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ABATEMENT TO HOMICIDE

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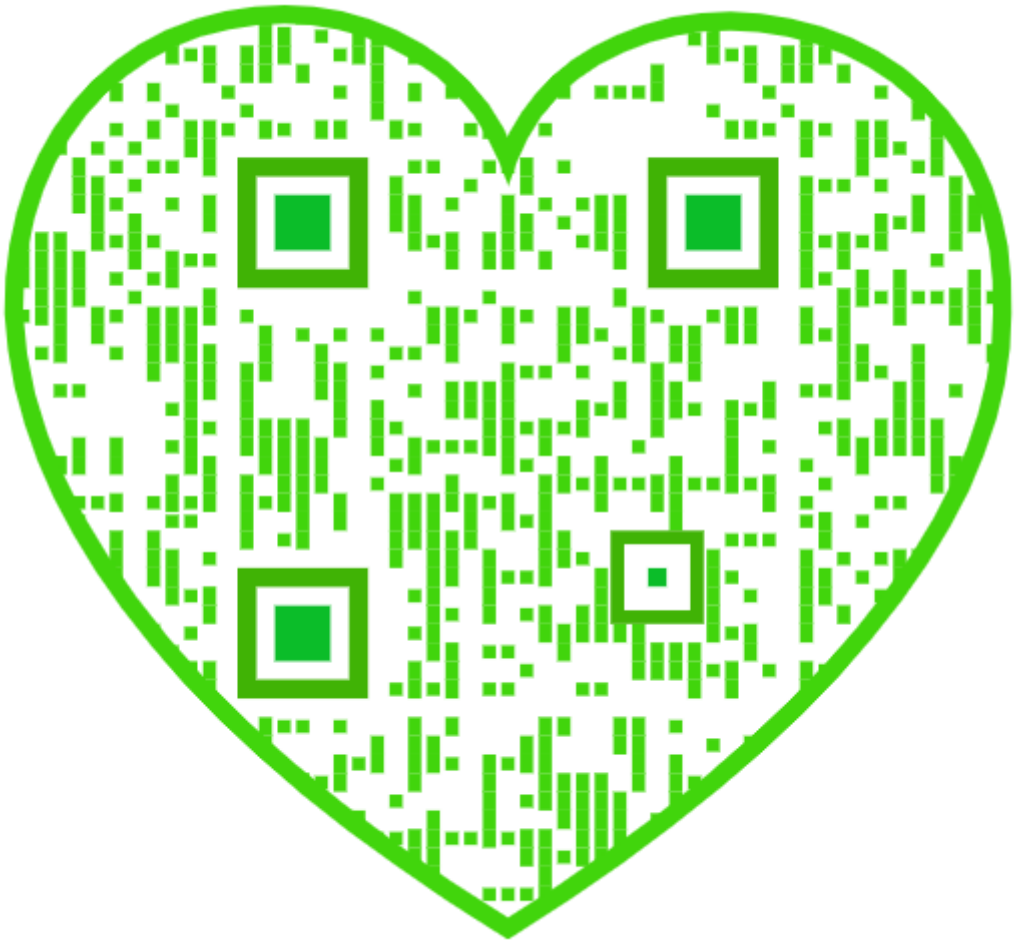

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CURRENT LAW

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VOLUME IX. OCTOBER, 1907. NUMBER 1.

ABANDONMENT, see latest topical index.

ABATEMENT AND REVIVAL.

§ 1. Causes of Abatement (1). The Pendency of Another Suit or Action (1). Death of a Party (3). Failure to Acquire Jurisdiction (4). A Misjoinder or Nonjoinder (4). Alienation of Party's Interest (4). Insanity (4). Cessation of Incumbency of Official Party (4).

§ 2. Raising Objection; Waiver (4).

§ 3. Survivability of Causes of Action (5).

§ 4. Effect of Abatement, Revival, and Continuation of Suits (5).

The scope of this topic excludes criminal prosecutions,[1] bills of revivor,[2] revival of judgments [3] or of statute-barred causes of action,[4] and the abatement of various writs for defects therein.[5]

§ 1. *Causes of abatement. The pendency of another suit or action.*[6]—There must be identity of the causes of action [7] and of the relief appropriate,[8] and sub-

1. See Indictment and Prosecution, 8 C. L. 189.

2. See Equity, 7 C. L. 1323. As to abatement of suit in equity see **Fletcher, Eq. Pl. & Pr.** § 915 et seq.; Effect on crossbill. Id. § 968. Bills of revivor in equity, and bills in the nature of bills of revivor see **Fletcher, Eq. Pl. & Pr.** §§ 962-968.

3. See Judgments, 8 C. L. 530.

4. See Limitation of Actions, 8 C. L. 768; Bankruptcy, 7 C. L. 387.

5. See Attachment, 7 C. L. 300, and like titles.

6. See 7 C. L. 1. Effect in equity of another suit pending, see Fletcher, Eq. Pl. & Pr. § 293 et seq.

7. Though the result of a suit in one court may affect the determination of another suit in another court, yet, where the causes of action are not identical, "lis pendens" cannot be properly pleaded. Central Impr. & Cont. Co. v. Grasser Cont. Co. [La.] 44 So. 10. The pendency of an appeal by a defendant, from a judgment against him by a justice for the possession of premises and rent to a certain time, is a bar to suit by the plaintiff for the possession and rent since the time of the former action. McLain v. Nurnberg [N. D.] 112 N. W. 245. While a contest of an alleged will is in progress of trial, it is improper for the administrator to file a separate contest, as he could have entered into the one pending if he desired. Rainey v. Ridgway [Ala.] 41 So. 632. During the pendency on appeal of a divorce decree dividing certain real estate between the parties, one of them cannot maintain an action against the other to recover one-half the products of the land. Richardson v. Richardson [Wash.] 86 P. 1069.

Not identical: Action on quantum meruit after partial payment made, and action to recover partial payment. Tyler v. Standard Wine Co., 102 N. Y. S. 65. An action to foreclose an equitable mortgage is not a bar to an action to foreclose another mortgage not an equitable one. Koppang v. Steenerson, 100 Minn. 239, 111 N. W. 153. Action by insurer to reform policy not barred by pendency of an action on the policy. National Fire Ins. Co. v. Hughes [N. Y.] 81 N. E. 562. Where in an action for unlawful detainer the issue is whether the defendant as tenant is holding over, he cannot plead pendency of another suit between him and a former owner to settle alleged contract rights in the land. Chambers v. Irish [Iowa] 109 N. W. 787. An action to recover possession of corporate stock, held by defendant to secure notes given by plaintiff to the seller for the purchase price, is not barred by pendency of another suit between the same parties involving different stock. Leigh v. Laughlin, 222 Ill. 265, 78 N. E. 563. An action by an insured for the cancellation of the policy and return of a note given for the first premium, on the ground of fraudulent representations, is not abated by the pendency of a suit by the agent of the insurer on the note. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 99 S. W. 580. A plaintiff is not barred from suing for a rescission of a contract of sale of land by the pendency of a suit against him and the defendant, brought by certain heirs who were in possession to establish their interest. Olschewske v. King [Tex. Civ. App.] 16 Tex. Ct. Rep. 635, 96 S. W. 665. The pendency of a suit against a mutual benefit association for funeral expenses is no

stantial identity of parties in interest and suable.[9] If in respect to the suits two courts are concurrent, it does not matter that one is ordinarily above the other.[10] While the jurisdiction of the Federal courts will ordinarily prevail over that of a state court having an identical controversy before it,[11] this does not apply where the objects of the suits differ.[12] The rule that the same person cannot maintain more than one action against the same defendant on the same cause applies no less to the state than to other litigants, and it has been uniformly applied in actions for penalties.[13] A suit is pending from the time it is commenced [14] until finally determined.[15] The pending of a suit may have ceased, though the formal entry of a

defense to a suit between the same parties for sick benefits in which the association claimed it was only liable for funeral expenses. Courtney v. Fidelity Mut. Aid Ass'n, 120 Mo. App. 110, 94 S. W. 768, 101 S. W. 1098. In Alabama the pendency of an action of unlawful detainer is no bar to an action in ejectment brought by the same plaintiff against the same defendant, concerning the same land. Williams v. Gaston [Ala.] 42 So. 552. A suit to quiet title need not be suspended until the final determination of a pending suit by defendant claiming that the conveyance to plaintiff's grantor was fraudulent, and of a contemplated suit to set such conveyance aside. Dorris v. McManus [Cal. App.] 86 P. 909. A suit to enjoin the cutting of timber on the ground that the right to do so has terminated is not abated by the pendency of a former suit alleging that only certain trees could be cut, though an amended answer in the first suit alleges the right to cut. Baker v. Davis [Ga.] 57 S. E. 62. An **action at law** for an injury does not abate by the pendency of a **suit in equity** to cancel a release alleged to have been obtained by fraud. St. Louis, etc., R. Co. v. Smith [Ark.] 100 S. W. 884. In New Jersey the pendency of a bill seeking to impose a lien on lands of an administrator claimed to have been fraudulently transferred does not bar a petition asking that the administrator be required to pay petitioner a distributive share under a decree of distribution. In re Bayley's Estate [N. J. Eq.] 63 A. 1117.

8. Where an action for trespass involving damages for taking goods is pending, an action of trover for the goods is properly found for the defendant. Charron v. Thivierge [R. I.] 66 A. 835. Where a nonresident is proceeded against by substituted process, the judgment can operate only on the property seized in the suit, hence, where such suit is against two parties and the property of only one of them is seized, the suit can be invoked as lis pendens only by the party whose property has been seized. Henderson Iron Works & Supply Co. v. Howard [La.] 44 So. 296.

9. A suit involving the right to personal property in which summons was issued but not served on one of the defendants abates a subsequent suit by such defendant for the same property in another county. Loveland-Garrett Co. v. Day, 30 Ky. L. R. 879, 99 S. W. 924. A suit by a bank on a note indorsed to it for value is not barred by a recovery against the defendant by the bank's president for the amount paid for the note in a pending action to which the bank was not a party, though it had advanced the consideration for the note at the request of its president as his agent. Empire Trust Co. v. Magee, 102 N. Y. S. 9. Then pendency of a **garnishee action** is a good defense by way of plea in abatement in an **action by the garnishee's creditor** to recover the debt sought to be reached by garnishment proceedings. The proper practice in such cases is to stay proceedings pending the determination of the garnishee's liability in the garnishee action. American Hardwood Lumber Co. v. Joannin-Hansen Co., 99 Minn. 305, 109 N. W. 403. A suit to foreclose a mortgage on an undivided interest in land is not abated by the pendency of a partition suit brought by the owner, to which the mortgagee was not a party. Van Houten v. Stevenson, 69 N. J. Eq. 626, 64 A. 1094; Id., 68 N. J. Eq. 490, 64 A. 1058.

10. The pendency of a mandamus proceeding in the superior court to compel police commissioners to issue an occupation permit is a bar under the California statute, to an identical proceeding between the same parties, in the court of appeals. Goytino v. McAleer [Cal. App.] 88 P. 991.

11. See note 3 C. L. 3.

12. Suit in Federal court by gas company making city gas commission and officers parties defendant, does not deprive state court of jurisdiction of suit by private citizen against company to enjoin cutting off gas. Richman v. Consol. Gas Co., 186 N. Y. 209, 78 N. E. 871. The pendency in another court of an action in personam, involving no issue or property of which a Federal court has acquired jurisdiction, presents no ground to stay the action in the Federal court. Guardian Trust Co. v. Kansas City So. R. Co. [C. C. A.] 146 F. 337. A suit in a Federal court to quiet title is not barred by the pendency in a state court of a suit, to recover the land, in which the positions of the parties were reversed. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

13. A plea of the pendency of another suit, in another county, for the same cause, states a good defense to a suit by the commonwealth, on relation of a school superintendent, to recover the penalty of a statutory bond given by a school book publisher to the commonwealth, but where the actions are not identical they may be prosecuted at the same time, prior to judgment in one of them, for different breaches of the bond, though there can be but one recovery. Johnson Pub. Co. v. Com., 30 Ky. L. R. 148, 97 S. W. 749.

14. See Actions, 7 C. L. 28; Limitation of Actions, 8 C. L. 768, and see, also, Process, 8 C. L. 1449.

15. See Judgments, 8 C. L. 1008. See, also, Appeal and Review, 7 C. L. 128.

final order therein has not yet been made.[16] By the later decisions a plea of another suit pending may be defeated by dismissing the other suit after plea filed.[17]

Death of a party.[18]—If the action has come to judgment it does not abate, though the cause of action be not survivable unless vacated or reversed,[19] and a new trial as to one defendant does not effect a total vacation of the judgment so as to fall outside this rule.[20] And statutes provide that death after verdict or decision of fact shall not frustrate judgment.[21] In equitable code actions a suspension and not abatement results.[22] A suit by a guardian abates by the ward's death, and the personal representative succeeds.[23] The frustration by death of a statutory mode of procedure not jurisdictional does not abate the proceeding.[24] By statutes the death of a coplaintiff [25] or a codefendant severally liable does not abate the action,[26] even in the case of a partnership where the only one served has died.[27] If a penal liability accrues to each of two persons, the death of one pending his action does not abate the other.[28] Under the United States bankruptcy acts, the death of a bankrupt after the filing of an involuntary petition, though prior to service, does not abate the proceedings, but his heirs and personal representatives should be made parties before adjudication.[29] The death of a party, pending his appeal, who has had permission from the legislature to sue the state, does not abate the suit on the ground that the permission was personal.[30]

16. The fact that the clerk failed to enter a dismissal, after being so directed by the plaintiff, does not render another suit by the latter for the cause abatable. McIntosh v. Robb [Cal. App.] 88 P. 517.

17. Jerseyville Shoe Mfg. Co. v. Bell, 125 Ill. App. 496, citing cases.

18. See 7 Cur. L. 2.

19. Plaintiff's death pending an appeal from an order granting defendant a new trial does not preclude the appeal from being prosecuted by his personal representatives. Wright v. Northern Pac.. R. Co. [Wash.] 88 P. 832. The death of a plaintiff pending an appeal from a judgment in her favor, in a suit on a liquor dealer's bond for sales to her minor son, does not abate the suit so long as the judgment is unreversed, but reversal does abate it. Ellis v. Brooks [Tex.] 102 S. W. 94.

20. An action for personal injuries does not abate by the death of the plaintiff, after judgment and denial of a motion for a new trial, but before an appeal. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 P. 178.

21. The death of plaintiff pending the determination of a divorce suit does not impair the power of the court to enter final judgment for him, under the California statute. John v. Superior Ct. of Los Angeles County [Cal. App.] 90 P. 53.

22. An equitable action to have a deed delivered up and canceled on the ground of fraud in its procurement does not abate upon the death of the grantor, who was the original plaintiff. Talbott v. Southern Oil Co. [W. Va.] 55 S. E. 1009. In a foreclosure proceeding a decree entered after the death of plaintiff, and without revivor, is an irregularity not open to collateral attack. Wardrobe v. Leonard [Neb.] 111 N. W. 134.

23. Where a guardian obtained a judgment as such, and, after the death of the ward, an appeal notice is served on the plaintiff as guardian, the appellate court acquires no jurisdiction of him individually or otherwise. Hurst v. Hawkins [Ind. App.] 80 N. E. 42.

24. Bastardy proceeding where death of mother prevents her presence in court. Bennett v. Briggs [N. J. Law] 65 A. 717.

25. Under U. S. Rev. St. § 956 (U. S. Comp. St. 1901, p. 697), an action in a Federal court by several plaintiffs as joint owners of bonds does not abate by the death of one of the plaintiffs, but may proceed in the name of the survivors upon suggestion of the death on the record. Thomas v. Green County [C. C. A.] 146 F. 969. The death of a coplaintiff pending an appeal by defendant does not abate the suit, under the Missouri statute. McManus v. Oregon Short Line R. Co., 118 Mo. App. 152, 94 S. W. 743.

26. Under the Alabama statute, judgment may be rendered against one defendant, in an action for tort, without revivor on the death of his codefendant. Hays v. Miller [Ala.] 43 So. 818.

27. An action against two partners does not abate, though the partner who was served with summons dies before trial. Nor need the personal representative be made a party, as the action survives against the surviving partner who is primarily liable. Latz v. Blumenthal, 50 Misc. 407, 100 N. Y. S. 527.

28. The abatement of an action, brought under the Texas statute by a father against a liquor dealer on his bond for selling liquors to his minor child, by the death of the father, does not preclude the mother from maintaining another action, though she objected to the abatement of the former. Brooks v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 967, 98 S. W. 936.

29. U. S. Rev. St. § 955 (U. S. Comp. St. 1901, p. 697) providing for bringing in the personal representative by scire facias, applies only to personal actions. Shute v. Patterson [C. C. A.] 147 F. 509.

30 Durbridge v. State, 117 La. 841, 42 So. 337.

Failure to acquire jurisdiction,[31] as where defendant is resident and entitled to be sued elsewhere,[32] is matter for abatement.

A *misjoinder or nonjoinder*[33] of parties is ground for abatement at common law, but statutes in some states modify the common-law rule.[34] The nonjoinder of the trustee in a subsequent bankruptcy proceeding has no such effect.[35] Nonjoinder of a merely proper but not necessary party does not abate the suit.[36]

Alienation of party's interest.—A plaintiff who assigns his interest to another can no longer prosecute the suit, and it abates until revived by the successor in interest,[37] nor does a reassignment to the original plaintiff operate to restore the suit to its original status.[38] But a transfer subject to the outcome of the suit avoids such an effect,[39] and the sale of a note by the payee pending a suit thereon, with the understanding that the purchaser should have the recovery, does not abate the suit where there was no indorsement of transfer on the note and no plea of counterclaim.[40]

Insanity.[41]

Cessation of incumbency of official party.[42]—The resignation of a city officer does not abate a suit against him in his official capacity, but his successor should be substituted as respondent.[43]

§ 2. *Raising objection; waiver.*[44]—While plea is the technical mode, under the codes a motion[45] or demurrer is sometimes allowable for this purpose. Demurrer for want of jusisdiction of the person will not reach the failure to sue defendant ex contractu in the county of his residence.[46] In the Federal courts the denial of the plaintiff's allegation of citizenship is preferably raised by plea rather than by motion.[47] The plea or equivalent should precede answer to the merits,[48]

31. See 7 C. L. 3. See, also, Jurisdiction, 8 C. L. 579; Appearance, 7 C. L. 251; Process, 8 C. L. 1449. The privilege of a nonresident witness, from service of mesne process by summons in a civil case, cannot be pleaded in abatement. Wilkins v. Brock [Vt.] 64 A. 232.

32. See Venue and Place of Trial, 8 C. L. 2236.

33. See, 7 C. L. 3. See, also, Parties, 8 C. L. 1236.

34. Virginia statute, providing that court may abate action as to parties improperly joined, and proceed as to the others, does not confer jurisdiction not otherwise existing. McIlvane v. Big Stony Lumber Co., 105 Va. 613, 54 S. E. 473. In an action for injury caused by the negligence of defendant in constructing an unsafe sidewalk in front of his property, the fact that defendant was tenant in common with another who was not joined cannot be pleaded in abatement, the action being in tort, and the plaintiff entitled to sue one or both. McDonald v. McAdams, 151 F. 781. An action against several persons alleged to be partners for an injury to plaintiff through the negligence of the firm, while he was in its employ, is not abatable because one of the defendants is not a member of the firm, or because one of the members is not made a defendant. Warner v. De Armond [Or.] 89 P. 373.

35. A pending suit for rent under which there has been a seizure is not ipso facto abated and the seizure released by the adjudication of the defendant, a voluntary bankrupt. Nor can the trustee in bankruptcy by making himself a party defendant to the pending suit insist on its being dismissed and the property seized turned over to him. Schall v. Kinsella, 117 La. 687, 42 So. 221.

36. The failure of a husband to join in a suit commenced by his wife before the marriage does not abate it, under the Texas statute giving him the privilege of making himself a party. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061.

37, 38. Automatic Switch Co. v. Cutler-Hammer Mfg. Co. [C. C. A.] 147 F. 250.

39. After the institution of a suit to quiet title, but before trial, a conveyance by plaintiff of part of the land does not defeat his right to prosecute it to final judgment, especially where a portion of the purchase price is withheld until the cloud is removed from the title. Boyer v. Robinson [Wash.] 86 P. 385.

40. Richey Grocery Co. v. Warnell [Tex. Civ. App.] 103 S. W. 419.

41, 42. See 7 C. L. 3.

43. People v. Best [N. Y.] 79 N. E. 890.

44. See 7 C. L. 4.

45. A defendant may object, by motion in the nature of plea in abatement, to being designated in any other than by his true name, and when he so objects the court should require the pleading and process to be amended by insertion of his true name. Davis v. Jennings [Neb.] 111 N. W. 128.

46. In that case the defect goes to the subject-matter, not to the person. Continental Life Ins. & Inv. Co. v. Jones [Utah] 88 P. 229.

47. Gaddie v. Mann, 147 F. 955.

48. Plea in abatement to the jurisdiction for insufficiency of amount involved cannot be considered after continuance of case and

else it is waived.[49] The sufficiency of such pleas is also discussed in another article.[50] The facts of such a plea are in some states triable by jury.[51]

§ 3. *Survivability of causes of action.*[52]—The general rule is that assignability makes the test of survivability,[53] and an action wholly personal does not survive.[54] By statute, survivability has been given in many of the tort actions,[55] particularly those torts affecting property,[56] but otherwise as to torts to the person,[57] or actions of a personal nature and statutory origin.[58] Penal [59] causes of action do not survive. An obligation not yet passed into judgment and limited in its nature to one's life-time cannot survive him.[60] An action may abate in part and survive in part; for example, actions for unlawful entry and detainer and assault and battery abate on the death of the defendant, though embraced with an action for conversion of personal property, which survives.[61]

§ 4. *Effect of abatement, revival, and continuation of suits.*[62]—Where the abatement does not oust jurisdiction, the validity of the judgment does not depend on a revivor.[63] Abatement due to failure to acquire jurisdiction makes subsequent

answer to the merits. O'Neil v. Murray [Tex. Civ. App.] 94 S. W. 1090.

49. Oakes v. Barbre, 127 Ill. App. 208.

50. See Pleading, 6 C. L. 1031; 8 C. L. 1355. Sufficiency of plea in abatement alleging agreement pending suit. O'Neil v. Murray [Tex. Civ. App.] 94 S. W. 1090. It must appear from the plea that a prior action is pending between the same parties for the same cause, as distinguished from actions for different causes depending in whole or in part on the same subject-matter. An action on a quantum meruit for balance due after partial payment for services rendered, and an action for the recovery of the partial payment for nonperformance and failure of consideration, are not for the same cause. Tyler v. Standard Wine Co., 102 N. Y. S. 65.

51. According to the Texas practice, the question whether a nonresident could be sued in the county from which mortgage chattels are removed by his agent, under the statute giving jurisdiction in that county, is submitted to the jury. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 569, 92 S. W. 439.

52. See 7 C. L. 5.

53. See 7 C. L. 5, n. 61, and see, also, Assignments, 7 C. L. 277. A cause of action by a husband for loss of services and medical attendance, occasioned by a negligent injury to his wife, is both survivable and assignable. Forbes v. Omaha [Neb.] 112 N. W. 326. In Virginia an action of ejectment brought in the name of a husband and wife does not abate on the death of the husband, but survives as to the wife. McMurray v. Dixon, 105 Va. 605, 54 S. E. 481.

54. On death of the plaintiff in a divorce case after the granting of a decree, his executors cannot be substituted as plaintiffs in a proceeding to have the decree set aside for want of proper service of process on defendant, since they do not represent plaintiff or the heirs with reference to the subject-matter of the action. Dwyer v. Nolan, 40 Wash. 459, 82 P. 746.

55. South Carolina Act of 1905, providing for survivability, does not apply to existing causes of action. Lorick v. Palmetto Nat. Bank [S. C.] 57 S. E. 527.

56. Actions for damages to property caused by smoke and vibration from passing trains survives, under the Maryland statute, and devolves upon the personal representative. Baltimore Belt R. Co. v. Sattler [Md.] 65 A. 752. An action for the recovery of money paid on a lost wager, under the Alabama statute, survives the death of the plaintiff. Motlow v. Johnson [Ala.] 44 So. 421.

57. Contra: Where pending a suit for personal injuries, plaintiff dies unmarried and without issue, leaving a mother, brother, and sisters, the action survives in favor of the mother alone, under the Louisiana Code, and she may recover for his pain and disfigurement and pecuniary loss. Payne v. Georgetown Lumber Co., 117 La. 983, 42 So. 475.

58. Under the Georgia statute, where a father has a cause of action for injury to his minor child and dies before bringing suit, the cause of action does not survive to the mother. King v. Southern R. Co., 126 Ga. 794, 55 S. E. 965.

Contra: Action against commissioner of public works for failure to give plaintiff preferences in employment guaranteed him as a veteran, by statute, survives the latter's death. Burke v. Holtzmann, 102 N. Y. S. 162. Under the Texas statute if a plaintiff in an action for personal injuries dies from the injuries his personal representatives cannot recover therein, but if he die from other causes they may recover, and the question is for the jury. International & G. N. R. Co. v. Ellyson [Tex. Civ. App.] 15 Tex. Ct. Rep. 580, 94 S. W. 910. See, also, Death by Wrongful Act, 7 C. L. 1083.

59. The Connecticut statute giving a right of action against a town to recover damages caused by a defective highway is not penal, under the act excepting from actions which survives "any civil action upon a penal statute." Town of Waterford v. Elson [C. C. A.] 149 F. 91.

60. A suit by a wife against her husband for maintenance abates on the death of the husband pending an appeal by him from a judgment in her favor. Johnson v. Bates [Ark.] 101 S. W. 412.

61. Mulligan v. O'Brien, 102 N. Y. S. 911.

62. See 7 C. L. 6.

63. The death of a party pending an appeal does not oust the supreme court of jurisdiction under the Nevada statute, and a

proceedings void in an equitable action, but does not affect the pendency of the action or the rights of the plaintiff in any way, and leaves the issue undetermined and open for future consideration.[64] The proper practice when the suit is revived in the name of the administrator is to file an amendment to the petition, or a supplemental petition setting out when the original plaintiff died and other necessary facts of succession.[65] A bill of revivor is preferable to the code procedure by substituting the personal representative when intervening matters require the bringing in of new parties, but in Colorado both modes are applicable to an equitable action.[66] In many jurisdictions it is now provided that on suggestion the suit may continue and the personal representative appear to be cited in [67] at the adverse party's motion,[68] but, when a coparty dies and the suit may continue by or against the survivors this may be unnecessary.[69] If the succession is not to a representative the proper successor in interest should be brought in.[70] In case of an alienation of interest the transferrer should be substituted,[71] it being in some states alternative to a continuation in the original name,[72] as a matter of right.[73] A court rule for the substitution of the personal representative should not be construed to apply where he would not succeed in interest.[74] When continued against an ancillary representative only, the domiciliary estate will not be bound.[75] When before judgment one of several

failure to substitute his personal representatives does not nullify its judgment. Twaddle v. Winters [Nev.] 89 P. 289.

64. Barlow v. Hitzler [Colo.] 90 P. 90.

65. Fancher v. Cleveland & S. W. Trac. Co., 3 Ohio N. P. (N. S.) 559.

66. Barlow v. Hitzler [Colo.] 90 P. 90.

67. Under Massachusetts statute, when one codefendant dies after suit commenced, the court may on motion of plaintiff order defendant's representative to appear and defend. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306. Where a trustee dies after filing a petition in error, in an action against him in his representative capacity, the appellate court will direct that his successor be substituted, instead of entering an order disposing of the cause at a date prior to the trustee's death. Field v. Leiter [Wyo.] 90 P. 378.

68. The defendant or the personal representative of a deceased defendant in a replevin suit may compel the substitution of the executor of the deceased sole plaintiff in such replevin suit. Strauss v. Merchants Loan & Trust Co., 119 Ill. App. 588.

69. Where one of several defendants dies after the submission of the case to an appellate court, the failure of the court upon its record to substitute his heirs and personal representative is not substantial error. Wilhite v. Skelton [C. C. A.] 149 F. 67. Where defense may be made by the codefendant as surviving partner, the personal representative of the other need not be brought in. Latz v. Blumenthal, 50 Misc. 407, 100 N. Y. S. 527. Where a litigant conveys interest to several parties as tenants in common, and after final determination of the case dies, it is not necessary to substitute all the tenants in common as parties. Twaddle v. Winters [Nev.] 89 P. 289.

70. Under the California statute, where a note and mortgage were assigned pending an action thereon, and the assignee died and his estate was distributed to his widow, she was properly substituted as plaintiff, neither her husband or his representative having been substituted. Blinn Lumber Co. v. McArthur [Cal.] 89 P. 436. Where pending a suit, by a substituted trustee against his predecessor's executor for an accounting of the new trust property, the beneficiary dies, the suit should continue, under the New York statute, though not revived by the personal representative. Farmer's Loan & Trust Co. v. Pendleton, 101 N. Y. S. 340. Where a party to a suit concerning land dies, after final judgment in his favor, and leaves a will which is probated before an appeal is taken, his heirs should be made parties appellee, under the Indiana statute. La Porte Land Co. v. Morrison [Ind.] 78 N. E. 321. In South Dakota an action for the cancellation of a deed may, after plaintiff's death, be continued by his executor, who is entitled to the possession of the estate until delivered over to the heirs or devisees. Subera v. Jones [S. D.] 108 N. W. 26.

71. The transferee of a deceased litigant's interest in an action should be substituted as a party, rather than his personal representative, where there is no counterclaim. Twaddle v. Winters [Nev.] 89 P. 289.

72. By statute in Oklahoma, where a party to a suit concerning land transfers his interests pendente lite, the action may be continued in the name of the original party, or the court may allow the transferee to be substituted. Gillett v. Romig [Okl.] 87 P. 325.

73. Under the North Carolina statute, where a plaintiff in ejectment has parted with his interest in the land before trial, the defendant has a right to have the transferee made a party thereto. Burnett v. Lyman, 141 N. C. 500, 54 S. E. 412.

74. The Nevada supreme court rule, providing that, upon the death or other disability of a party pending on appeal his personal representative shall be substituted, does not conflict with the statute providing for the survival of actions. Twaddle v. Winters [Nev.] 89 P. 289.

75. Where a resident of Michigan is sued in Massachusetts and process served on him while there, and pending the action he dies in Michigan leaving a will and estate in Massachusetts, and the court appoints an administrator with the will annexed, and

defendants dies, the action cannot be revived jointly against his personal representative and the survivors, but only as separate actions.[76] Where pendente lite the complainant dies, and her daughter files a bill of revivor alleging that she was sole deviser and heir, it is immaterial to her right of revivor whether she took as divisee or heir.[77] The power and practice of a territorial court of Indian Territory, in the revival of a suit upon the death of a party, is governed by the territorial statutes and not by those pertaining to Federal courts.[78] A motion to substitute should be seasonably made, but delay may be excusable.[79] A party who without excuse neglects to revive an action, after the death of the defendant, until after the claim is barred by the statute of limitations, cannot then revive it.[80]

Abbreviations, see latest topical index.

ABDUCTION.[81]

Under most statutes a taking for the specified purpose is all that is necessary [82] if force or persuasion be used.[83] The accomplishment of the purpose is not essential.[84] Under a statute defining the crime as a taking or receiving for the unlawful purpose, either act is sufficient.[85] The gist of the offense under the Minnesota statute is the taking from the custody of the legal guardian, and not the marrying of the child.[86] In order to constitute the offense of detaining a female against her will for the purpose of having carnal knowledge of her, it is sufficient if with intent to do so force is applied sufficient to prevent to any extent the exercise of her free power of locomotion.[87] Under the North Carolina statute the fact of the parents consent is a matter of defense.[88] An information charging the offense substantially in the language of the statute is sufficient.[89] The conduct of the accused prior to

renders a decision against him, such decree was satisfied by a distribution according to the Massachusetts laws, and did not bind the decedent's executor in Michigan. Brown v. Fletcher's Estate [Mich.] 13 Det. Leg. N. 818, 109 N. W. 686.

76. Mulligan v. O'Brien, 102 N. Y. S. 911.

77. Miller v. Ahrens, 150 F. 644.

78. In the Indian Territory courts, where one of several plaintiffs or defendants dies, and the right of action survives to or against the remaining parties, the court may suggest the death on the record and proceed to judgment without substituting the heirs or personal representatives; but, where any part of the right of action survives against the personal representative, he may be substituted, and the suit proceed against him. Wilhite v. Skelton [C. C. A.] 149 F. 67.

79. After great delay in the prosecution of an action, owing to acts of both parties which neither could control, one of the defendants died. A motion to permit the action to proceed against his personal representative should be granted. Folts v. Remington, 51 Misc. 224, 100 N. Y. S. 834. In Colorado the failure to renew an action after plaintiff's death, in the name of his representative, for more than one year, does not discontinue it, as Mills' Ann. Code, § 15, fixes no particular time in which a motion for substitution shall be made, and Mills' Ann. St. §§ 2916, 2917, do not apply. Barlow v. Hitzler [Colo.] 90 P. 90.

80. Washington Trust Co. v. Baldwin, 102 N. Y. S. 1105.

81. See 7 C. L. 7.

82. Evidence sufficient to show the taking of a female under the age of 18 years from her father for the purpose of concubinage under Ann. St. 1906, p. 1273. State v. Beverly [Mo.] 100 S. W. 463. To constitute abduction under Revisal 1905, § 3358, it is not necessary to prove that the taking was against the father's will and consent. State v. Burnett, 142 N. C. 577, 55 S. E. 72.

83. The offense as defined by Revisal 1905, § 3358, is not established where no force or inducement is used and the departure of the child from the custody of her father was voluntary. State v. Burnett, 142 N. C. 577, 55 S. E. 72. Instructions held proper. Id.

84. Under Ann. St. 1906, p. 1273, if it appear that the taking was for the purpose of concubinage, the offense is complete without showing accomplishment of the intent. State v. Beverly [Mo.] 100 S. W. 463.

85. Under Pen. Code, § 282, providing that one who takes, receives, employs or harbors a female under 18 years of age for the purpose of prostitution or intercourse is guilty of abduction, proof of "taking" is not essential, proof of receiving is sufficient. People v. Smith, 114 App. Div. 513, 100 N. Y. S. 259.

86. State v. Sager, 99 Minn. 54, 108 N. W. 812. Inference of legal custody follows as a matter of law from the fact of relationship of parent and child and an indictment need not show that the parents had legal custody of the person of the child. Id.

87. Robb v. Com. [Ky.] 101 S. W. 918.

88. One charged with abduction in violation of Revisal 1905, § 3358, has the burden to prove the defense that the carrying away was with the father's consent. State v. Burnett, 142 N. C. 577, 55 S. E. 72.

89. Information alleging that defendant

the commission of the offense is admissible.[90] In a prosecution the court may pointedly draw the attention of the jury to a material inquiry, if so authorized by rule of court.[91]

ABETTING CRIME; ABIDE THE EVENT; ABODE, see latest topical index.

ABORTION.[92]

An abortion under the Nebraska statute is the expulsion of the foetus at any stage of pregnancy.[93] Under some statutes any one who aids or assists in the operation is guilty.[94] If death of the woman results, the person responsible is guilty of murder in Illinois.[95] In Massachusetts it is a crime to distribute an advertisement stating where abortions will be performed.[96] Such offense is complete when the advertisement is intentionally given to one seeking such information.[97]

An indictment need not particularly describe the instrument or means used if it appears that such description was unknown,[98] and failure to do so is not ground for quashing the indictment where the defect may be remedied by a bill of particulars.[99] An indictment which charges that the woman died includes the offenses of murder in the first and second degree, manslaughter and assault.[1]

in a certain county, on a certain date took a female, under the age of 18 years from her father who had legal charge of her person, without his consent for the purpose of concubinage, held sufficient under Ann. St. 1906, p. 1273, defining the crime. State v. Beverly [Mo.] 100 S. W. 463. An indictment under Gen. St. 1894, § 4769, which sufficiently alleges that the taking was for the illegal purpose, is not bad for failure to show to whom it was intended that the child was to be married. State v. Sager, 99 Minn. 54, 108 N. W. 812. Nor was it insufficient for failure to allege the intent that the child should be married before she attained the age of 16 years. Id.

90. In a prosecution for abduction, evidence of defendant's conduct prior to the time alleged tending to show his intention is admissible. People v. Spriggs, 104 N. Y. S. 539.

91. People v. Smith, 114 App. Div. 513, 100 N. Y. S. 259.

92. See 7 C. L. 8.

93. The words "at any stage of the utero gestation period" held to mean at any stage of pregnancy. Edwards v. State [Neb.] 112 N. W. 611.

94. Under Rev. Laws, c. 212, § 15, penalizing the use of an instrument or aid or abetment therein with intent to procure a miscarriage, one is guilty if he aids and assists, though he does not himself handle the instrument. Commonwealth v. Sinclair [Mass.] 80 N. E. 799.

95. Under Hurd's Rev. St. 1905, p. 665, if death results from an abortion or an attempt to produce one, the person responsible is guilty of murder. Clark v. People, 224 Ill. 554, 79 N. E. 941. Under Rev. Code 1852, amended by 1893, p. 930, providing that one who causes a miscarriage unless the same be necessary to preserve life is guilty of a felony, if death results from the use of an instrument used for the purpose of procuring a miscarriage, the perpetrator is guilty of murder in the second degree. State v. Fleetwood [Del.] 65 A. 772.

96. Under a statute making it an offense to knowingly distribute an advertisement giving notice of where abortions will be performed, and one providing that a crime may be charged in the words of the statute, an indictment charging that one "distributed an advertisement" was not bad because not more specifically alleging guilty knowledge of the contents of the advertisement. Commonwealth v. Hartford [Mass.] 79 N. E. 784. Under a statute making it a crime to distribute an advertisement giving notice of a place where abortions may be performed where accused gave her card to an officer, her statements relative to the origin of her acquaintance with the officer and evidence describing her rooms, and envelopes addressed to others containing similar cards, were admissible as descriptive of her place of business as well as of her guilty knowledge. Id. Where a card was handed to an officer who represented that he was seeking a place where another could have an abortion performed, such fact did not render the officer's testimony incompetent. Id.

97. An offense under such statute is complete when an advertisement is intentionally handed to one seeking such treatment or to one inquiring on behalf of another. Commonwealth v. Hartford [Mass.] 79 N. E. 784.

98. Indictment charging that the defendant with intent to procure an abortion did use upon said woman certain instruments and other means, a particular description of which was unknown and did produce a miscarriage, held sufficient. State v. Bly, 99 Minn. 74, 108 N. W. 833.

99. Where an indictment charged that one with intent to procure an abortion did unlawfully use a certain instrument upon her body, failure to describe the instrument or state that it was unknown to the grand jurors is not ground for quashing the indictment where a bill of particulars could be demanded. Commonwealth v. Sinclair [Mass.] 80 N. E. 799. Under Rev. Laws, c. 2188, § 39, the defendant was entitled as of right to a bill of particulars describing the instrument and manner of its use. Id.

1. State v. Fleetwood [Del.] 65 A. 772.

The degree of proof corresponds to the degree required in all criminal prosecutions,[2] and the evidence admissible to establish the crime is governed by the general rules.[3] The venue of the offense is sufficiently proven if there is evidence sufficient to warrant a finding that it was committed at a certain place.[4]

Absconding Debtors, see latest topical index.

ABSENTEES.[5]

The estate of an absentee is liable for debts proved against him,[6] but he may not be divested of his property rights without a hearing or security for their restoration.[7]

ABSTRACTS OF TITLE.[8]

An abstractor must incorporate into the abstract all the records called for by the contract.[9] and is liable if injury results because of an error in an abstract which could have been avoided by the exercise of ordinary skill.[10] He is liable only to the person to whom he furnishes the abstract,[11] and not to a third person to whom the customer furnishes the abstract unless it has been republished to him.[12] Where an abstract purports to state the contents or substance of instruments and there is nothing on the face of the abstract to indicate mistake or error, the customer may rely upon it without making an independent investigation.[13] A complaint in an action against an abstractor for damages sustained because of errors in the abstract is subject to the general rules of pleading,[14] and need not negative matters of de-

2. Evidence sufficient though it did not appear what particular kind of an instrument was used or the manner in which defendant operated. State v. Bly, 99 Minn. 74, 108 N. W. 833.

3. Evidence that after commission of the offense defendant wanted to borrow money held admissible as bearing on his guilt or innocence. Commonwealth v. Sinclair [Mass.] 80 N. E. 799. Experts may give their opinion as to the kind of instrument and mode of using it which would produce the condition found. Id. In a prosecution for homicide in an abortion, dying declaration may be admitted under the same conditions as in prosecutions for murder. Edwards v. State [Neb.] 112 N. W. 611.

4. Where the prosecuting witness testified that she visited the accused at his office on a certain street without stating the city, and the street was a well known one in St. Louis, and accused stated that he advertised in St. Louis papers that he would treat women at his office on such street, the venue was held sufficiently proved. State v. Hogan [Mo. App.] 100 S. W. 528.

5. See 7 C. L. 9.

6. The claim of a divorced wife under a decree for alimony is a debt against the estate of her former husband within Rev. Laws, c. 144, § 9, providing that the court may order the property of absentees to be applied to the payment of debts proved against them. Purdon v. Blinn [Mass.] 78 N. E. 462. Such claim may be proved and allowed, without personal notice to the absentee, on proper general notice to the receiver and persons within the jurisdiction, interested in the estate. Id.

7. A statute authorizing the appointment of an administrator for the estate of a person absent and unheard of for more than seven years to judicially pronounce him dead without a hearing as to the fact of death and administer his estate, in the absence of heirs for the benefit of the the school board, violates the due process clause of the Federal constitution. Savings Bk. v. Weeks, 103 Md. 601, 64 A. 295.

8. See 7 C. L. 9.

9. Where an abstract contained a certificate stating that it contained all the conveyances shown of record and referred to a will a part of the chain of title, as shown by the will book, held the contract for the abstract included the will. Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co. [Tenn.] 102 S. W. 901.

10, 11. Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co. [Tenn.] 102 S. W. 901.

12. Not to one to whom the customer submitted it and who made a loan on faith of the title it purported to show. Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co. [Tenn.] 102 S. W. 901.

13. Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co. [Tenn.] 102 S. W. 901.

14. A complaint against abstractors for furnishing a defective abstract, which alleges that in reliance upon such abstract plaintiff was induced to purchase land, is sufficient against general demurrer without an allegation that the purchase depended upon the abstract defendants were employed to furnish or on what it might disclose. Hirshiser v. Ward [Nev.] 87 P. 171. A complaint against abstractors for furnishing a defective abstract which alleges a hiring to furnish a full and complete abstract is sufficient without alleging that the abstract was to be made from a particular date. Id. An allegation that abstractors furnished an ab-

fense.[15] A vendor is not required to furnish an abstract unless he contracts to do so.[16] An abstractor has the same right as the public to inspect public records of title but no right to quasi public books kept to facilitate the business of abstracting which the county by statutory authority conducts.[17]

Abuse of Process; Abutting Owners; Acceptance, see latest topical index.

ACCESSION AND CONFUSION OF PROPERTY.[18]

One who mingles property of another with his own has the burden to separate and identify his property,[19] and if such identification is impossible the owner of the property so confused may claim the entire mass.[20]

The right to recover value of improvements made upon the land of another[21] is generally prescribed by statute.[22] The Nebraska Occupying Claimant's Act applies to land occupied by the adverse claimant at the time the statute was enacted,[23] but does not require conveyances to him upon tender of the value of the land.[24] Where one builds a house on land of another with his consent or the owner of the land subsequently consents to its remaining there as property of the builder, the house

stract showing that certain persons were the owners of certain land "free from incumbrances" sufficiently alleges that the abstract showed that there were no incumbrances. Id. An allegation in a complaint against abstractors for furnishing a defective abstract, in reliance upon which they purchased property for $1100 and lost it because they acquired no title and that the grantor has refused to return the money, impliedly shows demand for its return. Id. Such a complaint sufficiently alleges as an ultimate fact as against general demurrer that the purchaser suffered damage to the extent of $1100. Id.

15. A complaint against abstractors for negligently furnishing a defective abstract by reason of which the purchaser lost the property need not show exhaustion of remedy against the grantor. Hirshiser v. Ward [Nev.] 87 P. 171.

16. A real estate broker cannot impose upon his principal the burden of furnishing an abstract of title where his contract of employment only fixes the price and does not provide for an abstract. Hunt v. Tuttle [Iowa] 110 N. W. 1026.

17. Davis v. Abstract Const. Co., 121 Ill. App. 121.

18. See 7 C. L. 9.

19. When goods purchased from one person were mixed with goods purchased from another under a sale fraudulent as to the vendor's creditors, and the purchaser took no steps to point out or separate the goods, a writ of attachment was properly executed on the property as a whole. Johnson v. Emery [Utah] 86 P. 869. In such case the purchaser has the burden to separate the goods and identify them. Mugge v. Jackson [Fla.] 43 So. 91. A deed of trust on a stock of goods is given to secure an indorser on a note, and the debtor while in possession mingles the goods conveyed with others, the trustee not consenting. The entire stock was levied upon. Held the trustee was not required to pick out the goods covered by his deed but the execution creditor must identify additional goods. Weaver v. Neal & Co. [W. Va.] 55 S. E. 909.

20. Where one knowingly mingles the property of another with his own in such manner that it becomes undistinguishable, the true owner may claim the entire mass, and if it has been disposed of may follow it or the proceeds thereof for the purpose of fastening upon it a lien for the property of which he has been dispossessed. Smith v. Township of Au Gres [C. C. A.] 150 F. 257. Where a husband has so commingled his separate property with the community property as to be unable to identify it, he cannot on the dissolution of the marriage charge the community with the value of his separate estate. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

21. See 7 C. L. 10.

22 Rev. Laws, c. 179, § 17, providing for compensation for betterments where one has been in possession of land for six years, in case he is ousted by judgment in writ of entry or partition, apply where relief is sought in equity. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497. This statute applies where a sale of a ward's land to her guardian is avoided by the ward. Id. See, also, Ejectment (and Writ of Entry), 7 C. L. 1212; Implied Contracts, 8 C. L. 155.

23. The Occupying Claimants Act (Laws 1883, p. 249), affording protection to persons not in possession of disputed lands who have paid taxes and made lasting improvements thereon in good faith, claiming title, and having an apparent title, applies to lands of which an adverse claimant had actual possession at the time the statute was enacted. Flanagan v. Mathisen [Neb.] 110 N. W. 1012. The right under such statute to compensation for lasting improvements is not affected by the fact that they were made in supposed compliance with a municipal regulation which was void. Id.

24. The owner of the real title to lands upon which improvements have been made for which a claimant is entitled to reimbursement cannot be compelled to convey to the claimant upon being tendered the appraised value thereof. Flanagan v. Mathisen [Neb.] 110 N. W. 1012.

remains personal property,[25] and the fact that structures are wrongfully built in a street does not vest title thereto in the fee owner.[26] Where one purchases land from an incompetent and places improvements thereon, such improvments remain a part of the land when the conveyance is set aide.[27] Nothing can be deemed an improvement for which compensation may be allowed which does not benefit the land and increase its value to the owner.[28]

Accessories; Accident; Accommodation Paper; Accomplices, see latest topical index.

ACCORD AND SATISFACTION.

§ 1. **The Accord (11).**
A. In general (11).
B. The Consideration (15).
C. Fraud, Mistake, and Duress (15).
§ 2. **Satisfaction or Discharge (16).**
§ 3. **Pleadings, Issues, and Proof (16).**

This topic does not include cases of composition with creditors,[29] novation,[30] or releases,[31] except in so far as such transactions are also accords, nor the general law of payment and tender.[32]

§ 1. *The accord. A. In general.*[33]—An accord and satisfaction is an executed agreement substituted between the parties in satisfaction of a former contract or liability.[34] Like every contract an accord depends on a meeting of the minds of the parties[35] and their intention to enter into a contract.[36] In order to be an accord,

25. Collins v. Taylor, 101 Me. 542, 64 A. 946. Where the builder sells such house to one who brings action to recover it, and he sets up that he holds as tenant of the land owner, admissions of the landowner as to title are admissible against him. Id.

26. The fact that a railroad company which constructed a bridge over a street placed iron supports in the street did not give the owner of the fee of the street title to the bridge so that he could charge the company rent for using it. Coatsworth v. Lehigh Valley R. Co., 100 N. Y. S. 504.

27. Where one purchased property from an incompetent and placed valuable improvements upon it, such incompetent on having the conveyance set aside was not entitled to an accounting for rents as he was fully compensated by the improvements. Rush v. Handley, 30 Ky. L. R. 170, 97 S. W. 726.

28. A tenant's claim for ties, rails, and equipment must be disregarded. Proctor v. Maine Cent. R. Co., 101 Me. 459, 64 A. 839. Filling in of flats is an improvement. Id.

29. See Composition with Creditors, 7 C. L. 674.

30. See Novation, 8 C. L. 1179.

31. See Releases, 8 C. L. 1714.

32. See Payment and Tender, 8 C. L. 1329.

33. See 7 C. L. 10.

34. **Evidence sufficient** to show that there was an agreement between the parties, executed on a certain date as to the amount of the indebtedness. Johnston v. Mulcahy [Cal. App.] 88 P. 491. Evidence sufficient to show a compromise and settlement and that the attorney acting for one of the parties had authority to effect such settlement. Flora v. Chapman [Neb.] 110 N. W. 664. A telephone company procured an injunction restraining one from interfering with poles set in front of his premises. After the injunction was dissolved, it was agreed that if the company would pay costs of the suit and move the poles to the other side of the street, all differences would be considered settled. **Held an accord and satisfaction** and a defense to an action on the injunction bond. Weierhauser v. Cole [Iowa] 109 N. W. 301. Where land was sold on the basis that the tract contained 116 acres and on its appearing that it did not contain that much it was agreed that the buyer might retain a certain portion of the purchase price to cover the shortage, held to warrant a finding that there had been a final adjustment of the acreage and the purchaser was not entitled to any further abatement. Austin v. Whitcher [Iowa] 110 N. W. 910. A compromise in good faith of unliquidated or disputed demands where there is an honest difference between the parties as to the amount is a good accord and satisfaction. Farmers' & Mechanics' Life Ass'n v. Caine, 224 Ill. 599, 79 N. E. 956. Held an accord and satisfaction. Agreement to scale the amount due for goods sold and delivered in consideration of release of counterclaim for nondelivery and delayed delivery. Hurrle Glass Co. v. Hooker Co., 120 Ill. App. 433.

35. Where one purchased a motor at an agreed price and an auto starter in an independent transaction and sent a check for the motor stating that the starter was defective and he had deducted the price of a new one, the check was used and two days later demand was made for the remainder of the price of the moter, held an accord and satisfaction was not shown. Bowery Bay Bldg. & Imp. Co. v. Rossiter, MacGovern & Co., 113 App. Div. 652, 99 N. Y. S. 922.

36. Where a writing executed by an employe who had been injured reciting that he had received a named sum in full satisfaction of claim for injuries was not intended by either party as a settlement but was executed for the sole purpose of collecting from an accident insurance company costs of medical expenses, it would not support a

there must be a disputed question [37] and an honest difference of opinion,[38] or the parties must think at the time that there is a bona fide question between them.[39] There must be a consideration,[40] hence partial payment of a liquidated debt is no satisfaction of the whole,[41] unless the debt is not yet due or payment is made at a place other than that designated: [42] but an acceptance of tender made in full of a disputed debt suffices.[43] An offer to compromise must be accepted [44] and the accept-

cause of action for the amount therein named. Shelley's Adm'x v. Coleman [Ky.] 102 S. W. 316. Where one purchased a cash register and was to pay by cash, note, and turn in an old register and the seller sent him word that for all cash the bank to which the note was sent for him to sign would accept a considerable discount, which exceeded the value of the old register, held not to show an intention to accept the sum mentioned in the notice as full payment without turning in the old register. National Cash Register Co. v. Petsas [Wash.] 86 P. 662. Where the business of a corporation was the cultivation of rice, and one of the partners died before maturity of the crop, and after the crop was harvested, on demand of the executors of the deceased partner, there was an equal division of the rice, but no undertaking to construe the contract or make final settlement, the transaction did not amount to an accord and satisfaction which would preclude the executor from denying that the survivor was entitled to one-half the crop. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64.

37. Evidence held to show no dispute. Silander v. Gronna [N. D.] 108 N. W. 544. Where a servant two months after his discharge commenced action for wrongful discharge and to recover subsequent salary, and it appeared that after his discharge he had written for his last month's salary and had received a check with a statement that it was in full to the time of discharge, held receipt and use of such check did not operate as satisfaction of his claim. Proctor v. Hobart M. Cable Co., 145 Mich. 503, 13 Det. Leg. N. 644, 108 N. W. 992.

38. Where mutual benefit association received a receipt in full on payment of less than the face of the policy, it was held no accord and satisfaction as it did not appear that the society claimed in good faith that it owed nothing or less than the face of the policy. Farmers' & Mechanics' Life Ass'n v. Caine, 224 Ill. 599, 79 N. E. 956. Particularly must good faith and fair belief in the claim be required of one who stands as a fiduciary respecting the subject-matter. Holtzman v. Linton, 27 App. D. C. 241. The disputed claim need not be in fact well founded if honestly made and having some prima facie appearance of right. In re Seybel, 105 N. Y. S. 145.

39. To support a compromise, it is sufficient if the parties think at the time that there is a bona fide question between them, though in fact it does not exist. Alexander v. Maryland Trust Co. [Md.] 66 A. 836.

40. See post, § 1 B. Bowery Bay Bldg. & Imp. Co. v. Rossiter, MacGovern & Co., 113 App. Div. 652, 99 N. Y. S. 922. A contract between creditors and a solvent debtor to accept a pro rata distribution among themselves of his assets and forbear collection of their claims is without consideration. Mt. Vernon Rattan Co. v. Joachimson, 103 N. Y. S. 1045.

41. A payment by a debtor of a less sum than is due his creditor who executes a release not under seal is not a satisfaction though the debtor borrowed the money to make the payment where such fact was unknown to the creditor. Schlessinger v. Schlessinger [Colo.] 88 P. 970. Where a creditor releases his debtor on payment of a less sum than where in consideration of the debtor's not taking the benefit of the bankruptcy act is without consideration where the debt is one which would not have been released by a discharge in bankrubtcy. Id. Partial payment of a liquidated debt is no consideration for its discharge in full. Weidner v. Standard Life & Acc. Ins. Co. [Wis.] 110 N. W. 246. Work was done under a contract which was to continue from January 1st to July 1st and the work was done for that period. After such date a check was given on the assumption that the contract was rescinded April 1st. There was no evidence of rescission. The check was given as the balance due. Held not a settlement. Detlaff v. Ideal Mfg. Co., 144 Mich. 342, 13 Det. Leg. N. 258, 108 N. W. 76. There cannot be an unliquidated demand unless there is a dispute as to the amount due and the amount is doubtful. Id.

42. The rule that partial payment of a matured debt is not a satisfaction does not apply where the debt is not yet due or payment is at a place other than where the debt is made payable. Flenor v. Flenor, 30 Ky. L. R. 543, 99 S. W. 258.

43. Northwestern Traveling Men's Ass'n v. Crawford, 126 Ill. App. 468; Snow v. Greisheimer, 120 Ill. App. 516. The payment of the face of an award for property taken for public use with a receipt in full from the owner reciting the facts was held an accord and satisfaction of the accrued interest on the award in view of a disputed claim by the public to the mesne rents and profits of the land. In re Seybel, 105 N. Y. S. 145.

44. Where one rendered an itemized statement which was rejected, such statement was not binding and he could subsequently prove full value though the amount exceeded the amount in the statement rendered. Wright v. St. Louis Sugar Co. [Mich.] 13 Det. Leg. N. 866, 109 N. W. 1062. An offer of compromise by the creditor which is not accepted is not admissible in an action on the original claim. Gillespie v. Scottish Union & Nat. Ins. Co. [W. Va.] 56 S. E. 213. Where a master placed a servant's pay in an envelope making a deduction for materials broken and when the servant demanded the balance refused it and the servant said he would have some one else get it for him and the master told him to go ahead, and the servant took the envelope and left, there was no accord and satisfaction. Stratton v. Hunt Sullivan Co., 100 N. Y. S. 846.

ance must be of the very terms proposed.[45] To constitute an accord and satisfaction it must not only appear that the debtor gave the amount in satisfaction but that it was accepted as such,[46] but where a sum is tendered in full payment, the creditor may not by notice that he does not accept the condition, evade or modify it, so as to enable him to retain it without being bound by the condition.[47] A mere executory accord is not binding where the agreement is to accept performance of a new promise and partial execution thereof does not extinguish the original demand.[48] Con-

45. No settlement shown where one who lost baggage wrote "What will you settle the claim for?" Reply "I am authorized to allow you $652.05. Please advise promptly that voucher may be issued at once." Reply "Provided you send voucher at once I will take $652.05." Reply "Beg to advise you that voucher should reach you in 15 days." Batavia v. St. Louis S. W. R. Co. [Mo. App.] 103 S. W. 140.

46. Where a landowner employed a broker to sell land on commission and deposited a certain amount to the broker's credit which he refused to accept but sued for a greater sum, but on learning that the deposit still stood unconditionally to his credit used it, held insufficient to show an accord and satisfaction as a matter of law. Rustler Realty Co. v. Swecker [Iowa] 112 N. W. 169. An accord and satisfaction is not shown where after service of a summons an amount less than that demanded was sent to the plaintiff and retained by him where it did not appear that it was not sent unconditionally. West Side Laundry Co. v. Calumet Hotel Co., 103 N. Y. S. 820. Where one sold nine cows to another but prior to time of delivery one died and the seller delivered only eight cows and the hide of the dead one, held acceptance of payment for the eight cows on the buyer's refusal to pay for the dead one did not constitute an accord and satisfaction. Shaver v. Armstrong, 103 N. Y. S. 926. Where a buyer of lumber in paying for it deducted without authority a certain discount, from the purchase price the seller's acceptance of the check did not waive the discount, it appearing that the seller elected to pocket the loss of the discount and repudiate liability for any further shipments under the contract. Taussig v. Southern Mill & Land Co. [Mo. App.] 101 S. W. 602. Evidence sufficient to show that the acceptance of partial payment was not regarded as an accord and satisfaction by either party where the creditor so stated at the time it was received and the debtor left without demanding back what he had paid and thereafter the creditor opened correspondence looking to a compromise. Beattie Mfg. Co. v. Heinz, 120 Mo. App. 465, 97 S. W. 188. An attorney collected money by suit and retained a certain per cent for services in the trial court and $500 for services on appeal. His client objected to the charge of $500 and the attorney gave him a check for $225 indorsed, in full of all demands. In an action to recover the over charge on the fee and overcharges for disbursements, the attorney admitted that his client was entitled to recover $43.41, but set up accord and satisfaction to the entire claim. Held the accord and satisfaction was a defense only as to the $500 fee and the client could recover the balance of his claim. Levi Cotton Mills Co v. Fried, 102 N. Y. S. 802.

47. Where one claimed a certain amount and the debtor gave him a check stating that it was all he would get and such check was accepted with the statement that the debtor would be given credit for the amount, held the check was accepted according to the terms on which it was offered and an accord and satisfaction was shown. Williams v. Bienenzucht, 104 N. Y. S. 438. The acceptance of a sum tendered as in full of an unliquidated simple contract indebtedness is a release by operation of law of any further claim, acceptance, and collection of check held binding as release of unliquidated claim for legal services. Hand Lumber Co. v. Hall [Ala.] 41 So. 78.

48. Where a land looker directed the attention of a lumberman to certain land and it was agreed that if the latter should purchase, he should share profits with the former. The lumberman purchased and denied the locater any interest but it was agreed that he would pay him a certain sum in satisfaction of his claim. A portion was paid and the balance refused. Held the locater could sue on the original contract. An accord and satisfaction is not binding unless its terms are executed. Howard v. Norton-Morgan Commercial Co. [Ariz.] 89 P. 541. Where a debtor offered land in settlement of a debt and the creditor accepted a portion of such land, but there was no evidence of a conveyance of such land or a surrender of the note evidencing the debt, there was no accord. Grimmett v. Ousley, 78 Ark. 304, 94 S. W. 694. Agreement to accept $300 and land in lieu of a claim is not an accord where before the debtor cleared the title to the land he died, and the creditor presented a claim for the original debt. Bull v. Payne, 47 Or. 580, 84 P. 697. Where there is an agreement to settle a controverted demand for a fixed consideration, all or a portion of which is executory it may be set up as an accord and satisfaction by making proper averments in regard to performance. Hayes v. Atlanta & C. Air Line R. Co. [N. C.] 55 S. E. 437.

Note: In matters of accord and satisfaction, there is a well defined and easily recognized distinction between two classes of agreements: (1) where the agreement of the creditor is to accept the performance of the debtor's new promise or agreement in satisfaction of the demand. (2) where such promise or agreement itself based upon a sufficient consideration is accepted in satisfaction of the demand. Chitty, Contracts [11 Am. Ed.] 1124. And in this class of cases it must clearly appear that the intention of the party was to accept such promise in satisfaction of the original demand. In the first class of cases the accord must be fully executed in order to bar an action on the original demand. 1 Cyc. 312. In the second class the original demand is extinguished and cannot furnish foundation for an action. 1 Cyc.

cessions made are not binding unless a settlement is reached.[49] A parol compromise of a boundary dispute between adjoining owners is valid.[50] In Alabama by statute a composition evidenced by a writing is binding.[51]

An accord adjusts no matters not within the contemplation of the parties,[52] nor before them for consideration,[53] but it being the policy of the law to favor compromises, a settlement in general terms is presumed to include all matters of difference between the parties.[54] It is binding on all the parties thereto [55] who act within the scope of their authority,[56] or who subsequently ratify it,[57] and constitutes a good defense to an action on the original obligation.[58]

336; Sioux City Stock Yard Co. v. Packing Co., 110 Iowa, 316, 81 N. W. 712—See Henderson v. McRae [Mich.] 111 N. W. 1057.

49. Where parties meet to adjust matters in dispute and agree upon the terms of the contract, the agreement is binding, but if they meet to compromise and a settlement is not effected, concessions made are not binding. Rikerd Lumber Co. v. Charles Hoertz & Son [Mich.] 13 Det. Leg. N. 809, 109 N. W. 664.

50. Dispute between adjoining owners is valid. Not contrary to law or public policy. Martin v. Conley, 30 Ky. L. R. 728, 99 S. W. 613.

51. Where a debtor forced into bankruptcy wrote to his creditor offering to pay 15 per cent. of the debt and the creditor wrote accepting the offer and also wrote to a bank to receive the 15 per cent. in full satisfaction and the debtor sent a check to the bank, Code 1896, § 1806, was held complied with. Norton v. Clayton Hardware Co. [Ala.] 43 So. 185.

52. A father, mother, and minor son were injured in a collision, suits for damages were commenced by the father and mother, but before trial a settlement was made. Held that the evidence did not show that the son's claim was included in the settlement. Johnson v. Minneapolis, etc., R. Co. [Minn.] 112 N. W. 534. Where a contractor paid a subcontractor a certain sum on condition that the contractor's losses by reason of delay of the subcontractor in furnishing materials under the contract would be adjusted thereafter, the contractor did not waive his right to damages caused by such delay. Modern Steel Structural Co. v. English Const. Co., 129 Wis. 31, 108 N. W. 70. A receipt settles only such matters as are comprehended in it by the intention of the parties. Stubbs v. Franklin & M. R. Co., 101 Me. 355, 64 A. 625. Retaining check to pay for goods "received" not accord and satisfaction of dispute as to those rejected by buyer. Olson v. Wabash Coal Co., 126 Ill. App. 253.

53. A receipt and check evidencing a settlement of all demands will not be considered as including a claim not known to the attorney of one of the parties who represented such party, all other evidences of indebtedness being before them. Crosthwait v. Saturday Night Sav. & Loan Ass'n, 30 Ky. L. R. 461, 98 S. W. 1044.

54. In an action on a note it appeared that plaintiff payee as cashier of a bank in which he held stock and of which the defendant maker was president and principal stockholder, had made excessive and unlawful loans to an insolvent; that the parties had agreed that the maker should pay to the bank its total loss and receive a credit on his note to the extent of the payee's share of such loss as stockholder. Held to constitute an accord and satisfaction of the transaction including claim for impairment of the value of the maker's stock, and that the bank having been paid in full had no assignable cause of action for the payer's misconduct. Balch v. Grove, 98 Minn. 259, 108 N. W. 807. In the absence of fraud or mistake it is conclusively presumed that unpaid portions of prior debts are merged in the obligation evidenced by the new contract. Crabtree's Adm'x v. Sisk, 30 Ky. L. R. 572, 99 S. W. 268.

55. Code 1896, § 138, does not prohibit an administrator from compromising a doubtful claim without authority of court. Hence a plea that an administrator settled a claim is not bad because it is not alleged that he received a reasonable amount and that the settlement was authorized by the court. Loveman v. Birmingham R., L. & P. Co. [Ala.] 43 So. 411. Where an insured person had been absent and unheard of for seven years and the company elected to pay the beneficiaries rather than question his death, the compromise and settlement based on the assertion of his death was binding on the company though it subsequently appeared that he was alive. New York Life Ins. Co v. Chittenden [Iowa] 112 N. W. 96. Where after judgment in favor of a corporation in an action for rescission of a contract for fraud or damages for deceit the parties settled the controversy, such settlement was a bar to any action against the officers of the corporation for deceit. Krolik v. Curry [Mich.] 111 N. W. 761. Where the settlement of a suit brought by the next friend of an infant was made without objection of his counsel and the agreement after being signed by the next friend was filed in court by counsel for defendant, a judgment rendered pursuant thereto was not void because the agreement was not signed by defendant's counsel. Wallace v. Boston El. R. Co. [Mass.] 80 N. E. 461. The entry of judgment on such settlement by the clerk without a special order of the court did not render the settlement void where the case was ripe for judgment after the agreement was filed, under the general order, and under that order went to judgment. Id. Compromise by which land is sold and proceeds divided binds coparties on one side of the compromise not to claim as against each other more than the share they would have had in the land. Dangerfield v. Williams, 26 App. D. C. 508.

56. One of two stockholders in a corporation may not as stockholder settle and discharge corporate claims against the other though such two own all the stock. Petersen v. Elholm [Wis.] 109 N. W. 76.

57. If a corporation acquiesces in and accepts the unauthorized settlement of corpo-

(§ 1) *B. The consideration.*[59]—An accord being a contract must be supported by a consideration.[60] The mutual release by the parties of their respective rights and the desire to avoid litigation is a sufficient consideration,[61] as is also anticipation of time of payment.[62] An unquestioned judgment may be ratified by payment of less than its amount in the settlement of a disputed matter collateral to the judgment.[63] The compromise of a wholly void claim is not a sufficient consideration for a new promise.[64]

(§ 1) *C. Fraud, mistake, and duress.*[65]—An accord may be set aside for fraud or mistake.[66] Proof of mistake must be clear,[67] especially when all evidences of

rate claims, it is bound. Petersen v. Elholm [Wis.] 109 N. W. 76.

58. The giving of a note by one party to another in settlement of differences between them is a good defense in an action by the maker against the payee to recover prior existing claims in the absence of fraud or mistake. Gandy v. Wiltse [Neb.] 112 N. W 569. Where the only issue was as to whether a certain item had been included in a settlement, evidence as to an independent transaction was inadmissible. Simpson v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 352, 95 S W. 94. Where the evidence was uncontradicted that a certain item had been included in a settlement, the creditor was not entitled to recover it though he did not know it was included and would not have made the settlement had he known it. Id. Where after a settlement a dividend was paid to the creditor for the debtor's benefit, the creditor was entitled to retain it and apply it on the debt. Id. Where it appeared that a dividend paid to a creditor for the benefit of his debtor was included in a settlement, the debtor in order to recover it had the burden to prove that he had not been credited with the amount of the dividend in such settlement. Id.

59. See 7 C. L. 14. See, also, Contracts, 7 C. L. 761.

60. A parol agreement by a creditor to accept from his debtor less than is due by way of compromise is without consideration and void. Eckert v. Wallace [N. J. Law] 67 A. 76. Settlement between one individual and a trust company who had had dealings relative to the procurement of funds for the construction of a railroad **held based on a sufficient consideration.** Alexander v. Maryland Trust Co. [Md.] 66 A. 836. Where one's right to cut and remove timber from land had been extended by parol and the owner of the land sold to one who had notice of such extension, an agreement between vendee and licensee that he could remove the timber cut if he would relinquish the right to cut any more timber was based on a consideration. York v. Westall [N. C.] 55 S. E. 724.

61. The compromise of a doubtful claim is usually valid and the mutual release by the parties of their respective rights and the desire to avoid litigation are sufficient consideration for such compromise. Dickie v. Steiger [Cal. App.] 88 P. 814. The compromise of a contention as to property rights, the final outcome of which, if settled by litigation, the parties consider doubtful, furnishes a consideration for an accord and satisfaction. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81.

Mutual concessions of adjoining owners in fixing a disputed boundary is sufficient consideration for the dismissal of an action by one to receive a tract notwithstanding one of the parties had acquired title to such tract by adverse possession. Martin v. Conley, 30 Ky. L. R. 728, 99 S. W. 613.

62. An offer by a company to settle in full with its agents by paying them at once one-half of all commissions accrued or to accrue when accepted is a good accord and satisfaction; anticipation of time of payment is a sufficient consideration. Singer Sewing Mach. Co. v. Lee [Md.] 66 A. 628.

63. Where it was in settlement of a dispute as to the right of the judgment creditor to hold the trustee in the pending trustee process proceeding, and such right could be honestly questioned. Mann v. Haley [Vt.] 64 A. 449.

64. The compromise of a claim on a note given for a gambling debt is not sufficient consideration for a new note. Union Collection Co. v. Buckman [Cal.] 88 P. 708.

65. See 7 C. L. 15.

66. Where an ignorant and easily influenced man confessed to a friend to having had improper relations with a young girl, and on the advice of his friend consulted an attorney and employed him to represent him in case of criminal prosecution, and the attorney consulted with the father of the girl and accepted employment from him to prosecute the case for one-half that could be recovered and thereafter on representation to the other party that he was subject to prosecution procured a settlement, held such settlement was the result of undue influence arising from confidential relations and could be set aside. Whitcomb v. Collier [Iowa] 110 N. W. 836. The vacation of such settlement would place the parties in statu quo and render unavailing a mortgage executed to secure the money, since it never became a lien. Id. Where one deceives another into believing that he owes him a certain sum, but states that he will take a less amount, which is paid, the law of settlements will not defeat the right to recover the amount fraudulently procured. Shearer v. Hill [Mo. App.] 102 S. W. 673. Where a railroad company had notice that one of the attorneys for a claimant was practicing a fraud on his former partner who was interested in the case to the extent of a contingent fee, but did not know that he was practicing fraud on the claimant, the settlement could be set aside as to the former partner but not as to the claimant. Bush v. Prescott & N. W. R. Co. [Ark.] 103 S. W. 176. A supervisor was indicted for embezzlement, and it appearing that funds drawn by him, except a certain amount, had been used by him for road purposes, and on payment of such amount he was given a release from liability for all funds theretofore coming

prior indebtedness are canceled and a new note given.[68] One who assails a settlement on the ground of fraud must tender back what he has received.[69]

§ 2. *Satisfaction or discharge.*[70]—A satisfaction is a performance of the terms of the accord,[71] and as a general rule an accord is not satisfied until its terms are fully performed.[72] An accord is not satisfied by giving the creditor an order on a third person.[73] Whether the terms of the accord have been fully performed is sometimes a question of fact.[74]

§ 3. *Pleadings, issues, and proof.*[75]—Accord and satisfaction is a matter of defense and must be pleaded.[76] A replication that a debt was not paid does not join issue on a plea of accord and satisfaction.[77]

into his hands. Prior to such settlement he had purchased claims for labor against the county which he was forbidden to do by law. Held the settlement did not preclude the county from refusing to pay such claims. Harrison County v. Ogden [Iowa] 108 N. W. 451. A compromise for 15 per cent. of a debt **is not fraudulent** where the debtor wrote to the creditor, as was the fact that he was making the same offer to all of his creditors, though some of the creditors got more. Norton v. Clayton Hardware Co. [Ala.] 43 So. 185. Where a landowner contracted to give another the sole control of the output of lime, cement, rock, and clay from his land for 20 years on faith of representations that the buyer would construct large works on his land employing many men, allegations that the buyer's representations were false, that the seller was old and was required to pay $1,500 to get a release from such contract, do not state a cause of action for the recovery of such money without allegations as to when the improvements were to be erected or how long it had been since the contract was made. Dickie v. Steiger [Cal. App.] 88 P 814.

67. Crabtree's Adm'x v. Sisk, 30 Ky. L. R. 572, 99 S. W. 268. Evidence insufficient to show mistake. Id.

68. Crabtree's Adm'x v. Sisk, 30 Ky. L. R. 572, 99 S. W. 268; Id. [Ky.] 101 S. W. 886.

69. This is so notwithstanding Ann. St. 1906, p. 670, providing that where in an action for injuries the defense of settlement is set up the plaintiff may attack such settlement on the ground of fraud. Althoff v. St. Louis Transit Co. [Mo.] 102 S. W. 642.

70. See 7 C. L. 17. See, also, ante, § 1 B

71. An act of congress ratifying a compromise and settlement made between the secretary of the treasury and a number of persons interested in judgments in pending suits in which the United States was plaintiff and the bondsmen of certain public officials were defendants, and directing a satisfaction of all judgments and dismissal of all suits, held to discharge the surety on a bond given by one defendant, though such sureties were not parties because the judgment was embraced in the settlement. U. S. v. Knabe, 147 F. 802.

72. A voluntary composition between a debtor and his creditors after involuntary bankruptcy proceedings have been instituted, by which the debtor agrees to pay a certain per cent. of his debts, one-half in cash, balance in notes, does not operate as an accord and satisfaction until the notes are paid, and where the debtor subsequently goes into voluntary bankruptcy, the creditors may prove their original claims less the cash payment. In re Carton & Co., 148 F. 63. A settlement between a buyer and seller of buggies provided for the return of certain buggies to the seller and the return of notes to the buyer. The buggies were to be returned complete as described in the contract of sale, freight prepaid. Held title to such returned buggies did not pass until delivered according to the contract and until that time there was no settlement. Capital City Carriage Co. v. Moody [Iowa] 110 N. W. 903. An agreement of accord and satisfaction in full release of a promise of marriage is without binding force so long as it remains unexecuted, or so long as the party complaining of the failure to execute the agreement of accord is unable to show a surrender of anything or the loss of any right by reason of entering into the agreement. Conard v. Bare, 8 Ohio C. C. (N. S.) 118

73. The giving to a creditor of an order on a third person for merchandise is not a satisfaction by delivery to him of property. Flenor v. Flenor, 30 Ky. L. R. 543, 99 S. W. 258.

74. Where a compromise provided for the return of certain goods, freight prepaid, and in an action on the original contract it was claimed that the freight had not been prepaid in full, whether the defendants had fully performed in this regard held a question of fact. Capital City Carriage Co. v. Moody & Son [Iowa] 110 N. W. 903. Where a compromise contract provided for the return of certain goods in a specified condition and they were refused because not in such condition, the evidence being conflicting as to the condition, the question should have been submitted to the jury. Id. Where a compromise contract required the payment of certain money on the return of certain notes, whether the party required to make such payment had sufficient funds on deposit to make it was immaterial where it appeared that the notes had never been tendered. Id.

75. See 7 C. L. 17.

76. Evidence of a settlement, in an action for conversion of corporate funds, is not admissible unless pleaded. Peterson v. Elhôlm [Wis.] 109 N. W. 76. Accord and satisfaction as a defense must be pleaded. Gandy v. Wiltse [Neb.] 112 N. W. 569; Bare v. Ford [Kan.] 87 P. 731. Evidence of a compromise and settlement is not admissible unless pleaded. Auerbach v. Curie, 104 N. Y. S. 233.

77. Stitzel v. Franks, 126 Ill. App. 260.

One who sets up an accord and satisfaction has the burden to prove it.[78] In an action to enforce the accord, evidence of the claim satisfied by it is irrelevant,[79] and in an action on the original obligation, evidence of an unaccepted offer of compromise is not admissible.[80] A release is admissible to show what matters were adjusted.[81]

Fraud vitiating the accord may be shown though not pleaded where the defense was interposed under such circumstances as to take the plaintiff by surprise.[82]

Where there is evidence in support of the plea, the party by whom it is interposed is entitled to have it submitted by an instruction embodying a hypothetical statement.[83]

ACCOUNTING, ACTION FOR.

§ 1. Nature of Remedy and Jurisdiction of Courts (17).
§ 2. Persons Liable and Entitled to Accounting (18).
§ 3. Practice and Procedure (18). Parties (18). Pleading (18). Evidence (18). Decree (19).
§ 4. Requisites, Form, Substance, and Statement of the Account (19).

This topic includes only suits in equity to obtain an accounting and equivalent legal remedies. The liability of fiduciaries to account is treated in topics dealing with their rights and liabilities,[84] as is accounting by officers[85] and between partners.[86]

§ 1. *Nature of remedy and jurisdiction of courts.*[87]—To entitle one to maintain a suit for an accounting, the existence of complicated accounts,[88] fiduciary,[89] or joint contract relation imposing the duty to account,[90] or fraud,[91] must appear.

78. National Cash Register Co. v. Petsas [Wash.] 86 P. 662. Evidence insufficient to show a compromise relative to damages for land taken under the power of eminent domain. Mason v. Iowa Cent. R. Co., 131 Iowa, 468, 109 N. W. 1. Evidence insufficient to show a settlement. McClure's Ex'r v. Anchor Roller Mills' Assignee, 30 Ky. L. R. 509, 99 S. W. 221. Evidence sufficient to show that one had not compromised his claim for damages. Fidelity & Deposit Co. v. Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272.

79. In suit against devisees and executor for specific performance of a contract to devise land, the record of a former compromised suit between the testator and devisees on which the contract to devise was based, is inadmissible. Price v. Price, 133 N. C. 494, 45 S. E. 855.

80. An offer of compromise not accepted is not admissible in an action on the original claim. McKnight v. Milford Gin Co. [Tex. Civ. App.] 99 S. W. 198.

81. Where a judgment was settled and adjusted and a release given, such release was admissible in another action to show matters adjusted. Nicholas v. Lord, 103 N. Y. S. 681.

82. Where the defense of accord and satisfaction is interposed under such circumstances as to take plaintiff by surprise, he may show fraud vitiating it though such fraud was not pleaded. Whitehead v. Trussed Concrete Steel Co., 101 N. Y. S. 250.

83. Where a plea of accord and satisfaction is interposed and supported by evidence, the party is entitled to have the defense submitted by an instruction embodying a hypothetical statement. Singer Sewing Mach. Co. v. Lee [Md.] 66 A. 628.

84. See Brokers, 7 C. L. 465; Agency, 7 C. L. 61; Guardianship, 7 C. L. 1899; Trusts, 6 C. L. 1736, and like topics.

85. See Officers and Public Employes, 8 C. L. 1191.

86. See Partnerships, 8 C. L. 1261.

87. See 7 C. L. 19.

88. Miller v. Russell, 224 Ill. 68, 79 N. E. 434.

89. A contract by which one was to advance money to another to establish an office for the sale of a certain article which was to be sold to the first party at a fixed price **does not show the second party to be a trustee** so that a suit for an accounting for such advances can be maintained by him. Mahler v. Sanche, 223 Ill. 136, 79 N. E. 9. Allegations that moneys were received by defendant, an attorney employed by plaintiff, to be used in his behalf, held insufficient to show that such moneys were received by him in a fiduciary capacity. New York Life Ins. Co. v. Hamilton, 102 N. Y. S. 771. Allegations that moneys received by defendant from plaintiff were to be used for plaintiff's benefit and that they were used for purposes unknown to plaintiff imports a gift rather than a trust. Id. A contract authorizing one to act as agent for others and gives him an irrevocable power for a term of years to manage their property, accounting to them for the balance after retaining an amount requiring in his discretion for disbursements enumerated, **creates a fiduciary relation justifying a bill for accounting.** Campbell v. Cook [Mass.] 79 N. E. 261.

90. Berg v. Mead, 100 N. Y. S. 792.

91. A bill alleging that plaintiff sold stock in defendant corporation to one of the other defendants, and was to receive a certain sum as liquidated damages in case such

The remedy is available though the items are all on one side, they being complicated,[92] and it will also lie though the tranasction is not yet closed.[93] It must also appear that there exists no adequate remedy at law,[94] and the mere fact that equitable relief is prayed for will not confer jurisdiction.[95]

The proceeding is an equitable one and courts of equity have jurisdiction,[96] and where a court of law has concurrent jurisdiction, the judgment of a court of equity to which the cause is transferred by it will not be disturbed unless manifest prejudice to the complaining party is apparent.[97]

§ 2. *Persons liable and entitled to accounting.*[98]

§ 3. *Practice and procedure. Parties.*[99]—One who has no interest in the proceeding is not a necessary party.[1]

Pleading.[2]—A bill for an accounting must state a cause of action [3] of equitable cognizance.[4] Failure of a complaint to show the existence of a fiduciary relation is not cured by alleging an agreement to account where failure to do so is not also alleged.[5]

Evidence.[6]—In a suit for an accounting the complainant is entitled to a full discovery,[7] and where the term during which a joint adventure was to continue has

stock was sold for less than a certain sum and should be entitled to certain accrued dividends, that the stock had been sold in violation of such agreement to the president of the corporation who had notice of the facts held to state a cause of action for equitable relief. Phillips v. Jacobs, 145 Mich. 108, 13 Det. Leg. N. 542, 108 N. W. 899.

92. An accounting may be had where the accounts are on but one side, they being complicated, and a discovery being sought which is material to the relief prayed for. Miller v. Russell, 224 Ill. 68, 79 N. E. 434.

93. Where one was entitled to one-fourth of the net profits from the sale of land whenever they were received, and the expense of the sale and original outlay had been returned and substantially the sum found to be subject to division was on hand, he was entitled to an accounting though the transaction was not yet closed. Rust v. Fitzhugh [Wis.] 112 N. W. 508.

94. An action for an accounting will not lie where there exists an adequate remedy at law. Where the bill shows that the amount due was ascertainable from records and the knowledge of the parties. Hunt v. O'Connor, 151 F. 707. A court of equity is without jurisdiction of a suit for an accounting for profits, damages, or royalties based on a contract granting a license under a patent. Adequate remedy at law. Allen v. Consol. Fruit Jar Co., 145 F. 948. Where four separate actions of assumpsit would be required, a bill for an account will lie. Simpson v. Summerville, 30 Pa. Super. Ct. 17.

95. Such jurisdiction is not conferred by the fact that the bill prays for equitable relief which cannot be granted in such proceeding. Cancellation of patents prayed for. Allen v. Consol. Fruit Jar Co., 145 F. 948.

96. Equity has jurisdiction of a case which involves an accounting between principal and agent covering business transactions between them for several months in which there were many items for and against each party to the contract. Harris v. Remmel [Ark.] 102 S. W. 716.

97. In many matters of account the jurisdiction of equity and law are concurrent, yet though a court of law has jurisdiction and transfers the cause to a court of equity which assumes jurisdiction, the cause will not be reversed on that ground unless the complaining party was manifestly prejudiced. Harris v. Remmel [Ark.] 102 S. W. 716.

98. See 7 C. L. 20.

99. See 7 C. L. 21.

1. Where one with six brothers executed a deed as tenants in common to themselves except one as joint tenants, and such deed was without consideration, and thereafter the property was conveyed to three of their number and part of the land was thereafter sold by such three, and after the death of two of them the remainder was sold by the survivor, in an action by the first party for an accounting of the proceeds of the sale last made, and of the rents and profits of the other tract, on the ground that the first deed was procured by undue influence, the other brothers were not necessary parties. Nichols v. Nichols [Conn.] 66 A. 161.

2. See 7 C. L. 21.

3. A complaint for an accounting of profits made on land sales held to state a cause of action and to show that a portion of the items were not barred by limitations. Hays v. Peavey [Wash.] 86 P. 170.

4. In an action on contract creating a joint adventure, where the complaint fails to state a cause of action for accounting or contribution because the prayer is for a sum of money only, it may be sufficient to state a cause of action for terminating the engagement. Jones v. McNally, 103 N. Y. S. 1011.

5. A defect in a complaint in failing to show that moneys were received in a fiduciary capacity is not cured by an allegation that defendant gave receipts for such moneys, agreeing to account for them, where it is not alleged that he failed to render an account. New York Life Ins. Co. v. Hamilton, 102 N. Y. S. 771.

6. See 7 C. L. 22.

7. Where in an action against a trustee for an accounting it appeared that the trust property was insured in companies of which the trustee was agent, the beneficiaries were

expired, there should be a general accounting of all transactions so that all matters may be finally adjusted.[8] A defendant may without pleading prove items constituting offsets if they are directly connected with matters alleged in the bill, but not those not so connected.[9] Book accounts shown to be erroneous will not support a decree.[10]

Decree.[11]—An interlocutory judgment is not necessary where it appears that the referee took a full account of all matters in dispute.[12] The court may apportion costs in its discretion.[13] Under a rule that the judgment shall bear interest, interest runs from the date of the judgment and not from the date of filing the report of the referee.[14] Exceptions to the report of a referee should be specific.[15]

§ 4. *Requisites, form, substance, and statement of the account.*[16]—One who does not show that he has any interest is not entitled to an accounting.[17] In an accounting on the bill of an insane person, a statement should be rendered for the transactions for each year.[18]

ACCOUNTS STATED AND OPEN ACCOUNTS.

§ 1. Nature and Elements of the Several Kinds of Accounts (19).
§ 2. Binding Effect Rights, and Liabilities (20).
§ 3. Remedies on Account Stated (21).
§ 4. Remedies on Open Accounts (21).

§ 1. *Nature and elements of the several kinds of accounts.*[19]—An account is an agreement between the parties fixing the amount due in respect to transactions between them and promising payment,[20] mutual assent, express or implied, being

entitled to an itemization of the amount of insurance premiums showing what companies carried the risks and the rates, though it appears that such companies were solvent. Campbell v. Cook [Mass.] 79 N. E. 261. In an action for an accounting between joint owners of real estate, evidence sufficient to sustain the finding of the trial court. First Nat. Bank v. Krause [Neb.] 111 N. W. 382. See, also, the topic Discovery and Inspection, 7 C. L. 1167.

8. Where parties agreed to purchase, develop, and sell real estate for a specified time, one to have active management of the affairs, developing the property and selling it. Berg v. Mead, 100 N. Y. S. 792. Where a bill for an accounting involved mutual accounts, the defendant without pleading could prove items constituting his offsets and expenses if they were directly connected with the matters alleged in the bill. Dettering v. Nordstrom [C. C. A.] 148 F. 81.

9. Where a bill by a cotenant of a mining claim was limited to the output of the mine and expense of mining, expenses incurred in surveying and in litigation over the location could not be shown where not pleaded. Dettering v. Nordstrom [C. C. A.] 148 F. 81.

10. Book accounts shown to have been irregularly and inaccurately kept and not disclosing known credits will not support a judgment for the amount shown by them to be due. Barnes v. Barnes' Adm'r [Va.] 56 S. E. 172.

11. See 7 C. L. 22.

12. In an action by an employe to recover a share of the profits of his employer in accordance with the terms of their contract, where the referee took full account of all matters in dispute, an interlocutory judgment in accounting was not necessary. Smith v. Smith, 101 N. Y. S. 521.

13. In an accounting between partners. Brown v. Rogers [S. C.] 56 S. E. 680.

14. Under Code Civ. Proc. 1902, § 1660, providing that judgments shall bear interest, interest does not run from date of filing of the report of a referee but from the date of the judgment. Brown v. Rogers [S. C.] 56 S. E. 680.

15. An exception to the report of a referee in stating accounts between partners, in that he should have first stated the same in the form of an account with an individual with the firm, is too general. Brown v. Rogers [S. C.] 56 S. E. 680.

16. See 7 C. L. 22.

17. Evidence insufficient to show one entitled to an accounting of the profits of an electric light company, it not appearing that any stock was ever issued to him, and after his discharge as manager he made no claim for ten years. Ruthenburg v. Hoffman [C. C. A.] 150 F. 578.

18. Where in an accounting it appeared that one of the parties was insane, an account should be taken for each year during plaintiff's insanity, he should be charged with all necessaries furnished him and credited with amounts paid, and if for any year he overpaid the account for such year it should be credited on final settlement if not barred by limitations. Gross v. Jones [Minn.] 42 So. 802. Where it appeared that plaintiff while sane purchased goods of defendant and sold goods to him, he should be charged with the current price of the goods purchased and credited with the goods sold. Id.

19. See 7 C. L. 22.

20. Wroten Grain & Lumber Co. v. Mineola Box Mfg. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 167, 95 S. W. 744. A complaint alleging that goods were sold to defendant, the amounts and prices of which were item-

essential.[21] An account stated constitutes one debt.[22] An account stated may result from the retention for an unreasonable length of time of an account rendered,[23] but it must be predicated on a preexisting debt or liability.[24] A statement of account must be certain as to the subject-matter of the debt.[25] Whether an account stated exists may be a question of fact.[26] An open account is one in respect to which nothing has occurred to bind either party; one which is fully open to be disputed.[27] An indebtedness is the proper subject of a book account though arising on written contract for sale.[28]

§ 2. *Binding effect, rights and liabilities.*[29]—An account stated does not create a liability where none previously existed,[30] but works a definition and limitation of existing liabilities.[31] It is not conclusive on the parties but may be impeached[32] for fraud or mistake,[33] or if it is clearly shown to have been founded on an erroneous calculation,[34] but only where the evidence is clear.[35]

ized in an exhibit, had paid certain freight charges for defendant, and that correct bills and invoices were made out to defendant at the time and that he agreed to pay the sums set forth, shows an account stated. Id. Where parties who had had dealings for years had a settlement and one of them executed a note for the balance found due, such note constituted an account stated in the absence of proof that unlawful charges had been incorporated into it. Gross v. Jones [Miss.] 42 So. 802. When an attorney makes a charge for services and the same is accepted by the client, it becomes an account stated. Lane & Bodley Co. v. Taylor [Ark.] 97 S. W. 441. Where an attorney collected money for a corporation and sent his check to an assignee of such corporation after the commencement of bankruptcy proceedings, and shortly afterwards an attorney for the assignee protested that the assignee could not accept the check but no agreement was made, held such facts together with the fact that the check was not returned **did not show an account stated.** In re Klein, 101 N. Y. S. 663.

21. Atlas R. Supply Co. v. Forster, Waterbury & Co., 123 Ill. App. 558. Waiver of proof preliminary to introduction of account book not an admission of its correctness. Kelly v. Judy, 125 Ill. App. 525. Statement rendered by debtor under an agreement looking to an adjustment not an account stated. Cherokee Nation v. U. S., 40 Ct. Cl. 252.

22. Payment on an account stated tolls the statute of limitations as to all items included therein. Nunn v. McKnight, 79 Ark. 393, 96 S. W. 193. An instruction that it must appear that each item became due within the statutory period was properly refused. Id. Where the whole of a running account is by agreement regarded as due on a certain date, an instruction that each item is to be regarded as a separate contract is properly refused. Id.

23. An account stated results where no objection is made to an account rendered within a reasonable time. Shively v. Eureka Tellurium Gold Min. Co. [Cal. App.] 89 P. 1073. An account rendered and retained for an unreasonable length of time becomes an account stated. Little & Hays Inv. Co. v. Pigg, 29 Ky. L. R. 809, 96 S. W. 455. Is of more or less weight according to circumstances. Hamilton-Brown Shoe Co. v. Choctaw Mercantile Co. [Ark.] 97 S. W. 284.

24. There can be no account stated where there is no pre-existing debt or liability. Cooper v. Upton [W. Va.] 56 S. E. 180 [Advance sheets only]. Where there is no preexisting debt or liability, the rendering of an account to one who keeps it without objection does not make an account stated. Id.

25. A statement of account "To Mdse.," giving dates of debits and credits with amount thereof, but not showing the sort of merchandise, is insufficient. Moffitt-West Drug Co. v. Crider [Mo. App.] 100 S. W. 1099.

26. Whether an account stated existed was held a question for the jury where a broker bought and sold stock for a client and his books showed a loss to the client who claimed he had no account with the broker, and was not indebted to him. Little & Hays Inv. Co. v. Pigg, 29 Ky. L. R. 809, 96 S. W. 455.

27. Wroten Grain & Lumber Co. v. Mincola Box Mfg. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 167, 95 S. W. 744. Where it appeared that an insane person had purchased goods from another and had sold him goods, he should be charged with the current contract price of the goods bought and credited with the goods sold. Gross v. Jones [Miss.] 42 So. 802. An account may be an open one though it arises by reason of contract. Davidson v. McCall Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 640, 95 S. W. 32.

28. Vallee Bros. Elec. Co. v. North Penn. Iron Co., 32 Pa. Super. Ct. 111.

29. See 7 C. L. 23.

30. An account stated, in the absence of fraud, mistake, error, or omission, determines only the amount of the debt when a liability exists. Alone it cannot create a liability where none previously existed. Cooper v. Upton [W. Va.] 56 S. E. 180 [Advance sheets only].

31. Account stated limits amount of a prior claim of set-off by party rendering account. Aygarn v. Fraser Co., 123 Ill. App. 93.

32. In an action on an account stated for labor done, a breach of the contract for such labor may be set up as a defense. Gutshall v. Cooper [Colo.] 86 P. 125.

33. May be impeached for mistake. Smith v. Allmon, 74 S. C. 502, 54 S. E. 1014. An account stated can be assailed only for fraud or mistake. Little & Hays Inv. Co. v. Pigg, 29 Ky. L. R. 809, 96 S. W. 455. Where an electric light company furnished power through a meter and by reason of negligence and mistakes of its servants a cus-

§ 3. *Remedies on account stated.*[36]—Limitations run against an account stated from date of rendition,[37] and a partial payment thereon tolls the statute as to all items therein.[38]

A debtor who indorses a note in payment of an account may be sued on his indorsement instead of on the account.[39] A statutory presumption in favor of the correctness of an open account does not apply to an account stated.[40] Assumpsit on an account stated will lie where a bid for repairing loss was accepted by several insurance companies and the pro rata share of defendant was agreed to.[41]

§ 4. *Remedies on open accounts.*[42]—A cause of action on an account may be pleaded by attaching an itemized statement to the complaint.[43] Such statement may be amended by adding a sum to the original account.[44] A complaint on an open account should state the items thereof with reasonable certainty.[45] The date on which the transactions occurred should be alleged.[46] One suing on an account has the burden to establish the correctness thereof.[47] A verified statement is in some states made prima facie proof of the correctness of the account,[48] unless denied under oath.[49]

ACCRETION; ACCUMULATIONS, see latest topical index.

tomer was billed and paid for only one-half the service rendered, and such customer had not changed his position because of such error, the company could recover the balance due. Union Elec. L. & P. Co. v. Surgical Supply Co. [Mo. App.] 99 S. W. 804.

34. Smith v. Allmon, 74 S. C. 502, 54 S. E. 1014. Bills for gas which were by mistake of clerk too low not binding after payment. Allegheny County Light Co. v. Thoma, 31 Pa. Super. Ct. 102.

35. Testimony of an attorney who rendered an account to his client held insufficient to overcome such account where such testimony was uncertain and indefinite. Lane & Bodley Co. v. Taylor [Ark.] 99 S. W. 441.

36. See 7 C. L. 24.

37. 1 Smith's Laws, p. 76, relative to accounts between merchants, factors, or servants, does not apply. Morgan v. Lehigh Valley Coal Co., 215 Pa. 443, 64 A. 633.

38. Nunn v. McKnight, 79 Ark. 393, 96 S. W. 193.

39. Where a debtor indorsed notes over to his creditor in settlement of an account, and one of such notes was not paid by the maker, the creditor properly sued the debtor on his indorsement on the note and not on the balance of the account. Le Tulle Mercantile Co. v. Rugeley [Tex. Civ. App.] 17 Tex. Ct. Rep. 276, 98 S. W. 438.

40. Rev. St. 1895, art. 2323, providing that an affidavit of correctness of an open account shall be prima facie evidence thereof, does not apply to an account stated. Wroten Grain & Lumber Co. v. Mineola Box Mfg. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 167, 95 S. W. 744.

41. Manchester Fire Assur. Co. v. Fitzpatrick, 120 Ill. App. 535.

42. See 7 C. L. 24.

43. In action to recover price of goods sold, held that plaintiff could plead his cause of action as one upon an account by attacking itemized bill to petition and alleging that there is due him thereon a specified sum, though there was special contract, and though transaction did not appear to have been entered in an account book. Frontier Supply Co. v. Loveland [Wyo.] 88 P. 651.

44. An amended account adding a sum to the original account may be filed. Davidson v. McCall Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 640, 95 S. W. 32.

45. A cause of action on an open account is set forth with sufficient certainty where it is alleged that defendant owed plaintiff so much for the price of goods sold on credit in the amounts and on the dates set out in a detailed statement annexed to the complaint. Fox v. Barksdale [La.] 42 So. 957.

46. Where in an action on an open account containing a number of items no date except the year is alleged, an objection should be sustained unless the defect is cured by amendment. Overstreet v. Nashville Lumber Co. [Ga.] 56 S. E. 650.

47. Evidence sufficient to show that defendant's account against plaintiff exceeded plaintiff's account against him by something over one dollar. Co-Operative Mfg. P. & H. Co. v. Rusche, 30 Ky. L. R. 790, 99 S. W. 677. Evidence sufficient to show that a certain amount was due according to the books kept by the creditor. Barron v. Lance, 102 N. Y. S. 1007. Evidence as to defendant's liability for work and labor done held a question for the jury. Steele v. Ancient Order of Pyramids [Mo. App.] 103 S. W. 108. In an action on an account for goods, an entry in an account book of a debit for a note where unexplained was too detached from ordinary business between merchant and merchant to be admissible. Bader v. Ferguson, 118 Mo. App. 34, 94 S. W. 836. Evidence sufficient to show that an account was against defendant and not against her husband. Id.

48. An account verified before a notary in another state is admissible under Code 1896, § 1799, providing that affidavits required in a suit may be taken without the state before a notary who shall certify under his hand and seal of office, over objection that the notary cannot administer an oath unless authorized to do so by the law of the state of his residence. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71. Rev. St. 1895, art. 2323, providing that a verified open

ACKNOWLEDGEMENTS.[50]

§ 1. Nature, Office, and Necessity (22).
§ 2. Officers Who May Take (23).
§ 3. Taking and Making Acknowledgements (23). Persons Who May Make (24).
§ 4. Certificate and Acknowledgement (24).
§ 5. Authentication of Officers' Authority (25).
§ 6. Operation and Effect (25).
§ 7. Defects and Invalidities (26). Liability of Officer (26).

§ 1. *Nature, office, and necessity.*[51]—Acknowledgment is, as a general rule, necessary to admit an instrument to record or registration,[52] or to entitle it to be received in evidence without further proof of execution,[53] and an instrument, deed, mortgage, or contract not properly proved or acknowledged, but nevertheless recorded, is not constructive notice,[54] nor is such instrument admissible to prove title.[55] It is also essential in case of agreement or conveyances by husband and wife in order to cut off dower and homestead rights,[56] and to a deed or other instrument executed by a married woman intended to divest her of title to her separate estate.[57] Under the Code of North Dakota, in order to authorize the entry of judgment upon motion,

account proves itself unless its correctness is denied under oath, applies where the debt arises by reason of contract express or implied. Davidson v. McCall Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 640, 95 S. W. 32. An account verified by the treasurer of a corporation is sufficient though affiant does not state that he is agent of such corporation. Id.

49. Under Rev. St. 1895, art. 2323, providing that a verified open account proves itself unless its correctness is denied under oath in affidavit filed in reply stating that the account was not just, followed by statements showing that its justness was not questioned, and attempting to present matter which could not affect it, does not destroy the prima facie case. Davidson v. McCall Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 640, 95 S. W. 32.

50. See generally **Tiffany Real Property,** § 405.

51. See 7 C. L. 25.

52. Longley v. Sperry [N. J. Eq.] 66 A. 1062; Williams v. First Nat. Bank [Or.] 87 P. 890; Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525. A chattel mortgage cannot, under the New Jersey chattel mortgage revision of 1902, be recorded until its execution "shall be first acknowledged or proved, and such acknowledgement or proof certified thereon in the manner prescribed by the act respecting conveyances." Longley v. Sperry [N. J. Eq.] 66 A. 1062. Section 5630 of B. & C. Comp. provides that "any mortgage, deed of trust, conveyance, or other instrument of writing intended to operate as a mortgage of personal property alone, or with real property, shall be executed, witnessed, and acknowledged in the same manner as a conveyance of real property." Williams v. First Nat. Bank [Or.] 87 P. 890.

Proof by subscribing witnesses as entitling to recordation: Section 2 of chap. 73, of the W. Va. Code of 1899, provides for the recordation of deeds and other instruments upon proof of the execution thereof by two witnesses before the clerk of a county court. Simpson v. Belcher [W. Va.] 56 S. E. 211. Under the Texas statute of 1846, proof of an instrument of writing for the purpose of being recorded might be made by one or more of the subscribing witnesses appearing before some authorized officer and stating on oath that "he or they saw the grantor or person executing the instrument sign the same or that the grantor * * * acknowledged in his or their presence that he had subscribed and executed the same * * * and that he or they had signed the same as witnesses at the request of the grantor," etc. It was held in Williams v. Cessna [Tex. Civ. App.] 16 Tex. Ct. Rep. 162, 95 S. W. 1106, that this did not require a witness to state on oath that he signed as witness at the grantor's request, but that under the statute of 1895, § 4624, it would seem that the certificate should show that such signature was at the request of the grantor.

53. Punchard v. Masterson [Tex.] 101 S. W. 204.

54. Longley v. Sperry [N. J. Eq.] 66 A. 1062; Kee v. Ewing [Okl.] 87 P. 297.

55. A deed which shows on its face that it was executed in one county before a notary public of another county is not properly attested for record and is not by virtue of such attestation and recording under it, rendered admissible either as title or color of title. Gray Lumber Co. v. Harris [Ga.] 56 S. E. 252. In North Carolina it is well settled and conceded that the registration of an ancient deed upon an unauthorized probate is invalid, and such deed is inadmissible in evidence as an essential link in a chain of title. Allen v. Burch, 142 N. C. 524, 55 S. E. 254. The Texas curative act of Feb. 9th, 1860 (Laws 1860, p. 75, c. 58), and the act of Apr. 23, 1895 (Laws 1895, p. 157, c. 99), will not validate the registration of instruments which were never properly acknowledged and proved. Punchard v. Masterson [Tex.] 101 S. W. 204. In Tennessee, however, a deed which has been registered twenty years in the county where the land lay will be admissible in evidence notwithstanding the probate was defective. Kobbe v. Harriman Land Co. [Tenn.] 98 S. W. 175.

56. Saldutti v. Flynn [N. J. Eq.] 65 A. 246.

57. Simpson v. Belcher [W. Va.] 56 S. E. 211, holding that proof of execution of such instrument, made by two witnesses before the clerk of a county court, as provided in § 2 of ch. 73 of the W. Va. Code 1899 (Code 1906, § 3075), is not the equivalent of such acknowledgement and cannot be substituted therefor.

as upon a statutory award, the agreement for submission must be acknowledged by the parties thereto in the same manner as a conveyance of real property.[58]

An acknowledgment is not necessary as between the parties to a deed,[59] and even as to third persons, actual notice is equivalent to due acknowledgment and recording.[60] In Kentucky [61] and Minnesota the taking of the proof or acknowledgment of the execution of an instrument by an officer is an act ministerial and not judicial in its nature.[62]

§ 2. *Officers who may take.*[63]—The officers who may take acknowledgments are specified by the statutes of the various states,[64] but, generally speaking, the acknowledgment and privy examination must be taken by a public official representing the state,[65] and acting within the territorial limits of his jurisdiction.[66] The official must be disinterested,[67] and when a recorded instrument shows upon its face that the acknowledgment was taken by a party in interest, it is improperly recorded and is not constructive notice,[68] and is not admissible of its own force.[69] The officer is not, however, disqualified merely by reason of being in the employ of one of the parties to the instrument,[70] but a mortgage on a homestead executed to a corporation, an officer of which takes the acknowledgment creates no lien.[71]

§ 3. *Taking and making acknowledgments.*[72]—An acknowledgment of a deed is intended to show that the grantor of the premises conveyed executed the

58. Award under Rev. Code, §§ 7692-7712. Gessner v. Minneapolis, etc., R. Co. [N. D.] 108 N. W. 786.

59. Robsion v. Gray, 29 Ky. L. R. 1296, 97 S. W. 347.

60. Kee v. Ewing [Okl.] 87 P. 297. A chattel mortgage not recorded, as provided in § 5631, B. & C. Comp., is nevertheless good as against a subsequent mortgagee with actual notice. Williams v. First Nat. Bank [Or.] 87 P. 890.

61. Commonwealth v. Johnson, 29 Ky. L. R. 897, 96 S. W. 801.

62. Barnard v. Schuler, 100 Minn. 289, 110 N. W. 966.

See, also, 5 C. L. 29.

63. See 7 C. L. 25.

64. The twenty-second section of the New Jersey "act respecting conveyances" (Pen. Laws 1898, p. 670), enumerates certain officers who may take acknowledgments. Longley v. Sperry [N. J. Eq.] 66 A. 1062.

65. Cason v. Cason [Tenn.] 93 S. W. 89.

66. In Georgia a notary can attest a deed only in the county in which he holds his appointment, and a deed showing on its face that it was executed in one county before a notary public of another county is not properly attested for record. Gray Lumber Co. v. Harris [Ga.] 56 S. E. 252.

67. Kee v. Ewing [Okl.] 87 P. 297; Roane v. Murphy [Tex. Civ. App.] 16 Tex. Ct. Rep. 24, 96 S. W. 782. A notary who is the general counsel for and a stockholder of the corporation mortgagee is incompetent to take the acknowledgment of a mortgage, and such acknowledgment is void, but such notary is competent as a witness to the mortgagee's signature. Maddox v. Wood [Ala.] 43 So. 968.

68. Kee v. Ewing [Okl.] 87 P. 297. A deed cannot be acknowledged before nor the privy examination of a feme covert be taken by an officer who has any interest in such conveyance, either as a party, trustee, or cestui que trust, and the registration upon such certificate will be invalid and not even notice to creditors and subsequent purchasers. Smith v. Ayden Lumber Co. [N. C.] 56 S. E. 555.

69. A deed the execution of which is not proved otherwise than by a certificate of acknowledgment, reciting that it was acknowledged by the grantor before his deputy, as such deputy, and signed by the grantor himself as clerk of a county court, is inadmissible in evidence. Webb v. Ritter [W. Va.] 54 S. E. 484. A deed the execution of which is not proved otherwise than by a certificate of acknowledgement, signed by the grantee as clerk of a county court, is properly rejected when offered as evidence. Id. The Indiana curative statute of March 7th, 1891 (Acts 1891, p. 336, c. 127), will obviate the insufficiency of a record as evidence arising from the fact that the acknowledgment, before a justice of the peace, of a deed, executed and recorded in 1885 was authenticated by the clerk of the circuit court who was the grantor in the deed. Hornet v. Dumbeck [Ind. App.] 78 N. E. 691.

70. Stoker v. Fugitt [Tex. Civ. App.] 102 S. W. 743. Thus, for instance, it is often the case that a notary public is a clerk in a bank, but this does not disqualify him to take acknowledgement of papers executed by or to the bank. Smith v. Ayden Lumber Co. [N. C.] 56 S. E. 555. A notary is not disqualified to take an acknowledgment of a partition deed by reason of the fact that he was employed and paid by one of the parties to survey the land in question and established a division line in controversy, or by the fact that he prepared the deed in accordance with the survey, it appearing that he was not engaged by either to write the deed or to take the acknowledgments thereto, that he made no charge and received no compensation for preparing the deed. Such evidence does not show that the notary was an agent or had a disqualifying interest. Stoker v. Fugitt [Tex. Civ. App.] 102 S. W. 743.

71. Home Bldg. & Loan Ass'n v. McKay, 118 Ill. App. 586.

72. See 7 C. L. 26.

deed.[73] When an acknowledgment is presented without declaring of what the acknowledgment shall consist, it is meant that the person or persons executing an instrument, must appear before a duly authorized officer and state that he or they executed the same,[74] and such facts must appear from the certificate.[75] In some states the officer taking the acknowledgment must, before certifying the same, make known the contents of deed or instrument to the party making the acknowledgment,[76] and must also be satisfied that such party is the grantor in such deed or instrument,[77] and that he executed such instrument as his act and deed.[78] In many states a deed by a married woman and her husband must be acknowledged by her on a privy examination separate and apart from her husband,[79] or it will be void and convey no title.[80] In New Jersey no estate or interest of a feme covert in any lands, tenements, etc., in the state will pass by her deed or conveyance without a previous acknowledgment, made by her on a private examination apart from her husband before the proper officer, that she signed, sealed, and delivered the same as her voluntary act and deed, etc.[81]

Persons who may make.[82]

§ 4. *Certificate of acknowledgment.*[83]—Upon the appearance before him of the person or persons executing the instrument, and after satisfying himself that the statutory requirements as to acknowledgments have been complied with, it is the duty of the officer taking the acknowledgment to make a certificate thereof [84] and to sign and seal the same with his seal of office.[85] While the certificate should show a compliance with the statutory requirements as to appearance of the parties described in the instrument,[86] privy examination where required,[87] explanation of con-

73. Sims v. McLaren, 117 Mo. App. 67, 94 S. W. 792.

74. Punchard v. Masterson [Tex.] 101 S. W. 204. "The acknowledgment of an instrument of writing for the purpose of being recorded shall be by the grantor or person was executed the same appearing before some officer authorized to take such acknowledgments, and stating that he had executed the same for the consideration and purposes therein stated." Act 4616, Sayles' Rev. Civ. St. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525.

Where more than one person join in the execution of the instrument, the acknowledgment of each of such execution should be made. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525.

75. Hughes v. Wright [Tex.] 101 S. W. 789.

76. Longley v. Sperry [N. J. Eq.] 66 A. 1062.

77. Longley v. Sperry [N. J. Eq.] 66 A. 1062. The officer must either personally know the party or have satisfactory evidence of the fact that he is the identical person described in and who executed the instrument. Barnard v. Schuler, 100 Minn. 289, 110 N. W. 966.

78. In Minnesota there are two essential matters to which the officer must direct his attention in taking an acknowledgment. They are the identity of the person appearing before him as the party described in the instrument, and his unequivocal acknowledgment that he executed the instrument as his act and deed. Having satisfied himself as to these points, he may certify to them. Barnard v. Schuler, 100 Minn. 289, 110 N. W. 966.

79. Cook v. Pitman [N. C.] 57 S. E. 219. In Virginia, in addition to the privy examination, the deed must also be fully explained to her. Tarrant v. Core [Va.] 56 S. E. 228.

80. Poland v. Porter [Tex. Civ. App.] 98 S. W. 214.

81. Saldutti v. Flynn [N. J. Eq.] 65 A. 246. In Alabama a separate examination of the wife is required in the case of deed by husband and wife only where a conveyance is made of the homestead of the husband. Campbell v. Noble [Ala.] 41 So. 745, holding it unnecessary where the husband owned a life estate and the wife owned a vested remainder in fee.

82. See 5 C. L. 30.

83. See 7 C. L. 26.

84. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525; Barnard v. Schuler, 100 Minn. 289, 110 N. W. 966; Tarrant v. Core [Va.] 56 S. E. 228. The officer taking the acknowledgment should make his certificate of compliance with the statutory requirements on, under or annexed to the deed or instrument. Longley v. Sperry [N. J. Eq.] 66 A. 1062.

85. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525. The California code requires that the official certifying to an acknowledgment must affix thereto his signature followed by the name of his office. Cal. Civ. Code, § 1193. Duckworth v. Watsonville Water & L. Co. [Cal.] 89 P. 338. A certificate beginning thus: "State of California, Monterey County—s.s.," and reciting that "before me John Runrds, notary public in and for said Monterey County, personally appeared," etc., and signed by the notary public with the words "Notary Public" after his signature, is a sufficient statement of the name of the office under the above requirement. Id.

86. Hughes v. Wright [Tex. Civ. App.] 16

tents of instrument,[88] and acknowledgment by the party or parties of the execution of the instrument by him or them,[89] yet it is usually held that a literal compliance with the statutory form is not essential and that a substantial compliance will be sufficient.[90]

§ 5. *Authentication of officers' authority.*[91]—In many states the seal of a notary dispenses with a certificate that he is such officer.[92]

§ 6. *Operation and effect.*[93]—The certificate of the proper officer taking the acknowledgment of an instrument, placed therein, or attached thereto, is the authority for the recorder to record the same.[94] The presumptions attaching to the

Tex. Ct. Rep. 122, 97 S. W. 525. The certificate should state that the person by whom the instrument purports to have been signed and acknowledged is the person described therein. Sims v. McLaren, 117 Mo. App. 67, 94 S. W. 792. Held bad for not showing that grantor was personally known or his identity proved and failure to identify deed by reciting date. Ohio Nat. Bank v. Berlin, 26 App. D. C. 218.

87. Cook v. Pitman [N. C.] 57 S. E. 219.

88. The officer taking the acknowledgment of a married woman to a deed must certify that he explained the deed to her. Kopke v. Votaw [Tex. Civ. App.] 16 Tex. Ct. Rep. 316, 95 S. W. 15; Downs v. Peterson [Tex. Civ. App.] 99 S. W. 751. Where the officer is required to make known the contents of the deed or instrument to the party making the acknowledgment, and also to satisfy himself that such party is the grantor therein, a failure of the certificate to show compliance with such requirements, will render the certificate fatally defective. Longley v. Sperry [N. J. Eq.] 66 A. 1062.

89. It should appear from the certificate that all the persons executing the instrument acknowledged such execution. Cook v. Pitman [N. C.] 57 S. E. 219. The certificate must show that the maker of the instrument appeared before the officer and stated that he executed the same. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525. Where more than one person is mentioned in the certificate of acknowledgment as maker of the deed, and as appearing before the officer for the purpose of acknowledging the execution of the instruments, the acknowledgment of each of the executions should be made, and this fact should be stated in the certificate of the officer. When more than one of the makers appear for this purpose and the certificate states this fact, and that "he" acknowledged he executed it, renders the certificate uncertain, and to a certain extent meaningless. Id. In North Dakota, under § 5022, Rev. Code 1905, the acknowledgment by a corporation must show that the officer assuming to act for it in executing the instrument acknowledged that the corporation executed it. Gessner v. Minneapolis, etc., R. Co. [N. D.] 108 N. W. 786.

90. Middlebrooks v. Stephens [Ala.] 41 So. 735; Washburn Land Co. v. Swanby [Wis.] 110 N. W. 806. The following certificate to a bill of sale was held sufficient: "City, County, and State of New York," "On the 12th day of July, A. D. 1905, before me personally appeared William M. Morse, Jr., to me known, and known to me to be the same person mentioned and described in the foregoing instrument, and he duly acknowledged to me that he executed the same."

[Notorial Seal] H. E. Cole,
Notary Public. New York City.

Sullivan v. Gum [Va.] 55 S. E. 535. The fact that the name of the party acknowledging the instrument was left blank will not invalidate the acknowledgment. Tennis v. Gifford [Iowa] 110 N. W. 586. In Middlebrooks v. Stephens [Ala.] 41 So. 735, the certificate objected to was as follows: "I, M. K. Stephens, and M. C. Stephens, in and for said county, hereby certify that M. K. Stephens and M. C. Stephens, whose names are signed to the foregoing conveyance, and who are known to me, acknowledged before me this day that, being informed of the contents of this conveyance, they executed the same voluntarily on the day the same bears date. Given under my hand this the 5th day of Jan. A. D. 1887. [Signed] S. J. Cummings, N. P. ee off. J. P." It was shown that said Cummings was a notary public at that time, that the signature was his handwriting, and that he was dead. It was held that the names of the grantors first appearing might be excluded as inserted by mistake and that this being done, there remained a good and sufficient acknowledgment containing every essential of the statutory form.

91. See 3 C. L. 34.

92. In Wisconsin where it appears that the deed was executed in the presence of subscribing witnesses and acknowledged by the grantors outside of the state before a notary public who certified to the same substantially in the form prescribed by the statutes, and made the impression of his official seal as such notary public upon the instrument, such acknowledgment is sufficient without the annexation of an additional certificate to the effect that such notary public was such officer. Washburn Land Co. v. Swanby [Wis.] 110 N. W. 806.

93. See 7 C. L. 26.

94. The question is not whether there was in fact a compliance with the law by the officer in taking the acknowledgment, but whether the certificate made by him is in compliance with the law so as to admit the instrument to record. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525. Though when a recorded instrument shows on its face that the acknowledgment was taken by a party in interest, it is improperly recorded, and is not constructive notice, yet when it is fair upon its face it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect. Kee v. Ewing [Okl.] 87 P. 297.

certificate vary according to the relations of parties affected.[95] The certificate of the officer cannot be called in question except upon the allegation of fraud or duress in the party benefited thereby, or a mistake on the part of the officer unless in a direct proceeding against the officer or his sureties.[96]

§ 7. *Defects and invalidities.*[97]—A certificate of acknowledgment will be defective if it fails to show at least substantial compliance with the statutory requirements as to authentication,[98] identity of person signing and acknowledging with the person described in the instrument,[99] separate examination of married woman,[1] and explanation of contents of instrument.[2] In Texas the right is given by statute to correct a defective certificate when the acknowledgment was in fact properly taken but defectively certified.[3]

Liability of officer.—The officer taking and certifying acknowledgments is not a guarantor of the absolute correctness of his certificate,[4] and the authorities are

95. A certificate of acknowledgment to a deed is prima facie proof of the recitals it contains and parol evidence to impeach it must be clear and convincing. Ford v. Ford, 27 App. D. C. 401. Between the parties it is prima facie correct, but impeachable for fraud or gross concurrent mistake; as to bona fide purchasers it is conclusive of all acts which it is the officer's duty to verify; as to all other persons it is disputable. Evidence held not to impeach signature. Id., citing many cases and discussing various doctrines.

96. Long v. Branham, 30 Ky. L. R. 552, 99 S. W. 271; Cason v. Cason [Tenn.] 93 S. W. 89. Under § 3760, Ky. St. 1903, the certificate to a feme covert's acknowledgment of a mortgage cannot be collaterally attacked for duress where the party benefited by the mortgage is not shown by the evidence to have been guilty of the duress under which the wife claims to have acted, and where, even though there is evidence that in signing and acknowledging the mortgage she acted under coercion from her husband, it does not sufficiently appear that the party benefited, though present, knew of such coercion at the time or when he accepted the mortgage. Long v. Branham, 30 Ky. L. R. 552, 99 S. W. 271.

97. See 7 C. L. 27.

98. A certificate of a notary public not authenticated by a statement, either engraved upon his seal or written under his official signature, of the date of the expiration of his commission or term of office is void. County of Sheridan v. McKinney [Neb.] 112 N. W. 329.

99. Sims v. McLaren, 117 Mo. App. 67, 94 S. W. 792. A certificate which merely shows that the officer saw the grantor in a deed sign his name thereto is in no sense an acknowledgment of the deed. Punchard v. Masterson [Tex.] 101 S. W. 204.

1. In Cook v. Pitman [N. C.] 57 S. E. 219, the probate to the deed offered as color of title certified that the justice had "privately examined Elisha Carroway, Nancy Carroway, his wife, grantors of the above deed, and Nancy his wife doth state that she signed the same freely and voluntarily without fear or compulsion of her said husband or any other person," etc. This certificate was held insufficient both because it does not appear therefrom that E. Carroway ever acknowledged the execution and because it failed to state that the privy examination of the wife was taken separate and apart.

2. The requirement that the officer taking the acknowledgment of a married woman should certify that he explained the deed to her is not complied with by a certificate that the wife, after understanding the deed and subscribing it, privately and apart from her husband, declared the same to be her voluntary act and deed. Kopke v. Votaw [Tex. Civ. App.] 16 Tex. Ct. Rep. 316, 95 S. W. 15.

3. Kopke v. Votaw [Tex. Civ. App.] 16 Tex. Ct. Rep. 316, 95 S. W. 15, in which it was held that to entitle a person to this relief he must plead a state of facts which show his right to it, and upon which a judgment granting it can be predicated, and in the absence of such pleading parol evidence that the officer complied with the law is not admissible. The deed of a married woman to which the certificate of acknowledgment is insufficient is not void if it was in fact acknowledged by her in the manner required by the statute, and by timely suit for that purpose the grantee in such deed, or any one holding title thereunder, may have the certificate corrected and made to conform to the facts. Tex. Rev. St. 1895, arts. 4662, 4663. Downs v. Peterson [Tex. Civ. App.] 99 S. W. 751.

Such subsequent correction will not relate back and validate a previous void registration upon the defective certificate. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525.

Limitation of action: The right to have a certificate corrected by a decree of the court has been held to be barred by the four-year statute of limitations where the action, which was trespass to try title, was brought more than that length of time after the deed in question was executed. Kopke v. Votaw [Tex. Civ. App.] 16 Tex. Ct. Rep. 316, 95 S. W. 15.

Evidence held insufficient to require correction: Testimony by the notary taking the acknowledgment of a married woman to a power of attorney that he was well posted as to the law prescribing the duties of a notary public, that he has no specific recollection of the transaction but believes that in taking the acknowledgment he complied with all the requirements of the statute, is not sufficient to require the correction of the certificate of acknowledgment, defective for failure to state that the instrument was explained to her. Downs v. Peterson [Tex. Civ. App.] 99 S. W. 751.

4. Nor does he undertake to certify that

to the effect that if, in taking an acknowledgment, he exercises that diligence which a reasonably prudent and cautious man would exercise under like circumstances, he performs faithfully the duties of his office and complies with the terms of the bond and oath of office.[5]

ACTIONS.[6]

This topic includes only questions relating strictly to actions. Causes of action and defenses,[7] forms of action,[8] questions of consolidation and joinder,[9] and matters relative to procedure,[10] are elsewhere treated.

As a general rule the creation of a right includes a remedy for its enforcement.[11] A cause of action must exist at the time of commencement of the suit.[12] If it does not exist the defect is fatal and cannot be cured by subsequent amendment.[13] In actions ex delicto demand against the wrongdoer is not a prerequisite of the right to sue,[14] unless made so by statute.[15] The commencement of an action usually dates from the issuance of summons,[16] filing of the original complaint,[17] or service of

the person acknowledging the instrument owns or has any interest in the land therein described, but he does undertake to certify that the person personally appearing before him is known to him to be the person described in and who executed the instrument. Barnard v. Schuler, 100 Minn. 289, 110 N. W. 966. He is not an insurer of the identity of persons who execute conveyances. Commonwealth v. Johnson, 29 Ky. L. R. 897, 96 S. W. 801.

5. Commonwealth v. Johnson, 29 Ky. L. R. 897, 96 S. W. 801. He is, however, responsible for his errors unless he can show that they occurred notwithstanding the use of reasonable care and diligence on his part to prevent them. Id. If a notary public certifies to an acknowledgment of an instrument without personal knowledge as to the identity of the person appearing before him, and without a careful investigation of such facts, he is guilty of negligence, and he and the sureties on his bond are liable for all damages proximately resulting therefrom. Barnard v. Schuler, 100 Minn. 289, 110 N. W. 966.

Liability for negligence of deputy: Where it is shown that a deputy county clerk took the acknowledgment of an imposter to a mortgage, then a prima facie case of negligence is made out against the clerk, and it devolves upon him to show that his deputy, in taking the acknowledgment, used care and diligence to prevent the fraud and imposition. Commonwealth v. Johnson, 29 Ky. L. R. 897, 96 S. W. 801.

6. See 7 C. L. 28.

7. See Causes of Action and Defenses, 7 C. L. 603.

8. See Forms of Action, 7 C. L. 1769.

9. See Pleading, 8 C. L. 1355.

10. See Trial, 8 C. L. 2161.

11. Whenever a right is given by statute, the party entitled has an action to enforce it. Rev. St. § 63, c. 15, providing that schools receiving certain pupils may maintain an action for tuition against the town wherein such pupils reside, but fails to specify the remedy to be employed, held assumpsit would lie. Ricker Classical Institute v. Mapleton, 101 Me. 553, 64 A. 948.

12. A cause of action must exist at the time the action is commenced or it will not lie. American Bonding & Trust Co. v. Gibson County [C. C .A.] 145 F. 871. Plaintiff in an action against a contractor did not show that his claim had been audited and certified by the architect, which was essential under his contract to give a cause of action. Id. Where a defendant at the time action on a contract was commenced against him had the right to retain a certain amount of the contract price as indemnity against liability on a chattel mortgage, such amount could not be recovered on proof that after the action was commenced the mortgage was discharged. Tullis v. Stone, 101 N. Y. S. 1082. Where one entrusted with money as a messenger embezzles it, an action for money had and received will not lie before complaint is made to a magistrate of the crime and a process issued thereon. Gen. Laws 1896, c. 279, § 16, and c. 233, § 16. Brady v. Messler, 27 R. I. 373, 62 A. 511. Action held not prematurely commenced. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357. Where two steers were struck by a locomotive going 25 to 30 miles an hour within a distance of 200 feet, and the first animal struck was dragged when the second was struck, there was one cause of action for killing both. Chicago, I. & L. R. Co. v. Ramsey [Ind. App.] 78 N. E. 669.

13. American Bonding & Trust Co. v. Gibson County [C. C. A.] 145 F. 871.

14. In actions of ex delicto, it is not a prerequisite of the right to sue that demand be made against the wrongdoer. Crowe v. Corporation of Charles Town [W. Va.] 57 S. E. 330.

15. Rev. St. 1898, § 4222, providing that no action for personal injury shall be maintained until notice is served on the wrongdoer, requires only that a notice inform him that he caused the injury, and need not state in terms that the injured person so claims. Hardt v. Chicago, etc., R. Co. [Wis.] 110 N. W. 427. See, also, Highways and Streets, 8 C. L. 40, as to notice of injury by defective streets; Master and Servant, 8 C. L. 846, as to notice under employers' liability acts.

16. A civil action is commenced when summons is issued. Under Revisal 1905, § 433, requiring the sheriff to indorse on the summons the date of its receipt from the clerk, it is presumed to be the date so indorsed. Smith v. Cashie & Chowan R. &

citation.[18] The question of time of commencement is usually determined with reference to abatement,[19] lis pendens,[20] or limitations.[21]

The fact that a trial de novo is allowed on appeal does not change the character of an action.[22] A case at law is not converted into one in equity by the mere fact that equitable defenses are pleaded but no affirmative relief asked.[23]

Special proceedings are not actions.[24] Where a statute providing a special proceeding is complete in itself, it is exclusive and proceedings under it are governed solely by its provisions.[25]

Act of God; Additional Allowances; Ademption of Legacies, see latest topical index.

ADJOINING OWNERS.[26]

In many states[27] there is an absolute right of lateral support which is infringed by any excavation of adjoining lands irrespective of negligence,[28] and such right is not subordinate to any right of his neighbor.[29] This rule is limited to injury to the land itself and does not extend to damage to improvements thereon.[30] Where such absolute right is recognized, it is a property right, and if the effect of a statute is to abrogate the common-law rule with reference to existing rights, such provision is unconstitutional.[31] A cause of action for deprivation of lateral support accrues when injury occurs and not when the support is removed.[32] The measure of

Lumber Co., 142 N. C. 26, 54 S. E. 788. An action is commenced when a petition is filed and a summons is issued in good faith thereon. Loveland-Garrett Co. v. Day, 30 Ky. L. R. 879, 99 S. W. 924. A certain divorce suit by the wife held "pending" at the time of a fraudulent transfer of property by the husband, though there was no valid service of process until later, so that upon decree setting aside said transfer the decree in the divorce suit transferring the property to the wife operated to convey title to the wife as against the husband and his grantee and a subsequent purchaser who acquired title with constructive notice and without value. Hamilton v. Rudy, 4 Ohio N. P. (N. S.) 427.

17. Not changed by the fact that an amendment is filed. Collins v. Gray [Cal. App.] 86 P. 983. Under Code W. Va. 1906, §§ 1363, 1366, prescribing the procedure in condemnation cases and requiring ten days' notice to owners of application to appoint commissioners, the proceeding is commenced when such application is presented to the court and not when it is served. Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co., 152 F. 824.

18. An action is commenced by service of citation though the citation does not bear the impress of the seal of the court. King v. Guynes [La.] 42 So. 959. A citation addressed to the mayor of a town interrupts limitation as against the town as to a cause of action against it. Gueble v. Lafayette [La.] 43 So. 63.

19. See Abatement and Revival, 9 C. L. 1.

20. See Lis Pendens, 8 C. L. 791.

21. See Limitation of Actions, 8 C. L. 768.

22. A prosecution for violation of a city ordinance commenced by affidavit and warrant is quasi criminal though triable de novo on appeal from the mayor's court to the city court. City of Selma v. Shivers [Ala.] 43 So. 565.

23. Brooks v. Gaffin, 192 Mo. 228, 90 S. W. 808.

24. Special proceedings of a civil nature provided for in Rev. St. 1887, § 4955, where issues of fact are made by a return to an alternative writ of mandate, are not civil actions such as are referred to in Rev. St. 1887, § 4020. Nelson v. Steele [Idaho] 88 P. 95. It is not a civil action nor a suit at common law within the code, but a special proceeding and questions of fact may be submitted to a jury in the discretion of the court. Id.

25. Ackerman v. Green [Mo.] 100 S. W. 30.

26. See 7 C. L. 28.

27. See note to Kansas City N. W. R. Co. v. Schwake, 68 L. R. A. 673, collating the conflicting cases.

28. McClelland v. Schwerd, 32 Pa. Super. Ct. 313. An adjoining owner has an absolute right to lateral support for his land. Simon v. Nance [Tex. Civ. App.] 100 S. W. 1038. One who digs a ditch so close to the boundary line as to cause land of his neighbor to cave in and wash away is liable in damages and in a proper case may be enjoined. Id.

29. Right to repel surface water. Simon v. Nance [Tex. Civ. App.] 100 S. W. 1038.

30. McClelland v. Schwerd, 32 Pa. Super. Ct. 313. The question of negligence becomes material where it is sought to recover for injuries to improvements. Simon v. Nance [Tex. Civ. App.] 100 S. W. 1038. Where buildings are injured because of deprivation of lateral support, the right of action is based on negligence. Schmoe v. Cotton [Ind.] 79 N. E. 184.

31. Belden v. Franklin, 8 Ohio C. C. (N. S.) 159. The effect of § 2676, Revised Statutes, relative to injuries caused by excavations, is to amplify the common-law rule as to lateral support so as to create a liability for removing lateral support of buildings, where an excavation goes more than nine feet below the street grade. It does not modify the common-law rule as to lateral support of the soil itself. Id.

32. Schmoe v. Cotton [Ind.] 79 N. E. 184. A cause of action for removal of lateral sup-

damages for deprivation of lateral support is the depreciation in the value of the land.[33] The fact that the source of injury was the settling of a party wall does not change the rule.[34] An adjoining owner is under no duty to so construct his buildings that they will not be injured by water falling upon them from buildings an adjacent land.[35] One who is without right to use a wall standing upon the lot of his neighbor may be enjoined from cutting into it or otherwise using it.[36]

Adjournments; Administration; Administrative Law, see latest topical index.

ADMIRALTY.

§ 1. **Jurisdiction and Courts (29).**
§ 2. **Remedies and Remedial Rights (31).**
§ 3. **Practice and Procedure (31).**
A. Pleading, Process, Interlocutory Orders, etc. (31).
B. Evidence, Proof, Hearing, and Decree (33).
§ 4. **Appeals and Subsequent Proceedings (33).**

This topic includes only admiralty jurisdiction and practice. The law of maritime traffic and navigation is treated elsewhere.[37]

§ 1. *Jurisdiction and courts.*[38]—In order that a contract may be enforceable in admiralty, it must be maritime in character,[39] but if of that character, the court will inquire into all its breaches and all the damages suffered thereby, however peculiar they may be, and whatever issues they may involve.[40] The test of jurisdiction is the nature and subject-matter of the contract,[41] and it is not dependent upon the existence of a maritime lien giving a right to proceed in rem.[42]

port accrues when injury occurs and not when such support is removed. Simon v. Nance [Tex. Civ. App.] 100 S. W. 1038.

33. Schmoe v. Cotton [Ind.] 79 N. E. 184; Hopkins v. American Pneumatic Service Co. [Mass.] 80 N. E. 624; McClelland v. Schwerd, 32 Pa. Super. Ct. 313. A complaint for deprivation of lateral support alleging undermining of fence, roadway, and orchard, and caving in of land greatly decreasing its value, held not fatally defective for failing to allege value of land before and after the injury. Schmoe v. Cotton [Ind.] 79 N. E. 184. Evidence that one whose land had been injured by deprivation of lateral support had made a claim for loss of rental against a railway company because of noise and smoke held admissible to show that such loss was not caused wholly by deprivation of lateral support. Hopkins v. American Pneumatic Service Co. [Mass.] 80 N. E. 624.

34. Hopkins v. American Pneumatic Service Co. [Mass.] 80 N. E. 624.

35. Where an adjoining owner's building is injured by water falling from an adjacent roof, it is no defense that the damage would have been less if the building had been better constructed. Davis v. Smith [N. C.] 56 S. E. 940.

36. Trulock v. Parse [Ark.] 103 S. W. 166.

37. See Shipping and Water Traffic, 8 C. L. 1903.

38. See 7 C. L. 30.

39. Whether or not a contract is maritime depends on its subject-matter and not on the place where it was made. The Conveyor, 147 F. 586. Agreement for raising of vessel, and to pay cost thereof, maritime liens for labor and supplies, and cost of repairs out of proceeds of insurance policy on vessel, balance of which was to go to mortgagees, held maritime. Id. Fact that such agreement was not fully executed held not to affect admiralty jurisdiction. Id. Admiralty held to have jurisdiction of action to recover rent of hydraulic dredge, a floating structure in its ordinary purpose distinctly maritime, though used to pump material on land of charterer for purpose of filling it in and not for deepening channel. Bowers Hydraulic Dredging Co. v. Federal Cont. Co., 148 F. 290. Contracts of affreightment are matters of admiralty jurisdiction. United States Shipping Co. v. U. S., 146 F. 914. Contract to build ship is not maritime. Iroquois Transp. Co. v. De Leney Forge & Iron Co., 205 U. S. 354, 51 Law. Ed. 836, afg. 142 Mich. 84, 12 Det. Leg. N. 441, 105 N. W. 527. Bond given by charterer to secure performance of charter, which did not obligate or authorize surety to perform in case of default, but merely bound him to pay damages in event of nonperformance by charterer, held not maritime contract so that court of admiralty had no jurisdiction of libel in personam passed thereon. Pacific Surety Co. v. Leatham & Smith T. & W. Co. [C. C. A.] 151 F. 440.

40. Suit to recover advances made by charterer to master, and which, by mistake, were not deducted on settlement of accounts, as provided by charter, held suit on contract of affreightment and within jurisdiction of court of admiralty. The Oceano, 148 F. 131. Though no pure case of storage, even on water, can be regarded as maritime in character, where storage is an incident of transportation it is maritime and jurisdiction follows. Evans v. New York & P. S. S. Co., 145 F. 841. Admiralty held to have jurisdiction of libel against carrier and storage company for failure to deliver goods to consignee as required by bill of lading where carrier delivered them to storage company, storage being incidental to transportation. Id.

41. United States Shipping Co. v. U. S., 146 F. 914.

42. Existence of admiralty jurisdiction in suit in personam is not dependent upon ex-

Courts of admiralty have exclusive jurisdiction to enforce maritime liens against vessels, whether created by the general maritime law [43] or by state statutes.[44] State statutes may however, create liens not maritime in character and confer on their own courts power to enforce them,[45] and the state court is not deprived of jurisdiction in such cases by reason of the fact that the vessel is engaged in interstate commerce,[46] or because she may in the future become subject to superior maritime liens enforceable in a court of admiralty.[47] A valid maritime lien created by a state statute may be enforced by a proceeding in rem in the admiralty courts of any district provided the court has possession of the vessel.[48] Though a court of admiralty has no jurisdiction to foreclose mortgages on vessels, when it has a fund to dispose of it may entertain claims based on mortgages.[49]

In the absence of treaty provisions to the contrary,[50] the admiralty courts may, in their discretion, assume jurisdiction over suits by seamen against foreign vessels to recover wages.[51]

Courts of admiralty have exclusive jurisdiction in salvage cases.[52]

The test of jurisdiction in tort cases is whether or not the tort is a maritime one.[53] Though a court of admiralty has no jurisdiction in a proceeding in rem to seize a vessel owned by a municipal corporation, devoted to public use, and necessary for carrying on some essential operations of the government,[54] there is a remedy

istence of right to proceed in rem. United States Shipping Co. v. U. S., 146 F. 914. Admiralty court held to have jurisdiction of suit in personam on contract of affreightment, brought against the United States under Act March 3, 1887, c. 359, 24 St. 505, though under such act no decree in rem could be entered against U. S. Id.

43. Jurisdiction to administer proceeds of insurance policy applicable in part to payment of maritime liens held not affected by fact that mortgagees having claims against same fund had previously commenced foreclosure proceedings in state court. The Conveyor, 147 F. 586.

44. The Vigilant [C. C. A.] 151 F. 747.

45. Lien given by Mich. Comp. Laws 1897, § 10,789, for materials furnished in construction of ship, may be enforced in state court. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 205 U. S. 354, 51 Law. Ed. 836, afg. 142 Mich. 84, 12 Det. Leg. N. 441, 105 N. W. 527. Contention that act is unconstitutional as in conflict with exclusive jurisdiction of Federal courts of admiralty over maritime liens cannot be raised in Federal supreme court in case appealed from state court in which no maritime lien is asserted. Id. Items furnished vessel after she was launched held really furnished for her completion and fairly a part of her original construction so that state court had jurisdiction. Id.

46, 47. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 205 U. S. 354, 51 Law. Ed. 836, afg. 142 Mich. 84, 12 Det. Leg. N. 441, 105 N. W. 527.

48. Though in different state. The Vigilant [C. C. A.] 151 F. 747.

49. Jurisdiction to administer proceeds of insurance policy held not affected by fact that mortgagees had claims against fund. The Conveyor, 147 F. 586.

50. Under Treaty Dec. 11, 1871, art. 13 (17 St. 921, 928), between Germany and the U. S., reserving to consuls of each government respectively exclusive power to take cognizance of and determine differences between the captains and crews of its vessels, and particularly in reference to wages, etc., held that U. S. court of admiralty had no jurisdiction of libel against German vessel to recover wages brought by seamen not citizens of U. S., who signed articles before German consul at U. S. port and were discharged at another U. S. port after completion of voyage. The Bound Brook, 146 F. 160. Contention that seamen were not members of crew because they were paid advance wages in violation of Act Dec. 21, 1898, c. 28 (30 St. 763), held untenable, that statute not being applicable to foreign vessels where treaties conflict with it. Id. In any event contract of shipment was not void under Rev. St. § 4523, since unlawful payment was not shown to have entered into contract as one of the things agreed upon by the parties. Id. Even if contract was void, held that libelants, having voluntarily rendered services throughout voyage, would still be members of crew within meaning of treaty. Id.

51. Jurisdiction assumed where libelant was an American citizen who signed articles on British ship before British consul in American port, and claimed to have been wrongfully discharged in foreign port, parties and vessel being within reach of court's process and voyage having ended. The August Belmont, 153 F. 639.

52. Where charge for landing steamer was really claim for salvage, held that it was properly withdrawn from suit in state court upon an account for services rendered, it being rightly cognizable by court of admiralty in proceeding in which members of crew of salving vessel could participate. Neel v. Iron City Sand Co. [C. C. A.] 149 F. 980.

53. Action for injury to pier by moving vessel is not cognizable in admiralty. The Curtin, 152 F. 588.

54. Vessel owned by the port of Portland, a municipal corporation created by state law for purpose of improving navigation, held not subject to seizure in suit by

in personam in such cases.[55] Courts of admiralty have jurisdiction of an independent libel by one of two vessels, equally in fault for a collision, to compel contribution by the other for damages which the former has been compelled to pay cargo owners.[56] They also have exclusive jurisdiction to determine whether a vessel owner has a right to limit his liability,[57] but the right may be interposed as a defense in an action in personam in a state court where there is only a single claim, and hence no need for apportionment.[58] Where the vessel has not been libeled but her owner has been sued, proceedings for limitation of liability may be brought either in the district in which such suit has been commenced or the district in which the vessel may be.[59] When a court has once acquired jurisdiction in the matter, it cannot be divested thereof by any act of one claiming damages in attempting to reduce his claim.[60]

§ 2. *Remedies and remedial rights.*[61]—Unless explicitly excluded by the charter party both shipper and owner may pursue their remedies for a breach thereof by actions in rem.[62] An action in rem against the vessel will not lie for an assault by the master on a member of the crew.[63]

§ 3. *Practice and procedure. A. Pleading, process, interlocutory orders, etc.*[64] Process in personam may be a simple monition in personam, or a monition united with a clause of attachment of defendant's goods and chattels if he is not found.[65] Consent cannot confer jurisdiction as to the subject-matter.[66] The filing by owners of a foreign vessel, which has been seized in a suit in rem, of a claim to such vessel and the giving of a bond for her release does not constitute a general appearance so as to give the court jurisdiction to render judgment against them in personam without service of monition.[67]

New parties necessary to a complete determination of the controversy in one suit may ordinarily be brought in by petition[68] provided it is done promptly.[69]

United States government for maritime tort. The John McCraken, 145 F. 705.

55. Port of Portland held liable under maritime law for damages resulting from collision due to negligent navigation by its servants. U. S. v. Port of Portland, 147 F. 865.

56. Erie R. Co. v. Erie & W. Transp. Co., 204 U. S. 220, 51 Law. Ed. 450.

57. Is question of admiralty and maritime jurisdiction. The Lotta, 150 F. 219.

58. Rev. St. §§ 4283, 4284, construed. The Lotta, 150 F. 219. Held that prosecution in state court of action for death by wrongful act would not be enjoined where state statute under which it was brought gave no remedy in rem against the vessel, though vessel had been appraised in ex parte proceeding in Federal court and her value paid into registry of that court. Id.

59. Supreme court rule 57 as amended in 1899 (9 Sup. Ct. iii). The John K. Gilkinson, 150 F. 454. Allegation that "vessel is now within this district and within the jurisdiction of this court," held to show jurisdiction, though suit against owner had been commenced in another district. Id.

60. Not by appearing specially and attempting to reduce claim below appraised value of vessel and her pending freight, particularly where he has previously commenced action in another district against owner, since court of latter district only would have jurisdiction to reduce claim. The John K. Gilkinson, 150 F. 454.

61. See 7 C. L. 32.

62. Claimant's action held to amount to deliberate refusal to repay an advance of freight, and hence a breach of charter party giving rise to right of action in rem. The Oceano, 148 F. 131.

63. Under admiralty rule 16, only remedy is in personam. The Sallie Ion, 153 F. 659.

64. See 7 C. L. 33.

65. Admiralty rule 9. Attachment obtained under process in personam with clause of foreign attachment vacated, where it appeared that there was ample opportunity to obtain service of process during long time action had been pending, but that libelants refrained from doing so in order to embarrass respondent or to get security from him without first obtaining judgment. Shewan v. Hallenbeck, 150 F. 231.

66. Appearance, filing claim, entering stipulation for value, and admitting jurisdictional averments of libel, held not a waiver of objection that contract sued on was not maritime in character, and that there was no foundation for decree in rem because no maritime lien. The Oceano, 148 F. 131.

67. The Lowlands, 147 F. 986.

68. In suit in rem for salvage, held that vessel was properly permitted to bring in tug and her owner whose neglect, it was alleged, exposed her to the perils from which she was rescued. The No. 81 [C. C. A.] 150 F. 111. Where vessel was libeled for failure to deliver cargo, and alleged that same was received and loaded by charterer and that she had delivered all cargo received on board, held that she was entitled, by analogy to admiralty rule 59 to bring in charterer to indemnify her in case she was held liable for the loss so as to settle all matters in controversy in one suit. The Crown of Castile, 148 F. 1012. On libel by

The substitution of a new owner as claimant of a libeled vessel previously released on stipulation is not the bringing in of a new party so as to release the surety if done without notice to him.[70]

The aim of the court is to bring all parties before it and determine the controversy on the merits as it appears from the proof, regardless of technical rules of pleading.[71] Whether the libel is intended as one in rem or as a joint proceeding in rem and personam is a question of construction.[72] In collision case the grounds of fault relied on should be pleaded and cannot be first raised in argument after the case has been litigated and closed on other issues.[73] Technical inaccuracies in the statement of facts in collision cases,[74] and surplusage,[75] may be disregarded. Where seamen intervene with claims for wages in a suit in rem against a vessel, their rights will be determined regardless of the disposition of the original libel.[76] Claims having no relation to the transaction out of which the litigation arose cannot be pleaded as a set-off.[77] The rule as to amendments is practically the same as in chancery.[78] The allowance of amendments to conform the pleadings to the proof is discretionary where no new facts are introduced and the cause of action is not changed.[79] A libel in rem on a claim not constituting a maritime lien cannot be converted into one in personam by amendment, where no monition has been served and the owner has not entered a general appearance.[80]

Under the statutes relating to the limitation of liability, the unoffending owner of an offending vessel has the absolute right to relieve himself of personal liability by turning over the vessel and her freight, for the benefit of those claiming damages, to a trustee appointed for that purpose by any court of competent jurisdiction.[81]

bankers to recover advances made on bills of lading on theory that goods had been improperly delivered to third persons, held that, since it appeared that, if libelants were entitled to recover against vessels, latter might have a right of recovery against such third persons, claimant was entitled, by analogy to rule 59, to have such persons made parties, though libelants had previously brought actions at law against them. The Cerea, 149 F. 924.

69. Held no laches sufficient to defeat motion to substitute claimants and to bring in new parties. The Cerea, 149 F. 924.

70. The Cerea, 149 F. 924.

71. On libel to recover for cargo on board barge lost by striking sunken wreck while in tow, it being alleged that the tug was negligent in towing barge onto wreck, and owners of wreck in failing to maintain a light above it, held that fact that tug admitted in answer allegation of negligence on part of owners of wreck did not preclude recovery against tug where evidence showed that there was a light over the wreck. The Volunteer [C. C. A.] 149 F. 723.

72. Libel to recover for death by wrongful act held clearly one in rem. The Lowlands, 147 F. 986.

73. The Werdenfels, 150 F. 400.

74. Fact that libel in collision case alleged that vessel was on somewhat different course than that found by district court held immaterial where material circumstances of case did not depend on such discrepancy. The Metamora [C. C. A.] 144 F. 936.

75. In proceeding for limitation of liability in collision case, where statutes of state to which vessel belonged gave right of action for death by wrongful act to widow, and claim was filed by one as "widow and executrix," held that word "executrix" was merely discriptio personae and immaterial, and might properly have been disregarded as surplusage. The Hamilton [C. C. A.] 146 F. 724.

76. The Eva D. Rose, 151 F. 704.

77. Claims arising under different charters than one which is subject of suit and not owned by claimant in such suit. The Oceano, 148 F. 131.

78. In proceeding for limitation of liability in collision case, where statutes of state to which vessel belonged gave right of action for wrongful death to widow, and claim was filed by one as "widow and executrix," held that amendment so as to charge that she claimed as widow did not set up new cause of action and was properly allowed. The Hamilton [C. C. A.] 146 F. 724. Leave to amend answer so as to set up new defense denied when application was not made until case came on for argument, though respondents must have had knowledge of facts when original answer was filed. Brennan v. Peter Hagan & Co., 147 F. 290.

79. To correct estimate as to value. Libel by passenger to recover value of jewelry stolen from her by an employe of vessel placed its value at $5,000, and vessel was bonded at that sum. Commissioner found on disputed testimony of expert that actual value was in excess of that sum. Held that court properly awarded judgment for excess against claimant having discretionary power to allow amendment to conform libel to proof, claimant having in no way been misled. The Minnetonka [C. C. A.] 146 F. 509.

80. Foreign vessel. The Lowlands, 147 F. 986.

81. Rev. St. § 4285. Ohio Transp. Co. v. Davidson S. S. Co. [C. C. A.] 148 F. 185.

The admiralty rule providing for the appraisement of the owner's interest, and the payment of the aforesaid value into court, or the giving of a stipulation therefor, is permissive only, and he has the right, before an appraisement had or his petition has been accepted, or acted upon by the court, to dismiss that part of his petition asking for it, and to substitute therefor the method of a transfer to a trustee.[82]

One holding a fund substituted for a vessel may be compelled to bring it into court to meet the exigencies of suits to enforce claims against it.[83]

Objections to jurisdiction should be made by plea, or, where the defect is palpable, by demurrer.[84] Want of jurisdiction of the subject-matter may, however, be raised at any time.[85] An objection to the seizure of a vessel owned by a municipal corporation, and devoted to a public use, may be raised by motion to vacate or set aside the warrant of arrest, where it sufficiently appears from the facts set out in the motion and libel that the seizure cannot be maintained in any event.[86] Exceptions to the petition not argued will be disregarded.[87]

(§ 3) *B. Evidence, proof, hearing, and decree.*[88]—Where a jury is authorized to try issues of fact, its verdict is advisory merely.[89] The findings of a commissioner upon questions of fact depending upon conflicting evidence, or the credibility of witnesses, will not ordinarily be disturbed unless clearly erroneous.[90] As in other cases, a final judgment or decree on the merits is conclusive between the parties as to all matters determined, or which might have been litigated and determined under the issues.[91] Controversies arising collaterally between the parties, or involving an adjudication against strangers to the original action, cannot be summarily determined on motion to set aside or satisfy a decree theretofore entered.[92]

§ 4. *Appeals and subsequent proceedings.*[93]—There is no pecuniary limitation on the jurisdiction of the circuit court of appeals in admiralty cases.[94] Parties aggrieved[95] may ordinarily appeal from any final judgment on the merits.[96] A

82. Admiralty rule 54 permissive. Ohio Transp. Co. v. Davidson S. S. Co. [C. C. A.] 148 F. 185. Where owner acted promptly, held that he was not deprived of such right because vessel had become of less value by reason of higher insurance rates, increased cost of operation, and poor outlook for business. Id.

83. Materialmen and seamen having agreed to treat insurance money, placed in hands of custodian, as substitute for vessel, held that they could compel him to bring same into court under admiralty rule 38. The Conveyor, 147 F. 586.

84. The August Belmont, 153 F. 639.

85. By exceptions to report of commissioner. The Oceano, 148 F. 131.

86. The John McCraken, 145 F. 705.

87. The John K. Gilkinson, 150 F. 454.

88. See 7 C. L. 34.

89. Jury authorized by Rev. St. § 566, 4 Fed. St. Ann. 236, in cases relating to contracts or torts arising on Great Lakes, etc. The Western States, 151 F. 929.

90. La Bourgogne [C. C. A.] 144 F. 781; The North Star [C. C. A.] 151 F. 168; The Minnehaha, 151 F. 782.

91. Decree dismissing proceeding for limitation of liability for damages resulting from collision on ground that petitioner was owner of both vessels concerned, and had surrendered only one though both were in fault, held final determination on merits of petitioner's right to limitation of liability, and, as between him and parties to proceeding, a bar to second proceeding for limitation of same liability in which both vessels are surrendered. The San Rafael, 149 F. 893. Decree dividing damages to vessels resulting from collision on ground that both were equally in fault, but refusing to divide damage to cargo because such question was not raised by pleadings, held not a bar to subsequent libel by vessel paying entire cargo damage to compel contribution by other vessel, right to division of liability for injury to vessels and contingent claim to indemnity for cargo damage being separable, and libelant not being bound to adopt procedure permitted by rule 59. Erie R. Co. v. Erie & W. Transp. Co., 204 U. S. 220, 51 Law. Ed. 450.

92. Motion "to set aside or satisfy" decree in favor of libelant against vessel, claimant, and surety on bond for release of libel, properly denied. Carroll v. Davidson [C. C. A.] 152 F. 424.

93. See 7 C. L. 85.

94. Rev. St. § 631, limiting appeals from district to circuit court to cases where sum in dispute exceeds $50, held inapplicable, it having been superseded by Act March 3, 1891, c. 517, 26 St. 827. The Joseph B. Thomas [C. C. A.] 148 F. 762. Claims of several seamen for wages, though united in one suit under Rev. St. § 4547, held not joint but several, so that, if jurisdiction depended upon amount in dispute, test would be amount of each claim and not aggregate of all. Id.

95. In suit for wages against owner of vessel and insurers, where only controversy was as to which was liable for wages admittedly due, and court dismissed libel as to

vessel not appealing cannot dispute findings of the lower court against her.[97] Evidence not made a part of the bill of exceptions, though appended, will be disregarded,[98] and questions not properly assigned as error will not be considered.[99] Findings of fact by the trial judge[1] or a commissioner,[2] depending upon conflicting evidence or the credibility of witnesses, will not ordinarily be disturbed unless clearly erroneous.

Admissions, see latest tpical index.

ADOPTION OF CHILDREN.

§ 1. Adoptive Acts and Proceedings (34). Contracts of Adoption (36).
§ 2. Consequences of Adoption (36).

§ 1. *Adoptive acts and proceedings.*[3]—Adoption was known to the Roman law,[4] but was unknown to the common law of England,[5] hence the proceeding for adoption is purely statutory,[6] and statutes relating thereto must be strictly complied with.[7] Thus the statutory contents of a petition for adoption are jurisdictional.[8] Strict construction, however, is not extended to the act of adoption. That is liberally construed in favor of the child.[9]

Statutes prescribing the method of adoption generally require the consent of the parents or guardian of the adopted child,[10] unless such child has been abandoned,[11]

insurer and entered decree in favor of libelant against owner, held that owner had right to appeal though libelant did not do so. Hume v. Frenz [C. C. A.] 150 F. 502.

96. Order denying motion to set aside or satisfy decree previously entered held not appealable. Carroll v. Davidson [C. C. A.] 152 F. 424.

97. The Gladiator [C. C. A.] 144 F. 681.

98 Exhibits. The Wyandotte [C. C. A.] 145 F. 321.

99. Assignment that court erred in not dismissing the libel with costs held more nearly an expression of opinion of counsel than an assignment. The Wyandotte [C. C. A.] 145 F. 321.

1. Where witnesses examined in open court. Coastwise Transp. Co. v. Baltimore Steam Packet Co. [C. C. A.] 148 F. 837; The Inca [C. C. A.] 148 F. 363.

2. See § 3 B, ante.

3. See 7 C. L. 35.

4, 5. Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585.

6. Where the records of such a proceeding have been destroyed by fire, one relying on its validity must prove that the court had acquired jurisdiction. Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767.

7. Are in derogation of the common law. Purinton v. Jamrock [Mass.] 80 N. E. 802. A statute providing that the petition shall be presented to the court of the county where the petitioner resides does not require that the petition should state that the petitioner was a resident of the county where the petition was presented. Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767.

In computing time under Comp. St. Neb. 1901, § 6322 a, requiring notice of hearing on a petition for adoption to be published "at least 10 days prior to said day of hearing," the last day of publication is to be excluded and the date of hearing included. Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502.

8. People v. Sullivan, 126 Ill. App. 389.

9. Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585.

An indenture of apprenticeship reciting that it was the intention of the party of the first part to place and of the party of the second part to receive the apprentice as an adopted child, to be treated with like care as his own child, held to constitute such child an adopted child and heir. In re Wallace's Estate [Pa.] 66 A. 1098.

10. Under Ball. Ann. Codes & St. 6480, where no guardian has been appointed for a child at the time adoption proceedings are instituted, it is necessary that both parents consent to the adoption. State v. Wheeler [Wash.] 86 P. 394. When both parents of a child are living, there can be no consent by guardian, next of kin, or next friend, to the adoption of such child unless both parents have abandoned such child and ceased to provide for its support. Taber v. Douglass, 101 Me. 363, 64 A. 653. Where the parent of a child had neither actual nor constructive notice of adoption proceeding and was not a party thereto, the order of adoption was not binding upon her and she could attack it collaterally in habeas corpus proceedings. Beatty v. Davenport [Wash.] 88 P. 1109. Under Comp. St. Neb. 1901, § 6318, providing that one who has had lawful custody of a child for six months last past for the support of which neither parent has contributed may consent to an adoption, a consent stating that the child was two years old, had been abandoned by its parents at birth, that the person giving the consent had assumed and retained control of the child and did not know who its parents were, held sufficient as against collateral attack to show that such person had authority to consent. Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502. A resolution of the state board of charity as to the constitutional right of every citizen and his family while any of them were under the wardship of the state to be instructed in their own religion

or that they at least be served with notice of the proceeding [12] if their whereabouts be known,[13] but statutes authorizing adoption without the consent of the parent where the child has been abandoned are constitutional.[14] Notice must by common-law principles be given to the deserting father of a child though the statute does not require it.[15] A mere conjecture as to future conditions which turns out to be incorrect is not a mistake vitiating consent founded thereon.[16]

Unless expressly required by statute, it is not essential that the adoptive parent be of the same religious faith as the parents of the child.[17]

In some states direct averments of illegitimacy on the records are prohibited.[18] The affluence of relatives who owe the children no duty is not controlling as against the care and interest of their mother.[19]

Before a court can make a decree of adoption, it must acquire complete jurisdiction,[20] and if the conditions precedent to the exercise of the authority to make the decree are not fulfilled, the proceedings are irregular and the decree void,[21] but mere clerical orders in the order of adoption will not vitiate it,[22] especially after

is not admissible to show that such board refused to consent to the adoption of a child by persons of a religious faith different from its parents, as the consent of such board was not required. Purinton v. Jamrock [Mass.] 80 N. E. 802. Under the Domestic Relations Laws of New York, a paternal grandparent who had adopted a grandchild may consent to a second adoption by the maternal grandparent of such child, and the natural parent of the child need not consent. In re MacRae [N. Y.] 81 N. E. 956.

11. The Nebraska statute of adoption (Abbey's Ann. St. 1903, § 1733), is based primarily on the consent of the parents, if living and accessible, and an adoption without such consent must clearly come within the exceptions contained in the statute. In re Wright [Neb.] 112 N. W. 311. Under the Nebraska statute, to warrant an adoption against the objection of a living parent it must clearly appear that such parent has abandoned the child for a period of six months, and that the person consenting to the adoption has had lawful custody during such period to the exclusion of all other control. Id.

12. A decree of adoption rendered in a proceeding in which a resident parent has no notice is void. Sullivan v. People, 224 Ill. 468, 79 N. E. 695.

13. Under a rule that the petition shall state whether either parent of the child is living and if so where they reside, an order of adoption reciting that the mother of the child died soon after his birth and the residence of the father, if living, was unknown, shows substantial compliance with the statute in the absence of the petition. Coleman v. Coleman [Ark.] 98 S. W. 733. Under a statute requiring a petitioner to show by two witnesses that the residence of neither parent of the child is known if either be living, held the jurisdiction of the court did not depend on such evidence, and an order made without such evidence could not be attacked by a brother of the adoptive parent. Id. Under Comp. St. Neb. 1901, § 6322 a, providing for notice by publication of proceedings for adoption, to interested person, a record of an adoption reciting that the parents of the child were unknown, held to show that they could not be served personally and sufficient to sustain the judgment on collateral attack. Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502.

14. A law authorizing the adoption of children without consent of their parents, where such parents permit the child to be supported by the public as a pauper, is constitutional. Purinton v. Jamrock [Mass.] 80 N. E. 802. A finding that a mother had suffered her child to be supported by the public as a pauper for more than two years is justified where it appears that she never made more than cursory inquiry and none within two years, and made no opposition to the commitment though notified of the proceeding. Id.

15. People v. Sullivan, 126 Ill. App. 389.

16. Decree not revoked on ground of mistaken belief by consenting parent that she would soon die. Nelson v. Nelson, 127 Ill. App. 422.

17. The policy of the commonwealth to rear children in the religious faith of their parents will not be allowed to interfere with the best interests of the child. Purinton v. Jamrock [Mass.] 80 N. E. 802.

18. A petition for adoption alleging that the child is the child of a single woman is not express averment of illegitimacy within a statute prohibiting such averments upon the records in adoption proceedings. Purinton v. Jamrock [Mass.] 80 N. E. 802.

19. Graviess v. Graviess, 7 Ohio C. C. (N. S.) 135.

20. Faber v. Douglass, 101 Me. 363, 64 A. 653. A recital in the decree that jurisdictional facts existed is not conclusive. The record of the proceeding must show jurisdiction. Id. Whether the facts in an adoption proceeding justified a decree of adoption may not be inquired into in a collateral proceeding. Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767. Where the records of an adoption proceeding which occurred 38 years ago were destroyed by fire, testimony of the attorney for the foster parents that all proceedings were regular and that the court had jurisdiction **held sufficient to show that jurisdiction was acquired** in such proceeding. Id.

21. Faber v. Douglass, 101 Me. 363, 64 A. 653.

22. Where it appeared that all persons interested were present in court at the time the order was made, the fact that the name of the real parent was written in the order

it has been acted upon as valid for several years by all the parties.[23] The discretion in a trial court with reference to the custody of children will not be inquired into by a reviewing court except on a charge of abuse of discretion or that a grave mistake has been made.[24]

Contracts of adoption.[25]—A contract of adoption under which the adopted child is to be made an equal heir with the foster parents' other children is valid,[26] but such contract must be made by one with authority to consent to the adoption.[27] Under the statutes of Missouri a deed of adoption need be executed only by the adoptive parent.[28] A lost or destroyed deed of adoption may be established by parol evidence.[29] A proceeding to establish it is not one to establish property rights.[30]

§ 2. *Consequences of adoption.*[31]—Statutes relating to adoption are construed strictly against the adopted child,[32] and while statutes generally provide that he shall inherit from his foster parent,[33] he is not, unless the will so intends, the child of such foster parent in such sense that a devise to his child is to be construed as a devise to his adopted heir.[34] Heirship does not ascend to the adopting parents.[35] Under the rule that adoption relieves the natural parent of all duty to or rights over the child, an adoption divests the natural parent of the relation therefore existing.[36]

where the name of the foster parent should have been written will be disregarded, it being an apparent oversight. Cubitt v. Cubitt [Kan.] 86 P. 475.

23. Cannot be avoided by the heirs at law of the foster parent. Cubitt v. Cubitt [Kan.] 86 P. 475.

24. Graviess v. Graviess, 7 Ohio C. C. (N. S.) 135.

25. See 7 C. L. 37.

26. Fugate v. Allen, 119 Mo. App. 183, 95 S. W. 980.

27. Where a decree of divorce awarded the custody of a child to its mother, the father alone could not enter into a valid contract of adoption by which the child was to be made an equal heir with other children of the foster parent. Such contract was unenforceable and the foster parent could disinherit the child. Fugate v. Allen, 119 Mo. App. 183, 95 S. W. 980.

28. Ann. St. 1906, p. 2728, does not require that a deed of adoption be executed by another than the adoptive parent, and it need not be consented to by the child, his parent, or guardian. Haworth v. Haworth [Mo. App.] 100 S. W. 531. Nor need the adoptive parent's wife join in such deed, though it is void as to her if she does not join. Id.

29. Where a deed of adoption and the record thereof had been destroyed, evidence of the adoptive parent that he adopted the child, that the child lived with him from infancy until he attained majority, testimony of others that they saw the child and that it recited a consideration of love and affection and was recorded held sufficient to establish it. Haworth v. Haworth [Mo. App.] 100 S. W. 531.

30. A petition to establish a lost deed of adoption need not allege that defendants, next of kin of the adoptive parent, claimed any interest in the estate of such parent adverse to the child, the object of the proceeding being to establish lost evidence and not to establish property rights. Haworth v. Haworth [Mo. App.] 100 S. W. 531.

31. See 7 C. L. 37.

32. Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585. Under the statutes of Missouri the act of adoption does not bring the adopted child into relationship with any one except the adoptive parents, and the child will not inherit from a brother of his foster parent his foster parents' share. Id.

33. Where the life beneficiary with remainder to her heirs under a deed executed in 1853, adopted a child during that year and died in 1905 without issue, held Laws 1896, p. 225, amended by Laws 1897, p. 333, preventing an adopted child from defeating by inheritance the limitation over of property dependent on the foster parent dying without heirs, did not prevent the adopted child from taking the property in remainder as heir under the statute giving it the right of inheritance. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697. Laws 1896, p. 225, providing that nothing in regard to an adopted child inheriting from its foster parent shall apply to any "will, devise or trust" created before a specified date, etc., does not prevent an adopted child adopted prior to such date from taking the remainder of an estate of which its foster parent was life beneficiary. Id.

34. Cochran v. Cochran [Tex. Civ. App.] 16 Tex. Ct. Rep. 1, 95 S. W. 731.

35. Coleman v. Swick, 120 Ill. App. 381.

36. Under a statute providing that after adoption the parents of the child are relieved of all duty towards it and have no rights over it, which duties and rights are assumed by the foster parents, a valid adoption divests the natural parents of the relation theretofore sustained toward the child. Such change of relation is not affected by death of the foster parents. In re MacRae [N. Y.] 81 N. E. 956.

ADULTERATION.[37]

§ 1. Legislation and Regulation (37).
§ 2. The Offense (37).
§ 3. Prosecutions and Penalties (37).

§ 1. *Legislation and regulation.*[38]—Statutes prohibiting the sale of adulterated foods apply to all persons connected with the sale.[39] One who asserts that he comes within an exception to the statute has the burden to establish such fact.[40]

§ 2. *The offense.*[41]

§ 3. *Prosecutions and penalties.*[42]—Statutory requirements as to the taking of samples for the analysis on which proceedings are based must be substantially complied with,[43] questions of fact as to such compliance being for the jury.[44]

ADULTERY.

§ 1. The Offense (37).
§ 2. The Indictment or Information (37).
§ 3. Evidence (38).
§ 4. Practice and Trial (38).

§ 1. *The offense.*[45]—The offense is statutory and the elements thereof vary in the several states. In Alaska it consists in the voluntary sexual intercourse by a married person with another than his or her wife or husband.[46] Where cohabitation is not requisite, each act constitutes a separate offense.[47]

§ 2. *The indictment or information.*[48]—Though the statute defines the offense as consisting in an act of intercourse between persons within its terms and does not recognize the offense of living in adultery, an indictment charging the offense with a continuendo is good [49] and is not double.[50]

37. See, also, Food, 7 C. L. 1670, as to regulation of food products; Health, 8 C. L. 36, as to health regulations and officers charged with their execution.

38. See 7 C. L. 38.

39. Where a nonresident manufacturer makes sales in Massachusetts through an agent, both the manufacturer and the agent must comply with the statutes prohibiting the sale of adulterated food. Sullivan v. Crave & Martin Co. [Mass.] 79 N. E. 792. Title "an act to provide against" adulteration sufficiently embraces prohibition of sale of adulterated food. Commonwealth v. Arow, 32 Pa. Super. Ct. 1.

40. Law 1900, § 199, providing that § 197 prohibiting the sale of pharmaceutical preparations below standard quality does not apply to sales of cream of tarter, etc, by merchants, construed and held merely to except merchants from the provision of the statute relative to visitorial duties of the state board of pharmacy, and not from the general prohibition against adulteration which had not yet been enacted. State Board of Pharmacy v. Gasau, 102 N. Y. S. 539. And see Commonwealth v. Arow, 32 Pa. Super. Ct. 1.

41, 42. See 7 C. L. 38.

43. The New York statute requiring the inspector to deliver a duplicate sample of the milk is imperative and no penalty can be recovered if it is not complied with. People v. Weaver, 101 N. Y. S. 961. Where in an action for a penalty under Laws 1893, p. 655, for selling adulterated milk, it appeared that the sample taken at place of delivery was below standard and the one taken at the herd was above standard, the fact that the inspector was not present at the entire milking of the herd does not bar recovery, since the provision for the inspector's presence at the milking is for the protection of the people. Id. Under Laws 1893, p. 659, requiring a milk inspector to take a duplicate sample and deliver it to the person who delivers the milk, where it appeared that when the inspector had gotten the samples sealed the person who delivered the milk had gone, and later in the day the inspector delivered the samples to such person's wife, held a sufficient delivery, though at the time the husband was but a short distance from the house, the sample having been given to him at night by his wife. Id.

44. Under Laws 1893, p. 659, c. 338, providing that before an inspector takes a sample of milk he shall request the owner to stir it himself, where it appeared that the inspector handed the owner a dipper and he gave the milk a few turns and the inspector did not further stir it or cause it to be stirred, and the sample was very slightly below the required standard, held a question for the jury whether the sample was a fair one, part of the milk being night's milk on which cream had risen. People v. Weaver, 101 N. Y. S. 961.

45. See 7 C. L. 39.

46. Under Alaska Code (Act March 3, 1899, c. 429), defining adultery as the voluntary sexual intercourse by a married person with another than the offender's husband or wife, a complaint must allege that the accused was married at the date of the alleged offense. Cartier v. U. S. [C. C. A.] 148 F. 804.

47. State v. Thompson [Utah] 87 P. 709.

48. See 7 C. L. 39.

49, 50. State v. Thompson [Utah] 87 P. 709.

§ 3. *Evidence.*[51]—The evidence must show that the accused was married,[52] the intercourse,[53] proof of opportunity and inclination, being usually sufficient,[54] and that it was habitual if that is an element of the offense.[55] All circumstances tending to establish the crime may be shown,[56] but evidence of the offense, committed with another is not admissible.[57] Evidence of the conduct of the parties prior to the offense charged is admissible,[58] though the circumstances occurred in a different county from that wherein the prosecution is being conducted.[59] Admissions of the accused of specific facts not in themselves constituting the crime but furnishing links in a chain of circumstances are admissible.[60] The woman is an accomplice within the rule requiring corroboration.[61]

§ 4. *Practice and trial.*[62]—In Iowa prosecutions must be commenced by the injured spouse,[63] but the fact does not enter into nor is it an essential element of the crime[64] and need not be proved beyond a reasonable doubt,[65] nor need such fact be alleged in the indictment in order to be proved.[66]

Instructions are to be considered as a whole[67] but must be consistent.[68] A fact

51. See 7 C. L. 40.

52. The state must show that the defendant's wife was alive at the time of the alleged offense. Dixon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 308, 97 S. W. 692.

53. Circumstantial evidence as to intercourse insufficient. Quinn v. State [Tex. Cr. App.] 101 S. W. 248.

54. Till v. State [Wis.] 111 N. W. 1109. Inclination means more than ordinary human tendencies and extends to conduct reasonably suggesting specific libidinous tendency of each of the parties toward the other. Id. Opportunity in such case must be understood as meaning more than mere chance. The parties must have been together under such circumstances as would lead the guarded discretion of a prudent man to the conclusion of guilt beyond a reasonable doubt. Id. The crime cannot be inferred from the mutual disposition of the accused and another to have sexual intercourse when coupled with no proof save that of opportunity to indulge therein. State v. Thompson [Iowa] 111 N. W. 319. Evidence insufficient to justify a conviction. Id.

55. Proof of four acts of intercourse held insufficient. Curlee v. State [Tex. Cr. App.] 98 S. W. 840.

56. On a prosecution for adultery with a woman who had never been married, it is admissible to show, where it appears that the woman is pregnant, that conception took place about the date of the alleged crime, though such testimony did not indicate that accused participated therein. State v. Thompson [Utah] 87 P. 709.

57. On a prosecution of a woman it is not competent to prove that she ran off with other men before she was indicted in the case at bar. Quinn v. State [Tex. Cr. App.] 101 S. W. 248. On prosecution of a woman the state may not prove by a witness who was on the jury, which acquitted defendant's codefendant, that he believed both parties guilty and acquitted him on a technicality. Id.

58. Under an information alleging that the crime was committed on one date, proof of an adulterous act committed on a prior date is admissible. State v. Thompson [Utah] 87 P. 709. Where an information charged that the crime was committed February 15, 1905, but the state elected to prove an act of adultery committed February 1, 1905, testimony of a physician that conception took place during the early or middle part of such month was not objectionable as tending to prove a subsequent act. Id.

59. Evidence tending to show improper conduct between the accused and his coadulterer, in a different county from that wherein the prosecution is conducted, is admissible as a circumstance pointing to guilt and as showing relations between the parties. Nobles v. State [Ga.] 56 S. E. 125.

60. Till v. State [Wis.] 111 N. W. 1109. Such admissions are not within the rule as to order of proof of confessions and may not received before proof of corpus delicti. Id.

61. Jackson v. State [Tex. Cr. App.] 101 S. W. 807. Evidence insufficient to corroborate. Id. Pregnancy is not sufficient because it goes only to the commission of the offense and does not connect accused therewith. State v. Thompson [Utah] 87 P. 709.

62. See 7 C. L. 40.

63, 64. State v. Harmann [Iowa] 112 N. W. 632.

65. State v. Harmann [Iowa] 112 N. W. 632. An allegation in an indictment that the prosecution was instituted by the wife of the accused need not be established beyond a reasonable doubt. Preponderance of evidence is sufficient. State v. Athey [Iowa] 108 N. W. 224. Where a prosecution was commenced on the voluntary complaint of the wife and at the trial she appeared and testified for him and stated that she did not intend to institute proceedings against him, her agency was held sufficiently shown. Id.

66. State v. Harmann [Iowa] 112 N. W. 632.

67. An instruction that testimony of an accomplice must be corroborated, and leaving to the jury to determine whether the witness was an accomplice, and also charging that she was an accomplice, held not misleading. State v. Athey [Iowa] 108 N. W. 224. Where the state claimed the offense to have been committed at a certain time and place, an instruction that the jury might consider whether there was anything unusual or suspicious in the episode held not error, when considered with instructions that the crime must be proved beyond reasonable doubt. Till v. State [Wis.] 111 N. W. 1109.

68. An instruction that if the jury be-

not of the essence of the offense and as to which the evidence is undisputed may be assumed.[69] Requests which are argumentative or misleading are properly refused.[70] Where in a prosecution the state is required to elect as to which act it would rely upon and does so, it is error to disregard such election in charging the jury.[71]

ADVANCEMENTS, see latest topical index.

ADVERSE POSSESSION.

§ 1. Estates and Property Subject to Adverse Possession (39).
§ 2. Against Whom Available (39).
§ 3. To Whom Available (41).
§ 4. Definition and Essential Elements (41).
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§ 10. Area of Possession (49).
§ 11. Sufficiency of Possession (50).
§ 12. Pleading, Evidence, and Instructions (52).
§ 13. Nature of Title Acquired (55).

§ 1. *Estates and property subject to adverse possession.*[72]—As a general rule all estates in land are subject to adverse possession.[73] A railroad right of way acquired by eminent domain,[74] or by grant from the government,[75] is not subject.

§ 2. *Against whom available.*[76]—Adverse possession does not run against the state[77] unless expressly so provided by statute,[78] but the mere fact that the state claims land will not prevent adverse possession from running against the true owner.[79] As a general rule adverse possession does not run against a municipality as to streets or property held by it in its governmental capacity[80] unless otherwise

lieved that prosecutrix was pregnant they should consider such fact with other evidence tending to connect accused with the crime, but that the fact of pregnancy was not of itself any evidence that defendant had had intercourse with prosecutrix, is contradictory. State v. Thompson [Utah] 87 P. 709.

69. If the evidence as to this fact is undisputed, it is not error for the court to state in instructions that the prosecution was properly commenced. State v. Harmann [Iowa] 112 N. W. 632.

70. An instruction describing the female as a self-confessed felon and declaring that her testimony must be corroborated, not only as to commission of the offense but as to the circumstances thereof was prejudicial. State v. Athey [Iowa] 108 N. W. 224. An instruction that the crime was one against the wife of the accused and if she condoned the offense the state could not complain, not connected with the question whether the wife commenced the proceeding was erroneous. Id.

71. Permitting the jury to inquire whether the offense had been committed on any other date than the one relied upon. State v. Harmann [Iowa] 112 N. W. 632.

72. See 7 C. L. 41.

73. **A right of way** acquired by grant. Woodbury v. Allan, 215 Pa. 390, 64 A. 590. The fee owner may extinguish the easement of the public of a way over the land by adverse possession for the statutory period where such possession in acquiesced in by the public for a sufficient length of time to raise a presumption of abandonment. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914. Adverse possession by the husband bars the **dower rights** of his widow under Comp. Laws 1897, § 8938, giving a nonresident wife dower in lands of which the husband dies seised. Putney v. Vinton, 145 Mich. 219, 13 Det. Leg. N. 459, 108 N. W. 655. A **right to have dower assigned** is barred by ten years adverse possession of the land after the death of the husband. Joplin Brew. Co. v. Payne, 197 Mo. 422, 94 S. W. 896. Rev. St. 1899, § 4262, providing that actions for the recovery of land must be brought within ten years, applies to a **homestead**. Id.

74. Reading Co. v. Seip, 30 Pa. Super. Ct 330.

75. Where the United States makes a grant to a railroad company for a specific purpose a private individual cannot acquire title thereto by adverse possession. Missouri, etc., R. Co. v. Watson [Kan.] 87 P. 687. An easement cannot be acquired across a railroad right of way. Louisville & N. R. Co. v. Smith [Ky.] 101 S. W. 317.

76. See 7 C. L. 41.

77. Green v. Pennington, 105 Va. 801, 54 S. E. 877. Bed and banks of a navigable stream. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.

78. Under Ky. St. 1903, § 2523, statutes of limitation apply to the state as well as to individuals. Louisville & N. R. Co. v. Smith [Ky.] 101 S. W. 317.

79. Hardie v. Bissell [Ark.] 94 S. W. 611.

80. Not against a city, town, or village as to a **street, alley, or other public land.** City of Lincoln v. McLaughlin [Neb.] 112 N. W. 363. Title to **streets** cannot be acquired. De Land v. Dixon Power & Lighting Co., 225 Ill. 212, 80 N. E. 125. B. & C. Comp. § 4820, expressly provides that adverse possession does not run against a municipality as to streets and alleys. Christian v. Eugene [Or.]

expressly provided by statute,[81] but this rule does not protect the owner of the fee;[82] and adverse possession may run against a city holding certain lands in trust for persons whose possession antedated a certain time in the absence of a showing of the existence of some person entitled to a conveyance because of such possession,[83] and the mere fact that the act creating such trust provides a method by which one in possession could obtain a conveyance of the land does not alter the rule.[85] Adverse possession does not run against one whose title has not so matured and vested as to support a possessory action.[85] Accordingly it does not run against a remainderman during the life of a life tenant[86] nor against infants,[87] nor against married women during coverture,[88] unless it was held adversely at the time title was cast upon her.[89]

89 P. 419. Rev. St. 1895, art. 3351, expressly provides that streets or grounds dedicated to the public cannot be acquired by adverse possession. Krause v. El Paso [Tex. Civ. App.] 101 S. W. 828. Where one purchased land bounded by a road laid out under a statute providing that all **roads** should be 60 feet wide, he was charged with notice of the width of the road and had no honest claim of right or color of title to claim by adverse possession a portion of the road fenced by him. Biglow v. Ritter, 131 Iowa, 213, 108 N. W. 218. Where one fenced a portion of the **highway** and planted a hedge on the portion fenced, the action of county authorities in permitting the hedge to grow did not estop them from afterward removing the fence. Id.

Contra: There is a marked difference between an encroachment upon a part of a street and the entire occupation of the street where the exclusion is entire for twenty-one years, the fact that the barrier was frail and unsubstantial does not prevent the possessor from successfully asserting title, and the public loses its rights both in and to the street. (Wright v. Oberlin, 3 Ohio C. C. [N. S.] 242, and Morehouse v. Burgot, 22 Ohio C. C. 174, questioned; Mott v. Toledo, 17 Ohio C. C. 472, approved.) Seese v. Village of Maumee, 7 Ohio C. C. (N. S.) 497. Whether § 4977, having reference to actions to quiet title to streets, held adversely for more than twenty-one years, and more especially that part of it which was added by the amendment of 1889, applies to a case where the streets have been opened, is a matter of grave doubt. But notwithstanding the uncertainty as to the application of the statute, it is entirely clear under the authorities that one may by adverse possession obtain title to streets which have been regularly laid out and opened. Id.

81. Ky. St. 1903, § 2546, providing that limitations do not run against a city as to its streets until the council has been notified by the party in possession that he holds adversely, applies to persons in possession of any street at the time the statute was enacted providing the city was not yet barred. City of Covington v. Hall, 30 Ky. L. R. 356, 98 S. W. 317. Ky. St. 1903, § 2546, providing that limitations do not run in respect to an action by a city to recover a street until notice has been given by one in possession that he holds adversely, applies to actions brought by a party asserting title as well as to actions brought by the city. Id.

82. Rev. St. 1895, art. 3200, amended by the act of 1887, providing that adverse possession does not run against streets, protects the public but does not protect the owner of the fee. Cocke v. Texas, etc., R. Co. [Tex. Civ. App.] 103 S. W. 407.

83. The so called Van Ness ordinance authorizing the conveyance of Pueblo lands by the city and county of San Francisco to persons who were in possession thereof prior to a certain time vests the title to such lands in the municipality in trust for those entitled thereto, but does not prevent the acquisition of title by adverse possession where there is no other person entitled to a conveyance because of such possession. Orack v. Powleson [Cal. App.] 85 P. 129.

84. Pueblo lands included in Van Ness ordinance. Orack v. Powleson [Cal. App.] 85 P. 129.

85. Railway company which has complied with all conditions of land grant has title against which adverse possession will run though patent has not issued. Iowa R. Land Co. v. Blumer, 206 U. S. 482, 51 Law. Ed. 1148.

86. Meurin v. Kopplin [Tex. Civ. App.] 100 S. W. 984. See, also, Life Estates, Reversions, and Remainders, 8 C. L. 762; Pryor v. Winter, 147 Cal. 554, 82 P. 202. A remainderman is not affected by adverse possession against a life tenant. Mitchell v. Cleveland [S. C.] 57 S. E. 33. Where a woman was the owner and in possession of land at the time of her marriage and she and her husband lived thereon until her death, and after her death the husband remarried and conveyed to his second wife, held the possession of the husband after the death of his first wife was not adverse as he was a life tenant by curtesy. Hinton v. Farmer [Ala.] 42 So. 563. Where a grantor reserved a life estate in the land, his subsequent possession and the making of certain improvements after his marriage was insufficient to establish adverse possession or a trust for his wife's benefit. Beechley v. Beechley [Iowa] 108 N. W. 762. Possession under life tenant is not hostile to owner of fee though it is generally known in the vicinity that the life tenant had made a will attempting to devise the fee. Weaver v. Oberholtzer, 31 Pa. Super. Ct. 425.

87. Meurin v. Kopplin [Tex. Civ. App.] 100 S. W. 984. Title is not acquired by fifteen years' adverse possession where during that period one under disability had within two years after removal of such disability asserted a superior claim to the land. Fortner v. Fell [Kan.] 88 P. 66.

88. Surghenor v. Taliaferro [Tex. Civ. App.] 17 Tex. Ct. Rep. 411, 98 S. W. 648. Where land was deeded to one in 1860, she afterwards married and her disability of

§ 3. *To whom available.*[90]—In Pennsylvania adverse possession does not run in favor of a corporation having the power of eminent domain.[91] In Iowa it does not run in favor of nonresidents.[92]

§ 4. *Definition and essential elements.*[93]—Possession to confer title[94] must be adverse,[95] actual,[96] visible and notorious,[97] exclusive,[98] continuous,[99] and under a claim of title inconsistent with that of the possession of the record title.[1] The

coverture was not removed until 1896, she died 1898, and one claiming under her brought action in 1904 against the decedent's grantor who had remained in possession and had deeded to another in 1889 Held the decedent's title was not lost under the ten-year statute. McAllen v. Alonzo [Tex. Civ. App.] 102 S. W. 475.

89. Where land was in adverse possession at the time descent was cast on a married woman, the statute was not tolled as to her. De Hatre v. Edmunds, 200 Mo. 246, 98 S. W. 744.

90. See 7 C. L. 42.

91. A railroad company which takes land for its right of way without compensation does not hold adversely. Connellsville Gas Coal Co. v. Baltimore & O. R. Co., 216 Pa. 309, 65 A. 669.

92. Under Code, § 3451, limitations do not run in favor of a nonresident until conveyance of the land to a resident, hence nonresidents who collected rents and paid taxes were not in adverse possession. Stern v. Selleck [Iowa] 111 N. W. 451.

93. See 7 C. L. 43.

94. Requisites generally: Actual, open, exclusive, continuous, and hostile possession, under a claim of right for the statutory period, is essential. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822. The requisites of adverse possession are that it be "actual, open, continuous, hostile, and exclusive" for a period of twenty-one years, and a charge of court is erroneous which includes among these requisites the word "undisputed." Heller v. Hawley, 8 Ohio C. C. (N. S.) 265.

95. See post, § 5, Hostility. Definition of adverse possession held not prejudicial. Taylor v. Hover [Neb.] 108 N. W. 149.

96. Actual possession is essential. Lisso & Bros. v. Giddens, 117 La. 507, 41 So. 1029 To overcome the constructive seisin in deed of the elder patentee, where two patents conflict, there must be actual invasion of the boundary of the senior patentee by some act palpable to the senses which would give him notice that his seisin was molested. Green v. Pennington, 105 Va. 801, 54 S. E. 877.

97. Possession must be of such character as will notify the owner of the intention of the occupant to appropriate it to his own use. Nona Mills Co. v. Wright [Tex.] 102 S. W. 1118. Where one entered land of another and commenced cutting timber under a bill of sale of all timber he could remove prior to a certain date, knowing that his seller claimed under tax title, he could not thereafter secretly acquire the original title and hold it adversely. Petroski v. Minzgohr, 144 Mich. 356, 13 Det. Leg. N. 241, 108 N. W. 77. Record of deeds under which one held, occupied and improved land and paid taxes for five years was sufficient notice of adverse possession. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406. Hostile acts must be such as to carry with them a presumption that they would be observed by the owner were he to visit the property. Costello v. Muheim [Ariz.] 84 P. 906. The statute of limitations, for want of adverse possession, does not apply in favor of one claiming coal in a state of nature in place not developed. Newman v. Newman [W. Va.] 55 S. E. 377.

98. Where a woman at the time of her marriage owned and was in possession of land, and she and her husband occupied the land until her death and during her life her husband procured a deed from one who held no title, held that during the marriage the possession of the husband was not adverse under color of title. Hinton v. Farmer [Ala.] 42 So. 563. A prescriptive right to an easement cannot accrue while both dominant and servient tenements are owned by the same person. Wells v. Parker [N. H.] 66 A. 121. Where one had a common right with another to the use of an alley, the fact that he used it for twenty years exclusively as a means of ingress and egress, and a place to store wagons, etc., is not adverse to the easement of the cotenant. Hofherr v. Mede, 226 Ill. 320, 80 N. E. 893. Exclusive and hostile possession is essential. Boltz v. Colsch [Iowa] 109 N. W. 1106. Tide land bounded on one side by the shore on which were railroad tracks and lying between a training wall built by the United States and a mole built out to deep water and the fourth side open to the bay is not enclosed within Code Civ. Proc. Cal. § 323, so to be deemed in the actual possession of the owner. Western Pac. R. Co. v. Southern Pac. Co. [C. C. A.] 151 F. 376. Whether use as means of access to plaintiff's church building on adjoining lot was hostile and exclusive held for jury. Davis v. Robinson, 32 Pa. Super. Ct. 90.

99. See post, § 6.

1. Where a grantee in a deed executed in 1869 and recorded 1879, held possession, executed mortgages on the land in which he asserted complete ownership, but allowed his children to believe that he claimed only as life tenant and in random conversations asserted only a life estate, held he acquired title by adverse possession as the children were charged with record notice of his deed and that he claimed his rights thereunder. McCarthy v. Colton [Iowa] 108 N. W. 217. Must be under a claim of right. Salt Lake Inv. Co. v. Fox [Utah] 90 P. 564. The fact that the tenant of a landlord who is in adverse possession returns the property for taxation and pays taxes does not affect the character of his landlord's possession where it appears that it was done under arrangement with the landlord. Roberson v. Downing Co., 126 Ga. 175, 54 S. E. 1020. Where one was in adverse possession by tenants, the fact that a tenant at one time consulted counsel with a view to setting up an adverse claim did not affect the character of his possession where it also appeared that

occupant must in some way appropriate the land to some purpose to which it is adapted,[2] but he need not make claim thereto by limitation.[3] Possession must originate under some claim or color of title having reference to some distinct source from which it is claimed to have been designed.[4] Good faith is an essential element in some states,[5] and in others additional elements have been made essential by statute, such as filing a declaration of intention to claim adversely,[6] and payment of taxes.[7] Exclusive use means that a right does not depend on a like right in others.[8]

§ 5. *Hostility.*[9]—Possession must be hostile to and inconsistent with the rights of the true owner[10] or any superior title.[11] The possession "hostile in its beginning" which constitutes one of the elements of adverse possession is possession hostile as a matter of law.[12] Permissive possession,[13] possession under a li-

the tenant did not remove from the premises so as to be in a position to set up adverse title. Id. Sayles' Ann. Civ. St. 1897, art. 3344, providing that peaceable possession shall be construed to embrace not more than 160 acres or the area actually enclosed if it contained more than 160 acres, does not require that all land be enclosed or improved but does require that all land be claimed. Webb v. Lyerla [Tex. Civ. App.] 16 Tex. Ct. Rep. 199, 94 S. W. 1095.

2. Nona Mills Co. v. Wright [Tex.] 102 S. W. 1118.

3. Where one held land adversely, it was immaterial under Rev. St. 1895, art. 3343, that he made no claim thereto "by limitation" at the time he went into possession or afterwards. Logan v. Meade [Tex. Civ. App.] 17 Tex. Ct. Rep. 158, 98 S. W. 210.

4. The taking of possession by a mere squatter does not work a disseisin of the true owner. Jasperson v. Scharnikow [C. C. A.] 150 F. 571. A prescriptive right to an easement may arise in parol gift. Wells v. Parker [N. H.] 66 A. 121. Possession under a tax sale certificate is not adverse during the period of redemption but is an admission that possession is subject to the owner's right to redeem. Salt Lake Inv. Co. v. Fox [Utah] 90 P. 564.

5. Possession by one who claims title under a warranty deed from the purchaser at a foreclosure sale is adverse even though the foreclosure sale is void. Brynjolfson v. Dagner [N. D.] 109 N. W. 320. Where one buys at tax sale under the honest belief that he is acquiring a good title and goes into possession under the sheriff's deed, he is not chargeable with moral fraud merely because he made a mistake of law as to the validity of the sale. Bower v. Cohen, 126 Ga. 36, 54 S. E. 918.

6. Adverse possession is not available where no declaration of intention to claim adversely has been filed in the office of the probate judge as required by statute. Campbell v. Noble [Ala.] 41 So. 745.

7 See post, § 9.

8. That other persons used a way does not preclude a claimant's user from being exclusive. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071. Where for a time land was fenced with other land belonging to claimant and for a time was not fenced at all, the possession was not exclusive. Webber v. Wannemaker [Colo.] 89 P. 780.

9. See 7 C. L. 44.

10. Lancey v. Parks [Me.] 66 A. 311; Salt Lake Inv. Co. v. Fox [Utah] 90 P. 564. Possession is admitted to have been adverse where one in possessory action alleges possession in defendant and asks possessory relief. Northern Pac. R. Co. v. Spokane [Wash.] 88 P. 135. The test of adverse possession must be that it is such as would subject the one claiming adversely to a possessory action. Id.; Purtle v. Bell, 225 Ill. 523, 80 N. E. 350. Where on death of an ancestor his heirs become the owners of land subject to the right of the ancestor's widow, who conveys to one who claims the whole estate, his holding is adverse to the heirs. First Nat. Bank v. Pilger [Neb.] 111 N. W. 361. Where one had not paid taxes for thirty years and had apparently abandoned all claim to the land during which period another had purchased at tax sale, improved it, and paid taxes, the rights of the former were barred by laches. Osceola Land Co. v. Henderson [Ark.] 100 S. W. 896. Evidence sufficient to show that occupancy was not adverse. Cruse v. Richards [Tex. Civ. App.] 100 S. W. 205. Under Code Civ. Proc. § 379, providing that an action to redeem from a mortgage may be maintained unless the mortgage has been in adverse possession for twenty years, the word "adverse" means rightful possession as mortgagee. Becker v. McCrea, 103 N. Y. S. 963. Where one fenced a part of an original highway which has been used for several years and established a new road in another place with the intention that the road as changed should be used by the public, the act not being hostile to the right of the public did not prevent the whole road from becoming a public highway by adverse possession. Berry v. St. Louis, etc., R. Co. [Mo. App.] 101 S. W. 714.

11. Where one purchased a tract of land and for twenty five years cut and sold timber from an adjacent tract, she did not acquire title to such adjacent tract where she asserted no claim thereto except under deed in which it was not included. Perry v. Stevens [Tex. Civ. App.] 16 Tex. Ct. Rep. 944, 97 S. W. 1075. Where land was devised to one for life, remainder to charity if he died childless, title to be vested in trustees appointed by the court, the possession of an heir at law of the life tenant after his death was not adverse to the trustees prior to their appointment. Kennedy's Adm'r v. Linn Orphan Asylum Trustees [Ky.] 103 S. W. 340. Where one in possession of land acknowledges, before the statutory period has run, that another owns the land, such acknowledgment shows that his possession is not adverse. Shirey v. Whitlow [Ark.] 97 S. W. 444.

12. Purtle v. Bell, 225 Ill. 523, 80 N. E.

cense,[14] or pursuant to an agreement,[15] is not adverse. A void attornment by the adverse holder's tenant to the true owner does not affect the possession.[16] The question whether one holds adversely is one of intention,[17] but such intention need not be declared affirmatively.[18] A possession commencing in subordination to the true title does not change into a hostile one until notice is brought home to the true owner by open acts unequivocal in character.[19] Notice to the true owner, however,

350. To acquire title under the twenty year statute, possession must have been hostile in its beginning. Id.

13. A permissive possession is not. Balty v. Colsch [Iowa] 109 N. W. 1106. No presumption of grant arises from permissive use. Woodbury v. Allan, 215 Pa. 390, 64 A. 590. The use of an easement with the knowledge and consent of the owner is not adverse. Zerbey v. Allan, 215 Pa. 383, 64 A. 587. Where one had oral permission to take ice from a pond but had not exercised his right for the full statutory period, had not acquired title by adverse possession. Carville v. Com., 192 Mass. 570, 78 N. E. 735. Where removable ornamental fixtures encroached a few inches over the line an assumption that they existed by leave and did not constitute adverse possession was warranted. Van Horn v. Stuyvesant, 50 Misc. 432, 100 N. Y. S. 547. Under Code Civ. Proc. § 346, declaring that an action to redeem from a mortgage may be maintained against a mortgagee unless he has been in adverse possession for five years, held, so long as a mortgagee was in possession by consent of the mortgagor and under a contract to apply rents and profits to the indebtedness, his possession was not adverse. Wadleigh v. Phelps [Cal.] 87 P. 93. Where one enters permissively unless he at some time has distinctively and bona fide abandoned the premises. McCutchen v. McCutchen [S. C.] 57 S. E. 678. Where one used a passway belonging to another more or less regularly for fifteen years when a gate leading to it was not locked and had attempted to make arrangements for uninterrupted use, but made no attempt to use it when the gate was locked, he did not hold adversely. Prewitt v. Hustonville Cemetery Co. [Ky.] 101 S. W. 892.

14. One who enters under a license cannot acquire title by adverse possession. Staples v. Cornwall, 99 N. Y. S. 1009.

15. One who enters under a contract cannot obtain title by adverse possession without showing that his occupancy had assumed an adverse character and continued so during the statutory period. Lanham v. Bowlby [Neb.] 112 N. W. 324. A vendee of land in possession under bond for title and in recognition of the contract does not hold adversely until some act has been done that places the parties in a hostile attitude. Worth v. Wrenn [N. C.] 57 S. E. 388. Where a father conveyed land to his children reserving the right to convey any portion of the same and reinvest in other property, and thereafter he and some of the children conveyed a right for ten years to remove standing timber which was subsequently extended, held the possession of the purchaser was not adverse to other children. Gulf Red Cedar Lumber Co. v. Crenshaw [Ala.] 42 So. 567. Where after a grant had been procured from the state a partition agreement had been entered into between the parties reciting that a certain person had an undivided interest for his services in locating and procuring title and authorizing one cotenant to adjust such claim, the possession of such cotenant would be regarded as in subordination to the locative rights and not adverse thereto. Surghenor v. Taliaferro [Tex. Civ. App.] 17 Tex. Ct. Rep. 411, 98 S. W. 648. Where one occupied under an agreement, no prescriptive rights could be acquired. Preston v. West Beach Corp. [Mass.] 81 N. E. 253. Where a son is given money to pay for land on condition that the donor have a home there, the donor's subesquent possession is not adverse. Hoyt v. Zumwalt [Cal.] 86 P. 600.

16. Briel v. Jordan, 27 App. D. C. 202.

17. A possession is not adverse where it appeared that one did not intend to claim to a certain marked line regardless of where the true line might be. Boltz v. Colsch [Iowa] 109 N. W. 1106. Mere occupancy without evidence of an intention to appropriate the land is insufficient. Nona Mills Co. v. Wright [Tex.] 102 S. W. 1118. The possession relied upon must be accompanied and characterized by an intention to claim adversely to the true owner. Sawbridge v. Fergus Falls [Minn.] 112 N. W. 385. Under Rev. St. 1895, art. 3349, defining adverse possession as actual and visible possession under claim of right inconsistent with and hostile to the claim of another, one who enters with knowledge that he has no title and that another has, but with intention to occupy in hostility to the world, is in adverse possession. Link v. Bland [Tex. Civ. App.] 16 Tex. Ct. Rep. 616, 95 S. W. 1110.

18. It may be established by circumstances. Sawbridge v. Fergus Falls [Minn.] 112 N. W. 385.

19. McCune v. Goodwillie [Mo.] 102 S. W. 997. One who enters permissively does not hold adversely until he discovers the owner's title and notice of such fact is brought home to the owner. Thompson v. Camper [Va.] 55 S. E. 674. A husband purchased land paying substantially all the purchase price and he and his family went into possession. His wife and child remained on the land when he went to the army. The wife held the land after his death. No dower was assigned to her. Held her possession not adverse after her husband's death notwithstanding failure to have dower assigned. Moore v. Gulley, 30 Ky. L. R. 442, 98 S. W. 1011. Where entry was permissive, possession will be presumed to continue permissive until distinctly repudiated by some hostile act brought home to the knowledge of the owner. Meurin v. Kopplin [Tex. Civ. App.] 100 S. W. 984. One in possession under parol gift is a tenant at will until there has been such adverse possession by him as, if continued for the statutory period, would work a divestiture of the donor's title. Gillespie v. Gillespie [Ala.] 43 So. 12. One who constructs a stone wall about three

need not be actual,[20] but it must be such as to put him on his guard and notify him that possession is hostile to him,[21] or be such as to cause him injury.[22] To constitute constructive notice there must be some visible change in the character or nature of the occupancy calculated to put the owner on his guard and notify him that such possession is hostile.[23]

One who under mistake as to the true boundary takes possession up to a certain line, claiming it as his own, encloses it and holds possession for the statutory period, acquires title,[24] but if he intends to claim only to the true line, wherever it may be, he does not.[25]

The possession of one cotenant is not adverse to the others[26] until there has

and one-half feet thick so that the center of it is on the boundary line is not in adverse possession of any land covered by the wall. Dewire v. Hanley [Conn.] 65 A. 573. Where one enters land of another with his consent, his possession is not adverse until such owner has actual or constructive notice of its character. Lancey v. Parts [Me.] 66 A. 311.

20. Notice to the owner that one claims adversely may be inferred from attending circumstances and actual notice need not be proven. Wells v. Parker [N. H.] 66 A. 121.

21. Where one enters on land bid in at a tax sale, his intention to hold adversely during the redemption period must be shown by some unequivical act, hostile to the owner's title, brought home to his knowledge, or which he ought to have known in the exercise of reasonable care in regard to the property. Lancey v. Parks [Me.] 66 A. 311. The remark incidentally made by one who had fenced in a parcel of land that the street was included within the fence does not amount to a declaration on his part that the right of the public is superior to his own in the strip once platted as a street which has been enclosed. Seese v. Village of Maumee, 7 Ohio C. C. (N. S.) 497. Occupation of land to which another made no claim does not charge him with notice that a hostile claim was made to adjoining land and does not put him on inquiry as to the nature of the possession. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

22. Mere notice to an upper riparian owner of a lower owner's claim to maintain a dam at a certain height, though persisted in for the requisite period or even actual maintenance at such height, does not give a prescriptive right to maintain it. It is only when the upper owner is injured by the backwater that prescription begins to run. Dutton v. Stoughton [Vt.] 65 A. 91.

23. Lancey v. Parks [Me.] 66 A. 311. A diverse user of a road imports an assertion of right on the part of those traveling the road hostile to the owner. Township Com'rs of St. Andrews Parish v. Charleston Min. & Mfg. Co. [S. C.] 57 S. E. 201.

24. See, also, Boundaries, 7 C. L. 446; Shirey v. Whitlow [Ark.] 97 S. W. 444. One who by mistake encloses land of another and claims it as his own holds adversely. Thornely v. Andrews [Wash.] 88 P. 757. If one claims against the world he holds adversely, but a mere tentative claim subject to the result of inquiry as to whether or not the land is within his boundaries is not adverse. Wiess v. Goodhue [Tex. Civ. App.] 102 S. W. 793. Title by adverse possession may be acquired under a claim of title although the interested parties were mistaken as to the true boundary. Weeks v. Upton, 99 Minn. 410, 109 N. W. 828. In 1890 an owner sold adjacent lots to separate persons. The boundary was staked off on the ground and lots improved with reference thereto. Held owners of lots claiming title to the line as staked held adversely. Thornelp v. Andrews [Wash.] 88 P. 757. Where the description contained in a deed reads "north with the half section line," the phrase denotes direction and not necessarily that the line intended is identical with the half section line, and the line connecting the corners and not the half section line must be taken as the dividing line. But where it was believed by the grantor and the grantee that the corners were located in the half section line, and both have acted on that belief, the grantee acquires title by adverse possession to the strip lying between the half section line and the true line. Puntt v. Zimmer, 8 Ohio C. C. (N. S.) 455. One who lives on land and claims title to a well defined boundary and uses it openly and uninterruptedly for thirty years acquires title. Aikman v. South, 29 Ky. L. R. 1201, 97 S. W. 4. One who took and held peaceable possession for ten years under a mistake as to the boundary, intending to claim to a certain fence, and when he found that there was doubt as to the boundary claimed by limitation, acquires title. Logan v. Meade [Tex. Civ. App.] 17 Tex. Ct. Rep. 158, 98 S. W. 210.

25. Shirey v. Whitlow [Ark.] 97 S. W. 444. One ignorant of the true line makes a mistake in erecting his fence and makes no claim of title up to the fence but only to the true line as it may subsequently be ascertained does not hold adversely. Thornely v. Andrews [Wash.] 88 P. 757. One who occupies an adjacent strip and claims title under mistake as to the true boundary of his lot does not hold adversely. Fieldhouse v. Leisberg [Wyo.] 88 P. 214. One who has title to a certain tract and by mistake as to the boundary occupies a strip of adjoining land belonging to another without intention to hold beyond the true line does not hold such strip adversely. Scott v. Williams [Kan.] 87 P. 550. Where an adjacent owner through mistake takes possession beyond the true line intending to claim only to the line, he does not hold adversely, but where his possession is under belief that he owns the land, incloses it, and claims it, he does hold adversely. Goodwin v. Garibaldi [Ark.] 102 S. W. 706. Where adjacent owners held possession up to a certain line under an agreement that the true line should be ascertained at some future time neither held adversely. Crosby v. First Presbyterian Church [Tex. Civ. App.] 99 S. W. 584.

26. See, also, Tenants in Common and

been an ouster and notice of the hostile claim has been brought home to him.[27] Where one tenant in common attempts to convey by warranty deed the whole estate and his grantee records the deed and enters into possession and claims the whole estate, his possession is adverse to the cotenant.[28] It does not run in favor of one holding under [29] or as fiduciary for [30] the owner.

§ 6. *Continuity.*[31]—The possession must be continuous for the statutory period,[32] consequently, if the possession be interrupted,[33] the operation of the statute

Joint Tenants, 8 C. L. 2114. Mere possession by one cotenant is not sufficient to establish ouster and adverse possession. Dahlem v. Abbott [Mich.] 13 Det. Leg. N. 894, 110 N. W. 47. There can be no adverse possession against a cotenant until actual ouster, or exclusive possession after demand, or express notice. Harriss v. Howard, 126 Ga. 325, 55 S. E. 59.

27. Where one cotenant purchases the share of another from such other's agent and has been in possession for thirty-five years, and such other had acknowledged that he had received his pay and had no interest in the land, held the possession was adverse. Godsey v. Standifer [Ky.] 101 S. W. 921. Where one cotenant conveys the entire estate with covenants of seisin and warranty and his grantee enters and holds exclusive possession, the entry and holding must be deemed adverse to the cotenant. Wiese v. Union Pac. R. Co. [Neb.] 108 N. W. 175.

Where one cotenant gave a mortgage on the entire estate which was foreclosed and the land sold to a person and the sheriff took the purchaser to the land which was vacant, and pointing to it informed him that he delivered it to him, held not an ouster. Harriss v. Howard, 126 Ga. 325, 55 S. E. 59.

28. Sanford v. Safford, 99 Minn. 380, 109 N. W. 819. The rule that one tenant in common who has knowledge of the existence of a deed executed by his cotenant may assume that such cotenant has conveyed only his interest does not apply where it appears that the other cotenant had no knowledge that the party in possession was claiming under a deed. Id. In such case, where other cotenants did not know of the existence of the deed but did know of the possession, held that the possession of the grantor was that of an apparent stranger. Id.

29. A mortgagee in possession may hold adversely to the mortgagor. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792. When one who in good faith claims title under a void foreclosure sale takes possession under such claim but with the consent of the mortgagor, although he is deemed a mortgagee in possession, his possession is adverse to the mortgagor from its inception. Id. Such possession puts limitations in motion against the remedies of the mortgagor. Id. The fact that the grantee of a purchaser at a void foreclosure sale may be deemed in equity a mortgagee in possession does not make him such in fact so that his possession under his supposed valid claims of title is not to be regarded as adverse to the mortgagor. Brynjofson v. Dagner [N. D.] 109 N. W. 320. Possession of purchaser under contract is not adverse until payment is made. Poston v. Ingraham [S. C.] 56 S. E. 780.

30. A guardian of minors who is in possession of their land as such cannot claim adversely to them so as to set in motion Gen. Laws 1896, c. 205, though literally construed the statute is effective in all relations. Searle v. Laraway, 27 R. I. 557, 65 A. 269.

31. See 7 C. L. 48.

32. Proctor v. Maine Cent. R. Co., 101 Me. 459, 64 A. 839. Evidence insufficient to show continuous possession. Id. Evidence insufficient to show continuous possession for the statutory period. Bolen v. Hoven [Ala.] 43 So. 736. Evidence held not to show a break in continuity where one was in actual possession by operating a saw mill on the premises under color of title to a tract, and after a sale of the mill left the premises for nine months when he returned and cultivated and improved the land for a period sufficient to acquire title. Roberson v. Downing Co., 126 Ga. 175, 54 S. E. 1020. Continuous and adverse possession for ten years is necessary to divest the owner of the paper title to underlying minerals of his title under Ann. St. 1906, p. 2335. Gordon v. Park [Mo.] 100 S. W. 621. Where one laid a pipe line over land of another and used it continuously for five years under a claim of right, he acquired an easement. Collins v. Gray [Cal. App.] 86 P. 983. Evidence sufficient to show continuous use. Id.

Continuity was not broken where one in possession had cleared and cultivated land but for a year had left it, and while fences were broken down in places, clear fields and buildings remained. Bradbury v. Dumond [Ark.] 96 S. W. 390. The **commencement of an action which is voluntarily discontinued** does not toll the statute. Foster v. New York Cent., etc., R. Co., 103 N. Y. S. 531. Interruption of a possession is not shown where the claimant in a **casual conversation** stated that he knew the fence was not on the line and that the parties would have it moved as soon as possible, where the parties subsequently joined in repairing the fence and the claimant held possession for several years thereafter. Closuit v. John Arpin Lumber Co. [Wis.] 110 N. W. 222. Such conversation does not show seisin in the other party within the statutory period. Id. A party in possession as owner may protect such possession by **purchasing any outstanding claim.** There is not thereby any break in possession nor does the occupant rely upon his purchase title in preference to the one previously possessed. Wiese v. Union Pac. R. Co. [Neb.] 108 N. W. 175.

33. Boltz v. Colsch [Iowa] 109 N. W. 1106. No title to water rights can be acquired where the possession was interrupted annually. Bree v. Wheeler [Cal. App.] 87 P. 255. A railroad which simply opens out and clears a right of way to a certain width does not necessarily remain in adverse possession to

suspended,[34] or the premises temporarily abandoned during the period, no title is acquired.[35]

Tacking.[36]—Privity must be shown before possession can be tacked.[37] Failure of some of the conveyances in the chain to properly describe the land does not impair the right of one to tack the possession of his privies in estate.[38]

§ 7. *Duration.*[39]—Possession must continue for the statutory period[40] without interruption,[41] which must have elapsed since the enactment of the statute under which rights are asserted.[42] The period is prescribed by statute and varies in the several states.[43] Shorter terms are usually prescribed where possession is under

such width. Instructions disapproved as leaving out of view subsequent abandonment of the whole or a portion of the right of way. Bennett v. Atlantic Coast Line R. Co., 126 Ga. 411, 55 S. E. 177.

34. Evidence that the land had been sold to the state for taxes is admissible to show that operation of the statute had been suspended between time of sale and redemption. Spotswood v. Spotswood [Cal. App.] 89 P. 362. Laws 1861, p. 17, suspended the operation of the statute of limitations as to actions to recover land from 1861 until 1872. Winn v. Coggins [Fla.] 42 So. 897. Death of an owner suspends for one year the running of limitation in favor of one in possession. Meurin v. Kopplin [Tex. Civ. App.] 100 S. W. 984. Under Rev. St. 1879, art. 3195, providing that a person can acquire title by adverse possession to only 160 acres, one who went into possession in 1861 could not acquire title to a greater area under Pasch Dig. art. 4624, because the statute of limitations was suspended from 1861 until 1870. Poland v. Porter [Tex. Civ. App.] 98 S. W. 214.

35. A temporary abandonment destroys the claim. Hoyle v. Mann, 144 Ala. 516, 41 So. 835.

36. See 7 C. L. 49.

37. Holdredge v. Livingston [Neb.] 112 N. W. 341. Where a father devised land to his wife on condition that one son should receive a certain amount when he attained majority and another son to receive a certain amount when he attained majority, and after the first son became of age he collected his share of the rents until the wife and other son leased to a third person, held the possession of the wife was not adverse to the first son and could not be tacked to that of the lessee. Pierce v. Lee, 197 Mo. 480, 95 S. W. 426. Where title is claimed by one and his successive grantees, it must appear that each grantee went into possession at the expiration of his predecessor claiming under or through him. Hoyle v. Mann, 144 Ala. 516, 41 So. 835. Where successive adverse occupants hold in privity with each other under the same claim of title, the time limited for maintaining an action may be computed by the last occupant of action accrued against the first occupant. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

38. Lawder v. Larkin [Tex. Civ. App.] 15 Tex. Ct. Rep. 809, 94 S. W. 171.

39. See 7 C. L. 49.

40. Where an owner permits a railroad to be built on his land and operated for twenty years, he cannot reclaim the property free from the servitude. McCutchen v. Texas & P. R. Co. [La.] 43 So. 42. His action would be barred for any relief in ten years. Id. Where one who took possession of the bed of a non-navigable lake had not held it for the statutory period, riparian owners were not barred. Rhodes v. Cissell [Ark.] 101 S. W. 758. Evidence that an owner attorned to one who claimed the land and that such claimant leased a portion of the land to one who cleared and fenced a small tract, but it did not appear how long the lease continued, and there was testimony that it was generally understood that the claimant was in possession, held insufficient to show title in the absence of proof that the act occurred more than seven years prior to action brought. Connerly v. Dickinson [Ark.] 99 S. W. 82. Where one went into possession in 1889 under purchase of improvements and did not set up claim to the land until 1891, when he purchased it, which was less than the statutory period from the time he sued, held insufficient to show title by adverse possession. Fisher v. Giddings [Tex. Civ. App.] 16 Tex. Ct. Rep. 288, 95 S. W. 33. Evidence insufficient to show that title had been acquired where possession was not continued for the statutory period. Winn v. Coggins [Fla.] 42 So. 897. Evidence insufficient to show adverse possession for the statutory period. Covtino v. Los Angeles [Cal.] 88 P. 1091. Under Ball. Ann. Codes & St. § 3846, the shortest period within which a highway can be established by user is seven years, and such period is required as to a highway over public lands notwithstanding the act of congress granting such way over lands not reserved for public use. Vogler v. Anderson [Wash.] 89 P. 551. Equity will not divest a title for laches until there has been an equal or greater lapse of time than that permitted by the statute of limitations. Updegraff v. Marked Tree Lumber Co. [Ark.] 103 S. W. 606.

41. See ante, § 6.

42. Civ. Code 1882, § 109, providing a forty year period, does not apply where forty years have not elapsed since the enactment of such statute. Mitchell v. Cleveland [S. C.] 57 S. E. 33.

43. When land is sold at a judicial sale, the five year statute runs in favor of the purchaser only against the parties thereto. Gaither v. Gage [Ark.] 100 S. W. 80. Under the rule that if a plaintiff dies the action shall not abate if it be one that survives, the death of a plaintiff in a suit to quiet title did not abate the suit as to his heirs, and the defense of adverse possession was not affected, the ten years being measured from the commencement of the action. Upson v. Campbell [Tex. Civ. App.] 99 S. W. 1129. Under Rev. St. 1899, § 4268, requiring one who claims or might claim an interest

color of title [44] or is accompanied by payment of taxes,[45] or the extent of the owner's rights.[46] The period is sometimes made to depend on the character of the land.[47] Possession to avail under the five year statute of Texas must be under a sufficient [48] and duly recorded deed.[49] The two year statute in Louisiana applies only where there has been a judgment of exappropriation,[50] and the ten year statute applies only where there has been actual possession under title translative of property.[51]

in land and who has not paid taxes thereon for thirty years to sue within one year, where one has in possession and paying taxes at the time descent was cast on a married woman, her failure to pay taxes or bring action within thirty years barred her rights. De Hatre v. Edmonds, 200 Mo. 246, 98 S. W. 744. Rev. St. 1899, § 4268, expressly provides that, where neither one claiming land nor one claiming under him has been in possession or paid taxes for thirty years, he has only one year within which to bring action, and on failure to do so title rests absolutely in another. Crain v. Peterman, 200 Mo. 295, 98 S. W. 600. The 30 year period applies where there was corporal possession in the beginning, which has been continued, or else the possession must be preserved during the entire period by external and public signs announcing such possession and intention to possess. This rule applies to swamp lands. Ramos Lumber & Mfg. Co. v. Sanders 117 La. 615, 42 So. 158. Under Laws 1847-48, adverse possession for seven years was necessary. Winn v. Coggins [Fla.] 42 So. 897.

44. The three year statute is inapplicable where claimant has neither title nor color of title. Beale's Heirs v. Johnson [Tex. Civ. App.] 99 S. W. 1045. Time should be reckoned from the date of the color of title to commencement of the action. Wade v. Goza, 78 Ark. 7, 96 S. W. 388. Where an owner mortgaged land and it was sold under a power contained in the mortgage, the color of title of the mortgagor was divested by sale under the mortgage and the seven year statute was inapplicable. Call v. Dancy [N. C.] 57 S. E. 220. Seven years actual possession under color of title gives title in North Carolina. Broadwell v. Morgan, 142 N. C. 275, 55 S. E. 340.

45. See, also, post, § 9. Allegations that one had been in quiet and peaceable possession under color of title and had paid taxes for seven years does not show title by adverse possession because not showing that he paid all taxes for seven consecutive years or to set up any paper title as basis for color of title, or allege claim of title in good faith. Webber v. Wannemaker [Colo.] 89 P. 780. Where one alleges in an action commenced in 1906 that he had been in possession under color of title and paid taxes for more than seven years "last past" before the commencement of the action, 3 Mill's Ann. St. Rev. Supp. § 29232, prescribing a seven year period, and not 2 Mills' Ann. St. § 2923, prescribing a five year period, applies. Id. Under 3 Mill's Ann. St. Rev. Supp. § 2923 e, giving title for payment of taxes for seven successive years no title is acquired where taxes were paid for one of such years by the true owner. Id. A redemption from tax sale does not constitute payment of taxes Id. Under 2 Ball. Ann. Codes & St § 5594, prescribing a seven year period where taxes are paid on vacant property, seven years must elapse between the date of the first payment and the commencement of suit to recover the land. Tremmel v. Mess [Wash.] 89 P. 487. Under the seven year statute requiring payment of taxes under claim and color of title, payment of taxes outside the taxpayer's boundaries under an error as to the location thereof is insufficient. Miller v. O'Leary [Wash.] 87 P. 113. Code, § 1448, limiting an action for the recovery of land sold for taxes to five years from execution of the tax deed, applies where the deed is merely irregular and not void. McCash v. Penrod, 131 Iowa, 631, 109 N. W. 180.

46. Arizona Rev. St. 1901, § 2941, fixing a two years' period as against one claiming a possessory right only, does not apply to possession against one claiming under a railroad company lands within the place limits of its grant. Howard v. Perrin, 200 U. S. 71, 50 Law. Ed. 374.

47. "Improved lands" within Civ. Code 1895, § 3065, providing that a right of way may be acquired over improved land in seven years and over wild land in twenty years, means an entire tract though only a part of it be under cultivation. The woodland on such tract is not wild land, but in connection with the cultivated portion constitutes a single tract. Hopkins v. Roach [Ga.] 56 S. E. 303. Where the allegation in a complaint to quiet title that the land was vacant and unoccupied was not denied, evidence of payment of taxes under color of title for seven successive years held sufficient to show title in plaintiff. Hardie v. Bissell [Ark.] 94 S. W. 611.

48. A deed by a husband and wife of land owned by the wife, duly recorded but purporting to be the deed of the husband, was sufficient to sustain title under the five-year statute though the acknowledgment of the wife was defective. State Nat. Bank v. Roberts [Tex. Civ. App.] 103 S. W. 454. Where one purchased and paid for land and had the deed run to another to secure an indebtedness, such deed was sufficient to enable the vendee to acquire title under the five-year statute. Kirby v. Hayden [Tex. Civ. App.] 99 S. W. 746. A deed is not sufficient under the five-year statute where the description therein is so indefinite that the land cannot be identified. Young v. Trahan [Tex. Civ. App.] 16 Tex. Ct. Rep. 956, 17 Tex. Ct. Rep. 20, 97 S. W. 147.

49. A deed containing a defective certificate of acknowledgment not being entitled to record is not a recorded instrument sufficient to support title under the five-year statute. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525.

50. The two-year period applies only where there has been a judgment of exappropriation and the corporation has entered into possession before payment of com-

§ 8. *Color of title.*[52]—Color of title is that which in appearance is title but which in reality is not title,[53] and has been sometimes defined as anything in writing and purporting to affect the title[54] however imperfect it may be as a conveyance,[55] but which serves to define the extent of the claim,[56] such as a quitclaim deed,[57] a tax deed,[58] or a void[59] or voidable deed.[60] A deed containing an insuffi-

pensation awarded. Amet v. Texas & P. R. Co., 117 La. 454, 41 So. 721.

51. The ten-year period applies only where there has been actual possession in good faith under a title translative of property. Ramos Lumber & Mfg. Co. v. Sanders, 117 La. 615, 42 So. 158. Where one who is unable to read receives a tax deed containing interlineations under circumstances which justify the belief on his part that they were made by the officer executing the deed, he is held a possessor in good faith under the ten-year statute. Hickey v. Smith [La.] 42 So. 762. Where one entered under a decree which was construed and enforced as a fieri facias, he was held a purchaser in good faith protected by the ten-year statute. Decuir v. Loeb [La.] 42 So. 955. A plea of the three, five, and ten-year statutes by one who had never been in possession cannot be sustained. Kernan v. Young [La.] 44 So. 1.

52. See 7 C. L. 50.

53. Little v. Crawford [Idaho] 88 P. 974. Where a person has always paid his taxes upon his entire property, a sale of it under another assessment in the name of another person is void and cannot serve as a basis for the three-year prescription. Bernstine v. Leeper [La.] 43 So. 889. A sale made on condition that it shall be found that the vendor is owner of the property cannot serve as a basis for prescription if it be found that the vendor is not the owner. Albert Hanson Lumber Co. v. Angelloy [La.] 43 So. 529.

54. Deed to religious association without legislative authority in violation of Maryland Bill of Rights, § 34. Dangerfield v. Williams, 26 App. D. C. 508.

An agreement void under the statute of frauds is color. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071.

A sheriff's deed, valid in form and translative of title, showing a sale made under a writ issued pursuant to a judgment of a competent court, together with such writ and judgment, constitutes just title which may serve as basis for the prescription of ten years. Leverett v. Loeb, 117 La. 310, 41 So. 584. Though personal jurisdiction of defendant in divorce was not obtained, a sheriff's deed on sale under execution based on personal money judgment for alimony was color of title. Joplin Brew. Co. v. Payne, 197 Mo. 422, 94 S. W. 896.

An act of sale is sufficient to furnish a basis for the operation of the ten-year statute. Railsback v. Leonard [La.] 43 So. 548. Whether the mortgagee and his adjudicatee has examined the title of his debtor, or otherwise informed himself of its defects, is a question of fact, and in the absence of affirmative proof he is entitled for the purpose of the plea of prescription to the benefit of the presumption of good faith. Leverett v. Loeb, 117 La. 310, 41 So. 584.

A tax deed based on a void sale is color. Osceola Land Co. v. Chicago Mill & Lumber Co. [Ark.] 103 S. W. 609.

A will duly recorded is color. Harris v. Howard, 126 Ga. 325, 55 S. E. 59. A will duly recorded devising "all my lands" contained a sufficient description to operate as color of title to land in the county of testator's residence to which he had recorded deeds and deed in possession of. Id.

55. Where one purchased land at a partition sale and the commissioner's deed purported to convey the entire property, and the purchaser took possession of all of it and paid taxes thereon and worked it, the deed gave color of title to all the land. Lang v. Osceola Consol. Min. Co., 145 Mich. 370, 13 Det. Leg. N. 474, 108 N. W. 678. A partition contract defining boundaries and binding the parties to make good any loss to each other under which possession is taken and held is color of title. Stover v. Stover [W. Va.] 54 S. E. 350. One who enters under a deed from an agent who has authority to sell is in adverse possession of which the vendor is presumed to have notice. Godsey v. Standifer [Ky.] 101 S. W. 921.

56. To serve as a basis for prescription the title need not be recorded. Registry is required only for transferring the property and in the law of prescription the title does not operate to transfer the property but merely to establish the good faith of the possessor and fix the limits of his possessions. Bernstine v. Leeper [La.] 43 So. 889. Where one was in possession under a donation deed valid on its face based on a sale of lands forfeited to the state in 1882, he was entitled to hold the land in the absence of evidence impeaching such deed. Wade v. Goza, 78 Ark. 7, 96 S. W. 388. Where one who claims under a defective sheriff's deed is not in actual possession, he cannot rely on the deed as color of title. Dixon v. Hunter [Mo.] 102 S. W. 970.

57. A quitclaim deed given by one not shown to have title, not sealed as required by law, and acknowledged in a county other than where the land was located, is color of title. Perkins Land & Lumber Co. v. Irvin, 200 Mo. 485, 98 S. W. 580.

58. A tax deed is color of title. Morgan v. Pott [Mo. App.] 101 S. W. 717. A deed based on a void tax sale describing the land and purporting to convey it constitutes color. Bradbury v. Dumond [Ark.] 96 S. W. 390. A void tax deed is sufficient upon which to base a title by adverse possession. Gilbert v. Southern Land & Timber Co. [Fla.] 43 So. 754.

59. A deed void because not joined in by the grantor's husband is color of title. Southern R. Co. v. Hayes [Ala.] 43 So. 487. A void tax deed. McCash v. Penrod, 131 Iowa, 631, 109 N. W. 180. A deed is color of title though it does not appear that the grantor therein had any title. Hoyle v. Mann, 144 Ala. 516, 41 So. 835.

60. Where when one became a bankrupt he was owner of certain land and thereafter while title was in his assignee in bankruptcy he took title to adjoining land from another under a deed which included the

cient description is not color of title.[61] Good faith is sometimes deemed essential to color of title.[62] Color of title is not essential[63] except to extend the title acquired beyond the limits of actual possession.[64]

§ 9. *Payment of taxes.*[65]—The rule that payment of taxes constitutes possession of wild land applies only where the entire tract is wild,[66] and a claimant has the burden to prove that the statute applies,[67] but the fact that the person who pays taxes subsequently takes actual possession is immaterial.[68] The fact that land was assessed to a certain person is not proof that he paid the taxes.[69] In Arkansas taxes must have been paid for the full period[70] during which the claimant must have had color of title.[71]

§ 10. *Area of possession.*[72]—One holding without color of title holds to the extent of actual possession only,[73] but one holding under color of title holds within the boundaries called in his color.[74] A constructive possession[75] of a tract follows

original strip, held such deed constituted color of title and he acquired title by adverse possession. Ledoux v. Samuels, 102 N. Y. S. 43. A deed executed while another is in adverse possession of the land is good as color of title. Hoyle v. Mann, 144 Ala. 516, 41 So. 835.

61. A deed which is void both as a conveyance and color of title because of insufficient description is not admissible to show title in the grantee though he entered into possession of some land thereunder. Whitehead v. Pitts [Ga.] 56 S. E. 1004. A deed describing land different from that claimed is not translative of title and does not furnish a basis for operation of the ten-year statute. Albert Hanson Lumber Co. v. Angelloz [La.] 43 So. 529.

62. Knowledge by entryman that his first entry has been rejected does not impute bad faith to a taking of possession on advice of counsel under a second entry which was subsequently canceled without his knowledge. Iowa R. Land Co. v. Blumer, 206 U. S. 482, 51 Law. Ed. 1148.

63. Bradbury v. Dumond [Ark.] 96 S. W. 390.

64. Bradbury v. Dumond [Ark.] 96 S. W. 390. In order to constitute a deed color of title the grantee must have taken possession of some part of the land described claiming title to the whole. Henry v. Frohlichstein [Ala.] 43 So. 126. Where there was a hiatus in the chain of title under which one claimed the defect was fatal to his claim of adverse possession as to land claimed under color of title. Morgan v. Pott [Mo. App.] 101 S. W. 717.

65. See 7 C. L. 52.

66. Kirby's Dig. § 5057, providing that payment of taxes under color of title to wild land is possession, does not apply where part of the particular tract is improved and occupied by another. Wheeler v. Foote [Ark.] 97 S. W. 447. A statute providing that unimproved and uninclosed land shall be deemed to be in the possession of the person who pays taxes does not apply where part of the tract is improved and occupied by another. Connerly v. Dickinson [Ark.] 99 S. W. 82.

67. Acts 1889, p. 117, c. 66, provides that unimproved land shall be deemed to be in the possession of one who pays taxes for seven years, and that at least three of the payments must have been made subsequent to the statute. Held one invoking the statute has the burden to prove that the land was unimproved in order to bring the payments within the operation of the statute. Gaither v. Gage [Ark.] 100 S. W. 80.

68. Under Acts 1899, p. 117, providing that unimproved and uninclosed land is deemed to be in the possession of one who pays taxes for seven years, the possession begins from the first payment and continues though he subsequently takes actual possession. Gaither v. Gage [Ark.] 100 S. W. 80.

69. The fact that lands were assessed to a certain person was not proof that he had paid taxes thereon as an evidence of ownership to establish a claim of adverse possession. Kennedy v. Sanders [Miss.] 43 So. 913.

70. Taxes must be paid for seven years. Osceola Land Co. v. Chicago Mill & Lumber Co. [Ark.] 103 S. W. 609.

71. Under Kirby's Dig. § 5057, there must be payment of taxes on vacant land for seven successive years, and the person claiming must have had color of title during an entire period of seven years. Updegraff v. Marked Tree Lumber Co. [Ark.] 103 S. W. 606.

72. See 7 C. L. 52.

73. Where one has no color of title, he acquires title only to the area of land actually in his possession. Grant v. Oregon Nav. Co. [Or.] 90 P. 178. One who claims under the ten-year statute by naked possession cannot extend such possession by construction unless he has maintained an open claim to a well defined, larger survey of which his actual possession forms a part, or has maintained a claim to a well defined tract. Rice's Ex'r v. Goolsbee [Tex. Civ. App.] 99 S. W. 1031. Evidence insufficient to show that one entering a survey exceeding 160 acres, and taking actual possession of a small portion of the tract, held constructive possession of any land in the survey outside his enclosure. Id. One cannot enter on a survey exceeding 160 acres and by actual possession of a small tract of it and a maintained assertion of a general and indefinite claim to 160 acres, for ten years, become entitled to select 160 acres out of a larger survey or have the court select it for him. Id.

74. Actual possession of part of a tract under color of title to the whole in general constitutes possession of the whole as to lands of the state as against persons not lawfully claiming under it. Green v. Pen-

the title until invalid by actual occupancy of a portion of the tract.[76] This rule does not apply as between intruders.[77] Where two patents to state land conflict and the junior patentee takes possession of the strip within the interlock, claiming the whole within the boundary, he thereby ousts the senior patentee of his constructive seisin and becomes actually possessed to the extent of his grant.[78] But if his settlement be outside the interlock, he only acquires possession of that part of the land within his boundaries and without the interlock.[79]

§ 11. *Sufficiency of possession.*[80]—The sufficiency of acts to constitute adverse possession is governed by the facts of each particular case,[81] and adverse possession

nington, 105 Va. 801, 54 S. E. 877. Actual possession of a portion of a tract under a tax deed extends to the entire tract where the residue is not in the actual possession of another. Jones v. Pond & Decker Mfg. Co., 79 Ark. 194, 96 S. W. 756. The fact that one owning a survey had the lines run when he acquired title and continued in actual possession of a portion of the tract paying taxes and claiming title to the extent of the boundaries gives him constructive possession of all land within the true boundaries of the survey. Davidson v. Equitable Securities Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 95, 96 S. W. 787. One who enters under a deed duly recorded and improves or encloses a portion of the tract is in actual possession to the extent of his enclosure and in constructive possession as to the remainder of the tract. Id. Possession of twenty acres of a quarter section under a donation deed gives constructive possession coextensive with the limits of the grant. Connerly v. Dickinson [Ark.] 99 S. W. 82.

Occupancy through a tenant of part of a tract under color of title to the whole gives the occupant title to the whole. Wheeler v. Foote [Ark.] 97 S. W. 447. Proof of adverse possession against a patent must show actual, adverse, and uninterrupted possession to a well defined boundary. Kountze v. Hatfield, 30 Ky. L. R. 589, 99 S. W. 262. In an action to establish adverse possession against a patent, the court should define adverse possession and charge that the patentee was owner of all land within the description of the patent except the tract which had been held adversely by another for the statutory period. Id. Under Rev. St. 1895, arts. 3343, 3344, a trespasser cannot acquire title to more than 160 acres, but one who takes possession and holds under a deed or memorandum duly recorded has possession coextensive with the description in the instrument. State Nat. Bk. v. Roberts [Tex. Civ. App.] 103 S. W. 454. Under Sayle's Ann. Civ. St. 1897, art. 3344, adverse possession may extend to an entire tract of 160 acres though all of it is not enclosed. Webb v. Lyerla [Tex. Civ. App.] 16 Tex. Ct. Rep. 199, 94 S. W. 1095. A deed from husband and wife of the wife's land purporting to be the deed of the husband, together with deeds from other heirs, duly recorded, was sufficient to authorize recovery by the grantee to the extent of the boundaries of the tract described under the ten-year statute, though the deed was defectively acknowledged by the wife. State Nat. Bk. v. Roberts [Tex. Civ. App.] 103 S. W. 454.

75. Constructive possession exists where a person having paper title to a tract is in actual possession of a part only of it. Hence adjacent owners may be in constructive possession of the same land which is included in the boundaries of both tracts. In such case adverse possession runs in favor of neither. Harriss v. Howard, 126 Ga. 325, 55 S. E. 59.

76. An actual occupancy of a part of a contiguous tract owned by another does not oust the possession of the true owner even though both tracts be described in the same instrument. Hardie v. Investment Guaranty Trust Co. [Ark.] 98 S. W. 701. Where two persons each claim title to an entire tract by adverse possession and each was in actual possession of a portion of the tract claiming title to the whole by constructive possession, neither could claim as against the other land of which he was not in possession. Morris v. Jacks [Tex. Civ. App.] 16 Tex. Ct. Rep. 764, 96 S. W. 637.

77. The principal that an owner in actual possession of a portion of a tract claiming title to the whole has constructive possession of all land not actually possessed by an intruder, though his actual possession is not within the limits of the deed under which the intruder claims, does not apply as between two intruders. Morris v. Jacks [Tex. Civ. App.] 16 Tex. Ct. Rep. 764, 96 S. W. 637.

78, 79. Green v. Pennington, 105 Va. 801, 54 S. E. 877.

80. See 7 C. L. 53.

81. Possession of defendant in ejectment required in order to sustain such action under Rev. St. 1899, § 3056, need not be sufficient to sustain adverse possession. Hunter v. Wethington [Mo.] 103 S. W. 543.

Occasional breaks in an inclosure will not destroy the character of the possession. Where a river forming a part of the inclosure went dry at times. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347.

Evidence sufficient to show adverse possession within Code Civ. Proc. §§ 369, 370. Freedman v. Oppenheim [N. Y.] 79 N. E. 841.

Evidence insufficient to show adverse use of the waters of a stream for the statutory period. Burson v. Percy [Neb.] 110 N. W. 544. Evidence sufficient to show that occupancy was by sufferance and not under a claim of ownership. Page v. Bellamy, 222 Ill. 556, 78 N. E. 938. Evidence insufficient where it appeared that all that was done was to pay taxes, that there was no building on the land, that scows and houseboats tied up there, but were not used continuously. Seabrook v. Coos Bay Ice Co. [Or.] 89 P. 417.

Possession held sufficient: Evidence sufficient to show adverse possession where one improved, **fenced, and sowed land.** Vanderbilt v. Johnson, 141 N. C. 370, 54 S. E. 293.

In the absence of a license which precludes the possibility of a claim of adverse possession, or the execution of an agreement in accordance with law granting the right of occupancy for a fixed period, **the placing of a permanent structure on the land** of another constitutes adverse and hostile possession under which title may be claimed after twenty-one years. McCleery v. Alton, 8 Ohio C. C. (N. S.) 481. Evidence sufficient to show hostile and adverse possession where the land was **platted as part of an addition to a city,** stakes driven to mark lot boundaries, plats filed for record, and taxes paid by occupants, and that there was general recognition of the occupant's ownership. Northern Pac. R. Co. v. Spokane [Wash.] 88 P. 135. Evidence sufficient to show that one who had been in possession for thirty years with the knowledge of others who might have an interest in the property and who had **made improvements** had acquired title. Morris v. Morris, 99 N. Y. S. 964. Where the description of land shows the boundary line to be a straight line, it is established by the wall of **a permanent building** standing for the statutory period even though the building does not extend the entire length of the boundary. The occupancy was such as to give notice of the extent of the adverse claim. Wilson v. Sidle, 4 Ohio N. P. (N. S.) 465.

Cutting wood and grass, pasturing cattle, etc., are regarded as acts tending to show adverse possession, but such acts must be exclusive and continued for twenty years. Nevin v. Disharoon [Del.] 66 A. 362. Pasturing land, taking timber from it, clearing a portion of it (an island), and having had possession and owned land on both sides of it for fifty years, held sufficient. Wall v. Wall, 142 N. C. 387, 55 S. E. 283. A railroad which lays out a right of way 200 feet wide and maintains it to that width by **keeping it clear of trees and undergrowth** acquires title to such width though its grant is only of a "right of way." Bennett v. Atlantic Coast Line R. Co., 126 Ga. 411, 55 S. E. 177. Where adverse possession was asserted by one cotenant against another, an instruction that it was not necessary that the occupation should be such that a mere stranger passing would see that some one was in possession claiming title to the whole section, but that it was sufficient if those in the neighborhood appreciated that he was in possession and claimed title. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380. To establish a prescriptive right in the public to use a strip of land as part of a highway where no act has been done by the owner or public to indicate that the same is part of the highway, it must appear that a well defined line of travel has existed over the property for at least 15 years, and that the use by the public has been adverse, continuous, and with the knowledge of the owner. City of Chicago v. Galt, 224 Ill. 421, 79 N. C. 701. To acquire title under the twenty-year statute it is essential that the **occupancy be under a claim of ownership.** Page v. Bellamy, 222 Ill. 556, 78 N. E. 938.

Payment of taxes for ten years together with **actual use and cultivation** of the land is a strong circumstance tending to show adverse possession and sufficient to support a finding that the party held under a claim of ownership. Dredla v. Patz [Neb.] 111 N. W. 136. Where a mortgage foreclosure proceeding was prosecuted to judgment, but there was no sale but the mortgagee went into possession, held that he held adversely. Becker v. McCrea, 103 N. Y. S. 963. The possession of one who entered under parol gift to be adverse must be accompanied by a claim of right and hostility to the donor's title. Gillispie v. Gillispie [Ala.] 43 So. 12. The occupation of pine land by annually **making turpentine** on it is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. Richbourg v. Rose [Fla.] 44 So. 69. Where land was **enclosed** by a fence on all sides except where bounded by impassable water barriers, and such fences were maintained for many years to restrain cattle, and all taxes on the land were paid, held sufficient to show title by adverse possession under both the five and ten-year statutes. Loring v. Jackson [Tex. Civ. App.] 95 S. W. 19. Where at the time one acquired title to his inclosure it contained a portion of an adjoining railroad's right of way, and he held it adversely for fifteen years, the rights of the railroad company were barred. Louisville & N. R. Co. v. Smith [Ky.] 101 S. W. 317.

Held insufficient: Encroachments over the line of mere ornamental fixtures held not adverse possession. Van Horn v. Stuyvesant, 50 Misc. 432, 100 N. Y. S. 547. Adverse possession of a mine is **not initiated by sinking deeper by six or eight feet a shaft of unstated depth already existing.** Costello v. Muheim [Ariz.] 84 P. 906. Evidence insufficient to show adverse possession under color of title where one went into possession as a squatter, acquired a deed and had it recorded only a few days prior to suit brought against him, had paid no taxes, and cleared only five acres in twelve years. Hunter v. Wethington [Mo.] 103 S. W. 543. Where the lessor of a lot had no title to a strip thereof, the **construction thereon of a sidewalk** was not adverse possession under the twelve-year statute. Miller v. O'Leary [Wash.] 87 P. 113.

Hunting, fishing, and trapping on land useless for any other purpose where it appeared that other persons had enjoyed it in these respects also held insufficient to show adverse possession. Austin v. Minor [Va.] 57 S. E. 609. An instruction that to support title by adverse possession the possession must have been actual, open, notorious, and exclusive, and where possession was of such a small tract that a reasonably prudent owner would not have notice that his lands were included, the possession would be insufficient as to lands outside the inclosure was proper. Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 So. 612. An instruction that if the evidence failed to show that a sufficient portion of lands was enclosed by a person claiming title by adverse possession, that would give notice to a reasonably prudent owner that the enclosure included a portion of his lands, such inclosure would not be sufficiently notorious to extend possession outside the inclosure, was not erroneous as going beyond the rule of notoriety. Id. The doctrine of constructive possession of an entire tract by a cultivation of a part accompanied by color of title to the whole does not apply to large tracts not purchased for cultivation, nor where one cultivates a few acres in an uncultivated township for the purpose of

being largely a question of intention, whether certain acts constitute it is generally a question of fact [82] unless it conclusively appears as a matter of law.[83]

§ 12. *Pleading, evidence, and instructions.*[84]—Adverse possession as a defense must be pleaded.[85]

claiming the entire township. Id. Proof of **payment of taxes** for eleven years raises no presumption of possession during such period. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572. Mere payment of taxes is insufficient. Overton v. Overton, 29 Ky. L. R. 736, 96 S. W. 469.

Occasionally cutting timber from land is insufficient. Auxier v. Herald, 29 Ky. L. R. 1093, 96 S. W. 915. An **open and notorious claim of ownership for a long time** does not raise a presumption of law that there has been a conveyance. Poland v. Porter [Tex. Civ. App.] 98 S. W. 214.

Mere cutting of timber, selling others the right to do so, and pasturing the land, do not amount to adverse possession though done under color and claim of title. Crain v. Peterman, 200 Mo. 295, 98 S. W. 600.

Payment of taxes, occasional cutting of timber, and employing others to prevent trespass. Connerly v. Dickenson [Ark.] 99 S. W. 82. Evidence that one who purchased a tax title **cut timber** on the land to the extent of several hundred cords, and that no one except himself did cut timber after he acquired the tax title, held insufficient where such cutting was not all done upon a continuous incursion nor by many continuous trespasses. Earle Improvement Co. v. Chatfield [Ark.] 99 S. W. 84.

Obtaining conveyances of land does not constitute adverse holding. Collingsworth v. Enterprise Land, Mineral & Lumber Co., 30 Ky. L. R. 467, 99 S. W. 234. Where minerals underlying the surface have been severed from the land by conveyance, **possession of the surface is not possession of the minerals.** Gordon v. Park [Mo.] 100 S. W. 621.

Actual possession, use, and enjoyment is insufficient. Earnest v. Lake [Tex. Civ. App.] 101 S. W. 479. Under Sayle's Ann. Civ. St. 1897, art. 3346, providing that possession by one owning or claiming 5,000 acres or more enclosed by a fence in connection therewith or adjoining thereto shall not be in peaceable and adverse possession under the ten-year statute unless the land belonging to another is segregated by a fence from the adjoining lands or unless one-tenth thereof is cultivated, held, where 555 acres was included in an inclosure containing 10,000 acres belonging to various parties, and there was no segregation as required, possession for ten years was insufficient. Flack v. Branan [Tex. Civ. App.] 101 S. W. 537. Where one entered land not knowing where the boundaries were or who owned it, **never listed it for taxation nor paid taxes, but simply claimed** that he had more right to it than any one else, his possession was not adverse. Heckescher v. Cooper [Mo.] 101 S. W. 658.

Cutting timber, paying taxes, and protecting the land from trespass is insufficient where there was no color of title. Morgan v. Pott [Mo. App.] 101 S. W. 717. Where one without deed or right entered 320 acres intending to acquire it by limitation, cleared and fenced 40 acres, and claimed the entire tract until he was told that he could acquire only 160 acres, whereupon he claimed only the south half but never had it surveyed. He had 40 acres surveyed and paid taxes on it but on no more of the land. He admitted that his claim had been merely mental until within two or three years. Held not to show adverse possession to more than 40 acres. White v. Eavenson [Tex. Civ. App.] 101 S. W. 1029. The fact that one who claimed land by adverse possession **camped upon it for the purpose of hunting** and on his return after an absence found certain buildings erected on the land without evidence of who erected them does not show an adverse occupation. Nona Mills Co. v. Wright [Tex.] 102 S. W. 1118.

Mere occupancy of a tract of wild land **for camping and hunting** purposes is insufficient. Nona Mills Co. v. Wright [Tex.] 102 S. W. 1118. Where the fee owner **built and maintained fences** across a highway for twenty years and for thirteen years maintained a stable on the inclosed land the public continuing to pass without hindrance, did not show adverse possession. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914.

Mere living on land and cultivating it at times for short periods only is insufficient. Overton v. Overton, 29 Ky. L. R. 736, 96 S. W. 469.

82. See post, § 13.

83. Adverse user of a way for twenty years conclusively shows an abandonment to the public. Riverside Tp. v. Pennsylvania R. Co. [N. J. Err. & App.] 66 A. 433. Where trustees of a church go into possession under a void deed and hold possession for twenty years, they acquire title. Regents of University v. Calvary M. E. Church South Trustees [Md.] 65 A. 398; Dickerson v. Franklin Street Presbyterian Church Trustees [Md.] 66 A. 494. Where one offers to dedicate land for a public park but continues in possession, excluding the public for twenty years, he acquires title. Canton Co. v. Baltimore [Md.] 66 A. 679. Where land is claimed by dedication, the fact that the owner in a mortgage excepted such tract and referred to it as dedicated does not interfere with his claim of title by adverse possession where he occupied it for over thirty years after the date of the mortgage, and it did not appear that the dedication was ever accepted. Id. Where one took possession of a lot belonging to a city and used it for twenty years, and the lines were marked by city officials and he paid taxes on it for six years, held he acquired title. Baltimore City v. Rowe [Md.] 67 A. 93. One who was in adverse possession for twenty-five years before action brought to recover the land had title by limitations. Hudson v. Stillwell [Ark.] 98 S. W. 356.

84. See 7 C. L. 55.

85. A plea that the defendant states that the cause of action if cause of action it be did not accrue within seven years next prior to commencement of the action, and the defendant here sets up, etc., sufficiently pleads the statute. McKewen v. Allen [Ark.] 96 S. W. 392. "Defendants, for a further defense,

Evidence.[86]—Every presumption is indulged in favor of a possession in subordination to the title of the true owner,[87] and one who asserts title by adverse possession has the burden to prove it [88] by clear and positive evidence.[89] The evidence

plead the statute of limitations of 20 years adverse possession under known and visible lines and boundaries in such cases provided as a bar to plaintiff's recovery" sufficiently pleads the statute. Duckworth v. Duckworth [N. C.] 57 S. E. 396.

86. See 7 C. L. 55.

87. The law will not presume that the possession is adverse, but every presumption is in favor of possession in subordination to the title of the true owner. Johanson v. Atlantic City R. Co. [N. J. Err. & App.] 64 A. 1061. Every presumption is in favor of a possession in subordination to the title of the true owner and an adverse possession must be established by clear and positive proof. Gilbert v. Southern Land & Timber Co. [Fla.] 43 So. 754.

88. Nevin v. Disharoon [Del.] 66 A. 362; Calhoun v. Moore, 79 Ark. 109, 94 S. W. 931; McAllen v. Alonzo [Tex. Civ. App.] 102 S. W. 475; Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 So. 612; Pennington v. Underwood, 59 W. Va. 340, 53 S. E. 465. One who asserts a prescriptive right to flow lands has the burden to prove it. Dutton v. Stoughton [Vt.] 65 A. 91. Claimant must show adverse possession by preponderance of evidence. Morrison v. Bomer, 195 Mo. 535, 94 S. W. 524. Where in ejectment the defense of adverse possession is based on a mixed possession by both parties, the right of possession is in the one who shows legal title. Nevin v. Disharoon [Del.] 66 A. 362.

89. Where the evidence offered to establish adverse possession is uncertain as to the date when the acts constituting adverse possession were commenced, and it does not clearly appear that they were commenced seven years prior to action brought by the record owner, a verdict for the record owner will not be disturbed. Gilbert v. Southern Land & Timber Co. [Fla.] 43 So. 754.

Evidence sufficient. Daniels v. Murray [Tex. Civ. App.] 103 S. W. 425; Clay City Nat. Bank v. Townsend, 30 Ky. L. R. 1219, 100 S. W. 1196; Blackburn v. Hall, 30 Ky. L. R. 134, 97 S. W. 399; Atlanta & W. P. R. Co. v. Atlanta, etc., R. Co., 125 Ga. 529, 54 S. E. 736; Sawbridge v. Fergus Falls [Minn.] 112 N. W. 385; Dredla v. Patz [Neb.] 111 N. W. 136. To show that a county had acquired title by adverse possession. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368. It is sufficient that a defendant claiming title by adverse possession prove by a preponderance of the evidence that his building which stands in part on his own land and in part on the disputed strip covers exactly the same and no more ground than it has covered for twenty-one years, and he should not be required by the charge of the court to establish this fact by "clear" proof. Heller v. Hawley, 8 Ohio C. C. (N. S.) 265. Where one tenant in common executes a deed to the entire premises, the possession of the purchaser thereunder is adverse to other cotenants. Gulf Red Cedar Lumber Co. v. Crenshaw [Ala.] 42 So. 564. Where one entered under color of title and held possession for fifteen years, he acquired title by adverse possession. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593. Where one in possession conveyed by quitclaim deed to another who took possession under color of title and held open and notorious possession, paid taxes, and made valuable improvements for five years, he acquired title by adverse possession. Little v. Crawford [Idaho] 88 P. 974. Where one was in actual possession in good faith under a tax deed and conveyances from the common source as color of title and had paid taxes for nine years, she acquired title. Laws v. Newkirk [Colo.] 88 P. 861. Evidence sufficient to show that one purchased land in 1860, at once took possession, and thereafter exercised acts of exclusive ownership over the land. Cornett v. Moore, 30 Ky. L. R. 280, 97 S. W. 380. Evidence sufficient to show that title had been acquired where the claimant had been in possession under color of title and had paid taxes. Samuel & Jessie Kenney Presbyterian Home v. Kenney [Wash.] 88 P. 108. Evidence sufficient to show that one had been in adverse possession of a strip of land under the eaves of his barn for the statutory period. Weeks v. Upton, 99 Minn. 410, 109 N. W. 828. Evidence sufficient to show that a city had acquired a prescriptive right to a strip of land as part of a highway. City of Chicago v. Galt, 224 Ill. 421, 79 N. E. 701.

Evidence insufficient. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4; McMahon v. Yazoo Delta Lumber Co. [Miss.] 43 So. 957; Dahlem v. Abbott [Mich.] 13 Det. Leg. N. 894, 110 N. W. 47; Miller v. Tyson [Tex. Civ. App.] 100 S. W. 1199. Evidence insufficient to show that the owner of the paper title to underlying minerals had been divested of his title by adverse possession. Gordon v. Park [Mo.] 100 S. W. 621. Evidence that a person bought an improvement, went into possession, and claimed 60 acres of a league claimed by a company; that an agent of the company agreed to give him 160 acres if he would look after the entire league; that before the five years expired he sold his interest to another, held insufficient to show possession in the company during the possession of successive holders of the improvement within the five and ten-year statutes. Wright v. Nona Mills Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 620, 98 S. W. 917. Evidence insufficient to show adverse possession where one went into possession under a purchase of improvements on land believing that it belonged to the government. He subsequently learned that another person had title and offered to purchase from him. It did not appear that such third person was ever advised that the occupant claimed adversely. Held insufficient to show adverse possession as against him. Missouri Lumber & Mining Co. v. Jewell, 200 Mo. 707, 98 S. W. 578. Evidence insufficient to show that defendant held actual possession of an entire quarter section, notwithstanding possession of another portion of the same survey by another person. Texas & N. O. R. Co. v. Haynes [Tex. Civ. App.] 17 Tex. Ct. Rep. 422, 97 S. W. 849. Evidence insufficient to give title under either the five or ten-year statutes. Mann v. Hossack [Tex. Civ. App.]

must suffice to bound or define the area possessed,[90] and establish all the essential elements.[91] The question as to whether one holds adversely is generally one of fact.[92] The law presumes a grant from adverse possession for the statutory period,[93] but such presumption is not conclusive where the possession relied upon is for less than the statutory period or is of a mixed character.[94] Evidence of all acts of the claimant tending to show the extent [95] and nature of his claim [96] is admissible.

16 Tex. Ct. Rep. 835, 96 S. W. 767. The rights of the legal owner of land not held adversely are not affected by his mere nonclaim for several years, or failure to pay taxes, or the payment of taxes by another claiming under a void deed. Hunter v. Hodgson [Tex. Civ. App.] 15 Tex. Ct. Rep. 110, 95 S. W. 637. Evidence insufficient to show that possession under a parol gift was adverse to the donor's title. Gillespie v. Gillespie [Ala.] 43 So. 12. Evidence insufficient to show adverse possession of a public road. Perry v. Staple [Neb.] 110 N. W. 652. Evidence insufficient to show adverse possession where one cotenant of wild land permitted it to be pastured without the other cotenant's consent. No particular thing was done, however, during subsequent years and the land was assessed as nonresident and vacant. The claimant paid taxes for some years and bid off the land or purchased from others at tax sales. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

90. Smith v. Combs, 29 Ky. L. R. 731, 96 S. W. 1134. Where one relies on actual possession of a portion of a tract without color of title, he has the burden to identify the portion of which he was possessed. Whitehead v. Pitts [Ga.] 56 S. E. 1004.

91. One claiming by adverse possession has the burden to prove actual adverse and continuous possession. Gaither v. Gage & Co. [Ark.] 100 S. W. 80. He must prove that persons against whom he asserts his rights were not under disability during the prescriptive period. Dees Bros. v. Harrison [Tex. Civ. App.] 95 S. W. 1093. Where one claimed by adverse possession the entire title to land which he previously owned in common with another who had been in rightful possession, the burden was on him to prove that his possession was accompanied by tortious and disloyal acts so as to preclude all doubt as to the character of his holding or of notice thereof to his cotenant. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

92. Henry v. Frohlichstein [Ala.] 43 So. 126; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275. Where there was some evidence of adverse possession for the statutory period, it was not error to refuse to take the case from the jury. Gordon v. Park [Mo.] 100 S. W. 621. The uncontradicted testimony of two witnesses as to the fact of adverse possession does not require a finding of adverse possession. Hunter v. Wethington [Mo.] 103 S. W. 543. Where when one predecessor in title went into possession an old spring was located on adjoining land from which water was taken by him. Some time later he dug a well and when the land was conveyed asserted that the grantee gave him a right to use the well. Held a question of fact whether such use was adverse. Wells v. Parker [N. H.] 66 A. 121. Where one adjacent owner asserted title by adverse possession and the true owner alleged that such possession was under an agreement to surrender when the true line was determined, and the testimony was conflicting as to the terms of the agreement, the question was for the jury, as the plaintiff had the burden to prove it. Crosby v. First Presbyterian Church of El Paso [Tex. Civ. App.] 99 S. W. 584. Evidence as to the good faith of an occupant's claim held for the jury. Perkins Land & Lumber Co. v. Irvin, 200 Mo. 485, 98 S. W. 580. The presumption of grant arising from possession is one for the jury. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. Evidence as to whether there was an ouster by one cotenant so as to give title by adverse possession held for the jury. Hamby v. Folsam [Ala.] 42 So. 548. Whether one had acquired title held a question for the jury where his ancestor had been in possession for several years, and thereafter employed persons to look over the land and paid taxes thereon. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822. Question of adverse possession held for the jury where evidence was conflicting. Theodore Land Co. v. Lyon [Ala.] 41 So. 682. Question as to whether one held adversely held for the jury where a plaintiff in a suit to recover the land testified that a short time before the action was brought the claimant stated that he did not claim the land, but the claimant testified that he did not make such statement. Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 So. 612.

93. Adverse possession for twenty years gives title. Nevin v. Disharoon [Del.] 66 A. 362. The law presumes title from such fact. Id. It is error to refuse to charge in an action against an adverse claimant that, "If the plaintiff has not derived his chain of title to the land in dispute by a chain of conveyances from the government, or from a grantor proved to have been in possession of the land in dispute when he executed the conveyance therefor, your verdict should be for the defendant." Heller v. Hawley, 8 Ohio C. C. (N. S.) 265. The right to maintain the projection of the eaves of a building over the land of another becomes absolute at the end of twenty-one years equally with the right to maintain a foundation or superstructure. McCleery v. Alton, 8 Ohio C. C. (N. S.) 481.

94. Nevin v. Disharoon [Del.] 66 A. 362.

95. Where one claimed an entire tract, evidence that he had paid taxes on but 40 acres was admissible on an issue as to the extent of his claim. White v. Eavenson [Tex. Civ. App.] 101 S. W. 1029. Where one was seeking to prove title in her father by adverse possession, deeds from her brothers and sisters to her were admissible to show that whatever possessory title had been held by her father had vested in her. Henry v. Frohlichstein [Ala.] 43 So. 126.

96. Where one in possession purchases a portion of the tract before the bar of the

Instructions.[97]—Must not be on the weight of evidence [98] and must define the elements of adverse possession.[99]

§ 13. *Nature of title acquired.*[1]—Adverse possession for the statutory period operates as a grant.[2] The title acquired by the adverse occupant in an indefeasible,[3] legal one and not a mere equitable right,[4] and is not divested by a mere recognition of some other title [5] or mere loose talk.[6] An act done after the statutory period has run is important only as a circumstance tending to show the character of the possession during the period.[7]

ADVICE OF COUNSEL, see latest topical index.

statute is complete, it is a circumstance tending to show recognition to title in the vendors and that his possession was not adverse. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525. Where one disclaimed title to property in his return of property for taxation, such disclaimer operated as a waiver of his claim by adverse possession as against the city. Baltimore City v. Rowe [Md.] 67 A. 93. Where one had title by adverse possession, the fact that after judgment against her in an action for broker's services with reference to the property, where the puchaser refused to complete the sale because of a defect in her title, she did not immediately bring suit to quiet title, did not show want of good faith. Laws v. Newkirk [Colo.] 88 P. 861. Where a county claimed land as against a city, different **orders of the commissioner's court** with reference to such property through a series of years were admissible to show exercise of authority by the county over such property. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368. A **map** on which the property in question was designated as "Court House Square," which had been in the possession of the county for 17 years, was admissible. Id. An **assessor's inventory** in his own handwriting is admissible to show that a taxpayer did not claim certain land under a statute requiring the taxpayer to subscribe an oath attached to the inventory. Webb v. Lyerla [Tex. Civ. App.] 16 Tex. Ct. Rep. 199, 94 S. W. 1095.

97. See 7 C. L. 56.

98. Where evidence showed that one had been in possession for the statutory period and afterward acknowledged another title by offering to purchase it, an instruction that if he recognized a superior title before the period had run he did not hold adversely was on the weight of evidence. Shirey v. Whitlow [Ark.] 97 S. W. 444.

99. An instruction that possession must have been "peaceable, distinct, notorious, continued, and hostile," and an appropriation "actual, open, peaceable, under a claim of right inconsistent with the rights of the true owner, and must disseise the owner," is erroneous under a statute requiring actions for the recovery of land in the peaceable and adverse possession of another to be brought within ten years, "peaceable possession" being defined as "continuous and not interrupted by adverse suit," and "adverse possession" as the visible appropriation of land held under a claim inconsistent and hostile to another's. Logan v. Meade [Tex. Civ. App.] 17 Tex. Ct. Rep. 158, 98 S. W. 210.

1. See 7 C. L. 57.

2. Where an adverse possession has continued for a sufficient length of time so that all remedies of the owner are barred, such possession divests the original owner of his title and vests it in the occupant. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792. One claiming title to land in the adverse possession of another cannot as against such occupant make a dedication of such land. Bruce v. Seaboard Air Line Ry. [Fla.] 41 So. 883. In an action for recovery of possession of land from a defendant claiming title by adverse possession, it is error to admit evidence which forces on him a claim of title coming from the common source of title. Heller v. Hawley, 8 Ohio C. C. (N. S.) 265. Performance of the requisites of the five-year statute will vest the claimant with title. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406.

3. A purchaser at tax sale in good faith who has a title from the proper officer, valid in form, and who has possessed by himself and another for ten years has acquired an indefeasible title. Soniat v. Donovan [La.] 43 So. 462. Where one had acquired title by adverse possession, the fact that his grantor had made no claim to certain underlying minerals was immaterial. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593.

4. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

5. Where one has acquired title by adverse possession, a mere recognition of some other title does not revest the title acquired. Shirey v. Whitlow [Ark.] 97 S. W. 444. A subsequent act recognizing the validity of another's claim does not operate to reinvest the title in him. Hudson v. Stillwell [Ark.] 98 S. W. 356. A title acquired by adverse possession is not vitiated by subsequent acceptance of a deed thereto from a third person. Nor does such acceptance estop him to deny that the title was in such third person. Levi v. Mathews [C. C. A.] 145 F. 152.

6. Stumpe v. Kopp [Mo.] 99 S. W. 1073.

7. An act done by one who claims under grant or inheritance from one who acquired title by limitations is not important for any purpose. Hudson v. Stillwell [Ark.] 98 S. W. 356.

AFFIDAVITS.

Who may take.[8]—Affidavits may be taken before any official authorized by law to take them.[9] They should be taken by persons not interested in the outcome of the proceeding in which they are to be used.[10]

Form and requisites.[11]—Judicial notice is taken of the seals of notaries.[12] It is presumed that an officer who takes an affidavit acted within the scope of his authority,[13] hence, omission of the venue is not a fatal defect,[14] nor is the omission of a notarial seal in the absence of a statute requiring the jurat to be so attested;[15] but under the statutes of Nebraska an affidavit must have attached the certificate of the officer before whom taken that the oath was administered by such officer.[16] Failure of the notary to certify when his term of office will expire does not render the affidavit ineffective.[17] In Alabama a statute permits a notary of another state to take affidavits therein for use in Alabama authenticating his act under his own seal without proof of his authority.[18]

Admissibility of affidavit in evidence and effect thereof.[19]—Where affidavits are admissible in evidence, those taken before a notary of another state are generally admissible.[20]

AFFIDAVITS OF MERITS OF CLAIM OR DEFENSE.[21]

The occasion and necessity of affidavits of claim and defense is governed by statute or rule of court.[22] They are designed to clear the issues and prevent sham and frivolous pleading or predicate a default if defense be not made.[23] The right in Pennsylvania to take judgment for the amount admittedly due and to proceed on the remainder is restricted to such as is clearly admitted.[24] An amendment does not necessarily require a new affidavit.[25] The plaintiff's affidavit which cuts off jury trial is to be strictly construed while defendant's is to be liberally con-

8. See 7 C. L. 58.

9. Under Code 1896, § 923, giving circuit court clerks power to take affidavits, a deputy may make a jurat to an affidavit in his own name. Southern R. Co. v. Hundley [Ala.] 44 So. 195. It is presumed that a deputy clerk in whose name a jurat was made was a de jure deputy. Id.

10. It is not commendable practice for one of the solicitors of record in a suit in chancery, especially where an injunction is sought, to have the affidavits of his client or of other parties to be used in the cause sworn to before himself as an official empowered to administer oaths. Savage v. Parker [Fla.] 43 So. 507. It is improper for affiant's solicitor to act as notary in taking an affidavit. McBride v. People, 127 Ill. App. 344.

11. See 7 C. L. 58.

12. An affidavit of appeal taken before a notary of another state is efficacious. Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669.

13, 14, 15. Meldrum v. U. S., 151 F. 177.

16. Sebesta v. Supreme Ct. of Honor [Neb.] 109 N. W. 166.

17. Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669.

18. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71.

19. See 7 C. L. 58.

20. Under Laws 1896, p. 609, amended by Laws 1903, p. 978, and Code Civ. Proc. § 844, an affidavit taken in another state with the certificate duly annexed, and where it appears that the notary was duly commissioned and qualified to take acknowledgments to be recorded in that state, is admissible in evidence in a New York court. Isman v. Wayburn, 104 N. Y. S. 491. Under Code 1896, § 1799, providing that affidavits required in a suit may be taken outside the state before a notary who shall certify under his hand and seal, it is no objection to the admission of a verified account that the notary outside the state cannot administer an oath unless authorized to do so by the state of his residence. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71; Connellsville Gas Coal Co. v. Baltimore & O. R. Co. [Pa.] 65 A. 669.

21. See 7 C. L. 59.

22. In Cumberland county no affidavit of defense is required by rule of court in appeals from justices of the peace in tort actions. Livingston v. Kerbaugh, 30 Pa. Super. Ct. 534.

23. See 7 C. L. 59, and earlier volumes. Under a rule that certain facts must be put in issue by affidavit, if no such affidavit is filed the fact is not in issue. In an action against a partnership where no affidavit was filed with the pleadings denying the partnership, as required by Rev. St. 1899, § 746, the fact of partnership was not in issue. Nephler v. Woodward, 200 Mo. 179, 98 S. W. 488.

24. United Oil Cloth Co. v. Dash, 32 Pa. Super. Ct. 155.

25. Cavanaugh v. Witte Gas & Gasoline Engine Co., 123 Ill. App. 571.

strued.[26] The plaintiff cannot turn his affidavit into a pleading, and by anticipating a defense force defendant to a specific denial thereof.[27] The statement of claim must embrace all the facts of a cause of action and not mere conclusions thereof.[28] In so far as the affidavit of defense serves also as a demurrer, its defensive allegations do not eke out the affidavit of claim.[29] A positively verified statement of facts within personal knowledge is not impaired by adding an averment of belief.[30] The statement should not be served till after the writ or at the same time, and if served before it may be bad if it fails to identify the court and case,[31] but a defendant who should have taken notice and defended waives his right to open default entered on such service.[32]

An affidavit of defense may be filed at any time before judgment is entered,[33] and a rule of court authorizing the judge to extend the time within which to plead but not to file an affidavit of defense does not authorize the court to enter judgment for plaintiff after an affidavit has been filed.[34] Judgment may not be entered for want of an affidavit of defense if the statement of claim is insufficient to sustain a judgment.[35] It is proper to deny leave to file an affidavit of defense which contains no defense.[36] If the affidavit be made by a stranger, reason for his so doing must be shown.[37] An affidavit of defense setting forth the nature and character of the defense relied on is sufficient.[38] If by any fair construction the affidavit of defense is within the scope of the plea, trial must proceed in ordinary course.[39] It is not tested as strictly as a special plea on demurrer,[40] but it is to be taken most

26. Dobbins v. Thomas, 26 App. D. C. 157; Potomac Laundry Co. v. Miller, 26 App. D. C. 230.

27. Booth v. Arnold, 27 App. D. C. 287.

28. Averments that the sum claimed is "justly due and owing" will not eke out a deficient statement of the cause of action. Tourison v. Engard, 30 Pa. Super. Ct. 179. The statement consisting of a copy of an account must be capable of certain understanding as to what was furnished. Leek v. Livingston Manor Mfg. Co., 30 Pa. Super. Ct. 377.

29. Question whether informal demurrer to plaintiff's statement of claim, contained in affidavit of defense, was improperly overruled is to be determined from inspection of statement alone, question not being whether statement, viewed in light of averments of affidavit of defense, was sufficient to entitle plaintiff to summary judgment. McGiffin v. Swanson Grocery Co., 29 Pa. Super. Ct. 431.

30. Yearsley v. Glaser, 32 Pa. Super. Ct. 141.

31, 32. Loeb v. Allen, 32 Pa. Super. Ct. 137.

33. Bordentown Banking Co. v. Restein, 214 Pa. 30, 63 A. 451. Judgment may not be entered for plaintiff for want of an affidavit of defense, if such affidavit has been filed, though such judgment might properly have been entered previously. Id. Where an affidavit of defense is filed after the time for doing so has expired, judgment cannot be rendered for want of it if no motion for judgment was made before it was filed. Id. Where a suggestion that the statement is insufficient to entitle plaintiff to judgment is overruled, it is discretionary with the court to enter judgment for plaintiff or allow an affidavit of defense to be filed. Id.

34. Bordentown Banking Co. v. Restein, 214 Pa. 30, 63 A. 451.

35. Where it is doubtful whether at the date judgment was entered for want of an affidavit of defense the required notice of filing the statement of claim had been given, and immediate action was taken to have the default removed and the statement was not sufficient to call for an affidavit of defense, the judgment will be opened. Trescott v. Co-operative Bldg. Bk., 215 Pa. 438, 64 A. 630.

36. Cavanaugh v. Witte Gas & Gasoline Engine Co., 123 Ill. App. 571.

37. Phillips v. Allen, 32 Pa. Super. Ct. 356.

38. Affidavit of defense in an action on a note setting up that there was nothing due thereon held sufficient. Marquis v. McKay [Pa.] 65 A. 678. Where a subcontractor sued a contractor alleging that work was to be paid for on monthly estimates and that the work had been accepted by the city for which it was done, an affidavit of defense denying such facts and alleging that work was not to be paid for until payment was made by the city was sufficient. Vulcanite Pav. Co. v. McNichol, 215 Pa. 100, 64 A. 325. An affidavit of defense in an action on a bond given to protect materialmen, and subcontractors setting forth damage because of failure to deliver material, held sufficient. Brown v. Goweley, 214 Pa. 154, 63 A. 607. Where a landowner delivered a deed in escrow and the person holding it delivered the deed without performance of the conditions, an affidavit of defense denying breach of the conditions was sufficient to prevent judgment. Gochnauer v. Union Trust Co., 214 Pa. 177, 63 A. 595. Statement of nondelivery of goods held sufficient as a defense of want of consideration of notes sued on. Kessler v. Connor, 32 Pa. Super. Ct. 145.

39. Seventy-third rule does not apply. Booth v. Arnold, 27 App. D. C. 287.

40. Yearsley v. Glaser, 32 Pa. Super. Ct. 141. If a defense be stated, it is not to be

strongly against the person who makes it.[41] An affidavit in the form of the Texas statute will not be held objectionable as being in the alternative.[42] A defensive counterclaim must show the amount recoverable or claimed.[43] A defense that the claim was discharged by an accord and satisfaction pursuant to dispute need not specify the items of the dispute.[44] The affidavit of defense may be eked out by averments of the claim.[45] A traverse in the statement of defense must be as broad as the allegation whereon it joins issue.[46]

The affidavit of defense may be received in evidence as an admission.[47]

AFFIRMATIONS, see latest topical index.

AFFRAY.[48]

AGENCY.

§ 1. The Relation Between the Parties (58).
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A. In General; Contract of Agency; Diligence and Good Faith (78).
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Scope.—Agency resulting by operation of law from certain relations, as in the case of partnership,[49] or marriage,[50] and other particular kinds of agencies,[51] are elsewhere treated as well as analogous matter properly pertinent to the relation of master and servant.[52]

§ 1. *The relation between the parties. In general.*[53]—The relation between principal and agent is a fiduciary one representative in function,[54] representation being the test to distinguish agency from option to buy or other contracts entitling

overcome by hypercritical construction. Failure to deny immaterial matter not an admission. Ferris v. Lutes, 30 Pa. Super. Ct. 72.

41. Camden Nat. Bk. v. Fries-Breslin Co., 214 Pa. 395, 63 A. 1022.

42. An affidavit that an account sued on "is not just or true in whole or in part" held not objectionable as being in the alternative under a statute prescribing that form. Milam v. Harrell Lumber Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 429, 97 S. W. 825.

43. Snyder v. Lingo, 30 Pa. Super. Ct. 651.

44. Yearsley v. Glaser, 32 Pa. Super. Ct. 141.

45. Potomac Laundry Co. v. Miller, 26 App. D. C. 230.

46. Denial of agency held too narrow. Martin Co. v. Williams, 30 Pa. Super. Ct. 298.

47. Farmers' & Merchants' Nat. Bk. v. Elizabethtown Nat. Bk., 30 Pa. Super. Ct. 271.

48. No cases have been found for this subject since the last article. See 5 C. L. 64.

49. See Partnership, 8 C. L. 1261.

50. See Husband and Wife, 8 C. L. 122.

51. See Attorneys and Counselors, 7 C. L. 319; Brokers, 7 C. L. 465; Corporations, 7 C. L. 862; Factors, 7 C. L. 1642; Insurance, 8 C. L. 377. On the general law of agency as well as the specific kinds of agency, see **Clark & Skyles Agency.**

52. See Master and Servant, 8 C. L. 840.

53. See 7 C. L. 62.

54. Hahl v. Kellogg [Tex. Civ. App.] 16 Tex. Ct. Rep. 30, 94 S. W. 389; Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P. 39; Lee v. Patillo, 105 Va. 10, 52 S. E. 696; Taylor v. Vail [Vt.] 66 A. 820; Pomeroy v. Wimer [Ind.] 78 N. E. 233.

one to deal for his own interest with another's property.[55] Agency is not enlarged into partnership unless all the elements of the latter are present.[56] An engagement to do a purely ministerial [57] or mechanical [58] service is not agency, nor is the operation of plant under lease,[59] and the actual relation of the parties must be judged from a fair construction of the contract and not from the name they give their relation.[60]

(§ 1) *A. Competency to act as agent or to employ agents* [61] depends primarily on contractual capacity [62] or on corporate power,[63] and, secondarily, on compliance with licensing and other regulations concerning particular agencies,[64] but one may be estopped to deny such capacity.[65]

(§ 1) *B. Creation and existence of the relation.*[66]—No particular form of words is necessary to convey the authority or define the agent's powers respecting ordinary chattel property,[67] but writing is sometimes required by statute as in the case of authority to make a contract for the sale of lands.[68] There are a few other

55. Illustrations: Contract that brokers should be compensated by what they got over a sum fixed was agency and not option. Tate v. Aitken [Cal. App.] 90 P. 836. A letter to a person from the defendant that he might sell defendant's land if able to do so within a certain time, the "letter to be an option," created an agency to sell and not an option to buy, especially as the alleged agent assumed to act throughout as agent. Winders v. Hill, 141 N. C. 694, 54 S. E. 440.

56. A contract made by a traveling buyer with a mill corporation providing that the buyer should receive for his services two-fifths of the net profits of the business with a monthly salary payable out of his share of the profits is a contract of agency and not of partnership. Van Duzer v. Zimmerman Lumber Co. [Miss.] 43 So. 177.

57. Where plaintiff employed defendant to sell land and the agent fraudulently made an offer himself and the plaintiff requested a third party to see if a better price could not be obtained and subsequently told the third party to close the original offer, such third party acting purely in ministerial capacity, was not an agent of the plaintiff so that the plaintiff was bound by his knowledge of the defendant's fraud. Storms v. Mundy [Tex. Civ. App.] 101 S. W. 258.

58. Where a publishing house was employed to manufacture certain books and certain plates for the state in getting out the court reports for which the state paid a certain price upon delivery, this was a special employment and not an agency. State v. State Journal Co. [Neb.] 110 N. W. 763.

59. A contract whereby one street railroad agreed to lease another held not to establish an agency whereby the former company operates as agent for the latter. Moorshead v. United Rys. Co. [Mo.] 100 S. W. 611, afg. 119 Mo. App. 541, 96 S. W. 261.

60. Instrument considered and held to be a conditional sale and not creating an agency for the sale of goods. Bradley, Alderson & Co. v. McAfee, 149 F. 254.

The mere designation of a person as agent does not change the nature of his contract. Defendant agreed to sell all its product to plaintiff who was designated its sole agent within a certain territory, but the contract was held one of sale not agency. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 86 P. 357.

61. See 7 C. L. 62.

62. See Contracts, 7 C. L. 761; Infants, 8 C. L. 267; Insane Persons, 8 C. L. 319; Incompetency, 8 C. L. 169. "Insane cannot appoint." Amos v. American Trust & Sav. Bk., 125 Ill. App. 91.

63. See Corporations, 7 C. L. 862.

64. See Licenses, 8 C. L. 734. See Insurance (duty of filing appointment), 8 C. L. 377; Brokers (necessity of written authority to sell land), 7 C. L. 465.

65. Agent for infant. Jackson v. Gallagher [Ga.] 57 S. E. 750. Insurance agent whose appointment was not filed. Penn. Mut. Life Ins. Co. v. Ornauer [Colo.] 90 P. 846. Authority to sell mules and apply the proceeds to the payment of debts need not be in writing. Hirsh & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678. Even where a statute, such as the statute of frauds, requires an instrument to be in writing in order to bind the party, he may, without writing, authorize an agent to sign in his behalf, unless the statute positively requires such authority to be in writing also. Brandon v. Pritchett, 126 Ga. 286, 55 S. E. 241.

66. See 7 C. L. 62.

67. Lindsley v. McGrath [Mont.] 87 P. 961, citing 5 C. L. 65.

68. California subd. 6, § 1624, Civ. Code. Authority to sell real estate. Davis v. Trachsler [Cal. App.] 86 P. 610. A husband not having written authority from his wife in reference to the sale of land cannot appoint an agent to sell by a written instrument. Kirkpatrick v. Pease [Mo.] 101 S. W. 651. Under Rev. St. 1899, § 3418, where the employment of an agent was not evidenced by a writing signed by the landowner, a written contract of sale made by the broker with a purchaser was unenforceable against the landowner. Young v. Ruhwedel, 119 Mo. App. 231, 96 S. W. 228. Where a real estate broker procures a purchaser according to the terms of a verbal agreement, he is entitled to his commission although the agreement for purchase could not be enforced by the owner. Id. Where the statute requires an agent's authority to sell land to be in writing, yet if the principal admits in open court that the agent was his agent and had authority, there is no necessity for proving that the agent had written authority. Chouteau Land & Lumber Co. v. Chrisman [Mo.] 102 S. W. 973. See Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S. W. 880, where a parole authorization was held sufficient.

instances in which statutes require an agent's authority to be in writing,[69] and in some cases, by statute, the power must be recorded,[70] but a conveyance by an attorney in fact made in pursuance of an unrecorded power is good between the grantor and grantee and those claiming under the grantee.[71] A contract under seal cannot ordinarily be made by an agent in the exercise of an authority resting upon simple contract.[72] Upon the taking over of the principal's business by a corporation and the subsequent practice of dealing with the corporation, a new relation is formed.[73]

If an agency is created by a written instrument, the construction thereof and the determination of the nature and extent of the agent's powers are for the court,[74] and so also is an oral contract when the facts are not in dispute and the inferences from them are not in doubt,[75] but where the fact of agency rests in parol and is a matter of dispute, it is a question for the jury.[76]

Intermediaries and dual agencies.[77]—One person may act for two principals if they consent thereto,[78] but where an agent acts in a dual capacity for both parties to a contract without their consent, the contract is voidable by either party upon discovery [79] and it is not necessary to show injury,[80] but one acting for two separate principals may transact business with a third party without a disclosure of his dual agency to such third party.[81] An intermediary may be agent for one principal in some dealings and for the other in other dealings in the same transactions.[82]

69. By statute in New Jersey leases made by an agent for terms exceeding three years must be in writing signed by the agent whose authority also must be in writing, and where an agent signs a lease without the written authority required by statute, such a lease has the effect of a mere lease at will. Gen. St., p. 1602. Clement v. Young-McShea Amusement Co. [N. J. Err. & App.] 67 A. 82. By statute in Missouri it is a misdemeanor for any person in cities of a certain size to offer for sale any property without a written authority. Staehlin v. Hoffmeister, 121 Mo. App. 24, 97 S. W. 970. By statute in New York an agent's authority to make a written lease of real estate for more than a year must be in writing. Laws 1896, p. 592, c. 547, § 207. Larkin v. Radosta, 104 N. Y. S. 165.

70. By statute in Kentucky (1903, § 499), a power of attorney to sell real estate must be recorded in order that a conveyance may be good as against creditors and purchasers. Godsey v. Standifer [Ky.] 101 S. W. 921. In South Carolina an agreement to receive and sell goods as the agent of another, title to remain in the principal until paid for, must be recorded to be valid against purchasers Plaintiff shipped meat to an agent to be sold, title to remain in plaintiff until sold. Armour & Co. v. Ross [S. C.] 55 S. E. 315.

71. Godsey v. Standifer [Ky.] 101 S. W. 921.

72. Horner v. Beasley [Md.] 65 A. 820.

73. Substitution of principals was effected. Stone v. Fox Mach. Co., 145 Mich. 689, 13 Det. Leg. N. 831, 109 N. W. 659.

74. Groscup v. Downey [Md.] 65 A. 930; State v. Fellows, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825.

75. Agent to make investment not an agent to receive interest and principal. Belcher v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 85; Ryle v. Manchester Bldg. & Loan Ass'n [N. J.] 67 A. 87; Hoskins v. O'Brien [Wis.] 112 N. W. 466.

76. Robinson & Co. v. Green [Ala.] 43 So. 797; Bloch v. De Lucia [Conn.] 66 A. 769; Groscup v. Downey [Md.] 65 A. 930; Norden v. Duke, 104 N. Y. S. 854; Heinzerling v. Agen [Wash.] 90 P. 262. Where after a real estate broker has failed to make a sale the owner requests the broker to let him know if he finds any one willing to take the land but giving him no authority to dispose of it, and the broker later makes an exchange to himself with the owner who examines the land exchanged for himself, is informed of all the facts connected therewith, and announces himself as satisfied with the bargain, the true character of the broker's relation was a question for the jury. Pomeroy v. Wimer [Ind.] 78 N. E. 233

77. See 7 C. L. 63.

78. An attorney acting openly for both parties. Taylor v. Vail [Vt.] 66 A. 820. Where real estate brokers named in a contract of sale as purchasers inform the owner of land that they are selling through other brokers to an unknown purchaser and no objection is made, there is no fraud by the agents which will avoid the sale. Woodward v. Davidson, 150 F. 840. Evidence held not to show consent of both parties to double agency in land brokerage. Marshall v. Reed, 32 Pa. Super. Ct. 60.

79. Agent to obtain options upon lands took commissions for the sale of same from both owners. Truslow v. Parkersburg Bridge & Terminal R. Co. [W. Va.] 57 S. E. 51.

80. Truslow v. Parkersburg Bridge & Terminal R. Co. [W. Va.] 57 S. E. 51.

81. Insurance agent representing two companies may cancel the policy of one and issue a policy of the other to the insured upon which such other company is liable. Aetna Ins. Co. v. Stambaugh-Thompson Co. [Ohio] 81 N. E. 173.

82. Where a party was the agent of a purchaser of land for the purpose of corresponding with the owner, he is not the agent to receive the deed if it is intrusted to him

Acts of a subagent are not binding on the principal unless the power of delegation was granted the agent.[83] The authority to employ subagents may be implied from the nature of the duties and powers committed to the general agent.[84]

(§ 1) *C. Implied agency from relation of parties.*[85]—For certain purposes incidental to the relation one person may be the implied agent for another to whom he sustains a particular relation.[86] Where a husband signs a lease for premises he is not the implied agent of his wife in so doing or of any other member of the family.[87]

(§ 1) *D. Evidence of agency.*[88]—Except as statutes provide for a writing, agency may be shown by parol,[89] and the fact that one is the agent of a corporation may be so shown as in the case of private persons.[90] The want of the necessary writing does not exclude parol proof of agency in a connection where the contract is not relied on.[91] The relation must be proved by facts and not by conclusions.[92] Agency may be established by inference from the circumstances and facts of his dealings for the principal,[93] and if it is proved that the alleged principal knew or ought to have known that an agent assumed authority and made no objection, together with proof of the acts of the agent it may be sufficient.[94] Facts consistent with the existence of agency alone or facts inconsistent therewith may be adduced to show agency or disprove it.[95] Thus, where there is prima facie evidence of agency, the

to be delivered to the purchaser upon payment of the purchase price, but becomes the agent of the owner for that purpose. Sennett v. Melville [Neb.] 107 N. W. 991. The plaintiff authorized P to invest her money and the defendants had arranged with P to raise money to pay off certain bonds. Plaintiff delivered to P the full amount necessary to pay off the bonds receiving the defendants' note therefor. The defendants then refused to receive the full amount at that time and the balance was retained by P. Subsequently the money was lost by a bank failure. Held that P was solely the agent of the defendants after the money was paid to him, hence the loss must fall upon them. Bemiss v. Robertson, 30 Ky. L. R. 521, 99 S. W. 291.

83. Chouteau Land & Lumber Co. v. Chrisman [Mo.] 102 S. W. 973. An agent has not as a matter of law authority to delegate his authority to another. Agent to sell real estate. Groscup v. Downey [Md.] 65 A. 930.

84. The superior officer of a railroad having charge of mail transportation may direct a station agent to make contracts for the handling of mail at his station. Blowers v. Southern R. Co., 74 S. C. 221, 54 S. E. 368. Where a landowner employed the general manager of a large railroad to sell lots, and he being some distance from the premises engaged the station agent to point out and describe lots to prospective purchasers, the subagent is the agent of the landowner. Wright v. Isaacks [Tex. Civ. App.] 15 Tex. Ct. Rep. 991, 95 S. W. 55; Groscup v. Downey [Md.] 65 A. 930. Where an agent for a consideration agrees to collect a bill of exchange and employs another agent for that purpose, the act of the subagent is the act of the original agent and not of the principal. Bank accepted a draft for collection and sent it to another for collection with authority to collect and place the proceeds to its credit. The second bank was agent of the first, and for loss was liable to such first bank and not to the principal (Landa v. Traders' Bk., 118 Mo. App. 356, 94 S. W. 770), but where he simply accepts one for collection without any agreement for consideration and employs another agent for the purpose, the subagent is the agent of the principal and not of the original agent (Id.).

85. See 7 C. L. 63.

86. See Husband and Wife, 8 C. L. 122; Parent and Child, 8 C. L. 1225, and like titles. See, also, **special article 3 C. L. 101.**

87. Husband could not be a witness for his wife who was injured owing to defective premises on the ground that he was her agent. Bianchi v. Del Valle, 117 La. 587, 42 So. 148.

88. See 7 C. L. 63.

89. A person employed around a depot may testify that work was done under the supervision of "'I,' agent of the Southern Railway." Blowers v. Southern R. Co., 74 S. C. 221, 54 S. E. 368.

90. Agent for railroad company. Blowers v. Southern R. Co. 74 S. C. 221, 54 S. E. 368.

91. In an action against an agent for the purchase of real estate, for misconduct the relation of principal and agent may be established by parol despite the statute of frauds. Mucke v. Solomon [Conn.] 64 A. 738.

92. The statement "he was at that time the recognized agent of James and Abbot for the purchase and sale of goods for their account" is an opinion and conclusion of the witness and inadmissible. Rice v. James [Mass.] 79 N. E. 807.

93. Tenants in common. Waiver by one of written contract. Hilton v. Hanson, 101 Me. 21, 62 A. 797. One who requests a loan from a loaning agent who in turn obtains the same from a third party is justified in dealing with the loaning agent as the agent of the third party. Murphy v. Becker [Minn.] 112 N. W. 264.

94. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93.

95. Whatever evidence tends to prove the agency is admissible. Robinson & Co. v.

letters and conversations of such agent are admissible to prove agency.[96] Evidence that one acted as adjuster for an insurance company at a certain time is not competent to show agency at a prior time,[97] but a contract signed by an agent is admissible as evidence of his agency at a prior time if at both times he was acting under the same general authority.[98] As tending to show agency one may prove his intimacy with alleged principal.[99]

The fact of the agency cannot be established by the agent's own statements and admissions [1] apart from the principal's knowledge,[2] except as such are res gestae,[3]

Green [Ala.] 43 So. 797. Agreement between well driller and defendant that driller furnish his own tools is competent evidence in an action by the owner of the tools against the defendant for their use. Jones v. Waterman [Cal. App.] 87 P. 469. Conversations between alleged principal and agent just prior to a transaction with the defendant are admissible to show relation of parties. Badger v. Cook, 101 N. Y. S. 1067.

Evidence held sufficient. Clamp v. Cutler [Colo] 88 P. 854; Norden v. Duke, 104 N. Y. S. 854. That a person calling himself manager was an agent of the defendant. Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551. Where a person purchased stocks for $1,500 and received $2,900 for them from another, the evidence was sufficient to show that the first party was agent for the second and that the transaction was not a resale. Kevane v. Miller [Cal. App.] 88 P. 643. Delivery of a check in payment for goods. Badger v. Cook, 101 N. Y. S. 1067.

Acts of adoption or ratification. Husband sold produce received as rent of premises demanded by the owner, his wife. Marks v. Herren, 47 Or. 603, 83 P. 385. One authorized to buy ties for a company for which it supplied the money according to his directions without limitation as to the number he should buy is acting as agent for such company. Hall v. Ayer & Lord Tie Co. [Ky.] 102 S. W. 867. Where a woman has signed her husband's name to an agreement to convey land owned by him, his subsequent offer of a deed though defective is a recognition of her authority. Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S. W. 880. Where a person soliciting orders for the defendant was arrested on suspicion that he was obtaining money under false pretences and the defendant telegraphed that it would fill all orders taken by him and later described his arrest as "unwarranted," there is ample evidence of agency. Howard v. Omaha Wholesale Groc. Co. [Neb.] 108 N. W. 158.

Acts assumptive of agency. Grout v. Moulton [Vt.] 64 A. 453. Where for a long period of time a person has collected interest on mortgages and also the principal sums and turned them over to the mortgagee, he has a general authority in fact so that payment to him extinguishes the debt. Bautz v. Adams [Wis.] 111 N. W. 69.

To prove express contract of agency to procure a purchaser for real estate. Young v. Ruhevedel, 119 Mo. App. 231, 96 S. W. 228. Agency held to be created by letters between the parties and not by subsequent oral conversations. Sidway v. American Mortg. Co., 222 Ill. 270, 78 N. E. 561.

Evidence held insufficient. Brokers soliciting orders to be executed by another firm in another city. In re Baxter & Co. [C. C. A.] 152 F. 141. Correspondence held to create no agency to sell land. Watkins Land Mortgage Co. v. Campbell [Tex.] 101 S. W. 1078. Evidence held to show no agency of person whose signature appeared on contract. Bender-Martin Co. v. Appollo Co., 101 N. Y. S. 75. Evidence held insufficient to show that one who wrongfully collected money was acting as agent of another. Miller v. Harris, 102 N. Y. S. 604. The fact that one who was formerly general manager for the plaintiff but who had resigned was found in the general manager's office without evidence of any acts done by him does not show agency. Tyler Ice Co. v. Coupland [Tex. Civ. App.] 99 S. W. 133. No evidence of agency where the alleged principal's brother hires and pays a man for his own benefit and the alleged principal has never held him out as authorized to act for him or ratified his acts. Rowan v. Kemp, 103 N. Y. S. 775. Where an agreement between a mother and children was signed by one child only, it is not binding in the absence of evidence of authority of the one child to sign for all. Banholzer v. Grand Lodge A. O. U. W., 119 Mo. App. 117, 95 S. W. 953. The presence of a wife during the making of repairs ordered by her husband and the giving of directions, where she only occupies as tenant, do not establish an agency on the part of the husband for the wife to order repairs. Shesler v. Patton, 100 N. Y. S. 286.

96. Hoffman Heading & Stave Co. v. St. Louis, etc. R. Co., 119 Mo. App. 495, 94 S. W. 597.

97. Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78.

98. Thompson v. Mills [Tex. Civ. App.] 101 S. W. 560.

99. Young v. Anthony, 104 N. Y. S. 87.

1. Eagle Iron Co. v. Baugh [Ala.] 41 So. 663; Shesler v. Patton, 100 N. Y. S. 286; General Cartage & Storage Co. v. Cox, 74 Ohio St. 284, 78 N. E. 371; Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78. Statement by an alleged agent that he was general manager. Tyler Ice Co. v. Coupland [Tex. Civ. App.] 99 S. W. 133. That he was superintendent. Smiley v. Hooper [Ala.] 41 So. 660. The letter of an alleged agent who is not a party or a witness in a case is mere hearsay and inadmissible to show his agency. Rice v. James [Mass.] 79 N. E. 807. The statement of an alleged agent that the defendant had instructed him to perform a certain act is not alone sufficient to show agency. Gambill v. Fuqua [Ala.] 42 So. 735. Declarations to plaintiff and others that he was authorized to sell land. Edmiston v. Hurley, 30 Ky. L. R. 557, 99 S. W. 259. Employment of a servant by an agent. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93.

2. Where there is no evidence that a de-

but he is competent to testify that he is agent.[4] The testimony [5] or the declarations of the principal are admissible for this purpose.[6]

(§ 1) *E. Estoppel to assert or deny agency.*[7] like estoppel respecting the authority of an admitted agent [8] is grounded on the principal's having created or suffered the appearance of such relation to exist to one who rightfully acted thereon to his detriment.[9] Declarations of the agent will not prove that he is such, but acts assuming authority of such a nature that the principal may have known them are admissible.[10] One who assumed to be the agent of a child cannot avoid accounting by saying that the child could not make him agent.[11]

(§ 1) *F. Termination of relation.*[12]—A contract of agency without limitation as to time is terminable at will by either party.[13] The grantor of a power of attorney not coupled with an interest in which it is provided that the power is irrevocable may, however, revoke the same; [14] even where the contract provides that, for a valuable consideration, the agency is to continue for a certain period the principal may still terminate the agency, and whether rightfully or wrongfully the agent has no further right to continue to act as agent; [15] and the fact that the agent has been to considerable expense and trouble does not deprive the principal of his power of revocation.[16] Revocation is subject to the duty of making such compensation as may be earned or agreed, or of paying damages for breach of the contract.[17] An agent's authority is revoked by the death of his principal.[18] In Texas a married

fendant knew that a party was using letterheads representing himself as the defendant's agent, such letterheads were inadmissible to show agency. Rice v. James [Mass.] 79 N. E. 807.

3. Statements which are a part of the res gestae may be evidence of agency, and it is not necessary that they be simultaneous with the conclusion of the contract but only that they should have been made during the negotiations leading to the contract, influenced the defendant in making it, and entered into as part thereof. Grout v. Moulton [Vt.] 64 A. 453.

4. Agency may be proved by the testimony of an agent as well as that of any other witness who has knowledge of the facts. Beekman Lumber Co. v. Kittrell [Ark.] 96 S. W. 988. In a suit for commissions for the lease of property where the son represented the owner, it was competent for the son to testify that he was the agent of the owner. Colloty v. Schuman [N. J. Law] 66 A. 933.

5. The plaintiff testified that she employed "F" an attorney to present her claim to the defendant. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117.

6. An owner of land referred a purchaser to a third party as his agent saying he would be satisfied with anything he did. Horner v. Beasley [Md.] 65 A. 820.

7. See 7 C. L. 67.

8. See post, § 2 B.

9. Instruction defining doctrine approved. Swannell v. Byers, 123 Ill. App. 545. Ice v. Maxwell [W. Va.] 55 S. E. 899, where principal stands by and reaps benefits of unauthorized acts. Before there can be an estoppel there must be a failure to act on the part of the principal, with full knowledge of the material facts, by which the party dealing with the agent has been prejudiced. Norden v. Duke, 104 N. Y. S. 854.

10. Bellman v. Pittsburg & A. V. R. Co., 31 Pa. Super. Ct. 389.

Held for jury: Permitting alleged agent to occupy principal's office, coupled with knowledge that he assumed to have authority to hire plaintiff who now sued for services. Bellman v. Pittsburg & A. Valley R. Co., 31 Pa. Super. Ct. 389.

11. Money was received as "agent" and converted. Jackson v. Gallagher [Ga.] 57 S. E. 750.

12. See 7 C. L. 68.

13. Attorney at law to collect back taxes. City of Wilmington v. Bryan, 141 N. C. 666, 54 S. E. 543. Facts held not to establish an implied covenant not to resign after the agency had proved fruitless. Security Trust & Life Ins. Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125; Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213. Where an agent's contract provided that he was to sell goods for the principal who might at the expiration of twelve months treat the agent as the purchaser of any unsold goods, the agent had the right to terminate the contract at any time before the twleve months without giving the principal the right to treat him as a purchaser. Owensboro Wagon Co. v. Hall, 143 Ala. 177, 42 So. 113. Where there is a statement in an instrument appointing an agent that he is the agent "for the sale of all the lumber that will or may be sawed" on a tract of land, this is not to be construed as an implied agreement that such agency will not be revoked before he has sold all the lumber in question. It is a mere description of the nature of the agency. Bradlee v. Southern Coast Lumber Co. [Mass.] 79 N. E. 777.

14. Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213.

15. Principal may enjoin an agent from acting. Star Fire Ins. Co. v. Ring, 103 N. Y. S. 137.

16. McMahan v. Burns [Pa.] 65 A. 806.

17. See post, §§ 4 A, C.

18. Notes to payee. Jones v. Jones, 101 Me. 447, 64 A. 815; Anderson v. Goodwin,

woman may dispose of her separate estate through a power of attorney in which she is joined by her husband, and it is not revoked by the husband's death.[19] If the agent's power is coupled with an interest, then it is irrevocable until the agency is completed,[20] and a like rule applies to a mandatory in Louisiana.[21] The interest coupled with a power which renders the power irrevocable must be in the thing itself and not in the exercise of the power, and the same instrument must convey both the interest and the power.[22] If a deed or other instrument whose validity depends on delivery is left with a third person to be delivered upon the happening of a contingency, the delivery is complete and irrevocable.[23]

The verbal appointment of an agent to sell real estate is not revoked by a subsequent statute declaring it a misdemeanor for an agent to offer real estate for sale without a written authority.[24]

Notice of revocation.[25]

§ 2. *Rights and liabilities of principal as to third persons.*[26] *In general.*—The principal cannot be bound by any act which he could not do in his proper person,[27] or by any acts neither actually, impliedly, nor apparently authorized nor ratified so as to supply authority;[28] and the agent's authority, however general, will not sanction an act done in a wholly different capacity.[29]

(§ 2) *A. Actual or implied authority to bind principal.*[30]—As distinguished from an agent's apparent, but as between him and the principal, unreal authority,[31] he has actual express authority or implied authority which is actual in the sense that it was presumably intended.[32] The creation of an agency implies authority to do the usual and appropriate acts to accomplish the object, and clothes the agent with such authority as is necessary to effectuate its purposes,[33] such as au-

125 Ga. 663, 54 S. E. 679. Death of husband before order placed by wife for goods was filled. Oatman v. Watrous, 105 N. Y. S. 174. Power of attorney to manage and dispose of real estate. Mills v. Smith [Mass.] 78 N. E. 765. Power of attorney to sell and dispose of land. Surghenor v. Taliaferro [Tex. Civ. App.] 17 Tex. Ct. Rep. 411, 98 S. W. 648. Power of attorney granted subsequent to the making of a will does not revoke the will. In re Kilborn [Cal. App.] 89 P. 985. Dealing with funds and distributing after death of distributor. Wallace v. Bozarth, 223 Ill. 339, 79 N. E. 57.

19. Skirvin v. O'Brien [Tex. Civ. App.] 16 Tex. Ct. Rep. 105, 95 S. W. 696.

20. Weaver v. Richards, 144 Mich. 395, 13 Det. Leg. N. 327, 108 N. W. 382; Blondel v. Ohlman [Iowa] 109 N. W. 806; McMahan v. Burns [Pa.] 65 A. 806; Taylor v. Burns, 203 U. S. 120, 51 Law. Ed. 116; City of Wilmington v. Bryan, 141 N. C. 666, 54 S. E. 543.

21. A mandate under Louisiana law was held not revoked by the death of the principal. Succession of Henry, 115 La. 874, 40 So. 253, 256.

22. A power of attorney to manage and dispose of land held not to be coupled with an interest. Weaver v. Richards, 144 Mich. 395, 13 Det. Leg. N. 327, 108 N. W. 382. Where an agent accepts a power of attorney under an agreement by which he is to prosecute a claim at his own expense receiving a definite share of the receipts, he thereby became vested with an interest. Blondel v. Ohlman [Iowa] 109 N. W. 806. An interest in the proceeds of sales as compensation for executing them is not such an interest as makes the agency irrevocable. Commission for the sale of land to be more than half of the purchase money. McMahan v. Burns [Pa.] 65 A. 806. An agreement to pay an agent seven-eighths of all he receives in excess of a certain amount in selling property is not an interest in the property upon which his power of attorney was to operate but was merely an interest in the exercise of the power. Taylor v. Burns, 203 U. S. 120, 51 Law. Ed. 116. Power to collect money and receive a certain percentage thereof is not coupled with an interest. City of Wilmington v. Bryan, 141 N. C. 666, 54 S. E. 543.

23. Death of maker. Jones v. Jones, 101 Me. 447, 64 A. 815.

24. Staehlin v. Hoffmeister, 121 Mo. App. 24, 97 S. W. 970.

25. See 7 C. L. 70.

26. See 7 C. L. 71.

27. One holding a chose in action as collateral security has no authority to satisfy and discharge the same except on full payment of the collateral. Rhomberg v. Avenarius [Iowa] 112 N. W. 548. Arrest by a deputy without a warrant where his chief had no such authority. Gambill v. Fuqua [Ala.] 42 So. 735.

28. See post, §§ 2 A-D.

29. General agency for distributee does not authorize act done as executor. Lahn v. Sullivan, 101 N. Y. S. 920.

30. See 7 C. L. 71. Evidence and proofs of implied authority, see supra, § 1 D.

31. See post, § 2 B.

32. In California by Code an agent's actual authority is only such as the principal intentionally confers or intentionally allows the agent to think he possesses. Davis v. Trachsler [Cal. App.] 86 P. 610.

33. Graham v. Edwards [Tex. Civ. App.] 99 S. W. 436; Kearns v. Nickse [Conn.] 66

thority to delegate or to employ necessary assistance.[34] The authority of an agent may be implied from his relation to the principal, the nature of his employment, and the mode in which he was permitted to conduct the business,[35] or from custom or precedent.[36] In the case of a corporation the general agent may have implied power to waive provisions of a written contract.[37] An agent has power to negotiate until the object of his agency is accomplished or his authority revoked.[38] The authority to draw, accept, or indorse bills, notes, and checks will not readily be implied as an incident to the express authority of an agent.[39] Actual authority granted by deed must be strictly construed, and the principal will not be bound under any circumstances beyond the plain import of the language of the instrument[40] unless it is found that he has waived some of the limitations upon the agent's authority[41] or ratified his unauthorized acts.[42]

(§ 2) *B. Apparent authority and unauthorized or wrongful acts of agent.*[43]—

A. 779. Insurance agent. Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 N. W. 861; New York Life Ins. Co. v. Chittenden [Iowa] 112 N. W. 96; In re American Fidelity Co., 104 N. Y. S. 711. The stipulations of an attorney at law as to certain facts are competent evidence on the trial of the cause, no revocation of his authority being shown. Westheimer v. State Loan Co. [Mass.] 81 N. E. 289. An attorney at law employed by a trustee in bankruptcy as counsel and attorney is not authorized to make a sale of the bankrupt's assets or take the proceeds. Mason v. Wolkowich [C. C. A.] 150 F. 699. It is within the authority of and incident to the business and duties of a general manager of a railroad company to offer a reward for the conviction of a person maliciously obstructing a track. Arkansas S. W. R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802. A husband acting as agent for his wife in caring for property is not a competent witness to testify as to the quality of cement put on a sidewalk in front of the premises by a contractor for the city, where the validity of the sidewalk assessment is put in issue by the wife, as his agency does not extend so far. City of Joplin v. Freeman [Mo. App.] 103 S. W. 130. A clerk in the general passenger agent's office of a railroad corporation has no implied authority to make arrangements for the payment of the funeral expenses of deceased employe. Rice v. New York, etc., R. Co. [Mass.] 81 N. E. 285. See, also, post, § 2 C.

34. An owner who contracted with an architect to construct a house which the architect had planned thereby authorized the architect to employ others to do a part or all of the work. Vickery v. Richardson, 189 Mass. 53, 75 N. E. 136. A general agent employed by a railroad company to look after the safety of passenger cars and investigate damages done could give a watchman employed by the railroad authority to make investigations. Johnston v. Chicago, etc., R. Co. [Wis.] 110 N. W. 424.

35. Robinson & Co. v. Green [Ala.] 43 So. 797.

36. There being no evidence of precedent or custom that the agents of a railroad company might contract for a spur track, the company was not bound by their act. Busby v. Yazoo & M. V. R. Co. [Miss.] 43 So. 1. Sale of horse. Warranty to furnish another if not satisfactory. Dunham v. Salmon [Wis.] 109 N. W. 959. An officer of a subordinate lodge charged with collecting assessments is an agent of the grand lodge and the latter is charged with notice of the usual and customary methods of its agents in the collection of premiums, so that a provision for forfeiture of a benefit policy for failure to make premium payments on certain dates is waived if it is the custom of agents to collect premiums a few days late. Trotter v. Grand Lodge of Iowa Legion of Honor [Iowa] 109 N. W. 1099. Evidence of custom as bearing on agent's apparent authority, see infra, § 2 B.

37. The general agent of a harvester machine company was held by his act of requiring additional tests of a harvester to waive the requirement that it must be returned after two days trial if unsatisfactory. Peter v. Plano Mfg. Co. [S. D.] 110 N. W. 783.

38. Plaintiff sent draft to defendant authorizing it to purchase a farm at a certain sum. The first offer was refused and the plaintiff requested a return of the money which request was not received by the defendant which finally consummated a purchase. Held the bank was not liable as for an unauthorized act. Brittain v. Pioneer State Bk. [Wash.] 87 P. 1051.

39. Bank of Morganton v. Hay [N. C.] 55 S. E. 811.

40. A power to sell lands does not authorize exchange, partition, barter, or to convey in discharge of a debt or claim. Skirvin v. O'Brien [Tex. Civ. App.] 16 Tex. Ct. Rep. 105, 95 S. W. 696; Davis v. Trachsler [Cal. App.] 86 P. 610.

41. Where goods were sold to defendant under a contract that payments were not to be made to agents, the defendant was discharged of the debt by payment to the agent after the plaintiffs had written to the agent that if he would cash the account or sell it they would allow him a discount and his commission. Superior Mfg. Co. v. Russell [Ga.] 56 S. E. 296. Agent's contract provided that all sales must be approved by the principal and that no one had authority to waive, alter, or enlarge the terms of the contract. This does not affect a letter written to the agent by the principal giving him express authority to make a sale outside the scope of his regular employment. Gooch v. Case Threshing Mach. Co., 119 Mo. App. 397, 96 S. W. 431.

42. See post, § 2 D, Ratification.

43. See 7 C. L. 74.

The principal is not bound by acts subsequent to the agency,[44] but acts of an accredited agent within the apparent scope of his authority are acts of the principal.[45] The basis of the binding force given to unreal but apparent authority is estoppel, based on the principal's having suffered or represented the semblance of authority;[46]

44. Contents of a letter written by an alleged agent for an alleged principal for the sale of a horse subsequent to the sale is inadmissible as evidence of the agency unless the alleged principal authorized it or knew it had been written. Clark v. Wooster [Conn.] 64 A. 10. The declarations of an agent made after the completion of a transaction have no probative value. Miller & Co. v. McKenzie, 126 Ga. 746, 55 S. E. 952.

45. Prospective purchasers of coal lands were referred by owners to a party employed to show the property as one acquainted with it and their representative. Such party made false statements and representations which owing to the nature of the territory had to be relied upon. A purchase having thus been induced, the purchasers were entitled to relief. Mather v. Barnes, 146 F. 1000. A telegraph company is bound by the waiver of condition that claims shall be presented in writing within sixty days by the general agent in charge of its officers in a city. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. The agent of a corporation who had charge of an office and employed the plaintiff and fixed the terms of such employment, etc., held to have had apparent authority to waive terms of a written agreement with the plaintiff. Krasnow v. Singer Mfg. Co., 100 N. Y. S. 591. Where it was within the authority of messenger boys' employment to present slips showing messages sent out by a third party and to collect money therefor, the presenting of slips fraudulently made out by the boys was within the apparent scope of their authority. Wilmerding v. Postal Tel. Cable Co., 103 N. Y. S. 594. Evidence that one G., the superintendent of the defendant, agreed to give plaintiff a commission, that G. took charge and made contracts that G. denied authority but admitted that the president of the company said plaintiff was entitled to a commission after the work was paid for. Books of defendant showed a note on the record of this work "commission to" plaintiff. Held sufficient evidence of authority in G. to act as agent to make the contract. Coles v. International Bank Note Co., 100 N. Y. S. 1060. Where everything regarding the sale of land except signing the deed was done by the owner's husband, the evidence was held to warrant a finding that he was authorized to do all acts necessary to effect a sale. Rathke v. Tyler [Iowa] 111 N. W. 435. Freight agent of the defendant has apparent authority to receive requests for freight cars so that the defendant was liable for failure to furnish such cars. Hoffman Heading & Stave Co. v. St. Louis, etc., R. Co., 119 Mo. App. 495, 94 S. W. 597.

Acts not within apparent scope: Principal not liable for notes of its general manager given in the purchase of a business. Manhattan Liquor Co. v. Magnus & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 785, 94 S. W. 1117. The only authority to be implied from the fact of possession by a ranch foreman of a herd of cattle was authority incidental to properly caring for them. McGraw v. O'Neil [Mo. App.] 101 S. W. 132. Clerk of courts charged costs to counsel for plaintiff at his request and released plaintiff. He had no authority to act in regard to sheriff's costs. Board of Education of Tennille v. Kelley, 126 Ga. 479, 55 S. E. 238. A salesman authorized only to obtain orders took an order, specified the price, and signed the same. No contract binding on principal. Gould v. Cates Chair Co. [Ala.] 41 So. 675. Where a telephone company's messenger on finding that the addressee was not at the place addressed agreed to take the message to the addressee, he is not acting within his authority and the company is not bound. Cumberland Tel. & T. Co. v. Atherton, 28 Ky. L. R. 1100, 91 S. W. 257. An agent with authority to procure bottles of whisky from his principal's barrels has no authority to deliver the same to any person. Nash v. Noble [Tex. Civ. App.] 102 S. W. 736. Where the plaintiff bank cashed a draft drawn on the defendant by its agent on the strength of the honoring of prior drafts, and a letter instructing the agent to draw upon him, but the plaintiff had also seen other correspondence in which the defendant showed he was not satisfied with results obtained in proportion to expenses, it was held that this correspondence should have put plaintiff on its guard, and all the facts together did not confer authority on the agent to have the draft cashed. Bank of Morganton v. Hay [N. C.] 55 S. E. 811. Letters by the resident attorney of a corporation not binding admissions unless made to dispense with formal proof. Horseshoe Min. Co. v. Miners' Ore Sampling Co. [C. C. A.] 147 F. 517. Evidence that a director of a corporation had authority to make short leases and had only made one long lease of which the company had no knowledge, and that a majority of the board of directors objected on several occasions when he sought to make leases on long terms, does not show actual authority sufficient to support a lease for ten years. Clement v. Young-McShea Amusement Co. [N. J. Err. & App.] 67 A. 82. Agent for sale of a furniture stock on commission held to have no apparent authority to purchase sewing machines on principal's credit. Kuecks v. New Home Sewing Mach. Co., 123 Ill. App. 660. A person who at times acted as the agent of a mortgagee in loaning money has no authority to reject insurance offered upon the mortgaged premises and bring suit to foreclose. Ver Veer v. Malone [Iowa] 112 N. W. 82. A majority stockholder has no authority to bind a corporation by his acts. Clement v. Young-McShea Amusement Co. [N. J. Err. & App.] 67 A. 82.

46. Where a principal has placed an agent in such a situation that a person of ordinary prudence is justified in assuming that such agent is authorized to perform on behalf of his principal a particular act, such act having been performed, the principal is estopped as against such third party from denying the agent's authority to perform it. A storage warehouse company is bound by a stipulation of its agent to insure goods, though such stipulation is made without au-

hence one cannot rely thereon who has been remiss in knowing or making reasonable inquiry about the authority,[47] especially where the statute requires the authority to be in writing,[48] or, where the act is inconsistent with known facts of authority or relationship.[49] But a third person is not concerned with the mental processes of the principal in granting authority, but the character in which the agent is held out by the principal, as it is the only method by which authority may be determined.[50] He who deals with an agent must also act in good faith respecting every restriction upon the agent's authority of which he may have notice.[51] Bad faith and fraudulent conduct on the part of an agent and participated in by the wrongdoer cannot form the basis of an estoppel against the principal's asserting his rights against the wrongdoer.[52] The assignment of a mortgage to the name

thority. General Cartage & Storage Co. v. Cox, 74 Ohio St. 284, 78 N. E. 371. Where the plaintiff's bookkeeper who was their agent as to matters pertaining to stores and store accounts informed the defendant that the plaintiff's tenant's store account was all right and on the strength of this the defendants levied on the tenant's cotton, the plaintiffs are bound by the bookkeeper's statements and estopped to deny them as to the defendant. Cadenhead v. Rogers & Bro. [Tex. Civ. App.] 16 Tex. Ct. Rep. 837, 96 S. W. 952. A principal held not estopped to deny authority to charge overdrafts merely because some were entered in passbook which principal never saw. Merchants' Nat. Bk. v. Nichols & Shepard Co., 123 Ill. App. 430. A general agent to sell commodities and make collections and manage a branch of the principal's manufacturing business has no apparent authority to bind the principal by over drafts. Id.

47. Bank of Morganton v. Hay [N. C.] 55 S. E. 811; Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213. A physician employed by a station agent and the local physician of the defendant to operate upon a passenger was put upon notice that it was not within the scope of the employment of these men to employ a surgeon. Galveston, etc., R. Co. v. Allen [Tex. Civ. App.] 15 Tex. Ct. Rep. 964, 94 S. W. 417. An agreement by the roadmaster and freight agent of a railroad company to lay a spur track was not binding, it not appearing that they had any power or that there was any custom or precedent giving them such power. Busby v. Yazoo & M. V. R. Co. [Miss.] 43 So. 1. The assumption by an attorney at law of authority to act for his principal outside of the due and orderly prosecution, defense, or conduct of litigation does not create any presumption of actual authority so to act, but, as in other cases of agency, his act must be shown to be within the scope of his authority to be binding on his principal. Horseshoe Min. Co. v. Miners' Ore Sampling Co. [C. C. A.] 147 F. 517. Where a purchaser was referred on two occasions by a dealer to his agent for terms, etc., and a third time made his contract direct with the agent, such facts are sufficient to show the authority of the agent to make such contract, in the absence of any evidence of a limitation upon the agent's authority, notice of which was chargeable to the purchaser. Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F. 641.

48. Davis v. Trachsler [Cal. App.] 86 P. 610. Third parties have no right to assume the existence of an authority which the statute requires shall be in writing. Clement v. Young-McShea Amusement Co. [N. J. Err. & App.] 67 A. 82.

49. Where the vice president of a bank who was also a director acted as its agent in discounting certain notes for a third party, there is nothing in his relation to the bank inconsistent with his position as agent, and hence his declarations to the third party are admissible against the bank. National Bk. v. Schirm [Cal. App.] 86 P. 981.

50. Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213.

51. General Cartage & Storage Co. v. Cox, 74 Ohio St. 284, 78 N. E. 371. Physician employed to operate by station agent and local physician of defendant. Galveston, etc., R. Co. v. Allen [Tex. Civ. App.] 15 Tex. Ct. Rep. 964, 94 S. W. 417. Unauthorized act of an agent to the knowledge of one dealing with him is not binding on principal. Sale of land. Hoskins v. O'Brien [Wis.] 112 N. W. 466. Owner's agent sold a mule on credit when the purchaser knew he was only authorized to sell for cash. Susong v. McKenna, 126 Ga. 433, 55 S. E. 236. A deed by an agent made in plain violation of the spirit and intent of his power of attorney to the knowledge of both grantor and grantee is ineffective to convey any interest. Holmes v. Dowie, 148 F. 634. A party dealing with an agent acting under a written authority must take notice of the extent and limit of that authority to the extent of seeing that every act done by the agent is legally identical with the act authorized by the power. Bowles v. Rice [Va.] 57 S. E. 575; Finch v. Causey [Va.] 57 S. E. 562. Insurance agent after nonpayment of premium when due, and after death of the insured, sent notice that if premium paid within a month of time when due it would be accepted. The insured's family made this payment and sought in vain to hold the company. Hanson v. Aetna Life Ins. Co. [Neb.] 110 N. W. 1000.

52. The president of a corporation operating theatres sought to have leases renewed in him personally, and his intent was known to and acquiesced in by the agent of a large stockholder. McCourt v. Singers-Bigger [C. C. A.] 145 F. 103. The secretary of a corporation indebted for provisions sold a surrey manufacturered by the corporation to the provision dealer in part payment of a debt due the dealer by him personally. Grooms v. Neff Harness Co., 79 Ark. 401, 96 S. W. 135. The fact that defendant to pre-

of one principal, though secret and unrecorded, prevails over a later and recorded one to himself as the executor for another estate.[53] If a principal desires to restrict the apparent authority of his agent, he is under obligation to bring this notice to the attention of those dealing with the agent.[54] There can be no apparent authority contrary to terms of a contract to which the third person is a party.[55]

Unauthorized and tortious acts.[56]—Where the servant is engaged in the performance of a duty delegated to him by the master, his tortious acts within the scope of his authority though unlawful, unauthorized, or even forbidden, are binding upon his master.[57] Corporations are liable civilly, the same as natural persons

vent breach of a contract paid claims against a company employed by him does not render him liable for goods sold on credit to such company while in his employ. Etoniah Canal & Drainage Co. v. Husband [Fla.] 41 So. 456. A transfer of stock by an agent to his wife without consideration under a power of attorney to sell is void. Prichard v. Abbott [Md.] 65 A. 421.

53. Whether his later act was that of an agent for the later assignee or was that of a principal, the notice was imputed to the later assignee. Latch v. West End Trust Co., 32 Pa. Super. Ct. 472.

54. Sale of books by agents, the customer not to resell. Authors' & Newspapers' Ass'n v. O'Gorman Co., 147 F. 616. After placing fire insurance an agent had his agency revoked, but the insured not being informed of this was entitled to rely upon his authority to cancel the policy. Aetna Ins. Co. v. Stambaugh-Thompson Co. [Ohio] 81 N. E. 173. If people are allowed to deal with an agent in a certain way and the principal recognizes these dealings as valid and gives no notice of any change in the conditions, he may be bound by subsequent transactions of a similar kind even though they were unauthorized or expressly forbidden. Rice v. James [Mass.] 79 N. E. 807.

55. Where the plaintiff purchased land of the defendant through the defendant's agent, paying $50 down, the balance on instalments, in an action for specific performance, he was not entitled to credit for insalments paid to the agent, for his contract provided that no instalments were to be paid to agents. Metz v. Harbor & Suburban Bldg. & Sav. Ass'n, 102 N. Y. S. 980.

56. See 7 C. L. 76.

57. Conversion by agent of collateral security pledged with his principal by acceptance of a less sum, in full settlement, than its full value. Rhomberg v. Avenarius [Iowa] 112 N. W. 548. Attorney representing one of three owners who was the agent of all refused to deliver deed. Douglas v. Hustead [Pa.] 65 A. 670.

Fraud: Messenger boys in the habit of presenting slips for telegraph charges collected on a number of forged slips. Wilmerding v. Postal Tel. Cable Co., 103 N. Y. S. 594. One of two grantees in procuring a deed of land induced the grantor to execute it by fraud of which the other grantee had notice. Kendrick v. Colyar, 143 Ala. 597, 42 So. 110. Where an agent for the purchaser of lands explains the contract to the vendors who are illiterate, the purchaser is bound by the false statements of the agent. Brock v. Tennis Coal Co., 29 Ky. L. R. 1283, 97 S. W. 46. The agent of an insurance company in obtaining business is acting within the scope of his employment, and although he was not instructed to use dishonest means in doing it yet if such means were used the insurance company cannot evade the consequences of his act. Aetna Ins. Co. v. Stambaugh-Thompson Co. [Ohio] 81 N. E. 173. General manager of defendant's business induced plaintiff to advance goods to one of defendant's agents falsely representing him as solvent, and then seizing such goods to satisfy a debt due the defendant by such agent. Western Cottage P. & O. Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061. Plaintiff's land subject to incumbrances for taxes, sewers, etc., amounting to $930.69, was condemned by the city and an allowance of $2,000 made therefor. The defendant's agent representing that there would be no balance left after payment of incumbrances procured a deed from the plaintiff for $100 and an order on the city for the amount of the damages awarded. Heath v. Schroer, 119 Mo. App. 93, 96 S. W. 313.

Illegal acts: A watchman arrested a person for destroying his master's property. Johnston v. Chicago, etc., R. Co. [Wis.] 110 N. W. 424. Prosecution for larceny by defendant's bookkeeper in aid of a civil suit. White v. Apsley Rubber Co. [Mass.] 80 N. E. 500. City employe while excavating in a street struck plaintiff who was attempting to remove an obstruction from the street car track. Barree v. Cape Girardeau, 197 Mo. 382, 95 S. W. 330. Where a mortgagee authorized his agent to take possession of the mortgaged property after a default, he is liable for damages caused by force used by the agent, although he had instructed the agent not to use force but to apply to a magistrate. Williams v. Tolbert [S. C.] 56 S. E. 908. An agent of the defendants sent to remove furniture got into a quarrel with the plaintiff, who occupied the house, before any attempt was made to remove such furniture, and it was held that the agent in striking the plaintiff was impelled by personal motives and did not do so in preparing to get out the furniture or overcoming resistance. Hardeman v. Williams [Ala.] 43 So. 726; Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37.

Slanderous words must be ascribed to the personal malice of the agent rather than to an act performed in the course of employment. Singer Mfg. Co. v. Taylor [Ala.] 43 So. 210. A corporation is not liable for false and malicious words spoken by an agent unless authorized or ratified by it (Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37; Bartles v. Courtney, 6 Ind. T. 379, 98 S. W. 133), yet, on the contrary, a corporation has been held liable for a libel uttered by its agent (Pennsylvania Iron Works Co. v.

for wrongs committed by their agents.[58] The owner of property lost at a gambling game by his servant or agent without his consent may recover the property from the winner.[59]

(§ 2) *C. Particular kinds of agencies.*[60]—Agency may be general or special.[61] The former relation arises where one is authorized to transact all business of another of a particular kind,[62] the latter where one is authorized to act in a single transaction only.[63] A special power of attorney is to be strictly construed so as to sanction only such acts as are clearly within its terms,[64] but the object of the parties is always to be kept in view, and, where the language will permit, that construction should be adopted which will carry out the purpose of the appointment.[65] In dealing with a special agent one is put upon inquiry as to such agent's authority and deals with that agent at the risk of that authority being exceeded.[66] The powers of a special agent are to be strictly construed, and he possesses no implied authority beyond what is indispensable to the exercise of the power expressly conferred.[67] Joint agents are jointly liable to their principal for the proceeds of a

Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551), and where a railroad company's agent used abusive language to the plaintiff while he was upon the railroad's property, engaged in a conversation with the agent upon business connected with the agency, this is sufficient to show that the agent was acting within the scope of his employment, and the railroad would be liable for any damages (Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37).

Misapplication of funds received by agent: Payment to a bank of a debt sent to it for collection satisfies the debt regardless of what subsequently becomes of the money or papers. Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13. Where agents were authorized to sell some mules free and clear of a mortgage and to pay off mortgage with the money received, the fact that such sale was made but the agents did not pay off the mortgage does not leave the property still liable. Hirsh & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678.

58. Singer Mfg. Co. v. Taylor [Ala.] 43 So. 210. A private corporation is liable for the acts of its agent in instituting a malicious prosecution for arson, authorized by the corporation or within the scope of the agent's authority. Farmers' M. F. Ass'n v. Stewart [Ind.] 79 N. E. 490. A railroad company is liable to a teamster for the acts of its depot agent in refusing to deliver to him goods for which he had orders. Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37. General manager of defendant company wrote a letter stating that plaintiffs were incompetent. Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551.

59. Plaintiff's agent was entrusted with a sum of money to deposit to the plaintiff's credit in the bank, but lost it instead in gambling. Ramirez v. Main [Ariz.] 89 P. 508.

60. See 7 C. L. 79.

61. Belcher v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 85.

62. Belcher v. Manchester Bldg. & L. Ass'n [N. J. Err. & App.] 67 A. 85. An agent held general, so that his writing a policy in a sum larger than his authority warranted was binding on the principal. Young v. Mueller Bros. A. & M. Co., 124 Ill. App. 94.

63. Belcher v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 85; Bowles v. Rice [Va.] 57 S. E. 575. A "steward" of a club who conducted a restaurant at his own risk in connection with the club and paid bills with his personal check held, if any, a special agent. Reis v. Drug & Chem. Club, 105 N. Y. S. 285.

64. Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213; Skirrin v. O'Brien [Tex. Civ. App.] 16 Tex. Ct. Rep. 105, 95 S. W. 696.

65. Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213; American Bonding Co. v. Ensey [Md.] 65 A. 921. Letter requesting an attorney at law to procure a bond. American Bonding Co. v. Ensey [Md.] 65 A. 921.

66. One dealing with a cement broker is chargeable with notice of his limited authority to agree upon the time of delivery. Molloy v. Whitehall Portland Cement Co., 102 N. Y. S. 363; Bowles v. Rice [Va.] 57 S. E. 575. Salesman has no authority to endorse his employer's check. Blum Jr.'s Sons v. Whipple [Mass.] 80 N. E. 501.

67. Bowles v. Rice [Va.] 57 S. E. 575. Where an agent was appointed to sell land by an instrument which was required to be in writing, his agency was special. Davis v. Trachsler [Cal. App.] 86 P. 610. A cement broker on his own account, and not generally the agent of a certain cement manufacturer, is a special agent. Molloy v. Whitehall Portland Cement Co., 102 N. Y. S. 363. An authority to rent premises is special and does not warrant the agent in contracting for repairs and improvements. Tenants sought to avoid payment of rent on ground that they should be credited with improvements. Peddicord v. Berk [Kan.] 86 P. 465. An agent to deliver a deed only upon the happening of a condition is a special agent, and delivery by him under any other circumstances is ineffectual. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679. A traveling salesman is a special agent with only limited authority and has no power to endorse his principal's name to checks (Blum Jr.'s Sons v. Whipple [Mass.] 80 N. E. 501), or to make drafts upon his employers (Seattle Shoe Co. v. Packard [Wash.] 86 P. 845). Where the constitution of an association limits the authority of its officers, a person dealing with such officers is charged with notice of their limited authority. Dris-

sale by them, and the payment by one to the other without special authority from the principal does not relieve him of his joint liability.[68]

Brokers, factors, attorneys and the like are special kinds of agents, the law relative to whom is separately treated.[69]

Authority to accept payment in discharge of obligations is not easily inferred,[70] and possession of the contracts payable in money is usually necessary to authority.[71] Possession of writings evidencing such a contract, but not the contract, have no such effect.[72] Power to make investment does not include power to receive payment of the obligation.[73] Agency of an attorney to receive payment of the debt is not implied from employment to draft the mortgage, especially when he does not retain it in custody.[74] A power of attorney to fill blanks when given as incident to an assignment is strictly construed against the assignee.[75] Authority to collect is not to be expanded beyond acts necessary to that end.[76] Authority to sell is not authority to exchange,[77] or necessarily to sell on credit,[78] or agree to a repurchase,[79] but includes ordinary warranting [80] and fixing [81] or receiving the price.[82]

coll v. Modern Brotherhood [Neb.] 109 N. W. 158. The secretary of a subordinate lodge is under the constitution a special agent and has no authority to admit members. Id.

68. Mason v. Wolkowich [C. C. A.] 150 F. 699. An administrator is not entitled to credit for payment of sums due to heirs made to one of two persons having powers of attorney to settle the estate without the consent of the other. Robbins v. Horgan, 192 Mass. 443, 78 N. E. 503.

69. See Attorneys and Counselors, 7 C. L. 319; Brokers, 7 C. L. 465; Factors, 7 C. L. 1642.

70. Failure of a person to collect a debt when due does not authorize payment by the debtor to an unauthorized person asserting authority to receive it. Ryle v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 87. Defendant through plaintiff's salesman bought an order of goods and with them came a statement of account headed "pay none but authorized collectors." Defendant paid the salesman who failed to turn it in to plaintiff. Held defendant not discharged. Zilberman v. Friedman, 104 N. Y. S. 363.

71. Payment of mortgage to one not having the securities is neither payment nor tender. Hughes v. Clifton [Ala.] 41 So. 998. After a mortgage was assigned but not recorded the mortgagor paid the mortgagee of record and obtained release; this was ineffectual to extinguish the debt where the mortgagee of record neither had possession of the security nor authority from the owner to receive payment. Authority should be shown by possession of the securities. Bautz v. Adams [Wis.] 111 N. W. 69.

72. Where a principal authorized his agent to make an investment for him by purchasing shares in the defendant company, which shares were evidenced by a passbook, the continued possession of the passbook was consistent with the original authority in making the investment, for in discharging this agency the periodical payment of dues was necessary, and was not evidence of an apparent authority to receive payments of the principal and interest of the investment. Belcher v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 85.

73. Belcher v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 85. Evidence held to show that owner of a store was the sole manager, and that a clerk had no authority to receive notice in regard to insurance. German Ins. Co. v. Goodfriend, 30 Ky. L. R. 218, 97 S. W. 1098.

74. Mynick v. Bickings, 30 Pa. Super. Ct. 401.

75. Assignment of wages to accrue. Simmons Hardware Co. v. Hargate, 122 Ill. App. 287.

76. An agent to collect rents and pay taxes has no authority to contract for repairs. Meade Plumbing, H. & L. Co. v. Irwin [Neb.] 109 N. W. 391. One having authority to collect a note given in payment for a horse has no authority to take back the horse in payment of the note. Loy v. McClure [Mo. App.] 101 S. W. 1148. A debtor in making payment to an agent must do it in such a manner as to facilitate the agent in transmitting funds to his principal. Payment by check or draft which agent has reason to believe is good may be received, but in conditional payment only. Griffin v. Erskine, 131 Iowa, 444 109 N. W. 13. Where a collection agency was employed to see debtors and induce payment directly to the principal, the agent had no authority to bring suit in the name of the principal, especially on an outlawed claim upon which judgment had previously been obtained. Satterlee v. First Nat. Bank [Neb.] 111 N. W. 591. Authority of agent to use money collected for any purpose except those specially authorized is for the jury. Harvey v. Sparks Bros. [Wash.] 88 P. 1108.

77. Kearns v. Nickse [Conn.] 66 A. 779.

78. Authority to sell land implies no authority to sell on credit. Winders v. Hill, 141 N. C. 694, 54 S. E. 440.

79. A traveling salesman, in the absence of any custom, has no implied authority to agree that on a sale of goods any part might be returned before settlement, although the season had closed for such goods. Friedman & Sons v. Kelly [Mo. App.] 102 S. W. 1066.

80. A warranty by an agent to make a sale is binding on his principal. Warranty of soundness of a horse. Ellison v. Simmons [Del.] 65 A. 591.

81. Where the authority of an agent to

Implied power to warrant does not include adjustment of damages for breach of warranty.[83] An agent to make a lease has authority to make binding representations concerning his principal's title,[84] but he cannot lease for a term longer than his known authority.[85] An agent to deliver a policy may receive the first premium,[86] and if he be an issuing agent may issue enlarged risks for enlarged premiums.[87] An agent to pay over a claim may make unconditional settlement thereof.[88]

(§ 2) *D. Ratification by principal*[89] is an act or series of acts of adoptive or otherwise confirmatory relation to unauthorized acts by agents[90] whereby the principal becomes bound as though authority had existed.[91] Whether the acts or

sell cattle is admitted, this authority included the power to fix the price and arrange the terms of sale so that it is unnecessary to invoke the principle of ratification. Graham v. Edwards [Tex. Civ. App.] 99 S. W. 436. Where an agent has the power to sell cattle, the warranty as to the number of cattle in each class is but a means of fixing the price and clearly within the scope of the agent's powers. Id.

82. By Code in California, an agent intrusted with the possession of goods sold may receive the price for which they are sold. Lindlow v. Cohn [Cal. App.] 90 P. 485.

83. This provision cannot be extended so as to clothe the agent with authority to determine the existence of a breach and award damages. Lindlow v. Cohn [Cal. App.] 90 P. 485.

84. Finch v. Causey [Va.] 57 S. E. 562.

85. Finch v. Causey [Va.] 57 S. E. 562. An agent's authority to lease premises for monthly terms does not impliedly carry authority to make leases for years. Larkin v. Radosta, 104 N. Y. S. 165.

86. An insurance agent with authority to make contracts of insurance and deliver policies has implied authority to accept notes for the first premium. Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 N. W. 861.

87. Agents with authority to solicit business for surety bonds, receive applications, issue bonds, and receive premiums, may not claim that they have no authority to issue a certain bond increasing their principal's liability where an additional premium is paid. Bond for an unlimited amount of liability. In re American Fidelity Co., 104 N. Y. S. 711.

88. Where an insurance company sent drafts to an agent to pay the insurance upon a risk wrongfully believed to be dead, the agent had authority to make an unconditional settlement despite the limitations in the policy. Payment made after absence of seven years of the insured who later appeared. New York L. Ins. Co. v. Chittenden [Iowa] 112 N. W. 96.

89. See 7 C. L. 81.

90. A simple denial of liability by a corporation for the unauthorized act of an employe in making arrangements for a funeral is not ratification. Rice v. New York, etc., R. Co. [Mass.] 81 N. E. 285.

Ratification found: Exchange of stock of goods for land by agent. Doolittle v. Murray & Co. [Iowa] 111 N. W. 999. Letters between principal and agent held admissible to show knowledge of the agent's act and ratification of the same. Central Texas Groc. Co. v. Globe Tobacco Co. [Tex. Civ. App.] 99 S. W. 1144. Ratification by trustees of a sale of land made by an agent who was employed by one only of three trustees. Hill v. People [Ark.] 95 S. W. 990. Ratification of the unauthorized contract of an agent of a wholesale company with a retailer that such retailer was to have commissions on all sales in a certain district which he would O. K. Garrett & Co. v. Josey [Tex. Civ. App.] 16 Tex. Ct. Rep. 824, 97 S. W. 139. Commission appointed by defendant company appointed plaintiff as its secretary and secretary of its engineer. Plaintiff's employment was recognized by the defendant's president and defendant accepted his services for over a year, paid for them, and later discharged him. American China Development Co. v. Boyd, 143 F. 258. Where the general manager of a railroad company had notices of a reward posted in all the stations, the fact that the president of the road traveled over it at least once in ten days is evidence of ratification of the general manager's act. Arkansas S. W. R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802. Where the plaintiff's agent made a sale of tobacco on consignment contrary to printed directions on the order slip signed by the defendant, it is competent for the agent to testify that he made a pencil note of the terms on the order slip and so notified the plaintiff, who replied "all right," to show ratification of the contract of sale. Central Texas Groc. Co. v. Globe Tobacco Co. [Tex. Civ. App.] 99 S. W. 1144.

No ratification found: Unauthorized sale of land. Skirvin v. O'Brien [Tex. Civ. App.] 16 Tex. Ct. Rep. 105, 95 S. W. 696. The fact that the commissioner of the land office accepted the survey of landowners of a land grant to the extent of marking the same on a map did not estop the estate from thereafter claiming that the survey was incorrect on the ground that the act was the act of an agent which was ratified by failure of the state to claim the incorrectness of the survey. Sullivan v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 234, 95 S. W. 645. Where a traveling salesman was in the habit of drawing upon his employers, the defendants, for expense money, which drafts the plaintiffs cashed and which were accepted by the defendants, no ratification of the salesman's act is shown which would establish his authority to draw upon them ad libitum. Seattle Shoe Co. v. Packard [Wash.] 86 P. 845.

91. A principal is liable for the unauthorized acts of its agents which it ratifies. Prosecution for larceny by defendants' bookkeeper whose acts were known to the general manager and president of the defendant company who either assented or declined to interfere. White v. Apsley Rubber Co. [Mass.] 80 N. E. 500.

conduct were so may be for the jury,[92] but may be implied by the circumstances [93] from an acceptance by the principal of the benefits derived from the agent's unauthorized acts,[94] or by bringing suit founded upon the agent's contract,[95] but mere silence is not usually sufficient [96] unless combined with other circumstances making it the principal's duty to speak.[97] A principal does not ratify the employment of a subagent by accepting the results of his acts unless he has knowledge of such employment.[98] Ratification is not to be inferred until the principal has full knowledge and then continues to be inactive,[99] unless he accepts the benefits of the acts

92. Where policy required that books, etc., be kept in a safe, but the agent agreed that this would not be enforced and after a loss, the books, etc., having been destroyed, the adjuster required duplicate copies, making no objection to their loss, and it further appeared that the premium was paid after the loss and retained, the question of ratification is for the jury. Gish v. Insurance Co. [Okl.] 87 P. 869. Whether unauthorized employment of surgeon was ratified, where it appeared that surgeon reported and the principal produced the report but did not negative inference that it was seasonably received and no disaffirmance was made. Hall v. New York, etc., R. Co., 27 R. I. 525, 65 A. 278.

93. One tenant in common ratifies acts of the other by seeing work done, making partial payment therefor, etc. Hilton v. Hanson, 101 Me. 21, 62 A. 797.

94. Fraud by agent. Krolik v. Curry [Mich.] 14 Det. Leg. N. 74, 111 N. W. 761; Schiffer v. Anderson [C. C. A.] 146 F. 457. Where one receives the proceeds of the sale of land and executes and delivers a deed therefor, she is in no position to deny the agency of one making the sale. Millard v. Smith, 119 Mo. App. 701, 95 S. W. 940. A party whose attorney settled a claim and turned over the amount to him which he kept without objection has ratified the act of his attorney if done without authority. Fenimore v. White [Neb.] 111 N. W. 204. Husband purchased land with his wife's money under an agreement to convey to a third party. Held, since by taking title she ratified husband's act, she could not refuse to complete the husband's contract and convey to plaintiffs. Peterson v. Hicks [Wash.] 86 P. 634. Payment with knowledge for services performed tends to show ratification. Kennedy v. Supreme Lodge Knights of Pythias, 124 Ill. App. 55. Acceptance of a check and appropriation of proceeds held a ratification of a settlement made by an agent, though principal wrote defendant that they would not be bound. Stetson-Preston Co. v. Dodson & Co. [Tex. Civ. App.] 103 S. W. 685.

95. Purchase of a horse by one of several associated for that purpose is ratified by bringing suit by all upon a breach of warranty. Daugherty v. Burgess, 118 Mo. App. 557, 94 S. W. 594. In a suit by a consignee against a carrier, the plaintiff cannot show lack of authority in the consignor to make the shipment. Bell Bros. v. Western A. R. Co., 125 Ga. 510, 54 S. E. 532.

96. A customer on a vacation received notification from his broker of the sale of securities and made no objection for ten days until he returned. Burnham v. Lawson, 103 N. Y. S. 482. Salesman endorsed his employer's check who allowed two years to elapse before giving notice to defendant, and it was held that this was not, as matter of law, ratification. Blum Jr.'s Sons v. Whipple [Mass.] 80 N. E. 501. Where a traveling salesman took an order and fixed a price without authority, sending such order to his principal, the mere silence of his principal after its receipt does not constitute acceptance. Gould v. Cates Chair Co. [Ala.] 41 So. 675.

97. Where a shipper of corn made no objection to the methods of treatment of shipments by the railroad company during several months of a particular transaction, but at the end sought to recover damages for acts which he had acquiesced in, his silence was consent and he cannot recover. Sutherland v. Illinois Cent. R. Co. [C. C. A.] 152 F. 694; White v. Apsley Rubber Co. [Mass.] 80 N. E. 500.

98. Groscup v. Downey [Md.] 65 A. 930.

99. Belcher v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 85; Lindlow v. Cohn [Cal. App.] 90 P. 485; Ryle v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 87. Manager of a company knew that books of company were being audited and assisted therein but did not know it was on behalf of the company. Thiel Detective Service Co. v. Seavey, 145 Mich. 674, 13 Det. Leg. N. 610, 108 N. W. 1080. Embezzlement by an agent to manage real estate of funds to pay taxes is not ratified by a refusal to reimburse unless knowledge of the transaction is shown. Foote v. Cotting [Mass.] 80 N. E. 600. Lease, seals placed thereon by lessor's agent after signing by lessees and without their knowledge or that of the lessor. Suit brought upon the sealed instrument. Tulane University v. O'Connor, 192 Mass. 428, 78 N. E. 494. Where a person without authority in behalf of the mortgagee refused to accept certain insurance offered by the mortgagee, such act is not ratified by a suit to foreclose brought by such person without the mortgagee's knowledge. Ver Veer v. Malone [Iowa] 112 N. W. 82. Contract for sale of coal which purchaser's agent arranged need not be delivered promptly. By accepting a shipment not delivered promptly the purchaser did not ratify agent's arrangement of which it was ignorant. Pittsburgh & Ohio Min. Co. v. Scully, 145 Mich. 229, 13 Det. Leg. N. 476, 108 N.W. 503. A principal by receiving the monthly rentals stipulated for in a lease for three years did not ratify the act of his agent whose authority was restricted to monthly leases in making such lease. Larkin v. Radosta, 104 N. Y. S. 165. Where a statute requires an agent's authority to lease for terms exceeding three years to be in writing, and an agent with authority to

or intentionally assumes the obligation without inquiry.[1] An agency may be ratified by adopting the unauthorized employment of the agent.[2] A principal cannot ratify in part and repudiate in part the unauthorized act of his agent.[3] Assent to an authorized offer made by an agent which is not accepted is not assent to a similar offer later made to the same or different parties.[4] A power of attorney to act in the future does not amount to a ratification of prior acts by the grantee.[5] An agent cannot ratify his own unauthorized acts.[6] Ratification of a written contract for the sale of land may be by parol.[7] It is the general rule that where an agent makes a deed of land of his principal without authority, ratification must be by deed of the principal and cannot be implied from assent and other circumstances.[8]

(§ 2) *E. Undisclosed agency.*[9]—The act of an agent acting for an undisclosed principal is the act of the principal and he may sue or be sued when his identity becomes known.[10] It is immaterial that the principal was never given credit provided the circumstances are not such as to make such a result unjust or inequitable.[11] Where an undisclosed principal sues on a contract by his agent in his own name with a person unaware of the agency, such suit is subject to any defense acquired by the third party before notice of agency,[12] but if the party knew or had reason to know of the fact of agency, he cannot plead such defenses.[13] To hold a person liable as an undisclosed principal he must be a party unknown to the transaction.[14] One who has dealt with an agent cannot upon discovery of an undisclosed principal hold both the agent and the principal.[15] Title to property taken

make leases for periods as long as three years makes an unauthorized lease for ten years, the fact of occupancy and improvements by the tenants is inadequate notice to the principal to impose the duty of inquiring whether the agent had exceeded his authority so that acquiesance would not work as ratification. Clement v. Young-McShea Amusement Co. [N. J. Err. & App.] 67 A. 82.

1. Heinzerling v. Agen [Wash.] 90 P. 262.

2. Tate v. Aitkin [Cal. App.] 90 P. 836.

3. A principal could not retain a note and repudiate the remainder of a settlement by which it was obtained. Dolvin v. American Harrow Co., 125 Ga. 699, 54 S. E. 706; McLeod v. Despain [Or.] 90 P. 492. Sales of flour made by an agent. The principals sought to hold the purchaser to the sale but to avoid terms of payment made. Brennan v. Dansby [Tex. Civ. App.] 95 S. W. 700.

4. Hoskins v. O'Brien [Wis.] 112 N. W. 466.

5. An owner gave a power of attorney to sell land having no knowledge that the grantee had already given a bond for a deed. Britt v. Gordon [Iowa] 108 N. W. 319.

6. Secretary of a lodge having admitted a party to membership without authority cannot ratify this act by later accepting dues. Driscoll v. Modern Brotherhood of America [Neb.] 109 N. W. 158. An owner executed a power of attorney to sell land to one who had already given a bond for a deed to a third party. The third party then paid part of the purchase price which was retained by the agent. Britt v. Gordon [Iowa] 108 N. W. 319.

7. Brandon v. Pritchett, 126 Ga. 286, 55 S. E. 241.

8. Knowledge of the son of a landowner and the fact that a letter was written to the owner stating the unauthorized act of the agent would not show knowledge from which assent might be implied. Skirvin v. O'Brien [Tex. Civ. App.] 16 Tex. Ct. Rep. 105, 95 S. W. 696. But see **contra.** Where authority to sell land is required by statute to be in writing but the owner knows that another is trying to make a sale, and had made out a deed in her name and she accepted the full purchase price, there was an irrevocable ratification of such act. Kirkpatrick v. Pease [Mo.] 101 S. W. 651.

9. See 7 C. L. 84.

10. Agent to purchase cattle took title to same in his own name. Kempner v. Dillard [Tex.] 101 S. W. 437. Where a written contract is signed by agents in their names only and is not under seal, action may be maintained on it either by or against the principals, even in case of a contract for sale of land. Pelletreau v. Brennan, 113 App. Div. 806, 99 N. Y. S. 955. Plaintiff contracted with defendant for dispatch of telegram through his agent. Western Union Tel. Co. v. Manker [Ala.] 41 So. 850. Where the fact of agency is concealed, the person dealing with the agent may, upon discovery of the principal, hold him liable and not the agent. Brown v. Tainter, 99 N. Y. S. 1030. Where one acts as the secret agent of another, evidence of what he did and said while acting as agent is admissible against the principal. Schiffer v. Anderson [C. C. A.] 146 F. 457.

11. Berry v. Chase [C. C. A.] 146 F. 625.

12, 13. Frazier v. Poindexter, 78 Ark. 241, 95 S. W. 464.

14. An indorser of a note for whose benefit money was borrowed cannot be held as a principal where the indorsement was procured at the lender's request. Brown v. Tainter, 99 N. Y. S. 1030. A person dealing with an agent acting for an undisclosed principal is not bound to follow up facts which tend to give notice of the agent's real relations. Book v. Jones [Tex. Civ. App.] 17 Tex. Ct. Rep. 509, 98 S. W. 891.

15. Stock broker acting for undisclosed

by an agent in his own name does not pass to his undisclosed principal in the case of negotiable instruments and contracts under seal.[16]

(§ 2) *F. Notice through agency.*[17]—If any material fact comes to the agent's knowledge or notice in the course of and with respect to his employment, the principal is charged,[18] but knowledge of matters not within the scope of the agent's employment cannot be imputed,[19] and knowledge of an agent is not knowledge of the principal when the agent is engaged in an idependent fraudulent act,[20] or where the knowledge is such that according to human nature and experience the agent is certain to conceal, or where the agent is acting in an adversary relation to the principal,[21] or where the knowledge was acquired while acting for himself or for a third

customer purchased stocks through another house. Berry v. Chase [C. C. A.] 146 F. 625.

16. Kempner v. Dillard [Tex.] 101 S. W. 437.

17. See 7 C. L. 86. See, also, **Clark & S. Agency, 1039.**

18. Blowers v. Southern R. Co., 74 S. C. 221, 54 S. E. 368. Assignee of a judgment chargeable with knowledge of his attorney as to defenses. Boice v. Conover [N. J. Err. & App.] 65 A. 191. Notice to one tenant in common representing all parties is notice to all. Atterbury v. Hopkins [Mo. App.] 99 S. W. 11. A principal whose agent buys land knowing that the vendor has already contracted with another is also charged with such knowledge. Johnson v. Tribby, 27 App. D. C. 281. Knowledge of a bank that a bankrupt had preferred a claim in its hands for collection is knowledge of the creditor. Hooker v. Blount [Tex. Civ. App.] 16 Tex. Ct. Rep. 993, 97 S. W. 1083. Several parties signed a note as makers with the understanding known to the payees' agent that the note was to be used as collateral by the payee for a certain purpose. Such knowledge bound the payee. Hoffman v. Habighorst [Or.] 89 P. 952. Where the understanding between the agent of grain brokers and a third party is that such third party is buying options merely without any intention of delíveries, the principals are charged with knowledge and it is assumed that they executed such orders with this understanding. Ware v. Heiss [Iowa] 110 N. W. 594. Knowledge of the local attorney and president of a local board of directors of a foreign corporation in regard to a matter coming within the sphere of their employment and acquired during their employment and acquired before sending their report to the home company must be imputed to the company. Armstrong v. Ashley, 204 U. S. 272, 51 Law. Ed. 482. Where defendants requested plaintiff's agent to communicate to plaintiffs an offer to sell at a certain price, the agent became the defendant's agent for that purpose and for receiving the plaintiff's acceptance, and an acceptance communicated to such agent was binding without notice upon the defendants. McClesky v. Howell Cotton Co. [Ala.] 42 So. 67. An agent for the sale of machines was required by a due regard for business methods to take into consideration the financial responsibility of a purchaser so that knowledge on his part of the transfer and mortgage of land by a purchaser was notice to his principal. Gibbes Mach. Co. v. Rope [S. C.] 57 S. E. 667. Notice to a clerk in a store that insurance on goods would not be renewed is not notice to owner. German Ins. Co. v. Goodfriend, 30 Ky. L. R. 218, 97 S. W. 1098. From the mere fact that the secretary of a company who is also a director makes an unauthorized lease, his knowledge cannot be ascribed to the company. Clement v. Young-McShea Amusement Co. [N. J. Err. & App.] 67 A. 82. One who is superintendent of lime works for the defendant but not his general superintendent has no authority to interfere in an outside matter, such as cutting a ditch across a roadway. Dunn v. Gunn [Ala.] 42 So. 686. An architect not being an agent in any matter connected with the purchase of or payment for materials, his knowledge that certain materials were being obtained is even not chargeable to the owner. Chicago Lumber & Coal Co. v. Garmer [Iowa] 109 N. W. 780. Knowledge of a hired man employed to receive and weigh corn that it might be subject to a prior lien is not to be imputed to his master where by statute in Missouri one purchasing crops raised on rented property is liable for unpaid rent if he has knowledge that they were raised on rented premises. King v. Rowlett, 120 Mo. App. 120, 96 S. W. 493. Traveling salesman held to have no authority to receive notice of change in ownership of business foreign to his "territory." Mackey-Nesbet Co. v. Kuhlman, 119 Ill. App. 144.

20. A "binding receipt" issued by a life insurance agent is not binding upon the company if it states that it is issued for a paid up cash premium but only half the premium was paid by note, the agent making a present of the remainder, his commission, to the insured. Union Cent. Life Ins. Co. v. Robinson [C. C. A.] 148 F. 358.

21. Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658. Where an agent is seeking to secure a certain membership to obtain a charter for an organization and persons over a certain age were not eligible, the plaintiff knowing the agent's purpose and not being eligible had no right to assume that his true age would be communicated to the principals. Elliott v. Knights of Modern Maccabees [Wash.] 89 P. 929. Where an agent was empowered to manage property and embezzled funds to pay the taxes, his principal is not charged with constructive notice of his act. Foote v. Cotting [Mass.] 80 N. E. 600. An agent cannot by agreement with a third party knowing the facts deposit the money of his principal with such third party to his own credit and thereby exclude his principal from recovery of the same. Robards v. Hamrick [Ind. App.] 79 N. E. 386. The agent's knowledge of his wrong towards the principal is not imputable. Agent charged overdrafts without authority. Merchants' Nat. Bk. v. Nichols & Shepard Co., 123 Ill. App. 430.

person and not for the principal,[22] unless clear proof is made that the agent had such knowledge in mind at the time of the transaction in question.[23] Notice to the agent before the agency is begun or after its termination will not ordinarily affect the principal.[24] The fact that agents committed a fraud does not alter the legal effect of their knowledge as binding on the principal in regard to third parties having no knowledge of such fraud.[25] If a principal receives from his agent a deed to land without payment of a consideration, he is bound to know the terms upon which it was granted.[26] The rule in many of the states is that an insurance company cannot avail itself of provisions in a policy that it be void if certain facts do not exist when these facts were known to the agent not to exist when he issued the policy, and such knowledge by the agent may be proved by parol,[27] but the opposite rule prevails in the Federal and some other courts.[28]

(§ 2) *G. Mode of executing authority.*[29]—An agent having authority to sign his principal's name to an instrument governed by the statute of frauds need not indicate that the signature is by the agent.[30]

(§ 2) *H. Remedies, pleadings, procedure, and proof.*[31]—Assumpsit will lie for breach of a contract for the sale of land made by an agent despite the fact that it is sealed by the agent's own seal, as this may be treated as surplusage, the agent having no authority to bind his principal by a sealed contract.[32] The making of a claim of liability against the agent does not waive the principal's liability.[33]

It may be alleged that an act was done by the principal through his agent,[34] and it is not necessary as between the principal and the third person to allege positively that the agent was authorized.[35] If a contract be pleaded as the joint personal act of two, it cannot be shown that one made it for himself and as agent for the other.[36] A plea of no agency should definitely negative the allegation of agency.[37]

22. Where the president of a company procured from a bank of which he was a director a loan upon encumbered property, his knowledge of the incumbrance was not notice to the bank. Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658. An agent is not presumed to have communicated to his principal professional confidences received in representing a third person. Id.

23. The fact that an agent knew during a prior transaction that certain calves were smuggled is not knowledge chargeable to his principal in a purchase of the same animals when grown full size, there being no evidence that the agent knew they were the same animals. Badger v. Cook, 101 N. Y. S. 1067.

24. Reed v. Munn [C. C. A.] 148 F. 737. Admissions of an agent after the completion of a transaction are not admissible as against the principal to show notice. After the lease of his wife's land a husband admitted that he knew another party claimed a part of it. Finch v. Causey [Va.] 57 S. E. 562. Attorney at law committed a fraud affecting title to land prior to his employment by the defendant to pass upon the title and draw deeds. Goerz v. Barstow [C. C. A.] 148 F. 562.

25. Armstrong v. Ashley, 204 U. S. 272, 51 Law. Ed. 482.

26. Agent obtained a grant of part of a parcel of land for his principal who had title to the remainder upon terms that the entire tract was to be conveyed back to the original grantor. By receiving the deed the principal was given notice of these terms. Carter v. Gray, 79 Ark. 273, 96 S. W. 377.

27. Agent knew that party insured was not the unconditional owner as required by the policy. Pearlstine v. Phoenix Ins. Co., 74 S. C. 246, 54 S. E. 372.

28. Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 46 Law. Ed. 213. See, also, Insurance, 8 C. L. 377; Fraternal Mutual Benefit Associations, 7 C. L. 1777.

29. See 7 C. L. 87.

30. Wife with authority signed her own name and that of her husband to an agreement for the sale of land. Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S. W. 880.

31. See 7 C. L. 87.

32. Horner v. Beasley [Md.] 65 A. 820.

33. Laguna Valley Co. v. Fitch, 121 Ill. App. 607.

34. Sending telegram by agent. Western Union Tel. Co. v. Garthright [Ala.] 44 So. 212.

35. Complaint held to sufficiently allege that defendant's husband was her authorized agent. McGeever v. Harris & Sons [Ala.] 41 So. 930.

36. Clark v. Wooster [Conn.] 64 A. 10.

37. It is not sufficient in a statement of defense to deny an allegation of agency in respect of a particular enterprise by allegation that there was no such agency created by a particular contract relating to such enterprise. Martin Co. v. Williams, 30 Pa. Super. Ct. 298.

The charge should set forth correctly the test of the principal's liability,[38] but need not single out the fact that express authority was or was not shown.[39]

Evidence of authority.[40]—In an action on a contract made by an agent, the authority of the agent will be presumed unless questioned.[41] A principal may testify as to the authority given his agent.[42] If there be evidence of the agency any declarations of the agent as to his authority are admissible,[43] and if there be evidence of authority to make a contract respecting the subject-matter, a contract in relation thereto signed by the agent and acted on by the principal is competent.[44] Where the fact of agency is admitted, proof of the acts of the agent within the scope of his duties is evidence that such acts were acts of the principal.[45] In determining the scope of an agent's authority in a particular transaction, it matters not what his relation to his principal was in other matters.[46] Where an agent acts outside the apparent scope of his authority, it is necessary in order to bind his principal to show by evidence aliunde the acts of the agent that he was actually invested with the special power that he assumed to exercise,[47] but evidence of the custom and course of business in other matters is admissible as showing the apparent authority.[48] Despite the fact that by written agreement an agent appears as principal, it may be shown by parol that he is acting for an undisclosed principal.[49] The determination of the facts as to what particular authority was given is a jury function.[50]

38. Charge to jury held incorrect in that the liability of a principal for agent's acts was not limited to acts authorized by the principal or ratified by him. Weir v. Long [Ala.] 39 So. 974.

39. Lawrie v. Lininger & Metcalf Co. [Neb.] 107 N. W. 259.

40. Evidence of the agency, see ante, § 1 D.

41. The validity of an assignment questioned on the ground of lack of authority. No evidence was introduced on the subject, however, and authority was presumed. Strayhorn v. McCall, 78 Ark. 209, 95 S. W. 455.

42. An employer might testify that a salesman was only authorized to take orders subject to approval. Gould v. Cates Chair Co. [Ala.] 41 So. 675.

43. Eagle Iron Co. v. Baugh [Ala.] 41 So 662; Western Cottage P. & O. Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061.

Contra: In New Jersey declarations of a person alleged to be an agent, although accompanying his acts, are not competent to establish either the fact or the extent of the authority. Ryle v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 87.

Neither the declaration of an agent nor the conduct of others founded on his declarations are competent evidence of his authority to sell as his own that for which he was a selling agent. Westheimer v. State Loan Co. [Mass.] 81 N. E. 289.

44. Thompson v. Mills [Tex. Civ. App.] 101 S. W. 560.

45. Acts of superintendent in ordering extra work. Baldwin v. Polti [Tex. Civ. App.] 101 S. W. 543.

46. Storms v. Mundy [Tex. Civ. App.] 101 S. W. 258.

47. A foreman in charge of cattle for the mortgagor has no authority to give them up and ship them to the mortgagee. McGraw v. O'Neil [Mo. App.] 101 S. W. 132.

48. Authority implied from customary acts, see supra, § 2 A. Where in an action for goods sold it appeared that plaintiff's salesman sold nearly all the goods sued for, and that the defendant had frequently paid the salesman money on account which was credited to him by the plaintiff, evidence of money paid by the defendants for which the salesman gave defendants a receipt crediting the same to the general account was admissible to show the salesman's authority. Murphy v. St. Louis Coffin Co. [Ala.] 43 So. 212. Evidence of the acts of a general manager of a railroad company is admissible to show the scope of his authority. Arkansas S. W. R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802. Evidence that an employe of the defendant had an office in its freight depot, collected charges and freight, and directed movement of cars, is competent to show that such employe was acting within the scope of his authority in receiving notice not to deliver goods in transitu. Faust v. Southern R. Co. [S. C.] 54 S. E. 566. Where parties have contracted with an agent, they may prove other sales made by salesmen of the principal to show the course of dealings between the parties, and from such course of dealings the purchasers have a right to assume the authority of a salesman to make the contract. Contract for sale of flour made by a salesman upon terms slightly unusual. Brennan & Son v. Dansby [Tex. Civ. App.] 15 Tex. Ct. Rep. 744, 95 S. W. 700.

49. Brown v. Taintor, 99 N. Y. S. 1030.

50. Where a defendant claims a performance of work according to the instructions of the plaintiff's agent, the question whether the agent had authority to give the instructions is for the jury. As to electric sign put up by defendant on plaintiff's store. Ilyman v. Waas [Conn.] 64 A. 354. Whether a station agent of a railroad company was the agent for attending to handling of mail pouches was for the jury. Blowers v. Southern R. Co., 74 S. C. 221, 54 S. E. 368.

Proof of the agency should precede proof that the alleged agent did certain acts to bind the principal.[51]

§ 3. *Rights and liabilities of agent as to third persons.*[52]—An avowed agent for a disclosed principal incurs no personal contractual liability to third persons by acts within the scope of his employment,[53] although an agent may bind himself personally though fully authorized to bind his principal if he pledges his personal responsibility but only upon clear and explicit evidence of such an intention,[54] the presumption being to the contrary.[55] If an agent executes an instrument in his own name and adds to his signature the word "agent," this is mere description and he alone is liable,[56] but if the name of the principal was disclosed at the time of the transaction though not upon the instrument, this may be shown by parol and the principal be liable in an action between the parties but not to a third party.[57] Where an agent acts for a disclosed principal but without authority, he cannot be treated as a principal so that specific performance will lie,[58] but he is not protected by the agency and is liable personally for damages.[59] An agent acting within the scope of his

Where it is admitted that one is an agent for some purposes it is for the jury to say whether the employment of servants was within the scope of his authority, unless the character of his agency clearly excluded or negatived such authority. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93.

51. Conversations with an attorney at law not admissible until his authority to act for a third party is shown. Howell v. Maine & Co. [Ga.] 56 S. E. 771.

52. See 7 C. L. 87.

53. Agent of a motor company made agreement to appoint plaintiff agent. Hoyt v. Hoyt, 73 N. H. 549, 64 A. 18. Theatrical booking agents. Collier v. Myers, 101 N. Y. S. 659. Wrecking company releasing steamer which was aground cannot hold marine insurance agents having no interest in the vessel. Great Lakes Towing Co. v. Worthington, 147 F. 926. Where one giving an order informs the dealer that the goods are for another, who is made known, he thereby declares himself an agent and is not personally liable. Hatchett v. Sunset Brick & Tile Co. [Tex. Civ. App.] 99 S. W. 174. Plaintiff contracted with defendants as agent for a landowner for the purchase of land making a deposit which the defendants agreed would be returned if the transaction was not satisfactory. The defendants were not personally liable for this deposit. Tripple v. Littlefield [Wash.] 89 P. 493.

54. Evidence held not to show that an insurance agent bound himself in employing an appraiser for the insured. Underhill v. Smith, 102 N. Y. S. 142. Agent employed contractor to build houses. Book v. Jones [Tex. Civ. App.] 17 Tex. Ct. Rep. 509, 98 S. W. 891. Malicious prosecution by an agent on his own account. Farmers' Mut. Fire Ins. Ass'n v. Stewart [Ind.] 79 N. E. 490. Purchase of brick by agents who were always in the habit of personally paying for orders. Hatchett v. Sunset Brick & Tile Co. [Tex. Civ. App.] 99 S. W. 174. Evidence held not to show that agent did not openly pledge his own credit. Tripple v. Littlefield [Wash.] 89 P. 493. An employer not liable where evidence shows a sale was made to an employe on his personal account and there was no evidence that the employe had an authority to purchase or that the employer ever received the goods. Sales of clothing and table supplies to an employe of a cattle company. Young v. Chi Psi Cattle Co. [Neb.] 112 N. W. 560. The defendant as agent for a landowner received a deposit from a prospective purchaser to be returned in case a good title could not be given or forfeited to the landowner in the event that he did not purchase. The agent paid the deposit to his principal but he was held personally liable therefor as it was done before the purchaser refused to complete his bargain. Martin v. Allen [Mo. App.] 103 S. W. 138. Where in a contract for the sale of land signed by the vendor's agents they agree in their own names to indemnify the vendee against loss of the land, but without authority and not claiming to act for their principal at the time, they are personally liable. Funk v. Church [Iowa] 109 N. W. 286. Where the course of business between plaintiff and defendant had always been that the agent paid for goods ordered by him, the plaintiff not looking to anyone else for his pay the agent would be held liable although the fact that he was acting for another was known. Hatchett v. Sunset Brick & Tile Co. [Tex. Civ. App.] 99 S. W. 174.

55. The presumption is that the agent intended to bind only the principal except where he exceeds his power, uses his own name, or fails to disclose. Laguna Valley Co. v. Fitch, 121 Ill. App. 607.

56. Burkhalter v. Perry [Ga.] 56 S. E 631; McLeod v. Despain [Or.] 90 P. 492.

57. Burkhalter v. Perry [Ga.] 56 S. E. 631.

58. Exchange of a stock of goods for land made by agent and repudiated by principal. Doolittle v. Murray & Co. [Iowa] 111 N. W. 999. Where an agent contracted for plumbing on behalf of her principal but without authority, she was not personally liable since the plumbers knew she was only acting as agent. Meade Plumbing, H. & L. Co. v. Irwin [Neb.] 109 N. W. 391.

59. Illegal sale of certificates. Fidelity Funding Co. v. Vaughn [Okl.] 90 P. 34. One who shares in the settlement of an estate and knows the decree of the court holding the testator to have a life interest only is liable for sums distributed though he made the distribution under the widow's direc-

authority is not liable to any other person than his principal for money received.[60] Where the name of a principal appears in the body of an instrument which is signed by agents only in their own names, they cannot be held as principals.[61] Where an agent having a written but unrecorded power of attorney to sell land executed a deed in his own name the evidence was held to show that the agent acted in execution of the power and not for his own benefit.[62] Where defendant claimed that he was the agent of a firm in the purchase of cotton, it was for the jury upon the evidence to say whether he was acting in his individual capacity or as agent.[63] The fraud of the principal does not render liable the agent who has fully performed his office.[64] As against the other party, the agent will be defeated by his principal's fraud,[65] though as to stock brokers they may by being regarded as principals pro tanto in a sale of stocks carried on margin escape this rule to the extent of their advances.[66]

Undisclosed agency.—An agent dealing in the name of a sham principal is liable as a principal,[67] and the burden of proving that the principal does not exist or is not capable of contracting is on the plaintiff.[68] An agent of an undisclosed principal may sue in his own name,[69] and the addition of the word "agent" after the agent's name may be treated as mere surplusage.[70] A person contracting as agent who does not dislose the fact of his agency and name of his principal at the time of making a contract will be held personally liable.[71] Both cannot be held.[72]

§ 4. *Mutual rights, duties, and liabilities. A. In general; contract of agency; diligence and good faith.*[73]—Their contract is the measure of their mutual rights,[74] but the principal may waive the right to hold an agent to his contract.[75] The agent is liable to his principal for failure to carry out the terms of a bond executed by

tions and as her agent. Wallace v. Bozarth, 223 Ill. 339, 79 N. E. 57.

60. A person who pays an agent an amount due and later pays the principal the same amount cannot recover the amount paid the agent. Fisher v. Meeker, 103 N. Y. S. 261.

61. Theatrical booking agents signed a contract with plaintiff, an actress, in their own names, the name of the principal appearing in the preamble as party of the first part. Collier v. Myers, 101 N. Y. S. 659.

62. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex Ct. Rep. 739, 95 S. W. 622.

63. Lewis v. Smith [Ala.] 43 So. 717.

64. Where a draft is made payable to a bank solely for purposes of collection and the bank receives the money thereon and pays it over to the drawer without notice of fraud, it cannot be held by the drawee who pays the same upon the faith of forged bills of lading. Nebraska H. & G. Co. v. First Nat. Bank [Neb.] 110 N. W. 1019.

65, 66. Recovery by broker against defrauded third person so limited. Leo v. McCormack, 186 N. Y. 330, 78 N. E. 1096.

67. Where agents of a company in Hawaii contracted with the plaintiff, it was held that there was no evidence that the company did not exist. Fulton v. Sewall, 102 N. Y. S. 109.

68. The fact that a company is not incorporated is not such proof. Fulton v. Sewall, 102 N. Y. S. 109.

69. Hewitt v. Torson, 124 Ill. App. 375. Either the agent or his principal may enforce a contract not under seal made by the agent in his own name for an undisclosed principal. Lease of a hall. Buffington v. McNally, 192 Mass. 198, 78 N. E. 309. In an action by an agent for an undisclosed principal upon a contract not under seal, the defendant's offer of proof of the undisclosed principal is rightly excluded as immaterial. Id.

70. Buffington v. McNally, 192 Mass. 198, 78 N. E. 309.

71. Defendant contracted for repairs in a hotel, no other party being mentioned. Beidleman v. Kelly, 99 N. Y. S. 907. Manager of a corporation purchased goods without disclosing that he was acting for the corporation. Haviland v. Mayfield [Colo.] 88 P. 148. Plaintiff ordered corn of the defendant which the defendant did not himself furnish, and paid a draft accompanying its delivery made in favor of a third person. The defendant was held liable for the inferior quality of the corn. Drake v. Pope, 78 Ark. 327, 95 S. W. 774.

72. Berry v. Chase [C. C. A.] 146 F. 625.

73. See 7 C. L. 89.

74. Contract of employment between principal and agent considered, construed determining the rights of both parties. Stone v. Fox Mach. Co., 145 Mich. 689, 13 Det. Leg. N. 831, 109 N. W. 659.

75. Where an agent's contract for the sale of goods provided that the principal might treat him as the purchaser of all unsold goods if he went out of the mercantile business, and the agent notified the principal that he had gone out of business, whereupon he was instructed to sell goods and settle monthly or after he had collected for the same, it was held that the principal had waived his right to treat the agent as purchaser notwithstanding the provision that a failure to exercise the option should in no way impair the right to enforce the same. Owensboro Wagon Co. v. Hall, 143 Ala. 177, 42 So. 113.

him upon entering principal's employ.[76] The relation is fiduciary and requires the utmost good faith,[77] even when acting gratuitously.[78] He is bound to use that degree of skill and care which the nature of the business demands,[79] and is liable to his principal for losses due to his negligence.[80]

An agent cannot avail himself of any advantage his position may give him to speculate off his principal.[81] Gifts procured and purchases made by agents from their principals are closely scrutinized,[82] but if clearly shown to have been fully understood and free from overreaching or fraud, may be valid.[83] An agent to buy cannot purchase of himself,[84] and the principal may rescind such a sale though fair and without fraudulent purpose.[85] Where an agent purchases property with his principal's money in his own name, the legal title is in the principal.[86]

The termination of the agency leaves one free to act for himself or others,[87] but the principal is liable to the agent for all damages he may have sustained.[88]

(§ 4) *B. Accounting, settlement, and reimbursement.*[89]—The agent must account for all advances.[90] The acts of an agent within the general scope of his employment, whether profitable or unprofitable, enure in the absence of bad faith

76. Urquhart v. Saner [Tex. Civ. App.] 16 Tex. Ct. Rep. 20, 94 S. W. 902.

77. International Register Co. v. Recording Fare Register Co. [C. C. A.] 151 F. 199; Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P. 39. Agent to sell land reported purchase price as much less than actually paid. Hahl v. Kellogg [Tex. Civ. App.] 16 Tex. Ct. Rep. 30, 94 S. W. 389. The agent obtained authority to sell certain timber land for $2,000, but represented that he could get but $1,250 for it, whereupon the principal executed a sale, the agent having, however obtained $2,000, and fraudulently conspired with the purchaser to keep the balance. Lee v. Patillo, 105 Va. 10, 52 S. E. 696. Where a principal employs an agent to sell real estate but nothing is accomplished and the owner then makes a general proposition that if the real estate agent can find a party willing to exchange to let him (the owner) know, assuming this to be an agency, it is far short of a confidential relation requiring a full disclosure of facts in relation to a sale to the agent. Pomeroy v. Wimer [Ind.] 78 N. E. 233.

78. Cannot purchase stock for principal and sell to him at an advance. Kevane v. Miller [Cal. App.] 88 P. 643.

79. Agent not liable for fraud of subagent if he has used reasonable care. McKone v. Metropalitan L. Ins. Co. [Wis.] 110 N. W. 472.

80. Insurance brokers by mistake included a warranty contrary to the facts and before it could be rectified a loss occurred. Walker, Stratman & Co. v. Black [Pa.] 65 A. 799. Agent held not negligent in management of bonds. Moore v. Coler, 99 N. Y. S. 846.

81. State v. State Journal Co. [Neb.] 110 N. W. 763. Notes were sent agent to collect the amounts collected to be remitted to the principal, but the agent applied part of the money to a debt due him, and in an action against him by the principal, the principal can recover. Frazier v. Poindexter, 78 Ark. 241, 95 S. W. 464. A confidential agent with power to sell or buy can neither buy nor sell to himself without the approval of his principal after full information of facts relating to the transaction. Pomeroy v. Wimer [Ind.] 78 N. E. 233.

82. Evidence held to show that a real estate agent and lawyer abused his trust in managing the affairs of a woman, and obtained a conveyance of land for an inadequate consideration consisting of alleged advances of which he kept no account. Holtzman v. Linton, 27 App. D. C. 241.

83. Where a person if of strong mind, in possession of her faculties, and has had transactions explained in full, she may be found to have understood the transaction fully. Taylor v. Vail [Vt.] 66 A. 820.

84. Montgomery v. Hundley [Mo.] 103 S. W. 527.

85. Evidence held to support finding of agency and that defendant held an option on stock purchased. Montgomery v. Hundley [Mo.] 103 S. W. 527. One holding an option on corporate stock is within the rule. Id.

86. R, the agent of K, purchased cattle in his own name and mortgaged the same to X, a bona fide mortgagee. Kempner v. Dillard [Tex. Civ. App.] 102 S. W. 952. Cattle. Kempner v. Dillard [Tex.] 101 S. W. 437. Where the general agent for a German firm purchased lumber in the usual manner but on learning that such lumber was not desired by the firm took up the drafts given by him in payment personally, the beneficial title to the lumber passed to the firm and they were not liable to the agent for the use thereof. Oliven v. Kastor [Tex. Civ. App.] 101 S. W. 563.

87. Where the agent of a landowner to find a purchaser purchased the land himself, his agency ceased and he had a right to dispose of the land to whomever and at what profit he pleased. Rathke v. Tyler [Iowa] 111 N. W. 435.

88. Star Fire Ins. Co. v. Ring, 103 N. Y. S. 137; Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213. Agency for the sale of lands to continue in force for five years. The fact that agents had been to some expense is no consideration for agreement not to revoke. McMahan v. Burns [Pa.] 65 A. 806.

89. See 7 C. L. 90. As to remedy for accounting, see post, § 4 D.

90. In an action by a warehouse company to recover advances to an agent, the weight of evidence was held to be against the agent. Orr v. Louisville Tobacco Warehouse Co., 30 Ky. L. R. 457, 99 S. W. 225.

to the advantage or disadvantage of the principal.[91] An agent is under legal obligation not to act adversely to his principal's interests in connection with any of his business, and any advantage the agent may obtain in this way inures to the benefit of his principal who is entitled to an accounting.[92] An agent who collects rents for another acts in a fiduciary capacity and holds amounts collected in trust, or if he collects the same without authority and converts them to his own use, they constitute a debt fraudulently contracted and in neither case does a discharge in bankruptcy release the agent from such a debt.[93]

(§ 4) *C. Compensation of agent.*[94]—The right to compensation and the amount thereof is usually determinable from the contract between the parties.[95] In Louisiana the general rule is that the contract of agency is gratuitous, but where services are valuable and onerous compensation would be allowed.[96] An agent is entitled to his commission only upon a due and faithful performance of all the duties of his agency,[97] and it is immaterial whether the result of the agent's conduct is injurious or not.[98] Compensation already earned on sales is not lost by revocation before the price is collected.[99] Performance must be within the time limited by

91. McCourt v. Singers-Bigger [C. C. A.] 145 F. 103. Must account for all that was realized from a sale though conveyance was made to agent for less sum, which was represented to be all that could be realized. Qate v. Aitken [Cal. App.] 90 P. 836.

92. The plaintiff's agent while in its employ made use of private information so as to obtain a contract for himself away from his employers. International Register Co. v. Recording Fare Register Co. [C. C. A.] 151 F. 199. Evidence held insufficient to entitle the complainant to an accounting from his agents on the ground of having fraudulently induced him to lease property for less than its fair rental value. Hubbard v. Cook [C. C. A.] 153 F. 554.

93. Stull v. Beddeo [Neb.] 110 N. W. 861.

94. See 7 C. L. 90.

95. Contract construed and agents held not entitled to half the profits on a deal in real estate by the principals with its money, though the agents performed part of the work. Hipwell v. Pioneer Inv. & Trust Co. [Cal.] 89 P. 1085. Contract for compensation for sale of bonds construed. Luce v. Consolidated Ubero Plantations Co. [Mass.] 80 N. E. 793. Where the basis for an agent's commission was to be on sales of $500 per month or over, he cannot recover where monthly sales are less. aas v. Malto-Grapo Co. [Mich.] 111 N. W. 1059. A tobacco warehouse company is entitled to commissions for tobacco sold and is not chargeable with the value of samples taken out of the tobacco. Orr v. Louisville Tobacco Warehouse Co., 30 Ky. L. R. 457, 99 S. W. 225. Contract of agency construed and the principal held entitled to reject certain notes judged by them to be worthless and apply the same on the agent's commissions. International Harvester Co. v. McKeever [S. D.] 109 N. W. 642. Where an agent was to receive commissions only when notes, securities, and other property taken in exchange for machines were paid in cash, he was entitled to receive his commissions where property taken in exchange was in turn exchanged at a fixed value by the principal for other property. Bills v. Stevens Co. [Mich.] 13 Det. Leg. N. 868, 109 N. W. 1059. Where a contract of agency provided that no commissions would be allowed upon secondhand machines, the provision related to secondhand machines taken in exchange and not to a secondhand machine taken in exchange by another agent and sent to the plaintiff to sell. Gooch v. Case Threshing Mach. Co., 119 Mo. App. 397, 96 S. W. 431. Where plaintiff in attempting to make a sale of an automobile was informed by the manufacturers to go ahead and they would "protect" him, and there was evidence of conversations on the subject of commissions, it was **for the jury** to say whether the plaintiff was entitled to a commission where the sale was finally made through another agency. Fredericksen v. Locomobile Co. [Neb.] 111 N. W. 845.

96. Defendant requested plaintiff, a traveling salesman, to get a purchaser for his plantation which was done, and it was held he was entitled to a moderate recompense. Stewart v. Soubral [La.] 43 So. 1009.

97. Agents retaining money collected without making report thereof not entitled to commissions. Sidway v. American Mortg. Co., 222 Ill. 270, 78 N. E. 561. Agent to sell land upon a commission of $1 per acre reported a sale at $22,000 whereas the actual price paid was $29,500. Principal entitled to recover the balance together with commissions deducted. Hahl v. Kellogg [Tex. Civ. App.] 16 Tex. Ct. Rep. 30, 94 S. W. 389. One who secretly acts for another party while in the employ of one forfeits all rights to a commission. One employed to sell stock and a house procured a purchaser but defendants refused a commission on the ground that the agent was in the employ of purchaser. Atterbury v. Hopkins [Mo. App.] 99 S. W. 11. Sufficient evidence of authority to lease premises to warrant an action for commissions. Colloty v. Schuman [N. J. Law] 66 A. 933.

98. Sidway v. American Mortg. Co., 222 Ill. 270, 78 N. E. 561.

99. Commissions sale of real estate. Eells Bros. v. Parsons [Iowa] 109 N. W. 1098. Agent employed to sell shares on commission. Shares subscribed for but not paid for gave him no commission, but he was to have notice and thirty days within which to resell. Many shares were thus forfeited but no notice or opportunity to resell was given the agent. In a bill for an accounting he

the contract of agency unless the time limit is waived,[1] but if a contract of agency ceases with the expiration of the time set in the contract and the agent continues the same employment after the expiration of the term without a new agreement, the presumption is that he continues at the original rate of compensation.[2] As between an agent and his principal, it is immaterial that the services were rendered without the statutory filing of his appointment.[3] Where accounts between principal and agent had been closed and several years later the agent was sued for a balance due the principal, the agent is not entitled to interest upon commissions for which he had made no claim until asserted in the action against him except from the date of his filing his claim.[4]

Subagents[5] must look to the agent unless the principal gave authority to employ them.[6] An agreement by an agent made with his principal to make good the embezzlement of funds by a subagent for which he believed himself liable is not binding for want of consideration.[7]

(§ 4) *D. Remedies, pleading, procedure, and proof.*[8]—The bare relation of principal and agent may not be sufficient to sustain a bill in equity for an accounting unless complicated,[9] but where the relations are of a fiduciary character, the agent becomes a trustee and such a bill may be maintained.[10] Where an agent repudiates the agency or fails to account for transactions within a reasonable time, there is no necessity for a demand before bringing an action for an accounting.[11] In an action for an accounting of goods alleged to have been received by an agent under his contract of agency, he may under a general denial show that the goods were received under a different contract.[12] The agent may be refused the appointment of administrator of the estate of his principal for the purpose of collecting a

was entitled to compensation on the basis of having resold such shares. Miller v. Russell, 224 Ill. 68, 79 N. E. 434; Atterbury v. Hopkins [Mo. App.] 99 S. W. 11. Where an agent is entitled to commissions upon goods sold upon payment for the same, he is entitled to commissions upon showing that payment was not made owing to fault of the principal in not shipping goods ordered. Abel v. Nelson, 104 N. Y. S. 362. Where an insurance company under contract with its agents to pay commissions upon premium notes when paid sells out its assets, thus putting it out of its power to to collect such notes, the contract of employment is broken and the agents may recover damages. Crowell v. Northwestern N. L. Ins. Co., 99 Minn. 214, 108 N. W. 962. Agent is entitled to commissions for sales made under contracts partially completed before his discharge and fully completed afterwards by the act of ordering according to "price memos" made out by him. Greene & Sons v. Freund [C. C. A.] 150 F. 721.

1. Where an agent is employed to find a purchaser for real estate within a certain time, he is not entitled to receive a specified commission unless he furnishes a purchaser within that time or unless the time limit is waived. Ice v. Maxwell [W. Va.] 55 S. E. 899.

2. Plaintiff brought an action to recover a commission under his contract upon a machine sold after the term had expired. Schurra v. Buffalo-Pitts Co. [Wash.] 87 P. 945.

3. Insurance agency. Penn M. L. Ins. Co. v. Ornauer [Colo.] 90 P. 846.

4. Orr v. Louisville Tobacco Warehouse Co., 30 Ky. L. R. 457, 99 S. W. 225.

5. See 7 C. L. 92.

6. Agent employed to purchase cotton seed employed another to assist him and the subagent must look to his immediate employer and not to the principal. Houston County O. M. & M. Co. v. Bibby [Tex. Civ. App.] 16 Tex. Ct. Rep. 145, 95 S. W. 562.

7. McKone v. Metropolitan L. Ins. Co. [Wis.] 110 N. W. 472.

8. See 7 C. L. 93.

9. Campbell v. Cook [Mass.] 79 N. E. 261.

10. Agent appointed by irrevocable power agent to manage real estate and account for rents, etc., after retaining what in his discretion was proper for disbursements required. Campbell v. Cook [Mass.] 79 N. E. 261. A principal is not entitled in equity to an accounting from his agent unless the agent is acting in a fiduciary capacity involving special reliance upon his integrity. The allegation of payment of money by a client to an attorney at law in connection with matters relating to real estate, taxation, and legislation, will not support a bill for an accounting. New York L. Ins. Co. v. Hamilton, 102 N. Y. S. 771. Where money is given to an agent for a specific purpose, he may be required to account in equity to his principal. Agent was given money for expenses in obtaining a concession in Panama. Allen v. O'Bryan, 103 N. Y. S. 125.

11. Defendant took plaintiff's goods agreeing to sell the same and report after each sale, but instead returned some of the goods in exchange for cash and mixed the rest with his own goods, selling the same and making no report. Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P. 39.

12. Acme Harvester Co. v. Curlee [Neb.] 110 N. W. 660.

debt against the principal.[13] An action will lie to recover money retained in fraud of the principal.[14] In a suit between a principal and agent to recover an alleged overpayment by the principal for goods purchased by the agent, the burden of proof is on the plaintiff to show that he was overcharged and that the price paid was not agreed upon regardless of the price paid by the agent.[15] In a suit by an agent to recover commissions of his principal for sale of goods, evidence is admissible to show the history of their business relations defining the nature and extent of the agent's employment.[16] In an action for his commission by a real estate broker where his principal refuses to complete a sale, the measure of damages is the amount of commission he earned and lost through his principal's wrong.[17] Where the question of the commission agreed to be paid is in dispute, the value of services renderd is competent evidence as bearing upon the issue.[18] Where an agent bought wheat for his principal in quantities shown by his reports and payments made and shipped the same to his principal and a shortage was discovered, in an action for embezzlement of the wheat the burden is not on the agent to account for the shortage but upon the principal to prove the shortage and that it was due to the agent's embezzlement.[19]

AGISTMENT; AGREED CASE, see latest topical index.

AGRICULTURE.

§ 1. Regulation (82).
§ 2. Cropping Contracts, Products, and Crop Liens (83). Liens (83).
§ 3. Agricultural Societies (84).

The status of crops as property and rights therein generally are elsewhere treated.[1]

§ 1. *Regulation.*[2]—One who permits noxious weeds to go to seed on his land and spread to adjacent land is liable in damages,[3] and if his act is malicious and wanton, exemplary damages may be recovered.[4] Under the Indiana statute the offense of permitting Canadian thistles to grow beyond a certain length is complete where one knowingly permits them to grow [5] and the five days' notice from the road supervisor to remove them is not an essential element of the offense.[6]

Where a department of agriculture has been created by valid legislation and a commissioner appointed thereunder he cannot be ousted from office by quo warranto because alleged powers are subsequently conferred upon him by the legislature.[7]

13. Nonresident widow of deceased appointed. Succession of Henry, 115 La. 874, 40 So. 253, 256.

14. Pleadings in an action by a principal to recover money retained by an agent held to state a cause of action. Wells v. Cochran [Neb.] 111 N. W. 381.

15. Bargman v. Brown [Tex. Civ. App.] 95 S. W. 39.

16. Admission of notices sent to customers by the authorities that goods were impure. Sullivan v. Crave & Martin Co. [Mass.] 79 N. E. 792.

17. Young v. Ruhwedel, 119 Mo. App. 231, 96 S. W. 228.

18. Plaintiff claimed a commission of ten per cent which was disputed, and he put in evidence that this was the usual commission. Standard Plunger Elevator Co. v. Brumley [C. C. A.] 149 F. 184.

19. Stone Mill Co. v. McWilliams [Mo. App.] 98 S. W. 828.

1. See Emblements and Natural Products, 7 C. L. 1275.

2. See 7 C. L. 94.

3. Complaint in an action against a railroad company for permitting Johnson grass to grow and mature upon its right of way and the seed thereof to be washed onto adjacent land held not wanting in particularity and to state a cause of action. Doeppenschmidt v. International & G. N. R. Co. [Tex. Civ. App.] 102 S. W. 950.

4. Railroad permitted Johnson grass to grow on its right of way and the seed thereof was washed onto adjacent land. Doeppenschmidt v. International & G. N. R. Co. [Tex. Civ. App.] 102 S. W. 950.

5. State v. Dawson [Ind. App.] 78 N. E. 352.

6. State v. Dawson [Ind. App.] 78 N. E. 352. An affidavit charging a property owner with knowingly and unlawfully permitting them to grow and mature on his land is sufficient. Id.

7. Commonwealth v. Warren [Pa.] 66 A. 322.

§ 2. *Cropping contracts, products, and crop liens.*[8]—The relation of the parties to a cropping contract is generally that of master and servant.[9] They are joint owners of the crop,[10] and one who furnishes the labor may mortgage his interest.[11] Where the relation of landlord and cropper exists, title and right to possession of the crop is in the landowner.[12] The rights of a landowner under a farm contract in so far as the contract vests in him the right to take enough of the tenant's share of the crops to reimburse him for the tenant's failure to perform the same are those of a mortgagee.[13]

Liens.[14]—In many states liens are given by statute to landowners,[15] persons who furnish funds to aid in raising a crop,[16] or who furnish seed grain,[17] or who thresh a crop.[18] The privilege conferred by the Louisiana statute is intended to secure only advances required by the cropper to raise the crop,[19] and one seeking to enforce it has the burden to prove the application of the statute.[20] Such a privilege follows the crop after it is severed from the soil.[21] A complaint to foreclose a statutory

8. See 7 C. L. 95.

9. Under a contract between a landowner and another requiring the latter to work the land and raise the crop, and to have one-half the net proceeds of the crop, title to which was to remain in the landowner, the relation of master and servant and not landlord and tenant existed. Bourland v. McKnight, 79 Ark. 427, 96 S. W. 179. Code 1896, § 2712, expressly provides that where one furnished land and team and another the labor under a contract of hire exists and the laborer has a lien on the crop for the value of the portion to which he is entitled. Farrow v. Wooley [Ala.] 43 So. 144. Where one was employed by a landowner to raise a crop for one-half the net proceeds thereof, whether medical attention to a cow and calf used on the farm was within the contract held a question for the jury. Bourland v. McKnight, 79 Ark. 427, 96 S. W. 179. A share cropper who is himself to perform the services in connection with the raising of a crop is, though a minor within the statute (Acts 1903, p. 90), punishing those who contract for services with intent to procure money or other thing of value, and not to perform the services contracted for to the loss and damage of the hirer. Vinson v. State, 124 Ga. 19, 52 S. E. 79.

10. Where parties contract to raise a crop on shares, one to furnish the land and the other the labor, and the one who was to furnish labor rented land in pursuance of the contract of the other to furnish it, held the parties were joint owners of the crop and not partners. Beaumont Rice Mills v. Bridges [Tex. Civ. App.] 101 S. W. 511.

11. One who is employed to raise a crop on land of another for one-half the net proceeds thereof may mortgage his interest therein. Bourland v. McKnight, 79 Ark. 427, 96 S. W. 179.

12. Goodson v. Watson, 125 Ga. 413, 54 S. E. 84.

13. In an action against a third person for conversion, the recovery is limited to the value of the tenant's share not exceeding the expenses occasioned by his failure to perform the contract. Agne v. Skewis-Moen Co., 98 Minn. 32, 107 N. W. 415, following McNeal v. Rider, 79 Minn. 153, 81 N. W. 830.

14. See 7 C. L. 96.

15. See Landlord and Tenant, 8 C. L. 656. Revisal 1905, § 1993, gives a lien where lands are rented for agricultural purposes only. Reynolds v. Taylor [N. C.] 56 S. E. 871.

16. National Bk. of Commerce v. Sullivan, 117 La. 163, 41 So. 480.

17. Evidence sufficient to show that plaintiff had a seed grain lien upon property described in the complaint and that defendant had converted such property. Schlosser v. Moores [N. D.] 112 N. W. 78. Where one sold seed wheat and seed flax to another and filed but one lien statement for the entire price upon the entire crop, but stated the number of bushels of each kind of grain and the price, held the contract was divisible and the lien was therefore divisible and should be construed as two liens, one against the wheat and one against the flax. Id. Under Rev. Codes 1905, §§ 6271, 6272, a person who furnishes seed grain to another is entitled to a lien for the entire purchase price of the seed upon the crop produced though all the seed was not sown. Id.

18. Gorthy v. Jarvis [N. D.] 108 N. W. 39.

19. The right of pledge in favor of one furnishing money, resulting from the execution and registry of the instrument authorized by Act No. 66, p. 114, of 1874, is intended to bear upon the crop as security for the reimbursement of the money that a planter "may require" for necessary expenses of the crop and plantation, and not as security for money which has already been advanced and used before the execution and the registry of the instrument. National Bk. of Commerce v. Sullivan, 117 La. 163, 41 So. 480.

20. The crop privilege conferred by Civ. Code, art. 3217, is intended to secure the reimbursement only of money which having been advanced is actually used for the purchase of necessary supplies and the payment of necessary expenses for the farm or plantation, and one seeking to enforce the privilege has the burden to prove such facts. National Bk. of Commerce v. Sullivan, 117 La. 163, 41 So. 480.

21. This privilege is not confined to growing crops but bears upon the products after they are severed from the soil and follows them into the hands of a purchaser who buying direct from the planter is presumed to have notice of the privilege. National Bk. of Commerce v. Sullivan, 117 La. 163, 41 So. 480.

thresher's lien must show the kind and quantity of grain upon which it exists,[22] and where the grain was grown in two counties, the lien statement should be filed in both.[23] In some states it is a criminal offense to sell property which is subject to an agricultural lien.[24]

§ 3. *Agricultural societies.*[25]—An agricultural society having authority to award premiums for improvements in stock, and entitled by statute to a certain sum from the state treasury on affidavits showing expenditures, not including races or money paid to secure games is impliedly authorized to conduct lawful games,[26] and its directors are not liable for mere nonfeasance in failing to more securely protect patrons from injuries.[27]

In North Dakota an appropriation was made to one of two associations which should deed land to the state.[28] It was only upon failure to comply with the provisions of the act as to matters that were preliminary to acceptance of title by the governor on behalf of the state that the appropriation could properly be claimed by the association that had not complied with the act.[29] A forfeiture of the appropriation should not be decreed unless the act under which it is claimed clearly shows that such was the legislative intention.[30] An agricultural society "dissolves or ceases to exist" so that its real estate vests in the county when it ceases to exist as a corporation and not when it ceases to give fairs.[31]

AIDER BY VERDICT, ETC.; AID OF EXECUTION; ALIBI, see latest topical index.

ALIENS.

§ 1. **Who are Aliens (84).**
§ 2. **Disabilities and Privileges (85).**
§ 3. **Immigration, Exclusion, and Expulsion (86).**
A. Admission and Exclusion (86).
B. Registration and Certificate (87).
C. Deportation and Procedure Incident Thereto (87).
D. New Trial and Appeal from Order of Deportation (88).
§ 4. **Naturalization (89).**

§ 1. *Who are aliens.*[32]—One is presumed to be a citizen of the United States from the fact of his residence therein,[33] unless it is shown that he was born in a

22. Where one has acquired a statutory thresher's lien on a large quantity of grain consisting of wheat, oats, and barley, a complaint in an action to foreclose the lien must show the kind and quantity of grain upon which the lien exists. Gorthy v. Jarvis [N. D.] 108 N. W. 39.

23. Where grain upon which a thresher's lien is claimed under Rev. Codes 1899, §§ 4823, 4825, was grown on land situated in two counties, the lien statement should be executed in duplicate and filed in both counties. Gorthy v. Jarvis [N. D.] 108 N. W. 39.

24. Evidence sufficient to sustain a conviction in a prosecution for selling property subject to an agricultural lien. State v. Pinckney, 74 S. C. 445, 54 S. E. 606.

25. Sec 7 C. L. 98.

26. Baseball games. Williams v. Dean [Iowa] 111 N. W. 931.

27. Occupant of grandstand struck by wild pitched ball. Dilliams v. Dean [Iowa] 111 N. W. 931.

28. Under Laws 1905, c. 46, vesting power to accept title to lands to be conveyed by the fair association in the governor and attorney general and also providing that upon failure of either fair association to comply with the act all appropriation should be made with the one complying with the act and the state fair located at that place, held that the fact that land conveyed by one association was incumbered could not be urged by the other as ground for paying to it of the appropriation after the governor and attorney general had accepted title. State v. Holmes [N. D.] 112 N. W. 144. The governor having been vested with power to accept title, his act in doing so could be questioned by no one except the state. Id.

29. State v. Holmes [N. D.] 112 N. W. 144. The failure of one fair association to manage the state fair strictly in accordance with law or to use the appropriations and make reports strictly within the terms of the act is not available to some other association as a ground for the payment to it of the appropriation. Id.

30. State v. Holmes [N. D.] 112 N. W. 144.

31. Toledo Exposition Co. v. Kerr, 8 Ohio C. C. (N. S.) 369. The tenant of an agricultural society has a right to defend under the title of that society derived from the county and cannot be ousted from the property by the county unless it be made to appear that the agricultural society has lost its rights therein, and a judgment against the tenant on the pleadings was therefore erroneous. Id. An action by a county against an exposition company to recover

foreign country.[34] The children of American citizens who are domiciled in a foreign country are citizens of the United States.[35] The statute naturalizing minor children of naturalized citizens "if dwelling in the United States" does not apply to a minor who has never dwelt in the United States on coming there to join a naturalized parent.[36] A citizen of Porto Rico, resident therein at the time of cession, is not an alien to the United States.[37] A citizen can be deprived of his status only by voluntary expatriation.[38] One born an American citizen cannot be deprived of his citizenship by any act of his father.[39] He can lose such citizenship only by his voluntary act after obtaining majority.[40]

§ 2. *Disabilities and privileges.*[41]—An alien may hold land except as against the sovereign.[42] In most states aliens are permitted to hold lands acquired by descent.[43] In Washington aliens may acquire mineral lands by purchase.[44] One who conveys to an alien for a valuable consideration divests himself of title though by statute the conveyance is void.[45] The right of the state to escheat land held by an alien is lost where not exercised during such alien's lifetime,[46] or before he conveys it to a citizen.[47]

. There is a conflict of authority as to whether a nonresident alien can sue for the wrongful death of a resident.[48]

land no longer used by the company for giving fairs and for rents and profits is one for the recovery of real property under Rev. St. § 5781, notwithstanding there are allegations which seem to call for some form of equitable relief. Id.

32. See 7 C. L. 98. See, also, Citizens, 7 C. L. 653.

33. State v. Jackson [Vt.] 65 A. 657. Where one born a British subject lived in the United States from before the Declaration of Independence until thirty years thereafter he will be deemed a citizen where it does not appear that he elected to adhere to the crown. Id. Residence once established is presumed to continue. Id.

34. A person is presumed to be a citizen of the country of his birth notwithstanding his residence in the United States. State v. Jackson [Vt.] 65 A. 657. Citizenship once established is presumed to continue. Id.

35. Where one born an American citizen removed to Canada before attaining majority and did nothing after becoming of age and before the birth of his son to expatriate himself, his son was born an American citizen under the Act of Congress Feb. 10, 1855 (10 Stat. 604), declaring that children born to American citizens out of the United States are citizens. State v. Jackson [Vt.] 65 A. 657. An American citizen who was a minor when he removed to Canada, where his son was born, had "resided" in the United States, within 10 Stat. 604 providing for citizenship of foreign born children. Id. Act April 14, 1802 (2 Stat. 155), declaring that children of persons who "now are" or "have been" citizens, though born out of the United States, are citizens thereof, does not apply to children of one not born until after the passage of such act. Id.

36. Rev. St. § 2172. Zartarian v. Billings, 204 U. S. 170, 51 Law. Ed. 428. Such child is not entitled to enter if affected with contagious disease. Id.

37. Narciso Basso v. U. S., 40 Ct. Cl. 202, following Gonzales v. William, 192 U. S. 1, 48 Law. Ed. 317.

38. Declarations of an American citizen after his removal to Canada are admissible to show that he did not expatriate himself. State v. Jackson [Vt.] 65 A. 657. Evidence insufficient to show that a citizen who removed to Canada did any thing prior to the birth of his son to expatriate himself. Id. Such citizenship is not affected by his subsequent removal to Canada. Id.

39. State v. Jackson [Vt.] 65 A. 657.

40. Removal to Canada after his birth does not divest him of his citizenship. State v. Jackson [Vt.] 65 A. 657. Evidence held to show that one born in Canada to American parents elected to conserve his American citizenship after attaining majority. Id.

41. See 7 C. L. 98.

42. Johnson v. Eversole Lumber Co. [N. C.] 57 S. E. 518. Laws 1852, p. 616, regulating sale of Cherokee lands, did not prevent aliens acquiring title to them. Id.

43. Under a statute providing that alien citizens may take real property by devise or descent in the same manner as citizens, an alien husband is entitled to curtesy in the estate of his deceased wife. Tenancy by the courtesy is one by descent within the rule that an alien may take lands by descent. Cooke v. Doron, 215 Pa. 393, 64 A. 595. Id. A constitutional provision permitting aliens to hold land acquired by inheritance permits them to inherit land whether the ancestors be aliens or citizens. Abrams v. State [Wash.] 88 P. 327.

44. Under a statute providing that an alien may acquire by purchase land containing valuable deposits of minerals, they may acquire land containing deposits of limestone, silica, silicated rock, and clay. State v. Evans [Wash.] 89 P. 565.

45. Abrams v. State [Wash.] 88 P. 327.

46. The land descended to his heirs on his death. Abrams v. State [Wash.] 88 P. 327.

47. State v. World Real Estate Commercial Co. [Wash.] 89 P. 471.

48. See, also, Death by Wrongful Act, 7 C. L. 1083. Nonresident alien parent may maintain an action for the wrongful death of their minor child. Atchison, etc., R. Co.

§ 3. *Immigration, exclusion, and expulsion. A. Admission and exclusion.*[49] The right to exclude aliens does not pertain to the judicial department,[50] and executive decisions refusing to permit an alien to enter are conclusive on the courts,[51] though such jurisdiction is invoked by a person entitled to remain in the United States.[52] The decision that a returned Chinese person is not entitled to re-enter the United States on one ground is not conclusive against his right to enter on another ground not asserted,[53] and failure to assert such ground is not a waiver of rights thereunder.[54] The amendments to the Chinese Exclusion Act do not enlarge the privileged classes entitled to enter under the original act.[55] The provision for the exclusion of nonregistered Chinese on their ceasing to be merchants and engaging in manual labor does not apply to a Chinese person who occasionally does manual labor in connection with his business.[56] Likewise, a laborer who becomes a merchant before proceedings for his deportation are begun is entitled to the immunities of that status.[57] An alien who is domiciled in the United States cannot legally be treated as an immigrant on his return after a temporary absence for a specific purpose not involving change of domicile.[58]

If the master of a vessel knowingly permits violation of the Chinese Exclusion Act, the vessel is subject to forfeiture.[59] Under such provision the word "vessel" includes tackle, furniture, and appurtenances,[60] and an appurtenance is not exempt from condemnation because not the property of the owner of the vessel.[61] It is an offense for officers of a vessel to fail to take due precautions to prevent the landing of aliens at any time or place other than as designated by immigration officials.[62]

v. Fajardo [Kan.] 86 P. 301. The provision of the treaty between the United States and Italy that citizens of Italy in the United States shall enjoy the same right in the protection of their person and property as citizens of the United States applies only to such as to their persons and property are within the jurisdiction of the United States. Under this treaty a nonresident alien cannot maintain an action for unlawful death under Act April 26, 1855 (P. L. 309). Maiorano v. Baltimore & O. R. Co. [Pa.] 65 A. 1077.

49. See 7 C. L. 101.

50. United States v. Ngum Lun May, 153 F. 209. See, also, post, § 3 C.

51. The decision of the immigration officer refusing to permit a Chinese alien to enter the United States after a hearing had in accordance with the acts of congress cannot be reviewed by the courts in habeas corpus proceedings. Wong Sang v. U. S. [C. C. A.] 144 F. 968. Proceedings to enforce the Chinese Exclusion Act are administrative and the decision of the Chinese inspector is not reviewable by the courts. Toy Tong v. U. S. [C. C. A.] 146 F. 343.

52. This is so though the proceeding was instituted by one domiciled in the United States who sets up that the person excluded is his minor son and invokes the jurisdiction of the court in his own behalf. Wong Sang v. U. S. [C. C. A.] 144 F. 968.

53. Decision because of his former status as an unregistered laborer, where his claim that he was a merchant was not investigated, is not conclusive against his right to enter by virtue of being a merchant. Ex parte Ow Guen, 148 F. 926.

54. Ex Parte Ow Guen, 148 F. 926.

55. 28 Stat. 7, amending 27 Stat. 25 (Chinese Exclusion Act), does not restrict the word "laborers" so as to enlarge the privileged classes. United States v. Yee Gee You alias Yee Jim [C. C. A.] 152 F. 157.

56. Partner in shrimp business who occasionally helped to pickle and deliver shrimps. Ow Yang Dean v. U. S. [C. C. A.] 145 F. 801. The Chinese Exclusion Act depriving a Chinese laborer of the right to re-enter the United States on his return does not apply to one who for a year prior to his return to China had done no manual labor except to help for a short time to pickle and deliver shrimps with a company in which he was a partner. Id.

57. The provision that an unregistered Chinese if found by certain persons shall be adjudged unlawfully in the United States does not forbid such person to remain here until proceeded against. Ex parte Ow Guen, 148 F. 926.

58. Rodgers v. U. S., 152 F. 346. 32 Stat. 1214, excluding "aliens" who are afflicted with loathsome or contagious disease, does not apply to aliens who are domiciled in this country. Id.

59. Under the provision of the Chinese Exclusion Act that every vessel whose master knowingly violates the act shall be forfeited, a purchaser of a vessel under conditional sale has power to appoint another master and render her subject to condemnation for such violation. The Frolic, 148 F. 918.

60. A chronometer is an appurtenant. The Frolic, 148 F. 921.

61. The Frolic, 148 F. 921.

62. The statutes requiring officers of vessels bringing an alien to the United States to adopt due precautions to prevent their landing at any place other than as designated by immigration officers, and making it an offense to land at any other time or place, are to be construed together and an officer is not liable if he adopted due precautions. "Alien" as used in such statutes includes members of a ship's crew, and while the master of a vessel is not forbidden to

On a prosecution for such offense, all evidence tending to show failure to adopt due precautions is admissible.[63] The importation of females for the purpose of prostitution or the holding or attempting to hold a female for such purpose in pursuance of such illegal importation is declared to be a felony.[64]

(§ 3) *B. Registration and certificate.*[65]—Registration and certificate of residence is conclusive against collateral attack,[66] and the enactment of statutes providing therefor and registration thereunder vacates a prior judgment of deportation.[67]

(§ 3) *C. Deportation and procedure incident thereto.*[68]—A resident claiming to be a native born citizen may not be deported until the right to deport has been judicially determined in accordance with the usual rules of evidence.[69] Deportation proceedings under the Chinese Exclusion Act are civil, not criminal.[70] No former complaint or pleadings are required.[71] Since the right to jury trial is not provided for by the act, it does not exist.[72] Such proceedings are not "causes" within the rule that issues of fact in causes in the United States district court shall be tried by a jury.[73] A Chinese inspector may file a complaint for violation of the exclusion laws before a district attorney outside the complainant's district.[74] A United States commissioner has jurisdiction to try a Chinese person on a charge of being unlawfully within the United States.[75]

A Chinese person brought before a commissioner or judge charged with being in the country illegally has the burden to establish his right to remain.[76] He must

allow members of the crew to go ashore, he is required to take reasonable precautions to prevent them from deserting. Taylor v. U. S. [C. C. A.] 152 F. 1.

63. On trial of a master of a vessel for permitting an alien (member of his crew) to leave the vessel in violation of the statute requiring him to adopt due precautions to prevent aliens landing except at times and places designated by immigration officials, he may be asked on cross-examination if a number of alien members of his crew did not desert at that port as material on the question whether he adopted due precautions. Taylor v. U. S. 152 F. 1.

64. Elements of the offense stated. United States v. Giuliani, 147 F. 594.

65. See 7 C. L. 102.

66. Under 28 Stat. 7, requiring Chinese laborers entitled to remain in the United States to register and procure certificates of residence, held, where a native born Chinese was duly registered under such act, such registration was not subject to collateral attack in a proceeding to deport him under a judgment rendered against him before the registration law took effect. In re Tom Hon, 149 F. 842.

67. A judgment in habeas corpus proceedings remanding a Chinese to the vessel on which he immigrated for deportation was vacated by the subsequent enactment of the statute providing for registration of Chinese entitled to remain and the registration of such Chinaman thereunder (28 Stat. 7). In re Tom Hon, 149 F. 842.

68. See 7 C. L. 103.

69. Moy Suey v. U. S. [C. C. A.] 147 F. 697. In deportation proceedings, the fact that the person is a native of China coupled with this personal appearance, dress, physiognomy, and queue, held sufficient to establish his nationality. Low Foon Yin v. U. S. Immigration Com'r [C. C. A.] 145 F. 791. Descriptive matter contained in the report of the master of the vessel on which an alien arrived in the United States, delivered to immigration officers, is admissible in an issue as to identity of such alien. McInerney v. U. S. [C. C. A.] 143 F. 729.

70. A defendant who claims to be a native born citizen may take and use depositions de bene esse. Rev. St. § 863. Lam Jung Sing, In re, 150 F. 608. The government may swear such person as a witness against himself. Low Foon Yin v. U. S. Immigration Com'r [C. C. A.] 145 F. 791.

71. No formal complaint or pleadings are required in Chinese deportation proceedings, and where the persons are before the court, objections to the validity of the process of arrest are not available to oust the court of jurisdiction. Toy Ton v. U. S. [C. C. A.] 146 F. 343.

72, 73. United States v. Ngum Lun May, 153 F. 209.

74. The provision in the Chinese Exclusion Act that no warrant shall issue for violation of the Exclusion Laws except on the sworn complaint of specified officials is merely descriptio personae of such officials and a complaint made by one of the officials designated may be filed with a commissioner outside the complainant's district. Toy Tong v. U. S. [C. C. A.] 146 F. 343.

75. A United States commissioner has jurisdiction to try a charge against a Chinese person for being unlawfully within the United States without a certificate, though the act of congress providing for the issuance of such certificate declares that a person who does not obtain it shall be adjudged unlawfully within the country and be arrested and taken before a "judge." Low Foon Yin v. U. S. Immigration Com'r [C. C. A.] 145 F. 791.

76. Toy Tong v. U. S. [C. C. A.] 146 F. 343. The Chinese Exclusion Act (27 Stat. 25), in so far as it places the burden of proof as to the right of a Chinese without a certificate to remain in the United States, is valid. Low Foon Yin v. U. S. Immigra-

establish such fact by affirmative proof to the satisfaction of the court or commissioner.[77] The only evidence admissible is the certificate of residence or in lieu thereof testimony that defendant was prevented from procuring one by sickness or other unavoidable cause and the testimony of at least one white witness that he was a resident prior to the registration period,[78] and where the evidence leaves the question in doubt, the court may require the defendant accompanied by counsel to be brought before him for further examination.[79] Evidence not produced at one proceeding is admissible in a subsequent one where such evidence was not required in the first.[80]

A judgment of deportation should state the facts upon which it is predicated.[81]

(§ 3) *D. New trial and appeal from order of deportation.*[82]—A Chinese person may appeal to the district court as a matter of right from an order of deportation made by the commissioner,[83] but the right of appeal must be exercised within the period prescribed.[84] An immigrant who has been denied the right to enter on

tion Com'r [C. C. A.] 145 F. 791. He has the burden of proving that he is a merchant and entitled to remain. United States v. Yee Gee You, alias Yee Jim [C. C. A.] 152 F. 157. One who asserts that he a native born citizen of the United States has the burden to prove it. Lee Yuen Sue v. U. S. [C. C. A.] 146 F. 670. Evidence insufficient. Id.

77. Lee Joe Yen v. U. S. [C. C. A.] 148 F. 682.

Evidence insufficient to sustain defendant's claim that he was a natural born citizen. United States v. Lam Jung Sing, 151 F. 715. Evidence insufficient to show that one was a merchant. United States v. Ngum Lun May, 153 F. 209. Evidence insufficient to show that one was born in the United States. Ho Ngen Jung v. U. S., 153 F. 232. Evidence sufficient to sustain a finding of the commissioner that a Chinese was not a native born citizen. United States v. Loy Too, 147 F. 750.

Evidence held not to warrant a deportation where defendant gave his place of birth, residence at different times, occupation and places of business of his father and uncle, and was corroborated and his testimony was uncontradicted. Moy Suey v. U. S., 147 F. 697. Evidence that a Chinese person entering the United States while a minor, he being the son of a merchant, did not have a certificate does not raise a presumption that he is unlawfully here, as such certificates were not required at the time he entered as to children of merchants. United States v. Ching Sing, 153 F. 590. One who was a merchant in the United States prior to congressional legislation excluding laborers, and who has a merchant's certificate providing for re-entry after a temporary absence, cannot he held to be unlawfully in the United States because since his return he has been engaged in the restaurant business and has no laborer's certificate. United States v. Quong Chee [Ariz.] 89 P. 525.

78. United States v. Yee Gee You, alias Yee Jim [C. C. A.] 152 F. 157. On trial of a Chinese person for being unlawfully in the United States, a certificate issued to him on his return from a visit in China reciting that it was issued under 23 Stat. 116, is admissible though it does not state that he was entitled to come into the United States under such act, he being a former resident merchant United States v. Quong Chee [Ariz.] 89 P. 525. Such certificate is not the only admissible evidence and the defendant may show by two white witnesses that he had been a merchant in the United States. Id. Though the government conceded that a Chinese person had been for twenty years a resident merchant, in a proceeding to deport him on the charge of being a laborer without a certificate of residence, where the issue was his right to remain, this obligation to establish such right entitles him to introduce any affirmative evidence. Id. Where in a trial of a Chinese for being a laborer unlawfully within the United States he introduced a certificate granted him on a return from China stating that he was not a laborer, his statements that since his return he had engaged in mercantile and restaurant business does not contradict the certificate. Id. Where in deportation proceedings it is alleged that the persons never had a certificate entitling them to remain in the United States, the invalidity of the rule providing for the taking away of such certificate was immaterial. Toy Tong v. U. S. [C. C. A.] 146 F. 343.

79. Lee Yuen Sue v. U. S. [C. C. A.] 146 F. 670.

80. The fact that a Chinese person on his return from China did not produce two white witnesses to testify that he had been a merchant in the United States does not bar such evidence in a subsequent proceeding to deport him as at the time of his admission such evidence was not required. United States v. Quong Chee [Ariz.] 89 P. 525.

81. A judgment for deportation of a Chinese person reciting that it appeared that the accused was a laborer and a subject of the Emperor of China, that he was not registered as required by 27 Stat. 25, and 28 Stat. 7, and that he did not belong to any of the classes excepted from registration and was unlawfully within the United States, was not objectionable for failure to state sufficient facts to sustain it. Lee Won Jeong v. U. S. [C. C. A.] 145 F. 512.

82. See 7 C. L. 103.

83. Order of judge allowing appeal is not necessary but an order staying execution of the commissioner's order is necessary. United States v. Loy Too, 147 F. 750.

84. Under 25 Stat. 479, a Chinese convicted of being unlawfully in the United States must appeal to the district court

a hearing before a board of special inquiry has a right to be informed of his right of appeal and the record must show that he was so informed.[85]

§ 4. *Naturalization.*[86]—It is an offense for one to falsely represent himself to be a citizen for any fraudulent purpose.[87] Under the statute making it an offense to knowingly possess a false certificate of citizenship with intent to use the same unlawfully, it is not essential that the certificate be actually used.[88]

ALIMONY

§ 1. Nature and Purpose of the Allowance (89).

§ 2. Jurisdiction and Power to Award (89).

§ 3. Stage or Condition of the Divorce Proceeding (90).

§ 4. Reasons for and Against Provisional Allowances (90).

§ 5. Amount, Character, and Duration (91). Division of Property (92). Support of Child (92).

§ 6. Procedure and Practice (92). Temporary Allowances (93). Permanent Award (93).

§ 7. The Decree: Its Enforcement and Discharge (93). Vacating or Modifying (94). Attachment of the Person (95). Subjection of Property (96).

§ 8. Suits for Annulment and Actions for Separate Maintenance (97).

§ 1. *Nature and purpose of the allowance.*[89]—The purpose of the law is that alimony shall be used for the maintenance of the wife or wife and children.[90] It is awarded in lieu of his duty to support his wife or in enforcement of such duty.[91] The object is present sustenance, hence counsel fees are not allowable for past counsel services in a different proceeding.[92]

§ 2. *Jurisdiction and power to award.*[93]—As a general rule the power to award alimony is vested in the trial court,[94] and while an appellate court will make provision for costs in preparing an appeal from a judgment awarding a wife divorce and alimony,[95] it has no jurisdiction pending the trial in the trial court to entertain a motion for the hearing of a matter to be determined at such trial.[96] To authorize the allowance of alimony pendente lite, the existence of marital relations must be

within 10 days or the court acquires no jurisdiction of the appeal. United States v. Yuen Yee Sum, 153 F. 494.

85. Under Immigration Act (32 Stat. 1213), and rule 7 of the secretary of commerce and labor, an immigrant who has been denied the right to enter on examination before a board of special inquiry has the right to be informed of his right of appeal and failure of the record to show that such information was given precludes finality of the decision. Rodgers v. U. S. [C. C. A.] 152 F. 346.

86. See 7 C. L. 103.

87. Under the statute making it a criminal offense for any person to falsely represent himself to be a citizen for any fraudulent purpose, an alien who knowingly makes a false affidavit that he has been naturalized for the purpose of being registered as a voter commits an offense. Violates Rev. St. § 5428 [U. S. Comp. St. 1901, p. 3670]. Green v. U. S. [C. C. A.] 150 F. 560.

88. Rev. St. § 5425. Green v. U. S. 150 F. 560.

89. See 7 C. L. 104.

90. Therefore it is not assignable. Fournier v. Clutton [Mich.] 13 Det. Leg. N. 747, 109 N. W. 425.

91. Where it appears that a defendant in divorce proceedings has means and his wife has not, the court will allow her suit money and counsel fees. Day v. Day [Idaho] 86 P. 531.

92. Womacks v. Womacks, 125 Ill. App. 441.

93. See 7 C. L. 105.

94. An appellate court will remand a cause which it reverses to the trial court with directions to such court to make its own decree relative to alimony and allowance for attorney's fees. This procedure is authorized by Code 1887, §§ 2261, 2263. Davenport v. Davenport [Va.] 56 S. E. 562.

95. Where the husband appeals with stay from a decree awarding his wife a divorce and alimony, and an order requiring payments to her pending further litigation, the supreme court will upon proper showing order payments for her support and expenses in such court pending appeal. Drake v. Drake [S. D.] 110 N. W. 270. The trial court's power to award money for appeal costs and fees continues till the case is in the appellate court by the lodgment there of the transcript. Bernsdorff v. Bernsdorff, 26 App. D. C. 228. Thereafter the power lies in the appellate court. Lane v. Lane, 26 App. D. C. 235.

96. The supreme court has no jurisdiction while an action for divorce is pending in the trial court to entertain a motion for allowance of counsel fees to enable counsel to prepare and present an appeal from an order of the trial court requiring the husband to provide for the wife pending final determination of the action and for counsel fees in the main case. Tonn v. Tonn [N. D.] 111 N. W. 609.

established to the satisfaction of the court,[97] but as in other preliminary issues the fact does not have to be established with the clearness exacted of proof as a basis of final adjudication of the rights of the parties litigant.[98] Alimony will not be awarded until it is shown that there is reasonable ground for commencing the divorce action.[99] In order that alimony may be awarded personal jurisdiction must be had of the defendant.[1] A void agreement for separation requiring the husband to pay the wife a certain annual sum is not a bar to an allowance of alimony in a subsequent suit for divorce.[2]

§ 3. *Stage or condition of the divorce proceeding.*[3]—An application for alimony may be tried before the principal case is ripe for trial.[4] In Georgia an application for temporary alimony must be based on a pending suit for divorce or for permanent alimony.[5]

§ 4. *Reasons for and against provisional allowances.*[6]—The allowance of alimony rests in the discretion of the trial court.[7] The action of such court is presumed correct,[8] and in the absence of an abuse of discretion will not be interfered with on appeal.[9] Ordinarily alimony will not be awarded where divorce is granted, because of the fault of the wife,[10] but there are exceptions to this rule.[11] In a suit

97. Fountain v. Fountain [Ark.] 97 S. W. 656.

98. Evidence sufficient to warrant allowance of temporary alimony. Fountain v. Fountain [Ark.] 97 S. W. 656.

99. Some evidence must be presented to the court showing reasonable ground for commencing the divorce action and showing reasonable probability that the charges will be established before alimony will be awarded. Heyman v. Heyman, 104 N. Y. S. 227.

1. Where a defendant is not served with summons and does not appear in a divorce action, a judgment for alimony cannot be awarded against him. Edwards v. Edson, 104 N. Y. S. 292. Appealing from a temporary allowance against a nonresident gives jurisdiction to hear a motion to grant a sum for support pendente lite and for attorney's fees. Gardiner v. Gardiner [Colo.] 83 P. 646.

2. Maney v. Maney, 104 N. Y. S. 541.

3. See 7 C. L. 105.

4. There is no law requiring nor reason for postponing the trial of an application for alimony until the divorce suit is ripe for default or answer. The prayer for alimony is a mere incident of the suit which may be taken up at any time after due notice. Rosenthal v. Rosenthal, 117 La. 786, 42 So. 270. Where the wife as next friend of her children petitioned for permanent alimony and an injunction restraining her husband from alienating his property, and such petition was presented to the judge in vacation and the restraining order was issued and the case set for hearing on a day in vacation, held the judge had jurisdiction in vacation to hear the application for injunction and also the petition for alimony though the day set for hearing was prior to the return day of the case. Edmondson v. Edmondson [Ga.] 57 S. E. 308.

5. Stallings v. Stallings [Ga.] 56 S. E. 469; King v. King [Ga.] 57 S. E. 227. Where a petition for temporary alimony showed that the husband and wife were living apart but no action for divorce or permanent alimony was pending and the petition itself did not pray for permanent alimony nor process, the prayer was properly refused. King v. King [Ga.] 57 S. E. 227.

6. See 7 C. L. 106.

7. Evidence as to the cause of separation is conflicting. Parks v. Parks [Ga.] 55 S. E. 176. Upon the hearing of an application for temporary alimony, the court may grant an order for such alimony and expenses of litigation as the facts of the case may justify. Stokes v. Stokes [Ga.] 56 S. E. 303. Where an application for alimony is made by the wife on behalf of herself and minor children, and at the hearing the wife abandons the application but is not dismissed as a party, the fact that she remains a party will not prevent the judge from granting alimony exclusively to the children. This was an exercise of the courts' discretion. Edmondson v. Edmondson [Ga.] 57 S. E. 308. Where a wife appealed from a decree of divorce in favor of her husband who died after submission of the case, she was not entitled to counsel fees necessary to prosecute the appeal which was one to determine property rights. Strickland v. Strickland [Ark.] 97 S. W. 659.

8. On appeal the action of the trial court in awarding or discontinuing alimony is presumably correct. Mahncke v. Mahncke [Wash.] 86 P. 645.

9. Discretion in allowing temporary alimony on conflicting evidence as to marriage not interfered with. Fowler v. Fowler [Ga.] 57 S. E. 682. Evidence sufficient to authorize an order requiring a husband to pay alimony and attorney's fees. Stokes v. Stokes [Ga.] 55 S. E. 1023.

10. Under the rule allowing a woman alimony where the divorce is procured through no fault of her's, where the husband procures a divorce because of the malformation of the wife's sexual organs preventing the act of sexual intercourse, the wife is not within the rule. Mutter v. Mutter, 30 Ky. L. R. 76, 97 S. W. 393.

11. Under a statute providing that in every case of divorce, except for the adultery of the wife, alimony may be awarded if the estate awarded to the wife is insufficient to sustain her, alimony may be awarded to her where a husband secures

for permanent alimony, to entitle the wife to alimony pendente lite it must appear that she is without means.[12] On appeal the application should be supported by proof that she is unable to advance the fees and suit money,[13] and also good reason why the relief could not be had in the lower court.[14]

§ 5. *Amount, character, and duration.*[15]—A decree for alimony in gross is a debt.[16] Permanent alimony is distinguished from temporary only in the sense that it is awarded after determination of the suit.[17]

In determining upon a proper award, the circumstances of the parties,[18] both prior and subsequent to the marriage, should be considered,[19] such as the value of property owned by the parties.[20] Where the husband concedes his wife's right to alimony in the amount fixed, the court may make a decree for such amount without further proof,[21] and when no testimony is offered to show that alimony is excessive, the defendant is bound by the judgment [22] until the amount is reduced in an appropriate proceeding.[23] A decree which awards only that which the wife already owned is not excessive,[24] especially when the divorce is granted because of the husband's

a divorce on the ground of cruelty. Lofvander v. Lofvander [Mich.] 13 Det. Leg. N. 793, 109 N. W. 662. Where a husband obtains a divorce on his counterclaim in an action brought by the wife, he is chargeable with her costs and a reasonable attorney's fee. Mutter v. Mutter, 30 Ky. L. R. 76, 97 S. W. 393. Not dependent on wife's freedom from fault, her fault not being cause for divorce. Jones v. Jones, 124 Ill. App. 201.

12. Ross v. Ross [Miss.] 42 So. 382. Oral proof is admissible on a motion for alimony pendente lite. Id.

13. Bernsdorff v. Bernsdorff, 26 App. D. C. 228.

14. Lane v. Lane, 26 App. D. C. 235. Showing of destitution and other facts held sufficient. Id.

15. See 7 C. L. 107.

16. A claim under a decree for alimony in gross is a debt of the estate of the divorced husband within Rev. Laws, c. 144, § 9, providing for the application of property of absentees to payment of their debts. Purdon v. Blinn [Mass.] 78 N. E. 462. Such claim may be proved and allowed against the property of an absentee in the hands of a receiver on general notice to the receiver and persons interested who are within the jurisdiction. Id.

17. The mere fact that alimony is denominated "permanent" does not preclude the court from modifying its decree as authorized by Civ. Code, § 139. Soule v. Soule [Cal. App.] 87 P. 205.

18. Where it appeared that the husband's estate was worth $7,553, that he was 52 and she 47 years old, he not able to perform hard labor and she capable of earning some income, a decree awarding household goods $2,000 cash, homestead worth $1,200, and $25 per month until the eldest child attained majority, and $12.50 per month until the youngest child reached majority, modified by giving the wife the furniture, homestead, $1,000, and $8 per month until the children attained the age of sixteen years. Bowerman v. Bowerman, 145 Mich. 726, 13 Det. Leg. N. 605, 108 N. W. 1086. Fifty dollars appeal costs on appeal from order to pay $25 a month held not excessive. Plattner v. Plattner [Mo. App.] 91 S. W. 459.

Where alimony is awarded in gross, it is especially important that facts material in determining a just award be before the court. Ferguson v. Ferguson, 145 Mich. 290, 13 Det. Leg. N. 453, 108 N. W. 682.

19. Decree of $1,000 cut down to $600 where it appeared that the husband was a baker and lived over his shop, which fact the wife knew before she married him. She contributed nothing to the property ($7,000), was fault finding at home, and left him within thirty days without cause, and shortly afterwards had a miscarriage. Lofvander v. Lofvander [Mich.] 13 Det. Leg. N. 793, 109 N. W. 662.

20. In determining the amount of permanent alimony the homestead will be considered, though held by both parties as an estate in entirety, where it once stood in the name of the husband and was conveyed to the wife without consideration, other than discontinuance of a prior divorce suit. Bowerman v. Bowerman, 145 Mich. 726, 13 Det. Leg. N. 605, 108 N. W. 1086. Twenty dollars a month out of a salary of $135 held reasonable where some other income came from her own property. McAndrews v. McAndrews, 31 Pa. Super. Ct. 252. Eighty dollars reduced to $50 where wife had already received a house and other property and was able to support herself in part. Anderson v. Anderson, 124 Ill. App. 613. In determining what is a proper allowance under Comp. Laws, § 8638, providing that the situation of the parties should be regarded, the court should consider the fact that plaintiff was the owner of certain property transferred to her in part compensation for the very wrong for which the divorce was granted. Ferguson v. Ferguson [Mich.] 111 N. W. 175. Where it is necessary in determining the amount to be awarded to estimate the value of an estate in expectancy, it should be valued at what purchasers would pay for it, not its present worth, computed from the age of the life tenant and his probable expectancy as fixed by mortality tables. Id.

21. Patrick v. Patrick, 30 Ky. L. R. 1364, 101 S. W. 328. The husband is not entitled to reversal of such decree on appeal. Id.

22, 23. O'Brien v. D'Hemecourt [La.] 43 So. 654.

24. Where at the time of the marriage the wife had 80 acres of land which was

fault.[25] An order to pay suit money for the cost of a transcript on appeal should not be fixed in a sum large enough to print the entire testimony,[26] when in fact some of it will probably not be necessary.[27] The allowance for counsel fees must be based on evidence of their value.[28] Subsequent counsel fees relating to applications concerning the child's custody may be allowed.[29]

Division of property.[30]—The statutory right to division of property between the parties is to such division as to the court seems just.[31] A just distribution may require that all the property be given to the wife.[32] Though a wife is accorded a certain interest in property by statute, if she consents to a decree for a different division she is bound by it.[33] In Nebraska, in a suit for divorce and alimony, the trial court has jurisdiction to award to the wife specific articles of personal property from the estate of her husband in addition to alimony.[34] On a liquidation of the community in Porto Rico property, allowance will be made to the wife of alimony pendente lite allowed her previously.[35]

Support of child.[36]—In determining the amount to be awarded for the support of children, their earnings should be considered.[37]

§ 6. *Procedure and practice.*[38]—Alimony may be awarded under a prayer for such other and further relief as is just and equitable.[39] Attorney's fees being a part of temporary alimony need not be separately prayed for.[40] In Nebraska if a husband has deserted his wife and become a nonresident, he may be served by publication for the purpose of appropriating property within the state to the payment of alimony.[41] A writ of prohibition will not issue to stay receivership proceedings to

subsequently sold and the proceeds invested in 160 acres, and the husband after the marriage acquired considerable property, an award of the 160 acres and directing the husband to pay all debts on which the wife might be made liable was reasonable. Luick v. Luick [Iowa] 109 N. W. 783.

25. Where the decree for divorce is granted because of the husband's fault, the award should not be less than the value of the wife's interest in the property which prior to divorce they owned together. Brown v. Brown, 144 Mich. 654, 13 Det. Leg. N. 312, 108 N. W. 288.

26. Sternberger v. Sternberger, 113 App. Div. 898, 98 N. Y. S. 946.

27. Order modified to leave amount of printing costs open till ascertained. Sternberger v. Sternberger, 113 App. Div. 898, 98 N. Y. S. 946.

28. Hunter v. Hunter, 121 Ill. App. 380.

29. Pike v. Pike, 123 Ill. App. 553.

30. See 7 C. L. 108. See, also, Divorce, 7 C. L. 1175.

31. Under a statute authorizing the court to decree in lieu of money allowance such division of the property of the parties held by joint ownership as is just, it is proper to decree an equal division of an estate in entirety. Jeske v. Jeske [Mich.] 13 Det. Leg. N. 1016, 110 N. W. 1060.

32. Where the community property was only worth about $1,000 and the husband was earning enough to support himself, and the wife has no earning capacity, it is proper to award her all the property. Markowski v. Markowski [Wash.] 87 P. 914.

33. Under the rule that where a wife procures a divorce on the ground of adultery her interest in his property is the same as upon his death, if the wife consents to a different division and accepts a certain amount as permanent alimony in lieu of all other interest in his estate, and judgment to such effect is entered and the money accepted, the wife is estopped to deny the validity of the judgment. Linse v. Linse, 98 Minn. 243, 108 N. W. 8.

34. Washington v. Washington [Neb.] 111 N. W. 787.

35. Garrozi v. Dastas, 204 U. S. 64, 51 Law. Ed. 369.

36. See 7 C. L. 108.

37. In determining the amount to be allowed for the maintenance of children, the amount of their earnings should be considered and only the amount required for their maintenance above their earnings should be allowed. Graham v. Graham [Colo.] 88 P. 852.

38. See 7 C. L. 108.

39. This is so, though Code Civ. Proc. § 580, provides that no relief in excess of the prayer will be granted. Cohen v. Cohen [Cal.] 88 P. 267.

40. Attorney's fees are a part of temporary alimony and may be awarded on a petition therefor, though not separately prayed for. Stokes v. Stokes [Ga.] 56 S. E. 303.

41. Cobbey's Ann. St. 1903, § 1078, authorizes service by publication in an action by a wife for alimony against her husband who has deserted her and become a nonresident of the state where the only relief sought is appropriation of land of the husband situated within the county where the action is brought to the payment of such alimony. Rhoades v. Rhoades [Neb.] 111 N. W. 122. Jurisdiction to subject property in such action within the territorial jurisdiction may be acquired by service of process by publication and placing the property in the hands of a receiver. Id. In such action residence of the wife in the county where the property of the husband is situated is not necessary. Id.

provide security for temporary alimony where there exists an adequate remedy at law.[42] An appellate court may review the facts pertaining to an award of alimony.[43]

Temporary allowances.[44]—Service of an application for temporary alimony pending a suit for divorce and permanent alimony must be personal,[45] but if it is impossible to procure personal service, a receiver may be appointed to preserve property in the state.[46] On a hearing of application it rests in the discretion of the court to hear the testimony by affidavits or orally.[47] Temporary alimony should not be refused without due inquiry into the merits of the case.[48] The hearing of an application will not be postponed unless a motion for such postponement be made timely.[49]

Permanent award.[50]

§ 7. *The decree; its enforcement and discharge.*[51]—The decree or order should run to the wife not to her counsel.[52] but it is proper to grant counsel fees to wife and order them paid to counsel.[53] A decree for alimony is not assignable.[54]

In Kentucky an order for alimony pendente lite is not a final judgment,[55] but a different rule prevails in Arkansas.[56] In Georgia such a judgment is subject to a writ of error the same as a judgment in injunction.[57] A judgment which, because of fraud, makes no provision for alimony may be impeached as in other cases,[58] but

42. Under the rule that a writ of prohibition will not issue where there exists an adequate remedy at law, it will not issue to stay receivership proceedings to provide security for the payment of temporary alimony from orders for payment of which the husband has appealed. Writ of supersedeas should be employed. McAneny v. Santa Clara County Sup'r Ct. [Cal.] 87 P. 1020.

43. On appeal from a decree awarding divorce and alimony, the appellate court may review only the facts pertaining to alimony. Patrick v. Patrick, 30 Ky. L. R. 1364, 101 S. W. 328.

44. See 7 C. L. 108.

45. Stallings v. Stallings [Ga.] 56 S. E. 469. Where in an action for divorce, temporary and permanent alimony, and subjection of property to the payment thereof, it was alleged that the parties had established a permanent residence and domicile in a certain county in the state, service of process should have been perfected there. Id. Though the defendant was absent from the state a great deal of the time on business and was absent for an indefinite length of time, he could not be served as a nonresident if he had a legal residence in the state at which service could be perfected. Id. Where service of process on an application for temporary alimony was not lawfully perfected, the court could not proceed over the objection of the defendant to hear it and make necessary orders in the premises. Id.

46. If it is impossible to obtain personal service because of the absence of defendant from the state, and he has property within the state which is in danger of being lost, removed, or depreciated by waste, a receiver may be appointed to preserve the property but cannot fix temporary alimony and order it paid. Stallings v. Stallings [Ga.] 56 S. E. 469.

47. Whitfield v. Whitfield [Ga.] 56 S. E. 490.

48. A plea in abatement to a petition for temporary alimony alleging that an action identical with the one at bar had been voluntarily dismissed by plaintiff and that the costs thereof had not been fully paid does not authorize the court at that stage of the proceedings to make an order refusing temporary alimony without inquiring into the merits of the case. Dougherty v. Dougherty, 126 Ga. 33, 54 S. E. 811.

49. Where counsel for defendant was present in an application for temporary alimony, entered upon the hearing of the case without objection, and after plaintiff had closed her case and defendant had submitted his answer, the defendant also being present to testify in his own behalf, it was not error to refuse to grant a postponement in order to obtain an additional affidavit on the ground that counsel for defendant had only been retained the previous day and had been prevented by other work from preparing the case. Stokes v. Stokes [Ga.] 56 S. E. 303.

50, 51. See 7 C. L. 110.

52. Anderson v. Anderson, 124 Ill. App. 613; Kowalski v. Kowalski, 127 Ill. App. 154.

53. Pike v. Pike, 123 Ill. App. 553.

54. Fournier v. Clutton [Mich.] 13 Det. Leg. N. 747, 109 N. W. 425.

55. A decree awarding a certain weekly allowance "as alimony pendente lite until final order" is not a final judgment on which action can be maintained. Geisler v. Geisler, 30 Ky. L. R. 430, 98 S. W. 1023.

56. A judgment for suit money and alimony pending a suit for divorce is a final judgment. Is appealable. Shirey v. Shirey, 79 Ark. 473, 96 S. W. 164.

57. The judgment of a judge in a proceeding for alimony, whether in term or vacation or in the progress of the cause, is the subject of a writ of error on the same terms that are prescribed in cases of injunction. Civ. Code 1895, § 2468. Stokes v. Stokes [Ga.] 55 S. E. 1023.

58. Where a decree of divorce is granted but through fraud of the defendant the judgment makes no provision for alimony, the judgment may be impeached for fraud as in other cases and alimony be awarded without disturbing the decree for divorce. Ex parte Smith [Kan.] 87 P. 189.

one which includes counsel fees, though erroneously, is not subject to collateral attack.[59] A judgment for alimony in which the wife is also allowed a certain amount for the support of children is not res judicata as to the extent of the defendant's liability for the support of the children.[60]

Enforcement may be by injunction and receivership if necessary,[61] and such proceedings are not a creditor's suit dependent on exhaustion of legal remedy.[62] An action at law cannot be maintained on a decree for permanent alimony which is subject to modification,[63] and the full faith and credit clause of the Federal constitution applies to a decree for alimony in so far as it is for a sum due, but not as to future payments as to which it remains subject to modification.[64] Under the rule that the perfecting of an appeal stays further proceedings on orders appealed from, the court has no power to enforce an award after an appeal has been perfected.[65]

Vacating or modifying.[66]—A decree for alimony may be revised or altered by the court if a change in the circumstances or condition of the parties require it,[67] and if the award was not based on property rights[68] or contract.[69] To authorize a modification of the decree the circumstances of the parties must have altered since the decree was entered[70] and such changed conditions must be pleaded.[71] Such modification rests solely in the discretion of the court,[72] and the right thereto must be timely asserted.[73] A wife who was granted all her prayers may not have a decree modified.[74] An order for temporary alimony based on false testimony may

59. Irrespective of the question whether counsel fees may be properly included in an award of permanent alimony, a decree entered upon a verdict in her favor which embraces such an award is not subject to collateral attack after the time for exception thereto has expired. Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537.

60. Graham v. Graham [Colo.] 88 P. 852.

61, 62. Harding v. Harding, 120 Ill. App. 389.

63. Under the rule that the court of chancery may alter decrees regarding the wife's support, an action at law on a decree for permanent alimony cannot be maintained. Nixon v. Wright [Mich.] 13 Det. Leg. N. 711, 109 N. W. 274.

64. Israel v. Israel [C. C. A.] 148 F. 576.

65. Anderson v. Anderson, 124 Ill. App. 613. Though Civ. Code, §§ 137, 140, authorizes the court to award temporary alimony and enforce such award by receivership, where the defendant filed a bond to stay proceedings pending appeal from orders requiring him to pay temporary alimony, the trial court had no jurisdiction to appoint a receiver to provide security for temporary alimony. Code Civ. Proc. § 946, provides that perfecting an appeal shall stay further proceedings on orders appealed from. McAneny v. Santa Clara County Superior Ct. [Cal.] 87 P. 1020.

66. See 7 C. L. 111.

67. According to the wife's conduct and necessities. Beall v. Beall, 27 App. D. C. 468. Under Code Civ. Proc. § 1963, declaring that things are presumed to happen according to the ordinary course of nature and habits of life, where a divorced wife who is drawing alimony remarries it is presumed that her second husband is able to support her, and in a proceeding by the first husband to vacate the decree she has the burden to prove that he is not. Cohen v. Cohen [Cal.] 88 P. 267. Not disturbed after long delay and on ill supported grounds. Leach v. Leach, 122 Ill. App. 94.

68. Where the complaint for divorce did not allege anything relative to property or ability of the husband to pay alimony, it is presumed that an award was not based on property rights and it may be vacated. Cohen v. Cohen [Cal.] 88 P. 267.

69. Evidence insufficient to show that a provision for alimony was inserted in the decree pursuant to agreement and that the agreement was that it was to continue during the life of the plaintiff. Soule v. Soule [Cal. App.] 87 P. 205.

70. Under a statute authorizing the court to make such changes in the decree as the circumstances may warrant, no change will be made unless circumstances of the parties have altered since the decree. Will not be changed because the husband at the trial testified falsely as to his property. Graves v. Graves [Iowa] 109 N. W. 707.

71. In a suit to enforce a decree, the husband is not entitled to have the decree modified because of changed conditions unless such changed conditions are pleaded. Gerrein's Adm'r v. Berry, 30 Ky. L. R. 978, 99 S. W. 944.

72. An issue as to the extent to which a decree should be modified because of changed conditions should not be submitted to a referee, as such modification rests peculiarly within the discretion of the court. Gerrein's Adm'r v. Berry, 30 Ky. L. R. 978, 99 S. W. 944.

73. Where it was agreed by the parties that no alimony should be demanded but it was allowed in the judgment, the husband was held not barred by laches from moving to vacate such provision after three years where he was not aware that it existed and no alimony had ever been paid or demanded. Cohen v. Cohen [Cal.] 88 P. 267.

74. Under Civ. Code, § 138, authorizing

be vacated.[75] An order will not be vacated if the effect of such action would be to vacate other orders.[76] No reservation of authority to modify is necessary where such authority is conferred by statute.[77] Under authority to modify a decree the court may relieve the defendant from making further payments,[78] or suspend further enforcement of the decree until further directions,[79] but it has no jurisdiction to annul the decree,[80] though a different rule seems to prevail in New York.[81] In New York in contempt proceedings the relatrix wife may on motion have the allowance for her suspended.[82]

Attachment of the person.[83]—Failure to pay alimony as ordered by the court renders the delinquent party liable for contempt [84] of the court which has the case [85] and subjects him to imprisonment [86] until he complies with the order or shows his reasons for not doing so.[87] The answer excusing the contempt must particularize

the court at any time to modify the decree relative to the care, custody, and education of children, a wife who has been granted all her prayers cannot have a decree modified so as to require the payment of a monthly sum for the care of the children. Calegaris v. Calegaris [Cal. App.] 87 P. 561.

75. The trial court may vacate an ex parte order for payment of attorney's fees made on misrepresentation of the wife that she had no separate property. Glass v. Glass [Cal. App.] 88 P. 734.

76. Where a suit for divorce is removed from one county to another by an order regular on its face, a party may not by mandamus compel the court to which it was removed to vacate an order for alimony, for want of jurisdiction, and thereby, in effect, vacate the order of removal which such court had refused to vacate and which was not sought to be reviewed in a direct proceeding. Bradfield v. St. Clair Circ. Judges [Mich.] 111 N. W. 1043.

77. Under Civ. Code, § 139, authorizing the court to award permanent or temporary alimony, and to modify its orders in such respect, an award of a specified sum per month may be modified by relieving defendant from further payments though no such reservation for modification was contained in the decree. Soule v. Soule [Cal. App.] 87 P. 205.

78. Soule v. Soule [Cal. App.] 87 P. 205.

79. Soule v. Soule [Cal. App.] 87 P. 205. Where the court under Ball. Ann. Codes & St. § 5723, awarded permanent alimony in monthly payments "until otherwise ordered" and the divorce was granted for fault of the wife, the court could, on proper notice and showing, order discontinuance of alimony. Mahncke v. Mahncke [Wash.] 86 P. 645. Under Civ. Code, § 139, authorizing the court to modify its decree, it may change a permanent monthly award to one for a specified period, or may vacate the decree altogether. Cohen v. Cohen [Cal.] 88 P. 267.

80. Soule v. Soule [Cal. App.] 87 P. 205.

81. Under a statute giving a court authority to modify the decree, it has power to annul it. Under Code Civ. Proc. §§ 1759, 1771, where it appeared that the wife remarried to one whose income was double that of her former husband. Comstock v. Comstock, 49 Misc. 599, 99 N. Y. S. 1057.

82. She had remarried and sought to enforce for benefit of child. Compton v. Compton, 111 App. Div. 923, 97 N. Y. S. 618.

83. See 7 C. L. 112.

84. Code Civ. Proc. § 1773, expressly provides that a judgment for alimony may be enforced by contempt proceedings. Stanley v. Stanley, 101 N. Y. S. 725. Prior to institution of such proceedings the defendant must be served with a copy of the decree and payment demanded of him. Id. Code Civ. Proc. § 1241, providing the cases where judgment may be enforced by punishment for disobeying it, does not apply to a judgment for alimony. Id. The power to enforce a decree for permanent alimony by attachment for contempt belongs inherently to the court having jurisdiction of divorce suits. Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537. Where proper service in an action for separation was had on the husband without the state and he was also properly served with an order to pay alimony and an attorney's fee, and with an order to show cause why he should not be punished for contempt for failing to do so, held the court had jurisdiction to punish for contempt by fine. Woolworth v. Woolworth, 100 N. Y. S. 865.

85. The supreme court of the District of Columbia has the power of commitment. Lane v. Lane, 27 App. D. C. 171.

86. One who refuses to pay alimony pursuant to an order of the court may be committed to jail for contempt. Discretion of court not abused. Gray v. Gray [Ga.] 56 S. E. 438.

87. Where a respondent does not seek to purge himself of contempt because of inability to comply with the decree, the rule may be made absolute. Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537. Failure or refusal to comply with an order requiring payment of alimony is a continuing contempt and the person so refusing may be imprisoned until he complies therewith. Not within the rule that a single act of contempt can be punished by imprisonment for only 20 days. Gray v. Gray [Ga.] 56 S. E. 438. An order of commitment may be for an indefinite time till payment of the award. Czarra v. Czarra, 124 Ill. App. 622. Where a wife obtains a decree for divorce, with an order that the husband pay to her alimony in a stipulated sum per month until the gross amount allowed has been paid, the judgment for alimony cannot be defeated, or a commitment to jail for failure to pay avoided, by the subsequent marriage of the defendant to another woman and the setting up by him of the claim that all of his meager salary is required to support his new family. Hoffman v. Hoffman, 8 Ohio C. C. (N. S.) 550.

the reasons for inability to pay.[88] In some states a delinquent may under some circumstances be imprisoned for failure to give bond to secure payment of alimony.[89] A fine for failure to pay alimony in separation proceedings and an attorney's fee must be limited to the fee and the amount of alimony due under the order when demand therefor was made.[90] Where an order to show cause why a decree should not be modified was served on the wife and she was restrained from enforcing the decree, the former husband was not in contempt in neglecting to pay alimony after such order issued.[91] In Nevada, before a delinquent may be committed for contempt, it must be made to appear that he has present ability to pay.[92] In Georgia a rule for contempt is not triable by a jury.[93]

The sole remedy in Rhode Island to procure release from imprisonment for not paying alimony is by procuring modification of the decree.[94] The provisions of statutes relating to imprisonment for debt do not apply.[95] In Georgia a judgment committing a person to jail for refusal to comply with an order requiring the payment of alimony must be brought to the supreme court by fast writ of error.[96]

Subjection of property.[97]—Alimony is not a lien on lands of the husband[98] or on personalty[99] unless made so by statute.[1] In Michigan it is a lien foreclosable in the same manner as a mortgage.[2] When in a suit for divorce and alimony the

88. Lane v. Lane, 27 App. D. C. 171.

89. Under statutes providing that the court may make provision for alimony pendente lite and enforce its orders by sequestration, contempt or execution, where the complaint alleges that a defendant though able to pay the award had declared his intention not to do so, and would leave the state unless he was compelled to give security, the court had authority to require him to give a bond and to be taken into custody on default of so doing. Ex parte Caple [Ark.] 99 S. W. 830. Where he was committed to jail in default of making the bond and on appeal from a judgment in habeas corpus, denying him a discharge, it did not appear that he was unable to comply with the order, the judgment will not be interfered with. Id. When in a proceeding for contempt founded on failure to comply with an order of court requiring payment of alimony the judge finds respondent in contempt and commits him to jail, it is when a bill of exceptions assigning error on such judgment, is tendered within the discretion of the judge to make supersedeas of the judgment dependant upon respondents giving bond in a reasonable amount conditioned to comply with the order requiring payment of alimony, in the event the judgment in contempt is sustained by the supreme court. Stokes v. Stokes, 126 Ga. 804, 55 S. E. 1023.

90. Woolworth v. Woolworth, 100 N. Y. S. 865.

91. Comstock v. Comstock, 49 Misc. 599, 99 N. Y. S. 1057.

92. A finding on an application for alimony that defendant had property, had been for many years employed at a salary more than sufficient to support himself and family, is not a finding of present ability to pay and will not sustain an order committing him to jail until he did pay. Lutz v. District Court of First Judicial Dist. [Nev.] 86 P. 445. An affidavit for an order committing the defendant for contempt for failure to comply with an order requiring him to pay alimony must allege his ability to pay or facts from which such ability can be inferred. Unless it does it is fatally defective. Id.

93. Civ. Code 1895, § 4046, providing for trial by jury in certain proceedings for contempt has no application to a rule for contempt issued in the progress of an alimony case requiring the respondent to show cause why he should not comply with an order of the court requiring him to pay alimony and attorney's fees. Stokes v. Stokes, 126 Ga. 804, 55 S. E. 1023.

94. Not habeas corpus. Ex parte Morey [R. I.] 66 A. 575.

95. He is imprisoned for noncompliance with a decree of court. Ex parte Morey [R. I.] 66 A. 575. Under a statute providing that temporary alimony is so far a debt that suit may be brought or execution issued, to run against the goods of the husband or his body, a statute permitting one jailed for debt to take the poor debtor's oath, one imprisoned for failure to pay alimony is not simply imprisoned for debt but also for contempt, and may not be permitted to take such oath. Mowry v. Bliss [R. I.] 65 A. 616.

96. Gray v. Gray [Ga.] 56 S. E. 438.

97. See 7 C. L. 113.

98. Alimony allowed the wife where a divorce has been granted the husband because of cruel treatment on the part of his wife is not a lien on his land. Kerr v. Kerr [Pa.] 66 A. 107.

99. Hunter v. Hunter, 121 Ill. App. 380.

1. A decree for alimony in a gross sum which is made a lien on real estate in the county where the suit is brought does not become dormant because no execution is issued thereon for more than five years from date of the decree. Is not a judgment within Rev. St. 1906, § 5380. Peeke v. Fitzpatrick, 74 Ohio St. 396, 78 N. E. 519. The chancery act in Illinois and not the divorce act confers power to make the decree a lien on land. Leafgreen v. Leafgreen, 127 Ill. App. 184.

2. Under Comp. Laws 1897, § 8640, providing that the decree is a lien on the husband's land and may be foreclosed as a

wife attaches the husband's property to secure her marital rights, they are not defeated by a subsequent attachment of a creditor.[3]

In New York it rests in the discretion of the court to require security for the payment of alimony.[4]

In some states it is declared that conveyance made by the husband with intent to defraud the wife of alimony shall be void as to her.[5] Under the Kentucky statutes such a conveyance can be declared void only as to the wife in a suit for divorce.[6] On setting aside a conveyance in fraud of alimony the doctrine of bona fide purchasers applies.[7] An order requiring the conveyance of certain property is not complied with by executing such conveyance after conveying it to another.[8]

§ 8. *Suits for annulment and actions for separate maintenance.*[9]—In Nebraska a court of equity will entertain an action for alimony and will grant the same though no divorce or other relief is sought where the wife is living apart from her husband without her fault,[10] or where other circumstances require it.[11] The power to award counsel fees and costs in suits for annulment is incidental.[12] A refusal to go to a nonsuitable residence will not defeat the wife's right to separate maintenance.[13] In Illinois it should be separately allowed for wife's and children's support,[14] and is not allowable in gross.[15] The amount given remains subject to modification by the court[16] which may discharge the husband if he thereafter proffers a suitable home which is rejected.[17] Additional counsel fees for appeal may be denied if needless cost has been incurred therein.[18]

mortgage and under § 515 providing that bills for foreclosure of mortgages shall be brought in the county where the land is situated, where a decree was rendered in one county and provided that it should be a lien on property in another, the suit to foreclose was properly brought in the latter. Ulman v. Ulman [Mich.] 111 N. W. 1072. Under a statute providing that a decree for alimony shall be a lien on land of the husband and shall be foreclosed the same as a mortgage where the alimony is payable in instalments, an action to enforce the lien may be brought to enforce one instalment. Id.

3. Sebree v. Sebree, 30 Ky. L. R. 670, 99 S. W. 282. The attaching creditor cannot complain that because of an agreement between husband and wife the money was to be paid on notes on which she was surety. Id.

4. Code Civ. Proc. § 1772, expressly provides that requiring security for the payment of alimony rests in the discretion of the court. Maney v. Maney, 104 N. Y. S. 541.

5. Held fraudulent as to the wife and children where, pending a suit for divorce, the husband made transfers of property for an inadequate consideration to one with notice of the facts. Zumbiel v. Zumbiel, 29 Ky. L. R. 791, 96 S. W. 542. In a suit for divorce and alimony and to set aside a conveyance in fraud of such alimony where the grantee defaulted and the husband admitted the right to alimony in the amount claimed, the conveyance could be vacated without proof of fraud. Patrick v. Patrick, 30 Ky. L. R. 1364, 101 S. W. 328.

6. Zumbiel v. Zumbiel, 29 Ky. L. R. 791, 96 S. W. 542.

7. A certain divorce suit by the wife held "pending" at the time of a fraudulent transfer of property by the husband though there was no valid service of process until later, so that upon decree setting aside said transfer, the decree in the divorce suit transferring the property to the wife, operated to convey title to the wife as against the husband and his grantee and a subsequent purchaser who acquired title with constructive notice and without value. Hamilton v. Rudy, 4 Ohio N. P. (N. S.) 427.

8. Where the court orders the defendant to pay a certain amount into court or convey certain property to the wife, a conveyance of such property after a prior conveyance to his son was not a compliance with the order. Green v. Green [N. C.] 55 S. E. 818.

9. See 7 C. L. 114.

10. Rhoades v. Rhoades [Neb.] 111 N. W. 122.

11. Evidence held to justify a decree for separate maintenance where the wife was taken to the home of her husband's parents and there compelled to do more menial work than her health would permit of. Bond v. Bond [Wash.] 88 P. 943.

12. Though a court is authorized by statute to require the husband to pay the wife sums necessary to carry on or defend a divorce proceeding, and such statute makes no such provision in suits to annul a void marriage, yet the court may order him to pay an attorney's fee. Power to order such payment is incidental. Webb v. Wayne Circ. Judge, 144 Mich. 674, 13 Det. Leg. N. 268, 108 N. W. 358.

13. Bernsdorff v. Bernsdorff, 26 App. D. C. 520.

14, 15. Hunter v. Hunter, 121 Ill. App. 380.

16, 17, 18. Bernsdorff v. Bernsdorff, 26 App. D. C. 520.

ALTERATION OF INSTRUMENTS.

§ 1. Nature, Kinds, and Materiality of Alterations (98).
§ 2. Effect of Alteration (98).
§ 3. Curing or Ratifying Alterations (98).
§ 4. Pleading, Practice, and Evidence (98).

§ 1. *Nature, kinds, and materiality of alterations.*[19]—A material alteration is one which changes the legal effect of an instrument,[20] and it is immaterial that such change is favorable to the party sought to be bound [21] if it be made without his knowledge or assent,[22] but a change made with the assent of the parties [23] or which does not change the legal effect of an instrument is not to be regarded as an alteration [24] and does not affect their liability.[25]

§ 2. *Effect of alteration.*[26]—A material alteration renders the contract evidenced unenforceable,[27] and a party who materially alters his duplicate copy thereby nullifies the contract regardless of his intent.[28] A principal is not bound where an agent acting beyond the scope of his authority alters a contract.[29] One who takes under an altered instrument with notice of the alteration is bound by the instrument as originally executed.[30] Where a writing is introduced only as evidence and not to predicate a liability thereon, alterations may weaken its force but do not impair its admissibilty.[31]

§ 3. *Curing or ratifying alterations.*[32]—The maker of a note may, subsequent to a material alteration therein by the payee or his agent, ratify the alteration and thereafter be bound by such ratification,[33] and cannot escape liability under the principle that a forgery cannot be ratified.[34]

§ 4. *Pleading, practice, and evidence.*[35]—The better rule seems to be that

19. See 7 C. L. 115.

20. Waller v. Ward [Ky.] 101 S. W. 341.

21. Adams v. Faircloth [Tex. Civ. App.] 17 Tex. Ct. Rep. 16, 97 S. W. 507. A promissory note may be vitiated by an unauthorized alteration made by inserting a lower rate of interest than that carried by the instrument as originally executed. New York Life Ins. Co. v. Martindale [Kan.] 88 P. 559.

22. Authority to change the legal character of a paper from a simple contract to a specialty cannot be conferred by parol. Thomason v. Wilson [Ga.] 56 S. E. 302. Neither the board of county commissioners nor the person appointed by them to superintend the work has power to alter the contract for construction of a road after its execution by the parties. Contract entered into under Acts 1895, p. 146, c. 63. Board of Jackson County Com'rs v. Branaman [Ind. App.] 79 N. E. 923.

23. Alterations made with the assent of a surety on a bail bond are accorded the same effect as if made with his own hand. State v. Baird [Idaho] 89 P. 298. Consent to alterations may be proved by parol. Id.

24. Whitehead v. Emmerich [Colo.] 87 P. 790. Alteration in a building contract held not material where the effect of the contract was not changed. McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229. Number "11" so written as to look like "41" made more legible after execution. Manuel v. Flynn [Cal. App.] 90 P. 463.

25. In a prosecution for maintaining a nuisance at a particular place, an application for gas to be used at such place signed by defendant is not rendered inadmissible by the fact that a word had been erased and another written over it. State v. Schaeffer [Kan.] 86 P. 477.

26. See 7 C. L. 117.

27. The law will not lend its aid to the enforcement of a materially altered note but will punish the guilty party to the extent of destroying the contract. Adams v. Faircloth [Tex. Civ. App.] 17 Tex. Ct. Rep. 16, 97 S. W. 507. Where the name of a grantee in a deed is changed after delivery of the instrument, no title passes to the party whose name is inserted for the reason that the grantor did not deliver to him, and there was no meeting of the minds of the parties. Perry v. Hackney, 142 N. C. 368, 55 S. E. 289. Alteration of note by increasing the amount avoids the note as a whole. Smith v. Dazey, 124 Ill. App. 399.

28. Koons v. St. Louis Car Co. [Mo.] 101 S. W. 49.

29. Where cashier of a bank made a notation on an instrument extending the time of payment, the effect of which was to discharge a surety. Vanderford v. Farmers' & Mechanics' Nat. Bk. [Md.] 66 A. 47.

30. One who claims under a materially altered deed and was present at the time it was executed and knew that a reservation clause had been erased could not claim under the altered deed as it read without the reservation. Waller v. Ward [Ky.] 101 S. W. 341.

31. State v. Schaeffer [Kan.] 86 P. 477.

32. See 7 C. L. 118.

33. Change in amount. Stringfellow v Petty [N. M.] 89 P. 258.

34. Stringfellow v. Petty [N. M.] 89 P. 258.

35. See 7 C. L. 118.

there is no presumption as to apparent alterations, the burden being on the party relying on the instrument to show that they were made before execution [36] or by consent,[37] the question being primarily for the court on the offer of the writing in evidence [38] and ultimately for the jury.[39] In some jurisdictions, however, it is held that alterations are presumed to have been made before execution and the burden is cast on him who seeks to avoid the writing,[40] in the absence of suspicious circumstances.[41] Where no alterations are apparent, the burden is on him who claims that alterations have been made.[42] One who sets up an alteration for the purpose of charging that the instrument sued was not the one executed, and for the sole purpose of letting in the defense of limitations, need not allege that the alteration was made by an interested party with intent to defraud.[43]

AMBASSADORS AND CONSULS.[44]

Under the treaty between the United States and the kingdom of Denmark, a Danish consul cannot appear for an infant citizen of that country and waive the issuance and service of citation on its behalf.[45] It is not improper for a consular agent to be allowed to retain from his fees full compensation for the current year before the year has expired,[46] the burden of securing a readjustment if he goes out of office before such compensation is earned being on the consul,[47] consular agents having no direct connection with the department of state but accounting through the consul.[48] The absence from duty which will deprive a consular officer of compensation during the period thereof is not mere casual absence but absence which is

36. Grand Lodge A. O. U. W. v. Young, 123 Ill. App. 628. Under Code Civ. Proc. § 1982, providing that one who offers in evidence an instrument purporting to have been materially altered must account for the alteration, he must do so on objection to its admissibility. Manuel v. Flynn [Cal. App.] 90 P. 463.

37. This is the rule under Mill's Ann. Code Civ. Proc. § 357. Whitehead v. Emmerich [Colo.] 87 P. 790. Evidence held to show that an alteration in a bail bond was made with the consent of the sureties. State v. Baird [Idaho] 89 P. 298.

38. The proper time to object to the admission of an instrument or to support the contention that it has been altered is when the question of the admissibility is before the court. Manuel v. Flynn [Cal. App.] 90 P. 463. It is for the court to determine whether proof in explanation of such alteration should be required before the note should be admitted. The court is not bound in the midst of the trial to rule on the materiality of the alterations and require explanation. Wood v. Skelley [Mass.] 81 N. E. 872. The discretion of the trial court in admitting an instrument in evidence after alterations had been explained to some extent is not subject to exception. Id. Where one witness testifies that an instrument offered in evidence is in the same condition as when executed, it is properly admitted in evidence. Id. Testimony of party producing instrument with corroborating circumstances held sufficient. Landt v. McCullough, 121 Ill. App. 328. The finding of a trial court on the question of whether an alteration was consented to based on conflicting evidence will not be disturbed on appeal. State v. Baird [Idaho] 89 P. 298.

39. Conflicting evidence including that of experts in microscopy held to make a case for the jury as to whether a seal was added to a note after execution. Wenchell v. Stevens, 30 Pa. Super. Ct. 527. Evidence insufficient to show alteration of deeds after execution by changing the name of the grantee. Zimmer v. Farr, 225 Ill. 457, 80 N. E. 261. Evidence sufficient to show that an order for merchandise had been altered after it was given. Price v. Stanbra [Wash.] 88 P. 115.

40. Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213. One who asserts that a contract is fraudulently altered has the burden to prove such fraud. Lawrence v. Meenach [Wash.] 88 P. 1120. Where an alteration is pleaded by a party as a matter of affirmative defense, he has the burden to prove it. Slyfield v. Willard [Wash.] 86 P. 392.

41. One who asserts an alteration has the burden of proof. McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229.

42. Parol evidence is admissible to show that an instrument was altered since its execution. Price v. Stanbra [Wash.] 88 P. 115.

43. Thomason v. Wilson [Ga.] 56 S. E. 302.

44. See 5 C. L. 112.

45. Under the laws of New York the only way in which a surrogate court can acquire jurisdiction of the estate of an infant is by issuance and service of citation. In re Peterson's will, 101 N. Y. S. 285.

46. Mahin v. U. S., 41 Ct. Cl. 1.

47. Mahin v. U. S. 41 Ct. Cl. 1. Consul knowing that his predecessor has allowed a consular agent to retain full compensation for the current year and allowing him to retain additional compensation is chargeable therewith. Id.

48. Mahin v. U. S. 41 Ct. Cl. 1

either inexcusable or protracted.[49] A vice-consul waives his right to compensation as consul during a sixty days' absence of his superior by failing to claim such compensation, the consul having reported himself as attending to his duties,[50] and current compensation having been adjusted on the basis of such report, the vice-consul cannot claim the additional in a subsequent accounting.[51]

Ambiguity; Amendments, see latest topical index.

AMICUS CURIAE.[52]

The court may authorize an amicus curiae to appear in any judicial proceeding.[53] An amicus curiae may examine witnesses and make argument,[54] but cannot take exception to a ruling of the court.[55] A court will not pass on questions which are merely suggested by an amicus curiae,[56] nor will an appeal be dismissed nor its hearing postponed at the instance of an amicus curiae when it appears that the action was brought in good faith and that the moving parties had ample opportunity to intervene upon the trial, or by brief upon submission.[57]

Amotion; Amount in Controversy; Ancient Documents, see latest topical index.

ANIMALS.

§ 1. Property in Animals (100).
§ 2. Personal Injuries Inflicted by Animals (100).
§ 3. Injuries to Property by Animals Trespassing or Running at Large (101).
§ 4. Liability for Killing or Injuring Animals (103).
§ 5. Contracts of Agistment (104).
§ 6. Estrays and Impounding (104).
§ 7. Regulations as to Care, Keeping Protection, and Health (105). Interstate Transportation; Quarantine; Inspection (107).
§ 8. Marks and Brands (107).
§ 9. Cruelty to Animals (107).
§ 10. Crimes Against Property in Animals (107).

§ 1. *Property in animals.*[58]—At common law the property which one had in a dog was of a base and inferior kind,[59] and this rule now prevails in some states unless statutory requirements as to registration are complied with.[60] Under the rule that the increase of animals belongs to the owner of the dam, such increase is the property of the person who owns the dam at birth of its young,[61] unlesss rights are otherwise fixed by contract.[62] An estray is prima facie the property of the person who takes it up.[63]

§ 2. *Personal injuries inflicted by animals.*[64]—The owner[65] or person having

49, 50, 51. United States v. Day, 27 App. D. C. 458.

52. See 5 C. L. 113.

53. In an application for a license to sell intoxicating liquors. In re Arszman [Ind. App.] 81 N. E. 680.

54, 55. In re Arszman [Ind. App.] 81 N. E. 680.

56. Where a party rests his right solely upon one ground, the court will not determine or pass upon other grounds which might have been raised and which were suggested by an amicus curiae. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042.

57. Kelly v. New York City R. Co., 102 N. Y. S. 741.

58. See 7 C. L. 120.

59. Dickerman v. Consolidated R. Co. [Conn.] 65 A. 289.

60. Under the statutes of Connecticut the owner of an unregistered dog more than six months of age has not such a property interest in it that he can maintain an action for the mere negligent killing of it. Dickerman v. Consolidated R. Co. [Conn.] 65 A. 289.

61. Under Civ. Code, § 1170, providing that increase of stock belongs to the owner of the dam a colt belongs to the person who owns the dam at the time the colt was foaled, though the dam was then in the possession of another who claimed ownership. Frank v. Symons [Mont.] 88 P. 561.

62. Where the owner of a mare entered into an agreement binding another to pay for stallion service for a half interest in the colt, and shortly before the colt was foaled sold the mare to one who had notice of the agreement reserving a half interest in the colt, held the agreement was valid. Dorris v. Rice, 145 Mich. 216, 13 Det. Leg. N. 425, 108 N. W. 700.

63. Frank v. Symons [Mont.] 88 P. 561.

64. See 7 C. L. 120. As to injuries to cattle by dogs, see post, § 3.

65. The owner of an animal ferae naturae is liable for injuries done by them

possession of an animal ferae naturae [66] is liable for personal injuries inflicted by it regardless of the question of notice of its vicious traits or negligence,[67] unless the person injured voluntarily goes dangerously near the animal while it is chained.[68] In some states it is provided by statute that the owners of dogs are liable for injuries inflicted by them,[69] unless such injury results from negligence of the person injured,[70] but as a general rule an owner of a domestic animal is not liable in the absence of notice of viciousness,[71] but if he has such notice he is liable.[72] An employe continuing to use a vicious animal after knowledge actual or imputed of its disposition assumes the risk.[73]

§ 3. *Injuries to property by animals trespassing or running at large.*[74]—At common law every person was bound at his peril to keep his cattle within his own possessions, and if he failed to do so he was liable for their trespasses, whether lands trespassed upon were enclosed or not.[75] An exception to this rule existed where cattle were being driven along the highway,[76] but this exception extends no further than to lands immediately adjacent to the highway.[77] This is the rule at present

regardless of notice of its viciousness or negligence in permitting it to run at large. Person bitten by a wolf. Hays v. Miller [Ala.] 43 So. 818.

66. One who has possession of a wild animal in a city street at the time it bites another is liable whether he was the owner of the animal or not. Hays v. Miller [Ala.] 43 So. 818.

67. The fact that the owner of a wild animal believes it to be harmless, that it had never been known to harm any one and had been in constant contact with people, is no defense. Hays v. Miller [Ala.] 43 So. 818.

68. One who voluntarily and unnecessarily goes within reach of a chained bear with full knowledge of its vicious propensities cannot recover from the owner for injuries sustained. Ervin v. Woodruff, 103 N. Y. S. 1051.

69. A married woman who permits her husband's dog to remain on the home premises, title to which is in her, is not harboring a dog as an owner within Code, § 2340, making an owner liable for injuries done by his dog. Burch v. Lowary, 131 Iowa 719, 109 N. W. 282.

70. For damages to person or property by a dog, a right of action against his owner is given by Rev. St. c. 4, § 52, only in those cases in which the damage was not occasioned through the fault of the person injured. Garland v. Hewes, 101 Me. 549, 64 A. 914. The word "fault" in this statute is equivalent to negligence and the burden in such action is upon the plaintiff to allege and prove that no want of due care on his part occasioned the injury. Id.

71. The owner of a dog is not liable where it bites a person who had cared for it for several months where the owner's knowledge of the dog's viciousness was limited to its propensity to attack strangers. Emmons v. Stevane [N. J. Law] 64 A. 1014.

72. An owner of an animal who has notice of its vicious disposition is liable for injuries caused by it while running at large irrespective of the question of negligence in securing it. Harris v. Carstens Packing Co. [Wash.] 86 P. 1125. Statements made by drovers the day after a steer injured a person, that it was vicious and had gored other persons were not res gestae and admissible to show that the drover had such knowledge prior to the injury complained of. Id. Where a person was injured by a steer, it is admissible to show that such steer remained in the vicinity for several days thereafter during which time it attacked other persons, that it was a "range steer," and that such steers were generally wild and vicious. Id. Where one was injured by a steer, an instruction that the injured person claimed that he was injured by the steer which had been let loose on the highway and at the time was being driven by the owner's servants is not susceptible to the construction that it was admitted that the steer was permitted to run unattended on the highway. Id.

73. Manufacturers' Fuel Co. v. White, 122 Ill. App. 527.

74. See 7 C. L. 122. See, also post, § 5, as to liability of agister.

75. Wood v. Snider [N. Y.] 79 N. E. 858. Whether cattle on the highway were running at large held a question for the jury. Donley v. Fowler [Mich.] 13 Det. Leg. N. 1074, 110 N. W. 1097. It is not necessary to show that one who permitted his sheep to graze on land of another had actual knowledge of the private ownership of such land, nor that they had such notice from the owner. Painter & Co. v. Stahley Bros. [Wyo.] 90 P. 375. It was not necessary to show that they knew whose land it was if they knew it was held in private ownership. Id.

76. At common law if domestic animals while being driven along a highway inadvertently escape onto unfenced adjoining lands, the owner was not liable if they were immediately pursued and driven back. Wood v. Snider [N. Y.] 79 N. E. 858. Cattle coming upon lands of an adjoining owner from a highway can be driven from such lands and it is the duty of the owner of the cattle to remove them with all reasonable speed. Id.

77. Where cattle being driven along a highway inadvertently escape onto adjoining land and from there trespass on unfenced land of another, the cattle were not lawfully on such land adjacent to the highway and the owner was liable. This is the rule under the fence laws of New York. Wood v. Snider [N. Y.] 79 N. E. 858.

in many states,[78] especially as to animals which have natural propensities to run at large,[79] but it has been abrogated in several western states[80] and does not apply to regions of public domain open to stock raisers.[81] It is also subject to the statutory duty to keep up boundary line fences.[82] One may drive trespassing cattle from his own premises but no further.[83] Where the remedy for trespassing by cattle is prescribed by statute, statutory requirements must be complied with.[84] An objection that the action is not brought within the limitation period must be raised by answer.[85]

The measure of damages is the injury to the crop[86] or freehold,[87] and the amount is generally a question for the jury.[88] An instruction that one is liable if he drives cattle on adjacent premises knowing "and" intending that they shall break plaintiff's fence is not error.[89] In an action for injury to plaintiff's boar by de-

78. Under Code, § 2314, prohibiting stock from running at large, etc., applies where cattle escape and cross a non-navigable stream and trespass on improved land. Foster v. Bussey [Iowa] 109 N. W. 1105. The common-law rule that the owner of animals is bound at his peril to keep them from trespassing exists in Illinois. Walters v. Stacey, 122 Ill. App. 658.

79. Rev. St. 1898, § 1482, providing that an owner of a bull who suffers him to run at large shall be liable for all damage done by him, though he escape without fault of the owner, does not make diligence to prevent his escape a defense, but diligence to capture the animal after its escape is a defense and is a proper exercise of the police power. Hadtke v. Grzyll [Wis.] 110 N. W. 225. In an action under Rev. St. 1898, § 1482, for injuries caused by a bull after he escaped from the premises of the owner, it was competent to show that the bull had broken through the same fence three times during the summer. Id.

80. One who turns his cattle out to graze unrestrained on land where he has a right to turn them, knowing that they will probably wander onto unenclosed lands of another, is not liable for damage done by them if they do so enter. Richards v. Sanderson [Colo.] 89 P. 769.

81. Richards v. Sanderson [Colo.] 89 P. 769.

82. Where the trespass occurred by defect of a fence which plaintiff and defendant were jointly bound to maintain, it must appear to justify recovery that the defect was in that part of the fence which defendant was bound to keep up. Walters v. Stacey, 122 Ill. App. 658. Section 1391, St. 1898, providing that where adjoining owners do not maintain a partition fence no damages can be recovered from injuries by trespassing cattle, applies to a tenant. Peterson v. Johnson [Wis.] 111 N. W. 659.

83. One who drives trespassing cattle off his own land has no right to drive them further and onto public lands. Richards v. Sanderson [Colo.] 89 P. 769.

84. Under Rev. Code Civ. Proc. § 817, Laws 1903, Ch. 10, providing for recovery of damages done by trespassing cattle, and § 819, providing for notice to the owner of cattle or person having them in charge, a complaint alleging that one through his agent allowed the cattle to trespass and immediately on taking up the cattle plaintiff notified such agent, the owner being in Canada, held sufficient. Moore v. Persson [S. D.] 111 N. W. 633. Where a county was not named or brought within the provisions of Rev. Code Civ. Proc. § 826, providing for the construction of fences, nor exempted from the herd law Civ. Code Proc. § 38, one claiming damage for injuries caused by trespassing cattle in such county need not plead nor prove that his lands were fenced. Id.

85. An objection that an action for injuries done by trespassing cattle was not brought within the statutory period must be raised by answer and not by demurrer. Express provision of Code Civ. Proc. § 39. Moore v. Persson [S. D.] 111 N. W. 633.

86. Where there was no showing that cattle trespassed on premises during the entire season, the measure of damages is the difference in value of the crop before and after the trespass and not rental value. Cole v. Thompson [Iowa] 112 N. W. 178. Where crops are destroyed the measure of damages is the value of such crops at the time of destruction. Risse v. Collins [Idaho] 87 P. 1006.

87. In an action for injuries to land used for grazing and lambing purposes, when the plaintiff exchanged such land for other land, proof of the value of the use of the other land is not essential to recovery. Painter & Co. v. Stahley Bros. [Wyo.] 90 P. 375. The defendant had the burden to prove the value of subsequent use of the land or of the other land. Id. In determining the amount of damage it was not necessary to find the value of subsequent use of the land or of other land and deduct it from damages sustained. Id.

88. Question of damages done by trespassing animals held for the jury. Painter & Co. v. Stahley Bros. [Wyo.] 90 P. 375. Where there was no evidence that cattle were on premises during the entire season but that defendant built a fence to keep them off and they broke through it two or three times, the question whether there was simply a trespass on an implied agreement to pay rent was for the jury. Cole v. Thompson [Iowa] 112 N. W. 178. Where the only evidence upon which damages could be estimated was evidence of rental value, an instruction which fails to point out the measure of damages is erroneous as the plaintiff was entitled at most to but nominal damages. Id.

89. The words are in such connection synonymous and their conjunction is not misleading. Moore v. Pierson [Tex.] 16 Tex. Ct. Rep. 191, 91 S. W. 1132.

fendant's trespassing one, expert evidence is admissible as to the disposition of boars to fight with each other and as to whether the injuries to plaintiff's animal were such as would be produced by such combat.[90]

In some states the owner of a dog is liable for injuries done by it unless the party injured was at the time doing an unlawful act,[91] and such unlawful act must be pleaded and proved.[92] The act of the dog must have been the proximate cause of the injury complained of,[93] and such fact must be established by the person injured.[94]

Where dogs belonging to several owners injure cattle, each owner is liable for the damages done by his dog,[95] and where stock belonging to several owners trespass, each owner is liable for the damage done by his stock,[96] but several owners of animals who have constituted of them a common or joint herd are jointly liable for trespasses committed by the herd.[97]

§ 4. *Liability for killing or injuring animals.*[98]—One who negligently kills an animal belonging to another is liable for its value to the owner.[99] The negligence must have been the proximate cause of the death [1] and must be established.[2] Where the stock law is in force, a railroad is not liable for the killing of stock al-

90. Walters v. Stacey, 122 Ill. App. 658.

91. Under Code, § 2340, imposing a liability for injury caused by dogs except when the party injured is doing an unlawful act, the unlawful act must be one which directly contributes to the injury. Beckler v. Merringer, 131 Iowa, 614, 109 N. W. 185. Permitting an animal to run at large on the highway is not an unlawful act within such statute. Id.

92. A defendant in an action for such injury must plead and prove the unlawful act. Beckler v. Merringer, 131 Iowa 614, 109 N. W. 185.

93. Under Code, § 2340, imposing a liability for injury done by dogs, where a horse on the highway was attacked by dogs and ran into a wire fence, held, if the action of the dogs was the cause that set in motion a tug on the harness of the horse which kept whipping it, such action was the proximate cause of the injury. Beckler v. Merringer, 131 Iowa, 614, 109 N. W. 185. Where one was injured by falling from his wagon because of the sudden starting of his horse and alleged that the horse was caused to start by the acts of a dog, evidence that the horse was in the habit of starting of its own accord is admissible. Johnstone v. Tuttle [Mass.] 81 N. E. 886. Error in excluding such evidence held not cured. Id.

94. In an action for injuries sustained in a runaway alleged to have been caused by the team becoming frightened at a dog, evidence held insufficient that the dog frightened the team. Nolan v. Kroening [Wis.] 109 N. W. 963. Instructions in an action for injuries alleged to have been caused by dogs frightening a team and causing it to run away held not misleading as requiring plaintiff to prove that the dog frightened the team and intended to do so. Id. Nor were such instructions misleading in other respects. Id.

95. Rev. Laws 1905, § 4986, does not change the common-law rule that where several dogs kill sheep and do other damage jointly the owner of each dog is liable only for the damage done by his dog and a joint action will not lie against owners of the dogs. The statute merely relieves the plaintiff from the necessity of showing scienter. Nohre v. Wright, 98 Minn. 477, 108 N. W. 865.

96. Where stock of different people trespassed on the same field at different times and there was nothing to show the amount of damage caused by the stock of each person, nominal damages only could be allowed. Foster v. Bussey [Iowa] 109 N. W. 1105.

97. Wilson v. White [Neb.] 109 N. W. 367.

98. See 7 C. L. 123.

99. Evidence sufficient to show that a sow was killed by defendant where the carcass was found on his premises bearing evidence of maltreatment and he was seen beating it shortly before. Warrick v. Reinhardt [Iowa] 111 N. W. 983. In an action for killing a dog where there is no issue of wilfulness made, it is error to base the finding of a verdict on such negligence. Mobile, etc., R. Co. v. Glover [Ala.] 43 So. 719.

The measure of damage for killing a dog is its value to its master. Gulf, etc., R. Co. v. Blake [Tex. Civ. App.] 16 Tex. Ct. Rep. 264, 95 S. W. 593. The pedigree of an animal may be shown by a certificate of a breeder's association under the hand and seal of its secretary as a basis for valuation. Warrick v. Reinhardt [Iowa] 111 N. W. 983. Where in an action for killing a hog the defendant counterclaims for injuries done by it to crops, the market value of such crops may be shown where the amount destroyed appears. Id.

1. Where a dog was killed by a locomotive, negligence in operating the train at a high rate of speed held not the proximate cause of the injury. Gulf, etc., R. Co. v. Blake [Tex. Civ. App.] 16 Tex. Ct. Rep. 264. 95 S. W. 593.

2. Evidence insufficient to sustain a judgment for one who sued for the shooting of his dog. Lipscomb v. Seaman [Ala.] 44 So. 46. Where in an action for killing a dog the evidence afforded an inference of negligent killing, a verdict should not be directed for defendant. Mobile, etc., R. Co. v. Glover [Ala.] 43 So. 719.

lowed to run at large except in case of gross negligence,[3] its operatives not being bound to keep a lookout for stock on the right of way, but only to exercise precautions when their presence is discovered and it would appear to a reasonably prudent man that they would not get out of the way.[4] The killing of stock by railroad trains is more fully covered in a separate topic.[5] The bailee of an animal must exercise reasonable care for its protection.[6]

§ 5. *Contracts of agistment.*[7]—An agister who contracts to care for cattle is liable for damage done by them if they escape and trespass.[8] A livery stable keeper is not liable for loss of animals kept by him unless the loss was caused by his failure to exercise ordinary care,[9] but he is liable if loss results from failure to do so.[10]

An agister's lien must rest on some contractual relation [11] and possession of the animals.[12] Such a lien is not assignable [13] and is inconsistent with one under an attachment and the two cannot coexist.[14]

§ 6. *Estrays and impounding.*[15]—The legislature may enact laws prohibiting animals from running at large,[16] and when stock is distrained under such statutes, the requirements thereof must be complied with.[17] The constitutional provisions as to the enactment of statutes apply.[18] Municipal corporations are generally

3. Ft. Worth, etc., R. Co. v. Hudgens [Tex. Civ. App.] 16 Tex. Ct. Rep. 44, 94 S. W. 378. Rev. St. 1898, § 4528, making railroads liable irrespective of negligence for stock killed, is not applicable in such cases. Id.

4. Ft. Worth, etc., R. Co. v. Hudgens [Tex. Civ. App.] 16 Tex. Ct. Rep. 44, 94 S. W. 378.

5. See Railroads, 8 C. L. 1590.

6. If a horse hired to work becomes exhausted and sick, the hirer must desist from working it, else if it die he will be liable. Carney v. Rease [W. Va.] 55 S. E. 729. Question when a horse is hired for a particular trip and is used for a further trip, during which it dies, such deviation from the contract renders the hirer liable, discussed. Id.

7. See 7 C. L. 123.

8. One who owned a pasture contracted to keep cattle and employ a man to look after the stock and see that they had salt and access to water. Glassey v. Sligo Furnace Co., 120 Mo. App. 24, 96 S. W. 310. Failure of an agister to exercise ordinary care in maintaining reasonably good fences renders him liable for damage done by escape of the stock. Hawkey v. Ketchum [Colo.] 89 P. 777.

9. Instructions in an action for loss of horses through the burning of a livery stable approved. Weaver v. Montana Stables [Wash.] 89 P. 154.

10. Where horses kept by a liveryman were killed by fire, the question whether the barn was sufficiently guarded against fire, as it should have been in the exercise of ordinary care, was held for the jury. Weaver v. Montana Stables [Wash.] 89 P. 154.

11. Where an owner of a race horse hired it to another and becoming dissatisfied with the management asked for an account of its maintenance, and when it was not furnished replevied the horse. At that time there was a valid lien against the horse. A third person replevied it from the owner and returned it to the custody of the keeper. Held such keeper had no lien for its maintenance from that time. Hodgkins v. Bowser [Mass.] 80 N. E. 796.

12. Under Rev. St. 1899, § 4228, giving a lien for keeping animals, the lien cannot exist unless the possession of the animals is with the agister. Cotton v. Arnold, 118 Mo. App. 596, 95 S. W. 280. Where one rented a pasture by the acre and turned his cattle into it and the owner of the pasture rendered some slight services thereafter in caring for the animals, held the possession of the cattle was in the tenant and the owner of the pasture had no agister lien. Id.

13. A livery stable keeper's lien for the care of stock given by Burn's Ann. St. 1894, § 7254, is not assignable. Reardon v. Higgins [Ind. App.] 79 N. E. 208.

14. One who has an agister's lien under Wilson's Rev. & Ann. St. 1903, c. 3, waives it by suing for the amount of the debt and causing the animals to be attached, as the lien under the statute and the lien under the attachment are inconsistent and cannot coexist. Crismon v. Barse Live Stock Commission Co. [Okl.] 87 P. 876.

15. See 7 C. L. 134.

16. Acts 1903, p. 183, authorizing summary destruction of hogs running at large on a public levee is a proper exercise of the state's power to protect levees and not a taking of property without due process. Ross v. Desha Levee Board [Ark.] 103 S. W. 380.

17. Where cattle are taken up under Ann. St. 1906, p. 2585, the written notice to the owner stating the amount of costs must be given. Ann. St. 1906, p. 2586, providing that no notice need be given where the owner has actual notice, applies only where the damages cannot be agreed upon. Gates v. Crandall [Mo. App.] 100 S. W. 51. Code, § 2313, providing that trespassing cattle may be distrained unless they escape because of failure to maintain a lawful partition fence, is only applicable for the protection of land fenced as required by law. Foster v. Bussey [Iowa] 109 N. W. 1105.

18. Laws 1903, p. 30, making it a crime to take up estrays, violates the constitu-

authorized to make effective ordinances prohibiting the running at large of animals.[19] Such ordinances must be reasonable.[20] The constitution and laws of Texas relative to stock law elections do not prevent a city from prohibiting stock from running at large within its limits without an election.[21] An ordinance prohibiting stock from running at large and authorizing the impounding of animals and fixing costs authorizes the holding of impounded animals for costs.[22]

§ 7. *Regulations as to care, keeping, protection, and health.*[23]—The keeping of live stock is under the police regulation of the state,[24] and it is within the police power of the state to prohibit animals from running at large.[25] In some states the herding of sheep on the public domain or within two miles of a dwelling is prohibited,[26] and such prohibition is valid [27] and is not unjustly discriminating because it applies only to sheep.[28] Under the statutes of the United States the privilege of

tional provision that a bill shall contain but one subject which shall be expressed in its title. State v. Cunningham [Mont.] 90 P. 755. Acts 1896-97, p. 648, making it an offense to permit hogs to run at large in Madison County, does not violate the constitutional provision that no law shall contain more than one subject which shall be expressed in its title. State v. Patterson [Ala.] 42 So. 19.

19. Rev. St. 1899, § 5836, as amended by Ann. St. 1906, p. 2950, empowering cities to regulate the running at large of stock, does not exclude operation of Ann. St. 1906, p. 2585, and state and municipal authorities have concurrent jurisdiction over the matter, and an ordinance permitting milch cows to run at large during certain seasons does not supersede the general law. Gates v. Crandall [Mo. App.] 100 S. W. 51. Indictment charging that one "unlawfully" allowed hogs to run at large within a district where it was prohibited was sufficient under Acts 1890-91, p. 774; Acts 1896-97, p. 648; Acts 1900-01, p. 923, fixing the limits of such district within which owners of hogs are prohibited from "knowingly" allowing them to run at large. State v. Patterson [Ala.] 42 So. 19. Act Feb. 9, 1897, makes it an offense to permit hogs to run at large in certain territory in Madison County, and Act Feb. 16, 1891, enlarged the area of such county. Held an indictment for allowing hogs to run at large in Madison County but not describing the territory was not demurrable. Id. Under an ordinance penalizing one who permits cattle to run at large and authorizing the marshal to impound them, an animal may be impounded though at large through no fault of the owner. Evans v. Holman [Mo.] 100 S. W. 624. Under a city ordinance providing for a dog tax and authorizing the chief of police to employ a dog catcher, held the dog catcher, though selected by the chief of police, was himself a public servant and the chief was not liable for his misconduct in the performance of his duties. Casey v. Scott [Ark.] 101 S. W. 1152.

20. In determining whether an ordinance prohibiting the keeping of hogs is reasonable, condition of lots in which hogs are kept is not to be considered. Town of Brunson v. Youmans [S. C.] 56 S. E. 651.

21. Thomason v. Brownwood [Tex. Civ. App.] 17 Tex. Ct. Rep. 418, 98 S. W. 938.

22. Thomason v. Brownwood [Tex. Civ. App.] 17 Tex. Ct. Rep. 418, 98 S. W. 938. Under Ann. St. 1906, p. 3011, authorizing cities to prohibit animals from running at large and impound them and penalize the owner, the city may provide for payment of costs and hold the cattle until paid, though they were at large through no fault of the owner. Evans v. Holman [Mo.] 100 S. W. 624.

23. See 7 C. L. 125.

24. See 5 C. L. 124, n. 59. Burn's Ann. St. 1901, § 4357, authorizing trustees of a town to declare what shall constitute a nuisance and take measures for preservation of health, empowers them to prohibit the keeping of hogs in pen within corporate limits and within 200 feet of a street or alley. Miller v. Syracuse [Ind.] 80 N. E. 411. Evidence sufficient to sustain a conviction of a nonresident for herding and grazing and permitting his cattle to run at large in the state. Beattie v. State, 77 Ark. 247, 95 S. W. 163. "Assented" is equivalent to "consented" in an instruction that if a nonresident's cattle were being herded or permitted to run at large, and he while in the state assented to it he was guilty. Id.

25. Owners may be compelled to keep them within their own enclosure and keep them off certain territory. Reser v. Umatilla County [Or.] 86 P. 595. As an incident to such power a charge or fee may be exacted for the exercise of such privilege. Id.

26. An action may be maintained under Rev. St. 1887, § 1210, for the trespass of sheep within two miles of plaintiff's dwelling house, where he is the fee owner of the land on which his house stands. Risse v. Collins [Idaho] 87 P. 1006. In actions under Rev. St. 1887, §§ 1210, 1211, damages sustained by reason of herding sheep upon public land within two miles of a dwelling are measured by a different standard and made up of different elements from damages caused by trespass. Id.

27. Idaho Rev. St. §§ 1210, 1211, sustained. Bacon v. Walker, 204 U. S. 311, 51 Law. Ed. 499; Brown v. Walling, 204 U. S. 320, 51 Law. Ed. 503. The rules and regulations of the secretary of the interior relative to the graping of stock on forest reserves are reasonable and within the authority conferred by Congress. United States v. Shannon, 151 F. 863.

28. Bacon v. Walker, 204 U. S. 311, 51 Law. Ed. 499; Bown v. Walling, 204 U. S. 320, 51 Law. Ed. 503.

grazing on the public domain cannot be monopolized.[29] In many states statutes provide for the determination by election of whether stock shall be permitted to run at large.[30] Statutory requirements as to such election must be observed.[31] The petition for the election must conform to statutory requirements[32] and must describe the boundaries of the district,[33] and statutory conditions precedent to the law going into effect must be observed.[34] An order for a stock law election is not invalidated by the fact that it contains surplusage.[35] Irregularities in stock law collection do not avoid it,[36] nor can such irregularities,[37] or the proceedings for the establishment of a stock law district,[38] be inquired into in a collateral proceeding, but the invalidity of an election may be.[39]

29. Under 23 U. S. Stat. 321, prohibiting enclosure of public lands, and state laws on the subject, the privilege of grazing on public lands cannot be monopolized either directly or indirectly under a claim that one is protecting his own lands. Richards v. Sanderson [Colo.] 89 P. 769.

30. Kirby's Dig. §§ 1378, 1379, amending Sand. & H. Dig. § 1176, authorizing the establishment of fencing districts by repeating the section and adding a provision authorizing the establishment of fencing districts for small stock, etc., authorizes establishment of district to restrain small stock. The amendment is properly made though in the same section it repeats the original provisions and adds the one relative to small stock. Flowers v. State [Ark.] 103 S. W. 384. The statute providing for an election to determine whether hogs, sheep, and goats shall be permitted to run at large, and the one to determine whether horses, mules, and cattle shall run at large, were passed at different times, but one election may be held and the requisites of each statute complied with. Houston, etc., R. Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 888, 97 S. W. 106. Acts 1894-95, p. 749, authorizing the commissioner's court of a certain county to establish a stock law district, being a local act, was not repealed by Acts 1903, p. 431. Mayfield v. Tuscaloosa County Com'rs [Ala.] 41 So. 932. Act Dec. 22, 1892, exempting a portion of a county from operation of the stock law between certain dates of each year, does not deny equal protection of the laws. Brown v. Tharpe, 74 S. C. 207, 54 S. E. 363. Nor is it a taking of private property for private use. Id. Where on appeal from a conviction of permitting stock to run at large it appears that the stock law is void, the cause will be reversed and dismissed instead of reversed and remanded. Peters v. State [Tex. Cr. App.] 97 S. W. 498.

31. Where the managers of a stock law election in certifying the result recited "We the undersigned inspectors," etc., it was no objection to their return that they signed their names as "inspectors." Henry v. Jefferson County Revenue [Ala.] 44 So. 110. Under Acts 1900-01, providing for the certification to the probate judge of the results of a stock law election by the managers of such election, a certification by one of two managers is sufficient. Dismubes v. Jones [Ala.] 44 So. 182.

32. Under Laws 1900-01, p. 170, providing that a probate judge may order an election to decide whether stock shall be allowed to run at large on the petition of freeholders, a petition seeking to "restrain" stock from running at large authorized the judge to order such election. Dismuber v. Jones [Ala.] 44 So. 182.

33. A description of the boundary of a stock district is certain where the boundary is described by metes and bounds. Express provision of Acts 1900-01, p. 170. Jones v. Elliott [Ala.] 43 So. 564. A petition of the requisite number of freeholders under this act which failed to describe the limits of the justice precinct for which the election was to be held by metes and bounds was void. Missouri, etc., R. Co. v. Tolbert [Tex.] 101 S. W. 206. Under Acts 26th Seg. c. 128, § 3, providing that if a petition for a stock law election be from the freeholders of a subdivision of a county such subdivision shall be described and the boundaries designated, it is insufficient where the petition merely designates the number of the precinct. Missouri, etc., R. Co. v. Tolbert [Tex. Civ. App.] 101 S. W. 1014. The provision of Acts 1894-95, p. 749, requiring order establishing a stock law district to describe the boundary lines, is complied with by describing the territory included. Mayfield v. Tuscaloosa County Com'rs [Ala.] 41 So. 932. That the boundary of a stock law district is irregular is immaterial where all the territory embraced is within the district. Jones v. Elliott [Ala.] 43 So. 564.

34. Where a militia district seeks to adopt a no fence stock law under Pol. Code 1895, § 1781, as amended by Acts 1899, p. 30, it is a condition precedent to the law going into effect that within six months after the election the ordinary shall have good fences erected around such portions of the district as touch nonstock law districts. Johnson v. Tanner, 126 Ga. 718, 56 S. E. 80. Under the act of 1899, the ordinary has not jurisdiction to pass judgment to the effect that "since the election had been held and had resulted in favor of stock law, and since the fence had been constructed within six months after the election, the stock law was in force. Id. Evidence insufficient to show that no fence law was in effect in the militio district at the time of the impounding of animals for running at large in the same. Id.

35. Recital in the order relative to fencing the district. Henry v. Jefferson County [illegible] [Ala.] 44 So. 110.

36. Where one election determined the will of the voters under two statutes. Houston, etc. R. Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 888, 97 S. W. 106.

37. In an action for animals killed. Houston, etc., R. Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 888, 97 S. W. 106.

38. The proceedings for the establishment of a stock law district are not sub-

Interstate transportation: quarantine: inspection.[40]—In many states statutes relative to inspection and quarantine of animals have been enacted.[41] Such statutes are not commerce regulations.[42] In some states it is declared an offense to sell infected animals [43] regardless of the question or scienter.[44] Where animals are shipped from a point quarantined against, the carrier must exercise ordinary care to prevent their escape into pastures outside the quarantine district,[45] but is not liable where no injury results from its negligence.[46]

§ 8. *Marks and brands.*[47]—Under live stock laws the record of a brand is prima facie evidence of ownership thereof and of the cattle bearing the brand [48] and ownership of branded stock cannot be established by parol [49] except where there has been failure to record the brand.[50] Unrecorded brands are competent evidence of ownership.[51]

§ 9. *Cruelty to animals.*[52]

§ 10. *Crimes against property in animals.*[53]—In Georgia it is an offense to

ject to collateral attack in an action for damages for permitting stock to run at large. Dismukes v. Jones [Ala.] 44 So. 182.

39. The validity of a stock law election may be inquired into in an action against a railroad for injuries to stock. Missouri, etc., R. Co. v. Tolbert [Tex. Civ. App.] 101 S. W. 1014. Where a stock law election was void, the fact that it had been declared to be in force and was being observed does not effect the liability of a railroad for killing stock. Missouri, etc., R. Co. v. Tolbert [Tex.] 101 S. W. 206.

40. See 7 C. L. 126. See, also, Carriers, 7 C. L. 554, as to carriage of live stock.

41. Laws 1903, p. 37, provides that when sheep are found diseased the state inspector shall make provision for quarantine and define the place and limit within which they may be grazed. Held the act of the inspector in quarantining and selecting the place and limits of quarantine are quasi judicial and he is not liable for damage for injuries resulting therefrom in the absence of malice or corruption. Garff v. Smith [Utah] 86 P. 772. An information under Sess. Laws 1895, c. 495, relative to the inspection of cattle shipped into the state, held not bad because "er" was left off "commissioner" in describing the official empowered to make such inspection, want of any inspection being charged. State v. Asbell [Kan.] 86 P. 457.

42. Sess. Laws 1895, Ch. 495, relative to the inspection of live stock imported into the state, is a reasonable inspection law necessary to protect cattle from the ravages of infectious diseases and is not a commerce regulation State v. Sabell [Kan.] 86 P. 457.

43. Under Rev. St. § 19, Ch. 19, one who sells an animal infected with tuberculosis is guilty of offense regardless of the question of scienter. Church v. Knowles, 101 Me. 264, 63 A. 1042. Cobbeys' Ann. St. 1903, § 3171, prescribing a penalty for selling glandered horses or permitting them to run at large, was not repealed by §§ 3174, 3177, preventing the importation, etc., of any domestic animal inflicted with a contagious disease. Canham v. Bruegman [Neb.] 109 N. W. 733.

44. Under Rev. St. § 19 Ch. 19, one who sells oxen which are infected with tuberculosis and takes a note therefor cannot recover on the note though he had no knowledge that the animals were diseased. Church v. Knowles, 101 Me. 264, 63 A. 1042. In an action for damages by a vendee against a vendor of horses infected with glanders, a complaint is not obnoxious to general demurrer because of an omission to allege that before or at the time of the sale the vendor had knowledge that the animals were so infected. Canham v. Bruegman [Neb.] 109 N. W. 733.

45. Reynolds v. Galveston, etc., R. Co. [Tex. Civ. App.] 99 S. W. 569. Evidence insufficient to show negligence where cattle escaped by working a gate loose which had never been opened in that manner before and was in no way defective. Id.

46. Where quarantine restrictions were limited to pastures in which infected cattle were or had been running, a railroad company is not liable in damages caused by a quarantine being declared against a pasture because it negligently permitted cattle to escape into it where it did not appear that any of the cattle were infected or that any cattle in the pasture were thereafter infected. Reynolds v. Galveston, etc., R. Co. [Tex.] 102 S. W. 724.

47. See 7 C. L. 126.

48. Where a stock brand has been recorded under Sess. Laws 1905, p. 352, the production of the original certificate issued by the state recorder or a certified copy of the record is prima facie evidence of the ownership of the brand and of the right to possession of the animals which bear such brand. State v. Dunn [Idaho] 88 P. 235. Under the provisions of Sess. Laws 1905, p. 352, no ownership can be acquired in a stock brand or the right to use the same except by compliance with the statute for the recording and transfer of brands. Id.

49. Under Sess. Laws 1905, p. 353, known as the "live stock law," parol evidence is not admissible to prove ownership of branded stock. State v. Dunn [Idaho] 88 P. 235.

50. One who has failed to record his brand as required by statute must prove ownership on an animal in the same manner as he would prove ownership of an unbranded animal. State v. Dunn [Idaho] 88 P. 235.

51. On prosecution for larceny. Hurst v. Territory, 16 Okl. 600, 86 P. 280.

52. See 5 C. L. 120.

53. See 7 C. L. 126.

maim an animal.[54] In Montana it is an offense to drive cattle from their accustomed range.[55] In Texas it is an offense to beat an animal willfully and wantonly.[56] Larceny of cattle is punishable under general statutes,[57] but is sometimes specially defined and penalized,[58] general rules being applicable except as such statutes control.[59]

ANNUITIES.[60]

The mental capacity required to make an annuity is that required to contract and not that required to make a will.[61] Where an annuity is provided for by will the usual rules as to the construction of wills apply.[62] An annuity contract may be avoided for undue influence[63] or for fraud on creditors.[64] Equity will enforce an annuity contract according to its terms.[65]

Another Suit Pending; Answers; Antenuptial Contracts and Settlements; Anti-trust Laws, see latest topical index.

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54. One who shoots a cow in the udder is guilty of the statutory offense of maiming animals. Brown v. State [Ga.] 56 S. E. 405. Evidence sufficient to establish the offense. Id.

55. Under 1 Mill's Ann. St. §§ 1424, 1425, providing that one who maliciously drives cattle from their usual range shall be liable, willful driving to any material extent from public domain within which cattle are accustomed to range to another locality is a driving from the usual range. Richards v. Sanderson [Colo.] 89 P. 769. "Maliciously" in such statute means "intentionally" without just cause or excuse. Id. Under Mill's Ann. St. §§ 1424, 1425, making it a misdemeanor to maliciously drive cattle from their usual range, where in an action to recover it was undisputed that the vicinity from which cattle were driven was their usual range, it was not necessary to instruct as to the quantum of proof necessary to establish the fact that cattle had been willfully driven from their usual range. Id. It was also unnecessary to define "range." Id. Advice of counsel is no defense to the willful driving of cattle from their usual range. Id.

56. Beating an animal is willful and wanton where done without reasonable grounds and with evil intent. Allen v. State [Tex. Cr. App.] 96 S. W. 927.

57. See Larceny, 8 C. L. 699; Robbery, 8 C. L. 1749.

58. In a prosecution for larceny of domestic animals under Wilson's Rev. & Ann. St. 1903, § 2480, evidence of marks and brands is competent to prove ownership though not recorded. Art. 4, c. 3, § 101, does not make such evidence incompetent. Hurst v. Ter., 16 Okl. 600, 86 P. 280.

59. In a prosecution for larceny of domestic animals under Wilson's Rev. & Ann. St. 1903, § 2480, since such statute does not define the offense the common-law rule applies, and it is not necessary to allege nor prove want of consent on the part of the owner. Hurst v. Ter., 16 Okl. 600, 86 P. 280. In a prosecution for larceny of domestic animals where the offense charged is the theft of one animal of a number delivered by defendant at one time, it may be shown that two other animals sold and delivered at the time were claimed by third persons. Id.

60. See 7 C. L. 126.

61. Barnes v. Waterman, 104 N. Y. S. 685.

62. An annuity to one for life and at her death "to revert to my estate" held to constitute a charge on the estate generally, and where the personalty was exhausted it was a charge on land. Dixon v. Roessler [S. C.] 57 S. E. 203. See, also, Wills, 8 C. L. 2305.

63. Barnes v. Waterman, 104 N. Y. S. 685.

64. Fraud not shown. Mertens v. Mertens, 48 Misc. 235, 96 N. Y. S. 785.

65. Where one purchases an annuity for another under an agreement that such annuity is to be paid to the purchaser during his lifetime and the annuitant refuses to allow such payment, equity will enforce the agreement. Harris v. Parry [Pa.] 64 A. 331.

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Scope of title.—All strictly revisory proceedings, as distinguished from supervisory remedies,[66] are included herein excepting proceedings in criminal cases.[67] certiorari,[68] and proceedings before justices of the peace.[69] Bills of review[70] and other legal or equitable remedies for opening or correcting judgments[71] are not review in the sense here used. The effect of judicial error (Harmless Error),[72] and the modes of saving the right to question such errors,[73] are allotted to separate titles.

§ 1. *The right in general. A. Constitutional and statutory provisions; policy*

66. See Mandamus, 8 C. L. 810; Prohibition, Writ of, 8 C. L. 1467, and the like.
67. See Indictment and Prosecution, 8 C. L. 189.
68. See Certiorari, 7 C. L. 606.
69. See Justices of the Peace, 8 C. L. 635.
70. See Equity, 7 C. L. 1323.
71. See Judgments, 8 C. L. 530.
72. See Harmless and Prejudicial Error, 8 C. L. 1.
73. See Saving Questions for Review, 8 C. L. 1822.

of the law.[74]—Within the constitutional and organic law[75] the legislature has exclusive power to withdraw,[76] or regulate [77] the right of review of judicial proceedings. The right is favored in the law, but being purely statutory [78] cannot be extended or denied by the courts.[79] The suing out of a writ of error is deemed the commencement of a new action,[80] but there seems to be a conflict of authority as to whether the same is true of an appeal.[81]

(§ 1) *B. Waiver, election, transfer, or extinguishment.*[82]—A waiver [83] or election [84] to treat a proceeding as valid will deprive the party of his right to review. An existing matter of controversy being essential to any form of review, the transfer of the aggrieved party's right is ground for dismissal.[85] The effect of an abandonment or dismissal of a perfected appeal is treated in a subsequent section.[86]

(§ 1) *C. Pendency of a formal appeal.*[87]—There can be no review while a formal proceeding for one identical in scope and operation is pending.[88]

74. See 7 C. L. 129.

75. Clause of Act Apr. 13, 1900, 94 Ohio Laws, p. 137, giving right of appeal from probate court of certain counties to circuit court in partition and other proceedings, held invalid under Const. art. 2, § 26, requiring general laws to have universal operation throughout the state. Wallace v. Leiter [Ohio] 81 N. E. 187. Since right given by organic act of a territory cannot be taken away by legislature, held that where appeal was taken under existing statute, repeal thereof without saving clause did not deprive supreme court of jurisdiction. Sena v. U. S. [C. C. A.] 147 F. 485.

76. Hurd's Rev. St. 1905, p. 585, c. 34, § 7, making decision of county court final in contests over removal of county seat, is constitutional, no property rights or personal liberty being involved. Loomis v. Hodson [Ill.] 79 N. E. 590, afg. 122 Ill. App. 75. Legislature has power to deny right of appeal in cases involving sale of intoxicating liquor. Hulvey v. Roberts [Va.] 55 S. E. 585.

77. Is no absolute right in suitor to have decision against him reviewed, which must be respected in making laws, and in absence of constitutional inhibition it is within power of legislature to prescribe cases and courts in which parties shall be entitled to appellate remedies. Powhatan Coal & Coke Co. v. Ritz [W. Va.] 56 S. E. 257.

78. Merritt v. Crane Co., 225 Ill. 181, 80 N. E. 103; Brown v. Brown [Ind.] 80 N. E. 535. Unknown to common law. United Iron Works Co. v. Sand Ridge L. & Z. Co. [Mo. App.] 102 S. W. 1104. Statutes granting it must be strictly pursued. In re Terrell's Estate, 6 Ind. T. 412, 98 S. W. 143.

79. Appeal provided for by statute is matter of right and does not rest in discretion of court or judge. May be denied only where no appeal is permitted by law. McCourt v. Singers-Bigger [C. C. A.] 150 F. 102.

80. City of St. Louis v. Butler [Mo.] 99 S. W. 1092.

81. Is continuation of old action. City of St. Louis v. Butler [Mo.] 99 S. W. 1092.
Contra. See 7 C. L. 129, n. 14.

82. See 7 C. L. 129.

83. May waive right to appeal by stipulation. Jones & Co. v. Spokane L. & W. Co. [Wash.] 87 P. 65. An attorney of record may so stipulate without special authority. Id. Where parties stipulated to take appeal in time to be heard at particular term or waive right of appeal, dismissal of an appeal not so taken cannot be avoided on ground that appellant's counsel was mistaken as to time of commencement of term. Id.

84. **Held to preclude appeal:** Accepting and receipting for amount awarded by judgment on an indivisible claim. Larson v. Vinje [Iowa] 109 N. W. 786. Payment by appellant's attorney with funds furnished by a surety held absolute and not a payment of judgment by a debtor within meaning of § 3972 of the Code. Plover Mercantile Co. v. Peterson [Iowa] 111 N. W. 944. One cannot take under a judgment and by virtue of it alone, and at the same time prosecute an appeal from it to vacate it. Haggin v. Montague [Ky.] 101 S. W. 893. Proceeding to trial on merits after overruling of demurrer is waiver of right to appeal from order, which can then only be reviewed after final judgment. Hale v. Broe [Okl.] 90 P. 5.

Held not to preclude appeal: Payment of costs by defendant without intention to settle case. Kootenai County v. Hope Lumber Co. [Idaho] 89 P. 1054. Involuntary payment of judgment coerced by posture of defendant's affairs. Lumaghi v. Abt [Mo. App.] 103 S. W. 104. Acceptance by party of amount of judgment which adverse party concedes is due to him does not estop him from appealing to determine his right to further recovery. Meade Plumbing, etc., Co. v. Irwin [Neb.] 109 N. W. 391. Compromise by defendant after judgment with the plaintiff of record, where compromise reached only one-half cause of action, other half having been assigned. Wells, Fargo & Co. Exp. v. Boyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 350, 98 S. W. 441.

85. Appeal in ejectment case dismissed as to an appellant who transferred her interest in land pending appeal. Collins v. Crawford [Mo.] 103 S. W. 537. One's right to prevent error cannot be defeated by mere ex parte statement in an unverified petition filed by defendant in error after term at which decree was rendered that plaintiff in error had been adjudged bankrupt. Spitznagle v. Cobleigh, 120 Ill. App. 191.

86. See § 11 G, post.

87. See 7 C. L. 130.

88. Error cannot issue while an appeal is pending in the same cause. Kehler v.

§ 2. *The remedy for obtaining review. A. Appeal and error*[89] are the common remedies, the former to review equitable causes,[90] and the latter judgments at law.[91] Statutory provisions as to which method shall be adopted in particular cases are, of course, controlling.[92]

Fast writs of error are allowed in Georgia in some cases.[93] Bankruptcy proceedings are specially reviewable under the act.[94]

(§ 2) *B. Certification or reservation.*[95]

(§ 2) *C. The common remedies,*[96] appeal or error, must, if adequate or applicable, be invoked rather than certiorari,[97] prohibition,[98] mandamus,[99] habeas corpus,[1] or motions [2] or suits to vacate the judgment below.[3]

Walls, 118 Mo. App. 384, 94 S. W. 760; Dunlap v. Weber Gas, etc., Co. [Mo. App.] 94 S. W. 761.

89. See 7 C. L. 130.

90. Suit to have deed declared mortgage and mortgage foreclosed is purely equitable and an appeal will lie. Fleurot v. Fletcher, 8 Ohio C. C. (N. S.) 488.

91. Judgment at law not reviewable by appeal. United States v. Fidelity & Deposit Co. [C. C. A.] 147 F. 228. Errors in action at law reviewable in Federal supreme court by writ of error only. Behn, Meyer & Co. v. Campbell & Go Tauco, 205 U. S. 403, 51 Law. Ed. 857. Judgment of state supreme court affirming a judgment of court below in replevin tried by court. National Live Stock Bank v. First Nat. Bank, 203 U. S. 296, 51 Law. Ed. 192.

92. Proceeding in nature of quo warranto to oust one from office does not relate to franchise or freehold, nor involve $100, exclusive of costs, and hence judgment therein is reviewable by writ of error and not by appeal. People v. Horan, 34 Colo. 304, 86 P. 252. Appeal does not lie under Gen. St 1902, § 819, from judgment of city court in proceedings by summary process under 14 Sp. Laws, p. 600, c. 123 § 1, but remedy is by writ of error under Gen. Laws 1902, § 788, as amended by Pub. Acts 1908, p. 324, c. 112. Marsh v. Burhans [Conn.] 64 A. 739. "Error" will not lie to "supreme" or "appellate" court to review an order or judgment where statute provides for an "appeal" to "circuit court." Gersman v. Cooper, 125 Ill. App. 402. Under U. S. 1625, contempt proceedings are reviewable by exceptions and not by error. In re Consolidated Rendering Co. [Vt.] 66 A. 790. When act relating to particular proceeding is silent as to method, it must be determined from implied intent of act and nature of order in question. Sullivan v. People, 224 Ill. 468, 79 N. E. 695. Error and not appeal proper method of review in habeas corpus proceedings. Hurd's Rev. St. 1905, c. 65. Id. Appeal, not error, lies to review judgment of supreme court of Philippine Islands in habeas corpus. Fisher v. Baker, 203 U. S. 174, 51 Law. Ed. 142.

93. It is character of case indicated in bill of exceptions, and not term of court stated in judge's certificate thereto, which determines whether a case shall be heard in supreme court as one brought by fast writ of error. Gray v. Gray, 127 Ga. 345, 56 S. E. 438. A judgment committing a party to jail for refusal to comply with order requiring payment of allmony and attorneys' fees must be brought to supreme court by fast writ of error. Id. Decree at chambers dismissing a petition cannot be so reviewed. Ivey v. Rome, 126 Ga. 806, 55 S. E. 1034.

94. Facts determined by a jury under § 19a are reviewable by writ of error and not by appeal. In re Neasmith [C. C. A.] 147 F. 160.

95, 96. See 7 C. L. 131.

97. See, also, Certiorari, 7 C. L. 606; Seaboard Air Line R. Co. v. Ray [Fla.] 42 So. 714.

Certiorari held to lie: Where injunction restraining use of voting machines cannot be reviewed by appeal until after an election at which it was proposed to use them, remedy by appeal being inadequate and question to be considered being jurisdiction of lower court to issue injunction. United States Standard Voting Mach. Co. v. Hobson [Iowa] 109 N. W. 458. To review interlocutory unappealable order in partition where injustice would otherwise result. Hyde v. Superior Ct. [R. I.] 66 A. 292. Is appropriate remedy to review determination of municipal election contest by city council pursuant to charter. Staples v. Brown, 113 Tenn. 639, 85 S. W. 254. To review proceedings of county court with reference to a decedent's estate, under Rev. St. 1895, art. 332, without any showing why appeal was not pursued. Friend v. Boren [Tex. Civ. App.] 16 Tex. Ct. Rep. 54, 95 S. W. 711. To review adjudication as to public use and necessity for which property is sought to be condemned, since appeal will not lie under § 5645, Ballinger's Ann. Codes & St. State v. Superior Ct. [Wash.] 86 P. 205.

Certiorari held not to lie: Where appeal might have been taken, although right of appeal has been lost by laches. Hall v. Justices' Ct. [Cal. App.] 89 P. 870. To review order, in suit to foreclose railroad mortgage, directing that crossing tracks of another road be torn up and appointing an agent to carry out order, it not being an order granting a mandatory injunction or appointing a receiver so as to be reviewable under Code Civ. Proc. § 963, subd. 2. Boca & L. R. Co. v. Superior Ct. [Cal.] 88 P. 715. Appeal is proper method to review order granting temporary injunction against liquor nuisance. Young v. Preston, 131 Iowa, 292, 108 N. W. 463. Supreme court will not exercise its supervisory jurisdiction conferred by Const. art 94, in order to review a case in which an appeal does not lie when respondent judge has usurped no power, has not refused to discharge any duty, and there has been no irregularity resulting in denial of justice. In re Theriot, 117 La. 532, 42 So. 93. To review judgment of circuit court, such court being constitu-

§ 3. *The parties. A. Persons entitled to review*[4] include only those who are

tional court having general common-law jurisdiction. Remedy is by writ of error. Taylor Provision Co. v. Adams Exp. Co., 72 N. J. Law, 220, 65 A. 508. To review order of circuit court in ordinary action to impose mechanic's lien, such action being one proceeding according to course of common law, and hence reviewable only by error. Five-Mile Beach Lumber Co. v. Friday [N. J. Law] 66 A. 901. Under P. L. 1883, p. 183, § 21, Gen. St. p. 2483, appeal is remedy for review in civil suits for penalties in police court where such court has jurisdiction and judgment is not by confession. City of Rahway v. Hunt [N. J. Law] 65 A. 164. Where exceptions are sufficient to prevent the full record to appellate court. In re Consol. Rendering Co. [Vt.] 66 A. 790. To review error in impanelling jury in condemnation proceedings, since appeal lies under Ball. Ann. Codes & St. § 5645. State v. Superior Ct. [Wash.] 86 P. 205. Where in condemnation proceedings, court entered ordinary money judgment instead of decreeing payment before taking, and on motion to vacate or modify judgment ordered defendant to elect whether it would take or refuse property, which defendant declined to do, whereupon motion to vacate or modify was denied, such entry and subsequent rulings are reviewable on appeal. State v. Superior Ct. [Wash.] 87 P. 814. Fact that **writ of review** is more speedy than remedy by appeal does not render latter inadequate within Ballinger's Ann. Codes & St. § 5741. State v. Superior Ct. [Wash.] 89 P. 879. Since under Laws 1905, p 84, c. 55, § 50, appeal lies to review adjudication that use for which municipality seeks to condemn property is public one, writ of review does not. Id.

98. See, also, Prohibition, Writ of, 8 C. L. 1467. If court has not jurisdiction, prohibition is appropriate remedy for preventing action. Powhatan Coal & Coke Co. v. Ritz [W. Va.] 56 S. E. 257. Prohibition will not issue on ground of lack of right of review of action of court sought to be prohibited. Id. Supreme court will not exercise its supervisory jurisdiction by issuing writ of prohibition where respondent judge has not usurped any authority or refused to discharge any duty and there has been no irregularity resulting in denial of justice. In re Theriot, 117 La. 532, 42 So. 93.

99. See, also Mandamus, 8 C. L. 810.

Mandamus does not lie where is right of appeal. State v. McCutchan, 119 Mo. App. 69, 96 S. W. 251. To review order dismissing appeal from probate court for lack of sufficient showing of authority to prosecute it, since writ of error lies. City of Flint v. Genesee Circ. Judge [Mich.] 13 Det. Leg. N. 829, 109 N. W. 769. To review order dismissing petition in condemnation proceedings on objection of property owner. Detroit United R. Co. v. Oakland County Circ. Judge [Mich.] 13 Det. Leg. N. 842, 109 N. W. 846. To compel lower court to vacate erroneous order extending time for appeal from judgment of justice of peace. Cosgrove v. Wayne Circ. Judge, 144 Mich. 682, 13 Det. Leg. N. 311, 108 N. W. 361. To compel municipal court to retain jurisdiction of cause erroneously transferred to another court. People v. Murray, 104 N. Y. S. 740. Whether supreme court will, in exercise of its supervisory jurisdiction, issue writ of mandamus rests in discretion of such court. State v. Summit Lumber Co., 117 La. 643, 42 So. 195. Supreme court will not exercise its supervisory jurisdiction conferred by Const. art. 94, by issue of writ of mandamus to compel issue of injunction against execution of judgment where relator has remedy by appeal from such judgment and from denial of injunction. Beasley v. Jenkins, 117 La. 577, 42 So. 145. Decree in action in which plaintiffs sought to be recognized as forced heirs of a decedent, to be sent into possession of his estate unconditionally, to have appointment of executrix decreed null, etc., held to sufficiently decide issues as presented to enable plaintiffs to appeal and to have all the questions involved decided on such appeal so that remedial writ of mandamus would not issue. Landry v. Bellanger [La.] 44 So. 266. Denial of motion to quash affidavit of service because of jurisdictional defects is reviewable on writ of error, judgment and all proceedings being void on face of record, and it is not necessary for defendant to review motion by mandamus. Monger v. New Era Ass'n, 145 Mich. 683, 13 Det. Leg. N. 653, 108 N. W. 1111.

Mandamus lies for refusal of circuit court to prescribe method and direct service of writ of scire facias, and for refusal, after sufficient service, to take jurisdiction of issues presented by writ. Collin County Nat Bk v. Hughes [C. C. A.] 152 F. 414.

1. See, also, Habeas Corpus (and Replegiando), 7 C. L. 1916. Since writ of error lies to review erroneous conviction for contempt it cannot be reviewed by habeas corpus. Ex parte Stidger [Colo.] 86 P. 219.

2. Where clerk improperly discharged mechanic's lien and lis pendens before filing of an undertaking provided for by order directing discharge, remedy is by a motion in lower court to restore lien and lis pendens of record and not by appeal. Danella v. Paradise, 102 N. Y. S 807. Where plaintiff gave notice of motion for judgment on demurrer as frivolous, but decision was entered overruling demurrer with leave to plead over as, upon trial of an issue of law, defendant's remedy is by motion in the trial court to correct mistake. Peabody v. West, 103 N. Y. S. 942.

3. See, also, Judgments, 8 C. L. 530. Proper remedy of state revenue agent, where county board of supervisors disallowed certain assessments for back taxes, held by appeal from order of board. Adams v Stonewall Cotton Mills [Mass.] 43 So. 65. Error if any, in appointing sheriff as syndic in insolvency when creditor had applied for appointment held not to present question which could be decided in proceedings to annul judgment, but remedy was by appeal. Conery v. His Creditors [La.] 43 So. 530. While Rev. St. 1899, § 214, authorizing vacation of allowance of a claim against a decedent's estate on application of heirs, etc., does not allow one who contests allowance to afterwards move to vacate it on same ground, his remedy being by appeal (Keele v. Keele, 118 Mo. App 262, 94 S. W. 775), one who was denied right to be heard in opposition to an allowance may pursue remedy provided by said section (Id.).

4. See 7 C. L. 132.

parties [5] of record,[6] aggrieved [7] by the decree of judgment, and in proceedings not

5. To entitle one to writ of error he must have been a party to case sought to be reviewed. Booth v. Saunders [Ga.] 57 S. E. 93. One not a party to proceedings below cannot bring up judgment for review by bill of exceptions. Murray v. Tarver, 127 Ga. 378, 56 S. E. 417. Under Hurd's Rev. St. 1905, p. 806, c. 42, § 25, only parties to an appeal to county court from classification of lands and amounts by drainage commissioners can take a further appeal. Carr v. People, 224 Ill. 160, 79 N. E 648. Under Hurd's Rev. St. 1905, p. 806, c. 42, § 24, relating to classification of lands by drainage commissioners, only such persons as appear and urge objections can appeal from the decision of the commissioners. Id.

Held entitled to appeal: Garnishee from order charging him as garnishee. Grimwood Co. v. Capitol Hill Bldg. & Const. Co. [R. I.] 65 A. 304. Where a petition to intervene in equity is treated as having been properly filed, though no formal leave to file it was granted, petitioner was a party so that he could appeal from an order dismissing it on its merits. Parsons v. Little, 28 App. D. C. 218. In action by county to recover of corporation poll taxes due from its employes, appeal may be taken by county and in its name as it is party in interest. Kootenai County v. Hope Lumber Co. [Idaho] 89 P. 1054. Administrator who was party of record below participated in case and had written authority to represent certain heirs could take joint appeal with another defendant. King v. Savage Brick Co., 30 Pa Super. Ct. 582.

Held not entitled to appeal: Mere filing claims with receiver does not make creditors parties to suit by another creditor in which receiver was appointed. Scott v. Great Western Coal & Coke Co., 223 Ill. 271, 79 N. E. 53. One cannot appeal individually from judgment in suit in which he is party only in capacity as executor. Cleveland v. Cleveland, 225 Ill. 570, 80 N. E. 302. Order of court reciting that certain corporation had appeared and ordering that court retain jurisdiction over it to enforce its compliance with terms of a bid held not sufficient to make such corporation party. Foreman v. Defrees, 120 Ill. App. 486. Rev. St. 1887, § 1776, as amended by Act. Feb. 14, 1899 (Sess. Laws 1899, p. 248), authorizes appeals from actions of board of commissioners only by "persons" aggrieved or by taxpayers, and does not authorize an appeal by county. Kootenai County v. Dittemore [Idaho] 88 P. 232. Where attorney for litigant moves, as such attorney, for an appeal from judgment against client, but alleges error to prejudice of the "mover" and prays that he ("mover") be allowed an appeal, and order prepared by him grants an appeal to the "mover," and it is not pretended that attorney has any appealable interest, appeal will be dismissed. Voelkel v. Succession of Aurich [La.] 43 So. 151. One who did not appeal from justice to circuit court not entitled to further appeal. Sexton v. Snyder, 119 Mo. App. 668, 94 S. W. 562. One of several bond holders represented by trustee is not entitled as matter of right to intervene and become a party to enable him to appeal. Fink v. Bay Shore Terminal Co. [C. C. A.] 144 F. 837.

6 Must either be party of record or sustain some mutual or successive relationship to the subject-matter, or parties out of which arises right, duty, or privilege to have judgment reviewed, or he must have some direct or collateral interest injuriously affected by judgment. Scott v. Great Western Coal & Coke Co., 223 Ill. 271, 79 N. E. 53. Status of party cannot be questioned on appeal when not questioned below. Easton Nat. Bk. v. American B. & T. Co., 70 N. J. Eq. 732, 64 A. 917.

7. **Held to be parties aggrieved:** Debtor by order allowing receiver compensation. Polk v. Johnson [Ind.] 78 N. E. 652. Creditor by allowance of administrator's accounts, where is deficiency of assets. Rev. St. 1899, § 268. Taylor v. Bader, 117 Mo. App. 72, 98 S. W. 80. Showing of deficiency of assets held sufficient. Id. Trustee of an infant by excessive allowance to special guardians of infant, though same is payable out of minor's distributive share. In re Stevens, 99 N. Y. S. 1070. Uncle of ward by overruling of his motion for removal of guardian for want of jurisdiction to make appointment. In re Guardianship of Murray, 8 Ohio C. C. (N. S.) 498. Complainant in action to set aside his father's will and certain deeds conveying land to his brothers-in-law in trust for his sisters has sufficient interest in controversy to object to decree assigning land to brothers-in-law absolutely. Schillinger v. Bawek [Iowa] 112 N. W. 210. Where court decided there was no priority between assignee of money due on paving contract and materialmen and laborers, total sum of claims exceeding amount of contract, mayor and clerk who appeared in action by cross bill have sufficient interest upon which to base appeal where no bond having been filed by contractors to protect laborers and materialmen, they would under court's decision, be individually liable for excess. Carlisle v. Spain [Mich.] 13 Det. Leg. N. 1002, 110 N. W. 532. Sheriff who has been restrained from levying execution on certain lands has sufficient interest to appeal from such decree. Heintz v. Brown [Wash.] 90 P. 211. Party not debarred from appealing merely because decision is to some extent in his favor. Turpin v. Derickson [Md.] 66 A. 276.

Held not to be parties aggrieved: Receiver by order directing him to make disbursements. Foreman v. Defrees, 120 Ill. App. 486. Brother by denial of application to investigate sanity of alleged lunatic. In re Brooks, 104 N. Y. S. 670. Defendant disclaiming any interest in certain funds, by judgment ordering money paid into court and distributed. Lazier v. Cady [Wash.] 87 P. 344. Executor in his representative capacity by imposition of costs on him as an individual. Meyer v. O'Rourke [Cal.] 88 P. 706. Administratrix in representative capacity by order settling her account which modified an allowance to her as widow by reducing same. In re Dougherty's Estate. 34 Mont. 336, 86 P. 38. Administrator cannot appeal from judgment declaring a nullity in absence of showing of interest. Virden v. Hubbard [Colo.] 86 P. 113. Party cannot appeal from judgment wholly in his favor. Patterson v. Patterson, 200 Mo. 335, 98 S. W. 613. Code 1904, § 3454. Commis-

inter partes, or which may affect others than parties, persons having a litigable interest,[8] affected detrimentally,[9] may appeal.

(§ 3) *B. Necessary or proper parties. Parties appellant.*[10]—Necessary parties appellant ordinarily include all coparties united in interest and aggrieved by the judgment,[11] though a severance may be had in some jurisdictions,[12] and in some the nonjoining parties may be brought in as respondents. Parties disclaiming [13] need not be joined. A joint appeal is available only to parties jointly aggrieved.[13a]

sioner appointed to resell land of decedent for default in payment of purchase money cannot appeal from subsequent decree setting aside decree of sale rendered upon petition to which commissioner alone was made defendant, where such commissioner had no personal interest in land. Brown v. Howard [Va.] 55 S. E. 682. Attachment in orphan's court after hearing on order to show cause for contempt being only a determination of apparent guilt followed by a further hearing upon return of the attachment, party attached is not aggrieved thereby. In re Doland, 69 N. J. Eq. 802, 64 A. 1091. Judgment having been erroneously entered against a garnishee, defendant may appeal from judgment where he is party to record, though he files no plea eo nomine but merely petition asking dissolution of attachment on ground that money claimed does not belong to him. McGeary v. Huff, 31 Pa. Super. Ct. 401. Indian tribes as such held not entitled to appeal from judgment distributing fund to Indians pursuant to Act Jan. 28, 1893, Indians being entitled to participate per capita, and act containing no provision whereby tribes could recover portions belonging to individual Indians, and no provision giving right of appeal to any tribe. New York Indians v. U. S., 41 Ct. Cl. 462.

8. Administrator who has been directed to pay distribution share of estate to certain person whom he claims to be still alive is "interested" in a probate decree appointing an administrator for such person. In re Clarke's Estate [Vt.] 64 A. 231.

9. Where a review is desired of proceedings under Jones Local Option Law (98 O. L. 68), qualified elector who feels aggrieved should appear as plaintiff and mayor of municipality in question as defendant in error. In re Jones Local Option Law, 8 Ohio C. C. (N. S.) 574.

10. See 7 C. L. 135.

11. Where demurrer filed by one of several defendants is sustained, but afterwards amendment to declaration is allowed, it is proper to make all defendants parties plaintiff in error. Wells v. Butler's Builders' Supply Co. [Ga.] 57 S. E. 55. Writ of error dismissed in mechanic's lien proceeding for nonjoinder of necessary codefendants. Wells v. Murphy, 126 Ill. App. 103. On appeal by owner of lands assessed in ditch proceedings, only parties to judgment need join. Kline v. Hagey [Ind.] 81 N. E. 209. Under statute making county necessary party to action to settle disputed boundary lines affecting location of any public road, supreme court acquires no jurisdiction over an appeal in such a proceeding unless notice of appeal was served on county, it being also a necessary party to appeal. Knight v. Action [Iowa] 109 N. W. 1089. In suit under intrusion into office act, citizens at whose instance suit is brought need not be made parties, and where judgment is rendered for costs against one of such citizens who is not party to suit, such citizen need not be made party to appeal by state. State v. Reid [La.] 42 So. 662. Where judgment is rendered against one and persons on his cost bond, latter are not necessary parties to appeal by the former. Taylor v. Gardner [Tex. Civ. App.] 99 S. W. 411. Where judgment is joint all defendants must join in appeal therefrom unless there has been summons and severance. Faulkner v. Hutchins, 6 Ind. T. 442, 98 S. W. 153. Appeal from order overruling joint demurrer interposed by two defendants should be taken in name of both. Rensford v. Magnus & Co. [Ala.] 43 So. 853. Personal injury judgment held joint, and several writ of error not sustained without showing that codefendant had been notified and failed to appear or had refused to join. Holbrook, etc., Cont. Co. v. Menard [C. C. A.] 145 F. 498. Joint judgment for firm debt not reviewable at instance of one partner only in absence of sufficient showing of ground for nonjoinder. Port v. Schloss Bros. & Co. [C. C. A.] 149 F. 731.

12. On appeal by principal from judgment against him and his sureties on an appeal bond, sureties are not necessary parties within Mills' Ann. Code, § 400. Christy v. Campbell [Colo.] 87 P. 548. One of several joint defendants applying alone for a writ of error must assign reason why others do not join. Kelmel v. Nine, 121 Mo. App. 718, 97 S. W. 635. When all parties to judgment still living and legal representatives and heirs of those deceased join in assignment of errors, case does not come within Burns' Ann. St. 1901, § 647, relating to appeals by part only of several coparties, and notice of appeal from one appellant to another required by such statute is not necessary. Kline v. Hagey [Ind.] 81 N. E. 209.

13. On a term time appeal in ditch proceedings it is not necessary to make coappellants all parties against whom judgment was rendered below, as where some of the parties who signed the bond withdrew their names and were allowed to dismiss proceedings as to themselves. Burns' Ann. St. 1901, §§ 647a, 647b. Smith v. Gustin [Ind.] 80 N. E. 959.

13a. Husband and wife, distributee and creditor, whose rights were distinct, not entitled to joint appeal. Bitler's Estate, 30 Pa. Super. Ct. 84. All parties aggrieved by final decision whereby bill in equity or petition in bankruptcy is dismissed may join in appeal, though some complain of one alleged error and some of another, all prior rulings being reviewable on such appeal. Stevens v. Nave-McCord Merc. Co. [C. C. A.] 150 F. 71.

Parties respondent.[14]—Necessary parties respondent include all persons who may be affected by a reversal.[15] Successors in title or interest may be substituted or brought in.[16]

§ 4. *Adjudications which may be reviewed, either generally or in one of two appellate courts. A. Statutes*[17] may provide for the review of any proceeding, affix conditions, or withdraw such right.[18] Appealability is determinable as of the time of the order or judgment sought to be reviewed.[19]

(§ 4) *B. Reviewableness may be dependent on the general form or character of the adjudication.*[20]—The decision must amount to the judgment[21] of the court

14. See 7 C. L. 136.

15. Held necessary parties: All parties jointly interested in joint decree. Harison v. Ocala Bldg. & Loan Ass'n [Fla.] 42 So. 696. All complainants in original bill, an appeal by interveners from decree dismissing intervention. Id. Where building and loan association is being administered by receiver on bill by stockholders, the association does not represent such stockholders on appeal from dismissal of intervention by others claiming to be stockholders. Id. Under Burns' Ann. St. 1901, § 648, personal representatives of deceased parties. La Porte Land Co. v. Morrison [Ind.] 78 N. E. 321. Under statute requiring all parties named in and affected by judgment to be made parties, a substituted receiver on appeal by debtor from order directing such receiver to pay certain commissions to his predecessor. Polk v. Johnson [Ind.] 78 N. E. 652. In vacation appeals are parties against whom judgment was rendered. Brown v. Brown [Ind.] 89 N. E. 535. Creditors of deceased who are interested in sustaining homologation of provisional account to appeal by deceased's minor child after attaining majority. Succession of Guilebert, 117 La. 371, 41 So. 653. Certain intervenors and creditors in petition for writ of error in foreclosure. Fleming v. Raywood Rice Canal & Mill. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 324, 95 S. W. 737.

Held not necessary parties: On appeal from circuit in ditch proceedings, parties who were not remonstrators and who were not, therefore, parties to judgment of circuit court. Smith v. Gustin [Ind.] 80 N. E. 959. Where, in action against city and another for personal injuries, judgment was rendered against city and action was dismissed as to other defendant, and city appealed making plaintiff and codefendant appellees, held that appeal would be dismissed as to latter, city having no cause for complaint that judgment was not rendered against him, since it sought no remedy against him. City of Covington v. Whitney, 29 Ky. L. R. 1096, 96 S. W. 907. Contractor sued abutting owner to enforce lien for local improvement, and made town party, and judgment was entered adjudging lien against property and dismissing petition as to town. Property owner appealed, making contractor and town appellees. Held that appeal would be dismissed as to latter, appellant having no cause of complaint that contractor did not recover judgment against it. Wolf v. Pierce, 29 Ky. L. R. 1095, 96 S. W. 903.

Held not proper parties: Under Burns' Ann. St. 1901, § 648, providing that in case of death of parties to judgment before appeal the appeal may be taken by and notice may be served on persons in whose favor or against whom the action might have been survived had death occured prior to judgment, and §§ 2722, 2685, 2687, terminating guardianship of person of unsound mind on death of such person, and making it the guardian's duty to settle the estate without administration, etc., appeal in which guardian alone was made appellee was a nullity, heir of ward being proper appellee. Hurst v. Hawkins [Ind. App.] 79 N. E. 216. On death of ward after judgment in his favor, guardian is not proper party appellee, and such an appeal is a nullity. Hurst v. Hawkins [Ind. App.] 80 N. E. 42.

16. Heirs should be brought into appeal from divorce decree dividing property where death of a party precedes submission, but not if it is subsequent. Strickland v. Strickland [Ark.] 97 S. W. 659.

17. See 7 C. L. 136.

18. Appeals allowed from all final judgments of county court to circuit court. Kirby's Dig. § 1487. Marion County v. Estes, 79 Ark. 504, 96 S. W. 165.

19. Not as of time of entry. In re Raricon Drainage Dist., 129 Wis. 42, 108 N. W. 198. Unappealable judgment not rendered reviewable on error by statute enacted subsequently to such judgment but before denial of rehearing. Harrison v. Magoon, 205 U. S. 501, 51 Law. Ed. 900. A judgment upon a plea in abatement entered prior to repeal of Rev. Laws, c. 173, § 96, denying appeals from such judgments, is not appealable. Kennedy v. McLellan [Mass.] 79 N. E. 819.

20. See 7 C. L. 136.

21. Judgment must be complete and certain in itself and must appear to be an adjudication not a memorandum. Ritchie County Bk. v. Bee [W. Va.] 55 S. E. 380. Opinion filed by trial court, being mere reason for its conclusion, is not appealable. Hews v. Stonebreaker [Iowa] 109 N. W. 1092. Finding of facts cannot be made to take place of judgment. Propeck v. Propeck [Neb.] 112 N. W. 302. Failure of trial court to enter statement of facts found on minutes as required by Code 1896, § 3320, does not involve an appealable adjudication. Matthews v. Southern R. Co. [Ala.] 41 So. 662. Order that "It is ordered, adjudged, and decreed that the motion to dismiss and the demurrers to bill, except the grounds numbered 13, 16, and 17, which are overruled; and said bill of complaint shall stand dismissed, unless complaint amends," etc., held insufficient to show sustaining of any grounds of demurrer, except by inference which was insufficient to sustain an appeal. Sanders v. Cunningham & Co. [Ala.] 42 So. 610. Probate order settling and allowing administratrix's account, while technically

as such,[22] on matters of law or fact as opposed to matters of discretion,[23] such as costs,[24] and it must have reached a finality,[25] become of record,[26] and been against appellant's consent [27] and not due to his default.[28] Decisions other than the fore-

not a judgment, must be regarded as such for purpose of appeal. In re Dougherty's Estate, 34 Mont. 336, 86 P. 38. Opinion in election contest embodying judge's views and citation of authorities, but which concluded by declaring respondent entitled to office, held sufficient where no point was made by respondent. Buckley v. McDonald, 33 Mont. 483, 84 P. 1114. Order clearly denying application to intervene, and forbidding filing of complaint, is sufficient to sustain an appeal without a more formal judgment. Dollenmayer v. Pryor [Cal.] 87 P. 616.

22. Decision of a judge in vacation is not the judgment of the court over which he presides and there is no right of appeal therefrom unless given by positive law. Decision of judge in December not judgment of court, and not appealable except under positive provision to that effect. Pittman v. Byars [Tex.] 101 S. W. 789. Under Rev. St. 1895, arts. 940, 996, supreme court has no jurisdiction of appeal from judgment of Court of civil appeals affirming decision in chambers of judge of district court. Id. Under constitution Tex. art. 5, § 29, order of county judge in civil proceeding other than probate, at "called term," is not a "judgment of the county court" within the meaning of Rev. St. 1895, art. 1383, and no appeal will be from it to court of civil appeals. Ex parte Reeves [Tex.] 103 S. W. 478.

23. Denial of rehearing not appealable. Conboy v. First Nat. Bank, 203 U. S. 141, 51 Law. Ed. 128. From an order setting aside a judgment by default and inquiry for excusable neglect under Revisal 1905, § 513, an appeal lies upon the question whether there was excusable neglect. Stockton v. Wolverine Gold Min. Co. [N. C.] 57 S. E. 335. Refusal of chancellor to grant new trial of issue at law in suit to quiet title, held appealable. See Gen. St. p. 3487, § 5, making allowance of issue in such suits obligatory and making verdict conclusive so long as it is permitted to stand. Brady v. Carteret Realty Co., 70 N. J. Eq. 748, 64 A. 1078.

24. Wright v. Gorman-Wright Co. [C. C. A.] 152 F. 408. Order retaxing costs is not a special proceeding nor a summary application after judgment, nor a matter involving the merits, and is not appealable. Feske v. Adam [Wis.] 112 N. W. 456. No appeal from allowance under Rev. St. 1906, § 7246, of fees for defending indigent prisoners. Long v. Miami County Com'rs 75 Ohio St. 539, 80 N. E. 188.

25. Sautter v. Supreme Conclave I. O. H. [N. J. Err. & App.] 65 A. 990. Burns' Ann. St. 1901, §§ 644, 1337o. Neyens v. Flesher [Ind. App.] 79 N. E. 1087. Record must show final decree. Peterson v. Guttormsen, 125 Ill. App. 28. See Court and Practice Act 1905, p. 141, § 497. McDonald v. Providence Tel. Co., 27 R. I. 595, 65 A. 266. Interlocutory orders are not ordinarily appealable. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867. No appeal from interlocutory order in absence of statute expressly providing therefor. Barney v. Elkhart County Trust Co. [Ind.] 79 N. E. 492. Under Code 1887, § 3454, prior to its amendment, appeal on writ of error did not lie in any case at law until there had been final order or judgment in the cause. Smiley v. Provident Life & Trust Co. [Va.] 56 S. E. 728. Under Code 1904, p. 1836, as amended, proceedings in ejectment cannot be reviewed by supreme court until final judgment has been entered in the cause. Id. Under Court and Practice act 1905, §§ 304, 328, 337, an appeal lies in divorce proceedings only from final decree. Hemenway v. Hemenway [R. I.] 65 A. 608. Interlocutory order in a receivership proceeding suspending enforcement of judgment, foreclosing mortgage lien, is not reviewable until case is finally disposed of. United States & Mexican Trust Co. v. Texas Southern R. Co. [Tex. Civ. App.] 101 S. W. 1048. Under Code Prac. § 566, trial judge may allow appeals from interlocutory judgments which may cause party irreparable injury. Ansley v. Stuart [La.] 43 So. 892.

Motion for new trial suspends judgment, and it does not become final for purpose of appeal until such motion is disposed of. State v. Kitchens [Ala.] 41 So. 871.

26. Judgment is not appealable until entered of record. Hoffman-Bruner Granite Co. v. Stark [Iowa] 108 N. W. 329; Barribeau v. Detroit [Mich.] 13 Det. Leg. N. 810, 109 N. W. 665.

27. Patrick v. Patrick, 30 Ky. L. R. 1364, 101 S. W. 328. Order made upon appellant's as well as appellee's motion. Dockery v. Lowerstein, 121 Mo. App. 394, 99 S. W. 40. A nonsuit taken after an adverse ruling relating solely to the issue of damages, and not to the cause of action, held to be voluntary and premature, and, therefor, held that from it no appeal would lie. Merrick v. Bedford, 141 N. C. 504, 54 S. E. 415.

Held not consent judgment: Grantee not debarred from appealing in suit against him, his trustee for creditors and others, by admissions of trustee's answer and his testimony, where deed of trust recited that grantee was able to pay all his debts, and provided for payment of surplus of proceeds of deed of trust to him. Turpin v. Derickson [Md.] 66 A. 276. Where plaintiff objected to striking of items from complaint, fact that he thereafter agreed that court had no jurisdiction of remaining cause of action did not render judgment of dismissal a consent judgment. Placer County v. Freeman, 149 Cal. 738, 87 P. 628. Missouri court of appeals has jurisdiction to review action of the circuit court in overruling of motion to set aside voluntary nonsuit, where the party taking it was compelled to do so by a decision precluding recovery by him. Dunnevant v. Mocksoud, 122 Mo. App. 428, 99 S. W. 515. Where on the trial the court intimates the opinion that the plaintiff cannot maintain his action, he may submit to a judgment of nonsuit and appeal. Morton v. Blades Lumber Co. [N. C.] 56 S. E. 551. After judgment in replevin for staves, an agreement of the parties that defendant should be credited with amount due him for making the staves does not make the judgment a consent judgment thereby estopping defendant from appealing. Dun-

going are reviewable under various statutes if they determine the "merits," "principles of the cause," deny a rightful mode of trial, "in effect discontinue the cause," or "prevent judgment," [29] or if they affect substantial rights [30] or work irreparable injury to parties cost.[31] In some jurisdictions any interlocutory order is appealable by leave of court, and as to some of such orders even this is needless.[32] Error will not lie to a judgment rendered pursuant to directions given on remand,[33] but where

ham v. Williams Cooperage Co. [Ark.] 103 S. W. 386. Nonsuit rendered at party's own request, or with his consent not appealable. Francisco v. Chicago & A. R. Co. [C. C. A.] 149 F. 354. This rule is not changed by Federal **conformity act.** Id.

Conformity act has no application to proceedings of Federal appellate courts, or to any means adopted to secure a review of judgments or decrees of the circuit or district courts. Francisco v. Chicago & A. R. Co. [C. C. A.] 149 F. 354.

28. Chute Co. v. Westbay, 101 N. Y. S. 527; Levine v. Munchik, 101 N. Y. S. 14; Wandelohr v. Grayson County Nat. Bank [Tex. Civ. App.] 102 S. W. 746. Only relief from default is by application under Court & Practice Act, § 428, to trial court, or to supreme court under section 471. In re Stillman [R. I.] 67 A. 4. Appeal does not lie from default judgment where no motion to open it was made. Chute Co. v. Westbay, 101 N. Y. S. 527. No appeal from default judgment in municipal court where such court had jurisdiction. Schiller v. Hardenburg, 102 N. Y. S. 529; Rogg v. Simelowitz, 102 N. Y. S. 535; Epstein v. Weisberger Co., 102 N. Y. S. 488; Steindler v. American Bonding Co., 101 N. Y. S. 795; Dixon v. Carrucci, 103 N. Y. S. 117; Gormley v. Brooklyn Heights R. Co., 102 N. Y. S. 692. Where defendant refuses to plead after denial of motion to strike out parts of complaint, judgment entered is given for want of an "answer" within B. & C. Comp. § 548, and hence not appealable. Brownell v. Salem Flouring Mills Co. [Or.] 87 P. 770. Order appointing substituted trustee entered upon default of the mortgagor under order to show cause is not appealable by the latter. In re Bostwick, 99 N. Y. S. 925. Under § 311 of the Municipal Court Act (Laws 1902, p. 1578, c. 580), judgment entered in action in which defendant has not been personally served with summons and in which he has not appeared is appealable. Gottlieb v. Kurlander, 101 N. Y. S. 751. Where defendant was prevented from taking any part in an action because of his failure to pay an interlocutory judgment for costs, a judgment renderd in the action is appealable. Fallon v. Crocicchia, 102 N. Y. S. 541. Fact that sheriff levied on property of defendant under execution issued on default judgment does not preclude defendant from having question as to whether process was served reviewed on appeal. Hogan v. Gault, 104 N. Y. S. 410.

Held appealable: Default judgment in district, municipal, or police court. Warburton v. Gourse [Mass.] 79 N. E. 270. Decree pro confesso. Gurpin v. Derickson. [Md.] 66 A 276.

29. Order denying leave to come in and defend is appealable. Dewsnap v. Matthews, 102 N. Y. S. 945. Decree of partition, whether after default or after full defense, adjudging title in parties, interests they hold, and that partition be made in proportion defined by it, and leaving nothing to be done except to divide property, "adjudicates the principles of the cause" and contains every element necessary to render it appealable under Code 1899, c. 135, § 1, cl. 7. Richmond v. Richmond [W. Va.] 57 S. E. 736. Citizens and taxpayers denied right to come in as defendants in suit by other citizens and taxpayers to enjoin holding of election under alleged void statute held not entitled to appeal under Code 1892, § 34, "to settle the principles of the case," that section having no reference to questions of practice. Bush v. Ross [Miss.] 43 So. 70.

30. Order denying interveners the right to amend their complaint not appealable under Ballinger's Ann. Codes & St. § 6500, subds. 6, 7, authorizing appeals from any order affecting a substantial right which either in effect determines the action and prevents final judgment therein or discontinues the action. Seattle & Northern R. Co. v. Bowman [Wash.] 89 P. 399. An order under B. & C. Comp. § 102, setting aside a default judgment as taken through mistake, inadvertence, and excusable neglect, is not a "final order affecting a substantial right" within § 547. Bowman v. Holman [Or.] 86 P. 792. Where court inadvertently signed two orders, substantially alike, vacating judgment, the action of the court in destroying the order presented by the defendant does not affect a substantial right, and is not appealable. Hill v. Muller, 103 N. Y. S. 94. Order for a compulsory reference is not appealable, though "affecting a substantial right" and "made in the action" within the statute, as it does not in effect determine the action and prevent a judgment from which an appeal might be taken. Wilt v. Neenah Cold Storage Co. [Wis.] 110 N. W. 177. An order correcting a verdict in claim and delivery by striking out a finding as to value is not appealable under Code Civ. Proc. § 1722, as amended by Sess. Laws 1899, p. 146, enumerating certain cases in which appeal may be taken. Frank v. Symons [Mont.] 88 P. 561.

31. Interlocutory judgments appealable only in such case. Bossier's Heirs v. Hollingsworth, 117 La. 221, 41 So. 553.

32. Ruling sustaining demurrer to evidence is an appealable order under Code Civ. Proc. §§ 542, 543. White v. Atchison, etc., R. Co. [Kan.] 88 P. 54. Where order of reference to take and state an account is made before a plea in bar of account which goes to the entire demand is considered and determined, the litigant who is prejudiced may at once appeal. Duckworth v. Duckworth [N. C.] 57 S. E. 396.

33. Wright v. Gormon-Wright Co. [C. C. A.] 152 F. 408; McCourt v. Singers-Bigger [C. C. A.] 150 F. 102. Remedy is by timely motion in appellate court for rehearing. Wright v. Gorman-Wright Co. [C. C. A.] 152 F. 408. Writ of error will not lie to review a judgment which has already been affirmed

a case is remanded with directions the lower court must construe the remand, and if error is committed in so doing the judgment is subject to correction on review;[34] and so, also, where the judgment after remand determines issues not determined by the prior judgment.[35] Decisions by nonjudicial tribunals or boards are reviewable only by virtue of statutory provision.[36] Rulings relating to pleadings[37] and process,[38] and matters of practice before the trial[39] or judgments on dilatory pleas,[40] are generally not reviewable except under express statutory provision,[41] or where

on appeal by the same party, even though affirmance was not on the merits. Salley v. People, 122 Ill. App. 70.

34. Circuit court of appeals could review order attempting to carry out its own decree as to division of costs. Kell v. Frenchard [C. C. A.] 146 F. 245.

35. McCourt v. Singers-Bigger [C. C. A.] 150 F. 102.

36. Decision of board of county commissioners to proceed with construction of court house held not appealable, and same held true of all subsequent proceedings up to allowance of claims for debts incurred by the board in such construction. Kraus v. Lehman [Ind. App.] 80 N. E. 550. Order of board of commissioners granting road through private premises and awarding damages is appealable. Latah County v. Hasfurther [Idaho] 88 P. 433.

37. **Rulings on demurrers** not appealable. Gate County v. Bourland [Miss.] 4 So. 379; Brown v. Reiter, 99 N. Y. S. 861; Smith v. Thompson, 103 N. Y. S. 336. Order sustaining demurrer. In re Larson's Estate [Neb.] 109 N. W. 752. Order sustaining demurrer is not final judgment, and hence not appealable. Cutler & Neilson Paint Color Co. v. Hinman [N. M.] 89 P. 267. No appealable final judgment where demurrer was sustained with leave to plaintiff to discontinue, but it did not appear that a discontinuance had been entered or that defendant had entered any judgment against plaintiff. Morris v. Dunbar [C. C. A.] 149 F. 406. Overruling of demurrer to petition. In re Fleming's Estate [Pa.] 66 A. 361. Overruling demurrer to plaintiff's statement of claim. Leedom v. Philadelphia, etc., R. Co. [Pa.] 66 A. 361. Order sustaining demurrer in part and overruling it in part. Cherry Tp. v. Sullivan County, 30 Pa. Super. Ct. 502.

Rulings on motions to strike: Sustaining motion to strike demurrer as irregularly interposed. Steinberg v. Saltzman [Wis.] 110 N. W. 198. Where new property rights were brought into the case by amended pleadings and determined by the decree, an order setting aside such decree and striking the amended pleadings was final as to such new rights. Miocene Ditch Co. v. Moore [C. C. A.] 150 F. 483.

Rulings on motions to amend: Allowing amendment of complaint. Albin v. Seattle Elec. Co. [Wash.] 90 P. 435. Order allowing amendment of complaint by striking out names of two parties, and not involving the merits of the case, is not appealable. McDaniel v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 543. Where only errors assigned are refusal of court to allow certain amendments to petition in case still pending in court below, the writ of error is prematurely sued out and the appellate court is without jurisdiction to entertain the same. Canuet v. Seaboard Air Line R. Co. [Ga.] 57 S. E. 92. Where court sustains special demurrer to specified portions of plaintiff's petition but allows them time to amend, and an amendment is filed within time allowed, and subsequently, after expiration of time allowed, upon the call of the case at a regular term of court, this amendment and an amendment thereto are objected to by the defendant, and the court refuses to allow such amendments, such rulings do not result in a final judgment dismissing the case, but leave the petition, with the paragraphs stricken on special demurrer eliminated, still pending in the trial court. Id.

Leave to plead: Order entered after decree and granting leave to plead to bill in equity, held not final. Jenkins & Reynolds Co. v. Wells, 123 Ill. App. 280.

Order re-establishing lost pleadings pending suit not appealable. See Gen. St. 1906, § 1692. Florida Cent. R. Co. v. Bostwick [Fla.] 44 So. 31.

Rulings on exceptions: Sustaining exceptions to answer. Cleveland v. Insurance Co. [Ala.] 44 So. 37.

Judgment on pleadings: Refusal to hold demurrer or answer frivolous and to render judgment thereon is not appealable. Morgan v. Harris, 141 N. C. 358, 54 S. E. 381.

38. Order quashing service of writ of scire facias without determining that writ may not be otherwise served and without dismissing action not final, and hence unappealable. Collin County Nat. Bk. v. Hughes [C. C. A.] 152 F. 414. Order discharging rule to show cause why service of subpoena in divorce should not be set aside held interlocutory, and not appealable. Tobin v. Tobin, 32 Pa. Super. Ct. 186.

39. Order denying an adjournment is not appealable. Chute Co. v. Westbay, 101 N. Y. S. 527. Order removing action from municipal court to city court of New York, not appealable. Bonagur v. Orlandi, 101 N. Y. S. 115. No appeal from order granting or refusing substitution of lost papers in pending case. Alabama City, etc., R. Co. v. Ventress [Ala.] 42 So. 1017. Refusal of municipal court to transfer action to proper district is appealable. People v. Murray, 104 N. Y. S. 740.

40. Overruling of exception to form of proceeding to compel husband as survivor of community to disclose community property in his possession held not appealable, ruling not working irreparable injury. Succession of Desina [La.] 42 So. 936.

41. Under Code 1896, § 427, providing for appeal from overruling of plea to bill in equity, the sufficiency of a defense in equity may be reviewed in advance of taking of evidence and hearing in merits. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

they in effect finally determine the action, involve substantive rights or the merits, etc.[42] Dismissals, nonsuits, orders to strike cause and the like, are reviewable when determinative of the action,[43] otherwise not.[44] Directed verdicts, orders directing or arresting judgment, or orders granting or refusing a new trial,[45] and others of similar operation, are usually held to be unappealable as being discretionary and in-

42 Judgment sustaining **demurrer** and awarding defendant costs of the action held final and appealable. State v. Lung [Ind.] 80 N. E. 541. Judgments sustaining separate demurrers and dismissing case as to two of three defendants sued as joint trespassers is final and can be brought up for review while the case is still pending in the lower court against the other defendant. Burns v. Harkin, 126 Ga. 161, 54 S. E. 946. Order overruling general demurrer to bill held final and appealable. Darcey v. Bayne [Md.] 66 A. 434. Order overruling demurrer to entire bill of complaint. City of Hyattsville v. Smith [Md.] 66 A. 44. Order overruling demurrer to bill is final order in motion of decree within Code, art. 5, § 20, and is appealable on an order settling disputed rights of parties. Darcey v. Bayne [Md.] 66 A. 434. Order denying defendant's motion under Code Civ. Proc. § 473, for **amendment** of his statement on motion for new trial by inserting specifications is appealable. Freeman v. Brown [Cal. App.] 87 P. 204.

Order striking out the answer of an administrator in a proceeding by the state treasurer to require the filing of an inventory of the estate for the assessment of collateral inheritance taxes is a final order affecting a substantial right in an action involving the merits and materially affecting the final decision. In re Stone's Estate [Iowa] 109 N. W. 455. Order allowing **interrogatories** is appealable, affecting substantial rights. Shafer v. McIntyre, 101 N. Y. S. 268. Order overruling **objections to jurisdiction** not appealable; jurisdiction not having been exercised it does not involve substantial right. In re Lowenguth's Estate, 100 N. Y. S. 422. Denial of **motion to resettle order** so as to make it recite facts appearing of record involves substantial right, and is appealable. Dewsnap v. Matthews, 103 N. Y. S. 902.

43. **Dismissals:** Order of circuit court dismissing appeal from probate court on ground that it did not appear that person in whose name appeal was taken had authorized it. City of Flint v. Genesee Circuit Judge [Mich.] 13 Det. Leg. N. 829, 109 N. W. 769. Order dismissing an action for want of service after quashing summons. Davis v. Jennings [Neb.] 111 N. W. 128. Order dismissing petition in condemnation proceedings on objection of property owner. Detroit United R. Co. v. Oakland County Circuit Judge [Mich.] 13 Det. Leg. N. 842, 109 N. W. 846. Judgment improperly abating action upon ground which precludes further proceedings is appealable. Underwood Typewriter Co. v. Piggott [W. Va.] 55 S. E. 664. Appeal lies from an order dismissing on its merits a petition to intervene in equity. Parsons v. Little, 28 App. D. C. 218. Judgment of circuit court that plaintiff who had elected to stand on motion to remand to state court, take nothing by suit, and that defendant go hence, held final. Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 51 Law. Ed. 430. Where, upon sustaining a demurrer to a complaint, plaintiff refuses to plead over, and the court thereupon orders that the "case be, and the same is, hereby dismissed," the entered case is disposed of although only one defendant demurred. Continental Life Ins. & Inv. Co. v. Jones [Utah] 88 P. 229.

Nonsuit: Judgment of compulsory nonsuit final and appealable. Fadley v. Baltimore & O. R. Co. [C. C. A.] 153 F. 514.

44. **Dismissals:** Order of municipal court of New York city dismissing complaint with leave to amend on terms is not appealable. Brown v. Reiter, 99 N. Y. S. 861. Under Const. art. 8, § 9, judgment of district court dismissing appeal from justice of peace is conclusive and unappealable. Hoffman v. Lewis [Utah] 87 P. 167. Decree dismissing a bill as to only one of two defendants not final and not appealable. Cay v. Vereen [C. C. A.] 144 F. 839. Order dismissing bill "unless complainant amends" is not final, since a further order is necessary to effect a dismissal. Sanders v. Cunningham & Co. [Ala.] 42 So. 610. Judgment dismissing only portion of several causes of action connected in one demand on ground of no cause of action. Bossier's Heirs v. Hollingsworth, 117 La. 221, 41 So. 553. Ex parte order dismissing an action without prejudice is not appealable. Wilson v. Martin [Wash.] 86 P. 205. Dismissal of petition by counsel for reference to determine compensation is not appealable. Kelly v. Horsley [Ala.] 41 So. 902.

Nonsuit: No appeal from order of nonsuit or an order directing judgment on nonsuit. Stebbins v. Larson [Cal. App.] 88 P. 505. See ante, this section, and subsection as to appealability of judgment by consent.

45. Appeal from order setting aside verdict and granting new trial dismissed because not from a final judgment. Code 1906, § 32. Yazoo, etc., R. Co. v. Reid [Miss.] 43 So. 952. Code 1906, § 4911, authorizing appeal in such cases, held invalid. Id. No appeal from order granting or denying a new trial. Sound Inv. Co. v. Fairhaven Land Co. [Wash.] 88 P. 198. In Utah appeal lies only from judgment and not from order denying new trial, the motion merely preventing the judgment from becoming final. Felt v. Cook [Utah] 87 P. 1092. A ruling setting aside a judgment and granting a rehearing is not a final judgment. Smiley v. Provident Life & Trust Co. [Va.] 56 S. E. 728. Grant of new trial **pursuant to mandate of appellate court** is not appealable. Albin v. Seattle Elec. Co. [Wash.] 90 P. 435.

Held final: Judgment awarding new trial, granted after term at which original judgment was rendered. Francis v. Lilly's Ex'x, 30 Ky. L. R. 391, 98 S. W. 996. Order dismissing motion for new trial without consideration of merits. Eldridge & Higgins Co. v. Barrere, 74 Ohio St. 389, 78 N. E. 516.

terlocutory. In some states, however, they are made appealable by statute.[46] A reviewable final judgment or decree must be finally determinative[47] of the con-

46. Under 2 Ballinger's Ann. Codes & St. § 6500, expressly providing that an order granting a new trial may be appealed from, such order is appealable whether based on questions of law or fact. Doyle v. Great Northern R. Co. [Wash.] 86 P. 861.

47. Ritchie County Bk. v. Bee [W. Va.] 55 S. E. 380. The court has no jurisdiction to pass upon an assignment of error complaining of the refusal of a new trial on a collateral notice, when there has been no final disposition of the main case. Smith v. Estes [Ga.] 57 S. E. 685. The supreme court has no jurisdiction of a case so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered in accordance with the contention of the plaintiff in error, would have been a final disposition of the case. Id.

What constitutes finality: Judgment, to be final, must dispose of case as to all parties and finally dispose of subject-matter of litigation. Terre Haute & L. R. Co. v. Indianapolis & N. W. Trac. Co. [Ind.] 78 N. E. 661. Order to be reviewable must dispose of merits of case and leave nothing for the further judicial determination of court. Continental Trust Co. v. Peterson [Neb.] 110 N. W. 316. The form of the judgment is immaterial, but, in substance, it must stand intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in litigation have been adjudicated. Ritchie County Bk. v. Bee [W. Va.] 55 S. E. 380. Order or judgment which finally determines a particular suit is an appealable decision under the circuit courts of appeals act, though it does not bar another proceeding. Stevens v. Nave-McCord Mercantile Co. [C. C. A.] 150 F. 71. Final judgment is one deciding all points in controversy and disposes of all issues not previously disposed of by interlocutory judgments, and is last judgment in the case. Bossier's Heirs v. Hollingsworth, 117 La. 221, 41 So. 553. Finality not affected by failure to provide for costs. Wallen v. Wallen [Va.] 57 S. E. 596. Decree settling the rights of the parties is final, though there remains the statement of an account on principles fixed by the decree. Young v. Rose [Ark.] 98 S. W. 370. Order which determines particular action pending is final, notwithstanding it does not determine right of action involved. French v. Central Const. Co., 8 Ohio C. C. (N. S.) 425. Appeal lies from final order or judgment of county court to the district court under Cobbey's Ann. St. 1903, § 4823, whether the hearing was upon the merits or not. Weeke v. Wortmann [Neb.] 109 N. W. 503. "Final decision" in judiciary act of 1891 is equivalent to "final decree" or "final judgment" used in preceding statutes. Cassatt v. Mitchell Coal & Coke Co. [C. C. A.] 150 F. 32.

Held final: Judgment **against one of two defendants,** the other defendant not appearing, is appealable. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947. Judgment allowing suit money and **alimony** during pendency of suit for divorce is final on that matter, and appealable. Shirey v. Shirey, 79 Ark. 473, 96 S. W. 164. Where in **attachment** a separate trial is had, under Mills' Ann. St. §§ 2711, 2712, of the claim of exemption, a judgment therein is final for the purpose of review. Eckman v. Poor [Colo.] 87 P. 1088. Order **construing deed** and determining rights thereunder, and referring cause to commissioner to report facts fails necessarily to carry order into effect. Roush v. Hyre [W. Va.] 57 S. E. 368. Order denying right of **intervention** is final as to right of intervention, and appeal may be taken without awaiting judgment in the action. Dollenmayer v. Pryor [Cal.] 87 P. 616. Fact that **partition** decree leaves open question as to whether land is susceptible to actual partition does not prevent its being final where it determines all rights of parties. Crowe v. Kennedy, 224 Ill. 526, 79 N. E. 626. Partition decree fixing rights of respective parties held final. Crowe v. Kennedy, 127 Ill. App. 189. Order requiring **production of books** and papers held final under judiciary act 1891. Cassatt v. Mitchell Coal & Coke Co. [C. C. A.] 150 F. 32. Order setting aside **sale** in particular proceedings. Barnes v. Henshaw, 226 Ill. 605, 80 N. E. 1076. Order confirming sale of land and directing deed to be made. Forrester v. Howard, 30 Ky. L. R. 375, 98 S. W. 984. Judgment decreeing sale of lands to which appellants have title, execution of which will divest them thereof, is deemed final for purposes of appeal, though court reserves disposition of fund that may be realized from sale. Staton v. Byron [Ky.] 101 S. W. 882. Decree determining **title** and ordering accounting held final, the court having no power to order an accounting in a suit to quiet title. Howard v. Brown, 197 Mo. 52, 95 S. W. 195.

Held not final: Where, contemporaneously with commencement of action, **attachment** was sued out and levied, and defendant reconvened for damages against plaintiff and asked to have sureties on attachment bond made parties, and prayed for judgment against them, and sureties answered, held that judgment not disposing of sureties was not final. Holley v. Duke [Tex. Civ. App.] 96 S. W. 1090. Judgment non obstante veredicto in favor of garnishee. Keystone Brew. Co. v. Canavan [Pa.] 67 A. 48. Order reciting that court refused to hear application to release attached property claimed to be exempt because such application was not properly before it is not final order, reviewable by writ of error, the applicant's remedy being mandamus to compel consideration. Collins v. Stanley [Wyo.] 88 P. 620. Order refusing to require garnishee to pay to clerk of district court sufficient funds to satisfy any judgment which might be rendered. Hawarden State Bank v. Hessler, 131 Iowa, 691, 109 N. W. 210. Appeal from order of court referring back **auditor's report** premature, report not yet having been finally confirmed by the court. Beach's Estate, 30 Pa. Super. Ct. 572. Judgment failing to dispose of claim of **intervener,** against whom cross bill prayed for judgment, held not final. Patton v. Bender [Tex. Civ. App.] 103 S. W. 690. Order requiring **payment of money into court** not final. Norris Safe & Lock Co. v. Manganese Steel Safe Co. [C. C. A.] 150 F. 577. Order refusing **petition for issue** to determine paternity of child

troversy to the aggrievement of the person claiming review.[48] Under the various statutes the appealability of orders and adjudicatons in interlocutory [49] or provisional,[50] extraordinary [51] and special [52] proceedings, depends upon their finality and

held not final. Commonwealth v. Nagle, 31 Pa. Super. Ct. 175. Order under Court and Practice Act 1905, p. 116, § 402, for **production of documents,** held not final so as to be appealable under sections 304, 328, 337. Hemenway v. Hemenway [R. I.] 65 A. 608. Action of court in **releasing levy** held not reviewable until final judgment in attachment proceeding. Sturges Cornish & Burn Co. v. Cornish, 125 Ill. App. 401. Order made in common pleas court in action to enforce **stockholders' liability,** which determines the liability of some but not of all the defendant stockholders, is interlocutory and not appealable. Marriott v. C., etc., R. Co., 8 Ohio C. C. (N. S.) 495. The vacation of an ex parte order **appointing a trustee** on the ground that proper notice was not given, but which leaves the application pending, is not appealable. In re Sinclaire's Estate [Wash.] 86 P. 1117.

48. Ritchie County Bk. v. Bee [W. Va.] 55 S. E. 380.

49. Order in a proceeding for examination of adverse witnesses before trial under Rev. St. 1898, § 4096, requiring them to produce certain documents, is not within § 3069, giving a right of appeal from a final order affecting a substantial right made in special proceedings or an order granting, refusing, or continuing or modifying a provisional remedy. Phipps v. Wisconsin Cent. R. Co. [Wis.] 110 N. W. 207.

50. Injunction proceedings: Orders granting preliminary injunction and continuing time for hearing on motion to dissolve are **not appealable.** Caflisch v. Logue [Pa.] 65 A. 31. An order which merely reiterates a former order of temporary injunction is not a final order. Rural Home Tel. Co. v. Kentucky & I. Tel. & T. Co., 30 Ky. L. R. 1230, 100 S. W. 847. No appeal lies under act Apr. 14, 1906, from interlocutory order refusing an injunction. Southern R. Co. v. Carolina Coal & Ice Co. [C. C. A.] 151 F. 477. Order dissolving temporary injunction which does not determine or make some final disposition of the case in which the injunction was issued is not appealable. Young v. Albion [Neb.] 110 N. W. 706. Fact that temporary injunction was invoked to protect constitutional rights does not render an order vacating it appealable. State v. Superior Ct. of King County [Wash.] 85 P. 989. Order modifying preliminary injunction is not appealable, nor is an order refusing to set the modifying order aside, neither being final. Simmons v. Alcona County Sup'rs, 144 Mich. 591, 13 Det. Leg. N. 279, 108 N. W. 282. Order modifying injunction with reference to prosecution of certain suits, but not determining cause on merits or ordering dismissal, not final. Vicksburg Waterworks Co. v. Vicksburg [C. C. A.] 153 F. 116. Vacating temporary injunction not reviewable under Ballinger's Ann. Codes & St. § 6500, subd. 3, unless there is a finding by superior court that party against whom it was obtained was insolvent. State v. Superior Ct. of King County [Wash.] 85 P. 989. Application for mandamus to compel trial judge to grant suspensive appeal from order dissolving a preliminary injunction on bond refused on ground that order would not work irreparable injury under circumstances. Lewis v. Sandell [La.] 43 So. 526. Refusal of preliminary injunction is **appealable.** Murphy v. Police Jury of St. Mary Parish, 117 La. 355, 41 So. 647. Refusal to grant a preliminary injunction is appealable under § 4101 of the Code. State v. Roney [Iowa] 110 N. W. 604. Appeal lies under act of 1887 from an interlocutory order denying a motion to dissolve an injunction. Pekin Tel. Co. v. Farmers Tel. Co., 120 Ill. App. 292. Under § 7 of court of appeals act an appeal lies from an interlocutory decree awarding an injunction, and this though the jurisdiction of the court below to issue the injunction may be involved. O'Dell v. Boyden [C. C. A.] 150 F. 731.

Receivership proceedings: Order appointing receiver not reviewable until after final disposition of case. Hale v. Broe [Okl.] 90 P. 5. Order denying compensation to receiver or fixing his compensation in whole or in part is final and appealable. In re Bank of Newcastle [Wyo.] 89 P. 1035. Mere direction to receiver not reviewable, where there were no exceptions pendente lite, and case is still pending on merits in lower court. Lambert Hoisting Engine Co. v. Dexter, 127 Ga. 581, 56 S. E. 778.

51. Refusal of supreme court of **mandamus** and order discharging role to show cause why mandamus should issue is not reviewable by writ of error, except in cases covered by mandamus Act 1903, § 6, authorizing review where constitutionality of a statute is involved. School Dist. v. Mannion [N. J. Err. & App.] 65 A. 440. Appeal lies from judgment of district court in **habeas corpus** proceedings determining rights of conflicting claimants to the custody of a child. Bleakley v. Smart [Kan.] 87 P. 76. Exceptions do not lie to discharge of a prisoner on habeas corpus. Stewart v. Smith [Me.] 64 A. 663. In Georgia a writ of error lies from the refusal of a judge of the superior court to grant leave to file an information in the nature of a writ of **quo warranto.** McWilliams v. Jacobs [Ga.] 57 S. E. 509.

52. Laws 1905, p. 102, c. 55, § 50, does not confirm right of review in **condemnation** by city to question of damages, but provides that the practice shall be as in civil actions in general, and hence under Ballinger's Ann. Codes & St. § 6500, subd. 1, a city may appeal from an order in such proceedings dismissing its petition. City of Puyallup v. Lacy [Wash.] 86 P. 215. In North Carolina an order of the superior court in condemnation proceedings remanding the cause to the clerk that he may hear the same is interlocutory, and no appeal lies therefrom to the supreme court, though a plea in bar is filed by the defendant. Carolina & T. S. R. Co. v. Bailey [N. C.] 55 S. E. 778. Rev. St. 1899, §§ 9416, 9419, 9447, 9448, 1674, 1688, held not to authorize appeal from county to circuit court by remonstrancers against turning of **public road** on petition of landowner. Howe v. Callaway, 119 Mo. App. 251, 95 S. W. 974. Writ of error does not lie from judgment of

effect, and so, also, as to orders in contempt proceedings.[53] Ex parte orders are not appealable.[54] Orders after judgment[55] are not reviewable separately from the judgment if merely a part or continuation of it; otherwise if they newly determine rights, as in case of orders on motions to vacate or modify judgments are usually appealable.[56] Decisions of lower appellate or intermediate courts are reviewable in

county court with respect to **location of county seat.** Judgment of county court is conclusive. Loomis v. Hodson, 122 Ill. App. 75. An order of the municipal court denying a motion to vacate and cancel an appearance of a tenant in **summary proceedings** is not appealable. Hallahan v. Cambridge Hotel Co., 103 N. Y. S. 787. Order setting aside **probate** of will and resetting application for rehearing is not final, and hence is not appealable. Schofield v. Thomas, 226 Ill. 631, 80 N. E. 1085. Under § 4831, Rev. St. 1887, an order of the probate court refusing to admit a will to probate is appealable. In re Paige's Estate [Idaho] 86 P. 273. Error lies to review probate decree in relation to sale of land to pay debts. Thomas v. Waters, 122 Ill. App. 434. Proceeding to sell real **estate of decedent** is a special statutory proceeding distinct from the general administration, and judgments therein are final and appealable. Ryan v. Geigel [Colo.] 89 P. 775. Order of probate court denying motion of administrator pendente lite to require suspended executrix to make settlement held appealable to circuit court under Rev. St. 1899, § 278. Hanley v. Holton [Mo. App.] 96 S. W. 691. Settlement of accounts on resignation of administrator held appealable. Taylor v. Bader, 117 Mo. App. 72, 98 S. W. 80. In a suit to condemn to satisfaction of plaintiff's debt against decedent certain property in hands of defendant, who was both independent executor and sole beneficiary under decedent's will, defendant alleged in his answer that he was by virtue of the terms of the will sole owner of the property. The judgment disposing of all the issues as to all the parties was held to be final and appealable, although no notice was taken therein of the defendant specially in his character of independent executor. Tison v. Gass [Tex. Civ. App.] 102 S. W. 751. Order allowing parties to apply to court for appointment of **road reviewers** held interlocutory, and not appealable. Washington Street, 30 Pa. Super. Ct. 542. Order appointing **drainage** commissioners is not a final order in a special proceeding involving a substantial right, and hence not appealable. In re Horicon Drainage Dist., 129 Wis. 42, 108 N. W. 198. Order certifying proceedings to establish drainage ditch back to commissioners with instructions to set aside appointment of viewers and all subsequent proceedings on account of disqualification of one of commissioners held final, since it disposed of case as far as court had power to do so. Carr v. Duhme [Ind.] 78 N. E. 322. Under statute making order confirming report of drainage commissioners final and appealable, an order finding against validity of system and refusing to confirm it is final and appealable, though court refuses to dismiss proceedings because not shown that no other system was available. In re Dancy Drainage Dist., 129 Wis. 129, 108 N. W. 202. Order of county court sustaining objections to special assessments by drainage district defeats the entire proceedings and renders it necessary to commence them over again, and hence is final. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780. Interlocutory decree adjudging certain claims of **patents** valid and infringed and others invalid and not infringed not final as to the latter, and appeal does not lie by complainant. Library Bureau v. Yawman & Erbe Mfg. Co. [C. C. A.] 147 F. 245. Decision or finding that party for whom **guardian** was requested was an imbecile and resident of county and ought to have a guardian not appealable by such party where no guardian was appointed. In re Guardianship of Elias Breitenstein, 4 Ohio N. P. (N. S.) 358. Under Missouri statutes no appeal lies from order for **examination of judgment** debtor as to ability to pay judgment. Ackerman v. Green [Mo.] 100 S. W. 30.

53. Attachment in orphans' court for contempt, after having an order to show cause being usually followed by further hearing, is not finally determinative, and hence not appealable. In re Doland, 69 N. J. Eq. 802, 64 A. 1091. Contempt order made in progress of case not in nature of criminal proceeding is interlocutory, and not reviewable by circuit court of appeals in advance of final decree. Doyle v. London Guarantee & Acc. Co., 204 U. S. 599, 51 Law. Ed 641.

54. Proper proceedure is to move to vacate order and then appeal from decision on such motion. Wilson v. Martin [Wash.] 86 P. 205.

55. Order granting motion for reargument not appealable. Hart v. Kaplan, 101 N. Y. S. 763. Order overruling motion for reargument not appealable. Steindler v. American Bonding Co., 101 N. Y. S. 795. Order relieving defendant from stipulation setting aside default upon payment of judgment is not appealable. Hering v. Land & Mortg. Co., 103 N. Y. S. 108.

56. Order overruling motion to set aside judgment of dismissal is an order after final judgment and appealable under subd. 3, § 4807, Rev. St. 1887. Oliver v. Kootenai County [Idaho] 90 P. 107. Order of probate court vacating judgment allowing claim held interlocutory, and not appealable. DeClerque v. Campbell, 125 Ill. App. 357. Since under Hill's Ann. St. & Codes, § 1393, the trial court is not authorized to vacate a judgment after term for errors of law, appeal does not lie from denial of motion to vacate on such ground. Sound Inv. Co. v. Fairhaven Land Co. [Wash.] 88 P. 198.

Opening or refusing to open defaults: Order refusing to open default and to set aside an order for judgment is appealable. Barrie v. Northern Assur. Co., 99 Minn. 272, 109 N. W. 248. Appeal lies from an order of municipal court of New York city denying motion to open a default. Steindler v. American Bonding Co., 101 N. Y. S. 795; Levine v. Munchik, 101 N. Y. S. 14. Motion to vacate default based on exceptions taken to ruling of court denying defendant right to defend action is appealable, the prohibition of § 257

cases usually prescribed by statute [57] if they possess finality.[58] Parts of judgments may be reviewed if separate and complete in themselves.[59] As costs are part of the judgment the taxation of them is not separately reviewable.[60]

(§ 4) *C. Reviewableness may depend on character or value of action, subject-matter, or controversy.*[61]—The action or proceeding must be such as is covered by the statutes relating to appeals,[62] and in order to be reviewable by civil remedies must

of the Municipal Court act applying only to appeals from orders opening defaults and vacating judgments where application is made under section 253. Fallon v. Crocicchia, 102 N. Y. S. 541. Under the Municipal Court Act, Laws 1902, c. 580, an order of a municipal court granting motion to open and vacate a default judgment is not appealable. Dixon v. Carrucci, 103 N. Y. S. 117; Wolter v. Liebmann, 102 N. Y. S. 487; Dutch v. Parker, 101 N. Y. S. 271; Beidleman v. Kelly, 99 N. Y. S. 907. Order of municipal court opening a default but not vacating judgment is appealable. Dorfman v. Hirschfield, 103 N. Y. S. 698.

57. Word "appeal" as used in § 2452, Gen. St. 1901, providing that no appeal shall lie from order of district court upon appeal from action of probate judge on application for druggist's license to sell intoxicants, means "review," and hence error will not lie. Hainer v. Burton [Kan.] 89 P. 697. The circuit court has jurisdiction to review an order by the common pleas made on appeal from the overruling by a justice of the peace of a motion to discharge an attachment. Nemit v. Vargo, 8 Ohio C. C. (N. S.) 97.

58. This language of the Texas statute relating to the jurisdiction of the supreme court "when the judgment of the court of civil appeals reversing a judgment practically settles the case" embraces all cases in which the practical effect of the reversal is to finally determine the rights of the parties. Ellis v. Brooks [Tex.] 102 S. W. 94. Writ of error held properly granted on ground that decision of court of civil appeals practically settled the case. Jockusch, Davison & Co. v. Lyon [Tex.] 102 S. W. 396. Order of court of civil appeals refusing to take jurisdiction of cause and to permit transcript to be filed is not a final judgment. Wandelober v. Rainey [Tex.] 100 S. W. 1155. Judgment of appellate court reversing and remanding for further proceedings is not finally determinative, and hence not appealable to supreme court under Hurd's Rev. St. 1905, c. 110, § 91. Bingham v. Isham [Ill.] 81 N. E. 690. That reversal by court of civil appeals "practically settles the case" may be shown by affidavits on appeal to supreme court. Ellis v. Brooks [Tex.] 102 S. W. 94.

59. In action to try title to land, cross appeal by defendants from finding that plaintiffs, subject to their lease, were owners of one-sixth undivided interest, will not be dismissed as appeal from a part of a judgment, since statute allows such appeals where an appeal from whole judgment is not necessary to fair determination. McDonald v. White [Wash.] 89 P. 891. Where practice of assigning cross errors does not prevail, party may within time limited, appeal from portion of judgment which is unfavorable to him after determination of adverse party's appeal from another portion of judgment. State v. Northern Pac. R. Co., 99 Minn. 280, 109 N. W. 238, 110 N. W. 975. Appeal cannot be taken from two separate and distinct appealable orders, hence appeal from order vacating judgment in favor of appellant and from judgment in favor of opposite party on second trial will be dismissed for duplicity. Ewing v. Lunn [S. D.] 109 N. W. 642.

60. Judgment merely for costs which does not adjudicate the matters in difference between the parties litigant is not a final judgment, and is not appealable. Ritchie County Bk. v. Bee [W. Va.] 55 S. E. 380. The appellate court has not jurisdiction to extend such a judgment into a final judgment in order to pass upon alleged errors. Id. No appeal from Warder overruling motion to retax costs where cause is still pending below. American Surety Co. v. Haynes [Mo. App.] 101 S. W. 690. Judgment for costs alone, the merits not being adjudicated therein, though entered for defendant after jury found verdict in his favor, is not such final judgment as will support writ of error. Dexter v. Seaboard Air Line R. Co. [Fla.] 42 So. 695. Judgment for costs after sustaining demurrer to complaint held not final, and hence not appealable. Neyens v. Flesher [Ind. App.] 79 N. E. 1087. General finding for defendants, and adjudication that plaintiff pay costs, held not final judgment, and hence not appealable. Miller v. McKean [Ind. App.] 78 N. E. 1049. Refusal to require nonresident plaintiff to give security for costs. Boggs v. Inter-American Min. & Smelting Co. [Md.] 66 A. 259; Enderlein v. Coghlan, 102 N. Y. S. 467.

Held appealable: A judgment for defendant for costs after an order sustaining demurrer to plaintiff's evidence is a final judgment, although it does not formally declare that plaintiff take nothing or that defendant go hence without day. White v. Atchison, etc., R. Co. [Kan.] 88 P. 54.

61. See 7 C. L. 144.

62. The presentation of a claim of an official court reporter to judge for allowance is neither an action nor a special proceeding within Code Civ. Proc. § 963, subd. 1, authorizing an appeal from a final judgment in such cases. Pipher v. Superior Ct. [Cal. App.] 86 P. 904. No appeal lies in Rhode Island from a decree for divorce, whether divorce is a vinculo or a mensa. See Court and Practice Act, §§ 9, 304, 328, Gen. Laws 1896, c. 195, §§ 18, 19, as amended by Pub. Laws 1902, c. 971, Pub. Laws. 1899, c. 649. Fidler v. Fidler [R. I.] 65 A. 609. In Georgia the judgment of a judge of a superior court in proceeding for alimony, whether in term, or vacation, or in the progress of the cause, is the subject of writ of error on the same terms that are prescribed in cases of injunctions. Civ. Code 1895, § 2468. Stokes v. Stokes, 126 Ga. 804, 55 S. E. 1023. Under Burns' Ann. St. Sup. 1905, § 5405f, no appeal lies from decision of railroad commission in proceedings under Burns' Ann.

be civil in its nature.[63] It must involve questions of law or of fact to be reviewable by the remedies appropriate to each, e. g., error or appeal. The case may go either to an intermediate or to the highest court or may or may not be subject to further appeal from the former to the latter if any of the criteria hereafter referred to exist.[64] Jurisdiction because of the subject-matter usually prevails over that dependent on the amount,[65] and the existence of one jurisdictional predicate makes others needless,[66] but the existence of one or the other is absolutely essential.[67]

Particular jurisdictional facts.[68]—Among the criteria[69] prescribed by various statutes to determine appealability are the existence of a constitutional[70] question

St. 1901, §§ 5158a-5158h, to establish interlocking devices at railroad crossing. Grand Rapids & I. R. Co. v. Railroad Commission [Ind.] 78 N. E. 981.

63. Action to recover penalty in forfeited recognizance for appearance of defendant in criminal case is not criminal proceeding, hence United States may have adverse judgment reviewed by circuit court of appeals. United States v. Zarafonitis [C. C. A.] 150 F. 97.

64. Const. art. 8, § 9, authorizing appeals from all final judgments of the district courts, is applicable only to final judgments in actions originally begun therein. McCashland v. Keogh [Utah] 88 P. 680. Under Rev. St. arts. 1155, 996, 940, where from judgment of district court in action on liquor dealers' bond, involving $1,000, an appeal is taken to court of civil appeals, the supreme court is without jurisdiction to grant writ of error to review judgment of latter court. Long v. Green & Co. [Tex.] 101 S. W. 786.

65. Laws 1903, p. 48, c. 52, authorizing appeals from final judgments in district court on appeal from city court except where it does not exceed $100, does not authorize appeal from judgments of nonsuit, however much may be involved in litigation. McCashland v. Keogh [Utah] 88 P. 680.

66. Supreme court has jurisdiction of appeal from judgment to tax costs for which party was held liable on previous appeal regardless of amount in controversy. Kentucky court of appeals has jurisdiction of appeal from judgment refusing to adjudge plaintiff a lien on land without regard to amount involved. Withers' Adm'r v. Withers' Heirs, 30 Ky. L. R. 1099, 100 S. W. 253. Supreme court of Texas has jurisdiction of appeal in action against guardian of minor children of a decedent to recover so much of sum collected by defendant on insurance policy on life of decedent as will cover amount of payments made by plaintiff as premiums upon policy with interest, although sum of such payments without interest does not amount to $1,000. Kelly v. Searcy [Tex.] 102 S. W. 100.

67. Supreme court has no jurisdiction of appeal from grant of mandamus to compel district attorney to recuse himself in order that a district attorney pro tem. may be appointed to institute a suit, no amount being in dispute and the suit being in futuro. State v. Lancaster [La.] 42 So. 583. Supreme court held to have no jurisdiction of suit by citizens and tax payers to compel compliance with statute requiring list of those who have paid poll tax to be filed in office of clerk of court, it not involving jurisdictional amount and not being case of which court had jurisdiction regardless of amount. State v. Briede [La.] 43 So. 992. Appeal held not to lie from decree distributing fund to Indians, pursuant to Act Jan. 28, 1893, in which they were entitled to participate per capita, amount in controversy between each individual and government not being $3,000, the jurisdictional amount fixed by Rev. St. § 707. New York Indians v. U. S., 41 Ct. Cl. 462. Supreme court held to have no jurisdiction of appeal by sheriff from taxation of costs in his favor for seizure of property under writs of fi. fa. and advertising it for sale where judgments were satisfied by parties before sale, jurisdictional amount not being involved. Robson v. Beasley [La.] 44 So. 136. Appeal by plaintiffs, in action by residents and taxpayers to have incorporation of village set aside, dismissed, it not being set out in petition that any of appellants, or all of them combined, had pecuniary interest in matter involved which would bring controversy within jurisdiction of supreme court, and appeal as to jurisdiction being governed by ordinary rules on that subject. State v. Pearl River [La.] 43 So. 815.

68. See 7 C. L. 145.

69. Under Code Civ. Proc. § 191, par. 2, subd. 2, an appeal may be allowed by the appellate division from its unanimous affirmance in a suit to recover compensation for services without certifying questions of law, § 190 not being applicable in such case. Fisher Co. v. Woods [N. Y.] 79 N. E. 836. Appeal from probate court's dismissal of petition to set aside decree of such court for separate support is an appeal relating to matter of separate support, and under Rev. Laws, c. 162, § 18, lies to superior court and not to supreme judicial court under § 9. Penno v. Penno [Mass.] 81 N. E. 293. Jurisdiction of supreme court on appeal from appellate court not dependent upon a statute, franchise or freehold being involved. Hill v. Viele, 225 Ill. 163, 80 N. E. 97.

70. Appellate court cannot determine constitutionality of a statute. Earp v. Lilly, 120 Ill. App. 123; People v. Severson, 121 Ill. App. 224. Constitutionality of an ordinance not reviewable by appellate court. Masonic Fraternity Temple Ass'n v. Chicago, 120 Ill. App. 612. In Missouri the court of appeals has no jurisdiction of appeal from rulings on constitutional questions. Wabash R. Co. v. Flannigan, 118 Mo. App. 124, 100 S. W. 661. Appeal involving constitutional question was properly taken directly to supreme court before it was consolidated with the court of appeals. City of Denver v. Iliff [Colo.] 89 P. 823. Supreme court has jurisdiction where constitutionality of municipal ordinance, under which a fine has been imposed, is at issue, but has no juris-

particularly pointed out, set up,[71] necessary to decision, and adversely or prejudicially decided,[72] the construction [73] or validity [74] of statutes or public regulations, a case involving the revenue [75] or taxes,[76] a case involving freeholds,[77] titles as boundadiction as to mode of procedure under such ordinance. Town of Minden v. Crichton [La.] 43 So. 395. Appeal dismissed where only question involved was whether defendant was exempt from road duty under ordinance. Id.

Constitutional question involved: Judgment founded upon erroneous construction of statute which makes its enforcement conflict with constitutional guaranties involves constitutionality of law, and is, therefore, reviewable without regard to the amount in controversy. Underwood Typewriter Co. v. Piggott [W. Va.] 55 S. E. 664.

Constitutional question not involved: Since jury trial may be waived, a demurrer to defendant's plea in action on insurance policy on ground that the policy provision for arbitration set up in such plea deprives plaintiff of jury trial raises no constitutional question. Stephens v. Springfield F. & M. Ins. Co., 27 R. I. 595, 65 A 300. Constitutional question settled by former cases under doctrine of stare decisis does not confer jurisdiction of direct appeal to supreme court. Pittsburg, etc., R. Co. v. Rodgers [Ind.] 81 N. E. 212. No constitutional question involved in question whether a telephone statute applied to individuals. State v. McKee, 196 Mo. 106, 95 S. W. 401. Amended answer alleging that decision of court of appeals conflicted with prior decisions and that the construction of certain statutes by that court violated the state and Federal constitutions held not to raise any constitutional or Federal question so as to confer appellate jurisdiction on supreme court. Sublette v. St. Louis, etc., R. Co., 198 Mo. 190, 95 S. W. 430. Construction of shipping contract held not to involve any questions under the state or Federal constitutions or under the interstate commerce act. Phoenix Powder Mfg. Co. v. Wabash R. Co., 196 Mo. 663, 94 S. W. 235. In suit for vidanguer service under city ordinance and contract made pursuant thereto, where defendant assailed, in general terms, legality purposes of trial, interpreted answer to mean and constitutionality of ordinance, and, for that answer infringed upon authority of board of health, held that it could not be said that constitutionality of any toll, tax, or impost was contested, and ordinance not having been declared unconstitutional, and jurisdictional amount not being involved, supreme court had no jurisdiction. Fisher v. Bryson [La.] 44 So. 127.

Constitutional question only a criterion. Constitutional question does not confer jurisdiction on supreme court in proceedings as to which no review is provided for by statute. Grand Rapids & I. R. Co. v. Railroad Commission [Ind.] 78 N. E. 981. Va. Const. 1904, p. ccxxx, art. 6, § 88, does not ex proprio vigore invest supreme court of appeals with jurisdiction where constitutional questions are involved, and since Code 1904, § 586a, provides for no appeal to such court in local option elections, the fact that decision of circuit court on validity of such election involved constitutionality of Code 1904, § 62, relating to qualification of voters, did not give right of appeal to supreme court. Hulvey v. Roberts [Va.] 55 S. E. 585.

When statute is held constitutional, court having jurisdiction by virtue of constitutionality of such statute being involved, can not consider other questions. Western Union Tel. Co. v. Chiles [Va.] 57 S. E. 587.

71. Supreme court does not acquire jurisdiction on the ground that question of constitutionality of a statute is involved, where such question was not raised below. Jacobs v. St. Joseph [Mo.] 102 S. W. 988.

72. Under constitutional amendment creating Georgia court of appeals, when that court certifies to supreme court for decision a constitutional question, and that certificate declares that a decision of such question is necessary to the determination of the case, the supreme court has no power to determine whether or not a decision of the question is necessary to the proper determination of the case. Harvey v. Thompson [Ga.] 57 S. E. 104. In Missouri to give the supreme court jurisdiction of an appeal on the ground that a constitutional question is involved, it must appear that such question was raised in the trial court and ruled to the disadvantage of appellant. Shell v. Missouri Pac. R. Co. [Mo.] 100 S. W. 617. Constitutionality of a statute held still an open question where another case involving it was still pending in Federal supreme court. O'Donnell v. Kansas City, etc., R. Co., 197 Mo. 110, 95 S. W. 196.

73. Construction of Burns' Ann. St. 1901, § 7954, requiring coroner to hold inquest on notice that body of person supposed to have died from violence or casualty is in county, is involved in appeal by coroner in suit for fees for inquest. Stults v. Allen County Com'rs [Ind.] 81 N. E. 471.

74. The validity of a statute cannot be considered as involved in a case after the question has been decided in the supreme court and its validity sustained so as to give the supreme court jurisdiction to grant a writ of error under the Texas statute, Rev. St. 1895, art. 996. City of San Antonio v. Tobin [Tex.] 102 S. W. 403.

75. Revenue must be directly and not merely incidentally involved. City of Chicago v. Cook County, 224 Ill. 246, 79 N. E. 571. Revenue not involved in contest between city and county as to right of county to certain fees out of taxes already collected for city purposes. Id.

76. Legality of tax involved in suit for license where defense is that statute levying license does not apply to defendant's business. State v. Wenar [La.] 42 So. 726. Legality of taxes assessed by one parish not involved in questions as to whether land lay in such parish, and whether if in such parish payment to another parish would discharge the land from liability. Page v. Thompson, 117 La. 274, 41 So. 571. Under the constitution of Missouri, art. 6, § 12, the court of appeals has no jurisdiction of an appeal in a case involving the construction of the revenue laws. State v. Adkins [Mo. App.] 100 S. W. 661.

77. Where freehold is involved appellate court has no jurisdiction. Peterson v. Guttormsen, 125 Ill. App. 28. Freehold must not only be involved in case below but also in assignments of error. Gilmore v. Lee

aries,[78] homestead exemptions,[79] or title to office,[80] or conflict between decisions of

[Ill.] 81 N. E. 26; Karsten v. Winkelman, 126 Ill. App. 418. Freehold must not only be involved in original decree, but also in questions to be determined on appeal, and hence question of another suit pending and as to whether plea in abatement in partition on that ground was properly stricken, being solely question of practice, does not confer jurisdiction. Miller v. Kensil, 223 Ill. 201, 79 N. E. 24. Freehold must be directly involved and not merely collaterally or incidentally. Burroughs v. Kotz, 226 Ill. 40, 80 N. E. 728.

Freehold involved in proceeding to partition realty. Steele v. Steele, 123 Ill. App. 176. Where perpetual easement was in issue. Snyder v. Baker, 125 Ill. App. 482. Where it was sought to set aside deeds as clouds. Pratt & Co. v. Ashmore, 127 Ill. App. 331. On appeal from denial of administrator's application to sell lands of decedent to pay debts, title to the lands having been put directly in issue below. In re Stahl's Estate [Ill.] 81 N. E. 531. Appeal lies direct to supreme court from order setting aside sale in partition proceedings. Barnes v. Henshaw, 226 Ill. 605, 80 N. E. 1076. In case by town to recover penalty for obstruction of alleged highway. Town of Audubon v. Hand, 223 Ill. 367, 79 N. E. 71. In suit to set aside probate of will devising real estate in a manner different from that in which it would have descended in absence of will. Gottmanshausen v. Wolfing, 224 Ill., 270, 79 N. E. 611.

Freehold not involved unless the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate. Karsten v. Winkelman, 126 Ill. App. 418. Appeal from order refusing to allow filing of a bill of review in a case involving a freehold held not to involve a freehold. Id. Where question was whether a widow's award should be paid out of proceeds of sale of realty. Miller v. Hammond, 126 Ill. App. 267. No bill seeking to have deed declared a mortgage and to redeem. Caraway v. Sly, 122 Ill. App. 648. Where question was only one of privity between a lien claim and claim for dower and homestead. Lidster v. Poole, 122 Ill. App. 227. In contested will case where will only purports to dispose of personal property. Dowie v. Sutton [Ill.] 81 N. E. 395. On appeal by one whose property is not taken by vacation of street. Hofmann Bros. Brew. Co. v. Cicero, 223 Ill. 155, 79 N. E. 121. Under Hurds' Rev. St. 1903, c. 52, p. 943, §§ 1 et seq., and c. 68, § 16, the wife's interest in the husband's homestead is not a freehold. Taylor v. Taylor, 223 Ill. 423, 79 N. E. 139. On appeal from decree enjoining issue of tax deed. Glos v. Sanitary Dist., 224 Ill. 272, 79 N. E. 562. In suit to enjoin issue of tax deed to defendant on ground that property belonged to plaintiff where suit was dismissed for want of equity and no tax deed was issued. Bush v. Caldwell, 224 Ill. 93, 79 N. E. 434. Where owner after foreclosure and before execution of master's deed sued assignee of certificate of sale and obtained decree authorizing redemption within certain time, the freehold being only collaterally involved and the decree not being an unconditional disposition of the freehold. Burroughs v. Kotz, 226 Ill. 40, 80 N. E. 728. The original bill having been filed before the execution of the master's deed, the setting aside of such deed was only an incident to the right of redemption and had no bearing on the real question in controversy. Id.

78. Court of appeals has no jurisdiction of action involving title to land, such as suits to quiet title. Kelmel v. Nine, 121 Mo. App. 718, 97 S. W. 635.

Title involved: If contest, on appeal in proceedings to open highway, is over right to take private property for road, title to realty is so far involved that jurisdiction is in supreme court rather than court of appeal. State v. McCutchan, 119 Mo. App. 69, 96 S. W. 251. In suit for specific performance. Barnes v. Stone, 198 Mo. 471, 95 S. W. 915. Decree appealable under West Virginia statute, Code 1906, § 4038, as one changing the title to real estate. Beverlin v. Casto [W. Va.] 57 S. E. 411.

Title or boundary not involved: Suit to enjoin sale of land under execution issued against third person, who was admitted to have superior record title, plaintiff claiming by adverse possession, held not to involve title to realty within meaning of Const. 1875, art. 6, § 12, giving supreme court jurisdiction where such title is involved. Payne v. Daviess County Sav. Ass'n, 198 Mo. 617, 96 S. W. 1016. Though claim sued on was lien on land, defendant could not appeal where there was no effort to enforce the lien. Chestnut v. Corbin Banking Co., 29 Ky. L. R. 665, 94 S. W. 633. In suit by purchaser at foreclosure to restrain resale on ground that it would cast a cloud on title. Barnes v. Stone, 198 Mo. 471, 95 S. W. 915. When priority of liens is only question involved. Stark v. Martin [Mo.] 102 S. W. 1089. Action brought by unsuccessful defendant in ejectment under Rev. St. 1899, § 3072 (Ann. St. 1906, p. 1766), to recover value of improvements is not such continuation of ejectment suit as to give supreme court jurisdiction on appeal for that reason. Bristol v. Thompson [Mo.] 102 S. W. 991. Water diverted into private water system becomes personal property and hence action to recover for water furnished therefrom does not involve title to real estate so as to give right of appeal from judgment of superior court on appeal from a justice court. Hesperia Land & Water Co. v. Gardner [Cal. App.] 88 P. 286. Supreme court of Missouri has not jurisdiction of appeal from judgment quashing levy of execution on real estate on ground that property is defendants' homestead and therefore exempt from execution, the title to real estate not being involved within the meaning of the constitution, art. 6, § 12. Snodgrass v. Copple [Mo.] 101 S. W. 1090. Action of trespass quare clausum fregit is not a controversy concerning the title or boundary of land, giving jurisdiction in the supreme court for a writ of error therein. Dickinson v. Mankin [W. Va.] 56 S. E. 824.

79. Grant of jurisdiction by Const. 1898, art. 85, of suits involving homestead exemptions, is sufficiently broad to cover all questions arising under Const. arts. 244-247, and hence covers suit on materialman's lien on homestead under exceptions set out in article 245, predicated upon a waiver of homestead and involving right to sell same. Peo-

courts of concurrent jurisdiction,[81] or a minimum [82] or maximum amount as pre-

ple's Independent Rice Mill Co. v. Benoit, 117 La. 999, 42 So. 480. Under Const. art. 85, supreme court has appellate jurisdiction of all suits involving homestead exemptions. Reily v. Johnston [La.] 43 So. 977.

80. Appeal from decree of quarter sessions imposing costs in contested election case goes to superior court under P. L. 215, § 7a, not being a case involving right to public office. In re Hayes' Election, 214 Pa. 551, 63 A. 974.

81. Decisions of court of civil appeals as to what would be a breach of contract for the shipment of cattle, what delay was and was not unreasonable for the purpose of watering and feeding, and as to whether the question of delay was one of law or fact, held not conflicting so as to give supreme court jurisdiction of the last decision. Rogers v. Texas & P. R. Co. [Tex.] 15 Tex. Ct. Rep. 968, 94 S. W. 321.

82. There is no law in force in Georgia authorizing an appeal from the county court to the superior court in cases where amount involved is $50 or less. De Lamar v. Dollar [Ga.] 57 S. E. 85. Under the constitution and statutes of West Virginia, in matters merely pecuniary, to give jurisdiction to the supreme court of appeals a sum exceeding $100, exclusive of costs, must be involved. Oppenheimer v. Triple-State Natural G. & O. Co. [W. Va.] 57 S. E. 271; Montgomery v. Economy Fuel Co. [W. Va.] 57 S. E. 137; Carskadon v. Board of Education [W. Va.] 56 S. E. 834. This rule applies to an appeal from an order overruling a motion to dissolve and perpetuating an injunction. Carskadon v. Board of Education [W. Va.] 56 S. E. 834. Under Gen. St. 1901, § 5019, the supreme court has no jurisdiction where amount in controversy is only $30.01. Liljestrom v. Anderson [Kan.] 882 P. 1076. Under laws 1901, p. 107, supreme court has no jurisdiction where the amount involved is not more than $4,500 exclusive of costs. Wait v. Atchison, etc., R. Co [Mo.] 103 S. W. 60. Supreme court held to have no jurisdiction of appeal in suit to recover possession of land worth $1,000 and $375 damages for its detention. Bodcaw Lumber Co. v. Huddleston [La.] 44 So. 258. Some sum or value must be in dispute to sustain appellate jurisdiction of United States supreme court over supreme courts of the territories conferred by act March 3, 1885. New Mexico v. Denver, etc., R. Co., 203 U. S. 38, 51 Law. Ed. 78. Right to have goods shipped was measurable in money and satisfied the act. Id. In Missouri the appellate jurisdiction of the supreme court, in injunction proceedings, where no constitutional question is involved, can only be maintained where the amount involved exceeds $4,500. Rev. St. § 1649a, as amended by laws 1901, p. 107 (Ann. St. 1906, p. 1208). Moffatt v. Board of trade [Mo.] 101 S. W. 6. In Kentucky no appeal can be taken to court of appeals from a judgment for recovery of money or personal property if value in controversy is less than two hundred dollars exclusive of interest and costs. Cincinnati, etc., R. Co. v. Lawrence [Ky.] 102 S. W. 298; Tillie v. Payne, 30 Ky. L. R. 664, 99 S. W. 322. Provision of act that either party might appeal from any judgment rendered by court held to be construed in harmony with general law regulating appeals, and not to authorize appeal regardless of amount in controversy. New York Indians v. U. S, 41 Ct. Cl. 462. Certificate of imputance required by 1 Starr. & C. Ann. St. 1896, p. 1153, c. 37, § 8, an appeal from appellate court to supreme court in actions ex contractu where less than $1,000 is involved. Merritt v. Crane Co., 225 Ill. 181, 80 N. E. 103. Judgment of appellate court final in suit to declare deed absolute a mortgage and to redeem where amount involved is less than $1,000 and there is no certificate of imputance. Hill v. Niede, 225 Ill. 163, 80 N. E. 97. Appeal lies from district court for Porto Rico to United States supreme court from decree in suit by wife for liquidation of community where matter in dispute exceeds $5,000. Garrozi v. Dastas, 204 U. S. 64, 51 Law. Ed. 369. Where amount involved in suit is less than jurisdictional sum, but judgment therein would be decisive as to plaintiff's rights with respect to sum in excess of such jurisdictional limit, such judgment is reviewable. International Harvester Co. v. Smith, 105 Va. 683, 54 S. E. 859.

Determination of amount: Affidavit that suit involved more than $2,000 held not to affect question of jurisdiction, it being mere statement of legal conclusion drawn from facts as to which court must judge itself. State v. Briede [La.] 43 So. 992. Appellate court determines amount in dispute from facts disclosed by transcript. Doullut v. Smith, 117 La. 491, 41 So. 913. Supreme court will consider entire record for a determination of amount in dispute and not only the petition, and will transfer the case to court of appeals if only a few hundred dollars is involved. Vanderberg v. Kansas City Gas Co., 199 Mo. 455, 97 S. W. 908. In ascertaining whether it has jurisdiction supreme court will look into record and ascertain sum actually in dispute, and will not be governed by pleadings and judgment appealed from alone. Pittsburg Bridge Co. v. St. Louis Transit Co. [Mo.] 103 S. W. 546. While in action before justice as a general rule amount claimed in the summons and pleadings tests the question of jurisdiction, yet if upon the hearing the evidence is without conflict and it appears therefrom clearly and conclusively that the amount in controversy cannot possibly exceed $100 exclusive of costs, the supreme court of appeals is without jurisdiction to entertain a writ of error. Oppenheimer v. Triple-State Natural G. & O. Co. [W. Va.] 57 S. E. 271. Under a statute denying the right to appeal unless the amount in controversy "as shown by the pleadings" exceeds certain amount, the amount in controversy is to be determined from the pleadings and not from the judgment. Hancock v. Hancock [Iowa] 109 N. W. 1009. While the amount claimed in the summons is prima facie as to the amount in controversy, the appeal cannot be retained if the evidence clearly shows that less than the jurisdictional amount was involved. Oppenheimer v. Triple-State Natural G. & O. Co. [W. Va.] 57 S. E. 271.

Cumulation of amounts or values: Independent claims of claimants to funds in court cannot be cumulated so as to make up jurisdictional amount. Sewerage & Water Board v. Thelen, 117 La. 923, 42 So. 426.

scribed by statute or constitution, "demanded," [83] "involved," [84] "in dispute," [85] "in controversy," or "recovered," [86] including or excluding costs, interest, and other

Where object of suit is to enforce payment of mechanics' liens of persons whose claims are several and distinct, an appeal will not lie to the supreme court from a decree adjudicating the same, except as to such of them as may exceed $100. Wees v. Elbon [W. Va.] 56 S. E. 611. In suit to establish mechanic's liens amounts of respective liens of different parties cannot be added so as to make up amount necessary to confer jurisdiction of appeal from appellate court to supreme court under 1 Starr & C. Ann. St. 1896, p. 1153, c. 37, § 8, without certificate of imputance. Merritt v. Crane Co., 225 Ill. 181, 80 N. E. 103. Appeal from order overruling objection to single, separable item of administrator's account does not bring up other items so as to render amount involved sufficient to authorize appeal from appellate court to supreme court. Bache v. Ward, 225 Ill. 320, 80 N. E. 330. Obligation of lessor of oil lands is indivisible among his heirs where the consideration is the drilling of one well, and hence in suits by the heirs to cancel the lease the amount involved in each suit is the value of the whole lease. Murray v. Barnhart, 117 La. 1023, 42 So. 489. Under Ky. St. 1903, § 950, which precludes appeal to court of appeals from judgment for recovery of money or personal property if the value in controversy is less than $200, exclusive of interest and costs, if suits of creditors are consolidated the amounts involved in separate suits cannot be added together so as to give right of appeal, but amount in each suit must determine that right. Covington Bros. & Co. v. Jordan, 30 Ky. L. R. 1135 100 S. W. 326. In action by several plaintiffs to restrain collection of assessments, amount in controversy is to be determined from the aggregate amount of assessments against plaintiffs. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.

Counterclaim entirely without merit interposed solely as a predicate for an appeal will not be considered. Texas & N. O. R. Co. v. Jones [Tex. Civ. App.] 16 Tex. Ct. Rep. 166, 95 S. W. 746. Appeal from judgment for plaintiff where defendant pleaded counterclaim and prayed judgment over, the amount in controversy is the amount of the judgment rendered, not amount of the judgment which defendant prayed on the counterclaim. Co-Operative Mfg., etc., Co. v. Rusche, 30 Ky. L. R. 790, 99 S. W. 677. Where defendants counterclaimed for more than $200, the amount in controversy exceeded $200 although plaintiff claimed and obtained judgment for only $79. Sorrill v. McGougan [Wash.] 87 P. 825.

Waiver of excess: That one sued in justice court for less than his original claim against defendant and thus deprived the latter of appeal to district court was not a fraud on the court. Texas & N. O. R. Co. v. Jones [Tex. Civ. App.] 16 Tex. Ct. Rep. 166, 95 S. W. 746.

Appellant's interest is determination of jurisdiction of Kentucky court of appeals. Craft v. Chesapeake & O. R. Co., 30 Ky. L. R. 1367, 101 S. W. 342. Under Act May 5, 1899, a legatee may appeal from orphan's court to supreme court from allowance of claim against estate for more than $1,500, though appellant's interest is less than that amount. In re May's Estate [Pa.] 67 A. 120.

83. Where in action against physician trial was had in court based on negligently infecting plaintiff and family, sustaining of demurrer to amended count adding elements of fraud and false representations did not bring case within Hurd's Rev. St. 1905, p. 601, c. 37, § 8, allowing appeals from appellate court to supreme court in actions sounding in damages where there was no trial on issue of fact before and amount "claimed" is more than $1,000. Haas v. Tegtmeier, 225 Ill. 275, 80 N. E. 130. Claim for damages manifestly **inflated** will not confer jurisdiction. Samuel Israelite Baptist Church v. Thomas, 117 La. 253, 41 So. 564; Leury v. Baton Rouge Compress Co., 117 La. 956, 42 So. 439.

84. The entire amount of the claim involved in the action is the test of jurisdiction and not the particular amount in controversy on appeal. Schultz v. Ford Bros [Iowa] 109 N. W. 614. Where sheriff's fees sued for did not reach jurisdictional amount, fact that original judgments were for more than jurisdictional amount held not to confer jurisdiction litigation not having arisen from any difference as to their construction, but from happening of independent fact arising after writs had gone into sheriff's hands and which extinguished judgments. Robson v. Beasley [La.] 44 So. 136. Where there is no appeal from a voluntary nonsuit and judgment of discontinuance, no appeal lies from taxation of costs made after such judgment where less than $2,000 is involved in such taxation. De Renzes v. His Wife, 117 La. 817, 42 So. 327. Supreme court has no jurisdiction of motion to establish attorney's lien on judgment reviewed where such lien is for less than minimum jurisdictional limit, though judgment is for more. Wait v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60.

85. Appeal by creditor from judgment refusing to set aside and vacate appointment of receiver for corporation, amount of corporation's assets, as shown by inventory and appraisement, and not amount of appellant's claim is test of jurisdiction. Perkins v. Crystal Ice & Pop Mfg. Co. [La.] 44 So. 284. Supreme court held to have jurisdiction where assets exceeded $2,000. Id. On mandamus by district attorney to compel sheriff to pay commissions on fines, only commissions on fines already collected will be considered in determining amount in dispute. State v. Henderson, 117 La. 209, 41 So. 496.

86. Under Hurd's Rev. St. 1905, c. 37, § 25, requiring certificate of importance on appeal from appellate court to supreme court in actions sounding in damages where the judgment is for less than $1,000 exclusive of costs, no such appeal lies from judgment against plaintiff on merits and for cost, though it was stipulated that if plaintiff was entitled to recover the amount of damages would be over $1,000. Wheeler v. Pullman Palace Car Co. [Ill.] 81 N. E. 789. Under Laws 1903, p. 48, c. 52, a cause decided in district court on appeal from city courts is only appealable when district court judgment exceeds $100, although amount in con-

items, according to the terms of the statute.[87] Orders in bankruptcy, probate and administration, lunacy or curatorial, and eminent domain proceedings, election contests,[88] and special statutory proceedings,[89] are appealable or not according to the various statutes.[90] Federal review of state or territorial decisions, or the right to a further appeal from the circuit court of appeals to the United States supreme court, or the right of direct appeal to it, depends on the existence of a real meritorious, Federal question [91] set up [92] and necessarily involved, and finally decided [93] adversely to

troversy may be more. Garcia v. Free [Utah] 88 P. 30. Laws 1903, p. 48, c. 52, authorizing appeals from judgments in district court exceeding $100 upon appeals from the city courts, is not unconstitutional as being unequal in its operation in that plaintiff cannot appeal from a judgment in favor of defendant in any case, while defendant may appeal if the judgment for plaintiff exceeds $100, nor is it special legislation. Id.

87. Exclusive of costs. Oppenheimer v. Triple-State Natural G. & O. Co. [W. Va.] 57 S. E. 271; Montgomery v. Economy Fuel Co. [W. Va.] 57 S. E. 137; Carskadon v. Keyser School Dist. [W. Va.] 56 S. E. 834; Wait v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60. Exclusive of interest and costs. Cincinnati, etc., R. Co. v. Lawrence [Ky.] 102 S. W. 298.

88. Under the constitution and statutes of Virginia there is no right of appeal from a judgment of the circuit court determining the validity of an election forbidding the licensing of the sale of intoxicating liquors. Hulvey v. Roberts [Va.] 55 S. E. 585. The determination of a municipal election contest by the city council pursuant to its charter is appealable to the circuit court, but certiorari, not appeal, is the appropriate remedy. Staples v. Brown, 113 Tenn. 639, 85 S. W. 254.

89 Acts 1906, p. 413, c. 247, providing for proceedings to forfeit charter of Cumberland and Pennsylvania Railroad Company, provides for appeal by reference to general laws, and hence appeal lies from dismissal of petition to forfeit such charter. State v. Cumberland & P. R. Co. [Md.] 66 A. 458.

90. See ante, this section, subsection B, Reviewableness May Be Dependent on the General Form or Character of the Adjudication.

91. Citizenship of parties is immaterial as affecting the jurisdiction of Federal supreme court of a writ of error to a state court under U. S. Rev. St. § 709. Barrington v. Missouri, 205 U. S. 483, 51 Law. Ed. 890. Question whether legislature could ratify conveyance from city of land confirmed to city by United States and afterwards patented held not too **unsubstantial.** City of Monterey v. Jacks, 203 U. S. 360, 51 Law. Ed. 220. Contention that proceedings under state law to condemn outstanding stock was not due process of law and violated contract obligations held not so **frivolous** as to require dismissal of error to state court. Offield v. New York, etc., R. Co., 203 U. S. 372, 51 Law. Ed. 231. Contention that a term of United States district court for Porto Rico was a special and not a regular term held frivolous. American R. Co. v. Castro, 204 U. S. 453, 51 Law. Ed. 564. Claim of right under Federal constitution to prove truth of published articles held to constitute contempt of a state court held too **unfounded.** Patterson v. Colorado, 205 U. S. 454, 51 Law. Ed. 879. Contention that state law impaired contract rights of certain bondholders held without merit. Smith v. Jennings, 206 U. S. 276, 51 Law. Ed. 1061. That an information in contempt was not supported by timely affidavits and that suits referred to in the published articles complained of were not pending held **local questions.** Patterson v. Colorado, 205 U. S. 454, 51 Law. Ed. 879. What constitutes contempt of a state court and time when it may be committed are local questions. Id.

Federal question involved where state supreme court answered some of defendant's contentions by construction it gave to bankrupt act. Eau Claire Nat. Bk. v. Jackman, 204 U. S. 522, 51 Law. Ed. 596. Where Federal statute was referred to in decision of state court and was an element in its decision. Hammond v. Whittredge, 204 U. S. 538, 51 Law. Ed. 606. Where state court sustained a statute challenged as repugnant to Federal constitution. Western Turf Ass'n v. Greenberg, 204 U. S. 359, 51 Law. Ed. 520 Where state court could grant relief to shipper consistently with interstate commerce act, held Federal question presented passed upon, and necessarily decided. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 Law. Ed. 553. Contention that state statute was authorized by enabling act and valid though repugnant to state constitution presents claim of right under "authority exercised under the United States." Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490. Controversy as to constitutional right of a territorial legislature to pass a certain law under the broad legislative power conferred by Rev. St. § 1851, involves validity of an authority exercised under the United States within act March 3, 1885, defining appellate jurisdiction of supreme court over supreme courts of territories. New Mexico v. Denver, etc., R. Co., 203 U. S. 38, 51 Law. Ed. 78. Error sustained where there was color for the contention as to the unconstitutionality of a statute in respect to all the counts of the declaration. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. Express denial of immunity claimed in both trial and appellate courts, under Federal statute, by officers of a bank, in respect to liability for making false report as to bank's financial condition, held to sustain error to state court. Yates v. Jones Nat. Bk., 206 U. S. 158, 51 Law. Ed. 1002. Decision of state court that a railway employe was guilty of contributory negligence as a matter of law did not defeat Federal review where the Federal safety appliance act was specially invoked as excluding defense of assumption of risk. Schlemmer v. Buffalo, etc., R. Co., 205 U. S. 1, 51 Law. Ed. 681.

Federal question not involved in contest over state office involving only application

appellant. If there be both diverse citizenship and another ground of original Federal jurisdiction, as a Federal question, then appeal lies from a circuit court to either the circuit court of appeals or direct to the supreme court.[94] Review is direct in the supreme court if there is a question of construction of the Federal constitution or of treaties, or of the jurisdiction of a United States court "as such."[95] Appeal

of state constitution or construction of state law. Elder v. Colorado, 204 U. S. 85, 51 Law. Ed. 381. In contention that a state law was not passed in conformity with state constitution. Smith v. Jennings, 206 U. S. 276, 51 Law. Ed. 1061. In contention that an accused was compelled, in state court, to testify against himself contrary to 5th Federal amendment. Barrington v. Missouri, 205 U. S. 483, 51 Law. Ed. 890. In rulings on admission of evidence under state constitution. Id. In state court's denial of change of venue. Id. In overruling demurrer to indictment for violating state and Federal guaranty of due process of law and defendant's constitutional right to be informed of character of accusation. Id. Where state court decided that an accused had been tried in accordance with local procedure, though names of witnesses were not indorsed on indictment, Federal question held not involved in claim that accused was a subject of Great Britain and by virtue of treaties, laws of nations, laws and constitution of United States, and laws of the state, was entitled to know who were the witnesses against him. Id. Decisions of state courts on questions of law do not present a question of violation of the 14th amendment merely because they are wrong or contrary to previous decisions of same court. Patterson v. Colorado, 205 U. S. 454, 51 Law. Ed. 879. Decision of highest court of state that state statute is repugnant to state constitution is not reviewable by Federal supreme court. State of Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490.

92. Carrier's denial that "it was bound by law" to carry an interstate shipment is not an assertion of a right under commerce act. Louisville & N. R. Co. v. Smith, Huggins & Co., 204 U. S. 551, 51 Law. Ed. 612. Request for finding as matter of law that a state statute could not under Federal constitution prohibit insured from going outside the state to procure insurance on its property held inadequate to raise a Federal question. Swing v. Weston Lumber Co., 205 U. S. 275, 51 Law. Ed. 799. Claim of immunity from suit under Federal law held **timely** though first made in petition for rehearing where necessarily involved and adversely decided. McKay v. Kalyton, 204 U. S. 458, 51 Law. Ed. 566. Question first raised in petition for writ of error to state court and accompanying assignments of error not timely. State of Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490. Suggestion of Federal question first made in motion for rehearing in highest state court too late. Barrington v. Missouri, 205 U. S. 483, 51 Law. Ed. 890.

Certificate of state court, justice cannot cure total failure of record to show that a Federal question was raised. Louisville & N. R. Co. v. Smith, Huggins & Co., 204 U. S. 551, 51 Law. Ed. 612. Reference to Dartmouth College Case in **opinion of state court** in discussing validity of a law under state constitution held not to show that contract clause of Federal constitution was relied on. Osborne v. Clark, 204 U. S. 565, 51 Law. Ed. 619. That state law might have been assailed under Federal constitution on grounds more or less similar to those actually taken was insufficient. Id. Question held "specially set up or claimed" where state court opinion clearly showed that it was assumed to be in issue, that decision was against the Federal claim, and that decision of the question was essential to judgment rendered. State of Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490.

93. Federal question though assigned in state appellate court will not be considered by United States supreme court where it does not appear that state court dealt with the question and where it may have refused to do so because it was not raised in trial court. Cox v. State of Texas, 202 U. S. 446, 50 Law. Ed. 1099. No decision of Federal question where highest state court dismissed appeal for defect of parties. Newman v. Gates, 204 U. S. 89, 51 Law. Ed. 385. Action of state court in holding statute valid not reviewable where failure of court to file an opinion left it doubtful whether court did or did not interpret a certain phrase so as to leave statute in harmony with Federal constitution. Bachtel v. Wilson, 204 U. S. 36, 51 Law. Ed. 357.

94. Mississippi R. Commission v. Illinois Cent. R. Co., 203 U. S. 335, 51 Law. Ed. 209. After an appeal to the United States circuit court of appeals by a petitioner in habeas corpus, **no further appeal** lies to the supreme court though an appeal might have been taken to that court direct from the circuit court. Mackenzie v. Pease [C. C. A.] 146 F. 743.

95. Failure of certificate of circuit court to show the exact nature of the jurisdictional question not fatal to direct appeal where examination of record and opinion therein contained shows it. City of Chicago v. Mills, 204 U. S. 321, 51 Law. Ed. 504. Decree construed to deny jurisdiction of lower court as a Federal court and not as a court of equity. Hence appealable direct. Crawford v. McCarthy [C. C. A.] 148 F. 198. Determination by supreme court of Arizona as to the rightful custodian of a child of tender years is not appealable to Federal supreme court under Rev. St. § 1909, as a case "involving the question of personal freedom." New York Foundling Hospital v. Gatti, 203 U. S. 429, 51 Law. Ed. 254. An appeal goes direct to the United States supreme court from the district court in certain private land claim cases if the decree is against the United States. Comes within exception in act March 3, 1891, requiring appeal to circuit court of appeals except where it is "otherwise provided by law." United States v. Dalcour, 203 U. S. 408, 51 Law. Ed. 248. No direct appeal on question of jurisdiction where jurisdiction challenged was not that of court rendering decree appealed from but that of court rendering another decree involved in suit. Empire State-

grounded on a constitutional question goes from the district to the Federal supreme court even in habeas corpus cases. The provision for direct appeal to the supreme court applies to proceedings to compel the production of papers before the interstate commerce commission Appeals and writ of error from district courts of Alaska are governed by Alaska Civil Code, and not by the Territorial Courts Appeals Act.

(§ 4) *D. Reviewableness may depend on the parties.*[96]

(§ 4) *E. Certificate or reserved questions and reported cases.*[97]—Certified questions must involve a real conflict,[98] and the practice in some jurisdictions is that only such questions may be reported as are finally determinative of the action,[99] while in others it is held that situations may arise when advice will be given on nondeterminative questions,[1] but that such advice will not be given when it is not clear that it will be acted upon or be of any service.[2] Questions cannot be certified in the absence of statutory authority.[3]

§ 5. *Courts of review and their jurisdiction* [4] exist by force of statute and may be regulated thereby subject to constitutional restrictions.[5] A constitutional general grant of appellate jurisdiction carries with it by necessary intendment all powers reasonably essential to the complete exercise in all cases of the jurisdiction conferred, but jurisdiction of appellate courts is primarily [6] and sometimes exclusively appellate.[7] Jurisdiction may be general or special,[8] and cannot be conferred by consent of the parties.[9] Review proper cannot exist between courts of co-ordin-

Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 51 Law. Ed. 779. Not on ground that case directly involved construction of Federal constitution where real issue was whether former decree was res adjudicata or was rendered without jurisdiction. Id.

96, 97. See 5 C. L. 146.

98. The fact that a conclusion of the court of civil appeals is in conflict with the decisions of other courts of civil appeals will not warrant certifying the question to the supreme court if there is no real conflict on the points actually decided. Texas & P. R. Co. v. Arnett [Tex. Civ. App.] 101 S. W. 834.

99. Questions must be finally determinative either per se or by stipulation. Fidelity & Casualty Co. v. Bodwell Granite Co. [Me.] 66 A. 314. Motion under Rev. St. c. 84, § 23, to require party to produce books and papers for inspection, is interlocutory, and hence not subject to be reported. Id.

1. Gen. St. 1902, § 751, is doubtless comprehensive enough to allow this, and such practice has doubtless been indulged in the past. Hart v. Roberts [Conn.] 66 A. 1026. Later practice is not to give advice on such questions. Hart v. Roberts [Conn.] 66 A. 1026, citing New York, H. & W. R. Co. v. B., H. & E. R. Co., 36 Conn. 197, and State v. Feingold, 77 Conn. 326, 59 A. 211.

2. As where the advice would leave the trial court free to take such action as would render the advice purely academic, as where the question reserved was whether trial court had power to authorize sale of trust property and reinvestment of funds when it did not appear that either the court or trustee deemed the sale an advantageous one. Hart v. Roberts [Conn.] 66 A. 1026.

3. There is no provision authorizing appellate court to certify questions of law on allowing appeal from its judgment affirming judgment for plaintiff for rent. Swan v. Inderlied, 187 N. Y. 372, 80 N. E. 195.

4. See 7 C. L. 151.

5. Laws 1901, c. 397, requiring appeals from the municipal court of the city of Duluth to be taken to the district court instead of directly to the supreme court, is constitutional and valid. Dahlsten v. Anderson, 99 Minn. 340, 109 N. W. 697.

6. Jurisdiction of St. Louis court of appeals to issue special and extraordinary writs exists only in cases within its appellate jurisdiction. State v. Nortoni [Mo.] 98 S. W. 554. Under constitution of Missouri, art. 6, § 2, supreme court is court of appellate jurisdiction and has original jurisdiction only in those cases set forth in section 3 of the same article. Wait v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60. Under Const. art. 85, supreme court has original jurisdiction to determine questions of fact affecting its own jurisdiction in any case pending before it. Riney v. Hemenway Furniture Co. [La.] 44 So. 116.

7. The supreme court of Georgia has no original jurisdiction and cannot make inquiry whether a suit sought to be enjoined has been dismissed, nor dismiss the bill of exceptions upon that ground where dismissal is denied by plaintiff in error. Johnson v. Tanner, 126 Ga. 718, 56 S. E. 80.

8. Under general appellate jurisdictions of court of appeals of District of Columbia, appeal lies to that court from final order of the supreme court in a condemnation proceeding under chapter 15 of code which does not provide for an appeal. Seufferle v. Macfarland, 28 App. D. C. 94.

9. United Iron Works Co. v. Sand Ridge L. & Z. Co. [Mo. App.] 102 S. W. 1104. On appellate court of case involving freehold. Town of Audubon v. Hand, 223 Ill. 367, 79 N. E. 71. Jurisdiction not conferred by appearance on appeal returnable in less than thirty days from date of appeal. Griffith v. Henderson [Fla.] 42 So. 705. Supreme court is bound to take notice of a jurisdictional defect whether raised by parties or not. McCashland v. Keogh [Utah] 88 P. 680.

ate jurisdiction, but it may exist when the concurrent jurisdiction is as to particular matters only.[10] As between several intermediate appellate courts,[11] or between a court of intermediate and final appeal,[12] jurisdiction nearly always depends on the existence of one or more of the criteria mentioned in the preceding section.[13] The principle that courts cannot directly adjudicate the rights of a person who is not before it is applicable to courts exercising appellate jurisdiction.[14] Appeal by a nonresident confers on the appellate court jurisdiction of the person to support provisional orders.[15] Appellate jurisdiction must be supported by a sufficient original jurisdiction to pronounce the judgment being reviewed [16] and by orderly procedure efficient to bring up the case,[17] else it can do nothing but dismiss.[18] Where appellate jurisdiction is not dependent upon the filing of the records, it is not divested by the destruction of the records filed.[19]

10. As rank of courts and right of appeal is regulated by statute, fact of concurrent jurisdiction of probate and common pleas courts in certain matters does not require that appeal from probate court in any one of those matters should be to circuit instead of common pleas court. Oberer v. State, 8 Ohio C. C. (N. S.) 93.

11. Order entered by county court appointing conservator is not an order in "a suit or proceeding in law or equity" and appeal therefrom goes to the circuit and not to the appellate court. Gersman v. Cooper, 125 Ill. App. 402. Appeals from judgments of county courts allowing or disallowing claims go to circuit and not to appellate court. Drake v. Lux, 125 Ill. App. 469. A proceeding under the Insolvent Debtor's Act is a "proceeding at law" and hence an appeal by one who has applied to the county court for discharge from custody thereunder must be taken to the appellate and not to the circuit court. Groszglass v. Von Bergen, 121 Ill. App. 212. Appeal lies to county court and not to appellate division from an order of court of special sessions committing child on ground that she did not have proper guardianship. People v. O'Neill, 117 App. Div. 826, 102 N. Y. S. 988. Where judgment by default is entered in municipal court against defendant who has not been served with summons, an appeal lies directly to appellate division. Altieri v. Trotta, 53 Misc. 649, 103 N. Y. S. 715.

12. Appeal held not to lie directly to court of appeals from order of quarterly court appointing receiver, but to circuit court, and from it to court of appeals. Statutes construed. Brown v. Crump, 29 Ky. L. R. 1226, 96 S. W. 1112. Appeal lies from decisions of register of state land office in regard to public land to district court of parish where land is situated. Rev. St. 2976, Acts 1886, p. 207, No. 107, § 2. Darby v. Emmer [La.] 43 So 148. Where amount claimed exceeds $2,000, an appeal lies to the supreme court under Const. art. 6, § 4. McAulay v. Tahoe Ice Co. [Cal. App.] 86 P. 912. Gen. St. 1901, § 5019, denies appeals to supreme court only in actions where there is nothing in controversy but money or property or rights susceptible of valuation in money and the amount does not exceed $100, and an appeal may be taken from an order sustaining a demurrer to a petition to enjoin a common nuisance. State v. Coler [Kan.] 89 P. 693.

13. See ante, § 4 C, Reviewableness May Depend Upon Character or Value of Action, Subject-Matter, or Controversy. Under constitution and statutes of Virginia in case involving constitutionality of rule of state corporation commission, a direct appeal does not lie from judgment of justice of peace to supreme court of appeals. Southern R. Co. v. Hill [Va.] 56 S. E. 278. In a suit under Acts 1905, pp. 89, 90, c. 53, Burns' Ann. Sup. 1905, § 5405f, to review decision of railroad commission in proceedings under Acts 1897, pp. 237-239, Burns' Ann. St. § 5158a-5158h, to establish an interlocking device at railroad crossing, an appeal lies to appellate court and not to the supreme court. Grand Trunk W. R. Co. v. Hunt [Ind.] 78 N. E. 975. Circuit court of United States is without jurisdiction to review judgment of a district court in bankruptcy, no such jurisdiction being conferred by statute act and being expressly excluded by bankruptcy act. Suit seeking to recover property in hands of trustee and to enjoin him from obeying order of district court. Hatch v. Curtin, 146 F. 200.

14. See 7 C. L. 151.

15. See 7 C. L. 161.

16. Where land court had jurisdiction the superior court had jurisdiction of issue submitted on appeal. Woodvine v. Dean [Mass.] 79 N. E. 882. Court in which proceedings to set aside a judgment obtained by fraud having no jurisdiction thereof, a court of general jurisdiction cannot obtain jurisdiction of the proceedings by an appeal being taken to it. Steinmetz v. Hammond Co. [Ind.] 78 N. E. 628. Judgment of circuit court affirming judgment of county court void for want of jurisdiction of subject-matter will be quashed in certiorari. Seaboard Air Line Ry. v. Ray [Fla.] 42 So. 714. Where jurisdictional amount involved is sufficient to give superior court jurisdiction, court of appeal of California has jurisdiction on appeal. Morgan v. San Diego County [Cal. App.] 86 P. 720. Appellate court will not consider objections to **equity jurisdiction** over boundary dispute submitted below by consent. Williams v. Wetmore [Fla.] 41 So. 545. Where answer creates equitable issues of which city court had no jurisdiction, the district court on appeal has no such jurisdiction. Ferguson-McKinney Dry Goods Co. v. Grear [Kan.] 90 P. 770. On appeal from probate court having no equitable jurisdiction, the district court trying the case de novo cannot exercise such jurisdiction. Ross v. Wollard [Kan.] 89 P. 680 Judgment void for want of jurisdiction is **appealable.** Evers v. Gould, 105 N. Y. S. 150.

17. United Iron Works Co. v. Sand Ridge L. & Z. Co. [Mo. App.] 102 S. W. 1104.

18. Upon an attempted appeal from the

§ 6. *Bringing up the cause.*—The section dealing with dismissal should also be consulted for effect of irregularity or delay in bringing up the cause.

(§ 6) *A. General nature and mode of practice.*[20]—The appropriate remedy for review[21] and matters relating to the transmission and filing of the record on appeal[22] are discussed in other sections. Appeals must be single.[23] Whether a joint appeal should be allowed rests largely in the discretion of the trial court.[24] The right of review being purely statutory,[25] the statutes granting it must be strictly complied with.[26] In case a statute giving the right of appeal fails to prescribe a method of procedure, the method prescribed in other like cases will be adopted.[27]

(§ 6) *B. Time for instituting and perfecting.*[28]—Proceedings for review must be taken[29] as to all necessary parties[30] within the time prescribed by statute,[31]

county court to the district court before the entry of final judgment, the latter court has no authority to remand the cause with directions to the county court to render judgment and file a supplementary transcript and return in the district court, the proper course being to dismiss the attempted appeal. Hayward v. Fisher [Neb.] 110 N. W. 984.

19. Destruction of record after submission does not prevent a decision. In re Davis' Estate [Cal.] 90 P. 711.

20. See 7 C. L. 152.

21. See § 2, ante.

22. See § 10, post.

23. Where two actions are tried together merely for convenience and are not united or consolidated in sense that they become by order of court one action, there should be separate appeals. Williams v. Carolina & N. W. R. Co. [N. C.] 57 S. E. 216.

24. Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675.

25. See § 1, ante.

26. Barney v. Elkhart County Trust Co. [Ind.] 79 N. E. 492. Noncompliance with requirements which entitle appellant to have his case reviewed cannot be excused because failure to observe them is due to negligence of counsel. Vivian v. Mitchell [N. C.] 57 S. E. 167. Certificate of importance required in certain cases. Merritt v. Crane Co., 225 Ill. 181, 80 N. E. 103. Statutes granting appeal from interlocutory order are strictly construed and must be strictly complied with. Barney v. Elkhart County Trust Co. [Ind.] 79 N. E. 492. Appeal from order fixing point of crossing of steam railroad by street railroad under Acts 1903, p. 125, c. 59, Burns' Ann. St. Sup. 1905, § 5464a, supplementary to Acts 1901, p. 461, c. 207, Burns' Ann. St. 1901, § 5468a et seq., held an appeal from an interlocutory order which should have been taken as directed by Burns' Ann. St. 1901, § 659, relating to appeals from interlocutory orders. Terre Haute & L. R. Co. v. Indianapolis & N. W. Traction Co. [Ind.] 78 N. E. 661.

27. Statutes providing for error proceedings from judgment of justice of the peace govern error from county court. Oakdale Heat & Light Co. v. Seymour [Neb.] 110 N. W. 541.

28. See 7 C. L. 152.

29. Where service of notice of appeal, which constitutes taking appeal under Rev. St. 1887, § 4808, was had on April 17, 1905, from judgment entered Feb. 18, 1905, appeal is timely under § 4808 allowing 60 days. Finney v. American Bonding Co. [Idaho] 90 P. 859. Appeal perfected as of time of filing transcript though notice not given until after expiration of time limit. Niemitz v. State [Ind. App.] 78 N. E. 357. Appeal under Burns' Ann. St. Supp. 1905, §§ 658, 659, from interlocutory order for injunction, is not perfected by filing of bond and granting of appeal by trial court, but by additional steps of filing transcript and assignment of errors in court to which appeal is taken and within time prescribed by statute. Barney v. Elkhart County Trust Co. [Ind.] 79 N. E. 492. Appeal proceeding is not commenced in supreme court within Gen. St. 1901, § 7342, until petition in error with case made or transcript attached is filed with clerk together with praecipe for summons. Kansas City v. Dore [Kan.] 88 P. 539. Under Code 1892, § 46, appeal is perfected on filing bond, and running of two-year statute of limitations is thereby stopped. Adams Lumber Co. v. Stevenson [Miss.] 42 So. 796. Where, though appeal was allowed within six months prescribed by circuit court of appeals act, no citation was issued to defendants and record was not filed by return day as required by rule 16, nor until nearly year after appeal was allowed, circuit court of appeals could not then award citation and by nunc pro tunc order allow appeal to stand as of date when record was filed. Hudson v. Limestone Natural Gas Co. [C. C. A.] 144 F. 952. Giving of time for allowing bill of exceptions does not postpone running of time for bringing writ of error. Kentucky Coal, Timber, Oil & Land Co. v. Howes [C. C. A.] 153 F. 163. Writ of error is not "brought" within Rev. St. § 1008, until actually lodged with clerk of court which rendered judgment. Id. Order allowing writ of error conditioned on giving bond ineffective until condition complied with. Id.

30. Jurisdiction of appeal not affected by fact that published notice to nonresident coparties, under Burns' Ann. St. 1901, § 647, did not mature until expiration of time limit for appeal. Hanley v. Mason [Ind. App.] 81 N. E. 610.

31. Appeal must be taken within one year from date of rendition of decree. Thornburgh v. Beakley [Ark.] 102 S. W. 362. Appeal taken on sixty-first day after entry of order appealed from is too late under Code Civ. Proc. § 939, subd. 3. Prine v. Duncan [Cal. App.] 90 P. 713. That party avails himself of all the time allowed for perfecting appeal is not sufficient to justify dismissal. Jones v. Starr, 26 App. D. C. 64.

which ordinarily runs from the date when an appealable order or judgment, legally sufficient, becomes a finality on the record,[32] or from the time when notice of entry of

Writ of error on judgment in civil action not sued out and taken within six months from date of judgment, as required by Rev. St. 1892, § 1271 (Gen. St. 1906, §1699), where plaintiff in error does not come within exceptions of statute, confers no jurisdiction on supreme court. Eaton v. McCaskill [Fla.] 43 So. 447. Sufficiency of evidence to sustain verdict cannot be reviewed on appeal from judgment unless appeal is taken within 60 days after rendition thereof. Trull v. Modern Woodmen of America [Idaho] 85 P. 1081. Under Rev. St. 1887, § 4807, subd. 3, appeal from an order overruling motion for new trial not taken within 60 days from entry thereof is ineffectual. Id. Appeal from decision of district court on appeal from order of board of commissioners granting road and awarding damages is under Sess. Laws 1899, p. 273, § 4, and not under Sess. Laws 1899, p. 249, and hence if taken within 90 days after entry of judgment is timely. Latah County v. Hasfurther [Idaho] 88 P. 433. Appeal in suit revived against personal representative of defendant is not subject to time limit prescribed by Burns' Ann. St. 1901, §§ 2609, 2610, growing out of matters connected with a decedent's estate, but is controlled by Civ. Code, §§ 644, 645, Burns' Ann. St. 1901, pp. 304, 306, relating to time of appeals in general. Hayes v. Shirk [Ind.] 78 N. E. 653. Appeals from courts of Indian Territory to circuit court of appeals are governed by same limitation as on appeal to such court from the United States circuit courts. Appeal from probate of will must be taken within six months. In re Terrell's Estate, 6 Ind. T. 412, 98 S. W. 143. Ruling on demurrer made more than year before proceeding in error was instituted is not reviewable. Missouri, etc., R. Co. v. Murphy [Kan.] 90 P. 290. Where statute limiting time within which appeal must be perfected is amended, all appeals not perfected are controlled by amendment. Kansas City v. Dore [Kan.] 88 P. 539. A party is entitled as matter of right to appeal from judgment at any time within two years next after right of appeal first accrues. Rush v. Handley, 30 Ky. L. R. 170, 97 S. W. 726. Where appeal was dismissed for failure to file transcript in time, held that appellant could take out another appeal before clerk of supreme court, two years not having elapsed since rendition of judgment. Alford v. Guffy, 30 Ky. L. R. 54, 97 S. W. 369. Appeal from judgment complete and perfect on its face must be taken within six months from date of its entry. Kearney v. Chicago, etc., R. Co., 101 Minn. 65, 111 N. W. 923. Where motion for new trial was filed in proper time, but was not heard until term following that in which judgment was rendered, when it was overruled, and appeal was allowed by circuit court at that term, held that such appeal, being taken under Rev. St. 1899, §§ 806, 807, 808, was in time. Lovell v. Kansas City So. R. Co., 121 Mo. App. 466, 97 S. W. 193. Appeal perfected in May from judgment regularly entered in municipal court the preceding October is too late. Park v. Regan, 105 N. Y. S. 253. Under Code Civ. Proc. § 1316, right to review interlocutory judgments on appeal from final judgment is not affected by expiration of time within which separate appeal therefrom might be taken. Bauer v. Hawes, 115 App. Div. 492, 101 N. Y. S. 455. Under Civ. Code, § 574 (Wilson's Rev. & Ann. St. 1903, § 4772), proceedings to review a judgment or order must be commenced in supreme court within one year from rendition or making thereof. Hebeisen v. Hatchell [Okl.] 87 P. 643. Where not so commenced supreme court is without jurisdiction. Id. Appeal from order overruling motion to quash summons must be taken within one year from date of order. Buxton v. Alton-Dawson Mercantile Co. [Okl.] 90 P. 19. Bill of exceptions does not lie to judgment of superior court, the review on exceptions provided for by statute being intended to take place before judgment is **entered**. In re Stillman [R. I.] 67 A. 4; Baker v. Tyler, 28 R. I. 152, 66 A. 65. Appeal from judgment and order denying new trial constitute but one appeal which may be taken within two years after entry of judgment, and right to have the sufficiency of evidence reviewed, is, therefore, not lost by failure to appeal within sixty days after receiving notice of denial of new trial. Northwestern Mortg. Trust Co. v. Ellis [S. D.] 108 N. W. 22. Under Acts 1897, p. 312, c. 131, writs of error, or appeals in nature of writs of error, may not be taken to supreme court from any decree of court of chancery appeals after expiration of ten days from the decree. Brosnan v. Lancaster [Tenn.] 96 S. W. 958. Filing petition for additional finding of facts held not to stop running of period for appeal. Id. Act not modified by Acts 1903, p. 98, c. 58, providing that clerk of court of chancery appeals may issue execution on any final judgment or decree after expiration of ten days allowed for filing of petition to rehear. Id. Even if construed to extend time until petition for rehearing, filed in time, is disposed of, does not operate to extend it pending determination of petition for additional finding of facts. Id. No error in final or an appealable decree will be considered upon appeal not taken within two years from its date. Kelner v. Cowden [W. Va.] 55 S. E. 649. But when order for payment of money is so appealed from and is based solely on former order which is null and void, order so appealed from will be reversed, although former order was entered more than statutory period before appeal was allowed. Id. Where neither party has appealed from final appealable decree within time prescribed by statute of limitations, appellate court is without jurisdiction to review such decree. Roush v. Hyre [W. Va.] 57 S. E. 368.

32. Appeal held to be taken in time although more than statutory period had elapsed since rendition of first of two decrees rendered in case, such decree not being final. Hargus v. Hayes [Ark.] 103 S. W. 163. Under Code Civ. Proc. § 939, subd. 3, requiring appeals to be taken from interlocutory judgment in partition within 60 days after judgment or order is entered in minutes of court or filed with clerk, appeal taken on March 18, 1906, is too late where order was entered on minutes December 23, 1905, and decree filed January 9, 1906. Bloom v. Gordan [Cal.] 90 P. 115. Under Rev. St.

judgment is served [33] and is computed according to the rules applicable to other procedure.[34] In the absence of a statutory provision to the contrary,[35] the court has no authority to extend the time.[36]

(§ 6) *C. Affidavits and oaths.*[37]—An affidavit of good faith is required in some states.[38]

(§ 6) *D. Notice, citation, or summons.*[39]—Timely [40] and regular service [41] by

1887, § 4807, subd. 3, appeal from special order after final judgment must be taken within 60 days after judgment is made and entered on minutes of court and filed with clerk. Campbell v. First Nat. Bank [Idaho] 88 P. 639; Oliver v. Kootenai County [Idaho] 90 P. 107. In absence of rule of court, party to record is required to take notice of different steps in proceeding and cannot excuse failure to file bill of exceptions and bond in time, by plea that he did not know order had been written up. Oltman v. Schoenbeck, 120 Ill. App. 351. Where order leaves question involving merits of case undisposed of, appeal need not be taken therefrom until final decision on such questions. Small v. Usher [S. C.] 57 S. E. 623. Time within which to appeal is not extended by pendency of appeal from clerk's taxation of costs and disbursements which are allowed by clerk and included in judgment. Kearney v. Chicago, etc., R. Co., 101 Minn. 65, 111 N. W. 923. Order retaxing costs is not entry of new judgment so as to extend time for taking appeal from original judgment. Ost v. Salmanowitz, 104 N. Y. S. 849.

Effect of motion for new trial: Where motion for new trial is made in proper time, limitation on right to appeal runs from refusal of new trial. Durbridge v. State, 117 La. 841, 42 So. 337. Since motion for new trial is not necessary to preserve ruling on motion to quash summons, it cannot extend time for appeal. Buxton v. Alton-Dawson Mercantile Co. [Okl.] 90 P. 19. Filing of motion for new trial after five days from entry of judgment, unless done according to law, does not prevent judgment from becoming final so as to extend time for appealing. Felt v. Cook [Utah] 87 P. 1092. Where appellant relies on motion for new trial not made within five days from entry of judgment to stay running of period within which to appeal from judgment, he must make it affirmatively appear of record that his belated motion was filed according to law. Id.

Bankruptcy proceedings: Under § 25, subsection 3, of the bankrupt act, appeal from an order allowing or denying discharge must be taken "within ten days after the judgment appealed from has been rendered." In re McCall [C. C. A.] 145 F. 898. Where order denying a rehearing was entered on journal for October 10, with indorsement "Filed October 10," and a direction "Enter this order. J. M., Judge. Oct. 16," it was presumed that "Oct. 16" was a clerical mistake since judge's approval had no proper place in journal, hence time began to run from October 10. Id. Time limit does not begin to run until disposition of timely motion for rehearing. Id. Thirty-day limitation prescribed by general order 36 for taking appeals from final orders of circuit court of appeals cannot be extended by filing petition for rehearing after 30 days has expired. Conboy v. First Nat. Bk., 203 U. S. 141, 51 Law. Ed. 128.

33. Notice of entry of judgment in City Court of New York reciting judgment to have been "entered herein in the office of the clerk of the court within named" is sufficient to limit time. Leer v. Wormser, 52 Misc. 455, 103 N. Y. S. 562.

34. Day on which judgment or decree was rendered in computing time fixed by Kirby's Dig. § 1199. Connerly v. Dickinson [Ark.] 99 S. W. 82. Under Pub. Acts 1905, p. 264, c. 24, when findings of fact for appeal were filed and notice thereof given in July, it was not necessary to file appeal within ten days after such notice, July and August being excluded by the statute. Young v. Lemieux [Conn.] 65 A. 436. Appeal may, however, be perfected by filing finding of fact and giving notice thereof in July and August to become operative thereafter. Id.

35. Application to extend time to appeal from order of the county court to circuit court under St. 1898, § 4035, authorizing such extension for good cause shown, is addressed to discretion of circuit court and its refusal to grant extension will not be disturbed in absence of an abuse. Maxcy v. Ellison [Wis.] 112 N. W. 424.

36. Brown v. Brown [Ind.] 80 N. E. 535. In absence of active fraud or concealment. Hurst v. Hawkins [Ind. App.] 80 N. E. 42. Appellate division is without power to grant order nunc pro tunc as of date in preceding term allowing appeal to court of appeals where its power to allow appeal terminated at expiration of such term. In re City of New York, 103 N. Y. S. 911.

37. See 7 C. L. 154.

38. Affidavit held not that of corporation but of its president in his personal capacity and insufficient under Rev. St. 1899, § 808. United Iron Works Co. v. Sand Ridge L. & Z. Co. [Mo. App.] 102 S. W. 1104.

39. See 7 C. L. 154.

40. Notice after expiration of year is sufficient where transcript is filed within year allowed for appeal. Niemitz v. State [Ind. App.] 78 N. E. 357. Under Burns' Ann. St. 1901, § 647, jurisdiction of nonresident coparties is complete upon expiration of publication for time specified by the statute. Hanley v. Mason [Ind. App.] 81 N. E. 610. Under Code Civ. Proc. 1902, § 345, notice of appellant's intention to appeal must be given within ten days after rising of circuit court. Foster v. Western Union Tel. Co. [S. C.] 57 S. E. 760. Delay in issuance of alias citation after return of first citation, which showed defective service, held ground for dismissing writ of error, statute providing that, on return of citation not executed, clerk shall forthwith issue an alias citation. Aspley v. Alcott [Tex. Civ. App.] 99 S. W. 1133; Aspley v. Wheat [Tex. Civ. App.] 99 S. W. 1135. Where notice is not served until after expiration of ninety days from entry of judgment, appeal may be dismissed. Krutz v. Isaacs [Wash.] 86 P. 167; Shipley v. McPherson [Wash.] 89 P. 408.

Extension of time: Supreme court has

the appellant on the opposing parties,[42] or those of them whose rights will be affected by a reversal [43] of such notice of appeal, citation, or summons as the practice requires,[44] in due form,[45] distinctly specifying the order or judgment appealed from,[46] properly signed [47] and addressed to the party to be notified,[48] is usually

power to extend time upon proper showing. Baca v. Anaya [N. M.] 89 P. 314. Where was continuous session of court until Aug. 8, on which day appeal was granted in open court, and appeal was made returnable on Sept. 29, and from that day time was extended to Oct. 1, held that service of citation before extension had elapsed was in time. Mayville Canal Co. v. Lake Arthur Rice Mill. Co. [La.] 44 So. 260.

41. Where residence of necessary parties is in same place and known to appellant, notice cannot be served by mail but service must be made by leaving notice at residence as required by Code Civ. Proc. § 1011, subsec. 2. Koyer v. Benedict [Cal. App.] 87 P. 231. Method of service named in Acts 1905, c. 114, § 2, is not exclusive, but under Comp. Laws, § 2964, service by publication is permissible where parties are numerous and personal service or service by mail is impossible. Baca v. Anaya [N. M.] 89 P. 314. Where record has been filed in supreme court and service of citation is only thing necessary to vest it with complete jurisdiction, notice for publication issues therefrom and not from trial court. Id. Filing of notice by clerk of circuit court is service upon him. Zahorka v. Geith, 129 Wis. 498, 109 N. W. 552.

42. Service on guardian after death of ward insufficient to give jurisdiction of guardian either in official or personal capacity, guardianship being terminated by death of ward. Hurst v. Hawkins [Ind. App.] 80 N. E. 42. Failure to serve necessary party fatal to appellate jurisdiction. Knight v. Acton [Iowa] 109 N. W. 1089. Under Rev. St. 1898, § 3305, as amended by Laws 1899, p. 83, c. 62, requiring notice to be served on adverse party, notice must be served upon each of them. Nelden-Judson Drug Co. v. Commercial Nat. Bank [Utah] 86 P. 498.

Service on attorney: Where notices were not addressed to a party nor his attorney, admission of service by his attorney, who was also attorney for another, limited as attorney for latter, is not an admission as to him. Burnett v. Piercy, 149 Cal. 178, 86 P. 603. Sufficient notice is given when citation is served on attorney of record of nonresident parties. McGowan v. Elroy, 28 App. D. C. 86. Under Rev. St. 1895, art. 1397, alias citation issued for service on attorneys of defendant in error, where original citation was returned not executed, must state that it is an alias citation. Vineyard v. McCombs [Tex.] 99 S. W. 544. Return of citation for defendant in error is not sufficient under Rev. St. 1895, art 1398, to lay basis for service on his attorneys of record if it fails to state diligence used to find defendant in error. Id. Where different attorneys appear of record for several defendants, fact that attorneys for one signed as "attorneys for defendants" when acknowledging service of notice of appeal does not estop other parties from denying service. Nelden-Judson Drug Co. v. Commercial Nat. Bk. [Utah] 86 P. 498.

43. Where receiver is appointed in action to establish trust in fund, a defendant, made party as beneficiary, is an "adverse party" within Code Civ. Proc. § 940, on appeal by other defendants from order, since he has an interest which may be affected. Ford v. Freeman [Cal. App.] 89 P. 1071. On appeal from judgment foreclosing mortgage by subsequent grantee who contends that mortgage is void, mortgagors who may be held personally on their notes are adverse parties on whom notice must be served. Koyer v. Benedict [Cal. App.] 87 P. 231. Where in partition it was decided that plaintiff and two of the defendants each had third interest and another defendant had lien on one interest, failure to give latter notice is not ground for dismissal as court may decide case without affecting his interest. Burnett v. Piercy, 149 Cal. 178, 86 P. 603. Defaulting codefendant as to whom no issue is joined is not one adversely interested in decision and a failure to serve him does not deprive supreme court of jurisdiction. Oliver v. Perry, 131 Iowa, 654, 109 N. W. 183. Where land on which plaintiff attempted to impose lien had been sold to third party under bond for deed, but grantors successfully contested rights of such person and also of plaintiff, such third person was an "adverse party" within B. & C. Comp. § 549, on appeal by plaintiff. Kramer v. Marsh [Or.] 90 P. 583. Where judgment is rendered against railroad company and another for death of an employe, on appeal by company codefendant is an "adverse party" within Rev. St. 1898, § 3305, upon whom notice must be served, as larger judgment might be rendered against him on retrial. Griffin v. Southern Pac. Co. [Utah] 87 P. 1091.

44. Where an appellant fails to file bond within time prescribed by court, his appeal will be a vacation appeal within roll requiring notice on such appeals, though a bond was filed by a joint appellant. Cincinnati, H. & D. R. Co. v. Acrea [Ind. App.] 81 N. E. 213. Under Court and Practice Act 1905, §§ 34, 490, and rule 32 of supreme court, failure to give in due time the notice of filing of bill of exceptions is a jurisdictional defect. Smith v. Haskell Mfg. Co. [R. I.] 65 A. 610.

45. Signature by living petitioners in ditch proceedings and by heirs at law of those deceased is sufficient. Kline v. Hagey [Ind.] 81 N. E. 209. Notice on joint appeal from single decision need not specify which of parties is prosecuting the appeal. Id. Notice of "appeal" will not suffice as notice of suing out of writ of error. Kelmel v. Nine, 121 Mo. App. 718, 97 S. W. 635. Upon appeal from probate to circuit court, notice must be in writing and must state all the reasons upon which appellant relies, and trial in circuit court will be restricted to reasons assigned. In re Beers [Mich.] 14 Det. Leg. N. 105, 111 N. W. 915.

46. Where record shows that preliminary injunction was granted, notice of appeal from an order "denying plaintiff's motion

requisite. In Arkansas on appeal from an order granting a new trial the notice must contain an assent that, in case of affirmance, judgment absolute shall be rendered against appellant.[49] In some states no notice is necessary where the appeal is allowed by the court in which the judgment is rendered.[50] Notice given in open court is generally sufficient.[51] Clerical errors may be disregarded.[52] In some states the court may in certain cases allow service on omitted parties after the expiration of the time for appeal.[53] Appearance ordinarily cures failure to serve notice,[54] though in some states appearances of counsel does not.[55] Statutory provisions as to the day to which the appeal may be made returnable must, of course, be complied with.[56]

(§ 6) *E. Application for leave to appeal*[57] or for a writ of error,[58] made within

for a preliminary injunction" was ineffective. Bishop v. Owens [Cal. App.] 89 P. 844. Notice of appeal from an order "denying plaintiff's motion for a temporary injunction" is ineffective as an appeal from an order dissolving an injunction previously granted. Id. Where notice recited that appeal was taken from judgment entered against appellant on certain date and only judgment in record was entered in favor of appellant on different date, appeal will be dismissed. Oberwager v. Levy, 101 N. Y. S. 793. An appeal from judgment entered on order overruling demurrer as frivolous does not limit review to question of whether judgment complies with order, though notice does not state an intention to review order. Smith v. Thompson, 103 N. Y. S. 336. As strictly speaking there can be no judgment in summary proceedings, notice of appeal in such a proceeding reciting that it is from a judgment is sufficient to apprise respondent that it is from final order. Seymour v. Hughes, 105 N. Y. S. 249. Notice given in open court at time of rendering decree appealed from and entered in journal as part of decree sufficiently identifies decree appealed from. In re Crawford's Estate [Or.] 90 P. 147. Where notice is otherwise sufficient, attempt to notice an appeal from an order overruling motion for new trial may be disregarded as surplusage. Lyon v. Mauss [Utah] 87 P. 1014.

47. Laws 1905, p. 323, c. 114, § 2, requiring citation to be signed by clerk of district court, does not apply to notice for publication issued out of supreme court. Baca v. Anaya [N. M.] 89 P. 314.

48. Statute requiring notice to be served on adverse party and clerk of lower court held not to require notice to be directed to clerk. Zahorka v. Geith, 129 Wis. 498, 109 N. W. 552.

49. Kirby's Dig. § 1188. Requirement is mandatory and appeal will be dismissed if it is not complied with. Grayson v. St. Louis, etc., R. Co. [Ark.] 102 S. W. 1111. Filing such assent in appellate court more than one year after appeal granted is not sufficient. Osborn v. Le Maire [Ark.] 102 S. W. 372.

50. Rev. St. 1899, § 811, refers only to appeals granted by appellate court by special order under § 810. Lovell v. Kansas City So. R. Co., 121 Mo. App. 466, 97 S. W. 193.

51. Where appeal is taken during term at which judgment is signed and day after the signing, it may be taken by motion in open court and citation is unnecesary. Glain v. Sparandeo [La.] 44 So. 120. Notice given in open court at time decree appealed from was rendered and entered on journal as part thereof is sufficient. In re Crawford's Estate [Or.] 90 P. 147. Issuance of citation not jurisdictional where appeal allowed in open court. Columbus Chain Co. v. Standard Chain Co. [C. C. A.] 145 F. 186.

52. Notice otherwise sufficient is not fatally defective, especially after appearance of appellee, merely because of misnomer of appellant. Heinz v. Roberts [Iowa] 110 N. W. 1034.

53. Where defendant served notice upon plaintiff and upon such of his codefendants as served notice of entry of judgment upon him, appeal will not be dismissed because of failure to serve defendants though their interests were adverse, but under § 1303, Code Civ. Proc., appellant will be permitted to serve notice on such defendants. Smith v. Havens Relief Fund Soc., 115 App. Div. 185, 100 N. Y. S. 932.

54. Written appearance acknowledging service and consenting to be bound by any judgment rendered. In re Mayhew's Estate [Cal. App.] 87 P. 417. Stipulation that appeal has been "perfected" signed by an attorney of record of a party waives failure to serve notice. Burnett v. Piercy, 149 Cal. 178, 86 P. 603. Where appeal is determined on merits as against one claiming to be adverse party, his motion to dismiss for failure to serve notice will not be considered. In re Russell's Estate [Cal.] 89 P. 345. Failure of appellant to serve citation held waived where appellee consented to appellant's designation of the parts to be included in the transcript. Dowling v. Buckey, 26 App. D. C. 266.

55. Failure to serve notice on necessary party. Knight v. Acton [Iowa] 109 N. W. 1089.

56. Appeal taken within thirty days of term must be made returnable to a day in such term not less than thirty and not more than fifty days from date of appeal. Griffith v. Henderson [Fla.] 42 So. 705. Appeal returnable to a certain term without specifying day thereof is returnable to first day. Id.

57. See 7 C. L. 156.

58. While the clerk of a United States circuit court may issue a writ of error to that court, it is not his duty to do so unless requested, but plaintiff in error must apply for the writ and deposit it for filing when issued. Delay not excusable for inaction of clerk. Kentucky Coal, etc., Co. v. Hawes [C. C. A.] 153 F. 163.

the time [59] and in the manner prescribed by law,[60] is necessary in some jurisdictions. Practice varies as to the necessity of an accompanying assignment of errors.[61]

(§ 6) *F. Allocatur, order for or allowance of appeal; certificate.*[62]—An allowance of the appeal is necessary in all practices where an appeal does not go as of right.[63] The necessity of dating [64] and signing the order of allowance [65] depends upon the statutes and rules of courts of the various states. Clerical errors will be disregarded.[66] An allowance improvidently granted may be vacated.[67] Failure to issue a writ of error is sometimes held to be immaterial where the record is brought up and filed by the party seeking it in the first instance.[68] Writs of error from the Federal circuit court of appeals to the Federal district court must issue in the name of the president of the United States and be attested by the chief justice of the supreme court and the clerk of the circuit court.[69]

(§ 6) *G. Bonds, security, payment of costs.*[70]—Supersedeas bonds [71] and liability on appeal bonds are treated in other sections.[72] A bond or security for the payment of costs is ordinarily required [73] except as dispensed with by statute.[74] It

59. Where appellant failed to apply for leave to appeal within statutory time, court has no jurisdiction to grant an application nunc pro tunc as of date of judgment. Walton v. Canon City [Colo.] 88 P. 860. Where a claim of appeal and bond were filed several months prior to settlement of case on appeal, failure to file second claim after settlement of case, under Pub. Acts 1899, p. 380, No. 243, providing that appeal must be claimed within forty days after settlement of case on appeal, is not fatal where no harm resulted. Patterson v. Hynes [Mich.] 14 Det. Leg. N. 287, 112 N. W. 129. Inasmuch as no express authority is given judges of circuit court by Jones' local option law (98 O. L. 68) or any statute to grant leave to file petition in error in vacation at chambers, petition filed at such time and by such leave must be striken from files. In re The Jones' Local Option Law, 8 Ohio C. C. (N. S.) 574.

60. Under Burns' Ann. St. 1901, § 5671, relating to appeals in ditch proceedings, entry of prayer for appeal upon order book is not essential. Smith v. Gustin [Ind.] 80 N. E. 959.

61. Assignment of error made in court of civil appeals, but not embraced in petition for writ of error, cannot be considered by supreme court. Texas Co. v. Stephens [Tex.] 103 S. W. 481.

62. See 7 C. L. 157.

63. Order granting appeal held one in favor of both defendants. State v. Davis [La.] 44 So. 4. Judges of civil district of parish of Orleans may sit in each other's places in each other's absence, and judge so sitting may grant appeal from judgment rendered by absent judge. Bolden v. Barnes [La.] 42 So. 934. Appeal may be taken from county court to circuit court without an order of former court granting it. Estate of Augustus Switzer v. Gertenbach, 122 Ill. App. 26.

64. Objection that order of appeal was not dated held untenable, where minutes showed that it was entered in open court on certain day, that being all that rules of practice require, and minutes being evidence of highest rank. Succession of Dielmann [La.] 43 So. 972.

65. Order of appeal entered on motion in open court need not be signed by trial judge. Succession of Dielmann [La.] 43 So. 972.

66. When from motion and order of appeal it is clear that it is the litigant, through his counsel, who complains of the judgment, and who prays for and is allowed the appeal, such appeal will not be dismissed because of some slight confusion in pronouns used. Alba v. Provident Sav. Life Assur. Soc. [La.] 43 So. 663.

67. MacKenzie v. Pease [C. C. A.] 146 F. 743.

68. Absence of praecipe for the issuance of and nonissuance of writ not fatal. McCain Co. v. Kingsley 126 Ill. App. 165.

69. That a writ was attested by the judge and clerk of district court held an amendable defect. Long v. Farmers' State Bk. [C. C. A.] 147 F. 360.

70. See 7 C. L. 157.

71. See § 7, post.

72. See § 17, post.

73. Where judgment is rendered against principal and his surety, and writ of error is sued out but bond is filed by surety alone, no jurisdiction is acquired to pass upon rights of principal. Turner v. Franklin [Ariz.] 85 P. 1070. Where appeal is taken from order directing entry of judgment and from judgment entered pursuant thereto, only one undertaking is necessary. McAulay v. Tahoe Ice Co. [Cal. App.] 86 P. 912. On appeal from judgment entered on an order, fact that notice states that an appeal is taken from order and judgment does not render single bond which fails to state as to which appeal it is condition insufficient. Abrams v. White, 11 Idaho, 497, 83 P. 602. Burns' Ann. St. 1901, § 647a, authorizing coparties who do not appeal to assign error within certain time on appeal by other parties, does not relieve such coparties from necessity of filing bond within time allowed in term time appeal, and where no such bond is filed the appeal is a vacation appeal as to such coparties. Cincinnatti, etc., R. Co. v. Acrea [Ind. App.] 81 N. E. 213. Upon appeal from county to circuit court from judgment in settlement of a guardian's account, bond must be given. Ky. St. 1903, § 978; Civ. Code Prac. tit. 16, c. 2, §§ 700, 724. In re Huggins [Ky.] 102 S. W. 849. Though bond executed by president of police jury could not be regarded as that of such jury, held that it was sufficient to support appeal by jury when regarded as executed by president in aid of appeal, signature of

need run only to such parties as may be affected by the appeal.[75] Failure to give the full name of a corporate obligee is immaterial where it is otherwise sufficiently identified.[76] The amount,[77] sureties,[78] and the terms and conditions of the bond[79] are largely regulated by statute. Approval by the court[80] or the clerk[81] is gener-

appellant not being necessary. State v. Davis [La.] 44 So. 4. Giving of bond not jurisdictional where appeal allowed in open court. Columbus Chain Co. v. Standard Chain Co. [C. C. A.] 145 F. 186.

74. State need not give bond on appeal in suit under intrusion into office act. State v. Reid [La.] 42 So. 662.

Municipalities: Under Mills' Ann. St. § 4444, city appealing from adverse judgment rendered in its police magistrate's court need not give bond; § 15, Laws 1885, p. 289, requiring bond in all appeals from such court not applying. Hummel v. Ouray [Colo.] 88 P. 582. Municipality may appeal from interlocutory order granting injunction without giving bond. City of Chicago v. O'Hare, 124 Ill. App. 290. Suit for mandamus to compel mayor and council to submit question of disincorporation to voters is action against city, and it need not give bond on appeal. Parish v. Collins [Wash.] 86 P. 557.

Persons appealing in representative or fiduciary capacity: One appealing from an order of probate court revoking letters of administration appeals as an individual, and Rev. St. 1901, par. 1947, excusing an administrator or executor from giving bond unless he is personally charged, does not apply. In re Morales' Estate [Ariz.] 89 P. 540. Executor and residuary legatee who has given bond to pay debts and legacies under § 5030, Cobbey's Ann. St. 1903, is absolved from necessity of giving appeal bond in cases which involve contest upon claims against estate. Thompson v. Pope's Estate [Neb.] 109 N. W. 498. Appeal from judgment against defendant individually held taken in his individual capacity and not as independent executor, so that he was not relieved from necessity of giving bond. Tison v. Gass [Tex. Civ. App.] 94 S. W. 376. Guardian appealing from order of probate court removing him because court had no jurisdiction to appoint him is not "a party in a fiduciary capacity" and does not "appeal in the interest of the trust," and hence is required by Rev. St. § 6408 to file a bond. In re Guardianship of Wallace, 4 Ohio N. P. (N. S.) 449.

Poor litigants: Under Rev. St. 1895, art. 1401, affidavit of inability to pay costs must be made before county judge of county where party resides, or court trying case, and affidavit made before notary public of county of trial is insufficient. Wood v. St. Louis S. W. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 982, 97 S. W. 323. Defective affidavit cannot be amended on appeal. Id.

75. Upon appeal by plaintiff, sufficiency of bond is not affected by omission as obligees of two defendants who are not necessary parties to the appeal. Wandelohr v. Rainey [Tex.] 100 S. W. 1155. Sufficiency of bond by alleged bankrupt not affected because running only to original petitioners, and not naming others who joined by intervention. Flickinger v. First Nat. Bk. [C. C. A.] 145 F. 162.

76. Wandelohr v. Rainey [Tex.] 100 S. W. 1155.

77. Clerk of trial court cannot refuse to deliver transcript to appellant on ground that appeal bond is not in double amount of costs, where bond recites that amount is double "fixed by the clerk," and is approved by him. Taylor v. Gardner [Tex. Civ. App.] 99 S. W. 411.

78. Word "cashier" appended to signature of surety held merely descriptio personae. Northup v. Bathrick [Neb.] 110 N. W. 685. Sureties on appellant's cost bond below are not ineligible as sureties on appeal bond, though judgment was rendered against them for costs. Taylor v. Gardner [Tex. Civ. App.] 99 S. W. 411.

79. Appellants need not be bound by security for costs only where no supersedeas is asked for, it being sufficient if the sureties acknowledge themselves liable. Mayfield v. Tuscaloosa County Com'rs. [Ala.] 41 So. 932. Where notice recites that appeal is taken to supreme court and undertaking is for an appeal to "Appellate Court of the Third District of the State of California," there being no such court, it is insufficient (McAulay v. Tahoe Ice Co. [Cal. App.] 86 P. 912), though under Code Civ. Proc. § 941 it was not necessary to name the court (Id.). Instrument in form a supersedeas bond, but before its approval and by erasure to bond for costs only, by appellant's attorney with consent of surety, held sufficient as an appeal bond. Parsons v. Little, 28 App. D. C. 218. Under Rev. St. 1887, § 4809, and surety company law, undertaking must obligate appellant to pay all costs and damages in case of dismissal of appeal and an undertaking to pay costs awarded "on the appeal" is insufficient. Jackson v. Barrett [Idaho] 86 P. 270. Where there are two appeals, undertaking to pay costs awarded against appellant "on the appeal" is void for uncertainty as to which it applies. Thum v. Bailey [Idaho] 86 P. 279. Bond on devolutive appeal conditioned that "if the said defendant shall well and truly prosecute said appeal and said sum, then in such case this bond shall be null and void," held sufficient. Parker & Co. v. Succession of Griffin, 117 La. 977, 42 So. 473. Where appeals are taken from order appointing receiver and from order refusing to vacate appointment, bond which recites that in consideration of "such appeal" appellant will pay costs awarded "on the appeal" is void for uncertainty as to which it refers. Faust v. Rustler Min. & Mill. Co., 34 Mont. 368, 86 P. 421.

80. On appeal from denial of rule nisi in certiorari, security must be approved by court as required by Code 1896, § 431; but, on appeal from final judgment, security must by virtue of section 2827, making provisions as to other appeals applicable, be approved by clerk of court as in other appeals. Mayfield v. Tuscaloosa County Com'rs [Ala.] 41 So. 932. On appeal from surrogate court it is discretionary with surrogate whether he will determine sufficiency of sureties from affidavits of justification or whether he will require sureties to appear before him and be examined touching their sufficiency before approving undertaking. In re Sheldon's Will, 103 N. Y. S. 177.

81. Under Code Civ. Proc. (Mills' Ann.

ally required. When the filing and approval is an integral part of the transfer of the cause it must be done within the time prescribed.[82] In a joint appeal the bond must be executed by all the appellants.[83] Defects may ordinarily be cured by the filing of an amended or substituted bond,[84] providing the bond is not void.[85] Formal defects are waived unless properly objected to.[86] Defects which can be cured by appellant, and which do not affect the jurisdiction of the appellate court, do not warrant the clerk of the trial court in refusing to prepare and deliver the transcript.[87] Where the giving of a bond is not a prerequisite to the transfer jurisdiction, a stipulation canceling it and discharging the sureties does not affect the jurisdiction of the appellate court.[88]

The refusal of appellant to fulfill his promise to pay the costs of the transcript does not justify the clerk of the lower court in refusing to deliver it to him.[89] Where appellant has given a supersedeas bond, the clerk of the Federal circuit court has no right to require him to pay the costs taxed in that court before the appeal as a condition precedent to the transmission of the transcript to the court of appeals.[90]

(§ 6) *H. Entry below.*[91]

§ 7. *Transfer of jurisdiction; supersedeas and stay.*[92]—The transfer is not

Code, § 380), providing that bond must be approved by clerk of county court, appeal will be dismissed where bond included in transcript bears no indorsement of approval and record shows no approval. Greenlaw Lumber & Timber Co. v. Chambers [Colo.] 88 P. 845. Act of clerk in fixing probable amount of costs and his approval of bond is essential to its validity, so that paper filed with record in case prior to that time, purporting to be bond, can be given no official recognition. Houston, etc., R. Co. v. Smith [Tex. Civ. App.] 97 S. W. 519.

82. Undertaking filed on same day on which notice of appeal is served is timely. McAulay v. Tahoe Ice Co. [Cal. App.] 86 P. 912. Under Rev. St. 1887, § 4808, an appeal is ineffectual unless undertaking is filed within five days from service of notice of appeal. Cole v. Fox [Idaho] 88 P. 561. Must be actually received by the clerk within that time and one using mails assumes risk of delays. Id. Is presumed to have been received by clerk for filing on day filing mark indicates. Id. Under Burns' Ann. St. 1901, § 5671, relating to appeals in ditch proceedings, filing a bond in proper time is absolutely essential to jurisdiction, notwithstanding section 1307, prohibiting dismissal for defects of form or substance of such bonds. Smith v. Gustin [Ind.] 80 N. E. 954. Appeal dismissed in so far as it purported to be suspensive one, where bond was signed after ten days within which suspensive appeal should be signed had elapsed. O'Brien v. D'Hemecourt [La.] 43 So. 654. Appeal dismissed where bond was approved more than twenty days after adjournment of court. Houston, etc., R. Co. v. Smith [Tex. Civ. App.] 97 S. W. 519. Under Ballinger's Ann. Codes & St. § 6505, failure to file bond within five days after service of notice of appeal renders appeal ineffectual. Main Inv. Co. v. Olsen [Wash.] 86 P. 657. Bond filed within five days after oral notice of appeal given at time of rendition of judgment is sufficient. Ayars v. O'Connor [Wash.] 88 P. 119. Bond may be filed before notice, and hence, where bond is filed after an oral notice which is subsequently abandoned and written notice given, same bond is sufficient. Id. Fact that notice and bond were dated and marked as filed on July 16th held to show a mistake of a service date of July 9th on each, so that appeal would not be dismissed on ground that bond was not filed within five days after service of notice. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947. Where bond is timely left with clerk for filing, his failure to file it within prescribed time does not defeat appeal. Main Inv. Co. v. Olsen [Wash.] 86 P. 1112.

Extension of time: Under Gen. St. 1902, § 791, time for filing may be extended. General Hospital Soc. v. New Haven Rendering Co. [Conn.] 65 A. 1065.

83. Bond by one joint appellant does not inure to benefit of others. Cincinnati, etc., R. Co., v. Acrea [Ind. App.] 81 N. E. 213.

84. Undertaking insufficient under Rev. St. 1887, § 4809, for failing to obligate appellant to pay costs awarded on dismissal, may be amended upon seasonable application. Jackson v. Barrett [Idaho] 86 P. 270. Application to amend must be made before motion to dismiss is granted. In re Paige's Estate [Idaho] 86 P. 273. Under §§ 1303, 2575, Code of Civ. Proc., supreme court may permit appellant to file new undertaking or to do any other act necessary to perfect appeal from surrogate's courts. In re Sheldon's Will, 103 N. Y. S. 177.

85. Where bond is void and not merely insufficient, it cannot be cured by filing sufficient bond under Code Civ. Proc. § 1740, that section only applying to insufficient bonds. Faust v. Rustler Min. & Mill. Co., 34 Mont. 368, 86 P. 421.

86. Indefiniteness. Jackson v. Barrett [Idaho] 86 P. 270.

87. Taylor v. Gardner [Tex. Civ. App.] 99 S. W. 411.

88. Dunlap v. Weber Gas & Gasoline Engine Co. [Mo. App.] 94 S. W. 761.

89. Taylor v. Gardner [Tex. Civ. App.] 99 S. W. 411.

90. Where supersedeas bond is given as per rule 13. Jennings v. Johnson [C. C. A.] 148 F. 337.

91, 92. See 7 C. L. 159

accomplished until the appeal is fully perfected,[93] and an unappealable order can support no jurisdiction to be transferred.[94]

Supersedeas [95] of the judicial power of the lower court results with the transfer of jurisdiction [96] if the appeal be from the judgment,[97] but the judgment ordinarily remains valid and enforceable [98] unless a supersedeas bond is given or order for supersedeas is made, though in some states the judgment below is said to be vacated.[99] In chancery practice the appeal itself is a supersedeas of all procedure dependent on the decree.[1] Aside from those judgments as to which supersedeas is allowed or denied absolutely,[2] the propriety of granting a supersedeas [3] or suspensive appeal rests in descretion subject to review in case of abuse. It should not be granted as

93. An appeal becomes pending the moment the appeal bond is approved and filed. Anderson v. Anderson, 124 Ill. App. 613.

94. The filing of the return in the appellate court will not oust the jurisdiction of the lower court where the order appealed from is not appealable. McDaniel v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 956. An attempted appeal from a nonappealable order gives the appellate court no jurisdiction, though the respondent did not file a brief. Wilt v. Neenah Cold Storage Co. [Wis.] 110 N. W. 177.

95. See 7 C. L. 160.

96. After appeal from order dividing a ward into election districts, but before removal of record and return day of writ, court could order a map of the districts to be filed nunc pro tunc. Waynesburgh Borough's North Ward, 29 Pa. Super. Ct. 525. After an appeal has been presented from the judgment of the county court and is pending in the circuit court, the county court cannot annul the judgment by an order entered in a case subsequently instituted. Commonwealth v. Stearns Lumber Co. [Ky.] 102 S. W. 836. When an appeal with a stay has been taken to the supreme court and the return has been made and filed therein, the jurisdiction of the appellate court attaches and that of the trial court is suspended as to all matters necessarily involved in the appeal. Bock v. Sauk Center Grocery Co., 100 Minn. 71, 110 N. W. 257. After an appeal has been perfected, the trial court is without jurisdiction to entertain a motion to correct an error in the proceedings. Guinn v. Iowa, etc., R. Co., 131 Iowa, 680, 109 N. W. 209.

97. Appeal from ancillary order does not stay main case. Murphy v. Police Jury of St. Mary Parish, 117 La. 355, 41 So. 647.

98. **The staying of process by the trial court** because of the pendency of some matter the outcome of which may alter the rights of parties is treated elsewhere. See Boston & M. R. Co. v. Gokey, 150 F. 686. See Stay of Proceedings, 8 C. L. 1999; Executions, 7 C. L. 1614.

99. In Georgia when a judgment granting or refusing an injunction is brought to the superior court by a last bill of exceptions no supersedeas results merely from the filing of the bill of exceptions and making an affidavit of inability from poverty to pay costs and give security. A supersedeas in such case only results when an order of the judge has been passed prescribing the terms upon which the supersedeas will be granted and such order has been complied with. Civ. Code 1895, § 4925. Stokes v. Stokes, 126 Ga. 804, 55 S. E. 1023.

1. Appeal operates as supersedeas and suspends power of court to enforce judgment on decree appealed from. Anderson v. Anderson, 124 Ill. App. 613. A technical chancery appeal brings up the facts as well as the law for re-examination, and the decree appealed from is vacated and annulled, and no proceeding can be taken thereon until the appeal is determined. Fort v. Fort [Tenn.] 101 S. W. 433. By a Tennessee statute, act 1883, c. 21, p. 68, chancery decrees are continued in force to the extent of preserving the judgment lien pending appeal, the effect of the statute being limited to cases where judgments pronounced constitute liens. Id.

Contra: An appeal from a decree in chancery does not stay proceedings unless supersedeas is granted. Meeks v. State [Ark.] 98 S. W. 378.

2. A supersedeas results as a matter of right and law from appellant's compliance with the statute. Cannot be denied by court his only function being to determine whether the security for "damages and costs" is sufficient. Rev. St. §§ 1000 et seq. McCourt v. Singers-Bigger [C. C. A.] 150 F. 102. The interposition of an equitable counter-claim for specific performance of a contract for a new lease, in an action of unlawful detainer, does not change the character of the action so as to entitle defendant to a stay of the judgment of restitution as a matter of right. Sarthou v. Reese [Cal.] 90 P. 187.

3 In Georgia where, in a proceeding for contempt founded upon a failure to comply with an order of court requiring payment of alimony, the judge finds respondent in contempt, it is discretionary with the judge, upon appeal being taken, to make a supersedeas depend upon the giving of a bond. Stokes v. Stokes, 126 Ga. 804, 55 S. E. 1023. An application for a stay pending an appeal from a mortgage foreclosure, and the amount of security to be given thereon, is addressed to the sound discretion of the trial court. Discretion held abused in granting an application where the good faith of the appeal did not appear, no notice of any exceptions having been filed within the time prescribed by law. Bouden v. Sire, 104 N. Y. S. 460. Supersedeas discharged in so far as it superseded dissolution or injunction restraining election commissioners from holding election for division of county into two court districts, etc., and sustained in so far as it superseded decree declaring such act constitutional and dismissing bill. Ross v. Quick [Miss.] 42 So. 281.

to parts of a decree preservative of the status quo.[4] In some cases the statute requires an order specifically allowing a stay.[5] The power to supersede injunctive orders of the dissolution thereof rests in the inherent chancery power [6] or in plain terms of statute to that effect.[7] The better doctrine is that they cannot be continued in force on the dismissal of the bill to which they pertain.[8] A self-executing decree cannot be superseded.[9]

Bond [10] is usually requisite to a supersedeas, the amount thereof being fixed by the court [11] unless the amount of the bond is ascertainable by a statute conferring the right to a stay on compliance with its terms, the penalty of the bond being usually based upon the amount involved in the appeal,[12] and the order or statute must be strictly followed.[13] If the band is both an appeal and a supersedeas bond it must

4. An appeal, by a claimant to $7,000 in the hands of a stakeholder, from a judgment directing the latter to pay the money into the registry of the court, and the clerk to pay the same over to another claimant, does not stay the judgment directing payment into court, and the bond need only be appropriate to stay that part of the judgment directing the clerk to pay to the adverse claimant. Lazier v. Cady [Wash.] 86 P. 209.

5. The perfecting of an appeal under § 1310, Code of Civ. Proc., and the giving of a bond under § 1326, does not stay proceedings to enforce a judgment for injunctive relief without an order of the court to that effect. Sagehomme v. Pugh & Co., 102 N. Y. S. 923. Under Code Civ. Proc. § 1176, there can be no stay on appeal from a judgment of restitution in an action of unlawful detainer unless the trial judge so directs and appellate court cannot therefore grant a supersedeas. Sarthou v. Reese [Cal.] 90 P. 187.

6, 7. State v. Chehalis County Superior Ct. [Wash.] 86 P. 632. 2 Ballinger's Ann. Codes & St. § 6507, providing that where a final judgment shall be rendered by any superior court in a cause where a temporary injunction has been granted, and the party at whose instance the injunction was granted shall appeal, such injunction shall remain in force, does not deprive the trial court of its inherent power to suspend a prohibitory injunction pending appeal. Id. Mandamus will not lie to compel a trial court to order a stay or fix a bond to supercede a prohibitory injunction pending appeal. Id.

8. Where a decree restraining the infringement of a patent is set aside on a bill of review and the bill dismissed, the court has no power to continue the injunction in force pending an appeal from the later decree. Kelley Bros. v. Diamond Drill & Mach. Co., 142 F. 868.

9. A judgment of disbarment, being self-executing, cannot be superseded as a matter of right, and mandamus will not lie to compel the court to fix a bond. State v. Poindexter [Wash.] 86 P. 176.

10. See 7 C. L. 161.

11. A bond conditioned as an appeal bond and as a supersedeas bond from a judgment granting equitable relief is ineffectual for any purpose unless the amount has been fixed by order of court. Tibbitts v. Henry [Wash.] 89 P. 880.

12. Where Code Prac. 575, fixing amount of suspensive appeal bond is inapplicable, as where plaintiff's suit is dismissed, the amount of the bond must be fixed by the court as on a devolutive appeal (Day v. Bailey, 116 La. 961, 41 So. 223; Wells v. Blackman, 117 La. 359, 41 So. 648), and hence registry of notice of such a suit does not change the rule that on a suspension appeal from judgment of dismissal the trial court must fix the amount of the bond. (Wells v. Blackman, 117 La. 359, 41 So 648). Act 1894, No. 22, p. 25, makes no change in the law except to relieve third persons of constructive notice of suits affecting land title unless, and until, a notice thereof is registered, and hence where suspensive appeal is from order of such notice as that Code Proc. 575, requiring bond equal to one and one-half of amount of judgment, is inapplicable, as when plaintiff's suit is dismissed, the amount of the bond must be fixed by the court and in absence of such bond the appeal will be dismissed. Day v. Bailey, 116 La. 961, 41 So. 223. Where the appeal is from an order, in proceedings supplemental to execution, refusing to discharge a receiver, a supersedeas bond need not be double the judgment, since its purpose is to stay payments on the judgment pending appeal and not to secure the judgment. Johnson v. Joslyn [Wash.] 88 P. 324. A statute requiring an undertaking in twice the amount of the judgment to stay proceedings on a judgment directing the payment of money has no application to a judgment limited to a direction of a sale of specific property in satisfaction thereof and hence an undertaking given thereunder without consideration or contractual element is void and unenforceable as a common-law undertaking. Olsen v. Birch & Co., 1 Cal. App. 99, 81 P. 656.

13. Where in a replevin action the chattels have been disposed of and the judgment is for money only, a stay of execution is properly granted upon filing a bond under § 1327, Code Civ. Proc., relating to judgments for the recovery of money only, instead of under § 1329, relating to stay bonds in replevin actions. Gilroy v. Everson, Hickok Co., 120 App. Div. 207, 105 N. Y. S. 188.

Clerical error in amount: Where a judgment is rendered for $900.29, with costs in the sum of $90.25, a stay bond reciting a judgment $900.99 and costs amounting to $87.58, that appellant was "desirous of staying the execution," and that he and his sureties were bound "in the sum of $200, being double the amount named in the judgment," held that the bond was a sufficient stay bond for $2,000, the error being cleri-

be large enough for the latter.[14] The appellate court may exact a new or additional bond.[15]

The effect [16] of a supersedeas is simply to suspend the judgment [17] in its entirety,[18] and not to vacate or dissolve it,[19] or the lien of process pertaining to it,[20] or writs incident to the suit,[21] and not to transform a negative decree into affirmative relief.[22] Conversely, the suspension of a provisional or preliminary order leaves the main case open in other respects.[23] If the appeal and supersedeas prevents the case from going to judgment, no lien on land attaches.[24] The lower court loses its power only in respect to those things which might trench on the appellate functions,[25] and retains subject thereto the power to take any action preservative of the status quo [26] and power to make its record speak the truth [27] unless the error be on the face of the record which has passed into the jurisdiction above.[28]

cal. Austin v. Union Pav. Cont. Co. [Cal. App.] 88 P. 731.

14. A bond conditioned on the appellant and his sureties paying to appellee a specific sum and damages adjudged on appeal, etc., on the affirmance of the judgment is both an appeal and supersedeas bond, and is insufficient unless given in double the money judgment and $200 in addition thereto. Tibbitts v. Henry [Wash.] 89 P. 880.

15. The supreme court has jurisdiction, in a clear case, to direct the appellant to give a new or additional supersedeas bond within a time limited, or upon his default to vacate the stay. Bock v. Sauk Center Grocery Co., 100 Minn. 71, 110 N. W. 257.

16. See 7 C. L. 161.

17. The effect of a supersedeas is to stay proceedings on the judgment. Gardner v. Continental Ins. Co. [Ky.] 101 S. W. 911.

18. Portion of decree of distribution of decedent's estate in appellant's favor cannot be executed pending the appeal without the consent of the appellate court. Van Houten v. Hall [N. J. Eq.] 66 A. 1085. A decree modifying a former decree is, by giving security, superseded in toto, and not only as to the modifications. McCourt v. Singers-Bigger [C. C. A.] 150 F. 102.

19. A writ of error at common law, where seasonably sued out and appropriate bond given, acts as a supersedeas to prevent the issuance of execution on the judgment appealed from. In other respects the judgment remains in full effect and validity as a ground of action, bar, or estoppel. Fort v. Fort [Tenn.] 101 S. W. 433.

20. Personal creditor of administrator instituted equitable action, under Civ. Code Prac. § 439, against him and defendant bank in which he, in his official capacity, had money of estate on deposit, to subject administrator's statutory allowance out of such sum to payment of his debt. Bill was dismissed and attachment discharged, but appeal was taken and judgment superseded. Held that effect of judgment was suspended by order of supersedeas, and bank was not liable for refusal to pay administrator entire amount of deposit pending such appeal. National Bk. v. Johnson's Adm'r, 29 Ky. L. R. 728, 96 S. W. 433.

21. Order of judge indorsed on petition for an appeal from, and supersedeas to, an order refusing to dissolve an injunction, held, upon proper construction thereof, not to stay the injunction but to have effect merely to grant appeal and supersedeas. Powhatan Coal & Coke Co. v. Ritz [W. Va.] 56 S. E. 257. The perfecting of an appeal from an order refusing to dissolve an injunction, together with a supersedeas, does not stay the operation of the injunction, nor deprive the court below of power to punish a party for his contempt in refusing to obey it. Id.

22. Where, in unlawful detainer, defendant sets up a counterclaim for specific performance of a contract for a new lease, which is denied, there is nothing to stay as far as the judgment on the counterclaim is concerned. Sarthou v. Reese [Cal.] 90 P. 187. On appeal from an order denying appellant the right to intervene, a supersedeas bond is not proper, since there is nothing to stay. Hindman v. Great Western Coal Development & Min. Co. [Wash.] 89 P. 894.

23. Suspensive appeal lies from refusal to grant preliminary injunction, but will not suspend trial on merits. Murphy v. Police Jury of St. Mary Parish, 117 La. 355, 41 So. 647.

24. A judgment debtor who appeals from an order on motion for a new trial and executes a sufficient stay bond, relieves his land from the lien of the judgment. May sell the same unless done with intent to defraud creditors. Austin v. Union Pav. & Cont. Co. [Cal. App.] 88 P. 731.

25. After case has passed to appellate court, trial court cannot make any order in it as between appellant and appellee. Williams' Heirs v. Zengel, 117 La. 614, 42 So. 157.

26. An appeal with supersedeas does not interfere with power of lower court to make any order necessary to preservation of funds or property involved in the lititgation pending such appeal, where such orders do not tend toward an execution or enforcement of order or decree appealed from, or to place property or funds involved beyond reach or control of judgment or decree of appellate court. McKinnon-Young Co. v. Stockton [Fla.] 44 So. 237. After appeal trial court held to have jurisdiction to pass on question of insolvency or illegality of bonds given in injunction and sequestration proceedings in original suit. Stuart v. Ansley [La.] 44 So. 294. After supersedeas following a judgment directing the sale of land, the trial court has no authority to place such land in the hands of a receiver pending the appeal. Gardner v. Continental Ins. Co. [Ky.] 101 S. W. 911. An appeal on sufficient undertaking from an order allowing

A bond to release a supersedeas must be so conditioned as to preserve all rights protected by the former.[29]

§ 8. *Appearance, entry, and docketing above*[30] within the time required by statute or rule[31] are generally essential, and where the appellant fails to enter the appeal the appellee may do so for the purpose of moving to dismiss.[32] The prosecution of a writ of error operates as an appearance, and further process is unnecessary.[33] Fees for docketing appeals are dependent upon statute.[34]

§ 9. *Perpetuation of proceedings and evidence for the reviewing court. (Record on appeal.) Scope and terminology.*[35]—The "record proper," sometimes designated as the "fundamental record," "judgment roll," or "common-law record," includes those matters which are at common law of record ex propria vigore. The "secondary record" includes the various means by which matters not part of the record proper are made of record, by bill of exceptions, settled case, abstract, approved motion for new trial, etc. The "entire record" or "record on appeal" comprises all that is transmitted to the reviewing court, including both record proper and secondary record.

(§ 9) *A. What the record proper must show.*[36]—That which is a part of the record proper must appear by such record, and its omission cannot be supplied by the secondary record.[37] The facts essential to appellate jurisdiction[38] must always

temporary alimony, under Code Civ. Proc. § 946, deprives the superior court of all power to enforce the order, and hence it cannot appoint a receiver to provide security for the ultimate payment of the alimony. McAneny v. Santa Clara County Sup'r Ct. [Cal.] 87 P. 1020.

27. Pending an appeal and supersedeas, the return of service of process commencing the suit may be amended in the lower court upon proper application and notice to the opposite party. Gauley Coal Land Ass'n v. Spies [W. Va.] 55 S. E. 903. The giving of a supersedeas bond does not stop a defendant appellant in a direct proceeding to correct the record from showing that the record, so far as it showed that another defendant had appealed, was false, where it does not appear that by reason of the supersedeas plaintiffs were prevented from enforcing the decree against such other defendant. Pickren v. Northcutt [Ark.] 102 S. W. 708. Trial court may correct error in calculation of amount of its judgment at any time prior to action of appellate court thereon. After filing of petition and supersedeas bond for writ of error and citation thereon. Blain v. Park Bk. & Trust Co. [Tex. Civ. App.] 94 S. W. 1091.

28. McKay v. Neussler [C. C. A.] 148 F. 86.

29. Where, in an action to set aside a deed, complainant was awarded judgment and put in possession, a bond given by him to prevent a stay is defective where it only obligates him to pay all rents collected by him pending the appeal, as it should also be conditioned to pay damages resulting from negligence in failing to collect rents or failing to properly lease the premises. Barron v. Myers, 145 Mich. 342, 13 Det. Leg. N. 506, 108 N. W. 712.

30. See 7 C. L. 162.

31. In North Carolina, under supreme court rules 5, 17, if an appeal from a judgment rendered before the commencement of term of supreme court is not docketed at such term seven days before entering upon call of docket of district to which it belongs, the case may be dismissed upon proper motion being made by appellee. Vivian v. Mitchell [N. C.] 57 S. E. 167. Appeal will not be dismissed because not docketed within the time prescribed by the North Carolina supreme court rule 5 if it is docketed during term of supreme court following trial and before appellee has moved to dismiss. Laney v. Mackey [N. C.] 57 S. E. 386.

32. Failure to enter appeals before return day of citations, as required by rule 16 of circuit court of appeals. Wong Sang v. U. S. [C. C. A.] 144 F. 968.

33. Where judgment was reversed on account of defective service. Barwick v. Rouse [Fla.] 43 So. 753; Hayman v. Weil [Fla.] 44 So. 176.

34. Statutes considered and held not to authorize clerk of county court to charge fee of $4 for docketing an appeal from justice of the peace, and a rule of court so providing held void. Dille v. Rice, 120 Ill. App. 353.

35, 36. See 7 C. L. 162.

37. Malott v. Central Trust Co. [Ind.] 79 N. E. 369; Central of Georgia R. Co. v. Carroll [Ala.] 41 So. 517; Mitchell v. State [Ala.] 41 So. 518. Recitals in bill of exceptions of motion for new trial and order thereon insufficient. Hogan v. Hinchey, 195 Mo. 527, 94 S. W. 522; Stark v. Zehuder [Mo.] 102 S. W. 992; Commercial Trust & Sav. Bk. v. Magee [Mo. App.] 102 S. W. 600; Walner v. Wade [Mo. App.] 101 S. W. 686; Morgan v. Smith [Mo. App.] 102 S. W. 673; Mason v. Smith [Mo. App.] 101 S. W. 1149; Hill v. Butler County, 195 Mo. 511, 94 S. W. 518; Pennowfski v. Coerver [Mo.] 103 S. W. 542. Is not proper to incorporate in bill of exceptions record entries of court and pleadings, but they should be certified up by clerk in transcript outside of the bill. London v. Hutchens [Ark.] 97 S. W. 443. Under P. L. 1902, p. 565, appellant on appeal from district court to supreme court must bring up with state of case a certified transcript of the judgment record. Katzin v. Jenny

appear. The record proper must also show the organization of the trial court,[39] the pleadings,[40] and order or judgment below,[41] and that the same has become a finality,[42] the motion for new trial and order thereon,[43] and in some jurisdictions the making of exceptions and taking of exceptions, the making of the secondary record,[44] and the timely taking of all steps necessary to bring up the case for review.[45]

[N. J. Law,] 65 A. 192. Special findings conclusions of law thereon cannot be made a part of the record by bill of exceptions. Walters v. Walters [Ind.] 79 N. E. 1037. The filing of the bill of exceptions must be shown by the record proper. Clay v. Union wholesale Pub. Co. 200 Mo. 665, 98 S. W. 575; Commercial Trust & Sav. Co. v. Magee [Mo. App.] 102 S. W. 600; Cramer v. Springfield Trac. Co. [Mo. App.] 97 S. W. 969. A nunc pro tunc entry showing allowance of time to file cannot be made where there is no minute on which to base it. Diamond Match Co. v. Wabash R. Co., 121 Mo. App. 43, 97 S. W. 993.

38. Bomer v. Legg [Tex. Civ. App.] 101 S. W. 839, McCarthey v. North Texas Loan Co. [Tex. Civ. App.] 101 S. W. 267.

39. Record must show that the lower court was duly organized. Thomas v. Daniel Bros. [Ala.] 42 So. 623.

40. Perkins v. Storrs, 99 N. Y. S. 849; Vanhorn v. Vanhorn [Kan.] 88 P. 62. Absence of pleadings because lost or destroyed cannot be cured by the concession of counsel that they were correct, but must be supplied by the court below. Campbell v. Greer, 197 Mo. 463, 95 S. W. 226.

41. De Laney v. Michigan Elm Hoop & Lumber Co., 144 Mich. 351, 13 Det. Leg. N. 240, 108 N. W. 77; Spencer v. Busch, 101 N. Y. S. 188. Under the Missouri statute, Rev. St. 1889, § 813, where the short transcript method of appealing is adapted, the transcript must contain a copy of the record entry of the order appealed from. Dockery v. Lowenstein, 121 Mo. App. 394, 99 S. W. 40. Appeal dismissed where there was no certified copy of record entry of judgment appealed from, showing term, day, month, and year upon which same was rendered, with order granting appeal as required by Rev. St. 1899, § 813, nor, in lieu thereof, any perfect abstract or transcript showing any judgment whatever, or order granting an appeal. Pennowfski v. Coerver [Mo.] 103 S. W. 542. A transcript of proceedings before a license board on an application for a license to sell liquor which does not contain a certified copy of the final order of such board presents no matter for review on appeal. In re Borland [Neb.] 112 N. W. 608. It is not reversible error for the trial judge to file a **written opinion** and make it a part of the record. But in such case the appellant or plaintiff in error is not bound to include such opinion in the record with his application for appeal or writ of error. Stover v. Stover [W. Va.] 54 S. E. 350.

42. Stebbins v. Larson [Cal. App.] 88 P. 505.

43. Hogan v. Hinchey, 195 Mo. 527, 94 S. W. 522; Stark v. Zehnder [Mo.] 102 S. W. 992; Commercial Trust & Sav. Bk. v. Magee [Mo. App.] 102 S. W. 600; Walner v. Wade [Mo. App.] 101 S. W. 686; Morgan v. Smith [Mo. App.] 102 S. W. 673; Mason v. Smith [Mo. App.] 101 S. W. 1149; Hill v. Butler County, 195 Mo. 511, 94 S. W. 518; Pennowfski v. Coerver [Mo.] 103 S. W. 542.

44. Orders relative to bill of exceptions, Hill v. Butler County, 195 Mo. 511, 94 S. W. 518. Where neither transcript nor appellant's abstract showed the allowance and filing of a bill of exceptions, only errors in record proper could be considered. State v. Trollinger [Mo. App.] 94 S. W. 833. A paper entitled "Bill of Exceptions," signed and sealed by the judge of the court, and bearing the style of the case in which an order has been entered, stating that a bill of exceptions was tendered, signed, sealed, and made a part of the record, is sufficiently identified to make it a part of the record. De Board v. Camden Interstate R. Co. [W. Va.] 57 S. E. 279. A bill of exceptions to the opinion of a county court under § 48, c. 39, West Virginia Code 1906, is a part of the record if the record shows that the bill was signed by the commissioners, or a majority of them at the same term of court at which the trial took place, although the record fails to show that the bill was otherwise noted thereon. Jones v. Harmer [W. Va.] 55 S. E. 657. Recital in bill of time fixed for signing and of order extending time insufficient to supply failure of record to show such orders. Mitchell v. State [Ala.] 41 So. 518. Where bill is signed in vacation the record proper must show an order in term time authorizing such signature. A recital in the bill is insufficient. Central of Georgia R. Co. v. Carroll [Ala.] 41 So. 517. Filing of bill of exceptions in clerk's office and date of filing cannot be shown by recitals of bill. Malott v. Central Trust Co. [Ind.] 79 N. E. 369; Walner v. Wade [Mo. App.] 101 S. W. 686; Stark v. Zehnder [Mo.] 102 S. W. 992. Lease given during term to file bill of exceptions after close of term must be shown by order book entry. Malott v. Central Trust Co. [Ind.] 79 N. E. 369. It will be presumed that the certificate of the trial judge bears the date upon which the bill of exceptions was tendered, unless it affirmatively appears from the record that it was tendered at an earlier date, and if such date is not within the time limited for tendering the bill the writ of error will be dismissed. Crawford v. Goodwin [Ga.] 57 S. E. 240.

45. Under § 4819, Rev. St. 1887, an appeal to the supreme court from a judgment of the district court on appeal from the probate court, appellant must furnish a copy of the notice of appeal, of the judgment or orders appealed from, and all papers used on the hearing which must be certified as correct by the attorneys or the clerk. In re Paige's Estate [Idaho] 86 P. 273. The recital in the bill of exceptions of the fact that an appeal was taken does not evidence that fact. It must appear from the abstract of the record proper. Commercial Trust & Sav. Bk. v. Magee [Mo. App.] 102 S. W. 600. On appeal from drain commissioners the circuit court may determine as a question of fact whether an appeal bond was filed with the auditor, and to that end may hear oral evidence. Smith v. Gustin

In some states, however, the secondary record must itself show that it was properly made and a showing thereof in the record proper is insufficient.[46] While in actions at law every presumption is in favor of the decision below and error must be made to affirmatively appear,[47] in equity a complainant to whom relief is granted must preserve in the record the evidence on which it is based by a certificate of evidence or by recitals in the decree.[48]

(§ 9) *B. What is part of record proper; necessity of secondary record.*[49]—The office of the bill of exceptions or other secondary record is to make of record that which is not part of the record proper, and it is necessary except to review errors apparent on the face of the judgment roll.[50] The record proper consists of the summons, pleadings, and judgment,[51] findings,[52] and orders made with reference to

[Ind.] 81 N. E. 722. On appeal from circuit court in drainage proceedings appealed to such court from commissioners, the record must show that a bond was filed with the auditor. Id. Line written in ink upon typewritten transcript between close of last order of board of commissioners and certificate of auditor as follows: "See certified copy of appeal bonds attached," was insufficient alone to show filing of such bonds. Id. Abstract held not to authorize court to go beyond record proper where it did not show by whom bill of exceptions was signed and sealed, nor by whose order nor when it was filed, nor when affidavit for appeal was filed and appeal allowed, etc. Harris v. Wilson, 199 Mo. 412, 97 S. W. 591.

46. See post, § 9 C 1.

47. See post, § 9 D.

48. In equity the rule in Illinois is that the party in favor of whom the decree is entered must preserve the evidence, or the decree must find the facts proven at hearing. Berg v. Berg, 223 Ill. 209, 79 N. E. 13; Standish v. Musgrove, 223 Ill. 500, 79 N. E. 161; Timke v. Allen, 225 Ill. 402, 80 N. E. 297. This rule, however, does not apply to cases in which parties are entitled to trial by jury. Berg v. Berg, 223 Ill. 208, 79 N. E. 13. This exception does not apply to a decree on a cross bill upon the hearing of which the parties were not entitled to a jury, though they were entitled to a jury on hearing of bill. Id. Where findings in decree are sufficient to support it and there is no certificate of evidence, the decree will be sustained. Geffinger v. Klewer [Ill.] 81 N. E. 712. Where court is unable from record to properly decide the case, it will reverse decree on its own motion and remand with directions to permit taking of further evidence. Standard Computing Scale Co. v. Computing Scale Co. [C. C. A.] 145 F. 627. Rule that appellee must preserve the evidence does not mean that when evidence has been produced and filed and referred to in a master's report as an exhibit and returned to the court, it is not appellant's duty when bringing up a transcript of the record to see that such transcript is complete or at least to make and show some effort to cause it to be so. Jackson v. Grosser, 121 Ill. App. 363. Under rule 7 of the supreme court of Missouri if, in an equity case, all the evidence is not embodied in the bill of exceptions, the judgment will not be reversed even though it is not a correct legal result of the facts found. Patterson v. Patterson, 200 Mo. 335, 98 S. W. 613. In a case in equity if the entire evidence is not brought up on appeal, the facts will not be reviewed but the usual presumption will be indulged in support of the decree. Mason v. Smith [Mo. App.] 101 S. W. 1149.

49. See 7 C. L. 164.

50. Stark v. Zehnder [Mo.] 102 S. W. 992; Barnard Leas Mfg. Co. v. Washburn, 30 Ky. L. R. 813, 99 S. W. 664. Errors apparent on the face of the record can be reviewed without a bill of exceptions. Crenshaw v. Duff's Ex'r [Ky.] 103 S. W. 287; Wait v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60; Cramer v. Springfield Trac. Co. [Mo. App.] 97 S. W. 969; Blue Ridge Light & Power Co. v. Tutwiler [Va.] 55 S. E. 539. Record proper held to show that grant of change of venue was error. Leslie v. Chase & Son Mercantile Co., 200 Mo. 363, 98 S. W. 523. While it is possible under Rev. Laws, c. 173, § 106, to raise questions of law by exceptions, where the hearing is upon an issue of law, and where there is a simple remedy by appeal, it is simpler and better practice in such cases to bring such questions directly to supreme judicial court by appeal. McCusker v. Geiger [Mass.] 80 N. E. 648.

51. Judgment, date thereof, motions for new trial and in arrest of judgment, and exceptions thereto, are part of record proper. Malott v. Central Trust Co. [Ind.] 79 N. E. 369. Where the record judgment roll is complete except as to a summons, it not appearing that one was issued, it will be presumed that defendant appeared without service as against a technical objection that the record is defective under Comp. Laws, § 3431, requiring the record to contain the judgment roll. Strosnider v. Turner [Nev.] 90 P. 581. On appeal from an order settling an administratrix's account, the account, the written objections thereto, and the findings and order certified by the clerk as a judgment roll, is sufficient record, and the exemplification of the papers in the form of a bill of exceptions is not necessary. In re Dougherty's Estate, 34 Mont. 336, 86 P. 38. Under Burns' Ann. St. Supp. 1905, § 641 C, action of court in allowing supplemental complaint to be filed and objection and exception thereto are part of record without bill of exceptions. Schmoe v. Cotton [Ind.] 79 N. E. 184. Upon a writ of error to review an order dismissing an appeal from the probate court, the papers and entries relating to the order of dismissal constitute the record without a bill of exceptions. City of Flint v. Genesee Circuit Judge [Mich.] 13 Det. Leg. N. 829, 109 N. W. 769. Motion recited in and identified

the record.[53] Proposed pleadings and amendments which have never become pleadings in the action are no part of the record.[54] Other proceedings had below, in order to be reviewed, must be brought into the record by a bill of exceptions,[55] journal entry, or equivalent proceedings. In chancery cases and some special statutory proceedings,[56] the record includes all proceedings and files below, including the testimony, if taken by deposition, or as settled if taken in open court, and statutes sometimes provide that documents filed become part of the record.[57] Stipulations,[58]

by final order based thereon is a part of the record. Recital in order of dismissal that such order is based on a motion which is identified in the order makes motion part of record. Bellinger v. Barnes, 223 Ill. 121, 79 N. E. 11. An order taxing costs cannot be reviewed on an appeal from the judgment in the absence of a bill of exceptions or statement containing the record of what the court acted on in making the order. Schomberg v. Long [N. D.] 108 N. W. 332.

52. Memorandum of findings of fact filed by single justice constitute part of record and stand upon same basis as those contained in a report. Elliott v. Baker [Mass.] 80 N. E. 450. A finding of facts made after judgment is no part of the record and cannot be considered. Farmers' Bank of Polo v. Barbee, 198 Mo. 465, 95 S. W. 225.

53 Except in actions at law in supreme judicial court, it is ordinarily unnecessary to take exceptions in a hearing on demurrer or motion to quash. McCusker v. Geiger [Mass.] 80 N. E. 648.

54. Demurrer striken must be brought into record by bill of exceptions. Commissioners' Ct. v. State [Ala.] 41 So. 463. An amendment to the pleadings which is disallowed in the court below is no part of the record and can come to the appellate court only by being embodied in the bill of exceptions or attached thereto as an exhibit. Williford v. Denby, 127 Ga. 786, 56 S. E. 1010; Chatman v. Hodnett, 127 Ga. 360, 56 S. E. 439. A pleading which is tendered and not allowed to be filed cannot be considered on appeal if not made part of the record. Krish & Co. v. Kentucky Jeans Clothing Co. [Ky.] 102 S. W. 803.

55. Rulings on objections to confirmation of street assessments. City of Chicago v. Ogden, Sheldon & Co. [Ill.] 81 N. E. 698. In absence of exceptions allowed by special order of court to master's report, only question open on review is whether decree is authorized by pleadings and report. Huntress v. Hanley [Mass.] 80 N. E. 946. Exceptions to master's report in suit in equity present questions of law in a proper form to be carried directly to full court on appeal. McCusker v. Geiger [Mass.] 80 N. E. 648. Where the circuit court on appeal from a justice court dismissed a garnishment proceeding in aid of a judgment in replevin rendered by the justice, for jurisdictional defects in the replevin proceedings the only papers properly in the judgment roll are those concerning the garnishment, and the jurisdictional defects in the replevin proceedings will not be reviewed unless such proceedings are embodied in the bill of exceptions. Kuehn v. Nero [Wis.] 111 N. W. 724. Where something essential to the determination of an alleged error in dismissing an appeal from the probate court is found outside the papers filed or entries made in relation to the order of dismissal, it must be shown by a bill of exceptions. City of Flint v. Genesee Circuit Judge [Mich.] 13 Det. Leg. N. 829, 109 N. W. 769.

56. The supreme court has jurisdiction to entertain an equity appeal without a bill of exceptions containing the testimony taken below. McMillan v. Diamond [Neb.] 110 N. W. 542.

57. In Kentucky pleadings, written motions, orders, and exhibits filed or made in open court become a part of the record when copied into it by the clerk in obedience to a schedule filed by one of the parties, or, in the absence of a schedule, when the clerk certifies that the transcript contains a true and complete copy of the record. Civ. Code Prac. § 737. Barnard Leas Mfg. Co. v. Washburn, 30 Ky. L. R. 813, 99 S. W. 664. In Massachusetts memorandum findings voluntarily made by the court constitute a part of the record. Such findings consist of brief abstract of material evidence and statement of findings of fact, and constitute part of record where voluntarily made having same effect as report made under Rev. Laws, c. 159, § 23. Lindsey v. Bird [Mass.] 79 N. E. 263. Under § 4819, Rev. St. 1887, the minutes of the court are not required to be furnished to the appellate court, and hence can only be presented by a bill of exceptions. In re Paige's Estate [Idaho] 86 P. 273. Acts 29th Leg. p. 220, c. 112, § 5, providing that original documentary evidence, maps, plats, or other matters introduced in evidence, and if embraced in stenographer's report, may be made part of record by written direction of the court, which may be sent up in original form if requested by either party, or transcribed by clerk with other parts of record, held not in derogation of Const. art. 35, § 3, providing that no bill shall contain more than one subject which shall be expressed in title. Newnom v. Williamson [Tex. Civ. App.] 103 S. W. 656. In order to make such evidence part of record and authorize its being sent up in original form, it must be embraced in stenographer's report, and there must be a written direction of the court that it be done. Id. Order of district judge, made in vacation, directing clerk to send up with transcript all documentary evidence offered by all parties, held not such a written order of the court as to make such evidence part of record, and there being no such order, direction to send up such evidence was unauthorized and it could not be considered. Id. Though documentary evidence could not be considered because not made part of record in manner prescribed by Acts 29th Leg. p. 220, c. 112, § 5, held that stenographer's transcript, in so far as it contained oral evidence, would be taken and considered as statement of facts. Id. The failure of the clerk to indorse upon a paper filed the day of filing it, as provided by the Kentucky statute, Civil Code of Practice, § 69, will not effect the

appearance,[59] interlocutory motions and orders thereon,[60] exhibits,[61] bills of particulars,[62] agreed statement of facts,[63] depositions,[64] proceedings at the trial,[65] verdict,[66] motion for new trial and order thereon,[67] affidavits,[68] propositions of law, the opinion

validity of the paper as a part of the record if it is actually filed in court. Barnard Leas Mfg. Co. v. Washburn, 30 Ky. L. R. 813, 99 S. W. 664.

58. **Contra:** Stipulation filed in cause held part of record. Bellinger v. Barnes, 223 Ill. 121, 79 N. E. 11.

59. A ruling sustaining jurisdiction obtained by garnishment will not be reviewed for the purpose of determining whether the garnishee was indebted to the defendant where neither the writs, the disclosure, nor the answers of the garnishee are incorporated in the record. Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712, 13 Det. Leg. N. 631, 108 N. W. 1081.

60. A motion to bring in new parties defendant and an order denying it are not properly part of the judgment roll. Grigsby v. Wolven [S. D.] 108 N. W. 250. Refusal to strike cause from short cause calendar. McDonald v. People, 222 Ill. 325, 78 N. E. 609. Motion to strike demurrer. Commissioners' Ct. v. State [Ala.] 41 So. 463. A judgment dismissing an action can only be reviewed where the motion to dismiss and the exception to the ruling thereon are preserved by a bill of exceptions, it not being sufficient that they are copied into the record proper. Stephens v. Moore [Colo.] 90 P. 853. An order of the district court remanding the cause to the county court and the exceptions thereto must be preserved by a bill of exceptions, and it is insufficient that they are copied into the record proper. Hafey v. Ballin [Colo.] 90 P. 852. Motion to revoke order appointing receiver is not part of record proper, and ruling thereon cannot, therefore, be reviewed unless motion is incorporated in bill of exceptions filed in proper court. Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S. W. 167. Where neither motion for a continuance, affidavit, action of court, nor exception thereto, were preserved in bill of exceptions, error in refusing continuance could not be considered. City of Mattoon v. Faller, 117 Ill. App. 65. Moving papers in support of a motion to vacate a default must be incorporated in a bill of exceptions. Rose v. Northern Pac. R. Co. [Mont.] 88 P. 767. On appeals from orders other than those granting or refusing new trials, the record must be made up by having the papers used at the trial court hearing authenticated by a bill of exceptions. In re Dougherty's Estate, 34 Mont. 336, 86 P. 38.

61. Contract filed with pleading and expressly referred to therein held no part of such pleading, and hence not part of record proper and not open to consideration on appeal based on record proper alone. Majors v. Maxwell, 120 Mo. App. 281, 96 S. W. 731. A copy of a deed included in an abstract, but not incorporated in a bill of exceptions or statement of facts or otherwise identified, cannot be considered. Sherman v. Goodwin [Ariz.] 89 P. 517.

62. Fender v. Fender, 123 Ill. App. 105.

63. Zindars v. Erie Gas & Mineral Co. [Kan.] 87 P. 188; White v. Roe [Ala.] 44 So. 211. Where a case is heard upon stipulation of counsel, the stipulation, like other evidence, must be brought upon the record by bill of exceptions. Robinson v. Cross [Ark.] 101 S. W. 754.

64. Depositions upon which the issues were tried not made part of the record by bill of exceptions or order of court cannot be considered, a statement in the judgment that the evidence was in writing and on file does not make them part of the record Moore Dry Goods Co. v. Thomas [Ark.] 99 S. W. 66. Under rule 55 for the district court, the Texas court of civil appeals cannot review the refusal of the district court to strike out answers to interrogatories if there is no bill of exceptions in the record, although the order of the court shows that appellants excepted. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 99 S. W. 128.

65. Where a dismissal is ordered after defendant has introduced some evidence, the evidence so adduced should be made part of the record. Weiller v. New York City R. Co., 100 N. Y. S. 1011. Rulings made during trial not relating to pleadings and not appearing on face of judgment, and exception thereto, must be preserved in bill of exceptions. Polowski v. Derengowski, 124 Ill. App. 445. Bill of exceptions necessary to review matters transpiring at trial. Porter v. Buckley [C. C. A.] 147 F. 140.

Remarks of counsel must be brought in by bill of exceptions. Jones v. Cooley Lake Club, 122 Mo. App. 113, 98 S. W. 82; Harless v. Southwest Mo. Elec. R. Co. [Mo. App.] 99 S. W. 793; Harvey v. Chicago & A. R. Co., 123 Ill. App. 442.

66. Paper verdict of jury appearing in transcript but not in bill of exceptions could not be considered. Blue Island Brew. Co. v. Fraatz, 123 Ill. App. 26.

67. Motion to vacate verdict and judgment and exception to action of court thereon must be preserved in bill of exceptions and not in common-law record. Christie v. Walker, 126 Ill. App. 424. Motion for new trial need not be in writing or shown by bill of exceptions in order to review order denying it. Moneagle & Co. v. Livingston [Ala.] 43 So. 840. Any action in regard to denial of new trial must be presented by bill of exceptions. Hicks v. Graves [Mass.] 80 N. E. 590. A statement on motion for new trial is not a part of the judgment roll as defined by Code Civ. Proc. § 1196. Harrington v. Butte & Boston Min. Co. [Mont.] 90 P. 748.

68. Smith v. Zachry [Ga.] 57 S. E. 513; Phoenix Indemnity Co. v. Greger [Colo.] 88 P. 1066; Shorno v. Doak [Wash.] 88 P. 1113; Borden v. Lynch, 34 Mont. 503, 87 P. 609; Crowley v. Croesus Gold & Copper Min. Co. [Idaho] 86 P. 536; In re Dean's Estate, 149 Cal. 487, 87 P. 13; Manuel v. Flynn [Cal. App.] 90 P. 463. Affidavits not part of record in absence of certificate of evidence and where it does not appear that they were considered by court. Bellinger v. Barnes, 223 Ill. 131, 79 N. E. 11. Leave to file affidavit does not show that it was considered. Id. Affidavits, documents, and records submitted in evidence on the hearing should be incorporated in the bill of exceptions or be attached thereto as exhibits, duly and properly identified, or be embodied in an approved

of the trial court,[69] and the evidence,[70] are no part of the record proper, and statutes providing for the filing of the reporter's transcript of the evidence does not make it of record,[71] nor do recitals in the motion for new trial make of record the matters recited.[72] Statutes sometimes provide that instructions may be made of record by order,[73] but unless so authenticated they must be embodied in the bill of exceptions.[74] Recital in the record proper of matters which are no part of such record are unavailing to supply omissions from the bill of exceptions.[75]

brief of evidence and brought up as part of the record. It is not sufficient to send up as parts of the record copies of such affidavits and documents, although the originals have on them the word "identified" followed by the signature of the trial judge. Askew v. Hogansville Cotton Oil Co., 126 Ga. 807, 55 S. E. 921. To simply file affidavits with the clerk, although identified by the judge, does not make them a part of the record or authorize them to be sent to the supreme court as such. Smith v. Zachry [Ga.] 57 S. E. 513.

69. A deduction by the trial court in its opinion that a cause of action was claimed by plaintiff's counsel to be based on the original contract, although not equivalent to a statement to that effect in a bill of exceptions, is entitled to consideration as an admission by plaintiff, under B. & C. Comp. § 158. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 86 P. 357. The opinion of the court in making an order, although included in the transcript, is no part of the record and cannot be considered. Bouchard v. Abrahamsen [Cal. App.] 88 P. 383.

70. In chancery cases oral evidence must be reduced to writing at the time or embodied in a bill of exceptions or other record certified by the chancellor. Meeks v. State [Ark.] 98 S. W. 378. Rulings on admission of evidence. Clare v. Doble [Mass.] 81 N. E. 871. Where evidence adduced at the trial is not made part of the record by proper bill of exceptions, none of the questions raised which depend upon such evidence can be considered. Gatewood v. Garrett [Va.] 56 S. E. 335. The evidence upon which judgment was rendered must be made part of the record by bill of exceptions. Newport News, etc., R. & Elec. Co. v. Lake, 105 Va. 311, 54 S. E. 328; United States Mineral Co. v. Camden [Va.] 56 S. E. 561. Assignments based on evidence printed in record but not embodied in bill of exceptions or otherwise authenticated as having been used before trial court could not be considered. Lee Won Jeong v. U. S. [C. C. A.] 145 F. 512. Parties may not by stipulation incorporate into the record matters foreign thereto and a record containing only such matters will be ignored. Denning v. Will, 121 Ill. App. 419. Findings not incorporated in the formal decision directing the entry of judgment form no part of the judgment roll. Elterman v. Hyman, 117 App. Div. 519, 102 N. Y. S. 613. Record of former trial not considered where not incorporated in bill of exceptions. Oxford & Coast Line R. Co. v. Union Bk. [C. C. A.] 153 F. 723. Transcript of evidence not incorporated in bill of exceptions by reference or otherwise could not be considered. Pittsburg Gas & Coke Co. v. Goff-Kirby Coal Co. [C. C. A.] 151 F. 466. Error in admitting evidence not considered in absence of bill of exceptions. Ellis v. Marshall Car Wheel & Foundry Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 719, 95 S. W. 689. Bill of exceptions or certificate of judge necessary to review, refusal to charge that under the evidence verdict should be for defendant. Levy v. Singer Mfg. Co., 32 Pa. Super. Ct. 117.

71. Stenographic report of evidence not part of record in action at law. Hicks v. Graves [Mass.] 80 N. E. 590. See post, § 9 C 2, as to reporter's transcript as statement of facts.

72. Argument of counsel. Harless v. Southwest Mo. Elec. R. Co. [Mo. App.] 99 S. W. 793; Harvey v. Chicago & A. R. Co., 123 Ill. App. 442. Although a motion for a new trial reciting irregularities at the trial is made a part of the record by a bill of exceptions, the fact of irregularity so recited is not thereby made a part of the record. Wallace v. Skinner [Wyo.] 88 P. 221. Mere recital in a motion of a fact as a ground for the motion is not evidence on appeal of truth of such fact, when motion has been denied by lower court, but such fact must be made to affirmatively appear on the record. Hayman v. Weil [Fla.] 44 So. 176.

73. Indianapolis Trac. & Terminal Co. v. Richey [Ind. App.] 80 N. E. 170.

74. Newport News & O. P. R. & Elec. Co. v. Take, 105 Va. 311, 54 S. E. 328; Phillips v. Washington & R. R. Co. [Md.] 65 A. 422; Shotts v. McKinney [Ind. App.] 79 N. E. 219; Aultman, Miller & Co. v. Moore [Tex. Civ. App.] 95 S. W. 17; Fellheimer v. Eagle, 79 Ark. 201, 95 S. W. 139; Nashville R. & L. Co. v. Marlin [Tenn.] 99 S. W. 367; Hastings Industrial Co. v. Baxter [Mo. App.] 102 S. W. 1075; Crowley v. Croesus Gold & Copper Min. Co. [Idaho] 86 P. 536; Hope v. West Chicago St. R. Co., 126 Ill. App. 507. Though clerk should have inserted instructions at the place pointed out in the bill of exceptions, they will not be ignored where referred to at that place and given in another part of the record even though they are not there identified. Huffman v. Charles, 30 Ky. L. R. 197, 97 S. W. 775.

75. Recital in judgment on motion for new trial and in order of court allowing time for signing of bill of exceptions not sufficient to supply failure of bill to show exception to ruling on such motion. Dorough v. Harrington & Son [Ala.] 42 So. 557. Exceptions to findings on objections to confirmation of street assessments which are preserved only by clerk's entry will not be considered. City of Chicago v. Ogden, Sheldon & Co. [Ill.] 81 N. E. 698. Recital in record made by clerk of denial of motion to strike cause from short cause calendar. McDonald v. People, 222 Ill. 325, 78 N. E. 609. An exception to the overruling of a motion for a new trial cannot be considered unless embodied in the bill of exceptions, although it is set forth in the abstract of the record

(§ 9) *C. Form, requisites, and settlement of secondary record.* 1. *The bill of exceptions.*[76]—The bill of exceptions in some jurisdictions embraces all matters not part of the record proper, while in others it is confined to specific errors, being used concurrently with other forms of secondary record,[77] while in yet others separate bills are settled to each alleged error. In the absence of statute or rule a joint bill may be settled on behalf of several appellants,[78] and several exceptions may be authenticated by one bill.[79] Reference by one bill to another is sometimes allowed.[80] The bill of exceptions is ordinarily required to be embraced in one document,[81] in clear, orderly, and coherent form,[82] and should include all matters essential to the questions involved[83] which were presented to the trial court, and nothing that was not so presented. Condensation into narrative form is usually required.[84]

proper. Moore v. Harmes [Mo. App.] 99 S. W. 764. Affidavits copied into record but not preserved by certificate of evidence. Bellinger v. Barnes, 223 Ill. 121, 79 N. E. 11. Prayers for instructions printed in record immediately after bill of exceptions but not as part thereof will not be considered. Phillips v. Washington & R. R. Co. [Md.] 65 A. 422. Action of trial court in granting motion to set aside verdict and for new trial held not reviewable where bill of exceptions did not show that any exception was reserved to court's action (Southern States Lumber Co. v. Green [Ala.] 43 So. 102), but errors in the bill of exceptions may be corrected by reference to the order book entries. Instructions considered though bill of exceptions showed exception in gross, where order book entry showed that exceptions were several. Baltimore, etc., R. Co. v. Kleespies [Ind. App.] 78 N. E. 252. Report of evidence in support of motion for new trial will not be considered in aid of the bill unless incorporated therein. Jones v. Jones, 101 Me. 447, 64 A. 815.

76. See 7 C. L. 167.

77. Under Comp. Laws, §§ 3860, 3425, 3427, orders denying motions to strike out and amend a judgment may be presented by a statement on appeal instead of a bill of exceptions. State v. Murphy [Nev.] 88 P. 335.

78. A bill properly filed is available to all parties whose exceptions appear therein. Yaryan v. Toledo, 75 Ohio St. 307, 79 N. E. 465. Where bill purported to be in behalf of two defendants, but their defenses were entirely independent and unconnected. Lord v. Rowse [Mass.] 80 N. E. 822.

79. But each exception must relate to single proposition. Addis v. Rushmore [N. J. Err. & App.] 65 A. 1036.

80. Where bill relating to instructions commenced, "The testimony upon the part of the plaintiff being closed, the defendant offered the following prayer," the evidence contained in a former bill was considered in passing on the ruling on the prayer. Di Giorgis Importing & Steamship Co. v. Pennsylvania R. Co. [Md.] 65 A. 425.

81. Where the bill of exceptions is contained in two separate volumes, a certificate as to one is not sufficient to identify the other, though it contains exhibits referred to in the authenticated volume, nor will file marks or indorsements placed thereon by the clerk of the trial or of the supreme court supply the place of proper authentication. State v. Paxton [Neb.] 108 N. W. 159.

82. Sufficiency of evidence will not be reviewed where it consists largely of a vast quantity of exhibits thrown into the record without index or classification. Schell v. Walla Walla [Wash.] 86 P. 1114. Must state separately and clearly the exceptions relied on. Court and Practice Act 1905, p. 139, § 490, promulgating this rule, held substantially complied with. Grimwood Co. v. Capitol Hill Bldg. & Const. Co. [R. I.] 65 A. 304.

83. Kiesewetter v. Supreme Tent of Knights of Maccabees [Ill.] 81 N. E. 19. Under St. 1899, § 3741, a bill of exceptions must contain all the evidence bearing on and necessary to explain the error complained of. State v. Craig [Wyo.] 89 P. 584. Exceptions to evidence should clearly point out that objected to, reference to pages of evidence in lower court being usually insufficient. Matthews v. Targarona [Md.] 65 A. 60. Must show that points raised are material and that rulings are erroneous and prejudicial. Jones v. Janes, 101 Me. 447, 64 A. 815. The record in the suit and judgment claimed to operate as res adjudicata in this case was so briefly referred to in the bill of exceptions that it was impracticable to determine whether it had that effect or not and the question was left open. Board of Education of Glynn County v. Day [Ga.] 57 S. E. 359. Exceptions to an auditor's report ought not to refer the court from one part of the record to another to discover what was ruled, and to other and various parts of the record to search for evidence relating to that particular point, but the exception should be complete in itself. Baxter & Co. v. Camp, 126 Ga. 354, 54 S. E. 1036. Where exceptions to the report of an auditor in an equity case involve a consideration of the evidence on which the auditor based his findings, it is incumbent on the party excepting to set forth, in connection with each exception, the evidence necessary to be considered in passing thereon, or to attach thereto as an exhibit so much of the evidence as is pertinent, or at least to point out where such evidence is to be found in the brief of the evidence filed by the auditor. Orr v. Cooledge, 125 Ga. 496, 54 S. E. 618. In Georgia the bill of exceptions must specify plainly the decision complained of and the alleged error, Civ. Code 1895, § 5527. Baxter & Co. v. Camp, 126 Ga. 354, 54 S. E. 1036.

84. Failure to condense evidence as required by Circuit Court Rule 33, subd. 5, Code 1896, p. 1201, not ground for striking bill where such condensation is not practicable. Boyett v. Standard Chem. & Oil Co. [Ala.] 41 So. 756. Under rule 1 (37 S. x), every question to a witness which is basis

Papers referred to therein must be annexed or identified beyond doubt.[85] Skeleton bills, that is bills which provide for the subsequent copying by the clerk into and as a part of them of some paper or document, are allowed in some states.[86] Appellant must see that record contains everything necessary to review, and its omissions will be construed against him,[87] the burden being upon him to affirmatively show error,[88] but mere formal defects or irregularities which do not cloud the record or violate a statutory requirement will be disregarded.[89] As a general rule deficiencies in matters which belong to the bill of exceptions cannot be aided by other parts of the record.[90] The bill of exceptions must, in some states, show on its face that it was presented, signed and filed in due time,[91] while in others such a show-

of some ground for reversal mentioned in assignment of errors, with its answer, if any, shall be stated at length, it is no ground of objection that questions and answers are "scattered through the record." Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 So. 903.

85. Certificate of evidence held to be sufficiently incorporated in the bill of exceptions, in a legal sense, and identified to make it a part thereof. De Board v. Camden Interstate R. Co. [W. Va.] 57 S. E. 279. Bill of exceptions and report of evidence held to be so articulated as to form one paper, thus sufficiently identifying the evidence referred to in the bill. Kecoughtan Lodge v. Steiner [Va.] 56 S. E. 569. A statement purporting to be the evidence in the case with the following certificate of the trial judge: "I hereby certify that the foregoing is all the evidence in this case," was incorporated in the record, but was not mentioned in or attached to or otherwise identified by the bill of exceptions. It was held that assignments of error based on such evidence could not be considered. United States Mineral Co. v. Camden [Va.] 56 S. E. 561. Bill of exceptions must show relation of exhibits and excerpts therein contained to issues involved. Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. [C. C. A.] 151 F. 466. While it is the better practice for the evidence to be set out in the bill of exceptions before the signature of the judge is attached, the failure to do this is not fatal where the certificate and identification of the evidence by the court is complete, and it is in effect made part of the bill of exceptions. Jeremy Imp. Co. v. Com. [Va.] 56 S. E. 224.

86. It is not necessary that a bill of exceptions be contained in one document. Parts of it may be in the form of exhibits to be inserted in the proper places according to directions given therein, but all of the bill must be present and examined when it is signed by the judge, and the several papers to be copied must be so marked as exhibits that no mistake in their identity can be made. Nashville R. & Light Co. v. Marlin [Tenn.] 99 S. W. 367. Skeleton bill of exceptions not containing evidence, charge, and requested charges, or sufficiently identifying them to bring them into the record. Id. Under the Missouri statute, Laws 1903, p. 105, deeds offered in evidence, if called for in the bill of exceptions by the name of grantor and grantee and the dates of their execution and acknowledgment and their record, and copied in full in the abstract, are parts of the record, though not filed and left with the clerk to remain in his custody until after termination of the appeal. Quail v. Lomas, 200 Mo. 674, 98 S. W. 617. Where bill of exceptions called for copying of instructions and motion for new trial, held that it was sufficient though they were not carried into the bill in full. Collins v. Crawford [Mo.] 103 S. W. 537.

87. Fact that bill shows that it does not contain all evidence does not invalidate it where it appears that the portion omitted does not affect question on which final determination of case depends. Cincinnati Seating Co. v. Neiry [Ind. App.] 81 N. E. 216. Bills of exceptions must be construed against the party excepting. Bill of exceptions held not to sufficiently identify certain book as one offered in evidence so that it could not be held that court erred in not admitting it. Bienville Water Supply Co. v. Hieronymus Bros. [Ala.] 43 So. 124.

88. See post, § 9 D.

89. The only error assigned in the bill of exceptions being upon the ruling of the court sustaining defendant's demurrer and dismissing the case, and all of the record material to a clear understanding of the error complained of being duly specified, the writ of error will not be dismissed merely because the plaintiff in error also specified as material "the brief of the evidence and the ruling of the court as contained therein," when in fact there was no brief of evidence. Giddens v. Alexander, 127 Ga. 734, 56 S. E 1014. Bill on appeal from superior court's judgment of nonsuit not noticed by record of motion for new trial being appended to it. Kebabian v. Adams Exp. Co., 27 R. I. 564, 65 A. 271. Where "defendant" was inadvertently used for "plaintiff" in bill of exceptions, the intended meaning was adopted on appeal. Ball v. The Tribune Co., 123 Ill. App. 235.

90. See ante, § 9 B.

91. Recital in bill of day it was presented and signed must be taken as correct, but not as to general statement that it was presented within proper time. Malott v. Central Trust Co. [Ind.] 79 N. E. 369. Record must show that bill of exceptions was filed in due time, and it will not be presumed that it was filed on the last day of a month so as to bring it within such time. Phoenix Accident & Sick Benefit Ass'n v. Lathrop [Ind. App.] 81 N. E. 227. Bill signed during purported extension cannot be considered unless record affirmatively shows that time was extended before expiration of time first granted. Louisville & N. R. Co. v. Dobson [Ala.] 43 So. 138. Memorandum purporting to be signed by the

ing is deemed an essential part of the record proper.[92] An unsigned explanation appended to a bill of exceptions cannot be looked to,[93] nor can statements in the certificate limit the effect of the facts shown in the bill.[94]

Settlement, signing, and filing.[95]—The bill must be settled by the judge[96] or referee[97] who tried the case, unless disqualified,[98] deceased, or retired.[99] It must be presented [1] during the term [2] or within the time limited by statute rule or

judge beneath his signature to bill but wholly outside thereof, to effect that bill was presented to him for signature on certain date, held not a compliance with Burns' Ann. St. 1901, § 641, requiring bill to state date of presentation to judge to be stated in bill where same is not filed within time allowed. Walters v. Walters [Ind.] 79 N. E. 1037. It must affirmatively appear from the bill of exceptions, or the entries thereon, or the record, that the bill of exceptions was presented within the time prescribed by law. Crawford v. Goodwin [Ga.] 57 S. E. 240.

92. See ante, § 9 A.

93. Morris & Co. v. Southern Shoe Co. [Tex. Civ. App.] 99 S. W. 178.

94. A judgment which recites a general finding in favor of one party is a finding in his favor upon every issue raised by the pleadings and supported by evidence, and cannot be limited by a statement of the trial judge in a certificate to a bill of exceptions. Hopper v. Arnold [Kan.] 86 P. 469.

95. See 7 C. L. 169.

96. The judge and not the clerk must certify as to what papers were used on motion for a new trial. Crowley v. Croesus Gold & Copper Min. Co. [Idaho[86 P. 536. Rev. Laws, c. 173, § 108, providing that in certain cases a judge other than the one presiding at the trial may allow exceptions, applies only when the trial judge fails to sign or return the exceptions, and does not authorize another judge to allow another bill of exceptions after death of the judge by whom the first bill was allowed. Commonwealth v. Porn [Mass.] 81 N. E. 305. The signing of the bill of exceptions, identification of each part thereof, is a judicial act upon the part of the trial judge which cannot be delegated to or conferred upon any other than himself. Nashville R. & Light Co. v. Marlin [Tenn.] 99 S. W. 367. Exceptions to master's report must be allowed by trial court by special order. See Chancery Rule 31. Huntress v. Hanley [Mass.] 80 N. E. 946. Judge who, under order of governor, presides over part of term in circuit other than his own, tries case which is concluded on day of adjournment, and before adjournment grants extension of time for moving for new trial, under Laws 1905, p. 81, c. 5403, may hear and determine motion for new trial within his own circuit and in vacation, if presented within time limited, though time of his assignment to such other circuit has expired, and may, at time and place of ruling on such motion, make order granting time within which to prepare and present bill of exceptions, and may certify and sign same within time so granted. Atlantic Coast Line R. Co. v. Mallard [Fla.] 43 So. 755. A judge of another circuit may properly sign a bill of exceptions as judge of the trial court where as such judge he heard the cause. Rosenbom v. Renk, 121 Ill. App. 226.

97. Where the cause is submitted to a referee to hear the same and to make findings of fact and conclusions of law, the evidence can only be presented for review by a bill of exceptions signed by the referee. Iralson v. Stang [Okl.] 90 P. 446. Where the evidence is heard by a referee who reported only findings of fact and conclusions of law, the judge has no power to sign a bill of exceptions preserving the evidence, or to incorporate the same into a case made unless first authenticated by the referee. Id. Where a cause is referred to a referee to find the facts and to report conclusions of law, the sufficiency of the evidence to support the findings of the referee cannot be considered where the evidence is not embodied in a bill of exceptions signed and allowed by the referee. Id. The evidence taken before a referee directed to try the cause and make findings can only be preserved by a bill of exceptions signed by the referee. Howe v. Hobart [Okl.] 90 P. 431.

98. Under Code Civ. Proc. § 170, a judge related within the third degree to defendant's attorney is not qualified to make an order extending the time for serving a bill of exceptions notwithstanding § 1054. Johnson v. German American Ins. Co. [Cal.] 88 P. 985.

99. Neither under the provisions of section 5543 of the Civil Code of 1895, nor under any other provision of law in Georgia, is one who has been a trial judge given any authority to certify, after the judge goes out of office, by resignation or otherwise, a fast bill of exceptions. Brand v. Lawrenceville, 127 Ga. 237, 55 S. E. 967. It is the duty and right of a judge's successor to settle and sign a bill not settled and signed by a deceased trial judge. Linderman Box & Veneer Co. v. Thompson, 127 Ill. App. 134.

1. Presentation to the clerk is not presentation to the justice. Johnson-Wynne Co. v. Wright, 28 App. D. C. 375.

2. Wilson v. Burbank [Mo. App.] 100 S. W. 491. On appeal from circuit court, held that bill of exceptions signed by judge after adjournment of court would be stricken where record did not show that any time was given for signing of same in vacation in manner authorized by statute, Gen. Acts 1903, p. 74, giving twenty days after rendition of decrees for signing bills, and authorizing an extension, being an amendment of Code 1896, § 465, and applying to appeals from probate court only. White v. Roe [Ala.] 44 So. 211. Bill cannot be considered when not properly signed. Western Union Tel. Co. v. Garthright [Ala.] 44 So. 212. Bill signed in vacation stricken where there was no order of court or agreement of counsel for an extension. Olderson v. Prattville [Ala.] 42 So. 986. Bill stricken where its recitals showed that it was not signed at term at which judgment was rendered, and no order entered during term extending time for its signing was shown by record. Clark

order,[3] or an extension of such time duly allowed [4] before the expiration of the time

v. Jernigan [Ala.] 42 So. 833. Under West Virginia Code 1906, c. 131, § 9, a bill of exceptions signed by a judge in vacation within thirty days after the adjournment of the term is not a part of the record unless the judge also certified the bill and the order certifying it was recorded. Jones v. Harmer [W. Va.] 55 S. E. 657. Pendency of motion in arrest does not relieve from filing bill at judgment term. Diamond Match Co. v. Wabash R. Co., 121 Mo. App. 43, 97 S. W. 993. Under the West Virginia Statute, (Code 1899, c. 131, § 9; Code 1906, § 3979), bills of exception are required to be signed at the term at which the trial is had or within thirty days after the adjournment thereof. Crowe v. Corporation of Charlestown, [W. Va.] 57 S. E. 330.

3. Where bill of exceptions was not signed until after expiration of thirty days from date of trial, and no extension was granted within that time, held that it could not be considered for purpose of reviewing rulings at trial. Cobb v. Owens [Ala.] 43 So. 826. In Georgia if the record and bill of exceptions show that the demurrer was heard before the trial, and that the trial was concluded more than sixty days before the bill of exceptions was tendered and no exceptions pendente lite were filed to the judgment overruling the demurrer, the supreme court will not consider the assignment of error upon the overruling of the demurrer. Yearwood v. Lang, 127 Ga. 155, 56 S. E. 305. Bill must be presented to judge for signature within time allowed for filing. Walters v. Walters [Ind.] 79 N. E. 1037. The Georgia statute, Civil Code 1895, § 5539, does not authorize delay in tendering a bill of exceptions alleging error in a judgment rendered during a given term for more than thirty days after the final adjournment of the court for that term. Crayford v. Goodwin [Ga.] 57 S. E. 240. The bill of exceptions must be presented for approval within the time limited by statute, rule, or order. Bledsor v. Columbia Mills Co., 75 S. C. 545, 55 S. E. 886. Bill not presented in time will not be considered though it was allowed. Western Union Tel. Co. v. Rowe [Tex. Civ. App.] 16 Tex. Ct. Rep. 863, 98 S. W. 228. Where bill is allowed and signed within time allowed by law, it will be presumed that preliminary steps required by rule of lower court, such as presentation to opposing counsel within certain time, were duly taken. Boyce v. Bolster [Vt.] 64 A. 79. A writ of mandate will not issue to compel a court to settle a bill not timely presented. Shipman v. Unangst [Cal.] 88 P. 1090. A bill of exceptions not presented within ten days after the service of the proposed bill and amendments, as required by Rev. St. 1898, § 3286, as amended by Laws 1905, p. 7, c. 7, will be stricken from the record upon motion. Van Why v. Southern Pac. Co. [Utah] 86 P. 485. An order that "defendant is allowed ninety days in which to prepare and file its bill of exceptions" does not allow ninety days from the last day of the term, but ninety days from the day the order is made. Roberts & Shafer Co. v. Jones [Ark.] 101 S. W. 165. After expiration of time originally granted for presentation of bill of exceptions, court has no power to further extend time by nunc pro tunc order or otherwise. Pieser v. Minkota Mill. Co., 124 Ill. App. 280. Bill **signed** after time allowed cannot be considered. Penton v. Williams [Ala.] 41 So. 783. Rulings complained of in assignments of error will not be reviewed by the supreme court of Georgia if made more than six months before the filing of the bill of exceptions, and if no exceptions pendente lite to such rulings were properly filed. Lambert Hoisting Engine Co. v. Dexter, 127 Ga. 581, 56 S. E. 778.

4. Under Acts 1898, p. 183, § 17, relating to Clay county court, held that court and not judge is authorized to grant extension of time for signing bills of exceptions, and that bill signed after adjournment under order of judge extending time until after adjournment would be stricken. Dial v McKay [Ala.] 43 So. 218. Time for signing may be extended by agreement of parties on appeal from Bessmere City court, provided signature be made within six months from date of trial. Birmingham R. Light & Power Co. v. Martin [Ala.] 42 So. 618. Where judge of city court of Bessmere, under authority of § 18 of act establishing such court [Acts 1900-01, p. 1863], extended during term the time for signing bill of exceptions, and granted subsequent extension by order made before expiration of limit formerly fixed, and time. Id. Under Acts 1900-01, establishing city Court of Bessmer, § 18, the judge of such court had authority to extend time during term. Id. Code 1896, p. 1200, rule 30, limiting time of extension by agreement and requiring signature before next term of court, does apply to extensions by the presiding judge. Harton v. Avondale [Ala.] 41 So. 934. The time for filing a bill of exceptions signed by a special judge cannot be extended by the regular judge. Martin v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 101 S. W. 672. The reservation of objection at time of service of bill of exceptions as to timeliness thereof does not constitute "a proceeding" within Code Civ. Proc. § 473, so as to require appellant to take steps thereunder to relieve himself from default within six months, but he had a reasonable time not exceeding six months from the time objections were imposed on hearing for settlement. Pollitz v. Wickersham [Cal.] 88 P. 911. Under Acts 1888-89, § 19, presiding judge of city court of Birmingham may extend time for signing during term, his power in the premises not being limited to vacation, as is case under general laws with reference to courts with short terms. Moss v. Mosley [Ala.] 41 So. 1012. Harton v. Avondale [Ala.] 41 So. 934. Under the Missouri statute, Rev. St. 1889, § 2168 (Rev. St. 1899, § 728), where the court has extended the time for filing the bill of exceptions, counsel by written stipulation may further extend the time. Cleveland Co-Operative Stove Co. v. Baldwin, 121 Mo. App. 397, 99 S. W. 47. Where motion for new trial was made within thirty days of date of trial, and on overruling motion court granted thirty days for a bill of exceptions, and within that time granted an extension of ten days from expiration of first order, held that bill of exceptions signed within extended time, excluding in computation day of expiration

originally limited [5] and made of record. Settlement need not be in the county where the case was tried.[6] Relief in case of accident, mistake, or other excusable neglect is generally provided.[7] The bill must be approved as and for a bill [8] in such manner as to verify it.[9] Approval must be by the judge, as such, within the

of first order, could be looked to for purpose of reviewing ruling on motion. Cobb v. Owens [Ala.] 43 So. 826. Acts 1896-97, p. 324, §§ 1, 5, 15, relating to city court of Anniston, construed, and held that, within thirty days after trial of cause, court had power to extend time for signing bill of exceptions for such a period as it, in its discretion, might see fit, even though it extended time into another term. Murphy v. St. Louis Coffin Co. [Ala.] 43 So. 212. Authority of city court of Anniston to grant, or of parties to agree upon, extension, held not limited to one extension, so that where court granted one extension, signing within subsequent extension agreed upon by counsel was valid. Id. Granting of order extending time for filing bill of exceptions held a judicial act so that it was a nullity when made without territorial limits of judge's jurisdiction, and bill signed within such extended time stricken on motion. Rainey v. Ridgway [Ala.] 43 So. 843. Judges' orders, made in vacation, extending the time for signing bills of exceptions, may be properly shown either by setting them out in the record proper or embodying them in the bill. Sellers v. Farmer [Ala.] 43 So. 967. Court held to have properly refused to sign bill after expiration of extension, plaintiff having been given one hundred and twenty days for its preparation, the maximum time allowed by Code. Zehe's Adm'r v. Louisville, 29 Ky. L. R. 1107, 96 S. W. 918. Where before expiration of time given for filing a bill of exceptions an order is made extending time for filing, the time will be computed from expiration of time given by the former order and not from date of last order. Czajkowski v. Robinson, 124 Ill. App. 97. Order of court extending its term for purpose of settling bill of exceptions as per rule 54 held equivalent to extension of time within which to present bill as provided by rule 55. Moran v. Wagner, 28 App. D. C. 166. Bill stricken where not presented within extension of time granted Pittsburgh, etc., R. Co. v. Brandota, 126 Ill. App. 92.

5. Riddle v. Regan [Ala.] 41 So. 953; Mitchell v. State [Ala.] 41 So. 518; Oxford & Coast Line R. Co. v. Union Bk. [C. C. A.] 153 F. 723. Acts 1903, p. 404, and practice rule 30 (Code 1896, p. 1200), construed, and held that bill of exceptions signed after next succeeding term of county court could not be considered, though parties extended time by agreement. Rainer Mercantile Co. v. Deal [Ala.] 44 So. 100. Should a judge through mistake or forgetfulness fail, within the initial period of five days, to make his endorsement upon a bill of exceptions of the extension of the time for the signing thereof, the subsequent endorsement of the extension thus granted and signing of the bill within the extended period would be in accordance with law. Cincinnati St. R. Co. v. McBee, 4 Ohio N. P. (N. S.) 13. Should a judge through mistake or forgetfulness fail, within the initial period of five days, to make his indorsement upon a bill of exceptions of the extension of the time for the signing thereof, the subsequent endorsement of the extension thus granted and signing of the bill within the extended period would be in accordance with law. Id. Bill stricken because order of extension of time for signing was made after expiration of time fixed by previous order. Iron City Min. Co. v. Hughes, 144 Ala. 608, 42 So. 39. Objection that order extending time for signing was not made until after expiration of term held waived by appellee's participation, without objection as to time, in the settlement of the bill when presented. Williams v. U. S. Fidelity & Guaranty Co. [Md.] 66 A. 495.

6. Rosenbom v. Renk, 121 Ill. App. 226.

7. Relief in case of accident, mistake, or other excusable neglect, is generally provided. Bledsoe v. Columbia Mills Co., 75 S. C. 545, 55 S. E. 886. Failure to sign in term excused by loss of exhibits where facts were certified by trial judge. Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. [C. C. A.] 151 F. 466. A bill of exceptions cannot be signed and made a part of the record after the time limited by statute for such signing has expired, nor can jurisdiction to sign after the expiration of such time be conferred by consent of parties. Crowe v. Corporation of Charles Town [W. Va.] 57 S. E. 330.

8. Leatherwood v. Richardson [Ariz.] 89 P. 503. Ky. St. 1903, §§ 4639, 4641, 4644, construed, and held that original bill of exceptions filed in circuit court by order of that court could not be brought to court of appeals where it was not attested by circuit judge, and it did not appear that evidence was taken in shorthand by the official reporter. Blackburn v. Hanlon, 29 Ky. L. R. 1290, 97 S. W. 352. Where circuit judge inadvertently fails to sign bill of exceptions when he makes order for filing it, he may sign it after it is filed in court of appeals. Id. Bill not signed by trial judge and not showing when it was filed, no bill of exceptions. City of Alton v. Eck, 122 Ill. App. 282.

9. A certificate of the judge that "I have this day settled the within statement in the manner marked by me in pencil, allowing the proposed amendments where so marked and disallowing them where so marked," is not sufficient where made before the statement was engrossed. Crowley v. Croesus Gold & Copper Min. Co. [Idaho] 86 P. 536. The certificate must certify that the bill is true. Cade v. Du Bose, 125 Ga. 832, 54 S. E. 697. Where the authentication of a bill of exceptions states that it is signed with the distinct understanding that any valid objections may be urged by counsel for plaintiff, and corrections made, it cannot be considered. Sims v. Young [Ark.] 98 S. W. 681. Grounds of a motion for a new trial which are not verified cannot be considered, by the supreme court. A ground of such a motion will be held not to be verified (a) when the record is silent on the subject, (b) when the record discloses an affirmative refusal to verify, and (c) when the judge

time allowed by law,[10] and the approved bill must be filed [11] in the court below after signature [12], within the time allowed by law,[13] and in some jurisdictions it is required to be served on the adverse party,[14] time for objection and amendment being allowed.[15] In Kentucky, where the case was reported, the judge need not accept anything but the reporter's transcript as a proposed bill.[16] It is generally held that if the bill is presented in time, delay of the court will not prejudice appellant,[17]

appends to the motion a note which states facts in conflict with any statement in the ground which would be material in the consideration of the errors complained of. Burdette v. Crawford, 125 Ga. 577, 54 S. E. 677.

10. "The trial court cannot properly authenticate a bill of exceptions after the time to file the same has expired." Priddy v. Hayes [Mo.] 102 S. W. 976. Under the Virginia Statute, Code of 1904, § 3385, bills of exceptions are properly a part of the record if signed in vacation within thirty days after the end of the term at which the final judgment was rendered. Manchester Home Bldg. & Loan Ass'n v. Porter [Va.] 56 S. E. 337. And failure to sign is not cured by judge's certificate that it was allowed, settled, and signed within such time. Oxford & Coast Line R. Co. v. Union Bk. [C. C. A.] 153 F. 723. If for any good cause the trial justice is prevented from signing a bill within rule time he may thereafter settle it nunc pro tunc. Johnson-Wynne Co. v. Wright, 28 App. D. C. 375. Lower court has jurisdiction to sign bill of exceptions after dismissal of appeal. Rev. St. 1899, §§ 727, 728. McNealy v. Bartlett [Mo. App.] 95 S. W. 273.

11. Where change of venue was taken on merits of cause after an appeal from order refusing to vacate appointment of receiver, held that bill of exceptions should have been filed in court from which venue was changed, and filing in court to which case was transferred was ineffectual. Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S. W. 167.

12. There being no record entry outside bill of exceptions showing that it was filed, the same could not be considered. Bower v. Daniel, 198 Mo. 289, 95 S. W. 347.

13 Priddy v. Hayes [Mo.] 102 S. W. 976; London v. Hutchens [Ark.] 97 S. W. 443; Nashville R. & Light Co. v. Trawick [Tenn.] 99 S. W. 695; London v. Crow [Tex. Civ. App.] 102 S. W. 177; Oxford & Coast Line R. Co. v. Union Bk. of Richmond [C. C. A.] 153 F. 723. Agreements extending time for filing bill of exceptions held sufficiently authenticated to become part of record. Rainer Mercantile Co. v. Deal [Ala.] 44 So. 100. In Kentucky where appellee is allowed to file a bill of exceptions and is given until a certain date to do so, a bill not filed in open court until after that date cannot be considered, although an endorsement of the clerk shows that it was filed with him prior to that date. Phillips v. Beattyville Mineral & Timber Co., 30 Ky. L. R. 1102, 100 S. W. 244. It is no excuse for not filing within the time so fixed that the special judge who tried the case was not present at the term until the day upon which the bill was filed. Id. Mere statement by clerk, on record, that time for filing bill was extended, and not showing how, held insufficient. Thompson v. Clear Jack Min. Co., 118 Mo. App. 524, 95 S. W. 307. The provision of the Texas statute permitting the court of civil appeals, under certain conditions, to consider a statement of facts filed after twenty days from adjournment does not extend to bills of exceptions. London v. Crow [Tex. Civ. App.] 102 S. W. 177. A bill of exceptions signed by the judge and filed after the expiration of the time for filing cannot be looked to to determine whether such timely exceptions were made. Id. Rule requiring eight days' notice to opposite party of settling of bill of exceptions is not mandatory but may be waived by the justice and the fact that he approves and signs it without such notice is not ground for striking it. Lindsey v. Pennsylvania R. Co., 26 App. D. C. 125. But trial justice may refuse to settle the bill if the required notice is not given. Johnson-Wynne Co. v. Wright, 28 App. D. C. 375.

14. Where a bill of exceptions is presented to the judge for settlement and no notice is given the adverse party; or where it is delivered to the clerk and no time is designated for settlement and no notice is given the adverse party of any time designated for settlement as required by statute, the bill will be stricken. Van Why v. Southern Pac. Co. [Utah] 86 P. 485. Under the Georgia Statute, Civ. Code 1895, § 5567, it was held that, upon motion made at the time of calling the case on appeal, an order would be granted directing the clerk of the supreme court to return the original bill of exceptions and affidavit of the clerk of the superior court that the entry of service might be filed and annexed to the bill of exceptions in terms of the law. Morrison v. Hilburn, 126 Ga. 114, 54 S. E. 938. When several persons are named in a bill of exceptions as defendants in error, an acknowledgment of service thereon, signed by an attorney "for" one of these persons by name "et al," affords no evidence of service of the bill upon the others or any one or more of them. Carter v. American Ginger Ale & Carbonating Co., 125 Ga. 819, 54 S. E. 755. An acknowledgement of service does not bind any person not actually named or sufficiently described in the bill of exceptions as a defendant in error when the acknowledgment is entered. McGregor v. Witham, 126 Ga. 702, 56 S. E. 55.

15. In an error proceeding the adverse party is entitled to ten full days for the filing of objections to the bill of exceptions, and the transmission of the bill and the receiving of by the trial judge on the tenth day after notice of its filing is premature, but where this abridgment of the rights of the defendant in error is a matter for which the clerk of court is responsible, and for which the plaintiff in error is in no way chargeable, and it is not shown that the bill was open to any objection or amendment, such an irregularity in the intermediate steps is not jurisdictional. Akron Water Works Co. v. Swartz, 8 Ohio C. C. (N. S.) 509.

16. Sebree v. Rogers [Ky.] 102 S. W. 841.

17. Failure of trial judge to sign and

nor will the failure of the clerk to append the filing mark,[18] and the judge may make amendments after expiration of the time to present.[19] The court need not sign an incorrect bill,[20] but should correct it to conform to the fact.[21] The duty of the trial court to approve a truthful bill presented in time will be enforced by mandamus,[22] but an appellate court will not, on mandamus, overrule the statement of the trial judge as to what were the facts.[23] In some states provision is made for authentication by affidavit of bystanders if the judge refuses to sign,[24] or for the establishment of the bill in the appellate court.[25] A bill duly settled is a record and can only be corrected as such.[26]

seal bill of exceptions until expiration of time for filing cured by action of appellate court in overruling motion to strike bill and allowing an amendment to same. Chaplin v. Illinois Terminal R. Co. [Ill.] 81 N. E. 15. Where appellant prepared and presented his bill of exceptions within the time allowed for having them signed and made part of the record, but they were not signed and filed with the record until after the expiration of that time and after a subsequent term of court had intervened, it was held that they could not be considered on appeal. Anderson v. Com., 105 Va. 533, 54 S. E. 305. Explanation in judge's certificate held to show that delay in signing such certificate, the bill of exceptions having been presented within the required time, was through no fault of plaintiff in error. Johnson v. Tanner, 126 Ga. 718, 56 S. E. 80. It is generally held that if the bill is presented in time, delay of the court will not prejudice the appellant. Id.

18. Eureka Stone Co. v. Knight [Ark.] 100 S. W. 878.

19. Amendment to bill not certified in time under Georgia statute, Acts 1905, p. 84. Marshall v. English-American Loan & Trust Co., 127 Ga. 376, 56 S. E. 449.

20. An affidavit of counsel accompanying a proposed bill of exceptions, stating that it contains all the evidence bearing on and explanatory of the exceptions and errors complained of, is not conclusive upon the judge requested to allow the same. State v. Craig [Wyo.] 89 P. 584.

21. Under Rev. St. 1899, § 3743, it is the duty of the court to sign and allow a presented bill of exceptions if correct, and if not to correct the same or suggest the corrections to be made. State v. Craig [Wyo.] 89 P. 584.

22. The proper remedy is mandamus, not an appeal. Priddy v. Hayes [Mo.] 102 S. W. 976. The writ of mandamus will not issue to compel a judge of the trial court to sign a bill of exceptions complaining of a ruling made in a case which was not within the jurisdiction of such court, when such want of jurisdiction appears from the application for the writ. Harris v. Sheffield [Ga.] 57 S. E. 305. Mandamus will not issue from supreme court to compel judge of circuit court to treat as bill of exceptions paper stricken from record of probate court previous to appeal from that court to circuit court, since each court must make out its own record and certify to same. Ex parte Walker [Ala.] 43 So. 130. While judge cannot be compelled to sign particulier bill, he may be compelled to act where he arbitrarily refuses to sign any bill. State v. Deupree [Ind. App.] 81 N. E. 678. Refusal of judge to sign a bill of exceptions unless it is first presented to opposing counsel is not ground for mandamus. Branch v. Winfield [Ark.] 95 S. W. 1007. Cannot be compelled to sign a particular bill which he maintains is not correct. Id.

23. The proposal of amendment to a bill of exceptions lies within the judicial discretion of the trial judge, and mandamus will not lie to compel the settlement of one to which he has demanded corrections. State v. Craig [Wyo.] 89 P. 584.

24. Under the Texas statutes Rev. St. 1895, arts. 1369, 1014, providing that the appellant may, if the trial judge refuses to allow and sign his bills of exceptions, have the same attested by the signatures of bystanders, the appellate court will not consider bills of exceptions refused by the court and authenticated only by the affidavit of appellant's counsel. Rabb v. Goodrich [Tex. Civ. App.] 102 S. W. 910.

25. Nashville, etc., R. Co. v. Reynolds [Ala.] 41 So. 1001. Under Rev. Laws, c. 173, § 110, appellant's only remedy when his bill of exceptions is disallowed by superior court is petition to supreme judicial court to establish his exceptions. Hicks v. Graves [Mass.] 80 N. E. 590. Under Court & Practice Act 1905, § 494, this is the only remedy where the trial court does not allow the bill within twenty days after filing, such court having no authority to act after such time. Hartley v. Rhode Island Co. [R. I.] 66 A. 63. Where act creating court was declared unconstitutional after signing of bill, an application to supreme court to establish the bill was controlled and should have been made within time prescribed. Gen. Laws 1903, p. 396, and not Gen. Laws 1903, p. 398. Nashville, etc., R. Co. v. Reynolds [Ala.] 41 So. 1001.

26. Supreme judicial court has no power to allow amendments to bills of exceptions, and if there is any reason for such amendment the proper practice is to strike case from docket and remit it to court wherein exceptions were taken. Barnes v. Squier [Mass.] 78 N. E. 731. After expiration of statutory time for reducing exceptions to writing, new exceptions cannot be added without consent of adverse party and of trial judge. Sullivan v. Crave & Martin Co. [Mass.] 79 N. E. 792. The bill of exceptions, after proper authentication and filing, constitutes a part of the record and carries with it absolute verity, and it can be changed or amended only by proper nunc pro tunc entries in the trial court based upon sufficient memoranda to authorize their being made. Althoff v. St. Louis Transit Co. [Mo.] 102 S. W. 642. When a bill of exceptions is signed and filed, the matter therein becomes matter of record. Eliot v. Kansas

(§ 9 C) 2. *The settled case or statement of facts.*[27]—Except where the statute provides for the authentication by the stenographer of his transcript,[28] or for the

City, etc., R. Co. [Mo.] 102 S. W. 532. The supreme court cannot adjudicate questions sought to be raised by an amendment to the bill of exceptions allowed and certified by the trial judge after signing the certificate to the bill. Beck & Gregg Hardware Co. v. Crum, 127 Ga. 94, 56 S. E. 242.

27. See 7 C. L. 173.

28. A statute providing for the appointment of an official stenographer whose report of the evidence may be made to serve as a statement of facts does not apply to a statement prepared for a case tried prior to its enactment. Houston, etc., R. Co. v. Burnett [Tex. Civ. App.] 15 Tex. Ct. Rep. 833, 95 S. W. 741; Hooks v. Pafford [Tex. Civ. App.] 95 S. W. 742. An appellant who files his bill of exceptions separately from the transcript of evidence prepared by the stenographer under Laws 1905, p. 219, c. 112, is not in a position to raise the question of the constitutionality of this act. Routledge v. Rambler Automobile Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 386, 95 S. W. 749. Where appellant had in the record a statement prepared as formerly, he could not question the validity of this statute. Id. It is sometimes provided that a stenographer's transcript approved by the judge may be used in lieu of a statement of facts. Act 1905, authorizing such procedure, applied to case tried before but not appealed until after the statute took effect. Elliott v. Ferguson [Tex.] 100 S. W. 911. A transcript of the evidence made by a stenographer appointed under the Texas statute, Rev. St. 1895, art. 1295, to take down the testimony in a single case in the district court, cannot be considered on appeal, the acts 1905, p. 219, c. 112, providing for the appointment of an official stenographer and providing that his transcript of the evidence shall be a sufficient record on appeal not applying to such a case. Galveston, etc., R. Co. v. Quinn [Tex. Civ. App.] 100 S. W. 1036. Cause sufficiently identified in stenographer's transcript of evidence where designated by style and number, statement of the cause, date of trial, and names of counsel. Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133. Held that transcript of official stenographer could not be regarded as statement of facts under Sayles' Ann. Civ. St. 1897, art. 1295, where it was not agreed to by parties as such statement, and it did not appear that judge made out and signed such transcript as statement of facts because of their disagreement. Elliott v. Ferguson [Tex. Civ. App.] 97 S. W. 517. Statement of facts not prepared and authenticated as required by law in force at time of trial cannot be considered, nor can compliance with law be waived. Id. Acts 29th Leg., p. 219, c. 112, making report of official stenographer, when filed and approved, the statement of facts of oral evidence in case, held not to have become effective until July 17, 1905, and not to operate retroactively. Id. Even if it had been properly authenticated held that it could not be considered as legal statement of facts where it was not embraced in transcript but was sent up with it as separate paper. Id.

Filing: Under Supreme court rule requiring reporter's transcript to be filed at term judgment is rendered, term at which judgment is rendered is the term at which it becomes final by overruling a motion for new trial. Prescott Nat. Bk. v. Head [Ariz.] 90 P. 328. Under the Texas statute, Laws 1905, p. 219, c. 112, the statement of facts made out by the stenographer and approved by the district judge to be sent up with the transcript must first be filed in the district court within the time prescribed. Cockrell v. Walkup [Tex. Civ. App.] 99 S. W. 443. If the statement bears no file mark of the district court, it cannot be considered. Id. The Texas statute, Rev. St. 1895, art. 1295, and acts 1905, p. 219, c. 112, construed and held that a stenographer's transcript of the evidence sent up with the record in lieu of a statement of facts was not open to the objection that it was not made by an official stenographer, where the stenographer upon agreement of the parties, there being no official stenographer, was appointed by the court and kept a record of the proceedings in compliance with the act of 1905. Galveston, etc., R. Co. v. Quinn [Tex.] 102 S. W. 723. Where a transcript of the reporter's notes was not filed in the district court within the term at which the judgment was rendered, and no extension of time was granted, it cannot be considered as a statement of facts. Leatherwood v. Richardson [Ariz.] 89 P. 503. Failure of stenographer to comply with appellant's request to file a report of the evidence as required by statute was not ground for reversal where appellant did not try mandamus or prepare a statement of facts in the usual form, which would have been sufficient. Smith v. Pecos Valley etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 206, 95 S. W. 11.

Authentication: A transcript of the stenographer's notes cannot be considered where there is no certificate of the stenographer that the transcript is true, as required by Laws 1905, p. 534, c. 320, § 1. Venable v. Budd [Kan.] 89 P. 901. Document not showing that it was the official stenographer's transcript of the evidence, or that it was submitted to the adverse party, or that the documentary evidence was incorporated by direction of court, not a statement of facts within Laws 1905, p. 219, § 112. Pirtle v. Nell [Tex. Civ. App.] 16 Tex. Ct. Rep. 16. 97 S. W. 707. A stenographic report of the evidence not signed by the parties or their attorneys, and consisting of questions and answers, is not a sufficient statement of facts under the Texas statute, Rev. St. art. 1379. Galveston, etc., R. Co. v. Quinn [Tex. Civ. App.] 100 S. W. 1036. The certificate of the trial judge that such report was approved by the attorneys is not sufficient to make it a good statement of facts. Id. The certificate of the stenographer to a transcript of the evidence prepared under § 1 of chap. 320, p. 534, Laws 1905, is not effectual because it does not immediately follow the recital of the evidence where it specifically refers thereto. Hardy v. Curry [Kan.] 89 P. 19.

Contents: Laws 1905, p. 219, c. 112, refers

use on appeal of the statement on motion for new trial,[29] the case must be settled and approved by the judge who tried the case,[30] within the time limited by law, rule[31] or stipulation of parties, or an extension thereof duly granted.[32] Mandamus

only to the oral evidence. Documentary evidence need not be made a part of the stenographer's transcript. Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133.

29. A statement on appeal filed within twenty days after the denial of motions to strike out and amend the judgment, but nearly a year after the entry of the judgment, should not contain the depositions and testimony introduced on the trial. State v. Murphy [Nev.] 88 P. 335. A statement on motion for a new trial which showed that objections thereto for failure to timely serve were heard in open court on plaintiff's affidavit of mistake, etc., under Code Civ. Proc. § 473, authorizing relief in such cases, and on counter affidavits, and that the objections were, "after consideration, overruled, and said statement ordered settled and filed," sufficiently shows that relief was granted under the statute. King v. Dugan [Cal.] 88 P. 925. A statement is not "used on a motion for a new trial" within Code Civ. Proc. § 1736, providing that any statement so used may be used on appeal where the motion is not passed upon. Harrington v. Butte & Boston Min. Co. [Mont.] 90 P. 748. Where a notice of intention to move for a new trial was not timely served, the statement and bill of exceptions used on the motion cannot be considered on appeal. Vreeland v. Edens [Mont.] 89 P. 735.

30. Will not consider an agreed statement of facts not approved by the judge. Watson v. Birdwell [Tex. Civ. App.] 98 S. W. 407; Liberty Min. & Smelting Co. v. Geddes [Ariz.] 90 P. 332; Middlehurst v. Collins-Gunther Co. [Tex.] 99 S. W. 1025; Smith v. Pecos Valley, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 206, 95 S. W. 11. The printed case must be signed and settled by the trial judge and a stipulation that it is a copy of the record does not cure the defect. Sacks v. Hookey, 105 N. Y. S. 235. Where the court adopts the "appellant's case as amended by appellee's exceptions," the appellant must have the case as thus modified or drafted and submitted to the judge for signature otherwise there is strictly no "case settled," and the appellate court in its discretion, if there are no errors upon the face of the record, may ex mero motu either affirm the judgment or remand the case. Gaither v. Carpenter [N. C.] 55 S. E. 625. A certificate of the trial judge that certain enumerated papers, among them the statement of the case, constitute the judgment roll does not take the place of a settled statement of the case. Murphy v. Foster [N. D.] 109 N. W. 216. Where oral evidence set forth in the record is not authenticated by the trial judge and no bill of exceptions is filed, it cannot be considered. Jones v. Mitchell [Ark.] 102 S. W. 719. Where the statement of facts consists in what purports to be a stenographic report of the evidence, it cannot be considered if there is no certificate or approval by the trial judge as required by the Texas statute, Acts 1905, p. 220, c. 112. Citizens' R. Co. v. Robertson [Tex. Civ. App.] 103 S. W. 443. A detached statement of certain testimony, presumably the stenographic notes of the witness taken upon the trial, sent up with the record, not shown to have been examined and approved by the trial judge or filed by the clerk, cannot be considered for any purpose. St. Louis S. W. R. Co. v. Hill [Tex. Civ. App.] 103 S. W. 227. Statement following signed agreement that the "above statement" is a fair and complete statement, etc., held not a compliance with the statute. Walker v. Allen [Tex. Civ. App.] 15 Tex. Ct. Rep. 519, 837, 95 S. W. 585. Certificate of judge to stenographer's transcript of evidence need not show a disagreement of counsel before approval by judge. A recital that transcript was prepared at request of one of the parties and approved by judge held sufficient. Gulf, etc., R. Co. Pearce [Tex. Civ. App.] 95 S. W. 1133.

31. Mayo v. Goldman [Tex. Civ. App.] 16 Tex. Ct. Rep. 862, 97 S. W. 1061. Certificate of evidence must be signed by chancellor at decree term, or within such time as court has by order retained jurisdiction for that purpose. Stanmeyer v. Rosenwald, 121 Ill. App. 583. The case must be settled and approved within the time limited by law. Bledsoe v. Columbia Mills Co., 75 S. C. 545, 55 S. E. 886. Laws 1905, p. 534, c. 320, does not operate retrospectively so as to confer power upon a judge to settle a case made who had prior to its enactment lost jurisdiction. Lander v. Johnson [Kan.] 88 P. 258. A ruling, sustaining a demurrer to evidence, being appealable directly without a motion for new trial the filing of such motion does not enlarge the time within which a case may be made to review. White v. Atchison, etc., R. Co. [Kan.] 88 P. 54. Where it appears that a settlement of a statement of facts was premature, the court cannot take notice of an alleged oral stipulation authorizing such settlement where respondent denies the stipulation. Costello v. Drainage Dist. [Wash.] 87 P. 513. Under Ballinger's Ann. Codes & St. § 5058, a statement of facts settled within the ten days allowed to respondent to propose amendments thereto is invalid, though settled upon notice and although respondent does not thereafter propose amendments. Id. A statement of facts filed nearly three months after the time allowed will be ignored. Smith v. Pecos Valley, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 206, 95 S. W. 11.

32. Under Pierce's Code, § 4377, an order extending the time for filing a statement of facts cannot be made by the trial judge while in a county different from that in which the cause is pending without the consent of both parties. Driscoll v. Dufur [Wash.] 88 P. 929. Order allowing appeal in filing bond within twenty days and certificate of evidence in——days held not to retain court's jurisdiction for purpose of signing certificate of evidence after term. Stanmeyer v. Rosenwald, 121 Ill. App. 583. Order limiting time for presentation of certificate of evidence to a specified day allows all of that day for that purpose. Id. Under Wilson's Rev. & Ann. St. 1903, § 4742, providing "The court or judge may * * * extend the time for making a case," etc., the regular judge may extend the time

will lie to compel a judge to settle and sign a properly presented case-made,[33] unless he has already done so.[34] In Georgia the recitals of a motion are verified by the order thereon.[35] It is generally provided that the proposed case, with notice of settlement,[36] be served on the adverse party[37] who may present amendments or accept the case as proposed at the time of settlement,[38] and in some states settlement is requisite only when counsel fail to agree.[39] The proposed case when served must be

though he was not the trial judge. Whitacre v. Nichols [Okl.] 87 P. 865. Laws 1905, p. 535, c. 320, § 3, requiring notice to be served upon the adverse party of an order extending the time for making and serving a case, is directory only and failure to give does not affect the validity of the order. Goodnough v. Webber [Kan.] 88 P. 879. In Texas, under Rule 74 for district courts, where a paper read in evidence has not been copied in the statement of facts or made a part of it, the court has not the power after adjournment of the term at which the judgment was entered to authorize or require the clerk to make such paper a part of the record entitling it to be considered a part of the statement of facts. Haberzettle v. Trinity, etc., R. Co. [Tex. Civ. App.] 103 S. W. 219. The Kansas statute requiring the case made to be filed within ten days after judgment has no application to a transcript of evidence prepared under § 1, c. 320, p. 534, Laws 1905. Hardy v. Curry [Kan.] 89 P. 19. Pub. Acts 1905, p. 178, No. 129, granting lower court power to extend time for making and filing a settled case for one year after filing of decree on special motion and notice, has no application to an action before court on a parol demurrer to an amended bill of complaint and not on pleadings and proofs. City of Detroit v. Wayne Circuit Judge, 144 Mich. 696, 13 Det. Leg. N. 312, 108 N. W. 283.

33. Mandamus will not lie to compel a judge to make a statement of facts under a particular statute where he does not refuse to prepare it under a new statute which he erroneously believes is applicable. Houston, etc., R. Co. v. Burnett [Tex. Civ. App.] 15 Tex. Ct. Rep. 833, 95 S. W. 741. Where the trial judge refuses to make and file a statement of facts as required by statute, mandamus is the proper remedy to compel him to do so. The appellate court cannot consider the matter on bill of exceptions or assignment of error. Middlehurst v. Collins-Gunther Co. [Tex.] 99 S. W. 1025; Id. [Tex. Civ. App.] 99 S. W. 1027.

34. Judge need not examine a proposed statement if he has already made and filed one. Mayo v. Goldman [Tex. Civ. App.] 16 Tex. Ct. Rep. 862, 97 S. W. 1061.

35. Granting a motion to reinstate a case after nonsuit is such an implied verification of the truth of the ground upon which the motion was predicated that on exception to the judgment the appellate court will treat such ground as sufficiently verified; aliter, had the motion been denied. City of Atlanta v. Miller, 125 Ga. 495, 54 S. E. 538.

36 Under Ballinger's Ann. Code & St. § 5058, the court is without jurisdiction to settle a statement of facts where respondent has timely proposed amendments, except upon due notice to or appearance of adverse party. Cuschner v. Longbehn [Wash.] 87 P. 817. Where appellant does not serve notice within two days after service of proposed amendments to the statement that the statement and amendments will be submitted to the judge for settlement, as required by Comp. Laws, § 3427 et seq., he will be deemed to have agreed to the amendments. Young v. Updike [Nev.] 89 P. 457.

37. The fact that it was due to neglect of counsel that the case was not served in time will not save the right of appeal. Cozart v. Assurance Co., 142 N. C. 522, 55 S. E. 411. Failure to submit stenographer's transcript of evidence to adverse party before approval, as per Laws 1905, p. 219, c. 112, not ground for striking it. Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133. The statutory requirement that the case be served on the adverse party within a specified time is a condition precedent without compliance with which the appeal does not become potential. Cozart v. Assurance Co., 142 N. C. 522, 55 S. E. 411. General understanding of bar that no advantage will be taken of failure to serve case in time cannot prevail against terms of statute or agreement of parties. Id. If such an agreement exists, the time agreed upon is a substitute for the statutory time and the court cannot further extend it. Id. In the absence of an agreement of parties extending statutory time of service, the court has no power to extend it. Id. Where an extension of time for preparing and serving a case made is granted by an order made as part of the journal entry of the judgment of which all parties had notice, the notice of extension required by § 5482, Gen. St. 1905, need not be given. Gerdom v. Durein [Kan.] 87 P. 1137.

38. In absence of fraud, trial court has no power to amend or supersede a duly filed statement of facts after expiration of time for preparing and filing statements. Dorsey v. Olive Sternenberg & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 860, 94 S. W. 413.

39. When counsel do not agree only the "case settled" by the judge should come up in the record. No part of the tentative case of counsel on either side should come up save as they appear in the redrafted case signed by the court. Gaither v. Carpenter [N. C.] 55 S. E. 625. Where counsel have failed to agree the judge does not merely adjust the differences between the two cases, but may disregard both cases, and should do so if he finds that the facts of the trial were different. Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196. But if counsel differ then judge sets a time and place for settling the case, after notice that counsel of both parties may appear before him, and then "settles" the case. Revisal 1905, § 591. Id. In North Carolina if counsel agree, the trial judge has nothing to do with settling the case on appeal. Id. If neither party desires to carry up the facts in the method provided by the Texas statute, Acts 1905, p. 219, c. 112, and they can-

complete or must refer intelligibly to matters to be inserted.[40] In New York errors and omissions may be corrected by motion to resettle.[41]

(§ 9 C) 3. *Abstracts.*[42]—Where the practice of abstracting prevails, the appellant should, in every case, present in due time [43] an abstract containing all that is necessary to an understanding of the matters which he wishes to urge,[44] and

not agree upon a statement of facts, the trial judge must prepare a statement of facts under Rev. St. 1895, arts. 1379, 1380. Middlehurst v. Collins-Gunther Co. [Tex. Civ. App.] 99 S. W. 1027. Under Sayle's Rev. St. art. 1380, where the parties do not agree on a statement of facts, it is the duty of the judge to make and file one. Mayo v. Goldman [Tex. Civ. App.] 16 Tex. Ct. Rep. 862, 97 S. W. 1061.

40. The "case on appeal" should contain such incidents of the trial as were duly excepted to. Gaither v. Carpenter [N. C.] 55 S. E. 625. The respondent is entitled to have the case show that certain evidence was excluded on objection of appellant. Selah v. New York Times Co., 103 N. Y. S. 445. It is the appellant's duty to see that the case contains all matters essential to a review. Simpson v. Maney, 100 N. Y. S. 620. Where the orders from which an appeal is taken recite that they were made upon testimony and allegations of the parties taken, such testimony will be deemed material for the purpose of making out a case on appeal under § 997 of the Code Civ. Proc., requiring the case to contain so much of the evidence as is matereial to the questions raised. Id. A loose paper in no way identifying the stenographer's report of the testimony and not filed below until after record had been removed to appellate court held not a sufficient certification of the testimony though drawn in exact words of a rule. Farley v. Altoona, etc., R. Co., 32 Pa. Super. Ct. 413. Under St. 1904, p. 450, c. 448, § 8, matters to be tried in superior court on appeal from land court may be specified in issues framed as part of appeal with reference to such issues in statement of appeal. Mead v. Cutler [Mass.] 80 N. E. 496. Report under St. 1905, p. 208, c. 288, from land court on appeal to superior court, held sufficiently full, though it did not set out evidence or undisputed matters. Woodwine v. Dean [Mass.] 79 N. E. 882. Statement of facts by a territorial supreme court, though confused and unnecessarily minute, not fatally defective if a sufficient statement finally emerges. Crowe v. Trickey, 204 U. S. 228, 51 Law. Ed. 454.

41. A party who is not satisfied with the case as settled may move for resettlement on additional affidavits. Henry v. Interurban St. R. Co., 115 App. Div. 352, 100 N. Y. S. 811. In New York, on appeal from the special term, a motion for a resettlement of the case is properly made returnable at part 1, special term (Id.), and as the settlement of the case on appeal must be made by the justice presiding at the trial, if he is not sitting at special term, part 1, when the motion is returnable, the presiding justice should refer the motion to the trial justice for decision (Id.). It is improper to refuse to allow a case to be resettled so as to show the grounds upon which a motion to dismiss the complaint was made. Blewett v. Hoyt, 101 N. Y. S. 1086. Under § 25, Code Civ. Proc., a motion to resettle a case must be made before the judge who tried the action even though no longer a member of the court in which the action was tried. So held where the trial judge resigned prior to the making of the motion. Knobloch v. Taube, 103 N. Y. S. 713. The form of the title of the case is immaterial and an order resettling the case so as to make its title conform to that of the summons and complaint will not be disturbed. Volhard v. Volhard, 115 App. Div. 548, 101 N. Y. S. 453. An order resettling a case so as to admit exhibits omitted by accident will not be disturbed. Id.

42. See 7 C. L. 175.

43. Amended abstract curing defects cannot be served after expiration of time to serve original. Redd v. Missouri Pac. R. Co., 122 Mo. App. 93, 98 S. W. 89. Appeal dismissed where not filed in time. Goesse & Remmers Bldg. & Cont. Co. v. Kinnerk [Mo. App.] 97 S. W. 218.

44. By the express provisions of B. & C. Comp. § 553, an abstract conforming to the rules of the appellate court is sufficient. Keen v. Keen [Or.] 90 P. 147. Document designated as "statement, points, and authorities" held not sufficient compliance with statute. Goesse & Remmers Bldg. & Cont. Co. v. Kinnerk [Mo. App.] 97 S. W. 218. Abstract sufficient though it did not clearly separate record entries from matters belonging in bill of exceptions. Sanguinette v. Mississippi River, etc., R. Co., 196 Mo. 466, 95 S. W. 386; Stark v. Zehnder [Mo.] 102 S. W. 992. An abstract of the record is a complete history in short, abbreviated form of the case as found in the record. It must be complete enough to show that the questions presented for review have been properly preserved in the case. Harding v. Bedoll [Mo.] 100 S. W. 638. Where the abstract is so deficient that the court is unable to ascertain the facts without exploring the record, the judgment will be affirmed. Van Patten v. Wank [Ark.] 102 S. W. 371. The abstract must show that motion for new trial was filed within the time required by statute. Harding v. Bedoll [Mo.] 100 S. W. 638. Error based on provisions of bill of lading not shown by abstract cannot be considered. Lehigh Valley Transp. Co. v. Post Sugar Co. [Ill.] 81 N. E. 819. Under Sup. Ct. Rule 1 (71 Pac. VI), providing that the abstract of record shall contain such portions of the record as may be necessary to inform the court of the errors relied on without an investigation of the record itself, an abstract omitting a deed, the admission of which is assigned as error, is insufficient. Daniel v. Gallagher [Ariz.] 89 P. 412. The supreme court is not required to look beyond the abstract to ascertain the matters sought to be reviewed. Kinsel v. Wieland [Colo.] 88 P. 153. Under Supreme Court Rule 1, subd. 6 (71 Pac. VI), the transcript of the reporter's notes will not be resorted to for the purpose of supplementing the abstract of record. Liberty Min. & Smelting Co. v. Geddes [Ariz.] 90 P. 332.

showing the names of the parties and nature of the proceedings, a short abstract of the bill or petition, and the testimony on which the findings are based,[45] presenting the evidence with intelligible fullness,[46] and in a total absence thereof the case will not be considered on its merits.[47] The court is not bound to go to the record or bill of exceptions in search of matters not abstracted but may do so in its discretion.[48] On the other hand, the evidence and proceedings must be condensed as far as practicable,[49] and proceedings and papers need not be set out in full, but the fact that each was duly had or served must be shown.[50] Where an appellee is not satisfied with appellant's abstract, he is entitled to file one supplying the omissions,[51] or, in some states, a specific objection.[52] In case of conflict between the abstracts the court will usually resort to the transcript.[53]

(§ 9) *D. Sufficiency of entire record to present particular questions (Presumptions on appeal).*[54]—The appellate court will look to the entire record[55] but

Testimony not presented by the abstract will not be reviewed. Morris v. Wilson [Colo.] 90 P. 845. Error cannot be predicated upon refusal to allow witness to testify where abstract fails to show what his testimony was, what questions were propounded to him, or even that he was called. Cheney v. Goldy, 225 Ill. 394, 80 N. E. 289. Assignments of error as to rulings on evidence will not be considered where the abstract does not contain the objections and exceptions, although it stated that the evidence was received over objection and refers to the bill of exceptions. McPhee v. Fowler [Colo.] 85 P. 421.

45. The abstract of the record required to be made by the Missouri statute, Rev. St. 1889, § 2253 (Ann. St. 1906, p. 783), need not set out the certificate of the clerk or the various matters of the record in full. Eliot v. Kansas City, etc., R. Co. [Mo.] 102 S. W. 532. Decree affirmed for failure to comply with rule 9, requiring abstract to set forth material parts of pleadings, proceedings, etc., upon which appellant relies, together with such other statements from record as are necessary to full understanding of all questions presented. Houghton v. Mosely [Ark.] 96 S. W. 1066. Where abstract contained petition and answer followed by purported bill of exceptions, but failed to show any record entries, held that there was nothing before court but record proper. Cummings v. Eiler, 121 Mo. App. 576, 97 S. W. 218. Filing and overruling of motion for new trial and filing of bill of exceptions must appear from record and cannot be proven by recitals of bill of exceptions. Id.

46. Abstract incomplete as to evidence and for failing to show a petition stating a cause of action. McClellan v. Powell, 197 Mo. 495, 95 S. W. 335. Where part of evidence was omitted from its abstract, city held not entitled to contend that evidence showed that it had no notice of defect in street. Keithley v. Independence, 120 Mo. App. 255, 96 S. W. 733. Contention that verdict was grossly excessive held not open to consideration where testimony on that issue was not abstracted. St. Louis, etc., R. Co. v. Evans [Ark.] 96 S. W. 616.

47. If the evidence for the appellee upon which the verdict and judgment were rendered, and the instruction, are not abstracted, the judgment will be affirmed. Jonesboro, etc., R. Co. v. Chicago Portrait Co. [Ark.] 99 S. W. 75.

48. Court will not search record for information which should be shown by the abstract. Thornton v. Muus, 120 Ill. App. 422.

49. Ruling does not compel appellant to condense the testimony when he feels it necessary to set it forth in full in order to properly present his cause. Jacks v. Reeves, 78 Ark. 426, 95 S. W. 781. Failure to set forth instructions in full creates the presumption that they were cured by others if they are curable. Id.

50. It is not necessary to copy the record entries into the abstract. It is sufficient if the substance is stated. Stark v. Zehnder [Mo.] 102 S. W. 992.

51. Objection to abstract as incomplete and misleading will not be considered where defendant in error does not file a further abstract. See Supreme Court Rule 14. Snead & Co. Iron Works v. Merchants' Loan & Trust Co., 225 Ill. 442, 80 N. E. 237. Where a review of points raised in appellant's brief necessitates a consideration of the evidence, the appellee may present the necessary evidence in an additional abstract. Conwell v. Tri-City R. Co. [Iowa] 112 N. W. 546. Where statements contained in an additional abstract filed by respondent are not denied by appellant, they will be taken as true. Grigsby v. Wolven [S. D.] 108 N. W. 250.

52. Failure to object to statement in abstract admits its correctness. Rev. St. 1899, § 813. Strother v. McMullen Lumber Co., 200 Mo. 647, 98 S. W. 34. Where an abstract is not properly objected to, it will be presumed to be correct and properly prepared. State Finance Co. v. Mather [N. D.] 109 N. W. 350.

53. Where appellee files an additional abstract to supply matters omitted in appellant's abstract, he waives any other objection to it than as indicated in the additional abstract. Eliot v. Kansas City, etc., R. Co. [Mo.] 102 S. W. 532. The appellate court cannot, at the request of respondent who files a counter abstract, require the clerk of the trial court to certify a copy of the bill of exceptions where appellants tacitly admit the correctness of such abstract. Schroeder v. Reinhardt [Mo. App.] 100 S. W. 538.

54. See 7 C. L. 176.

55. State v. Marshall County Election Com'rs [Ind.] 78 N. E. 1016.

to nothing outside of it,[56] and a record made for one purpose may sometimes be looked to for another.[57] Every presumption favors the correctness of the rulings below,[58] and accordingly the record, to present an alleged error, must not only show

56. See post, § 13 E. Evidence on former trial could not be considered on appeal in action for a new trial where not brought up with record and there was no agreement that transcript filed on the original appeal might be considered. Flint v. Illinois Cent. R. Co., 29 Ky. L. R. 1149, 97 S. W. 736. The appellate court cannot have corrected or completed the record in the lower court, but must deal with the case on the record before it. Atlantic Coast Line R. Co. v. Jones, 127 Ga. 447, 56 S. E. 761.

57. A transcript certified to by the court reporter to contain all the evidence which is referred to and identified in the court's certificate, sent up in support of defendant's motion for nonsuit and instruction for directed verdict, cannot be considered in determining whether there was evidence authorizing a particular instruction. Baker County v. Huntington [Or.] 87 P. 1036.

58. Parker & Co. v. Continental Ins. Co. [N. C.] 55 S. E. 717; Handlin-Buck Mfg. Co. v. Wendelkin Const. Co. [Mo. App.] 101 S. W. 702; Kiesewetter v. Supreme Tent of Knights of Maccabees [Ill.] 81 N. E. 19; Bautz v. Adams [Wis.] 111 N. W. 69; Burbank v. Succession of Barton, 117 La. 262, 41 So. 567; Murphy v. Reliance Gold Min. Co. [S. D.] 108 N. W. 15; Van Vranken v. Granite County [Mont.] 90 P. 164; Southern R. Co. v. Lester [C. C. A.] 151 F. 573; Franklin Union No. 4 v. The People, 121 Ill. App. 647; Worley v. Dade County Security Co. [Fla.] 42 So. 527, Johansen v. Mulligan [Wash.] 88 P. 1107; Kinsel v. Wieland [Colo.] 88 P. 153; United States Mineral Co. v. Camden [Va.] 56 S. E. 561; Cox v. National Coal & Oil Inv. Co. [W. Va.] 56 S. E. 494; Estep v. Estep, 30 Ky. L. R. 577, 99 S. W. 280; Hastings Industrial Co. v. Baxter [Mo. App.] 102 S. W. 1075; Ex parte Caple [Ark.] 99 S. W. 830; Patterson v. Patterson, 200 Mo. 335, 98 S. W. 613. Where the ground of decision does not appear, it will be presumed to have been on the ground which the evidence sustains. Crain v. Peterman, 200 Mo. 295, 98 S. W. 600; Farmers' Bk. v. Barbee, 198 Mo. 465, 95 S. W. 225; O'Mara v. Newcomb [Colo.] 88 P. 167; Naylor v. Foster [Tex. Civ. App.] 99 S. W. 114. But in some jurisdictions rulings on propositions of law must disclose whether the court acted thereon in reaching its decision. Declining to give proposition in terms stated does not disclose this, and in absence of such disclosure such refusal will be held error when the deposition was correct and applicable to the case. Jaquith v. Davenport, 191 Mass. 415, 78 N. E. 93. Where it appeared on face of decree that it was made "by the court," an assignment that the court did not sit in banc in passing on exceptions cannot be sustained. Zerbey v. Allan, 215 Pa. 383, 64 A. 587. It will be presumed in favor of an order of the commissioner's court changing a public road, in the absence of proof to the contrary, that the court took every precautionary step essential to its validity. Smith v. Ernst [Tex. Civ. App.] 102 S. W. 129. That a counterclaim was properly submitted and tried where the record contains no assignment of error to instructions and no objections or exceptions were saved relative to the verdict. Stone v. Victor Elec. Co. [Colo.] 85 P. 327. Where record was silent as to who paid taxes on realty during certain years, held that it would be presumed that they were paid by true owner. Updegraff v. Marked Tree Lumber Co. [Ark.] 103 S. W. 606. Where bill of exceptions recited that leave was asked and granted to amend so as to claim damages for a particular injury, held that it would be presumed that complaint was amended so as to meet evidence on that point in order to sustain ruling admitting it, though record did not show that amendment was in fact made. Southern R. Co. v. McGowan [Ala.] 43 So. 378. Mere identity of name will not, after judgment, authorize appellate court to presume, for purpose of reversing judgment, that sheriff who executed summons on one of defendants was a party to the suit. Hayman v. Weil [Fla.] 44 So. 176. That a sentence was suspended for good cause. Harris v. Lang, 27 App. D. C. 84. That documents and orders not in record justified dismissal below. McNicholas v. Tinsler, 127 Ill. App. 381. Evidence will be construed in the light most favorable to the findings and judgment of the trial court. Youd v. German Sav. & Loan Soc. [Cal. App.] 86 P. 991. Where record did not affirmatively show that any land was excluded in division of a ward into election districts. Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525. Will not be presumed that a party waived a motion by failing to call it up. Diamond Match Co. v. Wabash R. Co., 121 Mo. App. 43, 97 S. W. 993. Presumed in support of decree that court inferred as authorized by V. S. 936-942 facts necessarily or fairly resulting from facts reported by master. Davenport v. Crowell [Vt.] 65 A. 557. Presumed that conveyance was a quitclaim and not a warranty deed in absence of finding as to which it was. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245. On appeal from judgment of circuit court in action originally brought in justice's court against an individual as agent for a corporation, presumed in favor of jurisdiction of justice that in passing on question of his jurisdiction he ascertained that the corporation was a foreign corporation, and that its agent was a proper person upon whom to serve process. Western Tie & Timber Co. v. Thomas [Ark.] 101 S. W. 730. On appeal from decree on bill of review, appellate court will not presume that court looked to evidence for facts disclosed by pleadings, and, on such presumption, reverse decree. Peters v. Case [W. Va.] 57 S. E. 733. In view of statutes in regard to guardians' bonds and appraisements of ward's estates, held that it could not be presumed in support of order of county court reducing guardian's bond that second inventory of ward's property had been taken and that property had decreased in value more than half. Moore v. Hanscom [Tex. Civ. App.] 103 S. W. 665. Where it is insisted that the provision of a certain statute does not apply to proceedings instituted under a former statute, and the record fails to show where proceedings were instituted, it

the ruling complained of.[59] and objection and exception thereto,[60] and other proper

will be presumed that the trial court ruled properly in applying the provision. Commonwealth v. Chaudet, 30 Ky. L. R. 1157, 100 S. W. 819. Under Rev. St. 1892, § 6709, it will be presumed in all subsequent proceedings that the circuit court passed upon all assignments in a petition in error before it, and that when it reverses a judgment of the common pleas it overrules all assignments not specified in its mandate as ground for reversal. Weaver v. Columbus, etc., R. Co. [Ohio] 81 N. E. 180. And the presumptive overruling of such assignments as are not made grounds of reversal are presumed correct in absence of anything to contrary in record. Id. Where, therefore, plaintiff in error in proceedings to review such reversal has presented so much of the record as will show the error of which he complains, defendant in error, if he desires to sustain the circuit court's reversal on assignments overruled by such court, must see that the record contains matter showing that such assignments were improperly overruled. Id. Where the fees of a superintendent of irrigation are to be paid proportionately by the counties irrigated by the system, it will not be assumed on appeal in the absence of proof that other counties than those named in the pleading were supplied with water. Board of Com'rs of Montezuma County v. Wheeler [Colo.] 89 P. 50.

As to ground of general order: An order not specifying the ground on which it was made will be presumed to have been on a ground justifying it if any such appears. Where an order granting a new trial is general, the court will examine the entire record and if there is any error justifying the order it will be affirmed. Central Trust Co. v. Stoddard [Cal. App.] 88 P. 806. Where a ruling sustaining a motion to direct a verdict on several grounds is general, the court on appeal must determine whether the motion could be sustained on any of the enumerated grounds. Bromberg v. Evans Laundry Co. [Iowa] 111 N. W. 417. Where an order granting a new trial does not specify upon which of the many grounds assigned it is granted, the court will consider the grounds of the motion only to the extent of ascertaining if the order can be sustained on any one of them. Buckle v. McConaghy [Idaho] 88 P. 100. Where a ruling sustaining an objection to an offer of proof does not show upon what ground it was made, it will be sustained, if there is any ground supporting it. Rose v. Doe [Cal. App.] 89 P. 135. Where a motion for a new trial is made upon three distinct grounds and the order sustaining the motion is general, it will be affirmed if justified on any one of the grounds. Fournier v. Coudert, 34 Mont. 484, 87 P. 455. The specifying in an order granting a new trial on the ground upon which it was based does not limit the appellate court to such ground. Piercy v. Piercy, 149 Cal. 163, 86 P. 507. Where an order granting a new trial does not specify upon what ground it is made, it will be sustained if it can be done upon any ground of the motion. Walsh v. Conrad [Mont.] 88 P. 655. Though an order granting a new trial refers to an opinion, such opinion is not a part of the order, thereby constituting a limitation of the grounds upon which the order was made. Bouchard v. Abrahamsen [Cal. App.] 88 P. 383. Where a levy is made upon land sold by the judgment debtor, but a sale thereof is enjoined on the theory that, having been homestead property, the sale could not have been a fraud upon creditors, the judgment will not be so modified as to permit the determination of the question whether it exceeded the statutory homestead amount where no such issue was raised below. Nicholdson v. Nesbitt [Cal. App.] 88 P. 725. Where the trial court in granting a new trial fails to specify the ground of its action as required by Rev. St. 1899, § 801, its action cannot be assumed to have been based on any particular ground, but the correctness of the various rulings will be considered as was the practice prior to the new statutory rule. Pierce v. Lee, 197 Mo. 480, 95 S. W. 426. When there is evidence to support a verdict, the appellate court will not presume that the lower court granted a new trial because the verdict was against the law under the evidence. Id. Where the trial judge did not file any conclusions, his judgment must be approved upon any theory of the evidence by which it can be supported. Adams v. Bartell [Tex. Civ. App.] 102 S. W. 779. Where the evidence was sufficient to sustain a finding in favor of the party against whom the decision was given, and the trial court granted a motion for a new trial on a motion including the ground of insufficiency of evidence, it will be presumed that the court granted it on such ground where its order was general. Pollitz v. Wickersham [Cal.] 88 P. 911. Where one of the grounds for a new trial was insufficiency of evidence, and the order granting the motion was general, it will be assumed on appeal that it was granted for insufficiency of the evidence if it could be legally granted thereon, regardless of any reason stated in the opinion of the court. Id. Where a moving party relies on specific grounds and the court grants the motion without specifying the ground, it will be assumed that it was on one of the moving grounds and the appellate court will not look beyond them in support of the motion. Powell v. Springston Lumber Co. [Idaho] 88 P. 97. Though the trial court possesses the inherent power to set aside a verdict and grant a new trial on its own motion, its grounds for doing so should be made to appear in the record and if they do not the appellate court is not bound to search the record for the purpose of sustaining its action. Hensley v. Davidson Bros. Co. [Iowa] 112 N. W. 227. Where a new trial is granted on a single ground, the appellate court will only consider such ground and not search for other grounds in support of the order. Armstrong v. Musser Lumber & Mfg. Co. [Wash.] 86 P. 944. It will be presumed in support of the lower court's decision in plaintiff's favor that suit was brought within the time required after a previous nonsuit, although the record does not show when the action was brought. Parker & Co. v. Continental Ins. Co. [N. C.] 55 S. E. 717. In the absence of any statement of facts by the lower court, the appellate court will assume that it found such facts as would sustain its ruling. Id.

59. Caldwell v. Atlantic Coast Line R. Co., 75 S. C. 74, 55 S. E. 131; Medbury v. Maloney

steps to save the question in the trial court,[61] and in some states that a specification

[Idaho] 88 P. 81; Stewart v. Smallwood [Tex. Civ. App.] 102 S. W. 159; Ourand v. Johnson, 6 Ind. T. 361, 98 S. W. 127; Ellis v. Marshall Car Wheel & Foundry Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 719, 95 S. W. 689; Caldwell v. Atlantic Coast Line R. Co., 75 S. C. 74, 55 S. E. 131. Refusal to permit the filing of an amended complaint. Sturtevant v. McDougall [Wash.] 88 P. 1035. Where no judgment was taken or had on demurrers, held that it would be presumed that they had been abandoned. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71. Where, on trial before court, ruling on admissibility of depositions was reserved, and record failed to show any affirmative ruling excluding them, held that presumption, if any, was that court considered them. Scharff v. McGaugh [Mo.] 103 S. W. 550. Where the court reserved its ruling on testimony objected to, and the record is silent as to what the ruling was, it will be presumed that the court excluded it, and it cannot be considered on appeal. Civ. Code, §§ 1318, 1340. In re Dominici's Estate [Cal. App.] 87 P. 389. Demurrer presumed to have been abandoned where record shows no ruling thereon. Southern R. Co. v. Attalla [Ala.] 41 So. 664. Where record shows no action on demurrer by trial court, same must be considered as having been waived. Whitmire v. Farmers' Nat. Bk. [Tex. Civ. App.] 17 Tex. Ct. Rep. 18, 97 S. W. 512. Substitution of certified copy of answer to interrogatories for original. Birmingham Ry., Light & Power Co. v. Moore [Ala.] 42 So. 1024. Modification of a requested instruction. Painter & Co. v. Stahley Bros. [Wyo.] 90 P. 375. Refusal to give an instruction. Weiss-Chapman Drug Co. v. People [Colo.] 89 P. 778. An assignment that the court erred in setting aside the referee's report and making special findings and that the findings were not supported by the evidence cannot be reviewed where the abstract does not show what the report contained or what the findings were. Wilson v. Kent [Colo.] 88 P. 461. Motion to strike out parts of answer. Mark v. Williams Cooperage Co. [Mo.] 103 S. W. 20. Record did not show why or what legal objections were sustained to confirmation of street assessments. City of Chicago v. Ogden, Sheldon & Co. [Ill.] 81 N. E. 698.

60. People v. Wiemers, 225 Ill. 17, 80 N. E. 45; Shugars v. Shugars [Md.] 66 A. 273; United States Health & Accident Co. v. Jolly [Ky.] 101 S. W. 1179; Molt v. Hoover [Ind. App.] 81 N. E. 221; Simpkin v. Sny Island Levee Drainage Dist. Com'rs, 223 Ill. 67, 79 N. E. 38; Williams v. Connolly Cont. Co. [N. J. Law] 65 A. 179; Stein v. Goodenough [N. J. Err. & App.] 64 A. 961; Mitchell v. Young [Ark.] 97 S. W. 454; Blackburn v. Woodward [Ga.] 57 S. E. 318; Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 99 S. W. 869; Piedmont Co. v. Kelley, 125 Ga. 759, 54 S. E. 748; Coe v. Patterson, 103 N. Y. S. 472; Burdette v. Crawford, 125 Ga. 577, 54 S. E. 677; Haas v. Powers [Wis.] 110 N. W. 205; Harness v. McKee-Brown Lumber Co. [Okl.] 89 P. 1020; Henry v. Frohlichstein [Ala.] 43 So. 126; Texas & P. R. Co. v. Terry [Tex. Civ. App.] 16 Tex. Ct. Rep. 990, 97 S. W. 325; St. Louis, etc., R. Co. v. Dodson [Tex. Civ. App.] 16 Tex. Ct. Rep. 109, 97 S. W. 523; Bluestein v. Collins [Tex. Civ. App.] 103 S. W. 687; Heether v. Huntsville, 121 Mo. App. 495, 97 S. W. 239; Holloway v. White-Dunham Shoe Co. [C. C. A.] 151 F. 216; Henion v. Vavrik, 126 Ill. App. 292; Beck v. Stoddard, 118 Ill. App. 370; Sternberg v. Sklaroff, 32 Pa. Super. Ct. 116; In re Boning's Estate [Pa.] 66 A. 525; Roberson v. Wilmoth [Colo.] 90 P. 95; Weiss-Chapman Drug Co. v. People [Colo.] 89 P. 778; Painter & Co. v. Stahley Bros. [Wyo.] 90 P. 375; Martin v. Hertz, 224 Ill. 84, 79 N. E. 558; Dexter Sulphite Pulp & Paper Co. v. McDonald, 103 Md. 381, 63 A. 958; Gerting v. Wells, 103 Md. 624, 64 A. 298, 433; Jackson v. Mercantile Mut. Fire Ins. Co. [Wash.] 88 P. 127. A change in a rule of an appellate court so as to require objections to be specifically set out in motion for new trial cannot affect appeals already perfected in strict accordance with rules then existing. Missouri, etc., R. Co. v. Smith [C. C. A.] 152 F. 608. Record held to sufficiently show a several exception to ruling on demurrer as to each paragraph of complaint. Bedford Quarries Co. v. Bough [Ind.] 80 N. E. 529. Statement in bill of exceptions that a question as to authority of an agent was submitted to jury under proper instructions and not excepted to by either party held to show that such authority was not questioned below. Putnam v. Harris [Mass.] 78 N. E. 747. Admission of evidence is no ground for reversal where it does not show what objection was made to it at the time of its admission. Howard Supply Co. v. Bunn, 127 Ga. 663, 56 S. E. 757. Error in the admission of evidence will not be reviewed where the record does not disclose the ground of the objection and the evidence is admissible for any purpose. Jones v. Deardorff [Cal. App.] 87 P. 213. In the absence of a record showing to the contrary, it must be presumed that the trial court did not reject evidence on an issue duly made. Shaw v. O'Neill [Wash.] 88 P. 111. Admissibility of evidence not reviewable where abstract contained no reference to motion for new trial without which it was impossible for court without examining the transcript to determine whether an exception to the court's ruling was preserved. St. Louis, etc., R. Co. v. Boyles, 78 Ark. 374, 95 S. W. 783. Refused instruction not reviewable where court could not determine whether an exception was preserved without going to transcript. Id.

61. Stein v. Goodenough [N. J. Err. & App.] 64 A. 961. Granting of motion to amend complaint objected to on the ground of surprise will not be reviewed where the record does not show an application for a continuance. Smith v. Michigan Lumber Co. [Wash.] 86 P. 652. General submission to court by auditor's report of all questions of law "presented by the foregoing facts" held insufficient to show that exceptions to admissibility or sufficiency of evidence were passed on by the court. Hogan v. Sullivan [Vt.] 64 A. 234. Waiver of the right to have a question reviewed will not be presumed, and where it is asserted as a bar to review that the question was not raised below, that fact must appear affirmatively from the record. Stewart v. Grand Rapids & I. R. Co. [Mich.] 13 Det. Leg. N. 948, 110 N. W. 126. Denial of a request for special findings will not be reviewed where the record does not

of the errors complained of was filed in the trial court,[62] but so much of the evidence [63] and proceedings below [64] as to exclude every fair intendment in support of such rulings, and the record must affirmatively show that it contains all such matters,[65] though where the respondent has the privilege of serving counter ab-

specify what the request was or upon what issues the verdict was desired. Leonhart v. California Wine Ass'n [Cal. App.] 89 P. 847. Statement in bill of exceptions held not to show that question relating to pleadings was raised and passed upon below. James v. Saunders, 127 Ga. 336, 56 S. E. 491. Only such questions as are shown by record to have been presented and decided below will be considered. Watts v. River Forest [Ill.] 81 N. E. 12.

62. Equity Rule 92. Mason v. Linn [Pa.] 67 A. 61. Under § 5467, Rev. Codes 1899 (§ 7058, Rev. Code 1905), errors of law occurring at the trial must be specified in statement of the case. Jackson v. Ellerson [N. D.] 108 N. W. 241. Where statement of case on review of mandamus proceeding contains no specifications of error, nothing can be reviewed but the question of whether judgment is sustainable from a consideration of the judgment roll. State v. Fabrick [N. D.] 112 N. W. 74. Specification not necessary where motion for new trial was specific. Lennan v. Pollock State Bank [S. D.] 110 N. W. 834.

63. Decisions depending on evidence not reviewed in its absence. Smith v. Zachry [Ga.] 57 S. E. 513; Rabb v. Texas Loan & Investment Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 618, 96 S. W. 77; Guinan v. Donnell [Mo.] 98 S. W. 478; McClellan v. Powell, 197 Mo. 495, 95 S. W. 335; Rodgers v. U. S. [C. C. A.] 152 F. 426; In re Stillman [R. I.] 67 A. 5; State v. Stutler [W. Va.] 55 S. E. 906; Hastings Industrial Co. v. Baxter [Mo. App.] 102 S. W. 1075; Jackson Bros. & Watts Co. v. Gillespie, 127 Ga. 358, 56 S. E. 409; Edmondson v. Edmondson [Ga.] 57 S. E. 308; Lewis, Robinson & Co. v. Hutchinson, 127 Ga. 789, 56 S. E. 998. Exception to master's report. Royce v. Carpenter [Vt.] 66 A. 888; Houston, etc., R. Co. v. Skeeter Bros. [Tex. Civ. App.] 16 Tex. Ct. Rep. 941, 17 Tex. Ct. Rep. 538, 98 S. W. 1064. Auditor's finding as to construction of written agreement. Luce v. Consolidated Ubero Plantations Co. [Mass.] 80 N. E. 793. Master's findings not reviewable in absence of report of evidence. Eddy v. Fogg, 192 Mass. 543, 78 N. E. 549; Atkins v. Atkins [Mass.] 80 N. E. 806. Grounds of new trial dependent on evidence. Walters v. Walters [Ind.] 79 N. E. 1037. In absence of a statement of facts, judgment being authorized by pleadings, rulings on special exceptions giving or refusing charges or admitting or excluding evidence will not be reviewed. Smith v. Pecos Valley, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 206, 95 S. W. 11. Direction of verdict based on by-laws of beneficial association presumed sustained by by-laws where they are not in record. Kiesewetter v. Supreme Tent of Knights of Maccabees [Ill.] 81 N. E. 19. In an equity case, if the record does not contain all the evidence, the conclusions of the trial judge cannot be disturbed. Geltz v. Amsden [Mo. App.] 102 S. W. 1037; In re Morrison's Estate [Or.] 87 P. 1043. Where on an appeal from an order of reference the appeal itself and the exception noted in the record sufficiently raises the question of the validity of the order, no statement of the case is required. Duckworth v. Duckworth [N. C.] 57 S. E. 396; Schenker v. Breece [Mo. App.] 102 S. W. 659.

64. On appeal from judgment overruling motion to quash on execution on a revived judgment, no error of which cognizance can be taken is shown where the record fails to show any judgment, original or revived, or that any execution was introduced in evidence, and no such writ or proceedings thereunder is shown. In the absence of a bill of exceptions showing the proceedings before the clerk and before the court, an order retaxing costs will not be reviewed. Feske v. Adam [Wis.] 112 N. W. 456. The court on appeal will not presume that an initial payment on an accident policy was an advance payment of the premiums due thereunder where it might also have been a payment of the required policy fee. Greenwaldt v. U. S. Health & Accident Ins. Co., 102 N. Y. S. 157. No error disclosed where record did not show that defendant was in fact compelled to comply with court's order requiring him to submit his books to plaintiff's inspection. Hemple v. Raymond [C. C. A.] 144 F. 796. Questions of priority between two judgment creditors could not be reviewed where record did not show that debtor had an equitable estate referred to by appellant. Adriaans v. Reilly, 27 App. D. C. 167. An order disallowing costs, being made before judgment, will not be reviewed unless the evidence upon which it is based and the exceptions thereto are preserved in the bill of exceptions. Fowler v. Metzger Seed & Oil Co. [Wis.] 111 N. W. 677. Where error is predicated on filing of praecipe for default by attorney after appointment and qualification as judge, it will not be presumed merely from identity of name that attorney and judge were same person. Cone v. Knight [Fla.] 42 So. 460. Objection on account of arguing points in plaintiff's closing address not argued in his opening address is not presented where record does not show that the points were not argued in opening address. Pittsburgh, etc., R. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128. Error in construction of contract affecting finding must clearly appear in record in order to justify granting of new trial therefor. Talbott v. Newcastle [Ind.] 81 N. E. 724. In the absence of an official record as to what occurred on the argument of a motion, the statement of the trial court will be accepted as correct. Hews v. Hews, 145 Mich. 247, 13 Det. Leg. N. 482, 108 N. W. 694. In order to sustain a judgment against sureties on a replevy bond, the writ of sequestration and the bond must appear in the transcript of the record, especially where the certificate of the clerk to the transcript shows that it contains all the proceedings had in the case. The fact that the petition alleges that the writ was issued and served and the bond executed is not sufficient. Lewter v. Lindley [Tex. Civ. App.] 101 S. W. 276.

65. Necessity of recital or certificate:

stracts, it has been said that it will be presumed that the record contains all that is essential to the decision of the questions argued.[66] This rule has been applied to rulings relating to jurisdiction,[67] process,[68] and pleading,[69] appearance,[70] motions

Matters depending on the evidence cannot be reviewed unless the record is certified to contain it all. Eatherly v. State [Tenn.] 101 S. W. 187; Rogers v. Brown, 15 Okl. 524, 86 P. 443; Martin v. Gassert [Okl.] 87 P. 586; Passavant v. Arnold, 34 Mont. 513, 87 P. 905; Ronan v. Swift & Co., 122 Ill. App. 256; State v. Seattle [Wash.] 89 P. 152; Goldberg v. Harney, 122 Ill. App. 106; Crocker v. Shamleffer [Okl.] 90 P. 106; Kinsel v. Wieland [Colo.] 88 P. 153; Cane v. Lieberman, 103 N. Y. S. 728; Kuhn v. Knight, 115 App. Div. 837, 101 N. Y. S. 1; Silberman v. Uhrlaub, 102 N. Y. S. 299.

Sufficiency of recital or certificate: Certificate of register that bill contains "full and complete transcript of the record and proceedings * * * in so far as they apply to or affect" the matter presented for review held sufficient to show that all the evidence pertaining to such matters is in the record, though the record shows omission of certain depositions and exhibits which were before lower court. Sample v. Guyer, 143 Ala. 613, 42 So. 106. Certificate that transcript contains "All proceedings had upon trial of above numbered exception in entitled suit" held sufficient where case was disposed of below on the exception. State v. Reid [La.] 42 So. 662. A certificate reciting "Inasmuch as the foregoing matters do not otherwise appear of record, I hereby certify that this bill of exceptions has been by me settled and allowed," does not show that it includes all the evidence. Stone v. Ogden Packing Co. 30 Utah, 460, 85 P. 1004. Failure of certificate to show that succession papers attached to and referred to by petition but not offered in evidence, held not to render the certificate insufficient as failing to show that transcript contained all the evidence. Parker & Co. v. Succession of Griffin, 117 La. 977, 42 So. 473. Certificate held sufficient to present everything done below, notwithstanding deficiencies chargeable to the clerk who made it. Hays v. Mayer, 117 La. 1067, 42 So. 505. Unauthorized certificate of deputy clerk of civil district court held insufficient to overcome presumption that judge of division of such court acted on sufficient evidence. Appellant should obtain statement from judge as to real situation as to evidence. Code Proc., arts. 602, 603. Rosenthal v. Rosenthal, 147 La. 786, 42 So.270. A bill of exceptions certifying that it contains all of the evidence except that presented on one day of the trial, and all the "substantial" points presented on that day, may not be reviewed as to the weight of the evidence. Page v. State, 8 Ohio C. C. (N. S.) 581. A statement attached to the case-made and signed by counsel for appellant that the foregoing case-made contains all the evidence does not supply the place of an averment in the case itself. Schriber v. Buckner [Okl.] 90 P. 10. Where the certificate of the judge recites that the statement "contains all the evidence introduced considered herein," it will be presumed that documentary evidence introduced, but not contained in the record, was treated as immaterial and not considered. Van Camp v. Emery [Idaho] 89 P. 752. A recital in the case that "no further or other evidence was offered or introduced" held not equivalent to an averment that it contains all the evidence, where it was not clear that it did not refer to the last preceding item. Kiowa County Bk. v. Hobart Ice & Coal Co. [Okl.] 89 P. 1118. Bill certified by judge to contain the "substance of all the evidence" held sufficient to present question of error in refusing to direct verdict, presumption being that nothing material was omitted. First Nat. Bk. v. Moore [C. C. A.] 148 F. 953. A recital in the judge's certificate settling the statement of facts that the foregoing contains all the evidence is sufficient. Coulter v. Union Laundry Co., 34 Mont. 590, 87 P. 973. Certificate that bill contains full, true, and complete transcript of evidence held to authenticate recitals concerning objections and exceptions to evidence and offers of proof. Hart v. Scott [Ind.] 81 N. E. 481. Where the bill of exceptions recites that it contains all the evidence material to the questions raised on appeal, and in the certificate it is declared to contain "all the testimony given on both sides necessary to present the questions raised upon the appeal," the certification is sufficient to permit of a review of the facts. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928. Bill of exceptions failing to state that it contains all the evidence is not aided by the reporter's certificate. Continental Casualty Co. v. Maxwell, 127 Ill. App. 19. Is sufficient if bill of exceptions shows inferentially and by natural implication that it contains all the evidence. Mitchell v. Young [Ark.] 97 S. W. 454. Sufficient if it plainly appears without recital that bill contains all the evidence. Marshall v. Ford, 124 Ill. App. 284; Crowe v. Trickey, 204 U. S. 228, 51 Law. Ed. 454; Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35. When the court certifies in the bill of exceptions "the evidence introduced on the trial" was "as follows," and sets it forth, it is sufficient, if there is nothing in the record to show that it is not all the evidence. Manchester Home Bldg. & Loan Ass'n v. Porter [Va.] 56 S. E. 337. On appeal from a judgment in ejectment sustaining the plea of res adjudicata, if the bill of exceptions contains a complete transcript of the record pleaded in bar, and also shows that appellant acquired the title now asserted after that adjudication, it is sufficient to show affirmatively that the court's finding was erroneous, though it fails to show affirmatively that it contains all the testimony. Wadley v. Leggitt [Ark.] 101 S. W. 720. Words "plaintiff rests" followed by motion to take case from jury held to show that bill of exceptions contained all the evidence. Hill v. Chicago City R. Co. 126 Ill. App. 152. Sufficient showing that all the testimony taken in the case was embodied in the transcript. Lenon v. Brodie [Ark.] 98 S. W. 979.

66. Hensley v. Davidson Bros. Co. [Iowa] 112 N. W. 227.

67. Where record did not affirmatively show that case was heard on short cause calendar. Christie v. Walker, 126 Ill. App. 434. Silence of record of court of general

jurisdiction as to affidavit required by Acts 1894-95, p. 415, creates no presumption of lack of jurisdiction to render judgment against garnishee. Brookside Dry Goods Co. v. City Furniture Co. [Ala.] 41 So. 659. Where in proceedings by a guardian to sell real estate the published notice of application to sell ran from May 9th, and it does not appear when the application was filed, but the order permitting sale was made on May 27th, it will be presumed in support of jurisdiction that the application was filed May 9th. Mortgage Trust Co. v. Redd [Colo.] 88 P. 473. Where a complaint alleges that on account of the number and diverse residences of the plaintiffs it was impracticable to bring all before the court, and therefore plaintiff sued for all, and the court allowed it to be filed and denied a motion to strike, it will be presumed on appeal that the court ordered the action so brought under Code Civ. Proc. § 12.. Knight v. Boring [Colo.] 87 P. 1078. Where an amendment asking more than the jurisdictional amount would not divest jurisdiction if the original prayer was within such amount, it will be presumed in the absence of the original pleadings that the amount prayed was within the jurisdiction. Ft. Worth & D. C. R. Co. v. Underwood [Tex. Civ. App.] 98 S. W. 453. Appeal to court of appeals from judgment of circuit court in case originating in justice court dismissed where record did not show that circuit court ever obtained jurisdiction of case by appeal., Inks v. Brakebill Bros. 119 Mo. App. 159, 96 S. W. 220. Presumed that court, in permitting an administrator to sell realty, determined that petitioner was the duly appointed administrator. Hollingsworth v. McAndrew, 79 Ark. 185, 95 S. W. 485. Where the district court has jurisdiction of a cause unless the trustees of a city have designated a justice of the peace, under Mill's Ann. St. § 4438, appellant attacking the jurisdiction of the district court must make it appear of record that a justice has been so designated. Weiss-Chapman Drug Co. v. People [Colo.] 89 P. 778. A presumption will not be indulged in support of the jurisdiction of the trial court to appoint a guardian ad litem where the presumption does violence to the facts presented by the record. Johnston v. Southern Pac. Co. [Cal.] 89 P. 348. The rule that the lack of jurisdiction in a court of general jurisdiction must appear on the face of the record does not require an affirmative showing of the lack of a jurisdictional fact but it is sufficient that that which was actually stated as done was insufficient. Id. Recited that the appointment of a guardian ad litem was on the petition of the appointee while the statute required appointment on the application of the infant. Id. In absence of evidence of such fact in record, the supreme court will not presume that court of appeal rendered the judgment appealed from at a special session. Brown v. Louisiana & N. W. R. Co. [La.] 42 So. 656. One placita in the transcript, the one for the term at which judgment was rendered, is sufficient to show the legal organization of the court below, and it is not necessary to insert in the transcript a placita for each term at which there were any proceedings in the cause. Leafgreen v. Leafgreen, 127 Ill. App. 184. Presumed that judgment of circuit court was within limits of its jurisdiction and based on papers and evidence necessary to support it. Hawthorne v. Cartier Lumber Co., 121 Ill. App. 494.

68. Where record on appeal by claimant in claim proceedings is silent as to return of the execution and the evidence is not before the appellate court, it will be presumed that the sheriff's testimony and the writ were part of the evidence heard by the jury. Dunaway v. Ferst [Fla.] 41 So. 451. Where an affidavit of publication is verified by one whose name is identical with that of respondent the appellate court will not presume that they were the same person so as to defeat jurisdiction if it will have such effect. Callison v. Cole [Wash.] 87 P. 120. An amendment of a defective summons will be presumed to have been made while the question of jurisdiction was open on a rehearing granted on an order sustaining objections to the summons where the record does not disclose that such order was again sustained on an intermediate rehearing. Parker Co. v. Central West Inv. Co. [Neb.] 105 N. W. 985. In absence of contrary showing, it will be presumed that the seal to notice in drainage proceedings was attached by clerk, who acted in the several capacities of county clerk, clerk of county court, and clerk of drainage district, in proper capacity. Waite v. Green River Special Drainage Dist. Com'rs, 226 Ill. 207, 80 N. E. 725. Where an application for a writ of review to review the public use and necessity for which property was condemned shows that the notice of hearing was published, it will be presumed that an affidavit in support thereof as required by statute was filed. State v. Walla Walla County Superior Ct. [Wash.] 86 P. 205. Where affidavits showing lack of service of summons filed and served by defendant are not rebutted by affidavits by plaintiff, they will on appeal be assumed to be true. Fosullo v. Bonjiorno, 105 N. Y. S. 155.

69. Overruling appellant's special exceptions to appellee's pleadings cannot be declared reversible error in the absence of a statement of facts. Chicago, etc., R. Co. v. Breeding [Tex. Civ. App.] 100 S. W. 800. Where it does not appear from the record that the parties agreed the allegations of plea were true, nor that proof was made in respect thereto, it will be presumed that there was evidence concerning the plea, supporting the action of the court in overruling it. Receivers of Kirby Lumber Co. v. Poindexter [Tex. Civ. App.] 103 S. W. 439. Where the record does not contain one of the pleadings, uncontroverted statements in the respondent's brief as to the allegations of the omitted pleading will be assumed to be true for the purpose of sustaining the judgment. Perkins v. Storrs, 114 App. Div. 322, 99 N. Y. S. 849. In the absence of the pleadings it will be presumed on appeal that the trial court properly exercised its discretion in denying a motion for a default for want of an answer where it appears that there was an answer before the ruling was made. Bardon v. Hughes [Wash.] 88 P. 1040. Where exhibits filed with the petition were not copied in the record, it will be presumed that they warranted the judgment sustaining a demurrer to the petition. Commonwealth v. Chaudet, 30 Ky. L. R. 1157, 100 S. W. 819. Discrepancies between as to parties, mechanic lien, and suit to enforce same, not reviewable where lien is not in bill of

and affidavits,[71] entry and opening of default,[72] matters preliminary to trial,[73] de-

exceptions. Saunders v. Tuscumbia Roofing & Plumbing Co. [Ala.] 41 So. 982. Where no ruling appears to have been made on a motion to strike an answer, it will be presumed that the court passed on the issues raised by the pleadings as they stood. Widner v. Wilcox, 131 Iowa 223, 108 N. W. 238. The sustaining of a demurrer to an amended complaint, filed after the period of limitations has expired, on the ground that the action is barred, cannot be reviewed where the record does not show when the original was filed. Williams v. Southern Pac. R. Co. [Cal.] 89 P. 599. Refusal to allow amendment will not be reviewed in absence of showing that any material matter not already included in the pleading would have been added by the amendment. Glos v. Murphy, 225 Ill. 58, 80 N. E. 59. On appeal from an order refusing permission to file a supplemental answer, appellant's brief will not be consulted to ascertain the contents of such answer where it is not contained in the record. Johansen v. Mulligan [Wash.] 88 P. 1107. An order refusing permission to file a supplemental answer will not be reviewed where the record does not contain the proposed answer. Id. An assignment of error that a decree rendered was not within the issues made by the pleadings cannot be considered where the pleadings are not in the record. Montezuma Canal Co. v. Smithville Canal Co. [Ariz.] 89 P. 512. Findings of court below in striking an answer held conclusive on appeal in absence of the evidence. Hollingsworth v. McAndrew, 79 Ark. 185, 95 S. W. 485.

Amendments: Ruling on amendment not reviewable in absence of affidavits offered in support thereof. Stackpole v. Schmucker, 225 Ill. 502, 80 N. E. 314. Pleading presumed amended. See Burns' Ann. St. 1901, § 670. Richardson v. Stephenson [Ind. App.] 78 N. E. 256. Where an amendment could have been allowed in the court below, the appellate court will treat a pleading as amended on appeal if the facts found support the judgment. Alexander v. Harkin, 103 N. Y. S. 56. The mere recital in the bill of exceptions that after the hearing of the cause the judge permitted the defendant to file an amendment to its answer, of which the plaintiff did not have notice until after the decision of the judge was rendered, raises no question for decision by the appellate court where the bill of exceptions contains no assignment of error upon the action of the judge in receiving the amendment and permitting it to be filed. Thom v. Georgia Mfg. & Public Service Co. [Ga.] 57 S. E. 75. Where the record does not contain a proposed trial amendment, nor any affidavit showing why it should have been allowed at that time, the denial thereof will not be reviewed. Barngrover v. North [Mont.] 90 P. 162. Where the court makes findings in accordance with the averments of the complaint and ignoring an amended answer setting up affirmative defenses, and certifies that the parties introduced evidence tending to support their allegations, the court must conclude under the presumption of B. & C. Comp. § 788, subd. 15, that official duty has been regularly performed, that such amended answer was not filed with permission of court. Freeman v. Preston [Or.] 89 P. 375. Failure of the court to consider an amended answer of appellant will not be considered where it does not appear by abstract that permission to file the same was obtained. Id. Whether an amended petition alleges a new cause of action cannot be determined when there is nothing to show what is set up therein. Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133. Proposed amendment must be made part of record to allow review of refusal to permit it to be made. Dudley v. Herring, 30 Ky. L. R. 270, 98 S. W. 289. The refusal of the trial court to permit a pleading or amendment to be filed will not be reviewed unless it is made to appear that there was an order of court or bill of exceptions making the rejected pleading or amendment a part of the record. Patrick v. Patrick, 30 Ky. L. R. 1364, 101 S. W. 328; Weimer's Adm'r v. Smith, 30 Ky. L. R. 1311, 101 S. W. 327. If it is desired to review by direct exception the ruling of the trial court in rejecting an amendment to the pleadings, the proffered amendment, either literally or in substance, must be set out in the bill of exceptions or attached thereto as an exhibit. Cornwell v. Leverette, 127 Ga. 163, 56 S. E. 300. Overruling of demurrer to amended complaint not reviewable where record does not show what the amendment was. Central of Georgia R. Co. v. Carroll [Ala.] 41 So. 517. Refusal to allow the amendment of a pleading will not be reviewed where the record does not disclose the character of the amendment. Minton v. Palmer [Neb.] 112 N. W. 610.

Demurrers and motions: Where the record does not show that a general demurrer and special exceptions to plaintiff's petition were called to the attention of the trial court and passed upon, they will be considered as waived. Moore v. Woodson [Tex. Civ. App.] 99 S. W. 116. Ruling sustaining demurrer to court held not open to consideration where judgment entry showed that certain parts of count had been stricken on motion without showing what parts were so stricken, and motion to strike did not appear in record, and hence was no way to determine what parts were stricken or whether count as shown in record was same as when ruled on below. Wolf v. Smith [Ala.] 42 So. 824. Where plea is open to demurrer on any ground, a demurrer not shown by record will be presumed to have properly been sustained. Rhodes & Son Co. v. Charleston [Ala.] 41 So. 746. Ruling on motion to strike pleading not reviewable where bill of exceptions does not show such motion and an exception to the ruling thereon. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67.

70. Overruling of motion for judgment on account of defendant's failure to appear not reviewable where record does not show when defendant's appearance was entered. Bufford v. Chambers [Ala.] 42 So. 597.

71. Must show grounds of a motion. Medbury v. Maloney [Idaho] 88 P. 81; Johnson v. Center [Cal. App.] 88 P. 727. Where affidavits used on prior hearing were referred to and used, they should be incorporated in record on appeal. Staples & Hanford Co. v. Lord [C. C. A.] 148 F. 15. Refusal to stay proceedings not reviewable where bill of exceptions did not show motion to stay and exception to court's ruling. Bordner v. Myers, 125 Ill. App. 493. Where a court

positions,[74] proceedings at trial in general,[75] admission,[76] exclusion,[77] and sufficiency

vacates an order previously made, it will be presumed, in the absence of a contrary showing, that the order was made in a manner and under circumstances justifying its vacation. Glass v. Glass [Cal. App.] 88 P. 734. A transcript containing all the papers in the action, but not identifying the papers used on a motion to dismiss an appeal is insufficient to enable the court to consider the order on the motion. Kootenai County v. Hope Lumber Co. [Idaho] 89 P. 1054.

72. Judgment by default will not be reversed because case was tried out of its regular order where it is not made to appear on appeal that defendant had meritorious defense. Bartlett v. Jones Co. [Tex. Civ. App.] 103 S. W. 705. Assertion in agreed case on writ of error from default judgment that defendant claimed that he had meritorious defense which he was ready to present, etc., held not to tend to show that he in fact had such defense in absence of statement of grounds on which it was based. Id. An appeal from order denying motion to vacate a default judgment will not be dismissed on the ground that the affidavits upon which it was heard are not before the court, where the affidavit brought up was made a part of the motion and hence must have been considered, and it does not appear that any others were used. Richardson v. Richardson [Wash.] 86 P. 1069.

73. Assignment that court erred in overruling motion to transfer quasi criminal case from criminal to civil docket will not be considered where it is not shown by bill of exceptions or elsewhere in record that case was not already stated on civil docket when motion was made, and that motion was not overruled for that reason. City of Selma v. Shivers [Ala.] 43 So. 565. Abstract merely stating that a petition for change of venue had been filed and denied held insufficient to present for review court's action in denying petition. Hunt v. Pronger, 126 Ill. App. 403. Order denying continuance not reviewable, application not being contained in bill of exceptions. Sims v. McLaren, 117 Mo. App. 67, 94 S. W. 792. Affidavit not being abstracted, refusal of continuance not reviewable. Berry v. Campbell, 118 Ill. App. 646.

74. The action of the trial court in overruling a motion to quash a deposition upon the ground that the certificate of the officer who took it was defective cannot be reviewed where the bill of exceptions reserved to the ruling does not contain such certificate or state its contents. Gulf, etc., R. Co. v. Sauter [Tex. Civ. App.] 103 S. W. 201. A bill of exceptions quoting certain answers in a deposition and alleging that they were not introduced in evidence, but failing to recite that they were read to the jury during argument and commented on, presents no reversible error. Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983. Where it appears that depositions admitted below were taken on due notice and that appellant was represented by counsel, it will be presumed that they were filed and published. Oolitic Stone Co. v. Ridge [Ind. App.] 80 N. E. 441. Where the decree recites that the cause was heard upon depositions but the same are not copied into the transcript, it will be presumed that they tended to sustain the findings of the court. Weaver v. Parlin & Orendorf Co. [Ark.] 100 S. W. 878. In such case it cannot be assumed that affidavits of persons named, appearing in the transcript as exhibits to the answer, were treated as depositions. Id.

75. Cannot complain of trial of case out of order and without notice where record does not show that such was fact. Rabb v. Texas Loan & Inv. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 618, 96 S. W. 77. Where court decides civil case, submitted to him on law and evidence, without argument, will be presumed that none was necessary to enable him to come to a just conclusion Warner v. Close, 120 Mo. App. 211, 96 S. W. 491. Presumed that in passing on case court had before it the original papers filed or correct copies thereof. Brophy v. Sheppard, 124 Ill. App. 512. If trial took place in defendant's absence, this should be shown by bill of exceptions. That record did not affirmatively show defendant's presence was insufficient. Race v. Isaacson, 124 Ill. App. 196. In the absence of a showing to the contrary, it will be presumed that the trial court complied with Rev. St. 1899, § 3643, relating to the custody of the jury. Wallace v. Skinner [Wyo.] 88 P. 221. Cannot complain that case was tried without jury where record does not show demand for jury and payment of jury fee. Rabb v. Texas Loan & Inv. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 618, 96 S. W. 77. Where it does not appear affirmatively from the record that the demand for a jury was not timely made, nor that objections to the conclusions of the master were not presented before time, the presumption, from the action of the trial court in allowing a jury, should be that all that was essential to entitle the defendant thereto had been done. San Jacinto Oil Co. v. Culberson [Tex.] 101 S. W. 197. In the absence of the evidence it cannot be presumed that it raised an issue of estoppel not pleaded or that the court did not pass thereon. Big Horn Lumber Co. v. Davis, 14 Wyo. 455, 84 P. 900, 85 P. 1048. A reviewing court can not say that a trial judge was guilty of misconduct in rebuking counsel or disapproving of some action on his part where so far as is disclosed by the record the judge may have spoken pleasantly and with no tendency to prejudice counsel or his case. Betten v. Toledo, etc. R. Co., 9 Ohio C. C. (N. S.) 53. Order dismissing bill not reviewable where there was nothing in record to show that it was improper. Bellinger v. Barnes, 223 Ill. 121, 79 N. E. 11. Dismissal for want of solicitor's authority not reviewable in absence of evidence. Id. Refusal of new trial on ground of improper argument not reviewable where such argument is not brought into record by bill of exceptions. Manion v. Lake Erie & W. R. Co. [Ind. App.] 80 N. E. 166. An assignment that the court erred in refusing a new trial asked on the ground of a remark made by a juror to his fellows cannot be considered if the bill of exceptions does not show that it contains all the evidence heard upon the motion for a new trial. Lowry v. Southern R. Co. [Tenn.] 101 S. W. 1157.

76. Evidence admitted must appear. Rice v. Knostman [Wash.] 88 P. 194; McFarland v. Darien & W. R. Co. 127 Ga. 97, 56 S. E. 74; Maxwell v. Rucker, 127 Ga. 111, 56 S. E. 91; Chicago, etc., R. Co. v. Breeding [Tex. Civ. App.] 100 S. W. 800; St. Louis S. W. R. Co. v. Hill [Tex. Civ. App.] 103 S. W. 227; Garbanati v. Johnson [Colo.] 86 P. 1009; Robinson v. Muir [Cal.] 90 P. 521; Kinsly v. New Vulture Min. Co. [Ariz.] 90 P. 438; Green v. Dodge [Vt.] 64 A. 499; Sullivan v. Fugazzi [Mass.] 79 N. E. 775. In an action tried by the court without a jury, it will be presumed that the court considered only competent evidence. Palmer v. McFarlane [Neb.] 111 N. W. 794; Adams v. Weir [Tex. Civ. App.] 99 S. W. 726; Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406; Champion v. McCarthy [Ill.] 81 N. E. 808; Strayhorn v. McCall, 78 Ark. 209, 95 S. W. 455; Wald v. Wald, 119 Mo. App. 341, 96 S. W. 302. Where the date of a previous transfer admitted on the issue of value does not appear, whether it was too remote cannot be considered. Cane Belt R. Co. v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 927, 97 S. W. 1066. Where a conductor was charged with negligence and the evidence on that issue was not abstracted, the court could not determine whether it was prejudicial error to admit evidence of a conversation between the conductor and the engineer wherein the conductor asked the engineer if he was drunk. St. Louis, etc., R. Co. v. Boyles, 78 Ark. 374, 95 S. W. 783. It must be considered on appeal that the contents of a paper "introduced in evidence" were made known to the jury. Arkansas S. W. R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802. Where secondary evidence is admitted after a demand for the original on trial, it will be presumed that the evidence taken showed that party of whom production was demanded had sufficient time to produce where the bill of exceptions is silent upon the question. Scott v. Christenson [Or.] 89 P. 376. An objection that the court permitted defendant to contradict by parol evidence the legal effect of his blank endorsement cannot be reviewed where the abstract does not disclose whether the evidence was oral or written. Kinsel v. Wieland [Colo.] 88 P. 153. Where evidence is admissible on any ground it will be presumed that it was admitted on such ground where the record does not show the contrary. Southern Car Mfg. & Supply Co. v. Wagener [N. M.] 89 P. 259. Where documentary evidence was admitted and judgment rendered in favor of the respondent, it will be presumed on appeal that they were properly proven notwithstanding respondent's contention on appeal that no sufficient foundation was laid. Aetna Life Ins. Co. v. Duparquet, Huot & Moneuse Co., 104 N. Y. S. 375. Record held sufficient to authorize court to pass on question of waiver of privilege against disclosure by physician of plaintiff's physical condition. Elliott v. Kansas City, 198 Mo. 593, 96 S. W. 1023. Objection on account of reception of evidence by master cannot be considered where case does not show that he was requested to report any evidence received by him and report does not show that any evidence was received over objection and exception. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1160. Admission of testimony on re-examination will not be considered where it does not appear that it was not rendered admissible by the cross-examination. Grout v. Moulton [Vt.] 64 A. 453. Record must show wherein error in admitting testimony lies. Cushman v. Davis [Vt.] 64 A. 456. An appellate court cannot decide on the admissibility of evidence having relation to a certain issue if the evidence on such issue is not set out in the record. Seago v. White [Tex. Civ. App.] 100 S. W. 1015. An assignment of error in the admission of certain evidence over the objection that the same was "hearsay, immaterial and irrelevant and not admissible for any purpose," cannot be considered where no such grounds of objection are disclosed in the statement of facts to which the brief refers. London v. Crow [Tex. Civ. App.] 102 S. W. 177.

77. An assignment of error that a part of an answer of a witness stricken out should have been admitted with the other part in order to explain and qualify it cannot be considered if the bill of exceptions does not show that the other part was admitted. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354. On appeal from a judgment for plaintiff in action to recover from the executor of a decedent a sum alleged to be due plaintiff, alleged error in refusing to admit in evidence decedent's will will not be considered where the will is not contained in the record. Stuyvaert v. Arnold, 122 Mo. App. 421, 99 S. W. 529. Objections on account of exclusion of evidence by master cannot be considered where case shows no request for master to report evidence excluded and report shows no evidence excluded over objection and exception. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110. Alleged error in refusing to admit the transcript of the evidence of an absent witness taken at a former trial of the case cannot be considered if the bill of exceptions does not show that the testimony of the stenographer who took the evidence down was offered to prove the correctness of the transcript. El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 99 S. W. 587. Where the trial court by its findings of fact set forth its action in refusing an offer of an instrument in evidence in sufficient detail to bring the ruling properly before the court for review, the ruling may be reviewed although the instrument was not brought up by the record. Otero v. Otero [Ariz.] 90 P. 601. Exclusion of evidence not reviewed unless the objection made appears. Linn v. Waller [Tex. Civ. App.] 98 S. W. 430; San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574; Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133.

Excluded evidence must appear. Blackburn v. Woodward [Ga.] 57 S. E. 318; Priddy v. Boice [Mo.] 99 S. W. 1055; Barnes v. Squier [Mass.] 78 N. E. 731; Christy v. Campbell [Colo.] 87 P. 548; Devlne v. Kerwin, 102 N. Y. S. 841; Neves v. Costa [Cal. App.] 89 P. 860. An assignment of error to the exclusion of evidence cannot be considered where there is no approved statement of facts. Chicago, etc., R. Co. v. Edwards [Tex. Civ. App.] 99 S. W. 1049; McFern v. Gardner, 121 Mo. App. 1, 97 S. W. 972; Montezuma Canal Co. v. Smithville Canal Co. [Ariz.] 89 P. 512; Stevens v. Citizens' Gas & Elec. Co. [Iowa] 109 N. W. 1090; Gabbert v. Penfield [Mo. App.] 102 S. W. 627. Where objections to question propounded witness are sustained,

of evidence,[78] instructions,[79] findings,[80] verdict,[81] judgment and relief granted,[82] grant or denial of a new trial,[83] and proceedings on intermediate appeals.[84]

bill of exceptions must show what answer would have been. Bluestein v. Collins [Tex. Civ. App.] 103 S. W. 787; Mutter v. Lawrence Mfg. Co. [Mass.] 81 N. E. 263; St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152; Meredith v. Miller [Tex. Civ. App.] 99 S. W. 430.

Evidence and pleadings must appear. Race v. Isaacson, 124 Ill. App. 196; St. Louis S. W. R. Co. v. Hill [Tex. Civ. App.] 103 S. W. 227; In re Stillman [R. I.] 67 A. 5.

78. Where in an equity case oral evidence was heard, it will be presumed that it sustained the findings where it is not preserved. Meeks v. State [Ark.] 98 S. W. 378; Jones v. Mitchell [Ark.] 102 S. W. 710. Where defendants pleaded a material alteration of a chattel mortgage sought to be foreclosed and the court made no finding as to the alteration but decreed a foreclosure, it cannot be presumed on appeal that the allegation was established. Slyfield v. Willard [Wash.] 86 P. 392. If the statement of facts fails to show what was the holding in cases offered in evidence to prove the law of a foreign jurisdiction, it will be presumed that it was such as would support the action of the trial court. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354. Where a cause is remanded with directions to award the custody of children to the mother and to make such provisions for their maintenance "as the court may deem necessary," a denial of an order requiring the father to pay the mother for their past and future support will not be held an abuse of discretion in the absence of a statement of facts or a bill of exceptions. Kane v. Miller [Wash.] 86 P. 568. Affidavits offered to show error in master's findings as unsupported by evidence cannot be considered where they do not show all the evidence. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110. What jury sees upon view in condemnation case is not evidence, and hence court is not precluded by such a view from reviewing evidence where it is all in record. Zanesville, etc., R. Co. v. Bolen [Ohio] 81 N. E. 681. Where, on appeal in a suit for specific performance of a contract to convey lands, the evidence is not in the record, it will be assumed that the proof was no more definite as to the description of the land than that contained in the petition. Freeburgh v. Lamoureux [Wyo.] 85 P. 1054. In Massachussetts findings in equity case conclusive in absence of evidence in record. First Baptist Soc. v. Dexter [Mass.] 79 N. E. 342. Where documentary evidence could not be considered because not properly made part of record, held that it would be presumed that evidence supported judgment, it being impossible to determine without documentary evidence whether assignment that it did not was well taken or not. Newnom v. Williamson [Tex. Civ. App.] 103 S. W. 656. Where an appeal is sufficient to bring up errors of law alone, appellant cannot secure a review of the sufficiency of the evidence by assigning that the verdict is "against the law," thereby requiring the court to consider the evidence to ascertain the facts proven in order to pass on the assignment. Trull v. Modern Woodmen of America [Idaho] 85 P. 1081. Where the evidence is not preserved, an assignment that the court erred in approving the findings of fact and conclusions of law of the referee and dismissing the action can only be considered on the judgment roll, and the facts found are not reviewable. Howe v. Hobart [Okl.] 90 P. 431. Where the judgment entry recites that the case was heard upon the pleadings and stipulation of counsel, but the stipulation is not copied therein and there is no bill of exceptions and it does not appear that any motion for a new trial was filed, it will be presumed that the evidence sustained the findings of the trial court. Robinson v. Cross [Ark.] 101 S. W. 754. Though there is no evidence in the record to support a finding, yet if the recitals of the decree show that evidence was heard that is not preserved in the record it will be presumed that such evidence supports the finding. Dierks Lumber & Coal Co. v. Cunningham [Ark.] 99 S. W. 693. Where in an action to recover damages to a growing crop the record does not purport to contain all the evidence, it must be presumed that the evidence was of a character to enable the jury to assess the damages in the proper manner. Montgomery v. Somers [Or.] 90 P. 674.

Must show all the testimony. Schoen Plumbing Co. v. Empire Brew. Co. [Mo. App.] 102 S. W. 1064; Tabler v. Yaple, 120 Ill. App. 69; Ritter Lumber Co. v. Lestershire Lumber & Box Co. [C. C. A.] 153 F. 575; Kimball v. Houston Oil Co. [Tex.] 99 S. W. 852; Kruegel v. Bolanz [Tex. Civ. App.] 103 S. W. 435; Chicago, etc., R. Co. v. Edwards [Tex. Civ. App.] 99 S. W. 1049; Knudson-Jacob Co. v. Brandt [Wash.] 87 P. 43; Ep parte Caple [Ark.] 99 S. W. 830; Hempstead County v. Phillips, 79 Ark. 263, 95 S. W. 133; Van Vranken v. Granite County [Mont.] 90 P. 164; Mateer v. Jones [Tex. Civ. App.] 102 S. W. 734; Taylor v. Woolum, 30 Ky. L. R. 378, 98 S. W. 1006; Hibner v. Westover [Neb.] 110 N. W. 732; Johnson v. Grace [Tex. Civ. App.] 15 Tex. Ct. Rep. 793, 94 S. W. 1064; McQueen v. Phelan [Cal. App.] 88 P. 1099; Moore v. Harmes [Mo. App.] 99 S. W. 764. Nor in such case will the refusal of a demurrer to the evidence be reviewed. Moore v. Harmes [Mo. App.] 99 S. W. 764; Stewart v. Bobo [Ark.] 98 S. W. 682; Stevens v. Taylor [Tex. Civ. App.] 102 S. W. 791; Vaughan v. Bridgham [Mass.] 79 N. E. 739; Hodgdon v. Fuller [Mass.] 79 N. E. 749; Green Lumber Co. v. Nutriment Co., 224 Ill. 234, 79 N. E. 621; Boettcher v. Thompson [S. D.] 110 N. W. 108; Murphy v. Foster [N. D.] 109 N. W. 216; Rosenthal v. Rosenthal 117 La. 786, 42 So. 270; McMillan v. Diamond [Neb.] 110 N. W. 542; Farmers' United Tp. Mut. Hail Ass'n v. Dally, 98 Minn. 13, 107 N. W. 555; McQuiggan v. Ladd [Vt.] 64 A. 503; Smith v. Smith [Iowa] 109 N. W. 194; Patterson v. Cappon, 129 Wis. 439, 109 N. W. 103; Stone v. Ogden Packing Co., 30 Utah, 460, 85 P. 1004; Rogers v. Brown, 15 Okl. 524, 86 P. 443; Hanstad v. Canadian Pac. R. Co. [Wash.] 87 P. 832; Honerine Min. & Mill. Co. v. Tallerday Steel Pipe & Tank Co. [Utah] 88 P. 9; Kelly v. Butte, 34 Mont. 530, 87 P. 968; Hardie v. Bissell [Ark.] 94 S. W. 611; Taylor v. Bader, 117 Mo. App. 72, 93 S. W. 80; McCourt v. Singers-Bigger [C. C.

A.] 145 F. 103; Kirk v. Salt Lake City [Utah] 89 P. 458; Richardson v. Powers [Ariz.] 89 P. 542; Van Vranken v. Granite County [Mont.] 90 P. 164; Hoefer v. Dunbar [Okl.] 90 P. 412; Stokes v. Stokes, 127 Ga. 160, 56 S. E. 303; In re Burke, 102 N. Y. S. 785; Cohn v. Hanellin, 104 N. Y. S. 347.

79. Though bill of exceptions does not show that instructions refused were separately asked, rulings on each are reviewable where each charge shows that it was separately considered and marked refused. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 So. 1034. Refusal of given instructions cannot be considered on appeal if the record fails to show the action of the trial court upon such instructions or that they were submitted to that court. International, etc., R. Co. v. Kyle [Tex. Civ. App.] 101 S. W. 272. If the record shows that a special charge bears no notation of the trial judge with his signature, as required by the Texas statute, Rev. St. 1895, art. 1320, an assignment of error complaining of the giving of such charge cannot be considered, although there is an annotation on the margin of the record to the effect that it was given. Galveston, etc., R. Co. v. Worcester [Tex. Civ. App.] 100 S. W. 990. It will not be presumed that an instruction objected to by appellant on appeal or any similar thereto was given at appellant's request, but such fact must be affirmatively shown. First Nat. Bk. v. Carroll [Mont.] 88 P. 1012. Refusal to give special charges will not be considered on appeal where the record does not show that they were requested, and they are not signed by either appellants or their counsel. Selman v. Gulf, etc., R. Co. [Tex. Civ. App.] 101 S. W. 1030. Error in modifying instructions not reviewable where modifications did not appear in abstract. Peterson v. St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860. Appellate court would not assume that amended instruction was not taken out by jury when it retired. Cunningham v. Springer, 203 U. S. 647, 51 Law. Ed. 662. The refusal of the lower court to give an instruction asked cannot be considered where the record does not show what prayers were granted. Kecoughtan Lodge v. Steiner [Va.] 56 S. E. 569. Where documentary evidence could not be considered because not properly made part of record, and it could not be determined without it whether assignment that court erred in directing verdict was well taken or not, held that it would be presumed that there was no error in directing verdict. Newnom v. Williamson [Tex. Civ. App.] 103 S. W. 656.

Necessity of showing instructions refused or excepted to. Stainback v. Henderson, 79 Ark. 176, 95 S. W. 786; Wallen v. Wallen [Va.] 57 S. E. 596; Coal Bluff Min. Co. v. Akers [Ind. App.] 80 N. E. 545; O'Neal v. Parker [Ark.] 103 S. W. 165; Capital Fire Ins. Co. v. Montgomery [Ark.] 99 S. W. 687. Rule that charges or refusals to charge, which are made basis of assignment of error, must be set out in bill of exceptions does not prevent court from looking to entire record to ascertain whether prejudicial error was committed, and where the record on appeal by defendant shows that the general charge was given for appellant as to certain counts, the action of the trial court upon the pleadings relating to the charged out counts will not be reviewed, though such changes are not in the bill. Gambill v. Fuqua [Ala.] 42 So. 735.

Necessity of showing entire charge: Where not all instructions are in record, erroneous instructions will be presumed to have been corrected or withdrawn. People's State Bk. v. Ruxer [Ind. App.] 78 N. E. 337; Shotts v. McKinney [Ind. App.] 79 N E. 219. Where instructions given and refused do not appear, it will be assumed that an instruction objected to, together with the others, properly presented the law of the case. Churchill v. More [Cal. App.] 88 P. 290. In Arkansas objections to instructions will not be considered if the instructions are not set out in appellant's abstract as required by the rules of practice. O'Neal v. Parker [Ark.] 103 S. W. 165. Where instructions were not abstracted, refusal to give a particular instruction was not reviewable though appellant asserted that no other instruction was given presenting the same theory. St. Louis, etc., R. Co. v. Boyles, 78 Ark. 374, 95 S. W. 783. Instructions presumed correct or cured where certain evidence and other instructions were not abstracted. Dobbins v. Little Rock Ry. & Electric Co., 79 Ark. 85, 95 S. W. 794. Where bill of exceptions did not show that it contained all instructions given, but there was nothing in it tending to show that others were given, held that it could not be presumed that instructions erroneously stating that certain claims could not be considered was cured by other instructions. Bourland v. McKnight, 79 Ark. 427, 96 S. W. 179. Giving and refusal of charges requested in writing will not be considered unless charges are set out in bill of exceptions. Jones v. Adkins [Ala.] 44 So. 53.

Necessity of showing evidence: Instructions and refusals to instruct will be presumed to be sustained by the evidence where the evidence is not in the bill of exceptions. Simmons v. Hanne [Fla.] 42 So. 590; Jenkins v. St. Louis S. W. R. Co. [Tex. Civ. App.] 102 S. W. 937; Decker v. Mann [Conn.] 66 A. 884; Wallace v. Skinner [Wyo.] 88 P. 221; Mayo v. Goldman [Tex. Civ. App.] 16 Tex. Ct. Rep. 862, 97 S. W. 1061; Holland v. Williams, 126 Ga. 617, 55 S. E. 1023; Donovan-McCormick v. Sparr, 34 Mont. 237, 85 P. 1029; Baker County v. Huntington [Or.] 87 P. 1036; People's State Bk. v. Ruxer [Ind. App.] 78 N. E. 337; Politowitz v. Citizens' Tel. Co. [Mo. App.] 99 S. W. 756; San Antonio & A. P. R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 457, 94 S. W. 214; Christy v. Campbell [Colo.] 87 P. 548; Oliver v. Grant [Tex. Civ. App.] 100 S. W. 1022; Clements v. Mutersbaugh, 27 App. D. C. 165; Roach v. Warren, Neely & Co. [Ala.] 44 So. 103; Jonesboro, etc., R. Co. v. Chicago Portrait Co. [Ark.] 99 S. W. 75; St. Louis S. W. R. Co. v. Hill [Tex. Civ. App.] 103 S. W. 227; Chicago, etc., R. Co. v. Edwards [Tex. Civ. App.] 99 S. W. 1049; Chicago, etc., R. Co. v. Breeding [Tex. Civ. App.] 100 S. W. 800; Foreman v. Norfolk, Portsmouth & Newport News Co. [Va.] 56 S. E. 805; Hooker v. Forrester [Fla.] 43 So. 241; Roe v. Doe [Ala.] 43 So. 856; Sherrell v. Louisville & N. R. Co. [Ala.] 44 So 153. The rule that in the absence of a bill of exceptions it will be presumed that instructions are based upon the evidence does not apply to instructions which are recalled before a verdict was reached. Hibner v. Westover [Neb.] 110 N. W. 732. Notwithstanding the absence of a statement of facts, an error in the charge will be reviewed if the pleadings show that such charge is necessarily erroneous.

Haight & Co. v. Turner [Tex. Civ. App.] 99 S. W. 196.

80. Where the only error complained of is that the decree is not supported by the finding of facts, and there is no bill of exceptions bringing up the evidence, the judgment will be affirmed. Pitts v. Pitts [Mo.] 100 S. W. 1047. Though under the provisions of the Texas statute, Rev. St. 1895, art. 1333, the trial court has no authority to file his conclusions of fact and law without being requested to do so by one of the parties, yet in the absence of a showing in the record that he was not so requested, it will be presumed that such conclusions were filed by request. Riggins v. Trickey [Tex. Civ. App.] 102 S. W. 918. Finding that property was transferred with interest to defraud creditors implies a finding that the property was not exempt from execution, in absence of finding showing such exemption. Starke v. Lamb [Ind.] 79 N. E. 895. Where no amendments were proposed to the finding and no objection made, they will be aided on appeal by all reasonable intendments. Schelske v. Orange Tp. [Mich.] 13 Det. Leg. N. 988, 110 N. W. 506. A failure to find upon certain issues, where other findings fully support a judgment, is no ground for reversal unless it be shown by the statement of facts or bill of exceptions that evidence was submitted relative to such issues. People v. McCue [Cal.] 88 P. 899. Decree overruling exceptions to register's report will not be reversed unless record clearly shows that his conclusions are erroneous. Harper v. Raisin Fertilizer Co. [Ala.] 42 So. 550. Marking draft findings as "proven" is sufficient to enable appellate court to treat them as incorporated in the trial court's finding. Jackson v. Savage [Conn.] 64 A. 737. In construing an ambiguous finding subject to two reasonable constructions, that construction will be adopted which supports the judgment, and in construing it resort will be had to the evidence dealt with by the finding. Bautz v. Adams [Wis] 111 N. W. 69. Where the court's finding is silent as to an allegation established by uncontradicted evidence an affirmative finding will be assumed on appeal. Allen v. Bryant [Cal. App.] 88 P. 294. Where the salary of a justice was dependent upon the population of his township as shown by a particular census, a finding of the court as to population will be presumed to be based upon such census in the absence of anything to the contrary. Guiberson v. Argabrite [Cal. App.] 87 P. 226. Where a contractor agrees to cut a certain quantity of timber for the landowner and under another contract was to cut timber for himself, in conversion it will be presumed that the timber cut was under the latter contract where the trial court made no finding in respect thereto, but rendered judgment for defendant. Rice v. Knostman [Wash.] 88 P. 194. If it was necessary for a trustee in bankruptcy to represent both contract and judgment creditors in a suit, it must be presumed in the Federal supreme court that the trial court found that he did where record of bankruptcy court was before it, though not returned to Federal supreme court. Frank v. Vollkommer, 205 U. S. 521, 51 Law. Ed. 911. Rule that in trial by court without jury, in absence of findings of fact, such findings will be imputed to trial court as, supported by evidence, will sustain judgment, held not to apply to case where court on exceptions struck out defense and refused to consider same, and it did not appear from record that judgment would have been same had it been considered. Houston & T. C. R. Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 888, 97 S. W. 106. Where a statement and bill of exceptions cannot be considered, the only question reviewable is the sufficiency of the findings to support the judgment, though exceptions were taken to the findings as not covering all the issues, the exceptions being incorporated in the statement. Vreeland v. Eden [Mont.] 89 P. 735. Cannot assume that a judgment was based upon a finding of fact, where the trial court distinctly stated that no such finding was made. Steinfeld v. Zeckendorf [Ariz.] 86 P. 7. In the absence of specific findings to the contrary, it must be assumed that the court found those facts which are responsive to the issues and essential to the judgment rendered. Deaner v. O'Hara [Colo.] 85 P. 1123. Findings are to be construed to support a judgment rather than defeat it (Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276), and when, from the facts found, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court (Id.). A phase of the case which appears without any controversy in the record will be considered in support of the judgment though not specifically covered by the findings. Hoskins v. O'Brien [Wis.] 112 N. W. 466. Where findings on particular issues are not made by the trial court, they cannot be considered as made in favor of appellant though the evidence is sufficient to sustain them. Robinson v. Muir [Cal.] 90 P. 521.

81. Bill of exceptions did not show that instructions were such as to render findings on various counts contradictory. Lufkin v. Hitchcock [Mass.] 80 N. E. 456. Where under the issues framed there was but one question for the jury, in the absence of the charge, it will be presumed that but one was submitted. Kennedy v. Agricultural Ins. Co. [S. D.] 110 N. W. 116. On a motion for judgment as against a general verdict based on special findings, every issue raised by the pleadings and not eliminated by the instructions will be presumed to have been found for the party in whose favor the general verdict was returned, and it will be presumed that such findings are supported by sufficient evidence, but they will be given effect only in so far as they necessarily negative the findings which might otherwise be assumed in support of the general verdict. Conwell v. Tri-City R. Co. [Iowa] 112 N. W. 546. Presumed that jury were permitted to make all proper allowances of interest in arriving at a balance found due. Clements v. Mutersbaugh, 27 App. D. C. 165. Where no rule of damages was laid down by the court, it cannot be presumed that the jury adopted the correct rule. Barr v. Schefer, 103 N. Y. S. 733. It will be presumed that the jury followed the instructions. Abby v. Wood [Wash.] 86 P. 558; Frepons v. Grostein[Idaho] 87 P. 1004; in the absence of the evidence, a presumption will be indulged in favor of the materiality of a special interrogatory submitted. Wallace v. Skinner [Wyo.] 88 P. 221; Shafer v. McIntyre, 101 N. Y. S. 268.

82. Interest will be presumed to have been properly computed when the record

does not show the number of partial payments, or whether any of them exceeded the amount then due on the principal. Northwestern Mortg. Trust Co. v. Ellis [S. D.] 108 N. W. 22. Transcript of record so incomplete that appellate court could not hold that the judgment below was contrary to the law and evidence, and without evidence to support it. Atlantic Coast Line R. Co. v. Jones, 127 Ga. 447, 56 S. E. 761. Where a valid general assignment is essential to sustain the judgment of the trial court, and the instrument of assignment was before the court but has not been brought into the record on appeal, it will be presumed that the court found that it was a valid assignment. Tapp, Leathers & Co. v. Harper [Ark.] 103 S. W. 161. Upon appeal from a refusal to vacate a judgment it was held that it would be presumed, the record not showing the contrary, that an order of revivor after the death of the defendant in the original action was made in time and by consent of parties, and after all the heirs of deceased defendant had come of age. Estep v. Estep, 30 Ky. L. R. 577, 99 S. W. 280. No presumption that facts sustain decree where facts are stated. Kidd v. New Hampshire Traction Co. [N. H.] 66 A. 127. Where at the close of the evidence both parties move for a directed verdict and the court dismisses the complaint, disputed issues of fact will be deemed on appeal to have been determined by the court by consent of the parties in favor of the defendant, no requests having been made to submit any questions. O'Dwyer v. Verdon, 100 N. Y. S. 588. Appeal from judgment rendered at time when law made no provision for holding general term dismissed where record indicated that it was made at special term, but did not show organization of court nor that special term was had in compliance with statute, and therefore failed to show such a judgment as was appealable. Tidmore v. Perritt [Ala.] 42 So. 818. Judgment will be taken as correct and legal if brought up without the evidence, and there is no reversible error on face of proceedings. Martel v. Jennings-Heywood Oil Syndicate [La.] 42 So. 975. Where all parties agreed that sheriff was entitled to some compensation for services and left it to court to determine amount without introducing any evidence, held that it would be presumed that allowance was correct where no error was shown. Id. Where decision as to amount of compensation to which sheriff was entitled was, by agreement, rendered by court on his own knowledge, no evidence being introduced, and it did not appear that items of charges were allowed which were not before court, held that judgment would not be set aside. Jennings-Heywood Oil Syndicate v. Houssiere Latreille Oil Co. [La.] 42 So. 930. In action against stockholder of dissolved bank, where evidence as to defendant being a director, and hence a trustee in charge of liquidation, was conflicting, and there were no findings of fact or conclusions of law, held that it would be assumed in support of judgment that such issue was determined against defendant. Daugherty v. Poundstone, 120 Mo. App. 300, 96 S. W. 728. Where books upon which chancellor and commissioner based findings were not brought up on appeal, held that it would be presumed that they reached correct conclusion and judgment could not be disturbed. Combs v. Combs, 29 Ky. L. R. 919, 96 S. W. 589. Not presumed that court's judgment included an item of expense as to which there was no evidence, though its declaration of law seemed to so indicate. Fulbright v. Wabash R. Co., 118 Mo. App. 482, 94 S. W. 992. No presumption arises in support of a judgment shown by the record not to conform to the verdict notwithstanding absence of a statement of facts. Letot v. Peacock [Tex. Civ. App.] 16 Tex. Ct. Rep. 345, 94 S. W. 1121. Presumed that a judgment was based on estoppel supported by evidence, though question was not submitted to jury. Parker v. Citizens' R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 718, 95 S. W. 38. Where evidence of different items of damages was objected to as not provable but admitted, it will not be presumed in support of a general judgment that such evidence was not considered, but a contrary presumption will be indulged. Callahan & Co. v. Chickasha Cotton Oil Co. [Okl.] 87 P. 331. Where in an action to restrain defendant from interfering with plaintiff's prescriptive easement, a judgment is rendered for plaintiff, it will be presumed in support of such judgment that a finding that plaintiff had used the pipe adversely for more than five years related to the time of commencement of the action. Collins v. Gray [Cal. App.] 86 P. 983. Thus, it not appearing in the record, it cannot be inferred that action was dismissed by justice "upon answer and proof by defendant that the title to real estate was in controversy," which fact would have precluded defendant's denying jurisdiction of superior court under North Carolina statute, Revisal 1905, § 1424. Brown v. Southerland, 142 N. C. 225, 55 S. E. 108.

Judgment for Costs: Rev. St. § 5141, relative to costs after offer to confess judgment, presumed to have been complied with by trial court before entering judgment for costs as provided by the statute. Fisher v. Quillen [Ohio] 81 N. E. 182. An order retaxing costs which does not appear in the printed papers on appeal will not be considered. Ost v. Salmanowitz, 104 N. Y. S. 849.

83. Denial of motion for new trial sustained where court did not specifically find undue influence on jury. Illinois Cent. R. Co. v. Warren [C. C. A.] 149 F. 658. Where motion for a new trial was dismissed because certain material documentary evidence was omitted from the brief of the evidence, and on appeal the omitted evidence does not appear in the record or bill of exceptions, it cannot be determined that it was immaterial. Norred v. State, 127 Ga. 347, 56 S. E. 464. On appeal from judgment on verdict, overruling of motion for new trial is reviewable though record does not contain formal order overruling such motion. Southern R. Co. v. Nelson [Ala.] 41 So. 1006. The granting of a motion for a new trial on the ground of newly-discovered evidence will not be reviewed in the absence of a bill of exceptions containing both the evidence used at the trial and that alleged to have been newly-discovered. In re Winch's Estate [Neb.] 112 N. W. 293. Where the trial court was not bound to consider the sufficiency of the evidence to support the verdict because not properly specified in the statement of the case, it will be presumed that he did not

(§ 9) *E. Conclusiveness of record and effect of conflicts therein.*[85]—The record imports absolute verity[86] and cannot be impeached by affidavits,[87] or by

consider it in passing on a motion for a new trial. Boettcher v. Thompson [S. D.] 110 N. W. 108. An order denying a new trial will not be reviewed where the record does not contain the lower court's reasons for overruling the motion. Moerman v. Clark-Rutka-Weaver Co., 145 Mich. 540, 13 Det. Leg. N. 648, 108 N. W. 988. Under Comp. Laws, § 10,504, where the record does not contain a statement of the reasons of the trial judge in denying a new trial as to certain grounds, the denial of the motion as to such grounds cannot be reviewed. Wilbur v. Michigan Cent. R. Co., 145 Mich. 344, 13 Det. Leg. N. 522, 108 N. W. 713. Where want of diligence is the only ground relied upon for the reversal of an order granting a new trial on the ground of newly-discovered evidence, it will be presumed that the evidence was pertinent and material. Woerdenhoff v. Muekel, 131 Iowa, 300, 108 N. W. 533. Where an order granting a new trial was entered on the first day of a new term, but the order recited that the motion was heard on an adjourned day of a preceding term, it will be presumed that the order was made prior to the adjournment of such preceding term. Cooper v. Granger, 129 Wis. 50, 108 N. W. 193. Where the record on appeal from an order granting a new trial does not show what was used on the motion, it will be presumed that the motion was based on a ground upon which affidavits could be used and that they were used. Thompson v. Wheeler [Cal. App.] 89 P. 1065. Where no reason for granting new trial was given and there was no error of law, and evidence was conflicting, held that it would be presumed that new trial was granted on ground that verdict was contrary to weight of evidence. Sharp v. Odom, 121 Mo. App. 565, 97 S. W. 225. Assignments that court erred in refusing to grant a new trial dismissed where no exceptions were taken and reasons for motion for new trial were not printed in paper book. Hentzler v. Weniger, 32 Pa. Super. Ct. 164. On appeal from order sustaining motion for new trial and in arrest of judgment, held that court could not consider either motion where bill of exceptions did not specify whether exception was taken to sustaining of one, or other, or both motions, and did not give or call for any of the evidence, call for the motion for new trial, or refer to motion in arrest of judgment. Kupke v. United Rys. Co., 120 Mo. App. 452, 96 S. W. 1034. The granting of a new trial on the ground that the verdict is against law is equivalent to a holding that it was contrary to instructions, and therefore the order will not be reviewed in the absence of the instructions. Miller v. Griffith [Cal. App.] 88 P. 285. Where the facts upon which the trial court acted in setting aside a default are not brought up, the action will be presumed correct. Mitchell v. Danielson [Colo.] 89 P. 823. In the absence of a showing to the contrary, it will be assumed that a sufficient showing was made to authorize the court in setting aside a judgment under § 473, Code of Civ. Proc. Fox v. Townsend, 149 Cal. 659, 87 P. 82. Where a trial court passed upon a motion for a new trial, it will be presumed that it had a notice before it sufficient to justify it in so doing. Ettien v. Drum [Mont.] 88 P. 659. Where there is no bill of exceptions showing evidence was offered on a motion for new trial on the ground of newly-discovered evidence, it will be presumed that affidavits were offered authorizing the granting of the motion Central Trust Co. v. Stoddard [Cal. App.] 88 P. 806.

84. Supreme court not justified in reversing decision of intermediate court setting aside trial court's findings of fact, though it did not appear how the facts were brought before it where its recital of what it considered and its conclusions therefrom were sufficient to sustain the judgment. Andrews v. Eastern Oregon Land Co., 203 U. S. 127, 51 Law. Ed. 119. Where record on appeal from judgment of circuit court on appeal from justice's court did not show any appeal from justice's court, nor any judgment there, nor any appeal to circuit court, held that supreme court was without jurisdiction and appeal would be dismissed. Rayborn v. Cothern [Miss.] 43 So. 70. Under Code Civ. Proc. § 1338, an order of reversal made by the appellate division which fails to state the grounds thereof is presumed not to be based on questions of fact. Such an order will be reversed by the court of appeals where there is evidence to sustain the findings upon which the trial court based its judgment. Butler v. Wright, 186 N. Y. 259, 78 N. E. 1002. Where upon appeal from the Texas court of civil appeals to the supreme court, based upon the fact that the judges had disagreed, it appears that the disagreement is about an abstract question of law, and the facts of the such aproval, the objector being a party supreme court is without jurisdiction to review the question and cannot refer the case back to the court of civil appeals for a finding of facts under Laws 1905, p. 71, c. 51. Schneider v. Wetz [Tex.] 100 S. W. 135. In matters of practice a presumption in conformity with the regular practice in similar cases may be indulged in favor of the appellant. Objections by appellant to approval of receiver's report not presumed, upon the record recitals, to have been filed after such approval, the reasonable presumption in such case being that they were filed before such approval, the objection being a party and having received due notice. Standish v. Musgrove, 223 Ill. 580, 79 N. E. 161. Appellant's exceptions to master's report which were filed after expiration of twenty days, presumed to have been filed under special order of court. See Sup. Ct. rule 21. Nye v. Whittemore [Mass.] 79 N. E. 253. Where on appeal heard by single justice all exceptions are waived, and on a further appeal to full court no findings are filed and the evidence is not reported, the only question that can be considered is whether the single justice had jurisdiction. Codwise v. Livermore [Mass.] 80 N. E. 609. An appeal from a judgment dismissing an appeal from the justice court will be dismissed where the bill of exceptions does not contain the transcript from the justice, notice of appeal to the district court, motion to dismiss, or order dismissing the appeal. McKee v. Bielenberg [Mont.] 90 P. 757.

85. See 7 C. L. 189.

86. Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196; Peabody v. West, 103

the statement of counsel,[88] or by an ex parte certificate of the trial judge,[89] or clerk.[90] In case of conflict, that part of the entire record whose appropriate function is to present that particular matter prevails.[91] Interlineations in the record will be presumed to have been properly made.[92]

§ 10. *Transmission of record to reviewing court. A. Form and contents of transcript or return.*[93]—The transcript includes both the record proper and the secondary record, and generally all of such records should be included,[94] excluding extraneous and needless matter,[95] though in some states the parties indicate by prae-

N. Y. S. 942; Atkinson v. Maris [Ind. App.] 81 N. E. 745; Broadstreet v. Hall [Ind.] 80 N. E. 145; Boettcher v. Thompson [S. D.] 110 N. W. 108; Thornburgh v. Beakley [Ark.] 102 S. W. 362; Eliot v. Kansas City, etc., R. Co. [Mo.] 102 S. W. 532. The return is binding on the court on appeal. Gottlieb v. Kurlander, 101 N. Y. S. 751. As to time of denying a rehearing. In re McCall [C. C. A.] 145 F. 898. Recitals of evidence in certificate of evidence or bill of exceptions conclusive on reviewing court. Franklin Union v. People, 121 Ill. App. 647. Nunc pro tunc order purporting to have been made by the court could not be impeached by contention that it was made by judge in vacation. Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525. Cannot be contradicted, varied, or explained, by outside evidence. Martin v. Todd, 121 Ill. App. 230. In absence of compliance with statutory requirements as to signing or establishment of bill of exceptions, its incorporation in the transcript does not make it a part of the record, and hence it may be shown by parol that it was signed after expiration of time fixed by statute, and that attempted extension of such time was invalid. Rainey v. Ridgway [Ala.] 43 So. 843. Presumptions in favor of the records of the trial court are of no avail as against the facts shown by the record itself. First Nat. Bk. v. Sutton Mercantile Co. [Neb.] 110 N. W. 306. Entries as to extension of time to file bill of exceptions. Roberts & Shaeffer Co. v. Jones [Ark.] 99 S. W. 66.

87. Hardie v. Bissell [Ark.] 94 S. W. 611; Main Inv. Co. v. Olsen [Wash.] 86 P. 657; Broadstreet v. Hall [Ind.] 80 N. E. 145; Atkinson v. Maris [Ind. App.] 81 N. E. 745. Appeal having been allowed in open court, the presumption is that it was allowed by a judge duly authorized to hold such court and the record cannot be made to show otherwise by affidavits in the appellate court on motion to dismiss. Columbus Chain Co. v. Standard Chain Co. [C. C. A.] 145 F. 186.

88. Smith v. Gustin [Ind.] 81 N. E. 722; Kempner v. Patrick [Tex. Civ. App.] 95 S. W. 51.

89. Where record affirmatively shows that the case was tried without taking testimony, it cannot be contradicted or enlarged by an ex parte certificate of the judge. In re Ollschlager's Estate [Or.] 89 P. 1049.

90. Certificate of clerk that cause was not set down for hearing held not evidence to contradict certified transcript showing that it was so set down. Haile v. Venable [Fla.] 44 So. 76. Where the transcript of the record does not show that the pleadings were amended such fact cannot be shown by a letter of the circuit clerk to the effect that the transcript from the circuit court of another county showed that amended pleadings were filed. Hastings Industrial Co. v. Baxter [Mo. App.] 102 S. W. 1075.

91. If there is conflict between bill of exceptions and record proper as to matters properly a part of the latter, the record must control. Malott v. Central Trust Co. [Ind.] 79 N. E. 369. Bill of exceptions controls as to what were grounds on which new trial was granted. Martin v. McLeod [Ala.] 42 So. 622. Transcript prevails over bill of exceptions as to whether amount of verdict as written included dollar mark. Broadstreet v. Hall [Ind.] 80 N. E. 145. In case of conflict between bill of exceptions and record proper as to terms of an order, the bill of exceptions prevails. Paepcke-Leicht Lumber Co. v. Becker, 124 Ill. App. 311. Recitals in a judgment that defendant has been duly served with process or that he has appeared and answered are not conclusive on the appellate court, and if upon inspection of the entire record it appears that the recitals were untrue and the court acquired no jurisdiction over defendant, the judgment will be declared void. Orchard v. National Exch. Bk., 121 Mo. App. 338, 98 S. W. 824. Recitals in the bill of exceptions control the stenographer's transcript. Woodmen of the World v. Jackson [Ark.] 97 S. W. 673.

92. Interlineation changing return day of appeal held conclusive, in absence of explanatory evidence, in computing time for filing transcript. Parker Co. v. Succession of Griffin, 117 La. 977, 42 So. 473.

93. See 7 C. L. 189.

94. Where a rule of the trial court provided that such rule should constitute a part of the record in every case, it is the duty of the clerk to include it without further direction. Seymour v. Southern R. Co. [Tenn.] 98 S. W. 174. The fact that an amended petition is lost from the record and not copied into the transcript is immaterial, if it could throw no light on the case. McClellan's Adm'r v. Troendle, 30 Ky. L. R. 611, 99 S. W. 329. Where case is disposed of on exception of no cause of action, all the transcript need contain is the petition, the exception, the judgment and the minutes of the court. State v. Reid [La.] 42 So. 662. Docket entries constitute the record until formally extended, and where the entire proceedings are thus set out the appellate court may consider any question of law thus disclosed. Shanahan v. Boston, etc., R. Co. [Mass.] 79 N. E. 751. Case presented by copy of docket entries presented by copy, supplemented by agreed statement, sanctioned by trial judge. Id.

95. Costs of matter in transcript not made basis of any assignment of error taxed against appellants. Missouri, etc., R. Co. v. Williams [Tex. Civ. App.] 96 S. W. 1087.

cipe what shall be included.[96] Transcript should be made up in strict accordance with the rules of the appellate court.[97] Copies, not the original files, should be sent up unless the statute requires originals.[98] Rules usually require the transcript to be indexed[99] and arranged in an orderly manner.[1] Defects and omissions may be curable by amendment,[2] or they may limit review,[3] or be ground for dismissal.[4]

(§ 10) *B. Authentication and certification.*[5]—The approval of the secondary record[6] and the sufficiency of the certificate to show that all matter essential to review is included[7] are elsewhere treated. The transcript must be authenticated by the clerk[8] of the court from which it comes,[9] showing its completeness and

A paper designated "affidavit on motion for a new trial and on appeal" will be stricken from the transcript where there is no appeal from an order denying a motion for new trial, an affidavit on appeal being unknown. Hart v. Spencer [Nev.] 89 P. 289. Transcript should not be incumbered with improper and unnecessary papers. Savage v. Parker [Fla.] 43 So. 507.

96. Filing of schedule with trial court within 90 days after granting appeal is necessary only where appellant brings up part of record, and hence appeal will not be dismissed because schedule is filed after such time where complete transcript is filed in due time, but schedule will in such case be disregarded. Grubbs v. Fish, 29 Ky. L. R. 1291, 97 S. W. 358. Praecipe designating entries called for by reference to pages in order book is sufficient under Acts 1903, p. 340, c. 193, § 7, requiring clerk to include all entries called for. Hages v. Shirk [Ind.] 78 N. E. 653. Where entries called for are designated only by reference to pages of order book, it will be presumed that an entry included in the transcript by the clerk was found on one of the pages designated. Id. Where paragraphs of a complaint are called for by number, and there are no amended paragraphs of such number, the paragraphs called for are properly included in transcript, though marked as amended paragraphs by the marginal notes. Id. Praecipe requesting complete record may be either oral or in writing. Price v. Huddleston [Ind.] 79 N. E. 496. Where transcript is sent up without praecipe, it will be presumed that there was an oral praecipe. Id. Under praecipe for full transcript, such transcript need not contain all pleadings and ruling, but need only show such matters as will fully present the error relied on. Id. Clerk has no discretion to omit from transcript anything directed by either party to be inserted, provided it be a paper or proceeding in the cause having a relation or leading up to the order or decree appealed from. Worley v. Dade County Security Co. [Fla.] 42 So. 527. Where appeal is granted in circuit court, and schedule filed within 90 days thereafter, no notice of filing is necessary. Civ. Code Prac. § 737. Carr v. Calvert's Adm'r [Ky.] 102 S. W. 282.

97. Is duty of appellant to see that transcript is properly prepared in accordance with rules of court, and to make errors complained of clearly appear. Savage v. Parker [Fla.] 43 So. 507; Worley v. Dade County Security Co. [Fla.] 42 So. 527. A transcript is not prepared as required by rule 90 for the Texas courts of civil appeals, where some of the pages are left partly blank, and one entirely so, and there are erasures on some, and parts of sheets written on are pasted on others over writing not distinguishable, and some of the sheets are cut and not of uniform size. Aspley v. Wheat [Tex. Civ. App.] 99 S. W. 1135. A transcript not prepared in strict conformity with the rules of the appellate court will not prevent review where no matter of substance has been disregarded and no prejudice to the adverse party done. Lyon v. Mauss [Utah] 87 P. 1014.

98. Under Acts 1903, p. 338, c. 202, the original bill of exceptions may be considered as part of the transcript. New York, etc., R. Co. v. Callahan [Ind. App.] 81 N. E. 670.

99. In North Carolina an index must be placed in front of the record. Supreme Court Rule 19 (3). Davis v. Wall, 142 N. C. 450, 55 S. E. 350.

1. In North Carolina the exceptions must be numbered and grouped immediately after the end of the case on appeal. Revisal 1905, § 591; Supreme Court Rules (1902), 21 27. Davis v. Wall, 142 N. C. 450, 55 S. E. 350. A record which is so confused that it does not appear where the record proper ends and the bill of exceptions begins will not be considered. Clay v. Union Wholesale Pub. Co., 200 Mo. 665, 98 S. W. 575.

2. See post, § 10 D. That the transcript does not contain all the evidence is not ground for striking it, the proper procedure being for appellee to suggest a diminution of the record. Flickinger v. First Nat. Bk. [C. C. A.] 145 F. 162.

3. See ante, § 9 D.

4. See post, § 11 G.

5. See 7 C. L. 190.

6. See ante, § 9 C.

7. See ante, § 9 D.

8. Register of chancery court of Calhoun County held pro hac vice clerk, within Code 1896, § 4314, for purpose of certifying record on appeal in habeas corpus proceedings. State v. Fuller [Ala.] 41 So. 990. Deputy clerk of civil district court of a parish not authorized to certify as to facts of case tried in one of the divisions of such court, each division having its own stenographer and minute clerk who alone are cognizant of what takes place on trial in such division. Rosenthal v. Rosenthal, 117 La. 786, 42 So. 270.

9. A suit was brought in the Superior court of B. county, for a personal injury which occurred in the city of T., and after recovery and while motion for a new trial was pending, the county of T. was created and organized so as to include the city of T. within its boundaries; and suits pending in the original counties from which the territory was taken to create the new county, which would properly belong in such county, were by law provided to be transferred thereto. After the motion for

verity.[10] Objection to the certification must be made before submission on the merits.[11]

(§ 10) *C. Transmission, filing, and printing.*[12]—The transcript must be filed in the appellate court[13] within the time prescribed by rule or statute,[14] or an extension thereof duly granted,[15] and complete jurisdiction is not acquired until such filing.[16] Relief against accident or mistake is usually grantable.[17]

a new trial had been overruled, a bill of exceptions was tendered, and the clerk of the superior court of the new county was directed to send up a transcript of the record to the supreme court. It was held that a motion to dismiss the writ of error on the ground that the bill of exceptions and transcript should have been transmitted by the clerk of the superior court of B. county was without merit. Atlantic & B. R. Co. v. Johnson, 127 Ga. 392, 56 S. E. 482.

10. Under the Arkansas statute (Kirby's Dig. §§ 1194, 1195), the clerk is not required to certify that the transcript contains all the evidence. His duty is merely to send up a duly authenticated transcript of the record. Dierk's Lumber & Coal Co. v. Cunningham [Ark.] 99 S. W. 693. Where the court can consider only a complaint and demurrer thereto a certificate of the clerk that the transcript contains true copies of those papers is sufficient. Kootenai County v. Hope Lumber Co. [Idaho] 89 P. 1054.

11. Objection to the certificate of the trial judge to the judgment roll cannot be raised except by a motion duly made prior to the submission of the argument on the merits of the appeal. McLain v. Nurnberg [N. D.] 112 N. W. 245.

12. See 7 C. L. 191.

13. Agreed statement cannot take place of transcript. McDevitt v. Bryant [Md.] 64 A. 931.

14. Barney v. Elkhart County Trust Co. [Ind.] 79 N. E. 492. On appeal under Burns' Ann. St. 1901, § 4225, from county commissioners to circuit court, it was appellant's duty to see that auditor filed transcript in proper time. Kelly v. Lawson [Ind. App.] 80 N. E. 553. It is not necessary or proper to file transcript until after leave to appeal is granted, and the transcript filed after such time is the only one that will be considered. Atkinson v. Maris [Ind. App.] 81 N. E. 745. Code Prac. § 738, requiring filing of transcript in office of clerk of court of appeals at least twenty days before the first day of second term of that court after granting of appeal applies to appeals granted by the clerk of the court of appeals as well as to other appeals. Rush v. Handley, 30 Ky. L. R. 170, 97 S. W. 726. Filing timely where within the twenty days though not within the two years allowed for appeal where appeal was allowed within the two years. Id. Under Acts 1900, p. 150, no. 92, appeals, except in parish of Orleans, are returnable to supreme court, whether in term time, or vacation, in not less than fifteen nor more than sixty days, exclusive of days of grace, after date of order of appeal, except by consent of parties. Brooks v. Smith [La.] 43 So. 399. Where extension of time has been granted to file transcript, and return day fixed, no days of grace are allowed. Id. Return day, or extension of return day, fixed for date within period of vacation cannot be extended by implication to first day of next term of supreme court. Id. Statute held to have repealed Acts Ex. Sess. 1870, p. 10, no. 45, in so far as appeals from country parishes are concerned. Id. Where transcript is not filed in time and time is not extended, appeal will be dismissed, though good reason for delay is shown, court having no power to extend time after time fixed by code has expired. Alford v. Guffy, 30 Ky. L. R. 54, 97 S. W. 369. The fact that appellant removed the case into the Federal courts after judgment was rendered against him in the state court and the same was not remanded until after the expiration of the time for serving and filing a transcript, does not excuse his failure to file. Finney v. American Bonding Co. [Idaho] 90 P. 859. By the express provisions of Rev. St. 1901, par. 1582, the record of a case must be filed in the supreme court within thirty days after the perfection of the record in the district court. Leatherwood v. Richardson [Ariz.] 89 P. 503. The phrase in court rule 2 (78 Pac. vii), providing that "when there is a proceeding pending for the settlement of a bill of exceptions" the period within which the transcript must be filed does not commence to run until, etc., related to any proceeding actually pending, regardless of whether the bill can be legally settled. Dernham v. Bagley [Cal.] 90 P. 543. Under par. 9, rule 27 (32 Pac. v), requiring a transcript to be served and filed in the supreme court within 60 days after the appeal is perfected, a transcript not filed for nearly two years is too late. Finney v. American Bonding Co. [Idaho] 90 P. 859. Since the statute does not fix the time for filing the transcript and papers in the county court on appeal from the police magistrate's court by the city they must be filed within a reasonable time. Hummel v. Ouray [Colo.] 88 P. 582. B. & C. Comp. § 553, requires the transcript to be filed within 30 days after the appeal is perfected, § 549 gives the adverse party 5 days after the service of the undertaking to object to the sureties, and § 531 provides that in computing such time the first day shall be excluded and the last included. Held that where the undertaking was served on August 24th a transcript filed on September 29th was timely. Boothe v. Scriber [Or.] 87 P. 887. When the records show that ample time has elapsed between the perfecting of an appeal and the opening of the term of the supreme court at which it must be heard within which to comply with the rules of the court relative to the filing of an abstract and brief and no attempt is made to excuse the delay, the appeal will be dismissed. Brink v. Whisler [S. D.] 110 N. W. 94.

15. An order extending the time for filing a transcript on appeal cannot be attacked on a motion to dismiss the appeal. Garel v. Page [Cal. App.] 88 P. 591. An application for extension of time for filing a transcript will ordinarily be granted where no delay

(§ 10) *D. Amendment and correction.*[18]—Until the record is sent up the lower court has full power to correct it.[19] After it is filed in the appellate court, the practice in some states is to make corrections in the appellate court,[20] while in others the appellate court disclaims such power,[21] and the record will be returned for correction,[22] or the amendment made below and brought up[23] on leave[24] or

in the hearing will result therefrom. Id. Where time is insufficient, appellant should apply for extension under code Prac. 883. Hayes v. Mayer, 117 La. 1067, 42 So. 505. Where on second day of term time is given to file an additional transcript, appellate court is without power after expiration of such period to further extend the time. McDonald v. Greenwood, 124 Ill. App. 163. Inability of clerk to make out transcript because some of proceedings were lost, held good reason for extending time for filing it. Alford v. Guffy, 30 Ky. L. R. 54, 97 S. W. 369. Where the delay for the return of an appeal has been extended, and the transcript is not filed in the supreme court until after the return day, the appeal will be dismissed. Succession of Theriot [La.] 43 So. 265. Where there is not sufficient time between the perfecting of an appeal and the time when an abstract and brief must be filed, in which to prepare, serve, and file same, appellant should obtain the consent of opposing counsel or an order of the supreme court for an extension. Brink v. Whisler [S. D.] 110 N. W. 94. Where appellant's attorneys made timely request of court stenographer for transcript of record, which the latter failed to furnish because of alleged excess of work on hand, a motion for extension of time to perfect appeal was granted, condltionally. Love v. Turner, 75 S. C. 547, 56 S. E. 232.

16. Appeal not effective until transcript is filed in appellate court. Wade v. Goza, 78 Ark. 7, 96 S. W. 388. Appeal held perfected on filing so far as limitations were concerned though no notice had been given. Niemitz v. State [Ind. App.] 78 N. E. 357.

17. Where judge filled out order to stenographer for transcript to be delivered to appellant instead of fixing time for filing, case was one for application to Supreme Court for leave to file bill of exceptions. See Court and Practice Act 1905, §§ 71, 72, 473, 490. Baker v. Tyler [R. I.] 66 A. 65. Belief of appellant as to intentions of judge in retaining bill without signing it held not an accident, mistake, or unforseen circumstance, excusing appellant from filing petition in appellate court for allowance of bill within thirty days. See Court & Practice Act 1905, § 473. Hartley v. Rhode Island Co. [R. I.] 66 A. 576. Where on appeal from district court to supreme court no point was taken by appellee on account of appellant's failure to bring up judgment record with state of case, appellant was allowed time to perfect the appeal by bringing up such record. Katzin v. Jenny [N. J. Law] 65 A. 192. Where delay was caused by omission of register and not due to any fault of appellant or his attorney. Koenig v. Ward [Md.] 65 A. 345. Where there is a default in the service of a case on appeal, or in the filing of the case as settled, an application to open the default should be made to the special term; but where the default consists in a failure to file or serve the printed copy of the papers upon which the appeal is to be heard as required by rule 41 of the general rules of practice, the default must be relieved against in the appellate division. Hanson v. Walsh 101 N. Y. S. 1061. Where the papers constituting the record proper have been misplaced without any laches on the part of appellant, the proper course is to file the case on appeal "settled," and ask for a certiorari for the record proper. Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196.

18. See 7 C. L. 192.

19. Atkinson v. Maris [Ind. App.] 81 N. E. 745. Where the record does not show the date of actual entry of the judgment, the trial court should on motion, even after an attempted appeal, correct it upon a showing as to the actual date upon which the entry was made. Hoffman-Bruner Granite Co. v. Stark [Iowa] 108 N. W. 329.

20. Discrepancy between verified application under Gen. St. 1902, § 801, to rectify an appeal, and the finding does not necessarily dispense with the necessity of a verified answer by appellee as required by the statute. Avery v. White [Conn.] 66 A. 517.

21. Appellate court could not correct a purported statement of facts so as to have it precede the signatures of the parties and judge instead of following them. Walker & Sons v. Allen [Tex. Civ. App.] 95 S. W. 585. Where the appellee raises a question in his argument which was not presented to the court below, an amendment of the abstract which will show the true record on the point thus made will be allowed. Biglow v. Ritter, 131 Iowa, 213, 108 N. W. 218. Where the record does not show that objections to jurisdiction because of defects in the summons had been sustained prior to a motion to amend, application should be made to the trial court to correct it. Barker Co. v. Central West Inv. Co. [Neb.] 105 N. W. 985.

22. Where parties in their briefs refer to essential documents which are not contained in the record, each being equally derelict, the record will be returned to the court below for amendment. Waldman v. Mann, 101 N. Y. S. 757. Where the notice of appeal recites that the appeal is from a judgment and the record does not contain the judgment, the case will be returned to the court below for such action as the parties deem proper. Shiel v. Miller, 101 N. Y. S. 789. Where it is impossible to tell from the record who were parties plaintiff and defendant, it will be returned to the court below for correction. Bruck v. Gilmartin, 101 N. Y. S. 527.

23 Where in response to rule trial court makes answer that record was returned complete, rule for mandamus requiring return of papers will be discharged and depositions in denial of the judge's return refused. Commonwealth v. Hutton, 32 Pa. Super. Ct. 66. Where a case originally tried before a justice has reached the court of appeals from the circuit court, the court of appeals will not direct the circuit court to take evidence of an alleged alteration of the

stipulation,[25] or by certiorari.[26] A supersedeas does not prevent an application to correct the record.[27] Unnecessary amendments will be stricken.[28] Superfluous matters in the record will be ignored or stricken.[29] The time within which amendments may be made is usually limited by rule and where there is laches the application will be denied.[30]

filing mark on the justice's transcript, and to send up another bill of exceptions with such evidence and the court's finding, where such issue had not been raised in the circuit court. McGuffin v. McQuary [Mo. App.] 102 S. W. 3. On certiorari directing court below to correct and complete the record, that court may by nunc pro tunc entry make any change necessary to make the record conform to the facts and recite accurately what was done. Hays v. Wagner [C. C. A.] 150 F. 533. Where absence of seal from bill of exceptions has been corrected by amendment below and certified to appellate court, the defect is fully cured. Bunnell v. Rosenberg, 126 Ill. App. 196. That appellant presented a bill of exceptions showing that the regular judge presided at the trial did not estop him from having the record corrected so as to show that an attorney not elected special judge presided. Arkadelphia Lumber Co. v. Asman, 79 Ark. 284, 95 S. W. 134. Contention that appellant failed to prove allegation of his motion before it was overruled held untenable where court below overruled it on the ground of estoppel. Id. Where in an action on a foreign judgment it is urged on appeal that such judgment was not properly authenticated, such defect may be remedied by presenting a properly authenticated judgment. Milliken v. Dotson. 102 N. Y. S. 564. Where pending an appeal and supersedeas the return of service of process commencing a suit is amended in the lower court, such fact may be shown to the appellate court by supplemental record. Gauley Coal Land Ass'n v. Spies [W. Va.] 55 S. E. 903.

24. Where a judgment would be affirmed except for an erroneous record entry showing apparent error, it seems that it would be proper for trial court to amend its record. Mumma v. Easton & A. R. Co. [N. J. Err. & App.] 65 A. 208. Upon motion in the appellate court, appellant will be allowed to withdraw his bills of exceptions for the purpose of having orders made in the trial court filing them of record. Eubanks v. Com., 30 Ky. L. R. 606, 99 S. W. 232.

25. Stipulations for future corrections will ordinarily be sanctioned if availed of in due time. Cramer v. Springfield Trac. Co. [Mo. App.] 97 S. W. 969. The bill of exceptions cannot, by agreement of counsel in the appellate court, be amended by the insertion of additional evidence, not certified to by the presiding judge. Board of Education of Glynn County v. Day [Ga.] 57 S. E. 359.

26. Ordinarily motions for certiorari to complete the record are granted without examination of the transcripts on file (McGowan v. Elroy, 28 App. D. C. 84); where the matter sought to be brought up would add immensely to the record, the court will look into the transcript to see if there is reasonable ground for granting the motion (Id.). Failure of the clerk to include in the record a rule of the trial court which provided that it should be included in the record of every case is such a defect as may be corrected by certiorari on suggestion of diminution. Seymour v. Southern R. Co. [Tenn.] 98 S. W. 174. The appellate court will not by certiorari direct the trial court to make changes in the case on appeal, where a letter from the trial judge states that in his opinion the statement is fair and correct in all the material parts. Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196. Either party may have record corrected or supplied with necessary matter by writ of certiorari. Price v. Huddleston [Ind.] 79 N. E. 496.

27. Pickeren v. Northcutt [Ark.] 102 S. W. 708.

28. One will not be permitted to bring up unnecessary or immaterial matters, and accordingly, a motion to compel the bringing up of the evidence below, on appeal from dismissal of a bill of review, will be denied. McGowan v. Elroy, 28 App. D. C. 84.

29. Appeal records should not be encumbered with unnecessary recitals and such will be stricken. Howell v. Hess, 28 App. D. C. 167. On appeal from decision of commissioner of patents awarding a priority in interference, certain briefs, copies of patents, etc., held improperly included in transcript. Id.

30. Under the Missouri statute (Rev. St. 1899, § 813), and appellate court rule 15, an appellant cannot amend his abstract one day before the cause is set for trial in the appellate court, and cannot, after submission of the case, file amended abstracts without the permission of the court. Fleisher v. Hinde, 122 Mo. App. 218, 99 S. W. 25. Permission to file new bill of exceptions not grantable after argument on appeal. Pittsburg Gas & Coke Co. v. Goff-Kirby Coal Co. [C. C. A.] 151 F. 466. After mandate issued, motion to recall it and to file additional transcript too late. Smith v. Cosey, 26 App. D. C. 569. Leave to cure defects in abstract denied by appellate court where application was not made till shortly before hearing and oversight of counsel was the only excuse given. Redd v. Missouri Pac. R. Co., 122 Mo. App. 93, 98 S. W. 89. Where appeal from county court was dismissed because suit was not within original jurisdiction of county court, and there was no appeal bond or transcript from justice's court showing that it was pending in county court on appeal, held that subsequent motion for rehearing and certiorari to bring up appeal bond and transcript from justice's court would be overruled where no excuse was made for failure to bring them up originally. St. Louis & S. F. R. Co. v. Pettigrew [Tex. Civ. App.] 16 Tex. Ct. Rep. 986, 97 S. W. 338. A record will not be corrected so as to show service of citation on defendants in error, if, when upon motion to dismiss grounded in part upon failure to perfect service of citation, plaintiff in error did not move to correct the record. Aspley v. Alcott [Tex. Civ. App.] 99 S. W. 1123. Where a hearing on appeal has been continued to give appellant an opportunity to correct the record, and

§ 11. *Practice and proceedings in appellate court before hearing. A. Joint and several appeals: consolidation, severance.*[31]—Several orders or judgments may sometimes be brought up by the same appeal,[32] and several appeals may sometimes be consolidated.[33]

(§ 11) *B. Original and cross proceedings.*[34]—The cross assignment of errors is treated elsewhere.[35] The appellee cannot complain of provisions of the decree unless there is a cross appeal.[36] The plaintiff's failure to appeal from a judgment in favor of one of two joint defendants eliminates such defendant from the case so far as the questions involved in an appeal by the other defendant are concerned.[37]

(§ 11) *C. Amendment of parties.*[38]—Amendment and substitution may be allowed in case of the death of a party.[39] So, too, necessary parties who have been omitted may be brought in by way of amendment.[40]

the time in which to make the correction has expired, the court must determine the case upon the record as it stands. Jones v. Mitchell [Ark.] 102 S. W. 710. A record omitting a part of the pleadings cannot be amended after the expiration of a year from rendition of judgment in the lower court. Vanhorn v. Vanhorn [Kan.] 88 P. 62. An appellant's motion to postpone hearing on appellee's motion to dismiss or affirm, in order to make a stipulation and a part of the testimony a part of the record, denied where no excuse was offered for failure to make the testimony a part of the record. Jones v. Starr, 26 App. D. C. 64.

31. See 7 C. L. 193.

32. Two judgments signed same day, one making absolute rule to annul premature appointment of administrator, and other maintaining an opposition to his appointment. Succession of Weincke [La.] 42 So. 776.

33. Two cases, one brought up by writ of error and one by appeal consolidated, where they were in fact the same. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

34. See 7 C. L. 193.

35 See post, this section, subd. E. 3, Cross Errors.

36. Patterson v. Patterson, 200 Mo. 335, 98 S. W. 613; Anderson v. Fry, 102 N. Y. S. 112; Matthews v. Fry [N. C.] 55 S. E. 787. Hence, on plaintiff's appeal from judgment wholly in defendant's favor, defendant cannot bring up bill of exceptions to review findings, since such judgment is not appealable by him. Patterson v. Patterson, 200 Mo. 335, 98 S. W. 613. One who succeeds in having a decree modified so as to uphold trust as to him alone may not on appeal, he himself not appealing, go beyond supporting the modified decree and opposing the assignments of error. Landram v. Jordan, 203 U. S. 56, 51 Law. Ed. 88. Error prejudicial to respondent cannot be corrected without a cross appeal, particularly where he did not call the attention of the trial court to it. In re Switzer [Mo.] 98 S. W. 461. Writ of error awarded defendant does not bring up action of trial court in sustaining demurrer to declaration. Jenkins v. Chesapeake & O. R. Co. [W. Va.] 57 S. E. 48. Judgment cannot be disturbed **as between coappellees.** Garner v. Freeman [La.] 42 So. 767. Where judgment is rendered in petitory action against two or more persons claiming interest in property, and appeals are taken by some of the parties cast and not by others, plaintiff and parties not appealing are coappellees, and as between them judgment cannot be reversed or amended upon an answer filed by either in the appellate courts. In re Interstate Land Co. [La.] 43 So. 173. Cross assignment raising question of jurisdiction of trial court over certain trustees, who were originally parties defendant, held not open to consideration where there was no controversy between them and appellant, and no appeal bond was filed by them or by appellee. Houston Ice & Brew. Co. v. Nicolini [Tex. Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84. Prior to statute of 1905, cross appeal **in equity** could be prosecuted by filing brief in due season assailing decree appealed from, and such brief will be deemed to have been filed in due season where appellant neither objects to service or filing thereof, nor moves to have it stricken from the record as having been filed out of time. Meade Plumbing, H. & L. Co. v. Irwin [Neb.] 111 N. W. 636; Hahn v. Bonacum [Neb.] 109 N. W. 368.

Court rule 9 [45 S. E. vi] as to practice in writ of error, makes whole case reviewable regardless of absence of cross appeal. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

Cross appeal brings up only questions decided in favor of appellant or any coappellee against the appellee praying the cross appeal. Kirby's Dig. § 1225. Wade v. Goza, 78 Ark. 7, 96 S. W. 388.

37. Where a railroad company and construction company were sued jointly for injuries caused by fellow servant, and plaintiff did not appeal from a judgment for the railroad company, he could not on appeal by the construction company, urge that the two companies were practically identical and that hence the fellow-servant rule, as in cases against railroads, did not apply. Bradford Const. Co. v. Heflin [Miss.] 42 So. 174.

38. See 7 C. L. 194.

39. Where trustee, in action against him in his representative, dies after filing petition in error but before submission, his successor will be substituted instead of entering an order finally disposing of cause as of date prior to its submission and before his death. Field v. Leiter [Wyo.] 90 P. 378. Where intermediate appellate court affirmed judgment not knowing of death of an appellee, error could be corrected on further appeal. Wilhite v. Skelton [C. C. A.] 149 F. 67. Several reasons given. Id. Where deceased litigant had conveyed his interest and there was no counterclaim in the action, the grantee or successor should be substi-

(§ 11) *D. Calendars, trial dockets, terms.*[41]—The case must be docketed in the appellate court for trial [42] at the proper term,[43] and is before the court for hearing as of the date to which it is set.[44]

(§ 11) *E. Forming issues; pleading, assigning, and specifying error. 1. In general.*[45]—The assignment of errors is appellant's pleading tendering an issue of law,[46] and generally must be filed in the appellate court.[47] In some states it is required that the assignment of errors must be filed simultaneously with the entry of the appeal,[48] or must be made on the transcript itself,[49] or in the appellant's proper book.[50] Assignments first made in the reply brief will not be considered.[51]

Errors not assigned will not ordinarily be considered,[52] but fundamental er-

tuted rather than the representative (Twaddle v. Winters [Nev.] 89 P. 289), but where there are several successors holding as tenants in common, they need not all be substituted (Id.). Where there is **conflict between statute and supreme court rule** as to substitution of parties, the former controls. Id. Held no conflict between Supreme Court Rule 9 (73 Pac. xiii), and Comp. Laws, § 3111, the two agreeing in allowing the substitution of the representative of a deceased litigant, but the statute going further and providing for subsitution of a successor or transferee of interest. Id. Under Comp. Laws, § 3111, death of litigant and **failure to substitute his** representative does not oust supreme court of jurisdiction and render its decision void. Id.

40. The right to amend a writ of error and citation by adding omitted plaintiffs depends upon whether the record shows enough to authorize the amendment under Rev. St. § 1005, and if it appears from the record that the omission was accidental, the amendment should be allowed. Thomas v. Green County [C. C. A.] 146 F. 969. Assignment held amendable by inserting names of administrators as parties appellee when it affirmatively appeared that the administrators had been appointed, were represented by counsel, and filed a brief on the merits, and the amendment would not affect the consequences of either an affirmance or a reversal. Pierse v. Bronnenberg's Estate [Ind. App.] 78 N. E. 1045. Necessary parties appellant cannot be brought in by amendment of assignment of errors **after expiration of time limit** for appeal. Brown v Brown [Ind.] 80 N. E. 535; Polk v. Johnson [Ind.] 79 N. E. 491. Selection of wrong party as appellee cannot be remedied by amendment bringing in proper party after expiration of time limit on the appeal. Hurst v. Hawkins [Ind. App.] 79 N. E. 216.

41. See 7 C. L. 194.

42. Case not before appellate court for hearing until assigned on trial docket. Walt v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60.

43. Clerk of supreme court must inspect all bills of exceptions and enter case therein upon docket for proper term, even though term to which case is returnable in certificate of the judge is erroneously stated therein, the action of clerk in the premises being, of course, always subject to review. Gray v. Gray, 127 Ga. 345, 56 S. E. 438.

44. Where on motion of appellee an appeal is submitted as of a date prior to that on which appellant's argument was filed, it is before the court without argument for appellant and cannot be considered. Miller v. Machinery Mut. Ins. Ass'n [Iowa] 109 N. W. 118.

45. See 7 C. L. 195.

46. The assignment of error in a strict common-law sense is, in effect, the complaint or declaration of the plaintiff in error, and resembles in every material respect the initial pleading in a court of original jurisdiction. Scott v. Great Western Coal & Coke Co., 223 Ill. 271, 79 N. E. 53.

47. Requirement of Equity Rule 92 that statement of errors be filed in trial court does not dispense with necessity of filing assignment in appellate court. Jones v. Weir [Pa.] 66 A. 550. Supreme Court Rule 26, requiring appellant to assign errors in writing, signed by himself or counsel, and serve a copy thereof on respondent and file the original with the clerk of the supreme court, is not complied with by appellant placing in his abstract what purports to be an assignment of errors. Lyon v. Mauss [Utah] 87 P. 1014.

48. Rev. Laws, c. 162, § 10. Codwise v. Livermore [Mass.] 80 N. E. 609.

49. Assigning of errors on separate sheets of paper and attaching same to page of transcript with paper fastners held not compliance with rule, and such assignment cannot be considered. Hunter v. Louisville & N. R. Co. [Ala.] 43 So. 802.

50. Rule requiring appellant to print in his paper book a statement of the question involved is highly mandatory and if not complied with the appeal will be non-prossed. Rabinowitz v. Kenah, 31 Pa. Super. Ct. 334. Rule requiring a concise statement of question involved to be printed in appellant's paper book held mandatory and violated by printing a long statement. McMellen v. Williamson, 32 Pa. Super. Ct. 263.

51. Unless good **excuse** is shown and leave of court is obtained. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349. This rule is not subject to **waiver** by appellee. Id. Fact that appellee in answer to point raised for first time in appellant's reply brief cited authorities on issue is not waiver of appellant's tardiness where appellee also objects to the consideration thereof. Id.

52. Texas & P. R. Co. v. Weatherby [Tex. Civ. App.] 14 Tex. Ct. Rep. 809, 92 S. W. 58; Strosnider v. Turner [Nev.] 90 P. 581; Daniels v. Johnston [Colo.] 89 P. 811; Haynes v. Sherwin-Williams Co., 126 Ill. App. 414; Shedd v. Seefeld, 126 Ill. App. 375.

Admissions of evidence: Overruling motion to exclude witness' answer. Nevers Lumber Co. v. Fields [Ala.] 44 So. 81.

Instructions: Omissions in instructions. Shupack v. Gordon [Conn.] 64 A. 740. Refusal of instruction. Kirk v. Salt Lake City [Utah] 89 P. 458. Peremptory instructions. American Surety Co. v. San Antonio L. & T. Co. [Tex. Civ. App.] 98 S. W. 387. Direction

rors may be reviewed though not assigned.[53] As a general rule, where a motion for a new trial is necessary to preserve errors at the trial, the denial of such motion must also be assigned.[54] Assignments must name all the parties,[55] and must be sufficiently identified with the party who files it, the cause and the court.[56] Failure to designate the special capacity of the appellants is not necessarily fatal,[57] but the right of the party to assign errors must appear.[58] Questions upon which the jurisdiction of the appellate court depends must be presented by the assignment of errors.[59]

of verdict. Teakle v. San Pedro, etc., R. Co. [Utah] 90 P. 402.

Findings and judgment. Finding on which there is no assignment will not be disturbed. Bandy v. Cates [Tex. Cr. App.] 16 Tex. Ct. Rep. 811, 97 S. W. 710; Pittsburgh, etc., R. Co. v. Bovard, 121 Ill. App. 49. Failure to assign as error that findings are contrary to or not supported by the evidence warrants court in refusing to search the record. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540; objection that judgment for husband and wife for damages for injuries did not separately assess damages. Sperbeck v. Camden & S. R. Co. [N. J. Law] 64 A. 1012. Where appellant only complains of so much of a judgment granting divorce and allowing alimony as relates to alimony, the appellate court can only review the judgment in respect to the question of alimony. Patrick v. Patrick, 30 Ky. L. R. 1364, 101 S. W. 328.

Costs: Failure to tax costs against plaintiff on account of two defendants whose pleas of coverture were sustained and another who died and as to whom suit was abated. Prestwood v. McGowan [Ala.] 41 So. 779.

Conditional assignment: Request in brief to consider certain assignment if court should remand case held waiver of questions raised by such assignment where case was not remanded. Houston Ice & Brew. Co. v. Nicoline [Tex. Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84.

53. Where error is not fundamental and there is no assignment at all, appellate court has no discretion. Carrera v. Dibrell [Tex. Civ. App.] 15 Tex. Ct. Rep. 587, 95 S. W. 628.

Held reviewable: Question as to whether action judgment in which was appealed from could have been maintained will be reviewed. Magoun v. Quigley, 115 App. Div. 226, 100 N. Y. S. 1037. Alleged error in declarations of law depending on construction of a written contract set out in bill of exceptions. Alexander v. Beekman Lumber Co., 78 Ark. 169, 95 S. W. 449. Fundamental error in including interest in judgment apparent. Missouri, etc., R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 21, 97 S. W. 720. Rev. St. 1895, art. 1333, does not require a trial judge to file conclusions of law and fact unless requested, and when conclusions are voluntarily filed, no assignment of error on findings therein contained is necessary to an attack of the judgment for not being supported by the evidence. City of Houston v. Kapner [Tex. Civ. App.] 16 Tex. Ct. Rep. 331, 95 S. W. 1103. Where note sued on showed on its face that it had been altered, and uncontradicted evidence showed that it was done without knowledge or consent of makers, and at instance and with connivance of payee, held that, under Rev. St. 1895, art. 1014, error could be considered though not assigned. Adams v. Faircloth [Tex. Civ. App.] 17 Tex. Ct. Rep. 16, 97 S. W. 507.

Held not reviewable. Behn, Meyer & Co. v. Campbell & Go Tauco, 205 U. S. 403, 51 Law. Ed. 857. Though main issue was whether certain property was homestead, exclusion of evidence of its abandonment is not such fundamental error as will be reviewed in the absence of an assignment of error Linn v. Waller [Tex. Civ. App.] 98 S. W. 430.

54. Whitacre v. Nichols [Okl.] 87 P. 865; Martin v. Gassert [Okl.] 87 P. 586. Insufficiency of evidence. Harrington v. Butte & Boston Min. Co. [Mont.] 90 P. 748. Jury's finding on controverted questions of fact. Nashville, etc., R. v. Moore [Ala.] 41 So. 984.

55. Supreme Court Rule 6. Hoag v. Deter [Ind.] 78 N. E. 331. Personal representatives of deceased party below must be named. La Porte Land Co. v. Morrison [Ind.] 78 N. E. 321. One not party below need not be named. Carr v. Duhme [Ind.] 78 N. E. 322. Appellate court does not acquire jurisdiction to pass on merits unless all parties in whose favor judgment was rendered below or who will be affected thereby are named in assignment of errors. West v. Goodwin [Ind. App.] 81 N. E. 734. Sufficient where only abbreviated names were "Ed." and "Fred." and all names were set out more fully than in judgment. Kline v. Hagey [Ind.] 81 N. E. 209.

56. Failure to designate court by which ruling was made is not fatal where record clearly shows ruling and court that made it. Indianapolis St. R. Co. v. Kane [Ind.] 80 N. E. 841. An assignment of errors which does not bear the title of any court or cause nor the signature of any party or attorney and does not show by whom it was made is insufficient. Hawthorne v. Cartier Lumber Co., 121 Ill. App. 494. On appeal in case in which there was change of venue, an assignment of errors to rulings of court to which change was made as having been made by court from which case was transferred presented no questions for review. Indianapolis Traction & Terminal Co. v. Richey [Ind. App.] 81 N. E. 609.

57. Where appeal was taken by probate judge and commissioners' court in their official capacity, the assignment was not fatally defective because it began " come the appellants," etc. Commissioners' Ct. v. State [Ala.] 41 So. 463.

58. Where writ of error is sued out by one not a party of record, his right thereto must affirmatively appear in his assignment of errors. Scott v. Great Western Coal & Coke Co., 223 Ill. 271, 79 N. E. 53.

59. Freehold on direct appeal to supreme court. Gilmore v. Lee [Ill.] 81 N. E. 26.

Amendment may be allowed where the special circumstances of the case justify it.[60]

(§ 11 E) 2. *Proper parties to assign error.*[61]—Only parties to the appeal [62] who are aggrieved [63] can assign error.

(§ 11 E) 3. *Cross errors.*[64]—The appellee cannot be heard as to errors which he does not raise by cross assignment,[65] made and filed in the manner prescribed.[66]

(§ 11 E) 4. *Specifications and averments.*[67]—Assignments of error must be definite and specific.[68] Applications of this rule to assignments respecting pleadings,[69] the admission and exclusion of evidence,[70] instructions,[71] the sufficiency of

60. Amendment making assignment more specific may be allowed. Where appellant followed precedent contained in approved book of forms. Flickinger v. First Nat. Bank [C. C. A.] 145 F. 162.

61. See 7 C. L. 196.

62. Warrantors who have not perfected their appeal, nor filed answer to appeal of defendant cannot ask that the judgment on the call in warranty be reversed or amended. Code Proc. Arts. 888, 889. Foster v. Meyers 117 La. 216, 41 So. 551. One not joining in a writ of error is not entitled to a review by joining in bill of exceptions. Haas v. Malto-Grapo Co. [Mich.] 111 N. W. 1059.

63. See Harmless and Prejudicial Error, 8 C. L. 1. Third person not mentioned in judgment and failing to show his interest therein not entitled to reversal. Bowles v. Vaughn's Adm'r, 30 Ky. L. R. 230, 97 S. W. 802. Code 1896, § 1331, providing for assessment of costs in favor of such portion of defendants as to whom no recovery is had, and § 1332, providing for costs against plaintiff in abatement on account of death of defendant, are for benefit of parties discharged and their estates, and the remaining defendants cannot complain of failure to comply therewith. Prestwood v. McGowin [Ala.] 41 So. 779.

64. See 7 C. L. 197.

65. Kohlsaat v. Gay, 126 Ill. App. 4; Village of Shumway v. Leturno [Ill.] 80 N. E. 403; Anderson v. Frey, 102 N. Y. S. 112. Special rule 4, adopted March 2, 1905 [37 So. v]. Morgan v. Jones [Fla.] 42 So. 242. It is appellee's duty to pray reversal on such grounds as aggrieve him or be concluded as to such. Williams' Heirs v. Zengel, 117 La. 614, 42 So. 157. Dismissal of appellee's counterclaim. O'Mara v. Newcomb [Colo.] 88 P. 167. In Minnesota cross assignments of error are **not allowed** on appeal. State v. Northern Pac. R. Co., 99 Minn. 280, 109 N. W. 238, 110 N. W. 975.

66. Must be filed in trial court. Storms v. Mundy [Tex. Civ. App.] 101 S. W. 258; Williams & Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 546, 98 S. W. 916.

67. See 7 C. L. 197.

68. McKone v. Metropolitan L. Ins. Co. [Wis.] 110 N. W. 472. Court will not go through record to ascertain the issues. Fitch v. Richardson [C. C. A.] 147 F. 196. Must distinctly **specify the error** complained of. Poland v. Porter [Tex. Civ. App.] 98 S. W. 214. Assignment to overruling of exceptions to register's report must specify wherein the report is erroneous. Harper v. Raisin Fertilizer Co. [Ala.] 42 So. 550. Under Rule 24 for the Texas courts of civil appeals, assignments of error must distinctly specify the **grounds** of error relied on. Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 100 S. W. 982. Must specify **particular action or ruling** complained of. Gulf, etc. R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 560, 98 S. W. 657. It is not proper to incumber assignments of error with numerous **reasons and arguments** which tend to obscure rather than elucidate the point intended to be made. San Antonio & A. P. R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418. Argumentativeness in statement of objections on appeal will not render statement insufficient. Codwise v. Livermore [Mass.] 80 N. E. 609. Statement of **abstract proposition,** as that statute is unconstitutional under certain constitutional provisions, is insufficient when assigned independently and not as involved in decision of trial court brought up by record. Pittsburgh, etc., R. Co. v. Collins [Ind.] 80 N. E. 415. Rule 11 of circuit court of appeals requiring assignments to point out the particular errors relied on applies in **appeals in bankruptcy.** Flickinger v. First Nat. Bank [C. C. A.] 145 F. 162.

Held sufficient: Sufficiently specific. Martin v. Craven, 126 Ga. 780, 55 S. E. 962.

Held insufficient: Statement of objections on appeal to supreme judicial court is in nature of assignment of errors and must disclose issue to be tried. See Rev. Laws, c. 162, § 10. Codwise v. Livermore [Mass.] 80 N. E. 609. Such statement will not, however be construed with same strictness as pleading at common law. Id.

Jurisdiction is not affected by indefiniteness of assignment and amendments may be allowed. Flickinger v. First Nat. Bank [C. C. A.] 145 F. 162. See ante, this section, subd. 1, In General. Admitted and rejected, and embraced more than one point, and alleged as error in extract of the opinion below not in the decree. Jones v. Weir [Pa.] 66 A. 550.

69. Assignments held not to comply with supreme court Rule 20, requiring that in case of error in law the proposition of law relied on must be stated, followed by the authorities relied on, and if the error is in the action of the court on demurrer or plea, a statement of the substance thereof. Fort v. Fort [Tenn.] 101 S. W. 433. Assignment to sustaining of **demurrer** to complaint is insufficient where defendants demurred separately. State v. Lung [Ind.] 80 N. E. 541. Objection to one of two paragraphs of complaint will not sustain assignment to overruling of demurrer to whole complaint. Excelsior Clay Works v. De Camp [Ind. App.] 80 N. E. 981. Where demurrer was directed to whole complaint, an assignment to overruling of demurrer to single paragraph pre-

sents no question. Richardson v. Stephenson [Ind. App.] 78 N. E. 256. On assignment based upon overruling of demurrer, plaintiff in error will be confined to grounds stated in demurrer and argued in appellate court, and no other grounds will be considered unless declaration wholly fails to state cause of action. Royal Phosphate Co. v. Van Ness [Fla.] 43 So. 916. Assignment predicated upon overruling of demurrer to a declaration need not designate or specify particular grounds of demurrer relied on, though plaintiff in error will be confined to grounds stated in demurrer and argued, unless declaration wholly fails to state cause of action. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Alleged defects in **petition** cannot be considered under an assignment of error that "the court erred in directing a verdict for plaintiffs for the recovery of the land." Irvin v. Porterfield, 126 Ga. 729, 55 S. E. 946. An assignment of error that neither under the pleadings nor the evidence is the plaintiff entitled to recover is sufficient not only to bring up for decision the question as to whether the evidence authorizes the recovery, but also whether the petition set forth a cause of action. Western & A. R. Co. v. Third Nat. Bank, 125 Ga. 489, 54 S. E. 621. Assignment that court erred in making rule for mandamus absolute, because the allegations of the **answer** raised certain issues of fact which should first have been submitted to jury, raises question whether any issue of fact was made by answer. Southern R. Co. v. Atlanta Stove Works [Ga.] 57 S. E. 429. Assignment that court erred in overruling each and all of plaintiff's special exceptions to defendant's answer and **cross bill** held too general to be considered. Delaney v. Campbell [Tex. Civ. App.] 97 S. W. 519. Assignments of error in bill of exceptions, upon allowance of **amendment** of pleadings, will not be considered when such amendment is not set forth, either literally or in substance, nor attached as an exhibit, nor specified as material to a clear understanding of the errors complained of. Webb v. Hicks, 127 Ga. 170, 56 S. E. 307.

70. Assignment that court erred in its rulings on evidence held too general for consideration. Jones v. Adkins [Ala.] 44 So. 53. Assignment "that the court erred in admitting and rejecting evidence" held too general. Liberty Min. & Smelting Co. v. Geddes [Ariz.] 90 P. 332. Assignment must disclose the evidence either literally or in substance. Blackburn v. Woodward [Ga.] 57 S. E. 318; Lewis, Robinson & Co. v. Hutchinson, 127 Ga. 789, 56 S. E. 998. Assignments based on answers to points and admission of testimony not reviewable where points and testimony are not set out in assignments. Mathushek Piano Mfg. Co. v. Engberry, 30 Pa. Super. Ct. 543. Assignment must quote full substance of evidence admited or rejected with citation of record, where the evidence and ruling may be found. Bar Rule No. 20, subsec. 3. Nance v. Smyth [Tenn.] 99 S. W. 698.

Admission of evidence not considered when particular objection is not pointed out either in assignment of errors or brief. Parrish v. Mills [Tex. Civ. App.] 102 S. W. 184. Assignment need not be considered where there is no reference to evidence objected to. Draughon v. Sterling [Tex. Civ. App.] 103 S. W. 689. Under rule 31, reference must be made to proper book where the evidence may be found. Hallock v. Lebanon, 215 Pa. 1, 64 A. 362; Cameron v. Citizens' Traction Co. [Pa.] 65 A. 534. Where assignment and statement thereunder did not set forth evidence objected to, and there was no reference in either to bill of exceptions, held that rules were not complied with. Draughon v. Sterling [Tex. Civ. App.] 103 S. W. 689. Assignment is defective which objects to admission of the evidence as whole, part of which was admissible, without pointing out the inadmissible portion. Lewis, Robinson & Co. v. Hutchinson, 127 Ga. 789, 56 S. E. 998. Reference to evidence as being contained in brief of evidence is insufficient. Id. Evidence must be set out in such manner that its admissibility can be decided without reference to other parts of record. Webb v. Hicks, 127 Ga. 170, 56 S. E. 307.

Exclusion of evidence will not be considered unless assignment designates wherein court erred. Hall v. Kary [Iowa] 110 N. W. 930. Attention of appellate court must be called to specific evidence against which the objection is urged. Tarpenning v. Knapp [Neb.] 112 N. W. 290. Assignment should contain copies of written evidence excluded. Hallock v. Lebanon, 215 Pa. 1, 64 A. 362. Assignment to rejection of inquiries on cross-examination is insufficient where it is impossible to determine, without searching through brief of evidence, whether excluded evidence would have been relevant and material. McFarland v. Darien & W. R. Co., 127 Ga. 97, 56 S. E. 74. If exception is made of exclusion of evidence on which tenant relies to prove violation of lease the assignment of error must present so much of the excluded evidence as will show that the landlord has violated his obligations under the contract to the tenant's damage. Smith v. Green [Ga.] 57 S. E. 98. Assignments of error, stating generally that court erred in the admission of evidence of certain witnesses who had not qualified, and not particularly specifying error in any ruling, and containing no reference to the folio numbers of the transcript or abstract, will not be considered. Roberson v. Wilmoth [Colo.] 90 P. 95. Where court sustained two separate and distinct motions to exclude evidence and one of them was properly sustained, reference to "—— page" of the record was insufficient to identify the other motion. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822.

71. Specific ground of exception must be assigned. McLean v. Hattan, 127 Ga. 579, 56 S. E. 643. Mere general assignment that court erred in charging or in refusing to charge is not sufficiently specific where there were several prayers and instructions on different subjects. Decker v. Mann [Conn.] 66 A. 884. Where trial judge fails to subscribe his name to instruction given and refused as required by the Texas statute, Sayle's Ann. Civ. St. 1897, art. 1320, and in the record name of the instructions are numbered assignments of error in which the instructions rejected are numbered, but with no reference indicating which of the unnumbered instructions are referred to, cannot be considered. International & G. N. R. Co. v. Hall [Tex. Civ. App.] 102 S. W. 740.

Assignments to instructions given must be specific, a broadside assignment "for errors in the charge" being insufficient. Davis v. Wall, 142 N. C. 450, 55 S. E. 350. Must des-

the evidence,[72] orders,[73] verdict [74] and findings,[75] judgments,[76] rulings on motions

ignate wherein instructions were indefinite, uncertain, and inapplicable. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. That instruction is erroneous is too general. Inland Steel Co. v. Smith [Ind.] 80 N. E. 538. General assignment to instruction abstractly correct is insufficient. Demmores v. Booker [Ga.] 57 S. E. 108. Where excerpts from charge complained of state sound propositions of law, and no specific error is pointed out, no ground of error is alleged. Brackett & Co. v. Americus Grocery Co., 127 Ga. 672, 56 S. E. 762. That court erred in directing verdict held too general. Liberty Min. & Smelting Co. v. Geddes [Ariz.] 90 P. 332. That court erred in refusing to give certain instructions held too general. Omensky v. Gieske, 125 Ill. App. 77. That the court failed to state in a plain and correct manner the evidence in the case and to declare and explain the law arising thereon is too general. Davis v. Keen [N. C.] 55 S. E. 359. Statement under assignment, reciting "the charge of the court contained the objectionable feature as shown in the assignment (see Tr. p. 92, at the top)," held insufficient, the charge not being included in assignment. Galveston, etc., R. Co. v. Stevens [Tex. Civ. App.] 15 Tex. Ct. Rep. 977, 94 S. W. 395. Should challenge propriety or legal accuracy of some definite proposition contained therein, and if there be more than one erroneous proposition the safer way is to file an exception to each. Flannigan v. Strauss [Wis.] 111 N. W. 216. It is improper for appellant to try and convict lower court of error by merely extracting a portion of proper charge. Mapes v. Pittsburg Provision Co., 31 Pa. Super. Ct. 453. That court erred in charging as indicated in certain paragraphs of findings, which paragraphs respectively contained charge on all matters deemed noticed by appellee stated in language of his prayers, and all matters deemed noticed by court stated in its language, was equivalent to assignment that charge as given was erroneous and was too general to be considered. Woodbury v. Wittestine [Conn.] 64 A. 221. Under subd. 4, rule 7, Sup. Ct. (71 Pac. viii), assignment giving instruction must state wherein the instruction is erroneous in its statement of the law applicable to the case or any particular fact or facts thereof. De Amado v. Friedman [Ariz.] 89 P. 588. That charge "does not correctly state the law applicable to the case," and that it is "indefinite and so much so as to be confusing" is too general. Gilmore v. Houston Elec. Co. [Tex. Civ. App.] 102 S. W. 168. That court erred "in charging as stated in appellant's proposed findings of facts and as stated in the finding of the court" held too general. In re Anderson's Appeal [Conn.] 66 A. 7. Where alleged erroneous instructions are set out in separate paragraphs, but language complained of is not indicated by separate assignments, the court will not hold the entire assignment unavailing merely because a part of the charge is held correct. First Nat. Bank v. Miller [Or.] 87 P. 892. Assignment must quote portion objected to totidem verbis. Reading Co. v. Seip, 30 Pa. Super. Ct. 330. Assignment complaining of a charge incorrectly quoted is fatally defective. Ferguson v. Morrison [Tex. Civ. App.] 95 S. W. 1091.

Assignments to refusal or failure to instruct: That court erred in refusing to give instructions numbered 1 to 13 inclusive. Empire State Cattle Co. v. Atchison, etc., R. Co. [C. C. A.] 147 F. 457. Assignment to failure to instruct as to effect of evidence that defendant had disputed plaintiff's claim within six years held insufficient to raise point that payments on disputed claim within six years would not suspend limitations. Decker v. Mann [Conn.] 66 A. 884. Joint assignment to refusal of several instructions cannot be sustained if any of the instructions were properly refused. Cleveland, etc., R. Co. v. Hayes [Ind.] 79 N. E. 448. Error assigned upon refusal to charge that plaintiff assumed risk of negligence of fellow-servant is sufficient to present application of fellow-servant rule. Hartnett v. Owosso Sugar Co. [Mich.] 111 N. W. 457. Assignments that court erred in refusing plaintiff's request for directed verdict and erred in granting defendant's similar request held to present single question whether court erred in directing verdict for defendant instead of for plaintiff where both invoked action of court. Empire State Cattle Co. v. Atchison, etc., R. Co. [C. C. A.] 147 F. 457.

72. Assignments to insufficiency of evidence must point out wherein it is insufficient. Southern Ind. R. Co. v. Indianapolis & L. R. Co. [Ind.] 81 N. E. 65; Jackson v. Ellerson [N. D.] 108 N. W. 241. The test is whether the specification is sufficient to inform opposing counsel of the grounds of the alleged insufficiency to support the finding. Brown v. Bracking, 11 Idaho, 678, 83 P. 950. A specification alleging that the evidence was insufficient to support the decision and particularly finding No. 4, for the reason that there was no evidence to show that, etc., and particularly finding No. 5, for the reason that there was no evidence tending to prove, etc., held **sufficient.** Ahlers v. Barrett [Cal. App.] 87 P. 232. Under Rev. St. 1899, § 2727, providing that the Code of Civil Procedure shall be liberally construed to promote justice, the sufficiency of evidence to support a finding will be reviewed under an assignment challenging the sufficiency of the evidence to support the "judgment." Schiller v. Blyth & Fargo Co. [Wyo.] 88 P. 648. Assignment that evidence does not sustain judgment or verdict and is contrary to law of the case held **insufficient.** Liberty Min. & Smelting Co. v. Geddes [Ariz.] 90 P. 332. Where evidence supports verdict, allegations that verdict is contrary to law and is not sustained by law and evidence are too general. Livering's Ex'r v. Russell, 30 Ky. L. R. 1185, 100 S. W. 840. Assignment that there is "no" evidence to support the allegations of plaintiff's complaint which the court found to be true is not objectionable as failing to point out the respects in which the evidence is insufficient. Ahlers v. Barrett [Cal. App.] 87 P. 232. That verdict and judgment are not warranted by evidence held insufficient. Bills v. Stevens Co. [Mich.] 13 Det. Leg. N. 868, 109 N. W. 1059.

73. Assignment of error in granting an injunction is insufficient if it does not set forth the decree itself. McConahy v. Western Allegheny R. Co., 31 Pa. Super. Ct. 215. Assignment of error in denial of temporary

for new trials,[77] and an exception to the right of an auditor,[78] will be found in the notes.

The assignment should be accurate.[79] Distinct errors must not be grouped in one assignment.[80]

injunction held not so imperfect as to require dismissal of bill of exceptions on motion Kirkland v. Atlantic & B. R. Co., 126 Ga. 246, 55 S. E. 23.

74. Where excessiveness of a verdict was presented as a ground for a new trial, and the overruling of the motion is properly assigned as error, the excessiveness of the verdict is presented for review. Williams v. Spokane Falls & N. Ry. [Wash.] 87 P. 491.

75. Assignment that court erred in holding that reply did not present such issues of fact as entitled plaintiff to trial thereon held insufficient to present claim that notwithstanding findings on issues of law there remained undetermined issues of fact presented by plaintiff's pleadings entitling him to a trial. Coughlin v. Knights of Columbus [Conn.] 64 A. 223. Assignment that decision is against law is sufficient to present failure of court to find on all material issues. Dillon Implement Co. v. Cleveland [Utah] 88 P. 670.

76. On appeal in action of trespass to try title, following assignment of error: "The court erred in overruling defendant's motion for a new trial because the judgment of the court is contrary to the law. Under the law the title of the defendant was good and superior to the plaintiff's title," held too general. Musick v. O'Brien [Tex. Civ. App.] 102 S. W. 458. Assignment which merely states contents of judgment and follows same with statement that plaintiff in error comes "within less than thirty days from the said judgment and excepts to the same and assigns the same as error" does not comply with statutory requirement that alleged errors shall be plainly and distinctly pointed out. Jackson Banking Co. v. Maddox, 127 Ga. 96, 56 S. E. 119. To judgment passing upon questions both of law and fact, an assignment of error in this language, "and the defendant assigns error generally upon said judgment," fails to specify any error, and cannot be considered. Marshall v. English-American L. & T. Co., 127 Ga. 376, 56 S. E. 449. On appeal from judgment rendered by court without jury the following assignment of error: "To which ruling and judgment the defendants then and there excepted, and now except and assign the same as error," held too general to be considered. Smith v. Marshall, 127 Ga. 374, 56 S. E 416. "Contrary to the law and the evidence" too general to authorize review of decree entered without findings of fact. Craig v. Dorr [C. C. A.] 145 F. 307. Assignment that court erred in rendering judgment in favor of the plaintiff and against defendant are insufficient. Bills v. Stevens Co. [Mich.] 13 Det. Leg. N. 868, 109 N. W. 1059.

77. That motion for new trial was not supported by evidence is too general. Inland Steel Co. v. Smith [Ind.] 80 N. E. 538. Assignment that court erred in denying new trial and refusing to set aside verdict held too general. Liberty Min. & Smelting Co. v. Geddes [Ariz.] 90 P. 332. Where a bill of exceptions merely recites that the presiding judge refused to approve the brief of the evidence and dismissed the motion for a new trial "to which said order the defendant excepted and now assigns the same as error," the objection cannot be raised that the movant was not allowed an opportunity to correct the brief. Norred v. State, 127 Ga. 347, 56 S. E. 464. Assignment that "court erred in rendering judgment denying plaintiff the right to enforce the performance of the contract sued on, and in sustaining the cross action of the defendant for a cancellation of said contract," is too general to require consideration. Fisher v. Dippel [Tex. Civ. App.] 102 S. W. 448. Assignment that "the court erred in overruling defendant's motion for a new trial because the judgment of the court is contrary to the evidence. The plaintiffs failed to make out a case and failed to prove their title by a preponderance of the evidence" is too general to warrant consideration. Musick v. O'Brien [Tex. Civ. App.] 102 S. W. 458. Proposition under assignment that where verdict is clearly excessive it is error to refuse to grant a new trial held not to present anything tangible for review. Texas & P. R. Co. v. Middleton [Tex. Civ. App.] 16 Tex. Ct. Rep. 198, 94 S. W. 1097.

78. Assignment that court should have sustained each and all of appellant's exceptions to auditor's report and should have overruled each and all of the exceptions to such report filed by defendant in error held too general. Baxter & Co. v. Camp, 126 Ga. 354, 54 S. E. 1036.

79. An assignment of error to failure to give a special charge cannot be sustained if the record shows a material difference in such charge as embraced in it from the one which was really requested. Galveston, etc., R. Co. v. Worcester [Tex. Civ. App.] 100 S. W. 990.

80. Reading Co. v. Seip, 30 Pa. Super. Ct. 330. Court of civil appeals rules 24, 25, 26. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 101 S. W. 250; Henry v. Red Water Lumber Co. [Tex. Civ. App.] 102 S. W. 749; Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 100 S. W. 990. Assignment raising question of **pleading** and one of evidence held improper. Baldwin v. Polti [Tex. Civ. App.] 101 S. W. 543. Where each of separate **demurrers** filed by two of three defendants sued as joint trespassers were sustained by a separate order of the court, wherein the case was dismissed as to the particular demurrant, the following assignment of error was held sufficient: "Each of which orders and judgment the plaintiff excepted to, and now excepts, and assigns the same as error." Burns v. Horkan, 126 Ga. 161, 54 S. E. 946. Under stenographer's act of 29th Leg. p. 220, § 7, which provides that "all objections to the admissibility of **testimony**, if any shown by the stenographer's report and ruling of the court thereon, shall be regarded * * * as though they were separate bills of exceptions," it is not permissible to base an assignment of error upon a question formed by consolidating

A joint assignment by several parties presents no question if the ruling was right as to any of them,[81] or if any of them failed to save the point below,[82] but where the assignments are joint and several, each appellant has the benefit of all of them.[83] A joint exception will not support a separate assignment, nor can a joint assignment be based upon several exceptions.[84]

Error must be assigned to a reviewable judgment.[85] In Indiana, matters which are grounds for a new trial cannot be assigned as independent errors.[86] In Georgia a direct bill of exceptions to rulings pendente lite must assign errors also to a final verdict or judgment.[87]

(§ 11 E) 5. *Demurrers, pleas, and replication.*[88]—The answer to an appeal must be filed in proper time.[89] Where the character or capacity assumed by the appellant in his assignment of errors is not questioned, it will be deemed to be conferred.[90] A plea to an assignment of errors purporting to answer all of them must answer all.[91] Final judgment must be entered on sustaining a plea of release of errors.[92]

(§ 11) *F. Briefs and arguments.*[93]—Briefs must be filed [94] and served within the time prescribed,[95] though failure to do so may be excused [96] for good cause.[97]

several others because there could be no ruling of the court below upon such fabricated question which could be regarded as a bill of exceptions. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 101 S. W. 250. Single assignment complaining of court's refusal to give certain special **instructions,** involving separate rulings relating to different questions cannot be considered. Texas-Mexican R. Co. v. Lewis [Tex. Civ. App.] 99 S. W. 577. Single assignment to court's refusal to give charge presenting all issues involved cannot be considered. Morrow v. Camp [Tex. Civ. App.] 101 S. W. 819. Where contrary to rule a single assignment set out different parts of the court's charge, it could not after being held bad as to one be sustained as to another. Acme Food Co. v. Meier [C. C. A.] 153 F. 74. Assignment setting forth two distinct **orders** held bad. McConahy v. Western Allegheny R. Co., 31 Pa. Super. Ct. 215. Assignment that court erred in dismissing exceptions to **auditor's report** violates rule 14 where there are several exceptions. Graybill v. Deitrich, 32 Pa. Super. Ct. 482.

Inadvertent mistake in name of witness in an assignment alleging error in permitting certain questions to be put to him will not preclude consideration of the assignment. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 100 S. W. 176.

81. Greenberg v. People, 125 Ill. App. 626. Where defendant against whom judgment was rendered and a codefendant against whom no judgment was rendered joined in assignment to striking out paragraph of answer. Denkewalter v. Wilson [Ind. App.] 78 N. E. 1049. But upon a joint appeal from a **joint judgment,** all appellants may by joint assignment take advantage of any error committed against any one of the defendants. Greenberg v. People, 125 Ill. App. 626.

82. Davy v. Brown [Ind. App.] 78 N. E. 335.

83. A joint assignment by several appellants will be construed as several where proper words of severance are used, such as that "each of them swearing from the other separately and severally says," etc. Southern Ind. R. Co. v. Indianapolis & L. R. Co. [Ind.] 81 N. E. 65.

84. Separate exceptions must be presented by separate assignments. Davy v. Brown [Ind. App.] 78 N. E. 335; Whitesell v. Strickler [Ind.] 78 N. E. 845. Assignment that court erred in sustaining plaintiff's first and second special exceptions held too general, the exceptions presenting entirely different questions of law. Southern Kan. R. Co. v. Cox [Tex. Civ. App.] 95 S. W. 1124.

85. Entry of nonsuit not assignable as error, but assignment may be made to refusal to take off compulsory nonsuit. Hallock v. Lebanon, 215 Pa. 1, 64 A. 362.

86. Objection that judgment is not supported by evidence and is against weight of same cannot be made subject of independent assignment of error. Walters v. Walters [Ind.] 79 N. E. 1037.

87. Montgomery v. Reynolds, 124 Ga. 1053, 53 S. E. 512; Hendricks v. Reid, 125 Ga. 775, 54 S. E. 747. Under Laws 1898, p. 92, an assignment to a ruling which controlled the verdict, as where verdict was directed, is sufficient. Scarborough v. Holder, 127 Ga. 256, 56 S. E. 293.

88. See 7 C. L. 201.

89. Three days allowed for filing answer to appeal are computed from day for which case has been reassigned when first assignment has been set aside by consent. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153. Under Code Proc. art. 890, answer to appeal cannot be considered unless it is filed three days before that fixed for argument. Reily v. Johnston [La.] 43 So. 977.

90. See Burns' Ann. St. 1901, § 368. Kline v. Hagey [Ind.] 81 N. E. 209.

91. Otherwise it is demurrable. Kelly v. Jacobs, 123 Ill. App. 251.

92. Whether by formal release, acceptance of benefits of judgment or decree, or statute of limitations. Kelly v. Jacobs, 123 Ill. App. 251.

93. See 7 C. L. 202.

94. Where assignments of errors do not comply with Tennessee Supreme Court Rule 20, brief submitted in their support cannot cure defect if not filed within time required by rule. Fort v. Fort [Tenn.] 101 S. W. 433.

95. Must be timely filed. Egressy v. Stansbury, 149 Cal. 392, 87 P. 280; Sackett v. Price County [Wis.] 110 N. W. 821. Supplemental

Statutes and rules of court prescribing the form and contents of the brief must be complied with,[98] but substantial compliance only is required,[99] and the court generally has discretionary power to consider matters not properly presented.[1] Among the common requirements is a summary of so much of the record as presents the errors relied on,[2] with reference to the record for verification,[3] and a separate assignment or statement of the contentions or alleged errors.[4] Assignments not ar-

brief filed out of time will be stricken where no excuse is given for not including the matter therein in the original brief Groesbeck Cotton Oil Gin & Compress Co. v. Oliver [Tex. Civ. App.] 17 Tex. Ct. Rep. 241, 97 S. W. 1092. Where the time for filing points and authorities has expired, holidays coming thereafter have no effect upon his right to file. Egressy v. Stansbury, 149 Cal. 392, 87 P. 280.

96. Failure to serve and file the brief strictly on time held not to defeat an appeal where no substantial prejudice is done. Lyon v. Mauss [Utah] 87 P. 1014. Notwithstanding Rev. St. 1899, § 3286, giving to the supreme court rules the force of statutes, and rule 20, providing that for good cause shown before the expiration of the time for filing briefs the time may be extended, the court may extend the time after expiration of the period allowed where justice requires it. Phillips v. Brill [Wyo.] 90 P. 443.

97. Illness of counsel held good cause. Whiting v. Straup [Wyo.] 90 P. 445; Phillips v. Brill [Wyo.] 90 P. 443. Pressure of business and absence of counsel held not to excuse delay. Delmoe v. Bailey [Mont.] 88 P. 662.

98. Under rule 8, subd. 5 (40 Pac. x), appellant is not required to print all the findings made by the lower court, but only those on which questions are raised. Parish v. Collins [Wash.] 86 P. 557. Where a transcript was not printed and appellant's brief did not refer to the pleadings or state the issues made thereby or how they were raised, as required by Sup. Ct. Rule 10, par. 3, subd. a (82 Pac. x), the appeal will be dismissed. Alexander v. Great Northern R. Co., 34 Mont. 432, 87 P. 447.

99. Howard v. Adkins [Ind.] 78 N. E. 665; Hart v. Scott [Ind.] 81 N. E. 481. Failure of brief to state that bill of exceptions containing evidence has been filed does not preclude consideration of questions concerning evidence, where briefs of both parties are largely taken up with matters concerning the evidence. Hart v. Scott [Ind.] 81 N. E. 481.

1. Thistle Coal Co. v. Rex Coal & Min. Co. [Iowa] 109 N. W. 1094; Schultz v. Ford Bros. [Iowa] 109 N. W. 614. Omissions in appellant's brief of matter required by Supreme Court Rule 22 [55 N. E. v] may be supplied by appellee's brief. Adams v. Betz [Ind.] 78 N. E. 649; Wood v. Hall [Iowa] 110 N. W. 270.

2. Galbott v. New Castle [Ind.] 81 N. E. 724. Supreme Court Rule 22, subd. 5. Hayes v. Shirk [Ind.] 78 N. E. 653.

Rulings on pleadings: Only so much of pleading as is necessary to present ruling complained of is required by Supreme Court Rule 22, subd. 5. Hayes v. Shirk [Ind.] 78 N. E. 653. Statement that appellant demurred to complaint for want of facts to constitute cause of action, with reference to page and line of transcript, held sufficient statement of substance of demurrer. Kintz v. Johnson [Ind. App.] 79 N. E. 533. In support of assignment of error to overruling of motion to make complaint more specific, the objections to the complaint must be specifically pointed out. Pittsburg, etc., R. Co. v. Ross [Ind.] 80 N. E. 845. Defects in statement of pleadings will be disregarded where appellant has made a bona fide attempt to comply with the rule, and the parts claimed to show the insufficiency of the pleading are stated. Huber Mfg. Co. v. Wagner [Ind.] 78 N. E. 329.

Evidence: Evidence and grounds for new trial must be set out. City of Richmond v. Lincoln [Ind.] 79 N. E. 445. A rule of the supreme court requiring the argument to contain a condensed recital of the evidence, where the insufficiency of the evidence to sustain the verdict is assigned as error, contemplates merely a concise statement of the substance of the testimony and does not require the evidence to be set out in detail, but it must show wherein the testimony fails to establish the essential facts. In re Wiltsey's Will [Iowa] 109 N. W. 776; Vial v. Larson [Iowa] 109 N. W. 1007. Statement of evidence held insufficient to authorize review of amount of assessment of damages from sewer construction. Talbott v. New Castle [Ind.] 81 N. E. 724.

Instructions: Where appellant's instructions are not set out in his brief, court will not search record to determine whether they are in conflict with appellee's instructions. Indianapolis Trac. & T. Co. v. Kidd [Ind.] 79 N. E. 347. Exception to charge not considered where brief does not point out portion of charge to which the exception is directed. In re Murray's Will, 141 N. C. 588, 54 S. E. 435. Where defendant in error makes no appearance, it cannot be assumed that the statement of the case in plaintiff in error's brief is correct, unless the same is founded on the printed abstract. Kinsel v. Wieland [Colo.] 88 P. 153.

3. Talbott v. New Castle [Ind.] 81 N. E. 724; Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363; Ferguson v. Morrison [Tex. Civ. App.] 95 S. W. 1091; Storms v. Mundy [Tex. Civ. App.] 101 S. W. 258; Zeigler v. Creditors, 116 La. 250, 40 So. 693; Smith v. Hampshire [Cal. App.] 87 P. 224. Page and line of record where objectionable evidence may be found. Providence Washington Ins. Co. v. Wolf [Ind.] 80 N. E. 96; Inland Steel Co. v. Smith [Ind.] 80 N. E. 538; Blumenthal v. Stancliff, 104 N. Y. S. 262.

4. Substantial compliance sufficient. First Nat. Bank v. Miller [Or.] 87 P. 892. Alleged inconsistent instructions not considered where brief did not point out wherein they were in conflict. Texas & P. R. Co. v. Horne [Tex. Civ. App.] 16 Tex. Ct. Rep. 124, 95 S. W. 97. Supreme Court Rule 22 does not require abandoned points to be set out in brief. Pomeroy v. Wimer [Ind.] 79 N. E. 446. No precise order or form of setting out objections and points is required by Supreme Court Rule 22, and substantial compliance

therewith is sufficient. Id. Where a brief merely states that appellant relies upon a large number of exceptions referred to by number only, such exceptions cannot be considered. Snipes v. Norfolk & So. R. Co. [N. C.] 56 S. E. 477. Failed to specify error in overruling his demurrer on ground of misjoinder. O'Brien v. Quinn [Mont.] 90 P. 166. Sufficiency of the pleadings. Delmoe v. Long [Mont.] 88 P. 778. One desiring to question a judgment must present in his brief the particular matters complained of. Herman v. Dunman [Tex. Civ. App.] 16 Tex. Ct. Rep. 372, 95 S. W. 80. Brief and argument must point out wherein instruction was erroneous. Wickes v. Walden [Ill.] 81 N. E. 798; Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 99 S. W. 715. Must point out wherein error in admitting testimony lies. Cushman v. Davis [Vt.] 64 A. 456.

Assignment, Statement, and Proposition Under the Texas Rule. Assignments: Assignments of error not copied in the brief will be deemed waived. Texas Courts of Civil Appeals Rule 29. Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 100 S. W. 982; Poland v. Porter [Tex. Civ. App.] 98 S. W. 214; Missouri, etc., R. Co. v. Barnes [Tex. Civ. App.] 15 Tex. Ct. Rep. 524, 95 S. W. 714; Koch v. Missouri Valley Bridge & Iron Co. [Tex. Civ. App.] 102 S. W. 136. And this although it be stated that they are not waived. Martin v. German-American Nat. Bk. [Tex. Civ. App.] 102 S. W. 131. The numbers of the assignments as given in the record should be presented consecutively. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607; Martin v. German-American Nat. Bk. [Tex. Civ. App.] 102 S. W. 131; Eckert v. McDermott [Tex. Civ. App.] 99 S. W. 572; Moore v. Woodson [Tex. Civ. App.] 99 S. W. 116; Faison v. Meyenberg [Tex. Civ. App.] 98 S. W. 1066. By the word "copied" used in this rule it is not meant that reconstructed or amended assignments shall be placed in the brief, but that the assignments contained in the record shall be printed in the brief. Martin v. German-American Nat. Bk. [Tex. Civ. App.] 102 S. W. 131. Grouped and general assignments will not be considered unless the propositions under them serve to separate and make specific the errors urged. Jones v. Western Union Tel. Co. [Tex. Civ. App.] 101 S. W. 808; Haight & Co. v. Turner [Tex. Civ. App.] 99 S. W. 196; Frontroy v. Atkinson [Tex. Civ. App.] 100 S. W. 1023; Cantelou v. Trinity & B. V. R. Co. [Tex. Civ. App.] 101 S. W. 1017; Young v. Pecos County [Tex. Civ. App.] 101 S. W. 1055; Reeves v. Galveston, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 498, 98 S. W. 929. Questions reviewed though all assignments were grouped together, particularly where it appeared that vital error had been committed. Pinkston v. Boyd [Tex. Civ. App.] 16 Tex. Ct. Rep. 759, 97 S. W. 103.

Statements: In Texas the law authorizing the sending up of the stenographer's transcript has not changed the rule requiring condensed statements from the record to follow each proposition in the brief. United Oil & Refining Co. v. Grey [Tex. Civ. App.] 102 S. W. 934. Rule 31 for the Texas courts of civil appeals requires that there shall be subjoined to each proposition a brief statement of such proceedings contained in the record as will be necessary and sufficient to explain and support the proposition. Scanlon v. Galveston, etc., R. Co. [Tex. App.] 100 S. W. 982; Cockrell v. Egger [Tex. Civ. App.] 99 S. W. 568; Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133; Poland v. Porter [Tex. Civ. App.] 98 S. W. 214; Yellow Pine Oil Co. v. Noble [Tex. Civ. App.] 16 Tex. Ct. Rep. 750, 97 S. W. 332; Bluestein v. Collins [Tex. Civ. App.] 103 S. W. 687; Holmes v. Adams [Tex. Civ. App.] 100 S. W. 816; Miller v. Tyson [Tex. Civ. App.] 100 S. W. 1199; McDonald v. Downs [Tex. Civ. App.] 99 S. W. 892. Reference to other parts of record is not a sufficient statement. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192; Gammon v. Sigel [Tex. Civ. App.] 15 Tex. Ct. Rep. 998, 95 S. W. 730; Robertson v. Warren [Tex. Civ. App.] 100 S. W. 805; Kirby Lumber Co. v. Chambers [Tex Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607; Beaumont Trac. Co. v. Edge [Tex. Civ. App.] 102 S. W. 746. Where the only statement under certain assignments of error is a reference to the statement under another assignment, which embraces forty-four pages of printed matter and practically covers all the testimony given on the trial, such assignments will not be considered. Gulf, etc., R. Co. v. Caldwell [Tex. Civ. App.] 102 S. W. 461. Must show that appellant reserved a bill of exceptions to the action of the court complained of by the assignment. Holmes v. Adams [Tex. Civ. App.] 100 S. W. 816. Brief must on its face disclose reasons for reversal, and hence statement must show respects in which rulings were harmful. Pipkin v. Hayward Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 760, 96 S. W. 635. Limiting abandoned **pleadings** offered as evidence to single purpose not ground for reversal where appellant's brief does not show that they were admissible for any other purpose. Southern Kansas R. Co. v. Morris [Tex. Civ. App.] 99 S. W. 433. Statement subjoined to proposition following an assignment of error, complaining of the overruling of a special exception to a supplemental petition, held not full enough to require the appellate court to consider the assignment. City of San Antonio v. Routledge [Tex. Civ. App.] 102 S. W. 756. Assignment to a **charge** cannot be considered if such charge is not contained in the statement. Holmes v. Adams [Tex. Civ. App.] 100 S. W. 816. Statement under assignment on refusal of instructions must state that such instruction was requested and refused. American Surety Co. v. Lyons [Tex. Civ. App.] 16 Tex. Ct. Rep. 947, 97 S. W. 1080; Gilmore v. Houston Elec. Co. [Tex. Civ. App.] 102 S. W. 168. Statement under assignment on refusal of instructions must contain the instructions or refer to the page of the record where they may be found. American Surety Co. v. Lyons [Tex. Civ. App.] 16 Tex. Ct. Rep. 947, 97 S. W. 1080. Where no evidence is stated in the brief, under an assignment of error to the refusal of an instruction showing its applicability, the assignment will be overruled. El Paso Elec. R. Co. v. Furber [Tex. Civ. App.] 100 S. W. 1041; International, etc., R. Co. v. Stewart [Tex. Civ. App.] 101 S. W. 282; El Paso, etc., R. Co. v. Foth [Tex. Civ. App.] 100 S. W. 171; Ferguson v. Morrison [Tex. Civ. App.] 95 S. W. 1091. Where an assignment of error is directed against a part of the court's charge, the proposition should be followed by a statement of so much of the pleadings and evidence as is

gued [5] will ordinarily be deemed waived, though the court may consider them when

necessary to show what issues were. Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 100 S. W. 982. Assignment on admission of **evidence** must show the evidence and refer to the record. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607. Must show whether the evidence objected to was favorable or unfavorable to appellant. Schneider v. Rabb [Tex. Civ. App.] 100 S. W. 163. Must state that bill of exceptions was reserved to its admission and state its substance and site to the transcript or stenographer's report where it can be found. Morgan v. Barber [Tex. Civ. App.] 99 S. W. 730. Must point out part of record where offer of such evidence was made, and where bills of exception were reserved. El Paso Elec. R. Co. v. Telles [Tex. Civ. App.] 99 S. W. 444. Alleged error in excluding answers of witnesses to questions will not be considered where the brief fails to show what would have been the answers to such questions. Chicago, etc., R. Co. v. Birk [Tex. Civ. App.] 99 S. W. 753. Where appellant's brief does not state what testimony has been introduced in regard to matters embraced in a hypothetical question calling for witness' opinion, on objection that no predicate was laid for the question will be considered. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 99 S. W. 715. Must show what objection was made when the testimony was offered. Missouri, etc., R. Co. v. Matlock [Tex. Civ. App.] 99 S. W. 1052.

Propositions: Particular point or points sought to be made by an assignment must be stated in form of propositions followed by an appropriate statement. Rules 29, 30, 31 (67 S. W. xvi). McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760; City of San Antonio v. Routledge [Tex. Civ. App.] 102 S. W. 756; Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607; International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. An assignment of error in the brief that is not a proposition of law in itself and is not followed by any proposition cannot be considered. Storms v. Mundy [Tex. Civ. App.] 101 S. W. 258; Scanlon v. Galveston, etc., R. Co. [Tex. Civ. App.] 100 S. W. 982. Assignments relating to special exceptions to different pleadings held not open to consideration where there was no statement giving nature of any particular exception that was ruled on, nor its application to the pleading demurred to, but only reference was to pleadings generally. McAllen v. Raphael [Tex Civ. App.] 96 S. W. 760. Proposition that plaintiff's motion for change of venue should have been granted held not appropriate to assignment that court erred in not granting change of venue. Id. Assignment held not open to consideration where subjoined proposition dealt with more than one subject. Id. Where the only proposition advanced under an assignment of error is the enunciation of a law relating to affidavits, and neither the assignment nor proposition asserts the infraction of such law, its infraction cannot be considered. Young v. Pecos County [Tex. Civ. App.] 101 S. W. 1055. Where an assignment of error in the brief is not a copy of any assignment in the record, and the propositions presented thereunder are not appropriate to and do not arise under such assignment, neither the assignment nor the propositions can be considered. Kruegel v. Bolanz [Tex. Civ. App.] 103 S. W. 435. Where the bill of exceptions shows that a question to a witness was objected to on two grounds, but the proposition under the assignment of error attacks the court's action in sustaining the question only on one ground, the other ground cannot be considered. Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 101 S. W. 541. Where a single assignment of error attempts to collect every point upon which the appeal is based, and is placed before the court as a proposition and reference made to statements under five other assignments, it is multifarious and will not be considered. Russell v. Deutschman [Tex. Civ. App.] 100 S. W. 1164. A proposition which alleges that a special instruction was argumentative, contradictory, misleading, and on the weight of the evidence, is not proper under the rules for the Texas courts of civil appeals. Reeves v. Galveston, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 498, 98 S. W. 929. A proposition under an assignment of error which is not germane to the assignment will not be considered. Texas & N. O. R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 S. W. 1070. Where in the only assignment of error complaining of the charge to the jury the entire charge is alleged to be erroneous, and there is no accompanying proposition stating the particular instruction complained of, the assignment will not be considered. Ross v. Moskowitz [Tex.] 100 S. W. 768.

5 Long v. Nute [Mo. App.] 100 S. W. 511; Levi v. Mathews [C. C. A.] 145 F. 152; Libby v. Kearney, 124 Ill. App. 339; Sturges, Cornish & Burn Co. v. Cornish, 125 Ill. App. 401; Hunt v. Pronger, 126 Ill. App. 403; Omensky v. Gieske, 125 Ill. App. 77; Lemke v. Faustmann, 124 Ill. App. 624; Chicago & Alton R. Co. v. Jennings, 120 Ill. App. 195; Loellke v. Grant, 120 Ill. App. 74; Ray v. Hunter, 122 Ill. App. 466; Jackson v. Grosser, 121 Ill. App. 363; Robinson & Co. v. Green [Ala.] 43 So. 797; Seaboard Air Line R. v. Smith [Fla.] 43 So. 235; Morris v. Fisk Rubber Co. [Ala.] 43 So. 483; Hamilton v. Rogers, 126 Ga. 27, 54 S. E. 926; Powell v. Wiley, 125 Ga. 823, 54 S. E. 732; Carter v. Pitts, 125 Ga. 792, 54 S. E. 695; City of Smithville v. Dispensary Com'rs, 125 Ga. 559, 54 S. E. 539; Parris v. Atlanta, etc., R. Co. [Ga.] 57 S. E. 692; Caudell v. Caudell, 127 Ga. 1, 55 S. E. 1028; Southern R. Co. v. Sheffield, 127 Ga. 569, 56 S. E. 838; Dobbs v. Malcolm, 127 Ga. 487, 56 S. E. 622; Chatman v. Hodnett, 127 Ga. 360, 56 S. E. 439; Jackson Bros. & Watts Co. v. Gillespie, 127 Ga. 358, 56 S. E. 409; Liles v. Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795; Smith v. Atlantic Coast Line R. Co., 142 N. C. 21, 54 S. E. 786; Beard v. Southern R. Co. [N. C.] 55 S. E. 505; Clark v. Patapsco Guano Co. [N. C.] 56 S. E. 858; Snipes v. Norfolk & So. R. Co. [N. C.] 56 S. E. 477; United States Furniture Co. v. Taschner [Ind. App.] 81 N. E. 736; McNeil v. American Bridge Co. [Mass.] 81 N. E. 651; McChesney v. Chicago [Ill.] 81 N. E. 435; Puritan Oil Co. v. Myers [Ind. App.] 80 N. E. 851; Pittsburg, etc., R. Co. v. Ross [Ind.] 80 N. E. 845; Doe v. Boston & W. St. R. Co. [Mass.] 80 N. E. 814; Tower Co. v. Southern

they are apparent on the face of the record,[6] and is not limited to the views urged.[7] In like manner the court will not search the record in the absence of a brief by appellee to refute an apparent showing of error.[8] New points first raised in the reply or supplemental brief will not ordinarily be considered,[9] nor will amendments of the brief just before hearing be allowed.[10] Admissions and statements in a brief are binding on the party making them.[11] Scandalous[12] or irrelevant[13] briefs and arguments not prepared in accordance with the rules[14] may be stricken from the files.

Pac. Co. [Mass.] 80 N. E. 809; Foote v. Cotting [Mass.] 80 N. E. 600; Pittsburgh, etc., R. Co. v. Collins [Ind.] 80 N. E. 415; Sullivan v. Fugazzi [Mass.] 79 N. E. 775; Miller v. Kensil, 223 Ill. 201, 79 N. E. 24; Schmoe v. Cotton [Ind.] 79 N. E. 184; New Castle Bridge Co. v. Doty [Ind.] 79 N. E. 485; Buffington v. McNally, 192 Mass. 198, 78 N. E. 309; Woodall v. Boston El. R. Co., 192 Mass. 308, 78 N. E. 446; Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591; Galloway v. Erie R. Co., 102 N. Y. S. 25; Peterson v. Red Wing, 101 Minn. 62, 111 N. W. 840; Shaw-Walker Co. v. Fitzsimons [Mich.] 14 Det. Leg. N. 362, 112 N. W. 501; Trotter v. Grand Lodge of Iowa Legion of Honor [Iowa] 109 N. W. 1099; My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540; In re Wiltsey's Will [Iowa] 109 N. W. 776; Baltimore & O. R. Co. v. Whitehill [Md.] 64 A. 1033; Montgomery St. R. Co. v. Lewis [Ala.] 41 So. 736; Harper v. Raisin Fertilizer Co. [Ala.] 42 So. 550; Seaboard Air Line R. v. Scarborough [Fla.] 42 So. 706; Gambill v. Fuqua [Ala.] 42 So. 735; Town of Vernon v. Edgeworth [Ala.] 42 So. 749; Bully Hill Copper Min. & Smelting Co. v. Bruson [Cal. App.] 87 P. 237; Christy v. Campbell [Colo.] 87 P. 548; France v. Salt Lake & O. R. Co. [Utah] 88 P. 1; Daniels v. Johnston [Colo.] 89 P. 811; Western Union Tel. Co. v. Olsson [Colo.] 90 P. 841; People's Lumber Co. v. Gillard [Cal. App.] 90 P. 556; Simmons v. Rowe [Cal. App.] 89 P. 621; Garfield County Com'rs v. Beauchamp [Okl.] 88 P. 1124; Ross v. Becker [Ind.] 81 N. E. 478; Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318; Jacksonville Elec. Co. v. Schmetzer [Fla.] 43 So. 85; Southern Coal & Coke Co. v. Swinney [Ala.] 42 So. 808; Macon, etc., R. Co. v. Moore, 125 Ga. 810, 54 S. E. 700; Moore v. Lanier [Fla.] 42 So. 462.

Insufficient argument: Where only argument is curt statement that certain rulings were erroneous and prejudicial, court need not consider the point. Kevane v. Miller [Cal. App.] 88 P. 643. Statement by counsel that "many other charges requested by defendant and refused by the court announce correct propositions of law" is not such argument as to require their consideration. Birmingham R. Light & Power Co. v. Martin [Ala.] 42 So. 618. Statement by counsel that "an examination of a large number of charges refused to the defendant will lead to the conclusion that many of these charges were erroneously refused" is not sufficient argument. Id. Mere repetition of assignment is not argument. Harper v. Raisin Fertilizer Co. [Ala.] 42 So. 550; Rhodes & Son Co. v. Charleston [Ala.] 41 So. 746. The mere enumeration of exceptions in regard to which no grounds are stated, no propositions of law argued, and no principles of law discussed, is not sufficient. Roedler v. Chicago, etc., R. Co., 129 Wis. 270, 109 N. W. 88. Where appellant's counsel on one argument states that a point in his brief is not insisted on, such point will not be considered. Griesbach v. People, 226 Ill. 65, 80 N. E. 734. Statement in brief that all other points have been eliminated constitutes a waiver of such points. Merritt v. Crane Co., 225 Ill. 181, 80 N. E. 103. Where, on motion to dismiss an appeal, counsel requested a supersedeas in case of dismissal, but assigned no reason therefor in his brief, the application will be denied. Walton v. Canon City [Colo.] 88 P. 860.

6. Excessiveness of recovery. Williams v. Spokane Falls & N. R. Co. [Wash.] 87 P. 491.

7. Where the nature of the case is such as to require it, the court may take a broader view of the subject involved than is presented by the briefs or argument of counsel even to the extent of considering questions involved in pending litigation when closely connected with the subject of decision. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594. The appellate court is not bound by the reasons urged by counsel in reaching the right result. Fagan v. Hook [Iowa] 111 N. W. 981.

8. Bigger v. Garfield County Com'rs [Okl.] 87 P. 597.

9. Supreme Court Rule 22 [55 N. E. vi]. Pittsburg, etc., R. Co. v. Leightheiser [Ind.] 78 N. E. 1033. Where the appellee invokes the doctrine of the law of the case in his brief, appellant may urge for the first time in his reply brief that the doctrine is not applicable. Adams v. Thornton [Cal. App.] 90 P. 713.

10. Sheker v. Machovec [Iowa] 110 N. W. 1055.

11. Where an error was not assigned and appellant stated that the only question desired to be raised was the validity of certain bonds, court would not notice the error though authorized by rule to do so. Board of Com'rs v. Tollman [C. C. A.] 145 F. 753.

12. Shirk v. Hupp [Ind.] 79 N. E. 490. Where a brief contains a lengthy and wholly unnecessary tirade against witnesses, the brief will be stricken with leave to file a proper one. Stern v. Daniel [Wash.] 88 P. 1116.

13. A brief should be confined to a statement of the points or propositions of law arising upon pertinent matters in the record and relied on for reversal of the judgment and should not present views or use inappropriate language on impertinent matters of which the court cannot take notice. Fourteenth Street Bk. v. Strauss, 104 N. Y. S. 956. Statements in briefs extraneous of the record will not be considered. Evers v. Gould, 105 N. Y. S. 150.

14. Where no attention is paid to the

(§ 11) *G. Dismissal and abatement of appeal, and reinstatement of the same.*[15]—An appeal will be dismissed for want of jurisdiction [16] or of a litigable right,[17] for want of a real controversy [18] properly saved below,[19] for abandonment [20]

rules of court in the preparation of a brief, and it does not present the errors relied upon for reversal in such a way as to enable the court to intelligently pass upon them, it cannot be considered. Lowrey v. Haynes [Tex. Civ. App.] 17 Tex. Ct. Rep. 277, 98 S. W. 1068.

15. See 7 C. L. 207.

16. See, also, §§ 4, 5, and 13 B. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 112 N. W. 180; Town of Minden v. Crichton [La.] 43 So. 395; Rayborn v. Cathern [Miss.] 43 So. 70. An appellate court being without jurisdiction of the subject-matter, the only judgment it can render is one dismissing appeal. Sena v. U. S. [C. C. A.] 147 F. 485. Appeal to court of appeals dismissed where record showed that case originated in justice court, but did not show that circuit court ever obtained jurisdiction of it by appeal. Inks v. Brakebill Bros., 119 Mo. App. 159, 96 S. W. 220.

Jurisdictional amount not involved. State v. Pearl River [La.] 43 So. 815; State v. Briede [La.] 43 So. 992. Demand obviously inflated and real amount in controversy not sufficient. Leury v. Baton Rouge Compress Co., 117 La. 956, 42 So. 439. Appeal ordered dismissed unless appellant took proper steps to have it transferred to court of appeals. Robson v. Beasley [La.] 44 So. 136; Bodcaw Lumber Co. v. Huddleston [La.] 44 So. 258. Amount less than $1,000 and no certificate of importance. Bache v. Ward, 225 Ill. 320, 80 N. E. 330.

Nonappealable judgment. Tidmore v. Perritt [Ala.] 42 So. 818; Young v. Albion [Neb.] 110 N. W. 706; Hill v. Muller, 103 N. Y. S. 94; Caflisch v. Logue [Pa.] 65 A. 31. Where record failed to show a final decree in proceeding to set aside a will. Peterson v. Guttormsen, 125 Ill. App. 28. Because judgment was not final. Yazoo & M. V. R. Co. v. Reid [Miss.] 43 So. 952. Appeal from default judgment. Chute Co. v. Westlay, 101 N. Y. S. 527; Rogg v. Simelowitz, 102 N. Y. S. 535.

Death of party: Where pending appeal, from judgment for plaintiff in action on liquor dealer's bond, plaintiff dies, and record on appeal shows death in such way as to justify court in taking notice of it for purpose of rendering its judgment, proper practice, if error is found, is to dismiss cause rather than remand it. Ellis v. Brooks [Tex.] 102 S. W. 94.

17. Where appeal was taken in name of attorney instead of client. Voelkel v. Anrich [La.] 43 So. 151. Appeal dismissed as to appellee against whom appellant sought no remedy in court below. City of Covington v. Whitney, 29 Ky. L. R. 1096, 96 S. W. 907. Contractor sued abutting owner to enforce lien for local improvements and made town party. Judgment was rendered adjudging lien against property and dismissing petition as against town. Property owner appealed, making town and contractor appellees. Held that appeal would be dismissed as to former, appellant having no cause to complain that contractor did not recover judgment against it. Wolf v. Pierce, 29 Ky. L. R. 1095, 96 S. W. 903. Where appellant was party to proceedings and condemned by judgment, and it did not appear on face of papers that he was absolutely without interest, held that appeal would not be dismissed on ground of want of interest, but question would not be determined until hearing on merits. Succession of Dielmann [La.] 43 So. 972. Inclusion, as plaintiffs in error, of persons not parties below is not ground for dismissal but is an error which may be corrected by dismissing writ only as to them, or by striking out their names. Thomas v. Green County [C. C. A.] 146 F. 969. Under Civ. Code Prac. §§ 757, 785, if it be made to appear that appellant's right to prosecute an appeal has ceased, appellee may, upon stating grounds in writing, obtain a dismissal. Haggin v. Montague [Ky.] 101 S. W. 893. Court would dismiss of own motion where appellants had no right to appeal. Foreman v. Defrees, 120 Ill. App. 486.

18. See, also, § 13 B, post.

Appeal dismissed: Where trial court, in proper exercise of its power, vacates judgment appealed from and grants new trial. Kendall v. Kendall [Ind. App.] 79 N. E. 222. Where pending appeal, event occurs which makes determination of question unnecessary, or which would of necessity render judgment that might be pronounced ineffectual. Waller v. Henderson Tel. & T. Co. [Ky.] 101 S. W. 372. Appeal from order arresting judgment where abstract of record shows order was made on appellants as well as on respondent's motion. Dockery v. Lowenstein, 121 Mo. App. 394, 99 S. W. 40. Appeal from order denying new trial on ground of newly-discovered evidence, where on prior appeal appellant moved that case be remanded to give it an opportunity to amend and renew its motion for a new trial on same ground, which motion was denied. Kennedy v. Fidelity & Casualty Co., 100 Minn. 144, 110 N. W. 624. Where peremptory writ of mandamus was complied with prior to taking any steps to perfect appeal. People v. Voorhis, 100 N. Y. S. 717. Where prior to argument of appeal from order restraining appellant from acting as executor pending application to revoke his letters, his letters testamentary were revoked. In re Hirsch's Estate, 101 N. Y. S. 1027. Where record obviously presents no substantial question. Only sufficiency of conflicting evidence. Northern Texas Traction Co. v. Ake [Tex. Civ. App.] 98 S. W. 207. Where plaintiff's attorney has contract for percentage of recovery, and after appeal from judgment for plaintiff there is compromise and settlement without attorney's consent, such attorney, if he fears that retention of jurisdiction by appellate court will preclude him from proceeding, nisi, to enforce his lien, may by apt motion raise question of his right to dismiss appeal. Wait v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60.

Held not ground for dismissal: Part performance of mandate of writ of mandamus. People v. Voorhis, 186 N. Y. 263, 78 N. E. 1001. Where appeal is predicated on error below and error is established, mere fact that respondent consents to relief sought.

or want of prosecution,[21] for substantial[22] and inexcusable[23] defects of procedure in bringing up the case,[24] or for failure to make[25] or file[26] a proper record[27] as-

McCrea v. Burnstine, 105 N. Y. S. 194. Appeal will not be dismissed or its determination postponed on motion of third person on ground that action is collusive and that questions of public importance are sought to be reviewed in ex parte manner, where parties did not avail themselves of ample opportunities to intervene in action or submit a brief, a single question being in issue and action having been fairly tried. Kelly v. New York City R. Co., 102 N. Y. S. 741. Appeal in contest for political office will not be dismissed though term of office has expired and it is therefore impossible to induct appellant into office, where his right to fees still remains in controversy. McClelland v. Erwin, 16 Okl. 612, 86 P. 283.

19. See Saving Questions for Review, 8 C. L. 1822. Failure of appellant to serve proper notice of intention to move for new trial is not ground for dismissal of appeal from order overruling the motion, since it goes only to merits of order appealed from and not to regularity of appeal. Vreeland v. Edens [Mont.] 89 P. 735.

20. Where by uncontradicted affidavits it appears that appellant has consented to dismissal of appeal, it must be dismissed. Riney v. Furniture Co. [La.] 44 So. 116. Affidavits may be considered to show agreement. Id.

21. Where transcript was filed and citation served more than ten days before time for call of docket at which time case was returnable held that motion to docket and dismiss would be denied. Adams Lumber Co. v. Stevenson [Miss.] 42 So. 796. Held not a dilatoriness requiring dismissal. Driscoll v. Dufur [Wash.] 88 P. 929.

22. Should not be dismissed for mere curable defects in bond. Northrup v. Bathrick [Neb.] 110 N. W. 685.

23. Where the record showed that bond was not filed in time but appellant presented affidavits that it was timely left with clerk and that he had no knowledge that it was not immediately filed until he received respondent's brief, held that appeal would not be dismissed until appellant had opportunity to present the matter to trial court for correction. Main Inv. Co. v. Olsen [Wash.] 86 P. 657.

24. **Failure to appeal in time.** Thornburgh v. Beakley [Ark.] 102 S. W. 362. Writ of error sued out and taken in civil action after time allowed by statute. Eaton v. McCaskill [Fla.] 43 So. 447. Appeal from order taxing costs not taken within sixty days after entry thereof, as required by subd. 3, § 4807, Rev. St. 1887. Campbell v. First Nat. Bk. [Idaho] 88 P. 639. Appeal dismissed in so far as it purported to be suspensive one, where bond was signed after ten days within which suspensive appeal should be signed had elapsed. O'Brien v. D'Hemecourt [La.] 43 So. 654.

Prematurity: Exceptions by trustee in garnishment proceedings from ruling that court had jurisdiction, and charging him with the debt, dismissed because taken before service on principal defendant. Alexander v. Segee, 101 Me. 561, 64 A. 1049. No final judgment in record. Monroe County v. Fox [Ala.] 42 So. 441; Dexter v. Seaboard Air Line R. Co. [Fla.] 42 So. 695; Sautter v. Supreme Conclave Improved Order of Heptasophs [N. J. Err. & App.] 65 A. 990; Keystone Brew. Co. v. Canavan [Pa.] 67 A. 48. Bill of exceptions before verdict or final decision held prematurely preferred and dismissed without prejudice. Court and Practice Act 1905, p. 141, § 497. McDonald v. Providence Tel. Co., 27 R. I. 595, 65 A. 266. Where order vacating default was entered upon condition that defendant deposit amount of the judgment in court as security within certain time, appeal before expiration of that time held not premature. Fallon v. Crocicchia, 102 N. Y. S. 541.

Application for appeal: Held not ground for dismissal that application for appeal inadvertently referred to only one instead of two appellants where error was substantially cured and appellee acknowledged service of summons. Little Rock Trac. & Elec. Co. v. Hicks, 78 Ark. 597, 94 S. W. 711.

Order of appeal: Under Code Prac. 898, defects in order not imputable to appellant is not ground for dismissal. Hays v. Mayer, 117 La. 1067, 42 So. 505.

Notice of appeal: Failure to serve citation. Dowling v. Buckey, 26 App. D. C. 266. Where order resettling order appealed from materially changed latter, failure to serve notice of appeal from order as resettled. Dewsnap v. Bachrach, 104 N. Y. S. 330. Failure to serve notice of intention to appeal in time. Foster v. Western Union Tel. Co. [S. C.] 57 S. E. 760. Failure to give notice of filing of bill of exceptions as required by Superior Court Rule 32. See Court and Practice Act 1905, §§ 34, 490, 491. Smith v. Haskell Mfg. Co. [R. I.] 65 A. 610. Under Texas statute writ of error will be dismissed if issuance of alias citation is not promptly demanded upon return of citation showing certain parties not served. Aspley v. Wheat [Tex. Civ. App.] 99 S. W. 1135; Aspley v. Alcott [Tex. Civ. App.] 99 S. W. 1133. Equity rule requiring appellant to file in court below, with notice of appeal, a statement of errors, is not mere formality and noncompliance therewith cannot be subsequently cured by mere motion with no excuse offered. McMellen v. Williamson, 32 Pa. Super. Ct. 263. Appeal will be quashed for noncompliance with this rule in absence of exceptional circumstances. Groff v. City Sav. Fund & Trust Co., 32 Pa. Super. Ct. 416. General appeal from land court to superior court for failure to comply with St. 1904, p. 450, c. 448, § 8, requiring questions to be specified in the appeal. Mead v. Cutler [Mass.] 80 N. E. 496. Failure to file notice and proof of service until nine days after service held not ground for dismissal. Main Inv. Co. v. Olsen [Wash.] 86 P. 657.

Defect of parties. La Porte Land Co. v. Morrison [Ind.] 78 N. E. 321; Polk v. Johnson [Ind.] 78 N. E. 652; Brown v. Brown [Ind.] 80 N. E. 535. Failure to make creditors parties on appeal from homologation of provisional account of decedent's estate. Succession of Guillebert, 117 La. 371, 41 So. 653. Dismissal for want of necessary party cannot be obviated by appearance of such party after expiration of time limit for the appeal. Polk v. Johnson [Ind.] 79 N. E. 491. Where record showed that case below proceeded in name of "Samuel Mandle, ad-

ministrator of Julius Mandle," and in bill of exceptions "Samuel Mandle" individually was named as defendant in error, held that variance was a substantial one warranting dismissal. Rozier v. Mandle, 127 Ga. 295, 56 S. E. 428. Writ of error dismissed where it was sued out in case of "City of St. Louis v. Empire Theatre Company," and record returned was in case entitled "City of St. Louis v. Edward Butler and Empire Circuit Company, a Corporation." City of St. Louis v. Butler [Mo.] 99 S. W. 1092. Where action was pending against city of Denver at time Const. art. 20 (Sess. Laws 1901, p. 98, c. 46), providing that city and county of Denver shall succeed to rights and liabilities of City of Denver, went into effect, an appeal will not be dismissed because taken in name of original parties where parties impliedly agreed thereto by their action. City of Denver v. Iliff [Colo.] 89 P. 823.

Bonds; failure to give and defects therein: Failure to file bond within time allowed. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 81 N. E. 213; Kehler v. Walls, 118 Mo. App. 384, 94 S. W. 760. Failure to file bond on appeal in ditch proceedings ground for dismissal notwithstanding Burns' Ann. St. 1901, § 1307, forbidding dismissal for defects of form or substance of the bond. Smith v. Gustin [Ind.] 80 N. E. 959. Bond approved more than twenty days after adjournment of court. Houston & T. C. R. Co. v. Smith [Tex. Civ. App.] 97 S. W. 519. Appeal by business corporation from money judgment quashed where objection was made to bond which was not approved and no other bail was offered. Denlinger v. Conestoga, etc., Co., 32 Pa. Super. Ct. 418. Insufficient bond by railroad receiver who appeared below only after judgment against company and then without leave of court. Palmer v. Pittsburg, etc., R. Co., 215 Pa. 518, 64 A. 686. Const. art. 6, § 4, declaring that no appeal to supreme court or to district court of appeals shall be dismissed because taken to the proper court, but shall be transferred, does not save appeal which is not sufficient as to court to which it was taken, as where an undertaking on appeal to supreme court recited an appeal to a court which did not exist, though probably district court of appeals was meant. McAuley v. Tahoe Ice Co. [Cal. App.] 86 P. 912.

Docketing: If bill of exceptions properly sued out to the supreme court to review final judgment be docketed as "fast" writ of error, when in fact it is not such, case will not be dismissed, but will be transferred to docket of next term. Ivey v. Rome, 126 Ga. 806, 55 S. E. 1034. Appellee held entitled to have case docketed and dismissed where appellant failed to enter appeal before return day, as per rule 16 of circuit court of appeals. Wong Sang v. U. S. [C. C. A.] 144 F. 968.

Return day: Appeal returned to day less than thirty days from taking of appeal. Griffith v. Henderson [Fla.] 42 So. 705. Where bill of exceptions was sued out and transmitted to supreme court in time, motion to dismiss upon ground that writ of error in cause made same returnable to March term, 1906, when it should have been made returnable to October term, 1905, minutes of court showing that October term was still in session at time writ of error was sued out was held to be without merit and was overruled. Bell v. Gress Mfg. Co., 127 Ga. 15, 55 S. E. 1043.

25. No brief statement of error alleged filed in trial court as required by Equity Rule 92. Mason v. Linn [Pa.] 67 A. 61. Failure to file exceptions below. Wingert v. Teitrick, 31 Pa. Super. Ct. 187. Failure to serve the case and exceptions for approval within time required by law, in absence of satisfactory showing of mistake or excusable neglect. Code Civ. Proc. § 345. Bledsoe v. Columbia Mills Co., 75 S. C. 545, 55 S. E. 886. Where "abstract statement and brief" was served on respondents within required time, fact that corrected copy thereof was not served until after expiration of such time is not ground for dismissal where respondents are not prejudiced thereby. Hastings Industrial Co. v. Baxter [Mo. App.] 102 S. W. 1075. Unreasonable delay in making corrections in bill of exceptions or brief of evidence required by judge as condition precedent to certifying bill is sufficient ground for dismissal, unless it affirmatively appears that it was caused solely by providential cause or imperative necessity; and that cause was of such character must appear from certificate of judge. Dykes v. Brock [Ga.] 57 S. E. 700. The mere failure or refusal of the official stenographer to furnish transcript of notes of evidence at trial is neither providential cause nor imperative necessity. Id. Delay in presenting corrected brief of evidence for fifty-four days after attention had been called by judge to fact that brief as originally presented was not correct, held unreasonable. Id. Objection that bill of exceptions was not timely served must be presented to trial upon settlement of same, and it will not be determined by appellate court in first instance on motion to dismiss. Dernham v. Bogley [Cal.] 90 P. 543. Where there has been unwarranted delay in settlement of statement on appeal, trial court is forum in which to seek redress. Young v. Updike [Nev.] 89 P. 457.

26. Where record has been filed before service of citation has been completed, correct practice is not to dismiss writ of error but to strike cause from docket. Vineyard v. McCombs [Tex.] 99 S. W. 544. Delay of five days in filing record not ground for dismissal where motion was not made until nearly four months after filing when case had been docketed and record printed, and there was no injury or hardship to defendant in error. Equitable Life Assur. Soc. v. Tolbert [C. C. A.] 145 F. 338.

Abstract not filed in time. Goesse & Remmers Bldg. & Contracting Co. v. Kinnerk [Mo. App.] 97 S. W. 218.

Transcript. Failure to file. Prine v. Duncan [Cal. App.] 90 P. 712; Brooks v. Smith [La.] 43 So. 399. Failure to file transcript, though parties submitted agreed statement in lieu thereof. McDevitt v. Bryant [Md.] 64 A. 931. Failure to file in time. Fenney v. American Bonding Co. [Idaho] 90 P. 859; Alford v. Guffy, 30 Ky. L. R. 54, 97 S. W. 369; Hays v. Mayer, 117 La. 1067, 42 So. 505. Failure of auditor to file transcript in proper time on appeal from county commissioners under Burns' Ann. St. 1901, § 4225, held attributable to appellant, and hence ground for dismissal. Kelly v. Lawson [Ind. App.] 80 N. E. 553. Appeal not dismissed where before hearing appellant filed affidavit made by register that delay was fault of latter and not of appellant or his attorney. Koenig v. Ward [Md.] 65 A. 345. Under Supreme Court Rules 2, 3 (73 Pac. xii), providing for dismissal where transcript is not timely

signing error,[28] or for failure to file and serve a proper brief [29] within the time prescribed.[30] Pro forma affirmance [31] or reversal [32] is sometimes ordered instead on the same grounds.

filed, appeal will be dismissed where no statement or bill of exceptions has been served or filed and where appellant has never requested that transcript be forwarded to supreme court. Young v. Updike [Nev.] 89 P. 457.

27. Record did not show any organization of lower court. Thomas v. Daniel Bros. [Ala.] 42 So. 623. Where abstract of record proper does not show that motions for a new trial and in arrest of judgment were filed and overruled, but bill of exceptions is filed in time and in compliance with order of court, appellate court will dismiss appeal instead of affirming judgment. Mason v. Smith [Mo. App.] 101 S. W. 1149. Where appellant filed no abstract of record and his statement on appeal failed to show that bill of exceptions was filed or that any exceptions were taken to admission or rejection of evidence or to peremptory instruction to jury to find for defendant, or to show what was contained in motions for new trial and in arrest of judgment, appeal was dismissed. Haer v. Van Vickle [Mo. App.] 102 S. W. 61. Where judgment roll fails to include any paper purporting to be judgment and nothing but judgment roll can be considered because of absence of statement of facts or bill of exceptions, appeal must be dismissed. Hart v. Spencer [Mo.] 89 P. 289. Appeal dismissed under Supreme Court Rule 20, because of failure to properly index record and number and properly group exceptions. Davis v. Wall, 142 N. C. 450, 55 S. E. 350. Appeal quashed for failure to print evidence, charge and exceptions, specifications of error, etc. National Lumber Co. v. Mehaffey, 30 Pa. Super. Ct. 544. Under Rules 12 and 13, where case is before court upon complete transcript which requires review of evidence, and no abstract of the record has been filed and there is no index to manuscript record, nor any reference to evidence of respective witnesses in appellant's brief, appeal will be dismissed. Ozark City v. Wells [Mo.] 103 S. W. 32. Failure to send up all the testimony in equity case is not ground for dismissal since certain questions may be presented without evidence. Kieffer v. Victor Land Co. [Or.] 90 P. 582. Irregularity as to place in record of convening order of lower court before entering judgment and as to recital in bill of exceptions of prayer for and order granting appeal, held not ground for dismissal. People v. Cincinnati, etc., R. Co., 224 Ill. 523, 79 N. E. 657.

Defects in transcript: Failure to print plaintiff's statement as required by rules on appeal by plaintiff. Morris v. Philadelphia Rapid Transit Co., 215 Pa. 317, 64 A. 464. Under Code Prac. 898, errors in certificate of clerk not imputable to appellant are not ground for dismissal. Hays v. Mayer, 117 La. 1067, 42 So. 505. Defects which may be remedied by suggestion of diminution and certiorari are not ground for dismissal. Price v. Huddleston [Ind.] 79 N. E. 496. See ante, § 10 D, Amendment and Correction. Where no essential part of the record is omitted and appellee was not prejudiced, an appeal will not be dismissed for nonobservance of a provision of a rule relating to transcripts. McGowan v. Elroy, 28 App. D. C. 86.

Defects in abstract: Failure to prepare abstract in accordance with rules, or to amend same within time allowed. Lampman v. Bump [Colo.] 87 P. 1146. Where abstract insufficient to comply with statute. Goesse & Remmers Bldg. & Contracting Co. v. Kinnerk [Mo. App.] 97 S. W. 218. Imperfect abstract no ground for dismissal. Inks v. Brakebill Bros., 119 Mo. App. 159, 96 S. W. 220.

Bills of exceptions: Where certificate of trial judge omits to certify that bill is true, writ of error will be dismissed. Cade v. Du Bose, 125 Ga. 832, 54 S. E. 697. Where, by stipulation of counsel, two cases are to be heard together, fact that bill of exceptions in one contains evidence of other is not ground for dismissal, but substitution will be allowed. Mosca Milling & Elevator Co. v. Rhodes [Colo.] 88 P. 468.

28. Failure to comply with rules. Moline Trust & Sav. Bk. v. Wylie [C. C. A.] 149 F. 734. Failure to comply with Supreme Court Rule 11, and Equity Rule 92. Howard v. Swissvale Borough [Pa.] 65 A. 814. Failure to file assignments in appellate court. Commonwealth v. Owen, 32 Pa. Super. Ct. 420. Failure to comply with statute requiring assignments to be specific. Smith v. Marshall, 127 Ga. 374, 56 S. E. 416. Failure to comply with Supreme Court Rule 6, requiring assignments to contain the full name of all parties. Haag v. Deter [Ind.] 78 N. E. 331. In ditch proceedings and other analogous proceedings wherein much liberality in pleading is allowed, noncompliance with rule 6, is not ground for dismissal at instance of parties who have not caused their full names to be subscribed to their pleadings. Smith v. Gustin [Ind.] 80 N. E. 959. Entire failure to comply with supreme court rule 26, requiring appellant to assign errors in writing signed by himself or counsel, and serve copy on respondent and file original with clerk of supreme court within five days from filing of transcript. Lyon v. Mauss [Utah] 87 P. 1014.

29. Failure to file. Fitch v. Richardson [C. C. A.] 147 F. 196. Failure to comply with rules. Moline Trust & Sav. Bk. v. Wylie [C. C. A.] 149 F. 734; Niemitz v. State [Ind. App.] 78 N. E. 357. Failure to conform to subd. 3, rule 10, in that it contains no specification of errors. Delmoe v. Bailey [Mont.] 88 P. 662. Failure to file argument. State v. Scott [Iowa] 112 N. W. 185.

30. Delmoe v. Bailey [Mont.] 88 P. 662. Failure to file within time fixed by order of supreme court. Long v. Bank of Winden, 126 Ga. 679, 55 S. E. 915. Ordinary delays of the mail do not constitute providential cause excusing failure. Id. Where there was great delay in giving copy for brief to printer, fact that further delay was caused by illness of printer will not prevent dismissal. Bradley v. De Laney, 126 Mo. App. 715, 97 S. W. 634. Action of lower court in dismissing appeal held not abuse of discretion. Missouri, etc., R. Co. v. Kidd [C. C. A.] 146 F. 499.

31. Frivolous appeal: Motion to affirm a

As a general rule, abandonment of a perfected appeal [33] or pro forma affirmance [34] precludes a second appeal, while a voluntary dismissal,[35] or a dismissal on motion for defects in procedure,[36] does not. In some states, where an appeal is dismissed for defects of procedure, but the appellate court would have jurisdiction on error, the cause will be entered as pending on a writ or error.[37] In Louisiana the dismissal of an appeal in so far as it purports to be a suspensive one does not affect it in so far as it is devolutive.[38]

Appeals may, of course, be dismissed by stipulation,[39] and appellants are generally entitled to dismiss as of course at any time before hearing on payment of costs,[40] but respondent's right to a pro forma affirmance is not affected by the fact

judgment as a delay case will be overruled if appellees have failed to note upon record statement required by code. Staton v. Byrom [Ky.] 101 S. W. 882.

Record: Where, owing to fact that abstract contained no record entries, there was nothing before court but record proper in which errors assigned did not appear. Cummings v. Eiler, 121 Mo. App. 576, 97 S. W. 218. Fact that record was prepared by appellee does not prevent affirmance for insufficiency of record to present error. Thompson v. Wheeler [Cal. App.] 89 P. 1065. Where on appeal by plaintiff his statement was not printed and it was practically admitted that the cause of action was not proved. Morris v. Philadelphia Rapid Transit Co., 215 Pa. 317, 64 A. 464.

Abstract: Failure to file. State v. Allison [S. D.] 108 N. W. 556; Farmers' Mut. Hail & Cyclone Ins. Ass'n v. Roche [S. D.] 109 N. W. 512; Erickson v. Stevenson [S. D.] 110 N. W. 36. For failure to comply with rule 9 prescribing contents. Houghton v. Mosely [Ark.] 6 S. W. 1066. Insufficiency of abstract. Clifford v. Chicago, 124 Ill. App. 123. Incomplete abstract. McCellan v. Powell, 197 Mo. 495, 95 S. W. 335. Where appellant's abstract was unfair and defective. Knight v. Collings, 127 Ill. App. 333.

Bill of exceptions: For absence of bill. City of Alton v. Eck, 122 Ill. App. 282. Where assignments relate exclusively to matters which can be presented only by proper bill of exceptions, and there is no proper bill. Rainey v. Ridgway [Ala.] 43 So. 843. If for any reason a bill of exceptions is ineffectual, appellee should move to strike it and to affirm and not to dismiss. Moran v. Wagner, 28 App. D. C. 166.

Failure to assign error: Where there are no assignments in record. Renshaw v. Brennand [Tex. Civ. App.] 96 S. W. 1099. For failure to assign in manner prescribed by rules. Hunter v. Louisville & N. R. Co. [Ala.] 43 So. 802. Failure to assign discharge of defendant in action of replevin in which third person intervened will result in affirmance of judgment in that respect, although notice of appeal recited that appeal was from entire judgment. Hurley v. Walter, 129 Wis. 508, 109 N. W. 558.

32. Reversed and remanded for appellee's failure to file briefs as per rule. Matthews v. Williams, 122 Ill. App. 245. Appellee's failure to file briefs justifies reversal proforma where questions involved are important. Cleveland, etc., R. Co. v. Storm, 127 Ill. App. 333.

Briefs: Failure to file. State v. Allison [S. D.] 108 N. W. 556; Farmers' Mut. Hail & Cyclone Ins. Ass'n v. Roche [S. D.] 109 N. W. 512; Erickson v. Stevenson [S. D.] 110 N. W. 36. Where appellant's brief had not been filed at time of final submission. Larson v. Chicago, etc., R. Co. [Neb.] 110 N. W. 1015.

Argument: Where no argument is filed by the appellant at the time of the submission of an appeal, the order appealed from will be affirmed. Larson v. Larson [Iowa] 109 N. W. 783. Cause submitted on short transcript without argument for either side. State v. Bulecheck [Iowa] 110 N. W. 929.

33. Where an appellant has obtained an order for both a suspensive and devolutive appeal, and has perfected neither by giving bond, he is entitled, within the year, to another order for a devolutive appeal, there being no appeal to be abandoned until the bond is given. Durand v. Landry [La.] 43 So. 307.

34. Sureties on replevin bond who had not appealed from judgment against them held entitled to writ of error, though principal, who had appealed, and as to whom judgment had been affirmed pro forma joined in petition for writ and in giving writ of error bond. Wandelohr v. Rainey [Tex.] 100 S. W. 1155.

35. Dismissal of writ of error by leave of court without prejudice, for failure to file printed record within sixty days as required by Rev. St. 1906, § 6711, is no bar to subsequent writ of error to review same case provided the same writ is within the four months after judgment limitation prescribed by § 6723. Louisville & N. R. Co. v. Globe Soap Co., 74 Ohio St. 359, 78 N. E. 506.

36. May have another appeal allowed if applied for within time prescribed by statute limiting appeals. Kelner v. Cowden [W. Va.] 55 S. E. 649.

37. Where appeal is taken from judgment reviewable only by writ of error and defendant confers personal jurisdiction by appearing, appeal may be dismissed and action entered as on writ of error, under Mills' Ann. Code, § 388a. People v. Horan, 34 Colo. 304, 86 P. 252.

38. O'Brien v. D'Hemecourt [La.] 43 So. 654.

39. Stipulation canceling appeal bond held not to affect jurisdiction of appellate court acquired by order granting appeal. Dunlap v. Weber Gas & Gasoline Engine Co. [Mo. App.] 94 S. W. 761.

40. At any time while cause remains within jurisdiction of the appellate court. Fort v. Fort [Tenn.] 101 S. W. 433. Appellee is entitled to costs on such dismissal, but cannot object, nor is his consent required. Id. Power of appellant to dismiss

that appellant files a motion to dismiss after the filing of the motion to affirm.[41] Abandonment is equivalent to a dismissal.[42] A motion to dismiss,[43] specifying the grounds relied on[44] and made within the time fixed by the rules,[45] is ordinarily required when the respondent seeks a dismissal. Notice is sometimes required to be given the adverse party.[46] Matters involving the merits will not ordinarily be considered on the hearing of a motion to dismiss,[47] nor, in some states, matters which might have been presented in opposition to the petition for leave to appeal.[48]

Reinstatement.[49]—The court may reinstate an appeal after dismissal,[50] or set aside a pro forma affirmance,[51] where justice requires it.

is limited to appeal and he cannot after judgment dismiss the case. Id.

41. Dunlap v. Weber Gas & Gasoline Engine Co. [Mo. App.] 94 S. W. 761.

42. Prosecution of writ of error held abandoned as to certain parties who had not filed cost bond and were not represented by counsel. Yates v. Jones Nat. Bk., 206 U. S. 158, 51 Law. Ed. 1002.

43. Supreme court not bound to consider mere suggestion that suspensive appeal from interlocutory judgment, allowed pursuant to Code Prac. art. 566, on ground that judgment might work irreparable injury, should be dismissed because judgment does not work such an injury, where no motion to dismiss is filed. Ansley v. Stuart [La.] 43 So. 892. Will not be considered where same issues are before court on appeal from judgment on merits. Id. Where trial judge allowed suspensive appeal from interlocutory judgment as authorized by Code Prac. art. 566, on ground that it might work irreparable injury to defendant, held that appeal would not be dismissed ex parte and ex proprio motu on mere suggestion by plaintiff without a motion to dismiss, but action in that regard would be reserved until the hearing on the merits. Id.

44. Motion to dismiss on ground of defects in undertaking should specify defects complained of. In re Paige's Estate [Idaho] 86 P. 273. Motion to dismiss on ground that undertaking is insufficient is too indefinite. Jackson v. Barrett [Idaho] 86 P. 270. Where appeal is sought to be dismissed on ground that it is barred by limitation, statute must be pleaded. Spradlin v. Stanley's Adm'r, 77 Ky. 612, 99 S. W. 965. That failure to prosecute appeal with due diligence is not specified as a ground for dismissal is not objectionable where order to show cause is based on an affidavit setting forth facts which entitle respondent to relief sought. Brink v. Whisler [S. D.] 110 N. W. 94.

45. Motion to dismiss for incompleteness of transcript and insufficiency of clerk's certificate cannot be entertained if filed after lapse of three judicial days from day upon which transcript should be filed. Barton v. Burbank [La.] 43 So. 1014. Motion made within two days of hearing and after joinder of issues too late. Long v. Farmers' State Bk. [C. C. A.] 147 F. 360. Under Supreme Court Rules 5, 17, where the call of the docket of district to which appeal from judgment rendered before commencement of term belonged was commenced on February 26th, and there was no offer to docket the appeal until February 20th, a motion for dismissal filed on February 19th was not premature. Vivian v. Mitchell [N. C.] 57 S. E. 167. Motion to dismiss for want of jurisdiction must be considered, no matter at what stage of proceedings it is filed. United Iron Works Co. v. Sand Ridge Lead & Zinc Co. [Mo. App.] 102 S. W. 1104.

46. Appeal may be dismissed, though statutory notice is not given if appellant appears, replies to answer, pleading his satisfaction and abandonment of appeal, and briefs case on motion to dismiss. Haggin v. Montague [Ky.] 101 S. W. 893.

47. Case must be clear to justify appellate court in affirming a decision below on motion in advance of hearing on printed record. Jones v. Starr, 26 App. D. C. 64. Motion granted in interference case where appellee was entitled to priority on the record dates, and where appellate court could not possibly consider certain suppressed testimony. Id. Regularity of appeal from county court to circuit court cannot be determined on motion to dismiss appeal from decree of circuit dismissing appeal from county court, since it involves merits. In re Crawford's Estate [Or.] 90 P. 147. That there is nothing in record showing or tending to show that respondent owes appellant anything is not proper ground for dismissing appeal. Shepard v. McNail, 122 Mo. App. 418, 99 S. W. 494. Where motion to dismiss involves some of the questions to be considered on appeal, consideration thereof will be postponed. Darlington v. Butler [Cal. App.] 85 P. 931.

48. Atkinson v. Maris [Ind. App.] 81 N. E. 745.

49. See 7 C. L. 215.

50. Appeal dismissed for want of timely prosecution will not be reinstated except for good cause. Emerson v. Edge [Ark.] 98 S. W. 357. On application to reinstate, whether there is merit in the appeal will be considered. Id. Where an appeal by one of several joint defendants is dismissed for want of summons and severance, it will not be reinstated in such proceedings being taken. Faulkner v. Hutchins, 6 Ind. T. 442, 98 S. W. 153. Where appeal is dismissed for want of prosecution, surety on stay bond is not entitled to reinstatement where it delays for five months after receiving notice of dismissal before applying therefor. Where appeal is dismissed because of failure to file bond at or before docketing, as required by statute, court will not reinstate case and allow a bond to be filed, unless laches is negatived or reasonable excuse shown. Vivian v. Mitchell [N. C.] 57 S. E. 167. Appeal dismissed for failure to docket it in time will not be reinstated on ground of accident, mistake, or excusable neglect, if appellant neglected to give prompt notice of motion to reinstate and failed to show such diligence in repairing his fault as would enable the case to be argued in its regular order. Id.

51. Affirmance for failure to assign errors in manner required by rules set aside, and

Abatement [52] of an appeal ordinarily results from the death of a necessary party before, but not after, the appellate court acquires jurisdiction.[53]

(§ 11) *H. Raising and waiver of defects.*[54]—Nonjurisdictional defects are waived by failure to object at the proper time [55] or by proceeding with the case without objection.[56] The court will of its own motion dismiss for want of jurisdiction [57] or other fundamental error.[58] The practice on motions to dismiss is treated elsewhere.[59]

§ 12. *Hearing.*[60]—In Louisiana the death of the defendant in a proceeding via executiva, who has not been made a party to an injunction suit staying the writ, or to the appeal from the judgment therein, affords no ground for staying the hearing of such suit in the supreme court.[61]

§ 13. *Review. A. Mode of review; review proper or trial de novo.*[62]—Judgments at law and judgments or orders brought upon error or like proceedings, though called on appeal,[63] are reviewed for matter of law only,[64] as found in the record and

appellant allowed to assign errors properly where original attempt was under misconception of rules. Hunter v. Louisville & N. R. Co. [Ala.] 43 So. 802.

52. See 7 C. L. 214.

53. Where a husband dies pending an appeal from a decree alloting to his wife a portion of his real estate during her life, his administrator may prosecute the appeal, but after a reversal the action will abate and the property descend and be distributed as required by law. Johnson v. Bates [Ark.] 101 S. W. 412. Appeal by plaintiff in suit against state by permission does not abate on ground that permission to sue is personal to plaintiff, but may proceed to judgment on substitution of plaintiff's personal representative, leaving legislature to determine what its intentions were. Durbridge v. State, 117 La. 841, 42 So. 337. Under Rev. St. 1895, art. 1026, a suit does not abate by death of the party after appeal perfected, notwithstanding original cause of action may be one which does not survive. White v. Manning [Tex. Civ. App.] 102 S. W. 1160. Grant of new trial from which an appeal is pending does not destroy judgment so that death of plaintiff will abate proceeding. Wright v. Northern Pac. R. Co. [Wash.] 88 P. 832. Where petition in error is filed and summons issued, supreme court has jurisdiction and death of petitioner in error thereafter does not abate the proceedings. Field v. Leiter [Wyo.] 90 P. 378.

54. See 7 C. L. 215.

55. Irregularities in form of transcript. State v. Reid [La.] 42 So. 662. Technical defects in abstract. Sanguinette v. Mississippi River & B. T. R. Co., 196 Mo. 466, 95 S. W. 386. Defect of parties to a writ of error. Roth v. Burnham, 126 Ill. App. 222.

56. Motion to strike bill of exceptions is a general appearance waiving want of service of notice of issuing writ of error. McNealy v. Bartlett [Mo. App.] 95 S. W. 273. Irregularity in perfecting appeal waived by filing briefs. Carter v. People, 122 Ill. App. 77. Joinder in error on appeal to appellate court and an appeal therefrom to supreme court waives objection that error was the proper method of review. Sullivan v. People, 224 Ill. 468, 79 N. E. 695. Joinder in error waives failure of party in interest to join as appellant. Rensford v. Magnus & Co. [Ala.] 43 So. 853. An appeal in proceedings by executors for allowance of claims is not void as being an appeal from action of administrator in dealing with independent claims in severalty merely because it combines an appeal from allowance of a certain claim in favor of a certain party and an appeal from the disallowance of the same claim as to appellant, such joinder being at most only matter for plea in abatement. In re Bennett [Conn.] 65 A. 946.

57. Columbia N. S. D. Co. v. Morton, 28 App. D. C. 288.

58. Absence of proper parties. Voelkel v. Aurich [La.] 43 So. 151.

59. See ante, § 11 G.

60. See 7 C. L. 216.

61. Barton v. Burbank [La.] 43 So. 1014.

62. See 7 C. L. 216.

63. Motion to set aside sheriff's sale under foreclosure in equity is in nature of special proceeding and cannot be tried de novo on appeal. Fuller v. O'Connell [Iowa] 110 N. W. 281. Word "appeal" when used in a statute does not necessarily imply removal of whole cause to be tried as a new proceeding, but is to be construed under ordinary rules of construction. Nash v. Glen Elder [Kan.] 88 P. 62. Gen. St. 1901, § 1175, granting an appeal from an order of board of commissioners ' enlarging municipal boundaries, held to authorize only a review of so much of action of board as was judicial in its nature, and hence not unconstitutional as conferring legislative power. Id. Rev. Codes 1905, § 7229, providing for trial of "actions" de novo on appeal, does not apply to special proceedings such as mandamus. State v. Fabrick [N. D.] 112 N. W. 74.

64. Under Rev. Laws, c. 173, § 96, supreme judicial court can review on appeal from superior court only matters of law apparent on record. Hicks v. Graves [Mass.] 80 N. E. 590. Unless erroneous as a matter of law, findings of fact of probate court in proceedings for adoption of child cannot be disturbed on review on exceptions only without any appeal. Purinton v. Jamrock [Mass.] 80 N. E. 802. Whether a delay in disaffirming a release of the cause of action sued on was unreasonable is a question of fact and a ruling thereon will not support a writ of error. Galveston, etc., R. Co. v. Cade [Tex.] 15 Tex. Ct. Rep. 826, 94 S. W. 219. Appeal brings up questions of fact as well as of law; error, only questions of law apparent on the record. Behn, Meyer & Co. v. Camp-

bill of exceptions.[65] Equitable decrees and orders are usually reviewed de novo,[66] and even in states where a contrary rule prevails, a more generally revisory power is exercised than actions at law.[67] A trial de novo is also frequently provided for on appeals in certain special proceedings,[68] or from inferior courts or tribunals.[69] Subject to limitation to the issues as originally made, the rules of pleading and practice are the same as in ordinary actions when there is a formal retrial by a court of general superior juisdiction.[70]

(§ 13) *B. General scope or objects of review.*[71]—Unnecessary points[72] or

bell, 205 U. S. 403, 51 Law. Ed. 857. Whether supreme court of Philippine Islands erred in setting aside conclusions of lower court as manifestly against weight of evidence not reviewable on writ of error. Id.

65. See § 9, ante.

66. Foreclosure in equity. Fuller v. O'Connell [Iowa] 110 N. W. 281. On appeal from decree in equity given in any court, suit must be tried on transcript and evidence accompanying it, as prescribed by B. & C. Comp. § 555. In re Morrison's Estate [Or.] 87 P. 1043.

67. Where no findings of fact or rulings of law are made by court in equity case, the only question on appeal is whether upon all the evidence the decree is wrong. Staples v. Mullen [Mass.] 81 N. E. 877. Contentions justified by the evidence may be considered on appeal from decision of single justice though not raised below, and pleadings may be amended to meet the evidence. Old Corner Book Store v. Upham [Mass.] 80 N. E. 228. Appeal to full court from single justice with full report of testimony brings up all questions of law and fact unless the scope of the appeal is abridged by stipulation, though the issues tried before the single justice were abridged by stipulation. Bartlett v. New York Cent., etc., R. Co. [Mass.] 81 N. E. 204.

68. Where issues in bankruptcy were submitted to a jury but not under § 19a of the bankruptcy act, appeal from an adjudication of bankruptcy was "an appeal as in equity cases" under § 25, which brought up the whole case and could not be made to turn on errors in rulings made on trial of a feigned issue. In re Neasmith [C. C. A.] 147 F. 160.

69. On appeal to circuit court from judgment of county court allowing claim of jailer for feeding prisoners. Kirby's Dig. § 1492. Marion County v. Estes, 79 Ark. 504, 96 S. W. 165. Appeal to supreme court from judgment of circuit court affirming order of probate court confirming findings of auditor on accounting by administrator, held not to be treated as chancery appeal and determined on weight of evidence. Kirby's Dig. § 144, construed. Matthews v. Taylor Co., 79 Ark. 577, 96 S. W. 134. Under Sess. Laws 1899, pp. 240, 249, on appeal from order of board of county commissioners granting road through premises and awarding damages, the cause is tried de novo in district court. Latah County v. Hasfurther [Idaho] 88 P. 433. Appeal to the circuit court in proceeding to require listing of property for taxation is to be tried de novo, and circuit court cannot refuse to take jurisdiction because judgment of county court is silent as to particular steps taken in that court. Commonwealth v. Haggin, 30 Ky. L. R. 788, 99 S. W. 906. On appeal from county to circuit court in proceeding to require listing of property for taxation, evidence introduced in lower court cannot be sent up by bill of exceptions, but circuit court may receive such evidence as may be offered therein on hearing of appeal. Id. Where judgment of the county court in probate proceeding is reversed by district court in proceeding in error, latter court properly retains jurisdiction over the cause for trial de novo. In re Ray [Neb.] 109 N. W. 496.

70. On appeal from county court to district court, either party has same right to amend his pleadings as he would have had had action been originally instituted in district court. Myers v. Moore [Neb.] 110 N. W. 989.

71. See 7 C. L. 218.

72. Whether verdict was contrary to evidence, where grant of new trial was affirmed on ground that instruction was erroneous. Chambers v. Morris [Ala.] 42 So. 549. Where it was held that trial court erred in refusing to allow plea in abatement to be interposed, other assignments to matters accruing at trial. Eagle Iron Co. v. Malone [Ala.] 42 So. 734. Where findings supported by evidence are sufficient to warrant a judgment, sufficiency of evidence to support other findings. Percival v. Jack [Cal. App.] 90 P. 555. Where the appeal is decided on a controlling issue, no other assignments will be considered. Heile v. South Georgia Grocery Co., 125 Ga. 562, 54 S. E. 540. Correctness of proposition of law, where trial court decided that it was inapplicable under the evidence. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562. Where court on appeal held that state's attorney was the actual and not merely nominal party to suit, whether private person joined with him could have maintained the suit alone. Chicago, etc., R. Co. v. People, 222 Ill. 427, 78 N. E. 790. Unnecessary to determine whether trial court correctly placed burden of proof on appellant, the defendant below, as to defense unsustained by any evidence. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562. Questions eliminated by decision below where verdict not based on count complained of. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 N. E. 65. Where judgment reversed for insufficiency of complaint, questions arising on motion for new trial. Kintz v. Johnson [Ind. App.] 79 N. E. 533. Whether interlocutory decree established existence of partnership, when supreme court has found evidence sufficient to show its existence. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105. Questions eliminated by decision on appeal. Reddy v. Raymond [Mass.] 80 N. E. 484. Questions that have become immaterial. Lord v. Rowse [Mass.] 80 N. E. 822. Constitutional questions are peculiarly within this rule, and a statute will not be

abstract questions will not be decided.[73] Accordingly, errors which may not arise.[74] or which may be cured,[75] on a retrial, or which have been eliminated by a settlement[76] or change of facts,[77] or which have been merged in a later and final decis-

declared unconstitutional unless it is absolutely necessary to do so in order to dispose of the cause. Chicago, etc., R. Co. v. Hunt [Ind. App.] 79 N. E. 927. Where complaint demurred to generally was held good at common law, it was unnecessary to pass upon constitutionality of employers' liability act in order to sustain the complaint. Oolitic Stone Co. v. Ridge [Ind. App.] 80 N. E. 441. Paragraph of complaint, where it affirmatively appears that verdict rests on certain other paragraphs alone. Chicago, etc., R. Co. v. Williams [Ind.] 79 N. E. 442; City of Indianapolis v. Keeley [Ind.] 79 N. E. 499. Sufficiency of pleadings where same facts are presented by exception to conclusions of law on findings. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245. Sufficiency of complaint on demurrer where fundamental questions of case are presented by demurrers to answers. State v. Spittler [Conn.] 65 A. 949. Where declaration is insufficient and demurrer should have been sustained thereto, other questions in record are not open for consideration. Royal Phosphate Co. v. Van Ness [Fla.] 43 So. 916. On appeal from judgment for defendant, entered on plaintiff declining to plead over and taking a nonsuit after demurrers to complaint were sustained, where only questions of pleading were involved, held that court would not consider assignments predicated on mere expression of opinion by trial court that plaintiff could not recover under any state of facts. Esters v. Hurt [Ala.] 43 So. 565. Where demurrer to petition on ground of duplicity is erroneously overruled, all subsequent proceedings in trial are to be considered as nugatory and will not be reviewed. Macon & B. R. Co. v. Walton, 127 Ga. 294, 56 S. E. 419. Error cannot be predicated upon claims of law based upon contingency of court's finding contrary to way it actually did find. Contaldi v. Errichetti [Conn.] 64 A. 219.

73. Counsel cannot by stipulation in abstract submit questions of law not arising on record. Hubbard v. Justices' Court of San Jose Tp. [Cal. App.] 89 P. 865. Where term of imprisonment of alleged lunatic under criminal charge expires pending appeal from order denying application to investigate his sanity, only abstract questions are presented for review. In re Brooks, 104 N. Y. S. 670. Court cannot give mere advisory opinion, touching extraneous questions, for purpose of influencing future litigation. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593. Will not construe statute passed after rights of parties became fixed, and which does not, therefore, affect them. City of New Orleans v. Board of Liquidation of City Debt [La.] 43 So. 157. Question whether court should allow separate bills of exceptions to be filed and included in record, where was stenographer's transcript of all the evidence with objections, rulings, and exceptions, held not open to consideration where appellant's appeal was in no way affected thereby because statement of facts as certified to by stenographer contained and presented as part of record subject-matter of separate bills. Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513. Prohibition to prevent election commissioners from selecting judges, etc., from a certain list, denied where primary had been held. Kalbfell v. Wood, 193 Mo. 675, 92 S. W. 230. Concrete question as to constitutionality of a statute making stenographer's report only statement of facts under certain circumstances not presented where appellant also had in record a statement prepared as formerly. Routledge v. Rambler Automobile Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 386, 95 S. W. 749. Question of right of a student to enter a class not considered, college year having ended. State v. Georgetown College, 28 App. D. C. 87.

Moot questions. Kendall v. Kendall [Ind. App.] 79 N. E. 222. As to sufficiency of an indictment where another indictment had been sustained. United States v. Evans, 28 App. D. C. 269. Questions on mandamus rendered moot by compliance with order. McCormick v. State, 165 Ind. 639, 76 N. E. 293. Where bona fide purchaser of bond was not made party to action to restrain assessment or collection of taxes for payment of bonds, right to injunctive relief becomes moot question which will not be considered though defect of parties is waived. Slutts v. Dana [Iowa] 109 N. W. 794. Where in previous decision court established validity of action of board of school directors in selecting new site for school, after an appeal to state superintendent had resulted in site being selected by him, question as to whether state superintendent had authority to rehear question involved in appeal to him and to set aside his decision and enter a new one was a moot question. Doubet v. Riggs [Iowa] 112 N. W. 242. Validity of suspension of writ of habeas corpus by Philippine authorities held moot question where suspension was revoked on day of serving copy of petition for writ of error on opposing counsel, and over two months before writ issued. Fisher v. Baker, 203 U. S. 174, 51 Law. Ed. 142.

74. Where case is to be reversed and new trial ordered on other grounds, is not proper to discuss evidence with relation to findings. Williams v. Myer [Cal.] 89 P. 972. Questions which will not arise at another trial. Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 17 Tex. Ct. Rep. 598, 98 S. W. 909. Instruction need not be reviewed where it will probably be changed on new trial after reversal and remand for other error. Grout v. Moulton [Vt.] 64 A. 453. Questions which may or may not arise at a subsequent trial of the case will not be considered. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

75. Keenan v. Metropolitan St. R. Co. 103 N. Y. S. 61. Opinion of court expressed to jury on matters of fact but ultimately submitted to them for decision not reviewable, no rule of law being incorrectly stated. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F. 365.

76. Where from order granting new trial writ of error was perfected before new trial was had, held that rendition of final judg-

ion,[78] will be ignored. Important public questions may, however, be considered on the merits though the case is disposed of on a point of practice.[79] The scope of review is limited to such matters as fall within the appellate jurisdiction pertaining to the reviewing court.[80] As a general rule no question not properly saved below,[81] preserved and presented in the rerord,[82] properly assigned,[83] and briefed and argued,[84] and no questions which do not harm the person appealing or objecting,[85] will be considered, but fundamental errors and jurisdictional defects apparent on the face of the record are reviewable though never before claimed or urged.[86] The appellate court may, also, when justice requires it, consider questions not properly saved. A statute forbidding the review of a particular question precludes consideration of other questions necessarily involved therein.[87] An instruction not given at appellant's instance may be reviewed though not given at the instance of the respondent.[88] Failure to perform a mere clerical duty is not reviewable.[89] An objection is waived by assuming an attitude inconsistent therewith on appeal.[90]

(§ 13) *C. Restriction of review to rulings and issues below.*[91]—Review proper is of course strictly confined to the rulings made[92] and the issues joined and de-

ment, on second verdict obtained after writ of error was perfected, did not constitute settlement and adjustment of controversy barring prosecution of writ. De Board v. Camden Interstate R. Co. [W. Va.] 57 S. E. 279.

77. Where pending appeal by railroad from order of railroad commission fixing rates railroad complied with order, there was nothing to review, though railroad company might be liable to shippers for excess in rates already collected. Chicago, etc., R. Co. v. Hunt [Ind. App.] 79 N. E. 927.

78. Where new trial is granted, errors in first trial will not be considered on appeal from second. Multnomah County v Willamette Towing Co. [Or.] 89 P. 389.

79. As where judgment denying mandamus to compel placing of certain candidates upon ticket is affirmed on account of defects in pleadings. State v. Board of Ele. Com'rs [Ind.] 78 N. E. 1016. Appeal will not be retained to review abstract propositions as public questions where because of defendant's failure to deny allegations of petition for mandamus, theory upon which they proceeded and correctness of which they seek to have reviewed cannot be considered. People v. Voorhis, 100 N. Y. S. 717.

80. Circuit court of appeals cannot decide jurisdictional question respecting circuit court, the same being directly reviewable by the supreme court, though for all other purposes the circuit court of appeals had jurisdiction. Act March 3, 1891, § 6, c. 517, 26 St. 828 Town of Waterford v. Elson [C. C. A.] 149 F. 91. Decisions of state courts on questions of local law are not reviewable by the Federal courts. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 205 U. S. 354, 51 Law Ed. 836. Whether an order of a state corporation commission regulating train service was arbitrary and unreasonable as being beyond the scope of the commission's authority under the state laws, was a local question not reviewable on error to state court. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 Law. Ed. 933.

81. See Saving Questions for Review, 8 C. L. 1822.

82. See § 9, ante.

83. See § 11 E, ante.

84. See § 11 F, ante.

85. See Harmless and Prejudicial Error, 8 C. L. 1.

86. See, also, Saving Questions for Review, 8 C. L. 1822. Though objection to complaint was not made below, its sufficiency to state cause of action may be considered on appeal from a judgment. Murray v. Butte [Mont.] 88 P. 789. Objection that petition is subject to general demurrer as stating no cause of action may be made for first time on appeal. Western Union Tel. Co. v. Hidalgo [Tex. Civ. App.] 99 S. W. 426. Where bill in equity shows want of jurisdiction, question may be raised for first time in appellate court. Thompson v. Adams [W. Va.] 55 S. E. 668. Though there are no motions for new trial or in arrest of judgment, appellate court will reverse judgment if it appears on face of record that trial court had no jurisdiction or that petition fails to state cause of action. Orchard v. National Exchange Bk., 121 Mo. App. 338, 98 S. W. 824. Failure to object to jurisdiction below does not confer jurisdiction on circuit court of appeals unless record shows case cognizable by Federal courts. Henrie v. Henderson [C. C. A.] 145 F. 316. Objection that action on stay bond was prematurely brought may be passed on though made for first time in appellate court. Blackmore v. Winders [N. C.] 56 S. E. 874.

87. Hurd's Rev. St. 1901, c. 24, § 553, forbidding review of distribution of costs of local improvements between public and private property, precludes review of admissibility of evidence on such question. Chicago Consol. Trac. Co. v. Oak Park, 225 Ill. 9, 80 N. E. 42.

88. Connelly v. Illinois Cent. R. Co., 120 Mo. App. 652, 97 S. W. 616.

89. Failure of court to enter statement of facts found on minutes as required by Code 1896, § 3320. Matthews v. Southern R. Co. [Ala.] 41 So. 662.

90. One who objects to evidence below, but on appeal takes a position which would render it material, is not in a position to complain. Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963.

91. See 7 C. L. 220.

92. See Saving Questions for Review, 8 C. L. 1822. Supreme court, being only re-

cided [93] below.[94] As a general rule the theory of the case acquiesced in below will be adhered to,[95] and a correct ruling will be sustained though wrong or deficient reasons were given therefor below,[96] but where a party has acted to his prejudice on the ground stated, the order must stand or fall on such ground.[97]

(§ 13) *D. The extent of the review and the questions reached are determined by the character and effect of the order or judgment.*[98]—Generally speaking, the main or final judgment takes up all intermediate orders or proceedings,[99] but not

visory court, will not decide what was expressly pretermitted in chancery court. Peirce v. Halsell [Miss.] 43 So. 83. Evidence excluded below cannot be considered as evidence on appeal, but court can only determine whether it was erroneously excluded. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406. The sustaining of cross errors to the admission of secondary evidence for appellant does not justify the appellate court in affirming the judgment just as though such evidence was not in the record, but if on all the evidence the judgment was wrong, it will be reversed and the trial court instructed as to the incompetency of such evidence. Smith v. Berz, 125 Ill. App. 122. Question of validity of an assessment not reviewable where ruling of state court that question was not in the case was based on its view of objector's application and of the pleadings, it not being contended that such view was erroneous. Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 51 Law. Ed. 237.

93. See Saving Questions for Review, 8 C. L. 1822. Under Hurd's Rev. St. 1905, p. 806, c. 42, §§ 24, 25, on appeal by part of landholders from decision of drainage commissioners classifying lands and making assessments, the classification of all the lands in the district cannot be considered, but only such classifications as were objected to by appellants before the commissioners. Carr v. People, 224 Ill. 160, 79 N. E. 648. Where order of reference in a suit to enjoin infringement of a trademark was limited to question of profits, no damages being allowed, question as to right of court to assess damages was not involved on appeal by defendant. Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774. A case not passed upon by single justice who entered decree appealed from cannot on appeal to full court be substituted by agreement of counsel in place of case passed on by such justice. Holland v. Ball [Mass.] 78 N. E. 772. An assumption by trial court that mandamus is the proper remedy is equivalent to decision to that effect and may be reviewed. Dickinson v. Cheboygan County Canvassers [Mich.] 14 Det. Leg. N. 196, 111 N. W. 1075. On appeal from order of quarter sessions dividing a borough ward into election districts, appellate court is confined strictly to questions affecting jurisdiction of quarter sessions and regularity of proceedings therein. Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525. Matters arising subsequent to judgment appealed from not considered. Pipkin v. Tinch [Tex. Civ. App.] 97 S. W. 1077. Parties cannot by stipulation inject into an appeal matters not determined in the cause in which the decree appealed from was rendered. Headrick v. Larson [C. C. A.] 152 F. 93.

94. The consequence of this rule is that one must join issue, or procure a ruling by properly objecting or challenging the court's attention. See full treatment in Saving Questions for Review, 8 C. L. 1822.

95. See Saving Questions for Review, 8 C. L. 1822.

96. See Harmless and Prejudicial Error, 8 C. L. 1.

97. Though trial court would have been justified in refusing to admit evidence because offered after motion to direct verdict for defendant had been sustained where it places its ruling upon another ground which would require plaintiff to elect between testing its correctness or dismissing his case before submission to jury, correctness of ruling will be disposed of on ground assigned. Foley v. Cedar Rapids [Iowa] 110 N. W. 158. Document offered out of order but excluded on the ground that it was void on its face. Treasury, etc., Co. v. Gregory [Colo.] 88 P. 445.

98. See 7 C. L. 221.

99. Where demurrer to complaint is sustained and judgment of dismissal entered, appeal from judgment involves sustaining of demurrer. Amestoy Estate Co. v. Los Angeles [Cal. App.] 90 P. 42. Appeal by taxpayer from allowance of claim for debt incurred by county commissioners brings up all prior proceedings upon which allowance was based. Kraus v. Lehman [Ind. App.] 80 N. E. 550. Appeal to district court from decision of register of state land office on contest held to carry with it questions, interlocutory or otherwise, raised by parties at trial. Darby v. Emmer [La.] 43 So. 148. On appeal from decree pro confesso, where the party not only demurs and pleads but the court takes evidence, the demurrers and pleas as well as the decree are reviewable. Turpin v. Derickson [Md.] 66 A. 276. Appeal from judgment brings up all interlocutory and nonappealable orders of district court made prior to judgment, if they are properly presented by record. In re Paige's Estate [Idaho] 86 P. 273. Under Code Civ. Proc. § 1742, order correcting verdict by striking finding may be reviewed on appeal from judgment. Frank v. Symons [Mont.] 88 P. 561. If a plaintiff is denied an opportunity to prove his cause of action upon a sufficient pleading, it is immaterial whether such denial is upon a motion or a demurrer, and he is entitled, if he has not waived his right, to have an adverse judgment reviewed. Walters v. Exeter [Neb.] 110 N. W. 631. Unauthorized transfer of case from one district to another is reviewable on appeal from the final judgment. People v. Murray, 104 N. Y. S. 740. Where judgment by default was entered in municipal court after defendant had appeared and answered, and motion to open default was denied, both judgment and order are before court on review. North Side Iron Works v. Thacke & Co., 104 N. Y. S. 365. Upon appeal from judgment on the merits, court will review order of municipal

those subsequent to it,[1] nor separate parts not appealed.[2] In some states it does not take up appealable interlocutory orders,[3] though a contrary rule prevails in most code states,[4] at least in cases where the time for appealing therefrom has not expired.[5] An appeal from an interlocutory order brings up only the order itself as it stood at the making thereof and nothing subsequent.[6] In some states it does not bring up a previous appealable order on which it is based if the time for appealing from the latter has expired.[7] Appeals from the grant or refusal of a new trial,[8] or other orders made in the courts of the trial[9] or after judgment, reach only those matters which entered in the order itself, and other matters can be considered only on appeal from final judgment.[10] In some states, however an appeal from the order on a motion for a new trial, rather than an appeal from the judgment, reaches the facts,[11] and only matters urged as grounds for a new trial can be reviewed.[12] In states where a final decree cannot be rendered pending the determination of excep-

court denying transfer to another district. Schiller v. Hardenburg, 102 N. Y. S. 529. Granting of new trial is an interlocutory order involving merits, reviewable on appeal from judgment on retrial. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389. Refusal of commissioner of patents to extend time for taking testimony will not be reviewed in connection with final decision of priority. Jones v. Starr, 26 App. D. C. 64. On appeal from judgment, an order overruling demurrer cannot be reviewed where no judgment overruling it was entered. Kemp v. Tonnele Co., 99 N. Y. S. 885.

1. Denial of petition filed at term subsequent to one at which judgment appealed from was rendered. Gilbreath v. Farrow [Ala.] 41 So. 1000.

2. On appeal in an interference case, a ruling of the examiner of interferences suppressing certain of appellant's testimony, but not appealed from in time, could not be considered. Jones v. Starr, 26 App. D. C. 64.

3. See 7 C. L. 221, n. 36.

4. Order sustaining demurrer to evidence is reviewable on appeal from final judgment if made within year preceding filing of petition, although it is appealable in itself. White v. Atchison, etc., R. Co. [Kan.] 88 P. 54. Under § 1316, Code Civ. Proc., providing that right to review interlocutory judgment is not affected by expiration of time within which separate appeal might have been taken, party appealing from final judgment is entitled to have reviewed an interlocutory judgment appointing a referee. Bauer v. Parker, 101 N. Y. S. 455.

5. Ruling on demurrer made more than year before proceeding in error is instituted is not reviewable. Missouri, K. & T. R. Co. v. Murphy [Kan.] 90 P. 290.

6. Motion below after appeal from such order to set it aside does not constitute waiver of appeal. Continental Clay & Min. Co. v. Bryson [Ind.] 81 N. E. 210. Action of trial court in sustaining exceptions to answer not being within Code 1896, § 427, specifying what interlocutory orders are appealable, held that it could not be reviewed on appeal from decree overruling demurrers to bill and a motion to dismiss. Cleveland v. Insurance Co. [Ala.] 44 So. 37. Where the merits are presented by the pleadings, they will be passed on though the appeal is from an order on demurrer. Jolly v. Miller, 30 Ky. L. R. 341, 98 S. W. 326. St. 1900, p. 233, c. 311, Rev. Laws, c. 173, § 105, permitting a report upon interlocutory questions of law, limits the full court to the determination of the questions reported, and such court's decision is confined to the scope of the original order. Foote v. Cotting [Mass.] 80 N. E. 600. Appeal from order allowing withdrawal of juror upon terms to enable plaintiff to amend his complaint does not bring up for review ruling sufficiency of the complaint. Ranson v. Silo, 105 App. Div. 278, 93 N. Y. S. 416.

7. Where order is appealed from within time provided by statute, and error complained of is based solely on an appealable order not reversed or appealed from, an appeal from which is barred by the statute, such error cannot be reviewed. Kelner v. Cowden [W. Va.] 55 S. E. 649.

8. Sufficiency of complaint can be reviewed only on appeal from judgment and not on appeal from order denying new trial. Jenson v. Will & Finck Co. [Cal.] 89 P. 113. On appeal from order granting new trial, sufficiency of pleadings cannot be considered, but only propriety of order itself is reviewable. Cook v. Skinner [Wash.] 89 P. 553.

9. Appeal from judgment merely allowing defendant treble costs does not present alleged error in the taxation of those costs. Sidway v. Missouri Land & Live Stock Co., 197 Mo. 359, 94 S. W. 855.

10. Where grant of a new trial is affirmed pendente lite, exceptions will not be considered and passed upon as case is still pending in court below. Ogletree v. Livingston, 125 Ga. 548, 54 S. E. 625; Athens Elec. R. Co. v. Jackson, 125 Ga. 551, 54 S. E. 626. On appeal from order of sale made after decree finally settling rights of parties in suit for partition, matters adjudicated by the decree for partition are not open to review. Crowe v. Kennedy, 224 Ill. 526, 79 N. E. 626.

11. Where no appeal was taken from order denying new trial, appellate court will not weigh evidence, being confined to exceptions. Prager v. Schafuss, 99 N. Y. S. 840. Upon appeal from judgment but not from an order denying a new trial, court will only examine record for errors of law which were excepted to and which warrant reversal. Beinhauer v. Baldwin Engineering Co., 104 N. Y. S. 431. Sufficiency of evidence to sustain finding will not be reviewed, in absence of appeal from order denying new trial. Subera v. Jones [S. D.] 108 N. W. 26.

12. See Saving Questions for Review, 8 C. L. 1822.

tions, an appeal from such a decree must be determined on the exceptions alone.[13] If the finding in a law case in the Federal courts is general, a writ of error reaches only the rulings of the court in the progress of the trial, but if the finding is special the review may extend to the sufficiency of the facts found to support the judgment.[14]

(§ 13) *E. Restriction to contents of record.*[15]—The sufficiency of the record to permit the review of particular questions is treated elsewhere.[16] Except as to matters judicially noticed,[17] and fundamental errors,[18] appellate review is ordinarily confined to the record, and matters aliunde will not be considered.[19]

13. Under Rev. Laws, c. 173, § 79. McCusker v. Geiger [Mass.] 80 N. E. 648.

14. U. S. Rev. St. § 700. Southern R. Co. v. St. Louis Hay & Grain Co. [C. C. A.] 153 F. 728. Where in action at law, without a jury there are no special findings and ultimate facts are not agreed upon by parties, there can be no review of question whether judgment is supported by facts found. Rev. St. §§ 649, 700. National Surety Co. v. Cincinnati, etc., R. Co. [C. C. A.] 145 F. 34. On trial to the court findings being general, exceptions to denial of judgment for defendant presents to appellate court question only whether upon whole evidence with all inferences which jury could justifiably draw from it plaintiff was entitled to recover. Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51.

15. See 7 C. L. 224.

16. See § 9 D, ante.

17. Appellate court will take judicial notice of location of an important line of railroad of congressional grant of land to it, and that a particular section lies within limits of grant and location so that a plaintiff in ejectment connecting with railroad's title sufficiently shows title. Worden v. Colo [Kan.] 86 P. 464. Supreme court cannot take judicial notice of fact that train going at rate of 20 or 25 miles an hour could have stopped within 80 or 90 yards. Southern R. Co. v. Gullatt [Ala.] 43 So. 577. Court will not take judicial notice of laws of another state, but case will be decided according to laws of forum unless foreign law is introduced in evidence and incorporated in record. Smith v. Aultman, 120 Mo. App. 462, 96 S. W. 1034. Where right is claimed under rules of trial court, such rules must be embodied in bill of exceptions as they will not be judicially noticed. Case Threshing Mach. Co. v. Meyers [Neb.] 111 N. W. 602. Statements in brief as to proceedings occurring in former action cannot be considered where not made part of statement of facts, as court cannot take judicial notice of statement of facts in case not before it. Sweeney v. Waterhouse & Co. [Wash.] 86 P. 946.

NOTE. Judicial notice of own records: The court while confined to the "record" will judicially notice such of its own records though of other cases as are material. Sawyer v. First Nat. Bk. [Tex. Civ. App.] 14 Tex. Ct. Rep. 701, 93 S. W. 151, in which case it is said: **[Note.]** "For authority in taking judicial notice of our own records, we refer to the following cases: Doremus v. Root, 23 Wash. 721, 63 P. 572, 54 L. R. A. 649; State v. Bowen, 16 Kan. 477; Gans v. Holland, 37 Ark. 485; State v. Jackson, 35 La. Ann. 769; Poole v. Seney, 70 Iowa, 275, 24 N. W. 520, 30 N. W. 634; Brucker v. State, 19 Wis. 539; Butler v. Eaton, 141 U. S. 240-244, 35 Law. Ed. 713; Craemer v. State of Washington, 168 U. S. 129, 42 Law. Ed. 407; Bresnahan v. Tripp Giant Leveller Co. [C. C. A.] 72 F. 922; Cushman Paper Box Mach. Co. v. Goddard, [C. C. A.] 95 F. 666; Wood v. Cahill, 21 Tex. Civ. App. 44, 50 S. W. 1071; Avocato v. Dell'Ara [Tex. Civ. App.] 84 S. W. 444. In the case of Poole v. Seney, 70 Iowa, 275, 24 N. W. 520, 30 N. W. 634, we find that a writ of garnishment had issued, and the garnishee had answered, alleging that one of the defendants in the main litigation was indebted to him in a large amount, and that such amount was secured by mortgages. The plaintiffs in garnishment filed a pleading controverting the answers of the garnishee, and set up that the chattel mortgages had been adjudged fraudulent and void in an equity case in which they were plaintiffs and the garnishee was defendant. At the time that the suit of Poole, Gilliam & Co. was brought, the right of appeal in the equity case existed, but the appeal had not been perfected. Thereafter, a superior court determined that the mortgage was not fraudulent and void, and reversed the equity case. The court says: The determination of the equity case in this court must be regarded as a final and conclusive determination that the mortgage is not invalid. This being so, what effect, if any, does such adjudication have in this action? It is certain that the judgment rendered in the district court was right when it was rendered. It is equally certain that the plaintiffs have a judgment to which they are not now entitled. Is this court powerless to correct the wrong? is the question to be determined. On a rehearing of the case, the court says: Our own records, of which we take notice, show that the case referred to has been reversed. In view of those admissions, we do not think it can be justly said that the equity cause had not been appealed and we bound to know that it has been reversed. In the case of Butler v. Eaton, 141 U. S. 240, 35 Law. Ed. 713, the court says: And it cannot be said, therefore, looking to the record in this case alone, that there is error in the judgment now before us. But by our own judgment just rendered in the other case, the whole basis and foundation of the defense in the present case, viz: the judgment of the Supreme Judicial Court of Massachusetts is subverted and rendered null and void, for the purpose of any such defense. * * * It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why then, should not we reverse

(§ 13) *F. Rulings peculiar to province of trial court.* 1. *Discretionary rulings in general.*[20]—A discretionary ruling is not absolute but will be reviewed only for abuse or to prevent manifest injustice.[21] This rule has been applied to rulings on motion for a change of venue,[22] motions for continuance,[23] orders relating

the judgment which we know of record has become erroneous and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object."

18. See § 13 A, ante.

19. Landvoigt v. Paul, 27 App. D. C. 423; Cumberland Tel. & T. Co. v. St. Louis, etc., R. Co., 117 La. 199, 41 So. 492; Hicks v. Graves [Mass.] 80 N. E. 590; Weeke v. Wortmann [Neb.] 109 N. W. 503; Elterman v. Hyman, 102 N. Y. S. 613; Brown v. Southerland, 142 N. C. 225, 55 S. E. 108; Moline Plow Co. v. Bostwick [N. D.] 109 N. W. 923; Brooks v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 967, 98 S. W. 936; Ft. Worth, etc., R. Co. v. Travis [Tex. Civ. App.] 99 S. W. 1141; Southern R. Co. v. Hill [Va.] 56 S. E. 278; Petersen v. Elholm [Wis.] 109 N. W. 1034. Supreme court can act only in review of record presentations of what is done, or not done, or refused to be adjudicated. Yazoo, etc., R. Co. v. Wallace [Miss.] 43 So. 469. Common pleas court has jurisdiction, under Rev. St. § 6708, to consider errors of fact not appearing on record from court below, but this jurisdiction is limited to facts of which record may not be compelled to speak. Fouts v. Price & Co., 4 Ohio N. P. (N. S.) 55.

Held not open to consideration when not in record: Bill of exceptions in another suit. Wade v. Goza, 78 Ark. 7, 96 S. W. 388. Affidavits accompanying record apparently relating to newly-discovered evidence. Epps v. Miller, 127 Ga. 118, 56 S. E. 123. Affidavits inserted in brief. Lakin v. Lawrence [Mass.] 80 N. E. 578. Affidavits not called to attention of trial court but filed for first time on appeal. Jenkins v. Emmons, 117 Mo. App. 1, 94 S. W. 812. In construction of provision of charter, proceedings before commission preparing charter, explanatory note issued by them to voters. Landswick v. Lane [Or.] 90 P. 490. On review of proceedings in quarter sessions dividing a borough ward into election districts, Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525. Recital in brief. Lowrey v. Haynes [Tex. Civ. App.] 98 S. W. 1068. Affidavits as to events since trial. Brooks v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 967, 98 S. W. 936. Record of trial referred to for full statement bearing upon an exception. Green v. Dodge [Vt.] 64 A. 499. Alleged admission of counsel below. Wilhite v. Skelton [C. C. A.] 149 F. 67. Affidavit that communication of judge with jury was with consent of all parties could not be considered on rehearing where not filed below in resistance of motion for new trial. Holliday v. Sampson [Tex. Civ. App.] 15 Tex. Ct. Rep. 232, 95 S. W. 643. Will not consider records in other cases between same parties involving substantially same state of facts where such cases were not tried as one, and evidence in some was made part of evidence in other cases. Kahl v. New York City R. Co., 103 N. Y. S. 872. Denial of jury trial on appeal from municipal court to superior court sustained where record of superior court showed no demand for a jury and the only evidence of such demand was defendant's own affidavit. Mitchell v. Thomas [Mass.] 81 N. E. 198. Under St. 1904, p. 450, c. 448, § 8, no matters will be tried in superior court except those specified in the appeal. Mead v. Cutler [Mass.] 80 N. E. 496. Such provision is not an unconstitutional limitation of right of trial by jury. Id. Jurisdiction of land court not involved on appeal to superior court on issue not involving such jurisdiction as a material statement. Woodvine v. Dean [Mass.] 79 N. E. 882.

Opinion of trial court: Correctness of finding cannot be determined from opinion filed with order denying nonsuit. Rose v. Doe [Cal. App.] 89 P. 135. Appellate court must determine the question of excessiveness of a verdict from the evidence and not on opinion of trial court that it was large. Hanchett v. Haas, 125 Ill. App. 111. Opinion copied in abstract of record cannot be made to take place of finding of facts. Little v. Hooker Steam Pump Co., 122 Mo. App. 620, 100 S. W. 561. Under rule that except on exceptions an order granting or refusing a new trial must specify grounds upon which motion was made and those upon which it was granted, where order granting new trial specifies grounds of motion but not those upon which it was granted, court on appeal may consider opinion of trial court to ascertain whether it was granted or exceptions taken at trial. Israel v. Ury, 102 N. Y. S. 871.

20. See 7 C. L. 225.

21. Appeal brings up questions of discretion as well as matters of law. Decree dismissing bill modified so as to make the dismissal without prejudice. Lakin v. Lawrence [Mass.] 80 N. E. 578. Under Code Civ. Proc. § 3189, as amended by Laws 1902, c. 515, supreme court has power to review acts involving exercise of discretion by city court of New York. Tirpak v. Hoe, 103 N. Y. S. 795. While fact that appellate court is of unanimous opinion that trial court erred in discretionary ruling is not always sufficient to authorize reversal, it is generally so held where reversal will result in trial on merits where none has been had. Cutler v. Haycock [Utah.] 90 P. 897. Rulings of commissioner of patents in discretionary matters not reviewable. Jones v. Starr, 26 App. D. C. 64. General rule that appellate court will not disturb ruling of lower court as to whether an injunction bond shall be prosecuted does not apply where facts appear in pleadings and issues are before appellate court on appeal on merits. Cortelyou v. Houghton, 27 App. D. C. 188. Decision that appointment of administrator was necessary not disturbed. Miguez v. Delcambre [La.] 43 So. 703. On application for a writ of certiorari directed to the civil service commission of Chicago, questions of laches and incident expense were for court to which application was made. City of Chicago v. Gillen, 124 Ill. App. 210.

22. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389; Croft v. Chicago, etc., R. Co. [Iowa] 109 N. W. 723; Warden v.

to pleadings,[24] the consolidation of actions,[25] bringing in new parties,[26] to the appointment or refusal to appoint a receiver,[27] to the granting or refusing to grant a temporary injunction,[28] or the dissolving [29] or refusal to dissolve [30] such an injunc-

Madisonville, etc., R. Co. [Ky.] 101 S. W. 914. Denial of motion. Rand, McNally & Co. v. Turner, 29 Ky. L. R. 696, 94 S. W. 643. Denial of change sought on ground of convenience of witnesses. Bird v. Utica Gold Min. Co., 2 Cal. App. 672, 86 P. 509. Refusal to remove to another county for convenience of witnesses and in interest of justice. Garrett v. Bear [N. C.] 56 S. E. 479. Whether there would be difficulty in obtaining disinterested jury. Presbyterian Church v. Philadelphia, etc., R. Co. [Pa.] 66 A. 652.

23. Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706; Borden v. Lynch, 34 Mont. 503, 87 P. 609; City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317; Lanier v. Eastern Life Ins. Co., 142 N. C. 14, 54 S. E. 786. Revisal 1905, § 531. Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196. For absence of witnesses. Bratt v. Sparks [Ark.] 96 S. W. 1057; Ex parte Cannon, 75 S. C. 214, 55 S. E. 325. Because of sickness. Lynch v. Superior Ct. of San Francisco [Cal.] 88 P. 708. Because of surprise. St. Louis, etc., R. Co. v. Smith [Ark.] 100 S. W. 884. Denial of continuance on ground of the illness of party, when it appears that such party was in court at time of application and her condition was passed upon by court as by inspection. Carter v. Pitts, 125 Ga. 792, 54 S. E. 695.

24. Refusal to allow filing of demurrers to plea after issues were made up and case submitted to jury. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71. Allowance of court upon an express contract and count upon quantum valebat. Possell v. Smith [Colo.] 88 P. 1064. Upholding petition over objection as to form. Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622. Refusal to strike ground of remonstrance in drainage proceedings, usual rules as to motions to strike pleadings being applicable in such cases. Hart v. Scott [Ind.] 81 N. E. 481. Right to plead over after amendment by adverse party. Kansas Torpedo Co. v. Erie Petroleum Co. [Kan.] 89 P. 913. Lower court's construction of its own rules as to necessity of filing affidavit of defense. Livingston v. Kerbaugh, 30 Pa. Super. Ct. 534. Decision as to requiring bill of particulars. Blue Ridge Light & Power Co. v. Tutwiler [Va.] 55 S. E. 539.

Allowance or refusal to allow amendments. Miner v. Rickey [Cal. App.] 90 P. 718; Thompson v. Bank of California [Cal. App.] 88 P. 987; Chicago, etc., R. Co. v. Williams [Ind.] 79 N. E. 442; American Life Ins. Co. v. Melcher [Iowa.] 109 N. W. 805; Friedenwald Co. v. Warren [Mass.] 81 N. E. 207; Minton v. Palmer [Neb.] 112 N. W. 610; Trafton v. Osgood [N. H.] 65 A. 397; Hutchins v. Berry [N. H.] 66 A. 1046; Longfellow v. Huffman [Or.] 90 P. 907; McDaniel v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 956; Edwards v. Chicago, etc., R. Co. [S. D.] 110 N. W. 832; Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483; Montana Min. Co. v. St. Louis Min. & Mill. Co. [C. C. A.] F. 897. To conform to proof. Hollingsworth v. Barrett [Ky.] 102 S. W. 330; Omlie v. O'Toole [N. D.] 112 N. W. 677. Granting or denial of motion for compulsory amendment, based on Rev. St. 1892, § 1043. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318; Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706. Permitting amended answer to be filed, and allowing it to be signed and sworn to after it is filed. Haile v. Venable [Fla.] 44 So. 76. Allowing amendment at close of case so as to give defendant right to open and close. Beal-Doyle Dry Goods Co. v. Barton [Ark.] 97 S. W. 58. Allowance of an amendment to answer setting up counterclaim after demurrer to answer has been sustained. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768. Burden of showing abuse of discretion is on party attacking rulings. Lipscomb v. Perry [Tex.] 16 Tex. Ct. Rep. 787, 96 S. W. 1069. Refusal to allow amendment which according to proper practice should have been allowed in furtherance of justice is abuse of discretion and hence reviewable. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914. Judgment reversed, under circumstances, for refusal to allow amendment, and case remanded with directions to permit its allowance. Hackett v. Van Frank, 119 Mo. App. 648, 96 S. W. 247.

25. Harder v. Kansas, etc., R. Co. [Kan.] 87 P. 719.

26. Necessary party. Haskell v. Moran, 103 N. Y. S. 667. New parties defendant. Dedrick v. Charrier [N. D.] 108 N. W. 38. Circuit court will not be required by mandamus to allow one to intervene for purpose of taking an appeal where in the exercise of its discretion it has denied his petition therefor. Fink v. Bay Shore Terminal Co. [C. C. A.] 144 F. 837. Where court has no authority to allow new party to come in, its action in so doing is subject to exception. Partridge v. Arlington [Mass.] 79 N. E. 812.

27. Virginia-Carolina Chemical Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 54 S. E. 929; Burgess v. Simpson Grocery Co. [Ga.] 57 S. E. 717; Lamp v. Homestead Bldg. Ass'n [W. Va.] 57 S. E. 249.

28. Williams v. Los Angeles R. Co. [Cal.] 89 P. 330; Simms v. Patterson [Fla.] 43 So. 421; Virginia-Carolina Chemical Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 154 S. E. 929; Kirkland v. Atlantic & B. R. Co., 126 Ga. 246, 55 S. E. 23; Sellers v. Page, 127 Ga. 633, 56 S. E. 1011; Vogel v. Warsing [C. C. A.] 146 F. 949; Continuous Glass Press Co. v. Schmertz Wire Glass Co. [C. C. A.] 153 F. 577. Where evidence is conflicting. Knight v. Suddeth, 126 Ga. 231, 55 S. E. 31; Green v. Freeman, 126 Ga. 274, 55 S. E. 45; Hasbrouck v. Bondurant, 127 Ga. 220, 56 S. E. 241; Thom v. Georgia Mfg. & Public Service Co. [Ga.] 57 S. E. 75; Waycross, etc., R. Co. v. St. Mary's, etc., R. Co. [Ga.] 57 S. E. 227; Goette v. Sutton [Ga.] 57 S. E. 308; Burgess v. Simpson Grocery Co. [Ga.] 57 S. E. 717. Refusal to grant ad interim restraining order in advance of time set for hearing of application for temporary injunction. Ivey v. Rome, 126 Ga. 806, 55 S. E. 1034. Order continuing preliminary injunction until trial. Manufacturers Commercial Co. v. Anderson, 101 N. Y. S. 823. Will interfere where it is clearly made to appear that granting of pre-

tion, the varation of interlocutory orders generally,[31] rulings on motions to dismiss for want of prosecution [32] and to reinstate cases so dismissed,[33] rulings on motion to take up a case out of order,[34] rulings in regard to the selection of a jury,[35] rulings at the trial generally,[36] the determination of questions preliminary to the admission of evidence,[37] rulings in respect to the examination of witnesses,[38] the admission of expert testimony,[39] the qualification of experts,[40] and witnesses of tender

liminary injunction was abuse of discretion. Savage v. Parker [Fla.] 43 So. 507. Where grant or refusal involves certain issues of fact and court refuses injunction on erroneous view of the law without exercise of discretion upon facts, judgment will be reversed. High Shoals Mfg. Co. v. Penick, 127 Ga. 504, 56 S. E. 648. Order denying injunction pendente lite will be reviewed where it is apparent that no substantially different state of facts will be presented at trial from that presented on appeal, differences between parties being result of opposite deductions from admitted facts. Dutton & Co. v. Cupples, 102 N. Y. S. 309.

29. Pekin Tel. Co. v. Farmers' Tel. Co., 120 Ill. App. 292; Fogo v. Boyle [Wis.] 109 N. W. 977. Especially where judgment for damages is demanded in addition to injunctive relief. Gossard Co. v. Crosby [Iowa] 109 N. W. 483. Amount of solicitor's fees as damages on dissolution of injunction held primarily for chancellor, and his finding will not be disturbed unless it clearly appears that he was mistaken. Marks v. Chicago Yacht Club, 121 Ill. App. 308.

30. Collins v. Stanley [Wyo.] 88 P. 620. Even where all the equities of the bill are denied by the answer. Godwin v. Phifer [Fla.] 41 So. 597.

31. Godfrey v. Cunningham [Neb.] 109 N. W. 765.

32. Motion to dismiss action for want of diligence. People's Home Sav. Bk. v. Sherman [Cal.] 90 P. 133. Application to dismiss motion for new trial for lack of diligence. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415.

33. Geffinger v. Klewer [Ill.] 81 N. E. 712.

34. Where state officer waives his right to have action set for trial as preferred cause. Clement v. Mast, 103 N. Y. S. 1025.

35. Ruling on objection to juror on other than statutory grounds. Stone v. Pettus [Tex. Civ. App.] 103 S. W. 413. Overruling challenge. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 16 Tex. Ct. Rep. 254, 94 S. W. 1074.

36. Striking out of own motion, testimony introduced to discredit witness but having no tendency to do so. Chany v. Hotchkiss [Conn.] 63 A. 947. Refusal to put plaintiff to an admission of showing for absent witness. Southern R. Co. v. Taylor [Ala.] 42 So. 625. Refusal to place certain time limitation of testimony of custom as to movement of trains where accident occurred. Minot v. Boston, etc., R. Co. [N. H.] 66 A. 825. Granting nonsuit for delay in return of depositions and refusal to take off nonsuit after arrival and examination of the depositions. Sydney v. Linton [Pa.] 65 A. 668. Permitting counsel to make offer of proof in presence of jury upon sustaining objections to admission of evidence. Moss v. Gulf, etc., R. Co. [Tex. Civ. App.] 103 S. W. 221. Refusal to allow documents read in evidence to be put in hands of jury. Stone Mill. Co. v. McWilliams, 121 Mo. App. 319, 98 S. W. 828. Whether a writing was to obscene to be spread on record. Rinker v. U. S. [C. C. A.] 151 F. 755. Instructions cautioning jury against favoritism or prejudice. Donk Bros. Coal & Coke Co. v. Thil [Ill.] 81 N. E. 857. Denial of a motion to resettle an order already made. Twelfth Ward Bank v. Columbia Pub. Co., 99 N. Y. S. 908. Nature of special interrogatories submitted. Wallace v. Skinner [Wyo.] 88 P. 221. Refusal to take as confessed interrogatories propounded to deponent and not answered. Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 S. W. 198. Refusal to reopen case after trial where evidence upon which motion was based was conflicting. Kataoka v. Hanselman [Cal.] 89 P. 1082. Order awarding costs to defendant to abide the event on setting aside verdict as inadequate on plaintiff's motion. Waltz v. Utica & M. V. R. Co., 101 N. Y. S. 968. Under Code 1896, § 1326, providing that in tort actions plaintiff recovers no more costs than damages, where such damages do not exceed $20, unless judge certifies that greater damages should have been awarded, and on failure to certify judgment must be rendered against plaintiff for residue, action of court in certifying or refusing to certify, not being made revisable by statute, cannot be reviewed. Buford v. Christian [Ala.] 42 So. 997.

37. As to what was defendant's intention in making alleged offer of settlement. Finn v. New England Tel. & T. Co., 101 Me. 279, 64 A. 490. Whether proper effort had been made to secure attendance of witness whose testimony at former trial was admitted. Delahunt v. United Tel. & T. Co., 215 Pa. 241, 64 A. 515. Determination as to whether sufficient foundation has been laid to admit secondary evidence of contents of writing. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768. In matter of inspection and admission of note which appears to have been altered. Wood v. Skelley [Mass.] 81 N. E. 872.

38. Rulings as to sequestration of witnesses during trial. Seaboard Air Line R. v. Smith [Fla.] 43 So. 235. Allowance of leading questions. McBride v. Georgia R. & Elec. Co., 125 Ga. 515, 54 S. E. 674; Stark v. Burke, 131 Iowa, 684, 109 N. W. 206; Breiner v. Nugent [Iowa] 111 N. W. 446; Caldwell v. Atlantic Coast Line R. Co., 75 S. C. 74, 55 S. E. 131. Rulings on cross-examination. Chicago Tel. Supply Co. v. Maine & Elkhorn Tel. Co. [Iowa] 111 N. W. 935. Limitation upon cross-examination. Earley v. Winn, 129 Wis. 291, 109 N. W. 633. Refusal to allow witness to be recalled for further cross-examination. Hirsch & Sons Iron & Rail Co. v. Coleman [Ill.] 81 N. E. 21. Allowing plaintiff in action for services to explain discrepancy between his testimony and bill introduced by defendant. Hall v. New York, etc., R. Co., 27 R. I. 525, 65 A. 278.

39. Fitzgerald v. Langley Mfg. Co., 74 S. C. 232, 54 S. E. 373; Meyer Bros. Drug Co. v. Madden [Tex. Civ. App.] 99 S. W. 723.

40. Atlantic Coast Line R. Co. v. Crosby

years,[41] the admission of evidence in an equity case,[42] allowing experiments before the jury,[43] the order of proof [44] and the argument of counsel,[45] the discharge and substitution of counsel,[46] the ordering or refusing to order a reference,[47] rulings on exceptions to a referee's report,[48] orders granting or denying security for costs [49] and the allowance and appointment of costs in equity cases [50] and on motions,[51] the refusal to grant a nonsuit,[52] reinstating a case after nonsuit,[53] the confirmation of judicial sales.[54] rulings on motions to set aside judgments [55] or to open defaults,[56] or for stay of execution,[57] the granting [58] or denial [59] of a motion for a new trial,

[Fla.] 43 So. 318; Allen v. Durham Trac. Co. [N. C.] 56 S. E. 942; Horne v. Consolidated Rys. L. & P. Co. [N. C.] 57 S. E. 19; Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389; Municipal Court of Providence v. Kirby [R. I.] 67 A. 8; Meyer Bros. Drug Co. v. Madden [Tex. Civ. App.] 99 S. W. 723.

41. Birmingham R. Light & Power Co. v. Wise [Ala.] 42 So. 821.

42. Kuzek v. Magaha [C. C. A.] 148 F. 618. Where findings of jury are only advisory. Tobin v. O'Brieter, 16 Okl. 500, 85 P. 1121.

43. Dow v. Bulfinch, 192 Mass. 281, 78 N. E. 416.

44. Seaboard Air Line v. Scarborough [Fla.] 42 So. 706; Richbourg v. Rose [Fla.] 44 So. 69; Blickley v. Luce [Mich.] 14 Det. Leg. N. 121, 111 N. W. 752. Order of introduction of evidence. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Permitting further proofs after a party has rested. Brockmiller v. Industrial Works [Mich.] 14 Det. Leg. N. 336, 112 N. W. 688. Allowing plaintiff to introduce evidence in chief after defendant has closed. Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650. Refusal to admit evidence offered after both sides have closed. Webb v. Ritter [W. Va.] 54 S. E. 484; Winders v. Hill [N. C.] 57 S. E. 456. Will be presumed that referee properly refused to reopen case for additional evidence. Fulton Irr. Ditch Co. v. Meadow Island Irr. Co. [Colo.] 86 P. 748.

45. Order of argument, though prescribed by statute in a general way. Breiner v. Nugent [Iowa] 111 N. W. 446. Whether argument exceeds bounds of propriety. Beaumont Trac. Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352. Whether counsel was guilty of misconduct. Brusseau v. Lower Brick Co. [Iowa] 110 N. W. 577. Allowing damages to be discussed in plaintiff's closing address which were not discussed in opening address. Pittsburgh, etc., R. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128. Ruling on objection to argument. Smith v. Atlantic Coast Line R. Co., 142 N. C. 21, 54 S. E. 786.

46. Kelly v. Horsley [Ala.] 41 So. 902.

47. Refusal to grant reference to take testimony in strictly equitable action. Fludd v. Equitable Life Assur Soc., 75 S. C. 315, 55 S. E. 762.

48. Refusal to recommit case to assessor to reassess damages on motion generally to recommit. Hart v. Brierley, 192 Mass. 147, 78 N. E. 307. Refusal to recommit master's report. Allen's Adm'rs v. Allen's Admr's [Vt.] 64 A. 1110.

49. Goodenough v. Burton [Mich.] 13 Det. Leg. N. 693, 109 N. W. 52.

50. Thompson v. Normanden [Iowa] 108 N. W. 315; Leigh v. National Hollow Brake-Beam Co., 224 Ill. 76, 79 N. E. 318. Action of trial court in attempting to apportion costs pursuant to mandate of appellate court is reviewable on second appeal. Kell v. Trenchard [C. C. A.] 146 F. 245.

51. Taxing costs against plaintiff on motion to set aside sale of land for taxes. Rev. St. 1895, art. 1428. Moore v. Rogers [Tex.] 99 S. W. 1023.

52. See Gen. St. 1902, §§ 761, 762. Hull v. Douglass [Conn.] 64 A. 351.

53. City of Atlanta v. Miller, 125 Ga. 495, 54 S. E. 538; Richardson v. Agnew [Wash.] 89 P. 404. Setting aside involuntary nonsuit and reinstating case on ground of surprise. Coutant v. Snow [Mo.] 100 S. W. 5.

54. Culver Lumber Co. v. Culver [Ark.] 99 S. W. 391; Parsons v. Little, 28 App. D. C. 218. Mortgage sale. Shellenberger v. Altoona & Philipsburg Connecting R. Co. [Pa.] 67 A. 48.

55. Motion to open judgment. Augustine v. Wolf, 215 Pa. 558, 64 A. 777. Refusal to open judgment entered on warrants of attorney. Blake Tobacco Co. v. Posluszsy, 31 Pa. Super. Ct. 602.

56. Western Loan & Sav. Co. v. Smith [Idaho] 85 P. 1084; Kansas Torpedo Co. v. Erie Petroleum Co. [Kan.] 89 P. 913. Setting aside default. Poole v. Peoria Cordage Co., 6 Ind. T. 298, 97 S. W. 1015. Setting aside defaults for mistake, inadvertence, or excusable neglect. Barling v. Weeks [Cal. App.] 88 P. 502. Opening default to permit service of reply to defendant's counterclaim. Sullivan v. Bankers' Surety Co., 102 N. Y. S. 868. Refusal to set aside default in failing to serve notice of intention to move for new trial. Steen v. Santa Clara Valley Mill & Lumber Co. [Cal. App.] 88 P. 499. Refusal to open default where defendant had notice and failed through inadvertence to employ attorney. Benedict v. Hadlow Co. [Fla.] 42 So. 239. Refusal will be reversed where has been palpable abuse of discretion. Barrie v. Northern Assur. Co., 99 Minn. 272, 109 N. W. 248.

57. Refusal to grant stay after judgment. Hoit v. Brierley, 192 Mass. 147, 78 N. E. 307.

58. Newton v. United Elec. Gas. & Power Co. [Cal. App.] 86 P. 901; Heckman v. Espey [Idaho.] 88 P. 80; Snyder v. Thompson [Iowa] 112 N. W. 239; Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196; Jarrett v. High Point Trunk & Bag Co., 142 N. C. 466, 55 S. E. 338; Trower v. Roberts [Okl.] 89 P. 1113; Weller v. Western State Bk. [Okl.] 90 P. 877; Pickett v. Southern R. Co., 74 S. C. 236, 54 S. E. 375; Hartley v. Ferguson [Wash.] 89 P. 156; Cook v. Skinner [Wash.] 89 P. 553; Coalmer v. Barrett [W. Va.] 56 S. E. 385; Miller Supply Co. v. Crane [W. Va.] 57 S. E. 268; Bailey v. McCormick [Wis.] 112 N. W. 457. Rule not applicable where there is clear abuse of discretion. James v. Evans [C. C. A.] 149 F.

settling a case on appeal,[60] the allowance of fees [61] or allowances,[62] rulings on ap-

136. Showing for reversal of order granting new trial must be much stronger than for reversal of an order denying it. Trower v. Roberts [Okl.] 89 P. 1113. Where court grants nonsuit at close of plaintiff's case on ground of assumption of risk and contributory negligence but grants new trial on ground of error in ruling, only questions of law are presented on appeal. Doyle v. Great Northern R. Co. [Wash.] 86 P. 861.

First grant of new trial. Civ. Code 1895, § 5585. Athens Elec. R. Co. v. Jackson, 125 Ga. 551, 54 S. E. 626; Ogletree v. Livingston, 125 Ga. 548, 54 S. E. 625; Western & A. R. Co. v. Callaway, 127 Ga. 125, 56 S. E. 105; Livingston v. Ogletree, 127 Ga. 205, 56 S. E. 283; Phoenix-Duster & Mfg. Co. v. Allen-Holmes Co., 127 Ga. 458, 56 S. E. 513; Dobbs v. Malcolm, 127 Ga. 487, 56 S. E. 622; Bagley v. Shumate [Ga.] 57 S. E. 99. For misconduct of defendant. Piercy v. Piercy, 149 Cal. 163, 86 P. 507. On ground that defendant was unable to be present at trial by reason of surprise and excusable neglect. Trainor v. Maturen, 100 Minn. 127, 110 N. W. 370. For inadequacy. Ward v. Marshalltown Light, Power & R. Co. [Iowa] 108 N. W. 323. On ground that jury clearly erred in interpreting evidence where the evidence is conflicting. Drew v. Corrigan [Kan.] 90 P. 782. On ground that evidence was sufficient to take case to jury. Morris v. Chicago G. W. R. Co. [Iowa] 110 N. W. 154.

For newly-discovered evidence. Woerdenhoff v. Muekel, 131 Iowa, 300, 108 N. W. 533; Martin v. Corscadden, 34 Mont. 308, 86 P. 33; Rosenthal v. Bell Realty Co., 103 N. Y. S. 194; Cummings v. Sunich [Wash.] 87 P. 949.

For insufficiency of evidence. Crocker v. Garland [Cal. App.] 87 P. 209; Central Trust Co. v. Stoddard [Cal. App.] 88 P. 806; Hess v. Great Northern R. Co., 98 Minn. 198, 108 N. W. 7; Nelson v. Mississippi & Rum River Boom Co., 99 Minn. 484, 109 N. W. 1118; Sharp v. Odom, 121 Mo. App. 565, 97 S. W. 225; Fournier v. Coudert, 34 Mont. 484, 87 P. 455; Walsh v. Conrad [Mont.] 88 P. 655; Ettien v. Drum [Mont.] 88 P. 659. Fact that verdict is second one does not change rule. Drew v. Corrigan [Kan.] 90 P. 782. Where evidence is conflicting. Buckle v. McConaghy [Idaho] 88 P. 100; Langstaff v. Webster Grove, 122 Mo. App. 510, 99 S. W. 772; Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389; Cummings v. Sunich [Wash.] 87 P. 949. If there is any substantial evidence against verdict. Miners' & Merchants' Bank v. Rogers [Mo. App.] 100 S. W. 534; Crow v. Crow [Mo. App.] 100 S. W. 1123. Unless evidence plainly and palpably supports verdict. Owen v. McDermott [Ala.] 41 So. 730; Hervey v. Hart [Ala.] 42 So. 1013; McCrary v. Brawley & Yarbrough Bros. [Ala.] 43 So. 787; Farmer v. Stillwater Water Co., 99 Minn. 119, 108 N. W. 824; Noyes v. Butler Bros., 98 Minn. 448, 108 N. W. 839; Hamm Brew. Co. v. Kneise, 101 Minn. 531, 111 N. W. 577.

Because verdict is excessive. Morrell v. Lawrence [Mo.] 101 S. W. 571; Nelson v. Mississippi & Rum River Boom Co., 99 Minn. 484, 109 N. W. 1118.

59. Lambert Hoisting Engine Co. v. Bray & Co., 127 Ga. 452, 56 S. E. 513; Mathushek Piano Mfg. Co. v. Engberry, 30 Pa. Super. Ct. 543; Sternberg v. Sklaroff, 32 Pa. Super. Ct. 116; Illinois Cent. R. Co. v. Coughlin [C. C. A.] 145 F. 37; Tacoma R. & Power Co. v. Geiger [C. C. A.] 145 F. 504; Bell Tel. Co. v. Dethardinq [C. C. A.] 148 F. 371; St. Louis S. W. R. Co. v. Wainwright [C. C. A.] 152 F. 624; Miller v. Steele [C. C. A.] 153 F. 714. For misconduct of counsel. In re Wharton's Will [Iowa] 109 N. W. 492. For misconduct of jurors. Gulf, etc., R. Co. v. Blue [Tex. Civ. App.] 102 S. W. 128; Nolan v. Kroening [Wis.] 109 N. W. 963; Logeman Bros. Co. v. Preuss Co. [Wis.] 111 N. W. 64. For proceeding to trial in absence of defendants and counsel. Simeral v. Rosewater [Neb.] 110 N. W. 546. On ground of physical impossibility that certain evidence could be true where the trial judge made a personal test. Foster v. Chicago, etc., R. Co. [Iowa] 111 N. W. 415. On ground that verdict is contrary to law and evidence. Lord v. Rowse [Mass.] 80 N. E. 822. On ground that verdict is excessive. Lindsay v. Grande Ronde Lumber Co. [Or.] 87 P. 145. Dismissal of motion on account of failure to present brief of evidence. Norred v. State, 127 Ga. 347, 56 S. E. 464.

For newly-discovered evidence. Yearwood v. Lang, 127 Ga. 155, 56 S. E. 305; Clark v. Van Vleck [Iowa] 112 N. W. 648; Gaines v. Fidelity Casualty Co. [N. Y.] 81 N. E. 169; Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 N. W. 788; Harden v. Card [Wyo.] 88 P. 217. For surprise and newly-discovered evidence. Saginaw Suburban R. Co. v. Connelly [Mich.] 13 Det. Leg. N. 796, 109 N. W. 677.

For insufficiency of evidence. Where is evidence to support it. Southern Coal & Coke Co. v. Swinney [Ala.] 42 So. 808; Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622; Hardwood Mfg. Co. v. Wooten, 126 Ga. 55, 54 S. E. 814; Wetherington v. Cochran & Sons, 127 Ga. 390, 56 S. E. 422; Macon & B. R. Co. v. Parker, 127 Ga. 471, 56 S. E. 616; Louisville & N. R. Co. v. Gassoway [Ga.] 57 S. E. 231; Maynard Lumber Co. v. McCune [Ga.] 57 S. E. 685; McCarley v. Glenn-Lowry Mfg. Co., 75 S. C. 390, 56 S. E. 1; Sutton v. Catawba Power Co. [S. C.] 56 S. E. 966; Kirkland v. State [Wis.] 110 N. W. 801. Where there is substantial evidence to support it. Tracy v. California Elec. Works [Cal. App.] 90 P. 461; Wegeschiede v. St. Louis Transit Co., 118 Mo. App. 295, 94 S. W. 774. Where evidence is conflicting. Stumm v. Goetz [Conn.] 64 A. 810. Mere preponderance against verdict does not warrant reversal. Ruddell v. Seaboard Air Line R. Co., 75 S. C. 290, 55 S. E. 528. Unless evidence demands finding in favor of other party. Wright v. Sparks, 127 Ga. 365, 56 S. E. 442. Denial reversed where verdict was against great preponderance of evidence. Southern R. Co. v. Nelson [Ala.] 41 So. 1006. Exception on ground that verdict was entirely without evidence to support it will be considered. Sutton v. Catawba Power Co. [S. C.] 56 S. E. 966.

60. Rule that action of trial judge settling case on appeal cannot be reviewed only applies where it reasonably appears that he decided disputed matter upon his recollection or understanding of proceedings had before him, and where case was settled on stipulation while on his death bed, and motion to amend was made before another

plication for leave to file bills of review,[63] orders awarding the custody of children in divorce proceedings,[64] and the punishment for contempt.[65] An order granting or denying a new trial made by a judge who did not preside at the trial does not carry with it the usual presumption under which such orders will be sustained.[66] Where an application addressed to discretion is denied generally, it will be presumed that the denial was in the exercise of discretion.[67]

(§ 13 F) 2. *Questions of fact.*[68]—Rulings such as upon motion for continuance, motion to dissolve injunction, and the like, involve questions of fact, but being deemed to rest primarily on discretion are elsewhere treated.[69] Generally speaking, questions of fact will not be reviewed[70] unless the decision below is

justice, latter's decision is not conclusive. McMahon v. Delaware, etc., R. Co., 101 N. Y. S. 805.

61. Attorney's fees allowed in mechanic's lien proceedings held not such as to show abuse of discretion. Title Guarantee & Trust Co. v. Burdette [Md.] 65 A. 341. Under Comp. Laws 1897, § 6240, trial judge is final arbiter of amount to be allowed as attorney's fees in condemnation proceedings and his decision is not subject to review. Boyne City, etc., R. Co. v. Anderson [Mich.] 13 Det. Leg. N. 739, 109 N. W. 429.

62. Allowance by surrogate court to special guardians of infants so excessive as to constitute an abuse of discretion will be reversed. In re Stevens, 114 App. Div. 607, 99 N. Y. S. 1070. Where there was no dispute as to facts, question whether case was difficult and extraordinary so as to authorize allowance of additional costs held reviewable as presenting a question of law. Campbell v. Emslie [N. Y.] 81 N. E. 458. Denial of extra allowance of costs. Rowe v. Granger, 103 N. Y. S. 439.

63. Denial of application. Safe Deposit & Trust Co. v. Gittings, 102 Md. 456, 62 A. 1030.

64. Modification of divorce decree as to custody of child. Black v. Black, 149 Cal. 224, 86 P. 505. In habeas corpus proceedings. Hollenbeck v. Glover [Ga.] 57 S. E. 108.

65. Only question reviewable is jurisdiction of trial court. In re Consolidated Rendering Co. [Vt.] 66 A. 790. Committing to jail husband who had refused to pay alimony and attorney's fees. Gray v. Gray, 127 Ga. 345, 56 S. E. 438. While judgments of contempt for violation of an injunction will not be disturbed except for want of jurisdiction, they will not be permitted to stand where evidence shows an entire want of power to treat the matter complained of as a contempt. Ex parte Garza [Tex. Cr. App.] 16 Tex. Ct. Rep. 533, 95 S. W. 1059.

66. Appellate court will examine and weigh evidence same as nisi prius court should do. Van Camp v. Emery [Idaho] 89 P. 752.

67. Since Const. art. 3, § 5, authorizing review by court of appeals of apportionment of legislative districts, makes no provision as to scope of such review, the general rules apply, including the rule that refusal of mandamus will not be reviewed unless it affirmatively appears that the order of refusal was not made by the lower court in the exercise of its discretion. Sherrill v. O'Brien, 186 N. Y. 1, 79 N. E. 7.

68. See 7 C. L. 228.

69. See § 13 F 1, ante.

70. Bloch v. De Lucia [Conn.] 66 A. 769; Chicago, etc., R. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166; Chicago City R. Co. v. Pural, 224 Ill. 324, 79 N. E. 686; Clare v. Doble [Mass.] 81 N. E. 871; Succession of Sharp, 117 La. 751, 42 So. 255; Sargent v. Perry, 101 Me. 527, 64 A. 888; Johnson v. Johnson [Md.] 65 A. 918; Reddy v. Raymond [Mass.] 80 N. E. 484; Conroy v. Smith Iron Co. [Mass.] 80 N. E. 488; Morrison v. Bomer, 195 Mo. 535, 94 S. W. 524; Scanlan v. Gulick, 199 Mo. 449, 97 S. W. 884; Hutchins v. Berry [N. H.] 66 A. 1046; Wright v. Flynn, 69 N. J. Eq. 753, 61 A. 973; Brandenberg v. Rosen, 102 N. Y. S. 753; Parrish v. Felts, 215 Pa. 654, 64 A. 729; Hall v. New York, etc., R. Co., 27 R. I. 525, 65 A. 278; Ex parte Cannon, 75 S. C. 214, 55 S. E. 325; Spillers v. Stevens, 75 S. C. 548, 56 S. E. 238; Stockton v. Wolverine Gold Min. Co. [N. C.] 57 S. E. 335; Bowen v. Western Union Tel. Co. [S. C.] 57 S. E. 674; Victor Safe & Lock Co. v. Texas State Trust Co. [Tex. Civ. App.] 99 S. W. 1049; Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51. Conclusion of court from evidence on issue of alteration of instrument offered in evidence is binding unless evidence is such that appellate court can say as matter of law that evidence does not support conclusion. Manuel v. Flynn [Cal. App.] 90 P. 463. Under Rev. St. c. 79, § 55, only questions of law may be excepted to. Prescott v. Winthrop, 101 Me. 236, 63 A. 923. Court of appeals, on appeal from Baltimore city court in proceedings on appeal from appeal tax court, cannot review questions of valuation. Consolidated Gas Co. v. Baltimore [Md.] 65 A. 628. Allowance to a receiver not so excessive as to require reversal. State v. People's United States Bk., 197 Mo. 605, 95 S. W. 867. Where, in proceedings to determine what persons are entitled to take under a will, evidence is not conflicting and only questions of law are presented, court will act on evidence as on an agreed statement of facts upon request. In re Klein's Estate [Mont.] 88 P. 798. Code Civ. Proc. § 681a, relative to mode of review of judgments in suits in equity, does not disturb conclusiveness of decisions of fact by juries or trial judges in law cases. First Nat. Bk. v. Crawford [Neb.] 111 N. W. 587. In reviewing judgment entered on special verdict, evidence cannot be reviewed. Johanson v. Atlantic City R. Co. [N. J. Err. & App.] 64 A. 1061. Appellate court cannot review order of common pleas quashing arrest warrant issued under Act July 12, 1842, where order is based on insufficiency of evidence to show fraud. Phoenix Press v. MacKenzie, 32 Pa. Super. Ct. 183. Only questions of law can be considered on review of bankruptcy proceedings. In re Throckmorton [C. C. A.] 149 F. 145. Findings of fact anent a preference under bank-

wholly unsustained by the evidence, the wording of the rule varying somewhat in the various jurisdictions.[71] Every presumption favors the correctness of the find-

rupt act conclusive on error to state court. Eau Claire Nat. Bk. v. Jackman, 204 U. S. 522, 51 Law. Ed. 596. Finding based solely on alleged preponderance of testimony may be reviewed. The Fin MacCool [C. C. A.] 147 F. 123. Appellate court will not pass upon question of fact uninfluenced by conclusions of lower court, though greater part of evidence was in form of depositions, where oral evidence bore on vitally important issue. Fruitt v. Becktold [Kan.] 87 P. 188. Action of trial court in directing verdict as to certain issues, as having been conclusively established will not be disturbed unless it clearly appears to be wrong. Hodge v. Smith [Wis.] 110 N. W. 192. Where exclusion of written evidence was based on a finding of fact which was plainly a mistake, the finding will be set aside. Twombly v. Lord [N. H.] 66 A. 486. There is error of law where facts from which due care was inferred show that trial court required of plaintiff a lower degree of care than that required by law. Snow v. Coe Brass Mfg. Co. [Conn.] 66 A. 881. Whether several writings constituted single contract held a question of law. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

As to amount of damages. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind.] 81 N. E. 492.

Damages. Viou v. Brooks-Scanlon Lumber Co., 99 Minn. 97, 108 N. W. 891; Hall v. New York, etc., R. Co., 27 R. I. 525, 65 A. 278; Kern v. Snider [C. C. A.] 145 F. 327. As to market value of land taken in railroad expropriation suit, and necessity for width of right of way claimed. Opelousas, etc., R. Co. v. Bradford [La.] 43 So. 79. Assessment of damages by trial judge where quantum of damages depends on estimates of witnesses. McFarlain v. Jennings-Heywood Oil Syndicate [La.] 43 So. 155. Where evidence in record does not show that damages allowed are manifestly inadequate, they will not be increased. Lanphier v. Johnson & Son Co., 117 La. 741, 42 So. 254. Verdict will not be set aside as excessive unless passion or prejudice is shown. Capital Const. Co. v. Holtzman, 27 App. D. C. 125; Spring Valley Coal Co. v. Greig, 226 Ill. 511, 80 N. E. 1042; Western Underwriters Ass'n v. Hankins, 122 Ill. App. 600; Malott v. Central Trust Co. [Ind.] 79 N. E. 369; City of Columbus v. Allen [Ind. App.] 81 N. E. 114; Serano v. New York Cent. etc., R. Co., 188 N. Y. 156, 80 N. E. 1025; Brickman v. Southern R. Co., 74 S. C. 306, 54 S. E. 553; Galveston, etc., R. Co. v. Stevens [Tex. Civ. App.] 15 Tex. Ct. Rep. 977, 94 S. W. 395; Flannigan v. Strauss [Wis.] 111 N. W. 216; Central R. Co. v. Davies [C. C. A.] 146 F. 247; Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502. Even where it appears to appellate court to be exorbitant, where trial court has denied new trial and has not abused its discretion in so doing. White v. Columbia & M. Elec. R. Co., 215 Pa. 462, 64 A. 676. Will require reduction only in cases where upon most favorable view of evidence in favor of recovering party verdict seems to be unreasonably large. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 100 S. W. 176. Though appellate court convinced that lower court improperly refused relief on motion for new trial. Chicago, etc., R. Co. v. O'Brien [C. C. A.] 153 F. 511.

71. If there is any substantial evidence to support it. St. Louis, etc., R. Co. v. Saunders, 78 Ark. 589, 94 S. W. 709; Ritter v. Drainage Dist. No. 1, Poinsett County, 78 Ark. 580, 94 S. W. 711; Morrow v. Watts [Ark.] 95 S. W. 988; Shackleford v. Williams, 79 Ark. 629, 96 S. W. 350; Roberts & Shafer Co. v. Jones [Ark.] 101 S. W. 165; Shinn v. Plott, Newport & Co. [Ark.] 101 S. W. 742; Southern California R. Co. v. O'Donnell [Cal. App.] 85 P. 932; Ephraim v. Pacific Bk., 149 Cal. 222, 86 P. 507; Prince v. Kennedy [Cal. App.] 86 P. 609; Loehr v. Light [Cal. App.] 87 P. 1112; Coffin v. Johnson, 20 Colo. App. 567, 86 P. 354; Baer Bros. Land & Cattle Co. v. Wilson [Colo.] 88 P. 265; Copeland v. Kilpatrick [Colo.] 88 P. 472; Wadsworth Ditch Co. v. Brown [Colo.] 88 P. 1060; Possell v. Smith [Colo.] 88 P. 1064; Nogga v. Savings Bk. [Conn.] 65 A. 129; Wyeman v. Deady [Conn.] 65 A. 129; International Harvester Co. v. Smith [Fla.] 40 So. 840; Southern R. Co. v. Gardner, 127 Ga. 320, 56 S. E. 454; Elgin, etc., R. Co. v. Myers, 226 Ill. 358, 80 N. E. 897; Earp v. Lilly, 120 Ill. App. 123; King v. King, 122 Ill. App. 284; National Enameling & Stamping Co. v. McCorkle, 122 Ill. App. 344; Duncan v. Pfeiffer, 123 Ill. App. 63; Burk v. Matthews Glass Co. [Ind. App.] 81 N. E. 88; Sovereign Camp Woodmen of the World v. Cox [Ind. App.] 78 N. E. 683; Grey v. Callan [Iowa] 110 N. W. 909; Abrams v. Abrams [Kan.] 88 P. 70; McCready v. Crane [Kan.] 88 P. 748; Johnson v. Veneman [Kan.] 89 P. 677; Wilson v. Johnson's Adm'x, 29 Ky. 845, 96 S. W. 529; Holcomb-Lobb Co. v. Kaufman, 29 Ky. L. R. 1006, 96 S. W. 813; Wilson's Adm'r v. Wilson, 30 Ky. L. R. 695, 99 S. W. 319; Morris & Co. v. Schaefers, 30 Ky. L. R. 1222, 100 S. W. 327; Prescott v. Winthrop, 101 Me. 236, 63 A. 923; American Malting Co. v Southern Brew. Co. [Mass.] 80 N. E. 526; Maher v. McKnight, 145 Mich. 381, 13 Det. Leg. N. 504, 108 N. W. 712; Wright v. St. Louis Sugar Co. [Mich.] 13 Det. Leg. N. 866, 109 N. W. 1062; Archambault v. Blanchard, 198 Mo. 384, 95 S. W. 834; Wood v. Chicago, etc., R. Co., 119 Mo. App. 78, 95 S. W. 946; Hyatt Coal Co. v. Apperson, 121 Mo. App. 592, 97 S. W. 604; Perkins Land & Lumber Co. v. Irvin, 200 Mo. 485, 98 S. W. 580; Hethcock v. Crawford County, 200 Mo. 170, 98 S. W. 582; Atterbury v. Hopkins, 122 Mo. App. 172, 99 S. W. 11; Bond v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30; Carp v. National Assur. Co. [Mo. App.] 99 S. W. 523; Little v. Hooker Steam Pump Co., 122 Mo. App. 620, 100 S. W. 561; Majors v. Parkhurst [Mo. App.] 100 S. W. 1100; Pumphrey v. Fowler [Mo. App.] 100 S. W. 1101; Miller v. Barnett [Mo. App.] 101 S. W. 155; Abney v. Marshall [Mo. App.] 101 S. W. 694; Friedman v. Kelly [Mo. App.] 102 S. W. 1066; Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963; Kelly v. Butte, 34 Mont. 530, 87 P. 968; Union Pac. R. Co. v. Fickenscher [Neb.] 110 N. W. 561; Williams v. Connolly Cont. Co. [N. J. Law] 65 A. 179; Hudson Real Estate Co. v. Bauer [N. J. Law] 64 A. 954; Clark v. Apex Gold Min. Co. [N. M.] 85 P. 968; City of Stillwater

v. Swisher, 16 Okl. 585, 85 P. 1110; Austin Mfg. Co. v. Hunter, 16 Okl. 86, 86 P. 293; Shannon v. Petherbridge [Okl.] 87 P. 668; Boyes v. Masters [Okl.] 89 P. 198; Snyder v. Stribling [Okl.] 89 P. 222; Seffert v. Northern Pacific R. Co. [Or.] 88 P. 962; Luther v. Standard Bldg. & Loan Ass'n [Pa.] 64 A. 871; Bitler's Estate, 30 Pa. Super. Ct. 84; Compton's Estate, 30 Pa. Super. Ct. 605; Harrison's Estate, 31 Pa. Super. Ct. 485; Lowry v. Southern R. Co. [Tenn.] 101 S. W. 1157; Texas & P. R. Co. v. Bump [Tex. Civ. App.] 16 Tex. Ct. Rep. 577, 95 S. W. 29; St. Louis Southwestern R. Co. v. Wester [Tex. Civ. App.] 16 Tex. Ct. Rep. 783, 96 S. W. 769; Bray v. Paddock [Tex. Civ. App.] 16 Tex. Ct. Rep. 1009, 97 S. W. 130; Lone Star Salt Co. v. Allen [Tex. Civ. App.] 97 S. W. 131; Ellis v. Brooks [Tex.] 102 S. W. 94; Wells, Fargo & Co. Exp. v. Boyle [Tex.] 102 S. W. 107; Woodmen of the World v. Torrence [Tex. Civ. App.] 103 S. W. 652; Norfolk & W. R. Co. v. Carr [Va.] 56 S. E. 276; State v. Christopher [Wash.] 86 P. 382; Smith v. Michigan Lumber Co. [Wash.] 86 P. 652; Brennan v. Seattle [Wash.] 90 P. 424; Roedler v. Chicago, etc., R. Co., 129 Wis. 270, 109 N. W. 88; Clark v. Slaughter, 129 Wis. 642, 109 N. W. 556; Nolan v. Kroening [Wis.] 109 N. W. 963; Kohl v. Bradley, Clark & Co. [Wis.] 110 N. W. 265; Sexton v. Goodrich [Wis.] 111 N. W. 206.

The weight of the evidence is not reviewable. St. Louis, etc., R. Co. v. Wells [Ark.] 101 S. W. 738; Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276; Stevenson v. Woodward [Cal. App.] 86 P. 990; McDonald v. Wirt [Colo.] 88 P. 179; Meriden Sav. Bk. v. McCormack [Conn.] 64 A. 338; Russell Elec. Co. v. Bassett [Conn.] 66 A. 531; Chicago, etc., R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169; Virden v. Doyle, 123 Ill. App. 52; Fender v. Fender, 123 Ill. App. 105; Hobbs v. Eaton [Ind. App.] 78 N. E. 333; Lupton v. Taylor [Ind. App.] 78 N. E. 689; Bailey v. Marden [Mass.] 79 N. E. 257; Indianapolis Trac. & T. Co. v. Kidd [Ind.] 79 N. E. 347; Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363; Tinkle v. Wallace [Ind.] 79 N. E. 355; Indianapolis Trac. & T. Co. v. Klentschy [Ind.] 79 N. E. 908; Burk v. Matthews Glass Co. [Ind. App.] 81 N. E. 88; Ohio Valley Buggy Co. v. Anderson Forging Co. [Ind.] 81 N. E. 574; Knoefel v. Atkins [Ind. App.] 81 N. E. 600; Meridian Life & Trust Co. v. Eaton [Ind. App.] 81 N. E. 667; Dickinson v. Kansas City El. R. Co. [Kan.] 86 P. 150; Grimshaw v. Kent [Kan.] 89 P. 658; Pickerill v. Louisville, 30 Ky. L. R. 1239, 100 S. W. 873; Clay City Nat. Bk. v. Townsend, 30 Ky. L. R. 1219, 100 S. W. 1196; Inhabitants of Town of Casco v. Linington [Me.] 65 A. 523; Tolchester Beach Imp. Co. v. Scharnagl [Md.] 65 A. 916; Farmers' Bank v. Barbee, 198 Mo. 465, 95 S. W. 225; Archambault v. Blanchard, 198 Mo. 384, 95 S. W. 834; Warner v. Close, 120 Mo. App. 211, 96 S. W. 491; Knapp v. St. Louis Trust Co., 199 Mo. 640, 98 S. W. 70; Nephler v. Woodward, 200 Mo. 179, 98 S. W. 488; Bond v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30; Stumpe v. Kopp [Mo.] 99 S. W. 1073; Miners & Merchants' Bk. v. Rogers [Mo. App.] 100 S. W. 534; Wahl v. St. Louis Transit Co. [Mo.] 101 S. W. 1; Miller v. Barnett [Mo. App.] 101 S. W. 155; McNulty v. St. Louis & S. F. R. Co. [Mo.] 101 S. W. 1082; Thurmond v. Ash Grove White Lime Ass'n [Mo. App.] 102 S. W. 619; Shearer v. Hill [Mo. App.] 102 S. W. 673; Pickens v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 124; Serano v. New York Cent. etc., R. Co., 188 N. Y. 156, 80 N. E. 1025; Augustine v. Wolf, 215 Pa. 558, 64 A. 777; Blowers v. Southern R. Co., 74 S. C. 221, 54 S. E. 368; Sutton v. Catawba Power Co. [S. C.] 56 S. E. 966; Texas & P. R. Co. v. Middleton [Tex. Civ. App.] 16 Tex. Ct. Rep. 198, 94 S. W. 1097; Missouri, etc., R. Co. v. Matlock [Tex. Civ. App.] 99 S. W. 1052; Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 100 S. W. 176; Texas, etc., R. Co. v. Buch [Tex. Civ. App.] 102 S. W. 124; McDonald v. Cabiness [Tex.] 102 S. W. 721; Coolidge v. Taylor [Vt.] 65 A. 582; Norman v. Bellingham [Wash.] 89 P. 559; Hemple v. Raymond [C. C. A.] 144 F. 796. Action to quiet title is triable by jury, and hence Acts 1903, p. 338, c. 193, § 8, Burns 'Ann. St. 1905, § 641, requiring supreme court to weigh evidence in actions not triable by jury, does not apply. Adams v. Betz [Ind.] 78 N. E. 649. Is within province of appellate court to determine, as question of law, whether evidence given below in support of verdict and judgment has enough probative strength to present real issues of fact which may be honestly settled either way by a jury of reasonable men. Pickens v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 124. Where case is heard on affidavits, reviewing court has same means of judging as to the weight of testimony or credibility of the witnesses as trial court, and should treat such testimony as though it were presented in reviewing court for the first time. Ravenna Nat. Bk. v. Latimer, 8 Ohio C. C. (N. S.) 563.

Credibility of witnesses will not be passed on by reviewing court. Russell Elec. Co. v. Bassett [Conn.] 66 A. 531; Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706; Dickinson v. Kansas City El. R. Co. [Kan.] 86 P. 150; Chesapeake & O. R. Co. v. Satterfield, 30 Ky. L. R. 1168, 100 S. W. 844; Gumbel & Co. v. Ryan [La.] 43 So. 251; Martinez v. Fabacher [La.] 43 So. 632; Stumpe v. Kopp [Mo.] 99 S. W. 1073; Pickens v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 124; Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 100 S. W. 176; Texas, etc., R. Co. v. Buch [Tex. Civ. App.] 102 S. W. 124; Hardwick v. Gettier [Wash.] 86 P. 943. Case not one where jury arbitrarily disregarded creditable, reasonable and unimpeached testimony. St. Louis, etc., R. Co. v. Mize, 79 Ark. 629, 95 S. W. 488.

Unless so contrary to evidence as to denote passion or prejudice. Colorado Springs Elec. Co. v. Soper [Colo.] 88 P. 165; Mobile, etc., R. Co. v. Healy, 122 Ill. App. 275; Lehnick v. Metropolitan St. R. Co., 118 Mo. App. 611, 94 S. W. 996. Rev. St. 1899, § 866. Joy v. Cale [Mo. App.] 102 S. W. 30.

Unless manifestly against the weight of the evidence. Birmingham R., L. & P. Co. v. Moore [Ala.] 43 So. 841; Hale v. Milliken [Cal. App.] 90 P. 365; Boulder & White Rock Ditch Co. v. Leggett Consol. D. & R. Co. [Colo.] 86 P. 101; Morton v. Chicago [Ill.] 81 N. E. 847; Chicago & A. R. Co. v. Jennings, 120 Ill. App. 195; Fitzgerald v. Benner, 120 Ill. App. 447; Cleveland, etc., R. Co. v. Fuller, 122 Ill. App. 36; Chicago & J. Elec. R. Co. v. Muff, 122 Ill. App. 183; Porter v. Look, 122 Ill. App. 192; Illinois S. R. Co. v. Garrison, 122 Ill. App. 253; Cummins v. Reigle, 122 Ill. App. 368; Joseph Taylor Coal Co. v. Dawes, 122 Ill. App. 389; Lindstrum v. Kraft, 122 Ill. App. 612; Chicago Union Trac. Co. v. Brody, 123 Ill. App. 331; Workman v. Dikis,

124 Ill. App. 374; Kuhn v. Williams, 124 Ill. App. 390; Hanchett v. Haas, 125 Ill. App. 111; Sponsler v. Williams, 126 Ill. App. 583; Lexington R. Co. v. Herring, 29 Ky. L. R. 794, 96 S. W. 558; Gray v. Parrott, 30 Ky. L. R. 777, 99 S. W. 640; Woodmen of the World v. Walters, 30 Ky. L. R. 916, 99 S. W. 930; Chesapeake & O. R. Co. v. Satterfield, 30 Ky. L. R. 1168, 100 S. W. 844; Robertson v. Ross [Ky.] 101 S. W. 1187; National L. Ins. Co. v. Anderson [Ky.] 102 S. W. 323; Curtis v. Metropolitan St. R. Co., 118 Mo. App. 341, 94 S. W. 762; Eighth Ward Bk. v. Ehrlich, 112 App. Div. 883, 97 N. Y. S. 766; Phillips v. Silverzweig, 102 N. Y. S. 459; Franklin Transp. Co. v. Yonkers, 102 N. Y. S. 1060; Dormos v. Vassilas, 103 N. Y. S. 813; Hallums v. Hallums, 74 S. C. 407, 54 S. E. 613; International Harvester Co. v. McKeever [S. D.] 109 N. W. 642; Virginia I., C. & C. Co. v. Cash's Adm'r, 105 Va. 57, 54 S. E. 472; Kinsey v. Carr [W. Va.] 55 S. E. 1004; Brunkow v. Waters [Wis.] 110 N. W. 802; Hoskins v. O'Brien [Wis.] 112 N. W. 466; Bartle v. Bartle [Wis.] 112 N. W. 471. Rule applies to findings of circuit court in action tried on record of justice of peace from whose court appeal was taken, notwithstanding Rev. St. 1898, § 3769. Donner v. Genz, 129 Wis. 245, 107 N. W. 1039, 109 N. W. 71. Verdict or finding will be set aside when manifestly against weight of evidence. Schulze v. Shea [Colo.] 86 P. 117; Laesch v. Morton [Colo.] 87 P. 1081; Rankin v. Cardillo [Colo.] 88 P. 170; Crowley v. Shepard [Colo.] 88 P. 177; Titus v. Bates, 122 Ill. App. 103; Quincy Horse R. & Carrying Co. v. Rankin, 123 Ill. App. 472; Illinois So. R. Co. v. Laswell, 126 Ill. App. 621; East St. Louis R. Co. v. Smith, 126 Ill. App. 624; Lazarus v. Friedrichs, 117 La. 711, 42 So. 230; Stowell v. Ames [Mich.] 14 Det. Leg. N. 257, 111 N. W. 1070; Casto v. Baker, 59 W. Va. 183, 53 S. E. 600; Busse v. State, 129 Wis. 171, 108 N. W. 64. Where special findings returned with general verdict show that undisputed evidence was disregarded to such an extent as to clearly indicate that case was not fairly tried. Dewey v. Barnhouse [Kan.] 88 P. 877. Where there is no evidence to support it. Poels v. Wilson [Neb.] 108 N. W. 153; In re Royer's Estate [Pa.] 66 A. 854; Fieldhouse v. Leisberg [Wyo.] 88 P. 214. Under Code Civ. Proc. § 3063, judgment of municipal court will be reversed if against weight of evidence. Underhill v. Smith, 102 N. Y. S. 142. Will reverse where evidence relied on to support verdict necessarily involves an impossibility in the very nature of things, and is contrary to human experience and common observation. Waters-Pierce Oil Co. v. Knisel, 79 Ark. 608, 96 S. W. 342.

Judgments, verdicts, or findings based on conflicting evidence will not be disturbed. Leidigh & Havens Lumber Co. v. Clark, 78 Ark. 539, 94 S. W. 686; Marion County v. Estes, 79 Ark. 504, 96 S. W. 165; National Cooperage & Woodware Co. v. Aydelott & Co., 79 Ark. 629, 96 S. W. 359; Hanson v. Merchants' & Farmers' Bk. [Ark.] 101 S. W. 411; Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 P. 178; Piercy v. Piercy, 149 Cal. 163, 86 P. 507; Bone v. Ophir Silver Min. Co., 149 Cal. 293, 86 P. 685; Brown v. Yarraham Gold Min. Co. [Cal. App.] 86 P. 744; Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820; Edwards v. Lechleiter, 149 Cal. 677, 87 P. 194; Smith v. Hampshire [Cal. App.] 87 P. 224; In re Hayden's Estate, 149 Cal. 680, 87 P. 275; Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276; Jones v. Waterman [Cal. App.] 87 P. 469; Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 P. 622; Fleming v. Howard [Cal.] 87 P. 908; Spotswood v. Spotswood [Cal. App.] 89 P. 362; Lanigan v. Neely [Cal. App.] 89 P. 441; Schulze v. Shea [Colo.] 86 P. 117; Fulton Irr. Ditch Co. v. Meadow Island Irr. Co. [Colo.] 86 P. 748; Whitehead v. Ballinger [Colo.] 88 P. 169; McDonald v. Wirt [Colo.] 88 P. 179; April v. Rummage [Colo.] 88 P. 469; Clamp v. Cutler [Colo.] 88 P. 854; Golden Age No. 2 Min. & Mill. Co. v. Langridge [Colo.] 88 P. 1070; Cassell v. Deisher [Colo.] 89 P. 773; Goad v. Nevitt [Colo.] 89 P. 775; Hawkey v. Ketchum [Colo.] 89 P. 777; Taylor v. Barnett [Colo.] 90 P. 74; Ripley v. Park Center Land & Water Co. [Colo.] 90 P. 75; Roberson v. Wilmoth [Colo.] 90 P. 95; Manuel v. Flynn [Cal. App.] 90 P. 463; Thom v. Georgia Mfg. & Public Service Co. [Ga.] 57 S. E. 75; Frepons v. Grostein [Idaho] 87 P. 1004; Heckman v. Espey [Idaho] 88 P. 80; Lindstrom v. Hope Lumber Co. [Idaho] 88 P. 92; State v. Baird [Idaho] 89 P. 298; McKissick v. Oregon Short Line R. Co. [Idaho] 89 P. 629; Treloar v. Hamilton, 225 Ill. 102, 80 N. E. 75; Dieffenbacher v. County of Mason, 117 Ill. App. 103; Coal Belt Elec. R. Co. v. Kays, 119 Ill. App. 23; Swartz v. Atchison, 120 Ill. App. 119; Chicago City R. Co. v. Gregory, 123 Ill. App. 259; United Breweries Co. v. O'Donnell, 124 Ill. App. 24; Never-Split Seat Co. v. Climax Specialty Co. [Ind. App.] 78 N. E. 679; Price v. Huddleston [Ind.] 79 N. E. 496; Pittsburgh, etc., R. Co. v. Collins [Ind.] 80 N. E. 415; Stark v. Burke, 131 Iowa, 684, 109 N. W. 206; Allen v. Davis [Iowa] 109 N. W. 793; Baily v. Sioux City [Iowa] 110 N. W. 839; Hall v. Kary [Iowa] 110 N. W. 930; Rahto v. McMurray [Iowa] 110 N. W. 1025; Patton v. Sanborn [Iowa] 110 N. W. 1032; Sargeant v. Owen [Iowa] 111 N. W. 980; Missouri, etc., R. Co. v. Hayes [Kan.] 88 P. 64; Atchison, etc., R. Co. v. Hamlin [Kan.] 88 P. 541; Girdner v. Hampton, 29 Ky. L. R. 713, 96 S. W. 453; Louisville, etc., R. Co. v. Davis, 29 Ky. L. R. 846, 96 S. W. 533; South Covington, etc., R. Co. v. Core, 29 Ky. L. R. 836, 96 S. W. 562; Branham v. Northcutt, 30 Ky. L. R. 166, 97 S. W. 755; Combs v. Virginia Iron, Coal & Coke Co., 30 Ky. L. R. 408, 98 S. W. 1013; Lexington Brew. Co. v. Goode & Co., 30 Ky. L. R. 639, 99 S. W. 338; Massillon Engine Co. v. Smith, 30 Ky. L. R. 709, 99 S. W. 359; City of Louisville v. Knighton, 30 Ky. L. R. 1037, 100 S. W. 228; Hatfield v. Kountz's Trustee [Ky.] 101 S. W. 361; Asher v. Garrard [Ky.] 101 S. W. 889; Ferguson v. Heffner [Ky.] 103 S. W. 270; Illinois Cent. R. Co. v. Wilson [Ky.] 103 S. W. 364; Faure v. Faure, 117 La. 204, 41 So. 494; Higgins v. Franklin County Agricultural Soc., 100 Me. 565, 62 A. 708; Liberty v. Haines, 101 Me. 402, 64 A. 665; Cook v. Koochiching Co., 99 Minn. 472, 109 N. W. 1120; Laub v. Chicago, etc., R. Co., 118 Mo. App. 488, 94 S. W. 550; Betz v. Kansas City Home Tel. Co., 121 Mo. App. 473, 97 S. W. 207; Keyes Farm & Dairy Co. v. McCrady, 120 Mo. App. 670, 97 S. W. 602; Bond v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30; Bush v. Brandecker [Mo. App.] 100 S. W. 48; McGraw v. O'Neil [Mo. App.] 101 S. W. 132; Fulton v. Metropolitan St. R. Co. [Mo. App.] 102 S. W. 47; Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co. [Mont.] 89 P. 66; Rownd v. Hollenbeck [Neb.] 108 N. W. 259; Flanagan v. Fabens

ing below,[72] and the presumption in favor of a verdict is strengthened by approval by the trial judge on motion for a new trial,[73] or by concurrence of several verdicts on successive trials,[74] or the concurrent finding of two lower courts.[75] The foregoing rules apply to findings in law,[76] and to the findings of referees,[77] auditors,[78]

[Neb.] 110 N. W. 655; Bloch v. American Ins. Co. [Wis.] 112 N. W. 45; Hudson v. Truman [Neb.] 112 N. W. 325; Kohler v. Hughbanks [Neb.] 112 N. W. 577; Stringfellow v. Petty [N. M.] 89 P. 258; Bogert Co. v. Schmidt, 101 N. Y. S. 580; Shtrax v. Warm, 102 N. Y. S. 531; Straley v. Schnepp, 102 N. Y. S. 538; Garrison v. Hutton, 103 N. Y. S. 265; Daiker v. Hutchinson, 103 N. Y. S. 1121; Miller v. Margulies, 104 N. Y. S. 673; National Surety Co. v. Di Marsico, 105 N. Y. S. 272; Harness v. McKee-Brown Lumber Co. [Okl.] 89 P. 1020; Kuhl v. Supreme Lodge Select Knights and Ladies [Okl.] 89 P. 1126; Ginley v. Ashley, 215 Pa. 80, 64 A. 330; Jones v. Weir [Pa.] 66 A. 550; Illinois Cent. R. Co. v. Porter [Tenn.] 94 S. W. 666; Sullivan v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 234, 95 S. W. 645; Barrow v. Barrow [Tex. Civ. App.] 16 Tex. Ct. Rep. 951, 97 S. W. 120; Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 560, 98 S. W. 657; Rowe v. Gohlman [Tex. Civ. App.] 17 Tex. Ct. Rep. 40, 539, 98 S. W. 1077; Hoggan v. Cahoon [Utah] 87 P. 164; Ball v. Megrath [Wash.] 86 P. 382; Abby v. Wood [Wash.] 86 P. 558; Palmer v. Washington Securities Inv. Co. [Wash.] 86 P. 640; Hunner v. Mulcahy [Wash.] 88 P. 521; Lerch v. Wonder Department Store [Wash.] 88 P. 521; Coates v. Teabo [Wash.] 87 P. 355; Lawrence v. Meenach [Wash.] 88 P. 1120; Waldron v. Lynn [Wash.] 89 P. 153; Belch v. Big Store Co. [Wash.] 89 P. 174; Burrows v. Fitch [W. Va.] 57 S. E. 283; Cox v. National Coal & Oil Inv. Co. [W. Va.] 56 S. E. 494; Oliver v. Katz [Wis.] 111 N. W. 509; Slothawer v. Hunter [Wyo.] 88 P. 36; Harden v. Card [Wyo.] 88 P. 217; Schiller v. Blyth & Fargo Co. [Wyo.] 88 P. 648; Hussey v. Richardson-Roberts Dry Goods Co. [C. C. A.] 148 F. 598; Harrison v. Fite [C. C. A.] 148 F. 781; McDonald v. Campbell [C. C. A.] 151 F. 743; Coder v. Arts [C. C. A.] 152 F. 943. Though losing side introduced greatest number of witnesses. Shacklett v. Henderson County Sav. Bk. [Ky.] 100 S. W. 241. Though appellate court would have decided otherwise. Springfield Consol. R. Co. v. Johnson, 120 Ill. App. 100; Chicago & Joliet Elec. R. Co. v. Patton, 122 Ill. App. 174; Goupille v. Chaput [Wash.] 86 P. 1058. Is conflict when evidence will support determination either way. Kevane v. Miller [Cal. App.] 88 P. 643. Finding of ultimate fact from stipulation as to facts in detail is entitled to same consideration as finding on conflicting evidence. Crisman v. Lanterman, 149 Cal. 647, 87 P. 89.

72. Three States Lumber Co. v. Blanks [Tenn.] 102 S. W. 79. Usual presumption in favor of verdict is not destroyed because it was based solely on evidence given at former trial and read to jury by agreement of parties. C., P. & St. L. R. Co. v. Condon, 121 Ill. App. 440. Finding that solicitor had no authority to file suit held as finding of fact, and presumed correct in absence of evidence. Bellinger v. Barnes, 223 Ill. 121, 79 N. E. 11. On demurrer to sufficiency of evidence, appellate court will draw every reasonable inference from the facts in evidence that may be indulged in favor of the cause of action. Dunphy v. St. Joseph Stock Yards Co., 118 Mo. App. 506, 95 S. W. 301. Where third person at request of maker of note secured by mortgage gave holder a check to prevent him from foreclosing, and there was verdict for such holder in a suit on the check, it was presumed in support of the verdict that the check was given to prevent plaintiff from foreclosing, and not in purchase of the note, which had been paid, the check being without consideration in the latter case but not in the former. National Bk. v. Sayer [N. H.] 65 A. 254. Question whether freight schedules had been posted not reviewable where state court in effect declared that it was conceded to have been filed and published as per statute, and it did not appear but that court found facts showing that such was the case. Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 Law. Ed. 553.

73. Graham v. Bryant [Cal. App.] 87 P. 232; Helm v. Anchor Fire Ins. Co. [Iowa] 109 N. W. 605; Missouri Real Estate Syndicate v. Sims, 121 Mo. App. 156, 98 S. W. 783; Shively v. De Snell [Mont.] 90 P. 749; Kitchen v. Schuster [N. M.] 89 P. 261; Houston Ice & Brew. Co. v. Nicolini [Tex. Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84; Hardt v. Chicago, etc., R. Co. [Wis.] 110 N. W. 427.

74. La Salle Pressed Brick Co. v. Coe, 126 Ill. App. 308. Where three juries reached same conclusion. Consolidated Coal Co. v. Shepherd, 122 Ill. App. 323; Mills v. Larrance, 120 Ill. App. 83. Where two juries in expropriation proceedings have assessed damages at about same amount and their verdicts are sustained by preponderance of evidence, last verdict will not be disturbed. Louisiana & A. R. Co. v. Moseley, 117 La. 313, 41 So. 585.

75. See, also, § 13 G, post. Adjudication of county court on testamentary capacity and undue influence, affirmed by circuit court and sustained by evidence, will not be disturbed by supreme court. Sweetser v. Ladd [Fla.] 41 So. 705. Trial court held evidence too uncertain to award damages. Court of appeal awarded damages and supreme court reduced them and affirmed. Brown v. Louisiana, etc., R. Co. [La.] 42 So. 656. Findings approved by two courts not disturbed if there is any evidence to support them. Davidson S. S. Co. v. U. S., 205 U. S. 187, 51 Law. Ed. 764.

76. Findings of fact by court have same weight as verdict of jury. McGeever v. Harris [Ala.] 41 So. 930; Roberts & Shafer Co. v. Jones [Ark.] 101 S. W. 165; Caughlin v. Campbell-Sell Baking Co. [Colo.] 89 P. 53; Gratiot Street Warehouse Co. v. St. Louis, etc., R. Co., 122 Ill. App. 405; Thomas v. Consolidated Coal Co., 122 Ill. App. 465; Ray v. Hunter, 122 Ill. App. 466; Kimbro v. New York Life Ins. Co. [Iowa] 108 N. W. 1025; In re Smith's Estate [Iowa] 109 N. W. 196; Thistle Coal Co. v. Rex Coal & Min. Co. [Iowa] 109 N. W. 1094; Commonwealth v. Johnson, 29 Ky. L. R. 897, 96 S. W. 801; Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S.

commissioners,[79] masters,[80] and special tribunals.[81] They are also frequently applied to findings in equity cases,[82] though, strictly speaking, while entitled to some weight,[83] such findings are not conclusive if the appeal is triable de novo.[84]

W. 880; Sevier v. Bowling, 30 Ky. L. R. 217, 97 S. W. 806; Hartford Fire Ins. Co. v. Asher, 30 Ky. L. R. 1053, 100 S. W. 233; Citizen's Ins .Co. v. Herpolsheimer [Neb.] 109 N. W. 160; Miller v. International R. Co., 102 N. Y. S. 254; Matthews v. Fry [N. C.] 55 S. E. 787; Smith v. Kaufman, 30 Pa. Super. Ct. 265. Under Code 1896, § 3319, general finding of court has same effect as verdict and is not reviewable in absence of special findings or any request therefor. Nichols v. Ragsdale [Ala.] 41 So. 633. Findings on disputed questions of fact are presumptively correct and though, by statute, not as controlling as verdict of a jury, will stand unless evidence clearly preponderates against them. Buchanan v. Randall [S. D.] 109 N. W. 513. Are not binding where evidence is undisputed and question is merely as to its effect and construction. Bromley v. Atwood, 79 Ark. 357, 96 S. W. 356. Finding which merely affirmed issues joined by general denial of allegations of complaint without declaring specifically upon affirmative defenses raised by answer, except that all material allegations of answer were unproven and untrue, held not such a finding of fact as to be conclusive on appeal in presence of evidence so conflicting as to present but a mere preponderance either way. Closuit v. Arpin Lumber Co. [Wis.] 110 N. W. 222.

77. Harris v. Smith [N. C.] 57 S. E. 122; Frey v. Middle Creek Lumber Co. [N. C.] 57 S. E. 464; Thornton v. McNeely [N. C.] 57 S. E. 400; Shannon v. Petherbridge [Okl.] 87 P. 668; De La Vergne Refrigerating Mach. Co. v. Kolischer, 214 Pa. 400, 63 A. 971; McManus v. Watson, 214 Pa. 652, 63 A. 1012; Findlay v. Philadelphia [Pa.] 66 A. 520; Nelson v. Lybeck [S. D.] 111 N. W. 546; Eureke Hill Min. Co. v. Bullion Beck & Champion Min. Co. [Utah] 90 P. 157; Idema v. Comstock [Wis.] 110 N. W. 786.

78. Hutchins v. Munn, 28 App. D. C. 271; Orr v. Cooledge, 125 Ga. 496, 54 S. E. 618; Shadle's Estate, 30 Pa. Super. Ct. 151; Eslen's Estate, 30 Pa. Super. Ct. 475; Weldon's Estate, 31 Pa. Super. Ct. 47.

79. Seufferle v. Macfarland, 28 App. D. C. 94; Wolfe v. Morgan [W. Va.] 56 S. E. 504.

80. Phelps v. Root, 78 Vt. 493, 63 A. 941; Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110. When approved by trial judge. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902; Champion v. McCarthy [Ill.] 81 N. E. 808; Fosdick v. Forbes, 120 Ill. App. 226; Junction Min. Co. v. Springfield Junct. Coal Co., 122 Ill. App. 574; White v. Lifrieri, 124 Ill. App. 641; Naef v. Potter, 127 Ill. App. 106; Plummer v. Baxter, 127 Ill. App. 239; Donner v. Donner [Pa.] 66 A. 147; Houck v. Christy [C. C. A.] 152 F. 612; Mercantile Trust Co. v. Chicago, etc., R. Co. [C. C. A.] 147 F. 699; Moffat v. Blake [C. C. A.] 145 F. 40. Where evidence not refuted and findings were not plainly wrong. Young v. Winkley, 191 Mass. 570, 78 N. E. 377. Appellate court is not concluded by findings of master when appeal is from judgment of the court below after a hearing on the merits, but whole case before it. Merchants' Nat. Bk. v. Cole [C. C. A.] 149 F. 708.

81. Under Rev. St. 1895, arts. 4672, 4696, determination of commissioner's court as to whether proposed change in road will be for benefit of public cannot be reviewed, unless it clearly appears that it has abused power delegated to it. Smith v. Ernest [Tex. Civ. App.] 102 S. W. 129.

82. Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, 79 N. E. 276; Abrams v. Beale, 224 Ill. 496, 79 N. E. 671; Treloar v. Hamilton, 225 Ill. 102, 80 N. E. 75; Joseph Armstrong v. Stebbins, 122 Ill. App. 11; Dings v. Dings, 123 Ill. App. 318; Shedd v. Seefeld, 126 Ill. App. 375; Lindsey v. Bird [Mass.] 79 N. E. 263; Jennings v. Demmon [Mass.] 80 N. E. 471; Brown v. Gwin, 197 Mo. 499, 95 S. W. 208; Wald v. Wald, 119 Mo. App. 341, 96 S. W. 302; Waddington v. Lans [Mo.] 100 S. W. 1139; Dickey v. Norris [Pa.] 65 A. 541. Acts 1903 (2d Ex. Sess.) p. 7. Delmoe v. Long [Mont.] 88 P. 778. Finding that insurance companies in which defendant in accounting insured plaintiff's property were solvent did not involve finding that plaintiff was not entitled to further accounting by statement of names of companies and rates paid, and hence latter finding being one of law was reviewable. Campbell v. Cook [Mass.] 79 N. E. 261. Findings based on uncontradicted testimony of witnesses whose credibility is not impeached, although evidence is not of most satisfactory nature. Smith's Adm'r v. Huntsberry, 30 Ky. L. R. 867, 99 S. W. 911. Decree in partnership accounting arrived at by court and assistant from complicated and obscure accounts not disturbed. Mays v. Melat, 29 Pa. Super. Ct. 365.

If any substantial evidence to support it. Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93.

Unless manifestly against weight of evidence. Jenkins v. Jenkins [Ark.] 98 S. W. 685; Jones v. Jones, 124 Ill. App. 201; Schumacher v. Wolf, 125 Ill. App. 81; Amos v. American Trust & Sav. Bk., 125 Ill. App. 91; Bader v. Strother, 120 Mo. App. 17, 96 S. W. 243.

Where evidence is conflicting. Watkins v. Parker [Ark.] 99 S. W. 1106; Robbins v. Porter [Idaho] 88 P. 86; Hudson v. Hudson, 222 Ill. 527, 78 N. E. 917; Village of St. Anne v. Coyer, 223 Ill. 96, 79 N. E. 54; Watson v. Watson, 225 Ill. 412, 80 N. E. 332; Leafgreen v. Leafgreen, 127 Ill. App. 184; Burwell v. Nance, 127 Ill. App. 232; Hubbard v. West [Iowa] 112 N. W. 180; Rohr v. Stechman [La.] 43 So. 991; Gross v. Jones [Miss.] 42 So. 802; Tinker v. Kier, 195 Mo. 183, 94 S. W. 501; Steyermark v. Landau, 121 Mo. App. 402, 99 S. W. 41.

Where mind is left in doubt as to truth. Taylor v. Industrial Mut. Deposit Co.'s Receiver, 29 Ky. L. R. 767, 96 S. W. 462; Combs v. Combs, 29 Ky. L. R. 919, 96 S. W. 589; Wisdom v. Nichols & Shepherd Co., 29 Ky. L. R. 1128, 97 S. W. 18; United Loan & Deposit Bk. v. Minor, 30 Ky. L. R. 496, 99 S. W. 227; Cook v. Mallory, 30 Ky. L. R. 846, 99 S. W. 939; Wilson v. Hall [Ky.] 101 S. W. 889; Kentucky Mut. Bldg. & Loan Ass'n's trustee v. Hall [Ky.] 102 S. W. 1175; Ferguson v. Heffner [Ky.] 103 S. W. 270; Marston v. Fremd [Ky.] 103 S. W. 285.

(§ 13) *G. Rulings and decisions on intermediate appeals.*[85]—Where an intermediate appeal is had, the findings of fact therein are usually final, review in the court of last resort being confined to questions of law,[86] and to questions litigated

Finding of single justice will not be disturbed unless plainly wrong. United Shoe Mach. Co. v. Kimball [Mass.] 79 N. E. 790; Elliott v. Baker [Mass.] 80 N. E. 450. Rule that when appeal from decision of single judge is heard by full court on report of all evidence adduced at original hearing, the decision of such judge as to matters of fact will not be reversed unless clearly erroneous, is confined to cases where the evidence is oral and conflicting, and does not apply where the evidence is documentary, and in appellate court is in equally good position as trial judge was with respect to inferences from the evidence. Harvey-Watts Co. v. Worcester Umbrella Co. [Mass.] 78 N. E. 886. Rule does not prevent full court, upon consideration of all the evidence, from reaching different conclusion. Poland v. Beal, 192 Mass. 559, 78 N. E. 728. Rule does not apply where all the evidence is documentary. Old Corner Book Store v. Upham [Mass.] 80 N. E. 228.

83. Entitled to some weight. Thompson v. Normanden [Iowa] 108 N. W. 315; Swartwood v. Chance, 131 Iowa, 714, 109 N. W. 297. Accorded great weight. Moore v. Moore, 30 Ky. L. R. 383, 98 S. W. 1027; Jennings v. Demmon [Mass.] 80 N. E. 471. Appellate court inclined to follow lower court. Drew v. Hogan, 26 App. D. C. 55. Will not nicely weigh evidence to determine whether finding is correct. Morton v. Morton [Ark.] 102 S. W. 213.

84. Patterson v. Patterson, 200 Mo. 335, 98 S. W. 613; Southern Bk. v. Nichols [Mo.] 100 S. W. 613; Pitts v. Pitts [Mo.] 100 S. W. 1047; Mason v. Smith [Mo. App.] 101 S. W. 1149. Questions of fact are reviewable. Linkemann v. Knepper, 226 Ill. 473, 80 N. E. 1009. No presumptions of correctness can be indulged in favor of chancellor's decree, but appellate court must reach its own conclusions in regard to it. Spears v. Taylor [Ala.] 42 So. 1016. Chancellor's decision is of persuasive force only and case must be decided on the weight of the evidence. Gray v. Gray [Ark.] 98 S. W. 376. Judgment of chancellor will not be followed where it is against preponderance of evidence. Deatley v. Tolle, 29 Ky. L. R. 1111, 96 S. W. 920. Judgment will be given according to weight of evidence and truth of matter as it shall appear to court from the whole record. United Loan & Deposit Bk. v. Minor, 30 Ky. L. R. 496, 99 S. W. 227. Where appeal brings up facts as well as questions of law, reviewing court must determine case according to its own judgment. Jennings v. Demmon [Mass.] 80 N. E. 471. Where evidence is conflicting, credibility of witnesses involved, and charge of fraud to be determined, and proof is not sufficiently definite and certain to satisfy the appellate court that ends of justice have been attained by decree below, it will be reversed and an issue framed to be tried by jury. Morgan v. Booker [Va.] 56 S. E. 137. That trial court disregarded admitted evidence as immaterial held not available to appellant as appellate court would consider same. Budlong v. Budlong [Wash.] 86 P. 559. Finding upon an issue involving not merely question of fact but construction of written instruments is not conclusive. Pile v. Carpenter [Tenn.] 99 S. W. 360. Finding of chancellor based solely on an affidavit is not conclusive. Krieger v. Krieger, 120 Ill. App. 634. Finding on motion to set aside sheriff's sale under foreclosure in equity not being triable de novo on appeal is binding. evidence being in conflict. Fuller v. O'Connell [Iowa] 110 N. W. 281. Finding of jury in suit in equity is binding neither upon trial nor appellate court. Burdall v. Johnson, 122 Mo. App. 119, 99 S. W. 2.

85. See 7 C. L. 233.

86. Illinois: Appellate court's decision on questions of fact conclusive on supreme court. Libby v. Cook, 222 Ill. 206, 78 N. E. 599; Bauer v. Hindley, 222 Ill. 319, 78 N. E. 626; Hartford L. Ins. Co. v. Sherman [Ill.] 78 N. E. 923; Wallace v. Bozarth, 223 Ill. 339, 79 N. E. 57; People v. Harrison, 223 Ill. 550, 79 N. E. 164; Chicago, etc., R. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166; Lloyd & Co. v. Matthews, 223 Ill. 477, 79 N. E. 172; Chicago, etc., R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602. Ruling that there is no evidence is reviewable as question of law, though affirmed by appellate court. Rigdon v. More, 226 Ill. 382, 80 N. E. 901. Where appellate court on reversal of judgment of trial court incorporates in its judgment findings of fact different from those made below, findings so incorporated are not reviewable by the supreme court. Toolen v. Chicago Towel Supply Co., 222 Ill. 517, 78 N. E. 825; Chaplin v. Illinois Terminal R. Co. [Ill.] 81 N. E. 15; Schaller v. Independent Brew. Ass'n, 225 Ill. 492, 80 N. E. 334. Findings must be of the ultimate fact and not of evidentiary facts. National L. Ins. Co. v. Metropolitan L. Ins. Co., 226 Ill. 102, 80 N. E. 747; City of Chicago v. Roemheld [Ill.] 81 N. E. 45. Where appellate court's judgment of reversal recites fact, it will be presumed that such findings are different from those below, since no such recital is necessary where the findings are the same. Id. Supreme court will determine whether there is any evidence to support such findings. National L. Ins. Co. v. Metropolitan L. Ins. Co., 226 Ill. 102, 80 N. E. 747. Judgment of affirmance by appellate court is conclusive on supreme court upon questions of fact. Merchants' L. & T. Co. v. Egan, 222 Ill. 494, 78 N. E. 800; Chicago Consol. Traction Co. v. Schritter, 222 Ill. 364, 78 N. E. 820; Star Brewery Co. v. Houck, 222 Ill. 348, 78 N. E. 827; Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833; Railton v. Chicago Title & Trust Co., 224 Ill. 485, 79 N. E. 600; Chicago, etc., R. Co. v. Steckman 224 Ill. 500, 79 N. E. 602; Grace & Hyde Co. v. Strong, 224 Ill. 630, 79 N. E. 967; Chicago & A. R. Co. v. Wilson, 225 Ill. 50, 80 N. E. 56; Schell v. Weaver, 225 Ill. 159, 80 N. E. 95; Lasher v. Colton, 225 Ill. 234, 80 N. E. 122; Stern v. Bradner, Smith & Co., 225 Ill. 430, 80 N. E. 307; Illinois So. R. Co. v. Hayer, 225 Ill. 613, 80 N. E. 316; Donk Bros. Coal & Coke Co. v. Lucis, 226 Ill. 23, 80 N. E. 560; Harley v. Sanitary Dist. of Chicago, 226 Ill. 213, 80 N. E. 771; Illinois Steel Co. v. Saylor, 226 Ill. 283, 80 N. E. 783; St. Louis Merchants' Bridge

in the intermediate court.[87] If the judgment is in apparent conflict with the opinion, the case will be remanded for correction.[88]

(§ 13) *H. Effect of decision on former review in the same case.*[89]—The binding effect of a decision on appeal on a retrial in the lower court,[90] and the effect of appellate decisions as precedents in other cases, are treated elsewhere.[91] All matters necessarily [92] decided,[93] and, in case of affirmance, everything that might have

T. R. Ass'n v. Schultz, 226 Ill. 409, 80 N. E. 879; Spring Valley Coal Co. v. Greig, 226 Ill. 511, 80 N. E. 1042; Skinner v. Sullivan & Co. [Ill.] 81 N. E. 11; Dowie v. Sutton [Ill.] 81 N. E. 395; Chicago Union Traction Co. v. Ertrachter [Ill.] 81 N. E. 816.

New York: Unanimous affirmance by appellate division is conclusive on court of appeals on questions of fact. Rand v. Iowa Cent. R. Co., 186 N. Y. 58, 78 N. E. 574; People v. Bingham, 186 N. Y. 538, 78 N. E. 1098; Seger v. Farmers' L. & T. Co. [N. Y.] 79 N. E. 977; Busch v. Interborough Rapid Transit Co., 187 N. Y. 388, 80 N. E. 197; In re Stevens, 187 N. Y. 471, 80 N. E. 358; In re Caldwell, 188 N. Y. 115, 80 N. E. 663; Harris v. Baltimore M. & E. Works, 188 N. Y. 141, 80 N. E. 1028; Burke v. Baker [N. Y.] 80 N. E. 1033; Adams v. Lawson [N. Y.] 81 N. E. 315; Blum v. Mayer [N. Y.] 81 N. E. 780. Under Const. art. 6, § 9, and Code Civ. Proc. § 190, and § 191, subd. 3, authorizing review by court of appeals of final orders by appellate division in special proceedings, the review thus authorized extends only to questions of law in proceedings to review senatorial and assembly apportionments made by legislature. In re Sherill [N. Y.] 81 N. E. 124. Denial of motion to dismiss complaint for want of facts before evidence taken survives unanimous affirmance, and is reviewable by court of appeals. Kelly v. Security M. L. Ins. Co., 186 N. Y. 16, 78 N. E. 584. When affirmance is not unanimous, court of appeals will ascertain whether there is any evidence to support the verdict. Milbaur v. Larkin [N. Y.] 81 N. E. 321; Parsons v. Teller, 188 N. Y. 318, 80 N. E. 930. Where affirmance is not unanimous, trial court's failure to make findings is reviewable. Arnot v. Union Salt Co., 186 N. Y. 501, 79 N. E. 719. Under Code Civ. Proc. § 1338, it will be presumed that reversal by appellate division was upon law, where it does not appear that it was upon the facts. Freedman v. Oppenheim [N. Y.] 79 N. E. 841. Hence where, in such case, the findings of trial court are supported by evidence, they will control decision of court of appeals. Untermyer v. Yonkers [N. Y.] 80 N. E. 1087. Only question for the court of appeals in such case is whether the conclusions of law are supported by the facts found. Stokes v. Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090. On appeal from order of appellate division dismissing appeal from an order of the special term granting peremptory writ of mandamus, the court of appeals will not consider the sufficiency of the grounds for the writ. People v. Voorhis, 186 N. Y. 263, 78 N. E. 1001.

Texas: Finding of trial court approved by court of civil appeals is conclusive upon supreme court if there is any evidence to support it. McDonald v. Cabiness [Tex.] 102 S. W. 721. While supreme court cannot review objections that verdict is against preponderance of evidence and so excessive as to require a new trial, court of civil appeals should decide such questions before final decision. Parks v. San Antonio Traction Co. [Tex.] 16 Tex. Ct. Rep. 186, 94 S. W. 331. Assignments directed to improper remarks of counsel and denial of new trial for newly discovered evidence while reviewable by supreme court to determine whether appellant is entitled to a new trial as a matter of law can be passed on by that court only after court of civil appeals has determined how far misconduct influenced verdict and whether new evidence was sufficiently important to justify new trial. Id.

87. Matters not made subject of cross assignments by plaintiff on appeal by defendant to appellate court will not be considered by supreme court on error by plaintiff. Gay v. Kohlsaat, 223 Ill. 260, 79 N. E. 77.

88. Where, on plaintiff's appeal, court of civil appeals rendered judgment of affirmance, while its opinion indicated a reversal, defendant's application to supreme court for writ of error was returned that error if any might be corrected. Moore v. Rogers [Tex.] 95 S. W. 500.

89. See 7 C. L. 235.

90. See § 15 F, post.

91. See Stare Decisis, 8 C. L. 1965.

92. Topping v. Cohn [Neb.] 109 N. W. 151. Where in action on contractor's bond, constitutionality of Code Civ. Proc., § 1203, under which bond was given, was questioned, and court decided that bond was enforceable as common law bond regardless of validity of statute, such decision was not obiter but constituted law of the case. People's Lumber Co. v. Gillard [Cal. App.] 90 P. 556.

93. Rankin v. Schofield [Ark.] 98 S. W. 674; Griesbach v. People, 226 Ill. 65, 80 N. E. 734; Ruprecht v. Henrici, 127 Ill. App. 350; Coppes v. Union Nat. S. & L. Ass'n [Ind. App.] 79 N. E. 553; Hocker v. Louisville & N. R. Co., 29 Ky. L. R. 842, 96 S. W. 526; Mead v. Mead [Ky.] 101 S. W. 330; Julius Kessler & Co. v. Veio [Mich.] 14 Det. Leg. N. 197, 111 N. W. 1085; Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1; Holland v. Seaboard Air Line R. Co. [N. C.] 55 S. E. 835; Currie v. Gaar, Scott & Co. [N. D.] 110 N. W. 83; Baker County v. Huntington [Or.] 87 P. 1036. Only questions decided are concluded. Indianapolis St. R. Co. v. Taylor [Ind. App.] 80 N. E. 436. Not only questions referred to in opinion but all others properly before court. McGrew v. Missouri Pac. R. Co., 118 Mo. App. 379, 94 S. W. 719. In suit against a carrier, presumed by court of appeals that supreme court on prior appeal decided that remedy afforded by Rev. St. § 1140 applied to actions grounded on § 1126. Id. Decision of appellate court in affirming order granting new trial, upon all questions raised, is conclusive on appeal from judgment rendered in new trial. Sublette v. St. Louis, etc., R. Co., 122 Mo. App. 389, 99 S. W.

been raised,[94] is the law of the case on a subsequent review of the same case, where issues and evidence are substantially the same,[95] and as a general rule this is true whether the former decision was right or wrong.[96] The decision of an interme-

467. Decision denying motion to dismiss appeal from part of judgment, rendered in action under Code Civ. Proc. §§ 2840-2842. on all questions raised by motion. In re Klein's Estate [Mont.] 88 P. 798. Matters of law. Dye v. Crary [N. M.] 85 P. 1038. As to correctness of instructions. Cleaver v. Louisville & N. R. Co., 30 Ky. L. R. 1059, 100 S. W. 223. That defendant was in contempt. Green v. Green [N. C.] 55 S. E. 818. Validity of a claim location. Emerson v. Yosemite Gold Min. & Mill. Co., 149 Cal. 50, 85 P. 122. That employers' liability act of 1893 is not unconstitutional as an ex post facto law or as violating obligation of contract. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Holding that judgment on the pleadings is same as a judgment on demurrer, and that a judgment relied on as res judicata belonged to class specified in Code Civ. Proc. § 1007, which are not conclusive unless it expressly so declares. Glass v. Basin & Bay State Min. Co. [Mont.] 90 P. 753. Holding that notice of injury gave to defendant sufficiently definite information as to description of place. Hammock v. Tacoma [Wash.] 87 P. 924. That a wife had a life estate in certain land at time of execution of a mortgage thereon. Burns v. Cooper [C. C. A.] 153 F. 148. Judgment refusing plaintiff a personal judgment. That plaintiff was not entitled to a personal judgment. Henry Vogt Mach. Co. v. Lingenfelser, 30 Ky. L. R. 654, 99 S. W. 358. Construction of written contract. Adams v. Thornton [Cal. App.] 90 P. 713; Neal v. Conwell, 127 Ga. 238, 55 S. E. 936. Construction of statute. St. Louis, etc., R. Co. v. Neal [Ark.] 98 S. W. 958. As to sufficiency of evidence. Ryan v. Brown, 104 N. Y. S. 871. That there was evidence tending to establish plaintiff's case. Cleveland, etc., R. Co. v. Alfred, 123 Ill. App. 477. That evidence was sufficient to make question one of fact for jury. Barrie v. St. Louis Transit Co., 119 Mo. App. 38, 96 S. W. 233; Burner v. Higman & Skinner Co. [Iowa] 110 N. W. 580; Phillips v. Hazen [Iowa] 109 N. W. 1096. That question of contributory negligence was for jury. Oliver v. Iowa Cent. R. Co. [Iowa] 109 N. W. 282; Horn v. La Crosse Box Co. [Wis.] 111 N. W. 522. That evidence was insufficient to require submission of question to jury. Baines v. Coos Bay, etc., Nav. Co. [Or.] 89 P. 371. Adjudication that an instruction in nature of demurrer to evidence was properly refused held in effect, a direct ruling on every question presented or that could have been raised under the demurrer. Dunn v. Nicholson [Mo. App.] 103 S. W. 114. Complaint impliedly held sufficient on former appeal by holding that demurrer should have been sustained to answer. Dailey v. Heller [Ind. App.] 81 N. E. 219. As to sufficiency of complaint to state cause of action for equitable relief. Foster v. Rowe [Wis.] 111 N. W. 688. Sufficiency of bill for injunction. Fry v. Radzinski, 121 Ill. App. 303. Complaint held on former appeal to state cause of action ex contractu and treated by both parties on retrial as ex contractu will be so treated on subsequent appeal. Western Union Tel. Co. v. Manker [Ala.] 41 So. 850. Decision on demurrer. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928. Supreme court will not reconsider grounds of demurrer which it has held on former appeal to be without merit. Drennen v. Griffin [Ala.] 43 So. 785. Questions on appeal from refusal of order to stay proceedings held same as those decided on former appeal from refusal to quash partition proceedings. In re McMahon's Estate, 215 Pa. 10, 64 A. 321. Judgment of court of appeals on remanding case to district court, taken in connection with refusal of supreme court to review it, held conclusive on issues thus finally decided in subsequent review by supreme court of judgment rendered by court of appeals on subsequent appeal in same case. Huntington v. Westerfield [La.] 44 So. 317. Decision of general term on appeal from an order of special term dismissing a complaint is law of the case on subsequent appeal to appellate division. Jones v. Jones, 103 N. Y. S. 141. Where circuit court of appeals affirmed a judgment for plaintiff but later on cross writ reversed such judgment on different questions, though the effect of the later decision was a reversal of the former, the two decisions not withdrawn were still the law of the case on a subsequent writ of error. Montana Min. Co. v. St. Louis Min. & Mill. Co. [C. C. A.] 147 F. 897. Though interlocutory judgment for an accounting affirmed on appeal is law of case where it is ambiguous, it will not be so interpreted as to do manifest injustice. Hasell v. Buckley, 103 N. Y. S. 377.

94. Mariner v. Ingraham, 127 Ill. App. 550. That new assignments of error are made on second appeal is immaterial. Leeds v. Townsend, 124 Ill. App. 582.

95. Where parties, cause of action, and issues are the same. Coppes v. Union Nat. S. & L. Ass'n [Ind. App.] 80 N. E. 984. Where record supports same conclusion. Malone's Committee v. Lebus, 29 Ky. L. R. 800, 96 S. W. 619. Where answer held on former appeal to be insufficient is afterwards amended but remains substantially the same, former ruling remains the law of the case. Dailey v. Heller [Ind. App.] 81 N. E. 219. Not where evidence is materially different. Adams v. Thornton [Cal. App.] 90 P. 713; Horn v. Arnold, Schwinn & Co., 124 Ill. App. 185. Whether changes resulted from honest motives was not for appellate court. Id. Decision that nonsuit was erroneous held not binding on subsequent appeal upon contention that verdict was against weight of evidence. Barth v. Borden's Condensed Milk Co., 104 N. Y. S. 882. No res judicata on a third appeal where first decree was reversed for master's refusal to consider defendant's testimony and second decree dismissing bill for want of equity was reversed because court permitted taking of an exception not made on objection before master and refused to re-refer cause. George Green Lumber Co. v. Nutriment Co., 127 Ill. App. 495.

96. Vogt v. Grinnell [Iowa] 110 N. W. 603; Hensley v. Davidson Bros. Co. [Iowa] 112 N.

diate court on a former appeal is not, however, binding on the court of last resort,[97] nor on a subsequent appeal to the same court, where the court of last resort has announced a different doctrine in the meantime.[98] Errors not assigned upon a first appeal cannot be assigned on a second one.[99]

§ 14. *Provisional, ancillary, and interlocutory relief.*[1]—When all the issues may be reviewed on appeal, extraordinary supervisory powers will not be exercised where there is no ground therefor beyond the ordinary delays of litigation.[2]

§ 15. *Decision and determination. A. Affirmance or reversal.*[3]—Assuming the existence[4] and the proper acquisition of appellate power,[5] the appellate review within the rules before pointed out[6] will ordinarily lead to affirmance, reversal or modification according to the absence or presence of error;[7] and the number of prior reversals cannot be considered to prevent reversal for prejudicial error.[8] A decree which does not pass on all the issues[9] or which operates on the rights of one not before the court[10] must be reversed. A case will not ordinarily be remanded without decision to permit of an amendment of pleadings,[11] or the hearing of newly discovered evidence.[12] Where destruction of the record renders review impossible, a reversal pro forma may be granted.[13] A profitless reversal will not

W. 227. Even though ruling has been disapproved by court in a case decided before second appeal. Western & A. R. Co. v. Third Nat. Bank, 125 Ga. 489, 54 S. E. 621.

97. Decision of court of appeals not law of the case on appeal to supreme court. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815. Decision of appellate court not binding on supreme court. Zerulla v. Supreme Lodge O. M. P. 223 Ill. 518, 79 N. E. 160.

98. Zerulla v. Supreme Lodge O. M. P., 223 Ill. 518, 79 N. E. 160.

99. Warren v. Chicago, etc., R. Co., 122 Mo. App. 254, 99 S. W. 16.

1. See 7 C. L. 238. See ante, § 5 and, also, the topic Jurisdiction, 8 C. L. 579, as to the original jurisdiction of appellate courts.

2. Murphy v. Police Jury of St. Mary Parish [La.] 41 So. 647.

3. See 7 C. L. 238.

4. See ante, §§ 4, 5.

5. See ante, §§ 6, 11.

6. See ante, § 13.

7. Is duty of appellate court to reverse for error plainly appearing, unless it can be said from consideration of entire record that no injury resulted to complaining party. Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 16 Tex. Ct. Rep. 847, 96 S. W. 1087. Supreme court can and should reverse only in cases where, in its judgment, there is reversible error in what was done, omitted, or declined to be decided in court of original jurisdiction. Yazoo & M. V. R. Co. v. Wallace [Miss.] 43 So. 469. Judgment for defendant will not be affirmed where reversible error appears, unless the petition presents a case of which the trial court has no jurisdiction, or it clearly appears that no matter can be introduced that will change the result. Miller v. Drought [Tex. Civ. App.] 102 S. W. 145. Where finding is so insufficient in form as not to be conclusive on appeal, the court may affirm the judgment if clearly supported by preponderance of the evidence; reverse if not so supported, ordering judgment with what appears to be the preponderance of the evidence, or remand for further trial and findings. Closuit v. John Arpin Lumber Co. [Wis.] 110 N. W. 222. Decree modified so as to eliminate personal judgment against appellant without considering matter on merits, where **respondent admitted that it was error** to render it, and asked for such modification. Majors v. Maxwell, 120 Mo. App. 281, 96 S. W. 731.

8. Indianapolis St. R. Co. v. Taylor [Ind. App.] 80 N. E. 436.

9. Where appellate court finds that plea to jurisdiction below is still undisposed of, it will reverse and remand in order that a final decree may be rendered settling so far as practicable the rights of the parties concerned. Bryan v. Curtis, 26 App. D. C. 95. Where amendment raising new issue was not filed until after taking of proof was completed, and testimony on such issue was not developed as fully as it might have been, held that, in interests of justice, decree would be reversed with directions to allow either party to introduce additional evidence as to it. Carlile v. Corrigan [Ark.] 103 S. W. 620. Where necessary question was expressly pretermitted by lower court, and case decided on wrong theory, held that judgment would be reversed and remanded for full adjudication. Peirce v. Halsell [Miss.] 43 So. 83.

10. Joint decree against several defendants will be reversed where court has never acquired jurisdiction over one of them. Sarasota Ice, F. & P. Co. v. Lyle & Co. [Fla.] 43 So. 602.

11. Only in exceptional cases, and there must be a fairly persuasive showing on the merits and it must appear that the failure to present the new cause of action or defense was not attributable to mere negligence. Dahlman v. Milwaukee [Wis.] 111 N. W. 675. Where it was held that plaintiff could not recover on an express contract, he was not entitled to a remand in order to allow him to file an amended petition relying on quantum meruit. Wade v. Nelson, 119 Mo. App. 278, 95 S. W. 956.

12. Yarbrough v. Swift & Co. [La.] 44 So. 121.

13. Barton v. Burbank [La.] 43 So. 1014.

be granted unless rights are thereby established,[14] nor will a judgment be reversed for errors which in no way prejudice the party complaining,[15] nor for a mere clerical misprision which may be corrected in the trial court.[16] Pro forma affirmance is sometimes allowed for failure to properly prosecute the appeal, such affirmance being governed by the same consideration as dismissed and treated with it.[17] On failure of the appeal to present any matter open to review, affirmance, not dismissal, will be ordered.[18] Reversal or affirmance must ordinarily be entire,[19] though a reversal in part of a severable judgment is proper in the absence of statute;[20] but the benefits of reversal may be limited to those who complained of the judgment,[21] or reversal may be limited to the issues erroneously decided.[22] Con-

14. Where the amount in controversy is small and the merits have been fairly litigated, there will be no reversal except for substantial error. Gibson v. Swofford, 122 Mo. App. 126, 97 S. W. 1007. Would not reverse where only $2.81 was involved. Spunner v. Roney, 122 Ill. App. 19. A judgment in an equity case will not be reversed and the case sent back for amendment of the complaint to allege a fact as to which there is a finding on sufficient evidence, but the complaint will be considered as amended. Brown v. Baldwin [Wash.] 89 P. 483. Where, if a reversal was granted, it would only be necessary for respondent to plead a former judgment by way of estoppel to again succeed, the appeal will be affirmed. Bird v. Winyer [Wash.] 87 P. 259. Where in a boundary line dispute the jury awarded the successful party a few inches too much, the error will not be disregarded under the maxim " Lex non minimum curat" where the strip extends under the eaves of appellant's house and may involve further litigation. Thornely v. Andrews [Wash.] 88 P. 757.

15. See Harmless and Prejudicial Error, 8 C. L. 1.

16. Where from data existing in the clerk's office a judgment could be corrected by a nunc pro tunc entry formally inserting the names of plaintiffs omitted, either in the caption or the body of the judgment, such judgment when aided by the statute of jeofailes will not be reversed. Dixon v. Hunter [Mo.] 102 S. W. 970.

17. See ante, § 11 G.

18. That the certificate of evidence is stricken does not necessarily result in affirmance. Stanmeyer v. Rosenwald, 121 Ill. App. 583.

19. Morehead v. Allen, 127 Ga. 510, 56 S. E. 745; First Presbyterian Church v. McColly, 126 Ill. App. 333. Money judgment in action at law a unit, and must be affirmed or reversed as to all defendants. Goldberg v. Harney, 122 Ill. App. 106. A judgment at law is a unit as to all defendants against whom rendered, and if erroneous must be reversed in toto. Lovejoy v. Raymond, 127 Ill. App. 519. Joint judgment in tort a unit, and affirmable or reversable as such. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334; United Breweries Co. v. Bass, 121 Ill. App. 299; Mulderig v. St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801. Rules given as to when a decree in equity will, and when it will not, be reversed in toto, though joint in form. Kelly v. Jacobs, 123 Ill. App. 251. Where erroneous decision as to one of several lots involved in suit to set aside tax titles was severable, gross sum was found due defendant for taxes, etc. Glos v. Greiner, 226 Ill. 546, 80 N. E. 1055. Where appellant appeals from an entire judgment, he cannot complain of a reversal of the entire judgment, though a part was in his favor. Powers v. World's Fair Min. Co. [Ariz.] 86 P. 15. Where judgment is rendered against the served and unserved members of a partnership, an appeal by the served members inures to all. Spotswood v. Dernham [Idaho] 85 P. 1108. Where a trial court failed to find on all the material issues, the case must be reversed entirely, since in a law case the lower court cannot make additional findings. Dillon Implement Co. v. Cleaveland [Utah] 88 P. 670. Where in an action to quiet title, the issues are distinct and separate as to the different mines, an order denying a new trial, erroneous as to some and correct as to others, will only be reversed so far as necessary to correct the errors. Robinson v. Muir [Cal.] 90 P. 521.

20. Reversal as to one of several joint tort feasors is authorized by Rev. St. 1899, § 866. Railroad company and employe thereof jointly sued for negligence, and evidence failed as to employe. Stotler v. Chicago & A. R. Co., 200 Mo. 107, 98 S. W. 509. Judgment for son for personal injuries affirmed, and judgment for his mother for loss of his services thereby reversed. Texas Mexican R. Co. v. Lewis [Tex. Civ. App.] 99 S. W. 577.

21. Under Ballinger's Ann. Codes & St. § 6521, providing that the supreme court may reverse a judgment as to any or all of the parties, and § 6504, that an appeal shall not inure to the benefit of one not appealing except from the necessities of the case, reversal of joint judgment does not reverse it as to joint tort feasor not appealing. Shreeder v. Davis [Wash.] 86 P. 198. A judgment binding upon defendants jointly which is reversed as the appeal of one stands reversed as to the nonappealing defendants as well. Bauer v. Hawes, 115 App. Div. 492, 101 N. Y. S. 455.

22. Gen. St. 1902, §§ 802, 803. Smith v. Whittlesey [Conn.] 63 A. 1085. See post, this section, subsection F, Mandate and New Trial. Where only error is in relief granted, reversal will be limited to correction of such relief., Delia v. Caprio [Conn.] 64 A. 340. On overruling of exceptions to allowance of injunction, the case may be remanded for purpose of ascertaining damages. Parker v. American Woolen Co. [Mass.] 81 N. E. 468. Judgment in claim and delivery affirmed as to issue of ownership, and case remanded. for new trial on issue of damages. Haggerty Bros. v. Lash, 34 Mont. 517, 87 P. 907.

currence of a majority of the court [23] as constituted at the time of decision [24] is necessary to a reversal, and, where the justices are equally divided in opinion, the judgment stands affirmed by operation of law.[25] In Florida a majority is constitutionally required for decision, and the rule as to affirmance by a divided court is abrogated, but if the division seems permanent all should vote for affirmance, which will be binding only in the instant case.[26] A judgment may be affirmed upon condition [27] or without prejudice to proceedings had since the appeal.[28] Affirmance acts of the date which judgment was rendered, or of the date of submission.[29] A reversal relates back to the time when judgment was entered,[30] unless the mandate thereon gives it a different effect.[31]

(§ 15) *B. Transfers and removals, certifications and reservations.*[32]—Certification and reservation by trial court to reviewing court is elsewhere treated.[33] An appeal may, if taken to the court not having jurisdiction, be transferred by a court of primary to one of final appeal,[34] or vice versa.[35] Transfer or certification in case of failure of judges to agree,[36] or in case of difficulty or importance,[37] or conflicting decisions,[38] is sometimes allowed.

23. Mugge v. Tate, Jones & Co. [Fla.] 41 So. 603. Where three justices of the district court of appeals are unable to agree, a writ of habeas corpus must be denied under Const. art. 6, § 4, requiring a concurrence of three to pronounce a judgment. Ex parte Sauer [Cal. App.] 84 P. 995.

24. Where a case was argued and submitted before the constitutional supreme court was changed from three to seven members, but was decided thereafter, no valid decision could be made by two judges, and a rehearing is proper. Denver & R. G. R. Co. v. Burchard [Colo.] 86 P. 749.

25. Mugge v. Tate, Jones & Co. [Fla.] 41 So. 603; Clark v. Wabash R. Co. [Iowa] 109 N. W. 309.

26. Lore v. Atlantic Coast Line R. Co. [Fla.] 43 So. 309. See 5 C. L. 237, n. 52.

27. Remittitur of excess. Lupton v. Taylor [Ind. App.] 79 N. E. 523; Williams v. Spokane Falls & N. R. Co. [Wash.] 87 P. 491.

28. Where an order refusing to allow an amendment of a referee's report so as to show the facts results in no prejudice to the appellant, the order will be reversed without prejudice to any proceedings had in the action since the filing of the report. Hudson & M. R. Co. v. Jackson, 115 App. Div. 168, 100 N. Y. S. 737.

29. Hence, where respondent dies after submission, a judgment of affirmance rendered after his death may be revived by his personal representative after it has been certified to the lower court. Birmingham R., L. & P. Co. v. Cunningham, 141 Ala. 470, 37 So. 689.

30. Reversal of decree construing will held to vacate partition as between parties, but not to affect titles acquired by innocent third parties. Ure v. Ure, 223 Ill. 454, 79 N. E. 153. Such a reversal requires an accounting and restitution between the parties. Id. Mortgagee who lent money to one of parties on faith of decree held an innocent third party, and as such not affected by the reversal. Id.

31. A decree adjudicating water rights is set aside and a readjudication had, but on appeal the judgment was reversed with instructions to reinstate the priorities granted by the first decree and to modify its decree accordingly, held that the effect of the mandate was to reinstate the original decree and the rights are determined thereby and not by the decree entered. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042.

32. See 7 C. L. 240.

33. See ante, § 2 B.

34. Under Act 1904, No. 56, p 135, the supreme court has the "right" to transfer to proper court, but may dismiss where it deems proper to do so. Samuel Israelite Baptist Church v. Thomas, 117 La. 253, 41 So. 564. Acts 1904, p. 135, no. 56, providing for transfer of cases appealed to wrong court where case has been otherwise "properly brought up," held not unconstitutional as conferring jurisdiction on appellate courts of cases of which they have none under constitution because it authorizes them to determine whether cases have been properly brought up, that being first question to be determined in any appeal, and court necessarily having jurisdiction to determine it regardless of such statute. Bolden v. Barnes [La.] 42 So. 934. In Missouri, where an appeal is taken to the court of appeals, in a case in which a constitutional question was raised, the cause will be certified to the supreme court, even though it seems to the court of appeals that the constitutional point was not well taken. Wabash R. Co. v. Flannigan, 118 Mo. App. 124, 100 S. W. 661. Constitutional questions will not authorize a transfer to the supreme court from the appellate court where neither court has any jurisdiction of an appeal in the particular case. Grand Rapids & I. R. Co. v. Railroad Commission [Ind.] 78 N. E. 981. A transfer from supreme court to court of appeals for want of jurisdiction of supreme court must be of such court's own motion. Parker & Co. v. Succession of Griffin, 117 La. 977, 42 So. 473.

35. Where jurisdictional amount is not involved, supreme court will transfer case to court of appeals. Pittsburg Bridge Co. v. St. Louis Transit Co. [Mo.] 103 S. W. 546.

36. Under Burns' Rev. St. 1901, § 13370, cause will be transferred to supreme court where cause is submitted to entire appellate and four of judges thereof fail to concur

(§ 15) *C. Remand or final determination.*[39]—On reversal the ordinary practice is to remand for a new trial,[40] but if the error is formal or clerical,[41] or a mere matter of computation,[42] the error will be corrected and the judgment affirmed as reformed or the party may be required to cure the error by remittitur,[43] unless such

in result. Talbott v. New Castle [Ind. App.] 81 N. E. 82. Under Acts 1901, p. 569, c. 247, case transferrable to supreme court where the six judges of the appellate court are equally divided. Chicago, I. & L. R. Co. v. Pritchard [Ind. App.] 78 N. E. 1044.

37. Questions certified by the circuit court of appeals to the United States supreme court must not contain more than a single question or proposition of law. As to liability on certain bonds. Quinlan v. Green County, 205 U. S. 410, 51 Law. Ed. 860. Questions of mixed law and facts cannot be certified by circuit court of appeals to Federal supreme court. Chicago, B. & Q. R. Co. v. Williams, 205 U. S. 444, 51 Law. Ed. 875. The Federal circuit court of appeals should not certify a question of law to the supreme court except in cases of grave doubt (Cella v. Brown [C. C. A.] 144 F. 742), and not after the case has been decided (Id.). Under Burns' Ann. St. 1901, § 1337j, subd. 1, requiring transfer to supreme court where appellate court decides "new questions of law erroneously," only the opinion of the appellate court will be looked to in determining whether there is ground for transfer, regardless of questions presented to such court for determination, but not decided. Grand Rapids & I. R. Co. v. Railroad Commission [Ind.] 78 N. E. 981.

38. Opinion of Texas court of civil appeals held not to be in conflict with opinions of other courts of civil appeals, so as to require certification to supreme court under Laws 1899, p. 170, c. 95. Texas & P. R. Co. v. Conner [Tex.] 100 S. W. 367.

39. See 7 C. L. 241.

40. Where defendant's motion to dismiss in an equity case was sustained, though case was triable de novo on appeal, on reversal it was remanded for a new trial to give defendant an opportunity to rebut the prima facie case made out by plaintiff. Shetler v. Stewart [Iowa] 110 N. W. 582. New trial will not be awarded on reversal solely for error in sustaining a motion in arrest of judgment. Field v. Winheim, 123 Ill. App. 227. Where the conclusion below is based upon erroneous rulings excluding testimony, will remand the case for a rehearing. Faust v. Southern R. Co., 74 S. C. 360, 54 S. E. 566. Where real estate is involved it is the practice to remand the cause on reversal in order that the titles may be cleared and supplemantary proceedings had where the land is situate. Foster v. Beidler [Ark.] 98 S. W. 968. Where under Rev. St. 1899, § 866, the supreme court reverses a judgment without remanding case for new trial, the lower court is without jurisdiction to proceed. Donnell v. Wright, 199 Mo. 304, 97 S. W. 928.

41. Where interest was added to verdict and judgment entered for lump sum, appellate court would order judgment only for amount of verdict "with interest" from date thereof. Green v. Sun Co., 32 Pa. Super. Ct. 521. Where names of plaintiffs are omitted from the caption or body of decree, such informality will be corrected in the appellate court where the record shows who the plaintiffs are. Dixon v. Hunter [Mo.] 102 S. W. 970. In affirming judgment for defendants, certain state and county officers, in a suit to restrain such officers from imposing a tax under certain sections of the Texas statute, c. 48, p. 358, Acts 29th Legislature, the court will correct the judgment so as to recite the recovery by the state of Texas of the amount therein stated. Texas Co. v. Stephens [Tex. Civ. App.] 99 S. W. 160. Where moving party failed to appear at hearing of motion to open default and order thereon improperly recited that motion was denied instead of dismissed, upon appeal from the order it can only be modified by making it conform to the facts. Levine v. Munchit, 101 N. Y. S. 14. A judgment erroneously requiring surety on appeal bond to pay certain sum to successful respondent instead of requiring him to deposit it to the credit of respondent pursuant to conditions of bond may be corrected on appeal. Mossein v. Empire State Surety Co., 102 N. Y. S. 1013.

42. Henry County v. Salmon [Mo.] 100 S. W. 20. Where jury returned verdict for more than was justified by the paper sued on, appellate court at plaintiff's request could reduce the amount to conform thereto. King v. McKinstry, 32 Pa. Super. Ct. 34. Error of 77 cents in calculation of interest not reversible. Ellis v. National City Bk. [Tex. Civ. App.] 14 Tex. Ct. Rep. 892, 94 S. W. 437. Failure to deduct unpaid premium from judgment on insurance policy. St. Paul Fire & Marine Ins. Co. v. Stogner [Tex. Civ. App.] 17 Tex. Ct. Rep. 260, 98 S. W. 218. Judgment in excess of specific amount shown by appellee's own evidence modified. McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929. Where judgment is correct except that it includes items not authorized by findings, it may be modified; Kern Valley Water Co. v. Kern County [Cal.] 90 P. 121. Allowance of $4.62 excessive attorney's fees not reversible but to be deducted from judgment. Trabue v. Wade [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 S. W. 616. Judgment allowing recovery of an engine and tender when verdict referred to engine only could be corrected on appeal. Jonesboro, etc., R. Co. v. United Iron Works Co., 117 Mo. App. 153, 94 S. W. 726.

43. Houston, etc., R. Co. v. Barr [Tex. Civ. App.] 99 S. W. 437; Lyttle v. Goldberg [Wis.] 111 N. W. 718; Lupton v. Taylor [Ind. App.] 79 N. E. 523; Blowers v. Southern R. Co., 74 S. C. 221, 54 S. E. 368; Gulf, etc., R. Co. v. Bates [Tex. Civ. App.] 16 Tex. Ct. Rep. 319, 95 S. W. 738. Code 1906, § 4910, providing that circuit court shall not in any case cause plaintiff to enter remittitur on pain of a new trial, but that motion for new trial shall be overruled where only error is that, in court's opinion, verdict is excessive, but that supreme court may reverse when verdict is excessive unless remittitur is entered, held unconstitutional as preventing defendants from having complete disposition of their rights below, and

correction involves the rights of a party not in court;[44] and though the appellate court will not, except where the appeal is triable de novo, find additional facts or adjudicate matters not tried below,[45] or proceed to the assessment of damages,[46] it may, if it has all the facts before it, proceed to do complete justice,[47] particularly if the case was heard below on agreed facts[48] or without a jury,[49] the courts inclining to a final disposition of the case if it can be justly made.[50] If it clearly appears on reversal that but one result could be reached on a retrial, the court will order judgment absolute,[51] or remand with specific directions to the court

as giving supreme court original jurisdiction. Yazoo & M. V. R. Co. v. Wallace [Miss.] 43 So. 469. Where it is apparent that the damages are excessive, but the court on appeal is unable to determine in what amount so that a remittitur could be ordered, the judgment will be reversed and a new trial granted. Babbitt v. Union Pac. R. Co. [Neb.] 110 N. W. 1014; Phoenix Assur. Co. v. Maryland Gold Min. & Development Co. [C. C. A.] 146 F. 501; Hebblethwaite v. Flint, 101 N. Y. S. 43; In re Stevens, 114 App. Div. 607, 99 N. Y. S. 1070; Ackerman v. True, 105 N. Y. S. 12.

44. Appellate court could not finally dispose of certain insurance funds where all the claimants were not parties to the appeal. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

45. Where testimony on issue not decided by trial court is conflicting, appellate court cannot find facts and give judgment accordingly. Steinfeld v. Zeckendorf [Ariz.] 86 P. 7. Where, in proceedings to set aside mortgage foreclosure appeal record shows real issue tried was the validity of mortgage and foreclosure, leaving other questions to be more fully heard if foreclosure was set aside, judgment absolute should not be granted on holding mortgage void. Curry v. Wilson [Wash.] 87 P. 1065. Where trial court erroneously awarded rents after a certain date, the supreme court cannot order an entry of judgment for a reduced amount in absence of finding or agreement of facts in respect thereto. Crane v. Cameron [Kan.] 87 P. 466. Cannot consider erroneously excluded evidence as admitted in passing on sufficiency of findings nor determine what findings should have been made with such evidence in the case. In re Miller's Estate [Utah] 88 P. 338. Under Hurd's Rev. St. c. 110, § 88, authorizing appellate court to recite in its final judgment, order, or decree fact found by it where the final determination of such court is based on findings in whole or in part different from those of the lower court, the appellate court is not authorized to recite in its judgment findings on an issue not raised below and to reverse without remanding. Gilmore v. Chicago, 224 Ill. 490, 79 N. E. 596. If record contains evidence sufficient to establish a fact, court on appeal may find it. Bautz v. Adams [Wis.] 111 N. W. 69.

46. When the appellate court reverses an order of the circuit court denying a motion to dissolve an injunction and orders the injunction dissolved, the circuit and not the appellate court should assess the damages. Fry v. Radzinski, 121 Ill. App. 303.

47. Moore v. Price [Tex. Civ. App.] 103 S. W. 234; New York Life Ins. Co. v. Thomas [Tex. Civ. App.] 103 S. W. 423; Board of County Com'rs v. Smith [Okl.] 89 P. 1121. Where judgment in action to annul tax title annulled title to other lands than those in which plaintiff claimed an interest, held that it would be modified to that extent at plaintiff's cost. Kernan v. Young [La.] 44 So. 1.

48. Miller v. Kern County [Cal.] 90 P. 119. Under the municipal court act where justice requires it, the court may modify a judgment absolute for defendant by directing a judgment of dismissal without prejudice to a new action. Aetna Life Ins. Co. v. Deparquet, Huot & Moneuse Co., 103 N. Y. S. 800. Where on appeal to the general term a reversal is ordered for an error of law in dismissing a complaint, it may order an interlocutory judgment for an accounting as the judgment which should have been entered below. Jones v. Jones, 103 N. Y. S. 141. The supreme court has jurisdiction to declare a judgment brought up by writ of error fully paid. Ducey v. Patterson [Colo.] 86 P. 109. Where from judgment in an action of trespass to try title only two of a number of defendants appealed, and no error was complained of except as to the location of the west line of plaintiff's survey, it was held that the appeal carried up the entire case and brought before the appellate court all of the parties in such a way as to enable it to determine the effect of its decision upon the rights of those who did not appeal, and to render such judgment as would fully protect all concerned. Thompson v. Kelley [Tex.] 101 S. W. 1074.

49. Davidson v. Equitable Securities Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 95, 96 S. W. 787. Heard entirely on written evidence. Reeder v. Eidson [Tex. Civ. App.] 102 S. W. 750. Judgment below held improper under findings and rendered for appellant. Matthews v. Fry [N. C.] 55 S. E. 787. Where, in a suit under Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1430), by an adverse claimant to a mining claim, there is no conflict in the evidence and the possession and right to patent is supported by the evidence so that a contrary decree would not stand, the failure of the court to find thereon does not necessitate a new trial. Slothower v. Hunter [Wyo.] 88 P. 36.

50. Where public or semi-public questions are involved, the appellate court will incline toward finally determining the merits of a controversy rather than upon mere technical or formal issues to send the case back to the trial court for obvious, and not apparently useful, amendment. Gordon v. Doran, 100 Minn., 343, 111 N. W. 272.

51. Dawdy v. Baker, 123 Ill. App. 72; Cleveland, etc., R. Co. v. Alfred, 123 Ill. App. 477; Quincy Gas & Electric Co. v. O'Donnell, 123 Ill. App. 456; McGinn v. New Orleans R. & Light Co. [La.] 43 So. 450; Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483; Crock-

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below.[52] This power is exercised with great caution and not in a case where further evidence [53] or an amendment of the pleadings [54] may change the result.

ett v. Etter, 105 Va. 679, 54 S. E. 864; De Board v. Camden Interestate R. Co. [W. Va.] 57 S. E. 279; Germania Fire Ins. Co. v. McChristy [Tex. Civ. App.] 101 S. W. 822; Haynes v. State [Tex.] 100 S. W. 912; Gilley v. Harrell [Tenn.] 101 S. W. 424; Ziegler v. Freedman, 105 N. Y. S. 283; Dahlman v. Milwaukee [Wis.] 110 N. W. 479. Under Acts, 1901, p. 1862, § 14, held that, where judgment of city court of Bessemer foreclosing mechanic's lien insufficiently described property, but complaint and proof sufficiently described it, supreme court would render such judgment as should have been rendered below. Salter v. Goldberg [Ala.] 43 So. 571.

52. Lindsay v. Lindsay, 226 Ill. 309, 80 N. E. 876; Pierce v. Varn, Byrd & Co. [S. C.] 57 S. E. 184. Direction that the plaintiff have leave to vacate the verdict and substitute therefor a judgment of nonsuit when the remittitur is made the judgment of the court below. Zipperer v. Savannah [Ga.] 57 S. E. 311. In Virginia the supreme court in reversing a decree granting a divorce on appellee's cross bill, and directing a dismissal of the cross bill and a grant of divorce to appellant on her bill, will direct the circuit court to make its own decree in relation to alimony and appellant's counsel fees. Code 1887, §§ 2261, 2263 (Code 1904, p. 1123). Davenport v. Davenport [Va.] 56 S. E. 562. In North Carolina, where a motion to nonsuit is made and the requirements of the statute are followed, and such motion denied, and on appeal to supreme court such decision is reversed, the case will be remanded with instructions to enter judgment dismissing the action. Hollingsworth v. Skelding, 142 N. C. 246, 55 S. E. 212. Where no error has intervened prior to entry of judgment, but court has erred in such entry, as when judgment is not entered according to law and findings, the judgment will be reversed and the case remanded with direction to enter proper judgment. Village of Shumway v. Leturno, 225 Ill. 601, 80 N. E. 403. Where the decision reversed involves a question of fact, the power of the appellate court to give specific directions on remand is subject to the same limitations as its power to review questions of fact. Rand v. Iowa Cent. R. Co., 186 N. Y. 58, 78 N. E. 574. Court of appeals cannot give specific direction on reversal of judgment of appellate division affirming judgment. Where the judgment of both the trial court and of the appellate division involved the decision of a question of fact. Id. Where on appeal from an order dismissing an action to enjoin a blacksmith shop as a nuisance the record is not sufficiently clear to enable the court to determine under what conditions the shop could be operated without constituting a nuisance, the case will be remanded with directions prescribing the conditions under which the shop could be maintained and directing an injunction if the shop could not be operated under those conditions. Hughes v. Scheurman Bros. [Iowa] 112 N. W. 198. Where judgment is reversed on account of omissions in officer's return and it does not appear whether or not such omission was due to error, the cause will be remanded with direction to allow officer to amend or to dismiss cause according to the omission in return was a mere mistake or not. Abbott v. Abbott, 101 Me. 343, 64 A. 615.

53. Lembeck & Betz Eagle Brew. Co. v. Sexton, 184 N. Y. 185, 77 N. E. 38; In re Froment, 184 N. Y. 568, 77 N. E. 9; Dunham v. Salmon [Wis.] 109 N. W. 959; Powers v. Worlds Fair Min. Co. [Ariz.] 86 P. 15. It is only under exceptional circumstances that final judgment on reversal will be ordered. Lenon v. Mutual Life Ins. Co. [Ark.] 98 S. W. 117. Judgment will not be rendered for plaintiff though the defense found below is without merit if another alleged defense was not passed on. Elliott v. Morris [Tex. Civ. App.] 17 Tex. Ct. Rep. 259, 98 S. W. 220. On reversal of judgment holding certificate of county clerk no proof of recording and indexing of abstract of judgment, case remanded to enable appellee to show that there was not a proper record and indexing of the abstract. Abee v. Bargas [Tex. Civ. App.] 100 S. W. 191. Though the Texas court of civil appeals may reverse a judgment for plaintiff in an action on an insurance policy, upon the ground that the policy was forfeited by nonpayment of the premium note, it is error if the evidence on that issue is conflicting for it to enter judgment for the insured. Reppond v. National Life Ins. Co. [Tex.] 101 S. W. 786. Where it does not conclusively appear that case was fully developed below, appellate court will remand for new trial instead of rendering judgment. Allen v. Anderson & Anderson [Tex. Civ. App.] 16 Tex. Ct. Rep. 343, 96 S. W. 54; Brown Hardware Co. v. Catrett [Tex. Civ. App.] 101 S. W. 559. Where nearly four years elapsed between commencement of suit and close of appellant's proofs, case would not be remanded in order to allow appellant to introduce further evidence of damages. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902. On reversal for failure to prove foreign law on which plaintiff's case depended. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359. Where a tax deed wholly insufficient in form to constitute evidence of title is admitted in evidence upon the assumption by both the parties and the court that it is in proper form, attention being first called to its insufficiency on appeal, a new trial will be granted to afford the party claiming under it an opportunity to establish his title by other evidence. Beggs v. Paine [N. D.] 109 N. W. 322.

54. Where a petition for a statutory penalty contained also a general averment of negligence, on holding the penalty statute invalid the court will remand for a trial on the issue of damages. Texas & P. R. Co. v. Allen [Tex. Civ. App.] 17 Tex. Ct. Rep. 256, 98 S. W. 450. Upon reversal if case was not fully developed below, appellate court will not direct decree in favor of appellants but will remand with directions to allow amendment of pleading and taking of further

(§ 15) *D. Findings, conclusions, and opinions on which decision is predicated.*[55]—The decision may be rendered by a quorum of the justices.[56] Courts of intermediate review are often required to find facts or file reasons for their decisions,[57] and where such findings have not been made, the case may, on further appeal, be remanded therefor.[58]

(§ 15) *E. Modifying or relieving from appellate decree.*[59]—An appellate court may at any time amend its judgment to conform it to the decision actually made.[60]

(§ 15) *F. Mandate and retrial.*[61]—The mandate or remittitur is usually withheld for a time fixed by the rules to permit of motion for modification [62] or reargument at the end of which time it is filed in the court below,[63] and jurisdiction is thereby transferred to the lower court.[64] Notice of filing is sometimes required.[65]

proof. Gaither v. Gage & Co. [Ark.] 100 S. W. 80. Where special count purporting to be in assumpsit but in reality in tort was improperly joined with counts in assumpsit, the appellate court upon reversing judgment overruling demurrer to such special count remanded the case with instructions to sustain the demurrer, with leave to plaintiff to amend, and in case of amendment for such further proceedings as should be proper. Pennsylvania R. Co. v. Smith [Va.] 56 S. E. 567. On reversing decree for insufficiency of the bill in cause in which a good case is disclosed by the evidence, appellate court will remand cause with leave to plaintiff to amend. Toothman v. Courtney [W. Va.] 57 S. E. 415. Where plaintiff, who has brought suit for himself and others not connected with his interest, stands upon his amended complaint after a demurrer thereto has been sustained, the cause, upon affirmance on appeal, will not be remanded to permit plaintiff to apply for leave to amend to substitute a cause in his own favor only. State v. Warner Valley Stock Co. [Or.] 87 P. 534. In Texas court of civil appeals, if evidence is undisputed, the rule obtains that a judgment will not be reversed in order that pleadings may be amended so as to conform to the facts, but if error appears proper judgment will be rendered. Stovall v. Gardner [Tex. Civ. App.] 103 S. W. 405.

55. See 7 C. L. 245.

56. Civ. Code 1895, §§ 5622, 5832, 5833, Acts 1896, p. 42. Greene County v. Wright, 127 Ga. 150, 56 S. E. 288. Fact that special order was passed that case be heard by full court did not make failure of one of justices who heard case participate in decision fatal to validity thereof.

57. Under Rev. St. 1895, art. 1039, requiring courts of civil appeals to file reasons for reversal in all cases, a cause cannot be reversed by agreement of the parties without reasons. Higgins v. Matlock [Tex. Civ. App.] 95 S. W. 571. The Texas statute, Act 29th Leg. p. 71, adding art. 1024a to chapter 17, tit. 27, Rev. St. 1895, requiring courts of civil appeals to announce in writing their conclusions upon all issues presented to them either of fact or law, where construed in connection with Rev. St. 1895, art. 1039, held to apply only to causes in which writ of error will lie to the supreme court. Tucker & Co. v. Freiberg [Tex. Civ. App.] 101 S. W. 837. Under Acts 29th Legislature, p. 71, c. 51, court of civil appeals is not required, in all cases where assignments of error are addressed to admission or exclusion of evidence, to file conclusions of fact, setting out in full the evidence admitted or excluded with the objections thereto. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658. Where supreme court of a territory adopted a previous opinion in the same case containing findings of fact, an objection that court below found no facts on which a review could be had in Federal supreme court was untenable. National Live Stock Bank v. First Nat. Bk., 203 U. S. 296, 51 Law. Ed. 192.

58. Where question of fact has not been passed on by court of civil appeals, supreme court cannot pass upon it but will send back record for a finding. Ellis v. Brooks [Tex.] 102 S. W. 94. When the supreme court of Texas is unable to review errors by reason of the failure of the court of civil appeals to pass on questions of fact, the cause will be remanded to the latter court for a determination of such questions. Failure to determine how far misconduct of counsel influenced verdict and how important was alleged newly-discovered evidence. Parks v. San Antonio Trac. Co. [Tex.] 16 Tex. Ct. Rep. 186, 94 S. W. 331.

59. See 7 C. L. 245.

60. City of Durham v. Eno Cotton Mills [N. C.] 57 S. E. 465.

61. See 7 C. L. 245.

62. A statute providing that no mandate shall issue to the court below unless taken within twelve months from decision on appeal reversing and remanding the judgment below does not apply where the judgment is affirmed in part and reversed in part. National Bk. v. Kenney [Tex.] 16 Tex. Ct. Rep. 271, 94 S. W. 328.

63. Filing of mandate with clerk of lower court is filing "in the court." Hollingsworth v. McAndrews, 79 Ark. 185, 95 S. W. 485.

64. Where appeal is dismissed without prejudice to another appeal, second appeal may be taken before remittitur is filed in trial court. Jackson v. Barrett [Idaho] 86 P. 270. The taking of depositions before mandate is filed is premature. Fugate v. Gill, 30 Ky. L. R. 731, 99 S. W. 602. Under a statute requiring the clerk to remit the record to the lower court within sixty days after judgment on appeal, and a rule of the court requiring him to keep the papers for thirty days in the absence of the consent of the parties, the supreme court loses jurisdiction where the record is transmitted to the lower court at the expiration of the period limited by the rule and within the period limited by statute, and a motion to recall the record will not lie. Ott v. Boring [Wis.]

It is conclusive on the court below which must implicitly follow its directions,[66]

111 N. W. 833. Where main case is not removed from trial court by appeal which results in dissolution of injunction, trial court may assess damages for granting injunction before mandate of reversal is actually filed with it. Fry v. Radzinski, 121 Ill. App. 303. Where new trial was granted by court on appeal, fact that no mandate was sent down may be waived by parties. Courtney v. Minneapolis, etc., R. Co., 100 Minn. 434, 111 N. W. 399. Where judgment for costs has been docketed in conformity with Supreme Court rule 23 (78 Pac. xi) on remand of case and as provided by Code Civ. Proc. § 958, court still has jurisdiction to modify it so as to make it conform to mandate. Chapman v. Hughes [Cal. App.] 86 P. 908. Rule requiring judgment of supreme court to be entered of record in circuit court has no bearing on jurisdiction of trial court to proceed after remand. Hollingsworth v. McAndrews, 79 Ark. 185, 95 S. W. 485.

65. Only necessary where trial is demanded at first term after reversal. Kirby's Dig. § 6174. Nunn v. Robertson [Ark.] 97 S. W. 293. Notice required by Proc. Act, § 83, Laws 1885, p. 229, 3 Starr & C. Ann. St. 1896, p. 3111, c. 110, par. 84, of refiling of case in trial court after reversal and remand, need not be in any particular form, and is sufficient if it indicates what cause it is that is to be redocketed and when the redocketing is to take place. Gage v. People, 223 Ill. 410, 79 N. E. 158. Designation of county treasurer as plaintiff instead of county collector held not to render notice insufficient where treasurer was ex officio collector. Id. Failure to designate order of supreme court as an order reversing and remanding the cause was not fatal to notice, since such an order is the only order of supreme court authorized to be filed in trial court. Id.

66. Specific directions wherein to amend a decree precludes amendment in any other respect. South Chicago Brew. Co. v. Taylor, 126 Ill. App. 498. Circuit court could not modify mandate relating to validity of a patent. Keasbey & Mattison Co. v. American M. & C. Co., 148 F. 91. Decree of foreclosure charging a wife's life estate in land held to conform to mandate without a modification requested by her. Burns v. Cooper [C. C. A.] 153 F. 148. Mandate construed to authorize allowance of reasonable counsel fee to attorney of trustee in bankruptcy. Page v. Rogers [C. C. A.] 149 F. 194. Supreme court having held that without aid of extrinsic evidence it appeared that there was no infringement of a patent, and ordered a new trial, lower court was required to direct a verdict for defendant regardless of new evidence. Cramer v. Singer Mfg. Co. [C. C. A.] 147 F. 917. On remand with specific directions to amend a decree, the cause on reinstatement is not one for hearing in the ordinary sense and need not be placed upon the chancery calendar. South Chicago Brew. Co. v. Taylor, 126 Ill. App. 498. Mandate held not to justify summary judgment for defendant but a retrial in conformity with opinion of appellate court, and peremptory instruction for defendant if the same evidence should be introduced. Quisenberry v. Chenault, 30 Ky. L. R. 229, 97 S. W. 803. Where mandate did not include interest, held proper for lower court to enter judgment without it. Citizens' Nat. Bk. v. Donnell, 195 Mo. 564, 94 S. W. 516. On reversal with instructions to render judgment in accordance with the opinion, all defenses which might have been raised were foreclosed, and it was not error for lower court to refuse to permit the filing of new defenses. Hollingsworth v. McAndrews, 79 Ark. 185, 95 S. W. 485. Direction to trial court to direct a verdict for plaintiff. Western & A. R. Co. v. Third Nat. Bk., 125 Ga. 489, 54 S. E. 621. Where a case has been remanded for a new trial, no final judgment can be entered until such trial has been had. Bauer v. Parker, 101 N. Y. S. 455. The court at special term has no power to correct a judgment in a material particular after the judgment has been affirmed on appeal. Ferguson v. Bien, 104 N. Y. S. 715. Where case is tried on merits and is remanded with direction to proceed in accordance with views of appellate court, it is the duty of trial court to enter judgment in accordance with such views and not to retry the case. Noble v. Tipton, 222 Ill. 639, 78 N. E. 927. Where a judgment for the foreclosure of a mortgage is reversed on the appeal of a defendant who was a bona fide purchaser, and the mandate ordered judgment reversed and cause remanded with directions to enter judgment as prayed for by the appealing defendant which was the dismissal of the complaint, that defendant's claim be established against plaintiff, and that plaintiff be barred from claiming title, such a mandate does not authorize the entry of a personal judgment in favor of plaintiff against person individually liable on the debt for which the mortgage was deposited as collateral. Marling v. Maynard, 129 Wis. 580, 109 N. W. 537. Where on appeal from refusal to quash partition proceedings it was held that appellant had not sufficient title to authorize him to object to the partition, a petition by appellant after remand to stay proceedings pending determination of title in action at law was properly refused on ground of prior adjudication. In re McMahon's Estate, 215 Pa. 10, 64 A. 321. Where decree is affirmed for reasons given by lower court, such reasons will be treated by latter as opinion of former. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 65 A. 870. Decree cannot be modified by trial court on points affirmed on appeal. Id. In Texas when the judgment of the district court is reversed by the court of civil appeals and judgment rendered by that court, it is proper for the lower court to have the judgment of the appellate court entered of record upon its minutes as its judgment. Sayles' Rev. Civ. St. art. 1035. Henry v. Red Water Lumber Co. [Tex. Civ. App.] 102 S. W. 749. And this it may do without citation or other notice to the parties against whom the judgment was rendered. Id. The designation of two of the prevailing parties in a judgment for costs on appeal, in the remittitur by the term, "et al.," the judgment being so docketed in the trial court does not annul the judgment as to the parties not named, where they were parties to the action and had never been eliminated. Garrigan v. Huntimer [S. D.] 111 N. W. 563 Where a cause is remanded with directions

and mandamus lies to enforce its commands.[67] In like manner an intermediate appellate court must enter judgment in accordance with the decision of the court of last resort.[68] The trial court should order such restitution [69] and otherwise undo its former proceedings [70] as the decision on appeal may require. A general reversal leaves the case as though it had not been tried [71] except as to matters adjudicated on the appeal,[72] as to which the decision is the law of the case [73] in so far as the

to award the custody of children to the mother on and after a certain date, an order awarding their custody after the date and "until the further order" of the court is a compliance therewith. Kane v. Miller [Wash.] 86 P. 568. Where on appeal from judgment enjoining defendant from interfering with plaintiff's operations on certain land, it was determined that plaintiff's rights had terminated, and judgment was reversed and cause remanded with directions to dismiss petition, held that it was duty of trial court to restore defendants to possession of land, regardless of fact that plaintiff had made improvements pending appeal. Penn Lubricating Co. v. Bay City Petroleum Co., 29 Ky. L. R. 1215, 96 S. W. 1118.

67. Mandamus held to lie to enforce proper fulfillment of mandate where there were no legal obstacles to entry of decree pursuant thereto, though chancellor erroneously found that there were. Nunn v. Robertson [Ark.] 97 S. W. 293.

68. Olschewske v. Summerville [Tex. Civ. App.] 95 S. W. 1. Case cannot be reopened below for purpose of hearing new testimony except so far as specifically designated by the supreme court. Id.

69. In applying the doctrine of restitution after reversal, the nature of the action and the peculiar facts of the case must be considered. Where, pending appeal from judgment for plaintiff in detinue, plaintiff to whom property had been delivered sold same, trial court after reversal and remand would not be compelled to issue order of restitution or for alternate relief by payment of value and damages. Ex parte Wellden [Ala.] 42 So. 632. Where upon reversal of a decree for plaintiff, in an action involving title to real estate, the appellate court, through oversight, dismisses the complaint instead of remanding the cause, the trial court should, after proper notice, make restitution of what was taken under its erroneous decree, and appellants have a clear remedy at law. Therefore a writ of restitution will not be granted. Foster v. Beidler [Ark.] 98 S. W. 968.

70. Where a judgment has been reversed on error and remanded without specific directions, the trial court should retrace its steps to the point where the first material error occurred, and from that point the trial should progress anew, unless from the nature of the error, or the connection in which it occurred, a trial de novo is necessary to correct it. Colby v. Foxworthy [Neb.] 110 N. W. 857. But, where the court proceeds to try the case de novo, it is not at liberty to disregard the evidence taken and enter judgment on the findings of the former trial. Id. The court on appeal will not review the sufficiency of the evidence taken at a second trial where the judgment appealed from was entered upon findings made at a former trial. Id. Where upon reversal and remand without directions the trial court permitted plaintiff to file an amended petition, subsequently striking it out on motion as a departure, and entering judgment upon the record, a reversal of the order striking out the amended petition is in effect a determination that the case was not to be decided upon the findings made upon the first trial in the district court, and it was then too late for either party to insist that the first mandate required the decree to be entered on such findings. Id.

71. Zerulla v. Supreme Lodge O. M. P., 223 Ill. 518, 79 N. E. 160; Hartford F. Ins. Co. v. Enoch, 79 Ark. 475, 96 S. W. 393; George Green Lumber Co. v. Nutriment Co., 224 Ill. 234, 79 N. E. 621. A general reversal without specific directions awards a new trial. Riley v. Loma Vista Ranch Co. [Cal. App.] 89 P. 849. Where, upon a reversal of a judgment for a defendant, a judgment is entered against him on motion on the findings of fact made against his codefendants, there is not a new trial within Code Civ. Proc. § 656. Id. Where a judgment is reversed because the findings are not sustained by the evidence, such findings are of no further effect, and a subsequent judgment cannot be based thereon. Id. Where an appellate court does not decide a case on its merits but reverses and remands it for error of law preceding verdict, appellant is entitled to a new trial. Seymour v. Richardson Fueling Co., 123 Ill. App. 401. Plaintiff claimed title to certain lands as accretion, while defendant asserted that it first appeared as an island and by accretion thereto became attached to plaintiff's land. The court found for defendant and on appeal it was held that the evidence justified the finding but the court erred in not awarding plaintiff a strip not included in the island, and a general order of reversal was made. Held that plaintiff could relitigate his original claims. Glassell v. Hansen, 149 Cal. 511, 87 P. 200. Where upon appeal from a judgment refusing to grant a new trial there is a reversal and remand for proceedings consistent with the opinion, and the opinion simply decides that on the facts presented appellants are entitled to a new trial, the rights of the parties are not concluded, but they are remitted to the trial court for a trial of the matters in issue. Fugate v. Gill, 30 Ky. L. R. 731, 99 S. W. 602.

72. Western & A. R. Co. v. Third Nat. Bk., 125 Ga. 489, 54 S. E. 621. Where a case is remanded with directions that a new trial be granted, "or if either party does not care to introduce new testimony the court may make findings of fact and conclusions of law and enter judgment," etc., and plaintiff elects to submit his case on the evidence of the former trial, the judgment will not be disturbed on the ground that no evidence was introduced, and nonsuit ought to have been granted. Huber v. Mother Aurelia of St. Joseph's Hospital [Idaho] 89 P. 942. Where chancellor found that land in con-

evidence is in legal effect the same.[74] A party may amend his pleadings[75] and

troversy belonged to defendants and dismissed action, and hence did not adjudicate plaintiff's claim for rents and damages, held that reversal of judgment with directions to enter decree for plaintiffs necessarily implied that court should enter decree for recovery of land and adjudicate any rights flowing therefrom, and that failure of appellate court to direct finding for plaintiffs on question of rents and damages was not decision that they were not entitled thereto. Munn v. Robertson [Ark.] 97 S. W. 293.

Limited retrial may be ordered. Smith v. Whittlesey [Conn.] 63 A. 1085. Where in an action for injuries the only error related to the assessment of damages the circuit court of appeals had jurisdiction on reversal to limit retrial to the question of damages. Rev. St. § 701. Farrar v. Wheeler [C. C. A.] 145 F. 482. Where a portion of the verdict was unauthorized, court would not direct that only the amount of that portion be found and deducted from verdict already rendered. Id.

73. Illinois Cent. R. Co. v. Stith's Adm'x, 30 Ky. L. R. 531, 99 S. W. 303; Fidelity & Casualty Co. v. Southern R. News Co. [Ky.] 103 S. W. 297; Brackett & Co. v. Americus Grocery Co., 127 Ga. 672, 56 S. E. 762; Hollingsworth v. McAndrew, 79 Ark. 185, 95 S. W. 485; Reilly v. Freeman, 109 App. Div. 4, 95 N. Y. S. 1069; Gray v. Merchants' Ins. Co., 125 Ill. App. 370; National L. Ins. Co. v. Anderson [Ky.] 102 S. W. 323. The court on retrial is bound by a decision of the appellate court that questions of contributory negligence and assumption of risk were for the jury. Kiernan v. Eidlitz, 100 N. Y. S. 731. In so far as instructions are not criticised on appeal, they are in legal effect approved, and it is, therefore, proper to give them on the second trial. National L. Ins. Co. v. Anderson [Ky.] 102 S. W. 323. All questions which were presented to the appellate court by the record are concluded by its opinion, whether passed on in the opinion or not. Id. Where judgment on directed verdict had been reversed on the ground that the evidence was sufficient to take the case to the jury, the court is without power in a subsequent trial to set aside the verdict on the ground of the insufficiency of the evidence. Hensley v. Davidson Bros. Co. [Iowa] 112 N. W. 227. Where issues are fixed by decision retrial must be conferred thereto. Kincheloe v. Smith [Ky.] 102 S. W. 335. Prayer for instruction not discussed or approved on appeal need not and if erroneous should not be granted on retrial. Baltimore Belt R. Co. v. Sattler [Md.] 64 A. 507. Where overruling of demurrer to complaint is reversed, judgment sustaining the demurrer must be entered on remand, no change in pleadings having been made. Converse v. Aetna Nat. Bk. [Conn.] 65 A. 1064. Adjudication of reviewing court must be given effect by trial court on remand, though there is no specific direction in the remittitur, as where in suit challenging validity of license to keep dram shop on certain premises the supreme judicial court held that the license was invalid, it was the duty of the trial court to enter judgment of ouster, though the remittitur contained no such direction, and it was improper to allow the filing of additional pleas or to have other evidence. Griesbach v. People, 226 Ill. 65, 80 N. E. 734. Upon second trial after judgment on appeal eliminating every issue but one, it is not error to refuse to give an instruction on any other issue. Illinois Cent. R. Co. v. Stith's Adm'x, 30 Ky. L. R. 531, 99 S. W. 303. Where an instruction is upheld on appeal, it is, upon a second trial below, the law of the case. Illinois Cent. R. Co. v. Houchins [Ky.] 101 S. W. 924. Supreme court not bound on retrial by findings of fact by court of errors and appeals unless facts are same as on former trial. Sisters of Charity of St. Elizabeth v. Corey [N. J. Err. & App.] 65 A. 500. Same rule applies as to facts involved in a mixed question of law and fact. Id.

74. Holding that facts proved did not show waiver held not res adjudicata on retrial in lower court at which evidence was materially different. Hartford F. Ins. Co. v. Enoch, 79 Ark. 475, 96 S. W. 393.

75. Commonwealth v. Barker [Ky.] 103 S. W. 303; Hollingsworth v. Barrett [Ky.] 102 S. W. 330; Fugate v. Gill, 30 Ky. L. R. 731, 99 S. W. 602. Upon reversal of an order sustaining a bill of interpleader on the ground that the amount the interpleader admits to be due is less than that demanded by one of the claimants, if the discrepancy is small, the interpleader on remand may amend his allegation as to the amount due. Smith v. Grand Lodge A. O. U. W. [Mo. App.] 101 S. W. 662. The filing by appellants of an amended pleading before the mandate had been filed as required by the Kentucky statute, Civil Code of Practice, § 761, was premature, and it was proper for the lower court to strike it from the record. Fugate v. Gill, 30 Ky. L. R. 731, 99 S. W. 602. Where judgment in favor of county enjoining issue of tax deed was reversed because it did not find amount due purchaser by county, it was proper to allow county to file replication on remand if necessary to let in evidence as to amount thus due. Butts v. Peoria County, 226 Ill. 270, 80 N. E. 765. On affirmance by court of appeals of judgment of appellate court affirming an order overruling a demurrer, express leave to the demurrant to plead over is not necessary where such leave is granted by the judgment affirmed. Cassidy v. Sauer [N. Y.] 80 N. E. 625. An amendment involving a change of theory is not allowable when it will require a new trial upon an issue finally disposed of by the appellate court. Where deed was held void on account of nondelivery, and case was remanded with direction to proceed in accordance with views of appellate court, an amendment alleging that the deed was intended as a testamentary disposition of the property was not allowable. Noble v. Tipton, 222 Ill. 639, 78 N. E. 927. Where a complaint is held defective on appeal, the plaintiff may on paying the taxable costs of the appellate courts amend his pleadings. House v. Carr, 103 N. Y. S. 929. The special term has power to amend a complaint so as to make it conform to a decision of the court of appeals, though an order dismissing the complaint was affirmed by the latter court with leave to the plaintiffs to "apply to the supreme court for such relief as they may be advised." Town of Palatine v. Canajoharie Water Supply Co., 101 N. Y. S. 810.

introduce additional evidence,[76] and a new trial for newly discovered evidence [77] or other cause not involved in the appeal [78] is sometimes allowed after affirmance.

§ 16. *Rehearing and relief thereon.*[79]—After final decision, a motion for rehearing may in the discretion of the court [80] be entertained to correct error or oversight of the court.[81] A motion based on points not urged at the hearing,[82] or one which is a mere reargument of points decided,[83] will not be considered except in cases of great doubt or where there was a dissenting opinion,[84] nor, as a rule, will amendments of the record be allowed.[85] On grant of a rehearing, the case stands as if there had been no hearing,[86] unless the rehearing is restricted in scope.[87] The petition for rehearing must be respectful in tone,[88] and be filed within the time limited [89] and before jurisdiction is lost,[90] the filing thereof not operating as

Where on a former trial the case was tried upon the issue as to whether an exclusive agency for the sale of land was broken by a sale made by the owner personally, and decided on appeal upon that issue, on a subsequent trial the plaintiff cannot amend so as to set up an issue that the contract was broken by a sale through another agent. Ingold v. Symonds [Iowa] 111 N. W. 802. Where petition warranted only recovery of nominal damages, but was sufficient to that extent, held that, on reversal of judgment for defendant and remand, he might have leave to amend. Shepherd v. Gambill, 29 Ky. L. R. 1163, 96 S. W. 1104.

76. Where judgment in favor of county enjoining clerk from issuing tax deed was reversed generally because it did not find amount due holder of certificate, it was proper on remand to receive evidence of amount so due. Butts v. Peoria County, 226 Ill. 270, 80 N. E. 765. Where defendant's exceptions to denial of motion to dismiss for lack of evidence were sustained. Clark v. Middleton [N. H.] 66 A. 115.

77. The trial court has power to grant a new trial on the ground of newly-discovered evidence, though its judgment has been affirmed by the supreme court of the United States. James McCreery Realty Corp. v. Equitable Nat. Bk., 102 N. Y. S. 975.

78. The trial court has power to grant a new trial in an action for the obstruction of a highway on the ground that while the title to the land was in the United States a township could not acquire title by user, though a judgment against the defendant was affirmed on appeal where that question was not presented. Parkey v. Galloway [Mich.] 14 Det. Leg. N. 34, 111 N. W. 348.

79. See 7 C. L. 248.

80. Twaddle v. Winters [Nev.] 89 P. 289.

81. Misstatement in opinion as to who sent a certain letter, not affecting the result, not ground for rehearing. Guillaume v. K. S. D. Fruit Land Co. [Or.] 88 P. 586.

82. Brandon v. West [Nev.] 88 P. 140; Pomeroy v. Wimer [Ind.] 79 N. E. 446; Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033; Aetna L. Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245; Supreme Tribe of Ben Hur v. Miller, 122 Ill. App. 489; Supreme Hive of Ladies of Maccabees v. Harrington [Ill.] 81 N. E. 533. Too late on rehearing for debtor to claim that amount due was less than admitted in pleading. Trabue v. Wade [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 S. W. 616. New case cannot be made on petition for rehearing, nor can matters then be insisted upon which were not presented in the original case. Long v. Garey Inv. Co. [Iowa] 112 N. W. 550. Claim that statute was unconstitutional not made in original brief cannot be made on rehearing. See Sup. Ct. Rule 22 (55 N. E. v). Indianapolis St. R. Co. v. Kane [Ind.] 81 N. E. 721.

83. With reference to costs of intervention and opposition, the rule laid down on hearing is the law of the case on rehearing. Campbell v. Campbell Co., 117 La. 418, 41 So. 702.

84. The fact that one of the justices did not concur in the opinion as to one of the points decided is not ground for a rehearing as to such point. Moon v. Pere Marquette R. Co., 143 Mich. 125, 13 Det. Leg. N. 255, 108 N. W. 78.

85. Schneider v. Metcalf [Iowa] 109 N. W. 298; Smith v. Gustin [Ind.] 81 N. E. 722. That amendment of record showing entry of judgment appealed from was served on opposing counsel and mailed to clerk for filing is not sufficient to warrant allowance of such an amendment on rehearing after dismissal of appeal, original amendments never having been filed by clerk. Schneider v. Metcalf [Iowa] 109 N. W. 298. If no valid excuse is offered why jurisdictional facts were omitted in record, motion will be overruled. Bower v. Legg [Tex. Civ. App.] 101 S. W. 839.

86. Fleisher Bros. v. Hinde, 122 Mo. App. 218, 99 S. W. 25.

87. The judgment from which a restricted rehearing is granted continues to stand, and is decisive of all issues not embraced in the order of rehearing. Levy v. Levy, 117 La. 779, 42 So. 267.

88. Brief on a motion for a rehearing held so disrespectful and discourteous in its reference to the opinion of the court on the former hearing as to justify its being stricken from the files of the supreme court. Lynch v. Ryan [Wis.] 112 N. W. 427.

89. Under rules of court, motion for rehearing filed after adjournment of term at which decision was rendered will not be considered. Greene County v. Wright, 127 Ga. 150, 56 S. E. 288. The rule of the circuit court of appeals requiring a petition for rehearing to be filed within thirty days after filing of opinion is one of convenience and should not be enforced where the point raised is a reversal of the authority on which decision was based after time for petition to rehear but before the court had lost jurisdiction over judgment by expiration of term. Unitype Co. v. Long [C. C. A.] 149 F. 196.

90. A motion for a rehearing as used in a

a stay.[91] Amendment of the petition before hearing thereon may be allowed.[92] Renewal of a motion once denied will rarely be allowed.[93]

§ 17. *Liability on bonds and damages and penalties for delay.*[94]—Where the appeal was wholly ineffectual,[95] the bond is without consideration. Bonds given on successive appeals are cumulative.[96] An assignee pendente lite of the respondent's cause of action may recover on the supersedeas bond.[97]

In the absence of fraud, mistake, or circumstances, working an estoppel, a surety on a supersedeas bond can be held only for consequences of the proceedings in which the instrument was given,[98] and his liability cannot extend beyond the terms of the bond,[99] and arises only on breach of its conditions.[1] It is immaterial to such liability that the loss was not by fault of the appellant.[2] Interest may be charged against a surety from the time his liability is fixed.[3]

A surety is estopped by the judgment against his principal [4] and by the recitals of the bond.[5] Where no judgment is rendered against the appellant because of a discharge in bankruptcy, the sureties on the appeal bond will not be liable,[6] but discharge of the principal after judgment will not affect the liability of the sure-

statute requiring the presence of the record in the appellate court for the purpose of such motion does not refer to a motion for a reargument which is a motion in the nature of a motion for a rehearing. Ott v. Boring [Wis.] 111 N. W. 833.

91. The mere filing of a petition for a rehearing does not operate to suspend a judgment or to continue in force a restraining order previously granted by one of the justices of the supreme court, under § 4148 of the code, unless the court or one of the justices so order. State v. Cahill, 131 Iowa, 286, 108 N. W. 453.

92. Where a motion for leave to assign an additional reason as a ground for a rehearing was made on notice and filed within six days after the filing of the petition for a rehearing and before the petition had been considered, the application should be granted. Denver & R. G. R. Co. v. Burchard [Colo.] 86 P. 749.

93. Where a petition for a rehearing has been denied, a motion to modify or vacate the decision on alleged error, in a controlling matter of law which was not advanced on the original hearing, will be dismissed. Brandon v. West [Nev.] 88 P. 140. A second application for a rehearing after the denial of the first will not be entertained. Id. In Louisiana a rehearing cannot be had after judgment on rehearing unless permission for the second rehearing is reserved. Succession of Morere, 117 La. 543, 42 So. 132.

94. See 7 C. L. 249.

95. Appeal dismissed for lack of jurisdiction. Davis v. Huth [Wash.] 86 P. 654. No action lies on an appeal bond given on appeal from a judgment at law in a Federal court. United States v. Morris' Heirs, 153 F. 240.

96. Obligee may proceed upon either or both until he has obtained satisfaction. Obligors in one could not defend that creditor had brought suit upon the other. Fidelity Deposit Co. v. Cooney, 127 Ill. App. 523.

97. Ellis v. Cross, 6 Ind. T. 268, 97 S. W. 1030.

98. Under a statute providing that an undertaking on appeal to the circuit court shall be conditioned that appellant "will diligently prosecute his appeal to effect and pay all damages and costs which may be awarded against him on such appeal," a surety on a bond given on appeal from the county to the circuit court is not liable for costs incurred on an appeal to the supreme court. Breed v. Weed [Wis.] 110 N. W. 197. Where the recovery of land and not of the buildings thereon is sought in a suit of unlawful detainer, recovery cannot be had on the supersedeas bond for detention of the buildings pending appeal. Ellis v. Cross, 6 Ind. T. 268, 97 S. W. 1030.

99. Under a bond obligating a surety in case of the affirmance of the order appealed from to make restitution of a certain amount by depositing it to the credit of the respondent in a certain bank, a judgment requiring the payment of the amount to the respondent is erroneous. Mossein v. Empire State Surety Co., 102 N. Y. S. 1013.

1. Party who by appeal gained the right to further possession of land for ten months held to have so far prosecuted appeal to effect as to preclude recovery on supersedeas bond for use and occupation during that time. Crane v. Buckley, 203 U. S. 441, 51 Law. Ed. 260.

2. A supersedeas bond given by an appealing mortgagor in foreclosure under which he holds the property subject to final orders is a forthcoming bond, and where the property is destroyed by fire pending appeal, the obligors are liable. Perry v. Tacoma Mill Co. [C. C. A.] 152 F. 115.

3. Mossein v. Empire State Surety Co., 102 N. Y. S. 1013.

4. That property was not covered by a mortgage as it was adjudged to be by decree of foreclosure. Perry v. Tacoma Mill Co. [C. C. A.] 152 F. 115.

5. Estopped to deny the validity of the judgment recited therein. McCarthy v. Alphons Custodis Chimney Const. Co., 125 Ill. App. 119. Not estopped to deny the existence of the judgment recited in the bond where on appeal appellee procures a dismissal on the ground that he had obtained no judgment. Linvill v. McDowell, 127 Ill. App. 303.

6. Otto Young & Co. v. Howe [Ala.] 43 So. 488.

ties.[7] Summary judgment against the sureties in the appellate court is proper only on statutory authorization.[8]

Damages and penalties for delay[9] are allowed in some states.

§ 18. *Costs*[10] on proceedings for review are elsewhere treated.

APPEARANCE.

§ 1. General; Special; What Constitutes Each (232). General Appearance (232). Appeal (234). A Special Appearance (234).

§ 2. Who May Make or Enter (235).

§ 3. Effect (235). Withdrawal or Vacation (236).

This topic deals only with appearance as giving jurisdiction. Waiver of non-jurisdictional defects by failure to make timely objection is elsewhere treated.[11]

§ 1 *General; special; what constitutes each. General appearance.*[12]—The general rule is that an appearance for any other purpose than to question the jurisdiction is general.[13] Every appearance not limited in terms is general.[14] Any step looking to a hearing on the merits is a general appearance; thus one appears generally by requesting time to plead,[15] asking a continuance,[16] filing a counterclaim,[17] answer,[18] or demurrer,[19] or proceeding to set aside an ex parte order,[20] dissolution of an attachment by giving the statutory bond to pay any judgment which may be recovered,[21] participating in the trial,[22] or filing a motion challenging a judg-

7. Slusher v. Hopkins, 30 Ky. L. R. 257, 97 S. W. 1128.

8. Under Rev. St. 1895, art. 1028, upon appeal to the court of civil appeals from a separable judgment if the court affirms the personal judgment against appellant but sets aside that part of the judgment foreclosing a lien, the appellate court will render judgment against the sureties on the appeal bond. Russell v. Deutschman [Tex. Civ. App.] 100 S. W. 1164. Damages on a supersedeas will be awarded on dismissal of an appeal taken by a county or other municipality, though it may be impracticable to collect the judgment. Nelson County v. Bardstown, 30 Ky. L. R. 408, 97 S. W. 765. Failure to award damages on a supersedeas on dismissal of an appeal is a mere clerical error which may be corrected on motion, though time for rehearing has expired. Id. Damages will be awarded on a supersedeas where appeal is dismissed for want of jurisdiction and judgment is for the payment of money. Id. It is only where there has been a recovery of a money judgment or decree that a summary judgment against the sureties on the supersedeas bond is authorized. Their liability in other respects on the bond must be tested by an action at law on the bond after the decree has been executed. Bolling v. Fitzhugh [Ark.] 101 S. W. 173.

9. See 5 C. L. 247. Appeal in action against carrier for damages for loss of baggage held taken for delay only, and ten per cent. penalty allowed. Ft. Worth & R. G. R. Co. v. McCarty [Tex. Civ. App.] 15 Tex. Ct. Rep. 810, 94 S. W. 178. Where trivial error was consented to below. Ellis v. National City Bk. [Tex. Civ. App.] 14 Tex. Ct. Rep. 892, 94 S. W. 437. Penalty imposed for delay where questions presented had been repeatedly passed upon. City of Chicago v. Blaine, 126 Ill. App. 102.

10. See Costs, 7 C. L. 956.

11. See Saving Questions for Review, 8 C. L. 1822, and topics dealing with the particular proceeding in question.

12. See 7 C. L. 251.

13. Zobel v. Zobel [Cal.] 90 P. 191.

14. Stone v. Union Pac. R. Co. [Utah] 89 P. 715. Entry of appearance in a suit after the filing of a cross petition therein against the parties so entering their appearance. First Nat. Bk. v. Bedford [Ark.] 102 S. W. 683.

15. Within the rule limiting the right of removal of causes from State to Federal courts. Bryson v. Southern R. Co., 141 N. C. 594, 54 S. E. 434.

16. Zobel v. Zobel [Cal.] 90 P. 191; Allen v. Welch [Mo. App.] 102 S. W. 665. Even though orally asked. Zobel v. Zobel [Cal.] 90 P. 191.

17. Merchants' Heat & Light Co. v. Clow & Sons, 204 U. S. 286, 51 Law. Ed. 488.

18. Choctaw, etc, R. Co. v. Hickey [Ark.] 99 S. W. 839. Filing a general demurrer for want of facts, stipulating for appearance in the cause, and answering to the merits, is a submission of the person of the party to the jurisdiction of the court. Stone v. Union Pac. R. Co. [Utah] 89 P. 715. Demurrer and answer to a bill is equivalent to a general appearance so far as the jurisdiction of the court over the person is concerned. Rosenbleet v. Rosenbleet, 122 Ill. App. 408. To an amended complaint stating a new cause of action. Chicago, etc., R. Co. v. Fitzhugh [Ark.] 100 S. W. 1149.

19. Stone v. Union Pac. R. Co. [Utah] 89 P. 715; Holiday v. Perry [Ind. App.] 78 N. E. 877; Rosenbleet v. Rosenbleet, 122 Ill. App. 408; Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458. After general demurrer to a petition is overruled, it is too late to object to the jurisdiction of the court over the person of the demurrant. Ballard v. American Hemp Co., 30 Ky. L. R. 1080, 100 S. W. 271.

20. In re Bank of Newcastle [Wyo.] 89 P. 1035.

21. Butcher v. Cappon & Bertsch Leather Co. [Mich.] Det Leg. N. 266, 112 N. W. 110.

22. Farmers' Bk. v. St. Louis, etc., R. Co., 119 Mo. App. 1, 95 S. W. 286.

ment as entered without the court having jurisdiction over the persons of the movants.[23] Merely testifying or a witness for the plaintiff in a cause by a defendant who does so solely at the instance of the plaintiff is not an appearance by him as a party.[24] A mere agreement for postponement made out of court for the convenience of counsel has been held not a general appearance.[25] The rule that participation is an appearance is limited by the scope of the proceeding,[26] and a like restriction is read into the Iowa statute providing that an appearance for any purpose connected with the cause will be taken to be a general appearance is not to be deemed wholly unrestricted in meaning.[27] A general appearance will not ordinarily result from a proceeding which looks to the questioning of jurisdiction,[28] as a motion to quash the service of process [29] plea to the jurisdiction,[30] or removal to Federal court under special appearance.[31] Nor, if one objects to the jurisdiction on every appropriate occasion, does he lose the benefit of his objections by proceedings taken after they are overruled,[32] unless he asks affirmative relief,[33] but the benefit of a special appearance is lost when a general appearance is entered after the objection taken by special appearance is adversely ruled upon.[34] It is held in Kentucky that an answer in bar pleaded with an answer denying jurisdiction of the person of the defendant is not equivalent to an appearance.[35] In Michigan pleas

23. Notwithstanding recitals therein purporting to make it a special appearance. Bain v. Thoms [Wash.] 87 P. 504.

24. Mauck v. Rosser, 126 Ga. 268, 55 S. E. 32.

25. Woodard v. Tri-State Mill. Co., 142 N. C. 100, 55 S. E. 70.

26. Does not apply when the appearance is in a distinct and separate proceeding. Waterman v. Bash [Wash.] 89 P. 556. Appearance in action to review a judgment is not waiver of service in original action. Id. Does not permit the addition by amendment of a cause of action as to which the court would not otherwise have jurisdiction of defendant. Western Wheeled Scraper Co. v. Gahagan, 152 F. 648. When a foreign owner of property proceeded against in rem gives bond and files a claim to the property, he does not necessarily thereby admit the jurisdiction of the court over his person and waive no title. The Lowlands, 147 F. 986.

27. The appearance must have some relation to the merits of the controversy, and the purpose must be to invoke some action on the part of court having direct bearing in some way on the question of the judgment or decree proper to be entered. Bank of Hoston v. Knox [Iowa] 109 N. W. 201. Appearance for the purpose of filing a motion to stay order of sale in foreclosure proceedings held not a general appearance within the statute so as to authorize an in personam deficiency judgment against a party not otherwise within the jurisdiction of the court. Id.

28. Objection to taking jurisdiction to assess damages, exception to assessment and moving to expunge judgment from record, held consistent with pleas to jurisdiction, but unnecessary to preserve rights. Supreme Hive of Ladies of Maccabees of the World v. Harrington [Ill.] 81 N. E. 533. Application to vacate a personal deficiency judgment by a party who was only constructively served in a foreclosure proceeding. Sweeping v. Tritsch [Ala.] 44 So. 184.

29. Jones v. Gould [C. C. A.] 149 F. 153.

30. Return to order to show cause denying jurisdiction. Orchard v. National Exchange Bk. 121 Mo. App. 338, 98 S. W. 824. Motion for leave to amend a plea to the jurisdiction of the court in the nature of a plea in abatement. Pooler v. Southwick, 126 Ill. App. 264.

31. Clark v. Wells, 203 U. S. 164, 51 Law. Ed. 138.

32. Austin Mfg. Co. v. Hunter, 16 Okl. 86, 86 P. 293; St. Louis, etc., R. Co. v. Clark, 17 Okl. 562, 87 P. 430. Where one objects to the jurisdiction of his person in limine and maintains his objection in every pleading thereafter filed in the cause. Spratley v. Louisiana & A. R. Co., 77 Ark. 412, 95 S. W. 776. Filing of a motion to dissolve a temporary injunction after a plea of privilege to be sued in the courts of defendant's residence has been overruled. Schneider v. Rabb [Tex. Civ. App.] 100 S. W. 163. When a motion to procure the dismissal of an action for defective service of process is overruled, proceeding with the trial does not transmute the special appearance for such purpose into a general appearance for all purposes. Woodard v. Tri-State Milling Co., 142 N. C. 100, 55 S. E. 70. The privilege of being sued in the county of defendant's residence is not lost by filing a motion to dissolve a temporary injunction after a plea of the privilege has been overruled. Schneider v. Rabb [Tex. Civ. App.] 100 S. W. 163. When a motion to procure the dismissal of an action for defective service of process is overruled, proceeding with the trial does not waive the party's right to have the ruling reviewed. Woodard v. Tri-State Mill. Co., 142 N. C. 100, 55 S. E. 70.

33. Where the party files a cross petition and asks affirmative relief, he thereby submits his person to the jurisdiction of the court for all purposes of the entire action and estops himself from questioning the jurisdiction of the court in first instance. Austin Mfg. Co. v. Hunter, 16 Okl. 86, 86 P. 293.

34. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629; Rosenbleet v. Rosenbleet, 122 Ill. App. 408.

35. Under Civ. Code, § 118. Louisville

to the jurisdiction, like ordinary pleas in abatement, may be put in by attorney without admitting jurisdiction of the person.[36]

Appeal.[37]—When one has properly saved his objections to the jurisdiction over his person, he does not by appealing from adverse holdings on such objections confer jurisdiction,[38] but in some jurisdictions appeals,[39] or proceedings in error,[40] operate as a general appearance. One not a party of record may so connect himself with litigation by appearance and filing pleadings after judgment is rendered therein and appeal taken therefrom as to estop himself from attacking for lack of jurisdiction of his person the validity of a judgment adverse to him by the appellate tribunal.[41]

A special appearance,[42] which is one limited to the purposes of an attack on the jurisdiction of defendant's person,[43] is the proper procedure to reach defect of such jurisdiction resulting from irregularities of process or service thereof,[44] but where for some reason a party is privileged from suit in the place or at the time he is sued, he may set up want of jurisdiction of his person by answer, along with other defenses he may have, without making a special appearance or preliminary objections.[45] The Iowa statute that an appearance for any purpose connected with the case renders any further notice unnecessary does not prevent a special appearance.[46] A special appearance must challenge only jurisdiction, and if it is for the purpose of defending on the merits of any part of the proceeding, it becomes general.[47] Where on a hearing in equity as to the sufficiency of pleas to the jurisdiction a discussion of the merits is permitted or invited by the court in order that it may be informed on that question in the event it concludes to consider the merits along with such pleas, the benefit of a qualified appearance is not thereby waived, no motion for dismissal for want of equity having been interposed.[48]

Home Tel. Co. v. Beeler's Adm'r [Ky.] 101 S. W. 397.

36. The distinction between pleas to the jurisdiction and pleas in abatement which prevailed at common law does not prevail in Michigan. Fell v. Gorman, 144 Mich. 521, 13 Det. Leg. N. 275, 108 N. W. 282.

37. See 7 C. L. 252.

38. Louisville Home Tel. Co. v. Beeler's Adm'r [Ky.] 101 S. W. 397.

39. The acts of defendant in a proceeding to open a private road, after his plea to the jurisdiction is overruled in contesting the merits of the application, agreeing to a continuance in the county court, and when finally defeated in that court appealing to the circuit court from the judgment entered, constituted a general appearance. Allen v. Welch [Mo. App.] 102 S. W. 665. An appeal from adverse rulings on objections to jurisdiction of the person of appellant does not confer jurisdiction over his person on the court. Louisville Home Tel. Co. v. Beeler's Adm'r [Ky.] 101 S. W. 397. Where a writ of error is prosecuted from a judgment rendered on defective service of process, no further process is necessary after remand of the cause. Hayman v. Weil [Fla.] 44 So. 176.

40. It is held in Florida that prosecution of a writ of error from a judgment rendered on defective service of process operates on a general appearance. Hayman v. Weil [Fla.] 44 So. 176.

41. One made party on appeal from justice court to county court held bound by adverse judgment of county court irrespective of whether he would for the first time be made a party on appeal from the justice. Artusy v. Houston Ice & Brew. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 312, 94 S. W. 1106.

42. See 7 C. L. 252.

43. An appearance for the purpose of procuring the dismissal of an action for defective service of process is a special appearance. Woodard v. Tri-State Mill. Co., 142 N. C. 100, 55 S. E. 70.

44. Stelling v. Peddicord [Neb.] 111 N. W. 793.

45. Stelling v. Peddicord [Neb.] 111 N. W. 793. A special appearance by a foreign corporation in a state court for the single purpose of insisting that no valid service has been made upon it is not a waiver of its right or a submission to the jurisdiction of the state court. Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co., 150 F. 666. One entering a special appearance before service on him in a state court in a cause in which an attachment has been sued out and levied for the purpose only of removing the same to the federal court thereby saves the right to object to the rendition of a judgment against him in personam on substituted service. Clark v. Wells, 203 U. S. 164, 51 Law. Ed. 138.

46. David v. Cleveland, etc., R. Co., 146 F. 403.

47. Cannot make a special appearance to resist only an interlocutory order. Blondel v. Ohlman [Iowa] 109 N. W. 806.

48. Citizens' Savings & Trust Co. v. Illinois Cent. R. Co., 205 U. S. 46, 51 Law. Ed. 703.

§ 2. *Who may make or enter.*[49]—Appearance may be by attorney [50] if he is authorized thereto,[51] or if his action therein is ratified,[52] and an appearance by attorney is presumptively authorized [53] and has been held to confer jurisdiction until it is vacated.[54] The doctrine of appearance by representation has no application in divesting a vested remainder or in any case where those who would be entitled in remainder are in esse and may be brought before the court in propria persona.[55]

§ 3. *Effect.*[56]—A voluntary,[57] general appearance waives all irregularities in the proceedings to acquire jurisdiction of defendant's person,[58] as want of service of process [59] or notice,[60] defects therein or in the service thereof,[61] wrong venue,[62] or unauthorized change thereof,[63] or personal judgment on constructive service,[64] Appearance will not ordinarily confer jurisdiction of the subject-matter.[65] It is held in Washington that a general appearance binds prospectively only,[66] and jurisdictional defects in service anterior thereto are saved by a special appearance to

49. See 7 C. L. 253.

50. Ashby Brick Co. v. Ely & Walker Dry Goods Co. [Ala.] 44 So. 96.

51. Unauthorized appearance by counsel does not bind a party when there is no service of summons. Hatcher v. Faison, 142 N. C. 364, 55 S. E. 284.

52. The filing of an answer by attorneys in a cause who have entered into a previous agreement to appear ratifies their authority to make the agreement. Hutchins v. Munn, 28 App. D. C. 271. Ratification relates back to the original appearance. Id.

53. Appearance is presumptive evidence of the authority of the attorney. Ashby Brick Co. v. Ely & Walker Dry Goods Co. [Ala] 44 So. 96.

54. The rule that an unauthorized appearance by attorney confers jurisdiction on the court applies to appearances in the New York municipal courts. Park v. Regan, 105 N. Y. S. 253.

55. Devisees in remainder held not bound by sale of the land in proceedings to which they were not parties on the ground that they were represented by the life tenant of the particular estate on which their devises depended. Card v. Finch, 142 N. C. 140, 54 S. E. 1009.

56. See 7 C. L. 253.

57. Appearance in contempt proceedings held involuntary. Beck v. Vaughn [Iowa] 111 N. W. 994.

58. Weeke v. Wortmann [Neb.] 109 N. W. 503; Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371. By statute in Texas it is provided that appearance in person or by attorney in open court shall have the same force and effect as if citation had been duly issued and served. Tammen v. Schaefer [Tex. Civ. App.] 101 S. W. 468.

59. First Nat. Bk. v. Bedford [Ark.] 102 S. W. 683; Hutchins v. Munn, 28 App. D. C. 271; Ashby Brick Co. v. Ely & Walker Dry Goods Co. [Ala.] 44 So. 96. Want of process on amended declaration. Norfolk & W. R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465.

60. Defect in notice of proceeding to open private road. Allen v. Welch [Mo. App.] 102 S. W. 665. Want of notice of ex parte order. In re Bank of Newcastle [Wyo.] 89 P. 1035. By analogy to the rule that service of summons is waived by a general appearance, the giving of notice in probate proceedings may be rendered unnecessary by the appearance of the parties and their participation in the proceedings. In re Davis' Estate, 33 Mont. 539, 88 P. 957.

61. Stelling v. Peddicord [Neb.] 111 N. W. 793. Incorrect naming of defendant in process. Vaccarini v. New York, 104 N. Y. S. 28. To chancery summons in statutory election contest. Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371. Luetzke v. Roberts, 30 Wis. 97, 109 N. W. 949. Leaving of process at most notorious place of abode. Whitfield v. Whitfield, 127 Ga. 419, 56 S. E. 490. Constructive service of nonresident. Lyons v. Adams, 30 Ky. L. R. 870, 99 S. W. 900.

62. Tammen v. Schaefer [Tex. Civ. App.] 101 S. W. 468; Southern Exp. Co. v. B. R. Elec. Co., 126 Ga. 472, 55 S. E. 254; Farmers' Bk. v. St. Louis, etc. R. Co., 119 Mo. App. 1, 95 S. W. 286. The personal privilege of being sued in the federal district of which one is an inhabitant is waived by appearance and answer to the merits when the other jurisdictional requisites are present. But a corporation by joinder in a prayer for the appointment of a receiver to take charge of its business more distinctly waives such right. Horn v. Pere Marquette R. Co., 151 F. 626.

63. Defective change of venue. Tammen v. Schaefer [Tex. Civ. App.] 101 S. W. 468.

64. Merchants' Laclede Nat. Bk. v. Troy Grocery Co. [Ala.] 43 So. 208; Hall Commission Co. v. Foote [Miss.] 43 So. 676. The federal statute exempting national banks from attachment before final judgment in a state court does not prevent the rendition of a personal judgment against a national bank in a state court outside of the state of its domicile in a proceeding begun by attachment where it appears and answers the complaint after the dissolution of the attachment. Merchants' Laclede Nat. Bk. v. Troy Grocery Co. [Ala.] 43 So. 208. By statute in Mississippi the chancery courts of that state have power to render a personal deficiency judgment in an attachment proceeding against a nonresident when appearance is entered in the suit by such nonresident. Hall Commission Co. v. Foote [Miss.] 43 So. 676.

65. Appearance in foreign attachment suit held not to warrant an attachment of moneys due for wages. Morris Box Board Co. v. Rossiter, 30 Pa. Super. Ct. 23.

66. French v. Ajax Oil & Development Co. [Wash.] 87 P. 359.

make the objection,[67] but when no special appearance is involved a general appearance will cure anterior defects affecting the jurisdiction of the court over the person of the party generally appearing.[68] It is held in Louisiana that appearance to apply for bond in sequestration proceedings has no relation back of the date of the application so as to entitle the plaintiff to claim that defendant had been previously cited when such was not the fact.[69] A statute vesting the court with discretion to set aside a judgment and afford a hearing to a defendant not personally served has no application when a defendant constructively served has appeared prior to the rendition of the judgment.[70] By the terms of the Federal statute the right to remove a cause from a state court to the Federal court is lost by a general appearance or its equivalent.[71]

Withdrawal or vacation.[72]—To warrant the exercise of the court's discretion to vacate an unauthorized appearance by an attorney and set aside a judgment entered by reason of such appearance, the application must be made promptly and before the adverse party has lost any rights by the delay.[73]

Appellate Courts and Jurisdiction; Application of Payments; Appointment; Apportionments Laws, see latest topical index.

APPRENTICES.[74]

Rights and liabilities of apprentices considered generally as servants are elsewhere treated.[75] In Pennsylvania a binding by indenture to service is essential to create a technical apprenticeship,[76] but a contract of apprenticeship in the popular sense as descriptive of one who is learning a mechanical art is valid,[77] and a provision in such contract requiring the making up of lost time after the expiration of the term of service includes time lost by sickness.[78] Removal by a master of his entire plant from the state in which he has entered into a common-law contract of apprenticeship, and in which performance was contemplated, is a breach of the contract on his part.[79] A provision in an indenture requiring the apprentice to be received, maintained, and treated as an adopted child of the master is not such an adoption as to constitute the apprentice an heir of the master.[80]

ARBITRATION AND AWARD.

§ 1. The Remedy in General (237).
§ 2. The Submission and Agreements to Submit (237). Effect (237).
§ 3. The Arbitrators and Umpire (237).
§ 4. Hearing and Procedure Before Arbitrators (238).
§ 5. The Award; Requisites, Validity, and Effect (238). Effect (238). Enforcement of Award (238). Review of Award (238).
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67. General appearance held not to cure objection to process as to which a special appearance was made for the purpose of the objection prior to the entry of the general appearance. French v. Ajax Oil & Development Co. [Wash.] 87 P. 359.
68. Seaton v. Cook [Wash.] 87 P. 914.
69. Prater v. Craighead, 118 La. 627, 43 So. 258.
70. Zobel v. Zobel [Cal.] 90 P. 191.
71. Bryson v. Southern R. Co., 141 N. C. 594, 54 S. E. 434.
72. See 7 C. L. 254.
73. Delay held to warrant denial of motion to vacate. Park v. Regan, 105 N. Y. 253.
74. See 7 C. L. 254.
75. See Master and Servant, 8 C. L. 840.
76. Agreement for minor to work according to rules and regulations of shop signed as agreement of parties held not an apprenticeship. Behney v. Stoever Foundry Co., 30 Pa. Super. Ct. 625.
77. Contract with parent requiring minor son to make up for lost time after service for three years held not against public policy (Behney v. Stoever Foundry Co., 30 Pa. Super. Ct. 625), and supported by a sufficient consideration (Id.).
78. Behney v. Stoever Foundry Co., 30 Pa. Super. Ct. 625.
79. Conkey Co. v. Goldman, 125 Ill. App. 161. The Illinois statute inhibiting removal from the state of an apprentice by a master without the consent of the county court is opposite in the construction of a common-law apprenticeship executed in that state as declaratory of its policy. Id.
80. In re Wallace's Estate [Pa.] 66 A. 1098.

Arbitration under provisions of the by-laws of associations,[81] and under the terms of insurance policies,[82] and building contracts,[83] is distinctive in character and elsewhere treated.

§ 1. *The remedy in general.*[84]—An agreement to submit to arbitration is void when it seeks to wrest the courts of jurisdiction.[85] Future as well as past damages may be submitted to arbitration.[86]

§ 2. *The submission and agreements to submit.*[87]—A submission is essential,[88] and if the arbitration is statutory it must be in substantial conformity to the statute.[89] An award made under an agreement for submission contained in an illegal contract will not be enforced.[90] A common-law submission obtains its sanction wholly from the consent of the parties, and accordingly, where a consent out of court is revoked by the filing of exceptions, the award is naught.[91] A provision relating to the mode of settling special matters of difference prevails over a general agreement to submit all matters to arbitration.[92] The agreement to arbitrate is revocable though on consideration.[93] Unless so stated therein the submisssion to arbitration is not a condition precedent to a right of action on a contract containing an agreement for submission.[94] A submission is revoked by the death of a party before the award.[95]

Effect.[96]—When a submission under the statute is void, the court may disregard it and proceed with the trial.[97] In Kentucky an agreement to submit an accrued liability is no defense to an action.[98]

§ 3. *The arbitrators and umpire.*[99]—The appointment of the umpire is presumed to have been correctly made,[1] and the question of his qualification is immaterial when he did not act in the case.[2]

81. See Association and Societies, 7 C. L. 294; Fraternal Mutual Benefit Associations, 7 C. L. 1777; Exchanges and Boards of Trade, 7 C. L. 1613, and like topics.

82. See Fraternal Mutual Benefit Associations, 7 C. L. 1777; Insurance, 8 C. L. 377.

83. See Building and Construction Contracts, 7 C. L. 480; Public Works and Improvements, 8 C. L. 1506.

84. See 3 C. L. 303.

85. Requirement in insurance policy that question as to liability of company thereon, as well as amount thereof, held void. Lewis v. Brotherhood Accident Co. [Mass.] 79 N. E. 802. A submission of the question whether certain items were extra work, under a building contract, and the value thereof, was held not to oust the court of jurisdiction. Wyckoff v. Woarms, 103 N. Y. S. 650.

86. Frepons v. Grostein, 12 Idaho, 671, 87 P. 1004.

87. See 7 C. L. 254.

88. Before there can be a final award there must be something mutually submitted by the parties. Account rendered by accountants appointed by United States under agreement with Cherokee nation to render account of money due the nation held not an award, there being no mutual agreement to submit. Cherokee Nation v. U. S., 40 Ct. Cl. 252. An award of an ecclesiastical court is not binding where there was no agreement to submit the controversy to such court nor to abide by its award. Poggenborg v. Conniff, 29 Ky. L. R. 912, 96 S. W. 547.

89. A submission under the statute must conform substantially to the statutory form. Provision that no hearings are to be had except in the discretion of the arbitrators, or that "some reputable physician" be selected as referee if the arbitrators were unable to agree. May v. Boston & W. St. R. Co., 192 Mass. 517, 78 N. E. 547. Acknowledgment of agreement for submission as required by statute held essential. Gessner v. Minneapolis, etc., R. Co. [N. D.] 108 N. W. 786.

90. Pittsburgh Const. Co. v. West Side Belt R. Co., 151 F. 125.

91. Waisner v. Waisner [Wyo.] 89 P. 580.

92. Provision in a lease of coal lands that disputes as to the amount of coal remaining unmined should be decided by engineers controls clause providing for a submission of all differences to arbitration under Act June 16, 1836. Henry v. Lehigh Valley Coal Co., 215 Pa. 448, 64 A. 635.

93. Henry v. Lehigh Valley Coal Co., 215 Pa. 448, 64 A. 635.

94. Lawson v. Williamson Coal & Coke Co. [W. Va.] 57 S. E. 258.

95. Judgment entered on award subsequent to death of party held not binding on executor appointed in another state. Brown v. Fletcher's Estate, 146 Mich. 401, 13 Det. Leg. N. 818, 109 N. W. 686.

96. See 7 C. L. 255.

97. Nay v. Boston, etc., R. Co., 192 Mass. 517, 78 N. E. 547.

98. Shell v. Asher [Ky.] 102 S. W. 879.

99. See 7 C. L. 255.

1. Kaplan v. Niagara Fire Ins. Co., 73 N. J. Law, 780, 65 A. 188.

2. Where the arbitrators agreed upon finding. Kaplan v. Niagara Fire Ins. Co., 73 N. J. Law, 780, 65 A. 188.

§ 4. *Hearing and procedure before arbitrators.*[3]—Receipt by the arbitrators of an erroneous opinion of an attorney, produced by one party without objection from the other, is not ground for setting the award aside,[4] nor is the taking of legal advice by arbitrators.[5] An arbitrator selected because he is an expert accountant, with the intention that he alone is to examine the books, does not by reporting the result of such examination become a witness.[6] It is not error to hold a hearing in the absence of a party where he has been notified and has declined to attend.[7]

§ 5. *The award; requisites, validity, and effect.*[8]—The award cannot be impeached at law for fraud or misconduct of the arbitrators but only in equity,[9] and the parties are bound by the award of the arbitrator within the scope of the submission notwithstanding his mistakes on questions of law or fact.[10] The award must embrace all matters submitted [11] and nothing beyond.[12] When the statutory mode of arbitration is attempted, the statute must be substantially complied with.[13] An award published on Monday is not void because agreed to on Sunday.[14]

Effect.[15]—The award is not admissible in evidence in an action between different parties.[16] The lien of a statutory award attaches on the making thereof though confirmation of the award is required.[17]

Enforcement of award.[18]—Mere omission from the award of items in controversy cannot be shown by parol, for it is conclusive as to matters within the submission,[19] and objections to the introduction of evidence cannot be urged on appeal from the judgment entered on the award.[20] The court may not enter judgment on the award when the parties agreed to a trial before arbitrators.[21] A submission by rule of court is the only method wherein the award amounts to a judgment which ends the proceedings.[22]

Review of award.[23]—The mistakes for which an award may be referred back are only such as would be obvious when pointed out.[24] Every presumption is in

3. See 7 C. L. 255.
4. Stone v. Baldwin, 226 Ill. 338, 80 N. E. 890.
5. Stone v. Baldwin, 127 Ill. App. 563.
6, 7. Ehrlich v. Pike, 53 Misc. 328, 104 N. Y. S. 818.
8. See 7 C. L. 255.
9. Levin v. Northwestern Nat. Ins. Co., 146 F. 76.
10. Phaneuf v. Corey, 190 Mass. 237, 76 N. E. 718; Ehrlich v. Pike, 53 Misc. 328, 104 N. Y. S. 818; Stone v. Baldwin, 127 Ill. App. 563.
11. Bigler v. Sweitzer, 127 Ill. App. 14, where the submission asked for the statement of an account, a general award was held void. Hines v. Fisher [W. Va.] 56 S. E. 904. An agreement to submit all manner of claims and demands pending or existing authorized a finding as to whether interest should be allowed on amounts found due. In re Burke, 117 App. Div. 477, 102 N. Y. S. 785. An award providing that to the amount awarded should be added other items not fixed is void for uncertainty. Under a submission providing that the amount awarded should be considered a debt for which judgment might be entered. Real Estate Title Ins. & Trust Co. v. McNichol, 217 Pa. 545, 66 A. 768.
12. The arbitrator is limited to the questions submitted. Duncan Coal Co. v. Duncan & Co., 29 Ky. L. R. 1249, 97 S. W. 43.
13. Award held void where arbitration was not made rule of court by filing and recording of statement, and where award was not filed and recorded, as required by the statutes. Readdy v. Tampa Elec. Co. [Fla.] 41 So. 535.
14. Ehrlich v. Pike, 53 Misc. 328, 104 N. Y. S. 818.
15. See 7 C. L. 255.
16. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389.
17. Award more than four months before bankruptcy is not vacated thereby though confirmation was within such time. In re Koslowski, 153 F. 823.
18. See 7 C. L. 256.
19. Such omission not coming within the rule laid down in Ruckman v. Ransom, 35 N. J. Law, 565, that the award may be contradicted by parol to show that the arbitrators "neglected or refused" to take submitted matter into consideration. Kaplan v. Niagara Fire Ins. Co., 73 N. J. Law, 780, 65 A. 188.
20. The submission providing that proof should be taken in the same manner as in the trial of cases and that the judgment entered on the award should not be appealable. Burrell v. U. S. [C. C. A.] 147 F. 44.
21. Burrell v. U. S. [C. C. A.] 147 F. 44.
22. An award under a submission in pais, or under the statute requiring an action thereon or an independent proceeding in court. Nay v. Boston & W. St. R. Co., 192 Mass. 517, 78 N. E. 547; Gessner v. Minneapolis, etc., R. Co. [N. D.] 108 N. W. 786.
23. See 7 C. L. 256.
24. Submission under Act June 16, 1836,

favor of the validity and correctness of an award,[25] and in the absence of a showing of fraud or misconduct the award will not be set aside.[26] Either a common-law or a statutory award may be set aside for fraud or mistake under a statute providing that an award obtained by fraud may be set aside by the court with which it is filed.[27] Objection to the jurisdiction of the court to set aside an award and try the issues may be waived.[28] Where the parties acquiesce in an award and destroy the evidence on which it is based, they are precluded from questioning its correctness.[29] An award cannot be amended as to vital matters.[30] A party to an arbitration agreement, by accepting part of the award, is not estopped to except to another part which is divisible from the former.[31]

§ 6. *International disputes.*[32]

§ 7. *Statutory arbitration between employers and employes.*[33]

ARCHITECTS, see latest topical index.

ARGUMENT AND CONDUCT OF COUNSEL.

§ 1. Right of Argument and Order of Same (239). The Right to Open and Close (240).
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§ 5. Excuses for Impropriety (247).
§ 6. Objections and Rulings (247).
§ 7. Action of Court or Counsel Curing Objections (247).

Argument and conduct of counsel in criminal cases is treated elsewhere.[34]

§ 1. *Right of argument and order of same.*[35]—As a general rule the trial court has discretionary power to determine the order of argument,[36] or to limit its duration,[37] or to dispense with it entirely when unnecessary.[38]

providing that for mistake in fact or law the court may refer the cause back to the same referees for further proceedings. Klipstein v. Whitesides, 30 Pa. Super. Ct. 35.

25. Tyblewski v. Svea Fire & Life Assurance Co., 121 Ill. App. 528; In re Burke, 117 App. Div. 477, 102 N. Y. S. 785.

26. Tyblewski v. Svea Fire & Life Assurance Co., 121 Ill. App. 528. Nor for error in allowing interest. In re Burke, 117 App. Div. 477, 102 N. Y. S. 785. Not for errors of law. Stone v. Baldwin, 226 Ill. 338, 80 N. E. 890. Not on testimony of a single arbitrator that he was guilty of misconduct. In consulting an attorney. Id. An award based on fraud or perjured testimony may be set aside. Evidence held to show the falsity of the testimony on which the award for a loss under a fire insurance policy was based. Fire Ass'n v. Allesina [Or.] 89 P. 960.

27. On exceptions to the award. Waisner v. Waisner [Wyo.] 89 P. 580.

28. Held waived by party to dissolution proceedings appearing and submitting evidence on hearing on exceptions to award, and stipulating that the firm is dissolved and its affairs with reference to the property in controversy wound up. Waisner v. Waisner [Wyo.] 89 P. 580.

29. Stone v. Baldwin, 127 Ill. App. 563.

30. Failure to embrace all matters submitted. Bigler v. Sweitzer, 127 Ill. App. 14.

31. Award as to distribution of partnership personalty held divisible from part thereof providing for distribution of the real property. Waisner v. Waisner [Wyo.] 89 P. 580.

32, 33. See 3 C. L. 306.

34. See Indictment and Prosecution, 8 C. L. 189.

35. See 7 C. L. 257.

36. Though order of argument and conduct thereof is prescribed by statute in a general way, it is still peculiarly within sound discretion of trial court, and failure to follow statute is not reversible error in absence of prejudicial abuse of discretion. Breiner v. Nugent [Iowa] 111 N. W. 446. Denial of right to reply to new points in closing argument held not an abuse of discretion. Id.

37. Limitation of forty-five minutes in action for personal injuries held not an abuse of discretion. Christiansen v. Graver Tank Works, 126 Ill. App. 86, afd. 223 Ill. 142, 79 N. E. 97.

38. Right to be heard in argument is not an absolute right in civil cases, and does not exist at all where there is nothing jointly debatable, and it is therefore within court's power to dispense with argument where it is unnecessary. Warner v. Close, 120 Mo. App. 211, 96 S. W. 491. Where court decides civil case, tried without jury, without hearing argument, it is presumed on appeal that no argument was necessary. Id. Deciding case without permitting argument by defendant's counsel held not ground for

The right to open and close [39] generally belongs to the party having the burden of proof on the whole case,[40] as determined by the pleadings.[41] There seems to be some conflict of authority as to the effect, in this regard, of amendments made during the course of the trial.[42] The party entitled thereto may waive the right to

reversal where statement of facts did not show request therefor. Jackson v. Mercantile Mut. Fire Ins. Co. [Wash.] 88 P. 127.

39. See 7 C. L. 257.

40. St. Louis, etc., R. Co. v. Johnson, 74 Kan. 83, 86 P. 156. Denial of defendant's right to close, where he has affirmative of issue, is reversible error. Fischer v. Frohne, 100 N. Y. S. 1016. Claimant, who admits prima facie case for plaintiff in fi. fa. in claim case, and assumes burden of proof, is entitled to open and conclude the argument, though plaintiff has introduced no evidence. Turner v. Elliott, 127 Ga. 338, 56 S. E. 434. In will contest, where there was no controversy as to fact of execution of will, only issue submitted to jury being as to mental capacity and undue influence, held that burden was on contestants, and hence they were entitled to open and close. In re Wharton's Will [Iowa] 109 N. W. 492.

Plaintiff held to have right: In action for money paid and services rendered, where defendant pleaded general issue. Semler Mill. Co. v. Fyffe, 127 Ill. App. 514. In action against carrier for assault on passenger by conductor, where answer denied all allegations of complainant, including allegations that plaintiff was passenger and had been wantonly assaulted, etc., except that it admitted ejecting him, and pleaded that conductor acted in self-defense. Civ. Code Prac. § 526. Frankfort & Versailles Trac. Co. v. Marshall, 30 Ky. L. R. 431, 98 S. W. 1035. Right of defendant to open and close depends upon whether answer admits plaintiff's cause of action, and relies on affirmative defense, so that if defendant offered no evidence plaintiff would be entitled to judgment on pleadings. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768. Refusal held proper where answer admitted only that defendant was corporation, and denied all other allegations of complaint. Id. Civ. Code Prac. § 526, providing that burden of proof in whole action is on party who would be defeated if no evidence were given on either side, refers to party who would be defeated as to what is in issue, since party cannot be said to be defeated in action when judgment is rendered against him for what he has confessed, and hence defendant sued for gross negligence does not acquire right to open and close by admitting ordinary negligence and nominal damages. Southern R. Co. v. Steele, 29 Ky. L. R. 690, 94 S. W. 653. Offer of defendant to confess judgment for certain sum in full settlement of plaintiff's claim held not to give defendant right. Nelson County v. Bardstown & L. Turnpike Road Co., 30 Ky. L. R. 1254, 100 S. W. 1181. Confession of assault and battery by defendant and pleading mitigating facts held not to shift burden of proof so as to give him right. Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7. In any event refusal to allow him to do so held not prejudicial where there was no evidence whatever tending to prove such facts. Id.

Defendant held to have right: Where he admitted execution of note sued on and its assignment to plaintiff, but alleged failure of consideration, that it was procured by fraud, and that plaintiff was not bona fide purchaser. Kirby's Dig. §§ 6196, 3107. Roberts v. Padgett [Ark.] 101 S. W. 753. Where he admits prima facie case for plaintiff in his plea and assumes burden of proof, though plaintiff introduces no evidence. Dickey v. Smith, 127 Ga. 645, 56 S. E. 756. Where only issue tried was whether note sued on had been satisfied as claimed by defendants. Gibson v. Reiselt, 123 Ill. App. 52. In action for false arrest where he admitted arrest and justified it. Rich v. Bailey, 30 Ky. L. R. 155, 97 S. W. 747. In replevin where only issue was as to whether plaintiff authorized certain person as his agent to sell property in question, which fact defendant affirmed and plaintiff denied. Absher v. Franklin, 121 Mo. App. 29, 97 S. W. 1002. Where he interposed counterclaim and plaintiff voluntarily withdrew only disputed item of his claim. Fischer v. Frohne, 100 N. Y. S. 1016. In action on note where right to recover was admitted unless defeated by alleged settlement. Berry v. Joiner [Tex. Civ. App.] 101 S. W. 289. Where admitted of record plaintiff's right to recover unless it could be defeated upon affirmative grounds set up in answer. Stone v. Pettus [Tex. Civ. App.] 103 S. W. 413.

41. Under Kirby's Dig. § 6196, matter must be determined by pleadings in case. Beal & Doyle Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58. To entitle defendant to right he must in his pleadings, and before plaintiff begins to introduce testimony, admit enough to make out a prima facie case for plaintiff. Mitchem v. Allen [Ga.] 57 S. E. 721. Right held properly awarded to plaintiff where answer set up affirmative plea and denied plaintiff's allegation that defendant was indebted to him, and where defendant did not assume burden of proof or claim right until after plaintiffs had proceeded to make out case, and he had introduced evidence in his own behalf. Id. Right is determined by pleadings at time of trial and cannot be altered by admissions made during course of trial. Hollander v. Farber, 52 Misc. 507, 102 N. Y. S. 506. Plaintiff held to have right where defendant interposed general denial and counterclaim. Id. Defendant held not entitled to new trial for refusal of court to permit him to open and close, where it did not appear upon face of pleadings that he admitted plaintiff's cause of action and relied solely upon an affirmative defense. Early v. Early, 75 S. C. 15, 54 S. E. 827.

42. Allowing amendment of answer after close of testimony so as to strike out denial of allegation, thereby giving defendant burden of proof and right to open and close, held not an abuse of discretion. Beal & Doyle Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58. Amendments for sole purpose of changing order of argument should never

open, or to close, or both.[43] A waiver of the opening is ordinarily a waiver of the right to close provided the other party also waives argument, but not otherwise.[44]

§ 2. *Opening statement.*[45]—In his opening statement counsel should confine himself to the case made by the declaration.[46] and facts which he expects to prove by competent evidence.[47] His admissions and statements are not evidence and are not ordinarily conclusive of the rights of the parties.[48]

§ 3. *Kind, extent, and mode of argument or comment during trial.*[49]—The propriety of argument is a question largely addressed to the sound discretion of the trial court, which is not subject to review on appeal unless manifest abuse is shown.[50]

Statements of law and reading from decisions or papers pertinent to other cases.[51]—Counsel should not misstate the law in his argument.[52] Permitting him to read authorities to the jury is largely discretionary,[53] but it is error to read portions of decisions in other similar cases which are calculated to arouse their sympathies and prejudices.[54]

be allowed after trial has begun. Southern R. Co. v. Smith [Ky.] 102 S. W. 232. Refusal to adjudge defendant burden of proof and right to open and close held proper where amended answer withdrawing all denials of original, except those as to value of goods alleged to have been lost, was filed after trial had begun. Id.

43. St. Louis, etc., R. Co. v. Johnson, 74 Kan. 83, 86 P. 156.

44. When other party proceeds to argue case to jury, party having burden of issue is entitled to reply. St. Louis, etc., R. Co. v. Johnson, 74 Kan. 83, 86 P. 156.

45. See 7 C. L. 258.

46. Hoyt v. Garlock, 145 Mich. 632, 13 Det. Leg. N. 578, 108 N. W. 1074.

47. In will contest held not improper to emphasize and rely on financial condition of testator and principal beneficiary as tending to show unreasonableness, since that fact could properly be considered in determining whether will was so unreasonable as to show incapacity or undue influence. In re Wharton's Will [Iowa] 109 N. W. 492. Fact that statements made were not fully borne out by evidence held not necessarily ground for reversal, particularly where court cautioned jury to disregard statements, etc., not supported by evidence. Id.

48. Statement by counsel for plaintiff that he did not think one of the defendants was liable in case at bar held not to give such defendant right to be dismissed or to have verdict directed in its favor, so that its rights were not prejudiced by court's action in excluding such argument as improper on objection of other defendant and instructing jury not to consider it, etc. Consolidated Kansas City Smelting & Refining Co. v. Binkley [Tex. Civ. App.] 99 S. W. 181.

49. See 7 C. L. 259.

50. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352; Brusseau v. Lower Brick Co. [Iowa] 110 N. W. 577; Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808. Appellate court will not interfere except where from survey of whole situation it appears likely different result would have been reached but for misconduct. Hannestad v. Chicago, etc., R. Co. [Iowa] 109 N. W. 718. Will not interfere with discretion in refusing to grant new trial unless it is affirmatively made to appear that discretion has been abused to prejudice of appellant. In re Wharton's Will [Iowa] 109 N. W. 492. Will not reverse unless it can see that remarks objected to were clearly prejudicial to objecting party. Chicago & Grand Trunk R. Co. v. Smith, 124 Ill. App. 627. Failure to reprimand counsel for referring to excluded letters held not abuse of discretion, where he did not disclose contents, and opposing counsel was first offender. Locher v. Knechenmiester, 120 Mo. App. 701, 98 S. W. 92. Will not be presumed that court was improperly influenced by remarks on motion for nonsuit. Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053.

51. See 7 C. L. 259.

52. Refusal to sustain objection to statement that carrier was liable to plaintiff because car was in charge of inexperienced motorman held reversible error, argument being in conflict with law and instuctions. Ft. Smith Light & Trac. Co. v. Flint [Ark.] 99 S. W. 79. In action against railroad for damages by fire alleged to have been caused by sparks from engine, argument that it was negligence for defendant to use wood instead of coal in engines held improper, that not being the law. Monte Ne R. Co. v. Phillips, 80 Ark. 292, 96 S. W. 1060. Statement as to damages which should be allowed in personal injury case and statement by court that argument was proper held not ground for reversal, even if erroneous and embracing incorrect statement of law, where only possible effect could have been to increase verdict, and it was not claimed that it was excessive, and court correctly instructed as to measure of damages. St. Louis, etc., R. Co. v. Smith [Ark.] 100 S. W. 884.

53. Is somewhat a matter of discretion, though of doubtful propriety. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 101 S. W. 453. Refusal to pronibit reading of case excerpt from former opinion in same case held not an abuse of discretion. Mahoney v Dixon, 34 Mont. 454, 87 P. 452.

54. Permitting reading in jury's presence, and evidently for their benefit, held error. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574.

Comments on pleadings and evidence and scope of argument in relation thereto.[55]—It is proper to comment on the evidence in the case [56] and to draw fair inferences therefrom,[57] but not to call attention to or comment on facts not within the issues made by the pleadings,[58] or not in evidence,[59] unless they are mat-

55. See 7 C. L. 259.

56. Papers properly in evidence may be referred to and read to jury for first time in argument. Terry v. Williams [Ala.] 41 So. 804. Argument in action on note for price of horse, that horse had been returned to payee, and that if he had not disposed of him he had him yet, held sustained by evidence. Carey v. Nissle, 145 Mich. 383, 13 Det. Leg. N. 490, 108 N. W. 733. Statement held substance of what was in evidence and proper. Hax v. Quincy, etc., R. Co., 123 Mo. App. 172, 100 S. W. 693.

57. May state evidence as he understands it, and draw his own conclusions therefrom and state them to jury. Evidence held to support argument. Aetna Ins. Co. v. Missouri Pac. R. Co., 123 Mo. App. 513, 100 S. W. 569. Referring to edger as "that old rattletrap of a machine" held warranted where there was proof that it was badly out of repair. Bodcaw Lumber Co. v. Ford [Ark.] 102 S. W. 896. Where there was evidence of permanent injury held not improper in personal injury suit to state that jury are to settle claim for damages, to date and for all time to come. Chicago & Joliet Elec. R. Co. v. Patton, 122 Ill. App. 174. Argument as to probability of plaintiff's dying and leaving wife and children held based on testimony and proper. Wells, Fargo & Co. Exp. v. Boyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 350, 98 S. W. 441. Argument that rule of defendant railroad in regard to coupling cars was never intended to be enforced, but was made solely for use in defending litigation, held not impossible inference from evidence. Texas, etc., R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 S. W. 1070. In an action for breach of contract to purchase screenings, argument expressing contention that samples shipped to defendant ought to convince any one that they were mere sweepings, and that if, as was made to appear, plaintiff's process involved removal of dirt from screenings, it was dirt and not screenings that had been shipped to defendant, held within limits of legitimate contention as to inference to be drawn from evidence. Listman Mill Co. v. Miller [Wis.] 111 N. W. 496.

58. Excluding remarks wholly immaterial to issue held proper. Berger v. Standard Oil Co. [Ky.] 103 S. W. 245. Argument predicated on defects in car testified to by witness, but not alleged as ground of recovery in petition, held improper. Texas & P. R. Co. v. Terry [Tex. Civ. App.] 16 Tex. Ct. Rep. 990, 97 S. W. 325.

59. **Argument held proper:** Reference to fact that defendant was insured, taken in connection with incompetent testimony, held reversible error, where counsel did not withdraw it, though he offered to do so, and jury was not instructed to disregard it, and exception was properly saved. Capital Const. Co. v. Holtzman, 27 App. D. C. 125. Statement that there was no evidence that defendant was insured but that most of such people were, held prejudicial, particularly where defendant was an individual, though court told jury that there was no evidence on subject and to disregard it. Loughlin v. Brassil [N. Y.] 79 N. E. 854. Held error in will contest for counsel for propounder to show revocatory words on margin of will to jury and point out difference, in formation of letters, etc., between signature on margin and signature to will, jury not being entitled to decide question of genuineness of signature on margin by comparison of handwriting. In re Shelton's Will, 143 N. C. 218, 55 S. E. 705. Statement as to customary practice before magistrates, as to which there was no evidence. Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 97 S. W. 712. Statement that certain matters were shown by evidence, when in fact they were not. Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 29, 97 S. W. 712. Appeal to jury to consult their own knowledge as to reputation of witness for truth and veracity, outside of impressions received at trial. San Antonio & A. P. R. Co. v. McMillan [Tex. Civ. App.] 17 Tex. Ct. Rep. 596, 98 S. W. 421. Statements of counsel as to character of plaintiff and improbability that she was lying, based on his own knowledge, held reversible error, where evidence was sharply conflicting. Texas, etc., R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. Going outside of facts and testimony, or asking jury to found verdict on matters they may have observed outside facts proved on trial. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574. Statement that every conductor on defendant's line would testify that sign "For Negroes" was not placed in customary place. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 101 S. W. 554. Comments on effort to impeach witness by testimony as to his reputation for truth and veracity. International, etc., R. Co. v. Munn [Tex. Civ. App.] 102 S. W. 442.

Argument held not ground for reversal: If, as contended, proximate cause of accident was negligence of conductor in failing to see that switch was thrown before starting train out of side track, and that fact was conclusively established, argument that crew was drunk. St. Louis, etc., R. Co. v. Boyles, 78 Ark. 374, 95 S. W. 783. Attempt to go outside of case and state verdicts returned in other cases, to which objection was sustained. Richardson v. Nelson, 123 Ill. App. 550. In trover against sheriff to recover value of chattels seized and sold under writ of attachment as property of a debtor who had previously transferred them to plaintiff's intestate, which transfer defendant claimed was fraudulent, statement that certain witness for defendant, who testified that he was creditor of judgment debtor and had investigated his financial condition, "did not proceed with any such proceeding as we find in this case." Major v. Brewster [Mich.] 14 Det. Leg. N. 323, 112 N. W. 490. Statements of fact not supported by evidence, and having no bearing on case except in so far as they tended to support conclu-

ters of common knowledge,[60] or to comment on excluded evidence [61] or pleadings,[62] or to refer to the outcome of other similar cases,[63] or of former trials of the same case.[64]

Comments on witnesses, parties, and counsel.[65]—Counsel may draw any and all proper inferences from the evidence tending to discredit a party [66] or a witness,[67] but it is improper to make unwarranted and unreasonable assaults upon the character or integrity of parties,[68] or witnesses,[69] or opposing counsel,[70] or to state, without

sions of law attempted to be drawn by counsel, where court declined to charge in accordance with such conclusions. Beckman v. Hampton [N. H.] 65 A. 254. Fact that counsel stated in direct terms that he was not at certain place, instead of stating that evidence showed that he was not, where he stated nothing that evidence did not justify. Hammock v. Tacoma [Wash.] 87 P. 924.

60. Argument that as matter of common knowledge it is easier to copy or simulate handwriting with a pencil than with a pen held proper, as appealing to general experience of jury. Foss v. Smith, 79 Vt. 434, 65 A. 553.

61. Commenting on excluded evidence held reversible error where court failed and refused to instruct jury to disregard it. Hanstad v. Canadian Pac. R. Co. [Wash.] 87 P. 832. Attempt by innuendo to suggest to jury that evidence properly excluded upon objection of opposing party would have been injurious to latter held improper. Listman Mill Co. v. Miller [Wis.] 111 N. W. 496. Ruling that counsel could not refer to letter which had been excluded from evidence, and instructing jury to disregard his comment on it held proper, though comment related only to fact that letter was written, and not to its contents. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768. A ruling properly excluding evidence held nullified by the court's permitting counsel to refer to such evidence, over objection thereto. Steltemeier v. Barrett, 115 Mo. App. 323, 91 S. W. 56.

62. Seeking to base right of recovery on allegations of count of declaration which had been withdrawn and taunting counsel for objecting. Springfield Boiler & Mfg. Co. v. Parks, 123 Ill. App. 503. Permitting allegation of pleading to which special exception had been sustained to be read to jury held prejudicial, where evidence was equally balanced. Simpson v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 352, 95 S. W. 94.

63. In action against traction company for injuries, telling jury if they wanted to find out whether defendant's motorman and conductors were negligent, to go to records of county and see what juries in other cases had said about them. San Antonio Traction Co. v. Parks [Tex. Civ. App.] 15 Tex. Ct. Rep. 171, 93 S. W. 130.

64. Referring to fact that opposing party had been unable to get verdict on former trial Prewitt v. Southern Tel. & T. Co. [Tex. Civ. App.] 101 S. W. 812.

65. See 7 C. L. 261.

66. Argument as to dangerous character of plaintiff held not so unwarranted as to be error. Foss v. Smith, 79 Vt. 434, 65 A. 553.

67. Where affidavit for continuance was read as deposition of absent witnesses, remarks of counsel to effect that he knew nothing about them, had had no opportunity to cross-examine them, and that they might have been produced if they had been wanted, held not improper or prejudicial, particularly where testimony was not material except in one particular, as to which it was corroborated. Louisville St. R. Co. v. Brownfield, 29 Ky. L. R. 1097, 96 S. W. 912. Waiver of privilege by plaintiff after physician who had attended him was produced in court, in presence of jury as witness for defendant, held not to bar comment by counsel for plaintiff affecting physician's credibility as witness. Hodge v. St. Louis, 146 Mich. 173, 13 Det. Leg. N. 749, 109 N. W. 252. When made under claim that improper disclosures by the physician led to his being called as a witness. Id. Referring to testimony as manufactured of much the same stuff as dreams are made of, as baseless fabrication of dream, etc., held proper. Harless v. Southwest Missouri Elec. R. Co., 123 Mo. App. 22, 99 S. W. 793. Where testimony is conflicting, may urge that testimony of adverse witness is untrue, and, if manner of witness and character of his testimony indicates that he has been coached, may endeavor to induce jury to believe that such is fact; but it is improper to make such a statement as a fact, or in absence of anything to warrant jury in believing it a fact, to argue that it is. Beaumont Trac. Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352.

68. Constitutes prejudicial error where it tends to inflame minds of jurors. Young v. Kinney [Neb.] 112 N. W. 558. Argument from which jury could draw no inference except that defendant was thief and was keeping a fence for pack of organized thieves. Id. Making statements concerning opposite party, not supported by evidence, and which were calculated to prejudice minds of jury against him. Hurst v. Williams [Ky.] 102 S. W. 1176. Persisting in charges and accusations in nowise supported by evidence, and which clearly tended to arouse prejudice of jury against defendant, held reversible error. Fishblatt v. New York City R. Co., 99 N. Y. S. 836. Though conduct of defendant was justly subject to censure, held improper to vilify him. Crow v. Ball [Tex. Civ. App.] 99 S. W. 583. Vilification in action for conversion held harmless, where undisputed evidence showed that he converted plaintiff's property, and verdict was not in excess of its reasonable value. Id.

69. Constitutes prejudicial error where it tends to inflame minds of jurors. Young v. Kinney [Neb.] 112 N. W. 558. Argument from which jury could draw no inference except that certain of defendant s witnesses were perjured, and testified falsely at instance of defendant. Id. Statement of counsel that he had "mighty little" respect for experts "because they are employed to serve their clients and paid mighty well for it," held reversible error, where was no evi-

any evidence to support the assertion, that employes will lose their positions unless they testify in favor of their employer.[71] It is proper to comment on the failure of a party to testify,[72] the absence of testimony to meet the case made,[73] or the failure to produce witnesses,[74] not equally accessible to both parties,[75] but not on the refusal of a witness to testify on the ground of self incrimination,[76] or the failure of an attorney in the case to testify in behalf of his client, when it would have been improper for him to do so,[77] or to refer to the ability of a corporate defendant to procure witnesses to meet the case made against it,[78] or to state the reasons why certain witnesses were not called.[79]

dence respecting compensation of experts who testified, or that they were specially employed by plaintiff for whom they testified, and no steps were taken to remove prejudicial effect from minds of jury. Winslow v. Smith [N. H.] 65 A. 108. Dwelling unduly on fact that conductor on car on which plaintiff was injured did not give right name on entering defendant's employ, and referring to him as man who committed crime on entering that corporation, held improper. Keenan v. Metropolitan St. R. Co., 103 N. Y. S. 61. In action against railroad for injury to horses, argument to effect that railroad men always swore that shipments were handled carefully because they did not want to be censured, and that jury had doubtless seen railroad men in court, who were doubtless inspectors and knew of condition of car, and, if condition of car was not as plaintiff claimed, why were they not called to prove it, held reversible error, where evidence was conflicting. Texas & P. R. Co. v. Terry [Tex. Civ. App.] 16 Tex. Ct. Rep. 990, 97 S. W. 325. Refusal to grant new trial for gratuitious assault on character of experts held not cause for reversal, particularly where brief did not show that their testimony was favorable to complaining defendant, or material on any defensive issue. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 99 S. W. 715.

70. Continued attacks on conduct of counsel for unprofessional conduct in taking different sides of same question in different suits held cause for reversal, when persisted in after objections had been repeatedly sustained. Thompson v. Hoppert, 120 Ill. App. 588. Unjustifiable attacks on integrity of opposing counsel in briefs filed in appellate court, unless voluntarily withdrawn or satisfactorily explained, will be ordered erased from copies which remain part of public records, where brief is not stricken on that account. Ogg v. Glover, 72 Kan. 247, 83 P. 1039.

71. Kentucky & I. Bridge & R. Co. v. Nuttall, 29 Ky. L. R. 1167, 96 S. W. 1131. Held violation of rule 39, and reversible error. Texas & P. R. Co. v. Beezley [Tex. Civ. App.] 101 S. W. 1051. Refusal to require counsel to withdraw statement held harmless. Minard v. West Jersey & S. R. Co. [N. J. Law] 64 A. 1054.

72. On fact that defendant, though present, failed to testify in denial of plaintiff's evidence, and offered no explanation for failure to testify. Hull v. Douglass, 79 Conn. 266, 64 A. 351. Fairly within latitude allowed counsel to call it refusal on defendant's part to take stand in his own behalf. Id. Where the principal facts attending transaction are peculiarly within knowledge of plaintiff and defendant and plaintiff gives his version favoring his claim. Ledford v. Emerson, 141 N. C. 596, 54 S. E. 433. His voluntary absence in Europe, in violation of bail bond made by order in cause, he having been arrested on allegations of fraud, held not to alter case to his advantage. Id.

73. Dahrooge v. Pere Marquette R. Co., 144 Mich. 544, 13 Det. Leg. N. 381, 108 N. W. 283.

74. In action against city, reference to nonproduction of witnesses to show want of notice of defect in sidewalk held fair argument. Stagner v. Rich Hill, 119 Mo. App. 281, 95 S. W. 957. In action for personal injuries, refusal to permit defendant's counsel to comment on failure of plaintiff to produce physician who treated him as witness, with view of having jury infer that his testimony would not have been favorable to plaintiff, held reversible error. Brotherton v. Barber Asphalt Pav. Co., 117 App. Div. 791, 102 N. Y. S. 1089.

75. Held reversible error to permit counsel to call attention to fact that defendant had not produced certain witness and ask jury to draw unfavorable inference from that fact against defendant, where such person was no longer in defendant's employ and latter had no knowledge of his whereabouts. Mutual Industrial Indemnity Co. v. Perkins [Ark.] 98 S. W. 709. In slander, where defendant testifies that alleged defamation was told him by third person living within few miles of and equally as accessible to him as to plaintiff, unfavorable comment on plaintiff's failure to call such third person as witness is reversible error. Sears v. Duling, 79 Vt. 334, 65 A. 90.

76. Easterly v. Gater, 17 Okl. 93, 87 P. 853.

77. Failure of court, on objection, to stop argument, reprimand counsel, and instruct jury to disregard it, held virtual holding that it was proper. Sanger v. McDonald [Ark.] 102 S. W. 690.

78. Held not prejudicial. Dahrooge v. Pere Marquette R. Co., 144 Mich. 544, 13 Det. Leg. N. 381, 108 N. W. 283; Bettis v. Chicago, etc., R. Co., 131 Iowa, 46, 108 N. W. 103. Statement, without any evidence to justify it, that defendant had millions of capital, and thousands of employes, and had failed to produce a passenger who saw accident, held improper. Keenan v. Metropolitan St. R. Co., 103 N. Y. S. 61.

79. Statement in reply to comments of opposing counsel on their absence held not ground for reversal, it not appearing that result of trial was in any way affected thereby. Hammock v. Tacoma [Wash.] 87 P. 924.

Comments on instructions and special interrogatories.[80]—Counsel may read and comment upon interrogatories, and array the evidence necessary to be considered in answering the same,[81] though he may not tell the jury how to answer them.[82] He may also use the instructions to illustrate his argument,[83] but he may not discuss the significance of a refused instruction,[84] or to tell the jury that they need only consider such instructions as present his theory.[85]

Appeals to passion, prejudice, and sympathy.[86]—Appeals on considerations other than the merits of the case,[87] or the use of language or argument calculated to arouse the sympathy of the jury,[88] or to prejudice them against the opposite party,[89] are improper. Thus, it is improper to contrast the financial conditions

80. See 7 C. L. 261.

81. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.

82. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. In case he does so, opposite party is only entitled to have jury sufficiently admonished without delay that such statement may not be considered, and is no ground for discharging jury. Id.

83. Under Sess. Laws 1901, p. 160, counsel held entitled to use instructions to illustrate Sess. Laws 1901, p. 160. Held no impropriety in his re-reading such portions of charge as he deemed particularly pertinent. Storm v. Butte [Mont.] 89 P. 726. Refusal to allow such use held harmless, where it did not appear that he was unable to properly argue case without them, or that he could not recall to jury substance of charge given. Id.

84. Statement that it was duty of court to give demurrer to evidence if plaintiff had no case, and in not giving demurrer and letting case go to jury he decided, in effect, that plaintiff did have case, held improper. Eppstein v. Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967.

85. Statement that first instruction required jury to find for plaintiff, and that others need not be considered if they believed as therein defined, held improper. Hurst v. Williams [Ky.] 102 S. W. 1176.

86. See 7 C. L. 261.

87. Statement as to probable size of fee of defendant's counsel in insurance case held improper. Cox v. Continental Ins. Co., 104 N. Y. S. 421. Statement in case against insurance company that insurance companies will go to any ends (Id.), that they have stacks of money (Id.), and pay large dividends, held reversible error (Id.). Persisting, after being reproved, in making remarks showing an intention to procure verdict through prejudice of jury rather than upon evidence held reversible error. Id. In action for death by wrongful act statement by counsel for defendant in arguing motion for nonsuit that if it was done he would promise to take care of plaintiff and her children, etc., held improper, but not reversible error, where granting of nonsuit was proper on evidence. Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053.

88. Held improper: Allusion to plaintiff's orphanage in personal injury action. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334. Referring to plaintiff as "penniless girl." Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 99 S. W. 715. Statement that if jury did not believe plaintiff and thought him a fraud, and that there was no evidence backing him, then they should throw him and his wife and children on world, held not reversible error. Wells, Fargo & Co. Exp. v. Boyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 350, 98 S. W. 441.

Held not improper for counsel to speak of his client as "this honest German girl," and to ask verdict in her favor, though such characterization was not authorized by any testimony, and though most of jury were Germans, it not appearing that he sought verdict because she was German. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 99 S. W. 715.

89. Argument held improper: Referring to contract under which cattle were shipped as "yellow backed literature," where was no issue as to its validity. St. Louis, etc., Ry. Co. v. Crowder [Ark.] 103 S. W. 172. In action against railroad for personal injuries, statement that by reports of interstate commerce commission there had been many thousands of deaths and injuries by railroad accidents during past year. Seaboard Air Line Ry. v. Smith [Fla.] 43 So. 235. In action against railroad for wrongful death, unwarranted assertion by plaintiff's counsel that defendant's engineers and firemen were murderers held cause for reversal where persistently repeated after he had been warned, and after jury had been instructed to disregard statements. Orendorf v. New York Cent. & H. R. R. Co., 104 N. Y. S. 222. Statement that action of defendant corporation was unheard of and damnable. Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 29, 97 S. W. 712. Statement that foreman of grand jury, who was vice-president of defendant company, had no right to request court for attendance of witnesses before grand jury who had been sworn and placed under rule as witnesses in case at bar. Id. Expressing fear that employés of defendant who had testified for plaintiff would lose their places, though there was no evidence on that point. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459. Statement that counsel for defendant railroad rode in their private and palace cars when they came to court, though there was no evidence to that effect. Id. Argument that in many states defendant's conduct would have landed him in the penitentiary "as it ought to do here" held not ground for reversal under the circumstances. Bradford v. National Benefit Ass'n, 26 App. D. C. 268. Reference to number of employes killed annually through negligence of railroads, held not prejudicial. Louisville & A. R. Co. v. Wilson, 30 Ky. L. R. 734, 99 S. W. 634.

of the parties,[90] appeal to the prejudice against corporations,[91] or to sectional prejudice,[92] refer to the fact that the opposite party had taken exceptions and will appeal if the verdict is against him,[93] or to attempt to create an impression in the minds of the jury that whatever they do will be approved on appeal.[94]

§ 4. *Conduct and demeanor during trial.*[95]—It is improper to abuse witnesses while examining them.[96] It is improper to make remarks or statements at any time during the trial which operate to bring prejudicial matters outside the record before the jury,[97] or which are calculated to prejudice the standing of the opposite party before the jury,[98] or his right of cross-examination.[99] In personal injury cases it is improper to persistently attempt to impress the jury with the idea that an insurance company and not the local defendant in the case will be called upon to respond as to such damages as may be assessed.[1] The mere offer of inadmissible evidence.[2]

90. Seaboard Air Line Ry. v. Smith [Fla.] 43 So. 235; Bettis v. Chicago, etc., R. Co., 131 Iowa, 46, 108 N. W. 103; Davis v. Adrian, 147 Mich. 300, 13 Det. Leg. N. 1023, 110 N. W. 1084; Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459. Held violation of rule 39, and reversible error. Texas & P. R. Co. v. Beezley [Tex. Civ. App.] 101 S. W. 1051. In action by bank against receiver of an insolvent bank on fraudulently certified checks, argument that plaintiff was solvent while creditors of defendant bank were poor held prejudicial error. Detroit Nat. Bk. v. Union Trust Co., 145 Mich. 656, 13 Det. Leg. N. 593, 108 N. W. 1092. In action for injuries to miner, where counsel for plaintiff stated in argument respecting plaintiff's return to work before his injuries were healed, that miners do not have a very large bank account, and that if plaintiff went to work he did not do so because he wanted to, but because he had to, and because he had wife and family, and had to get daily bread, refusal of new trial was within discretion of the trial court. Cook v. Smith-Lowe Co. [Iowa] 109 N. W. 798.

91. Statements as to difficulty of controlling corporations, etc. Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 29, 97 S. W. 712. Refusal to withdraw juror because of statement in suit for personal injury against city that corporate property owner was ultimately liable held reversible error, where court did not attempt to withdraw remark from jury or admonish them in regard to it. Walsh v. City of Wilkes-Barre, 215 Pa. 226, 64 A. 407.

92. In action against carrier for damages for alleged insulting conduct of conductor to female passengers, argument that latter were from south and that conductor was from north held improper, particularly where there was no evidence tending to show latter fact. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574.

93. Statement that in estimating damages jury should take into consideration fact that defendant had taken exceptions, and that it had been stated if verdict was against it, it would appeal. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

94. Statement that member of appellate court would approve verdict in double amount sued for because he was a confederate soldier held highly prejudicial. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574.

95. See 7 C. L. 263.

96. Statement to witness in course of examination that counsel did not think that oath amounted to anything with him. New York Life Ins. Co. v. Rilling, 121 Ill. App. 169. Asking witness during cross-examination if he had anything to conceal, where not justified by record. Libby v. Cook, 123 Ill. App. 574.

97. Statement by counsel in controversy over admission of evidence and in presence of jury that issue to which such evidence related had been determined in his client's favor by two juries held improper. Meyer Bros. Drug Co. v. Madden, Graham & Co. [Tex. Civ. App.] 99 S. W. 723.

98. Where plaintiff introduced evidence that age of certain person was shown in family Bible, but did not introduce latter in evidence, held improper, on defendant's counsel commenting in argument on failure to introduce it, for plaintiff's counsel to produce it and tell defendant's counsel he could then introduce it himself. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275. Remark on objection to testimony being sustained "That's all right. It doesn't hurt much," and, on counsel for adverse party announcing that they would offer objections to testimony, "I have no doubt you will," held too trivial to influence jury. Guffy Petroleum Co v. Hamill [Tex. Civ. App.] 94 S. W. 458. Where plaintiff's counsel stated that defendant's counsel might state that plaintiff was a knave, but could not claim that he was a fool, argument by defendant's counsel on assumption that plaintiff's counsel granted that plaintiff was a knave and that speaker guessed it was generally granted held not prejudicial. Foss v. Smith, 79 Vt. 434, 65 A. 553.

99. Statements by counsel during cross-examination of his witnesses calculated to prejudice opponent's right to cross-examine without witness being assisted by his counsel. Keenan v. Metropolitan St. R. Co., 103 N. Y. S. 61.

1. Suggesting such fact by questioning jurors and opposing counsel held ground for new trial. Beaumont Trac. Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352. Is improper in examining jurors as to their interest in any casualty insurance company to do so in an extraordinary manner as if this portion of their examination were of peculiar moment. Howard v. Beldenville Lumber Co., 129 Wis. 98, 108 N. W.

or the asking of improper questions,[3] is not ordinarily ground for reversal unless done in bad faith,[4] or persisted in after an adverse ruling.[5] Misconduct of counsel is no ground for striking a pleading from the files and entering judgment by default in the absence of a showing that his client in any way participated in or instigated it.[6]

§ 5. *Excuses for impropriety.*[7]—There is a conflict of authority as to whether misconduct is excused because provoked by opposing counsel or because the latter has been guilty of the same offense.[8]

§ 6. *Objections and rulings.*[9]—Alleged misconduct cannot be reviewed on appeal unless an objection is seasonably interposed, a ruling obtained, and an exception thereto taken,[10] and unless the ordinary steps are taken to perfect the appeal and to present the matter to the reviewing court.[11]

§ 7. *Action of court to counsel curing objections.*[12]—Unless improper remarks are such as to prevent a fair verdict,[13] their harmful effect may generally be

48. Should simply ask fair questions in regard to subject, same as in examination as to any other matter, and should not discuss same with court and counsel, etc. Id.

2. Colloquy with court as to making of record on exclusion of evidence tending to show that defendant in action for wrongful death of servant was indemnified held not prejudicial. Hamner v. Janowitz, 131 Iowa, 20, 108 N. W. 109. Statement of counsel in opening argument that evidence would show certain fact, and subsequent offer to prove same, which court, after argument, refused to permit, held not in any sense improper or prejudicial, even if such evidence was not competent for purpose for which it was offered, and particularly where it was not incompetent for all purposes. McGinnis v. Rigby Printing Co., 122 Mo. App. 227, 99 S. W. 4. Denial of motion to withdraw juror and continue case because of offer of certain testimony held not an abuse of discretion, there being nothing in record indicating that court had any ground to believe that offer was not made in good faith. Frech v. Lewis, 32 Pa. Super. Ct. 279. Statement in answer to court's inquiry as to purpose of certain evidence, that it was to show that there was nothing in defendant's defense and that it was entirely fictitious held not prejudicial in view of fact that plaintiff claimed that contract on which defendants relied was forgery. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658.

3. Asking improper question held not prejudicial where it was answered in negative. Bodcaw Lumber Co. v. Ford [Ark.] 102 S. W. 896. Refusal to reprimand counsel for asking question to which objection was sustained held not an abuse of discretion. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. Asking question, answer to which had been ruled out on former trial, but which was not question to which any answer would have been illegitimate, held not improper, though counsel had been notified by opposing counsel before trial not to ask it, of which fact court was informed when objection was made, particularly where record did not show that answer was improper. Paris & G. N. R. Co. v. Calvin [Tex. Civ. App.] 103 S. W. 428.

4. Refusal to withdraw juror because of an offer of record in previous suit against another party for same injury, showing large verdict for plaintiff which was set aside on appeal, held reversible error. Wagner v. Hazle Tp., 215 Pa. 219, 64 A. 405.

5. Persistently disregarding rulings of court in continuing to ask incompetent questions after they had been ruled out, and indulging in remarks in regard to current testimony in presence and hearing of jury during examination of witnesses, of character tending to prejudice adverse party, thereby getting incompetent matter before jury, held reversible error. English v. Ricks [Tenn.] 95 S. W. 189. Repeatedly asking same question of different witnesses after court had held it improper held not ground for reversal where verdict was clearly justified by evidence. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 99 S. W. 867.

6. Misconduct of defendant's attorney in purposely absenting himself at time fixed for arguing demurrer to answer and taking papers with him held not imputable to client in absence of showing that he participated in or instigated it. Chenault v. Norton, 30 Ky. L. R. 875, 99 S. W. 899.

7. See 7 C. L. 263.

8. See 7 C. L. 264, n. 46. Improper remarks held not ground for reversal where they were provoked by opposing counsel, and jury was instructed to disregard them. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354. Fact that remark was replied to in kind considered in determining that it was not ground for reversal. St. Louis S. W. R. Co. v. Granger [Tex. Civ. App.] 100 S. W. 987; American Freehold Land Mortg. Co. v. Brown [Tex. Civ. App.] 101 S. W. 856.

9. See 7 C. L. 264.

10. See Saving Questions for Review, 8 C. L. 1822. On objection being made to language used, judge should stop discussion and take it down and then and there note exception, so there can be no question as to what actually transpired. Moseley v. Johnson [N. C.] 56 S. E. 922.

11. See Appeal and Review, 9 C. L. 148.

12. See 7 C. L. 264. See, also, Harmless and Prejudicial Error, 8 C. L. 1.

13. Ought to clearly appear that court took such action as was sufficient to remove prejudice and meet exigencies of the case. Seaboard Air Line Ry. v. Smith [Fla.] 43 So. 235. Instruction to disregard, etc., held insufficient. Id. How far effect of improper

cured by sustaining objections thereto promptly,[14] by their withdrawal,[15] by reprimanding counsel,[16] by instructing the jury to disregard them,[17] or properly instructing them as to their duty in the premises,[18] or by two or more of these com-

remark is cured by rebuke from court depends upon circumstances. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275. Mild rebuke held insufficient. Id. Pronounced and persistent misconduct in making charges in nowise supported by evidence, and which clearly tended to arouse prejudice of jury against defendant, held not cured by mild observation of judge to jury that they should base verdict on evidence alone. Fishblatt v. New York City R. Co., 99 N. Y. S. 836. Improper argument not necessarily cured by instructions to disregard it, but counsel takes chances of reversal in using it. Missouri, K. & T. R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 29, 97 S. W. 712.

14 Where argument is stopped on sustained objection, failure of court to reprimand counsel or instruct jury to disregard argument or to declare mistrial is not generally sufficient reason for setting verdict aside in absence of request for such instructions or reprimand, or motion for mistrial. Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911.

15. **Held not ground for reversal:** Attacking witness, where remark was withdrawn and court was not asked to reverse on that ground. Libby v. Cook, 123 Ill. App. 574. Referring to fact that child had been thrown off car, when it was not claimed or proved that violence had been used, where remark was immediately recalled and disavowed by counsel. Harless v. Southwest Missouri Elec. R. Co., 123 Mo. App. 22, 99 S. W. 793. Argument, where counsel withdrew statement and asked jury to discharge it, and verdict was not contrary to preponderance of evidence. San Antonio & A. P. R. Co. v. McMillan [Tex. Civ. App.] 17 Tex. Ct. Rep. 596, 98 S. W. 421. Remarks withdrawn on objection thereto being sustained. International, etc., R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 S. W. 660. Statement that every conductor on defendant's line would testify to certain thing, where it was withdrawn, and there was no evidence of it having been injurious. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 101 S. W. 554.

16. Statement that witnesses had to swear as they did, or lose their jobs held not prejudicial where court promptly rebuked counsel in presence of jury. Kentucky & I. Bridge & R. Co. v. Nuttall, 29 Ky. L. R. 1167, 96 S. W. 1131.

17. Fact that counsel told jury how to answer interrogatories does not entitle opponent to have jury discharged, but only to have them warned not to consider it, if so requested. Pittsburgh R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Where jury is instructed to disregard argument, on appeal it will be presumed in favor of judgment that they did so, and that verdict was not affected thereby. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666.

18. **Held cured by instruction to disregard.** Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 29, 97 S. W. 712. In action for libel, any misconduct on part of counsel for plaintiff in discussing action to be taken by court, and right to interrogate jury, in regard to publication of article in defendant's paper in regard to case pending trial. Tingley v. Times Mirror Co. [Cal.] 89 P. 1097. Harmful effect of remark, if any, Macon & B. R. Co. v. Parker, 127 Ga. 471, 56 S. E. 616. Statement that if suit had not been brought until after sound examination damages would have been $10,000 held not cause for reversal, where verdict did not indicate that jury were influenced thereby. City of Gibson v. Murray, 120 Ill. App. 296. Statement to witness while examining him that speaker did not think oath amounted to anything with him. New York Life Ins. Co. v. Rilling, 121 Ill. App. 169. Contrasting financial condition of parties, where no further instruction in regard to matter was requested, and it did not appear that jury was influenced thereby. Davis v. Adrian, 147 Mich. 300, 13 Det. Leg. N. 1023, 110 N. W. 1084. In action by children for death of father, telling jury that they might award substantial damages for loss of parents advice and counsel. Beaumont Trac. Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352. Stating as facts that witness had been drilled, where exception was not taken till close of argument in which it was used. Id. Appeal to sympathy of jury, if improper, where verdict did not indicate that it was result of prejudice or sympathy. San Antonio, etc., R. Co. v. McMillan [Tex. Civ. App.] 17 Tex. Ct. Rep. 596, 98 S. W. 421. Improper side bar remarks. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 99 S. W. 867. Improper remarks, where they were provoked by opposing counsel and jury was instructed to disregard same, and there was nothing to indicate that jury did not obey instruction. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354. Calling attention to fact that affidavit for continuance, which was received as testimony of absent witness, was made by counsel and not by witness. Thompson v. Issaquah Shingle Co [Wash.] 86 P. 588. Remarks as to probable force of evidentiary facts and claim predicated thereon by opposing counsel. Glettler v. Sheboygan Light, Power & R. Co., 130 Wis. 137, 109 N. W. 973. In action against railroad for damages by fire alleged to have been caused by sparks from engine, argument that it was negligent for defendant to burn wood instead of coal held not to require reversal, where instructions required verdict to be based on negligence in use of insufficient appliances to arrest sparks, and not on negligence in kind of fuel used. Monte Ne R. Co. v. Phillips, 80 Ark. 292, 96 S. W. 1060. Fact that counsel told jury how to answer interrogatories held not prejudicial where court instructed them to answer according to preponderance of evidence. Pittsburgh, etc. R. Co. v. Lightheiser, [Ind.] 78 N. E. 1033. Refusal to set aside verdict because of argument against propriety of taking advantage of bankruptcy law held not to require reversal in view of charge of court, particularly where record was insufficient to properly present question. Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808. Misstatement of evidence held no

bined,[19] nor will they result in a reversal where the findings are fully justified by the evidence and a new trial would undoubtedly result in a similar outcome.[20]

ARMY AND NAVY; ARRAIGNMENT AND PLEAS, see latest topical index.

ARREST AND BINDING OVER.

§ 1. Occasion or Necessity for Warrant (250).
§ 2. Privilege from Arrest (251).
§ 3. Complaint, Affidavit, or Information to Procure Warrant (251).
§ 4. The Warrant and Its Issuance (251).
§ 5. Making Arrest, and Keeping and Disposing of Prisoner (252).
§ 6. Preliminary Hearing, Binding Over, or Discharge (253).
§ 7. Custody Awaiting Indictment for Trial (254).

This topic is confined to arrest on charge of crime,[21] and also excludes admission to bail,[22] proceedings after binding over,[23] and civil liability for unlawful

ground for new trial where jury were instructed they must rely solely on their own recollection of evidence. Aetna Ins. Co. v. Missouri Pac. R. Co., 123 Mo. App. 513, 100 S. W. 569. Comments on refusal of witness to testify on ground of self-incrimination held not ground for reversal where court subsequently instructed jury that refusal should not be considered, and record did not justify appellate court in assuming that they disregarded such instruction. Easterly v. Gater, 17 Okl. 93, 87 P. 853.

19. Remarks held not ground for reversal: Where they were withdrawn and jury instructed to disregard them. Arden Lumber Co. v. Henderson Iron Works & Supply Co. [Ark.] 103 S. W. 185; San Antonio Trac. Co. v. Parks [Tex. Civ. App.] 15 Tex. Ct. Rep. 171, 93 S. W. 130. Seeking to base recovery on allegations of court in declaration which had been withdrawn, etc., where court sustained objections, rebuked counsel, and made it clear to jury that matter was not in case, and it was not claimed that verdict was excessive. Springfield Boiler & Mfg. Co. v. Parks, 123 Ill. App. 503. Where counsel withdrew remarks, and court without delay admonished jury not to consider them. Malott v. Central Trust Co. [Ind.] 79 N. E. 369. Reference to disparity of financial condition between parties, where, on objection, court stopped counsel and directed jury not to pay any attention to such statements or allow them to prejudice defendant, in absence of anything in record to show disregard of admonition by counsel or jury, particularly where trial court ruled on motion for new trial that misconduct was not prejudicial. Bettis v. Chicago, etc., R. Co., 131 Iowa, 46, 108 N. W. 103. Improper argument as to damages recoverable in condemnation proceedings, where court carefully gave jury proper rules for their guidance, and instructed them to disregard argument complained of, unless it seems probable that argument affected verdict. City of Detroit v. Little Co., 146 Mich. 373, 13 Det. Leg. N. 803, 109 N. W. 671. Where the court promptly interfered and reprimanded counsel, did not permit him to complete his statements, and instructed jury to disregard remarks. Brockmiller v. Industrial Works [Mich.] 14 Det. Leg. N. 336, 112 N. W. 688. In action for injuries by fall of elevator, where plaintiff's counsel remarked that the question whether plaintiff was a passenger was turning point in case. Court overruled objection but later changed ruling and stated that in special verdict there is no turning point. Held no reversible error in rulings. Ferguson v. Truax [Wis.] 110 N. W. 395. Attempt by innuendo to suggest to jury that evidence properly excluded upon objection of opposing party would have been injurious to latter, where court promptly suppressed it, commanded counsel to confine himself to evidence which had been admitted and ruled that jury had no right to infer what excluded evidence would have shown, particularly where trial court concluded that prejudice had not occured warranting new trial. Listman Mill Co. v. Miller [Wis.] 111 N. W. 496. Where language was withdrawn as soon as objected to, and court instructed jury not to consider it, it being presumed that jury obeyed. San Antonio Trac. Co. v. Parks [Tex. Civ. App.] 97 S. W. 510. Where counsel was promptly reprimanded, jury instructed to disregard it, and counsel withdrew it. Texas, etc., R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 S. W. 1070. Where remarks were withdrawn, and jury instructed not to consider them, held that it would be presumed on appeal, in absence of anything to contrary, that no prejudice resulted. Chicago, etc., R. Co. v. Gillett [Tex. Civ. App.] 99 S. W. 712. Referring to plaintiff as penniless girl cured, where court instructed jury to disregard it, and counsel asked them not to consider it. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 99 S. W. 715. Statements in jury's presence that issue raised by evidence sought to be introduced had been determined in his client's favor by two juries, where such statement was repeatedly and emphatically denied by court and opposing counsel, and such issue was not submitted to the jury, and evidence justified verdict. Meyer Bros. Drug Co. v. Madden, Graham & Co. [Tex. Civ. App.] 99 S. W. 723. Argument based on excluded testimony, where, on objection, counsel stated that he had not understood that it was excluded and would refrain from discussing it, and did so, and court instructed jury to disregard it. Houston, etc., R. Co. v. Davis [Tex. Civ. App.] 100 S. W. 1013. Improper comments on effort to impeach witness, where objection was promptly sustained, and court instructed jury at time to disregard it. International, etc., R. Co. v. Munn [Tex. Civ. App.] 102 S. W. 442.

20. See, also, last preceeding note. Moseley v. Johnson [N. C.] 56 S. E. 922.

21. See Civil Arrest, 7 C. L. 653.

22. See Bail, Criminal, 7 C. L. 348.

23. See Indictment and Prosecution, § C. L. 189.

arrest.[24] Purpose to lawfully arrest and resistance to unlawful arrest as justification for assault,[25] or homicide,[26] are also more fully treated elsewhere.

§ 1. *Occasion or necessity for warrant.*[27]—A peace officer may ordinarily arrest without a warrant for an offense committed in his presence,[28] particularly if it constitutes a breach of the peace,[29] and authority is sometimes given to magistrates to order arrest under like circumstances.[30] An officer may likewise arrest without warrant where a felony has been committed and he has reasonable ground to believe that the person to be apprehended is guilty thereof.[31] He has, however, no right to arrest a person without a warrant merely because he is acting in a suspicious manner,[32] and a police officer finding a person in possession of lost property has no authority to arrest him without a warrant on refusal to surrender it.[33] The authority of officers charged with the enforcement of particular laws is ordinarily more limited.[34] In some jurisdictions a warrant is not essential to authorize the arrest of one who has violated a town ordinance.[35] The right to arrest without warrant is generally regulated by the statutes and is in such case limited to the terms of the statute.[36] Among the specific offenses which under the statutes of different states authorize an arrest without a warrant are drunkenness,[37] carrying a pistol,[38] engaged in a public exhibition of baseball on Sunday,[39] theft,[40] and obstructing voting.[41]

24. See False Imprisonment, 7 C. L. 1643.

25. See Assault and Battery, 7 C. L. 274.

26. See Homicide, 8 C. L. 106.

27. See 7 C. L. 265.

28. Ky. Cr. Code Proc. § 36. Commonwealth v. McCann, 29 Ky. L. R. 707, 94 S. W. 45.

29. Reed v. Com., 30 Ky. L. R. 1212, 100 S. W. 856. Drunk and disorderly. Stevens v. Com., 30 Ky. L. R. 290, 98 S. W. 284. The criminal act must have been committed in the sight of the officer, or in such a manner that he could detect it by sight or hearing as the act of the person arrested. Brown v. Wallis [Tex. Civ. App.] 101 S. W. 1068.

30. Code, § 5198, providing that "a magistrate may orally order a peace officer—to arrest any one committing or attempting to commit a public offense" in his presence, does not authorize a magistrate to order the arrest of a person whom he did not see commit an offense. Snyder v. Thompson [Iowa] 112 N. W. 239.

31. Tracy v. Coffey, 8 Ohio C. C. (N. S.) 88. Under the Iowa Code, § 5196, subd. 2, to authorize a peace officer to make an arrest without a warrant, a public offense must have been committed, and the officer must have reasonable grounds for believing that the person arrested committed it. Snyder v. Thompson [Iowa] 112 N. W. 239. Evidence held sufficient to show probable cause for arrest for felony without warrant. O'Malley v. Whitaker, 118 La. 906, 43 So. 545.

32. Philips v. Leary, 100 N. Y. S. 200.

33. Ryan v. Chicago, 124 Ill. App. 188.

34. In Alabama a deputy license inspector cannot, without a warrant, arrest a person for engaging in business without a license. Gambill v. Fuqua [Ala.] 42 So. 735.

35. In Alabama a policeman has authority to arrest without a warrant for violation of a town ordinance if the offense is committed in his presence. Hammond v. State [Ala.] 41 So. 761. In Georgia, as a general rule, a municipal peace officer in whose presence a town ordinance has been violated has no authority to arrest without a warrant, when he has had ample time and opportunity since the commission of the offense to procure a warrant. Yates v. State, 127 Ga. 813, 56 S. E. 1017.

36. Snyder v. Thompson [Iowa] 112 N. W. 239.

37. Under Code, § 2402, the offender must be "found in a state of intoxication." Snyder v. Thompson [Iowa] 112 N. W. 239. Under Texas Code Cr. Proc., art. 249, and Rev. St. 1895, arts. 593, 598, 607, and the ordinance is of a town, a policeman of the town held authorized to arrest without a warrant one found drunk in a public place. Early v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 78, 97 S. W. 82.

38. Under the Texas Code Cr. Proc. 1895, art. 43, a policeman is a peace officer, and under Pen. Code 1895, art. 342, may, without a warrant, arrest any person carrying a pistol on his knowledge or upon information derived from some credible person. Hull v. State [Tex. Cr. App.] 100 S. W. 403. Under this statute, § 342, where a sheriff, who has without a warrant arrested a person for gaming, is subsequently informed that such person was carrying a pistol, he may hold him in custody for the latter offense. Garner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 173, 97 S. W. 98. A deputy sheriff may without a warrant arrest a person who, on information received, he believes to be carrying a pistol, even though the information is not correct. Saye v. State [Tex. Cr. App.] 99 S. W. 551.

39. A sheriff as a peace officer may without a warrant arrest any person engaged in his presence in a public exhibition of baseball on Sunday, in violation of New York Pen. Code, § 265. Paulding v. Lane, 104 N. Y. S. 1051.

40. Where cattle levied upon were retaken by the judgment debtor under a claim of right in the presence of a deputy sheriff and the judgment creditor, no theft was committed, authorizing an arrest without

A private person may ordinarily arrest for an offense in his presence or on information that a felony has been committed.[42] Where a congregation has met in a church for religious worship, and no peace officer is present or accessible, members of the congregation may arrest persons in the immediate vicinity, though not on the church premises, who are committing acts which are statutory misdemeanors and thereby disturbing the worshipers.[43]

§ 2. *Privilege from arrest.*[44]

§ 3. *Complaint, affidavit, or information to procure warrant.* —The form of the complaint or information is generally prescribed by statute,[46] but it must be made under oath, although there is no statutory requirement that it shall be,[47] and must either be on the complainant's knowledge or discloses the facts on which his belief is based.[48] Where an affidavit is required as the basis of a prosecution or accusation, it must be made before such officer as the statute prescribes,[49] but if the statute fails to make provision on this subject, it may be made before a commercial notary public.[50] Statutory requirements and the nature of the offense are determination of what shall be stated in a complaint or information,[51] but it must affirmatively disclose the commission of a definite crime,[52] and in New York a magistrate need not examine witnesses in aid of an information deficient in this respect.[53] The failure of a complaint to give the date of the commission of the offense alleged will not render it void.[54] In the absence of statutory requirement to the contrary, a complaint may be made by any person who can legally be a witness and who has knowledge or information of the facts.[55] Amendment may be allowed after demurrer sustained for nonjurisdictional defects,[56] and a lost information may ordinarily be allowed to be supplied by copy.[57]

§ 4. *The warrant and its issuance.*[58]—The purpose of a warrant being to get

a warrant for that crime, or under Code Cr. Proc. art. 364, authorizing such arrest where stolen property is found in the possession of the thief. Martin v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 63, 95 S. W. 501.

41. Under the Missouri statutes, Rev. St. 1899, §§ 6212, 6213, 6232, a police officer in the city of St. Louis may arrest without warrants persons who, in his view, obstruct the voting at a polling place by assaulting the voters. State v. Flynn, 119 Mo. App. 712, 94 S. W. 543.

42. In South Carolina any person may, without a warrant, arrest one upon information that he has committed a felony, although such information is not true, if it is of such a nature as to convince a reasonable man that a felony has been committed by him. Cr. Code 1902, § 1. State v. Griffin, 74 S. C. 412, 54 S. E. 603.

43. Rich v. Bailey, 30 Ky. L. R. 155, 97 S. W. 747.

44, 45. See 7 C. L. 268.

46. Pub. Acts 1893, p. 170, Act No. 118, providing for the trial of convicts for crimes committed in prison, does not make any change in the form of complaint or information in a proceeding under it. People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514.

47, 48. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330.

49. Under statute Dec. 9, 1896, § 3 (Acts 1896-97, p. 124), the clerk of the circuit court, and ex officio clerk of the county court of Shelby County, has autnority to take an affidavit in a prosecution for selling liquor without a license. Roland v. State [Ala.] 41 So. 963.

50. In city court of Bainbridge. Shuler v. State, 125 Ga. 778, 54 S. E. 689. In criminal court of Atlanta. Mitchell v. State, 126 Ga. 84, 54 S. E. 931. Whether such an affidavit would furnish a sufficient foundation for the issuance, by the judge of the criminal court, of a warrant to arrest the accused person, quaere. Id.

51. Complaint praying for the commitment of minor to the California State School for Juvenile Offenders held insufficient because it failed to state the home of the prisoner to be an unfit place for her and that she was incorrigible, or a vagrant, or to make any averment bringing her under the provisions of St. 1905, p. 806, c. 610, § 2, subsec. 1, and p. 81, c. 84, § 3. In re Lewis, 3 Cal. App. 738, 86 P. 996.

52, 53. People v. Wahle, 49 Misc. 435, 99 N. Y. S. 895.

54. Does not authorize suit against officer who signed it. Roberts v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 50, 94 S. W. 388.

55. State v. Giles, 101 Me. 349, 64 A. 619. Neither the commissioner of the sea and shore fisheries and his deputies nor the fish wardens have exclusive right to make complaints before magistrates for violations of Rev. St. c. 41. Such complaints may be made by unofficial persons. State v. Giles, 101 Me. 349, 64 A. 619.

56. Jones v. State [Ala.] 41 So. 299.

57. County court has inherent power to allow substitution. Roland v. State [Ala.] 41 So. 963.

58. See 7 C. L. 269.

the accused into court, if he be present and stand trial, it is immaterial that there was no warrant,[59] or that it has become functus officio because of delay,[60] nor can mere technical defects in a warrant be invoked to set aside the conviction of the person arrested under it.[61] What judicial officers have jurisdiction to issue warrants is generally determined by statute.[62] In Nebraska a county court or county judge has jurisdiction to issue a warrant in a case where the offense is beyond his jurisdiction.[63] It is the duty of a magistrate to whom a complaint has been made to determine for himself whether an offense has been committed.[64] If the facts shown do not warrant an inference of the existence of probable cause to believe that the crime charged has been committed, the magistrate is without jurisdiction to cause the arrest of the accused.[65] A warrant which by its terms is based upon a complaint filed on a certain date cannot be supported by a complaint of another date.[66] The warrant must state the offense.[67] When a warrant is delivered to a sheriff for service and the sheriff thereafter, by direction of the county attorney, returns the warrant "not found," and files the same with the justice who issued it, such warrant thereupon becomes functus officio.[68]

§ 5. *Making arrest, and keeping and disposing of prisoner.*[69]—Technically, any detention of the person of another by the laying on of hands, or by the exercise of force or threats, may be an arrest.[70] That the warrant was defective[71] or the arrest illegal is no ground for acquittal of the person arrested.[72] Where persons having authority to arrest, and using the proper means for that purpose, are resisted in so doing, they may repel force with force and need not give back.[73] In making an arrest for a felony, a peace officer is justified in using a greater degree of force than in arresting for a misdemeanor.[74] Where an officer has reasonable grounds

59. Roland v. State [Ala.] 41 So. 963; People v. Markowitz, 104 N. Y. 872.

60. Roland v. State [Ala.] 41 So. 963.

61. Under the Michigan statute, Pub. Acts 1893, p. 170, Act No. 118, providing for the trial of convicts for crimes committed in prison, if a warrant for the arrest of a convict is made in the ordinary form and directed to the warden of the prison, the fact that it uses the word "inmate" instead of "convict" cannot be invoked in behalf of the convict to set aside his subsequent conviction and cause his discharge. People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514. The warden may waive the technical defect in the warrant. Id.

62. Under Rev. St. U. S., § 1014 (U. S. Comp. St. 1901, p. 716), a justice of the peace in Texas might have issued a warrant for the arrest of one who had committed a crime in the Indian Territory, agreeably to the usual mode of process in Texas. Roberts v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 50, 91 S. W. 388.

63. Stetter v. State [Neb.] 110 N. W. 761.

64. Under the Washington Statute, Ballinger's Ann. Codes & St., § 6695, the magistrate must investigate for himself, and if he finds that an offense has been committed he must issue his warrant, and he cannot refuse to perform this duty on the ground that it is incumbent on the prosecuting attorney to make the investigation. State v. Yakey [Wash.] 85 P. 990.

65. People v. Moss, 187 N. Y. 410, 80 N. E. 383.

66. In re Lewis, 3 Cal. App. 738, 86 P. 996.

67. A warrant which after describing the crime states that it is "in violation" of a specified statute "as amended" by another statute, specifying it, states an offense, under the requirement of the New York statute, Code Cr. Proc. § 152, although the amending statute is in part unconstitutional. People v. Mensching [N. Y.] 79 N. E. 884. The charge in a warrant that the accused did bring whisky into a certain town necessarily includes the charge that he had it in his possession in such town. McGuire v. Com., 30 Ky. L. R. 720, 99 S. W. 612. Upon a trial under such a warrant the court may, when the evidence comes out, order the warrant amended so as to charge defendant with having the whisky in his possession in the town. Id.

68. In re Broadhead, 74 Kan. 401, 86 P. 458. Upon such return of the warrant no action is thereafter pending which suspends the running of the statute of limitations. Id.

69. See 7 C. L. 269.

70. Rich v. Bailey, 30 Ky. L. R. 155, 97 S. W. 747. There need not be an application of actual force, or manual touching of the body, or such physical restraint as is visible to the eye. McAleer v. Good, 216 Pa. 473, 65 A. 934. Where police officers go to plaintiff's house and get him to accompany them to the office of chief of police, and that officer has him incarcerated in prison, they are liable for an unlawful arrest. Id.

71. See § 4, ante.

72. Mitchell v. State, 126 Ga. 84, 54 S. E. 931.

73. Policeman held justified in shooting resisting offender. Hammond v. State [Ala.] 41 So. 761.

74. **In making an arrest for a felony** a peace officer may use such force as is neces-

to apprehend that one who has committed a breach of the peace will resist arrest, he is justified in summoning bystanders as a posse comitatus.[75] If a suspect refuses to submit to arrest and compels the officers to use force, he is guilty of resisting officers provided he is aware of their character as officers.[76] In a prosecution for killing an officer while he was attempting to make an arrest for a felony, if the killing was premeditated, and the officer was fully advised as to the crime, and would have been authorized in making the arrest without a warrant, the question of the legality of the warrant under which the arrest was made is of no importance and does not excuse the willful and premeditated killing of the officer.[77] It is the duty of an officer to whom a warrant is delivered to arrest the person named therein and take him before the proper judicial officer.[78] While prisoners may be searched, a suspected person cannot be searched without a formal arrest.[79] It is improper to photograph for police records a person under arrest and not yet tried unless such photogaph is necessary for purposes of identification with reference to the particular offense charged.[80] An officer arresting without warrant and discovering that he has made a mistake as to the identity of the prisoner should at once release him.[81]

§ 6. *Preliminary hearing; binding over, or discharge.*[82]—The object of a preliminary examination is to ascertain whether a crime has been committed, and whether there is probable cause for believing that the accused is guilty.[83] Where a preliminary examination is not prerequisite to indictment, it must be timely asked.[84] The evidence at a preliminary examination is generally sufficient to authorize a holding over if a probability appears that the offense has been committed by accused,[85] But the evidence must at least be sufficient to show that there is reason to believe that an indictment will be preferred for some violaion of the law.[86] The burden is upon the state to show sufficient facts to warrant a holding

sary to arrest the felon, even to the extent of killing him while in flight. Reed v. Com., 30 Ky. L. R. 1212, 100 S. W. 856. But the killing of a felon is not excusable if he could have been arrested without the taking of his life. Id.

In arresting one guilty of a misdemeanor, a peace officer is never justified in killing the offender merely to effect the arrest. Reed v. Com., 30 Ky. L. R. 1212, 100 S. W. 856. But if the officer met with resistance he may oppose sufficient force to overcome it, even to the taking of life, provided the offender is resisting to such an extent as to place the officer in danger of loss of life or great bodily harm. Id. But the officer must use no greater force than is reasonably necessary, or apparently so, for his protection, or to prevent the prisoner, if in custody, from effecting his escape by overcoming him by violence or force. Id. If after a legal arrest by a peace officer for a misdemeanor the prisoner attempts to release himself by forcibly overpowering the officer, the latter may use such force as is reasonable necessary to overcome that being used by the prisoner even to the extent of shooting and killing him, if it reasonably appears that that is the only way to prevent his escape. Stevens v. Com., 30 Ky. L. R. 290, 98 S. W. 284.

75. Reed v. Com., 30 Ky. L. R. 1212, 100 S. W. 856. In such case, what would have justified the peace officer in killing the person resisting arrest will justify the killing by a member of a posse comitatus. Id.

76. Scienter for jury. Tracy v. Coffey, 8 Ohio C. C. [N. S.] 88.

77. Coile v. State, 8 Ohio C. C. (N. S.) 596.

78. Where, under Rev. St. U. S. § 1014 (U. S. Comp. St. 1901, p. 716), a warrant issued by a justice of the peace for one who has committed a crime in the Indian Territory is delivered to the sheriff, it is his duty to arrest the offender and take him before the nearest United States circuit court commissioner or judicial officer having jurisdiction. Roberts v. Brown [Tex. Civ. App] 16 Tex. Ct. Rep. 50, 94 S. W. 388.

79. An officer who has no warrant for arrest is not justified in compelling a person whom he may suspect of larceny to strip naked for the purpose of a search. Hebrew v. Pulis, 73 N. J. Law, 621, 64 A. 121.

80. Schulman v. Whitaker, 117 La. 704, 42 So. 227; Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228.

81. Tracy v. Coffey, 8 Ohio C. C. (N. S.) 88.

82. See 7 C. L. 270.

83. State v. Bond, 12 Idaho, 424, 86 P. 43.

84. After a case has been reached and called for trial on the merits, the defendant is not entitled to a postponement in order that he may first have a preliminary trial before a magistrate. Under the Georgia Act of September 6, 1891 (Acts 1890-91, p. 935), creating the criminal court of Atlanta, which provides that where the judge of that court issues his warrant and the defendant is arrested under it, if he so desires he may have "a criminal trial" before a magistrate. Mitchell v. State, 126 Ga. 84, 54 S. E. 931.

85. In re Stilts, 74 Kan. 805, 87 P. 1134.

86. Ex parte Patterson [Tex. Cr. App.] 16 Tex. Ct. Rep. 710, 95 S. W. 1061. Evidence of assaulting an officer attempting to make

over.[87] What courts have jurisdiction to act as committing magistrates depends wholly on statute.[88] It is essential to the regularity of a commitment to await the action of the grand jury that it charge the prisoner with a crime,[89] but irregularity is not ground for absolute discharge.[90]

§ 7. *Custody awaiting indictment for trial.*[91]

Arrest of Judgment; Arrest on Civil Process, see latest topical index.

ARSON.

The Crime (254).
Indictment and Prosecution (255).
Evidence, Presumptions and Burdens of Proof (255).
Admissibility (255).
Weight and Sufficiency (256).
Instructions (256).
Punishment (257).

The crime.[93]—Arson is the unlawful and malicious[94] burning of the house[95] of another.[96] Want of consent to the burning by the owner of the building burned is not an ingredient of the crime.[97] Intent is essential to the crime of arson and the statutory crime of maliciously burning property with intent to defraud an insurance company.[98] At common law arson is a felony.[99] One who aids, abets, or procures the burning of a building may be prosecuted as a principal offender.[1]

an arrest without a warrant held sufficient. In re Stilts, 74 Kan. 805, 87 P. 1134. Evidence held not sufficient to authorize holding on charge of rape. Ex parte Patterson [Tex. Cr. App.] 16 Tex. Ct. Rep. 710, 95 S. W. 1061.

87. Ex parte Patterson [Tex. Cr. App.] 16 Tex. Ct. Rep. 710, 95 S. W. 1061.

88. In Nebraska a county court or county judge has jurisdiction to conduct a preliminary examination in a case where the offense is beyond his jurisdiction. Stetter v. State [Neb.] 110 N. W. 761. In Texas a justice of the peace may not discharge one accused of a capital felony, but he has final jurisdiction to fix the bail until indictment found, or in the absence of an application to increase the bail. Ex parte Wasson [Tex. Cr. App.] 17 Tex. Ct. Rep. 173, 97 S. W. 103. Where upon preliminary examination of a felony charge before a justice of the peace acting in his ex-officio capacity of magistrate the accused is discharged upon the felony charge, the justice has not jurisdiction to order him to appear before him as a justice of the peace for trial upon a misdemeanor without the interposition of a formal complaint. People v. Swain [Cal. App.] 90 P. 720.

89. In New York a commitment which charges prisoner "with having caused the death" of a person specified is irregular, as under Pen. Code, § 180, causing the death of a person may not be a crime. In re Joerns, 51 Misc. 395, 100 N. Y. S. 503.

90. In New York where a prisoner is legally committed for a criminal offense, but the commitment is irregular, he is not entitled to absolute discharge but is entitled to a final order discharging him upon his giving bail. Code Civ. Proc. § 2035. In re Joerns, 51 Misc. 395, 100 N. Y. S. 503.

91. See 7 C. L. 271.

92, 93. See 7 C. L. 271.

94. Mai v. People, 224 Ill. 414, 79 N. E. 633. A willful and malicious burning is an essential element of the crime. Williams v. State, 125 Ga. 741, 54 S. E. 661. The burning must be the willful act of a person criminally responsible. State v. Pienick [Wash.] 90 P. 645.

95. Mai v. People, 224 Ill. 414, 79 N. E. 638. If one part of a school building is used as a habitation, the entire building is a dwelling house, within the meaning of the law relating to arson, if there is an internal communication between the two parts. United States v. Cardish, 145 F. 242. Building held to be a "house" within the meaning of the Texas statutes (Pen. Code 1895, § 757), which defines a house as "a building, device, or structure, enclosed with walls and covered, whatever be the material used for building." Caddell v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 275, 97 S. W. 705.

96. Mai v. People, 224 Ill. 414, 79 N. E. 633. At common law one is not guilty of arson who burns his own house while occupying it. United States v. Cardish, 145 F. 242. But where a building to which a wife held the legal title was set on fire and burned under circumstances indicating guilty complicity of the husband and there is no evidence that she had any connection with the crime, an indictment charging him with arson is proper, rather than one charging him with intent to defraud an insurance company, although such may have been his intent. Hutchinson v. State, 8 Ohio C. C. (N. S.) 313. No defense that accused occupied the premises as tenant. Posey v. U. S., 26 App. D. C. 302.

97. Caddell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 275, 97 S. W. 705.

98. Elgin v. People, 226 Ill. 486, 80 N. E. 1014; Mai v. People, 224 Ill. 414, 79 N. E. 633. Under the Illinois statutes (Starr v. C. Ann. St. 1896, c. 38, par. 48), prescribing the punishment for the willful and malicious burning of goods, etc., with the specific intent to injure the insurer of the same, the intent is the controlling element of the offense. Id.

99. Mai v. People, 224 Ill. 414, 79 N. E. 633.

1. Hutchinson v. State, 8 Ohio C. C. (N. S.) 313.

Indictment and prosecution. Indictment or information.[2]—The indictment must so describe the building burned as to clearly identify it[3] and aver its location within the county.[4] The indictment must lay the title[5] and at common law must show that the building burned did not belong to the defendant.[6] Under a Federal statute it does not furnish ground for demurrer to an indictment that one count therein charges the defendants with burning a certain building and another count charges the same defendants with burning a different building.[7] Counts for arson and for burning defendant's own property to defraud insurer may be joined if both offenses were committed by the same act.[8] The proof must correspond with the allegations of the indictment.[9]

Evidence, presumptions and burden of proof.[10]—From the bare fact of destruction by fire, accident rather than criminal design is presumed,[11] and the corpus delicti must be proven beyond a reasonable doubt.[12] The specific intent to defraud an insurer must be proved to convict of burning with such intent.[13]

Admissibility.—Evidence which is part of the res gestae is admissible even though it involves a statement of a third person implicating the defendant.[14] Evidence of previous burning of other property of the same owner is not admissible,[15] nor is evidence that persons other than defendant did[16] or did not[17] entertain malice toward him. Evidence is admissible to rebut showing of motive.[18] Explanatory or significant conditions, such as the location of adjacent buildings,[19] footprints near the scene of the crime,[20] and the contents of the burned building,[21] are admissible.

2. See 7 C. L. 272.

3. Description held sufficient to identify building. United States v. Cardish, 145 F. 242.

4. Information alleging that the accused "in the county of Okanogan * * * then and there being * * * did then and there * * * burn a certain barn," sufficiently alleges that the situs of the barn was in Okanogan county. State v. McLain [Wash.] 86 P. 390.

5. An incident properly charges the ownership of the property burned when the owner named is the holder of the legal title. Hutchinson v. State, 8 Ohio C. C. (N. S.) 313.

6. Averments held sufficient to indicate that building was the habitation of another than defendant. United States v. Cardish, 145 F. 242.

7. Rev. St. § 1024 (U. S. Comp. St. 1901, p. 720). United States v. Cardish, 145 F. 242.

8. Rosey v. U. S., 26 App. D. C. 302.

9. Ownership. Heard v. State [Tenn.] 94 S. W. 605. Proof of actual occupancy sufficient to sustain allegation of ownership. Id.; Dunlap v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 444, 98 S. W. 845.

10. See 7 C. L. 272.

11. Williams v. State, 125 Ga. 741, 54 S. E. 661.

12. State v. Pienick [Wash.] 90 P. 645; Williams v. State, 125 Ga. 741, 54 S. E. 661.

13. Starr & C. Ann. St. 1896, c. 38, p. 48. Mai v. People, 224 Ill. 414, 79 N. E. 633.

14. Where there is proof of a conspiracy between the defendant and S to burn a building, the testimony of P to the effect that in furtherance of the conspiracy he was employed by S to do the act, is competent as a part of the res gestae, even if it involves a statement of S to P implicating the defendant. Hutchinson v. State, 8 Ohio C. C. (N. S.) 313.

15. In a prosecution for burning a barn, evidence that a month before such burning a house on the same farm was burned, was held not admissible, though there was evidence that accused had threatened to "get even" with the owner and the tenant of the farm. Raymond v. Com., 29 Ky. L. R. 785, 96 S. W. 515. Error in admitting such evidence was not cured by an instruction that it was only to be considered in so far as it tended to establish defendant's guilt of he crime charged. Id.

16. Evidence of threats of a third person against the owner of the building burned is inadmissible. State v. McLain [Wash.] 86 P. 390. As is also evidence of accusations by such owner against such third person. Id.

17. It is not permissible for the state to prove by the prosecutor that he did not know of anyone who had anything against him. Moore v. State [Tex. Cr. App.] 103 S. W. 188.

18. Where in a prosecution for burning a college building, to prove motive it was shown that defendant had insurance on personal property in the building, evidence that he and his wife were in charge of a boarding house used in connection with the building burned, and that he was a teacher in the college and she matron thereof, and that from these sources their profits were $100 a month, was admissible. Dunlap v. State, [Tex. Cr. App.] 17 Tex. Ct. Rep. 444, 98 S. W. 845.

19. In a prosecution for the statutory offense of burning a barn, evidence to show the location of certain adjacent buildings is admissible, where it appears that certain witnesses who first discovered the fire were sleeping therein. State v. McLain [Wash.] 86 P. 390.

20. In a prosecution for arson where the state's case was founded in fact on evidence

Weight and sufficiency.—Defendant's extrajudicial confession alone is not sufficient to warrant a conviction.[22] An alleged verbal confesson testified to by a witness, but denied by defendant cannot be considered by the jury as a fact against defendant, unless they find it to be true beyond a reasonable doubt.[23] To justify a conviction the corpus delicti must be proved,[24] and the evidence must show that the building burned belonged to someone other than defendant.[25] The question of defendant's guilt may be submitted to the jury upon circumstantial evidence, if such evidence is sufficiently strong.[26] But to warrant a conviction upon circumstantial evidence, all the circumstances proved must be consistent with the hypothesis of defendant's guilt, and inconsistent with the hypothesis of his innocence.[27]

Instructions[28] must submit every element of the crime,[29] and must not be on the weight of the evidence.[30]

of tracks resembling defendant's near the scene of the alleged crime, it was not error to allow defendant's shoes to be shown to the jury and a description given them of certain peculiarities about the same in connection with the impressions found near the scene of the alleged crime. Moore v. State [Tex. Cr. App.] 103 S. W. 188. In a prosecution for feloniously burning a storehouse in the night time, evidence that a trained bloodhound followed for some distance tracks alleged to be those of the defendant and then seemed to catch the scent of something in the air, whereupon he broke off through the woods and treed the defendant, is admissible in corroboration of other evidence that the tracks were defendants. State v. Hunter, 143 N. C. 607, 56 S. E. 547. In a prosecution for arson the state's case was grounded in fact on evidence of tracks at and near the scene of the alleged crime resembling tracks shown to have been made by shoes worn by defendant, it was held not error to admit evidence of alterations in defendant's shoes subsequent to the alleged crime, that changed the track made by them, although it was not conclusively shown that the alterations were not made by others than defendant. Moore v. State [Tex. Cr. App.] 103 S. W. 188. In such case it was not error to refuse to instruct the jury that unless they believed defendant had made the alterations they must disregard the evidence. Id.

21. Under the Washington statute (Ballingers' Ann. Codes & St., § 7095), which declares that the term "structure," as used in § 7094 defining arson, shall include any barn in which property is stored or which is intended to be used for storage, evidence is admissible, in a prosecution for burning a barn of the contents thereof. State v. McLain [Wash.] 86 P. 390.

22. Where there was no evidence of defendant's guilt except the statement of a witness that defendant asked him not to tell on him, and the facts that defendant had insurance on some goods in the building burned and lived near the building, the court should have instructed the jury that accused could not be convicted alone upon his extrajudicial verbal confession. Dunlap v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 444, 98 S. W. 845. The mere extrajudicial confession of the accused is not sufficient to prove the corpus delicti beyond a reasonable doubt. Williams v. State, 125 Ga. 741, 54 S. E. 661.

23. So held where the alleged confession was the main evidence relied on for conviction. Dunlap v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 444, 98 S. W. 845.

24. Proof of the single fact that a building has been burned does not show the corpus delicti of arson, but it must also appear that it was burned by the willful act of some person criminally responsible. State v. Pienick [Wash.] 90 P. 645. In a prosecution for burning a house it was held that after eliminating the confessions of the defendant, there was not sufficient evidence to show beyond a reasonable doubt that there was a willful and malicious burning of the house. Williams v. State, 125 Ga. 741, 54 S. E. 661.

25. In a prosecution for burning a barn, if the evidence shows that one other than defendant had received a bond for title to the land upon which the barn was situated, and had been put in possession of the barn, it sufficiently appears that the barn belonged to one other than the defendant. State v. Perry, 74 S. C. 551, 54 S. E. 764.

26. Circumstantial evidence held sufficiently strong to warrant such submission. State v. McLain [Wash.] 86 P. 390. In a prosecution for feloniously burning a storehouse in the nighttime, there was evidence that tracks leading from the scene of the crime were defendant's; that they were followed by a trained bloodhound and defendant run down and treed; that upon being found in the tree he said: "What does this mean? I didn't do it." It was held that the evidence was sufficient for submission to the jury. State v. Hunter, 143 N. C. 607, 56 S. E. 547.

27. The circumstantial evidence in this case was insufficient to warrant a conviction. State v. Pienick [Wash.] 90 P. 645. Evidence held insufficient to sustain conviction. Heard v. State [Tenn.] 94 S. W. 605.

28. See 7 C. L. 274.

29. If there is an issue made as to whether the building was merely smoked and scorched and not burned, the court should instruct on this subject. Moore v. State [Tex. Cr. App.] 103 S. W. 188. Upon a prosecution under an indictment charging the willful and malicious burning of personal property, an instruction that if the jury should believe beyond a reasonable doubt that defendants burned a certain building, they should find them guilty, is erroneous. Mal v. People, 224 Ill. 414, 79 N. E. 633.

30. It is not error to refuse to instruct that there being no evidence other than tracks, the jury should acquit, when there is evidence of motive and an opportunity to

Punishment.—Under a Federal statute the crime of arson when committed by an Indian upon a reservation within a state, whether the property burned belongs to an Indian or a white person, is subject to the same punishment as that prescribed for the same crime when committed by a white person at a place exclusively within the jurisdiction of the United States.[31]

ASSAULT AND BATTERY.

§ 1. Nature and Elements of Criminal Offense (257). Attempt to Provoke Assault (257). Aggravated Assault (257).
§ 2. Defenses (258).
§ 3. Indictment (258).
§ 4. Evidence; Instructions; Verdict; Punishment (258). Instructions (259). A Verdict (260).
§ 5. Civil Liability (261). Defenses (261). Pleading, Evidence, and Trial (261).

Qualified assaults are elsewhere treated.[31a]

§ 1. *Nature and elements of criminal offense.*[32]—An assault is an attempt or offer, coupled with a present ability, to do hurt to the person of another.[33] A battery includes an assault, and is the actual striking or shooting of another.[34] To constitute an assault and battery there must be unlawful violence with an intent to injure.[35] In a mutual combat, the one who does not strike the first blow is not guilty of assault, if he did not provoke the other to strike him, and does not use more force than is necessary to defend himself.[36] One who aids or abets the commission of a common assault is a principal in the offense.[37]

Attempt to provoke assault.—Intent is an essential element of the offense of attempting to provoke another to commit an assault.[38]

Aggravated assault.[39]—In determining whether there are such circumstances of aggravation as to make an assault an aggravated one, all the facts in the case must be considered.[40] In some jurisidictions, aggravated assault has been defined by statute.[41]

have committed the crime. Moore v. State [Tex. Cr. App.] 103 S. W. 188.

31. Act of March 3, 1885, c. 341, § 9 (23 Stat. 385) repealing by implication Rev. St. § 2143. United States v. Cardish, 145 F. 242.

31a. See Homicide, 8 C. L. 106; Rape, 8 C. L. 1667, and like topics.

32. See 7 C. L. 274.

33. State v. Handy [Del.] 66 A. 336. Pointing a loaded pistol at another, without intent to kill or do great bodily harm. State v. Wilson [Mo. App.] 103 S. W. 110. Where a man without intending to assault a girl accidently touches her, he is not guilty of an assault. Menach v. State [Tex. Cr. App.] 97 S. W. 503. Evidence held sufficient to sustain a conviction of assault. People v. Galto, 105 N. Y. S. 165; State v. Ostmann, 123 Mo. App. 114, 100 S. W. 696. Evidence held to show defendant guilty of assault at common law, if not under the North Carolina statute (Revisal 1905, § 3622). State v. Scott, 142 N. C. 582, 55 S. E. 69. Evidence held not to authorize conviction of assault. Shubert v. State, 127 Ga. 42, 55 S. E. 1045; Harrison v. State [Tex. Cr. App.] 102 S. W. 412.

34. State v. Handy [Del.] 66 A. 336.

35. Tubbs v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 707, 95 S. W. 112. The unlawful striking of a person with a hard substance is an assault and battery. Miles v. U. S. [Ind. T.] 103 S. W. 598. If persons blocking a public road fire several shots and an approaching traveler is hit, the persons who fire the shots which hit him are guilty of assault and battery. State v. Handy [Del.] 66 A. 336. Evidence held insufficient to sustain a conviction of assault and battery. Clerget v. State [Ark.] 103 S. W. 381; Johnson v. State, 127 Ga. 277, 56 S. E. 420.

36. Money v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 147, 97 S. W. 90.

37. State v. Ostman, 123 Mo. App. 114, 100 S. W. 696. Persons who are present when an assault and battery is committed, abetting, procuring, commanding, and counseling, its commission, are themselves guilty of assault and battery. State v. Handy [Del.] 66 A. 336. Evidence held insufficient to sustain a conviction of aiding or abetting an assault and battery. Clerget v. State [Ark.] 103 S. W. 381.

38. Heard v. State [Ind. App.] 78 N. E. 358.

39. See 7 C. L. 274.

40. Facts held to constitute an aggravated assault. Avery v. State [Tex. Cr. App.] 102 S. W. 405; Ford v. State [Tex. Cr. App.] 102 S. W. 404. Evidence held not to sustain a conviction of aggravated assault. McCutcheon v. State [Tex. Cr. App.] 95 S. W. 525. The use of a gun simply with intent to alarm constitutes only a simple and not an aggravated assault. Id.

In a prosecution for aggravated assault on a female, it was held that under the facts in the case the court should have charged that if defendant used violence to the person of prosecutrix with intent to injure her and fondle her person against her will, and thereby create in her mind a sense of shame, or

§ 2. *Defenses.*[42]—It is lawful to use reasonable force for the protection of life or property, but the force used must be proportionate to the danger to be apprehended.[43] If the aggressor withdraws from the conflict and is pursued by his adversary, his right of self-defense revives, if his withdrawal is made in good faith, and is an actual withdrawal, and not a mere attempt to retreat from the conflict.[44] Except in cases of excess and cruelty, the puishment of a child by its parent is lawful.[45]

§ 3. *Indictment.*[46]—An information for a statutory assault must be drawn under the appropriate statute.[47] The indictment or information must so set out the elements of the crime as to apprise defendant of the offense charged.[48] In an indictment for a statutory assault, the language of the statute is ordinarily sufficient.[49] A conviction may be had of a lesser offense under an indictment or information charging a greater offense which includes the lesser.[50] The proof must correspond with the allegations of the information.[51]

§ 4. *Evidence: instructions; verdict; punishment.*[52]—The burden is upon the prosecution to establish the guilt of defendant beyond a reasonable doubt.[53] Specific intent unless presumed from the facts[54] must be clearly shown.[55] Accused may

other disagreeable emotion, he would be guilty of aggravated assault; but that if he had no such intent, or if his conduct did not create such emotion, he would not be guilty of such an assault. Koen v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 629, 95 S. W. 114.

41. Whoever assaults another with a deadly weapon, not having a premeditated design to effect death, and not having an intent to take life, is guilty of an aggravated assault, under the Florida statutes (Rev. St. 1892, § 2402, and Gen. St. 1906, § 3228). Lindsey v. State [Fla.] 43 So. 87. An assault committed on the gallery of a private residence is an aggravated assault under the Texas statutes, which provides that an assault becomes aggravated when the party making it goes "into" a private residence. Herd v. State [Tex. Cr. App.] 99 S. W. 1119.

To sustain a conviction for assault with intent to inflict "great bodily injury," as defined by the Nebraska statute Cr. Code, § 17b (Comp. St. 1903), the evidence must show an attempt to inflict an injury of a greater and more serious character than an ordinary battery. Bice v. State [Neb.] 108 N. W. 1066.

42. See 7 C. L. 274.

43. State v. Scott, 142 N. C. 582, 55 S. E. 69; State v. Cephus [Del.] 67 A. 150. To resist an assault. State v. Cephus [Del.] 67 A. 150. To protect his property or to retake it, when it has wrongfully been taken, or is withheld without authority. State v. Scott, 142 N. C. 582, 55 S. E. 69. To resist illegal arrest. Ryan v. Chicago, 124 Ill. App. 188.

44. Collock v. State [Ala.] 41 So. 727.

45. State v. Koonse, 123 Mo. App. 655, 101 S. W. 139. Where such punishment is so excessive and cruel as to show beyond a reasonable doubt that the parent is not acting in good faith for the benefit of the child, but to satisfy his own evil passion, he is guilty of an unlawful assault. Id. It is not error to direct a verdict of guilty on the finding that defendant "inflicted unreasonable, cruel, and excessive punishment" on his adopted child, without including in the hypothesis that the punishment was inflicted with malice. Id.

46. See 7 C. L. 274.

47. In Missouri in a prosecution for assault upon a child against one who adopted the child under a deed of adoption, the information was properly drawn under Rev. St. 1899, § 1850 (Ann. St. 1906, p. 1280), rather than under Rev. St. 1899, § 1857 (Ann. St. 1906, p. 1282). State v. Koonse, 123 Mo. App. 655, 101 S. W. 139.

48. Indictment for assault with a deadly weapon held sufficient in this respect, and not open to the objection that it charges merely a simple assault. Territory v. Gonzales [N. M.] 89 P. 250. The use of the word "unlawfully" in an information for assault and battery necessarily implies a criminal intent, and precludes the necessity of expressly alleging it. State v. Koonse, 123 Mo. App. 655, 101 S. W. 139.

49. Territory v. Gonzales [N. M.] 89 P. 250. In information held sufficient to charge an assault in the second degree under the Montana statute, (Pen. Code, § 401, subd. 3). State v. Tracey [Mont.] 90 P. 791; State v. Farnham [Mont.] 89 P. 728. Where by statute all guns are declared to be deadly weapons, an indictment for assault with a deadly weapon, the weapon being a gun, need not allege that the gun was loaded. Territory v. Gonzales [N. M.] 89 P. 250.

50. See Indictment and Prosecution, 8 C. L. 189.

51. Where the complaint and information allege that the assault was committed with a sharp instrument, the name of which is unknown, and the proof shows that the assault was made with a knife, but that this was not known at the time the information was drawn, there is no variance. Shelton v. State [Tex. Cr. App.] 100 S. W. 955.

52. See 7 C. L. 274.

53. People v. Gatto, 105 N. Y. S. 165. Where the evidence raises the issue of alibi, if there is reasonable doubt of defendant's presence at the place of the alleged offense, he should be acquitted. Henderson v. State [Tex. Cr. App.] 101 S. W. 245.

54. When unlawful violence has been used upon the person of another, an intent to injure will be presumed; but when no such injury has been inflicted, such prosecution will not obtain. Pen. Code 1895, art. 588. Tubbs v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 707, 95 S. W. 112.

55. Evidence of intent: The intent essen-

testify directly as to his own intent.[56] The evidence must be relevant to the assault charged,[57] but evidence of matters constituting part of the res gestae,[58] and as to conditions at the scene of the assault,[59] and as to its consequences,[60] are admissible. To admit evidence of a custom bearing on which of the parties was in the right in the altercation leading to the assault, it must appear that the custom was applicable.[61]

Instructions.—The court must declare the law applicable to every phase of the case.[62] The elements that would justify the act committed must be given in the charge.[63] The charge must also embody the rule that the burden is upon the prosecution to establish defendant's guilt beyond a reasonable doubt, and that the burden is not upon defendant to establish self-defense.[64] The law applicable to aggravated assault need not be charged where the indictment is for a greater offense not embracing all the elements of aggravated assault.[65] It is error to charge the law applicable to a certain degree of assault or to a certain theory advanced by the prosecutor or defendant, if there is no evidence to warrant a conviction of such offense or to support such theory.[66] But where the defendant submits evidence in support of his theory that no unlawful act was committed, a requested instruction embodying that theory must be given.[67] A charge which pretermits a consideration of all

tial to the offense of attempting to provoke another to commit an assault may be proved either by positive or circumstantial evidence. Heard v. State [Ind. App.] 78 N. E. 358. Evidence from which it was held that trial court might find such intent. Id.

56. Money v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 147, 97 S. W. 90.

57. Henderson v. State [Tex. Cr. App.] 101 S. W. 245.

58. Herd v. State [Tex. Cr. App.] 99 S. W. 1119; State v. Koonse, 123 Mo. App. 655, 101 S. W. 139.

59. In a prosecution for assault committed by shooting evidence of a state's witness that shortly after the shooting he saw signs of some shots made by bullets which had taken effect in the walls of the house where it is alleged the shooting occurred, and found some blank shells which had been shot near a path leading to defendant's house, is admissible. Andrews v. State [Ala.] 43 So. 196.

60. Testimony of the wife of the injured person as to the nature and extent of his wounds is admissible in a prosecution under an information alleging only an aggravated assault with a deadly weapon. Whittle v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 573, 95 S. W. 1084.

61. Under the facts, evidence of a custom that when wagons went in the road a loaded wagon should have the right of way over one not loaded held not admissible. Tubbs v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 707, 95 S. W. 112.

62. Speaking generally, it is a sufficient compliance with this requirement if the court has submitted the statutory definitions of the several degrees of the crime. The instruction in this case was held sufficient. State v. Tracey [Mont.] 90 P. 791.

63. In a prosecution for assault committed by shooting another, a charge which leaves it to the jury to determine what elements would justify the shooting is bad. Andrews v. State [Ala.] 43 So. 196.

64. In this case it was held there was a sufficient statement of this rule, and that it was not modified by a subsequent observation by the court. People v. Gatto, 105 N. Y. S. 165.

65. Lindsey v. State [Fla.] 43 So. 87.

66. In a prosecution for assault it is error to give in the charge the law applicable to using dangerous weapons on the semblance thereof, in order to alarm another, if there is no evidence that defendant had any weapon. Menach v. State [Tex. Cr. App.] 97 S. W. 503. And it is error in such a prosecution to charge the law in regard to temporary insanity, produced by the recent use of intoxicants, if there is no evidence that defendant was temporarily insane. Id. Upon a prosecution for felonious assault, the court is not required to instruct upon any lower offense, if there is no evidence upon which to predicate such an instruction. State v. Terry, 201 Mo. 697, 100 S. W. 432. It is not error for the court to refuse to give a charge in reference to defendant's right of self-defense when there is no evidence in the case upon which to base it. Collock v. State [Ala.] 41 So. 727. An instruction that if defendant sought the diffioulty and willingly engaged in same with intent to do the injured party great bodily harm or take his life, the jury could not acquit on the ground of self-defense, held, under the peculiar facts of the case, to be erroneous. Ward v. Com. [Ky.] 103 S. W. 719. Evidence held not to warrant instruction authorizing jury to find provocation on defendant's part leading to the encounter. Harrison v. State [Tex. Cr. App.] 102 S. W. 412.

67. In a prosecution for aggravated assault upon a female, it is error to refuse to give the requested instruction that if defendant accidently touched the female and did not intentionally assault her, he should be acquitted, when there is evidence to support that theory. Menach v. State [Tex. Cr. App.] 97 S. W. 503. It is error not to submit the issues of self-defense and defense of another to the jury where defendant testified that he acted in self-defense and in defense of his youthful brother. Reese v. State [Tex. Cr. App.] 98 S. W. 842.

the evidence is bad.[68] In certain cases a special charge need not be given unless requested.[69] Thus failure to instruct as to the law applicable to simple assault in a prosecution for assault of a higher degree is not error if no such instruction is requested.[70] Refusal to give a proper instruction is not reversible error if the court's charge embodies the substance of such instruction.[71] So failure or refusal to give a proper instruction,[72] or the giving of an erroneous one,[73] is not reversible error, if no harm resulted to defendant therefrom. Where the statutory definition of an offense is entirely clear, an instruction in defining such offenses should use the words of the statute.[74] But the omission of a word is not error if a synonymous word or phrase is substituted therefor.[75] The fact that the word "felonious" is used unnecessarily in the indictment, does not require its use in an instruction.[76] The failure to use a qualifying adjective is not reversible error if a jury of reasonable men could not be misled by its omission.[77] A charge on self-defense may assume that an injury was inflicted by defendant if that fact is not controverted.[78]

A verdict is sufficient as to form if it substantially conforms to the statute defining the offense, and contains all the essential elements of such offense.[79] The nature and amount of the punishment, and whether the power to impose it shall reside in the court or the jury, is generally determined by statute.[80]

68. So held of the following charge: "If the jury have a reasonable doubt growing out of any portion of the evidence as to the guilt of the defendant, it will be your duty to acquit." Andrews v. State [Ala.] 43 So. 196.

69. Failure to charge that even though the prosecuting witness was cut, if the jury believed from the evidence that he was cut by some other person than defendant, they should acquit, is not error if such charge was not requested. Shelton v. State [Tex. Cr. App.] 100 S. W. 955.

70. High v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 779, 98 S. W. 849; Territory v. Gonzales [N. M.] 89 P. 250; State v. Horn [S. D.] 111 N. W. 552.

71. State v. Tracey [Mont.] 90 P. 791; Herd v. State [Tex. Cr. App.] 99 S. W. 1119; Whittle v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 573, 95 S. W. 1084.

72. The refusal of the court to charge an aggravated assault was not prejudicial where defendant was convicted of simple assault. Whittle v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 573, 95 S. W. 1084. Where upon the evidence the defendant might have been convicted of assault in either the second or third degree, and he was convicted of the lower degree, he cannot complain that the court did not specifically define the distinctions between the several charges of assault. State v. Tracey [Mont.] 90 P. 791. Under the Montana statute (Pen. Code, §§ 2320, 2600), a new trial will not be awarded on such ground. Id.

73. A defendant cannot complain of an instruction defining all the degrees of assault when he was convicted of the lowest degree. State v. Farnham [Mont.] 89 P. 728. Where by statute a verdict of not guilty might be returned where eight jurors agreed thereto, an instruction that a verdict of not guilty must be unanimous was held not reversible error where nine out of ten jurors agreed to a verdict of guilty. Id. Error in charging that though the jury believed that defendants made an assault simply, they might nevertheless be convicted of assault and battery, is not one for which reversal may be had, where the indictment charged assault and battery and the evidence overwhelmingly showed that both assault and battery were committed. Canterberry v. State [Miss.] 43 So. 678.

74. Accessory in an assault and battery. Clerget v. State [Ark.] 103 S. W. 381.

75. In a prosecution for an assault with a deadly weapon the words "without excuse or justification," in an instruction stating what would warrant conviction, held equivalent to the word "unlawful." Territory v. Gonzales [N. M.] 89 P. 250.

76. Territory v. Gonzales [N. M.] 89 P. 250.

77. So held in a prosecution for assault and battery inflicted by a parent on his child, where the word "punishment" was used without qualifying it with the adjective "corporal," or with one of similar import. State v. Koonse, 123 Mo. App. 655, 101 S. W. 139.

78. High v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 779, 98 S. W. 849.

79. Verdict finding defendant guilty "of shooting without justifiable or excusable cause, at another with a firearm with intent to injure him, held sufficient as to form under the South Dakota statute (Rev. Pen. Code, § 314). State v. Horn [S. D.] 111 N. W. 552. A verdict will not support a sentence for a statutory assault, which is a felony, if it fails to find the elements necessary to constitute the felony. State v. Third Judicial District Ct. [Mont.] 89 P. 63. Thus a verdict finding defendant guilty of "assault with corrosive acids and caustic chemicals" will not support a sentence for the offense of "willfully and maliciously" throwing upon the person of another any corrosive acid or caustic chemical "with intent to injure the flesh or disfigure the body of such person," which by statute in Montana (Pen. Code, § 403) is made a felony. Id.

80. Under the Michigan statutes (Comp. Laws, §§ 1019, 1058, and Pub. Acts 1899, p. 296, No. 189, § 1, subd. 8), where in a trial before a justice of the peace for assault and

§ 5. *Civil liability.*[81]—The liability of corporations for assaults of their representatives,[82] and of employers for assaults by their servants,[83] are elsewhere treated, as is the measure of damages for assault and battery.[84]

Defenses.[85]—Such force as is reasonably necessary under the circumstances may be used to repel an assault.[86] or eject a trespasser.[87] Insulting words[88] or offensive demeanor.[89] do not justify an assault, nor is a defense that the fight was on plaintiff's challenge.[90] Neither is force warranted in the recaption of property taken publicly and peaceably under claim of right.[91] In an action against a corporation for an assault committed by its employes, it is not a sufficient defense that the purpose of one of such employees in laying his hands on plaintiff was to save her from impending danger.[92]

Pleading, evidence and trial.[93]—In Alabama, although the complaint alleges an assault and battery by two persons, a recovery may be had against one only.[94] On plea son assault demesne, the burden is on defendant to show that excessive force was not used.[95] The previous relations of the parties,[96] their condition at the time of the assault,[97] and all that then took place,[98] may be shown. The theory presented by an instruction must be supported by the pleadings and by evidence.[99]

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battery the sentence exceeds three months, it is valid for three months, but void in so far as it exceeds that limit. In re Kenney, 147 Mich. 678, 14 Det. Leg. N. 4, 111 N. W. 189. Under the Alabama statutes (Code 1896, §§ 4343, 5415), the power to fix hard labor as a punishment for assault and battery in addition to a fine is given to the court, and the mere fact tnat the jury attempts to award the additional punishment does not affect the court's power to impose it. Freeman v. State [Ala.] 44 So. 46.

81. See 7 C. L. 275.

82. See Corporations, 7 C. L. 862.

83. See Master and Servant, 8 C. L. 840. See, also, special article, 5 C. L. 275.

84. See Damages, 7 C. L. 1029.

85. See 7 C. L. 276.

86. An instruction that defendant was justified in using the amount of force which he honestly believed to be necessary was held erroneous. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503. The fact that the difficulty was provoked by plaintiff can afford no justification for an excessive and unreasonable battery. Lizana v. Lang [Miss.] 43 So. 477. In a personal encounter where there was mutual provocation, one of the combatants is not justified in seizing in his mouth a portion of the other's hand and biting off a knuckle and breaking the bones of a finger. Milam v. Milam [Wash.] 90 P. 595. Evidence held to sustain finding that plaintiff was aggressor. Biffi v. Dasaro, 118 La. 599, 43 So. 248.

87. Evidence held to show excessive force. Green v. Buckingham, 122 Ill. App. 631.

88. Doerohefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7.

89. Bernard v. Kelley, 118 La. 132, 42 So. 723

90. Lizana v. Lang [Miss.] 43 So. 477.

91. So held where plaintiff, an officer of a labor union, was assaulted while leaving defendant's shop with a union card taken therefrom. Farley v. Briebach, 130 Wis. 231, 109 N. W. 979.

92. Moore v. Camden & T. R. Co. [N. J. Err. & App.] 65 A. 1021.

93. See 7 C. L. 276.

94. Code 1896, § 44. Lovelace v. Miller [Ala.] 43 So. 734.

95. Where in an action for assault and battery the defendants pleaded the general issue, and one of them, D., also pleaded son assault demesne, to which last plea plaintiff replied de injuria, it was held that the burden was cast upon defendants to make it affirmatively appear that D. used no more force upon the plaintiff than reasonably appeared to him, under all the circumstances, to be necessary for his own personal safety. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503.

96. It is not error to admit evidence to prove that prior to the assault and battery defendants had been cautioned by their parents as to their conduct toward plaintiff. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503. Evidence of what certain persons told defendant a half hour before the assault as to the nature of an alleged insult by plaintiff to defendant's daughter is not admissible in mitigation of punitive damages. Lovelace v. Miller [Ala.] 43 So. 734. Where three days before an alleged assault a dispute had arisen between defendant and plaintiff as to whether the former had delivered a sum of money to the latter, evidence of a witness that he had seen such delivery is not admissible in an action for the assault. Alabama & V. R. Co. v. Harz [Miss.] 42 So. 201.

97. In an action for assault and battery, evidence is admissible to show **that plaintiff was intoxicated** at the time of alleged assault, and that when intoxicated on previous occasions he had been cross and ugly, and defendant knew of this. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503. Where plaintiff introduced evidence to prove that he never drank intoxicating liquor, evidence for defendants that he was intoxicated several years previous to the alleged assault is not objectionable on the ground of remoteness. Id.

98. In an action against a railroad company for an assault committed by a conductor on one of its trains, a conversation between such conductor and plaintiff, which occurred about three weeks after the assault,

ASSIGNMENTS.

§ 1. Rights Susceptible of Assignment (262). Contracts for Personal Services or Otherwise Appurtenant to Persons or Specific Property (262). Assignments of Future Earnings (263). Contingent Interests (263).
§ 2. Requisites and Sufficiency of Express Assignments (263). Notice to the Debtor (264). Record (264).
§ 3. Constructive or Equitable Assignments (265).
§ 4. Construction, Interpretation, and Effect (265).
§ 5. Enforcement of Assignment and of Rights Assigned (267).

§ 1. *Rights susceptible of assignment.*[1]—As a general rule rights of action which survive [2] are assignable,[3] and the fact that an instrument may not be negotiable does not affect its assignability.[4] A contract may be rendered assignable by express provision to that effect,[5] and by statute in some states it may be assigned although it contains a covenant against assignment.[6] An act prohibiting the assignment of claims against a certain class of employes for the purpose of evading the state exemption laws and giving the debtor a right of action against the assignor is constituted.[7]

Contracts for personal services or otherwise appurtenant to persons or specific property.[8]—Contracts involving the exercise of skill or a relation of personal confidence or credit are not assignable,[9] and where one of the contracting parties is

is not part of the res gestae, and evidence of it is not admissible against defendant. Louisville N. R. Co. v. Williamson, 29 Ky. L. R., 1165, 96 S. W. 1130. The jury may consider the actions and words of defendant to determine the character of the assault and battery. Henderson v. Agon [Mich.] 14 Det. Leg. N. 106, 111 N. W. 778.

99. Charge in action for assault and battery that plaintiff claimed that he was humiliated and asked damages therefor held not erroneous on the ground that such damages were not authorized by the pleadings or the proof. Morgan v. Langford, 126 Ga. 58, 54 S. E. 818. An instruction as to what would justify the assault held not to be supported by evidence. Lizana v. Lang [Miss.] 43 So. 477.

1. See 7 C. L. 277.

2. Under Act No. 195, Session Laws 1897, authorizing assumpsit to recover damages for fraudulent representations and providing that the cause of action shall survive a right of action of a state bank for deceit of director of a national bank which it succeeded under § 6106 Comp. Laws 1897, may be assigned. Hicks v. Steel, 142 Mich. 292, 12 Det. Leg. N. 706, 105 N. W. 767. A husband's right of action for loss of consortium survives and is assignable. Forbes v. Omaha [Neb.] 112 N. W. 326.

3. **Held assignable:** A bond for a deed. Royce v. Carpenter [Vt.] 66 A. 888. Contract to convey land. Moore v. Gariglietti [Ill.] 81 N. E. 826. Attorney's lien on a judgment for services. Fisher v. Mylius [W. Va.] 57 S. E. 276. Charterer's commissions and profits under a charter party. Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 P. 820. Earned wages of a municipal employe. Kansas City Ordinance No. 11,125, held to apply to unearned salary only. Kansas City Loan Guarantee Co. v. Kansas City, 200 Mo. 159, 98 S. W. 459.

Unassignable: A decree for alimony is not assignable. Fournier v. Clutton, 146 Mich. 298, 13 Det. Leg. N. 747, 109 N. W. 425. But see Cohen v. Cohen [Cal.] 88 P. 267, holding that an assignee of accrued alimony takes subject to defenses available against assignor.

4. Contract to sell fruit trees. Strong v. Moore [Kan.] 89 P. 895.

5. On option to purchase land to the optionee "and his assigns" may be assigned. Fulton v. Messenger [W. Va.] 56 S. E. 830. A provision in a contract permitting its assignment by one of the parties renders it assignable irrespective of the wishes of the other party if the assignment is made in good faith. Harris v. Sheffel, 117 Mo. App. 514, 94 S. W. 738. Contract between another and a publishing company for the publication of books of the former held not assignable by its terms though it obligated the latter its "representatives and assigns" to perform. Wooster v. Crane Co. [N. J. Eq.] 66 A. 1093.

6. Under Code, § 3046, a stipulation of nonassignability in a contract will not prevent its transfer to an assignee subject to all defenses available against the assignor. Thomassen v. De Goey [Iowa] 110 N. W. 581.

7. Code Civ. Proc. § 531, c. 531 f. Gordon Bros. v. Wageman [Neb.] 108 N. W. 1067. In such an action proof that the assignor claiming to hold an account against the debtor assigned same to a person unknown to plaintiff, that suit was instituted thereon in another state by a person other than the assignor in which exempt wages of the debtor were attached in satisfaction of the account, is sufficient to create a prima facie case notwithstanding that the process under which the wages were attached was irregularly issued and served. Id. An account which one claims to hold against an employe is a claim within the meaning of the act. Id.

8. See 7 C. L. 278.

9. An agreement by the putative father to pay a certain sum per week to the mother of his illegitimate children in consideration of her agreement to support them involves the performance of personal services by the latter and is not assignable. People's Bk. & Trust Co. v. Weidinger, 73 N. J. Law, 433, 64 A. 179. A contract between another and a publishing company for the publication of the books of the former during the continuance of the copyright and renewals, the publishing company to render periodical accounts of sales and to pay a certain percent-

a corporation, such a contract cannot be assigned by it to a foreign corporation, though composed of practically the same stockholders.[10] The rule does not apply to contracts which have been fully performed by the assignor,[11] nor to purely mechanical services,[12] nor does it affect the right of an assignee to recover for a breach wholly independent thereof where the services agreed to be performed by the assignor were for the sole benefit of the latter and his assigns.[13]

Assignments of future earnings,[14] except those of public officers,[15] are generally held valid,[16] but statutory provisions in some states have materially modified this rule.[17]

Contingent interests.[18]—The assignability of an heir's expectant interest in a probable inheritance has given rise to a conflict of decisions, some courts holding such interests assignable,[19] and others adopting a contrary view.[20]

§ 2. *Requisites and sufficiency of express assignments.*[21]—The assignment must not be illegal,[22] and, as between the assignor and assignee,[23] or subsequent assignees,[24] must be founded upon a sufficient consideration, but as between the

age thereof, is not assignable. Wooster v. Crane & Co. [N. J. Eq.] 66 A. 1093. Contract for the exclusive agency for the sale of land involves a personal relation and is unassignable. So held where a servant of a real estate broker procured such a contract in his own name. Sumner v. Nevin [Cal. App.] 87 P. 1105. Contract for the sale of lumber cut during a certain year held to involve relations and considerations of a personal nature and of trust, confidence, and credit, rendering it unassignable. Demarest v. Dunton Lumber Co., 151 F. 508.

10. A contract with a corporation involving services of a personal nature and responsibility cannot be assigned to a corporation organized under the laws of another state, though the personnel of the two corporations is the same with the exception of a local stockholder and director which the laws of the state under which the assigning corporation was organized require. Wooster v. Crane & Co. [N. J. Eq.] 66 A. 1093.

11. A claim for personal services actually rendered is assignable. United States Title Guaranty & Indemity Co. v. Marks, 116 App. Div. 341, 101 N. Y. S. 483.

12. The mere mechanical work of printing and binding a book described in a subscription agreement with a publisher may be assigned by the latter. Harris v. Paine [Neb.] 107 N. W. 748.

13. Contract by defendant to deliver lumber and to turn over certain dry kilns and sheds to plaintiff's assignor, and in the event of the destruction of such kilns the latter agreed to give his skill and service in rebuilding them, held the latter clause was for the sole protection of the assignor and did not affect plaintiffs' right to recover for a failure to deliver the lumber. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008.

14. See 7 C. L. 279.

15. The unearned salary of a public officer is not assignable. McGowan v. New Orleans, 118 La. 429, 43 So. 40.

16. Future earnings under a valid contract whether public or private are assignable. First Nat. Bk. v. School Dist. No. 1 [Neb.] 110 N. W. 349.

17. An assignment of earned and unearned wages as security for a loan is void as to the unearned wages under Laws 1904, p. 84, § 17. Central of Georgia R. Co. v. Dover [Ga. App.] 57 S. E. 1002.

18. See 7 C. L. 279.

19. The daughter of a widow occupying the homestead of her deceased husband who has made no application to have her distributive share set off, or to have her homestead rights fixed and determined, may assign her expectant interest as an heir of her mother. Betts v. Harding [Iowa] 109 N. W. 1074. Contract by a son for the sale of an expectant interest in his father's estate upheld. Hudson v. Hudson, 222 Ill. 527, 78 N. E. 917.

20. An agreement by a son founded on a valuable consideration whereby he relinquished all rights to his expectant interest in his father's estate is void, though the consideration was paid by the father and the relinquishment was made to him. Elliott v. Leslie, 30 Ky. L. R. 743, 99 S. W. 619.

21. See 7 C. L. 279.

22. An agreement by an assignee of county warrants of doubtful validity to pay for same at their face value and to defend contemplated actions to test their validity is void as against public policy where in such an action the warrants were adjudged void. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 N. W. 499.

23. Where assigned county warrants were adjudged void in a taxpayer's suit against the parties to the assignment, there is a total failure of consideration for the assignment. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 N. W. 499. Where a father assigned his interest in a non-assignable gratuity as security for funds which defendant might advance to preserve his membership in the association, a subsequent assignment by his daughter after his death in consideration of being allowed to retain $500 was without consideration and did not increase defendant's interest in the fund assigned. Holmes v. Seaman, 117 App. Div. 381, 102 N. Y. S. 616.

24. An assignment to a woman in consideration of her agreement to marry the assignor at once is based upon a sufficient consideration as against a subsequent assignment notwithstanding the fact that she had already promised to marry him when his financial condition was such as to enable him to support her, his finances not being in such condition at the time of the assignment. Huntress v. Hanley [Mass.] 80 N. E. 946. An assignment given as collateral security for a pre-existing indebtedness is supported by a sufficient consideration as against a sub-

assignee and the debtor,[25] except in the case of equitable assignments,[26] the question of the consideration for the transfer is immaterial. It must be definite in amount or capable of being made definite,[27] and where for only a portion of a fund must specifically identify the identical money intended to be transferred.[28] The fact that an assignment was for more than the amount due the assignor from the debtor does not invalidate it.[29] An assignment under seal passes title without an actual delivery of the property.[30] A power of attorney to the assignee to fill out and date a written assignment of wages to be earned must be strictly complied with.[31]

Notice to the debtor[32] of an assignment is not essential as between the assignor and the assignee,[33] nor is the assignee bound to give notice to third persons dealing with the assignor,[34] but as against subsequent assignees notice to the debtor is essential.[35] As between the assignee and the debtor, notice to the latter is essential and where the debtor is a muncipal corporation the notice must be in compliance with the law.[36] The receipt of written notice of assignment by the debtor is sufficient authority for the payment to the assignee of the fund assigned, though the assignment itself is not served.[37] No further notice than that given to the debtor by the assignee at the time of the assignment is required.[38]

Record.[39]—The lien of a judgment creditor upon the equitable interest of a legatee under a will is superior to that of an assignee of such interest holding under an unrecorded assignment.[40]

sequent assignee. Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 P. 820.

25. The fact that a foreign corporation had assigned the accounts in controversy to the plaintiff to evade a statute limiting the right of such corporations to sue is no defense in an action against the debtor. Dewey v. Komar [S. D.] 110 N. W. 90.

26. The rule that as between the assignee and the debtor the question of the consideration for the assignment is immaterial is confined to legal as distinguished from equitable assignments. Dewey v. Komar [S. D.] 110 N. W. 90.

27. An assignment of commissions under a charter party is not invalid because not specifying any particular amount where the method for ascertaining the amount clearly appears from the terms of the charter party. Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 P. 820.

28. An instrument purporting to assign a sum of money out of a fund in the hands of another but which does not identify any specific money intended to be assigned does not vest the legal title thereto in the assignee. At most it vests only an equitable interest in the entire fund. Western & A. R. Co. v. Union Inv. Co. [Ga.] 57 S. E. 100.

29. The assignee takes only the amount actually due. Provident Nat. Bk. v. Harnett Co. [Tex.] 17 Tex. Ct. Rep. 50, 97 S. W. 689.

30. Assignment of a revisionary interest in the principle of an annuity. Taylor v. Vall [Vt.] 66 A. 820.

31. Where wages for a certain month were expressly assigned such a power in the assignment does not authorize the assignee to insert a different month. Simmons Hardware Co. v. Hargate, 122 Ill. App. 287.

32. See 7 C. L. 281.

33. The fact that an assignment of a bond was not presented to the obligor and the bond was not transferred on his books does not invalidate the assignment. Bone v. Holmes [Mass.] 81 N. E. 290. As between the assignor and the assignee and his successors in interest, notice to the debtor is unnecessary. Cogan v. Conover Mfg. Co., 69 N. J. Eq. 809, 64 A. 973.

34. The fact that an assignee of the charterer's commissions under a charter party knew that a third person was financing the undertaking did not require it to give such third person notice of the assignment. Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 P. 820.

35. Where the equities of two assignees of the same chose in action are otherwise equal, the one first giving notice to the debtor has the prior right though his assignment is subsequent to that of the other assignee. Jack v. National Bk. of Wichita, 17 Okl. 430, 89 P. 219, overruling Gillette v. Murphy, 7 Okl. 91, 54 P. 413.

36. Where an assignee of money due on a contract with a city upon which action was pending filed same with a subordinate in the city clerk's office as an assignment of future wages or earnings under Rev. Laws, c. 189, § 34, it being the duty of such subordinate to receive assignments of that character only and notice was by him given to a subordinate in the treasurer's office whose duty it was to receive similar assignments, it was held that the notice to the city was insufficient where it had in good faith paid a judgment against it or the same claim to the assignor. Hellen v. Boston [Mass.] 80 N. E. 603. Under the Omaha charter the notice must be in writing and must be served upon the executive head of the city or in his absence on the city clerk. Gordon v. Omaha [Neb.] 110 N. W. 313.

37. North Penn. Iron Co. v. International Lithoid Co., 217 Pa. 538, 66 A. 860.

38. If pursuant to the request of the assignor the debtor disregards the notice, he does so at his own risk. City Bk. of New Haven v. Thorp, 79 Conn. 194, 64 A. 205, 465.

39. See 7 C. L. 281.

40. Ohio Nat. Bk. v. Berlin, 26 App. D. C. 218.

§ 3. *Constructive or equitable assignments.*[41]—An assignment inoperative at law may be good in equity.[42] Thus an assignment of a portion of a fund operates as an equitable assignment pro tanto.[43] Ordinarily the subject-matter of the assignment must be presently under the control of the assignor,[44] and, accordingly, an agreement to satisfy out of the proceeds of a fund to be realized from judicial proceedings is not an assignment pro tanto of such fund.[45] It is generally held that a check does not constitute an assignment pro tanto either in law or in equity,[46] but prior to the adoption of the negotiable instruments law a contrary doctrine prevailed in Kentucky.[47] An unaccepted draft has been held to operate as an assignment.[48] An equitable assignment may be created on the principle of a resulting trust.[49] The equitable owner of a chose in action will be protected against garnishment process against his assignor.[50]

§ 4. *Construction, interpretation and effect.*[51]—Where there is an actual appropriation which confers a present right on the assignee, the instrument will be construed as an assignment, although the circumstances may not admit of its immediate exercise.[52] An agreement contemplating the transfer of claims of creditors against an insolvent firm to a third person about to become a partner therein but not an extinguishment of such indebtedness is an assignment and not a composition agreement.[53] Equity will regard the substance rather than the form of an assignment and give it such effect as the parties intended.[54] An assignment trans-

41. See 7 C. L. 281.

42. A transfer of the possession of an order for money with intent to pass the title vests the equitable ownership in the transferee and it is unnecessary that an indorsement thereon should be signed by the assignor. Gray v. Bever, 122 Ill. App. 1.

43. And is enforcible in equity though the drawee does not accept. Wamsley v. Ward [W. Va.] 55 S. E. 998.

44. Alleged equitable assignment held a mere promise to pay when the fund alleged to have been assigned was paid to the promisor, and therefore not enforcible. Speckman v. Smedley Bros., 153 F. 771.

45. Agreement by a party to a partition suit to pay a mortgage on the land out of her share of the proceeds, or that the master should make distribution on such basis upon the assumption that the personal estate of the decedent through whom they derived title was responsible for the payment of the mortgage, and the other parties not being entitled to participate in the distribution thereof, held not to constitute an equitable assignment of the proceeds of the partition sale to the extent of the mortgage. Mathison v. Magnuson, 226 Ill. 368, 80 N. E. 885.

46. The mere giving of a check does not operate as an assignment of the drawer's funds pro tanto. Poland v. Love [Ind. T.] 103 S. W. 759; Bowker v. Haight & Freese Co., 146 F. 257. A check drawn by a depositor on his general account and not on a special fund does not constitute an assignment. Pennell v. Ennis [Mo. App.] 103 S. W. 147. The fact that a check was presented to the bank prior to the appointment of a receiver for the maker does not entitle the payee to a preference over the general creditors of the maker. Eastern Mill. Export Co. v. Eastern Mill. & Export Co., 146 F. 761.

47. As against a junior lien on the drawer's bank deposit, a check given for value and in due course of business operates as a pro tanto assignment of the deposit. Boswell v. Citizens' Sav. Bk., 29 Ky. L. R. 988, 96 S. W. 797.

48. A draft for the entire amount due attached to a statement of the account constitutes an assignment to the payee of the amount due thereon, though not accepted by the drawee. Provident Nat. Bk. v. Hartnett Co. [Tex.] 17 Tex. Ct. Rep. 50, 97 S. W. 689.

49. An heir paying a mortgage on land owned by the decedent and procuring an assignment to be made to his sister becomes an equitable assignee of the mortgage. In re Heeney's Estate, 3 Cal. App. 548, 86 P. 842.

50. Order for money. Gray v. Bever, 122 Ill. App. 1.

51. See 7 C. L. 282.

52. An absolute assignment of an account not yet due will not be construed as a covenant to pay out of the proceeds of the contract assigned from the mere fact that the assignor agrees to act as the assignee's agent in collecting it. Cogan v. Conover Mfg. Co., 69 N. J. Eq. 809, 64 A. 973.

53. An agreement between the creditors of an insolvent partnership and a third person whereby the former agree to assign their claims to the latter upon payment of a certain per centage thereof is an assignment and not a composition agreement, notwithstanding an agreement between such third person and the firm that upon making such payment and a payment to one of the partners individually be was to become a member of the firm. Harris v. Zier [Wash.] 86 P. 928.

54. An informal indorsement on a bond for a deed showing an intent to assign followed by a transfer of possession will be construed as an assignment. Royce v. Carpenter [Vt.] 66 A. 888. The proceeds of an annuity provided by the assignor and her daughter do not pass by an assignment of the assignor's interest in the estate of a relative nor by an assignment of specifically enumerated chattels followed by a general

fers to the assignee all the right, title and interest of the assignor in the thing assigned,[55] but nothing more;[56] hence, all set-offs[57] and defenses[58] available against the assignor are available against his assignee, but the assignee takes subject only to such equities as exist at the time of the assignment,[59] and is chargeable with notice of such equities only.[60] He is not bound by conditions other than those expressed in the contract with reference to which the assignment was made.[61] The rule operates conversely and, therefore, in an action by the assignor on an unassigned portion of the contract, the obligor cannot defend on the ground that compliance therewith would compel him to commit an actionable breach of the portion of the contract assigned.[62] An assignment by one of the parties to a contract without the consent of the other does not release the assignor.[63] Where the proceeds of an unperformed contract are assigned, and part of it is subsequently performed and accepted, the assignee is entitled to the payments made thereon to the extent of the performance.[64] Rights not incidental to the assignment and not expressed therein

clause conveying all her personal property. Taylor v. Vail [Vt.] 66 A. 820.

55. Where an express company required its driver to pay for goods which he claimed to have delivered to a purchaser but which the latter denied having received, the company having paid the consignor their value, the driver on procuring an assignment from the consignor of his claim for the unpaid purchase price was held entitled to recover the value of the goods from the purchaser upon proving delivery. Buchholz v Damick, 115 App. Div. 843, 101 N. Y. S. 17. An assignment of a contract to convey land vests in the assignee all remedies, all the rights and remedies which the assignor possessed. Moore v. Gariglietti [Ill.] 81 N. E. 826. An assignment transfers to the assignee all rights under the contract assigned possessed by the assignor. Strong v. Moore [Kan.] 89 P. 895. The assignee of a chose in action stands in the shoes of his assignor. Jack v. National Bk., 17 Okl. 430, 89 P. 219.

56. Washington Tp. v. First Nat. Bk., 147 Mich. 571, 14 Det. Leg. N. 36, 111 N. W. 349. The assignee of a contract for the sale of lumber has no greater right to enforce the contract than his assignor had. Demarest v. Dunton Lumber Co., 151 F. 508. Claim against an insolvent corporation. Watrous v. Hilliard [Colo.] 88 P. 185. An assignment based on a nominal consideration confers upon the assignee no greater rights than the assignor possesses. Rising v. Sebring, 104 N. Y. S. 486.

57. The assignee of a claim takes it subject to set-off against the assignor. Chung v. Stephenson [Or.] 89 P. 386. Where a purchaser's claim for damages for breach of contract exceeds the amount due on the claim assigned, the assignee is not entitled to a recovery. Earnshaw v. Whittemore [Mass.] 80 N. E. 520.

58. Insufficiency of a gambling debt as a consideration. Union Collection Co. v. Buckman [Cal.] 88 P. 708. The assignee of money due under a decree for alimony takes it subject to all defenses which would have been available against it while in the hands of the assignor. Cohen v. Cohen [Cal.] 88 P. 267. An innocent purchaser of a certificate for the purchase of state school lands takes it subject to defenses of fraud against his assignor. De Laittre v. Board of Com'rs, 149 F. 800.

59. Where the beneficiary under a life insurance policy assigned part of her interest thereunder to her attorney as a contingent fee for services in collecting the insurance, the fact that after payment of a final judgment on the policy the insurance company ascertained that the insured was not dead did not entitle it to recover the money paid to the assignee who had no notice of the fraud. Fidelity Mut. Life Ins. Co. v. Clark, 203 U. S. 64, 51 Law. Ed. 91.

60. The fact that in an action on a life insurance policy the insurance company denied that the insured was dead does not charge an assignee of the policy who was the attorney for the plaintiff with notice of the plaintiff's fraud where after paying a judgment on the policy the company ascertained that the insured was alive. Fidelity Mut. Life Ins. Co. v. Clark, 202 U. S. 64, 51 Law Ed. 91.

61. The assignee of a contract for the sale of land in determining his obligations thereunder is not bound to look beyond the terms of an escrow agreement signed by the vendor and the vendee and upon compliance with the terms of which a deed was to be delivered. Womble v. Wilbur. 3 Cal. App. 535. 86 P. 916.

62. Plaintiff had a contract with defendant for the exclusive right to sell beer in a certain village and a credit to be paid by the delivery of beer by defendant to them. They assigned the contract and exclusive right to sell beer to B. Held defendant could not refuse to deliver beer on plaintiff's order on the ground that such delivery would violate his duty to B., the debt not having been assigned. Harris v. Sheffel, 117 Mo. App. 514, 94 S. W. 738.

63. Bunch Grain Co. v. Law, 79 Ark. 375, 96 S. W. 196. The assignment by two members of a firm to a third of a contract with the United States for the construction of public works though valid as between themselves does not affect the government. It is effective only as an assumption by one of the firm of the debts of the firm in consideration of the receipts of the benefits to be derived from the execution of the agreement. Hardaway v. National Surety Co. [C. C. A.] 150 F. 465.

64. Assignment of payments under contract to deliver two condensers prior to the appointment of a receiver for the assignor,

do not pass to the assignee;[65] hence where only the profits to be realized under a contract are assigned, nothing passes to the assignee where the contract is performed at a loss.[66] An assignment of half the amount realized on a claim does not limit the assignor's right to recover to the portion unassigned.[67] Where the debt for which an assignment was given as security is paid by the assignor, the assignee is not entitled to a recovery thereon as against the creditors of the assignor.[68] The assignor impliedly warrants that he has title and that the claim is not spurious,[69] but other warranties will not be implied.[70] The right of a surety of an assignor of a contract for government work to be subrogated to his rights to percentages withheld by the government on work completed prior to the assignment is superior to that of the assignees.[71]

§ 5. *Enforcement of assignment and of rights assigned.*[72]—Where the debtor's liability under an assignment is uncertain, demand is a condition precedent to the maintenance of the action[73] and must be alleged in the complaint.[74] Where one of the parties to a contract refused to assent to an assignment by the other party and both subsequently acted upon the assumption that the assignee was the agent for the assignor, the assignee cannot maintain an action for the breach of the contract.[75] Where the assignee clothes the assignor with the indicia of ownership, he is estopped to assert his title as against a subsequent bona fide assignee,[76] and he may also be estopped to assert an assignment against the debtor by acquiescing in payments by the latter to the assignor;[77] but mere failure to collect assigned accounts as they become due does not constitute such negligence as will work an estoppel.[78]

one condenser was delivered and payment thereof made to the receiver, held the assignee was entitled to such payment. Cogan v. Conover Mfg. Co., 69 N. J. Eq. 809, 64 A. 973.

65. A subsequent assignee of a medicinal preparation has no right to the use of the picture of the inventor and his certificate as to its contents, for advertising purposes merely because a prior assignee had permission to use them, authority not having been given by assignment from the inventor. Edison v. Edison Polyform Mfg. Co. [N. J. Eq.] 67 A. 392.

66. An assignment of profits under a certain contract and all claims and demands over and above the cost of performing and completing the contract is an assignment of the net earnings under the contract, and where there were no profits the assignee was not entitled to recover. Price Bros. v. Cushing [Iowa] 110 N. W. 1030.

67. Assignment to an attorney of half the amount realized on a claim for personal injuries. Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 17 Tex. Ct. Rep. 598, 98 S. W. 909.

68. Note assigned by a husband to his wife to induce her to execute a mortgage and to secure her. The mortgage was paid by the husband. Shropshire's Ex'rs v. Combs, 30 Ky. L. R. 1120, 100 S. W. 252.

69. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 N. W. 499.

70. An instrument assigning the assignor's "right, title, and interest, in and to a certain contract," does not create a warranty as to any of the conditions of the contract assigned. Pierce v. Coryn, 126 Ill. App. 244.

71. Hardaway v. National Surety Co. [C. C. A.] 150 F. 465.

72. See 7 C. L. 285.

73. Where an assignment is given as security, notice thereof to the debtor creates only a contingent liability and demand is a prerequisite to the maintenance of an action thereon. Packard v. Long Island R. Co., 52 Misc. 98, 101 N. Y. S. 660.

74. Packard v. Long Island R. Co., 52 Misc. 98, 101 N. Y. S. 660.

75. Demarest v. Dunton Lumber Co., 151 F. 508.

76. Contract for public works assigned under an agreement that the assignor should collect the proceeds and retain the original contract, held a subsequent assignee in good faith acquired title to an order of the township with whom the contract was made for the payment of work thereunder. Washington Tp. v. First Nat. Bk. of Huntington, 147 Mich. 571, 14 Det. Leg. N. 36, 111 N. W. 349.

77. Evidence of a course of dealing between the assignor and the debtor by which assigned accounts were paid to the former at its request by the latter, held insufficient to show acquiescence by the assignee therein, notice of each assignment being given by the latter to the debtor and it not being shown that the assignee had any knowledge of such payments. City Bk. of New Haven v. Wilson, 193 Mass. 164, 79 N. E. 246. Evidence that subsequent to notice of the assignment the assignor notified the debtor to disregard notices of assignment and to pay all accounts to the former, and that the debtor paid such accounts to the assignor from time to time, held not to charge the assignee with knowledge thereof as a matter of law. City Bank of New Haven v. Thorp, 79 Conn. 194, 64 A. 205, 465.

78. City Bank of New Haven v. Thorp, 79 Conn. 194, 64 A. 205, 465.

Except where the common-law rules remain, the assignee of an express assignment may maintain an action thereon in his own name,[79] and the action is legal rather than equitable,[80] unless only an equitable assignment exists.[81] In the latter case, action in the assignor's name is allowed in Illinois.[82] The assignor may sue in the United States court of claims for the use of the assignee;[83] but the action will not fail merely because the assignor does not appear as a nominal party plaintiff,[84] and an amendment of the petition so as to bring in an assignor as a nominal party plaintiff will not be allowed.[85] In Texas the drawer and the drawee of an unaccepted draft operating as an assignment may be joined in an action thereon.[86] The action being against the original debtor, a tender by the assignor is unavailing,[87] and the equities of the assignor against the assignee cannot be set off.[88]

Defenses personal to the assignor are not available to the debtor in an action on the assignment.[89] Statutory provisions as to process in actions on assignments must be complied with.[90] A creditor's bill which does not allege the entire consideration for an agreement is not demurrable on the ground that the consideration alleged is inadequate.[91] In an action on an assignment, the complaint need not allege the corporate entity of the assignor.[92] Evidence of the unexpressed intention of the assignor at the time of making an assignment,[93] or showing notice on the part of an assignee, subsequent to the assignment,[94] is inadmissible. The

79. Haller v. Ingraham, 101 N. Y. S. 789. An assignee for value of a non-negotiable obligation is the real party in interest and may sue thereon in his own name. Doyle v. Nesting [Colo.] 88 P. 862.

80. Where wages, earned and to be earned, during a named period are assigned, it is not necessary that the assignee should bring his action in equity. Assignment executed prior to Acts 1904, p. 79. Western Union Tel. Co. v. Ryan, 126 Ga. 191, 55 S. E. 21. Such an assignment gives the assignee the right to maintain an action against the debtor in the name of the assignor. Assignment as security. Independent Credit Co. v. South Chicago City R. Co., 121 Ill. App. 595. Where the debtor accepts the assignment, action may be brought by the assignee. Order for money assigned by delivery upon which the debtor subsequent to the assignment indorsed an acceptance. Gray v. Bever, 122 Ill. App. 1.

81. An action at law cannot be maintained upon a partial assignment of a debt in the absence of the debtor's consent thereto. Resort must be had to equity. Central of Georgia R. Co. v. Dover [Ga. App.] 57 S. E. 1002; Western Union Tel. Co. v Ryan, 126 Ga. 191, 55 S. E. 21. An action at law cannot be maintained on an assignment of only a portion of a particular fund where the drawee does not accept. Wamsley v. Ward [W. Va.] 55 S. E. 998.

82. Where the assignee holds merely the equitable title to the chose in action, assigned action thereon must be brought in the name of the assignor. Transfer of an order for money by delivery only, an indorsement of transfer thereon being unsigned by the assignor. Gray v. Bever, 122 Ill. App. 1.

83, 84, 85. Federal Mfg. & Printing Co. v. U. S., 41 Ct. Cl. 318.

86. Under Rev. St. 1895, arts. 1203 and 1204, the payee of a draft constituting an assignment may join the drawer and the drawee in an action thereon, though the latter did not accept the draft. Provident Nat. Bk. v. Hartnett Co. [Tex.] 17 Tex. Ct. Rep. 50, 97 S. W. 689.

87. An unaccepted tender by the assignor to the assignee of the amount due the latter does not affect the assignee's right of action against the debtor. Independent Credit Co. v. South Chicago City R. Co., 121 Ill. App. 595.

88. In an action by the assignee of wages earned and to be earned, the recovery against the debtor must be for the full amount due the assignor irrespective of the assignor's equity in a portion of such amount as against the assignee. In an action against the debtor on an assignment of wages as security, the fact that the amount justly due the assignee from the assignor is less than the amount due the assignor from the debtor cannot be raised by the latter. Independent Credit Co. v. South Chicago City R. Co., 121 Ill. App. 595.

89. The debtor may not set up that assignment was given as security for an usurious loan, especially where the assignor is a party to the action and did not defend. Western Union Tel. Co. v. Ryan, 126 Ga. 191, 55 S. E. 21. Evidence that the debtor had been notified by the assignor of his discharge in bankruptcy from the debt for which the assignment sued on was given as security is inadmissible. Id.

90. Rev. St. c. 84, § 144, requiring the indorsement of the name and residence of an assignee on writs or process at any time during the pendency of an action, if requested by defendant, where the demand sued on has been assigned, is mandatory. Liberty v. Haines, 101 Me. 402, 64 A. 665.

91. A creditor's bill alleging the assignment of the judgment sought to be enforced in consideration of the sum of $15.00, and other sufficient and valuable consideration is not demurrable as expressing a consideration so inadequate as to raise a presumption that it was a mere speculative venture which equity will not aid. Jahn v. Champagne Lumber Co., 147 F. 631.

92. Strong v. Moore [Kan.] 89 P. 895.

93. Provident Nat. Bk. v. Hartnett Co. [Tex. Civ. App.] 100 S. W. 1024.

94. Evidence tending to show notice on the part of an assignee of a contract to con-

burden is upon the assignee to prove the existence of an indebtedness to the assignor,[95] and that the contract was completed at a profit where only the profits were assigned,[96] and the existence of the assignment itself where it is in issue.[97] An assignee cannot recover against the assignor for a breach of a collateral agreement while retaining all benefits derived from the assignment.[98]

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 1. Nature of Transaction in General (269).
§ 2. Statutory Provisions and Conflict of Laws (269).
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§ 16. Rights of Creditors Under a Void Assignment, or After Asignee's Discharge (274.)

§ 1. *Nature of transaction in general.*[99]—In the absence of any preference an instrument intended as an assignment for the benefit of creditors, and as an absolute transfer to raise funds for the payment of debts, will be held to be a general assignment;[1] but a transfer of assets in payment of a debt due the transferee is not an assignment for the benefit of creditors, though accompanied by an agreement to pay outstanding debts.[2]

§ 2. *Statutory provisions and conflict of laws.*[3]—A voluntary assignment executed in one state according to its laws is ineffectual as to real property in another unless so executed and recorded as to render it effectual if made in the latter state;[4] but one who participates in the proceedings may become estopped from questioning the title of a purchaser in good faith of realty in another state on the ground that the deed of assignment was inoperative for nonconformity to the laws of that state.[5]

§ 3. *Right to make a general assignment and to join therein.*[6]

§ 4. *Filing, recording or registering; qualifying of assignee; removals and substitution.*[7]

§ 5. *Meaning and effect in general.*[8]—The execution and recording of an in-

vey land of the terms of the contract between the vendor and his assignor must be restricted to a time prior to the date of the assignment. Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916.

95. The burden is upon a plaintiff holding an equitable assignment of money due under a building contract to show that the assignor performed all the conditions of the contract. Botsford v. Lull, 30 Pa. Super. Ct. 292. Evidence held sufficient to show that the debtor owed the drawer of an order subsequently assigned the amount mentioned therein. Tim v. Elite Realty Co., 52 Misc. 125, 101 N. Y. S. 533.

96. Under an assignment of the net earnings under a contract, the burden is upon the assignee to show that the work provided for in the contract was performed at a profit, even though no issue is raised thereon where recovery is based on the assignment. Price Bros. v. Cushing [Iowa] 110 N. W. 1030.

97. Evidence held insufficient to show an assignment of unpaid labor claims. Calloway v. Oro Min. Co. [Cal. App.] 89 P. 1070.

98. An assignee of a judgment who retains the benefits of the assignment for an unreasonable length of time after a breach of a collateral agreement to assign a note of the judgment debtor securing the judgment cannot sue for a breach of such agreement not having tendered a reassignment of the judgment. Newmyer v. Davidson, 31 Pa. Super. Ct. 468.

99. See 7 C. L. 286.

1. Tapp, Leathers & Co. v. Harper [Ark.] 103 S. W. 161.

2. Not within Acts 1893, p. 433, c. 453 National Union Bk. v. Hollingsworth, 143 N. C. 520, 55 S. E. 809.

3. See 7 C. L. 287.

4, 5. Kirkendall v. Weatherley [Neb.] 109 N. W. 757.

6. See 7 C. L. 286.

7, 8. See 7 C. L. 287.

denture of assignment divests the assignor for the time being of all his right, title, or equity in all the property except the right of exemption reserved by law.[9]

§ 6. *Legality and equitableness.*[10]—A deed is not invalid for stipulating for a release of the debtor from personal liability for such part of his debts as the fund does not discharge,[11] or because it provides for the payment of debts inadvertently omitted and which may be admitted by the grantor or otherwise shown to be correct.[12] Likewise it may authorize the trustees to adjust and correct debts incorrectly stated and pay the same according to the true amount,[13] to accept the approval of a debt by the debtor as conclusive of its correctness,[14] to compromise and adjust disputed claims on such terms as they may deem proper or expedient,[15] and to take out of the fund fees properly due for serivces rendered by them as lawyers in connection with the affairs of the trust.[16] A description of the property is sufficient where it is as full as it can conveniently be made.[17] An inadvertant omission from the deed of a small amount of assets does not render it fraudulent.[18] A provision that the trustees may notify creditors not named to present their claims within a specified time does not apply to creditors whose names are listed in the deed.[19] It is sufficient that a reasonable time be given creditors wherein to decide to accept or reject the deed.[20] A Washington deed of trust for the benefit of creditors is not invalid as being within the "sales-in-bulk" law of that state.[21]

Under a statute requiring creditors, as a condition precedent to sharing in the assigned estate, to file releases of all their claims except the pro rata share to which they shall be found entitled, an agreement between the assignor and a creditor whereby the latter is to file his claim and allow any balance to be discharged in consideration of the promise of the former to subsequently pay such balance is fraudulent and unenforceable,[22] and where a debt has been thus voluntarily discharged, a new promise to pay it is without consideration.[23] One who seeks merely to foreclose an invalid mortgage is not in a position to question the validity of an assignment for the benefit of creditors.[24]

Reservation of property.[25]

Preferences.[26]—An insolvent debtor may in good faith mortgage all his property to secure bona fide debts due to preferred creditors,[27] and such mortgage is

9. One not entitled to exemption at time of assignment not afterwards entitled to claim it though he had then become a householder. Miller v. Swhier [Ind. App.] 79 N. E. 1092.

10. See 7 C. L. 287.

11. Joel Bailey Davis Co. v. Augustus, 105 Va. 843, 54 S. E. 985. The right of an insolvent debtor to prefer creditors by the payment of honest debts necessarily implies the right to require creditors to give a release of all claims before being entitled to their shares. McAvoy v. Jennings [Wash.] 87 P. 53.

12, 13, 14, 15, 16. Joel Bailey Davis Co. v. Augustus, 105 Va. 843, 54 S. E. 985.

17. Deed held sufficient describing the property as all of the stock of goods owned by grantor contained in a certain designated store, also all cash, accounts, and choses owned by him, the lease, merchant's license, and any other right owned by him in connection with his business at said place. Joel Bailey Davis Co. v. Augustus, 105 Va. 843, 54 S. E. 985.

18. Where cured next day by supplemental deed. Joel Bailey Davis Co. v. Augustus, 105 Va. 843, 54 S. E. 985.

19. Joel Bailey Davis Co. v. Augustus, 105 Va. 843, 54 S. E. 985.

20. Provision in deed requiring trustees to submit to creditors such statement as will enable them to act advisedly construed to allow a reasonable time. Joel Bailey Davis Co. v. Augustus, 105 Va. 843, 54 S. E. 985.

21. Laws 1901, p. 222, c. 109, was assigned to prevent a vendor from disposing of all his stock and pocketing the proceeds in fraud of creditors. McAvoy v. Jennings [Wash.] 87 P. 53. Even should the transaction be construed to come within this act, it would not enable one creditor to avail himself of all the proceeds to the exclusion of the others, since the purchaser would simply be trustee for all the creditors. Id.

22. Gen. St. Minn. 1891, § 4268. Samuel Westhelmer & Co. v. Flasheim & Co., 30 Ky. L. R. 641, 99 S. W. 346.

23. Samuel Westhelmer & Co. v. Flasheim & Co., 30 Ky. L. R. 641, 99 S. W. 346.

24. Where chattel mortgage on partnership property was not signed by all the partners as required by statute. Thomas v. Schmitz [Wyo.] 87 P. 996.

25, 26. See 7 C. L. 287.

27. Wyily-Gabbett Co. v. Williams [Fla.] 42 So. 910.

not void as an assignment for the benefit of creditors attempting preferences if the debtor in good faith intended it as security only and did not intend to make a general assignment or to defeat the statute forbidding preferences in assignments.[28] A petition to have an alleged preferential conveyance declared an assignment of all the debtor's property for the benefit of creditors is properly refused where not filed within the statutory period.[29]

§ 7. *Property passing to and rights of assignee therein.*[30]—An assignment of all of one's property carries a defeasible fee subject to the conditions of the title and of the trust.[31] The dower right of a wife who does not join in the assignment is unaffected.[32] A statute allowing a resident householder to have set off exemption to a certain amount does not apply to one who is not a resident householder at the time he makes the assignment, though he becomes such before the property is appraised.[33] The right of an assignee to a surrender of property in another state as against creditors there is dependent upon the comity existing between the two states.[34] The assignee's rights in the property transferred are generally held to be identical with those his assignor had,[35] but in Mississippi a vendor's lien is not enforceable against the assignee after he has taken charge of the goods, made an inventory, and notified creditors to present their claims.[36] Before a creditor has become a party to the assignment the debtor's property is still attachable in Massachusetts, but when the assignee is himself a creditor his signature to the deed of assignment is an acceptance by him, as creditor, of the provisions of the deed[37] rendering the deed so far executed that after he takes possession the property is no longer subject to attachment as the property of the debtor.[38] Where a fraudulent conveyance made prior to an assignment for the benefit of creditors is not attacked by the assignee, and after the assignment a judgment is obtained against the assignor, the property fraudulently conveyed should be treated as having been acquired by the assignor after the assignment for the purposes of the levy of an execution thereon under the judgment.[39] As soon as the purpose of the assignment is accomplished, the legal title to remaining property reverts in the assignor by operation of law.[40]

§ 8. *Liability of assignee; bond.*[41]

§ 9. *Collection of assets and reduction to money.*[42]—The present Kentucky statute contains no provisions abridging the common-law power of an assignee to sell realty at private sale pursuant to authority given by the deed of assignment.[43]

28. Instrument considered and held a mortgage not fraudulent. Wylly-Gabbett Co. v. Williams [Fla.] 42 So. 910.

29. Under Ky. St. 1903, art. 2, c. 54, §§ 1910, 1911, fixing time at six months, petition filed two years after transfer held properly denied. Smith's Adm'r v. Huntsberry, 30 Ky. L. R. 867, 99 S. W. 911.

30. See 7 C. L. 288.

31. Where before his death the owner of a defeasible fee conveyed all his property to a trustee for the benefit of his creditors, and the event on which the fee was to be defeated did not transpire, the trustee took the fee simple title subject to the condition of the trust. Whalin v. Bailey, 29 Ky. L. R. 1048, 96 S. W. 1105.

32. Wife who did not join in assignment could, after husband's death, maintain common-law action of dower against purchaser at assignee's sale. McFadden v. McFadden, 32 Pa. Super. Ct. 534.

33. Burn's Ann. St. 1901, §§ 715, 2907. Miller v. Swhier [Ind. App.] 79 N. E. 1092.

34. Illinois assignee held not entitled to funds in New York before payment of assignor's attaching New York creditors. In re John L. Nelson Bro. Co., 149 F. 590.

35. Where execution levy was valid as against assignor, assignee could not avoid levy on theory that officer's possession was not sufficiently exclusive. Murchie v. Wentworth [N. H.] 64 A. 507. A voluntary assignee merely represents the debtor and is **not a bona fide purchaser** for value. Smith v. Equitable Trust Co., 215 Pa. 418, 64 A. 594. Equitable lien on goods in hands of a factor held enforceable as against him. Id.

36. Goodbar & Co. v. Knight [Miss.] 42 So. 539.

37, 38. Reddy v. Raymond [Mass.] 80 N. E. 484.

39. Bishop v. Hibben Dry Goods Co., 30 Ky. L. R. 725, 99 S. W. 644.

40. Where assignor compromised his debts before any steps were taken by the assignee. Early v. Early, 75 S. C. 15, 54 S. E. 827.

41, 42. See 7 C. L. 289.

43. Effect of act March 16, 1898, amending

and when a private sale is made no appraisement under the statute is necessary.[44] The county court of the county where the assignee qualifies and not where the business is carried on has jurisdiction to order a sale of the assigned estate.[45] A sale by an assignee under his guaranty to furnish the purchaser with a person to take the property from him at the sale price is voidable at the election of the creditors regardless of good faith.[46] Before a trustee's sale is confirmed purchasers thereat have not such an interest in the property sold them as to entitle them to apply to a court of equity to have the title corrected.[47]

§ 10. *Administration of trust in general.*[48]—Reasonable prudence and good faith is required of the assignee in the administration of his trust.[49]

§ 11. *Debts and liabilities of the estate.*[50]—While debts due but payable in the future or damages for a breach of contract accruing prior to the assignment are claims against the estate,[51] debts arising after the assignment or dependent upon future contingencies are not.[52] In the absence of fraud or collusion, a judgment obtained against the assignor after the assignment of a claim existing when the trust deed was executed is binding on the trustee though he was not made a party defendant.[53]

§ 12. *Presentment and allowance of claims.*[54]—Only creditors who were such at the time of the assignment are entitled to participate in the proceeds of the estate.[55] A creditor who has property coming to him by way of compromise of a claim which the debtor considered exorbitant will be allowed a dividend based only on the market value of the property and not on the compromise valuation.[56] It is not an abuse of discretion for trustees to deny creditors who at first refused to join in the assignment the right to do so after the time allowed for that purpose unless they will pay certain expenses incident to unsuccessful litigation instituted by them in the meantime for the purpose of having the debtor adjudged a bankrupt.[57]

§ 13. *Classes and priorities of debts.*[58]—After a conveyance to secure certain debts the property becomes impressed with a trust for that purpose,[59] and neither

§§ 87, 96, Ky. St. 1903, was a repeal provision of § 87, requiring public sale. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31. An agreement by an assignee of insolvent corporation made in contract for sale of property to deliver to the purchaser certificates for 90 per cent of the capital stock of the corporation is complied with by delivery of 90 per cent of certificates of stock outstanding, though the articles of incorporation state the capital stock at a larger amount than that actually issued. Id.

44. Ky. St. 1903, §§ 2362 et seq., not applicable. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31.

45. Ky. St. 1903, §§ 75, 87. That statute requires recordation of deed in other counties not controlling. Lexington & Carter County Min. Co. v. Columbia F. & T. Co., 30 Ky. L. R. 336, 98 S. W. 332.

46. Where under such agreement the assignee afterwards bought from the purchaser at the sale, he was chargeable with the property or its value. Nabours v. McCord [Tex.] 100 S. W. 1152.

47. Turpin v. Derickson [Md.] 66 A. 276.

48. See 7 C. L. 290.

49. In suit by assignor against trustees for accounting, evidence held insufficient to show that a sale under execution could have been prevented because trustees had funds in their possession. Nodine v. Richmond [Or.] 87 P. 775. Evidence insufficient to show any fraud or collusion between trustees and judgment creditors and mortgagees. Id. Insufficient to show that a purchaser bought land for joint benefit of himself and one of the trustees. Id.

50. See 7 C. L. 290.

51. In re Chestnut St. Trust & Sav. Fund Co.'s Assigned Estate, 217 Pa. 151, 66 A. 332.

52. Liability of surety, principal's default occurring after surety's assignment. In re Chestnut St. Trust & Sav. Fund Co.'s Assigned Estate, 217 Pa. 151, 66 A. 332.

53. Nicholas v. Lord, 103 N. Y. S. 681. In an action by the judgment creditor against the trustee, a certain release executed by the debtor held admissible to show that the judgment was not settled and to show that any claim of the debtor in relation to certain alleged partnership property had been satisfied. Id.

54. See 7 C. L. 291.

55. Award for whose guardian a trust company continued to hold funds after it had made an assignment held not entitled to participate where the funds were stolen by one of the officers after the assignment. In re Chestnut St. Trust & Sav. Fund Co.'s Assigned Estate, 217 Pa. 151, 66 A. 332.

56. In re Real Estate Inv. Co.'s Assigned Estate, 215 Pa. 50, 64 A. 331.

57. Moulton v. Bartlett [Mass.] 80 N. E. 619.

58. See 7 C. L. 291.

59. Timberlake's Committee v. Moore [Va.] 56 S. E. 571.

the assignor nor the trustee may thereafter apply the proceeds of the property to the payment of unsecured debts without the consent of the secured creditors.[60] Where, however, the proceeds are thus erroneously applied the application should be disturbed only to the extent that it may be necessary to protect the secured creditors.[61] One who furnishes materials or supplies to run a rolling mill, foundry, or other manufacturing establishment assigned for the benefit of creditors in Kentucky has a lien on such property [62] which arises when the assignment is made and not before,[63] and hence it is not material that more than sixty days elapse after the lienor ceases to furnish material or that his claim is not filed in the county clerk's office, such requirements having reference only to other liens provided for in the statute.[64] Where an assignment is made after the setting aside of prior bankruptcy proceedings, a court in another state wherein are funds belonging to the assignor can apply neither the bankruptcy statute nor the insolvent law of the state of assignment in determining the question of priority as between creditors in its own state.[65] The doctrine of marshalling assets will not be applied so as to require the holders of notes for whose benefit a contract had been assigned to the trustee to first resort to the proceeds of that contract before being entitled to share in the general estate, where such proceeds are uncertain in amount and may not be realized for a long time.[66] The trust fund must go to the creditors pro rata and no one of them can by garnishment subject it to the payment of all his claims to the exclusion of others.[67]

§ 14. *Satisfaction and discharge of debts and claims.*[68]

§ 15. *Accounting, settlement and discharge, or failure of trust.*[69]—Creditors representing less than one-fourth of the liabilities of voluntary assignees may not sue for the settlement of the estate in the circuit court in Kentucky.[70] An assignor may have the confirmation of the assignee's account opened for excessive compensation allowed the assignee where petitioner was ignorant that the account had been filed until after confirmation,[71] but such relief will not be granted as to counsel fees actually paid in conformity with the decree of the court.[72] The widow and children of an assignor, who died before settlement by the assignee who was made administrator may properly bring an action against the assignee to surcharge and correct his settlement and collect amounts alleged to be fraudulently paid out.[73] An assignor who controls and directs the administration of the estate to the detri-

60. Deed signed by one of the creditors consenting to a release of the assignment as to certain land did not warrant application of proceeds of the land to payment of an unsecured debt where it recited as a consideration that the proceeds had been applied to the payment of secured debts. Timberlake's Committee v. Moore [Va.] 56 S. E. 571. A creditor's concession of the correctness of defendants' exception in so far only as it referred to a decision that defendants' unsecured claim was barred held not to estop the creditor from asserting the incorrectness of the application of the proceeds of the land. Id.

61. Timberlake's Committee v. Moore [Va.] 56 S. E. 571.

62. A flouring mill is a "manufacturing establishment" within Ky. St. 1903, § 2487. Hall v. Guthrie's Sons [Ky.] 103 S. W. 721.

63. Hall v. Guthrie's Sons [Ky.] 103 S. W. 721.

64. All that is required is to sue within sixty days from the assignment, etc., or to file a claim asserting the lien within such time with the proper person. Hall v. Guthrie's Sons [Ky.] 103 S. W. 721. Creditors held not bound to appeal from county court's judgment disallowing the lien, but could sue in circuit court. Id.

65. Claimants for wages held not entitled to preference as against attaching creditors, despite these laws. In re John L. Nelson Bro. Co., 149 F. 590.

66. Carter v. Tanners' Leather Co. [Mass.] 81 N. E. 902.

67. Tapp Leathers & Co. v. Harper [Ark.] 103 S. W. 161.

68, 69. See 7 C. L. 292.

70. Ky. St. 1903, § 96. Hall v. Guthrie's Sons [Ky.] 103 S. W. 721.

71. Court would not disturb findings. Wentzel's Assigned Estate, 30 Pa. Super. Ct. 628.

72. That the attorney was assignee's brother did not alter the case. Petition insufficient as to attorney's fee. Wentzel's Assigned Estate, 30 Pa. Super. Ct. 628.

73. Administrator could not be expected to prosecute the action. Adamson v. Donaldson, 30 Ky. L. R. 397, 98 S. W. 1009. Petition held to state a cause of action. Id.

ment of creditors and delays a settlement in order to force concessions cannot recover in equity assets alleged to remain in the hands of the assignee,[74] neither can the assignee who participates in such conduct be allowed to recover from the assignor for alleged overpayments.[75]

§ 16. *Rights of creditors under a void assignment, or after assignee's discharge.*[76]

ASSISTANCE, WRIT OF.[77]

The interest of one not made a party to a foreclosure proceeding cannot be adjudicated on an application for a writ of assistance,[78] and if such person or his administrator is in possession of the property, he may have the execution of the writ restrained.[79] Nor will the writ lie to try the validity of a tax title acquired by an adverse claimant after the rendition of the decree which it is sought to execute.[80] On reversal of a decree for plaintiff in a chancery suit involving real property, the lower court should restore to defendant the property taken under the erroneous decree, and defendant has also a clear remedy at law;[81] hence a writ of assistance will not be granted by the appellate court to restore the possession.[82] Mandamus will not lie to compel a sheriff to execute writs which have become functus officio,[83] or writs which have not yet come into his hands and as to which there has been no dereliction.[84]

ASSOCIATIONS AND SOCIETIES.

§ 1. Definition, Nature and Organization (274).
§ 2. Internal Relations, Rights, and Duties (275).
§ 3. The Association, and Persons not Members (276).
§ 4. Actions and Litigation (277).
§ 5. Dissolution and Termination (277).

Scope of topic.—This article treats only of voluntary, unincorporated associations and membership corporations organized for purposes not pecuniary.[85] Fraternal, mutual benefit associations are also excluded.

§ 1. *Definition, nature and organization.*[86]—The constitution and by-laws of a voluntary, unincorporated association constitute a contract between the members,[87] and are repealed and supplanted by a new constitution and new by-laws covering the same ground, subjects, and purposes as the old.[88] Incorporation does not necessarily destroy the voluntary character of the organization,[89] and it seems that the shares of such a corporation have not the value of ordinary corporate stock in open market.[90] Special rights and privileges are sometimes granted to certain kinds of associations.[91]

74, 75. Commonwealth v. Scoville [Ky.] 101 S. W. 1188.

76. See 7 C. L. 292.

77. See 7 C. L. 293. See, also, Possession, Writ of, 8 C. L. 1441.

78. Hibernia Sav. & Loan Soc. v. Robinson [Cal.] 88 P. 720.

79. Evidence held sufficient to sustain finding that administrator was not in possession and hence he could not restrain execution of the writ. Hibernia Sav. & Loan Soc. v. Robinson [Cal.] 88 P. 720.

80. Flint Land Co. v. Grand Rapids Terminal R. Co., 147 Mich. 627, 14 Det. Leg. N. 63, 111 N. W. 192

81, 82. Foster v. Beidler [Ark.] 98 S. W. 968.

83, 84. Reeves v. State, 145 Ala. 510, 41 So. 927.

85. See the titles Building and Loan Associations, 7 C. L. 500; Combinations and Monopolies, 7 C. L. 661; Corporations, 7 C. L. 862; Foreign Corporations, 7 C. L. 1725; Joint Stock Companies, 8 C. L. 521.

86. See 7 C. L. 294.

87. Dingwall v. Amalgamated Ass'n of Street Railway Employes [Cal. App.] 88 P. 597.

88. Bachman v. Harrington, 52 Misc. 26, 102 N. Y. S. 466.

89. Chicago board of trade held voluntary association. People v. Board of Trade, 224 Ill. 370, 79 N. E. 611; Bostedo v. Board of Trade [Ill.] 81 N. E. 42.

90. Verdict of $3,000 damages for failure to deliver share in shooting club held excessive. McAlpin v. Garden, 53 Misc. 401, 103 N. Y. S. 509.

91. Rev. St. § 3631a, is not unconstitutional in that it confers upon an organization of the character of a mutual burial association, whether it be regarded as an insur-

§ 2. *Internal relations, rights, and duties.*[92]—The rules and regulations of a voluntary association are binding upon applicants who agree to become bound thereby,[93] and, a fortiori, the members of such an association are bound by its rules and regulations[94] as set forth in its constitution and by-laws,[95] and while members chargeable with violations of such rules and regulations may be tried by the duly constituted tribunals of the association,[96] and may, if found guilty, be fined[97] or even expelled,[98] such trials must be in strict accordance with the rules and regulations of the association;[99] and where written charges and notice to the accused are required, jurisdiction cannot be acquired without them[1] unless they are waived.[2] Membership, moreover, is a personal right,[3] which cannot be taken away except in strict accordance with the constitution and by-laws of the association,[4] and which will be protected by the courts against unauthorized proceedings on the part of fellow members either as individuals or in their official or collective capacity.[5] As a general rule, however, the courts will not review the decisions of an association tribunal on a trial of a member until the remedies within the association have been exhausted,[6] but this rule is not without exception.[7] After the remedies within the association have been exhausted, resort may be had to the courts,[8] but in such case

ance company or a beneficial society, rights and privileges differing from those bestowed upon other associations doing a similar business. State v. Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

92. See 7 C. L. 294.

93. Under rule that the subordinate tent of Maccabees shall be the agent of its members and applicants and not of the great camp, and that the latter will in no case be liable for the fault or negligence of the former, the great camp is not liable for injuries inflicted during initiation by members of the Subordinate tent. Kaminski v. Great Camp, K. M. M., 140 Mich. 16, 13 Det. Leg. N. 665, 109 N. W. 33.

94. Bostedo v. Board of Trade [Ill.] 81 N. E. 42; City Trust, Safe Deposit and Surety Co. v. Waldhauer, 47 Misc. 7, 95 N. Y. S. 222. Internal relations, rights and duties of members of voluntary, unincorporated association, are measured by the constitution, and bylaws of the association. Dingwall v. Amalgamated Ass'n of Street R. Employes [Cal. App.] 88 P. 597.

95. Rights of members must be settled according to the constitution and by-laws of the association. Hickey v. Baine [Mass.] 81 N. E. 201.

96. Equity will not enjoin such a trial. Bostedo v. Board of Trade [Ill.] 81 N. E. 42.

97. Surety company allowed recovery against member of builders' association for whom it had furnished indemnity bond against violation of rules by such member. City Trust, Safe Deposit & Surety Co. v. Waldhauer, 47 Misc. 7, 95 N. Y. S. 222.

98. Bostedo v. Board of Trade. [Ill.] 81 N. E. 42. Incorporated association has implied power of motion. Bryant v. D. C. Dental Soc., 26 App. D. C. 461. Under Odd Fellows' constitution lodge had jurisdiction to try and expel member for conduct unbecoming a member in threatening to kill another member. Moon v. Flack [N. H.] 65 A. 829.

99. Tarbell v. Gifford, 79 Vt. 369, 65 A. 80. Rule that charge against member shall be referred to a committee, and that upon the return of their report the association by a certain vote may expel the accused if the charge has been sustained, held not to contemplate or require a rehearing on the evidence by the society. Bryant v. D. C. Dental Soc., 26 App. D. C. 461.

1. That procurement of member's discharge by his employer was pursuant to penalty imposed by association held no defense to action by member against association where the penalty was imposed on trial without written charges and notice. Tarbell v. Gifford, 79 Vt. 369, 65 A. 80.

2. Waiver is a question of fact. Tarbell v. Gifford, 79 Vt. 369, 65 A. 80; Brennan v. United Hatters of North America, 73 N. J. Law, 729, 65 A. 165. Service of charges and notice waived by appearance and defense on merits. Fritz v. Knaub, 103 N. Y. S. 1003.

3. Especially when the purposes of the association are the amelioration or enforcement of the condition under which the members obtain their livelihood. Dingwall v. Amalgamated Ass'n of Street R. Employes [Cal. App.] 88 P. 597.

4. Mandate granted for reinstatement of members expelled for offense for which constitution and by-laws provided only a fine. Dingwall v. Amalgamated Ass'n of Street R. Employes [Cal. App.] 88 P. 597.

5. Dingwall v. Amalgamated Ass'n of Street R. Employes [Cal. App.] 88 P. 597.

6. Fritz v. Knaub, 103 N Y. S. 1003; Ward v. David & Jonathan Lodge [Miss.] 43 So. 302. Members claiming offices cannot invoke the aid of the courts until they have exhausted the remedies available to them under the rules of the association, and hence mandamus refused where petitioners had not availed themselves of remedy by appeal to convention Hickey v. Baine [Mass.] 81 N. E. 201.

7. Jurisdiction taken of suit for reinstatement though petitioner had not availed himself of further appeal within the association, where the appellate tribunal would sit at great distance and not for over a year, and peitioner's insurance would lapse if he was not reinstated before expiration of such time. Fritz v. Knaub, 103 N. Y. S. 1003.

8. Where no appeal is provided for within the association, the action of the association tribunal may be reviewed by the courts.

the courts do not sit as appellate tribunals, their review being confined to matters of fraud and lack of jurisdiction.[9] Much is conceded to the decisions of association tribunals[10] and the evidence will be reviewed only to the extent of ascertaining whether there was any substantial evidence to sustain the charge.[11] Failure to appear in response to notice of charges does not confer jurisdiction to impose a penalty not authorized by the constitution and by-laws and not referred to in the notice,[12] nor is an unauthorized penalty validated by affirmance by the association's appellate tribunal.[13] Resort to the courts is not precluded by failure to object to the jurisdiction of the tribunal on the trial before it,[14] but objection to an association committee as a judicial board may be waived.[15] Where the association has jurisdiction, the members of the tribunal cannot be held liable for acts committed in their judicial capacity,[16] and when there is probable cause for the prosecution of a member before an association tribunal, the prosecutors will not be liable for either malicious prosecution or conspiracy.[17] A by-law providing for forfeiture of membership may be self-executing, in which case membership ceases upon the commission of the act constituting the ground of forfeiture.[18] When an association committee has acted upon a member's claim to the extent required by the by-laws, mandamus will not issue to compel further action.[19]

§ 3. *The association and persons not members.*[20]—A voluntary, unincorporated association is liable for the acts of a branch association created by it and employed as its instrumentality in committing the acts complained of,[21] but not for the personal or individual contracts of its officers[22] or employes.[23] Where such

Bachman v. Harrington, 52 Misc. 26, 102 N. Y. S. 406.

9. Such a review is in the nature of a collateral attack, but the tribunal's decision is open to such an attack where it had no jurisdiction, as where trial was under a repealed constitution and by-laws and therefore for an offense that did not exist. Bachman v. Harrington, 52 Misc. 26, 102 N. Y. S. 406. Decision that members of dental association was guilty of "unprofessional conduct" in writing certain letters derogatory and defamatory of fellow members held not reviewable. Bryant v. D. C. Dental Soc., 26 App. D. C. 461.

10. Variance is that complaint charged accused with furnishing an orchestra at less than union prices, while punishment imposed was for playing at less than union prices, held not fatal. Bachman v. Harrington, 52 Misc. 26, 102 N. Y. S. 406. An association tribunal is not confined to sworn testimony, but the accused has a right to know all that is produced against him. Id.

11. Evidence held insufficient to sustain charge against member of Brotherhood of Locomotive Engineers of violating constitution standing rule 11, and by-laws of order of 1902, relating to giving of information to railroad officials. Fritz v. Knaub, 103 N. Y. S. 1003.

12. Dingwall v. Amalgamated Ass'n of Street R. Employes [Cal. App.] 88 P. 597.

13. Unauthorized expulsion. Dingwall v. Amalgamated Ass'n of Street R. Employes [Cal. App.] 88 P. 597.

14. Bachman v. Harrington, 52 Misc. 26, 102 N. Y. S. 406.

15. Control of membership and acquiescence in and practical submission to the tribunal as constituted held a waiver of objection to committee as judicial board. Moon v. Flack [N. H.] 65 A. 829.

16, 17. Moon v. Flack [N. H.] 65 A. 829.

18. By-laws of board of trade of Chicago providing for forfeiture of membership for nonpayment of dues held self-executory and valid. People v. Chicago Board of Trade, 224 Ill. 370, 79 N. E. 611. By-law of Chicago board of trade for expulsion for nonpayment of dues, held valid. Id. By-laws of Chicago board of trade proceeding for forfeiture of membership for non-payment of dues held to apply to suspended member as well as others. Id.

19. Decision of executive committee of a commercial protective association that claim of member against stranger was so doubtful as to require dismissal, held a decision "as to the justice or otherwise of the claim," within the meaning of the by-laws, and further action would not be compelled. People v. Manufacturers' & Dealers' Protective Ass'n, 104 N. Y. S. 575.

20. See 7 C. L. 295.

21. Evenson v. Spaulding [C. C. A.] 150 F. 517, afg. 149 F. 913.

22. Not liable for money advanced to treasurer on his personal note and not shown to have come into the hands of the association. Pelchat v. Societe des Artisans Canadiens Francais, de Montreal, Succursale de Providence [R. I.] 67 A. 362.

23. Fact that club steward conducted restaurant in club rooms did not clothe him with any authority, real or apparent, to bind the club for goods sold to him for use in the restaurant. Reis v. Drug & Chem. Club, 105 N. Y. S. 285. Where one employed by a club or steward conducted a restaurant in the club rooms under contract that club should not be liable therefor, and a bookkeeper was jointly employed by the steward and the club, and goods were delivered to the steward's employes on the steward's and his

an association has no power to elect, expel, or control its members, they are not liable for each other's negligence.[24]

§ 4. *Actions and litigation.*[25]—In an action at law against an unincorporated association, all its members must be made parties defendant,[26] but this is not always necessary in equity.[27] A part of the members of such an association cannot sue for the benefit of the association,[28] or for the benefit of the beneficiaries of an association contract.[29] Trustees of the property of an association may sue to recover the same,[30] but such property will not be bound by a judgment in a suit against the trustees.[31] An association may be estopped to deny its capacity to be sued as such.[32]

§ 5. *Dissolution and termination.*[33]—A contributor's vested right to his proportionate share of the association's assets on dissolution cannot be impaired by statute.[34]

ASSUMPSIT.

§ 1. Nature, Form, and Propriety of Action (277). Waiver of Tort (278).

§ 2. The Common Counts (278). Use and Occupation of Land (278). Goods Sold and Delivered (278). Money Had and Received (278). Money Paid (279). Work, Labor, and Materials (279).

§ 3. Declaration, Pleas, and Defenses (279). Joinder of Counts (279). The Declaration (279). Pleas (280).

§ 4. Evidence (280).

This topic treats only of the remedial law of assumpsit and excludes the substantive aspects of contract express[35] or implied.[36]

§ 1. *Nature, form, and propriety of action.*[37]—Assumpsit lies only upon a simple[38] contract expressed or implied,[39] though a superfluous seal does not defeat

bookkeeper's orders, and were paid for with the steward's personal checks, the steward was at most only the special agent of the club as regards purchase of other goods in same manner from same person. Id.

24. Members of pilot association not liable for negligence of a member in the performance of his work. Guy v. Donald, 203 U. S. 399, 51 Law. Ed. 245.

25. See 7 C. L. 295.

26. Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753.

27. Where members are numerous, a number of them may be made defendants as representative of a class. Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753. Where association of many members was represented by committee or regularly appointed officers, such as president, secretary, manager, and superintendents, all of whom were before the court, and there was also a general appearance by the association as such, the court had jurisdiction over the association as such and all parties who appeared. Evenson v. Spaulding [C. C. A.] 150 F. 517, afg. 149 F. 913.

28. Suit to compel one of constituent companies of telephone association to connect with common switchboard. Westbrook v. Griffin [Iowa] 109 N. W. 608.

29. Code § 3459, authorizing nominal party to contract to sue in own name for benefit of beneficiary, does not authorize part of members of telephone association to sue members of a constituent company in behalf of other members thereof for violation of its contract with the association. Westbrook v. Griffin [Iowa] 109 N. W. 608.

30. Notwithstanding that the association is incorporated and has right to sue in its own name. Rhodes v. Maret [Tex. Civ. App.] 101 S. W. 278.

31. Property of voluntary unincorporated association not subject to execution on judgment against trustees of such property. Moore v. Stemmons, 119 Mo. App. 162, 95 S. W. 313.

32. Association sued as corporation cannot come into court by attorney in its association name and assert that it is not a suable entity. Cigar Makers' International Union v. Huecker, 123 Ill. App. 336.

33. See 7 C. L. 296.

34. Acts 1870, p. 124, c. 89, gave contributors to Maryland Mechanical & Agricultural Association right to proportionate share of assets on dissolution, and such right could not be taken away by Acts 1890, p. 57, c. 73, attempting to postpone the contributors to subsequent creditors. Maryland Jockey Club v. State [Md.] 67 A. 239. Provision of Acts 1886, p. 198, c. 128, that state shall be preferred as to repayment on dissolution of appropriation made to such association by such act, and Acts 1904, p. 246, c. 141, making similar provision for preference, held invalid. Id. Appropriation for such association by Acts 1872, p. 462, c. 282, held a donation as to which state was not entitled to share in distribution of assets. Id.

35. See contracts, 7 C. L. 761.

36. See Implied Contracts, 8 C. L. 155.

37. See 7 C. L. 296.

38. Covenant and not assumpsit lies upon a contract under seal. Fry v. Talbott [Md.] 66 A. 664.

39. Lies for instalments or rent as they become due under a contract to pay by instalments. Bates v. Winifrede Coal Co., 4 Ohio N. P. (N. S.) 265. No contractual relation between husband of passenger and common carrier so as to enable the former to recover for medical expense incurred for wife because of injuries caused by carrier's

the action.[40] It is not appropriate to enforce a judicial decree,[41] to try title to realty,[42] to recover the value of personalty in the possession of another,[43] or to revise and correct a partnership settlement.[44]

Waiver of tort.[45]—Freqeuntly a tort may be waived and an action in assumpsit maintained,[46] the determination as to when such right exists being elsewhere treated.[47] Whether a particular action sounds in tort or assumpsit is usually determinable from the pleadings.[48]

§ 2. *The common counts.*[49]—Where a contract is fully executed[50] on plaintiff's part and nothing remains but payment by defendant, recovery may he had under the common counts.[51] Where a renewal note is invalid, recovery may be had on the original obligation under the common counts.[52]

Use and occupation of land.[53]—Royalties due under a lease may be recovered under an indebitatus count for use and occupation.[54]

Goods sold and delivered.[55]

Money had and received.[56]—Assumpsit for money had and received will lie where defendant has received money which in equity and good conscience he ought not retain from plaintiff,[57] as where an agent receives money from a third person

negligence. Plefka v. Detroit United R. Co., 147 Mich. 641, 14 Det. Leg. N. 33, 111 N. W. 194. Does not lie by one co-tenant to recover of another rents accruing from estate, as right of recovery is not based on theory of promise expressed or implied. Kran v. Case, 123 Ill. App. 214. The operation of street railway raises an implied promise to pay an annual license fee of $25 imposed by ordinance upon each car operated within the city, and assumpsit will lie. Bloomington & Normal R., E. & H. Co. v. Bloomington, 123 Ill. App. 639.

40. Agent's individual seal upon a contract of sale of realty may be disregarded where he had no authority to bind his principal by a sealed contract. Horner v. Beasley [Md.] 65 A. 820.

41. The fact that contractual liability is fixed and made certain by decree does not render assumpsit inappropriate, as where a decree fixes the assessment of the policy holders in a defunct mutual insurance company. Swing v. American Glucose Co., 123 Ill. App. 156.

42. Kran v. Case, 123 Ill. App. 214.

43. Royal Trust Co. v. Overstrom, 120 Ill. App. 479.

44. Especially where the settlement was effected by division of goods, and a money judgment for a mistake might be unjust. Pfeiffer v. Bauer, 122 Ill. App. 625.

45. See 7 C. L. 296.

46. New York Market Gardners' Ass'n v. Adam's Dry Goods Co., 115 App. Div. 42, 100 N. Y. S. 596; Plefka v. Detroit United R. Co., 147 Mich. 641, 14 Det. Leg. N. 33, 111 N. W. 194.

47. See Election and Waiver, 7 C. L. 1222.

48. Declaration against a common carrier construed as stating an action in tort, it lacking the allegation of consideration necessary to assumpsit. Pennsylvania R. Co. v. Smith [Va.] 56 S. E. 567. Action by one induced by fraud to enter into a contract held not in tort for deceit but in assumpsit for recovery of the consideration paid. Whitney v. Haskell, 216 Pa. 622, 66 A. 101.

49. See 7 C. L. 296.

50. Where a contract of employment is broken by the employer and the employe elects to treat it as abandoned, the contract is deemed executed so as to authorize recovery under the common counts. Anglo-Wyoming Oil Fields v. Miller, 117 Ill. App. 552. Recovery for breach must be under special count. Thompson v. Hoppert, 120 Ill. App. 588. Recovery cannot be had under the common counts where plaintiff has failed to comply with a condition precedent but relies on an excuse, as where he relies on fraud to excuse the failure to obtain the architect's certificate of completion. Hart v Carsley Mfg. Co., 221 Ill. 444, 77 N. E. 897. **Contra.** Hart v. Carsley Mfg. Co., 116 Ill. App. 159.

51. Newman v. Lumley, 125 Ill. App. 382; Ryan v. Hooton, 122 Ill. App. 514. Contract for services. Richards v. Richman [Del.] 64 A. 238. Fire loss reduced to account stated. Manchester Fire Assur. Co. v. Fitzpatrick, 120 Ill. App. 535.

52. Common counts joined with the special count on the note. Councilman v. Towson Nat. Bk., 103 Md. 469, 64 A. 358.

53. See 5 C. L. 299.

54. Lawson v. Williamson Coal & Coke Co. [W. Va.] 57 S. E. 258.

55. See 5 C. L. 298.

56. See 5 C. L. 299.

57. Harr v. Roome, 28 App. D. C. 214. Where the maker of a purchase price note assigned the contract of purchase to his surety who is given credit by the vendor for the amount of the note, the maker may recover in assumpsit upon paying the note. McGee v. McGee, 125 Ill. App. 436.

Petitions construed as stating causes for money had and received: A petition alleging a contract authorizing defendant to sell land in which plaintiff had an interest, fraud on the part of defendant that he could and had sold for a particular amount when in fact he had sold for more, that he was fraudulently withholding the balance due, etc. Crigler v. Duncan, 121 Mo. App. 381, 99 S. W. 61. A petition against the executor of plaintiff's mother alleging that by agreement between plaintiff and his mother the

for his principal,[58] or a municipality collects by special assessments more than is needed for the improvements.[59] The plaintiff must not have voluntarily paid the money to defendant.[60]

Money paid.[61]—Indebitatus assumpsit lies to recover money involuntarily paid [62] to one who ought not in equity and good faith retain it, or money paid to a third person under compulsion which defendant should have paid.[63]

Work, labor, and materials.[64]

§ 3. *Declaration, pleas, and defenses.*[65]—By statute in some states one for whose benefit a contract was executed may maintain assumpsit thereon, though not a party thereto.[66]

Joinder of counts.—While a count in tort cannot be joined with a count in assumpsit,[67] distinct indebtedness may be united in a single indebitatus count.[68]

The declaration on a special count should specifically allege the promise to pay,[69] but in indebitatus assumpsit such allegation is not necessary.[70] Matters necessarily implied from the nature of the transaction declared on need not be directly averred,[71] nor is it necessary to negative matters of affirmative defense.[72] A technical quantum meruit count is not necessary to a quantum meruit recovery.[73] While a specification following the common money counts limits them to the claims asserted therein,[74] the failure to file a statutory bill of particulars does not waive the counts.[75] Although a contract be pleaded specially, yet deceit in procuring payment of the consideration will support recovery under the common count.[76]

former turned his wages over to the latter to be kept for him, after paying their living expenses, that the defendant had collected a deposit which belonged to plaintiff and refused to pay over the same. Stuyvaert v. Arnold, 122 Mo. App. 421, 99 S. W. 529.

Evidence held to show that money in hands of executor belonged to plaintiff and not to estate. Stuyvaert v. Arnold, 122 Mo. App. 421, 99 S. W. 529.

58. Action allowed against one receiving money on a note intrusted to him for collection. Harr v. Roome, 28 App. D. C. 214. For money received by defendant under a contract authorizing him to sell land for plaintiff and to receive the proceeds. Crigler v. Duncan, 121 Mo. App. 381, 99 S. W. 61.

59. City of Chicago v. Fisk, 123 Ill. App. 404. Notwithstanding that the special fund has been depleted. City of Chicago v. McCormick, 124 Ill. App. 639.

60. Indorsement for collection of draft made to the joint order of two, is not payment to indorse so as to defeat recovery of amount collected. Rawson v. Bethesda Baptist Church, 123 Ill. App. 239.

61. See 5 C. L. 299.

62. Unjust water rents paid under protest and under a threat of defendant to shut off the water are not voluntarily paid. City of Chicago v. Northwestern M. L. Ins. Co., 120 Ill. App. 497.

63. Where a tenant agrees to assume an unperformed contract but makes default, the lessor may recover in assumpsit for money paid on a judgment recovered against it. Pocono Spring Water Ice Co. v. American Ice Co., 214 Pa. 640, 64 A. 398.

64. See 5 C. L. 299.

65. See 7 C. L. 297.

66. Under Code 1899, § 2, c. 71 (Code 1906, § 3021), a smallpox patient transported under a contract executed between a railroad and the county court may sue in assumpsit for failure of the company to keep it warm as per contract. Jenkins v. Chesapeake O. R. Co. [W. Va.] 57 S. E. 48. See, also, Contracts, 7 C. L. 761.

67. Demurrable. Pennsylvania R. Co. v. Smith [Va.] 56 S. E. 567.

68. An express promise for work done under an executed special contract and the implied promise as to extra work can be declared on in one count. Donegan v. Houston [Cal. App.] 90 P. 1073.

69. The mere recital of the writing sued on is insufficient, and there is no distinction in pleading an express or implied promise. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 S. E. 826.

70. Potomac Laundry Co. v. Miller, 26 App. D. C. 230.

71. In indebitatus assumpsit for work and labor, a direct averment of indebtedness and that the services were rendered at defendant's request are not necessary, since the consideration and promise will be implied. Donegan v. Houston [Cal. App.] 90 P. 1073.

72. Special count on contract of sale need not allege fulfillment of warranty. Ryan v. Hooton, 122 Ill. App. 514.

73. Such recovery may be had under common counts in indebitatus assumpsit. Viles v. Barre & M. Trac. & Power Co., 79 Vt. 311, 65 A. 104. Though a complaint did not contain a quantum meruit count but there was evidence showing extra work as well as the agreed work, and no objection was made to the complaint or the evidence, the action in one count for the total sum was sufficient to sustain a judgment for the extra work. Donegan v. Houston [Cal. App.] 90 P. 1073.

74. Where specification is for money earned by services, etc., recovery cannot be had under count for money had and received. Carson v. Calhoun, 10 Me. 456, 64 A. 838.

75. Bill required by Code 1899, § 11, c. 125. Federation Window Glass Co. v. Cameron Glass Co., 58 W. Va. 477, 52 S. E. 518.

76. The waiver of the fraud by specially

Pleas.—Failure of consideration[77] and recoupment for nonperformance or breach of warranty[78] may be shown under the general issue. An affidavit of defense must connect the defense made with the claim sued on.[79] The withdrawal of the general issue leaving only a plea of off-set admits plaintiff's claim.[80]

§ 4. *Evidence.*[81]—In indebitatus assumpsit the special contract is admissible to establish the amount due,[82] though plaintiff need not prove a particular agreed sum.[83] In an action for money paid at defendant's request, a contract under seal is admissible to show that defendant and not plaintiff was under obligation to pay the claim.[84] There must be no material variance between the allegations and proof. Plaintiff has the burden of establishing all the essential averments.[86]

Assumption of Obligations; Assumption of Risk, see latest topical index.

ASYLUMS AND HOSPITALS.

§ 1. Corporations or Societies and Their Officers (280).
§ 2. Establishment and Maintenance of Institutions and Support of Inmates (281).
§ 3. Liability of Institutions or Officers for Injuries to Inmates or Others (281).

§ 1. *Corporations or societies and their officers.*[87]—That a certificate of incorporation declares the object of the corporation to be the maintaining of a "hospital and dispensary" does not render it invalid though the statute does not permit

pleading the contract does not limit the issues made by the common counts. Gubbins v. Ashley, 146 Mich. 453, 13 Det. Leg. N. 844, 109 N. W. 841.

77. Not special defense or matter of confession and avoidance to be set up in brief statement under the statute. Clark v. Holway, 101 Me. 391, 64 A. 642. Defendant's brief statement examined and held to sufficiently allege failure of consideration, although couched in language peculiar to a set off, if it was necessary to so plead lack of consideration. Id.

78. Common counts to recover for the construction of a building. Bauer v. Jerolman, 124 Ill. App. 151.

79. An affidavit of defense in assumpsit for work done and materials furnished, alleging that plaintiff's intestate agreed to make certain improvements and to be compensated therefor by increased rentals, although not clearly showing that the claims sued on were included within the contract, held sufficient when considered with plaintiff's affidavit in support of the action. Potomac Laundry Co. v. Miller, 26 App. D. C. 230.

80. Park Steel Co. v. Staver Carriage Co., 125 Ill. App. 105.

81. See 7 C. L. 297.

82. Donegan v. Houston [Cal. App.] 90 P. 1073. Contract being fully executed. (Lawson v. Williamson Coal & Coke Co. [W. Va.] 57 S. E. 258), and hence not error to admit evidence of execution (Id.). In an action under the common counts for goods sold, the contracts, invoices, bills of lading, etc., are admissible to show contract price and make a prima facie case. Holloway v. Whitehunham Shoe Co. [C. C. A.] 151 F. 216.

83. On common counts for the use of oxen plaintiff is not confined to proving a particular contract price. Wilson v. Taylor [Ala.] 41 So. 824. Where, in an action on special and common counts, the contract for services is not proven, recovery may be had under the common counts for the reasonable value of the services. Richards v. Richman [Del.] 64 A. 238.

84. Contract of sale of land admitted to show upon whom the payment of taxes rested. Fry v. Talbott [Md.] 66 A. 664.

85. Where statement in assumpsit sets forth claim for services as bookkeeper and salesman and proof related wholly to alledged partnership, judgment for plaintiff must be set aside. Hale v. Hale, 32 Pa. Super. Ct. 37. There is fatal variance between proof of implied contract of carriage or contract between defendant railroad company and the county court for carriage and a declaration upon a special contract of carriage. Jenkins v. Chesapeake & O. R. Co. [W. Va.] 57 S. E. 48. Where one sues for money had and received, recovery is not prevented by a mistatement of the contract under which defendant collected the money as plaintiff's agent, the particulars not being of the essence of the case. Crigler v. Duncan, 121 Mo. App. 381, 99 S. W. 61. Evidence to sustain demand for rent is not admissible under indebitatus counts for goods, etc., sold and delivered, work and labor, money lent, money had and received, and an account stated. Lawson v. Williamson Coal & Coke Co. [W. Va.] 57 S. E. 258.

86. In an action for money had and received against one who is alleged to have received the proceeds of a note intrusted for collection, plaintiff has the burden of showing ownership of the note, that defendant received the same for collection on plaintiff's account, and collection. Harr v. Roome, 28 App. D. C. 214. In order to recover under the common counts for goods sold and delivered, plaintiff must establish delivery by a greater weight of the evidence. Kitchin v. Clark, 120 Ill. App. 105.

87. See 7 C. L. 297.

an incorporation for more than one of the purposes specified therein.[88] nor is the charter of a charitable corporation rendered invalid because it is proposed to charge an entrance fee.[89] The superintendent of a county infirmary in Ohio is not the holder of a public office.[90] Upon the expiration of his term no order of the board of directors is necessary for his removal, and hence no cause need be assigned by the board for the termination of his term.[91]

§ 2. *Establishment and maintenance of institutions and support of inmates.*[92] The expenses chargeable to the inmates of detention hospitals under the Iowa statute are limited to expenses of attendance, nursing, board, and treatment. The expense of providing and furnishing the hospital is chargeable against the county.[93] A statute providing for reimbursement from the relatives of insane persons to the county for hospital expenses incurred in the public support of such persons is constitutional.[94] Under a statute making pension money exempt from seizure in legal proceedings, such money in the hands of the committee of an incompetent may be applied to the payment of current state hospital expenses,[95] though not of any arrears existing at the time the first pension money was received by the committee.[96]

§ 3. *Liability of institutions or officers for injuries to inmates or others.*[97]—Charitable hospitals are generally held exempt from liability for negligence resulting in injury to inmates,[98] though in New Hampshire such a hospital has been held liable for the negligence of its officers causing injury to a servant employed by it.[99] A hospital organized for pecuniary profit,[1] and undertaking to treat a patient for hire, will be held liable for negligence in respect thereto.[2] A corporation may not introduce evidence outside of its articles of incorporation for the purpose of showing that it is a charitable institution.[3] A state is not liable for the negligence of its employes resulting in the death of an inmate of a state hospital.[4] An employe of

88. Laws 1895, p. 354, c. 559, § 80. In re Nason's Will, 104 N. Y. S. 601.

89. Did not prevent incorporation under Laws 1895, p. 354, c. 559, § 80. In re Nason's Will, 104 N. Y. S. 601.

90. Quo warranto to oust him would not have been proper. Palmer v. Zeigler [Ohio] 81 N. E. 234.

91. Palmer v. Zeigler [Ohio] 81 N. E. 234. Successor duly appointed could maintain injunction to protect his possessions. Id.

92. See 7 C. L. 298.

93. Code Supp. § 2570a, and Laws Thirtieth Gen. Assem. p. 102, c. 98, construed. Kurtz Co. v. Polk County [Iowa] 109 N. W. 612.

94. Under Code, § 2297, providing that public support of insane persons shall not release relatives otherwise liable for the support of such persons, a father is liable for the care of his minor son in a state hospital. Guthrie County v. Conrad [Iowa] 110 N. W. 434. Law does not impose a tax, hence not unconstitutional for not complying with constitutional provisions relating to tax legislation (Id.), and not a double tax (Id.). Does not take property without due process. Id.

95, 96. In re Strohm, 101 N. Y. S. 688.

97. See 7 C. L. 300.

98. Not liable for negligence of servants unless negligent in selecting them. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691. A private or quasi private charitable hospital is not liable for negligence of its employes or for its own negligence in selecting them. Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453. Association with no stock and paying no dividends organized to provide free treatment to the poor and train nurses held a charity not liable for injury to a patient. Id.

99. In this case the hospital held its property under its charter for the general purposes of a hospital and not for the purpose of carrying out any special trust. Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190. An apprentice nurse employed by the hospital is a servant entitled to care (Id.), and the hospital is liable for negligently failing to notify her of the contagious character of a case to which she is assigned (Id.). No defense that she misrepresented her age. Id. Evidence sufficient to justify submission of issue of negligence to jury. Id.

1. Articles showing capital stock and giving all the rights of a business corporation held to show incorporation for pecuniary profit. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691.

2. That the county paid the expense did not render the relation between defendant and the patient charitable. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691. Evidence sufficient to require submission of issue of negligence to jury. Id.

3. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691.

4. Where negligently inspected railroad car used in connection with hospital was negligently permitted to run into the building. Martin v. State, 105 N. Y. S. 540.

a county house may properly place an inmate in a room designed for the confinement of refractory inmates for the purpose of preventing him from doing bodily harm and of checking the open violation of the rules of the house where he immediately reports the occurrence to the keeper of the house,[5] and he will not be liable for a continued confinement directed by the keeper after the notification.[6]

ATTACHMENT.

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§ 1. *Definition, nature and distinction.*[7]—Attachment is a purely statutory remedy, and the general doctrines herein formulated are based entirely upon the similarity of the various statutes, which should always be consulted.

§ 2. *In what actions it will issue.*[8]—A statutory substitute for an action at law will be considered as such an action within the attachment laws.[9] An implied contract comes within a provision authorizing an attachment in actions on contract,[10] and where the transaction giving rise to the implied contract is tortious, the tort may be waived, and the suit brought on the contract.[11] Actions for the recovery of money include actions for the recovery of unliquidated damages for a tort,[12] but an action in rem cannot be held to be an action for the recovery of money only.[13] Attachment is sometimes expressly authorized in actions ex delicto.[14]

5. Engineers could confine inmate using profane language in engine room and threatening harm contrary to rule providing for infliction of punishment on inmates using profane language. Contention that only the keeper could do it was untenable. Cunningham v. Shea, 111 App. Div. 624, 97 N. Y. S. 884.

6. Cunningham v. Shea, 111 App. Div. 624, 97 N. Y. S. 884. Held error to exclude evidence that confiners reported to keeper who directed incarceration to continue, and evidence showing what instructions the keeper had previously given them relative to the care of inmates and enforcement of rules. Id. That the obscene language was directed to defendants only did not render it merely a personal affair. Id.

7, 8. See 7 C. L. 300.

9. Code 1887, § 2959 [Code 1904, p. 1568] authorizing attachments in "actions at law," applies to motions for judgment by notice. Breeden v. Peale [Va.] 55 S. E. 2.

10. Implied contract to refund money received under contract wrongfully rescinded by recipient. Hanley Co. v. Combs [Or.] 87 P. 143.

11. Where money was paid on fraudulent voucher. Morgans' Louisiana, etc., Co. v. Stewart [La.] 44 So. 138. Where party wrongfully rescinded contract after receiving money thereunder. Hanley Co. v. Combs [Or.] 87 P. 143. Conversion of personalty, precise value of property being alleged. Hitson v. Hurt [Tex. Civ. App.] 101 S. W. 292.

12. Under Rev. St. 1899, authorizing attachments in civil actions for recovery of money, attachment will lie in action for unliquidated damages for unlawful and forcible entry. Collins v. Stanley [Wyo.] 88 P. 620.

13. Code Civ. Proc. § 635, authorizing attachments in actions for money only, does not authorize attachment in action under § 1843 against heir for debt of ancestor

or certain kinds of such actions,[15] but even in such case the damages must be shown by the attachment papers with reasonable certainty.[16] Where the test is that the demand be in its nature definite and certain, claims ex delicto are generally excluded because indefinite and uncertain in amount,[17] but not merely and necessarily because not based on contract.[18]

§ 3. *Right to and ground for the writ.*[19]—It is sometimes provided that an attachment may issue on certain grounds before the debt is due.[20]

Insolvency is ground for attachment in Kentucky.[21]

Absconding of debtor.[22]—The absconding of the debtor is usually ground for attachment.[23]

Nonresidence[24] of the debtor is one of the most common grounds for attachment,[25] and the right to an attachment on such ground is not affected by the availability of other remedies.[26] Statutes giving debts due to nonresidents a local situs so as to be attachable are constitutional.[27] Actual residence and not domicile controls.[28]

Attachment against corporations.[29]—Special provisions are sometimes made for attachments against corporations.[29a]

Fraud.[30]—Some of the phases of frauds constituting ground for attachment are fraud in contracting the debt,[31] fraudulent concealment of property,[32] and

where defendant has not alienated the property sought to be charged and the judgment therefore must direct, as required by § 1852, that the debt be collected out of the property. Avery v. Avery 104 N. Y. S. 290, rvg. 52 Misc. 297, 102 N. Y. S. 955.

14. Under Code 1906, § 536, attachment in equity may issue against nonresident for damages arising ex delicto. Wallace v. Lucas [Miss.] 42 So. 607.

15. Destruction of business of corporation and thus destroying value of stock deposited by plaintiff with defendant as collateral, and subsequent sale of stock at low price to pay debt secured, held not conversion of personalty within Code Civ. Proc. § 635, authorizing attachment in actions for such conversion. Dudley v. Armenia Ins. Co., 115 App. Div. 380, 100 N. Y. S. 818.

16. Evidence of unliquidated damages to corporate stock held too vague to sustain attachment. Dudley v. Armenia Ins. Co., 115 App. Div. 380, 100 N. Y. S. 818.

17. Morgan's Louisiana, etc., Co. v. Stewart [La.] 44 So. 138.

18. Word "debt" as used in statute does not necessarily exclude claims ex delicto. Morgan's Louisiana, etc., Co. v. Stewart [La.] 44 So. 138.

19. See 7 C. L. 301.

20. Right to attachment before debt is due in cases prescribed in Code, § 237, may be exercised by surety to whom the note is indorsed by payee before due. Danker v. Jacobs [Neb.] 112 N. W. 579.

21. That defendant has not sufficient property in state subject to execution to satisfy the plaintiff's demand and that collection of such demand will be endangered by delay in obtaining judgment and a return of "No property found." Lexington Brew. Co. v. Goode Co., 30 Ky. L. R. 639, 99 S. W. 338. In determining whether defendant's property is sufficient to pay plaintiff's claim, its value on immediate sale and not at retail is the test. Id. Only leviable property can be considered, which excludes saloon license. Id.

22. See 7 C. L. 301.

23. Evidence held to show that debtor had left county with intent to avoid service of process. Blackburn v. Hanlon, 30 Ky. L. R. 539, 99 S. W. 252. That defendant had left county of residence to avoid service of process held sustained by evidence. Id.

24. See 7 C. L. 301.

25. Code Civ. Proc. § 636, subd. 2. Avery v. Avery, 52 Misc. 297, 102 N. Y. S. 955. Code 1906, § 536. Wallace v. Lucas [Miss.] 42 So. 607. Evidence on motion to dissolve held sufficient to show nonresidence of defendant. Hughes v Crooker [N. C.] 56 S. E. 510.

26. Shepherd v. Shepherd, 51 Misc 418, 100 N. Y. S. 401.

27. Ga. Acts 1904, p. 100, held not invalid as an attempt to pass an act having extra territorial effect, and, as applied to debt due railroad employee living in another state by company doing business in such state and also in Georgia, such act is not invalid as authorizing a deprivation of property without due process. Harvey v. Thompson [Ga.] 57 S. E. 104.

28. Defendant held nonresident where she had sold her home and been away from state for over a year and had no place of residence within state where process could be served, though she still owned property in state and had formed no definite intention of acquiring domicile elsewhere. Webb v. Wheeler [Neb.] 112 N. W. 369.

29. See 7 C. L. 301.

29a. Under P. L. 1901, p. 158, the test is not whether corporation is resident or nonresident, but whether it be one created by the laws of the state or recognized as a coporation by such laws. Brand v. Auto Service Co. [N. J. Law] 67 A. 19.

30. See 7 C. L. 301.

31. Affidavits held to state facts sufficient to authorize issue of writ. Wilkinson, Gaddis & Co. v. Bloch [N. J. Law] 67 A. 117. Title to attachment act was amended by Act March 13, 1903, P. L. 70, so as to exclude attachments against fraudulent debtors.

fraudulent transfer of property.[33] Suspicious conduct is not alone sufficient to show fraud. A fraudulent intent must be shown,[34] but such intent may be implied from the character and effect of the transfer, and need not be a consciously fraudulent intent involving moral obliquity.[35]

Embezzlement is ground for attachment in Missouri.[36]

§ 4. *Attachable property.*[37]—An interest in property in order to be attachable must be such as is recognized by law.[38] Equitable interests may be attached.[39] The individual property of a member of a partnership is not attachable in an action against the firm alone,[40] nor is a principal's property attachable for the debts of his agent.[41] Property in the hands of an officer under a prior levy may be levied on by the same officer under a subsequent attachment,[42] and if the interests of third persons have not intervened, the rule is the same where the officer has left the property in the possession of the person in possession at the time of the levy, thus making such person his bailee.[43] Property in custodia legis is not attachable,[44] but where the court in which the attachment action is pending has lawful possession of the property, it will retain such possession to await the result of the action, regardless of the manner in which such possession was acquired,[45] and as between several claimants a court of equity will recognize the attachment of property in its custody to the extent of giving priority to the senior attachment in the distribution of such property.[46] An attachment under state laws cannot reach either the instru-

Id. Evidence held sufficient to sustain attachment on ground that debt was fraudulently and criminally contracted. Collins v. Stanley [Wyo.] 88 P. 620.

32. Charge of concealment of property will be regarded as sufficiently proven when sustained by testimony of number of witnesses as to declarations made by debtor at different times that he was execution proof and that his property had all been placed beyond reach of creditors. Ravenna Nat. Bk. v. Latimer, 8 Ohio C. C. (N. S.) 563.

33. Evidence held sufficient to sustain attachment on ground of fraudulent transfer. Danker v. Jacobs [Neb.] 112 N. W. 579. Refusal to dissolve attachment sustained where it appeared that defendant had transferred by absolute conveyance over $15,000 worth of property to secure debt of $8,000. First Nat. Bk. v. Anderson, 101 Minn. 107, 111 N. W. 947. Mere offer to sell at low price and to accept notes and mortgage for all or large part of price not alone sufficient to show intent to make fraudulent transfer. Ravenna Nat. Bk. v. Latimer, 8 Ohio C. C. (N. S.) 563. Failure to keep promise to deed property to creditor as security and sale and application of proceeds to payment of other creditors held not a disposition of property with intent to hinder, delay, or defraud creditors. Breeden v. Peale [Va.] 55 S. E. 2.

34. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357.

35. Placing one's property in hands of another with instructions to convert into cash and pay creditors justifies attachment by creditors excluded, regardless of any dishonest intent of owner. Frank v. Minsterketter, 30 Ky. L. R. 485, 99 S. W. 219.

36. Mere shortage of agent as to principal's property is insufficient to authorize attachment on ground of embezzlement. A willful and felonious conversion is essential. Stone Mill. Co. v. McWilliams, 121 Mo. App. 519, 98 S. W. 828

37. See 7 C. L. 302.

38. Where a mother conveyed property to one son by absolute deed on express understanding that no trust was to be created in favor of other son, mere verbal expression of desire that granter would give other son a part created no leviable interest in favor of such other. Boyer v. Robison [Wash.] 86 P. 385.

39. Code Civ. Proc. 1902, § 253, makes equitable interests in personalty attachable. Pelzer Mfg. Co. v. Pitts [S. C.] 57 S. E. 29. When partner contributed to firm capital by giving note secured by corporate stock as collateral, and firm endorsed note and had it discounted by a bank, the subsequent payment of the note by the partner with firm assets subrogated the firm to the bank's rights in the stock and rendered the stock attachable by firm creditors. Id.

40. Haas v. Cook [Ala.] 41 So. 731 Attachment against W. & W., a firm composed of C. W. and J. W., is against firm alone. Id.

41. Money deposited in bank in agent's name to enable him to pay certain of principal's debts. Anderson v. Taylor, 131 Iowa, 485, 108 N. W. 1051.

42. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629.

43. Second attachment was by officer's bailee. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629.

44. In re Nelson & Bro. Co., 149 F. 590; In re Renda, 149 F. 614. Some action of court is necessary to place property in custodia legis, and hence property is not in custodia legis where it is placed in hands of clerk, but court has not ordered such act nor recognized it. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629.

45. Whether possession acquired by attachment or otherwise is immaterial in such case. Lemly v. Ellis, 143 N. C. 20, 55 S. E. 629.

46. In re Nelson Bro. & Co., 149 F. 590. See post § 14A, subd. Between Attachments and Receivers.

mentalities of interstate commerce[47] or the proceeds resulting from the use of such instrumentalities.[48] Property exempted by statute is not attachable.[49]

Attachment of debts and choses in action.[50]

§ 5. *Procedure in general.*[51]—The procedure in attachment materially differs from that in an ordinary action,[52] and under some of the statutes no complaint or pleading is necessary in order to obtain an attachment.[53] The amounts claimed in the various attachment papers must correspond,[54] but the affidavit may claim and the writ may issue for less than the amount claimed in the petition in the principal action.[55] Conditions precedent required by the statute must be complied with.[56]

Jurisdiction.[57]—Jurisdiction depends upon the proceedings prior to the return term.[58] For the purposes of the attachment, the levy takes the place of personal service,[59] and hence in the absence of such service no jurisdiction is acquired unless defendant's property is reached by the levy,[60] as where the property attached does not belong to the defendant,[61] but in the latter case jurisdiction is conferred by the intervention of the owner.[62] No jurisdiction of the person is acquired by the levy on the res,[63] and such jurisdiction is not conferred by a special appearance for the purpose of objecting to jurisdiction,[64] or for the purpose of

47. Cars used for continuous carriage of goods from one state to another as authorized by Rev. St. § 5258, U. S. Comp. St. 1901, § 3564. Davis v. Cleveland, etc., R. Co., 146 F. 403. Exemption from attachment continues for at least reasonable time in which to start car on homeward trip after being unloaded. Id. Railroad car owned by foreign company not attachable while loaded with interstate freight. Shore & Bro. v. Baltimore & O. R. Co. [S. C.] 57 S. E. 526. Cars of foreign railroad company sent into state with freight from another state to be unloaded by the terminal company and then reloaded and returned in same direction to point without state are exempt from attachment for debt of owner. Southern Flour & Grain Co. v. Northern Pac. R. Co., 127 Ga. 626, 56 S. E. 742.

48. Freights due foreign carrier on interstate shipments and collected by the final carrier held not subject to attachment in hands of latter. Davis v. Cleveland, etc., R. Co., 146 F. 403.

49. Wages exemption applies to attachment against nonresident. Morris Box Board Co. v. Rossiter, 30 Pa. Super. Ct. 23. See generally Exemptions, 7 C. L. 1631.

Waiver: Exemption is not waived by a general appearance. Morris Box Board Co. v. Rossiter, 30 Pa. Super. Ct. 23.

50, 51. See 7 C. L. 303.

52. Civ. Code 1895, § 1861, requiring petition to set forth cause of action in orderly, distinct paragraphs, numbered consecutively, is inapplicable to declarations in attachment. Brackett & Co. v. Americus Grocery Co., 127 Ga. 672, 56 S. E. 762. See, also, Fincher v. Stanley Elec. Mfg. Co., 127 Ga. 362, 56 S. E. 440. Declaration in attachment held not subject to demurrer for uncertainty in setting out grounds of action. Brackett & Co. v. Americus Grocery Co., 127 Ga. 672, 56 S. E. 762.

53. Under Code Civ. Proc. §§ 636, 638, summons and affidavit is all that is necessary. Shepherd v. Shepherd, 51 Misc. 418, 100 N. Y. S. 401.

54. Damages laid in attachment declaration must not exceed amount claimed in affidavit. Brackett & Co. v. Americus Grocery Co., 127 Ga. 672, 56 S. E. 762. When amount claimed in the declaration does not exceed that claimed in the affidavit, the former is not defective because the aggregate of the items of the damages claimed exceed the amount claimed in the affidavit, where no question of jurisdiction is involved. Id.

55. Elrod Bros. v. Rice [Tex. Civ. App.] 99 S. W. 733.

56. Demand in writing upon debtor for necessaries, for over ninety per cent of his personal earnings, is a necessary condition to issuing of order for attachment. Hughes v. Shields, 7 Ohio C. C. (N. S.) 84, followed by a majority of the court. Judge Wildman adopts the contrary holding in K. B. Co. v. Batie, 2 Ohio C. C. (N. S.) 358; Nemit v. Vargo, 8 Ohio C. C. (N. S.) 97.

57. See 7 C. L. 304.

58. See post, § 9, The Levy or Seizure. Albright-Prior Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251.

59. Albright-Prior Co. v. Pacific Selling Co. 126 Ga. 498, 55 S. E. 21.

60. When there is no evidence that the garnishee has any of the debtor's property, the court has no jurisdiction to state account between plaintiff and defendant. Werner Sawmill Co. v. Sheffield [Miss.] 42 So. 876. Where levy is by service on garnishee, jurisdiction is in abeyance until answer of garnishee showing possession within jurisdiction of property of debtor. Albright-Prior Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251. See post § 10, Return to the Writ.

61, 62. Morrison v. New Haven & Wilkerson Min. Co., 143 N. C. 251, 55 S. E. 611.

63. See 7 C. L. 312. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629.

64. Appearance for purpose of moving to dismiss on account of defective service. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629. Statement of counsel that he appears specially is sufficient to constitute a special appearance without stating that he did not appear generally, and though no objection to jurisdiction was specified. Marr v. Cook, 147 Mich. 425, 111 N. W. 116.

moving to quash the attachment,[65] but it is otherwise where the appearance is general.[66] Where personal service is had, jurisdiction is not dependent upon the validity of the attachment.[67] No jurisdiction is acquired where neither the writ of attachment nor the summons is served by one shown to be competent.[68]

The same presumptions are indulged in favor of jurisdiction on attachment proceedings as in cases of personal service.[69]

Necessity of issuance of summons and service thereof.[70]—The summons need not be served and filed before the issuance of the attachment.[71] Where published service is authorized,[72] the publication must be commenced within the time specified by statute,[73] and failure to comply with the requirements in this regard will not be excused by delay on the part of the sheriff [74] or the publisher.[75] Notice properly addressed and mailed is prima facie presumed to have been received,[76] and a notice is properly addressed and mailed if done as prescribed by the statute.[77] The return need not show the particular post-office or mail box where the notice was mailed.[78]

§ 6. *Affidavit and its sufficiency.*[79] *Necessity.*[80]—An affidavit alleging legal grounds for the attachment is essential to the validity of the writ.[81] Provision is sometimes made for the issuance of several writs on a single affidavit.[82]

Averments in general.[83]—Mere insufficiency of the allegations is not necessarily fatal,[84] and additional proof may be received.[85] Jurisdictional defects, however, are not curable by amendment.[86] The grounds must not be alleged in the alternative,[87] and must be based on legal evidence,[88] hearsay being admissible only in

65. Davis v. Cleveland, etc., R. Co., 146 F. 403.

66. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629.

67. Even where the debt is not due, abatement of attachment does not divest court of jurisdiction, the question of maturity of the claim being of importance only in connection with the sufficiency of the cause of action and having no relation to question of jurisdiction. National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co., 201 Mo. 30, 98 S. W. 620. See post, § 15C, subd. Judgment, Decree, or Order. Personal judgment rendered against foreign corporation whose officer was personally served and which appeared for balance after sale of attached property. Hall Commission Co. v. Foote [Miss.] 43 So. 676.

68. Marr v. Cook, 147 Mich. 425, 111 N. W. 116.

69. Burris v. Craig, 34 Colo. 383, 82 P. 944. See post, § 15 C., subd. Judgment, Decree, or Order.

70. See 7 C. L. 304.

71. Only necessary that summons issue before attachment. Ranch v. Werley, 152 F. 509.

72. Plaintiff upon a showing that summons cannot be served upon defendant within the county is entitled to obtain service by publication. Foote v. Central American Commercial Co., 7 Ohio C. C. (N. S.) 531.

73. Court was without jurisdiction where publication was not commenced within thirty days after return day, as required by Comp. Laws, § 10, 572. McLaughlin v. Jackson, Circuit Judge, 147 Mich 379, 13 Det. Leg. N. 1038, 110 N. W. 1079.

74. Only remedy for delay of officer in making return is by application for order requiring him to make it. McLaughlin v. Jackson, Circuit Judge, 147 Mich. 379, 13 Det. Leg. N. 1038, 110 N. W. 1079

75. Only remedy for publisher's delay is by application for extension of return day. McLaughlin v. Jackson Circuit Judge, 147 Mich. 379, 13 Det. Leg. N. 1038, 110 N. W. 1079.

76. Smith v. Berz, 125 Ill. App. 122.

77. Slattery v. Stevens, 125 Ill. App. 67. Evidence tending to show that plaintiff might by earnest effort have discovered defendant's street address and thus could have had notice mailed to him at such address is not sufficient to sustain charge of fraud. Id.

78. Slattery v. Stevens, 125 Ill. App. 67.

79. See 7 C. L. 304.

80. See 5 C. L. 306.

81. Lord v. Dowling Co. [Fla.] 42 So. 585.

82. Code Civ. Proc. §§ 537-540, authorizing several writs to sheriffs of several counties. Martinovich v. Marsicano [Cal.] 89 P. 333. Additional writs may be issued subsequently to issuance of original writ without filing new or additional affidavits. Id.

83. See 7 C. L. 304.

84. Lord v. Dowling Co. [Fla.] 42 So. 585.

85. By affidavit or otherwise. Lord v. Dowling Co. [Fla.] 42 So. 585.

86. Butcher v. Cappon & Bertsch Leather Co. [Mich.] 112 N. W. 110. Under statute requiring allegation that defendant is indebted to plaintiff, allegation that defendant is indebted to deponent, one of the plaintiffs, is jurisdictionally defective. Id.

87. Averment in language of Rev. St. 1898, § 6064, subd. 3, that defendant "has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal" his property with intent to defraud his creditors, held to state only a single ground. Johnson v. Emery [Utah] 86 P. 869.

88. Gumbes v. Hicks, 116 App. Div. 120, 101 N. Y. S. 741. Averment that goods were sold defendant on strength of false statement to commercial agency insufficient where

cases of necessity,[89] and when admitted it must not only be accompanied by its sources,[90] but as between sources of unequal value as evidence the best must be furnished.[91] As to what constitutes sufficient proof,[92] the test is whether the evidence presented in the papers would justify a verdict on the trial,[93] and in applying such test the absence of counter affidavits may be considered.[94] Matters of which the court will take judicial notice need not be alleged.[95]

Averments as to nonresidence.[96]—In the absence of counter affidavits it is sufficient if nonresidence can be inferred from the facts alleged.[97] An allegation that defendant is a foreign corporation [97a] is not necessarily insufficient as being a conclusion based on hearsay.[98]

§ 7. *Attachment bond or undertaking.*[99] *Necessity.*—When a bond is required as a condition precedent, jurisdiction cannot be acquired without it,[1] but it is not always made a condition precedent to the issuance of the writ.[2]

Terms.[3]—A bond in double the amount claimed in the affidavit is sufficient.[4]

Liabilities on bond.[5]—Liability on an attachment bond is limited to damages naturally and proximately resulting from the attachment,[6] which includes expenses incurred in defense of the attachment proceedings,[7] but not of the entire suit.[8]

there was no averment of personal knowledge of the making of the statement and no affidavits of other parties showing the making of the statement. Philip Becker & Co. v. Bevins, 102 N. Y. S. 144.

89. Gumbes v. Hicks, 116 App. Div. 120, 101 N. Y. S. 741.

90. Hearsay based on letter must be accompanied by the letter. Gumbes v. Hicks, 116 App. Div. 120, 101 N. Y. S. 741.

91. Where allegations are on information derived by telephone message and letter from same person, the letter must be introduced. Gumbes v. Hicks, 116 App. Div. 120, 101 N. Y. S. 741.

92. Allegation of attorney that certain amount was due plaintiff over and above all counterclaims held sufficient, in absence of counter affidavits, where the attorney had represented plaintiff in two former suits over same claim, and had possession and access to all papers on which claims of the respective parties depended besides having cross-examined defendant in the former litigation. Campbell v. Emslie, 115 App. Div. 385, 100 N. Y. S. 783.

93. Simons v. Lehigh Mills Co., 53 Misc. 368, 104 N. Y. S. 739.

94. Simons v. Lehigh Mills Co., 153 Misc. 368, 104 N. Y. S. 739; Campbell v. Emslie, 115 App. Div. 385, 100 N. Y. S. 783

95. On motion to quash attachment in suit on judgment rendered by same court, judicial notice will be taken of records in original suit in order to ascertain whether judgment therein was docketed ten years prior to suit on such judgment as required by Code Civ. Proc. § 1913. Shepherd v. Shepherd, 51 Misc. 418, 100 N. Y. S. 401.

96. See 7 C. L. 305.

97. Allegation that defendant was resident of another state where he carried on his business, that he had no business in the state, and that deponent had been plaintiff's attorney for several years in litigation between the parties and had learned that defendant was a nonresident, held sufficient in absence of counter affidavits. Campbell v. Emslie, 115 App. Div. 385, 100 N. Y. S. 783.

98. Such allegation held sufficient under circumstances of particular case. Mersereau v. Hirsch Co., 103 N. Y. S. 577. In view of Code Civ. Proc. § 1776 dispensing with proof of corporate existence in absence of verified answer denying same, an unqualified averment in plaintiff's affidavit that defendant is a foreign corporation is sufficient in absence of any affidavit to the contrary. Simons v. Lehigh Mills Co., 53 Misc. 368, 104 N. Y. S. 739.

99. See 7 C. L. 305.

1. Bond essential to jurisdiction of attachment in justice's court. Marr v. Cook, 147 Mich. 425, 111 N. W. 116.

2. Attachment act does not require bond as conditon precedent to issuance of writ. Wilkinson, Gaddis & Co. v. Block [N. J. Law] 67 A. 117.

3. See 7 C. L. 305.

4. The petition in principal action claimed interest in addition to amount claimed in affidavit. Elrod v. Rice [Tex. Civ. App.] 99 S. W. 733.

5. See 7 C. L. 305.

6. Damages resultig from loss of credit and consequent quitting of employees of attachment defendant and institution of lien proceedings by them, and inability to borrow money, are not recoverable as proximately or naturally resulting from attachment of real estate, where defendant's possession thereof was in no way disturbed. Plymouth Gold Min. Co. v. United States Fidelity & Guaranty Co. [Mont.] 88 P. 565.

7. Reasonable attorney's fees. State v. Allen [Mo. App.] 103 S. W. 1090. Where there is no evidence that plaintiff has contracted to pay or paid his attorney any particular fee, a reasonable fee may be assessed by the jury. Id. On bond conditioned pursuant to Code Civ. Proc. § 892, for payment of costs and damages, an attorney's fee is recoverable as damages though the fees contracted for by defendant have not been paid. Plymouth Gold Min. Co. v. United States Fidelity & Guaranty Co. [Mont.] 88 P .565. Price agreed to be paid by attachment defendant to his attorney may be considered by jury but is not conclusive on defendant in action on bond. Id.

8. Instruction held not susceptible to construction as authorizing recovery of dam-

The sureties are not liable for wanton and malicious acts of the attachment plaintiff in which they did not participate.[9]

Actions on bond.[10]—Persons who will be affected by a judgment on the bond are proper parties to a suit thereon.[11] The defendants in such an action cannot attack the validity of the officer's return in the attachment proceedings.[12]

Pleading.[13]—The declaration or complaint must allege ownership of the attached property by the plaintiff.[14]

Evidence.[15]—When the officer's return does not show when he surrendered possession of the property attached, the date may be shown by parol evidence,[16] and so also where the return is void.[17]

Verdict.[18]

§ 8. *The writ or warrant.*[19]—The writ may issue for interest in addition to the sum claimed in the affidavit.[20] Provision is sometimes made for the issuance of several writs to the sheriffs of several counties.[21]

§ 9. *The levy or seizure.*[22]—The levy must be made within the territorial jurisdiction of the officer making it [23] and must not be excessive.[24] It may be made by way of garnishment,[25] and the owner may be estopped to deny the possession of the garnishee.[26] As to the time of the levy or service,[27] it must be made prior to the return term.[28]

Indemnifying bonds.[29]

§ 10. *Return to the writ.*[30]—Jurisdiction is not acquired by the return but is in abeyance until a return is made showing a levy on the defendant's property.[31] The return must be to the proper court,[32] must be made at the proper time,[33]

ages incurred in defense of entire suit. State v. Allen [Mo. App.] 103 S. W. 1090.

9. Plymouth Gold Min. Co. v. United States Fidelity & Guaranty Co. [Mont.] 88 P. 565.

10. See 7 C. L. 306.

11. Where in attachment by firm only part of members executed bond, other members were proper parties defendant in action on bond, since any judgment against makers of bond would, in effect, be a debt against the firm. State v. Allen [Mo. App.] 103 S. W. 1090.

12. State v. Cowell [Mo. App.] 102 S. W. 573. Contention that return is void is in conflict with contention that it cannot be impeached. Id.

13. See 3 C. L. 363.

14. Allegation that sheriff "levied upon and seized as the property of the relator," etc., held sufficient after judgment. State v. Cowell [Mo. App.] 102 S. W. 573.

15. See 7 C. L. 306.

16. Language of return held not to show when possession was surrendered. State v. Cowell [Mo. App.] 102 S. W. 573.

17. State v. Cowell [Mo. App.] 102 S. W 573.

18. See 7 C. L. 307.

19. See 5 C. L. 308.

20. Where writ issues for sum claimed in affidavit with "interest," the interest will be held to run only from date of affidavit, and hence the writ will not be invalid for variance. Elrod v. Rice [Tex. Civ. App.] 99 S. W. 733.

21. On single affidavit. Code Civ. Proc. §§ 537-540. Martinovich v. Marsicano [Cal.] 89 P. 333.

22. See 7 C. L. 307.

23. Levy outside of jurisdiction of officer is void and cannot be validated by subsequent acts, such as execution of replevy bond. Jones v. Baxter, 146 Ala. 620, 41 So. 781.

24. Evidence held not to show excessive levy. Bell v. Thompson [Ky.] 102 S. W. 830.

25. Levy on foreign corporate stock in hands of one holding it under pooling agreement may be made by service on the holder. Lowenthal v. Hodge, 105 N. Y. S. 120.

26. Where defendant expressly constituted another his agent to hold property and to receive service of attachment and to give certificate of possession. Lowenthal v. Hodge, 105 N. Y. S. 120.

27. Under Comp. Laws, § 10,761, where the owners of logs attached are not parties to the suit and are nonresidents, service may be made on a resident agent of the owner before the return day of the writ. Pepin v. Nalt [Mich.] 112 N. W. 959.

28. Albright-Prior Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251.

29. See 7 C. L. 307.

30. See 7 C. L. 308.

31. Albright-Prior Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251.

32. Under Acts 1895, p. 374, a justice of the peace had jurisdiction to issue attachment against nonresident for sum exceeding $100, and make it returnable to city court of Brunswick in Glynn county. Howard Supply Co. v. Bunn, 127 Ga. 663, 56 S. E. 757. The clause of the act providing that laws applicable to attachments in superior court should apply "so far as the nature of the city court will admit" did not refer to its territorial limitations so as to prevent the return to it of attachment issued in another county. Id.

33. Under Comp. Laws, § 10,761, the return

and must show that the property attached was that of the defendant,[34] and must describe or enumerate it.[35] The return is at least prima facie evidence that the property enumerated therein was attached,[36] and its effect in this regard is not affected by a further recital of the taking of statutory steps to preserve the attachment.[37] The return may be amended,[38] but an amended return will not relate back to validate a judgment entered when no legal levy appeared to have been made.[39] The failure of an amended return to repeat a recital of the original return does not necessarily negative such recital.[40]

§ 11. *Custody, sale, redelivery, or release of attached property.*[41]—On a motion to tax the expenses of keeping to the defendant he may oppose it on any ground not previously adjudicated against him,[42] and since such expenses do not become costs until allowed by the court, the defendant is not precluded as to them by previous taxation of the costs of the action.[43] The defendant is not liable for the expense of keeping property which does not belong to him.[44] The attachment plaintiff is not liable for the negligence of the officer in the care of property unless the attachment was wrongfully sued out,[45] nor is he liable for damages accruing from a delay in the sale when he did not cause such delay.[46] The defendant cannot complain that the sale was not made by the proper officer where he is not harmed by the departure from the regular procedure. The officer's deed to attached realty takes effect as of the date of the levy.[47]

Upon filing the statutory undertaking the defendant is entitled to the possession of the property,[48] and such right may be enforced by an action for conversion.[49]

§ 12. *Forthcoming bonds and receipts.*[50]—The bond must be sealed[51] and approved[52] as required by the statute. In the absence of fraud[53] the agreement

of service on agent of nonresident owner of logs attached may be made before the return day where such owners are not parties to the action. Pepin v. Nalt [Mich.] 112 N. W. 959.

34. Return of writ levied on property of two defendants as having been levied on property of "defendant" is insufficient to sustain judgment on attachment against either defendant. Albright-Prior Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251.

35. Levy on barrels "each about half full" held levy on barrels and contents. Parham & Co. v. Potts-Thompson Liquor Co., 127 Ga. 303, 56 S. E. 460.

36. In suit against officer holding execution for failure to demand within thirty days after judgement, the property attached from the officer who made the attachment, and thus preserve the latter's liability to the plaintiff in the manner required by statute. Kelly v. Tarbox [Me.] 66 A. 9.

37. Recital of filing of attested copy of return in office of the clerk of the town in which the attachment was made as provided by Rev. St. c. 83, § 27, held not to show that officer did not take property into possession or that he did not make an attachment. Kelly v. Tarbox [Me.] 66 A. 9.

38, 39. Albright-Prior Co. v. Pacific Selling Co. [Ga.] 55 S. E. 251.

40. In attachment under Comp. Laws, § 10,761, relating to logging leins, an amended return reciting that the owners of the logs were not found in the state, without reference to their nonresidence, did not negative a recital of nonresidence in the original return so as to render service on an agent and return before the return day premature. Pepin v. Nalt [Mich.] 112 N. W. 959.

41. See 7 C. L. 308.

42, 43, 44. Beeman & Cashin Mercantile Co. v. Sorenson [Wyo.] 89 P. 745.

45. McFadden v. Sims [Tex. Civ. App.] 16 Tex. Ct. Rep. 757, 97 S. W. 335.

46. Delay of officer. Bell v. Thompson [Ky.] 102 S. W. 830.

47. Takes precedence over deed executed by debtor in meantime. Martinovich v. Marsicano [Cal.] 89 P. 333. Defendant not harmed by sale of property by commissioner as in equity instead of by sheriff upon venditioni exponas, since he has the right to object if the sale does not bring a fair price, whereas he would have no such right on a sale by the sheriff. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629.

48. Filing of statutory bond for dissolution terminates plaintiff's right to possession under attachment. Pearne v. Coyne, 79 Conn. 570, 65 A. 973.

49. Pearne v. Coyne, 79 Conn. 570, 65 A. 973. Where officer held property as agent for creditor, verdict was properly rendered against both. Id. Instruction that measure of damages was value at date of attachment instead of date of dissolution by filing of bond held harmless where it did not appear that values were different at the different dates. Id.

50. See 7 C. L. 308.

51. Dissolution bond. Pierce Co. v. Casler [Mass.] 80 N. E. 494.

52. Where forthcoming bond was not approved by court, as required by Rev. St. 1899, § 413, Ann. St. 1906, p. 501, the attachment

as evidenced by an officer's receipt cannot be affected by a prior agreement to enter into a different contract[54] and cannot be changed or altered by a parol agreement,[55] and the parties thereto are estopped to deny the recitals thereof.[56] When the filling out and the execution of a dissolution bond constitute a single transaction, the order of the several steps taken is immaterial.[57] The bond is not necessarily vitiated by irrelevant and superfluous recitals.[58] Whether sureties are released by the failure to enter an order condemning the property for the satisfaction of the debt depends upon the provisions of the statute and the terms of the bond.[59] A waiver of exemptions in the bond is not affected by the filing of a claim for exemption in the attachment suits.[60] A judgment awarding the property to an interpleading claimant discharges the obligation of a forthcoming bond.[61] In an action on the bond the due execution of the bond must be proved by the plaintiff,[62] and a prima facie case is then made out by proof of refusal to deliver,[63] the plaintiff not being bound to prove that the debt has not been satisfied.[64] The time of the demand for delivery of the property, whether before or after the judgment against the attachment debtor, is not of the substance of the cause of action,[65] though it may affect the damages recoverable.[66] In any event defects in this regard relate merely to matters of form and may be waived.[67] Remedies available to enforce the obligations of a statutory bond do not apply where the bond is so effective as to be only

was not dissolved, and special execution thereafter issued was proper. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 S. W. 680.

53. Defense in action on officer's receipt that it was agreed between plaintiff and defendant that latter should sign receipt as director of corporate owner of property attached and should not be bound individually held insufficient to raise any issue of fraud in procurement of individual signature. Dejon v. Street, 79 Conn. 333, 65 A. 145.

54. Prior agreement that one who signed receipt individually should sign a receipt in capacity of director of corporation whose property was attached. Dejon v. Street, 79 Conn. 333, 65 A. 145.

55. Parol agreement that one who signed receipt individually should be held liable only in an official capacity held not to relieve from individual liability. Dejon v. Street, 79 Conn. 333, 65 A. 145.

56. Recital that parties were estopped to deny that property was owned by attachment defendant. Dejon v. Street, 79 Conn. 333, 65 A. 145. Recitals as to value of property attached. Id. Agreement in receipt that parties shall be estopped to deny ownership and value of attached property held valid. Id.

57. Immaterial whether seal be affixed before or after, in point of time, the signature, or whether a seal previously affixed by another is adopted by signer or is affixed by another at his request after signature. Pierce Co. v. Casler [Mass.] 80 N. E. 494. Not necessary for sealing to take place before approval by magistrate. Id.

58. Where attachment against partnership was levied on property of one of partners, and subsequent attachment was levied on property of other partner, a replevy bond given by the latter was not vitiated by recitals of first attachment and by being made to plaintiff's in both attachments, it being evident that it was intended to cover only property levied on under second attachment. Haas v. Cook [Ala.] 41 So. 731.

59. In absence of statute requiring such order in order to create attachment lien, failure to enter such order in entering personal judgment against defendant does not release sureties on replevy bond conditioned merely for surrender of property, and execution may issue on default of such bond notwithstanding failure to enter order against property. Reynolds v. Williams [Ala.] 44 So. 406.

60. Execution on default of replevy bond will not be superseded in such case. Reynolds v. Williams [Ala.] 44 So. 406.

61. Bond conditioned to satisfy any judgment against attachment defendant or, in alternative, to have property forthcoming. Ourand v. Johnson, 6 Ind. T. 361, 98 S. W. 127.

62. Instruction in action on dissolution bond, that bond was presumed to be correct and burden was on defendant to show that it was not properly sealed held to mean that defendant who had set up material alteration by affixing seals after delivery had burden of proof as to such defense. Pierce Co. v. Casler [Mass.] 80 N. E. 494.

63. Action on officer's receipt. Dejon v. Street, 79 Conn. 333, 65 A. 145.

64. This is matter of affirmative defense. Dejon v. Street, 79 Conn. 333, 65 A. 145.

65. Allegation of a demand made during the continuance of the attachment lien may be sustained by proof of demand made either before or after judgment against the attachment debtor. Dejon v. Street, 79 Conn. 333, 65 A. 145.

66. Damages not affected where amount of judgment exceeded agreed valuation of property attached. Dejon v. Street, 79 Conn. 333, 65 A. 145.

67. By failing to demur and by denying allegation as made and going to trial on merits. Dejon v. Street, 79 Conn. 33, 65 A. 145.

a common-law bond.[68] The verdict in an action on a dissolution bond should be for the amount of the penalty.[69]

A void levy is not validated by the execution of a replevy bond.[70]

§ 13. *Lien or other consequences of levy.*[71]—The scope of an attachment lien in so far as it relates to priorities between such lien and other liens or claims is treated in the next succeeding section, as is also the effect of an attachment as a waiver of other liens.[72]

§ 14. *Conflicting levies and liens, and hostile claims.*[73] *A. Priorities in general.*[74]—An attachment reaches only the debtor's interest in the property,[75] and is subject to all prior liens and claims, whether legal[76] or equitable.[77] An equitable lien in favor of the attaching creditor is waived by the attachment,[78] as is also any other inconsistent lien.[79] The effect of failure to record an equitable lien or interest depends upon the provisions of the various recording acts.[80] Priorities cannot be affected by amendment of the attachment papers.[81]

68. Rev. St. 1895, § 214, providing that when defendant has replevied the property, judgment in favor of plaintiff shall be entered against defendant and sureties for amount of judgment, interest, and costs, or for value of property, does not apply where bond so entirely fails to comply with article 204 as to be only a common-law bond but judgment may be rendered for foreclosure of attachment against attached property provided same can be found. Elrod v. Rice [Tex. Civ. App.] 99 S. W. 733.

69. Pierce Co. v. Casler [Mass.] 80 N. E. 494.

70. Jones v. Baxter, 146 Ala. 620, 41 So. 781.

71. See 7 C. L. 309.

72 See post, § 14, Conflicting Levies and Liens and Hostile Claims.

73. See 7 C. L. 309, 313.

74. See 7 C. L. 309.

75. Seward & Co. v. Miller [Va.] 55 S. E. 681. Principal's money deposited in agent's name to enable latter to pay former's debts is not reached by attachment for agent's personal debts. Anderson v. Taylor [Iowa] 108 N. W. 1051.

76. Relationship between attachment debtor and purchaser at prior execution sale, and fact that property was in debtor's hands and that he was selling it, held insufficient to show transfer by such purchaser to debtor so as to render property liable to attachment for debts of latter. Lipschit v. Halperin, 53 Misc. 280, 103 N. Y. S. 202. Bank discounting purchase-money draft with bill of lading attached acquires right superior to that of subsequent attaching creditor of the maker of the draft. Seward & Co. v. Miller [Va.] 55 S. E. 681. As regards the recording acts, Code, § 2465, the bank is at least a mortgagee in possession and is not affected thereby. Id. Where car of foreign railroad company is sent into state over road of domestic company under agreement that latter may reload it for its return trip; the right of the domestic company to reload the car and to use it for transportation of such load is superior to rights of creditor of owner of the car under attachment at law. Southern Flour & Grain Co. v. Northern Pac. R. Co., 127 Ga. 626, 56 S. E. 742.

77 Waterman v. Buckingham, 79 Conn. 286, 64 A. 212. Attachment subject to trust resulting from claimant's having furnished purchase-money under agreement that property was to be conveyed to him as security. City Nat. Bk. v. Crahan [Iowa] 112 N. W. 793. Evidence held to sustain finding that intervener had equitable lien on property. Id. Where consignee sold goods while in transitu, drew draft on purchaser and had same, with bill of lading attached, discounted by a bank, one who subsequently purchased the goods from the agent of the consignee in consideration of payment of the draft, the first purchaser having refused payment and rejected the goods, acquired the rights of the bank as against an attachment creditor of the consignee, regardless of the right of the agent to resell the property as belonging to his principal. Seward & Co. v. Miller [Va.] 55 S. E. 681.

78. City Nat. Bk. v. Crahan [Iowa] 112 N. W. 793.

79. Pasturer's lien under Wilson's Rev. & Ann. St. Okl. 1903, C. 3, §§ 108, 110, is similar to a chattel mortgage and is inconsistent with attachment by same person and hence is waived by such attachment. Crismon v. Barse Livestock Commission Co., 17 Okl. 117, 87 P. 876.

80. See post, this section and subsection, subdivision Between Attachments and Conveyances in General. Such acts held not applicable to trust resulting from purchase of land with claimant's money under agreement to convey to him. City Nat. Bk. v. Crahan [Iowa] 112 N. W. 793. Not applicable to trust resulting from investment by attachment debtor of claimant's money in property attached. Waterman v. Buckingham, 79 Conn. 286, 64 A. 212. Attaching creditor who did not extend credit on faith of debtor's ownership or record title held not bona fide purchaser for value as against owner of equitable interest. Id. One whose money was invested by attachment debtor in property attached not **estopped** to assert resulting trust. Id.

81. Where attachment against firm in firm name was levied on property of individual member, an amendment making the attachment against individual members also could not affect rights of intervening attachment creditor whose attachment was against firm and its members and who had realized thereon from property of such individual member. Haas v. Cook [Ala.] 41 So. 731.

Between attachments and conveyances in general.[82]—Where a conveyance by the debtor is not vitiated by fraud,[83] it takes precedence over a subsequent attachment,[84] subject, of course, to the provisions of the recording acts.[85]

Between attachments and mortgages.[86]—An attachment levied subsequently to the recording of a mortgage is subject to the mortgage.[87] A mortgagee in possession is not affected by the recording acts.[88] An assignment for creditors which has been accepted by the assignee and the creditors is superior to a subsequent attachment.[89] The rights of a foreign assignee, as against attaching creditors, depend upon the nature of the assignment, possession of property, notice and residence of the attaching creditors.[90]

Between attachments and receivers.[91]—Property in the hands of a receiver is not subject to attachment,[92] and while a release of the property from bankruptcy proceeding leaves the property subject to the claims of attaching creditors,[93] it is not subject to attachment while still in the hands of the receiver,[94] but the court will consider the attachments served on the receiver as notices of claims addressed to the court through its receiver and will distribute the funds according to general principles of law.[95]

Effect of bankruptcy proceedings.[96]—An adjudication in bankruptcy vacates all attachments levied within four months prior to the filing of the petition in

82. See 7 C. L. 313.

83. Evidence held not to show conclusively that interpleader received property under fraudulent conveyance. Handlin-Buck Mfg. Co. v. Wendelkin Court Co. [Mo. App.] 101 S. W. 702.

84. Where undisputed evidence showed that property had been sold to claimant who was in possession through his agents at time of attachment, verdict was properly directed for claimant. Tillar v. Liebke, 78 Ark. 324, 95 S. W. 769. Symbolical **delivery** of logs to purchaser according to usage in regard to such matters held sufficient to exempt logs from attachment as property of seller. Chaney v. Southerland-Innes Co., 80 Ark. 572, 98 S. W. 967. See Forestry and Timber, 7 C. L. 1737.

85. Where at time of attachment of realty more than five days had elapsed since execution of claimant's deed, the attachment took precedence over the deed. Hains v. Connell [Or.] 87 P. 265. Under B. & C. Comp. § 301, requiring sheriff on attaching realty to deliver to county clerk a certificate containing the title of the cause, names of the parties, etc., the title and names need not be stated in the caption of the certificate if they are contained in the body thereof. Id. Where **lis pendens** was filed pursuant to Code 1887, § 3566 [Code 1904, p. 1903], an attachment against property as belonging to an original vendor took precedence over a deed executed by him, subsequently to the attachment, to one to whom his vendee had sold the property by verbal contract. Breeden v. Peale [Va.] 55 S. E. 2.

86. See 7 C. L. 309.

87. Crismon v. Barse Livestock Commission Co., 17 Okl. 117, 87 P. 876. Rev. St. 1899, § 1024, Ann. St. 1906, p. 886, prohibiting **foreign corporations** from mortgaging their property to the injury of resident creditors, does not give an attaching creditor priority where there is no evidence that his claim was in existence when the mortgage was recorded. Handlin-Buck Mfg. Co. v. Wendelkin Const. Co. [Mo. App.] 101 S. W. 702. Evidence held not conclusive that interpleader took possession under foreign mortgage instead of bill of sale. Id.

88. Seward & Co. v. Miller [Va.] 55 S. E. 681.

89. Where assignee, who was also a creditor, signed the deed of assignment and also took possession of the goods, such signature constituted acceptance both as assignee and creditor and the goods were not attachable in specie by other creditors. Reddy v. Raymond [Mass.] 80 N. E. 484.

90. Rights of foreign assignee or receiver to aid of courts in obtaining possession of property and his rights as against resident and nonresident attaching creditors determined. Smith v. Berz, 125 Ill. App. 122.

91. See 5 C. L. 31.

92. In re John L. Nelson & Bro. Co., 149 F. 590. Money in hands of ancillary receiver in bankruptcy proceedings instituted in another state. Id. Proceeds of **bankrupt's exemption** not attachable in hands of receiver even by attachment issued on judgment with waiver. In re Renda, 149 F. 614.

93. By order deciding that owner is not subject to bankruptcy. In re John L. Nelson & Bro. Co., 149 F. 590.

94. Hence creditors who attached after order declaring owner not subject to bankruptcy was entered acquired no priority over creditor who attached before entry of such order. In re John L. Nelson & Bro. Co., 149 F. 590.

95. Fund awarded to resident attaching creditor as against foreign assignee for creditors. In re John L. Nelson & Bro. Co., 149 F. 590. As between several resident attaching creditors fund was awarded to the one whose attachment was first served on receiver, with permission to junior attaching creditors to contest the senior creditor's claim on any grounds except date of attachment. Id. Federal court could not recognize in favor of resident wage earners preferences given by bankruptcy act and by foreign insolvency act, but not recognized in the state in which court was sitting. Id.

96. See 7 C. L. 310.

bankruptcy,[97] and a judgment thereafter rendered is void[98] and may be vacated on motion,[99] even after the expiration of the term at which it was rendered,[1] and though there was service on and appearance by the defendant.[2] The right of firm creditors to attach firm property is not affected by the bankruptcy of one of the members of the firm.[3]

(§ 14) *B. Procedure. In general.*[4]—In some states the right to intervene in the attachment proceedings is given to claimants,[5] parties in possession,[6] but a claimant cannot intervene as being interested in the subject-matter of the litigation.[7] Parties intervening and being made defendants on their own petition are not entitled as a matter of right to subsequently withdraw from the proceedings.[8] Except in so far as the validity of the attachment is affected by the title to the property, the proceedings on the attachment and on the claim are practically independent.[9] Intervention by the true owners confers jurisdiction to adjust and adjudicate the relative claims of the plaintiff and the interveners,[10] but when plaintiff has no claim upon the land as against the interveners, he will be nonsuited.[11] In order to protect the rights of a stakeholder in whose hands property has been attached in a Federal court, such court will compel the attachment plaintiff to appear in a state court and establish his rights as against a hostile claimant who has sued the stakeholder in the state court.[12] The trustee in bankruptcy is a proper party to a motion to vacate an attachment as having been levied within four months prior to the filing of the petition in bankruptcy.[13]

The right of a claimant to move for the dissolution or vacation of the at-

97. Bankr. Act, July 1, 1898, c. 541, § 67f, 30 Stat. 565, U. S. Comp. St. 1901, p. 3450. Wise Coal Co. v. Columbia Lead & Zinc Co. [Mo. App.] 100 S. W. 680.

98. Judgment in such attachment proceedings rendered ofter such adjudication is absolutely void. So far as it sustains the attachment, and all subsequent orders for enforcement of such judgment are also absolutely void. Wise Coal Co. v. Columbia Lead & Zinc Co. [Mo. App.] 100 S. W. 680.

99. 1, 2. Wise Coal Co. v. Columbia Lead & Zinc Co. [Mo. App.] 100 S. W. 680.

3. Pelzer Mfg. Co. v. Pitts [S. C.] 57 S. E. 29.

4. See 7 C. L. 311.

5. Intervention by claimant expressly authorized by Code, § 3928, City Nat. Bk. v. Crahan [Iowa] 112 N. W. 793.

6. Under Civ. Code 1902, § 255a, providing for intervention by party in possession of property attached, a domestic railroad company may intervene when a foreign car loaded with interstate freight is attached in its possession. Shore & Bro. v. Baltimore & O. R. Co. [S. C.] 57 S. E. 526.

Retaining bond executed by claimant pursuant to Kirby's Dig. § 3268, is not forfeited until after issue of execution on original judgment against defendant, the practice being that if claimant then refuse to deliver property to officer holding such execution the bond is forfeited and has effect of judgment for appraised value, and hence where there has been no **appraisement** upon execution of retention bond, no judgment can be entered against the claimants in the proceedings on the interplea, and plaintiff must resort to action on the bond. Faulkner & Co. v. Cook [Ark.] 103 S. W. 384. Kirby's Dig. § 3268, providing for appraisement of property upon execution of retaining bond by claimant, does not contemplate appraisement by jury on trial of issues presented by interpleas. Id.

7. Code, § 50a, giving one interested in subject-matter of litigation right to intervene, does not authorize one who is interested in property attached to intervene in the attachment proceedings, the subject matter of such litigation being the debt claimed by plaintiff from defendant and the grounds of attachment and not the property attached. Danker v. Jacobs [Neb.] 112 N. W. 579.

8. Especially where their peititon alleges agency between plaintiff and themselves which is admitted by plaintiff, thus calling for accounting. Morrison v. New Haven & Wilkerson Min. Co., 143 N. C. 251, 55 S. E. 611.

9. Under Civ. Code 1895, § 4574, a claim may be interposed either before or after judgment in the attachment proceedings. Parham & Co. v. Potts-Thompson Liquor Co. [Ga.] 56 S. E. 460. Issues on claim case not affected by judgment in attachment proceedings. If property be found subject to attachment, the necessity of judgment in attachment proceedings is not dispensed with, and if such judgment is void the finding in the claim case stands but a new judgment must be obtained. Id.

10. Where petition for intervention alleged that plaintiff was intervener's agent for care of land and plaintiff claimed lien for services. Morrison v. New Haven & Wilkerson Min. Co., 143 N. C. 251, 55 S. E. 611.

11. Morrison v. New Haven & Wilkerson Min. Co., 143 N. C. 251, 55 S. E. 611.

12. United States v. Neeley, 146 F. 763. Rule not affected by fact that United States is nominal plaintiff in attachment proceedings, where it disclaims any interest in the property Id.

13. Wise Coal Co. v. Columbia Lead & Zinc Co. [Mo. App.] 100 S. W. 680.

tachment is treated of elsewhere,[14] as is also his independent remedies for a wrongful levy on his property.[15]

Pleadings.[16]—A claimant interpleading need not make defense in the original action.[17] Where the original pleadings of the claimant are sufficient to confer jurisdiction, they may be amended.[18] Where the complaint in an action on a claimant's bond alleges ownership in the attachment defendant, such ownership is confessed if it is not denied by the answer.

Evidence and questions for the jury.[19]—Where the claimant proves that he acquired the title to the property prior to the attachment, the burden is upon the plaintiff to show that the claimant has divested himself of such title.[20] Where the issues on a claim are required to be made up under the direction of the court, it has an implied discretion in fixing the burden of proof.[21] Where the return of the officer does not fully describe the property, its character may be shown by other evidence on the trial of the claim case.[22] The claimant may testify generally that he owned the property when it was attached.[23] A claimant intervening in attachment proceedings against a decedent's estate is competent to testify as to transactions with the decedent.[24] The intervener's interest [25] and fraud therein [26] are questions of fact to be disposed of as such.

Trial.[27]—Instructions, as in other proceedings, must be authorized by the evidence [28] and be confined to the issues.[29]

Verdict and judgment.—The forms of the verdict [30] and judgment [31] are fixed by statute.[32] In Ohio the property may be released from a judgment in favor of the claimant by the execution of a bond.[33]

14. See post, § 15A, Release or Abatement; § 15B, Validity and Grounds for Setting Aside.

15. See post, § 18, Wrongful Attachment.

16. See 7 C. L. 314.

17. Ourand v. Jornson, 6 Ind. T. 361, 98 S. W. 127.

18. Affidavit that property did not belong to attachment defendant but to claimant and that latter had just claim thereto held amendable by alleging nature of claim and that it was a mortgage so as to conform to Code 1896, § 4145, as amended by Acts 1900-01, p. 106. Witherington v. Gainer [Ala.] 43 So. 117.

19. See 7 C. L. 315.

20. Burden on plaintiff to show reconveyance to debtor by purchaser at prior execution sale. Lipschitz v. Halperin, 53 Misc. 280, 103 N. Y. S. 202.

21. See statute requiring issues to be thus made up. Pelzer Mfg. Co. v. Pitts [S. C.] 57 S. E. 29. Discretion held not abused in placing burden on plaintiff. Id.

22. Where levy was on barrels "each about half full," evidence was admissible to show what contents were. Parham & Co. v. Potts-Thompson Liquor Co. [Ga.] 56 S. E. 460.

23. Such testimony is not a mere conclusion. Lipschitz v. Halperin, 53 Misc. 280, 103 N. Y. S. 202.

24. Code, § 4604, does not apply in such case, the controversy involved in the intervention being between the intervener and the attaching creditor. City Nat. Bk. v. Crahan [Iowa] 112 N. W. 793.

25. Finding of court as to intervener's interest held to have force of verdict and not to be disturbed. City Nat. Bk. v Crahan [Iowa] 112 N. W. 793.

26. Refusal of requested declaration of law held not to show that court passed on question of fraud in conveyance to interpleader as question of law instead of question of fact. Handlin-Buck Mfg. Co. v. Wendelkin Const. Co. [Mo. App.] 101 S. W. 702.

27. See 7 C. L. 316.

28. Instructions on fraudulent conveyances held erroneous as not applicable under the evidence, there being no evidence that conveyance to claimant was fraudulent. Valdosta Mercantile Co. v. White [Fla.] 42 So. 633. Where issue as to ownership was, at claimant's instance, confined to question whether certain partnership had attachable interest in property, claimant could not urge, in support of negative decision, that there was no evidence of individual ownership by one of partners. Pelzer Mfg. Co. v. Pitts [S. C.] 57 S. E. 29.

29. After judgment against defendant and sustaining the attachment the claimant is not entitled to an instruction on effect of purchase of goods by plaintiff in satisfaction of his claim, no such issue being raised by the interplea. Faulkner & Co. v. Cook [Ark.] 103 S. W. 384.

30. A verdict "for the plaintiff in the sum" of his claim, construed as finding for him on issues between him and claimant, the specification of the amount being treated as surplusage. Faulkner & Co. v. Cook [Ark.] 103 S. W. 384.

31. Where in action on claimant's bond against defendant in attachment as executor of claimant's estate it was found that defendant was owner of the property, judgment should have been rendered against him as executor. Reiss v. Pfeiffer, 117 App. Div. 880, 103 N. Y. S. 478.

32. Rev. St. 1892, § 1199. Valdosta Mercantile Co. v. White [Fla.] 42 So. 633.

33. Undertaking given for benefit of

Appeal.—When a claimant does not appeal from the denial of his motion to dissolve, grounds urged in support of such motion cannot be considered in support of an instruction complained of on an appeal from a judgment in his favor on the trial of the claim.[34]

§ 15. *Enforcement and dissolution, vacation, or abandonment of attachment. A. Release or abatement.*[35]—An attachment may be dissolved by filing a statutory dissolution bond,[36] by filing an exemption schedule,[37] or by operation of law on account of failure to take subsequent proceedings, such as the levy of execution within a certain time after judgment.[38] An attachment of devised realty by a creditor of the devisee is not affected by a subsequent order of distribution.[39]

(§ 15) *B. Validity and grounds for setting aside.*[40]—An attachment may be dissolved on the ground of lack of jurisdiction,[41] or on the ground that the complaint in the original action is incurably insufficient,[42] unless the attachment is issued on summons and affidavit alone as is authorized in some jurisdictions.[43] An attachment will not be dissolved on account of the consolidation of the principal action with one in which the plaintiff has obtained security,[44] or on account of a variance, as to the amount of the debt, between the petition in the main action and the attachment affidavit,[45] or a similar variance between the affidavit and the writ,[46] or between the bond and petition.[47] As a general rule only the debtor can contest the grounds of the attachment,[48] but an intervening claimant may contest the debtor's ownership of the property.[49]

(§ 15) *C. Procedure.*[50]—The merits of the action will not be considered on a motion to dissolve[51] except so far as may be necessary for the disposition of such motion,[52] but such a trial is sometimes provided for after the refusal to abate the

claimant after judgment in his favor as provided by Rev. St. 1906, § 5446, takes place of attached property to extent of interest claimant may establish therein in suit on the undertaking, and value of such interest, with interest from date of delivery of undertaking, is measure of claimant's damages. Adamson Co. v. Izor, 76 Ohio St. 64, 80 N. E. 1037.

34. Pelzer Mfg. Co. v. Pitts [S. C.] 57 S. E. 22.

35. See 7 C. L. 310.

36. Pearne v. Coyne, 79 Conn. 570, 65 A. 973.

37. Must be filed within ten days after levy, where notice to do so is served on debtor at time of attachment. Gibson v. People, 122 Ill. App. 217.

38. Time within which execution is required by Gen. Laws 1896, c. 256, § 19, to be levied on attached realty in order to prevent discharge of attachment, is computed according to Gen. Laws 1896, c. 26, § 12, under which the day of the levy is excluded. Carroll v. Salisbury [R. I.] 65 A. 274. Where rights of innocent parties have not intervened, a valid title to realty may be acquired at sale under execution levied after the expiration of the six months' limit prescribed by Gen. Laws 1890 c. 256, § 19. Id.

39. Martinovich v. Marsicano [Cal.] 89 P. 333.

40. See 7 C. L. 310.

41. Questions of nonresidence of debtor may be contested on such motion. Aspell Wholesale Grocery Co. v. Meeker, 104 N. Y. S. 493. When any essential jurisdictional fact is successfully controverted, the attachment will be vacated. Id. Affidavits presented by defendant considered and held to show that he was a resident. Id.

42. Pinkiert v. Kornblum [Cal. App.] 90 P. 969. When complaint is not amended before decision on motion to dissolve, it will be deemed not susceptible to amendment. Id.

43. Code Civ. Proc. § 686. Shepherd v. Shepherd, 51 Misc. 418, 100 N. Y. S. 401. Attachment in suit in judgment not effected by failure of complaint to allege expiration of the ten years from docketing of judgment prescribed by Code Civ. Proc. § 1913, as condition precedent to right to maintain such suit. Id.

44. Consolidation of suit in city court with one in supreme court. Goepel v. Robinson Mach. Co., 103 N. Y. S. 5.

45. Where less sum is claimed in affidavit than in petition. Elrod Bros. & Phillips v. Rice [Tex. Civ. App.] 99 S. W. 733.

46. When writ merely calls for interest in addition to amount claimed in affidavit, the interest will be held to run only from date of affidavit. Elrod Bros. & Phillips v. Rice [Tex. Civ. App.] 99 S. W. 733.

47. When bond was for double amount claimed in affidavit but petition claimed interest in addition thereto. Elrod Bros. & Phillips v. Rice [Tex. Civ. App.] 99 S. W. 733.

48. Intervening claimant or lienor cannot. Danker v. Jacobs [Neb.] 112 N. W. 579. Code, § 50a, authorizing intervention by one interested in subject-matter of litigation, does not authorize contest of grounds by claimant. Id. Creditor who has acquired no lien cannot. Haas v. Clark [Ala.] 41 So. 731.

49. On motion to dissolve. Morrison v. New Haven & Wilkerson Min. Co., 143 N. C. 251, 55 S. E. 611.

50. See 7 C. L. 311.

51, 52. Collins v. Stanley [Wyo.] 88 P. 620.

attachment.[53] On a motion to vacate based on the original papers, all necessary inferences must be construed in plaintiff's favor and all facts stated are conceded.[54] As a general rule the plaintiff cannot recover without proving his claim,[55] and where default judgment is authorized the authorizing statute must be strictly complied with.[56]

Evidence.[57]—The burden is on the plaintiff to prove the grounds of the attachment,[58] and on a motion to dissolve he must produce additional evidence where the grounds are denied by counter affidavits.[59] Matters judicially noticed need not be proved.[60] The admissibility and sufficiency of evidence presented by the affidavit is considered elsewhere,[61] as is also the sufficiency of the evidence to support the grounds alleged.[62]

Judgment and decree or order.[63]—Where the defendant makes a general appearance, a personal judgment may be rendered against him,[64] even though he has executed a forthcoming bond.[65] As a general rule a default judgment cannot be rendered.[66] The judgment may be attacked on jurisdictional grounds by motion even after the term at which it was rendered,[67] but jurisdiction to sell the land of a nonresident without service of the writ on him personally cannot be collaterally attacked.[68] A motion to vacate the judgment for want of jurisdiction may be amended by adding additional grounds therefor.[69] The amount collected on the attachment should be credited on the judgment in the principal action.[70]

Appeal.[71]—Orders to discharge or refusing to discharge attachments may be taken up on petition in error before final judgment.[72] Refusal to consider, as ill timed, a motion to release the attached property as exempt is not a final order and hence is not appealable. Grounds of dissolution not urged below will not be considered.[73]

§ 16. *Other remedies.*[74]—Contempt proceedings may be invoked in aid of an

53. Rev. St. 1899, § 407, providing that upon sustaining of plea in abatement to attachment the cause shall proceed to trial on merits as if originally begun by summons alone, applies to attachments under § 367 for debts not due so as to authorize trial on merits after maturity of cause of action. National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co., 201 Mo. 30, 98 S. W. 620. Provision of § 407 relative to filing of bill of exceptions to abatement of attachment, others containing the attachment in force, does not affect the right to trial on merits but relates only to appeal from the order of abatement. Id.

54. Allegation that defendant is a foreign corporation held sufficient on such a motion to vacate. Mersereau v. Hirsch Co., 103 N. Y. S. 577.

55. No default judgment allowable, Civ. Code 1895, § 4961, not being appreciable to attachments. Peavy v. Atkinson, 108 Ga. 167, 33 S. E. 956.

56. Judgment entry must show compliance with Code 1896, § 531, requiring service by publication of order to authorize default judgment against nonresident attachment defendant. Trammell v. Guy [Ala.] 44 So. 37.

57. See 7 C. L. 311.

58. Stone Mill Co. v. McWilliams, 121 Mo. App. 319, 98 S. W. 828.

59. Collins v. Stanley [Wyo.] 88 P. 620.

60. Records of original action in same court in which judgment sued on in principal action was rendered. Shepherd v. Shepherd, 51 Misc. 418, 100 N. Y. S. 401.

61. See ante, § 6, Affidavit and its Sufficiency.

62. See ante, § 3, Right to and Grounds for the Writ.

63. See 7 C. L. 312.

64. See ante, § 5, Procedure in General, subd. Jurisdiction.

65. Bond merely for return of property and not for satisfaction of judgment does not preclude personal judgment against defendant whether bond be valid or not. Moshell v. Reed, 30 Ky. L. R. 10, 97 S. W. 372.

66. See ante, this section and subsection, subdivision Procedure.

67. Was rendered, and through them was service on and appearance by defendant. Wise Coal Co v. Columbia Lead & Zinc Co. [Mo. App.] 100 S. W. 680.

68. In suit to sustain sale by grantee of defendant's interest. Burris v. Craig, 34 Colo. 383, 82 P. 944.

69. Albright-Prior Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251.

70. Under Rev. St. 8198, §§ 3210, 3211, court has power to enter satisfaction of such judgment to extent of such credit. Blake v. Farrell [Utah] 86 P. 805.

71. See 7 C. L. 312.

72. Circuit court has jurisdiction to review order of common pleas on appeal from judgment of justice of peace overruling motion to discharge of attachment. Nemit v. Vargo, 8 Ohio C. C. (N. S.) 97.

73. Collins v. Stanley [Wyo.] 88 P. 620.

74. See 7 C. L. 313.

attachment.[75] Where the debtor's interest in the property is that of a conditional vendee, the title being in the seller, the attaching creditor does not, under his attachment, acquire any of the remedies of the seller,[76] and where he claims the rights to such remedies under an assignment from the seller, he cannot enforce them without performing the conditions of the contract.[77]

§ 17. *Wrongful attachment.*[78]—The attachment plaintiff is liable to the defendant for a wrongful attachment,[79] where the attachment was issued without probable cause,[80] but he will not be liable for an excessive levy unless he advises, requires, or encourages it.[81] According to the circumstances and under the various statutes, one whose property has been levied on as the property of another[82] has several remedies, regardless of any question of malice or lack of probable cause,[83] such as intervention in the attachment proceedings,[84] an action for damages for the trespass,[85] trover,[86] replevin,[87] claim for damages in the attachment proceedings,[88] or injunction to restrain the attachment proceedings[89] or a sale thereunder,[90] unless the attachment was without notice of the claimant's title,[91] or his title is vitiated

75. Court has inherent power to punish for contempt for moving attached property beyond its jurisdiction, attachment writ being a mandate within Code Civ. Proc. § 3343, subd. 3, and an order within § 767, and the officer levying the attachment being an officer charged with duty of enforcing the mandate or order, Lowenthal v. Hodge, 105 N. Y. S. 120. Attorney liable, though not served with writ, where, with knowledge of the facts, he participated in the removal of the attached property. Id. Code Civ. Proc. § 655, authorizing sheriff in certain cases to maintain action in aid of attachment, does not meet case where both property and custodian thereof are out of the court's jurisdiction, and in such case the court, having jurisdiction of the attorney who participated in the removal of the property, will order him to bring it back within the jurisdiction on penalty of being in contempt. Id.

76. Under Gen. St. 1902, § 834, he acquires only rights of vendee, and hence cannot assert seller's right of forfeiture. Pearne v. Coyne, 79 Conn. 570, 65 A. 973.

77. Could not claim forfeiture for nonpayment of installment becomig due while he held possession under the attachment or otherwise, since condition of contract was that vendee should have possession. Pearne v. Coyne, 79 Conn. 570, 65 A. 973.

78. See 7 C. L. 316.

79. Fact that sheriff may be liable for allowing conversion by plaintiff after levy does not exempt plaintiff. Abernathy v. Meyer-Bridges Coffee & Spice Co. [Ky.] 103 S. W. 342.

80. The judgment in the attachment suit in favor of the defendant therein is conclusive evidence that the attachment was wrongful. McGill v. Fuller & Co. [Wash.] 88 P. 1038. Mere fact, however, that the attachment was wrongful is not alone sufficient to sustain the action, lack of probable cause being an essential element. Id. Malicious motion and favorable termination not alone sufficient. Cahoon v. Hoggan [Utah] 86 P. 763.

Evidence held sufficient to go to jury on probable cause. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422. Judgment for the plaintiff in the attachment suit is conclusive of the question of probable cause. Bell v. Thompson [Ky.] 102 S. W. 830.

81. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422.

82. Evidence held to show that property was subject to levy as belonging to defendant. Parham & Co. v. Potts-Thompson Liquor Co. [Ga.] 56 S. E. 460.

83. Williams v. Inman [Ga. App.] 57 S. E. 1009.

84. See ante, § 14, Conflicting Liens and Levies and Hostile Claims.

85. If an attorney, on behalf of himself and of his client, causes an attachment to be levied on the property of a stranger, both may be joined as joint trespassers in a suit by such stranger. Williams v. Inman [Ga. App.] 57 S. E. 1009. A grantee of the attachment defendant cannot invoke the doctrine of **trespass ab initio** by reason of acts of the sheriff subsequent to the levy, as where sheriff levied on mortgaged property, the fact that he sold it at place other than that advertised did not deprive him of right to defend action of trover by mortgagee on ground that mortgage was fraudulent as to creditors. Ryan v. Young [Ala.] 41 So. 954.

86. See Ryan v. Young [Ala.] 41 So. 954.

87. See Smith v. Berz, 125 Ill. App. 122.

88. Rev. St. 1895, art. 5311, providing that one availing himself of provisions thereof relating to method of asserting claim to attached property waives damages on account of the levy, will not be extended to claims for damages otherwise asserted, as where claimant is made defendant in attachment proceedings and recovers judgment for the property, damages being allowable in such case against the officer. Terry v. Webb [Tex. Civ. App.] 96 S. W. 70.

89. See Haines v. Connell [Or.] 87 P. 265.

90. Where entire tract owned by two persons is attached for debt of one, but only the interest of the defendant is exposed for sale, the other owner is not affected and cannot complain. Burris v. Craig, 34 Colo. 383, 82 P. 944.

91. Verbal reservation of title by seller of personalty held insufficient to give him right of action for attachment of the property, where contract of sale not only did not reserve title or any lien but by its terms

by fraud,[92] or the identity of the property has been destroyed by confusion with other property which is subject to the levy, and the claimant, claiming it all, refuses to point out that to which he is entitled,[93] or is unable to identify it so that the jury may make a proper separation with reasonable certainty.[94] The officer is protected by the writ so long as he keeps within the mandates thereof[95] provided he makes a proper return thereof,[96] but this protection does not extend to one at whose instance the attachment is issued for the purpose of causing the trespass to be committed.[97]

Pleading.[98]—An allegation that the plaintiff owned the property on a certain day is a sufficient allegation of ownership.[99] Actual seizure of the property need not be expressly alleged.[1] It seems that a statutory third party claim is not essential to the maintenance of a suit by a stranger for a levy on his property.[2] The complaint in such an action may be sufficient as against a general demurrer though it states a cause of action for nominal damages only.[3] Special damages must be specially alleged,[4] and money paid to recover possession of the property cannot be recovered in the absence of a sufficient allegation of duress.[5] Under some circumstances damages for a wrongful attachment may be recovered by way of set-off.[6] A cause of action for maliciously suing an attachment cannot be joined with one on an indemnifying bond.[7]

Evidence and questions of fact.[8]—The burden of proving the wrongfulness of the attachment is on the party alleging it,[9] and so also as to an allegation of fraud in the attachment,[10] and one who has confused property subject to levy with that not subject has the burden of identifying the latter.[11] The burden of proving that

negatived the validity of verbal agreements relative to the sale. Tripp Bros. v. Hymer, 30 Ky. L. R. 624, 99 S. W. 330. In suit by bona fide purchaser to restrain attachment proceedings, the burden on defendant to prove that his attachment was without notice of complainant's deed was sustained by uncontroverted averments of answer, though such notice was alleged in complaint and was denied in the answer, absence of notice in such case being an affirmative defense which was admitted by complainant's failure to deny it, and the averments of the complaint not being a sufficient denial. Haines v. Connell [Or.] 87 P. 265.

92. Johnson v. Emery [Utah] 86 P. 869. The officer may defend an action of trover by the debtor's grantee on the ground that the conveyance was fraudulent as to creditors. Ryan v. Young [Ala.] 41 So. 954.

93. Property purchased by claimant from two persons, attached on ground of fraudulent conveyance by one of the sellers, and sheriff was sued by purchaser. Johnson v. Emery [Utah] 86 P. 869.

94. Mugge v. Jackson [Fla.] 43 So. 91.

95. The officer is protected by a special direction from the court to levy on specific property, even where property of stranger is levied on. Williams v. Inman [Ga. App.] 57 S. E. 1009.

96. Evidence in trover against sheriff by attachment defendant's mortgage held not to show that return was not made in attachment suit, but, on the contrary, to show that such return was made, and hence sheriff was not deprived of protection of attachment writ or of right to assert invalidity of mortgage. Ryan v. Young [Ala.] 41 So. 954.

97. Williams v. Inman [Ga. App.] 57 S. E. 1009.

98. See 7 C. L. 316.

99. Since law takes no notice of fraction of day. O'Brien v. Quinn [Mont.] 90 P. 166.

1. Allegation of levy and seizure under attachment sufficiently shows dispossession and invasion of the plaintiff's rights, the only method of attaching personalty being by taking actual possession of them. O'Brien v. Quinn [Mont.] 90 P. 166.

2. Plaintiff, where property was attached as belonging to another, need not make verified third party claim under Code Civ. Proc. § 906, at least where his title is denied by defendant's answer. O'Brien v. Quinn [Mont.] 90 P. 166.

3. Allegation of levy on plaintiff's property for debt of another held sufficient. O'Brien v. Quinn [Mont.] 90 P. 166.

4. O'Brien v. Quinn [Mont.] 90 P. 166.

5. Allegation of acceptance of money by defendant in lieu of possession of property is insufficient. O'Brien v. Quinn [Mont.] 90 P. 166.

6. Where the plaintiff is a nonresident, damages may be recovered by the defendant by way of **set-off**. Where attachment plaintiff is nonresident. Abernathy v. Meyer-Bridges Coffee & Spice Co. [Ky.] 103 S. W. 342.

7. Bell v. Thompson [Ky.] 102 S. W. 830.

8. See 7 C. L. 317.

9. Where the defendant sets up a claim for damages in his answer and alleges that the attachment was wrongful. McFaddin v. Sims [Tex. Civ. App.] 16 Tex. Ct. Rep. 757, 97 S. W. 335.

10. In action on replevin bond the burden of showing fraud in attachment proceedings relied on by defendant as justification for the replevy is on the plaintiff. Smith v. Berz, 125 Ill. App. 122.

11. Where defendant in action on replevin bond, having such burden, fails to identify

the attachment was without notice of the plaintiff's title is on the defendant.[12] Evidence of submission of the cause to competent counsel and acting on his advice is admissbile to rebut allegations of malice.[13] In trover against the officer by a mortgagee of the property, the defendant may show that the property was left in the possession of the mortgagor,[14] and the attachment writ, when properly identified,[15] is admissible under the general issue.[16] The general rules as to secondary evidence apply,[17] and as to conflicting evidence.[18] The sufficiency of the evidence is treated elsewhere.[19]

Instructions.[20]

Damages.[21]—The plaintiff in an action for wrongful attachment must have done everything reasonably possible to avoid damage,[22] and only such loss as is caused to the plaintiff himself is allowable.[23] In such an action only actual, compensatory damages can be recovered in the absence of fraud, malice, oppression, or other special aggravation,[24] and substantial damages will not be allowed on account of the mere issuance of the writ without other evidence of actual [25] damages, and where actual damages are not shown, exemplary damages cannot be allowed.[26] In some states exemplary damages are not allowable in any case in a common-law action for wrongful attachment unless authorized by statute.[27] Only such damages can be recovered as naturally and proximately result from the issuance of the attachment and the taking and detention of the property, and the measure of damages for the taking and detention is the value of the use of the property,[28] some-

with reasonable certainty the property not subject to the levy, he cannot complain of charge to jury to find value of all the property at the date of the levy. Mugge v. Jackson [Fla.] 43 So. 91.

12. In suit by bona fide purchaser to restrain attachment. Haines v. Connell [Or.] 87 P. 265.

13. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422.

14. Ryan v. Young [Ala.] 41 So. 954. In this aspect of the case it was immaterial whether or not attachment plaintiff had a lien on the property for rent. Id.

15. Such writs were sufficiently identified by testimony of deputy, which was not objected to, that he seized the property under the writs, and that they were issued by the court from which on their face they purported to have been issued. Ryan v. Young [Ala.] 41 So. 954. Court took judicial notice of signatures of the issuing officers, though they had been succeeded by others at time writs were offered in evidence. Id.

16. In suit by mortgagee of attached property against levying officer, the writs under which the property was levied on were admissible under the general issue. Ryan v. Young [Ala.] 41 So. 954.

17. Examination of files in attachment proceedings held insufficient foundation for secondary evidence of letter in evidence on trial of such proceedings. McGill v. Fuller & Co. [Wash.] 88 P. 1038.

18. Where evidence is conflicting, it is for jury to determine damage to property occasioned by defendant while in his possession. Shearer v. Taylor [Va.] 55 S. E. 7.

19. See ante, this section, first subdivision and notes.

20, 21. See 7 C. L. 318.

22. Held that evidence of cost of replevin bond and plaintiff's ability to furnish it was improperly excluded. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422.

23. Where there was evidence of loss to others, court should have instructed that only damage for loss to plaintiff could be allowed. Shearer v. Taylor [Va.] 55 S. E. 7.

24. Shearer v. Taylor [Va.] 55 S. E. 7. In absence of wantonness or malice, damages for detention in excess of value of property held under circumstances of case excessive, attachment plaintiff having derived no profit from property but on contrary having been put to expense. Carr v. Wood [Ky.] 103 S. W. 314.

25. Expense of litigating counterclaim in attachment proceedings asserting that attachment is wrongful and claiming damages not allowable as actual damages. New Sharon Creamery Co. v. Knowlton [Iowa] 108 N. W. 770.

26. New Sharon Creamery Co. v. Knowlton [Iowa] 108 N. W. 770.

27. McGill v. Fuller & Co. [Wash.] 88 P. 1038. Ball. Ann. Codes & St. § 5857, authorizing such damages in actions on attachment bonds where notice is shown, does not authorize such damages in common-law actions for wrongful attachments. Id.

28. McGill v. Fuller & Co. [Wash.] 88 P. 1038. Cost of refilling up store room of which attachment defendant was deprived by attachment of goods, not recoverable. Id. Value of use must be determined from market value of the situs of the property. Shearer v. Taylor [Va.] 55 S. E. 7. Value of use of property is not necessarily rental value, as where property was in storage during detention. Id. Instruction that measure of damages was rental value held erroneous as excluding consideration of evidence that property was in storage. Id. Question for jury whether plaintiff intended to use property during detention. Id.

times estimated by the interest on the value of property,[29] increased or diminished, as the case may be, by the difference between the determination of the property when in use and when tied up.[30] No recovery can be had for injury to the attachment of defendant's credit, reputation, pride, or feelings,[31] or for attorney's fees in the pending action,[32] or for speculative profits,[33] or prospective profits except as special damages,[34] or for any injury resulting from the issuance of the writ and things done pursuant to the mandates thereof, where the attachment is sustained,[35] but damages may be recovered for conversion after the levy.[36] No damages can be allowed on dissolution of the attachment where none are proved.[37] In trover by a mortgagee against the levying officer, the measure of damages is the amount of the mortgage debt and interest, not to exceed, however, the value of the property.[38]

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§ 1. *Admission to practice and license taxes.*[39]—It is within the legislative power to require the admission of person possessing specified qualifications.[40] The North Carolina statute does not authorize the court to go behind an applicant's certificate of good character.[41] Provision is usually made for the admission without examination of attorneys who have practiced in other states.[42]

29. Attachment of railroad cars. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422.

30. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422.

31. McGill v. Fuller & Co. [Wash.] 88 P. 1038. Such damages not allowable as elements of exemplary damages even where latter are allowable. Id.

32. McGill v. Fuller & Co. [Wash.] 88 P. 1038; Chisenhall v. Hines [Tex. Civ. App.] 100 S. W. 362. Where no attorney's fees are incurred in procuring dissolution of the attachment, none are recoverable in the action for wrongful attachment. McGill v. Fuller & Co. [Wash.] 88 P. 1038.

33. Evidence of profits which might have been made by hiring out railroad cars attached held properly excluded as bearing only on speculative damages. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422. Where at time of attachment the business of attachment defendant was totally disorganized by absconding of his partner and the return of almost entire stock of goods to unpaid sellers thereof, the case was not one for allowance of damages for loss of future, ascertainable profits from an established business. McGill v. Fuller & Co. [Wash.] 88 P. 1038. Where tools of trade are seized, no recovery can be had for what might have been earned by their use in such trade. Id.

34. Loss of profits from business by reason of attachment of personalty constitutes special damages. O'Brien v. Quinn [Mont.] 90 P. 166.

35. Abernathy v. Meyer-Bridges Coffee & Spice Co. [Ky.] 103 S. W. 342.

36. Conversion by attachment plaintiff. Abernathy v. Meyer-Bridges Coffee & Spice Co. [Ky.] 103 S. W. 342.

37. Damages for tying up the property disallowed under circumstances of case. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357.

38. Ryan v. Young [Ala.] 41 So. 954.

39. See 7 C. L. 319.

40. Does not violate constitutional provision that the legislative, executive and judicial departments shall be kept separate, or deprive the judicial department of any rightful power. In re Applicants for License, 143 N. C. 1, 55 S. E. 635.

41. In re Applicants for License, 143 N. C. 1, 55 S. E. 635.

42. Under the Pennsylvania practice, a certificate from the state board of law ex-

§ 2. *Duties, privileges, and disabilities.*[43]—An attorney at law is an officer of the court.[44] He is, however, charged with specific duties to his client and cannot be held in contempt for their proper and respectful performance.[45] It is not reversible error to permit an attorney in a criminal case to testify as a witness.[46] He is, however, held to a high standard of ethics in the conduct of his business.[47] An attorney, by virtue of his admission to the bar, acquires a right of office to appear in all courts of record of the state,[48] but an attorney who is confined in jail pending an appeal from a conviction of felony, without bail, may be forbidden by the court to appear as counsel for another.[49]

§ 3. *Suspension and disbarment. Grounds.*[50] *Proceedings in general.*[51]—Statutes regulating the suspension and removal of attorneys from their office are penal in their nature and should be strictly construed,[52] though it has been held that a statute providing for the disbarment of attorneys does not limit the court's power of disbarment to the causes specifically mentioned therein, but an attorney may be disbarred for any good cause.[53] Attempting under guise of professional duty to subvert justice,[54] infidelity to clients,[55] defrauding client,[56] conversion of

aminers that an applicant for admission to the bar is a member in good standing of the bar of the appellate court of another state, has practiced in a court of record of the state for at least five years, and is of good moral character, without stating that he has passed the required examination, will not entitle him to practice. In re Musgrave's Case, 216 Pa. 598, 66 A. 84. Kentucky statute admitting attorneys from other states to practice repealed by subsequent act. In re Creste, 30 Ky. L. R. 249, 98 S. W. 282.

43. See 7 C. L. 320.

44. Barkley Cemetery Ass'n v. McCune, 119 Mo. App. 349, 95 S. W. 295.

45. Motion to modify sentence on grounds reflecting on judge not contempt if made in good faith. Tracy v. State, 8 Ohio C. C. (N. S.) 357. An attorney is not guilty of contempt in returning a document to his client after being requested to produce it before a referee in bankruptcy. In re Johnson & Knox Lumber Co. [C. C. A.] 151 F. 207. See, also, Contempt, 7 C. L. 746.

46. Wilkinson v. People, 226 Ill. 135, 80 N. E. 699.

47. Solicitation of business condemned. Ingersoll v. Coal Creek Coal Co. [Tenn.] 98 S. W. 178.

48. In re Bickley, 4 Ohio N. P. (N. S.) 129.

49. Pedersen v. Superior Court of San Francisco, 149 Cal. 389, 86 P. 712.

50. See 7 C. L. 321.

51. See 7 C. L. 322.

52. In re Bickley, 4 Ohio N. P. (N. S.) 129. A charge of unprofessional conduct involving moral turpitude, which sets forth conduct which does not involve a professional act, but the conduct of an attorney as a private citizen, is insufficient in law and does not state a cause under the statute, for removal or suspension from office and a demurrer thereto will be sustained although the act charged amounts to a crime involving moral turpitude. Collecting exorbitant attorney's fee from himself as administrator. Id. But for an attorney, who is an administrator, to falsely represent to creditors of the estate that he had been ordered by the probate court appointing him to pay but three per cent. interest on a note, when in fact no such order had ever been made, as he well knew, is unprofessional conduct involving moral turpitude for which he will be held to answer. Id.

53. Ingersoll v. Coal Creek Coal Co. [Tenn.] 98 S. W. 178. A statute providing for the suspension or removal of an attorney for any violation of his oath, or of his duties as attorney, includes all acts involving his honesty or reliability in his professional capacity. State v. Martin [Wash.] 87 P. 1054.

54. An attorney, who goes to another state to prevent an extradition of his client, and after obtaining bail for him conspires to get him to a foreign country, and when forced to return endeavors to avoid the officers by an assumed name, should be disbarred. In re Kaffenburgh, 115 App. Div. 346, 101 N. Y. S. 507. The submission by an attorney to a litigant of a third party's proposition, to change the opinion of the court which had been found but not rendered, is ground for disbarment. People v. Reaugh, 224 Ill. 541, 79 N. E. 936. After an attorney has been instructed by his client to discontinue an action as he had no just claim, and his associate counsel has withdrawn from the case, it is ground for suspension for him to make affidavit that his client had a good cause of action, and that another attorney was counsel, and thereby obtain an order to extend time to serve complaints. In re Hansen, 105 N. Y. S. 159. Suspension for ninety days for commission of perjury under extenuating circumstances. State v. Tanner [Or.] 88 P. 301. Though improper, it is not ground for disbarment for an attorney to pay money as a consideration for the withdrawal of a criminal charge against his client, without distinctly informing the magistrate of the circumstances. In re Woytisek, 105 N. Y. S. 144.

55. Attorney may be deprived of license for unprofessional conduct in acting for both parties to a suit without reasonable excuse. People v. Keithley, 225 Ill. 30, 80 N. E. 50.

56. Disbarment for willful misconduct in office. State Board of Examiners in Law v. Byrnes, 100 Minn. 76, 110 N. W. 341.

client's money,[57] intrusion into a case,[58] procuring admission to practice by fraud,[59] or practicing under the name of one who has been disbarred,[60] are among the grounds for suspension or disbarment. It is no defense, to disbarment proceedings for forging legal papers, that the defendant believed them to be mere antiquated matters of form and not binding and that he benefited the state by such act.[61] For an attorney to undertake the defense of a case with the prosecution of which he has previously been concerned is not necessarily ground for disbarment.[62] Suspension in one Federal circuit does not require like action in another.[63] In Kentucky it is held that an attorney cannot be disbarred for a crime not connected with his professional conduct,[64] but the general rule is otherwise,[65] and neither acquittal[66] nor pardon[67] of the criminal offense will prevent disbarment.

Procedure.—Disbarment charges should be clear, specific, and stated with great particularity, that the defendant may be fully appraised of their nature and enabled to prepare his defense, and to authorize a disbarment not only must the improper act be clearly proved but also the bad or fraudulent motive for its commission.[68] If deficient, charges are subject to demurrer.[69] Attorneys are presumed to be innocent of disbarment charges, hence, to warrant a disbarment, the court should be satisfied to a reasonable certainty that they are true.[70] Disbarment proceedings may be instituted on motion of the members of a county bar association where the statute

57. An attorney will be disbarred for converting money collected for his client to his own use, and for receiving money for costs to prosecute an appeal and pay the court stenographer, and failing to pay the costs and stenographer thereby causing his client to pay the judgment and costs. In re Stern, 105 N. Y. S. 199. The misconduct of an attorney in converting $1,389.63 intrusted to him for deposit by a client not restoring it until under stress of commitment for contempt six years later, and in giving false testimony relative thereto, is ground for disbarment. In re Cohn, 105 N. Y. S. 84.

58. Three years' suspension. State v. Martin [Wash.] 87 P. 1054.

59. An attorney who was admitted to practice on a showing that he had practiced in another state, suppressing the fact that subsequently he had been removed from the bar of that state, where he had practiced under an assumed name, should be disbarred. In re Marx, 115 App. Div. 448, 101 N. Y. S. 680. In disbarment proceedings on the ground that the attorney when admitted to practice concealed the fact that he had been disbarred in another state for manufacturing a divorce decree and delivering it to his client, it is no excuse that his client knew that the paper was void and not a bona fide decree. Id.

60. It is also ground for disbarment for an attorney to practice under the assumed name of one who has been suspended from practice for conviction of crime, and even if a statute permit the carrying on of a business under an assumed name, it does not apply to attorneys, as practicing law is not a business. In re Kaffenburgh, 115 App. Div. 346, 101 N. Y. S. 507; In re Kaffenburgh, 188 N. Y. 49, 80 N. E. 570.

61. Ex parte Turner [Or.] 89 P. 426.

62. Not ground for disbarment for an ex-district attorney to defend an accused against whom he had filed the information while district attorney, where the court permitted it without objection from the new prosecutor. People v. Johnson [Colo.] 90 P. 1038.

63. Not ground for disbarment of attorneys by a Federal court that the circuit court of appeals of another circuit has suspended them indefinitely for filing a brief containing scandalous and insulting matter. In re Watt, 149 F. 1009.

64. Making a false affidavit in a case in which he was not acting as counsel. Beckner v. Com. [Ky.] 103 S. W. 378.

65. See note 3 C. L. 378.

66. People v. Thomas [Colo.] 91 P. 36.

67. But where he avers that he did not get a fair trial, and was pardoned because innocent, judgment should not be given on the pleadings, and he should be allowed to offer proof of his defense. People v. Burton [Colo.] 88 P. 1063.

68. But an appellate court will not interfere with the conclusions of the lower court upon the evidence unless it be insufficient to support them. Zachary v. State [Fla.] 43 So. 925; In re Kaffenburgh, 188 N. Y. 49, 80 N. E. 570.

69. An appellate court will not reverse the lower court for overruling a demurrer to part of disbarment charges where there was sufficient evidence introduced under the part not demurred to to justify the disbarment. State v. Martin [Wash.] 87 P. 1054. Though the Ohio statutes make no provision for any demurrer to be filed to a charge of disbarment, the right is indirectly recognized in that state. In re Bickley, 4 Ohio N. P. (N. S.) 129.

70. In re Parsons [Mont.] 90 P. 163. They must be clearly and satisfactorily established. People v. Thornton [Ill.] 81 N. E. 793. Insufficiency of proof of fraudulent misappropriation of client's money. Bar Ass'n of Boston v. Casey [Mass.] 81 N. E. 892. Sufficient proof of unprofessional conduct. People v. Stirlen, 224 Ill. 636, 79 N. E. 969. Insufficiency of proof that attorney fraudulently collected money from his client under false representation that it was required for costs. People v. Johnson [Colo.] 90 P. 1038.

requires them to be instituted on the court's own motion or on information of another.[71] Where the accused is acquitted, there is no necessity of perpetuating the evidence.[72]

§ 4. *Creation and termination of relation with client.*[73]—The relation of attorney and client can only be created by contract, express or implied,[74] but in some states the court may appoint an attorney to defend an accused, who is unable to employ counsel, and the legislature may adopt reasonable regulations for such appointment. The assistance of counsel, however, cannot be forced on an accused not desiring it.[75] A client may employ one or more attorneys to represent him, and the fact that he has one attorney does not deprive him of the right to employ others.[76] Any person competent to contract may employ counsel for himself,[77] and a fiduciary has been held entitled to do so without leave of court.[78] A contract for legal services is personal in its nature, hence it cannot be assigned by one party without the other's consent,[79] and is annulled by death.[80] An attorney's relation to a suit is terminated by an assignment of the judgment by his client, unless he be re-employed by the assignee.[81] A client may dispense with his attorney's services at will, subject to the latter's lien, upon funds brought into court or judgment obtained through his services.[82]

Substitution [83] of one attorney for another will only be authorized by the court on the giving of security by the client to protect the rights of the discharged attorney.[84]

§ 5. *Rights, duties, and liabilities between attorney and client. Loyalty and good faith.*[85]—In making contracts of employment with clients, attorneys should exercise the highest order of good faith and disclose all information in their possession which might influence the client in entering into or declining to execute the contract.[86] Also, after the relation of attorney and client is established, the highest degree of good faith is required from the attorney.[87] He cannot represent

71. But in such case costs, of which the defendant is relieved, must be taxed against the state. State v. Martin [Wash.] 87 P. 1054.

72. State v. Tomlinson, 131 Iowa, 617, 109 N. W. 120.

73. See 7 C. L. 323.

74. Caldwell v. Bigger [Kan.] 90 P. 1095.

75. May be appointed at any stage of proceedings when essential to accused, and the decision of the court making such appointment cannot be contested. Korf v. Jasper County [Iowa] 108 N. W. 1031. An application by the attorney for an accused for the appointment of an assistant will be presumed to be made by the accused. Id.

76. An Indian nation is entitled to the same privilege. Love v. Peel, 79 Ark. 366, 95 S. W. 998.

77. An incompetent person, prior to judicial determination of his incompetency, has a right to employ an attorney, such a contract being at most only voidable, and even after being declared incompetent he may in effect retain counsel to secure his release or discharge. But the determination of a client's incompetency terminates the relation. In re Stenton, 53 Misc. 515, 105 N. Y. S. 295.

78. Personal representatives have a right to employ counsel without an order of court authorizing it. Ward v. Koenig [Md.] 67 A. 236.

79. Corson v. Lewis [Neb.] 109 N. W. 735.

80. The death of an attorney terminates all rights under his contract of employment, although his fee was to be contingent, and his personal representatives have no right to employ another attorney to perform the services contracted for. Rights of representatives in event of such employment, as to advancements, etc. Love v. Peel, 79 Ark. 366, 95 S. W. 998.

81. In such case the attorney is not disqualified to purchase real estate sold to satisfy the judgment after the termination of his attorneyship. Caldwell v. Bigger [Kan.] 90 P. 1055.

82. The right to control the discharge of an attorney is within the discretion of the court trying the case, and will not be reviewed unless it clearly appears that such discretion was abused. Kelly v. Horsley [Ala.] 41 So. 902. Mandamus will not lie to compel the lower court to refuse to recognize the discharge of an attorney until his fees are paid, where there is an adequate remedy at law to recover them. Id.

83. See 7 C. L. 325.

84. The mere preservation of his lien is not sufficient security. New York Phonograph Co. v. Edison Phonograph Co., 150 F. 233; The New York Phonograph Co. v. Edison, 148 F. 397.

85. See 7 C. L. 325.

86. Weil v. Fineran, 78 Ark. 37, 93 S. W. 568.

87. Lewis v. Helm [Colo.] 90 P. 97. Re-

both sides of a litigated case,[88] and if he has been employed by one side and been paid by them, he cannot accept a retainer from the other side, though in performing the new duties he violates no confidence of his first client.[89]

Diligence.[90]—An attorney is liable to his clients for failure to exercise ordinary care, skill, and diligence,[91] but the failure of an attorney to undertake and attempt to prove a futile defense involves no lack of reasonable diligence or breach of professional duty to his client,[92] nor is an attorney liable for negligence of the clerk of court.[93]

Dealings between attorney and client[94] should be closely scrutinized by the court, and the client should be relieved from any undue consequences where the good faith of such dealings does not clearly appear.[95] To insure his fidelity to his client an attorney will be prevented from profiting from a sale of his client's property which he was employed to prevent,[96] nor will the client be bound by recognition of the attorney's title to property which he has improperly acquired from the client,[97] nor can an attorney act for his own profit in a transaction which he might have turned to the profit of his client, if such transaction was within the purview of his employment.[98]

Accounting to client.[99]—An attorney must account for money collected for client.[1] Where certain sums were sent by a client to his attorney as retainers and

tention of $15 as fee for collection of $66 by suit held not bad faith on part of an attorney. Davis v. Farwell [Vt.] 67 A. 129.

88. But the dismissal of a suit by defendant's attorney under authority from plaintiff is not an improper representation of both parties. Ex parte Randall [Ala.] 42 So. 870.

89. A settlement by an attorney representing both sides of the controversy is void. Whitcomb v. Collier [Iowa] 110 N. W. 836. Attorneys for a testatrix in a transaction between her and her confidential adviser may also act for him in drawing the necessary papers to effect their purpose and give him the necessary advice for his protection. Taylor v. Vail [Vt.] 66 A. 820.

90. See 7 C. L. 325.

91. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340. If a client sustain loss by reason of the negligence of his attorney, he may recover therefor. Priddy v. MacKenzie [Mo.] 103 S. W. 968. An attorney owes it to his client to use every lawful endeavor to the advantage of the latter. Nichols v. Riley, 103 N. Y. S. 554. It is for the jury to decide whether an attorney is liable for neglect of duty in advising his client to plead guilty to a misdemeanor, which has been settled with the person injured and the indictment for which was clearly insufficient. Cleveland v. Cromwell, 110 App. Div. 82, 96 N. Y. S. 475.

92. Reich v. Cochran, 102 N. Y. S. 827.

93. An attorney for a judgment creditor who receives a draft payable to the order of the clerk of the court for the amount of the judgment and delivers it to such clerk is not responsible for the latter's misappropriation thereof. Missouri, etc., R. Co. v. Ferris [Tex. Civ. App.] 99 S. W. 896.

94. See 7 C. L. 326.

95. But a settlement between attorney and client will not be interfered with if made voluntarily and not induced by threats of the attorney. Lewis v. Helm [Colo.] 90 P. 97. Deeds set aside as having been secured by unfair dealing of attorney with client. Holtzman v. Linton, 27 App. D. C. 241.

96. If, after agreeing to purchase property of his clients for their protection, the attorney purchases it for himself, such purchase inures to the client's benefit to the amount of the surplus value over the amount paid by the attorney. Nichols v. Riley, 103 N. Y. S. 554. An attorney who purchases land belonging to his client, after having improperly caused it to be sold under execution, acquires no rights as against his client. Misrepresentations by attorney to client. Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922.

97. Nor does the client's acquiescence in a decree obtained by his attorney avail the latter to his advantage and the client's loss. Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922.

98. Where an attorney for a judgment creditor purchases the debtor's land at an execution sale, he is presumed to purchase it for his client's benefit. Malone's Committee v. Lebus, 29 Ky. L. R. 800, 96 S. W. 519. But an attorney who purchases land, after the refusal of his client to purchase it at his advice, does not hold it in trust for such client. Webber v. Wannemaker [Colo.] 89 P. 780. Where an attorney employed to purchase land for his client buys it for himself and takes a deed in the name of a third party, who sells it to the client at a large advance, the latter may recover from his attorney the difference in price. Roberts v. Gates, 146 Mich. 169, 13 Det. Leg. N. 724, 109 N. W. 264. An allegation that an attorney in purchasing land acted for his client and holds it in trust for him, but which fails to allege fraud or wrong on the attorney's part, is insufficient. Webber v. Wannemaker [Colo.] 89 P. 780.

99. See 7 C. L. 327.

1. Money belonging to an estate collected by the executor's attorney must be accounted for by the executor. Lupton v. Taylor [Ind. App.] 78 N. E. 689.

credited as such, an inference is justified that the amount thereof was agreed upon.[2] An attorney who collected money for a client, who afterwards went into bankruptcy, is justified in refusing to pay the money to the trustee until his compensation is ascertained.[3]

A client may compromise or dismiss[4] a claim or suit, without or against the consent of his attorney, even after the action has commenced, if not done for the purpose of depriving the attorney of his compensation,[5] and a contract, providing that the client shall not dismiss or settle a suit prior to the rendition of judgment, is against public policy and void,[6] but a collusive settlement between the parties to defraud plaintiff's attorney may be set aside and the attorney allowed to proceed in his client's name to determine and recover the amount of his fee.[7] Though a party may appear by attorney or in his own proper person, he cannot do both, and if he have an attorney of record he can act only through him, and the court will not recognize any other person as having control of the action.[8]

§ 6. *Remedies between the parties.*[9]—An attorney may be compelled by summary proceedings to pay over money belonging to his client if it came through his employment in his professional character,[10] and the order therein may be enforced by contempt proceedings,[11] but the client's right to such summary proceeding is not absolute, and is subject to the court's discretion,[12] the alternative remedy, being by accounting.[43] On a motion for the summary discharge of an attorney, the question whether he has broken his contract of employment will not be determined where the facts are in dispute, but will be left for determination in a plenary action for the breach.[14] The lien of an attorney on a fund in his hands does not prevent an action by his client to recover such fund.[15] In New York, where an attorney retains money collected, claiming a lien thereon, the supreme court has jurisdiction

2. Blair v. Columbian Fireproofing Co., 193 Mass. 540, 79 N. E. 779.

3. In re Klein, 101 N. Y. S. 663. A check for part of moneys collected for a client, sent to the latter's assignee after the commencement of bankruptcy proceedings, which the assignee refused to accept and sent back, does not show a settlement between the attorney and the assignee as trustee in bankruptcy. Id.

4. See 7 C. L. 328.

5. In re Baxter & Co. [C. C. A.] 154 F. 22; Ex parte Randall [Ala.] 42 So. 870. But a statute providing that an action may be dismissed by the plaintiff himself does not authorize him to do so in his own proper person where he has appeared by attorney of record, nor, where the statute requires a written dismissal, is a motion by attorney in open court sufficient. Boca & L. R. Co. v. Superior Ct. [Cal.] 88 P. 718.

6. Jackson v. Stearns [Or.] 84 P. 798.

7. But where the attorney proceeds for the recovery of his fee only, he cannot enjoin the dismissal. Averment and proof of defendant's bad faith. Jackson v. Stearns [Or.] 84 P. 798. An attorney under a parol contract for part of land as a contingent fee cannot have deed from his client to defendant, in settlement, set aside in the original suit. Id.

8. Boca & L. R. Co. v. Superior Ct. [Cal.] 88 P. 718.

9. See 7 C. L. 328.

10. This remedy is given by the common law, and the New York statute only regulates the manner of exercising it. People v. Feenaughty, 101 N. Y. S. 700. In an action to compel restitution of money collected by an attorney, evidence that the attorney had withheld money from other clients is inadmissible. Proof that attorney had received no money for his client. Paul Jones & Co. v. Gilbert, 117 App. Div. 775, 102 N. Y. S. 983.

11. In New York the supreme court may enforce payment of money improperly retained by an attorney by dealing with him as for contempt. Cartier v. Spooner, 103 N. Y. S. 505. Where no order of court has been served on an attorney directing him to pay money to his client, he is not guilty of contempt for not doing so, though such an order has been made. People v. Feenaughty, 101 N. Y. S. 700.

12. Refusal of summary proceeding for money borrowed on mortgage by client and his minor son, and permitted to be held by the attorney and paid out at client's direction. In re Nellis, 116 App. Div. 94, 101 N. Y. S. 698.

13. Where attorney retains client's money on which he has a lien for services, the client's remedy is not by action for conversion but by action for accounting or motion to show cause why it should not be paid over. Rose v. Whiteman, 52 Misc. 210, 101 N. Y. S. 1024.

14. The New York Phonograph Co. v. Edison, 148 F. 397; New York Phonograph Co. v. Edison Phonograph Co., 150 F. 233.

15. But the client cannot maintain such action until after demand and refusal. Whinery v. Brown, 36 Ind. App. 276, 75 N. E. 605.

to determine the amount to which the attorney is entitled and to summarily order payment of the balance.[16]

§ 7. *Compensation and lien.*[17]—Provisions in notes[18] and mortgages[19] for stated attorneys' fees on their enforcement are elsewhere treated. Where there is a valid express contract as to compensation, the amount is fixed thereby and the attorney is not entitled to more,[20] nor is the agreed compensation to be reduced because less service was required than was expected,[21] nor because his efforts were unsuccessful;[22] but a note given for legal services in conducting wholly unnecessary proceeding is without consideration,[23] but the attorney must perform the agreed services,[24] and in case of substitution before completion of services, recovery must be had on quantum meruit.[25] The attorney will be remitted to his remedy on a quantum meruit where the agreement for a stipulated fee was obtained by fraud.[26] Though an executor agree to pay a certain amount as attorney's fee, if such sum is exorbitant, there is no consideration for the excess.[27] An attorney is not bound by a fee contract made by his colleague, who was not his partner, and which he knew nothing of before performing the service.[28] Merely attempting to collect a fee from an agent does not necessarily constitute an election to discharge the principal from liability therefor.[29] It is not illegal as against public policy for an attorney to bring suit for a client who is unable to pay for his services, nor in such case is the attorney under any legal or moral obligation to give security for costs.[30] But a plaintiff cannot obtain an order to sue in forma pauperis, under the United States statute, where his attorney is financially interested in the result of the suit, without showing that the attorney was also financially unable to give security.[31] The distinction which obtained, under the English common law, between attorneys, counsel and barristers, does not prevail in Tennessee, at least as to the right to compensation.[32] But a contract to pay a contingent fee for the collection of a gambling debt is

16. So a trustee in bankruptcy may maintain an application in the supreme court to compel the attorney of the bankrupt to pay over moneys collected for his client of which there has been no settlement. In re Klein, 101 N. Y. S. 663.

17. See 7 C. L. 329.

18. See Negotiable Instruments, 8 C. L. 1124.

19. See Foreclosure of Mortgages on Land, 7 C. L. 1678.

20. An attorney who expressly agrees to perform legal services for a specified fee is estopped to deny that such amount is reasonable. In re Rapp's Estate [Neb.] 110 N. W. 661.

21. Entitled to agreed fee, though case was settled without trial. Cordes v. Bailey [Ind. App.] 78 N. E. 678.

22. An unconditional agreement to pay for searching a title, with the intention of securing a loan on the property from the party employed to search the title, is binding, though the loan was refused. Title Guarantee & Trust Co. v. Stemberg, 103 N. Y. S. 857.

23. Buckler v. Robinson, 29 Ky. L. R. 1174, 96 S. W. 1110.

24. An attorney who, after contracting with his client for a percentage of the recovery in a suit, refuses to proceed under the contract, cannot recover for any services already performed. McDonald v. De Vito, 103 N. Y. S. 508. Fees contracted for cannot be recovered where the client settles the case before full performance of the stipulated services, only remedy in such case being on a quantum meruit. Pratt v. Kerns, 123 Ill. App. 86.

25. An agreement by a client to pay his attorney a certain part of the amount "he may secure" on a claim contemplates payment only on a collection by him, and hence if the client substituted another attorney prior to any collection the former attorney can only recover the value of his services rendered. Roake v. Palmer, 103 N. Y. S. 862.

26. Concealment of actual facts of case from client, and representation that case was much more grave than it really was. Pratt v. Kerns, 123 Ill. App. 86.

27. Lupton v. Taylor [Ind. App.] 78 N. E. 689.

28. Bissell v. Zorn, 122 Mo. App. 688, 99 S. W. 458.

29. No such election where attorney filed claim against estate of deceased agent of corporation under honest mistake that corporation was not legally incorporated and that therefore agent was personally liable as well as corporation. Laguna Valley Co. v. Fitch, 121 Ill. App. 607. Filing claim for services against estate of deceased agent not evidence of original charge against agent to exclusion of principal. Id.

30. And though the client be unable to give security for costs and the attorney refuse to do so, the suit should not be dismissed. Stevens v. Sheriff [Kan.] 90 P. 799.

31. Phillips v. Louisville & N. R. Co., 153 F. 795.

32. Ingersoll v. Coal Creek Coal Co. [Tenn.] 98 S. W. 178.

against public policy and void, as it amounts to an employment to collect the fruits of a crime for compensation.[33] A contract to assist in defending a suit is not limited to services in actual trial, but also contemplates the rendition of services necessary in preparing therefor.[34] An attorney who renders services to a county, under a contract which was void for want of authority, cannot retain part of the ocervery as compensation under an implied contract.[35] Nor is a county liable for the services of a special attorney relating to matters in charge of the county solicitor, unless there has been a special contract entered into between him and the proper county authoritites prior to the rendition of the services.[36]

Contingent fees.[37]—If an agreement for such fees is invalid it is because it violates the law against champertous contracts, and the subject is accordingly elsewhere treated.[38] The right of an attorney to demand payment for his services depends upon whether he was employed, and he cannot recover from one who did not employ him, however valuable the result of his services may have been to such person, especially if the person was not a party to the suit.[39] Nor do third parties become liable to an attorney for fees by reason of the fact that they are equally interested in the case with his clients and accept the benefit of his services.[40] But a person consulting an attorney concerning property of another is personally liable for the legal services where the ownership of the property was not known by, or disclosed to, the attorney,[41] and one employing another is not relieved by the fact that his servicess were to be rendered for the benefit of a third person.[42] An attorney is not precluded from recovery for services by his failure to make a charge when they were rendered, as the debt is not created by a charge but precedes it.[43]

Quantum meruit.[44]—An attorney whose services are accepted and are satisfactory is entitled to reasonable compensation therefor, though there was no specific contract as to his fee.[45] An attorney for defendant in a criminal prosecution has a right to quit his client's service where the latter attempts to modify the contract of employment so as to make the fee contingent upon his acquittal; and such withdrawal does not preclude the attorney from recovering at least for the services performed.[46] Where a client agrees to a fee account but refused to pay it because of other items charged, the attorney cannot recover on a quantum meruit.[47]

Allowance of fees by court or taxation as costs.[48]—In many states counsel fees

33. Delahunty v. Canfield, 103 N. Y. S. 939.
34. Cordes v. Bailey [Ind. App.] 78 N. E. 1060.
35. State v. True [Tenn.] 95 S. W. 1028.
36. In Pennsylvania county commissioners have no authority to employ additional counsel in criminal prosecutions. Bechtel v. Fry, 217 Pa. 591, 66 A. 992. But payment by a town, on account for legal services before they are rendered, creates an obligation by ratification or estoppel as to the services thereafter rendered. Newton v. Hamden, 79 Conn. 237, 64 A. 229.
37. See 7 C. L. 330.
38. See Champerty and Maintenance, 7 C. L. 621.
39. Act of legislature authorizing suit to recover for legal services rendered a city does not create a right of action. Forman v. Sewerage & Water Board [La.] 43 So. 908.
40. Trimble v. Kansas City, etc., R. Co., 201 Mo. 372, 100 S. W. 7.
41. Instruction as to liability of agent for legal services. Dillon v. McManus, 121 Mo. App. 37, 97 S. W. 971.
42. Sufficiency of evidence, in action for legal services, to show original promise to pay, not within statute of frauds. Treakle v. Vaughan Abstract Co. [Ark.] 103 S. W. 174.
43. The charge or omission to charge may, however, serve as evidence of the existence or non-existence of the debt. Davis v. Farwell [Vt.] 67 A. 129.
44. See 7 C. L. 331.
45. Dorr v. Dudley [Iowa] 112 N. W. 203. Ten thousand dollars held sufficient on a quantum meruit for collecting $130,000 from a minor, on a $300,000 claim. Delahunty v. Canfield, 103 N. Y. S. 939. An attorney who in one count alleged that he was employed by defendant to perform services and then not permitted to do so, and in another count alleged services rendered and money spent at defendant's request, cannot recover on a quantum meruit, as he had not treated the contract as rescinded. Weil v. Fineran, 78 Ark. 87, 93 S. W. 568.
46. Bissell v. Zorn, 122 Mo. App. 688, 99 S. W. 458.
47. Instruction as to binding effect of the account. Lane & Bodley Co. v. Taylor, 80 Ark. 469, 97 S. W. 444.
48. See 7 C. L. 332.

are allowed by statute to the party prevailing, as an incident to his recovery.[49] the most common instances being suits for foreclosure of mortgages,[50] receiverships,[51] and proceedings involving the estates of decedents.[52] The allowance of "costs" which are in reality attorney's fees is also treated elsewhere.[53] An attorney who is appointed by the court, under the Iowa statute, to defend an accused for homicide, is entitled to compensation, though the accused had previously been acquitted of all except manslaughter.[54] One bringing a suit for the preservation of a fund in which several persons have a common interest will be reimbursed by a court of equity out of such fund for reasonable attorney's fees incurred by him in so doing.[55] The application for the allowance of such fees may be made either by the party employing counsel or the attorneys themselves.[56] It is discretionary with a Federal court to allow counsel fees out of a fund or property which a joint owner has maintained a suit to protect, and which has been directly benefited thereby.[57] But a court of equity has no power to fix the fee of an attorney who appeared for his client, both as an administrator and individually, in an action to establish a debt against the estate, sell its lands to pay the same, and distribute the surplus, except by consent of parties.[58] A defendant in a suit for an injunction which is dissolved is entitled to an allowance for attorney's fees in both the trial and appellate courts.[59] An attorney who bears the expense of a trial is entitled to the costs recovered from the adverse party.[60] Counsel fees allowed to a party may be ordered to be paid to

49. In **contempt proceedings** for violating an injunction, the court may allow an attorney's fee to the prosecutor of the case. State v. Plamondon [Kan.] 89 P. 23. Counsel fees in proceeding for contempt, under Wisconsin statute, taxable against guilty party. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540. A plaintiff who succeeds in **abating a liquor nuisance** is entitled to recover counsel fees, under the Iowa statute, whether the proceeding was in his own name or by the state. Plank v. Hertha [Iowa] 109 N. W. 732. In an **action for employing the tenant of another,** such defendant is not entitled to a judgment for attorney's fees, unless they were made an issue and found in his favor by the jury, in the absence of which the court has no power to award them. Jones v. Roughton [Ga. App.] 57 S. E. 1061. In action **for damages to passenger** by being carried beyond destination, plaintiff not entitled to recover attorney's fee under the Arkansas statute, unless he allege a violation of some express statute. St. Louis, etc., R. Co. v. Knight [Ark.] 99 S. W. 684. The plaintiff in a **suit on an attachment** bond is entitled to recover reasonable attorney's fees, and, where no stipulated fee was agreed upon, its assessment should be left to the jury. State v. Allen [Mo. App.] 103 S. W. 1090. Nor in such case is the stipulated fee conclusive as to the amount allowable. Plymouth Gold Min. Co. v. U. S. Fidelity & Guaranty Co. [Mont.] 88 P. 565. But independent of statute, counsel fees are not recoverable in an action of **replevin.** Nor are they recoverable under the Florida statute. Gregory v. Woodbery [Fla.] 43 So. 504.

50. See Foreclosure of Mortgages on Land, 7 C. L. 1678.

51. See Receivers, 8 C. L. 1679.

52. See Estates of Decedents, 7 C. L. 1386; Wills, 8 C. L. 2305.

53. See Costs, 7 C. L. 956.

54. Nor in such case does an attorney who has conducted one trial, and secured a reversal, have to be reappointed in the second trial, in order to get his fee. Tomlinson v. Monroe County [Iowa] 112 N. W. 100. Under the Ohio statute, the determination of the county commissioners as to the compensation to be paid for defending indigent persons is final, subject to certain limits. Long v. Miami County Com'rs, 75 Ohio St. 539, 80 N. E. 188.

55. Action for appointment of receiver and to wind up affairs of insolvent bank being, under the statute, for the benefit of all the creditors, creditor bringing it will be reimbursed for attorney's fees. Bradshaw v. Little Rock Bk., 76 Ark. 501, 89 S. W. 316. The allowance of fees to attorneys for a single creditor who brings an action to wind up an insolvent corporation is to be made from the amounts received by the various creditors, and not from the surplus coming to the corporation. Id. Services of creditor's attorney in connection with sale under senior judgment, such as bidding up the property, etc., held to entitle him to compensation from fund. Eisenhower v. Shank, 31 Pa. Super. Ct. 23. A collection fee stipulated for in the instrument on which the judgment was rendered may be allowed to him, though preliminary demand for payment has been made and no execution has issued. Id.

56. Bradshaw v. Little Rock Bk., 76 Ark. 501, 89 S. W. 316.

57. Culyer v. Atlantic & N. C. R. Co., 132 F. 570.

58. Consent to order of reference to fix such fee is not sufficient. Cauthen v. Cauthen [S. C.] 56 S. E. 978.

59. In Mississippi it is held that a proper allowance of attorney's fees for services in the supreme court is one-half the allowance in the trial court. Curphy v. Terrell [Miss.] 42 So. 235.

60. Blondel v. Ohlman [Iowa] 109 N. W. 806.

the counsel instead of to the party himself.[61] Where in entering a decree jurisdiction to adjudicate upon certain matters is reserved, counsel fees may be allowed upon the adjudication of such matters.[62]

The amount of allowance by court.[63]—An order of court fixing an allowance for attorney's fees is presumptive evidence that they are not exorbitant, but is not conclusive against persons not parties to the suit.[64] The extent of the assets coming into the hands of the receiver may be considered in fixing the amount to be allowed as attorney's fees, but the amount should be fixed at a sum which would have been a reasonable charge against their own clients for the services rendered.[65] The United States Bankruptcy Act, providing for the allowance of reasonable attorney's fee, does not authorize an allowance for all legal work the attorney may do, but only for that required by the provisions of the law and the necessities of the proceeding.[66] A judgment will not be reversed for a slightly excessive allowance in taxing the attorney's fee.[67]

Evidence as to value of services.[68]—In fixing an attorney's fee the court may hear evidence as to the value of his services.[69] The testimony of expert lawyers is admissible as to the value of legal services.[70] In fixing the value of legal services, the nature of the controversy, the results dependent thereon, the magnitude of the interests involved, and the responsibility assumed, should all be considered.[71] In

61. Pike v. Pike, 123 Ill. App. 553.

62. In divorce proceedings. Pike v. Pike, 123 Ill. App. 553.

63. See 7 C. L. 332.

64. An allowance of $12,000 out of a claim which, after pending for several years and being twice tried on appeal, was settled for $35,000 is not exorbitant. Hays v. Johnson's Adm'r, 30 Ky. L. R. 614, 99 S. W. 332. An attorney for an insurance company who successfully filed an interpleader for the company may be allowed $1,000 as a fee, where the amount involved was $46,133.89. Mutual L. Ins. Co. v. Lane, 151 F. 276. On appeal from a judgment foreclosing a mechanic's lien, an attorney's fee of $50 will not be declared an improper amount, in the absence of evidence. Lee v. Kimball [Wash.] 88 P. 1121. One hundred dollars is a reasonable allowance to an attorney prosecuting a contempt proceeding for violating an injunction. State v. Plamondon [Kan.] 89 P. 23. Where it is proven without contradiction in a suit that a certain amount is a reasonable attorney's fee, the court should not disregard such proof and allow a smaller amount. Wright v. Conservative Inv. Co. [Or.] 89 P. 387.

65. Bradshaw v. Little Rock Bk., 76 Ark. 501, 89 S. W. 316.

66. In re Payne, 151 F. 1018.

67. The excess may be cured by a remittitur or deducted from the judgment, and the appellant cannot profit thereby in the matter of costs in the appellate court. Trabue v. Wade [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 S. W. 616.

68. See 7 C. L. 332.

69. Under Iowa statute providing for attorney's fees against a railroad in a successful appeal from an appraisement of damages. Hall v. Wabash R. Co. [Iowa] 110 N. W. 1039.

70. But an instruction that the jury might rely on their own judgment as to the value of legal services and are not confined to the evidence is erroneous, as they should take all the evidence into consideration and find such a sum as would be a reasonable compensation. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340. In a suit for legal services, a hypothetical question based on the plaintiff's evidence detailing the services rendered, the time expended, the value of the property involved, and every fact connected directly with the services, is not misleading. Id.

71. But evidence of the amount paid another attorney in the same case is inadmissible. Heblich v. Slater, 217 Pa. 404, 66 A. 655. The time taken in performing the services may also be considered, but it is a less important element. Trimble v. Kansas City, S. & G. R. Co., 201 Mo. 372, 100 S. W. 7. In an action for legal services, the jury may consider the liability of an attorney for failure to exercise ordinary skill, care, and diligence, in determining the value of the services. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340. A decree, dismissing attorneys on condition that a fixed fee be paid them, which was affirmed on appeal, is a final adjudication of the amount due, and will support an action for its recovery. Seymour v. Du Bois, 145 F. 1003. Where land is sold on the faith of abstracts of title, the price received should be considered as showing what would be a reasonable fee for preparing the abstracts. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340. The erroneous belief of an attorney that his fee was limited to a certain amount does not prevent him from recovering what his services were reasonably worth. Bissell v. Zorn, 122 Mo. App. 688, 99 S. W. 458. Proof of reasonable fee. Whinery v. Brown, 36 Ind. App. 276, 75 N. E. 605. A verdict for $3,000 as an attorney's compensation for five months' work in preparing thirty-five abstracts, and perfecting title to 38,000 acres of land which sold for $200,000, is not excessive. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340. Insufficiency of evi-

determining the amount due an attorney for services, the court must be guided by a conscientious estimate of their value, and while expert evidence is useful it is not controlling, and, where the nature and extent of the services is shown, the court should exercise its own knowledge of their value.[72]

Proceedings to recover.[73]—An attorney may sue his client for breach of contract of employment for not paying an agreed retainer, for the loss of contingent fees contracted for, and for money expended under an agreement to reimburse him.[74] Where there is no dispute as to the agreed amount, but only as to the mode, time, and condition of payment, a judgment for less than the agreed fee is erroneous.[75] In an action for legal services the defendant is entitled to offset money collected and not turned over to him.[76] In a suit for legal services in defending an action, under a contract by which the fee was to be fixed after an investigation of the matter, an answer that no services had been performed and that the contract had been canceled by agreement is not objectionable.[77] A defense which is not pleaded, in a suit to recover for attorney's services, cannot be proved.[78] In a suit to recover for services rendered in a Federal court, proof of services in another action in a state court is inadmissible.[79] Where an attorney fully performs his contract until discharged without cause, his measure of damages is the unpaid balance which was agreed upon.[80] In an action for legal services the plaintiff is not required to specify the charge for each item of service rendered, but only the value of each service performed as far as he is able.[81] Where the parties to a suit settle it without the knowledge of plaintiff's attorney, he may, under the Kentucky statute, proceed against the defendant in the original action if still pending, or bring an independent suit against him.[82] An attorney who has contracted for one-half the recovery is entitled to one-half of a compromise made without his consent, but cannot recover for more except by suing for breach of contract in another suit.[83] In an action by an attorney against his client for breach of contract, the burden is on the defendant to prove that he was induced to enter into it by fraud.[84]

dence to show discrepancy between value of services and compensation therefor. Hamilton v. Holmes [Or.] 87 P. 154. Declarations of a third person not under oath are not admissible to show the value of legal services. Miner v. Rickey [Cal. App.] 90 P. 718.

72. But where the amount allowed by the trial judge is not manifestly insufficient or excessive, its judgment should be affirmed. Dinkelspiel v. Pons [La.] 43 So. 1018.

73. See 7 C. L. 333.

74. Instructions as to recovery, and measure of damages, in action by attorney against client for breach of contract. Weil v. Fineran, 78 Ark. 87, 93 S. W. 568. Sufficiency of evidence to sustain judgment in action for legal services. Marshall v. Piggott [Neb.] 111 N. W. 592. Sufficiency of evidence, in action for legal services, to go to jury. Bissell v. Zorn, 122 Mo. App. 688, 99 S. W. 458. Insufficiency of evidence. Loomis v. Mullins [Ky.] 101 S. W. 913. Counterclaim. Treakle v. Vaughan Abstract Co. [Ark.] 103 S. W. 174. Sufficiency of **bill of particulars** in suit for legal services. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340.

75. Allen v. Flynn, 52 Misc. 121, 101 N. Y. S. 747.

76. Lupton v. Taylor [Ind. App.] 78 N. E. 689.

77. Higgins v. Matlock [Tex. Civ. App.] 16 Tex. Ct. Rep. 170, 95 S. W. 571.

78. Offer of evidence that attorney did not go out of state to take depositions. Sessions v. Warwick [Wash.] 89 P. 482. Defense that contract was illegal must be pleaded. Prince v. Kennedy, 3 Cal. App. 498, 86 P. 609. Necessity of pleading champerty, see Champerty and Maintenance, 7 C. L. 621.

79. Higgins v. Matlock [Tex. Civ. App.] 16 Tex. Ct. Rep. 170, 95 S. W. 571.

80. Sessions v. Warwick [Wash.] 89 P. 482.

81. Treakle v. Vaughan Abstract Co. [Ark.] 103 S. W. 174.

82. And if he petition in the original action the plaintiff is not a necessary party. Proctor Coal Co. v. Fye, 29 Ky. L. R. 804, 96 S. W. 512.

83. In re Snyder, 104 N. Y. S. 571. Sufficiency of evidence to prove contract of retainer, in suit by attorney to recover part of the proceeds of a compromise. Wilson v. Seeber [N. J. Eq.] 66 A. 909.

84. Instruction as to whether contract procured by fraud or made in good faith. Weil v. Fineran, 78 Ark. 87, 93 S. W. 568. In an action for legal services, though the attorney must show that the contract was fair or reasonable, this obligation does not apply to mere retainers establishing the relation. Title Guarantee & Trust Co. v. Stemberg, 103 N. Y. S. 857.

Lien.[85]—In the absence of statute, an attorney's lien on his client's cause of action but only on the fruits thereof.[86] It is held in Minnesota that an attorney's lien cannot be created upon a mere right of action for a personal tort.[87] Attorneys may assert a lien on money in their hands as attorneys, for services not paid for, and hold it until their compensation be agreed upon and paid or tendered.[88] An attorney has a lien on a judgment obtained by him for his client for services in the case, the amount of which is fixed by special contract, though under the terms of the contract payment cannot be had until the money is actually recovered.[89] But an attorney who defends an action to recover land is not entitled to a lien thereon, though he succeeds in saving it.[90] Drafts placed with the owner's attorney, in order that the owner might realize on them and apply the money to the payment of debts as he thought best and to prevent the fund from being levied on, are not subject to a lien for services of the attorney.[91] An attorney's lien on a judgment is assignable and may be enforced by the assignee, though the assignor by his assignment has lost the right to enforce it.[92] Where, pending an appeal, the parties settle the claim without fraud or collusion, the appellent's counsel has no lien that entitles him to enter judgment against the appellee for his fee.[93] A defendant who clandestinely settles with plaintiff and agrees to settle the lien of his attorney, which was for one-half of the recovery, is liable to such attorney for an amount equal to that paid plaintiff.[94] If a settlement between litigants be honestly made, and plaintiff's attorneys was to receive a percentage of recovery, the amount of his lien is controlled by the settlement, and not by a judgment which has not become final.[95] Attorneys have a lien upon all suits brought by them and all judgments obtained upon a real cause of action, in behalf of their clients, but they have no right to enforce a judgment obtained by surprise when the defendant has been, by the act of their client, deprived of the right to be heard on the existence of a cause of action at the time of their employment and the institution of the suit.[96] Statutes providing for attorney's liens are constitutional, remedial, and should be liberally

85. See 7 C. L. 334.

86. Protection of lien in bankruptcy proceedings. In re Baxter & Co. [C. C. A.] 154 F. 22.

87. Nor is such right assignable as security, hence a client is not prevented from compromising a personal injury claim before judgment by the fact that he has contracted with his attorney for a contingent fee. Boogren v. St. Paul City R. Co., 97 Minn. 51, 106 N. W. 104.

88. Rose v. Whiteman, 52 Misc. 210, 101 N. Y. S. 1024.

89. Nor does the failure of an attorney to prosecute a suit to enforce the judgment destroy his lien, where he was not bound to do so without additional compensation. Fisher v. Mylius [W. Va.] 57 S. E. 276. But if a client has to expend money to realize on a judgment for the common benefit of himself and his attorney, the latter must contribute ratably to his share of such expense. Id. A contract between attorney and client, that as compensation the attorney shall receive a certain part of the proceeds of an action, gives him an equitable lien upon them when they take form. Wilson v. Leebar [N. J. Eq.] 66 A. 909. An attorney for a wife in divorce proceedings acquires a lien on a money judgment awarded to her, by perfecting it according to statute. Hubbard v. Ellithorpe [Iowa] 112 N. W. 796. An attorney for a mother in bastardy proceedings whose fee is to be paid out of the fund recovered has a lien upon such fund. Costigan v. Stewart [Kan.] 91 P. 83; Taylor v. Stull [Neb.] 112 N. W. 577.

90. Forrester v. Howard, 30 Ky. L. R. 375, 98 S. W. 984.

91. Walts v. Newberry [Va.] 57 S. E. 657. But an attorney has a lien on securities in his hands out of which his client agreed he should take his fee. Heyward v. Maynard, 103 N. Y. S. 1028.

92. Fisher v. Mylius [W. Va.] 57 S. E. 276.

93. Crossman v. Smith, 116 App. Div. 791, 102 N. Y. S. 18.

94. Curtis v. Metropolitan St. R. Co. [Mo. App.] 102 S. W. 62. Persons sued with a defendant, who participate in effecting a compromise of the claim, after notice to the defendant that an attorney has been employed to prosecute it, are also liable for the attorney's fees. Ingersoll v. Coal Creek Coal Co. [Tenn.] 98 S. W. 178.

95. Wait v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60.

96. The existance of an attorney's lien is no reason for allowing the attorneys to enforce a judgment against a surety which was rendered as a result of his being lulled into security by assurances by their client that no claim would be made against him. Hall v. Lockerman, 127 Ga. 537, 56 S. E. 759.

97. Wait v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60.

construed.[97] The Missouri statute providing for attorney's liens is not invalid either as class legislation, or as destroying defendant's right to contract; nor does it violate the constitutional requirement that no bill contain but one subject, clearly expressed in its title.[98] An attorney's lien under the Kentucky statute cannot be divested by a compromise between the parties without the attorney's knowledge or consent, unless made in good faith without the payment of anything of value.[99] An attorney employed on a contingent fee has no lien for his services before judgment, under the Oregon statute.[1] In Alabama no attorney's lien attaches to lands or any other thing except moneyed judgments.[2] Under the Arkansas statute, a defendant who compromises a case with one of plaintiff's attorneys, knowing that another of plaintiff's attorneys has contracted for a contingent fee, is liable to such other attorney for a reasonable fee.[3] The lien of plaintiff's attorney, under the New York statute, attaches to the fund in litigation, and is not affected by defendant paying all of it to plaintiff under a settlement.[4]

Loss of lien.[5]—An attorney releases his lien by acceding to his client's demand that he pay over the amount collected, but he does not thereby disentitle himself to any claim for the services rendered.[6] The termination of the relation of attorney and client by the client's being declared insane does not destroy the attorney's lien,[7] nor does the assignment of the judgment after plaintiff's attorneys have filed their lien thereon,[8] and the lien attaches to money paid into court to satisfy the judgment.[9]

Enforcement of lien.[10]—If an attorney render services in a court having no jurisdiction to enforce his lien, he may maintain an action thereon in a court having such jurisdiction.[11] A proceeding to enforce an attorney's lien, being in rem against the fund, may be maintained in the state court where the original suit was brought, though the defendant be a foreign corporation, and before the settlement the suit was removed to a Federal court.[12] Where parties to a suit compromise it between

98. And as the action under this statute is not strictly to enforce the lien, but to recover the amount thereof, it may be brought before a justice of the peace. O'Connor v. St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150. The attorney's lien under the Missouri statute attaches to the cause of action from the commencement thereof. Taylor v. St. Louis Transit Co., 198 Mo. 715, 97 S. W. 155. The Missouri statute creating attorney's liens is not void as contrary to public policy, since it does not permit an attorney to block a settlement between the parties. Id. Under the Missouri statute an attorney has a lien, after suit is brought and summons served, though he gives no notice thereof, and it cannot be affected by any settlement between the parties, and if he gives such notice the lien dates from the service thereof. Wait v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60.

99. Nor need the attorney, in his petition to recover from the defendant, allege bad faith, where the plaintiff received valuable consideration. Proctor Coal Co. v. Tye, 29 Ky. L. R. 804, 96 S. W. 512.

1. Jackson v. Stearns [Or.] 84 P. 798.

2. Kelly v. Horsley [Ala.] 41 So. 902.

3. But though the settlement be invalid as to the defrauded attorney, it will not be set aside in favor of the plaintiff, where the defendant did not know that the plaintiff also was being defrauded. Bush v. Prescott & N. W. R. Co. [Ark.] 103 S. W. 176.

4. Oishel v. Bonaddio, 117 App. Div. 110, 102 N. Y. S. 368.

5. See 7 C. L. 336.

6. Nor does the acceptance of a receipt from his client "in settlement of money collected" preclude him from recovering fees therefor. Davis v. Farwell [Vt.] 67 A. 129.

7. But in such case an order directing that the attorney surrender his client's bank books to the latter's committee should provide for payment of the attorney's fees. In re Stenton, 53 Misc. 515, 105 N. Y. S. 295.

8. Taylor v. Stull [Neb.] 112 N. W. 577.

9. Hubbard v. Ellithorpe [Iowa] 112 N. W. 796.

10. See 7 C. L. 336.

11. Municipal Court of New York city has no jurisdiction to enforce attorney's lien, but supreme court has. Tynan v. Mart, 53 Misc. 49, 103 N. Y. S. 1033. Jurisdiction of Missouri supreme court to determine issue raised to establish attorney's lien. Wait v. Atchison, etc., R. Co. [Mo.] 103 S. W. 60. An attorney's lien may be established in equity where the law gives no adequate remedy, and if, pending an appeal, the suit be settled without his assent, such settlement will be set aside to the extent of his lien, and the lien is enforceable by execution in the original suit. Id.

12. Oishel v. Bonaddio, 117 App. Div. 110, 102 N. Y. S. 368. The New York statute providing for an attorney's lien on the client's cause of action creates a right and

themselves, the right of an attorney to enforce his lien is regulated by statute in some states,[13] and summary proceedings for the enforcement of liens are sometimes authorized.[14] A judgment obtained by an attorney to enforce his lien on the proceeds of a settlement between the parties need not provide that execution shall first issue against his client who was insolvent and without the state, though all the proceeds were paid to him.[15] Where there are mutual judgments, an attorney's lien against one of them is subject to the right to set off the judgments.[16]

§ 8. *Authority of attorney to represent client. Creation, proof, and termination of authority.*[17]—The professional obligations of an attorney at law raise a presumption that he has authority from his client to institute a suit or appear in a pending case in his client's behalf,[18] though the filing of an affidavit or other evidence of authority is sometimes required.[19] Though an attorney be generally retained, his assumption of authority to act for his client outside of the due and orderly conduct of litigation, does not create a presumption of actual authority.[20] The authority of an attorney is not terminated by judgment in the cause so long as the court retains control thereof.[21]

Scope of authority.[22]—An attorney has implied power to do all acts incident to the conduct of litigation in which he is employed,[23] including the making of

provides a remedy for its enforcement, and consequently is controlling on federal courts sitting in that state. In re Baxter & Co. [C. C. A.] 154 F. 22.

13. Where the statute gives a lien for the amount agreed upon or in the absence of agreement, for a reasonable fee, an indefinite settlement between the parties without the knowledge of plaintiff's attorney entitles the latter to recover from the defendant a reasonable fee, though he had agreed with plaintiff for a part of the amount recovered. Proctor Coal Co. v. Tye, 29 Ky. L. R. 804, 96 S. W. 512. Where the parties to a suit compromise it, and the plaintiff is insolvent, his attorney may recover from the defendant in a separate action the percentage of recovery agreed to be paid him by plaintiff without further prosecution of his clients' suit. Taylor v. St. Louis Transit Co., 198 Mo. 715, 97 S. W. 155. In an action by plaintiff's attorney to enforce his lien under the New York statute, where there has been a settlement between the parties, the plaintiff is a necessary party. Oishei v. Bonaddio, 117 App. Div. 110, 102 N. Y. S. 368. Under the New York statute providing that an attorney's lien on his client's cause of action from the commencement thereof cannot be affected by any settlement between the parties, testamentary trustees who were sued for an accounting and construction of the will, and the suit discontinued by consent, are not proper parties to a proceeding to fix the lien of plaintiff's attorney; but after the amount is established the attorney may present his claim against the estate. Sullivan v. McCann, 115 App. Div. 146, 100 N. Y. S. 739. In discontinuing a partition suit pursuant to a settlement between the parties, the court can only impose a lien for the services of defendant's attorney on his client's interest in the land. Horn v. Horn, 115 App. Div. 292, 100 N. Y. S. 799.

14. Enforcement of lien by summary proceedings under New York statute. In re Williams [N. Y.] 79 N. E. 1019. Enforcement of attorney's lien on mortgaged land under Montana statute. Gilchrist v. Hore, 34 Mont. 443, 87 P. 443.

15. Oishei v. Bonaddio, 117 App. Div. 110, 102 N. Y. S. 368.

16. The right of a plaintiff to set off his judgment for costs against that of defendant is superior to the lien of plaintiff's attorney on his judgment. Garrigan v. Huntimer [S. D.] 111 N. W. 563; Park v. Hutchinson, 80 Ark. 183, 96 S. W. 751.

17. See 7 C. L. 337.

18. He is not required to produce a warrant of attorney, and the presumption of his authority cannot be overcome by slight evidence. Barkley Cemetery Ass'n v. McCune, 119 Mo. App. 349, 95 S. W. 295. Attorneys in whose hands a claim has been placed will be presumed to have authority to file suit, answer defendant's pleas, and try the case. And the client cannot complain of their action in the absence of fraud or negligence on their part. McBurnett v. Lempkin [Tex. Civ. App.] 101 S. W. 864.

See note on rebuttal of presumption, 7 C. L. 337.

19. Insufficiency of affidavit that solicitors who filed a suit for a county were unauthorized. Butts v. Peoria County, 226 Ill. 270, 80 N. E. 765.

20. So admissions of an attorney are inadmissible against his client, unless shown to be authorized, or properly made for the purpose of dispensing with formal proof. Horseshoe Min. Co. v. Miners' Ore Sampling Co. [C. C. A.] 147 F. 517.

21. Krieger v. Krieger, 120 Ill. App. 634. See post, this section, subd. Scope of Authority.

22. See 7 C. L. 341.

23. An attorney has authority to agree with the court and opposing counsel that the judge might sign a skeleton bill of exceptions and afterwards have a transcript of testimony inserted therein, and his client is estopped to object that the transcript was not properly incorporated. Memphis Consol. Gas & Elec. Co. v. Simpson [Tenn.] 103 S. W. 788. The vacation of a judgment by consent of the attorneys for both parties cannot be

stipulations and admissions.[24] He may receive payment of the judgment recovered,[25] though it has been assigned by his client.[26] He cannot ordinarily sell or assign his client's property, cause of action or judgment,[27] or confess judgment,[28] or compromise his client's case,[29] or to employ another to do acts within the scope of his own powers.[30] An attorney to collect has no power to make new contracts.[31] An attorney by virtue of a general retainer acquires no authority to inject into a suit against his client, property in no way connected therewith, and then consent to a disposition of such property by a compromise decree.[32] The knowledge of an attorney that the judge is so prejudiced against his client as to justify a change of venue is the knowledge of his client.[33] A client is not bound by an authorized act of his attorney which he promptly repudiates,[34] but an unauthorized agreement made by an attorney may be ratified by his client,[35] or release a fund from a lien in

objected to by third persons, as the consent of the attorneys is presumed to have been authorized. Hokey v. Greenstein, 104 N. Y. S. 621. An attorney for an administrator may be authorized to sign a notice to creditors in the administrator's name and on his behalf. Meikle v. Cloquet [Wash.] 87 P. 841. An employment of counsel by one of two administrators to foreclose a mortgage for the estate is sufficient to authorize him to represent the estate where the other administrator knew of such employment, though he took no part in authorizing it. Waid v. Koenig [Md.] 67 A. 236. Service of notice of appeal on the attorney of one defendant is insufficient to bind the other defendant who was not represented by the attorney served, though such attorney acknowledge service "as attorney for defendants." Nelden-Judson Drug Co. v. Commercial Nat. Bk. [Utah] 86 P. 498. An entry of discontinuance of a suit signed by plaintiff's counsel is as much the act of the plaintiff as if it was made in person. Seeligson v. Gifford [Tex. Civ. App.] 103 S. W. 416.

24. A statute providing that an attorney has authority to bind his client by agreements in a suit does not apply to contracts made by an attorney before any action is commenced. Ephraim v. Pacific Bk., 149 Cal. 222, 86 P. 507. An attorney's admissions made within the scope of his authority bind his client to the same extent as a stipulation. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 86 P. 357. A stipulation, waiving the right of appeal, made by an attorney of record binds his client. Arthur D. Jones & Co. v. Spokane Valley L. & W. Co. [Wash.] 87 P. 65.

25. Though an order directing the clerk to pay certain money due a judgment creditor to his attorney as part of his fee be void, the payment is valid on the ground that the attorney had authority to collect the amount due his client, and the judgment should be credited by the amount so paid. Cauthen v. Cauthen [S. C.] 56 S. E. 978. An attorney may receive money due his client in a case in which he is employed, and his receipt therefor will bind the client, unless the party paying it had notice that the attorney's authority to act in the case had been revoked. Gordon v. Omaha [Neb.] 110 N. W. 313.

26. Hayes v. Koepfli [Wash.] 89 P. 151.

27. Nor does an attorney's general employment by the receiver of a bankrupt authorize him to sell the bankrupts' assets or receive the proceeds thereof. Mason v. Wolkowich [C. C. A.] 150 F. 699. In the absence of special authority, an attorney has no power to assign or sell a claim or judgment of his client. Attorney for trustee under deed of trust has no authority to settle the beneficiaries' claim without his consent. Schroeder v. Wolf [Ill.] 81 N. E. 13. Without special authority an attorney has no power to sell or assign a judgment of his client. Id.

28. In the absence of fraud, decrees entered by consent of counsel bind their clients, the consent of the attorneys being in law the consent of their clients. Hollenbeck v. Glover [Ga.] 57 S. E. 108.

29. Sebree v. Sebree, 30 Ky. L. R. 670, 99 S. W. 282; Schroeder v. Wolf, 127 Ill. App. 506.

30. An attorney empowered to recover judgment and sell property securing it at public auction has no authority to contract with a third person to sell it at a specified sum for a stipulated compensation. National Bk. of Commerce v. Bowman, 30 Ky. L. R. 1236, 100 S. W. 831. An attorney has no implied authority to employ assistant counsel. Continental Adjustment Co. v. Hoffman, 123 Ill. App. 69. See ante, § 7, Compensation and Lien.

Contra: An attorney has authority to empower another lawyer to appear for him, and the client is bound by such appearance. Reich v. Cochran, 102 N. Y. S. 827.

31. But an attorney, employed merely to collect rents and serve certain notices, has no authority to make new contracts for his client. McLain v. Nurnberg [N. D.] 112 N. W. 243.

32. Such decree will be vacated if it be shown that no such authority existed. Miocene Ditch Co. v. Moore [C. C. A.] 150 F. 483.

33. Priddy v. MacKenzie [Mo.] 103 S. W. 968.

34. Attorney's settlement of claim by forged release. Riley v. Boston Elevated R. Co. [Mass.] 81 N. E. 197.

35. Fenimore v. White [Neb.] 111 N. W. 204. Ratification by plaintiff of a settlement obtained by his counsel through a forged power of attorney precludes such plaintiff from a subsequent recovery. Memphis St. R. Co. v. Roe [Tenn.] 102 S. W. 343. An unauthorized purchase of property by an attorney in his client's name is ratified by the client's subsequent statement that he had bought it and wished to sell it. Ford v. Bigger, 80 Ark. 300, 97 S. W. 65. A litigant

favor of his client.[36] The right to serve an attorney with notice is not necessarily terminated by judgment or decree in the cause.[37] When an attorney is employed as to matters outside professional duty, the ordinary rules of agency apply.[38]

§ 9. *Rights and liabilities to third persons.*[39]—The general principles of ageney apply,[40] and third persons who know that an attorney is acting in disloyalty to his client cannot rely on his acts as binding the client.[41] In some cases an attorney at law may be treated as the agent of his client and be jointly liable with him.[42] An agreement, not itself champertous, by which an attorney is bound to pay a third party a part of fees which he may earn under a champertous contract is enforceable.[43] A judgment debtor who settled with the attorney for the creditors, some of whom were minors and did not receive their shares, cannot be substituted to any rights of the minors against the attorney, in a suit by them to set aside the settlement.[44]

§ 10. *Law partnerships and associations.*[45]—As in case of other partnerships, all the partners are liable for the act of each in respect to firm transactions,[46] and the firm must account to clients for money collected by one partner.[47]

§ 11. *Public attorneys. A. Attorneys general.*[48]—An attorney general may exercise all the common-law powers incidental to his office in addition to those expressly conferred by statute.[49] His statutory authority cannot be enlarged or diminished by the interpretation which other officers put on the statute.[50] A state is not liable for services rendered under a contract with its attorney general which

who receives money paid under an order of court based on a settlement of the suit by his attorney cannot afterwards deny the attorney's authority to settle. State v. Spokane [Wash.] 87 P. 944. A party who prosecutes a liquor nuisance in his own name by an attorney is estopped to deny that the attorney represents him. Plank v. Hertha [Iowa] 109 N. W. 732.

36. Such unauthorized release will be set aside. Van Kannell Revolving Door Co. v. Astor, 105 N. Y. S. 683.

37. Client bound by notice to attorney of motion to vacate order of dismissal where notice was given at same term in which order was entered. Krieger v. Krieger, 120 Ill. App. 634.

38. Representations by the attorney of an obligee inducing the obligor to make the obligation, are binding on the former, though he also represented the obligor. An obligation, induced by representations of the obligee's attorney, that unless made the obligor's sons would be criminally prosecuted is void. Beal & Doyle Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58. A deed delivered to the attorneys of the grantee in payment of a judgment against the grantor is a sufficient delivery where the grantee had requested the grantor to settle the matter with his attorneys. Elliott v. Morris [Tex. Civ. App.] 17 Tex. Ct. Rep. 259, 98 S. W. 220.

39. See 7 C. L. 345.

40. Fortune v. English, 226 Ill. 262, 80 N. E. 781.

41. A purchaser of land from an attorney, having notice of facts indicating that it was procured from the grantor's client through fraud and disloyalty, should be required to settle with the client for the purchase price instead of with the attorney. Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922. Purchase of client's land by attorney as affecting rights of subsequent innocent purchaser. Railsback v. Leonard, 118 La. 916, 43 So. 548. In an action to settle the affairs of an insolvent firm a clandestine agreement between the firm's attorneys and the attorney for certain creditors that the former should try to get all possible allowances for their services without notice to the other creditors and divide them with the latter attorney is void as against public policy. Fried v. Danziger, 105 N. Y. S. 44.

42. If an attorney on behalf of his client and himself causes an attachment against one party to be levied on the goods of another in such other's possession, the attorney and client may be joined as trespassers. Williams v. Inman, 1 Ga. App. 321, 57 S. E. 1009. An attorney who cashed a check as a retainer from a corporation after knowledge that a receiver had been appointed therefor will be required to turn over the amount to the receiver. Bowker v. Haight & Freese Co., 146 F. 257.

43. Kelerher v. Henderson [Mo.] 101 S. W. 1083.

44. Missouri, K. & T. R. Co. v. Ferris [Tex. Civ. App.] 99 S. W. 896.

45. See 7 C. L. 345.

46. Liability to client for negligence. Priddy v. MacKenzie [Mo.] 103 S. W. 968.

47. Lupton v. Taylor [Ind. App.] 78 N. E. 689.

48. See 7 C. L. 345. See Quo Warranto, 8 C. L. 1582, and like topics for authority to bring prerogative writs.

49. A state may remove municipal officer for misconduct through its attorney general, and the latter's power is not taken away by the Minnesota statute requiring county attorneys to prosecute for violations of statute. State v. Robinson [Minn.] 112 N. W. 269. Power of attorney general to file motion for temporary continuance in suit brought by district attorney, in order that state's interests may be protected by legislature. State v. Hackley [La.] 44 So. 272.

50. Hord v. State [Ind.] 79 N. E. 916.

he had no authority to make, nor can such a contract be ratified by any other authority than the legislature.[51] The Indiana statute authorizing the attorney general to employ assistants does not empower him to continue such employment beyond his official term.[52] The employment of an attorney for a private interest to assist in the prosecution of a suit by the United States in the public interest is in the discretion of the attorney general, and should not influence the action of the court if the object of the private party and the United States is one and the same.[53] Though a court may compel an attorney general to grant leave to prosecute a suit, it should only do so where his refusal of such leave is extreme and clearly indefensible.[54]

(§ 11) *B. District and state's or prosecuting attorneys.*[55]—A constitutional provision that county attorneys may be elected or appointed as provided by law does not create such office until the legislature determines it is elective or appointive.[56] Prosecuting attorneys are usually so far regarded as general officers that their compensation must be fixed by general law,[57] and their districts need not be coterminous with those of the court in which they act.[58] Special prosecutors appointed on the disqualification of the regular attorney [59] have all the power for the purposes of the case that the regular prosecutor would have had,[60] but have no authority to take charge of any other matter before the grand jury.[61] A statute imposing on a county from which venue is changed costs of criminal trials does not include the fees of a special prosecutor appointed on disqualification of the district attorney.[62] A county attorney who is required to institute proceedings for the benefit of the county may bind the county to pay the necessary and reasonable expenses thereof,[63] but a statute providing that all necessary expenses incurred by

51. In a suit to recover from the state for services rendered under a contract with the attorney general, the burden is on the plaintiff to show that the attorney general had power to employ him. Hord v. State [Ind.] 79 N. E. 916.

52. Nor does the acquiescence of the succeeding attorney general authorize such appointee to continue to represent the state, but he must be reappointed. Hord v. State [Ind.] 79 N. E. 916.

53. United States v. Chandler-Dunbar Water Power Co. [C. C. A.] 152 F. 25.

54. Court not justified in compelling attorney general, by mandamus, to grant such leave. Lamb v. Webb [Cal.] 91 P. 102.

55. See 7 C. L. 346. General propositions as to terms and salary are treated in Officers and Public Employees, 8 C. L. 1191.

56. Nor does a provision extending the term of officials extend the term of attorneys employed by the county commissioners. People v. Lindsley [Colo.] 86 P. 352. Construction of Colorado laws providing for the office of attorney for the city and county of Denver. Id.

57. Prosecuting attorneys are not local officers, but are a part of the permanent organization of the government of the state, hence a statute providing for their compensation, which specifies the maximum amount thereof in certain counties, and fixes the salary in other counties on a basis of population, is unconstitutional and void as being a law of a general nature lacking uniform operation throughout the state. State v. Lucas County Com'rs, 7 Ohio C. C. (N. S.) 519.

58. Statute creating superior court not invalid because the prosecuting attorney of the circuit, some counties of which were without the superior court district, was made prosecutor in such superior court. Elkhart County Com'rs v. Albright [Ind.] 81 N. E. 578.

59. Under a statute proscribing the duties of a county attorney, the court can only appoint a substitute, for reasons disqualifying the county attorney from performing such statutory duties. State v. Barber [Idaho] 88 P. 418. Under a statute providing for the appointment of a special prosecuting attorney when the regular prosecutor's interest in a case is inconsistent with his official duties, a recital that the regular prosecutor had been employed by defendant is sufficient to sustain the appointment. And it will be presumed on appeal that such special prosecutor qualified according to statute. State v. Wilson, 200 Mo. 23, 98 S. W. 68.

60. State v. Wilson, 200 Mo. 23, 98 S. W. 68. Where a county attorney is disqualified to conduct a case, a special attorney duly appointed in his place will be presumed to have authority to prosecute an appeal, where there is no repudiation of such authority. Lake City Elec. Light Co. v. McCrary [Iowa] 110 N. W. 19.

61. Invalidity of special prosecutor's appointment as affecting his compensation. State v. Miller [Iowa] 109 N. W. 1087.

62. State v. Lewis & Clarke County, 34 Mont. 351, 86 P. 419.

63. Christner v. Hayes County [Neb.] 112 N. W. 347.

the district attorney in criminal actions are county charges does not authorize him to offer a reward to be paid by the county for evidence of an offense not then committed.[64] Under the Kentucky constitution, though the salary of a county attorney was not fixed before his election, but afterwards by the court which had jurisdiction to do so, it cannot be changed during his term.[65] Under the Arkansas statute a prosecuting attorney is not entitled to commissions on money collected during his term of office on a judgment rendered during the term of his predecessor on a forfeited bail bond.[66] A district attorney whose duty requires him to assist in prosecuting a case removed to his county is not entitled to extra compensation therefor, though he was employed by the district attorney of the county from which the case was removed with the approval of the judge of such county.[67] Prosecuting attorneys are not required by the Washington statute to represent school districts without extra compensation.[68] In some states they are compensated by fees.[69] They represent the county in all litigation to which it is a party,[70] and are usually authorized to bring suits on its behalf,[71] but will rarely be compelled thereto.[72] Such suits are sometimes permitted or required to be on complaint of third persons.[73] Duties outside the scope of his powers cannot be imposed by county officers.[74] There is no rule of law or public policy that exempts a district attorney or acting district attorney from punishment for contempt of court.[75]

(§ 11) *C. Municipal attorneys.*[76]—In construing an ordinance specifying the city attorney's duties, all duties naturally pertaining to his office will be included, unless the language clearly indicates the contrary.[77] The powers of such an attorney extend to all matters requiring action during his term.[78] When the office of city attorney is elective and his duties are defined by law, he is not subject to the control of the city council in matters which concern the public in general rather than the city as an individual.[79] Where a statute provides that a

64. McNeil v. Suffolk County Sup'rs, 100 N. Y. S. 239.

65. Spalding v. Thornbury [Ky.] 103 S. W. 291.

66. Hernn v. Sharp County [Ark.] 98 S. W. 704.

67. People v. Neff, 105 N. Y. S. 559.

68. Sufficiency of evidence in action by prosecuting attorney to recover for services rendered school district. Excessive verdict. Bates v. School Dist. No. 10 [Wash.] 88 P. 944.

69. Construction of Illinois laws as to compensation of the state's attorney of Cook county. Cook County v. Healy, 222 Ill. 310, 78 N. E. 623. Right of prosecuting attorney to allowance of fee under North Carolina statute. State v. King, 143 N. C. 677, 57 S. E. 516.

70. A county attorney in Oklahoma is the agent of the county in all litigation to which it is a party, and his acts bind the county within the scope of his agency. Logan County Com'rs v. State Capital Co., 16 Okl. 625, 86 P. 518.

71. In Ohio the prosecuting attorney has authority to bring an action requiring banks to account for and restore interest derived improperly from the loan of county funds. State v. National Bks., 4 Ohio N. P. (N. S.) 245.

72. The Louisiana supreme court has no jurisdiction of a mandamus suit to compel a district attorney to bring suit to annul a municipal charter, or to excuse himself so that a district attorney pro tem might be appointed for the purpose. State v. Lancaster, 118 La. 24, 42 So. 583.

73. Suit will not be dismissed as collusive merely because it was instituted by state's attorney upon solicitation of private persons and is conducted with assistance of special counsel employed by such persons, where he does not receive or expect compensation for his services and claims to be acting solely in behalf of the public. People v. Decatur, etc., R. Co., 120 Ill. App. 229.

74. In Kentucky the court has no power to appoint the county attorney back tax collector and require him to collect such taxes for a contigent fee. Spalding v. Thornbury [Ky.] 103 S. W. 291.

75. State v. Reid, 118 La. 827, 42 So. 455.

76. See 7 C. L. 347.

77. Johnson v. Winfield [Kan.] 89 P. 657.

78. An attorney who has been employed by a municipality for five years has authority to enter a plea in an action against it which had been pending for over eight years, where his term does not expire for several days afterwards. Munley v. Sugar Notch Borough, 215 Pa. 228, 64 A. 377.

79. City attorney not bound by order of city council to dismiss suit for penalty for violation of ordinance relating to gaming such suit being essentially criminal in nature though civil in form. Flynn v. Springfield, 120 Ill. App. 266.

city attorney's compensation must be specified by ordinance, he cannot claim compensation which was not so specified.[80] He is not entitled to extra compensation for any act within his ordinary duties.[81] A city council cannot authorize the city attorney to employ and fix the compensation of an assistant.[82]

Attorneys for the Public, see latest topical index.

AUCTIONS AND AUCTIONEERS.[83]

License and regulation.[84]—In the exercise of police power, reasonable[85] and indiscriminatory[86] regulations may be imposed.

Sale.[87]—The authority of the auctioneer may be revoked any time before a valid sale is consummated,[88] especially if the revocation is brought home to the bidder.[89] Until accepted a bid is a mere offer, and the property may be withdrawn by the auctioneer[90] unless he is bound to sell.[91] Where a sale is upon condition that the purchase money be paid in cash or by a secured note, title does not pass until the production of such note, if possession of the property is retained.[92]

Rights and liabilities.[93]—Failure of an auctioneer to pay over the proceeds of a sale to the consignor constitutes a breach of his statutory bond without demand.[94] The right of a purchaser threatened with eviction to withhold payment, in Louisiana, does not of itself relieve him from interest,[95] and, if the title is held good, he must pay interest on the credit price from the date of such adjudication.[96] Specific performance will not be decreed if it will work inequity.[97]

Audita Querela; Australian Ballots; Automobiles; Autrefois Acquit; Baggage, see latest topical index.

80. Insufficiency of mere resolution or informal promises by councilmen. Johnson v. Winfield [Kan.] 89 P. 657.

81. Where it is the duty of municipal attorneys to represent all the city departments, they cannot recover compensation for representing the city school board in a federal court. Tarsney v. Board of Education of Detroit, 147 Mich. 418, 13 Det. Leg. N. 1021, 110 N. W. 1093. Liability of county for services of its attorney in Federal court. Nichols v. Shawnee County Com'rs [Kan.] 91 P. 79.

82. City of Bowling Green v. Gaines, 29 Ky. L. R. 1013, 96 S. W. 852.

83. See 7 C. L. 347. **See, also, Clark and Skyles Agency, 1860.**

84. See 3 C. L. 394.

85. Ordinance prohibiting the sale of jewelery and watches held reasonable because of the opportunity for fraud connected therewith. State v. Bates [Minn.] 112 N. W. 67.

86. Ordinance prohibiting auctioneers from selling jewelry and watches held not invalid as "discriminatory as against a certain business within a certain class." State v. Bates [Minn.] 112 N. W. 67.

87. See 7 C. L. 347.

88. Where, before memorandum is executed, employer publicly requests that property be again put up for sale, insisting that sale bid was his, and states that property will not be delivered, authority of auctioneer is revoked. Byrne v. Fremont Realty Co., 105 N. Y. S. 838.

89. Revocation publicly made in presence of bidder charges him with notice that party claims authority to revoke, and binds him if such authority in fact exists. Byrne v. Fremont Realty Co., 105 N. Y. S. 838.

90. McPherson Bros. Co. v. Okanogan County [Wash.] 88 P. 199.

91. Officer in charge of sale of county lands held to have discretion to refuse inadequate price, and, in absence of showing, it will be presumed that he acted in good faith in rejecting a bid. McPherson Bros. Co. v. Okanogan County [Wash.] 88 P. 199.

92. Where horse sold dies in meantime, seller must bear loss. Brown v. Reber, 30 Pa. Super. Ct. 114.

93. See 7 C. L. 348.

94. No demand is necessary. Plummer v. Bankers' Surety Co., 52 Misc. 97, 101 N. Y. S. 529. Request after sale for proceeds is sufficient demand if demand is necessary. Id.

95. Must deposit price as required by Civ. Code, art. 2559. Tobin v. O'Kelly, 117 La. 753, 42 So. 258.

96. And not from date of judgment condemning him to comply with terms of adjudication. Tobin v. O'Kelly, 117 La. 753, 42 So. 258. Duruty's Case, 42 La. Ann. 362, 7 So. 555, and Tobin's Case 115 La. 366, 39 So. 33, distinguished, as applying only to cash price. Id.

97. As where owner, who made sale bid or one of similar amount, immediately so declares and demands resale, and upon its being refused states that he will not abide the sale. Byrne v. Fremont Realty Co., 105 N. Y. S. 838.

BAIL, CIVIL.[98]

§ 1. Jurisdiction to Grant (319).
§ 2. Rights and Liabilities of Sureties on Bail Bonds and Recognizance (319).

The law of arrest in civil cases, including the bond given on discharge of insolvent debtor from body execution, where that practice obtains, is elsewhere treated.[99]

§ 1. *Jurisdiction to grant.*—Where the warrant of arrest issues from a Federal court, application for bail must be made to a United States commissioner.[1]

§ 2. *Rights and liabilities of sureties on bail bonds and recognizance. Validity of bond.*—A valid recognizance can only be entered into on a legal arrest.[2] and the invalidity of the arrest is not waived by an application to take the poor debtor's oath.[3] Mere irregularities in procedure do not affect the validity of the bond.[4]

Surrender of principal.—The right of the bail to the custody of and the power to seize and surrender his principal is incidental to the relation.[5]

Breach.—Where a defendant was not originally liable to arrest, he surely cannot be held even upon a surrender of him by his sureties.[6] The failure of the defendant to surrender within the time[7] and in the manner[8] provided by law, and to render himself amenable to such process as is contemplated by the bond,[9] constitutes a breach, and the burden is upon the debtor to see that all conditions relative thereto are complied with.[10] Discharge by a court having jurisdiction cannot constitute a breach.[11] Where petition for discharge is denied, no order of remand is necessary to constitute defendant's failure to surrender a breach of the bond.[12]

Conclusiveness of judgment against principal.—The judgment against the principal is conclusive upon the surety in an action on the bond.[13]

Discharge.—Surrender of the principal by the bail releases the latter from

98. See 7 C. L. 348.

99. See Civil Arrest, 7 C. L. 653.

1. Rev. St. § 991 (U. S. Comp. St. 1901, p. 709). Johnson v. Crawford, 154 F. 761.

2, 3. Mann v. Cook [Mass.] 81 N. E. 286.

4. Failure of the sheriff to return the writ of arrest before judgment does not affect the validity of the bond given to procure release. Banning v. Roy [Or.] 82 P. 708.

5. Upon execution of bail bond, principal becomes prisoner of bail who has legal authority to keep him in custody, and to terminate his liability at any time by surrendering him to court or to sheriff. Keyes v. Bennett, 218 Ill. 625, 75 N. E. 1075, afg. 122 Ill. App. 60.

6. Defendant having been arrested on a body execution, was subsequently discharged on habeas corpus. On being surrendered by his sureties he sued out another writ and was again discharged. Held, no error. Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969.

7. The default of the debtor fixes the liability of the sureties on his recognizance. Sureties on recognizance of poor debtor. Carpenter v. Goddard, 191 Mass. 54, 76 N. E. 953. Bond of insolvent debtor, conditioned upon his surrender in default of obtaining his discharge upon a day certain, is forfeited where he does not surrender within statutory period after the entry of order denying discharge, irrespective of notice of such entry. Surrender within eight days after entry of order and immediately upon obtaining knowledge of its entry is not a defense in action on bond, the statute requiring surrender within forty-eight hours after entry of order. Marks v. Willenski, 31 Pa. Super. Ct. 177.

8. Surrender by principal within required time after his arrest does not release bail where no notice thereof was given to judgment creditor. Ryder v. Ouellette [Mass.] 79 N. E. 820.

9. Under a bond conditioned that defendant at all times render himself amenable to such process as might be issued to enforce the judgment, the fact that he was in attendance upon court during term in which judgment was rendered and for a short time thereafter is not a defense. Banning v. Roy [Or.] 82 P. 708.

10. Debtor takes upon himself the risk of proper notice being given. That court refused to issue notice is not a defense. Ryder v. Ouellette [Mass.] 79 N. E. 820.

11. Where principal upon notice to judgment creditor surrenders, and is discharged, the fact that order of discharge proceeded from an erroneous view of the law on part of magistrate does not constitute a breach. Mann v. Cook [Mass.] 81 N. E. 286.

12. Sozio v. Giuliano [N. J. Err. & App.] 67 A. 601.

13. Cannot show that acts upon which judgment was predicated were not willful, and that liability was therefore discharged by discharge of principal in bankruptcy. McChristal v. Clisbee, 190 Mass. 120, 76 N. E. 511.

further liability,[14] if in the manner provided by law,[15] hence, when the right of the bail to seize and surrender his principal has ceased, the relation terminates.[16] At common law the liability of the bail is fixed by the issuance of a capias ad satisfaciendum, and the return thereof and a discharge in bankruptcy of the principal prior thereto releases the bail,[17] as such discharge prevents the subsequent issuance of the writ,[18] and the entry of a formal exoneretur is not essential to the maintenance of such a defense in an action on the bond,[19] but an adjudication in bankruptcy of the principal subsequent to default does not affect the liability of the sureties for substantial damages.[20]

BAIL, CRIMINAL.

§ 1. Authority to Take and Right to Give Bail (320).
§ 2. Making of Recognizance and Sufficiency Thereof (321).
§ 3. Fulfillment or Forfeiture. Discharge; Rights and Liabilities of Sureties (321).
§ 4. Enforcement of Bond or Recognizance (322).
§ 5. Remission of Forfeiture and Return of Deposits Made in Lieu of Bail (322).

§ 1. *Authority to take and right to give bail.*[21]—By constitutional provisions generally adopted bail is of right except in capital cases[22] where the proof is evident or the presumption great.[23] Where a statute provides that the court may admit to bail on habeas corpus, a defendant actually in the presence of the court though not on habeas corpus, may be admitted to bail.[24] Where a court had power to admit defendant to bail on his appearing for trial, his subsequent petition for a writ of habeas corpus must show that he did so appear in order to entitle him to bail.[25] Admission to bail, on appeal, rests in discretion of the court,[26] unless the statute otherwise provides,[27] the primary authority being usually in the trial court.[28] Grant of a writ of error to the Federal supreme court does not deprive the state court of jurisdiction to set aside an order admitting to bail pending the hearing of such writ, bail not having been taken thereunder.[29] Admission to bail does not follow of right from the issuance of a certificate of probable cause whereby execution of the sentence is stayed pending appeal.[30] The "stay" which is under the New York statutes prerequisite to the right to give bail on appeal is the stay re-

14. Keyes v. Bennett, 218 Ill. 625, 75 N. E. 1075 afg. 122 Ill. App. 60.

15. Under statute providing that surrender of principal by the bail shall be in presence of an officer, surrender not made in presence of such officer is inoperative. Rev. Laws, c. 169, § 19. Ryder v. Ouellette [Mass.] 79 N. E. 820.

16. Discharge of principal in bankruptcy before liability of bail has become fixed. Keyes v. Bennett, 218 Ill. 625, 75 N. E. 1075, afg. 122 Ill. App. 60.

17, 18. Keyes v. Bennett, 218 Ill. 625, 75 N. E. 1075, afg. 122 Ill. App. 60.

19. Sec. 24, c. 16, Hurd's Rev. St. 1901, provides that, upon discharge in bankruptcy of the principal from liability to pay judgment secured by the bond, bail shall be entitled to have a formal exoneretur entered on the records which shall have the same effect as surrender of the principal would have had. Keyes v. Bennett, 218 Ill. 625, 75 N. E. 1075, afg. 122 Ill. App. 60.

20. Bankruptcy Act July 1, 1898, provides that liability of a surety shall not be "altered" by debtor's subsequent "discharge" in bankruptcy. Carpenter v. Goddard, 191 Mass. 54, 76 N. E. 953.

21. See 7 C. L. 348.

22. It is error not to admit defendant to bail on a prosecution for murder where a charge on manslaughter would be required. Defendant killed another for insulting a female relative of the defendants and was indicted for murder. Ex parte Proctor [Tex. Cr. App.] 99 S. W. 1010.

23. The burden is on the prosecution to bring the case within the constitutional exception as to evident proof or great presumption. State v. District Ct. of Second Judicial Dist. [Mont.] 90 P. 513.

24. Rev. Stats. Mo. 1899, § 2702. Ex parte McAnally, 199 Mo. 512, 97 S. W. 921.

25. Ex parte Ruef [Cal.] 89 P. 605.

26. Vanderford v. Brand, 126 Ga. 67, 54 S. E. 822; Shuler v. Wilis, 126 Ga. 73, 54 S. E. 965.

27. The Federal statute allowing bail "on all arrests in criminal cases" authorizes bail at any stage of the prosecution. Rev. St. § 1015. Bail on appeal. United States v. Louis, 149 F. 277.

28. The primary authority to admit to bail pending appeal from conviction of misdemeanor is in the circuit court. Ex parte Doyle [W. Va.] 57 S. E. 824.

29. Ex parte Collins, 151 F. 358.

30. In re Neil, 12 Idaho, 749, 87 P. 881.

sulting from the grant of a certificate of reasonable doubt and not that authorized pending application for such certificate.[31] An order admitting to bail at a time when accused was not entitled thereto will not be affirmed, because pending the appeal he has become so entitled.[32] A committing magistrate is usually authorized to fix bail [33] after he has acquired jurisdiction of the prosecution [34] and before he has relinquished it.[35] Entering into recognizance before such magistrate to await the action of the superior court impliedly waives a commitment trial.[36] The sheriff is bound to accept bail in the sum fixed by the magistrate,[37] and on surrender by the sureties he must accept a new bond in the sum originally fixed.[38] United States commissioners have power to accept bail, the amount having been fixed.[39]

§ 2. *Making of recognizance and sufficiency thereof.*[40]—The sufficiency of a bail bond before a court of the United States is determined by the laws of the state where the proceedings takes place.[41] A statutory requirement that the bond state whether accused is charged with a felony or a misdemeanor is satisfied by averments from which the degree of the offense appears.[42] A recognizance is not invalid because the principal failed to sign.[43] It is sufficient if it clearly state the offense charged without mention of any particular facts,[44] but the offense cannot be designated by name only unless it is an offense eo nomine.[45] Provision for acknowledgment before magistrate does not prohibit acknowledgment before any officer authorized to administer oaths.[46] Unimportant errors in a bail bond do not invalidate it or release sureties, but are treated as surplusage,[47] and alterations in a bail bond made with the consent of the sureties do not avoid the bond.[48] It must contain no conditions more erroneous than the statute requires.[49]

§ 3. *Fulfillment or forfeiture; discharge; rights and liabilities of sureties.*[50]—

31. Code Cr. Proc. § 555. People v. Reardon, 186 N. Y. 164, 78 N. E. 860.

32. People v. Reardon, 186 N. Y. 164, 78 N. E. 860.

33. A committing magistrate has primary authority to fix bail and his order thereon will not be set aside before indictment except on application to increase bail. Ex parte Wasson [Tex. Cr. App.] 17 Tex. Ct. Rep. 173, 97 S. W. 103.

34. A complaint being filed in a county court for the purpose of having an information based on it and a bail bond being taken before the information was filed. Leal v. State [Tex. Cr. App.] 102 S. W. 414; Ochoa v. State [Tex. Cr. App.] 102 S. W. 415.

35. After entry of order of commitment and issue of mittimus, magistrate loses authority to take bail. Reardon v. People, 123 Ill. App. 81. Justice may take bail after he has returned his transcript to the quarter sessions. Commonwealth v. Lamar, 32 Pa. Super. Ct. 200.

36. It need not appear to justify forfeiture that a commitment trial was had or expressly waived. Bird v. Terrell [Ga.] 57 S. E. 777.

37, 38. Ex parte Wasson [Tex. Cr. App.] 17 Tex. Ct. Rep. 173, 77 S. W. 103.

39. They are, under Act Cong. May 28, 1896, the successors of circuit court commissioners who were so authorized by Rev. St. § 1014. United States v. Louis, 149 F. 277.

40. See 7 C. L. 350.

41. Rev. St. § 1014. United States v. Zarafonitis [C. C. A.] 150 F. 77.

42. Thus, where code requires that if a defendant is charged with an offense that is a felony, or a misdemeanor, the bail bond shall state that he is charged with a felony, or a misdemeanor, the particular word "felony" or "misdemeanor" is not required to be used, it being sufficient if the specific offense is alleged. United States v. Zarafonitas [C. C. A.] 150 F. 97.

43. Commonwealth v. Lamar, 32 Pa. Super. Ct. 200.

44. A recognizance charging defendant with having sold and thereby "deprived the owner thereof of a horse, the same being the crime of larceny," sufficiently describes the crime to bind his sureties. Territory v. Minter [N. M.] 88 P. 1130. A bond charging defendant with "obtaining property by means of false representations and pretenses" sufficiently describes the offense. Territory v. Conner, 17 Okl. 135, 87 P. 591.

45. "Violating local option law" is not. Woods v. State [Tex. Cr. App.] 103 S. W. 895.

46. State v. Baird [Idaho] 89 P. 298.

47. The dates, in a bail bond, giving the time the court would convene and the defendant appear were incorrect, but the bond stated that defendant was to appear at the "next term." The errors were treated as mere surplusage and the bond as valid. Territory v. Conner, 17 Okl. 135, 87 P. 591.

48. Where the amount in a bail was reduced from $1,500 to $1,000, and the name of one of the sureties stricken out, the bond was not avoided, the alterations being made with the consent of the sureties. State v. Baird [Idaho] 89 P. 298. Consent may be shown by parol. Id.

49. Bond for "personal" appearance on charge of misdemeanor is void. Williams v. State [Tex. Cr. App.] 103 S. W. 929.

50. See 7 C. L. 351.

One under recognizance in the United States district court may be ordered to appear in any division thereof within the district.[51] A recognizance is discharged by appearance at the day fixed,[52] or by surrender of principal and giving of new recognizance,[53] but a surrender to a magistrate who has no authority to receive it does not discharge sureties.[54] Imprisonment of principal in another county is an "uncontrollable circumstance which prevented appearance without fault on his part."[55] Amendment of information does not discharge sureties.[56] Deficiency in the acknowledgment of the bond is no defense to sureties if the bond is accepted and the principal released thereon.[57]

§ 4. *Enforcement of bond or recognizance.*[58]—A bail bond unsigned by the committing magistrate can be proved by his identifying the signature and stating that he saw them made by the principal and surety,[59] and where the bond is lost it may be proved by secondary evidence.[60] A judgment rendered against a surety on a recognizance was void where the record failed to show that he was a surety or that any summons had issued against him directing him to show cause why judgment should not be given against him.[61] The scire facias takes the place of a declaration and its sufficiency as such must be determined from its averments unaided by the record.[62] Scire facias is "process awarded in court" which need not be made returnable within ninety days.[63] Slight variance between writ and recognizance may be disregarded.[64] Citations issued to sureties on a forfeited recognizance must state the date of the recognizance.[65] Where a scire facias fails because not issued in time for the return term, a new forfeiture is not prerequisite to the ordering of a second scire facias.[66] Judgment of forfeiture may be rendered at the term at which scire facias is returned.[67] Affidavit of defense that he "never became surety for anybody by the name of" the alleged principal is not a good plea of non est factum.[68] An action on a forfeited recognizance not being a criminal proceeding the prosecution may appeal.[69] The principal and surety are liable for clerk's costs in the court of appeals although a scire facias case was on such appeal dismissed on account of the bail bond being insufficient, the rule in civil cases that appellant is primarily liable therefor being applicable.[70] On appeal by the state from a judgment admitting defendant to bail, it is not necessary that the state show that it reserved an exception to the judgment at the time it was rendered.[71] A judgment in assumpsit on a forfeited recognizance is not a judgment on contract within the Pennsylvania exemption law.[72]

§ 5. *Remission of forfeiture and return of deposits made in lieu of bail.*[73]—

51. Hollister v. United States [C. C. A.] 145 F. 773.

52. Cannot be forfeited on failure to appear at a subsequent adjourned day. Allen v. Cape Brewery & Ice Co., 196 Mo. 435, 95 S. W. 417.

53. Young v. Deneen, 123 Ill. App. 380.

54. Bird v. Terrell [Ga.] 57 S. E. 777. A committing magistrate who has taken a recognizance to appear in superior court has no authority to accept a surrender of the municipal. Id.

55. Code Cr. Proc. 488, subd. 3. Woods v. State [Tex. Cr. App.] 103 S. W. 895.

56. Carter v. People 122 Ill. App. 77.

57. Territory v. Conner, 17 Okl. 135, 87 P. 591.

58. See 7 C. L. 352.

59. State v. Matlack [Del.] 64 A. 259.

60. Day v. State [Tex. Cr. App.] 101 S. W. 806.

61. Bonner v. Commonwealth [Ky.] 102 S. W. 247.

62. Hollister v. U. S. [C. C. A.] 145 F. 773. Not demurrable for failure to allege the nature of the charge and that it was pending at the time the recognizance was forfeited. Id.

63. Vir. Code 1887, § 3220. Lewis v. Commonwealth [Va.] 54 S. E. 999.

64. Hollister v. U. S. 145 F. 773.

65. "9" written over printed "8" in year held sufficient. Pearson v. State [Tex. Cr. App.] 101 S. W. 802.

66, 67. Bird v. Terrell [Ga.] 57 S. E. 777.

68. Commonwealth v. Lamar, 32 Pa. Super. Ct. 200.

69. United States v. Zarafonitis [C. C. A.] 150 F. 97.

70. Stephens v. State [Tex. Cr. App.] 99 S. W. 1122.

71. State v. Likes [Ala.] 41 So 777

72. Act April 9, 1849. Commonwealth v. Savage, 30 Pa. Super. Ct. 364.

73. See 7 C. L. 352.

If a recognizance given to the United States is forfeited, the proceeds belong to the United States and cannot be appealed to payment of the costs awarded a party.[74] By statute in some states the forfeiture may be remitted in whole [75] or in part,[76] if the principal subsequently surrenders himself or is arrested.

BAILMENT.

§ 1. Definition and Mode of Creation (323).
§ 2. Rights and Liabilities as Between Bailor and Bailee (324).
§ 3. Rights and Liabilities as to Third Persons (327).

The rights and liabilities arising from particular kinds of bailments are more fully treated in topics appropriate thereto,[77] this topic including only the general rules and cases arising from such relations as that between storekeeper and customer around which no such body of law has gathered as to permit of topics dealing therewith.

§ 1. *Definition and mode of creation.*[78]—A bailment is a delivery [79] of personal property for some particular purpose,[80] or a mere deposit,[81] upon a contract express or implied that after the purpose has been fulfilled the property shall be redelivered to the person who delivered it,[82] or otherwise dealt with according to his directions,[83] or kept until he reclaims it,[84] as the case may be. Generally there can be no bailment unless the identical thing bailed is to be returned to the bailor,[85] but the rule is not absolute, as the intention with which the subject-matter is placed in the possession of, or is held, by the alleged bailee, controls.[86] It is often difficult to determine whether a given transaction is a bailment or a sale.[87, 88]

74. A Russian sailor was arrested for desertion at the instance of the vice-consul and discharged on habeas corpus. On appeal by the vice-consul the sailor gave bond to the amount of $200 pending the appeal. The case being finally remanded to the district court by the supreme court for further proceedings, the vice-consul petitioned to have the bail applied to payment of his costs as the money had been paid into court, the sailor failing to appear. The petition was denied on the ground that the money belonged to the United States. United States v. Alexanderoff, 148 F. 652.

75. Ky. Code Cr. Prac. § 96, 98. Defendant was charged with murder and gave bail and appeared at the time mentioned, but soon left the state fearing an attack on his life. The grand jury indicted him for murder and the court on his failing to appear ordered the bond forfeited, awarding summons against the sureties. Before judgment against them had been given he returned for trial explaining his absence. Held that the court did not err in setting aside the forfeiture. Commonwealth v. Hillis, 29 Ky. L. R. 1063, 96 S. W. 873.

76. Code Cr. Proc. art. 491. Williams v. Stall [Tex. Cr. App.] 103 S. W. 929. Judgment entered for $100 on $500 recognizance. Id.

77. See Animals (Agistment), 9 C. L. 100; Carriers, 7 C. L. 522; Inns, Restaurants, and Lodging Houses, 8 C. L. 317; Warehousing and Deposits, 8 C. L. 2258, and like topics.

78. See 7 C. L. 353.

79. Where a purchaser of a dying business leaves the key to the place of business with the seller, the latter assumes the bailment and custody of property therein contained. Campbell v. Klein, 52 Misc. 123, 101 N. W. S. 577.

80. Bowen v. Isenburg Bros. Co. [Del.] 67 A. 152.

81. Deposit of valuables by bathers with proprietor of bathhouse. Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181. An agreement by a lessor of rooms to store boxes as part of the consideration for the lease may constitute the lessor a bailee for hire of the boxes and their contents. Henry v. Salmon [Mich.] 14 Det. Leg. N. 194, 111 N. W. 1035. The proprietor of a bathhouse is a bailee for hire, where for a consideration he furnishes bathrooms, bathing suits, and other accessories of the bath to bathers, and receives their money or other valuables for safekeeping. Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181. The delivery of a carpet to a person to be cleaned and stored until redelivered to the owner, for which service the owner is expected to pay, is a bailment for hire. Bowen v. Isenburg Bros. Co. [Del.] 67 A. 152.

82. Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181; Henry v. Salomon [Mich.] 14 Det. Leg. N. 194, 111 N. W. 1035; Knapp v. Knapp, 118 Mo. App. 685, 96 S. W. 295

83. Sprinkle v. Brim [N. C.] 57 S. E. 148; Knapp v. Knapp, 118 Mo. App. 685, 96 S. W. 295.

84. Campbell v. Klein, 52 Misc. 123, 101 N. Y. S. 577; Henry v. Salomon [Mich.] 14 Det. Leg. N. 194, 111 N. W. 1035; Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181.

85. Knapp v. Knapp, 118 Mo. App. 685, 96 S. W. 295; Chisholm v. Eagle Ore Sampling Co. [C. C. A.] 144 F. 670, quoting Powder Co. v. Burkhardt, 97 U. S. 110, 24 Law. Ed. 973.

86. Bailment of money. Knapp v. Knapp, 118 Mo. App. 685, 96 S. W. 295.

87, 88. The recognized distinction between

The inherent character, not the name, of the transaction must be considered,[89] and depends on the real intent and purpose of the contract,[90] being a question of law, when it turns wholly upon the construction of a written instrument,[91] and, in the absence of evidence of subsequent conduct of the parties, must be ascertained from the terms of the instrument.[92] In determining the intent, negotiations leading up to the contract out of which the litigation arises may be considered,[93] or, if the terms of a written instrument under which the parties act leave in doubt the true meaning and intent, resort may be had to the construction which the parties put upon it.[94] The relation of bailor and bailee does not exist between a passenger in a quasi public conveyance and the owner thereof.[95]

§ 2. *Rights and liabilities as between bailor and bailee.*[96]—Measure of damages for loss, injury, or conversion is elsewhere treated,[97] as are such general matters as limitations,[98] verdicts,[99] and the like. A bailee is not an insurer,[1] the obligation imposed by law requiring the exercise of ordinary care or diligence,[2] the

bailment and sale is that, when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title of the property is changed, and the transaction is a sale. Chisholm v. Eagle Ore Sampling Co., [C. C. A.] 144 F. 670, quoting Sturm v. Boker, 150 U. S. 312, 37 Law. Ed. 1093.

Held sale: Contract for the reduction of ore, providing that plaintiff should deliver ore to sampling company for reduction, the ore to be paid for by the company at stated rates. Chisholm v. Eagle Ore Sampling Co. [C. C. A.] 144 F. 670. Contract for sale of cattle at specified aggregate weight, and price payment not to be made for several months, during which time cattle are to be fed by vendee, and then resold to vendor. Gills v. George, 8 Ohio C. C. (N. S.) 393. If contract is substantially one of conditional sale, the fact that the purchase money is demanded as hire or as rent and divided into sums payable in installments throughout the term of credit will not render the transaction one of bailment for hire. Hamilton v. Hilands [N. C.] 56 S. E. 929.

Contract termed lease for use of piano. Hamilton v. Hilands [N. C.] 56 S. E. 929. Option to purchase machinery on performance of covenants in lease, and payment of $2 in addition to specified rent. Harron, Rickard & McCone v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512.

Held Bailment: Consignment for sale with title reserved to consignor. Federal Chem. Co. v. Green, 30 Ky. L. R. 223, 97 S. W. 803; In re Fabian, 151 F. 949. Agreement for lease of sheep providing that title to sheep and their increase should remain in lessor. Rich v. Utah Commercial & Sav. Bk., 30 Utah, 334, 84 P. 1105. Contract for use of engine held bailment and not sale. Miller v. Douglas, 32 Pa. Super. Ct. 158. Property delivered to consumer to use for a stated period, paying rental, with option of returning or purchasing at a specified time and specified sum. In re Froelich Rubber Refining Co., 139 F. 201. Contract for rental of personal property for specified period and price, and containing a provision that in case of purchase the rent should apply on the price, and that the title to the machine should remain in the manufacurer until paid for. Lambert Hoisting Engine Co. v. Carmody, 79 Conn. 419, 65 A. 141. Shipment of pianos to dealer under contract stipulating that they are furnished on memorandum, and stating price, and providing that dealer pay cash for pianos sold, though invoices were sent. In re Smith & Nixon Piano Co. [C. C. A.] 149 F. 111.

Although invoices were sent, when the pianos were furnished under the contract, containing a recital that the shipper sold the pianos described to the corporation. In re Smith & Nixon Piano Co. [C. C. A.] 149 F. 111.

89. Hamilton v. Hilands [N. C.] 65 S. E. 929.

90. Lambert Hoisting Engine Co. v. Carmody, 79 Conn. 419, 65 A. 141.

91. In re Smith & Nixon Piano Co. [C. C. A.] 149 F. 111.

92. Harron, Rickard and McCone v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512.

93. Lambert Hoisting Engine Co. v. Carmody, 79 Conn. 419, 65 A. 141.

94. Chisholm v. Eagle Ore Sampling Co. [C. C. A.] 144 F. 670.

95. Cotton v. Willmar & S. F. R. Co., 99 Minn. 366, 109 N. W. 835. The employment by a person of a livery team with a driver to carry him to a specified place does not create the relation of master and servant between the passenger and the driver, over whom he has no rightful control or management, rendering the passenger liable for the negligence of the driver, although he is responsible for his own personal negligence. Id.

96. See 7 C. L. 354.

97. See Damages, 7 C. L. 1029.

98. See Limitation of Actions, 8 C. L. 768.

99. See Verdicts and Findings, 8 C. L. 2245.

1. Campbell v. Klein, 52 Misc. 123, 101 N. Y. S. 577.

2. Littlefield v. New York City R. Co., 51 Misc. 637, 101 N. Y. S. 75; Campbell v. Klein, 52 Misc. 123, 101 N. Y. S. 577; Baker & Lockwood Mfg. Co. v. Clayton [Tex. Civ. App.] 103 S. W. 197; Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181; Bowen v. Isenberg Bros. Co. [Del.] 67 A. 152. An instruction that a warehouseman is only bound to exercise such care as is taken by other persons owning and keeping storage warehouses in the vicinity of his warehouse is erroneous. Barker v.

failure to use which renders him liable for injuries proximately resulting from his negligence.[3] He may, unless prevented by rules of public policy,[4] limit his liability by contract to that for gross negligence only.[5] Reasonable care is such care as an ordinarily prudent man would take under like circumstances with respect to his own property.[6] The legal requirement is that there must be sufficient evidence to warrant a finding of negligence in order to fix liability on a bailee.[7] The burden of proof is on the bailor to establish negligence on the part of the bailee,[8] and this burden is never shifted.[9] The necessary evidence may be supplied by presumption,[10] such presumption arising against a bailee for hire, where it appears that the subject of the bailment was injured or destroyed while in his custody,[11] or from failure to deliver the property on demand.[12] For injuries to the property bailed due wholly to the negligence of the bailor, the bailee its not liable.[13] A bailee cannot set up title in himself,[14] but may, if goods are claimed by third person, refuse at

Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143; Evans v. Nail [Ga. App.] 57 S. E. 1020. A gratuitous bailee is held to ordinary care. Hotel keeper taking care of property of one no longer a guest. Ross v. Daugherty, 127 Ill. App. 572.

3. Baker & Lockwood Mfg. Co. v. Clayton [Tex. Civ. App.] 103 S. W. 197. Although a bailee for hire is not liable for injury to carpets deposited with him, due to a fire occurring without bailee's negligence, yet he is liable for injury resulting from any negligence on his part failing to take proper care of the carpets after the fire has occurred. Bowen v. Isenburg Bros. Co. [Del.] 67 A. 152.

4. See Carriers, 7 C. L. 522, as to limitation of liability by carriers.

5. Hire of horses. Evans v. Nail [Ga. App.] 57 S. E. 1020.

6. Bowen v. Isenburg Bros. Co. [Del.] 67 A. 152. A person hiring a livery horse is not bound to exercise the experience of an expert horseman or a veterinary surgeon in the care of the animal. Welch v. Fransioli [Wash.] 90 P. 644.

7. Swenson v. Snare & Triest Co., 145 F. 727.

Held negligent: A revenue collector sold three kegs of brandy in distraint and agreed with the purchaser to ship the brandy to a third person and to send the bill of lading to the purchaser, but failed to do so, and, the brandy having been lost, he was held liable for its value including the price of revenue stamps for which the purchaser paid. Sprinkle v. Brim [N. C.] 57 S. E. 148. Working hired horse while it was exhausted and sick. Carney v. Rease, 60 W. Va. 676, 55 S. E. 729. Proprietor of a bathing establishment who receives from his patrons a consideration for the privilege of bathing and assumes the custody of their money and valuables. Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181

Held not negligent: Storekeeper held not liable for loss of garment laid off to try on new one. Wamser v. Browning, King & Co. [N. Y.] 79 N. E. 861. That bailee permitted another to have a key to building from which goods were lost by burglary, even if a negligent act in a general sense, is not material, in the absence of a showing that the particular key was connected with the crime. Campbell v. Klein, 52 Misc. 123, 101 N. Y. S. 577. Evidence insufficient to connect particular key with the crime. Id. Evidence sufficient to show negligence of motorman, but insufficient to show contributory negligence of bailee's driver of truck rented, injured in collision, or to show any fault on part of the bailees. Littlefield v. New York City R. Co., 51 Misc. 637, 101 N. Y. S. 75. Defendant's motion for peremptory instruction to find for it should have been sustained. Cumberland Tel. & T. Co. v. Tally, 30 Ky. L. R. 1328, 101 S. W. 307. A telegraph company maintaining a staff of messengers not liable, in the absence of a special agreement to deliver, for failure of messenger to deliver package handed to him by one accepting his services. Hirsch v. American Dist. Tel. Co., 112 App. Div. 265, 98 N. Y. S. 371. Bailee of a tent not liable for injury to it received at another place, irrespective of the cause, although he negligently permits the tent to be moved there. Baker & Lockwood Mfg. Co. v. Clayton [Tex. Civ. App.] 103 S. W. 197. Driving a livery horse known to be afraid of trains within forty feet distance of a railroad crossing, while a train is passing, does not in itself show negligence. Cumberland Tel. and T. Co. v. Tally, 30 Ky. L. R. 1328, 101 S. W. 307. Where a rented truck was placed by the bailees in charge of an experienced driver, and the truck, without any negligence on the part of the driver, was injured in a collision with a street car, caused by the negligence of the motorman, the bailees were not liable to the bailors for damages sustained. Littlefield v. New York City R. Co., 51 Misc. 637, 101 N. Y. S. 75. Injury to carpets by fire, without fault of bailee. Bowen v. Isenburg Bros. Co. [Del.] 67 A. 152. Where bailee, after doing work on bristle, repacked and directed it to bailor and delivered it to the same common carrier that bailor had used in sending it, and the bristle was lost by the carrier's negligence, the bailee was not liable to the bailor for its loss. Polack v. O'Brien, 114 App. Div. 366, 100 N. Y. S. 385.

8. Polack v. O'Brien, 114 App. Div. 366, 100 N. Y. S. 385.

9. Campbell v. Klein, 52 Misc. 123, 101 N. Y. S. 577.

10, 11. Swenson v. Snare & Triest Co., 145 F. 727.

12. Polack v. O'Brien, 114 App. Div. 366, 100 N. Y. S. 385.

13. Customer laying off garment in store to try on new one held negligent. Wamser v. Browning, King & Co. [N. Y.] 79 N. E. 861.

14. Atlantic & B. R. Co. v. Spires [Ga.

his peril to deliver to bailor,[15] and may protect himself from liability by showing delivery on demand to true owner,[16] but cannot by mere assertion of right in another avoid liability for conversion by himself.[17] He may likewise maintain a bill of interpleader to try the conflicting claims.[18] The bailee, by an unqualified refusal to redeliver property to the bailor, may waive any lien that he may have on such property for labor he has expended upon it.[19] An action ex contractu lies at the instance of the bailor to recover the value of an article borrowed and destroyed by the bailee.[20] And a bailor may sue his bailee in trover for conversion of the subject-matter of the bailment.[21] And where the bailee renounces the relationship and notifies the bailor that he no longer holds the property as a bailment, such repudiation constitutes a conversion of the property.[22] The lessee of a machine, who is obliged to keep it in running order, cannot refuse to pay the stipulated rent for its use where there is no structural defect in the machine, but its failure to give satisfaction is due to the ignorance or mismanagement of the former.[23] Where the bailor contracts to ship goods to the bailee to be sold for bailor's account, the title to remain in the bailor until the goods are sold, the bailor is entitled to recover the goods or their proceeds, for breach of condition to make stipulated payments.[24] Where there is a bailment of the possession, with an agreement for a future purchase, conditioned on the prepayment of the price, on failure of the bailee to pay the purchase money, the bailor may demand either the return of the subject of the bailment or the payment of the purchase money.[25] The right to terminate a bailment may be specially provided for in the contract of bailment.[26]

App.] 57 S. E. 973; Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143.

15. Atlantic & B. R. Co. v. Spires [Ga. App.] 57 S. E. 973.

16. Klein v. Patterson, 30 Pa. Super Ct. 495.

17. The bailee cannot deny the title of the purchaser or justify his conversion by refusal to deliver on the theory that the property belongs to another. Riddle v. Blair [Ala.] 42 So. 560. Where a bailee acquires possession of a mileage book from the bailor for the purpose of riding thereon, and agrees to return the balance of the mileage, he is estopped to deny his obligation to make return, because the bailor is not the original purchaser, who is alone entitled to use the book for transportation. Cook v. Bartlett, 115 App. Div. 829, 100 N. Y. S. 1032.

18. Lavelle v. Belliu, 121 Mo. App. 442, 97 S. W. 200.

19. Alabama Cotton Oil Co. v. Weeden [Ala.] 43 So. 926.

20. May be joined with count for 'work and labor Redel v. Missouri Valley Stone Co. [Mo. App.] 103 S. W. 568.

21. Alabama Cotton Oil Co. v. Weeden [Ala.] 43 So. 926. A present right of possession at the time of conversation, independent of the question of ownership, will support the action. Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143. An admission in the defendant's answer that it was bailee of the property in the capacity of warehouseman, and that plaintiffs were the joint bailors thereof, is an admission of plaintiff's right to a joint recovery, on proof of conversion. Id. Where it is alleged that cotton was delivered to a ginner to be ginned and was never redelivered to the owner, the question whether there was a conversion by the ginner is one of fact for the jury. Alabama Cotton Oil Co. v. Weeden [Ala.] 43 So. 926.

Demand is not necessary. Alabama Cotton Oil Co. v. Weeden [Ala.] 43 So. 926.

22. Lowe v. Ozmun, 3 Cal. App. 387, 86 P. 729.

23. He is required to have someone in charge capable of managing the machine. Stark Grain Co. v. Automatic Weighing Mach. Co. [Ark.] 99 S. W. 1103. Such a provision is not inconsistent with a provision that he shall not allow any alterations in the same, and both may be enforced. Id. Evidence held insufficient to sustain judgment dismissing complaint, in action for rent of lamp, under contract by which defendant agreed to use same for twelve months at one dollar per month, payable in advance. Municipal Lighting Co. v. Paull, 101 N. Y. S. 84.

24. A bailee was declared a bankrupt subsequent to receiving goods under agreement to sell for petitioner's account, the title remaining in the petitioners until sold, and the bailee failing to make payments agreed on, the petitioners were entitled to the goods or their proceeds as against the trustee in bankruptcy. In re Fabian, 151 F. 949.

25. The bailor can choose to consider such a transaction either a continuing bailment or a sale, but is bound by his election. In re Froelich Rubber Refining Co., 139 F. 201. The bailor waives the performance of the condition precedent and his title to the subject-matter of the bailment if he fails to demand possession within a reasonable time after the date fixed for his election. Id.

26. Wetherill v. Gallagher, 217 Pa. 635, 66 A. 849. Boilers were leased with stipulation that on failure to comply with any of the covenants of bailment the bailor

On the termination of the bailment it is the duty of the bailee to restore the property to the bailor within a reasonable time thereafter,[27] and there is an implied agreement to return property borrowed in substantially the same condition that it was received.[28] The right of the bailor upon duly terminating the bailment to remove the subject-matter of the bailment from premises leased by the bailee is not dependent upon his payment of rent in arrears due by the bailee, as tenant, to the owner of the premises;[29] nor the restoration of another's property to the place from which it was removed by the bailee upon installing the subject-matter of the bailment for his use.[30] Where a purchaser of goods ships them back to the seller without any notification, or any previous agreement in regard thereto, and the seller in order to protect the goods stores them, he is a gratuitous bailee, and the buyer is liable to him for necessary storage charges actually paid.[31]

§ 3. *Rights and liabilities as to third persons.*[32]—A bailee may recover from third person for negligent destruction of the property,[33] even though being a gratuitous bailee he was not liable to the bailor therefor.[34] It is the duty of the bailee of the finder of a bill, if he ascertains the intention of the finder to convert it, to retain the bill until the ownership is determined.[35] If there are rival claimants to the property bailed, the bailee may maintain a bill of interpleader to determine, in a single suit the question of ownership.[36] The bailor is not liable to a third person for an injury resulting from the negligent use of the property bailed if it was used at the time independently of his control and business.[37] A sale of the subject-matter of the bailment confers on the purchaser an immediate and valid title, and the possession of the bailee becomes that of the purchaser without any formal delivery of the subject of the bailment to him, a mere notice to the bailee of the sale being sufficient.[38]

BANKING AND FINANCE.

§ 1. The Occupation in General; Regulation, Supervision, Control (328).
§ 2. Associated or Incorporated Bankers; Corporate Existence in General (328). Transfer of Stock (328). General Powers (328). Personal Liability and Duty of Officers and Directors (328). Powers of Officers and Right to Represent Bank (329). Winding Up (331). Stockholders' Individual Liability (332).
§ 3. National Banks; Officers and Examiners (332).
§ 4. Savings Banks (334).
§ 5. Loan, Investment, and Trust Companies (334).
§ 6. Deposits and Repayment Thereof; Checks, Drafts, Certificates, Receipts, Credits (334). Relation of Banker and Depositor (335). Repayment of Deposits (335). Forged or Altered Checks and Drafts (336). Set-off to Debts Due Bank Against Deposit (337). Set-off of Deposit Against Debts Due Bank (337). Deposits Received After Insolvency (337). General and Special Deposits (338). Specific Deposits (338). Trust Funds (338). Slander of Credit or Damages for Failure to Pay Check (339). Action to Recover Deposits (339). Certification (339).
§ 7. Circulating Notes (339).
§ 8. Loans and Discounts (339). Drafts with Bills of Lading Attached (340).
§ 9. Collections (340).
§ 10. Offenses Against Banking Laws (341). Receipt of Deposits When Bank is Insolvent (342).

should have "the right to declare this lease void." Id.

27. Riddle v. Blair [Ala.] 42 So. 560. Allegation of delay in the return of goods, held good as against general demurrer, although the allegation fail to show that the negligence of defendant resulted in the loss of other contracts. Baker & Lockwood Mfg. Co. v. Clayton [Tex. Civ. App.] 103 S. W. 197. It seems that such allegation would not be good as against a special demurrer. Id.

28. Redel v. Missouri Valley Stone Co. [Mo. App.] 103 S. W. 568.

29. A tenant having removed boilers owned by the landlord from premises and installed leased boilers, and then become insolvent, the owner of the leased boilers, having terminated the bailment on default in rent, could remove the boilers without paying the arrears of rent due by the tenant to the landlord. Wetherill v. Gallagher, 217 Pa. 635, 66 A. 849.

30. Wetherill v. Gallagher, 217 Pa. 635, 66 A. 849.

31. Smith v. Heitman Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 124, 98 S. W. 1074.

32. See 7 C. L. 357.

33. American Storage & Moving Co. v. St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184.

34. Abrahamovitz v. New York City R. Co., 104 N. Y. S. 663.

35. The return of the bill under such cir-

§ 1. *The occupation in general; regulation, supervision, control.*[39]—A person who makes loans and discounts but does not receive deposits is not a banker.[40] In the exercise of its right to regulate banks a state may require foreign banking companies to comply with certain statutory requirements before transacting business within the state.[41]

§ 2. *Associated or incorporated bankers; corporate existence in general.*[42]—Many matters common to all corporations are elsewhere treated.[43]

Transfer of stock.[44]—Recordation of the transfer of stock on the books of the bank is not always essential in order to relieve the original holder from his stockholder's liability.[45]

General powers.[46]—As a general rule a bank may not engage in the business of buying and selling chattels.[47] It may enter into a contract of leasing for the purpose of procuring a building suitable for its own needs.[48] Only the state can raise the question of ultra vires as to a completed transaction.[49]

Personal liability and duty of officers and directors.[50]—The relation of officers and directors of a bank to stockholders and creditors is that of trustee [51] and if by their gross mismanagement and neglect loss is incurred they are liable therefor to them.[52] Directors of a bank are charged with the duty of reasonable supervision over its affairs.[53] It is their duty to use ordinary diligence in ascertaining the condition of its business.[54] They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts if they have exercised ordinary care as directors.[55] Ordinary care in this matter as in other departments of the law

cumstances would, it seems, make him an accessory to the commission of a felony. Lavelle v. Belliu, 121 Mo. App. 442, 97 S. W. 200.

36. Bailee without adequate remedy at law to prevent multiplicity of suits. Lavelle v. Belliu, 121 Mo. App. 442, 97 S. W. 200.

37. Owner of vehicle not liable for injury to another due to negligence of borrower, the vehicle not being used at time in owner's business. Doran v. Thomsen [N. J. Law] 66 A. 897.

38. After notice by the purchaser to the bailee, the latter stands in the same relation to the purchaser as he did to the original bailor. Riddle v. Blair [Ala.] 42 So. 560.

39. See 7 C. L. 358.

40. Within Civ. Code 1895, § 3688, providing where protest is necessary to bind indorsers. Davis v. West & Co., 127 Ga. 407, 56 S. E. 403.

41. Pol. Code pt. 3, c. 3, art. 11, § 471, amended by Laws 1897, p. 107, and Laws 1903, p. 184, requiring banks and loan companies to pay fees to the state, and § 498, prescribing penalties for failure to do so, held the section providing for penalties does not apply to foreign banking companies doing business in the state. State v. Aetna Banking & Trust Co., 34 Mont. 379, 87 P. 268. Laws 1905, p. 232, c. 104, requiring foreign banking companies to make certain reports and pay certain fees under penalty, is unconstitutional. Id.

42. See 7 C. L. 359.

43. See Corporations, 7 C. L. 862.

44. See 7 C. L. 360.

45. Where the director of a bank sold his stock and directed the cashier to do everything necessary to effect the transfer and was informed that there was nothing more to do, he was relieved from liability as shareholder though the transfer was not recorded on the books of the bank as required by statute. Bracken v. Nicol, 30 Ky. L. R. 846, 99 S. W. 920.

46. See 7 C. L. 360.

47. See post, § 8, Drafts With Bills of Lading Attached.

48, 49. Lechenger v. Merchants' Nat. Bk. [Tex. Civ. App.] 16 Tex. Ct. Rep. 620, 96 S. W. 638.

50. See 7 C. L. 360.

51. Elliott v. Farmer's Bank [W. Va.] 57 S. E. 242. Complaint by receiver of insolvent bank against officers for having unlawfully appropriated funds held to state a cause of action. McGregor v. Witham, 126 Ga. 702, 56 S. E. 55. A stockholder who sues a president and director for negligence in managing the affairs of a bank need not allege the particular loss occasioned by the negligence of a particular officer, nor allege all the losses complained of, nor who were on the managing board when the loss occurred. Sigwald v. City Bk., 74 S. C. 473, 55 S. E. 109,

52. Elliott v. Farmers' Bk. [W. Va.] 57 S. E. 242.

53. Directors of a National bank. Rankin v. Cooper, 149 F. 1010. Trustees of unincorporated bank held liable for loss of deposits where they wholly failed to exercise any supervision over the affairs of the bank. Holmes v. McDonald, 226 Ill. 169, 80 N. E. 714.

54. Rankin v. Cooper, 149 F. 1010. Will not be relieved from liability on the ground of ignorance of matters which it is their duty to know. Elliott v. Farmers' Bk. [W. Va.] 57 S. E. 242.

55. Rankin v. Cooper, 149 F. 1010. Not liable for negligence of disbursing officer in paying unauthorized checks. Daugherty v. Poundstone, 120 Mo. App. 300, 96 S. W. 728.

means that degree of care which ordinarily prudent and diligent men would exercise under similar conditions.[56] If nothing has come to their knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient,[57] but if they know or by the exercise of ordinary care should know any facts which should awaken suspicion and put a prudent man on guard, then a degree of care commensurate with the evil to be avoided is required.[58] It is incumbent upon them in the exercise of ordinary prudence to cause an examination of the condition and resources of the bank to be made with reasonable frequency.[59] Ill health and other business engagements do not relieve a director from exercising his duties.[60] While a director should not be held liable for conduct of the business from the very day of his election, he becomes responsible from the time he acquires knowledge of the affairs of the bank.[61] In some states the liability of directors who wrongfully declare a dividend is prescribed by statute.[62] Directors may purchase with their own money stock owned by other stockholders at as low a price as they can.[63] Officers who execute their personal notes to procure funds for the bank are liable thereon,[64] regardless of the notice of the lender as to the character of the transaction.[65] The statutory liability of bank officers for deposits received after insolvency of bank is penal rather than contractual.[66] The members of a voluntary association are liable as partners.[67]

Powers of officers and right to represent the bank.[68]—Every person dealing with a bank is charged with notice of its powers, but a creditor whose own debt against the bank does not exceed its borrowing powers and who has no notice of other debts is not bound by the limitation of indebtedness prescribed in the articles of incorporation.[69] A bank is bound by the acts of its officers acting as

56. Rankin v. Cooper, 149 F. 1010. Depends upon the subject to which it is to be applied and each case must be determined in view of all circumstances. Id.

57. Rankin v. Cooper, 149 F. 1010.

58. Rankin v. Cooper, 149 F. 1010. They are not required to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the business is conducted and upon what securities its larger line of credit is given, and give direction to the important and general affairs. Id.

59. Rankin v. Cooper 149 F. 1010. Where directors become aware that the bank has been making excessive loans, but took no steps to prevent their increase or reduce them, and they continued until the bank became insolvent, they will be held jointly and severally liable for such loss as they should have prevented. Id. Equity will entertain a suit to charge them with personal liability though an action at law would be barred. Id.

60, 61. Rankin v. Cooper, 149 F. 1010.

62. Under to statutes of Kentucky, St. 1903, §§ 548, 596, 598, where directors of a bank innocently declare a dividend when the bank is insolvent, they are liable for the amount of the dividend so declared, but not for all existing and subsequent debts of the bank. City of Franklin v. Caldwell, 29 Ky. L. R. 935, 96 S. W. 605.

63. After it is purchased, it belongs to them to sell to whom they desire. In re Liquidation of Shreveport Nat. Bank, 118 La. 664, 43 So. 270. Where liquidators of a bank called a meeting of stockholders to decide upon what was to be done, and it was decided to sell the assets, which was done at private sale and were purchased by a bank of which the liquidators were directors at a fair price and more than could have been obtained at judicial sale. There was no bad faith. The stockholders were not injured and made no objection until after the sale. Held they could not charge the liquidators with the face value of the assets. Id.

64. Where the capital of a bank was impaired by unwise investments and the directors made their notes to the bank under an agreement with the president that they were to be carried so as not to show overdue paper and paid out of the profits of the business, held that when a receiver was afterwards appointed they could not set up want of consideration for the notes. State Bk. v. Kirk, 216 Pa. 452, 65 A. 932.

65. Where the president borrows money executing his personal note he will be bound thereon though payee was informed at the time that the maker was acting as agent for the bank. Willoughby v. Ball, 18 Okl. 535, 90 P. 1017.

66. Two year limitation applies. Klages v. Kohl, 127 Ill. App. 70.

67. Bradford v. National Benefit Ass'n, 26 App. D. C. 268. Evidence as to whether member had withdrawn. Id.

68. See 7 C. L. 361.

69. Citizens' Bk. v. Bank of Waddy's Receiver [Ky.] 103 S. W. 249. The validity of a loan to a bank must be determined by what the lender had notice of at the time the loan was made and not by what he afterwards learned. Id.

agent or representative of the bank within the scope [70] or apparent scope of their authority,[71] when the persons dealing with such officers have no notice that they are acting beyond their authority,[72] and it is also bound by their unauthorized acts which have been ratified by it,[73] but it is not bound by their unauthorized acts [74] where the person dealing with them is charged with notice of their want of au-

70. Failure of a bank officer to pay over to the bank moneys received at the usual place of business is one for which the bank is liable. Scow v. Farmers' & Merchants' Sav. Bk. [Iowa] 111 N. W. 32. Under Negotiable Instruments Law, providing that where an instrument is drawn to an officer of a bank it is prima facia payble to the bank and may be negotiated by the bank or the officer, it is competent to show that a certificate of deposit payable to the cashier of a bank and indorsed by him was done as agent of the bank. Johnson v. Buffalo Center State Bk. [Iowa] 112 N. W. 165. Where in evidence of a loan actually made to a bank, the lending bank accepts from the borrowing bank a note signed by the cashier of the latter personally and indorsed by the bank, this being done to avoid disclosing on the face of the transaction an excessive loan to the borrowing bank, the borrowing bank is not thereby relieved from its liability as debtor. First Nat. Bank v. State Bk. [N. D.] 109 N. W. 61.

71. Cashier has apparent authority to pledge bank's notes to secure money borrowed by him for the bank in the regular course of business. Citizens' Bk. v. Bank of Waddy's Receiver [Ky.] 103 S. W. 249. The performance for a long time by the president of a bank of acts which he is not expressly authorized to perform and the acquiescence therein by the directors makes such acts within his authority. Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13. Where the cashier of a bank is permitted to and does for a long time exercise general authority with respect to the business of the bank, the bank is bound by his acts which are not ultra vires and are performed in the ordinary course of his employment. Sherwood v. Home Sav. Bk. 131 Iowa, 528, 109 N. W. 19. Whether deposit was made with bank or with cashier personally held for jury. Id. Where the holder of a note transmitted it to a bank for collection and a draft for the amount was received in payment payable to the president followed by "Pt." and the president acknowledged receipt of the same in which he affixed to his signature "Pres.," held that the president was not the agent of the debtor to pay such money to the bank and the debtor was not affected by his misappropriation of the money. Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13. Where a depositor after a conference with the president of the bank gave him a check for the amount of his deposit and receipted his personal note, believing that it was the obligation of the bank, evidence held to show that the bank was liable thereon. Patterson v. First Nat. Bk. [Neb.] 110 N. W. 721. In an action by a bank on a note given in payment of a draft on a bank which failed before the draft was presented, evidence that the director of the bank advised him to purchase the draft before it was needed is admissible if it appears that the advice was communicated to and acquiesced in by the bank. West Branch State Bank v. Haines [Iowa] 112 N. W. 552. In an action by a bank on a note given in payment of a draft on a bank which failed before it was paid, evidence held for the jury whether the bank in issuing the draft could reasonably presume that it would be honored if presented within a reasonable time. Id.

72. Where a bank restricts its cashier's authority, it is bound to those having notice of the restriction to the extent of the cashier's actual authority. Citizens' Bk. v. Bank of Waddy's Receiver [Ky.] 103 S. W. 249. The fact that one lending money to a bank through its cashier held a majority of the bank's stock as collateral did not give him notice that there were no directors or that stockholders were taking no interest in the affairs of the bank. Id. Where one lending money to a bank acted in good faith and there was nothing to put him on notice that the cashier exceeded his authority, and the cashier showed him a spurious resolution authorizing the loan, held the transaction was binding on the bank. Id. Where one bank accepted collateral security from the cashier of another bank, evidence held insufficient to charge it with notice of any rights of the bank of which the pledgor was cashier. First Nat. Bk. v. Gunhus [Iowa] 110 N. W. 611.

73. Where officer without authority borrowed money in the name of the bank and pledged securities, and the borrowed money was received and used by the bank and the transaction was such that the directors should have had knowledge of it, it is estopped to deny the authority of the officer to make the contract. First Nat. Bank v. State Bank [N. D.] 109 N. W. 61. Ratified by bringing suit thereon. Lechenger v. Merchants' Nat. Bk. [Tex. Civ. App.] 16 Tex. Ct. Rep. 620, 96 S. W. 638 The payment by a cashier of his personal indebtedness to the bank by accepting as cashier the note of a third person may be ratified by the bank so as to give it effect. First Nat. Bk. v. Gunhus [Iowa] 110 N. W. 611. A bank does not ratify the unauthorized act of its cashier in using its funds for his individual benefit by attempting to hold him individually liable for such diversion. Home Sav. Bank v. Otterback [Iowa] 112 N. W. 769.

74. Cashier has no implied authority to extend time of payment of a note without the knowledge or consent of the person primarily liable thereon. Vanderford v. Farmers' & Mechanics' Nat. Bk. [Md.] 66 A. 47. The President may testify that no officer was ever authorized to do certain act on behalf of the bank. Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 P. 820. A bank which held a life policy as security went out of existence and the policy passed to a director and trustee who assigned it to a third person in payment of a debt. Held the assignment was void as the director and trustee had no authority to assign it. New

thority.[75] An officer of a bank who is intrusted with sole management of its affairs has authority to do all acts necessary to the conduct of its business,[76] and is not deprived of such authority because he is personally interested in the transaction,[77] but cannot bind the bank by an agreement adverse to its interests, made with another when such party and the officer are at the time serving their own interests and where the sole purpose of the agreement is to benefit themselves.[78]

Winding up.[79]—In some states a bank whose charter has expired may continue to do business for the purpose of winding up its affairs.[80] A bank which does so is a de facto corporation.[81] The appointment of a receiver for a bank constitutes an equitable levy on the fund received by a preferred creditor as well as other assets of the bank in his possession.[82] In Colorado savings depositors are entitled to a preference in case of the bank's insolvency.[83] Where the assets of an insolvent bank are sufficient to pay all creditors in full, they are entitled to interest as against the bank and its stockholders.[84] The appointment of temporary receivers obviates

York Life Ins. Co. v. Kansas City Nat. Bk. 121 Mo. App. 479, 97 S. W. 195. The director and trustee was entitled to the proceeds of the policy as trustee for the shareholders of the bank. Id.

75. Cashier cannot pay his personal indebtedness to it by his acceptance as cashier of the note of a third person. His obligation is to pay in cash. First Nat. Bk. v. Gunhus [Iowa] 110 N. W. 611. Where the cashier transferred a draft belonging to the bank in payment of his individual note, the taker was charged with notice that it was drawn on the bank's funds and could not as against a showing that the cashier acted without authority retain the funds. Home Sav. Bank v. Otterbach [Iowa] 112 N. W. 769. Where creditor of cashier was not induced by the action of officers of the bank to rely on the cashier's authority to use funds of the bank for his own benefit, he was charged with notice that the cashier had no such authority and cannot claim an estoppel against the bank. Id. Where a bank sues to recover funds used by the cashier to pay his individual debt, the defendant has the burden to prove acts estopping the bank from denying authority of the cashier to use its funds for his own benefit. Id.

76. A cashier who has sole charge of the business of the bank may receive service of notice by a surety on a note to sue the principal. Skillern v. Baker [Ark.] 100 S. W. 764. Whether such service was made held a question for the jury. Id. Where the officer of a bank intrusted with entire management of its affairs appropriates to his own use collateral securities held by the bank the bank is liable. First Nat. Bk. v. Sing Sing Gas Mfg. Co., 104 N. Y. S. 1040.

77. An officer of a bank who is entrusted with entire management of its affairs and has general authority to receive additional securities for notes held by it, is not disqualified from receiving collateral in behalf of the bank because he is an indorser on the note. First Nat. Bk. v. Sing Sing Gas Mfg. Co., 104 N. Y. S. 1040.

78. A president of a bank who procures the bank to discount a note signed by himself and others for their benefit may not by assuming to act for the bank bind it by an agreement which releases himself and other makers from liability thereon where such agreement is not ratified by the bank. Fowler v. Walch, 104 N. Y. S. 544.

79. See 7 C. L. 362.

80. Stockholder may not insist on appeal from an assessment in receivership proceedings that the liability was not one for which he was liable as stockholder, though the charter had expired when the proceeding was commenced. Elson v. Wright [Iowa] 112 N. W. 105.

81. Stockholders not liable as partners. Elson v. Wright [Iowa] 112 N. W. 105.

82. In re Plant, 148 F. 37. Where the teller, a day or two prior to insolvency, drew a check and paid himself, it constituted a preference. Id.

83. Holders of time certificates of deposit as well as holders of pass books are "savings depositors" within Mill's Ann. St. § 529, giving a preference to savings depositors in case of the bank's insolvency. Tabor v. Mullen [Colo.] 86 P. 1007. Where a corporation was incorporated as "F. Building & Loan Association" and changed its name to "F. Savings Association," and people deposited money with it and received pass books containing a certificate that the depositor had paid the amount deposited on shares of stock, held they were members of the association and not depositors within Mill's Ann. St. § 529. Askey v. Fidelity Sav. Ass'n [Colo.] 86 P. 1025.

84. People v. Merchants' Trust Co., 116 App. Div. 41, 101 N. Y. S. 255. Holders of certified checks of insolvent trust company are entitled to interest thereon from date of appointment of receiver where amount of such checks had been deducted from the account of depositors who were not allowed interest on such amount. Id. Depositor with insolvent trust company is entitled to interest after dissolution only upon balances which would have been due, had he accepted instalments at the time they were paid to creditors by the receiver. Id. Where a bank becomes insolvent and an action is commenced by the attorney general to wind up its affairs, interest should be allowed creditors at the contract rate until the receiver took possession, but not thereafter as between creditors but is allowable against the bank if it had assets sufficient to pay it at the time the receiver took possession. People v. Merchants' Trust Co. [N. Y.] 79 N. E. 1004.

necessity of formal demand on the part of depositors for their money, so as to entitle them to interest.[85] Where depositors had special contracts for the payment of interest, they are entitled to interest at the contract rate up to the date of appointment of a receiver, and thereafter at the legal rate until the deposit is repaid,[86] but where they had no contract they were entitled to interest at the legal rate from date of such appointment.[87] In a suit to marshal and distribute assets, the claims of creditors who are also officers and directors may be postponed.[88] In such a suit claims of the bank against creditors may be offset against the claims of the creditors.[89] A stockholder who is sued for the amount of a dividend which should have been paid to a creditor cannot be charged on his breach of duty as trustee where the complaint shows that he was not a trustee,[90] and no recovery can be had until the remedy against the culpable officer has been exhausted. Opposition to final account of liquidators of a bank is limited to their acts as liquidators.[91]

Stockholders' individual liability.[92]—An assessment in receivership proceeding is a proper method to enforce a stockholders' liability.[93] A statutory liability imposed on stockholders cannot be enforced while the bank is not dissolved until reduced to judgment.[94]

§ 3. *National banks; officers and examiners. Powers.*[95]—A national bank has no power to enter into a general contract of guaranty,[96] and if it does so the contract is ultra vires and void.[97] If a national bank exceeds its powers as to investment of funds it is for the government to call it to account, and private parties cannot directly or indirectly usurp this function of the government.[98] The statute

85, 86. People v. Merchants' Trust Co., 116 App. Div. 41, 101 N. Y. S. 255.

87. People v. Merchants' Trust Co., 116 App. Div. 41, 101 N. Y. S. 255. This rule applies to interest bearing certificates of deposit. Id.

88. In a suit by creditors who are also directors and officers of an insolvent bank to marshal and distribute assets and charge stockholders with their statutory liability, the claims of such creditors may be postponed where it appears that the insolvency is due to their mismanagement and negligent acts. Elliott v. Farmers' Bank of Philippi [W. Va.] 57 S. E. 242.

89. The bank, its creditors or stockholders, are not estopped to offset against the debts of other claimants their indebtedness to the bank not involved nor adjudicated in a former suit between the same parties. Elliott v. Farmers' Bank [W. Va.] 57 S. E. 242.

90. Where trustees of a dissolved bank sue a stockholder to recover a dividend that should have been paid to creditors, and the complaint shows that he was not a trustee, his liability cannot be predicated on breach of duty as trustee. Daugherty v. Poundstone, 120 Mo. App. 300, 96 S. W. 728. Trustees of a dissolved bank cannot maintain suit to recover a dividend paid a stockholder which should have been applied to a judgment against the trustees in favor of a depositor whose funds had been wrongfully paid out until they have exhausted their remedy against the culpable officers. Id.

91. Their acts as directors prior to the passing of the bank into liquidation, if subject to attack by stockholders, should be advanced in some other proceeding. In re Liquidation of Shreveport Nat. Bk., 118 La. 664, 43 So. 270.

92. See 7 C. L. 363.

93. Under Code, § 1882, creating double stockholders' liability, an assessment in a receivership proceeding is a proper method to enforce such liability. Elson v. Wright [Iowa] 112 N. W. 105. Under the provision of such statute that all persons interested shall be brought into court, a stockholder must be brought in individually before the assessment. Id. In action by receiver to recover from stockholders on their statutory liability, an amendment to the original complaint held not to set forth a new cause of action and that the complaint as amended stated a cause of action. Reid v. Jones, 127 Ga. 114, 56 S. E. 128.

94. Under Banking Laws 1892, p. 1913, making stockholders individually liable for debts of a corporation defaulting in the payment of its debts, where a trust company was not dissolved and was liable to suit, it was necessary for the holder of the claim to reduce it to judgment before suing the stockholders. Gause v. Boldt [N. Y.] 80 N. E. 566.

95. See 7 C. L. 365. As to rules relating to deposits, collections, etc., see subsequent sections of this topic.

96. Under Rev. St. U. S. 5136, authorizing national banks to exercise such incidental powers as is necessary to carry on the business of banking, it has power to guaranty the payment of an instrument on discounting it, but has no power to enter into a general contract of guaranty rendering it liable for the debt of another. Appleton v. Citizens' Cent. Nat. Bk., 116 App. Div. 404, 101 N. Y. S. 1027.

97. Where a state bank at the request of a national bank made a loan, the payment of which the national bank guarantied. Held such guaranty ultra vires and void. Appleton v. Citizens' Cent. Nat. Bk., 116 App. Div. 404, 101 N. Y. S. 1027.

98. In constructing an office building and renting offices. Farmers' Deposit Nat. Bank

requiring directors of national banks to make reports to the comptroller of currency renders them liable for injuries sustained because of reliance on a false report.[99] A national bank which assumes the liabilities of a state bank is liable to a subscriber for stock of such bank but cannot be compelled to issue him stock in the national bank.[1] Where one asserts a lien on or ownership of a fund in the hands of a receiver of a national bank it is discretionary with the court to retain the property within its jurisdiction until issues are determined, and the receiver may be enjoined from transmitting it to the comptroller of currency in the usual course as required by statute.[2] Knowing violation of law is essential to the civil liability imposed on directors by the national bank act.[3] Such liability may be enforced in a state court,[4] but the denial in such a suit of an immunity claimed under the act presents a Federal question for purposes of review.[5]

Rights of stockholders.[6]—Stockholder of record at time of reduction of capital stock is entitled to benefit of proceeds of doubtful assets then charged off as against stockholder of record at time of realization.[7]

Enforcement of stockholders' liability.[8]—The trustee of an estate which is stockholder in a national bank is not personally liable as a stockholder.[9] The pledgee of national bank stock has been held beneficial owner and subject to stockholder's liability.[10]

A *receiver* of a national bank is an officer of the government,[11] and an action by him to recover assets of the bank is not within the statute denying costs to one who recovers judgment for less than a prescribed amount.[12]

State interference and powers of state courts.[13]—National banks are subject to state control as regards the construction of contracts, transfer of property, or creation of debt and liability to suit.[14]

Usury by national banks.[15]—The Federal statutes prescribing the rate of interest a national bank may charge is valid.[16] The statutes apply to state banks in New York.[17]

v. Western Pennsylvania Fuel Co., 215 Pa. 115, 64 A 374.

99. Under Rev. St. U. S. § 5211, requiring directors of a national bank to make reports to the comptroller of currency, where they negligently signed a false report, they are individually liable to one who purchases stock on faith of such report, and was damaged. Smalley v. McGrew [Mich.] 14 Det. Leg. N. 226, 111 N. W. 1093.

1. Where a national bank had assumed the liabilities of a state bank which had sold stock to a subscriber, the national bank was liable for anything that was due the subscriber as stockholder, but could not be compelled to issue its stock in exchange for stock in the state bank. Dupoyster v. First Nat. Bk., 29 Ky. L. R. 1153, 96 S. W. 830.

2. American Can Co. v. Williams [C. C. A.] 152 F. 882.

3. Rev. St. § 5239. Yates v. Jones Nat. Bk., 206 U. S. 158, 51 Law. Ed. 1002. Not liable for negligent participation in false report. Id.

4, 5. Rev. St. § 5239. Yates v. Jones Nat. Bk., 206 U. S. 158, 51 Law. Ed. 1002.

6. See 7 C. L. 368.

7. Jerome v. Cogswell, 204 U. S. 1, 51 Law. Ed. 343.

8. See 7 C. L. 368.

9. Where stock of a national bank at the time of its failure was held by a trustee, the fact that the trust estate was consumed by the failure does not render the trustee personally liable with the additional stockholders' liability imposed by Rev. St. §§ 5151, 5152. Fowler v. Gowing, 152 F. 801. Rev St. §§ 5151, 5152, imposing a stockholder's liability on failure of a national bank, and providing that such statute applies where stock is held by a trustee, does not render the trustee personally liable where the trust was not declared for the purpose of evading liability and he did not hold himself out as owner of the stock. Id.

10. Ohio Valley Nat. Bank v. Hulitt, 204 U. S. 162, 51 Law. Ed. 423.

11. A receiver of a national bank is an officer of the government within Rev. St. § 629, and in a suit by him to recover assets the circuit court has jurisdiction without regard to the amount involved or citizenship of the parties. Murray v. Chambers, 151 F. 142.

12. An action by a receiver of a national bank to recover assets is not within Rev. St. § 968, denying costs to a plaintiff who recovers less than $500. Murray v. Chambers, 151 F. 142.

13. See 7 C. L. 370.

14. St. 1903, § 483, placing bills and notes payable at or indorsed to banks on the same footing as foreign bills, violates no rights secured to national banks by acts of congress. Merchants' Nat. Bk. v. Ford, 30 Ky. L. R. 558, 99 S. W. 260.

15. See 7 C. L. 371.

16. Rev. St. U. S. §§ 5197, 5198, limiting

§ 4. *Savings banks.*[18]—Savings banks are subject to a franchise tax in Maryland.[19]

Payment of deposits.[20]—A savings bank is authorized to pay a deposit to a joint owner of the fund who has control of the pass book.[21] The bank must exercise ordinary care to avoid paying a deposit to the wrong person.[22] Ordinary care in such case means a high degree of care,[23] and whether it has been exercised is often a question of fact.[24] Whether a deposit should be repaid without production or the pass book or the giving of an indemnity bond is a question for judicial triers and not for officers of the bank, under the Michigan statute.[25]

§ 5. *Loan, investment, and trust companies.*[26]—The organization of trust companies and their powers is a subject of statutory regulation.[27] An officer of a trust company who makes an accommodation for the president of the company is liable thereon unless it appears that the company itself agreed that he should not be liable.[28]

§ 6. *Deposits and repayment thereof; checks, drafts, certificates, receipts, credits.*[29]—Checks are negotiable instruments,[30] and rights and liabilities between drawer, drawee, and indorsers, not involving the bank, are accordingly elsewhere

the rate of interest national banks may charge, superseding all state laws on the subject of usury, and providing for forfeiture of all interest for usury, is a valid exercise of the powers of congress. Schlesinger v. Gilhooly [N. Y.] 81 N. E. 619. As no penalty is imposed by the banking laws of New York or the national banking laws of congress for the bona fide purchase of a note void for usury, and the only penalty is where the bank acts knowingly, usury is no defense against a state bank's receiver, in an action on a note discounted by it before maturity, in due course and for value. Id.

17. Under the statutes of New York the penalty for usury can be recovered against a state bank only in an action of debt and not as a set-off or counterclaim to the original obligation. State banks are on an equality with national banks, and the national banking act applies. Schlesinger v. Lehmaier, 117 App. Div. 428, 102 N. Y. S. 630.

18. See 7 C. L. 371.

19. Code Pub. Gen. Laws 1888, art. 81, § 86, imposing a franchise tax on savings banks, etc, applies as well to savings banks having a capital stock, subject to taxation, as to banks which have no capital stock. Fidelity Sav. Bank v. State, 103 Md. 206, 63 A. 484.

20. See 7 C. L. 371. See, also, post, § 6, as to rules common to all banks.

21. Where a savings bank pass book showed a deposit in the name of father and daughter, and it was kept in a common receptacle in the household and the daughter could get it whenever she desired, held insufficient to show that the book was not in the daughter's possession and the fund under her control. Carlin v. Carlin [N. J. Eq.] 64 A. 1018.

22. A savings bank which has paid out all of a deposit on a forged order, accompanied by a stolen pass book, is liable to the depositor for the amount thus paid out, if the forged signature varied from the real signature on a signature card and the bank neglected to compare said signatures. Hough Ave. Sav. & Banking Co. v. Anderson, 9 Ohio C. C. (N. S.) 13.

23. Anderson v. Hough Avenue S. & B. Co., 4 Ohio N. P. (N. S.) 22. The fact that a young man earning wages every day, with no family to support, and in good health, should place his bank book in his trunk and not look for it again for nine months, does not constitute negligence as a matter of law contributing to mistake in repaying the deposit. Id.

24. Whether, a bank book having been stolen, the payment of the deposit to another constituted negligence on the part of the bank is a question to be determined by the jury under all the circumstances of the case. Anderson v. Hough Avenue S. & B. Co., 4 Ohio N. P. (N. S.) 22.

25. Comp. Laws, § 6117, provides that no payment or check against a savings bank account shall be made unless entered in the pass book, except for good cause and on assurances satisfactory to the bank, held that where the pass book is not produced the question of "good cause" and "satisfactory assurance" is for judicial triers, and not for officers of the bank. Vincent v. Port Huron Sav. Bk., 147 Mich. 437, 111 N. W. 90. This statute does not authorize refusal to pay unless the pass book is presented or indemnity given where the pass book is not negotiable, the demand being made by the administrator of the depositor's estate, though several months have elapsed since death of the depositor. Id.

26. See 7 C. L. 372.

27. Laws 1899, p. 450, relative to trust companies, etc., upon which had been conferred trust powers, complies with the rule that the subject of a statute must be expressed in its title. State v. Twining [N. J. Err. & App.] 64 A. 1073.

28. Where the trust officer of a trust company made a note in a large amount to the company as an accommodation for the president of the company, and on his assurance that he would not have to pay it, held, he was liable on the note unless the company itself agreed that he should not be held. Chestnut St. Trust & Sav. Fund Co. v. Hart, 217 Pa. 506, 66 A. 870.

29. See 7 C. L. 373.

30. Boswell v. Citizens' Sav. Bk., 29 Ky. L. R. 988, 96 S. W. 797.

treated.[31] Title to a check remains in the drawer until delivered unless the payer directs the drawer to send it to him by mail, in which case title passes when it is placed in the mail.[32] The drawer of a check, the payee of which has negligently failed to present it for payment, may upon the drawee becoming a bankrupt present a claim for his deposit without waiving its claim of payment against the payee.[35]

Relation of banker and depositor.[34]—The relation between banker and depositor is that of debtor and creditor,[35] and the obligation of a banker to keep money for and return it to a depositor is that of a debtor.[36] This is the rule though the fund deposited belongs to the public.[37]

Repayment of deposits.[38]—A deposit raises an implied promise to repay the same.[39] When a bank receives a deposit, it is to be paid to the depositor, or his order, or for his use or benefit,[40] or to the person for whose benefit it is made.[41] The bank assumes the duty of seeing that it is so paid.[42] If it pays out the money otherwise it is liable to the depositor to the amount of such payment.[43] The depositor of money is prima facie entitled to withdraw it.[44] A bank is justified in paying bearer paper to one who presents it.[45] Money deposited to the credit of a third person unconditionally may be withdrawn by him on demand,[46] but if the de-

31. See Negotiable Instruments, 8 C. L. 1124.

32. But where a creditor does not direct it sent by mail, and the drawer sends it in this manner, title to it does not pass until it is delivered to the payee. Watt-Harley-Holmes Hardware Co. v. Day [Ga. App.] 57 S. E. 1033. Where one unable to pay his debts delivered his goods to a trustee who was to sell them and divide the proceeds among creditors, and he did so and mailed checks to such creditors, held that after he mailed the checks, and it did not appear that he could recall them, he could not be held as garnishee for the money. Parker-Fain Grocery Co. v. Orr [Ga. App.] 57 S. E. 1074.

33. Pink Front Bankrupt Store v. Mistrot & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 889, 14 Tex. Ct. Rep. 200, 90 S. W. 75.

34. See 7 C. L. 373.

35. In re Salmon, 145 F. 649. Deposit of draft. Hilburn v. Mercantile Nat. Bk [Colo.] 89 P. 45. Deposit by register of court in his own name. Clisby v. Mastin [Ala.] 43 So. 742.

36. Where the bank paid money to the son of a person in whose name the deposit was made, it was liable to the father in the absence of a showing that the father was estopped from denying the son's authority to draw it. Fricano v. Columbia Nat. Bk., 103 N. Y. S. 189.

37. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20. In case of bankruptcy of the bank such depositor has not any preference over other depositors. In re Salmon, 145 F. 649.

38. See 7 C. L. 373.

39. Anderson v. Santa Cruz County Bk. [Cal. App.] 88 P. 379. Plaintiff should not be nonsuited in an action to recover a deposit where such deposit is shown to have been made and the bank promised to repay it when a certain draft was returned. Id. A purchaser who deposits money as security for performance is entitled to its return unless there has been such a failure as to give a cause of action against him for default. Wells, Fargo & Co. v. Page [Or.] 82 P. 856. The indorsement of a demand certificate of deposit to another transfers that much money to the indorsee. Moore v. Hanscom [Tex. Civ. App.] 103 S. W. 665.

40. O'Neil v. New England Trust Co. [R. I.] 67 A. 63.

41. A bank may not deprive a person for whose benefit a deposit is made by a third person of the benefit thereof by inserting the name of her bankrupt husband in the certificate without her knowledge, consent, or acquiescence. Robards v. Hamrick [Ind. App.] 79 N. E. 386.

42. O'Neil v. New England Trust Co. [R. I.] 67 A. 63.

43. A bank paid as a garnishee against a judgment debtor other than the depositor, though bearing the same name. O'Neil v. New England Trust Co. [R. I.] 67 A. 63. Cashier may testify without producing books that certain money held by the bank was credited to a certain person. Smith v. First Nat. Bank [Tex. Civ. App.] 16 Tex. Ct. Rep. 729, 95 S. W. 1111.

44. Where a deposit is made by a person as "Atty.," if the bank has no further notice as to ownership of the fund, it is justified in paying it to an officer levying a writ against the attorney. Cunningham v. Bk. of Nampa [Idaho] 88 P. 975. In such case as between the bank and the attorney it is liable to pay the money to him, and the same relation exists as between any other general depositor. Id. Where a bank places the proceeds of a check payable to a beneficiary to the credit of the trustee who indorses the check pursuant to power to do so, it is not responsible to the beneficiary for the proper application of the money. Mills v. Nassau Bank, 52 Misc. 243, 102 N. Y. S. 1119.

45. Where a depositor sent check payable to and indorsed by him to the bank by his messenger for deposit, and the bank cashed the checks and the messenger absconded, the bank was not liable. Peerrot v. Mt. Morris Bank, 104 N. Y. S. 1045.

46. A certificate of deposit, issued by a

posit is subject to conditions such conditions must be performed.[47] Where a deposit is attached, it may be withheld by the bank until final determination of the cause.[48] A check does not operate as an assignment of the fund upon which it is drawn until it has been accepted or certified.[49] Nor does the mere fact of presentment entitle the holder to priority where the drawer subsequently becomes insolvent.[50] and if he receives payment he may under some circumstances be required to return the money.[51] A demand deposit does not bear interest in the absence of special contract [52] or refusal of the bank to repay the same.[53]

Forged or altered checks and drafts.[54]—A bank is charged with knowledge of a depositor's signature,[55] but in cashing a check it has a right to rely on prior indorsements.[56] It cannot charge depositor with the amount paid on raised checks however skillfully the alteration was made.[57] Where a bank pays a forged check, it cannot cast on the depositor the duty of recovering from the payer,[58] but if one who deposits a check has notice that it is forged before he has been prejudiced he is liable therefor,[59] and, where a depositor has recovered from the forger, he cannot recover from the bank.[60] A bank which pays money under mistake may recover it.[61] This rule applies where it pays money to a bank which has cashed a forged

bank, certifying that a stated sum of money is deposited to the credit of a third person, subject to the check of such third person, and over which no control is reserved by the depositor, is the equivalent of a promise by the bank to pay such third person the amount on presentation of the certificate. Lamar, Taylor & Riley Drug Co. v. First Nat. Bk., 127 Ga. 448, 56 S. E. 486.

47. If it is stipulated in the certificate that the money is received on deposit to the credit of a third person, subject to his check on certain conditions, the promise is not absolute but depends upon the contingencies expressed in the certificate. Lamar, Taylor & Riley Drug Co. v. First Nat. Bk., 127 Ga. 448, 56 S. E. 406. A petition by such third person against the bank alleging generally that the conditions have been performed is open to special demurrer calling for specific allegations of performance. Id.

48. Where judgment discharging attachment is superseded, bank can rightfully hold fund until appeal is determined. National Bk. of Lancaster v. Johnson's Adm'r, 29 Ky. L. R. 728, 96 S. W. 433.

49. Bowker v. Haight & Freese Co., 146 F. 257; Eastern Milling & Export Co. v. Eastern Milling & Export Co., 146 F. 761. Where a draft was drawn on a depositor in one bank which with his consent issued a draft on another bank to the creditor and remitted the amount to pay it before charging the same to the depositor, held that the money sent was not so separated from the general funds of the first bank that it should be applied on the draft; the first bank having failed. Commonwealth v. State Bank of Pittsburg, 216 Pa. 124, 64 A. 923.

50. Eastern Milling & Export Co. v. Eastern Milling & Export Co., 146 F. 761. Under the rule that a check does not operate as an assignment pro tanto until accepted or certified, where the payer presents it two days before the drawer's insolvency, but it was not paid because of rumors of the drawer's insolvency, the payee acquired no lien. In re Grive, 151 F. 711. A conditional acceptance is not sufficient. Id.

51. Where the payee of a check issued by a corporation for which a receiver had been appointed presents and receives payment thereof with notice of such fact, he will be required to turn the amount over to the receiver. The payee was attorney for the insolvent company, and received the check as a fee. Bowker v. Haight & Freese Co., 146 F. 257.

52. Clark's Adm'r v. Farmers' Nat. Bk., 30 Ky. L. R. 738, 99 S. W. 674.

53. Although a certificate of deposit payable on demand after a stated period provides that it shall not bear interest after maturity, the holder is entitled to interest at the legal rate from the date the bank fails, or refuses to pay it when due. First Nat. Bank v. State Bk. [N. D.] 109 N. W. 61.

54. See 7 C. L. 376.

55. Evidence sufficient to establish forgery. Greenwald v. Ford [S. D.] 109 N. W. 516.

56. Where one transmitting it to the bank for payment guaranties the indorsement, and it is supposed the check is going through the regular course. Greenwald v. Ford [S. D.] 109 N. W. 516.

57. Chicago Savings Bk. v. Block, 126 Ill. App. 128.

58. Zarborough v. Banking Loan & Trust Co., 142 N. C. 377, 55 S. E. 296.

59. Where one deposits a forged check in a bank for collection and before the certificate of deposit issued by the drawer therefore is returned to the person from whom the depositor procured the check the bank in which the check was deposited for collection has notice of the forgery, the rule that an agent is charged with the notice of the principal makes such depositor liable. Greenwald v. Ford [S. D.] 109 N. W. 516.

60. In an action against a bank for accepting the check of a corporation which showed on its face that it was unauthorized, evidence held to show that the corporation had treated the tort of its officers as a debt and accepted payment thereof. Security Warehousing Co. v. American Exchange Nat. Bk., 103 N. Y. S. 399. The acceptance of payment of the debt from the officers who drew the check released the bank. Id.

61. Where after twice refusing to pay a check because there were no funds on deposit, it paid it by mistake. Iowa State Bank v. Cereal Refund & Brokerage Co. [Iowa] 109 N. W. 719.

check drawn on it if the bank which cashed the check is not in worse position than it would have been had payment been refused on presentation.[62] A depositor is bound to examine the account rendered by his pass book and returned vouchers within a reasonable time and with ordinary care, and to report errors without unreasonable delay.[63] He is charged with the notice of his agent who examines his pass book and returned vouchers.[64]

Set-off of debts due bank against deposit.[65]—Where a deposit is made by mistake in the name of one who does not own the money, the bank may not apply it to his debt to the bank.[66] The contract right of a bank to declare due notes of a corporation held by it in case such corporation became insolvent and to apply thereon any deposit of the corporation cannot be exercised after the appointment of a receiver for such corporation.[67]

Set-off of deposit against debts due bank.[68]—A debtor of a bank may not set off the deposit of another against the debt.[69]

Deposits received after insolvency.[70]—A deposit made when a bank is insolvent may be recovered from the receiver in preference to the claims of general creditors.[71] if it can be shown that his money passed into the receiver's hands.[72] It is presumed that the money on hand when the bank failed is the last money deposited,[73] but this presumption is rebuttable.[74] Part of the depositors of an insolvent bank may sue the directors for deceit in inducing them to make deposits when the bank was insolvent.[75]

62. A bank which pays forged checks drawn on it to another bank which has cashed them may on subsequently discovering the forgery recover from the bank which cashed them if it has not been placed in any worse position than it would have been had it refused payment when presented. Canadian Bank of Commerce v. Bingham [Wash.] 91 P. 185.

63. First Nat. Bk. v. Richmond Elec. Co. [Va.] 56 S. E. 152. Whether he did so, held a question of fact. Id.

64. Where his agent who made the examination had forged checks, he was chargeable with the notice of the agent. First Nat. Bk. v. Richmond Elec. Co. [Va.] 56 S. E. 152.

65. See 7 C. L. 377.

66. McLennan v. Farmers' Sav Bk., 131 Iowa, 696, 109 N. W. 291.

67. Title to the deposit passed to the receiver on his appointment. Eastern Milling & Export Co. v. Eastern Milling & Export Co., 146 F. 761. A contract right of a bank to declare the indebtedness of a depositor due and payable at once in case of his insolvency, and to apply thereon money or other property in the hands of the bank, does not create a lien on such money or property, but merely gives an option which cannot be exercised after appointment of a receiver for such depositor. Corn Exch. Nat. Bk. v. Locher [C. C. A.] 151 F. 764.

68. See 7 C. L. 378.

69. Where one borrowed money from a bank to pay off the administrator of a decedent's estate for his interest in a firm, and issued a check on such fund which was deposited to the credit of the heir, held the borrower could not set off the amount of such check against his debt to the bank on its insolvency. People v. German Bank, 116 App. Div. 687, 101 N. Y. S. 917. Where the president of a bank borrows money for it and gives his personal note and leaves the money with the lending bank to the credit of the borrower, and the lending bank fails when it has on deposit money of the borrowing bank, the president cannot set off the deposit against the note. Willoughby v. Ball, 18 Okl. 535, 90 P. 1017.

70. See 7 C. L. 378. Personal Liability of Officers, see ante, § 2. Criminal Prosecutions, see post, § 10.

71. If it appears that the specific funds can be traced. Cherry v. Ter., 17 Okl. 221, 89 P. 192.

72. In re Bank of Indiahoma, 17 Okl. 605, 89 P. 196. Where money of the territory is deposited in insolvent bank, the rules applicable to other creditors and depositors apply regardless of the authority of the territorial officer who made the deposit. Cherry v. Ter., 17 Okl. 213, 89 P. 190. One who deposits checks and drafts in a bank which is in a failing condition is not entitled to priority over other creditors on the money in the bank at the time of its failure without tracing the proceeds of such checks and drafts and showing that they are included in such cash. Id.

73. Cherry v. Ter., 17 Okl. 213, 89 P. 190. Where a bank is insolvent on the last two days it does business and receives $12,000 deposits the last day and fails with $20,000 on hand, where one who deposited prior to the last day seeks a preference his recovery is limited to the amount on hand less the deposits made the last day. Id.

74. Depositors who made a deposit in an insolvent bank on the last day it transacted business are not entitled to a preference as to money on hand at the time of failure if it appears that it is not the money they deposited. Cherry v. Ter., 17 Okl. 221, 89 P. 192.

75. Blumer v. Ulmer [Miss.] 44 So. 161. Equity has jurisdiction of suit in order to prevent multiplicity of suits. Id.

General and special deposits. Banker's lien.[76]—The securities upon which a banker's lien may be maintained are those deposited in the regular course of banking business and must be of the class usually dealt in by banks in the usual course of banking business.[77] A bank has no general lien on securities deposited with it for a special purpose.[78] Nor on deposits made by a corporation after a receiver for it has been appointed, though the bank hold such company's notes payable on demand.[79]

Specific deposits.[80]—A bank which accepts a deposit of notes and securities must exercise ordinary care over them though the bailment is gratuitous.[81] An action for loss of such deposit is one for breach of contract.[82] Money deposited for a specific purpose constitutes a trust fund,[83] if the bank had notice of such purpose.[84]

Trust funds.[85]—Funds held by a bank in trust are not a part of its assets,[86] and are entitled to preference over general creditors on the bank's insolvency,[87] but

76. See 7 C. L. 378.

77. Under Idaho statute 1887, § 3448, giving a general lien on all property in the possession of the bank, it is limited to property taken in the usual course of banking business such as notes, bonds, etc., and does not include stocks of merchandise. In re Gesas [C. C. A.] 146 F. 734. Under Civ. Code, § 3054, giving a banker a general lien on property in his possession where he has an assignment of a life policy, he has a lien for an overdraft on a paid up policy issued in lieu of the one assigned. Du Brutz v. Bank of Visalia [Cal. App.] 87 P. 467.

78. Van Zandt v. Hanover Nat. Bk. [C. C. A.] 149 F. 127. A contract by which a bank is to have a lien on securities coming into its possession as collateral * * * or otherwise held to apply only to securities deposited as collateral "or otherwise" having reference to the nature of the liability for which the collateral was to be held as security and not to the manner in which possession was obtained. Id.

79. Horn v. Pere Marquette R. Co., 151 F. 626.

80. See 7 C. L. 378.

81. Under Code, § 1841, authorizing savings banks to receive deposits and funds and preserve the same, it may receive a special deposit of securities for safe keeping. Sherwood v. Home Sav. Bank, 131 Iowa, 528, 109 N. W. 9. Where a note is deposited with a bank for safe keeping and collection of interest, the bank must exercise ordinary care though the bailment is gratuitous. Id. Whether directors of a bank had exercised ordinary care in guarding securities deposited with it for safe keeping held for the jury where a year prior to the cashier's discharge they had notice that he was gambling, incurring expenses beyond his salary, etc. Id. In an action to recover the value of a special deposit where the court required a finding that it was the custom of the bank to accept special deposits, it was not material that local custom of banks to do so was not proven. Id.

82. An action against a bank for the value of a note and mortgage deposited with it for safe keeping, in which the bank pleaded that the cashier had misappropriated the papers and that they had been lost without negligence on its part, is for breach of contract and not for tort, and the plaintiff did not need to allege negligence, the bank being required to prove that the loss occurred, notwithstanding due care on its part. Sherwood v. Home Sav. Bk., 131 Iowa, 528, 109 N. W. 9.

83. Where the purchaser of land sent money to a bank to be paid by it on the delivery of certain deeds, evidence held insufficient to show such money to be a special deposit to be paid to the vendor when title was perfected Lennan v. Pollock State Bk. [S. D.] 110 N. W. 834.

84. Where a bank is not a party to an agreement by which a deposit is charged with a trust in favor of the payee of a certain check, it is justified in paying therefrom on any check and refusing payment of the check to the beneficiary of such trust if the deposit is then insufficient. Troike v. Cook County Savings Bk., 127 Ill. App. 413.

85. See 7 C. L. 379.

86 Where the cashier of a bank was also deputy county treasurer and for three months prior to the bank becoming insolvent had collected taxes and mingled the moneys with funds of the bank and credited the same to the county treasurer, who had no authority to so deposit or part with title to the money, held a trust fund which could be followed by the county. Board of Com'rs of Crawford County v. Patterson, 149 F. 229.

87. Moneys received by a bank to be applied on the payment of a particular debt are regarded as trust funds and entitled to preference over general creditors in the distribution of the assets of an insolvent bank Whitcomb v. Carpenter [Iowa] 111 N. W. 825. Where a banker sold a draft on a correspondent knowing that he had no funds there and mingled the money received with funds of the bank and the draft was dishonored, held the buyer was entitled to a preference over general creditors on insolvency of the bank. Id. The fact that the assets of a bank turned over to an assignee are less than was on hand when the bank wrongfully obtained money and mingled it with funds of the bank does not overcome the presumption that such moneys passed into the hands of the assignee. Id. Where several banks entered into a combination to suppress bidding for county funds under an agreement that the successful bidder should apportion the funds between them, held, where the successful bidder became bankrupt, the county could rescind and recover from the conspiring banks the funds in their possession as against the general creditors of the bankrupt. In re Salmon, 145 F. 649.

it must be shown that the moneys are a trust fund.[88] A bank may be liable for interest on such fund.[89]

Slander of credit or damages for failure to pay check.[90]—An action for damages for wrongful dishonor of a check is on contract.[91] The damages recoverable in such case are such temperate damages as would be reasonable compensation for the injury.[92]

Action to recover deposits.[93]—A cause of action for recovery of a demand deposit does not arise until demand therefor and refusal to pay.[94] In an action to recover a deposit, proof of deposit and demand therefor establishes a prima facie case,[95] and the burden is on the bank to prove payment.[96] In Pennsylvania the holder of a check cannot sue the bank thereon unless it has been accepted.[97]

Certification.[98]—The certification of a check at the request of an endorsee discharges the drawee and indorsers.[99] This is so though made in the absence of funds of the drawee,[1] and a bank which certifies a check or gives assurance that it is good is not relieved by a subsequent stoppage of payment by depositor.[2] One who takes a check fraudulently certified by the cashier of an insolvent bank has the burden to prove that he is a bona fide holder.[3]

§ 7. *Circulating notes.*[4]

§ 8. *Loans and disounts.*[5]—A bank is charged with the notice of its president who acting as agent for the bank makes an investment of its funds.[6]

88. A receiver deposited moneys of his estate with a trust company which was surety on his bond under an agreement that the money should bear interest and be subject to check with the counter signature of the company. Such money was mingled with other funds of the company. Held that on the company becoming insolvent the receiver could not demand the entire amount of his deposit on the ground that it was a trust fund under a rule of court that all corporations approved as security shall keep in a separate fund moneys deposited by the persons for whom they are surety. Commonwealth v. City Trust, Safe Deposit & Surety Co. [Pa.] 66 A. 995.

89. State v. National Banks, 4 Ohio N. P. (N. S.) 245.

90. See 7 C. L. 379.

91. An action for damages for refusal of a bank to honor a check is on contract, though there be some expression in the complaint indicating a purpose to rely on tort. Lorick v. Palmetto Nat. Bk. [S. C.] 57 S. E. 527.

92. Instruction approved. Hilton v. Jesup Banking Co. [Ga.] 57 S. E. 78. In a suit by a depositor for damages for wrongful dishonor of his check, evidence relative to his credit and financial standing is admissible though there is no claim for special damages. Id.

93. See 7 C. L. 379.

94. Clark's Adm'r v. Farmers' Bk., 30 Ky. L. R. 738, 99 S. W. 674.

95. The bank has the burden to prove payment to the depositor or for his benefit. O'Niel v. New England Trust Co. [R. I.] 67 A. 63.

96. Yarborough v. Banking, Loan & Trust Co., 142 N. C. 377, 55 S. E. 296. In an action by a depositor to recover a deposit where it was set up that the husband of the depositor withdrew the money a year before and deposited it in his own name in another bank, it was held that the question of ratification held to properly submit the issues. Id. In an action by a depositor to recover a deposit, admission of certain evidence held proper. Id. In an action to recover a deposit, an answer denying ever having received the sum demanded and alleging that the bank had sold plaintiff a bill of exchange payable to a third person for the amount and had received payment therefor is good against demurrer. Anderson v. Santa Cruz County Bk. [Cal. App.] 88 P. 379.

97. Clark & Co. v. Savings Bk., 31 Pa. Super. Ct. 647. Facts held not to show acceptance Id.

98. See 7 C. L. 381.

99. First Nat. Bank v. Currie, 147 Mich. 72, 13 Det. Leg. N. 965, 110 N. W. 499; Dunn v. Whalen, 105 N. Y. S. 588.

1. First Nat. Bank v. Currie, 147 Mich. 72, 13 Det. Leg. N. 965, 110 N. W. 499. Where one bank sues the receiver of an insolvent bank on a check fraudulently certified by the latter and discounted by the former, the fact that plaintiff advanced more money to the drawer than it was authorized to loan or that usurious charges were made was no defense. Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656, 13 Det. Leg. N. 593, 108 N. W. 1092.

2. Telegraphic assurance that check was good. Farmers & Merchants' Nat. Bk. v. Elizabethtown Nat. Bk., 30 Pa. Super. Ct. 271.

3. In an action against the receiver. Detroit Nat. Bk. v. Union Trust Co., 145 Mich. 656, 13 Det. Leg. N. 593, 108 N. W. 1092. Evidence held for the jury. Id. Where one bank sues the receiver of an insolvent bank on a fraudulently certified check discounted by plaintiff, it is admissible to show on the issue of good faith notice of plaintiff of the financial standing of the drawer, prior business transactions, etc. Id.

4. See 5 C. L. 363.

5. See 7 C. L. 381.

6. Bank held charged with notice that

Drafts with bills of lading attached.[7]—A national bank has no power to deal in merchandise and the fact that it discounts drafts to which bills of lading are attached does not render it liable for deficiency in the goods,[8] and the mere fact that it discounts such drafts does not pass title to the goods to it.[9]

§ 9. *Collections.*[10]—Where a check payable in another place is deposited for collection, it is the duty of the receiving bank to seasonably transmit to a bank or other suitable agent at the place of payment for collection.[11] A bank which accepts paper on a bank in a distant city for collection is not liable for the default of the collector if it exercises due care in selecting one.[12] The drawee bank or other payee should not in such case be selected as the collecting agent.[13] A collecting bank which receives paper only at the owner's risk until full payment limits its liability only as to agents properly selected and not from negligence in selecting a collecting agent,[14] and the fact that it is the custom of banks to send checks to the drawee bank does not change the rule.[15] The owner of a note which a bank holds for collection is chargeable with notice of the bank.[16] A bank which holds a note for collection may accept a check or draft as conditional payment unless instructed to the contrary, or has reason to be believe that such check or draft will not be paid.[17] A bank which collects from the drawee of a draft who relies on a forged bill of lading is not liable for the drawee.[18] If a bank fails to make a collection through fault of its own, it is liable for all damages sustained.[19]

certain discounts were made by its president in furtherance of a fraudulent scheme to obtain money for his own purposes. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641.

7. See 7 C. L. 383. See, also, Factors, 7 C. L. 1642.

8. Under Rev. St. U. S. § 5136, national banks have power to take personal property as security but may not deal in merchandise, and the fact that it discounts drafts to which bills of lading are attached does not render it liable for deficiency in the goods since the transaction would be ultra vires. Leonhardt & Co. v. Small & Co. [Tenn.] 96 S. W. 1051. The fact that the bank indorsed a part of the drafts with the statement that it was not responsible for the quality or condition of the goods does not render it liable because of deficiency in other goods, the drafts for which were not so indorsed. Id.

9. Where sellers of goods drew drafts on the purchasers, attached them to bills of lading and transferred them to a bank, the bank did not become purchaser of the goods and liable for deficiency in quality of the goods. Leonhardt & Co. v. Small & Co. [Tenn.] 96 S. W. 1051. Where goods were consigned to a factor who had authority to sell or reconsign, and the factor reconsigned and transferred the draft drawn against them to a bank, evidence held to show that the draft was bought by the bank and not taken for collection. Smith v. Jefferson Bk., 120 Mo. App. 527, 97 S. W. 247.

10. See 7 C. L. 383.

11. The person to whom it is transmitted in such case becomes agent of the owner of the check. Bank of Rock Mount v. Floyd, 142 N. C. 187, 55 S. E. 95. Admission of telegram stating that collecting bank held the transmitting bank and drawer liable held not error. Id.

12. A San Francisco bank sent a check on an Arizona bank to Los Angeles for collection. The Los Angeles bank sent it for collection to a bank in the city where it was payable, such bank collected it and before its draft for the amount reached Los Angeles failed. Held the Los Angeles bank was not liable. San Francisco Nat. Bk. v. American Nat. Bk. [Cal. App.] 90 P. 558. The Los Angeles bank not having accepted the draft as payment and it not appearing that any other method of collection would have availed to procure the cash it was not liable for taking the draft instead of insisting on money. Id. Where one bank sends a check to another city for collection, it is chargeable with notice of a custom of banks in such city to forward such paper for collection to some reliable person or bank and is not liable for such collector's default. Id.

13. Where the transmitting bank selected such agent, it was held liable where the drawee failed prior to returning the money. Bank of Rock Mount v. Floyd, 142 N. C. 187, 55 S. E. 95. Collecting bank is negligent where it sends the evidence of indebtedness for collection to the payor therein named. Whittier v. First Nat. Bk., 124 Ill. App. 102.

14, 15. Bank of Rock Mount v. Floyd, 142 N. C. 187, 55 S. E. 95.

16. Where the note was paid under such circumstances that it amounted to an unlawful preference. Hooker v. Blount [Tex. Civ. App.] 16 Tex. Ct. Rep. 993, 97 S. W. 1083.

17 Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 14.

18. A bank that without notice or suspicion of wrongdoing receives a draft for collection and demands and obtains payment thereof from the drawer is not liable to the payor in damages because he made payment in reliance on a forged bill of lading attached to the draft. Nebraska Hay & Grain Co. v. First Nat. Bk. [Neb.] 110 N. W. 1019.

19. Where a bank holding a note for col-

§ 10. *Offenses against banking laws.*[20]—The Federal statutes make it an offense for an officer of a national bank[21] to willfully misapply the funds of the bank,[22] or to make a false report with intent to deceive an examiner,[23] or to falsify the books of the bank.[24] To constitute the misapplication of the funds of a bank it is necessary that the fund be withdrawn from the possession or control of the bank or that a conversion should occur so that the bank loses the same.[25]

An indictment under the Federal statute must show a misapplication of credits,[26] and while it need not be alleged that the misapplication was without authority of directors,[27] it must not appear that it was by their authority.[28] It must show

lection protested it but failed to notify the indorser and the holder brought an unsuccessful action against him, held a question of fact whether the bank induced him to bring such action rendering the bank liable for costs. Howard v. Bank of Metropolis, 115 App. Div. 326, 100 N. Y. S. 1003.

20. See 7 C. L. 385.

21. A certificate of the comptroller of currency reciting that a national bank had complied with all the provisions of Act Congress July 12, 1882, authorizing extension or corporate existence of such banks, and declaring that the bank was authorized to have succession until November 25, 1908, is conclusive evidence of compliance by the bank with all conditions precedent to the extension of its charter, in a prosecution of its president for violation of the national bank act. Clement v. U. S. [C. C. A.] 149 F. 305. A national bank which continues its existence and performs the functions of such an institution after the expiration of its original corporate existence is presumed to have accepted the benefit of a certificate executed by the comptroller of currency extending its corporate existence. Id.

22. The discounting by a president of a national bank of worthless paper known by him to be worthless, for the benefit of a corporation of which he is an officer is a willful misapplication of the funds within Rev. St. § 5209. Flickinger v. U. S. [C. C. A.] 150 F. 1. Instructions given and refused in a prosecution of an officer of a national bank under Rev. St. § 5209, held correct and requests refused were covered by instructions given. Goll v. U. S. [C. C. A.] 151 F. 412. In a prosecution of a president of a national bank for violation of National Bank Act (13 Stat. 101), evidence held sufficient to go to the jury on the question as to whether he willfully abstracted and misapplied to his own use funds to the extent of $10,000 without authority of the board of directors. Lear v. U. S. [C. C. A.] 147 F. 349. Evidence that the cashier overdrew his account by means of checks which were not charged to him but were carried as cash and afterwards taken up by his note, all without consent of the directors, warrants a conviction of misapplication of funds in violation of Rev. St. § 5209. Brock v. U. S. [C. C. A.] 149 F. 173. Evidence sufficient to justify conviction of the president of a national bank for willfully misapplying funds and converting them to his own use in violation of Rev. St. § 5209. Clement v. U. S. [C. C. A.] 149 F. 305.

23 Where the president of a national bank makes a false report to the comptroller of currency with intent to deceive an examiner who might be appointed to make an examination of the bank as provided by U. S. Comp. St. 1901, § 5240, such act constituted an offense under § 5209, regardless of the existence of other incidents mentioned in such statute. Clement v. U. S. [C. C. A.] 149 F. 305. A paper exhibited to a person authorized to examine the condition of a trust company, as the unrecorded minutes of a meeting of the directors and containing a resolution for the purchase of shares of stock which the examiner had discovered among the assets of the company and inquired about, is a "paper" within Laws 1899, p. 461, and if false and exhibited with intent to deceive him the officer exhibiting it was guilty of an offense under that statute. State v. Twining [N. J. Err. & App.] 64 A. 1073.

24. In the prosecution of an officer of a national bank under Rev. St. § 5209, for making false entries on its books showing the indebtedness to it of other banks, statements taken from the bank's files purporting to have been rendered by such other banks and shown to have been under defendant's charge are admissible and may be identified by employes of such other banks and their correctness verified by the books which are in evidence. Goll v. U. S. [C. C. A.] 151 F. 412. An allegation in an indictment under U. S. Comp. St. 1901, p. 3497, against the president of a national bank for making a false entry on the books or reports, that the president made a false entry in a report to the comptroller of currency as to the amount or reserve, held not objectionable for want of an allegation that the lawful reserve exceeded the amount on hand, the gist of the offense being the making of false entries. Clement v. U. S. [C. C. A.] 149 F. 305. Count in an indictment for violating national bank act alleging that the president of the bank made a false entry showing certain real estate to be an asset held not defective as failing to charge that such land was known or described in accordance with the description recited or as not charging that such real estate was not an asset to the bank. Id.

25. Mere drawing of a draft or entering a credit to a depositor is no offense within Rev. St. § 5209. United States v. Martindale, 146 F. 280.

26. United States v. Smith, 152 F. 542.

27. An indictment under Rev. St. § 5209, charging an officer of a national bank with willful misapplication of its funds, need not aver that the acts were done without authority from the directors. Flickinger v. U. S. [C. C. A.] 150 F. 1. An indictment for

how the misapplication was made and that it was an unlawful one.[29] It must describe the moneys, funds, and credits misapplied,[30] and allege that they were misapplied to the defendants use, benefit, or gain.[31] The offense charged must be specifically alleged.[32] Several offenses cannot be charged in one count.[33] A verdict must not be inconsistent.[34]

Receipt of deposits when bank is insolvent.[35]—Fraudulent intent is not an essential element of the crime of accepting a deposit after a bank is insolvent under the Minnesota statute and need not be alleged in the indictment.[36] An indictment under such statute must describe the moneys received.[37] In a prosecution under the statute, the presumption is that defendant knows of such insolvency.[38] Such presumption is one of fact and may be rebutted.[39]

misapplication of the funds of a national bank must directly aver that the same was without the knowledge and approval of the board of directors or the discount committee of the bank or aver some fraudulent imposition practiced in procuring their approval. Rev. St. § 5209, construed. United States v. Martindale, 146 F. 280. An averment in an indictment for misapplication of the funds of a national bank that the same was "without the knowledge and consent thereof" is insufficient to show that it was without the knowledge and approval of the board of directors or the discount committee of the bank. Id.

28. An indictment which shows that what was done was apparently by authority of the board of directors is insufficient. United States v. Smith, 152 F. 542.

29. Rev. St. § 5209, construed. United States v. Martindale, 146 F. 289. Under an indictment for misapplication of the funds of a national bank, charging merely the giving of checks and drawing of money out of the bank, when defendant had overdrawn his account and had nothing to his credit in the bank, evidence of a fraudulent procurement of credit by a false deposit slip was inadmissible. Id.

30. An indictment under Rev. St. § 5209 charging misapplication of "money, funds, and credits," must describe the funds and credits and show how much of money, of funds, and of credits there was misapplied separately. United States v. Smith 152 F. 542. In Rev. St. § 5209, making it a criminal offense for an officer of a national bank to embezzle, abstract, or willfully misapply any "money, funds or credits," "moneys" means currency; "funds" means bonds and other securities in which investments may be made, and "credits" means notes and bills payable to the bank and other direct promises to pay. Id. An indictment under Rev. St. § 5209, is bad both for duplicity and insufficient description of the offense where it charges embezzlement as well as misapplication of "funds and credits" without describing either nor setting forth the amount either of "funds" or "credits" embezzled or misapplied. Id. An indictment under Rev. St. § 5209, charging misapplication of a certain sum of "funds and credits" by discounting the note of a person known to be insolvent, is insufficient where the word "moneys" is not used or the funds and credits alleged to have been misapplied are not described. Id.

31. United States v. Smith, 152 F. 542.

32. An indictment alleging the misapplication of a specified sum of money of a national bank during a period of over two years is too general. United States v. Martindale, 146 F. 280.

33. An indictment for misapplication of funds of a national bank cannot joint in one count the misapplication of funds in the payment of separate notes with the alleged misapplied funds. Each payment constitutes a separate misapplication and must be charged in a separate count. United States v. Martindale. 146 F. 280.

34. Where an indictment under Rev. St. § 5209, charged an officer of a national bank with willful misapplication of funds in one count charging discounting of a separate instrument, and another count charging discounting all of such instruments, a verdict of guilty on the last count and not on the first is not inconsistent. Flickinger v. U. S. [C. C. A.] 150 F. 1.

35. See 7 C. L. 387.

36. State v. Quackenbush, 98 Minn. 515, 108 N. W. 953.

37. An indictment charging a banker with receiving a deposit after insolvency of his bank in violation of Rev. Laws 1905, § 5118, certain money, to wit, one hundred dollars, good and lawful money and current as such under the laws of Minnesota, and of the value of $100, a better description of which is to the grand jury unknown, held the description of the money taken in connection with the statement that a better description was unknown is sufficient. State v. Quackenbush, 98 Minn. 515, 108 N. W. 953. Good and lawful money and current as such under the laws of the state means good and lawful money such as is in current circulation, the words "under the laws of the state of Minnesota" are surplusage. Id.

38. State v. Quackenbush, 98 Minn. 515, 108 N. W. 953. Instructions on scienter held sufficient. Commonwealth v. Tryon, 31 Pa. Super. Ct. 146.

39. State v. Quackenbush, 98 Minn. 515, 108 N. W. 953. Evidence insufficient to show that an officer of a bank voluntarily, knowingly, or negligently received a deposit with knowledge that the bank was insolvent, though he had reason to believe it to be in an unsafe condition. State v. Strait, 99 Minn. 327, 109 N. W. 598.

BANKRUPTCY.

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§ 1. *The bankruptcy act, amendments, and general orders.*[40]—The amendatory act of 1903 did not apply to pending cases.[41]

§ 2. *Supersession of state laws.*[42]—Under the constitution, congress has the supreme power, untrammeled by state laws, to pass such laws for the division of a bankrupt's property between the bankrupt, his family, and his creditors as it deems proper.[43] While the bankruptcy act supersedes all state insolvency laws [44] except as to cases and persons not within its purview,[45] still it does not take away the jurisdiction of state courts to appoint receivers of the assets of an insolvent corporation,

40. See 7 C. L. 388.
41. In re Screws, 147 F. 989. Compensation of trustee qualifying in April, 1901, must be determined under old law. Id.
42. See 7 C. L. 388.
43. Hurley v. Devlin, 151 F. 919.
44. State insolvency law of Kentucky, superseded. Smith v. Mottley [C. C. A.] 150 F. 266, rvg. In re Potter's Sons, 143 F. 407. Pub. Laws 1905, c. 85, being an insolvency law and enacted after the Bankruptcy Act of 1898, it never went into effect. Moody v. Port Clyde Development Co. [Me.] 66 A. 967. The operation of the bankruptcy law cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. Id.
45. See 7 C. L. 388, n. 6.

though the latter be within the purview of the bankruptcy act,[46] and this is especially true where bankruptcy proceedings have not been commenced against such corporation.[47] A state statute which authorizes the court to appoint an officer, whatever his title, to take charge of the estate with full power to bring suits in law or in equity, discharge the liabilities, and distribute the assets either in full or upon a percentage of the claims proved, and which also has all claims not proven, within the time specified by the statute, or by the order of the court, is in effect and practical operation an insolvency law.[48]

§ 3. *Occasion for proceeding and acts of bankruptcy. A. In general. Insolvency.*[49]—A debtor is not insolvent, under the present bankruptcy law, unless the aggregate of his property, whether legally exempt from execution or not,[50] at a fair valuation and exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be removed, with intent to defraud, hinder, or delay his creditors,[51] but including property preferentially transferred,[52] is sufficient to pay his debts. A fair valuation of notes and accounts is the net sum that, with reasonable diligence, can be realized from their collection within a reasonable time after the institution of the bankruptcy proceedings.[53] A condition of insolvency is presumed to continue as long as such conditions usually continue under similar circumstances.[54]

(§ 3) *B. Disposition of property with intent to hinder, delay, or defraud creditors.*[55]—In order to constitute an act of bankruptcy under this section the bankrupt must have transferred [56] the property with intent to hinder, delay, or defraud his creditors.[57] Solvency when the petition is filed is important only as a defense to an act of bankruptcy under this subdivision,[58] and the burden of showing this is on the defendant.[59]

(§ 3) *C. A preferential transfer while insolvent.*[60]—An insolvent [61] knowingly and intentionally [62] preferring a creditor or creditors by a transfer of any por-

46, 47. Murphy v. Penniman [Md.] 66 A. 282.

48. Moody v. Port Clyde Development Co. [Me.] 66 A. 967. Pub. Laws 1905, c. 85, held an insolvency law. Id.

49. See 7 C. L. 388.

50. In contested involuntary proceeding, property exempt from execution should be included in determining the issue of the solvency of the respondent. Plymouth Cordage Co. v. Smith, 18 Okl. 249, 90 P. 418.

51. Acme Food Co. v. Meier [C. C. A.] 153 F. 74; Plymouth Cordage Co. v. Smith, 18 Okl. 249, 90 P. 418. Allegations of bill for appointment of a receiver held to constitute an admission of insolvency. Moody v. Port Clyde Development Co. [Me.] 66 A. 967.

52. Acme Food Co. v. Meier [C. C. A.] 153 F. 74. Competent to show deed was mortgage. Id.

53. Not their face value unless such value was in fact their fair value. Plymouth Cordage Co. v. Smith, 18 Okl. 249, 90 P. 418.

54. Cleage v. Laidley [C. C. A.] 149 F. 346. Proof that one had $500 worth of property and owed over $25,000 in July, and that he paid no part of this indebtedness during the succeeding four months, is sufficient evidence that he was insolvent in the following October and December. Id.

55. See 7 C. L. 389.

56. An insolvent voluntarily confessing judgment in favor of certain creditors and permitting them to levy executions on and sell his property thereunder without having vacated such sale "transfers" his property within the meaning of the bankruptcy act. In re Nusbaum, 152 F. 835.

57. Where a woman had years previously executed continuing guaranty of son's notes, renewals, etc., held a conveyance of real estate to a large creditor of herself was not made with intent to hinder, delay or defraud creditors. Merchants' Nat. Bk. v. Cole [C. C. A.] 149 F. 708. Mortgage must have been given to secure an antecedent debt or for a grossly inadequate consideration and with intent to hinder, delay or defraud creditors. In re Flint v. Hill Stone & Const. Co., 149 F. 1007. Competent to show a deed was a mortgage to show absence of fraudulent intent. Acme Food Co. v. Meier [C. C. A.] 153 F. 74.

58, 59. Acme Food Co. v. Meier [C. C. A.] 153 F. 74.

60. See 7 C. L. 389.

61. Insolvency at the time of the giving of the preference is essential. Acme Food Co. v. Meier [C. C. A.] 153 F. 74.

62. Mortgage must be given with intent to prefer. In re Flint Hill Stone & Const. Co., 149 F. 1007. Execution of chattel mortgage for part of purchase price of certain goods, mortgage ultimately covering said goods, and goods on hand held not to constitute an act of bankruptcy, there being no intent to prefer. Martin v. Hulen & Co. [C. C. A.] 149 F. 982.

tion of his property to them commits an act of bankruptcy.[63] This preferential transfer should be distinguished from the preferential transfer made voidable by the trustee, in that the creditor in this case need not have reasonable cause to believe that a preference was intended.[64] It is essential that the property transferred be that of the bankrupt.[65]

(§ 3) *D. Suffering or permitting while insolvent, the obtaining of a preference through legal proceedings.*[66]—In order to constitute an act of bankruptcy under this subdivision a preference must have actually been obtained,[67] and the debtor must have been insolvent at the time.[68] While the failure to discharge a levy five days before sale is an act of bankruptcy,[69] an independent act of bankruptcy is also committed by a failure to discharge the levy on each succeeding day, including the day of the sale;[70] and hence limitations against the creditor's right to file the petition runs from the date of sale.[71]

(§ 3) *E. General assignment and the appointment of a receiver or trustee.*[72]—The receiver must have been appointed because of the debtor's insolvency,[73] but, insolvency being in fact the basis for the receivership, it is immaterial that it was not so in name[74] or that it was not the sole reason.[75]

(§ 3) *F. Admitting insolvency in writing and willingness to be adjudged a bankrupt.*[76]—The judicial sale of the franchise and property of a corporation does not necessarily disenable its directors from admitting its insolvency and willingness to be adjudged a bankrupt.[77]

§ 4. *Persons who may be adjudged bankrupts and who may petition.*[78]—A natural person engaged chiefly in farming or tilling of the soil cannot be adjudged an involuntary bankrupt.[79] A natural person may be adjudged an involuntary bank-

63. The giving of a mortgage by an insolvent corporation in order to constitute an act of bankruptcy must have been to secure an antecedent debt, or for a grossly inadequate consideration and with intent either to hinder, delay or defraud its creditors, or to prefer the mortgagee over other creditors. In re Flint Hill Stone & Const. Co., 149 F. 1007. To give a mortgage, while insolvent, to secure an honest debt incurred in his business at the time the mortgage is given to carry on the business, or to secure an indorsement made at the time of giving a note which is for a present fair consideration in carrying on the business, the mortgage being given at the same time, even if the acts are within the four months' period, is not an act of bankruptcy. Id. Renewal in good faith of chattel mortgage not a preferential transfer. In re Cutting, 145 F. 388.

64. Hussey v. Richardson-Roberts Dry Goods Co. [C. C. A.] 148 F. 598.

65. A conveyance by a partner of his individual property, though with intent to prefer a firm creditor, does not constitute an act of bankruptcy by the firm. Hartman v. Peters & Co., 146 F. 82.

66. See 7 C. L. 389.

67. An insolvent corporation occupying leased premises does not commit an act of bankruptcy by permitting its property on such premises, which is subject to a mortgage given to secure its bonds, to be sold under a distress warrant lawfully issued for past due rent, which by the state statute is given a lien on such property. Richmond Standard Steel, Spike & Iron Co. v. Allen [C. C. A.] 148 F. 657.

68. Acme Food Co. v. Meier [C. C. A.] 153 F. 74.

69, 70, 71. In re Nusbaum, 132 F. 835.

72. See 7 C. L. 389.

73. Receiver appointed under Rev. St. Ohio 1906, §§ 3167, 3169, on petition of surviving partner and administrator of dead partner, held not appointed because of insolvency, and not an act of bankruptcy. Moss Nat. Bk. v. Arend [C. C. A.] 146 F. 351.

74. The appointment of a receiver for a corporation under Pub. Acts Conn. 1903, p. 158, c. 194, § 26, which authorizes proceedings for the dissolution of a corporation and the appointment of a receiver therein on various stated grounds, which do not include insolvency by name, or for other "good and sufficient reason," may constitute an act of bankruptcy where the records of the state court show that the appointment was in fact, though not in name, made "because of insolvency." In re Belfast Mesh Underwear Co. 153 F. 224.

75. If insolvency, either as a distinct ground of proceeding or as coupled with others, was one of the substantial reasons for the appointment of the receiver, an act of bankruptcy is committed. Beatty v. Anderson Coal Min. Co. [C. C. A.] 150 F. 293. Where superior court of Massachusetts appointed a receiver on a bill asking for the receivership on the ground of insolvency, and for other reasons, held sufficient, although it did not appear by the record that insolvency was the sole reason for the appointment. Id.

76. See 7 C. L. 389.

77. So held where sold under a special writ of fieri facias under Pa. Act April 7, 1870 (P. L. 58). Cresson & Clearfield Coal & Coke Co. v. Stauffer [C. C. A.] 148 F. 981.

78. See 7 C. L. 390.

79. Where a farm was conveyed to a mar-

rupt, although he is not "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits."[80] A corporation engaged chiefly in manufacturing [81] or in trading and mercantile business [82] may be adjudged an involuntary bankrupt, but the act does not apply to a corporation authorized to deal in notes, loans, and bonds.[83] A corporation may be subjected to bankruptcy after a judicial sale of its franchise and property.[84] Under the bankruptcy law a partnership is treated as an entity.[85] One may by conduct become estopped to deny that he is the real party in interest and subject to the proceedings.[86]

Who may petition. Voluntary proceedings.[87]—While an insolvent debtor, not a corporation, may become a voluntary bankrupt, there is no legal obligation upon him to do so.[88]

Involuntary proceedings.[89]—A creditor who has a voidable preference may present or may join in an involuntary petition, but he cannot be counted for [90] or against [91] the petition unless he surrenders his preference before adjudication.[92] A petitioner becoming bankrupt, his trustee may be substituted in his place.[93] Where the alleged act of bankruptcy is the making of an assignment under the state law, a petitioner does not become disqualified by proving a different claim against the debtor in the assignment proceedings after the filing of the petition and pending a hearing thereon.[94]

§ 5. *Procedure for adjudication. A. In general.*[95]—A proceeding in bankruptcy is a proceeding in equity, and the rules and practice in equity prevail in its conduct so far as they are consonant with the speedy administration of justice which it prescribes.[96] Notice to creditors is not required, and filing of the petition operates as notice to the world.[97]

Jurisdiction.[98]—The court in which a petition is filed has the sole jurisdiction to decide whether the debtor is or is not subject to the bankruptcy law.[99]

ried woman for the purpose of placing it beyond the reach of her husband's creditors, and she and her husband thereafter operated the farm with an agreement that it was to be carried on as his, the wife performing only such services as were generally performed by a farmer's wife, the husband taking full charge of the farming operations, the wife was not "a person engaged chiefly in farming or tillage of the soil." In re Johnson, 149 F. 864.

80. The clause quoted qualifies "any corporation" only. Cleage v. Laidley [C. C. A.] 149 F. 346.

81. A corporation principally engaged in building concrete arches and bridges and dressing stone is a manufacturing corporation. In re First Nat. Bk. [C. C. A.] 152 F. 64. A construction company whose business is the building by contract of piers and abutments for railroad bridges, made of concrete, which is mixed on the ground as the work progresses, with the necessary incidental work, is not engaged principally in manufacturing. In re Hill Co. [C. C. A.] 148 F. 832. Corporation operating quarry and finishing stone is engaged in mining and manufacture. In re Quincy Granite Quarries Co., 147 F. 279.

82. A corporation organized to carry on a general stock, bond, grain, and brokerage business, and to trade on its own behalf in stocks, bonds, grain, etc., and to lease and dispose of real and personal property, is "trading and mercantile business." In re Leighton & Co., 147 F. 311. Corporation cutting and storing ice not engaged in manufacturing, trading, or commercial pursuits. In re New York & New Jersey Ice Lines [C. C. A.] 147 F. 214.

83. Murphy v. Penniman [Md.] 66 A. 282.

84. So held where sold under a special writ of fieri facias under Pa. Act April 7, 1870 (P. L. 58). Cresson & Clearfield Coal & Coke Co. v. Stauffer [C. C. A.] 148 F. 981.

85. Manson v. Williams [C. C. A.] 153 F. 525, afg. In re Hudson Clothing Co., 148 F. 305. Evidence held to show a partnership. Id.

86. One allowing a business to be conducted in his name, goods ordered in his name, etc., held he could not avoid liability for the debts contracted in the business on the ground that another was the real party in interest, and he was merely an employe, where such fact was not stated to nor known by the creditors, nor defeat bankruptcy proceedings on the claim of solvency where the concern was insolvent. Strellow v. Schloss, 149 F. 907.

87. See 7 C. L. 391.

88. Richmond Standard Steel, Spike & Iron Co. v. Allen [C. C. A.] 148 F. 657.

89. See 7 C. L. 391.

90, 91, 92. Stevens v. Nave-McCord Mercantile Co. [C. C. A.] 150 F. 71.

93, 94. Hays v. Wagner [C. C. A.] 150 F. 533.

95. See 7 C. L. 391.

96. In re Broadway Sav. Trust Co. [C. C. A.] 152 F. 152.

97. In re Billing, 145 F. 395.

98. See 7 C. L. 391.

99. In re Nelson Bro. Co., 149 F. 590.

Schedules.[1]

(§ 5) *B. Voluntary proceedings.*[2]

(§ 5) *C. Involuntary proceedings.*[3]—Where the bankrupt is temporarily absent from the district, but has his dwelling house or usual place of abode therein, valid service may be made by leaving a copy of the petition and subpoena at such dwelling with some adult person who is a member or resident in the family.[4] Creditors who have joined in the petition cannot withdraw without the consent of all when the effect would be to discontinue the proceeding.[5] The debtor contests in his own behalf and so may withdraw his opposition at any time.[6]

While the petitioners are entitled to allege and prove any number of acts of bankruptcy,[7] still it is essential that the petition set forth facts showing the commission of at least one act of bankruptcy.[8] Jurisdictional facts are those which condition the power of the court to decide some of the issues in the case like the nature of the subject-matter and the service of process.[9] Other facts, which condition the character of the decree or the nature of the relief that should be granted or denied, are not jurisdictional.[10] An involuntary petition against a natural person must allege that the debtor is not a wage earner or a person engaged chiefly in tilling the soil.[11] Failing so to do it is demurrable [12] and insufficient to sustain an adjudication if timely objection is made thereto.[13] Defects in form in the petition may be supplied by the proof.[14] The petitioners may be allowed to amend their petition, nunc pro tunc, for the purpose of setting up additional acts of bankruptcy[15] and to overcome a variance between the act of bankruptcy alleged and the act proved,[16] and, under its general power to allow amendments, the court may permit a correction of the petition as to the nature of the bankrupt.[17] An application to amend the petition so as to state facts within the knowledge of the petitioners at the time the petition was filed must allege the reason for the omission,[18] but failing so to do the applicant will generally be granted time to supply the omission.[19] A creditor failing to appear and answer the petition is deemed to have waived all objections to subsequent amendments which do not change the substance of the cause of action there stated nor the extent of the relief sought,[20] and to renounce his right to contest the cause of action of which the original petition gives fair notice.[21]

Fraud being an element of the act charged, great latitude in the admission of evidence should be allowed on the trial, and all the circumstances fairly connected with the transaction may be shown.[22]

(§ 5) *D. Exemption of bankrupt from arrest.*[23]—The exemption from arrest

1. See 7 C. L. 392.
2. See 5 C. L. 371.
3. See 7 C. L. 392.
4. Equity rule 13 followed. In re Norton, 148 F. 301. The personal service referred to in § 18 of the Act of 1898 is not personal service upon the alleged bankrupt himself, but personal service upon any of the persons mentioned in equity rule 13 upon whom service is permitted as the equivalent of service upon the alleged bankrupt himself. Id.
5. In re Quincy Granite Quarries Co., 147 F. 279.
6. In re Billing, 145 F. 395.
7. In re Nusbaum, 152 F. 835.
8. In re Flint Hill Stone & Const. Co., 149 F. 1007.
9. In re First Nat. Bk. [C. C. A.] 152 F. 64.
10. In re First Nat. Bk. [C. C. A.] 152 F. 64. The averment that the alleged bankrupt was a corporation "engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone and selling the same," was demurrable and amendable before, and invulnerable after, adjudication. Id. Neither the allegation nor the fact that a corporation is engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits is jurisdictional. In re Broadway Sav. Trust Co. [C. C. A.] 152 F. 152.
11, 12, 13. Edelstein v. U. S. [C. C. A.] 149 F. 636.
14. Defective in form in setting out claim. Hays v. Wagner [C. C. A.] 150 F. 533.
15. In re Nusbaum, 152 F. 835.
16. Hark v. Allen Co. [C. C. A.] 146 F. 665.
17. Gleason v. Smith Perkins & Co. [C. C. A.] 145 F. 895.
18, 19. In re Portner, 149 F. 799.
20, 21. In re Broadway Sav. Trust Co. [C. C. A.] 152 F. 152.
22. In re Luber, 152 F. 492.
23. See 7 C. L. 393.

afforded the bankrupt extends to civil process issued from a Federal circuit court,[24] but does not prevent his commitment by a state court for a contempt where such commitment is intended as a punishment and not for the collection of a debt,[25] or if for the latter purpose if the debt was one unaffected by the discharge.[26] State statutes exempting witnesses from arrest are generally held applicable to bankruptcy proceedings [27] and apply to the bankrupt when attending proceedings following an involuntary petition,[28] and in such cases, the bankrupt being a nonresident, he is entitled to a reasonable time within which to return home.[29]

(§ 5) *E. Adjudication.*[30]—The judgment of adjudication possesses every attribute of finality and estoppel appertaining to those of courts of general jurisdiction,[31] and, except for want of jurisdiction, are not subject to collateral attack.[32] Final adjudications of issues relating to nonjurisdictional facts conclusively estop the parties to the proceeding from again litigating them.[33] The judgment of adjudication is not binding on persons not parties nor in privity with parties.[34]

§ 6. *Procedure after adjudication. In general.*[35]—A person listed as a creditor and whose identity is proven is entitled to an opportunity for an examination of the bankrupt to ascertain the exact condition of the bankrupt's estate before he determines whether he will become a party to the proceeding or not.[36] The duty imposed upon the bankrupt to submit to examinations involves the duty of answering truthfully and as intelligently and connectedly and fully as his mental equipment will permit, and his failure so to do is a contempt of court,[37] as is also false swearing,[38] and the latter is punishable as such in summary proceedings.[39] The bankrupt is also guilty of contempt if he fails to file his schedule [40] or refuses to surrender his books of account or excuse such failure.[41] In a proceeding for contempt the answer of the respondent, though under oath, is not conclusive, and his denial of the contempt does not entitle him to a discharge.[42] The provision that the bankrupt's testimony shall not be used against him in any criminal proceeding applies only to the testimony given by the bankrupt in his own bankruptcy case,[43] but bars a conviction of perjury for false testimony given by him in support of a claim filed against his estate in bankruptcy.[44] The court of bankruptcy is without power to

24. On a judgment of said court rendered prior to the bankruptcy proceedings. In re Wenman, 153 F. 910.

25. So held where order of bankruptcy court restraining sheriff followed language of the bankruptcy act. In re Fritz, 152 F. 562.

26. In re Fritz, 152 F. 562.

27. Code Civ. Proc. § 860 so construed. Goldsmith v. Haskell, 105 N. Y. S. 327.

28. Goldsmith v. Haskell, 105 N. Y. S. 327

29. Waiting for adjourned hearing and then going to his attorney's office held not unreasonable delay. Goldsmith v. Haskell, 105 N. Y. S. 327.

30. See 7 C. L. 394.

31. In re First Nat. Bk. [C. C. A.] 152 F. 64. Unopposed adjudication. In re Billing, 145 F. 395. Judgments rendered in the bankruptcy proceedings possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction, and, unless revised on appeal or merit of error, import absolute verity. Edelstein v. U. S. [C. C. A.] 149 F. 636.

32. Not subject to collateral attack because petition did not state debtor was not a wage earner or person engaged chiefly in tilling the soil. Edelstein v. U. S. [C. C. A.] 149 F. 636. Adjudication is not subject to collateral attack because of defect in petition. Id.

33. In re First Nat. Bk. [C. C. A.] 152 F. 64. The issue whether or not a corporation is subject to adjudication as a bankrupt is not jurisdictional, and is concluded by the adjudication. Id. After verdict and judgment, an objection that the petition fails to state facts sufficient to constitute a cause of action is tenable only when the pleading fails to allege the substance or foundation of a cause of action, and it is impregnable to attack because it is otherwise defective, informal, indefinite, or incomplete, and was demurrable before answer and judgment. Id.

34. Involuntary adjudication of partnership held not to preclude a trustee of an individual partner from questioning the existence of the partnership, he not being a party to the proceedings against the latter. Manson v. Williams [C. C. A.] 153 F. 525, afg. In re Hudson Clothing Co., 148 F. 305.

35. See 7 C. L. 394.

36. So held where bankrupt claimed claim was barred by limitations. In re Kuffler, 153 F. 667.

37. In re Fellerman, 149 F. 244.

38. Although a criminal offense. In re Fellerman, 149 F. 244.

39, 40, 41, 42. In re Fellerman, 149 F. 244.

43, 44. United States v. Simon, 146 F. 89.

make an order on an ex parte oral motion requiring a person not a party to the proceeding to appear and produce a document in his possession.[45] Findings must be definite.[46]

§ 7. *Protection and possession of the property pending the appointment of trustees; receivers.*[47]—Where an involuntary proceeding is dismissed after seizure of the bankrupt's property, the bankrupt is entitled to be allowed "all costs, counsel fees, expenses and damages occasioned by such seizure;" but he is only entitled to a single allowance which must include all of such items claimed by him.[48] The only liability for costs, damages, etc., resulting from the seizure is upon the bond given,[49] and such bond is deemed to run only in favor of those who were respondents at the time it was given;[50] any person subsequently becoming a respondent, if he desires to be protected, being required to move for an additional bond.[51] Prior to the adjudication, any Federal district court other than the one in which the proceedings are pending is authorized to take charge of the alleged bankrupt's property within its own territorial jurisdiction and to appoint an ancillary receiver therefor,[52] and a court of bankruptcy, after the filing of a petition and before adjudication, has like power[53] and may vacate alleged fraudulent conveyances of the bankrupt's property made within four months prior to the filing of the petition.[54]

The creditors failing to show any assets not covered by valid liens, if they want a receiver they will be obliged to furnish a bond conditioned, amongst other things, to pay the expenses of the receivership if sufficient assets applicable to that purpose are not discovered.[55] The effect of the appointment of a receiver is not to oust any person of his right to the possession of the property but merely to retain it for the benefit of the party who may ultimately appear to be entitled thereto.[56] and, aside from the power of the district court with regard to assets of bankrupts, which is especially given it by the statutes, it has all the authority which any court exercising equitable jurisdiction has to protect its receivers and the contracts made by them.[57] When necessary for the protection of the estate, it clearly appearing that certain transfers by the bankrupt are fraudulent, the court may, without the institution of a plenary suit by the creditors, direct its receiver to take possession of and hold the property pending suit.[58] An intervening petition by an adverse claimant to goods in the hands of a receiver is essentially one in equity relating to property in the custody of the court and triable by the court without a jury.[59] The receiver being an officer of the court, money in his hands is in custodia legis against which no attachment lies,[60] but attachments served on him are deemed notices of claim addressed to the court.[61] The power to continue business of a bankrupt corporation through a receiver or trustee implies the power to make debts, to provide for their payment,

45. Such an order is void. In re Johnson & Knox Lumber Co. [C. C. A.] 151 F. 207.

46. The term "continuing contract" in a finding held not void for indefiniteness. In re Meyer [N. M.] 89 P. 246.

47. See 7 C. L. 394.

48. Nixon v. Fidelity & Deposit Co. [C. C. A.] 150 F. 574. Failure to include item of "damages" does not warrant subsequent recovery therefor. Id.

49, 50, 51. In re Spalding [C. C. A.] 150 F. 120.

52. In re Nelson Bro. Co., 149 F. 590.

53. Horner-Gaylord Co. v. Miller, 147 F. 295.

54. Horner-Gaylord Co. v. Miller, 147 F. 295. In a suit for the appointment of a receiver of a bankrupt prior to the adjudication for the purpose of taking possession of property alleged to have been fraudulently transferred, the bill is not multifarious for joining many of the alleged fraudulent transferees. Id. Bill alleging fraudulent transfer and secretion, held to warrant appointment of receiver. Id.

55. In re McKane, 152 F. 733.

56. In re Nelson Bros. Co., 149 F. 590.

57. Mason v. Wolkowich [C. C. A.] 150 F. 699.

58. In re Haupt Bros., 153 F. 239.

59. Dokken v. Page [C. C. A.] 147 F. 438.

60. In re Renda, 149 F. 614. Ancillary receiver. In re Nelson Bro. Co., 149 F. 590.

61. Ancillary receiver; original proceedings dismissed; senior attachment creditor entitled to fund. In re Nelson Bro. Co., 149 F. 590.

and to borrow money for urgent necessities,[62] and all persons dealing with the receiver are bound by the terms of the order authorizing him to continue the business.[63] The receiver should not sell the property of the bankrupt unless necessary for the preservation of the estate,[64] and hence a sale of a chattel real by a receiver without the express direction of the court conveys no title, and such defect cannot be cured by a motion to confirm the sale and to quiet adverse claims to the property sold.[65] The general employment of an attorney at law as counsel and attorney by the receiver does not authorize the attorney to make a sale of the bankrupt's assets nor take the proceeds thereof.[66] Wherever a receiver, by direction of the court appointing him, makes a sale of assets in his possession, the parties concerned in the sale are bound to recognize him as an officer of the court; and consequently such court not only has the power to enforce in a summary manner the completion of the contract of sale [67] but the parties involved are deemed to have consented to such a proceeding.[68]

§ 8. *Creditors' meetings; appointment of trustee; removals.*[69]—There can be no question of the right of a referee, under ordinary circumstances, to postpone a meeting of creditors for the purpose of allowing a restatement or perfecting of a proof of debt.[70] However inadvisable, as a rule, this may be, it is a matter of discretion, and will not be interfered with except for abuse.[71] Where it appears, however, that such postponement would avail nothing, the court may go ahead and appoint a trustee without awaiting further action by the creditors.[72] The giving out of a list of creditors by a bankrupt before the filing of his schedule is a practice to be severely condemned, and no attorney should be permitted to vote any claim in the election of a trustee which has come to him through the instrumentality of the bankrupt;[73] but the fact that he so receives claims is not sufficient ground for excluding his vote on claims which came to him unsolicited.[74] When possible a court in appointing a trustee will select someone from the locality where the property is situated.[75] An alien may act as trustee, he having the proper residential qualifications.[76] The bankruptcy act contemplates that the trustee elected for a partnership shall also be the trustee of the individual partners.[77] A trustee may be removed upon charges preferred by a creditor, and, in this connection, one who has filed a formal proof of claim against a bankrupt's estate has a prima facie status as a creditor which cannot be collaterally attacked, but continues, unless his claim is objected to and disallowed either when first presented or on reconsideration.[78]

§ 9. *Compositions.*[79]—A composition accepted by the requisite number of

62. In re Erie Lumber Co., 150 F. 817.

63. Where order appointing receivers to continue business authorizing them to borrow money in an amount not exceeding $3,000 as might thereafter be directed by the court, and the court subsequently authorized them to issue receivers' certificates to the amount of $3,000, such order was notice to all dealing with the receivers that they had no authority to contract further indebtedness, and persons who thereafter sold them property on credit in excess of that amount cannot have priority of their claims therefor against the estate. In re Erie Lumber Co., 150 F. 817.

64. A receiver should not attempt the sale of a lease held by the bankrupt. In re Fulton, 153 F. 664. A temporary receiver appointed "for the preservation of the estate" has power to sell perishable property in his hands in order to prevent a loss thereof. In re Garner & C., 153 F. 914.

65. In re Fulton, 153 F. 664.

66, 67. Mason v. Walkowich [C. C. A.] 150 F. 699. May compel payment of proceeds of sale. Id.

68. Mason v. Walkowich [C. C. A.] 150 F. 699.

69. See 7 C. L. 396.

70, 71. In re Morris, 154 F. 211.

72. Where a majority of the claims were defective in the statement of the consideration and were noted by the bankrupt's attorney or by a student in his office, held court would appoint a trustee. In re Morris, 154 F. 211.

73, 74. In re Lloyd, 148 F. 92.

75. In re Morris, 154 F. 211.

76. Is not a public officer. In re Coe, 154 F. 162.

77. There is no authority for the election of separate trustees for the partners. In re Coe, 154 F. 162.

78. In re Roanoke Furnace Co., 152 F. 846.

79. See 7 C. L. 396.

creditors will generally be confirmed.[80] A composition procured by fraud will be rejected,[81] and the burden is on the opposing creditor to prove the fraud by clear and positive proof.[82] That the testimony of the bankrupt was evasive and perhaps false in some particulars is insufficient to justify the rejection of a composition on the objection of an unsecured creditor.[83] A contract by which one creditor agrees to advance the money to pay a composition made by the bankrupt in consideration of his receiving payment of his debts in full is illegal.[84] The court has no power to set aside a composition after the lapse of six months from the date of its confirmation,[85] and hence a petition to set aside a composition must be filed within such time.[86] So long as an order confirming a composition stands, it is effective to discharge the bankrupt from his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge.[87] It would seem, however, that an unfulfilled composition will not operate as a discharge.[88] Where a composition offered by a bankrupt, which includes the payment of all costs, is confirmed after opposition, the bankrupt's attorney will not be allowed fees from the estate for his services in securing the confirmation.[89]

§ 10. *Property and rights passing to the trustee. A. Particular kinds of property.*[90]—The plain purpose of the bankruptcy act is that the title and right to all things and rights which do not fall within the vesting words of section seventy shall remain in the bankrupt.[91] The studied enumeration of the particular rights and things which the bankrupt is required to surrender takes all other rights and things, not named, without the definition thus fixed, of the "property" which the statue intends to take from the bankrupt or to pass to his creditors.[92] The trustee takes title to all property of the bankrupt which prior to the filing of the petition the latter could by any means have transferred or which might have been levied upon and sold under judicial process against him,[93] and also to any right of action arising upon contract,[94] but an unliquidated claim for personal injuries, on which a claimant had brought suit prior to the institution of bankruptcy proceedings against him, does not pass to his trustee.[95] The right of the debtor to work and contract for future services is not mentioned, directly or inferentially, in the rights or things required to be sold, appraised or scheduled, or which pass to the trustee.[96] The

80. Composition accepted by requisite number of creditors, considered and affirmed. In re Martin, 152 F. 582.

81. Evidence held insufficient to justify the court in rejecting a compromise, the proof being insufficient to show that false oath was committed fraudulently or knowingly. In re Cohen, 149 F. 908.

82. False oath. In re Cohen, 149 F. 908.

83. In re Cohen, 149 F. 908.

84. McCormick v. Solinsky [C. C. A.] 152 F. 984. Will not support an action by such creditor against another creditor, a party to the agreement, to recover money paid the latter thereunder, and which by the agreement he agreed to repay. Id.

85. In re Eisenberg, 148 F. 325.

86. In re Jersey Island Packing Co., 152 F. 839. Act 1898, § 15, providing for the revocation of a discharge, does not apply to a discharge affected by means of a composition Id.

87. In re Jersey Island Packing Co., 152 F. 839.

88. In re Eisenberg, 148 F. 325.

89. In re Martin, 152 F. 582.

90. See 7 C. L. 397.

91, 92. In re Howe Discount Co., 147 F. 538.

93. Ellison v. Ganlard, 167 Ind. 471, 79 N. E. 450. Burns' Ann. St. 1901, § 3392, declares that no trust in lands shall defeat the title of a purchaser for a valuable consideration without notice of the trust. Held, where the owner of land conveyed it by deed absolute and at the same time executed a separate instrument whereby the grantee was to hold the land in trust for the grantor's children, and such separate instrument was not recorded, the land did not pass to the grantee's trustee in bankruptcy as a bona fide purchaser. Id.

94. Where a seller after the delivery of chattels sold to the buyer without an agreement as to the price, and before the price was ascertained was adjudged bankrupt, the trustee in bankruptcy is entitled to enforce the obligation of the buyer to pay the value of the goods (Leist v. Dierssen [Cal. App.] 88 P. 812); and this is not affected by the fact that the bankrupt included the chattels in his schedule in bankruptcy, or by his omitting to name the obligation of the buyer to him to pay the value of the chattels as to part of his assets (Id.).

95. Sibley v. Nason [Mass.] 81 N. E. 887

96. In re Home Discount Co., 147 F. 538, Wages earned by a bankrupt after his adju-

bankrupt's right to earn wages in the future and to dispose of the fruits of his labor is not "property" in any sense in which the bankruptcy act uses the term, but constitutes rather rights and privileges which go to make up a man's liberty and freedom.[97] Trust funds belonging to the bankrupt,[98] life interests vested in him,[99] his membership in a stock exchange,[1] and future commissions of a bankrupt life insurance agent on renewal premiums,[2] are all deemed property passing to the bankrupt's trustee. The trustee also takes title to property pledged by the bankrupt and which has not been used for the purposes of the pledge.[3] While the right to enforce full payment for stock passes to trustee of corporation,[4] yet it has been held that the double liability of a stockholder of a bankrupt corporation is not an asset of the estate passing to the trustee,[5] and that the bankrupt corporation's creditors may enforce such liability independent of the bankruptcy proceedings.[6] Property held by the bankrupt under a conditional sale void as to general creditors for want of record passes to the trustee.[7] An endowment policy of insurence on the life of a bankrupt, payable to him at the end of the term if living, or in case of his prior death to his wife, is one in which he has an interest which passes to his trusee.[8] The words "cash surrender value" embrace policies which, by their terms, or by the practice or concession of the company issuing them, have such value,[9] and the investment feature of so-called tontine policies of life insurance does not exclude them from the meaning of such terms.[10] Life insurance policies which have not lapsed either at the time of the filing of the petition or of the adjudication have a cash surrender value, although it may be the practice of the company not to accept a surrender until the policy has lapsed.[11] Where a commercial firm goes into bankruptcy, it is a proceeding against each and every member, and both the firm and individual assets must be administered in the bankruptcy proceedings,[12] but, though the equity of a copartner in partnership property passes to his trustee,[13] partnership property is not to be administered by the trustee of an individual partner.[14] Trustee takes title to property of the bankrupt, though not scheduled.[15]

Property fraudulently conveyed.[16]—A trustee in bankruptcy is expressly

dication belong to him and are not a part of his estate in bankruptcy, and the court of bankruptcy has no jurisdiction to take action against a creditor who has wrongfully collected such wages on an assignment made prior to the bankruptcy, the remedy being an action in the state courts for the recovery of the money. In re Karns, 148 F. 143.

97. In re Home Discount Co., 147 F. 538.

98. Where a father uses money of his sons without their consent to buy a farm, and thereafter sells the farm at a profit, the profits when invested become an asset in the hands of the trustee. Merrill v. Hussey, 101 Me. 439, 64 A. 819.

99. Adair v. Adair's Trustee, 30 Ky. L. R. 857, 99 S. W. 925.

1. O'Dell v. Boyden [C. C. A.] 150 F. 731.

2. In re Wright, 151 F. 361.

3. Deposit of stock with brokers to cover possible future losses of bankrupt held a mere pledge, and not being used for such purposes was recoverable by the trustee. In re Jacob Berry & Co. [C. C. A.] 149 F. 176.

4. In re Remington Automobile & Motor Co. [C. C. A.] 155 F. 345.

5, 6. Tiger Shoe Mfg. Co.'s Trustee v. Shanklin [Ky.] 102 S. W. 295.

7. Bradley v. McAfee 149 F. 254. So held under Rev. St. Mo. 1899, § 3412. Id. Where contract was not recorded and bankrupt never agreed to the conditional sale terms which were printed in fine type on the back of the contract. In re George O. Hassam & Son, 153 F. 932. Under §§ 71, 72 of the New Jersey act respecting conveyances (P. L. 1898, p. 699), if unrecorded conditional sale contract leaves the property in the possession of the purchaser, it passes to the purchaser's trustee. In re Franklin Lumber Co., 147 F. 852. Conditional sale contract being void as to the trustee, its record after the filing of the petition and before the adjudication is insufficient. Bradley v. McAfee, 149 F. 254. Conditional sale recorded within four month period, void as to trustee. North Carolina. In re Builders' Lumber Co., 148 F. 244.

8. In re Schofield, 147 F. 862.

9, 10, 11. Hiscock v. Mertens, 205 U. S. 202, 51 Law Ed. 771, afg. In re Mertens, 142 F. 445.

12. New Orleans Acid & Fertilizer Co. v. Guillory & Co., 117 La. 821, 42 So. 329.

13. New York Inst. for Deaf and Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. S. 412.

14. Ludvigh v. Umstadter, 148 F. 319. An order adjudicating a partner individually a bankrupt confers on no one any authority to interfere with the copartnership assets. Gibbons v. Bush Co., 115 App. Div. 619, 101 N. Y. S. 721.

15. Leist v. Dierssen [Cal. App.] 88 P. 812; Assignee under former act. Ledoux v. Samuels, 116 App. Div. 726, 102 N. Y. S. 43.

16. See 7 C. L. 399.

authorized by the bankruptcy act to avoid any transfer by the bankrupt of his property which any creditor might have avoided, and recover the property so transferred, or its value, from the one to whom it was transferred, unless such person was a bona fide holder for value prior to the date of the adjudication.[17] The purpose of this portion of the bankruptcy act was to vest the trustee with the same rights which a creditor of the bankrupt would have had under the state laws in the event the debtor had not been adjudicated a bankrupt.[18] That portion of the bankruptcy act which authorizes the avoidance of transfers of a certain character made by the bankrupt within four months prior to the adjudication relates to transfers which are in violation of the bankruptcy act,[19] and does not apply to such transfers as would have been fraudulent at common law, by statute, or by any other recognized rule of law, other than the special provisions of the bankruptcy act.[20] The four months limitation is not applicable to such transfers made by the bankrupt prior to the adjudication which were in fraud of creditors, and which they could have avoided even if no bankruptcy proceedings had been instituted.[21] Only such transfers by a bankrupt are fraudulent under the bankruptcy act as were fraudulent at common law or are made acts of bankruptcy,[22] and hence the creditor must paticipate in the fraud.[23] One acquiring payment of his debt otherwise than by descent is a "purchaser."[24] To be protected the purchaser must have acted in good faith[25] and, as has been stated, for a present fair consideration.[26] Still a transfer made in good faith to pay or to secure an honest antecedent debt by an insolvent within four months of the filing of a petition in bankruptcy by or against him constitutes no evidence of an intent on his part to hinder, delay or defraud other creditors, nothwithstanding the fact that its necessary effect is to hinder and delay them and to deprive them of the opportunity they might otherwise have had to collect their claims in full.[27] One is not a purchaser in good faith if he purchases with knowledge of the fraudulent intent of the seller, or under such circumstances as should put him on inquiry as to the object for which the vendor sells.[28] A bankrupt's trustee may maintain an action to set aside a transfer fraudulent as against creditors, existing at the time it was made, independent of whether subsequent creditors are entitled to participate in the assets recovered by such proceeding.[29] The salary of a city official is not exempt so as to prevent its recovery by the trustee of the bankrupt's official from the persons to whom he assigned it in fraud of his creditors.[30] In the absence of a statutory provision in the bankruptcy act that a sale not made in the ordinary course of business of the debtor shall be prima face evidence of fraud, the fact that a sale or

17, 18, 19. Hunt v. Doyal [Ga.] 57 S. E. 489.

20. Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898.

21. Hunt v. Doyal [Ga.] 57 S. E. 489, citing 1 C. L. 317; 3 C. L. 448; 5 C. L. 379; 7 C. L. 400.

22. Wright v. Sampter, 152 F. 196. By "common law" must be understood the rules of property growing out of 13 Eliz. c. 5, as affected by similar statutory enactments in force in the state wherein the transaction complained of took place. Id.

23. Wright v. Sampter,152 F. 196. Evidence held to show that woman loaning money to her uncle did not participate in fraud of repayment. Id.

24. Act 1898, § 67e, construed. Wright v. Sampter, 152 F. 196.

25. O'Sullivan's Trustee v. Douglass, 30 Ky. L. R. 366, 98 S. W. 990.

26. O'Sullivan's Trustee v. Douglass, 30 Ky. L. R. 366, 98 S. W. 990. Assignment of salary held fraudulent, no consideration passing. Id.

27. Act 1898, § 67e, construed. Coder v Cuts [C. C. A.] 152 F. 943, modifying In re Armstrong, 145 F. 202. A transfer or mortgage made by a person adjudged a bankrupt to secure a pre-existing debt within four months of the filing of the petition is not voidable unless it was either made with the intent on his part to hinder, delay, or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the state, territory, or district in which the property is situated. Id.

28. Houck v. Christy [C. C. A.] 152 F. 612 Evidence held sufficient to charge purchasers with knowledge that sale was in fraud of creditors. Id.

29. Tresder v. Burgor, 130 Wis. 201, 109 N. W. 957.

30. O'Sullivan's Trustee v. Douglass, 30 Ky. L. R. 366, 98 S. W. 990.

conveyance is made out of the usual course of business does not, without more, render it prima facie fraudulent, but it may be a badge of fraud, depending for its effect on the surrounding facts.[31] In the absence of agreement or a fraudulent purpose, the mere withholding of a mortgage from record does not render the mortgage fraudulent.[32] As to whether the transfer was fraudulent depends upon the facts and circumstances of each case.[33] The trustee is bound by the judgment in a suit by a creditor to reach all property alleged to have been fraudulently conveyed.[34]

(§ 10) *B. Nature of trustee's title in general.*[35]—Speaking generally, in all cases unaffected by fraud,[36] and wherein no attachments or executions have been levied upon the bankrupt's property,[37] the trustee, upon his appointment and qualification, is vested, by operation of law,[38] with the same but no better title than the bankrupt had[39] at the date of the adjudication[40] to all nonexempt property of the

31. Houck v. Christy [C. C. A.] 152 F. 612 limiting and explaining Dokken v. Page [C C. A.] 147 F. 438. Evidence that goods were sold without invoice or examination, held, in connection with other circumstances to show that sale was fraudulent. Dokken v. Page [C. C. A.] 147 F. 438. The bare transfer of property of an insolvent is not of itself sufficient to warrant the setting aside thereof but is a circumstance to be considered with all the other facts in evidence. Webb's Trustee v. Lynchburg Shoe Co. [Va.] 56 S. E. 581.

32. Unrecorded deed or mortgage held not fraudulent, there being no allegation or proof that it was withheld from record by agreement or for a fraudulent purpose, or that the grantee fraudulently concealed its existence In re McIntosh [C. C. A.] 150 F. 546.

33. Transfer of all attachable property to wife more than four months prior to the filing of the petition and for a nominal consideration, held fraudulent. Thomas v. Fletcher, 153 F. 226. Transfer of a bankrupt's interest in certain timber to his wife in consideration of her assuming his debt to a bank for part of the purchase price of the timber, held fraudulent. Id. Where bankrupt a few days before bankruptcy sold property and paid proceeds to his wife, held she would be regarded as his agent. In re Eddleman, 154 F. 160. Where bankrupt borrowed money from creditor's brother and used money to pay such creditor's claim, held a mortgage given to secure such loan was given with intent to hinder, delay and defraud other creditors. Roberts v. Johnson [C. C. A.] 151 F. 567. Sale of entire stock, money being received by wife of bankrupt and used in payment of so-called unidentified loans, held a scheme to defraud creditors. In re Friedman, 153 F. 939. Purchase of land for wife, she subsequently repaying amount loaned her by husband for purchase money, held not fraudulent. Clark v. Else [S. D.] 110 N. W 88. Sale of stock of goods for about one-half its value shortly before bankruptcy and during an adjournment of an action against him by one of his creditors, held fraudulent. Ott v. Doroshow, 147 F. 762. The independent and unconnected facts that a bankrupt, when free from debt, paid the consideration for property which was conveyed to his wife, and that he soon thereafter engaged in a hazardous illegal business, do not establish an intent to defraud creditors. In re Foss, 147 F. 790. Where an insolvent debtor in contemplation of bankruptcy and immediately before filing her petition disposed of substantially her whole estate, and out of the proceeds paid certain of her creditors, to the exclusion of others, her trustee in bankruptcy in an action to set aside the payments as entitled to go to the jury on the question whether she made the payments with intent to hinder, delay, or defraud creditors Webb's Trustee v. Lynchberg Shoe Co. [Va.] 56 S. E. 581. A mortgage executed by a corporation when insolvent and within four months prior to its bankruptcy to secure notes which were delivered to an officer of the corporation without consideration, and pledged by him as collateral security for his personal indebtedness, and which were used for such purposes and not for any corporate purpose, to the knowledge of the pledgees, does not constitute a valid lien in their favor. In re Builders' Lumber Co., 148 F. 244. Where a bankrupt executed a deed of real estate to his wife, October 26, 1903, to secure alleged pre-existing indebtedness, and on November 6, 1905, filed a voluntary petition in bankruptcy on which he was adjudged a bankrupt, the deed was valid only as an equitable mortgage to secure the bankrupt's actual indebtedness to the grantee at the time the deed was made. Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957. Evidence held to show that at the time of the conveyance the bankrupt was indebted to his wife in the sum of $380. Id.

34. Judgment was rendered within four months of the filing of the petition. O'Sullivan's Trustee v. Douglass, 30 Ky. L. R. 366, 98 S. W. 990.

35. See 7 C. L. 401.

36, 37. In re Blake [C. C. A.] 150 F. 279.

38. In involuntary proceedings the passage of title from the bankrupt to the trustee is by operation of law and is neither a voluntary assignment nor a transfer under execution or other legal process. Held not to work forfeiture of a lease. Gazlay v. Williams [C. C. A.] 147 F. 678.

39. In re Great Western Mfg. Co. [C. C. A] 152 F. 123; In re Franklin, 151 F. 642; In re Fabian, 151 F. 949; In re Newton & Co. [C. C. A.] 153 F. 841; Atchison,etc., R. Co. v Hurley [C. C. A.] 153 F. 503; Doucette v Baldwin [Mass.] 80 N. E. 444; In re Blake [C. C. A.] 150 F. 279. Bankruptcy court held to have jurisdiction to hear issues and render judgment, and there was no error in the proceedings not waived. Id. Whatever rights a third party had against the property of a bankrupt before adjudication, that party, in the absence of fraud or fixed liens created by state statutes in favor of others, has

bankrupt. There are, however, several exceptions to this statement, as clearly appear from the other provisions of the act. Under certain circumstances the trustee is a representative of the creditors, rather than the bankrupt, in relation to the property of the estate, and he may unquestionably exercise rights and enforce a title that the bankrupt himself could neither enforce nor exercise.[41] As has been stated, in respect to an adverse claimant to property, a trustee in bankruptcy stands in the place of the bankrupt and with the same rights and no more,[42] but, in a contest with a creditor who claims a lien or right of priority, the trustee represents the body of unsecured creditors.[43] It should, however, be borne in mind that the property of the bankrupt after the filing of the petition is in custodia legis.[44] That it is subject to the prehensory power of the courts, and bankrupt cannot make any legal disposition of it.[45] In other words, persons dealing with the bankrupt's property after the filing of the petition do so at their peril.[46] However, after the adjudication and before the appointment of a trustee or receiver, the bankrupt still retains title to his property so that he may maintain an action on a chose in action,[47] and in such a case, a recovery being awarded against the defendant, the latter may protect himself against liability to another suit by the trustee by application to the bankruptcy court.[48] Property

against his estate in bankruptcy. Atchison, etc., Ry. Co. v. Hurley [C. C. A.] 153 F. 503. Unfiled conditional sale held valid as against trustee who did not represent any attaching or judgment creditor. In re Great Western Mfg. Co. [C. C. A.] 152 F. 123. The trustee takes the property subject to all the equities imposed upon it in the hands of the bankrupt which are not invalid as to creditors. In re Chantler Cloak & Suit Co., 151 F. 952. Takes no title to trust funds. In re Northrup 152 F. 763. Where bankrupt held property in his own name, but as trustee, held trust was enforceable against his trustee in bankruptcy, none of his creditors having extended credit to him in reliance on such apparent ownership. In re Coffin [C. C. A.] 152 F. 381. Property held by bankrupt as bailee does not pass to trustee. In re Smith & Nixon Piano Co. [C. C. A.] 149 F. 111. Takes subject to rights of pledgor of property held by the bankrupt as pledgee. In re Bolling, 147 F. 786. A stockholder who purchases and carries stock on account of a customer, on margins furnished by such customer, holds the same as pledgee, and on his bankruptcy the customer is entitled to the stock on payment of the amount due thereon, or to the surplus realized from its sale by the trustee to the exclusion of the bankrupt's creditors. Id. In the absence of evidence as to the creditors represented by the trustee, held he took subject to agreement between bankrupt and one who sold him goods that an absolute sale should be deemed a shipment on consignment. Buckwalter Stove Co. v. Stratton, 118 App. Div. 915, 103 N. Y. S. 118. Where plaintiff, a stock exchange member, executed the orders of a brokerage firm not a member, and the firm accepts orders of customers which it directs plaintiff to execute, such customers, though unknown by plaintiff, sustain the relation to him of debtor and creditor, and he will be required to pay them funds he may have from their business, done on the firm's orders, before he pays anything to the firm's trustees in bankruptcy. Doucette v. Baldwin [Mass.] 80 N. E. 444. On a bankrupt's adjudication the debtor's entire nonexempt estate is in legal contemplation brought into custodia legis and appropriated to the payment of his debts as effectually as if taken in execution or attachment, subject to the qualification, except as otherwise provided, that the property is appropriated in the same condition and subject to the same equities as when in the possession of the bankrupt. In re Youngstrom [C. C. A.] 153 F. 98.

40. In re Fulton, 153 F. 664; In re Youngstrom [C. C. A.] 153 F. 98; Hiscock v. Varick, Bk., 206 U. S. 28, 51 Law. Ed. 945. Pledgee's power of sale may be exercised after filing of petition and before adjudication. Id. Wages earned after adjudication do not pass to trustee. In re Karns, 148 F. 143. See, also, In re Home Discount Co., 147 F. 538.

41. The estoppel of a bankrupt to deny the validity of a lien on his property does not affect his trustee, where such lien was voidable by his creditors. In re Shaw, 146 F. 273. In an action by the trustee to set aside a transfer by the bankrupt to his wife in consideration of their marriage, the trustee is entitled to prove that the "wife" had a husband living, and was incapable of entering into the marriage contract, thereby showing that there was no consideration for the transfer. Hosmer v. Tiffany, 115 App. Div. 303, 100 N. Y. S. 797. See, also, In re Chantler Cloak & Suit Co., 151 F. 952.

42, 43. In re Doran, 148 F. 327.

44, 45. In re Duncan, 148 F. 464.

46. Fraudulent assignees of salary paying money collected to bankrupt. O'Sullivan's Trustee v. Douglass, 30 Ky. L. R. 366, 98 S. W. 990. It is under the sole and exclusive control and jurisdiction of the bankruptcy court, and, if such court adjudges the party a bankrupt on such petition, the title for his property vests in the trustee as of the date of the filing of the petition; that date being the point of cleavage. In re Duncan, 148 F. 464. Trustee held to take title to note of third party, transferred by bankrupt after filing of petition. Id. Redelivery of shipping receipts by bankrupt consignee and buyer after filing of petition held not to revest title in seller. Grange Co. v. Farmers' Union & Mill Co., 3 Cal. App. 519, 86 P. 615.

47, 48. Rand v. Iowa Cent. R. Co., 186 N. Y. 58, 78 N. E. 574.

acquired by a bankrupt between the date of the filing of the petition and the date of the adjudication in bankruptcy does not pass to his trustee.[49] The administration and distribution of the property of bankrupts is a proceeding in equity and should be conducted on broad, equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable, or both.[50] The trustee takes subject to valid notice to quit served on a bankrupt lessee.[51] Enforcement of the forfeiture of a lease will be decreed where the lessee has failed to live up to the terms of the lease and has become bankrupt, and the forfeiture is the only effective remedy of the rights of the lessor.[52] It is well settled that trustees in bankruptcy are not bound to accept property or take over contracts which are onerous and unprofitable, and which would burden, rather than benefit, the estate,[53] but in such case they are required to elect whether to assume an existing executory contract, continue its performance, and ultimately dispose of it for the benefit of the estate, or to renounce it and leave the injured party to such legal remedies for the breach as the case affords.[54] If they elect to assume such a contract, they are required to take it cum onere as the bankrupt enjoyed it, subject to all its provisions, conditions, and modifications, in the same plight and condition that the bankrupt held it.[55] The adjudication and appointment of a trustee divests the bankrupt of all title to his property, and the trustee's discharge does not restore title to him or his heirs.[56]

(§ 10) *C. The trustee takes title from liens*[57] acquired by legal proceedings in a state or Federal court within four months of the time of filing the petition in voluntary or involuntary proceedings upon property not exempt as against the trustee.[58] A lien being acquired[59] before the four month period, the entry of judgment within such period of time does not defeat the lien.[60] The trustee takes subject to all liens and contract rights valid as between the parties and as against all creditors of the bankrupt who have not fastened upon it by some specific lien,[61] and

49. Sibley v. Nason [Mass.] 81 N. E. 87.

50. Atchison, etc., R. Co. v. Hurley [C. C. A.] 153 F. 503.

51, 52. Lindeke v. Associates Realty Co. [C. C. A.] 146 F. 630.

53, 54. Atchison, etc., R. Co. v. Hurley [C. C. A.] 153 F. 503.

55. Atchison, etc., R. Co. v. Hurley [C. C. A.] 153 F. 503. Valid oral modifications, whether known to trustee or not, are binding. Id. Sale of coal; oral agreement that advances should be deemed advance payments for coal. Id.

56. Kemper v. Bauer, 53 Misc. 109, 104 N. Y. S. 76.

57. See 7 C. L. 403.

58. Property seized under claim and delivery within four month period cannot be held as against trustee. In re Builders' Lumber Co., 148 F. 244. Attachment lien acquired within four month period of no effect. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 S. W. 680.

59. Garnishment held not to create a lien hence where made more than four months before the filing of the bankruptcy petition and judgment was entered within such period, there was no lien binding on the trustee. Meyers v. Smith [Mo. App.] 98 S. W. 104.

60. So held where mortgage was given prior to the four month period a decree of foreclosure entered within such period. In re McKane, 152 F. 733. A lien acquired by the award of arbitrators more than four months before the bankruptcy of the debtor is not defeated by the entry of judgment thereon within such four month period. So held though bankrupt contested case until a few days before bankruptcy when he confessed judgment. In re Koslowski, 153 F. 823.

61. Conditional sale. In re Fabian, 151 F. 949. Takes subject to valid liens. In re Platteville Foundry & Mach. Co., 147 F. 828. Equitable liens. Eisman v. Whalen [Ind. App.] 79 N. E. 514. Takes subject to attorney's lien on funds in his possession. In re Klein, 101 N. Y. S. 663. Takes subject to attorney's lien upon property. Kneeland v. Pennell, 104 N. Y. S. 498. Mortgage on after acquired property to secure the mortgagee as guarantor of the purchase price thereof is based on a present consideration and is valid as against the mortgagor's trustee. In re Chantler Cloak & Suit Co., 151 F. 952. Sale of standing timber held to give the seller a lien on the timber remaining uncut for the price thereof which was enforceable against the trustee. In re Muncie Pulp Co. [C. C. A.] 151 F. 732. Where trustee mingled trust funds with his own and converted all into property, held beneficiary had an equitable lien on all the proceeds of the sale of such property for the amount of the trust fund, general creditors being only entitled to the residue. Smith v. Au Gres Township, Mich. [C. C. A.] 150 F. 257. Parol agreement by

in this connection the adjudication in bankruptcy is not equivalent to a judgment, attachment, or other specific lien upon the property.[62] The taking possession of the property of a bankrupt by the bankruptcy court does not operate as a caveat or sequestration of property owned by the bankrupt subject to valid liens so as to make the lien holder a party to the proceedings.[63] Before a creditor can claim a lien given by a state statute on property of a bankrupt, he must prefect the same as required by such statute.[64] The taking of a preference does not destroy a creditor's right to his lien.[65] The validity and extent of a pledge depends upon local law.[66] A pledge of property invalid for want of a change of possession creates no lien enforceable against the trustee.[67] Where the bankrupt is the principal debtor on a secured liability, the trustee cannot apply the property of the bankrupt covered by such security to his general creditors and compel the sureties to pay such secured indebtedness.[68] Where all the property is consumed in payment of preferred liens, it is immaterial that such disposition deprives the trustee of all compensation for his service.[69] Estoppel may bar the questioning of the validity of the lien.[70] A parol lien may be established by the testimony of the parties alone where such testimony is uncontradicted and credible, the witnesses are not impeached, and the circumstances cast no doubt upon their truthfulness.[71]

(§ 10) *D. Whether chattel mortgages*[72] executed by the bankrupt are, as between the parties, valid,[73] whether the contract is a chattel mortgage or a conditional sale,[74] and what the effect of the failure to record it may be,[75] are questions to be

husband to assign life insurance policies to wife in consideration of her releasing her dower rights in certain property held valid and to create an equitable lien binding on the trustee. In re J. F. Grandy & Son, 146 F. 318. Where a husband gave his wife certain stocks and she lent them to her husband's partner taking as security an assignment of a stock exchange seat held by such partner, her husband knowing of transaction, held gift was valid and wife had a valid lien on such stock exchange seat. Tucker v. Curtin [C. C. A.] 148 F. 929. A temporary injunction in a suit by a creditor, issued on February 6, 1904, the bill in the suit being filed the day before, creates an equitable lien on the interests of a defendant in a partnership of the defendants, which is valid as against a trusteee in bankruptcy of the partnership appointed January 11, 1906. Rev. Laws c. 159, § 3, cl. 7 construed. Gay v. Ray [Mass.] 80 N E. 693. A parol assignment by a man in business of the accounts and bills receivable which he should acquire in the course of such business to secure a person for becoming his indorser to enable him to raise money for use in the business creates a valid lien as against the trustee where assignment was made in good faith more than four months prior to the bankruptcy, although no notice of the same was given creditors and the notes and accounts remained in possession of the assignor until his bankruptcy. Union Trust Co. v. Bulkeley [C. C. A.] 150 F. 510.

62. In re Fabian, 151 F. 949.

63. In re Plattesville Foundry v. Machine Co., 147 F. 828.

64. Material man's lien. In re Franklin, 151 F. 642.

65. Taking a preferential mortgage does not destroy the creditor's right to his preferred lien. Smith v. Au Gres Township Mich. [C. C. A.] 150 F. 257. A mortgagee's right to payment from the proceeds of the mortgaged property when sold by the trustee is not affected by the fact that he received an illegal preference from the bankrupt in an entirely separate transaction. In re Franklin, 151 F. 642.

66. Hiscock v. Varick Bk., 206 U. S. 28, 51 Law. Ed. 945. Sale without notice held valid under law of New York. Id.

67. A pledge of property not retained in his possession cannot claim it as against the pledgor's trustee in bankruptcy. Goodrich v. Dore [Mass.] 80 N. E. 480. Holder of so-called warehouse receipts under a pledge which was invalid for want of a change of possession have no equitable lien which takes precedence of the title of the trustee. Security Warehousing Co. v. Hand, 206 U. S. 415, 51 Law. Ed. 1117.

68 White v. Rovall, 105 N. Y. S. 624.

69. Smith v. Au Gres Township, Mich. [C. C. A.] 150 F. 257.

70. A creditor of an insolvent corporation held not estopped by an agreement with certain mortgagees looking to the sale of the mortgaged property to contest the validity of the mortgage in subsequent bankruptcy proceedings against the mortgagor. In re Builders' Lumber Co., 148 F. 244.

71. Parol assignment of choses in action as security. Union Trust Co. v. Bulkeley [C. C. A.] 150 F. 510.

72. See 7 C. L. 404.

73, 74. In re Newton & Co. [C. C. A.] 153 F. 841.

75. In re Newton & Co. [C. C. A.] 153 F. 841. An unfiled chattel mortgage is void as to creditors, even if the mortgagee is in possession of the property where proceedings in bankruptcy have been commenced prior to a sale of the property to satisfy such mortgage. Cornelius v. Boling, 18 Okl. 469, 90 P. 874. A chattel mortgage is void, as against the mortgagor's trustee in bankruptcy, where it was not recorded and the property was not

determined exclusively by the local law. The trustee is not a "party" to a mortgage given by the bankrupt within the meaning of the recording acts.[76]

(§ 10) *E. Preferential transfers and payments.*[77]—In order to constitute a preference, there must have been a transfer [78] by the bankrupt while insolvent [79] within four months prior to the filing of the petition [80] to a creditor [81] or some one in his behalf from which a preference actually resulted.[82] In order that the preference may be avoided by the trustee, the person receiving it, or the one to be benefited thereby, or his agent acting therein,[83] must have reasonable cause to believe that a preference was intended.[84] There is a conflict as to whether intention on the part of the bank-

retained by the mortgagee in conforming to the express provisions of Rev. Laws, c. 198 § 1. Goodrich v. Dore [Mass.] 80 N. E. 480. See Chattel Mortgages, 7 C. L. 634.

76. Unrecorded chattel mortgage held void as against trustee. Rev. St. Me. c. 93, § 1, construed. In re Shaw, 146 F. 273.

77. See 7 C. L. 404.

78. Where trustee of minor and officer of corporation loaned trust funds to corporation and subsequently took bill of sale of corporation's machinery, etc., to secure said loan and within the four month period, held a preference. In re Arkonia Fabric Mfg. Co., 151 F. 914. A "transfer" includes a mortgage or a lien voluntarily created by the debtor. Sec. 60a construed. Coder v. Arts [C. C. A.] 152 F. 943, modifying, In re Armstrong, 145 F. 202. Mortgage to secure repayment of misappropriated trust funds held a preference. Smith v. Au Gres Township, Mich. [C. C. A.] 150 F. 257.

79. Evidence held to show that corporation was insolvent at date of transfer of its machinery, etc. In re Arkonia Fabric Mfg. Co., 151 F. 914.

80. Conveyance of father to same claims of sons held not a preference. Merrill v. Hussey, 101 Me. 439, 64 A. 819. Conditional sale recorded within four month period void as to trustee in North Carolina. In re Builders' Lumber Co., 148 F. 244. Where there had been no effective transfer of certain insurance money to a creditor until the money was in fact paid which was within the four month period, held the amount so paid constituted a voidable preference. Long v. Farmers' State Bk. [C. C. A.] 147 F. 360. Transfer of property for past consideration and within 10 days of the filing of the petition held voidable as a preference. In re Gesas [C. C. A.] 146 F. 734. Where mortgage was not recorded until within four months and mortgagors were permitted to remain in possession and sell in usual course of trade, mortgage was void. Mitchell v. Mitchell, 147 F. 280. Giving of possession under bill of sale or mortgage executed prior to four months period not within act. Mower v. McCarthy, 79 Vt. 142, 64 A. 578; Fisher v. Zollinger [C. C. A.] 149 F. 54. A duly recorded chattel mortgage on after acquired property under the laws of Ohio is valid as between the parties and becomes a valid lien as of its date as against the mortgagor's general creditors when the property is taken into possession by the mortgagee. Hence such taking of possession within the four month period does not operate as a preference or the creation of a lien within such period. Fisher v. Zollinger [C. C. A.] 149 F. 54. Mortgagee under unfiled chattel mortgage taking possession within the four month period cannot hold the property as against the mortgagor's trustee. Cornelius v. Boling, 18 Okl. 469, 90 P. 874.

81. Where broker bought stock on a margin held he held same as pledgee to secure advances made by him and hence the customer not being a creditor, a transfer to him within the four month period is not preferential. Richardson v. Shaw [C. C. A.] 147 F. 659. Where three days before closing of bank its receiving and paying teller, with full knowledge of the bank's insolvency, paid himself an amount claimed by him, held a preference. In re Plant, 148 F. 37.

82. Under Civ. Code La. art. 2446, and the decisions of that state, a transfer of realty by an insolvent to his wife within the four month period if made in good faith and of property not exceeding in value the total property of the wife does not constitute a preference. Gomila v. Wilcombe [C. C. A.] 151 F. 470. An insolvent corporation occupying leased premises does not commit an act of bankruptcy by permitting its property on such premises, which is subject to a mortgage given to secure its bonds, to be sold for past due rent under a distress warrant, the rent being made by the state statute a lien upon the premises. Richmond Standard Steel, Spike & Iron Co. v. Allen, [C. C. A.] 148 F. 657. Where within the four month period the bankrupt executed a bill of sale of his stock of merchandise to a creditor, who executed contemporaneously an instrument whereby he agreed to realize the best prices obtainable for the merchandise, and the merchandise was sacrificed for the benefit of the creditor, who obtained full value for his claim, held a preference. Belknap & Co. v. Lyell [Miss.] 42 So. 799.

83. Knowledge of bank collecting note held imputable to owner of note. Hooker v. Blount [Tex. Civ. App.] 16 Tex. Ct. Rep. 993, 97 S. W. 1083. In order to make the words "or his agent acting therein" applicable, the person whose knowledge is to be imputed to another must be an agent (McNaboe v. Columbian Mfg. Co. [C. C. A.] 153 F. 967), authorized and empowered to act in respect of the preference, and must actually perform the duties of his agency in respect of the preference (Id.). Where president of bankrupt corporation was also agent of defendant corporation and stole money of latter and put to the use of the bankrupt corporation, held restoration of such money from funds of bankrupt corporation was not a preference. Id.

84. Coder v. Arts [C. C. A.] 152 F. 943, modifying, In re Armstrong, 145 F. 202; Cummings v. Kansas City Wholesale Grocery Co., 123 Mo. App. 9, 99 S. W. 470; Ridge Ave. Bk. v. Studheim [C. C. A.] 145 F. 798; Hussey

rupt to prefer is essential.[85] The words "such person" refer either to the person receiving the preference or the person who is benefited thereby.[86] If the party receiving the preference is without the jurisdiction of the court, and person benefited thereby is within the jurisdiction of the court, the trustee may proceed against the latter.[87] It is only where new sales succeed payments, and the net result is to increase the value of the estate, that payments made by an insolvent debtor on a running account are not to be considered as preferences.[88] Where transferee pays a present, fair consideration for the property, there is no preference.[89] The restoration of stolen money to one who is in entire ignorance of the theft and restoration is not a preference.[90] Where a preference consists in a transfer, the period of four months does not expire until four months after the date of recording, if by law such recording is required.[91] "Required" as here used has reference to the character of the in-

v. Richardson-Roberts Dry Goods Co. [C. C. A.] 148 F. 598. When one engaged principally in farming made statements showing that he was solvent and gave a mortgage upon a large part of his lands for $98,503.32 to secure a pre-existing debt within four months before filing a voluntary petition in bankruptcy, and the creditor then advanced him several thousand dollars without security, held creditor did not have reasonable cause to believe a preference was intended. Coder v. Arts [C. C. A.] 152 F. 943. Modifying, In re Armstrong, 145 F. 202. Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop. Code v. McPherson [C. C. A.] 152 F. 951. Mortgage on practically all of debtor's unincumbered property held, under the circumstances, to give creditor reasonable cause to believe a preference was intended. Id. As to reasonable cause to believe that a preference was intended where mortgagor of chattels retains possession until within the four month period, see Mower v. McCarthy, 79 Vt. 142, 64 A. 578. Cummings v. Kansas City Wholesale Grocery Co., 123 Mo. App. 9, 99 S. W. 470. Mere fact of transfer will not warrant an assumption that the creditor had reasonable cause to believe that a preference was intended. Kowledge that debtor is not meeting obligations promptly is not sufficient to give one reasonable cause to believe a preference was intended. Arkansas Nat. Bk., Sparks [Ark.] 103 S. W. 626. Evidence held insufficient to show that creditor had knowledge of debtor's insolvency or reasonable cause to believe a preference was intended. Id. It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate the security. Id. Where young woman of no business experience had money on deposit with uncle in his business and he sent her check stating that he could no longer use the money, held she did not have reasonable cause to believe a preference was intended. Wright v. Sampter, 152 F. 196. Creditor at the time of receiving the preference must have had knowledge of such facts as afforded him reasonable ground to believe that a preference was intended. Arkansas Nat. Bk. v. Sparks [Ark.] 103 S. W. 626. In an action to set aside a preference, the burden is on the trustee to show that the creditor accepted the preference with knowledge of the insolvency of bankrupt or had reasonable ground to believe that a preference was being intended. Id. Where a new creditor of bankrupt sent attorney to investigate the condition of his debtor and on investigation was assured by the bankrupt that he was solvent, held the taking by the attorney of a chattel mortgage to secure his client's claim was not a preference. Hussey v. Richardson-Roberts Dry Goods Co. [C. C. A.] 148 F. 598. Finding that creditor had reasonable cause to believe that a preference was intended held sustained by the evidence. Parker v. Black [C. C. A.] 151 F. 18, afg. 143 F. 560. Chattel mortgage covering all bankrupt's personal property and given nine days before the adjudication and while he was insolvent held voidable, the creditor having ceased selling him goods some time before, pressed payment, had checks dishonored, etc. Pittsburgh Plate Glass Co. v. Edwards [C. C. A.] 148 F. 377. In order that knowledge of insolvency by the debtor may give rise to an intent, on his part, to prefer it is essential that he have such knowledge at the time of the transfer. Galveston Dry Goods Co. v. Frienkel [Tex. Cov. App.] 103 S. W. 224.

85. Intent to prefer is by bankrupt essential. Goodlander-Robertson Lumber Co. v. Atwood [C. C. A.] 152 F. 978. An intent to prefer is an intent that some particular creditor shall receive a greater percentage of his debts than other creditors of the same class. Id. Where bankrupt at time of making payment was indebted to the extent of $20,000 and had assets of only about $1,500, but possessed a knowledge of a technical business and a valuable good will and did not contemplate quitting business, held no intent to prefer. Id. See note 7 C. L. 406, n 72.

86. In re Sanderson, 149 F. 273. Surety on notes held one "benefited by" preference. Id.

87. In re Sanderson, 149 F. 273.

88. Joseph Wild & Co. v. Provident Life & Trust Co. [C. C. A.] 153 F. 562, afg. In re Watkinson, 146 F. 142.

89. Weeks v. Spooner, 142 N. C. 479, 55 S. E. 432.

90. McMaboe v. Columbian Mfg. Co. [C. C. A.] 153 F. 967.

91. In re Reynolds, 153 F. 295. Act 1898, § 13, has no application to a lien given by an oral chattel mortgage. Mower v. McCarthy, 79 Vt. 142, 64 A. 578. Failure to

strument rather than to the particular individuals who may or may not be affected by an unrecorded instrument.[92] For a going concern, when unable to pay all its debts, to use a part of its assets to pay current expenses does not constitute a preference.[93] An adjudication of bankruptcy based on the ground that a certain transfer is a preference is not conclusive of its being voidable by the trustee.[94] A preferential payment on a note being adjudged to be such does not extinguish the note as to indorsers or sureties.[95] Vacation of a sale by the bankrupt will not restore the vendee to his previous status as mortgagee.[96] The trustee may recover preferential transfers,[97] though there are no creditors entitled to bring creditors' suit.[98] A preferential transfer is not validated by the fact that it was executed in the performance of a contract to do so made more than four months before the filing of the petition.[99] A conditional sale contract being void as to the trustee, its record after the filing of the petition and before the adjudication is insufficient.[1]

§ 11. *Collection, reduction to possession, and protection of property.* A. *Discovery.*[2]

(§ 11) *B. Compelling surrender by bankrupt.*[3]—Bankruptcy courts have summary jurisdiction to compel the surrender of concealed assets,[4] and may refer a petition for an order requiring a bankrupt to turn over money or property to a special master for hearing and an examination of the bankrupt.[5] Order will issue as to property in his possession or under his control.[6] A seller of goods rescinding for fraud is not entitled to the benefit of a summary order obtained by the trustee compelling the bankrupt to surrender the property,[7] but his only right cognizable in bankruptcy is to liquidate, as the court may direct, his claim against the estate for the goods not recovered.[8] A proceeding to enforce obedience to an order requiring the bankrupt to surrender property to the trustee is criminal in character, and a finding that the bankrupt is in contempt should be reached only on evidence which induces belief beyond a reasonable doubt.[9] In such connection the denial of the bankrupt is not conclusive, but is entitled to due weight in connection with the other evidence and circumstances shown.[10] The evidence showing beyond a reasonable doubt that the

record a deed or mortgage given as security until after the bankruptcy of the grantor does not create a preference, Civ. Code Cal. § 1217 providing that an unrecorded instrument is valid as between the parties thereto and those that have notice thereof. In re McIntosh [C. C. A.] 150 F. 546. Chattel mortgage given in Ohio to secure an antecedent debt which though given before the four month period is not recorded until afterwards constitutes a preference. Loeser v. Savings Deposit Bk. & Trust Co. [C. C. A.] 148 F. 975. A state statute which requires a conveyance or transfer to be recorded in order to be effectual as against any class or classes of persons is a law by which such recording is "required" within the meaning of the bankruptcy act. Ohio law construed. Id. Correction of defect which affects only right to record allowed after bankruptcy. In re International Mahogany Co. [C. C. A.] 147 F. 147.

92. In re Reynolds, 153 F. 295.

93. Paid president's salary. Richmond Standard Steel Spike & Iron Co. v. Allen [C. C. A.] 148 F. 657.

94. Issue of reasonable cause to believe that a preference is intended is not involved in the one. Hussey v. Richardson-Roberts Dry Goods Co. [C. C. A.] 148 F. 598.

95. Hooker v. Blount [Tex. Civ. App.] 16 Tex. Ct. Rep. 993, 97 S. W. 1083.

96. Railton v. Chicago Title & Trust Co., 125 Ill. App. 617.

97. In re Ansley Bros., 153 F. 983.

98. Mitchell v. Mitchell, 147 F. 280.

99. In re Great Western Mfg. Co. [C. C. A.] 152 F. 123.

1. So held where property was in the hands of a receiver. Bradley v. McAfee, 149 F. 254.

2. See 5 C. L. 386.

3. See 7 C. L. 409.

4. Where bankrupts claimed that money drawn out had been used to pay for diamonds claimed to have been smuggled by seller and hence were not entered on the books, held evidence warranted order requiring them to pay over money as concealed assets. In re Weinreb [C. C. A.] 146 F. 243. Summary order compelling surrender must be on evidence that property is in possession or under control of bankrupt at time proceedings to surrender were brought. In re Barton Bros., 149 F. 620.

5. In re Herskovitz, 152 F. 316.

6. So held where he sold property and paid proceeds to wife. In re Eddleman, 154 F. 160. Order held not issuable as to proceeds of sale of property paid to his wife and which it was affirmatively shown she had used to pay off notes of her own. Id.

7, 8. In re Ellowich, 148 F. 510.

9, 10, 11. Moody v. Cole, 148 F. 295.

bankrupt is in contempt, the court should exercise the power of commitment and not compel the trustee to resort to a plenary suit.[11] But if a criminal prosecution is pending against him for the same acts, he will not be committed until such prosecution is disposed of.[12]

(§ 11) *C. Property in the possession of officer appointed by state courts.*[13] Where firm property is held by a receiver appointed in a suit, in a state court, by a creditor of a partner, and it becomes evident that the firm property is insufficient to pay firm debts, the receiver should turn over the property to a trustee in bankruptcy of the firm subsequently appointed;[14] but, if a balance will remain after the payment of the firm's debts, the receiver should wind up the business so far as to determine the value of defendant's interest and pay the amount of such interest to plaintiff so far as is necessary to satisfy his demand, and turn the balance over to the trustee.[15] If it cannot be determined whether a balance will remain after payment of firm debts, the trustee may become a party to the original suit, and the receiver should wind up the business, and then final action can be taken in the manner stated.[16] In any event the receiver's proper fee for his services, and his disbursements, should be ascertained and he should not be ordered to turn over the property in his hands to the trustee until these have been paid either out of the fund or otherwise.[17]

(§ 11) *D. Summary proceedings against third persons.*[18]—A court of bankruptcy has jurisdiction by a summary order to compel the return of property forcibly taken from the possession of its receiver or a trustee,[19] and may interfere summarily to compel an intermeddler with its possession to desist and restore the status quo.[20] And the court may thus interfere either of its own motion or upon the complaint of the bankrupt or some other interested person,[21] but it has no jurisdiction to thus counsel an adverse claimant to surrender the property[22] unless such person holds it as a mere cover or receptacle,[23] but it may summarily determine conflicting claims to all that bankrupt has in possession,[24] and unauthorized surrender of possession by the trustee does not impair such right.[25] The trustee may apply to the court for an order directing the attorney of the bankrupt to pay over funds in his hands belonging to the bankrupt, subject to the attorney's right to have the amount due him and claimed as a lien deducted therefrom.[26] There is no provision for summary proceedings or for auxiliary or ancillary proceedings in another court of bankruptcy in aid of the bankruptcy court that made the adjudication and has charge of the bankrupt's estate.[27]

(§ 11) *E. Actions to collect or reduce the property to the trustee's possession.*[28]—The right to sue for and subject to the payment of the bankrupt's debts such property is vested alone in the trustee, and failure of the trustee to bring such suit within the time prescribed by law does not transfer the right to do so to the creditor,[29] and creditors cannot sue[30] except by his consent.[31] Subject to the exceptions made

12. Indictment in state court for embezzlement. In re Hooks Smelting Co., 146 F. 336.
13. See 7 C. L. 410.
14, 15, 16, 17. Gay v. Ray [Mass.] 80 N. E. 693.
18. See 7 C. L. 410.
19. In re Landis, 151 F. 896.
20. In re Home Discount Co., 147 F. 538. Filing of a void assignment of future wages after adjudication held invasive of the possession of the court. Id.
21. In re Home Discount Co., 147 F. 538.
22. Morning Tel. Pub. Co. v. Hutchinson Co., 146 Mich. 38, 13 Det. Leg. N. 701, 109 N. W. 42. Where a receiver has with the apparent assent of the bankruptcy court vacated premises of which a third party is claiming possession, and such third person has thereupon made peaceable entry thereon, a subsequently appointed trustee cannot retake possession by summary proceedings. In re Rothschild [C. C. A.] 154 F. 194.
23. In re Friedman, 153 F. 939.
24, 25. In re Schermerhorn [C. C. A.] 145 F. 341.
26. In re Klein, 101 N. Y. S. 663.
27. Hull v. Burr [C. C. A.] 153 F. 945.
28. See 7 C. L. 411.
29. Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898.
30. A creditor of one discharged in bank-

by the amendment of 1903, the trustee is vested with all the rights and title of the bankrupt, as well as with the rights of the bankrupt's creditors, and, when he seeks to enforce rights or to recover property in another district outside of the territorial jurisdiction of the court which appointed him, he stands in the position of those whose rights he has acquired, and can resort only to the same courts, state or federal, and is confined to the same remedies.[32] He may recover any interest in the bankrupt's estate as it existed at the time of the filing of the petition.[33] Thus he may sue in trover for a conversion of goods occurring before or after bankruptcy, and in a declaration may join a count upon the bankrupt's title and a count upon the trustee's title,[34] but where he declares solely upon his own title, a variance in that the evidence shows title to have been in the bankrupt at the time of the conversion may be waived.[35] He may properly be directed to institute a suit to recover assets on petition of a creditor and the giving of a bond by the latter to protect the estate from liability for costs and expenses.[36] The trustee may, without an order of court or other direction, institute suits for the purpose of collecting and reducing to money property of the estate,[37] and this includes the right to enforce payment of unpaid subscriptions of the stockholders of a bankrupt corporation,[38] but not the right to enforce the stockholder's double liability.[39] Where the trustee desires to enforce unpaid stock liabilities, it is proper for him to file a petition in the bankruptcy court for an order directing him to make an assessment and call upon the unpaid stock of the corporation for the purpose of paying its debts.[40] In order to determine whether such an order should be made it is necessary for the court to decide whether any particular share has been fully paid for or not, and whether the corporate indebtedness exceeds its assets, and what is the amount of its indebtedness.[41] In such case the corporation's indebtedness may properly be proved by presentation of the proofs of claim.[42] The assessments are collectable by plenary suits,[43] and hence the order authorizing the trustee to levy an assessment should not provide for execution against the stockholders for the respective amounts found due on such assessment.[44] The judgment of the bankruptcy suit on such questions is res judicata, in an action by the trustee to recover the assessment levied.[45] As to whether demand is prerequisite to suit for a preference, the cases are in conflict,[46] but failure to make it is in any event waived by answer asserting right in defendant.[47] An order in summary proceedings refusing to compel third person to turn over property alleged to be in his possession or under his control is no bar to an action by the trustee against such third person on the ground that the property was fraudulently transferred to him.[48] The discharge of the bankrupt in no way precludes a trustee from recovering property which the bankrupt has fraudulently transferred.[49]

ruptcy cannot maintain a suit to set aside an alleged fraudulent transfer of the property of the bankrupt, although such transfer may have been made more than four months prior to the filing of the petition in bankruptcy. Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898.

31. In an action on a claim assigned by bankrupts with the consent of the trustee, defendants, not having paid for the goods, could not assert the right of the trustee to the claim as against the title acquired by plaintiff with the trustee's consent. Oldmixon v. Severance, 104 N. Y. S. 1042. Where partners, adjudicated bankrupts as individuals, scheduled a partnership claim for goods sold, and, after the trustee had sued on it and been nonsuited, they assigned it as partners, but in their individual names, to one who assigned it to plaintiff, the trustee consenting in writing to the assignment, plaintiff acquired the right to sue thereon. Id.

32. Hull v. Burr [C. C. A.] 153 F. 945.

33. Cornelius v. Boling, 18 Okl. 469, 90 P. 874.

34. Burns v. O'Gorman Co., 150 F. 226.

35. So held where case was tried and submitted without objection. Burns v. O' Gorman Co., 150 F. 226.

36. In re Bailey, 151 F. 953.

37, 38, 39. Tiger Shoe Mfg. Co.'s Trustee v. Shanklin [Ky.] 102 S. W. 295.

40, 41, 42, 43, 44, 45. In re Remington Automobile & Motor Co. [C. C. A.] 153 F. 345.

46. See 7 C. L. 411, n 30.

47. Eau Claire Nat. Bk. v. Jackman, 204 U. S. 522, 51 Law. Ed. 596.

48. Murray v. Joseph, 146 F. 260.

49. Hunt v. Doyal [Ga.] 57 S. E. 489. Where, in a suit by a judgment creditor to

Jurisdiction.[50]—The trustee's action to recover preferential transfers will lie in any court of equity[51] if the trustee has exhausted his legal remedy.[52] Courts of bankruptcy are created by statute, and they have no jurisdiction except that conferred by statute, either expressly or by implication.[53] Except on consent [54] or to maintain the trustee's possession and title,[55] they have no jurisdiction except in suits to recover a preference or set aside a transfer as fraudulent,[56] of a controversy at law or in equity between the trustee and an adverse claimant of the bankrupt's property,[57] unless the transfer is such as any creditor of the bankrupt might have avoided it.[58] Such equity jurisdiction as they have is concurrent with the state courts,[59] though the validity of all other claims against the bankrupt, and the question whether others have received voidable preferences and have not been required to surrender them, cannot be litigated in a suit in a state court to avoid an alleged unlawful preference.[60] An action by the trustee, where the complaint asks a money judgment only, to recover a preferential payment, is an action at law,[61] to recover on an implied contract,[62] and this is true regardless of the method in which the preferential payment was made.[63]

Limitations.—The two years' limitation prescribed by Rev. St. § 5057 for suits

set aside certain fraudulent conveyances, defendants pleaded their discharge in bankruptcy as a bar, such plea was properly met by an amendment to the bill alleging that the lien under the judgment sought to be enforced was acquired more than four months before the filing of the bankruptcy petition. Brunson v. Rosenheim [Ala.] 43 So. 31.

50. See 7 C. L. 411.

51. In re Plant, 148 F. 37; Parker v. Black [C. C. A.] 151 F. 18, afg. 143 F. 560. An action by the trustee asking that a certain bill of sale by the bankrupt be declared a mortgage, and that a subsequent confirming bill of sale be set aside as perferential and void as to the trustee, is properly brought in equity. Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. S. 571.

52. Brock v. Oliver [Ala.] 43 So. 357.

53. Hull v. Burr [C. C. A.] 153 F. 945. Under the act as amended the bankruptcy court has jurisdiction of a suit by a trustee to set aside an alleged fraudulent transfer of property made more than four months prior to the bankruptcy both as to subject-matter and as to parties, without the consent of the defendant. Act 1898, §§ 70e and 23b, both as amended, construed. Hurley v. Devlin, 149 F. 268.

54. Section 23, sub. "B," construed. Hull v. Burr [C. C. A.] 153 F. 945. A court of bankruptcy may acquire by consent of all the parties in interest jurisdiction to determine a controversy between the trustee and an adverse claimant concerning an indebtedness to a third party, and the lawful power to adjudicate all the claims of the parties thereto, and to enforce their rights against each other by decree and execution. In re Blake [C. C. A.] 150 F. 279.

55. Where a lease to the bankrupt passed to his trustee and the lessors claimed that the lease was not assignable without their consent, the court of bankruptcy had jurisdiction of a proceeding by the trustee, in the nature of a bill to remove a cloud on his title, to determine his rights in such leasehold prior to a sale thereof. Gazlay v. Williams [C. C. A.] 147 F. 678. The bankruptcy court having possession through its trustee of the real estate of the bankrupt, it has jurisdiction to determine all questions in respect to title or liens theron. In re McMahon [C. C. A.] 147 F. 684. Has jurisdiction of petition by trustee for order to sell real estate free from a mortgage given within the four month period. Id.

56. A United States district court as a court of bankruptcy has jurisdiction either at law or in equity to set aside a preference alleged to have been given after the amendment of the act, without the consent of the creditor alleged to have been preferred. Bowman v. Alpha Farms, 153 F. 380. The court of bankruptcy has no jurisdiction of a suit to set aside a fraudulent conveyance without the bankrupt's consent. Skewis v. Barthell, 152 F. 534.

57. Hull v. Burr [C. C. A.] 153 F. 945. Has no jurisdiction of a suit to recover on the ground that conveyance was in fact a mortgage. Circuit court alone of the Federal courts has jurisdiction. Id.

58. Section 70, subd. "e," as amended, construed. Hull v. Burr [C. C. A.] 153 F. 945.

59. A suit by a trustee in bankruptcy to set aside an unlawful transfer of the bankrupt made within four months of the filing of a petition in bankruptcy, and to recover the property or the value thereof, is within the jurisdiction of the supreme court of New York. Bouton v. Wheeler, 118 App. Div. 426, 104 N. Y. S. 33. Where mortgaged property is sold and by agreement the lien attaches to the proceeds which are placed in the hands of a temporary receiver, such fact does not deprive a state court of its jurisdiction of a suit by the trustee to set aside the mortgage as fraudulent. Frank v. Vollkommer, 205 U. S. 521, 51 Law. Ed. 911.

60. Eau Claire Nat. Bk. v. Jackman, 204 U. S. 522, 51 Law. Ed. 596.

61. Cohen v. Small, 120 App. Div. 211, 105 N. Y. S. 287, rvg. 104 N. Y. S. 412.

62. Municipal court has jurisdiction. Cohen v. Small, 120 App. Div. 211, 105 N. Y. S. 287, rvg. 104 N. Y. S. 412.

63. So held where third party collected debts of bankrupt and made the payments to the creditor. Cohen v. Small, 120 App. Div. 211, 105 N. Y. S. 287, rvg. 104 N. Y. S. 412.

between an assignee in bankruptcy and a person claiming an adverse interest is not applicable to claims arising subsequent to the assignment.[64]

Parties.[65]—A trustee appointed for two bankrupts individually, and for them also as copartners in a single proceeding, hold but one office and may sue to set aside an alleged fraudulent conveyance by the bankrupts.[66]

Pleading.[67]—A complaint in an action by the trustee may join a count for a preferential transfer and one alleging the transfer was made fraudulent,[68] and causes of action to set aside fraudulent transfers of realty and personalty may be joined,[69] and a complaint to set aside successive alleged fraudulent transfers to different persons made during eight years as a part of one fraudulent scheme, states but one cause of action.[70] The complaint to set aside a transfer must show the trustee's appointment[71] and the facts making the transfer voidable,[72] but need not allege in terms that it was voidable.[73] Amendments are allowable as in other cases.[74] A complaint to set aside an alleged fraudulent conveyance alleging a cause of action at least as to some of the bankrupt's creditors, it is sufficient.[75]

Presumptions and burden of proof; evidence.[76]—Burden is on trustee to show creditor had reasonable cause to believe a preference was intended.[77] A purchaser of the entire stock of a retail merchant is deemed put upon inquiry, and in the absence of such inquiry is not deemed a bona fide purchase.[78] Evidence of the value of the property is admissible.[79] The mere relation of mortgagor and mortgagee, in the absence of evidence of collusion between them to defraud the mortgagor's creditors, does not create such priority of estate as entitles the mortgagor's trustee to use the declarations of the mortgagor against the mortgagee.[80]

64. Hammond v. Whittredge, 204 U. S. 538, 51 Law. Ed. 606.

65. See 5 C. L. 388.

66. Wright v. Simon, 52 Misc. 360, 102 N. Y. S. 1108.

67. See 7 C. L. 412.

68. Bouton v. Wheeler, 118 App. Div. 426, 104 N. Y. S. 33.

69. Hunt v. Doyal [Ga.] 57 S. E. 489.

70. Wright v. Simon, 52 Misc. 360, 102 N. Y. S. 1108.

71. A complaint by the trustee which alleges that the trustee was appointed "by an order duly made" on a specified date, that a petition in bankruptcy was filed in the office of the clerk of a Federal district court, sufficiently shows the capacity of the trustee to sue. Code Civ. Proc. § 532, construed. Bouton v. Wheeler, 118 App. Div. 426, 104 N. Y. S. 33. Allegations in petition by trustee alleging that defendant had conveyed to the bankrupt certain growing timber, had warranted the title, and alleging breach of warranty, held doubtful and equivocal and petition subject to demurrer for failing to show facts as to cutting by certain third persons. Dickey v. Gray Lumber Co., 127 Ga. 468, 56 S. E. 481. In a complaint to set aside a preferential transfer, allegations of the filing of the petition in bankruptcy, of the adjudication that the grantor was a bankrupt, of the demand of the trustee for possession of the property and the grantee's refusal to deliver it, sufficiently shows plaintiff's interest. Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. S. 571.

72. Where a bill by a bankrupt's trustee to recover an alleged fraudulent preference averred that a mortgage was fraudulently given, and showed that the mortgage had been fully paid and filed before the bill was filed, and was therefore functus officio, the bill was not maintainable under Code 1896, §818, as a bill to set aside a fraudulent conveyance or transfer. Brock v. Oliver [Ala.] 43 So. 357. A complaint in a suit to set aside a preferential transfer alleging that the latter was "intended to and did create a preference in favor of defendant * * * and thereby secured to it a greater percentage of its debt," etc., held a sufficient allegation that the "enforcement" of the transfer would enable defendant to obtain a greater percentage of its debt. Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. S. 571.

73. Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. S. 571.

74. In an action by the trustee against the bankrupt and his chattel mortgagee, held, after judgment in favor of plaintiff, to permit plaintiff to amend his complaint by inserting an allegation that the "assets in plaintiff's hands were at the commencement of this action, and are at the present time, and have been during the period of his trust, insufficient to pay all creditors." Lellman v. Mills [Wyo.] 87 P. 985.

75. Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957.

76. See 7 C. L. 412.

77. Calhoun County Bk. v. Cain [C. C. A.] 152 F. 983.

78. In re Knopf, 146 F. 109.

79. Suit by trustee to set aside conveyance by the bankrupt to his wife as in fraud of creditors. Hunt v. Doyal [Ga.] 57 S. E. 489.

80. Mower v. McCarthy, 79 Vt. 142, 64 A. 578. In an action by a mortgagor's trustee in bankruptcy to recover personal property from the mortgagee, a declaration of the mortgagor soon after he went into business that the mortgagee had loaned him $5,000 or

Trial and judgment.[81]—In a suit in equity to recover a preference, the facts not being disputed, defendant is not entitled to a jury trial.[82] As in other cases, instructions are construed as a whole.[83] Where a bill to recover an alleged preference contains a prayer for general relief, the court is not limited to the entry of a money judgment against the preferred creditor but is authorized to issue an order commanding him to turn the property or money over to the trustee and to commit him for contempt until he does so.[84]

Appeal and review.[85]—Findings of fact will not ordinarily be reviewed on error.[86]

(§ 11) *F. Claims not reduced to possession by the trustee.*[87]—Where a surplus remains in the hands of the trustee after the termination of the proceedings and the debts proved have been paid, such surplus reverts to the bankrupt.[88] If real estate forms any part of such surplus, the bankrupt is deemed in equity the owner thereof, even though a decree may be necessary to revest title in him.[89] A bankrupt cannot, however, claim the reverting of assets not disclosed by him in the absence of a showing of abandonment by the trustee.[90] The trustee is not bound to take property of the bankrupt which may involve him in litigation.[91] The bankrupt may litigate a claim which the trustee on notice fails to prosecute.[92]

§ 12. *Protection of trustee's title and possession.*[93]—On an adjudication the bankrupt's property is in custodia legis,[94] and the trustee's possession cannot be disturbed by process from other courts,[95] but this applies only to property of which the bankrupt had possession at the time of instituting bankruptcy proceedings.[96] Part-

$6,000 to go into business with, and that the mortgagee was to have the right at any time to take possession of the property, held a declaration against the mortgagor's interest; and admissible. Id.

81. See 7 C. L. 412.

82. In re Plant, 148 F. 37.

83. In a suit to recover a preference, instruction that if transfer resulted in a preference the intent to prefer would be inferred held not erroneous, an affirmative finding of insolvency being rendered necessary by other portions of the charge. Galveston Dry Goods Co. v. Frenkel [Tex. Civ. App.] 103 S. W. 224.

84. In re Plant, 148 F. 37.

85. See 7 C. L. 413.

86. Findings of fact upon which depends the answer to the question whether or not certain transactions were invalid under the bankrupt act as operating as a preference are conclusive upon supreme court of the United States in reviewing, by writ of error, the judgment of a state court. Eau Claire Nat. Bk. v. Jackman, 204 U. S. 522, 51 Law. Ed. 596.

87. See 7 C. L. 413.

88. Wade v. Goza, 78 Ark. 7, 96 S. W. 388. Upon the close of the bankruptcy proceedings all of the property of the bankrupt undisposed of reverts to him or to those entitled to his estate. Act 1867, considered. Hunter v. Hodgson [Tex. Civ. App.] 15 Tex. Ct. Rep. 110, 95 S. W. 637.

89. Wade v. Goza, 78 Ark. 7, 96 S. W. 388.

90. Assignees in bankruptcy cannot be deemed to have abandoned the interest in remainder of the bankrupts under a testamentary trust because they did not sell such interest, where, apparently, as soon as they learned of the existence of the trust fund, and of the fact that creditors of the bankrupts were seeking to reach and apply this interest in satisfaction of his debts, they brought a bill in equity in the nature of a bill of quia timet to compel the transfer to them of the bankrupts' interest, and to enjoin the trustee from paying any part of the trust fund to the bankrupts or those claiming under him. Hammond v. Whittredge, 204 U. S. 538, 51 Law. Ed. 606.

91. Oldmixon v. Severance, 104 N. Y. S. 1042.

92. Hubbard v. Gould [N. H.] 64 A. 668.

93. See 7 C. L. 413.

94. In re Bishop, 153 F. 304. Bankrupt's landlord cannot enforce claim for rent by distress. Id.

95. Property of the bankrupt, the title to which was vested in his trustee, is not subject to seizure on execution against the bankrupt issued on a judgment recovered after the adjudication. In re Franklin Lum. Co., 147 F. 852. The trustee may appear and move that a judgment perfecting and enforcing an attachment lien acquired within the four month period be set aside. Not an unnecessary party to such motion. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 S. W. 680. Lien creditor cannot interfere therewith or maintain replevin against the receiver or trustee. In re Platteville Foundry & Mach. Co., 147 F. 828. He may, however, petition the bankruptcy court for payment of the amount of his lien (Id.), or, never having appeared in the bankruptcy court, or in any way consented that the latter might take jurisdiction to determine his rights, he may maintain trover in a state court against the trustee (Id.).

96. The bankrupt not having the possession or the right of possession to the property at the time of the institution of the bankruptcy proceedings, an adverse claimant may maintain an action to determine his rights therein in a state court. Replevin; bankrupt had mortgaged property to trustee

nership creditors may attach partnership assets, though a member of the firm is a bankrupt.[97]

Right of trustee in actions pending by or against the bankrupt.[98]—As to suits pending against the bankrupt, the trustee occupies the position of a purchaser pendente lite.[99] The adjudication does not abate an action pending by or against the bankrupt in state court,[1] but the trustee may intervene [2] or the action may be stayed.[3] The trustee will not be authorized to compromise and settle a suit brought by the bankrupt in a state court without the consent of the bankrupt's attorney who has a lien on any judgment recovered for his services.[4]

Suits against trustee.[5]—An ex parte order improvidently granted authorizing suit against the trustee may be vacated and the claimant enjoined from proceeding further.[6]

§ 13. *Management of the property and reduction to money.*[7]—All contracts relating to the property which are voidable as to the trustee he must avoid or he will be held to have affirmed them.[8] The trustee knowingly holding over after the expira-

for benefit of creditors. Morning Tel. Pub. Co. v. Hutchinson Co., 146 Mich. 38, 13 Det. Leg. N. 701, 109 N. W. 42.

97. Pelzer Mfg. Co. v. Pitts [S. C.] 57 S. E. 29.

98. See 7 C. L. 413.

99. Linstroth Wagon Co. v. Ballew [C. C. A.] 149 F. 960.

1. Where a landlord has seized movables of his tenant in bringing suit for rent, and before judgment the tenant is adjudicated a bankrupt and his trustee makes himself a party, he cannot insist that the suit should be dismissed and the property turned over to him. Schall v. Kinsella, 117 La. 687, 42 So. 221. Where a lessor sues for rent and seizes movables, and the defendant before judgment is adjudicated a bankrupt, the adjudication does not abate the suit and release the seizure. Id. A state court is not ousted of jurisdiction of an action pending to recover specific property from the bankrupt by the filing of the petition, nor by the adjudication. Property had been seized under a writ of sequestration. Linstroth Wagon Co. v. Ballew [C. C. A.] 149 F. 960.

2. A stipulation by a receiver to enter the appearance of the bankrupt in a suit brought against the latter does not bind him to enter his own appearance as receiver or trustee. In re Muncie Pulp Co. [C. C. A.] 151 F. 732. Where demurrer to defense set up by the defendant in a suit by the bankrupt to compel specific performance of a contract to exchange land was overruled, held trustees properly refused to prosecute suit further. In re Throckmorton [C. C. A.] 149 F. 145.

3. The mere statement by defendant's counsel at the trial that defendant is in bankruptcy will not operate as a stay of proceedings. McGowan v. Bowman, 79 Vt. 295, 64 A. 1121. A stay of the proceedings in the state court must be granted on motion, even though the bankrupt is in default and all papers necessary to make up the judgment are filed. American Woodworking Mach. Co. v. Furbush, 193 Mass. 455, 79 N. E. 770. The trustee has the right to intervene in a pending revocatory action in a state court and prosecute the same to final judgment for the benefit of the bankrupt estate. New Orleans Acid & Fertilizer Co. v. Guillory & Co., 11 La. 821, 42 So. 329. Where defendant showed that he had been adjudged a bankrupt, and moved that the trustee in bankruptcy be substituted in his place, but it did not appear that the court in bankruptcy had directed the trustee to intervene, and the trustee himself made no motion, the application would be denied. Oscar Bonner Oil Co. v. Pennsylvania Oil Co. [Cal.] 89 P. 613. It is discretionary with the state court to order a suspension of proceedings in actions pending against the bankrupt or to order the trustee to enter his appearance therein and defend the same. Reynolds v. Pennsylvania Oil Co. [Cal.] 89 P. 610. It follows that a mere showing of the pendency of the bankruptcy proceedings is insufficient to stay the proceedings in the action against the bankrupt. So held where bankrupt filed a certified copy of the order adjudging him a bankrupt and gave notice that he would move to dismiss by reason thereof. Id. On an application to the bankruptcy court to stay an action against the bankrupt, or to vacate such a stay, the court is not required to enter into an investigation dehors the pleadings in such action to ascertain its nature. In re Adler [C. C. A.] 152 F. 422. An action at law to recover a money judgment for a sum which the complaint alleges the defendant received as a factor and agent of the plaintiff for the sale of goods, under a contract by which he was to bill the goods in his own name, collect the proceeds, and forthwith pay over the identical money so received to plaintiff, and which it is further alleged he misappropriated to his own use, is not one to recover a debt created by the defendant's fraud or misappropriation awhile acting in a fiduciary capacity, and on the bankruptcy of the defendant such action may properly be stayed by the court of bankruptcy. Id.

4. In re Adamo, 151 F. 716.

5. See 7 C. L. 414.

6. In re Schermerhorn, 145 F. 341.

7. See 7 C. L. 415.

8. Lease of farm held properly satisfied by trustee, tenant raising crop and paying note given for rent. In re Throckmorton [C. C. A.] 149 F. 145. Where after an alleged unauthorized sale the trustee applies for an order directing that the proceeds be delivered to him, which was duly ordered by the court, such act constituted an affirmance of the sale. Mason Wolkowich [C. C. A.] 150 F. 699.

tion of the bankrupt's lease and after a notice to vacate is given becomes a trespasser, and is personally liable for the damages sustained,[9] though if he acts in good faith and for the benefit of the estate he is entitled to reimbursement from the estate;[10] but in such a case the landlord is entitled to prove such damages against the estate, in a proceeding to which the trustee is a party, before establishing his claim against the trustee in a separate suit.[11] The bankrupt's estate is taxable while in the hands of the trustee,[12] and it is the duty of the court to require such payment even though no claim for the same is presented in the manner or within the time prescribed by the bankruptcy act for the filing of claims.[13] It follows that it is the duty of the trustee to pay the taxes assessed or becoming due on the property of the bankrupt while in his hands for administration;[14] but there is no provision of the law requiring or authorizing him to pay interest thereon.[15] This duty can only be discharged by actual payments or by a legal agreement whereby payment is assumed by some third person.[16]

Sale of property.[17]—While the bankruptcy court may sell the property free and clear from liens,[18] yet the power to do so is extraordinary, and an order merely directing the sale of the property, without mentioning liens, will be taken as a sale subject to existing liens,[19] and notice to the lien creditors of the application for the sale must not only be given but the record must disclose affirmatively that every creditor whose lien will be discharged by the sale has received due notice of the application.[20] Where a trustee sells mortgaged property of the bankrupt's estate free of the mortgage, and the proceeds of the sale are sufficient for that purpose, the mortgagee is entitled to payment of the interest upon his mortgage debt, as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage.[21] Where the sale was not to the highest bidder,[22] or the price was inadequate,[23] or it appears that a better price can be obtained,[24] resale will be ordered. A purchase by the attorney of

9, 10. In re Hunter, 151 F. 904.

11. Prevents circuity of action. In re Hunter, 151 F. 904.

12, 13, 14, 15, 16. In re William Fisher & Co., 148 F. 907.

17. See 7 C. L. 415.

18. In re Platteville Foundry & Mach. Co., 147 F. 828. Where property belonging to the bankrupt was sold free from liens, the act of a lien creditor in bringing trover against the trustee for the conversion of the property so sold constitutes an affirmance of the sale and a waiver of defects therein. Id. A purchaser of property at a resale after the first sale has been set aside on its petition, for a price in excess of that which it offered to bid, held, under the terms of the orders, entitled to the property free of incumbrance, and to have the claim of the former purchaser, the costs made on connection therewith and the accumulated taxes paid by the trustees. In re Wiley [C. C. A.] 153 F. 281.

19, 20. In re Platteville Foundry & Mach. Co., 147 F. 828.

21. Coder v. Arts [C. C. A.] 152 F. 943, modifying In re Armstrong, 145 F. 202. The court says: "Another rule might prevail if the proceeds of the mortgaged property were insufficient to pay the mortgage debt and its interest in full and the mortgagee was seeking to collect an unpaid balance by sharing with other creditors in the distribution of the common property." Id.

22. Where certain of the bankrupt's real estate was offered for sale, and the bankrupt offered to bid $10,500, but could not deposit any earnest money or pay the amount of her bid, and the auctioneer did not receive or cry her bid, but finally sold the property to another for $10,354, held that such sale was properly confirmed nearly a month thereafter, the bankrupt having taken no steps in the meantime to make her bid good. In re Throckmorton [C. C. A.] 149 F. 145.

23. Where land in which the bankrupt owned a four-fifths interest was appraised at $6,000 and the bankrupt's interest was sold for $4,600, the price was not so inadequate as to entitle the bankrupt to have the sale set aside. In re Throckmorton [C. C. A.] 149 F. 145.

24. Where a private sale of real estate was set aside by the court on an offer of a better price and after the purchaser had made improvements thereon, the order providing that the first purchaser should be repaid the amount expended in making such improvements, the costs of the proceedings for ascertaining such amount should be borne by the estate in bankruptcy (In re William Fisher & Co., 148 F. 907), except perhaps as to specific items of costs incurred by the other parties for their own benefit (Id.). Petitioners for resale should pay for transcript of evidence furnished their counsel. Id. Order requiring resale on petitioner agreeing to bid a stated sum plus compensation to former purchaser for additions construed and held to require payment of such compensation by trustees where at the resale the petitioners purchased the property at a price largely in excess of that which it was required to bid by the bidder. Id.

the bankrupt is not void.[25] As regards the allowance of an attorney's fee to the attorney of the mortgagee on sale by the trustee of the mortgaged property, the court is largely governed by the local practice.[26] Payment must be in cash unless the order for sale otherwise provides.[27] Where the bankrupt purchased a chose in action at the trustee's sale he can assert no greater rights thereon than he scheduled.[28] A bill will not lie in state court to establish a joint interest with the purchaser.[29]

§ 14. *Claims against estate and proof and allowance.*[30] *A. Claims provable.*[31] Among the claims provable under section 63 of the act are fixed liabilities evidenced by writing and due absolutely at the filing of the petition,[32] claims on contract express or implied,[33] and claims founded on provable debts reduced to judgment.[34] Under subdivision "b" of section 63 [35] claim for unliquidated damages resulting from

25. Beall v. Chatham [Tex.] 99 S. W. 1116, rvg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 325, 94 S. W. 1086.

26. Under Pennsylvania practice court held entitled to reduce commission provided in mortgage. In re Wendel, 152 F. 672.

27. Bonds of the bankrupt company being void, they cannot be used to satisfy the bid of a purchaser at a trustee's sale according to the local practice. In re Wyoming Valley Ice Co., 153 F. 787.

28. Where the bankrupt scheduled a claim against P. and the same was sold by the trustee and subsequently purchased by the bankrupt, held he was not entitled to sue P.'s wife to enforce her alleged liability as an undisclosed principal. Shesler v. Patton, 114 App. Div. 846, 100 N. Y. S. 286.

29. Where, under a decree in a bankruptcy proceeding in the United States court, land is sold and a deed is ordered to be made to the purchaser, a state court is without jurisdiction to enjoin the execution of such deed upon a bill filed therein by one claiming to be jointly interested with the purchaser of said property, nor can the purchaser be enjoined from acquiring title to such land. Henderson v. Henrie, 61 W. Va. 183, 56 S. E. 369.

30, 31. See 7 C. L. 416.

32. Where notes provided for a stated attorney's fee upon being placed in an attorney's hands for collection and the notes matured and were placed in an attorney's hands for collection before the maker became bankrupt, the holder is entitled to prove his claim for attorney's fees. In re Edens, Co., 151 F. 940. Alleged agreement limiting fee of attorney for creditors held ineffective to deprive the creditors of their right to have attorney's fees allowed in addition to the amount of their notes providing for such fees (Id.), but the rule is otherwise as to notes maturing after the commencement of the bankruptcy proceedings (Id.).

33. Where shortly before bankruptcy bankrupt gave notice to other party to an executory contract that he would be unable to perform same, such other party may treat the contract as broken although the time for performance has not arrived, and prove his claim for damages for the breach against the estate in bankruptcy. In re Spittler, 151 F. 942. It would seem that the adjudication would work a breach of an executory contract. Id. Where the members of a firm borrow money on their individual credit for the benefit of the firm, the lender after having obtained a dividend from the firm's assets in bankruptcy may have his claim allowed for the balance due thereon as a claim against the individual partners. In re McCoy [C. C. A.] 150 F. 106. One who sold property on credit to a third person, who turned it over to a corporation which did not become a party to the contract of sale, did not thereby become a creditor of the corporation for the price and entitled to prove a claim against its estate in bankruptcy. In re Builders' Lumber Co., 148 F. 244. Right to sue former partner on agreement to indemnify plaintiff from all liability on partnership debts held not barred by discharge of defendant, plaintiff having paid the indebtedness after defendant's discharge. Ogilly v. Munro, 52 Misc. 170, 100 N. Y. S. 753. Where bankrupt bought property of insolvent and agreed to pay latter's debts, held a promise to pay giving the former owner's creditors provable claims against the bankrupt's estate. In re Baumblatt, 153 F. 485. Where the principal on a bond given to dissolve an attachment went into bakruptcy and was discharged between the time of bringing suit on the bond and the recovery of a judgment thereon, which was afterward paid by the surety, the claim of the surety was not provable in the bankruptcy proceedings. Smith v. McQuillin, 193 Mass. 289, 79 N. E. 401. The liability of a bankrupt indorser on commercial paper which did not become absolute until after the filing of the petition is a debt founded upon a contract within § 63a (4) and provable in bankruptcy thereunder after such liability has become fixed and within the time limited for proving claims. In re Smith, 146 F. 923.

34. A judgment of a state court of California on which an execution has been awarded under the provisions of Code Civ. Proc. Cal. § 685, more than five years after its entry, which execution was levied prior to the bankruptcy proceedings, is provable as a claim against the debtor's estate though an action thereon is barred by limitations under another section of the statute. In re Rebman [C. C. A.] 150 F. 759. A judgment debt is provable though the creditor have collateral security. So held where creditor held mortgage, had foreclosed, and bankrupt had appealed from foreclosure decree. In re Myer [N. M.] 89 P. 246. Judgment on a note is a provable debt. Johnson v. Joslyn [Wash.] 88 P. 324.

35. Section 63, subd. "b" does not add anything to the class of debts which may be proved under the preceding subsection, but has merely to do with a matter of procedure,

injury to the property of another, not connected with or growing out of any contractual relation, is not provable.[36] The several subdivisions of section 63*a* are not to be regarded as an enumeration of a group of characteristics all of which are essential to a provable claim, but as a classification, each specifying a separate class of provable claims,[37] and hence the provision of the first subdivision limiting the claims provable thereunder to those which were a fixed liability absolutely owing at the time of the petition does not impose the same limitation upon claims within other classes.[38] Unfulfilled voluntary composition made prior to the proceedings does not bar the creditors from proving their claims in full, less amounts paid under composition.[39] Instituting an action against a guarantor does not bar proof against the debtor's estate, though the debtor was given the conditional privilege that if part of the indebtedness was paid promptly the creditor would release the balance.[40] An individual partner going into bankruptcy the firm debts are provable against him; the firm creditors sharing only in the individual estate after the individual creditors have been paid in full.[41]

(§ 14) *B. Proof of claims.*[42]—General order No. 21, providing that proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred, is a valid exercise of the authority conferred upon the supreme court.[43] Claims must be proved within one year after the adjudication,[44] except where liquidated by litigation.[45, 46] The proof must specifically itemize the debt.[47] The burden of proof is on the claimant,[48] but a verified petition for the allowance of a claim is

as to how unliquidated claims, founded upon open account or contract, may be liquidated or made certain. Brown v. United Button Co. [C. C. A.] 149 F. 48.

36. Brown v. United Button Co. [C. C. A.] 149 F. 48. Claim for damage to wool from overheating adjoining premises held not provable whether treated as resulting from negligence or nuisance. Id. The debts which may be proved under section 63 are not enlarged by the fact that it is assumed in section 17, regulating the effect of a discharge that, with certain exceptions, liabilities for torts are discharged and hence provable, any inconsistency between the two being controlled by section 63 which is devoted specifically to what debts are made provable. Id.

37, 38. In re Smith, 146 F. 923.

39. In re Carton & Co., 148 F. 63.

40. Du Vivier & Co. v. Gallice [C. C. A.] 149 F. 118. Rule applied where under agreement so providing debtor gave creditor notes indorsed by third party and after default creditor started suit against the indorser. Id.

41. New York Inst. for Deaf & Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. S. 412.

42. See 7 C. L. 417.

43. Orcutt Co. V. Green, 204 U. S. 96; 51 Law. Ed. 390, modifying In re Ingalls Bros., 137 F. 517.

44. An attachment creditor who deemed himself secured, and did not prove his claim within the year lest it should prejudice his rights under the attachment, cannot prove it thereafter upon being defeated on the attachment. In re Baird, 150 F. 600. The limitation is on time of proving and allowance may be after the year. In re Mertens & Co. [C. C. A.] 147 F. 177. The presentation and delivery of a proof of claim to the trustee within a year after the adjudication is a sufficient filing. Act 1898, § 57, and General Order No. 21, construed. Orcutt Co. v. Green, 204 U. S. 96, 51 Law. Ed. 390, modifying In re Ingalls Bros. [C. C. A.] 137 F. 517. Except as to personal claims of the trustee (Id.), and it follows that as to the latter a delivery of such a claim to the trustee's attorney to be filed with the referee is likewise insufficient (Id.).

45, 46. Act 1898, § 57 N. In re Baird, 154 F. 215. Creditor who had an attachment suit pending at the time of the bankruptcy of the debtor held to come within the words "liquidated by litigation" and if defeated might prove his claim. Id. Where a claim secured by a mortgage on a bankrupt's stock in trade was attacked by the trustee as a preference, whereupon the creditor sued in a state court to establish the validity of the mortgage, in which action the mortgage was held void as a preference, the creditor's claim was "liquidated by litigation." Powell v. Leavitt [C. C. A.] 150 F. 89, rvg. In re Noel, 144 F. 439. If a final judgment be entered within thirty days before the expiration of the year after the adjudication, or at any time thereafter, the claim may be proved within sixty days after the rendition of the judgment. Act 1898, § 57 "n," construed. Id.

47. A proof of debt is clearly defective where the sole statement of the consideration is that it was for "services, mdse., etc.," "bal. of wages," "for goods sold and delivered," and the like. In re Morris, 154 F. 211.

48. The burden rests upon one making claim against the estate of a bankrupt for salary under a contract to prove the contract and that the services contracted for were fairly rendered, and if he fails so to do his claim cannot be allowed for the contract price but only on a quantum merult as to which the burden of proof also rests upon him. Mason v. St. Albans Furniture Co., 149 F. 898.

prima facie evidence of the validity of the claim itself, on which it may be allowed as a general claim.[49] A court of bankruptcy being a court of equity may allow the proof of a claim unenforceable under the laws of the state, but the power is to be exercised with great caution.[50]

(§ 14) *C. Contest of claims.*[51]—The "parties in interest" who may contest are those who have an interest in the res which is to be administered and distributed in the proceeding, and does not include those who are merely debtors or alleged debtors of the bankrupt.[52] While the bankrupt cannot object to the proof of claims, he has an equitable right to insist that the trustee shall object to illegal claims.[53] The right to have a re-examination of allowed claims should not be denied to creditors who clearly have an interest therein because they seek such re-examination chiefly or solely in the interest of third party.[54] Proceedings to expunge an allowed claim should properly be based on petition and answer,[55] and the claimant allowing the time to answer to expire he is not entitled to file an answer after the trustee has finished taking testimony under his petition.[56]

(§ 14) *D. Surrender of preferences and effect thereof.*[57]—That the net result of the transaction was a gain to the bankrupt does not relieve the creditor from the necessity of surrendering a preference.[58]

(§ 14) *E. Secured creditors.*[59]—It is only when collateral held by a creditor has not been disposed of in accordance with the contract of pledge that a court of bankruptcy can exercise the power to determine the value of such securities and direct their disposition.[60] On rejecting claim because creditor has security, the court cannot in the same proceeding enter a decree against him for the excess of security over debt.[61]

(§ 14) *F. Set-off.*[62]—The right of set-off is not affected by the fact that the creditor holds collateral security exceeding in value the amount of the bankrupt's indebtedness to him.[63] A creditor may use his claim as a set-off against the trustee though he has not proved it and the year has expired.[64]

(§ 14) *G. Priorities.*[65]—Priority is given in the order named: To taxes;[66] cost of preserving the bankrupt estate; fees and expenses of creditors in certain cases;[67] cost of administration;[68] wages earned within three months;[69] and debts pre-

49. In re Jones, 151 F. 108.

50. In re Tucker, 148 F. 928. A loan by a wife to her husband of stocks previously received by her from him as a direct gift, which gift was invalid under the law of the state and passed no title does not afford basis for a claim against his estate in bankruptcy. Id.

Note: For allowance of a claim under above rule, see James v. Gray [C. C. A.] 131 F. 401, 1 L. R. A. (U. S.) 321

51. See 7 C. L. 418.

52. In re Sully, 152 F. 619.

53. In re Carton & Co., 148 F. 63.

54. In re Sully, 152 F. 619.

55, 56. In re Lewis, Eck & Co., 153 F. 495.

57. See 7 C. L. 418.

58. Preferential transfer was within four months and other parts of transaction far back. In re Watkinson, 146 F. 142.

59. See 7 C. L. 418.

60. Hiscock v. Varick Bk., 206 U. S. 28, 51 Law. Ed. 945.

61. Fitch v. Richardson [C. C. A.] 147 F. 197.

62. See 7 C. L. 419.

63. Bank deposit. Steinhardt v. National Park Bk., 105 N. Y. S. 23, rvg. 52 Misc. 464, 102 N. Y. S. 546.

64. Norfolk & W. R. Co. v. Graham [C. C. A.] 145 F. 809.

65. See 7 C. L. 419.

66. New Jersey corporate franchise tax held a tax within the term as here used. State of New Jersey v. Anderson, 203 U. S. 483, 51 Law. Ed. 284, rvg. In re cosmopolitan Power Co. [C. C. A.] 137 F. 858. Franchise tax assessed under N. J. Gen. St. 1895, §§ 251, 252, 257, 258, 260, on the basis of the capital stock of a corporation issued and outstanding on the 1st of January preceding the making of the return is "legally due and owing." Id. In case any question arises as to the amount or legality of any tax entitled to priority of payment, the same must be heard and determined by the bankruptcy court. Finding of state board of assessors as to the amount of outstanding capital stock of a corporation, made for the purpose of fixing the amount of the annual license fee or franchise tax imposed by the New Jersey statutes is not conclusive on the bankruptcy court. Id. Taxes are to be paid with all interest and penalties to time of actual payment. In re Kallak, 147 F. 276.

67. Fees of attorneys for the petitioning creditors in involuntary proceedings are allowable and given priority as a part of the

ferred by state laws.[70] One who has augmented the fund for creditors may be entitled to an equity of preference therein.[71] Under the United States bankruptcy act the creditors of an insolvent partnership have a claim only against the surplus of the individual estate of a partner after his individual debts have been paid.[72]

cost of administration and such claims rank next after the wages of laborers, taking precedence, subject to tax claims, of all other mortgages or other liens on funds in the hands of the court for distribution. In re Erie Lumber Co., 150 F. 817. The reasonable fee of counsel employed by a trustee to recover a preference constitutes a part of the trustee's expenses and, as such, a part of the costs and expenses of administration, entitled to preferential payment. Page v. Rogers [C. C. A.] 149 F. 194.

68. A mortgagee who had no notice of the bankruptcy proceedings in which at the request of the other parties interested, the business is continued at a loss and the property sold, is entitled to priority of payment from the proceeds after they have contributed ratably to the payments of labor claims and the costs of administration. (In re Erie Lumber Co., 150 F. 817), but the rule is otherwise where the mortgagee has notice of the proceedings and participates therein (Id.). Held precluded from insisting on the priority of his mortgage over the operating expenses or other obligations incurred by the receivers under orders of the court in carrying on the business which was intended to conserve his security. Id. Money advanced by bankrupt to pay for publication of notice of application for discharge is costs of administration. In re Hatcher, 145 F. 658.

69. Where the business is continued, by order of the court, under receivers' wages due laborers for labor performed within three months prior to the bankruptcy, and also under the receivership, will be given priority over all other claims except taxes. In re Erie Lumber Co., 150 F. 817. The priority accorded wages due to workmen, clerks, or servants, is not applicable to one advancing the employer money, before his bankruptcy, with which to pay his employes and took assignments of their claims as security. In re St. Louis Ice Mfg. & Storage Co., 147 F. 752. An assignee of the wages of employes of the bankrupt is entitled to the preference given by the act (In re Fuller, 152 F. 538; Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 51 Law. Ed. 436), unless he exchanges such claims for the employer's note and due bill thus working a novation (In re Fuller, 152 F. 538). A claim for wages earned more than three months before the commencement of the bankruptcy proceedings is not entitled to a preference. In re Huntenberg, 153 F. 768.

70. In re Bennett [C. C. A.] 153 F. 673. Priority given claim for materials furnished to manufacturing corporation under Ky. St. 1903, § 2487, held entitled to priority. Id. Ky. St. 1903, § 2494, as to filing of notice, held not applicable to such lien. Id. Under S. C. Civ. Code 1902, §§ 2427-2429, landlord's lien for rent held due to date of adjudication held entitled to priority. In re Bishop, 153 F. 304. A claim, which is entitled to priority because of a state statute by which the right of priority is given to the debt, and not to the creditor, may be assigned before bankruptcy, and the right of priority will pass to the assignee. In re Bennett [C. C. A.] 153 F. 673. The principle controlling the construction and effect of the provision giving priority to debts owing any person who by the laws of the state is entitled to priority is that the creditor shall be allowed the same priority under the bankruptcy act which he would have had if such act had not superseded the state laws governing the distribution of the estates of insolvent debtors. In re Jones, 151 F. 108. Comp. Laws Mich. § 9675, which provides that the assignee of an insolvent debtor "under this title" shall pay in full all debts owing by the debtor as guardian, etc., is not a law of the state of such general character as gives priority a debt due from a bankrupt as guardian, it being applicable only in special proceedings under that title. Id. Priority of claim as given to claims preferred by state laws is only a priority over those claims which are not specified in the bankruptcy act as being higher in right. In re Consumers' Coffee Co., 151 F. 933. As to whether claim for trust fund is entitled to priority must be governed by the bankruptcy act and not by state insolvency law. Smith v. Mottley [C. C. A.] 150 F. 266, rvg. In re Potter's Sons, 143 F. 407. There would seem to be a valid distinction in the application of the rule that a misappropriated trust fund must be found in the assets between the settlement of an estate in bankruptcy proceedings and proceedings upon a bill filed by the marshaling and appropriation of assets according to the principles of equity. In the latter case there is a seizure of the res for the direct purpose of fostering the inchoate rights of creditors; in the former the trustee takes the estate as he finds it. Id. Under Ky. St. 1903, § 496, a mortgage withheld from record for several months and until shortly before the bankruptcy proceedings is not a lien as against the mortgagor's creditors in bankruptcy whose claims originated while it was so withheld. In re Doran, 148 F. 327. Under the laws of New Mexico community property being primarily a fund for the payment of community debts, on the bankruptcy of the husband having only a community estate, the claims of an antenuptial creditor must be postponed until those of community creditors are satisfied in full. In re Chavez [C. C. A.] 149 F. 73. A finding denying a claim of the wife of the bankrupt for repayment of money brought into the community by her at the time of her marriage, priority over other creditors of the community will not be disturbed on appeal, where the record failed to show that the marriage was solemnized in a state, by the laws of which, at the time of the marriage, she was entitled to priority. In re Myer [N. M.] 89 P. 246.

71. Buyer of quantity of specific kind of goods not having paid anything held not entitled to equitable relief giving him a preference over other creditors, his remedy being at law regardless of the bankruptcy of the seller. Block v. Shaw, 78 Ark. 511, 95 S. W. 806.

72. Euclid Nat. Bk. v. Union Trust & Deposit Co. [C. C. A.] 149 F. 975.

Where a partnership goes into bankruptcy, the right of an individual creditor to be paid by preference out of individual assets must be enforced in the bankruptcy proceedings.[73] Such a right is no defense to a suit by "partnership creditors" to annul sale as operating an undue preference.[74] Those liens which are not affected by the act of course give priority against the property charged,[75] while as to others, the lien holders come in as general creditors.[76] It has been doubted whether a lien existing only by operation of law falls within the class of "liens given or accepted, etc."[77] An unliquidated claim for damages for breach of a contract by receivers of a bankrupt is not entitled to priority as against antecedent liens against the estate.[78] Allegations, in a verified petition for the allowance of a claim, of facts to establish the right of such claim to priority, are not to be taken as prima facie true, but must be proved by evidence.[79]

(§ 14) *H. Expenses of the proceedings.*[80]—One reasonable attorney's fee is allowed to the petitioning creditors in involuntary cases, and to the bankrupt in voluntary cases.[81] The compensation allowed the trustee by the bankruptcy act is in full for all his services,[82] and a contract between a creditor and the trustee whereby the latter receives any additional compensation is void.[83] Holding daily auction sales

73, 74. New Orleans Acid & Fertilizer Co. v. Guillory & Co., 117 La. 821, 42 So. 329.

75. Where a judgment against a bankrupt was a lien on certain real estate of which the bankrupt's father had died seized, and from a sale of which the fund subject to distribution arose, such claim was entitled to priority. In re L'Hommedieu [C. C. A.] 146 F. 708.

76. An infant not being able to put the bankrupt in statu quo and electing to disaffirm a contract with the latter can only prove his claim as a general creditor. In re Huntenberg, 153 F. 768. Where creditors of bankrupt file their claims as "unsecured" and then file mechanic's liens on property of persons indebted to the estate they are entitled on surrendering their liens to share generally in the assets, or on agreeing as to the value of their security to credit such amount on their claims and prove the balance as unsecured. In re Grive, 153 F. 597.

77. Act 1898, § 67, subd. "d." Landlord's lien under Pennsylvania statute. In re Consumers' Coffee Co., 151 F. 933.

78. In re Erie Lumber Co., 150 F. 817.

79. In re Jones, 151 F. 108.

80. See 7 C. L. 421.

81. The provision authorizing the allowance of one reasonable attorney's fee to the bankrupt in involuntary proceedings does not authorize such allowance of fees for all legal work the attorney may do for the bankrupt in the proceeding, but only for that which was required by the provisions of the law and the necessities of the proceeding. In re Payne, 151 F. 1018. The attorney for the bankrupt being employed by the trustee as his attorney is entitled to compensation for services rendered the latter. In re Dimm & Co., 146 F. 402. Executors were held liable to repay to the trustee of an alleged preference a sum sufficient to pay all debts and expenses of trustee. A fee of $15,000 was allowed the trustee's attorney, but the executor's total liability was more than $7,000 less than the aggregate of the debts and expenses, including the allowance to counsel. Held that such allowance was not excessive in so far as such executors were concerned. Page v. Rogers [C. C. A.] 149 F. 194. Where mandate on former appeal provided that appellants were liable for a sum sufficient "to pay * * * the expenses of the trustee, his fee and costs," provided the aggregate did not exceed the amount of the preference received by them, held they were properly charged with a reasonable counsel fee to the trustee's attorney. Id. A trustee in bankruptcy of a corporation is not entitled to be reimbursed from the proceeds of mortgaged property for expenses and attorney's fees paid out by him in litigating the right of certain of the bondholders its share in the fund, which expense was principally incurred for the benefit of the general creditors. In re Waterloo Organ Co., 147 F. 814. Under an order, pending a motion to dismiss the proceedings, requiring the bankrupt to deposit a certain amount as security for the payment of all disputed claims, attorney's fees, etc., the lien of an attorney for the petitioning creditor for his services is protected. In re Baxter & Co [C. C. A.] 154 F. 22. And under N. Y. Code. Civ. Proc. § 66, extended to all the demand of creditors who were settled with after the attorney's formal appearance in the proceeding. Id.

82. Devries v. Orem, 104 Md. 648, 65 A. 430. Though a trustee renders meritorious services and suffers considerable inconvenience in investigating a bankrupt's disposition of his property, etc., no allowance in addition to the fees prescribed can be made therefor. In re Screws, 147 F. 989. The trustee is entitled to commissions on the entire amount realized at the sale though the property is purchased by a creditor who under the terms of the order of the sale is entitled to deduct from the purchase money paid the equivalent of the dividend which would otherwise be paid him. In re Morse Iron Works v. Dry Dock Co., 154 F. 214.

83. So held where creditor agreed, in consideration of trustee's acceptance of appointment, to pay trustee a sum equal to the difference between a certain per cent. on the entire proceeds of the sale and the compensation which he would receive under the statute. Devries v. Orem, 104 Md. 648, 65 A. 430.

is a continuance of the business within the meaning of the rule allowing the trustee additional compensation in such cases.[84] In such case he may also be properly allowed in his account for unavoidable losses of small sums to the estate through inability to collect from purchasers.[85] A mortgagee who submits his claim to the bankruptcy court for allowance and payment from the proceeds of the mortgaged property is chargeable with his pro rata share of the costs of the bankruptcy proceedings.[86]

(§ 14) *I. Expenses of receivers and assignees appointed prior to bankruptcy proceedings.*[87]—The compensation to be allowed receivers and their attorneys is a matter entirely within the discretion of the court,[88] to be determined in view of the services rendered and the net results to the estate,[89] and it is not essential to the validity of such allowance that notice should have been given the trustee or creditors, or that a hearing be had either before the court or a commissioner.[90] A receiver is entitled to the assistance of counsel, and a reasonable allowance, keeping in view the economy enjoined by the general policy of the bankruptcy act, and taking into consideration the value of the estate, will be made to him in the settlement of his accounts.[91] But he is not entitled to an allowance for services rendered by the attorney for the petitioning creditors in instituting the proceedings and obtaining the receiver's appointment, or for other services rendered primarily in the interests of his clients.[92] the former services being a matter for consideration if at all on the settlement of the estate by the trustee.[93]

§ 15. *Distribution of assets; dividends.*[94]—The distribution of assets recovered by the trustee in an action in a state court to set aside an alleged fraudulent conveyance is within the exclusive jurisdiction of the bankruptcy court.[95]

§ 16. *Exemptions.*[96]—Exemptions are governed by the state law [97] of the bankrupt's domicile.[98] This section excludes all questions arising under such state laws,[99] including only the claiming and loss of exemptions under the bankruptcy act. In determining a bankrupt's right to exemption, the construction placed by the highest court of the state on its exemption statutes is controlling on the court of bankruptcy, but such court is not obliged to follow an obiter dictum.[1] The right of the bankrupt to his exemptions should be determined at least as of the date of the adjudication, and probably as of the date of filing the petition.[2] A bankrupt who makes seasonable claim to his exemptions is not deprived of his right by a sale of the property by a receiver with his consent;[3] but, since in such case the proceeds come into the bankruptcy court for distribution, such court may consider and determine any claims to the fund by others.[4] The bankrupt or his assignees who claims property as exempt must prove it to be so.[5] Where the exemption is in property as distinguished from

84, 85. In re Dimm & Co., 146 F. 402.

86. In re Franklin, 151 F. 642.

87. See 7 C. L. 421.

88. In re Martin Borgeson Co., 151 F. 780; In re Kirkpatrick [C. C. A.] 148 F. 811. Is not limited by Act 1898, § 2, subd. 5, as amended. Id.

89, 90. In re Martin Borgeson Co., 151 F. 780.

91, 92, 93. In re Oppenheimer, 146 F. 140.

94. See 5 C. L. 399.

95. Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957.

96. See 7 C. L. 422.

97. In re Downing, 148 F. 120.

98. McCarty v. Coffin [C. C. A.] 150 F. 307; Duncan v. Ferguson-McKinney Dry Goods Co. [C. C. A.] 150 F. 269.

99. See Exemptions, 7 C. L. 1631.

1. In re Sullivan [C. C. A.] 148 F. 815; In re Wood, 147 F. 877.

2. In re Youngstrom [C. C. A.] 153 F. 98. Bankrupt held not entitled to homestead exemption under Mill's Ann. St. Colo. § 2133, such fact not appearing of record at the date of the adjudication. Id.

3. In re Renda, 149 F. 614.

4. In re Renda, 149 F. 614. Claim of landlord upon a lease waiving exemption and wage claims, against which there is no exemption under the state law, are to be preferred to the exemption claiming of the bankrupt. Id. An attachment execution, however, issuing from the common pleas and served on a receiver in bankruptcy, even though based on a judgment with waiver, is entitled to nothing; property in custodia legis. Id.

5. O'Sullivan's Trustee v. Douglass, 30 Ky.

money, and the property is sold at the bankrupt's request that cash be allowed them, he should be charged with his percentage of difference between what the property sold was appraised at and what it actually brought.[6] The bankrupt failing to make a full disclosure, his exemptions should not be allotted him until all of the personal property has been accounted for.[7] Property or money converted by the bankrupt to his own use after the filing of the petition and prior to the property passing into the hands of the marshal should be deducted from the amount of his exemptions.[8]

§ 17. *Death of bankrupt pending proceedings.*[9]—The death of the bankrupt after the filing of an involuntary petition against him, though prior to service, does not abate the proceedings;[10] and dower rights in his estate are governed by the bankruptcy act.[11] His personal representatives must be brought in by proper process.[12]

§ 18. *Referees, proceedings before them, and review thereof.*[13]—The referee has only such powers as are conferred by the act and general orders, [14] and his jurisdiction is confined to the district for which he is appointed.[15] It is the duty of a special master to whom has been referred a bankrupt's petition for discharge and specifications of objection thereto to take and report all testimony offered with his rulings as to its admissibility,[16] and he may properly reserve such rulings, especially if they are made in time to enable the parties to reserve exceptions.[17] A referee is authorized to administer an oath to a witness, including the bankrupt, appearing either voluntarily or by compulsory process, and testifying in support of claims filed against the bankrupt's estate.[18] Violation of his proper orders is contempt.[19]

Review [20] must be sought in the mode prescribed by general orders No. 27.[21] In

L. R. 366, 98 S. W. 990. Testimony that bankrupt was a resident with a family and needed salary, assigned, to keep up, held insufficient to show that it was exempt. Id.

6. In re Ansley Bros., 153 F. 983.

7. Where concealment was as to personal property and amount of concealment could not be ascertained, held real property, but not personal property, exemptions would be allowed. In re Ansley Bros., 153 F. 983.

8. Proceeds of sale of goods made during such time. In re Ansley Bros., 153 F. 983.

9. See 7 C. L. 422.

10. Shute v. Patterson [C. C. A.] 147 F. 509.

11. Where a bankrupt dies pending the administration of his estate in bankruptcy, the widow's dower right and her right to an allowance for herself and children is governed by the bankruptcy act, and not by the laws of the particular state in which the property is situated, except so far as such laws are adopted and preserved by the bankruptcy act. Hurley v. Devlin, 151 F. 919. It follows that where a bankrupt dies pending the bankruptcy proceedings seized of realty in various states, the bankruptcy court of the bankrupt's residence has exclusive jurisdiction to determine the right of the widow to dower in such land. Id. As to lands of which the bankrupt died seized, lying in the state of his residence, his widow's right to dower under the laws of the state remain undisturbed by the proceedings. Id.

12. Heirs and personal representatives. Shute v. Patterson [C. C. A.] 147 F. 509. In such case the process must be served upon them in ample time to allow their appearance. Where heirs were served in Oregon, held improper to require their appearance in Iowa in four days (Id.), and process indicating that the purpose of the proceedings is to adjudge such persons bankrupts is erroneous (Id.).

13. See 7 C. L. 423.

14. Referee held not to have authority to approve compromise between trustee and lien claimant in the absence of an order of the court. Eisman v. Whalen [Ind. App.] 79 N. E. 514.

15. In re Schenectady Engineering & Const. Co., 147 F. 868. The bankruptcy court has no jurisdiction to refer a case to a referee appointed and residing in another district for any purpose. Act 1898, § 22, refers to referees appointed within the district where the case is pending. Id.

16, 17. In re Knaszak, 151 F. 563.

18. United States v. Simon, 146 F. 89.

19. In a proceeding for contempt for violating an order of the reference, it is no defense that the disobedience was under advice of counsel. In re Home Discount Co., 147 F. 538. Where, after a referee had ordered a creditor to withdraw an assignment of wages which had been filed with the bankrupt's employer, the creditor took no steps to obey or supersede it, but continued to tie up the bankrupt's wages until he was compelled to pay the claim, held the creditor was subject to punishment for contempt. Id. A party certified for contempt for refusing to obey an order, who has not superseded it and given security for the costs of the petition to review, cannot justify his disobedience, if the order is not absolutely void, on the ground that it is no offense to disobey the order until the court has confirmed it. Id.

20. See 7 C. L. 423.

21. In re Home Discount Co., 147 F. 538. Cannot ignore the order until the referee certifies his disobedience to the judge, and

the absence of rule or statute, petition must be brought within a reasonable time,[22] to be determined by the district court.[23] Petition to review does not operate a supersedeas, and whether or not it shall have that effect rests in the discretion of the reviewing court.[24] It has few of the properties of an appeal. Primarily, at least, it does not contemplate a trial de novo.[25] The court may by rule provide for an appeal bond.[26] The referee's findings stand on the same footing for review as those of a court.[27]

§ 19. *Modification and vacation of orders of bankruptcy court.*[28]—A proceeding in bankruptcy is a continuous suit,[29] and, until the termination of the proceeding, the court has the power to re-examine its orders therein upon a timely application in appropriate form.[30]

§ 20. *Appeal and review in bankruptcy cases.*[31]—In all controversies arising in bankruptcy proceedings,[32] the remedy for review is by appeal,[33] which may be taken by any person aggrieved,[34] from any of the orders specified in § 25*a* of the act.[35] Where issues of fact are tried to a jury, however, the review must be by error.[36] A

then, on the summary hearing, set up in defense matters contested before the referee, unless he show that the referee had no jurisdiction to make the order. Id.

22. Bacon v. Roberts [C. C. A.] 146 F. 729.

23. Bacon v. Roberts [C. C. A.] 146 F. 729. Its action will not be reviewed by an appellate court except for an abuse of discretion or manifest error. Id. Dismissal of petition filed fifty days after making of order held not an abuse of discretion, no good reason for delay being shown. Id.

24. In re Home Discount Co., 147 F. 538.

25. In re Home Discount Co., 147 F. 538. It is no more than a motion for a rehearing, or a motion for a new trial, in the court of original jurisdiction, while the judgment or decree remains in the power of the court during the term, and does not stay execution unless in pursuance of rules or by special order. Id.

26. In re Home Discount Co., 147 F. 538.

27. In re Simon, 151 F. 507.

28. See 5 C. L. 402.

29. In re First Nat. Bk. [C. C. A.] 152 F. 64

30. In re First Nat. Bk. [C. C. A.] 152 F. 64; In re Tucker [C. C. A.] 153 F. 91. Application to vacate adjudication five weeks after rendition of same, held too late. In re First Nat. Bk., 152 F. 64.

31. See 7 C. L. 424.

32. Proceedings by trustee to compel payment to him of the proceeds of a sale of the bankrupt's assets, held to involve a controversy arising in bankruptcy proceedings, and reviewable only on appeal. Mason v. Wolkowich [C. C. A.] 150 F. 699. A suit by the trustee to cancel a conveyance of real estate by the bankrupt and quiet the trustee's title to the property is a controversy arising in bankruptcy proceedings. McCarthy v. Coffin [C. C. A.] 150 F. 307. A proceeding on a petition filed by an adverse claimant to recover property from the trustee is a "controversy arising in bankruptcy proceedings," and is reviewable by appeal. Smith v. Means [C. C. A.] 149 F. 720. Appeal is the proper remedy to review a judgment adjudging or refusing to adjudge the debtor a bankrupt. (Cook Inlet Coal Fields Co. v. Caldwell [C. C A.] 147 F. 475), a judgment granting or denying a discharge (Id.), and a judgment allowing or rejecting a claim or debt for $500 or over (Id.).

33. An interlocutory order granting an injunction is reviewable by appeal, though the jurisdiction of the bankruptcy court is involved, where the nature of the cause or proceeding is such that the final decree therein would be reviewable by appeal. (O'Dell v. Boyden [C. C. A.] 150 F. 731); but is not so appealable where such final decree or order would be one in a "proceeding in bankruptcy" reviewable only on a petition to revise in matter of law (Id.). Where controversy was between trustee and prior assignee of stock exchange, membership of bankrupt held reviewable only on petition to revise. Id.

34. All parties aggrieved by a final decision, whereby the petition is dismissed, may join in appeal, though some complain of one alleged error and some of another, for on such an appeal all prior rulings are reviewable. Stevens v. Nave-McCord Mercantile Co. [C. C. A.] 150 F. 71.

35. An order dismissing an involuntary petition on the ground that it does not state facts sufficient to constitute an act of bankruptcy is appealable under § 25a, and also reviewable by petition to revise under § 24b. Stevens v. Nave-McCord Mercantile Co. [C. C. A.] 150 F. 71. A claim is rejected so as to afford the right of appeal where creditor insisted that his claims were for a definite amount, viz., the amount stated in the proof of debt, less the sum derived from the sale of collateral, and the referee declined to allow the claims as established as the proof stood, and the bankruptcy court approved and affirmed the ruling of the referee as a disallowance of the claims, and entered an order accordingly. Hiscock v. Varick Bk., 206 U. S. 28, 51 Law. Ed. 945. An order of a court of bankruptcy passing upon the claim of a creditor for the allowance of counsel fees and expenses incurred in contesting claims and prosecuting suits on behalf of the estate, is not one allowing or rejecting a "debt or claim" against the estate and appealable, but is an administrative order reviewable only on petition to revise in matter of law. Ohio Valley Bk. Co. v. Switzer [C. C. A.] 153 F. 362.

36. In re Neasmith [C. C. A.] 147 F. 160.

supervisory jurisdiction on petition to review is also given by section 24.[37] Decisions of state courts are reviewable in the Federal supreme court on the same grounds as in other cases.[38] The supreme court of a territory has no jurisdiction to review on appeal an order refusing to vacate an adjudication in bankruptcy and permit the petitioners to intervene.[39] The circuit court of appeals has no jurisdiction to review orders by territorial courts outside its circuit.[40] Appeals are to be taken in like manner as appeals in equity,[41] within the time limited by the general orders.[42] Neither citation nor bond are jurisdictional[43] and defects therein may be cured after the time limited for appeal.[44] Rules applicable to other appeals obtain as to scope and necessity of record,[45] presumptions in favor of the ruling below,[46] scope of review generally,[47] and restriction of review to objections urged and passed on below.[48]

Writ of error is the only method of reviewing an adjudication of bankruptcy entered on a directed verdict on a jury trial demanded as of right by the alleged bankrupt for the determination of the issues as to insolvency and the commissions of acts of bankruptcy. Grant Shoe Co. v. Laird Co., 203 U. S. 512, 51 Law. Ed. 292.

37. Order denying partnership creditor right to participate in the individual assets of the bankrupt until the individual creditors have first been paid, and no order was entered rejecting petitioner's claim, the order is reviewable on petition to review. Euclid Nat. Bk. v. Union Trust & Deposit Co. [C. C. A.] 149 F. 975. An order of a court of bankruptcy confirming an order of a referee denying a claim of certain exemptions asserted by the bankrupt's wife, not being an order specially appealable under Act 1898, § 25a, is reviewable on a petition to revise, presented within six months generally limited for invoking the appellate jurisdiction of the circuit court of appeals. Act Cong. Mar. 3, 1891, c. 517, § 11 (26 Stat. 829). In re Youngstrom [C. C. A.] 153 F. 98. Proceedings upon a petition filed by the trustee for an order to sell real estate, and also to bring in third persons asserting liens thereon for the purpose of determining their rights as incidental to such sale, are "proceedings in bankruptcy," and reviewable on petition to revise. In re McMahon [C. C. A.] 147 F. 684. Validity of conveyances by bankrupt within four months "arises in the bankruptcy proceedings." Morgan v. First Nat. Bk. [C. C. A.] 145 F. 466.

38. A judgment of the highest state court in favor of a trustee, in an action brought by him to recover the value of an alleged avoidable preference, may be reviewed by the Federal supreme court on a decision against a Federal right on immunity, specially set up or claimed, where the state court answered some of the defendant's contentions by the construction which it gave the bankruptcy act. Eau Claire Nat. Bk. v. Jackman, 204 U. S. 522, 51 Law. Ed. 596.

39. In re American Copper Co. [Ariz.] 89 P. 516.

40. The circuit court of appeals of the eighth circuit has no jurisdiction to revise in matter of law the orders of the courts of original jurisdiction of the Indian Territory sitting in bankruptcy. In re Crawford [C. C. A.] 152 F. 169.

41. Cook Inlet Coal Fields Co. v. Caldwell [C. C. A.] 147 F. 475.

42. The thirty days' limitation prescribed by general order No. 36 for taking an appeal from a final order of a circuit court of appeals in a bankruptcy case cannot be extended by filing a petition for rehearing after the thirty days have expired, although there may be but one term of that court and, by its rules of practice, petitions for rehearing may be presented at any time during the term. Conboy v. First Nat. Bk., 203 U. S. 141, 51 Law. Ed. 128. The allowance of an appeal from a circuit court of appeals on certificate of a justice of the supreme court cannot operate as an adjudication that such appeal is taken within thirty days allowed by the general orders. General Order No. 36. Id. Petition for review filed within thirty days held, under the circumstances of the case, filed within a reasonable time. In re Foss, 147 F. 790. Time for appeal from order confirming composition begins to run from the record entry of the order of confirmation. In re McCall [C. C. A.] 145 F. 898.

43, 44. In re Hill Co. [C. C. A.] 148 F. 832.

45. Circuit Court of Appeals Rule 36, subd. 2, providing that on petitions to superintend and revise the petitioner shall file a certified copy of the transcript, contemplates the certification of the record and proceedings by the clerk of the bankruptcy court, and not a transcript certified by the referee. Cook Inlet Coal Field Co. v. Caldwell [C. C. A.] 147 F. 475. No case will be heard on appeal until a complete record has been prepared by the clerk after he has been directed by counsel to do so, and unless the record contains in itself, and not by reference, all papers, exhibits, deposits, and other proceedings necessary to the hearing in the appellate court. Id. On appeal the record required to be certified and filed is the record of the case in the bankruptcy court. Id. A finding that a contract between a wife and her husband for the return of money brought by her into the marriage community at the time of the marriage was a continuing contract, and was not barred by limitations, was not reviewable, where the evidence was not brought up. In re Myer [N. M.] 89 P. 246.

46. Where necessary for trustee to represent judgment creditors in order to sustain findings, it will be presumed on appeal that the lower court found that he represented such creditors. Frank v. Vollkommer, 205 U. S. 521, 51 Law. Ed. 911.

47. An objection to an order entered nunc pro tunc adjudging petitioner a bankrupt is reviewable on appeal taken at the time the order of adjudication was entered, and not on a subsequent petition to superin-

§ 21. *Trustee's bonds; actions thereon.*[49]

§ 22. *Discharge of bankrupt: its effect and how availed of. A. Procedure to obtain discharge and vacation thereof.*[50]—In the southern district of New York the petition for discharge may be filed with the referee.[51] Proceedings for a discharge are not such new and independent proceedings as to bar an estoppel based upon previous acts.[52] The denial of the application for a discharge renders the issue of the bankrupt's right thereto res judicata as to debts provable in that proceeding,[53] but not as to new debts.[54] The fact that a partnership has been adjudicated a bankrupt, and the partners have been denied a discharge in such proceedings, does not preclude one of the partners from filing an individual petition and asking for a discharge, although he schedules the same debts and assets.[55]

The specification of objections[56] must allege the particular ground of objections and the facts constituting it,[57] but may be amended.[58]

Hearing, evidence, and burden of proof.[59]—The objections are usually referred to a referee for hearing,[60] and his decision will only be disturbed for manifest error.[61] He must be governed solely and entirely by such legal evidence as may be admissible under the pleadings [62] and is actually introduced.[63] The burden is on the objecting creditors [64] to clearly establish the ground of objection.[65]

tend and revise. Cook Inlet Coal Fields Co. v. Caldwell [C. C. A.] 147 F. 475. On petition to the circuit court of appeals to review orders of the district court in bankruptcy proceedings, only questions of law arising out of the facts found or conceded can be considered. In re Throckmorton [C. C. A.] 149 F. 145. In the absence of obvious mistake of law or serious mistake of fact, a finding or decree of the lower court will not be reversed on appeal. As to whether creditor had reasonable cause to believe that a preference was intended. Coder v. Arts [C. C. A.] 152 F. 943, modifying In re Armstrong, 145 F. 202. Appeal from adjudication, being in equity, brings up the whole case. In re Neasmith [C. C. A.] 147 F. 160.

48. Objection that trustee only represented simple contract creditors, and hence could not attack mortgage as fraudulent, cannot be raised for the first time on appeal. Frank v. Vollkommer, 205 U. S. 521, 51 Law. Ed. 911. Only specifications of objection passed on by the referee and the district court will be considered on appeal from an order denying the discharge. Vehon v. Ullman [C. C. A.] 147 F. 694.

49. See 3 C. L. 487.

50. See 7 C. L. 426.

51. Under District Court Rule 11 in bankruptcy in the southern district of New York which makes the office of the referee the office of the court. In re Pincus, 147 F. 621.

52. Failure of bankruptcy to have trustee object to claims of objecting creditors. In re Carton & Co., 148 F. 63.

53, 54. Subsequent voluntary proceeding. In re Kuffler [C. C. A.] 151 F. 12, rvg. 144 F. 445.

55. In re Feigenbaum, 151 F. 508.

56. See 7 C. L. 426.

57. The allegations of the specifications must be specific and of such a character that their sufficiency may be met by demurrer, or by exceptions analogous to those allowed in equity. Troeder v. Lorsch [C. C. A.] 150 F. 710. Specifications of objection which are in the language of the statute without more, and contain no statement of facts, are not amendable. In re Bromley, 152 F. 493.

58. An opposing creditor may amend his specifications of objection to a bankrupt's discharge by supplying allegations that the acts relied upon were knowingly and fraudulently committed by the bankrupt at any time before the evidence closed. In re Knaszak, 151 F. 503. Rule 32 in bankruptcy does not operate as a statute of limitations to prevent the court from permitting creditors to file amended specifications of objection to a bankrupt's discharge after the expiration of ten days in its discretion. In re Nathanson, 152 F. 585.

59. See 7 C. L. 426.

60. Under rule 41 in the eastern district of New York, it is the duty of objecting creditors to see that the objections to a bankrupt's application for discharge are referred to a referee as special master, and to arrange for the hearing thereon. In re Eldred, 152 F. 491.

61. Where an application for a discharge was heard on briefs and the report of a referee overruling the specifications of objection, and the referee's findings, so far as they were disputed, were amply supported by the testimony, an order denying the application will be reversed. Boyd v. Loucheim & Co. [C. C. A.] 149 F. 187.

62. In re Walder, 152 F. 489.

63. In re Walder, 152 F. 489. A referee, acting as special master in hearing objections to a bankrupt's discharge, has no legal right to consider any evidence which has been previously offered before him as referee, or to refuse to recommend a discharge upon the ground that, at some former hearing before him as referee, he, as such referee, may have formed some opinion upon some fact which would be sufficient to bar a discharge, unless some such fact is legally established by proper evidence under the specifications. Id.

64. In re Kolster, 146 F. 138. On a hearing of objections, the burden of proof to

(§ 22) *B. Grounds for a refusal.*[66]—Where equitable, the court may withhold the discharge so as to permit creditors to sue in state courts to recover, for their own benefit, assets not recoverable by the trustee.[67] Among the grounds for which refusal of discharge is provided by § 14b are commission of a crime against the provisions of the act,[68] destruction of or failure to keep proper books of account,[69] obtaining property or credit by false statements,[70] concealment or transfer of property with intent to defraud creditors,[71] and refusal to answer a material question approved by the court.[72]

sustain the alleged specifications is upon the creditors that filed the same, and that burden never shifts. In re Walder, 152 F. 489.

65. On the hearing of an objection to a bankrupt's discharge on the ground that he has committed a criminal offense, while the opposing creditor is not required to establish such offense beyond a reasonable doubt, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Troeder-Lorsch [C. C. A.] 150 F. 710. While acts charged may be established by inference from facts proved (In re Kolster, 146 F. 138), it is not sufficient that such facts justify a suspicion of fraud, but they must be inconsistent with honest and good faith (Id.). Sufficiency of evidence to support particular objections is treated in connection with grounds for refusing discharge. See post, § 22B.

66. See 7 C. L. 426.

67. In re Tiffany, 147 F. 314.

68. On determination of an issue as to the making of a false oath by the bankrupt, it is not a question of the latter's general truthfulness, but a question as to some specific matter which can be framed into an issue material to the bankruptcy proceedings. Troeder v. Lorsch [C. C. A.] 150 F. 710. Evidence of false oath insufficient. Id.

69. Finding of referee on conflicting evidence that evidence was insufficient to sustain objection, that bankrupt failed to keep proper books, and that transfers were fraudulent confirmed. In re Forth, 151 F. 951. In order to have a discharge for failure to keep books of account, it must be shown that the bankrupt not only failed to keep such books but that his omission to do so was with intent to conceal his financial condition. In re Garrison [C. C. A.] 149 F. 178. Failure of firm to keep books held not to bar discharge of nonresident member (Id.), and the burden is upon the opposing creditor to prove both propositions by convincing proof (Id.).

70. The provisions of the bankruptcy act barring a discharge, where the bankrupt has obtained property upon a materially false written statement, are not to receive the strict construction given to criminal statutes, but should receive a reasonable one to effectuate the intention of congress. In re Dresser [C. C. A.] 146 F. 383. Such intention is to deprive any bankrupt of the benefit of a discharge who has obtained property from any person by means of a written statement false in material matters; and within the fair meaning of the clause the statement is made to such person, if it was given to an agent for the purpose of using it in obtaining property for the bankrupt and if its contents were communicated by the agent to such person. Id. The words "such person" refer to the previous words "any person," and the statement is "made to such person" whenever it is made by the bankrupt himself or his duly authorized agent; and it is none the less "made," although the statement itself is not delivered, when its contents are correctly communicated by the agent. Id. The language of the clause does not necessarily import that the statement shall have been made for the purpose of inducing any particular person to rely on it. Id. It is the act of making the false statement to obtain credit and the fraudulent intent which constitute the ground for refusing the discharge, and the right to make the objection is not confined to the person defrauded, but may be made by any party in interest. In re A. B. Carton Co., 148 F. 63. A written financial statement made to a commercial agency, reciting that it is made as a basis of credit with associate members of such agency, and which is communicated to members, who extend credit on the faith of it, is equivalent to one made to them, and if materially false will bar a discharge. In re Pincus, 147 F. 621.

71. A transfer by employes having general authority to make such transfers if made within the four month period and with intent to defraud will bar a discharge. In re Jacob Berry & Co., 146 F. 623. The pledging by a firm of brokers of their customer's stock to secure a loan to themselves held not a transfer with intent to delay or defraud creditors, although the brokers may have had a lien on some of the stock pledged. Id. Unscheduled, surrendered lease held not concealed assets, the surrender being in good faith. In re Kolster, 146 F. 138. Findings of special master on conflicting evidence that bankrupt had concealed property and made false oath with intent to defraud creditors, affirmed. In re Knaszak, 151 F. 503. The judgment of a state court, in a suit brought by the bankrupt's trustee, refusing to set aside a certain transfer as fraudulent, concludes the creditors who cannot thereafter set up the same ground to defeat the discharge. In re Tiffany, 147 F. 314. While intent is a material inquiry or an issue as to the concealment of assets by a bankrupt, if fraudulent intent alone does not justify a refusal of a discharge unless assets belonging to his estate were actually concealed or withheld. Vehon v. Ullman [C. C. A.] 147 F. 694. Duplicate list of customers of mail order house held not the property of the president thereof, and failure to schedule the same did not bar a discharge. Id. To justify the refusal of a discharge, a fraudulent concealment of property by the bankrupt must be predi-

(§ 22) *C. Liabilities released and use of discharge.*[73]—A discharge releases all provable debts [74] except, among others, liability for willful and malicious injury to person or property,[75] liability for obtaining property by false pretenses or representations,[76] liability for support of wife or child,[77] liability for fraud or defalcation

cated upon acts committed after the adjudication (In re Jacobs, 147 F. 797), but, if a concealment is initiated, with intent to defraud creditors, prior to the adjudication is continued thereafter, it is a "concealment" within the statute (Id.). Unaccounted for discrepancy of $15,000 in value of goods on hand before and after bankruptcy held to justify the inference that the bankrupts converted the goods into money and fraudulently and knowingly continued to conceal the same. Id. Evidence held not to sustain specification of objection on the ground of a fraudulent concealment of property, by causing stock in a corporation, in fact paid for by him, to be bought by his wife and held in trust for his benefit, but show that the stock was bought with the separate money of his wife. In re Tillyer, 147 F. 860. Where, acting under advice of counsel that policy of life insurance belonged to his wife, bankrupt failed to schedule same, but in his examinations disclosed its existence, and upon being ordered to do so delivered it to the trustee and paid its cash surrender value, held no fraudulent concealment barring discharge. In re Schofield, 147 F. 862. Evidence held insufficient to sustain objections that bankrupt had concealed assets. Troeder v. Lorsch [C. C. A.] 150 F. 710.

72. No more formal approval is required from the referee than the overruling of objections, if any are made, and the allowance of the questions. In re Weinreb [C. C. A.] 153 F. 363. And this is true though after the objection to the discharge is made he offers to answer the question. Id. The fact that the refusal of a bankrupt to answer material questions in the course of the proceedings which were approved by the referee was based on the claim of his constitutional privilege not to incriminate himself does not deprive the court of the right to deny him a discharge. In re Dresser [C. C. A.] 146 F. 383. That the testimony of the bankrupt was evasive and perhaps false in some particulars is insufficient to warrant the denial of a discharge. In re Cohen, 149 F. 908.

73. See 7 C. L. 428.

74. Only provable debts are discharged. Ogilby v. Munro, 52 Misc. 170, 101 N. Y. S. 753. A nonprovable claim is not discharged whether properly scheduled or not. Smith v. McQuillin, 193 Mass. 289, 79 N. E. 401; Sibley v. Nason [Mass.] 81 N. E. 887. Judgment barred. Young & Co. v. Howe [Ala.] 43 So. 488. The discharge releases the bankrupt from all debts and claims which are made provable against his estate and which existed on the date the petition was filed, excepting only such debts as are exempted from the operation of the discharge by the bankruptcy act. Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898. A duly scheduled claim is included in the discharge, whether proved or not. In re Kuffler, 153 F. 667.

75. A judgment in an action for breach of marriage promise in which there is no allegation of seduction or other wrong is a judgment in an action for breach of contract, and hence is not a judgment "for willful and malicious injuries to the person or property of another." Bond v. Milliken [Iowa] 109 N. W. 774. The exception of judgments in actions "for willful and malicious injuries to the person or property of another" extends to all actions in which the facts of intent and malice are judicially ascertained (Flanders v. Mullin [Vt.] 66 A. 789), but it would seem that something more than the ordinary finding of a willful and malicious act is required (Id.). A close jail certificate on an action for injuries sustained while undergoing a surgical operation, that the cause of action "arose from the willful and malicious act of the defendant and for willful injuries to the person of the plaintiff;" held sufficient to exempt judgment from the operation of the discharge. Id. As to whether there is such a finding is to be determined from the record as a whole. Id. A close jail certificate may be included in the consideration of the question. Id.

76. That a void claim was created by false pretenses does not create a debt which is not affected by the discharge. Loan of money contrary to statutory provisions. In re Home Discount Co., 147 F. 538. Claims for damages arising out of false and fraudulent representations inducing sales of merchandise may be proved as debts "founded upon an open account or upon a contract, expressed or implied," if the sellers had chosen to waive the law and take their places with the other creditors of the bankrupt estate, and are therefore barred by a discharge. Tindle v. Birkett, 205 U. S. 183, 51 Law. Ed. 762, afg. 183 N. Y. 267, 76 N. E. 25. Judgment on note held discharged, allegations of fraud in procurement of money not being sustained. Johnson v. Joslyn [Wash.] 88 P. 324. Judgment for obtaining property by false representations is not released. Lee v. Tarplin [Mass.] 79 N. E. 786. An action at law to recover a money judgment for a sum which the complaint alleges the defendant received as factor and agent of the plaintiff for the sale of goods, under a contract by which he was to bill the goods in his own name, collect the proceeds, and forthwith pay over the identical money so received to plaintiff, and which it is further alleged he misappropriated to his own use, is not one to recover a debt created by the defendant's fraud or misappropriation while acting in a fiduciary capacity. In re Adler [C. C. A.] 152 F. 422. Where one obtained sheep upon fraudulent representation that he would that day receive a check for more than the price of the sheep and would turn it over to the seller, held not discharged from debt. Rowell v. Ricker, 79 Vt. 552, 66 A. 569.

77. Contractual obligations in the nature of alimony are not released. The obligation incurred by a husband under a contract between himself and wife, made in contem-

as officer or fiduciary,[78] and debts not duly scheduled by the bankrupt.[79] Whatever the bankrupt is not required to surrender is his absolutely, freed from the enforcement of the obligation of his prior contracts, unless at the time of the filing of the petition it has taken the form of property, upon which a lien has fastened.[80] The adjudication of a debtor, followed by a discharge, takes away all remedy for the enforcement of the obligation of the contract concerning wages earned after his bankruptcy.[81] Security which was not affected by the bankruptcy proceeding may be enforced after the discharge.[82] A creditor's suit is an action in rem and not against

plation of her obtaining a divorce, which she subsequently did, whereby he agreed to pay her a specified sum per month until her remarriage, is not discharged by his subsequent discharge in bankruptcy. Schlessinger v. Schlessinger [Colo.] 88 P. 970.

78. Forbes v. Keyes, 193 Mass. 38, 78 N. E. 733. The words "while acting as an officer or in any fiduciary capacity" extend to "fraud, embezzlement, misappropriation" as well as to "defalcation." Tindle v. Birkett, 205 U. S. 183, 51 Law. Ed. 762, afg. 183 N. Y. 267, 76 N. E. 25. A judgment obtained by a railroad company against a ticket agent for money collected by him for tickets sold and misappropriated will be released by a discharge. In re Wenhan, 153 F. 910. Money received from copartner as partnership capital pursuant to formation of a contemplated copartnership between the parties held received in a fiduciary capacity, the other partner dying immediately after making such payments. Haggerty v. Badkin [N. J. Eq.] 66 A. 420. Whether a debt due from an agent to his principal for rent collected and converted to his own use is one created by fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity, quaere. Stull v. Beddes [Neb.] 112 N. W. 315, vacating, 110 N. W. 861. Query as to whether "officer" as used above means only a public officer. In re Wenhan, 153 F. 910.

79. If the creditor has no notice or actual knowledge of the proceedings in bankruptcy, and the debt has not been duly scheduled, the discharge is not operative as against such creditor (Marshall v. English-American Loan & Trust Co., 127 Ga. 376, 56 S. E. 449), but mere want of notice or actual knowledge of the proceedings will not prevent the discharge if the debt has been duly scheduled (Id.). The debt and the name of the creditor being duly scheduled, the debt is released regardless of notice to the creditor (Beck & Gregg Hardware Co. v. Crum, 127 Ga. 94, 56 S. E. 242), and the burden would seem to be on the creditor that his name and the debt were not duly scheduled (Id.). Where the bankrupt fails to endeavor to learn the street address of a creditor, but simply states that his address is "Mulberry Street, New York City," and the creditor has no knowledge of the proceedings and receives no notice thereof, the debt is not discharged. Cagliostro v. Indelli, 53 Misc. 44, 102 N. Y. S. 918. The bankrupt having neither knowledge nor notice of an assignment of the indebtedness, a schedule of the same in the original creditor's name is sufficient (Mueller v. Goerlitz, 53 Misc. 53, 103 N. Y. S. 1037), and in this connection the recordation of the assignment is not generally deemed notice to the bankrupt (Id.). So held recordation of assignment of mortgage. Id. Where a creditor whose debt was not scheduled had such actual knowledge of the bankruptcy proceedings as to permit him to participate in all of the proceedings taken, with the exception of the choice of trustee, and the relative value of the creditor's claim as against the claims scheduled, the representatives of which chose the trustee, was such that the deprivation of that right could not be deemed the deprivation of a material right, the creditor's debt was discharged by the discharge in bankruptcy. Morrison v. Vaughn, 104 N. Y. S. 169. A debt is not duly scheduled when the creditor's office address, instead of his residence, is set forth in the schedule under the designation "residence." Weidenfeld v. Tillinghast, 104 N. Y. S. 902, afg. 104 N. Y. S. 712. Unless a debt is duly scheduled in time for proof and allowance, it is not affected by the discharge unless the creditor had actual notice or knowledge of the proceedings. Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263. Where a creditor's name was scheduled as "Costard" instead of "Custard," his true name held not sufficiently scheduled as to be barred. Id. A discharge in bankruptcy is not effectual to discharge a claim for stockholders' statutory liability or unpaid stock subscription, was not properly scheduled, and no notice of the bankruptcy proceedings was served on a corporation, and there is no showing that the claim was ever liquidated. Roebling Sons Co. v. Shawnee Valley Coal & Iron Co., 4 Ohio N. P. (N. S.) 113. Giving name of creditor as to the English-American Trust Co., New York City, is not a sufficient scheduling of the claim of the English-American Loan & Trust Company of Atlanta, Ga. Marshall v. English-American Loan & Trust Co., 127 Ga. 376, 56 S. E. 449. The burden of proof is upon the bankrupt to establish the fact that the debt was duly scheduled, or that the creditor had notice or actual knowledge of the bankruptcy proceedings. Application to cancel a judgment under Code Civ. Proc. § 1268, because defendant has been discharged of his debts in bankruptcy. Weidenfeld v. Tillinghast, 104 N. Y. S. 712, afd. 104 N. Y. S. 902.

80, 81. In re Home Discount Co., 147 F. 538.

82. Morganstein v. Commercial Nat. Bk., 125 Ill. App. 397. A mortgage is not discharged by the mortgagor's adjudication and discharge as a bankrupt. Security Sav. Bk. v. Scott, 3 Cal. App. 687, 86 P. 903. Where a mortgage was signed by the mortgagor's wife and contained an express agreement on her part to pay the note secured by the mortgage according to its

the creditor personally, and a discharge by a court of bankruptcy is no bar thereto.[83] Liability as principal on a bail bond in a civil case, which liability has not become fixed, is released.[84] As a general proposition, neither a voluntary nor an involuntary adjudication releases a surety of the bankrupt from his obligation as surety.[85] Individual partners cannot be discharged from partnership debts under an adjudication against the partnership only.[86] Though there are decisions to the contrary,[87] it is generally held that the discharge does not satisfy the debt but merely releases the debtor's legal obligation to pay.[88] Accordingly the moral obligation to pay remains and furnishes a sufficient consideration in law for a new promise to pay.[89] This promise to be enforceable must be express, positive, and unconditional,[90] or, if con-

terms and conditions, she was not discharged from liability by the mortgagor's adjudication and discharge in bankruptcy. Id.

83. Flint v. Chaloupka [Neb.] 111 N. W. 465. A fraudulent grentee cannot plead the subsequent discharge in bankruptcy of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceeding, where the land involved was never brought within the jurisdiction of the bankruptcy court. Id.

84. Keyes v. Bennett, 122 Ill. App. 60.

85. Wise Coal Co. v. Columbia Lead & Zinc Co., [Mo. App.] 100 S. W. 680. The sureties on an appeal bond conditioned on the payment of the judgment appealed from, in the event of its affirmance, are not discharged from liability by appellant pending the appeal filing a petition in bankruptcy and obtaining a discharge subsequent to the affirmance of the judgment. Slusher v. Hopkins, 30 Ky. L. R. 257, 97 S. W. 1158. Under a state statute providing that the giving of a claimant's bond shall not release the levy of an execution, the debtor's discharge in proceedings instituted more than four months after the levy does not affect the right of the judgment creditor to recover on the claimant's bond. Bishop v. Hibben Dry Goods Co., 30 Ky. L. R. 725, 99 S. W. 644. Under Code 1896, § 493, authorizing a judgment against sureties on an appeal bond only in case the judgment appealed from is affirmed, the sureties on the appeal bond cannot be proceeded against where the judgment was barred by the discharge in bankruptcy of the principal debtor. Young & Co. v. Howe [Ala.] 43 So. 488. Discharge is a good defense to a suit brought by a surety on the defendant's bond as a trustee in bankruptcy in another bankruptcy estate, plaintiff having further become his surety upon notes at bank discounted to raise the money wherewith the defendant paid off a misappropriation of the funds of the bankrupt estate in his hands, and as such surety on the notes has had to pay them. Leinkauf v. Wellhouse [Ga. App.] 57 S. E. 961. Rule would have been otherwise but for note transaction. Id. A surety on an injunction bond, given in a suit brought to restrain the enforcement of a judgment, is not released from liability thereon by the discharge of his principal in bankruptcy. Stull v. Beddeo [Neb.] 112 N. W. 315, vacating, 110 N. W. 861. The liability of a surety on a note is not affected by the discharge in bankruptcy of the principal. Wolfboro Loan & Banking Co. v. Rollins [Mass.] 81 N. E. 204.

86. In re Pincus, 147 F. 621. An individual member of a firm may obtain a discharge in bankruptcy not only from his individual debts but from his firm liabilities, and without regard to the existence or nonexistence of firm assets. New York Inst. for Deaf & Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. S. 412. Partnership debts are discharged by the discharge in bankruptcy of an individual member of the firm, when the debts of the copartnership were listed in the schedules of the bankrupt and there are no assets of the firm. Berry Bros. v. Sheehan, 115 App. Div. 488, 101 N. Y. S. 371.

87. The effect of the discharge is to extinguish the debt (Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810), and a promise by the debtor to revive the discharged debt must be clear, express, distinct, unequivocal, and without qualification or condition before it will be enforceable against him (Id.). Letter in which debtor promised creditor he "should be paid in near future" held insufficient. Id.

88. Farmers' & Merchants' Bk. v. Richards, 119 Mo. App. 18, 95 S. W. 290. Does not prevent corporation from being dissolved under Code Civ. Proc. § 1785, subd. 2, for neglecting or refusing for a year to pay or discharge its notes. People v. Troy Chemical Co., 118 App. Div. 437, 104 N. Y. S. 22.

89. Farmers' & Merchants' Bk. v. Richards, 119 Mo. App. 18, 95 S. W. 290; Stern v. Bradner Smith & Co., 127 Ill. App. 640. The bankrupt may after his discharge by a new, clear, distinct, and unequivocal promise to pay a debt released by the discharge become liable therefor in an action at law. Torrey v. Kraus [Ala.] 43 So. 184; Mordaunt v. Monroe, 124 Ill. App. 306. A promise to pay the indebtedness in full makes the debtor liable for both principal and interest. Old debt evidenced by note. Stern v. Bradner, Smith & Co., 225 Ill. 430, 80 N. E. 307.

90. Farmers' & Merchants' Bk. v. Richards, 119 Mo. App. 18, 95 S. W. 290. Evidence that debtor repeatedly said "I will pay it," that is the debt, held sufficient. Id. It cannot be inferred from the mere fact that defendant paid interest on a note which he had previously scheduled in bankruptcy that the payment was made to protect real estate which was mortgaged to secure the note and which had been scheduled in the bankruptcy, and the title to which had consequently been divested from defendant. Stern v. Bradner, Smith & Co., 225 Ill. 430, 80 N. E. 307. The evidence of the subsequent promise to pay must be strong, positive, and unequivocal, both as to the identi-

ditional, compliance with the condition must be plainly shown.[91] The new promise may be made after the adjudication, and before or after the discharge.[92] In some states such promises are required to be in writing.[93] The creditor may sue directly on the new promise, or, at his election, on the original debt, and reply the new promise to a plea of discharge.[94] Where a discharged bankrupt agreed to pay a discharged debt in monthly installments, the creditor, on default in such payments, could only recover the installments due to the date of the writ in his action.[95] The bankruptcy court being a court of record, proof of an order discharging the bankrupt raises the presumption that the court acquired jurisdiction, and that its proceedings were had in conformity to law,[96] and that a creditor had notice of the proceedings and of the scheduling of his debt;[97] and lapse of time strengthens the presumption.[98] Discharge cannot be collaterally attacked.[99]

§ 23. *Amendment and reopening; grounds and effect.*[1]—A court of bankruptcy has power to amend an order of discharge at any time before the proceedings in the case have been closed, provided such amendment shall not affect vested rights.[2]

fication of the debt and as to a distinct, unconditional, and present promise to pay. Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808. The possibility of wrong to the discharged debtor, by perjured testimony, in depriving him of the legitimate benefit of the bankruptcy act, is not to be remedied by hostile, unusual, or forced interpretation of the evidence, introduced in support of such promise to pay. Id. Wherever, upon application of the natural and ordinary rules of common sense and simple logic to the proof introduced in support of the subsequent promise to pay, construed as a whole, the trial court is satisfied that such proof conforms to the legal standard, and it is contradicted, it is its duty to submit the questions of fact to the jury under appropriate instructions. Id. Evidence held to warrant submission of case to jury and verdict against debtor. Id. Declaration of debtor and creditor made before the discharge promising to pay the debt thereafter, held admissible under the circumstances of the case. Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808. In instructions on this subject the word "promised" implies a distinct, express, and unconditional promise. Stern v. Bradner, Smith & Co., 225 Ill. 430, 80 N. E. 307.

91. Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307. A new promise to pay as soon as the debtor is able is enforceable, and not void for uncertainty. Torrey v. Kraus [Ala.] 43 So. 184. Where the bankrupt promises that as soon as he is able he will pay a debt barred by his discharge, it is necessary for plaintiff, in an action on the promise, to allege and prove that defendant is able to pay, and proof of ability to borrow money is not sufficient. Id. Where there is no showing that defendant has any means apart from his salary, and it is undisputed that that is required for the support of himself and family, held defendant was entitled to the affirmative charge if he requested it. Id. Held not error to exclude evidence of his ability to borrow money. Id. Held not error to ask defendant how much of his income was necessary for the support of himself and family. Id. Held not error to exclude testimony of defendant's earnings two years subsequent to the commencement of the suit. Id. Under such a promise the debtor is not required to gauge his family expenditures so as to obtain the means to meet the obligation. Id.

92. Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810.

93. Under Rev. Laws, c. 74, § 3, requiring a new promise to be in writing, a letter by a discharged bankrupt to his creditor, stating, "you are not to regard yourself in any danger of losing the amount as long as I hold my position, because I have promised in time to take care of it as it will be done as fast as resources allow," was a sufficient writing within the statute, but one stating that if certain arrangements resulted as anticipated there "will be nothing to prevent my regular payments * * * on your account" was not. Nathan v. Leland, 193 Mass. 576, 79 N. E. 793. Rev. St. 1899, § 3706, providing that parties may agree in writing for the payment of interest, not exceeding eight per cent per annum, on money due or to become due upon a contract, does not render an oral promise to pay a note bearing eight per cent interest per annum, made after the maker's discharge in bankruptcy, unenforceable. Farmers' & Merchants' Bk. v. Richards, 119 Mo. App. 18, 95 S. W. 290.

94. Torrey v. Kraus [Ala.] 43 So. 184. Failure of **petition in suit on new promise** to allege discharge held cured by answer setting up such fact. Farmers' & Merchants' Bk. v. Richards, 119 Mo. App. 18, 95 S. W. 290.

95. Nathan v. Leland, 193 Mass. 576, 79 N. E. 793.

96, 97. New York Inst. for Deaf & Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. S. 412.

98. Where fifteen years had elapsed, presumed that proceeding was closed. Hunter v. Hodgson [Tex. Civ. App.] 15 Tex Ct. Rep. 110, 95 S. W. 637.

Note: Court deems cases involving presumption that an administration has been closed are analogous to case at bar. Hunter v. Hodgson [Tex. Civ. App.] 15 Tex. Ct. Rep. 110, 95 S. W. 637.

99. Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263.

1. See 7 C. L. 430.

2. In re Diamond [C. C. A.] 149 F. 407.

After eighteen months' delay, the bankrupt cannot have the proceedings opened to permit the amendment of the schedule.[3] Reopening on petition of creditors because assets fraudulently transferred had been discovered does not of itself authorize a suit by creditors therefor but leaves the matter in the hands of the referee.[4]

§ 24. *Offenses against the bankruptcy law.*[5]—Advice of counsel which does not go to the act charged is no defense.[6] The term "false oath" is not limited to the examination of the bankrupt at the first meeting of the creditors, nor to false swearing in connection with the bankrupt's schedules, but relates to any proceeding in bankruptcy, including the examination of the bankrupt before a referee on an investigation of specifications filed against his discharge.[7] The provision of the bankruptcy act giving the bankrupt immunity from criminal prosecution, on evidence given by him at examinations at the instance of his creditors, relates to past transactions, and the words "in any criminal proceedings" are limited to proceedings out of the conduct of the bankrupt's business, the disposition of his property, etc.,[8] and gives immunity from the use of his evidence in such criminal proceedings as arise out of the conduct of his business or the disposition of his property, etc., and does not protect him from prosecution for false swearing in giving his evidence.[9] An indictment which charges that a bankrupt unlawfully, knowingly, willfully, and fraudulently concealed from his trustee certain property belonging to his estate in bankruptcy carries with it a sufficient averment of his knowledge that such property belonged to his estate.[10]

BASTARDS.

§ 1. **Legal Elements and Evidence of Illegitimacy (383).**
§ 2. **Rights and Duties of and in Respect to Bastards (384).** Contracts for Support (385).
§ 3. **Procedure to Ascertain Paternity and Compel Support (385).**
§ 4. **Legitimation, Recognition, Adoption (387).**

§ 1. *Legal elements and evidence of illegitimacy.*[1]—The word "child" as used in law does not include a bastard.[2] A child born in wedlock is presumed legitimate,[3] and this presumption is one of the strongest known to the law,[4] but the presumption does not apply to a child born out of wedlock.[5] Declarations of deceased parents and members of the family are admissible to prove illegitimate relationship,[6] but declarations of the deceased putative father are inadmissible to prove the maternal paternity of the child.[7] The declarations of either parent are inadmissible to show that children born after marriage are illegitimate,[8] and evidence

3. In re Spicer, 145 F. 431.
4. In re Ryburn, 145 F. 662.
5. See 5 C. L. 412.
6. That attorney advised bankrupt to continue business until close of day on which petition was filed, held immaterial and no defense to criminal action for concealing money belonging to the estate. McNiel v. U. S. [C. C. A.] 150 F. 82.
7. Edelstein v. U. S. [C. C. A.] 149 F. 636.
8. Edelstein v. U. S. [C. C. A.] 149 F. 636. Privilege held to bar indictment for perjury in such case. United States v. Simon, 146 F. 89.
9. Edelstein v. U. S. [C. C. A.] 149 F. 636. Does not grant him immunity from prosecution for testifying falsely in a proceeding to investigate the truth of specifications filed against his discharge. Id.
10. McNeil v. U. S. [C. C. A.] 150 F. 82.
1. See 7 C. L. 430.
2. Statute giving cause of action for wrongful death. Landry v. American Creosote Works [La.] 43 So. 1016.
3. McAllen v. Alonzo [Tex. Civ. App.] 102 S. W. 475. Child born three months after marriage of its parents. Grant v. Stimpson, 79 Conn. 617, 66 A. 166.
4. Mayer v. Davis, 103 N. Y. S. 943. Evidence held insufficient to sustain finding of illegitimacy of child of married woman born 241 days after death of husband, notwithstanding evidence of nonaccess for three months prior to his death where there was possibility of access within period of gestation, and witnesses to contrary were biased and hostile. Id.
5. Lynch v. Knoop, 118 La. 611, 43 So. 252. Where there was no proof of marriage of decedent and claimant's mother, the mere fact that in his will decedent spoke of him as "my son" is not sufficient proof of legitimacy. In re Wharton's Estate [Pa.] 67 A. 414.
6, 7. Champion v. McCarthy [Ill.] 81 N. E. 808.
8, 9, 10. Koffman v. Koffman, 193 Mass. 593, 79 N. E. 780.

tending to prove the adultery of the mother is not competent to prove that a child born within the usual period of gestation thereafter is illegitimate;[9] hence in an action for divorce a finding against the libelee's contention of condonation by subsequent intercourse does not bastardize a child born after the entry of a decree nisi.[10] The offspring of void marriage are illegitimate.[11]

§ 2. *Rights and duties of and in respect to bastards.*[12]—Under the Louisiana Code providing for action for wrongful death, the natural mother of a bastard cannot maintain an action for its wrongful death,[13] even though the child were acknowledged,[14] but an action for the wrongful death of a legitimate bastard may be maintained.[15] The right of the natural mother of an illegitimate child to its custody and control is superior to that of any one other than the putative father,[16] unless surrendered or forfeited,[17] and in Arkansas it is held that her right is even superior to that of the father[18] provided she is not incompetent and is capable of supporting it.[19] The pendency of bastardy proceedings against the defendant is not ground for the abatement of a criminal proceeding for refusal to support the child.[20]

The inheritable rights of the mother[21] or the surviving spouse[22] of a bastard, in its estate, and the inheritable rights of a bastard in the estate of his putative father,[23] or collateral legitimates[24] or illegitimates by the same mother,[25] is largely a matter of statutory regulation.

11. Under statute prohibiting miscegenation, children of attempted marriage of a negro and a white woman are bastards. Moore v. Moore, 30 Ky. L. R. 383, 98 S. W. 1027.

12. See 7 C. L. 430.

13, 14. Lynch v. Knoop, 118 La. 611, 43 So. 252.

15. Acknowledgment is distinguished from legitimation. See § 4. Landry v. American Creosote Works [La.] 43 So. 1016.

16. Hesselman v. Haas [N. J. Eq.] 64 A. 165.

17. Where a mother maintained a child for over three years after its birth when from stress of circumstances she was compelled to abandon it, offering to consent to its adoption by a fit person, the fact that the child's custodian turned it over to a third person who maintained it for seven years did not entitle such third person to the custody of the child as against the mother where such action on the part of the custodian was without the mother's consent and where the latter had no knowledge of the child's whereabouts for over six years, though she made constant efforts to find it. Hesselman v. Haas [N. J. Eq.] 64 A. 165. The fact that when a bastard child was nine months old the mother surrendered it to the care of another who maintained it for over ten years does not deprive the mother of the right to its custody where at the expiration of that period the custodian surrendered the child to the mother on the latter's promise to pay for past support, which promise she did not keep. Lipsey v. Battle, 80 Ark. 287, 97 S. W. 49. Where a bastard child was committed to the State Board of Charity, evidence that the mother made only a few cursory inquiries, the last about two years prior to the filing of a petition for its adoption, and that she made no objection to the adjudication, of commitment, though notified of the proceding, is sufficient to sustain a finding that she suffered her child to be supported as a pauper for more than two years prior to the filing of the petition. Purinton v. Jamrock [Mass.] 80 N. E. 802.

18, 19. Lipsey v. Battle, 80 Ark. 287, 97 S. W. 49.

20. State v. Veres, 75 Ohio St. 138, 78 N. E. 1005.

21. Under Code Pub. Gen. Laws, art. 46, § 30, mother of illegitimate child dying without descendants or brothers or sisters may inherit both his real and personal estate. The fact that the law was codified under the article dealing with "Inheritance," instead of under that treating of "Distribution" and that the word "inherit" as used, does not limit her right of inheritance to the realty only. Reese v. Starner [Md.] 66 A. 443.

22. Art. 93, § 119, Code Pub. Gen. Laws 1904, providing that where the decedent leaves no issue, parent, grandchild, brother, or sister, etc., the surviving husband or wife shall be entitled to the whole of his estate, must be construed with art. 46, § 30, allowing the mother to inherit the estate of her bastard child, hence in such case the widow and the mother of a bastard are entitled to an equal share of his estate. Reese v. Starner [Md.] 66 A. 443. Under a statute providing that upon the death of an unacknowledged bastard without issue the estate shall pass to the mother, or on her demise to her heirs, the separate estate of an illegitimate daughter, who has not been acknowledged, and who dies without issue, passes to the heirs of her deceased mother and not to a surviving husband, notwithstanding the fact that another section provides that where the decedent leaves a surviving husband, but neither issue nor parents, the entire estate shall pass to the husband. Civ. Code, § 1388, provides a rule of succession for a special case, and hence is not controlled by §§ 1386 and 1387. In re De Cigaran's Estate [Cal.] 89 P. 833.

23. A bastard cannot inherit from his putative father. Moore v. Moore, 30 Ky. L. R. 383, 98 S. W. 1027.

24. §§ 5, c. 31, General Laws, provides: "A

Contracts for support.[26]—The father of illegitimate children is under a natural obligation to support them,[27] and an agreement by him to support the mother and illegitimate children in consideration of her promise not to institute bastardy proceedings is not void as against public policy,[28] nor is it void because founded upon past illicit relations,[29] but the burden is upon the claimant to establish such a contract.[30]

§ 3. *Procedure to ascertain paternity and compel support.*[31]—Proceedings under the bastardy act are in some states in the nature of civil proceedings,[32] hence a verdict of "not guilty" may be set aside as a verdict in a civil proceeding,[33] and a statute providing that the verdict shall be final has been construed as not preventing its being set aside.[34] The fact that the child was born dead does not deprive the mother of the right to institute proceedings.[35] An action for damages for breach of a contract to support the mother and illegitimate children is not a bastardy proceeding.[36]

Jurisdiction.[37]—In Massachusetts the superior court has jurisdiction and proceedings may be brought to a hearing in a county or judicial district in which either the complainant or the defendant resides.[38] A bond conditioned upon the appearance of the defendant after the birth of the child is void, no date being named,[39] and, where the defendant was released on such a bond, such release does not deprive the magistrate of jurisdiction to issue a second warrant for his arrest.[40] Statutory provisions requiring the examination of the complainant on the preliminary examination are not jurisdictional and may be waived.[41]

Abatement.[42]—A statutory provision that the mother shall be examined in the presence of the defendant is for the sole protection of the latter, and the intervening death of the mother does not deprive the court of jurisdiction to proceed.[43]

Dismissal and new action.[44]

bastard shall be capable of inheriting and transmitting any inheritance on the part of, or to the mother, and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of, or to each other, as if such bastards were born in lawful wedlock. Overton v. Overton, 29 Ky. L. R. 736, 96 S. W. 469.

25. Illegitimate children by the same mother may inherit from each other. Champion v. McCarthy [Ill.] 81 N. E. 808. An illegitimate child of the mother, by a different father, who has not been acknowledged by the latter, is an heir capable of inheriting, under a statute providing that upon the death of a bastard without issue his estate shall pass to the mother or her heirs. In re De Cigaran's Estate [Cal.] 89 P. 833.

26. See 5 C. L. 416.

27, 28. Burton v. Belvin, 142 N. C. 151, 55 S. E. 71.

29. A contract in consideration of past cohabitation to support the mother and children is neither void nor immoral, even though the illicit cohabitation continues, if there is no stipulation for future cohabitation. Burton v. Belvin, 142 N. C. 151, 55 S. E. 71.

30. Evidence held insufficient. Butler v. Setser, 30 Ky. L. R. 959, 99 S. W. 972.

31 See 7 C. L. 431.

32. Corcoran v. Higgins [Mass.] 80 N. E. 231; State v. Addington, 143 N. C. 683, 57 S. E. 398.

33. Corcoran v. Higgins [Mass.] 80 N. E. 231.

34. St. 1785, c. 66, §12, embodied in § 15c, 82 Rev. Laws, providing that the verdict should be final, was construed as intending to take away from the parties in bastardy proceedings the right to appeal and review which both parties in civil actions and the defendant in criminal actions had when the statute was first enacted in 1785, and which gave them the right to a second trial upon the facts when dissatisfied with the verdict. Corcoran v. Higgins [Mass.] 80 N. E. 231.

35. Defendant may be required to pay her medical expenses and those incident to burial of child. State v. Addington, 143 N. C. 683, 57 S. E. 398.

36. Contract to support based an plaintiff's promise not to institute bastardy proceedings, and past illicit relations, but without a stipulation for the continuance of such relations. Burton v. Belvin, 142 N. C. 151, 55 S. E. 71.

37. See 7 C. L. 431.

38. Proceedings in police, district, or municipal court are merely initiatory. Kennedy v. McLellan, 193 Mass. 528, 79 N. E. 819.

39, 40. Bennett v. Briggs [N. J. Law] 65 A. 717.

41. Held waived when defendant appeared and testified at the preliminary examination without objecting to the nonappearance of the prosecutrix. State v. Charlton, 101 Minn. 535, 111 N. W. 733.

42. See 5 C. L. 414.

43. Bennett v. Briggs [N. J. Law] 65 A. 717.

44, 45. See 7 C. L. 432

Trial procedure; pleading; indictment.[45]—The affidavit need not specifically allege that prosecutrix is pregnant with a bastard child,[46] but must allege that defendant is the father of the child.[47] Under the New Jersey statute it is duty of the magistrate to proceed to determine the matter without unnecessary delay, although the child is not yet born,[48] but he has power to adjourn the proceedings for a period of not exceeding six weeks.[49] Evidence essential to the complainant's case must be introduced in chief.[50] Instructions must be consistent[51] and must not be of such a character as to allow a verdict of guilty on mere conjecture.[52] It is improper to instruct the jury as to the effect of conviction upon the defendant[53] or the relative importance of the rights of the state and the defendant.[54] Under the Nebraska statute, when requested by the defendant, it is the duty of the court to give an instruction as to the credibility of the testimony of the prosecutrix so far as applicable to the evidence.[55]

Evidence; presumptions; sufficiency of proof.[56]—Where from complainant's testimony as to the date of intercourse it appears that the child must have been of premature birth, the burden is upon the complainant to prove that it was prematurely born.[57] Evidence of sexual intercourse with another within the period of gestation is admissible,[58] but evidence of intercourse without such period is inadmissible to contradict the evidence of the prosecutrix that she had never had intercourse with any one other than the defendant[59] or to show intercourse with the defendant at such time.[60] Evidence that another was going with the prosecutrix at a time not within the period of gestation is not admissible.[61] Ordinarily a preponderance of the evidence suffices,[62] but some courts require proof beyond a reasonable doubt.[63] The defendant must be acquitted unless it is shown that he had intercourse with the prosecutrix within the period of gestation,[64] though the evidence need not always establish the exact time or the exact circumstances,[65] and if upon

46. Affidavit alleging that prosecutrix is a single woman and is in a pregnant condition, and that defendant, a man, "is the cause of said pregnancy," and that he did impregnate her, sufficiently alleges the illegitimacy of the child. Allred v. State [Ala.] 44 So. 60.

47. Affidavit that prosecutrix is a single woman and is pregnant, and that defendant, a man, is the cause of said pregnancy, and that he did impregnate her, sufficiently charges the defendant with being the father of the child. Allred v. State [Ala.] 44 So. 60.

48. It is improper to release the defendant upon a bond conditioned upon his appearance after birth of child. Bennett v. Briggs [N. J. Law] 65 A. 717.

49. On such adjuornment, defendant may be released upon bond for appearance on adjourned day. Bennett v. Briggs [N. J. Law] 65 A. 717.

50. Where burden was upon complainant to establish premature birth of child, it was improper to allow evidence tending to show such fact upon rebuttal. Souchek v. Karr [Neb.] 111 N. W. 150.

51. Instructions as to right to acquittal, if the jury did not find that the sexual act took place on day alleged, held inconsistent. Menn v. State [Wis.] 112 N. W. 38.

52. Where evidence tended to show intercourse on a certain day only, an instruction authorizing a verdict of guilty if the jury found that the sexual act took place on some other day is erroneous. Menn v. State [Wis.] 112 N. W. 38.

53, 54. Menn v. State [Wis.] 112 N. W. 38.

55. Sec. 5, c. 37, Comp. St. 1903 (6254 Cobbey's Ann St. 1903). Stoltenberg v. State [Neb.] 106 N. W. 975. Where there is variance between complainant's testimony on preliminary examination and that given on trial, it is error to refuse such istruction. Quinn v. Eggleston [Neb.] 106 N. W. 976.

56. See 7 C. L. 432.

57. Child born less than 252 days after intercourse. Souchek v. Karr [Neb.] 111 N. W. 150.

58, 59. Allred v. State [Ala.] 44 So. 60.

60. Letters written by prosecutrix to defendant indicating fondness for him are inadmissible where defendant denies intercourse within period of gestation and the letters were written before commencement of that period. Allred v. State [Ala.] 44 So. 60.

61. Allred v. State [Ala.] 44 So. 60.

62. Souchek v. Karr [Neb.] 111 N. W. 150.

63. Evidence held sufficient to sustain a verdict of guilty. Menn v. State [Wis.] 112 N. W. 38.

64. Held reversible error to refuse such an instruction. Allred v. State [Ala.] 44 So. 60.

65. But if the evidence conclusively shows that the intercourse, if it took place at all, took place on a certain day, that fact

the whole evidence the defendant's guilt is doubtful or he cannot reasonably be said to be guilty he must be acquitted.[66]

Judgment and bond.[67]—The purpose of the bastardy law is to protect the county from the expense of maintaining the mother during the lying in period and child after its birth,[68] hence, where the proceeding is commenced before the birth of the child, the bond must cover the mother's lying in expenses,[69] but if commenced after the birth of the child, and the mother has recovered, the bond need only indemnify the county against a charge for the education and maintenance of the child until it arrives at the statutory age.[70]

Commitment and discharge.[71]—Under a statute directing commitment on default in the payment of a fine imposed, the court is without authority to require the defendant to do work on the public roads.[72] The word "fine" as used in the North Carolina bastardy act is used in the sense of a criminal punishment,[73] and consequently it cannot be imposed where the issue submitted is tried like the issues in other civil actions.[74]

Bonds for support.[75]—An indemnity bond cannot be required where the child is still-born.[76]

Review.—An order refusing a petition to frame an issue in proceedings to determine the paternity of a child is merely interlocutory and no appeal will lie therefrom.[77]

§ 4. *Legitimation, recognition, adoption.*[78]—Legitimation under the civil law confers the same right from its date upon illegitimate children as those born during wedlock,[79] and is distinguishable from acknowledgment.[80] An acknowledgment after the death of the child does not legitimize it.[81] Intermarriage of the parents and subsequent recognition legitimize a child in Missouri,[82] and recognition by a father of a child born out of wedlock after he has married the mother is persuasive, if not conclusive, evidence that he is the father of the child.[83] Under the Minnesota statute an instrument acknowledging the paternity of a child need not be made for that express purpose or in a separate instrument.[84] Open and notorious recognition of paternity is sufficient, though the name of the child or its mother is not mentioned where it is otherwise identified.[85] Under a statute providing that an acknowledg-

must be established. Menn v. State [Wis.] 112 N. W. 38.

66. Held error to refuse such an instruction. Allred v. State [Ala.] 44 So. 60.

67. See 7 C. L. 433.

68, 69. Martin v. State, 127 Ga. 39, 56 S. E. 79.

70. Bond need cover only the expense of educating and maintaining the child until it arrives at the age of fourteen years. Martin v. State, 127 Ga. 39, 56 S. E. 79.

71. See 7 C. L. 433.

72. State v. Addington, 143 N. C. 683, 57 S. E. 398.

73. Revisal 1905, § 259. The amount is uncertain and the statute requires that the defendant be committed in default of payment. State v. Addington, 143 N. C. 683, 57 S. E. 398.

74. State v. Addington, 143 N. C. 683, 57 S. E. 398.

75. See 5 C. L. 416.

76. The county is not exposed to a charge for its support. State v. Addington, 143 N. C. 683, 57 S. E. 398.

77. Such an order involves merely the mode of procedure. Commonwealth v. Nagle, 31 Pa. Super. Ct. 175.

78. See 7 C. L. 434.

79, 80. Landry v. American Creosote Works [La.] 43 So. 1016.

81. Lynch v. Knoop, 118 La. 611, 43 So. 252.

82. Evidence held sufficient to show such recognition. Breidenstein v. Bertram, 198 Mo. 328, 95 S. W. 828.

83. Breidenstein v. Bertram, 198 Mo. 328, 95 S. W. 828.

84. It is sufficient if the acknowledgment be made in any written instrument, collateral or otherwise, signed by the party, in the presence of a competent witness, in which he clearly and specifically acknowledges that he is the father of the child. So held where the acknowledgment was made in a lease to a bastard daughter. In re Pederson's Estate [Minn.] 106 N. W. 958.

85. Frequent acknowledgment of paternity of a child "back in Illinois" with occasional references to its place of residence and the name of one of the mother's relatives, and declarations of the settlement of

ment of paternity by the putative father shall legitimize the child, the children of an acknowledged bastard dying before his father may inherit from the latter.[86]

Beneficial Associations; Beneficiaries; Betterments, see latest topical index.

BETTING AND GAMING.

§ 1. The Offense and Criminal Prosecutions (388).
A. The Offense (388).
B. Indictment or Information and Trial Procedure (390).
§ 2. Penalties and Seizure of Implements (391).
§ 3. Recovery Back of Money Lost (391).

Gambling contracts[87] and lotteries[88] are elsewhere treated.

§ 1. *The offense and criminal prosecutions. A. The offense.*[89]—A gambling device is any contrivance by the operation of which chances are determined whereby money or property is lost or won.[90] Engaging in a shooting match upon which money is wagered is not gambling, under the Kentucky statute,[91] except as to those, whether participants or not, who bet thereon.[92] Betting may be implied from the acts of the parties.[93] The use of an article as a gambling device determines its illegality,[94] and evidence of maintenance coupled with use is sufficient to sustain a conviction.[95] Under a statute prohibiting gift enterprises involving an element of chance, gifts of the same character to each purchaser as part of an advertising scheme are not unlawful.[96] Where a city charter does not confer upon the city exclusive jurisdiction to prevent gambling houses, the offense being recognized at common law, the circuit courts have jurisdiction.[97]

Validity of regulations.[98]—A mere gift when not designed as a cover to a lottery is not subject to statutory prohibition.[99]

Cards and other table games.[1]—Merely playing cards is not an offense.[2] In Texas all games of chance, except dice games,[3] are prohibited unless played at a private residence occupied by a family,[4] though no wagers are made,[5] and except as

bastardy proceedings against him coinciding with the settlement in the particular case, held sufficient. Morgan v. Strand [Iowa] 110 N. W. 596.

86. Evidence held sufficient to show an acknowledgment of paternity of a bastard by an unmarried man by publicly acknowledging it as his own, receiving it into his family, and otherwise treating it as if it were a legitimate child. In re Garr's Estate [Utah] 86 P. 757.

87. See Gambling Contracts, 7 C. L. 1858.

88. See Lotteries, 8 C. L. 795.

89. See 7 C. L. 434.

90. State v. Ayers [Or.] 88 P. 653.

91. Statutes 1903, § 1977, prohibit any one from engaging in a game or hazard upon which money is bet. Commonwealth v. Davis [Ky.] 102 S. W. 327.

92. Commonwealth v. Davis [Ky.] 102 S. W. 327.

93. Whether a bet was made is entirely independent of a prior express understanding between the parties. Playing pool, the loser paying for both cues. Rainbolt v. State [Tex. Cr. App.] 101 S. W. 217.

94. Whether gaming table is within statute is determined by its use, and not by its character or construction. Irvin v. State [Fla.] 41 So. 785.

95. The maintenance of a poker table with cards and chips and a roulette wheel, coupled with evidence of their use, held sufficient to sustain a conviction under § 215, Crim. Code, prohibiting gaming tables or other gambling devices. Stetter v. State [Neb.] 110 N. W. 761.

96. United Jewelers' Mfg. Co. v. Keckley [Kan.] 90 P. 781.

97. State v. Ayers [Or.] 88 P. 653.

98. See 7 C. L. 435.

99. Trading stamps. Humes v. Little Rock, 138 F. 929.

1. See 7 C. L. 435.

2. Evidence that defendant played cards, without showing that money or some other thing of value was bet, does not warrant a conviction for gaming. Barker v. State, 127 Ga. 276, 56 S. E. 419.

3. Playing craps with dice within ten feet of the front door of a private residence is not an offense. Young v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 93, 97 S. W. 90.

4. The back room of a shop in which the owner who had been separated from his wife lived alone is not a "private residence occupied by a family" within Acts 1901, p. 26, c. 22, arts. 379, 381, and the fact that an adult son occasionally stayed with him does not make it such. Beard v. State [Tex. Cr. App.] 101 S. W. 796.

5 It is an offense to play cards, even without betting, at any place except a private residence occupied by a family. Art.

to dice games [6] where a private residence is commonly resorted to for the purpose of gambling, games of chance played therein come within the statutory inhibition.[7] A crap table is a gambling device within the Missouri statute.[8]

Racing and race tracks.[9]—In some states horse racing is considered a sport and, therefore, not within a statute prohibiting betting on games of skill or hazard.[10] The selling of pools on horse races does not come within the inhibition of a statute relating to the playing of games for money by gambling devices.[11] A statute prohibiting racing for bets, except for premiums offered by authorized corporations, does not authorize betting on the result of trials of speed of horses for premiums given by such a corporation.[12]

Slot machines.[13]—A slot machine is a banking game [14] and is a gambling device within Texas statute, though so constructed that the operator cannot lose,[15] but under the California statute is not a prohibited gambling device unless played for "money, checks, credits, or other representatives of value." [16]

Dealing in futures [17] where no actual future delivery is contemplated [18] is an offense in most states.

Gaming at public place.[19]—Gambling in public constitutes an indictable public nuisance at common law and under statutes relating to such nuisances,[20] but the burden is upon the state to prove beyond a reasonable doubt that the place was a public one.[21] The place must be of an inhibited character at the time of the act complained of.[22]

Keeping a gaming place.[23]—Irrespective of statute, the keeping of a common gaming house is indictable as a public nuisance,[24] but in most states it is a statutory crime to keep a gaming house, or knowingly [25] to permit of the use of premises

379, Pen. Code 1895, as amended by Acts 27 Leg. p. 26, c. 22. Lamar v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 392, 95 S. W. 509.

6. Though a private residence is resorted to for the purpose of gaming, it does not lose its character as such under Pen. Code 1895, art. 388, permitting dice games played at a private residence. Marks v. State [Tex. Cr. App.] 101 S. W. 805; Thompson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 92, 96 S. W. 1085.

7. Evidence that three or four games of cards were played in a private house in which five or six persons took part is sufficient to show that such residence was commonly resorted to for the purpose of gambling. Herrin v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 89, 97 S. W. 88.

8. Rev. St. 1899, § 2194 (Ann. St. 1906, p. 1404). State v. Holden [Mo.] 102 S. W. 490.

9. See 7 C. L. 436. See, also, Racing, 8 C. L. 1589.

10. State v. Vaughan [Ark.] 98 S. W. 685.

11. The wager being on a horse, it is not determined by the manipulation of a device. State v. Ayers [Or.] 88 P. 653.

12 Rev. Laws, c. 214, § 30. Commonwealth v. Rosenthal [Mass.] 80 N. E. 814.

13. See 7 C. L. 436.

14. Ex parte Williams [Cal. App.] 87 P. 565.

15. Operator being entitled to from five to twenty-five cents worth of merchandise, dependent upon color of light appearing. Lytle v. State [Tex. Cr. App.] 100 S. W. 1160.

16. Playing for cigars does not come within the prohibition of the statute, the latter clause being construed as referring to values germane to the specific enumeration. Ex parte Williams [Cal. App.] 87 P. 565.

17. See 7 C. L. 436. Also Gambling Contracts, 7 C. L. 1858, for validity and civil remedies.

18. Evidence held sufficient to show that no actual future delivery was contemplated by the parties to a contract for the sale of cotton on a margin. De Lam v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 390, 95 S. W. 532.

19. See 7 C. L. 436. See, also, ante, "Cards and other table games," as to exception of games at private residence.

20. Selling pools at a horse race attended by the public constitutes a public nuisance punishable at common law and under a statute relating to public nuisances tending to grossly injure or openly outrage public decency. State v. Ayers [Or.] 88 P. 653.

21. Evidence that the game was played by two persons in the woods at night, about 150 yards from a church in which religious services were being held and from which the place of the game could not be seen, held insufficient to sustain a conviction. Bradford v. State [Ala.] 41 So. 1024.

22. Under Cr. Code 1896, § 4792, prohibiting gaming with dice in a storehouse for the selling or giving away of intoxicating liquors, gaming in a bar room which had been closed for the transaction of business and used exclusively as a private storehouse does not come within the inhibition. Brogden v. State [Ala.] 44 So. 403.

23. See 7 C. L. 437.

24. State v. Vaughan [Ark.] 98 S. W. 685.

25. Under a statute making it a crime to knowingly rent premises for gambling purposes, the state must prove beyond a reasonable doubt that the lessor had such knowledge at the time of the execution of the lease. Actual as distinguished from

in the possession or under the control of the defendant for gambling purposes,[26] but in such case defendant must have some right or power over or in the premises for the time being.[27] A single offense is sufficient to sustain a conviction.[28] There must be some act of proprietorship in connection with the keeping of a gaming house,[29] hence merely taking part as a player in a gaming house does not render the player guilty of the offense of keeping such a house;[30] but one doing any act connected with keeping or maintaining it and in aid thereof, may be convicted as the proprietor of the enterprise.[31] It must be shown that the place is in fact a common gaming house.[32] Under a statute making it a crime to keep or permit of the occupation of a room with devices for registering bets on races, the offense is complete when the room is so occupied by any person whether any bets are recorded within the state,[33] but occupation with books, instruments, or other devices for registering bets is essential.[34]

(§ 1) *B. Indictment or information and trial procedure.*[35]—An indictment in the language of the statute is sufficient,[36] and, where separate offenses were committed at the same time and are part of the same transaction, an indictment setting them up is not bad on the ground of duplicity.[37] An indictment in the alternative is bad.[38] An indictment for maintaining a gaming table need not describe the character of the table.[39] Under the Missouri statute an indictment for permitting the use of a room for the purpose of selling pools and registering bets should name the person permitted to use same, or if his name is unknown that fact should be alleged,[40] and must allege that such person occupied such room with a book, in-

constructive knowledge must be shown. Flynn v. People, 123 Ill. App. 591.

26. The occupation of a booth underneath the grandstand at a race track constitutes a "room" within the meaning of Laws 1905, p. 131, making it a felony to permit such occupation for the purpose of selling pools on races. State v. Oldham, 200 Mo. 538, 98 S. W. 497.

27. A conviction for permitting a gaming table to be set up in premises in possession or control of defendant cannot be sustained where evidence shows that at the time the premises were in control of the owner through his representative, though defendant was present and operated a gaming table. Nelson v. U. S., 28 App. D. C. 32.

28. Nelson v. U. S., 28 App. D. C. 32.

29. Destruction construed with others held not to require more. Rosenthal v. State, 126 Ga. 558, 55 S. E. 497.

30, 31. White v. State, 127 Ga. 273, 56 S. E. 425.

32. Evidence held sufficient to sustain a conviction for keeping a gaming house. Hicks v. State [Ga. App.] 57 S. E. 958. Showing that on several occasions sounds indicating a game of some sort on defendant's premises were heard, that several men were playing cards in a room therein with money on the table which they tried to hide, held sufficient to sustain a conviction of keeping a common gaming house. Commonwealth v. Charlie Joe, 193 Mass. 383, 79 N. E. 737.

33. Laws 1905, p. 131. State v. Oldham, 200 Mo. 538, 98 S. W. 497.

34. A blackboard on which the names of horses and odds given were written, and numbered tickets issued on admission to the track, do not constitute a book, and a private telephone by which bets were transmitted to a bookmaker in another state does not constitute a device for the registration of bets within the statute: State v. Oldham, 200 Mo. 538, 98 S. W. 497.

35. See 7 C. L. 438.

36. An indictment charging defendant with keeping a gaming house need not negative games not only not forbidden but expressly allowed by statute. State v. Yoe [S. C.] 56 S. E. 542. An indictment in the words of the statute for permitting gambling on premises controlled by defendant need not allege that gaming was permitted with the knowledge of defendant. Bunnell v. Com., 30 Ky. L. R. 491, 99 S. W. 237.

37. An indictment charging defendant with keeping a gaming table and gambling devices, cards and poker chips, is not bad on the ground of duplicity, though each is a distinct offense. Irvin v. State [Fla.] 41 So. 785.

38. An indictment charging that defendant bet at a certain "gaming table or bank, to wit, a pool table," is bad. Taylor v. State [Tex. Cr. App.] 16 Tex Ct. Rep. 580, 95 S. W. 119; Moore v. State [Tex. Cr. App.] 100 S. W. 1161.

39. The use to which the table is put and not its character or construction determines its illegality. Irvin v. State [Fla.] 41 So. 785.

40. Laws 1905, p. 131, provides (1) that any person who keeps any room, etc., within the state and occupies the same with any book or device to register bets on speed contests to take place within or without the state, or (3), being the owner, lessee, occupant, or person in charge thereof, knowingly permits the same to be used or occupied for any such purpose, etc., shall be guilty of a felony. Held the third subdivision must be construed with reference to the

strument, or device for the purpose of recording or registering bets.[41] An indictment for betting at a card game played at a private residence need not allege the name of the owner of the residence,[42] nor that any particular thing was bet.[43] Defendant cannot be convicted of a violation of the statute different from that set up in the indictment.[44] In a prosecution for permitting and suffering gaming on premises under the control of the defendant, the court should instruct the jury as to the meaning of the words "suffer" and "permit" where defendant is not shown to have had actual knowledge of the gambling.[45]

§ 2. *Penalties and seizure of implements.*[46]—An act authorizing the summary seizure and destruction of gambling instruments and devices is valid,[47] and is not unconstitutional as depriving a person of his property without due process of law.[48] No cause of action can be predicated upon the taking, damaging, or destroying of gambling instrumentalities,[49] and replevin will not lie to recover gambling instruments and devices seized by the sheriff which can be used for no lawful purpose.[50] The keeping of a common gaming house being an indictable public nuisance, equity will not enjoin it.[51]

§ 3. *Recovery back of money lost.*[52]—The parties being in pari delicto at common law, no action could be maintained to recover back money lost in gambling, but this rule does not apply where there was in fact no bet but merely a fraud in the guise of a bet,[53] and in such case all participants in the fraud are liable:[54] nor does the rule apply where the money or property lost did not belong to the loser,[55] and as an action to recover same is not based upon an account the defendant is not entitled to an itemized bill of particulars.[56] Ordinarily, in the absence of contrary understanding, the stakeholder has implied power to decide which party has won upon the happening of the contingency.[57] In the absence of statute, money paid by a stakeholder without notice of disaffirmance from the loser cannot be re-

first, and the indictment must name the person permitted to use such room or allege that his name is unknown. State v. Oldham, 200 Mo. 538, 98 S. W. 497.

41. State v. Oldham, 200 Mo. 538, 98 S. W. 497.

42, 43. Herrin v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 89, 97 S. W. 88.

44. Under an information charging defendant with permitting a gaming table to be set up and operated in a building under his control, he cannot be convicted of the offense of setting up and keeping a gaming table, notwithstanding the statute requires a liberal construction. Nelson v. U. S., 28 App. D. C. 32.

45. Bunnell v. Com., 30 Ky. L. R. 491, 99 S. W. 237.

46. See 7 C. L. 439.

47. Laws 1899, § 4. Mullen & Co. v. Mosley [Idaho] 90 P. 986.

48. Mullen & Co. v. Mosley [Idaho] 90 P. 986.

49. Robertson v. Porter [Ga. App.] 57 S. E. 993.

50. Robertson v. Porter [Ga. App.] 57 S. E. 993. Slot machines. Mullen & Co. v. Mosley [Idaho] 90 P. 986.

51. State v. Vaughan [Ark.] 98 S. W. 685.

52. See 7 C. L. 440.

53. Several conspirators induced plaintiff to bet on a race by advising him that the race was "fixed" and that the man upon whom plaintiff bet would win; the outcome of the race was in fact "fixed" but in such a way that plaintiff's man would lose. Held that, defendants having perpetrated numerous frauds of a similar character as a matter of public policy, plaintiff could recover. Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934. Evidence held sufficient to sustain a verdict that plaintiff was deprived of his money in a bogus poker game. Bynum v. Brady [Ark.] 100 S. W. 66.

54. A bank which, knowing of the fraudulent scheme, lent its financial influence to defendants and aided them in the exchange and transfer of money and checks was held liable, though it was not shown that it received any portion of the gains. Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934. All participants in fraudulent scheme to deprive a person of his money by means of fake poker game are liable in an action by the loser for the money lost, although some of them did not win. Bynum v. Brady [Ark.] 100 S. W. 66.

55. Owner of money lost in gaming by his servant may recover same from the winner. Ramirez v. Main [Ariz.] 89 P. 508. Trust funds lost in gambling may be recovered by the cestui qui trust. Money lost in a "bucket shop." Joslyn v. Downing, Hopkins & Co. [C. C. A.] 150 F. 317. Corporate funds lost by the managing officers and directors of a corporation may be recovered in a suit by an innocent stockholder in behalf of the corporation. Dealing in futures. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202.

56. Lacey v. Bentley [Colo.] 89 P. 789.

57. Wager on a horse race, each party claiming to be the winner. Himmelman v. Pecaut [Iowa] 110 N. W. 919.

covered,[58] and a general claim by the loser that he has won does not constitute notice of disaffirmance.[59] Statutes in many states authorize the recovery of money lost in gambling, but such an action must be brought by the owner.[60] The principal to whom the money was lost, the assignee of the principal, and the owner of the property, may be properly joined in such an action.[61] The property lost must be sufficiently described in the complaint,[62] and the plaintiff must establish that defendant was the winner [63] and the amount of money lost.[64]

BIGAMY.

The offense.[65]—A statute punishing bigamy irrespective of the state in which the prior marriage was consummated is constitutional.[66] Congress having defined and provided for the punishment of bigamy in the territories, conviction therefor cannot be had under a territorial act.[67] The offense is complete where a man whose wife is living enters into a second marriage with another woman.[68] A common-law marriage will sustain a conviction in states where such marriages are regarded as valid.[69] Where a prior marriage was a nullity, a subsequent marriage is not bigamous.[70] Intent is immaterial.[71] Duress is not a defense unless personal and existing at the time of the second marriage.[72]

The indictment [73] need not allege matters of defense [74] and is sufficient if in the words of the statute.[75] Under a statute punishing bigamy, though the marriage was entered into in another state, the indictment need not allege where the second marriage took place,[76] nor need it allege in what county the offense was committed.[77]

58, 59. Himmelman v. Pecaut [Iowa] 110 N. W. 919.

60. Crim. Code, § 132. The loser, if not the owner of the money lost, cannot maintain the action. Ware v. Dumont, 123 Ill. App. 1.

61. Pentz v. Burrows, 8 Ohio C. C. (N. S.) 349.

62. A complaint alleging the loss of $5.950 in Mexican money held good, the court refusing to take judicial notice of the fact that there is no such thing as a "dollar" in Mexican money, particularly in view of an act of congress authorizing certain Federal offices to receive such coins at a certain value. Ramirez v. Main [Ariz.] 89 P. 508.

63. In the absence of fraud, money lost in gambling can be recovered from the winners only. Bynum v. Brady [Ark.] 100 S. W. 66. Evidence that the "dealer" and "banker" were employes of the proprietor, that money taken in on a crap table was placed in a drawer until taken charge of by the proprietor, held sufficient to show that the money was lost to the latter. Clark v. Slaughter, 129 Wis. 642, 109 N. W. 556. Evidence held sufficient to sustain a verdict for plaintiff, the only issue being as to which of two defendants won the money, one being solvent and the other insolvent. Lacey v. Bentley [Colo.] 89 P. 789.

64. Evidence of amount lost in gambling held not too indefinite to warrant setting aside a verdict for plaintiff. Clark v. Slaughter, 129 Wis. 642, 109 N. W. 556.

65. See 7 C. L. 442.

66. The bigamous marriage is exploited by openly living in ratification of it in the state in which the prosecution is commenced. State v. Long, 143 N. C. 670, 57 S. E. 349.

67. Territory v. Alexander [Ariz.] 89 P. 514.

68. Words "former wife" in statute relating to bigamy are used in contradistinction to the person with whom the second marriage was entered into and do not refer to another wife. Burton v. State [Tex. Cr. App.] 101 S. W. 226.

69. Hearne v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 372, 97 S. W. 1050. Agreement to marry in praesenti followed by cohabitation and recognition is a sufficient basis upon which to predicate conviction for bigamy. State v. Bates, 4 Ohio N. P. (N. S.) 502.

70. Prior marriage held void as bigamous. McCombs v. State [Tex. Cr. App.] 99 S. W. 1017.

71. An honest belief in the death of the first wife is not a defense where the second marriage takes place prior to the expiration of the statutory period. Parnell v. State, 126 Ga. 103, 54 S. E. 804. Vt. St. 5059 provides that a husband marrying a second time shall not be guilty of bigamy where his first wife was continuously beyond the seas or without the state for a period of seven years, and the second marriage was entered into in ignorance of the fact that she was still alive. Held a belief that the first wife was dead is not a defense where the second marriage occurred prior to the expiration of seven years. State v. Ackerly, 79 Vt. 69, 64 A. 450.

72. Where a mob demanded that defendant marry a certain woman at once, compliance next day was not under duress. Burton v. State [Tex. Cr. App.] 101 S. W. 226.

73. See 7 C. L. 442.

74. Need not negative divorce and absence of the first wife for the statutory period. State v. Long, 143 N. C. 670, 57 S. E. 349.

75. Need not allege the date of either marriage. State v. Long, 143 N. C. 670, 57 S. E. 349.

76. State v. Long, 143 N. C. 670, 57 S. E. 349.

77. The finding and return of the grand

Evidence and instructions.[78]—The state must establish the validity of a prior marriage,[79] as it will not be presumed,[80] the identity of the defendant as one of the parties thereto,[81] that the former wife was living at the time of the bigamous marriage.[82] and the existence of a second marriage.[83] The burden is upon the defendant to establish all matters of confession and avoidance.[84] In Texas a certified copy of a marriage license is inadmissible unless the original is filed and notice thereof is given to the accused three days before the trial.[85]

Bigamy being a crime against the marriage relation and not a crime committed by one spouse against the other the wife is incompetent to testify against the husband,[86] but there is a variety of views as to the principles which ought to determine this question. Letters from defendant to an alleged former wife are inadmissible,[87] but it is not error for the state to call as a witness the former wife of defendant where she was not questioned and did not testify.[88]

Bill of Discovery; Bills and Notes; Bills in Equity; Bills of Lading; Bills of Sale; Birth Registers, see latest topical index.

BLACKMAIL.[89]

Extortion under color of office[90] and the offense of making threats without intent to extort[91] are elsewhere treated.

To constitute the statutory offense three things are essential, a threat to do one or more of the things specified in the statute, the existence of fear induced by such threats, and the obtaining of money or property of another with his consent induced by such fear or threat.[92] Extortion under threats of physical injury or death,[93] or criminal prosecution,[94] or any public accusation,[95] is blackmail and a threat to file a formal complaint is unnecessary.[96] A threat to expose criminal relations existing between a married man and a single woman is sufficient to constitute the offense,[97] and where defendant brought about the compromising situation and accepted money for

jury is sufficient prima facie to confer jurisdiction. State v. Long, 143 N. C. 670, 57 S. E. 349.

78. See 7 C. L. 442.

79. Instruction held not to place burden on defendant. Hearne v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 372, 97 S. W. 1050.

80. Evidence held insufficient. McCombs v. State [Tex. Cr. App.] 99 S. W. 1017.

81. Confession that defendant had a wife and children in the state in which a former marriage is alleged to have been consummated does not identify him as such. Goad v. State [Tex. Cr. App.] 102 S. W. 121.

82. Goad v. State [Tex. Cr. App.] 102 S. W. 121; Hearne v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 372, 97 S. W. 1050. In the absence of such evidence commitment is unauthorized. Ex parte Baker [Cal. App.] 86 P. 915.

83. Evidence reviewed and held the existence of a second common-law marriage was for the jury. Williams v. State [Ala.] 44 So. 57.

84. Must show impediments to prior marriage rendering it illegal or void. State v. Kniffen [Wash.] 87 P. 837.

85. Sayles' Ann. Civ. St. 1897, art. 2958, Burton v. State [Tex. Cr. App.] 101 S. W. 226.

86. Ballinger's Ann. Codes & St., § 5994, makes either spouse a competent witness against the other in a criminal proceeding for a crime committed by one against the other. State v. Kniffen [Wash.] 87 P. 837. The rule that either spouse is incompetent to testify against the other has not been modified in Ohio. State v. Bates, 4 Ohio N. P. (N. S.) 502.

87. Hearne v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 372, 97 S. W. 1050.

88. Burton v. State [Tex. Cr. App.] 101 S. W. 226.

89. See 7 C. L. 442.

90. See Extortion, 7 C. L. 1639.

91. See Threats, 6 C. L. 1697.

92. State v. Coleman, 99 Minn. 487, 110 N. W. 5.

93. Sending letters, purporting to come from the "Black Hand," threatening death to the addressee and his family unless money was paid, is a violation of Pen. Code, § 558, making it an offense to send a letter containing threats with intent to obtain money thereby. People v. Triscoli, 117 App. Div. 120, 102 N. Y. S. 328.

94. Conspiracy to extort money under threat of criminal prosecution is a felony under either Pen. Code, art. 753, punishing combination to extort money, or art. 875, relating to obtaining money by threats. Williams v. State [Tex. Cr. App.] 100 S. W. 149.

95. Threat to accuse of adultery. State v. Louanis, 79 Vt. 463, 65 A. 532.

96. State v. Louanis, 79 Vt. 463, 65 A. 532.

97. State v. Coleman, 99 Minn. 487, 110 N. W. 5.

his promised silence, he is guilty though he did not expressly threaten exposure.[98] In such case the illicit relations between the parties involved by the threatened exposure is immaterial.[99] Extorting money under threat to call a strike is a crime under the New York statute,[1] and evidence that the calling of a strike would have resulted in injury to the person threatened is sufficient though the extent is not shown.[2] The state must not only establish threats [3] placing the person threatened in fear,[4] but it must show that defendant intended that they should have that result,[5] except in Minnesota, where obtaining money by means of a threat is the gist of the offense and intent need not be proved as an independent fact.[6] The essential facts constituting the crime being established, intent will be presumed.[7] Evidence of similar threats is admissible as showing intent [8] and the existence of a preconceived plan.[9] The ownership of money turned over pursuant to threats is immaterial.[10] The question of whether the threat was calculated to unsettle and overcome the mind of the person threatened is properly left to the jury.[11] The court need not instruct the jury as to the meaning of the word "extort."[12]

Blended Properties; Board of Health; Boards; Body Execution; Bona Fides, see latest topical index.

BONDS.

§ 1. The Instrument; Essentials and Validity (395). Consideration (395). Execution (395). Delivery (395).
§ 2. Rights of Parties and Transferees (396).
§ 3. The Terms and Conditions in General; Interpretation and Legal Effect (396).
§ 4. Remedies and Procedure (396).

Scope of title.—Questions relating to negotiable bonds and the like,[13] to indemnity,[14] and to suretyship,[15] are treated elsewhere. Matters concerning bonds in particular actions and proceedings,[16] and bonds of particular officers,[17] will be found in the appropriate titles.

98. For the purpose of securing evidence for a divorce case, defendant procured a woman to make an appointment with a man in a rooming house, and pursuant to a prior arrangement with the woman broke in upon them. State v. Coleman, 99 Minn. 487, 110 N. W. 5.

99. State v. Coleman, 99 Minn. 487, 110 N. W. 5.

1. Pen. Code, § 552. Evidence held sufficient to show that payment was induced by threats of officer of labor union to call a strike. People v. Weinseimer, 117 App. Div. 603, 102 N. Y. S. 579.

2. People v. Weinseimer, 117 App. Div. 603, 102 N. Y. S. 579.

3. Evidence that defendant asked prosecuting witness "have you received my letters," "these letters in which you are asked to pay $500," held sufficient to show the sending of the letters, witness having received no other letter demanding $500. People v. Triscoli, 117 App. Div. 120, 102 N. Y. S. 328.

4. Whether threats of the displeasure of the Mafia Black Hand society upon failure to contribute money to it amounts to a menace depends upon what the parties understood as to the nature of the society and its punishments. Commonwealth v. Campolla, 28 Pa. Super. Ct. 379.

5. Evidence that defendant had invited others to join a certain society, that he admitted membership therein, that the society obtained money by threats, and that physical injury was inflicted upon those refusing to comply, held admissible as showing intent. Commonwealth v. Campolla, 28 Pa. Super. Ct. 379.

6. Rev. Laws 1905, § 5096. State v. Coleman, 99 Minn. 487, 110 N. W. 5.

7. Money paid to purchase defendant's silence regarding a compromising situation brought about by the latter, though no express threat of exposure was made. State v. Coleman, 99 Minn. 487, 110 N. W. 5.

8. Executed threat to call a strike on a former contractor. People v. Weinseimer, 117 App. Div. 603, 102 N. Y. S. 579. Threats to others to accuse prosecuting witness of adultery. State v. Louanis, 79 Vt. 463, 65 A. 532.

9. People v. Weinseimer, 117 App. Div. 603, 102 N. Y. S. 579.

10. Contractor threatened with strike unless money was paid president of labor union, held whether money paid belonged to owner of building or contractor is immaterial. People v. Weinseimer, 117 App. Div. 603, 102 N. Y. S. 579.

11. Threat to accuse of adultery. State v. Louanis, 79 Vt. 463, 65 A. 532.

12. State v. Louanis, 79 Vt. 463, 65 A. 532.

13. See Corporations, 7 C. L. 862; Municipal Bonds, 8 C. L. 1046; Negotiable Instruments, 8 C. L. 1124; Non-negotiable Paper, 8 C. L. 1167; Railroads, 8 C. L. 1590.

14. See Indemnity, 8 C. L. 173.

15. See Suretyship, 8 C. L. 2050.

16. See Appeal and Review, 9 C. L. 108; Attachment, 9 C. L. 282; Replevin, 8 C. L. 1732, and like titles.

17. See Estates of Decedents, 7 C. L. 1386; Guardianship, 7 C. L. 1899; Officers and Pub-

§ 1. *The instrument; essentials and validity.*[18]—Though a bond is given under a state statute, the question of its validity and construction may be one of general law which a Federal court will decide regardless of state decisions.[19] An instrument may be valid as a common-law obligation though not good as a statutory bond.[20] provivded there is a sufficient privity of contract between the makers and the party seeking to enforce it.[21]

Consideration.[22]—A consideration is necessary,[23] and in jurisdictions where the seal is only presumptive evidence of consideration, want of consideration may be shown,[24] in which case the bond is unenforceable,[25] but at common law a bond, because of its seal, conclusively imports a consideration.[26]

Execution.[27]—The order of the different steps in the execution of a bond is immaterial if they are all parts of one transaction.[28] A bond purporting to be the obligation of one as principal and others as sureties but which has been executed only by the sureties does not upon its face show any obligation on the part of the sureties,[29] but failure of the obligee to sign his acceptance as provided in the bond does not invalidate if acceptance is otherwise shown.[30] The absence of witnesses is not fatal though the bond may be signed by mark only,[31] and the contract may still stand as a promise to pay though a clause waiving exemptions may be void for want of execution of the agreement according to statute.[32]

Delivery.[33]—While upon proof that a bond was delivered after its date it is presumed that it was intended to take effect from delivery only, such presumption is inapplicable where it satisfactorily appears from its terms that it was intended to take effect from its date or some other time.[34] If a bond complete upon its face is delivered to an obligee who is without knowledge of any equities, a surety may not defend on the ground that it was given by him to his cosurety on an express condition;[35] but if the bond is irregular on its face,[36] as where it is not acknowledged

lic Employes, 8 C. L. 1191; Receivers, 8 C. L. 1679, and other like titles.

18. See 7 C. L. 443.

19. Public contractor's bond held valid as to materialmen though construction contract was invalid. Kansas City Hydraulic Press Brick Co. v. National Surety Co. 149 F. 507.

20. Injunction bond. Babcock v. Reeves [Ala.] 43 So. 21.

21. Replevy bond in sequestration, invalid under statute, not good at common law, makers having dealt solely with the officer. Broussard v. Hinds [Tex. Civ. App.] 101 S. W. 855.

22. See 7 C. L. 444.

23. Bond executed by publishers required by statute for the purpose of enabling them to have text books adopted for use in the schools of a state is not without consideration. Graziani v. Burton, 30 Ky. L. R. 180, 97 S. W. 800.

24. Danby Tp. v. Beebe, 147 Mich. 312, 110 N. W. 1066.

25. Bond to a township to help build a bridge if township should be ordered by county supervisors to construct it held without consideration and not sustainable as a gift or subscription. Danby Tp. v. Beebe, 147 Mich. 312, 110 N. W. 1066.

26. Bond for past consideration held conclusive against maker's administrator. Woody's Adm'r v. Schaaf [Va.] 56 S. E. 807.

27. See 7 C. L. 444.

28. Where attachment bond was delivered complete, it was immaterial whether it was signed before or after it was sealed or whether it was sealed before approved by the magistrate. George N. Pierce Co. v. Casler [Mass.] 80 N. E. 494.

29. School Dist. No. 80 v. Lapping, 100 Minn. 139, 110 N. W. 849. Where complaint stated that sureties intended to be bound without the principal's signature, evidence held to sustain a finding to the contrary. Id.

30. Indemnity bond making it essential to validity that employer sign for acceptance. American Bonding & Trust Co. v. New Amsterdam Casualty Co., 125 Ill. App. 33.

31. Code 1896, § 1, providing that "signature" or "subscription" includes mark when the person cannot write, his name being written near it and witnessed by a person who writes his own name, did not change common-law rule so as to invalidate instruments not required to be in writing though signed by mark without a witness. Penton v. Williams [Ala.] 43 So. 211.

32. Penton v. Williams [Ala.] 43 So. 211.

33. See 7 C. L. 444.

34. Fidelity bond held to cover period before delivery. Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483.

35. Condition that it was not to be used until an indemnity bond was furnished. Hendry v. Cartwright [N. M.] 89 P. 309.

36. As where not signed by all the sureties named therein, or because of erasures or for lack of some requirement of law. Hendry v. Cartwright [N. M.] 89 P. 309.

as required by law,[37] the obligee is put upon inquiry as to whether it was signed upon condition.[38]

§ 2. *Rights of parties and transferees.*[39]

§ 3. *Terms and conditions in general; interpretation and legal effect.*[40]—The extent of the obligation assumed must be determined from a fair consideration of the terms of the bond and the instrument which it secures.[41] A contract which by the terms of a bond is made a part thereof is as much a part of the bond as if copied therein at length.[42] When a statutory bond is given, that which is not expressed but should have been will be deemed included, and unnecessary matters will be excluded if it is sufficiently clear from the bond itself that the parties intended to comply with the law in its execution.[43] Coupons draw interest after maturity without demand of payment where a provision for payment at a certain bank is rendered unimportant by failure to place funds there to meet a demand.[44]

§ 4. *Remedies and procedure.*[45]—Persons for whose benefit a bond was made may sue thereon in the name of the obligee,[46] and where there has been a mistake in the name of the obligee, the true obligee may sue by alleging and proving such fact, even as against the sureties,[47] but one to whom a bond is given merely as an officer of a society has no right of action thereon as an individual.[48] A statute authorizing the bringing of a new action after the running of limitations where a plaintiff fails otherwise than on the merits and his action was brought in time applies to an action on a bond authorized and required to be given by a subsequent statute providing that an action thereon must be brought within a specified time.[49]

Pleading and evidence.[50]—The complaint must state a cause of action,[51] including the performance of conditions precedent by plaintiff,[52] and a breach on

37. Rule of court requiring acknowledgment of all bonds approved by clerk held to have force of law. Hendry v. Cartwright [N. M.] 89 P. 309.

38. Surety could prove unfulfilled condition that bond was not to be used until an indemnity bond had been furnished him. Hendry v. Cartwright [N. M.] 89 P. 309 and cases cited.

39. See 5 C. L. 425, and 7 C. L. 444.

40. See 7 C. L. 444.

41. Bond construed to require obligors to pay a stated sum as the balance of the purchase price of a mining claim only out of net earnings or proceeds of a resale, and not to continue working after mines were exhausted, and to allow an assignment of their interests to a corporation without becoming liable for the entire amount. Blewett v. Hoyt, 103 N. Y. S. 451.

42. City of Flora v. Searles, 127 Ill. App. 465. Where a bond is executed with express reference to a contract, plans and specifications, the three instruments must be construed together and the obligations of the bond determined from them all. McArthor v. McGilvray [Ga. App.] 57 S. E. 1058. Petition held to state cause of action on contractor's bond. Id.

43. Bond to pay expense of election on removal of county seat held valid though condition was not in exact words of statute. Chambers v. Cline, 60 W. Va. 588, 55 S. E. 999, and cases cited.

44. Parsons v. Utica Cement Mfg. Co. [Conn.] 66 A. 1024.

45. See 7 C. L. 445.

46. Materialmen could sue on contractor's bond which showed that it was intended to include them as beneficiaries. City of Flora v. Searles, 127 Ill. App. 465. Where injunction bond provided for the payment of "damages and costs which any person may sustain" action thereon was properly brought by all the obligees for the use of one as the party who had been damaged. Babcock v. Reeves [Ala.] 43 So. 21. City held not entitled to maintain action on public contractor's bond for benefit of private property owners. City of St. Louis v. Wright Contract. Co., 202 Mo. 451, 101 S. W. 6.

47 Suit on school treasurer's bond. State ex rel. School Dist. v. Delaney, 122 Mo. App. 239, 99 S. W. 1. Petition sufficient without more particularly alleging that error was an inadvertence or mistake. Id.

48. Officer of insurance society could not sue individually on bond of a depository though he was personally liable to the society for default of depository. Bort v. McCutchen, 147 F. 626. Where bond could not reasonably be construed as having been given for plaintiff's benefit, the rule that a third person may sue on a contract made for his benefit did not apply. Id.

49. Public contractor's bond. Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 F. 507.

50. See 7 C. L. 445.

51. Allegation that defendant executed the instrument by having his name signed thereto and making his mark held not necessary to show that there was no witness to the instrument so as to render it demurrable. Penton v. Williams [Ala.] 43 So. 211.

52. That every condition was fulfilled all things happened, and all times elapsed necessary to recovery, held not to show due

the part of defendant.[53] Where a second bond is given which is merely a renewal of the first and cumulative in its effect, it is proper to set them both forth in the pleading.[54] A declaration setting out the bond, the contract it was given to secure, a breach thereof, and also a former decree against the principals, is not bad for duplicity.[55] Where the bond is the gist of the action, a plea of nil debet is improper,[56] and a plea of non est factum must be verified.[57] The bond must be regarded as the act of defendant, its execution not having been put in issue by a plea of non est factum.[58]

The burden is on plaintiff to prove a breach.[59] Sureties may testify that in signing and leaving the bond with the obligees they did not intend to deliver it as binding on them without the principal's signature.[60] In an action on an injunction bond, it is proper to introduce the proceedings and decree in the injunction suit.[61] A decree against the principal is prima facie evidence of the amount due in an action against the sureties who had notice of the proceeding against the principal.[62]

Where defendant sets up that seals were affixed to the instrument sued on without authority, an instruction that the bond is presumed correct being regular on its face, and that the burden is on defendant to show that it was not properly sealed, should not be construed as relieving plaintiff of proving the due execution of the bond.[63]

Judgment and damages.[64]—Where a bond is executed subject to the terms and conditions of a statute providing that in case of breach the full amount thereof shall be recovered as liquidated damages, such provision cannot be defeated because of hardship or because public officials may have given such bonds a different construction.[65]

"Bottle" and "Can" Laws; Bottomry and Respondentia; Bought and Sold Notes, see latest topical index.

BOUNDARIES.

§ 1. Rules for Locating and Identifying (398). Monuments, Courses, Distances, and Quantity (400). Highways, Streets, or Ways as Boundaries (401).
§ 2. Riparian or Littoral Boundaries (402).
§ 3. Establishment by Agreement of Adjoiners (402).
§ 4. Establishment by Acquiesence, Estoppel, or Adverse Possession (403).
§ 5. Establishment by Arbitration, Action, or Statutory Mode (405).

performance of conditions precedent by plaintiff. Gansevoort Bk. v. Empire State Surety Co., 117 App. Div. 455, 102 N. Y. S. 544. Complaint on bond to secure payment of a note held not demurrable for failure to show that plaintiff had loaned the money. Id.

53. Complaint held to allege breach of bond of government disbursing officer, and wherein damages had been sustained. Ewing v. U. S. [Ariz.] 89 P. 593. An allegation that a former decree against the principal is in full force and effect is equivalent to an allegation that it has not been performed or paid. Henry v. Heldmaier, 226 Ill. 152, 80 N. E. 705. In suit on injunction bond, averment that bill was dismissed and injunction dissolved held a sufficient allegation of the breach. Babcock v. Reeves [Ala.] 43 So. 21.

54. Objection that two causes were united in one count. Ewing v. U. S. [Ariz.] 89 P. 593.

55. Henry v. Heldmaier, 226 Ill. 152, 80 N. E. 705. Notice to principal held sufficiently shown by chancery proceeding set out in declaration. Id.

56. Administrator's bond. McDonald v. People, 222 Ill. 325, 78 N. E. 609.

57. McDonald v. People, 222 Ill. 325, 78 N. E. 609.

58. Penton v. Williams [Ala.] 43 So. 211.

59. Failure to prove breach of bond conditioned on defendant's paying for a mining claim out of the profits. Blewett v. Hoyt, 103 N. Y. S. 451.

60. School Dist. No. 80 v. Lapping, 109 Minn. 139, 110 N. W. 489. Form of questions asked not erroneous. Id.

61. Babcock v. Reeves [Ala.] 43 So. 21.

62. Henry v. Heldmaier, 226 Ill. 152, 80 N. E. 705. See, also, Suretyship, 8 C. L. 1250.

63. Should be construed merely as a charge that the burden was on defendant to make out his defense that the instrument had been materially altered. George N. Pierce Co. v. Casler [Mass.] 80 N. E. 494.

64. See 7 C. L. 446.

65. Surety on bond of mail carrier's contract liable for full amount. United States v. United States Fidelity & Guaranty Co., 151 F. 534.

§ 1. *Rules for locating and identifying.*[66]—In determining the location of a boundary all calls must be given some effect if possible,[67] but a call may be rejected if necessary to reconcile a description,[68] or a discordant call may be ignored,[69] or two calls may be read as one.[70] A course omitted in a deed to a lot may be supplied from the description in the deed to an adjoining lot.[71] In determining the location of a boundary from a description in a deed, the general rules as to the construction of deeds apply,[72] and a particular description will be held to modify a general one.[73] Calls may be reversed where all monuments called for, except the final one, have disappeared,[74] or where to do so will reconcile or make clear the calls,[75] or harmonize the area of land embraced with that called for.[76] The primary rules for locating city plats upon the ground are: First. Find the lines actually run and the corners and monuments actually established by the original survey.[77] Second. Run lines from known, established or acknowledged corners and monuments of the original survey.[78] Third. Run lines according to courses and distances marked on the plat.[79]

If the original corner of a quarter section has been preserved, it marks one of the points from which the dividing line between quarter sections must be run.[80] But if it is lost it must be established according to the rules laid down by the Department of the Interior for the establishment of lost corners, or some other rule producing an equitable result.[81] The lost corners of a boundary may not be fixed by adhering to the description without regard to topography.[82] It is presumed that a county surveyor placed corner stakes as required by statute.[83] Where a subdivision of land containing an excess in area is divided, each grantee is entitled to a proportionate part of the excess.[84] The rule that the excess is to be added to or the deficiency sub-

66. See 7 C. L. 446.

67. Where three corners are lost, the distances of the three lines will be altered proportionately to make them conform to the known parts of the boundary rather than radically alter the course of one line. Morgan v. Renfro, 30 Ky. 533, 99 S. W. 311.

68. Upton v. Santa Rita Min. Co. [N. M.] 89 P. 275.

69. Where a single call of description fixes the tract by course and distance from a common section corner as in range 14, when several other description calls fix it by reference to known monuments as in range 12, the discordant element first named will be ignored. Upton v. Santa Rita Min. Co. [N. M.] 89 P. 275.

70. Descriptive matter in a patent which if literally construed would constitute two calls and leave the courses and corners undefined, but if construed as one call the survey closed and embraced the amount of land called for, may be construed so as to more nearly effectuate the apparent intention of the parties. Mineral Development Co. v. Tuggle Land & Timber Co. [C. C. A.] 151 F. 450.

71. Zerbey v. Allan, 215 Pa. 383, 64 A. 587.

72. See Deeds of Conveyance, 7 C. L. 1103.

73. "The boundary of the land conveyed to him by J." will modify "the tract of land said H. bought of S., known as N. land." Hall v. Smith, 30 Ky. L. R. 167, 97 S. W. 1125.

74. Where all monuments along the line had disappeared except the final one, it was permissible to begin at such monument and reverse the lines. Cahill v. Mullins, 30 Ky. L. R. 73, 97 S. W. 370.

75. Newbold v. Condon, 104 Md. 100, 64 A. 356.

76. In cases of conflicting boundary where it appears that part of the survey was made on the ground, the calls may be reversed and lines traced the other way where by so doing the land embraced will more nearly harmonize all the calls and objects of the grant. Carter v. Kirby Lumber Co. [C. C. A.] 152 F. 622.

77, 78, 79. Appeal of Richardson, 74 Kan. 557, 87 P. 678.

80. King v. Carmichael [Wash.] 87 P. 1120.

81. King v. Carmichael [Wash.] 87 P. 1120. If a government corner can be established with reasonable certainty from known and existing monuments, it is sufficient. Thompson v. Fuhrmann, 130 Wis. 375, 110 N. W. 236. In Iowa surveys are to be made according to the rules established by congress. Hootman v. Hootman [Iowa] 111 N. W. 60.

82. An instruction that, in locating the last line or last corner of a boundary, to adhere to course and fix the corner without regard to the topography of the ground at the place described in the title papers is erroneous. Green v. Pennington, 105 Va. 801, 54 S. E. 877.

83. Morgan v. Renfro, 30 Ky. L. R. 533, 99 S. W. 311. Where a point in a line of a known survey is called for, a corner of which is the nearest point in the line to the last call of the survey in question, the corner should be accepted as the point intended. Id.

84. Quarter section of land was conveyed, one-half to each of two parties on the theory that it contained but 160 acres when it in fact contained 164. Hootman v. Hootman [Iowa] 111 N. W. 60.

tracted from the sections or half sections on the northern or western boundaries of a township does not apply to smaller subdivisions of a section.[85]

The rule that a survey of land intended to be conveyed will control the description is not contrary to the public policy of the registration laws,[86] nor is it a violation of the statute of frauds.[87] Field notes which can probably be located on the ground do not necessarily establish the location of a boundary.[88] Where field notes of a survey are consistent and can be identified, the field notes of another survey may not be looked to to create inconsistency.[89] In determining the location of a survey, the jury should be left to apply the rule which indicates with most certainty the location of the land.[90]

The actual location of a boundary is often a question of fact [91] to be determined by the application of established rules.[92] The evidence to be considered and which

85. Hootman v. Hootman [Iowa] 111 N. W. 60.

86. This rule may be applied in ejectment, though the same result might be obtained in a bill to reform the deed. Staub v. Hampton [Tenn.] 101 S. W. 776. When a deed called for a point on the boundary of another survey and it appeared that such survey was erroneous, held that the survey or the land intended to be conveyed controlled the description, though the land was not included within the calls. Id.

87. Staub v. Hampton [Tenn.] 101 S. W. 776.

88. Field notes shown to be delineated on an official map, and which may perhaps be found on the ground while calling for certain boundaries, do not necessarily establish the location of such survey upon the ground. McDonald v. Downs [Tex. Civ. App.] 99 S. W. 892.

89. Upshur County v. Lewright [Tex. Civ. App.] 101 S. W. 1013.

90. In an issue as to the location of certain surveys, an instruction as to the rule to be followed in determining the location on the ground held erroneous. Upshur County v. Lewright [Tex. Civ. App.] 99 S. W. 441. Where it appeared that lines were originally run at an angle of nine degrees forty-five minutes, and it appeared that during the fifty years that had elapsed since the survey the variation had decreased from two to three minutes a year, it was proper to instruct the jury to find at what variation the lines should be run to follow the original survey. Battles v. Barnett [Tex. Civ. App.] 100 S. W. 817. Where a part only of the lines of a survey were run, the jury must determine the lines not run as well as those that may be found by following the footsteps of the surveyor. Upshur County v. Lewright [Tex. Civ. App.] 101 S. W. 1013.

91. Evidence as to the location of a boundary held for the jury. Turner v. Angus, 145 Mich. 679, 13 Det. Leg. N. 646, 108 N. W. 1100; Williamson v. Bryan, 142 N. C. 81, 55 S. E. 77.

Evidence held sufficient to sustain a finding that the south boundary of a tract as located on the ground in partitioning the same was located on the true boundary. Brodbent v. Carper [Tex. Civ. App.] 100 S. W. 183. A boundary to camp grounds reserved to Indians by treaty fixed by government survey of adjoining land, and shown by the plat returned, is sufficient for the purpose of a subsequent conveyance of the land after the reservation has been relinquished. United States v. Chandler-Dunbar Water Power Co. [C. C. A.] 152 F. 25. Where the only issue raised to the return of processioners was whether a line run and marked by them was the true line, and the evidence was sufficient to sustain a finding that it was a new trial was properly refused. Whitehurst v. Hathorn [Ga.] 57 S. E. 682. Where trees called for have disappeared, it is presumed that they had been at the distance apart called for. Keystone Mills Co. v. Peach River Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 958, 96 S. W. 64. One who asserts otherwise has the burden to prove it. Id. Evidence held insufficient. Id. Evidence sufficient to sustain the finding of the jury as to the location of a boundary. Beckham v. Thompson [Tex. Civ. App.] 97 S. W. 131; Manuel v. Flynn [Cal. App.] 90 P. 463; Davidson v. Equitable Securities Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 95, 96 S. W. 787. Evidence sufficient to show that a poplar tree called for as a corner formerly stood at a certain point. Eastham v. Smith [Ky.] 103 S. W. 315. Evidence sufficient to show that a corner formerly represented by a gate post was at a point fixed by aged residents. Phillips v. Stewart, 29 Ky. L. R. 1199, 97 S. W. 6. Evidence sufficient to show that a certain survey had been made, that a rock had been adopted as a corner, and that the calls were intended to be therefrom. Fincannon v. Sudderth [N. C.] 57 S. E. 337. A finding of fact as to the location of a boundary **based on a plain mistake** may be vacated. Twombly v. Lord [N. H.] 66 A. 486.

Evidence held insufficient to sustain a finding as to location of a boundary. Martin v. Hill, 30 Ky. L. R. 1110, 100 S. W. 343.

92. Where a devisee helped to survey land devised to him, the presumption that such survey contained all the land he was entitled to is not overcome by a statement in a deed made by him that other land conveyed by such deed was also contained in the devise to him. Shive v. Garman's Guardian, 30 Ky. L. R. 1368, 101 S. W. 300. Where certain township boundaries were in dispute and twenty years previously a survey had been made and roads laid, and other improvements made with respect thereto, and about two years later another survey was made by a surveyor who claimed to have located some of the government corners, but in making it he relied on other information, held the survey first made should control. Foskuhl v. Herzer [Kan.] 91 P. 56

is admissible on the question is determined by the general rules of evidence.[93] Evidence of general repute is admissible.[94]

Monuments, courses, distances, and quantity.[95]—In case of conflict in the calls, such elements of description will be preferred as are the least liable to mistake.[96] Inconsistent calls are to be given prevailing effect in the following order: Natural or artificial monuments[97] or the places where they were located if destroyed;[98]

Instructions in action to determine boundary held not erroneous where evidence was conflicting and two theories as to location of line were involved. Fincannon v. Sudderth [N. C.] 57 S. E. 337.

93. See Evidence, 7 C. L. 1511. Where corner was pointed out by several aged residents, since deceased, surveyor to whom it was pointed out could testify concerning the facts. Phillips v. Stewart, 29 Ky. L. R. 1199, 97 S. W. 6.

General statement of district surveyor that certain survey is free from conflict is not competent on issue as to boundaries of another survey. Keystone Mills Co. v. Peach River Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 958, 96 S. W. 64.

Declarations of surveyor, since deceased, as to fact of which he is presumed to have had knowledge is admissable. Keystone Mills Co. v. Peach River Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 958, 96 S. W. 64. Such declarations in order to be given effect must possess the element of certainty. Id. In action to determine boundaries of lots, **old plat** obtained from volume of state papers is admissible if its authenticity is not questioned. Twombly v. Lord [N. H.] 66 A. 486. Where trees called for in senior survey had disappeared, one claiming under junior survey could show their location. Keystone Mills Co. v. Peach River Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 958, 96 S. W. 64. Where a tract of land is described as having so many arpents front by so many deep, side lines are **presumed** to run parallel out from right angles with front lines, unless there are controlling circumstances to the contrary. This presumption is strengthened by the fact that one of the side lines is perpendicular to the front line. Ramos Lumber & Mfg. Co. v. Sanders, 117 La. 615, 42 So. 158.

Declarations of deceased person through deed from whom title is claimed, made at time of survey, are admissible. Fincannon v. Sudderth [N. C.] 57 S. E. 337. On issue as to location of boundary, it **cannot be assumed** that surveyor who surveyed township did not run a line on the ground. Brown v. Yarraham Gold Min. Co., 3 Cal. App. 474, 86 P. 744.

Declaration of grantor in making a deed for purpose of settling street boundary, admissible. Rix v. Smith, 145 Mich. 203, 13 Det. Leg. N. 508, 108 N. W. 691. On issue as to location of boundary, **map is not admissible** where person who made it testified that he made no measurements on the ground but used as his data boundaries mentioned in deed, certain city plats and field notes. Seabrook v. Coos Bay Ice Co. [Or.] 89 P. 417.

Parol evidence, except to correct a mistake is not admissible to correct a call. Hamilton v. Blackburn [Tex. Civ. App.] 15 Tex. Ct. Rep. 721, 95 S. W. 1094. Parol evidence admissible to show what lines were intended in a deed where there is ambiguity. Haskell v. Friend [Mass.] 81 N. E. 962.

Field notes of surveyor not shown to be dead, admitted without objection, must be given effect as evidence. Keystone Mills Co. v. Peach River Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 958, 96 S. W. 64. Field notes of a junior survey cannot be resorted to to create an ambiguity in calls of a senior survey. Id. Where the field notes of different surveyors were in conflict as to the distance of one corner from another, such field notes were held not to be evidence as to the location of the corner. Id. Nor are such field notes evidence of location of bearing trees which had disappeared. Id. Field notes of subsequent government survey duly filed for record supersede those of prior survey. Kimball v. McKee, 149 Cal. 435, 86 P. 1089. Prior to Acts 1901, p. 39, it was necessary for processioners and the surveyor to trace and mark anew the lines around the entire tract of an applicant for prosecuting before the plat certified by the surveyor and the lines so marked should be prima facie correct and admissible without further proof. Gillis v. Taylor, 127 Ga. 676, 56 S. E. 992. On a trial of issues formed by a protest of adjoining owners to a return of processioners made before the act of 1901, where it appeared that the lines around the entire tract of the applicant were not surveyed and marked anew, it was proper to dismiss the entire proceeding. Id.

94. Phillips v. Stewart, 29 Ky. L. R. 1199, 97 S. W. 6. Where land was described as "beginning at a pine on the east side of" a swamp. A witness testified that he had known the beginning corner for fifty years That there was nothing to show that corner but a stub on the ground. That disinterested persons had pointed out the stub. Surveyors starting at that point had found blazed lines. Held sufficient to locate the corner. Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340. The fact that boundaries of fields and highways as established by early settlers are in harmony with disputed monuments is relevant as tending to show that such monuments are true corners. Bridenbaugh v. Bryant [Neb.] 112 N. W. 571.

95. See 7 C. L. 449.

96. Upton v. Santa Rita Min. Co. [N. M.] 89 P. 275. Original monument having disappeared, old boundary fences are better evidence of where the lot lines actually are. than a resurvey based on no original monument. Boundary, if a straight line, is established by wall of permanent building standing for the statutory period, though the building does not extend entire length of boundary. Wilson v. Sidle, 4 Ohio N. P. (N. S.) 465.

97. **Marks on the ground prevail over course and distance.** Lewis v. Louisville & N. R. Co., 30 Ky. L. R. 684, 99 S. W. 658. Ancient monuments **prevail over courses and distances.** Thompson v. Fuhrmann, 130 Wis.

course and distance;[99] quantity. This, however, is only their relative force as evidence, and the weakest may, by the aid of other facts, overcome a call of the highest dignity,[1] or where it gives effect to the intention of the parties,[2] or where it is evident that there is error in the call for the monument,[3] or where the call for the monument is uncertain and the calls for metes and bounds are certain.[4] Monuments are of no effect if not called for.[5] The calls in a senior survey prevail over those in a junior survey.[6]

Highways, streets, or ways as boundaries.[7]—As a general rule where streets,[8] alleys,[9] or ways [10] are designated as a boundary, the grantee will take the fee to the center thereof, and, if the grantors own the fee of the entire street, it will pass,[11] unless the terms of the grant indicate a contrary intention.[12] This rule is a presumption of fact and may be rebutted.[13]

375, 110 N. W. 236; Kimball v. McKee, 149 Cal. 435, 86 P. 1089; Green v. Pennington, 105 Va. 801, 54 S. E. 877; Upton v. Santa Rita Min. Co. [N. M.] 89 P. 275. Party wall. Schwalm v. Beardsley [Va.] 56 S. E. 135. Fences and monuments. Breakey v. Woolsey [Mich.] 14 Det. Leg. N. 364, 112 N. W. 719. Natural boundaries. Nevin v. Disharoon [Del.] 66 A. 362; Morgan v. Renfro, 30 Ky. L. R. 533, 99 S. W. 311. Abrupt descent on the end of lot. Miller v. Lavelle, 130 Wis. 500, 110 N. W. 421.

Monuments prevail over field notes. Strunz v. Hood [Wash.] 87 P. 45.

98. Monuments control plats, field notes, and other evidence where such monuments can be definitely established. Propper v. Wohlwend [N. D.] 112 N. W. 967. Evidence sufficient to sustain finding as to identity of tree called for as corner. Wyatt v. Watkins, 30 Ky. L. R. 784, 99 S. W. 643. Conflicting evidence as to location of monument held for jury. Propper v. Wohlwend [N. D.] 112 N. W. 967.

99. Where land is described by courses and distances and not by monuments, courses and distances prevail. Nevin v. Disharoon [Del.] 66 A. 362. Course and distance prevail if no marks or monuments are found. Lewis v. Louisville & N. R. Co., 30 Ky. L. R. 684, 99 S. W. 658.

1. Where a boundary was disputed, and where plaintiff's right rests on a deed describing the land as beginning at a certain rock, being a corner of a certain tract, and running with the line of that tract, though a call for fixed line will control course and distance if the corner and line cannot be established, a line running from the rock must be adopted. Fincannon v. Sudderth [N. C.] 57 S. E. 337. Unless course and distance are corroborated by other sufficient circumstances. Kimball v. McKee, 149 Cal. 435, 86 P. 1089.

2. Distance does not necessarily yield to course where one or the other must be disregarded. One is to be preferred over the other according to the manifest intention of the parties and circumstances of the case. Green v. Pennington, 105 Va. 801, 54 S. E. 877. Call for course and distance will control a call for a state where the giving of effect to the latter would cause the survey to embrace several hundred acres in excess. Mathews v. Pursifull, 29 Ky. L. R. 1001, 96 S. W. 803.

3. Where there is sufficient evidence to induce a belief that there is a mistake in a call for natural or artificial objects, and not in a call for course and distance, the latter will prevail. Hamilton v. Blackburn [Tex. Civ. App.] 15 Tex. Ct. Rep. 721, 95 S. W. 1094.

4. When a notice of condemnation of a strip of land described it by metes and bounds, and stated that it was off the southern boundary of an owner's land which was in dispute, held the description by metes and bounds was controlling, and the abutting owner was entitled to a tract between the condemned strip and the street. Pinney v. Borough of Winsted, 79 Conn. 606, 66 A. 337.

5. Brodbent v. Carpet [Tex. Civ. App.] 100 S. W. 183; Hamilton v. Blackburn [Tex. Civ. App.] 15 Tex. Ct. Rep. 721, 95 S. W. 1094; Eshleman v. Rankin, 32 Pa. Super. Ct. 254.

6. Keystone Mills Co. v. Peach River Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 958, 96 S. W. 64. When a survey of a tract called for old surveys on every side thereof and for courses and distances without any distances being measured on the ground, held the calls for the older surveys controlled. Isaacs v. Texas Land & Cattle Co. [Tex. Civ. App.] 99 S. W. 1040.

7. See 7 C. L. 451.

8. Grantee of lot in a recorded plat takes title to center of street on which it abuts subject to public easement. Wegge v. Madler, 129 Wis. 412, 109 N. W. 223. Though the lot is described by metes and bounds extending to the line of the street, although without express mention of such street. (Id.), or though the land described is bounded by a street (Id.). Fact that street is never opened is immaterial. Trowbridge v. Ehrich, 116 App. Div. 457, 101 N. Y. S. 995.

9. Wiess v. Goodhue [Tex. Civ. App.] 102 S. W. 793.

10. Gray v. Kelley [Mass.] 80 N. E. 651.

11. Where a street was laid out along a navigable river, conveyance of lots abutting on it passed title to the entire roadbed and carried riparian rights following the grant of upland. Johnson v. Grenell [N. Y.] 81 N. E. 161. A deed to land on each side of a street passes title to the street. Cocke v. Texas, etc., R. Co. [Tex. Civ. App.] 103 S. W. 407.

12. The general designation of a road as a boundary will not control a particular description by metes and bounds which shows the line to be the side of the road. Hamlin v. Attorney General [Mass.] 81 N. E. 275. Conveyance of lot held not to pass title to the street. Wegge v. Madler, 129 Wis. 412, 109 N. W. 223. A description "beginning in the east line of the road" running around

§ 2. *Riparian or littoral boundaries.*[14]—The meander line of a government survey is not a boundary.[15] As a general rule, where land is described as bounding on a non-navigable stream, the boundary is the thread of the stream.[16] Where a "shore" is designated the meaning to be given the word must be determined from the entire instrument in which it is used.[17] A description of land as founded upon or a running to or along the sea or bank of a stream carries with it the entire estate of the grantor whether to high water mark or to the thread of the stream,[18] but this rule does not apply where lots are particularly described on a plat and the plat makes no reference to the sea or stream.[19] The question whether the title to the suit under waters of a lake or stream passes to a grantee of the upland is to be determined by the law of the state where the land lays.[20] In Washington, in grants made prior to the adoption of the constitution, the line of ordinary high water marks the boundary only where the navigable water has been meandered or the meander line runs above the line of ordinary high water. Where it runs below that line the meander line marks the boundary.[21]

§ 3. *Establishment by agreement of adjoiners.*[22]—Agreements between coterminous owners settling disputed boundaries are favored by the courts and may be oral.[23] If carried into effect and acted upon they are binding, though the line

the lot to the east, "thence southerly by the sea to a road or passway," and "thence northerly in the east line of said road," excludes the road. Hamlin v. Attorney General [Mass.] 81 N. E. 275. A description "beginning at the southeast corner of M. & G. streets, running thence southerly along G. street * * *, thence * * * to M. street, thence westerly along M. street," did not pass title to any part of M. street. Tietjen v. Palmer, 105 N. Y. S. 790. Where the side of a private way is designated, such side is the boundary. Gray v. Kelley [Mass.] 80 N. E. 651.

13. Tietjen v. Palmer, 105 N. Y. S. 790. A license to the probate court to sell certain land described it as land on the side of a street containing a certain area with right in an adjoining private way. The deed was of a certain described area, with the private way as a boundary, with right to use the way. Held not to convey to the center of the way. Gray v. Kelley [Mass.] 80 N. E. 651.

14. See 7 C. L. 453. See Riparian owners, 8 C. L. 1744, as to rights of accretion, etc.

15. Berry v. Hoogendoorn [Iowa] 108 N. W. 923. Under Laws 1872, p. 129, providing for the sale of tide lands and that the applicant to purchase shall have the same surveyed and that the surveyor shall conform to and connect the survey with the survey of the United States so far as practicable, held where a deed described land as running along the meander line a certain course and distance, the calls were not governed by the meander line of the public survey. Seabroot v. Coos Bay Ice Co. [Or.] 89 P. 417. Where on an issue as to the location of the boundaries of a tract of tide land the description called for a place a certain distance from a post located a certain distance from a certain corner, the proper method was to find the post from some known corner and not to fix a starting point according to the distance mentioned from the corner. Id.

16. Foster v. Bussey [Iowa] 109 N. W. 1105; Wall v. Wall, 142 N. C. 387, 55 S. E. 283. A description beginning on a river, and the last two calls were "to" the river "thence up said river with its meanders to point of beginning," conveys to the main channel and includes an island though the distance called for falls short of such channel. Huffman v. Charles, 30 Ky. L. R. 197, 97 S. W. 775.

17. A description "beginning at a point on the shore" thence "to the shore" "along the shore," etc., and "bounded westerly by Squam River," did not restrict the boundary to high water mark but included the flats. Haskell v. Friend [Mass.] 81 N. E. 962. A line "thence southwesterly on a line parallel with the shore 300 feet" to a point is a straight line though the shore is curved where the line would be 328 feet if run parallel with the shore. Id.

18. Polson v. Aberdeen [Wash.] 87 P. 73.

19. Where an owner platted land but did not extend the boundaries of lots along the river to the bank, held the lines as shown by the plat were the boundaries. Polson v. Aberdeen [Wash.] 87 P. 73.

20. In Arkansas his title extends to the thread of a non-navigable stream and to high water mark of a navigable one. Harrison v. Fite [C. C. A.] 148 F. 781. This is the rule when the United States has disposed of lands bordering on non-navigable lakes by patent containing no reservations. Id. Riparian rights of persons who acquired land bordering on a navigable stream are not affected by Repeal of Act Congress 1846, declaring Des Moines River to be a navigable stream. Berry v. Hoogendoorn [Iowa] 108 N. W. 923.

21. Van Siclen v. Muir [Wash.] 89 P. 188.

22. See 7 C. L. 453.

23. A parol agreement between adjacent owners to employ a surveyor to establish their boundary followed by actual survey and building of a fence on the line constitutes such a boundary agreement as gives the right to recover possession up to the line in ejectment, though a different line had been recognized for many years. Roberts v. Birks, 223 Ill. 291, 79 N. E. 103. Where adjacent owners whose boundary line is in dispute establish a line by parol and improve

established is not the true one,[24] especially after a long lapse of time.[25] Such an agreement is not contrary to law nor against public policy,[26] and need not be acknowledged nor recorded.[27] It is binding on all persons claiming under or through the parties making it,[28] irrespective of whether the limitation period has expired;[29] but it is not valid for any other purpose than that of settling a boundary dispute, and where adjoining owners agree on a line knowing that it is not the true one for the purpose of transferring title, the agreement will not be given effect.[30] Where in an endeavor merely to ascertain the true boundary an erroneous line is agreed upon by mistake, the agreement is not binding and the line will not be established.[31] Such an agreement must be made by the owner [32] and must be entered into for the purpose of establishing the boundary.[33] Whether such an agreement has been entered into is sometimes a question of fact,[34] but it may be established by such conduct of the parties as will justify the inference of a prior agreement.[35]

§ 4. *Establishment by acquiescence, estoppel, or adverse possession.*[36]—The location of a boundary may be established by estoppel,[37] and if recognized for a long

their respective properties with respect to such line they are estopped to deny that it is the true boundary. Adams v. Betz [Ind.] 78 N. E. 649. An oral agreement settling a disputed line acquiesced in for several years will not be disturbed. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275. A conditional line is one made by agreement without the aid of surveyors. Martin v. Hill, 30 Ky. L. R. 1110, 100 S. W. 343. A disputed or unascertained boundary between adjacent owners may be fixed by parol agreement. Purtle v. Bell, 225 Ill. 523, 80 N. E. 350.

24. A boundary agreement is binding though the line fixed is not the original one. Breakey v. Woolsey [Mich.] 14 Det. Leg. N. 364, 112 N. W. 719.

25. Where adjoining owners fixed their boundary by a wall used for buildings on the lots and used the portion of the lots in the rear of the wall for many years in accordance with the line so fixed, held such line was the boundary. Younker v. White [Iowa] 111 N. W. 824. Where coterminious proprietors have established a division line and have acquiesced in it for a period equal to that prescribed by the statute of limitations, they are thereafter precluded from claiming that it is not the true line. Adams v. Child, 28 Nev. 169, 88 P. 1087. Where each of two coterminous proprietors recognizes the ownership of the other and that the tract of each is bound by that of the other the ascertainment of the true line between them fixes the extent of their respective tracts. Richardson v. Pitts, 127 Ga. 107, 56 S. E. 105.

26. Martin v. Conley, 30 Ky. L. R. 728, 99 S. W. 613.

27. Samples v. Smyth, 30 Ky. L. R. 498, 98 S. W. 1047.

28, 29. Adams v. Betz [Ind.] 78 N. E. 649.

30. Lewis v. Ogram, 149 Cal. 505, 87 P. 60. Where there is no dispute as to the location of a boundary, it cannot be established by a parol agreement. The fact that a wrong line was pointed out by a vendor does not affect its location in the absence of adverse possession. Turner v. Angus, 145 Mich. 679, 13 Det. Leg. N. 646, 108 N. W. 1100.

31. Purtle v. Bell, 225 Ill. 523, 80 N. E. 350.

32. An agreement between the husband of an owner and an adjacent owner is not binding on her. Hornet v. Dumbeck [Ind. App.] 78 N. E. 691.

33. Where adjacent owners after partly constructing buildings with a party wall doubted the accuracy of the boundary but agreed to complete the buildings and save expense of tearing them down, held that such agreement did not fix the boundary and was not binding as to land in the rear of the wall. Thoman v. Gross [Mich.] 14 Det. Leg. N. 210, 112 N. W. 111.

34. Whether a disputed boundary line had been fixed by mutual agreement and acquiescence held a question of fact. Scott v. Baird, 145 Mich. 116, 13 Det. Leg. N. 513, 108 N. W. 737. Evidence sufficient to show a boundary established by agreement between the predecessors in title. Morgan v. Lewis, 30 Ky. L. R. 747, 99 S. W. 676. Evidence insufficient to show that a boundary line had been agreed upon. Cottrell v. Pickering [Utah] 88 P. 696. When adjoining owners give deeds to each other to establish a line, and the location of objects called in the description is necessary to an intelligent understanding of the case, testimony of a person who was present when the line was run is admissible. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275. When adjacent owners agreed to a survey and thereafter one of them acquiesced in the location of a fence on the line found, it is immaterial to the establishment of a boundary whether he agreed to abide the result of the survey. McBride v. Bair [Iowa] 112 N. W. 169.

35. Stumpe v. Kopp, 201 Mo. 412, 99 S. W. 1073.

36. See 7 C. L. 454.

37. Where parties believed when certain deeds were executed that a boundary was in a certain place, and surveyed and sold the land with reference thereto, such supposed line will control. Asher v. Johnson, 30 Ky. L. R. 652, 99 S. W. 282. Where a township is segregated under the Carey act and a water company has it surveyed by a private surveyor and persons purchase tracts with reference to such survey and with knowledge that the lines were established by a private survey, they will be bound thereby. Taylor v. Reising [Idaho] 89 P. 943. Where a tract of land is subdivided and sold to several persons with reference to the private

period of years may be establishd by acquiescence.[38] In order to establish a line by estoppel, the elements of estoppel must exist,[39] and whether they do exist may be a question of fact.[40] The doctrine of acquiescence does not apply where adjacent owners do not regard a certain line as a boundary nor intend to treat it as such,[41] nor where a boundary has existed for only a comparatively short time.[42]

Occupancy under a claim of ownership up to a certain time for a period necessary to give title by limitations establishes a line by adverse possession,[43] but he must claim it as such line regardless of where the true line may be.[44]

survey made and they take, relying on such survey, and make improvements, the line so established will be held to be the correct one. Id. Where evidence shows that purpose of original grantor was to give equal portions of the disputed strip, and line midway of the strip was acquiesced in as the dividing line, a decree will be granted making such line the established boundary between subsequent grantees and heirs, notwithstanding an ambiguity in original deeds. Challen v. Martin, 8 Ohio C. C. (N. S.) 473.

38. Where a township of land has been segregated under the Carey act and a water company has contracted to furnish water and reclaim such tract and the government corners and lines have become obliterated, and the company has the tract surveyed by a private surveyor and thereafter the land is taken by persons in accordance with such private survey and improvements made with reference thereto, it is presumed to conform to the government survey. Taylor v. Reising [Idaho] 89 P. 943. Where improvements calculated to mark a boundary were erected by adjacent owners and existed for thirty years, and a fence conforming to such line was also erected, held such line was the true one and not one shown by a survey determined from street monuments placed long after the improvements were made. Holmes v. Judge [Utah] 87 P. 1009. Where a road has been for twenty-five years recognized as a boundary between lots and they have been transferred with reference thereto, it will prevail over the location of the road on a plat. Quade v. Pillard [Iowa] 112 N. W. 646. Where one lot owner erected a building on his lot intending to cover all of it and thereafter the adjoining owner built on his lot and used the wall and afterwards purchased one-half of it, and such wall was recognized as the line for twenty years, held the center of the wall was the line. Younker v. White [Iowa] 111 N. W. 824. A fence recognized by adjoining owners as the true line for eleven years establishes as the true line between the parties and those claiming under them. Amber v. Cain [Iowa] 110 N. W. 1053. Where owners of land adjacent to a highway have acquiesced for many years in a change of highway lines and have located building with reference to such change, and the last grantor of a lot has conveyed to another with oral declaration recognizing the new line, the description in the conveyance as against subsequent grantees must be construed with regard to such boundary. Rix v. Smith, 145 Mich. 203, 13 Det. Leg. N. 508, 108 N. W. 691. Where streets have, by parties interested or by public authorities, been opened, used and acquiesced in, they become permanent boundaries. Id. Where adjoining owners have for twenty years recognized a fence as their boundary, and after a survey one expressed his dissatisfaction and the other was fully advised before going to any expense in constructing a fence on the line shown by the survey, the former was not estopped to assert that the original fence was the true line. Andrews v. Meredith, 131 Iowa, 716, 109 N. W. 287.

39. Where a fence did not constitute an agreed boundary and one of the owners did not construct his buildings so that the eaves projected over the true time, and it did not appear that any representations were made as to the location of the line, held owners were not estopped because one had filled in his lot over the true line. Cottrell v. Pickering [Utah] 88 P. 696. Where one adjacent owner had no notice or knowledge that the building of the other extended over the line until just prior to action commenced, the line was held not established by acquiescence. Connell v. Clifford [Colo.] 88 P. 850.

40. Evidence held for the jury as to whether one of two co-tenants who voluntarily partitioned property was estopped to deny that the walls of buildings or adjoining lots were the boundaries of the lot partitioned. Scott v. Baird, 145 Mich. 116, 13 Det. Leg. N. 513, 108 N. W. 737. Statements made by one in the presence of an adjacent owner held admissible on an issue as to whether he was estopped to deny the location of a boundary. Id. Evidence as to the making of a survey and building a fence on the line shown thereby and recognizing it as the line for twenty years raises a question of fact as to the establishment of such line. Coleman v. Robens, 146 Mich. 333, 13 Det. Leg. N. 740, 109 N. W. 420. Where owners of land adjacent to a highway acquiesced in a change of highway lines for over a generation and a plat referred to in a deed showed the boundaries of the highway but there was nothing to show that highway authorities ever accepted the change in lines, held the question of true boundary was for the jury. Rix v. Smith, 145 Mich, 203, 13 Det. Leg. N. 508, 108 N. W. 691.

41. Where adjacent owners do not regard a fence as their boundary nor intend nor treat it as such, the doctrine of acquiescence does not apply. Boltz v. Colsch [Iowa] 109 N. W. 1106.

42. A fence which had existed only a comparatively short time when it was discovered that it was not on the line cannot be taken as establishing a line by acquiescence. Cottrell v. Pickering [Utah] 88 P. 696. Where neither of two adjacent owners had occupied to a particular line long enough to establish it by adverse possession or to raise an inference that it had been settled by acquiescence, one could assume that the other was claiming only the land described in his deed. Hootman v. Hootman [Iowa] 111 N. W. 60.

43. When adjacent owners treat a fence

§ 5. *Establishment by arbitration, action, or statutory mode.*[45]—Equity has no inherent jurisdiction to settle boundary disputes,[46] and will do so only as incidental to a remedy which it properly grants.[47] A controversy over the location of a boundary does not of itself afford sufficient ground for the appointment of commissioners to determine such boundary,[48] nor does mere confusion of boundaries.[49] There must exist some equity superinduced by the act of the party defendant,[50] or a danger of multiplicity of suits.[51] The established foundations of jurisdiction to appoint commissioners are (1) fraud or misconduct on the part of the defendant resulting in confusion,[52] (2) a relation between the parties which makes it the duty of one to preserve the boundary together with neglect of such duty, which results in confusion,[53] (3) the necessity of a resort to equity to prevent a multiplicity of suits.[54] The scope of equity in this proceeding is not alone to ascertain the boundary; if the original location cannot be found it will compel the defendant to make good to plaintiff his proper quantity of land.[55] Before equity will act in such proceeding, all persons interested whether their estates be present or future, must be made parties.[56] It is necessary for plaintiff to show that some of his land is in the possession of defendant.[57] Where more than one line is in dispute, a demurrer to the petition will be overruled where all parties interest as to one line are joined.[58] Statutory methods for establishing boundaries are prescribed in many states.[59] In North Carolina the plaintiff has the burden to establish the line as-

as a boundary line for twenty years, it will be regarded as the true line. Andrews v. Meredith, 131 Iowa, 716, 109 N. W. 287. Where a certain line has been acquiesced in by adjoining owners for twenty years, the fact that they agree to survey is insufficient to overthrow such line where it does not appear that either agreed to accept the survey. Id. Where a fence between adjacent owners has been maintained for twenty-five years it will be accepted as marking the true boundary, McBride v. Bair [Iowa] 112 N. W. 169. An adjacent owner who holds and claims title up to a certain line under belief that he owns the land holds adversely. Where one had held possession and improved up to a certain line until within a few months of the expiration of the statute of limitations, held such boundary was established by lapse of time. Goodwin v. Garibaldi [Ark.] 102 S. W. 706.

44. Boltz v. Colsch [Iowa] 109 N. W. 1106.

45. See 7 C. L. 455.

46. Dolan v. Smith, 147 Mich. 276, 13 Det. Leg. N. 1030, 110 N. W. 932.

47. Where a line was in dispute and plaintiffs were not in possession of the disputed strip when the bill was filed, equity would not quiet title to the disputed strip. Dolan v. Smith, 147 Mich. 276, 13 Det. Leg. N. 1030, 110 N. W. 932.

48, 49, 50, 51, 52, 53, 54, 55. Watkins v. Childs [Vt.] 66 A. 805.

56. Watkins v. Childs [Vt.] 66 A. 805. Evidence insufficient to show grounds for equitable interference. Id.

57. Watkins v. Childs [Vt.] 66 A. 805.

58. Watkins v. Childs [Vt.] 66 A. 805. A demurrer to an allegation on information and belief that defendant removed monuments admits the fact. Id.

59. In an action to establish a lost boundary under Ball. Ann. Code and St. § 5667, 5669, which provides for the appointment of a commission in the discretion of the court, neither the court, nor commissioners can correct government surveys nor establish government corners at points other than those fixed by the surveyors. Strunz v. Hood [Wash.] 87 P. 45. Hurd's Rev. St. 1905, p. 1894, that where adjacent owners cannot amicably settle a boundary, commissioners may be appointed by the court, that their report may be objected to by persons interested and the court shall determine the boundary from such report and objections is not a taking of property without due process because denying the right to jury trial. Hood v. Tharp [Ill.] 81 N. E. 861. Special proceedings brought under Revisal 1905, §§ 325, 326, to establish a boundary, are properly transferred to the civil issues docket under § 717 for trial of all issues where issue is raised as to title, and the clerk need not determine the question of boundary before making such transfer. Woody v. Mountain, 143 N. C. 66, 55 S. E. 425. In such case the burden of proving title rests on the plaintiff. Id. Where defendant in a processioning proceeding did not raise an issue of title in an action for location of a boundary, he was estopped by the judgement from denying the boundary thus determined. Davis v. Wall, 142 N. C. 450, 55 S. E. 350. Under Revisal 1905, §§ 325, 326, where a boundary is in dispute, either owner may have the land processioned without the consent of the other, even though title may become involved. Gren v. Williams [N. C.] 56 S. E. 549. Under the express provisions of Revisal 1905, §§ 325, 326, a petition alleging ownership of a lot lying between two of defendant's lots and that the boundary was in dispute is sufficient to sustain the proceedings. Id. Costs should be divided equally among the parties in an action under Ball. Ann. Codes and St. § 5667, 5669, to establish a lost boundary. Stunz v. Hood [Wash.] 87 P. 45.

serted by him to be the correct one.[60] The rule providing for a new trial as of right does not apply to such proceeding.[61] One who has sold land under deed of general warranty after pointing out boundaries may sue to settle a boundary dispute subsequently arising.[62] The police power can be resorted to for the settlement of a boundary dispute between counties only in case of overwhelming necessity and exigency.[63] The fixing of parish boundary lines is a legislative function, but where a dispute arises between two parishes as to which of two lines a statute has intended to adopt, the courts have jurisdiction of the controversy,[64] but the legislature having prescribed a mode of procedure for the fixing of uncertain parish lines, that mode must be followed and exhausted before recourse can be had to the courts.[65] The report of a surveyor appointed by the court to determine a boundary is prima facie correct if not excepted to,[66] and a judgment based thereon is conclusive.[67]

BOUNTIES

Sugar bounties.[68]

Wild animals.[69]—A bounty claim for killing a stock destroying animal is not assignable under the Montana statute.[70]

False claims.[71]—In a prosecution for forging bounty claim certificates under the Montana statute, it is not a defense that accused while bounty inspector had merely purchased outstanding claims and included them in a certificate together with the claims of another, and had procured the latter to swear that he had presented all the skins.[72]

Boycott; Brands, see latest topical index.

60. In proceedings to establish a boundary under Revisal 1905, §§ 325, 326, brought before the clerk and transferred to the civil issues docket for trial on account of issue to title the complainant has the burden to establish the boundary. Woody v. Fountain, 143 N. C. 66, 55 S. E. 425. The plaintiff in a proceeding to establish a disputed boundary has the burden of proof. Green v. Williams [N. C.] 56 S. E. 549. In a proceeding to establish a boundary, whether surveyors started from the right corner and correctly measured the intervening street lines and lots and in other respects proceeded correctly were questions of fact. Id.

61. Rev. Laws 1905, § 4430, providing for a second trial in actions for the recovery of real property, does not apply to an action under § 4454, to establish a boundary between adjoining farms. Tierney v. Gondereau, 99 Minn. 421, 109 N. W. 821. Ball. Ann. Codes & St. § 5518, giving a new trial as a matter of right in actions to recover land, does not apply to an action under §§ 5667, 5669, to establish a lost boundary. Strung v. Hood [Wash.] 87 P. 45.

62. Where an owner of land sells the same by deed of general warranty after pointing out the boundaries, and thereafter a controversy arises as to the location of a boundary, the vendor may sue to settle the dispute where the vendees joined. Amber v. Cain [Iowa] 110 N. W. 1053.

63. A boundary dispute between counties of one hundred years standing, though involving the jurisdiction of courts, the right of franchise, and the power of taxation, presents no exigency that requires the immediate and arbitrary exercise of the police power of the state or the law of overwhelming necessity in the invasion of private rights. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. Laws 1902, p. 1125, directing the location of and permanently marking the boundary between certain counties and making an appropriation therefor made no appropriation for property taken and did not authorize injury to private property. Id.

64, 65. Parish of Caddo v. De Soto, 114 La. 366, 38 So. 273.

66. The report of a surveyor appointed by the court to find a disputed boundary is when unexcepted to, prima facie the proper location of the line. Bates v. Baker [Ky.] 101 S. W. 340. The report of a survey not excepted to which shows the boundaries of land claimed and the surveyor's testimony as to the correctness of the lines run establishes a prima facie case. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

67. Where after processioners have duly made out and certified a plat a protest to their action is filed by an adjoining owner and the same is returned to the superior court, where a verdict is rendered sustaining the return of the processioners and such return is made the judgement of the court, such judgment is conclusive against protestant and his privies. Martin v. Patillo, 126 Ga. 436, 55 S. E. 240.

68, 69. See 7 C. L. 456.

70. State v. Newman, 34 Mont. 434, 87 P. 462.

71. See 7 C. L. 457.

72. State v. Newman, 34 Mont. 434, 87 P. 462. On the contrary, such evidence shows the prepetration of the additional crimes of subornation of perjury and the purchasing of claims against the state. Also fraud upon the state in claiming bounty for skins for which no bounty could be collected by law, the claims having been purchased. Id.

BREACH OF MARRIAGE PROMISE.

Right of action.—That the promise was void when made [73] does not preclude a valid new promise after removal of the disability.[74] A man is not liable for breach of an agreement to marry a consumptive woman, though he knew of her condition at the time he made the promise.[75]

A suit for breach of promise is abated by the death of defendant before being put in default,[76] but if he dies after being put in default his obligation may be enforced against his heirs.[77] When the validity of a prior marriage of plaintiff is drawn in question, plaintiff in seeking to show by her reply that such marriage was void because her alleged husband had another spouse living at the time need not negative the exceptions of the New York statute, declaring void a marriage contracted by one who at the time already has a living husband or wife.[78] An agreement of accord and satisfaction is without force so long as it remains unexecuted unless there has been loss of any right by reason of entering into the agreement.[79]

Form of action.[80]—Though seduction is alleged as ground for damages, the action is not one for personal injury within the meaning of a statute authorizing an order for the physical examination of plaintiff.[81]

Evidence and instructions.[82]—Testimony as to what occurred between plaintiff and defendant more than a year before suit is admissible where it is alleged that the agreement was constantly renewed, and the question of limitations is properly submitted to the jury.[83] The sending of letters and papers may be shown.[84] An allegation that defendant promised to marry plaintiff at any time at her request is not sustained by proof of a promise to marry after the happening of a contingency.[85]

Damages; aggravation and mitigation.[86]—Seduction may be considered in aggravation of damages [87] if properly pleaded,[88] and this notwithstanding a statute giving an independent action therefor.[89] Likewise, the birth of issue therefrom and the publicity resulting may be shown.[90]

Liability of third person inducing breach.[91]

BREACH OF THE PEACE, see latest topical index.

73. Promisor married. Leaman v. Thompson [Wash.] 86 P. 926.

74. After divorce. Leaman v. Thompson [Wash.] 86 P. 926. Complaint sufficient to allow evidence of new promise. Id. Evidence for jury whether relations with defendant were based on new promise or on former void one. Id.

75. Grove v. Zook [Wash.] 87 P. 638.

76, 77. Johnson v. Levy, 118 La. 447, 43 So. 46.

78. Under Laws 1896, p. 216, c. 272, § 3, not necessary to allege that the marriage had not been dissolved for a cause other than adultery, or that the wife had not been sentenced to imprisonment or absented herself. Stein v. Dunne, 103 N. Y. S. 894.

79. Conard v. Bare, 8 Ohio C. C. (N. S.) 118.

80. See 7 C. L. 457.

81. Not within Code Civ. Proc. § 873, providing for examination, and § 3343, providing that personal injury includes seduction, etc. Pitt v. Dunlap, 54 Misc. 115, 105 N. Y. S. 846.

82. See 7 C. L. 457.

83. Cain v. Corley [Tex. Civ. App.] 99 S. W. 168.

84. Cain v. Corley [Tex. Civ. App.] 99 S. W. 168. Held proper under the other evidence to ask defendant if he had received a letter from plaintiff advising him of the result of her consultation with a physician. Lanigan v. Neely [Cal. App.] 89 P. 441. The sending of papers by defendant to plaintiff may be proved by circumstantial evidence. Not error to admit papers and leave questions for jury. Cain v. Corley [Tex. Civ. App.] 99 S. W. 168.

85. Proof of promise to marry after death of plaintiff's mother a fatal variance. Bailey v. Brown [Cal. App.] 88 P. 518.

86. See 7 C. L. 458.

Measure of damages is elsewhere treated, see Damages, 7 C. L. 1029.

87. Lanigan v. Neely [Cal. App.] 89 P. 441.

88. Complaint held to plead it as punitive damages and not as independent cause of action. Lanigan v. Neely [Cal. App.] 89 P. 441.

89, 90. Lanigan v. Neely [Cal. App.] 89 P. 441.

91. See 3 C. L. 527.

BRIBERY.

Nature and Elements of Offense (408).
Indictment (408).
Evidence (408).
Trial and Instructions (408).

Nature and elements of offense.[92]—Members of a city council are induced by the words "or other officer," as used in the Ohio statute relating to the giving of bribes.[93]

Indictment.[94]

Evidence [95] is admissible to trace the act of accused to its origin and show it to have been a part of a general combination or scheme.[96] A receipt given by accused may be explained by parol evidence where on its face it is so ambiguous as to require explanation.[97] The proof must be beyond reasonable doubt,[98] and if circumstantial it must exclude every reasonable hypothesis except that of guilt.[99]

Trial and instructions.[1]—The court need not define terms not necessary to the charge.[2] Defendant's theory of the case should be submitted to the jury where the evidence authorized it.[3]

BRIDGES.

§ 1. Regulation and Control (408).
§ 2. Establishment and Location by Public Agencies (409).
§ 3. Contracts and Construction (409).
§ 4. Public Liability for Costs and Maintenance (409).
§ 5. Establishment, Construction and Maintenance by Private Enterprise (410).
§ 6. Injuries From Defective Bridges (411).
§ 7. Injuries to Bridges (413).

§ 1. *Regulation and control.*[4]—By virtue of the complete control of a state over navigable watercourses within its boundaries,[5] it may authorize and supervise the construction of bridges [6] subject to the Federal power to remove obstructions to navigation.[7]

92. See 7 C. L. 458.

93. Rev. St. § 6900. Amundson v. State, 8 Ohio C. C. (N. S.) 518.

94, 95. See 7 C. L. 459.

96. In prosecution of a senator for bribing another senator, evidence held admissible showing a combination of senators, including accused for the purpose of receiving money for the passage of bills, and tracing certain money until it was finally paid by accused. Butt v. State [Ark.] 98 S. W. 723.

97. Receipt of school director charged with having received a bribe from a teacher. Commonwealth v. Miller, 31 Pa. Super. Ct. 317.

98. Evidence sufficient to authorize submission to jury of question whether defendant offered a bribe to a sheriff for the purpose of preventing him from carrying accused before a justice and getting out papers against him for unlawfully carrying a pistol. Garner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 173, 97 S. W. 98. Evidence held sufficient to sustain conviction of senator. Butt v. State [Ark.] 98 S. W. 723. Testimony that defendant said that "some of the other members of council will have to be fixed up," and that it will take $1,400 to get the matter through, held to make prima facie case of soliciting a bribe. Amundson v. State, 8 Ohio C. C. (N. S.) 518.

99. In prosecution for bribery of a government officer in violation of Rev. St. § 451, evidence held not sufficient to warrant finding that defendant gave or offered any money or other valuable thing. Vernon v. U. S. [C. C. A.] 146 F. 121.

1. See 7 C. L. 460.

2. "Wilfully" and "corruptly" not being part of the statutory definition of the offense of bribing a sheriff, though used in the court's charge. Garner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 173, 97 S. W. 98.

3. In prosecution for offering a bribe to a sheriff for not having accused prosecuted for carrying a pistol, the court, under the evidence, should have instructed that accused had a right to talk to the sheriff and intercede for his clemency. Garner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 173, 97 S. W. 98.

4. See 7 C. L. 460.

5. See Navigable Waters, 8 C. L. 1083.

6. The Nonpareil, 149 F. 521.

7. State may authorize board of county commissioners to remove bridges which have been condemned by the war department. State v. Ashtabula County Com'rs, 8 Ohio C. C. (N. S.) 169. River and harbor act of 1899, empowering secretary of war to require changes or alterations in bridges found by him to unreasonably obstruct navigation, is not a delegation of legislative or judicial powers to an executive officer. Act March 3, 1899, § 18. Union Bridge Co. v. U. S., 204 U. S. 364, 51 Law. Ed. 523, and alterations ordered pursuant thereto do not constitute the taking of private property for public use so as to require compensation (Id.).

§ 2. *Establishment and location by public agencies.*[8]—A bridge used for general travel is a public highway and authorized as a public municipal improvement, though a portion of it extends beyond the corporate limits of the city,[9] and, where a city has full authority to construct an interstate bridge so far as its charter and the general laws of its own state are concerned, congress has power to authorize it to construct that portion which will extend into the other state.[10] Where a town is authorized to build a bridge across a stream, it is its duty to build one more permanent and substantial than a pontoon bridge,[11] but the action of a town council in refusing to rebuild a bridge which was washed away cannot be reviewed by mandamus in the absence of arbitrary action,[12] and refusal to rebuild for lack of funds will be sustained, though some inhabitants are greatly inconvenienced.[13] On petition for the building of a bridge partly in one township and partly in another, a majority vote of the board of county supervisors is sufficient in Michigan.[14]

§ 3. *Contracts and construction.*[15]—In New York the commissioners of highways have power, if they are in funds, to enter into a joint contract for making or repairing a bridge between two towns without action of the town board or vote of the electors.[16] If not in funds, authority to act rests with the board of supervisors as provided by the county law.[17] The highway commissionerss may not, however, contract for the building of a bridge not abutting on highways,[18] or on a site not selected or authorized by the towns joined.[19] Before a contract for a county bridge may be legally entered into in Ohio, the county auditor must certify that the money required is in the bridge fund or levied or in the process of collection,[20] and it was not the intention of the legislature to dispense with plans and specifications.[21]

§ 4. *Public liability for costs and maintenance.*[22]—A city may be legally empowered to issue bonds to pay for a bridge.[23] When a bridge is constructed over a stream running between adjoining towns, an audit of the expense by joint action of the town boards is not necessary in New York [24] and when towns apply to a board

8. See 7 C. L. 460.

9. Haeussler v. St. Louis [Mo.] 103 S. W. 1034.

10. Could authorize city of St. Louis to construct Illinois end of bridge across Mississippi. Haeussler v. St. Louis [Mo.] 103 S. W. 1034. Statutes held to authorize the city of St. Louis to build a bridge over the Mississippi River connecting the city with the opposite Illinois bank. Id.

11. Doubtful whether town would have authority to rebuild a pontoon bridge as it was sought to compel it to do. Clay City v. Roberts, 30 Ky. L. R. 820, 99 S. W. 651.

12, 13. Clay City v. Roberts, 30 Ky. L. R. 820, 99 S. W. 651.

14. Act 1905, p. 478, No. 306, is complete in itself. Horner v. Ionia County Sup'rs, 147 Mich. 581, 14 Det. Leg. N. 3, 111 N. W. 174. Act constitutional. Id.

15. See 7 C. L. 461.

16. Highway Law 1890, §§ 130-134. Colby v. Mt. Morris, 100 N. Y. S. 362.

17. Laws 1892, p. 1761, §§ 68, 69. Colby v. Mt. Morris, 100 N. Y. S. 362.

18. Irregularity in building highways and bridge at same time cured where highways were open for public use on completion of bridge, and bridge was accepted and payment provided for. Colby v. Mt. Morris, 100 N. Y. S. 362.

19. Site held properly authorized. Colby v. Mt. Morris, 100 N. Y. S. 362.

20. In action by prosecuting attorney, under Rev. St. § 1277, to recover back money paid out on illegal county bridge contract, motion to strike out will not lie to an averment that there was no certificate of county auditor, as required by the Burns Law that the money required for payment for this bridge was in the bridge fund, or levied, or in process of collection. State v. Huston, 4 Ohio N. P. (N. S.) 423.

21. An averment in an action by the county that a contract was entered into without proposals being solicited for a structure in accordance with any plans whatever, and that no plans were kept on file with the county auditor, is therefore good against a motion to strike out. State v. Huston, 4 Ohio N. P. (N. S.) 423. Averment concerning failure of county commissioners to comply with Rev. St. § 795, relating to the substructure of bridges, will be stricken where the action is against the bridge company for recovery of money paid for the superstucture only. Id.

22. See 7 C. L. 462.

23. Ordinances for issuance of bonds to pay for a bridge which city of St. Louis was authorized to construct over the Mississippi River held not to violate art. 4, § 46, or art. 9, § 6, of the constitution of 1875. Haeussler v. St. Louis [Mo.] 103 S. W. 1034. See, also, Municipal Bonds, 8 C. L. 1046.

24. On acceptance by highway commissioners and approval by state engineer, the towns become liable to pay the cost as per contract. Colby v. Mt. Morris, 100 N. Y. S. 362. Rule that action ex contractu is not

of supervisors for leave to construct a bridge and borrow money therefor, they will be concluded by the apportionment of the expense made by the supervisors under authority of a statute in such case provided.[25] A bridge should be maintained by the county though lying partly within a city where not necessary for urban travel, but used principally by the county.[26] Where more than one municipality derive benefit from the construction or maintenance of a bridge, provision is generally made for an equitable apportionment of the expense.[27] A statute providing for the apportionment of an undeterminable part of the cost of a bridge, but being silent as to the manner of such apportionment, implies the application of the same principles as those governing the apportionment of the part determined.[28] On the question of the joint liability of adjoining counties for repair, a public bridge is generally regarded as a part of a common highway extending across a stream,[29] and the fact that a bridge was built by private subscription aided by a township in one of the counties, does not render it less a part of the public highway where adapted and used by the public as such.[30] A county which refuses to join with an adjoining county in having a bridge between them repaired is liable to the latter county for such part of the cost as it ought to pay.[31] If an issue is made as to the necessity for repairs or the reasonableness of the cost, the question of the amount to be contributed by a defaulting county is generally one for the jury.[32] Where notice to a county is required, a county cannot be made to contribute toward the cost of an improvement not reasonably contemplated therein.[33]

§ 5. *Establishment, construction and maintenance by private enterprise.*[34]—Statutes have been enacted in many states requiring owners or operators of ditches, canals, or railroads across public highways to provide and maintain suitable and sufficient crossings.[35] In a proper case, mandamus will lie to enforce this obliga-

maintainable against a town on a claim which the town board has jurisdiction to audit not applicable. Id. The audit or rejection of the claim by town board held no objection to recovery. Id.

25. County Laws 1892, §§ 68, 69. Colby v. Mt. Morris, 100 N. Y. S. 362. Where bridge was partly within limits of a village, consent of its trustees was not required to authorize apportionment, since, under § 70 of the county law, village has no voice in matter until tax is imposed on property of town. Id.

26. Where bridge was outside settled portion of city. Nelson County v. Bardstown, 30 Ky. L. R. 870, 99 S. W. 940.

27. By St. 1893, c. 368, § 6, cost of building bridge was to be apportioned among the county and certain cities and towns specially benefited. By St. 1900, c. 439, § 6, a new plan was adopted by which the city directly interested was given charge, changes made at greatly increased cost, and the cost of the unbuilt part apportioned upon the county "to be apportioned upon the cities and towns as provided in § 6" of the Act of 1893. Held, the county was not required to pay any part of the cost of the unbuilt portion. In re Bristol County Com'rs, 193 Mass. 257, 79 N. E. 339. In proceeding under St. 1893, p. 1062, c. 368, for apportionment of cost of building a bridge, no interest is allowable between report of commissioners and judgment. Id.

28. Where statute provided that apportionment of the part of the cost not yet determined should be made by declaring in what percentage such cost should thereafter be apportioned. In re Bristol County Com'rs, 193 Mass. 257, 79 N. E. 339.

29. Cloud County Com'rs v. Mitchell County Com'rs [Kan.] 90 P. 286.

30. County could not avoid liability for its share of cost of repair under Laws 1874, p. 176, c. 109. Cloud County Com'rs v. Mitchell County Com'rs [Kan.] 90 P. 286.

31. Not exceeding one-half of amount expended. Dodge County v. Saunders County [Neb.] 110 N. W. 756. Where no issue is made as to the necessity for repairs or the reasonableness of the expenditure, the defaulting county will be liable for one-half the cost. Id. That a bridge across the Platte river was not one continuous structure but consisted of separate portions, separated by an island, one of which portion was entirely within Dodge county, did not relieve Saunders county from the burden of contributing to the repair of the entire structure. Id.

32. Dodge County v. Saunders County [Neb.] 110 N. W. 756.

33. Where county was notified that a bridge was unsafe for travel and had to be rendered safe, it could not be required to pay for new ice breaks not necessary to make travel safe. Dodge County v. Saunders County [Neb.] 110 N. W. 756.

34. See 7 C. L. 463.

35. Cobbey's Ann. St. 1903, § 6106. Nuckolls County v. Guthrie & Co. [Neb.] 107 N. W. 779. Statute making it duty of landowner to bridge any drainage ditch constructed by him across public road has no

tion,[36] and a county will not be estopped for long delay.[37] Railroads benefited by the construction or alteration of a bridge may be rendered liable for a portion of the cost,[38] and where a street railway company lays its tracks in a street and over a bridge connecting portions thereof, under an ordinance giving it the right to use the streets for tracks on condition that it keep them in repair, the bridge will be held to be a part of the street for purposes of repair.[39]

That the stockholders of a bridge company have sold the entire property of the company to a city is no ground for forfeiting its franchise.[40] When a state has acquiesced in the use of a bridge exclusively for railroad travel for upwards of thirty years, the court is entitled to consider this fact in determining whether in the exercise of its discretion it will grant to the state a writ of mandamus compelling the proprietors to reconstruct and open the bridge for general public travel.[41] After the expiration of the franchise of a bridge company, it may no longer maintain a bridge and collect toll without further authority from the county supervisors, as required by statute.[42]

§ 6. *Injuries from defective bridges.*[43]—"Bridge" and "culvert" are not synonymous in a statute giving a cause of action for defects in "any bridge or culvert."[44] A bridge includes not only the portion spanning a chasm but also all appurtenances necessary to its proper use, including abutments and approaches.[45] Persons or municipalities charged with the duty of keeping bridges in repair[46] are held liable for negligence in this regard,[47] including failure to provide suitable

application where road is established after ditch is constructed. Revisal 1905, § 2697. State v. Davis, 143 N. C. 611, 56 S. E. 511.

36. Nuckolls County v. Guthrie & Co. [Neb.] 107 N. W. 779. Contention that it was not shown that defendant owned a canal or ditch, not tenable. Id. Action properly brought in name of county. Id. Although writ properly ran in name of state. Id.

37. Twenty years' delay did not estop county to compel bridging of a canal. Nuckolls County v. Guthrie & Co. [Neb.] 107 N. W. 779.

38. St. 1900, p. 411, c. 439, § 6, imposing on railroad a part of cost of raising a bridge over grade, etc. In re Bristol County Com'rs, 193 Mass. 257, 79 N. E. 339.

39. Northern Cent. R. Co. v. United Rys. & Elec. Co. [Md.] 66 A. 444.

40. Com. v. Monongahela Bridge Co., 216 Pa. 108, 64 A. 909.

41. Evidence insufficient to require court to exercise its discretion. State v. Boonville R. Bridge Co. [Mo.] 103 S. W. 1052.

42. Where constitution limited charter to thirty years and grant was not given to successors. Rockwith v. State Road Bridge Co., 145 Mich. 455, 13 Det. Leg. N. 548, 108 N. W. 785.

43. See 7 C. L. 464.

44. Notice of injury sufficient which designated the place as the first "bridge" beyond a certain residence, though there were intervening culverts. Cleveland v. Washington, 79 Vt. 498, 65 A. 584.

45. Howington v. Madison County, 126 Ga. 699, 55 S. E. 941; Schell v. German Flatts, 104 N. Y. S. 116. Structure of masonry 41 feet wide and 479 feet long with perpendicular walls and arches and built across low land usually covered with water held a "bridge" within a statute rendering a town liable. Id. One is "traveling upon a bridge," within the meaning of a statute, when he is traveling over that part of the way which is above the abutments and other essential portions of the structure as well as when he is traveling over the part spanning the stream or depression. Within Laws 1893, p. 47, c. 59, § 1, rendering towns liable to persons injured while traveling on defective bridges. Wilson v. Barnstead [N. H.] 65 A. 298. A difference in the levels of the planking and a depression beyond the header and over the abutments and filling, calculated to produce jolting of wagons, held defects in the bridge. Id.

46. Under Village Laws 1897, p. 414, § 142, continuing with highway commissioners of the town control of bridges within a village unless the village shall have assumed a whole or part of the expense, town held liable for an injury where it did not appear that village had assumed any expense. Schell v. German Flatts, 104 N. Y. S. 116. Under the Rhode Island statute, the obligation of one of two adjoining towns to keep in repair a connecting bridge is several as to the portion in that town. Gen. Laws, c. 72, §§ 1, 19, 20. Haley v. Calef [R. I.] 67 A. 323.

47. City of Boston held liable for plaintiff's being struck by rebound of a gate caused by a defective latch. Meaney v. Boston [Mass.] 80 N. E. 522. Certain cases held not to justify defendant's contention that it was not liable if obstacle constituting the defect was in use at the time. Id. A railway company contracting with the owner of a ferry to maintain a bridge across the river suitable for persons and vehicles is liable for injuries sustained by the public because of defects in the bridge. Evidence held to sustain finding that defendant's predecessor contracted to maintain a suitable bridge. Wertz v. Southern R. Co. [S. C.] 57 S. E. 194.

and sufficient railings;[48] but a city is under no obligation to protect a person from dangers not to be anticipated and which could not have resulted from the ordinary and lawful use of a bridge,[49] neither is it liable for defects due to non-repair where it has been given no authority to repair.[50] A toll bridge company, though not a common carrier, is required to keep its bridge reasonably safe for travel.[51] Though a railroad company may have the right under state authority to erect and maintain piers and abutments for a bridge, it must do so in such manner as not to create hidden or dangerous obstructions to navigation.[52]

Defective construction.[53]—That a defect arises from wear only, and not from faulty construction, is immaterial unless the statute makes a distinction.[54]

Proximate cause of injury.[55]—The general rule applies that in order to justify a recovery the negligence complained of must have been the proximate cause of the injury.[56]

Contributory negligence[57] bars recovery,[58] but one may travel over any portion of a public bridge and he is not negligent in so doing.[59]

Remedies.[60]

Pleading, evidence, and instructions.[61]—The petition must show that the defect was in the bridge.[62] An allegation that commissioners and overseers whose duty it was to see that roads and bridges were kept in repair had notice of a defect is a sufficient averment of notice to the county as against a general demurrer.[63]

When a road supervisor is a county officer whose duty it is to keep roads and bridges in repair, evidence that a bridge had previously been kept in repair by him is admissible in an action against the county without showing any order of court directing him to repair.[64] Where the obligation of an adjoining town is several

48. Cutting v. Shelburne, 193 Mass. 1, 78 N. E. 752.

49. Where a boy was injured by cog-wheels used to move gates. Widger v. Philadelphia, 217 Pa. 161, 66 A. 249.

50. Where it was given authority only to construct a bridge outside its limits. Town of Montezuma v. Law [Ga. App.] 57 S. E. 1025.

51. Evidence held to authorize submission to jury whether a toll bridge was reasonably safe. Gibler v. Terminal R. Ass'n [Mo.] 101 S. W. 37.

52. Railroad company held liable for maintaining a submerged and hidden crib causing collision of a canal boat. The Nonpareil, 149 F. 521.

53. See 7 C. L. 464.

54. Wilson v. Barnstead [N. H.] 65 A. 298.

55. See 5 C. L. 443.

56. Negligent nonrepair held proximate cause where horse's foot was caught in a hole and owner injured trying to help him. Cooper v. Richland County [S. C.] 56 S. E. 958. Evidence held to show that cause of an injury to a boy on a bridge was the wrongful act of a stranger for which city was not responsible. Widger v. Philadelphia, 217 Pa. 161, 66 A. 249. It may be a **question for the jury** whether the absence of a railing was the proximate cause of an injury. Schell v. German Flatts, 104 N. Y. S. 116.

57. See 7 C. L. 464.

58. One who drives over a bridge is not guilty of contributory negligence as a matter of law for keeping the reins between his crossed legs while preparing to light his pipe. Cleveland v. Washington, 79 Vt. 498, 65 A. 584. That traveler knew of defect and could have observed danger, held not conclusive. Cutting v. Shelburne, 193 Mass. 1, 78 N. E. 752. Driving with one hand a blind horse at slow trot over narrow bridge without suitable railing not contributory negligence as a matter of law. Id. That horse was blind should be considered in connection with the other evidence. Id. One injured by defective bridge while riding with another may recover from the county, notwithstanding the negligence of the driver, the injured party being free from negligence and having no control over the driver. Loso v. Lancaster County [Neb.] 109 N. W. 752. To bar recovery under Code Civ. Proc. 1902, § 1347, plaintiff's act must be the proximate cause of his injury. Cooper v. Richland County [S. C.] 56 S. E. 958.

Held for jury whether plaintiff injured while riding a bicycle over a bridge was guilty of contributory negligence. Schell v. German Flatts, 104 N. Y. S. 116. Where one fell on ice and slush. Gibler v. Terminal R. Ass'n [Mo.] 101 S. W. 37.

59. Ridings v. Marion County [Or.] 91 P. 22.

60, 61. See 7 C. L. 465.

62. A petition stating that that part of the public road which connected the bridge with the highway was in a defective condition shows that the defect was a defect in the bridge. Howington v. Madison County, 126 Ga. 699, 55 S. E. 941.

63. Howington v. Madison County, 126 Ga. 699, 55 S. E. 941.

64. Ridings v. Marion County [Or.] 91 P. 22.

and limited to keeping in repair the portion of a bridge which is within its line, plaintiff must prove at what particular place on the bridge the defect was located, even though he be permitted by statute to join both towns in one action because of doubt as to which one is liable.[65]

Instructions must be justified by the law and the evidence[66] and must not be misleading.[67] While it is for the court to construe the term "bridge" as used in a statute, the question whether the particular portion of the way in which a defect existed was on the bridge as so defined is one for the jury.[68]

§ 7. *Injuries to bridges.*[69]

BROKERS.

§ 1. Employment and Relation in General (413). License (413). Creation of Relation (413). Necessity of Contract Being in Writing (414). Scope of Broker's Authority (414).

§ 2. Mutual Rights, Duties, and Liabilities (415). Stockbrokers (415).

§ 3. Rights and Liabilities as to Third Persons (416).

§ 4. Compensation and Lien (416). Necessity of Contract (416). Substantial Performance of his Contract by the Broker (418). Broker Must be Efficient Producing Cause of Sale (418). Customer Must be Ready, Willing, and Able to Purchase (420). Broker Must Act in Good Faith Towards Principal (421). Procuring Loan (422). Necessity of Broker's Contract Being in Writing (422). Amount of Commissions and Measure of Recovery for Services (422). Actions to Recover Commissions (423). Evidence and Burden of Proof (423). Questions for Jury (424).

§ 1. *Employment and relation in general. Definition.*[70]—A person employed to sell goods by procuring orders or purchasers therefor, when his contract does not contemplate any possession in him, is a commercial broker.[71]

License.[72]—One who acts as broker[73] without a license, where one is required,[74] cannot recover compensation.[75] In Texas a penal statute, making it an offense for a real estate broker to do business without paying the required tax, is no defense in an action by him for compensation earned.[76]

Creation of relation.[77]—Where an owner of land agreed to pay a broker a certain commission for procuring a purchaser, the contract is established, though the price and terms are left to the owner's control,[78] but the mere fact that a broker

65. Haley v. Calef [R. I.] 67 A. 323.

66. Objection that instruction authorized recovery, without a finding that ice and slush were a dangerous obstruction, held not tenable where jury were required to find that defendant did not exercise ordinary care. Gibler v. Terminal R. Ass'n [Mo.] 101 S. W. 37. Instruction authorizing recovery for medical treatment held not justified by evidence. Id. Evidence held to justify an instruction on plaintiff's theory that the hub of his wagon struck the top plank of a pile of lumber lying on a bridge. Keokuk & Hamilton Bridge Co. v. Wetzel [Ill.] 81 N. E. 864.

67. Instruction that to justify recovery jury must find that defendant knew or by reasonable care could have known of the defect held misleading under the evidence, as ignoring knowledge on part of the road supervisor. Adams v. Somerset County Com'rs [Md.] 66 A. 695. Instruction on contributory negligence held sufficient and not misleading. Cleveland v. Washington, 79 Vt. 498, 65 A. 584. Instruction not misleading or confusing, though defining ordinary care as "such care as a prudent operator of a toll bridge would exercise." Gibler v. Terminal R. Ass'n [Mo.] 101 S. W. 37.

68. Wilson v. Barnstead [N. H.] 65 A. 298.

69. See 5 C. L. 445.

70. See 7 C. L. 465.

71. The consummation of a sale by such broker depends on the purchase, he having no power to make delivery. Southwestern Port Huron Co. v. Wilber [Kan.] 88 P. 892.

72. See 7 C. L. 466.

73. Parties agreeing with a landowner that, in consideration of their finding a purchaser, he should make a sale to them at a certain price, are real estate brokers, and cannot recover compensation unless licensed as required by law. Pile v. Carpenter [Tenn.] 99 S. W. 360.

74. It is immaterial whether a broker who sues for services rendered in another state had license or not, where there is no proof that the law of such state required a license. Richards v. Richman [Del.] 64 A. 238. License need not be shown unless broker is "engaged in business" of real estate broker. Packer v. Sheppard, 127 Ill. App. 598.

75. Reeder v. Jones [Del.] 65 A. 571.

76. Watkins Land Mortg. Co. v. Thetford [Tex. Civ. App.] 16 Tex. Ct. Rep. 175, 96 S. W. 72.

77. See 7 C. L. 467.

78. Oliver v. Katz [Wis.] 111 N. W. 509.

inquires and obtains from the owner a certain price for land does not alone establish a contract of employment.[79] The contract is binding on the owner, though his wife did not sign it.[80] It may be signed by an agent authorized thereto or whose act is ratified.[81] Whether a contract is one of brokerage or an option to the alleged broker to buy depends on the intention.[82] A contract whereby a homestead entryman on government land agrees to pay a broker commissions for a sale thereof is not void as violating the United States land laws.[83] Giving a broker the exclusive right to sell for a specified period, does not create a power coupled with an interest, and is revocable by proper notice within the time, so that purchasers buying after such revocation, though within the period, cannot enforce their contract.[84]

Necessity of contract being in writing [85] is treated in another topic.[86]

Scope of broker's authority.[87]—The authority usually incident to a broker's employment is simply to find a purchaser, and communications from an owner to a broker regarding the sale of land should be construed as giving him only such power, unless a different intention is clearly shown,[88] but general authority to make a sale of land empowers the agent to sign a written contract in accordance with local custom.[89] An unauthorized sale by an agent is not ratified by the mere silence of the owner, who was misled by the broker and did not know all the facts, and who has neither received any benefits nor caused any loss to the vendee.[90] An agent having charge of property with authority to sell cannot delegate his authority to a sub-agent without the consent of his principal.[91] The extent of an agent's authority, if in writing, is a question of law, but if it is to be inferred from the relations and conduct of the parties to each other, or from a transaction in pais, it is

79. Stephens v. Bailey & Howard [Ala.] 42 So. 740.

80. Homestead land. Kepner v. Ford [N. D.] 111 N. W. 619.

81. Contract signed by owner's wife with his approval and her act subsequently ratified by him. Tate v. Aitken [Cal. App.] 90 P. 836.

82. An agreement between an owner and broker to sell for a certain price, the broker to receive all he might get over such price, is not an option but a mere brokerage contract. Young v.Ruhwedel, 119 Mo. App. 231, 96 S. W. 228. Though in writing. Tate v. Aitken [Cal. App.] 90 P. 836. Sufficiency of evidence to require submission to jury of question whether transaction was sale of stocks to brokerage firm, on order to them to sell on New York stock exchange. Berry v. Chase [C. C. A.] 146 F. 625. But a contract by an owner to sell land to the purchaser or his assigns at a certain acreage price, the latter to plat the land and sell it, paying all the proceeds to the seller until he had received the then agreed price, is a contract for the sale of land and not a mere brokerage contract. Whipple v. Lee [Wash.] 89 P. 712.

83. Hoyle v. Johnson, 18 Okl. 330, 89 P. 1119.

84. Norton v. Sjolseth [Wash.] 86 P. 573.

85. See 7 C. L. 467.

86. See Frauds, Statute of, § 6, 7 C. L. 1829.

87. See 7 C. L. 469.

88. Words "to sell" or "make sale" construed as meaning to negotiate or arrange for a sale, and a sale is spoken of as made when its terms have been orally agreed upon. Brown v. Gilpin [Kan.] 90 P. 267. A broker has no authority to execute a contract of sale where the owner wrote him merely stating the price and rate of commission without specifying any terms of sale. Colvin v. Blanchard [Tex. Civ. App.] 103 S. W. 1118. A broker whose contract only authorized him to procure a purchaser of land at a fixed price cannot impose on the owner, as a condition of the sale, the duty to furnish an abstract of title. Hunt v. Tuttle [Iowa] 110 N. W. 1026. Correspondence held insufficient to authorize agent to bind principal by written contract of sale. Brown v. Gilpin [Kan.] 90 P. 267. No power to make sale. Illinois Canning Co. v. Ft. Des Moines Canning Co. [Iowa] 112 N. W. 810.

89. Watkins Land Mortg. Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 932, 98 S. W. 227.

90. Colvin v. Blanchard [Tex. Civ. App.] 103 S. W. 1118. Broker fraudulently obtained title to principal's land and rented it to third person with option to buy, and latter with notice of fraud exercised option and resold to innocent purchaser. Principal cannot recover land but only the rent paid to to the broker after notice of the fraud. Knowledge of fraud by another agent of the principal as affecting him. Storms v. Mundy [Tex. Civ. App.] 101 S. W. 258.

91. Nor does a sale by the principal to a purchaser procured by such subagent ratify his employment or make the principal liable for his compensation, unless the principal knew that he had procured the purchaser. Groscup v. Downey [Md.] 65 A. 930. Authority of subagent question for jury. Mestler v. Jeffries, 145 Mich. 598, 13 Det. Leg. N. 600, 108 N. W. 994.

a question for the jury.[92] A principal is not bound by an unauthorized act of his broker.[93]

§ 2. *Mutual rights, duties, and liabilities.*[94]—It is the duty of a broker to serve his principal to the latter's best advantage without any secret profit to himself, and he cannot act in a dual capacity for both parties to a transaction without the consent of each.[95] A broker employed to sell land on commission for a fixed price is liable to the owner for the amount he receives in excess of such price.[96] Principal may recover for failure of broker to obey instructions and fraudulently obtaining the property and selling it at a profit.[97] Though a broker has the exclusive right to find a purchaser, the owner is not precluded from selling the land through an auctioneer acting under his immediate instructions.[98]

Stockbrokers.[99]—A stockbroker who fails to obey the orders of a customer regarding sales or purchases of stock is liable for the actual loss sustained thereby.[1] If a customer leave stock with his broker as collateral for a balance due on its purchase price, a qualified relation of pledgor and pledgee is created, with the legal title in the customer.[2] A stockbroker cannot set off payments of profits to his employer in an action by the latter for sums advanced as margins.[3] A customer is liable to his broker for advances,[4] but to entitle a broker to recover for advances

92. Groscup v. Downey [Md.] 65 A. 930.

93. Plaintiff having agreed with defendants not to sell stock in a pool has no right to do so though defendant's brokers agree to it. Ridgely v. Taylor, 103 N. Y. S. 262.

94. See 7 C. L. 470.

95. Secret agreement between a broker and a lawyer whereby the broker, for procuring the lawyer's employment by his principal, was to share the fee is unenforceable as being a breach of trust against the principal and contrary to public policy. Auerbach v. Curie, 104 N. Y. S. 233. In order to recover in such case the broker must plead and prove his principal's knowledge and consent to his agreement with the lawyer, though its invalidity is not set up as an affirmative defense, as there is no presumption that the broker disclosed such arrangement to his principal. Id. After making offer for principal agent cannot contract with seller for commission on the amount his principal might pay at public auction. Perkins v. Underhill, 103 N. Y. S. 25. Evidence showing fraud of agent in action therefor by principal. Anderson v. Wheeler [Mo. App.] 102 S. W. 628. If a broker secretly obtains an interest in a transaction hostile to his principal, the latter may recover the commissions paid such broker. Guidetti v. Tuoti, 52 Misc. 657, 102 N. Y. S. 499.

96. False representation as to amount of purchase price received. Borst v. Lynch [Iowa] 110 N. W. 1031.

97. Question one of fact for jury. Set off for expenses not allowed. Van Raalte v. Epstein, 202 Mo. 173, 99 S. W. 1077. Where it is a question for the jury whether a stockbroker acted as principal or broker, an instruction assuming that he acted as principal is improper. Picard v. Beers [Mass.] 81 N. E. 246.

98. Ingold v. Symonds [Iowa] 111 N. W. 802.

99. See 7 C. L. 470.

1. Instructions as to damage where there is no evidence of market value. King v. Zell [Md.] 66 A. 279. Brokers authorized to sell "short," under an agreement by the customer to reimburse them for any expenditures made in executing his orders, may, after his refusal to put up more margins, purchase the stock and charge the loss to his account, though he inform them of rumors that on the next day the stock may be settled for less. Armstrong v. Bickel, 217 Pa. 173, 66 A. 326. Insufficiency of evidence to support finding that broker was liable for failure to sell stock when directed. Potter v. Malcolm, 104 N. Y. S. 760. A stockbroker is liable to his customer for the damages occasioned by an unauthorized sale of a contract for future delivery. Hurt v. Miller, 105 N. Y. S. 775. Where a stockbroker, having bought a contract for future delivery for a customer, without authority applies part of money advanced as margin to an old contested indebtedness of his customer, and sells the customer's contract because the remaining sum was insufficient to maintain the margin, such sale is unauthorized. Id.

2. And though the broker need not retain the identical stock, he must keep on hand an equal amount thereof for delivery on its demand, and unles he does so it is a conversion to hypothecate it for an unauthorized loan. Strickland v. Magoun, 104 N. Y. S. 425. If a stockbroker does not require his customer to advance money for margins but makes the necessary advance himself, the relation of pleader and pledgee is created, and if the broker sells the stock without proper notice, he is liable for conversion. Sufficiency of notice. Content v. Benner, 184 N. Y. 121, 76 N. E. 913. Where a broker telephoned his customer that more margins were required and was told to sell the stock, he was authorized to do so, though the original agreement between them required written notice to put up margins, and also notice of the time and place of sale. Pierson v. Frankel, 103 N. Y. S. 49.

3. A dealer in stocks taking verbal orders from an employer for the purchase and sale of stocks, and giving the latter, after deals, unsigned tickets as evidence of the transaction, is acting in the capacity of a broker. Picard v. Beers [Mass.] 81 N. E. 246.

4. A customer who instructs his broker

made for his principal, he must show an actual payment, a mere liability to pay being insufficient.[5] A broker cannot recover advances made for his principal in forwarding wagering contracts for fictitious futures, if he was privy to such illegal transaction.[6] A stock exchange member who executes orders of customers of a nonmember brokerage firm at the direction of such firm becomes the debtor of such customers as to funds of the latter in his hands from the business.[7]

§ 3. *Rights and liabilities as to third persons.*[8]—A broker is not liable on a contract if his principal was disclosed, but if the principal was undisclosed the broker is personally liable.[9] One who deals directly with a broker is not liable to an undisclosed principal.[10]

§ 4. *Compensation and lien.*[11]—A principal cannot defeat his broker's right to compensation for procuring a purchaser by showing that at the time of employing the broker he did not own the property, but subsequently secured full title before the sale.[12] The financial irresponsibility of a broker is no defense in an action to recover his commissions.[13]

Necessity of contract.[14]—A broker is ordinarily entitled to compensation only where there has been a contract of employment,[15] but an owner who accepts the services of a broker without making objection is usually estopped to deny that they were rendered at his request.[16] It is no defense to an action to recover com-

to buy stock for him, agreeing to pay the broker therefor on delivery, cannot rescind the contract after purchase by the broker as the latter cannot be placed in statu quo. Wiger v. Carr [Wis.] 111 N. W. 657. Liability of customer to broker for advances made in purchase of stock which, though not authorized, was duly ratified. Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034.

5. Ware v. Heiss [Iowa] 110 N. W. 594.

6. Insufficiency of petition for recovery of such advances. Anderson & Co. v. Holbrook [Ga.] 57 S. E. 500. And see Gambling Contracts, 7 C. L. 1858. Brokers conducting a speculation for a customer, through their agent, are bound by his acts and are charged with knowledge of the character of the transaction. Ware v. Heiss [Iowa] 110 N. W. 594.

7. In such case the stock exchange member will be required to pay the customers before he pays anything to the trustees in bankruptcy of the firm, and the fact that the customers prove their claim against the firm does not bar them from recovery from him. Doucette v. Baldwin [Mass.] 80 N. E. 444.

8. See 7 C. L. 471.

9. Drake v. Pope, 78 Ark. 327, 95 S. W. 774.

10. Horlacher v. Bear, 32 Pa. Super. Ct. 269.

11. See 7 C. L. 471.

12. McDonald v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 518, 98 S. W. 943.

13. Watkins Land Mortg. Co. v. Thetford [Tex. Civ. App.] 16 Tex. Ct. Rep. 175, 96 S. W. 72.

14. See 7 C. L. 471.

15. Merely requesting a broker for an introduction to a prospective buyer does not create contract. Bassford v. West [Mo. App.] 101 S. W. 610. Broker representing purchaser not entitled to commissions from seller where he merely asked latter his price and introduced the purchaser to him, and said nothing about commissions. Denton v. Abrams, 105 N. Y. S. 2. Insufficiency of evidence, in suit for commissions, to show that plaintiff was employed or that he procured the purchaser. Taylor v. Jay [La.] 43 So. 993. Where an agent employed to sell land turns over the sale to another agent, agreeing that the latter shall have the commissions, to which the owner consents, such second agent is entitled to the commissions for selling, not as the assignee of the prior agent but because he sold with the consent of the owner after the first agent waived his rights. In such case the first broker is estopped from claiming the commissions. Munson v. Mahon [Iowa] 112 N. W. 775. Correspondence not constituting contract of employment. Lotz v. Levy, 104 N. Y. S. 1058.

16. Ice v. Maxwell [W. Va.] 55 S. E. 899. An unauthorized contract made by the secretary of a corporation with a broker for the sale of its stock is ratified by knowledge of and formal acceptance by the officers and directors of sales by such broker, and he is entitled to his agreed compensation. Bauersmith v. Extreme Gold Min. & Mill. Co., 146 F. 95. Contract of agency completed by owner sending brokers power of attorney to sell, and notice of withdrawal does not preclude the brokers from recovering their commissions if they had already procured a purchaser. Luckett Land & Emigration Co. v. Brown, 118 La. 943, 43 So. 628. A broker is entitled to his compensation where the duly authorized agent of the owner of land agreed to allow him all he might get over a certain net sum, though the owner had previously contracted with him on a commission basis. Foster v. Taylor [Wash.] 87 P. 358. Though an owner agree to sell to brokers who first claimed to be acting for themselves but afterwards stated that they were merely acting as brokers, and the contract was made to a third person, proof of their employment before making the contract is not necessary to their right to commissions. Shapiro v. Shapiro, 117 App. Div. 817, 103 N. Y. S. 305.

pensation for the sale of land that the contract with the broker was within the statute of frauds.[17] A promise to pay after a sale made by the owner without knowledge of the broker's services is, however, without consideration.[18] Where there is an express contract, no contract can be implied beyond it.[19] Though a statute makes it an offense for a broker to offer real estate for sale without the written authority of the owner, yet if a sale secured by an orally appointed broker is ratified by the owner he is entitled to his commission where he did not intend to violate the law.[20] If the broker contract with the other party for commissions, he cannot recover from his principal without showing the latter's knowledge and consent to his acting in such dual capacity,[21] but both parties are liable for the broker's compensation where each knew of his employment by the other, and no discretion was given or trust imposed in him.[22] A prospective purchaser of land who agrees to buy it if the broker will look to the vendor for commissions, is liable to the broker therefor, if he refuse to buy after the broker has secured a valid agreement from the vendor to sell and pay the commissions.[23] A broker having no implied authority to employ assistance at the owner's expense,[24] one employed by him has no recourse to the owner,[25] in the absence of an acceptance by him of the employment,[26] and his rights against the broker depend on the terms of their contract.[27]

17. Stephens v. Bailey & Howard [Ala.] 42 So. 740.

18. Sharp v. Hoopes [N. J. Law] 64 A. 989.

19. Contract confined to particular sale. Ballard v. Shea, 121 Ill. App. 135.

20. Ratification by owner cures defect in broker's appointment. Mercantile Trust Co. v. Niggeman, 119 Mo. App. 56, 96 S. W. 293.

21. Evidence as to knowledge of second employer that first employer was to pay him. Bellin v. Wein, 104 N. Y. S. 360.

22. Sufficiency of evidence to show disclosure by broker to principal of his employment by other party. Tieck v. McKenna, 115 App. Div. 701, 101 N. Y. S. 317.

23. Eells Bros. v. Parsons [Iowa] 109 N. W. 1098.

24. See ante, § 1, Scope of Authority.

25. A broker who assists the agent of the owner in making a sale, under an agreement to divide the agent's commission, cannot recover compensation from the owner. But an owner whose agent employs a broker to assist him in making a sale is estopped to deny the agent's authority to employ the broker, if he accepts the sale and benefits under it. Watkins Land Mortg. Co. v. Thetford [Tex. Civ. App.] 16 Tex. Ct. Rep. 175, 96 S. W. 72. A broker who buys stock on margin for a customer who fraudulently induces another broker to buy it for an irresponsible party can only recover his interest as pledgee from the latter broker. Leo v. McCormack, 186 N. Y. 330, 78 N. E. 1096.

26. But if the broker, with his principal's consent, obtained the assistance of a third person and agreed to divide commissions with him, the third person is authorized to sell and may recover his compensation from either the owner or broker. Warren Com. & Inv. Co. v. Hull Real Estate Co., 120 Mo. App. 432, 96 S. W. 1038.

27. A written agreement between agents by which one agrees to compensate the other for finding a purchaser is not invalidated by a statute requiring brokerage contracts to be signed by the landowner. Provident Trust Co. v. Darrough [Ind.] 78 N. E. 1030. The existence of a partnership between brokers as to a particular transaction must be determined by the terms of their agreement and the nature of the transaction. Mere agreement to divide commissions, no expenses or losses being involved, does not make them partners. Sain v. Rooney [Mo. App.] 101 S. W. 1127. A contract between a broker employed to sell land and a third party, under which the broker agreed to share the commissions with such party should he find a purchaser, is unilateral and binding on neither until such party finds a purchaser. But if such contract only referred to a sale to a certain person which fell through, the party contracting with the broker is not liable to the latter for a share of commissions from a sale to different purchaser. Wefel v. Stillman [Ala.] 44 So. 203. Liability of one broker to another under an agreement to divide commissions. Knapp v. Hanley [Mo. App.] 102 S. W. 670. A broker who agrees to compensate another broker for procuring a purchaser for real estate in the hands of the first broker is liable to the second broker for procuring a purchaser, though the sale is made by the first broker at a different price. Second broker not estopped by his silence after introducing purchaser, as his contract was performed. Provident Trust Co. v. Darrough [Ind.] 78 N. E. 1030. Insufficiency of complaint in suit by one agent to recover agreed share of commission from another. Wefel v. Stillman [Ala.] 44 So. 203. In suit by one broker against another for share of commissions, evidence of defendant's authority to sell is admissible. Id. Where a person is employed by a real estate broker to give his entire time to the business, his compensation to be a per cent of commissions, the relation between them is that of master and servant and not principal and agent. Sumner v. Nevin [Cal. App.] 87 P. 1105. Where the servant of a real estate broker agreed to give all his time and attention to the business and interests of the

Substantial performance of his contract by the broker[28] within the life of his contract[29] is essential, but the principal by waiving performance within the specified time and accepting the agent's services becomes liable for the commissions.[30] Likewise, though a broker cannot recover his specified compensation unless he sells in accordance with the terms of his contract, yet if he sells on different terms which are satisfactory to the owner he may recover what his services are reasonably worth.[31] The discharge of a broker, who has procured a purchaser, and conclusion of the sale by the owner is wrongful and the broker is entitled to compensation.[32] Under a contract to obtain options it is not necessary that there should be an actual purchase before the agent's compensation is earned.[33] A broker who fails to comply with the terms of his contract but exceeds his authority in making a sale cannot recover compensation.[34]

Broker must be efficient producing cause of sale.[35]—The broker must bring the minds of the vendor and vendee together.[36] But a contract to sell land is executed when the sale is made through the broker's influence and he is entitled to his compensation.[37] The criterion in determining a real estate broker's right to compensation for the sale of land, is whether, under the peculiar conditions of the given case, he was the efficient cause of the sale.[38] It is no defense that he procured the ens-

master, but took an exclusive agency in his own name, the contract so acquired by the servant, being of a personal character, could not be directed to be assigned to the master. Id. But commissions acquired by the servant during his employment belonged to the master, and he was entitled to an accounting as to their amount. Id.

28. See 7 C. L. 472. In order to recover commissions for a sale of real estate, the broker must prove that he made the sale on the conditions specified by the owner. An instruction failing to base the broker's right to recover on his compliance with the terms of the contract is erroneous. Hunt v. Tuttle [Iowa] 110 N. W. 1026.

29. Commissions cannot be recovered unless a purchaser is procured during the life of the contract, or if no time is specified, within a reasonable time. Hurst v. Williams [Ky.] 102 S. W. 1176; Harris v. Moore [Iowa] 112 N. W. 163; Oliver v. Katz [Wis.] 111 N. W. 509; Dekker v. Klingman [Mich.] 112 N. W. 727; Horton v. Immen, 145 Mich. 438, 13 Det. Leg. N. 486, 108 N. W. 746. Where the contract specifies no time, a subsequent understanding that the broker was to get the deed by a certain day does not make his right to commissions conditional upon the deeds' arrival by that day. Hanna v. Espalla [Ala.] 42 So. 443. Sufficiency of evidence, in action for commissions, to show that plaintiff had found purchaser within agreed time. Muir v. Moeller [Wash.] 90 P. 1042. A broker employed by a lessee to find a purchaser of his lease within a specified time, which was done, is not entitled to commissions, if the lessee in good faith tried to get the necessary consent of his lessor within the specified time but failed. McCurry v. Hawkins [Ark.] 103 S. W. 600.

30. If time is waived and principal accepts services, it will be presumed that the agent is to receive the compensation originally agreed upon. Ice v. Maxwell [W. Va.] 55 S. E. 899.

31. McDonald v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 518, 98 S. W. 943; McDonald v. Cabiness [Tex.] 102 S. W. 721.

32. Liability of trustee of land for compensation of agent procuring purchaser. McGovern v. Bennett, 146 Mich. 558, 13 Det. Leg. N. 853, 109 N. W. 1055.

33. Where the options are shown to be at a price satisfactory to the purchaser, the agent has fulfilled his contract. Worthington v. McGarry [Ala.] 42 So. 988.

34. Unauthorized requirement of principal furnishing abstract of title and unauthorized change in terms of deferred payment. Crosthwaite v. Lebus, 146 Ala. 525, 41 So. 853.

35. See 7 C. L. 473.

36. A broker having procured an offer which was refused by the owner as not coming up to the quoted price cannot recover, if he had no exclusive agency, though the same party subsequently made a better offer, in another's name, through a different broker, which was accepted. Cole v. Kosch, 116 App. Div. 715, 102 N. Y. S. 14. A broker employed to exchange land for personalty earns his commissions when the owners agree upon the terms of exchange, and he is entitled to his commissions on the value of the land regardless of the value put on it in the exchange. Davidson v. Wills [Tex. Civ. App.] 16 Tex. Ct. Rep. 774, 96 S. W. 634. The contract of a broker employed to purchase land is not performed until he procure an enforcible contract with the owners or bring the parties together so that his employer may make such contract. Logan v. McMullen [Cal. App.] 87 P. 285.

37. Hubbard v. Leiter, 145 Mich. 387, 13 Det. Leg. N. 477, 108 N. W. 735. A broker employed to procure land must prove that he either obtained an enforcible contract of sale or a valid conveyance, in order to recover his compensation. Bolton v. Coburn [Neb.] 111 N. W. 780.

38. Hudson Real Estate Co. v. Bauer [N. J. Law] 64 A. 954; Tracy v. Dean [Neb.] 109 N. W. 505; Foley v. Punchard, 103 N. Y. S. 206. The question of whether a broker has been the efficient cause of a sale entitling him to compensation is one of fact, and is only reviewable when there is no legal evi-

tomer in an unauthorized manner.[39] It is usually not necessary that the purchaser enter into an enforceable contract,[40] particularly if it be subsequently validated by ratification,[41] and the buyer's failure to perform his contract does not affect the broker.[42] But under a statute providing that no contract for the sale of lands by an agent shall be binding on the principal unless in writing, a written contract of sale made by a broker, whose employment was by parol, does not bind the landowner.[43] Though an owner has placed land in a broker's hands for sale, he may sell it himself, and is only liable to the broker for his commissions,[44] and where the sale is negotiated by the owner, the agent must prove that he was the cause of the negotiations.[45] A broker procuring a customer after the owner has sold to another is not entitled to commissions,[46] nor is he ordinarily so entitled if the sale is made after his authority is terminated, though to a person with whom he had negotiated,[47] and unless the broker has the exclusive right to sell, he is not entitled to commissions

dence to support the finding thereon. A broker is not entitled to recover for merely inviting a purchaser's attention to property, where the purchase was not affected thereby but had already been under negotiation. Sexton v. Goodrich [Wis.] 111 N. W. 206. Brokers in whose hands property is placed for sale cannot recover commissions if another broker, to whose attention they called the property, procures the purchaser. Burnham v. Lawson, 103 N. Y. S. 482. A broker who was called up by telephone by mistaking him for the owner of property is not entitled to commissions merely for making an appointment to bring the owner and purchaser into communication. Shapiro v. Shapiro, 117 App. Div. 817, 103 N. Y. S. 305. A broker who finds a person who takes an option on land of his principal cannot recover commissions from the latter's administrator who sells the property to the same party after the option expires, the principal having died before the option expired. Crowe v. Trickey, 204 U. S. 228, 51 Law. Ed. 454; Crowe v. Harmon, 204 U. S. 241, 51 Law. Ed. 461.

39. Though a broker, in whose hands land is placed for sale, is instructed not to advertise it, he is entitled to commissions for a sale made through advertising. Maloon v. Barrett, 192 Mass. 552, 78 N. E. 560.

40. It is no defense, in an action to recover commissions under a written agreement, that the contract with the prospective purchaser was merely verbal. Pope v. Caddell [Ky.] 102 S. W. 327.

41. Though the agent's authority gives him no right to make a contract of sale, yet if he does so and immediately advises his principal thereof and remits the money received the latter, by expressing his entire satisfaction, ratifies the contract and is bound thereby. Roberts v. Hilton Land Co. [Wash.] 88 P. 946. In such case, if the owner inform the attorney for the purchaser that the sale was authorized, such statement is a ratification of the agent's authority which estops the owner from denying it. Gregg v. Carey [Cal. App.] 88 P. 282.

42. Where a broker's right to compensation is absolute when he procures a contract, it is not affected by the nonperformance thereof. Treck v. McKenna, 115 App. Div. 701, 101 N. Y. S. 317.

43. Young v. Ruhwedel, 119 Mo. App. 231, 96 S. W. 228.

44. Woolf v. Sullivan, 224 Ill. 509, 79 N. E. 646. If a broker employed to make a sale introduces a purchaser, whom the owner informed that he could buy cheaper through another agency, and sale is made through such other agency, the broker who introduced the purchaser is entitled to his commissions. Gilmour v. Freshaur [Mo. App.] 102 S. W. 1107.

45. Cooper v. Upton [W. Va.] 56 S. E. 180 [advance sheets only]. A broker claiming compensation for securing the attendance of the purchaser at a public sale must prove that he had some effect on his attendance. Perkins v. Underhill, 103 N. Y. S. 25.

46. Ettinghoff v. Horowitz, 115 App. Div. 571, 100 N. Y. S. 1002. But if the broker procures a binding contract to purchase from a purchaser able to comply, he is not precluded from recovering his commissions by a prior verbal offer made to the owner which was not binding. Lovett v. Clench, 115 App. Div. 635, 101 N. Y. S. 174; Brooke v. Byrnes [Iowa] 110 N. W. 1028. Where an owner after negotiating with a prospective purchaser gives authority to sell to a broker, who negotiates unsuccessfully with the same party, and thereafter the owner revokes the authority and sells pursuant to his original negotiations with the purchaser, the broker is not entitled to commissions in the absence of fraud by the owner. Cords v. Ruth, 115 App. Div. 568, 100 N. Y. S. 1043.

47. Where a purchaser procured by a broker refused the owner's offer but afterwards made an offer to accept it, which the owner then declined, the broker was not entitled to commissions, as when the purchaser refused the first offer the matter was at an end. Bailey v. Moorhead, 122 Mo. App. 268, 99 S. W. 39. If a prospective lessor procured by a broker fails to agree with the owner and advises the broker that negotiations are ended, but some weeks thereafter the lessor again negotiates with the owner and effects a lease, the broker is not entitled to commissions in the absence of evidence of bad faith to defeat his rights thereto. Arnold v. Woollacott [Cal. App.] 88 P. 504. When a broker failed to negotiate a sale and the owner discharged him in good faith and sold the land through another broker for more than the first broker had succeeded in obtaining, such broker is not entitled to commissions, though the sale was for less than he had been instructed to sell for. Smith v. Kimball, 193 Mass. 582, 79 N. E. 800.

if the sale was made by some one else, even though he procure a purchaser.[48] But a broker's right to compensation for bringing his principal and a purchaser together is not defeated by the principal's assumption of exclusive charge of subsequent negotiations, and concluding them on different terms.[49] An owner who colludes with his broker's agent and the purchaser to defraud the broker out of his commissions is liable therefor.[50] Though a purchaser procured by a broker refuse to buy at the owner's price, yet if, during the continuance of the broker's contract, the owner sells to the purchaser, at a lower figure, he is liable for the broker's commissions.[51] If an owner sell to a purchaser procured by his broker the latter is entitled to compensation, whether the owner acted fraudulently or was unaware that the broker's efforts induced the sale; but the owner may sell to a stranger without being liable to his broker, provided he does not do so for the purpose of defeating the latter's right to compensation.[52] In case of the sale of a liquor business and of a license transferable only by order of court, an acceptance by a buyer conditioned on the court's action is good.[53]

Customer must be ready, willing, and able to purchase.[54]—A real estate broker cannot recover compensation unless he procures a purchaser ready, willing, and able to buy according to the terms of the contract[55] as they stood when the purchaser

48. Questions of whether broker had exclusive agency and whether purchaser was secured by him are for the jury. Rothenburger v. Schoniger, 30 Ky. L. R. 1018, 99 S. W. 1150. Where an owner in good faith sells land listed with a broker, in ignorance of the fact that the broker had influenced the sale, for less than the listed price, he is not liable for the broker's commissions unless there was an exclusive agency. Quist v. Goodfellow, 99 Minn. 509, 110 N. W. 65.

49. McMillan v. Beves [C. C. A.] 147 F. 218; Jones & Co. v. Moore, 30 Ky. L. R. 603, 99 S. W. 286; Rankin v. Cardillo [Colo.] 88 P. 170; British-American Land & Inv. Co. v. Western Land & Securities Co., 99 Minn. 429, 109 N. W. 826. Brokers whose contract was to find a purchaser at a price satisfactory to their principal must bring the seller and buyer to an agreement, but need not personally conclude the sale to entitle themselves to compensation. Reade v. Haak, 147 Mich. 42, 13 Det. Leg. N. 952, 110 N. W. 130. Agent procuring purchaser not precluded from recovering his commissions by fact that owner secretly closed deal at less than price quoted by agent, if latter was moving cause of sale. Hahl & Co. v. Wickes [Tex. Civ. App.] 16 Tex. Ct. Rep. 924, 97 S. W. 838. A commercial broker cannot be deprived of his commissions by the fact that he gave the name of a prospective purchaser to his principal, who sent another agent to consummate the sale, if but for his efforts it would not have been effected, and the revocation of his agency during the negotiations does not affect his rights if he acted in good faith. Southwestern Port Huron Co. v. Wilber [Kan.] 88 P. 892. But where a broker communicates an offer to his principal without informing him who made it, and the principal declines it, the latter is not liable for the broker's commissions, though he subsequently sells to the same party at a larger price. Nance v. Smyth [Tenn.] 99 S. W. 698. Broker finding purchaser, showing him property, negotiating with him, and introducing him to owner, is entitled to commissions, though sale made by owner for a smaller price. Holland v. Vinson [Mo. App.] 101 S. W. 1131. Broker entitled to commissions where business was obtained as a result of his efforts. Goldmark v. U. S. Electro-Galvanizing Co., 104 N. Y. S. 696. Contract for "net cash" between vendor and vendee of land does not preclude vendor's agent, who procured the purchaser, from recovering his agreed compensation. Love v. Scatcherd [C. C. A.] 146 F. 1. A broker who began negotiations that resulted in a sale through a third party is entitled to compensation where the owner promised it if the sale was effected. Rigdon v. More, 226 Ill. 382, 80 N. E. 901.

50. Knowledge of owner that agent was in broker's service and that he violated his instructions. Haven v. Tartar [Mo. App.] 102 S. W. 21.

51. Oliver v. Katz [Wis.] 111 N. W. 509.

52. McDonald v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 518, 98 S. W. 943.

53. Black v. Pentony, 30 Pa. Super. Ct. 38. Principal is liable for full commissions if he refuses in bad faith otherwise for nominal damages only. Black v. Pentony, 30 Pa. Super. Ct. 38.

54. See 7 C. L. 474.

55. Tracy v. Fobes [Iowa] 109 N. W. 772; Behrmann v. Marcus, 102 N. Y. S. 467; Oldham v. Howser, 125 Ill. App. 543; Newman v. Lumley, 125 Ill. App. 382; Packer v. Sheppard, 127 Ill. App. 598; Dotson v. Milliken, 27 App. D. C. 500; Dennis v. Walters, 123 Ill. App. 93; Hough v. Baldwin, 53 Misc. 284, 103 N. Y. S. 133; Van Norman v. Fitchette, 100 Minn. 145, 110 N. W. 851; Devlin v. Fox, 99 Minn. 520, 109 N. W. 241; Shanks v. Michael [Cal. App.] 88 P. 596; Vandercook Co. v. Wilmans Co. [Cal. App.] 87 P. 1116; Coon v. St. Paul Park Realty Co. [Minn.] 112 N. W. 526; Wagner v. Norris [Colo.] 88 P. 973; Boyson v. Frink, 80 Ark. 254, 96 S. W. 1056; Northwestern Packing Co. v. Whitney [Cal. App.] 89 P. 981; Morris v. Francis [Kan.] 89 P. 901; Lewis v. Briggs [Ark.] 98 S. W. 683; McGill v. Gargoula, 103 N. Y. S. 113; Tebo v. Mitchell [Del.] 63 A. 327. A broker employed to sell on stipulated terms cannot

was procured,[56] and having done so is entitled to his commission unless the sale is prevented by his act.[57] If the owner contracts with the offered purchaser he cannot question his ability to perform [58] or the terms of the contract.[59] A broker employed to purchase bonds at a certain price must prove, in order to recover, that the owner was willing to sell at such price and that he could give a merchantable title.[60]

Broker must act in good faith towards principal.[61]—If a broker acting for both parties with their consent misrepresents facts to one of them, he may be discharged by such party and is not entitled to commissions, though the parties afterwards close the deal.[62] Though an agent cannot represent both parties to a deal, yet an agent of a seller is not precluded from recovering his agreed commissions by the fact that he was manager of other property for the buyer, if he did not represent them in the purchase.[63] Mere acquiescence will not waive rule that broker cannot act for both parties, but the waiver must be express.[64] An agent for one party to an exchange,

recover for procuring a purchaser offering different terms which are not acceptable to the owner. Meader v. Brown, 116 App. Div. 734, 102 N. Y. S. 32. Though a broker, according to contract, found a person agreeing to exchange land for his principal's stock of goods, he is not entitled to commissions if the land did not belong to the party procured by him. Snyder v. Fidler [Iowa] 112 N. W. 546. A broker, in whose hands property is placed for sale on such terms as the owner and purchaser may agree upon, is not entitled to commissions for merely producing a party ready, willing, and able to take an option to purchase on terms not acceptable to the owner. Fox v. Denargo Land Co. [Colo.] 86 P. 344. While an owner of land and a prospective purchaser, procured by the owner's broker, are negotiating for a written contract, either may withdraw any oral proposition made without the owner becoming liable for the broker's commissions, where the parties finally fail to agree. Id. The fact that a purchaser procured by the broker could not make the required cash payment for seven months and only then by money expected to be realized from sales of part of the land does not show the purchaser's financial ability to buy. Id. A broker is not entitled to compensation where an exchange of property, which he negotiated for, was not effected by reason of defective title in the party secured by him. Keating v. Haley, 147 Mich. 279, 13 Det. Leg. N. 1035, 110 N. W. 943. If brokers merely request the owner of property who lived in another city to come to their office to meet a purchaser, there is no production of a purchaser entitling them to compensation, as it is their duty to produce the purchaser to him. Lotz v. Levy, 104 N. Y. S. 1058. Where the purchaser procured by a broker is unable to pay for the property and the contract is canceled, the broker is not entitled to compensation, though part of the price was paid. Riggs v. Turnbull [Md.] 66 A. 13. But an agent securing a purchaser ready, willing, and able to buy is entitled to his commissions, though the owner did not furnish him with terms, if the owner and purchaser agree upon them. Frost v. Houx [Wyo.] 89 P. 568. An owner who refuses to deliver a deed, making him responsible for a sewer tax for which he is not liable, is not bound for broker's commissions. Mercantile Trust Co. v. Wiggemen, 119 Mo. App. 56, 96 S. W. 293. Where a prospective purchaser procured by a broker insists on conditions, which the vendor did not agree to and cannot or will not comply with, the broker is not entitled to compensation. Ward v. Kennedy, 101 N. Y. S. 524. A broker is not entitled to compensation for procuring a purchaser, who does not sign a contract to buy and who refused to accept a deed. Kampf v. Dreyer, 103 N. Y. S. 962.

56. If an owner agreeing to sell for a certain price subject to change does not change until after the sale was negotiated, he is liable for his broker's commissions. Warren Com. & Inv. Co. v. Hull Real Estate Co., 120 Mo. App. 432, 96 S. W. 1038. But an owner agreeing to pay his broker "when the title is passed" is not liable for commissions if the title never passed because of defects therein. Couper v. O'Neill, 53 Misc. 319, 103 N. Y. S. 122.

57. An owner having come to terms with a purchaser procured by his agent, knowing his financial ability, cannot object, in a suit for commissions, that the purchaser was not able to buy. Lenschner v. Patrick [Tex. Civ. App.] 103 S. W. 664.

58. A real estate agent who by recording his contract for commissions clouds the title to the land so as to justify the purchaser in refusing to complete the sale deprives him of his right to commissions. Woolf v. Sullivan, 224 Ill. 509, 79 N. E. 646. Where owner makes no question of purchaser's ability at the time he is offered, the burden is on him in action by the broker to show want of ability. Dotson v. Milliken, 27 App. D. C. 500.

59. If the owner voluntarily conveys the land to the purchaser procured by the agent, it is conclusive proof that the price was satisfactory. Cooper v. Upton [W. Va.] 56 S. E. 180 [advance sheets only].

60. Anderson v. Johnson [N. D.] 112 N. W. 139.

61. See 7 C. L. 476.

62. Attempt to mislead question for jury. Instructions. Featherston v. Trone [Ark.] 102 S. W. 196.

63. Neither party defrauded and no dual agency. Owen v. Matthews, 123 Mo. App. 463, 100 S. W. 492. A broker contracting for all over a fixed price that he might get for land and a certain sum in addition, does not forfeit his right to compensation, does not by refusing to state what he got for the land, or by stating that he only got the minimum price. Fulton v. Walters, 216 Pa. 56, 64 A. 860.

64. Evans v. Rockett, 32 Pa. Super. Ct. 365.

having a discretion as to the valuation to be placed on his principal's property, cannot recover for commissions if he and the agent for the other party agree to pool and divide their commissions which were based on the valuations.[65]

Procuring loan.[66]—A broker employed to procure a loan cannot recover for securing an offer to lend which does not comply with the terms of the application.[67]

Necessity of broker's contract being in writing [68] is elsewhere treated.[69]

Amount of commissions and measure of recovery for services.[70]—The amount of a broker's compensation is usually dependent upon the terms of his contract,[71] and in the absence of an express agreement as to the compensation of a broker for making a sale he is entitled to a reasonable compensation measured by the customary charge for making such sales,[72] but where a usage or custom is relied on to fix a broker's compensation, it must be shown to be uniform and notorious as regulating the amount in the particular class of transactions.[73] The recovery of compensation by a broker from his principal for breach of contract must be confined to the actual loss thereby occasioned.[74] A settlement of a broker's compensation induced by fraud on the part of the principal does not preclude the broker from recovering his just commissions.[75] The amount of a mortgage on land must be taken into consideration as part of the purchase price, in determining a broker's commissions for making the sale, if such mortgage continues on the land.[76] Usually a broker is entitled to his commissions for a sale of land out of the first payment thereon.[77]

65. Quinn v. Burton [Mass.] 81 N. E. 25.

66. See 7 C. L. 477.

67. Kronenberger v. Teschemacher, 52 Misc. 130, 101 N. Y. S. 764. But a broker employed to procure a party agreeing to lend is entitled to his compensation when he secures an agreement to lend and his right is not affected by the failure of either party to comply with such agreement. Perry v. Bates, 115 App. Div. 337, 100 N. Y. S. 881.

68. See 7 C. L. 477.

69. See Frauds, Statute of, § 6, 7 C. L. 1829.

70. See 7 C. L. 477.

71. Under contract stipulating that owner shall receive a certain net price and any balance to belong to broker as his compensation, latter must show that former received part of balance belonging to broker. Lewis v. Briggs [Ark.] 98 S. W. 683. Under an agreement whereby one party was to have an agreed commission out of the proceeds of a sale, charge for traveling expenses and a subagent's fees would be included in the commission. Lyttle v. Goldberg [Wis.] 111 N. W. 718. A broker who, having agreed with an owner to divide all they could get for land above a fixed price, sells for the owner's executor at a price which left nothing to be divided under his agreement with the owner cannot collect commissions from the executor. In re French's Estate, 101 N. Y. S. 734. Where, with the consent of his principal, a broker secures the assistance of a third party agreeing to divide with him his compensation, which was to be all over a fixed price, and they sold part of the land for more than the fixed price, and the owner paid the broker his compensation in full, held that, though the third party was entitled to one-half of the unsold land, he could not recover from the owner any portion released to him by the broker. Ewart v. Young, 119 Mo. App. 483, 96 S. W. 420. Where a party, who contracted to pay a broker who negotiated the purchasing of land one-third of the profits to be divided from a subsequent sale thereof, dies before such subsequent sale was made, no time for which was fixed, the broker is entitled to recover one-third the value of the land after deducting the purchase price, taxes, and interest. Kauffman v. Baillie [Wash.] 89 P. 548. Where petition alleged that broker was entitled to commission if he sold for a certain price, and evidence showed that he sold for a larger price, an instruction submitting the case as stated in petition, does not prejudice defendant. Gaume v. Hargan, 122 Mo. App. 700, 99 S. W. 457.

72. Jones & Co. v. Moore, 30 Ky. L. R. 603, 99 S. W. 286.

73. A leasehold sale does not entitle the broker to as much compensation as a fee, and a custom allowing equal compensation must be of such notoriety that the owner must be presumed to have known of and expected to be bound by it. Groscup v. Downey [Md.] 65 A. 930.

74. Where a broker employed to procure a loan sues for breach of contract, the defendant may prove as an offset that the broker had agreed to pay the lender a part of his commissions. Finch v. Pierce, 53 Misc. 554, 103 N. Y. S. 765. A broker who sells stock, the price of which is compromised by his principal with his acquiescense, can only recover commissions on the amount of the actual sale. Bauersmith v. Extreme Gold Min. & Mill. Co., 146 F. 95.

75. Owner rejected offer of purchaser made through broker, paid latter a nominal sum, then personally sold to same party procured by the broker. Bowe v. Gage [Wis.] 112 N. W. 469.

76. Hobart v. Stewart, 99 Minn. 394, 109 N. W. 704.

77. Young v. Ruhwedel, 119 Mo. App. 231, 96 S. W. 228.

Actions to recover commissions.[78] *Pleading.*[79]—The complaint must allege a valid contract [80] and full [81] and timely [82] performance. A material variance between the pleading and proof is fatal.[83] The defendant may, under a general denial, prove a different contract than that claimed by the broker and a nonperformance thereof by the latter.[84] A defense that a brokerage contract was not in writing as required by statute cannot be especially pleaded where its invalidity does not appear on the face of the complaint.[85] An answer in an action to recover commissions, which alleges that the sale was not consummated, states no defense, as such failure may have resulted from the defendant's fault.[86] Where two brokers claim commission the defendant may interplead,[87] or answer alleging payment to one.[88]

Evidence and burden of proof.[89]—In actions to recover commissions the general rules of evidence control as to opinion,[90] hearsay,[91] self-serving declarations,[92] offers of compromise,[93] impeachment,[94] and relevancy [95] or irrelevancy.[96] Where a

78. See 7 C. L. 477.

79. See 7 C. L. 478.

80. A petition alleging that each of two defendants gave plaintiff the price and terms of property for sale sufficiently charges a contract on part of each authorizing recovery on proof that either made such contract. Failure of defendant to object on appeal. McDonald v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 518, 98 S. W. 943. A petition for the recovery of compensation, which on its face discloses that the brokerage contract was not in writing. Real estate brokers contract in Nebraska as required by statute, is demurrable. Smith v. Aultz [Neb.] 110 N. W. 1015.

81. A complaint alleging the broker's employment, his compliance therewith by procuring a purchaser ready, willing and able to buy on the owner's terms, and refusal by the latter to consummate the sale, is sufficient. Stephens v. Bailey [Ala.] 42 So. 740; Remple v. Hopkins, 101 Minn. 3, 111 N. W. 385. Sufficiency of petition by one of two brokers against principal. Sain v. Rooney [Mo. App.] 101 S. W. 1127.

82. When time is of the essence of a brokerage contract, an extension thereof must be pleaded in order that it may be proved. Leuschner v. Patrick [Tex. Civ. App.] 103 S. W. 664.

83. Steere v. Gingery [S. D.] 110 N. W. 774. Immaterial variance. Richards v. Richman [Del.] 64 A. 238. There can be no recovery, under an allegation of special contract, on an agency implied from acceptance of the agents' services. Bassford v. West [Mo. App.] 101 S. W. 610. Recovery under special contract from both seller and buyer. Rule of quantum meruit inapplicable. Brunson v. Blair [Tex. Civ. App.] 16 Tex. Ct. Rep. 926, 97 S. W. 337.

84. Harris v. Moore [Iowa] 112 N. W. 163.

85. Strunski v. Geiger, 52 Misc. 134, 101 N. Y. S. 786.

86. Atterbury v. Hopkins, 122 Mo. App. 172, 99 S. W. 11.

87. Right of defendant in suit by broker for commissions to interplead that another broker claimed to have been procuring cause of sale. Rogers v. Picken Realty Co., 105 N. Y. S. 281.

88. In a suit for commissions by one of two brokers, the answer of defendant that he had paid one of them is sufficient to put the question of their partnership in issue. Sain v. Rooney [Mo. App.] 101 S. W. 1127.

89. See 7 C. L. 478.

90. It is an incompetent question to ask a broker as to whether he "had found a purchaser ready, willing, and able to buy," as it calls for his opinion. Northwestern Packing Co. v. Whitney [Cal. App.] 89 P. 981.

91. In action against husband for sale of wife's land, evidence that a third party told defendant that plaintiff tried to sell at a profit is inadmissible, as is also conversation between the wife and the purchaser. Green v. Brady [Ala.] 44 So. 408.

92. In suit by broker seller cannot show that he notified purchaser that he would only deal with him directly, such evidence being a self-serving declaration,—nor is notification of purchaser by broker that he and seller would call and close the deal admissible to show authority but only on issue of whether broker's efforts procured sale. Ross v. Moskowitz [Tex.] 100 S. W. 768.

93. Offer of compromise inadmissible in action to recover commissions. Hurst v. Williams [Ky.] 102 S. W. 1176.

94. Admissibility of evidence to contradict defendant's denial of having put property in anybody's hands for sale. Bluestein v. Collins [Tex. Civ. App.] 103 S. W. 687.

95. In action for commissions, broker may prove that land had been listed by him for two years and that the purchaser had been informed of it from that source, where the purchaser testifies that he bought on his own initiative. Ryan v. Page [Iowa] 111 N. W. 405. In suit for negotiating a purchase of land, which defendant refused to consummate, broker may prove a deed, receipt, and tender purporting to be made by the owner. Hanna v. Espalla [Ala.] 42 So. 443.

96. Evidence that owner asked and obtained advice as to proposition of prospective purchaser is not admissible in suit for commissions. Teuschner v. Patrick [Tex. Civ. App.] 103 S. W. 664. Admissibility of evidence, in suit for commissions, as to arrangements made by purchaser to procure funds, and as to what occurred between broker and third party as to drawing deed. Id. In suit by broker against owner for commissions for procuring a contract to purchase, evidence as to the purchaser's financial ability is inadmissible in the absense of allegation or proof that plaintiff induced defendant to execute the contract by misrepresentations. Fleet v. Barker, 104 N. Y. S. 940. Admissibility of son's testi-

broker's commission is fixed by contract, evidence is inadmissible to show what was a reasonable commission.[97] In an action for broker's commissions parol evidence is admissible to show whether the broker was agent of the seller or of the buyer, where the terms of the written contract are ambiguous.[98] The fact that a contract to pay a broker commissions for a sale of land is not signed by the broker but only by the owner does not render it inadmissible in evidence in a suit by the broker thereon.[99] The burden of proving his contract is on the plaintiff in a suit for commissions,[100] but the burden of showing a defense is on the defendant, as in other contractual actions.[101]

Questions for jury.[102]—The employment of a broker is usually a question of fact for the jury's determination.[103]

BUILDING AND CONSTRUCTION CONTRACTS.

§ 1. **The Contract; Sufficiency and Interpretation (424).**
§ 2. **Performance of Contract (426).** Architects (427). Impossibility of Performance (427). Destruction of Subject-Matter (428).
§ 3. **Modification of Contract, and Changes in Plans and Specifications (429).**
§ 4. **Extra Work (429).**
§ 5. **Delay in Performance (429).**
§ 6. **Termination or Cancellation of Contract (431).**
§ 7. **Completion by Owner or Third Person (431).**
§ 8. **Architect's and Other Certificates of Performance, and Arbitration of Disputes (432).**
§ 9. **Acceptance (434).**
§ 10. **Payment (434).**
§ 11. **Subcontracts (434).**
§ 12. **Bonds (435).**
§ 13. **Remedies and Procedure (437).**

Matters common to all contracts,[1] and those peculiar to contracts for public works,[2] are elsewhere treated, and a separate article deals with mechanics' liens.[3]

§ 1. *The contract; sufficiency and interpretation.*[4]—The usual rules as to offer and acceptance,[5] form,[6] consideration,[7] and validity,[8] apply. The contract as finally

mony that he represented his mother, the owner, in contract to pay broker's commissions for making lease. Colloty v. Schuman [N. J. Law] 66 A. 933. Admissibility of evidence to show ratification by corporation of broker's employment. Peach River Lumber Co. v. Ayers [Tex. Civ. App.] 14 Tex. Ct. Rep. 684, 91 S. W. 387.

97. Hanna v. Espalla [Ala.] 42 So. 443.

98. Purchaser wrote agent that he would pay a certain sum for property and a fixed commission on the sale. Hanna v. Espalla [Ala.] 42 So. 443.

99. Kepner v. Ford [N. D.] 111 N. W. 619.

100. Sufficiency of proof of contract to justify denial of motion for nonsuit. Colloty v. Schuman [N. J. Law] 66 A. 933.

101. In an action by stockbrokers to recover for stocks purchased for defendant, the burden of proving that it was a gambling contract is on the defendant. King v. Zell [Md.] 66 A. 279.

102. See 7 C. L. 480.

103. Stephens v. Bailey [Ala.] 42 So. 740. Evidence requiring the question of broker's employment to be submitted to jury. Tieck v. McKenna, 115 App. Div. 701, 101 N. Y. S. 317. In an action by a stockbroker against his customer, the question of whether the former had rendered a stated account to the latter is for the jury. Sufficiency of evidence to justify finding that broker was unauthorized to act for defendant. Little & Hays Inv. Co. v. Pigg, 29 Ky. L. R. 809, 96 S. W. 455. Issue as to which of two brokers entitled to commission. Painter v. Kilgore [Tex. Civ. App.] 101 S. W. 809. An instruction assuming a finding in a suit for commissions in improper. Green v. Brady [Ala.] 44 So. 408.

1. See Contracts, 7 C. L. 761.

2. See Public Contracts, 8 C. L. 1473.

3. See Mechanics' Liens, 8 C. L. 954.

4. See 7 C. L. 481.

5. Contract to furnish marble sent to a contractor for signature and signed by him is complete without notifying the other party. Stannard v. Reid Co., 103 N. Y. S. 521. Where building materials are ordered on condition that they are not to be shipped until ordered, an order not to ship them given within a reasonable time countermands the order. Stainbach v. Henderson, 79 Ark. 176, 95 S. W. 786. Where a contractor submitted the two lowest bids for the construction of a bridge to be either of four or five spans, but the question which it was to be had not been settled, he may **withdraw his offer** although he was notified that his bid was accepted conditioned upon leave to issue bonds. Northeastern Const. Co. v. North Hampstead, 105 N. Y. S. 581.

6. A building contract requiring the construction of a building conformable to **plans and specifications annexed** and signed by the parties was fully satisfied by pages of specifications and plans annexed to the contract and signed on the last page by the parties, being in effect one document. Howe v. Schmidt [Cal.] 90 P. 1056. Where a **written draft not signed** by the parties is frequently referred to in their dealings as their contract, it should be considered as though executed. Roberts, Johnson & Rand Shoe Co.

executed determines the rights of the parties,[9] and although an accepted proposal is for the entire work, if the bidder thereafter enters into a formal contract severing the work he is bound thereby.[10]

Interpretation.[11]—As in the case of all other contracts, the intention of the parties gathered from the whole instrument must control,[12] and contracts will be construed as they were understood and acted upon by the parties thereto.[13] The

v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218.

7. Where contractor refused to continue his contract as the price would not compensate him and a new contract was drawn up naming a different basis for payment, there is a consideration for the new contract. Scanlon v. Northwood, 147 Mich. 139, 13 Det. Leg. N. 1013, 110 N. W. 493. The promise by the owner to pay a subcontractor's lien is a consideration for the subcontractor's agreement not to file a lien. Harness v. McKee-Brown Lumber Co., 17 Okl. 624, 89 P. 1020.

8. Contract to build ice houses at a certain price, which price was raised by the managers of the two parties with the understanding that they divide the increase among themselves, invalid. Standard Lumber Co. v. Butler Ice Co. [C. C. A.] 146 F. 359. Contract to build a roof with a pitch of thirty degrees when statute prohibited a pitch of more than twenty degrees. Eastern Expanded Metal Co. v. Webb Granite & Const. Co. [Mass.] 81 N. E. 251. Where original contract was illegal in that the price stipulated was in fraud of one of the parties, no recovery could be had for extra work done under the contract. Standard Lumber Co. v. Butler Ice Co [C. C. A.] 146 F. 359. So long as a contract not involving moral turpitude illegal in part remains unexecuted in that part which the law forbids, either party may disaffirm it on account of its illegality and recover money or property advanced under it. Contractor refused to construct roof on building according to specifications which required a pitch prohibited by statute. Eastern Expanded Metal Co. v. Webb Granite & Const. Co. [Mass.] 81 N. E. 251.

9. Where plans are changed after preliminary agreement but before execution of formal contract, and bidder makes no objection thereto, he cannot recover damages. Sanger v. U. S., 40 Ct. Cl. 47.

10. Sanger v. U. S., 40 Ct. Cl. 47.

11. See 7 C. L. 481.

12. There was no specific clause in a contract that **architects were constituted final judges** in all matters but such a power might be construed from a consideration of the whole instrument. Andrew Lohr Bottling Co. v. Ferguson, 223 Ill. 88, 79 N. E. 35. Contract providing that none of the architect's certificates should be conclusive evidence of performance except the final one, held to make the final one conclusive. Carnegie Public Library Ass'n v. Harris [Tex. Civ. App.] 97 S. W. 520.

Illustration of interpretation of particular contracts: Contract **to build butter factory** by subscription. Sager v. Gonnermann, 50 Misc. 500, 100 N. Y. S. 406. Two different provisions in the same contract as to how **extras** were to be provided for. McLaughlin v. Bayonne [N. J. Law] 66 A. 1070.

Delivery of material before working hours of **day following time limit** set in contract is sufficient. New Jersey Co. v. Nathaniel Wise Co., 105 N. Y. S. 231. Evidence considered in an action on a contract for excavation and held not to show that **time was of the essence** of the contract. Cleveland, etc. R. Co. v. Scott [Ind. App.] 79 N. E. 226. "Erected" held to mean "completed" for purposes of time limit. Hartrath v. Holsman, 127 Ill. App. 560. Upon revocation of the contract it was provided that the municipality might recover **damages** determined by the architect and also a clause provided for a certain sum as liquidated damages. Intention held to be that only one of the remedies should be availed of. City of New Haven v. National Steam Economizer Co., 79 Conn. 482, 65 A. 959. In the absence of an express **warranty that the plans are sufficient,** their sufficiency should not be implied unless there is the clearest reason for it. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387. The language of a **contract for drilling for gas and oil** will be given its commonly understood meaning where no reason for the contrary appears. Contract to drill to a certain depth in a workmanlike manner at one dollar per foot. Collier v. Munger [Kan.] 89 P. 1011. Where a contract for **construction of sewers** provides that the contractor shall take care of all water flowing in, the contractor cannot recover damages because of water flowing into his trenches from tributary sewers of the existence of which he knew at the time of contracting. Leahy v. New York, 116 App. Div. 442, 101 N. Y. S. 936. In **excavation contract** silt held **foreign substance** and not part of the excavated material. San Francisco Bridge Co. v. U. S., 40 Ct. Cl. 139. Where a contractor agrees **to provide sprinkling system for factory,** the title to all material to be in him until paid for with a right to remove if payment not made, the owner of the factory is liable for the loss by fire of so much of the system as has been installed although attached to the buildings. Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co [C. C. A.] 148 F. 159.

13. School Dist. of South Omaha v. Davis [Neb.] 107 N. W. 842. Arbitration clause. Roberts, Johnson & Rand Shoe Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218. Where a contract for a building is ambiguous in a certain part referring to ornamental iron work and the contractor writes to the owner his interpretation of it to which letter he receives no reply, the contractor has a right to assume that his construction has been assented to and the courts will so enforce it if possible to do so without making a new contract. Snead & Co. Iron Works v. Merchants' Loan & Trust Co., 225 Ill. 442, 80 N. E. 237. Contractors during excavations for a road bed made no measurements themselves but relied upon the measurement of the railroad engineers and received payments based on these measure-

situation of the parties at the time the contract was entered into is one of the most satisfactory tests in construing a contract.[14] Express terms cannot be varied by evidence showing custom or usage.[15] The construction of an ambiguous written contract is for the jury.[16]

Fraud, misrepresentations, and mistake.[17] are elsewhere treated.

§ 2. *Performance of contract.*[18]—The contractor in the performance of his contract is bound to exercise the ordinary care and skill of the business and is liable to the owner [19] and to third persons for negligence.[20] Performance must be according to the contract and nothing beyond it can be required of the contractor [21] except by way of extra work,[22] but material furnished may be required to conform to the contract though it cannot be accomplished with the tools specified in the contract.[23] Literal compliance with the terms of a contract is not essential to a recovery under the contract if there has been substantial performance of the contract in its material parts made in good faith,[24] but deductions must be made from

ments. This clearly shows an intent to be bound by a stipulation that the railway engineers' estimates should be final although not expressly made a part of the original contract. Cook v. Foley [C. C. A.] 152 F. 41. Parties construed contract as making architects final judges of all matters. Andrew Lohr Bottling Co. v. Ferguson, 223 Ill. 88, 79 N. E. 35. Time of payment indefinite but construed to be upon certain dates by the parties. Failure to pay on such date was a default. Cleveland, etc., R. Co. v. Scott [Ind. App.] 79 N. E. 226.

14. Contract for excavating railroad bid. Cook v. Foley [C. C. A.] 152 F. 41; Harris v. Faris-Kesl Const. Co. [Idaho] 89 P. 760.

15. Contract to construct a sarcophagus of certain parts and dimensions of Scotch granite not performed by making base of native granite according to custom. Fish v. Correll [Cal. App.] 88 P. 489. Contract to dig foundation trench certain number of feet. By blasting rock contractor loosened it to a greater depth and was compelled to remove loose stone, etc. Could not recover for this as extra by showing a custom or necessity for blasting. Gallick v. Ebling, 52 Misc. 533, 102 N. Y. S. 803. Usage of colortype trade not to "rough" pictures. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306. As to meaning of "measured in place." Bowers Hydraulic Dredging Co. v. U. S., 41 Ct. Cl. 498.

16. Extrinsic evidence was necessary to show the amount of work to be done under a contract to dredge a river. Jones & Laughlin Steel Co. v. Monongahela & Western Dredging Co. [C. C. A.] 150 F. 298.

17. See Fraud and Undue Influence, 7 C. L. 1813; Mistake and Accident, 8 C. L. 1020; as to what constitutes; Contracts, 7 C. L. 761, as to rescission.

18. See 7 C. L. 482.

19. Contract to excavate so negligently performed as to cause owner's house to collapse. Olson v. Goerig [Wash.] 88 P. 1017; Wing & Bostwick Co. v. United States Fidelity & Guaranty Co., 150 F. 672.

20. Tenant of adjoining property forced to vacate premises because of careless and negligent methods employed by contractor. McFadden v. Thompson-Starrett Co., 116 App. Div. 285, 101 N. Y. S. 467.

21. A provision that materials should pass the inspection of the engineer does not authorize him to require materials different from the contract specification. Beattie v. McMullen [Conn.] 67 A. 488.

22. See post, § 4.

23. Stone was to be cut smooth with pick point or stone ax and without a deviation from a true plane exceeding one-eighth of an inch. Sanger v. U. S., 40 Ct. Cl. 47.

24. Bauer v. Hindley, 222 Ill. 319, 78 N. E. 626. Contract to build house. Roane v. Murphy [Tex. Civ. App.] 16 Tex. Ct. Rep. 24, 96 S. W. 782; Bloomington Hotel Co. v. Garthwait [Ill.] 81 N. E. 714; Whitcomb v. Roll [Ind. App.] 81 N. E. 106; Arkansas, Missouri Zinc Co. v. Patterson, 79 Ark. 506, 96 S. W. 179; Bergfors v. Caron, 190 Mass. 168, 76 N. E. 655; Easthampton Lumber & Coal Co. v. Worthington, 186 N. Y. 581, 79 N. E. 325; Ramstedt v. Brooker, 113 App. Div. 45, 98 N. Y. S. 1044.

Performance held substantial: The contract price was $29,400, and extras $3,000. The work not performed was covering steam pipes with asbestos worth $100 and repair to damaged stucco work worth $100. Van Orden v. MacRae, 105 N. Y. S. 600. Contract called for delivery of bricks not later than June 20th. They were delivered June 21st at 6:25 a. m. New Jersey Co. v. Wise Co., 105 N. Y. S. 231. Where a patent vacuum system was installed upon the agreement that the owner was to have a certificate to operate, the installing of the system by the patentee was an implied license and the furnishing of the written license is largely a matter of form. Hankee v. Arundel Realty Co., 98 Minn. 219, 108 N. W. 842.

Performance held not substantial: The doctrine of substantial performance does not apply where the variation from the terms of the contract are so substantial that an allowance out of the contract price of damages for the deviations would not give the owner essentially what he contracted for. Hoglund v. Sortedahl [Minn.] 112 N. W. 498. Where there is an architect's certificate of performance by the contractor, yet there are many changes from the specifications which by themselves be trivial and compensated for by money damages, and these charges are combined with the fact that there is a crack in the wall and parts of the building are out of plumb, is sufficient to warrant a jury in finding that the contract was not substantially performed. Id. Where a tank collapsed

the contract price for errors and omissions.[25] Performance according to contract may, however, be waived by the owner or by the conduct of the parties,[26] in which case the owner is estopped to reject the work,[27] but this estoppel will not prevent his rejection of the work for other defects of which he had no knowledge.[28] When the advertisement directs the bidders to examine the drawings and to make estimates for themselves, mistakes growing out of their neglect to do so will not be relieved,[29] but in an action against a contractor for breach, he may show that plans furnished him on which to bid were materially different from those by which work was to be done.[30]

Architects are also bound to a substantial performance of their contracts,[31] and there is an implied agreement that the plans shall be fit for the purpose intended.[32]

Impossibility of performance.[33]—Whether one can obtain damages for attempting work impossible of performance depends upon whether he was induced to enter upon the work by some act amounting to deceit.[34] Where the action of the building

when nearly completed, the contractor could not recover on the theory of substantial performance. Logan v. Consolidated Gas Co., 107 App. Div. 384, 95 N. Y. S. 163. In building a house, contractor submitted for specified articles many which he deemed just as good. Easthampton Lumber & Coal Co. v. Worthington, 186 N. Y. 407, 79 N. E. 323. Plaintiff contracted to lay flooring on defendant's bridge but after partially performing refused to continue. Douglas v. Lowell [Mass.] 80 N. E. 510.

25. Arkansas-Missouri Zinc Co. v. Patterson, 79 Ark. 506, 96 S. W. 170; Easthampton Lumber & Coal Co. v. Worthington, 186 N. Y. 581, 79 N. E. 325. A finding that a contractor did not fully perform and that $25 should be deducted from the contract price and that the value of labor and material furnished was $175 was consistent with a finding that petitioner acted in good faith and had substantially performed. Bergfors v. Caron, 190 Mass. 168, 76 N. E. 655. The proper finding for the jury to make is not the amount of money which would be required to make the tower conform to the specifications, but the diminished value of the tower by reason of the failure to construct in accordance with the specifications. Village of Madisonville v. Rosser, 8 Ohio C. C. (N. S.) 387.

26. Logan v. Consolidated Gas Co., 107 App. Div. 384, 95 N. Y. S. 163. Where a provision that a contract for building shall not be sublet is violated to the owner's knowledge who sees the work performed without objection, such a prohibition is waived. Bader v. New York, 101 N. Y. S. 351. Where a contractor agreed to clear a road bed according to specifications by the railroad engineers but no specifications were shown him, but he worked under the engineer's supervision, the specifications are not admissible in an action for work done under the contract for the purpose of estimating amount of work done. St. Louis, etc., R. Co. v. Bogan, 78 Ark. 173, 95 S. W. 448. Where specifications in a contract are not followed, the builder is liable for damages unless the other party knows of and acquiesces in the variance. Arkwright Mills v. Aultman & Taylor Mach. Co. [C. C. A.] 145 F. 783.

27. The owner of a boat specified with the builder that it should have a draft of 23 inches, but after it was started knew that its draft would exceed this but made no objection and continued to make suggestions and changes as to construction. Marine Iron Works v. Wiess [C. C. A.] 148 F. 145.

28. A guarantee that a boat could maintain speed of fourteen knots when built. Marine Iron Works v. Wiess [C. C. A.] 148 F. 145.

29. Bowers Hydraulic Dredging Co. v. U. S., 41 Ct. Cl. 214. Where bidders are informed that they must satisfy themselves as to the character of the material to be excavated and "that the government will not guarantee the accuracy of its information," a contractor cannot abandon a contract because the material proves different from that revealed by governmental borings. Lewman v. U. S., 41 Ct. Cl. 470.

30. Contract to furnish steam heat plant Contractor refused to perform when shown construction plans on ground of variation from plans on which he bid. Beinhauer v. Baldwin Engineering Co., 104 N. Y. S. 431.

31. An architect who agrees to draw plans and specifications for a building not to cost more than $25,000 cannot recover when the lowest obtainable bid under his plans is $35,000. Graham v. Bell-Irving [Wash.] 91 P. 8.

Compensation: An architect who is to receive 5 per cent of the cost of construction is not entitled to a percentage on damages paid to contractors because of fault of owner. Boller v. New York, 117 App. Div. 458, 102 N. Y. S. 729. Evidence sufficient to warrant a finding of $500 in favor of an architect for services. Harms v. Sheppard, 30 Ky. L. R. 404, 98 S. W. 1012. In an action by an architect to recover his fees, evidence held to sustain judgment for plaintiff. There was evidence that drawings furnished by the architect were treated by the parties as those stipulated for. Evans v. Philadelphia Borse, 215 Pa. 652, 64 A. 463.

32. Where defects and omissions in an architect's plans run through the entire system so that they are useless for the guidance of builders, the architect is not entitled to recover therefor (Dunne v. Robinson, 53 Misc. 545, 103 N. Y. S. 878), and the owner is entitled to recover payments made therefor without knowledge of their uselessness (Id.).

33. See 7 C. L. 485.

34. A contracted to dig a well at a spot chosen by the city engineer, which, being in-

specified is rendered impossible by the nature of the premises on which it is to be erected, the contractor is not liable for a breach if there was no occasion or opportunity for an investigation of the premises.[35] A contractor is excused from performance where further performance is rendered impossible by acts of the owner.[36]

Destruction of subject-matter.[37]—Where a contractor agrees to do a particular part of the work in the construction of a building or to make repairs thereon, and the building is destroyed before completion, he is excused from further performance and may recover for what he has done,[38] but the rule excusing nonperformance in case of the destruction of the thing assumed as the basis of the contract does not apply where the thing destroyed is the thing which one of the parties expressly agreed to construct and deliver,[39] and even though the fall is due to inherent defects in the plans, the contractor must bear the loss,[40] but if it fall on that account after completion the loss must be borne by the owner,[41] and if after destruction of the subject-matter without fault of the owner the contractor refuses to proceed further, he is liable to refund any money which may have been paid and also for damages for nonperformance,[42] and the fact that the money is to be paid by instalments, if the contract price is for an entire sum for a completed building, does not affect this principle, if the instalments are arbitrary and fixed without regard to the value or any distinctive portion of the work done.[43] If, however, the price is payable in instalments which are fixed with regard to the value of the work done, the builder may recover for the instalments fully earned,[44] but it seems that he has no claim for a proportional part of the next instalment which has been only partially earned,[45] but if the destruction of the subject-matter of the contract is due to the owner's fault, the contractor may recover for part performance;[46] and where a builder has contracted to construct buildings upon foundation walls already laid and one of the buildings collapses owing to a giving away of a foundation wall, he is entitled to recover for part performance under his contract, if there was nothing in the foundation walls to indicate to one giving them such an inspection as a builder would

dicated, he attempted to dig, but was prevented from completing his work by an inrush of water which might have been due to an old well hole dug by the city and then covered up. Murtland v. Atlantic City [N. J. Err. & App.] 65 A. 1049.

35. The contractor agreed to construct a booth to be set up in the agricultural pavillion at the World's Fair. When the material arrived ready to be set up it was found that the floor fell away seven inches and it was necessary to reconstruct parts of the booth. Beattie Mfg. Co. v. Heinz, 120 Mo. App. 465, 97 S. W. 188.

36. Barnum v. Williams, 115 App. Div. 694, 102 N. Y. S. 874.

37. See 7 C. L. 485.

38. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387.

39. Agreement to construct and deliver gas holder and tank complete. Logan v. Consolidated Gas Co., 107 App. Div. 384, 95 N. Y. S. 163.

40. Firm of building contractors specified that a building was to be erected according to the plans of an architect and the work to be done under his direction and to his satisfaction. The building when nearing completion collapsed solely by reason of defects in the plans, etc. This did not excuse the contractors. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387.

41. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387.

42. Keel v. East Carolina Stone & Const. Co., 143 N. C. 429, 55 S. E. 826. Where four notes for $1,000 each were given by the owner at the time a contract was entered for the construction of a building to be paid upon the completion of the building and the building was destroyed before completion, the contractor refusing to go on with the work, these notes never having been earned and become due, the owner is entitled to have them given up and canceled. Id.

43. Keel v. East Carolina Stone & Const. Co., 143 N. C. 429, 55 S. E. 826.

44. When walls of building reached second story $950 was due the contractor and was paid. Building then destroyed by fire and contractor refused to complete. Owner could not recover back $950. Keel v. East Carolina Stone & Const Co., 143 N. C. 429, 55 S. E. 826.

45. Keel v. East Carolina Stone & Const. Co., 143 N. C. 429, 55 S. E. 826.

46. Fire due to owner's negligence. Clarke v. Koeppel, 104 N. Y. S. 65.

give that they were defective.[47] And this is true although the owner was ignorant of the incompetency of the person who built the foundation.[48]

§ 3. *Modification of contract, and changes in plans and specifications.*[49]—Where a contract provides for changes only upon the order of the architect, it is fair to assume without direct evidence of such order that if architect was present any change made was at his order,[50] but if the written order of the architect is required, changes on his oral order will not bind the owner.[51]

§ 4. *Extra work.*[52]—An extra in a building contract is something beyond or outside its provisions.[53] Changes in the depth of a foundation wall from that specified in the contract is an alteration and not an extra.[54] The contractor cannot charge for extra work made necessary by his faulty performance.[55] Where a written contract provides that no extra work shall be done unless ordered in writing with price named, and the fact that the work was extra stated, yet if the owner orally orders work and receives the benefit thereof he is liable therefor.[56] Where extra work is necessary to be performed before the terms of the contract can be carried out, the contractor is not entitled to abandon his contract but should do it himself recovering extra compensation therefor or demand of the owner to have it done.[57] The contractor cannot, however, recover for extra work demanded by the owner as a matter of right.[58]

§ 5. *Delay in performance.*[59]—Where a contract is indefinite as to the time of its completion, then the work must be done within reasonable time,[60] but, if a party contracts to do a certain thing within certain time without exceptions on account of contingencies which may arise, he is liable for nonperformance within the time stipulated, though unavoidably prevented,[61] unless he is hindered by the

47, 48. Colgan v. O'Rourke, 215 Pa. 308, 64 A. 529.

49. See 7 C. L. 485.

50. American Surety Co. v. Scott & Co., 18 Okl. 264, 90 P. 7.

51. Chicago Lumber & Coal Co. v. Garmer [Iowa] 109 N. W. 780.

52. See 7 C. L. 485.

53. The fact that the contractor had to dig to a great depth and use a large amount of material in laying a foundation cannot be charged for as extra where the contract provided that he should go to "solid ground." Hennessey v. Fleming Bros. [Colo.] 90 P. 77. Removing rubbish from premises at owner's request is an extra. Hennessey v. Fleming Bros. [Colo.] 90 P. 77. Work, though not shown by plant, held not an extra. Langford v. Manchester [Mass.] 81 N. E. 884.

54. Contract provided no alterations to be made without the written order of the architect. The change having been made without the written order the contractor sought to recover on the ground that it was an extra. Chicago Lumber & Coal Co. v. Garmer [Iowa] 109 N. W. 780.

55. Where a contractor agrees to dig a foundation to a certain depth but in blasting out rock loosened the rock to a greater depth and is compelled to take it out by the architect so that the foundation may be on solid rock, he cannot recover for such work as extra. Gallick v. Ebling, 52 Misc. 533, 102 N. Y. S. 803.

56. Clark v. Harris, 53 Misc. 556, 103 N. Y. S. 785. Where the owner familiar with carpentering sees a contractor doing work not called for by the contract and not ordered by him, he is liable therefor as for extra work. New York Metal Ceiling Co. v. Leonard, 48 Misc. 500, 96 N. Y. S. 187. Evidence held sufficient to show an order by the owner to subcontractor to do extra work. New York Metal Ceiling Co. v. Minsky, 104 N. Y. S. 759.

57. Contractor agreed to resurface a railroad bed. In order to do this it was necessary that some old grading be done. There was dispute as to whether this was included in the contract and contractor abandoned his contract. He could recover on quantum meruit. Henderson-Boyd Lumber Co. v. Cook [Ala.] 42 So. 838.

58. Gier v. Daiber [Mich.] 14 Det. Leg. N. 183, 111 N. W. 733.

59. See 7 C. L. 486.

60. Street improvement work. Paul v. Conqueror Trust Co. [Mo. App.] 102 S. W. 1070.

61. Beattie Mfg. Co. v. Heinz, 120 Mo. App. 465, 97 S. W. 188. Collapse of building due to defective plans. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387. Not excused by strike in brick factory from which contractor ordered brick. Neblett v. McGraw [Tex. Civ. App.] 103 S. W. 1113. A contractor who has agreed to commence excavations for a canal whenever ordered cannot excuse his failure to commence because of the fact that the ground was frozen. Harley v. Sanitary Dist., 226 Ill. 213, 80 N. E. 771. Where a contractor agrees to begin excavation work for a canal for a city when

fault of the other party,[62] an act of God, or the law.[63] In the event of delay due to such causes, the contractor's time is thus extended for a reasonable time,[64] and he is not required to abandon his contract but may continue and recover for any losses due to the delay.[65] A provision that the contractor waives all damages for delay caused by the owner, stipulating only for a proportional extension of the time to complete, is valid,[66] but a mere provision for proportional extension does not per se operate as a waiver of damages.[67] Where time is not of the essence of the contract, a failure to complete upon the agreed date will not prevent recovery,[68] less, however, the damage to the owner which is usually the loss of rent.[69] Delay due to errors in the architect's plans or specifications which could not have been detected by the contractor is excusable.[70] A provision that no allowance will be made for delays due to any cause whatsoever, unless claimed as soon as the cause for delay arises and the duration of the delay is certified by the architect, is binding and will be enforced by the courts.[71] As the damages resulting from delay are difficult of being ascertained and may be unusual and extraordinary, the parties should agree in advance as to what the damages shall be, for remote or speculative damages cannot be recovered,[72] and such stipulated sum will be binding in the absence of fraud or mistake.[73]

notified, after receiving notice he cannot justify a failure to commence work on the ground that the city has no title to the right of way when there has been a condemnation and he takes and holds possession. Id. Delay caused by mistake made by a contractor in the size of the base of a sarcophagus, the dimensions of which were given in the contract. Fish v. Correll [Cal. App.] 88 P. 489.

62. Architect's specifications wrong so that building could not be completed unless plans changed. This necessitated working over many parts constructed and for this contractor might recover extra compensation. Beattie Mfg. Co. v. Heinz, 120 Mo. App. 465, 97 S. W. 188; American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387. Delay caused by failure of architect to furnish specifications. Snead & Co. Iron Works v. Merchants Loan & Trust Co. 225 Ill. 442, 80 N. E. 237. Where two contracts for the construction of a pipe line were entered into, the mere fact that the owner requested contract B be performed before contract A does not show any excuse for delay. First Nat. Bk. v. Carroll [Mont.] 88 P. 1012. Where under a contract to construct a certain pipe line the owner gratuitously had an inspector at the factory where the contractor purchased material pass upon the same and such inspector allowed some defective material to pass him which had to be returned causing delay, the cause of these delays cannot be charged to the owner, for without his providing an inspector much more defective material might have been furnished. Id. Where a contract of street improvement was entered into on the understanding that the city had acquired a right of way, losses due to failure of such right of way may be recovered. Sheehan v. Pittsburg, 213 Pa. 133, 62 A. 642. Where a contractor agrees with a city to construct a street, removing all obstructions in the way, within a certain number of working days, and is delayed by telegrph poles of a railroad company and the laying of water pipes, none of which obstructions he had a legal right to remove, it was the duty of the city to see that these matters did not cause delay, and if delay was caused the contractor was entitled to credit therefor. Smith Cont. Co. v. New York, 115 App. Div. 180, 100 N. Y. S. 756.

63. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387.

64. The contractor was delayed far beyond the specified time by acts of the owner, and it was held that the reasonable time to be allowed him should be extended by reason of a strike occuring just as he was about to commence work. Barnum v. Williams, 115 App. Div. 694, 102 N. Y. S. 874.

65. Where, on default of a city in obtaining a right of way, a contractor for construction of a street is delayed, he does not waive losses due thereto by continuing the work. Sheehan v. Pittsburg, 213 Pa. 133, 62 A. 642. Because of a strike, wages were higher and it was necessary to employ inexperienced men, causing additional expense which contractor might recover for if due to owner's delay. Barnum v. Williams, 115 App. Div. 694, 102 N. Y. S. 874.

66. Merchants' Loan & Trust Co. v. U. S., 10 Ct. Cl. 117.

67. Cramp v. U. S., 41 Ct. Cl. 164.

68. Contractor prevented from completing excavation by frost in the ground. Cleveland, etc., R. Co. v. Scott [Ind. App.] 79 N. E. 226.

69. Ten per cent of the cost was held a correct estimate of the rental value. Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F. 672.

70. The contractor agreed to construct a very elaborate booth to be set up in the Agricultural Pavilion at the World's Fair. When the material arrived all ready to set up it was found that the floor fell away seven inches and it was necessary to reconstruct parts of the booth. Beattie Mfg. Co. v. Heinz, 120 Mo. App. 465, 97 S. W. 188.

71. Chapman Decorative Co. v. Security Mut. Life Ins. Co. [C. C. A.] 149 F. 189.

72. Dunnevant v. Mocksoud, 122 Mo. App. 428, 99 S. W. 515. Where materials sold to the owner for construction are so delayed that the owner is obliged to pay the con-

Where contractor failed to complete a building upon the agreed date but did so later, the owner is entitled to nominal damages at least.[74] Where a date is fixed for the completion of a contract, it is for the benefit of the owner and not the contractor, and he cannot refuse to continue his contract after the date set unless delay is caused by the owner.[75]

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§ 6. *Termination or cancellation of contract.*[76]—A contractor who is prevented from completing his work by acts of the owner may abandon his contract,[77] and he may recover for all work and material furnished up to the time of abandonment.[78] A difference of opinion as to the construction of a contract does not justify the contractor in abandoning the contract altogether.[79] Notifying a contractor that he is going to get some one else to perform the work is a rescission of the contract by the owner.[80]

§ 7. *Completion by owner or third person.*[81]—Where a contractor abandons his contract and the owner completes the same, the contractor may recover the balance of the contract price after deducting the cost of completion to the owner.[82] Where a contract has been rightfully canceled, and it is provided that under such circumstances the owner may complete the contract and recover of the contractor the sums expended in excess of the contract price, the owner is entitled to recover for all such sums expended in good faith and the reasonableness of the amount can not be questioned.[83] If it appears that the owner did work which should have been done by the contractor, a reduction will be allowed from the contract price.[84] Where

tractors large sums on this account, the seller is not liable unless he had notice of the contract between the owner and contractor at the time of the sale. Delivery of rails sold to railroad delayed several months. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551.

73. In a contract to decorate a building it was agreed that as damages would be difficult of computation the sum of fifty dollars a day for delay in completing the work would be considered as liquidated damages. Chapman Decorative Co. v. Security Mut. Life Ins. Co. [C. C. A.] 149 F. 189. Stipulation for five dollars a day as liquidated damages for delay in constructing house will be sustained by the court. Jenkins v. American Surety Co. [Wash.] 88 P. 1112. Where delay is caused by the contractor's fault, the owner may recover the rental value of the premises, lost by such delay, of the contractor's surety. Tally v. Ganahl [Cal.] 90 P. 1049.

74. Dunnevant v. Mocksoud, 122 Mo. App. 428, 99 S. W. 515.

75. Contractor ordered bricks of sufficient quantity to complete buildings, all to be delivered before Dec. 1st. They were not delivered at that time and brickmaker claimed the right to refuse to deliver at contract price after Dec. 1. Rosenthal v. Empire Brick & Supply Co., 104 N. Y. S. 769.

76. See 7 C. L. 488.

77. The plaintiff contracted to put iron stairs and elevators in defendant's building by a certain date but was prevented from doing so because the building was not ready to receive them. Barnum v. Williams, 115 App. Div. 694, 102 N. Y. S. 874. Contract to macadamize streets. Monthly payments to be made upon estimates by the city's engineer. These estimates were furnished but payment was not made and contractor abandoned his contract. Peet v. East Grand Forks [Minn.] 112 N. W. 1003. Evidence insufficient to show that contractor was notified by owner to discontinue drilling well. Lemaster v. Southern Missouri R. Co., 122 Mo. App. 313, 99 S. W. 500.

78. Plaintiff contracted to put in iron stairs and elevators in defendant's building by a certain date but was prevented from doing so owing to condition of the building. Part of the iron work had been set up and the remainder was manufactured and ready to be put in place. Barnum v. Williams, 115 App. Div. 694, 102 N. Y. S. 874. Payments were not made monthly as agreed. Peet v. East Grand Forks [Minn.] 112 N. W. 1003.

79. Difference of opinion between a contractor to construct sewers as to whether certain additional work made necessary by a change in the location of a sewer should be paid for at regular rates or at price for extra work. Somerset Borough v. Ott, 216 Pa. 557, 65 A. 1101.

80. Where a contractor agreed to construct buildings upon foundations already laid and, one of the foundation walls giving away, the owner wrote that not knowing who was responsible he would get a new contractor, this was a rescission of the contract. Colgan v. O'Rourke, 215 Pa. 308, 64 A. 529.

81. See 7 C. L. 488.

82. Bader v. New York, 101 N. Y. S. 351; Brown v. Mader, 105 N. Y. S. 70.

83. Baer v. Sleicher [C. C. A.] 153 F. 129.

84. Noyes v. Noullet & Co., 118 La. 888, 43 So. 539. Evidence of cost of completing house after taking possession by the owner should be admitted to show damages. Smith v. Davis [Ala.] 43 So. 729. Defendant held entitled to set off an amount necessarily spent in completing work abandoned by the

a contract provides that the architect "shall be at liberty" to complete the contract upon default by the contractor at the contractor's expense, an action may be brought against the contractor for breach, although the architect has made no attempt to complete.[85]

§ 8. *Architect's and other certificates of performance, and arbitration of disputes.*[86]—Where the architect's certificate is provided for in the contract as a condition precedent to recovery or for any other purpose, its production is necessary despite actual performance [87] in the absence of evidence that it is wrongfully withheld,[88] or its production waived,[89] or the contractor has abandoned the work [90] or has been ousted under another clause of the contract.[91] The certificate is final [92] in the absence of fraud or such gross mistake as implies bad faith,[93] although in construing provisions in a building contract for arbitration of differences by the architect the courts will adopt the construction sustaining the jurisdiction of the

contractor which was of the original contract. Conroy v. Carlin, 96 N. Y. S. 141.

85. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387.

86. See 7 C. L. 489.

87. Traitel v. Oussani, 101 N. Y. S. 105; American Bonding & Trust Co. v. Gibson County [C. C. A.] 145 F. 871; Paul v. Conqueror Trust Co. [Mo. App.] 102 S. W. 1070; Neblett v. McGraw [Tex. Civ. App.] 103 S. W. 1113; Provost v. Shirk, 223 Ill. 468, 79 N. E. 178. Where liquidated damages were provided for delay upon the architect's certificate fixing the delay, the contractor cannot recover any damages except those actually sustained without producing such certificate. Swift Co. v. Dolle [Ind. App.] 80 N. E. 678. Certificate that granite satisfactory. Standard Const. Co. v. Brantley Granite Co. [Mass.] 43 So. 300.

88. Donegan v. Houston [Cal. App.] 90 P. 1073; Provost v. Shirk, 223 Ill. 468, 74 N. E. 178; Neblett v. McGraw [Tex. Civ. App.] 103 S. W. 1113; Paul v. Conqueror Trust Co. [Mo. App.] 102 S. W. 1070; American Bonding & Trust Co v. Gibson County [C. C. A.] 145 F. 871.

89. Where architect's certificate is necessary to allow for delays, yet, if all parties meet and agree upon a final settlement the architect issuing a certificate therefor, the owner cannot claim liquidated damages provided for delay on the ground that the architect has not given a certificate allowing such delay. Bloomington Hotel Co. v. Garthwait [Ill.] 81 N. E. 714.

90. Certificate of completion is waived where the owner completes the building according to the terms of the contract. Bader v. New York, 101 N. Y. S. 351. Where a building contract provided for the employment of more men by the owner at the contractor's expense if the architect certified that not enough men were employed, and the contractor abandoned the contract altogether, the owner may complete the work and recover damages without the architect's certificate, for this was provided for in the case of the displacement of the contractor against his will, but does not apply where he voluntarily abandons the contract and forces the other party to perform the entire work. Smith v. Jewell [Md.] 65 A. 6. Where a contract with a subcontractor provided that the contractor might complete the work upon a certificate from the architect that there was occasion for it, such a certificate is not necessary where the subcontractor has abandoned his work, and the contractor may complete the work and recover of the surety without any certificate. United States Fidelity & Guaranty Co. v. Probst, 30 Ky. L. R. 63, 97 S. W. 405. Where a contractor has abandoned his contract, the architect's certificate of completion is not necessary in a suit by the owner against the surety. Jenkins v. American Surety Co. [Wash.] 88 P. 1112. Expense of owner in completing contract held not within arbitration clause. Main Inv. Co. v. Olsen [Wash.] 86 P. 1112.

91. Jonathan Clark & Sons Co. v. Pittsburgh, 146 F. 441.

92. Shead & Co. v. Field, 124 Ill. App. 558. Arkansas Missouri Zinc Co. v. Patterson, 79 Ark. 506, 96 S. W. 170; Loftus v. Jorjorian [Mass.] 80 N. E. 235; Lohr Bottling Co. v. Ferguson, 223 Ill. 88, 79 N. E. 35. After final certificate given, owner cannot sue contractor's surety because of inferior material used. Carnegie Public Library Ass'n v. Harris [Tex. Civ. App.] 97 S. W. 520. Engineer to make estimates as a basis for payment for work done in grading a railroad. Edwards v. Hartshorn, 72 Kan. 19, 82 P. 520. Excavations for a roadbed, payments to be based on estimates made by the railroad engineers. Cook v. Foley [C. C. A.] 152 F. 41. Where a contract provided for decision of matters in dispute by the engineer, with a right of appeal to a body of three arbitrators, the engineer's decision is final in the absence of fraud unless an appeal is taken and is a defense to an action at law. Roberts, Johnson & Rand Shoe Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218. Contract for the construction of a railroad. Carlile v. Corrigan [Ark.] 103 S. W. 620.

93. Cook v. Foley [C. C. A.] 152 F. 41; Roberts, Johnson & Rand Shoe Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218. Allegations that contractor was prevented from completing his contract by force, and that the judgment of the architect in refusing an extension of time was wrongful and unjust, are insufficient to admit proof that the architect acted fraudulently or made a mistake so gross as to imply bad faith. Standard Const. Co. v. Brantley Granite Co. [Miss.] 43 So. 300.

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court rather than that ousting it.[94] A very high degree of proof is required to impeach the finding of an engineer whose estimates of work done are made final by the contract.[95] Such a provision is not binding where it is subsequently agreed between the parties that the decision shall not be relied on [96] or another umpire is substituted by consent of the parties.[97] A provision in a contract that work shall be satisfactory to a named person is also binding, and the contractor cannot recover unless it is so satisfactory,[98] but a mere arbitrary or capricious expression of dissatisfaction would not prevent recovery.[99] Where an architect in making a finding departs from the authority conferred upon him by the contract and his award is made as an entirety, it is not binding and is wholly ineffectual.[1] An arbitrator authorized to pass upon any question or dispute is entitled to determine whether one party is entitled to recover a liquidated sum provided for as damages for delay.[2] A provision for the work on a building to be performed in the best manner and the materials of the best quality, subject to the acceptance or rejection of the architect, all to be done in strict accordance with the plans and specifications, does not make the acceptance by the architect final and conclusive and will not bind the owner or relieve the contractor from the agreement to perform according to plans and specifications.[3] Though no provision is made as to the effect of engineers if the owner habitually pays thereon without question, estimates after the establishment of such usage will be treated as prima facie evidence.[4] The certificate may be by the architect acting at the time the certificate is required [5] and should substantially certify the facts as

94. Owner to supply more men if architect certified not enough men employed. Contractor abandoned contract and owner completed without architect's certificate, and it was held this situation was not contemplated by the contract. Smith v. Jewell [Md.] 65 A. 6. Where a contract provided for arbitration of all differences, and also for the removal of the contractor by the engineer if he saw fit, if the contractor is removed this is a waiver of a right of arbitration, and the contractor is entitled to bring an action at law to determine his damages. Clark & Sons Co. v. Pittsburgh, 146 F. 441.

95. Findings as to amount of earth excavated. Cook v. Foley [C. C. A.] 152 F. 41. The fact that the decision of an umpire differs from that of others subsequently employed is no evidence of fraud or gross mistake. Carlile v. Corrigan [Ark.] 103 S. W. 620.

96. An estimate of the amount of work done, rendered by an umpire, does not preclude an action on the contract where by agreement of the parties a more correct estimate is to be made. Edwards v. Hartshorn, 72 Kan. 19, 82 P. 520.

97. Seretto v. Rockland, etc., R. Co., 101 Me. 140, 63 A. 651.

98. Arkansas-Missouri Zinc Co. v. Patterson, 79 Ark. 506, 96 S. W. 170. Where the plaintiff contracted to install a concentrator to the satisfaction of one of the members of the defendant corporation, which member was present and watched the process of installing the machinery and expressed no dissatisfaction, he cannot recover if the member refuses to accept the work after it is finished, for the member was not estopped from refusing to accept by his previous silence. Id.

99. Contractor to install a concentrator to the satisfaction of the purchaser. Arkansas, Missouri Zinc Co. v. Patterson, 79 Ark. 506, 96 S. W. 170.

1. Architect in making an award determined that certain photographs were parts of an ambiguous contract, and that a certain letter referring to the same ambiguity was not, while the court found the reverse to be true and upset the award. Snead & Co. Iron Works v. Merchants Loan & Trust Co., 225 Ill. 442, 80 N. E. 237.

2. Director of public works appointed arbitrator by a contract found that delays caused in the work of building a reservoir were not due to the contractor and that the city was not entitled to liquidated damages of $100 per day as provided in the contract for delay. Jonathan Clark & Sons Co. v. Pittsburg [Pa.] 66 A. 154.

3. Action against contractor's surety. Defendant objected to evidence that building not up to specifications on the ground that the architect had certified that the building was properly constructed. Evidence held admissible. Mercantile Trust Co. v. Hensey, 205 U. S. 298, 51 Law. Ed. 811.

4. Freygang v. Vera Cruz & P. R. Co. [C. C. A.] 154 F. 640.

5. Where a contract provided that the architect should certify any damage to the owner caused by the contractor, and the contractor abandoned the work and the architect was discharged, the work being completed by a new contractor and a new architect, a certificate of damage signed by the new architect and the only remaining member of the firm of original architects is a sufficient certificate entitling recovery of damages from the surety. Tally v. Ganahl [Cal.] 90 P. 1049; McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229.

to which certificate is required.[6] A final certificate usually exhausts the power to certify.[7]

§ 9. *Acceptance.*[8]—The occupation or taking possession of buildings not in compliance with the requirements of the contract is not an acceptance,[9] and, where a test or certificate is provided for in the contract, acts of possession antecedent thereto will not ordinarily be considered an acceptance;[10] but where the owner, though protesting, takes possession of a building, pointing out defects which the contractor remedies, and the contractor requests that any further defects be pointed out to him, this is conduct on the part of the owner amounting to acceptance.[11]

§ 10. *Payment.*[12]

§ 11. *Subcontracts.*[13]—A time limit known to the subcontractor will be imported into the subcontract, though it contains no time limit,[14] but a reference by a subcontractor to the plans and specifications for a specific purpose does not of itself imply an intention to adopt the same with respect to all other provisions, and it is competent to refer to such contract for a specific purpose only,[15] and adoption by subcontract of so much of original contract as was applicable has been held not to adopt provision that extra work should not be allowed for unless ordered by engineer in writing.[16] Where a subcontractor abandons his contract and the contractor completes it, he is entitled to recover of the subcontractor only his necessary and reasonable expenses and not necessarily the actual cost,[17] but the subcontractor is not liable in damages for default due to the contractor.[18] For delay of a subcontractor, the contractor may recover wages and hire of men and machinery kept idle, but ordinarily

6. Where an architect's certificate is required before payment, a statement of a claim for a lien filed in court marked "O. K. except the last item" and signed by the architect is not sufficient. Provost v. Shirk, 223 Ill. 468, 79 N. E. 178. An itemized account of amounts expended by the owner in completing a builder's contract introduced in evidence in a suit against the surety which is signed by the architect who swears on the stand that he has approved and certified each item is a substantial compliance with a contract requirement that amounts so expended should be audited and certified by the architect. McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229.

7. Power of engineer held exhausted by first certificate so that second was nullity. City of St. Charles v. Stookey [C. C. A.] 154 F. 772.

8. See 7 C. L. 491.

9. Douglas v. Lowell [Mass.] 80 N. E. 510; Gier v. Daiber [Mich.] 14 Det. Leg. N. 183, 111 N. W. 773. Where a contractor has built an addition to a house and turned it over as completed to a third party to plaster, the act by the owner of having it plastered is not an acceptance. Schindler v. Green [Cal. App.] 82 P. 341.

10. Getting ready to use a tank in case it met a test held no acceptance. Logan v. Consolidated Gas Co., 107 App. Div. 384, 95 N. Y. S. 163. Where a contractor agreed to construct and deliver a gas holder and tank complete, and that the structure should not be accepted until tested, the mere delivery of bills of sale to the owner as the work progressed was not a modification of the contract, or an acceptance, so as to render the owner liable for the loss due to a destruction of the tank while being tested. Id. It was immaterial where the title to the property was during performance. Id. Where a contractor has abandoned his work after supplying defective materials and some payments have been made on account, there is no acceptance of the material where the contract provided for an architect's certificate of completion, and also that payments on account should not be construed as acceptance of work done. Jenkins v. American Surety Co. [Wash.] 88 P. 1112.

11. Gier v. Daiber [Mich.] 14 Det. Leg. N. 183, 111 N. W. 773. Where a contractor agrees to do work satisfactory to the owner's superintendent, and after doing some work is told that it is not satisfactory, evidence that the owner and superintendent agreed to accept the work if certain changes were made which was done is sufficient to show that work was satisfactory to the superintendent. Lang v. Crescent Coal Co. [Wash.] 87 P. 261.

12, 13. See 7 C. L. 492

14. Noyes v. Noullet & Co., 118 La. 888, 43 So. 539.

15. Bid by subcontractors for glass specified in a building contract, reference to specifications being only for purpose of determining amount and sizes. Noyes v. Butler Bros., 98 Minn. 448, 108 N. W. 839.

16. Beattie v. McMullen [Conn.] 67 A. 488.

17. Seventh St. Planing Mill Co. v. Schaefer, 30 Ky. L. R. 623, 99 S. W. 341. In an action by a subcontractor against the contractor,t conractor held entitled to deduct value of digging a trench, which work had been included in the subcontractor's contract and omitted by him. Scanlon v. Miller, 98 N. Y. S. 662.

18. Failure to supply material. Seventh St. Planing Mill Co. v. Schaefer, 30 Ky. L. R. 623, 99 S. W. 341.

not for loss of his own time, or injury to business reputation or hypothetical damages which could not have entered into the minds of the parties at the time of contracting.[19] The contractor has no right to do work called for by a subcontractor at the expense of the subcontractor without notice to him.[20] The owner who in good faith pays the contractor in full is not liable to the subcontractor for work done.[21] A contract with a subcontractor providing that the contractor might take possession of all the subcontractor's tools and material upon his failure to perform is not susceptible of specific performance unless it appears that no similar property could be obtained in the market.[22]

§ 12. *Bonds.*[23]—In determining the liability of the parties to a surety bond, it should be construed with the original contract.[24] The surety's liability being measured in part by the terms of the original contract, it is important that this liability be not changed by material changes in the substance of the original contract or deviation from its provisions,[25] but immaterial alterations of a contract by the owner without the builders' knowledge will not discharge the surety,[26] nor will an immaterial departure from the provisions of the contract.[27] Defense by a surety

19, 20. Noyes v. Noullet & Co., 118 La. 888 43 So. 539.

21. Drall v. Gordon, 101 N. Y. S. 171.

22. Lewman & Co. v. Ogden Bros, 143 Ala. 351, 42 So. 102.

23. See 7 C. L. 493.

24. First Nat. Bk. v. School Dist. No. 1 [Neb.] 110 N. W. 349. Where a contract provided that monthly payments should be made, 20 per cent of the amount due to be retained by the owner and a surety bond given to the owner provided that not less than 15 per cent of the monthly installments should be retained, payments of all but 15 per cent was not such a breach of the original contract as would release the surety. American Surety Co. v. Scott & Co., 18 Okl. 264, 90 P. 7. In a suit on a surety bond which refers to the contract, plans, and specifications, the obligations of the bond must be construed according to the terms of the contract, plans, and specifications. McArthur v. McGilvray [Ga. App.] 57 S. E. 1058. Contractor's contract provided for a bond securing materialmen and laborers but the city accepted a bond which did not secure these. The bond could not be extended to cover these. Smith v. Bowman [Utah] 88 P. 687. Where a contract for putting in place a steam heating plant provided for certain payments upon the architect's certificate and it appeared, after the contractor abandoned the contract, that over payments had been made, but all on architect's certificates, which certificates were given in good faith by the architect, the owner acted according to the terms of the contract, and the surety cannot complain. City of New Haven v. National Steam Economizer Co., 79 Conn. 482, 65 A. 959. Where a surety bond provides that not more than 80 per cent of the value of work done shall be paid for, and further provides that the owner shall perform all the things set forth in the original contract, and one of its provisions is that the owner shall pay for work as certified to by the architect, the surety would not be released if in compliance with the terms of the contract all payments were made on the architect's certificates, but some payments, owing to mistake or collusion with the contractor on the part of the architect, were over 80 per cent. McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229. Specified sums provided for in the contract, to be used by the owner in supplying hardware and fixtures on approval by the architect, may be recovered of the surety if paid out as provided. Jenkins v. American Surety Co. [Wash.] 88 P. 1112.

25. City of New Haven v. National Steam Economizer Co., 79 Conn. 482, 65 A. 959.

26. The inserting of words specifically stating that a barn was to be painted where this fact was clearly implied from the original language. McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229.

27. Certificates calling for payments dated and paid upon different dates from that provided in the contract City of New Haven v. National Steam Economizer Co., 79 Conn. 482, 65 A. 959.

Surety held not released: The fact that the contractors proceed with the work after the date upon which the contract required completion does not amount to an extension of time granted by the owner so as to relieve a surety. America Surety Co. v. Scott & Co., 18 Okl. 264, 90 P. 7. A continuance of work under a contract beyond the time specified for its completion does not constitute such a novation of the contract as will discharge the surety. Wing & Bostwick v. U. S. Fidelity & Guaranty Co., 150 F. 672. Where it is provided that a certain sum shall be retained out of the contract price until the building is completed, the payment of laborers out of this sum, who would otherwise have filed liens which the surety would have to satisfy, is not a breach sufficient to discharge the surety. United States Fidelity & Guaranty Co. v. Trustees of Baptist Church of Columbus. [Ky.] 102 S. W. 325. Surety is not released by alterations if contract provided that owner may take changes in the plans (American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387), or where bond provides that changes may be made in the contract (American Surety Co. v. Scott & Co, 18 Okl. 264, 90 P. 7). Where overpayments are made to a contractor upon estimates furnished by the

that owner did not reserve payments as provided for in the contract is unavailable where not pleaded.[28] Under United States statutes providing for the giving of a bond by the contractor to pay all claims for labor and material, etc., where a contractor's surety was compelled to pay labor and material claims to an amount exceeding that due from the government, the surety is subrogated to the funds due to such laborers and materialmen in preference to a mere debt for money lent.[29] Where a contractor, unable to complete his contract, obtains assistance from another who is to receive as compensation a percentage of the gross outlay, such other person is not a subcontractor but a lender of credit and as such is not entitled to recover a deficit from the contractor's surety under the United States statute providing for a bond to protect laborers and materialmen.[30] The surety of a defaulting contractor is preferred in his right to be subrogated to earned payments over an equitable assignee of the contract.[31] Rights under a general surety bond may be assigned.[32] A contractor's surety bond which provides that he shall pay for material and labor used in the construction of a building is not only for the benefit of the owner but for laborers and materialmen who may sue to enforce the same in their own names.[33] The owner after abandonment of contract by contractor may recover against the surety for amounts of liens paid by him which contractor has admitted as proper,[34] and attorney's fees in defending a mechanic's lien where it

architect, as provided in the contract, the owner is not chargeable with the inefficiency or mistakes of his architect, provided an attempt at an estimate is really made if the deficiencies are not so great as to put him on inquiry or he has no actual notice of the incorrectness of the estimates. Architect made estimates for payment for marble based on invoices on which material was shipped from the quarry and on representations of the builder. Fidelity & Deposit Co. v. Agnew [C. C. A.] 152 F. 955. The failure to complete a contract on time is not such breach and abandonment of the contract as requires **notice from owner to surety** as provided for in bond. American Surety Co. v. Scott & Co., 18 Okl. 264, 90 P. 7. Where a subcontractor's surety had received notice of the termination of the contract both from the architect and the contractor, who was liable under his contract to complete the work the subcontractor was about to abandon, the fact that a new contract is made, not differing substantially from the conditions of the original contract, without notice to the surety, did not release the surety from liability. Wing & Bostwick Co. v. United Sttes Fidelity & Guaranty Co., 150 F. 672. Contractor ceased work, owing to weather in January claiming that he would complete his contract at the stipulated time. In April the owner definitely learned that he had abandoned his contract and sent written notice within thirty days to the surety. This was sufficient. United States Fidelity & Guaranty Co. v. Trustees of Baptist Church of Columbus [Ky.] 102 S. W. 325.

Surety held released: If a stipulation for a reservation of part of the contract price until after completion is waived by the owner without consent of the surety, it operates to discharge him. National Surety Co. v. Long, 79 Ark. 523, 96 S. W. 745, Where a contract provides for the payment of a contractor as the work progresses for labor and materials as estimated by the architect, an advance or overpayment so prejudices a surety that it operates as a discharge as a matter of law. Fidelity & Deposit Co. v. Agnew [C. C. A.] 152 F. 955.

Failure to notify the surety that the contractor would not be able to complete his contract on time until two weeks have elapsed since the actual failure to complete on time is a substantial breach, and action cannot be maintained against surety. Surety provided that if at any time it appeared that contractor would not be able to complete the building on time the owner would immediately notify the surety company. National Surety Co. v. Long, 79 Ark. 523, 96 S. W. 745. A provision in a surety bond that the surety shall not be liable unless notified at once of the failure of the insured contractor to carry out his contract is of the esence of the surety contract, and, unless such notice is given, no damages can be recovered of the surety. United States Fidelity & Guaranty Co. v. Rice [C. C. A.] 148 F. 206.

28. United States Fidelity & Guaranty Co. v. Probst, 30 Ky. L. R. 63, 97 S. W. 405.

29. Henningsen v. U. S. Fidelity & Guaranty Co. [C. C. A.] 143 F. 810.

30, 31. Hardaway v. National Surety Co. [C. C. A.] 150 F. 465.

32. A contractor assigned to the owner his rights under a subcontractor's surety bond. Wing & Bostwick v. U. S. Fidelity & Guaranty Co., 150 F. 672.

33. Ochs v. Carnahan Co. [Ind. App.] 80 N. E. 163. Although statutes prohibit liens against public buildings, and there is no express authority for the trustees of the state college to take a bond from contractor securing payment for labor and material, yet a bond taken may be enforced by the beneficiaries. Smith v. Bowman [Utah] 88 P. 687.

34. Jenkins v. American Surety Co. [Wash.] 88 P. 1112. A contractor may recover of a subcontractor's surety the amounts paid to satisfy liens. United States

is provided that the contractor shall deliver the premises free of liens.[35] Materialmen may sue on bond in name of obligee to their use.[36] A bond allowing recovery in the name of the owner by parties furnishing material to the contractor cannot be taken advantage of by one supplying material to a subcontractor where the original contract provides that the owner will recognize none but the original contractors throughout the transaction.[37] Where a surety bond provided that the surety should be liable until completion and acceptance of a building, the surety's liability continued until both contingencies occurred.[38]

§ 13. *Remedies and procedure* [39] differ in no way from those allowed on other contracts, and are elsewhere treated.[40]

BUILDING AND LOAN ASSOCIATIONS.

§ 1. Definition and Statutory Regulation (437).
§ 2. Membership and Stock (437).
§ 3. Loans and Mortgages (438).
A. In General (438).
B. Applicability of, and Exemption from, Usury Laws (438).
C. Accounting with Borrower While Solvent (439).
D. Accounting After Insolvency (439).
§ 4. Termination and Insolvency (440).
§ 5. Rights of Withdrawing Shareholders (440).

§ 1. *Definition and statutory regulation.*[41]—A foreign company has no standing as a loan association in another state if from its powers and business transactions it is not such an association within the laws of that state.[42]

§ 2. *Membership and stock.*[43]—Though shares are illegally issued, members who accept them and receive the benefits conferred will not be permitted to assert their invalidity to the prejudice of others.[44] One may recover against an association for deceit in procuring stock subscriptions by false representations as to solvency and readiness to make loans.[45]

Charters and by-laws.[46]—The board of directors of an Illinois homestead and loan association have no power to enact by-laws.[47]

Kinds of stock.[48]—The issuance of a kind of stock not authorized by the act under which an association was incorporated is ultra vires the association.[49]

Payments of dues.[50]—Since the right of an association to impose fines for failure to pay dues or other charges is statutory only, the legislature may limit it even as to already existing loans.[51] A court will not enforce a by-law which is ambiguous as to the principle on which a fine is to be calculated.[52]

Maturity of stock and rights of holders of matured stock.[53]—A by-law provid-

Fidelity & Guaranty Co. v. Probst, 30 Ky. L. R. 63, 97 S. W. 405.

35. Tally v Ganahl [Cal.] 90 P. 1049.

36. City of Flora v. Searles, 127 Ill. App. 465.

37. Plaintiff supplied paint to subcontractor to do the painting. Contract provided that it should not be transferred, nor any interest therein, to other parties. Mosier v. Kurchhoff, 101 N. Y. S. 643.

38. Suit for premium. Length of time bond in force. Aetna Indemnity Co. v. Ryan, 53 Misc. 614, 103 N. Y. S. 755.

39. See 7 C. L. 496.

40. See Contracts, 7 C. L. 761.

41. See 7 C. L. 500.

42. Minnesota corporation held not a homestead loan association, within meaning of Illinois statute. Cobe v. Airey, 125 Ill. App. 43.

43. See 7 C. L. 500.

44. Shares constituting a guaranty to other stock. People v. New York Bldg. Loan Banking Co., 104 N. Y. S. 892.

45. Petition sufficient without allegation that plaintiff had applied for a loan. Trollinger v. Amarillo Sav. & Loan Co. [Tex. Civ. App.] 103 S. W. 199.

46. See 7 C. L. 500.

47. As to interest and premium rates. Free Home Bldg., Loan & Homestead Ass'n v. Edwards. 124 Ill. App. 191.

48. See 7 C. L. 501.

49. Act Apr. 9, 1875, does not authorize issue of income stock. Bettle v. Republic Sav. & Loan Ass'n [N. J. Eq.] 64 A. 176.

50. See 7 C. L. 501.

51. Act April 8, 1903 (P. L. 457), held applicable to loan made before its passage. Egg Harbor Bldg. & Loan Ass'n v. Baake [N. J. Eq.] 65 A. 864.

52. Where it failed to specify the principal on which a certain per cent of forfeiture should be computed. Egg Harbor Bldg. & Loan Ass'n v. Baake [N. J. Eq.] 65 A. 864.

53. See 7 C. L. 501.

ing that no profit or interest shall be paid on stock after it has matured does not disable the association from borrowing from a holder of matured stock the amount he is entitled to receive therefor;[54] and the association will not be heard to deny the power of its executive officers to execute a note for such amount pursuant to a custom prevailing in the management of its business.[55] One who receives such a note in settlement is no longer a member but a creditor of the association regardless of the validity of the note.[56]

§ 3. *Loans and mortgages. A. In general.*[57]—In the absence of statutory restrictions the power of an association to borrow money is implied from the general nature of its business.[58] In any event a plea of ultra vires is unavailing in a suit to enforce a certificate issued for money borrowed for the benefit of its members where it refuses to restore the benefits received and outside creditors are not involved.[59]

An association may estop itself by its conduct or negligence from showing that its president had not authority under its by-laws to accept payment of a mortgage from a member and cancel the mortgage.[60] Notice to the secretary of an incorporated association of the fraudulent release of a mortgage is notice to the association.[61] Fines cannot be included in a foreclosure decree where not provided for either by the bond or the mortgage.[62]

An association has power to transfer an ordinary negotiable note not given by a member for money borrowed by him.[63]

(§ 3) *B. Applicability of, and exemption from, usury laws.*[64]—While homestead and loan associations are often authorized by statute to charge more than the legal rate of interest, they can do so only by compliance with the statutory conditions.[65] Under statutes requiring competitive bidding, loans made without it are usurious if more than the legal rate is charged.[66] An unauthorized bid made for a member may be ratified by his direction that the association appropriate a portion of the loan to the premium bid.[67] One is not estopped to assert usury because he received the loan and paid the illegal rates where he was without knowledge that the rates were not fixed by by-law as required by statute.[68] Where it is

54. Bohn v. Boone Bldg. & Loan Ass'n [Iowa] 112 N. W. 199.

55. Where there were blanks for signatures of president and secretary and transaction was entered on "bills payable book." Bohn v. Boone Bldg & Loan Ass'n [Iowa] 112 N. W. 199, rvg. on rehearing [Iowa] 108 N. W. 1025.

56. Bohn v. Boone Bldg. & Loan Ass'n [Iowa] 112 N. W. 199. See post, § 4.

57. See 7 C. L. 502.

58. Bohn v. Boone Bldg. & Loan Ass'n [Iowa] 112 N. W. 199.

59. Bettle v. Republic Sav. & Loan Ass'n [N. J. Eq.] 64 A. 176.

60. Held estopped as against a member and a second mortgagee where it had permitted its president to act in such matters. Manchester Bldg. & Loan Ass'n v. Beardsley [N. J. Eq.] 66 A. 1.

61. Schumacher v. Wolf, 125 Ill. App. 81.

62. That the word "fines" appeared in the proviso of the mortgage was not sufficient. Egg Harbor Bldg. & Loan Ass'n v. Baake [N. J. Eq.] 65 A. 864.

63. Note taken out of ordinary course. Russell v. Cassidy, 122 Mo. App. 565, 99 S. W. 781.

64. See 7 C. L. 503.

65. There must be either competitive bidding or valid by-law. Free Home Bldg. Loan & Homestead Ass'n v. Edwards, 223 Ill. 126, 79 N. E. 64. The attempted fixing of interest and premium rates by the resolution of a board of directors having no power to enact by-laws is not a compliance with a statute authorizing the fixing of rates by by-law instead of by competitive bidding. Loan held usurious. Free Home Bldg., Loan & Homestead Ass'n v. Edwards, 124 Ill. App. 191; Id., 223 Ill. 126, 79 N. E. 64.

66. Cobe v. Airey, 125 Ill. App. 43; Roeser v. German Nat. Bldg. & L. Ass'n, 32 Pa. Super. Ct. 100, by divided court. Loan held usurious where fifteen applicants had been instructed beforehand that they would be required to pay 6 per cent in addition to legal rate, and made applications on such terms which were passed on without competition. Klein v. Pennsylvania Sav. Fund & Loan Ass'n, 216 Pa. 516, 65 A. 1103.

67. Equitable Bldg. & Loan Ass'n v. Thomas, 216 Pa. 671, 65 A. 1100.

68. Where fixed only by an unauthorized resolution of board of directors. Free Home Bldg. Loan & Homestead Ass'n v. Edwards, 223 Ill. 126, 79 N. E. 64.

clear that a borrower also sustains to the association the relation of a bona fide stockholder, stock dues will not be credited as payments on the loan for the purpose of determining whether such loan was usurious;[69] and a transaction is not usurious if there is nothing to prevent the borrower from discharging the note by payment according to its terms and also paying up the stock and holding it as absolute owner.[70] A purchaser who assumes payment of a usurious loan as a part of the consideration cannot be relieved from the usury.[71]

(§ 3) *C. Accounting with borrower while solvent.*[72]—A borrower may agree to have all past and future payments of dues on the stock credited on the loan,[73] and it is immaterial that the election is written in the assignment of the stock as collateral rather than on the bond and mortgage where the different papers are delivered concurrently in one transaction.[74] But in the absence of any agreement to that effect, stock payments will not be applied on the loan.[75] Usurious premiums may be credited on the debt,[76] but will not always be credited as of the date of payment or draw interest from that date.[77]

(§ 3) *D. Accounting after insolvency.*[78]—Upon the appointment of a receiver in insolvency, mortgages held against members immediately become due and may be foreclosed,[79] and limitations will run from that time.[80] The prevailing doctrine seems to be that payments on stock cannot then be credited on the debt,[81] though in some states it is held that a member is entitled to credit on the loan not only for premiums and interest but also for stock dues.[82] In Pennsylvania the borrower may not after insolvency elect to receive such credit,[83] but insolvency does not affect the validity of an election made prior thereto.[84] The act of an association in depositing with an officer of another state its securities as a condition to doing business in that state and as a trust fund for members in that state only, destroys the fundamental principle upon which its organization was based;[85] and in a suit to enforce a bond and mortgage so deposited and given by one not residing in that state, his contract with the association will be held by such act to have been abrogated ab initio,[86] and he will be regarded as a simple debtor and credited with all sums paid as interest or stock dues.[87] Such member is not estopped to question the act of the association in thus giving a preference to other members where he is without knowledge thereof until after the insolvency.[88]

69. Bank of Loudon v. Armor [Miss.] 44 So. 66.

70. Rabb v. Texas Loan & Investment Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 618, 96 S. W. 77.

71. Where vendor did not plead usury nor consent that plaintiff might do so, and there was no novation or release of the vendor. Aggleson v. Middle States Loan, Bldg. & Const. Co. [W. Va.] 56 S. E. 177.

72. See 7 C. L. 504.

73, 74. Kurtz v. Campbell, 31 Pa. Super. Ct. 516.

75. A by-law for the payment of one-half per cent monthly interest on the loan, and providing that interest shall be annually reduced by deducting interest on contributions made on stock, held not to authorize crediting of stock payments on the loan. Haspel v. Moffit, 32 Pa. Super. Ct. 344.

76. Roeser v. German Nat. Bldg & Loan Ass'n, 32 Pa. Super. Ct. 100.

77. Roeser v. German Nat. Bldg. & Loan Ass'n, 32 Pa. Super. Ct. 100, affirming, by divided court, decree below.

78. See 7 C. L. 505.

79. Graves v. Seifried [Utah] 87 P. 674. After insolvency and the appointment of a receiver, further performance of the contract with borrowing members is impossible and an equitable adjustment betwen the association and such members may then be made. Preston v. Albee, 105 N. Y. S. 33. Where the referee excluded the bond and mortgage in an action to foreclose, though the same were properly executed and acknowledged, and also the judgment appointing the receiver, a judgment dismissing the complaint but finding that the receiver had been duly appointed could not stand. Preston v. Arthur, 105 N. Y. S. 36.

80. Graves v. Seifried [Utah] 87 P. 674.

81. Sokoloski v. New South Bldg. & Loan Ass'n [Miss.] 43 So. 674; Bank of Loudon v. Armor [Miss.] 44 So. 66.

82. Where mortgage provided for payment of premium, interest, and dues until maturity of stock at par. Preston v. Woodland, 104 Md. 642, 65 A. 336. See 7 C. L. 506, N. 55.

83. Haspel v. Moffitt, 32 Pa. Super. Ct. 344.

84. Kurtz v. Campbell, 31 Pa. Super. Ct. 516.

85, 86, 87, 88. Clark v. Darr [Ind.] 80 N. E. 19.

§ 4. *Termination and insolvency.*[89]—A receiver will not be appointed for a reorganized association on mere suggestion that the trustees were too closely connected with the former management, and criticism as to the manner of their selection.[90] The impounding of assets and appointment of receivers does not deprive an association of power to employ counsel to defend its interests.[91] When authorized by the court a receiver may maintain an action against a stockholder to recover a fund unlawfully withdrawn and which belongs to the association for distribution among all the stockholders.[92]

General creditors are entitled to priority from the assets against the shareholders as such.[93] The holders of certificates for the payment of money issued by an association for the purpose of raising funds for the benefit of its borrowing members and secured by cash or securities in the hands of a trustee are creditors and not stockholders and are entitled to be paid by the trustee in full and without deductions for cost, expenses, or premiums.[94] After stock has matured and the holder has been given a note for the amount found due, he also occupies the position of a creditor, and whether the note be valid or not he cannot be relegated to the position of a member where the association was solvent until after he retired, though insolvent long before it ceased to do business.[95] Where persons deposit money with an organization styled a saving association receiving passbooks certifying that the depositor as a member is entitled to deposit shares to the amount of the credit balance therein stated bearing a dividend payable out of the earnings, such persons become members of the association and are not saving depositors of a bank within the meaning of a statute prefering such depositors in the case of the inolvency of any bank or association formed under its provisions.[96]

The right to priority from the assets as between different classes of shareholders will depend on the terms of the charter and by-laws.[97] The different classes will be treated alike as to the principal of the stock in the absence of provisions to the contrary;[98] but holders of stock issued "as a guaranty to the other classes of shares" in consideration of increased dividends and to provide a permanent capital for the association will be postponed to the holders of other stock.[99] If the holder of matured stock receives a part of its value before the appointment of a receiver and without knowledge of the insolvent condition of the association, his subsequent transferee will be entitled to dividends on the balance equally with the other stockholders without accounting for the amount paid by the association to his transferrer.[1]

§ 5. *Rights of withdrawing shareholders.*[2]—Insolvency suspends a previously

89. See 5 C. L. 486.

90. Watkins v. State Mut. Bldg. & Loan Ass'n [N. J. Eq.] 66 A. 920.

91. Assets Realization Co. v. Defrees, 127 Ill. App. 454.

92. Aldrich v. Gray [C. C. A.] 147 F. 453.

93. Watkins v. Com. Sav. & Loan Ass'n [N. J. Eq.] 64 A. 751.

94. With further right to pro rata participation in assets of association of trust fund proves insufficient. Bettle v. Republic Sav. & Loan Ass'n [N. J. Eq.] 64 A. 176.

95. Bohn v. Boone Bldg. & Loan Ass'n [Iowa] 112 N. W. 199.

96. Mills' Ann. St. § 529. Askey v. Fidelity Sav. Ass'n [Colo.] 86 P. 1025.

97. Common shareholders held entitled to priority over founder shareholders. Watkins v. Com. Sav. & Loan Ass'n [N. J. Eq.] 64 A. 751.

98. Certain preferred stock held not preferred as to principal. People v. New York Bldg. Loan Banking Co., 50 Misc. 23, 100 N. Y. S. 459.

99. People v. New York Bldg. Loan Banking Co., 104 N. Y. S. 892. Where a resolution provided that the further dividends were paid "in consideration of the guaranty to the other classes of shares," the voting down of an amendment adding the words "including its obligations to the holders of all other classes of shares" did not show that it was not intended to guaranty the other stock. Id. Guaranty not terminated by insolvency. Id.

1. McKee v. Home Sav. & Trust Co. [Iowa] 110 N. W. 908.

2. See 7 C. L. 506.

existing right of stockholders to withdraw from the association,[3] and a withdrawal which was illegal because made during insolvency and when the conditions for withdrawal did not exist cannot be ratified by the association.[4] An association is liable for paying the withdrawal value of prepaid stock to one who is not authorized to receive it,[5] and will not be heard to say that the payments were made without it having received a required three months' notice of withdrawal.[6] In an action to recover the withdrawal value of stock, the burden of proving a forfeiture is on the association.[7] Where a claim of a withdrawing member does not become due until the association receives funds with which to pay it, interest cannot be charged until after the time where it appears that the association had funds.[8] An association is not bound by the unauthorized act of its secretary in receiving a deposit of money from one who is no longer a member.[9]

BUILDINGS AND BUILDING RESTRICTIONS.

§ 1. Public Regulation (441).
§ 2. Private Regulation (443).
§ 3. Liability for Unsafe Condition of Premises (445).
§ 4. Liability for Negligent Operation of Elevators (447).

§ 1. *Public regulation.*[10]—In the exercise of the police power it is generally provided by statute or ordinance that certain regulations be complied with in the construction of buildings.[11] Failure to comply with such regulations in some cases subjects the person so failing to a penalty,[12] or a building violating such regulations may be declared a nuisance and abated [13] or enjoined,[14] or the authorities may conform the building to the requirements at the owner's expense.[15] A contract in violation

3. Liquidation of stock held invalid after insolvency and when there were no funds in the treasury to meet such demands as required by statute authorizing withdrawal under certain conditions. Aldrich v. Gray [C. C. A.] 147 F. 453.

4. Attempted supbsequent ratification by directors of withdrawal allowed by secretary. Aldrich v. Gray [C. C. A.] 147 F. 453.

5. Evidence sufficient to show forged assignment. Big Four Bldg. Ass'n v. Clegg [Ind. App.] 79 N. E. 517.

6. Big Four Bldg. Ass'n v. Clegg [Ind. App.] 79 N. E. 517.

7. Where association had paid to wrong person under a forged assignment. Big Four Bldg. Ass'n v. Clegg [Ind. App.] 79 N. E. 517. Certificate not forfeitable where association through negligence or mistake paid out its value under a forged assignment. Id.

8. Taylor v. Bankers' Loan & Inv. Co., 102 N. Y. S. 1029.

9. Abraham Lincoln B., L. & H. Ass'n v. Walsh, 126 Ill. App. 76.

10. See 7 C. L. 507.

11. A structure erected for an engine consisting of a roof made of boards and roofing paper and supported by posts is a building within an ordinance prohibiting the using of an engine "in any building." City of Concord v. Morgan [N. H.] 64 A. 725.

Precautions against fire: The police power of a city includes the power to enact reasonable ordinances to prevent spread of fires and for protection of property therefrom. Tilford v. Belknap [Ky.] 103 S. W. 289; Inhabitants of Houlton v. Titcomb [Me.] 66 A. 733. An ordinance requiring fire escapes to be attached to all buildings used for hotel purposes and that an owner who refused to attach them after notice from the city was liable for a penalty was effective from its passage on all owners of hotel buildings, the notice, being necessary only to subject the owner to penalty. Adams v. Cumberland Inn Co. [Tenn.] 101 S. W. 428. Laws 1897, p 363, requiring owners of office and manufacturing buildings to provide hose, extinguishers, and such other means of preventing fires as commissioners may direct, is complied with by a system of perforated pipes connected with valves outside for use of firemen; wooden building covered with corrugated iron held not fireproof within fire ordinance. City of Sylvania v. Hilton, 123 Ga. 754, 51 S. E. 744.

12. Under Laws 1897, p. 468, providing that where double floors are laid "carpenter contractors" shall lay under flooring on each story to not less than two stories below where work is being performed, an instruction that the owner was liable for injuries if she had a foreman on the job to put in a certain floor is improper where there was no carpenter contractor, as it was for the jury to say whether she was negligent and whether her negligence was the proximate cause of the injury. Hashagen v. Schafer, 101 N. Y. S. 11. In such case if the owner had no carpenter contractor whose duty it was to comply with the statute, such circumstance might be admissible on the question of negligence. Id.

13. Micks v. Mason, 145 Mich. 212, 13 Det. Leg. N. 472, 108 N. W. 707.

14. Violation of an ordinance prohibiting the erection of buildings of certain material within fire limits. Inhabitants of Houlton v. Titcomb [Me.] 66 A. 733.

15. Building Code, Laws 1901, p. 208, c. 466, § 470, providing that in case of danger

of such regulations is void.[16] Different authorities may have concurrent jurisdiction relative to such regulations,[17] but the power to prescribe them cannot be delegated to a citizen.[18] Such regulations must be reasonable[19] and protect the constitutional rights of the parties.[20] It is within the police power of a state to limit the height of buildings in a city[21] and to classify parts of a city so that in one part one height is prescribed and a different height in another.[22] It may also delegate to a commission the determination of the boundaries of the different parts,[23] and the making or rules and regulations such as to permit different heights in different places according to the conditions in one of the general classes of territory.[24] Such regulations apply only to buildings within the terms of the statute,[25] and where made by a municipality do not apply to property of the state which is under the control of the legislature.[26] The duty of complying with them is upon the person upon whom it is imposed by the statute.[27] They inure to the benefit of all

arising from falling of buildings the building department may cause necessary work to be done to render the same temporarily safe, does not authorize it to make a contract for the storage of goods taken from a collapsed building. People v. Metz, 115 App. Div. 269, 100 N. Y. S. 913.

16. St. 1892, p. 489, forbidding under penalty the erection of building having a roof with a pitch of less than 20 degrees, makes illegal the acts which it prohibits. Eastern Expanded Metal Co. v. Webb Granite & Const. Co. [Mass.] 81 N. E. 251. A contract for the construction of a building which violates such statute is void as to both parties. Id.

17. The fact that Building Code, § 15 provides for installing perforated pipes in buildings and confers power on the building department in reference thereto is not inconsistent with the exercise of jurisdiction over the same subject matter by fire commissioner. Lantry v. Hoffman, 105 N. Y. S. 353.

18. An ordinance providing that no frame building shall be erected, moved, or remodeled within the city until permission shall have been obtained from all owners of permanent brick or stone structures within a radius of 60 feet from the proposed structure is void as a delegation of governmental power to citizens. Tilford v. Belknap [Ky.] 103 S. W. 289. If a municipal ordinance undertaking to prescribe fire limits and to impose restrictions upon the erection of buildings of inflammable material be in part void because the municipal authorities are without power to enforce some of the provisions and if to enforce such of its provisions as are valid will not carry out the general scheme adopted by such authorities with a view to affording necessary protection to all property exposed to more than ordinary fire risks, the whole ordinance must be declared inoperative. Town of Blackshear v. Strickland, 126 Ga. 492, 54 S. E. 966.

19. Held reasonable: Ordinance requiring temporary floors in buildings in course of erection for protection of laborers. O'Donnell v. Riter-Conley Mfg. Co., 124 Ill. App. 544. An ordinance requiring hotels to be equipped with fire escapes. Adams v. Cumberland Inn Co. [Tenn.] 101 S. W. 428.

Held unreasonable: Ordinance prohibiting erection of a frame structure within 60 feet of a brick or stone building without the consent of owner of latter. Tilford v. Belknap [[Ky.] 103 S. W. 289.

20. Ordinance providing that no frame building shall be erected, moved, or remodeled within the city until permission obtained from permanent brick or stone structures within 60 feet of the proposed structure deprives the owners of frame structures of equal protection of the law and constitutes a taking of their property without due process. Tilford v. Belknap [Ky.] 103 S. W. 289.

21, 22, 23. Welch v. Swasey, 193 Mass. 364, 79 N. E. 745.

24. Welch v. Swasey, 193 Mass. 364, 79 N. E. 745. A rule by commissioners that no building shall be erected in a residence district higher than 80 feet unless its width on each street on which it stands is at least one-half its height is reasonable. Id.

25. Acts 1899, p. 352, providing that every hotel over three stories high and over one hundred feet long shall be equipped with iron balconies with iron stairs running from one balcony to another, does not apply to a hotel not exceeding those dimensions. Adams v. Cumberland Inn Co. [Tenn.] 101 S. W. 428. Acts 1899, p. 352, requiring that all hotels hereafter constructed of certain dimensions shall have certain means of escape in case of fire, does not apply to a building already constructed though several changes were made after that time. Id. The erection of two tenement houses fronting on the same street by the owner of two lots fronting on different streets coming together at right angles is not within the provision of the tenement house act providing that where a tenement house is erected on a lot which runs through from one street to another a yard or space shall be left in the center of the lot. People v. Butler, 115 App. Div. 655, 100 N. Y. S. 978.

26. Under Ky. St. 1903, § 301, the board of visitors of the school for the blind has control of the buildings and grounds. Sec. 302 provides that the institution, its property, officers, and employes shall remain subject to the control of the general assembly held that though the institution was a corporation it was not subject to control of the city where its buildings were located and required to provide fire escapes under penalty as provided by ordinance. Kentucky Institution for Education of Blind v. Louisville, 30 Ky. L. R. 136, 97 S. W. 402.

27. Acts 1899, p. 352, c. 178, § 1, requiring

persons for whose protection they are intended,[28] and while non-compliance may not subject the person required to comply to civil liability if it was not the proximate cause of injury sustained,[29] one for whose protection they were enacted may not waive such noncompliance.[30]

§ 2. *Private regulation. Restrictive covenants.*[31]—A restrictive covenant is in the nature of a negative easement and where one person procures the title to all the land affected by it such easement is extinguished.[32] Like other covenants it is not binding until executed,[33] and it must be based on a consideration.[34] In construing a covenant the usual rules as to the construction apply.[35] Recordation is not essential to its enforcement against one who takes with actual notice of it.[36] Building restrictions are construed strictly against the grantor,[37] but acts clearly in disregard of the terms must be construed as a breach.[38]

the keeper or proprietor of a hotel to provide each room with a rope or rope ladder, does not impose this duty on the owner of a hotel operated by a lessee. Adams v. Cumberland Inn Co. [Tenn.] 101 S. W. 428. Landlords who have a right to enter buildings to comply with orders of fire commissioners may not escape liability for failure to do so because the premises were at the time the order was made in possession of a tenant who by the terms of his lien was required to comply with all orders and laws of state and municipal authorities. Lantry v. Hoffman, 105 N. Y. S. 353. One who has an easement under the yard in the rear of the premises of another for the purpose of maintaining an engine room and boiler may not at the suit of the owners of the servient estate be required to make the roof of his enginehouse fireproof as required by law. Bachrach v. E. Seidenberg, Stiefel & Co., 105 N. Y. S. 369. An affidavit charging contractor with proceeding to erect a building without first having obtained permit from the building inspector is insufficient where the requirement of the ordinance is that such a permit shall be taken out by either the owner of the building or the contractor. City of Toledo v. Kiebler, 8 Ohio C. C. (N. S.) 437.

28. A regular boarder is within the protection of Acts 1899, p. 352, requiring every hotel over two stories high to be equipped with means of escape in case of fire. Adams v. Cumberland Inn Co. [Tenn.] 101 S. W. 428.

29. Whether failure to equip a hotel with fire escapes was the proximate cause of an injury to a guest who jumped from a window held a question for the jury. Adams v. Cumberland Inn Co. [Tenn.] 101 S. W. 428.

30. Noncompliance with statutory regulations requiring fire escapes on hotels is not waived by a guest who continues to occupy a room therein for six months with notice of such noncompliance. Adams v. Cumberland Inn Co. [Tenn.] 101 S. W. 428.

31. See 7 C. L. 509.

32. Korn v. Campbell, 104 N. Y. S. 462. The fact that person so acquiring tract lost it by foreclosure of purchase-money mortgage does not eliminate him from claim of title. Id. As a general rule a covenant in a deed restricting the use of land inserted for the benefit of adjoining land will be extinguished by the subsequent vesting in one person of the title to both tracts. Miscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S. E. 1028.

33. Where several lot owners agreed to enter into a restrictive covenant which should be of no effect until signed and acknowledged by all, and a portion of them failed to execute it for eight years during which period a part of them conveyed without mention of the restriction, held the covenant was not binding. Schefer v. Ball, 53 Misc. 448, 104 N. Y. S. 1028. Mere notice of the agreement by one of the parties from the records where recorded did not make it binding on him though it was afterwards duly executed. Id.

34. Where husband and wife owned adjoining lots and on a sale of the husband's lot the wife joined in a restrictive covenant affecting hers, her dower interest in her husband's lot constituted a sufficient consideration to make the covenant binding on her. Wahl v. Stoy [N. J. Eq.] 66 A. 176.

35. Where a husband and wife owning adjoining lots executed an agreement that no building should be constructed on the wife's lot nearer than five feet from a certain line, but by error of the scrivener it was made binding on the husband only and the wife's name was inserted as party of the first part only, held the contract construed according to the intent of the parties was sufficient to bind the wife. Wahl v. Stoy [N. J. Eq.] 66 A. 176.

36. Wahl v. Stoy [N. J. Eq.] 66 A. 176.

37. A two family house is not a violation of a restruction against the use of premises for trade manufacture, etc. McDonald v. Spang, 105 N. Y. S. 617.

38. Covenants violated: Building an apartment house is a violation of a restriction to use of lot "for residence purposes only." Burton v. Stapely, 4 Ohio N. P. (N. S.) 65. A restriction in a deed that the front of said dwelling house or any part thereof shall not be nearer to the street than the house next east means that the front walls of both houses must be in line with each other, and to build a house so that its front wall is in a line with the front of the porch of the adjacent house is a violation of the restriction in the deed. Id. A veranda is a part of a house within a restriction that a house shall not be erected within 25 feet from the street. McDonald v. Spang, 105 N. Y. S. 617. A restriction that no building shall be erected nearer to the street than 25 feet is violated where one procured a lot after the widening of the street and built nearer to the street than such distance, though the building was 25 feet

Where one platting land and selling lots inserts in each deed a restrictive covenant for the benefit of each purchaser, the covenant inures to the benefit of each regardless of whom he purchases,[39] and is binding on all purchasers who take with notice of it [40] irrespective of whether it is expressed in their deed,[41] and the fact that a portion of the lots were conveyed under other restrictive covenants does not show that the restriction contained in all the deeds did not apply to all the lots.[42]

The violation of a restrictive covenant by the grantor [43] or one of several grantees [44] will be enjoined at the suit of one for whose benefit it was executed,[45] irrespective of whether there was privity of estate or of contract between the parties.[46] But if the original grantor did not bind himself, the grantee may not pursue any other grantee to whom he conveys the whole or a part of the remaining lands.[47] Equitable relief against a breach of a restrictive covenant must be promptly sought.[48] Mere delay, however, will not bar relief where it is due to hope that the violation could be otherwise stopped.[49] One will not be deemed to have waived the restriction [50] where he asserts his right to have it enforced as soon as his rights are

from the original line of the street. Id. Any building consisting of more than one story in which there are one or more suites on each floor equipped for separate housekeeping purposes in a "flat." Lignot v. Jaekle [N. J. Eq.] 65 A. 221. The payment of a higher rental does not convert what would otherwise be a "flat" into an "apartment" within a restriction against flats. Id. A restriction against the use of the lots for any purpose offensive to the neighborhood for dwelling houses prohibits the construction of an automobile garage to accommodate 125 machines, containing a portable forge, to repair machines and that 75 to 100 machines would go in and out each day. Evans v. Foss [Mass.] 80 N. E. 587.

39. Barton v. Slifer [N. J. Eq.] 66 A. 899.

40. Bill alleging purchase of tract by an association, its subdivision into lots, the adoption of a general building scheme, and a restrictive covenant, and its insertion in all deeds shows a right to enforce such covenant by a purchaser. Barton v. Slifer [N. J. Eq.] 66 A. 899. One who purchases a lot affected by a building restriction of which he has notice is charged with notice of the restriction as it exists though he is told that it does not prevent certain things. Wahl v. Stoy [N. J. Eq.] 66 A. 176. One who has notice of a restrictive covenant affecting his property who procures a new deed for the purpose of curing an alleged mistake as to the restriction in the original deed, a recitation as to what the restriction was does not alter it as it really exists. Id. Both buyer and his grantor must have notice of private restrictions to make them binding. Roak v. Davis [Mass.] 80 N. E. 690. Notice of restrictions in deeds to certain other lots held not notice of a general scheme of restriction. Id.

41. Where a uniform plan of improvement restricting the use to which each parcel can be put is adopted and parcels are sold in reference to such plan, mutual negative easements are created irrespective of whether the covenant is expressed in the deed. Silberman v. Uhrlaub, 116 App. Div. 869, 102 N. Y. S. 299. Owners of a tract contemplating its division into small parcels adopted a general scheme of improvement and united in mutual restrictive covenants in partitioning the property. Held subsequent purchasers with notice of the scheme had a right to rely on its observance by all purchasers, whether expressed in deeds or not. Id.

42. Evans v. Foss [Mass.] 80 N. E. 587.

43. Leaver v. Gorman [N. J. Eq.] 67 A. 111.

44. Where the lots of a platted tract are sold under deeds containing a restrictive covenant for the benefit of all lots, a grantee of a lot may enforce the covenant against the grantor or the purchaser of another lot. Evans v. Foss [Mass.] 80 N. E. 587.

45. At the suit of one who owns property for benefit of which restriction was established. Silberman v. Uhrlaub, 116 App. Div. 869, 102 N. Y. S. 299.

A grantor who on selling a portion of a lot restricts the use of the portion granted may enforce such restriction in equity if it is reasonable. Lignot v. Jaekle [N. J. Eq.] 65 A. 221. When there are restrictions put upon the grantee in a deed as to the use of the ground, a court of equity will, in behalf of the grantor, restrain any violation of the restrictions which are threatened by the grantee. Burton v. Stapely, 4 Ohio N. P. (N. S.) 65.

46. Silberman v. Uhrlaub, 116 App. Div. 869, 102 N. Y. S. 299.

47. Leaver v. Gorman [N. J. Eq.] 67 A. 111.

48. Evidence held not to show laches in a proceeding to enforce a building restriction. Lignot v. Jaekle [N. J. Eq.] 65 A. 221. One who permits a breach of a covenant to continue for several years loses the right to enforce it. Leaver v. Gorman [N. J. Eq.] 67 A. 111.

49. The right to enforce a restrictive covenant against the sale of liquor will not be deemed to have been waived where the complainant at no time gave his consent to its violation, and his delay in seeking to enforce it has been due to hope that it could be otherwise stopped. Woodbine Land & Imp. Co. v. Riener [N. J. Eq.] 65 A. 1004.

50. Evidence sufficient to show that a restriction against the construction of a tenement house had not been waived. Lignot v. Jaekle [N. J. Eq.] 65 A. 221.

prejudiced.[51] One who asserts that a breach of a covenant causes no injury has the burden to prove it beyond a reasonable doubt.[52] Restrictive covenants will not be enforced where changed conditions render their enforcement inequitable,[53] or where violations thereof have been so numerous as to indicate that the covenant has been abandoned.[54]

§ 3. *Liability for unsafe condition of premises.*[55]—The owner[56] or person in possession of premises charged with the repair thereof[57] must exercise ordinary care to keep them in a reasonably safe condition for persons lawfully upon them, but he is not an insurer of their safe condition and is liable only for negligence.[58] He owes no duty to mere licensees or trespassers,[59] unless a nuisance exists,[60] the

51. That a covenant against erecting a house nearer than 25 feet from the street has not been generally observed does not preclude its enforcement by one who will be injured by its breach. McDonald v. Spang, 105 N. Y. S. 617. One is not estopped to enforce a restriction where as soon as its violation is attempted he gives notice to the foreman of the work and procures a bill to enjoin such breach as soon as possible. Barton v. Slifer [N. J. Eq.] 66 A. 899. The right of one owner in a platted tract where all lots are affected by a restriction is not lost because there have been several violations which did not affect his rights and did not show a general intention to abandon the plea in the district. Id.

52. A grantee who asserts that his breach of a building restriction does not injure the grantor must show such fact beyond the possibility of doubt. Lignot v. Jaekle [N. J. Eq.] 65 A. 221.

53. The original scheme of improvement forbade the use of the property for any but residental purposes but the locality had become a manufacturing and tenement house district. Schwarz v. Duhne, 103 N. Y. S. 14. A restriction made when the locality was a residential one that no building should be erected nearer to the street than seven feet will not be enforced after the district has become a business locality. Schefer v. Ball, 53 Misc. 448, 104 N. Y. S. 1028. Where the owner of a trust subdivided it and sold the lots under deed containing a restriction against using the lots for any purpose offensive to residences, the fact that the locality was becoming a business district, that stables were built and a railroad run through it, did not show such a change of conditions as to preclude the enforcement of the restriction. Evans v. Foss [Mass.] 80 N. E. 587.

54. Where a restriction affected 150 owners but had been broken by 100 and no action was taken to enforce it except once when a case was started but permitted to rest for seven years, held the restriction was abandoned. Chelsea Land & Imp. Co. v. Adams [N. J. Err. & App.] 66 A. 180.

55. See 7 C. L. 510. See, also, Negligence, 7 C. L. 1090 and topics dealing with particular dangerous agencies such as Electricity, 7 C. L. 1258; Steam, 8 C. L. 2080.

56. See, also, Landlord and Tenant, 8 C. L. 656. A landlord who has control of water closets is liable where by freezing and bursting they overflow. Kecoughtan Lodge No. 29, K. P. v. Steiner [Va.] 56 S. E. 569. Owner of building is also liable though tenant was required to repair. Mitchell's Adm'r v. Brady, 30 Ky. L. R. 258, 99 S. W. 266. One who constructs a building in proximity to a street must exercise reasonable care to construct the same with such safety and security that it will withstand any wind or storm that may reasonably be expected to occur. Uggla v. Brokaw, 117 App. Div. 586, 102 N. Y. S. 857.

57. A tenant in possession of property is liable where a pipe attached to the side of the building falls onto a pedestrian in the street. Mitchell's Adm'r v. Brady, 30 Ky. L. R. 258, 99 S. W. 266. Where the owner of a building has parted with exclusive possession of it to a tenant prior to the time a skylight therefrom is blown into the street, the negligence inferrable cannot relate to the landlord's possession. Uggle v. Brokaw, 117 App. Div. 586, 102 N. Y. S. 857.

58. Complaint in an action for injuries sustained by falling into a hole which fails to allege that the owner knew or should have known of the dangerous condition of the opening and in the exercise of ordinary care failed to make it safe is fatally defective. Fearon v. Mullins [Mont.] 88 P. 794. Where a mechanic familiar with the premises, knowing the purpose of a lift and manner of its operation, stepped into the lift without ascertaining whether the roof was in place, he was held guilty of contributory negligence. Gilfillan v. German Hospital & Dispensary, 115 App. Div. 48, 100 N. Y. S. 601. Where in an action for injuries it is not shown that the defendant is owner of the building or knew of defects therein nor did the extent of injuries to the person complaining appear, a nonsuit was properly granted. Jackson v. Ross [Ga. App.] 57 S. E. 913. The owner of an office building is bound to use due care with respect to the conditions of the halls and stairway for the protection of persons having business with his tenants. Construction of steps held not negligent. Bell v. Central Nat. Bk., 28 App. D. C. 580. Failure to artificially light halls in the daytime held not negligent. Id.

59. Where one employed about hospital grounds attempted to leave them by going over a wall on which the roof of a lift was located and stepped into the roof which was not secured and was injured, held that since he was not authorized to use such means of exit the defendant owed him no duty to keep it safe and was not liable. Gilfillan v. German Hospital & Dispensary, 115 App. Div. 48, 100 N. Y. S. 601.

60. A building which has been negligently permitted to remain in a dangerous conditon so that portions of it may be blown into the street is a public nuisance to persons using the street. Uggla v. Brokaw, 117

liability of the owner of a building for injuries to a traveler on the highway caused by the falling of an object from the building is to be determined on the principles of negligence,[61] the maxim res ipsa loquitur being ordinarily applicable.[62] A municipal corporation is not liable for injuries sustained in buildings used wholly for governmental purposes.[63] But in New York City the board of education is liable for injuries resulting because of defects in a school building.[64]

App. Div. 586, 102 N. Y. S. 857. A complaint by one injured by being struck by a skylight dlown from the roof of a building into the street which alleges that divers structures had been erected on the roof of the building in a negligent manner and that the owner's attention had been called to the fact and he had refused to repair, etc., held to sustain a recovery on the theory of nuisance. Id. In such case a prima facie case is established by proof of nuisance that it was created by the defendant or existed under such circumstances that he was charged with notice. Id.

61. Waller v. Ross, 100 Minn. 7, 110 N. W. 252.

62. Where on driving a team in the street was struck by a part of a skylight blown from the roof of an adjacent building, a presumption of negligence under the maxim res ipsa loquitur is raised. Uggla v. Brokaw, 117 App. Div. 586, 102 N. Y. S. 857. Where one standing on a sidewalk and working within two or three feet from an awning frame was injured by the falling of a brace from such frame, there is no presumption of negligence on the part of the owner of the building where it does not appear that the plaintiff may not have caused such brace to fall. Meaney v. Horowitz, 115 App. Div. 572, 100 N. Y. S. 975. Where one in the street is injured by being struck by a skylight blown from a building in possession of a tenant sues the landlord he has the burden to prove that the skylight was not originally securely fastened, independent of the doctrine res ipsa loquitur. Uggla v. Brokaw, 117 App. Div. 586, 102 N. Y. S. 857. In an action for damages for the falling of a sign because it was negligently attached to a building, when it appeared that it was attached under the direction of the plaintiff's agent, there can be no recovery. Hyman v. Waas, 79 Conn. 251, 64 A. 354. Res ipsa loquitur applies where a part of a stone window sill falls to the pavement. Evidence held sufficient to rebut negligence. Papazian v. Baumgartner, 49 Misc. 244, 97 N. Y. S. 399.

NOTE: The rule of res ipsa loquitur has been consistently applied to damages done to one lawfully using a highway by the falling of buildings or parts of buildings. The common acceptance of this view in the two leading cases on the subject. Ryder v. Kinsey, 62 Minn. 85, 64 N. W. 94, 54 Am. St. Rep. 623, 34 L. R. A. 557 and Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530, is especially significant because the doctrine of Rylands v. Fletcher, L. R. 3 H. L. 330, has been accepted in Minnesota and essentially rejected in New York. See, also, Travers v. Murray, 84 N. Y. S. 558, as to the falling of a chimney, but see, Nichol v. Marshland, L. R. 10 Ex. 255, quoted in Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224 and Isherwood v. Jenkens Co., 84 Minn. 423, 87 N. W. 931, as to the falling of a pile of lumber and, generally, see Martin v. Dufulla, 50 Ill. App. 371; Kappes v. Apel, 14 Ill. App. 170; Patterson v. Jos. Schlitz Brewing Co. [S. D.] 91 N. W. 336. There is no consistency with this rule in holding the person responsible for damages done by the falling of a wall on principles of nuisance under appropriate circumstances. See Simmons v. Everson, 124 N. Y. S 319, 21 Am. St. Rep. 676; Wilkinson v. Detroit, etc., Works, 73 Mich. 405, 41 N. W. 490; Miles v. City, 154 Mass. 511, 28 N. E. 676, 13 L. R. A. 84, 26 Am. St. Rep. 264; Murray v. McShane, 52 Md. 217, 36 Am. Rep. 367; and see Lauer v. Palms (Mich.) 89 N. W. 695; Chute v. State, 19 Minn. 270; Nordheim v. Alexander, 19 Can. Sup. Ct. 248. So also, the liability caused by the falling of a cornice has been determined under the rule res ipsa loquitur or by the principles of nuisance. Roberts v. Mitchell, 21 Ont. App. 433; Grove v. Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262. It is true that the liability for a roof constructed so that it will inevitably, certain seasons of the year and with more or less frequency, subject innocent travelers to damage or danger may be found without refernce to diligence upon the principles of Rylands v. Fletcher, L. R. H. L. 330. Shipley v. 50 Associates, 101 Mass. 252, 3 Am. Rep. 346, 106 Mass. 199, 8 Am. Rep. 318; Smithurst v. Proprietors of Independent Congregational Church, 148 Mass. 261, 2 L. R. A. 695, 12 Am. St. Rep. 550; Shepard v. Creamer, 160 Mass. 496, or of nuisance, Hannem v. Pence, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717; Lowell v. Glidden, 159 Mass. 317, 34 N. E. 459. But see Garland v. Town, 55 N. H. 56, 20 Am. Rep. 164. The inherent and necessary tendency of a roof eaves overhanging a highway to do harm, however, varies materially from the tendency of an ordinary awning to fall. That natural difference is a good foundation for the distinction between the legal principles of liability applicable to the respective owners for consequent damages. The same reasoning which holds the owner of such a roof responsible for damages without reference to the culpability justifies the holding of the owner of such awning in an action for negligence responsible on the theory of res ipsa loquitur only. It is true that the owner of a building to which the awning is attached may be held responsible for damages to a passerby due to its fall, on the doctrines of nuisance. Hume v. Mayor, 74 N. J. 264.—See Waller v. Ross [Minn.] 110 N. W. 252.

63. Persons killed by negligent operation of an elevator in a court house. Moest v. Buffalo, 116 App. Div. 657, 101 N. Y. S. 996.

64. The board of education of New York City managing the schools and having power to close them is liable for injuries to a pupil caused by a defect in the building. Wahrman v. Board of Education of New York, 187 N. Y. 331, 80 N. E. 192.

§ 4. *Liability for negligent operation of elevators.*[65]—Owners and operators of passenger elevators owe to passengers the duty to exercise the highest degree of care,[66] both in the construction,[67] maintenance,[68] and operation of the elevator. This rule does not apply to freight elevators[69] except as there is an invitation to use them.[70] Failure to equip an elevator with a device required by statute does not entitle a person injured to recover if such failure was not the proximate cause of the injury.[71] They owe to persons lawfully on the premises[72] the duty to exercise reasonable care to see that elevator shafts are properly guarded,[73] and are liable for injuries which result from failure to exercise such care.[74] There is no liability

65. See 7 C. L. 511.

66. Where a customer in store was injured in elevator, evidence held to show negligence in that some person started elevator after it had stopped and while injured person was leaving it. Moerman v. Clark-Rutka-Weaver Co., 145 Mich. 540, 13 Det. Leg. N. 648, 108 N. W. 988. One who goes to an office building to see a physician and is in the elevator on his way to the floor of the building on which the physician's office is located is a passenger. Ferguson v. Truax [Wis.] 110 N. W. 395. Evidence held to show that one injured in the elevator of an office building was in the building on business. Id. In an action against the owner of a building on the janitor who ran the elevator for injuries sustained because of a fall of the elevator, a verdict aginst the owner of the building alone is proper. Id.

67. Negligent construction of an elevator held the proximate cause of an injury to one who had his foot caught between the floor of an elevator and strips negligently nailed to floor beams. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. Whether an elevator well was negligently constructed held a proper subject for expert testimony. Id. Whether an elevator was negligently constructed held a question for the jury. Id.

68. Where one was injured by the fall of an elevator it was admissible to show a similar accident just shortly prior to the one in question. Glassman v. Surpless, 53 Misc. 586, 103 N. Y. S. 789. Where the owner of a building, the elevator in which was enclosed on two sides by slats, permitted two of the slats to remain broken and one lawfully using the elevator inadvertently allowed his foot to protrude through the hole and it was crushed, held the owner was liable. Rosenberg v. Schoolherr, 116 App. Div. 289, 101 N. Y. S. 505. Evidence held to show that the owner of a building did not exercise ordinary care to keep the elevator in a safe condition. Ferguson v. Truax [Wis.] 110 N. W. 395.

69. Proper care in construction of freight elevators does not require that they be wholly enclosed. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. Where a person was injured while riding on a freight elevator on which there was a sign forbidding persons to ride on it, and it appeared that it had been in good condition just prior to the accident and the injured person was riding on the invitation of one who had no authority to invite him, evidence insufficient to show negligence on the part of the owner. McQuirk v. Manhattan Life Ins. Co., 50 Misc. 590, 99 N. Y. S. 536.

70. A landlord who has control of a freight elevator owes to persons whose business requires them to use it the duty of maintaining it in a reasonably safe condition. Rosenberg v. Schoolherr, 116 App. Div. 289, 101 N. Y. S. 505.

71. The fact that an elevator was not equipped with a device giving notice that it is in motion as required by Pub. Laws, p. 43, c. 973, does not entitle one to recover where his own negligence was the proximate cause of the injury. Leahy v. U. S. Cotton Co. [R. I.] 66 A. 572.

72. Evidence sufficient to show that one injured by falling into an open elevator shaft was on the premises by invitation. Hamilton v. Taylor [Mass.] 80 N. E. 592.

73. Evidence sufficient to show negligence in leaving an elevator shaft open and unguarded. Hamilton v. Taylor [Mass.] 80 N. E. 592. Instruction that owner of building was under duty to use reasonable care to guard the injured person from injury and what constituted reasonable care dependent on the circumstances and that it was the duty of the injured person to use reasonable care for his own protection under the circumstances and that it was for the jury to say how high a degree of care should be exercised, held proper. Pascieszny v. Boydell Bros. White Lead & Color Co., 146 Mich. 223, 13 Det. Leg. N. 726, 109 N. W. 417. Persons lawfully in a building may go around it for the purpose for which they entered and may assume that reasonable precautions have been taken for their safety. Gardner v. Waterloo Cream Separator Co. [Iowa] 111 N. W. 316. Where one entered a building for the purpose of delivering goods by a side door which had been left unfastened and fell down an elevator shaft, held that the proximate cause of the injury was in not properly guarding the elevator shaft and in failing to give warning, and not the act of a third person in leaving the door unlocked. Id. Where one delivering goods fell down an open elevator shaft, had no notice that it was dangerous to enter the building, the mere fact that there were signs on the door warning him to keep out was no excuse for failure to guard the shaft, the building being under repair. Id.

74. Evidence sufficient to show negligence in failing to caution one who fell into an open elevator shaft. Wills v. Taylor, 193 Mass. 113, 78 N. E. 774. Evidence sufficient to show that one who fell into an open elevator shaft was not negligent. Id. In an action for injuries sustained by the fall of an elevator, a letter written by the agent of a nonresident owner to the owner, prior to the accident stating that the elevator was out of order and that a third person had stated that it was out of order

for injuries which result from contributory negligence of the person injured.[75] One suing to recover for injuries sustained has the burden to prove negligence,[76] but he need not prove a specific defect or act.[77]

BULK SALES; BURDEN OF PROOF, see latest topical index.

BURGLARY.

§ 1. What Constitutes (448).
§ 2. Indictment (449).
§ 3. Evidence (450).
§ 4. Instructions and verdict (452).

§ 1. *What constitutes.*[78]—A statute defining burglary as the breaking and entering of a building "with intent to commit larceny or any other felony" does not require as to larceny an intent to commit a felony.[79] Breaking with intent to enter a house in which property of any value whatever is stored constitutes an attempt to commit burglary in Texas, though entry is frustrated.[80]

Breaking and entry.[81]—Felonious entry without the consent of the occupant is essential to the commission of the offense,[82] hence, entrance in response to what defendant believed to be an invitation does not constitute burglary,[83] but one having a right to enter in the performance of his duties may be guilty where entrance is

is admissible as showing the owner's notice. Ferguson v. Truax [Wis.] 110 N. W. 395.

75. Evidence insufficient to show contributory negligence as a matter of law where a boy fourteen years of age was injured in an elevator. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. Question of contributory negligence held for the jury where a person fell down an elevator shaft. Gardner v. Waterloo Cream Separator Co. [Iowa] 111 N. W. 316. Question of contributory negligence held for the jury where one delivering goods fell into an open elevator shaft, which was unguarded in the path he was required to follow in making the delivery. Hamilton v. Taylor [Mass.] 80 N. E. 592. It is negligence per se for one familiar with premises to step into an open elevator shaft. Leahy v. U. S. Cotton Co. [R. I.] 66 A. 572. One who volunteered to oversee the work of a janitor and who walks through an open door into an elevator shaft at five o'clock in the morning may not recover from the owner of the building where it appears that the door was open through no fault of his and the person injured had notice that the elevator might not be there. In such case it is not permissible to show that the door had been open at other times and the other accidents had happened (Id.), nor to show that the door could be opened without a key (Id.). The doctrine of **res ipsa loquitur** does not apply where one was injured by falling into an open elevator shaft, the door of which had evidently been left open through no fault of the owner of the building. Hope v. Longley, 27 R. I. 579, 65 A. 300.

76. Questions of negligence and contributory negligence held for the jury where one riding on an elevator fell between the elevator and a wall. Gray v. Siegel-Cooper Co., 187 N. Y. 376, 80 N. E. 201. Whether an elevator was defective or negligently operated held a question for the jury. Glassman v. Surpless, 53 Misc. 586, 103 N. Y. S. 789. Where one delivering goods was injured by falling into an opening between an elevator and the wall, evidence that it had for a long time been customary for persons delivering goods to use the elevator without objection held admissible on the question of negligence. Gray v. Siegel-Cooper Co., 187 N. Y. 376, 80 N. E. 201. Where one was injured by falling into an opening between an elevator and the wall, it was permissible to show the condition of the premises several hours later where it appeared that the condition was the same. Id.

77. One who is injured by the fall of an elevator need only prove facts from which the jury may infer that the car was defective or negligently operated and need not prove specific defect on misconduct. Glassman v. Surpless, 53 Misc. 586, 103 N. Y. S. 789.

78. See 7 C. L. 512.

79. The word "larceny" in Laws 1905, c. 19, p. 16, amending Rev. St. 1898, § 4334, includes misdemeanors as well as felonies, and the words "or any other felony" mean felonies not included in the crime of larceny and is not a limitation upon the latter. State v. Hows [Utah] 87 P. 163.

80. Throwing a stone through a window behind which property is situated. Mason v. State [Tex. Cr. App.] 100 S. W. 383, correcting and afg. [Tex. Cr. App.] 98 S. W. 854.

81. See 7 C. L. 512.

82. Instruction held not bad as authorizing conviction though jury found that defendant's confederate who was in fact a detective had owner's permission to enter. Dees v. State [Miss.] 42 So. 605. Evidence held to show that entry was without consent of occupant. Martinez v. State [Tex. Cr. App.] 103 S. W. 930.

83. Defendant testified that codefendant knocked at door and he thought he heard some one say "Come in," and that codefendant went in, held sufficient to require submission to jury. Stout v. State [Tex. Cr. App.] 103 S. W. 391.

effected for the purpose of committing a crime.[84] One may be guilty of an illegal entry into part of a house though he may legally enter another portion.[85] Thus, a person entering a room in a house with intent to commit rape is guilty of burglary though he may have entered the house without any intention of committing a felony.[86] Where the statute provides the time of the day during which the crime must be committed in order to constitute the offense, felonious entrance at a different time is not within the statute.[87] Under the Texas statute, where the crime is committed in the day time, there must be an actual breaking,[88] but it is otherwise where the crime was committed at night,[89] and in that state where entrance is with intent to commit larceny, the value of the property is immaterial though only a portion of the body enters.[90]

Accomplices.[91]

Nature and situation of building.[92]—The building entered must be of the character covered by the statute.[93] Residence under statute relating to burglary means a place of abode,[94] and as to persons having a common right to enter a building, each room therein constitutes a separate dwelling house.[95]

To constitute the offense of having burglar's tools in possession,[96] manual possession is not essential.[97]

§ 2. *Indictment.*[98]—The indictment must show that the building entered is a structure of the character described in the statute,[99] and where the statute is descriptive of the nature of the structure covered, a general allegation that it was of that character is insufficient.[1] It must allege the ownership of the building entered,[2] and if the owner is a corporation that fact should appear,[3] but where no plea denying the corporate existence of the person injured is filed, same need not

84. Entrance by servant for purpose of commiting larceny. Pointer v. State [Ala.] 41 So. 929.

85. State v. Descant, 117 La. 1046, 42 So. 486.

86. Entry by an inmate of the house. State v. Descant, 117 La. 1016, 42 So. 486.

87. Under Pen. Code 1895, arts. 838, 839, and 845c, in order to constitute burglary of a private residence, the crime must be committed at night. Reyes v. State [Tex. Cr. App.] 102 S. W. 421.

88. Pen. Code 1895, art. 839. Instruction held erroneous as authorizing conviction if entry was without consent of occupant. Bates v. State [Tex. Cr. App.] 99 S. W. 551.

89. Trousers hanging near open window. Hays v. State [Tex. Cr. App.] 100 S. W. 926.

90. White's Ann. Pen. Code art. 838. Mason v. State [Tex. Cr. App.] 100 S. W. 383, correcting and afg. on rehearing [Tex. Cr. App.] 98 S. W. 854 and overruling Jones v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 569, 87 S. W. 1157.

91, 92. See 7 C. L. 513.

93. A chicken house is a building within Kirby's Dig. §§ 1603-1605. Gunter v. State, 79 Ark 432, 96 S. W. 181, but a chicken "coop" is not necessarily such a structure (Id.).

94. Room in a school dormitory is a private residence. Mays v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 720, 97 S. W. 703.

95. Entry of a room by an inmate of the house with intent to commit rape. State v. Descant, 117 La. 1016, 42 So. 486.

96. See 7 C. L. 513.

97. Evidence that defendant wore coat in which burglar's tools were found on the night previous, and that next morning the tools were found therein in his room at a hotel, held sufficient. State v. Hanley [Iowa] 110 N. W. 914.

98. See 7 C. L. 513.

99. Indictment charging defndant with breaking into a depot in which goods, etc., were kept for sale or deposit held demurrable. Dickinson v. State [Ala.] 41 So. 929.

1. Under Acts 1899, p. 318 c. 178, making burglary of a private residence at night a distinct offense and describing same as any building or room actually occupied at the time as a place of residence, an allegation that the house was a private residence is insufficient. Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 542, 96 S. W. 44. An indictment for entering a private residence must allege that it was actually used and occupied at the time of the offense as a private residence Johnson v. State [Tex. Cr. App.] 11 Tex. Ct. Rep. 556, 96 S. W. 45.

2. It is sufficient to lay the ownership of the building entered in the person in possession and occupancy thereof. Railroad depot. Peck v. State [Ala.] 41 So. 759. Railway company in possession of car owned by foreign road. Burrow v. State [Ala.] 41 So. 987. Ownership should be laid in the occupant, especially where the goods taken belonged to him. Room in a school dormitory. Mays v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 720, 97 S. W. 703.

3. Indictment charging defendant with breaking into "the depot of the S. Ry. Co., said depot being the property of the S. Ry. Co., a corporation," sufficiently alleges corporate character of owner. Peck v. State [Ala.] 41 So. 759.

be proved as alleged.[4] An indictment in the language of the statute is sufficient.[5] Under a statute defining burglary as the breaking and entering of a building with intent to commit larceny or any other felony, the information need not state the value of the goods.[6] A general allegation that a house was broken and entered by force is ordinarily sufficient to cover night or day burglary.[7] In Texas an indictment for burglary of a private residence in the daytime need not allege that the building was a private residence, the statute making the felonious entry of a private residence a distinct offense only when committed at night,[8] and an allegation that the building entered was a private residence in an indictment for burglary committed in the daytime is merely descriptive [9] and is not an attempt to charge burglary of a private residence,[10] but though merely descriptive it must be proved as alleged.[11] The allegation and proof must correspond,[12] hence, under an indictment for burglary with intent to steal property of a designated person, such person must be shown to be the owner thereof.[13]

§ 3. *Evidence.*[14]—Evidence showing the history of the case,[15] the movements of defendant,[16] and the condition of the premises,[17] including foot prints.[18] is admissible; but evidence of the commission of other burglaries is inadmissible [19] unless part of the res gestae,[20] or for the purpose of identifying defendant as the perpetrator of the crime,[21] or to show intent,[22] or a common design or scheme,[23] or concert of action between persons engaged in the commission of the crime,[24] hence, evidence of the fruits of other burglaries found in defendant's pos-

4. Burrow v. State [Ala.] 41 So. 987.

5. Indictment for burglary with explosives under Acts 1906, p. 946, c. 476, held. good. Smith v. State [Md.] 66 A. 678.

6. Rev. St. 1898, § 4334, as amended by Laws 1905, c. 19, p. 16, includes both grand and petit larceny. State v. Hows [Utah] 87 P. 163.

7. Henderson v. State [Tex. Cr. App.] 99 S. W. 1001.

8. Pen. Code 1895, arts 838, 839, and 845c. Reyes v. State [Tex. Cr. App.] 102 S. W. 421.

9, 10. Martinez v. State [Tex. Cr. App.] 103 S. W. 930.

11. Evidence that building was occupied as a residence by a bachelor held sufficient. Martinez v. State [Tex. Cr. App.] 103 S. W. 930.

12. Under a statute making burglary of a private residence a distinct offense, defendant cannot be convicted under an indictmet charging burglary of a house where the building entered was a private residence. Room in a school dormitory. Mays v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 720, 97 S. W. 703. Where a night burglary is positively alleged, proof that crime was committed during day constitutes a fatal variance. Henderson v. State [Tex. Cr. App.] 99 S. W. 1001.

13. Evidence considered and held that defendant's contention that he and not the person named in the indictment owned property taken should have been submitted to jury. Harris v. State [Tex. Cr. App.] 103 S. W. 390. Defendant cannot be convicted under an indictment alleging occupancy in a certain person and entry with intent to steal his property where the evidence shows entry with intent to take property of a joint occupant. Roberson v. State [Tex. Cr. App.] 101 S. W. 800.

14. See 7 C. L. 514.

15. Evidence that tools found in burglarized building were taken from a nearby blacksmith shop which had been broken into is admissible. State v. Arthur [Iowa] 109 N. W. 1083.

16. Evidence of movements of defendant on night of commission of offense is admissible. Dupree v. State [Ala.] 42 So. 1004.

17. Evidence of an officer as to condition of premises upon his arrival after burglary is admissible. Herndon v. State [Tex. Cr. App.] 99 S. W. 558, as is evident of occupant that he opened cash drawer (Id.).

18. Leonard v. State [Ala.] 43 So. 214.

19. That after perpetuation of different burglary defendant was tracked with blood hounds and arrested is inadmissible. Jordan v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 596, 96 S. W. 35. Alleged confession of one of several defendants as to other burglaries on same night is inadmissible. Barnett v. State [Tex. Cr. App.] 99 S. W. 556.

20. Where houses burglarized on same night are some distance apart, evidence thereof is not admissible as part of res gestae. Herndon v. State [Tex. Cr. App.] 99 S. W. 558.

21. In a prosecution for burglary of a pullman car, evidence that shortly after the crime was committed defendants were seen dismantling a locomotive is admissible. State v. Toohey [Mo.] 102 S. W. 530.

22. To rebut claim of accident. Herndon v. State [Tex. Cr. App.] 99 S. W. 558.

23. Under an indictment for burglary of a railroad car, evidence that another car coupled to it was broken into at the same time and that property taken from both cars was sold by defendants at the same time and place is admissible. State v. Toohey [Mo.] 102 S. W. 530.

24. Cook v. State, 80 Ark. 495, 97 S. W. 683.

session is inadmissible.[25] Evidence of defendant's possession of inculpatory instruments,[26] or of property taken from burglarized premises,[27] if identified,[28] or of its disposition by defendant or one particeps criminis,[29] is admissible, as is evidence tending to identify such property as the property stolen.[30] Where defendant's opportunity to commit the crime is shown, evidence that on the day following the commission of the crime defendant brought goods of a similar character to a certain woman in whose possession they were found is admissible,[31] and defendant's relations with her may be shown.[32] Irrelevant [33] or immaterial [34] evidence, or evidence calling for conclusions of the witness,[35] is inadmissible. Negative evidence does not controvert positive affirmative testimony.[36] The state must prove beyond a reasonable doubt the breaking and entry [37] by defendant [38] of a structure of the character described by statute,[39] at night, if essential,[40] with intent to commit a crime,[41] but circumstantial evidence suffices,[42] and in a prosecution for breaking with intent to

25. Herndon v. State [Tex. Cr. App.] 99 S. W. 558; Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 556, 96 S. W. 45.

26. Evidence that one of several persons arrested escaped and when recaptured had in his possession burglar's tools is admissible. State v. Leonard [Iowa] 112 N. W. 784.

27. Herndon v. State [Tex. Cr. App.] 99 S. W. 558. Evidence that a portion of the property stolen was found in defendant's possession is admissible. People v. Lowrie [Cal. App.] 87 P. 253.

28. Alleged stolen property is not admissible in evidence unless identified as such. Barnett v. State [Tex. Cr. App.] 99 S. W. 556. Instruction held to require identification. Johnson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 382, 98 S. W. 266.

29. Evidence of disposition of stolen property is admissible though in the exclusive possession of a codefendant, where defendant was present at the time of the sale and is otherwise connected with the burglary. State v. Toohey [Mo.] 102 S. W. 530.

30. Evidence that wheat purchased from defendant and sample shown witness were of same grade is admissible. Stevens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 936, 95 S. W. 505.

31, 32. Pointer v. State [Ala.] 41 So. 929.

33. Where burglar's tools were found in a coat which defendant left in his room in a hotel, evidence that a third person, a guest at the hotel, but a stranger to defendant, offered to sell a coat of similar appearance is inadmissible. State v. Hanley [Iowa] 110 N. W. 914.

34. Evidence that a search revealed no burglar's tools or implements in a room occupied by defendant is inadmissible. People v. Lowrie [Cal. App.] 87 P. 253.

35. Opinion evidence as to whether a lock on the door of the building entered could have been broken from the outside is inadmissible, being a matter for the jury to determine. Dupree v. State [Ala.] 42 So. 1004.

36. State's evidence of lime balls in wheat stolen is not contraverted by testimony of witness that he did not see them. Stevens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 936, 95 S. W. 505.

37. Evidence held insufficient, defendant's testimony that he was drunk and went to sleep in building and was locked in not being controverted, he being an employe in the store. Burrell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 307, 97 S. W. 706. Evidence held sufficient to show felonious entry, it being shown that defendant had entered premises and asked for mail, and that he had an opportunity to remove goods which were subsequently found in his possession. People v. King [Cal. App.] 87 P. 400.

38. Evidence held insufficient to sustain conviction for breaking and entering a freight car, though defendant disposed of goods taken, the car door having been open and others having had an opportunity to enter. Ross v. State [Miss.] 42 So. 801.

39. Evidence that a chicken "coop" was broken into will not sustain conviction, a "coop" not necessarily being a building. Gunter v. State, 79 Ark. 432, 96 S. W. 181.

40. Evidence that at 5:30 a. m. it was found that a house had been burglarized during the night is sufficient to sustain conviction for burglary in the first degree, the degree depending upon the time. People v. Lowrie [Cal. App.] 87 P. 253.

41. Evidence sufficient to sustain conviction for burglary with intent to rape. Miller v. State [Tex. Cr. App.] 100 S. W. 398. Under an indictment for burglary with intent to commit larceny, the state must establish beyond a reasonable doubt that defendant broke and entered the building with a felonious intent to take and convert goods therein to his own use without the consent of the owner. State v. Wright [Del.] 66 A. 364.

42. Possession of property taken from house which had ben broken into coupled with evidence of defendant's proximity to place of crime and subsequent flight held sufficient to sustain conviction. Delmont v. State [Wyo.] 88 P. 623; State v. Delcore, 199 Mo. 228, 97 S. W. 894. The corpus deliciti may be proved by circumstantial evidence. Dupree v. State [Ala.] 42 So. 1004. Evidence held sufficient, defendant having been seen in proximity to the place of the crime and having disposed of property taken. Reyes v. State [Tex. Cr. App.] 102 S. W. 421. Evidence held sufficient, it being established that building was broken into and goods taken, the latter being found in defendant's possession, and his acts and declarations subsequent to crime indicating guilt. Martinez v. State [Tex. Cr. App.] 103 S. W. 930. Evidence that defendant with others was in vicinity of place where crime was committed shortly after its commission and with them

stael, it has been held that slight evidence of intent is sufficient.[43] The presumptions attendant upon defendant's possession of stolen property has given rise to a diversity of views, some courts holding that unexplained exclusive possession by defendant,[44] or a codefendant,[45] creates a prima facie case,[46] while others hold that such possession is a mere incriminating circumstance,[47] and though sufficient to sustain a conviction [48] creates no presumption of guilt.[49] As a rule the testimony of an accomplice must be corroborated,[50] and for the purpose of corroboration evidence of prior attempts to effect an entrance into the same building is admissible.[51]

§ 4. *Instructions and verdict.*[52]—It is the duty of the court to instruct as to such of defendant's contentions as are substantiated by evidence,[53] but need not charge upon defenses which there is no evidence to support.[54] An instruction requiring the jury to find that property found in defendant's possession was identified as stolen and setting forth defendant's contention of purchase as ground for acquittal need not refer to a conflict as to the identity of the property.[55] Instructions

attempted to escape, that one of the gang had a burglar's outfit in his possession, held sufficient to sustain a conviction. State v. Leonard [Iowa] 112 N. W. 784. Evidence held to sustain conviction for breaking and entering a bank, defendant having been in company of a codefendant who pleaded guilty and his actions subsequent to the crime being consistent with guilt. State v. Arthur [Iowa] 109 N. W. 1083. Evidence held sufficient to justify submission to jury, defendant having attempted to dispose of stolen property shortly after burglary. State v. Toohey [Mo.] 102 S. W. 530. Evidence held insufficient to sustain conviction, though stolen property was found in defendant's possession, but his explanation being consistent with innocence. People v. Rosenberg, 105 N. Y. S. 218.

43. Evidence held sufficient though nothing was proved to have been taken. Smith v. State [Tex. Cr. App.] 102 S. W. 406.

44. Sufficient if found on premises occupied by defendant. State v. Wright. [Del.] 66 A. 364.

45. State v. Wright [Del.] 66 A. 364.

46. Unexplained possession of stolen goods is prima facie evidence that the person in whose possession they are found broke and entered the building in which they were situated for the purpose of committing larceny. State v. Wright [Del.] 66 A. 364. Possession of stolen property shortly after burglary creates a presumption of guilt. State v. Toohey [Mo.] 102 S. W. 530. Evidence sufficient, stolen goods being found in defendant's possession. State v. Howard [Mo.] 102 S. W. 504.

47. Defendant's unexplained possession of goods taken is sufficient to connect him with the burglary. Nightingale v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 422, 95 S. W. 531.

48. Unexplained possession of stolen property will sustain a conviction for burglary where the larceny is proved to have occurred at time of breaking and entry of house (Gunter v. State, 79 Ark. 432, 96 S. W. 181), and this is true though only part of property taken is found in defendant's possession (Id.).

49. Gunter v. State, 79 Ark. 432, 96 S. W. 181. For further cases on this subject see Larceny, 8 C. L. 707, in prosecution for which presumptions arising from possession most frequently arise.

50. Evidence held insufficient, conviction being based upon uncorroborated testimony of an accomplice. Simmons v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 380, 97 S. W. 1052. Evidence held sufficiently corroborative of positive testimony of an accomplice to sustain conviction. Cook v. State, 80 Ark. 495, 97 S. W. 683.

51. Accomplice testified that shortly prior to burglary he had surreptitiously obtained a key to the building. Held evidence of an attempt to enter at about that time was admissible. Cook v. State, 80 Ark. 495, 97 S. W. 683.

52. See 7 C. L. 515.

53. Where at the time of his arrest defendant wore a pair of pants alleged to have been stolen, stating that he did not remember where he got them, but at the trial testified that he purchased them, it was held error not to charge as to the purchase though a charge as to the statement made when defendant was arrested was given, and though other stolen property was found in his possession unexplained. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 556, 96 S. W. 45. Where defendant testified that his codefendant knocked at the door of a house and he thought he heard some one invite him in and that his codefendant went in, it was held error not to charge that if evidence was true defendant could not be guilty of burglary. Stout v. State [Tex. Cr. App.] 103 S. W. 391.

54. Where there is no evidence that defendant received goods found in his possession from another, an instruction that defendant must be acquitted unless shown that he did not receive goods from a third person is properly refused. People v. King [Cal. App.] 87 P. 400.

55. Defendant while wearing alleged stolen trousers was arrested on complaint of owner who identified same as his. Upon being taken to jail the trousers were taken from defendant and presented to complainant who denied that they were the ones worn on the day of the arrest. It was shown that after being lodged in jail certain clothing of prisoner's was burned, the state contending that trousers in question were burned at that time. Johnson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 382, 98 S. W. 266.

should present the essentials to conviction,[56] and the constituent elements of the crime which defendant intended to commit upon entry.[57] An instruction assuming certain facts as true is not erroneous where the instructions as a whole are correct.[58] In Texas an instruction on unexplained possession as a circumstance of guilt is improper as a charge on the weight of evidence.[59] A charge on principals is proper where the evidence tends to connect defendants with the crime as such.[60] Instructions ignoring possible guilt as to other crimes charged in the indictment are properly refused.[61]

Where burglary and larceny is charged in an indictment, a general verdict of guilty as charged is a verdict of guilty of burglary alone.[62]

Burnt Records; By-laws; Calendars, see latest topical index.

CANALS.

Rights arising from traffic on canals are excluded.[64]

The United States has power to construct the Panama canal in the territory acquired by its treaty with the Republic of Panama.[65] To authorize the appropriation of private land for the improvement of a state canal in New York the state engineer must make and file a map and survey and a certificate of appropriation, and notice must be served on the owner,[66] otherwise the entry upon the land by the contractor may be enjoined as a trespass.[67] Where an owner's lands are overflowed by the negligent turning of water from a state canal and into a creek and partly by rainfall, the state will be liable for that part of the damage which would not have resulted but for its negligence.[68] Though a railroad company may be given authority by a state to construct a bridge over a public canal subject to the right of the Federal government to remove obstructions to navigation,[69] it will be held liable for maintaining hidden and dangerous obstructions in the canal causing damage to boats.[70] A canal company may estop itself by inaction from objecting to a discharge into its canal of refuse from a paper mill where it stands by and permits heavy expenditures.[71] The conveyance of the property of a canal company having

56. Where evidence shows occupancy in two persons and ownership of property taken in one, and the indictment alleges entry with intent to steal property of the other, the jury should be instructed that unless entry was made with intent to steal property of such other person defendant should be acquitted. Roberson v. State [Tex. Cr. App.] 101 S. W. 800.

57. Where defendant introduced evidence tending to show ownership of property, taken in himself, held error not to charge that if defendant effected an entry for purpose of taking property belonging to himself, he should be acquitted, such taking not constituting larceny. Harris v. State [Tex. Cr. App.] 103 S. W. 390.

58. Instruction that if the tools were found in defendant's possession the jury "would be justified in finding that defendant had such burglar's tools in his possession for the purpose," etc., is not erroneous where the jury was instructed that the question as to whether the tools were burglar's tools was for them to determine. State v. Hanley [Iowa] 110 N. W. 914.

59. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 556, 96 S. W. 45; Hays v. State [Tex. Cr. App.] 100 S. W. 926.

60. Evidence that defendants acted together in the disposition of stolen goods justifies a charge on the law of principles, though there is no positive evidence as to who committed the burglary. Nightingale v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 422, 95 S. W. 531.

61. Instruction that if defendant did not break into a building with intent to commit a crime the jury should acquit him is properly refused wher defendant was also charged with larceny. Dees v. State [Miss.] 42 So. 605.

62. Dees v. State [Miss.] 42 So. 605.

63. See 7 C. L. 516.

64. See Shipping and Water Traffic, 8 C. L. 1903.

65. Wilson v. Shaw, 204 U. S. 24, 51 Law. Ed. 351. See, also, Territories and Federal Possessions, 8 C. L. 2121.

66. Laws 1903, p. 337, c. 147, § 4. United Trac. Co. v. Ferguson Contr. Co., 117 App. Div. 305, 102 N. Y. S. 190.

67. United Trac. Co. v. Ferguson Contracting Co., 117 App. Div. 305, 102 N. Y. S. 190.

68. Carhart v. State, 115 App. Div. 1, 100 N. Y. S. 499. Records of rainfall seven miles away from valley drained held not admissible to prove rainfall. Id.

69, 70. The Nonpariel, 149 F. 521.

71. Where operation of canal was not

power under a statute to locate a canal and acquire water rights to supply it vests in the grantee only the rights held by the company.[72] Title to the bed of a canal passes by a conveyance, without reservation, of a tract of land which includes the canal strip, and by the foreclosure of a mortgage containing the same description.[73]

CANCELLATION OF INSTRUMENTS.

§ 1. Nature of Remedy (454). Adequacy of Remedy at Law (454). Relief Obtainable and Conditions Precedent Thereto (455). Laches and Limitations (457).
§ 2. Cause of Action and Grounds for Relief (458).
§ 3. Procedure (461).

This topic excludes the definition and proof of fraud,[74] mistake,[75] and incapacity to contract,[76] the rescission of contracts other than by bill in equity,[77] and relief against instruments constituting a cloud on title,[78] and conveyances in fraud of creditors.[79]

§ 1. *Nature of remedy.*[80]—The cancellation of instruments is exclusively within the jurisdiction of equity.[81]

Adequacy of remedy at law.[82]—As a general rule a court of equity will not exercise its jurisdiction to cancel an instrument if the remedy at law, by way either of action or defense, is adequate and plain. It is a matter, however, which rests in the sound discretion of the court.[83] Mere breach of contract is not, ordinarily, ground for cancellation of a contract or deed, as for this there is an adequate remedy at law,[84] but cancellation may be had where the promise was made with intention at

interfered with. Morris Canal & Banking Co. v. Diamond Mills Paper Co. [N. J. Eq.] 64 A. 746.

72. City acquired no right to divert water from a mill. Stevens v. Worcester [Mass.] 81 N. E. 907.

73. In re Canal Place in New York, 115 App. Div. 458, 101 N. Y. S. 397.

74. See Fraud and Undue Influence, 7 C. L. 1813.

75. See Mistake and Accident, 8 C. L. 1020.

76. See Incompetency, 8 C. L. 169.

77. See Contracts, § 8, 7 C. L. 819.

78. See Quieting Title, 8 C. L. 1570.

79. See Fraudulent Conveyances, 7 C. L. 1841.

80. See 7 C. L. 517.

81. Tillamook County v. Wilson River Road Co. [Or.] 89 P. 958. Action to rescind a lease on the ground of fraud. Garrett v. Finch [Va.] 57 S. E. 604. Action to cancel a deed by reason of an alleged trust having been violated. Bluett v. Wilce [Wash.] 86 P. 853. Action to cancel contract of sale because of mistake as to price. Farquhar [Mass.] 80 N. E. 654. Action under P. & C. Comp. § 4946, to cancel a lease of a county road for failure to comply with its provisions. Tillamook County v. Wilson River Road Co. [Or.] 89 P. 958. Suit to cancel a note and mortgage on the ground that another note and mortgage have been given in lieu thereof, there being no common-law issue involved in the case. Leigh v. Citizens' Sav. Bk. [Ky.] 102 S. W. 233. A bill in an action for the cancellation of a written contract which alleges that the contract agreed upon is not the contract found in the writing, and that the substitution was without plaintiff's knowledge or consent and was procured by fraud, states a case exclusively within the jurisdiction of equity. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 S. W. 686.

82. See 7 C. L. 517.

83. Mosier v. Walter, 17 Okl. 305, 87 P. 877. Where by mistake the purchase price in a written contract of sale is wrongly stated, and there is no fraud involved, a suit to bar cancellation is the only remedy. Farquhar v. Farquhar [Mass.] 80 N. E. 654. Where the maker of a negotiable note obtained from him by fraud is liable to be put to a disadvantage in making a defense to it in an action at law, equity may decree its cancellation. Sipola v. Winship [N. H.] 66 A. 962. A corporation may maintain an action to cancel negotiable bonds which it has been induced to issue by fraud, against holders charged with notice, although against them the defense of fraud could be made at law, and this because such defense could not be made against innocent purchasers. Pere Marquette R. Co. v. Bradford, 149 F. 492. An assignment to defendant, induced by his fraudulent misrepresentations of a supposed claim against the corporation for goods furnished it at defendant's request and upon his promise to pay therefor, being no bar to an action against defendant for the price of the goods, an action to cancel it will not lie. Gordon v. Maas, 115 App. Div. 377, 100 N. Y. S. 891. Equity has jurisdiction to cancel an instrument of title to land at the suit of one in possession under good title, though such instrument be void on its face. Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 730.

84. Thompson v. Lanfair, 127 Ga. 557, 56 S. E. 770; Carter v. Ware Commission Co. [Tex. Civ. App.] 101 S. W. 524. But it is sufficient ground for the cancellation of a contract for the sale of land, that, in the deed conveying the land, land not included

the time not to perform it.[85] As a general rule an executed conveyance will not be canceled for grantee's failure to comply with a condition subsequent, where there was no fraud or misrepresentation in procuring it.[86] As to whether a conveyance will be canceled for grantee's failure to perform his agreement to support grantor or give him a home, the courts are entirely in accord.[87] Of course, cancellation may be had for breach of contract, where the contract expressly provides for cancellation in that event.[88]

Relief obtainable and conditions precedent thereto.[89]—Where a deed conveying land is voidable only, it will not be set aside as against a bona fide purchaser from the grantee,[90] especially where the grantor has induced such purchaser to believe that he does not claim any interest in the land.[91] Under some circumstances, where cancellation cannot be decreed, the court may enforce the contract or enter a personal judgment against defendant,[92] and as a means of enforcing a decree canceling notes it may render a judgment for the amount of the notes to be enforced only in the event of the notes not being delivered in court for cancellation within a time specified;[93] and it may pass upon all the rights of the parties growing out of the

in the contract is substituted for land agreed to be purchased, though no fraud is alleged. Shaw v. O'Neill [Wash.] 88 P. 111. When a party to a contract brings an action to cancel it on the ground that another has refused to perform it, he must stand on the contract as he executed it. Lockwood v. Geier, 98 Minn. 317, 108 N. W. 877, 109 N. W. 245.

85. Evidence held not to show such intent in action to cancel note and deed of trust. Carter v. Ware Commission Co. [Tex. Civ. App.] 101 S. W. 524.

86. Roy v. Harney Peak Tin Min. Mill. & Mfg. Co. [S. D.] 110 N. W. 106; Thompson v. Lanfair, 127 Ga. 557, 56 S. E. 770. But where the consideration in whole or in part for a deed conveying real esate is that grantee will erect certain buildings thereon, his failure to do so within a reasonable time is sufficient ground for the cancellation of the deed. Mosier v. Walter, 17 Okl. 305, 87 P. 877. Where one deeds his property to agents under a contract that they shall sell the same for him and receive part of the proceeds as compensation, if the agents abandon the contract, the contract and deed will be canceled at the suit of the grantor. Bogard v. Sweet, 17 Okl. 40, 87 P. 669.

87. **In Kentucky and Nebraska** it has been held that where one in consideration of a conveyance to him of land assumes to support grantor for life, his failure to substantially perform his contract will authorize its cancellation. Alvey v. Alvey, 30 Ky. L. R. 234, 97 S. W. 1106; Tomsik v. Tomsik [Neb.] 110 N. W. 674.

In an Iowa case involving such a contract, where there was no fraud in its procurement, and the grantee abandoned another home or other employment to assume the responsibility entailed and had for a period of years discharged the obligations of the contract with reasonable fidelity, and had improved the property granted a cancellation was refused. Lewis v. Wilcox, 131 Iowa, 268, 108 N. W. 536.

In Texas it has been held that, for a breach of a promise of a home to grantor to afford ground for cancelling his deed, the promise must have been made fraudulently without intent to keep it, and it must have been made with intent to influence and must have influenced grantor in making the deed. White v. White [Tex. Civ. App.] 16 Tex. Ct. Rep. 134, 95 S. W. 733.

88. Contract for sale of land and vendor unable to pass good title. Lockwood v. Geier, 98 Minn. 317, 109 N. W. 245, rvg. [Minn.] 108 N. W. 877. Where by mutual mistake in reducing such a contract to writing it was provided that it should be cancelled only at the election of the vendor, it will be reformed and as reformed cancelled. Id. Lease providing for forfeiture in the event of a failure to comply with certain conditions. Florence Oil & Refining Co. v. McCumber [Colo.] 88 P. 265.

89. See 7 C. L. 518.

90. Conveyance by imbecile and purchase of coal under land from grantee. Jackson v. Counts [Va.] 54 S. E. 870.

91. Under such circumstances the original conveyance will not be set aside against the innocent purchaser on the ground of fraud. White v. White [Tex. Civ. App.] 16 Tex. Ct. Rep. 134, 95 S. W. 733.

92. Where in suit to set aside a conveyance made in consideration of grantee's paying grantor an annuity for life, on the ground of grantee's failure to perform, if the evidence does not support the allegation of nonperformance, the court may enter judgment against defendant for the unpaid installments of annuity and adjudge the future performance of defendant's contract to be a lien on the property. Lewis v. Wilcox, 131 Iowa 268, 108 N. W. 536. Where suit is brought for cancellation of certain notes on the ground of fraud, and such relief cannot be granted because the notes have been transferred to bona fide holders for value, which fact was not known to plaintiff when suit was brought, the cause may be retained and a personal judgment for damages rendered. Luetzke v. Roberts, 130 Wis. 97, 109 N. W. 949. Such a personal judgment may be rendered in such a suit where "such other . . . relief as the court . . . may deem just and equitable" is asked for. Roberts v. Leutzke [Ind. App.] 78 N. E. 635.

93. So held where decree was entered in favor of a defendant for cancellation of notes in plaintiff's possession. Minneapolis

transaction in which the instrument is given, where, by the pleadings, such rights are submitted to its jurisdiction.[94] A conveyance of land by two persons, each owning an undivided half interest, may be adjudged invalid and set aside as to one of them and upheld as to the other.[95] A contract of sale will not be canceled for breach by vendee where vendor has not performed his entire obligation under it.[96] Where vendee refused tender by vendor's administration of a deed for a five-sixth interest in the property sold, such administrator upon subsequently discovering that decedent's interest was six-sevenths is not required to tender such interest as a condition precedent to securing a cancellation of the contract of purchase.[97] Before action is commenced, notice of intention to disaffirm the deed or contract should be given.[98] But where a vendee has so acted as to create the reasonable belief that he has abandoned the contract, such notice is not required.[99] A contract or conveyance will not be canceled until the consideration, or so much of it as has been received, is returned or tendered back,[1] and this is so, as a general rule, even where the contract or conveyance has been induced by fraud.[2] But this rule does not apply where such return is rendered impossible by reason of the act of the other party in the prosecution of his fraudulent purpose,[3] or where the fraud is practiced upon a person under mental disability,[4] or where notes sought to be canceled were given as part of a scheme to defraud the public,[5] or where the consideration is received in checks drawn on a bank which, unknown to either party, is insolvent.[6] Where the state sues to cancel a contract, it is not required that before suit it shall place defendant in the position he was in before the contract was made. No more can be required than that its officers consent to judgment against it for the amount paid by defendant under the contract.[7] A return of the purchase money is not an essen-

Threshing Mach. Co. v. Currey [Kan.] 89 P. 688.

94. Where note was given for plaintiff's share of mining stock purchased by plaintiff and defendant on joint account, in a judgment cancelling note, the court had jurisdiction to decree that plaintiff should pay defendant one-half the expense incurred by him by reason of plaintiff's failure to meet his obligation. Davidor v. Bradford, 129 Wis. 524, 109 N. W. 576.

95. Shepherd v. Turner, 29 Ky. L. R. 1241, 97 S. W. 41.

96. Failure by vendor to pay rent for occupation of part of land sold. Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916.

97. Purchase of all the coal under a certain tract of land. Farber v. Blubaker Coal Co. 216 Pa. 209, 65 A. 551.

98. Studebaker v. Taylor [Ind. App.] 80 N. E. 861.

99. Mosier v. Walter, 17 Okl. 305, 87 P. 877.

1. Conveyance of land where part of consideration had been paid. Rudolf v. Costa [La.] 44 So. 477. Where a settlement is vacated on the ground of undue influence, then judgment should provide for the return of money paid under it, with interest at six per cent. Whitcomb v. Collier [Iowa] 110 N. W. 836. In action to set aside a deed on ground of undue influence, evidence examined, and decree requiring plaintiff as a condition precedent to the granting of relief to pay defedant $50 approved. Owings v. Turner [Or.] 87 P. 160.

Tax deed: Under Rev. St. 1898, § 1210h, as a condition precedent to relief from a tax deed which is void for irregularities, the plaintiff must pay the face value of the tax certificates, with the prescribed interest, although such certificates have been sold at less than their face value. Maxcy v. Simonson, 130 Wis. 650, 110 N. W. 803.

2. Supreme Council of Knights and Ladies of Columbia v. O'Neill [Neb.] 111 N. W. 640; Gallagher v. O'Neill [Neb.] 111 N. W. 582; Clint v. Eureka Crude Oil Co., 3 Cal. App. 463, 86 P. 817; Bridges v. Barbree, 127 Ga. 679, 56 S. E. 1025; Fritz v. Jones, 117 App. Div. 643, 102 N. Y. S. 549; Ring v. Ring, 105 N. Y. S. 498.

3. Ring v. Ring, 105 N. Y. S. 498. Where a part of the consideration for a deed procured by fraud is marriage, the fact that plaintiff cannot release defendant from that legal bond will not preclude a cancellation of the deed. Id.

4. Vendee guilty of actual fraud in procuring deed from one laboring under mental disability, and it was not shown what part of consideration, if any, was paid vendor. Jackson v. Counts [Va.] 56 S. E. 870. But if the grantee dealt fairly with the grantor without knowledge of his disability, he must usually be placed in statu quo. Id. Consideration inadequate and grantor laboring under mental disabilty known to the grantee, or attended with such outward, visible signs as to put a reasonably prudent man upon inquiry. Studebaker v. Taylor [Ind. App.] 80 N. E. 861.

5. Champion Funding & Foundry Co. v. Haskett [Mo. App.] 102 S. W. 1050.

6. Dille v. White [Iowa] 109 N. W. 909.

7. Such officers have no power to draw money except as authorized by an appropriation. State v. Washington Dredging & Imp. Co. [Wash.] 86 P. 936.

tial condition precedent to the right of the United States to maintain a suit for the cancellation of a patent to land issued through mistake, in order that the title may be conveyed to one equitably and rightfully entitled thereto.[8] Delay in returning or tendering the consideration may preclude cancellation.[9] An offer in the petition to return it is not a sufficient tender,[10] but under peculiar circumstances, where part of the consideration had been returned, an offer of the other part at the trial was held sufficient.[11] Where an undertaking to make a tender is met by the assertion that it will not be accepted, a more formal tender is excused.[12] It is not essential as a prerequisite to rescission that plaintiff shall be able to make his adversary whole pecuniarily, but only that he return to him what he received, or, if this cannot be done, show its worthlessness.[13] But upon the cancellation of a deed conveying land defendant is entitled in addition to a return of the price paid to be compensated for all legitimate disbursements which have either preserved or improved the property,[14] deducting, however, its rental value during the time of occupancy.[15] For such disbursements defendant is entitled to a lien on the land.[16] It is not an essential prerequisite to the cancellation of a deed that plaintiffs should compensate defendant for the support and maintenance of grantor and his wife where defendant received rents and profits from the land granted amply sufficient to compensate him therefor.[17] Defendant is not entitled to any allowance for the expenses of moving to the land granted from an adjoining place.[18] Grantor cannot be required to pay a sum mentioned in the deed as a consideration but never received by him.[19]

Laches and limitations.[20]—No precise limit of time can be stated within which an action must be brought for the cancellation of a contract of conveyance on the ground of fraud.[21] It is not required that action be brought before the defrauded

8. United States v. Laam, 149 F. 581.

9. Grantor with full knowledge of material facts accepted the purchase price, and did not disavow the sale for nearly a month and kept the money for neary four years without tendering it back, and then paid it into court. It was held that cancellation was properly refused. Burke-Mobray v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 827, 97 S. W. 321.

10. Burke-Mobray v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 827, 97 S. W. 321.

11. At the time suit was brought to set aside a conveyance of land as a consideration for which two tracts of land had been conveyed to plaintiff, plaintiff led his counsel to understand that he had executed to defendant a deed to one of such tracts, when in fact he had only left the deed with him. Therefore a deed to one tract only was tendered before suit. At the trial when the mistake was discovered, a deed to the other tract was tendered. The plaintiff was mentally weak. Owings v. Turner [Or.] 87 P. 160.

12. Suit to cancel assignment of decree for alimony. Fournier v. Chulton, 146 Mich. 289, 13 Det. Leg. N. 747, 109 N. W. 425.

13. A contract for the purchase of mining stock induced by fraudulent misrepresentations and a deed executed in pursuance thereof were held to be properly rescinded and cancelled, although since the contract was made the stock had fallen in value. Barron v. Myers, 146 Mich. 510, 13 Det. Leg. N. 858, 109 N. W. 862.

14. Setting aside a conveyance of land and cancelling the deed on the ground of constructive fraud can be made conditional upon compensation being made for such disbursements. Atkins v. Atkins [Mass.] 80 N. E. 806. Taxes paid by the grantee comes within this rule. Id. Under the Massachusetts statutes, where a guardian who has indirectly sold and conveyed her ward's realty to herself, occupies the premises for more than six years, she or one claiming under her is entitled to betterments. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497.

15. Tomsik v. Tomsik [Neb.] 110 N. W. 674. Defendant not entitled to allowance for improvements of no greater value than the rent during the period of his occupancy. Alvey v. Alvey, 30 Ky. L. R. 234, 97 S. W. 1106.

16. Defendant entitled to lien for the amount paid for taxes and to relieve the land from a mortgage, less rental value, during the time of his occupancy. Tomsik v. Tomisk [Neb.] 110 N. W. 674.

17. Action by heirs of grantor to cancel deed made to his son. Groesbeck v. Groesbeck [Or.] 88 P. 870.

18. Alvey v. Alvey, 30 Ky. L. R. 234, 97 S. W. 1106.

19. May v. May, 29 Ky. L. R. 1033, 96 S. W. 840.

20. See 7 C. L. 519.

21. Garrett v. Finch [Va.] 57 S. E. 604. What is a reasonable time must in a great measure depend upon the exercise of the sound discretion of the court under all the circumstances of the particular case. Id. In action to rescind a lease, held that from allegations of bill it could not be stated as a matter of law that right to rescind had been lost by laches. Id.

person has discovered the fraud, or acquired knowledge of facts which ought in the exercise of reasonable prudence to put him on inquiry,[22] but upon discovery of the fraud he must act with reasonable promptness.[23] Laches will not be imputed to one in possession of land for delay in bringing suit to cancel his deed conveying such land.[24] The relationship of the parties will sometimes excuse delay in bringing suit.[25] In some jurisdictions the time within which action must be brought is regulated by the statute of limitations.[26] Where a cestui que trust conveys to his trustees, the statute of limitations begins to run against an action to cancel the conveyance on the ground of fraud from the date of such conveyance.[27]

§ 2. *Cause of action and grounds for relief.*[28]—An instrument may be canceled for fraud,[29] breach of trust,[30] undue influence,[31] duress,[32] or mental incompetency,[33] or for two or more of these causes combined.[34] To warrant canceling an instrument

22. Evidence upon which it could not be said that trial court erred as matter of law in finding that plaintiff was not guilty of laches. Manning v. Mulrey, 192 Mass. 547, 78 N. E. 551. In suit to rescind contract for purchase of mining stock and to cancel deed given in pursuance thereof, facts held not to constitute laches. Barron v. Myers, 146 Mich. 510, 13 Det. Leg. N. 858, 109 N. W. 862.

23. Barron v. Myers, 146 Mich. 510, 13 Det. Leg. N. 858, 109 N. W. 862; Gallagher v. O'Neill [Neb.] 111 N. W. 582. If after such discovery of fraud grantor remains silent and uses negotiable paper given as part of the consideration, or retains the purchase price, he will be held to have waived his right to rescind and to have affirmed his contract. Id.

24. Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736.

25. Delay by wife in bringing suit against husband or his heirs to cancel deed conveying property to husband is excused. Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736. Where an action is brought by a parent to set aside a conveyance made to a child on the ground of fraud and undue influence, the same promptness is not required as would oe necessary were the action brought against a stranger. Hunter v. McCammon, 104 N. Y. S. 402.

26. Action to cancel a conveyance on the ground of fraud must be brought within ten years under Ky. St. 1903, § 2519. Jolly v. Miller, 30 Ky. L. R. 341, 98 S. W. 326. In Louisiana an action to set aside a contract for the sale of land must be brought within four years. Rudolf v. Costa [La.] 44 So. 477. Fontenette v. Kling, 118 La. 152, 42 So. 756.

27. Conveyance by heir of his entire interest as such to administrator, who had by power of attorney from the heirs been authorized to sell the real estate and to settle and adjust debts due the estate. Jolly v. Miller, 30 Ky. L. R. 341, 98 S. W. 326.

28. See 7 C. L. 519. Se, also, the topics Duress, 7 C. L. 1201; Fraud and undue influence, 7 C. L. 1873; Incompetency, 8 C. L. 169; Mistake and Accident, 8 C. L. 1020.

29. Deed. Ring v. Ring, 105 N. Y. S. 498; May v. May, 29 Ky. L. R. 1033, 96 S. W. 840. Assignment of land contract. Moore v. Irish [Wash.] 86 P. 942. Corporate stock subscription notes. Leutzke v. Roberts, 130 Wis. 97, 109 N. W. 949. Note canceled to extent that fraud has rendered the consideration therefor inadequate. Sipola v. Winship [N. H.] 66 A. 962. A contract obtained by misrepresentation or fraudulent concealment of superior knowledge will be canceled. Tolley v. Poteet [W. Va.] 57 S. E. 811. Woman 85 years old and mentally incapacitated induced to convey lands worth $12,000 for a grossly inadequate consideration. Studebaker v. Taylor [Ind. App.] 80 N. E. 861. In an action to set aside a quitclaim deed a finding that the property was sold under a tax judgment prior to the deed does not preclude a finding that the plaintiff is the owner of such property, where it further appears that defendant knew or believed that the tax judgment was void, and could be set aside on motion, and not only concealed knowledge of this fact or belief from plaintiff but made representations directly to the contrary. Cantwell v. Nunn [Wash.] 88 P. 1023. Where one from whom a deed for land was procured by fraud was induced to believe that he was executing an option contract with one acting as agent of the fraudulent grantee, and to part with substantial interests of property in addition to those covered by such contract, but proposes to perfect in grantee such title as by said contract was agreed to be given, the deed will be set aside upon repayment of the purchase money, unless the grantor reconvey all interest in the land except such as the grantor agreed in said contract to convey. Tolley v. Poteet [W. Va.] 57 S. E. 811.

30. Contract of sale entered into by trustee with one having knowledge of trust. Jones v. Byrne, 149 F. 457.

31. Deed. Champeau v. Champeau [Wis.] 112 N. W. 36; Ring v. Ring, 105 N. Y. S. 498. Undue influence resulting from confidential relations existing between client and attorney warranting judgment setting aside settlement. Whitcomb v. Collier [Iowa] 110 N. W. 886.

32. The maxim "In pari delicto, melior est conditio defendantis" does not apply to a case where a married woman sues to set aside a deed of her separate property made by her under express or implied threats of the prosecution of her husband for a felony, whether the threatened prosecution was lawful or unlawful. Burton v. McMillan [Fla.] 42 So. 849.

33. Deed. Jones v. Gilpin, 127 Ga. 379, 56 S. E. 426. Deed of trust. Gross v. Jones [Miss.] 42 So. 802.

34. Fraud and breach of trust by agent: Quitclaim deed. Cantwell v. Nunn [Wash.] 88 P. 1023.

on the ground of fraud, legal fraud, actual or constructive, must be clearly proved,[35] but representations which are untrue and which materially affect the value of the property which forms the subject of the contract will furnish grounds for a rescission even though they may not have been made with fraudulent intent.[36] Fraudulent representations are not ground for cancellation if the means of knowledge respecting the matters falsely represented were equally open to both parties.[37] Ratification is not a good defense to an action to cancel a contract of sale or deed of conveyance on the ground of fraudulent misrepresentations, unless it is shown that such ratification was with notice or knowledge of the falsity of the representations.[38] Where in an action upon promissory notes it appears that the notes were given as part of a scheme to defraud the public, the court may decree their cancellation.[39] Where cancellation of a deed is sought on the ground of duress questions as to the amount of property involved, its value, and the consideration paid, are immaterial.[40] Mutual mistake of facts is ground for cancellation,[41] as is also a mistake of facts by one party only, if no injustice will accrue therefrom to the other party.[42] But the mistake to justify such relief must affect the substance of the contract[43] and must not be due to negligence.[44] Mistake of law is not, as a general rule, ground for cancellation of a contract or deed,[45] but if such mistake is occasioned by the fraudulent representation or culpable negligence of another, or induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken persons such as inequitable conduct of the other party, cancellation may be had.[46] Where a deed is executed without consideration but not for any fraudu-

Mental incompetency and undue influence: Deeds and transfers of property. Ferguson v. Heffner [Ky.] 103 S. W. 270.

35. Conveyance of real property. Dorris v. McManus, 3 Cal. App. 576, 86 P. 909. A plaintiff who shows average intelligence and can read must, to secure cancellation of an instrument on the ground that he did not read it before signing, and was thereby imposed on, establish a very clear case. Smith v. Humphreys, 104 Md. 285, 65 A. 57.

36. Shaw v. O'Neill [Wash.] 88 P. 111. Such representations, though founded on mistake in contemplation of equity, constitute fraud. Id. Rescission may be had of a contract for the sale of land where vendor misrepresented that he owned the land agreed to be purchased and also misrepresented that his deed described such land, although such representations were made without knowledge of their untruth. Id.

37. Burke v. Johnson [C. C. A.] 146 F. 209. A contract without warranty for the sale of cattle will not be canceled because the cattle are diseased and the seller stated that they were not, if such statement was made in good faith and the buyer inspected the cattle before he made the contract. Dorsey v. Watkins, 151 F. 340.

38. Graybill v. Drennen [Ala.] 43 So. 568. Reconveyance and acceptance by grantor of part of property granted in ignorance of falsity of representations and of material facts concealed will not preclude cancellation. Tolley v. Poteet [W. Va.] 57 S. E. 811.

39. Champion Funding & Foundry Co. v. Heskett [Mo. App.] 102 S. W. 1050. And this though the plaintiff is not compelled to bring in the illegal transaction in order to make out a prima facie case. Id.

40. Bartek v. Kolacek [Tex. Civ. App.] 99 S. W. 114.

41. Purchase price in written contract of sale wrongly stated. Farquhar v. Farquhar [Mass.] 80 N. E. 654. In an action for the rescission of a contract on the ground of fraud an answer alleging mutual mistake is no defense. Shaw v. O'Neill [Wash.] 88 P. 111. Where a borrower gives his note and receives checks, even though such checks be received as money, if unkonwn to either party the bank on which they are drawn is hopelessly insolvent, the note may be canceled on the ground of mutual mistake. Dille v. White [Iowa] 109 N. W. 909. And in such case if the checks are received not as money but as a convenient mode of obtaining the money, the note may be canceled, though the borrower took the checks to the bank and received drafts therefor. Id.

42. Thompson v. Dupont Co., 100 Minn. 367, 111 N. W. 302; Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N. E. 564. Facts in a suit to set aside a sale and quitclaim deed held not to bring it within the purview of this rule. Thompson v. Dupont Co., 100 Minn. 367, 111 N. W. 302.

43. Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N. E. 564.

44. Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N. E. 564. A contract of sale will not be canceled at the suit of the seller because of his error in adding up the amounts representing the selling price. Id.

45. Tolley v. Poteet [W. Va.] 57 S. E. 811; Burk v. Johnson [C. C. A.] 146 F. 209. The fact that a grantor did not understand the legal effect of his voluntary deed is not, in itself sufficient ground for cancellation. Fretz v. Roth, 70 N. J. Eq. 764, 64 A. 152.

46. Tolley v. Poteet [W. Va.] 57 S. E. 811.

lent purpose, it will be canceled at the suit of the grantor,[47] but inadequacy of consideration alone is not a sufficient ground for canceling a contract or conveyance,[48] unless it is so gross that it shocks the conscience and furnishes decisive evidence of fraud.[49] Cancellation is frequently had because of want of consideration combined with other causes.[50] Mere breach of contract is not, ordinarily, ground for cancellation of a contract or deed, as for this there is an adequate remedy at law.[51] It is not sufficient ground for canceling a lease that lessee stipulates therein that at the end of a specified time he shall have the option to keep the lease in force by then doing some act which at the date of the lease he is unable to perform,[52] nor will a lease be canceled because the lessee does not perform the conditions therein on his part immediately, when, by the provisions of the instrument, he is permitted to delay performance for a specified time.[53] That an instrument is forged,[54] or that a contract is usurious,[55] is sufficient ground for cancellation. At common law a deed by a wife conveying land to her husband is void and will be set aside at her suit,[56] and under the West Virginia statute the fact that the husband did not join therein is sufficient ground for canceling a married woman's deed.[57] That deeds were not delivered to and accepted by grantee is ground for cancellation at the suit of grantor's heirs.[58] A sheriff's deed conveying property sold under an execution which was issued under an invalid judgment will be canceled as a cloud upon the owner's title.[59] A satisfaction of a deed of trust will be canceled if the person marking the deed satisfied on the record did so without authority.[60] Where a note and mortgage is given simply in lieu of a prior note and mortgage, the first note and mortgage should be canceled.[61] An instrument will not be canceled for ambiguity when the contract of the parties can be clearly and certainly ascertained therefrom.[62] A deed will not be set aside merely because it was made for the purpose of depriving the state of inheritance taxes.[63] As a general rule equity will not aid one who has knowingly entered into a contract void as against public policy by canceling a deed executed in pursuance thereof.[64] Where a grantor acknowledged his deed willingly, the fact that the persons procuring it may have known before its execution that he was unwilling to execute it is not ground for cancellation.[65] A husband's voluntary deed conveying part of his property to his wife will not be canceled at his suit merely because it is improvident or because it contains no provision for revocation or re-

47. Deed executed to prevent grantor from squandering his property under the influence of his wife. Bybee v. Bybee [Wash.] 87 P. 1122.

48. Smith v. Collins [Ala.] 41 So. 825. Deed conveying land. Shepherd v. Turner, 29 Ky. L. R. 1241, 97 S. W. 41. Mere fact that grantor made a poor bargain no cause for canceling deed. Thurman v. Ellinor [Ark.] 101 S. W. 1154.

49. Smith v. Collins [Ala.] 41 So. 825. The inadequacy must be so gross as to strike the understanding with the conviction that the transaction was not fair and bona fide. McCaskill v. Scotch Lumber Co. [Ala.] 44 So. 405.

50. Undue influence and want of consideration. Groesbeck v. Groesbeck [Or.] 88 P. 870. Mental incompetency, undue influence, and want of consideration. Smith v. Gardner, 147 Mich. 670, 14 Det. Leg. N. 23, 111 N. W. 347.

51. See ante, § 1.

52, 53. Ringle v. Quigg, 74 Kan. 581, 87 P. 724.

54. Evidence requiring submission to jury of question whether deed of trust was a forgery. Helm v. Lynchburg Trust & Sav. Bk. [Va.] 56 S. E. 398.

55. Loan contract and trust deed. Guaranty Sav. Loan & Investment Co. v. Mitchell [Tex. Civ. App.] 99 S. W. 156.

56, 57. Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736.

58. Evidence held to sustain a decree canceling certain deeds on this ground. Leidenthal v. Leidenthal, 105 N. Y. S. 807.

59. Giddens v. Alexander, 127 Ga. 734, 56 S. E. 1014.

60. Ennis v. Padgett [Mo. App.] 99 S. W. 782.

61. Leigh v. Citizens' Sav. Bk. [Ky.] 102 S. W. 233.

62. Ringle v. Quigg, 74 Kan. 581, 87 P. 724.

63. Blake v. Ogden, 223 Ill. 204, 79 N. E. 98.

64. Roy v. Harney Peak Tin Min., Mill. & Mfg. Co. [S. D.] 110 N. W. 106.

65. Charge held not violative of this proposition. London v. Crow [Tex. Civ. App.] 102 S. W. 177.

version.[66] A judgment creditor is not entitled to have canceled a mortgage alleged to be fictitious and without consideration assumed by his debtor on premises leased by him.[67]

§ 3. *Procedure.*[68]—An action for the cancellation of a contract for the sale of lands being in personam, a court in one state or judicial district has jurisdiction of it though part of the lands are in another state and district.[69] In an action to cancel a written contract, deed, or other instrument, it is essential to allege such facts as will authorize its cancellation.[70] If fraud is the gist of the action it must be distinctly alleged,[71] and facts constituting legal fraud, actual or constructive, must be pleaded,[72] but if fraud is alleged, but is not an essential element of the case stated, it is not essential to allege the facts constituting fraud.[73] The rule that the facts constituting the gist of the action must be pleaded applies, whatever the cause of the action may be, whether undue influence,[74] mental incapacity,[75] inadequacy of consideration,[76] failure to comply with provisions of lease,[77] or absence of authority to enter on the record the satisfaction of a deed of trust.[78] Where in an action to cancel a deed conveying real estate it appears from the facts pleaded that the vendee has so acted as to create a reasonable belief that he has abandoned the contract, it is not necessary for the vendor to plead notice of disaffirmance.[79] The complaint or petition should allege a repayment or tender back of the consideration reviewed by plaintiff,[80] but the defendant may be estopped to complain of the

66. Fretz v. Roth, 70 N. J. Eq. 764, 64 A. 152.

67. The mortgage in this case was not a lien on anything ever owned or transferred by the debtor, and it did not appear that the landlord was attempting to enforce a claim for any sum as secured by such mortgage. Pritz v. Jones, 117 App. Div. 643, 102 N. Y. S. 549.

68. See 7 C. L. 521. For general rules of equity practice, see Equity, 7 C. L. 1323.

69. Jones v. Byrne, 149 F. 457.

70. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 S. W. 686. In an action to set aside an assignment of a claim against a corporation on the ground of fraud, if the allegations of the complaint show that plaintiff had no claim against the corporation, and the assignment is no bar to any right of action which plaintiff may have against defendant, a demurrer to such complaint will be sustained. Gordon v. Maas, 115 App. Div. 377, 100 N. Y. S. 891.

71. Lease. Smith v. Collins [Ala.] 41 So. 825.

72. Conveyance of real property. Dorris v. McManus, 3 Cal. App. 576, 86 P. 909.

Allegations showing cause of action: Lease. Garrett v. Finch [Va.] 57 S. E. 604. Assignment of school land contract. Norgren v. Jordan [Wash.] 90 P. 597. Transfer of personal property. Pritz v. Jones, 117 App. Div. 643, 102 N. Y. S. 549.

73. Action to cancel a satisfaction of a deed of trust. Ennis v. Padgett [Mo. App.] 99 S. W. 782.

74. In suit to recover real property, the deeds for which were taken in the name of defendant, complaint held not to allege undue influence. Mullin v. Mullin, 104 N. Y. S. 323.

75. Complaint in action to set aside a transfer of personalty, which merely alleges that transferrer was not in fit condition to transact any business and unable to understand his acts or the effect thereof, but which does not allege that he was insane or wholly unable to understand the nature of the transaction, is insufficient. Pritz v. Jones, 117 App. Div. 643, 102 N. Y. S. 549. In suit for the cancellation of a deed, complaint is sufficient if it show unsoundness of mind, knowledge thereof by grantee, and gross inadequacy of consideration. Studebaker v. Taylor [Ind. App.] 80 N. E. 861. In such case, if the suit is by heirs of grantor, who was 85 years old when the deed was executed, it need not be averred that decedent did not rescind or disaffirm during life. Id. In suit for cancellation of a deed, an averment of afcts that fairly and reasonably impute knowledge in the grantee of the grantor's mental incapacity is sufficient. Averment in complaint held sufficient in this respect. Id.

76. Lease. Smith v. Collins [Ala.] 41 So. 825.

77. Action under B. & C. Comp. § 494, to cancel lease of county road. Complaint held sufficient. Tillamook County v. Wilson River Road Co. [Or.] 89 P. 958.

78. Petition held sufficient. Ennis v. Padgett [Mo. App.] 99 S. W. 782.

79. Mosier v. Walter, 17 Okl. 305, 87 P. 877.

80. In an action to set aside an assignment of a contract on the ground of fraud, an allegation of readiness and willingness to repay all advances with legal interest is sufficient. Norgren v. Jordan [Wash.] 90 P. 597. A deed will not be canceled on the ground of fraud where it appears from the petition that complainant had in hand money which had been paid or deposited with her by the grantee, and there is no allegation of repayment of or offer to repay such money. Bridges v. Barbree, 127 Ga. 679, 56 S. E. 1025. Where it is sought to have canceled a release executed by a beneficiary of a certificate issued by a fraternal benefit society on the ground that it was obtained by fraud, the complaint is insufficient if it fails to allege a return or tender of a sum received

insufficiency of the petition on this ground.[81] Lack of an adequate remedy at law need not be pleaded, but the facts themselves should be pleaded from which that conclusion can be drawn.[82] Allegations in a bill which are immaterial to the case presented cannot be considered.[83] The bill must not be multifarious.[84] In an action to set aside a deed, a demurrer to the bill does not admit the allegation therein that the deed was never lawfully delivered.[85] In Oregon the demurrer must specify the grounds of objection to the complaint.[86] The answer must contain a sufficient denial to the allegations of the complaint or must set up a good affirmative defense.[87] Where the answer sets up an affirmative defense which raises no issue that has not already been raised by the pleadings, such defense may be stricken out upon motion.[88] The answer must not plead inconsistent defenses.[89] In Kansas a cross petition in an action on promissory notes asking that the notes be canceled on the ground of failure of consideration may be so amended as to conform to the facts proved.[90] The charge of the court must be confined to issues made by the pleadings.[91] The charges should not be obscure, nor should there be undue repetition

by the beneficiary. Supreme Council of Knights and Ladies of Columbia v. Apman [Ind. App.] 80 N. E. 640. But in New York it has been held that in an action to set aside a transfer of personal property on the ground of fraud, a complaint which contains a prayer for general relief is sufficient, though it does not specifically allege a precedent return of the consideration paid or an offer to return. Pritz v. Jones, 117 App. Div. 643, 102 N. Y. S. 549.

81. In an action to set aside a deed defendants are estopped to complain of the insufficiency of the petition in not tendering the return of a sum mentioned in the deed as the consideration paid, or surrender of land on which grantor was permitted to reside, when such sum was never paid and the land was restored to grantee. May v. May, 29 Ky. L. R. 1033, 96 S. W. 840.

82. Action to cancel deed. Mosier v. Walter, 17 Okl. 305, 87 P. 877.

83. So held where a bill to cancel a note charged fraudulent misrepresentations as to the value of certain stock and therein charged that the note was given and the stock put up to secure it as an accommodation to defendant and without any consideration, and that plaintiff was not to pay it. The allegations as to fraudulent misrepresentations are immaterial to the case presented. Bass v. Sanborn, 119 Mo. App. 103, 95 S. W. 955.

84. Bill in action to rescind lease on ground of fraud held not multifarious. Garret v. Finch [Va.] 57 S. E. 604. In an action under B. & C. Comp. § 4946, to cancel lease of county road for failure of lessee to comply with its provisions, plaintiff cannot join a claim to avoid the contract because made without authority, or because not yet fully executed. Tillamook County v. Wilson River Road Co. [Or.] 89 P. 958.

85. Blake v. Ogden, 223 Ill. 204, 79 N. E. 68.

86. Under B. & C. Comp. §§ 68, 69, 72, where an action to set aside a deed on the ground of grantor's mental incompetency is brought by grantor by his next friend, if the defendant does not demur on the ground that such suit cannot be brought by next friend, that objection will be deemed waived. Owings v. Turner [Or.] 87 P. 160.

87. In action to cancel contract for sale of land, denials in answer to complaint which alleged that defendants willfully neglected and refused to pay interest as required by contract held sufficient to preclude judgment on pleadings. Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916. In action to annul contract of sale on ground of fraudulent representations, a plea in the answer which charges a ratification of the sale, but pretermits any notice or knowledge of the falsity of the representations, is bad. Graybill v. Drennen [Ala.] 43 So. 568. In action to cancel a contract for the sale of bonds and stock of a corporation on the ground of false representations as to their value, etc., a plea in the answer that complainants, before purchase, had an investigation made of the property and business of the corporation and were informed of the condition of such property is insufficient in that it does not aver that complainants did not act upon respondent's representations, or that they acted upon the result of the investigation. Id. In such an action a plea in the answer that complainants after the purchase assumed control of the corporation and managed and operated its business for twelve months before offering to rescind the contract is insufficient in that it does not aver that complainants discovered the fraud, or were negligent in not doing so during the time they were in possession of the property. Id. So a plea in such answer charging complainants with notice of all facts connected with the issuance of the bonds, but not charging notice of knowledge as to the condition of the business of the corporation, is bad. Id.

88. So held, in action by vendee to rescind contract for sale of land, of defense that vendee had negligently permitted certain improvements on the land to deteriorate, where the complaint had alleged that vendee had offered to restore vendor to his original rights in the land which offer had been refused, and this allegation was denied by the general denials in the answer. Shaw v. O'Neill [Wash.] 88 P. 111.

89. Answer held not to plead inconsistent defenses. Bluett v. Wilce [Wash.] 86 P. 853.

90. Code Civ. Proc. § 139. Minneapolis Threshing Mach. Co. v. Currey [Kan.] 89 P. 688.

91. In an action by heir to cancel deed

therein, nor should it assume as facts matters not established by the undisputed evidence.[92] The judgment must be confined to the issues raised by the pleadings [93] and must be supported by the findings.[94]

Parties.[95]—An administrator may bring an action to cancel a deed made by his intestate.[96] The heirs at law of a grantor may sue to set aside his deed on the ground of undue influence and want of consideration.[97] In Kentucky a husband cannot bring an action in his own name to set aside a settlement made by his wife with another person concerning her separate estate.[98] The United States may maintain an action for the cancellation of a patent to a tract of land issued by mistake, where such land had been selected by the state of California under the Act of March 3, 1853, c. 145, and the application for such selection approved by the secretary of the interior, but the selection itself not formally approved, the state being without remedy in her own behalf.[99] An action for the cancellation of a sheriff's deed conveying property sold under an execution issued under an invalid judgment is properly brought against the sheriff, the purchaser at the sheriff's sale, and a grantee of lessee of the latter.[1]

Evidence and proof.[2]—As a general rule one seeking cancellation of an instrument has the burden of proof.[3] If fraud is the gist of the action the burden rests upon him to prove fraud,[4] and he must prove it clearly.[5] Where false representations are alleged the burden is upon plaintiff to show that false representations were made and that he was misled and damaged thereby.[6] Where no confidential relation exists, no presumption arises against the validity of a deed on the ground of undue influence,[7] and the burden is upon the plaintiff where he seeks cancellation on that ground. This rule applies to the deed of a married woman where it appears from its face that it has been duly executed and acknowledged.[8] But where

conveying land inherited, issue submitted as to concealment by grantee of number of acres of land belonging to decedent's estate and other material facts relating to such estate not made by pleadings. White v. White [Tex. Civ. App.] 16 Tex. Ct. Rep. 134, 95 S. W. 733.

92. Charge in action to cancel deed, as to effect of duress on rights of ultimate grantee charged with knowledge, held not open to objection on any of these grounds. London v. Crow [Tex. Civ. App.] 102 S. W. 177.

93. Judgment in action to set aside deed and bill of sale that conveyance was void because made in trust for purposes not permitted by Civ. Code, § 875, or that it conveyed no beneficial interest beyond the life of the grantor, held outside issues raised by pleadings. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276. Where the gravamen of the bill in a suit for the cancellation of a contract is the false and fraudulent representations of defendant, a decree for plaintiff cannot be had upon proof of a mutual mistake. Burk v. Johnson [C. C. A.] 146 F. 209. Complaint held to state sufficient facts to support decree canceling deed on the ground of fraud. Studebaker v. Taylor [Ind. App.] 80 N. E. 861. Complaint held to sustain decree cancelling lease on ground of lessee's failure to comply with provisions thereof. Florence Oil & Refining Co. v. McCumber [Colo.] 88 P. 265.

94. In action to set aside deed and bill of sale on ground of grantor's mental incapacity, a finding that "grantor was in full possession of his mental faculties and fully understood the transaction" was sufficient to suport a judgment for defendant under Civ. Code, § 38. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276.

95. See 7 C. L. 521.

96. Jones v. Gilpin, 127 Ga. 379, 56 S. E. 426.

97. Groesbeck v. Groesbeck [Or.] 88 P. 870.

98. Ky. St. 1903, § 2128. McGregor v. Overton's Ex'rs, 29 Ky. L. R. 1146, 96 S. W. 1114.

99. United States v. Lann, 149 F. 581.

1. Giddens v. Alexander, 127 Ga. 734, 56 S. E. 1014.

2. See 7 C. L. 521.

3. Where a paper which is in form a deed is delivered, in a suit to have it canceled on the ground that it is a will the burden is upon plaintiff to establish that fact. Fellbush v. Fellbush, 216 Pa. 141, 65 A. 28.

4. Dorsey v. Watkins, 151 F. 340. Action to cancel sale and transfer of property. Burrows v. Fitch [W. Va.] 57 S. E. 283.

5. Smith v. Collins [Ala.] 41 So. 825. The degree of proof required is more than a mere probability of the truth of the charge or a mere preponderance of the evidence. Id. The complainant cannot, ordinarily, maintain his case by his own testimony, or by mere preponderance of proofs, but must satisfy the court that he is entitled to relief. Marsh v. Cortis [C. C. A.] 150 F. 121.

6. Deed. Church v. Marsh [Iowa] 110 N. W. 161.

7. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276.

8. Where cancellation of a married woman's deed is sought on the ground of undue

an antenuptial contract provides that the wife shall not participate in the husband's estate if she survive him, the burden shifts to those seeking to uphold the contract,[9] and the burden will shift to defendant where a fiduciary relationship exists and it is shown that the maker of the instrument was suffering from mental impairment or other weakness.[10] So the relationship of mother and son, where the consideration for her deed to him was nominal, has been held to shift the burden.[11] When plaintiff makes out a prima facie case entitling him to relief, the defendant must take up the burden and meet the case so made by other evidence.[12] This rule applies where undue influence is the ground of action.[13] In an action to cancel a note it is not permissible for the maker to prove that though he executed the paper it was, at the time, agreed that he need not pay it.[14] Evidence relevant to an issue raised by the pleadings is admissible,[15] but evidence which is irrelevant to any such issue, or which is immaterial, is not admissible.[16] Evidence which is

influence, or that she was not conscious of her act in executing the same, if it appears from its face that it was duly executed and acknowledged, the burden is upon the plaintiff to establish one of said grounds by clear and convincing proof, and mere preponderance of the evidence in its favor is not sufficient. In this case the evidence was insufficient. Willis v. Baker, 75 Ohio St. 291, 79 N. E. 466.

9. In such case the burden is upon them to show that the contract is fair and equitable and was understood by the wife when she signed it. Maze's Ex'rs v. Maze, 30 Ky. L. R. 679, 99 S. W. 336.

10. Assignment of bonds. Cooper v. Moore, 104 N. Y. S. 1049.

11. Mother was 64 years of age and did not understand English. The burden was upon the son to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and of the effect of the transfer. Arellanes v. Arellanes [Cal.] 90 P. 1059.

12. Boyle v. Robinson, 129 Wis. 567, 109 N. W. 623.

13. Champeau v. Champeau [Wis.] 112 N. W. 36. Where the court stated the rule, an added remark which standing alone might be interpreted as indulging in unwarranted presumption against defendant was held not to vitiate the instruction. Id. In a suit for the cancellation of a deed, if mental weakness and gross inadequacy of consideration and knowledge of such mental weakness by the grantee are shown, it will be inferred that the inadequate consideration arose from undue influence or that an undue advantage was taken of the weakness, unless such presumption is satisfactorily rebutted by evidence. Studebaker v. Faylor [Ind. App.] 80 N. E. 861. Where there is evidence raising a presumption of undue influence, the burden is imposed on defendant of showing that plaintiff acted knowingly, intentionally, and deliberately, with full knowledge of the nature and effects of his acts, and that his consent to the execution of the instrument was not obtained by any advantage taken of his mental condition. Owings v. Turner [Or.] 87 P. 160. Evidence held sufficient to create an inference that defendant executed an undue influence over plaintiff in securing his deed. Id. Evidence held not to make a prima facie case for plaintiff. Boyle v. Robinson, 127 Wis. 567, 109 N. W. 623. Evidence held insufficient to overcome inference of undue influence. Owings v. Turner [Or.] 87 P. 160.

14. Bass v. Sanborn, 119 Mo. App. 103, 95. S. W. 955.

15. In a suit for the concellation of a note, if the complaint alleges that the note was solely for accommodation and without consideration, evidence to show consideration is admissible under an answer denying the allegations of the complaint. Morris v. Wilson [Colo.] 90 P. 845. In action to cancel note and trust deed given as security therefor, on the ground that the note was barred by the statute of limitations, the note with indorsements of payments made thereon was held to have been properly admitted in evidence upon the issue of the balance due upon the note in case the finding should be in favor of defendants upon affirmative defenses, in view of the fact that the findings were in favor of defendants on those issues. Sartor v. Wells [Colo.] 89 P. 797. In action for cancellation of contract for sale of land, a deed from vendee to his assignee of the property contracted for is admissible where complaint alleges that such assignee claims some interest in the property. Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916. In action to set aside deed on ground of breach of trust, evidence of expenses incurred by grantee upon land is admissible. Bluett v. Wilce [Wash.] 86 P. 853.

16. In action to cancel deed on ground of fraud and breach of trust, where it is alleged that plaintiff was induced to make deed by false representations made by defendant and another person who afterwards became her husband and from whom she was divorced, testimony of plaintiff as to her husband's treatment of her during their married life is inadmissible. Bluett v. Wilce [Wash.] 86 P. 853. In action to cancel on ground of duress a note given by a cashier to a bank for an amount claimed to have been taken by him, evidence that interest that should have been received by the bank was not credited on its books is not admissible where it was not considered when the note was executed. Lacks v. Butler County Bk. [Mo.] 102 S. W. 1007. In suit for the cancellation of contract for sale of land, letters passing between vendor and vendee, relating to nonpayment of interest on deferred payments, are not admissible to affect the rights of vendee's assignee who is not obligated to pay such interest, nor the rights of the bank

not part of the res gestae but is mere hearsay is not admissible.[17] All the evidence in the case must be considered in determining whether there is sufficient proof to warrant cancellation on the ground alleged in the pleadings.[18] Whether there is sufficient proof of some fact essential to the right of cancellation,[19] or whether defendant's evidence is sufficient to rebut plaintiff's or to establish some affirmative defense,[20] is to be determined from the facts adduced in each particular case.

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with which the deed to the land contracted to be conveyed had been deposited in escrow, where such bank was not authorized to collect interest. Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916. In action to set aside deed made by mother to son, a question asked two of the other children of plaintiff as to whether their father had left any estate to them was properly excluded, where the father did not die until some years after the execution of the deed by plaintiff and it was undisputed that he had conveyed practically all his property to defendant. Arellanes v. Arellanes [Cal.] 90 P. 1059. In such action a question asked a daughter as to her financial condition since the year of the execution of the deed was held inadmissible. Id.

17. In action for cancellation of note on ground of duress, where note was given by cashier of a bank to the bank for an amount claimed to have been taken from the bank by him, evidence of an admission made by a certain person ten days after the money was taken that he stole part of it is mere hearsay and not admissible as part of the res gestae. Lacks v. Butler County Bk. [Mo.] 102 S. W. 1007.

18. Evidence sufficient to warrant cancellation on ground of fraud: Deed. Ring v. Ring, 105 N. Y. S. 498; May v. May, 29 Ky. L. R. 1033, 96 S. W. 840. Assignment of land contract. Moore v. Irish [Wash.] 86 P. 942. Conveyance by mother to daughter. Hunter v. McCammon, 104 N. Y. S. 402.

Evidence insufficient to warrant cancellation on ground of fraud: Contract. Sellers, Bullard & Co. v. Grace [Ala.] 43 So. 716; Lewis v. Wilcox, 131 Iowa, 268, 108 N. W. 536. Deed. Bluett v. Wilce [Wash.] 86 P. 853; Lewis v. Wilcox, 131 Iowa, 268, 108 N. W. 536; Burchell v. Collier [Mich.] 14 Det. Leg. N. 65, 111 N. W. 748; Church v. Marsh [Iowa] 110 N. W. 161. Deed and bill of sale. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276. Assignment and deed. Moss v. Jack [Cal.] 90 P. 552. Deed conveying property from mother to son. Thompson v. Lanfair, 127 Ga. 557, 56 S. E. 770; Arellanes v. Arellanes [Cal.] 90 P. 1059. Lease. Smith v. Collins [Ala.] 41 So. 825. Acts of sale and contracts of lease. Fontenette v. Kling, 118 La. 152, 42 So. 756. In action to set aside timber contract, evidence held not to sustain allegation that plaintiff was deceived by defendant's agent. McCaskill v. Scotch Lumber Co. [Ala.] 44 So. 405.

Evidence sufficient to warrant cancellation on ground of undue influence: Deed. Champeau v. Champeau [Wis.] 112 N. W. 36; Groesbeck v. Groesbeck [Or.] 88 P. 870; Ring v. Ring, 105 N. Y. S. 498. Deeds and transfers of property. Ferguson v. Heffner [Ky.] 103 S. W. 270. Conveyance by mother to daughter. Hunter v. McCammon, 104 N. Y. S. 402. Annuity agreements. Barnes v. Waterman, 104 N. Y. S. 685. Discharge of mortgage. Smith v. Gardner, 147 Mich. 670, 14 Det. Leg. N. 23, 111 N. W. 347.

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Evidence sufficient to warrant cancellation on ground of duress: Conveyance by mother to daughter. Hunter v. McCammon, 104 N. Y. S. 402. Promissory note given by cashier of bank to the bank and deed of trust and chattel mortgage given to secure same. Lacks v. Butler County Bk. [Mo.] 102 S. W. 1007.

Evidence insufficient to warrant cancellation on ground of duress: Contract. Sellers, Bullard & Co. v. Grace [Ala.] 43 So. 716.

Evidence sufficient to warrant cancellation on ground of incompetency: Deeds and transfers of property. Ferguson v. Heffner [Ky.] 103 S. W. 270. Deed of trust. Gross v. Jones [Miss.] 42 So. 802. Conveyance by mother to daughter. Hunter v. McCammon, 104 N. Y. S. 402. Annuity agreements. Barnes v. Waterman, 104 N. Y. S. 685. Discharge of mortgage. Smith v. Gardner, 147 Mich. 670, 14 Det. Leg. N. 23, 111 N. W. 347.

Evidence insufficient to warrant cancellation on ground of incompetency: Deed. Thurman v. Ellinor [Ark.] 101 S. W. 1154. Deed and an assignment of certificates of deposit. Boyle v. Robinson, 129 Wis. 567, 109 N. W. 623.

Evidence sufficient to warrant cancellation on ground of want of consideration: Deed. Groesbeck v. Groesbeck [Or.] 88 P. 870. Discharge of mortgage. Smith v. Gardner, 147 Mich. 670, 14 Det. Leg. N. 23, 111 N. W. 347.

Evidence insufficient to warrant cancellation on grounds of want of consideration: Contract for sale of land. Rudolf v. Costa [La.] 44 So. 477.

Evidence sufficient to warrant cancellation on ground of usury: Loan contract and trust deed. Guarantee Sav. Loan & Inv. Co. v. Mitchell [Tex. Civ. App.] 99 S. W. 156.

Evidence not showing mutual mistake or fraud and mistake: In suit to set aside sale and quitclaim deed, evidence held not to show mutual mistake or mistake by one party and fraud on the part of other. Thompson v. Dupont Co., 100 Minn. 367, 111 N. W. 302.

19. Evidence held sufficient to show disaffirmance of deed before commencement of action for its cancellation. Studekaber v. Faylor [Ind. App.] 80 N. E. 861.

20. Evidence in action to set aside an act of sale held sufficient to prove that plaintiff consented to and signed the act. Fontenette v. Kling, 118 La. 152, 42 So. 756. In an action to set aside an assignment of a contract on the ground of fraud, evidence

CARRIERS.[21]

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Part I. General Principles.

§ 1. *Definition and distinctions.*[22]—A common carrier is one who undertakes for hire [23] to transport [24] goods or persons for all who may choose to employ him,[25]

held insufficient to prove a payment by the assignee of $2,000 at the time of the assignment. Norgren v. Jordan [Wash.] 90 P. 597. Evidence in same suit held insufficient to prove certain other payments alleged to have been made by the assignee. Id.

21. **This topic treats** only of laws relating to common carriers of persons or property. Those relating to corporations engaged in such carriage (See Railroads, 8 C. L. 1590; Shipping and Water Traffic, 8 C. L. 1903; Street Railways, 8 C. L. 2004) are pertinent to specific topics. Likewise relationship between carrier and employe is treated in Master and Servant, 8 C. L. 840. Rules peculiar to water traffic are treated in Shipping and Water Traffic, 8 C. L. 1903.

22. See 7 C. L. 523.

23. With or without special agreement as to price. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252. Express company offering to carry money for hire is a common carrier thereof under Rev. Civ. Code S. D. 1903, 1577. Platt v. Le Cocq, 150 F. 391.

24. Sleeping car company, held not common carrier. Calhoun v. Pullman Palace Car Co., 149 F. 546. Where distinct street car companies operate cars over parallel tracks in common, one does not sustain relation of carrier to a passenger on the other's cars. Foreman v. Norfolk, Portsmouth & Newport News Co. [Va.] 56 S. E. 805.

25. Under Pub. St. 1901, c. 160, §§ 21-23, it seems that a railroad company which enters into a contract to furnish special cars to a firm for transportation of milk

and it is immaterial whether he owns the facilities of carriage or not.[26] Unless prohibited by statute,[27] one may be a common carrier of passengers exclusively.[28]

§ 2. *Public duty, control, and regulation.*[29] *A. In general.*[30]—A carrier cannot relieve itself of its public duties without legislative sanction,[31] and hence is liable for the torts of its lessee,[32] including conversion of goods.[33] Federal courts may enforce order of state commissioners on cross bill, though a remedy is provided through the state courts.[34]

(§ 2) *B. Duty to undertake and provide carriage.*[35]—Subject to constitutional restrictions,[36] a carrier may be required to accept shipments a reasonable time before train time.[37] A carrier may limit express business to a single express company, provided it affords adequate service to the public.[38] A state may require reasonable connecting service between carriers.[39] Mandamus will lie to compel service only where carrier is under a legal duty,[40] and has means of rendering same.[41]

thereby becomes a common carrier of milk. Baker v. Boston & M. R. Co. [N. H.] 65 A. 386.

Held private carrier only: Where charter party gives to charterer full capacity of ship. The Fri [C. C. A.] 154 F. 333. One employed to tear down house and to move brick and lumber to another place. McBurnie v. Stelsly, 29 Ky. L. R. 1191, 97 S. W. 42.

26. Ownership of car immaterial where defendant was operating same. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978. Held under facts of case that railroad holding itself out as ready to do switching which required it to use own and another's tracks was common carrier. Larabee Flour Mills Co. v. Missouri Pac. R. Co., 74 Kan. 808, 88 P. 72.

27. Under Const. art. 11, § 12, and Hurd's Rev. St. 1905, c. 114, § 84, a railroad organized under the general act must carry both passengers and freight. Litchfield & M. R. Co. v. People, 222 Ill. 242, 78 N. E. 589.

28. Under Rev. Laws 1905, a corporation is no less a common carrier though its articles do not prescribe that one of its powers is to carry freight. In re Minneapolis & St. P. Surburban R. Co. [Minn.] 112 N. W. 13.

29. Validity of state regulations as affecting interstate commerce, see Commerce, 7 C. L. 667.

30. See 7 C. L. 523.

31. Leased property. Georgia R. & Banking Co. v. Haas, 127 Ga. 187, 56 S. E. 313.

32. Carleton v. Yadkin R. Co., 143 N. C. 43, 55 S. E. 429. Liability extends to injuries due to negligence of servants of lessee. Id. Lessor carrier is liable for lessee's breach of duty to passengers. Pickens v. Georgia R. & Banking Co., 216 Ga. 517, 55 S. E. 171. Carriers operating their lines jointly through common lessee may be sued jointly, especially where negligent acts were continuous over line of each. Carleton v. Yadkin R. Co., 143 N. C. 43, 55 S. E. 429.

33. Converted goods by delivery after notice of claim by true owner. Georgia R. & Banking Co. v. Haas, 127 Ga. 187, 56 S. E. 313.

34. Notwithstanding Rev. Pol. Code S. D. 1903, c. 7, authorizing commissioners to apply to state courts, etc. Platt v. Le Cocq, 150 F. 391.

35. See 7 C. L. 524.

36. It is no defense to order requiring carrier to receive shipments of money at reasonable hours that it will result in loss, where order does not fix the charge or compel the carrier to continue as carrier of money. Platt v. LeCocq, 150 F. 391.

37. It is no defense to order requiring carrier of money to receive shipments during reasonable hours that shipper could use postal department, and was therefore not prejudiced by its order accepting money only at unreasonable time. Platt v. Le Cocq, 150 F. 391. Rev. Pol. Code S. D. 1903, c. 7, applies to express company doing intrastate business whether incorporated in state or not, and subjects them to control of state board of railroad commissioners. Id.

38. Dulaney v. United Rys. & Elec. Co., 104 Md. 423, 65 A. 45.

39. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 Law. Ed. 933. Under police power, state may require interchange of cars and switching between lines physically connecting. Louisville & N. R. Co. v. Central Stock Yards Co., 30 Ky. L. R. 18, 97 S. W. 778. Const. § 213, held not to deprive carrier of property without due process of law, although it deprived it temporarily of possession and use of its cars (Id.), and carrier who has complied therewith, except as to stock cars consigned to particular yard, is estopped to contest its reasonableness (Id.). Contract with one stockyard not to deliver cars to another, as required by such section, is void, and hence no defense for noncompliance. Id. Carrier cannot refuse to obey on ground of inconvenience or increased expense. Id. Railroad takes its charter and holds property and franchise subject to constitutional changes, hence charter does not constitute contract so as to excuse carrier trom complying with Const. § 213. Id. Const. § 213 makes it compulsory for carriers to use terminal facilities for transfering freight with lines having physical connection, (Id.), and is not limited to requiring carrier to deliver such cars only as it receives from the connecting carrier (Id.). Under Const. § 213, stockyard company located on one line may compel carrier physically connecting with such line to deliver cars to such line for delivery at yard, where it delivers to other lines. Id. Order requiring Atlantic Coast Line Railroad Company to connect with particular train of Southern Railway Company, held not so arbitrary and unreasonable as to amount to denial of due process of law

Duty to furnish cars.[42]—The common-law duty to furnish cars upon proper demand [43] has been supplemented in some states by penal statutes,[44] that of Texas being valid as to intrastate [45] and inapplicable to interstate shipments.[46] Any legitimate excuse is available under this statute.[47]

(§ 2) *C. Charges.*[48]—Under the interstate commerce act as amended, the rate for a through shipment is sum of local rates filed or published, if no through joint rate has been filed.[49] Subject to the constitutional inhibitions against class legislation,[50] taking property without due process of law,[51] and impairment of contract rights,[52] the states may regulate and prescribe charges on intrastate shipments.[53] In determining the reasonableness of a rate, consideration should be given to the

or deprivation of equal protection of laws, other connections being inadequate, though it may require operation of train at loss so long as total state income affords adequate remuneration. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 Law. Ed. 933.

40. The East St. Louis v. Suburban R. Co. held under no legal duty to run cars to the east end of Eads Bridge. People v. East St. Louis & Suburban R. Co., 122 Ill. App. 431.

41. Carrier had no trackage rights. People v. St. Louis & Belleville Elec. R. Co., 122 Ill. App. 422.

42. See 7 C. L. 525.

43. Order to furnish cars "as soon as possible" is insufficient. Texas & P. R. Co. v. Shipman [Tex. Civ. App.] 17 Tex. Ct. Rep. 152, 96 S. W. 449.

44. The penal liability prescribed by Act March 31, 1874, § 23 (Hurd's Rev. St. 1905, c. 114, § 84), cannot be exacted for failure to "furnish, start, and run cars for the transportation of property," as required by § 22. Atchison etc., R. Co. v. People, 227 Ill. 270, 81 N. E. 342.

45. Rev. St. 1895, arts. 4497-4502, as amended by Acts 1899, p. 67, c. 48, imposing penalty for failure to furnish cars within certain time after demand. Allen v. Texas & P. R. Co. [Tex.] 101 S. W. 792.

46. Sayles' Rev. Civ. St. §§ 4497-4499, does not require carrier to furnish cars for interstate shipment extending beyond its line, hence application stating that shipper desired to bill over defendant's line to point in state, and from that point over another road to point in another state, is insufficient. Texas & P. Ry. Co. v. Loving [Tex. Civ. App.] 17 Tex. Ct. Rep. 159, 98 S. W. 451.

47. Rev. St. 1895, arts 4497-4502, held not to apply where carrier had any legitimate excuse, though specific excuses were mentioned in proviso clause, hence not unconstitutional as taking property without due process of law. Allen v. Texas & P. R. Co. [Tex.] 101 S. W. 792, rvg. 98 S. W. 450, as to availability of excuses. Answer failing to show that carrier had sufficient cars to meet ordinary demands, held demurrable. Id.

48. See 7 C. L. 525.

49. Interstate commerce act as amended by Act March 2, 1889, c. 382 (25 Stat. 855, U. S. Comp. St. 1901, p. 3156). United States v. Wood, 145 F. 405.

50. P. L. 1903, p. 665, § 38, fixing maximum rates, etc., is not unconstitutional in that it allows railroads organized under special charters to charge a higher rate than those organized under the general law. Shelton v. Erie R. Co., 73 N. J. Law, 588, 66 A. 403.

51. Whether rate adopted and fixed for transportation on line owning majority of stock of another could be legally applied to transportation on latter depends upon whether it is reasonable or confiscatory. Hill v. Wadley Southern R. Co. [Ga.] 57 S. E. 796,

Held void: Act March 15, 1906 (Acts 1906, p. 451, c. 256), requiring railroads operating in state to keep on sale family mileage books, etc. Commonwealth v. Atlantic Coast Line R. Co. [Va.] 55 S. E. 572. Acts 1905, p. 238, c. 124, fixing the weight of standards on lumber cars at 1,000 pounds, requiring it to be deducted from the "net weight" of the lumber, and freight charged on the remainder. State v. Great Northern R. Co., 43 Wash 658, 86 P. 1056.

Held valid: Rate of one cent per ton per mile on phosphates held reasonable where it appeared that such rate was nearly two mills higher than average rate in state. Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 Law. Ed. 175. Regulation of local freight rates for shipments to and from the Florida West Shore Railroad, and over Seaboard Air Line Railway, does not deprive latter of property without due process of law, even if total receipts from local freight rates are insufficient to meet proper charges against such business, where such regulation merely secures equality of rates throughout state. Id. Where Alabama & Vicksburg Railroad voluntarily gave rate of three and one-half cents per 100 pounds on grain between Vicksburg and Meridian to some shippers, it estopped itself from contending that similar rate fixed on by commission for all shippers was too low. Alabama & V. R. Co. v. Railroad Commission of Mississippi, 203 U. S. 496, 51 Law. Ed. 289.

52. Texas Act 1853, providing that the legislature should not reduce rates unless they shall have made a net profit of twelve per cent per annum during the ten previous years, held not to create a contract between the state and certain roads chartered thereafter. Houston & T. C. R. Co. v. Storey, 149 F. 499.

53. Circular No. 325, fixing continuous mileage rate between Wadley Southern Railway Company and Central of Georgia Railway Company, is clear and complete without reference to rule No. 1 (33 S. E. v.) or commission. Hill v. Wadley Southern R. Co. [Ga.] 57 S. E. 795. On appeal from an order of the railroad commission fixing rate, only questions are whether it has been established in due form of law under valid law, by valid commission, and is reasonable. Chicago, I. & L. R. Co. v. Hunt [Ind. App.] 79 N. E. 927.

value of carrier's property,[54] stocks, and bonds,[55] and current operating expenses,[56] but no allowance need be made for a sinking fund.[57] Unreasonable discriminations should not be made between commodities, quantitative shipments of same commodity,[58] or localities,[59] and the reasonableness of a single commodity rate cannot be considered apart from general schedule.[60] Rates fixed by commission are prima facie reasonable,[61] and a finding of the interstate commerce commission is prima facie evidence of the fact found in subsequent litigation.[62] Fact that schedule may indirectly result in discrimination in practice does not render it invalid.[63] An overcharge through mistake not amounting to gross negligence [64] creates no liability in New York. Congressional act prohibiting free transportation does not affect an existing contract.[65] A lessee of a land-grant aided road must carry government freight at rate prescribed for the land-grant road.[66]

Under interstate commerce act, copies of schedules of rates on interstate lines must be "posted,"[67] although such posting is not a condition precedent to operation of such rates.[68]

(§ 2) *D. Discriminations and preferences.*[69]—A carrier must not unjustly [70]

54. Chicago, I. & L. R. Co. v. Hunt [Ind. App.] 79 N. E. 927.

55. In action to enjoin enforcement of rates established by commission on ground that they are unreasonable and confiscatory, allegations in bill as to value of road's stocks and bonds are pertinent. Houston & T. C. R. Co. v. Storey, 149 F. 499.

56. Chicago, I. & L. R. Co. v. Hunt [Ind. App.] 79 N. E. 927. Expenditures for permanent improvement and equipment should not be charged to current expenses of single year for purpose of testing reasonableness of a rate. Illinois Cent. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 Law. Ed. 1128.

57. Houston & T. G. R. Co. v. Storey, 149 F. 499.

58. Disturbance of relation between freight rates for soap in carload lots and less than carload lots, created by advancing former from class six to class five and latter from class four to class three, was not cured by classifying soap in less than carload lots at twenty per cent less than third class, but not less than fourth class, where the result of such classification is to leave less than carload lots in fourth class in some portion of territory, and in higher in other portions. Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 51 Law. Ed. 995.

59. Economic and natural advantages of localities may justify classification of commodity rates in respect to such localities. Southern R. Co. v. Atlanta Stove Works [Ga.] 57 S. E. 429.

60. Hence, in action to enforce particular rate, answer, attacking its reasonableness without relation to body of rates presents no defensive issue of fact. Southern R. Co. v. Atlanta Stove Works [Ga.] 57 S. E. 429.

61. Burden is on attacking party to show contrary. Southern R. Co. v. Atlanta Stove Works [Ga.] 57 S. E. 429. Intra-state rate on phosphates will not be held unreasonable where the evidence does not show cost of transportation, amount of phosphates carried, or the effect of rate on income. Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 51 Law. Ed. 174. Where, after establishing a reasonable schedule of rates for all commodities, an exception is made in favor of one commodity between designated points, such exception cannot be said to be discriminatory as matter of law. Southern R. Co. v. Atlanta Stove Works [Ga.] 57 S. E. 429.

62. Where commission found reclassification unjustifiable, railroad in action to restrain enforcement thereof has burden of justifying. Interstate Commerce Commission v. Cincinnati, H. & D. R. Co., 146 F. 559. Reclassification of laundry soap shipments in less than carload lots from the fourth to twenty per cent less than third class rates, held unjustifiable. Id.

63. As that roads having right to charge higher rates will reduce them only at competitive points, thereby working discrimination between localities. Houston & T. C. R. Co. v. Storey, 149 F. 499.

64. Where street car conductor exacts second fare under mistaken belief that none has been paid, company is not liable under Railroad Law, § 39 (Laws 1890, p. 1096, c. 565), such over-charge being due to mistake not amounting to gross negligence. Robinson v. International R. Co., 103 N. Y. S. 588.

65. Act Cong. June 29, 1906, §§ 1, 2. Mottley v. Louisville & N. R. Co., 150 F. 406.

66. Acts 2d July, 1864 (13 Stat. P. 365) and Act 27th February, 1893 (27 Stat. P. 483), concerning such rates, are applicable. Astoria & Columbia River R. R. Co. v. U. S., 41 Ct. Cl. 284.

67. Posting of notices that they may be inspected on application is not sufficient. Wabash R. Co. v. Sloop, 200 Mo. 198, 98 S. W. 607.

68. Compliance with § 6 of Interstate commerce act as amended, not condition precedent. Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 Law. Ed. 562.

69. See 7 C. L. 527.

70. Granting that § 3 of interstate commerce act applies to facilities for shipment, indictment for discrimination in denying switching facilities which fails to allege that switches desired were reasonably practicable, could be put in with safety, that business justified them, and offer to pay usual cost, held insufficient. United States v. Baltimore & O. R. Co., 153 F. 997. Pol.

discriminate between businesses,[71] localities,[72] persons,[73] or between persons and other carriers,[74] but must serve all alike who apply under similar conditions.[75] Lack of cars to meet the demand does not justify discrimination, but the available cars must be proportionably distributed.[76] Both the interstate commerce act[77] and the Elkins act.[78] and some state statutes,[79] prohibit unjust discriminations. Rules and regulations of railroad commissioners to prevent discrimination are prima facie just and reasonable.[80] After May 1, 1908, it will be unlawful for a railroad to transport coal mined by it from state to state.[81]

As a means of preventing discrimination, the interstate commerce act, as

Code 1903, c. 7 § 437, prohibiting common carrier from subjecting any particular description of traffic to any prejudice or disadvantage in any respect whatsoever, construed to mean any "unreasonable" prejudice or disadvantage. Platt v. Le Cocq, 150 F. 391. Whether conditions justify difference in rates between localities is question of fact. United States v. Vacuum Oil Co., 153 F. 598.

71. Cannot refuse to carry consignments of liquor C. O. D. while it so carries other commodities. Crescent Liquor Co. v. Platt, 148 F. 894. Nor can it require a consignee of liquors to furnish an affidavit that he has a state license, or that he is a bona fide purchaser thereof for his own use, before delivery. Id.

72. Discrimination in demurrage charges in favor of Charlestown over South Boston is not available to one claiming discrimination against Forest Hills. Michie v. New York, etc., R. Co., 141 F. 694.

73. Cannot refuse to receive and deliver liquors from lawful dealers in one state if it receives and carries the same in other states. Crescent Liquor Co., v. Platt, 148 F. 894. Where switching service has been wrongfully discontinued as to a disfavored shipper, mandamus will lie to compel restoration. Larabee Flour Mills Co. v. Missouri Pac. R. Co., 74 Kan. 808, 88 P. 72.

74. Louisville & N. R. Co. v. Central Stock Yards Co., 30 Ky. L. R. 18, 97 S. W. 778.

75. Undertaking to distribute employes and materials between stations for one telegraph company, it must do so for others, although such distribution is under special contract (State v. Atlantic Coast Line R. Co. [Fla.] 41 So. 705), and railroad commission may make reasonable rules and regulations to prevent such discrimination (Id.).

76. Wright v. Baltimore & O. R., 32 Pa. Super. Ct. 5. Percentage ascertained by taking actual shipments of mines when supply is ample and possible capacity of mines, counting former as two points and latter as one, held not unreasonably discriminative against new mines. United States v. Baltimore & O. R. Co., 154 F. 108. In allotting by percentage, private cars are not to be diverted from the exclusive use of the owners, but must be credited on the allowance. Id. Reasonable extra allowance of cars may be made for prompt return of cars, such practice having been adopted instead of demurrage, charge, and open to all. Id. In making a percentage allotment of coal cars, credit need not be given for cars furnished by carrier, other carriers, or consumer, for receiving coal purchased for private use. Id. Allotment of arbitrary number of cars to develop new mines which have had no opportunity to establish a percentage is lawful within reasonable limits. Id. The fact that a shipper is not a mine owner or lessee, but has only a contract to purchase and sell coal, does not affect his right to an equal share of cars with the owners and lessees. Wright v. Baltimore & O. R. Co., 32 Pa. Super. Ct. 5. Carriers cannot discriminate in favor of "regular shippers" and against shippers for the first time. Id.

77. Provisions of interstate commerce act requiring rates for transportation and for "receiving, delivering, storage, or handling" to be reasonable, and prohibiting discrimination, are sufficiently broad to cover demurrage charges. Michie v. New York, etc., R. Co., 151 F. 694. Demurrage charge of $1 per day after first ninety-six hours, deducting Sundays, holidays, and rainy days, for time car of hay remains unloaded, held not unreasonable. Id. Demurrage charge for loaded hay cars is not a discrimination because hay is stored at less rate in hay shed by defendant at another point, or because storage on cars is allowed at shed rates at latter point if the shed is full. Id. Excessive charge for privilege of reconsignment of hay shipped through East St. Louis is unjust discrimination within §§ 2, 33 of interstate commerce act. Southern R. Co. v. St. Louis Hay & Grain Co. [C. C. A.] 153 F. 728.

78. The Elkins act is not restricted in its provisions to departures from published rate, but prohibits any unjust discriminations, hence immaterial in a prosecution for receiving an unjust discrimination whether the rate received was published or not. United States v. Vacuum Oil Co., 153 F. 598.

79. Acts 1901, p. 149, c. 93, Burns' Ann. St. 1901, §§ 3312b and 2212e, providing that express companies shall grant to all consignors, including other responsible express companies as consignors, equal terms and accommodations, etc., is not violative of 14th Amend. Fed. Const. in that it deprives express companies of right to demand prepayment of charges, compels them to make "forced loans" for accrued charges, or of common-law right of contract. American Exp. Co. v. Southern Ind. Exp. Co., 167 Ind. 292, 78 N. E. 1021.

80. Hence enforcement thereof is not a taking of property without due process of law, nor does it deprive a railroad of equal protection, in the absence of a showing that they are unreasonable or unjust. State v. Atlantic Coast Line R. Co. [Fla.] 41 So. 705.

81. Hepburn act (Act. Cong. June 29, 1906, 34 Stat. 584, c. 3591). Although title thereto passes before shipment. Central Trust Co. v. Pittsburg, etc., R. Co., 52 Misc. 195, 101 N. Y. S. 837.

amended, requires certain foreign rates,[82] joint interstate rates,[83] and rates on a through interstate line under a common arrangement,[84] to be filed and published. Where a rate between two points has been so filed and published, there can be no deviation therefrom except as provided by law,[85] though shipment is over another route.[86] One receiving a rebate [87] from a rate [88] which has been "filed and published" [89] is criminally liable under the Elkins act, though he did not request the same [90] or receive any personal benefit therefrom.[91] It is not essential that some other shipper shall have paid a higher rate.[92] A rebate need not have been prearranged to render carrier liable for granting the same.[93] A contract to carry goods at the then established rate for a definite period becomes ineffective after a higher rate is filed.[94] The rate law of June 29th, 1906, became effective on date of approval.[95]

Remedies, criminal liability, prosecution, and punishment.[96]—Injunction [97] will lie at instance of person discriminated against,[98] but a mere technical violation of the interstate commerce act will not support a private suit.[99]

82. If foreign shipment is carried under aggregate through rate which is sum of ocean rate and local rate to part of transshipment, the latter rate must be filed (Armour Packing Co. v. U. S. [C. C. A.] 153 F. 1.) But, if rate is joint rate by virtue of a common control, management, or arrangement, such joint rate must be filed (Id.). Rates of transportation from places in the United States to ports of trans-shipment of property in foreign commerce carried under through bills must be filed and published under the interstate commerce act and its amendments. Id.

83. Express agreement for through interstate rate is not necessary, but receipt and forwarding of business under a through bill or arrangement for through shipment is sufficient. United States v. Wood, 145 F. 405. Each carrier must file, hence indictment against one need not allege that such rate was not filed by the others. United States v. New York Cent., etc., R. Co., 153 F. 630.

84. Carrier must file, though its line is wholly intra-state. United States v. New York Cent., etc., R. Co., 153 F. 630. Indictment considered and held to sufficiently allege that defendant's road, though intrastate, was a part of a joint through route over which interstate commerce was established. Id.

85. United States v. Pennsylvania R. Co., 153 F. 625. Fact that shipment was made in cars not owned by carrier, and in bulk, does not authorize departure as matter of law. United States v. Vacuum Oil Co., 153 F. 598. Elkins law prohibits shipments at less than regular established rate, though by direct agreement. United States v. Standard Oil Co., 148 F. 719. Carrier filing and publishing schedule of rates for shipments beyond line must adhere thereto. Id.

86. United States v. Pennsylvania R. Co., 153 F. 625; United States v. Vacuum Oil Co., 153 F. 598. Indictment for departure from published joint rate for shipment between same points over another route is not defective for failing to allege that latter rate is not filed. United States v. Pennsylvania R. Co., 153 F. 625.

87. Elkins Law prohibits rebates to consignee as well as consignor. United States v. Standard Oil Co., 148 F. 719. Stockholder is not criminally liable for rebate accepted by corporation. United States v. Wood, 145 F. 405. Where partnership receives rebate, but turns it over to corporation for which it is sales agent, receiving no benefit itself, silent member who took no part, and who had no knowledge thereof, is not liable. Id.

88. Word "rate," as used in interstate commerce act, means net amount received and retained from shipper. United States v Chicago & A. R. Co., 148 F. 646. Hence, where carrier charges scheduled rate and remits part thereof as allowance for use of shipper's private side tracks, such act constitutes rebate. Id. Cancellation of terminal charge constitutes rebate. United States v. Standard Oil Co., 148 F. 719.

89. Under Elkins Act of February 19, 1903 (c. 708, 32 Stat. 847, U. S. Comp. St. Supp. 1905, p. 599), it is unlawful for carrier to grant rebate from joint rate which has been "filed or published," but shipper is liable for receiving rebate only when rate has been "filed and published." United States v. Wood, 145 F. 405.

90. United States v. Vacuum Oil Co., 153 F. 598.

91. As where he turns it over to another for whom he is acting as salesman. United States v. Wood, 145 F. 405.

92. Hence indictment need not name such a person nor allege that the published rate has ever been charged. United States v. Vacuum Oil Co., 153 F. 598. United States v. New York Cent., etc., R. Co., 146 F. 298.

93. Indictment under § 1 of Elkins Act for giving rebate which alleges that defendant received legal rate, and paid shipper rebate or concession, need not allege prearrangement to that effect. United States v. Chicago, etc., R. Co., 151 F. 84.

94. Right to change given by interstate commerce act is read into contract. Armour Packing Co. v. U. S. [C. C. A.] 153 F. 1.

95. Joint resolution of congress on day after approval, held ineffective to postpone. United States v. Standard Oil Co., 148 F. 719.

96. See 7 C. L. 527.

97. Louisville & N. R. Co. v. Central Stock Yards Co., 30 Ky. L. R. 18, 97 S. W. 778.

98. Where, in violation of Const. §§ 213 214, a carrier arbitrarily discriminates in refusing to deliver cars of stock to a connect-

The Hepburn act did not repeal the Elkins act as to offenses previously committed thereunder.[1] The only criminal intent necessary to the offense of receiving a rebate is an intent to accept a lesser rate.[2]

Where a rebate is given on a through rate, the offense is judicable in any district through which the shipment passes.[3] While the offense of discrimination may be set forth in the general language of the statute, it must be accompanied by a statement of particulars sufficient to avoid uncertainty.[4] Conspiracy to give and receive rebates will not lie where same facts constitute an offense under interstate commerce act.[5]

A carrier and its agents may be prosecuted under a single indictment for granting concessions.[6] The indictment must show a published rate binding upon the carrier,[7] though it need not especially aver that such rate was required to be filed,[8] and a willful [9] departure therefrom.[10]

Offense under act of February 19, 1903, of receiving rebates may be prosecuted upon information.[11] An indictment for giving or receiving a rebate need not expressly aver that carrier came within the statute,[12] nor need it negative facts which may render payment legal [13] or the means whereby the rebating was effected.[14] Indictment must not be duplicitous.[15]

ing line for transportation to particular stockyard, such stockyard company may sue to restrain. Louisville & N. R. Co. v. Central Stock Yards Co., 30 Ky. L. R. 18, 97 S. W. 778.

99. Mere proof that defendant technically violated the act by filing a separate charge for icing in its schedule, without proof of an excessive charge or unlawful discrimination, is insufficient. Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co. [C. C. A.] 148 F. 968.

1. United States v. New York Cent., etc., R. Co., 153 F. 630. Hepburn act, § 10, when construed in accordance with Rev. St. § 13, held not to relieve offenders under § 1 of Elkins act from subsequent prosecution, but merely to relate to procedure to be followed in pending cases. United States v. Chicago, etc., R. Co., 151 F. 84; United States v. Standard Oil Co., 148 F. 719; United States v. Delaware, etc., R. Co., 152 F. 269.

2. Immaterial that the shipper thought that he had a contract right to a lesser rate. Armour Packing Co. v. U. S. [C. C. A.] 153 F. 1.

3. Offense is continuing one. Armour Packing Co. v. U. S. [C. C. A.] 153 F. 1. Rebate or concession from part of single rate renders all transportation thereunder illegal. Id. Concession need not be charged or proved from part of established rate proportionate to carriage through particular district. Id.

4. United States v. Baltimore & O. R. Co., 153 F. 997. Indictment under interstate commerce act charging discrimination generally in refusing to furnish particular coal dealer with his share of cars and motive power, and furnishing of more than their share to other coal shippers, held insufficient where did not allege facts showing the quota to which they were respectively entitled. Id.

5. Indictment for conspiracy under § 5440, Rev. St. alleging that agents of shipper and carrier gave and received rebates in pursuance of fraudulent conspiracy, will not lie, since offense charged is essentially an offense under interstate commerce act, and punishment would thereby be increased. United States v. New York Cent., etc., R. Co., 146 F. 298.

6. United States v. New York Cent., etc., R. Co., 146 F. 298.

7. Indictment considered, and held sufficient to show that carriers concurred in rate. United States v. Pennsylvania R. Co., 153 F. 625. Held to sufficiently charge common arrangement for through interstate shipment under joint tariff. United States v. New York Cent., etc., R. Co., 153 F. 630; United States v. Pennsylvania R. Co., 153 F. 625. Need not aver that it is reasonable, nor set out schedule in full. United States v. Standard Oil Co., 148 F. 719.

8. An allegation that it was filed as required by law is sufficient. United States v. Vacuum Oil Co., 153 F. 598.

9. Allegation that full rate was charged and rebate given sufficiently alleges willful deviation. United States v. New York Cent., etc., R. Co., 146 F. 298.

10. Allegation that total rate of connecting lines was a particular sum, and that property was transported at lower rate, is defective in not negativing joint rate. United States v. Standard Oil Co., 148 F. 719.

11. Not being punishable by imprisonment in the state prison or penitentiary, it is not an infamous crime within 5th Const. Amend., requiring presentment or indictment by the grand jury. United States v. Camden Iron Works, 150 F. 214.

12. Allegation of facts bringing shipment within statute is sufficient. United States v. Camden Iron Works, 150 F. 214.

13. Matter of defense. United States v. Chicago, etc., R. Co., 151 F. 84. Indictment for rebating, alleging agreement whereby shipping clerk was to direct shipments over defendant's line at regular rates, and thereafter present claims for rebates under guise of claims for lighterage, etc., held good as against objection that it did not negative that money was paid as commission for ob-

In prosecutions for departing from published schedule, the government has the burden of showing a binding rate.[16] In prosecutions for receiving rebates, any evidence tending to show a shipment within the statute is admissible,[17] as is the schedule filed to show the lawful rate.[18] A local rate is not admissible to show discrimination between nonlocal rates.[19] Point of shipment must be proven substantially as alleged.[20] Act of Cong. June 29, 1906, amending the Elkins act, by providing imprisonment for offenses under the act, is prospective only in operation.[21]

§ 3. *Connecting carriers, draymen, and transfermen.*[22]—While a carrier is liable for injuries proximately resulting from its negligence, irrespective of where it occurs.[23] ordinarily it is liable only for its own negligence,[24] and its responsibility terminates upon delivery to a connecting carrier.[25] Where, however, it controls the connecting line,[26] or expressly undertakes to carry to destination,[27] it is liable for

taining business. United States v. Delaware, etc., R. Co., 152 F. 269.

14. Armour Packing Co. v. U. S. [C C. A.] 153 F. 1.

15. An indictment under the Elkins act, declaring it unlawful to offer, grant, or give a rebate, is not duplicitous because it alleges that defendant offered, granted, and gave a rebate. United States v. Delaware, etc., R. Co., 152 F. 269.

16. Has burden of showing common arrangement for continuous carriage between such points. United States v. Pennsylvania R. Co., 153 F. 625.

17. Evidence tending to show shipment under through bill of lading, or under contract for continuous shipment, is admissible to show that such carrier was used for the purpose of shipment under common control, management, or arrangement, for a continuous carriage. United States v. Camden Iron Works, 150 F. 214. As agent's abstract of through shipments, account sheets showing settlement for particular shipment in accordance with tariff rates, distribution of charges, etc. Id.

18. United States v. Camden Iron Works, 150 F. 214. Provision of Act Feb. 19, 1903, that, in prosecution of carrier for giving rebate, rate filed by it or in which it participates "shall be conclusively deemed to be the legal rate" as against such carrier, etc., merely prescribes effect of such evidence, and does not render it inadmissible in prosecution of shipper for receiving rebate. Id.

19. Southern R. Co. v. St. Louis Hay & Grain Co. [C. C. A.] 153 F. 728.

20. Where shipment was alleged to have been made from Philadelphia, it is immaterial that shipment really originated elsewhere, where it was merely lightered across to Philadelphia, such lightering being analagous to local transportation to point of shipment. United States v. Camden Iron Works, 150 F. 214.

21. United States v. New York Cent., etc., R. Co., 146 F. 298.

22. See 7 C. L. 529.

23. Delay caused ice supply to become exhausted in hands of terminal carriers. St. Louis, etc., R. Co. v. White [Tex. Civ. App.] 103 S. W. 673.

24. Cincinnati, etc., R. Co. v. Greening, 30 Ky. L. R. 1180, 100 S. W. 825. Connecting carriers making separate contracts of carriage relating to transportation over their respective lines are liable only for losses on their own line. McGuire v. Great Northern R. Co. [C. C. A.] 153 F. 434.

25. Glazier v. Old Dominion S. S. Co., 53 Misc 290, 103 N. Y. S. 112; Roy v. Chesapeake & O. R. Co., 61 W. Va. 616, 57 S. E. 39. Not liable for delay of connecting carrier in returning sick horse to initial carrier that it might be unloaded for medical treatment. Wente v. Chicago, etc., R. Co. [Neb.] 112 N. W. 300. Actual acceptance by connecting carrier constitutes delivery by initial carrier, though not made at usual place of transfer. Texas & P. R. Co. v. Bailey [Tex. Civ. App.] 16 Tex. Ct. Rep. 843, 96 S. W. 1089. Delivery of cotton to compress company, held delivery to connecting carrier, there being evidence that such was custom between the roads, and that latter made no objection to such delivery upon receiving notice, and especially in view of contract which it had with compress company to compress cotton for it. Southern R. Co. v. Hubbard Bros. & Co. [C. C. A.] 150 F. 312. Where evidence shows that car was placed on receiving track, but does not show notice to connecting carrier, or that it took charge of car, held no abuse of discretion in refusing to allow amendment of answer alleging delivery to connecting line. Illinois Cent. R. Co. v. Stevens, 29 Ky. L. R. 1079, 96 S. W. 888.

26. Where petition alleges that both defendants were really one and the same line and operated by same management, which is not specifically denied, it need not allege place and time of injury. Southern Kansas R. Co. v. Bennett [Tex. Civ. App.] 103 S. W. 1115. In action against initial carrier whose liability was limited to its own line, statements of defendant's local agent that it had acquired control of connecting line held insufficient to require submission of question to jury, although defendant had been accustomed to ship by different connecting line prior thereto, plaintiff having dealt with connecting line as independent. Goehrend v. Pere Marquette R. Co., 146 Mich. 497, 13 Det. Leg. N. 851, 109 N. W. 849.

27. Special contract extending liability beyond own line will not be inferred from doubtful or loose expressions but must clearly appear. Roy v. Chesapeake & O. R. Co., 61 W. Va. 616, 57 S. E. 39. Acceptance of goods consigned to point not on carrier's line implies undertaking to carry to destination. St. Louis S. W. R. Co. v. Kilberry [Ark.] 102 S. W. 894; Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777. **Contra.** McLendon v. Wabash R. Co., 119 Mo. App. 128, 95 S. W. 943. Contract construed as undertaking of initial carrier to carry to

acts of connecting lines,[28] and likewise, where a partnership exists between them.[29] Where a carrier wrongfully refuses to route as directed,[30] or thereafter changes the route,[31] or selects a connecting carrier without consulting the shipper [32] it is responsible, irrespective of where the loss occurs. Receipt of connecting carrier is prima facie evidence of delivery.[33] A connecting carrier receiving damaged goods need only exercise reasonable care to prevent further injury.[34]

As between connecting carriers, the carrier whose negligence causes the loss is primarily liable.[35]

Where ample and equal baggage facilities are furnished to all passengers, a carrier may grant to a transfer line the exclusive right to enter its trains to solicit, and may lease to it a portion of its baggage room for storage of baggage until checked.[36]

Part II. Carriage of Goods.

§ 4. *Delivery to carrier and inception of liability.*[37]—A carrier must accept goods tendered at a reasonable time,[38] unless some impending danger justifies a refusal.[39] While it is entitled to a prepayment of freight charges, it may waive the right.[40] Liability as carrier does not attach until goods have been delivered to

destination through agency of connecting carrier, and not a joint undertaking by the carriers Meyers v. Missouri, etc., R. Co., 120 Mo. App. 288, 96 S. W. 737. Where carrier agreed with consignee while cars were en route to deliver without extra charge and through connecting lines to consignee's private tracks, it was liable for delay caused by connecting line's refusal to promptly accept. Cohen v. Missouri, etc., R. Co. [Mo. App.] 102 S. W. 1029.

28. Sabbatino v. Snow's U. S. Sample Exp. Co., 104 N. Y. S. 1004. Texas Cent. R. Co. v. Marrs [Tex. Civ. App.] 101 S. W. 1177. Connecting lines become its agents. Cohen v. Missouri, K. & T. R. Co. [Mo. App.] 102 S. W. 1029. In absence of stipulation restricting liability, initial carrier and connecting carrier on whose line injury occurred are liable therefor. St. Louis S. W. R. Co. v. Kilberry [Ark.] 102 S. W. 894.

29. Allegation that agent of initial carrier was agent of defendant, that the roads had arrangement whereby each acted as agent of other in making contracts of shipment, and that they acted together in transporting, held not to allege partnership. Texas, etc., R. Co. v. Gray [Tex Civ. App.] 99 S. W. 1125. Fact that connecting carriers advertised a through line from G. to C., and had a common agent and baggageman, held to support a finding that they were partners. Hence jointly liable. Wolf v. Grand Rapids, etc., R. Co. [Mich.] 112 N. W. 732.

30. Pecos River R. Co. v. Harrington [Tex. Civ. App] 99 S. W. 1050. Becomes insurer. Texas & P. R. Co. v. Eastin [Tex.] 102 S. W. 105.

31. Cincinnati, etc., R. Co. v. Pendleton 29 Ky. L. R. 721, 96 S. W. 434.

32. Will be deemed to have undertaken a through shipment. Wabash R. R. Co. v. Thomas, 122 Ill. App. 569.

33. Receipt acknowledging delivery of only box lost is prima facie an admission of delivery, although the immediate preceding item was marked lost which was in fact received. Meyers v. Missouri, etc., 120 Mo. App. 288, 96 S. W. 737.

34. Need not resort to unusual means or expense. Calender-Vanderhoof Co. v. Chicago, etc., R. Co., 99 Minn. 295, 109 N. W. 402. Where it was unusual to ship apples in bulk in box freight car during November, held that carrier receiving such consignment at midnight was not negligent in not having facilities to immediately transfer to refrigerator car or run it into round house, there being none closer than three miles, and no available engine. Calender-Vanderhoof Co. v. Chicago, etc., R. Co., 99 Minn. 295, 109 N. W. 402.

35. Evidence that delivering carrier had not cleated door of car containing cotton to exclude sparks; that an engine which it was operating nearby was emitting sparks, which fell upon car, held to make prima facie case. Cane Belt R. Co. v. Missouri, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 48, 98 S. W. 1066. Where initial carrier is adjudged liable for negligence of connecting carrier, it becomes subrogated to rights of plaintiff. Texas & P. R. Co. v. Eastin [Tex.] 102 S. W. 105.

36. Hart v. Atlanta Terminal Co. [Ga.] 58 S. E. 452.

37. See 7 C. L. 533.

38. Express company's rule not to receive shipments of money after 7:45 a. m., the time of the departure of the train for the day, held unreasonable. Platt v. Le Cocq, 150 F. 391.

39. Impending flood of character to fall within definition of act of God, and which threatened to inundate tracks justifies refusal to accept cars from initial carrier. Gray v. Wabash R. Co., 119 Mo. App. 144, 95 S. W. 983.

40. Acceptance for transportation without exacting payment, held waiver. Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., 124 Mo. App. 545, 102 S. W. 11.

the carrier [41] and accepted by it [42] for immediate shipment.[43] Delivery to an agent [44] constitutes delivery to the carrier.

§ 5. *Bills of lading and other contracts of carriage.*[45]—While a bill of lading as a receipt may be contradicted by parol,[46] a written contract of shipment cannot be,[47] in the absence of mistake [48] or fraud.[49] Such contracts are subject to the constitution and laws in force at the time of execution.[50] Where a carrier knowingly permits a discharged agent to remain in charge of its office, it is bound by his acts.[51] Local agent of an intermediate carrier has no implied authority to modify terms of a through shipment contract.[52] A secret arrangement between a shipper and another for substitution of stock, and a refund of a part of charges by latter to former, held not to invalidate contract of shipment.[53]

Interpretation.[54]—A bill of lading providing that in case of loss the carrier should have the benefit of any insurance thereon does not require the shipper to negotiate insurance.[55]

41. Where it is customary to deliver cotton to compress company and to take receipts therefor upon which carrier issued bill of lading, such course being pursued for benefit of carrier, cotton in possession of compress company for which bill of lading has been issued is in possession of carrier. Arthur v. Texas & P. R. Co., 204 U. S. 505, 51 Law Ed. 590. In absence of mistake, recital in bill of lading that carrier received car for shipment on specific date must control. Illinois Cent. R. Co. v. Nelson, 30 Ky. L. R. 114, 97 S. W. 757.

42. Seaboard Air Line R. Co. v. Friedman [Ga.] 57 S. E. 778. Where carrier is under no duty to accept cars placed on its track, it is under no obligation to push cars to platform to avoid a flood. Gray v. Wabash R. Co., 119 Mo. App. 144, 95 S. W. 983. Where it was customary for one carrier to deliver cars intended for another on transfer track where they were picked up by the latter, there was no delivery to the latter until cars were accepted by train crews, in absence of affirmative acceptance by some agent. Seaboard Air Line R. Co. v. Friedman [Ga.] 57 S. E. 778. Placing of cars on transfer track under arrangment between carriers that cars so placed would be accepted for further shipment does not constitute acceptance. Gray v. Wabash R. Co., 119 Mo. App. 144, 95 S. W. 983. Delivery on platform with shipping instructions to a watchman who received freight and issued bills of lading without authority, with notice to agent, held to make a question for jury. Garner v. St. Louis, etc., R. Co., 79 Ark. 353, 96 S. W. 187. Evidence that cotton was placed on defendant's platform, marked for shipment; that no shipping directions were given or bill of lading received; that plaintiff customarily so delivered, held to make case for jury. Copeland v. Southern R. Co. [S. C.] 57 S. E. 535.

43. Issuance of bill of lading not necessary. Garner v. St. Louis, etc., R. Co., 79 Ark. 353, 96 S. W. 187. Carrier receiving goods in afternoon for shipment next morning stores as carrier, although shipper knows that there is no train until next morning. Southern R. Co. v. Smith [Ky.] 102 S. W. 232.

44. Evidence held for jury whether compress company had been made agent by contract, or custom to receive cotton from preceding connecting carriers. Southern R. Co. v. Hubbard Bros. Co. [C. C. A.] 146 F. 31.

45. See 7 C. L 533

46. Cohen Bros. v. Missouri, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 121, 98 S. W. 437.

47. As that stock was to be delivered at certain packing house. International, etc., R. Co. v. Griffin [Tex. Civ. App.] 103 S. W. 225. Fact that waybill issued by carrier for guidance of servants stipulated for delivery at particular place does not affect written contract of shipment. Id. Where written contract was silent as to place of delivery, and it was customary to deliver at stockyards, evidence that carrier agreed to so deliver is no contradiction. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 99 S. W. 1052.

48. Fact that written contract contained blanks headed "consignee, destination, and route," and were all filled except as to route, held sufficient to make case for jury as to mistake in omitting to name particular connecting carrier. Cincinnati, etc., R. Co. v. Pendelton, 29 Ky. L. R. 721, 96 S. W. 434.

49. Where, in checking forty-nine cases, carrier's agent rechecks six cases, and shipper, knowing of double count, states that there are fifty-five cases, for which number bill of lading is issued, held fraud. Cohen Bros, v. Missouri, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 121, 98 S. W. 437.

50. Hence an order of commissioners compelling equal service to others, in violation thereof will not violate valid contractual rights. State v. Atlantic Coast Line R. Co. [Fla.] 41 So. 705.

51. Where carrier accepts resignation of agent, but gives no notice thereof to public and leaves him in apparent charge of office, it is estopped to deny his authority. Louisville & N. R. Co. v. Mink [Ky.] 103 S. W. 294.

52. St. Louis, etc., R. Co. v. Frazar [Tex. Civ. App.] 16 Tex. Ct. Rep. 983, 97 S. W. 325.

53. Even if it violates interstate commerce act. Southern Kansas R. Co. v. Cox [Tex. Civ. App.] 95 S. W. 1124.

54. See 7 C. L. 534.

55. Hence shipper may take out policy, providing that it should not inure to benefit of carrier, and may accept conditional payment thereunder without affecting his rights against the carrier. Bradley v. Lehigh Valley R. Co. [C. C. A.] 153 F. 350.

Indorsement and transfer.[56]—Assignment of a bill of lading is a symbolical delivery of the goods represented thereby.[57] An order for delivery passes title, [58] and gives the same right as a mortgagee in possession.[59] Bills of lading are negotiable in a restricted sense,[60] and in Louisiana they have been given negotiability.[61] A statute making carrier liable for loss due to issuing of a bill of lading where no goods have been received does not apply to a mere deficiency in weight,[62] especially where investigation is inconvenient and the bill recites that contents are unknown.[63] Indorsement of sight drafts with bill of lading attached does not render indorsee liable on contract of shipment.[64]

§ 6. *The duty to furnish cars.*[65]—Carrier must furnish cars within a reasonable time,[66] on sufficient requisition,[67] upon the proper agent,[68] and is liable for negligence in failing so to do.[69] Written demand may be waived.[70] Where a duly authorized agent [71] contracts to furnish cars at a particular time,[72] they must be so

56. See 7 C. L. 534

57 Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., 124 Mo. App. 545, 102 S. W. 11.

58. Bank discounted draft with order attached as collateral. Seward Co. v. Miller [Va.] 55 S. E. 681. Where, after bank has discounted draft with order of delivery attached as collateral, the consignor makes a sale to another, upon refusal of original purchaser to accept, all title of bank passes to such purchaser, upon accepting payment of draft, though sale was unauthorized as title was in bank. Id.

59. Bank discounting draft with order attached need not record papers, as required by Code, § 2465, to preserve lien. Seward & Co. v. Miller [Va.] 55 S. E. 681.

60. Goods consigned to factor were reconsigned without authority by company of which he was president, and bank purchased draft with bill of lading attached drawn upon consignee, evidence examined and held not to show that bank had any knowledge of irregularity. Smith v. Jefferson Bank, 120 Mo. App. 527, 97 S. W. 247. Where company has power to reconsign goods and to draw against them, bank, purchasing in good faith draft with bill attached drawn on consignee, is not liable to principal. Id.

61. St. 1868, p. 194, No. 150. Hardie & Co. v. Vicksburg, etc., R. Co., 118 La. 253, 42 So. 793. Where carrier's liability becomes that of warehouseman, its bill of lading is equivalent to warehouseman's receipt, and negotiable under Acts 1902, p. 329, No. 176. Id. Under local custom of merchants, bill of lading, after seven months from date of issue, held to pass without suspicion. Id.

62. Code 1896, § 4223. Alabama Great Southern R. Co. v. Commonwealth Cotton Mfg. Co., 146 Ala. 388, 42 So. 406.

63. Cotton delivered in sealed car. Alabama Great Southern R. Co. v. Commonwealth Cotton Mfg. Co., 146 Ala. 388, 42 So. 406.

64. Leonhardt & Co. v. Small & Co. [Tenn.] 96 S. W. 1051. Where drafts of seller were attached to bill of lading and transferred to bank, fact that bank indorsed all but three, with statement that it was not responsible for quantity, quality, etc., does not render it liable for deficiency in quality of goods covered by the three bills, endorsement being surplusage. Id.

65. See 7 C. L. 535.

66. If it can do so without jeopardizing its other business. Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., 104 Md. 693, 65 A. 425; Baltimore & O. R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033. Where twenty-one cars were furnished on day of notice, and ten on following morning, but fruit had already deteriorated, carrier held not liable, there being no sufficient notice. Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., 104 Md. 693, 65 A. 425. Failure to furnish cars at P. from A. on day they were ordered creates no liability where it appears that none were available, though shipper informed agent at A. that he would want two cars at "A. and P.," it appearing that agent at A. had no authority to order cars from A. to P. Lake Shore, etc., R. Co. v. Anderson [Ind. App.] 79 N. E. 381.

67. Requisition must be definite as to time when wanted. Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., 104 Md. 693, 65 A. 425. Requisition for large number of cars for following week, to be used as vessels arrive, is insufficient without further notice (Id.), carrier owing no duty to keep posted as to arrival of vessels. (Id.).

68. Local agent has authority to receive application. Texas & P. R. Co. v. Allen [Tex. Civ. App.] 17 Tex. Ct. Rep. 256, 98 S. W. 450.

69. Negligence in failing to furnish car is sufficiently shown by proof that car assigned was diverted and defendant forgot to replace it. Baltimore & O. R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033.

70. Promised to furnish when oral demand was made. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 S. W. 375.

71. Local agent has authority to contract for his station. (San Antonio & A. P. R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418; Clark v. Ulster, etc., R. Co. [N. Y.] 81 N. E. 766), but not for another station. (Southern Kansas R. Co. v. Cox [Tex. Civ. App.] 103 S. W. 1122). Fact that shipper knew that he would be required to sign written contract before shipping, and that similar contracts previously signed had generally negatived agent's authority to contract for cars on specific date, did not charge him with knowledge that agent lacked such authority. San Antonio & A. P. R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418.

72. Undertaking to "endeavor" to secure

furnished,[73] and, while unusual pressure of business relieves it from common-law liability,[74] it is no defense to action on contract.[75] Request for cars carries an implied promise to use the same.[76] Where, upon receipt of requisition, the carrier has reason to believe that it will not be able to furnish cars, it must so advise the shipper.[77] Breached oral contract is not superseded by a subsequent written contract for future shipment, in the absence of a consideration for accrued damages.[78]

§ 7. *Forwarding and transporting goods.*[79]—An agent routing cars contrary to express direction is liable therefor.[80] Where carrier undertakes to carry goods requiring special care, it becomes its duty to render such care.[81] An express company contracting to carry in a refrigerator car must ice and reice the same as is necessary.[82] Carrier is liable for negligence in shipping stock beyond destination specified by shipper.[83]

Delay in transportation.[84]—A carrier is not an insurer against delay,[85] but must exercise ordinary care and diligence [86] to transport within a reasonable time,[87] and is liable only for injuries proximately resulting [88] from negligence.[89] Plaintiff in

cars constitutes no contract to furnish them. Lake Shore, etc., R. Co. v. Anderson [Ind. App.] 79 N. E. 381. Answer "all right" to request for cars on specific date creates contract to so furnish. San Antonio, etc., R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418.

73. Where cattle are held for any length of time in pens after time carrier agreed to furnish cars, carrier is liable Southern Kansas R. Co. v. Morris [Tex. Civ. App.] 99 S. W. 433.

74. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 S. W. 375.

75. Southern Kansas R. Co. v. Morris [Tex. Civ. App.] 99 S. W. 433.

76. Hence a contract to furnish cars is not void for lack of mutuality. Clark v. Ulster, etc., R. Co. [N. Y.] 81 N. E. 766.

77. Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., 104 Md. 693, 65 A. 425.

78. Clark v. Ulster, etc., R. Co. [N. Y.] 81 N. E. 766.

79. See 7 C. L. 536.

80. Misfeasance as distinct from nonfeasance. Texas & P. R. Co. v. Eastin & Knox [Tex.] 102 S. W. 105.

81. Failed to ice fruit car. St. Louis, etc., R. Co. v. Renfroe [Ark.] 100 S. W. 889; Brennisen v. Pennsylvania R. Co., 100 Minn. 102, 110 N. W. 362. Carrier undertaking to transport perishable fruit is bound to guard against injuries thereto by elements, from effects of delay, and other sources which may be averted by exercise of reasonable care. Taft Co. v. American Exp. Co., 133 Iowa, 522, 110 N. W. 897. Rule not to reice cars unless 600 pounds of ice can be put into tank, unknown to shipper, does not relieve company for failure to re-ice at specific points as per contract. Orem Fruit & Produce Co. of Baltimore City v. Northern Cent. Co. [Md.] 66 A. 436. Under Pub. St. 1901, c. 160, § 1, providing that carriers shall furnish reasonable facilities and accommodations for transporting property, carrier of milk must furnish reasonable facilities for transportation of such commodity. Baker v. Boston, etc., R. Co. [N. H.] 65 A. 386. Whether it must furnish special iced cars is one of fact. Id. Where large quantities of milk are produced for transportation, and it is more advantageous to producers, distributers, and consumers to have special cars furnished with icing facilities, it is duty of carrier to furnish such cars. Id.

82. Proof that ice bunkers were nearly empty upon arrival of car at destination, and that berries were spoiled, held to show negligence. Taft Co. v. American Express Co., 133 Iowa, 522, 110 N. W. 897.

83. Missouri, etc., R. Co. v. Hayes, 74 Kan. 880, 88 P. 64.

84. See 7 C. L. 536.

85. St. Louis S. W. R. Co. v. Thompson [Tex. Civ. App.] 103 S. W. 684.

86. St Louis S. W. R. Co. v. Thompson [Tex. Civ. App.] 103 S. W. 684. In absence of express agreement. Harby v. Southern R. Co., 75 S. C. 321, 55 S. E. 760. Instruction requiring delivery "as speedily as possible," followed by clause imposing duty of "ordinary, reasonable, care," held not erroneous. Id.

87. Baltimore & O. R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033. Law implies contract to deliver shipment with reasonable promptness and without unnecessary delay. St. Louis, etc., R. Co. v. Pearce [Ark.] 101 S. W. 760. Plaintiff must show length of time ordinarily required and that more time was consumed than was necessary. Cleve v. Chicago, etc., R. Co. [Neb.] 108 N. W. 982.

Delays held unreasonable: Where sixty-two hours were required to make run ordinarily made in thirty-six hours. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152. Where month was required to carry thirty-three miles, though yards were congested. Chesapeake & O. R. Co. v. Saulsberry [Ky.] 103 S. W. 254.

88. Delay of stock for five and seventeen hours in feed pens will not be presumed injurious, in absence of evidence that they were not properly cared for, fed, and watered. Louisville & N. R. Co. v. Warfield, 30 Ky. L. R. 352, 98 S. W. 313.

89. St. Louis Merchants Bridge Terminal R. Co. v. Tassey, 122 Ill. App. 339. Where fourteen carloads of stock were kept waiting unreasonable time, and excuse offered was that there was no regular train out, instruction that unreasonable delay for regular train without reasonable explana-

action for delay must show not only that unreasonable time was consumed but that it was result of negligence.[90] Hence extraordinary pressure of business excuses.[91] Special promptness is required of perishable goods.[92] By express contract,[93] however, a carrier may obligate itself to carry within a specified time. In some states a negligent delay subjects the carrier to a penalty,[94] upon notice that prompt shipment is desired.[95]

Delivery to succeeding carrier.[96]—Unreasonable refusal of connecting carrier to accept shipment does not of itself reduce the liability of holding line to that of forwarder.[97]

§ 8. *Loss or injury to goods.*[98]—In the absence of special contract,[99] a carrier is an insurer [1] and liable irrespective of negligence unless the loss or injury is due to an act of God,[2] the inherent nature of the goods,[3] the ordinary wear and tear of

tion would not be justifiable, held proper. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152. Instruction held not to state that as matter of law that delay in feed pens longer than required by law was negligence. Id.

90. Ecton v. Chicago, etc., R. Co. 125 Mo. App. 223, 102 S. W. 575. Where court specifically charged that delay, to authorize recovery, must be result of negligence, instruction that each carrier was liable only for damages arising from "negligence or unreasonable delays" on its line, held not to impose liability for unreasonable delay without regard to negligence. Chicago, etc., R. Co. v. Gillett [Tex. Civ. App.] 99 S. W. 712.

Delays held not negligent: Delay in removing body of man killed without negligence from under train, and in taking it back to station. Ecton v. Chicago, etc., R. Co., 125 Mo. App. 223, 102 S. W. 575. Failure to send express package by first train. Goldstein v. Adams Express Co., 32 Pa. Super. Ct. 190. Delay of shipment of stock for rest, food, and water, in compliance with Rev. St. U. S. § 4386 (U. S. Comp. St. 1901, p. 2995). Ecton v Chicago, etc., R. Co., 125 Mo. App. 223, 102 S. W. 575. Delay caused by right of way of mail trains and switching out of cars. St. Louis Merchants Bridge Terminal R. Co. v. Tassey, 122 Ill. App. 339.

Held negligent: Evidence that initial carrier transported freight in customary time of nine hours, that connecting carrier consumed sixty-six hours, though regular time was only twenty-eight to thirty hours, and that terminal carrier transported in usual time of fourteen hours, held to authorize finding of negligence on part of connecting carrier, although there was evidence that four or five days was reasonable time for shipment. St. Louis, I. M. & S. R. Co v. White [Tex. Civ. App.] 103 S. W. 673.

91. Excessive crop. Shipper knowing of the carrier's inability to transport with usual dispatch. Yazoo, etc., R. Co. v. Blum [Miss.] 42 So. 282.

92. Carrier held liable where the cars if forwarded in the usual way would have reached destination about twenty-four hours sooner than they did, and they might have been forwarded still more rapidly if attached to fast train. Frey v. New York, etc., R. Co., 114 App. Div. 747, 100 N. Y. S. 225.

93. Conversations between shipper and defendant's general superintendent and the train dispatcher, held to constitute an express contract to carry in time for particular steamer. Frey v. New York, etc., R. Co., 114 App. Div. 747, 100 N. Y. S. 225. Such contract held not merged in shipping receipt containing printed conditions on its back that carrier would not be bound to carry in time for particular steamer, where the words "for export . . . per S. S. L., sailing Dec. 13," was written on its face. Id.

94. Revisal 1905, § 2632, providing penalty for failure to transport within reasonable time, and prescribing what time shall be prima facie reasonable, held valid exercise of police powers. Stone & Co. v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 932. Under South Carolina statute imposing penalty for failure to transport within time therein specified Sunday is excluded in computing hours. Sallen v. Seaboard Air Line R. Co. [S. C.] 56 S. E. 782. Carrier issuing bill of lading marked "prompt shipment required" before receiving goods from connecting carrier, and with full knowledge of facts, is liable for penalty for delay occurring on such line. Id. Liability for unreasonable delay under Nebraska constitution and laws is the same whether contract is oral or written. Nelson v. Chicago, etc., R. Co. [Neb.] 110 N. W. 741.

95. Act 1904 (24 Stat. p. 671) does not require shipper to have "prompt shipment required" inserted in bill of lading, but actual notice is sufficient. Jamison v. Southern R. Co. [S. C.] 57 S. E. 768.

96. See 7 C. L. 538.

97. Must manifest purpose to reduce liability by some unequivocal act. Cohen v. Missouri., etc., R. Co. [Mo. App.] 102 S. W. 1029. Where carrier contracted to deliver cars on its "hold" track to plaintiff's private track through connecting carriers, held to sustain relation of common carrier while holding cars for acceptance of connecting line. Id. As to what constitutes delivery, see ante, § 3.

98. See 7 C. L. 538.

99. See post, § 11.

1. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252.

2. Fentiman v. Atchison, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 500, 98 S. W. 939. Act of God which will relieve carrier is such inevitable accident as cannot be prevented by human foresight, and arises from natural causes. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252. Unusual flood constitutes act of God, though similar one occurred sixty years before. Fentiman

transportation,[4] or the negligence of the shipper.[5] An act of God, however, is no defense if the carrier's negligence concurs therewith,[6] as a proximate cause.[7] As against the shipper, a carrier cannot shift its liability by contract with a third person,[8] though, if the shipper contracts with another for special service, the carrier is not liable for a default therein.[9] Liability is governed by laws of the place where the loss or injury occurs.[10] A station agent has no implied authority to bind his principal for a liability which in fact does not exist.[11]

§ 9. *Delivery by carrier and storage at destination.*[12]—In a few states a carrier's liability as such ceases when the goods have arrived at their destination and are ready for delivery,[13] or have been placed in a warehouse.[14] but most states give the consignee a reasonable time to remove the same,[15] while others continue the liability until notice has been given[16] and a reasonable time thereafter.[17] Carrier's

v. Atchison, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 500, 98 S. W. 939. Cold weather in latitude and at season when it should be anticipated is not act of God. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 99 S. W. 1052.

3. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252. Instruction held to state the correct rule of law as to liability for natural deterioration of fruit en route, although it was inaccurately designated as an act of God. Fockens v. U. S. Exp. Co., 99 Minn. 404, 109 N. W. 834. Instruction on measure of damages, held to make carrier liable for natural depreciation due to long shipment without regard to negligence. St. Louis, etc., R. Co. v. Moon [Tex. Civ. App.] 103 S. W. 1176.

4. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252.

5. Marking or packing. Broadwood v. Southern Exp. Co. [Ala.] 51 So. 769. Negligent packing. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252. Instruction held to ignore negligence of shipper's agent in marking package. Southern Exp. Co. v. Hill [Ark.] 98 S. W. 371. Negligence of shipper in loading relieves carrier, though latter has knowledge of fact. International & G. N. R. Co. v. Drought & Co. [Tex. Civ. App.] 100 S. W. 1011 The fact that consignor shipped apples in bulk in box freight car from New York to Minneapolis during November, held not to constitute contributory negligence. Calender-Vanderhoof Co. v. Chicago, etc., R. Co., 99 Minn. 295, 109 N. W. 402. One shipping stock to particular place does not assume risk of exposure to cholera in infected zone where he knew it existed, where there was no necessity for diverting car into such zone. Council v. St. Louis & S. F. R. Co., 123 Mo. App. 432, 100 S. W. 57.

6. Southern R. Co. v. Smith [Ky.] 102 S. W. 232; Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., 124 Mo. App. 545, 102 S. W. 11; Fentiman v. Atchison, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 500, 98 S. W. 939. Negligence in exposing to flood after warnings of weather department, held for jury. Fentiman v. Atchisoin, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 500, 98 S. W. 939. Evidence of record of previous floods, and of warnings of weather bureau, held to sustain finding of negligence in depositing goods in yard in view of approaching flood. Atchison, etc., R. Co. v. Madden, Sykes & Co. [Tex. Civ. App.] 103 S. W. 1193. Negligence of carrier in not promptly forwarding car, and in voluntarily opening embankment before car was removed, whereby car was inundated, held for jury. Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., 124 Mo. App. 545, 102 S. W. 11.

7. Negligent delay in moving goods does not render carrier liable for their destruction by an act of God after reaching destination. Rodgers v. Missouri Pac R. Co. W. 11; Fentiman v. Atchison, etc., R. Co. [Kan.] 88 P. 885. **Contra.** Alabama Great So. R. Co. v. Elliott [Ala.] 43 So. 378.

8. Contracted with refrigerator company to ice cars. St. Louis, etc., R. Co. v. Renfroe [Ark.] 100 S. W. 889.

9. Carrier is not liable for failure to ice where shipper knew that contract for icing was with refrigerator company, though it issued bill of lading, and its agent received money for icing. McConnell Bros. v. Southern R. Co. [N. C.] 56 S. E. 559.

10. Liability for loss of goods shipped from New York to Kentucky, which loss occurred in Kentucky, is governed by law of latter state, though contract was made in New York. Cincinnati, etc., R. Co. v. Hansford, 30 Ky. L. R. 1105, 100 S. W. 251.

11. Fact that he persuaded consignee to pay freight, accept damaged goods, and present claim, does not render company liable if it was not originally liable. Southern R. Co. v. Gardner, 127 Ga. 320, 56 S. E. 454.

12. See 7 C. L. 539.

13. Though consignee has received no notice, and has had no opportunity to remove same. Hicks v. Wabash R. Co., 131 Iowa, 295, 108 N. W. 534.

14. Kight v. Wrightsville & T. R. Co., 127 Ga. 204, 56 S. E. 363.

15. United Fruit Co. v. New York & Baltimore Transp. Co., 104 Md. 567, 65 A. 415; Brunson v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 538; Murphy v. Southern R. Co. [S. C.] 57 S. E. 664. Reasonable time is such as will enable one residing in vicinity, and who is informed of probable time of arrival, and of course of carrier's business, to inspect and remove goods during business hours. United Fruit Co. v. New York & Baltimore Transp. Co., 104 Md. 567, 65 A. 415. Where goods are placed in warehouse ready for delivery on Oct. 6th, and are not removed on Oct. 13th, liability is that of warehouseman. Murphy v. Southern R. Co. [S. C.] 57 S. E. 664.

16. In absence of custom, notice of arrival

liability then becomes that of a warehouseman,[18] and especially where goods are stored under agreement for consignee's convenience.[19] A carrier must deliver within a reasonable time,[20] at a safe[21] and usual place.[22] Inexcusable nondelivery[23] of goods actually received,[24] or a misdelivery[25] unless waived,[26] as where made to the wrong person,[27] renders the carrier liable. Only one recovery can be had under the North Carolina statute for failure to inform consignee of the freight charges due, and to delivery on tender of the amount.[28] Property in transitu is not subject to order of a stranger to the contract.[29] A tender terminates the carrier's liability.[30]

of goods need not be given. Ross v. Chicago, etc., R. Co., 119 Mo. App. 290, 95 S. W. 977. Carrier need not give notice where package is not addressed to consignee's usual shipping place. American Standard Jewelry Co. v. Witherington [Ark.] 98 S. W. 695. Where goods are sent by express to place where delivery is not made, prompt notice must be given. Id.

17. United Fruit Co. v. New York & Baltimore Transp. Co., 104 Md. 567, 65 A. 415.

18. Brunson v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 538.

19. Kight v Wrightsville & F. R. Co., 127 Ga. 204, 56 S. E. 363; United Fruit Co. v. New York & Baltimore Transp. Co., 104 Md 567, 65 A. 415. Especially if under contract that they are at consignee's risk. United Fruit Co. v. New York & Baltimore Transp. Co., 104 Md. 567, 65 A. 415.

20. Instruction omitting delivery within reasonable time, properly refused. St. Louis S. W. R. Co. v. Thompson [Tex. Civ. App.] 103 S. W. 684. Fact that delivery was delayed because of error of consignor in shipping C. O. D. is no defense where carrier undertook to correct such error and delay was caused by negligence of carrier's agent at receiving point in forwarding release. Southern Exp. Co. v. Briggs [Ga. App.] 57 S. E. 1066.

21. Evidence held sufficient to sustain finding of negligence in requiring horse to be unloaded at depot platform. Gulf, etc., R. Co. v. Prater [Tex. Civ. App.] 102 S. W. 739.

22. Where it is customary to deliver cattle through stockyards, carrier owes duty to so deliver. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 99 S. W. 1052. Evidence held to authorize instruction that it was duty of defendant to carry to certain point, and there deliver to a connecting carrier. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 99 S. W. 439. In an action for delay in delivering cattle at stockyards in time for particular market, instruction predicating plaintiff's recovery upon delay in delivering at "Clairmont," where delivery at stockyards is not made until cattle are placed "at the pens," is properly refused. Baltimore & O. R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033.

23. Failure to deliver part of shipment necessary to render whole of value is failure to deliver whole, as failure to deliver shafting of steam engine consigned with engine. McKerall & Murchison v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 965. Fact that consignee left country without giving directions as to delivery does not excuse nondelivery where no attempt by notice through mail or otherwise was made to effect delivery. Broadwood v. Southern Exp. Co. [Ala.] 41 So. 769. Revisal 1905, § 2632, imposing penalty for failure to "transport" within reasonable time, does not include failure to deliver. Alexandre v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 697.

24. Receipt held for jury where lost money must have been extracted before sealing of package and evidence is conflicting as to whether sealing was in plaintiff's presence and immediately upon delivery. Goldstein v. Adams Exp. Co., 32 Pa. Super. Ct. 190.

25. Where consignor and consignee with assent of purchaser rescind sale of goods before delivery, carrier has no right to deliver thereafter to vendee. Norris v. St. Joseph & G. I. R. Co. [Mo. App.] 101 S. W. 159. Custom of delivering upon production of shipping receipt is no justification for wrongful delivery where custom was unknown to shipper. Adrian Knitting Co. v. Wabash R. Co., 145 Mich. 323, 13 Det. Leg. N. 550, 108 N. W. 706. Where offer of purchase is accepted by delivery of goods to carrier, latter may deliver to purchaser, though seller thereafter changes consignee. Star Union Line v. Boston Medical Inst., 126 Ill. App. 106. In action to recover amount of sight draft on ground of wrongful delivery to consignee without payment carrier may show that goods were so inferior to contract quality that in fact there was no balance due. Stearns v. Grand Trunk R. [Mich.] 14 Det. Leg. N. 108, 111 N. W. 769.

26. Wrongful delivery without payment of draft attached to bill of lading, held waived by shipper's accepting part payment and check of consignee. Callaway v. Southern R. Co., 126 Ga. 192, 55 S. E. 22.

27. No fraud, imposition, or mistake will excuse delivery to wrong party. Atlantic & B. R. C. v. Spires, 1 Ga. App. 22, 57 S. E. 973. Fact that such person was director of consignee corporation and had possession of unindorsed bill of lading, held not to relieve carrier. Cane Belt R. Co. v. Penden Iron & Steel Co. [Tex. Civ. App.] 101 S. W. 528. Carrier cannot justify delivery to unauthorized person on ground of his apparent authority to receive growing out of former partnership, where it was ignorant of such partnership. Adrian Knitting Co. v. Wabash R. Co., 145 Mich. 323, 13 Det. Leg. N. 550, 108 N. W. 706. Wrongfully delivered electrical apparatus consigned to city to superintendent of municipal electric plant, who had no authority to receive. Southern Exp. Co. v. B. R. Elec. Co., 126 Ga. 472, 55 S. E. 254.

28. Not liable for each refusal under Revisal 1905, § 2633. Harrill Bros. v. Southern R. Co. [N. C.] 57 S. E. 383.

29. No liability for refusal to stop shipment in transitu on order of one claiming

Consignee cannot refuse goods unreasonably delayed and recover for nondelivery.[31] Where carrier expressly undertakes to deliver goods in possession of another, it assumes risk of receiving them unharmed from the bailee.[32]

Liability for conversion.[33]—A wrongful refusal to deliver,[34] or a delivery to wrong person,[35] constitutes conversion, as does an absolute refusal to deliver where a qualified refusal is proper.[36] Though carrier may withhold delivery to investigate discrepancy between bill of lading and way bill as to charges, it can do so only for a reasonable time.[37] A sale for charges without giving owner an opportunity to pay the same,[38] or not in accordance with the statute,[39] renders the carrier liable. A statute regulating sale of rejected freight supersedes the common law in respect thereto.[40] Upon inability to locate consignee, carrier must hold goods for a reasonable time subject to consignor's order.[41]

§ 10. *Liability of carrier or connecting carrier.*[42]

§ 11. *Limitation of liability.*[43]—While a shipper may insist on carriage without restrictions,[44] in the absence of constitutional [45] or statuory prohibtitions, a carrier may reasonably restrict [46] its common-law liability by special contract.[47] Such

title thereto, especially where opportunity to apply to courts is given. Switzler v. Northern Pac. R. Co. [Wash.] 88 P. 137.

30. Not liable for depreciation thereafter. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252.

31. Southern R. Co. v. Moody [Ala.] 44 So. 94; Chesapeake & O. R. Co. v. Saulsberry [Ky.] 103 S. W. 254. A carrier who deposits goods with a warehouseman for safe keeping is still responsible therefor. Wrongful delivery. Hardie & Co. v. Vicksburg, etc., R. Co. 118 La. 253, 42 So. 793.

32. Accepted check upon which they were deliverable,, and undertook to deliver at specific address. Zambakian v. Werner, 102 N. Y. S. 533.

33. See 7 C. L. 541.

34. Withholding of freight under unlawful claim for freight charges. Beasley v. Baltimore P. R. Co., 27 App. D. C. 595. And, where carrier refuses to deliver unless excessive charges demanded are paid, tender of amount actually due is not necessary. Gates v. Bekins [Wash.] 87 P. 505. Demand, tender of lawful charges, and refusal on part of carrier to deliver, makes prima facie case of conversion. Beasley v. Baltimore P. R. Co., 27 App. D. C. 595. Carriage according to contract after demand by true owner is no defense to action for conversion where contractee had no title or right to possession. Georgia R. & Banking Co. v. Haas, 127 Ga. 187, 56 S. E. 313.

35. Liable for full value of goods. Atlantic Coast Line R. Co. v. Goodwin, 1 Ga. App. 351, 57 S. E. 1070.

36. As refusal without production of bill of lading. Louisville & N. R. Co. v. Britton [Ala.] 43 So. 108.

37. Beasley v. Baltimore P. R. Co., 27 App. D. C. 595. Six days held not so clearly reasonable as to authorize taking case from jury. Id.

38. Sale while carrier was trying to obtain leave of car service association to remit charges pursuant to understanding with shipper. Southern R. Co. v. Born Steel Range Co., 126 Ga. 527, 55 S. E. 173. Fact that official making sale misunderstood facts of case, held no defense. Id.

39. Chesapeake & O. R. Co. v. Saulsberry [Ky.] 103 S. W. 254 Ky. St. 1903, § 785, held not to authorize sale of unclaimed freight outside of state. Id. General state statute providing for sale of rejected freight is applicable to interstate shipments. St. Louis S. W. R. Co. v. Arkansas & T. Grain Co. [Tex. Civ. App.] 15 Tex. Ct. Rep 372, 95 S. W. 656.

40. Sale not in compliance therewith is illegal. St Louis S. W. R. Co. v. Arkansas & T. Grain Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 372, 95 S. W. 656. Fact that corn was moldy and in damaged condition does not show that it is perishable, so as to take it out of Arkansas statute relating to sale of rejected freight, if such statute is not applicable to perishable goods. Id.

41. If his ownership of goods is known. Southern R. Co. v. Born Steel Range Co., 126 Ga. 527, 55 S. E. 173.

42. See ante, § 3.

43. See 7 C. L. 541.

44. Knight v. Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716.

45. Provision for presentment of claims within a specified time after unloading, held void under Neb. Const. art. 11, § 4. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718. Contract limiting recovery to value given by shipper for obtaining concession of rates is not void under Const. Ky. § 196, prohibiting contract "for relief against common-law liability." Barnes v. Long Island R. Co., 115 App. Div. 44, 100 N. Y. S. 593.

46. Murphy v. Wells-Fargo & Co. Exp., 99 Minn. 230, 108 N. W. 1070. Exemption from liability for condition of berries on arrival if ordinary care is used to keep bunkers supplied with ice en route cannot be sustained on principle controlling exemptions after arrival. Id.

Limitations held reasonable: Requiring suit to be brought within six months. St. Louis, etc., R. Co. v. Pearce [Ark.] 101 S. W. 763. Provision for notice of claim for damages within thirty hours after arrival of stock. St. Louis, etc., R. Co. v. Phillips, 17 Okl. 264, 87 P. 470. Requiring shipper to unload and reload, and to feed and water stock. Houston, etc., R. Co. v. Mayes [Tex. Civ. App.] 16 Tex. Ct. Rep. 818, 97 S.

contract must be supported by a sufficient consideration,[48] and may be contained in the shipping order,[49] and generally such contract, in the absence of fraud or concealment,[50] is binding notwithstanding the shipper did not read[51] or understand the same,[52] though some states require actual knowledge and assent.[53] Where the owner ratifies the contract of the consignee, he must ratify the limitations therein.[54] Generally a carrier cannot contract against negligence,[55] though some states permit

W. 318. Limitation by carriers carrying under independent contracts of liability to own line. Id. Relieving carrier from liability for loading and want of bedding. St. Louis S. W. R. Co. v. Butler [Ark.] 102 S. W. 378.

Held unreasonable: Arbitrarily fixing amount of recovery, and relieving carrier from all risks and losses. Pecos, etc., R. Co. v. Hughes [Tex. Civ. App.] 17 Tex. Ct. Rep. 263, 98 S. W. 410. Limitation of liability to sum of $50 on $2,000 shipment where freight paid was $330. Murphy v. Wells-Fargo & Co. Exp., 99 Minn. 230, 108 N. W. 1070.

47. Common-law liability can be limited only by express or implied contract. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252.

48. Southern Exp. Co. v. Hill [Ark.] 98 S. W. 371. Contract disclosed no consideration. Meyers v. Missouri, etc., R. Co., 120 Mo. App. 288, 96 S. W. 737. Stipulation for computation of loss at value at time and place of shipment need not be supported by independent consideration. Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., 124 Mo. App. 545, 102 S. W. 11. Fact that goods are carried at lower of two rates filed under interstate commerce act does not show consideration where no rate was agreed upon, either verbally or in writing. Phoenix Powder Mfg. Co. v. Wabash R. Co., 120 Mo. App. 566, 97 S. W. 256. Where contract for interstate shipment expresses no consideration, carrier cannot show reduced rate unless it proves that such rate was scheduled, filed and posted, as required Meyers v. Missouri, etc., R. Co., 120 Mo. App. 288, 96 S. W. 737. Option to ship under common-law liability and at higher rate need not be expressly offered. Arthur v. Texas & P. R. Co., 204 U. S. 505, 51 Law. Ed. 590. Recital in bill of lading that, in consideration of reduced rate, shipper agrees, etc., without statement of regular rate, is insufficient to show shipment at reduced rate. Farmers' Bk. v. St. Louis & H. R. Co., 119 Mo. App. 1, 95 S. W. 286. Evidence held to show that no verbal contract of shipment was made, and hence limitation of liability in written contract was not without consideration for lack of reduced rates. Houston, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Civ. Rep. 107, 97 S. W. 836. Regular rate may be sufficient to support limitation where such rate is fixed in view of limited liability. Arthur v. Texas P. R. Co., 204 U. S. 505, 51 Law. Ed. 590.

49. Shipping order signed by shipper and accepted by carrier is binding contract as to limitations of liability therein. Michigan Cent. R. Co. v. Chicago Elec. Vehicle Co., 124 Ill. App. 158.

50. Where limitation is contained in bill of lading, it must be expressed in such manner as to be understood by man of ordinary intelligence, or be explained to shipper. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252.

51. Where shipper signs contract of shipment without reading same and without asking for time to do so, he is bound by limitations therein. Houston, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct Rep. 107, 97 S. W. 836. Passage ticket for ocean voyage is a contract, and fact that purchaser did not notice limitation therein does not relieve him. Tewes v. North German Lloyd S. S. Co., 186 N. Y. 151, 78 N. E. 864. Testimony of plaintiff that he did not read receipt "at the time of shipment," held insufficient to sustain finding that he had no notice, where receipt came from book in his possession. Fried v. Wells-Fargo & Co., 51 Misc. 669, 100 N. Y. S. 1007.

52. Where agent of shipper reads bill of lading stamped "Valuation restricted to $5 per 100 pounds," and accepts same without objection, such limitation is binding though agent testifies that he did not understand same. Lansing v. New York Cent. etc., R. Co., 52 Misc. 334, 102 N. Y. S. 1092.

53. Must expressly agree thereto under Civ. Code 1895, § 2276. Southern Exp. Co. v. Briggs [Ga. App.] 57 S. E. 1066. Mere knowledge that rates are based upon value of goods does not render restriction of recovery to declared value binding. Hayes v. Adams Exp. Co. [N. J. Err. & App.] 65 A. 1044. Hence, where such knowledge is made determining issue, judgment for restricted value must be set aside. Id. Whether consignor assented to restrictions of liability in bill of lading is question of fact for jury. Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777. Retention of receipt limiting liability makes case of consent for jury, where he could have reclaimed goods and secured return of money. Coggswell v. Weir, 101 N. Y. S. 188.

54. Must ratify in toto. Rates v. Weir, 105 N. Y. S. 785.

55. Wabash R. Co. v. Thomas, 122 Ill. App. 569; McConnell Bros. v. Southern R. Co. [N. C.] 56 S. E. 559; Wabash R. R. Co. v. Foster, 127 Ill. App. 201; Missouri, etc., R. Co. v. Fry, 74 Kan. 546, 87 P. 754. Lake Shore, etc., R. Co. v. Gibson, 4 Ohio N. P. (N. S.) 345; Atlantic Coast Line R. Co. v. Goodwin, 1 Ga. App. 351, 57 S. E. 1070. In absence of fraud, false statement of value by shipper will not relieve carrier from liability for full amount where loss occurs through negligence. Broadwood v. Southern Exp. Co. [Ala.] 41 So. 769.

Stipulations held void as against loss by negligence: Notice of claim within specified time. St. Louis, etc., R. Co. v. Phillips, 17 Okl. 264, 87 P. 470. Amount of liability. Southern Exp. Co. v. Owens, 146 Ala. 412, 41 So. 752. Limitation of liability for delay to amount expended for food and water. Davis v. Wabash R. Co., 122 Mo. App. 637, 99 S. W. 17. That cattle are not to be delivered within any specific time, nor in

except as to "gross negligence." [56] A carrier may limit its liability to its own line [57] unless it undertakes a through shipment, in which case it cannot contract against the negligence of connecting carriers.[58] The more common limitations held valid are those requiring shipper to load at his own risk,[59] fixing the amount of damages in case of loss,[60] or the time and place of ascertaining the same,[61] and limiting recovery to a particular sum unless true value is disclosed.[62] The loss, however, must come clearly within the limitation,[63] and the contract is construed against the carrier.[64]

season for any particular market. Cornelius v. Atchison, etc., R. Co., 74 Kan. 599, 87 P. 751. Stipulation that damages shall be ascertained by value at place of shipment. McConnell Bros. v. Southern R. Co. [N. C.] 56 S. E. 559.

Held valid against losses by negligence: Stipulation that loss shall be computed at value at time and place of shipment. Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., 124 Mo. App. 545, 102 S. W. 11. Requiring verified claim to be presented within specified time. Pennsylvania Co. v. Shearer, 75 Ohio St. 249, 79 N. E. 431. Limiting liability for loss of baggage to specific amount unless excessive value is declared and freight paid. Tewes v. North German Lloyd S. S. Co., 186 N. Y. 151, 78 N. E. 864.

Loss held due to negligence where carrier negligently failed to take up car on side track for two days and it was destroyed by fire originating in nearby mill. Arkansas So. R. Co. v. Murphy [Ark.] 103 S. W. 743. Stipulation that goods were lost or stolen en route in manner unknown to either party is insufficient to show due care. Norton v. Adams Exp. Co., 123 Mo. App. 233, 100 S. W. 502.

56. Attempt to push car upon side track by placing tie between it and engine on main track, resulting in derailment, held not gross negligence. Wilson v. Delaware, etc., R. Co., 104 N. Y. S. 293.

57. Michigan Cent. R. Co. v. Chicago Elec. Vehicle Co., 124 Ill. App. 158; Texas, etc., R. Co. v. Gray [Tex. Civ. App.] 99 S. W. 1125. On interstate shipment. Houston, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 107, 97 S. W. 837; Cane Hill Cold Storage & Orchard Co. v. San Antonio, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751. Although it has through transportation arrangements. McLendon v. Wabash R. Co., 119 Mo. App. 128, 95 S. W. 943.

58. St. Louis, etc., R. Co. v. Frazar [Tex. Civ. App.] 16 Tex. Ct. Rep. 983, 97 S. W. 325; Hardin v. Missouri Pac. R. Co. [Mo. App.] 96 S. W. 681. Under Missouri statute. McLendon v. Wabash R. Co., 119 Mo. App. 128, 95 S. W. 943. Under Rev. St. 1899, § 5222, carrier cannot limit where it issues through bill. Farmers' Bk. v. St. Louis & H. R. Co., 119 Mo. App. 1, 95 S. W. 286.

59. St. Louis, etc., R. Co. v. Burgin [Ark.] 104 S. W. 161. Load and bed. St. Louis S. W. R. Co. v. Butler [Ark.] 102 S. W. 378. Written contract imposing risk of loading on shipper cannot be related back to include loss already accrued on theory that verbal contract was reduced to writing, where preliminary arrangements only extended to rates and question whether car could be obtained. St. Louis, etc., R. Co. v. Burgin [Ark.] 104 S. W. 161.

60. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252. Shipper is estopped from demanding more, and carrier from reducing it. St. Louis, etc., R. Co. v. Sharrock, 6 Ind. T. 458, 98 S. W. 158.

61. Value at place and time of shipment. Southern R. Co. v. Cofer [Ala.] 43 So. 102.

62. Southern Exp. Co. v. Stevenson [Miss.] 42 So. 670; Bates v. Weir, 105 N. Y. S. 785.

63. Atchison, etc., R. Co. v. Poole, 73 Kan. 466, 87 P. 465. Mere depredator is not "robber" within clause exempting carrier from liability for acts of robbers. Louisville & N. R. Co. v. Dunlap [Ala.] 41 So. 826. Goods held not "ready for delivery" to connecting carrier within exemption clause until demanded charges have been prepaid. Lehigh Valley Transp. Co. v. Post Sugar Co., 228 Ill. 121, 81 N. E. 819. Stipulation that stock was not to be transported within specified time, nor be delivered on specific day or in season for particular market, does not relieve carrier for failure of sale which would have been consummated if delivery had been made with diligence. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 96 S. W. 106. Where carrier undertook to carry from St. Louis to point on its line, provision that if destination was beyond its line liability would terminate on delivery to connecting line, held inapplicable to loss on line carrying stock from St. Louis to its line. St. Louis S. W. R. Co. v. Kilberry [Ark.] 102 S. W. 894. Contract providing that in case of unusual delay, due to carrier's negligence, the shipper shall accept as full compensation amount expended for food and water, does not apply to actual injuries, as where shipper is unable to procure food and water and stock dies. Galloway v. Erie R. Co., 116 App. Div. 777, 102 N. Y. S. 25. Exemption from liability for negligence is inapplicable to loss caused by arbitrary change of route. Pecos, etc., R. Co. v. Hughes [Tex. Civ. App.] 17 Tex. Ct. Rep. 263, 98 S. W. 410. Provision that, "In event of loss * * * under provisions of this agreement," value at place of shipment shall control, does not apply to damage due to negligent delay in transportation. Hardin v. Missouri Pac. R. Co. [Mo. App.] 96 S. W. 681. Where oil clothing was shipped under bill of lading providing that inflammable goods might be transported on deck and should be at shipper's risk, and evidence shows custom to treat oil clothing as inflammable, carrier is not liable for loss due to washing overboard. Tower Co. v. Southern Pac. Co. [Mass.] 80 N. E. 809. And where it was so classified because of danger of spontaneous combustion, evidence that oil clothing manufactured by plaintiff was hard to ignite, and upon ignition did not burst into flames, was properly excluded. Id. Agreed valuation for purpose of fixing extent of liability does not prevent shipper from recovering such amount, though he sells stock for more than agreed amount. Davis v. Wabash R. Co., 122 Mo. App. 637, 99 S. W. 17.

64. Where equivocal. Galloway v. Erie R. Co., 116 App. Div. 777, 102 N. Y. S. 25.

While a connecting carrier cannot take advantage of a limitation made for the benefit of another,[65] the contract may by express provision be for the benefit of all.[66]

The validity of limitations upon substantive rights is determined by the laws of the state where executed,[67] but that of remedial provisions is dependent upon the laws of the state where the action is brought.[68] A contract though valid where made will not be enforced if against the public policy or statutory law of the state where suit is brought.[69]

Provisions for notice of injury.[70]—A carrier may contract for reasonable notice[71] of injury or claim for damages and a failure to give notice within the time limited,[72] in the manner specified,[73] and to the party designated,[74] will defeat recovery unless noncompliance is waived,[75] or the carrier is estopped to assert it,[76] or had actual notice and opportunity to investigate.[77] The loss, however, must come within the contract.[78] Where connecting carriers transport under independent contracts,[79] notice to one is not notice to the other.[80]

65. Davis v. Wabash R. Co., 122 Mo. App. 637, 99 S. W. 17.

66. Limited amount of recovery. Harby v. Southern R. Co. 75 S. C. 321, 55 S. E. 760.

67. Southern Exp. Co. v. Owens, 146 Ala. 412, 41 So. 752; St. Louis, etc., R. Co. v. Hambrick [Tex. Civ. App.] 17 Tex. Ct. Rep. 244, 97 S. W. 1072. Valid Arkansas provisions for notice of injury (Id.), and for determination of damages from value at place of shipment, held enforceable in Texas (Id.). Presumptively, the constitution and laws of state where shipping contract was executed are same as that of state where suit is brought. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718; Southern Exp. Co. v. Owens, 146 Ala. 412, 41 So. 752.

68. St. Louis, etc., R. Co. v. Hambrick [Tex. Civ. App.] 17 Tex. Ct. Rep. 244, 97 S. W. 1072. Arkansas contract requiring suit to be instituted within six months, held void under Rev. St. 1895, art. 3378, where sought to be enforced in Texas. Id.

69. St. Louis, etc., R. Co. v. Moon, [Tex. Civ. App.] 103 S. W. 1176. Contract exempting carrier by water from liability for negligence of pilot, master and mariners cannot be held to affect public policy of this country where it was entered into in another country and related to transportation on foreign vessel on voyage which did not include port of U. S. The Fri [C. C. A.] 154 F. 333.

70. See 7 C. L. 545.

71. Reasonableness for jury. St. Louis, etc., R. Co. v. Phillips, 17 Okl. 264, 87 P. 470. **Time held reasonable:** One day after unloading of cattle. St. Louis, etc., R. Co. v. Pearce [Ark.] 101 S. W. 760. Ninety days. Broadwood v. Southern Exp. Co. [Ala.] 41 So. 769. Ninety-one days, where shipper knows of local agent to whom notice may be given, is reasonable within Sayles' Ann. Civ. St. 1897, art. 3379. Houston, etc., R. Co. v. Mayes [Tex. Civ. App.] 16 Tex. Ct. Rep. 818, 97 S. W. 318. Provision requiring sworn claim for injuries to be presented within ten days after unloading cannot be held reasonable as matter of law where injury is of nature not to be fully ascertainable within such time. Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777.

72. St. Louis, etc., R. Co. v. Puckett [Ark.] 101 S. W. 762. Fact that shipper or agent does not accompany stock does not relieve him. St. Louis, etc., R. Co. v. Phillips, 17 Okl. 264, 87 P. 470.

73. Where contract of shipment requires written notice, oral notice is not compliance therewith. St. Louis, etc., R. Co. v. Phillips, 17 Okl. 264, 87 P. 470. Where upon arrival of package verbal notice was given of missing contents and tracer sent out, and upon report ninety days later that goods could not be found written notice of claim was made, there was sufficient compliance with requirement of written notice of claim within thirty days. Southern Exp. Co. v. Stevenson [Miss.] 42 So. 670.

74. Provision in through contract of shipment by connecting carrier requiring notice of claims "to the agent at point of delivery," held satisfied by service upon, agent of delivering carrier, although defendant had agent at such place. Mulrooney, Ryan & Clark Co. v. Western Transit Co. [Minn.] 112 N. W. 988. Filing of claim with cashier apparently in charge of office during absence of agent, is compliance with statute requiring claim to be filed with agent at destination. Walker v. Southern R. Co. [S. C.] 56 S. E. 952.

75. Transactions with initial carrier, held not waiver of stipulation for presentment of written claim for loss within ninety days as to terminal carrier. Broadwood v. Southern Exp. Co. [Ala.] 41 So. 769. Where contract provides in large type and unambiguous terms that agents have no authority to waive notice of claim for injuries, acts of agent cannot constitute waiver. St. Louis, etc., R. Co. v. Phillips, 17 Okl. 264, 87 P. 470.

76. Acceptance of unverified claim for damages and investigation pursuant thereto estops carrier from asserting that it was not verified as required. Farmers' Bk. v. St. Louis & H. R. Co., 119 Mo. App. 1, 95 S. W. 286.

77. Hardin v. Missouri Pac. R. Co. [Mo. App.] 96 S. W. 681. Stipulation for notice of loss or injury to stock before removal does not apply to a claim for dead stock removed from car by carrier. Missouri, etc., R. Co. v. Frogley [Kan.] 89 P. 903.

78. Provision for notice of loss or injury to stock before removal does not apply to damages occasioned by failure to timely furnish car. St. Louis S. W. R. Co. v. McNeil, 79 Ark. 470, 96 S. W. 163. Provision for notice of claim for "loss or injury to the

§ 12. *Public records of traffic.*[81]

§ 13. *Remedies and procedure.*[82] *Timely notice and bringing of suit.*[83]- Suit must be brought within the time specified by special contract[84] unless delayed at the instance of carrier.[85]

Persons who may sue.[86]—The consignor,[87] the consignee[88] who has an interest in the goods[89] or for whose benefit the contract was made,[90] or the assignee of the bill of lading,[91] may sue for loss or injury to the shipment. While one cannot recover for loss of goods of another, shipped in his name and with his goods,[92] it has been held that one may recover for breach of contract to furnish cars, though stock was owned jointly with another.[93] The right to sue connecting carriers jointly,[94] or to join them in a single action,[95] depends upon whether their liability, is joint or several. Only the aggrieved party can recover the North Carolina statutory penalty for failure to transport within a reasonable time.[96]

stock" does not cover claim for decline of market during delay Pecos, etc., R. Co. v. Evans-Snyder-Buel Co. [Tex.] 16 Tex. Ct. Rep. 978, 97 S. W. 466. Stipulation for written notice of claim for loss or injury to stock during transportation does not apply to depreciation in market during delay. Atchison etc., R. Co. v. Poole, 73 Kan. 466, 87 P. 465; Cornelius v. Atchison, etc., R. Co., 74 Kan. 599, 87 P. 751. A stipulation for notice of claim for loss or injury, resulting from carrier's negligence, "including delays," held not to cover loss due to decline in market occasioned by delay. Missouri, etc., R. Co. v. Fry, 74 Kan. 546, 87 P. 754. Stipulation for notice of loss or injury resulting from carrier's negligence, including delays, before stock is removed, does not apply to loss due to decline of market because of delays. Missouri, etc., R. Co. v. Frogley [Kan.] 89 P. 903. Contract for through shipment, held to require notice to initial carrier of claim for damages only if claim occurred on its line. Davis v. Wabash R. Co., 122 Mo. App. 637, 99 S. W. 17. Contract provisions for notice of claim, and the bringing of suit within specified time, construed to relate to losses during transportation and to injuries due to escaping of stock from pens. St. Louis, etc., R. Co. v. Beets [Kan.] 89 P. 683.

79. Where shipper contracted with initial carrier to carry to certain point, and there entered into another contract with connecting carrier, held that contracts were independent. Houston, etc., R. Co. v. Mayes [Tex. Civ. App.] 16 Tex. Ct. Rep. 818, 97 S. W. 318.

80. Sayles' Ann. Civ. St 1897, arts. 331a, 331b, apply only to through contracts of shipment. Houston, etc., R. Co. v. Mayes [Tex. Civ. App.] 16 Tex. Ct. Rep. 818, 97 S. W. 318.

81. See 3 C. L. 603, § 12.

82. See 7 C. L. 546.

83. See 5 C. L. 522.

84. Suit commenced on May 17th, 1904, for damages accruing in Sept. 1903, held too late where contract required suit to be brought within six months. St. Louis S. W. R. Co. v. Butler [Ark.] 102 S. W. 378.

85. Request for time to investigate claim does not excuse failure to sue within six months where notice of disallowance is given before expiration of period and plaintiff delays nearly six months thereafter. St. Louis, etc., R. Co v.. Pearce [Ark.] 101 S. W. 763.

86. See 7 C. L. 546.

87. Gratiot St. Warehouse Co. v. Missouri etc., R. Co., 124 Mo. App. 545, 102 S. W. 11. Whether owner or not may sue on transportation contract. Ross v. Chicago, etc., R. Co., 119 Mo. App. 290, 95 S. W. 977. May sue for entire damage notwithstanding he has only partial interest. Southern Kansas R. Co. v. Morris [Tex.] 102 S. W. 396.

88. Texas & P. R. Co. v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 1011. 97 S. W. 509. Where debtor deposits money in express office addressed to creditor, pursuant to understanding, and gives no further instructions, creditor may maintain action for possession thereof. Pratt v. Northern Pac. Exp. Co. [Idaho] 90 P. 341.

89. Where property is delivered unconditionally, carrier must treat consignee as absolute owner until he receives notice to contrary, Pratt v. Northern Pac. Exp. Co. [Idaho] 90 P. 341.

90. Where property is delivered unconditionally, it will be presumed that contract was made on behalf of consignee and that he is owner thereof. Pratt v. Northern Pac. Exp. Co. [Idaho] 90 P. 341.

91. Assignment prior to destruction. Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., 124 Mo. App. 545, 102 S. W. 11.

92. Roy v. Chesapeake & O. R. Co., 61 W. Va. 616, 57 S. E. 39.

93. Southern Kansas R. Co. v. Morris [Tex. Civ. App.] 99 S. W. 433.

94. Where petition charges joint contract of shipment and joint liability, connecting carriers may be joined in same action. St. Louis, etc., R. Co. v. Dodson [Tex. Civ. App.] 16 Tex. Ct. Rep. 109, 97 S. W. 523

95. Where contract provided for carriage from point of shipment to destination, but it specified that initial carrier was only to carry to C., and thence forward by connecting line to destination, lines may be joined in single action for negligent handling en route, though liability of each is limited to own line. Cincinnati, etc., T. P. R. Co. v. Greening, 30 Ky. L. R. 1180, 100 S. W. 825.

96. Presumption of title in consignee, together with evidence that he was "anxious for the hay," held to show that consignee, and not consignor, was aggrieved party. Stone & Co. v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 932.

Particular remedies available.[97]—An action will be construed as ex delicto rather than ex contractu.[98]

Jurisdiction and venue.[99]

Pleading, proofs, and evidence.[1]—The pleadings should not be duplicitous [2] or aver mere conclusions.[3] Contributory negligence of shipper,[4] failure of plaintiff to give notice precedent,[5] waiver of notice of injury,[6] proximate cause,[7] and consideration in assumpsit,[8] must be pleaded; but a prior claim for damages on a different ground of negligence may be shown though not averred.[9] In an action for failure to furnish cars, demand therefor [10] and tender of shipment [11] should be alleged. One invoking foreign laws to sustain a contract limiting liability must plead such laws.[12] In an action against lessor for default of lessee, the petition must allege whether wrong was done by employes of the lessor or lessee.[13] The amendableness,[14] construction,[15] and sufficiency of pleadings [16] to admit particular proof,[17] are treated in the notes.

97. See 7 C. L. 546.

98. Atlantic Coast Line R. Co. v. Goodwin, 1 Ga. App. 351, 57 S. E. 1070. Declaration construed as action in tort for failure to furnish cars under common-law duty, and not ex contractu. Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., 104 Md. 693, 65 A. 425. Action before justice for unreasonable delay in delivery, construed as ex contractu. Southern Exp. Co. v. Briggs, 1 Ga. App. 294, 57 S. E. 1066.

99. See 7 C. L. 546. See, also, Jurisdiction, 8 C. L. 579; Venue and Place of Trial, 8 C. L. 2236.

1. See 7 C. L. 547.

2. Paragraph alleging that, "If said melons were not delayed in transit, they were damaged by reason of the fact that said company failed to notify petitioner of arrival, as was custom," etc., held duplicitous. Macon & B. R. Co. v. Walton, 127 Ga. 294, 56 S. E. 419.

3. In action for recovery of demurrage, defendant assignee of consignee can plead only such rights as were possessed by consignee and denial by him of promise to pay demurrage, in so far as it is denial of implied promise, must be treated as mere conclusion. Cincinnati & Columbus Trac. Co. v. Norfolk & W. R. Co., 8 Ohio C. C. (N. S.) 134.

4. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718.

5. Must be specifically pleaded, and mere allegation that shipment was under special contract, and filing of such contract with petition, is insufficient. McNealey v. Chicago, etc., R. Co., 119 Mo. App. 200, 95 S. W. 312.

6. Frey v. New York Cent., etc., R. Co., 114 App Div. 747, 100 N. Y. S. 225.

7. Allegation that plaintiff placed logs along defendant's track for shipment, and because of defendant's failure to furnish cars they deteriorated in value, from exposure to weather, held to sufficiently allege that failure to furnish cars was proximate cause of damage. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 S. W. 375.

8. Pennsylvania R. Co. v. Smith [Va.] 56 S. E. 567.

9. On prior trial. Cane Hill Cold Storage & Orchard Co. v. San Antonio, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751.

10. Allegation of demand upon defendant is sufficient without specifying agent upon whom made or alleging his authority, especially after verdict. St. Louis, etc., R. Co. v. Wynne, Hoop & Cooperage Co. [Ark.] 99 S. W. 375.

11. Allegation that plaintiff had placed saw logs along defendant's track for shipment sufficiently alleges tender. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 S. W. 375.

12. Southern Exp. Co. v. Owens, 146 Ala. 412, 41 So. 752.

13. Dismissed. Georgia R. & Banking Co. v. Haas, 127 Ga. 187, 56 S. E. 313.

14. Petition for statutory treble damages under Rev. St. 1899, § 1140, held amendable under Code to action for violation of common-law duty, the evidence required being same in either case as is measure of damages. Knight v. Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716. Where pleading is defective as charging either common-law or statutory liability, it may be amended to charge latter. Southern R. Co. v. Gardner, 127 Ga. 320, 56 S. E. 454.

15. Petition for damages for delay held to state cause of action ex contractu. Macon & B. R. Co. v. Walton, 127 Ga. 294, 56 S. E. 419. Petition held not to allege cause of action on joint contract of carriage. Meyers v. Missouri, etc., R. Co., 120 Mo. App. 288, 96 S. W. 737. Pleading held to charge wrongful exposure of hogs to other infectious diseases, as well as cholera. Council v. St. Louis, etc., R. Co., 123 Mo. App. 432, 100 S. W. 57. Complaint as amended, held action to recover freight overcharge, and not a penalty. Atlanta & W. P. R. Co. v. Georgia R. & Elec. Co., 125 Ga. 793, 54 S. E. 753. In action for failure to deliver number of cases mentioned in bill of lading, special plea held to allege defense of mistake as well as fraud in bill. Cohen v. Missouri, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 121, 98 S. W. 437.

16. Petition alleging that plaintiff "was (damaged) for overcharge of freight on said car of melons in sum of $20." held to state cause of action. Macon & B. R. Co. v Walton, 127 Ga. 294, 56 S. E. 419. Petition held defective as charging common-law liability in failing to allege that damage resulted from act of defendant, and as an attempt to enforce statutory liability as last carrier in that it did not aver that goods were received in good condition. Southern R. Co. v Gard-

While plaintiff has the burden of establishing all the material allegations of his complaint if put in issue,[18] including negligence,[19] proof of failure to deliver a shipment received in good order, within a reasonable time,[20] or a delivery in a damaged state,[21] generally [22] raise a presumption of negligence and makes a prima facie case,[23] casting the burden on the carrier to relieve itself by showing that loss was due to a cause for which it was not responsible,[24] or by establishing a special contract [25] and bringing the case within it.[26] In some states, upon proof of loss or delay, the initial carrier has the burden of disproving that it occurred on its line.[27] Where goods shipped over several lines are injured en route, in the absence of location of the injury,[28] a rebuttable presumption [29] generally [30] arises that it occurred on the terminal line,[31] unless the shipper accompanies the goods; [32] and hence if a

ner, 127 Ga. 320, 56 S. E. 455. In action for breach of contract to furnish cars on specified date, allegation that defendant promised to accept cattle on or about June 12, 1904, and that defendant instructed plaintiff to have cattle ready at that time, held sufficient to permit evidence that cars were not furnished as promised. San Antonio, etc., R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418. Allegation of damages held not so connected with the last preceding count as to be stricken therewith. Baltimore, etc., R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033.

17. Where there was failure to deliver because terminal carrier was not aware of identity of shipment because of transfer to different car, allegation of notice from notation on way bill held sufficient to authorize proof of custom to so notify of transfer. St. Louis S. W. R. Co. v. Wester [Tex. Civ. App.] 16 Tex. Ct. Rep. 783, 96 S. W. 769. General allegation that contract of shipment was reduced to writing is insufficient to render admissible clause therein that all verbal contracts in reference to shipment were merged. Texas, etc., R. Co. v. Feiker [Tex. Civ. App.] 99 S. W. 439.

18. Alleged demand and refusal, held put in issue. Thaxter v. Missouri Pac. R. Co., 123 Mo. App. 636, 100 S. W. 1102.

19. Failure to ice fruit car. Taft Co. v. American Exp. Co., 133 Iowa, 522, 110 N. W. 897.

20. Is sufficient to establish negligence without proof of specific acts of negligence. Baltimore, etc., R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033. Carrier must absolve itself. Chicago, etc., R. Co. v. Gillett [Tex. Civ. App.] 99 S. W. 712; Nelson v. Chicago, etc., R. Co. [Neb.] 110 N. W. 741; Tiller v. Chicago, etc., R. Co. [Iowa] 112 N. W. 631. St Louis Merchants' Bridge Terminal R. Co. v. Tassey, 122 Ill. App. 339. Where actionable delay is shown, presumption arises that it was caused by carrier having possession after delay. Harper Furniture Co. v. Southern Exp. Co. [N. C.] 57 S. E. 458. Non-arrival within a reasonable time warrants inference of loss. Southern R. Co. v. Montag, 1 Ga. App. 649, 57 S. E. 933.

21. Fockens v. U. S. Exp. Co., 99 Minn. 404, 109 N. W. 834. Evidence held for jury whether defendant had fulfilled its duty in reicing car. Orem Fruit & Produce Co. v. Northern Cent. R. Co. [Md.] 66 A. 436.

22. No presumption of negligence arises from mere fact that horse is taken sick en route. Wente v. Chicago, etc., R. Co. [Neb.] 112 N. W. 300. Where facts disclose that animal was not injured through neglect of carrier, rule that proof of delivery to carrier in good condition and delivery in injured condition makes prima facie case has no weight. Id.

23. Brennisen v. Pennsylvania R. Co., 100 Minn. 102, 110 N. W. 362. Rule is applicable to perishable goods. Brennisen v. Pennsylvania R. Co., 100 Minn., 102, 110 N. W. 362; Brennisen v. Pennsylvania R. Co., 101 Minn. 120, 111 N. W. 945. Evidence held insufficient to overcome prima facie case. Brennisen v. Pennsylvania R. Co., 100 Minn. 102, 110 N. W. 362.

24. Fockens v. U. S. Exp. Co., 99 Minn. 404, 109 N. W. 834; Brennisen v. Pennsylvania R. Co., 100 Minn. 102, 110 N. W. 362. As by act of God. Fentiman v. Atchison, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 500, 98 S. W. 939; Gulf, etc., R. Co. v. Belton Oil Co. [Tex. Civ. App.] 99 S. W. 430. Evidence held insufficient to show that loss was not occasioned in part by negligence of defendant. Fockens v. U. S. Exp. Co., 99 Minn. 404, 109 N. W. 834.

25. Carpenter v Baltimore, etc., R. Co. [Del.] 64 A. 252; Baltimore, etc., R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033. Has burden of showing assent. Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777, afg. 122 Ill. App. 569.

26. Louisville & N. R. Co. v. Dunlap [Ala.] 41 So. 826; Southern R. Co. v. Montag, 1 Ga. App. 649, 57 S. E. 933. Limiting liability to own line. Illinois Cent. R. Co. v. Stevens, 29 Ky. L. R. 1079 96 S. W. 888; Southern R. Co. v. Montag, 1 Ga. App. 649, 57 S. E. 933.

27. Orem Fruit & Produce Co. v. Northern Cent. R. Co. [Md.] 66 A. 436. Where shipment is accepted for delivery beyond its line, initial carrier has burden of showing that delay in transportation occurred after delivery to succeeding connecting carrier. Norfolk & W. R. Co. v. Wilkinson, [Va.] 56 S. E. 808.

28. St. Louis, etc., R. Co. v. Renfroe [Ark.] 100 S. W. 889. Where goods are shipped under contract for continuous carriage, prima facie right of action exists against any carrier in whose custody goods are shown to have been in damaged condition. Rule applies to wrongful delay. Harper Furniture Co. v. Southern Exp. Co. [N. C.] 57 S. E. 458.

29. Calender-Vanderhoof Co. v. Chicago, etc., R. Co., 99 Minn. 295, 109 N. W. 402.

30. While burden is on plaintiff in action against initial carrier to show that damage occurred on its line, there is no presumption as to where the damage occurred. St. Louis, etc., R. Co. v. Pearce [Ark.] 101 S. W. 760.

31. Michigan Cent. R. Co. v. Chicago Elec. Vehicle Co., 124 Ill. App. 158. Where

carrier other than the terminal is sued plaintiff must prove loss on its line.[33] This presumptive rule is applicable to a partial loss of an entire shipment.[34] In Mississippi the presumption is conclusive unless the terminal carrier furnishes upon demand [35] copies of all records of the shipment of each carrier. The rule requiring the terminal carrier to prove the extent of injury, as well as that the goods were received in damaged state is inapplicable where the goods are not open to inspection.[36] When the terminal carrier overcomes the presumption, it shifts to the next preceding carrier.[37] Carrier has the burden of establishing special defenses,[38] as that liability was that of a warehouseman.[39] delivery to true owner,[40] etc. Plaintiff must show compliance with all conditions precedent to maintaining the action,[41] and that a lost express package was properly addressed.[42] A shipper alleging co-operation creating a through line has burden of proving the same.[43] Courts will take judicial notice of railroad connections,[44] of unreasonableness of time consumed in transportation where it is notoriously long,[45] but not of the exact quantum of delay.[46] In an action for penalty for an unreasonable delay, plaintiff has the burden of showing that time was unreasonable.[47]

In the admission of evidence the ordinary rules respecting admissibility of

vents of car are sealed open on delivery to initial carrier, they will be presumed to have remained so when delivered to each succeeding carrier. Cane Hill Cold Storage & Orchard Co. v. San Antonio, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751.

32. Texas, etc., R. Co. v. Gray [Tex. Civ. App.] 99 S. W. 1125.

33. Michigan Cent. R. Co. v. Chicago Elec. Vehicle Co., 124 Ill. App. 158. Proof of delivery of goods to initial carrier in good condition, and delivery by terminal carrier in damaged state, make prima facie case only against terminal carrier. Cane Hill Cold Storage & Orchard Co. v. San Antonio, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751.

34. Walker v. Southern R. Co. [S. C.] 56 S. E. 952; Bradley v. Northwestern R. Co. [S. C.] 57 S. E. 1101.

35. Note asking delivering carrier to "kindly trace shortage" is not a demand for records, memoranda, etc., as to render carrier liable under Code 1896, § 4853. Threefoot Bros. & Co. v. New Orleans, etc., R. Co. [Miss.] 43 So. 303.

36. Chinaware in box. St. Louis, etc., R. Co. v. Green [Tex. Civ. App.] 17 Tex. Ct. Rep. 1, 97 S. W. 531.

37. In action for damage to fruit for failure to keep air vents open, proof that they were open when delivered to terminal carrier meets burden cast upon next preceding carrier by proof of terminal carrier that loss was not occasioned on its line. Cane Hill Cold Storage & Orchard Co. v. San Antonio, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751. Where action is brought against three connecting carriers, instruction that if jury were unable to determine which, if either, of connecting carriers, referring to initial and succeeding carrier, last carrier handling cattle was liable therefor, was erroneous. Texas & P. R. Co. v. Bailey [Tex. Civ. App.] 16 Tex. Ct. Rep. 843, 96 S. W. 1089. Where burden rests on connecting carriers to disprove negligence, and no evidence is introduced to show on what line damage occurred, judgment should be rendered against each carrier for full amount. Cincinnati, etc., R. Co. v. Greening, 30 Ky. L. R. 1180, 100 S. W. 825.

38. Where carrier asserts ownership as defense to suit in conversion of goods accepted as carrier, it has burden of showing that it accepted goods in good faith under mistake as to plaintiff's ownership, and that it is true owner. Valentine v. Long Island R. Co. [N. Y.] 79 N. E. 849. Where, in action for wrongful delivery, carrier claims bill of lading was procured by fraud, carrier must clearly establish such fact. Atlantic, etc., R. Co. v. Spires, 1 Ga. App. 22, 57 S. E. 973.

39. Brunson v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 538. Consignee makes prima facie case by proving failure to deliver upon demand. Id.

40. Contrary to bill of lading. Atlantic, etc., R. Co. v. Spires, 1 Ga. App. 22, 57 S. E. 973.

41. Notice of claim for damages. St. Louis, etc., R. Co. v. Pearce [Ark.] 101 S. W. 760.

42. Fact that carrier issued receipt showing that it was properly addressed does not shift burden. Southern Exp. Co. v. Hill [Ark.] 98 S. W. 371.

43. St. Louis, etc., R. Co. v. Keys, 6 Ind. T. 396, 98 S. W. 138. Testimony of carrier's agent, together with other evidence, held to make case for jury. Id. Where shipper testifies to agreement for through shipment with agent, and latter does not deny same presumption arises that carrier had control of line of connecting carrier for purposes of shipment. Id.

44. That city of Erie, Pa., is accessible by rail, and that Lenoir, N. C., is connected with trunk lines running north. Harper Furniture Co. v. Southern Exp. Co. [N. C.] 57 S. E. 458.

45. That fourteen days is too long a time for transportation of goods by express from Erie, Pa., to Lenoir, N. C. Harper Furniture Co. v. Southern Exp. Co. [N. C.] 57 S. E. 458.

46. Harper Furniture Co. v. Southern Exp. Co. [N. C.] 57 S. E. 458.

47. Action for penalty under Revisal 1905, § 2632. Alexander v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 697.

writings,[48] acts[49] and statements[50] of employes, relevancy,[51] competency,[52] res gestae,[53] hearsay evidence,[54] conclusions of witnesses,[55] expert testimony,[56] parol

48. Contract of shipment made by initial carrier for itself and as agent for connecting line, especially where acted upon by latter, is admissible against it. St. Louis, etc., R. Co. v. Dodson [Tex. Civ. App.] 16 Tex. Ct. Rep. 109, 97 S. W. 523. Where partnership of carriers is admitted, bill of lading issued by one is admissible against all. St. Louis, etc., R. Co. v. Watkins [Tex. Civ. App.] 100 S. W. 162. Where bill of lading is not declared on in petition, execution must be proven (Id.), though it may be made by circumstantial evidence (Id.). Carrier's receipt is not admissible until authenticated. Southern Exp. Co. v. Hill [Ark.] 98 S. W. 371. Receipt given to preceding carrier, held admissible, though signed in freight agent's name by unknown person, where it was received through regular course of business and was signed by person, who usually signed such receipts. Meyers v. Missouri, etc., R. Co., 120 Mo. App. 288, 96, S. W. 737.

49. In an action, for conversion, evidence that defendant's claim agent offered to sell to witness some goods addressed to plaintiff, and stated that they belonged to plaintiff, is not inadmissible, not being binding on defendant. Louisville & N. R. Co., v. Britton [Ala.] 43 So. 108.

50. Unauthorized statement of brakeman is inadmissible. St. Louis, etc., R. Co. v. Frazar [Tex. Civ. App.] 16 Tex. Ct. Rep. 983, 97 S. W. 325.

51. Evidence held admissible on particular issues: Rule to transport cattle as quickly as possible on issue of delay (St. Louis, etc., R. Co. v. Gunter [Tex. App.] 99 S. W. 152), as is time ordinarily required (Baltimore, etc., R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033), and time required on previous trips. (St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152). Evidence that later consignment reached destination first to rebut plea that carriage was made as quickly as unprecedented pressure of business would permit. Southern R. Co. v. Cofer [Ala.] 43 So. 102. In action for wrongful detention, delivery being withheld until carrier could investigate discrepancy between bill of lading and way bill as to charges, way bill and evidence of investigation are admissible to explain delay. Beasley v. Baltimore, etc., R. Co., 27 App. D. C. 595. Evidence of flood fifty-nine years before, and of tradition of another one hundred years before, on issue whether flood should have been anticipated. Atchison, etc., R. Co. v. Madden [Tex. Civ. App.] 103 S. W. 1193. Evidence that defendant had wrongfully refused to deliver to plaintiff's agent as showing that former's liability had not been reduced to that of warehouseman by plaintiff's failure to call within reasonable time. Louisville & N. R. Co. v. Dunlap. [Ala.] 41 So. 826. Evidence that shipper did not read receipt is admissible upon question whether he consented to vary oral contract of shipment to accord with terms of receipt. Coggswell v. Weir, 101 N. Y. S. 188. In view of Code 1896, § 4224, providing that common carrier is not relieved from liability as carrier by reason of storage unless within twenty-four hours after arrival of goods notice is given, evidence as to when notice was given is admissible as tending to show that goods did not arrive until or at about that time. Southern R. Co. v. Cofer [Ala.] 43 So. 102. On issue of acquiescence in route selected, evidence that he had consented to make previous shipments over such route, and desired this shipment to be made as the others, and that he could only have been given local rates by other route, held admissible. Pecos River R. Co. v. Harrington [Tex. Civ. App.] 99 S. W. 1050. Manufacturer agreed to furnish and set up monument for specific sum. Over his objection carrier rendered special service to purchasing association, thereby diverting part of funds which were to go to manufacturer. Held, in action for damages against carrier, evidence of financial irresponsibility of association was admissible. Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712, 13 Det. Leg. N. 631, 108 N. W. 1081.

Inadmissible: In action for failure to supply cars upon demand, requisition for cars for another time and for other goods. Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., 104 Md. 693, 65 A. 425.

52. Copy of bill of lading kept for filing in carrier's office is secondary evidence. Walker v. Southern R. Co. [S. C.] 56 S. E. 952.

53. Statement by agent of carrier while tracing car that it had not reached certain place is admissible as res gestae, as is statement of gaent made while attempting to adjust claim and while examining shipment to ascertain the damages. St. Louis, etc., R. Co. v. Watkins [Tex. Civ. App.] 100 S. W. 162.

54. Statement by plaintiff that he ordered cars through R. is not hearsay. San Antonio, etc., R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418. Statement in letter that carrier not party thereto had taken up claim for damages is hearsay. Houston, etc., R. Co. v. Mayes [Tex. Civ. App.] 16 Tex. Ct. Rep. 818, 97 S. W. 318.

55. Inadmissible: That particular run was made as quickly as possible under the circumstances. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152. Answer to question why stock remained in pens for the length of time they did that witness did not know, but presumed, etc. Dupree v. Texas & P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 809, 96 S. W. 647.

Not objectionable as conclusions: Testimony that certain person was in charge of train. Council v. St. Louis, etc., R. Co., 123 Mo. App. 432, 100 S. W. 57. One in position to observe physical surroundings may testify that car could have been moved to place of delivery without being switched into certain stockyards. Id.

56. One having special knowledge of rates under similar conditions may testify as to reasonableness of a rate though he does not know of financial condition of road or cost of transportation thereon. Halliday Milling Co. v. Louisiana, etc., R. Co., 80 Ark. 536, 98 S. W. 374. Testimony of rate clerk of commission as to reasonableness of rate is not rendered inadmissible because based in part upon report of former railroad auditor containing alleged errors. Id.

evidence to contradict[57] or explain[58] written instruments, and the like, apply. On reasonableness of rate on particular division, evidence of through rate, and division thereof, is admissible.[59] The evidence[60] and proof must correspond to the allegations,[61] though a variance on matters of inducement may be disregarded.[62] Recovery must be had on the negligence alleged.[63] Custom in respect to the negligence charged is admissible to show performance on particular occasion.[64]

The sufficiency of evidence to establish particular issues is treated in the notes.[65]

57. Where partial nondelivery is attempted to be shown by fact that seals placed on package remained unbroken, plaintiff may testify that it was not sealed in his presence upon delivery, though he signed statement to that effect. Goldstein v. Adams Exp. Co., 32 Pa. Super. Ct. 190. Receipt of consignee's agent may be contradicted by parol. Strawn v. Missouri, etc., R. Co., 120 Mo. App. 135, 96 S. W. 488. Evidence that all cases received of carrier were delivered to consignee, and that one case was not received by consignee, held to overcome receipt given to carrier for all of goods. Id.

58. Bills of lading for cotton reading "consignee and destination: Name, G. & K., Place, West Point, Va., County, care of Press, State, Selma, Ala.," held so ambiguous as to place of delivery as to render evidence of custom to show sense in which parties intended it to be understood admissible. Southern R. Co. v. Cofer [Ala.] 43 So. 102.

59. Halliday Mill. Co. v. Louisiana, etc., R. Co., 80 Ark. 536, 98 S. W. 374.

60. Where no issue is made as to injury on another line, original petition alleging that stock was so injured is inadmissible. Missouri, etc., R. Co. v. Garrett [Tex. Civ. App.] 96 S. W. 53. Where plaintiff bases his right to recover on negligence in delaying train at certain points, refusal to allow shipment on faster trains, and objection that that schedule was unreasonably slow, are not within issues. Ecton v. Chicago, etc., R. Co., 125 Mo. App. 223, 102 S. W. 575.

61. Fatal variance: Between allegation of failure to deliver and proof of delay in delivery. Southern R. Co. v. Moody [Ala.] 44 So. 94. Allegation of common-law carriage and proof of shipment under special contract. Leh v. Delaware, etc., R. Co., 30 Pa. Super. Ct. 396. Between allegation that cars were ordered through agent at station at which they were to be furnished and proof that they were ordered through agent at another station, though company undertook to furnish them and did so tardily. Southern Kansas R. Co. v. Cox [Tex. Civ. App.] 103 S. W. 1122. Between allegation of actual knowledge of infected condition of stock pens and proof of negligence in failing to know thereof. Texas & P. R. Co. v. Beal [Tex. Civ. App.] 16 Tex. Ct. Rep. 985, 97 S. W. 329. Where negligence charged is for permitting plaintiff to put stock in infected pens after defendant had received notice of quarantine, recovery cannot be had on duty to provide suitable shipping and feeding pens. Id.

Where plaintiff pleads an oral contract of shipment, and defendant answers by alleging shipment under a written one, recovery may be had under written one. Cornelius v. Atchison, etc., R. Co., 74 Kan. 599 87 P. 751.

62. Oral contract alleged, but a written one proved as inducement. Nelson v. Chicago, etc., R. Co. [Neb.] 110 N. W. 741.

63. Missouri, etc., R. Co. v. Garrett [Tex. Civ. App.] 96 S. W. 53.

64. Examination of air vents. Cane Hill Cold storage & Orchard Co. v. San Antonio, etc., R. Co. [Tex. Civ. App.] 16 Tex. Rep. 362, 95 S. W. 751.

65. Evidence held sufficient to show that damage to berries was due to negligent icing. Brennisen v. Pennsylvania R. Co., 101 Minn. 120, 111 N. W. 945. To warrant finding that loss occurred on initial line. Illinois Cent. R. Co. v. Stevens, 29 Ky. L. R. 1079, 96 S. W. 888. To show that delay was proximate cause of deterioration in value of logs for manufacture of hoops. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 S. W. 375 Positive and uncontradicted testimony of unimpeached loading clerk of delivery to connecting carrier, held to show delivery. Glazier v. Old Dominion S. S. Co., 53 Misc. 290, 103 N. Y. S. 112. Evidence that all goods received were packed into defendant's wagon and carefully covered and were delivered at plaintiff's residence, held to sustain finding that goods sued for were delivered as against evidence that such goods could not be found by plaintiff next day. Freeman v. Winkler, 103 N. Y. S. 215. Evidence that car of fruit was received upon delivery siding in good condition, and that it was found moved about two lengths next morning and fruit crushed and shoved into mass, held to sustain finding that other cars had been negligently forced against it. Anderson v. Pittsburg, etc., R. Co., 31 Pa. Super. Ct. 302. Where shipment of stock required forty-eight hours longer than usual, and was carried fifty hours without unloading for food or water, contrary to § 4386, U. S. St. (U. S. Comp. St. 1901, p. 2995), and delivered in weakened and injured condition, negligence of carrier was not rebutted by testimony that there were no unreasonable delays, and that stock was in good condition at various points, and on arrival did not bear evidence of greater hardships than usual to such trips. Cincinnati, etc., R. Co. v. Greening, 30 Ky. L. R. 1180, 100 S. W. 825. Manufacturer agreed to furnish and set up monument for specific sum. Evidence that carrier rendered unnecessary special service for purchasing association over his objection, thereby diverting part of such sum, with full knowledge of facts, held to support count for damages for wrongful interference with manufacturer's rights. Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712, 13 Det. Leg. N. 631, 108 N. W. 1081. And it is no defense that defendant carried and delivered in good order. Id.

Evidence held insufficient to show that horse was dead when received by terminal carrier, and to overcome presumption against carrier. Walker v. Southern R. Co. [S. C.] 56 S. E. 952. To identify goods. Callaway v. Southern R. Co., 126 Ga. 195, 55 S. E. 23 To show that stock died through negligence of carrier. Louisville, etc., R. Co. v. Warfield, 30

Trial and instructions.[66]—The reasonableness of time of transportation [67] and proximate cause of injury [68] are questions for the jury.

Instructions should not be upon the weight of the evidence,[69] indicate the opinion of the court,[70] submit issues unsupported by the pleadings,[71] or the evidence,[72] assume facts in dispute,[73] emphasize particular facts,[74] or be misleading.[75] Again, instructions should not withdraw issues.[76] Requested instructions already covered may be refused.[77]

Damages and penalties.[78]—Penalties are provided in some states for a failure to settle claims upon proper demand.[79]

Ky. L. R. 352, 98 S. W. 313. Proof that when box was unpacked week after delivery goods were missing, it being accessible to strangers in meantime, held insufficient to show nondelivery as against positive testimony that box was in good condition when delivered, and receipt to that effect. Creager v. McGowan, 104 N. Y. S. 416.

Evidence held to make question for jury whether fire was caused by lighting. Southern R. Co. v. Smith [Ky.] 102 S. W. 232. Whether cholera was contracted while cars were standing in infected stockyards. Council v. St. Louis, etc., R. Co., 123 Mo. App. 432, 100 S. W. 57. Whether timely notice of claim for damage was given. McConnell Bros. v. Southern R. Co. [N. C.] 56 S. E. 559. Negligence of delay caused by failure to arrange schedule so as to connect with through train, and by break down. St. Louis, etc., R. Co. v. Crowder [Ark.] 103 S. W. 103 S. W. 172. Where there is no evidence that plaintiff paid freight on more than one case, and there was evidence tending to show that freight paid was on a different case than that in litigation, payment of freight on latter case, held for jury. Louisville & N. R. Co. v. Britton [Ala.] 43 So. 108. Where stock was unreasonably delayed, evidence of wreck on initial carrier's line, delaying transportation for four or five hours, without proof of any deay on connecting line, held to make case for jury against initial carrier. Illinois Cent. R. Co. v. Stevens, 29 Ky. L. R. 1079, 96 S. W. 888.

66. See 7 C. L. 551 .

67. Within Revisal 1905, § 2632, imposing penalty. Alexander v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 697.

68. McConnell Bros. v. Southern R. Co. [N. C.] 56 S. E. 559.

69. Held on weight of evidence as withdrawing question as to place where delivery to connecting carrier should have been made. Texas & P. R. Co. v. Bailey [Tex. Civ. App.] 16 Tex. Ct. Rep. 843, 96 S. W. 1089. Instruction as to damages, held not on weight of evidence where it was made applicable only in event jury found facts creating liability. Missouri, etc., R. Co. v. Garrett [Tex. Civ. App.] 96 S. W. 53.

70. Instruction adding, after stating plaintiff's theory, "so, of course," and then setting out defendant's view, held not to indicate that court considered carrier's theory of less weight. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152.

71. Where contract under which shipment was made was not attacked, error to submit question whether it was fair and reasonable. St. Louis, etc., R. Co. v. Crowder [Ark.] 103 S. W. 172.

72. Instruction submitting necessity of unloading cattle for recuperation, held error. Dupree v. Texas & P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 809, 96 S. W. 647. Evidence of custom to accept goods of plaintiff for shipment placed on platform without special notice to agent, held to authorize an instruction in respect thereto. Copeland v. Southern R. Co. [S. C.] 57 S. E. 535. Evidence as to delay on connecting line, held sufficient to render refusal of instruction limiting recovery to loss on defendant's line prejudicial. St. Louis, etc., R. Co. v. Stokes [Tex. Civ. App.] 99 S. W. 120.

73. Assumed date of receipt. St. Louis S. W. R. Co. v. Thompson [Tex. Civ. App.] 103 S. W. 684.

74. Certain facts to be considered in determining whether reasonable diligence in shipment had been exercised. Dupree v. Texas & P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 809, 96 S. W. 647.

75. In action for failing to deliver cattle in time for certain market, instruction using words "open market" without explanation, held misleading. Baltimore & R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033. Instruction to consider other freight being handled over road at same time in determining whether cattle were transported in reasonable time, held misleading where there is no evidence as to amount of such freight. Dupree v. Texas & P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 809, 96 S. W. 647. Instruction that if injuries were result of weakness of cattle, or their condition was such that they were unable to make journey without injury, verdict should be for defendant, does not impose absolute duty to transport safely if they were able to make journey. Texas, etc., R. Co. v. Felker [Tex. Civ. App.] 99 S. W. 439.

76. Instruction that only duty defendant owed plaintiff was to carry cattle with reasonable diligence, properly refused where there is count for failure to timely furnish cars. Baltimore, etc., R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033. Prayer limiting recovery to nominal damages is properly refused where there is proof of actual loss. Id.

77. **Particular instruction held covered:** As to duty to deliver to original consignee unless notified to deliver to his agent. St. Louis S. W. R. Co. v. Wester [Tex. Civ. App.] 16 Tex. Ct. Rep. 783, 96 S. W. 769. That if cattle were poor and weak, and injuries resulted proximately therefrom, no recovery could be had. Texas, etc., R. Co. v. Felker [Tex. Civ. App.] 99 S. W. 439. Relieving carrier from loss caused by erroneous addressing of goods by shipper. Southern Exp. Co. v. Hill [Ark.] 98 S. W. 371.

78. See 7 C. L. 552. See, also, Damages, 7 C. L. 1029.

79. Filing claim with "soliciting freight

§ 14. *Freight and other charges.*[80]—A carrier undertaking to carry to destination must prepay charges of connecting carriers if demanded.[81] A carrier has a lien for his lawful charges,[82] upon an authorized shipment,[83] unless he has waived the same[84] or is indebted to the shipper for default in excess of the charges due,[85] though it has been held that the lien does not extend to demurrage charges.[86] A carrier may establish reasonable demurrage charges,[87] and adopt reasonable rules for the collection thereof.[88] A carrier's charges must be reasonable,[89] and, if an unlawful[90] or unreasonable charge,[91] or a charge in excess of a valid[92] contract,[93] is made, the excess may be recovered in a common-law action,[94] especially if paid under a mistake of fact.[95] Where the duly established rate is charged on an interstate shipment, a shipper cannot maintain an action based on its unreasonableness until the interstate commerce commission has acted thereon.[96] In some states the intentional[97] collecting of unlawful[98] or excessive charges[99] renders the carrier liable to a penalty. Manner of adjusting charges is prescribed by statute in some states.[1]

agent" at destination is sufficient to entitle plaintiff to penalty for loss of property, provided by Act Feb. 23, 1903 (24 Stat. p. 81). Bell v. Southern R. Co. [S. C.] 57 S. E. 689.

80. See 7 C. L. 552.

81. Lehigh Valley Transp. Co. v. Post Sugar Co., 228 Ill. 121, 81 N. E. 819.

82. Carrier receiving shipment from connecting carrier has lien only for contract price as set forth in bill of lading, and if it claims lien for larger amount it does so at own risk. Beasley v. Baltimore & P. R. Co., 27 App. D. C. 595.

83. Letter from plaintiff in replevin to third person directing him to ship goods by defendant sustains special plea of right to possession under lien for carriage. Kebabian v. Adams Exp. Co. [R. I.] 66 A. 201.

84. Special contract will not be construed to waive lien for charges unless such intent clearly appears. Atchison, etc., R. Co. v. Hinsdell [Kan.] 90 P. 800. Recitals that all prior agreements are merged therein, and that it contained all terms agreements, and provisions in any manner relating to the transportation, held not to waive lien. Id.

85. Refusal to deliver without payment of freight constitutes conversion. Missouri Pac. R. Co. v. Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 P. 408, 87 P. 80.

86. Wallace v. Baltimore & O. R. Co., 216 Pa. 411, 65 A. 665.

87. Though bill of lading does not provide that demurrage shall be paid by consignee or his assignee, yet assignee by delivering bill to railway company and accepting goods becomes bound by implied promise to pay all specified charges. Cincinnati & Columbus Trac. Co. v. Norfolk & Western Ry. Co., 8 Ohio C. C. (N. S.) 134. In action for demurrage based upon rule of carrier, affidavit of defense denying existence of rule is sufficient. Pennsylvania Co. v. Marquis Limestone & Clay Co., 31 Pa. Super. Ct. 198.

88. Rule requiring shipper to pay demurrage charges whether just or unjust, and to submit claim for return to manager of car service association, is not reasonable. Larabee Flour Mills Co. v. Missouri Pac. R. Co., 74 Kan. 808, 88 P. 72. Refusal to pay demurrage is not ground for discontinuing switching where delay was occasioned as much by carrier's fault as shipper's. Id.

89. Applies to interstate shipments. Halliday Mill Co. v. Louisiana & N. W. R. Co. [Ark.] 98 S. W. 374. Filing and publishing rate under interstate commerce act raises no presumption that it is reasonable. Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 Law. Ed. 441.

90. Carrier is not entitled to switching charges paid to connecting carrier where charge exceeds prescribed rate on shipment. Timpson, etc., R. Co. v. Sanford [Tex. Civ. App.] 103 S. W. 432.

91. Extra charges of two cents for hay unloaded into warehouse in East St. Louis and reloaded for shipment to southeastern points, held excessive by one cent. St. Louis Hay & Grain Co. v. Southern R. Co., 149 F. 609. Finding by interstate commerce commission that charge of one cent per one hundred pounds for privilege of reconsignment at East St. Louis was reasonable is prima facie evidence of such fact. Southern R. Co. v. St. Louis Hay & Grain Co. [C. C. A.] 153 F. 728. In proceeding in which interstate commerce commission's findings are prima facie evidence as to facts found, it is not error to admit in evidence whole report including opinion where case is being tried before court. Id.

92. Agreed rate for interstate shipment less than schedule rate is void and unenforcible, and shipper paying schedule rate cannot recover difference. Atchison, etc., R. Co. v. Holmes, 18 Okl. 92, 90 P. 22.

93. In action for rebate of $3 per car on material furnished for shipment under special contract, evidence held insufficient to establish contract. Dimeling & Co. v. Buffalo, etc., R. Co., 215 Pa. 480, 64 A. 677.

94. Common-law remedies for recovery of excessive freight charges are not affected by remedy afforded by interstate commerce act. Halliday Mill. Co. v. Louisiana & N. W. R. Co. [Ark.] 98 S. W. 374. Complaint in language of Kirby's Dig. §§ 6621, 6730, for recovery of overcharges, held to state common-law cause of action. Id.

95. Where consignor agreed upon reduced rate, which was to be paid by consignee and deducted from purchase price, and consignee pays full rate in ignorance of reduced rate, excess may be recovered. Georgia R. & Banking Co. v. Crossley & Co. [Ga.] 57 S. E. 97.

96. Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 Law. Ed. 553.

97. Under Rev. St. 1895, art. 4575, excusing overcharge only when unintentionally

Part III. Carriage of Live Stock.

§ 15. *Duty to carry and contract of carriage generally.*[2]—Fact that stock will require food and water does not justify a refusal to transport unless accompanied by a caretaker.[3] A contract for uninterrupted carriage for a period longer than that allowed by statute is void.[4]

§ 16. *Care required of carrier.*[5]—Except as to injuries due to the inherent nature and propensities of the animals, the carrier assumes the same liability as in the carriage of goods,[6] the liability attaching when the stock is delivered in pens for immediate shipment.[7] It must provide suitable pens for the reception and delivery of stock,[8] and must keep them in a reasonably safe condition[9]

and innocently made through mistake of facts, it is no defense to action for penalty for overcharges on local shipments that carrier transported under same contract interstate shipments at much lower rate than it could have charged. Timpson, etc., R. Co. v. Sanford [Tex. Civ. App.] 103 S. W. 432. In prosecution for extortion in overcharging under Texas statute, that overcharge was unintentional is matter for defendant to plead and prove. St. Louis S. W. R. Co. v. Rutherford [Tex. Civ. App.] 16 Tex. Ct. Rep. 179, 96 S. W. 73.

98. Demand and collection of demurrage in addition to freight before giving shipper free use of car for forty-eight hours is extortion under Sayles' Ann. Civ. St. 1897, art. 4573. St. Louis, S. W. R. Co. v. Rutherford [Tex. Civ. App.] 16 Tex. Ct. Rep. 179, 96 S. W. 73.

99. Penalty held properly awarded where carrier demanded and received over protest rate in excess of prescribed amount and same was not innocently, or unintentionally collected. Timpson, etc., R. Co. v. Sanford [Tex. Civ. App.] 103 S. W. 432. Proof that charge was greater than published charge between same points in opposite direction does not as matter of law prove overcharge within Revisal 1905, §§ 2642-2644, rendering company liable for penalty for charging more than printed tariff. Scull & Co. v. Atlantic Coast Line Co. [N. C.] 56 S. E. 876.

1. Act 1903 (26 Stat. p. 81) entitled "Act to regulate the manner in which carriers . . . shall adjust freight rates, and claims for loss or damage of freight," is not unconstitutional as relating to two subjects. Aycock-Little Co. v. Southern R. Co. [S. C.] 57 S. E. 27. Revisal 1905, § 2633, providing that carriers shall settle freight charges according to rate specified in bill of lading, provided it shall not be in excess of rate filed with interstate commerce commission or corporation commission, and shall inform consignee on request of rate due, etc., held applicable where no rate has been filed. Harrill Bros. v. Southern R. Co. [N. C.] 57 S. E. 383.

2. See 7 C. L. 554.

3. Knight v. Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716.

4. Extending over twenty-eight hours, held void under Federal Statute requiring stock not to be carried longer than twenty-eight hours without unloading for rest and feeding. St. Louis R. Co. v. Frazar [Tex. Civ. App.] 16 Tex. Ct. Rep. 983, 97 S. W. 325.

5. See 7 C. L. 554.

6. Cleve v. Chicago, etc., R. Co. [Neb.] 108 N. W. 982. Carriers of live stock held not insurers, but owe greater degree of care than mere bailees. Cincinnati, etc., R. Co. v. Greening, 30 Ky. L. R. 1180, 100 S. W. 825. Where carrier proves that mule dying en route bore no marks of injury, and that there was no delay in transportation, there being no evidence as to cause of death, defendant is entitled to peremptory instruction. Illinois Cent. R. Co. v. Davis [Miss.] 43 So. 674.

7. Nelson v. Chicago, etc., R. Co. [Neb.] 110 N. W. 741.

8. Cattle escaped. St. Louis, etc., R. Co. v. Beets [Kan.] 89 P. 683. Whether delivery is made to owner or connecting carrier. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 99 S. W. 439. Delivery through stockyards company does not relieve from responsibility. Id. Liable for maintaining pens inadequate in size, though no notice in respect thereto has been served upon it. Texas & P. R. Co. v. Slator [Tex. Civ. App.] 102 S. W. 156. Rev. St. 1895, art. 4519, if it applies to live stock, does not require carrier to provide covered pens for their reception. Instruction held erroneous as warranting jury so to believe. Ft. Worth, etc., R. Co. v. Cage Cattle Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 52, 95 S. W. 705. Permitting pens to be in muddy condition does not show negligence as matter of law. Ft. Worth, etc., R. Co. v. Glanton [Tex. Civ. App.] 100 S. W. 166. Evidence that posts were rotten, and that one whole side of pen fell down, held to show actionable negligence. St. Louis, etc., R. Co. v. Beets [Kan.] 89 P. 683. Negligence in keeping pens in such condition as to render it necessary to shut hogs in loading chute, held for jury. St. Louis, etc., R. Co. v. Keys, 6 Ind. T. 396, 98 S. W. 138.

9. Must keep in reasonably safe condition. Atchison, etc., R. Co. v. Allen [Kan.] 88 P. 966. Carrier is liable for injury to caretaker of stock from defective walk about feed pens only when it has notice of defect or is charged with notice. Id. Special finding that carrier did not have actual notice is not inconsistent with general verdict for plaintiff where there was evidence of facts charging notice. Id.

10. Though the duty of caring for and watering devolves upon carrier, caretaker is not a trespasser in following and inspecting the cattle. Atchison, etc., R. Co. v. Allen [Kan.] 88 P. 966.

for those properly about the same.[10] In the absence of special contract,[11] a carrier need exercise only reasonable diligence [12] to transport within reasonable time.[13] While a carrier is not liable for contributory negligence of the shipper,[14] it must exercise reasonable care in bedding [15] and loading the cars [16] when it undertakes such work. Carrier must not knowingly [17] expose stock to infectious diseases.

Rest, feeding, and watering [18] are usually required,[19] and to that end suitable pens must be maintained [20] and due opportunity given.[21] A contract requiring a shipper to feed and water at his own expense implies that an opportunity so to do will be given.[22]

§ 17. *Delivery.*[23]

§ 18. *Liability of carrier or connecting carrier.*[24]

§ 19. *Limitation of liability.*[25]

§ 20. *Procedure in actions relating to carriage of stock.*[26]—Evidentiary matters need not be pleaded.[27] Where stock is delivered in good condition, proof of injury or death raises a presumption of negligence, and carrier has burden of relieving itself,[28] unless a caretaker accompanied the stock.[29] That the injury was due to inherent propensities is a matter of defense.[30] Recovery must be had upon the particular negligence charged.[31] In the admission of evidence the general rules in

11. Evidence held to show that defendant accepted cattle for delivery in time for particular market. Baltimore & O. R. Co. v. Whitehill,, 104 Md. 205, 64 A. 1033.

12. Missouri, etc., R. Co. v. Kyser [Tex. Civ. App.] 15 Tex. Ct. Rep. 891, 95 S. W. 747. Instruction held not to state as matter of law that it was negligence to permit cattle to remain in pens longer than five hours, minimum time required by law. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152.

13. Ecton v. Chicago, etc., R. Co., 125 Mo. App. 223, 102 S. W. 575. Time within which transportation is customarily made will be considered as reasonable time. Id.

14. Not contributory negligence to place cattle in pens at request of carrier and to allow them to await cars without food or water, where carrier's agent informs shipper that cars will arrive soon. Missouri, etc., R. Co. v. Kyser [Tex. Civ. App.] 15 Tex. Ct. Rep. 891, 95 S. W. 747.

15. Houston, etc., R. Co. v. Mayes [Tex. Civ. App.] 16 Tex. Ct. Rep. 818, 97 S. W. 318.

16. Instruction rendering carrier liable for overcrowding, without regard to what prudent man would have done under circumstances, is erroneous. Ft. Worth & R. G. R. Co. v. Cage Cattle Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 52, 95 S. W. 705.

17. Notice to person in charge of train is notice to carrier. Council v. St. Louis, etc., R. Co., 123 Mo. App. 432, 100 S. W. 57.

18. See 7 C. L. 555.

19. Fact that ninety-three fat beef cattle are loaded in five cars sufficiently shows that they had not space and opportunity to rest so as to excuse carrier from unloading as required by Rev. St. U. S. § 4386 (U. S. Comp. St. 1901, p. 2995.) Ecton v. Chicago, etc., R. Co., 125 Mo. App. 223, 102 S. W. 575. Negligence in failing to water hogs received in heated condition, held for jury. St. Louis, etc., R. Co. v. Keyes, 6 Ind. T. 396, 98 S. W. 138.

20. Atchison, etc., R. Co. v. Allen [Kan.] 88 P. 966. Where provision for stock is sufficient for ordinary weather conditions, carrier is not liable for loss due to unprecedented conditions. Louisville & N. R. Co. v. Warfield, 30 Ky. L. R. 352, 98 S. W. 313.

21. Evidence held to show actionable negligence in failing to furnish proper facilities for feeding and watering. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718.

22. Carrier held liable for failure to afford opportunity. Wabash R. Co. v. Thomas, 122 Ill. App. 569.

23. See 3 C. L. 610. See, also, ante, § 9.

24. See 3 C. L. 610. See, also, ante, § 3.

25. See 3 C. L. 610. See, also, ante, § 11.

26. See 7 C. L. 556.

27. Evidence that cattle of other shippers on same train were killed introduced to show rough handling. Southern Kansas R. Co. v. Bennett [Tex. Civ. App.] 103 S. W. 1115.

28. Sufficient if proof excludes idea that death was due to other causes than inherent vices, without proof of specific cause. Thomas v. Wells-Fargo Exp. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 986, 95 S. W. 723. Evidence held to show that dog died from heat and inherent vices. Id.

29. No presumption of negligence arises, and shipper has burden of showing same. Cleve v. Chicago, etc., R. Co. [Neb.] 108 N. W. 982.

30. Hence, where there is no evidence that injuries were so caused, instructions on liability may omit such exception. St. Louis S. W. R. Co. v. Kilberry [Ark.] 102 S. W. 894.

31. Proof of defective condition of car is not admissible under general allegation of rough handling. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 96 S. W. 106. Where negligence charged is unreasonable delay, and inability to feed because of condition of pens is shown to explain loss in weight, instruction limiting recovery to negligence charged should have been given. St. Louis, etc., R. Co. v. Crowder [Ark.] 103 S. W. 172.

respect to statements of officers[32] and agents,[33] relevancy,[34] hearsay,[35] conclusions of witnesses,[36] etc., apply.

§ 21. *Damages.*[37]

Part IV. Carriage of Passengers.

§ 22. *Who are passengers.*[38]—The relation is said to be based upon contract expressed or implied,[39] but the invalidity thereof is immaterial if it is being recognized.[40] Except in those cases where fare is not required,[41] the party must have paid or intend to pay,[42] and have the means of so doing.[43] One boarding in the bona fide belief that he possesses a valid ticket temporarily becomes a passenger,[44] and in some states continues as such if the invalidity is due to carriers' default.[45] One attempting to board without an invitation, expressed or implied,[46] or who is

32. In action for loss due to inadequacy of pens, evidence that after loss witness told defendant's superintendent of insufficiency of pens, and superintendent told him to get up plans for additions and he would consider them, is inadmissible, since it did not show notice at time of loss, nor was it an admission of inadequacy. Texas & P. R. Co. v. Slator [Tex. Civ. App.] 102 S. W. 156.

33. Conversation between defendant's agent and plaintiff year before shipment about building new pens is inadmissible to show inadequacy of pens, being too remote. Ft. Worth, etc., R. Co. v. Cage Cattle Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 52, 95 S. W. 705.

34. Held admissible: Evidence that cattle of other shippers on same train were killed, as showing rough handling. Southern Kansas R. Co. v. Bennett [Tex. Civ. App.] 103 S. W. 1115. Testimony of caretaker that he did not authoize delivery at stockyards, as showing delivery was made there on carrier's authority. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 99 S. W. 439. Though only negligence charged is delay, evidence that stock was unloaded in pens which were in such condition that they could not be fed, as explaining loss of weight. St. Louis, etc., R. Co. v. Crowder [Ark.] 103 S. W. 172. Where in action for delay, it appears that stock was unloaded into pens so maintained that they could not be fed while awaiting through train, notice of intended shipment may be shown, as bearing on negligence in failing to arrange schedule so as to avoid such detention. St. Louis, etc., R. Co. v. Crowder [Ark.] 103 S. W. 172.

Held irrelevant: Testimony that calves weighing from 340 to 350 pounds, transported as calves involved were, would decrease certain amount in weight, where calves shipped weighed from 303 to 306 pounds. Texas & P. R. Co. v. Leggett [Tex. Civ. App.] 99 S. W. 176. Where there is no evidence that cattle did not reach destination in time to get a "fill," it is error to permit testimony that cow of certain weight will take fill of twenty-five pounds. Id.

35. Where, in action for delay due to failure of branch train to connect with through train, it appeared that stock was unloaded into pens so maintained that they could not be fed, statements of agents at other stations that company had issued orders to avoid such delay are inadmissible. St. Louis, etc., R. Co. v. Crowder [Ark.] 103 S. W. 172.

36. Inadmissible to prove inadequacy of pens. Texas & P. R. Co. v. Slator [Tex. Civ. App.] 102 S. W. 156.

37. See 7 C. L. 557. See, also, Damages, 7 C. L. 1029.

38. See 7 C. L. 557.

39. Proof that plaintiff purchased ticket before boarding train, or that he had money to pay fare and did pay, establishes relation without proof of express contract. Galveston, etc., R. Co. v. Fink [Tex. Civ. App.] 99 S. W. 204.

40. Policeman being carried free under a void ordinance. Bradburn v. Whatcom County R. & Light Co. [Wash.] 88 P. 1020.

41. Where street car company offered free use of three of its cars, under control of its employes, to delegates of convention and they were accepted, delegates were passengers. Indianapolis Trac. & T. Co. v. Klentschy, 167 Ind. 598, 79, N. E. 908. Child riding with knowledge of conductor and without objection as too young to require payment of fare is passenger. Southern R. Co. v. Lee, 30 Ky. L. R. 1360, 101 S. W. 307.

42. Gates v. Quincy, etc., R. Co., 125 Mo. App. 334, 102 S. W. 50.

43. Evidence of offer to borrow of a fellow passenger upon rejection of ticket, held to make question of tender for jury. Gulf, etc., R. Co. v. Bunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 721, 95 S. W. 640. Where one voluntarily left train upon rejection of his ticket, but asked to be allowed to re-enter, stating that he could get fare on train a refusal renders company liable. Id. Instruction in respect thereto, held correct. Id.

44. Relation continues until he is notified of its invalidity and refuses to pay fare. Gulf, etc., R. Co. v. Bunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 721, 95 S. W. 640. Where pass issued to prospective employe was at first accepted, but subsequently canceled because of lack of authority of party issuing, holder was passenger at time of cancellation. St. Louis S. W. R. Co. v. Hill [Tex. Civ. App.] 103 S. W. 227.

45. Transfer erroneously punched. Little Rock R. & Elec. Co. v. Goerner, 80 Ark. 158, 95 S. W. 1007.

46. Attempting to board moving car

riding solely by the consent of one not authorized to give the same [47] or in violation of a permanent and reasonable prohibition because of prior misconduct,[48] is not a passenger. While one must be riding with a legitimate purpose,[49] the mere fact that one of the purposes is improper does not destroy the relation.[50] Statutes in some states fix the relation.[51] Postal clerks,[52] and, generally, employes riding under the direction of the carrier,[53] especially where transportation is given as compensation.[54] and express messengers,[55] are held passengers, but not Pullman car conductors.[56]

Trains other than passenger trains.[57]—Persons riding on a freight train,[58] logging train,[59] or freight elevator,[60] especially if in charge of freight,[61] and with knowledge on the part of the carrier that persons are so carried,[62] are passengers; and the fact that caretaker rides upon the engine in the absence of a better place does not render him less so.[63] It has been held, however, that a freight conductor has no

(Lexington R. Co. v. Herring, 29 Ky. L. R. 794, 96 S. W. 558), or train, though he possesses a ticket (Illinois Cent. R. Co. v. cotter [Ky.] 103 S. W. 279).

47. Boy boarding street car with consent of gripman. Drogmund v. Metropolitan St. R. Co. [Mo. App.] 98 S. W. 1091.

48. On passenger elevator. Ferguson v. Truax [Wis.] 112 N. W. 513. And such prohibition need not be repeated each time plaintiff came about the building. Id. Instruction failing to submit question whether misconduct was such as to authorize a permanent prohibition, held erroneous. Id.

49. Boy riding on elevator to office of tenant to see if he was wanted for errand is passenger. Ferguson v. Truax [Wis.] 110 N. W. 395. Evidence held to sustain finding that he was so riding, though contrary to statements in deposition taken nearly year before. Id.

50. Where one takes car for purpose of transportation and pays fare, fact that one purpose was to continue controversy with conductor does not render him less a passenger. Little Rock R. & Elec. Co. v. Dobbins, 78 Ark. 553, 95 S. W. 788. Defendant held not prejudiced by modification of instruction that if plaintiff enter car for purpose of continuing controversy with conductor he was not a passenger, by stating that if he went on car with expectation of being put off he was not a passenger. Id.

51. One going through the station grounds and yards to take freight caboose under special permit is not a passenger "being transported over the company's road," within Cobbey's Ann. St. 1903, § 10,039, and the company owes only reasonable care. Chicago, etc., R. Co. v. Mann [Neb.] 111 N. W. 379. One accompanying stock under contract is not passenger being transported, within Cobbey's Ann. St. 1903, § 10,039, and hence common law and not statutory, rule of liability applies. Riley v. Chicago, etc., R. Co. [Neb.] 111 N. W. 847.

52. Wabash R. R. Co. v. Jellison, 124 Ill. App. 652; Malott v. Central Trust Co. [Ind.] 79 N. E. 369; Decker v. Chicago, etc., R. Co. [Minn.] 112 N. W. 901.

Pa. Act of April 4, 1868, **making the liability** of railroad to mail clerk **same as that to employe,** held not infringement of constitutional power of congress over postal system. Martin v. Pittsburg, etc., R. Co., 203 U. S. 284, 51 Law. Ed. 184.

53. Held a passenger: Riding on ticket furnished by foreman according to general custom, which ticket was good on any car. Indianapolis Trac. & T. Co. v. Romans [Ind. App.] 79 N. E. 1068. Petition alleging such facts, held not inconsistent with allegation that decedent was a passenger. Id. Riding under contract between his employer and defendant, whereby latter was to carry servants. Gray v. Columbia, etc., R. Co. [Or.] 88 P. 297.

Held not passengers: Workmen being transported home in special car for mutual benefit. Kilduff v. Boston Elev. R. Co. [Mass.] 81 N. E. 191. Toolhouse foreman, who also assisted in clearing away wrecks, returning from such work in caboose of freight train under direction of foreman. St. Clair v. St. Louis, etc., R. Co., 122 Mo. App. 519, 99 S. W. 775

54. Enos v. Rhode Island Suburban R. Co. [R. I.] 67 A. 5.

55. Davis v. Chesapeake & O. R. Co., 29 Ky. L. R. 53, 92 S. W. 339. **Contra.** Robinson v. St. Johnsbury & L. C. R. Co. [Vt.] 66 A. 814.

56. Denver, etc., R. Co. v. Whan [Colo.] 89 P. 39.

57. See 7 C. L. 558.

58. With consent of conductor and in ignorance of rule prohibiting such carriage is passenger, especially where rule is so openly violated as to charge company with knowledge thereof and no objection has been made. St. Louis S. W. R. Co. v. Morgan [Tex. Civ. App.] 98 S. W. 408. Absence of caboose or fact that other cars were to be added did not render locomotive and cars any less a train within contract authorizing shipper to ride "on the train with the animals." Southern R. Co. v. Cullen, 122 Ill. App. 293.

59. Harvey v. Deep River Logging Co. [Or.] 90 P. 501.

60. Riding in charge of freight as was the custom. Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1962.

61. Southern R. Co. v. Cullen, 122 Ill. App. 293.

62. Custom of allowing persons to ride on logging train, held so general as to authorize finding that company had knowledge thereof. Harvey v. Deep River Logging Co. [Or.] 90 P. 501.

63. Southern R. Co. v. Cullen, 122 Ill. App. 293.

implied authority to accept passengers.[64] An engineer voluntarily riding on an engine while learning a new run is a passenger.[65]

The relation begins.[66]—Since the relation is founded upon contract the passenger must be accepted as such,[67] but one entering a train or car upon invitation [68] becomes a passenger, though such car does not go directly to his destination.[69]

The relation ceases or is interrupted [70] when the destination is reached and the passenger has had a reasonable time to leave the train [71] and to quit the premises.[72] One refusing to pay fare for a child in his charge,[73] or failing to pay his own fare within a reasonable time after demand,[74] ceases to be a passenger. A passenger does not lose his rights by riding in a dangerous place with the consent of the carrier,[75] nor does one on a freight train by temporarily leaving the same while switching to talk with a friend.[76]

§ 23. *Duty to receive and carry passengers.*[77]—A carrier negligently failing to stop at a flag station upon proper signals is liable.[78]

Through trains.[79]—If a carrier furnishes ample local service, it may operate through trains,[80] and a passenger boarding the same must ascertain whether it stops at his destination,[81] the carrier being liable only when it has misled him.[82] By contract,[83] or the acceptance of a passenger for a particular station,[84] the carrier may obligate itself to stop at unusual stations.

Ejection of passenger.[85]—A carrier is liable for a wrongful ejection[86] with-

64. One working passage, held not a passenger. Vassor v. Atlantic Coast Line R. Co., 142 N. C. 68, 54 S. E. 849.

65. Not employe. Wilkes v. Buffalo, etc., R. Co., 216 Pa. 355, 65 A. 787.

66. See 7 C. L. 558.

67. Assent may be by words or conduct. Alabama City, etc., R. Co. v. Bates [Ala.] 43 So. 98. Instruction "a passenger is one who is boarding a car or who is attempting to board a car, or at the station of a company operating a car, for the purpose of being carried on the cars," held erroneous, as is statement "he becomes a passenger when, with intention of boarding a train, he attempts to board for purpose of riding." Alabama City, etc., R. Co. v. Bates [Ala.] 43 So. 98.

68. St. Louis S. W. R. Co. v. Wainwright [C. C. A.] 152 F. 624. On platform. Georgia R. & Elec. Co. v. Cole, 1 Ga. App. 33, 57 S. E. 1026.

69. Where, in response to plaintiff's companion's question as to which car would leave for Norfolk first, motorman replied "this one," and plaintiff walked around toward rear and attempted to board, he was a passenger, though car was not going directly to destination. Snipes v. Norfolk & Southern R. R. Co. [N. C.] 56 S. E. 477.

70. See 7 C. L 559.

71. Houston, etc., R. Co. v. Easton [Tex. Civ. App.] 97 S. W. 833. Delay of four minutes, held not to terminate relation as matter of law. Hodges v. Southern Pac. Co., 3 Cal. App. 307, 86 P. 620.

72. Atlantic City R. Co. v. Kiefer [N. J. Law.] 66 A. 930. Whether plaintiff had ceased to be passenger by waiting until his train pulled out so as to take more direct route home, held for jury Id.

73. Hence in ejecting only reasonable care is due. Ft. Worth & D. C. R. Co. v. Gribble [Tex. Civ. App.] 102 S. W. 157.

74. Has reasonable time to produce fare. St. Louis Southwestern R. Co. v. Russell [Tex. Civ. App.] 16 Tex. Ct. Rep. 861, 97 S. W. 332.

75. **On engine.** Wilkes v. Buffalo, R. & P. R. Co., 216 Pa. 355, 65 A. 787.

76. Arkansas Cent. R. Co. v. Bennett [Ark.] 102 S. W. 198.

77. See 7 C. L. 559.

78. Williams v. Carolina & N. W. R. Co. [N. C.] 57 S. E. 216.

79. See 7 C. L. 561.

80. Albin v. Gulf, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 270, 95 S. W. 589. Special plea that defendant furnished ample local service, that plaintiff boarded through train, that defendant refused to accept fare except to station at which train stopped and that plaintiff was ejected for refusal to pay such fare, held to state defense. Id.

81. Albin v. Gulf, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 270, 95 S. W. 589.

82. By habitually stopping. Albin v. Gulf, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 270, 95 S. W. 589.

83. Sale of ticket to particular destination creates contract to stop at such place. Missouri, etc., R. Co. v. Glass [Tex. Civ. App.] 102 S. W. 447. And it is no defense for failure to do so that conductor had not reached passenger in collection of tickets and hence did not know of his desire to alight. Id. Fact that auditor collected fare to station at which train did not stop, did not create contract duty to stop there where opportunity was given to alight at station one mile before reaching such point, especially where auditor did not know that it was not stopping place but plaintiff did. St. Louis S. W. R. Co. v. Townsend [Tex. Civ. App.] 101 S. W. 455.

84. Accepted ticket knowing of destination. Pickens v. Georgia R. & Banking Co., 126 Ga. 517, 55 S. E. 171.

85. See 7 C. L. 561.

86. Where passenger, who has voluntarily left car before paying fare, is refused readmission but is directed to take another

out regard to the good faith of its servants,[87] or that they exceeded their authority in so doing.[88] A passenger failing to tender a valid ticket for himself,[89] or one in his charge,[90] and refusing to pay fare, may be ejected,[91] and when he boards the train without intending to pay,[92] or thereafter willfully refuses so to do,[93] a tender after expulsion has commenced does not entitle him to remain. Tender of fare by third person with passenger's assent is equivalent to tender by passenger.[94] A passenger is entitled to a reasonable time within which to produce a ticket or pay fare before expulsion.[95] He may also be ejected for noncompliance with reasonable rules[96] unless waived,[97] or for indulging in abusive and obscene language[98] or wrongful conduct.[99] The ejection, however, must be accomplished in a proper manner[1] and without unnecessary force;[2] but whether rightful or wrongful, the passenger has no right to offer resistance,[3] unless about to be ejected in a dangerous manner,[4] and cannot recover for injuries received in so doing.[5]

which is waiting, there is no ejection. Dobbins v. Little Rock R. & Elec. Co., 79 Ark. 85, 95 S. W. 794. Evidence held to authorize finding that plaintiff was expelled and did not voluntarily leave train. Lindsay v. Oregon Short Line R. Co. [Idaho] 90 P. 984.

87. Refused genuine money, believing it to be counterfeit. Chicago Union Traction Co. v. McClevey, 126 Ill. App. 21.

88. Held liable for ejection by brakeman because of the duty to protect. Lindsay v. Oregon Short Line R. Co. [Idaho] 90 P. 984. It is within scope of employment of conductor of trolley car to control and manage car and to eject passenger when necessary to preserve peace and order in car, and where in so doing malicious assault is committed, company is liable therefor. Scioto Valley Traction Co. v. Graybill, 8 Ohio C. C. (N. S.) 469.

89. Where passenger presents valid transfer which is dishonored, he is not obliged to pay his fare and resort to action to recover it, but may sue for wrongful ejectment. Arnold v. Rhode Island Co. [R. I.] 66 A. 60. Where transfer is good under rules and practice of carrier, it is no defense that statute does not require issuance thereof. Id. One going onto train without ticket and knowing that he will be ejected cannot recover for ejectment though he had paid for ticket which he did not receive. Can only recover for amount of fare. Gulf, etc., R. Co. v. McCormick [Tex. Civ. App.] 100 S. W. 202. One who has lost ticket and is ejected cannot recover. Id.

90. Refused to pay fare for child. Ft. Worth & D. C. R. Co. v. Gribble [Tex. Civ. App.] 102 S. W. 157.

91. Shelton v. Erie R. Co., 73 N. J. Law, 558, 66 A. 403; Missouri, etc., R. Co. v. Smith [C. C. A.] 152 F. 608.

92. Tender may by another for him. Gates v. Quincy, etc., R. Co., 125 Mo. App. 334, 102 S. W. 50.

93. Missouri, etc., R. Co. v. Smith [C. C. A.] 152 F. 608.

94. Missouri, etc., R. Co. v. Smith [C. C. A.] 152 F. 608. Tender of fare on behalf of passenger in his presence and unrepudiated by him constitutes tender by him. Gates v. Quincy, etc., R. Co., 125 Mo. App. 334, 102 S. W. 50.

95. Instruction held to ignore right. Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706. What is reasonable time depends upon circumstances and facts and cannot be said as matter of law that passenger has until reaching next station. Id.

96. Rule prohibiting passengers from standing on front platform is reasonable. Dobbins v. Little Rock R. & Elec. Co., 79 Ark. 85, 95 S. W. 794.

97. Rule requiring production of hat checks held waived where conductor told plaintiff that he would have to produce his credentials at each station, to which plaintiff consented. Chicago & A. R. Co. v. Gwin, 125 Ill. App. 456.

98. Under Code 1896, § 3457, conductor may eject passenger without regard to whether language is offensive to other passengers. Hence evidence as to its offensiveness is immaterial. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984. Evidence of use of abusive language held to authorize reversal of a judgment for plaintiff. East St. Louis R. Co. v. Smith, 126 Ill. App. 624.

99. Where conductor was present and witnessed ejected passenger's conduct, evidence of requests from passengers to remove him, etc., is not admissible as right to eject depended on conduct. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984.

1. Liable for ejecting passenger from moving car. Chicago Union Traction Co. v Brethauer, 125 Ill. App. 204. Arrested and detained by police officers although he stated that no resistence would be made. Chicago & A. R. Co. v. Gwin, 125 Ill. App. 456.

2. Peoria & P. Terminal R. Co. v. Hoerr, 120 Ill. App. 65. Where no opportunity is given passenger to alight at destination, fact that he is not entitled to ride beyond does authorize an abusive and violent ejectment. Kina v. Southern R. Co. [Ga.] 57 S E. 507. Plaintiff's evidence held to make prima facie case of such wrongful ejectment. Id. Instruction as to right to eject held erroneous in omitting qualification that unnecessary force must not be used as required by Code 1896, § 3457. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984.

3. Must submit and resort to remedy at law for wrongful ejectment. Chicago Union Traction Co. v. Brethauer, 125 Ill. App. 204; Peoria & P. Terminal R. Co. v. Hoerr, 120 Ill. App. 65.

4. May resist ejectment from moving car. Chicago Union Traction Co. v. Brethauer, 125 Ill. App. 204.

5. Peoria & P. Terminal R. Co. v. Hoerr, 120 Ill. App. 65.

Delay and misrouting.[6]—It is the duty of the carrier to carry within a reasonable time,[7] though the passenger is riding on a freight train.[8]

§ 24. *Rates and fares, tickets and special contracts.*[9]—A carrier though acting as agent for another is liable for issuing vitally defective ticket.[10] In most states the ticket is conclusive as between the conductor and the passenger as to the rights of the latter[11] and cannot be varied by parol evidence unless ambiguous,[12] though some give effect to the actual contract.[13] Recognition by one carrier of a defective ticket does not make it binding on connecting lines.[14] A contract to carry to destination does not require that the initial car be used throughout.[15] The rate charged[16] and the time within which a ticket may be used[17] may be regulated by franchise or statute. In Georgia a passenger failing without fault of carrier[18] to procure ticket before boarding may be charged four cents per mile.[19] Carrier is not liable for a mistake of which the passenger has knowledge.[20] Where a ticket has been wrongfully dishonored, passenger does not waive his rights by demanding a return of the same.[21] A street railway company may fix a reasonable limit on amount of change it will undertake to furnish passengers.[22] The agent of a sleeping car company has no authority to make representations as to the validity of a railroad ticket.[23]

Conditions and limits.[24]—Unless prohibited by constitution, statute, or public policy,[25] a carrier may restrict its common-law liability by conditions knowingly[26]

6. See 7 C. L. 563.

7. Green v. Missouri, etc., R. Co., 121 Mo. App. 720, 97 S. W. 646.

8. Nature of train must be considered in determining negligence. Green v. Missouri, etc., R. Co., 121 Mo. App. 720, 97 S. W. 646.

9. See 7 C. L. 563.

10. Bussey v. Charleston & W. C. R. Co., 75 S. C. 116, 55 S. E. 163.

11. Ticket to intermediate station. Virginia & S. W. R. Co. v. Hill, 105 Va. 729, 54 S. E. 872. Expired by its express terms. Shelton v. Erie R. Co., 73 N. J. Law, 558, 66 A. 403. Conclusiveness of ticket is not affected by fact that ticket agent should have given unlimited ticket, and communication of fact to conductor. Id.

12. Words "Charleston, S. C., and return" written in ink across printed matter of conditional round trip ticket does not render it ambiguous so as to make parol evidence of passenger's understanding admissible, nor does it affect conditions therein. Sellers v. Atlantic Coast Line R. Co. [S. C.] 57 S. E. 1102.

13. Passenger has right to assume that ticket corresponds to contract of carriage made. Texas & P. R. Co. v. Wynn [Tex. Civ. App.] 16 Tex. Ct. Rep. 817, 97 S. W. 506. Where ticket good on date only is sold after last train of day going to destination has departed, carrier is liable for expulsion from first available train, where there is rule leaving acceptance of such ticket to discretion of conductor. St. Louis S. W. R. Co. v. Furlow [Ark.] 99 S. W. 689.

14. Bussey v. Charleston & W. C. R. Co., 75 S. C. 116, 55 S. E. 163.

15. Car may be switched off to make up lost time where transfer is offered to a waiting car. Dryden v. St. Louis Transit Co., 120 Mo. App. 424, 96 S. W. 1044.

16. Franchise provision that rate from intermediate points to terminal "shall at no time exceed the rate then charged by the company" between terminals, includes rate charged between such terminal points on line subsequently purchased. West Bloomfield Tp. v. Detroit United R. Co., 146 Mich. 198, 13 Det. Leg. N. 717, 109 N. W. 258.

17. Under Rev. St. c. 52, § 2, providing that ticket shall be good on all trains for six years from date of issue, except that railroads may sell excursion tickets "to be used only, as provided on the ticket," excursion ticket containing single limitation as to continuous trip is good on regular train for six years from date of issue. Crabtree v. Washington County R. Co., 101 Me. 485, 64 A. 842.

18. Under rule of railroad commission of Georgia, ticket offices at "way stations" may be closed one minute before arrival of trains. Southern R. Co. v. Fleming [Ga.] 57 S. E. 481.

19. Under sale of railroad commission. Southern R. Co. v. Fleming [Ga.] 57 S. E. 481.

20. Fact that reduced rate tickets were advertised for sale at station known to be flag station held to make question of carrier's mistake, plaintiff's notice thereof, and his good faith in accepting for jury. Cluck v. Houston & T. C. R. Co. [Tex. Civ. App.] 101 S. W. 1021.

21. Pullman Co. v. Willett, 7 Ohio C. C. (N. S.) 173.

22. Knoxville Traction Co. v. Wilkerson [Tenn.] 99 S. W. 992. Limitation to $5 held reasonable. Id. Such rule may be enforced though not known to passenger. Id.

23. Calhoun v. Pullman Palace Car Co., 149 F. 546. Hence petition alleging that plaintiff took passage in reliance upon representation of defendant's agent that ticket which he held need not be countersigned and ejectment does not state cause of action. Id.

24. See 7 C. L. 564.

25. Contracts exempting carrier from liability of injuries to employes of sleeping

assented to by the passenger or party transported,[27] if such restriction is based on a consideration.[28] Conditions in free passes[29] are usually held valid,[30] as are indemnifying contracts of express companies.[31] Except as to performance of services not required by law,[32] a carrier cannot relieve itself from its own wrongful acts or negligence[33] and especially from a statutory liability.[34] One riding on a ticket requiring identification need produce only such evidence as will satisfy a reasonable man.[35] Where a passenger has missed the regular train through the negligence of the carrier, he may wait for the next regular through train though ticket expires in the meantime.[36] In Maine an excursion or special ticket at reduced rates must contain all its limitations.[37] A contract of indemnity between carrier and shipper,[38] or between a shipper and his servant,[39] does not relieve the carrier from liability to servant, though a contract between the latter expressly relieving the carrier may be enforced by it.[40]

car company held not void as against public policy nor as against const. art. 15, §§ 62, 15, prohibiting discriminations in facilities of transporation and making it unlawful to require employe to discharge his employer from liability for injuries occasioned by negligence. Denver & R. G. R. Co. v. Whan [Colo.] 89 P. 39.

26. Knowledge of express messenger that his employer has made some contract for his transportation does not charge him with knowledge of its terms limiting his rights in case of injury. Robinson v. St. Johnsbury & L. C. R. Co. [Vt.] 66 A. 814. Employe is not bound by terms of contract between his employer and carrier relieving latter from liability, such terms being unknown to him. Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636.

27. Express messenger entering employ of express company with knowledge of contract of indemnity between his employer and carrier assents thereto. Robinson v. St. Johnsbury & L. C. R. Mo. [Vt.] 66 A. 814. Presumptively ticket is not a contract and hence it will not be presumed that ordinary duties owed by carrier have been modified thereby. McCallum v. Southern Pac. Co. [Utah] 88 P. 663.

28. Shipper's contract indemnifying carrier against claims for personal injuries to former's servants carried free is void where transportation according to common-law duty was not offered shipper as alternative. Baker v. Boston & M. R. Co. [N. H.] 65 A. 386.

29. Whether pass "thrown out" with pay envelope without any remark, after employe had been permitted to ride free for many years, was gratuity or was issued as term of employment held for jury. Dugan v. Blue Hill St. R. Co., 193 Mass. 431, 79 N. E. 748. Desire to have policeman on car because presence tended to preserve peace and order held no consideration for pass. Marshall v. Nashville R. & Light Co. [Tenn.] 101 S. W. 419. Where pass is issued to employe as one of terms of his employment, condition therein that he assume all risks is not binding. Dugan v. Blue Hill St. R. Co., 193 Mass. 431, 79 N. E. 748.

30. Assumption of all risks held valid. Dugan v. Blue Hill St. R. Co., 193 Mass. 431, 79 N. E. 748. Where pass issued to prospective employe contained stipulation that carrier reserved right to cancel at any time, he cannot recover for cancellation while en route. St. Louis S. W. R. Co. v. Hill [Tex. Civ. App.] 103 S. W. 227. Carrier, carrying one gratuitously under contract that he shall ride at own risk, is liable only for **willful, reckless, or gross negligence.** Marshall v. Nashville R. & Light Co. [Tenn.] 101 S. W. 419.

31. Express company assumed risks to employes. Robinson v. St. Johnsbury & L. C. R. Co. [Vt.] 66 A. 814.

32. Denver & R. G. R. Co. v. Whan [Colo.] 89 P. 39. Railroad is not common carrier of sleeping cars, and may impose conditions upon hauling same. Id.

33. Assault by employe. Galveston, etc., R. Co. v. Bean [Tex. Civ. App.] 99 S. W. 721; Baker v. Boston & M. R. Co. [N. H.] 65 A. 386; Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636. Provision that claim for damages resulting from any bona fide mistake of conductor in rejecting proof of identity shall be limited to cost of ticket does not limit amount of recovery where conductor acts in bad faith. Pierson v. Illinois Cent. R. Co. [Mich.] 112 N. W. 923. Condition that passenger assume risks incident to boarding caboose at any place it may stop held not to amount to limitation of liability for negligence. Chicago, etc., R. Co. v. Mann [Neb.] 111 N. W. 379.

34. Under const. art. 17, § 12, making railroads liable for damages under such regulations as legislature may prescribe, and Kirby's Dig. § 6773, making them liable for damages to persons caused by running of trains, stipulation in free pass against injuries for negligence is void. St. Louis, etc., R. Co. v. Pitcock [Ark.] 101 S. W. 725.

35. Signature together with description in ticket held sufficient identification. Marlow v. Southern Pac. Co. [Cal.] 90 P. 928.

36. Not obliged to take train going part way to destination. Stevens v. Wichita Valley R. Co. [Tex. Civ. App.] 100 S. W. 807.

37. Rev. St. c. 52, § 2. Crabtree v. Washington County R. Co., 101 Me. 485, 64 A. 842. Cannot be limited by provisions in posters or advertisements. Id.

38. Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636. Though assented to. Robinson v. St. Johnsbury & L. C. R. Co. [Vt.] 66 A. 814.

39. Baker v. Boston & M. R. Co. [N. H.] 65 A. 386.

40. Being for its benefit. Denver & R. G. R. Co. v. Whan [Colo.] 89 P. 39.

A conditional contract, though valid where made, will not be enforced in another state if against its constitution or statute.[41]

Transfers.[42]—The duty to issue transfers may be imposed by franchise[43] or by statute.[44] While Laws 1890, New York, does not entitle a passenger to a transfer from one car to another passing the initial point,[45] the contrary has been held under Laws 1892.[46] Under the latter, transfers must be issued only for a continuous trip[47] by the most direct route.[48] Wrongful refusal,[49] not due to inadvertence or mistake,[50] of a transfer renders a carrier liable to a penalty in New York.[51] unless the trip was being made for the sole purpose of recovering such penalty.[52] Where transfers are habitually issued under a rule, they must be honored though the rule is not strictly applicable.[53] The carrier may require that the transfers be demanded at some reasonable point,[54] as at the time of paying fare,[55] and that the transfer

41. Davis v. Chesapeake & O. R. Co., 29 Ky. L. R. 53, 92 S. W. 339. Under Ky. Const. § 196, and Code Va. 1887, § 1296, prohibiting carriers from contracting away common-law liability, contract whereby express messenger releases all claims for injuries is void as to injuries caused by carrier's negligence. Id.

42. See 7 C. L. 565.

43. Under franchise authorizing street car company to charge but one fare for carriage from one point in city to another, carrier must issue transfer to passengers who desire to continue where car turns back. Frankfort & V. Traction Co. v. Marshall, 30 Ky. L. R. 431, 98 S. W. 1035.

44. The fact that statute is in ligation does not affect passenger's right to transfer thereunder if it is in fact valid. Chicago Union Traction Co. v. Brethauer, 125 Ill. App. 204. Street surface railroad which leases and operates connecting elevated and steam surface railroads does so under Laws 1890, art. 3, § 78, and is only subject to art. 4, §§ 101, 104, requiring surface street railroads to charge but a single 5 cent fare over all main and connecting lines. People v. Brooklyn Heights R. Co. [N. Y.] 79 N. E. 838. Railroad Law (Laws 1890, p. 1114, c. 565, § 104, amended by Laws 1892, p. 1382, c. 676), relates to companies which have entered into contracts with other companies to insure continuous passage from point on one line to point on other and does not apply to trip between points on same line. Baron v. New York City R. Co., 105 N. Y. S. 258.

45. Under Railroad Law (Laws 1890, p. 1406, c. 676), passenger is not entitled to through trip where he takes car which turns off before reaching his destination. Roach v. Brooklyn Heights R. Co., 104 N. Y. S. 219.

46. Under Railroad Law (Laws 1892, p. 1406, c. 676, § 104) street railway company operating long and short service cars must issue transfers from latter to former. Baron v. New York City R. Co., 52 Misc. 581, 102 N. Y. S. 746; Plant v. New York City R. Co., 102 N. Y. S. 749; Baron v. New York City R. Co., 105 N. Y. S. 258.

47. One who rides by point at which he should have transferred for purpose of visiting friend on car and thereafter attempts to reach destination by transferring from line to line, is not making continuous trip within Railroad Law (Laws 1892, p. 1406, c. 676, § 104). Hunt v. Brooklyn Heights R. Co., 115 App. Div. 673, 101 N. Y. S. 209.

48. Railroad Laws (Laws 1892, p. 1406, c. 676, § 104). Kelly v. New York City R. Co., 104 N. Y. S. 561, rvg. 52 Misc. 585, 102 N. Y. S. 742.

49. In action under Railroad Laws (Laws 1892, p. 2107, c. 565, § 104), it is no defense that company had provided conductor with transfers. Snee v. Brooklyn Heights R. Co., 104 N. Y. S. 907. Not liable where passenger merely asks for transfer to particular street and is given one good only in wrong direction. Thistle v. New York City R. Co., 104 N. Y. S. 401.

50. Abusive language used by conductor when request for transfer was made held to show that refusal was not due to inadvertence or mistake but deliberate. Wasserman v. New York City R. Co., 104 N. Y. S. 398. Railroad Law, § 39, exempting carrier from liability for asking or receiving more than lawful fare, where done through inadvertence or mistake not amounting to gross negligence, is inapplicable to refusal of transfer. Snee v. Brooklyn Heights R. Co., 104 N. Y. S. 907.

51. The penalties under Railroad Law (Laws 1890, p. 1082, c. 565, as amended by Laws 1892, p. 1406, c. 676, § 104), are not cumulative, and bringing of action for one penalty waives all penalties previously incurred. Harkow v. New York City R. Co., 105 N. Y. S. 689.

52. Johnston v. New York City R. Co., 104 N. Y. S. 812; Nicholson v. New York City R. Co., 118 App. Div. 858, 103 N. Y. S. 695. One refused transfer in violation of Railroad Laws (Laws 1890, pp. 1096, 1113, 1114, c. 565,) may recover penalty though "one" of his purposes was to enforce penalty if he was refused transfer. Hennion v. New York City R. Co., 51 Misc. 671, 101 N. Y. S. 100. Evidence that plaintiff has many cases pending, that trips were planned in his attorney's office, that upon refusal of transfers he returned immediately to office and filled out blank complaints already prepared, etc., held to show that trips were made for purpose of suit although he testified to contrary. Johnston v. New York City R. Co., 104 N. Y. S. 812.

53. Arnold v. Rhode Island Co. [R. I.] 66 A. 60.

54. Railroad Law, § 105, (Laws 1890, p. 1114 c. 565), requiring street railways to issue transfers for continuous rides to points

be made at particular places,[56] if such rules are duly published.[57] The transfer is conclusive of the passenger's right to carriage [58] and hence must be presented unmutilated.[59]

Regulation of sale of tickets; brokerage.[60]—In the exercise of its police power,[61] a state may prohibit brokerage in nontransferable reduced rate tickets,[62] and an act prohibiting persons other than carriers, or duly authorized agents from selling the same, does not authorize the carrier or agent to sell except to the original purchaser.[63] A franchise requiring a suburban street car company to sell family tickets is not satisfied by placing them on sale at a drug store.[64] Carrier may enjoin the sale of outstanding nontransferable reduced rate return tickets,[65] but not the sale of tickets to be issued in future.[66]

§ 25. *General rules of liabiliy for personal injuries. A. Nature and extent of liability.*[67]—While not an insurer of the safety of its passengers,[68] a carrier

on its lines, does not prevent adoption of rule requiring passenger to demand such transfer at particular reasonable point in the trip. Ketchum v. New York City R. Co., 118 App. Div. 248, 103 N. Y. S. 486.

55. Fischer v. New York City R. Co., 104 N. Y. S. 400. Especially where transfer is good at any transfer point and passenger could continue to end of line without using it. Ketchum v. New York City R. Co., 118 App. Div. 248, 103 N. Y. S. 486. Rule does not require that demand be made at same second and where conductor did not regard demand made at time of payment, second request within minute is timely. Wasserman v. New York City R. Co., 104 N. Y. S. 398.

56. Shortsleeves v. Capital Traction Co., 28 App. D. C. 365. Where passenger boards at wrong transfer station and refuses to pay fare, he may be ejected, though car has passed point at which transfer is good. Id.

57. Where company has posted rule conspicuously and advertised it in such manner as to bring it to notice of the public, it is immaterial that particular passenger has no knowledge thereof. Ketchum v. New York City R. Co., 118 App. Div. 248, 103 N. Y. S. 486. Rights of passenger under transfer cannot be limited by secret rule. De Board v. Camden Interstate R. Co. [W. Va.] 57 S. E. 279.

58. Passenger must resort to action for breach of contract (Little Rock R. & Elec. Co. v. Goerner, 80 Ark. 158, 95 S. W. 1007), or for negligence in issuing transfer (Montgomery Traction Co. v. Fitzpatrick [Ala.] 43 So. 136). Fact that passenger was entitled to valid transfer and had been assured by issuing conductor that it was good, is immaterial. Nicholson v. Brooklyn Heights R. Co., 118 App. Div. 13, 103 N. Y. S. 310.

59. Instruction as to duty to carry plaintiff, if he presented unmutilated transfer, held proper. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 S. W. 495.

60. See 7 C. L. 566.

61. Acts 1905, p. 873, c. 410, held valid. Samuelson v. State [Tenn.] 95 S. W. 1012.

62. Acts 1905, p. 873, c. 410, prohibiting persons other than duly authorized agents to sell nontransferable reduced rate tickets, held not unconstitutional as delegating to carrier legislative authority to create penal offense, or not by issuing or refusing to issue such reduced rate tickets (Samuelson v. State [Tenn.] 95 S. W. 1012), nor does it deprive purchaser of property without due process of law (Id.), nor is it class legislation (Id.). Acts 1905, p. 873, c. 410, prohibiting traffic in nontransferable tickets, requiring redemption of unused tickets, and providing punishment for violation, held not unconstitutional as embracing more than one subject expressed in title. Id. Acts 1905, p. 873, c. 410, prohibiting traffic in tickets issued and sold "below the standard schedule rate," etc., is not invalid for uncertainty in using expression "standard schedule," since such schedule is fixed as to interstate carriage by reference to Interstate Commerce Act and as to intrastate by Acts 1897, p. 121, c. 10, § 22. Id. Ordinance of City of San Antonio making it unlawful for any person, corporation, etc., to sell or transfer within city limits any ticket or pass unless duly authorized in writing by railroad issuing same, is not invalid as depriving any citizen of equal rights with other citizens or of right to carry on lawful business, or to transfer property as he sees fit (Ex parte Hughes [Tex. Cr. App.] 100 S. W. 160), nor does it deny equal protection of law by granting special privileges to railroads (Id).

63. Acts 1905, p. 873, c. 410. Samuelson v. State [Tenn.] 95 S. W. 1012.

64. Must be on sale on cars. West Bloomfield Tp. v. Detroit United R. Co., 146 Mich. 198, 13 Det. Leg. N. 717, 109 N. W. 258.

65, 66. Lytle v. Galveston, etc., R. Co., [Tex. Civ. App.] 100 S. W. 199.

67. See 7 C. L. 566.

68. Reiss v. Wilmington City R. Co. [Del.] 67 A. 153; Hollingsworth v. Skelding, 142 N. C. 246, 55 S. E. 212; Marble v. Southern R. Co., 142 N .C. 557, 55 S. E. 355.

Liable only for negligence. Reiss v. Wilmington City R. Co. [Del.] 67 A. 153. Carrier exercising reasonable judgment is not liable, though accident would not have happened had judgment been different. Whilt v. Public Service Corp. [N. J. Law.] 64 A. 972. Not liable to one accidently knocked from running board by collision with fellow passenger where collision was not caused by negligence. Sanderson v. Boston Elevated R. Co. [Mass.] 80 N. E. 515. One who has assumed risks incident to boarding caboose at any place it may stop cannot recover for injuries received by falling into ash pit while on way to caboose, in absence of showing of negligence. Chicago, etc., R. Co. v. Mann [Neb.] 111 N. W. 379. Where evidence

owes them the highest degree of care consistent with a practical operation of its business,[69] irrespective of how the relation is established,[70] and is liable for all injuries[71] proximately resulting[72] to plaintiff[73] from a failure to exercise such care.[74] While

tended to show that lurch was incident to proper handling of train, instruction relieving defendant from liability unless jury found jerk to be unusual or violent, held erroneously refused. Houston, etc., R. Co. v. Johnson [Tex. Civ. App.] 103 S. W. 239.

Instructions: Holding carrier liable unless accident was "occasioned by inevitable casualty or some other cause which human foresight could not prevent," approved. Kline v. Santa Barbara Consol. R. Co. [Cal.] 90 P. 125. Held not to authorize verdict for plaintiff upon finding that cable machinery was defective without regard to negligence. Chicago Union Trac. Co. v. Lowenrosen, 222 Ill. 506, 78 N. E. 813.

69. Louisville & N. R. Co. v. Mulder [Ala.] 42 So. 742; Chicago Consol. Trac. Co. v. Schritter, 124 Ill. App. 578; Chicago, etc., R. Co. v. Smith, 124 Ill. App. 627. Chicago Consol. Trac. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820; Magee v. New York, etc., R. Co. [Mass.] 80 N. E. 689; Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 N. E. 1049; Chicago, etc., R. Co. v. Stibbs, 17 Okl. 97, 87 P. 293. Passenger elevator. Belvidere Bldg. Co. v. Bryan, 103 Md. 514, 64 A. 44. Street car company. Bell v. Central Elec. R. Co., 125 Mo. App. 660, 103 S. W. 144. Street car company must exercise such reasonable diligence as nature of its business demands. Egan v. Old Colony St. R. Co. [Mass.] 80 N. E. 696. Instruction requiring carrier to exercise "the highest degree of care and prudence" in crossing steam railroad tracks, held not erroneous, although **reasonable care in view of the danger** to be apprehended is true rule. Walsh v. Yonkers R. Co., 100 N. Y. S. 278. Rule that one crossing street car track need only use ordinary care does not apply to omnibus owner. Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652. Where carrier fails to exercise care required, it is no defense that it was operating train in customary manner. International & G. N. R. Co. v. Cruseturner [Tex. Civ. App.] 98 S. W. 423.

Must exercise degree of care of highly prudent person in like business and under similar circumstances. Gilmore v. Houston Elec. Co. [Tex. Civ. App.] 102 S. W. 168; Schloemer v. St. Louis Transit Co., 204 Mo. 99, 102 S. W. 565; O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 S. W. 54; International, etc., R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000. Instruction that carrier must exercise highest diligence known to "very" diligent men, held not to require too high degree of care. Southern R. Co. v. Burgess, 143 Ala. 364, 42 So. 35.

Care must be consistent with practical operation of road. Pitcher v. Old Colony St. R. Co. [Mass.] 81 N. E. 876. Instruction as whole, held correct. International Mercantile Marine Co. v. Smith [C. C. A.] 145 F. 891. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 N. E. 1049. Instruction using phrase consistent with practical "prosecution" instead of practical "operation," held not erroneous. Chicago City R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716. Instruction held not erroneous as not qualifying word "consistent" by word "reasonably." Id; Chicago City R. Co. v. Pural, 127 Ill. App. 652, afd., 224 Ill. 324, 79 N. E. 686. Instruction held not erroneous in omitting words "consistent with the practical operation of its vehicle and the exercise of its business as a common carrier where it contained words "under the circumstances" and "in view of the character and mode of conveyance adopted." Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652.

Instructions: That carrier owes duty to exercise that high degree of care for the "reasonable" personal safety, etc., held erroneous in using word "reasonable." Moore v. Northern Texas Trac. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 354, 95 S. W. 652. That, if plaintiff received injury as result of some occurrence which careful men could not have reasonably anticipated, occurrence was an "accident," held misleading in use of phrase "reasonably anticipated." Hunt v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 1088. Instruction in action against omnibus owner for injuries received in collision with street car that if driver "rightfully proceeded across the tracks then you are instructed that he had a right to rely on the motorman to so manage the cars as to avoid a collision," held properly refused. Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652.

70. Where contract of carriage is made with conductor, passenger is entitled to care due passengers generally. Williamson v. Central of Georgia R. Co., 127 Ga. 125, 56 S. E. 119. Fact that passenger is being carried gratuitously does not deprive him of his cause of action for injuries. Indianapolis Trac. & Terminal Co. v. Klentschy, 167 Ind. 598, 79 N. E. 908.

71. Where failure to properly warm waiting room produced condition of health rendering passenger susceptible to tuberculosis, and as natural and probable consequence thereof she became afflicted and died, carrier is liable. Chicago, etc., R. Co. v. Groner [Tex Civ. App.] 16 Tex. Ct. Rep. 507, 95 S. W. 1118.

72. Florida East Coast R. Co. v. Wade [Fla.] 43 So. 775; Baltimore, etc., R. Co. v. Sheridan [Ky.] 101 S. W. 928; Smithers v. Wilmington City R. Co. [Del.] 67 A. 167. Injury must be such as should have been foreseen as the probable proximate result. Florida East Coast R. Co. v. Wade [Fla.] 43 So. 775. Where carrier knows of passenger's illness and that he is going home, he must as matter of law anticipate injury from carrying him by destination. Nelson v. Chicago & N. W. R. Co. 130 Wis. 214, 109 N. W. 933.

Instructions: Use of word "directly" contributed instead of "proximately," held not erroneous under facts of case. Ruffin v. Atlantic & N. C. R. Co., 142 N. C. 120, 55 S. E. 86.

Held proximate cause: Announcement of wrong street, inducing passenger to alight at unfamiliar place, of injuries sustained by falling upon curbstone while trying to find way home through darkness. Georgia R. & Elec. Co. v. McAllister, 126 Ga. 447, 54 S. E. 957. Exposure of husband to smallpox, of wife contracting it from him. Missouri K. & T. R. Co. v. Raney [Tex. Civ. App.] 99 S. W. 589. Delay in warm and close place, of sick-

the same degree of care is due to one riding on a freight train or elevator,[75] the passenger assumes the inconveniences and risks incident to that mode af travel.[76] It has been held, however, that "due" care is owed to a caretaker of goods.[77] The test of negligence is not whether the carrier actually anticipated the injury, but whether a very prudent person would have anticipated[78] an injury to some person.[79] Since its liability is based upon negligence, a carrier is not liable for injuries due to an act of God[80] unless its negligence concurs therewith,[81] and, likewise, the concurrent negligence or act of a third person is no defense.[82] If a carrier has knowl-

ness of passenger who was weak from recent operation and susceptible to heat. Gulf, etc., R. Co. v. Redeker [Tex. Civ. App.] 100 S. W. 362. Negligence in carrying passenger beyond destination, of injuries received by falling from trestle in darkness while walking back up track under directions of conductor. Kentucky & I. Bridge & R. Co. v. Buckler, 30 Ky. L. R. 1086, 100 S. W. 328. Starting of train before shipper could tie horse, of injuries received while holding him. Houston & T. C. R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202. Delay whereby freight car was left standing all night, of injuries from exposure, although warm station was nearby where passenger had reason to expect train to proceed at any minute. Green v. Missouri, etc., R. Co., 121 Mo. App. 720, 97 S. W. 646. Where plaintiff was thrown forward by sudden jerk, and because of absence of guard chain fell between cars held that absence of chain was proximate cause of injury. Hooper v. Metropolitan St. R. Co., 125 Mo. App. 329, 102 S. W. 58.

Held not proximate cause: Mistaken information given by conductor as to point reached, of injuries received by falling through trestle in walking back to station. Jewell v. St. Louis, etc., R. Co. [Ark.] 102 S. W. 370. Where plaintiff boarded train without ticket because of absence of ticket agent from office and thereafter got off to procure one, absence of agent from office held not proximate cause of injuries received while attempting to board (San Antonio, etc., R. Co. v. Trigo [Tex. Civ. App.] 101 S. W. 254), nor was act of leaving train to procure ticket (Id.). Negligence in not furnishing better platform or portable step, of injuries received after passenger had safely reached car steps. Ft. Worth & D. C. R. Co. v. Work [Tex. Civ. App.] 100 S. W. 962. Negligent statement that next stop was plaintiff's destination, of her alighting at intermediate stop under facts of the case. Florida East Coast R. Co. v. Wade [Fla.] 43 So. 775.

Proximate cause for jury: Open door, of plaintiff's cold and injury. Decker v. Chicago, etc., R. Co. [Minn.] 112 N. W. 901. Alighting from high step, of rupture. Brooks v. Philadelphia & R. R. Co. [Pa.] 66 A. 872. Carrying sick passenger past destination, of permanent paralysis. Nelson v. Chicago & N. W. R. Co., 130 Wis. 214, 109 N. W. 933. Mistake in putting plaintiff on wrong train, of aortic regurgitation. Baltimore, etc., R. Co. v. Sheridan [Ky.] 101 S. W. 928. Electric shock, of injuries sued for. McRae v. Metropolitan St. R. Co., 125 Mo. App. 562, 102 S. W. 1032. Fall through trap door, of pleurisy and miscarriage Jordan v. St. Louis & M. R. R. Co., 122 Mo. App. 330, 99 S. W. 492

73. Instruction as to duty owed to passengers held not subject to objection that it authorized plaintiff to recover for injuries suffered by other passengers, in that it did not single out duty as owed to plaintiff. Mathis v. Southern Pac. Co. [Utah] 88 P. 668.

74. **Held not negligence** to permit passengers to pass from one car to another while the train is standing. Hogan v. Boston Elevated R. Co. [Mass.] 81 N. E. 198. In running down one walking on switch track, all warnings and signals having been given. Raymond v. Chicago, etc. R. Co., 126 Ill. App. 240.

Evidence held to sustain finding that defendant used too much force in attempting to prevent boarding at improper place. Ditchfield v. Philadelphia & West Chester Trac. Co., 32 Pa. Super. Ct. 531.

Negligence for jury where intruder or porter stumbled over passenger's leg while he was sitting on edge of berth. Pullman Co. v. Haight [C. C. A.] 151 F. 1009.

75. Bussell v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 S. W. 613; Southern R. Co. v. Burgess, 143 Ala. 364, 42 So. 35. Instruction imposing care of person of great prudence, held correct. Missouri, etc., R. Co. v. Schroeder [Tex. Civ. App] 100 S. W. 808; Southern R. Co. v. Burgess, 143 Ala. 364, 42 So. 35. Instruction defining care required, improperly refused. Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062.

76. Marable v. Southern R. Co., 142 N. C. 557, 55 S. E. 355. Riding on freight elevator. Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062. Assumes only such inconveniences and dangers. Bussell v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 S. W. 613. One riding on logging train with consent of company does not assume risk of collision. Harvey v. Deep River Logging Co. [Or.] 90 P. 501.

77. Baker v. Boston & M. R. Co. [N. H.] 65 A. 386.

78. Error to permit conductor and motormen to testify that they had no idea that plaintiff would jump from front platform if a horse fell in front of car, and that no one had ever told them anything to make them believe that she would do so. Moore v. Northern Tex. Trac. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 354, 95 S. W. 652.

79. Instruction held erroneous as leading jury to believe that motorman must have anticipated the precise injury and person to whom it would happen. Moore v. Northern Tex. Trac. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 354, 95 S. W. 652.

80. Cyclone blowing cars from track, held act of God. Galveston, etc., R. Co. v. Crier [Tex. Civ. App.] 100 S. W. 1177.

81. Carrier held not negligent in running into path of cyclone. Galveston, etc., R. Co. v. Crier [Tex. Civ. App.] 100 S. W. 1177.

82. Forsythe v. Los Angeles R. Co., 149 Cal. 569, 87 P. 24. Fact that brick causing

edge of a passenger's feeble condition,[83] it must exercise special care in respect thereto, and, in the absence of such knowledge, it is liable for injuries due to negligence, though it would not have injured an ordinary person.[84] The duty to exercise special care because of a passenger's perilous position does not arise until carrier has knowledge thereof.[85] The duty owed to one not a passenger[86] and the liability of private carriers[87] are less strict.

(§ 25) *B. Contributory negligence.*[88]—Passengers must exercise reasonable care for their own safety,[89] and a failure so to do[90, 91] relieves the carrier from lia-

derailment was placed on track by boy is no defense where motorman negligently failed to discover same in time to stop. O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 S. W. 54. The fact that boy opened switch is no defense where carrier was negligent in leaving it unlocked or unguarded, or in not discovering that it was open. Elgin, Aurora & Southern Trac. Co. v. Wilson, 120 Ill. App. 371. Where reasonable time to alight was not afforded, carrier is liable though a boarding passenger interefered with plaintiff. St. Louis S. W. R. Co. v. Bryant [Tex. Civ. App.] 103 S. W. 237.

83. Notice to porter, acting as brakeman, of passenger's weak condition and need of special care held notice to carrier. Gulf, etc., R. Co. v. Redeker [Tex. Civ. App.] 100 S. W. 362.

84. Injuries caused by negligent delay. Gulf, etc., R. Co. v. Redeker [Tex. Civ. App.] 100 S. W. 362.

85. Carrier may assume that passengers will avoid perilous positions. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222. And that no one will attempt to alight from car while moving at dangerous speed. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 S. W. 142. Evidence held to show that servants had no knowledge of plaintiff's presence on platform. Houston, etc., R. Co. v. Johnson [Tex. Civ. App.] 103 S. W. 239.

86. Pushing of one from train by porter, held failure to exercise ordinary care, as matter of law, so it was immaterial whether relation of carrier and passenger had terminated. International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000.

87. Company operating private logging road, and whose conductors were expressly instructed not to allow passengers to ride except in caboose, owes no duty to provide for safety of one who is riding on flat car, although under direction of conductor. Boisen v. Cobbs, 147 Mich. 429, 111 N. W. 82.

88. See 7 C. L. 569.

89. Interurban R. & T. Co. v. Hancock, 75 Ohio St. 88, 78 N. E. 964; Farrell v. Great Northern R. Co., 100 Minn. 361, 111 N. W. 388; Eagen v. Jersey City, etc., R. Co. [N. J. Err. & App.] 67 A. 24; Reiss v. Wilmington City R. Co. [Del.] 67 A. 153. Must exercise due care to obtain food where train is detained through fault of carrier. Texas, etc., R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. Passenger on improperly heated car must use reasonable means at hand to prevent ill effect, and may properly allege what she did. Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006. Age without evidence of physical or mental condition is not circumstance to be considered in determining passenger's negligence in alighting. Hodges v. Southern Pac. Co., 3 Cal. App. 307, 86 P. 620. Instruction is not erroneous in using expression "due diligence" where in all the intructions "reasonable diligence," "ordinary care," and "reasonable care" are used synonymously. Bond v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30. Instruction "'contributory negligence' means that where plaintiff does some negligent act or omits to perform some act which * * * contributes," etc., held erroneous as not requiring such omitted act to be negligence. Selman v. Gulf, etc., R. Co. [Tex. Civ. App.] 101 S. W. 1030.

90, 91. Negligence should not be imputed to one who, in alighting from electric car at regular stopping place, passed around rear end and was struck by car running in opposite direction, and which he could neither see nor hear by reason of obstruction caused by car upon which he had been passenger, in absence of clear proof of proper warning. Cincinnati St. R. Co. v. McBee, 4 Ohio N. P. (N. S.) 13.

Acts held not negligence as matter of law: Violation of stipulation not to be in car while switching was being done. Hardin v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 100 S. W. 995. Riding on tank car with consent of conductor and under contract between carrier and his employer. Gray v. Columbia River, etc., R. Co. [Or.] 88 P. 297. Failure of passenger who has not been furnished proper accommodations and protection to leave car after having made demands upon the conductor in respect thereto. McCollum v. Southern Pac. Co. [Utah] 88 P. 663. In remaining on a car improperly heated. Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006. Passenger negligently put off at wrong street, in seeking to find way home through storm instead of asking shelter at nearby houses. Georgia R. & Elec. Co. v. McAllister, 126 Ga. 447, 54 S. E. 957.

Acts held not negligence: Remaining in cold depot until it became clearly apparent that carrier did not intend to heat as required by Rev. St. 1895, § 4521. St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 17 Tex. Ct. Rep. 265, 97 S. W. 1087. **One carried beyond station** in walking back through rain where he was under impression that there was no return train until next day and he had pressing business engagements. St. Louis, etc., R. Co. v. Knight [Ark.] 99 S. W. 684. In walking back up track as directed by conductor and in falling from trestle in darkness. Kentucky, etc., R. Co. v. Buckler, 30 Ky. L. R. 1086, 100 S. W. 328. To ride six miles across country to destination, there being no train until next evening, and she being dressed in winter wear. St. Louis, S. W. R. Co. v. Foster [Tex. Civ. App.] 103 S. W. 194. Remaining in unheated station, train being due and boarding house 150 yards away. International & G. N. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 982,

bility, for injuries proximately caused thereby,[92] unless the carrier is willfully negligent.[93] Negligence of an infirm passenger in traveling alone does not relieve a carrier having knowledge of his condition from liability for its own negligence.[94] A carrier owes duty of common humanity after injury regardless of passenger's contributory negligence.[95] One attempting to hold an untied horse only assumes risks ordinarily incident thereto.[96]

95 S. W. 595. Passenger on street car, in not seeing approaching train in time to avoid injury from collision. Chicago, etc., R. Co. v. Smith, 124 Ill. App. 627.

Negligence held for jury: Of one thrown from steps of car while alighting. Hall v. Northern Pac. R. Co. [N. D.] 111 N. W. 609. Attempting to board car, knowing of jostling of crowds on other occasions. Kuhlen v. Boston & N. St. R. Co. 193 Mass. 341, 79 N. E 815. Crossing tracks to leave station without looking for approaching trains. Atlantic City R. Co. v. Kiefer [N. J. Law] 66 A. 930. Intoxication is not conclusive proof of contributory negligence, but is circumstance to be considered. Kansas City S. R. Co. v. Davis [Ark.] 103 S. W. 603.

Evidence insufficient to disprove negligence: General evidence that decedent who was old and feeble fell when car started in usual way with something of jerk. Jameson v. Boston El. R. Co., 193 Mass. 560, 79 N. E. 750.

Evidence held insufficient to raise issue: That person accompanying stock went into car with consent of defendant's employe to get a calf onto its feet and was injured by sudden jerk of car. Missouri, etc., R. Co. v. Lindsey [Tex. Civ. App.] 101 S. W. 863. Where white female passenger did not know that sleeper was attached and it was unlawful for her to go into coach set apart for negroes and not proper for her to go into smoker, fact that those coaches were warm was insufficient to raise question of negligence in remaining in cold car. Texas, etc., R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. Negligence cannot be based upon fact that infirm man, injured while traveling alone, was receiving government pension for total disability. Toledo, Bowling Green & So. Trac. Co. v. McFall, 8 Ohio C. C. (N. S.) 271. Evidence of warning not to attempt to pass from one coach to another which was about to be separated therefrom, held too indefinite to predicate negligence on. St. Louis S. W. R. Co. v. Gammage [Tex. Civ. App.] 16 Tex. Ct. Rep. 805, 96 S. W. 645.

Instruction held to sufficiently charge contributory negligence in remaining in cold depot instead of seeking shelter elsewhere. St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 17 Tex. Ct. Rep. 265, 97 S. W. 1087. As to contributory negligence in alighting from moving car, held improperly modified so as to excuse plaintiff if defendant was negligent in certain particulars. Van Horn v. St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326 Making plaintiff guilty of negligence if by exercise of ordinary care he could have discovered that front end of car was not intended for passengers and took seat therein, held too narrow as ignoring what reasonable man would have done having such knowledge. Miller v. Atlanta & Charlotte Air Line R. Co. [N. C.] 57 S. E. 345.

92. Negligence must be proximate cause to defeat recovery. Black v. New York, etc., R. Co., 193 Mass. 448, 79 N. E. 797. That injury was due "in part" is not sufficient. Yazoo, etc., R. Co. v. Byrd [Miss.] 42 So. 286. Instruction that if mother's negligence "in any way contributed" to death of child no recovery could be had, held properly refused. Coney Island Co. v. Dennan [C. C. A.] 149 F. 687. Instruction held erroneous as ignoring proximate cause. Hardin v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 100 S. W. 995. Instruction properly modified so as to require negligence to contribute to injury to defeat recovery. Kansas City So. R. Co. v. Davis [Ark.] 103 S. W. 603. Negligence in alighting from car moving at dangerous speed, held proximate cause of injuries. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 S. W. 142. Where intoxicated and helpless passenger was taken from train and placed near top steps of station platform, from which he fell, held that question whether his intoxication was proximate cause or mere condition of accident was for the jury. Black v. New York, etc., R. Co., 193 Mass. 448, 79 N. E. 797.

93. Though passenger is negligent in riding in vestibule, company held liable where porter carelessly jostled him off. Chicago, etc., R. Co. v. Ferguson, 74 Kan. 253, 86 P. 471. Evidence examined and held insufficient to show willful negligence by porter in pushing plaintiff off platform. Illinois Cent. R. Co. v. Warren [C. C. A.] 149 F. 658. Finding that motorman was not guilty of willful negligence after discovering plaintiff's perilous position, sustained. Pendleton v. Chicago City R. Co., 120 Ill. App. 405. Although passenger was negligent in passing around rear of car from which he had just alighted and in front of another, carrier is still liable if operatives on such car could by exercise of reasonable care have discovered his peril and by exercise of reasonable care have prevented injury. Louisville City R. Co. v. Hudgins 30 Ky. L. R. 316, 98 S. W. 275. Instruction that plaintiff could not recover if she attempted to board moving car, held properly modified so as to allow recovery for failure to stop car after discovering that she was being dragged. Foland v. Southwest. Mo. Elec. R. Co., 119 Mo. App. 284, 95 S. W. 958 Where evidence of plaintiff tended to show that car was started suddenly from standing position while she was alighting, and that of defendant that plaintiff attempted to alight from moving car, instruction bringing in humanitarian doctrine, held erroneous. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 S. W. 142.

94. Toledo, Bowling Green & So. Trac. Co. v. McFall, 8 Ohio C. C. (N. S.) 271.

95. Held liable where it left one thrown from train to lie for three hours in hot sun and heavy shower. Yazoo, etc., R. Co. v. Byrd [Miss.] 42 So. 286.

96. Houston, etc., R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202.

Acts done at the direction of employes,[97] if given within the scope of their duty,[98] are not negligent if one of ordinary prudence would rely thereon under the circumstances.[99]

Acts due to impulse of sudden danger[1] are not negligent unless devoid of the common prudence dictated by the situation.[2]

Going about stations, platforms, tracks, or standing cars.[3]—Negligence in walking about the tracks depends upon the circumstances,[4] and it is not per se negligence to take position near the track and in front of large crowd, knowing that they would rush to get on the cars.[5]

Boarding the car or vehicle of transit.[6]—Boarding standing car[7] or caboose before the train is made up,[8] and failure to take a seat with due diligence,[9] are not per se negligent acts, nor is the use of a car cradle track to reach a ferry boat.[10]

Boarding at wrong place.[11]

Boarding moving train or car[12] is not negligence per se[13] unless moving at an obviously dangerous rate of speed.[14]

97. See 7 C. L. 570.

98. Evidence that porter assisted in helping passengers off supports finding that it was in scope of his duty to direct passengers to alight. Texas & P. R. Co. v. Whiteley. [Tex. Civ. App.] 96 S. W. 109.

99. Acts held not negligent: Alighting at usual place. Brooks v. Philadelphia & R. R. Co. [Pa.] 66 A. 872. On vestibule pursuant to rule requiring users of tobacco to so ride. Goodloe v. Metropolitan St. R. Co., 120 Mo. App. 194, 96 S. W. 482. Alighting from front platform which had passed beyond station platform, being enjoined so to do by posted notice. Illinois Cent. R. Co. v. Johnson, 123 Ill. App. 300. On running board. And especially where injury results from operation of train. Boesen v. Omaha St. R. Co. [Neb.] 112 N. W. 614. Directed and forcibly urged by the conductor to go upon the rear platform. Druzepski v. People's St. R. Co., 30 Pa. Super. Ct. 380.

Negligence held for jury: In alighting from moving train. St. Louis, etc., R. Co. v. Leamons [Ark.] 102 S. W. 363.

Instruction that suggestion of carrier's employes to alight did not alone justify plaintiff in alighting from moving train, but was circumstance to be considered in determining whether he exercised due care, cannot be complained of by carrier. Texas & P. R. Co. v. Whiteley [Tex. Civ. App.] 96 S. W. 109.

1. See 7 C. L. 570.

2. Not negligence to jump from overturning stage. Dinnigan v. Peterson, 3 Cal. App. 764, 87 P. 218. Boy twelve years old held not negligent in jumping from car upon hearing explosion and seeing flames shooting from controller box, although other passengers remained seated. Paine v. Geneva, etc., Tract. Co., 115 App. Div. 729, 101 N. Y. S. 204. One jumping from train under mistaken belief that collision is threatened, when there is in fact no apparent danger, is negligent. Riley v. Chicago, etc., R. Co. [Neb.] 111 N. W. 847. Instruction that "one brought into sudden danger . . . is not expected to act with coolness or deliberation as moved a reasonable man under ordinary circumstances," held erroneous as predicating lack of coolness and deliberation upon "sudden danger" however slight. Alabama City, etc., R. Co. v. Bates [Ala.] 43 So. 98.

3. See 7 C. L. 571.

4. Held per se negligence: In passing around rear of car from which he had alighted without waiting for car to move so that he could see approaching cars on adjacent track. Eagen v. Jersey City, etc., R. Co. [N. J. Err. & App.] 67 A. 24.,

Held not negligence per se: Crossing tracks after alighting without looking for approaching trains. Illinois Cent. R. Co. v. Johnson, 123 Ill. App. 300. Not per se gross negligence to cross and recross track after hearing first signal of approaching train. Drawdy v. Atlantic Coast Line R. Co., 75 S. C. 308, 55 S. E. 444.

Negligence for the jury: Crossing tracks ahead of approaching train after alighting from another. Illinois Cent. R. Co. v. Johnson, 123 Ill. App. 300.

Negligence: Walking on switch track after warning, although others frequently did so. Raymond v. Chicago, etc., R. Co., 126 Ill. App. 240.

5. Pushed under car. Cousineau v. Muskegon Trac. & Lighting Co., 145 Mich. 34, 13 Det. Leg. N. 436, 108 N. W. 720.

6. See 7 C. L. 571.

7. Graham v. New York City R. Co., 104 N. Y. S. 869.

8. Held for jury under facts of case. Miller v. Atlantic & C. Air Line R. Co., 143 N. C. 115, 55 S. E. 439.

9. Cutcliff v. Birmingham R. L. & P. Co. [Ala.] 41 So. 873.

10. Burke v. St. Louis S. W. R. Co., 120 Mo. App. 683, 97 S. W. 981.

11, 12. See 7 C. L. 572.

13. Powelson v. United Trac. Co., 216 Pa. 583, 66 A. 78. Boarding slowly moving train with assistance of conductor. Feagin Gulf, etc., R. Co. [Tex. Civ. App.] 100 S. W. 346; Lexington R. Co. v. Herring, 29 Ky. L. R. 794, 96 S. W. 558.

14. Person boarding moving train knowing that it is dangerous and negligent so to do cannot recover and defendant is entitled to instruction so stating. San Antonio, etc., R. Co. v. Trigo [Tex. Civ. App.] 101. S. W. 254. Where there is evidence that child was so young as not to appreciate danger in boarding moving train, his age and intelligence may be considered in passing on his negligence. Id

Riding or being in dangerous position or place.[15]—It is not negligence per se to ride in cupola of caboose [16] or on the truck of a logging train,[17] to leave seat in a a stationary train and to go to front end of the car for a drink,[18] or to go out onto platform,[19] or to place hand on door jamb.[20] Negligence in standing up in train [21] or in going out onto the platform [22] depends upon the circumstances,[23] the test being whether an ordinarily prudent man would have so acted.[24] A passenger riding in a place of danger assumes only the risks incident thereto when train is operated with due care [25] if carrier accepts him as a passenger in such position.[26]

Riding on the running board or platform of a street car.[27]—Generally it is held not per se negligence to ride on the platform,[28] running board,[29] or steps,[30] and

15. See 7 C. L. 572.

16. St. Louis S. W. R. Co. v. Morgan [Tex. Civ. App.] 16 Tex. Ct. Rep. 928, 98 S. W. 408.

17. Train consisting only of engine and truck. Harvey v. Deep River Logging Co. [Or.] 90 P. 501.

18. While switching was being done. St. Louis, etc., R. Co. v. Billingsley, 79 Ark. 335, 96 S. W. 357.

19. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318; Cleveland, etc., R. Co. v. Henry [Ind.] 81 N. E. 592. Though in disobedience of sign, especially where he was only momentarily stopped by conductor. Louisville & N. R. Co. v. Mulder [Ala.] 42 So. 742. Hence declaration alleging "that while train was standing still, and while plaintiff was standing on platform," defendant negligently, etc., is not demurrable. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Instruction stating that it was not negligence for passenger to go upon platform of coach while train was standing, approved when construed with other instructions. Id.

20. Louisville & N. R. Co. v. Mulder [Ala.] 42 So. 742.

21. Negligence of passenger in standing up in caboose for a few minutes as train was starting, held for jury. Pasley v. St. Louis, etc., R. Co. [Ark.] 102 S. W. 387.

22. Held for jury. Houston, etc., R. Co. v. Johnson [Tex. Civ. App.] 103 S. W. 239.

23. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318.

24. **Negligence held for jury:** Using steamship berth without vertical protecting board. International Mercantile M. Co. v. Smith [C. C. A.] 145 F. 891. Permitting recently broken leg to extend into aisle while sitting on side of berth. Pullman Co. v. Haight [C. C. A.] 151 F. 1009.

Held negligence: Voluntarily taking standing position just inside open door, knowing of rough condition of road. Foley v. Boston, etc., R. Co., 193 Mass. 332, 79 N. E. 765. Leaving passenger compartment of combination car and going into baggage compartment. Bromley v. New York, etc., R. Co., 193 Mass. 453, 79 N. E. 775.

Held not negligence: In seating seven year old boy at end of seat next to screen of summer car. Indianapolis Trac. & T. Co. v. Beckman [Ind. App.] 81 N. E. 82. Evidence that while plaintiff was still standing, facing partly forward and partly sideways, and helping her child to move over so as to make room for herself, she was thrown by a sudden starting of the car, held to warrant finding that she was using due care. Hamilton v. Boston, etc., R. Co., 193 Mass. 324, 79 N. E. 734.

25. Went out onto platform before reaching station. Houston, etc., R. Co. v. Johnson [Tex. Civ. App.] 103 S. W. 239. Duty to exercise highest degree of care in maintenance of track and operation of train extends to passenger passing from one car to another of moving train. Galveston, etc., R. Co. v. Patillo [Tex. Civ. App.] 101 S. W. 492. Instruction that defendant is not liable if plaintiff was thrown from train while unnecessarily standing on platform while train was passing from straight track to curve track is erroneous in not adding that train was being operated with "all due care." Yazoo, etc., R. Co. v. Byrd [Miss.] 42 So. 286.

26. One injured while riding on running board who does not prove that car stopped to receive him, or that he was seen by conductor and suffered to remain there, or that his fare had been collected while in such position, does not make a case. Kramer v. Brooklyn Heights R. Co., 114 App. Div. 804, 100 N. Y. S. 276. Fact that conductor punched plaintiff's ticket while he was in baggage compartment, held not to constitute acquiescence to his riding therein. Bromley v. New York, etc., R. Co., 193 Mass. 453, 79 N. E. 775.

27. See 7 C. L. 573.

28. Baskett v. Metropolitan St. R. Co., 123 Mo. App. 725, 101 S. W. 138. Standing on front platform preparatory to alighting, though there was room inside. Wellmeyer v. St. Louis Transit Co., 198 Mo. 527, 95 S. W. 925.

Held per se negligence to ride on front platform when there is room inside. McDade v. Philadelphia Rapid Transit Co., 215 Pa. 105, 64 A. 327.

29. Egan v. Old Colony St. R. Co. [Mass.] 80 N. E. 696; Chicago Consol. Trac. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820. Outside of lowered bar is **negligence per se.** Harding v. Philadelphia Rapid Transit Co., 217 Pa. 69, 66 A. 151.

30. Riding after request to go inside. Coffey v. Omaha, etc., R. Co. [Neb.] 112 N. W. 589. Where there is no room inside and no objection is made. Consolidated Trac. Co. v. Schritter, 124 Ill. App. 578. Passenger who rides on footboard outside car when it is reasonably practicable to take seat within assumes risk of his position. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334. Doctrine of assumed risk is not applicable to passenger standing on steps and injured by collision with wagon. Chicago Consol. Trac. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820.

hence not to board a car so crowded as to necessitate riding thereon.[31] Negligence in such cases is for the jury.[32]

Riding on platform of railroad train.[33]—It is not negligence, as a matter of law, to ride [64] on the platform where there are no available seats,[35] but by statutes in some states a carrier is relieved from liability if it posts proper notices.[36]

Going about on cars or from car to car.[37]—A passenger is not per se negligent in going from one car to another of a moving train,[38] and in so doing assumes only the risks incident thereto after the carrier has fully discharged its duty.[39]

Allowing body to project.[40]—There seems to be a conflict as to whether it is per se negligence to needlessly project arm from a car window.[41]

Acts attendant on alighting and departing.[42]—A passenger must exercise reasonable care in alighting,[43] doing so with reasonable expedition,[44] but he may as-

31. Baskett v. Metropolitan St. R. Co., 123 Mo. App. 725, 101 S. W. 138.

32. Standing on front platform. Moore v. Northern Tex. Trac. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 354, 95 S. W. 652. Negligence of one stepping on running board while passing to seat. Pomeroy v. Boston & N. St. R. Co., 193 Mass. 507, 79 N. E. 764.

Held not negligent: To stand on platform, although he had felt jerkings of car before. Wellmeyer v. St. Louis Transit Co., 198 Mo. 527, 95 S. W. 925. To take seat on front platform, there being no room within car, and plaintiff being ignorant that electric explosion might occur. Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 S. W. 1072.

Held negligence to ride on front platform, there being room within. Kleffman v. Metropolitan St. R. Co., 116 App. Div. 334, 101 N. Y. S. 582. Where street car passenger remained upon rear platform, leaning upon or near closed gate,when there was room inside, and was thrown out by opening of gate, instruction that he had perfect right to stand there after conductor had taken his fare in such position, held erroneous. Engelhardt v. New York City R. Co., 52 Misc. 474, 102 N. Y. S. 516.

33. See 5 C. L. 539.

34. Fact that plaintiff was standing on platform of stationary train does not indicate that he has voluntarily selected such place to ride on. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318.

35. Question of fact for jury. Yazoo, etc., R. Co. v. Byrd [Miss.] 42 So. 286.

36. Revisal 1905, § 2628, is not inapplicable, though passenger acted as prudent person in going thereon. Shaw v. Seaboard Air Line R. Co., 143 N. C. 312, 55 S. E. 713. But such statute does not apply where passenger is on platform by invitation and is injured through carrier's negligence. Darden v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 512.

37. See 7 C. L. 574.

38. Galveston, etc., R. Co. v. Patillo [Tex. Civ. App.] 101 S. W. 492. Negligence of passenger in releasing his hold on rail to grasp his hat which had been raised by wind, held for jury. Boston & M. R. Co. v. Stockwell [C. C. A.] 146 F. 505.

39. Does not assume risks arising from carrier's negligence. Galveston, etc., R. Co. v. Patillo [Tex. Civ. App.] 101 S. W. 492. One passing from one coach to another in search of closet, there being no rule prohibiting passengers from going from one car to another held not to assume risk of having hand crushed by porter closing door on it. St. Louis, etc., R. Co. v. Neely [Tex. Civ. App.] 101 S. W. 481.

40. See 7 C. L. 574.

41. Held negligent: Rapidly moving train. Interurban R. & T. Co. v. Hancock, 75 Ohio St. 88, 78 N. E. 964. Electric car. Id.

Contra: Street car. Smith v. St. Louis Transit Co., 120 Mo. App. 328, 97 S. W. 218.

42. See 7 C. L. 574.

43. Passenger negligently alighting on wrong side cannot recover. Ruffin v. Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86.

Held not negligence per se: In stepping off car into gutter without examining ground. Maxwell v. Fresno City R. Co. [Cal. App.] 89 P. 367. In running into gate without observing it or brakeman closing same. McGarry v. Boston El. R. Co. [Mass.] 81 N. E. 194. Alighting while drunk. Louisville & N. R. Co. v. Deason, 29 Ky. L. R. 1259, 96 S. W. 1115.

For jury: In jumping instead of stepping off, being compelled to alight at place where there was no platform. Truesdell v. Erie R. Co., 104 N. Y. S. 243. In stepping down onto step without holding onto guard while train was moving. Southern R. Co. v. Hundley [Ala.] 44 So. 195. In alighting from freight caboose at unusual place. Southern R. Co. v. Burgess, 143 Ala. 364, 42 So. 35.

Held negligence: To take position with one foot on platform and other on door sill before train came to stop. Illinois Cent. R. Co. v. Warren [C. C. A.] 149 F. 658. In arising while car was in motion, knowing of unevenness of tracks, and that car would sway. Cottrell v. Pawtucket St. R. Co., 27 R. I. 565, 65 A. 269. In alighting on wrong side and in attempting to pass ahead of approaching train. Fadley v. Baltimore & O. R. Co. [C. C. A.] 153 F. 514.

Held not negligence: To alight from train on side away from station, conditions of track being same on each side. Hodges v. Southern Pac. Co., 3 Cal. App. 307, 86 P. 620. Fact that passenger attempted to alight with child in one arm and grip in other hand does not raise issue of negligence where there was no servant present to assist. Missouri, etc., R. Co. v. Corse [Tex. Civ. App.] 101 S. W. 522. In attempting to alight when car has stopped for such purpose, and starts while is alighting. Burke v. Bay City Trac. & Elec. Co., 147 Mich. 172, 13 Det. Leg. N. 974, 110 N. W. 524.

44. Evidence held to show reasonable **diligence** in alighting, way being blocked. Hur-

sume that the car has stopped at a safe place,[45] that the steps are in a reasonably safe condition,[46] and that the car will not be started until he has been given a reasonable opportunity to alight.[47] Negligence in going out onto platform before the train comes to a stop[48] and attempting to alight without a stepbox[49] is usually a question for the jury. A passenger does not assume the risk of injury in alighting in a particular way unless the danger is obvious or known.[50]

Leaving moving train or car[51] is not per se negligence[52] unless the danger is so great as to be obvious to one of ordinary prudence,[53] or warning has been given,[54] but it is usually a question for the jury,[55] especially if done under invitation.[56] Fact that a passenger is being carried beyond the street at which he desires to alight does not justify him in alighting from a moving car.[57]

Alighting at wrong station or unusual place.[58]—Whether this be negligence depends upon the circumstances,[59] and the announcement of the station does not re-

ley v. Metropolitan St. R. Co., 120 Mo. App. 262, 96 S. W. 714.

Instruction making plaintiff guilty of negligence per se for delay in attempting to leave by locked door, if it was not customary to have it locked and defendant's servants did not know it was locked, properly refused. Houston, etc., R. Co. v. Easton [Tex. Civ. App.] 97 S. W. 833. Held to correctly submit question of negligence in failing to discover that rear door was locked and in attempting to alight from moving train. Id.

45. Is not conclusively negligent in alighting at place in fact unsafe. McGovern v. Interurban R. Co. [Iowa] 111 N. W. 412.

46. Unless she knows, or by exercise of reasonable care could know that they are defective. Smithers v. Wilmington City R. Co. [Del.] 67 A. 167.

47. Although conductor's arm is raised toward bell cord. Hurley v. Metropolitan St. R. Co., 120 Mo. App. 262, 96 S. W. 714.

48. Electric train. Washington, etc., R. Co. v. Chapman, 26 App. D. C. 472.

49. Negligence in alighting, as decedent did, knowing of absence of stepbox, held for jury., (Selman v. Gulf, etc., R. Co. [Tex. Civ. App.] 101 S. W. 1030), and instruction held erroneous as, in effect, telling jury that it was per se negligence (Id.)

50. Stepped straight out from car. St. Louis S. W. R. Co. v. Bryant [Tex. Civ. App.] 103 S. W. 237.

51. See 7 C. L. 576.

52. Burke v. Bay City Trac. & Elec. Co., 147 Mich. 172, 13 Det. Leg. N. 974, 110 N. W. 524; Newport News, etc., R. & Elec. Co. v. McCormick [Va.] 56 S. E. 281. Galveston, etc., R. Co. v. Morrison [Tex. Civ. App.] 102 S. W. 143; Green v. Metropolitan St. R. Co., 122 Mo. App. 647, 99 S. W. 28; Bond v. Chicago, etc., R. Co., 122 Mo. App 207, 99 S. W. 30; Ford v. Paducah City R. Co., 29 Ky. L. R. 752, 96 S. W. 441; Texas & P. R. Co. v. Whiteley [Tex. Civ. App.] 96 S. W. 109. Had assisted one to board. Gist v. International & G. N. R. Co. [Tex. Civ. App.] 102 S. W. 457. Passenger must see that car has stopped before alighting. Reiss v. Wilmington City Ry. Co. [Del.] 67 A. 153.

53. Dallas Consol. Elec. St. R. Co. v. Lasch [Tex. Civ. App.] 99 S. W. 729; Turley v. Atlanta, etc., R. Co., 127 Ga. 594, 56 S. E. 748. Knowingly stepped from train running sixteen miles per hour while encumbered with grip and umbrella. Hunter v. Louisville & N. R. Co. [Ala.] 43 So. 802. Alighted in front of approaching car. Chicago City R. Co. v. Lundberg, 124 Ill. App. 144.

54. Betten v. Toledo, etc., R. Co., 9 Ohio C. C. (N. S.) 53.

55. **Negligence held for jury:** Alighting from train moving four miles per hour to avoid being carried beyond station. Turley v. Atlanta, etc., R. Co., 127 Ga. 594, 56 S. E. 748.

Finding of negligence sustained. Louisville & N. R. Co. v. Wilson, 30 Ky. L. R. 1055, 100 S. W. 290; Hannestad v. Chicago, etc., R. Co., 132 Iowa, 232, 109 N. W. 718. In stepping off into darkness, believing train had stopped, when he knew that brakeman with light was at other end of car. Bartle v. New York, etc., R. Co., 105 N. Y. S. 522. Where passenger persisted in alighting after discovering that street car had started. South Covington, etc., R. Co. v. Core, 29 Ky. L. R. 836, 96 S. W. 562. Evidence so conflicting as to whether plaintiff attempted to alight while train was moving as to make case for jury. Skean v. Schuylkill Valley Trac. Co., 32 Pa. Super. Ct. 558.

Instruction that alighting from moving train was not negligence unless the conditions and circumstances made it so, of which jury was judge, held misleading in that jury might infer that, as matter of law, general rule is that it was not negligence, and that circumstance had to make exception. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128.

56. Announcement of station is not invitation to alight until train stops. Illinois Cent. R. Co. v. Warren [C. C. A.] 149 F. 658. Held not guilty of negligence in alighting from slowly moving train, having been led to believe that train had stopped by opening of doors and statement of conductor that depot is "right there." Baltimore & O. S. W. R. Co. v. Mullen, 120 Ill. App. 88

57. Newport News, etc., R. & Elec. Co. v. McCormick [Va.] 56 S. E. 281.

58. See 7 C. L. 576.

59. Absence of customary depot lights, held not so suggestive that station had not been reached as to render one alighting at crossing stop negligent as matter of law. Wolf v. Chicago, etc., R. Co. [Wis.] 111 N. W. 514. Whether passenger properly assumed that she was expected to alight at stop before caboose reached depot from known custom for passengers so to do, held for jury. Southern R. Co. v. Burgess, 143

lieve a passenger from exercising reasonable diligence to ascertain if the next stop is in fact the station.[60] An agreement with the conductor to permit passenger to alight at an unusual place must be considered in passing on negligence in so alighting.[61]

Leaving train en route.[62]

§ 26. *Care and condition of premises.*[63]—Carrier must exercise reasonaole care to maintain its station and approaches thereto in a reasonably safe condition [64] for those rightfully there as passengers,[65] to provide suitable [66] and sufficient platform facilities to accommodate the ordinary crowd assembling during rush hours,[67] to keep it free from obstructions,[68] and properly lighted.[69] The same care is required to provide safe means of reaching a boat,[70] but the highest degree of care is required in the maintenance of track [71] and switches.[72] Where a carrier uses a station for its own benefit and invites the public thereto, it is liable for defects though it does not control the station.[73]

Ala. 364, 42 So. 35. Negligence of one familiar with locality in stepping off at stop before reaching station, held for jury where station had been announced and night was very dark. Wolf v. Chicago, etc., R. Co [Wis.] 111 N. W. 514. Passenger on interurban car does not assume risk in alighting at place more dangerous than usual stopping place where she does not know of added danger. McGovern v. Interurban Co. [Iowa] 111 N. W. 412.

60. Informed by conductor that next stop will be at station. Farrell v. Great Northern R. Co., 100 Minn. 361, 111 N. W. 388. And if person of ordinary faculties would know that it was not place intended for alighting he cannot recover. Id. Held negligent. Id. Negligence of woman unused to traveling in attempting to alight at stop before reaching station platform after trainman had announced station and called "all change," held for jury. Walford v. New York, etc., R. Co., 118 App. Div. 553, 102 N. Y. S. 1008.

61. Instruction ignoring agreement, held properly refused, there being evidence thereof. Galveston, etc., R. Co. v. Alberti [Tex. Civ. App.] 103 S. W. 699.

62, 63. See 7 C. L. 577.

64. Cincinnati, etc., R. Co. v. Giboney, 30 Ky. L. R. 1005, 100 S. W. 216. Presence of piece of tobacco on stairway of station, causing injury, without proof that it was there sufficiently long to impute notice, does not render defendant liable. Kaplowitz v. Interborough Rapid Transit Co., 53 Misc. 646, 103 N. Y. S. 721.

65. One who, on finding all seats taken, decided to stay over and left train, leaving child to go with relatives, held not to have lost right to step to side of coach to receive her child through window upon his refusing to go without her. Cincinnati, etc., R. Co. v. Giboney, 30 Ky. L. R. 1005, 100 S. W. 216.

66. Where plaintiff testified that it was "quite a high step" from platform to steps of coach and defendant's employes stated it was 12 or 14 inches, negligence in not providing better platform was for jury. Ft. Worth, etc., R. Co. v. Work [Tex. Civ. App.] 100 S. W. 962. In action by one pushed by crowd under cars, question of negligence of defendant in not making adequate provision by way of railings, barriers, and policemen to protect passengers, held for the jury. Cousineau v. Muskegon Trac. & L. Co., 145 Mich. 314, 13 Det. Leg. N. 436, 108 N. W. 720.

67. Instruction that defendant was not liable for accidents happening solely through such rush, properly refused. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507.

68. Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P. 207. Truck standing thereon. Toledo, etc., R. Co. v. Stevenson, 122 Ill. App. 654.

69. Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P. 207. Fact that there was no system of public lighting in municipality does not excuse. Toledo, etc., R. Co. v. Stevenson, 122 Ill. App. 654. Need only keep it sufficiently lighted to enable ordinary passenger to alight in safety, and instruction that it owed duty of so lighting that "plaintiff" could see, etc., held erroneous. Illinois Cent. R. Co. v. Cruse, 29 Ky. L. R. 914, 96 S. W. 821.

70. For one intending to become passenger though not yet passenger. Burke v. St. Louis S. W. R. Co., 120 Mo. App. 683, 97 S. W. 981. Use of loose cradle track consisting of detached rails connecting with regular track for running cars onto ferry boat held not reasonably safe as matter of law. Id. Negligence held for jury in failing to guard bridge leading from vessel to wharf boat. Coney Island Co. v. Dennan [C. C. A.] 149 F. 687. Instruction that failure to have sufficient lights on wharf was "continuing negligence," held not erroneous where recovery was authorized only if injury proximately resulted. Ruffin v. Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86.

71. Question whether trains could be operated over them in usual and customary manner with reasonable safety held not test. St. Louis, etc., R. Co. v. Boyer [Tex. Civ. App.] 97 S. W. 1070. Negligently maintained pole too close to track. City Elec. R. Co. v. Salmon, 1 Ga. App. 491, 57 S. E. 926. Passing cars came into contact. Staples v. Rhode Island Suburban R. Co. [R. I.] 67 A. 431. Negligence in maintaining leaning trolley pole striking one on running board, held for jury. Pomeroy v. Boston, etc., R. Co., 193 Mass. 507, 79 N. E. 764.

72. Held negligent in failing to guard or lock switch, it being opened by boy. Elgin, A. & So. Trac. Co. v. Wilson, 120 Ill. App. 371.

73. Details of agreement under which it

Penal regulations.[74]—The statutory liability for failure to provide drinking water, water closets, etc., is elsewhere treated.[75]

§ 27. *Means and facilities of transportation*[76] such as cars,[77] elevators,[78] steamboats,[79] carsteps,[80] platforms,[81] and appliances,[82] must be maintained at the highest degree of efficiency obtainable by extraordinary diligence, and to that end every reasonable test must be applied and every reasonable precaution taken to discover defects.[83] Carrier cannot shift its duty to provide safe transportation to another.[84]

Separate accommodations for white and colored persons,[85] are provided by statute in many states,[86] but independent thereof a carrier may separate the races.[87]

is being used are inadmissible. Kuhlen v. Boston, etc., R. Co., 193 Mass. 341, 79 N. E. 815.

74. See 7 C. L. 578.

75. See Railroads, 8 C. L. 1590.

76. See 7 C. L. 578.

77. Smithers v. Wilmington City R. Co. [Del.] 67 A. 167; Ozanne v. Illinois Cent. R. Co., 151 F. 900. Duty is fully discharged when it has supplied best instrumentalities that highly prudent person would have supplied in same business in then known condition of art and business. Id. Must exercise reasonable care to keep cars properly heated. Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006. Faulty construction of window resulting in sash coming down held for jury. Boice v. Ulster & D. R. Co., 105 N. Y. S. 83. Leaving vestibule door open and trap door raised held not negligence under circumstances. St. Louis, etc., R. Co. v. Oleson [Ark.] 99 S. W. 385. Failure to equip ladies' dressing room in sleeper with handholds and seats held not negligence per se where car was constructed according to uniform pattern and had been operated for years without accident. Ozanne v. Illinois Cent. R. Co., 151 F. 900. Instruction defining care owed mail clerk in providing suitable doors to car and keeping them in repair approved. Decker v. Chicago, etc., R. Co. [Minn.] 112 N. W. 901.

78. Evidence as to defective condition held to sustain finding of want of ordinary care. Ferguson v. Truax [Wis.] 110 N. W. 395. Evidence held insufficient to show defects in elevator or appliances. Belvedere Bldg. Co. v. Bryan, 103 Md. 514, 64 A. 44.

79. Negligence in fixing steamship berth without vertical protecting board held for jury. International Mercantile M. Co. v. Smith [C. C. A.] 145 F. 891.

80. Must use reasonable care and judgment in construction of steps. Traphagen v. Erie R. Co., 73 N. J. Law, 759, 64 A. 1072. Evidence held not to show negligence in construction of steps, they being of usual height. Id. Held not negligent in not discovering banana peel on car steps, it having been dropped there shortly before or after leaving preceding station, servants being otherwise engaged in meanwhile. Pittsburgh, etc., R. Co. v. Rose [Ind. App.] 79 N. E. 1094.

81. Sufficiency of platform gates and negligence in not closing same held for jury, brakeman being engaged momentarily in signaling following train. Boston & M. R. Co. v. Stockwell [C. C. A.] 146 F. 505. Instruction as to negligence in depositing or allowing to be deposited bag of tools on rear platform held erroneous where there was no evidence that defendant's servants deposited them or knew of their presence. Price v. St. Louis Transit Co., 125 Mo. App. 67, 102 S. W. 626.

82. Evidence of insufficiency of appliance to stop cable train on decline with cable out of grip held to render refusal of nonsuit proper. Roscoe v. Metropolitan St. R. Co., 202 Mo. 576, 100 S. W. 32. Evidence of failure to provide proper means of holding grip of cable train to cable held sufficient to go to jury. Id.

83. Mere proof of inspection and that door in floor of car was found to be safe without proof as to character of inspection does not conclusively disprove negligence in maintaining defective trap door. Jordan v. St. Louis, etc., R. Co., 122 Mo. App. 330, 99 S. W. 492. Held negligent in not discovering a cracked wheel. Lowenthal v. Vicksburg, etc., R. Co., 117 La. 1007, 42 So. 483. Instructions as whole held correct and not open to objection that jury might infer that if defendant purchased of a reputable manufacturer, it had performed its duty in respect to new cars. Marshall v. Boston & W. St. R. Co. [Mass.] 81 N. E. 195.

84. Sleeping car company. Ozanne v. Illinois Cent. R. Co., 151 F. 900.

85. See 7 C. L. 580.

86. Under Pen. Code 1895, §§ 526, 529, carrier must not permit them to intermingle. Hillman v. Georgia R. & Banking Co., 126 Ga. 814, 56 S. E. 68. Act April 4, 1905, (Acts 1905 p. 321, c. 150), held proper police regulation and not violative of Const. Tenn. art. 1, §§ 7, 8, and art. 11, § 8, and 4th, 5th, and 14th Amend. to Federal Const. as abridging privileges and immunities of citizens and depriving them of equal protection of laws (Morrison v. State [Tenn.] 95 S. W. 494), nor as depriving citizens of property, rights, or privileges, without due process of law in violation of Tenn. Const. art. 1, § 8, or 4th, 5th and 14th Amend. Federal Const., in that it requires one refusing to take seat assigned to leave car or be guilty of misdemeanor (Id.), nor unlawful delegation of police power to conductors in violation of Const. providing how officers shall be elected, in that they are vested with power to change line of division (Id.), and in excepting nurses tending children or helpless persons of other race from its provisions, it is not violative of Const. art. 11, § 8, as class legislation. (Id.).

87. Through passengers are interstate travelers, provided equal accommodations are furnished. Chiles v. Chesapeake & O. R. Co., 30 Ky. L. R. 1332, 101 S. W. 386.

Pressure of business [88] or the fact that there are no negroes on the particular train [89] does not excuse failure to provide separate accommodations. The requirement of such statutes cannot be limited by custom,[90] and where a passenger is permitted to occupy the wrong compartment, the carrier becomes responsible for his presence.[91] Though a carrier may compel a passenger in the wrong car to leave the same, unnecessary force must not be used.[92]

§ 28. *Operation and management of trains and other vehicles.*[93]—The degree of care due in respect to other duties [94] must be observed in respect to all operations of the train, as in crossing the tracks of another carrier,[95] in passing places where passengers alight or disembark,[96] in remaining stationary while passengers are boarding or alighting,[97] in preventing collisions,[98] in discovering obstructions on the track,[99] in keeping its cars safe,[1] in managing the same,[2] in avoiding sudden

88, 89. Laws 1891, p. 44, c. 41. Southern Kansas R. Co. v. State [Tex. Civ. App.] 99 S. W. 166.

90. Custom to allow passenger to occupy compartment of other race when his own was crowded. Louisville & E. R. Co. v. Vincent, 29 Ky. L. R. 1049, 96 S. W. 898.

91. Negro in white compartment engaged in altercation over ticket which caused panic resulting in plaintiff's injury. Louisville & E. R. Co. v. Vincent, 29 Ky. L. R. 1049, 96 S. W. 898. Action for failure to protect held based upon negligence in failing to exclude abusive white passenger from car assigned to negroes (Hillman v. Georgia R. & Banking Co., 126 Ga. 814, 56 S. E. 68), and instruction held erroneous as not submitting such fact (Id.).

92. Assaulted passenger as he was leaving after having taken package to one in other coach. St. Louis, etc., R. Co. v. Mynott [Ark.] 102 S. W. 380.

93. See 7 C. L. 580.

94. See ante, § 25.

95. Held negligence: In attempting to cross in front of approaching train without effort to ascertain whether way was clear. Indianapolis Trac. & T. Co. v. Romans [Ind. App.] 79 N. E. 1068. In following conductor who went ahead to railroad crossing so closely as not to be able to stop on warning. Chicago & G. T. R. Co. v. Smith, 124 Ill. App. 627.

Held not negligence: In crossing ahead of switch engine approaching under control. Horton v. Houston, etc., R. Co. [Tex. Civ. App.] 103 S. W. 467.

Instruction as to duty of street car employes before crossing railroad tracks held not to impose absolute duty to see that track was clear. St. Louis, etc., R. Co. v. Nance [Tex. Civ. App.] 101 S. W. 294.

96. Must approach with car under control where passengers are being discharged. Louisville City R. Co. v. Hudgins, 30 Ky. L. R. 316, 98 S. W. 275. Evidence held to support finding of negligence in so constructing station platform and operating engine at high speed as to injure passenger standing on edge of platform. Georgia R. & Banking Co. v. Adams, 127 Ga. 408, 56 S. E. 409.

97. See post, § 30.

98. As to passengers, motorman has no right to assume that one driving wagon parallel to tracks will not attempt to cross at "mid block." Strong v. Burlington Trac. Co. [Vt.] 66 A. 786. Slippery condition of rails does not meet presumption of negligence arising from collision where motorman could and should have allowed therefor. Goodloe v. Metropolitan St. R. Co., 120 Mo. App. 194, 96 S. W. 482.

Negligence held for jury: In attempting to pass wagon. Chicago Consol. Trac. Co. v. Schritter, 124 Ill. App. 578. In failing to discover wild car coming on cross track in time to evade it. Illinois Cent. R. Co. v. McCollum, 122 Ill. App. 531. In action for injuries received in collision with wagon coming through opening in wall parallel with track held under evidence for jury whether defendant was negligent in approaching opening in manner it did and in failing to give warning to its servants of approach of team. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 N. E. 1049. Evidence that speed of car was not lessened as it approached street and that motorman was talking to another and not attentive to his duties held to make questions of negligence in colliding with team for the jury. Bamberg v. International R. Co., 53 Misc. 403, 103 N. Y. S. 297.

Evidence held to sustain finding of **negligence** in not timely checking speed of car upon seeing team about to cross track. Forsythe v. Los Angeles R. Co., 149 Cal. 569, 87 P. 24.

Instruction held to properly submit issue of negligence in colliding with horse. Wynn v. Paducah City R. Co. [Ky.] 102 S. W. 824.

99. Negligence in not seeing boy place brick on track fifty feet in front of car and in not discovering it after it had been placed there in time to stop car held for jury. O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 S. W. 54. Instruction relieving motorman absolutely from liability in failing to discover brick placed on track ahead of car if he was putting car under control and sounding gong to warn children playing about tracks, held properly refused. Id.

1. Not negligence per se to permit passener's bag to be placed in aisle. Pitcher v. Old Colony St. R. Co. [Mass.] 81 N. E. 876. Right of carrier to remove luggage taken into passenger coach contrary to rules does not authorize it to do so in violent and abusive manner. Smith v. Atchison, etc., R. Co., 122 Mo. App. 85, 97 S. W. 1007.

2. Negligence held for jury: In operating elevator, under the evidence. Belvedere Bldg. Co. v. Bryan, 103 Md. 514, 64 A. 44. In closing door without seeing that plaintiff had cleared it. Louisville & N. R. Co. v. Mulder [Ala.] 42 So. 742. In failing to properly use

and violent jerks,[3] in avoiding false appearance of danger,[4] in switching,[5] and in running at a proper and safe speed.[6] Where carrier has knowledge of a passenger's perilous position, he must operate the train with respect thereto.[7] Failure to run train on schedule time creates no liability in the absence of negligence [8] or contract duty.[9]

§ 29. *The duty to protect passengers* [10] generally renders the carrier liable absolutely for indignities [11] and torts to the person of a passenger by its employes,[12]

appliance to control cable train. Roscoe v. Metropolitan St. R. Co., 202 Mo. 576, 101 S. W. 32. In failing to stop cable train before beginning descent of decline, according to instructions. Id. Negligence of porter in closing door on hand of one about to enter coach held for jury. St. Louis, etc., R. Co. v. Neely [Tex. Civ. App.] 101 S. W. 481.

The fact that rear fender of street car was down contrary to custom does not authorize inference of negligence. Whilt v. Public Service Corp. [N. J. Law] 64 A. 972.

3. Evidence that car "jumped" without description of extent or manner held insufficient to show negligence, there being evidence that power was off. Adams v. New York City R. Co., 116 App. Div. 315, 101 N. Y. S. 510. Negligence in turning on full force and causing car to give jerk while one ordered from front platform was working his way along running board held for jury. Budner v. Public Service Corp. [N. J. Law] 65 A. 893.

4. While explosion in controller box is of such nature as likely to create panic and cause passengers to jump from car, defendant is liable for injuries so received though explosion is harmless in itself. Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 S. W. 1072. Evidence held to show that defendant had previous knowledge of such explosions and that they were of nature to frighten passengers riding on platform. Id. Where it is matter of common knowledge that explosion in controller box of electric car is of nature to frighten passengers on front platfrom, evidence that it frightened other passengers is not essential to recovery for injuries received in jumping from platform during panic. Id. Instructions relieving defendant if such explosion could not have been prevented held properly modified so as to submit negligence in allowing plaintiff to be in close proximity to controller box. Id.

5. Switching of cars into another with such force as to bump it into passenger coach though brakes were set held negligence. St. Louis, etc., R. Co. v. Billingsley, 79 Ark. 335, 96 S. W. 357.

6. Whether given rate of speed is negligent depends upon circumstances. Elgin, A. & So. Trac. Co. v. Wilson, 120 Ill. App. 371. Negligence of given speed depends upon whether, under circumstances, it involves unnecessary dangers, and not whether servants ought to have known that car was likely to lurch more violently than incident to ordinary operation. Partelow v. Newton, etc., R. Co. [Mass.] 81 N. E. 894. Rule limiting speed while rounding curves may be considered in determining whether higher speed was negligent. Id.

Held question for jury: High speed in view of crowded condition of car. Coffey v. Omaha, etc., R. Co. [Neb.] 112 N. W. 589. Evidence that car left track because of high rate of speed around curve. Ludinsky v. New York City R. Co., 53 Misc. 569, 103 N. Y. S. 711.

Held negligent: Running street car at such speed as not to be able to stop before entering open switch and colliding with standing car. Stevens v. New Jersey, etc., R. Co., [N. J. Law] 65 A. 874. Approaching switch by street car at a speed of 30 miles per hour. Elgin, A. & So. Trac. Co. v. Wilson, 120 Ill. App. 371. Such speed around curve as to throw child from its seat. Indianapolis Trac. & T. Co. v. Beckman [Ind. App.] 81 N. E. 82. Description of the speed as "swift" and jar in passing over a cross over switch as "quite violent," "terrible," "awful," "very severe," and "unexpected," **held not to show negligence.** Foley v. Boston, etc., R. Co., 193 Mass. 332, 79 N. E. 765.

7. Must use care proportionate to danger. Van Horn v. St Louis Transit Co., 198 Mo. 481, 95 S. W. 326. Riding on steps. Chicago Consolidated Traction Co. v. Schritter, 124 Ill. App. 578. Where speed was dangerous in view of passenger's known perilous position, it is immaterial that it was only ordinary speed. Van Horn v. St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326. Evidence held to authorize submission of negligence in failing to timely stop car after discovering plaintiff's perilous position. Foland v. Southwestern Mo. Elec. R. Co., 119 Mo. App. 284, 95 S. W. 958.

8. Gerardy v. Louisville & N. R. Co., 52 Misc. 466, 102 N. Y. S. 548. Proof of delay due to washout without proof that washout was caused by defendant's negligence does not show negligence. Id.

9. Mere sale of ticket does not create contract to have train on schedule time. Gerardy v. Louisville & N. R. Co., 52 Misc. 466, 102 N. Y. S. 548. Neither ticket agent or conductor has authority to make special contract to carry on schedule time, hence statement that train would make up lost time did not create contract so to do. Id.

10. See 7 C. L. 583.

11. Refusal to stop car upon request may constitute insulting conduct. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574.

12. Immaterial whether servant was acting within scope of employment. Galveston, etc., R. Co. v. Bean [Tex. Civ. App.] 99 S. W. 721. Unprovoked assaults of brakeman. St. Louis, etc., Co. v. Dowgiallo [Ark.] 101 S. W. 412. Liable for insulting acts and language of conductor without regard to whether such acts and language were "negligently done." San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 101 S. W. 554.

Evidence held to authorize verdict for plaintiff: For being pushed off by conductor from moving train. Atlanta, etc., R. Co. v. Potts [Ga.] 57 S. E. 686. That, before plaintiff had time to produce fare, conductor caught him by shoulder and called him a G— d— bum. St. Louis S. W. R. Co. v. Fussell [Tex. Civ. App.] 16 Tex. Ct. Rep. 861, 97

though in some states they must be acting within the scope of their authority,[13] unless committed in self-defense [14] or in discharge of duty,[15] mere abusive language not justifying an assault.[16] While a carrier must exercise a high,[17] if not the highest, degree of care and diligence [18] to anticipate and protect passengers from indignities and assaults by third persons,[19] and to that end must employ sufficient servants,[20] it

S. W. 332. That porter while on duty and assisting in operating train pushed plaintiff off. International, etc., R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000.

13. Assault. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574. Unjustifiable assault or arrest "through mistake of identity." Tolchester Beach Imp. Co. v. Scharnagl [Md.] 65 A. 916. Superior officer of conductor who has right to take charge of car at any point has authority to order arrest of passengers, hence company is liable for wrongful arrest by him. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 S. W. 495. Not liable for false imprisonment and malicious prosecution instituted by conductor beyond scope of employment and unauthorized. Dobbins v. Little Rock R. & Elec. Co., 79 Ark. 85, 95 S. W. 794. Question whether officer commissioned under § 403, art. 23, Code Pub. Gen. Laws 1904, for protection of carrier's property, and who undertakes to enforce its rules, is employe of carrier and acts within scope of his employment in making arrest, held for jury. Tolchester Beach Imp. Co. v. Scharnagl [Md.] 65 A. 916.

14. Not liable for assault committed in selfdefense. Reed v. New York, etc., R. Co., 116 App. Div. 709, 102 N. Y. S. 19. Force exercised on plaintiff, held justified by actual or apparent danger of brakeman from assault by plaintiff. Friar v. Orange & N. W. R. Co. [Tex. Civ. App.] 101 S. W. 274.

15. Where intoxicated passenger on being asked for his pistol which he was brandishing gave it to his wife who placed it under her, brakeman did not commit assault by reaching under her for it. Friar v. Orange, etc., R. Co. [Tex. Civ. App.] 101 S. W. 274. Refusal of passenger to remove tools from aisle of car as required by rule of carrier held not to justify profane and abuse language used by brakeman. Smith v. Atchison, etc., R. Co., 122 Mo. App. 85, 97 S. W. 1007.

16. Colman v. Yazoo, etc., R. Co., [Miss.] 43 So. 473. Liable for insult and assault though provoked by passenger. Danziger v. Interborough Rapid Transit Co., 104 N. Y. S. 845. May be shown in mitigation of damage. Mitchell v. United R. Co., 125 Mo. App. 1, 102 S. W. 661. Unless cooling period has elapsed. Instruction properly refused for failing to limit. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574.

17. Norfolk & W. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879.

18. Grimsley v. Atlantic Coast Line R. Co., 1 Ga. App. 557, 57 S. E. 943. Where carrier knows, or should know, that actions of passenger threaten safety of other passengers, it must exercise highest care to insure safety of such other passengers. McWilliams v. Lake Shore, etc., R. Co., 146 Mich. 216, 13 Det. Leg. N. 722, 109 N. W. 272. Carrier must use highest degree of care, consistent with nature of its business, to maintain such reasonable regulations as will protect passengers against misconduct of fellow passengers which may be anticipated and guarded against. Kuhlen v. Boston, etc., R. Co., 193 Mass. 341, 79 N. E. 815. Failure to protect to full extent of power when he has knowledge of facts requiring interference renders carrier liable. Hillman v. Georgia R. & Banking Co., 126 Ga. 814, 56 S. E. 68.

19. Passengers need not be threatened with "serious" danger to require protection. Hillman v. Georgia R. & Banking Co., 126 Ga. 814, 56 S. E. 68. Fact that abusive passenger desisted upon request is no defense if such request was not timely made. Id.

Held for jury: Whether carrier should have anticipated that intoxicated passenger who had been shooting pistol on train would jump off and shoot into coach. Grimsley v. Atlantic Coast Line R. Co., 1 Ga. App. 557, 57 S. E. 943. Whether conductor who knew that drunken passenger was firing revolver loaded with blank cartridges was required to disarm him or to keep him under surveillance. McWilliams v. Lake Shore, etc., R. Co., 146 Mich. 216, 13 Det. Leg. N. 722, 109 N. W. 272. Negligence of carrier in failing to protect negro from assault in waiting room and on train. McCardell v. Gulf, etc., R. Co. [Tex. Civ. App.] 102 S. W. 941. Whether defendant had exercised reasonable care in protecting its passengers at its station from boisterous and disorderly crowd of students. Kennedy v. Pennsylvania R. Co., 32 Pa. Super. Ct. 623. Held that there was evidence for jury whether carrier should have anticipated injury for crowd rush hour. Kuhlen v. Boston, etc., R. Co., 193 Mass. 341, 79 N. E. 815.

Evidence held to show that altercation must have been heard by conductor and was of nature to require interference. Norfolk & W. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879.

Instruction as to duty to protect passengers from boisterous conduct and obscene and vulgar language, held sufficient. Williams v. St. Louis, etc., R. Co., 119 Mo. App. 663, 96 S. W. 307. As to conductor's duty to interfere in altercation though he believed one participant to be special officer of carrier, held favorable to defendant. Norfolk & W. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879. Duty of carrier to protect passengers from injury by boisterous and disorderly crowd of students, held properly submitted by instructions. Kennedy v. Pennsylvania R. Co., 32 Pa. Super. Ct. 623. Not error to fail to instruct that use of obscene and vulgar language in presence of ladies constitutes misconduct. Williams v. St. Louis, etc., R. Co., 119 Mo. App. 663, 96 S. W. 307. Instruction, in action for assault by baggagemaster, that if plaintiff's brother had assaulted baggagemaster and latter was acting in self-defense, or it reasonably appeared to him that it was necessary to defend himself, etc., held to require too low degree of care. Hartley v. Pecos Valley, etc., R. Co. [Tex. Civ. App.] 103 S. W. 1123.

20. Kuhlen v. Boston, etc., R. Co., 193

is not liable for assaults which could not have thereby been anticipated.[21] Carrier owes no duty to protect passengers from arrest by proper police officers,[22] but an arrest by the conductor without probable cause [23] renders the carrier liable. Carrier must exercise due care to furnish opportunity [24] to passengers to procure food where delayed through its default,[25] and must not knowingly [26] permit a servant afflicted with a contagious disease to expose passengers.[27] While a carrier owes no duty to warn passengers of obvious dangers,[28] it may become its duty to inform them of unusual dangers.[29] Where carrier undertakes to give information, it must do so correctly.[30]

§ 30. *Taking up and setting down passengers. Generally.*[31]—While not an insurer,[32] a carrier owes at least reasonable care,[33] if not the highest degree,[34] to passengers boarding or alighting from its vehicles of transportation upon its invitation.[35]

Mass. 341, 79 N. E. 815. Negligence in failing to provide more men to prevent such crowding as endangered passengers at certain hours, held for jury. Id.

21. Held not liable for injury from wad shot from blank cannon cartridge, such shooting having been going on all day without injury. Ormandroyd v. Fitchburg, etc., R. Co., 193 Mass. 130, 78 N. E. 739. Evidence that person who threw missile into car was standing between tracks near stopping place waving his hands with something in them, held insufficient to take case to jury. Woas v. St. Louis Transit Co., 198 Mo. App. 664, 96 S. W. 1017. Not liable for permitting intoxicated person to board where evidence shows no appearance of intoxication until his fare was demanded. Brehony v. Pottsville Union Trac. Co. [Pa.] 66 A. 1006.

22. Bowden v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 558. Surrender to police officer upon demand of key to closet in which passenger had locked himself, nor delay of train on account of arrest, held not an abetting of his arrest. Id.

23. Fact that one was riding beyond destination and refused to pay fare, held to constitute no offense, and hence arrest therefor was without probable cause. Davis v. Chesapeake & O. R. Co., 61 W. Va. 246, 56 S. E. 400.

24. Fact that opportunity was sufficient to enable ordinary passengers to obtain food is no defense where passenger because of weather was unable to take infant to boarding place. Texas, etc., R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653.

25. Texas, etc., R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653.

26. Evidence held to show that agent had small pox and knew it when he exposed passengers by presenting himself at window to sell tickets. Missouri, etc., R. Co. v. Raney [Tex. Civ. App.] 99 S. W. 589. His knowledge was knowledge of carrier though he was not principal agent at station. Id.

27. Missouri, etc., R. Co. v. Raney [Tex. Civ. App.] 99 S. W. 589.

28. Of space between cars. Hogan v. Boston El. R. Co. [Mass.] 81 N. E. 198. Assent without warning to attempt to change seats by stepping out onto running board, held not negligence where change could be made with safety by use of proper care. Tietz v. International R. Co., 186 N. Y. 347, 78 N. E. 1083.

29. Stage attempting to pass team at dangerous place on mountain road. Dinnigan v. Peterson, 3 Cal. App. 764, 87 P. 218.

30. Where carrier knows of quarantine and undertakes to give information, it is liable for failing to inform as to a quarantine which will interrupt journey. Hasseltine v. Southern R. Co., 75 S. C. 141, 55 S. E. 142.

31. See 7 C. L. 584.

32. Instruction as to duty owed boarding passenger, held not objectionable as placing absolute duty on carrier as matter of law to stop trains reasonably sufficient time to enable passengers to enter cars. Galveston, etc., R. Co. v. Fink [Tex. Civ. App.] 99 S. W. 204.

33. Starting of car. Speer v. West Jersey & S. R. Co. [N. J. Law] 65 A. 896. Ordinary care is such care as person of ordinary prudence would exercise under similar or same circumstances. Chicago Union Trac. Co. v. Hansen, 125 Ill. App. 153. Instruction requiring such care as person of ordinary "skill" would "usually" exercise, held erroneous. Id. Liable if passenger is invited to alight at place more hazardous than that at which car could have conveniently stopped. McGovern v. Interurban R. Co. [Iowa] 111 N. W. 412.

34. Must exercise degree of care of very prudent and cautious person. International, etc., R. Co. v. Tasby [Tex. Civ. App.] 100 S. W. 1030. Under Civ. Code 1895, § 2266, carrier must exercise extraordinary care and diligence in reception of passengers. Georgia R. & Elec. Co. v. Cole, 1 Ga. App. 33, 57 S. E. 1026. Must exercise degree of care which is commensurate with circumstances and danger to be apprehended, and where aged and infirm man notifies conductor as to point at which he wishes to get off, and adds caution against starting car before he is off, more special attention is demanded. Toledo, Bowling Green & So. Trac. Co. v. McFall, 8 Ohio C. C. (N. S.) 271. Instruction that if car was suddenly jerked forward when plaintiff was alighting she could recover, as modified by statement that carriers are not insurers, but owe highest degree of care to deliver safely, held correct. Birmingham R. Light & Power Co. v. King [Ala.] 42 So. 612.

35. Court takes judicial notice that stopping of street car at crossing is special invitation for passengers to board though car is crowded. Baskett v. Metropolitan St. R. Co., 123 Mo. App. 725, 101 S. W. 138. In-

Particular duties.[36]—While a reasonable time to board must be given[37] after the car stops,[38] the conductor cannot assume that no one is boarding because such time has elapsed,[39] but must see that no one is boarding.[40] Such duty, however, does not arise where a passenger attempts to board at an unusual place without the carrier's knowledge.[41] After a passenger has gotten onto the car, it must be held until he has reached a place of safety or started in such manner as not to injure him.[42] While stations must be announced,[43] and, in making such announcements, care must be taken not to mislead a passenger to alight before the train stops,[44] or at the wrong place,[45] no duty is owed to see that a passenger in fact alights.[46] The duty to back train to station to enable one negligently carried by to alight depends upon the circumstances.[47] The train must be stopped[48] with due care[49] at a

struction as to liability for suddenly stopping car, throwing alighting passenger, held not objectionable as imposing duty owed alighting passengers when defendant did not know actually or constructively that one was alighting. Savannah Elec. Co. v. Mullikin, 126 Ga. 722, 55 S. E. 945.

36. See 7 C. L. 585.

37. Johnston v. New York City R. Co., 104 N. Y. S. 1039. Motorman is not negligent in starting car on signal where he does not know that passenger is boarding. Instruction of court excluded negligence of conductor. Egg v. Rochester R. Co., 115 App. Div. 804, 101 N. Y. S. 195.

Negligence in starting car, held for jury. Chicago Union Trac. Co. v. May, 125 Ill. App. 144; St. Louis S. W. R. Co. v. Wainwright [C. C. A.] 152 F. 624.

Evidence held to show negligence. Speer v. West Jersey & S. R. Co. [N. J. Law] 65 A. 896. Where train started as soon as plaintiff, an old and feeble woman, got onto steps. Louisville & N. R. Co. v. Arnold [Ky.] 102 S. W. 322. Where conductor started train knowing that plaintiff intended to board. Arkansas Cent. R. Co. v. Bennett [Ark.] 102 S. W. 198. Testimony that car suddenly started and without warning while plaintiff was attempting to board, and that he was thrown thereby. McLaughlin v. Syracuse Rapid Transit Co., 115 App. Div. 774, 101 N. Y. S. 196.

38. Duty to give person fair and reasonable chance to board does not arise until car has stopped and person is invited to board it. Schwartz v. New York City R. Co., 105 N. Y. S. 1. Negligence of conductor in inviting passenger to board slowly moving train, held properly submitted by instruction. Arkansas Cent. R. Co. v. Bennett [Ark.] 102 S. W. 198.

39. Miller v. Metropolitan St. R. Co., 125 Mo. App. 414, 102 S. W. 592.

40. Where car may be boarded from either side, conductor must look on both sides. Miller v. Metropolitan St. R. Co., 125 Mo. App. 414, 102 S. W. 592.

41. Collins v. Southern R. Co. [Miss.] 42 So. 167. Proof of sudden increase of speed in middle of block, held not to show negligence. Gomez v. New York City R. Co., 105 N. Y. S. 108. Sudden jerk of train while moving, throwing one who was boarding, held not to constitute negligence where crew did not know of plaintiff's position. Winchell v. New York Cent. etc., R. Co., 105 N. Y. S. 425.

42. Miller v. Metropolitan St. R. Co., 125 Mo. App. 414, 102 S. W. 592.

Held negligent in starting car with violent jerk before passenger had time to get off platform into car. Gainesville Midland R. Co. v. Jackson, 1 Ga. App. 632, 57 S. E. 1007. Before woman of excessive obesity and burdened with care of child was seated. Plattor v. Seattle Elec. Co. [Wash.] 87 P. 489. In starting car before plaintiff was seated, she being incumbered with care of child. Hamilton v. Boston, etc., R. Co., 193 Mass. 324, 79 N. E. 734. Where woman seventy-seven years old was thrown by mere starting of car, negligence in starting it before she had reached place of safety, **held for jury.** Morrow v. Brooklyn Heights R. Co., 103 N. Y. S. 998. Proof that decedent who was very feeble fell in car starting apparently in usual way, with something of jerk, held **insufficient** to show negligence. Jameson v. Boston El. R. Co., 193 Mass. 560, 79 N. E. 570.

43. Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P. 207.

44. Held negligent in misleading passengen to believe that train had stopped and in not warning him to contrary. Baltimore & O. S. W. R. Co. v. Mullen, 120 Ill. App. 88.

Instruction approved. Kansas City So. R. Co. v. Davis [Ark.] 103 S. W. 603.

45. Honest mistake of conductor does not excuse carrier from liability for causing passenger to alight at wrong place. Tennessee Cent. R. Co. v. Brasher's Guardian, 29 Ky. L. R. 1277, 97 S. W. 349. Conductor, having contracted to put passenger off at intermediate point, is liable for negligently putting off at different intermediate place. Williamson v. Central of Georgia R. Co., 127 Ga. 125, 56 S. E. 119. One negligently put off at wrong street may recover for illness caused by exposure after leaving car, if she exercised due care. Georgia R. & Elec. Co. v. McAllister, 126 Ga. 447, 54 S. E. 957. Negligence of brakeman in announcing station without giving warning of intermediate stop, night being very dark and rainy and customary lights being out, held for jury. Wolf v. Chicago, etc., R. Co. [Wis.] 111 N. W. 514. Held negligence for trainman to announce station and to say "all change" while train was stopped before reaching platform, knowing that it was liable to start at any time. Wolford v. New York Cent. etc., R. Co., 118 App. Div. 553, 102 N. Y. S. 1008.

46. Chicago & A. R. Co. v. Meyer, 127 Ill. App. 314.

47. Mere fact that conductor did not know of any train following would not justify him in backing train. Louisville & N. R. Co. v. Gaddie [Ky.] 102 S. W. 817.

48. Failing to bring train to full stop, carrier is liable for resulting injuries, es-

reasonably safe place [50] and proper means provided [51] to enable passengers to disembark, and must be held until by the exercise of due diligence they can alight in safety.[52] Conductor may contract to put passenger off at an intermediate point.[53] The carrier, however, has no right to assume that they are off because a reasonable time to alight has been afforded,[54] but must ascertain the fact,[55] looking to both

pecially where speed is suddenly increased while passenger is alighting. Turley v. Atlanta, etc., R. Co., 127 Ga. 594, 56 S. E. 748. Negligence of defendant in directing passenger to alight from moving train, held for jury under proper instructions. St. Louis, etc., R. Co. v. Leamons [Ark.] 102 S. W. 363. Evidence held to sustain finding of negligence. Id.

49. Must anticipate that passenger may attempt to alight after car has so slackened speed as to make it safe to do so. Negligence to suddenly increase speed. Little Rock R. & Elec. Co. v. Doyle, 79 Ark. 379, 96 S. W. 353.

50. Ran by platform and compelled plaintiff to alight at unusual place. Brooks v. Philadelphia & R. R. Co. [Pa.] 66 A. 872. Duty to furnish safe place is not relieved by knowledge on part of passenger that it has not been discharging such duty. McGovern v. Interurban R. Co. [Iowa] 111 N. W. 412.

Held negligence to stop street car on curve so that alighting passengers could step into gutter. Maxwell v. Fresno City R. Co. [Cal. App.] 89 P. 367. To fail to keep street repaired as required by law, and to invite plaintiff to alight at unsafe place without warning. Miller v. International R. Co., 52 Misc. 344, 102 N. Y. S. 254.

Negligence held for jury: In not providing place to alight except on filling between tracks which was about of height of ties and having number of holes. Truesdell v. Erie R. Co., 104 N. Y. S. 243.

Not liable for yielding of ground causing fall, there being nothing to apprise defendant of fact that it was not all right. Rose v. Boston & N. St. R. Co. [Mass.] 80 N. E. 580. Street car company held not liable for condition of street. Stepped into gutter. Thompson v. Gardner, etc., R. Co., 193 Mass. 133, 78 N. E. 854.

51. Negligence held for jury where evidence showed that step of car was seventeen to twenty-one inches from platform and that no step box was furnished though it was dark. Louisville & N. R. Co. v. Mount [Ky.] 101 S. W. 1182.

52. Bell v. Central Elec. R. Co., 125 Mo. App. 660, 103 S. W. 144; Louisville, etc., Trac. Co. v. Leaf [Ind. App.] 79 N. E. 1066.

Carrier must stop reasonable time to allow passenger to alight. Reiss v. Wilmington City R. Co. [Del.] 67 A. 153; Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P. 207. Instruction held to relieve carrier if train was stopped a reasonable time. Louisville R. Co. v. Owens, 29 Ky. L. R. 1294, 97 S. W. 356.

Premature starting may render carrier liable without regard to manner of starting. Choctaw, etc., R. Co. v. Hickey [Ark.] 99 S. W. 839; Southern R. Co. v. Burgess, 143 Ala. 364, 42 So. 35. Starting of car with sufficient force to throw alighting passenger renders carrier liable without regard to whether starting was violent or not. Green v. Metropolitan St. R. Co., 122 Mo. App. 647, 99 S. W. 28. Where impetus of alighting passenger's motion and sudden starting of car carried her off without her volition, it is immaterial whether act of stepping off occurred an instant before or after jerk. Lake St. El. R. Co. v. Craig, 126 Ill. App. 361.

Evidence held to show **negligence as matter of law** in starting car. Pittsburgh R. Co. v. Bloomer [C. C. A.] 146 F. 720.

Held negligence to suddenly start car while passenger is alighting (Ohio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 S. W. 142), under express or implied invitation (Burke v. Bay City Trac. & Elec. Co., 147 Mich. 172, 13 Det. Leg. N. 974, 110 N. W. 524), especially where conductor saw plaintiff (Southern R. Co. v. Dean [Ga.] 57 S. E. 702). To suddenly and violently move train without warning. Louisville & N. R. Co. v. Deason, 29 Ky. L. R. 1259, 96 S. W. 1115. To move train to enable engine to take water. St. Louis S. W. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653.

Evidence held to make question of negligence **for jury.** Quincy Horse R. & Carrying Co. v. Rankin, 123 Ill. App. 472; Illinois Cent. R. Co. v. Downs, 122 Ill. App. 545. Evidence of plaintiff and another that car started before she had time to fully alight and while she was stepping off. Weiller v. New York City R. Co., 51 Misc. 668, 100 N. Y. S 1011. Evidence that plaintiff who had stepped down onto steps of car as it slowed down was thrown therefrom by jerk, though there was no evidence that jerk was unusual. Louisville R. Co. v. Williams, 30 Ky. L. R. 493, 99 S. W. 245. Starting of elevated train while plaintiff was moving toward door, in view of Railroad Law, Laws 1890, p. 1126, c. 565, § 138, providing that such trains shall not start until every passenger who has manifested intention to alight has done so. Frauhauf v. Interborough Rapid Transit Co., 52 Misc. 135, 101 N. Y. S. 781. Evidence that conductor started car with knowledge that thirteen year old child was alighting and was burdened with heavy bundle, held to make question of **gross negligence** for jury. Louisville R. Co. v. Owens, 29 Ky. L. R. 1294, 97 S. W. 356. Evidence that engineer suddenly and violently backed train without warning at place where passengers might be alighting, held **evidence of wantonness.** Hiers v. Atlantic Coast Line R. Co., 75 S. C. 311, 55 S. E. 457.

53. Williamson v. Central of Georgia R. Co., 127 Ga. 125, 56 S. E. 119.

54. Murphy v. Metropolitan St. R. Co., 125 Mo. App. 269, 102 S. W. 64; Bell v. Central Elec. R. Co., 125 Mo. App. 660, 103 S. W. 144; Green v. Metropolitan St. R. Co., 122 Mo. App. 647, 99 S. W. 28. While not bound to see that passenger has in fact alighted, carrier is not justified in starting after having merely waited a reasonable time. Millmore v. Boston El. R. Co. [Mass.] 80 N. E. 445.

55. Louisville R. Co. v. Pulliam, 30 Ky. L. R. 1325, 101 S. W. 295; Snipes v. Norfolk & So. R. Co. [N. C.] 56 S. E. 477. No excuse

sides of the car if passengers may so alight.[56] On the other hand, passengers must make known their intention to alight.[57] Where stop is made at an unusual place to permit passengers to alight [58] or the carrier has knowledge that they frequently alight, or are in fact alighting,[59] thereat, it must exercise the same care as at regular stopping places, though such stop is in violation of a rule [60] or an ordinance.[61] While a carrier owes no general duty to assist passengers to board or to alight, such duty may arise under special circumstances,[62] as where the passenger is physically weak,[63] or the steps unusually dangerous,[64] and, where it unnecessarily undertakes to render assistance, it must exercise due care.[65] Carrier owes no duty to observe passenger's condition to ascertain whether he needs assistance.[66] Where a passenger is in a helpless condition, he must not only be assisted from the train but must be taken to a place of safety.[67] While a carrier need not warn as to dangers generally known,[68] in the absence of special circumstances,[69] its high duty as a carrier

that he was engaged in car. Hurley v. Metropolitan St. R. Co., 120 Mo. App. 262, 96 S. W. 714. It is duty of brakeman on elevated road to know whether passengers are attempting to alight when he closes gate. McGarry v. Boston El. R. Co. [Mass.] 81 N. E. 194. Words "not knowing" or "having no reasonable grounds to suspect" or "knew" or "know" or "had reasonable grounds to suspect," held legal equivalents when used in instructions relating to knowledge or want of knowledge on part of conductor that passenger was boarding when he started train. Choctaw, etc., R. Co. v. Hickey [Ark.] 99 S. W. 839.

56. Especially where passengers are in habit of boarding on wrong side. Costello v. St. Louis Transit Co., 119 Mo. App. 391, 96 S. W. 425.

Held negligent in not ascertaining whether people were alighting from side away from station, conditions being same on each side, and people being in habit of so alighting. Hodges v. Southern Pac. Co., 3 Cal. App. 307, 86 P. 420.

57. Plaintiff's conduct in arising from her seat, but without attempting to get down to running board or to give signal, held insufficient to charge conductor with notice of intention to alight. Keenan v. Metropolitan St. R. Co., 118 App. Div. 56, 103 N. Y. S. 61.

58. Murphy v. Metropolitan St. R. Co., 125 Mo. App. 269, 102 S. W. 64.

59. Irrespective of reason of stop. Parks v. St. Louis Transit Co., 119 Mo. App. 445, 96 S. W. 426. Stop before crossing railroad tracks. Thomas v. Philadelphia Rapid Transit Co. [Pa.] 67 A. 207. Switch stop. South Covington & C. St. R. Co. v. Core, 29 Ky. L. R. 836, 96 S. W. 562.

60. Dreyfus v. St. Louis & S. R. Co., 124 Mo. App. 585, 102 S. W. 53.

61. Habitually so stopped. Parks v. St. Louis Transit Co., 119 Mo. App. 445, 96 S. W. 426.

62. Having failed to furnish suitable platform and to properly light grounds, and having permitted steps to become icy, negligence in failing to assist passengers to board, held for jury. Ft. Worth, etc., R. Co. v. Work [Tex. Civ. App.] 100 S. W. 962.

Held negligence to fail to assist passenger incumbered with bundles where step was twenty-five or thirty inches from platform. St. Louis S. W. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653.

63. Carrier accepting passenger known to be physically incapable of caring for himself must render such special assistance as his condition requires. Williams v. Louisville & N. R. Co. [Ala.] 43 So. 576. In action for wrongful treatment of plaintiff and invalid daughter, instruction that carrier owed duty of exercising such degree of care as would reasonably insure safety of passengers in view of physical condition, held proper and not objectionable as making carrier insurer. Gulf, etc., R. Co. v. Coppwood [Tex. Civ. App.] 16 Tex. Ct. Rep. 354, 96 S. W. 102. Where conductor failed to discover one-armed man's condition through indifference as to who passenger might be, such fact may be considered in determining whether failure to observe his condition was willful. Talbert v. Charleston & W. C. R. Co., 75 S. C. 136, 55 S. E. 138. Evidence that defendant's servants saw plaintiff, an old and feeble woman, with one arm in sling and heavy telescope in other hand, held to authorize submission of negligence in failing to assist her to board. Louisville & N. R. Co. v. Arnold [Ky.] 102 S. W. 322.

64. Negligence in failing to assist young robust woman to alight from slippery steps, held for jury. San Antonio Trac. Co. v. Flory [Tex. Civ. App.] 100 S. W. 200.

65. Liable for negligence. Williams v. Louisville & N. R. Co. [Ala.] 43 So. 576; Hanlon v. Central R. Co. [N. Y.] 79 N. E. 846.

66. Instruction that it was duty to assist if passenger's feebleness was "apparent," held erroneous. Illinois Cent. R. Co. v. Cruse, 29 Ky. L. R. 914, 96 S. W. 821.

67. Negligence in leaving intoxicated passenger near top steps of station platform, held for the jury. Black v. New York, etc., R. Co., 193 Mass. 448, 79 N. E. 797. Where at transfer point conductor took drunken but not helpless passenger to safe place and told him to remain there, it fully discharged duty owed him. Thixton's Ex'r v. Illinois Cent. R. Co., 29 Ky. L. R. 910, 96 S. W. 548.

68. Existence of gutter similar to those generally maintained. Thompson v. Gardner, etc., R. Co., 193 Mass. 133, 78 N. E. 854.

69. Where passenger followed conductor out onto platform after he announced station and passed down onto steps, held that it became duty to warn her that train had not stopped, it being dark and car moving smoothly. Blue Grass Trac. Co. v. Skillman [Ky.] 102 S. W. 809.

may require it to give warnings[70] of special and unusual dangers.[71] It is not negligence to back into station where passengers are warned.[72]

§ 31. *Duties to persons other than passengers.*—These generally are employes[74] or licensees, trespassers, and strangers.[75] Where one boards a train to assist a passenger with the knowledge of the carrier,[76] the latter must afford him a reasonable opportunity to alight,[77] but such person must exercise due diligence and care for his own safety.[78] A carrier owes to one transported in a private car the duty of reasonable care.[79] Carrier owes same duty to mail clerk to provide suitably heated cars as to ordinary passengers.[80] By statute in Pennsylvania a sleeping car conductor assumes all the risks of an employe.[81]

§ 32. *Remedies and procedure.*[82]—Suit may be brought in the county where the cause of action accrues,[83] and must be timely instituted.[84] Where the carrier defaults in respect to a duty imposed by law as well as by contract, recovery may be had in an action ex delicto or ex contractu.[85] Trespass lies for wrongful ejectment.[86] Attorney's fees may be recovered against carriers under the statutes of some states.[87]

70. Where warning was almost simultaneous with starting of car and too short to be of avail, it does not constitute notice, and instruction may assume that no notice was given. Green v. Metropolitan St. R. Co., 122 Mo. App. 647, 99 S. W. 28. Warning given in such manner as would naturally be heard by one paying ordinary attention to what was going on about him is sufficient. Wertheimer v. Interborough Rapid Transit Co., 52 Misc. 540, 102 N. Y. S. 706.

71. Negligence held for jury in failing to adopt means to prevent alighting from wrong side or to give warning. Ruffin v. Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86. Failure to warn passenger that car was on wrong track, and hence to guard against trolley poles while on running board. Indianapolis Trac. & T. Co. v. Richey [Ind. App.] 80 N. E. 170. In backing into station at night, contrary to custom until shortly prior thereto, without warning against alighting on wrong side. Ruffin v. Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86. Where train has stopped reasonable time to allow passengers to alight, carrier owes no duty to give warning of starting unless it knows that passengers are alighting. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128. General instruction that it is negligence to start without warning held erroneous. Id.

72. Alighted on wrong side. Ruffin v. Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86.

73. See 7 C. L. 587.

74. See Master and Servant, 8 C. L. 840.

75. See Railroads, 8 C. L. 1590; Street Railways, 8 C. L. 2004.

76. Evidence that plaintiff told conductor of passenger's need of assistance and had been requested to assist her, held to show knowledge that plaintiff intended to alight. Southern R. Co. v. Patterson [Ala.] 41 So. 964.

Evidence held not to show knowledge. Louisville & N. R. Co. v. Wilson, 30 Ky. L. R. 1055, 100 S. W. 290. Fact that ticket agent knew that plaintiff purchased half-fare ticket for child with her, but did not purchase one for herself, and that she stated that she was sending children to their mother, held insufficient to charge him with notice that she was going aboard train to assist them. Id.

77. Southern R. Co. v. Patterson [Ala.] 41 So. 964. Must hold train until such person in exercise of reasonable care can alight in safety. Bond v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30.

78. Held not negligent as matter of law in alighting from starting train. Southern R. Co. v. Patterson [Ala.] 41 So. 964. Held guilty of negligence in rushing out onto platform in such haste as not to be able to stop on discovering that train was moving too fast to alight therefrom. Louisville & N. R. Co. v. Edmondson [Ga.] 57 S. E. 877.

79. Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636. Evidence that cars were backed into private car with such force as to demolish platform of caboose, held to show negligence. Id.

80. Lindsey v. Pennsylvania R. Co., 26 App. D. C. 503. U. S. Rev. St. § 4002, 4005 (U. S. Comp. St. 1901, pp. 2719, 2723), imposes duty upon carriers to properly heat postal cars, and any clerk injured by failure so to do may maintain action. Id.

81. Under Act Pa. April 4, 1868, no recovery can be had for death resulting from negligence of trainmen in operation of train. Scott v. Pennsylvania Co., 151 F. 931.

82. See 7 C. L. 587.

83. Where passenger boarded train in Tennessee, but on account of crowd was unable to get into train, and after passing over line into Georgia was pushed from car by one thrown against him by sudden jerk of car, the cause of action occurred in latter state. Parris v. Atlanta, etc., R. Co. [Ga.] 57 S. E. 692. See Venue and Place of Trial, 8 C. L. 2236.

84. Action for ejection is not within Kirby's Dig. § 5065, requiring actions for assault and battery to be brought within one year but within § 5064, prescribing three years' limitation for all other actions on case. St. Louis, etc., R. Co. v. Mynott [Ark.] 102 S. W. 380.

85. Both actions available: Negligent failure to stop for passenger. Williams v. Carolina, etc., R. Co. [N. C.] 57 S. E. 216. Negligently issued invalid transfer subsequently dishonored. Montgomerry Trac. Co. v. Fitzpatrick [Ala.] 43 So. 136. Smallpox patient

Pleading.[88]—The general rules of pleading apply.[89] The petition must be definite and certain[90] and allege the place of accident,[91] the relation of carrier and passenger,[92] a direct averment being sufficient,[93] and that plaintiff was on a car used for passengers[94] and under the control of defendant.[95] The complaint must specify wherein defendant was negligent,[96] and, while an allegation of negligence on

being transported under contract between carrier and county court may sue on such contract or in tort for breach of duty arising from relation of passenger and carrier. Jenkins v. Chesapeake & O. R. Co., 61 W. Va. 597, 57 S. E. 48.

Construed as ex delicto: Action for injuries resulting from negligent delay. Gulf, etc., R. Co. v. Redeker [Tex. Civ. App.] 100 S. W. 362. Petition construed ex delicto, purchase of ticket, paying of passage, and delivery of ticket to carrier being alleged to show duty. King v. Southern R. Co. [Ga.] 57 S. E. 507.

86. Fact servants were authorized to make ejectment does not make their acts lawful as far as they are concerned so as to render case, and not trespass, proper. Chicago Union Trac. Co. v. Brethauer, 125 Ill. App. 204.

87. In action based on common-law negligence, attorney's fees cannot be recovered under statute authorizing such recovery for violation of any law regulating transportation of freight or passengers, such act being valid only as to violations of statutory law. St. Louis, etc., R. Co. v. Knight [Ark.] 99 S. W. 684.

88. See 7 C. L. 588.

89. Complaint for premature starting of car, held not demurrable on ground that averments were not alleged as facts. Birmingham R., Light & Power Co. v. Moore [Ala.] 43 So. 841. Complaint for premature starting of car, held not demurrable as joining count in trespass with one in case. Id.

90. Allegation that "in her attempts to get out of place where defendant had carelessly and negligently left her she fell into hole, badly wrenching her side and back, causing her great pain and suffering," held indefinite and uncertain. Waldrup v. Central of Georgia R. Co., 127 Ga. 359, 56 S. E. 439. Complaint that when plaintiff stepped down onto step to alight motorman negligently started car, thereby precipitating plaintiff into street, held sufficiently specific without alleging whether car had come to full stop. Louisville & S. I. Trac. Co. v. Leaf [Ind. App.] 79 N. E. 1066. Complaint held not objectionable as vague and uncertain. Birmingham R., Light & Power Co. v. King [Ala.] 42 So. 612. Premature starting of car. Birmingham R., Light & Power Co. v. Moore [Ala.] 43 So. 841.

91. Allegation that plaintiff was injured while on defendant's car, which operated its cars in city of Birmingham, is sufficient, since court will take judicial notice that city is wholly within Jefferson County. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 So. 1024.

92. Averments held sufficient: To show acceptance as passenger. Williams v. Louisville & N. R. Co. [Ala.] 43 So. 576. Positive averment as well as facts alleged. Birmingham R., Light & Power Co. v. Wise [Ala.] 42 So. 821. Allegations that, on certain day, plaintiff purchased a ticket entitling him to ride as passenger between certain points, and that he boarded train at one point to go to other, etc. Pittsburgh, etc., R. v. Haislup [Ind.] 79 N. E. 1035.

93. Need not allege evidentiary facts establishing relation, as payment of fare, etc. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978.

94. Allegations of equipment of car, and that it was known as summer or open car, held to sufficiently aver that it was one used for passengers. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978. Where petition fails to show whether plaintiff was passenger on freight or passenger train, defendant is entitled to information thereon upon special demurrer. Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006.

95. Allegation that road was being operated by defendant, and that car was "one of the defendant's road," held to sufficiently allege that car was under control of defendant. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978.

96. Particular averments held sufficient: That defendant while running car at rate of six miles per hour suddenly stopped it so as to cause violent and sudden shock sufficient to throw plaintiff from car. Latimer v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 1102. General allegation that defendant through its servants so carelessly and improperly ran, managed and operated its car that collision occurred. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 N. E. 1049. That banana peel was left on steps of car for more than an hour, and that by exercise of ordinary care defendant might have discovered and removed same. Pittsburgh, etc., R. Co. v. Rose [Ind. App.] 79 N. E. 1094. Allegation of derailment of train sufficiently charges negligence without averment of cause thereof. Galveston, etc., R. Co. v. Gracia [Tex. Civ. App.] 100 S. W. 198. That collision occurred wholly on account of negligence of defendants in construction, equipment, operation, and control of railroad and trains thereon, sufficiently charges each act of negligence. New York, etc., R. Co. v. Callahan [Ind. App.] 81 N. E. 670. That defendant so negligently conducted itself that, while plaintiff was alighting, train was jolted and plaintiff caused to fall, under Code 1896, § 3285. Southern R. Co. v. Burgess, 143 Ala. 364, 42 So. 35. In action for injuries from shock received from electric plate in floor of car, allegation that shock was caused by negligence of defendant in negligently constructing, maintaining, and operating train. McRae v. Metropolitan St. R. Co., 125 Mo. App. 562, 102 S. W. 1032. Under Code 1896, § 3441, requiring street cars to stop before crossing railroad tracks, and not to proceed until the way is known to be clear, allegation that operatives of car negligently ran same on railroad crossing without first knowing that track was clear is not objectionable as insufficient attempt to particularize defendant's negligence. Montgomery St. R. Co. v. Lewis

the part of the carrier is sufficient to embrace negligence of servants,[97] yet if plaintiff attempts to aver negligence on the part of the latter, he must allege the relationship [98] and that they were acting within the scope of their employment.[99] While a designation of a servant's official capacity is sufficient without naming him,[1] yet, where notice to an agent is charged, he must be so designated as to show his authority to receive the same.[2] An accepted ticket in an action ex delicto need not be described with particularity.[3] In an action for forcible ejectment, it must appear that the departure was not voluntary,[4] and in all actions that the carrier's default was the proximate cause of the injury complained of.[5] That the car stopped at a regular stopping place to permit plaintiff to alight,[6] and that others were present when the insulting language was used by the conductor toward plaintiff,[7] may be shown though not alleged. The sufficiency [8] and construction [9] of particular pleadings are treated in the notes.

[Ala.] 41 So. 736. In action for injuries received in collision between car and wagon driven through wall parallel with track, allegations that such opening was connected with street, and that "long prior to, and at the time and place in question, said opening and roadway was used by teams and wagons," held to sufficiently allege duty to protect plaintiff where objection is raised by motion in arrest of judgment. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 N. E. 1049.

Held insufficient: General averment that defendant was moving car negligently and carelessly, thereby throwing plaintiff, etc. Riedel v. Wilmington City R. Co., 5 Pen. [Del.] 572, 64 A. 257.

97. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 So. 1024.

98. Held to sufficiently allege relation of master and servant between carrier and motorman and conductor. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978.

99. Held sufficient. Birmingham R., Light & Power Co. v. King [Ala.] 42 So. 612. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978. To show that servants were acting within scope of authority in assisting plaintiff to board. Williams v. Louisville & N. R. Co. [Ala.] 43 So. 576. Alleging that "defendant by and through its servants" in charge of the car negligently ran it on the railroad track and collided with a freight car thereon, etc., sufficiently charges that defendant's servants had charge of car and were acting within line of their duty. Indianapolis Trac. & T. Co. v. Formes [Ind. App.] 80 N. E. 872. Under Rev. St. 1887, § 4168, subd. 2, allegation that wrongful acts were committed by brakeman, agent and employe of defendant without alleging that he acted within scope of his authority. Lindsay v. Oregon Short Line R. Co. [Idaho] 90 P. 984.

1. Allegation that plaintiff was ejected by conductor on certain car. Montgomery Trac. Co. v. Fitzpatrick [Ala.] 43 So. 136.

2. Allegation that agent's attention was called to improperly heated condition without specifying what agent or whether he was connected with operation of train is open to special demurrer. Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006.

3. As to dates, conditions, etc., printed thereon. King v. Southern R. Co. [Ga.] 57 S. E. 507.

4. Allegations that defendant by its servants wrongfully and purposely assaulted plaintiff and ejected him from car, and in so doing he was thrown from and run over by car and received injuries, set out in detail, held to sufficiently allege forcible ejection and injury. Pittsburgh, etc., R. Co. v. Halslup [Ind.] 79 N. E. 1035.

5. Riedel v. Wilmington City R. Co., 5 Pen. (Del.) 572, 64 A. 257. Complaint held to sufficiently allege that negligence of servants was proximate cause of plaintiff's injuries. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978.

6. Murphy v. Metropolitan St. R. Co., 125 Mo. App. 269, 102 S. W. 64.

7. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574.

8. Petitions held sufficient: To state cause of action for being wantonly pushed from moving car by carrier's employe. Primus v. Macon R. & Light Co., 126 Ga. 667, 55 S. E. 924. To state cause of action for sudden starting of train while slowing down at station. Southern R. Co. v. Hundley [Ala.] 44 So. 195. Charging negligence in moving train while plaintiff was alighting and in failing to assist her. St. Louis S. W. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653. Alleging relation of carrier and passenger, and injury by operation of locomotive while plaintiff was standing on edge of station platform. Georgia R. & Banking Co. v. Adams, 127 Ga. 408, 56 S. E. 409. Averment that defendant's servant while acting within scope of his authority wantonly or intentionally prevented plaintiff from boarding car aforesaid, it being theretofore alleged that plaintiff was not given reasonable time or opportunity to board, is good as against demurrer that it does not show that injury was wantonly or intentionally "inflicted." Birmingham R., Light & Power Co. v. Wise, [Ala.] 42 So. 821. Allegation of negligence "in the construction, maintenance, and operation of said line and car," held sufficient to admit evidence of excessive speed. Baskett v. Metropolitan St. R. Co., 123 Mo. App. 725, 101 S. W. 138.

9. Gravamen of cause of action, held to be negligent delay, and not failure to hear freight car. Green v. Missouri, etc., R. Co., 121 Mo. App. 720, 97 S. W. 646. Petition construed to charge negligence in prematurely starting car, and negligence in failing to timely stop same after discovering plaintiff's position (Foland v. Southwest. Mo. Elec. R. Co., 119 Mo. App. 284, 95 S. W. 958), and instruction submitting both questions of

In actions ex delicto, a plea of not guilty does not put in issue the relation of carrier and passenger.[10] The general issue in case for injuries does not put in issue the ownership of the track or operation of the car,[11] and special pleas charging negligence on the part of plaintiff may be so worded as to amount to the general issue.[12]

The general rules respecting amendments apply,[13] and in Alabama the form of the action may be changed thereby so long as the amendment relates to the same transaction.[14]

Issues, proof and variance.[15]—Plaintiff must prove by a preponderance of the evidence[16] all allegations put in issue unless they are immaterial,[17] mere matters of inducement,[18] or such as come within judicial notice,[19] it being sufficient.

negligence, held correct, and other instructions properly modified so as to authorize recovery on either (Id.). Petition and amended petition, held to state but single cause of action, for execution with unnecessary force, and hence motion to compel election between actions for ejectment and assault and battery was properly overruled. Louisville & N. R. Co. v. Fowler, 29 Ky. L. R. 905, 96 S. W. 568. Allegation that "before he (plaintiff) could ascend said steps and enter car the engineer was signaled to go ahead, and the train started before he could get on said car," held on demurrer not to allege that car was moving when plaintiff started to get on. Galveston, etc., R. Co. v. Fink [Tex. Civ. App.] 99 S. W. 204. Complaint alleging that plaintiff became passenger on defendant's car, and that defendant's servants without cause assaulted him, etc., held to allege breach of contract to carry safely, and not assault, and hence municipal court of city of New York had jurisdiction. Schwartz v. Interborough Rapid Transit Co., 53 Misc. 289, 103 N. Y. S. 80. Declaration construed as alleging negligence in causing collision as well as in running at high rate of speed. Chicago City R. Co. v. Pural, 127 Ill. App. 652, afg. 224 Ill. 324, 79 N. E. 686 Under allegation that trapdoor was rotten, worn, loose, and unfit for use, plaintiff is not confined to proof of rottenness. Jorden v. St. Louis, etc., R. Co., 122 Mo. App. 330, 99 S. W. 492. In action by mail clerk for personal injuries, contract between defendant and United States for carrying of mail, held admitted by pleadings. Decker v. Chicago, etc., R. Co. [Minn.] 112 N. W. 901. Where complaint alleged willful and reckless failure to furnish transportation, and that plaintiff was ejected, and that ejectment was due to willful and reckless conduct, latter words refer to conduct other than failure to transport. Bussey v. Charleston, etc., R. Co., 75 S. C. 116, 55 S. E. 163. Complaint held not to affirmatively show contributory negligence of plaintiff in being on platform preparatory to alighting. Southern R. Co. v. Hundley [Ala.] 44 So. 195.

10. Being matter of mere inducement, special plea is necessary to put in issue. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318.

11. Hill v. Chicago City R. Co., 126 Ill. App. 152.

12. Pleas that injury was caused entirely by fault, negligence, and carelessness of plaintiff, and by no negligence of defendant simply amounts to general issue. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Answer averring that plaintiff carelessly and negligently stepped from moving car and was proximately injured thereby, etc., held to be special answer to plaintiff's allegations that he was injured by starting of car while alighting, and not plea of contributory negligence. Lincoln Trac. Co. v. Brookover [Neb.] 109 N. W. 168.

13. Where complaint for wrongful ejection alleges that plaintiff was passenger, it is not abuse of judicial discretion to deny motion under Rev. St. 1892, § 1043, for compulsory amendment stating "whether plaintiff was on such train as passenger by being holder of a ticket purchased." Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706.

14. Count for intelligently issuing torn transfer added to count for wrongful ejectment. Montgomery Trac. Co. v. Fitzpatrick [Ala.] 43 So. 136.

15. See 7 C. L. 590.

16. Not beyond reasonable doubt in personal injury action. Chicago Consol. Trac. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820. Slight preponderance is sufficient. Chicago, etc., R. Co. v. Smith, 124 Ill. App. 627. Instruction to find for plaintiff if she has proved her case as laid in declaration by preponderance of evidence approved. Springfield Consol. R. Co. v. Farrant, 121 Ill. App. 416. Penalty under Railroad Law, Laws 1890, pp. 1096, 1113, 1114, c. 565, need not prove case beyond reasonable doubt. Kerin v. New York City R. Co., 53 Misc. 536, 103 N. Y. S. 769. Plaintiff held too uncertain as to date of refusal of transfer to authorize judgment for him. Meyers v. New York City R. Co., 103 N. Y. S. 767.

17. Held immaterial: In action for negligently carrying plaintiff beyond destination, allegation that she was stranger in city. Henderson v. Metropolitan St. R. Co., 123 Mo. App. 666, 100 S. W. 1111. In action for negligence in failing to have stepbox for alighting passengers, allegation that it was customary to have such box at such station. Selman v. Gulf, etc., R. Co. [Tex. Civ. App.] 101 S. W. 1030. In action for negligently carrying plaintiff beyond destination, allegation that she was carried to car barn. Henderson v. Metropolitan St. R. Co., 123 Mo. App. 666, 100 S. W. 1111.

18. In action for sudden starting of car while plaintiff was alighting, allegations that car had stopped or was running so slow as to be almost stopped, held mere inducements. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 S. W. 142.

19. Courts will take judicial notice that

however, to prove the gravamen of the negligence alleged.[20] Recovery must be had on the particular contract[21] or negligence[22] alleged, although if several acts of negligence are averred only one need be proven[23] though charged conjunctively,[24] unless they constitute a "compound plea."[25] As in actions generally, there must be no fatal variance between the allegations and proof,[26] but this does not require the proof of all negligent acts pleaded.[27]

railway under laws of state is common carrier of passengers. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978.

20. In action for injuries due to starting car before passenger had reached place of safety, proof that it was started with jerk as alleged is not essential. Morrow v. Brooklyn Heights R. Co., 103 N. Y. S. 998. Failure to prove wreck is not fatal where gist of negligence alleged was collision, and no injuries are attributed to wreck. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 So. 1024. Allegation that "engine was running at high and dangerous rate of speed, to wit: At rate of twenty miles per hour," is supported by evidence showing negligent speed though it was not twenty miles per hour. Georgia R. & Banking Co. v. Adams, 127 Ga. 408, 56 S. E. 409. Allegation of negligence in starting stationary car is supported by proof of sudden increase from movement so slow as not to enhance danger of alighting. Green v. Metropolitan St. R. Co., 122 Mo. App. 647, 99 S. W. 28. Charge that plaintiff was induced by "conductor" to alight at wrong station is supported by proof that she was so induced by flagman assisting conductor. Ford v. Southern R. Co., 75 S. C. 286, 55 S. E. 448. In action for forcible ejectment, failure to prove rate of speed alleged is not a variance. Chicago Union Trac. Co. v. Brethauer, 223 Ill. 521, 79 N. E. 287.

21. Jenkins v. Chesapeake & O. R. Co., 61 W. Va. 597, 57 S. E. 48. Petition declaring on special contract between plaintiff and defendant is not supported by proof of contract between county court and defendant or by implied contract of carriage. Id.

22. Reiss v. Wilmington City R. Co., [Del.] 67 A. 153; Hall v. Northern Pac. R. Co. [N. D.] 111 N. W. 609. Where declaration charges specific acts of negligence, they must be established. Chicago Union Trac. Co. v. Leonard, 126 Ill. App. 189. Instruction limiting recovery thereto, erroneously refused. St. Louis S. W. R. Co. v. Johnson [Tex.] 17 Tex. Ct. Rep. 167, 97 S. W. 1039. Instruction construed as limiting recovery to negligence alleged. Chicago Union Trac. Co. v. Lowenrosen, 222 Ill. 506, 78 N. E. 813. Instruction held not objectionable as authorizing recovery on negligence not charged. Chicago Union Trac. Co. v. Lowenrosen, 125 Ill. App. 194.

23. Where severable. Galveston, etc., R. Co. v. Patillo [Tex. Civ. App.] 101 S. W. 492. Averments that collision occurred by reason of negligence of defendant in construction, equipment, operation, and control of railroad and trains thereon are not joint. New York, etc., R. Co. v. Flynn [Ind. App.] 81 N. E. 741; New York, etc., R. Co. v. Callahan [Ind. App.] 81 N. E. 670. Charge of negligence in keeping and maintaining unsafe and dangerous roadbed and track and in negligent operation of train is general and admits proof of any specific negligence which makes track unsafe or which shows negligent operation of train. Mefford v. Missouri, K. & T. R. Co., 121 Mo. App. 647, 97 S. W. 602. Where petition charges failure to stop as gravamen of action and other acts of negligence as merely subsidiary and was so treated and understood by jury, instruction that plaintiff must prove negligence in manner as charged does not require plaintiff to prove all. De Castillo v. Galveston, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 481, 95 S. W. 547.

24. Houston, etc., R. Co. v. Easton [Tex. Civ. App.] 97 S. W. 833.

25. Plea that plaintiff alighted "in an improper manner and at an improper time and place." Southern R. Co. v. Burgess, 143 Ala. 364, 42 So. 35. Where it is alleged that, having failed to provide suitable platform, and having failed to have platform properly lighted, and having permitted steps of coach to become icy it was negligence not to have some one to assist passengers to board, it was error to submit as independent negligence failure to give assistance. Ft. Worth, etc., R. Co. v. Work [Tex. Civ. App.] 100 S. W. 962.

26. Variance held fatal between allegation: That plaintiff was thrown by starting of train and proof that he was thrown or fell after it had moved 300 yards and attained speed of 15 miles an hour. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222. That negligent jerk occurred while standing on platform and proof that it happened while she was stepping to ground. Southern R. Co. v. Hundley [Ala.] 44 So. 195. That negligent jerk occurred before train came to standstill and proof of sudden start after it had fully stopped. Id. Of refusal of transfer by conductor on Dec. 7 and proof of refusal by transfer agent on street on July 7. Stevenson v. New York City R. Co., 104 N. Y. S. 866. Of duty owed passenger and proof of duty owed in another capacity. Chicago Union Trac. Co. v. Lowenrosen, 125 Ill. App. 194. Petition alleging negligence on part of servants in charge of car on which plaintiff was passenger is not supported by proof of negligence of crews of another car in trying to get it on track. Coyne v. United R. Co., 121 Mo. App. 114, 98 S. W. 110. Where declaration charges violent and forcible ejectment and directions to alight at unsafe place, negligence in failing to see that plaintiff got off at his destination cannot be shown. Chicago & A. R. Co. v. Meyer, 127 Ill. App. 314. Where plaintiff pleads implied contract of carriage, provisions of actual contract are not available though admitted without objection. Seaboard Air Line R. v. Friedman [Ga.] 57 S. E. 778.

No fatal variance between allegation: That car stopped at certain street, proof that it stopped on south side thereof though north side was usual stopping place. Chicago City R. Co. v. Foster, 226 Ill. 288, 80 N. E. 762. That plaintiff fell into hole in floor while

Presumptions and burden of proof.[28]—The burden is on plaintiff to establish the relation of carrier and passenger[29] and to prove negligence on the part of the former,[30] while that of showing contributory negligence[31] and excusing a breach of the contract of carriage is usually on the carrier.[32] In some states, however, a presumption of negligence arises from injury while a passenger,[33] especially where due to the operation of the train,[34] and under the doctrine of res ipsa loquitur a presumption arises where the accident is one which in the ordinary course of affairs would not have happened except for negligence[35] and where

walking down aisle and proof that her movement was affected by sudden starting of car. Cameron v. Citizens' Trac. Co., 216 Pa. 191, 65 A. 534. That floor of car was defective and proof of defective trapdoor therein. Jorden v. St. Louis, etc., R. Co., 122 Mo. App. 330, 99 S. W. 492. That "just as soon as train came to full stop" plaintiff boarded and before she could reach seat it was started with sudden and violent jerk, etc., and proof that she boarded before train came to full stop. Feagin v. Gulf, etc., R. Co. [Tex. Civ. App.] 100 S. W. 346. That when plaintiff struck ground he was shocked and shaken out of his senses and proof that he spoke few words after falling and then lapsed into unconsciousness. International, etc., R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000. That "after having paid his fare the passenger demanded a transfer" and proof that such demand was made "at the time he paid his fare." Wasserman v. New York City R. Co., 104 N. Y. S. 398. Where negligence charged was shoving of plaintiff off train by porter, plaintiff was not limited on proof as to effects of injuries to precise language of complaint. International, etc., R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000.

27. As that brakeman left door open after announcing station, it being only one of acts alleged as inducing plaintiff to believe that station had been reached. Wolf v. Chicago & N. W. R. Co. [Wis.] 111 N. W. 514.

28. See 7 C. L. 591.

29. Injured while attempting to board. Alabama City, etc., R. Co. v. Bates [Ala.] 43 So. 98.

30. Reiss v. Wilmington City R. Co. [Del.] 67 A. 153. Where plaintiff alleges that defendant negligently started car before he had alighted, and defendant answered specially averring that plaintiff jumped off before car came to stop, instruction that burden was on defendant to prove that plaintiff stepped from moving car, etc., held erroneous. Lincoln Trac. Co. v. Brookover [Neb.] 109 N. W. 168.

31. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128. See Negligence, 8 C. L. 1090. Instruction to find for carrier unless they believe that decedent was free from negligence, held erroneous as placing burden of proof on plaintiff to disprove contributory negligence. Selman v. Gulf, etc., R. Co. [Tex. Civ. App.] 101 S. W. 1030. Where defendant's answer particularized contributory negligence, instruction that, if such negligence contributed so directly to accident as alleged by defendant in its answer, and but for his own negligence he would not have been injured, defendant was not liable, held not to impose too great a burden on defendant. El Paso Electric R. Co. v. Kitt [Tex. Civ. App.] 99 S. W. 587.

32. Thus, where passenger was thrown by opening of gate, question being whether it was insecurely fastened or was opened by passenger, carrier has burden. Spurlock v. Shreveport Trac. Co., 118 La. 1, 42 So. 578.

33. Washington, etc., R. Co. v. Chapman, 26 App. D. C. 472. Fell while alighting. Kehan v. Washington R. & Elec. Co., 28 App. D. C. 108; Georgia R. & Banking Co. v. Adams, 127 Ga. 408, 56 S. E. 409.

34. Kirby's Deg. § 6773, is not limited to injuries arising from failure to keep vigilant lookout, but applies to all injuries due to operation of train. Kansas City So. R. Co. v. Davis [Ark.] 103 S. W. 603. Where passenger was mislead by carrier in supposing train had stopped to allow passengers to alight and was injured by sudden starting of train, failure to warn and starting of train were concurring causes, and plaintiff is entitled to benefit of statute. Id. Laws 1891, c. 4071, p. 113, merely casts burden on carrier to show due care, and in weighing evidence such presumption should not be considered. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Civ. Code, art. 2754, casting burden on carrier to relieve itself from liability upon proof of loss, relates only to carriage of goods. McGinn v. New Orleans R. & Light Co., 118 La. 811, 43 So. 450.

35. Accidents to Which Doctrine is Applicable. Derailment. Louisville St. R. Co. v. Brownfield, 29 Ky. L. R. 1097, 96 S. W. 912; Braun v. Union R. Co., 115 App. Div. 566, 100 N. Y. S. 1012; Galveston, etc., R. Co. v. Gracia [Tex. Civ. App.] 100 S. W. 198; Overcash v. Charlotte Elec. R. Light & Power Co. [N. C.] 57 S. E. 377; Hill v. Chicago City R. Co., 126 Ill. App. 152. By brick placed by boy on track. O'Gara v. St. Louis Transit Co., 204 Mo. 724, 102 S. W. 54. **Collision.** Wabash R. R. Co. v. Jellison, 124 Ill. App. 652; Birmingham R. Light & Power Co. v. Moore [Ala.] 42 So. 1024; Hunt v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 1088; Goodloe v. Metropolitan St. R. Co., 120 Mo. App. 194, 96 S. W. 482; Chicago City R. Co. v. Pural, 127 Ill. App. 652; Sedoff v. City R. Co., 124 Ill. App. 609; Simone v. Rhode Island Co. [R. I.] 66 A. 202; Enos v. Rhode Island Suburban R. Co. [R. I.] 67 A. 5. **Overturning of stagecoach.** Dinnigan v. Peterson, 3 Cal. App. 764, 87 P. 218. **Breaking of coupler.** Galveston, etc., R. Co. v. Young [Tex. Civ. App.] 100 S. W. 993. **Passenger elevator fell.** Field v. Winheim, 123 Ill. App. 227. **Collapse of trapdoor** in floor under weight of passenger. Jordan v. St. Louis, etc., R. Co., 122 Mo. App. 330, 99 S. W. 492. **Bumping together of passing cars** on parallel tracks. Smith v. St. Louis Transit Co., 120 Mo. App. 328 97 S. W. 218. **Falling of structure connecting docks.** Bellinger v.

the cause thereof is under the control of defendant.[36] The presumption of negligence, however, arising under this doctrine, being general, does not make a prima facie case where specific acts of negligence are pleaded.[37] Where a prima facie case based on application of res ipsa loquitur is made,[38] the burden is frequently said to shift to the defendant to disprove negligence,[39] but a more accurate statement would seem to be that it merely rests on defendant to meet the prima facie presumption.[40]

Broadhead, 52 Misc. 57, 102 N. Y. S. 381. **Breaking** and falling **of trolley pole.** Cincinnati Trac. Co. v. Holzenkamp, 74 Ohio St. 379, 78 N. E. 529. **Explosion of controller box.** Paine v Geneva, etc., Trac. Co., 115 App. Div. 729, 101 N. Y. S. 204.

Swivelling of street car at switch, front and rear trucks taking different tracks. Egan v. Old Colony St. R. Co. [Mass.] 80 N. E. 696. Where car starts prematurely it will be presumed that starting was due to negligence. Bell v. Central Elec. R. Co., 125 Mo. App. 660, 103 S. W. 144. Explosion among machinery of electric car, there being evidence that it was not dangerous and was due to burning out of fuse. Trotter v. St. Louis & Suburban R. Co., 122 Mo. App. 405, 99 S. W. 508. Injury resulting from stepping on electric plate in floor of street car. McRae v. Metropolitan St. R. Co., 125 Mo. App. 562, 102 S. W. 1032. Catching of heel on piece of metal projecting from steps, causing fall. Rattan v. Central Elec. R. Co., 120 Mo. App. 270, 96 S. W. 735. Catching of plaintiff's dress as she was alighting. Thomas v. Boston El. R. Co., 193 Mass. 438, 79 N. E. 749. Starting street car with such violence as to injure passenger exercising due care while on way to seat. Miller v. Metropolitan St. R. Co., 125 Mo. App. 414, 102 S. W. 592. Instruction held to cast on defendant burden of showing that derailment was accidental. Overcash v. Charlotte Elec. R. Light & Power Co. [N. C.] 57 S. E. 377.

Not applicable: To mere proof of accident. (McGinn v. New Orleans R. & Light Co., 118 La. 811, 43 So. 450), while alighting (Reiss v. Wilmington City R. Co. [Del.] 67 A. 153). Where passenger alighted at wrong street and thereafter sustained injury. Georgia R. W. Elec. Co. v. McAllister, 126 Ga. 447, 54 S. E. 957.

36. Pennsylvania R. Co. v. McCaffrey [C. C. A.] 149 F. 404.

Not applicable: Injury resulting from missile thrown by bystander. Woas v. St. Louis Transit Co., 198 Mo. 664, 96 S. W. 1017. Derailment caused by cyclone. Galveston, etc., R. Co. v. Crier [Tex. Civ. App.] 100 S. W. 1177. Mere proof that plaintiff was injured by bolt with nut on end such as are largely used in constructing freight trains, and that freight train was passing, does not sufficiently show that it came therefrom so as to raise presumption of negligence, there being evidence that some boys were throwing missiles at the train. Pennsylvania R. Co. v. McCaffrey [C. C. A.] 149 F. 404. Instruction held too broad in itself as not limited to act of defendant, but correct when taken in connection with cause at issue. New York, etc., R. Co. v. Callahan [Ind. App.] 81. N. E. 670.

37. Roscoe v. Metropolitan St. R. Co. 202 Mo. 576, 101 S. W. 32; Chicago Union Trac. Co. v. Leonard, 126 Ill. App. 189. Ferguson v. St. Louis, etc., R. Co., 123 Mo. App. 590, 100 S. W. 537. Must prove specific acts alleged. Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062.

38. Instruction held to properly submit effect of doctrine. Overcash v. Charlotte Elec. R. Light & Power Co. [N. C.] 57 S. E. 377. Where plaintiff's evidence shows not only that derailment was caused by broken and defective wheel but also that defect could not have been discovered by any precaution, demurrer to evidence should be sustained. Ferguson v. St. Louis, etc., R. Co., 123 Mo. App. 590, 100 S. W. 537.

39. Bowlin v. Union Pac. R. Co., 125 Mo. App. 419, 102 S. W. 631. Proof that injury was caused by sudden and violent stopping of train casts burden on carrier to show that accident was not due to lack of care or skill. Bussell v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 S. W. 613. Where presumption arises from premature starting, carrier must show that starting was due to unavoidable accident. Bell v. Central Elec. R. Co., 125 Mo. App. 660, 103 S. W. 144. Where evidence shows that inspection might have revealed defect in coupler, defendant must show inspection to rebut prima facie case of negligence arising from the breaking. Galveston, etc., R. Co. v. Young [Tex. Civ. App.] 100 S. W. 993. Instruction that if plaintiff was injured by car leaving track defendant is liable unless it shows by greater weight of evidence that it could not have prevented accident by exercise of care required of carrier held proper. O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 S. W. 54.

Presumption overcome: Proof that catch holding car door open was of latest pattern and in good repair, and that train was not negligently operated, held to overcome presumption of negligence arising from closing of door. Goss v. Northern Pac. R. Co. [Or.] 87 P. 149.

Sufficiency of defendant's evidence held for jury: To rebutted presumption of negligence arising from falling of elevator. Field v. Winheim, 123 Ill. App. 227. Explanation of collision. Simone v. Rhode Island Co. [R. I.] 66 A. 202. Whether evidence that collision was caused by failure of brake to work, without further proof as to cause of such failure, overcome presumption of negligence arising from collision. Chicago City R. Co. v. Pural, 127 Ill. App. 652, afd. 224 Ill. 324, 79 N. E. 686. Evidence that fall of dock was due to sudden and unusual weight thereon, as against evidence of rotten joists, held insufficient to overcome presumption of negligence arising from fall. Bellinger v. Broadhead, 52 Misc. 57, 102 N. Y. S. 381.

40. To overcome plaintiff's prima facie case, defendant's evidence need only counterbalance it. Chicago Union Trac. Co. v. Leonard, 126 Ill. App. 189.

Admissibility of evidence[41] is governed by general rules.[42]

41. See 7 C. L. 593.

42. **Rules and ordinances:** Rules of company prescribing duties of servants are inadmissible where plaintiff had no knowledge of them at time of accident and did not rely thereon. Illinois C. R. R. Co. v. Downs, 122 Ill. App. 545. Evidence that car was going "very fast" and "mighty fast" held sufficient to render ordinance limiting speed to seven miles per hour admissible. Moore v. Northern Texas Trac. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 354, 95 S. W. 652. In action for forcible ejectment on conductor's refusal to accept transfer, ordinance establishing its validity is admissible. Chicago Union Trac. Co. v. Brethauer, 223 Ill. 521, 79 N. E. 287.

Customs: Known custom to keep track clear while train was receiving passengers is admissible on negligence in crossing track to reach train. Illinois Cent. R. Co. v. Proctor [Ky.] 102 S. W. 826. Custom not to have racks on street cars for parcels and bags, but to allow them to be placed on floor is admissible as bearing on negligence in allowing bag to be placed in aisle. Pitcher v. Old Colony St. R. Co. [Mass.] 81 N. E. 876. Evidence of custom among passengers to ride in baggage compartment of combination car, and to have their tickets taken and punched there, held inadmissible as showing acquiescence. Bromley v. New York, etc., R. Co., 193 Mass. 453, 79 N. E. 775. Custom to merely slow down to receive passengers is inadmissible to show implied invitation to board moving car where custom was unknown to plaintiff and he thought car stationary. Greer v. Union St. R. Co., 193 Mass. 246, 79 N. E. 267. Where car stopped, but alleged negligence was premature starting, evidence of custom to merely slow down to receive passengers is inadmissible. Id.

Res gestae, admissible as: In action for negligently issuing torn transfer, one issued at same time to plaintiff's companion and paid for by plaintiff, to show how plaintiff's should have appeared and how mechanical device testified to by defendant's witnesses cut transfers. Montgomery Trac. Co. v. Fitzpatrick [Ala.] 43 So. 136. Conversation between passenger and conductor issuing transfers as to their validity, in action for subsequent ejectment. Chicago Union Trac. Co. v. Brethauer, 125 Ill. App. 204, afd. 223 Ill. 521, 79 N. E. 287. Conversation between plaintiff and conductor as to how plaintiff fell from train, occurring after train stopped and conductor had gone back to where plaintiff was lying. Pittsburgh, etc., R. Co. v. Haislup [Ind.] 79 N. E. 1035. Statement that plaintiff was "full of counterfeit money" made by conductor when ejecting him. Chicago Union Trac. Co. v. McClevey, 126 Ill. App. 21. Statements made couple of minutes after accident, and while plaintiff lay as he fell, to questions as to cause of fall which were not leading. International, etc., R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000. In action for injuries received in collision between street car and train, statements of conductor on street car that he must go forward to look for trains. Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 99 S. W. 869. Evidence that, when carrier's servants were taking invalid to baggage car, stranger protested. Gulf, etc., R. Co. v. Coopwood [Tex. Civ. App.] 16 Tex. Ct. Rep. 354, 96 S. W. 102. Exclamation of mother of infant passenger that latter was injured through her fault made immediately after accident. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318.

Not res gestae: Statements made by plaintiff's brother few minutes after accident that car had not stopped when she attempted to alight. Kehan v. Washington R. & Elec. Co., 28 App. D. C. 108. Statement of plaintiff's daughter after car had gone about block that he had jumped off. Chicago Union Trac. Co. v. Lowenrosen, 125 Ill. App. 194.

Opinions and conclusions: On issue of negligence in occupying steamship berth without protecting board, direct question whether he knew it was unsafe is not objectionable as calling for opinion testimony. International Mercantile Marine Co. v. Smith [C. C. A.] 145 F. 891. Statement by conductor that car did not lurch more than single track cars is admissible as expression of his observation though it involves opinion. Partelow v. Newton & B. St. R. Co. [Mass.] 81 N. E. 894. Statement by plaintiff in action for ejectment that he "was in no position to meet any such assault, for that reason I resisted as long as I could," after having testified that conductor seized him while he was sitting and proceeded to drag him out, held not objectionable as conclusion. Pierson v. Illinois Cent. R. Co. [Mich.] 112 N. W. 923. In action for injuries received by being crowded off station platform alleged negligence consisting of maintaining too small platform and in permitting too many passengers to congregate thereon, witness may testify whether certain number of passengers thereon would make fair sized crowd. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507. Witness who sees moving car and possesses knowledge of time and distance may express opinion as to speed. Coffey v. Omaha, etc., R. Co. [Neb.] 112 N. W. 589. Question whether one standing thirty feet from crossing could hear approaching train, held to call for opinion. Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 99 S. W. 869. In action for injuries received in collision between street car and train, question to conductor of later "when a street car is approaching a crossing, when will it appear that it is going to stop? When would it appear that there was danger of a collision when the car was coming on M. street like this?" held to call for opinion. Id.

Primary and secondary evidence: Where through ticket is composed of coupons, each coupon is separate ticket, so that service of notice to produce the "ticket" upon one holding only coupon is compliance with Rev. St. 1898, § 3410, and secondary evidence is admissible. McCollum v. Southern Pac. Co. [Utah] 88 P. 663. Oral testimony as to class of surrendered ticket is admissible upon noncompliance with reasonable notice to produce. Id. Rule that where action is founded upon writing, contents and execution which is denied and which is in possession of one without state, secondary evidence is not admissible unless proper effort

is made to obtain original, does not apply to tort action. Id. In action by one injured while riding on free pass issued by express company, parol evidence is admissible to show that by terms of written contract between defendant and express company latter could issue passes, contract being only incidentally involved. International, etc., R. Co. v. Lynch [Tex. Civ. App.] 99 S. W. 160.

Hearsay: Requisition of claim agent to division superintendent stating that he is advised that accident occurred, etc., held to show that it was hearsay. Weinstein v. Interurban St. R. Co., 52 Misc. 468, 102 N. Y. S. 512.

Expert opinions: Experienced railroad man may tesitfy that street car can be stopped in shorter space than train. Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 99 S. W. 869. Necessity of assisting woman not infirm or incumbered with bundles to alight is not subject of expert opinion. San Antonio Trac. Co. v. Flory [Tex. Civ. App.] 100 S. W. 200.

Acts and declarations of employes: Declarations of employes after accident are not admissible as admissions of defendant. Weinstein v. Interurban St. R. Co., 52 Misc. 468, 102 N. Y. S. 512. Statements of servant subsequent to accident that elevator had failed to work properly before are admissible to impeach him as witness, but not to show negligence Belvedere Bldg. Co. v. Bryan, 103 Md. 514, 64 A. 44. In action for ejection, evidence of conduct of conductor toward other passengers thereafter is not admissible. Dobbins v. Little Rock R. & Elec. Co., 79 Ark. 85, 95 S. W. 794. In action for series of misconduct and insulting acts toward plaintiff and companions by conductor, evidence that conductor started car before plaintiff's companion had time to alight is admissible. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 101 S. W. 554. Evidence that no report was made to accident clerk is admissible on issue whether an accident happened, and to explain why defendant did not produce employes in charge of car as witnesses. McArthur v. New York City R. Co., 53 Misc. 292, 103 N. Y. S. 102.

Prior and subsequent acts and conditions: Proof that there was no usual or customary stopping place at station two years prior to accident is no evidence that there was no such place at time of accident. De Castillo v. Galveston, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 481, 95 S. W. 547. Evidence that plaintiff had been seen to get on moving cars is inadmissible to show that she did so on occasion of the accident. Lexington R. Co. v. Herring, 29 Ky. L. R. 794, 96 S. W. 558. In action for injuries caused by missile thrown by bystander, evidence of prior assaults on car which was not so framed as to exclude sporatic assaults extending over period of years or to show such frequency as to indicate repetition, properly rejected. Woas v. St. Louis Transit Co., 198 Mo. 664, 96 S. W. 1017. In action for injuries caused by derailment, evidence of prior derailments at same place is not admissible to show negligence unless track is shown to have been in same condition. Overcash v. Charlotte Elec. R. Light & Power Co. [N. C.] 57 S. E. 377. In action for failure to keep street in repair, and for inviting plaintiff to alight at unsafe place without warning, evidence that other conductors had given warning is inadmissible. Miller v. International R. Co., 52 Misc. 344, 102 N. Y. S. 254. In action by one whose hand was crushed between guard rail and passing car, evidence that prior thereto cars similar to ones involved had been heard and felt to scrape together while passing is admissible. Staples v. Rhode Island Suburban R. Co. [R. I.] 67 A. 431. Evidence as to condition of cars immediately after collision is admissible to show speed. Elgin, Aurora & So. Trac. Co. v. Wilson, 120 Ill. App. 371. Enlargement of platform after accident is admissible to show that it was practical for defendant to maintain larger platform, but not to show negligence. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507. Evidence that same conductor had accepted transfers, although change was not made at point named therein, is not admissible to show waiver of rule requiring their rejection. Shortsleeves v. Capital Trac. Co., 28 App. D. C. 365.

Inspections and measurements: Where passenger was ejected for interfering with controller, inspection of a car and controller by jury is permissible to aid in determining whether interference was intentional, there being evidence that all cars are alike. Dobbins v. Little Rock R. & Elec. Co., 79 Ark. 85, 95 S. W. 794. Evidence of measurements of distance from car step to platform is inadmissible without proof that they were on car from which plaintiff fell or that cars are supplied with steps of uniform height. Louisville & N. R. Co. v. Mount [Ky.] 101 S. W. 1182. Result of experiment to ascertain how far open switch could be seen from approaching car is admissible though made after accident where conditions remain same. Elgin, Aurora & So. Trac. Co. v. Wilson, 120 Ill. App. 371.

Evidence admissible on particular issues: In action for injuries received while alighting from freight train to answer call of nature, absence of water closet may be considered in determining whether carrier should anticipate such action, and hence give warning when train stopped at dangerout place. International, etc., R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 987, 98 S. W. 423. As may also fact that brakeman alighted for same purpose shortly before. Id. In action for insulting conduct of conductor, presence of other passengers may be shown. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574. Evidence that plaintiff went to front door to alight, but found it locked, is admissible to show due diligence. International, etc., R. Co. v. Hugen. [Tex. Civ. App.] 100 S. W. 1000. In action for insult offered by conductor, evidence that plaintiff reported conduct to defendants as soon as she arrived home is admissible to show that she felt aggrieved (San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 101 S. W. 554), and it is not necessary to plead same (Id.). Where party assaulting passenger claimed to be special agent of carrier, evidence showing that one leading him from car was detective for defendant is admissible. Norfolk & W. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879. In action for wantonly starting car before plaintiff had reasonable time to board, leaving her behind after some of her children were aboard evidence that conductor thereafter stated that he did not have time to stop to let plaintiff on or to let children off, but finally did let latter off, is admissible to show

wantonness. Birmingham R. Light & Power Co. v. Wise [Ala.] 42 So. 821. Length of time of stop is competent evidence on issue as to whether passenger was given reasonable time to alight. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222. What passenger alighting had time to do before reentering is admissible to show length of stop (Id.), but not details of conversation while off (Id.). In action for injuries from being crowded off station platform, evidence as to means of controlling entrance to platform is admissible. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507. Evidence of expenditure necessary to remedy defect is admissible as bearing upon negligence in not repairing. Haskell v. Manchester St. R. Co., 73 N. H. 587, 64 A. 186. In determining negligence of plaintiff who was riding on foot boards, inquiry should not be limited to his action at precise moment of accident. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334. Where fact whether car stopped for plaintiff who attempted to board at point other than that marked, is in issue evidence that cars stopped at points other than those designated is admissible. Lexington R. Co. v. Herring, 29 Ky. L. R. 794, 96 S. W. 558. Where carrier sold ticket defective on its face, testimony that defendant's conductor told plaintiff that ticket was void is admissible to show recklessness and disregard of plaintiff's rights. Bussey v. Charleston, etc., R. Co., 75 S. C. 116, 55 S. E. 163. Letter written by agent of nonresident owner of office building that elevator was out of order, and that third person had stated that whole machine ought to be built over, is admissible to show notice. Ferguson v. Truax [Wis.] 110 N. W. 395. Where plaintiff claims that she was willfully pushed or kicked off car, while defendant contends that she voluntarily stepped off after car started, testimony that on street where injury occurred there was place where cars stopped at a crossing is admissible. Savannah Elec. Co. v. McElvey, 126 Ga. 491, 55 S. E. 192. Evidence that distance from step of car to platform at place of accident was greater than at other stations is not admissible as proving distance necessarily dangerous. Louisville & N. R. Co. v. Mount [Ky.] 101 S. W. 1182. Where plaintiff claims that car stopped to receive her at place other than that marked as stopping place which was disputed, evidence of propriety and necessity of stopping at regular places is inadmissible. Lexington R Co. v. Herring, 29 Ky. L. R. 794, 96 S. W. 558. In action for insulting manner in which conductor placed sign in front of plaintiff and companion, which had been jestingly removed by latter defendant held not harmed by exclusion of question as to whether affair would have happened if companion had not moved sign. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 101 S. W. 554. Not error to refuse to allow motorman to state whether there were other passengers on car where if answered in negative it would contradict plaintiff on immaterial matter and if in affirmative it would have corroborated her. Birmingham R. Light & Power Co. v. Moore [Ala.] 43 So. 841. Where conductor may remove passenger for using obscene language, whether offensive or not, and was present and witnessed plaintiff's conduct, evidence of requests of passengers that plaintiff be removed is inadmissible. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984. Cr. Code 1896, § 4345, providing that on trial for assault, etc., defendant may give evidence of abusive language of person assaulted, has no application to action for ejectment. Id. In action for injuries received while alighting, evidence of crowded condition of platform at another point is inadmissible. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222. Where negligence charged consisted of maintaining too small station platform, propriety of considering desire of public for rapid transportation in determining plan of operation is immaterial. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507. In action based on negligence of carrier in failing to assist passenger in alighting from "closed car," evidence that it would be impossible to assist all passengers alighting from "open car" is inadmissible. San Antonio Trac. Co. v. Flory [Tex. Civ. App.] 100 S. W. 200. Held not error to exclude testimony of conductor as to words on sign usually found on coaches admonishing passengers against standing on platform where he testified that he did not know whether such sign was on car in question or whether it was on all cars. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Testimony of plaintiff that he had never transferred at any other point is inadmissible to prove custom to accept transfers at such point. Shortsleeves v. Capital Trac. Co., 28 App. D. C. 365.

Evidence admissible under particular allegations: Under allegation of negligence for failing to provide safe means of alighting, it being dark and steps of car at dangerous distance from platform, plaintiff may prove absence of light and of any appliance trainmen were accustomed to provide. Louisville & N. R. Co. v. Mount [Ky.] 101 S. W. 1182. Allegations that conductor threatened to put plaintiff's wife off unless she paid fare for child, that upon refusal he became violent and abusive, held sufficient to admit proof that conductor brought into car one purporting to be officer who advised her to pay, since his acts and statements must be treated as that of conductor. St. Louis S. W. R. Co. v. Granger [Tex. Civ. App.] 100 S. W. 987. Where petition alleged that certain conversation took place between plaintiff and conductor, proof of such conversation between conductor and another is inadmissible. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574. Where no foundation has been laid therefor in pleadings or evidence, it is error to admit evidence of comparative equipment of trains on branch line, where injury occurred, and on main line. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318.

Rebuttal and cross-examination: Where defendant introduces evidence of custom to announce station after stop at switch, plaintiff may introduce evidence of contrary custom prevailing five or six months prior to accident in rebuttal. Kansas City So. R. Co. v. Belknap, 80 Ark. 587, 98 S. W. 366. Where witness has testified to habit and custom of engineer in making couplings, he may be asked on cross-examination whether conductor is in habit of making couplings with unusual violence. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Plaintiff may be cross-examined as to delay in bringing suit as bearing upon bona fides of claim that illness was caused by defendant's negligence. Atlantic Coast Line R. Co. v.

The sufficiency of the evidence[43] to establish particular issues is treated in the notes.[44]

Powell, 127 Ga. 805, 56 S. E. 1006. Where evidence of statement of plaintiff that she was injured while alighting from moving car was introduced, testimony of one who was present that he did not hear such statement, but she said that she was "attempting to get off car when it started again," is admissible in rebuttal. South Covington, etc., R. Co. v. Core, 29 Ky. L. R. 836, 96 S. W. 562. Where defendant had introduced evidence that plaintiff was on car again next day, question as to how long after that occasion before she left home again is not rebuttal. Cutcliff v. Birmingham R., Light & Power Co. [Ala.] 41 So. 873.

Irresponsive answers: Answer "heavy trains like that always start slowly" to question "How did the car start with reference as to how it should be started," held not responsive. Birmingham R., Light & Power Co. v. King [Ala.] 42 So. 612.

43. See 7 C. L. 595.

44. Evidence held sufficient to show: That plaintiff was negligently or intentionally pushed from car by conductor. Foley v. West End St. R. Co. [Mass.] 81 N. E. 189. That unnecessary force was used in ejecting plaintiff. Chicago Union Trac. Co. v. Brethauer, 125 Ill. App. 204. That cause of collision was high rate of speed. Chicago City R. Co. v. Pural, 224 Ill. 324, 79 N. E. 686. That plaintiff was aggressor in fight with conductor. Reed v. New York, etc., R. Co., 116 App. Div. 709, 102 N. Y. S. 19. That door to mail car was so defective as to be uncloseable. Decker v. Chicago, etc., R. Co. [Minn.] 112 N. W. 901. That plaintiff was thrown by starting of car while he was alighting, rather than that he attempted to alight from moving car. Tauger v. New York City R. Co., 104 N. Y. S. 681. That plaintiff was passenger though he inadvertently stated on cross-examination that he did not intend to take car. Chicago Union Trac. Co. v. Lowenrosen, 125 Ill. App. 194. That station was not announced. Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P. 207. That catch holding car door open was of latest pattern and in good repair, and that train was not running at negligent speed. Goss v. Northern Pac. R. Co, [Or.] 87 P. 149. Negligent impact while making up freight train. Oxendine v. Louisiana R. & Nav. Co. [La.] 43 So. 1003. That track was defective. Galveston, etc., R. Co. v. Patillo [Tex. Civ. App.] 101 S. W. 492 That coupler was broken by negligent application of steam in locomotives drawing train. Galveston, etc., R. Co. v. Young [Tex. Civ. App.] 100 S. W. 993. That plaintiff was thrown by premature starting of car. Kupke v. St. Louis Transit Co., 122 Mo. App. 355, 99 S. W. 472; Graham v. New York City R. Co., 104 N. Y. S. 869. That plaintiff contracted smallpox from ticket agent. Missouri, etc., R. Co. by Raney [Tex.] Civ. App.] 99 S. W. 989. That vestibule was sufficiently lighted. St. Louis, etc., R. Co. v. Oleson [Ark.] 99 S. W. 385. That fall was caused by plaintiff's heel catching on metal projecting from step. Rattan v. Central Elec. R. Co., 120 Mo. App. 270, 96 S. W. 735. Negligence in suddenly moving train while plaintiff was alighting, although evidence was conflicting as to jerk and as to whether plaintiff was injured while alighting or fell from train at another point. Louisville & N. R. Co. v. Deason, 29 Ky. L. R. 1259, 96 S. W. 1115. That plaintiff's illness was due to defendant's negligence in having station closed, compelling her to remain out in cold, and in having it improperly heated after she was admitted. International, etc., R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 982, 95 S. W. 595. That car started with sudden jerk while plaintiff was alighting. Louisville R. Co. v. Worley [Ky.] 101 S. W. 926. That plaintiff left car while it was moving, authorizing nonsuit. Dockman v. North Jersey St. R. Co. [N. J. Law] 66 A. 961. That car was run at negligent rate of speed. Dupuis v. Saginaw Valley Trac. Co., 146 Mich. 151, 13 Det. Leg. N. 767, 109 N. W. 413; Galveston, etc., R. Co. v. Patillo [Tex. Civ. App.] 101 S. W. 492. Negligent starting of car. Evansville Elec. R. Co. v. Lerch [Ind. App.] 81 N. E. 225; Zampelli v. New York City R. Co., 105 N. Y. S. 109; Klein v. Interurban St. R. Co., 105 N. Y. S. 95. That train did not stop more than minute to allow passengers to alight. Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P. 207. That break in airbrake was caused by collision, and was not cause of collision. Hunt v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 1088. Verdict for defendant held against weight of evidence. Id. To warrant finding of negligence in that some person started elevator while plaintiff was alighting. Moerman v. Clark-Rutka-Weaver Co., 145 Mich. 540, 108 N. W. 988.

In action for refusing transfer not brought for two years, evidence held so incredible as to plaintiff's route as to authorize directed verdict for defendant. Gruber v. New York City R. Co., 103 N. Y. S. 216. Evidence that while train was running at "extra rate of speed" it suddenly stopped within few feet, throwing plaintiff, and that coach upon which plaintiff was riding was switched out, held to authorize inference of negligence. Magee v. New York, etc., R. Co. [Mass.] 80 N. E. 689. Plaintiff's testimony held not admission that he was directed by conductor to wait until caboose pulled up before boarding, but open to construction that conductor offered as favor to pull up. Miller v. Atlanta & C. Air Line R. Co., 143 N. C. 115, 55 S. E. 439. Testimony of plaintiff and another that car had stopped and started while she was alighting, held to support verdict in her favor though several witnesses testified to contrary. Louisville R. Co. v. Bohon, 30 Ky. 862, 99 S. W. 915. Derailment, together with proof of condition of track from dripping of water thereon from tank and freezing thereof, held to sustain finding of negligence in maintaining unsafe track or in operation of train. Mefford v. Missouri, K. & T. R. Co., 121 Mo. App. 647, 97 S. W. 602. Testimony of plaintiff, together with circumstances of case, held to support finding that plaintiff alighted at wrong place, relying on assurances of conductor, although testimony of several tended to show voluntary alighting at own risk. Tennessee Cent. R. Co. v. Brasher's Guardian, 29 Ky. L. R. 1277, 97 S. W. 349.

Evidence held insufficient: To show that plaintiff was thrown from car by sudden jerk. Cicero & Proviso St. R. Co. v. Hughes,

Questions for jury.[45]—Contributory negligence[46] and negligence[47] are questions for the jury[47] unless the acts are negligent[48] or not negligent[49] as a mat-

125 Ill. App. 186. To show unnecessary force in ejecting decedent. Chicago & A. R. Co. v. Meyer, 127 Ill. App. 314. To show that place of alighting was unsafe. Id. To sustain plaintiff's theory that car struck wagon and turned it completely around so that rear end hit plaintiff who was near rear of car. Hollingsworth v. Skelding, 142 N. C. 246, 55 S. E. 212. To show that gate, opening of which threw passenger to street, was unlatched by him. Spurlock v. Shreveport Trac. Co. 118 La. 1, 42 So. 575. To show that motorman or gripman was not at post of duty. Roscoe v. Metropolitan St. R. Co., 202 Mo. 576, 101 S. W. 32. Proof of jerk in moving car sufficient to throw off one who was standing on running board and reaching for package, held insufficient to show negligence. Sanderson v. Boston El. R. Co. [Mass.] 80 N. E. 515. Fact that plaintiff's dress caught so firmly as to throw her held insufficient to show negligence. Thomas v. Boston El. R., 193 Mass. 438, 79 N. E. 749. Testimony of plaintiff as opposed to all other witnesses held insufficient to show sudden starting of car. Randall v. Providence & D. R. Co. [R. I.] 67 A. 419. Testimony of plaintiff and friend that car upon bumper of which plaintiff was riding moved backward and crushed him against express wagon held not to sustain finding to that effect as against testimony that car did not move, coupled with fact that it had come to stop on level because of lack of power. Feldstein v. New York City R. Co., 103 N. Y. S. 219. Evidence of plaintiff that car suddenly started with jerk after slowing down for him to alight as against testimony of three witnesses, held insufficient to support verdict in his favor. Sacco v. New Orleans R. & Light Co., 117 La. 651, 42 So. 198. Testimony of plaintiff that as he was in act of stepping to rear platform car suddenly started and he was "rushed" out on platform and from car by momentum held so improbable from construction of car as to require reversal of favorable verdict. Berkley St. R. Co. v. Simpson [Va.] 56 S. E. 331. Testimony of plaintiff and disinterested witness as to assault by conductor, as against no evidence on behalf of defendant except proof of no record, held to require reversal of judgment for defendant. Neidenberg v. Dry Dock, etc., R. Co., 105 N. Y. S. 105. Not negligent as matter of law in not ringing gong though such ringing would have prevented collision. Strong v. Burlington Trac. Co. [Vt.] 66 A. 786.

Evidence held for jury: Negligent starting of train. Hall v. Northern Pac. R. Co. [N. D.] 111 N. W. 609. Sudden jerk while passenger was alighting. Louisville & N. R. Co. v. Deason, 29 Ky. L. R. 1259, 96 S. W. 1115. Unusual and violent stop. Houston & T. C. R. Co. v. Johnson [Tex. Civ. App.] 103 S. W. 239. Forcible ejectment. Chicago Union Trac. Co. v. Brethauer, 223 Ill. 521, 79 N. E. 287. Identity of uniformed person as employe. San Antonio & A. P. R. Co. v. Trigo [Tex. Civ. App.] 101 S. W. 254. Whether plaintiff's fall was caused by moving of footstool. St. Louis S. W. R. Co. v. Johnson [Tex.] 17 Tex. Ct. Rep. 167, 97 S. W. 1039. Question whether passenger on platform who was facing car in front could be thrown off by sudden stop. Houston, etc., R. Co. v. Johnson [Tex. Civ. App.] 103 S. W. 239. Proximate cause of plaintiff's physical condition. Chicago Union Trac. Co. v. May, 125 Ill. App. 144. Negligence of motorman in colliding with wagon crossing tracks "midblock." Strong v. Burlington Trac. Co. [Vt.] 66 A. 786. Whether plaintiff who was carried beyond destination was carried to car barn as alleged. Henderson v. Metropolitan St. R. Co., 123 Mo. App. 666, 100 S. W. 1111. Negligence in running too close to car in front at unusual speed, resulting in collision with wagon which attempted to cross behind front car. Strong v. Burlington Trac. Co. [Vt.] 66 A. 786. Negligence in attempting to pass wagon standing beside tracks. Brower v. Public Service Corp. [N. J. Law.] 64 A. 1052. Testimony of plaintiff and daughter that car started before she had reasonable opportunity to be seated, and that jerk threw her down. White v. Columbia & M. Elec. R. Co., 215 Pa. 462, 64 A. 676. Negligence of passenger ejected at flag station on stormy night in attempting to follow track back to next station instead of seeking other roads. Filburg v. Northern Cent. R. Co., 217 Pa. 618, 66 A. 846. Negligence in maintaining too small station platform, and whether guard who was not present should have been. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507. Negligence in ejecting passenger at flag station on stormy night where no shelter was obtainable. Tilburg v. Northern Cent. R. Co., 217 Pa. 618, 66 A. 846. Plaintiff's positive evidence that she was thrown from seat to floor and injured by sudden stopping of car as against negative testimony of other passengers that they did not see her fall. Bowlin v. Union Pac. R. Co., 125 Mo. App 419, 102 S. W. 631. Manner of injury by being thrown against desk in caboose held not so incredible as to take case from jury. Bussell v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 S. W. 613. Evidence that sudden lurch of car caused decedent to project arm between guard bars on window, and to be injured by coming in contact with passing car, held not so inconsistent with physical facts as to take case from jury. Schloemer v. St. Louis Transit Co., 204 Mo. 99, 102 S. W. 565.

45. See 7 C. L. 596.

46. Instruction that reasonable care did not require decedent to look for trolley poles on side next to the running board held erroneous. Indianapolis Trac. & T. Co. v. Richey [Ind. App.] 80 N. E. 170.

47. Under Const. Art. 1, § 20, where fact that plaintiff was passenger, that there was collision, and that plaintiff was injured therein, is not admitted nor proved by documentary evidence, entire question of liability is for jury. New York, etc., R. Co. v. Callahan [Ind. App.] 81 N. E. 670. Court should not confine jury to ascertainment of few facts, but leave question of negligence to them to be determined from all facts and circumstances. Metropolitan St. R. Co. v. Warren, 74 Kan. 244, 86 P. 131, 89 P. 656.

48. Starting of train while passenger was alighting. Galveston, etc., R. Co. v. Alberti [Tex. Civ. App.] 103 S. W. 699. Where plaintiff's testimony does not show negligence as matter of law, it is error to instruct to

ter of law, which exists only when a single inference can be drawn from the undisputed facts by reasonable minds. The reasonableness of a rule[50] or of the time allowed for the doing of an act,[51] is usually for the jury as are all questions of fact dependent upon conflicting evidence.[52]

Instructions[53] must conform to the issues made by the pleadings,[54] be based upon the evidence,[55] and must not ignore any issue raised thereby.[56] Requested

find for plaintiff if jury believe his testimony. Johnston v. New York City R. Co., 104 N. Y. S. 1039.

49. Evidence held to show as matter of law that defendant's servants were not negligent in running street car onto tracks ahead of approaching train, resulting in collision. Bartholomaus v. Milwaukee Elec. R. & Light Co., 129 Wis. 388, 109 N. W. 143.

50. Denominational limit by street car company on currency which will be accepted and changed in payment of fare. Knoxville Trac. Co. v. Wilkerson [Tenn.] 99 S. W. 992.

51. To produce ticket or pay fare, especially where evidence is conflicting. Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706.

52. Speed. Partelow v. Newton & B. St. R. Co. [Mass.] 81 N. E. 894. As to necessity of stopping freight train on trestle, and therefore whether risk of alighting thereat was incident to mode of travel. International, etc., R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 987, 98 S. W. 423.

53. See 7 C. L. 597.

54 Issues not raised: Paramount right of street car company to clear track. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334. Contributory negligence on grounds not alleged. Louisville & N. R. Co. v. Mulder [Ala.] 42 So. 742. Negligence on ground not raised. Alabama City G. & A. R. Co. v. Bates [Ala.] 43 So. 98. Existence of relation of passenger and carrier. Little Rock R. & Elec. Co. v. Dobbins, 78 Ark. 553, 95 S. W. 788. Erroneouusly submitted question of exposure and discomfort. Baltimore, etc., R. Co. v. Sheridan [Ky.] 101 S. W. 928. Where only issue is whether car stopped to receive plaintiff, not error to refuse instruction making right of recovery depend upon whether employes knew plaintiff was boarding when they started car. Lexington R. Co. v. Herring, 29 Ky. L. R. 794, 96 S. W. 568. Instruction justifying assault by motorman to protect conductor from imminent danger held not applicable in action for injury received during panic created by altercation between conductor and negro. Louisville & E. R. Co. v. Vincent, 29 Ky. L. R. 1049, 96 S. W. 898. Where plaintiff based his right of recovery upon ticket as it was, instruction that defendant was liable for misdescription therein is erroneous. Pierson v. Illinois Cent. R. Co. [Mich.] 112 N. W. 823. Discretion of plaintiff to render her liable for contributory negligence. Birmingham R. Light & Power Co. v. Moore [Ala.] 43 So. 841.

Held proper: Evidence and pleadings held to authorize instruction as to negligence in failing to assist plaintiff to alight. St. Louis S. W. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653. Instruction, considered with entire charge, held not to submit negligence in not calling station. Ford v. Southern R. Co., 75 S. C. 286, 55 S. E. 448. Instruction as to liability for starting car before plaintiff had reasonable time to alight is not erroneous though adjective "reasonable" was omitted from averment of petition relating to time given plaintiff to alight. Green v. Metropolitan St. R. Co., 122 Mo. App. 647, 99 S. W. 28.

55. Issues not raised: Last clear chance doctrine. Newport News & O. P. R. & Elec. Co. v. McCormick, [Va.] 56 S. E. 281. Attempt to alight from moving train. Boesen v. Omaha St. R. Co. [Neb.] 112 N. W. 614. Negligent delay in alighting. Hodges v. Southern Pac. Co., 3 Cal. App. 307, 86 P. 620. Allowance of sufficient opportunity to alight. Savannah Elec. Co. v. McElvey, 126 Ga. 491, 55 S. E. 192. Consent of shipper that car might be moved to railroad yards with door open. Houston, etc., R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202. Where there is no evidence of attempt to ascertain plaintiff's presence in car, instruction as to degree of care which should have been exercised to discover his presence is improper. Hardin v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 100 S. W. 995. Where passenger had no means of knowing condition of ground, instruction that if she could have learned of condition of ground by due diligence she cannot recover held properly refused. Texas, etc., R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. Where undisputed evidence showed that plaintiff did not intend to pay fare, instruction as to rights if he intended to pay fare is abstract. Little Rock R. & Elec. Co. v. Goerner, 80 Ark. 158, 95 S. W. 1007.

Evidence held to authorize instructions on: Unusual sway and jerk. Coffey v. Omaha, etc., R. Co. [Neb.] 112 N. W. 589. Shipper's duty to load and tie horse. Houston, etc., R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202. Agreement of defendant's employe to aid plaintiff in holding horse. Id. Evidence that car was moving from two to four miles per hour held to authorize instruction using word "slowly" moving train. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 S. W. 142. Evidence that servant threatened plaintiff with controller handle, and that plaintiff was forcibly removed to back platform, held to justify instruction on liability for threatening and putting plaintiff in peril of life and compelling him to leave car. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 S. W. 495. Positive testimony that train suddenly jerked held to authorize instruction in respect thereto though it was flatly contradicted and manner of coupling tended to show that it was impossible. Bond v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30, Where, in action based on failure to warn plaintiff against alighting at dangerous place, evidence showed that conductor and brakeman were about caboose use of word "employes" instead of "employe" in instruction held proper. International, etc., R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 987, 98 S. W. 423

instructions on issues properly raised should be given.[57] They should not be misleading,[58] inconsistent,[59] argumentative,[60] or on the weight of the evidence,[61]

Where, in action for negligence in failing to provide stepbox and in jerking plaintiff from car in rude manner, evidence was confined to latter negligence exclusively, instruction rendering carrier liable for failing to provide "safe means" for passengers to alight held not to submit negligence in not providing stepbox. Texas & P. R. Co. v. Beezley [Tex. Civ. App.] 101 S. W. 1051.

56. Issues ignored: Contributory negligence. Savannah Elec. Co. v. Mullikin, 126 Ga. 722, 55 S. E. 945; Alabama City, G. & A. R. Co. v. Bates [Ala.] 43 So. 98. Reasonableness of time to board, and whether plaintiff was not thrown by sudden jerk. Choctaw, etc., R. Co. v. Hickey [Ark.] 99 S. W. 839. Instruction which assumes that plaintiff was in care of defendant if he was passenger held erroneous where it is contended that he assume risk by refusing to leave perilous position upon request. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334. Instruction basing right of recovery upon whether plaintiff entered caboose before train was made up held erroneous, there being evidence tending to render defendant liable notwithstanding. Miller v. Atlanta & C. Air Line R. Co., 143 N. C. 115, 55 S. E. 439. Testimony of plaintiff that he was on steps when train suddenly started held to render binding instruction, based on negligence in boarding moving train, improper. Galveston, etc., R. Co. v. Fink [Tex. Civ. App.] 99 S. W. 204.

Issues held not eliminated: Contributory negligence. Galveston, etc., R. Co. v. Morrison [Tex. Civ. App.] 102 S. W. 143; Savannah Elec. Co. v. Mullikin, 126 Ga. 722, 55 S. E. 945. Contributory negligence by instruction on premature starting. Hurley v. Metropolitan St. R. Co., 120 Mo. App. 262, 96 S. W. 714. Instruction as to negligence in riding on platform held not to withdraw negligence in riding on over crowded car. Baskett v. Metropolitan St. R. Co. 123 Mo. App. 725, 101 S. W. 138. Instruction to find for defendant if plaintiff was injured in any other way than according to his theory sufficiently submits defendant's theory. Louisville & N. R. Co. v. Deason 29 Ky. L. R. 1259, 96 S. W. 1115. Instructions held properly refused, as withdrawing an alleged act of negligence. Lake St. Elev. R. Co. v. Craig, 126 Ill. App. 361. Where evidence shows that plaintiff was injured before she got onto the steps, instruction authorizing recovery if car started suddenly before plaintiff had reasonable time to become seated held not erroneous in not ignoring fact that there may have been no seats. Miller v. Metropolitan St. R. Co., 125 Mo. App. 414, 102 S. W. 592. Instruction on contributory negligence held proper where it was pleaded as defense and supported by evidence. Louisville & N. R. Co. v. Mount [Ky.] 101 S. W. 1182.

57. Erroneously refused instruction on contributory negligence. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 S. W. 142. Instruction, on attempt to board while car was in motion, improperly refused. Chicago Union Trac. Co. v. Hansen, 125 Ill. App. 153. Where defendant pleads contributory negligence, held entitled to specific instruction submitting such defense, notwithstanding general charge in respect thereto. Dallas Consol. Elec. St. R. Co. v. Lasch [Tex. Civ. App.] 99 S. W. 729.

58 Held not misleading: Using word "accident" in that jury might infer that carrier was not negligent. Rambie v. San Antonio, etc., R. Co. [Tex. Civ. App.] 100 S. W. 1022. General instruction as to care owed passengers held not misleading in that it held employe to such degree in advising plaintiff to jump. St. Louis, etc., R. Co. v. Leamons [Ark.] 102 S. W. 363. Instruction as to negligence in starting car before shipper had fastened horse held not misleading as to facts to be considered. Houston, etc., R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202. Where petition charges failure to put plaintiff off at Nineteenth and Flora streets, and all evidence showed that she was to be put off there, instruction directing verdict if she was not put off at Nineteenth and Vine streets held not misleading, especially where another instruction negatived liability for failure to put off there. Henderson v. Metropolitan St. R. Co., 23 Mo. App. 666, 100 S. W. 1111. In action against railroad company and street car company for injury to passenger on latter, instruction defining care owed by carrier to passenger held not misleading as applying to railroad company. Chicago City R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716.

Held misleading: In that jury might infer that plaintiff could recover for injuries to wife, notwithstanding her contributory negligence. Texas & N. O. R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. In action for ejectment with unnecessary force, instruction held misleading in failing to state that recovery could not be had for ejectment itself. Louisville & N. R. Co. v. Fowler, 29 Ky. L. R. 905, 96 S. W. 568. Instruction as to negligence in alighting from moving car held misleading in ignoring whether carrier's negligence did not cause him so to do. Hurley v. Metropolitan St. R. Co., 120 Mo. App. 262, 96 S. W. 714. Instruction that passenger standing on platform whether train was moving or not assumed risks incident to regular and orderly operation of train held misleading where passenger went out onto platform while train was waiting for another train. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Instruction that operatives had right to assume that train would stop before crossing its tracks, as required by statute, and to act thereon unless circumstances would indicate that it was not going to stop, held misleading and as ignoring duty of operatives to stop before crossing, as required by Code 1896, § 3441. Montgomery St. R. Co. v. Lewis [Ala.] 41 So. 736.

59. Held consistent: Instruction that though it was more dangerous to ride in cupola of caboose than on floor, yet, if man of ordinary prudence would have so ridden under circumstances, plaintiff was not negligent, and instruction that if cupola was place of obvious danger plaintiff cannot recover. St. Louis S. W. R. Co. v. Morgan [Tex. Civ. App.] 16 Tex. Ct. Rep. 928, 98 S. W. 408. Instruction permitting recovery if defendant knew, and plaintiff did not, of probability of such explosion, and with instruction that defendant is not liable if explosion was from

and must not invade the province of the jury,[62] assume facts in dispute,[63] or

unknown cause and could not have been foreseen. Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 S. W. 1072. Instruction relieving defendant from liability if explosion in controller box could not have been reasonably foreseen or prevented, unless defendant was negligent in permitting plaintiff in close proximity thereto, and instruction to find for defendant if plaintiff's negligence contributed to his injury, and instruction authorizing finding for defendant if plaintiff voluntarily removed himself from train independent of negligence. International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000.

60. Instructions on negligence in alighting on side away from depot and while incumbered with bundles held not argumentative. Rambie v. San Antonio, etc., R. Co. [Tex. Civ. App.] 100 S. W. 1022.

61. On weight: Instruction on proximate cause. Moore v. Northern Texas Trac. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 354, 95 S. W. 652. Instruction, in action for injuries while in freight car while coupling was being made, that if plaintiff remained in car when engine was approaching when he could have left car, he cannot recover. Hardin v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 100 S. W. 995. Instruction that if plaintiff took no precaution to protect himself against jar incident to an approaching coupling "which he knew, or in exercise of ordinary care ought to have known, was about to occur from said coupling," he could not recover. Id.

Instruction not on weight: Premature starting before shipper had tied horse. Houston, etc., R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202. As to liability of carrier for abusive conduct of conductor. St. Louis S. W. R. Co. v. Granger [Tex. Civ. App.] 100 S. W. 987. Assumption of undisputed fact does not render instruction on weight of evidence. Shipper's duty to load and tie horse. Houston, etc., R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202.

62. Instruction held to invade: That one on running board of car being operated on wrong track was not bound to anticipate danger from trolley poles. Indianapolis Trac. & T. Co. v. Richey [Ind. App.] 80 N. E. 170. That, if plaintiff was riding up and down in elevator as he testified in deposition, he was not a passenger. Ferguson v. Truax [Wis.] 110 N. W. 395. To find for defendant if injury happened "by reason of the usual and ordinary operation and running of the train," held erroneous as pretermitting consideration whether ordinary "operation and running" was reasonably safe. Yazoo, etc., R. Co. v. Byrd [Miss.] 42 So. 286. That defendant was not liable unless servants had notice or knowledge of his presence in car when coupling was made, is erroneous where negligence in not ascertaining presence was for jury. Hardin v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 100 S. W. 995.

Held not to invade: After instructing that mere fact that plaintiff charged particular matters as negligence does not warrant jury in so treating them, added instruction to bear in mind presumption of negligence is not objectionable as invading province of jury or as charging that any act which plaintiff may characterize as negligence is so presumed. Georgia R. & Banking Co. v. Adams, 127 Ga. 408, 56 S. E. 409. Charge construed as expression of the court's opinion, and not as withdrawing question of negligence from jury. Pittsburgh R. Co. v. Bloomer [C. C. A.] 146 F. 720.

63. Erroneous: Instruction that plaintiff continued to be passenger "up to and including the act of alighting at his proper stopping place" held erroneous where there was evidence tending to show that plaintiff jumped off before reaching his stopping place. Lincoln Trac. Co. v. Brookover [Neb.] 109 N. W. 168. Binding instruction for defendant if plaintiff alighted from moving car held properly refused as assuming that she alighted and intimating that she was not thrown as alleged. Birmingham R., Light & Power Co. v. Moore [Ala.] 43 So. 841. Instruction in action for ejection respecting plaintiff's right to recover for injuries caused by his resistance held erroneous as pretermitting inquiry as to force used by conductor, and as assuming that injuries were caused by his resistance, and also that his acts justified ejection. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984. Instruction held properly refused as assuming that conductor was not bound to use care to determine whether starting car would endanger safety of persons intending to become passengers. Smith v. Detroit United R. Co., 145 Mich. 629, 13 Det. Leg. N. 540, 108 N. W. 1024. Instruction as to contributory negligence assumed that plaintiff alighted from moving train. Bond v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30. Assumed shock and excitement attendant on getting on wrong train, and that it was result of mistake of gateman. Baltimore, etc., R. Co. v. Sheridan [Ky.] 101 S. W. 928.

Correct: Where facts are undisputed and establish legal conclusion, court may so state, as that plaintiff was passenger (Georgia R. & Elec. Co. v. Cole, 1 Ga. App. 33, 57 S. E. 1026), or existence of regular and customary stopping place at station (De Castillo v. Galveston, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 481, 95 S. W. 547). Where conductor testified positively that he saw passenger alighting, instruction as to facts necessary to warrant recovery was not erroneous for failing to require finding that operatives knew when starting car of attempt to alight. Parks v. St. Louis Transit Co., 119 Mo. App. 445, 96 S. W. 426. Instruction assuming relation of carrier and passenger is not erroneous where specific instruction directs verdict for defendant if it does not exist Houston, etc., R. Co. v. Easton [Tex. Civ. App.] 97 S. W. 833. Instruction that if defendant failed to stop at station long enough to enable plaintiff to alight promply with safety, but suddenly started train, etc., held not objectionable as assuming negligence, for it left truth of facts to jury, which facts constituted negligence as matter of law if true. St Louis, etc., R. Co., v. Price [Ark.] 104 S. W. 157. Instruction as to duty owed alighting passengers and instruction specifically submitting defendant's negligence, held not to assume relation of

single out and give undue prominence to particular matters.[64] Requested instructions[65] substantially covered[66] by instructions already given may be refused.[67] The court must instruct as to all matters necessary to a proper determination of the issues,[68] defining such terms as need to be explained[69] but should not repeat.[70] Where an instruction directs a verdict upon a finding of particular facts, it must embrace all facts essential to such recovery.[71]

passenger and carrier. International, etc., R. Co. v. Tasby [Tex. Civ. App.] 100 S. W. 1030. Instruction held not objectionable as assuming that plaintiff suffered pain. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 S. W. 495. Instruction stating that plaintiff "sues . . . for injuries received while attempting to board" defendant's train held not objectionable as assuming injury alleged. Galveston, etc., R. Co. v. Fink [Tex. Civ. App.] 99 S. W. 204.

64. Objectionable: Instruction that if plaintiff was riding up and down in elevator, as he himself testified in his deposition, he was not passenger, held properly refused as directing attention to particular evidence. Ferguson v. Truax [Wis.] 110 N. W. 395.

Not objectionable: Where statement of conductor to motorman "When you stop, why in the devil don't you give people a chance to get off" is introduced as contradictory statement of witness, instruction limiting it to that purpose is not objectionable as directing attention to such contradictory evidence. Louisville & S. I. Trac. Co. v. Leaf [Ind. App.] 79 N. E. 1066. Special instructions submitting negligence in alighting at side away from depot and while incumbered with bundles, though general charge on contributory negligence had been given Rambie v. San Antonio, etc., R. Co. [Tex. Civ. App.] 100 S. W. 1022. Although court has stated in general charge that plaintiff must establish allegations by preponderance of evidence, giving special charge that passenger injured while alighting cannot recover unless it is shown by preponderance of evidence that injury was caused by failure of defendant to exercise high degree of care, etc. Id. Instruction "If the conductor pushed the man off after he got upon the step of the car," etc., held not attempt to repeat testimony. Greenwood v. Union Trac. Co., 30 Pa. Super. Ct., 488.

65. Instruction as to liability for failing to assist passenger to alight from slippery steps held not erroneous in not requiring jury to find that steps were dangerous and that condition was known to servants, in absence of request therefor. San Antonio Trac. Co. v. Flory [Tex. Civ. App.] 100 S. W. 200.

66. Held covered: Where facts which would constitute assumption of risk also constitute contributory negligence, instructions as to assumption need not be given where latter is fully submitted. McGovern v. Interurban R. Co. [Iowa] 111 N. W. 412. Instruction as to defendant's liability if plaintiff failed to exercise due diligence in alighting. International & G. N. R. Co. v. Tasby [Tex. Civ. App.] 100 S. W. 1030. Instruction as to voluntary exposure to danger held covered by instructions on contributory negligence. Wellmeyer v. St. Louis Transit Co., 198 Mo. 527, 95 S. W. 925.

Held not covered: Where there is evidence that ejected passenger resisted ejection and provoked assault thereafter, instruction that he cannot recover for injuries resulting from his resistance does not cover requested instruction that he could not recover for injuries contributed to by his own acts, since latter includes injuries received after ejectment. Virginia, & S. W. R. Co. v. Hill, 105 Va. 729, 54 S. E. 872. Instruction limiting recovery to negligence charged, moving of footstool, held not covered by charge given. St. Louis S. W. R. Co. v. Johnson [Tex.] 17 Tex. Ct. Rep. 167, 97 S. W. 1039. Instruction denying recovery if passenger voluntarily alighted from moving car is not covered by one relieving carrier if she alighted "without knowledge of conductor or motorman . . . or before they could prevent her." Van Horn v. St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326. Requested instruction on contributory negligence held not covered by instruction that plaintiff cannot recover if she voluntarily left train at water tank without knowledge of defendant's servants, since contributory negligence would defeat recovery though servants knew of her action. Ft. Worth & D. C. R. Co. v. Gribble [Tex. Civ. App.] 102 S. W 157.

67. Instruction that plaintiff must prove negligence alleged by preponderance of evidence is not objectionable in failing to state negligence alleged where it is stated fully in another instruction. Coffey v. Omaha, etc., R. Co. [Neb.] 112 N. W. 589. Instruction that plaintiff's known lameness should be considered in determining whether carrier exercised reasonable care in giving opportunity to board was not erroneous for not stating what effect should be given such facts where effect was controlled by other instructions. Choctaw, O. & G. R. Co. v. Hickey [Ark.] 99 S. W. 839.

68. Instruction that passenger may recover if he was not treated with courtesy, leaving it to jury to say what would be courteous treatment, is erroneous. Little Rock R. & Elec. Co. v. Goerner, 80 Ark. 158, 95 S. W. 1007. Court may properly instruct as to degree of care owed. Galveston, H. & N. R. Co. v. Morrison [Tex. Civ. App.] 102 S. W. 143. Instruction properly defining care required held erroneously refused though plaintiff pleaded specific acts of negligence, thereby assuming burden of proving them, such fact not affecting care owed. Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062.

69. Instruction to find for plaintiff if defendant negligently or carelessly gave train sudden or violent jerk while plaintiff was alighting, sufficiently defines "negligently." Louisville & N. R. Co. v. Deason, 29 Ky. L. R. 1259, 96 S. W. 1115. Failed to define what would constitute such disorderly conduct or interference with apparatus to authorize ejection. Dobbins v. Little Rock R. & Elec.

Trial.—The general rules relating to discretionary rulings,[72] cross-examination,[73] argument of counsel,[74] and verdicts and findings apply.[75]

Part V. Carriers of Baggage and Passengers' Effects.

§ 33. *What constitutes baggage and effects; duty to accept and carry.*[76]—Personal effects, carried as incident to the carriage of the owner,[77] though not necessarily on the same train,[78] and which are reasonably necessary for his use and convenience during the journey,[79] constitute baggage. Personal effects include articles of adornment,[80] and they do not lose their character as such by becoming temporarily unfit for use.[81] While a passenger cannot insist upon the

Co., 79 Ark. 85, 95 S. W. 794. Held not prejudicial error to use phrase "proper care" where requisite care has been previously stated. Randolph v. Metropolitan R. Co., 125 Mo. App. 620, 102 S. W. 1085.

70. Where several negligent acts are charged and submitted as single ground of recovery, instruction submitting them separately is not objectionable as repetition. Texas & N. D. R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653.

71. Directed verdict if collision was caused by backing of wagon into car and pretermitted consideration of negligence in attempting to pass it by so close margin. Chicago Consol. Trac. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820. Where facts hypothecated in instruction as to liability for suddenly starting train as plaintiff was about to alight constitute negligence, instruction is not defective for failing to require finding of negligence. Bond v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30. Where plaintiff's evidence tended to show that she was carried ten blocks beyond destination, while that of defendant that she was carried only a block, instruction that defendant was liable if it carried her beyond destination and to another and distant part of city is not subject to rule that instruction which covers case and authorizes finding for either party must not exclude any material issue supported by substantial evidence. Henderson v. Metropolitan St. R. Co., 123 Mo. App. 666, 100 S. W. 1111.

72. Refusal of court to accept offer of defendant, in action based on negligence in rounding curve at a light rate of speed, to take court and jury on car and to make curve, held within court's discretion. Dupuis v. Saginaw Valley Trac. Co., 146 Mich. 151, 13 Det. Leg. N. 767, 109 N. W. 413.

73. Where witness has testified generally to situation and conditions surrounding accident, he may be cross-examined in detail as to action of decedent. Fadley v. Baltimore & O. R. Co. [C. C. A.] 153 F. 514. Where conductor shows a manifest lack of recollection of incidents of accident, and has testified that if any one was hurt he did not know it, it is proper cross-examination to ask if particular person was not badly hurt and if he knew names of any one on car. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 So. 1024.

74. Error for plaintiff's attorney to state, without justifying evidence that defendants "had millions of capital" and "thousands of employes" and had failed to produce passenger who saw accident, and to dwell unduly upon fact that conductor had entered defendant's service under assumed name and characterizing it as a crime. Keenan v. Metropolitan St. R. Co., 118 App. Div. 56, 103 N. Y. S. 61.

75. Special finding that car was at full stop when plaintiff "stepped or got off" construed to mean that it was standing when he stepped, and not inconsistent with the verdict based upon finding that it started while he was alighting. Burke v. Bay City Trac. & Elec. Co., 147 Mich. 172, 13 Det. Leg. N. 974, 110 N. W. 524. General verdict held not in conflict with special findings, since it was not limited to negligence covered by latter. Louisville & S. I. Trac. Co. v. Leaf [Ind. App.] 79 N. E. 1066. General verdict for plaintiff, based upon negligence in permitting banana peel to remain upon car steps, not inconsistent with special findings that steps were cleaned by servants on morning of accident, it not appearing whether peel was seen or not and that car was inspected before trip, time of inspection not appearing. Pittsburgh, etc., R. Co. v. Rose [Ind. App.] 79 N. E. 1094. Where only negligence submitted to jury was failure to discover defect in controller, and court instructs that evidence fails to show any known appliance, device, or degree of care which would have prevented accident, finding for plaintiff must be reversed. Paine v. Geneva, etc., Trac. Co., 115 App. Div. 729, 101 N. Y. S. 204.

76. See 7 C. L. 600.

77. Where passenger at junction takes another line and thereafter has baggage rechecked and forwarded by original route it is not carried as baggage. Hicks v. Wabash R. Co., 131 Iowa, 295, 108 N. W. 534.

78. Carrier is not, as matter of law, liable only as gratuitous bailee of baggage which it has regularly checked, especially if owner in good faith intends to follow it on later train. McKibbin v. Wisconsin Cent. R. Co., 100 Minn. 270, 110 N. W. 964. Evidence held to show that he did so intend to follow. Id.

79. Money reasonably necessary for journey is baggage. Texas, etc., R. Co. v. Lawrence [Tex. Civ. App.] 15 Tex. Ct. Rep. 471, 95 S. W. 663. Whether tools of carpenter on way to work constitute baggage held for jury. Texas, etc., R. Co. v. Russell [Tex. Civ. App.] 17 Tex. Ct. Rep. 607, 97 S. W. 1090. Sample case containing photographs used by traveling salesman in sale of goods held not baggage within Code, § 2077. McElroy v. Iowa Cent. R. Co., 133 Iowa, 544, 110 N. W. 915.

80. Jewels, etc. Pullman Co. v. Green [Ga.] 57 S. E. 233.

81. Diamond in ring became loose. Pull-

carriage of merchandise as baggage, yet if the carrier knowingly[82] accepts it as baggage, it becomes liable therefor as such.[83] A baggage master has implied authority to accept as baggage goods not strictly such.[84] If it is secretly checked, the carrier is liable only as a bailee.[85]

§ 34. *Care of baggage and effects.*[86]—A carrier is liable for the loss of baggage unless occasioned by an act of God or the public enemy,[87] or the negligence of the owner;[88] and the owner's negligence in packing is no excuse if the carrier knowingly accepts it in such condition.[89] Where personal effects are not placed in the custody of the carrier,[90] it is not an insurer thereof,[91] but must exercise reasonable care,[92] being liable for negligence only.[93] Contributory negligence of the passenger relieves the carrier.[94] Carrier is liable for wrongful delivery,[95] unless such delivery is ratified.[96] The liability does not attach until the baggage is received[97] and accepted as such[98] and ceases upon delivery.[99] Where the carrier undertakes to deliver through another, it is liable for the acts of the latter.[1] An agent of one road generally has no power to bind connecting lines by representations.[2] Where baggage is delivered to the carrier an un-

man Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933.

82. Where circumstances are such as to charge carrier with knowledge that baggage contains merchandise, it is liable as for baggage. St. Louis, etc., R. Co. v. Green [Tex. Civ. App.] 17 Tex. Ct. Rep. 1, 97 S. W. 531. Whether word "glass" in large letters upon box presented as baggage containing china, was sufficient to charge carrier with knowledge of contents held for jury. Id. Evidence that plaintiff checked as baggage four large trunks of size and pattern in use by salesmen, held sufficient to take case to jury as to notice that they contained merchandise. McKibbin v. Wisconsin Cent. R. Co., 100 Minn. 270, 110 N. W. 964.

83. Fleischman, Morris & Co. v. Southern R. Co. [S. C.] 56 S. E. 974.

84. Hence his acceptance binds carrier unless passenger has knowledge that he is exceeding his authority. Bergstrom v. Chicago, etc., R. Co. [Iowa], 111 N. W. 818.

85. Illinois So. R. Co. v. Antoon, 122 Ill. App. 359. Is not liable for failure to promptly deliver. McElroy v. Iowa Cent. R. Co., 133 Iowa, 544, 110 N. W. 915.

86. See 7 C. L. 602.

87. Wolf v. Grand Rapids, etc., R. Co. [Mich.] 112 N. W. 732.

88. Where goods are checked to wrong station, acceptance of check does not constitute negligence on part of owner. Strange v. Atlantic Coast Line R. Co. [S. C.] 57 S. E. 724.

89. Especially where not pleaded. Texas, etc., R. Co. v. Russell [Tex. Civ. App.] 17 Tex. Ct. Rep. 607, 97 S. W. 1090.

90. In absence of special agreement, street railway company does not assume control of baggage. Sperry v. Consolidated R. Co., 97 Conn. 565, 65 A. 962. Fact that conductor took baggage, carried it into car, and placed it within sight and control of passenger does not justify finding that he assumed control thereof as carrier. Id.

91. Money taken from plaintiff's trousers while asleep. Cohen v. New York Cent., etc., R. Co., 105 N. Y. S. 483.

92. Sleeping car company must exercise reasonable care against theft. Pullman Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933. Stolen while asleep or in toilet room. Pullman Co. v. Green [Ga.] 57 S. E. 233.

93. Sperry v. Consolidated R. Co., 79 Conn. 565, 65 A. 962. To establish liability for loss of baggage, plaintiff must show that defendant accepted baggage as carrier or that loss was due to its negligence. Id. Held not negligent in permitting baggage in control of owner to be carried out by another passenger, conductor having no reason to believe latter was not owner. Id. Evidence that no porter was present when plaintiff went to his berth and that none was present when he arose held insufficient to show that loss of money in meantime was due to defendant's negligence. Cohen v. New York Cent., etc., R. Co., 105 N. Y. S. 483.

94. Passenger leaving articles of adornment in berth while making toilet is not negligent as a matter of law. Pullman Co. v. Green [Ga.] 57 S. E. 233.

95. Possession of baggage check is prima facie evidence of ownership or right to receive. St. Louis, etc., R. Co. v. Stone, 78 Ark. 318, 95 S. W. 470. Genuineness of check upon which baggage was rechecked held for jury. Id.

96. Acceptance of new check ratifies act of one rechecking. St. Louis, etc., R. Co. v. Stone, 78 Ark. 318, 95 S. W. 470.

97. Testimony of transfer agent that he delivered plaintiff's baggage to defendant held to make case for jury as to whether defendant received same. Wolf v. Grand Rapids, etc., R. Co. [Mich.] 112 N. W. 732.

98. Fact that transfer agent violated instruction by checking baggage before passenger had purchased ticket does not relieve carrier from liability where ticket is subsequently purchased. Wolf v. Grand Rapids, etc., R. Co. [Mich.] 112 N. W. 732.

99. Rechecking over another line is an acceptance from original line. St. Louis, etc., R. Co. v. Stone, 78 Ark. 318, 95 S. W. 470.

1. Where carrier uses station of another carrier for discharging passengers, and agents of latter assume control of and deliver baggage of incoming passengers, such servants are agents of former while so acting. Campbell v. Missouri Pac. R. Co. [Neb.] 111 N. W. 126.

2. Where railroad company gave hotel

reasonable time before owner expects to take passage,[3] or where it is not removed within a reasonable time after arrival at destination,[4] the carrier's liability becomes that of a warehouseman,[5] and the baggage subject to storage liens.[6]

§ 35. *Limitation of liability.*[7]—Unless prohibited by statute,[8] a carrier may reasonably[9] limit its liability by special contract, based upon a sufficient consideration,[10] made with owner or his agent,[11] and in the absence of fraud, passenger is bound by a signed ticket containing such restrictions.[12] Carrier cannot relieve itself from loss of baggage due to willful misconduct although passenger is riding on free pass.[13]

§ 36. *Damages.*[14]—The measure of damages for loss of baggage is its value to owner at destination.[15]

§ 37. *Remedies and procedure.*[16]—The articles need only be itemized in actions for loss[17] and not in suits for negligent delay.[18] Proof of loss raises presumption of negligence.[19] The courts will take judicial notice of the custom to carry sample trunks as personal baggage.[20] The general rules applicable to the admission[21] and sufficiency[22] of evidence, and the giving of instructions,[23] apply.

Carrying Weapons; Car Trusts, see latest topical index.

privilege of checking baggage of guests, porter entrusted with such duty has no power to bind connecting carrier, especially where each carrier's liability terminated at end of its own line. Bachman v. Clyde S. S. Co. [C. C. A.] 152 F. 403.

3. Fleischman, Morris & Co. v. So. R. Co. [S. C.] 56 S. E. 974.

4. Kressin v. Central R. Co., 103 N. Y. S. 1002; Moyer v. Pennsylvania R. R. Co., 31 Pa. Super. Ct. 559. What is reasonable time is question of law where facts are undisputed. Kressin v. Central R. Co., 103 N. Y. S. 1002. Where baggage arrives early in morning, reasonable time for removal does not extend beyond day. Moyer v. Pennsylvania R. R. Co., 31 Pa. Super. Ct. 559.

5. Does not relieve from all liability. Central of Georgia R. Co. v. Jones [Ala.] 43 So. 575.

6. Under Laws 1897, p. 533, c. 418, § 73, providing for warehousemen's liens. Kressin v. Central R. Co., 103 N. Y. S. 1002.

7. See 7 C. L. 602.

8. Civ. Code, § 970, when construed with §§ 2876, 2878, held not to prevent carrier limiting liability for baggage by special contract. Rose v. Northern Pac. R. Co. [Mont.] 88 P. 767.

9. Under Civ. Code, § 2892, making liability of carrier for loss of baggage same as that for loss of goods, carrier may contract to limit liability for baggage, provided such limitation is reasonable. Rose v. Northern Pac. R. Co. [Mont.] 88 P. 767.

10. Reduced rate is sufficient consideration for all provisions of contract and it is not necessary that there be independent consideration for each provision limiting liability. Rose v. Northern Pac. R. Co. [Mont.] 88 P. 767. Evidence that nothing was said to passenger about reduced rate or limitation of liability for baggage is inadmissible where ticket was furnished her according to telegraphic directions of another. Id.

11. Agent charged with checking of baggage has authority to stipulate for terms of transportation, as where minor son signed release. Kanevsky v. New York, etc., R. Co., 53 Misc. 564, 103 N. Y. S. 727.

12. Cannot be heard to say that she did not know of limitations. Rose v. Northern Pac. R. Co. [Mont.] 88 P. 767.

13. Hutto v. Southern R. Co., 75 S. C. 295, 55 S. E. 445.

14. See 5 C. L. 555. See, also, Damages, 5 C. L. 904.

15. Cannot recover for expense in effort to recover, for being deprived of use, or for purchase of other apparel, in absence of notice to carrier of special circumstances. Turner v. Southern R. Co., 75 S. C. 58, 54 S. E. 825. See Damages, 7 C. L. 1029.

16. See 7 C. L. 603.

17. Where railroad company sued for loss of baggage, it is entitled to be informed as to contents of trunks lost. Texas & P. R. Co. v. Weatherby [Tex. Civ. App.] 14 Tex. Ct. Rep. 809, 92 S. W. 58.

18. Texas, etc., R. Co. v. Russell [Tex. Civ. App.] 17 Tex. Ct. Rep. 607, 97 S. W. 1090.

19. Central of Georgia R. Co. v. Jones [Ala.] 43 So. 575. Where personal effects are stolen from passenger while asleep, sleeping car company has burden of proving freedom from negligence. Pullman Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933. Evidence as to manner in which theft was committed and effects scattered about, held to sustain finding that due vigilance was not kept. Id. Fact that passenger declares in case instead of in assumpsit does not require him to prove negligence, but may still rely on defendant's liability as insurer. Wolf v. Grand Rapids, etc., R. Co. [Mich.] 112 N. W. 732.

20. Fleischman, Morris & Co. v. Southern R. Co. [S. C.] 56 S. E. 974.

21. Passenger may testify that carrier agreed to carry baggage to certain destination without producing check. Strange v. Atlantic Coast Line R. Co. [S. C.] 57 S. E. 724. Where steamship ticket signed by passenger constituted contract which limited carrier's liability for baggage, it cannot be varied by parol evidence of conversation be-

CASE, ACTION ON.[1]

A count alleging that after discovering plaintiff's peril defendant's servant wantonly, recklessly, or wilfully ran a car of which he was in charge against the wagon of plaintiff states a cause of action in case.[2]

CASE AGREED; CASE CERTIFIED; CASE SETTLED; CASH; CATCHING BARGAIN, see latest topical index.

CAUSES OF ACTION AND DEFENSES.[3]

This topic includes only the most general and abstract propositions,[4] excluding both practice[5] and the constituents of particular causes of action and defenses.[6]

A statute instituting a new remedy for an existing right does not take away a pre-existing remedy without express words or necessary implication,[7] but a statute conferring the right to enforce an existing cause of action does not confer a right of action.[8] At common law political as distinguished from civil rights were not subject to judicial determination,[9] but by statute in many states the strict rule of the common law has been modified or abrogated so that rights conferred by statute, whether civil or political, may be protected and enforced.[10] Statutory rights of action which did not exist at common law will be enforced in other forums subject to limitations and burdens imposed by the statute creating them.[11] Right to a recovery depends upon the accrual of the cause of action at the inception of the suit,[12] and the subsequent accrual of a right of action cannot be set up by amendment.[13] Hence, all conditions precedent to the right to maintain an action must

fore purchase. Bachman v. Clyde S. S. Co. [C. C. A.] 152 F. 403. In action for loss of baggage rechecked by one traveling as husband of plaintiff, evidence that when he called he presented check therefor bearing correct number and letter purporting to be from plaintiff representing him as her husband and directing rechecking is admissible to show agency. St. Louis, etc., R. Co. v. Stone, 78 Ark. 318, 95 S. W. 470.

22. Fact that plaintiff's agent signed release when checking baggage reciting that trunk was without lock held sufficient to establish such fact as against testimony of plaintiff and two children. Kanevsky v. New York, etc., R. Co., 53 Misc. 564, 103 N. Y. S. 727.

23. Instruction authorizing recovery on facts hypothesized therein, without limiting it by reference to contributory negligence, is not erroneous where other instructions submit such issue. Underwood v. Metropolitan St. R. Co., 125 Mo. App. 490, 102 S. W. 1045. Where right of plaintiff to transport articles set out in bill of particulars as baggage is not raised by pleadings, instruction that company was not liable therefor unless it had notice of character of such articles, held properly refused. St. Louis S. W. R. Co. v. Johnson [Ark.] 102 S. W. 205.

1. See 7 C. L. 603. See, also, Damages, 7 C. L. 1029.

2. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45.

3. See 7 C. L. 603.

4. Most of the cases involving the terms "cause of action" or "defense" are referable to the identity or the joinder, severance, or splitting of them. See Pleading, 8 C. L. 1355 (joinder of causes of action); Abatement and Revival, 9 C. L. 1; Former Adjudication, 7 C. L. 1750; Limitation of Actions, 8 C. L. 768.

Other topics dealing with kindred abstractions are Actions, 9 C. L. 27; Forms of Action, 7 C. L. 1769.

5. See Pleading, 8 C. L. 1355, and like topics.

6. See topic dealing with the particular matter.

7. Bergman v. Gay, 79 Vt. 262, 64 A. 1106. U. S. 2279, 2281, giving lien for repairs on chattels and providing for sale in satisfaction is cumulative and does not take away remedy provided by Act of 1867, U. S. 2299, providing a remedy by attachment and sale on execution.

8. Forman v. New Orleans Sewerage & Water Board [La.] 43 So. 908.

9. Brown v. Cole, 104 N. Y. S. 109.

10. Injunction granted restraining political party from adopting certain rules as to qualifications of persons entitled to vote at political primary. Brown v. Cole, 104 N. Y. S. 109.

11. Action for wrongful death brought in Kansas under New Mexico statute, held notice being prerequisite to action under such statute, the action could not be maintained in absence of compliance therewith. Swisher v. Atchison, etc., R. Co. [Kan.] 90 P. 812.

12. Action on contractor's bond prior to auditing and certification of account by architect as provided in contract held prematurely brought. American Bonding & Trust Co. v. Gibson County [C. C. A.] 145 F. 871.

13. Where judgment against contractor and bondsmen was reversed for failure to allege and prove that account had been audited and certified by architect as provided in contract, the action cannot be

be complied with.[14] The motive actuating the doing of a lawful act cannot be made the basis of a right of action,[15] but the rule is otherwise where the act, though lawful in the proper case, is not authorized under the particular circumstances.[16] A right of action cannot be predicated upon the wrongdoing of the person seeking relief.[17] An action may be ex delicto though based upon a contract.[18] and may be ex contractu though the act constituting the breach is a tort.[19] A cause of action ex contractu may exist in favor of one not a party thereto.[20] Unless authorized by statute legal and equitable causes of action cannot be joined,[21] but equitable jurisdiction is not invoked where no affirmative relief is asked.[22] A single cause of action[23] cannot be severed, and if severed recovery thereon bars further recovery,[24] but a contract the performance of which is several may be made the basis of separate causes of action,[25] and though acts may be consecutive in time and purpose, several causes of action may arise therefrom.[26]

Defenses.[27]—Unless permitted by statute,[28] grounds for equitable relief can-

sustained on an amendment showing that certificate was procured subsequent to reversal, it not being alleged that same had previously been refused. American Bonding & Trust Co. v. Gibson County [C. C. A.] 145 F. 871.

14. Under Gen. Laws 1896, c. 233, § 16, requiring a criminal prosecution to be commenced before bringing a civil action or any act constituting a crime, an action aginst guardian for embezzlement cannot be maintained until such prosecution has been instituted. Williams v. Smith [R. I.] 66 A. 63. Under a charter provision requiring notice to council of the accumulation of ice or snow on sidewalks as a condition to liability on part of city for injuries caused thereby, the giving of such notice is a condition precedent to the accrual of a right of action and must be alleged and proven. MacMullen v. Middletown [N. Y.] 79 N. E. 863. Provision in contract for carriage requiring notice of claim for damages before property is removed from place of destination is a prerequisite to the right to maintain an action therefor. St. Louis & S. F. R. Co. v. Phillips, 17 Okl. 264, 87 P. 470. For further cases on notice as a condition precedent see Carriers, 7 C. L. 522; Master and Servant, 8 C. L. 840; Municipal Corporations, 8 C. L. 1056; Highways and Streets, 8 C. L. 40.

15. Jones v. Jones [La.] 44 So. 429.

16. The malicious filing of a mechanic's lien upon a fictitious claim constitutes an actionable wrong. Ghiglione v. Friedman, 115 App. Div. 606, 100 N. Y. S. 1024.

17. Plaintiff was induced to bet on a fake race by a band of swindlers who assured him that the race had been fixed so that he would win. The race had in fact been fixed so that plaintiff could not win, the whole purpose of the scheme being to defraud plaintiff. Held the maxim ex dolo malo non oritur actio was not applicable. Stewart v. Wright [C. C. A.] 147 F. 321.

18. Action for negligent performance of contract resulting in damage held ex delicto through negligence constituted breach of contract. Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503. Complaint setting up breach of contract for carriage but not alleging sufficient consideration to support it, held to state a cause of action in tort and not in assumpsit. Pennsylvania R. Co. v. Smith [Va.] 56 S. E. 567.

19. Action for breach of contract for carriage held ex contractu, the complaint alleging a contract to carry safely and an assault as a breach. Busch v. Interborough Rapid Transit Co. 187 N. Y. 388, 80 N. E. 197, afg. 110 App. Div. 705, 96 N. Y. S. 747.

20. Action by beneficiary under insurance policy to reçover from assignee of policy as security for failure to pay premiums agreed to be paid. Scheele v. Lafayette Bk., 120 Mo. App. 611, 97 S. W. 621.

21. In the Federal courts legal and equitable causes of action cannot be blended. Cook v. Foley [C. C. A.] 152 F. 41. Joinder of action to recover dividend declared by corporation and to restrain increase of capital stock held improper. Searles v. Gebbie, 115 App. Div. 778, 101 N. Y. S. 199.

22. That conveyance was in fraud of creditors may be set up as a defense in an action at law where no affirmative relief is demanded. Schollars v. Coghlan, 104 N. Y. S. 742.

23. Cause of action for killing two steers on a railroad track is single where steers were struck within a few seconds of the same time. Chicago, etc., R. Co. v. Ramsey [Ind.] 81 N. E. 79.

24. Judgment for injuries sustained from tort bars recovery for further injuries from same tort, though at the time further injuries were not anticipated. Painter v. Norfolk & W. R. Co. [N. C.] 57 S. E. 151.

25. Baumhoff v. St. Louis & K. R. Co. [Mo.] 104 S. W. 5. The breach of each instalment of a continuing contract, to be performed in instalments, constitutes a separate cause of action. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex.] 99 S. W. 701, rvg. [Tex. Civ. App.] 94 S. W. 191. The breach of a rent contract for one year under which rent is payable monthly constitutes a separate breach as to each month's rent. Williams v. Houston Cornice Works [Tex. Civ. App.] 101 S. W. 839.

26. Ejection and arrest of passenger held to create separate causes of action. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 S. W. 495.

27. See 7 C. L. 604.

28. Rev. St. c. 84, § 17, allowing defendant in an action at law to plead in defense "any matter which may be ground for relief in equity" is limited by its context to claims made by plaintiff in the action. Hence re-

not be set up in an action at law,[29] but by statute in many states such defenses are allowed,[30] and where the union of legal and equitable defenses is permitted, a party must set up all defenses which he has, whether legal or equitable.[31] What is a legal action depends upon the nature of the relief sought.[32] A counterclaim cannot be split so as to use part of it as a defense in the pending action and the remainder as a cause of action in another suit.[33] The motive underlying the bringing of an action does not constitute a defense.[34]

CEMETERIES.[35]

Right of sepulture is elsewhere treated.[36]

Boroughs in Pennsylvania have power to prohibit interments within their limits or portions thereof,[37] and this power may be validly exercised by the passage of an ordinance prohibiting further burials except within the limits of existing cemeteries.[38] A cemetery is not, however, a nuisance per se,[39] and the legislature in authorizing towns to provide burial places did not contemplate that they should be so located and maintained as to constitute nuisances.[40] Where so located and maintained they may be enjoined.[41] One who buys land near a cemetery will not be presumed to know that the cemetery was a nuisance in fact so as to be prevented from having it abated.[42]

An association managed by white persons may not deny colored persons the right to bury in a lot owned by them and enclosed by the cemetery grounds.[43] An owner of a cemetery lot has no implied license to roam at will all over the cemetery grounds and outside the avenues or ways provided for access to lots,[44] and one who is injured while taking a "short cut" for his own convenience has no cause of action against the association.[45] Where an association has express or implied authority

formation cannot be had as the equitable matter permitted must be a matter of defense. Martin v. Smith [Me.] 65 A. 257.

29. Reformation on ground of mistake. Martin v. Smith [Me.] 65 A. 257. In the Federal courts an equitable defense cannot be pleaded in an action at law. Cook v. Foley [C. C. A.] 152 F. 41.

30. Levin v. Gladstein, 142 N. C. 482, 55 S. E. 371; Sharrock v. Kreiger, 6 Ind. T. 466, 98 S. W. 161.

31. Gorman v. Bonner, 80 Ark. 339, 97 S. W. 282.

32. Action to recover percentage of gold taken from mine, for an injunction restraining defendant from extracting gold therefrom, an accounting for gold already extracted and the appointment of a receiver is an action in equity and defendant may demand reformation. Kuzek v. Magaha [C. C. A.] 148 F. 618.

33. Palm's Adm'rs v. Howard [Ky.] 102 S. W. 267, 1199.

34. Fact that minority stockholders who were also creditors commenced proceedings for appointment of receiver for corporation in a case authorized by law with ulterior motives to secure control of corporation is not a defense. Catlin v. Vichachi Min. Co. [N. J. Eq.] 67 A. 194. Fact that administrator's object in bringing action to recover possesion of land owned by decedent was to absolve himself of his individual contract for sale of his interest in land is immaterial. Kern v. Cooper, 97 Minn. 509, 106 N. W. 962. In an action to enjoin a liquor nuisance, fact that action was instigated by plaintiff at request of others, who agreed to pay counsel fees, that he merely lent his name for purpose of bringing action and that action was not brought in good faith, is immaterial. Rizer v. Tapper [Iowa] 110 N. W. 1038.

35. See 7 C. L. 605.

36. See Corpses and Burial, 7 C. L. 953.

37. Act 1851 (P. L. 322, § 2, cls. 16, 17). Carpenter v. Yeadon Borough, 151 F. 879.

38. Carpenter v. Yeadon Borough, 151 F. 879. Transactions considered, and held a certain tract of land had not become an "established cemetery" before the ordinance was passed. Id.

39, 40. Payne v. Wayland, 131 Iowa, 659, 109 N. W. 203.

41. Evidence held to support finding of a nuisance. Payne v. Wayland, 131 Iowa, 659, 109 N. W. 203. Evidence sufficient to sustain finding that establishment of a cemetery would pollute plaintiffs' wells. Elliott v. Ferguson [Tex. Civ. App.] 103 S. W. 453. Not necessary to submit question as to which of the wells would be polluted. Id. Plaintiffs could not be required to adopt wooden cisterns though inexpensive. Id. Rule that injunction should not be granted where plaintiff's injury is trivial not applicable. Id. Demurrer and special exceptions to petition properly overruled. Id.

42. Payne v. Town of Wayland [Iowa] 109 N. W. 203. Though a purchaser knew that the cemetery was a nuisance, he would not be bound to submit to an enlarged danger. Id.

43. Though cemetery had offered to purchase the lot. Richmond Cemetery Co. v. Walker, 29 Ky. L. R. 1252, 97 S. W. 34.

44, 45. Mt. Greenwood Cemetery Ass'n v. Hildebrand, 126 Ill. App. 399.

to issue transferrable certificates entitling persons who have sold land to it to share in the proceeds of the sale of lots,[46] such certificates have the attributes of stock certificates with reference to transfers,[47] and the association will be liable for damages suffered by innocent transferees or pledgees of new certificates fraudulently issued by its officers without the surrender of old ones.[48] Property owned by a cemetery company and on which there are no graves may be sold to pay a commissioner's fees in a suit for the purchase price of the property.[49] Joint grantees of a cemetery lot are tenants in common and not joint tenants.[50] Where a cemetery lot is inalienable and subject to all burial regulations, the owner has a bare right of burial and no interest which will support ejectment,[51] but where one has under such right buried his dead in such lot, he has a right of action against one disturbing the bodies,[52] and such right is transmitted to his heirs.[53] Consent by one heir to the removal of bodies does not bind his coheirs.[54]

A determination by town trustees of a dispute between lot owners as to the boundary between their lots made in the absence of one of the parties and without notice to him is void for want of jurisdiction.[54a]

CENSUS AND STATISTICS.[55]

An official census is admissible in evidence to establish facts by law required to appear therein.[56] Under the New Jersey statute making certificates of birth prima facie evidence of the facts recited therein, a fraudulent certificate based upon the representations of a married woman that her husband is the father of the child which is in fact a bastard may be canceled in so far as such paternity is shown and its use for the purpose of establishing such paternity enjoined.[57]

Certificate of Doubt; Certificates of Deposit, see latest topical index.

CERTIORARI.

§ 1. Nature, Occasion and Propriety of Remedy (543). Ancillary Certiorari (546).
§ 2. Right to Certiorari; Parties (546).
§ 3. Procedure for Writ; Writ, Service and Return (547). The Statutory Bond (548). The Writ (548). Notice of the Writ (548). Service of the Writ (548). The Return (548). Objections and Amendments (549). Quashal or Dismissal (549).
§ 4. Hearing and Questions Which May be Raised and Settled (550).
§ 5. Judgment (551).
§ 6. Costs (552).
§ 7. Review of Certiorari (552).

Certiorari to review summary convictions of crime,[58] and to try the validity of municipal ordinances[59] is more fully treated elsewhere.

46. Certificates held authorized. American Exch. Nat. Bk. v. Woodlawn Cemetery, 105 N. Y. S. 305.

47. American Exch. Nat. Bk. v. Woodlawn Cemetery, 105 N. Y. S. 305.

48. Especially where for many years it failed to discover the fraud or remedy it. American Exch. Nat. Bk. v. Woodlawn Cemetery, 105 N. Y. S. 305. Plaintiff not negligent in not discovering that certificates were not numbered consecutively. Id. That name of owner of certificates was filled in by pledgor held not to charge plaintiff with notice. Id. Plaintiff not required to have certificates transferred on books of company. Id. Not negligent in not having certificates registered. Id.

49. Woodland Cemetery Co. v. Stout's Adm'r, 30 Ky. L. R. 165, 97 S. W. 756. See, also, Exemptions, 7 C. L. 1631; Executions, 7 C. L. 1614.

50, 51. Anderson v. Acheson [Iowa] 110 N. W. 335.

52. Anderson v. Acheson [Iowa] 110 N. W. 335. The right of persons as members of the public to bury at a certain place carries with it the right to protect and care for the graves of the dead and prevent trespass thereon. Hassenclever v. Romkey, 133 Iowa, 470, 110 N. W. 905. Action of lower court in determining boundary between lots sustained. Id.

53. Anderson v. Acheson [Iowa] 110 N. W. 335.

54. Such removal is in the nature of waste. Id.

54a. Hassenclever v. Romkey, 133 Iowa, 470, 110 N. W. 905.

55. See 7 C. L. 606.

56. To show the number of bona fide inhabitants of a town or city when in issue. Gregory v. Woodbery [Fla.] 43 So. 504. Certified copies of United States census reports are admissible to show age when material. Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055.

57. Vanderbilt v. Mitchell [N. J. Err. & App.] 67 A. 97.

58. See Indictment and Prosecutions § 18, 8 C. L. 189.

59. See Municipal Corporations, 8 C. L. 1056.

§ 1. *Nature, occasion and propriety of remedy.*[60]—Certiorari is a common-law writ,[61] but it is generally regulated by statute, and in some states is termed a writ of review. It lies from a superior court[62] to review the proceedings of inferior courts,[63] tribunals,[64] boards,[65] and public officers exercising judicial functions.[66] It is only available to correct errors in law,[67] and it will not issue from a court of common law, as such, to review proceedings in a court of equity.[68] But in Rhode Island the supreme court has jurisdiction, under certain circumstances, to issue the writ to the superior court sitting in equity.[69] In the absence of an express statutory provision to the contrary, the writ will issue only when there is no other adequate remedy provided by law.[70] Accordingly it will not issue, as a general rule, if an appeal or writ of error may be had,[71] unless by statute it is made a remedy con-

60. See 7 C. L. 606.

61. Seaboard Air Line R. Co. v. Ray [Fla.] 42 So. 714.

62. General power to issue certiorari expressly conferred upon supreme court by Const. art. 5, § 4, and under § 25 each of justices is granted same power at chambers, but subject to an appeal to the court. State v. Ansel [S. C.] 57 S. E. 185. Under Const. 1875, art. 6, § 12, as amended in 1884, the St. Louis court of appeals cannot issue certiorari in a case where the supreme court has appellate jurisdiction. State v. Nortoni, 201 Mo. 1, 98 S. W. 554.

63. Seaboard Air Line R. Co. v. Ray [Fla.] 42 So. 714. District court. United States Standard Voting Mach. Co. v. Hobson, 132 Iowa, 38, 109 N. W. 458. Justice of the peace. Richardson v. Smith [N. J. Law] 65 A. 162. Commissioner's court. Mayfield v. Tuscaloosa County Com'rs Ct. [Ala.] 41 So. 932.

64. Tax assessors. City of New York v. Mitchell, 103 N. Y. S. 87. Civil service commission. Blake v. Lindblom, 225 Ill. 555, 80 N. E. 252, afg. 124 Ill. App. 282; City of Chicago v. Condell, 224 Ill. 595, 79 N. E. 954, rvg. 124 Ill. App. 64, and overruling City of Chicago v. Bullis, 124 Ill. App. 7; City of Chicago v. Gillen, 124 Ill. App. 210 and People v. Powell, 127 Ill. App. 614.

65. Board of supervisors of county. People v. Westchester County Sup'rs, 116 App. Div. 844, 102 N. Y. S. 402.

66. It is only a determination which is made when exercising judicial functions that can be reveiwed by certiorari. Beaumont v. Samson [Cal. App.] 90 P. 839; Butler v. Harrison, 124 Ill. App. 367; United States Standard Voting Mach. Co. v. Hobson, 132 Iowa, 38, 109 N. W. 458; People v. New York Department of Health, 51 Misc. 190, 100 N. Y. S. 788.

A judicial proceeding implies a hearing as a matter of right to the person affected thereby. People v. New York Department of Health, 51 Misc. 190, 100 N. Y. S. 788. The fact that a public board or agent exercises judgment and discretion in the performance of duties does not necessarily make the action judicial in character. Id.

Summary determination of department of health of New York City that one shall not vend milk in the city is not a judicial determination. People v. New York Department of Health, 51 Misc. 190, 100 N. Y. S. 788.

Certiorari to ministerial boards or officers is not the proper remedy to try the title to an office, or the right to exercise corporate functions. Beaumont v. Samson [Cal. App.] 90 P. 839. Certiorari is not the proper remedy to determine validity of municipal corporation created by board of supervisors of county. Id.

Governor of state: Certiorari will not issue from the supreme court of a state to review an executive act of the governor. State v. Ansel [S. C.] 57 S. E. 185. But if the legislature invests him with some judicial function it would seem that the writ will issue to review his decisions rendered thereunder. Id.

Not to review action of **city council** in disciplining a member for words spoken in debate. Butler v. Harrison, 124 Ill. App. 367.

Not to review action of board for **promotion and retirement of army officers,** the action of such board being in effect that of the president of the United States. Reaves v. Ainsworth, 28 App. D. C. 157.

67. Hayford v. Municipal Officers of Bangor [Me.] 66 A. 731; Collier v. St. Charles Tp., 147 Mich. 688, 14 Det. Leg. N. 30, 111 N. W. 340.

68. Hyde v. Superior Ct. [R. I.] 66 A. 292.

69. If any error or abuse exists without other remedy expressly provided, and it is "necessary for the furtherance of justice and the due administration of the law." Hyde v. Superior Ct. [R. I.] 66 A. 292.

70. Hyde v. Superior Ct. [R. I.] 66 A. 292; State v. Anderson, 130 Wis. 227, 109 N. W. 981.

71. Knight v. Creswell [Ark.] 101 S. W. 754; Fields v. U. S., 205 U. S. 292, 51 Law. Ed. 807.

Proceedings in common-law actions are not reviewable by certiorari Five-Mil Beach Lumber Co. v. Friday [N. J. Law] 66 A. 901. Accordingly, writ will not issue to review order of circuit court in action to enforce mechanic's lien (Id.), or dismissal of rule requiring plaintiff to show cause why service of summons and declaration should not be set aside (Taylor Provision Co. v. Adams Exp. Co., 72 N. J. Law. 220, 65 A. 508).

Condemnation proceedings: Under Ballinger's Ann. Codes & St. § 5645, upon appeal from final judgment awarding damages, all questions which incidentally arise during the trial before the jury for determination of such damages, or after return of verdict, can be reviewed, and, therefore, such questions cannot be reviewed by certiorari. State v. Pierce County Ct. [Wash.] 87 P. 814.

Decision of highway commissioner: Certiorari will not lie to review decision of highway commissioner where appeal lies

current with appeal,[72] and in some jurisdictions it is expressly provided by statute that it may issue only where there is no appeal and no plain, speedy, and adequate remedy at law.[73] But where in a particular case the delay incident to an appeal will render it ineffective to protect the rights of a party, the writ will issue.[74] It will also issue where, though a writ of error has been allowed, the propriety of its allowance is doubtful and a motion to dismiss it has been filed.[75] After opportunity to appeal has been lost by the neglect or laches of the applicant, the writ will not lie.[76] Even where there is no other adequate remedy at law, certiorari will not issue, in the absence of express statutory authorization, unless the court or tribunal acted without jurisdiction, or exceeded its jurisdiction,[77] or has not proceeded according to

from that officer to township board, and no sufficient reason appears why that remedy was not resorted to. Detroit, etc., R. Co. v. Graham [Mich.] 112 N. W. 998.

Judgment of justice's court: Under Code Civ. Proc. § 1068, a writ of review will not lie from the judgment of a justice's court where an appeal may be had. Hall v. San Francisco Justices' Ct. [Cal. App.] 89 P. 870.

72. Under Rev. St. 1895, art. 332, certiorari will issue to review an order settling an administrator's account without a showing of cause why an appeal was not taken. Friend v. Boren [Tex. Civ. App.] 16 Tex. Ct. Rep. 54, 95 S. W. 711.

73. Code Civ. Proc. § 1068. Boca & L. R. Co. v. Lassen County Super. Ct. [Cal.] 88 P. 715. Ballinger's Ann. Codes & St. § 5741. State v. King County Super. Ct. [Wash.] 89 P. 879. Does not lie to review judgment condemning land for municipal purposes. Id. Order in ordinary foreclosure action empowering agent of court to remove and retain petitioner's property is not appealable under Code Civ. Proc. § 963, subd. 2, and, therefore, certiorari will lie to review it. Boca & L. R. Co. v. Lassen County Super. Ct. [Cal.] 88 P. 715. Code Civ. Proc. § 937, providing that order made out of court without notice to adverse party may be vacated by judge who made it, is applicable only to such orders as judge has power to make without notice, and does not preclude certiorari upon the ground of want of jurisdiction. Id.

74. The length of time it will take to prosecute an appeal is not a test of the efficiency of the remedy. It must further appear that the delay incident to the appeal will work deprivation of some substantial right which will prevent the enjoyment of the fruits of the appeal. State v. King County Super. Ct. [Wash.] 89 P. 879. In a case involving the right to an office, where an appeal could probably not be determined before the expiration of the time for which the office is claimed, a writ of review is an available remedy. State v. Kitsap County Super. Ct. [Wash.] 91 P. 4. Appeal from injunction prohibiting use of voting machines which cannot be heard until after election is not a speedy and adequate remedy. United States Standard Voting Mach. Co. v. Hobson, 132 Iowa 38, 109 N. W. 458.

75. In this case the litigation had been protracted for many years and a large amount was involved, and the case was brought up from the circuit court of appeals to supreme court by certiorori to avoid any question of the latter court's jurisdiction of the writ of error. Montana Min. Co. v. St. Louis Min. & Mill. Co., 204 U. S. 204, 51 Law. Ed. 671.

76. Hall v. Justices' Ct. of San Francisco [Cal. App.] 89 P. 870.

77. The mere fact that the court acts contrary to law in a matter within its jurisdiction is not ground for certiorari. Hoffman v. Lewis [Utah] 87 P. 167. But certiorari will always lie where the court has exceeded its jurisdiction. Vette v. Byington, 132 Iowa 487, 109 N. W. 1073; Seaboard Air Line R. Co. v. Ray [Fla.] 42 So. 714.

Neither order granting leave to demur nor question whether right to demur has been waived can be reviewed by certiorari. Voorman v. San Francisco Super. Ct., 149 Cal. 266, 86 P. 694.

Where in entering judgment a justices' court acts within its jurisdiction, a writ of review will not lie under Code Civ. Proc. § 1068. Hall v. San Francisco Justices' Ct. [Cal. App.] 89 P. 870.

Order granting motion brought regularly before court: Under Code Civ. Proc. § 1947, the writ will not issue to review order granting motion, which came regularly before court, to strike out objections to an executor's final account and petition for distribution. State v. Second Judicial Dist. Ct., 34 Mont. 303, 87 P. 614.

Error in dismissing appeal: Under Rev. St. 1897, the writ will not lie where the district court did not exceed its jurisdiction but merely erred in dismissing an appeal from justices' court. Hoffman v. Lewis [Utah] 87 P. 167.

As a nunc pro tunc order correcting a judgment of imprisonment and costs by inserting therein a fine, entered nearly six years after the judgment, is an excess of jurisdiction, certiorari is the proper remedy. Smith v. Mahaska County Dist. Ct., 132 Iowa 603, 109 N. W. 1085.

Certiorari will lie to determine validity of order granting injunction restraining officer de facto from exercising duties of office. Vette v. Byington, 132 Iowa, 487, 109 N. W. 1073.

Order void on its face: Where order of commissioner's court establishing stock district under acts 1894-95 p. 749, is void on its face, certorari is proper remedy. Wayfield v. Tuscaloosa County Com'rs Ct. [Ala.] 41 So. 932.

No jurisdiction over defendant: Where it appears upon face of justices' judgment that no summons was issued and served on defendant, certiorari is the proper remedy. But the writ will not issue if such defect does not appear on the face of the judgment. Knight v. Creswell [Ark.] 101 S. W. 754. Under the "act constituting courts for the trial of small causes," P. L. 1903, p. 279, § 93, where the justice of the peace lacks

the essential requirements of law.[78] Certiorari will not lie where no trial has been had,[79] and as a general rule, it will not lie from an interlocutory decree,[80] and to warrant its issuance it must appear that it will be available to relieve some actual and substantial wrong or injury of the applicant.[81] It is the proper remedy where a review of the setting aside of a default judgment is sought,[82] and upon an appeal it is the proper process for attacking the record of the trial court,[83] and it lies to review an assessment for taxation,[84] or to review a proceeding of the civil service commission removing a police officer.[85]

In Connecticut the circuit court may by certiorari review proceedings before a judge of a court of record to compel a public officer to deliver books, etc., in his custody to his successor.[86] Certiorari will not issue to determine the validity of an election to local option,[87] or the title to an office and its emoluments [88] or to review a decision resting in the discretion of the officer or tribunal rendering it.[89] It will not lie to review a commitment for contempt,[90] or to review the action of an appellate court made final by consitutional provision,[91] or in order to permit a party to avail himself of a defense which he neglected to urge below.[92] The supreme court of the United States will not grant the writ to review a judgment of the court of appeals of the District of Columbia in a criminal case, however important it may be to the applicant if the question involved is not one of gravity and general importance, there being no conflict between decisions of state and Federal courts or between those of Federal courts of different circuits, and nothing affecting international relations.[93] The writ can be issued only upon evidence presented by the record itself.[94]

jurisdiction over defendant because of illegality in service of summons upon him, and yet proceeds to render judgment against him, such judgment may be reviewed by certiorari. Richardson v. Smith [N. J. Law] 65 A. 162.

No appeal taken: Where a court proceeds to the trial of an appeal case where no appeal has been taken as required by law, its action is reviewable by certiorari. Hoffman v. Lewis [Utah] 87 P. 167.

Affirmance of judgment entered without jurisdiction is sufficient ground for certiorari. Seaboard Air Line R. Co. v. Ray [Fla.] 42 So. 714

78. Seaboard Air Line R. Co. v. Ray [Fla.] 42 So. 714.

79. Will not lie to compel the police commissioner of New York city to reinstate a policeman where no trial was had before commissioner. Elder v. Bingham, 118 App. Div. 25, 103 N. Y. S. 617.

80. Hyde v. Superior Ct. [R. I.] 66 A. 292. But under Court and Practice Act 1905, c. 1, § 2, and under the peculiar circumstances of this case, certiorari was held to lie from the interlocutory decree therein. Id.

81. State v. Ansel [S. C.] 57 S. E. 185.

82. State v. Thompson [Tenn.] 102 S. W. 349.

83. Motion to dismiss appeal not proper. Ashway Nat. Bk. v. Utter [R. I.] 67 A. 364.

84. City of New York v. Mitchell, 103 N. Y. S. 87; People v. Keefe, 104 N. Y. S. 154.

85. City of Chicago v. Condell, 224 Ill 595, 79 N. E. 954; Blake v. Lindblom, 225 Ill. 555, 80 N. E. 252.

86. Const. art. 7, § 8. State v. Morgan, 130 Wis. 293, 110 N. W. 245.

87. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616.

88. State v. Ansel [S. C.] 57 S. E. 185; Bumsted v. Blair, 73 N. J. Law. 378, 64 A. 691. But it is the proper remedy for testing the validity of an ordinance, resolution, or motion adopted by a municipal body, although the action under review may affect, collaterally, the right to an office. Lewis v. Newark, [N. J. Law] 65 A. 1039.

89. State v. Ansel [S. C.] 57 S. E. 185. Where municipal charter provides that charges against member of fire department shall be established to satisfaction of board of fire commissioners, and that such board shall be responsible for efficient working of department, if charges have been regularly preferred, opportunity given to defend, and board has exercised its discretion in passing thereon its judgment is not reviewable by writ of review Ryan v. Handley, 43 Wash. 232, 86 P. 398. Certiorari will not lie to review action of a school district and its board of directors as to a matter which the law has committed to their discretion, under Code, § 4154, which authorizes certorari where it is alleged that an inferior tribunal or board exercising judicial functions has exceeded its proper jurisdiction or otherwise acted illegally. Brockway v. Louisa County Sup'rs, 133 Iowa. 293, 110 N. W. 844.

90. For ignoring a valid injunction after an order overruling motion to dissolve, from which order no appeal was taken. Saginaw Lumber & Salt Co. v. Griffore, 145 Mich. 287, 13 Det. Leg. N. 505, 108 N. W. 681.

91. Action of district court on appeal from justices' court. Hoffman v. Lewis [Utah] 87 P. 167.

92. McBurnett v. Lampkin [Tex. Civ. App.] 101 S. W. 864.

93. Fields v. U. S., 205 U. S. 292, 51 Law. Ed. 807

94. Hayford v. Municipal Officers of Bangor [Me.] 66 A. 731.

Ancillary certiorari.[95]—An appellant is entitled to certiorari to bring up a transcript of the record proper,[96] but it is unnecessary where the full record is brought up by exceptions.[97] Where the transcript is insufficient to present the errors relied on, either party may have it corrected by certiorari.[98] But the writ will not issue to a judge who has settled a case on appeal ordering him to make changes therein.[99]

Prerogative writ.[1]

§ 2. *Right to certiorari; parties.*[2]—Certiorari is not a writ of right. Its issuance is discretionary with the courts.[3] But the discretion exercised must be a sound judicial discretion,[4] not an arbitrary one.[5] In New York, where the allegations of a petition for certiorari to review an assessment for taxation upon the ground of overvaluation are sufficient to confer jurisdiction upon the court, the issue of the writ is imperative.[6] Only a party to the proceeding sought to be reviewed or one directly affected by it can prosecute the writ.[7] It will not issue to review judicial action on the ground that injury is anticipated therefrom.[8] Where a judgment has been voluntarily paid, it will not be reviewed on certiorari, but payment under legal compulsion will not preclude such review.[9] One who is bound by a judgment rendered on appeal cannot have another adjudication of the same matter by certiorari.[10]

95. See 7 C. L. 611.

96. This is the proper course where the papers constituting such record have been misplaced without any laches by appellant. Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196.

97. Contempt proceedings. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

98. Price v. Huddleston, 167 Ind. 536, 79 N. E. 496.

99. Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196. It will only issue to give the judge an opportunity to correct the case when it is first made clear, usually by letter from the judge, that he will make the correction if given the time opportunity. Id.

1. See 7 C. L. 611.

2. See 7 C. L. 612.

3. State v. Anderson, 130 Wis. 227, 109 N. W. 981; McBurnett v. Lampkin [Tex. Civ. App.] 101 S. W. 864; Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law] 64 A. 1081; Hayford v. Municipal Officers of Bangor [Me.] 66 A. 731; City of Chicago v. Condell, 224 Ill. 595, 79 N. E. 954, afg. 124 Ill. App. 64; City of Chicago v. Gillen, 124 Ill. App. 210. The writ may be granted or denied in the discretion of the court, according to the showing made in each particular case. Deslauries v. Soucie, 222 Ill. 522, 78 N. E. 799, afg. 122 Ill. App. 81. Evidence extrinsic to the record may be received before issuing it to show that no injustice has been done. Deslauries v. Soucie, 222 Ill. 522, 78 N. E. 799; Hayford v. Municipal Officers of Bangor [Me.] 66 A. 731.

4. Seaboard Air Line R. Co. v. Ray [Fla.] 42 So. 714.

5. City of Chicago v. Condell, 224 Ill. 595, 79 N. E. 954.

6. City of New York v. Mitchell, 103 N. Y. S. 87.

7. State v. Drake, 130 Wis. 152, 109 N. W. 982; State v. Anderson, 130 Wis. 227, 109 N. W. 981. As a general rule, strangers to the record sought to be reviewed have no right to the writ. Polk County v. Polk County Dist. Ct. 133 Iowa, 710, 110 N. W. 1054. One who is not a party must show that the decision sought to be reviewed is directed against him or his property in the sense that its enforcement would involve special, immediate, and, in effect, direct injury to his interests. State v. Drake, 130 Wis. 152, 109 N. W. 982; State v. Anderson, 130 Wis. 227, 109 N. W. 981.

Taxpayer: Certiorari will not lie at suit of a taxpayer of a town to review decision of jury awarding damages for opening highway. State v. Anderson, 130 Wis. 227, 109 N. W. 981. A taxpayer is not entitled to certorari to review action of county court because such action involves indirectly and incidentally the expenditure of public funds. Polk County v. Polk County Dist. Ct., 133 Iowa, 710, 110 N. W. 1054.

Nor is the county entitled to certiorari in such case. Polk County v. Polk County Dist. Ct., 133 Iowa, 710, 110 N. W. 1054.

But a taxpayer and abutting landowner is entitled to certiorari to review award by city of contract for street paving to a bidder whose bid failed to conform in material particulars to specifications under which bids were offered. Barber Asphalt Paving Co. v. Trenton [N. J. Law] 65 A. 873.

And an owner of real estate whose buildings are connected with sewers of a sewer company, who has paid sewer rent therefor has sufficient interest to question by certiorari an ordinance granting to a new company the right to take over the plant of the old company, and to lay its pipes and system of sewerage beneath the surface of the streets, and fixing higher rates for sewer rentals. Fogg v. Ocean City [N. J. Law] 65 A. 885.

8. Polk County v. Polk County Dist. Ct., 133 Iowa, 710, 110 N. W. 1054.

9. Null v. Shasta County Super. Ct. [Cal. App.] 87 P. 392. Payment made to prevent seizure by a party armed with apparent authority to seize property is compulsory. Id. Where respondent sets up payment to defeat issuance of writ, burden is upon him to show it was voluntary. Id.

10. Judgment on appeal by administrator

Certiorari may be refused on the ground of laches [11] or because its allowance would result in an injury to public interests,[12] or on these grounds the matters to be reviewed by the writ may be circumscribed.[13] That an administrator has paid out the entire estate, and that an order finally discharging him has been entered, will not preclude the issuance of certiorari to review the order settling his account.[14] The writ should be directed to the person who, in legal contemplation, has the custody of the record to be certified.[15]

§ 3. *Procedure for writ; writ, service and return. Application or petition.*[16] The petition for certiorari must be verified by an affidavit.[17] Good cause must be shown in the petition for issuing the writ.[18] The application must state the evidence heard or facts established in the trial court,[19] and there must be a specific assignment of error.[20] Mere general statements of a good defense, or that injustice has been done, is not sufficient.[21] The petition is to be strictly construed against the petitioner.[22] All the evidence or facts must be stated, or so much thereof as is sufficient to show that a vital error was committed.[23] In Georgia a distinct averment that bond has been filed or affidavit made is essential to the validity of the petition.[24] A petition by one not a party to the proceeding sought to be reviewed must show that the enforcement of the decision rendered therein would

sustaining probate order will preclude maintenance of certiorari by such administrator acting in his capacity of guardian of minor heirs. In re Pearce [Tex. Civ. App.] 16 Tex. Ct. Rep. 838, 96 S. W. 1094.

11. Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law.] 64 A. 1081. No question of laches is involved upon the issuance of a writ of certiorari at any time during the period prescribed by statute. Reeves v. Jones [N. J. Law] 66 A. 113. Facts held not to constitute laches barring prosecution of certiorari to set aside ordinance for firehouse, and proceedings taken under its provisions. Lockwood v. East Orange, 73 N. J. Law, 518, 64 A. 144. Section 71 of act for incorporation of cities, etc., P. L. 1899, p. 313, which provides that no certiorari shall be allowed to set aside any ordinance for any improvement after the contract therefor shall have been awarded, does not apply to an ordinance to build a firehouse. Id.

12. Seaside Realty & Imp. Co. v. Atlantic City, [N. J. Law.] 64 A. 1081.

13. Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law] 64 A. 1081. Order of justice who allowed writ, striking out a reason filed attacking an ordinance which had been in existence over six years without being questioned, approved. Id.

14. Friend v. Boren [Tex. Civ. App.] 16 Tex. Ct. Rep. 54, 95 S. W. 711.

15. State v. Lebanon Town Clerk [Wis.] 111 N. W. 1129. Where record is in custody of a mere ministerial officer of a court or municipal corporation, it is in legal contemplation in custody of the court or corporation. Id. A writ to review action of town supervisors in laying out highway under St. 1898, c. 52, should be directed to supervisors and not to town clerk. Id.

16. See 7 C. L. 614.

17. Evans v. Forsyth, 126 Ga. 589, 55 S. E. 490. Petition must be verified in the manner required by Civ. Code 1895, § 4638. Hobbs v. Hunter [Ga. App.] 57 S. E. 922; Linder v. Renfroe [Ga. App.] 57 S. E. 975.

18. City of Chicago v. Condell, 224 Ill. 595, 79 N. E. 954. Petition held sufficient to warrant issuance of writ. Linder v. Renfroe [Ga. App.] 57 S. E. 975. Petition to review order settling account of administrator held good on general demurrer. Friend v. Boren [Tex. Civ. App.] 16 Tex. Ct. Rep. 54, 95 S. W. 711. Petition to review assessment for taxation upon ground of overvaluation held sufficient under Laws 1896, p. 882, c. 908, § 250. City of New York v. Mitchell, 103 N. Y. S. 87. Petition held sufficient under Mills' Ann. St. § 2695, which provides that petition shall show that judgment was not result of petitioner's negligence, that it was erroneous and unjust, and that it was not in petitioner's power to take an appeal in the ordinary way. State Bk. v. Harcourt [Colo.] 88 P. 855.

19. McBurnett v. Lampkin [Tex. Civ. App.] 101 S. W. 864. Applicant who was plaintiff below is not relieved from operation of this rule if suit was brought by his attorneys who filed an answer to defendant's plea in reconvention, although he alleges he had no notice of suit, nor that defendant had asserted a counterclaim, there being no allegation of fraud or negligence on the part of his attorneys, or that they lacked authority to act in his behalf. Id.

20. Assignment of error held too general, and that nothing could be considered under it except whether finding was supported by evidence. Gilbert v. King & Co. [Ga. App.] 57 S. E. 991.

21. McBurnett v. Lampkin [Tex. Civ. App.] 101 S. W. 864.

22. Petition based on loss of right of appeal, held to show that such loss was due to negligence. Schmitt v. Hines Lumber Co., 124 Ill. App. 319.

23. McBurnett v. Lampkin [Tex. Civ. App.] 101 S. W. 864.

24. Act of Dec. 10, 1902 (Acts 1902, p. 105). Yeazey v. Crawfordville, 126 Ga. 89, 54 S. E. 817.

involve special, immediate and, in effect, a direct injury to his interests.[25] Insufficiency of the petition may be waived.[26] All the allegations of fact in the petition are to be taken as true, if clearly set forth and properly verified, in deciding whether the writ shall issue.[27] Until the time for the answer, such allegations are to be applied to such assignments of error as are properly presented by and contained in the petition.[28] There must be no unreasonable delay in making application if such delay will result in detriment or inconvenience to the public.[29] The time within which the application must be made is generally prescribed by statute or constitutional provision.[30] Where the purpose is to attack an appeal upon a ground which strikes at the appeal for want of some act which would make it effective if taken, and where the time for such act has passed, application may be made as soon as the transcript is filed in the appellate court.[31] A statement in the petition that it was presented within the statutory time from the rendition of the judgment is sufficient to show prima facie that the application was brought in due time, although the date of the judgment is not stated.[32] Aliunde proof is not admissible to show that the writ was applied for within the time prescribed.[33] Notice of the application is sometimes required.[34] but failure to give it is waived if not taken by motion to quash.[35]

The statutory bond.[36]—The applicant for certiorari must file a bond.[37] The bond, while for some purposes a part of the record, is not evidence of the facts therein incidentally recited. Its allegations are verified neither by the oath of the petitioner nor by the certificate of the magistrate.[38]

The writ.[39]

Notice of the writ.[40]—Written notice of the sanction of the writ may be waived.[41]

Service of the writ.[42]

The return.[43]—A formal legal return is generally prerequisite to the jurisdiction of the court to review the proceedings or determination below.[44] The return

25. Petition by widow to review judgment of justice against her deceased husband, insufficient in this respect. State v. Drake, 130 Wis. 152, 109 N. W. 982.

26. Is waived by making return before moving to dismiss. City of New York v. Sloat, 116 App. Div. 815, 102 N. Y. S. 1.

27, 28. Linder v. Renfroe [Ga. App.] 57 S. E. 975.

29. City of Chicago v. Condell, 224 Ill. 595, 79 N. E. 954. Delay of a year and a half in applying for certiorari to review proceeding of civil service commission removing policeman will warrant refusal of writ, though such delay resulted from ignorance of law and of certain facts, if defendant was not responsible for such ignorance. Id.

30. In Georgia, application must be made within thirty days from date of judgment. Evans v. Forsyth, 126 Ga. 589, 55 S. E. 490; Yeazey v. Crawfordville, 126 Ga. 89, 54 S. E. 817; Landrum v. Moss [Ga.] 57 S. E. 965. Under act 101 of the Const. of 1898, applications for certiorari to courts of appeal must be presented to supreme court not later than thirty days after decision of court of appeal has been rendered and entered on minutes, or after refusal of application for rehearing. Rimmer v. Jones Bros., 117 La. 910, 42 So. 421.

31. Hoffman v. Lewis [Utah] 87 P. 167.

32. Evans v. Forsyth, 126 Ga. 589, 55 S. E. 490.

33. Landrum v. Moss [Ga. App.] 57 S. E. 965.

34. Before allowing a writ of certiorari, notice of application should be required, especially where writ is sought against a body like the Civil Service Commission of Chicago. City of Chicago v. Gillen, 124 Ill. App. 210.

35. City of Chicago v. Condell, 124 Ill. App. 64.

36. See 7 C. L. 615.

37. The filing of bond or making of proper affidavit, required under act approved Dec. 10, 1902 (Acts 1902, p. 105), is a condition precedent to application for certiorari. Yeazey v. Crawfordville, 126 Ga. 89, 54 S. E. 817. Upon certiorari to review a justice's judgment, if the bond is not filed with the clerk of the superior court within three months after date of the judgment, the clerk has no authority to issue the writ, and if he does so it is void. Loudermilk v. Stephens, 126 Ga. 782, 55 S. E. 956.

38. Landrum v. Moss [Ga. App.] 57 S. E. 965.

39, 40. See 7 C. L. 615.

41. Under the following waiver "written notice of the sanction of the writ of certiorari . . . and of the time and place of hearing, waived," the court did not err in refusing to dismiss the certiorari because of a noncompliance with the requirements of Civ. Code of 1895, § 4644. Maddox v. Central of Georgia R. Co. [Ga. App.] 57 S. E. 1062.

42. See 5 C. L. 562.

43. See 7 C. L. 616.

44. State v. Pacific County Super. Ct. [Wash.] 89 P. 479.

must be made within the time prescribed by statute [45] or rule of court.[46] Facts upon which the issuance of certiorari is asked or opposed must appear from the return.[47] The return or answer is conclusive as to material facts stated,[48] but not so as to waive legal conclusions.[49] Allegations in the petition not verified by the answer cannot be considered.[50] But facts stated in the petition and admitted by the return must be considered in connection with the facts stated in the return,[51] and mere opinions or conclusions contained in a return do not controvert allegations of fact in the petition.[52]

Objections and amendments.[53]—In Georgia, exceptions to the answer of the magistrate to the writ must be specific in pointing out the alleged deficiencies.[54] Petition for certiorari cannot be amended.[55] A written notice of the sanction of the writ and of the time and place of hearing may be amended when the certiorari is called for hearing.[56]

Quashal or dismissal.[57]—Defendants are entitled before return to move to quash and make a showing in support of such motion.[58] Where certiorari has been improvidently issued, it should be quashed, and the petition dismissed.[59] Causes for quashal or dismissal are that certiorari is not the appropriate remedy,[60] that there is an adequate remedy by appeal,[61] that the verdict,[62] or the finding and judgment of the trial court,[63] was warranted by the evidence, that it does not appear that there was any action by the court or irregularity in the proceeding authorizing certiorari,[64] that

45. Under Ballinger's Ann. Codes & St. §§ 5744, 5748, the return must be made not later than the day on which the writ is returnable, or to which the court by its order may have extended the time. State v. Pacific County Super. Ct. [Wash.] 89 P. 479.

46. Under rule 60 of the supreme court, requiring writs of certiorari to be returnable in twenty days unless otherwise ordered, where a writ was drawn with return day postponed beyond the twenty days, an order endorsed upon the writ, allowing it and ordering it to be sealed, sanctioned the return day as mentioned in the writ. Richardson v. Smith [N. J. Law] 65 A. 162.

47. That there was an oral answer in justices' court questioning plaintiff's right to lands, thus making certification to district court imperative, must be established by the record as certified. Affidavit of defendant's attorney is insufficient. State v. Carson Justice Ct. [Nev.] 87 P. 1. Facts alleged to show that plaintiff had an adequate remedy by appeal cannot be considered if they do not appear by the return. United States Standard Voting Mach. Co. v. Hobson, 132 Iowa, 38, 109 N. W. 458.

48. People v. Westchester County Sup'rs, 116 App. Div. 844, 102 N. Y. S. 402; Evans v. Forsyth, 126 Ga. 589, 55 S. E. 490; People v. Blood, 105 N. Y. S. 20.

49. People v. Westchester County Sup'rs, 116 App. Div. 844, 102 N. Y. S. 402. Legal conclusions, in return to certiorari to review proceedings of board of supervisors of county in auditing claim against county for legal services, that services were not rendered to county and that claim was not legal charge against it, may be examined into. Id.

50. Evans v. Forsyth, 126 Ga. 589, 55 S. E. 490; Western Union Tel. Co. v. Ryan, 126 Ga. 191, 55 S. E. 21; Linder v. Renfroe [Ga. App.] 57 S. E. 975.

51. People v. Blood, 105 N. Y. S. 20. When the return is silent as to material allegations of facts contained in the petition, the presumption is that the officers making the return intended to admit such allegations. People v. Desmond, 186 N. Y. 232, 78 N. E. 857.

52. People v. Blood, 105 N. Y. S. 20.

53. See 5 C. L. 563.

54. Civ. Code, 1895, § 4647. Landrum v. Moss [Ga. App.] 57 S. E. 965.

55. McBurnett v. Lampkin [Tex. Civ. App.] 101 S. W. 864; Landrum v. Moss [Ga. App.] 57 S. E. 965.

56. May be amended by striking date appearing in notice and inserting in lieu thereof the date when service of notice was actually made or waived, such amendment being based on affidavit of attorney for plaintiff in certiorari who made service or secured waiver thereof. Maddox v. Central of Georgia R. Co. [Ga. App.] 57 S. E. 1062.

57. See 7 C. L. 616.

58. Deslauries v. Soucie, 122 Ill. App. 81.

59. City of Chicago v. Condell, 224 Ill. 595, 79 N. E. 954.

60. Where it appears that the real matter in controversy in a proceeding removed by certiorari is the title to a municipal office, the writ will be dismissed. Bumsted v. Blair, 73 N. J. Law, 378, 64 A. 691.

61. State v. King County Super. Ct. [Wash.] 89 P. 879.

62. Allen & Co. v. Boyd [Ga. App.] 57 S. E. 939. Where in suit on contract the issues presented were fairly submitted to jury and verdict for plaintiff rendered, there was no error in overruling certiorari. James v. Bowser [Ga. App.] 57 S. E. 1017.

63. Hardy v. Eatonton [Ga.] 57 S. E. 99.

64. Where upon application for certiorari and return thereto it does not appear that the court usurped power, or refused to discharge any duty imposed by law, or that there has been any irregularity, operating a denial of justice in the proceedings complained of, the writ will be dismissed. In re Theriot, 117 La. 532, 42 So. 93.

there was no final judgment below,[65] that there was no application for rehearing,[66] that prosecution has been guilty of laches,[67] or has failed to make application or file petition for the writ within the time prescribed,[68] or has failed to give notice of the application,[69] or has failed to prosecute it with due diligence.[70] Where the purpose of a writ is to set aside certain proceedings, and to do so would be an abuse of sound legal discretion and a great public detriment, the writ may be quashed without requiring defendants to make return thereto.[71] Motion to dismiss the petition and quash the writ on the ground that the petition is insufficient must be made before making return.[72] Motion to quash admits all facts well pleaded.[73] To determine the merits of the motion to dismiss, the petition, as well as the transcript from the trial court, should be looked to.[74]

§ 4. *Hearing and questions which may be raised and settled.*[75]—The hearing on certiorari is restricted to errors alleged to have been committed in the trial below.[76] A question not raised in the trial court,[77] or alleged erroneous action as to which no objection was made,[78] cannot be considered. Only questions of law can be passed upon.[79] The jurisdiction of the trial court is always open to review,[80] and as a

65. Answer of magistrate failed to disclose that a final judgment had been rendered in justices' court, and no exceptions were filed pointing out this deficiency. Landrum v. Moss [Ga. App.] 57 S. E. 965.

66. Under Supreme Court Rule 12, where no application for rehearing was filed in court of appeal, writ of review will be dismissed. But this rule does not apply to matters decided at a rehearing, as no application for second rehearing is permissible. Succession of Morere, 117 La. 543, 42 So. 132.

67. Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law] 64 A. 1081. Laches should be raised before answer unless the delay is equal to that limited for suing out writ of error. City of Chicago v. Condell, 124 Ill. App. 64.

68. If the answer to writ untraversed, or with a traverse not sustained, shows that more than the prescribed period elapsed after judgment and before application for writ, the writ should be dismissed. Evans v. Forsyth, 126 Ga. 589, 55 S. E. 490. In Georgia, certiorari to review justice's judgment will be dismissed where it does not affirmatively appear from record that writ was applied for within thirty days from final determination of the case. Landrum v. Moss [Ga. App.] 57 S. E. 965. This is not sufficiently shown where the only portion of the record showing date of judgment complained of is an unverified recital of date of the trial appearing in certiorari bond. Id. Where petition duly verified and sanctioned alleges that application was made within thirty days from date of judgment, it is error to dismiss writ on ground that date of judgment was not shown. Evans v. Forsyth, 126 Ga. 589, 55 S. E. 490. When certiorari is dismissed for failure to aver in petition that bond has been filed or affidavit made, as required by Act of Dec. 10, 1902 (Acts 1902, p. 105), a second petition sued out within six months from such dismissal, but more than thirty days from the judgment complained of, should be dismissed. Yeazey v. Crawfordville, 126 Ga. 89, 54 S. E. 87.

69. City of Chicago v. Condell, 124 Ill. App. 64.

70. State v. Pacific County Super. Ct. [Wash.] 89 P. 479. Where no return was made for more than two months after time fixed by writ, and no application for extension made until nearly one month after that time, upon which application the court took no action, and the return was filed sixteen days after time to which extension was asked, it was held the writ should be dismissed. Id.

71. Writ issued to test legality of organization and proceedings of drainage district where the district had been in operation for some time, contracts made, expenses incurred, and taxes levied, and the errors alleged, are technical and harmless. Deslauries v. Soucie, 222 Ill. 522, 78 N. E. 799. Extrinsic evidence may be heard to show that public detriment and inconvenience might result from quashing such proceedings. Id.

72. City of New York v. Sloat, 116 App. Div. 815, 102 N. Y. S. 1.

73. Schmitt v. Hines Lumber Co., 124 Ill. App. 319.

74. McBurnett v. Lampkin [Tex. Civ. App.] 101 S. W. 864.

75. See 7 C. L. 617.

76. Bryant v. Ridgway, 126 Ga. 733, 55 S. E. 932. Assignments of error relating to matters occurring since the trial cannot be considered. Id.

77. Validity of ordinance. Hardy v. Eatonton [Ga.] 57 S. E. 99; Reeves v. Jones [N. J. Law] 66 A. 113.

78. Reeves v. Jones [N. J. Law.] 66 A. 113.

79. On certiorari to review the action of a justice of the peace, the office of the writ is to bring up the record for review on questions of law, and unless it shows an error of law below the judgment must be affirmed. Questions of fact cannot be retired on new affidavits or proofs in the circuit court. Appleman v. Hahn [Mich.] 112 N. W. 917. Upon certiorari's bringing up a habeas corpus proceeding to determine the custody of a child, the court will pass upon the question of law involved where the facts are undisputed. Lipsey v. Battle, 80 Ark. 287, 97 S. W. 49.

80. Under the Colorado statutes, upon petition to county court for certiorari by garnishee against whom judgment has been rendered by justice, petitioner is entitled to

general rule, is the only question that can be raised and settled.[81] The constitutionality of the law upon which the judgment below was based[82] and the propriety of granting mandamus[83] are questions that may be determined upon certiorari. Upon certiorari to review the action of a municipal board in awarding a contract to one who it is alleged was not the lowest responsible bidder, apart from the rights of the lowest bidder, the right of the board to pass over another bidder whose bid was lower than that of the person to whom the contract was awarded should be passed upon.[84] The fact that the court states that it expresses no opinion on one of the questions involved, but passes judgment thereon because it will in any event be passed upon by the appellate court, will not preclude the question being reviewed on certiorari.[85] The rights of persons not made parties to the proceeding cannot be passed on.[86] Allegations in the petition as to which the answer of the magistrate is silent are not verified, and are not to be considered upon the hearing.[87] Matters which are not referred to in the arguments or briefs presented by counsel cannot be reviewed.[88] The regularity or manner of appointment, or the qualifications of the trial judge, cannot be determined.[89] Upon certiorari to review a judgment condemning riparian rights, the petitioner in the condemnation proceedings cannot show, by way of reduction of damages, a prior ownership in a part of the waters covered by the judgment.[90] The right to raise questions upon certiorari may be lost by waiver.[91] Upon certiorari to review judgment of justice of the peace, a trial de novo is sometimes authorized by statute.[92]

§ 5. *Judgment.*[93]—The judgment below will be quashed where it affirms a judgment entered without jurisdiction.[94] The character of judgment that may be entered upon certiorari to review a justice's judgment is, in some states, determined by statute.[95] The effect of a judgment reversing the dismissal of proceedings to

question jurisdiction of justice to render judgment against him. State Bk. v. Harcourt [Colo.] 88 P. 855.

81. Upon certiorari to review order extending time of defendants to plead, demur, or waive, only jurisdiction of court to make the order can be considered. Voorman v. San Francisco Super. Ct., 149 Cal. 266, 86 P. 694. The only question reviewable on certiorari bringing up judgment in proceedings to recover penalty for violation of provisions of ordinance passed by a board of health pursuant to Gen. St. p. 1638, § 18, is whether the court had jurisdiction of the parties and the subject-matter of the suit. Board of Health of Woodbury v. Cattell, 73 N. J. Law, 516, 64 A. 144.

82. Laws 1905, c. 117, p. 182, entitled "Juvenile Courts." Mill v. Brown [Utah] 88 P. 609.

83. Upon certiorari to review action of circuit court in mandamus proceeding, an assumption by lower court that mandamus was the proper remedy was equivalent to so deciding, and leaves open for review the propriety of that remedy. Dickinson v. Board of County Canvassers of Cheboygan County [Mich.] 14 Det. Leg. N. 196, 111 N. W. 1075.

84. Jacobson v. Board of Education [N. J. Law] 64 A. 609.

85. Grant of mandamus to compel railroad company to comply with franchise. West Bloomfield Tp. v. Detroit United R. Co., 146 Mich. 198, 13 Det. Leg. N. 717, 109 N. W. 258.

86. Certiorari to review action of school district in issuing bonds where holders of bonds not made parties. Brockway v. Louisa County Sup'rs, 133 Iowa, 293, 110 N. W. 844.

87. Landrum v. Moss [Ga. App.] 57 S. E. 965.

88. Sharp v. Sweeney [N. J. Law] 65 A. 859.

89. Will v. Brown [Utah] 88 P. 609.

90. State v. Stevens County Super. Ct. [Wash.] 90 P. 650.

91. Upon writ of review to review judgment condemning riparian rights, the objection cannot be raised that notice was not given the party affected as required by Act of 1890, § 45, where by petition the court acquired jurisdiction of the subject-matter and the party affected appeared generally and answered and in open court agreed that the case should be tried, without objection for want of notice. State v. Stevens County Super. Ct. [Wash.] 90 P. 650.

92. Under Colorado statutes, upon petition to county court for certiorari by garnishee against whom judgment has been rendered by justice. State Bk. v. Harcourt [Colo.] 88 P. 855.

93. See 7 C. L. 619

94. Seaboard Air Line R. Co. v. Ray [Fla.] 42 So. 714.

95. In Georgia the superior court, upon certiorari, has discretionary power, under certain circumstances, to set aside a judgment by default rendered in a justice's court against a garnishee, and to order a new trial. O'Donovan v. Ocean S. S. Co. [Ga. App.] 57 S. E. 982. Under Comp. Laws, § 948, upon certiorari to review a justice's judgment, the circuit court will enter a new judgment on which execution may issue, upon the original

revoke a liquor license is merely to remove a possible bar to the beginning of a new proceeding.[96] Under the Michigan statutes where the judge files an opinion deciding each question raised, concluding with the statement that the writ may be dismissed, a judgment may be entered thereon by his successor in office.[97] Under the California statutes a judgment of the superior court denying a writ of review is conclusive, except on appeal. [98]

§ 6. *Costs.*[99]—Upon setting aside a contract awarded by a municipal board, because not awarded to the lowest responsible bidder, it is proper to impose costs upon defendants.[1]

§ 7. *Review of certiorari.*[2]—What court has jurisdiction of an appeal is generally determined by statute.[3] The name of one who was not a party to the suit in the lower court should, on his motion, be stricken from the scire facias.[4] The appellate court must deal with the case as it appears from the record before it.[5] The transcript of the record must show what the issues between the parties were,[6] and it should, by implication at least show that the certiorari bond and certificate as to costs were filed in due time and before the issuance of the writ.[7] A transcript of the answer need not be sent up where the judgment below dismissing the writ, was based on the petition alone.[8] Appellant is estopped to urge a point which is in conflict with the express averments of his petition.[9] Where the judgment sought to be reviewed is supported by the evidence, a judgment denying the writ will be affirmed.[10] Where the evidence is conflicting, the discretion of the lower court will not, as a general rule, be interfered with.[11] Upon appeal from a judgment overruling a mo-

cause of action. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 N. W. 161. Where in such case the circuit court decides all points raised, concluding with a direction for a judgment not authorized, and the clerk does not enter judgment as prescribed by Comp. Laws, § 10,260, the judge who rendered the decision, or his successor, may, upon application of the successful party, enter the proper judgment. Id.

96. It is not, therefore, a complete remedy. State v. Curtis, 130 Wis. 357, 110 N. W. 189.

97. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 N. W. 161.

98. Therefore it will preclude the court of appeals from entertaining a petition for the writ. Beaumont v. Samson [Cal. App.] 89 P. 137.

99. See 7 C. L. 620.

1. Jacobson v. Board of Education [N. J. Law.] 64 A. 609.

2. See 7 C. L. 620.

3. Under the California statutes an appeal lies to the supreme court from a judgment of the superior court denying a writ of review. Beaumont v. Samson [Cal. App.] 89 P. 137.

4. So held where, upon petition to county court for certiorari by garnishee against whom judgment had been rendered by justice, plaintiff below was not made party, and justice's motion that he be made a party was overruled, and judgment of justice affirmed, and upon appeal such plaintiff was made a party, and the scire facias issued against him as well as against the justice. State Bk. v. Harcourt [Colo.] 88 P. 855.

5. On appeal from judgment of superior court affirming on certiorari judgment of city court, the answer to the writ having stated that copies of proceedings were attached, the supreme court, by order, directed clerk of superior court to transmit copy of any proceedings so attached; but he having certified that none were attached, or in the record of his office, the supreme court could act only on the record before it. Atlantic Coast Line R. Co. v. Jones, 127 Ga. 447, 56 S. E. 761.

6. Mere general statement in petition for certiorari, "the case being a suit for damages against the last carrier for damages to freight," does not show what the issues passed on were. Atlantic Coast Line R. Co. v. Jones, 127 Ga. 447, 56 S. E. 761.

7. Sufficiently shown where copies of bond and certificate appear in transcript, dated, but with no entry of filing thereon, if there also appears a copy of the writ of certiorari bearing a date subsequent to that of the bond and certificate. Loudermilk v. Stephens, 126 Ga. 782, 55 S. E. 956.

8. Evans v. Forsyth, 126 Ga. 589, 55 S. E. 490.

9. Deslauries v. Soucie, 222 Ill. 522, 78 N. E. 799.

10. Gilbert v. King & Co. [Ga. App.] 57 S. E. 991.

11. Discretion in granting a first new trial will not be controlled. Bryant v. Ridgway, 126 Ga. 733, 55 S. E. 932. The second grant of a new trial on certiorari from justice's court will not be reversed when the evidence in support of the verdict is weak and unsatisfactory, and the overwhelming preponderance thereof is against the verdict, and it is manifest the interests of justice require another hearing. Loudermilk v. Stephens, 126 Ga. 782, 55 S. E. 956. It cannot be held by supreme court that a judge of the superior court abuses his discretion in overruling certiorari from ordinary's decision discontinuing public road upon proceeding instituted under Pol Code, §§ 520, 524, when

tion to dismiss if the petition is insufficient, the court, on reversing, will not remand, but will instruct the lower court to dismiss the petition.[12] By whom security for costs shall be approved is in Alabama, determined by statute.[13]

CHALLENGES; CHAMBERS AND VACATION, see latest topical index.

CHAMPERTY AND MAINTENANCE.[1]

Grants of Land Held Adversely (553).
Agreements as to Contingent Fees and Payment of Expenses at Trial (553).
Assignment to or Purchase by Attorney of Chose in Action (554).
Champerty as a Defense (554).
Maintenance (554).

Statutes have to a great extent displaced the common-law doctrine as to champerty, but it has been held to prevail in Missouri.[2]

Grants of land held adversely[3] are in many states void as champertous,[4] but the grantor must have been disseised[5] and the possession must be adverse.[6] Hence the rule does not apply to owners under statutory disability.[7] The invalidity of such deeds exists only as between the adverse possessor and the grantor,[8] and the mere fact that the grantee had notice of the alleged title of a third person does not render the conveyance ineffective, where the claim of title was in fact baseless.[9] The Kentucky champerty statute has been held not to apply to an easement.[10]

Agreements as to contingent fees and payment of expenses at trial.[11]—In most states a contract for a contingent interest in the subject-matter of the litigation as compensation for legal services is valid,[12] but an agreement by an attorney to pay

the evidence, though conflicting, was sufficient to support decision of ordinary, and no error of law is complained of. Wilcher v. Nunn, 127 Ga. 7, 55 S. E. 924.

12. Petition failed to state evidence heard or facts established in trial court. McBurnett v. Lampkin [Tex. Civ. App.] 101 S. W. 864.

13. When appeal is from judgment of judge awarding or denying rule nisi, appeal must be taken under § 431 of Code of 1896, and security for costs approved by judge; but, when appeal is from final judgment of court, appeal is governed by § 2827, and security must be approved by clerk of court. Mayfield v. Tuscaloosa County Com'rs Ct. [Ala.] 41 So. 932.

1. See 7 C. L. 621.

2. Kelerher v. Henderson [Mo.] 101 S. W. 1083.

3. See 7 C. L. 621.

4. Baecht v. Hevesy, 115 App. Div. 509, 101 N. Y. S. 413. Though under no color of title. Mahan v. Smith [Ala.] 44 So. 375. Conveyance of land held adversely under a void mortgage foreclosure held champertous. Brynjionlfson v. Dagner [N. D.] 109 N. W. 320. Deed given prior to St. 1891, p. 919, c. 354, authorizing such conveyances, and not delivered on the premises. Joyce v. Dyer, 189 Mass. 64, 75 N. E. 81.

5. Occasional entry on land for purpose of cutting hay does not amount to disseisin of owner. State Finance Co. v. Beck [N. D.] 109 N. W. 357.

6. Merely obtaining conveyance to land does render grantee adverse holder within champerty statute. Collingsworth v. Enterprise Land, Min. & Lumber Co., 30 Ky. L. R. 467, 99 S. W. 234. One in actual possession who anounces that his possession is not adverse but amicable has not such possession as will defeat a deed thereto in absence of notice of renouncement of amicable holding to true owner that his possession was hostile. Madison Stockyards Co. v. Frazee, 30 Ky. L. R. 254, 98 S. W. 283. Evidence held to sustain verdict negativing claim of adverse possession. Westerfield v. McDonald, 30 Ky. L. R. 1034, 100 S. W. 230.

7. One in possession as purchaser from an infant does not hold adversely to infant so as to render void a conveyance by infant to another after attaining his majority. Smith v. Cornett, 30 Ky. L. R. 302, 98 S. W. 297.

8. State Finance Co. v. Myers [N. D.] 112 N. W. 76.

9. An unconstitutional purchase of land of which no one was in possession is not void or champertous under Rev. Codes 1905, § 8733, merely because the grantee's attorney examined the records before purchase and discovered defects in defendant's title. State Finance Co. v. Meyers [N. D.] 112 N. W. 76; State Finance Co. v. Trimble [N. D.] 112 N. W. 984.

10. Sale of land and appurtenant easement held valid though both parties had knowledge that easement was in adverse possession of a third person. Williams v. Poole [Ky.] 103 S. W. 336.

11. See 7 C. L. 622.

12. Taylor v. St. Louis Transit Co., 198 Mo. 715, 97 S. W. 155. Not illegal or against public policy. Stevens v. Sheriff [Kan.] 90 P. 799. Percentage of amount recovered. Parker v. People, 126 Ill. App. 538. Though client agreed not to settle or compromise without attorney's consent, held not champertous. In re Speranza, 186 N. Y. 280, 78 N. E. 1070. Under a contract by which an attorney was to have as his compensation a share of land in controversy, if he succeeded, he is entitled to his share of the land recovered, though only part of it was recovered. Carlisle v. Gibbs [Tex. Civ. App.] by an attorney to collect a claim for $10 if $50 was recovered, and for a proportionate

the costs of litigation is void.[13] Such contracts, however, must be distinguished from an agreement to pay costs out of the fruits of the litigation,[14] the latter being valid. That fee provided by contingent fee contract is exorbitant does not avoid it.[15] Poverty of a litigant, while evidence tending to establish a champertous agreement with the attorney, is not sufficient, alone, to establish such an agreement.[16] The fact that as to one action a contract may have been champertous does not affect vested rights in separate causes of action under the same contract.[17] Under the New York statute prohibiting the promising of a valuable consideration as an inducement to a retainer such promises do not affect a contingent fee contract unless made before retainer.[18] An agreement by an attorney to pay to a third person a portion of fees earned under a champertous contract is not from that fact alone champertous.[19]

Assignment to or purchase by attorney of chose in action.[20]—The purchase by an attorney of claims against his client pending suit is not champertous.[21] Under the New York statute the purchase of a chose in action, by an attorney, with intent to sue thereon is prohibited.[22]

Champerty as a defense.[23]—Champerty is a defense only as between parties to the alleged champertous agreement and their privies,[24] and to be available must be pleaded.[25]

Maintenance.[26]—Maintenance is the aiding of a litigant with money to prosecute or defend his suit by a stranger having no interest, direct or remote, immediate or contingent, upon an agreement with the party in interest, whereby such

fee if more was recovered, made in good faith, held valid. Whinery v. Brown, 36 Ind. App. 276, 75 N. E. 605.

13. Contract for contingent fee held not champertous as requiring attorney to pay costs of litigation. Calkins v. Pease, 125 Ill. App. 270. An agreement by an attorney to pay all court fees, fees of witnesses, and necessary disbursements to judgment in consideration of clients' agreement to give him percentage of amount recovered, is void under Code Civ. Proc. § 74, prohibiting an attorney from making loans to client to conduct litigation. In re Speranza, 186 N. Y. 280, 78 N. E. 1070.

14. Agreement by attorney not to call upon client for money to pay necessary disbursements required in pending litigation does not render agreement champertous under Code Civ. Proc. § 74. Ransom v. Cutting [N. Y.] 81 N. E. 324.

15. In absence of fraud or concealment that amount to which attorney is entitled under contingent fee contract is disproportionate to value of service performed does not invalidate contract. Humphries v. McLachlan, 87 Miss. 532, 40 So. 151.

16. Evidence held insufficient to establish champertous contract between plaintiff and her counsel, the claim being based upon plaintiff's poverty and her inability to pay attorney's fees for conducting litigation. Lyttle v. Goldberg [Wis.] 111 N. W. 718.

17. Where three persons having separate causes of action enter into contingent fee contract, such contract is not champertous as to two actions which have been commenced merely because thereafter one of the attorneys became surety for costs as to the third plaintiff. Taylor v. St. Louis Transit Co., 198 Mo. 715, 97 S. W. 155.

18. Contingent fee contract with an attorney held not champertous under Code Civ. Proc. § 74, because induced by a promise to advance money, it not being shown that the alleged promise was made before retainer. O'Neill v. Campbell, 103 N. Y. S. 150.

19. Kelerher v. Henderson [Mo.] 101 S. W. 1083.

20. See 7 C. L. 623.

21. Action against administrator and his surety, purchase by attorney for latter of claims of certain distributees during pendency of the action is valid. Moseley v. Johnson [N. C.] 56 S. E. 922.

22. Contingent fee contract with attorney providing for latter's compensation out of percentage of amount recovered held not in violation. Code Civ. Proc. §§ 73, 74, prohibiting an attorney from purchasing or being interested in a chose in action with intent to sue thereon or to make loans to client. In re Speranza, 186 N. Y. 280, 78 N. E. 1070. Evidence that plaintiff was an attorney, and the opening statement of his counsel that plaintiff was a clerk in his office and held only the legal title, and the fact that action was brought within a month after assignment, held insufficient to show a purchase of a claim by an attorney with intent to sue thereon in violation of Code Civ. Proc. § 73. Oldmixon v. Severance, 104 N. Y. S. 1042.

23. See 7 C. L. 624.

24. That litigation grows out of champertous contract not defense in collateral proceeding. Elser v. Gross Point, 223 Ill. 230, 79 N. E. 27. Deed to land adversely held invalid only as between grantor and adverse holder. State Finance Co. v. Myers [N. D.] 112 N. W. 76.

25. Kelerher v. Henderson [Mo.] 101 S. W. 1083.

26. See 7 C. L. 624.

stranger is to receive part of the thing in dispute:[27] but where a common right is involved, the participation of any party having an interest in the result of the litigation is not maintenance.[28] An agreement by which a third person is to share in the fruits of the litigation with the attorney is not champertous where such person does not undertake to pay any of the costs of the litigation.[29]

CHANGE OF VENUE; CHARACTER EVIDENCE; CHARITABLE AND CORRECTIONAL INSTITUTIONS, see latest topical index.

CHARITABLE GIFTS.

§ 1. Nature and Essentials; Validity (555).
§ 2. Capacity of Donee or Trustee (557).
§ 3. Interpretation and Construction (558).
§ 4. Administration and Enforcement (559).

Scope of topic.—Matters applicable to trusts in general,[30] and to religious societies,[31] hospitals,[32] schools,[33] and the care of paupers,[34] in particular, and to the taxation of the property of charitable institutions,[35] and their liability for the torts of their agents and servants,[36] are treated elsewhere. Reference should also be had to the topics dealing with the interpretation of deeds,[37] and wills.[38]

§ 1. *Nature and essentials; validity.*[39]—The validity of charitable trusts depends largely on the statutes of the various states.[40] No particular words are necessary to create such a trust.[41] The subject-matter of a gift to charitable uses,[42] the objects and purposes to be accomplished,[43] and the beneficiaries,[44] must be de-

27. Agreement by stranger at his own cost to bring an action to quiet title as against an oil and gas lease in consideration of owner's promise to lease same to him held champertous. Mud Valley Oil & Gas Co. v. Hitchcock [Ind. App.] 81 N. E. 111.

28. Agreement by owner of land affected by change of adjacent waterway with an owner similarly situated to pay all costs of litigation in respect to such change held valid. Elser v. Gross Point, 223 Ill. 230, 79 N. E. 27. An agreement between two persons jointly interested in certain property by which one party agreed to pay all expenses of litigation in relation thereto and to share the proceeds thereof equally with the other is not champertous. Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 F. 217.

29. An agreement by which in consideration of plaintiff's services in procuring bonds to be sued on by defendant the latter agreed to pay the former one-half fee paid, plaintiff agreeing to pay one-half of all reasonable expenses necessary to successful prosecution of the actions, does not obligate him to pay any portion of costs of litigation and is not champertous. Kelerher v. Henderson [Mo.] 101 S. W. 1083.

30. See Trusts, 8 C. L. 2169.

31. See Religious Societies, 8 C. L. 1718.

32. See Asylums and Hospitals, 9 C. L. 280.

33. See Colleges and Academies, 7 C. L. 657; Schools and Education, 8 C. L. 1851.

34. See Paupers, 8 C. L. 1324.

35. See Taxes, 8 C. L. 2058.

36. See topics dealing with the particular institution involved, as Asylums and Hospitals, etc.

37. See Deeds of Conveyance, 7 C. L. 1103.

38. See Wills, 8 C. L. 2305.

39. See 7 C. L. 624.

40. See, also, Trusts, 8 C. L. 2169. Will leaving property to "Wilder charity" held not violative of statute regulating uses and trusts. Appleby v. Appleby's Estate, 100 Minn. 408, 111 N. W. 305.

41. Donation of funds to committee to be expended for benefit of sufferers from burning of excursion steamer held to create valid trust, though such purpose was expressed by oral and written declarations and by conduct. Loch v. Mayer, 50 Misc. 442, 100 N. Y. S. 837.

42. Will held to mean that all income over and above certain bequests should be used for charitable purposes so that subject-matter was sufficiently certain. Welch v. Caldwell, 226 Ill. 488, 80 N. E. 1014.

43. Bequest to corporation for general purpose of its incorporation is not indefinite in any respect. Jordan's Adm'x. v. Richmond Home for Ladies [Va.] 56 S. E. 730. Bequest to trustees of Universalist general convention of remainder in certain realty which was to be by them sold and proceeds applied to mission work in the U. S. held not void for uncertainty. Jordan v. Universalist General Convention Trustees [Va.] 57 S. E. 652. Direction to executors to distribute residue to such religious, charitable, and benevolent institutions "as in their discretion shall be best and proper" held to create valid trust. In re Dulle's Estate [Pa.] 67 A. 49. Fact that will was indefinite as to any particular institution or any particular charitable purpose held not to invlidate provision creating charitable trust. In re Shattuck's Will, 103 N. Y. S. 520. Will expressing testatrix's desire to devote greater portion of property to charitable purposes and directing executors to give income to such charitable purposes as they and their successors should judge would do most real good held to constitute valid gift to charitable uses. Selleck v. Thompson [R. I.] 67 A. 425. Will giving

ignated with reasonable certainty. There must also be a class of beneficiaries to whom the gift may apply.[45] Statutes in some states provide that such gifts shall not fail because of indefiniteness or uncertainty as to the beneficiaries.[46] A mere misnomer of a corporate beneficiary does not render the gift invalid,[47] extrinsic evidence being admissible to identify the institution intended.[48] Hospitals[49] not conducted for pecuniary profit,[50] churches,[51] and masonic associations,[52] have been

widow life estate in all testator's property on condition that she give as she might see fit to his relations, and that balance should be given "to advance the cause of religion and promote the cause of charity" in such manner as she should think would be most conducive to the carrying out of testator's wishes, held not to create such a trust for charitable use as equity could enforce after widow's death. Hadley v. Forsee [Mo.] 101 S. W. 59.

44. Certainty of beneficiaries is secured where a power of selection or appointment is vested in some person. Welch v. Caldwell, 226 Ill. 488, 80 N. E. 1014. Where will provided that income, above certain bequests, should be devoted to a certain association and other charitable purposes selected by widow, and vested her with power of appointment of residue of estate to charitable and religious purposes after her death held that gift was not void for uncertainty of beneficiaries. Id. Question as to effect of death of widow without exercising power as to residue held not open to consideration during her lifetime. Id. Trust whereby executors were authorized to distribute residue of estate among such religious, charitable, and "benevolent" institutions as they might in their discretion deem proper, held not too indefinite to be enforced. In re Dulles's Estate [Pa.] 67 A. 49. Beneficiaries of trust fund for relief of sufferers from burning of excursion steamer held sufficiently definite, so that Laws 1893, p. 1748, c. 701, providing that charitable gifts shall not be deemed invalid because of indefiniteness of beneficiaries, was inapplicable. Loch v. Mayer, 50 Misc. 442, 100 N. Y. S. 837.

Devises to corporation for purpose of helping to educate poor Catholic children (McDonald v. Shaw [Ark.] 98 S. W. 952), and to pastor of certain church for purpose of helping to establish school in parish for education of Catholic boys, and for helping to educate young men for the priesthood, held not void for indefiniteness of beneficiaries (Id.). Bequest in trust to establish and maintain school for purpose of educating boys residing in Illinois between ages of 12 and 18, and who are unable to educate themselves, held not void for uncertainty as to individual members, such uncertainty being necessary to valid charity. Tincher v. Arnold [C. C. A.] 147 F. 665. Gift in trust for benefit of unincorporated religious association held void, under laws of West Virginia, for uncertainty, whether regarded as devise of realty or gift of personalty. Miller v. Ahrens, 150 F. 644.

45. Trust for purpose of educating boys of certain age in Illinois who are unable to educate themselves held not rendered void for want of such a class by reason of fact that in that state all children could obtain free education at public schools, there being a class of boys unable to attend them. Tincher v. Arnold [C. C. A.] 147 F. 665.

46. Laws 1893, c. 701, held not to validate gift to unincorporated association attempting to make it trustee for itself as such beneficiary. Catt v. Catt, 103 N. Y. S. 740.

47. See, also, Wills, § C. L. 2305. Bequest or devise will not fail because of mere inaccuracy in designation of beneficiary, where meaning of testator can be gathered with reasonable certainty from the instrument itself, or where the identity of the objects of testator's bounty can be shown by intrinsic evidence, which is always admissible for that purpose where there is ambiguity or uncertainty. McDonald v. Shaw [Ark.] 98 S. W. 952. Devise to "the convent of the Sisters of Mercy at Ft. Smith, known as St. Anne's Convent," held intended for the "Sisters of Mercy of the Female Academy of Ft. Smith," a corporation. Id. "Sisters of the Poor of St. Francis," a corporation conducting hospital known as the St. Francis Hospital, held to take bequest to the "Trustees of St. Francis Hospital," particularly as act under which it was incorporated provided that no misnomer should defeat any gift or devise to it. Johnston v. Hughes, 187 N. Y. 446, 80 N. E. 373. Extrinsic evidence as to knowledge and relations of testatrix to various societies considered and held that "Christmas Fund of the Protestant Episcopal church in the Diocese of Western New York" was entitled to bequest to "the society for Disabled Potestant Episcopal Clergymen, by whatever name said society may be known." In re North, 52 Misc. 429, 103 N. Y. S. 574. Bequest to "the trustees of the Presbyterian Home for Old Ladies, situated in Richmond, Virginia," held intended for "Richmond Home for Ladies." Jordan's Adm'x v. Richmond Home for Ladies [Va.] 56 S. E. 730.

48. Parol evidence. Jordan's Adm'x v. Richmond Home for Ladies [Va.] 56 S. E. 730. Extrinsic evidence held admissible to show which of two possible societies was intended by gift to "the Society for Disabled Protestant Episcopal Clergymen, by whatever name said society may be known." In re North, 52 Misc. 429, 103 N. Y. S. 574.

49. Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453.

50. Whether or not a corporation is one for pecuniary profit must be determined from its articles, and evidence aliunde is inadmissible to show that it is in fact a charitable association. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691. Corporation conducting hospital held one for pecuniary profit and not charity. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691.

51. Churches are public charitable institutions and property of church is charitable trust fund. Bruce v. Central M. E. Church, 147 Mich. 230, 13 Det. Leg. N. 1099, 110 N. W. 951.

52. Evidence that masonic association was formed for certain purposes of charity and

held to be charities, and gifts for educational or religious purposes, gifts to charitable uses.[53]

In the absence of a statutory provision to the contrary, and subject to the rights of the surviving husband or wife, one may by will give all his property to charity.[54] In some states the amount that can be so disposed of is limited, where the testator is survived by certain named relatives.[55] In others all gifts,[56] or all gifts in excess of a certain amount,[57] are void if made within a specified time before the death of the grantor or testator.

The rule against perpetuities is generally held not to apply to charitable gifts,[58] though a contrary rule seems to prevail in some states.[59]

§ 2. *Capacity of donee or trustee.*[60]—In order that gifts to corporations for charitable purposes may be valid, the corporation must be capable of taking and holding the property,[61] and the gift must be for a use consistent with the purposes

held its funds in trust for such purposes alone, etc., held sufficient to support finding as to its charitable character. Kauffman v. Foster, 3 Cal. App. 741, 86 P. 1108.

53. Gifts for educational purposes. McDonald v. Shaw [Ark.] 98 S. W. 952. Bequest to trustees of incorporated college to use income for higher education of young men for Christian ministry on certain conditions held to create public charity. Trustees of Washburn College v. O'Harra [Kan.] 90 P. 234. Fund raised for benefit of widows and orphans of ministers of particular church, accumulations in excess of amount necessary for that purpose to be used for other objects connected with church in discretion of warden and vestry, held valid charitable trust for religious purposes which could be applied cy pres on proper showing. Sears v. Attorney General, 193 Mass. 551, 79 N. E. 772. Gift to incorporated college, both founded and conducted as a charity, held gift to charitable use, though there was nothing in will in connection with gift indicating a charitable purpose. Amole's Estate, 32 Pa. Super. Ct. 636.

54. Except as to statutory rights of surviving husband or wife. Hubbard v. Worcester Art Museum [Mass.] 80 N. E. 490.

55. Bequest in violation of Laws 1860, p. 607, c. 360, providing that no person having a husband, wife, child, or parent shall bequeath or devise more than half his estate to any charitable society, is void as to such excess, and such invalidity may be taken advantage of by others than the persons therein enumerated. St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 N. Y. S. 808. Since will takes effect at testator's death, held that word "having" should be construed to mean "leaving him surviving," and hence validity of such bequests depends on survivorship of one of those enumerated in the act. Id. Where husband and wife perished in common disaster, held that burden was on next of kin, who were relying on the act to defeat husband's bequest to charity, to prove that wife survived him. Id. In determining whether will gives more than half of estate to charities, held that life estate given to widow should be considered as legacy, and that present value thereof should be deducted from legacies to charities and others. In re Strang, 105 N. Y. S. 566. Statute does not apply to donations by deeds of trust executed during the lifetime of the donor. Robb v. Washington and Jefferson College, 185 N. Y. 485, 78 N. E. 359. May be insisted on by any person who derives a benefit therefrom. Id.

56. Gift to college held gift to charitable use within meaning of Act April 26, 1855, § 11, P. L. 328, and void where will was executed within one calendar month of testator's death. Amole's Estate, 32 Pa. Super. Ct. 636. Will executed less than 30 days before testator's death recited that testator was insured for certain sum in fraternal order made payable to certain person, "who is authorized to distribute the same according to directions given him by myself during my lifetime." Such directions were given more than 10 years before testator's death. Held that in so far as they directed gifts to charity they were not void as made within 30 days of testator's death. Kelley's Estate, 29 Pa. Super. Ct. 106.

57. Laws 1848, p. 448, c. 319, § 6, providing that certain corporations shall not take more than one-fourth of an estate under a will made within two months of testator's death, held to apply only to corporations formed under that act. In re Shattuck's Will, 103 N. Y. S. 520.

58. Gift of residue to trustees to manage until certain sum had accumulated, when it was to be devoted to charity held not to offend rule because of perpetuity in first taker, or to be void for remoteness. Tincher v. Arnold [C. C. A.] 147 F. 665.

59. In case of bequests for charitable uses law permits suspension of ownership and power of alienation during period necessary to form corporation, not exceeding two lives in being at testator's death, to take bequest, which, in such case, is valid as an executory devise or bequest. St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 N. Y. S. 808. Trust during lives of seven annuitants not rendered valid because ultimate gift was to charity. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359.

60. See 7 C. L. 628.

61. Statute held to have ipso facto created corporation so that it was capable of taking devise. McDonald v. Shaw [Ark.] 98 S. W. 952. Charter of incorporation of home for indigent women held valid. Jordan's Adm'x. v. Richmond Home for Ladies [Va.] 56 S. E. 730. Corporation founded under laws of Ohio to administer charity held at least a de facto corporation and entitled to the bequest. St. John v. Andrews Inst. for Girls, 177 App.

for which the corporation was created.[62] The amount of property which such corporations may hold is limited by statute in some states.[63] There is a conflict of authority as to the right of unincorporated religious and charitable associations to take and hold property.[64] The capacity of a foreign corporation to take ordinarily depends upon the law of the state where it is organized. The interpretation of the charter of a corporation for the purpose of determining its right to hold property is governed by the law of the state where it is organized,[65] but its right to hold realty in other states is limited by the statutes and public policy of the state where such realty is situated.[66] It has been held that, in the absence of express statutory authority, a state cannot take property for the purposes of a charitable trust.[67]

§ 3. *Interpretation and construction.*[68]—The purpose for which trust property is to be used,[69] the manner of selecting the beneficiaries,[70] and who are to act as trustees,[71] depends largely on the terms and conditions of the instrument creat-

Div. 698, 102 N. Y. S. 808. Corporation held validly incorporated and hence entitled to take bequest. In re Nason's Will, 104 N. Y. S. 601. Validity of corporation cannot be attacked in action to construe will leaving property to it. Smith v. Havens Relief Fund Soc., 103 N. Y. S. 770. Devise of land in West Virginia in trust for benefit of foreign religious corporation held void as contrary to public policy, laws of that state forbidding incorporation of church organizations or holding by them, through trustees, of realty in more than specified amount or for other than specified purposes. Miller v. Ahrens, 150 F. 644.

62. Gift to charitable corporation composed of members of Catholic religious society, organized for gratuitous care of sick, aged, infirm, and poor, to be used for saying masses for souls of the dead, held for a use consistent with the purposes of the corporation, included within powers given it, and therefore valid. Johnston v. Hughes, 187 N. Y. 446, 80 N. E. 373.

63. Society incorporated under Laws 1871, c. 301, held to have power to take and hold property devised to it by persons mentioned in certificate of its incorporation to an unlimited amount, subject only to limitations on right of person leaving certain relatives to give more than certain portion of his property to charity. Smith v. Havens Relief Fund Soc., 103 N. Y. S. 770. Though Rev. Laws, c. 125, § 8, limits amount of property which charitable corporation is authorized to hold, gift to such a corporation by will to an amount in excess of such limit is valid as against everyone but the state. Hubbard v. Worcester Art Museum [Mass.] 80 N. E. 490. Hence St. 1906, p. 278, c. 312, increasing limit, operates as waiver of right of state to object to holding by corporation of sum in excess of previous limit given to it by a will probated prior to its enactment. Id.

64. See 7 C. L. 629, n. 94. Unincorporated association cannot take and hold property for purposes of administering charitable trust. Catt v. Catt, 103 N. Y. S. 740. Gift in remainder to Iowa State College of Agriculture and Mechanic Arts for purpose of founding scholarships, with provision that treasurer of college should be custodian of fund, held void, college not being a corporation or even a voluntary association. Id. Gift held equally void even if it could be construed as gift in trust to treasurer of such college. Id.

65. The law favors the upholding of charitable bequests whether they are to be administered at home or abroad, and if to be administered abroad right of foreign legatee to take will be determined by the courts of the forum before directing executors to turn over fund, but under law of the foreign jurisdiction, and unaffected by laws of state of forum in regard to perpetuities and accumulations. St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 N. Y. S. 808.

66. Miller v. Ahrens, 150 F. 644.

67. Even if, under Iowa Code, § 2903, devise or bequest might vest title in that state if same were accepted, held that it did not do so where it was not accepted when will went into effect, and acceptance thereafter could not operate retroactively. Catt v. Catt, 103 N. Y. S. 740.

68. See 7 C. L. 629. See, also, Trusts, 8 C. L. 2169; Wills, 8 C. L. 2305.

69. See, also, § 4, post. Where trustees were to exercise their judgment and discretion in disposing of trust estate, held that they might avail themselves of judgment and wishes of testator as disclosed by his declarations and conversations. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

70. Will held to give trustees power to select beneficiaries of trust for educational purposes. Tincher v. Arnold [C. C. A.] 147 F. 665. Selection of beneficiaries left to discretion of trustees as directed by will. Selleck v. Thompson [R. I.] 67 A. 425.

71. Will held to show intention to constitute pastors of certain church in succession as trustees. McDonald v. Shaw [Ark.] 98 S. W. 952. Will held to create trust for charitable purposes and to vest widow as trustee with such estate as was necessary to carrying out of trust, though she was not specifically named as trustee. Welch v. Caldwell, 226 Ill. 488, 80 N. E. 1014. Will giving residue in trust to pay income to testator's wife for life, with direction that after her death part of fund should go to charitable corporation to be formed by executors, held to show intention that corporation should take though it was not formed until after widow's death. St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 N. Y. S. 808. Gift in remainder to Iowa State College of Agriculture held not a gift to

ing the trust. So, too, whether a gift is absolute or in trust is ordinarily a question of intention.[72]

§ 4. *Administration and enforcement.*[73]—The trustee takes the legal title to trust property,[74] and he alone has power to execute the trust.[75] An otherwise valid trust will not, however, be allowed to fail for want of a trustee, but the court will appoint one[76] in a proper proceeding instituted for that purpose.[77] In some states the court itself is required to act where no trustee is named.[78]

The administration of charities is always subject to the supervision and control of courts of equity,[79] or of certain particular courts designated by statute.[80]

The purposes for which trust funds may be used are limited to those designated in the instrument creating the trust.[81] Gifts for charitable purposes which either originally or in the course of time cannot be literally executed will, in most states, be administered as nearly as may be according to the donor's purpose.[82] There is,

state of Iowa for purposes designated in will. Catt v. Catt, 103 N. Y. S. 740.

72. Devise of land to executors with directions to sell same and pay certain part of proceeds to a corporation, having for its object, as stated in act incorporating it, "the gratuitous care of the sick, aged, infirm, and poor," held not to create trust but to be an absolute gift to corporation, though it was provided that it was to be for the use and benefit of the "Blessed Virgin Mary purgatorial fund of said hospital" and there was, in fact, no such fund. Johnston v. Hughes, 187 N. Y. 446, 80 N. E. 373. Gift to certain named persons with expression of wish that they use same in creating charitable or educational institution, held to indicate intention that they should take, not as tenants in common but as trustees and joint tenants, title vesting in survivors. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030. Bequest held an absolute one to corporation for its general purposes, and not one in trust to be devoted to particular purpose, or limited to period during which it maintained hospital in certain city. In re Nason's Will, 104 N. Y. S. 601. Gifts in trust for charitable uses are to be deemed absolute gifts in so far as the settler or testator is concerned. Gift to corporation to be formed held not one in trust in such sense as would invalidate it under statutes relating to perpetuities and accumulations. St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 N. Y. S. 808.

73. See 7 C. L. 630.

74. Laws 1893, p. 1748, c. 701. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

75. Title to trust property having vested in trustees, held that, so long as any of them survived, they alone had power to execute trust, and finding that majority of them had reached conclusion that fund should be devoted to particular institution did not show an execution by them or authorize court to direct that it be so used. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

76. Even if will did not give trustees power to select beneficiaries of trust for educational purposes, held that court could appoint trustee for that purpose. Tincher v. Arnold [C. C. A.] 147 F. 665.

77. Court held to have no power to appoint trustee to take and administer charitable bequests to voluntary associations in proceeding on case made, under court and Prac. Act 1905, § 323, to determine validity of such bequests, since act prohibits administering of any relief in such cases. In re Guild [R. I.] 65 A. 605.

78. Laws 1893, c. 701, held not to authorize court to act as trustee of gift to foreign association. Catt v. Catt, 103 N. Y. S. 740.

79. Masonic association to which fund was bequeathed for charitable purposes held so far under control of court of equity that it could be compelled to execute duties of trust and be dealt with for breach thereof. Kauffman v. Foster, 3 Cal. App. 741, 86 P. 1108.

80. Direction to trustee to pay over income to religious, educational, or eleemosynary institutions, as he might deem advisable, held to show an intent that it should be used for charitable purposes which such institutions represented, so that, under Laws 1893, c. 701, § 2, supreme court had control over gift, and could be appealed to at any time to see that it took course indicated and did not go to societies incompetent to take it, and was not used by any society for a purpose not contemplated by testator or the law. In re Shattuck's Will, 103 N. Y. S. 520.

81. Complainant association held to take legacy solely for purpose of establishing home for aged Germans as provided in will, and not for any of its other more general objects. German Pioneer Verein v. Meyers [N. J. Err. & App.] 67 A. 23. Where money was donated for benefit of sufferers from burning of excursion steamer, held that payment of any part of fund to church giving the excursion would be an unjustifiable diversion from original purpose of the trust. Loch v. Mayer, 50 Misc. 442, 100 N. Y. S. 837.

82. Where a main charitable purpose is disclosed with reasonable clearness, directions of donor relating to management of trust, not intended as limitations, will be regarded as directory only, if necessary to preserve trust, and carry out its leading purpose. Tincher v. Arnold [C. C. A.] 147 F. 665. Provision that net income of balance of fund, after erection of school house, should be used to pay teachers employed in school held not mandatory so as to prevent use of part of such income for heat and other necessary expenses, thereby rendering scheme abortive. Id. If gift to charitable corporation of property in excess of amount such corporations were authorized to hold by Rev. Laws, c. 125, § 8, was void, held that, on subsequent enactment of St. 1906, p.

however, no room for the application of this doctrine if literal compliance is possible.[83]

The right of the trustee to sell the property of the trust estate depends on the nature of his title and the terms of the instrument creating the trust.[84] Provision is sometimes made that trustees may appoint their successors.[85]

By statute in some states trustees of charitable corporations are not entitled to receive compensation except under some special employment by the board, or authority expressed in the original deed or instrument of trust.[86]

Charter Party, see latest topical index.

CHATTEL MORTGAGES.

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§ 15. Remedies as Against Third Persons (568).

This topic deals with chattel mortgages only,[87] excluding conditional sales,[88] general trust deeds upon the property of corporations,[89] such as railroads,[90] street railways,[91] and water companies.[92] The effect of the mortgage as a preference or fraudulent transfer is treated elsewhere,[93] as well as limitations on actions to enforce it[94] and questions relating to interest.[95] So, also, the law pertaining to filing

278, c. 312, increasing limit, court would, under cy pres doctrine, appoint such corporation trustee to administer the fund. Hubbard v. Worcester Art Museum [Mass.] 86 N. E. 490. Laws 1901, p. 751, c. 291, giving supreme court control over certain charitable gifts and providing that when it appears that circumstances have so changed since execution of "instrument" creating such a gift that literal compliance with its terms has become impractical or impossible, court shall direct administration in such manner as shall most effectively accomplish general purpose, but that no such order shall be made until expiration of 25 years from execution of instrument, or without consent of donor or grantor of property, if living, construed, and held applicable to trust for benefit of sufferers from disaster, and created by oral language, or expressions, or by conduct of various donors of the fund. Loch v. Mayer, 50 Misc. 442, 100 N. Y. S. 837. On application by trustees of such fund for directions as to disposition of balance after relieving all worthy applicants, held that court could not direct distribution of fund to others than such sufferers under cy pres doctrine until expiration of 25 years, and was trustees' duty to continue to administer it and to keep and add to fund moneys not expended until expiration of such time, when application for directions as to its disposition might be renewed. Id.

83. Plaintiffs held not to have brought case within doctrine, even if it was in force in state. Harris v. Neal [W. Va.] 55 S. E. 740.

84. Trustees held to have power to sell realty during life of life tenant. McDonald v. Shaw [Ark.] 98 S. W. 952. Though trustees took estate in remainder, held that they could dispose of their interest and execute trust during lifetime of life tenant. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

85. Where will provided that each trustee should, in his lifetime, so far as he could legally do so, appoint his successor, held that such nominations could be made by them subject to final action of court having general equity jurisdiction. Selleck v. Thompson [R. I.] 67 A. 425.

86. Comp. Laws, § 8292, precludes them from receiving compensation for services in rendition of which officers have simply acquiesced, however strong the inference may be that compensation was expected, but there must be an express employment by board in order to bind corporation. Henry v. Michigan Sanitarium and Benev. Ass'n, 147 Mich. 142, 13 Det. Leg. N. 989, 110 N. W. 523. Appointment of plaintiff as member of building committee held not such a special employment. Id.

87. Real estate mortgages, see Mortgages, 8 C. L. 1022, and Foreclosure of Mortgages on Land, 7 C. L. 1678.

88. See Sales, § 14, C. L. 1751.

89. See Corporations, 7 C. L. 862.

90. See Railroads, 8 C. L. 1590.

91. See Street Railways, 8 C. L. 2004.

92. See Waters and Water Supply, 8 C. L. 2262.

93. See Bankruptcy, 9 C. L. 343; Assignments for Benefit of Creditors, 9 C. L. 269; Fraudulent Conveyances, 7 C. L. 1841.

94. See Limitation of Actions, 8 C. L. 768.

95. See Interest, 8 C. L. 472; Usury, 8 C. L. 2211.

or recording of the instrument and notice of prior rights or liens is fully discussed in a separate article.[96]

§ 1. *What constitutes a chattel mortgage.*[97]—A common-law chattel mortgage is an absolute sale of personal property subject to redemption,[98] and this may be valid as between the parties though the property is not actually delivered and though the agreement is not in writing.[99] It must, however, appear that there was some debt due or to become due, or that the instrument was intended as security for some contingent liability.[1] The intention of the parties governs.[2] Hence the mere absence of terms of defeasance is not controlling,[3] and except where the question arises under some penal statute,[4] or in cases of conditional sales,[5] an instrument must be considered a mortgage if, taken alone or in connection with surrounding facts, it appears to have been given as a security.[6]

§ 2. *Subject-matter. What may be mortgaged.*[7]—After-acquired property may be covered by the mortgage [8] provided possession is taken by the mortgagee after the property is acquired by the mortgagor.[9] Thus, a mortgage on a stock of goods may be made to cover goods subsequently purchased to replenish the stock,[10] and in such case, when the mortgagee takes possession of the after-acquired goods, they are brought under the operation of the mortgage as of its date.[11] In like manner the mortgage may include outstanding book accounts and also accounts thereafter to become due to the mortgagor in the regular course of business.[12] A chattel real is not the proper subject of a chattel mortgage.[13]

96. See Notice and Record of Title, 8 C. L. 1169. See, also, last year's article, 7 C. L. 640.

97. See 7 C. L. 635.

98. Mower v. McCarthy, 79 Vt. 142, 64 A. 578.

99. Father's loan of money to enable son to start business, goods in stock from time to time to stand as security. Mower v. McCarthy, 79 Vt. 142, 64 A. 578.

1. Agreement between contractor and subcontractor for former's use of latter's property in case of latter's failure to perform, held not an equitable mortgage. Lewman & Co. v. Ogden, 143 Ala. 351, 42 So. 102.

2. Instrument in terms a conditional sale lease held to constitute a chattel mortgage of a watch placed in a case owned by mortgagor. State v. Haynes, 74 S. C. 450, 55 S. E. 118. An instrument in form a chattel mortgage, but evidently intended as security on real property, will be construed and enforced as an equitable mortgage as between the parties thereto and those having notice. Standorf v. Shockley [N. D.] 111 N. W. 622. Not necessary to reform such instrument in order to enforce it in a suit in equity. Id.

3. Wylly-Gabbett Co. v. Williams [Fla.] 42 So. 910.

4. A bill of sale of personal property, absolute on its face, given to secure a note, is not a mortgage within Gen. St. 1902, § 4134, making void any note and mortgage overstating the amount actually loaned. Morin v. Newbury, 79 Conn. 338, 65 A. 156.

5. Agreement to deliver goods to be sold in usual course, but title and right of possession to all goods and proceeds to remain in vendor until price was fully paid, and vendee not to remove any goods except to sell in ordinary course of business, held a conditional sale, and not a chattel mortgage void in bankruptcy proceedings. In re Newton & Co. [C. C. A.] 153 F. 841. Sale of machinery on condition that title remain in vendor until payment of price for which drafts were given, held not a chattel mortgage. Tompkins v. Fonda Glove Lining Co., 188 N. Y. 261, 80 N. E. 933.

6. Wylly-Gabbett Co. v. Williams [Fla.] 42 So. 910. Bill of sale on stock of goods and fixtures as security for money loaned, held a chattel mortgage. In re Reynolds, 153 F. 295. Instrument in terms retaining a vendor's lien on stock, binding vendees to keep up the stock, and authorizing vendor to take possession and sell on default, held a mortgage. Fleisher v. Hinde, 122 Mo. App. 218, 99 S. W. 25.

7. See 7 C. L. 636.

8. Mortgage on after-acquired property, valid. In re Chantler Cloak & Suit Co., 151 F. 952.

9. Mortgagee must take possession. Medina Gas & Elec. Light Co. v. Buffalo Loan, Trust & Safe Deposit Co., 104 N. Y. S. 625. When possession is taken under a mortgage of goods to be acquired in usual course of business mortgagee acquires a valid lien thereon, no rights of third persons having intervened. Hack v. Magerstadt, 124 Ill. App. 140.

10. Mower v. McCarthy, 79 Vt. 142, 64 A. 578; Fisher v. Zollinger [C. C. A.] 149 F. 54.

11. Fisher v. Zollinger [C. C. A.] 149 F. 54; Mower v. McCarthy, 79 Vt. 142, 64 A. 578. Where father took possession of son's stock of goods under oral mortgage, his possession related back to the agreement as against the other creditors of the son. Mower v. McCarthy, 79 Vt. 142, 64 A. 578.

12. Buvinger v. Evening Union Printing Co. [N. J. Eq.] 65 A. 482. Mortgage held to include such accounts. Id.

13. Ten-year lease. In re Fulton, 153 F. 664.

Title and interest of mortgagor.[14]—A mortgage on a crop not yet planted attaches only to such interest as the morgagor has in the crop when it comes into being.[15]

Description of property.[16]—The property must be so described as to enable third persons to identify it by the aid of such inquiries as the instrument itself suggests.[17] A landlord who expressly waives his lien in favor of a mortgagee, and has knowledge of the property covered by the mortgage, is not such a stranger to the transaction as to enable him to take advantage of the inadequacy of a description good as between the parties.[18] A vendee who gives a mortgage covering the goods delivered to him may not defeat the lien by showing that such goods were not those which he actually bought.[19]

The question of what is covered by the description is largely one of intent.[20] In order that after-acquired property may be covered, the language must manifest an intention to include it.[21]

§ 3. *Consideration.*[22]—Like other contracts, the mortgage must be supported by a consideration.[23] That the mortgagee had already taken another mortgage to

14. See 7 C. L. 636.

15. Endreson v. Larson [Minn.] 112 N. W. 628.

16. See 7 C. L. 637.

17. Klug v. Munce [Colo.] 90 P. 603. Any description enabling third persons to identify property by aid of inquiries suggested by mortgage, held sufficient. Harless v. Jester [Tex. Civ. App.] 97 S. W. 138.

Held sufficient: Description giving residence of mortgagor, and describing property as "two diamond rings mounted 14 K Tiffany rings." Harless v. Jester [Tex. Civ. App.] 97 S. W. 138. "One gray horse, five years old, branded with S's brand." Klug v. Munce [Colo.] 90 P. 603. "One blue mare mule, thirteen and one-half hands high, of the value of $100." Watt v. Parlin & Orendorff Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 154, 98 S. W. 428. "Fifteen spans of mules, . . . described stock being all of the kind now owned by me, and are in my possession, . . . on its premises," described. Strop v. Hughes, 123 Mo. App. 547, 101 S. W. 146. "All crops of cotton, corn, or other products grown or cultivated by said R in L County during or for year 1905." Read Phosphate Co. v. Weichselbaum Co. [Ga. App.] 58 S. E. 122. Evidence sufficient to identify property in suit as that described in mortgage. Strop v. Hughes, 123 Mo. App. 544, 101 S. W. 149.

Held insufficient: "All my crops, corn, cotton, etc., now up and growing on about 240 acres of land, all the above property is in Jackson district county, and state aforesaid," held inadequate as against another mortgagee, though explainable by parol as between parties. Read Phosphate Co. v. Weichselbaum Co. [Ga. App.] 58 S. E. 122. "Twelve tram cars, 5 tons tram car rails, 600 tram car ties, 1,000 pounds of spikes," etc., fatally indefinite as against third person. Wood v. West Pratt Coal Co., 146 Ala. 479, 40 So. 959. "One hundred and twenty-five head of three year old steers owned by and in the possession of" the mortgagor on certain land in another state described, mortgagor then having no steers on such land, but afterwards shipping one hundred and twenty-five three and four year old dehorned steers to a person in that state, who placed them on the land described and then mortgaged them to a third person, held insufficient as against the second mortgagee. Des Moines Nat. Bank v. Council Bluffs Sav. Bk. [C. C. A.] 150 F. 301. Lien of first mortgage did not attach under provision covering after-acquired property. Id.

18. Gaulding v. Masterson [Tex. Civ. App.] 101 S. W. 1017.

19. Wallace v. Leoni, 104 N. Y. S. 392. Under Municipal Court Act, Laws 1902, p. 1533, c. 580, §§ 139, 141, providing for foreclosure of chattel mortgage liens, and that the final judgment shall "specify the amount of the lien," judgment should be for plaintiff unless it appears that nothing was due on the mortgage. Id.

20. "All personal property of whatever kind and character now belonging or which may hereafter belong" to the mortgagor, including "all estate, rights, titles, incomes, and interest whatsoever," held sufficient to include present and future book accounts. Buvinger v. Evening Union Printing Co. [N. J. Eq.] 65 A. 482. Mortgage on the "machinery" belonging to a cotton print works company held to include copper rolls on which designs were engraved, which were not part of printing presses but purchased separately in the market, but unavailable for use except in the presses. Doty v. Oriental Print Works [R. I.] 67 A. 586. Mortgage on entire crops to be grown on certain described land held to include crops grown on the premises by tenants or croppers. Delta Cotton Co. v. Arkansas Cotton Oil Co., 80 Ark. 431, 97 S. W. 440.

21. "All my stock of merchandise" did not include additions. Armour & Co. v. Ross, 75 S. C. 201, 55 S. E. 315. Held intention of parties to create a lien on stock of merchandise kept and thereafter to be kept in usual course of business. Hock v. Magerstadt, 124 Ill. App. 140.

22. See 7 C. L. 638.

23. Mortgage on property to be subsequently purchased by mortgagor and given to secure mortgagee as guarantor of purchase price, held based on a present consideration, and valid as against mortgagor's trustee in bankruptcy. In re Chantler Cloak & Suit Co., 151 F. 952.

secure the same liability does not render the second mortgage invalid as being without consideration.[24]

§ 4. *Fraudulent conveyances.*[25]

§ 5. *The Instrument. Form, execution, and delivery.*[26]—The lex citus governs as to the validity of a chattel mortgage.[27] In the absence of statute, recordation,[28] acknowledgement,[29] or attestation,[30] is not essential to validity as between the parties and persons with notice, and a chattel mortgage executed by a corporation need not be under its corporate seal.[31] Under the Wyoming statute a valid mortgage on partnership property must be signed by every member of the firm,[32] regardless of whether the mortgagee knows that the chattels are firm property.[33] In Massachusetts a mortgage on household furniture to secure a loan for less than $1,000 on which eighteen per cent interest or more is charged is void unless it gives information as to amount, time, interest, and actual expense of making the loan.[34]

Alteration, reformation, and construction.[35]—The instrument will be reasonably construed as to amounts secured [36] and property subjected.[37]

Renewal affidavits.[38]—The Kansas statute extending the renewal periods to two years does not apply to mortgages filed prior to its passage.[39]

§ 6. *Filing or recording and notice of title or rights.*[40]

§ 7. *Title and possession before default.*[41]—At common law the mortgagee has the entire legal property with immediate right of possession even before law day, unless by stipulation or reasonable implication mortgagor is to retain possession,[42] but by statute in many jurisdictions the mortgagor now retains possession generally until default.[43] In South Dakota the mortgagor remains the legal owner of the chattels and is entitled to possession until breach of conditions and demand of the property by the mortgagee for the purpose of foreclosure,[44] and a purchaser from the mortgagor has the same rights.[45]

24. Mortgages to indemnify surety. Kitchen v. Schuster [N. M.] 89 P. 261.

25. See Fraudulent Conveyances, 7 C. L. 1841; Bankruptcy, 9 C. L. 343; also, 7 C. L. 638.

26. See 7 C. L. 639.

27. Where mortgage was not registered until after removal of property into another state, it was not a valid lien in the latter state. Bridges v. Barrett, 126 Ill. App. 122.

28, 29. Kitchen v. Schuster [N. M.] 89 P. 261.

30. Comp. Laws, § 75, applies only to sales. Kitchen v. Schuster [N. M.] 89 P. 261.

31. Rev. St. 1899, § 982, applies only to conveyances of real estate. Strop v Hughes, 123 Mo. App. 547, 101 S. W. 146.

32. Rev. St. 1899, § 2808. Lellman v. Mills [Wyo.] 87 P. 985. Evidence held to sustain finding that it was partnership property which only one partner had attempted to mortgage. Id.

33. Lellman v. Mills [Wyo.] 87 P. 985.

34. Is invalid under Rev. St. 1892, p. 516, c. 428, § 3 (Rev. Laws, c. 102, § 53), for failure to inform as to expense of making loan, though there is no expense. Ternan v. Dunn [Mass.] 80 N. E. 603.

35. See 7 C. L. 639.

36. Mortgage construed and held to secure only advances made during a certain year, though reciting that it should be void if mortgagor should satisfy all demands due "at time of foreclosure." Bank of Omaha v. Pope [Tex. Civ. App.] 103 S. W. 692.

37. Phrase "now kept or hereafter to be kept," held to refer not only to words immediately preceding but also to a stock of groceries mentioned in the mortgage. Hock v. Magerstadt, 124 Ill. App. 140.

38. See 7 C. L. 640.

39. Laws 1903, p. 563, c. 364, repealing Gen. St. 1901, § 4246. Smith v. Thompson, 122 Mo. App. 246, 98 S. W. 1095.

40. See 7 C. L. 640, and Notice and Record of Title, 8 C. L. 1169.

41. See 7 C. L. pp. 642, 643.

42. Hardison v. Plummer [Ala.] 44 So. 591. Entitled to possession at common law. Kitchen v. Schuster [N. M.] 89 P. 261. Where mortgage for price of a mill edger recited that balance should not be due until a certain number of logs had been delivered, buyer held entitled to possession until dlivery of last lot of logs. Hardison v. Plummer [Ala.] 44 So. 591.

43. By Comp. Laws, § 2265, mortgagor retains possession until divested by operation of law or breach of terms of mortgage. Kitchen v. Schuster [N. M.] 89 P. 261. An assignor of a note and mortgage may not seize the mortgaged property against the will of the mortgagor before the maturity of the debt because of fear that the maker will default and thereby render him liable as indorser. McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132.

44, 45. Mere purchase of grain and mingling it with other grain, not conversion. Catlett v. Stokes [S. D.] 110 N. W. 84.

§ 8. *Disposal and use of the property by the mortgagor.*[46]—Statutes have been enacted in many states penalizing the fraudulent sale or other disposition of the mortgaged property by the mortgagor without the consent of the mortgagee.[47] Such statutes are considered as part of the mortgage the same as if embodied therein in so many words,[48] and their violation gives the mortgagee the right to sell as for breach of condition,[49] and the right to sell includes the right to possession.[50] Intention to defraud is essential to conviction,[51] and in Georgia it must be shown that the mortgagee sustained loss.[52] Where the possession of the mortgagor is lawful in the first instance, replevin will not lie until after demand or actual conversion.[53] A repudiation of the right of the mortgagee in the chattels, evidenced by the exercise of dominion over them inconsistent with such right, constitutes conversion.[54]

§ 9. *Liens and priorites; waiver.*[55]—When a recorded mortgage covers future advances, one who buys the property mortgaged, after the making of any such advance, takes subject thereto.[56] Most courts observe a distinction between a mortgage lien on existing property and the equitable lien created by a provision that the mortgage shall cover after-acquired property,[57] the latter not attaching until possession is taken by the mortgagee or an equitable proceeding is brought to establish it.[58] Legislation which postpones a valid recorded mortgage to liens subsequently created is unconstitutional;[59] but in some states a first mortgagee, in order to maintain the priority of his lien over that of a second morgagee, must take possession of the property within a reasonable time after default, otherwise the second mortgagee acquires a prior right if he first takes possession.[60]

Duration of mortgage lien.[61]—Where the mortgagor sells the property and the mortgagee thereafter takes from the vendee another mortgage on the same and other property, the question of novation is one of intention.[62] Under a statute continuing a mortgage on a growing crop so long as the crop shall remain on the land of the mortgagor, removal from that land prima facie removes the incumbrance,[63] but mortgaged property subsequently becoming a part of the assets of a partnership re-

46. See 7 C. L. 646.

47. Comp. Laws, § 2370. Kitchen v. Schuster [N. M.] 89 P. 261. Removal of property from jurisdiction of state with purpose or necessary effect of defeating mortgage lien is within Cr. Code 1902, § 337, prohibiting selling or disposal of property under lien or mortgage. State v. Haynes, 74 S. C. 450, 55 S. E. 118. Evidence of defendant's guilt sufficient to go to jury. Id. Where information for fraudulent concealment of the property alleged that mortgage was executed by defendant and his wife to secure a note given by them, evidence showing that only mortgage was signed by both held not a fatal variance. State v. Miller, 74 Kan. 667, 87 P. 723.

48. Kitchen v. Schuster [N. M.] 89 P. 261.

49, 50. Kitchen v. Schuster [N. M.] 89 P. 261.

51. Gen. St. 1901, § 4259. State v. Miller, 74 Kan. 667, 87 P. 723. Under Rev. St. 1899, § 1933 (Ann. St. 1906, p. 1315), there must be an intent to defraud the mortgagee or the purchaser. Pinson v. Campbell [Mo. App.] 101 S. W. 621.

52. The gist of the offense under Pen. Code 1895, § 671, is the fraudulent disposition of mortgaged chattels and loss sustained by the mortgagee. Denney v. State [Ga. App.] 58 S. E. 318. Both of these elements must be proven. Id. Loss not shown by general evidence that prosecutor had lost valuable time and been compelled to employ lawyer to foreclose. Id.

53. Kitchen v. Schuster [N. M.] 89 P. 261.

54. Sale of cattle contrary to penal statute and butchering of some by vendee, held to justify replevin against vendee without demand. Kitchen v. Schuster [N. M.] 89 P. 261.

55. See 7 C. L. 644.

56. Bullard v. Stewart [Tex. Civ. App.] 102 S. W. 174.

57, 58. Medina Gas & Elec. Light Co. v. Buffalo Loan, Trust & Safe Deposit Co., 104 N. Y. S. 625.

59. Impairs vested rights and obligation of contract. National Bk. of Commerce v. Jones [Okl.] 91 P. 191.

60. That second mortgagee took "subject to a prior mortgage" was immaterial. Cassell v. Deisher [Colo.] 89 P. 773. Where second mortgage covered property in addition to that covered by first, but there was no proof of its value or how much of it second mortgagee had seized under his mortgage, first mortgagee was not entitled to have such additional property first applied to claims of second mortgage. Id.

61. See 7 C. L. 644.

62. Long v. Gump [C. C. A.] 144 F. 824.

63. Code, § 3876. Brande v. Babcock Hardware Co. [Mont.] 88 P. 949. Knowledge of purchaser that grain was once mortgaged not sufficient to charge him. Id.

mains subject to seizure and sale under the mortgage,[64] in the absence of estoppel against the mortgagee,[65] and where a dissatisfied vendee has the property exchanged for other property pursuant to the contract of sale, the substituion does not satisfy the note and mortgage given for the purchase price.[66]

Conflicting liens.[67]—A valid mortgage properly filed is superior to a subsequent attachment lien,[68] and at common law the mortgage takes precedence though the attaching creditor had no notice, actual or constructive, that it existed.[69] A seed grain lien takes priority over a chattel mortgage previously executed,[70] but the lien of a prior recorded mortgage is superior to that of a livery stable keeper or agister unless the animals were delivered to him to be kept and cared for with the consent of the mortgagee.[71] The title acquired by taking an assignment of a conditional sale note after purchasing the interest of the vendee in the property prevails as against the lien of a mortgage executed after the note was given and before the second sale, though this sale was made subject to liens of record.[72] Where a mortgage is construed to secure only advances made during a certain year, it will not, as against a second mortgagee, cover any advances made after the expiration of the year and the execution and recordation of his mortgage,[73] but the second mortgagee is not in a position to complain of the appropriation by the first mortgagee of so much of the property as is necessary to satisfy his demand for advances made after the expiration of the year but before the lien of the second mortgage attached.[74]

In many states a landlord has a superior lien on crops raised by his tenant for rent or other advances,[75] but a landlord who merely goes surety on his tenant's note for property purchased from another does not advance supplies within the meaning of a statute giving him priority as against mortgagees.[76] In Delaware where mortgaged property is moved by the mortgagor onto premises rented by him, and subsequently sold in distress for rent, the lien for rent is superior to that of the mortgagee.[77] A mortgagee who takes his mortgage from a tenant on the landlord's agreement to hold the property only "for the land rent" may not have his security impaired by an addition of rent due for previous years.[78]

Waiver.[79]—Where the mortgagee takes an assignment of a superior claim for rent, he may waive such lien as to the mortgaged property.[80] An agreement by the mortgagee that a third person may purchase the property and pay the price to him

64. Booker v. Bass, 127 Ga. 133, 56 S. E. 283.

65. As where he induces one to enter the partnership by stating that the property is not incumbered. Booker v. Bass, 127 Ga. 133, 56 S. E. 283.

66. Exchange of mules, and death of mule substituted because of ill treatment. Jones v. Wolfort, 80 Ark. 474, 97 S. W. 452.

67. See 7 C. L. 644.

68. The lien of a prior and valid mortgage properly filed is superior to that of an attaching creditor who has not paid off the mortgage or deposited the amount thereof as required by statute. Crismon v. Barse Live Stock Commission Co., 17 Okl. 117, 87 P. 876.

69. Jordan v. Pence, 123 Mo. App. 321, 100 S. W. 529.

70. Purchaser of wheat held justified in paying seed grain note with proceeds as against the mortgagee. Endreson v. Larson [Minn.] 112 N. W. 628.

71. National Bk. of Commerce v. Jones [Okl.] 91 P. 191.

72. No merger. Townsend v. Southern Product Co., 127 Ga. 342, 56 S. E. 436.

73, 74. Bank of Omaha v. Pope [Tex. Civ. App.] 103 S. W. 692.

75. Under Civ. Code 1896, §§ 2703-2706, a landlord's rent lien on a crop raised in the current year is superior to that of a mortgagee (Wilson v. Curry [Ala.] 42 So. 753), and he is not restricted in its enforcement to any particular portion of the crop (Id.).

76. Statute giving prior lien on crop for necessary advances to enable tenant to make it. Kaufman v. Underwood [Ark.] 102 S. W. 718.

77. Rev. Code 1852, amended in 1893, p. 874, § 41. State v. Frick [Del.] 65 A. 781.

78. Beattie v. Hughes [Ark.] 101 S. W. 170.

79. See 7 C. L. 645.

80. Citizens' Sav. Bk. v. Woods [Iowa.] 111 N. W. 929. Where a tenant mortgaged certain stock not exempt, and also had stock exempt from execution, except as to a lien for rent, the mortgagee, who also acquired the rent claim, was not required to apply any of the proceeds of the mortgaged stock to the claim for rent. Id.

after making certain deductions is either a waiver or an exchange of the mortgage lien for the promise to make such payment.[81] A second mortgagee may waive priority as against a first mortgagee by requesting and procuring the latter to sell the property and apply the proceeds first to his own claim.[82] A title reserved by purchase-money notes is not lost by waiver or estoppel as against other creditors by the subsequent acceptance and foreclosure of a mortgage, such creditors having lost nothing thereby.[83]

§ 10. *Assignment of the mortgage.*[84]—The sale and indorsement of a note and its delivery to the purchaser, together with a mortgage securing it, operates to pass all the interest of the mortgagee.[85] An assignment of a chattel mortgage is supported by a sufficient consideration where the assignee agrees to surrender a lien on property sold by the assignor to the mortgagor.[86] A transfer of a note and an instrument expressly providing that title to certain chattels shall be in the creditor until the note is paid, and of all rights and interest in such instruments passes the legal title to the chattels, and not merely the interest of the creditors in the instruments.[87] Where the assignor warrants the validity of the mortgage as against judgment creditors of the mortgagor and a breach is alleged the assignee must show that he is unable to collect his claim in full.[88] If the mortgage proves void, he may recover the amount of the debt, but not amounts paid out to satisfy outstanding judgments.[89]

§ 11. *Payment and discharge.*[90]—The mortgagor may deal directly with an assignee of the mortgage for an extension of time for payment,[91] and an extension thus obtained before maturity of the debt prevents a default for non-payment at the time originally fixed.[92] When each of two mortgages executed simultaneously provides that it is given to secure a note and also any other amount owing by the mortgagor, it stands as security for the debt expressed in the other, as well as that primarily secured, and the mortgagee is not required to surrender it on tender of the amount primarily secured unless there is also an offer to pay the other mortgage.[93] It is not ordinarily the duty of a probate judge to make entries of satisfaction on the margin of mortgage records,[94] and, in the absence of proof of authority on his part, such entries are not admissible in detinue by the mortgagee to show that a prior mortgage has been satisfied.[95] The doctrine that a mortgage may be kept alive notwithstanding payment, for the security of other creditors as against subsequent incumbrancers or purchasers, is inapplicable where the attempt to keep it alive is made by only one of two mortgagors having only a third interest in the property for the purpose of defrauding his co-owner,[96] or where such subsequent parties are led to a reasonable belief that the mortgage has been discharged.[97]

§ 12. *Enforcement, foreclosure, sale.*[98]—The right to sell the property for

81. Brande v. Babcock Hardware Co. [Mont.] 88 P. 949.

82. McCarthy v. North Texas Loan Co. [Tex. Civ. App.] 101 S. W. 835. Could not thereafter maintain conversion against first mortgagee. Id.

83. Foster v. Briggs Mach. & Supply Co., 6 Ind. T. 342, 98 S. W. 120.

84. See 7 C. L. 646.

85. Second Nat. Bk. v. Thuet, 124 Ill. App. 501.

86. Jordan v. Pence, 123 Mo. App. 321, 100 S. W. 529.

87. Joiner v. Stallings, 127 Ga. 203, 56 S. E. 304. Admission of a second transfer, expressly specifying that the property also should pass, was therefore immaterial. Id.

88, 89. Stark v. Huber Mfg. Co., 130 Wis. 432, 110 N. W. 231.

90. See 7 C. L. 647.

91. McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132.

92. Assignor could not seize mortgaged property because of fear that there would be default rendering him liable as indorser. McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132.

93. Sellers & Co. v. Malone-Pilcher Co. [Ala.] 44 So. 414.

94, 95. Wilson v. Johnson [Ala.] 44 So. 539.

96. Longley v. Sperry [N. J. Eq.] 66 A. 1062.

97. Where assignee permitted mortgage and note stamped paid to remain in hands of mortgagor, who induced his partner and subsequent mortgagee to believe that note had been paid. Longley v. Sperry [N. J. Eq.] 66 A. 1062.

98. See 7 C. L. 648.

breach of a condition in the mortgage includes the right to possession for that purpose,[99] and the right to possession after a breach is not affected by the immaturity of the debt or the fact that a contingent liability secured against has not yet been incurred.[1] While a provision authorizing the mortgagee to take possession of and sell the property on default creates an irrevocable power coupled with an interest,[2] it does not authorize a taking of possession in any way involving a breach of the peace,[3] and the mortgagee is required to exercise good faith and diligence in disposing of the property, otherwise he will be charged with its reasonable value.[4]

Where a mortgage authorizes the mortgagee to declare the debt due and foreclose whenever he shall feel himself unsafe or insecure, the mortgagee may do so at any time when he has reasonable grounds for feeling unsafe,[5] and a vendee who had knowledge of such authorization cannot complain that the mortgagee exercises his option.[6] An assignor of the mortgage cannot be made defendant in an action to foreclose, no cause of action having yet accrued against him.[7] As in other cases, the evidence must be relevant,[8] and instructions must be justified thereby,[9] and appropriate to the case.[10] After-acquired property or choses of which no possession has been taken will not pass by foreclosure, in the absence of allegations showing the existence of the equitable lien or any reference thereto in the judgment of sale.[11] The proceeds of the sale being before the court, together with all the parties interested, and these having all prayed that the property be turned into cash, the invalidity of the mortgage will not prevent the court from doing complete equity where it is fully advised of the facts.[12] The mortgagee may not apply the proceeds to claims not secured by the mortgage [13] without the mortgagor's consent.[14] After foreclosure the mortgage is no longer executory within the meaning of a statute avoiding certain contracts at the option of one of the parties.[15]

§ 13. *Redemption.*[16]

99. Breach by sale in violation of statute. Kitchen v. Schuster [N. M.] 89 P. 261.

1. Surety before liability as such could recover possession for wrongful sale. Kitchen v. Schuster [N. M.] 89 P. 261.

2. Gilliland v. Martin [Ala.] 42 So. 7.

3. Forcing open a door. Gilliland v. Martin [Ala.] 42 So. 7.

4. Provision that he might take possession and sell without advertisement at public or private sale did not authorize a sale twenty miles from location of property, and purchase by him at nominal sum. Kelly Co. v. McCarthy [Kan.] 88 P. 882.

5, 6. Warren v. Osborne [Tex. Civ. App.] 97 S. W. 851.

7. Where he had merely indorsed note "with recourse after security had been exhausted." Smith v. Bradley [N. D.] 112 N. W. 1062.

8. Not error to exclude a certain "cotton bill" offered by defendant, it not being shown that plaintiff had any connection with the transaction of which it was evidence. Bird v. Benton, 127 Ga. 371, 56 S. E. 450.

9. Instruction on hypothesis that defendant consented to application of certain payments to items of indebtedness not covered by mortgage, held proper, and sustained by evidence. Bird v. Benton, 127 Ga. 371, 56 S. E. 450.

10. Where pending foreclosure a third person who had been made defendant purchased the note and mortgage, and was substituted as plaintiff, an instruction held inappropriate and misleading in view of fact that original plaintiff had been eliminated from the case. Williams & Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 546, 98 S. W. 916.

11. Cause of action did not pass by sale. Medina Gas & Elec. Light Co. v. Buffalo Loan, Trust & Safe Deposit Co., 104 N. Y. S. 625.

12. Could grant relief to mortgagee who also held purchase-money notes reserving title, though mortgage was invalid for lack of proper acknowledgment. Foster v. Briggs Mach. & Supply Co., 6 Ind. T. 342, 98 S. W. 120.

13. The debtor has no authority to direct that the mortgagee apply the proceeds of the sale on claims not secured by the mortgage. Citizens' Sav. Bk. v. Woods [Iowa] 111 N. W. 929. Where a tenant gave mortgages on animals kept on the farm, and the same were sold at foreclosure, mortgagees were required to apply the proceeds to the mortgage debt, and not to the landlord's claim for rent which they had acquired by assignment. Id.

14. Brigham v. Madden [N. H.] 64 A. 723.

15. Code 1896, § 1323, making voidable contracts made by foreign corporations without compliance with its terms. Hardison v. Plumber [Ala.] 44 So. 591. That purchaser at foreclosure was officer of corporation did not prevent foreclosure from executing contract. Id.

16. See 7 C. L. 647.

§ 14. *Other remedies as between the parties.*[17]—The mortgagor may not, in an action on the note, counterclaim damages for the refusal of the mortgagee to allow him to market the property mortgaged pursuant to contract where the evidence shows that the mortgagee only advised against a sale at that particular time.[18] One who sues on the theory that a conveyance absolute on its face was made in trust, with the understanding that defendant satisfy a claim and account for the balance, may not introduce parol evidence to show that the conveyance was intended as a mortgage.[19]

§ 15. *Remedies as against third persons.*[20]—The mortgagee may maintain an action for the possession or value of the mortgaged property against third persons who wrongfully claim possession by purchase from the mortgagor,[21] but he cannot maintain trespass or conversion before default where he has no right to possession before that time.[22] Defendant may show estoppel,[23] or prior outstanding mortgages,[24] or that the mortgagee consented to the sale,[25] or that the chattels were included in a mortgage held by him;[26] and a purchaser is not liable for conversion where prior to demand upon him an agreement is entered into between the mortgagor and the mortgagee whereby the latter accepts other property in lieu of his mortgage lien.[27]

In Texas the statutory trial of a right of property is maintainable by a first mortgagee, in actual possession at the time of levy upon the property, under a judgment foreclosing a subsequent mortgage.[28] Where the title of a first mortgagee has become absolute by default and possession taken, a second mortgagee, having knowledge thereof, is guilty of conversion in obtaining possession of the chattels by an action to which the first mortgagee is not a party, and refusing to surrender them on

17. See 7 C. L. 651.

18. Malloy v. Sweazea, 123 Mo. App. 179, 100 S. W. 503.

19. Nevius v. Nevius, 117 App. Div. 236, 101 N. Y. S. 1091.

20. See 7 C. L. 652.

21. Mortgagee after default may recover property from purchaser from mortgagor who fails to tender amount of debt. Burriss v. Owen [S. C.] 57 S. E. 542. In such case, purchaser may redeem by paying mortgage and interest. Id. Though, by mistake, the record gave notice of a much smaller amount than that specified in mortgage, purchaser was required to tender amount for which mortgage was indexed. Id. In detinue against a third person for a mule, held for jury whether plaintiff was the same person as the one mentioned in mortgage as mortgagee. Williams v. Vining [Ala.] 43 So. 744. In replevin by mortgagee, petition held not subject to general demurrer for failure to allege condition broken, and maturity of notes, where notes and mortgages were attached thereto and showed these facts, and that mortgagee was entitled to possession. Whiteacre v. Nichols, 17 Okl. 387, 87 P. 865. A petition in a suit to recover money due and to foreclose a mortgage, and for conversion in the event that the property has been converted, is not subject to general demurrer for not alleging the value of the property. Bullard v. Stewart [Tex. Civ. App.] 102 S. W. 174.

22. Wilson v. Curry [Ala.] 42 So. 753.

23. That mortgagee after default heard that property had been traded several times and saw it in possession of third persons without asserting his interest otherwise than by record, held not to estop him from enforcing lien. Crafton v. Patrick [S. C.] 58 S. E. 1. Vendor in conditional sale held not estopped to deny title in vendee to cattle mortgaged by the latter where mortgagee did not rely on vendor's conduct as authorizing mortgage or as a ratification. Huston v. Peterson [Colo.] 87 P. 1074.

24. In detinue by a mortgagee against a purchaser from the mortgagor, defendant may show prior outstanding mortgages (Wilson v. Johnson [Ala.] 44 So. 539), especially where he shows a purchase by him of the debts and mortgages, and delivery of them to him with the property (Id.). Instruction preter-mitting plaintiff's contention that payment by defendant of prior debt was intended to extinguish the mortgage, held properly refused. Id.

25. In suit by mortgagee against vendee of mortgagor, evidence insufficient to show mortgagee's consent to sale. Delta Cotton Co. v. Arkansas Cotton Oil Co., 80 Ark. 431, 97 S. W. 440. In conversion against purchaser from mortgagor, held for jury whether plaintiff gave mortgagor authority to sell. Alabama Cotton Products Co. v. Myrick [Ala.] 44 So. 587. A purchaser of grain from the mortgagor is not protected by the mere fact that the mortgagee permitted the mortgagor to thresh and sell the grain. Endreson v. Larson [Minn.] 112 N. W. 628.

26. In trover for cattle, instruction held erroneous as ignoring defendant's contention that a mortgage transferred to him included the cattle in question. Harding v. Thuet, 124 Ill. App. 437.

27. There being no conversion until demand for purpose of foreclosure. Catlett v. Stokes [S. D.] 110 N. W. 84.

28. Evidence held to show possession. Craig v. Martin-Bennett Co. [Tex. Civ. App.] 102 S. W. 1172.

demand.[29] A second mortgagee who waives a right of priority by requesting and procuring the first mortgagee to sell the property and apply the proceeds first to the satisfaction of the first mortgage may not thereafter maintain conversion against the first mortgagee for complying.[30]

The equity of the mortgagor being subject to execution or attachment, the execution or attachment creditor cannot be liable in trespass or trover for taking possession of the property under either process.[31] A third person cannot recover damages for the sale of mortgaged property at foreclosure, in the absence of any showing of ownership, want of notice of foreclosure, or excuse for not previously asserting his rights.[32]

Chattels; Cheats; Checks; Children; Chinese; Cigarettes; Citations, see latest topical index.

CITIZENS.[1]

This topic excludes alienage,[2] domicile,[3] and right to vote.[4]

Citizenship and domicile are not synonymous and neither necessarily controls the other.[5] Residence in the United States creates a presumption of citizenship,[6] and once established is not affected by removal to a foreign country.[7] A British subject residing in the United States after the Declaration of Independence and taking no action indicating an election to adhere to the crown will be deemed a citizen of the United States.[8] The child of a citizen born in a foreign country is also a citizen,[9] but must, within a reasonable time after attaining his majority, elect as to whether to conserve to the citizenship of the country of his domicile or that of the citizenship of his father and is bound by his election.[10] Children of an expatriate, born in a foreign country, are not citizens.[11] A child born in the United States moving to a foreign country continues a citizen unless on attaining its majority it does something inconsistent therewith,[12] and no act of the father can deprive the child of such citizenship during its minority,[13] nor can the child during its minority expatriate itself.[14] The Act of Congress of 1802, relating to the citizenship of children of citizens from outside of the United States, does not apply to children born subsequent to its adoption.[15] To overcome the presumption of citizenship, evidence of an actual removal or a continued residence abroad with a fixed purpose to throw off the former allegiance is essential.[16] Declarations of a citizen after removing to a foreign country are admissible to show that he did not terminate his allegiance to the United States.[17] The Act of Congress of 1855, providing that citizenship shall not descend to children of citizens born abroad whose fathers never resided in the United States, is complied with by birth and residence of the father in the United States during a portion of his minority.[18]

29. Dethoff v. Gattie, 103 N. Y. S. 589.

30. McCarthy v. North Texas Loan Co. [Tex. Civ. App.] 101 S. W. 835.

31. Wilson v. Curry [Ala.] 42 So. 753.

32. Kuhling v. Beidenhorn, 30 Ky. L. R. 811, 99 S. W. 646.

1. See 7 C. L. 633.

2. See Aliens, 9 C. L. 84.

3. See Domicile, 7 C. L. 1194.

4. See Elections, 7 C. L. 1230.

5, 6, 7, 8, 9. State v. Jackson, 79 Vt. 504, 65 A. 657.

10. The child of a citizen, who is born in Canada, elects to become a citizen of the United States by moving here and performing the duties of a citizen. State v. Jackson, 79 Vt. 504, 65 A. 657.

11. State v. Jackson, 79 Vt. 504, 65 A. 657.

12. Evidence held insufficient to show expatriation. State v. Jackson, 79 Vt. 504, 65 A. 657.

13, 14. State v. Jackson, 79 Vt. 504, 65 A. 657.

15. Act April 14, 1802 (Ch. 28, 2 Stat. 155.) State v. Jackson, 79 Vt. 504, 65 A. 657.

16. State v. Jackson, 79 Vt. 504, 65 A. 657. Where a child of a citizen born in the United States was moved to Canada during its minority, and upon becoming of age married and resided there, the evidence was held insufficient to establish expatriation.

17. State v. Jackson, 79 Vt. 504, 65 A. 657.

18. A child of a citizen was born in the United States in 1810 and removed to Canada with his father in 1812. Held descendants of the child were citizens, he not having renounced his citizenship after becoming of age and prior to their birth. State v. Jackson, 79 Vt. 504, 65 A. 657.

CIVIL ARREST.

§ 1. Privilege from Arrest (570).
§ 2. Arrest on Mesne Process (570).
§ 3. Execution Against the Body (570).
§ 4. Supersedeas Bail or Discharge from Arrest (571).
§ 5. Liability for False Imprisonment (572).

Excludes admission to bail [19] and commitment for contempt in failing to obey decree.[20]

§ 1. *Privilege from arrest.*[21]—One claiming a statutory exemption must show himself to be within the provisions of the law.[22] Statutes in many states exempt persons attending judicial proceedings as witnesses from arrest on civil process,[23] and under such a statute a nonresident witness must be allowed a reasonable time within which to return to the place from which he came.[24] A bankrupt is exempt from arrest on a claim which is barred by discharge in bankruptcy.[25]

§ 2. *Arrest on mesne process. When allowable.*[26]—The right to arrest in a civil action is largely a matter of statutory regulation.[27]

Procedure to obtain arrest.[28]—The affidavit must allege facts from which the court can determine whether a cause of action exists,[29] upon competent and positive evidence sufficient to justify the court in making a finding upon a trial.[30] An affidavit designating defendant by a fictitious name is insufficient where it appears therefrom that plaintiff knew his true name.[31]

Writ and proceedings thereon.[32]—The validity of the arrest does not depend upon the validity of the cause of action,[33] and the existence of a good defense on the merits does not invalidate a capias ad respondendum.[34] Hence, in an action on a judgment, a capias is not invalidated by the fact that the judgment sued on is void,[35] but its invalidity may be set up in defense without resort to a writ of error.[36]

§ 3. *Execution against the body. Occasion and propriety.*[37]—Constitutions of many states prohibit imprisonment for debt.[38] Under such a provision prohibit-

19. See Bail, Civil, 9 C. L. 319.
20. See Contempt, 7 C. L. 746.
21. See 7 C. L. 653.
22. Rev. Laws, c. 168, § 45, giving to a person discharged on taking the oath after an arrest on mesne process the same advantage of exemption from second arrest on same cause of action as upon discharge after arrest on execution, applies only to discharge on taking poor debtor's oath and not to a voluntary discharge or discharge on taking oath that defendant does not intend to leave state. Ex parte Morton [Mass.] 81 N. E. 869.
23. Code Civ. Proc. § 860, exempting from arrest persons ordered to attend as witnesses in cases where attendance can be enforced by attachment, applies to an involuntary bankrupt order to attend before a referee. Goldsmith v. Haskell, 105 N. Y. S. 327.
24. At conclusion of hearing on examination of involuntary bankrupt, a delay to consult his attorney held not unreasonable. Goldsmith v. Haskell, 105 N. Y. S. 327.
25. Judgment for money misappropriated by railroad ticket agent from sales of tickets held barred. In re Wenman, 153 F. 910.
26. See 7 C. L. 653.
27. Nonresidents may be arrested in actions not arising out of contract. S. C. Code Civ. Proc. 1902, § 200, subd. 6. Action for damages by purchaser for wrongful sale of same property to a second person held ex delicto. Davis v. Reynolds [S. C.] 57 S. E. 850.
28. See 7 C. L. 654.
29. Code Civ. Proc. § 557. Affidavit for arrest on ground of fraud in selling a painting as that of a celebrated artist held defective as not showing personal knowledge on plaintiff's part that it was not the work of such artist. Wilson v. Collins, 103 N. Y. S. 1038. Must allege facts from which alleged cause of action arises. Dadirrian v. Whitson, 105 N. Y. S. 458.
30. Affidavit containing neither a positive averment of fraud nor a positive averment of facts from which fraud could be inferred held insufficient. Neves v. Costa [Cal. App.] 89 P. 860.
31. Dadirrian v. Whitson, 105 N. Y. S. 458.
32. See 7 C. L. 654.
33, 34. Ex parte Morton [Mass.] 81 N. E. 869.
35. Judgment entered without obtaining jurisdiction over the person held not ground for release on habeas corpus. Ex parte Morton [Mass.] 81 N. E. 869.
36. Ex parte Morton [Mass.] 81 N. E. 869.
37. See 7 C. L. 654.
38. Fines or penalties arising from a violation of city ordinances or penal laws of state do not come within the constitutional inhibition. Peterson v. State [Neb.] 112 N. W. 306. Code 1896, § 4730, as amended by Acts 1903, p. 345, making person entering into contract of employment and procuring advances thereon, refusing to perform same,

ing imprisonment for debt, except for fraud, fraud must be alleged and proven,[39] and must be submitted to the jury as a separate and distinct issue,[40] unless the cause of action is of such a nature that questions of debt and fraud can be tried in one issue so as to have a clear and intelligible finding as to each.[41] A body execution cannot issue on a claim barred [42] by discharge in bankruptcy.[43] While body executions are confined to actions at law, equity may grant such process in cases where, if the action had been at law, arrest could have been had,[44] except that in equity an execution will not issue where inability to pay appears.[45] The Federal courts may in the proper case enforce a state statute authorizing a body execution,[46] and though such statute is essentially a part of the state insolvent law, the right to the writ is not suspended by the passage of the national bankruptcy act.[47]

The order and writ.[48]—The capias must issue from a court having jurisdiction.[49] Recitals in the judgment essential to the issuance of the writ,[50] and the necessity for the return of outstanding executions,[51] are largely matters of statutory regulation.

§ 4. *Supersedeas bail or discharge from arrest.*[52]—Petitions for discharge are regulated by statute, and a defendant seeking to avail himself thereof must comply strictly with its provisions [53] and must show that his application is covered by the statute under which relief is sought.[54] A voluntary discharge of the debtor by the creditor for a consideration does not preclude the latter from having the former arrested in a second suit upon the same obligation.[55] A discharge in bankruptcy from the debt for which defendant was arrested entitles him to his discharge from custody,[56] and though the state insolvent laws are suspended by the bankruptcy act, the defendant is nevertheless entitled to avail himself of their provisions to

or to refund money, with intent to defraud, punishable as though they had stolen money advanced, held not unconstitutional as providing imprisonment for debt. State v. Vann [Ala.] 43 So. 357. Imprisonment for contempt for failure to comply with decree requiring payment of specific funds is not imprisonment for debt. Meeks v. State, 80 Ark. 579, 98 S. W. 378.

39, 40, 41. Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969.

42. In determining whether a judgment is within the exception of the bankruptcy act as for willful and malicious injury, the court may look to the close jail certificate issued as a body execution on such judgment. Judgment in action for malpractice construed to have been for willful and malicious injury. Flanders v. Mullin [Vt.] 66 A. 789.

43. Judgment for misappropriation by ticket agent of money realized on sale of tickets held barred. In re Wenman, 153 F. 916.

44. Equitable action to require trustee to refund money converted to his own use. Haggerty v. Badkin [N. J. Eq.] 66 A. 420.

45. Haggerty v. Badkin [N. J. Eq.] 66 A. 420.

46. Rev. St. § 916 (U. S. Comp. St. 1901, p. 684). Johnson v. Crawford & Yothers, 154 F. 761; Ex parte Crawford [C. C. A.] 154 F. 769.

47. Johnson v. Crawford & Yothers, 154 F. 761. Affirmed on ground that state law was not an insolvency act. Ex parte Crawford [C. C. A.] 154 F. 769.

48. See 7 C. L. 655.

49. Act July 1, 1898, exempts bankrupts from arrest on civil process except "(1) when issued from a court of bankruptcy for contempt or disobedience of its lawful orders, (2) when issued from a state court having jurisdiction, etc." Held the United States circuit court was without jurisdiction to issue an execution against the body. In re Wenman, 153 F. 910.

50. Under B. & C. Comp. § 218, where defendant has been provisionally arrested and discharged on bail, an execution against the person may issue though the judgment does not show the issuance of the writ or an order therefor or direct a body execution. Banning v. Roy [Or.] 82 P. 708.

51. Under Comp. Laws, § 11, 175, prohibiting issuance of execution against body or property of defendant while an execution against either is unreturned, an execution against the property, or in the event of its insufficiency the body, is void. Sink v. Oceana Circuit Judge, 146 Mich. 121, 13 Det. Leg. N. 681, 109 N. W. 115.

52. See 7 C. L. 655. See, also, Bail, Civil, 9 C. L. 319.

53. St. 1903, § 2180, provides that petition for discharge may be made to a justice of the peace, or the presiding justice of the county, or the police judge of the county seat. Held a circuit judge was without jurisdiction. McGovern v. Maloney, 30 Ky. L. R. 801, 99 S. W. 935.

54. Imprisonment for nonpayment of alimony is for contempt as well as for debt, and hence a statute directing release upon taking the poor debtor's oath in cases of imprisonment for debt has no application. Prohibition awarded to restain release. Mowry v. Bliss [R. I.] 65 A. 616.

55. Ex parte Morton [Mass.] 81 N. E. 869.

56. Johnson v. Crawford, 154 F. 761.

procure his discharge where the statute under which arrest is authorized directs discharge upon compliance therewith.[57] Under the Georgia statute upon a satisfactory showing of inability to give security,[58] or to produce the property in an action for the recovery thereof, the court may order the defendant discharged without requiring security; but in the latter case where the property sued for is beyond the jurisdiction of the court, in the control of the defendant, and was taken there to keep it outside of the jurisdiction, the reasons for nonproduction must be clear and satisfactory.[59] Though the statute contemplates discharge from imprisonment, any restraint is sufficient.[60] and in a proceeding upon application for release thereunder, a traverse to the sheriff's return upon the bail process is too late if filed after pleading to the merits.[61] Where malice is conclusively established by the judgment upon which the capias issued, the defendant on a petition for discharge is not entitled to have the question of malice retried.[62] A motion to vacate an order of arrest may be considered if based on papers upon which the order was granted, although the defendant was not arrested.[63]

§ 5. *Liability for false imprisonment.*[64]

CIVIL DAMAGE ACTS; CIVIL DEATH, see latest topical index.

CIVIL RIGHTS.[65]

Separation of races in the public schools,[66] and in the conveyances of common carriers,[67] is elsewhere treated.

A barber shop is not a "place of public accommodation" within a statute forbidding discrimination because of color.[68]

CIVIL SERVICE; CLEARING HOUSES, see latest topical index.

CLERKS OF COURT.

§ 1. The Office; General Powers and Duties (572). Deputies (573).
§ 2. Fees and Compensation (573). Duty to Account for Fees (574). United States Courts (574).
§ 3. Liability on Bond (574).

§ 1. *The office; general powers and duties.*[69]—An act which merely erroneously assumes that a county is entitled to only one clerk does not necessarily deprive such county of its rightful number.[70] The commencement and duration of

57. Act Pa. July 12, 1842 (P. L. 339), providing that upon assigning his property for benefit of his creditors, either before or after commitment, shall be entitled to discharge from custody, is available to a person arrested under such act notwithstanding such act was suspended by the bankruptcy act. Johnson v. Crawford, 154 F. 761. Affirmed on ground that act in question was not an insolvency law. Ex parte Crawford [C. C. A.] 154 F. 769.

58. Allowed in action for recovery of personal property, notwithstanding fact that property was orlginally wrongfully taken. Hinson v. Battle, 127 Ga. 459, 56 S. E. 489.

59. Hinson v. Battle, 127 Ga. 459, 56 S. E. 489.

60. Custody of sheriff, held sufficient. Everett, Ridley & Co. v. Holcomb [Ga. App.] 58 S. E. 287.

61. Everett, Ridley & Co. v. Holcomb [Ga. App.] 58 S. E. 287.

62. Judgment for assault and battery held conclusively to establish malice, same being the gist of the action. Salomon v. Buechele, 127 Ill. App. 420.

63. Dadirrian v. Whitson, 105 N. Y. S. 458.

64. See 7 C. L. 655; See, also, False Imprisonment, 7 C. L. 1643.

65. See 7 C. L. 656.

66. See Schools and Education, 8 C. L. 1851.

67. See Carriers, § 27, 9 C. L. 512.

68. Pub. Acts 1903, p. 91, c. 130, requiring barbers to procure license, does not render it such. Faulkner v. Solazzi, 79 Conn., 541, 65 A. 947.

69. See 7 C. L. 656.

70. Acts 1905, p. 601, §16, dividing Union county into two judicial districts, not unconstitutional on this ground, since county was still entitled to a clerk of the circuit court and a county clerk. Pryor v. Myrphy, 80 Ark. 150, 96 S. W. 445.

the term depend upon the provisions of the statute.[71] A mere scrivener or clerical assistant employed by a justice of the peace is not a clerk of court whose acts or representations are binding as those of the court.[72]

The Louisiana statute authorizing clerks of court to homologate the proceedings of family meetings is constitutional.[73] It is the right and duty of the clerk of an appellate court to control by reasonable regulations the inspection and handling of the records of his office.[74] In Iowa it is a misdemeanor for any officer required to keep a court docket or account to falsify the same, regardless of fraudulent motive,[75] and it is immaterial that the books falsified are not books specifically prescribed by statute to be kept by the officer where they are adopted and kept by him in his office for the purposes of settlement.[76] The negligent failure of a clerk to promptly enter and docket a judgment renders him liable for damages sustained by the judgment creditor or one who is substituted to his rights.[77] A clerk may not refuse to prepare and deliver an appeal transcript for defects which can be cured by appellant and which do not affect the jurisdiction of the appellate court.[78] The clerk is liable for negligence on the part of his deputy in the performance of duties pertaining to the office.[79]

Deputies.[80]—It will be presumed that one who appears to have acted as a deputy was a de jure deputy.[81] Ministerial duties which the clerk could have done may generally be performed by his deputy [82] in his own name.[83] The Iowa statute making it a misdemeanor to falsify court dockets or accounts applies to deputies as well as to clerks.[84]

§ 2. *Fees and compensation.*[85]—Authority to collect fees and the amount thereof must be gathered from statute.[86] The Indiana statute does not prohibit

71. Act relating to "county clerks" did not postpone commencement of term of "clerk of the circuit court." Taylor v. State [Ind.] 80 N. E. 849. In Laws 1905, p. 18, § 10, creating Sanders county and providing that officers appointed thereunder should serve until after the next general election, the "next general election," so far as the clerk of court was concerned, meant the next general election to be held for filling that particular office, and not the next general election to be held for any purpose. State v. Smith [Mont.] 90 P. 750.

72. Representation that a case would not be tried. Park v. Callaway [Ga.] 57 S. E. 229. Entry by such person but not signed by justice was not a judgment but a mere memorandum. Id.

73. Act No. 43, p. 54, of 1882. Clerk could authorize sale of minor's property. Holliday v. Hammond State Bk., 118 La. 1000, 43 So. 656.

74. Publisher did not have unrestricted right of access to decisions of supreme court for purpose of making copies for publication. Ex parte Brown, 166 Ind. 593, 78 N. E. 553.

75. Code, §4910. Offense complete if alteration be willful or intentional. State v. Hanlin [Iowa] 110 N. W. 162. Instruction sufficiently favorable to accused. Id.

76. State v. Hanlin [Iowa] 110 N. W. 162.

77. Clerk held liable to a surety who paid the judgment not docketed until intervention of other liens on property of principal. Whelan v. Reynolds [Minn.] 112 N. W. 223. Statement of confession of judgment held to require clerk to enter the judgment. Id. Plaintiff not required to file the notice provided for in Rev. Laws 1905, § 4281, whereby a surety may continue the judgment in effect in his favor. Id.

78. Could not refuse because appeal bond was not in double amount of costs where it recited that it was in double the amount fixed by the court. Taylor v. Gardner [Tex. Civ. App.] 99 S. W. 411. That appellant had not complied with his promise to pay for transcript and objection to certain sureties, held not to justify refusal. Id.

79. Evidence that deputy took acknowledgment of an imposter threw upon clerk burden of showing diligence on part of deputy. Commonwealth v. Johnson, 29 Ky. L. R. 897, 96 S. W. 801. That imposter was introduced by a reputable citizen was some evidence of diligence, its sufficiency to overcome the prima facie case being for the jury. Id.

80. See 7 C. L. 657.

81. Southern R. Co. v. Hundley [Ala.] 44 So. 195.

82. Deputy clerk had authority to take from a surety on a replevin bond on affidavit as to the amount of his property and to administer the oath by which he swore to its contents. Stamper v. Com., 30 Ky. L. R. 992, 100 S. W. 286.

83. Jurat to affidavit in deputy's own name held good. Southern R. Co. v. Hundley [Ala.] 44 So. 195.

84. Code, § 4910. State v. Hanlin [Iowa] 110 N. W. 162.

85. See 7 C. L. 657.

86. The clerk of the city court of New

the clerk of the supreme court from furnishing uncertified copies of the decisions of that court for publication at less than ten cents per hundred words.[87] Where a judge is required to act as his own clerk but has power to appoint a deputy, power in a city council to fix the judge's compensation implies power to fix the salary of a deputy clerk appointed by him in addition to that allowed the judge for his services.[88] In Alabama a clerk may sue the county for the reasonable value of ex officio services not exceeding a certain sum, and allowance is not discretionary with the county commissioner.[89] Services which a clerk is required by law to perform, for which no fee or charge is specified, and which cannot be legally charged to either party in a cause, are ex officio services.[90]

Duty to account for fees.[91]—Where a clerk is required to account to the county for all fees coming into his hands from whatever source, he must account for fees for taking land proofs under a Federal statute.[92]

United States courts.[93]—Separate trials under one indictment against several defendants are separate causes for the purpose of determining docket fees.[94] Where both the state practice and the order of the court require that witnesses be served by copies of subpoenas, the clerk is entitled to fees for making the copies.[95] and under the provisions allowing fees for "making any record," separate charges are justified for recording abstracts of judgments as required by a rule of court.[96] The clerk of the district court is entitled to a per diem for attendance on court while bankruptcy business is actually transacted by the judge sitting in chambers.[97] The approval of a clerk's account by the court is prima facie evidence of its correctness.[98]

§ 3. *Liability on bond.*[99]—In Texas a clerk of court, like other public officers in that state, is responsible for the loss of money deposited by him for safekeeping pursuant to statute, regardless of the degree of care used.[1]

Cloud on Title; Clubs; Codicils; Cognovit, see latest topical index.

York has no authority to collect any fee as a condition precedent to the filing of a note of issue. Consolidation Act, § 1278, Laws 1882, p. 335, c. 410, requiring him to collect a stenographer's fee, does not authorize its collection at time of filing note of issue. Costa v. New York City R. Co., 100 N. Y. S. 558. Sec. 1249, providing for the collection of a fee on issuance of any attachment or warrant, does not apply. Id. Could not collect any sheriff's fee for notifying jurors, since it is the duty of the commissioners of jurors to notify jurors. Id. Under Rev. St. 1899, § 3242, the clerk of the circuit court is entitled to only 20 cents for a motion to make a petition more definite, and the order thereon. Buckman v. Missouri, etc., R. Co., 121 Mo. App. 299, 98 S. W. 820. He is entitled to only five cents for filing a bill of exceptions. Id.

87. Burns' Ann. St. 1901, § 7798 (Rev. St. 1881, § 5831) fixing fees at 10 cents per hundred words, applies only to certified copies. Ex parte Brown, 166 Ind. 593, 78 N. E. 553.

88. Ky. St. 1903, §§ 3514, 3515. Greenleaf v. Woods, 29 Ky. L. R. 723, 96 S. W. 458. The words "his services" might be construed to mean "their services" so as to authorize the allowance. Id.

89. May sue under Code 1896, § 1363, though § 1372 seems to make allowance discretionary with commissioners. Calhoun County v. Watson [Ala.] 44 So. 702.

90. Calhoun County v. Watson [Ala.] 44 So. 702. Attending court or keeping minutes not ex officio services. Id.

91. See 7 C. L. 657.

92. Under Rev. St. § 2294, and act March 11, 1902, c. 182, 32 St. 63, clerk of district court takes land proofs and collects fees in his official capacity and must account for all fees, whether for "preparing the deposition" or administating oaths. Rhea v. Board of County Com'rs, 12 Idaho, 455, 88 P. 89.

93. See 7 C. L. 657.

94. Within U. S. Rev. St. § 828, Comp. St. 1901, p. 625. United States v. Keatley, 204 U. S. 562, 51 Law. Ed. 618, afg. 41 Ct. Cl. 384.

95. Keatley v. U. S., 41 Ct. Cl. 384.

96. Rev. St. § 828, par. 8, United States v. Keatley, 204 U. S. 562, 51 Law. Ed. 618, afg. 41 Ct. Cl. 384.

97. Fee allowed under Act March 3, 1887 (24 St. p. 541), under Rev. St. §§ 574, and under Bankruptcy act, § 2. Owen v. U. S., 41 Ct. Cl. 69.

98. Owen v. U. S., 41 Ct. Cl. 69.

99. See 5 C. L. 593.

1. Money paid into court, placed in county safe, and stolen. Lanham v. Dies [Tex. Civ. App.] 17 Tex. Ct. Rep. 513, 98 S. W. 897.

COLLEGE ACADEMIES.

Nature, Establishment and Public Regulation (575).
Bequests and Private Aid (575).
Public Aid (575).
Consolidation (576).
Actions (576).
Officers and Instructors (576).

Schools of grade inferior to colleges are elsewhere treated.[2]

Nature, establishment and public regulation.[3]—The Medical College of Georgia is not a state institution because the state has made appropriations to it and designated it as a branch of the state university,[4] and though it has been declared to be a public eleemosynary institution, it is liable for the torts of its agents in the conduct of its business and within the scope of their authority.[5] While a court may be authorized to allow an amendment of a college charter,[6] an amendment which seeks to change the permanent location of a college established under contract will not be granted against the objection of contracting parties.[7]

Bequests and private aid.[8]

Public aid.[9]—A state has the power, through the agency of a university, to acquire and hold at the public expense forest lands for the promotion of education in scientific forestry.[10] A university so holding lands for the state may not contract with a corporation for the removal of timber therefrom in a manner hostile to the act under which it holds,[11] and a corporation contracts at its peril in relation to such lands where it has notice of the restricted powers of the university.[12] That part of the Nebraska statute providing for an annual state tax of one mill on the dollar for the maintenance of the state university was not repealed by the general revenue law of 1903.[13] The grants and appropriations made by the Congressional acts of 1862 and 1890, for the maintenance and support of state agricultural colleges, were made to the states themselves and not for the benefit of any particular institutions.[14] Hence a state treasurer cannot be required by one college to pay the fund to it where he is already about to pay it to another in accordance with the state and Federal statutes.[15] Money from the state agricultural experimental station fund created by the Federal statute of 1887 and supplemental acts may be expended by the board of regents of the Nebraska state university without any more specific legislative appropriation than that already implied by the constitution and statutes of that state.[16]

2. See Schools and Education, 8 C. L. 1851.

3. See 7 C. L. 658.

4. Can sue and be sued and its property is liable to execution. Medical College v. Rushing [Ga. App.] 57 S. E. 1083.

5. Where it conducted a hospital for treatment of patients for compensation, it was liable for mutilation of body of a patient who died there. Medical College v. Rushing [Ga. App.] 57 S. E. 1083.

6. Act Apr. 29, 1874, § 42 (P. L. 106). In re Thiel College's Appeal, 216 Pa. 630, 66 A. 83.

7. In re Thiel College's Appeal, 216 Pa. 630, 66 A. 83.

8. See 7 C. L. 658.

9. See 7 C. L. 659.

10. Laws 1898, p. 230, c. 122, authorizing Cornell University to acquire lands for such purpose and to sell timber therefrom, is not violative of Const. Art. 7 § 7 prohibiting removal of timber from the state forest preserves, the legal title never having vested in the state (People v. Brooklyn Cooperage Co. [N. Y.] 79 N. E. 866), nor of Const. Art. 8, § 9, against the giving or lending of the state money or credit in aid of any association, corporation, or private undertaking (Id.).

11. Contract for removal of timber by a cooperage company held hostile to Laws 1898 p. 230, c. 122, authorizing Cornell University to acquire and hold land for education in forestry. People v. Brooklyn Cooperage Co [N. Y.] 79 N. E. 866.

12. People v. Brooklyn Cooperage Co. [N. Y.] 79 N. E. 866.

13. Comp. St. 1905, c. 87, § 19, not repealed by implication by Laws 1903, c. 73, § 134 State v Searle [Neb.] 112 N. W. 389. Act Apr. 4, 1907, appropriating the proceeds of this tax for the biennium ending March 31, 1909, was sufficiently specific within the constitution. Id. Auditor required to draw a warrant regardless of whether there was money actually in the treasury belonging to the fund. Id. Contention that board of equalization might not levy tax held untenable. Id.

14. Act July 2, 1862, and act August 30, 1890. State of Wyoming v. Irvine, 206 U. S. 278, 51 Law. Ed. 1063.

15. Wyoming Agricultural College not entitled to fund where state proposed to give it to the state university. State of Wyoming v. Irvine, 206 U. S. 278, 71 Law. Ed. 1063.

16. State treasurer authorized to expend the fund under Const. Art. 8, § 2, and Comp.

Consolidation.[17]

Actions.[18]—The Medical College of Georgia is not a public institution of the state so as to exempt it from suit, or its property from execution.[19]

Officers and instructors.[20]—The question whether college authorities should be compelled to readmit a student into the freshman class will not be considered after the college year has expired.[21]

Collision; Color of Title, see latest topical index.

COMBINATIONS AND MONOPOLIES.

§ 1. Combinations Violative of the Federal Anti-Trust Act (576). Patented Articles (577).
§ 2. Combinations Violative of State Anti-Trust Acts and of the Common Law (578).
§ 3. Grants of Privileges by Statute, Ordinance, and Contracts with Municipalities Tending to Create Monopolies (580).
§ 4. Remedies and Procedure Under State and Federal Laws (580). Compulsory Testimony and Immunity of Witnesses (583).

§ 1. *Combinations violative of the Federal anti-trust act.*[22]—The Sherman law declares illegal every contract, combination, or conspiracy tending to restrain interstate commerce or trade with foreign nations.[23] The question of whether a particular business scheme is within the prohibition of this act is to be determined by its effect upon interstate commerce,[24] which need not be a total suppression of trade or a complete monopoly, it being sufficient if it necessarily tends to restrain such commerce and to deprive the public of the benefits of free competition.[25] If such is its direct or necessary tendency, any contract or combination is prohibited by the act whether valid at common law or not.[26] As further illustrating the

St. 1905, c. 87, § 19 (Cobbey's Ann. St. 1903, § 11,215). State v. Searle [Neb.] 109 N. W. 770.

17, 18. See 7 C. L. 660.

19. Medical College v. Rushing [Ga. App.] 57 S. E. 1083.

20. See 7 C. L. 661.

21. But semble, that the action of a private college in expelling a student for unauthorized absence was warranted. United States v. Georgetown College, 28 App. D. C. 87.

22. See 7 C. L. 661.

23. Agreement by members of a publishers' association controlling 90 per cent of book business of country not to sell any books to anyone cutting prices on copyrighted books, etc., held to relate to interstate commerce and to violate the act of 1890. Mines v. Scribner, 147 F. 927. Copyright laws no justification. Id. Elaborate scheme by which nearly all wall paper mills of United States sold their output through plaintiff corporation at certain fixed prices, and jobbers and wholesalers were compelled to join, held illegal. Continental Wall Paper Co. v. Lewis Voight & Sons Co. [C. C. A.] 148 F. 939. Sherman act applies to a case where several persons or associations combine and agree not to sell a product handled by them to any one who cuts prices maintained by the combination, and are thus enabled to control prices. Jayne v. Loder [C. C. A.] 149 F. 21. Combination of wholesalers and manufacturers to maintain the retail price of patent medicines and exclude "aggressive cutters" held violative of the Federal act. Id. Contract for sale of a business held invalid under the Federal act as in aid of monopoly of the fruit business in the United States. McConnell v. Comors-McConnell Co. [C. C. A.] 152 F. 321 Essentials to violation of Sherman act discussed in charge to grand jury. In re Charge to Grand Jury, 151 F. 834. Contract by which plaintiff was to develop and conduct the milk business along defendant's railroad and have the exclusive privilege of transporting milk over defendant's lines so far as permitted by law, for a commission, held not to give a monopoly of the milk traffic or to violate the Federal anti-trust act. Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51.

24. United States v. MacAndrews & Forbes Co., 149 F. 823. Contract made in Missouri, to be there performed, for sale of wheat for future delivery, held not affected by Sherman act, though buyer made other purchases through Chicago agencies, delivery to be in Missouri, the latter being also Missouri contracts. Albers Com. Co. v. Spencer [Mo.] 103 S. W. 523. The action of union men in curtailing the product of a nonunion factory in one state and the distribution of such product in another state is not a restraint of interstate commerce with in the Federal act. Strike, boycotts, etc. Loewe v. Lawlor, 148 F. 924. Combination of corporate producers of licorice paste by which they ceased competition, apportioned customers, procured contracts with other competitors and advanced prices, held to directly affect interstate commerce. United States v. MacAndrews & Forbes Co., 149 F. 823.

25. United States v. MacAndrews & Forbes Co., 149 F. 823.

26. Declaration held to show a combination or contract in restraint of interstate trade or commerce in window glass. Wheeler-Stenzel Co. v. National Window

sweeping scope of this statute, combining and creating a monopoly are made separate offenses.[27] A corporation as well as a natural person may be guilty of conspiring within the meaning of its terms;[28] and a number of persons as well as a single individual may be charged with attempting to monopolize.[29] Corporate officers may not claim immunity on the ground that the offenses were corporate acts where they personally participate in carrying out the illegal scheme,[30] and the act applies not only to those who originally agreed to combine but also to persons who subsequently participated in furthering the objects of the combination.[31] Contracts violative of the act are not merely unenforceable but per se illegal, so that one who is harmed thereby in his business or property has suffered a legal injury within the meaning of the seventh section giving a private right of action for damages.[32] It must, however, be shown, before a contract will be declared illegal, that it is clearly within the provisions of the statute.[33]

It has been held that the Federal act does not apply to a combination formed in a foreign country for the purpose of originating and maintaining steamship trade between the United States and a foreign port.[34] That an association is a party to an unlawful agreement in restraint of trade does not render it liable for damages resulting from the execution of a subsequent agreement by other parties to the first agreement, to which the association did not consent.[35]

Patented articles,[36] unless and until released by the owner of the patent from the dominion of his monopoly, are not articles of trade or interstate commerce within the meaning of the Sherman act:[37] hence the holder of a valid patent may require licensees to join other licensees in a combination or pool to control the output or prices of an innocuous article.[38] But the rule applicable to patented or copyrighted productions does not obtain as to articles or medicines made under secret process or formula.[39] A manufacturer and vendor of these articles cannot, so long as he keeps his process secret, bring himself within the principle granting a temporary monopoly in consideration of full publication.[40]

Glass Jobbers' Ass'n [C. C. A.] 152 F. 864. That a combination may be valid at common law as imposing only a reasonble restraint on competition does not save it from illegality if the direct result is to restrain interstate or foreign commerce. Continental Wall Paper Co. v. Lewis Voight & Sons Co. [C. C. A.] 148 F. 939.

27. Defendants penalized under two counts, one for combining and one for attempting to create a monopoly. United States v. MacAndrews & Forbes Co., 149 F. 836.

28, 29, 30, 31. United States v. MacAndrews & Forbes Co., 149 F. 823.

32. Wheeler-Stenzel Co. v. National Window Glass Jobbers' Ass'n [C. C. A.] 152 F. 864.

33. Where it did not appear that contract contemplated interstate or international commerce. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264. For further discussion of contracts in restraint of trade, see post, § 2, and Contracts, 7 C. L. 761.

34. And that the subsequent putting on of "fighting steamers," which cut rates as against outside steamers, did not render the combination unlawful. Thomson v. Union Castle Mail S. S. Co., 149 F. 933. This case, however, turned on the holding that plaintiff's alleged damages did not proximately flow from the combination even conceding that there was one.—Ed.

35. Agreements held separate. Jayne v. Loder [C. C. A.] 149 F. 21.

36. See Patents, 8 C. L. 1285.

37. Are not articles in which people are entitled to freedom of trade. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. [C. C. A.] 154 F. 358.

38. System of contracts fixing uniform prices, apportioning business, etc., held valid and not avoided by provisions for accumulation of funds to push the article on the market and so undersell other makers or infringers. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. [C. C. A.] 154 F. 358. Contracts licensing all thresher manufacturers in the country to use numerous straw stacker inventions fixing prices, etc., held not violative of Sherman act. Indiana Mfg. Co. v. Case Threshing Mach. Co. [C. C. A.] 154 F. 365, rvg. 148 F. 21.

39. Park & Sons Co. v. Hartman [C. C. A.] 153 F. 24.

40. A "contract system" controlling the price and sale of "Peruna," by which manufacturer sold only to jobbers or wholsalers at uniform prices, such buyers being obligated to sell only to retailers named by manufacturer and who had signed an agreement to re-sell only at price named by the manufacturer, held illegal at common law and under the Sherman act, and equity would

§ 2. *Combinations violative of state anti-trust acts and of the common law.*[41] A monopoly includes not only an exclusive state grant of a right which was formerly common, but also any combination or contract the tendency of which is to prevent competition in its broad and general sense and control prices to the public detriment, regardless of the form assumed.[42] It is within the police power of a state to decide by its legislature what monopolies in trade should be forbidden as injurious to the public.[43] Combinations and monopolies in restraint of trade are illegal both at common law and by statute in many jurisdictions,[44] though with the exception of combinations obnoxious to the Federal anti-trust law,[45] a partial and reasonable restraint of trade is generally upheld,[46] especially at common law.[47] In determining whether a contract combination or trust is in unreasonable restraint of trade so as to be void at common law or by a statute, no hard and fast rule can be applied.[48] The court will consider the subject-matter, the situation of the parties, and all the attending circumstances.[49] It is immaterial whether or not the subject-matter of the combination is a prime necessity,[50] or whether prices have been raised or lowered,[51] or whether the monopoly is complete or not.[52] Not only what has been done but also what may be done pursuant to the powers attempted

not enforce such contracts by enjoining an outsider from buying the medicine and selling at any price. Parks & Sons Co. v. Hartman [C. C. A.] 153 F. 24, disapproving Dr. Miles Medical Co. v. Jayne Drug Co. 149 F. 838, in so far as it fails to distinguish between patented or copyrighted articles and those produced by secret formula.

41. See 7 C. L. 663.

42. Jones v. Carter [Tex. Civ. App.] 101 S. W. 514. In a dedication of land for a city, reservations to grantors of exclusive right to use streets for street railroads, lighting, gas, sewer, and waterworks, and for telephone lines free from city's control, held void. Id.

43. Though a state may not interfere with the monopoly of inventions procured by letters patent, patentees and licensees are nevertheless subject to police regulations. In re Opinion of the Justices [Mass'] 81 N. E. 142. Certain proposed legislation affecting the rights of patentees considered and authorized. Id.

44. Arrangement between two cotton purchasers whereby each was interested in purchases of the other thus stifling competition, while the appearance of competition was held out to the public, held illegal. Arnold & Co. v. Jones Cotton Co. [Ala.] 44 So. 662. An association of local dealers engaged in various kinds of business, formed solely for the purpose of driving nonresident dealers out of business by following up and harassing their agents, is unlawful, and such acts will be enjoined. Such acts not competition where many of the dealers had no interest in the line of business of the nonresident. Spaulding v. Evenson, 149 F. 913.

45. See ante, § 1.

46. State anti-trust and anti-combination statutes are generally construed to render invalid only such contracts or combinations as tend unreasonably to restrict competition and naturally to create monopolies. Contract whereby one agrees to sell exclusively to another, and the latter to buy only from the former, farm machinery to be sold in a certain territory, held not monopolistic or violative of Civ. Code 1902, § 2845, as lessening free competition. Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 75 S. C. 378, 55 S. E. 973. Agreement not to operate any other clay-grinding plant in the state and to sell only to plaintiff, who was to buy from no other person, held to foster a legitimate business and not violative of Federal or state statutes. Lanyon v. Garden City Land Co., 223 Ill. 616, 79 N. E. 313.

47. Reasonable and partial restraint of trade lawful at common law. Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 75 S. C. 378, 55 S. E. 973; Thomson v. Union Castle Mail S. S. Co., 149 F. 933. Combination of foreign ship owners trading between New York and Africa and giving certain rebates to exclusive patrons. Id.

48. Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 75 S. C. 378, 55 S. E. 973.

49. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264.

50. It being an object of legitimate trade, such as coke. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264.

51. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264.

52. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264. Sufficient if an agreement really tends to create a monopoly and affect prices. Not necessary to show that prices were in fact changed or that monopoly was complete. Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co. [Miss.] 43 S. 435. If an agreement tends to lessen competition, it is immaterial under Acts 1903, c. 140, what its scope, effect, or duration is. Standard Oil Co. v. State [Tenn.] 100 S. W. 705. If the purchase by one corporation of the majority of the stock of another has a tendency to restrain competition, it is sufficient to render the transaction unlawful, though a complete monopoly would not result. Averments of bill for injunction held to show suppression of competition and tendency to monopoly. Dunbar v. American Tel. & T. Co., 224 Ill. 9, 79 N. E. 423.

to be conferred will be looked to,[53] and the combination or contract will be held illegal if the direct and natural or necessary effect is to restrain competition and control the prices.[54] The concerted refusal of a number of dealers to supply goods to one, together with coercive measures brought to bear by them on other dealers to prevent them from supplying goods to him, because of his refusal to join a combination calculated to create a monopoly, is also illegal, and one may maintain an action for injury to one's business directly resulting therefrom.[55] The Illinois statutes do not supersede the common law with respect to combinations,[56] hence combinations may still be illegal in that state regardless of the absence of statutory prohibition.[57] While a penal state anti-trust act has no extra-

53. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264.

54. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264. Arrangement by which 20 different coke manufacturers controlled prices of coke by a single corporation acting as agent in selling, etc., held illegal at common law. Id.

Combinations held unlawful: Evidence held to sustain finding that defendant corporation had agreed with various companies to control the price of harvesting machines and prevent competition in violation of Ky. St. 1903, § 3915. International Harvester Co. v. Com., 30 Ky. L. R. 716, 99 S. W. 637. Indictment having been found before enactment of law of 1906 authorizing farmers to pool crops, it was unnecessary to determine the effect of that law on St. 1903, § 3915. Id. Contract between two companies whereby one was not to buy cotton seed in territory of the other held violative of the anti-trust act (Laws 1900, c. 88, § 3), as tending to suppress all competition in purchase of cotton seed. Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co. [Miss.] 43 So. 435. Contract whose purpose was to establish a trust to limit price and production of goods held void under Rev. St. 1899 § 8966, declaring unlawful contracts tending to lessen free competition. Hastings Industrial Co. v. Baxter [Mo. App.] 102 S. W. 1075. Evidence sufficient to sustain injunction against association of grain dealers controlling prices contrary to the "Jenkins Act" of 1905. State v. Omaha El. Co. [Neb.] 110 N. W. 874. Where association was formed long before passage of this act and members had agreed to promote its objects until they severed their relations with it, held, in a suit instituted shortly after the act took effect, the presumption would obtain against them that an injunction was necessary to enforce the act. Id. An organization of manufacturers of a certain commodity which, by assessment of its members, raises a fund with which it "leases down" certain rival factories, and which allots the trade of such factories among its own members, controls the output of its members' factories, and the prices they may charge for the goods they manufacture, binding them not to sell to specified customers except by consent of its officers, is a combination in restraint of trade and is illegal. Fisher v. Flickinger Wheel Co., 7 Ohio C. C. (N. S.) 533. The provisions of the Valentine anti-trust law, Rev. St. §§ 4427-1, include the business of fire insurance, and an indictment which charges the defendants with unlawfully conspiring, combining, and agreeing together to restrict the "trade, business and commerce of insuring property," and to fix and increase the premiums therefor and prevent competition, charges a crime under the laws of Ohio. State v. Ross, 4 Ohio N. P. (N. S.) 377. Corporation engaged in gaining control of cotton compress business by purchases, leases, and restrictive agreements, held unlawful as tending to restrain trade, destroy competition, and create a monopoly. Anderson v. Shawnee Compress Co., 17 Okl. 231, 87 P. 315. Salesman of an oil company who procured the countermand of orders for oil given by former customers to a competitor by giving away oil held to violate Acts 1903, p. 268, c. 140, §§ 1, 3, prohibiting agreements to lessen full and free competition. Standard Oil Co. v. State [Tenn.] 100 S. W. 705. Act not unconstitutional as interfering with interstate commerce. Id. Agreement tending to lessen competition in the sale of oil already in the state was not less violative of the state anti-trust act because it procured the countermanding of orders for oil to be shipped from another state and thus incidentally affected interstate commerce. Id.

Held not unlawful: Purchasing of wheat to such extent as to bull market held not violation of Rev. St. 1899, § 8965. Albers Com. Co. v. Spencer [Mo.] 103 S. W. 523. Agreement between railroad companies and associations and citizens of a city by which the companies engage to sell nontransferable excursion tickets does not contravene the state or Federal anti-trust laws, the purpose of making tickets nontransferable being to maintain the regular rates as to those not buying excursion tickets. Lytle v. Galveston, H. & S. A. Ry. Co. [Tex.] 99 S. W. 396. An agreement to purchase the stock of and manage a certain corporation until its property should be sold to another corporation as provided therein, the latter corporation to be reorganized and to operate the property of the former and other properties does not provide for any trust or combination in violation of Me. Rev. St. 1903, c. 47, § 53. Borland v. Prindle, Weeden & Co., 144 F. 713.

55. Rule that a number of dealers may lawfully refuse to sell to another does not apply where the refusal is made in execution of an unlawful conspiracy in restraint of trade. Klingel's Pharmacy v. Sharp, 104 Md. 218, 64 A. 1029. Petition held to state a cause of action. Id.

56. People v. Aachen & Munich Fire Ins. Co., 126 Ill. App. 636.

57. Combination of insurers held illegal at common law. People v. Aachen & Munich Fire Ins. Co., 126 Ill. App. 636.

territorial effect,[58] a state statute is violated by members of a pool or trust formed without the state if their designs are executed within the state.[59] A corporation and its officers or agents may all be counted in making up the number necessary to constitute a conspiracy in violation of the anti-trust law.[60]

In the absence of statute, a contract legal in itself and made in the ordinary course of business is not rendered illegal or unenforceable merely because one of the parties is a member of a combination or has a monopoly.[61] But where a dealer is forced into an illegal combination and buys goods from its agency pursuant to and on terms fixed by the monopolistic agreement, the illegality of such agreement is a good defense to an action for the price.[62] A provision in a state act making it a defense in an action for the price of goods that the sale was made by a violation of the act does not apply where the alleged offense consisted in combining in another state.[63] General common-law principles applicable to contracts in restraint of trade are discussed in another article.[64]

§ 3. *Grants of privileges by statute, ordinance, and contracts with municipalities tending to create monopolies.*[65]

§ 4. *Remedies and procedure under state and Federal laws.*[66]—Combinations violative of the common law may be restrained by injunction in a suit by the attorney general of a state.[67] An anti-trust law authorizing the attorney general to restrain its violation and giving to a private person a cause of action in damages precludes the latter from any equitable remedy except in cases of fraud, insolvency, or the like.[68] A municipal corporation may maintain an action under the Federal statute for treble damages to "business or property" by reason of its having been led by a combination of foreign corporations to purchase pipe for a waterworks system from a corporation, in another state at excessive prices.[69] That one is a member of a trades union which more or less monopolizes the labor market does not bar his cause of action against the union and its officers for being unlawfully deprived of his work in a proceeding had without jurisdiction.[70] An action against a corporation for doing business in the state contrary to the Arkansas anti-trust

58. Illinois act of June 11 1891 (Laws 1891, pp. 206, 207, 208). Chicago Wall Paper Mills v. General Paper Co. [C. C. A.] 147 F. 491.

59. Members of foreign pool to control prices of agricultural machinery within the state. International Harvester Co. v. Com., 30 Ky. L. R. 716, 99 S. W. 637.

60. Under acts 1903, p. 268, c. 140, §§ 1, 3. Standard Oil Co. v. State [Tenn.] 100 S. W. 705. That the corporation could not be indicted under this statute was immaterial. Id. Where corporation directed its salesman to procure the countermand of orders for oil given by former customers to a competitor and the salesman did so by giving such customers a quantity of oil as a consideration, the corporation was a co-conspirator though it had not expressly authorized the giving away of the oil. Id. The merchant who agreed to countermand his order was also a conspirator. Id.

61. Contract for sale of goods merely collateral. Chicago Wall Paper Mills v. General Paper Co. [C. C. A.] 147 F. 491. No defense to suit to restrain violation of a lease that plaintiff was a member of a trust to control trade in brewery products. Schlitz Brew. Co. v. Nielsen [Neb.] 110 N. W. 746. Lease of a distillery to a corporation organized to monopolize manufacture and sale of liquor held not illegal. Brooklyn Distilling Co. v. Standard Distilling & Distributing., Co 105 N. Y. S. 264.

62. Sherman act. Continental Wall Paper Co. v. Lewis Voight & Sons Co., [C. C. A.] 148 F. 939.

63. Illinois Laws 1891, p. 208 § 6. Chicago Wall Paper Mills v. General Paper Co. [C. C. A.] 147 F. 491.

64. See Contracts, 7 C. L. 761.

65. See 7 C. L. 667.

66. See 7 C. L. 662, 666.

67. Agreements not merely unenforceable as between the parties. People v. Aachen & Munich Fire Ins. Co., 126 Ill. App. 636. Insurance business impressed with public interest so as to sustain injunction restraining combination to control rates and dictate terms. Id.

68. Seller on an exchange could not restrain payment of margins on theory of defendants' violation of Rev. St. 1899, §§ 8978-8981, in cornering the market. C. H. Albers Commission Co. v. Spencer [Mo.] 103 S. W. 523.

69. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 51 Law. Ed. 241.

70. Discharge due to deprivation of membership in proceeding had without charges or notice as required by by-laws. Brennan v. United Hatters of North America Local No 17, 73 N. J. Law, 729, 65 A. 165.

act of 1905 is not within the constitutional provision requiring an indictment or presentment of a grand jury.[71]

In a suit in a Federal court in Tennessee to recover treble damages under the Sherman law, the ten year state statute of limitations applies[72] and not the five year Federal statute applicable in suits for penalties and forfeitures.[73]

For purposes of prosecution an illegal combination among corporations in restraint of trade exists in each and every county where its constituent members exist and act, hence quo warranto proceedings based upon such illegal combination need not be brought in a county where the combination does business as a separate entity.[74] Members of a pool or trust formed without the state are punishable within the state and under its laws if their plans are carried out within the state.[75]

An association which is charged with complicity in, and as being the medium to execute, the various illegal acts going to make up the cause of action is properly made a party defendant.[76] Parties to one agreement in restraint of trade may not be joined in a joint tort action with parties to another and independent agreement and a joint judgment recovered against all.[77] A corporation offending against the Sherman act and its officers who personally participate may be jointly charged in one indictment.[78] In a proceeding under this law other parties may be brought in whenever the ends of justice require it,[79] whether residing within the limits of the district or not.[80] The approved practice in such case is to make all the conspirators, resident and nonresident, parties to the bill, setting forth the connection of each with the offense and, immediately upon filing the bill, present a proper petition praying that they may be summoned.[81]

An indictment under the Sherman act which charges in separate counts, a combination, a conspiracy in restraint of trade, and an attempt to monopolize a portion of such trade, all based on the same transactions, is not bad for duplicity as to any of the counts.[82] The alleged combination must be described with reason-

71. Offense of "conspiracy to defraud" under Act. Jan. 23, 1905, not identical with common-law crime of criminal conspiracy. Hammond Packing Co. v. State [Ark.] 100 S. W. 407.

72. Ten year limitation prescribed by Tenn. Code, § 2776, "for all cases not expressly provided for," applies to an action for treble damages under the Sherman law rather than the one year limitation under § 2772 for "statute penalties," or the three years limitation prescribed by § 2773 for injuries to personal or real property. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 51 Law. Ed. 241.

73. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 51 Law. Ed. 241.

74. State v. King Bridge Co., 7 Ohio C. C. (N. S.) 557. Quo warranto proceedings brought by the attorney general against several corporations to oust them from their corporate franchises on the ground that they have entered into an illegal agreement or conspiracy in restraint of trade and in violation of the anti-trust laws of the state may be commenced in the circuit court of any county where one or more of the defendant corporations is situated or has a place of business, and process may issue thence to any other county where any other of the defendant corporations is situated. Id.

75. Pool to control prices of harvesters sold within the state amenable to state anti-trust law, though entered into beyond state limits. International Harvester Co. v. Com., 30 Ky. L. R. 716, 99 S. W. 637.

76. Action for damages to plaintiff's business. Klingel's Pharmacy v. Sharp, 104 Md. 218, 64 A. 1029.

77. Though parties to second agreement were also parties to the first. Jayne v. Loder [C. C. A.] 149 F. 21.

78. United States v. MacAndrews & Forbes Co., 149 F. 823. Counld not be determined on demurrer that the officers acted as mere clerks and not as aiders and abettors. Id.

79. Act July 2, 1890, § 5. United States v. Standard Oil Co., 152 F. 290. In suit to enjoin a conspiracy under this act, the ends of justice require that all parties interested should be brought in. Id. Since suit could be brought in district where a subsidiary corporation could be found and served, the fact that the larger number of conspirators were nonresidents was immaterial. Id.

80. That larger number of co-conspirators resided in other states was immaterial. United States v. Standard Oil Co., 152 F. 290. Congress had power to enact the provision. Id. Inhibition against bringing suit against any person outside district of his residence held inapplicable. Id.

81. Order granting such petition before service of process on resident conspirator or notice to nonresidents held not premature. United States v. Standard Oil Co., 152 F. 290.

82. Each alleged overt act not charged

able fullness,[83] but it is sufficient to state the time when the various acts complained of were done without setting out the precise time when the purpose or plan to monopolize or combine was first formed or devised.[84] In an action for damages under the Federal act, the declaration must set out the nature and substance of the contracts relied on and the substantial facts alleged to constitute an attempt at monopoly; the language of the statute is not sufficient.[85] If the declaration sufficiently charges a contract or combination in restraint of interstate trade, general allegations showing that by reason thereof plaintiff was deprived of his customers and that his business suffered injury are sufficient to sustain an action for damages.[86] An indictment in the language of the Kentucky statute sufficiently describes the offense.[87] A charge of conspiracy to lessen competition in the sale of oil "imported into the state" refers to oil already imported and not to oil to be imported.[88] A bill by the state to restrain a combination need not specifically allege injury to civil or property rights, injury to the public being presumed from a violation of laws affecting the public interest.[89]

In an action for damages against parties to an agreement in restraint of trade, a subsequent agreement entered into by only some of the defendants is not admissible to charge those who were not parties thereto.[90]

Only such damages may be recovered by a private person under the Sherman act as proximately and naturally flowed from the alleged combination.[91] In a suit to restrain a violation of the so called "Jenkins Act" of Nebraska, the court is not authorized, in the first instance, to declare a forfeiture of the charters of corporations found to have violated the act.[92] An indictment in separate counts, one for combining and the other for monopolizing, charges offenses legally distinct and justifies separate punishment on conviction under both counts.[93] Corporations may not be indicted and fined under the Tennessee statute, the only punishment for its violation by them being forfeiture of charter or deprivation of the right to do business in the state.[94] The imprisonment or penalty clause of the Valentine anti-trust law of Ohio does not contravene the constitutional requirement that all laws of a general nature have uniform operation throughout the state.[95] Where defendants are not misled into entering pleas of guilty or taking other steps prejudicial

as a separate offense. United States v. MacAndrews & Forbes Co., 149 F. 823.

83. Indictment considered and held to sufficiently describe the combination and conspiracy charged under the Sherman act. United States v. MacAndrews & Forbes Co., 149 F. 823.

84. United States v. MacAndrews & Forbes Co., 149 F. 823.

85. "Divers contracts," "by divers means and methods," etc., held insufficient. Cilley v. United Shoe Mach. Co., 152 F. 726.

86. Wheeler-Stenzel Co. v. National Window Glass Jobbers' Ass'n [C. C. A.] 152 F. 864.

87. St. 1903, § 3915. International Harvester Co. v. Com., 30 Ky. L. R. 716, 99 S. W. 637.

88. Standard Oil Co. v. State [Tenn.] 100 S. W. 705.

89. People v. Aachen & Munich Fire Ins. Co., 126 Ill. App. 636.

90. Jayne v. Loder [C. C. A.] 149 F. 21.

91. Even should it be held that a combination of foreign ship owners to engage in trade between the United States and a foreign port and give rebates to exclusive patrons is obnoxious to the Federal anti-trust act, the refusal of the combination to pay the rebates to an exclusive shipper does not cause such damage as can be trebled under that act. Thomson v. Castle Mail S. S. Co., 149 F. 933.

92. Suit held to be under this act (Laws 1905, p. 636, c. 162), though defendant association had commenced business prior to its enactment, and the so called "Gondring Act" held inapplicable. State v. Omaha El. Co. [Neb.] 110 N. W. 874.

93. Sherman act. United States v. MacAndrews & Forbes Co., 149 F. 836. Combination is proven when it is shown to exist with intent to restrain interstate commerce, the overt acts proven being merely cumulative evidence of intent and continuance, but in themselves the proof of the monopoly, and the fact that all the evidence was applicable to both counts, was not material. Id.

94. "Person or persons" as used in § 3 of act 1903, c. 140, refer only to natural persons. Standard Oil Co. v. State [Tenn.] 100 S. W. 705.

95. Rev. St. §§ 4427-4. State v. Hygeia Ice Co., 4 Ohio N. P. (N. S.) 361.

to their rights, by anything said or done by the court,[96] their own misjudgment or that of their attorneys as to the attitude of the court with reference to the nature of the offense committed and the degree of punishment which should be imposed is not ground for vacation of the sentence pronounced, in the absence of any intimation of leniency.[97]

Compulsory testimony and immunity of witnesses.[98]—When defendant is a corporation it may be required to produce books and papers in an action for treble damages under the Sherman act, though such action is penal in character.[99] A statute authorizing an order of court requiring a corporation to produce non-resident witnesses is valid,[1] and such statutes may provide for a reasonable order for the production of books and documents.[2] The position of the attorney general in applying for an order requiring the production of books and papers under the New York statute is somewhat analagous to that of one who before commencement of the action had the right to an inspection of the documents sought,[3] and petitioner should not be subjected to the strict rules which might obtain if a different relationship had existed between the parties.[4] Wide latitude must ordinarily be given in the examination of books and papers extending not only to the particular transactions attacked but to the previous history of defendant, including its organization and subsequent acts which may prove to be related to the alleged illegal scheme.[5] It will not be assumed that an attorney general is prompted by improper motives in seeking inspection of books and papers on mere assertions unsupported by facts.[6]

COMMERCE.

§ 1. Nature of Commerce; Domestic, Interstate, or Foreign (584). Original Packages (584).
§ 2. Regulation of Commerce (584).
A. The "Commerce Clause" and Its Application to Particular Regulatory Measures (584). Regulation of Foreign Corporations (586). Regulation of Traffic in Intoxicating Liquors (586). Inspection Laws (587). Regulation of Railroads and Other Carriers (588). State Burdens on Foreign Commerce (590). The Safety Appliance Act (591). Discrimination in Rates (591).
B. Regulation of Trade and Commerce Within a State (591).
§ 3. The Interstate Commerce Commission; Its Functions and Proceedings Before It (591).
§ 4. The Department of Commerce and Labor; Its Functions (592).
§ 5. State Railroad and Corporation Commissions (592).

This topic deals with the respective province of the Federal and state governments in the regulation of commerce and with the powers and proceedings of special agencies created to administer such regulations. It excludes the general constitutional limitations on the power to regulate[7] and the operation and effect of regulations.[8] It also excludes regulations designed to prevent monoply.[9]

96. Held not misled by court. State v. Hygeia Ice Co., 4 Ohio N. P. (N. S.) 361.
97. State v. Hygeia Ice Co., 4 Ohio N. P. (N. S.) 361.
98. See 7 C. L. 662.
99. American Banana Co. v. United Fruit Co., 153 F. 942.
1. Act Jan. 23, 1905, §§ 8, 9, simply requires defendant to make an honest effort to comply with the order. Hammond Packing Co. v. State [Ark.] 100 S. W. 407. Sec. 9 imposing default judgment when defendant refuses to obey order, held due process. Id.
2. Act Jan. 23, 1905, authorizing order for production of nonresident witnesses and that such witnesses bring with them books and papers, and providing for default against the corporation for disobedience, held valid in so far as it authorizes a reasonable order for the production of books, papers, and documents of a corporation over which the state has control. Hammond Packing Co. v. State [Ark.] 100 S. W. 407.
3. Under Laws 1899, pp. 1515, 1516, §§ 4-7. People v. American Ice Co., 105 N. Y. S. 650.
4. People v. American Ice Co., 105 N. Y. S. 650.
5. Application for inspection under Laws 1899, pp. 1515, 1516, §§ 4-7. People v. American Ice Co., 105 N. Y. S. 650.
6. People v. American Ice Co., 105 N. Y. S. 650.
7. See Constitutional Law, 7 C. L. 691.
8. See topics relating to the subject-matter regulated, as Intoxicating Liquors, 8 C. L. 486.
9. See Combinations and Monopolies, ante, p. 576.

§ 1. *Nature of commerce: domestic, interstate, or foreign.*[10]—Commerce is a comprehensive term and includes intercourse for purposes of trade in any and all its forms and branches.[11] Interstate commerce comprehends all forms of trade intercourse, such as transportation, purchase, sale, and exchange of commodities between citizens of different states,[12] and if any commercial transaction reaches an entirety in two or more states, and if the parties thereto deal from different states, the whole transaction is a part of the interstate commerce of the United States and subject to regulation by congress under the constitution.[13] So, also, a transportation from a point in one state through one or more other states to a point in the state of origin is interstate commerce.[14] Employees of persons or corporations engaged in commerce are instrumentalities of commerce.[15]

Original packages.[16]—The original package doctrine primarily concerns the right to sell within the state goods coming into it from outside,[17] and hence goods specifically appropriated to prior contracts of sale and shipped to fill such contracts are protected until delivery to the purchasers, though before that time they may be removed from the bundle or package in which they were shipped.[18] Where unidentified and unappropriated boxes or packages are shipped in a larger box or crate and subsequently removed therefrom, the interstate character of the transaction is destroyed and the business becomes subject to local laws.[19]

§ 2. *Regulation of commerce. A. The "commerce clause" and its application to particular regulatory measures.*[20]—This treats only of the validity of regulations. For their operation and effect see topics dealing with the subjects to which they relate.[21] Whether regulations infringe constitutional provisions other than the "commerce clause" is also excluded.[22] The power to regulate interstate commerce is the power to enact legislation which relates to, acts upon, or touches either interstate commerce or its adjuncts.[23] All commerce in the United States is under the control of either a state or the nation.[24] The Federal constitution confers upon congress plenary power to regulate interstate commerce [25] authorizing legislation with respect to all the subjects of foreign and interstate commerce, including the persons

10. See 7 C. L. 667.

11. Snead v. Central of Georgia R. Co., 151 F. 608.

12. In re Charge to Grand Jury, 151 F. 834. Purchase of stock in one state for a person residing in another and at his written request held an act of interstate commerce entitling broker to recover the price though it was a foreign corporation and had not complied with state statutes relative to its doing business in the state. Catlin & Powell Co. v. Schuppert, 130 Wis. 642, 110 N. W. 818.

13. In re Charge to Grand Jury, 151 F. 834. When merchandise is carried from one state into another, no system or scheme can be devised to make it intrastate traffic. Bills of lading, way bills, transfers, etc. United States v. Chicago, etc., R. Co., 149 F. 486.

14. Prosecution for rebating. Shipment from New York City to Buffalo by way of New Jersey and Pennsylvania. United States v. Delaware, etc., R. Co., 152 F. 269.

15. Snead v. Central of Georgia R. Co., 151 F. 608.

16. See 7 C. L. 667. See, also, Intoxicating Liquors, 8 C. L. 486.

17. Rearick v. State of Pennsylvania, 203 U. S. 507, 51 Law. Ed. 295.

18. Rearick v. State of Pennsylvania, 203 U. S. 507, 51 Law. Ed. 295. Agent delivering packages of drugs which had been removed from the crate in which they were shipped, held engaged in interstate commerce. State v. Trotman, 142 N. C. 662, 55 S. E. 599. Compare Parks Bros. & Co. v. Nez Perce County [Idaho] 89 P. 949.

19. Where an agent of a foreign corporation to fill previous orders received shipments in large boxes and barrels, containing smaller unidentified and unappropriated packages, opened the boxes and arranged the goods to be called for by the purchasers, the corporation was not engaged in interstate commerce but in the business of a retail merchant, and hence was subject to the privilege tax imposed on local merchants. Loverin & Brown Co. v. Tansil [Tenn.] 102 S. W. 77.

20. See 7 C. L. 667.

21. See Carriers, 9 C. L. 466; Intoxicating Liquors, 8 C. L. 486; Railroads, 8 C. L. 1590, and like topics.

22. See Constitutional Law, 7 C. L. 691.

23. United States v. Adair, 152 F. 737. Congress may regulate the adjuncts of interstate commerce as well as such commerce itself. Id.

24. Can be no commerce under the control of neither. United States v. Chicago, etc., R. Co., 149 F. 486.

25. Snead v Central of Georgia R. Co., 151 F. 608.

engaged in it and the instruments by which it is carried on.[26] This power to regulate imports the right and power to enact laws and not merely to make rules and regulations.[27] If the purpose of congress is legitimate and expressly relates to interstate commerce or its instrumentalities, it is immaterial to the validity of an act that somewhere in its operation it may have a casual or contingent effect upon the domain of state legislation.[28]

A quarantine regulation promulgated by the secretary of agriculture is in excess of the powers conferred upon him by the act of 1903 relative to contagious diseases of live stock, where on its face it applies as well to intrastate as to interstate commerce.[29]

In the absence of congressional legislation on the same subject, states may, in the exercise of their police power, pass reasonable laws local in their operation, though incidentally affecting interstate commerce.[30] Thus the courts have upheld state legislation prohibiting the killing and sale of nongame birds,[31] forbidding the abstraction of water from the lakes, ponds or streams of a state for transportation into any other state,[32] prescribing the parties to and the venue of suits against carriers,[33] or penalizing telegraph companies for failure to deliver messages.[34] So, also, the enforcement of a state lien for materials furnished for the construction of a vessel engaged in interstate commerce does not trench upon the Federal power.[35] On the other hand, states may not enact laws amounting to regulations of or a direct interference with interstate commerce,[36] and the implied consent of congress to state legislation which may affect such commerce arising from a failure of congress to enact similar legislation is temporary only and is withdrawn by subsequent congressional legislation.[37]

26. Kelley v. Great Northern R. Co., 152 F. 211 When a corporation or other person engages in interstate or foreign commerce eo instanti, the men who control it and the corps of its employes become subject to all those legitimate means which congress may select for its regulation. Snead v. Central of Georgia R. Co., 151 F. 608. Congress has power under the interstate commerce clause to legislate for the safety and protection of employes engaged in interstate commerce, whether the transportation be on land or on water. Could enact Employers' Liability Act. Spain v. St. Louis, etc., R. Co., 151 F. 522. See post, Regulation of Railroads.

27, 28. Snead v. Central of Georgia R. Co., 151 F. 608.

29. Order under February 2, 1903. Illinois Cent. R. Co. v. McKendree, 203 U. S. 514, 51 Law. Ed. 298.

30. Acts 1901, p. 149, c. 93, requiring express companies to grant equal terms and accommodations. American Exp. Co. v. Southern Indiana Exp. Co. [Ind.] 78 N. E. 1021. The right of states to legislate for the safety and welfare of its people is not taken away from them by the exclusive power of congress to regulate interstate commerce except where its attempted exercise conflicts with an act of congress or seeks to regulate interstate commerce. New Mexico v. Denver & R. G. R. Co., 203 U. S. 38, 51 Law. Ed. 78.

31. Act 14, p. 106, of 1904, held valid. In re Schwartz [La.] 44 So. 20.

32. Water abstracted contrary to act May 11, 1905 (P. L. 1905, p. 461), cannot legitimately enter into interstate commerce. McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 65 A. 489.

33. Act March 13, 1905 (Gen. Laws 1905, p. 29, c. 25) held a proper exercise of state's police power and not invalid as discriminating against or imposing burdens upon interstate commerce. St. Louis S. W. R. Co. v. Wester [Tex. Civ. App.] 16 Tex. Ct. Rep. 783, 96 S. W. 769; St. Louis, etc., R. Co. v. Moon [Tex. Civ. App.] 103 S. W. 1176.

34. Code 1904, § 1294h, cl. 6, held not a regulation of interstate commerce so far as applied to a message sent from a point in Virginia to a naval officer in Norfolk Navy Yard. Western Union Tel. Co. v. Chiles [Va.] 57 S. E. 587.

35. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 205 U. S. 354, 51 Law. Ed. 836.

36. A state may not prohibit the importation of docked tailed horses. (Stubbs v. People [Colo.] 90 P. 1114), nor the use of such horses after importation while they are still owned by the person who brought them into the state (Id.). Acts 1899, p. 175, c. 93, § 1, violative of interstate commerce clause so far as it prohibits importation and such use (Id.). Regulation of rates of ferriage for foot passengers across Hudson River from New Jersey to New York held a regulation of interstate commerce and beyond power of state of New Jersey. New York Cent. etc., R. Co. v. Hudson County Freeholders [N. J. Law] 65 A. 860, distinguishing Chosen Freeholders of Hudson v. State, 24 N. J. Law 718.

37. United States v. Adair, 152 F. 737. Power of congress paramount, and such power exercised by enactment of interstate

In aid of its validity, a general state statute will, if possible, be so construed as not to apply to interstate commerce,[38] and if an act is primarily intended to regulate domestic commerce and is complete and susceptible of enforcement, it will be sustained so far as it relates to such commerce though it may also contain clauses attempting to regulate interstate commerce.[39]

Regulation of foreign corporations.[40]—A state statute may lawfully impose conditions upon the right of a foreign corporation to transact intrastate, nongovernmental business within its borders,[41] although such corporation be also engaged in interstate, governmental business of the same class,[42] and a judgment of ouster from local nongovernmental business for noncompliance with such conditions is not regulation of interstate commerce, although it may incidentally affect such commerce.[43] The right of a corporation to engage in interstate commerce may not, however, be restricted,[44] and congress having jurisdiction over navigable interstate waters for the purposes of interstate commerce,[45] a state may not impose conditions on the right of steamship companies to engage in interstate traffic thereon.[46] The fact that a telegraph or telephone line when completed will be used as an instrument of interstate commerce gives the company projecting it no greater rights respecting right of way than those possessed by a purely local company.[47]

Regulation of traffic in intoxicating liquors.[48]—The Wilson act was a regulation of interstate commerce in intoxicating liquors.[49] Prior to the enactment of this law a shipment of liquor into a state was protected as interstate commerce until after delivery and sale in the original package.[50] The act did not allow the states to forbid the transportation of liquor from one state and into another,[51] but merely provided that such merchandise should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment and before

commerce act. New York Cent., etc., R. Co. v. Hudson County Chosen Freeholders [N. J. Law.] 65 A. 860.

38. The Bush Act (Laws 1898, p. 27, c. 10), requiring foreign corporations to pay a charter fee for the right to do business in the state, should be so construed as not to apply to interstate commerce or governmental business carried on by foreign corporations, and, as so construed, is valid. State v. Western Union Tel. Co., [Kan.] 90 P. 299. Anti-Trust Law, Acts 1903, p. 268, c. 140, rendering void arrangements restricting competition in the "importation or sale of articles imported into this state," etc., was not intended to apply to interstate commerce, the word importation simply referring to articles already imported, and this law is a valid exercise for police power. Standard Oil Co. v. State [Tenn.] 100 S. W. 705.

39. Anti-trust law. Standard Oil Co. v. State [Tenn.] 100 S. W. 705.

40. See 5 C. L. 602.

41. Acts Feb. 16, 1899, and May 8, 1899, requiring filing of articles and payment of a fee construed as requiring this only as a condition to doing intrastate business. Western Union Tel. Co. v. State [Ark.] 101 S. W. 748. Kirby's Dig. § 7946, does not in effect require a foreign telegraph company to do the things required by these acts as a condition to doing interstate business. Id.

42. Could compel telegraph company to pay charter fee so far as domestic business was concerned. State v. Western Union Tel. Co. [Kan.] 90 P. 299.

43. Though receipts of a telegraph company at many offices from interstate and government business were not sufficient to keep them open. State v. Western Union Tel. Co. [Kan.] 90 P. 299.

44. Corporation in one state procuring orders for hay presses in another by agent held engaged in interstate commerce and not subject to penalty for failure to file a statement in office of secretary of state. Commonwealth v. Eclipse Hay Press Co. [Ky.] 104 S. W. 224.

45. Cumberland River is a natural highway for interstate commerce within Federal jurisdiction. Ryman Steamboat Line Co. v. Com., 30 Ky. L. R. 1276, 101 S. W. 403.

46. Steamship company could not be required to keep an agency in the state or to file a statement with the secretary of state. Ryman Steamboat Line Co. v. Com., 30 Ky. L. R. 1276, 101 S. W. 403.

47. Must acquire right of way subject to state laws. Northwestern Tel. Exch. Co. v. St. Charles, 154 F. 386.

48. Sec 7 C. L. 668.

49, 50. State v. Intoxicating Liquors [Me.] 67 A. 312.

51. State v. Intoxicating Liquors [Me.] 67 A. 312. Intoxicating liquors are articles of commerce and as such are within the protection of the Federal constitution while being transported from state to state. Id.; Commonwealth v. Illinois Cent. R. Co. [Ky.] 101 S. W. 894. Carriers could not be prosecuted for bringing liquor into local option district. Id.; Commonwealth v. Southern Exp. Co. [Ky.] 103 S. W. 339. Two shipments of liquor from state where orders therefor were accepted and into Iowa held interstate shipments. Westheimer v. Habinek [Iowa] 109

sale in the original package.[52] States must permit the delivery of the liquor to the consignee within the state,[53] and the question whether the liability of the carrier, as such, has ceased and has become that of a warehouseman is immaterial.[54] After delivery to the consignee states may enact police measures regulating or prohibiting the sale of liquors even in the original packages,[55] and unless it clearly appears that a statute or ordinance providing for a license tax was designed as a mere revenue measure, it will be sustained as a police regulation.[56] A state may also regulate the business of soliciting orders within its borders for liquor to be shipped from other states.[57] The Maine statute precluding any action for liquors purchased out of the state with intent to sell the same in violation of its provisions is not invalid as an interference with interstate commerce.[58]

Inspection laws.[59]—Inspection, as distinguished from purely revenue laws, are valid as being within the police powers of a state though incidentally affecting

N. W. 189. Shipment to defendant held interstate though liquor had been first sent to another customer within the state but before delivery to him had been reshipped to defendant. Id. In prosecution of a railroad for permitting an express company having its office in defendant's building to sell liquor contrary to law, defendant held entitled to show that transaction was interstate commerce conducted in usual course of business and that express company delivered and collected for the whisky not knowing that it had not been ordered. Louisville & N. R. Co. v. Com. [Ky.] 103 S. W. 349. Transaction not interstate commerce where carrier on receiving an unsolicited C. O. D. shipment from outside the state, notified consignee who took and paid for it. American Exp. Co. v. Com., 30 Ky. L. R. 207, 97 S. W. 807.

52. State v. Intoxicating Liquors [Me.] 67 A. 312. Under the Wilson Act interstate shipments of liquor become subject to state police regulations upon arrival at their destination in the state, and delivery to the consignee whether in original packages or not. Meyer, Jossen & Co. v. Mobile, 147 F. 843.

53. State v. Intoxicating Liquors [Me.] 67 A. 312. Liquor cannot be seized at carrier's freight house or from its delivery wagons. Id., overruling State v. Intoxicating Liquors, 95 Me. 140, 49 A. 670. Rule the same whether or not consignee was known to carrier or whether or not consignee's name was fictitious. State v. Intoxicating Liquors [Me.] 67 A. 312. Liquor not seizable in car on "team track" 20 rods from carrier's freight house, though consignee might have called for them there had he chosen to do so. State v. Intoxicating Liquors [Me.] 66 A. 393. Delivery to the consignee is essential to constitute the arrival of liquor in the state within the meaning of the Wilson act. Heymann v. Southern R. Co., 203 U. S. 270, 51 Law. Ed. 178. The mere placing of them in the carrier's warehouse to await delivery is not sufficient. Id. Where express company was bound to deliver to consignee either in person or at his street number, the liquor could not be seized at the express office of point of destination and before such delivery in the usual course. State v. Intoxicating Liqours, 101 Me. 430, 64 A. 812. Rev. St. 1883, c. 27, § 31, and Rev. St. 1903, c. 29, § 39, so far as applicable to interstate commerce, held incompatible with interstate commerce clause of Federal constitution. Id. Acts W. Va. 1903, p. 130, c. 40, prohibiting carriers from delivering any package of liquor except to a person having a state license to sell or to a bona fide consignee who has ordered the same for his own use, held void. Crescent Liquor Co. v. Platt, 148 F. 894. Held not applicable to interstate shipments. State v. Kenney [W. Va.] 57 S. E. 823. In prosecution of an express company for selling intoxicating liquor, evidence that the express company knew that the shipment was not ordered held immaterial under the indictment. Adams Exp. Co. v. Kentucky, 206 U. S. 129, 51 Law. Ed. 987. Following cases governed by same principles as preceding one. Adams Exp. Co. v. Kentucky, 206 U. S. 138, 51 Law. Ed. 992; American Exp. Co. v. Kentucky, 206 U. S. 139, 57 Law. Ed. 993.

54. State v. Intoxicating Liquors [Me.] 67 A. 312. An agreement of an express agent to hold an interstate shipment of liquor for a few days to suit the convenience of the consignee in paying for it does not destroy the character of the transaction as interstate commerce. Adams Exp. Co. v. Kentucky, 206 U. S. 138, 51 Law. Ed. 987.

55. State v. Intoxicating Liquors [Me.] 67 A. 312. The failure of the Irwin county liquor act to exempt from license wines made outside the state does not invalidate the act but merely places all wines on the same basis wherever made. Acts 1906, p 430, § 5. Glover v. State, 126 Ga. 594, 55 S. E. 592.

56. Ordinance of city of Mobile imposing license tax on dealers in beer held not violative of interstate commerce clause as applied to sale of beer in the bottles in which it was brought from other states. Meyer, Jossen & Co. v. Mobile, 147 F. 843. Ordinance licensing and regulating breweries and distilleries in city held a police and not a revenue measure, and held not to interfere with interstate commerce. Schmidt v. Indianapolis [Ind.] 80 N. E. 632.

57. Under the Wilson Act an annual license charge on the business of selling intoxicants within the state by a traveling salesman, who solicits orders for less than five gallons, cannot be regarded as repugnant to the commerce clause when applied to interstate shipments. Delamater v. South Dakota, 205 U. S. 93, 51 Law. Ed. 724.

58. Rev. St. c. 29, § 64. Boehm v. Allen [Me.] 66 A. 474.

59. See 7 C. L. 669.

interstate commerce,[60] if they are passed primarily for the public protection and do not constitute an arbitrary discrimination against such commerce.[61]

Regulation of railroads and other carriers.[62]—A state may regulate the business of common carriers within its boundaries,[63] and in the absence of previous legislation by congress on the same particular subject, it may make reasonable police regulations touching transportation and intended for the general welfare of its people and the protection of life and property, though interstate commerce may be incidentally affected.[64] Hence, it may require express companies to grant to the public equal terms and accommodations,[65] or require railroads to furnish separate coaches for white and negro passengers,[66] or limit the speed of an interstate train within city limits,[67] or forbid the running of freight trains on Sundays,[68] or penalize carriers for failure to notify consignees of the arrival of goods and failure to deliver them on payment of the freight,[69] or enact laws relating to the tracing of goods in transit and proof of loss or damage to goods,[70] or require the interchange and switching of cars between connecting carriers,[71] or prescribe the liability of carriers for injuries to persons within its jurisdiction,[72] and require railroads to report once a year to the state railroad and warehouse commission.[73] A state may not directly or in-

60. New Mexico v. Denver & R. G. R. Co., 203 U. S. 38, 51 Law. Ed. 78.

61. Act N. M. March 19, 1901, prohibiting carriers from receiving for transportation beyond the territorial limits hides not bearing evidence of inspection, held a valid exercise of the police power in absence of prior congressional legislation, though hides not offered for transportation are not required to be inspected and though the incidental effect may be to levy a tax on hides shipped out of the territory. New Mexico v. Denver & R. G. R. Co., 203 U. S. 38, 51 Law. Ed. 78. Amount of inspection fee did not render act invalid where not so unreasonable as to challenge the good faith of the law. Id.

62. See 7 C. L. 671.

63. The right of a state to regulate the business of common carriers within its boundaries is founded on its right to protect its commerce. Platt v. Le Cocq, 150 F. 391. Movement of freight is not freed from state control until it has been released to a carrier for transportation beyond state line. Larabee Flour Mills Co. v. Missouri Pac. R. Co., 74 Kan. 808, 88 P. 72.

64. Peterson v. State [Neb.] 112 N. W. 306.

65. Acts 1901, p. 149, c. 93, requiring express companies to grant equal terms and accomodations, held a valid exercise of state's police power though incidentally affecting interstate commerce. American Exp. Co. v. Southern Indiana Exp. Co. [Ind.] 78 N. E. 1021.

66. Laws 1891, p. 44, c. 41, applies only to railroads doing business in the state, and therefore does not conflict with the Federal constitution. Southern Kansas R. Co. v. State [Tex. Civ. App.] 99 S. W. 166.

67. An ordinance limiting the speed of an interstate train carrying mail to ten miles an hour within the city limits is not void as an unreasonable restriction on interstate commerce and speedy transmission of the mail. Peterson v. State [Neb.] 112 N. W. 306.

68. Pen. Code 1895, § 420, held valid and applicable to interstate trains. Seale v. State, 126 Ga. 644, 55 S. E. 472.

69. Revisal 1905, § 2633, held not invalid as to an interestate shipment. Harrill Bros. v. Southern R. Co. [N. C.] 57 S. E. 383.

70. Civ. Code 1902, v. 1, §§ 1710, 2176, and Laws 1903, Act 1 (24 St. at L. p. 1.), requiring carriers to trace lost or damaged goods if able to do so and making them liable for shipments over their own or connecting lines unless they produce receipts from connecting carriers, and making the bill of lading prima facie evidence of loss or damage, held not regulations of interstate commerce. Skipper v. Seaboard Air Line R. Co., 75 S. C. 276, 55 S. E. 454; Jonesville Mfg. Co. v. Southern R. Co. [S. C.] 58 S. E. 422.

71. Const. § 213, requiring interchange and switching of cars between connecting carriers of freight not invalid, its effect on interstate commerce being merely indirect and incidental. Louisville & N. R. Co. v. Central Stockyards Co., 30 Ky. L. R. 18, 97 S. W. 778. After arrival of stock in a carrier's "break up" yards at the point of destination the shipper demanded delivery of the stock in the car to a connecting carrier for shipment to another point in the state. Held the demanded reshipment was not interstate commerce though stock had been shipped from without the state. Id. Where the switching of cars is purely local and contracted for independently of the interstate shipment, it is subject to state control. Larabee Flour Mills Co. v. Missouri Pac. R. Co., 74 Kan. 808, 88 P. 72.

72. In the absence of prior congressional legislation the interstate commerce clause did not deprive states of power to legislate concerning the liability of common carriers as to persons within its jurisdiction, though interstate commerce may be indirectly affected. Pa. Act, April 4, 1868, restricting rights of persons injured in or about a railroad to those an employe of the road would have, held not repugnant to interstate commerce clause. Martin v. Pittsburg & L. E. R. Co., 203 U. S. 284, 51 Law. Ed. 184.

73. A state statute requiring every railroad company incorporated or doing business in the state to report once a year as to its affairs to the state railroad and warehouse commission is valid [Hurd's Rev. St. 1905, c. 114, § 6] (People v. Chicago, I. & L. R. Co., 223 Ill. 581, 79 N. E. 141), and the fact that congress has acted on the subject by the

directly regulate rates for interstate shipments,[74] or punish for delay in furnishing cars, by a statute intended to control both state and interstate traffic,[75] or require a company to stop its interstate mail trains at a county seat when proper and adequate facilities are otherwise afforded at such station.[76] The allowance by railroad companies of elevator charges to terminal elevators on shipments of grain from points within to points without a state is also a matter which the state court cannot limit or control.[77]

Carriers engaged in interstate commerce are subject to regulation by congress,[78] whose power in this respect cannot be defeated because a carrier is also engaged in intrastate business and uses therein the same means or agencies in whole or in part.[79] There was a difference of opinion among the Federal courts as to the validity of the so-called "Employers' Liability Act,"[80] but the law has recently been declared unconstitutional by the supreme court.[81] A similar conflict may be noted in regard to the validity of section ten of the congressional act of June 1, 1898, regulating the relations between interstate carriers and their employees.[82] The fact that the amended interstate commerce act requires the filing of aggregate or joint through rates for through export shipments does not render it obnoxious to the constitutional inhibitions against the laying of taxes or duties on exports and the giving of prefer-

passage of the interstate commerce act requiring reports to the interstate commerce commission is not controlling, the state and Federal reports being substantially the same (Id.).

74. Acts 1906, p. 413, c. 257, amending charter of Cumberland & Penn. R. Co. so as to prohibit connection of its tracks with tracks of Baltimore & Ohio Co. unless the latter should arrange its coal rates so that combined charges of the two roads should not exceed charge of Baltimore & Ohio Co. for hauling coal over its line to same destination and for as great a distance from Pennsylvania or West Virginia, held invalid as attempt to regulate interstate commerce. State v. Cumberland & P. R. Co. [Md.] 66 A. 458. Not valid as merely incidentally affecting interstate commerce. Id. That state reserved power to amend or repeal company's charter immaterial. Id. Code 1906, § 2482, imposing a forfeiture on any carrier or person demanding or receiving greater tolls or compensation for handling goods than provided therein, is void so far as applicable to interstate commerce. Jennings v. Big Sandy & C. R. Co. [W. Va.] 57 S. E. 272.

75. Rev. St. 1895, arts. 4497, 4499, penalizing carriers for delay in furnishing cars for shipments, held an interference with interstate commerce. Texas & P. R. Co. v. Allen [Tex. Civ. App.] 17 Tex. Ct. Rep. 256, 98 S. W. 450.

76. Order of commission under Miss. Code 1892, §§ 3550, 4302, held invalid. Mississippi R. Commission v. Illinois Cent. R. Co., 203 U. S. 335, 51 Law Ed. 209.

77. State v. Omaha El. Co. [Neb.] 110 N. W. 874.

78. A carrier operating its own construction train, which hauls its own rails and products from a point in one state to a point in another state, is engaged in interstate commerce so as to subject it to the provisions of the safety appliance act. United States v. Chicago, etc., R. Co., 149 F. 486.

79. Kelley v. Great Northern R. Co., 152 F. 211.

80. Held valid: Spain v. St. Louis & S. F. R. Co., 151 F. 522; Snead v. Central of Georgia R. Co., 151 F. 608; Plummer v. Northern Pac. R. Co., 152 F. 206; Kelley v. Great Northern R. Co., 152 F. 211. Not invalid as including both intrastate and interstate commerce. Spain v. St. Louis & S. F. R. Co., 151 F. 522; Kelley v. Great Northern R. Co., 152 F. 211. Not violative of fifth, seventh, tenth, or fourteenth amendments. Id. Not a deprivation of property without due process. Snead v. Central of Georgia R. Co., 151 F. 608; Plummer v. Northern Pac. R. Co., 152 F. 206. Trade Mark and other cases distinguished. Spain v. St. Louis & S. F. R. Co., 151 F. 522; Snead v. Central of Georgia R. Co., 151 F. 608.

81. Held invalid. Howard v. Illinois Cent. R. Co., 28 S. Ct. 141, afg. 148 F. 997, and Brooks v. Southern Pac. Co., 148 F. 986.

82. Held valid: Act Cong. June 1, 1898, c. 370, § 10, 30 St. 428, U. S. Comp. St. 1901, p. 3211, prohibiting interstate carriers from discriminating against union laborers, or from requiring employes to agree to contribute to funds for charitable, social, or beneficial purposes, or to agree to release the employer from liability for personal injuries, or from conspiring to prevent discharged employes from obtaining employment, held constitutional as directly affecting the adjuncts of interstate commerce. United States v. Adair, 152 F. 737. Not void for affecting both interstate and intrastate commerce. Id. Fifth amendment that no person shall be deprived of life, liberty, or property without due process, though a limitation on the commerce clause held not infringed; interstate carriers not being entitled to unrestricted liberty of contract in relations with the public or their employes. Id.

Held void: Section 10 is not a regulation of interstate commerce but a mere regulation of the right of an employer to chose his servants, whether the services relate to interstate commerce or not. United States v. Scott, 148 F. 431; Order of R. R. Telegraphers v. Louisville & N. R. Co., 148 F. 437.

ences to the ports of one state over those of another.[83] A carrier, though operating a line wholly within the state is within the provisions of the commerce act requiring the filing of rates, where its line is a portion of a through route engaged in interstate commerce through a common arrangement between several connecting carriers.[84] Where a railroad has filed and published its interstate rates as required by the Federal statute and joins in transporting an interstate shipment to a point within the state, it is engaged in interstate commerce so as to render the interstate rates applicable though the distance covered by it is wholly within the state and though it has not expressly agreed with connecting carriers to be a part of the through line;[85] but where the owner of an interstate shipment, after its arrival at the original terminal point, orders it forwarded to another point within the same state, whether in pursuance of an original intention or otherwise, the shipment between the last two points is not interstate so as to exempt it from state rates.[86]

State burdens on foreign commerce.[87]—A state or municipality has no power to tax or otherwise burden the right of an individual or corporation to engage in interstate commerce,[88] but a tax on the right to pursue an occupation or to exercise a franchise within the state may be valid though both interstate and intrastate business is considered in arriving at the amount.[89] Thus a tax on the right of a carrier to do local business under its franchise derived from the state has been upheld though computed on its gross receipts derived in part from interstate business.[90] It is not an unlawful interference with interstate commerce to attach by garnishment a railroad car used for the transportation of interstate freight, there being no attempt to interrupt any shipment,[91] but a car loaded with interstate freight cannot be attached while on its way to the point of unloading, there to be reloaded and returned to the state whence it came.[92] A tax on the transfer of corporate stock is not an interference with interstate commerce as applied to a sale of stock of a foreign corporation made by one nonresident to another within the state.[93] After property

83. Armour Packing Co. v. U. S. [C. C. A.] 153 F. 1.

84. United States v. New York Cent., etc., R. Co., 153 F. 630.

85. Corcoran v. Louisville & N. R. Co. [Ky.] 101 S. W. 1185.

86. Gulf, etc., R. Co. v. Texas, 204 U. S. 403, 51 Law. Ed. 540.

87. See 7 C. L. 669.

88. Agents of foreign corporations soliciting orders for or delivering portraits or frames held engaged in interstate commerce and not subject to license taxes. Chicago Portrait Co. v. Macon, 147 F. 967; Commonwealth v. Baldwin, 29 Ky. L. R. 1074, 96 S. W. 914. Ex Parte Hull, 153 F. 459. Statute declaring that tax should not apply to dealers having a permanent place of business in the state, or who kept picture frames as part of their stock in trade, held an unjust discrimination in restraint of interstate commerce. Id. Transaction held interstate commerce as to portraits but not as to frames sought to be sold at delivery of portraits. State v. Looney [Mo.] 97 S. W. 934. One who takes orders and delivers goods for a corporation residing outside the state, but which has been admitted to do business therein, and also sells goods from stock on hand, is **not engaged in interstate commerce** though the goods are shipped from out of the state. Could not avoid license tax. People v. Smith, 147 Mich. 391, 13 Det. Leg. N. 1068, 110 N. W. 1102.

89. Tax on gross receipts of wholesale dealers in oil. Texas Co. v. Stephens [Tex.] 103 S. W. 481. A tax may be imposed upon the mere intangible right of a corporation to exercise its franchise within a state and such tax may be computed on the basis of its capital stock employed in the state at a rate determined by the dividends declared, even though the business of the corporation is interstate or foreign commerce. Franchise tax imposed by Laws 1896, c. 908, § 182, is a tax on the "mere intangible right to exercise a franchise." People v. Roberts, 116 App. Div. 30, 101 N. Y. S. 184.

90. In Laws 1905, p 336, c. 141, imposing a tax of one per cent of the gross earnings of railroad companies, is an occupation tax for doing state business and not a tax on gross receipts, reference to such receipts being merely a means by which to ascertain the amount of the tax. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

91. Transportation to a point in the state. Southern Flour & Grain Co. v. Northern Pac. R. Co., 127 Ga. 626, 56 S. E. 742.

92. Shore v. Baltimore & O. R. Co. [S. C.] 57 S. E. 526.

93. Tax under New York Laws 1905, c. 241. People of State of New York v. Reardon, 204 U. S. 152, 51 Law. Ed. 415.

brought from another state has become merged as a part of the general property in the state, it is subject to state taxation.[94]

The Safety Appliance Act [95] is within the constitutional power of congress to regulate interstate commerce.[96]

Discrimination in rates.[97]

(§ 2) *B. Regulation of trade and commerce within a state.*[98]—A state regulation requiring junk dealers and dealers in secondhand articles to keep certain goods on hand for thirty days is not unreasonable.[99] A commodity brought into a state becomes subject to the police power and commerce regulations of the state, though an article of interstate commerce before its importation.[1]

§ 3. *The interstate commerce commission; its functions and proceedings before it.*[2]—One is not compelled in the first instance to resort to the interstate commerce commission where an interstate carrier unlawfully refuses to receive goods tendered for shipment.[3] In the investigation of a complaint filed by manufacturers of a commodity as to freight rates, the commission has power, in the public interest, to consider the whole matter unembarrassed by any supposed admissions in the complaint,[4] and such admissions are ineffectual to deprive a Federal court of power to test the validity of the order of the commission by the scope of the interstate commerce act.[5] It is within the power of the commission to direct that carriers desist from further enforcing a classification of a certain commodity by percentage where such classification operates to disturb relations previously existing in the affected territory and creates discriminations and preferences among manufacturers and shippers and between localities.[6] The rule that an action at law to recover excessive interstate freight charges cannot be maintained in advance of action by the interstate commerce commission will not prevent a Federal court, in which proceedings are commenced pending action by the commission, from granting injunctive relief as a court of equity, under the powers conferred by the interstate commerce act, and after the commission has acted.[7] After a rate has been declared unreasonable by the commission a decree of restitution of overcharges may be legally stipulated for by the parties in a subsequent proceeding in a Federal court.[8] Findings and orders

94. Goods held to become part of common mass after delivery at destination, breakage of shipping box, and removal therefrom of smaller packages therein contained. Parks Bros. & Co. v. Nez Perce County [Idaho] 89 P. 949. Coal shipped from one state and stored in another for an indefinite time to await orders for sale and then to be transshipped to purchasers is taxable at the place where stored. Lehigh & Wilkesbarre Coal Co. v. Junction [N. J. Law.] 66 A. 923.

95. See 7 C. L. 671. See, also, Master and Servant, 8 C. L. 840.

96. Act March 2, 1893, c. 196, 27 St. 531, U. S. Comp. St. 1901, p. 3174, as amended. United States v. Atlantic Coast Line R. Co., 153 F. 918. Provision authorizing American railway association to designate the standard height of drawbars and prohibiting use of cars not complying with the standard held not an unconstitutional delegation of legislative power to American railway association. St. Louis, etc., R. Co. v. Neal [Ark.] 98 S. W. 958.

97. See 7 C. L. 672. For operation of common law rules against discrimination, see Carriers, 9 C. L.

98. See 7 C. L. 673.

99. Rev. St. § 4413, not unconstitutional. Phillips v. State, 4 Ohio N. P. (N. S.) 398.

1. Coal oil subject to anti-trust act. Standard Oil Co. v. State [Tenn.] 100 S. W. 705.

2. See 7 C. L. 673.

3. May resort to courts, since such refusal violates a duty imposed by law of which courts have original jurisdiction. Danciger v. Wells-Fargo & Co., 154 F. 379.

4. Could consider operation of classification in entire territory, reasonableness, preferences, etc. Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 51 Law Ed. 995.

5. In proceeding to enforce order of commission directing carriers to desist from enforcing a freight rate for soap in less than carload lots. Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 51 Law. Ed. 995.

6. Classification of soap at 20 per cent less than third class but not less than fourth class. Cincinnati, etc., R. C. v. Interstate Commerce Commission, 206 U. S. 142, 51 Law. Ed. 995.

7. Southern R. Co. v. Tift, 206 U. S. 428, 51 Law. Ed. 1124.

8. Southern R. Co. v. Tift, 206 U. S. 428,

of commerce and railroad commissions are prima facie binding,[9] and the burden is on the party seeking to impeach them.[10]

§ 4. *The department of commerce and labor; its functions.*[11]

§ 5. *State railroad and corporation commissions.*[12]—The creation of the state corporation commission of Virginia and vesting it with limited legislative, executive and judicial functions was not a violation of the bill of rights or of any provision in the Federal constitution.[13] A commission can make no order affecting the rights of a railroad company not properly served with notice or process and not a party to proceedings before it.[14] The South Dakota railroad commission has power to make reasonable orders affecting the business of express companies within the state.[15] That of Washington may employ an expert in ascertaining the cost of railroad construction in the state and may fix the amount of his salary.[16] The Texas commission has power to fix passenger rates not exceeding three cents pre mile,[17] and within the limits prescribed by the constitution may fix different rates for different carriers.[18] In Mississippi the commission has power to establish reciprocal demurrage charges.[18a] A "joint rate" as used in the Georgia statute providing for the fixing of rates by the railroad commission is one prescribed to be charged for the transportation of goods or passengers over connecting lines of two or more roads and to be divided between them for the service rendered by each respectively.[19] The statute prescribes no fixed or an arbitrary rule for making such rate,[20] and the fact that continuous mileage is taken as a basis does not render the rate illegal as beyond the power of the commission if it is just and reasonable.[21] On review of an order of a railroad commission fixing rates, the questions to be determined are whether the rates were fixed in due form under a valid law by a valid commission, and whether they are reason-

51 Law. Ed. 1124. Court could make order of reference to ascertain sum of increase in rates paid since rate went into effect. Id.

9. Findings of fact in support of order of interstate commerce commission. Interstate Commerce Commission v. Cincinnati, etc., R. Co., 146 F. 559. The findings of the commission are given prima facie effect, and when concurred in by a Federal court will not be interfered with in the absence of clear and unmistakable error. As to reasonableness of rates. Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 51 Law. Ed. 995; Illinois Cent. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 Law. Ed. 1128.

10. Finding of interstate commerce commission that reclassification of laundry soap was unjustifiable. Interstate Commerce Commission v. Cincinnati, etc. R. Co., 146 F. 559.

11. See 7 C. L. 673.

12. See 7 C. L. 673.

13. Winchester & S. R. Co. v. Com. [Va.] 55 S. E. 692. Not a denial of equal protection of law or of deprivation of property without due process. Id.

14. Order as to running trains. Winchester & S. R. Co. v. Com. [Va.] 55 S. E. 692.

15. Could require express company to receive money for shipment at reasonable hours. Platt v. Le Cocq, 150 P. 391. In suit by express company to restrain enforcement of such order, Federal court could enter a decree for its enforcement on defendant's cross bill, notwithstanding the state statute making it the duty of the commissioners, in case a carrier refuses to obey their orders, to apply to state courts for their enforcement. Id.

16. In absence of fraud its action cannot be reviewed by the state auditor. State v. Clausen [Wash.] 87 P. 498.

17. Houston, etc., R. Co. v. Storey, 149 F. 499.

18. But may not prescribe unreasonably low rates for one carrier and allow others to charge higher rates. Houston, etc., R. Co. v. Storey, 149 F. 499.

18a. Code 1906, § 4843. Yazoo & M. V. R. Co. v. Keystone Lumber Co. [Miss.] 43 So. 605. May initiate such charges without action of car service association. Id.

19. Hill v. Wadley Southern R. Co. [Ga.] 57 S. E. 795.

20. Deducting a certain per cent of local rates and adding such rates thus reduced held not the only method. Hill v. Wadley Southern R. Co. [Ga.] 57 S. E. 795.

21. Where the stocks and bonds of one railroad company were owned by a connecting carrier having separate directors and operated separately, a "continuous mileage rate" applying to both was within the power of the railroad commissioners as a "joint rate" and was not unauthorized if reasonable and just. Hill v. Wadley Southern R. Co. [Ga.] 57 S. E. 795. Rule not changed because the two roads remained separate in law. Id. Whether application of rates in vogue on one line to traffic on the other connecting line was legal would depend on reasonablenses of such rates. Id. Circular prescribing such rate held complete in itself without resort to commissioner's rule No. 1 to ascertain its meaning. Id. Rule No. 1 construed and held to apply where a majority of the stock of "each" of two roads should be owned by one of them. Id.

able,[22] but the rates must be presumed lawful until proven discriminatory or otherwise unreasonable.[23]

Commercial Paper; Commitments; Common and Public Schools, see latest topical index.

COMMON LAW.[24]

The common-law rules relating to particular subject-matters are treated in the topics appropriate thereto,[25] and the enforcement by one state of the common law of another is also discussed elsewhere.[26] The common law of another state is assumed to be the same as that of the forum.[27] So much of the common law of England as is applicable to the local situation and not repugnant to the constitution or laws of the state has been adopted by statute in Vermont,[28] and also in Nebraska.[29] The adoption by the people of a state of such parts of the English common law as were in force on a certain date does not compel the adoption of principles inapplicable to their circumstances.[30] Though an English statute may have no force in a state as a statute unless re-enacted by the legislature, the principle which it embodies may be a part of the state law if suited to local conditions.[31]

Community Property; Comparative Negligence; Complaint for Arrest; Complaints in Pleading, see latest topical index.

COMPOSITION WITH CREDITORS.

Includes only general compositions independent of bankruptcy or general assignment,[33] composition of a single claim being elsewhere treated.[34] To be binding as a composition a contract must amount to an agreement on the part of the creditors to accept the sums fixed thereby in full discharge of their claims.[35] While compositions are favored by the law, they are void if induced by misrepresentation or suppression of material facts on the part of the debtor, either as to the amount of his property or of his indebtedness.[36] In such case an innocent creditor need not rescind the compositon or return any sums received thereunder but may treat such sums as payments pro tanto and sue for any balance,[37] or suit may be brought in equity to set aside the composition.[38]

22. Chicago, I. & L. R. Co. v. Hunt [Ind. App.] 79 N. E. 927.

23. Southern R. Co. v. Atlanta Stove Works [Ga.] 57 S. E. 429.

24. See 7 C. L. 674.

25. See particularly Criminal Law, 7 C. L. 1010, as to the common law of crimes.

26. See Conflict of Laws, 7 C. L. 677.

27. Common law of Texas as to accord and satisfaction. Attorney General v. Supreme Council A. L. H. [Mass.] 81 N. E. 966.

28. St. 9 Anne c 20, relating to pleading in mandamus, held part of law of state. Clement v. Graham, 78 Vt. 290, 63 A. 146.

29. Kinkead v. Turgeon [Neb.] 109 N. W. 744. As to riparian rights. Id.

30. On subject of riparian rights. Trustees, etc., of Brookhaven v. Smith, 188 N. Y. 74, 80 N. E. 665.

31. Statutes of Marlbridge and Gloucester making tenants for years liable for waste. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873.

32. See 7 C. L. 674.

33. See Assignments for Benefit of Creditors, 9 C. L. 269; Bankruptcy, 9 C. L. 343.

34. See Accord and Satisfaction, 9 C. L. 11.

35. Agreement not purporting to transfer to trustees all of debtor's property, not providing for time of payments and containing no covenants on part of creditors to discharge their claims in payment of less than full amount, held not a bar to action on a note. Reynolds v. Pennsylvania Oil Co. [Cal.] 89 P. 610. Where a creditor wrote the debtor accepting his written offer to pay 15 per cent in full settlement and instructed a bank to accept such amount which the bank did by stamping the account "paid" on receipt of a check, there was a valid composition in writing, within Code 1896, § 1806. Norton v. Clayton Hardware Co. [Ala.] 43 So. 185.

36. Burgess v. Simpson Grocery Co. [Ga.] 57 S. E. 717. Where debtor truthfully wrote a creditor that he was making a similar offer to every creditor, the fact that some insisted on getting more and got it did not render the composition void. Norton v. Clayton Hardware Co. [Ala.] 43 So. 185.

37. Burgess v. Simpson Grocery Co. [Ga.] 57 S. E. 717.

38. Pleadings and evidence held to authorize relief granted. Burgess v. Simpson Grocery Co. [Ga.] 57 S. E. 717.

COMPOUNDING OFFENSES.[39]

Includes only the criminal offense as distinguished from that of being accessory after the fact of crime,[40] the validity of contracts for the composition of crime being also elsewhere treated.[41]

Misprision of felony at common law is criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous consent with or subsequent assistance of him as will make the concealer an accessory before or after the fact.[42] The common law on this subject is a part of the law of Vermont.[43] An information for misprision of a felony merely charging concealment and secrecy without showing failure to discover the felon to the officers of justice, is insufficient,[44] and so is an information failing to allege that defendant intended to hinder the course of justice and to cause the felon to escape unpunished.[45] An allegation that defendant "well knew" all of certain matters stated in the information sufficiently charges knowledge as to such matters.[46]

Compounding an offense is the act of the party aggrieved in agreeing with the offender for a consideration or return of stolen property, not to prosecute him.[47]

Since the commission of a previous offense is essential to the crime of compounding it, an indictment for compounding should state that such offense had been committed,[48] and the agreement not to prosecute being the gist of the offense, such agreement must also be clearly charged.[49] An indictment for compounding a crime arising from the violation of a statute must contain averments sufficient to show that such statute was in force.[50]

Compromise and Settlement; Concealed Weapons, see latest topical index.

CONCEALING BIRTH OR DEATH.[51]

Condemnation Proceedings; Conditional Sales; Confession and Avoidance, see latest topical index.

CONFESSION OF JUDGMENT.[52]

Definition and Nature (595).
The Warrant and Authority Conferred (595).
The Judgment (595).

Judgment on the pleadings[53] and rights of parties to judgment notes[54] are excluded.

39. See 7 C. L. 674.
40. See Criminal Law, 7 C. L. 1010.
41. See Contracts, 7 C. L. 785.
42. State v. Wilson [Vt.] 67 A. 533.
43. Offense not confined to treason because U. S. 4483, c. 211, touching treason, related to misprision of treason. State v. Wilson [Vt.] 67 A. 533.
44, 45. State v. Wilson [Vt.] 67 A. 533.
46. Where information for misprision of felony set forth in form and substance, with time and place, the commission of grand larceny with name and place of residence of offender, and alleged that "all of which defendant well knew," held, it was not objectionable as not charging knowledge of these matters. State v. Wilson [Vt.] 67 A. 533.
47. Evidence sufficient to support conviction for compounding a misdemeanor. Powell v. State [Tex. Cr. App.] 101 S. W. 1006. Evidence held not to vary from information charging the making of an agreement with one who was acting for the perpetrator of the offense. Id.
48. State v. Hodge, 142 N. C. 665, 55 S. E. 626.
49. State v. Hodge, 142 N. C. 665, 55 S. E. 626. Indictment bad for failure to allege agreement between accused and his associates to extort or make agreement with the offender to obtain the money. Williams v. State [Tex. Cr. App.] 100 S. W. 149.
50. Indictment bad for failure to allege legal publication of result of local option election. Williams v. State [Tex. Cr. App.] 100 S. W. 149.
51. No cases have been found for this subject since the last article. See 5 C. L. 608.
52. See 7 C. L. 675.
53. See Pleading, 8 C. L. 1430.
54. See Negotiable Instruments, 8 C. L. 1124.

Definition and nature.[55]—A confession of judgment is an informal and summary entry of judgment upon admission or confession of the debtor.[56]

The warrant and authority conferred.[57]—A corporation which takes and continues possession under a lease thereby ratifies a power executed by its president.[58] A power to confess judgment for rent is not void because the lease provides for the payment of gas bills in addition to rent.[59] That a statement of confession of judgment does not state the facts out of which the debt arose does not render the judgment invalid as between the parties.[60] In a debtor's affidavit in support of a judgment by confession under the North Carolina statute, no statement need be made that the controversy is real and the proceedings bona fide.[61] After a long lapse of time a debtor may be estopped to attack his own affidavit substantially complying with the statute, especially where there is no charge of fraud or claim of payment.[62] A joint power of attorney does not authorize entry of judgment against one person only,[63] and release of errors by the cognovit pursuant to the terms of the power does not remedy the defect.[64]

The judgment.[65]—To authorize an entry of judgment on defendant's offer under the Wisconsin statute, plaintiff must give written notice of acceptance within ten days from the time the offer is made.[66] A satutory provision that when a judgment is confessed it shall be entered without delay is directory and not mandatory.[67] In Florida a judgment upon confession before a justice of the peace must show the cause of action or indebtedness.[68] Collection fees are allowable as per stipulation where substantial services are performed in guarding the creditor's interests at a sale by subsequent judgment creditors.[69] Judgments by confession valid in the state where taken are valid in other states under the full faith and credit clause of the Federal constitution.[70] The laws of the state where a note was made payable and by which the parties intended its validity and enforceability to be governed is controlling on the validity of the judgment entered under is provisions regardless of whether the note was in fact signed elsewhere.[71]

The manner of hearing a motion to vacate or open a judgment is discretionary with the court.[72] All presumptions favor the regularity of a judgment entered in open court, in term time and by a court of general jurisdiction,[73] and substantial

55, 56, 57. See 7 C. L. 675.

58. Higbie Co. v. Weeghman Co., 126 Ill. App. 97.

59. On theory that amount of gas bills was unliquidated. Bowman v. Powell, 127 Ill. App. 114.

60. So as to excuse failure of clerk to enter judgment thereon. Whelan v. Reynolds [Minn.] 112 N. W. 223.

61. Revisal 1905, § 581, providing for verified writing authorizing entry of judgment and stating facts on which debt arose and that it is justly due. Martin v. Briscoe, 143 N. C. 353, 55 S. E. 782.

62. After limitation period debtor could not attack on ground that affidavit did not contain a sufficient statement of facts out of which debt arose or that sum was justly due. Martin v. Briscoe, 143 N. C. 353, 55 S. E. 782.

63. Power of attorney in lease to man and wife held joint despite the use of words "him" and "his." Barron v. Kimball, 124 Ill. App. 268.

64. Barron v. Kimabll, 124 Ill. App. 268.

65. See 7 C. L. 676.

66. Notice several months after offer was made held a rejection. Rev. St. 1898, § 2789, construed. Smith v. Thewalt, 126 Wis. 176, 105 N. W. 662.

67. Code 1899, c. 50, § 114 (Ann. Code 1906, § 2065): That justice of peace did not enter judgment against one of the defendants on his confession until return of summons did not render judgment void. McDowell County Bk. v. Wood, 60 W. Va. 617, 55 S. E. 753.

68. Judgment void for noncompliance with Rev. St. 1892, § 1623. Palmer v. Parker [Fla.] 42 So. 398.

69. Immaterial that execution had not issued on senior creditor's judgment or that senior creditor or attorney made no demand of payment. Eisenhower v. Shank, 31 Pa. Super. Ct. 23.

70, 71. Vennum v. Mertens, 119 Mo. App. 461, 95 S. W. 292.

72. Affidavits or oral testimony. Higbie Co. v. Weeghman Co., 126 Ill. App. 97.

73. Bowman v. Powell, 127 Ill. App. 114. Presumed that attorney confessing a judgment was an attorney of record authorized to practice in courts of the state. Id.

proof is required to set aside a judgment as fraudulent.[74] A discharge of the judgment is, of course, a good defense to its enforcement.[75]

CONFESSIONS; CONFISCATION, see latest topical index.

CONFLICTS OF LAWS.

§ 1. Extraterritorial Effect of Laws in General (596).
§ 2. Contracts in General (596).
§ 3. Effect of Status or Domicile (597).
§ 4. Matters Relating to Personal Property (597).
§ 5. Effect of Public Policy (597).
§ 6. Protection of Citizens in State of Forum (598).
§ 7. Contracts Respecting Realty (598).
§ 8. Application of Remedies (598). Presumptions and Judicial Notice and Pleading of Foreign Laws (599).
§ 9. Torts (599).

§ 1. *Extraterritorial effect of laws in general.*[76]—Except as to penal laws[77] the statutes of foreign states will generally be enforced as a matter of comity.[78] The Federal courts apply the state[79] and territorial laws in matters of local concern,[80] but not as to Federal questions,[81] and the binding effect of state decisions is likewise limited.[82]

§ 2. *Contracts in general.*[83]—All matters bearing upon the execution, interpretation, and validity of a contract,[84] and the measure of damages for breach

74. Relationship, preference, or waiver of interest, held insufficient. Weldon's Estate, 31 Pa. Super. Ct. 47. Where in an action to open a confessed judgment the petitioner alleges payment and that he accepted a deed to property purchased upon representations of the defendant and the assignee of the judgment that it had been paid, and his evidence strongly preponderates, the judgment should be opened. Ripple v. Succop, 30 Pa. Super. Ct. 638.

75. Judgment for defendant sustained on evidence that the debt had been discharged by settlement of partnership business and delivery to plaintiff of his interest in the business which had been conducted in defendant's name. Lazzari v. Lazzari, 31 Pa. Super. Ct. 212.

76, 77. See 7 C. L. 677.

78. Where by statute a right of action which did not exist at common law is given such action will be enforced in other states, and the limitations and conditions attached to the right of action by the statute will control. Swisher v. Atchison, etc., R. Co. [Kan.] 90 P. 812. Exceptions to this rule are stated in Cannaday v. Atlantic Coast Line R. Co., 143 N. C. 439, 55 S. E. 836. See post, § 5. Effect of public policy.

79. Ballantine v. Yung Wing, 146 F. 621.

80. Criminal prosecutions by the United States in territorial district court, governed by territorial laws as to practice and mode of procedure. Cochran v. U. S. [C. C. A.] 147 F. 206. Ann. St. of Indian Ter. 1899, §3449, providing for revival of real actions, held to govern. Wilhite v. Skelton [C. C. A.] 149 F. 67.

By statute: By Act of Congress (Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716]) proceedings for admission of parties to bail are to be assimilated to those under local law, which therefore governs sufficiency of bail bond. United States v. Zarafonitis [C. C. A.] 150 F. 97.

81. By Rev. St. § 858 (U. S. Comp. St. 1901, p. 659), the competency of a witness is made a Federal question in certain cases. Miller v. Steele [C. C. A.] 153 F. 714. See, also, Bankruptcy, 9 C. L. 343.

82. See Stare Decisis, § C. L. 1965.

83. See 7 C. L. 677.

84. Validity and construction. Cannaday v. Atlantic Coast Line R. Co., 143 N. C. 439, 55 S. E. 836. Execution, authentication, and construction. Johnson v. Western Union Tel. Co. [N. C.] 57 S. E. 122. Validity of agreement to assume mortgage by vendee. McCrery v. Nivin [Del.] 67 A. 452. When a contract is made in one state to be performed in another, the lex loci contractus controls as to the nature, validity, obligation, construction, and interpretation of the contract. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93. Parties are presumed to contract with reference to the place of the contract, and if it is valid there it is valid everywhere. Id. Validity of contract made by resident of New Jersey in Pennsylvania, as affected by statute of frauds, governed by law of Pennsylvania. Callaway v. Prettyman [Pa.] 67 A. 418. Laws of state in which contract of insurance was made, and where by its terms it was to be performed, and where its subject was situated, held conclusive of its obligatory force and of its meaning and effect. Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246. Married woman's contract valid in New York enforced in New Jersey, though invalid then. Irving Nat. Bk. v. Ellis [N. J. Law] 64 A. 1071. Virginia contract releasing common carrier from liability for injuries arising through negligence of the carrier or otherwise, void under Code Va. 1887, § 1296, and not enforceable in Kentucky where injuries were received. Davis v. Chespeake & O. R. Co., 29 Ky. L. R. 53, 92 S. W. 339. Where a release of liability was signed in Utah by employes of express and railroad company doing business in Wyoming, held that it was inferable that it was contemplated that his duties would be performed in part in Wyoming, and, the injuries sued for having been received there, the contract was a Wyoming contract and void under Const. Wyo. art. 10,

thereof,[85] are determined by the law of the place where the contract is made; though there are cases holding, in apparent contradiction to the above rule, that if it appears that it was to be executed or performed in another country, the law of the place of performance governs.[86] Where a contract is to be performed in two states, the law of each governs the part to be performed within it.[87] Matters connected with the performance and legality of the object of the contract are regulated [88] by the law obtaining at the place of performance, and matters respecting the remedy upon the lex fori.[89] These rules are not changed by the taking of foreign security.[90] Where a note or obligation is valid where made and does not conflict with any usury law, it is valid in any state in which it is sought to be enforced.[91] A contract is made where one party, either by himself or by his duly authorized agent, unqualifiedly accepts the offer of the other.[92] The application of these rules to contracts for carriage into other states will be found elsewhere.[93]

§ 3. *Effect of status or domicile.*[94]—The law of testator's domicile governs as to the validity and interpretation of a will.[95] The law of the domicile of husband and wife at the date of their marriage governs the wife's right to a tacit lien for the repayment of money brought by her into the marriage community.[96]

§ 4. *Matters relating to personal property.*[97]—Subject to a number of exceptions,[98] title to tangible personal property is ordinarily determined by the law of its situs.[99]

§ 5. *Effect of public policy.*[1]—The law of comity is not a law of absolute ob-

§ 4, making void such releases, and so unenforceable in Utah. Stone v. Union Pac. R. Co. [Utah] 89 P. 715.

85. Johnson v. Western Union Tel. Co. [N. C.] 57 S. E. 122; Western Union Tel. Co. v. Pratt, 18 Okl. 274, 89 P. 237. The right to and the amount of interest. Freygang v. Vera Cruz & P. R. Co. [C. C. A.] 154 F. 640. Damages and lawyer's fees. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93.

86. Order from Michigan to purchase stock in Massachusetts governed by law of latter state, although payment could be made in either state, or elsewhere. Douglass v. Paine, 141 Mich. 485, 12 Det. Leg. N. 527, 104 N. W. 781. Carrier's liability for loss occurring in Kentucky is governed by law of Kentucky, and not by law of New York, although contract made then. Cincinnati, etc., R. Co. v. Hansford & Son, 30 Ky. L. R. 1105, 100 S. W. 251.

87. Contract for sale of material for railroad construction to be performed partly in Arkansas and partly in Indian territory. Law of each applied as to liens. Midland Valley R. Co. v. Moran Bolt & Nut Mfg. Co., 80 Ark. 399, 97 S. W. 679.

88. Legality of order from Tennessee to buy or sell stocks on New York Stock Exchange governed by law of New York. Berry v. Chase [C. C. A.] 146 Fed. 625. Lex. fori will be applied in case of sale of liquor with intent to violate prohibitory liquor law whether contract was made outside of state or not. Levy v. Stegemann [Iowa] 104 N. W. 372. Suit for anticipatory damages governed by laws of New York, that being place of performance, and contract expressly providing that it should govern. Michaelsen v. Security Mut. Life Ins. Co., 150 F. 224.

89. See post, § 7, application of remedies.

90. A mortgage of New York land given to secure a Massachusetts loan at a legal rate there, but illegal in New York, is not void under 1 Rev. St. (1st Ed.) p. 77h, pt. 2, c. 4, tit. 3, § 5, as amended by Laws 1837, p. 486, c. 436, providing that mortgages to secure loans at usurious rates shall be void. Manhattan Life Ins. Co. v. Johnson, 115 App. Div. 429, 101 N. Y. S. 65.

91. Note made and payable in one and the same state. Manhattan Life Ins. Co. v. Johnson, 115 App. Div. 429, 101 N. Y. S. 65.

92. Irving Nat. Bk. v. Ellis [N. J. Law.] 64 A. 1071. Guaranty signed in New Jersey and sent to New York not a complete contract until accepted and acted upon there. Question as to mailing in New Jersey or New York, immaterial. Governed by New York law. Id.

93. See Carriers, 7 C. L. 522.

94. See 7 C. L. 679.

95. See Wills, § 6, 8 C. L. 2347.

96. Record silent and claim disallowed. In re Myer [N. M.] 89 P. 246.

97. See 5 C. L. 614.

98. Replevin suit involving title to engines. Case gives list of exceptions to general rule, but holds none of them apply. Schmidt v. Perkins [N. J.] 67 A. 77.

99. Liens for material furnished for construction, equipment or repair of a railroad, governed by law of situs. Midland Valley R. Co. v. Moran Bolt & Nut Mfg. Co., 80 Ark. 399, 97 S. W. 679. Validity of chattel mortgage governed by law of situs of the property, not by that of mortgagor's domicil. Bridges v. Barrett, 126 Ill. App. 122. The validity of a parol assignment of choses in action is governed by the laws of the state where the assignee resides, and the choses are and not by the lex loci contractus. Assignment of book accounts and bill receivable made in Connecticut by a Michigan man, governed by Michigan law. Union Trust Co. v. Bulkeley [C. C. A.] 150 F. 510.

1. See 7 C. L. 679.

ligation, and its principles can never be invoked in aid of the enforcement of foreign laws, if such enforcement would contravene the setled policy or positive law of the state of the forum.[2]

§ 6. *Protection of citizens in state of forum.*[3]—Comity will not intervene to enforce the laws of a foreign state when to do so would be prejudicial to the interests of citizens of the state of the forum.[4]

§ 7. *Contracts respecting realty.*[5]—The law of the situs governs in regard to all rights, interests, and titles in and to immovable property.[6]

§ 8. *Application of remedies.*[7]—The lex fori governs as to the enforceability of a contract,[8] including availability of defenses,[9] and as to all matters of pleading and practice,[10] including limitations.[11] Proceedings antecedent to and creative of the cause of action are governed not by the lex fori but by the lex loci.[12]

2. Contract limiting liability of carrier for injuries caused by its own negligence. St. Louis, etc., R. Co. v. Moon [Tex. Civ. App.] 103 S. W. 1176. The laws of one state have force in the territory of another as long as they do not come in conflict with the statute law, power, or right of the state of the forum, or violate its public policy or conscience. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93. Missouri Rev. St. § 8012, held not repugnant to Georgia Constitution. Id. Courts of Texas will not recognize statute of New Mexico which provides that actions under it may be maintained in its courts alone. Atchison, T. & S. F. R. Co. v. Sowers [Tex. Civ. App.] 99 S. W. 190. A contract which is valid when made, no part of which is to be performed in the United States and relates to the transportation of property in a foreign vessel on a voyage which does not include any American port, does not concern the public policy of the United States. The Fri [C. C. A.] 154 F. 333. Not within the rule. Cannaday v. Atlantic Coast Line R. Co., 143 N. C. 439, 55 S. E. 836.

3. See 7. C. L. 679.

4. Illinois assignee for benefit of creditors postponed, as to funds of assignor in New York to attaching New York creditors. In re Nelson & Bros., 149 F. 590.

5. See 7 C. L. 679.

6. Question whether title to soil under waters passes to grantee of shore land from United States governed by laws of State where land lies. Harrison v. Fite [C. C. A.] 148 F. 781. Assignment for benefit of creditors executed in one state, ineffectual to convey real estate in another state unless so executed and recorded that it would be effectual in the latter state. Kirkendall v. Weatherley [Neb.] 109 N. W. 757. The rule of inheritance of the state where land is situated will govern, regardless of the domicile of the intestate. Montgomery v. Montgomery [Tex. Civ. App.] 99 S. W. 1145. New York law governs status of child adopted in Pennsylvania with regard to New York realty. Kettell v. Baxter, 50 Misc. 428, 100 N. Y. S. 529. Deed governed by lex rei sitae. Crane v. Blackman, 126 Ill. App. 631.

7. See 7 C. L. 679.

8. Conn. Statute of Frauds (Revision of 1902, § 1089), prohibiting actions on oral agreemnts not to be performed within one year, applied, on the ground that it attacked the remedy. Ballantine v. Yung Wing, 146 F. 621.

9. Suit on life insurance policy. Meritorious defense under lex loci contractus necessary. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93.

10. The lex fori controls the form of action, the parties to the suit, the sufficiency of the pleadings, and the competency of the evidence. Fryklund v. Great Northern R. Co., 101 Minn. 37, 111 N. W. 727. Territorial law of Oklahoma as to rights of defendants to be tried separately, and as to presumptory challenges of jurors, govern in criminal prosecutions by the United States before territorial district court. Cochran v. U. S. [C. C. A.] 147 F. 206. Ann. St. of Indian Ter. 1899, § 3449, providing for revival of real actions, held to control. Wilhite v. Skelton [C. C. A.] 149 F. 67.

By Statute: Sufficiency of bail bond governed by state law. U. S. Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), providing for assimilation of proceedings for admission to bail with state procedure cited. United States v. Zarafonitis [C. C. A.] 150 F. 97. The law of the state where the contract is to be performed governs presumptions. Presumption of payment by acceptance of promissory note. American Malting Co. v. Souther Brew. Co. [Mass.] 80 N. E. 526.

11. Klages v. Kohl, 127 Ill. App. 70. Action on foreign judgment held not barred either by statutes of state where it was obtained or by lex fori. Mahoney v. State Ins. Co., 133 Iowa, 570, 110 N. W. 1041. Leave to amend to conform to New Jersey law refused after statute of limitations had become a bar. Le Bar v. New York, etc., R. Co. [Pa.] 67 A. 413. When by statute a right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced, time so fixed becomes a limitation or condition upon the right, and will control, no matter in what form the action is brought. Swisher v. Atchison, etc., R. Co. [Kan.] 90 P. 812. The exception to the rule that the statute of limitations of the forum governs, that where a right is given by statute, subject to a special limitation, such limitation inheres to the right and has extraterritorial force, cannot be extended to make the general statute of limitations of the state when the right arose operate extraterritorrially, and case held not to be within the exception. Ramsden v. Knowles [C. C. A.] 151 F. 721.

12. Jurisdiction. Service of notice in Ne-

Presumptions and judicial notice and pleading of foreign laws.[13]—When necessary to sustain the cause of action, foreign laws must be pleaded and proved [14] as a mater of fact,[15] such laws not being judicially noticed.[16] The proof is ordinarily to the court, not to the jury.[17] Proof may ordinarily be made by expert witness, by certified copy, or by evidence of judicial recognition.[18] The law of a foreign state is ordinarily presumed to be the same as the lex fori,[19] including the constitution and statutes thereof,[20] though in some jurisdictions the presumption is that the common law obtains,[21] and to be the same as the common law of the forum,[22] unless the state is not of common origin, and in such case the lex fori governs in absence of proof of foreign law.[23] In determining what constitutes the common-law rule, the decisions of the courts of the state of the forum control.[24]

§ 9. *Torts.*[25]—Liability for tort governed by law of state where it occurred.[26] A statute creating a cause of action for wrongful death is remedial and the cause

braska case upon defendant in Iowa, invalid. Bank of Horton v. Knox, 133 Iowa, 443, 109 N. W. 201.

13. See 7 C. L. 680.

14. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354. Need not be pleaded in a suit for injuries, but may be proved so far as material under a plea of "not guilty." Christiansen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97. In Pennsylvania under plea of nonassumpsit, printed statutes of a foreign state inadmissible, and are admissible only by way of special matter after due notice under Rule of Court No. 30, § 8. Callaway v. Prettyman [Pa.] 67 A. 418. Foreign statutes may be pleaded by amendment. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93. The burden is on the party seeking to avail himself of the benefit of foreign laws to introduce them in evidence and incorporate them in the records. Smith v. Aultman, 120 Mo. App. 462, 96 S. W. 1034. Usury law not pleaded. Betz v. Wilson, 17 Okl. 383, 87 P. 844.

15. App. v. App. [Va.] 55 S. E. 672; Christiansen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97; Loyal Mystic Legion of America v. Brewer [Kan.] 90 P. 247; Norfolk & W. R. Co. v. Denny's Adm'r [Va.] 56 S. E. 321; Smith v. Aultman, 120 Mo. App. 462, 96 S. W. 1034.

16. Courts do not take judicial notice of statutes and decisions of other states. Loyal Mystic Legion of America v. Brewer [Kan.] 90 P. 247; App v. App [Va.] 55 S. E. 672; Norfolk & W. R. Co. v. Denny's Adm'r [Va.] 56 S. E. 321.

17. Christiansen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97. Proof is not for the jury but for the judge who is not bound by opinions of witnesses but whose duty it is at law to decide the law himself, aided by these opinions and such other sources of information as are accessible to him. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93.

18. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93. The written law of a foreign country must be proved by the production, duly authenticated, of the law itself or by the reports or other authorized publications, duly proved, of such law. Authentication of secretary of state under great seal of state is sufficient under Code, § 420. Topliff v. Richardson [Neb.] 107 N. W. 114. Under Cobbey's Ann. St. 1903, § 1381, parol proof of statutes and constitution of another state, inadmissible. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718. Hurd's Rev. St. 1905, p. 1036, c. 51, § 10, providing that printed statute books of the United States and of the several states and territories, purporting to be printed under the authority of said United States, or any state or territory, shall be evidence in courts and places in this state of the acts therein contained, construed. McCraney v. Glos, 222 Ill. 628, 78 N. E. 921. Ky. St. 1903, § 164a, providing manner of proof of printed laws of any state, held to be complied with. Graziani v. Burton, 30 Ky. L. R. 180, 97 S. W. 800. Proof by certified copy is not exclusive of every other means of proof. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93.

19. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718. Laws regarding duties of railroads. Norfolk & W. R. Co. v. Denny's adm'r [Va.] 56 S. E. 321. Statute of limitations. Smith v. Aultman, 120 Mo. App. 462, 96 S. W. 1034. Where judge charged that law of foreign state was same as lex fori and the action maintainable held no error in excluding two decisions, in point of the highest court of the foreign state. Austin v. Whitcher [Iowa] 110 N. W. 910.

20. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718. Statutes regarding mortgages. Mantel v. Dabney [Wash.] 87 P. 122. Usury laws. Betz v. Wilson, 17 Okl. 383, 87 P. 844. So held, as to Arkansas law as to conditional sales. Star Clothing Mfg. Co. v. Nordeman [Tenn.] 100 S. W. 93. Nebraska statute presumed same as Iowa Code, 3541, providing that appearance for any purpose connected with the cause will be taken to be a general appearance. Bank of Horton v. Knox, 113 Iowa, 443, 109 N. W. 201.

21. Ellington v. Harris, 127 Ga. 85, 56 S. E. 134.

22. Attorney General v. Supreme Council A. L. H. [Mass.] 81 N. E. 966.

23. So held as to Louisiana. Allen v. Caldwell, Ward & Co. [Ala.] 42 So. 855.

24. Not having been proved, law of Wisconsin presumed to be the common law as understood and enforced by the courts of the forum. Jonesville Mfg. Co. v. Southern R. Co. [S. C.] 58 S. E. 422.

25. See 7 C. L. 681.

26. Negligent injury to servant. Christiansen v. William Graver Tank Works, 126 Ill. App. 86.

of action being transitory, it may be enforced in any state or county whose public policy is not opposed to the recognition and enforcement thereof,[27] even though by its terms it requires all actions under it to be brought in its own courts alone.[28] In such cases, unless contrary to the public policy of the forum, the right of action,[29] the plaintiff's legal capacity to sue,[30] and the time within which the action may be brought depend solely on the statute of the state where the wrongful act is committed.[31] The practice of the lex fori in respect to pleadings, amendments, and the general mode of procedure will control if it differs from the practice in the state where the cause of action arose.[32] An action for wrongful death by collision on the high seas is governed by law of state to which the vessel at fault belonged.[33] An action for injury to animals in one state is transitory and maintainable anywhere that jurisdiction may be had of the defendant.[34] The right to sue for mental suffering caused by the failure to deliver a telegram is governed by the law of the state from which it was sent,[35] as well as the measure of damages.[36]

Confusion of Goods; Connecting Carriers; Consideration; Consolidation, see latest topical index.

CONSPIRACY.

§ 1. Civil Liability (601).
§ 2. Criminal Liability (603). Limitations (606). Indictment (606). Variance (608). Evidence (608). Instructions (610).

27. Free v. Southern R. Co. [S. C.] 58 S. E. 952. Action under West Virginia law. maintainable in Virginia. Norfolk & W. R. Co. v. Denny's Adm'r [Va.] 56 S. E. 321. An action will be in Utah for wrongful death occurring in another state, brought by the administrator in the county where he resided. Stone v. Union Pac. R. Co. [Utah] 89 P. 715. Action under Kan. St. 1897, c. 95, § 418, Dassler's Comp. Kan. Gen. St. 1899 §§ 4686, 4687, is maintainable in Missouri. Charlton v. St. Louis, etc., R. Co., 200 Mo. 413, 98 S. W. 529. Minnesota Statute creating right of action for wrongful death, held not to be contrary to public policy of New Jersey. Keep v. National Tube Co. 154 F. 121. The rule established by the weight of authority is that if a statute of the forum creates a right of action for damages resulting from death caused by wrongful act, neglect, or default, a foreign statute creating such right will be enforced, if the two statutes be not so dissimilar as to establish substantially different policies. It is not necessary that the statutes shall be precisely the same. Mere dissimilarities as to the persons in whose names actions may be brought, or in the amounts recoverable, will not defeat jurisdiction. Substantial similiarity is all that is required. Id.

28. Const. U. S., art. 4, § 1, does not require the courts of Texas to recognize the validity of a New Mexico statute containing that provision. Atchison, etc., R. Co. v. Sowers [Tex. Civ. App.] 99 S. W. 190.

29. Cason's Adm'r v. Covington & C. El. R. Co., 30 Ky. L. R. 352, 98 S. W. 304; Swisher v. Atchison, etc., R. Co. [Kan.] 90 P. 812; Le Bar v. New York, etc., R. Co. [Pa.] 67 A. 413. Suit for injuries received in Indiana which employed under a contract made and to be performed there, governed by Indiana law. Christiansen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97. Fellow servant rule of foreign state, applied. Morrison v. San Pedro, etc., R. Co. [Utah] 88 P. 998. Action dismissed because Pennsylvania statute did not entitle nonresident aliens to recover. Gurofsky v. Lehigh Valley R. Co., 105 N. Y. S. 514. State cannot by statute enacted after death close its courts to action under statute of sister state. Brennan v. Electrical Installation Co., 120 Ill. App. 461.

30. Where a widow sued in her own right for death of husband instead of as executrix, as required by New Jersey law, held too late to amend after statute of limitations had become a bar. Le Bar v. New York, etc., R. Co. [Pa.] 67 A. 413.

Contra: Such an amendment was allowed on the ground that it did not substitute a new party or make a new cause of action so as to open the case to the statute of limitations. Atlanta K. & N. R. Co. v. Smith [Ga. App.] 58 S. E. 106.

31. The fact that the foreign statute prescribes a longer period of limitations for suits brought under it than the local statute does not make it contrary to the public policy of the forum. Keep v. National Tube Co., 154 F. 121.

32. Amendments. Atlanta, etc., R. Co. v. Smith [Ga. App.] 58 S. E. 106.

33. The Hamilton [C. C. A.]146 F. 724. Collision between two Delaware ships, governed by Delaware law. Id.

34. Governed by law of state where injury occurred. Kansas City Southern R. Co. v. Ingram, 80 Ark. 269, 97 S. W. 55.

35. Doctrine not recognized in Virginia. Johnson v. Western Union Tel. Co. [N. C.] 57 S. E. 122. Governed by law of Indian Territory which is Federal common law. Western Union Tel. Co. v. Pratt, 18 Okl. 274, 89 P. 237. Question has not been passed upon by courts of Arizona or supreme court of U. S. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354.

36. Damages allowed under Federal common law. Western Union Tel. Co. v. Pratt, 18 Okl. 274, 89 P. 237. No damages in Virginia. Johnson v. Western Union Tel. Co. [N. C.] 57 S. E. 122.

The topic excludes joint civil [37] and criminal [38] liability apart from conspiracy, measure of damages,[39] relief by way of injunction,[40] and punishment for violation of injunctions,[41] and also prosecutions for felony committed in pursuance of conspiracy.[42]

§ 1. *Civil liability.*[43]—Generally stated, a conspiracy results from any agreement of two or more persons to do an unlawful act or accomplish an unlawful purpose by any means, or to do a lawful act or accomplish a lawful purpose by unlawful means.[44] Either the act conspired or the manner of its doing must be unlawful.[45] Such a conspiracy is actionable if injury is committed pursuant to it,[46] and it is not essential that the means employed or that the act to be done should be criminal,[47] but the fact that it is criminal is immaterial.[48] Acts that may be innocent when done by an individual without co-operation may become unlawful when performed by agreement.[49] A voluntary combination for the purpose of contracting or refraining therefrom, irrespective of motive, is unlawful,[50] but the creation by coercion of an involuntary combination, the effect of which is to abridge the right to contract or refrain therefrom, to the detriment of another, is unlawful.[51] The deprivation of property rights in pursuance of an unlawful agreement made with intent to defraud constitutes an actionable conspiracy.[52] Agreements having for their object the breach of a contract,[53] to defraud creditors,[54] or others,[55] are unlawful. But or-

37. See Contracts, 7 C. L. 761; Torts, 8 C. L. 2125; Parties, 8 C. L. 1236, and like topics.

38. See Criminal Law, 7 C. L. 1010.

39. See Damages, 7 C. L. 1029.

40. See Injunction, 8 C. L. 279.

41. See Contempt, 7 C. L. 746.

42. See Criminal Law, 7 C. L. 1010, as to liability of principal's and accessories; Indictment and prosecution, 8 C. L. 189, as to acts and declarations of coconspirators; and titles of particular crimes as to what constitutes participation therein.

43. See 7 C. L. 681.

44. White v. White [Wis.] 111 N. W. 1116; Murray v. Joseph, 146 F. 260.

45. Jetton-Dekle Lumber Co. v. Mather [Fla.] 43 So. 590. Members of a fraternal order confederating for purpose of expelling a member for "unbecoming" and "improper" conduct within the meaning of the constiutution and by-laws of the order, held not liable for conspiracy. Moon v. Flack [N. H.] 65 A. 829.

46. Exchange Bk. v. Moss [C. C. A.] 149 F. 340; White v. White [Wis.] 111 N. W. 1116. Proceedings by trustee in bankruptcy to recover value of money and property transferred in fraud of creditors in pursuance of agreement between bankrupt and another. Murray v. Joseph, 146 F. 260. May recover whether transfer before or after bankruptcy occurs. Murray v. Joseph, 146 F. 260. The gist of an action to recover compensation is not the conspiracy charged but the damages resulting from the tort. White v. White [Wis.] 111 N. W. 1116; Wyeman v. Deady, 79 Conn. 414, 65 A. 129; James v. Evans [C. C. A.] 149 F. 136; Woodruff v. Hughes, Ga. App. 58 S. E. 551. Yet the conspiracy may be pleaded and proved in aggravation of the wrong complained of for the purpose of enabling a recovery against all the conspirators as joint tortfeasors. Wyeman v. Deady, 79 Conn. 414, 65 A. 129; Woodruff v. Hughes [Ga. App.] 58 S. E. 551.

47. Malicious separation of husband and wife. White v. White [Wis.] 111 N. W. 1116. Transfer of property in fraud of creditors. Murray v. Joseph, 146 F. 260. If done before the bankruptcy occurs it is an illegal act, or if after bankruptcy, and is knowingly and intentionally done, it is both an illegal and criminal act under the bankruptcy law. Id.

48. Murray v. Joseph, 146 F. 260; New York Cent. Iron Works Co. v. Brennan, 105 N. Y. S. 865. Motion to dissolve injunction, denied. New York Cent. Iron Works v. Brennan, 105 N. Y. S. 865. Carrying out of conspiracy to destroy or injure business of a manufacturing corporation, lawfully conducted, will be enjoined, though such acts may be criminally prosecuted. Id. On application for preliminary injunction to restrain striking employes and labor unions from interfering with complainant's business, evidence of wrongful acts sufficient to satisfy court that the allegations of the complaint are true answers requirements. Id.

49. Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753. Conduct of pickets may amount to coercion and intimidation, although no act is done that would be unlawful if done by a single person, where the concerted, persistent harrassing of workmen amounting to a threat produces fear. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155.

50. Booth v. Burgess [N. J. Eq.] 65 A. 225.

51. Booth v. Burgess [N. J. Eq.] 65 A. 226. Injunction granted restraining officers of labor unions from coercing employes of boss carpenters to strike, the object being the boycott of a manufacturer of "unfair" goods. Id. The creation by coercion of an involuntary combination among employes, to effect a boycott, does not constitute the persons in the combination conspirators. Id.

52. Murray v. Joseph, 146 F. 260; Exchange Bk. v. Moss [C. C. A.] 149 F. 340.

53. Malicious alienation of affection, causing husband to desert. White v. White

ganization and co-operation for legitimate and lawful purposes is not unlawful,[56] and combinations having as a purpose the promotion of economic means of protection and legitimate competition may be lawful,[57] although having the apparent effect of injuring or destroying the interests of others.[58] However, an agreement the object of which is to injure another in his employment, through malice [59] or by any other means, whether direct [60] or indirect,[61] is unlawful; and this rule embraces the maintenance of pickets for the purpose of threatening, intimidating, and using personal violence to coerce,[62] although the employment of pickets who use peaceable persuasion and do no acts of violence is not unlawful.[63] A combination formed for the purpose of driving a competitor out of business by suppressing competition by the destruction of lawful business,[64] restraining trade [65] or business,[66] is unlawful,

[Wis.] 111 N. W. 1116. Complaint is not demurrable for insufficiency which states a criminal conspiracy under Wis. St. 1898, § 4466a, and alleging, also, consummation of purpose, damage, and stating generally means employed, although such complaint partially or in toto may be subject to motion to make more definite and certain. Id. As to conspiracy, every essential of § 4466a, St. 1898, need not be satisfied, the essentials of common-law conspiracy answering all requirements. Id.

54. Murray v. Joseph, 146 F. 260.

55. James v. Evans [C. C. A.] 149 F. 136. Money swindled by pretended foot races. Exchange Bk. v. Moss [C. C. A.] 149 F. 340. Held, not the duty of the trial court to reform a requested instruction and to cut out such parts as render it improper as a whole. Id.

56. New York Cent. Iron Works Co. v. Brennan, 105 N. Y. S. 865; Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155. Refusal to work, and peaceable strike by union laborers in order to secure all the labor for themselves, is not violation of Fla. Laws 1893, c. 4144, p. 69, prohibiting wrongful combinations against workmen. Jetton-Dekle Lumber Co. v. Mather [Fla.] 43 So. 590. Injunction denied. Id. The English common law, including statutes engrafted into it, as to criminal conspiracy, is not so consonant with the spirit of our government as to control the discretion exercisable in granting or refusing injunctions against laborers who refuse to work. Id.

57. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155. Combinations between bricklayers' and masons' unions to compete for the additional work of pointing buildings they construct is lawful, though it may interfere with the business of regular pointers. Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753. But organized laborers' right of coercion is limited to strikes on persons with whom the organization has a trade dispute. Id. Association of retail dealers may combine and agree among themselves not to purchase from wholesalers and jobbers selling to catalogue or mail order houses, and to inform each other what wholesalers and jobbers sell to such houses. Montgomery Ward & Co. v. South Dakota Retail Merchants' Ass'n, 150 F. 413. Interference with one's right to buy goods by persuasion or peaceable means exerted against sellers does not constitute unfair competition, intimidation, or coercion. Id.

58. Contempt proceedings against labor union for violating injunction against inducing or directing strike to injure business. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155. Combination among retailers to compete with "mail order" houses. Montgomery Ward & Co. v. South Dakota Retail Merchants', etc., Ass'n, 150 F. 413. Injunction denied. Id.

59. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155. The constant maintenance of pickets by strikers after repeated acts of violence, the use of abusive epithets, and the creation of an unfriendly atmosphere surrounding workmen by such pickets, constitutes a conspiracy for the purpose of willfully or maliciously injuring the business of the employer, within the meaning of Rev. St. Wis. 1898, § 4466a, which makes such a conspiracy a criminal offense, and is a violation of an injunction against such conspiracy. Id.

60. New York Cent. Iron Works Co. v. Brennan, 105 N. Y. S. 865. Where defendants participated in a plan to induce employes to leave their employment, assisted in maintaining an unlawful picketing system, etc., in violation of an injunction order, injury to the employers will be presumed. Flannery v. People, 225 Ill. 62, 80 N. E. 60. Or proceedings for contempt for violating injunction. Id.

61. Conspiracy to procure plaintiff's discharge by threatening and intimidating his employers. Wyeman v. Deady, 79 Conn. 414, 65 A. 129.

62. Pope Motor Car Co. v. Keegan, 150 F. 148; contempt proceedings for violating injunction. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155; Pope Motor Car Co. v. Keegan, 150 F. 148. Interference by threats, intimidation, or coercion to compel concessions, or, as an alternative, the destruction of business, enjoined. New York Cent. Iron Works Co. v. Brennan, 105 N. Y. S. 865.

63. Injunction denied. Pope Motor Car Co. v. Keegan, 150 F. 148. Modification of blanket injunction against striking members of labor union that permitted the union peaceably to enforce its rules against members, even to expulsion of those working for employers of nonunion labor, affirmed. Jetton-Dekle Lumber Co. v. Mather [Fla.] 43 So. 590.

64. A voluntary association comprising numerous firms and corporations doing business over extended territory, having organized a subsidiary organization for purpose of competition, the duty of whose agents was to follow salesmen of competitors, harass,

regardless of its form,[67] and although the acts, if done by an individual without cooperation, might be legal.[68] Each party to the combination is liable, irrespective of the degree of his activity in effecting the unlawful purpose.[69] A verdict will lie against any one or more of the defendants,[70] without proof of a conspiracy among them all where the tort would be actionable if committed by one alone,[71] since in such case the allegation of conspiracy is surplusage except as to the rules of admission of evidence, making admissions and statements of one of the conspirators binding on the rest,[72] and the discharge of one or more defendants does not necessarily discharge all.[73] A complaint is not demurrable for misjoinder of causes of action unless two or more causes of action are pleading which are not joinable.[74] If malice is not essential to a sufficient statement of the cause of action, averment and proof of other malice than that which the law implies from the unlawful act proved is not required.[75] The allegation of conspiracy is not essential in an action against two or more defendants jointly for procuring plaintiff's discharge by threats and intimidation.[76] Presumptions and burden of proof,[77] admissibility [78] and sufficiency of evidence, is considered in the note.[79]

§ 2. *Criminal liability.*[80]—A conspiracy is formed when two or more persons in any manner, or through any contrivance, positively or tacitly come to a mutual

intimidate, etc., enjoined. Spaulding v. Evenson, 149 F. 913. Association liable for acts of such branch association to same extent as if acts had been done by entire membership. Id. Unnecessary to make all members parties to bill for injunction where representative committee or regularly constituted officers are sued. Id.

65. Booth v. Burgess [N. J. Eq.] 65 A. 226. Officers of labor union enjoined from directing or inducing by threats, etc., the employes of boss carpenters to strike against their will for purpose of creating boycott of "unfair" goods of manufacturer declaring for "open shop." Id.

66. American Freehold Land Mortg. Co. v. Brown [Tex. Civ. App.] 101 S. W. 856.

67. Action for conspiracy to weaken and destroy business by false and malicious statements. American Freehold Land Mortgage Co. v. Brown [Tex. Civ. App.] 101 S. W. 856. Omission to define malice, held not fatal to charge. Id. Instruction refused tending to lead jury to believe they could find for plaintiff whether or not statements were falsely, fraudulently and maliciously made for purpose of breaking plaintiffs' business up. Id. Officers of labor union having created by coercion an involuntary combination among employes of boss carpenters, to prevent the use by employers of "unfair" goods, in order to effect a boycott of manufacturer declaring for "open shop," were enjoinable from directing or inducing employes to effect a boycott of manufacturer declaring for "open shop," were enjoinable from directing or inducing employes to strike. Booth v. Burgess [N. J. Eq.] 65 A. 226. Officers of the unions were not justified in interfering with market of manufacturer by coercing employes of boss carpenters. Id. The persons in the combination are not conspirators. Id.

68. Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753; Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155.

69. White v. White [Wis.] 111 N. W. 116.

70. James v. Evans [C. C. A.] 149 F. 136.

71. Conspiracy to cheat and defraud of property. James v. Evans [C. C. A.] 149 F. 136. Verdict against one of two defendants, construed in favor of other. Id.

72. State v. Caine [Iowa] 111 N. W. 443; State v. Crofford, 133 Iowa, 478, 110 N. W. 921; Hutchinson v. State, 8 Ohio C. C. (N. S.) 313.

73. James v. Evans [C. C. A.] 149 F. 136.

74. White v. White [Wis.] 111 N. W. 1116.

75. Wyeman v. Deady, 79 Conn. 414, 65 A. 129. In action for damages for procuring plaintiff"s discharge by threats and intimidation, it is not necessary to aver or prove malice. Id. Though it may be pleaded and proved as an allegation of fact in aggravation of the injury complained of. Id.

76. Wyeman v. Deady, 79 Conn. 414, 65 A. 129.

77. Plaintiff has the burden of proof (Murray v. Joseph, 146 F. 260), and must establish his claim by a preponderance of evidence (Id.).

78. Evidence of similar acts and declarations made under similar circumstances admitted to show guilty intent and motive, in action to recover money obtained by conspiracy to swindle. Exchange Bk. v. Moss [C. C. A.] 149 F. 340.

79. Evidence insufficient to show that the vendor and the agent negotiating sale of land to corporation were parties to a conspiracy to defraud the corporation by selling the land to it at a price in excess of that at which it was purchased. South Missouri Pine Lumber Co. v. Crommer, 202 Mo. 504, 101 S. W. 22. Proof that defendants were joint tortfeasors in performing the acts charged is sufficient proof of the conspiracy. Wyeman v. Deady, 79 Conn. 414, 65 A. 129. "A labor union and its walking delegate, who procured plaintiff's discharge from employment by means of threats made to plaintiff's employers, with the knowledge, approval and authority of the union, were liable for plaintiff's discharge as joint tortfeasors." Id.

80. See 7 C. L. 685.

understanding to accomplish by their united action a crime or unlawful purpose,[81] or a lawful purpose by criminal means.[82] In the absence of statute, an overt act is not necessary to constitute the offense.[83] Conspiracies to embezzle funds,[84] to obtain money by false pretenses,[85] to burn a building,[86] to produce abortion,[87] and, in some states, to break and enter a jail for purpose of lynching,[88] or to commit election frauds,[89] are indictable offenses. Section 5440 of the Revised Federal Statutes covers all conspiracies to commit any offense against the United States.[90] Under it convictions for conspiracy may be had if in addition to the agreement any of the parties do any act to effect its object,[91] such act, though done by one of the conspirators,

81. United States v. Cole, 153 F. 801; United States v. Richards, 149 F. 443.

82. United States v. Greene, 146 F. 803. The essence of the offense is the unlawful combination. Id.

83. At common law the conspiracy was ripe when the secret agreement had been reached by and among the conspirators. Ex parte Black, 147 F. 832. As agreement by several to a common design embraced the probability of success, and consequent injury to society, the mere unlawful agreement was indictable at common law, and is indictable in many, if not all, of the states. United States v. Greene, 146 F. 803.

84. Imboden v. People [Colo.] 90 P. 608. Instruction not objectionable as misleading jury to believe prosecution to be for substantive offense, and not conspiracy to commit same. Id. The jury being specifically charged that defendants were being tried for the offense as charged, an instruction was not prejudicial that contained the conspiracy statute providing that if two or more persons conspire to do or "to aid" in the doing of a wrongful act each shall be guilty, etc., on the ground that defendants were not charged with "aiding" but with "doing" the unlawful act. Id. Where the offense is defined in the instruction, and the jury charged if defendant did unlawfully and feloniously agree and co-operate to do the act alleged, etc., and are told that the design and purpose formed must have been the commission of the offense mentioned in the indictment, an instruction that the common design and unlawful purpose by two or more persons is the essence of the charge of conspiracy is not prejudicial which fails to define with certainty the meaning of "common design." Id.

85. Indictment sufficient. Imboden v. People [Colo.] 90 P. 608. Instruction not objectionable, as misleading jury to believe defendant on trial for substantive crime, and not conspiracy to commit same. Id.

86. Hutchinson v. State, 8 Ohio C. C. (N. S.) 313.

87. Prosecution for murder resulting from abortion in pursuance of a conspiracy. State v. Crofford, 133 Iowa, 478, 110 N. W. 921. Female upon whom abortion is attempted may conspire with others to commit it. Id. Letter from third person to decedent bearing date prior to formation of conspiracy, though in fact written subsequent to it, held admissible. Id.

88. N. C. Revisal 1905, § 3698. State v. Lewis, 142 N. C. 626, 55 S. E. 600. Indictment not defective for omitting to name "others" in conspiracy. Id.

But the lynching of a citizen of the United States, in pursuance of a conspiracy between other citizens, to which a state is not a party, is not a violation of any right, privilege or immunity secured under the Federal constitution or laws, or a violation of any Federal law prescribing punishment for same. United States v. Powell, 151 F. 648. Rev. Fed. St. §§ 5508 and 5509, held not applicable Id. Demurrers to indictment sustained. Id.

89. Fraudulently assessing and placing voters on assessor's list. Commonwealth v Valverdi [Pa.] 66 A. 877. That an election clerk with full knowledge of election frauds signed the returns without objection, sufficiently shows participation in the conspiracy. Commonwealth v. Williams, 31 Pa. Super. Ct. 372.

90. Van Gesner v. U. S. [C. C. A.] 153 F. 46. An indictment merely alleging a violation of the interstate commerce act, as amended by the Elkins Act, abolishing imprisonment as a punishment for offenses committed against the interstate commerce act, in giving and receiving rebates, is not sustainable under § 5440 as alleging a conspiracy, etc., punishable by imprisonment. United States v. New York, etc., C. R. Co., 146 F. 298. Demurrer sustained. Id. The offense defined by § 5440 is a continuing one so long as it is in process of execution, as shown by overt acts in pursuance thereof. United States v. Brace, 149 F. 874. Prosecutions being limited to one conspiracy, irrespective of the number of overt acts committed in pursuance of it. Id. But under Rev. Fed. St. § 5480 (U. S. Comp. St. 1901), relating to use of mails for fraudulent purposes, each overt act of mailing a letter or withdrawing a letter warrants a charge of conspiracy to commit such offense, and an indictment therefor will not bar a subsequent indictment for another conspiracy of the same person to commit another and additional offense, though of the same kind. Francis v. U. S. [C. C. A.] 152 F. 155.

91. United States v. MacAndrews & Forbes Co., 149 F. 823; Van Gesner v. U. S. [C. C. A.] 153 F. 46; United States v. Greene, 146 F. 803; United States v. Cole, 153 F. 801; United State v. New York Cent. & H. R. R. Co., 146 F. 298. The act must be a subsequent independent act following a complete agreement of conspiracy, and done prior to consummation, to carry into effect the object of the original combination. United States v. Richards, 149 F. 443. The policy of the statute is not to introduce a new element into the crime, but to allow a period of grace, an opportunity for repentance, after the plot has been perfected, and before any decisive act has been done in furtherance of it. Ex parte Black, 147 F. 832. But when anything is

completing the offense as to all, and making each amenable to the law,[92] but only to the extent that they are the natural and probable outcome of the unlawful agreement.[93] Conspiracies to use the mail for fraudulent purposes,[94] to hold in condition of peonage,[95] to injure one in his trade or occupation,[96] and to create a monopoly, in restraint of interstate commerce,[97] whether partial or total,[98] are indictable. Agreements by which the title acquired by an entryman under the Stone and Timber Act inures to the benefit of another in whole or in part is in violation of that act, and an indictable offense,[99] as are agreements to defraud the United States in respect to homestead [1] and timber culture entries,[2] or other public lands.[3] A conspiracy once established, each conspirator becomes responsible for means used and acts done by any conspirator in accomplishing the purpose of the conspiracy,[4] though absent at the time,[5] but only to the extent that they are within the contemplation of the conspiracy, or are the natural and probable outcome thereof.[6] When the concurrent action of two or more persons is necessary to perpetrate a crime, liability for its commission can not be increased by charging a conspiracy to commit, the conspiracy and substantive offense being identical.[7] A corporation is amenable to punishment

done by one of the conspirators to effect its object it is regarded by law as such an aggravation of the conspiracy that there is no longer a place for repentance, and in the penalties of the statutes attach. United States v. Greene, 146 F. 803.

92. United States v. Richards, 149 F. 443. In contemplation of law the act of one is the act of all, and each is responsible for any act of his associate, or associates, done to effect the object of the crime. United States v. Greene, 146 F. 803. The overt act need not be that of an alleged conspirator actually on trial, but, the conspiracy being established, the acts of either one or more or all the persons indicted may be considered to ascertain if any act was done to effect the object of the conspiracy. Id.

93. State v. Keleher, 74 Kan. 631, 87 P. 738.

94. Violation of Rev. St. §§ 5480 (U. S. Comp. St. 1901). Francis v. U. S. [C. C. A.] 152 F. 155. Each overt act of mailing a letter pursuant to a scheme to defraud, or withdrawing a letter from the postoffice, warrants a charge of conspiracy to commit such offense, and an indictment therefor will not bar a subsequent indictment for another conspiracy to the same person to commit another and additional offense, though of the same kind. Id.

95. United States v. Cole, 153 F. 801.

96. Instructions as to elements of offense of conspiracy to injure persons not members of a certain trade union, approved. Johnson v. People, 124 Ill. App. 213. Evidence held insufficient to show conspiracy of members of executive committee of trade union to injure persons not members of such union. Id.

97. In violation of anti-trust law, § 2, Act of July, 1890, c. 647 (26 Stat. 209, U. S. Comp. St. 1901, p. 3200). United States v. MacAndrews & Forbes Co., 149 F. 823.

98. Monopoly of larger portion of licorice paste consumed in the United States. United States v. MacAndrews & Forbes Co., 149 F. 823. Combinations to be violative of this law, as in restraint of interstate commerce, need not totally suppress trade, nor completely monopolize, but is sufficient if its necessary operation tends to restrain and to deprive the public of the advantage flowing from free competition. United States v. MacAndrews & Forbes Co., 149 F. 823.

99. Subornation of perjury to acquire. Van Gesner v. U. S. [C. C. A.] 153 F. 46.

1. Stearns v. U. S. [C. C. A.] 152 F. 900. And such fraud is within Rev. Fed. St. § 5440, although there is no purpose to carry the preliminary entries to final entry and patent. Id.

2. United States v. Burkett, 150 F. 208.

3. Conspiracy to defraud by obtaining, in violation of law respecting sale, title to public land by false applications for purchase. United States v. Brace, 149 F. 874.

4. Trial for murder committed by alleged coconspirator. State v. Kelcher, 74 Kan. 631, 87 P. 738. One joining a conspiracy after its inception and before its consummation, adopts and thereby becomes liable for the acts of his associates. State v. Crofford, 133 Iowa, 478, 110 N. W. 921. Trial for murder due to abortion performed in pursuance of alleged conspiracy. Id. Where there is a conspiracy to commit robbery, the knowledge of one conspirator that the person robbed had the money on his person would be imputed to the other conspirators. People v. Stokes [Cal. App.] 89 P. 997.

5. State v. Keleher, 74 Kan. 631, 87 P. 738; State v. Crofford, 133 Iowa, 478, 110 N. W. 921.

6. State v. Keleher, 74 Kan. 631, 87 P. 738. Conspiracy to steal money from barn where it was supposed to be hidden is not such a conspiracy as would naturally and probably result in the murder of the owner of the money at a place remote from barn, and under circumstances in no way connected with obtaining money from barn. Id. In the absence of evidence showing any connection between the conspiracy and the murder, except that the murder was for the purpose, on the part of the slayer, to obtain the money, it was error to instruct jury that they might find the absent conspirator, on trial for the murder, guilty as charged, if they found that the murder was the natural and probable outcome of the conspiracy. Id.

7. United States v. New York Cent. & H.

for complicity in a criminal conspiracy,[8] and a corporation and its officer or agent are not one person in law and may conspire together.[9]

Limitations run from the last overt act.[10] Where a conspiracy is formed and an overt act committed at a time outside the period of limitations, to sustain a conviction on a subsequent act within such period the existence of the conspiracy and the conscious participation of accused therein within such period must appear.[11]

Indictment.[12]—In North Carolina an indictment charging a conspiracy may be found in a county adjoining the one where the crime was committed.[13] Certainty to a common intent, sufficient to identify the offense charged, is all that is required.[14] When the charge is of a conspiracy to commit an offense, it is not required that the offense be described with the same precision as would be required on indictment for the substantive offense.[15] A description of the offense conspired to be committed, in the language of the creative statute, is sufficient,[16] yet an omission to name the offense makes imperative the allegation of facts constituting every element necessary to establish the offense as fully as if the indictment was for its perpetration.[17] The indictment may charge intent to injure persons of a specified class without naming any of them.[18] The offense may be charged in different forms to meet the testimony, and it is not objectionable that acts constituting parts of the same offense are contained in several counts.[19] An averment restricted to one transaction is not supported by proof of a general conspiracy.[20] The charge being against several persons, a finding will be supported if the guilt of at least two is shown, as it is not essential to establish the guilt of all charged.[21] Acquittal of one jointly charged with a crime, committable by one person, does not bar proceedings against

R. R. Co., 146 F. 298. Hence, an indictment under the "Elkins Act," Act. Cong. Feb. 19, 1903, c. 708 (32 Stat. 847, U. S. Comp. St. Supp. 1905, p. 599), abolishing imprisonment for violations of acts against the interstate commerce act, that merely alleges a violation of the interstate commerce act, by the giving and receiving of rebates, as amended by the Elkins Act, is demurrable. Id. Demurrer sustained. Id.

8. United States v. MacAndrews & Forbes Co., 149 F. 823. In an indictment under the anti-trust law of July 2, 1890, c. 647 (26 Stat. 209, U. S. Comp. St. 1901, p. 3200), the offenses thereunder being made misdemeanors, all who aid in the commission may be charged as principals, and a corporation and its officers who personally participate in committing the same may be joined as defendants, although their acts may have been separate and not done at the same time. Id.

9. Standard Oil Co. v. State [Tenn.] 100 S. W. 705.

10. United States v. Brace, 149 F. 874.

11. Ware v. U. S. [C. C. A.] 154 F. 577. Proof of his participation in the original conspiracy is competent but not sufficient without evidence showing continuance of such participation to a time within the statute. Id.

12. See 7 C. L. 687.

13. Under N. C. Revisal 1905, § 3233, held constitutional. State v. Lewis, 142 N. C. 626, 55 S. E. 600.

14. Van Gesner v. U. S. [C. C. A.] 153 F. 46.

15. Indictment charging conspiracy to defraud the United States by subornation of perjury in proceeding to acquire public lands, held sufficient. Van Gesner v. U. S. [C. C. A.] 153 F. 46.

16. Imboden v. People [Colo.] 90 P. 608. Under Mills' Ann. St. Colo. § 1455, an indictment for conspiracy to defraud a bank of money is sufficient if it describes same without specifying particular coin or note. Id.

17. Imboden v. People [Colo.] 90 P. 608.

18. Those not members of a certain trade union. Johnson v. People, 124 Ill. App. 213.

19. Indictment charging, in one count, confederation to injure certain persons by assaulting them, and, in another, charging confederation to do an act injurious to the public police, and to injure the property of a named corporation by assaulting, etc., persons employed in seeking employment from the corporation, held not duplicitous under Code of Iowa, prohibiting charging of more than one offense in the same indictment. State v. Cain [Iowa] 111 N. W. 443. Indictment, under anti-trust law, charging in separate counts a combination and a conspiracy in restraint of interstate commerce and an attempt to monopolize a portion of such commerce, all based on the same transactions, held not bad for duplicity as to either count. United States v. MacAndrews & Forbes Co., 149 F. 823. Embezzlement and false pretenses. Imboden v. People [Colo.] 90 P. 608.

20. Rabens v. U. S. [C. C. A.] 146 F. 978. On indictment for conspiracy to rob a postoffice at a place named, evidence showing a general conspiracy to rob banks and everything else "robable" is competent. Id. Evidence tended to show general conspiracy to rob but there was no evidence connecting accused with conspiracy to rob postoffice at the place designated in the indictment. Id. Judgment of conviction reversed. Id.

21. Commonwealth v. Valverdi [Pa.] 66 A. 877, afg. Commonwealth v. Valverdi, 32 Pa. Super. Ct. 241.

the other, although the crime is committed pursuant to a conspiracy between them.[22] An indictment defective in that it omits an essential element of the offense cannot be aided by the statement of acts to effect the object of the conspiracy,[23] although reference may be had to such statement in construing terms of charge.[24] Where it is essential to allege an overt act, the allegation must be of an act subsequent to and independent of the complete agreement,[25] and done before the consummation of the conspiracy,[26] although it is unnecessary to set forth all of the overt acts done or necessary to be done to render the object effective.[27] It is not necessary to allege that perjury was willfully committed where the facts alleged necessarily import willfulness,[28] to aver with exact accuracy the date of the formation of the conspiracy [29] or that the conspiracy was consummated as designed,[30] to set forth the means by which the conspiracy was to be accomplished where its object in itself is unlawful;[31] nor to set out the names of all parties conspiring in an indictment charging a part only.[32] An indictment containing several counts is sufficient to support a conviction on counts charging two or more overt acts, provided the evidence establishes the commission of at least one of them.[33] Indictments passed on are collected in the note.[34]

22. Prosecution for murder resulting from attempted abortion, in pursuance of alleged conspiracy. State v. Crofford, 133 Iowa, 478, 110 N. W. 921.

23. Stearns v. U. S. [C. C. A.] 152 F. 900; Van Gesner v. U. S. [C. C. A.] 153 F. 46.

24. To ascertain the sense in which terms are used in charging the conspiracy Stearns v. U. S. [C. C. A.] 152 F. 900.

25. United States v. Richards, 149 F. 443. Indictment held not defective for uncertainty in setting out overt acts performed in pursuance of conspiracy to defraud the government of title to lands entered under timber culture claims. United States v. Burkett, 150 F. 208.

26. Overt act alleged in indictment for conspiracy to defraud in respect to entries under Timber and Stone Act, held ineffective, where it occurred after consummation of conspiracy. Ex parte Black, 147 F. 832. An act appertaining to the conspiracy itself is insufficient. Id.

27. United States v. Burkett, 150 F. 208.

28. Not fatal error for indictment to omit to use word "willfulness" in charging commission of offense by subornation of perjury in proceedings to acquire public lands, where the facts alleged necessarily import willfulness. Van Gesner v. U. S. [C. C. A.] 153 F. 46.

29. Indictment under § 5440, Rev. Fed. St. Bradford v. U. S. [C. C. A.] 152 F. 617. If the date is alleged it need not be proved as laid, but it is sufficient if the conspiracy is proved to have existed prior to the commission of the overt act charged, and that it continued to exist at that time. Id. An indictment under §§ 1 or 2 of the anti-trust law of July 2, 1890, c. 647 (26 Stat. 209, U. S. Comp. St. 1901, p. 3200), for engaging in a combination in restraint of interstate commerce, or for attempting to monopolize a portion of the same, sufficiently sets out the time of the combination or attempted monopoly when it alleges the time when the several acts relied on to establish the offense were done. United States v. MacAndrews & Forbes Co., 149 F. 823.

30. It is sufficient that the conspiracy, in the absence of interruption, might have accomplished its unlawful purpose. United States v. Burkett, 150 F. 208.

31. Imboden v. People [Colo.] 90 P. 608. Indictment for conspiracy to obtain real estate by false pretenses, held fatally defective in omitting allegation of unlawful means, as false pretenses in respect to real estate is not an offense. State v. Eno, 131 Iowa 619, 109 N. W. 119.

32. Indictment charging that defendant and "others" conspired to enter jail, for purpose of lynching, held sufficient under N. C. Revisal 1905, § 3698. State v. Lewis, 142 N. C. 626, 55 S. E. 600.

33. United States v. Richards, 149 F. 443.

34. Indictment for conspiracy to defraud government of public lands, in making false application for purchase, held not defective for uncertainty. United States v. Burkett, 150 F. 208. An indictment charging conspiracy to defraud the government of land by false entries is not fatally defective in that it does not expressly allege that the lands, of which it was the purpose to defraud, were public lands subject to homestead entry. Stearns v. U. S. [C. C. A.] 152 F. 900. Objection cannot be taken by motion in arrest of judgment. Id. Indictment held to sufficiently describe combination and conspiracy, in restraint of interstate commerce. United States v. MacAndrews & Forbes Co., 149 F. 823. Defendants indicted in several counts for conspiracy to embezzle funds and obtain money by false pretenses, having been convicted on four counts and sentenced for the same term on each, the sentences to be concurrent, held not prejudiced by the insufficiency of one or more of the counts if one of the counts on which they were convicted was good. Imboden v. People [Colo.] 90 P. 608. Application to compel state to furnish bill of particulars, denied. Id. In an indictment charging conspiracy for false and fraudulent entries under the homestead law, the word "entry" may properly be used and construed as applying to any or all of the steps necessary to acquire title under such law. Bradford v. U. S. [C. C. A.] 152 F. 617. A charge that defendants, during all

Variance.[35]—Where a conspiracy to do a specific act only is charged, proof of a general conspiracy is fatal, in the absence of evidence connecting accused with the crime charged.[36] Proof that the conspiracy was entered into in a place different from that charged is fatal.[37]

Evidence.[38]—The court will not take notice of the manner in which the evidence was obtained.[39] A conspiracy may be proved by circumstantial evidence.[40] Previous intimacy between persons charged with conspiracy is competent,[41] and the guilty connection of a conspirator may be established by showing his association with the persons accused in and for the purpose of procuring the illegal object.[42] Evidence tending to show the state of mind of a co-conspirator in reference to matters related to the conspiracy, prior to the date of its formation, is admissible.[43] The testimony of a person employed by one of the conspirators to do an act in its

the times between May 25, 1902, and the commission of the last overt act therein set forth, continued to conspire together to defraud, etc., of title to public lands in the manner and by the means agreed on between them on May 25, 1902, was not equivalent to a charge that defendants subsequent to that date entered into a new conspiracy to accomplish their unlawful design, but was merely an allegation that the conspiracy formed on that day was never abandoned but was in continuous operation thereafter until the date of the last overt act charged. United States v. Brace, 149 F. 874. Indictment under Elkins Act for inducing, giving, taking rebates, not sustainable as alleging a conspiracy, etc., under Rev. Fed. St. § 5440 (U. S. Comp. St. 1901, p. 3676.) United States v. New York Cent, & H. R. R. Co., 146 F. 298. Demurrer sustained. Id.

35. See 7 C. L. 689.

36. On charge of conspiracy to rob a designated post-office, evidence of general conspiracy to rob banks and everything else "robable," held inadmissible. Rabens v. U. S. [C .C. A.] 146 F. 978. Evidence did not connect defendant with conspiracy to rob post-office. Id.

37. Indictment for conspiracy in holding in condition of peonage. United States v. Cole, 153 F. 801. Where the overt act charged transpired in Louisiana, and the conspiracy was charged to have been formed in Texas, the jury was specially instructed that they must believe beyond a reasonable doubt that the conspiracy was entered into in the place charged. Id. Such instruction was given with the explanation that it was not necessary that the overt act, that is the act to effect the object of the conspiracy, as charged in the indictment, should have been committed in Texas, for if the proof showed that the overt act was committed there, or in Louisiana, it would be sufficient. Id.

38. See 7 C. L. 689.

39. Imboden v. People [Colo.] 90 P. 608. Collateral issue will not be formed to determine if illegally obtained. Id. Private letters and telegrams of conspirators surrendered to official by servant stealing same from files is not objectionable as evidence subjecting defendants to unreasonable searches and seizures, prohibited by Colorado Const. art. 2, § 7. Id.

40. State v. Crofford, 133 Iowa 478, 110 N. W. 921; People v. Stokes [Cal. App.] 89 P. 997; United States v. Cole, 153 F. 801; United States v. Greene, 146 F. 803; United States v. Richards, 149 F. 443. A conspiracy from its very nature being a secret or furtive agreement can rarely be proven by witnesses who heard it. United States v. Greene, 146 F. 803. the actual agreement to enter into the conspiracy need not be proved by direct evidence. State v. Caine [Iowa] 111 N. W. 443. Facts from which inferrable. United States v. Greene, 146 F. 803. Admissibility not affected because facts have a tendency to prove guilt of accused. People v. Stokes [Cal. App.] 89 P. 997. In such case great latitude of proof is allowed, the jury being entitled to consider every fact having a tendency to prove the ultimate fact in issue. United States v. Greene, 146 F. 803. Flight of accused as showing guilt. Id. Overt acts may be considered, with other evidence, as one of the circumstances, in determining existence of a conspiracy. United States v. Richards, 149 F. 443. Sufficient in prosecution for breaking and entering where it was claimed that defendant and another conspired to commit burglary. State v. Arthur [Iowa] 109 N. W. 1083. Acts and declarations of coconspirators. State v. Caine [Iowa] 111 N. W. 443; State v. Crofford, 133 Iowa, 478, 110 N. W. 921; Hutchinson v. State, 8 Ohio. C. C. (N. S.) 313. Admissions by accused, though not involving his guilt, yet tending in connection with other facts to prove it, held competent without preliminary proof that they were voluntarily made. People v. Stokes [Cal. App.] 89 P. 997.

41. Conspiracy to defraud United States in respect to contracts for public works, the conspirators being, respectively, the contractors for the work and the government engineer official in charge of the work. United States v. Greene, 146 F. 803. Particularly important if duties of parties are in opposition. Id.

42. United States v. Cole, 153 F. 801. On trial for breaking and entering, evidence that accused and another, who admitted his guilt, were frequently together shortly before breaking, was admissible to prove conspiracy. State v. Arthur [Iowa] 109 N. W. 1083.

43. United States v. Greene, 146 F. 784. A letterpress copy of a letter purporting to have been written by alleged coconspirator, found in his possession and proved to be in his handwriting, was admitted as original evidence to show state of mind at the time the letter was written, there being material evidence in proof of the conspiracy, although there was no proof that the original letter was sent to the addressee. Id.

furtherance is competent, although it involves a declaration of such conspirator implicating accused.[44] After the formation of conspiracy the acts and declarations of each conspirator, during its progress in carrying out the common design, are admissible in evidence against any or all of the others,[45] though not transpiring in their presence.[46] Generally, the fact of the conspiracy must be first established by a prima facie case[47] to set the preceding rule in operation,[48] but it lies within the discretion of the court to admit the acts and declarations of a conspirator in evidence before sufficient proof is given of the conspiracy.[49] Under an indictment for a conspiracy to commit a specific offense, proof of a general conspiracy is inadmissible, especially where the evidence does not connect accused with the particular offense charged.[50] Proof of concerted action in carrying out the criminal purpose establishes prima facie case.[51] Admissibility[52] and sufficiency[53] of evidence appears in the notes.

44. Part of res gestae. Hutchinson v. State, 8 Ohio C. C. (N. S.) 313.

45. State v. Caine [Iowa] 111 N. W. 443. So held in prosecution of physician for murder where theory of state was that it was done in pursuance of a conspiracy to produce abortion. State v. Crofford, 133 Iowa 478, 110 N. W. 921. Testimony of person, hired by a coconspirator of accused to burn a building in pursuance of the object of the conspiracy, as to what the hirer said, was competent, although it involved a statement implicating accused. Hutchinson v. State, 8 Ohio C. C. (N. S.) 313. Where, on a trial for murder by abortion, the evidence showed that a third person visited the sanitarium of accused, a physician, on a certain day, and was there again about the time the deceased female arrived there, and was also there shortly before her death, and that the female reached the sanitarium a few days before her death in a normal state of health, it was sufficient to show prima facie a collusion between the accused and the third person, justifying the admission in evidence of declarations of the third person made in promotion of their common design at any time subsequent to its inception and before its accomplishment. State v. Crofford, 133 Iowa, 478, 110 N. W. 921. "It was not essential to the admissibility of the evidence that all enter into this unlawful combination at its inception, nor that it be established by direct evidence." Id.

46, 47, 48. State v. Caine [Iowa] 111 N. W. 443; United States v. Richards, 149 F. 443.

49. People v. Stokes [Cal. App.] 89 P. 997. Held not error where the district attorney stated that he proposed to show a connection between the conspirators, and the jury was instructed that if not satisfied that there was an understanding between the parties then that they should disregard the evidence of such acts or declarations. Id.

50. Rabens v. U. S. [C. C. A.] 146 F. 978. On indictment charging a conspiracy to rob a post-office at a place named, evidence of general conspiracy to rob banks and everything else "robable," and not tending to connect defendant with conspiracy to rob post-office, held inadmissible. Id.

51. State v. Caine [Iowa] 111 N. W. 443. It being shown by acts and declarations of defendant during a strike that he acted in conjunction with the strikers in threatening violence to and inflicting injuries on others, a prima facie case of conspiracy was thereby established and the question of the existence of a conspiracy was properly submitted to the jury. Id.

52. Evidence that defendants advanced money to entryman to pay entry fee and for improvements on lands acquired under homestead entries is limited to consideration in determining existence of conspiracy or lawful agreement, of which the advancement formed a part. United States v. Richards, 149 F. 443. In prosecutions for robbery, evidence of the acts of a conspirator with defendant to the effect that after the commission of the offense he procured a towel and washed the blood from the face of the person robbed, and showing where such coconspirator came from, and his movements immediately preceeding such act, were admissible as tending to corroborate claim of prosecuting witness that he had been robbed, but immaterial in connecting accused with crime, and admission, as to him, was harmless error. People v. Stokes, [Cal. App.] 89 P. 997. On trial for subornation of perjury in inducing others to file false entries under Timber and Stone Act, evidence that defendants induced others to file on or purchase state lands in vicinity, which were subsequently conveyed to defendants, was admitted under proper instruction on the question of motive. Van Gesner v. U. S. [C. C. A.] 153 F. 46. It was also competent for the government to show, by those making such application to purchase land, that it was their intention and understanding at the time that the land should be conveyed by them to defendants, contrary to their sworn statements and testimony. Id. Letters and telegrams between coconspirators, admissible in evidence, to show character of relation existing between parties charged with conspiracy to defraud in connection with public work contracts. United States v. Greene, 146 F. 784.

53. On a charge of conspiring to defraud the government by subornation of perjury in procuring persons to make application for the purchase of lands under the Timber and Stone Act, under agreements to convey to defendants, and to falsely swear, among other things, that such lands were chiefly valuable for timber, evidence was admissible to prove that the lands were not valuable for the timber upon them, but were chiefly valuable for grazing purposes, although such evidence tended to show that the lands were

Instructions.[54]—Instructions should present defendant's theory of the case.[55] Special instructions may be given in connection with general charge.[56] Instructions passed on are given in the note.[57]

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CONSTITUTIONAL LAW.

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This topic treats of the organic law of the nation and the states and the distribution of power between them. Constitutional provisions germane to specific subjects are treated in appropriate topics.[58]

§ 1. *Adoption and amendment of constitutions.*[59]—The authority to frame a constitution and its provisions,[60] including the offices to be defined and created,[61] and

not subject to entry under the act. Van Gesner v. U. S. [C. C. A.] 153 F. 46. A timber culture entry, voidable at instance of government, is sufficient to sustain prosecution for conspiracy in combining to secure title to public land by false and fraudulent proof. United States v. Burkett, 150 F. 208. An exception to the overruling of a motion for a directed verdict of acquittal at the close of the government's case on the ground of the insufficiency of the evidence is waived by the defendant introducing evidence in his own behalf. Stearns v. U. S. [C. C. A.] 152 F. 900.

54. See 7 C. L. 690.

55. United States v. Cole, 153 F. 801.

56. Special instruction given. United States v. Cole, 153 F. 801.

57. The fact that the parties charged with a conspiracy to embezzle and obtain money by false pretenses met on a given date being undisputed, an instruction assuming that they came together does not constitute reversible error. Imboden v. People [Colo.] 90 P. 608. Instruction that either or both defendants may be convicted, proved that the one or both to be convicted conspired together or with some other person or persons jointly indicted, or that either or both may be found not guilty, is not objectionable as assuming that one or both defendants were to be convicted. Id. An instruction that the material allegations of the third and fourth counts of the indictment were that on the 10th of September, A. D. 1904, "or within three years prior to the finding of the indictment," the defendants did, etc., was not objectionable because the phrase quoted was not in the indictment. Id.

58. See Commerce, 9 C. L. 583; Criminal Law, 7 C. L. 1010; Jury, 8 C. L. 617; Elections, 7 C. L. 1230; Eminent Domain, 7 C. L. 1276; Intoxicating Liquors, 8 C. L. 486; Licenses, 8 C. L. 734; Statutes, 8 C. L. 1976; Taxes, 8 C. L. 2058.

59. See 7 C. L. 691.

60. Constitutional convention has plenary powers subject only to the restriction that the constitution adopted shall provide for republican form of government and must not contravene any of the provisions of the Federal constitution, and that all provisions of the enabling act be irrevocably accepted. Frantz v. Autry [Okl.] 91 P. 193.

61. Officers included under enabling act

the manner and time of its submission to the people,[62] is delegated to the constitutional convention by the enabling act, and the exercise by it of its delegated powers cannot be restrained[63] though it proceeds in excess of its authority.[64] The term "ordinance" as used in an enabling act means a law essential to carrying into effect the objects for which the convention was created,[65] and when adopted has the force and effect of a law.[66] A constitutional convention does not possess absolute sovereignty or inherent powers of legislation and its powers may be limited by the act authorizing its creation, its acts outside such limitations being void.[66a] The constitution proposed and subsequent amendments must provide for a republican form of government; but it is held that this does not mean that the functions of the three departments of government must be preserved intact in each.[67] The question as to whether the instrument fulfills this requirement is a legislative one, and not subject to judicial cognizance.[68] The power of the state to amend its constitution is absolute,[69] and the method to be employed in doing so is usually provided for by the instrument itself and must be substantially complied with.[70] Legislative adoption of a certain method of submission does not restrict subsequent legislatures from employing a different method if the one adopted is in accord with the constitution.[71] Usually different amendments are required to be separated on the ballot,[72] which must be sufficiently precise to show their nature and character.[73] The manner of counting the votes is subject to legislative control.[74]

constitute not only those whose powers and duties are coextensive with state boundaries but all officers provided for in the constitution whose duties are in any manner connected with the administration of the government. Frantz v. Autry [Okl.] 91 P. 193.

62. Under Oklahoma enabling act, convention may submit proposed constitution to people for ratification or rejection by appropriate ordinance at an election to be held at a time fixed therein. Frantz v. Autry [Okl.] 91 P. 193.

63. Frantz v. Autry [Okl.] 91 P. 193; Walck v. Murray [Okl.] 91 P. 238.

64. Submission of proposed constitution, or any part thereof, to vote of people, cannot be enjoined in advance of its adoption by the people and its approval by the president on the ground that it is unconstitutional, or that the convention exceeded its authority. Frantz v. Autry [Okl.] 91 P. 193; Walck v. Murray [Okl.] 91 P. 238.

65, 66. Frantz v. Autry [Okl.] 91 P. 193.

66a. Ex parte Birmingham & A. R. Co., 145 Ala. 514, 42 So. 118. Convention assembled pursuant to Acts 1900-1901, p. 224, entitled "An Act to provide for the holding of a convention to revise and amend the constitution" was without power to provide for additional courthouses in certain counties. Id. Where an ultra vires ordinance was not submitted to the people with the proposed constitution, there was no ratification by the latter. Id.

67. Constitutional amendment conferring on corporation commission limited executive, legislative, and judicial functions held valid. Winchester & S. R. Co. v. Com. [Va.] 55 S. E. 692. A state constitution may be amended so as to take away from or add to the powers of the various departments of government. People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514.

68. Whether proposed constitution guarantees a republican form of government, having been delegated by congress to the president of the United States, will not be judicially reviewed. Frantz v. Autry [Okl.] 91 P. 193.

69. May be amended in any particular not in conflict with the Federal constitution. Amendment providing indeterminate sentences for crime held valid. In re Manaca, 146 Mich. 697, 13 Det. Leg. N. 919, 110 N. W. 75.

70. Literal compliance not required. Where constitution required publication of amendment once each week in every county in state for three months, omission to publish notice in one county for one week held not to invalidate amendment. State v. Winnett [Neb.] 110 N. W. 1113.

71. Submission by joint resolution. Murphy Chair Co. v. Attorney General [Mich.] 112 N. W. 127.

72. Amendment increasing term of certain officers and the tenure of the then incumbents, and giving judges of district court power to fill vacancies, relates to one general scheme, and does not violate a constitutional provision requiring amendments to be distinguished by numbers, or otherwise, to permit of their being separately voted. State v. Silver Bow County Com'rs, 34 Mont. 426, 87 P. 450.

73. Ballot on amendment as follows "Amendment of the constitution relative to the teaching of a mechanical trade to convicts in the state prisons of this state," held sufficient to call attention to the subject. Murphy Chair Co. v. Attorney General [Mich.] 112 N. W. 127. Ballot must be sufficient to identify amendment and show its character, but entire proposed amendment need not be printed thereon. State v. Winnett [Neb.] 110 N. W. 113.

74. Act providing for counting straight party votes for constitutional amendment when such party has endorsed same held valid. State v. Winnett [Neb.] 110 N. W. 1113.

Amendments are presumed to have been regularly submitted and adopted,[75] and, when submitted at a general election, provisions of the general election law will be presumed to have been adopted with reference to the matter of voting thereon.[76] An amendment inconsistent with general provisions in the instrument governs though such provisions are not expressly negatived.[77]

§ 2. *Operative force and effect.*[78]—A constitutional amendment does not cure prior invalid legislation.[79]

Self-executing provisions.[80]—A section of the fundamental law is self-executing when it prescribes a rule, the application of which puts into operation the constitutional provision.[81] An amendment creating certain offices operates to establish such offices immediately upon its adoption.[82]

§ 3. *Interpretation and exposition. A. When called for.*[83]—Courts will not pass upon the constitutionality of a statute unless absolutely necessary to a decision of the case,[84] hence the validity of a statute cannot be questioned by one as to whom it has no application,[85] or who is not injured by it,[86] or who has voluntarily

75. Failure to comply with constitutional provisions must be pleaded. State v. Silver Bow County Com'rs, 34 Mont. 426, 87 P. 450.

76. State v. Winnett [Neb.] 110 N. W. 1113.

77. Amendment providing for an inheritance tax governs a general provision requiring equality of taxation. Thompson v. Kidder [N. H.] 65 A. 392.

78. See 7 C. L. 692.

79. Amendment relieving municipal charters from control of general laws does not validate an ordinance adopted prior thereto conflicting with general laws. Ex parte Sweetman [Cal. App.] 90 P. 1069.

80. See 7 C. L. 692.

81. Manner of exercising initiative and referendum powers by municipal corporations held self-executing. Acme Dairy Co. v. Astoria [Or.] 90 P. 153.

82. May be filled by vote of electors at same election at which amendment is adopted. State v. Winnett [Neb.] 110 N. W. 1113.

83. See 7 C. L. 693.

84. Native Lumber Co. v. Harrison County sup'rs [Miss.] 42 So. 665; City of Toledo v. Kiebler, 8 Ohio C. C. (N. S.) 437. Will not be passed upon if the case can be disposed of on another ground. Thompson v. Mitchell, 133 Iowa, 527, 110 N. W. 901.

85. One who is not on his own account entitled to question the constitutionality of a statute cannot object that it is unconstitutional as to others. Thompson v. Mitchell, 133 Iowa 527, 110 N. W. 901. A citizen cannot object to the constitutionality of an act on the ground that it confers upon citizens of the state rights denied citizens of other states. State v. McIntosh [Mo.] 103 S. W. 1078; Schmidt v. Indianapolis [Ind.] 80 N. E. 632. Whether an act authorizing farmers to unite and pool their crops, etc., renders previous anti-trust laws unconstitutional will not be considered where statutes provide that no new law shall be construed to repeal a former law as to any offense committed thereunder, the indictment being found before the passage of such act. International Harvester Co. v. Com., 30 Ky. L. R. 716, 99 S. W. 637. Where plaintiff was injured while employed on a train engaged in interstate commerce, the court is not bound to determine the constitutionality of the Federal employer's liability act on the ground that it applies equally to intra-state and interstate commerce. Spain v. St. Louis, etc., R. Co., 151 F. 522. Resident of the city, not accused under an act of failure to report to mayor, cannot complain that the provision of the act requiring such report is unconstitutional for lack of uniform operation, inasmuch as a dealer outside of the city limits could not be required to comply with its provisions. Phillips v. State, 4 Ohio N. P. (N. S.) 398. One charged with employing children more than ten hours per day in violation of statute cannot object to constitutionality of another portion thereof prohibiting such employment before seven in the morning or after six at night. State v. Shorey [Or.] 86 P. 881.

86. Where judgment is awarded for an amount for which defendant would be liable in the absence of a statute questioned, the constitutionality of such statute will not be determined. Southern R. Co. v. Schlittler, 1 Ga. App. 20, 58 S. E. 59. One upon whom a penalty provided by law was not imposed cannot object that law is unconstitutional on ground of excessiveness of penalty. Texas Co. v. Stephens [Tex.] 103 S. W. 481. One who has been afforded full opportunity to be heard cannot attack the constitutionality of an act as denying due process, though no provision for notice was contained therein. Security Trust & Saftey Vault Co. v. Lexington, 203 U. S. 323, 51 Law. Ed. 204. Under act providing imprisonment in state prison for wife abandonment or a bread and water diet for ten days in county jail, one sentenced to state prison cannot object that latter clause imposes a cruel and unusual punishment. Spencer v. State [Wis.] 112 N. W. 462. Unconstitutionality of state statute giving lien on vessel as an infringement of exclusive jurisdiction of Federal courts cannot be asserted in a case where no maritime lien is claimed. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 205 U. S. 354, 51 Law Ed. 836. The validity of an act requiring accused to waive certiorari as a condition to right of appeal to city council on conviction of violation of liquor laws by mayor will not be determined where no appeal to council was had. Sawyer v. Blakely [Ga. App.] 58 S. E. 399.

complied with it,[87] or who has invoked its provisions,[88] or as to one who is estopped to assert its invalidity;[89] but he is not estopped from questioning its constitutionality as to acts which remain to be done or expenses to be incurred thereunder.[90] It follows that the objecting party must possess a direct and substantial interest in the statute sought to be invalidated [91] though, as in the case of public officers affected by a statute in their capacity as such, it need not be personal,[92] accordingly one not a party to a contract cannot question the validity of legislation as impairing it.[93] In order that an appellate court may pass upon a constitutional question, it must ordinarily have been properly raised below,[94] decided adversely to appellant, and fully argued on appeal.[95]

(§ 3) *B. General rules of interpretation. Constitutions.*[96]—Established rules of construction applicable to statutes govern in construing constitutions.[97] The position of a clause in the constitution is not decisive of its meaning.[98] Proceedings of the convention at which the constitution was framed,[99] and contemporaneous construction by co-ordinate branches of government,[1] may be resorted to for the purpose of removing ambiguities; and in such case a long continued legislative and administrative construction will prevail.[2] Conditions existing at the time of the adoption of a constitution [3] or amendments [4] may be considered, and though the constitution

87. Compliance by railroad with rate fixed by state raises only a moot question, and reasonableness of rate will not be determined. Chicago, I. & L. R. Co. v. Hunt [Ind. App.] 79 N. E. 927.

88. On mandamus to compel dental board to grant relator an examination, the latter cannot object to the constitutionality of the act creating the board, as if the law is invalid, no examination can be granted. State v. MacIntosh [Mo.] 103 S. W. 1078. The constitutionality of an act cannot be raised on an appeal authorized solely by its provisions. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 So. 979.

89. A person seeking relief under a statute is estopped to assert its invalidity. American Unitarian Ass'n v. Com. 193 Mass. 470, 79 N. E. 878. One giving a liquor dealer's bond, conditioned not to commit certain acts under penalties provided by law, cannot, in an action on the bond, object that law is unconstitutional as imposing excessive penalties. White v. Manning [Tex. Civ. App.] 102 S. W. 1160. One active in procuring the passage of a law and accepting benefits thereunder may be estopped to assert its invalidity. Facts held insufficient to establish an estoppel. Sellers v. Cox, 127 Ga. 246, 56 S. E. 284.

90. Injunction to restrain incurring indebtedness or levying taxes for future support of school district on ground of invalidity of law creating it. Sellers v. Cox, 127 Ga. 246, 56 S. E. 284.

91. Where a right of action is predicated upon an alleged invalid statute, the person against whom such right of action is thereby created may raise the question of its unconstitutionality. Bedford Quarries Co. v. Bough [Ind.] 80 N. E. 529.

92. A public officer required to pay out trust funds may attack the constitutionality of the law under which payment is sought, though he is a mere ministerial officer. State v. Blumberg [Wash.] 89 P. 708.

93. Prospective purchaser of property entering into a contract for purchase of land with agent acting under parol authority after the passage of an act requiring authority to be in writing cannot question constitutionality of statute as impairing contract between principal and agent. Brown v. Gilpin [Kan.] 90 P. 267. The county court cannot object to the constitutionality of an act limiting its power to levy taxes on the ground that the levy authorized was insufficient to pay county indebtedness and thus impaired the obligation of contracts. State v. Braxton County Ct., 60 W. Va. 339, 55 S. E. 382.

94. See Saving Questions for Review, 8 C. L. 1822.

95. See Appeal and Review, 9 C. L. 108.

96. See 7 C. L. 695.

97. State v. Boyden [S. D.] 108 N. W. 897; State v. Samuelson [Wis.] 111 N. W. 712.

98. Thompson v. Kidder [N. H.] 65 A. 392.

99. Sanipoli v. Pleasant Valley Coal Co. [Utah] 86 P. 865.

1. Where meaning is doubtful, court may consider practical and contemporaneous construction given by legislature and executive officers. Passage of act year following adoption of constitution allowing state's attorney fees apparently in excess of those allowed by constitution. Cook County v. Healy, 222 Ill. 310, 78 N. E. 623; Uzzell v. Anderson [Colo.] 89 P. 785. Where constitution is subject to two equally reasonable interpretations, a legislative adoption of one of them will be followed by courts. Providing governor with residence rent free held not a "perquisite of office or other compensation" within inhibition of constitution. State v. Sheldon [Neb.] 111 N. W. 372. Exercise by different branches of government of powers of others. Henrico County v. Richmond [Va.] 55 S. E. 682.

2. Cook County v. Healy, 222 Ill. 310, 78 N. E. 623.

3. Exemption laws having been recognized in Ohio ever since the adoption of the present constitution, and long before, it has manifestly been the policy of the state to allow certain property to be exempted from

as it stands will be regarded as a whole as if enacted at one time,[5] the readoption of a constitutional provision after its construction by the courts amounts to a legislative adoption of such construction.[6] Constitutional provisions may be enlarged by construction to meet changed conditions of society,[7] but cannot be limited by inserting a qualifying word therein.[8] Federal courts are bound to follow the construction placed on state constitutions by the state courts of last resort, and the construction placed on the Federal constitution by the supreme court of the United States is binding upon the state courts.[9]

Statutes violative of the constitution[10] are unenforcible, courts being found to give effect to the organic law;[11] but unless clearly invalid an inferior court may leave the determination of the validity of an act to an appellate tribunal.[12] In determining the validity of an act, courts are not at liberty to review its policy[13] or wisdom,[14] and the fact that it is oppressive is no ground for setting it aside.[15] A stipulation as to facts which if true renders the law unconstitutional merely denies its efficacy to the party admitting such facts, and does not render the law ineffective.[16]

Every presumption favors the validity of a statute,[17] a reasonable doubt as to its constitutionality being sufficient to sustain it.[18] Doubtful statutes will be so construed, if possible, as to harmonize them with the constitution.[19] The validiy of an

taxation; and section 1038a, Rev. St., relating to deductions from the duplicate for destroyed or injured property, must therefore be upheld as valid and reasonable notwithstanding the constitutional provision as to the taxing of all property by a uniform rule according to its true value in money. State v. Wright, 8 Ohio C. C. (N. S.) 366.

4. History of taxation to reconcile provision requiring equality and an amendment authorizing inheritance tax. Thompson v. Kidder [N. H.] 65 A. 392.

5. Thompson v. Kidder [N. H.] 65 A. 392.

6. Prohibition against putting person twice in jeopardy. Gillespie v. State [Ind.] 80 N. E. 829. Judicial construction placed on provision of former constitution will be followed where same is readopted. Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114.

7. Requiring that elections be by ballot, held to permit use of voting machines. Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698.

8. Power "to regulate" interstate commerce cannot be limited by construing provision as power "to regulate directly." United States v. Adair, 152 F. 737.

9. See Stare Decisis, 8 C. L. 1965.

10. See 7 C. L. 696.

11. A constitutional provision declaring that all laws should be made for the good of the whole and ought to be evenly distributed among all citizens is advisory merely. Is not violated, act requiring abutting owners and occupants to remove snow from sidewalks. State v. McCrillis [R. I.] 66 A. 301.

12. Michie v. New York, etc., R. Co., 151 F. 694.

13. That act limiting hours of labor in certain occupations makes no exception for emergencies where life and property is in danger does not render it invalid. State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 87 P. 980. An act will not be declared void merely because the court differs from the legislature as to expediency of its provisions. Limitations on height of building. Welch v. Swasey, 193 Mass. 364, 79 N. E. 745.

14. Miller v. Louisville, 30 Ky. L. R. 664, 99 S. W. 284.

15. State v. Pullman Co. [Kan.] 90 P. 319. Federal employer's liability act. Kelley v. Great Northern R. Co., 152 F. 211.

16. Stipulation that but one city came within purview of act, thereby rendering it void as special legislation. Rutten v. Paterson, 73 N. J. Law, 467, 64 A. 573.

17. See 7 C. L. 696.

18. Statute will be supported by every **reasonable intendment.** Cain v. Allen [Ind.] 79 N. E. 201. Button v. State Corp. Commission, 105 Va. 634, 54 S. E. 769; Snead v. Central of Georgia R. Co., 151 F. 608. Whether act relating to consolidation of cities is special legislation. Pittsburg's Petition, 32 Pa. Super. Ct. 210. Must be **clearly obnoxious** to the constitution. Board of Escambria County v. Pensacola Port Pilot Com'rs [Fla.] 42 So. 697; Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513, rvg. 146 F. 414; Snead v. Central of Georgia R. Co., 151 F. 608; Ex parte Owens [Ala.] 42 So. 676; In re Spencer, 149 Cal. 396, 86 p. 896. An act will not be held unconstitutional unless its invalidity is manifest **beyond a reasonable doubt.** People v. Nassau County Sup'rs, 104 N. Y. S. 353; Campbell v. Skinner Mfg. Co. [Fla.] 43 So. 874; State v. Anson [Wis.] 112 N. W. 475.

19. Statute will not be overthrown on constitutional grounds when it may be so construed as to avoid that result. State v. Braxton County Ct., 60 W. Va. 339, 55 S. E. 382. If there is any theory or purpose which would bring questioned legislation within the power of the legislature, the court will assume such a basis for it. State v. Anson [Wis.] 112 N. W. 475. Federal employer's liability construed a proper regulation of interstate commerce. Spain v. St. Louis, etc., R. Co., 151 F. 522, overruled Howard v. Illinois Cent. R. Co., 28 S. Ct. 141. Act requiring as a prerequisite to registration of anthracite miners two years' experience "in mines of this commonwealth" construed to mean two

act must be tested by its terms and what it authorizes,[20] and not by what may be attempted to be done under it.[21]

A statute containing invalid provisions yields only to the extent of its repugnancy to the constitution,[22] and a part may be unconstitutional without rendering the whole statute bad, if the invalid part is so independent of the remainder that it may be eliminated without rendering the whole ineffective, unless the invalid portion was manifestly an inducement for the passage of the remainder.[23]

Scope of Federal and state power.[24]—The Federal constitution is a grant of power,[25] while state constitutions are merely declaratory of or limitations on existing power.[26] In case of conflict the Federal constitution is paramount.[27]

The court cannot consider evidence aliunde.[28]

Where the words of a statute are plain,[29] no construction is permissible.

§ 4. *Executive, legislative, and judicial functions.*[30]—State constitutions usually provide for the division of government into three distinct branches, each supreme in its own sphere;[31] but it has been held that such a division does not prevent the exercise by one branch of the powers of the other to a limited extent,[32] nor does the exercise of such powers contravene any provision of the Federal constitution.[33]

(§ 4) *A. Executive functions.*[34]—Powers conferred on the executive by the constitution cannot be exercised by other departments of government,[35] nor can powers properly appertaining to other departments be conferred upon executive officers.[36]

years' experience in anthracite mines, rendering it unobjectionable as infringing privileges and immunities. Commonwealth v. Shaleen, 215 Pa. 595, 64 A. 797. While subject of taxation is general in its nature, requiring uniformity of operation throughout state, Rev. St. § 1365-25, giving to county commissioners power to extend the time for payment of taxes, although limited to "counties containing a city of the second grade of the first class," must be regarded as a provision suited to certain localities and merely regulative of the mode of receiving taxes in such localities, and is therefore constitutional. State v. Madigan, 8 Ohio C. C. (N. S.) 553.

20. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513, rvg. 146 F. 414. In determining validity of act, court must consider not only what has been done under it in the particular instance but what may be done under its authority. Act prohibiting offering for sale of real estate without written authority from owner or attorney in fact. Fischer Co. v. Woods [N. Y.] 19 N. E. 836.

21. That power conferred on administrative body to license and regulate is exercised arbitrarily does not render act conferring it unconstitutional. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513, rvg. 146 F. 414. Fact that officers to whom power to license sale of intoxicating liquor is delegated may act capriciously thereunder does not invalidate the act. State v. Settles, 34 Mont. 448, 87 P. 445. That act confers on sheriff discretion in selection of jurors which may be used to abridgment of rights of colored persons to serve on jury does not render it invalid. Montgomery v. State [Fla.] 42 So. 894. That commission created by statute may abuse discretion and act arbitrarily does not affect validity of act creating it. Ex parte McManus [Cal.] 90 P. 702.

22. See 7 C. L. 697.

23. See Statutes, 8 C. L. 1976.

24. See 7 C. L. 698.

25. Button v. State Corp. Commission, 105 Va. 634, 54 S. E. 769.

26. Button v. State Corp. Commission, 105 Va. 634, 54 S. E. 769; Platt v. Le Cocq, 150 F. 391; State v. Sheldon [Neb.] 111 N. W. 372.

27. State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 87 P. 980.

28. See 5 C. L. 625.

29, 30, 31. See 7 C. L. 699.

32. Act conferring certain nonjudicial functions on court held valid. Henrico County v. Richmond [Va.] 55 S. E. 683.

33. Constitutional amendment conferring on state corporation commission limited legislative, judicial, and executive powers held constitutional. Winchester & S. R. Co. v. Com. [Va.] 55 S. E. 692.

34. See 7 C. L. 700.

35. When and how an extraordinary session of the legislature may be called is a matter for the determination of the executive alone. Pittsburg's Petition, 217 Pa. 227, 66 A. 348, afg. 32 Pa. Super. Ct. 210. Act conferring on board of pardons power to parole prisoners under indeterminate sentence held not an interference with executive functions. People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514. Act providing for sentence to state reformatory without a fixed term, such term to be determined by the managers of the reformatory and authorizing them to parole prisoner and if conditions justify it to grant him an absolute discharge from imprisonment, held not an invasion of pardoning power of governor, the act expressly reserving such power to him. People v. Madden, 105 N. Y. S. 551.

36. Act requiring auditor general and state land commissioner to determine when state tax lands shall become state tax homestead lands held not to confer judicial powers upon executive officers, such deter-

(§ 4) *B. Legislative functions.*[37]—State legislatures have all the powers not expressly or by necessary implication withheld by the state or Federal constitution,[38] and their actions thereunder cannot be reviewed by other departments of the government.[39] Legislative powers cannot be delegated [40] even to the people,[41] except that municipalities may be given power over matters of purely local concern,[42, 43] but the delegation must be made to the governing body of the municipality,[44] and the fact

mination being a mere classification of state lands. Griffin v. Kennedy [Mich.] 112 N. W. 756. Act April 17, 1905, p. 351, c. 146, making secretary of state and comptroller members of state tax board with power to determine value of intangible assets of certain corporations and to distribute values for local taxation, held not unconstitutional as conferring judicial powers on executive officers. Missouri, etc., R. Co. v. Shannon [Tex.] 100 S. W. 138, afg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 866, 97 S. W. 527. Act Mar. 3, 1899 (30 Stat. 1121, 1153, c. 425, U. S. Comp. St. 1901, p. 3545), empowering secretary of war to require such alterations in bridge over navigable waters as will render it safe for navigation when after hearing parties interested he is satisfied that same obstructs navigation, held not unconstitutional as conferring judicial powers on an executive officer. Union Bridge Co. v. U. S., 204 U. S. 364, 51 Law. Ed. 523.

37. See 7 C. L. 701. See, also, Intoxicating Liquors, 8 C. L. 486, as to local option laws.

38. To what extent the state may regulate under its police power is within the legislative discretion, except as it may be restrained by constitutional provisions. Licensing of sale of intoxicating liquors. Cain v. Allen [Ind.] 79 N. E. 201.

39. **Held legislative functions:** Whether act is obnoxious to constitutional inhibition against special legislation because general law can be made applicable to subject-matter. Buist v. Charleston City Council [S. C.] 57 S. E. 862. Alterations of established law based on considerations of public policy. Tomlinson v. Armour & Co. [N. J. Law.] 65 A. 883. Power to tax. State v. Braxton County Ct. 60 W. Va. 339, 55 S. E. 382. Whether public welfare demands particular regulations. Limiting height of buildings. Welch v. Swasey, 193 Mass. 364, 79 N. E. 745; Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513. Sufficiency of fees allowed witnesses. In re Consol. Rendering Co. [Vt.] 66 A. 790. That system of taxation authorized under a valid law results in inequality is for legislature, and not courts, to remedy. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A. 1115.

40. **Void for delegation:** Act authorizing municipal board to levy general taxes without consent of the people. Vallelly v. Grand Forks Park Dist. Com'rs [N. D.] 111 N. W. 615. Changing rule as to when liability of carrier ceases and that of warehouseman begins involves legislative functions and cannot be delegated to a railway commission. Jones Bros. v. Southern R. Co. [S. C.] 56 S. E. 666. Act making it a criminal offense to violate rules of secretary of agriculture. United States v. Matthews, 146 F. 306. Act authorizing railway and warehouse commission to allow railroads to increase capital stock for such purposes and on such terms as it may deem advisable, or in its discretion to refuse it. State v. Great Northern R. Co., 100 Minn. 445, 111 N. W. 289.

Not void for delegation: Act authorizing governor to fix salaries of police commissioners, and latter to fix salaries of police officers. Arnett v. State [Ind.] 80 N. E. 153. Where legislature established county boundaries, act making line as run and defined by surveyor the true boundary held valid. Trinity County v. Mendocino Conty [Cal.] 90 P. 685. Act authorizing commission to accept applicant for license to practice medicine only where diploma presented shall have been issued by a school, the requirements of which shall not be less than those of a certain medical association. Arwine v. California Medical Examiners [Cal.] 91 P. 319. Act Cong. Mar. 28, 1893, authorizing American Railway Association to designate standard height of draw bars for freight cars, and providing that after such designation no cars of a different height shall be used in interstate commerce. St. Louis, etc., R. Co. v. Neal [Ark.] 98 S. W. 958. Act creating state railroad commission held constitutional. Houston, etc., R. Co. v. Storey, 149 F. 499. Act delegating to commission power to classify city with respect to height to which buildings in classified districts might be erected. Welch v. Swasey, 193 Mass. 364, 79 N. E. 745. Act authorizing majority and minority members respectively of board of supervisors to select judges of election. People v. Edgar County Sup'rs, 223 Ill. 187, 79 N. E. 123. Charter provision creating municipal board of public works held not violative of a constitutional prohibition against delegation to a special commission of power to levy taxes or exercise any municipal function. City of Denver v. Iliff [Colo.] 89 P. 823.

41. Legislature cannot confer upon citizens the right to determine whether the operation of an existing law shall be suspended. Cain v. Allen [Ind.] 79 N. E. 201.

42. May delegate power to make such rules and regulations as may be necessary to secure, within their limits, the purposes of their organization. Welch v. Swasey, 193 Mass. 364, 79 N. E. 745. Act empowering commission to fix different heights for buildings in different districts, and to make rules and regulations in the nature of subsidiary legislation, held proper as a delegation of matters of local self-government. Id.

43. Power to license journeymen and master plumbers. Commonwealth v. Shafer, 32 Pa. Super. Ct. 497. Power to regulate sale of railroad tickets. Ex parte Hughes [Tex. Cr. App.] 100 S. W. 160. Authority to construct and maintain sewers. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A. 1115. Power to tax. City of Perry v. Davis, 18 Okl. 427, 90 P. 865.

44. Act authorizing change of ward lines in city held to require action by fifty per cent of members of city council in their ca-

that the act delegating such powers fixes a penalty for a violation of the municipal regulation does not affect its validity.[45] Limited powers may be granted to municipalities to make police regulations beyond their corporate limits, but no greater power can be delegated than the bare necessity requires.[46] Delegation of purely administrative[47] or ministerial duties,[48] or power to make regulations for the enforcement of laws,[49] is not within the inhibition. Making the operation of an act depend upon a contingency[50] or upon a determination by the person or body upon whom the power is conferred of the existence of facts upon which its action depends[51] does not constitute a delegation of legislative functions. In dealing with the Philippine Islands, congress may delegate legislative authority to such agencies as it may select.[52]

(§ 4) *C. Judicial functions.*[53]—The powers of the judiciary are as exclusive as those of the other departments of government, and cannot be invaded by executive or legislative action,[54] hence judicial functions cannot be conferred upon nonjudicial officers,[55] nor can nonjudicial duties be imposed on the judiciary,[56] though as to the

pacity as such, and not as citziens. Rutten v. Paterson, 73 N. J. Law, 467, 64 A. 573.

45. Commonwealth v. Shafer, 32 Pa. Super. Ct. 497.

46. Act March 27, 1907, giving city of Memphis all governmental and police power within its limits and for two miles beyond, held unconstitutional. Malone v. Williams [Tenn.] 103 S. W. 798.

47. Act empowering voting machine commission to determine whether secret vote is practicable with machine submitted held to confer mere administrative duties. Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698.

48. Act authorizing city council to establish city court where city has a population of 3,000 is not a delegation of legislative power because requiring council to ascertain when city has a population of 3,000. Chicago Terminal Transfer R. Co. v. Greer, 223 Ill. 104, 79 N. E. 46.

49. United States v. Matthews, 146 F. 306. Act regulating licensing of architects held not unconstitutional because delegating to commission power to make rules for examination and qualification of applicants. Ex parte McManus [Cal.] 90 P. 702.

50. Intangible assets law (Act April 17, 1905, p. 351, c. 146), providing that, upon compliance with its terms by the corporations affected and payment of tax imposed, acts imposing gross earnings taxes on such corporations should be repealed, held not unconstitutional as an invalid delegation of power to suspend operation of law. Missouri, etc., R. Co. v. Shannon [Tex.] 100 S. W. 138, afg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 866, 97 S. W. 527. Act making it unlawful for miner to enter unsafe mine until same is examined and reported safe held not a delegation of legislative power, the act being continuously in force, but the circumstances under which a mine may be safe varying. Koppala v. State [Wyo.] 89 P. 576. Act authorizing creation of city courts in cities having a certain population whenever council shall submit question to voters and same shall be adopted by them held not a delegation of power. Chicago Terminal Transfer R. Co. v. Greer, 223 Ill. 104, 79 N. E. 46. Act designating place for holding terms of court, providing council or citizens thereof furnish suitable accommodations; held not a delegation of legislative power. McCall v. Calhoun Circuit Judge, 146 Mich. 319, 13 Det. Leg. N. 757, 109 N. W. 601.

51. Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698. Act Mar. 3, 1899 (30 Stat. 1121, 1153, c. 425, U. S. Comp. St. 1901, p. 3545), empowering secretary of war when satisfied after hearing parties interested that a bridge over navigable waters obstructs navigation to require such alterations as will render navigation reasonably safe, held constitutional. Union Bridge Co. v. U. S., 204 U. S. 364, 51 Law. Ed. 523. Act authorizing city council to determine whether city should avail itself of its provisions held not a delegation of legislative power to council. Vallelly v. Grand Forks Park Dist. Com'rs [N. D.] 111 N. W. 615.

52. Act of congress ratifying imposition of illegal duties on imports from Phillipines held valid. United States v. Heinszen, 206 U. S. 370, 51 Law Ed. 1098.

53. See 7. C. L. 704.

54. A statute which merely regulates the manner of introducing relevant evidence is not an unlawful invasion of judicial power. Act placing burden on plaintiff in action on negotiable instrument to show good faith where maker alleges that it was procured by fraud held valid. Johnson County Sav. Bk. v. Walker, 79 Conn. 348, 65 A. 132. Act providing for a feigned issue in action to quiet title in chancery, and making a decision thereon conclusive upon the chancellor, held not invalid as an infringement of judicial power. Brady v. Carteret Realty Co. [N. J. Err. & App.] 67 A. 606. Act prescribing qualifications for admission to bar held not an infringement of judicial functions, though precluding examination into the moral character of the applicant. In re Applicants for License. 143 N. C. 1, 55 S. E. 635. Indeterminate sentence act, empowering board of pardons to parole prisoners, held not an interference with judicial functions. People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514. Act authorizing sentence to state reformatory without a fixed term, such term to be determined by the managers of the reformatory, held not an infringement by executive of judicial functions. People v. City Prison Warden, 105 N. Y. S. 551; People v. Madden, 105 N. Y. S. 554.

55. Greater New York Charter conferring on commissioners power to examine accounts

latter a contrary rule as to certain ministerial duties has been adopted in some states.[57] Administrative powers in aid of judicial functions may properly be conferred on the courts.[58] The term "judicial functions" means the power to hear and determine causes between parties affecting the rights of persons as to life, liberty, or property,[59] and is distinguishable from quasi judicial functions, so called, or the act of an executive officer in passing upon facts and determining his action from the facts found.[60] Judicial power extends to review of all legislative action for the purpose of determining its validity as tested by the constitution,[61] but courts are without power to control the exercise of functions vested exclusively in other departments of government.[62]

of municipal officers, and to compel attendance of witnesses for that purpose, the result of the examination to be reported to the mayor, held not delegation of judicial power, as the report determines nothing. In re Hertle, 105 N. Y. S. 765. That registrar under Torrens law is required to determine legal effect of instruments relating to registered title held not to confer judicial functions upon him. Robinson v. Kerrigan [Cal.] 90 P. 129.

56. Functions held judicial: Acts conferring upon court power to hear and determine election contests confined to such questions of law and fact as arise from an inspection of ballots, and to be decided on evidence furnished by ballots alone held not to confer a mere ministerial duty. Metz v. Maddox, 105 N. Y. S. 702. Act providing for extension of corporate limits of cities, conferring on court power to carry out its provisions. Henrico County v. Richmond [Va.] 55 S. E. 683. Act conferring on courts jurisdiction over extension of boundaries of municipal corporations with power to determine reasonableness of same. New Orleans, etc., R. Co. v. Vidalia, 117 La. 561, 42 So. 139. Act June 1906, providing for establishing and quieting title to realty where public records are destroyed by fire, flood, or earthquake, held to provide for a judicial proceeding, though at the outset of the proceedings no person is named as opposing relief. Title & Document Restoration Co. v. Kerrigan [Cal.] 88 P. 356. Proceedings for registration of titles under Torrens system. Robinson v. Kerrigan [Cal.] 90 P. 129.

Non judicial: Whether a proposed drainage ditch will be conducive to the public health, convenience, or welfare, or whether the route therefor is practicable, are questions of administrative or governmental policy, and jurisdiction over them cannot be conferred upon courts by statute. Tyson v. Washington County [Neb.] 110 N. W. 634. Requiring judges of district court to appoint members of board of control of county almshouse and hospital. State v. Brill, 100 Minn. 499, 111 N. W. 294, 639.

57. Act directing a court upon petition alleging corrupt expenditure of public money to summarily investigate same, either in person or by commission, held valid, though court is not required to reach any conclusion thereon. City of Hoboken v. O'Neill [N. J. Law] 64 A. 981. Act designating certain place for holding terms of court, providing council or citizens thereof furnish suitable accommodation, to be approved by circuit judge upon inspection, held a delegation of a ministerial duty which might properly be exercised by him. McCall v. Calhoun Circuit Judge. 146 Mich. 319, 13 Det. Leg. N. 757, 109 N. W. 601.

58. Appointment of jury commissioners for selection of person may be conferred on circuit judges. State v. Anson [Wis.] 112 N. W. 475. Act conferring on court power to fix date of special terms held constitutional. Ex parte Boyd [Tex. Cr. App.] 17 Tex. Ct. Rep. 64, 96 S. W. 1079.

59. Missouri, etc., R. Co. v. Shannon [Tex.] 100 S. W. 138, afg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 866, 97 S. W. 527.

60. Act April 17, 1905, p. 351, c. 146, making secretary of state and comptroller members of state tax board with power to determine value of intangible assests of railroads and to distribute same for local taxation, held not unconstitutional as conferring judicial powers on executive officers. Missouri, etc., R. Co. v. Shannon [Tex.] 100 S. W. 138, afg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 866, 97 S. W. 527.

61. Senatorial appointment. Commonwealth v. Crow [Pa.] 67 A. 355. Legislative determination as to what is a proper exercise of police power is subject to supervision of courts. Act prohibiting offering of land for sale without written authority of owner or attorney in fact. Fischer Co. v. Woods [N. Y.] 79 N. E. 836. Under the New York constitution the supreme court may review a legislative apportionment. Const. art. 3, § 5. In re Sherill, 188 N. Y. 185, 81 N. E. 124. Whether an expenditure demanded to be made from county taxes is for county purposes within the constitution is a judicial question. Board of Escambia County Com'rs, v. Pensacola Port Pilot Com'rs [Fla.] 42 So. 697. But, where an expenditure is authorized by the legislature as being a county purpose, courts will not interfere except in cases free from reasonable doubt. Id. Whether constitutional provisions relative thereto are complied with by a statute redistricting state into representative districts presents judicial and not political questions. Ragland v. Anderson, 30 Ky. L. R. 1199, 100 S. W. 865.

62. Creating counties and civil districts is a political power and, though the districts created may not comply with constitutional requirements as to area, wealth, population, etc., the legislative discretion is absolute and cannot be reviewed by the courts. Maxey v. Powers [Tenn.] 101 S. W. 181. Authority to provide adequate court house and manner of making expenditures therefor being conferred on police jury, courts will not interfere with their judgment except to prevent

Original jurisdiction in matters other than those enumerated in the constitution cannot be conferred upon a constitutional appellate court.[63]

§ 5. *Relative powers of Federal and state or other subordinate governments.*[64] Within its granted powers the Federal government is supreme, and, in such matters, state regulation must give way to Federal legislation. This rule as applied to Federal bankruptcy acts,[65] patents,[66] regulation of interstate commerce,[67] recognition of foreign judgments,[68] extradition,[69] treaties,[70] import duties,[71] and other matters of Federal administration and regulation, is discussed in appropriate topics.

State legislation directed toward protecting the national flag does not infringe upon the exclusive powers of the Federal government.[72]

§ 6. *Police power in general.*[73]—Within the limitations of the state and Federal constitutions,[74] the state may, in the exercise of its police power, make such regulations as are conducive of the health,[75] morals,[76] safety,[77] convenience and general welfare and prosperity[78] of the people, though they may incidentally interfere

fraud or gross abuse of power. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 So. 979.

63. Act conferring on supreme court original jurisdiction in election contests held unconstitutional. Lauritsen v. Seward, 99 Minn. 313, 109 N. W. 404. Act prohibiting lower court from granting new trial or requiring remittitur on sole ground of excessiveness of verdict, but giving supreme court such power, held unconstitutional as an attempt to confer original jurisdiction on supreme court. Yazoo, etc., R. Co. v. Wallace [Miss.] 43 So. 469.

64. See 7 C. L. 705.

65. See Bankruptcy, 9 C. L. 343.

66. See Patents, 8 C. L. 1285.

67. See Commerce, 9 C. L. 583.

68. See Foreign Judgments, 7 C. L. 1734.

69. See Extradition, 7 C. L. 1639.

70. See Treaties, 8 C. L. 2146.

71. See Customs Laws, 7 C. L. 1019.

72. Neb. Act April 8, 1903, prohibiting use of flag for advertising purposes. Halter v. Nebraska, 205 U. S. 34, 51 Law. Ed. 696.

73. See 7 C. L. 706.

74. Fisher Co. v. Woods [N. Y.] 79 N. E. 836. Cannot in guise of police power impose burden upon interstate commerce. Western Union Tel. Co. v. State [Ark.] 101 S. W. 748. Ky. St. 1903, § 571, providing that corporations doing business in that state shall have a known place of business therein and a resident agent on whom process may be served held unconstitutional in so far as applied to corporations engaged in interstate commerce. Ryman Steamboat Line Co. v. Com., 30 Ky. L. R. 1276, 101 S. W. 403. But see Western Union Tel. Co. v. State [Ark.] 101 S. W. 748, in which a similar act was held constitutional as applying only to intra-state commerce.

75. Held within police power: Act providing **for removal of dam** as a sanitary measure. Chesapeake & O. R. Co. v. Com., 105 Va. 297, 54 S. E. 331. Summary seizure and destruction of impure and dangerous articles of **food.** North American Cold Storage Co. v. Chicago, 151 F. 120. Requiring railway companies to maintain **water closets** in passenger stations. Missouri, etc., R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 21, 97 S. W. 720.

76. Act authorizing summary destruction of gambling instrumentalities held within police power. Mullen & Co. v. Mosley [Idaho] 90 P. 986. Prohibiting unlicensed racing. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513.

Sale of intoxicants is within police power. Regulation or prohibition. Clark v. Tower, 104 Md. 175, 65 A. 3. State v. Settles, 34 Mont. 448, 87 P. 445. Licensing. Cain v. Allen [Ind.] 79 N. E. 201. Imposing license fee on all breweries, domestic and foreign doing business within the state. Schmidt v. Indianapolis [Ind.] 80 N. E. 632. Requiring interior of bar room to be visible from public street on days when sale of liquor is prohibited. Meehan v. Jersey City Excise Com'rs, 73 N. J. Law, 382, 64 A. 689.

77. Acts 28th Leg. p. 178, requiring electric **cars** to be equipped with **vestibules** to protect motorman during winter months held a valid exercise of police power. Beaumont Trac. Co. v. State [Tex. Civ. App.] 103 S. W. 238. Statute fixing standard of purity of **petroleum oils.** Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 P. 212. Act requiring abutting owners and occupiers to remove accumulations of **snow** from **sidewalks** is within police power. State v. McCrillis [R. I.] 66 A. 301.

Dangerous employments: Act regulating operation of coal mines for protection of miners. Koppla v. State [Wyo.] 89 P. 576. Railroad employer's liability acts. Schradin v. New York Cent., etc., R. Co., 103 N. Y. S. 73. Gen. Laws 1905, p. 386, c. 163, restricting defense of assumed risk. El Paso, etc., R. Co. v. Foth [Tex. Civ. App.] 100 S. W. 171. Requiring stretcher, woolen and waterproof blankets, together with bandages, etc., to be kept in **mines.** Wolf v. Smith [Ala.] 42 So. 824.

78. Anti Trust Law Acts 1903, p. 268, c. 140, held valid exercise of police power. Standard Oil Co. v. State [Tenn.] 100 S. W. 705. Constitutional provision requiring **interchange** of **cars** where goods carried are destined to places on other roads, at point of physical connection with such roads held within police power. Louisville & N. R. Co. v. Central Stock Yards Co., 30 Ky. L. R. 18, 97 S. W. 778. Mo. Rev. St. § 7890, providing that false and fraudulent **representations** in application for **insurance** shall not constitute a defense in action on policy unless matters

with liberty,[79] or affect property rights.[80] Laws for the prevention of fraud,[81] regulating municipal liability,[82] public service,[83] and foreign [84] corporations, and the marital relations and incidents thereof,[85] declaring new causes of escheat,[86] fixing uniform systems of weights and measures,[87] and providing for the licensing of occupations requiring peculiar knowledge or skill,[88] are within the police power. Though

misrepresented actually contributed to death of insured held within police power. Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 51 Law. Ed. 168. Act limiting amount of commissions payable by insurance company for new business held within police power. Boswell v. Security Mut. Life Ins. Co., 104 N. Y. S. 130. Limiting height of **buildings.** Welch v. Swasey, 193 Mass. 364, 79 N. E. 745. See, also, Buildings and Building Restrictions, 9 C. L. Prohibition against sale of **railroad tickets** by other than agents of company issuing same. Ex parte Hughes [Tex. Cr. App.] 100 S. W. 160. Act creating commission to license and regulate **racing associations** held within police power. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513. Statute requiring owners of places of public **amusement** to recognize **tickets** issued by them in hands of unobjectionable persons held within police power. Western Turf Ass'n v. Greenberg, 204 U. S. 359, 51 Law. Ed. 520.

Cattle industry: Imposing license on business of raising, herding, grazing, and pasturing, sheep. Plumas County v. Wheeler, 149 Cal. 758, 87 P. 909. Idaho Rev. St. §§ 1210, 1211, authorizing recovery of damages against owner permitting sheep to graze on public domain within two miles of dwelling house held within police power. Bacon v. Walker, 204 U. S. 311, 51 Law. Ed. 499; Bown v. Walling, 204 U. S. 320, 51 Law. Ed. 503.

79. Act requiring license to hunt **protected game** during open season held within police power. Kyle v. People, 226 Ill. 619, 80 N. E. 1081, and see, Fish and Game Laws, 7 C. L. 1659. Act providing for licensing of **peddlers** who are or who have declared their intention to become citizens of the United States held valid exercise of police power. Commonwealth v. Hana [Mass.] 81 N. E. 149, and see, Peddling, 8 C. L. 1338. Act making **wages** due laborers payable in money only or negotiable drafts payable in money and making same payable when ever the laborer ceased work held within police power. Shortall v. Puget Sound Bridge & Dredging Co. [Wash.] 88 P. 212.

80. Right to transport deer raised on private preserve is subordinate to police power. Dieterich v. Fargo, 52 Misc. 200, 102 N. Y. S. 720. Acts 1903, p. 183, authorizing summary destruction of hogs running at large on public levee held a proper exercise of police power as preventing damage to levees. Ross v. Desha Levee Board [Ark.] 103 S. W. 380. Act limiting height of buildings without compensation to owner held within police power. Welch v. Swasey, 193 Mass. 364, 79 N. E. 745; American Unitarian Ass'n v. Com., 193 Mass. 470, 79 N. E. 878.

81. Prohibiting screening of coal before weighing where same is mined by quantity held within police power as preventing fraud on miners. McLean v. State [Ark.] 98 S. W. 729. Act prohibiting sale of horses suffering from affection known as "choking" held within police power as preventing fraud, though disease was not contagious. Wester v. State, 147 Ala. 121, 41 So. 969.

Bulk sale act, making sales in bulk out of usual course of business, without notice, voidable as to creditors, held within police power. Wilson v. Edwards. 32 Pa. Super. Ct. 295; Spurr v. Travis, 145 Mich. 721, 13 Det. Leg. N. 598, 108 N. W. 1090; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 600.

82. Act making written notice to city council of accumulations of snow on sidewalks and a failure to remove same within a reasonable time thereafter a prerequisite to municipal liability for injuries caused thereby held a valid exercise of police power. MacMullen v. Middletown [N. Y.] 79 N. E. 863.

83. An act providing generally for what purposes and upon what conditions, terms, and limitations, an increase of the capital stock of a railway company may be made is within the police power. State v. Great Northern R. Co., 100 Minn. 445, 111 N. W. 289.

84. May impose reasonable terms upon the right of a foreign corporation to engage in intrastate commerce though it may also be engaged in interstate commerce. Western Union Tel. Co. v. State [Ark.] 101 S. W. 748. Laws 1898, p. 27, c. 10, requiring foreign corporation to pay charter fee based upon authorized capital stock before doing business in state held to be within police power. State v. Western Union Tel. Co. [Kan.] 90 P. 299.

85. Act making wife's inchoate interest absolute in her as upon death of husband, where on judicial sale such interest is not directed to be sold or barred by the judgment, held within police power. Green v. Estabrook [Ind.] 79 N. E. 373.

86. Commonwealth v. Chicago St., etc., R. Co., 30 Ky. L. R. 673, 99 S. W. 596.

87. State may, in exercise of its police power, adopt a uniform system of weights and measures and to require that all persons whose business transactions require use of same to conform thereto. McLean v. State [Ark.] 98 S. W. 729.

88. Regulations as to qualifications for admission of **attorneys.** In re Applicants for License, 143 N. C. 1, 55 S. E. 635. Act requiring registration of **physicians** exempting those practicing at a certain prior date. Watson v. State [Md] 66 A. 635. **Pharmacists.** State v. Hovorka, 100 Minn. 249, 110 N. W. 870. Act providing for examination and licensing of **plumbers** held within police power. Douglas v. People, 225 Ill. 536, 80 N. E. 341; Commonwealth v. Shafer, 32 Pa. Super. Ct. 497. Act providing for licensing of plumbers in cities having an underground sewer system. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774. **Dentistry.** State v. McIntosh [Mo.] 103 S. W. 1071; State v. McIntosh [Mo.] 103 S. W. 1078.

the fourteenth amendment does not impair the police powers of the states,[89] it cannot be exercised so as to impair constitutional rights,[90] except in cases of the gravest public necessity.[91] To constitute a valid police regulation, a law must be reasonable[92] and must bear a substantial relation to the public welfare.[93] The police power of the state cannot be abdicated[94] but may be delegated to municipal corporations.[95]

§ 7. *Liberty of contract and right of property*[96] cannot be invaded, except as reasonably necessary for the public welfare,[97] but this does not grant the right to ac-

89. North American Cold Storage Co. v. Chicago, 151 F. 120.

90. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513; Jordan v. State [Tex. Cr. App.] 103 S. W. 633. A state cannot in the exercise of its police power deprive a person of a right granted by the constitution. Act making interstate carrier of intoxicating liquors a dealer therein held unconstitutional. Crescent Liquor Co. v. Platt, 148 F. 894. Act providing that any agricultural laborer, who, after receiving advances should wilfully and without just cause fail to perform services required by his contract, shall be guilty of a misdemeanor, held an attempt to secure compulsory services in payment of a debt and not within police power. Ex parte Drayton, 153 F. 986.

91. Where a boundary dispute existed between counties for over a century, no such exigency was presented as to require the immediate and arbitrary exercise of police power or the law of overwhelming necessity in the invasion of private rights, though involving the jurisdiction of courts, the right of franchise and the power of taxation. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

92. Fischer Co. v. Woods [N. Y.] 79 N. E. 836. Rev. St. § 4413, for the regulation of dealers in secondhand articles and junk, requiring that certain goods purchased by them shall be kept on hand for thirty days, is not an unreasonable requirement. Phillips v. State, 4 Ohio N. P. (N. S.) 398.

93. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513. It must appear that the interests of the public generally as distinguished from a particular class require regulation. Fischer Co. v. Woods [N. Y.] 79 N. E. 836. Act prohibiting offering of real estate for sale without written authority from legal or equitable owner or his attorney in fact held not within police power. Id. Excise tax upon business of selling articles when accompanied with "trading stamps" held not within police power. O'Keefe v. Somerville, 190 Mass. 110, 76 N. E. 457. Act prohibiting construction of railroad in certain territory held to have been enacted in interest of abutting owners whose property would be rendered less desirable by construction and operation of road and therefore not within police power. Baltimore & O. R. Co. v. Waters [Md.] 66 A. 685.

Employment of children: Act prohibiting employment of children under certain age in oiling of machinery is within police power. Lenahan v. Pittston Coal Min. Co. [Pa.] 67 A. 642. Act regulating employment of infants and limiting hours of daily labor held within police power though employment does not involve direct danger to morals, decency, life, or limb. State v. Shorey [Or.] 86 P. 881. Act prohibiting employment of illiterate children under sixteen during session of public schools, unless attending night school, held within police power. In re Spencer, 149 Cal. 396, 86 P. 896. Act prohibiting employment of children under sixteen in certain occupations between hours of 10 P. M. and 6 A. M., held within police power. Id.

Employment of women: Act prohibiting employment of females, regardless of age, in factories between hours of 9 P. M. and 6 A. M., held not within police power. People v. Williams, 189 N. Y. 131, 81 N. E. 778, afg. 116 App. Div. 379, 101 N. Y. S. 562 and 51 Misc. 383, 100 N. Y. S. 337.

Hours of labor: Act limiting hours of employment of laborers on municipal work and in ore mills, smelters and mines held within police power. State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 87 P. 980. Act limiting hours of daily labor on public improvements held **not** within police power. Keefe v. People [Colo.] 87 P. 791.

Truck: Acts 29th Leg. p. 372, c. 152, prohibiting payment of laborers in merchandise held unconstitutional. Jordan v. State [Tex. Cr. App.] 103 S. W. 633.

94. Charter allowing railway company to increase capital stock without restriction does not prevent state from regulating purposes for which increase may be made, or terms, conditions, or limitations, thereon. State v. Great Northern R. Co., 100 Minn. 445, 111 N. W. 289.

95. City of Portland v. Cook [Or.] 87 P 772.

96. See 7 C. L. 709.

Held invalid: Acts 29th Leg. p. 372, c. 152, prohibiting payment of laborers in merchandise. Jordan v. State [Tex. Cr. App.] 103 S. W. 633. Acts prohibiting employment of women, irrespective of age, in factories between hours of 9 p. m. and 6 a. m. People v. Williams, 189 N. Y. 131, 81 N. E. 778, afg. 116 App. Div. 379, 101 N. Y. S. 562 and 51 Misc. 383, 100 N. Y. S. 337. Ordinance imposing license fee of $300 on temporary stores and transient dealers. Uhrlaub v. Cincinnati, 4 Ohio N. P. (N. S.) 505.

Valid: Act giving threshers a paramount lien if filed within ten days after threshing. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 N. W. 843. A mechanics' lien law is not an impairment of the right to contract where it does not extend but limits liability under a constitutional lien. Stimson Mill Co. v. Nolan [Cal. App.] 91 P. 262. An act giving attorney lien on cause of action after notice to defendant, and making latter liable to attorney in event of settlement without attorney's consent after such notice. O'Connor v. St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150.

97. As carrier exercises public functions, contracts with their employes are subject

quire property in anything which is not made the subject of private property by law,[98] nor the right to dispose of property which has not been acquired under the law of the land.[99]

§ 8. *Freedom of speech and of the press*[1] cannot be abridged,[2] nor can it be abused without liability.[3]

§ 9. *Personal*[4] *and religious liberty*[5] including the right to choose employment[6] cannot be infringed. Involuntary servitude except for crime[7] and imprisonment for debt,[8] except for fraud or other wrong,[9] is prohibited.

§ 10. *Equal protection of the law,*[10] as guaranteed by the Federal constitution merely requires that the law shall have equality of operation on all citizens[11] of the same class.[12] Within this rule statutes providing for licenses,[13] taxation,[14] local im-

to regulation and control by the Federal government, when within interstate commerce clause. United States v. Adair, 152 F. 737. Ordinance prohibiting sale of railroad tickets except by persons authorized in writing by companies issuing same held not unconstitutional as depriving a person of the right to dispose of his property as he sees fit. Ex parte Hughes [Tex. Cr. App.] 100 S. W. 160.

Health regulations: Ordinance prohibiting sale of milk containing less than three per cent. butter fat, to be determined in a certain manner, held not unconstitutional as depriving a citizen of the gains of his industry. City of St. Louis v. Bippen, 201 Mo. 528, 100 S. W. 1048.

Hours of Labor: Act limiting hours of employment of laborers on municipal work and in ore mills, smelters and mines held to be within police power and therefore not an infringement on liberty of contract. State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 87 P. 980.

Employment of children: Act prohibiting employment of children under 16 for greater daily period than 10 hours held not an infringement on liberty of contract. State v. Shorey [Or.] 86 P. 881.

Bulk sale laws: Act making sales in bulk except upon notice void as to creditors held not unconstitutional as restraining liberty to contract. Spurr v. Travis, 145 Mich. 721, 13 Det. Leg. N. 598, 108 N. W. 1090; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 600.

98. Water rights. McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 65 A. 489.

99. At common law riparian owner had no right to divert water from streams for purposes of sale as merchandise. McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 65 A. 489.

1. See 7 C. L. 710.

2. Act prohibiting newspapers from publishing details of execution of a capital sentence held not an infringement on the liberty of the press. State v. Pioneer Press Co., 100 Minn. 173, 110 N. W. 867.

3. See, also, Contempt, 7 C. L. 746; Libel and Slander, 8 C. L. 713.

4. See 7 C. L. 710. Neb. Act April 8, 1903, prohibiting use of national flag for advertising purposes, held not an infringement on right of personal liberty. Halter v. State of Nebraska, 205 U. S. 34, 51 Law. Ed. 696.

5. See 7 C. L. 710. For validity of act of school board in authorizing certain religious exercise in public schools, see Schools and Education, 8 C. L. 1851.

6. Right of citizens to follow legitimate occupations is subject to paramount power of state to regulate same for the public welfare. Act providing examination and licensing of plumbers held valid. Douglas v. People, 225 Ill. 536, 80 N. E. 341. Prohibiting employment of children in certain occupations held not an unreasonable restriction on right of minors to work at any occupation in which they wish to engage. In re Spencer, 149 Cal. 396, 86 P. 896. Ordinance prohibiting sale of railroad tickets except by agents of company issuing same held not unconstitutional as preventing persons from carrying on a lawful occupation. Ex parte Hughes [Tex. Cr. App.] 100 S. W. 160.

7. Act authorizing commitment to prison of person acquitted of crime on ground of insanity where his discharge would be manifestly dangerous to community does not violate the constitutional inhibition against involuntary servitude, except as punishment of crime whereof the party shall have been duly convicted. State v. Snell [Wash.] 89 P. 931. Act authorizing associations to whom homeless or abandoned child is committed to bind it out for service for a specified period held not violative of 13th amendment as authorizing involuntary servitude in cases other than as punishment for crime. Kennedy v. Meara, 127 Ga. 68, 56 S. E. 243. Act making agricultural laborer failing to complete contract of employment after receiving advances thereon guilty of a misdemeanor, punishable by imprisonment, creates system of peonage in violation of 13th amendment. Ex parte Drayton, 153 F. 986.

8. See 7 C. L. 711.

9. See Civil Arrest, 9 C. L. 653.

10. See 7 C. L. 711.

11. Act prohibiting all persons except resident Indians from fishing for salmon except with hook and line on certain days during the year held not to deny equal protection, the exemption as to Indians being construed to include only such Indians as are not citizens. State v. Lewis [Wash.] 88 P. 940. A foreign corporation which is not subject to process is not a citizen within the meaning of the amendment. Merchants' Nat. Bank v. Ford, 30 Ky. L. R. 558, 99 S. W. 260. A nonresident corporation cannot demand rights which are accorded not to citizens of the state but only to resident incorporated banks. Id.

12. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513. Though an act is local, or special, or even exceptional in its application it is invalid as class legislation if it is general in its application to the class to which it applies. Act exempting city from liability

where injury was caused by neglect of any person to keep sidewalks clear of obstruction held not class legislation. Maclam v. Marquette [Mich.] 14 Det. Leg. N. 207, 111 N. W. 1079. Mo. Rev. St. § 7890 providing that false and fraudulent representations in application for insurance shall not constitute a defense in action on policy unless matters misrepresented actually contributed to death of insured, by its terms applying alike to domestic and foreign insurance companies, held not unconstitutional as denying equal protection. Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 51 Law. Ed. 168. St. 1891, p. 490, c. 264, authorizing certain corporations to act as executor upon depositing securities of value of $200,000 with state treasurer, and provides that no other bond shall be required, but that before accepting it must obtain certificate of compliance with law from bank commissioners, held that as such certificate was not conclusive of its solvency, court might require further security and the act was therefore not unconstitutional as class legislation. In re Kilborn [Cal. App.] 89 P. 985. Act making it unlawful for employers of labor to combine or confer together for purpose of preventing any person from obtaining employment held to operate equally on all employers. Joyce v. Great Northern R. Co., 100 Minn. 225, 110 N. W. 975. Act providing for appointment of board of architecture from certain association of architects, such board to have power to examine and certify architects, held not class legislation. Ex parte McManus [Cal.] 90 P. 702. Act prohibiting assignment of claims against employes of firms, etc., engaged in interstate business for purpose of avoiding state exemption laws, and creating a right of action for the recovery from the assignor of exempt wages attached pursuant to such assignment, together with attorney's fees and costs, held constitutional. Gordon Bros. v. Wageman [Neb.] 108 N. W. 1067. Act providing for county depositories does not fail of uniform operation throughout state by reason of provision that in counties where there are located banks or trust companies incorporated under the state laws or laws of the United States, such banks only shall be eligible to bid for and receive county funds, but in counties where there are no such banks located, private banks may be awarded funds. State v. Oviatt, 4 Ohio N. P. (N. S.) 481. Imprisonment or penalty clause of anti-trust law (Rev. St. § 4427-4), held not in contravention of requirement that all laws of a general nature shall have uniform operation throughout the state. State v. Hygeia Ice Co., 4 Ohio N. P. (N. S.) 361. Exemption from act prohibiting employment of children in favor of domestic work and certain kinds of agricultural labor during time public schools are not in session or after school hours held not to constitute an unlawful discrimination. In re Spencer, 149 Cal. 396, 86 P. 896. Act prohibiting employment of children in certain enumerated occupations held not unconstitutional as discriminating in favor of other unenumerated employments. Id. Act prohibiting employment of illiterate children under sixteen years of age during hours of session of public schools unless attending night school, held not discriminatory. Id. Provision in act prohibiting employment of children permitting same during vacation of public schools upon permit from principal construed as authorizing employment during public school vacation upon permit from principal of school which child attends and therefore not a discrimination against children attending private schools. Id. Proviso in act prohibiting employment of children permitting same where child is over 12 years of age and parent is sick and unable to labor held not a discrimination against orphans and abandoned children, such proviso being intended for benefit of infirm parent. Id.

13. Act providing for licensing of **peddlers** who are, or who have declared their intention to become citizens of the United States held not to deny equal protection, being within police power. Commonwealth v. Hana [Mass.] 81 N. E. 149. Act providing for licensing of peddlers, discriminating in favor of residents of city or town, who pay taxes there on stock in trade, and those over seventy years of age held not a denial of equal protection. Id. Ordinance imposing a license fee of $200 on wholesalers of kerosene oil held not discriminative. Mefford v. City Council of Sheffield [Ala.] 41 So. 970. Act requiring licensing of plumbers held not class legislation. Douglas v. People 225 Ill. 536, 80 N. E. 341. Act prohibiting any "person or firm" from engaging in business of plumbing unless licensed held not to permit firm to engage therein if only one member thereof is licensed and therefore not within inhibition against class legislation. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774. Under an act authorizing the registration by a municipal board of journeymen and master plumbers, a regulation by such board providing for the registration of master plumbers only is void as lacking uniformity. Commonwealth v. Shafer, 32 Pa. Super. Ct. 497.

14. The inequality of a tax does not come within the purview of the 14th amendment as a denial of equal protection. State v. McCrillis [R. I.] 66 A. 301. A tax which is general and uniform and based on due process does not deny equal protection of the law. Bergen & Dundee R. Co. v. State Board of Assessors [N. J. Err. & App.] 67 A. 668; Central R. Co. v. State Board of Assessors [N. J.] 67 A. 672. Legislature may classify different persons or subjects of taxation and it is sufficient if tax levied on each class is equal and uniform as to that class. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71, rvg. [Tex. Civ. App.] 93 S. W. 464. Act imposing a heavy burden on one class of property and none upon other classes does not deny equal protection. People v. Mensching [N. Y.] 79 N. E. 884. An occupation tax imposed equally on all persons engaged in such occupation does not deny equal protection of law. Acts 1906, p. 549, imposing license tax on rectifiers of spirits. Brown-Foreman Co. v. Com., 20 Ky. L. R. 793, 101 S. W. 321. New York Laws 1905, c. 241, imposing tax on **transfers** of **corporate stock** held not unconstitutional as an arbitrary classification in favor of sales of other kinds of personalty, corporate bonds, etc. People of New York v. Reardon, 204 U. S. 152, 51 Law. Ed. 415.

Occupation Tax on presidents of certain enumerated corporations held not a denial of equal protection. Witham v. Stewart [Ga.] 58 S. E., 463. For the purposes of taxation, railroads may be treated as a separate class

provements,[15] regulating foreign corporations,[16] business, trades and professions,[17] and the operation and control of railroads and other carriers [18] have been held valid.

and hence an act does not deny equal protection because applying only to railroads. State v. Chicago & N. W. R. Co. [Wis.] 112 N. W. 515. Ordinance imposing tax on persons engaged in business of selling fire-sale, auction sale, damaged or bankrupt stocks of goods, held constitutional, such occupation constituting a class to which legislation may be specifically directed. City of Emporia v. Endelman [Kan.] 89 P. 685. The legislature may single out and make classifications for the purpose of levying occupation taxes, the only requirement being that they operate equally on those of the same class. Occupation tax on oil producers held valid. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157. That Acts 29th Leg. p. 364, c. 148, § 9, imposes an occupation tax at a higher rate on persons engaged in wholesaling oil than those engaged in wholesaling other goods held not to render it unconstitutional as denying equal protection. Texas Co. v. Stephens [Tex.] 103 S. W. 481. Act imposing tax on gross earnings of carriers held to operate uniformly on all carriers and therefore not a denial of equal protection. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71, rvg. [Tex. Civ. App.] 93 S. W. 464.

Districts: Act setting out divers rules for taxation of property in same taxing district held not a denial of equal protection. Central R. Co. v. State Board of Assessors [N. J. Law] 65 A. 244. Each county being a separate taxing district, a tax law exempting certain counties from its operation does not deny equal protection. Murph v. Landrum [S. C.] 56 S. E. 850.

Inheritance taxes: La. Act June 28, 1904, exempting from inheritance tax successions which have been closed, does not deny equal protection as an arbitrary classification, a tax on closed successions being invalid. Cahen v. Brewster, 203 U. S. 543, 51 Law. Ed. 310. Ill. Act May 10, 1901, amending Laws 1895, p. 301, exempting domestic, religious, and educational corporations from payment of inheritance tax, and subjecting foreign corporations of same character to payment of tax, held not a denial of equal protection, the classification being reasonable. Board of Education v. People, 203 U. S. 553, 51 Law. Ed. 314.

15. Acts Arpil 23, 1893, p. 92, § 109, providing that city may include in a special assessment for street improvements cost of bringing street to established grade when in its opinion general revenue fund does not warrant expenditure therefor, held not to deny equal protection. City of Sedalia v. Smith [Mo.] 104 S. W. 15.

16. Act incorporating local society with same name as that of a previously existing state association whose charter from a foreign corporation had been withdrawn by latter, and conferring upon such society exclusive right to grant subcharters in state, held not to deny foreign corporation equal protection of law. National Council v. State Council, 203 U. S. 151, 51 Law. Ed. 132. W. Va. Acts 1905, c. 39, requiring all foreign and domestic nonresident corporations to appoint state auditor to accept service of process, held not to deny equal protection. St Mary's Franco-American P. Co. v. West Virginia, 203 U. S. 183, 51 Law. Ed. 144. Act requiring foreign corporations as a condition to doing business in state to file certified copy of articles of incorporation and pay required fee in substance what is required of domestic corporations held not unconstitutional as denying equal protection. Western Union Tel. Co. v. State [Ark.] 101 S. W. 748. Laws 1898, p. 27, c. 10, requiring domestic and foreign corporations before doing business in state to pay fee based upon authorized capital stock, is held not unconstitutional as denying foreign corporations equal protection, though most of their capital may be invested in property outside of the state. State v. Western Union Tel. Co. [Kan.] 90 P. 299. Laws 1891, p. 75, prohibiting foreign corporations who have not complied with state law from doing business in the state and making contracts entered into by them therein void, held not unconstitutional as denying equal protection of the law. Roeder v. Robertson, 202 Mo. 522, 100 S. W. 1086.

17. Act giving a prior **lien** to persons furnishing mining or manufacturing companies' supplies necessary to operation of same held not to deny equal protection. First Nat. Bk. v. William R. Trigg Co. [Va.] 56 S. E. 158. Act making lien of thresher superior to all other liens except those given for the seed from which grain was grown held not unconstitutional as class legislation because given for use of threshing machine only and not for men and teams used in connection therewith. Phelan v. Terry [Minn.] 112 N. W. 872. Act creating attorney's lien on cause of action held not invalid as class legislation. O'Connor v. St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150. Act making sales in **bulk,** except upon notice, void as to creditors, held not to constitute class legislation because not including merchants having no creditors, nor persons of other callings. Spurr v. Travis, 145 Mich. 721, 13 Det. Leg. N. 598, 108 N. W. 1090. Act providing that sale in bulk of stock of merchandise and fixtures otherwise than in ordinary course of trade and in regular and usual prosecution of seller's business without notice shall be void held not class legislation. Wilson v. Edwards, 32 Pa. Super. Ct. 295. Idaho Rev. St. §§ 1210, 1211, authorizing recovery of damages against owner of **sheep** permitting them to graze on public domain within two miles of dwelling house, held not unconstitutional as discriminating in favor of owners of cattle. Bacon v. Walker, 204 U. S. 311, 51 Law. Ed. 499; Brown v. Walling, 204 U. S. 320, 51 Law. Ed. 503. Ordinance prohibiting sale of railroad **tickets** except by persons duly authorized in writing by companies issuing same held not a denial of equal protection by granting special privileges to railroads. Ex parte Hughes [Tex. Cr. App.] 100 S. W. 160. Act requiring all persons, corporations, or associations, conducting places of public amusement, to recognize tickets issued by them in hands of persons not objectionable, held not to deny owner of race course equal protection. Western Turf Ass'n v. Greenberg, 204 U. S. 359, 51 Law. Ed. 520. Illinois Act April 18, 1899, making mine owners responsible for

Criminal laws and procedure [19] and civil remedies and proceedings [20] are unassailable unless unequally oppressive as to particular persons.[21]

defaults of certain employes whom they are required to select from those licensed by state mining held not to deny them equal protection. Wilmington State Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. Ordinance prohibiting sale of **meat** after nine a. m. on Sunday held not unconstitutional as class legislation, general laws prohibiting sale of any goods on Sunday except provisions and drugs and then only in cases of immediate necessity. City of St. Louis v. De Lassus [Mo.] 104 S. W. 12. Act prohibiting practice of **architecture** by uncertified architects, unless they inform clients that they are not certified, held not class legislation. Ex Parte McManus [Cal.] 90 P. 702. Act prohibiting employment of children under 16 in certain occupations, between hours of 10 P. M. and 6 A. M., held not class legislation. In re Spencer, 149 Cal. 396, 86 P 896. Act prohibiting employment of **laborers** for more than eight hours per day on municipal work or in ore mills, smelters, and mines, held not a denial of equal protection. State v. Livingston Concrete Bldg. & Mfg. Co., 34 Mont. 570, 87 P. 980. Act regulating licensing of sale of **intoxicating** liquors held to give applicant for license right to contest in court the validity of a blanket remonstrance and therefore not denying equal protection. Cain v. Allen [Ind.] 79 N. E. 201. Act requiring saloons except those maintaining bowling alleys to keep interiors visible from street on days when sale of liquor is prohibited held not class legislation, though other places where intoxicating liquor is sold do not come within the purview of the act. Meehan v. Board of Excise Com'rs of Jersey City, 73 N. J. Law, 382, 64 A. 689. Act regulating sale of intoxicating liquors providing that it shall not apply to wholesalers selling not less than five gallons at a time held not to deny equal protection. State v. Bock, 167 Ind. 559, 79 N. E. 493.

18. Act making a carrier delivering intoxicating liquor to other than bona fide consignees a dealer therein and subject to criminal prosecution as such denies carrier equal protection of law. Crescent Liquor Co. v. Platt, 148 F. 894. Act requiring railway company to sell 500 mile mileage books at less rates per mile than usual charges held to deny company equal protection of law. Commonwealth v. Atlantic Coast Line R. Co. [Va.] 55 S. E. 572. Act delegating to agent of carrier right to determine who are bona fide consignees of intoxicating liquor and to refuse to deliver to others deprives shippers thereof equal protection of the law. Crescent Liquor Co. v. Platt, 148 F. 894. Employer's liability act governing railroads construed as to applying to all persons operating railroads whether corporate or not and therefore not denying equal protection. Pittsburg, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Laws 1897, p. 14, c. 6, making "every person, receiver or corporation," owning or operating a railroad, liable for injuries caused employe through negligence of fellow-servant held not to deny equal protection, though construed as applying to servant injured while pushing a car on a tram way used in hauling ties from defendant's main line to its creosote plant. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 99 S. W. 743. Constitutional amendment abrogating fellow-servant doctrine as to railways of commerce held not denial of equal protection because not applying to railroads constituting an adjunct to the main business of owners or operators. Bradford Construction Co. v. Heflin [Miss.] 42 So. 174. Constitutional amendment and laws passed thereunder subjecting carriers to jurisdiction of corporation commission clothed with limited executive, legislative, and judicial powers, held not to deny equal protection, all of that class being treated alike. Winchester & S. R. Co. v. Com. [Va.] 55 S. E. 692. Federal employer's liability act regulating liability of interstate carriers for injury to employes held not to deny equal protection of law. Kelley v. Great Northern R. Co., 152 F. 211, overruled as an attempted regulation of intra-state commerce. Howard v. Illinois Cent. R. Co., 28 S. Ct. 141. Act imposing penalty on railroads for failure to maintain water closets in passenger stations held not a denial of equal protection. Missouri, etc., R. Co. v. State [Tex. Civ. App.]17 Tex. Ct. Rep. 25, 97 S. W. 720. Gen. Laws 1905, p. 386, c. 163, restricting defense of assumed risk in actions against railroads and street railroads, held not to deny equal protection because not applying to interurban railroads as if latter belong to separate class the act is not discriminatory. El Paso & S. W. R. Co. v. Foth [Tex. Civ. App.] 100 S. W. 171. Act authorizing corporations owning tramway, electric railways, etc., created thereunder to condemn crossings with existing railroads held not to deny latter equal protection of law because not conferring such power on them. Alderman & Sons Co. v. Wilson Lumber Co. [S. C.] 57 S. E. 756.

19. Act making it a crime to procure advances under contract of employment with intent to defraud held not to deny equal protection. Vance v. State [Ga.] 57 S. E. 889. Act permitting person injured by act of defendant in procuring advances under contract of employment with intent to defraud, to testify, and denying defendant such right, held not a denial of equal protection. Id. Penal statute making officer of bank guilty of embezzlement, if money taken was deposited though not intrusted to his custody, held to apply alike to all persons in that occupation and not objectionable as class legislation because in other cases requiring money to be in custody of employe. Imboden v. People [Colo.] 90 P. 608. Act authorizing challenge of grand jurors on ground of age prior to such juror being sworn does not deny equal protection to one barred from making such challenge because alleged crime was committed after such jurors had been sworn, as it applies alike to all persons under like circumstances State v. Lang [N. J. Law] 66 A. 942.

20. Ark. Act Feb. 15, 1893, requiring personal service of summons on resident owners at least 20 days before entering decree for unpaid levee taxes and providing constructive service on non-residents by publication for only four weeks held not to deny

Classification is not prohibited [22] but it must be reasonable,[23] must not discriminate against particular persons in favor of others of the same class,[24, 25] and must

latter equal protection. Ballard v. Hunter, 204 U. S. 241, 51 Law. Ed. 461. Rev. St. 1899, §§ 3227-3232 (Ann. St. 1906, pp. 1832-1834), authorizing ex parte order requiring judgment debtor to appear and submit to examination in supplementary proceedings, held not unconstitutional as denying equal protection. Ackerman v. Green, 201 Mo. 221, 100 S. W. 30. Act authorizing citizens having an interest to institute quo warranto upon obtaining leave where county attorney refuses to do so held not to deny equal protection though no provision is made for notice of application for leave. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867. Act requiring corporations to produce books and papers necessary to inquiry before court held not discriminatory in violation of 14th amendment because applying only to corporations, being construed as a subpoena duces tecum requiring a corporation to do that which an individual could already be compelled to do. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

21. Act making agricultural laborers failing to complete contract of employment after receiving advances guilty of a misdemeanor violates equality clause of 14th amendment. Ex parte Drayton, 153 F. 986. Statute allowing an attorney's fee as part of costs in one class of actions and not in others, or which allows it to one party to an action and not to the other, denies equal protection of the law. Mechanic's lien. Builders' Supply Depot v. O'Connor [Cal.] 88 P. 982. Act March 27, 1907, providing that in taking appeals city of Memphis shall be required to give bond but need not give security therefor, held unconstitutional as class legislation. Malone v. Williams [Tenn.] 103 S. W. 798.

22. Where one of two possible classes is admittedly subject to classfication, the other is likewise subject. Railroads organized under general laws being subject to classification, those operating under special charters are also. Shelton v. Erie R. Co., 73 N. J. Law, 558, 66 A. 403. Minors form a class to which legislation may be exclusively directed without coming within the inhibition against class legislation. In re Spencer, 149 Cal. 396, 86 P. 896. Act prohibiting employment of **children** under 16 for more than 10 hours per day held not a denial of equal protection. State v. Shorey [Or.] 86 P. 881. Act requiring successful candidate for office of supervisor of assessments to furnish bond to the state signed by an authorized **surety company** held not unconstitutional as class legislation. State v. Samuelson [Wis.] 111 N. W. 712. The legislature may prescribe reasonable qualifications for **public offices.** Act requiring candidate for supervisor of assessments to be an elector and householder of county for not less than four years held not class legislation. Id. The Ohio act providing for **county depositories** (98 O. L. 274) is not in contravention of sections 1 or 2 article 1 of state Constitution, or of Fourteenth Amendment of Federal Constitution, by reason of the fact that it discriminates against natural persons and in favor of banks and trust companies. State v. Oviatt, 4 Ohio N. P. [N. S.) 481. Classification may properly be made the basis of the choice or selection of the legislative or the administrative body upon whom the power of selection is conferred. Act conferring authority to license **racing associations** on a state racing commission held valid. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513. Rev. St. § 3631a, held not unconstitutional because conferring upon mutual **burial association,** whether regarded as an insurance company or a beneficial society, rights and privileges differing from those bestowed upon other associations doing a similar business. State v. Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

23. Bedford Quarries Co. v. Bough [Ind.] 80 N. E. 529; Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513. Act for registration of physicians exempting gratuitous services, students in hospitals or offices of physicians, physicians licensed in other states, army and navy surgeons, chiropodists, midwives, etc., held a reasonable classification. Watson v. State [Md.] 66 A. 635. Act placing peddlers of butter and milk in one class for license purposes while peddlers of other articles are classified together held not to deny equal protection. Miller v. Birmingham [Ala.] 44 So. 388. Owing to peculiar hazards of railroading, employers' liability acts applying only to railroads are not based on arbitrary classification. Pittsburg, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Act requiring all physicians and surgeons to be registered, exempting those practicing at a certain date prior who were still practicing and who could prove to have treated a certain number of persons, held not an arbitrary discrimination. Watson v. State [Md.] 66 A. 635. Pa. Act April 4, 1868, restricting right of action of railway mail clerks and others whose employment in and about railroads subjects them to greater peril than passengers for injuries to that which an employe of the company would have under like circumstances, held a reasonable classification. Martin v. Pittsburg, etc., R. Co., 203 U. S. 284, 51 Law. Ed. 184. Neb. Act April 8, 1903, prohibiting use of national flag for advertising purposes, expressly exempting newspapers, books, pamphlets, etc., on which may be printed a representation of the flag when disconnected from any advertisement, held not unconstitutional as denying equal protection. Halter v. State of Nebraska, 205 U. S. 34, 51 Law. Ed. 696. Act prohibiting dispensing of drugs by anyone other than a registered pharmacist in towns having a population of 500 or over, or by other than an assistant registered pharmacist in towns having less than that population, held not to deny equal protection. State v. Evans, 130 Wis. 381, 110 N. W. 241. Act prohibiting screening of coal before weighing in mines employing ten or more men under ground, mining by quantity, held not to deny equal protection because not applying where less than ten men are employed, the act being to prevent fraud and the chance of fraud being less in such case. McLean v. State [Ark.] 98 S. W. 729.

24, 25. Wilson v. Edwards, 32 Pa. Super.

tend in a substantial degree to promote the public welfare.[26] A saving clause protecting vested rights does not invalidate a laws general and uniform in other respects.[27] An act which by its terms practically prevents a resort to the courts to determine its constitutionality denies equal protection of the law.[28] The fourteenth amendment prohibiting a denial of equal protection of the law does not apply to the Federal government.[29] To render an act invalid as class legislation, discrimination must be manifest from the act itself, and not from the possibility of discrimination in its administration.[30]

§ 11. *Privileges and immunities of citizens.*[31]—The Federal constitution prohibits states from passing laws abridging the privileges or immunities [32] of citizens,[33]

Ct. 295. Meehan v. Excise Com'rs of Jersey City, 73 N. J. Law, 382, 64 A. 689. Act April 4, 1900, relating to the improvement of streets in cities of the second class and fourth grade, held unconstitutional for lack of uniformity of operation. State v. Mt. Vernon, 4 Ohio N. P. (N. S.) 317. Rev. St. § 2834b, in so far as it applies to boards of education, held unconstitutional for lack of uniformity of operation. Bower v. Education of Fulton Tp., 8 Ohio C. C. (N. S.) 305. Ordinance authorizing city council to arbitrarily refuse to issue license to sell **water** held unconstitutional. City of La Junta v. Heath [Colo.] 88 P. 459. Ordinance imposing license fee of $300 on temporary stores and transient dealers held invalid, because prohibitive as to some classes, unreasonable as to others. Uhrlaub v. Cincinnati, 4 Ohio N. P. (N. S.) 505. Ordinance prohibiting erection, removal, or remodeling, of frame building within 60 feet of brick or stone structure without written consent of owner of latter, held unconstitutional as denying owners of frame structures equal portection of the law. Tilford v. Belknap [Ky.] 103 S. W. 289. Act March 27, 1907, relieving city of Memphis of burdens imposed on other communities by general law in the manner of conducting elections and depriving its inhabitants of safe guards granted such communities, thereby held unconstitutional as class legislation. Malone v. Williams [Tenn.] 103 S. W. 798. Act March 27, 1907, making taxes on corporate stock delinquent at a different date than other kinds of property, held unconstitutional as class legislation. Id. Act March 27, 1907, authorizing treasurer of city of Memphis to collect personal tax by distress sale of any personal property of person who has moved or is about to move from city whether tax is delinquent or not, held unconstitutional as class legislation under the general laws, distress being authorized only where tax is delinquent. Id. Act March 27, 1907, conferring on city of Memphis all governmental and police power within its limits and for two miles beyond held unconstitutional as class legislation. Id. Act March 27, 1907, providing that person successfully attacking a tax title to property in city of Memphis shall pay to defeated holder of tax title the amount paid at tax sale with interest, and any tax which purchaser may have paid with interest, together with costs of litigation, held unconstitutional as class legislation. Id. Where after defendants had constructed a livery stable in a portion of the city in which other stables of the same character were located, an ordinance was passed requiring a permit and consent of property owners as condition precedent to right to conduct stable in such locality, excepting from its operation stables already maintained therein, held discriminatory as to defendants. City of Billings v. Cook [Mont.] 88 P. 656. Employer's liability act applying to "railroads and other corporations" held unconstitutional as to such other corporations as a denial of equal protection of the law, as it does not apply to individuals engaged in same business. Bedford Quarries Co. v. Bough [Ind.] 80 N. E. 529. Act prohibiting offering for sale of real estate without written authority of owner or his attorney in fact held to deny equal protection. Fischer Co. v. Woods [N. Y.] 79 N. E. 836. Act exempting soldiers enlisting in Confederate War from South Carolina from any license for carrying on business held to deny equal protection as being founded on an arbitrary classification and ignoring veterans of other wars or soldiers enlisting in the civil war from other states. City of Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136.

26. Act conferring power on racing commission to assign dates for racing held valid. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513.

27. Act requiring elector to disclose party, to vote at succeeding primary, but exempting electors registering before law took effect. Shostag v. Cator [Cal.] 91 P. 502.

28. Act fixing price of gas at 80 cents per 1000 feet and providing a penalty of $1,000 for each demand in excess of that sum. Consolidated Gas Co. v. Mayer, 146 F. 150.

29. Act regulating contracts between interstate carriers and their employes held not invalid as conferring privileges on union labor not conferred on nonunion labor. United States v. Adair, 152 F. 737.

30. See § 3B, supra.

31. See 7 C. L. 714. Compare title Civil Rights, 9 C. L. 572.

32. Act requiring two years experience "in mines of this commonwealth," as a prerequisite to registration, as an anthracite coal miner construed as requiring two years' experience in anthracite mines, and as such held not to infringe on the privileges and immunities of citizens. Commonwealth v. Shaleen, 215 Pa. 595, 64 A. 797. Pa. Act April 4, 1868, restricting right of action of railway mail clerks for injuries to that which an employe of the company would have under like circumstances as applied to interstate transportation held not unconstitutional as abridging privileges and immunities of citizens of the United States. Martin v. Pittsburg, etc.,

or from granting privileges to citizens of the state,[34] not accorded to citizens[35] of other states.

§ 12. *Grants of special privileges and immunities.*[36]—Constitutions of many of the states prohibit discrimination between persons of the same class by grants of special privileges or immunities.[37] As such grants necessarily result in a denial of equal protection of the law, resort should be had to the section dealing with that provision.[38] Such provisions are to be distinguished from those against special or local legislation, which are elsewhere treated.[39]

§ 13. *Laws*[40] *impairing the obligation of contracts,*[41] including corporate

R. Co., 203 U. S. 284, 51 Law. Ed. 184. Illinois Act April 18, 1899, making mine owners responsible for defaults of mine managers and examiners whom they are required to select from among those licensed by state mining board held not to abridge privileges or immunities of citizens, incompetent persons not being required to be retained and owners not being obligated to select any particular individual. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. Neb. Act. April 8, 1903, prohibiting use of national flag for advertising purposes, held not to abridge privileges and immunities of citizens. Halter v. State of Nebraska, 205 U. S. 34, 51 Law. Ed. 696.

33. Corporations are not citizens within that clause of the 14th amendment prohibiting states from enforcing laws abridging the privileges or immunities of the citizens of the United States. Pittsburg, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033; Merchants' Nat. Bk. v. Ford, 30 Ky. L. R. 558, 99 S. W. 260; Schmidt v. Indianapolis [Ind.] 80 N. E. 632; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 51 Law. Ed. 520.

34. Act regulating importation of sheep from other states and providing for quarantine and treatment of sheep affected with disease held to apply to citizens of all states without discrimination. Adams v. Lytle, 154 F. 876. Act making sales in bulk void as to creditors except on compliance with certain conditions held equally applicable to residents and nonresidents. Spurr v. Travis, 145 Mich. 721, 13 Det. Leg. N. 598, 108 N. W. 1090. That personal service by mail or otherwise, of notice of application to admit will to probate is required to be made on resident heirs, while service by publication is authorized as to nonresidents, does not invalidate statute as discriminating against latter. Tracy v. Muir [Cal.] 90 P. 832. Laws 1891, p. 75, prohibiting foreign corporations who have not complied with state law from doing business in the state and making contracts entered into therein by them void, held not unconstitutional as depriving such corporations of the same privileges, rights, and immunities, that are accorded citizens, of the state. Roder v. Robertson, 202 Mo. 522, 100 S. W. 1086. Ill. Act May 10, 1901, amending Laws 1895, p. 301, exempting domestic, religious, and educational corporations from inheritance tax and subjecting foreign corporations of same character to payment of tax, held not to abridge privileges or immunities of citizens. Board of Education v. People of Illinois, 203 U. S. 553, 51 Law. Ed. 314. Ark. Act Feb. 15, 1893, requiring personal service of summons on resident at least 20 days before entering decree for unpaid taxes, and providing constructive service on nonresidents by publication for only four weeks, held not to deny latter privileges and immunities of citizens. Ballard v. Hunter, 204 U. S. 241, 51 Law. Ed. 461. Acts 1906, p. 549, imposing license tax on rectifiers of spirits, makes no discrimination between residents and nonresidents. Brown Foreman Co. v. Com., 20 Ky. L. R. 793, 101 S. W. 321.

35. Corporations are not citizens within meaning of art. 4, § 2, of constitution, providing that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. Merchants' Nat. Bk. v. Ford, 30 Ky. L. R. 558, 99 S. W. 260. This provision does not guaranty to nonresidents who are not citizens the same rights as residents. McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 65 A. 489.

36. See 7 C. L. 715.

37. Contract by municipality for construction of a waterworks or for the supply of water or other public utility creates no special privilege or immunity. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. Poll tax exempting women and all persons under twenty-one and over fifty years of age held not obnoxious to the constitutional inhibition against conferring special privileges and immunities. Thurston County v. Tenino Stone Quarries [Wash.] 87 P. 634. Act prohibiting practice of architecture by uncertified architects unless they first inform clients that they are not certified held not to grant special privileges to architects of that class giving such information. Ex parte McManus [Cal.] 90 P. 702. Act providing for appointment of board of architecture from certain associations of architects held not to confer special privileges and immunities on such associations. Id. Act prohibiting certain animals from being allowed to run at large in specified portions of named county held not a grant of special privileges or immunities. Hendricks v. Block, 80 Ark. 333, 97 S. W. 63. Act making certain kind of fence a lawful fence in specified portions of a named county held not a grant of special privileges or immunities. Id. Contract with city under which person was authorized to install and maintain boxes in public streets for the storage of paper and other litter thereon, such person to have the right to sell advertising space on same, held a grant of special privileges. People v. Clean St. Co., 225 Ill. 470, 80 N. E. 298.

38. See § 10, supra.

39. See Statutes, 8 C. L. 1976.

40. For impairment by judicial decisions overruling previous decisions under which rights had vested see Stare Decisis, 8 C. L. 1965. A resolution as well as an ordinance

charters or franchises,[42] public service franchises,[43] and tax and assessment laws,[44] are void.

may impair the obligation of a contract where, under the state law, it would be as effective as an ordinance. Des Moines City R. Co. v. Des Moines, 151 F. 854.

41. See 7 C. L. 718.

Act requiring foreign corporation to comply with certain state laws and to pay license fee for privilege of doing business in state held not to impair obligation of contract between such corporation and a railroad under the terms of which it was bound to do business in the state. State v. Pullman Co. [Kan.] 90 P. 319. There being no evidence of an express contract of employment other than services performed during a period of many years, it was held that no contract was impaired by a state employer's liability act. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Act incorporating local society with same name as that of a previously existing voluntary state association whose charter from a foreign corporation had been withdrawn, and conferring upon it exclusive right to grant subcharters in state, held not to impair obligation of contract with foreign corporation. National Council v. State Council, 203 U. S. 151, 51 Law. Ed. 132. Act amending Indian law in relation to erection of poles and wires on the Tonawanda reservation held not to impair obligation of contracts. Jemison v. Bell Tel. Co., 186 N. Y. 493, 79 N. E. 728. Parties to contract are charged with knowledge of rights which may accrue to third persons in subject-matter of contract under existing laws, and hence an act making certain liens subsequent in time paramount does not impair the obligation of a contract. Act making thresher's lien on grain superior to all other liens except seed liens. Phelan v. Terry [Minn.] 112 N. W. 872. Gen. Laws 1905, p. 386, c. 163, restricting defense of assumed risk, held not unconstitutional as impairing obligation of contract with one entering service before its passage. El Paso & S. W. R. Co. v. Foth [Tex. Civ. App.] 100 S. W. 171. Act making subsequent agister's lien prior to an existing valid mortgage lien held to impair obligation of contract. National Bk. of Commerce v. Jones [Okl.] 91 P. 191. Act prohibiting offering for sale of real estate without written authority from owner or attorney in fact held to impair the obligation of a contract. Fischer Co. v. Woods [N. Y.] 79 N. E. 836. Under a law providing that upon dissolution of an agricultural association citizens contributing to same should be entitled to such proportion of the proceeds of the sale as the amount paid in by them bore to amount paid by state and a municipal corporation, a subsequent act making claims of creditors preferred and making an amount subsequently paid in by the state a preferred lien on such proceeds impairs obligation of a vested right. Maryland Jockey Club of Baltimore City v. State [Md.] 67 A. 239.

What is a contract: Right of the holder of a negotiable bond to transfer same to an innocent purchaser for value free from defenses is a vested right which cannot be impaired by subsequent legislation. Gamble v. Rural Independent School Dist. of Allison [C. C. A.] 146 F. 113. Under a reservation of power to amend corporate charters, a special act exempting members of a fire department thereby created held not to constitute a contract incapable of subsequent abrogation. State v. Cantwell, 142 N. C. 604, 55 S. E. 820. Grant of authority by city to erect a slaughter house on specific property, in reliance on which large sums of money were expended on improvements, held not to constitute a contract which city could not impair by declaring maintenance thereof a nuisance. City of Portland v. Cook [Or.] 87 P. 772. Mere consent by city council to construction of subways in streets, no action being taken thereunder, does not constitute a contract which the legislature cannot subsequently revoke. People v. Ellison, 51 Misc. 413, 101 N. Y. S. 55. A judgment lien does not become a vested right or interest in land until levy and sale, and an act increasing a wife's right of dower in lands of her husband, adopted after entry of judgment against husband, is not void as impairing the obligation of a contract. Davidson v. Richardson [Or.] 89 P. 742. That judgment was entered by confession does not render it such a contract as to prevent enactment of laws affecting right of parties thereunder. Id. Contract by attorney general with an attorney to collect war claims for state upon agreed compensation held beyond scope of former's authority and void. Hord v. State, 167 Ind. 622, 79 N. E. 916.

42. Compliance by foreign corporation with state law, entitling it do business in state on same basis as domestic corporations, constitutes a contract which is impaired by a subsequent law imposing upon it greater burdens than are imposed on domestic corporations. American Smelting & Ref. Co. v. People of Colorado, 204 U. S. 103, 51 Law. Ed. 393; British American Mortg. Co. v. Jones [S. C.] 56 S. E. 983. Under a constitutional reservation of power to alter or amend corporate charters, the legislature cannot amend a contract between the corporation and a third person (Boswell v. Security Mut. Life Ins. Co., 104 N. Y. S. 130), but the rule has no application where the parties in making the contract must have contemplated the possibility of a legislative change. (Id.). Act limiting amount which insurance companies may expend to procure business held not to impair obligation of contract between company and its general agent, especially in view of a proviso therein that company should continue to be legally authorized to do business. Id. While under its reserved power the legislature may amend a corporate charter in so far as it constitutes a contract between the state and the corporation and its stockholders, it cannot amend same in so far as it constitutes a contract between the corporation and its stockholders. Garey v. St. Joe Min. Co. [Utah] 91 P. 369. Act authorizing two-thirds of holders of outstanding stock to amend charter against wishes of minority so as to make full paid nonassessable stock assessable and subject to sale therefor held void as impairing obligation between corporation and stockholders. Id. A constitutional reservation of

Regulations of remedies [45] merely, or laws passed under the police power,[46] are enforcible, providing they do not materially impair vested rights.[47]

§ 14. *Retroactive legislation; vested rights.*[48]—Except where expressly forbidden by the constitution, retroactive laws [49] are valid so long as they do not infringe on other constitutional limitations.[50]

power to amend corporate charter does not confer power to amend laws which would impair the obligation of a contract. General law conferring power on a city to enter into contracts for erection and maintenance of waterworks for a definite period cannot be amended so as to modify a contract entered into thereunder. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. Act prohibiting construction of lateral railroad in certain territory, notwithstanding irrepealable charter granting right to construct laterals, held void. Baltimore & O. R. Co. v. Waters [Md.] 66 A. 685. Conn. Gen. St. §§ 3694, 3695, authorizing condemnation of outstanding stock of railway company by railway owning three-fourths of its capital stock where purchase by latter will be for public interest, held not unconstitutional as impairing obligation of contracts. Offield v. New York, etc., R. Co., 203 U. S. 372, 51 Law. Ed. 231. Act authorizing railway and warehouse commission to allow increase of capital stock of railway for such purposes and upon such terms and conditions as it may deem advisable, or in its discretion to refuse it, held not to impair charter of company. State v. Great Northern R. Co., 100 Minn. 445, 111 N. W. 289. Where at the time of granting of charter of a railroad company a general law provided that no reduction in rates for carriage should be made until net earnings exceeded a certain percentage, a subsequent act amendatory thereof does not impair the obligation of a contract. Houston, etc., R. Co. v. Storey, 149 F. 499. Conn. Act July 1, 1895, imposing on street railways cost of paving part of streets occupied by tracks, held valid exercise of reserved power to alter or amend charters. Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 51 Law. Ed. 237.

43. Franchise to operate street railway construed and held to constitute a perpetual franchise which could not be impaired. Des Moines City R. Co. v. Des Moines, 151 F. 854. Contract between city and waterworks company fixing minimum rates for certain period cannot be modified by city by reducing rates within that period. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. As a railroad company holds its franchise and operates subject to constitutional and statutory conditions and limitations, a constitutional provision requiring interchange of cars at points of physical connection with other roads does not impair the obligation of a contract. Louisville & N. R. Co. v. Central Stockyards Co., 30 Ky. L. R. 18, 97 S. W. 778.

44. Where public utility was purchased from state under contract that it should not be subject to taxes except for state purposes, act authorizing levy of county tax thereon held to impair obligation of contract. Columbia Water Power Co. v. Campbell, 75 S. C. 34, 54 S. E. 833. A valid lien of a purchaser at a tax sale cannot be impaired by subsequent legislation. Beggs v. Paine [N. D.] 109 N. W. 322. Tax on exercise by will of power of appointment conferred by deed executed prior to passage of statute authorizing tax held not unconstitutional as impairing obligation of contract. Chanler v. Kelsey, 205 U. S. 466, 51 Law. Ed. 882.

45. See 7 C. L. 721.

An enlargement of the period of limitations does not impair the obligation of a contract as to one in whose favor the full period of limitation had not run. Cole v. Van Ostrand [Wis.] 110 N. W. 884. Act extending period of limitations as to revival of judgments held not to impair the obligation of a contract as to a judgment not barred. Doehla v. Phillips [Cal.] 91 P. 330. Minn. Gen. Laws 1899, c. 272, rendering personal service of process on nonresident stockholders, in action to enforce stockholder's liability, held not to impair obligation of contract because under old law such stockholders could not be reached, or because expenses necessary to enforce liability against nonresident stockholders are taken into consideration in estimating amount of assessment. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163. Act ratifying ultra vires loan by school commissioners held not to impair obligation of contract as to one to whom money was loaned. Courtner v. Etheredge [Ala.] 43 So. 368. Act providing for voluntary dissolution of corporations held not to impair obligation of contracts, as dissolution does not affect rights of creditors. Crossman v. Vivienda Water Co. [Cal.] 89 P. 335.

46. Baltimore & O. R. Co. v. Waters [Md.] 66 A. 685. Act limiting amount of commissions paid by insurance company for new business held within police power and therefore not to impair contract between company and agent. Boswell v. Security Mut. Life Ins. Co., 104 N. Y. S. 130.

47. Where, under law, creditor upon return of execution against corporation nulla bona might have execution issued against a stockholder, an act passed subsequent to entry of judgment against corporation providing for appointment of receiver upon such return who should sue stockholders for benefit of creditors impairs the obligation of a contract as to such judgment. Pusey & Jones Co. v. Love [Del.] 66 A. 1013.

48. See 7 C. L. 721; Interpretation of Statutes to determine whether they are retroactive, see Statutes, 8 C. L. 1976.

49. Act imposing tax on gross amount of premiums constituting new business of an insurance company during preceding year, payable the year following held a tax on a franchise and not on property and therefore not retroactive. People v. Kelsey, 116 App. Div. 97, 101 N. Y. S. 902. Employer's liability act (Act Cong. June 11, 1906), regulating liability of carriers for injuries to employes, is not retrospective, and therefore does not deprive one of the right to enforce causes of action existing prior to its adoption. Hall v. Chicago, etc., R. Co., 149 F. 564.

50. A retroactive statute is not unconstitutional unless it deprives a person of

Vested rights [51] cannot be impaired, nor can a cause of action be created out of past transactions.[52]

Taxes, licenses, and public rights.[53]—Taxes cannot be levied retrospectively,[54] but a curative act confined to matters which the legislature might previously have authorized or omitted is valid.[55]

Regulations of procedure.[56]—A vested right in rules of procedure does not exist.[57]

Ex post facto laws.—The prohibition against the passage of ex post facto laws applies only to criminal and penal laws.[58]

Retroactive statutes assailed as authorizing a deprivation of property without due process of law are treated elsewhere in this topic.[59]

§ 15. *Deprivation without due process of law, or contrary to law of the land.*[60] The fifth amendment to the Federal constitution is a restriction upon the Federal government and not upon the states.[61]

property without due process of law. Plummer v. Northern Pac. R. Co., 152 F. 206. The power to pass curative statutes is limited only by the necessity of protecting vested rights. Act legalizing issue of bonds voted under act impliedly repealed. City of Redlands v. Brook [Cal.] 91 P. 150. As a general rule the legislature may validate retrospectively any proceeding which might have been authorized in advance. Act binding all persons not in esse possessing an expectant or contingent interest under limitations in deeds or wills by all prior proceedings for the sale of the property to which all persons in being, who would have taken same had the contingency then happened, were made parties, held constitutional. Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272. Where no vested rights are impaired, the legislature may ratify what has already been done where it could have authorized same in the first instance. Courtner v. Etheredge [Ala.] 43 So. 368. Rev. St. 1899, § 2938 (Ann. St. 1906, p. 1694), giving surviving husband one-half real and personal estate of deceased wife leaving no descendents, held not retrospective as to a woman who was married and owned property prior to adoption of statute and who died subsequent to its adoption. Ferguson v. Gentry [Mo.] 104 S. W. 104.

51. See 7 C. L. 722.

If a judgment on the trial and on appeal was correct, it cannot be invalidated by a statute subsequently passed. Powell v. Nevada, C. & O. R. Co., 28 Nev. 305, 82 P. 96. Act imposing more onerous conditions on right to redeem from tax sale than existed when property was sold held unconstitutional in so far as it was retrospective. Johnson v. Taylor [Cal.] 88 P. 903.

52. Act providing that, in action for damages "heretofore or hereafter" sustained by either party to marriage relation caused by negligence of another, the fact that a legal impediment to the marriage existed shall be immaterial where the marriage was entered into in good faith, held retroactive and void. Philip v. Heraty, 147 Mich. 473, 111 N. W. 93.

53. See 7 C. L. 722.

54. Railroad gross earnings tax in force July 15, 1905, held not to embrace entire year 1905, and therefore not unconstitutional as retrospective. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71, rvg. [Tex. Civ. App.] 93 S. W. 464.

55. Curative act validating tax deeds irregularly executed held constitutional. Spokane Terminal Co. v. Stanford [Wash.] 87 P. 37. Curative statute validating assessments defective because insufficiently described in tax rolls, or because not listed by assessor and presented to commissioners for approval, held valid as relating to mere formal defects. Haynes v. State [Tex. Civ. App.] 99 S. W. 405. Act Cong. June 30, 1906, ratifying illegal imposition of duties by president on imports from Philippines between ratification of treaty with Spain and passage of Philippine tariff act, held constitutional, though action to recover duties so collected had been commenced prior to passage of act. United States v. Heinszen, 206 U. S. 370, 51 Law. Ed. 1098. Curative act legalizing tax deeds, ineffective because of formal defects, where period of redemption has expired, held constitutional. Baird v. Monroe [Cal.] 89 P. 352.

56. See 7 C. L. 723. See, also, Limitation of Actions, 8 C. L. 768.

57. The legislature may alter, enlarge, modify, or confer a remedy for existing legal rights, and may establish new rules of evidence to be applied in the trial of existing causes of action. Philip v. Heraty, 147 Mich. 473, 111 N. W. 93. Act regulating procedure on change of point of diversion by owner of water held remedial in its character, and therefore not unconstitutional as depriving of vested rights owners who had already changed the point of diversion. Ashenfelter v. Carpenter, 37 Colo. 534, 87 P. 800.

58. Held not to apply to state employer's liability act. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. An act authorizing revocation of physician's license, in a civil action, and pursuant to rules of pleading and evidence in civil cases, for fraud in its procurement, occurring prior to passage of act, held not an ex post facto act within the constitutional inhibition. State v. Schaeffer, 129 Wis. 459, 109 N. W. 522.

59. See § 15, post.

60. See 7 C. L. 724.

61. State v. Newton, 74 Kan. 561, 87 P. 757; Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.

Due process of law [62] does not necessarily require judicial inquiry,[63] but merely means the law of the land,[64] and is secured by laws operating on all alike without discrimination.[65] It is satisfied by notice and a right to be heard.[66] Interference with

62. See 7 C. L. 726.

63. Act requiring owner of impounded animals to pay all expenses of impounding, on notice and providing for sale upon failure to do so, held not unconstitutional as a deprivation of property without due process of law, although no judicial process is required. Hendricks v. Block, 80 Ark. 333, 97 S. W. 63.

64. A constitutional prohibition against depriving a person of life, liberty, or property except by the law of the land does not limit the power of the legislature to pass laws, but forbids such deprivation except in accordance with law. Sumpter v. State [Ark.] 98 S. W. 719.

65. Act imposing penalty on railroads for failure to maintain waterclosets held not to authorize taking of property without due process of law. Missouri, etc., R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 21, 97 S. W. 720. Act placing peddlers of one kind of goods in one class for license purposes, while peddlers of other articles are classified together, held to secure due process of law. Miller v. Birmingham [Ala.] 44 So. 388. Ordinance prohibiting erection, removal, or remodeling of a frame building within sixty feet of a brick or stone structure without written consent of owner of latter held unconstitutional as depriving owners of frame structures of property without due process of law. Tilford v. Belknap [Ky.] 103 S. W. 289. Act March 27, 1907, authorizing treasurer of city of Memphis to collect personal tax by distress sale in certain cases, though same is not delinquent, held unconstitutional as depriving owner of property without due process of law, under general laws, distress being authorized only where tax is delinquent. Malone v. Williams [Tenn.] 103 S. W. 798. Act March 27, 1907, relieving city of Memphis of burdens imposed on other communities by general law in manner of conducting elections, and depriving its inhabitants of safeguards granted such communities thereby, held unconstitutional as depriving persons of property without due process of law. Id. Act March 27, 1907, providing that person successfully attacking a tax title to property in city of Memphis shall pay to defeated holder of tax deed the amount paid at tax sale with interest, and any tax which purchaser may have paid with interest, together with costs of litigation, held unconstitutional as a deprivation of property without due process of law. Id.

66. Act June, 1906, providing for establishing and quieting title to real estate in case of destruction of public records by fire, flood, or earthquake, held not unconstitutional as not affording due process because of the insufficiency of the service provided for therein. Title & Document Restoration Co. v. Kerrigan [Cal.] 88 P. 356. Act providing that on commitment of child to benevolent institution for causes enumerated parent shall be notified and given ten days within which to show that circumstances resulting in commitment were not due to his neglect held constitutional. Kennedy v. Meara, 127 Ga. 68, 56 S. E. 243. Act authorizing voluntary dissolution of corporations upon notice by publication held constitutional, dissolution not affecting creditors. Crossman v. Vivienda Water Co. [Cal.] 89 P. 335. Act giving applicant for liquor license right to contest in court validity of a blanket remonstrance does not deprive him of his property without due process of law. Cain v. Allen [Ind.] 79 N. E. 201. Statute authorizing constructive service upon resident defendant who is within the state and the entry of a personal judgment thereon held not violative of due process clause, it being reasonably probable that defendant would receive notice thereof. Nelson v. Chicago, etc., R. Co., 225 Ill. 197, 80 N. E. 109. As rights of heirs not appearing are not concluded by decree admitting will to probate, that Code Civ. Proc. § 1303 does not give nonresident heirs sufficient notice of proceedings does not invalidate it. Tracy v. Muir [Cal.] 90 P. 832. A public act may constitute constructive notice of contingencies which may arise thereunder. Act providing that after lapse of four years water rights adjudicated in one water district should be conclusive on claimants in other districts held not to deprive such claimants of property without due process of law, the statute itself furnishing constructive notice that such adjudications might be had. Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co. [Colo.] 90 P. 1023. Constitutional amendment clothing corporation commission with limited executive, legislative, and judicial powers, subjecting carriers to its jurisdiction in the matter of their public duties and charges, and providing for hearing, representation by counsel, and the right to cross-examine witnesses to introduce evidence and to appeal, held not to authorize deprivation of property without due process of law. Winchester, etc., R. Co. v. Com. [Va.] 55 S. E. 692. Act imposing tax on gross earnings of carriers, and providing for its enforcement in judicial proceedings, held not a deprivation of property without due process. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71, rvg. [Tex. Civ App.] 93 S. W. 464. Act June 1906, providing for establishing and quieting title to realty where public records are destroyed by fire, flood, or earthquake, held not unconstitutional as not affording due process on ground that proceedings provided for therein are not judicial, because no controversy is required to be asserted in its inception. Title & Document Restoration Co. v. Kerrigan [Cal.] 88 P. 356. Ark. Act Feb. 15, 1893, providing constructive notice on nonresidents of pendency of suit for collection of unpaid levy taxes by publication for four weeks, held sufficient to afford due process. Ballard v. Hunter, 204 U. S. 241, 51 Law. Ed. 461. Minn. Gen. Laws 1899, c. 272, providing for more efficient enforcement of stockholder's liability, is not unconstitutional as depriving them of property without due process of law because not requiring service of process on stockholders in action in which assess-

property rights under the police power does not constitute a deprivation without due process.[67] There can be no denial of due process except by a state officer.[68]

Property.[69]—To render an act invalid as a deprivation of property without due process of law, it must interfere [70] with vested rights.[71]

ment is made. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163. Act authorizing recovery by county from relatives of insane persons supported at public expense held not to deprive relatives liable of property without due process of law, as in such an action sanity may be set up as a defense. Guthrie County v. Conrad, 133 Iowa, 171, 110 N. W. 454. Act providing for registration of titles under Torrens system held not to deprive persons of property without due process of law, because barring claims of persons not named in proceedings. Robinson v. Kerrigan [Cal.] 90 P. 129. Act authorizing publication of summons in actions to quiet title without requiring a description of the land to appear in such publication held unconstitutional as not providing sufficient notice to adverse claimants. Fenton v. Minnesota Title Ins. & Trust Co. [N. D.] 109 N. W. 363. Act authorizing personal judgment against foreign corporations, whether doing business in state or not, by service of summons on state auditor, held to deny due process. Cella Commission Co. v. Bohlinger [C. C. A.] 147 F. 419.

67. Ordinance prohibiting sale of milk containing less than three per cent of butter fat, to be determined in a certain manner, held not unconstitutional as a deprivation of property without due process of law. City of St. Louis v. Bippen, 201 Mo. 528, 100 S. W. 1048. Act prohibiting possession of certain game within the state, though same was killed in and imported from another state, held not a deprivation of property without due process of law. People v. Waldorf-Astoria Hotel Co., 118 App. Div. 723, 103 N. Y. S. 434. An act prohibiting shipment of deer, wild or domestic, does not deprive owner of deer raised on private preserve of property without due process of law. Dietrich v. Fargo, 52 Misc. 200, 102 N. Y. S. 720. Act requiring abutting owners and occupiers to remove snow from sidewalks is not a deprivation of property without due process of law. State v. McCrillis [R. I.] 66 A. 301. Act authorizing fence viewers to assign partition fences to adjoining owners held not unconstitutional as to one whose predecessors in title had erected a hedge fence as depriving him of his property without due process of law. Hill v. Tohill, 225 Ill. 384, 80 N. E. 253. Act forbidding employment of infants under sixteen for more than ten hours per day held not a deprivation of liberty or property without due process. State v. Shorey [Or.] 86 P. 881. Ordinance authorizing summary seizure and destruction of impure and dangerous articles of food held not to deprive owner of property without due process of law. North American Cold Storage Co. v. Chicago, 151 F. 120; Kaiser v. Walsh, 4 Ohio N. P. (N. S.) 507. A resolution of a board of health providing that "all milk the temperature of which shall be found on examination or test to be above fifty degrees Fahrenheit shall be confiscated, forfeited, and immediately destroyed by or under the direction of a health officer or milk inspector" is not unconstitutional. Id. When the thing itself is not a nuisance, but the way in which it is used is a nuisance, the thing itself cannot be destroyed; its illegal use must be punished. Id. An instrument adaptable to no purpose other than gambling is not protected by a constitutional inhibition against taking property without due process of law, and an act authorizing its summary destruction is valid. Mullen & Co. v. Mosley [Idaho] 90 P. 986. Act authorizing destruction of unlicensed dogs unless license is paid within two days after impounding held not to deprive owner of property without due process of law, because no notice is required to be given owner. Ex parte Ackerman [Cal. App.] 91 P. 429. The legislature may authorize summary destruction of property where it is of little value, and the emergency is such as not to admit of delay essential to judicial inquiry, or the circumstances are such as to render regular judicial proceedings for its condemnation impracticable. Acts 1903, p. 183, authorizing summary destruction of hogs running at large on public levee, held not unconstitutional as depriving owner of property without due process of law, the act being designed to prevent damage to levees. Ross v. Desha Levee Board [Ark.] 103 S. W. 380. The prohibition of the sale of intoxicants in a certain territory does not deprive one who has made improvements for the purpose of the sale thereof prior to passage of act of his property without due process of law. Clark v. Tower, 104 Md. 175, 65 A. 3.

68. Hence acts of private individuals in lynching a person accused of crime do not come within the amendment. United States v. Powell, 151 F. 648.

69. See 7 C. L. 727.

70. Act providing that where on judicial sale a wife's inchoate interest is not directed by the judgment to be sold or barred such interest shall become absolute in her as upon death of the husband does not deprive the husband of his property without due process. Green v. Estabrook [Ind.] 79 N. E. 373. An act passed after title of remainderman had accrued authorizing payment of sum in gross to holder of life estate out of proceeds of sale on foreclosure, with the consent of such life tenant, is not a deprivation of property without due process as to the remainderman. Leach v. Leach [N. J. Eq.] 66 A. 595. Statute providing that determination by auditor general and state land commissioner that state tax lands have become tax homestead lands shall be conclusive unless assailed by suit within six months held not unconstitutional as requiring owner to bring an action to assert his rights, owner having no rights on expiration of period of redemption, and the determination being a mere classification of state lands. Griffin v. Kennedy [Mich.] 112 N. W. 756.

71. The right to have a controversy determined by existing rules of evidence is not

Liberty,[72] as used in the fourteenth amendment, includes natural persons only.[73]

Regulations must be reasonable,[74] but the question of reasonableness will not be determined by any individual case.[75]

Regulations of business and occupations[76] may be so restrictive of the right to contract and to choose employment as to amount to a denial.[77]

a vested right. Campbell v. Skinner Mfg. Co. [Fla.] 43 So. 874. The lien of a judgment though by confession is only part of the remedy until levy and sale thereunder, and gives the judgment creditor no vested interest in the land of the judgment debtor. Davidson v. Richardson [Or.] 89 P. 742. Neb. Act April 8, 1903, prohibiting use of national flag for advertising purposes, held not an invasion of property rights. Halter v. Nebraska, 205 U. S. 34, 51 Law. Ed. 696. Pa. Act 1868, restricting right of action of railway mail clerks and others employed about railroads to that which an employe of company would have under like circumstances, held not unconstitutional as denying due process of law. Martin v. Pittsburg, etc., R. Co., 203 U. S. 284, 51 Law. Ed. 184. Act incorporating local society with same name as that of a voluntary state association whose charter from a foreign corporation had been withdrawn by latter, and conferring upon such society exclusive right to grant subcharters in state, held not to deprive foreign corporation of property without due process of law. National Council v. State Council, 203 U. S. 151, 51 Law. Ed. 132. Right to dispose of property by will is not a vested right. Ferguson v. Gentry [Mo.] 104 S. W. 104. Right to practice dentistry is not a vested right. State v. McIntosh [Mo.] 103 S. W. 1078. As between the state and an office-holder, a public office does not constitute property, hence an act providing that an officer indicted for malfeasance or nonfeasance shall be suspended until tried does not deprive him of property without due process of law. Sumpter v. State [Ark.] 98 S. W. 719. Statutory exemptions and privileges do not constitute vested rights. Exemption from jury duty. State v. Cantwell, 142 N. C. 604, 55 S. E. 820. Collateral heirs who in the event of the invalidity of a trust created by will would take nothing under the statute of distribution are not deprived of property without due process of law by a retroactive construction placed upon a statute enacted after execution of will under which the trust would be valid, as they have no vested interest in the estate. Morgan v. Durand, 51 Misc. 523, 101 N. Y. S. 1002. The statutory interest of a wife in the lands of her husband during his life is an inchoate and not a vested right, and may be restricted or destroyed by statutory enactments at any time prior to his death. Griswold v. McGee [Minn.] 112 N. W. 1020. Vested rights to continue a business or occupation subject to legislative control under the police power cannot be acquired. Pharmacist licensed under prior statute. State v. Hovorka, 100 Minn. 249, 110 N. W. 870. The owner of tide lands does not acquire a vested interest to all possible future accretions which cannot be cut off by subsequent legislation. Western Pac. R. Co. v. Southern Pac. Co. [C. C. A.] 151 F. 376. A citizen of a municipality has no vested right in its municipal powers which is affected by an act authorizing its consolidation with another municipality. Pittsburgh's Petition, 32 Pa. Super. Ct. 210. Act authorizing consolidation of two cities on vote of consolidated body, instead of upon vote of smaller city, held not in violation of due process clause as to citizens of latter. Pittsburg's Petition, 217 Pa. 227, 66 A. 348, afg. 32 Pa. Super. Ct. 210. Act prohibiting the acquisition of ownership in flowing waters for the purpose of transporting them out of the state is not in conflict with the 14th amendment. McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 65 A. 489. A parent has a vested right in the labor and services of his minor child. Kennedy v. Meara, 127 Ga. 68, 56 S. E. 243. Act providing that person on whose lands seepage or spring waters shall first arise shall have a prior right thereto, if capable of being used on his lands, held unconstitutional in so far as it deprived a lower riparian owner, who was a prior patentee, of the use of the water. Neilson v. Sponer [Wash.] 89 P. 155.

72. See 7 C. L. 728.

73. Does not protect corporations. Western Turf Ass'n v. Greenberg, 204 U. S. 359, 51 Law. Ed. 520.

74. See 5 C. L. 642.

An act so arbitrary and unreasonable as to be unnecessarily subversive of property rights will be set aside. Act prohibiting erection of building in excess of eighty feet in height in certain district unless its width on each public street on which it stands is at least one-half its height held not on its face a prohibition for mere aesthetic reasons. Welch v. Swasey, 193 Mass. 364, 79 N. E. 745. Act March 27, 1907, conferring power on certain municipal officers to enter and examine all buildings within city and within ten miles beyond city limits, to destroy dangerous buildings and to direct erection of certain structures, and conferring power on one of such officers to summarily abate nuisances which in his opinion exist at cost of owner, held unconstitutional as a deprivation of property without due process of law. Malone v. Williams [Tenn.] 103 S. W. 798. Act March 27, 1907, giving municipality all governmental and police powers within its limits and for two miles beyond, held unconstitutional as depriving persons residing beyond the corporate limits and within the two mile limit of property without due process of law. Id. Act March 27, 1907, empowering municipality to prohibit pig pens, cow stables, and dairies within two miles of city limits, held unconstitutional. Id.

75. That compliance with an order requiring express companies to receive money during reasonable business hours would require company to carry money at a loss is not a deprivation without due process, as if the company chooses it need not carry money at all. Platt v. Le Cocq, 150 F. 391.

76. See 7 C. L. 728.

77. Idaho Rev. St. §§ 1210, 1211, permitting recovery of damages against owner of **sheep** allowing them to **graze** on public

domain within two miles of a dwelling house, held not to deprive sheep owner of property without due process of law. Bacon v. Walker, 204 U. S. 311, 51 Law. Ed. 499; Brown v. Walling, 204 U. S. 320, 51 Law. Ed. 503. Act providing for licensing of **peddlers** who are, or who have declared their intention to become, citizens of the United States, held not a deprivation without due process. Commonwealth v. Hana [Mass.] 81 N. E. 149. Illinois Act April 18, 1899, making **mine** owners responsible for defaults of mine managers and examiners whom they are required to select from among those licensed by state mining board, held not unconstitutional as taking property without due process of law, no particular individual being required to be selected or retained if incompetent. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. Statute compelling persons or corporations conducting places of public **amusement** to recognize tickets issued by them in hands of unobjectionable persons does not deprive them of property without due process of law. Western Turf Ass'n v. Greenberg, 204 U. S. 359, 51 Law. Ed. 520. Ordinance prohibiting sale of railroad **tickets** by other than agent of company issuing same held not a deprivation of property without due process of law. Ex parte Hughes [Tex. Cr. App.] 100 S. W. 160. Act providing for examination and licensing of plumbers, making violators guilty of a misdemeanor, held not in violation of "due process" clause of 14th amendment. Douglas v. People, 225 Ill. 536, 80 N. E. 341. A maximum **rate** fixed by the legislature for a public utility so low as to result in a destruction of the business of the company supplying it deprives it of its property without due process of law. Brooklyn Gas Co. v. New York, 50 Misc. 450, 100 N. Y. S. 570. Act prohibiting issuance or redemption of **trading stamps** or other premiums as part of a sale of goods held unconstitutional as depriving a person of property without due process of law. Leonard v. Bassindale [Wash.] 89 P. 879. Act prohibiting offering for sale of **real estate** without written authority from legal or equitable owner or his attorney in fact held violative of due process clause. Fischer Co. v. Woods [N. Y.] 79 N. E. 836. Ordinance granting to **street railway** company right to use property remaining in streets owned by another company whose franchise had expired held unconstitutional as depriving latter of property without due process of law. Brooklyn Union Gas Co. v. Cleveland, 204 U. S. 116, 51 Law. Ed. 399.

Payment of wages: Act making wages due laborers payable in money only or negotiable drafts redeemable in money, and making same due and payable whenever employe ceased work, held not to deprive employer of property without due process of law. Shortall v. Puget Sound Bridge & Dredging Co. [Wash.] 88 P. 212. Acts 29th Leg. p. 372, c. 152, prohibiting payment of laborers in merchandise and prescribing a penalty for violation thereof, held unconstitutional as depriving employer of property without due process of law. Jordan v. State [Tex. Cr. App.] 103 S. W. 633.

Liens: A mechanic's lien law is not a taking of property without due process of law as the contract is presumed to have been entered into with such laws in mind, and they form part of the contract. Stimson Mill Co. v. Nolan [Cal. App.] 91 P. 262. Mechanic's lien law is not a taking of property without due process of law because it extends to the land upon which building is erected, the owner having made the building part of the realty. Id. Act giving persons furnishing supplies to mining or manufacturing company, necessary to operation of same, a prior lien, held not a deprivation of property without due process. First Nat. Bk. v. Trigg Co. [Va.] 56 S. E. 158. Act giving thresher lien on grain if filed within ten days after threshing held not to deprive purchaser without notice of property without due process of law. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 N. W. 843. Act giving threshers a paramount lien on grain except as to seed liens held not a deprivation of property without due process because making such liens superior to prior chattel mortgages and bona fide attachments and executions. Phelan v. Terry [Minn.] 112 N. W. 872. Act giving attorney lien on cause of action held not to deprive a defendant settling action with client without consent of attorney after accrual of lien of property without due process of law. O'Connor v. St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150.

Foreign Corporations: Laws 1891, p. 75, prohibiting foreign corporations who have not complied with state laws from doing business in the state and making contracts entered into therein by them void, held not unconstitutional as a deprivation of property without due process of law. Roeder v. Robertson, 202 Mo. 522, 100 S. W. 1086. W. Va. Acts 1905, c. 39, requiring all foreign and and nonresident domestic corporations to appoint state auditor to accept service of process, and requiring payment of annual fee of $10, held not to deprive a nonresident domestic corporation of property without due process of law, although prior laws allowed corporations to appoint attorney for that purpose. St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183, 51 Law. Ed. 144. Act requiring foreign corporations as a condition to doing business in state to file certified copy of articles of incorporation and pay required fee in substance what is required of domestic corporations held not unconstitutional as depriving former of property without due process of law. Western Union Tel. Co. v. State [Ark.] 101 S. W. 748. Act requiring foreign corporations doing business in the state to appoint a resident agent upon whom service of process may be had, and authorizing service on the secretary of state where no such agent is appointed, held not to deprive such corporation of property without due process, as by complying with the law it will acquire notice, and by failure to do so it consents to service on the secretary of state. Olender v. Crystalline Min. Co., 149 Cal. 482, 86 P. 1082. Laws 1899, c. 10, requiring foreign corporations to pay charter fee based upon authorized capital stock before doing business in state held not to deprive such a corporation then doing business therein of property without due process of law. State v. Western Union Tel. Co. [Kan.] 90 P. 299.

Bulk sale act, making sales in bulk out of usual course of business without notice voidable as to creditors, held not to violate

Statutes creating liability may be valid.[78]

Eminent domain proceedings[79] which properly conserve the owners the right to compensation are valid.[80]

Local assessments for improvements[81] require notice and opportunity to be heard.[82] Judgment confirming a special assessment does not create a charge

"due process" clause. Wilson v. Edwards, 32 Pa. Super. Ct. 295; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 600; Spurr v. Travis, 145 Mich. 721, 13 Det. Leg. N. 598, 108 N. W. 1090.

Railways and carriers: Act requiring railway companies to keep in stations separate waiting rooms for white and colored races, to keep stations open during day and night unless no trains are run at night, and to keep same in a sanitary condition and comfortably heated, and prescribing penalties for violation, held constitutional. State v. St. Louis & S. F. R. Co. [Ark.] 103 S. W. 623; State v. St. Louis & S. F. R. Co. [Ark.] 103 S. W. 625. Constitutional provision requiring interchange of cars destined to places on other roads at point of physical connection with such roads held not to deprive railroad company of property without due process of law, the use of such cars being only temporary and reasonable, and a uniform rental in such cases having been agreed to by all railroads in the country. Louisville, etc., R. Co. v. Central Stockyards Co., 30 Ky. L. R. 18, 97 S. W. 778. Acts 29th Leg. p. 324, c. 133, requiring railroads to erect waterclosets in all stations, and providing a penalty of $100 per week for each violation, if construed as operating from time law took effect, is unconstitutional as depriving railroads of property without due process of law. Missouri, etc., R. Co. v. State [Tex.] 100 S. W. 766, rvg. [Tex. Civ. App.] 17 Tex. Ct. Rep. 21, 97 S. W. 720. Statute requiring railway companies, on demand, to construct side tracks connecting manufacturing or industrial enterprises, initial cost to be paid by latter and repaid to them by former in annual installments, held a deprivation of property without due process of law. Mays v. Seaboard Air Line R., 75 S. E. 455, 56 S. E. 30. Act requiring railway companies to sell 500 mile mileage books at less rates per mile than usual charges held to deprive company of property without due process of law. Commonwealth v. Atlantic Coast Line R. Co. [Va.] 55 S. E. 572. Act arbitrarily fixing weight of "standards" used to keep lumber in place on cars at 1,000 pounds, and requiring railway company to deduct same from weight of lumber shipped, held to deprive latter of property without due process of law, as requiring free carriage of freight. State v. Great Northern R. Co. [Wash.] 86 P. 1056. An act prohibiting an express company from unjustly discriminating against another company in the same business held not to deprive it of its property without due process of law on the theory that it has a right to demand prepayment of its charges from whom it will. American Exp Co. v. Southern Indiana Exp. Co., 167 Ind. 292, 78 N. E. 1021. Rev. St. 1895, arts. 4497-4502, imposing penalties on carriers for failure to have cars at designated points within certain time after demand, but exempting it from liability where failure to do so was caused by strike or public calamity, held not unconstitutional as arbitrarily excluding legitimate defense, the exemptions named not being exclusive. Allen v. Texas & P. R. Co. [Tex.] 101 S. W. 792. Act June 1, 1898, forbidding discharge of employes by interstate carriers because of membership in labor unions, is invalid. Adair v. U. S., 28 S. Ct. 277, rvg. 152 F. 737. Act making carrier delivering intoxicating liquor to other than bona fide consignees a dealer therein and subject to criminal prosecution as such denies due process of law. Crescent Liquor Co. v. Pratt, 148 F. 894.

78, 79. See 7 C. L. 729.

80. Act authorizing setting off benefits aganst damages, in determining compensation in eminent domain proceedings, held not to deprive owner of property without due process of law. In re City of New York, 105 N. Y. S. 750. Conn. Gen. St. §§ 3694, 3695, authorizing condemnation of outstanding stock of railway company by railway company owning three-fourths of its capital stock where purchase by latter will be for public interest, held not unconstitutional as depriving owner of property without due process of law. Offield v. New York, etc., R. Co., 203 U. S. 372, 51 Law. Ed. 231. Act authorizing city to condemn land, providing for selection of twelve freeholders by it, owner to have right to strike three and city three, remaining six to constitute board, and making no provision for appeal, held unconstitutional as depriving owners of property without due process of law. Tucker v. Paris [Tex. Civ. App.] 99 S. W. 1127.

81. See 7 C. L. 730.

82. Notice provided by local improvement act held sufficient. City of Perry v. Davis, 18 Okl. 427, 90 P. 865. McChesney v. Chicago, 227 Ill. 450, 81 N. E. 435; McChesney v. Chicago, 226 Ill. 238, 80 N. E. 770. Charter provision requiring objections to special tax bill to be filed with board of public works within sixty days after issuance of bill as a condition to right to object to same in an action thereon held unconstitutional as a deprivation of property without due process of law. Curtice v. Schmidt, 202 Mo. 703, 101 S. W. 61; Gilsonite Const. Co. v. Arkansas McAlester Coal Co. [Mo.] 103 S. W. 93. Local improvement act requiring publication of notice in newspaper that plat and schedules are on file, and fixing time within which written objections must be filed, after having heard which council shall levy assessment, held not to deprive owner of property without due process, though no time for hearing objections was fixed in act. Reed v. Cedar Rapids [Iowa] 111 N. W. 1013. Provision for notice of confirmation of special assessment for local improvements held sufficient, notice of hearing and of passage of ordinance for improvement being required to be mailed to person paying taxes during

against the property benefited, requiring personal notice, and constructive service is sufficient.[83] Reassessment is permissible.[84]

Drainage acts.[85]

Taxation.[86]—Taxes properly assessed[87] under authority of law,[88] after notice, actual or constructive, and opportunity to be heard,[89] do not constitute a deprivation of property without due process. Curative statutes are valid if the defect cured might have been authorized.[90] Tax deeds to delinquent lands cannot be given without notice to the owner.[91]

preceding year and to occupant of premises, and a like notice of proceeding for confirmation, in addition to publication and posting. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127.

83. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127. Where right of appeal to court from order of council levying special assessment exists, owner of property assessed is not deprived of his property without due process because not afforded an opportunity to appear and object to assessment. Reed v. Cedar Rapids [Iowa.] 111 N. W. 1013. Method of assessing benefits provided in local improvement act held not to deprive owners of property without due process of law. City of Perry v. Davis, 18 Okl. 427, 90 P. 865. Act authorizing municipality to collect cost of constructing sewer from property owners benefited is constitutional, though municipality had already paid for it. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A. 1115.

84. An act authorizing reassessment where work was illegal when done because of invalidity of prior assessment does not deprive owner of property assessed of a vested right to damages because of performance of work under an invalid assessment. Dahlman v. Milwaukee [Wis.] 110 N. W. 479.

85, 86. See 7 C. L. 730.

87. Method prescribed by act creating state tax board for ascertaining value of intangible property of certain corporations "in so far" as other evidence does not make it appear unjust held not exclusive so as to deny owners due process of law because method provided in arbitrary and unjust. Missouri, etc., R. Co. v. Shannon [Tex. Civ. App.] 16 Tex. Ct. R. 866, 97 S. W. 527, afg. [Tex.] 100 S. W. 138. Act March 27, 1907, providing that no error in assessment, land tax book, personal tax book, notice, advertisement, etc., shall invalidate sale, held unconstitutional as a deprivation of property without due process of law. Malone v. Williams [Tenn.] 103 S. W. 798.

88. Act taxing main stem, franchises, and tangible personal property of railroads and canal companies on the so called "average rate" held not violative of due process clause. Central R. Co. of New Jersey v. State Board of Assessors [N. J. Law.] 67 A. 672. State law taxing proprietor of bonded warehouse with goods stored therein during fiscal year held valid, though proprietor did not own same. Anderson County v. Kentucky Distilleries & Warehouse Co., 146 F. 999. La. Act June 28, 1904, imposing inheritance tax on shares of universal legatees under will of person dying prior to its enactment, held not unconstitutional as depriving them of property without due process of law, though under the Code ownership passed to them upon death of testator. Cahen v. Brewster, 203 U. S. 543, 51 Law. Ed. 310. N. Y. Laws 1905, c. 241, imposing tax on transfers of corporate stock, adopting face value of shares as basis of tax, held not unconstitutional as depriving owners of property without due process of law. People v. Reardon, 204 U. S. 152, 51 Law. Ed. 415. New York Laws 1905, c. 241, imposing tax on transfers of corporate stock as applied to shares owned by nonresidents in a foreign corporation, held not unconstitutional as taking property without due process of law. Id. N. Y. Laws 1897, c. 284, authorizing transfer tax on exercise by will of power of appointement conferred by deed executed prior to passage of act, held not unconstitutional as taking property without due process of law. Chanler v. Kelsey, 205 U. S. 466, 51 Law. Ed. 882. Act taxing land at its full value, irrespective of mortgages thereon, held not to deprive owner of his property without due process of law. Paddell v. New York, 50 Misc. 422, 100 N. Y. S. 581; afd. 100 N. Y. S. 1133.

89. Act providing for reassessing land illegally assessed held to require notice before fixing valuation. People v. Nassau County Sup'rs, 104 N. Y. S. 353. Inheritance tax law providing method for ascertaining amount of tax and for notice and appraisement held not to deprive one of property without due process of law, though by its terms the interest of the state therein vests immediately upon the death of decedent. Trippet v. State, 149 Cal. 54, 86 P. 1084. Act requiring employer of persons liable to pay poll tax to furnish list of names and amount due to collector, and if wages are due to pay amount of tax out of same at once, held not to deprive employer of property without due process of law as if he has doubt as to whether employe is liable for tax he may compel him to interplead in a civil action to recover same. Thurston County v. Tenino Stone Quarries [Wash.] 87 P. 634.

90. Act Cong. June 30, 1906, ratifying illegal imposition of duties by president on imports from Philippine Islands between ratification of treaty with Spain and passage of Philippine tariff act, held not to deprive importers of property without due process of law, though suit to recover duties so collected was commenced prior to passage of act. United States v. Heinszen, 206 U. S. 370, 51 Law. Ed. 1098.

91. Acts 1879, p. 69, authorizing deed of delinquent lands to person redeeming without notice to owner held unconstitutional as authorizing appropriation of delinquent lands to payment of taxes without due process of law. Mason v. Gates [Ark.] 102 S. W. 190.

Civil remedies and proceedings.[92]—Statutes of limitation do not violate the due process clause [93] unless interfering with vested rights.[94] Statutes regulating remedies,[95] defenses,[96] or procedure,[97] are sustained unless violative of property rights.

Criminal offenses and procedure.[98]—Statutes defining and punishing crimes,[99] and regulating criminal procedure,[1] unless violative of fundamental rights, are sustained.[2]

92. See 7 C. L. 731.

93. Act allowing original owner of lands sold to the state for taxes, and conveyed to private parties, six months' grace, held not an infringement of private property rights. Reed v. Auditor General, 146 Mich. 208, 13 Det. Leg. N. 711, 109 N. W. 275. An enlargement of the period of limitations does not deprive one in whose favor the full period of limitation has not run of property without due process of law. Cole v. Van Ostrand [Wis.] 110 N. W. 884. Statute exempting real estate of decedent from liability for his debts unless letters of administration are taken out within six years from his death held not to deprive the holder of a mortgage thereon of his property without due process of law. Fuhrnham v. Power, 13 Wash. 533, 86 P. 940. Act limiting time within which action to revive a judgment may be commenced affects the remedy only and does not deprive creditor whose judgment was entered prior to passage of act of his property without due process of law. Gaffney v. Jones [Wash.] 87 P. 114.

94. A statute enlarging the period of limitations as to causes of actions barred under a previous statute is void as a deprivation of property without due process of law. State v. Chicago, etc., R. Co. [Wis.] 112 N. W. 515.

95. Act making residence of garnishee the situs of a debt for a purpose of garnishment or attachment held not to deprive a nonresident, to whom money was due from a resident garnishee for services performed in another state and payable there, of property without due process of law. Harvey v. Thompson [Ga.] 57 S. E. 104. An act denying a remedy for breach of a duty imposed for the public benefit is not a deprivation of property without due process of law. Act making written notice to common council of accumulations of snow on sidewalk and a failure to remove same within a reasonable time a prerequisite to the maintenance of an action against the municipality for injuries caused thereby held constitutional. MacMullen v. Middletown [N. Y.] 79 N. E. 863. Wrongful death statute permitting recovery of exemplary damages where death was due to recklessness, willfulness, or malice held not a deprivation of property without due process of law. Hull v. Seaboard Air Line R. [S. C.] 57 S. E. 28; Osteen v. Southern R. Co. [S. C.] 57 S. E. 196.

96. An act depriving a person of a defense based on purely arbitrary rules of law is not repugnant to the "due process" clause. Plummer v. Northern Pac. R. Co., 152 F. 206. Gen. Laws 1905, p. 386, c. 163, restricting defense of assumed risk, held not to distrub vested rigths. El Paso, etc., R. Co. v. Foth [Tex. Civ. App.] 100 S. W. 171. Mo. Rev. St. § 7890, providing that false and fraudulent representations in application for insurance shall not constitute a defense in action on policy unless in judgment of jury matters misrepresented actually contributed to death of insured, held not to deprive companies of property without due process of law. Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 51 Law. Ed. 168.

97. Act authorizing striking out of answer for failure or refusal to answer interrogatories in the nature of discovery construed as making such refusal an implied admission of truth of facts sought to be elicited, and hence requiring party seeking penalty to show the materiality of such facts, and as so construed held valid. Lawson v. Black Diamond Coal Co. [Wash.] 86 P. 1120. Anti-trust law (Acts 1905, p. 9), authorizing striking out of answer and entry of default judgment for failure to comply with order directing discovery, held to provide for matters of procedure and practice in procuring testimony and enforcing orders for production thereof, and hence not violative of due process clause of Federal constitution. Hammond Packing Co. v. State [Ark.] 100 S. W. 407. That act authorizing issuance of subpoena duces tecum provides no compensation for expense of moving property from another state to place of trial does not render it violative of due process clause. In re Consolidated Rendering Co. [Vt.] 66 A. 790. Act authorizing citizens having an interest to institute quo warranto proceedings upon obtaining leave where county attorney refuses to do so held not unconstitutional, though no notice of application for leave is required. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867. The legislature has the power to change the rules of evidence and to declare what shall constitute prima facie proof. Employer's liability act construed and held to create a presumption that certain servants should be presumed to be vice-principals, and not to create a new cause of action. Schradin v. New York Cent., etc., R. Co., 103 N. Y. S. 73. Rev. St. 1899, §§ 3227-3232 (Ann. St. 1906, pp. 1832-1834), authorizing ex parte order requiring judgment debtor to appear and submit to examination in supplementary proceedings, held not to deprive him of property without due process of law because making no provision for notice of application. Ackerman v. Green, 201 Mo. 231, 100 S. W. 30.

98. See 7 C. L. 732.

99. Neb. Cr. Code, § 124, imposing fine of double amount embezzled by public officer on conviction, irrespective of restitution, same to operate as a judgment against his estate, held not to deprive him of property without due process of law. Coffey v. Harlan County, 204 U. S. 659, 51 Law. Ed. 666.

1. Act authorizing reception of deposition of witness since deceased or incapacitated taken on preliminary examination in a criminal proceeding when defendant was present and had opportunity to cross-examine held not to deny accused due process of law. People v. Clark [Cal.] 90 P. 549.

2. Act making parent in any way respon-

§ 16. *Compensation for taking property.*[3]—The taking of private property for public use without compensation,[4] or for a private use without the owner's consent,[5] is prohibited by all constitutions.

§ 17. *Right to justice and guaranty of remedies.*[6]—A certain remedy at law for every injury is a natural right conferred by all constitutions.[7]

§ 18. *Jury trials preserved.*[8]—The right to trial by jury as it existed at common law has been almost universally preserved.[9]

§ 19. *Regulation of criminal procedure; rights secured to persons accused of crime.*[10]—Under American constitutions persons accused of crime are entitled to a fair,[11] speedy,[12] and a public trial,[13] by an impartial jury,[14] to be informed of the nature of the accusation against them,[15] and are protected from ex post facto laws,[16]

sible for delinquency of child guilty of misdemeanor, and authorizing juvenile court upon complaint to examine into his guilt and if guilty to impose a fine, held unconstitutional as depriving parent of liberty and property without due process of law, the juvenile court not being a criminal court. Mill v. Brown [Utah] 88 P. 609. Act authorizing commitment to prison of persons acquitted of crime on ground of insanity where discharge would be manifestly dangerous to community held not a deprivation of liberty without due process of law. State v. Snell [Wash.] 89 P. 931. Act providing for incarceration of insane persons on petition without trial held not to violate 14th amendment, the act requiring the court on habeas corpus to inquire into and determine sanity. In re Crosswell's Petition [R. I.] 66 A. 55. Act authorizing punishment for contempt or failure of witness to comply with subpoena duces tecum held not unconstitutional, though order required him to produce testimony tending to incriminate him, the question of privilege being for the court. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

3. See 7 C. L. 733. For full treatment, see Eminent Domain, 7 C. L. 1276.

4. Act providing that relatives of insane persons supported at public expense shall remain liable to county for such support held not a taking of private property for public use without compensation. Guthrie County v. Conrad, 133 Iowa 171, 110 N. W. 454.

5. Act requiring railway companies on demand to construct side tracks connecting manufacturing or industrial enterprises, initial cost to be paid by latter and repaid to them by former in annual instalments held void as taking private property for private use without owner's consent. Mays v. Seaboard Air Line R. Co., 75 S. C. 455, 56 S. E. 30.

6. See 7 C. L. 734.

7. Act permitting recovery of actual damages only for publication of libel, where publication was made in good faith, the result of accident or mistake and retraction was published, held not unconstitutional as denying a remedy for injury. Comer v. Age-Herald Pub. Co. [Ala.] 44 So. 673. Act making written notice to city of accumulations of snow on sidewalk and a failure to remove same within a reasonable time a prerequisite to the maintenance of an action against the city for injuries caused thereby held constitutional. MacMullen v. Middletown [N. Y.] 79 N. E. 863. Act prohibiting lower court from granting new trial or requiring remittitur on sole ground of excessiveness of verdict held unconstitutional as depriving defendant of full disposition of rights in forum provided by organic law for all, though under act supreme court had power to require such remittitur. Yazoo, etc., R. Co. v. Wallace [Miss.] 43 So. 469.

8. See 7 C. L. 735.

9. For full treatment, see Jury, 8 C. L. 617.

10. See 7 C. L. 735. See, also, Indictment and Prosecution, 8 C. L. 189.

11. Statute authorizing reception of unsworn testimony of children under twelve years of age in a criminal proceeding held not in derogation of constitutional rights. People v. Sexton, 187 N. Y. 495, 80 N. E. 396.

12. Act providing for suspension of criminal proceedings for seduction where parties marry before defendant pleads to indictment and live together for two years thereafter, and providing for revival upon failure to do so held unconstitutional as denying accused right to a speedy trial. Waldon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 455, 98 S. W. 848.

13. Rule which excludes from the court room all except officers of the court, witnesses certain relatives, newspaper men, and those having special permission from the court to enter, is in violation of the guarantee of a public trial found in section 10 of article I of the State Constitution. Fields v. State, 4 Ohio N. P. (N. S.) 401. Act prohibiting newspapers from publishing details of execution of death sentence held not in conflict with constitutional guaranty of a speedy and a public trial. State v. Pioneer Press Co., 100 Minn. 173, 110 N. W. 867.

14. See Jury, 8 C. L. 617.

15. An act directing a court to which a petition reciting corrupt expenditure of municipal funds is addressed to summarily investigate same, or to appoint others to do so, does not provide for a criminal investigation, and hence does not infringe on right to presentment and indictment by grand jury. (City of Hoboken v. O'Neill [N. J. Law] 64 A. 981), nor is it unconstitutional because not informing accused as to nature of accusation, there being in fact no accusation (Id.). That act punishing sale of intoxicating liquors without license did not require indictment to name person to whom and when and where sale was made held not to render it unconstitutional. Colman v. State [Ala.] 43 So. 715.

16. Act permitting judge in vacation to call special term for purpose of sentencing person whose conviction antedated the passage of the act held not unconstitutional as

from giving evidence against themselves,[17] from being twice placed in jeopardy for the same offense,[18] and from excessive fines and cruel punishment.[19]

§ 20. *Searches and seizures.*[20]—Unreasonable searches and seizures are prohibited.[21]

§ 21. *Suffrage and elections.*[22]—This subject is governed by constitutional provisions peculiar to the several states and is treated in an appropriate topic.[23]

§ 22. *Frame and organization of government, courts, and officers.*[24]—The constitutional provision requiring a republican form of government and hence a representative government has no application to municipal corporations.[25]

The right to local self government [26] is guarantied in terms in many constitutions.[27]

Courts [28] and their jurisdiction are generally placed beyond legislative control.[29]

Creation of offices.[30]—The power of the legislature to create offices in the absence of constitutional limitations is elsewhere treated.[31]

§ 23. *Taxation and fiscal affairs.*[32]—Validity of tax laws under general constitutional provisions are treated in preceding sections of this topic, while constitutional limitations expressly imposed the power to tax and the manner of its exercise are treated in an appropriate topic.[33]

§ 24. *Schools and education; school funds.*[34]

§ 25. *The enactment of statutes* [35] is hedged about with various inhibitions, such as those against local or special laws, laws addressed to a plurality of subjects, and not reciting their subjects in their titles, and amendatory acts not setting out that amended.[36]

§ 26. *Miscellaneous provisions other than the foregoing,*[37] chiefly matters more properly belonging within the domain of legislation, are to be found in the more recent constitutions. Among them are claims against the state,[38] public lands,[39] homesteads,[40] and other exemptions,[41] regulations of carriers,[42] corporations,[43] and the liquor traffic.[44] The full faith and credit clause of the constitution is most frequently invoked to protect foreign judgments.[45]

Consuls, see latest topical index.

CONTEMPT.

§ 1. Nature of Contempt and What Constitutes (641).
A. Elements of Contempt and Nature of Proceedings; Civil or Criminal (641).
B. Disrespect to the Court in General (641).
C. Acts in Disobedience of Court (641).
D. Official Misconduct and Obstruction or Perversion of Justice (643).

an ex post facto law. Ex parte Boyd [Tex. Cr. App.] 17 Tex. Ct. Rep. 64, 96 S. W. 1079.

17. The fifth amendment providing that no person shall be compelled in a criminal case to be a witness against himself applies only to the Federal courts. Ex parte Munn, 140 F. 782.

18. See Criminal Law, 7 C. L. 1010.

19. See Criminal Law, § 6, 7 C. L. 1015.

20. See 7 C. L. 737.

21. See Search and Seizure, 8 C. L. 1870.

22. See 7 C. L. 737.

23. See Elections, 7 C. L. 1230.

24. See 7 C. L. 737.

25. "Initiative referendum" held valid. In re Pfahler [Cal.] 88 P. 270. See Municipal Corporations, 8 C. L. 1056.

26. See 7 C. L. 738.

27. See Municipal Corporations, 8 C. L. 1056.

28. See 7 C. L. 739.

29. See Courts, 7 C. L. 999; Jurisdiction, 8 C. L. 579. Conferring original jurisdiction on appellate courts, see § 4 C., supra.

30. See 7 C. L. 739.

31. See Officers and Public Employes, 8 C. L. 1191.

32. See 7 C. L. 739.

33. See Taxes, 8 C. L. 2058, and see such topics as Municipal Corporations as to constitutional provisions relating to fiscal management.

34. See 7 C. L. 743. For full treatment, see Schools and Education, 8 C. L. 1851.

35. See 7 C. L. 743.

36. See Statutes, 8 C. L. 1976.

37. See 7 C. L. 744.

38. See States, 8 C. L. 1970.

39. See Public Lands, 8 C. L. 1486.

40. See Homesteads, 8 C. L. 93.

41. See Exemptions, 7 C. L. 1631.

42. See Carriers, 9 C. L. 466.

43. See Corporations, 7 C. L. 862.

44. See Intoxicating Liquors, 8 C. L. 486.

45. See Foreign Judgments 7 C. L. 1734.

§ 2. Defense, Excuse, or Purgation (644).
§ 3. Power to Punish or Redress; Contempt or Other Remedy (644).
§ 4. Pleadings and Other Proceedings Before Hearing (645).
§ 5. Hearing; Evidence; Trial (646).
§ 6. Findings and Judgment (647).
§ 7. Punishment; Fine and Commitment; Further Proceedings (648).
§ 8. Discharge of Pardon (648).
§ 9. Review of Proceedings (649).

The scope of this topic is noted below.[46]

§ 1. *Nature of contempt and what constitutes. A. Elements of contempt and nature of proceedings; civil or criminal.*[47]—Contempt proceedings are criminal when brought for the purpose of vindicating the power and authority of the court and maintaining its dignity.[48] When instituted mainly or solely for the purpose of protecting or enforcing private rights in which the public have no special interest, they are civil.[49] A district attorney or acting district attorney,[50] a municipal corporation,[51] or the individual members of an unincorporated labor organiation,[52] may be guilty of, and punished for, contempt.

(§ 1) *B. Disrespect to the court in general.*[53]—Improper charges addressed to the court constitute contempt,[54] but an attorney cannot be adjudged in contempt for making charges in good faith and for justifiable ends in the course of his professional duties unless he had reason to believe that they were unfounded.[55]

(§ 1) *C. Acts in disobedience of court.*[56]—Failure to comply with an order of the court constitutes contempt,[57] if the order is valid and within the court's juris-

46. This topic includes all matters relating to contempt of court.

It excludes contempt of legislative bodies (Municipal Corporations, 8 C. L. 1056; States, 8 C. L. 1970; United States, 8 C. L. 2210), criminal prosecution for acts obstructing justice (Obstructing Justice, 8 C. L. 1191), the striking of disrespectful pleadings (Pleading, 8 C. L. 1355), briefs and motions for rehearing (Appeal and Review, 9 C. L. 108), and the suspension and disbarment of attorneys for contempt (Attorneys and Counselors, 9 C. L. 300).

47. See 7 C. L. 746.

48. Patterson v. Wyoming Valley District Council, 31 Pa. Super Ct. 112. Willful disobedience of injunction against interference with nonunion labor held criminal contempt. Enterprise Foundry Co. v. Iron Moulders' Union of North America [Mich.] 112 N. W. 685.

49. Violation of injunction against boycotting. Patterson v. Wyoming Valley District Council, 31 Pa. Super. Ct. 112.

50. There is no law or rule of public policy exempting a district attorney or acting district attorney from the penalty of contempt of court. State v. Reid, 118 La. 827, 43 So. 455.

51. Marson v. Rochester, 185 N. Y. 602, 78 N. E. 1106.

52. The individual members of an unincorporated labor organization who have been active in its management may be punished for contempt committed by the organization. Patterson v. Wyoming Valley District Council, 31 Pa. Super. Ct. 112.

53. See 7 C. L. 746.

54. The presentation of an affidavit in support of an application for a change of judge, which affidavit without supporting facts charges the judge with corrupt and improper motives, constitutes contempt notwithstanding a statute authorizing the filing of affidavits for changes of judge when a party cannot have fair trial. Lamberson v. Tulare County Super. Ct. [Cal.] 91 P. 100. Attorney who knowingly presented the affidavit held guilty equally with client. Id. Under Code 1904, § 3768, subd. 3, authorizing courts to punish summarily contempts consisting in the use of obscene, contemptuous, or insulting language addressed to the court, the language whether spoken or written must be specifically addressed to the court. Yoder v. Com. [Va.] 57 S. E. 581.

55. There is not only justification in such a course, but counsel would be recreant to their sworn duty as officers of the court if they did not urge, in proper language and spirit, the vacation of a sentence which in their honest belief is excessive, and was based on a plea of guilty improperly obtained, and pronounced by a judge actuated by improper motives. Tracy v. State, 8 Ohio C. C. (N. S.) 357. Counsel so acting in good faith cannot be subjected to proceedings in contempt, notwithstanding the charges they put forth proved ill-founded and were false to the personal knowledge of the judge at the time of the filing. Id.

56. See 7 C. L. 746.

57. Order of court requiring one to return a portion of assets received from a receiver held enforceable by contempt proceeding. Orchard v. National Exchange Bk., 121 Mo. App. 338, 98 S. W. 824. Bankrupts guilty for failure to file schedules. In re Fellerman, 149 F. 244. Creditor held punishable for contempt for persistent refusal to obey order of referee in bankruptcy requiring him to withdraw an assignment of wages filed by him with bankrupt's employer. In re Home Discount Co., 147 F. 538. When an attorney has money belonging to his clients, he is not in contempt until service upon him of an order of court requiring him to pay it over and refusal to obey such order. People v. Feenaughty 51 Misc. 468, 101 N. Y. S. 700. Interference with water commissioner in his distribution of water according to rights decreed by the court held not a dis-

diction,[53] regardless of whether the order was improvidently or erroneously made.[54]

obedience of any lawful order or writ of the court. Roberson v. People [Colo.] 90 P. 79. Order requiring carrier to furnish facilities for transportation of passengers and freight held complied with by putting on only a passenger train where no freight had ever been offered for shipment between the points involved. Louisville & N. R. Co. v. Com. [Ky.] 103 S. W. 269.

Failure to pay alimony: Contempt proceeding for enforcement of decree for alimony is specifically authorized by Code Civ. Proc. § 1773. Sec. 1241 does not apply. Stanley v. Stanley, 116 App. Div. 544, 101 N. Y. S. 725. Certified copy of decree for alimony held properly served on defendant and personal demand made for alimony so as to sustain contempt proceeding. Id. Proceedings and service on defendant without the state and on his attorney within the state in divorce and contempt proceedings held sufficient to give court jurisdiction to punish by fine or imprisonment for failure to pay alimony and attorney's fees. Woolworth v. Woolworth, 115 App. Div. 405, 100 N. Y. S. 865.

Refusal to testify or produce documents: Husband held guilty of contempt in refusing to answer questions concerning the nature and whereabouts of property belonging to succession of his wife. Succession of Desina, 118 La. 278, 42 So. 936. Failure to obey order for examination before referee held contempt. Grant v. Greene, 105 N. Y. S. 641. A party is guilty of contempt for refusal to answer questions before a master in chancery after overruling of objections thereto unless he himself makes some valid claim of personal privilege. Bowker v. Haight & Freese Co., 146 F. 256. Immateriality of evidence or insufficiency of pleadings no justification for disobedience of subpoena to testify. Fairfield v. U. S. [C. C. A.] 146 F. 508. Where court had made no order relative to the taking of a deposition before a notary, failure of a witness to obey the subpoena of the notary was not contempt. McIntyre v. People, 227 Ill. 26, 81 N. E. 33. Held not contempt to refuse to answer questions before grand jury where answers might have incriminated accused. Ex parte Andrews [Tex. Cr. App.] 100 S. W. 376. Acts 1903, p. 122, c. 94, §§ 15, grants immunity only in proceedings before a justice of the peace investigating violation of anti-trust law, and not in proceedings before a grand jury. Id. Bankrupts guilty of contempt for refusing to surrender books or give reasonable excuse for their disappearance and for swearing falsely and giving evasive and unsatisfactory answers. In re Fellerman, 149 F. 244. Order to produce documents cannot be disobeyed on claim that they are incriminating, such objection being properly raised only after the witness is sworn. United States v. Collins, 146 F. 553. Witness in bankruptcy not tendered fees and not served with subpoena duces tecum not in contempt for failure to produce a document. In re Johnson & Knox Lumber Co. [C. C. A.] 151 F. 207. Corporate officers who answered that demanded books and papers had been destroyed held not guilty of contempt because the answer was based on information received from subordinate custodians, and not on their own knowledge. Despeaux v. Pennsylvania R. Co., 149 F. 798. An officer of a corporation cannot be punished for contempt for failure to produce papers which he cannot obtain except surreptitiously or by breach of the peace. United States v. American Tobacco Co., 146 F. 557. Order adjudging an attorney guilty of contempt for returning a document to his client after he had been ordered to produce it in bankruptcy held not warranted by the facts. In re Johnson & Knox Lumber Co. [C. C. A.] 151 F. 207.

58. It is not a contempt to disobey an injunction void for want of jurisdiction in the court to grant it. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257. An assistant prosecuting attorney is not amenable to a charge of contempt for refusing to obey an order of court to prepare and present a nolle prosequi in a specified case. Such an order should be directed to the prosecuting attorney. Ex Parte Froome Morris, 8 Ohio C. C. (N. S.) 212. An injunctional provision of order of confirmation of foreclosure sale held not within power reserved by court to enforce conditions of foreclosure decree, and no basis for contempt proceedings against individual bondholders not parties who instituted proceedings in state court. Lewis v. Peck [C. C. A.] 154 F. 273. Order of bankruptcy requiring production of a document by one not served and not appearing held void. In re Johnson & Knox Lumber Co. [C. C. A.] 151 F. 207. Pending appeal court below could not punish for contempt for disobeying order for temporary alimony. Anderson v. Anderson, 124 Ill. App. 613. A state court has no power to adjudge one guilty of contempt for failure to respond to a summons served on him outside the territorial limits of the state. Failure to appear on service of summons of receiver of a corporation. Fidelity & Casualty Co. v. MacAfee Co. [N. J. Eq.] 65 A. 879. Federal supreme court has power to decide whether it has jurisdiction of an appeal, hence lack of such jurisdiction will not enable one to violate its order that proceedings below be stayed and that appellant be retained pending the appeal. United States v. Shipp, 203 U. S. 563, 51 Law. Ed. 319. Order requiring defendant's attendance at proceedings supplementary to execution of judgment recovered in municipal court, and reciting that execution was issued "out of the supreme court," held valid. Jaques v. Willett, 104 N. Y. S. 500. Laws 1906, p. 79, No. 75, requiring corporations to produce books and papers, held constitutional, and order of court requiring a corporation to produce documents before grand jury in investigation of breach of a criminal statute by citizens of the state held valid, so as to confer upon court power to punish corporation for contempt by fine. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

59. If a court has jurisdiction of the party and subject-matter, its order must be obeyed regardless of whether it was improvidently or erroneously made. Butler v. Champlin, 124 Ill. App. 29; Meeks v. State, 80 Ark. 579, 98 S. W. 378. Where a court has power to issue an injunction, one may not disobey it because erroneously granted without notice or because the bill was insufficient. Christian

Thus, injunctional orders may not be disobeyed [60] by persons having knowledge thereof,[61] whether parties to the cause or not,[62] and whether or not such orders were legally served upon them.[63]

(§ 1) *D. Official misconduct and obstruction or perversion of justice.*[64] False swearing in court,[65] attempts to improperly influence witnesses [66] or jurors,[67] interference with a res in the custody of the law,[68] the intentional absence of an attor-

Hospital v. People, 223 Ill. 244, 79 N. E. 72; Id., 125 Ill. App. 631. That bill for injunction was not properly verified held immaterial. Id. Court having jurisdiction, refusal to dismiss creditor's bill held not reviewable in contempt proceedings for refusal to comply with order of court in the cause. Trombly v. Klersy, 146 Mich. 648, 13 Det. Leg. N. 891, 110 N. W. 44. Respondent may question injunction only by showing it to be absolutely void. Flannery v. People, 225 Ill. 62, 80 N. E. 60.

60. Evidence held to show willful violation of an injunction. Christian Hospital v. People, 125 Ill. App. 631. Evidence held to sustain conviction of contempt for interference with employes in violation of injunction. Ideal Mfg. Co. v. Ludwig [Mich.] 112 N. W. 723. Evidence insufficient to show violation of injunction against use of complainant's name and picture. Christian Hospital v. People, 223 Ill. 244, 79 N. E. 72; rvg. 125 Ill. App. 631. Fine imposed for contempt in violating injunction against infringement of patent. Frank v. Benard, 146 F. 137. Held contempt for ticket broker to sell tickets in violation of injunction. Ex parte Cash [Tex. Cr. App.] 99 S. W. 1118. Where one is enjoined from collecting or attempting to collect a judgment or enforcing the execution under the judgment, it is a violation of the spirit and interest of that order to bring suit against the surety on a bond given in an effort to appeal from that judgment. Strong v. Wesley Hospital, 125 Ill. App. 201. Stockholder held not to violate injunction against transfer of stock, pending action by corporation to rescind contract by which he held it, by instituting suit in another state to compel directors to transfer to corporation certain real estate. Maine Products Co. v. Alexander, 115 App. Div. 475, 101 N. Y. S. 464. Where defendant violated a temporary injunction granted on a bill to restrain him from engaging in business contrary to his contract, resultant contempt proceedings were not void as being independent of the action. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540. A contempt proceeding for violation of an injunction will not be quashed because petition shows that certain facts therein stated were obtained from defendant's testimony in another case, it not appearing that such facts may not be proven by other evidence. Hammond Lumber Co. v. Sailors' Union of the Pacific, 149 F. 577.

61. Any means of information whereby notice of an injunction is actually brought to the knowledge of a respondent is sufficient. Notice by registered mail. McBride v. People, 127 Ill. App. 344.

62. One need not be a party to the cause to be punishable for violating an injunction. Where injunction ran to defendants, their confederates, and any person aiding or abetting. McBride v. People, 127 Ill. App. 344. Need not be named in injunction or be party to suit. Flannery v. People, 127 Ill. App. 526. Strikers indulging in acts of violence after the issuance of an injunction are amenable to punishment for contempt, though not named therein, if they had notice of its issuance. Pope Motor Car Co. v. Keegan, 150 F. 148.

63. Where defendant in injunction proceeding was informed by plaintiff's attorney that a temporary restraining order had been issued and was also shown a copy, he was bound to obey whether served with the writ or not. Anderson v. Hall [Ga.] 58 S. E. 43. Service of certified copy of restraining order held sufficient to justify contempt proceeding for its willful violation. Hammond Lumber Co. v. Sailors' Union of the Pacific, 149 F. 577.

64. See 7 C. L. 749.

65. False swearing in bankruptcy though a criminal offense is also contempt of court and punishable summarily. In re Fellerman, 149 F. 244.

66. Evidence insufficient to justify order of contempt for attempt to influence a witness. United States v. Carroll, 147 F. 947. A circuit court of Michigan has no statutory or inherent power to punish for contempt one who induced a witness to absent himself from the jurisdiction of the justice court at a preliminary examination of one charged with an offense triable in the circuit court. Emery v. Law [Mich.] 112 N. W. 951. Comp. Laws, c. 301 § 10891, subd. 4. does not apply to contempts in criminal proceedings. Id.

67. All willful attempts of whatever nature to improperly influence jurors, whether by conversation or attempts to bribe, and whether successful or not, constitute contempt. Emery v. State [Neb.] 111 N. W. 374. Evidence sufficient. Id. An attempt without success to induce a third person to influence jurors in a pending Federal case was not a contempt under the rule that the act done must naturally and directly tend to obstruct the administration of justice. United States v. Carroll, 147 F. 947.

68. Removal from state of property attached in an action against a nonresident is an act hindering and impairing plaintiff's rights and constitutes contempt. Lowenthal v. Hodge, 105 N. Y. S. 527, afg. 105 N. Y. S. 120. That an attorney was not a party upon whom an attachment was served does not affect his liability for contempt for removing the attached property from the court's jurisdiction, it being sufficient that knowing the facts he participated in its removal. Id. An attempt to evade the order of a court with reference to a res within its jurisdiction by the institution of another, and similar proceeding in a court of concurrent jurisdiction, constitutes contempt (Terry v. State [Neb.] 110 N. W. 733), but one not in any way participating in the institution of

ney from court,[69] or similar acts tending to obstruct justice,[70] constitute contempt. A Federal court is without power to adjudge in contempt one not an officer of the court or a suitor therein on a charge of using its process to obstruct the administration of justice in a state court.[71]

§ 2. *Defense, excuse, or purgation.*[72]—A bona fide attempt to comply with an order may be shown,[73] but advice of counsel,[74] or a disclaimer of intention, disrespect, or design to embarrass the administration of justice, is not a defense;[75] nor will the truth of alleged defamatory matter addressed to a court or judge be inquired into.[76] That a decree has been appealed from does not excuse disobedience until the same has been superseded in the manner provided by law.[77] Whether breach of an injunction was invited depends upon the facts.[78]

§ 3. *Power to punish or redress; contempt or other remedy.*[79]—Common-law courts of record have inherent power to punish for contempt,[80] which power cannot be denied or unreasonably restricted by legislative enactment.[81] The incapacity of a court of equity to punish for crimes does not deprive it of power to punish for acts done pursuant to a conspiracy in violation of its writ of injunction.[82] Under a statute authorizing "courts and judges" to punish contempts, a judge in vacation may punish the violation of an injunction.[83] A legislative committee appointed to investigate the affairs of a state institution may be lawfully empowered by the legislature to punish a contumacious witness for contempt.[84] The Federal

such action cannot be convicted (Id.). Contemners could not defend on ground that they could not dismiss the unauthorized action as to one whom they had made plaintiff without her consent. Id.

69. The absence of an attorney from court when he should be there attending to a case is contempt where it necessarily impedes or delays the court. In re Clark [Mo. App.] 103 S. W. 1105.

70. Murder of prisoner who has been allowed an appeal to Federal supreme court, with intent to prevent attendance thereon, held contempt where supreme court had ordered that all proceedings against him be stayed and his custody retained pending appeal. United States v. Shipp, 203 U. S. 565 51 Law. Ed. 319.

71. In re Riggsbee, 151 F. 701.

72. See 7 C. L. 749.

73. Held good excuse for failure to pay over money that accused had handed it to his partner and instructed him to make the payment, but the partner had absconded without complying. Meeks v. State, 80 Ark. 579, 98 S. W. 378.

74. Order requiring creditor to withdraw assignment of wages filed with bankrupt's employer in order to force settlement. In re Home Discount Co., 147 F. 538.

75. Attempt to frustrate order of court in habeas corpus by institution of similar proceedings in court of concurrent jurisdiction. Terry v. State [Neb.] 110 N. W. 733.

76. Evidence is not admissible to prove that language used was justified by the facts. State v. Reid, 118 La. 827, 43 So. 455. Charges affecting the court may be strictly or substantially true and yet involve the one making them in contempt, if they are not made in due course of procedure and for legitimate and justifiable ends. Tracy v. State, 8 Ohio C. C. (N. S.) 357.

Truth as a defense to contempt proceedings based on publications charging an appellate court with corrupt motives, see People v. News-Times Pub. Co., 35 Colo. 253, 84 P. 912, and authorities cited.

77. Meeks v. State, 80 Ark. 579, 98 S. W. 378.

78. Where railroad company sent an agent to ascertain whether defendant was violating an injunction restraining him from selling tickets, and the agent purchased a ticket from defendant, held, this did not constitute such an invitation as relieved defendant of contempt. Ex parte Cash [Tex. Cr. App.] 99 S. W. 1118.

79. See 7 C. L. 750.

80. In re Clark [Mo. App.] 103 S. W. 1105; Lowenthal v. Hodge, 105 N. Y. S. 120, afd. 105 N. Y. S. 527. A court of record has complete jurisdiction and inherent power to punish for contempt in the case of an employer who complains of interference with his business and irreparable injury thereto by strikers and members of a labor union. Iron Molders' Union v. Greenwald Co., 4 Ohio N. P. (N. S.) 161.

81. Court could punish attorney for absence from court though such conduct is not enumerated as a contempt in Rev. St. 1899, § 1616. In re Clark [Mo. App.] 103 S. W. 1105. Code 1904, § 3768, limiting the classes of contempts which may be punished summarily, is not an unreasonable restriction of the power of the courts to punish for contempt. Yoder v. Com. [Va.] 57 S. E. 581.

82. Flannery v. People, 127 Ill. App. 526.

83. Under Code 1899, c. 147, § 27 (Code 1906, § 4327), providing that "courts and judges" may punish for contempts, a judge in vacation may punish as a contempt the violation of an injunction awarded in vacation. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257.

84. Committee to investigate affairs of state dispensary. Ex parte Parker, 74 S. C. 466, 55 S. E. 122. Evidence not hearsay. Id. No excuse that conversation was private. Id.

statute does not empower a court martial to punish as for contempt a witness who refuses to testify before it.[85] Prohibition will lie to stop contempt proceedings based on disobedience of a void injunction.[86]

§ 4. *Pleadings and other proceedings before hearing.*[87]—Two or more persons may be proceeded against jointly though the contempt consisted of crimes for which they would be entitled to separate trials.[88] Contempts in facie curiae may generally be tried summarily.[89] In other cases reasonably specific[90] and verified,[91] charges of the kind authorized[92] must be filed and served,[93] and in all cases the proceedings

85. Can only certify facts to United States district attorney. United States v. Praeger, 149 F. 474.

86. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257.

87. See 7 C. L. 750.

88. Could be prosecuted jointly for a contempt consisting of false swearing though they would be entitled to separate trials for purjury. In re Fullerman, 149 F. 244.

89. Presentation of affidavit for change of judge attacking judge's integrity held contempt in presence of court authorizing either summary procedure or order to show cause and dispensing with any supporting affidavit. Lamberson v. Tulare County Super. Ct. [Cal.] 91 P. 100. Code Civ. Proc. § 1209, subd. 12, defining contempt not controlling. Id. "Summary proceeding" within Code 1904, § 3768, is one in which trial by jury is not allowed. Yoder v. Com. [Va.] 57 S. E. 581. To constitute contempt punishable summarily under subd. 3, § 3768, Code 1904, the insulting language therein referred to whether spoken or written must be specifically addressed to the judge. Id. Statute not unconstitutional as an unreasonable restriction of court's power to punish for contempt. Id. A grand jury is not such a part of the court as to authorize the court to summarily punish a person for any act done before the grand jury without proceeding on affidavit and citing the offender to show cause. Ex parte Hedden [Nev.] 90 P. 737. It is only when the offense is committed in the presence of the court in actual session and within its view and hearing that proceedings by rule can be lawfully dispensed with. State v. Reid, 118 La. 827, 43 So. 455. The sending of a motion containing defamatory matter to the judge in chambers does not constitute a contempt faciem curiae punishable summarily. Id.

90. Contempt proceedings being quasi criminal in character, the charge against accused is strictly construed in his favor. Iron Molders' Union v. Greenwald Co., 4 Ohio N. P. (N. S.) 180. But since the proceeding is summary in character, technical pleadings are not required; it is sufficient that it appears from the petition, affidavit, or other showing that the court's order has been willfully violated. Contempt for violation of injunction. Hammond Lumber Co. v. Sailors' Union of the Pacific 149 F. 577. It is sufficient if a rule to show cause specifically states the facts constituting the contempt charged; **it need not have the formalities of an indictment.** French v. Com., 30 Ky. L. R. 98, 97 S. W. 427. Petition and affidavits held to sufficiently apprise court of violation of an injunction. Flannery v. People, 225 Ill. 62, 80 N. E. 60. Rule charging defendants with unlawfully procuring witnesses to leave the state held sufficiently specific. French v. Com., 30 Ky. L. R. 98, 97 S. W. 427. Affidavit charging erection of two dams held not to charge more than one offense. State v. Sieber [Or.] 88 P. 313. Rule charging three persons with inducing three witnesses to leave the state held not to charge three separate offenses. French v. Com., 30 Ky. L. R. 98, 97 S. W. 427. Mere clerical error showing violation of injunction before it had been issued held no defense. McBride v. People, 127 Ill. App. 344. If an affidavit initiating a proceeding is not sufficiently specific as to the charge, it may be amended, with the court's consent, by a reverification. State v. Sieber [Or.] 88 P. 313.

91. An affidavit on information and belief is not sufficient in a constructive contempt proceeding. State v. Newton [N. D.] 112 N. W. 52. Where a charge of contempt is stated positively and directly in the body of an information, a defect in the verification in this respect does not render it void. Verification of prosecutor that charges were true "as he verily believes." Emery v. State [Neb.] 111. N. W. 374. That petition and affidavit in contempt proceeding were sworn to before a notary who was petitioner's solicitor, though improper, held not ground for reversing contempt order. Mc Bride v. People, 127 Ill. App. 344. Insufficient verification of petition which was unnecessary because of existence of numerous affidavits in support of rule to show cause held immaterial. Flannery v. People, 127 Ill. App. 526.

92. Under B. & C. Comp. § 665, it is discretionary with the court to either make an order to show cause why accused should not be arrested to answer or issue a warrant of arrest to bring such person in in the first instance. State v. Sieber [Or.] 88 p. 313. Failure of warrant of arrest to contain directions as to bail held waived by failure to make objection. Id. Under Code Civ. Proc. § 2269, a proceeding to punish for contempt must be commenced either by order to show cause or by warrant of attachment; a notice of motion for order punishing for contempt is unauthorized. West Hudson County Trust Co. v. Waldron, 104 N. Y. S. 513.

93. In constructive criminal contempt proceedings a formal accusation of some kind is essential. State v. Newton [N. D.] 112 N. W. 52. Resistance to a command of court to enter a nolle prosequi in a certain case is not punishable summarily but only under the procedure provided in Rev. St. § 5641, and, unless that procedure as to the filing of written charges, etc., is conformed with, a court is without jurisdiction to punish for a contempt thus committed. Ex parte Froome Morris, 8 Ohio C. C. (N. S.) 212.

must be sufficient to constitute due process of law.[94] In contempt for nonobservance of an injunction, an affidavit otherwise sufficient need not allege a demand of performance.[95] Defendant does not waive want of jurisdiction by pleading guilty to a charge insufficiently alleged.[96] The rule entitling accused to a discharge upon his sworn denial of the charges against him does not obtain in equity,[97] and the courts seem to be gradually departing from it even at common law.[98] An affidavit in commencement of a constructive contempt proceeding is not sustained by proof of contemptuous acts not charged therein.[99]

§ 5. *Hearing; evidence; trial.*[1]—A judge is not disqualified from presiding at a hearing because the contempt itself consists in imputations upon his motives and attacks upon his integrity.[2] A motion in a Federal court to commit for contempt for failure to pay over money will not be considered pending prosecution of accused in the state courts for embezzlement.[3] In the absence of statute, accused is not entitled to trial by jury,[4] and a hearing may be had at chambers at defendant's request.[5] The evidence need not be taken by the court itself.[6] Where the contempt

Rule to show cause why one should not be adjudged guilty of contempt must be served in person on the party charged. Ex parte Mylius, 61 W. Va. 405, 56 S. E. 602. Failure to deliver to accused a copy of the affidavit initiating a contempt proceeding for the violation of an injunction is not error where accused did not demand it. State v. Sieber [Or.] 88 P. 313.

94. While courts do not derive their power to punish for contempt from any statute, it is their duty to conform to a statute which does not abridge this power, but simply points out the manner in which it shall be exercised. Ex parte Froome Morris, 8 Ohio C. C. (N. S.) 212. In a proceeding for contempt committed without the presence of the court, accused must be served with a formal statement of the charge against him and given an opportunity to plead and answer. Reymert v. Smith [Cal. App.] 90 P. 470. Contempt proceeding held due process of law where instituted in conformity with usual practice in only court having power to punish for the injunction decree. Flannery v. People, 225 Ill. 62, 80 N. E. 60. Where proceedings were commenced by order to show cause based on affidavits setting forth the acts charged, and order and affidavits were served on accused, and proofs taken pro and con, held accused were informed of the charge against them and afforded opportunity to meet them. Seastream v. New Jersey Exhibition Co. [N. J. Err. & App.] 65 A. 982. Where court enjoined against interference with nonunion labor, it could in the same proceeding determine whether the injunction had been violated, and such practice was proper where accused were notified and given an opportunity to be heard. Enterprise Foundry Co. v. Iron Moulders' Union of North America [Mich.] 112 N. W. 685.

95. State v. Sieber [Or.] 88 P. 313.

96. Where affidavit did not give jurisdiction. State v. Newton [N. D.] 112 N. W. 52.

97. In re Fellerman, 149 F. 244.

98. Sworn answer does not authorize discharge in constructive contempt. O'Flynn v. State [Miss.] 43 So. 82. Where proceedings are civil. Flannery v. People, 127 Ill. App. 526. Where the act complained of is in itself a contempt. Emery v. State [Neb.] 111 N. W. 374. In an indirect contempt proceeding the showing made by the party charged imports verity. McSwane v. Foreman, 167 Ind. 171, 78 N. E. 630. In Federal practice a mere sworn denial of the charge by the accused is not an exoneration where the contempt is direct and tends to obstruct the administration of justice. Attempt to persuade witness to testify contrary to truth in pending case, or to influence jury, held direct contempt where made in immediate vicinity of court. United States v. Carroll 147 F. 947. In such case the matter should be heard and determined on testimony pro and con. Id. Sworn denial that accused murdered a prisoner after he had been allowed an appeal held insufficient to purge of contempt. United States v. Shipp, 203 U. S. 563, 51 Law. Ed. 319. Denial of bankrupt that he had money in his possession or control held not conclusive in contempt proceeding to enforce order requiring him to turn it over to trustee. Moody v. Cole, 148 F. 295.

99. Evidence of cutting a ditch not admissible under charge of erecting dams. State v. Sieber [Or.] 88 P. 313.

1. See 7 C. L. 752.

2. Alleged contempt consisted in presenting scandalous affidavit for change of judge. Lamberson v. Tulare County Super. Ct. [Cal.] 91 P. 100.

3. Motion to commit treasurer of bankrupt corporation for failure to obey order of referee requiring him to turn over money to trustee. In re Hooks Smelting Co., 146 F. 336.

4. O'Flynn v. State [Miss.] 43 So. 82; In re Fellerman, 149 F. 244. Civil Code 1895, § 4046, providing for trial by jury in certain contempt proceedings, held not applicable to rule for contempt issued in progress of an alimony case requiring respondent to show cause why he should not comply with court's order requiring payment of alimony and counsel fees. Stokes v. Stokes, 126 Ga. 804, 55 S. E. 1023.

5. The request of the accused that the hearing be had at chambers confers jurisdiction the same as if the hearing had been had in open court. Smith v. Smith [S. C.] 57 S. E. 666.

6. A vice-chancellor has authority as mas-

is civil in nature, the inhibition against compelling one to give evidence against himself does not apply.[7] Criminal contempt must be established by proof beyond a reasonable doubt.[8] Other rulings on evidence[9] and instructions[10] will be found in the notes.

§ 6. *Findings and judgment.*[11]—It is error to find a defendant guilty of anything not contained in the written charges against him.[12] The judgment must be supported by evidence or findings of fact properly filed or made of record.[13] That two judgments are recorded in one entry does not make them one.[14] Recitals in the judgment must be taken as true, and all reasonable inferences must be made to support its validity.[15] Where the contempt is not in the presence of the court but the proceeding originates in a civil suit, the moving papers may be looked to to help out irregularities in the judgment.[16] Under the Wisconsin statute "actual loss"

ter of the court of chancery to take the testimony of witnesses produced before him in a proceeding to punish one for contempt of the court of chancery and to submit the same to the chancellor for adjudication. Seastream v. New Jersey Exhibition Co. [N. J. Err. & App.] 65 A. 982.

7. Court could require a labor organization to produce books and records in investigation as to violation of injunction against boycotting. Patterson v. Wyoming Valley District Council, 31 Pa. Super. Ct. 112. A contempt proceeding for the violation of an injunction is not a criminal prosecution within the inhibition against compelling a party accused to testify against himself. State v. Sieber [Or.] 88 P. 313. Contemners who voluntarily offered themselves as witnesses on hearing and were examined and cross-examined without objection could not urge that court subjected them to examination without authority. Seastream v. New Jersey Exhibition Co. [N. J. Err. & App.] 65 A. 982. Court held to properly require defendant to be examined concerning the amount and value of a crop one-third of which he was required by the court to turn over and to authorize the master to examine other witnesses also before disposing of rule for contempt. Smith v. Smith [S. C.] 57 S. E. 666.

8. A proceeding in bankruptcy to compel the bankrupt to obey an order requiring him to surrender property to the trustee is criminal in its character, and a finding of contempt should be based on evidence inducing a belief beyond a reasonable doubt. Moody v. Cole, 148 F. 295. Accusations of contempt, especially where of criminal import, must be supported by evidence sufficient to convince the trier beyond a reasonable doubt of the actual guilt of the accused and to establish every element of the offense, including the criminal intent. United States v. Carroll, 147 F. 947. In contempt for violation of an order or process of court, the proof of guilt should be clear and conclusive. Evidence insufficient in proceeding for violating a stay order pending appeal from decree enjoining interference with irrigation water. State v. Small [Or.] 90 P. 1110. Proceeding for violation of injunction by conspiring held neither criminal nor quasi criminal and hence proof of guilt beyond reasonable doubt was not necessary. Flannery v. People, 225 Ill. 62, 80 N. E. 60.

9. A witness could testify that money had been furnished to induce him to leave the state where accused had participated in the arrangement. French v. Com., 30 Ky. L. R. 98, 97 S. W. 427. Where an affidavit charged a violation of an injunction by a sale of intoxicants, held not prejudicial for court to inquire into other violations where they were clearly established and hearing was continued so as to fully inform defendant of nature of charge. State v. McCarley, 74 Kan. 874, 87 P. 743. Where conspiracy in violation of injunction was prima facie established, evidence introduced on former hearings for contempt held properly admitted. Flannery v. People, 127 Ill. App. 526.

10. Not error not to charge that accused could not be convicted on the uncorroborated evidence of accomplices there being no accomplices in the case, all the offenders being principals. French v. Com., 30 Ky. L. R. 98, 97 S. W. 427.

11. See 7 C. L. 754.

12. Iron Molders' Union v. Greenwald Co., 4 Ohio N. P. (N. S.) 180.

13. Under the Iowa statute, where the contempt order is based on facts proved by the testimony of others the evidence must be reduced to writing and filed and made of record before the order of commitment is made. Code, § 4466. Walker v. Kennedy, 133 Iowa, 284, 110 N. W. 581. When the court acts from personal knowledge, a statement of facts must be entered on the records or filed. Id. Proceeding void where no statement had been filed and shorthand notes had not been translated. State v. District Ct., 133 Iowa, 450, 110 N. W. 592. Order reciting that an attorney "interrupted" the court does not comply with a statute requiring court to state the facts. Ex parte Shortridge [Cal. App.] 90 P. 478.

14. Where attorney was adjudged guilty of two contempts on same day, each offense being separately adjudicated and adjudications and fines separately stated. In re Clark [Mo. App.] 103 S. W. 1105.

15. Where judgment showed an attorney's absence from court delaying a criminal trial, it was presumed that he waived his right to twelve hours in which to challenge the jury. In re Clark [Mo. App.] 103 S. W. 1105. Judgment reciting that court was "of opinion" that an attorney's delay was intentional held to sufficiently show that the attorney was given an opportunity to explain. Id.

16. To ascertain particular character of violation of injunction. Ex parte Cash [Tex. Cr. App.] 99 S. W. 1118.

recoverable by complainant is independent of "costs and expenses,"[17] and the latter includes counsel fees.[18]

§ 7. *Punishment, fine and commitment; further proceedings.*[19]—Contempts are properly punished by fine or imprisonment,[20] but judgment of imprisonment may not be imposed in the absence of the accused.[21] In New York, when proceedings are instituted by affidavit and attachment, a warrant of commitment must issue, and when begun by affidavit and order to show cause, the offender may be committed by certified copy of the contempt order.[22] The extent of the punishment is largely regulated by statute.[23] A defendant's answer may not be stricken for his contempt of an order directing him to appear before a referee for examination.[24] If an order committing for contempt is intended as punishment, it should fix a definite time of imprisonment;[25] if intended as a means to compel compliance with an order, it may properly provide for confinement until the order is complied with,[26] but should provide for a release on such compliance.[27] A judgment of confinement until costs and fines are paid is sufficient without an alternative provision that the confinement continue until the accused is discharged according to law.[28] While impossibility of performance terminates a confinement under an order of imprisonment until a certain thing be done,[29] it does not purge of the contempt,[30] but contemnor having remained recalcitrant until the intervention of that which made performance impossible is still subject to another sentence of imprisonment for a specified term.[31]

§ 8. *Discharge or pardon.*[32]—In Rhode Island, one who is incarcerated for failure to comply with an order of the superior court for alimony pendente lite is

17. Under Rev. St. 1898, § 3490, costs and expenses may be recovered independently of actual loss. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540. Judgment, though irregular, for awarding costs and expenses as for indemnity, held not prejudicial where defendant was not required to pay a fine in addition to costs and expenses. Id.

18. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540.

19. See 7 C. L. 754.

20. A statute providing for fine for contempt for violation of an order under its provisions for the production of documentary evidence does not authorize a deprivation of property without due process of law. Laws 1906, p. 79, No. 75. In re Consolidated Rendering Co. [Vt.] 66 A. 790. Where the evidence is sufficient to show contempt in the refusal of a bankrupt to turn over property to the trustee, the court should exercise the power of commitment given by the statute, and should not compel the trustee to resort to a plenary suit. Moody v. Cole 148 F. 295. Imprisonment for failure to comply with a decree requiring one to make payment of specific funds in his possession is not imprisonment for debt. Meeks v. State, 80 Ark. 579, 98 S. W. 378.

21. Judgment of imprisonment imposed in absence of accused held void. Ex parte Mylius, 61 W. Va. 405, 56 S. E. 602.

22. When contempt proceedings are instituted by affidavit and attachment, a warrant of commitment must issue under Code Civ. Proc. § 2281, but when begun by affidavit and order to show cause the offender may be committed by a certified copy of the order adjudging contempt under § 2283. People v. Feenaughty, 51 Misc. 468, 101 N. Y. S. 700.

23. The fine for failure to pay alimony and an attorney's fee must be limited to attorney's fee and alimony due under the order when demand was made therefor. Woolworth v. Woolworth, 115 App. Div. 405, 100 N. Y. S. 865. Defendants could not object to punishment beyond merits of offense where proceeding was a second one for violation of an injunction in substantially the same manner. Flannery v. People, 225 Ill. 62, 80 N. E. 60. Fine of $500 and thirty days' imprisonment held without jurisdiction under Mansfield's Dig. § 629, limiting punishments to $50 fine and ten days' imprisonment. In re Connor [Ind. T.] 103 S. W. 760. Fine of $5,000 imposed by jury for procuring witnesses to leave the state held not excessive. French v. Com., 30 Ky. L. R. 98, 97 S. W. 427. Code 1904, § 3771, providing that no court shall without a jury impose a fine of more than $50 or imprison for more than ten days, applies only to the contempts embraced in the first subdivision of § 3768, relating to misbehavior in presence of court, or so near as to interrupt administration of justice. Yoder v. Com. [Va.] 57 S. E. 581.

24. Would contravene fourteenth amendment. Grant v. Greene, 105 N. Y. S. 641.

25. Anderson v. Anderson, 124 Ill. App. 613.

26. Decree to pay alimony. Czarra v. Czarra, 124 Ill. App. 622. Failure to pay alimony and fees. Twenty day limitation in case of a single act of contempt not applicable. Gray v. Gray, 127 Ga. 345, 56 S. E. 138.

27. Anderson v. Anderson, 124 Ill. App. 613.

28. In re Clark [Mo. App.] 103 S. W. 1105.

29, 30. United States v. Collins, 146 F. 553.

31. Refusal to produce documentary evidence until discharge of grand jury. United States v. Collins, 146 F. 553.

32. See 5 C. L. 658.

imprisoned not only for debt but also for contempt,[33] hence the district court has no jurisdiction to permit him to obtain his discharge by taking the poor debtors' oath.[34]

§ 9. *Review of proceedings.*[35]—A statute granting the writ of habeas corpus to one confined for contempt does not apply where the punishment is by fine only.[36] In Indiana, where a contempt is indirect, the only question for review is whether accused has fully answered the charge made against him, and hence a motion for a new trial is not necessary to authorize an appeal.[37] A judgment or decree of criminal contempt is not reviewable except for lack of jurisdiction,[38] but this does not preclude revision or correction of illegal sentences or excessive or cruel punishments.[39] Contempt being a specific criminal offense, the charge, findings, and judgment will be construed in favor of the accused,[40] but defendant may not contradict the facts set forth in the order of commitment.[41]

CONTINUANCE AND POSTPONEMENT.

§ 1. Power and Duty of Court (649).
§ 2. Occasion for or Propriety of Continuance or Postponement (650).
A. In General (650).
B. Absence or Disability of Party or Counsel (650).
C. Absence of Witness or Inability to Procure Evidence (651).
D. Surprise (652).
§ 3. Proceedings to Procure Continuance or Postponement (653).
§ 4. Appellate Procedure (654).

The scope of this topic is noted below.[42]

§ 1. *Power and duty of court.*[43]—The grant or refusal of a continuance rests largely in the discretion of the court under all the circumstances.[44] The imposition

33, 34. Mowry v. Bliss [R. I.] 65 A. 616.

35. See 7 C. L. 756.

36. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

37. Proceeding for refusal to be examined held one for indirect contempt governed by Burns' Ann. St. 1901, § 1025. McSwane v. Foreman, 167 Ind. 171, 78 N. E. 630.

38. Seastream v. New Jersey Exhibition Co. [N. J. Err. & App.] 65 A. 982. No review if power to punish for contempt is fairly exercised in a case within court's jurisdiction. In re Consolidated Rendering Co. [Vt.] 66 A. 790. The findings of the judgment do not preclude an examination of the record to determine the jurisdictional facts. Reymert v. Smith [Cal. App.] 90 P. 470.

39. Notwithstanding Ky. St. 1903, § 950, providing that no appeal shall lie from judgments punishing for contempt. French v. Com., 30 Ky. L. R. 98, 97 S. W. 427.

40. Reymert v. Smith [Cal. App.] 90 P. 470. Order merely showing that while a witness was being examined an attorney persisted in addressing the court, though admonished to desist, held not to justify commitment, it not appearing that he was not rightfully and respectfully discharging his duty. Ex parte Shortridge (Cal. App.) 90 P. 478. Could not be presumed that his client was a fugitive from justice. Id.

41. Ex parte Shortridge [Cal. App.] 90 P. 478.

42. This topic excludes postponement of criminal trials. (Indictment and Prosecution, 8 C. L. 189) and of hearings in appellate courts (Appeal and Review, 9 C. L. 108), and the adjournment of terms of court (Courts, 7 C. L. 999). See, also, Dockets, Calendars and Trial Lists, 7 C. L. 1192.

43. See 7 C. L. 757.

44. Bagley v. Shumate [Ga.] 57 S. E. 99; St. Louis, etc., R. Co. v. Smith [Ark.] 100 S. W. 884; Leamon's Adm'x. v. Louisville etc., R. Co., 30 Ky. L. R. 443, 98 S. W. 1016; Thompson Bros. v. Piedmont Mut. Ins. Co. [S. C.] 57 S. E. 848. Portland & S. R. Co. v. Ladd [Wash.] 91 P. 573; Traynor v. White [Wash.] 87 P. 823; Ourand v. Johnson, 6 Ind. T. 361, 98 S. W. 127; Pacific Mill Co. v. Inman, Poulsen & Co. [Or.] 90 P. 1099; Ex parte Cannon, 75 S. C. 214, 55 S. E. 325; Citizens' R. Co. v. Robertson [Tex. Civ. App.] 103 S. W. 443. Where diligence and good faith in obtaining the testimony of an absent witness was controverted and court's decision reasonable, refusal to grant will not be disturbed, especially where court permitted written statement of witness to be used as a deposition. Bratt v. Sparks [Ark.] 96 S. W. 1057. No abuse to refuse continuance because defendant could not make out his defense without the policy of insurance sued on which he believed from the pleadings plaintiff would have in court on trial. Thompson Bros. v. Piedmont Mut. Ins. Co. [S. C.] 57 S. E. 848. Held discretionary to continue cause for plaintiff on payment of costs of the term. Revisal 1905, § 531. Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196.

Sickness of a party to an action does not deprive the court of exercising its discretion in the matter of allowing a continuance. Lynch v. San Francisco Super. Ct. [Cal.] 88 P. 708.

Surprise. McFadden v. McFadden, 32 Pa.

of terms [45] or modification of an order for a continuance [46] is also discretionary, and in a proper case the order may be revoked.[47] After a cause has been continued for the term, the court may not proceed in the absence of defendant and without notice.[48] Failure to pay costs imposed as a condition to adjournment on the ground of the absence of counsel does not justify the preclusion of a party from participation in the trial on the adjourned day.[49]

§ 2. *Occasion for or propriety of continuance or postponement. A. In General.*[50]—Lack of preparation,[51] another cause pending,[52] loss of pleadings,[53] improper discussion before the jury [54] or permitting a juror to testify,[55] may constitute ground for a continuance, and sometimes it is granted as a matter of course upon a good defense being shown.[56] Where the pleadings show prima facie a right in plaintiff to maintain the action, his right to do so cannot be questioned by a motion for a continuance.[57]

(§ 2) *B. Absence or disability of party or counsel.*[58]—To justify a postponement on account of the absence of a party, a meritorious reason existing at the time of trial, which prevents his presence, must be shown.[59] The illness or infirmity of a party,[60] or his necessary absence on business, [61] is ground for continuance,

Super. Ct. 534. In the absence of any affidavit in support of the motion, the granting of a continuance on the ground of surprise is discretionary with the court. Rife v. Middletown, 32 Pa. Super. Ct. 68.

45. Imposition of terms held discretionary where opposing party had incurred no expense in preparing for trial. Pacific Mill Co. v. Inman, Paulson & Co., [Ore.] 90 P. 1099. Discretionary with court to tax costs to plaintiff and continue cause on defendant's motion where plaintiff had failed to comply with conditions of a continuance granted him. Ourand v. Johnson, 6 Ind. T. 361, 98 S. W. 127.

46. Held discretionary to modify judgment allowing continuance so as not to require payment of expenses of attendance of witnesses as condition to going to trial. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 111 N. W. 534.

47. Where a court orders a continuance in order for a party to obtain rebuttal evidence, and the other party withdraws the evidence sought to be rebutted, the continuance order may be revoked upon an oral instruction to disregard such evidence, and in the absence of a request for a written instruction such oral instruction is sufficient. Guilliford v. McQuillen [Kan.] 89 P. 927.

48. Hayes v. Kirby [Ark.] 103 S. W. 1152; Simmons v. Kirby [Ark.] 103 S. W. 1153.

49. Fallon v. Crocicchia, 52 Misc. 503, 102 N. Y. S. 541.

50. See 7 C. L. 758.

51. Not error to refuse to postpone hearing for alimony on ground that counsel had been retained only the day previous and had not made preparation where he entered upon the hearing without objection and defendant, his client, was present to testify. Stokes v. Stokes, 127 Ga. 160, 56 S. E. 303.

52. Where a controversy involves the interpretation of a contract governed by the laws of another state and a similar suit between the same parties is pending in that state, it is discretionary with the supreme court, though the pendency of the other suit is not pleadable in abatement, to direct a continuance until the disposition of the suit in the other state. Moore v. Maryland Casualty Co. [N. H.] 64 A. 1099.

53. A motion to continue on the ground that the original pleadings were lost is properly denied where the court orders that the record of such papers may be used on the trial the same as the original, as expressly provided by Code 1896, §§ 2644, 2645. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 So. 1024.

54. Permitting discussion of a motion for an increase of the ad damnum in the presence of the jury where the damages are unliquidated is ground for continuance. Easterbrooks v. Rhode Island Suburban R. Co. [R. I.] 66 A. 298.

55. Not error to refuse to continue cause on ground that a juror was permitted to testify where he was discharged by consent and trial proceeded without him. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658.

56. Affidavit held not to set out a defense to an action by the state on a liquor dealer's bond so as to authorize a continuance within a court rule entitling defendant to a continuance at the first term on his satisfying the court that he has probable ground of defense, etc. State v. Cote [N. H.] 65 A. 693.

57. Suit on mortgage to plaintiff as guardian, and defense that right of action was in wards who had become of age. Young v. Malone [Pa.] 67 A. 355.

58. See 7 C. L. 758.

59. No abuse of discretion to refuse continuance for absence of a party on account of illness where it was not shown what his condition was at time of trial. Cavender v. Atkins [Ga. App.] 58 S. E. 332.

60. Held error to refuse continuance where defendant was old and unable to attend trial or give a deposition, but would probably be able to attend within a month. Deacon v. Rasch [Ind. App.] 81 N. E. 84.

61. Error to refuse postponement where defendant, a necessary witness, was absent in Porto Rico on important business, and there had been previous adjournments not rendered necessary by him. Hoffman v. Gunst, 104 N. Y. S. 926.

but the fact that a party is sick,[62] or the absence of one of several defendants,[63] does not necessarily authorize delay. It is not an abuse of discretion to deny a continuance in habeas corpus to recover minor children until the father can be notified and heard, the writ having issued against his brother.[64]

A continuance may be allowed for the illness of counsel [65] or his actual engagement in other causes,[66] but not where no reasonable excuse for his absence is shown,[67] or where the party is represented by other counsel,[68] or where a previous postponement was granted on the promise of counsel to be present on a subsequent day.[69]

(§ 2) *C. Absence of witness or inability to procure evidence.*[70]—In a proper case the court should grant a continuance on account of the absence of a material witness,[71] but the motion is properly denied where it is not shown that due diligence was exercised in procuring his attendance,[72] or that his expected testimony is material [73] or cannot be procured from other witnesses,[74] or where such testimony would not have changed the result of the trial [75] or is at variance with that given

62. That a party is sick does not ipso facto entitle him to a continuance. It is for court to exercise its discretion in view of all the circumstances. Lynch v. San Francisco Super. Ct. [Cal.] 88 P. 708.

63. No abuse to refuse to continue condemnation proceeding for absence of owner of an interest in the premises, it not appearing that he was relied on as a material witness, and the other owners being present. Portland & Seattle R. Co. v. Ladd [Wash.] 91 P. 573.

64. Ex Parte Cannon, 75 S. C. 214, 55 S. E. 325.

65. Held discretionary with court to continue case for illness of counsel. Lambert Hoisting Engine Co. v. Bray & Co., 127 Ga. 452, 56 S. E. 513. The right of a litigant to have a case passed because of the sickness or disability of counsel is not affected by the fact that such litigant is a corporation or has not on trial a certain number of cases, notwithstanding a rule limiting to six the number of cases to be placed on the trial call for one day where the same litigant is plaintiff or defendant. Chicago City R. Co. v. Gregory, 123 Ill. App. 259.

66. Where an attorney presents to municipal court an affidavit showing his actual engagement in supreme court, he is entitled to an adjournment as of legal right. Dorfman v. Hirschfield, 53 Misc. 538, 103 N. Y. S. 698. Continuance proper where one of defendant's attorneys was engaged in a murder trial, another attending his mother's funeral, and the remaining one was not familiar with the case. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 111 N. W. 534.

67. That counsel was out of town, no ground, no reason for his absence being given. Jones v. Morrison Shirt Waist Co., 52 Misc. 561, 102 N. Y. S. 769. The action of a court in proceeding to trial in the absence of counsel will not be interfered with where no reasonable excuse is shown for the absence. McArthur v. Kansas City El. R. Co., 123 Mo. App. 503, 100 S. W. 62.

68. No abuse to refuse continuance for absence of defendant's leading counsel in attendance on other trials, other counsel having been procured. Rice v. Lockhart Mills, 75 S. C. 150, 55 S. E. 160.

69. Where postponement was granted on promise of defendant's counsel to proceed the next day, held not error to refuse further postponement the next day on ground that counsel could not leave another case. Riesgo v. Glengariffe Realty Co., 116 App. Div. 414, 101 N. Y. S. 832.

70. See 7 C. L. 759.

71. Error to refuse continuance to railroad company to enable it to obtain its conductor as a witness where by the rules of the union of which he was a member he could not be present on day of trial. Camden Interstate R. Co. v. Frazier, 30 Ky. L. R. 186, 97 S. W. 776. No abuse to refuse continuance for absence of three witnesses where cause had long been pending, and testimony of two could have been obtained, affidavit not showing what particular facts the witnesses would testify to, or what particular steps had been taken to procure their testimony, and it being merely alleged on information and belief that witnesses had evaded service at request of opposite party. Leamon's Adm'x v. Louisville, etc., R. Co., 30 Ky. L. R. 443, 98 S. W. 1016.

72. Smith v. Chicago Junction R. Co., 127 Ill. App. 89. Not error to refuse continuance or allow reading of affidavit as to what he would testify where witness had testified on previous trial and movant knew he was absent from state, but relied on his promise to be present. Nicola Bros. Co. v. Hurst, 30 Ky. L. R. 851, 99 S. W. 917. Carrier's application properly denied for failure to show reasonable diligence in procuring attendance of employes as witnesses in suit for injury to live stock. Texas & P. R. Co. v. Huff [Tex. Civ. App.] 99 S. W. 177. Diligence not shown where, though witness had written he would not be at place of trial until after time set, there was no allegation he had not returned, and no subpoena was issued until two days before trial. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 101 S. W. 554.

73. Materiality of evidence must be shown. Smith v. Chicago Junction R. Co., 127 Ill. App. 89; Johnson v. Anna Bldg. & Loan Ass'n, 126 Ill. App. 592.

74. Maloney v. Stetson & Post Mill Co. [Wash.] 90 P. 1046.

75. Smith v. Wofford [Tex. Civ. App.] 16 Tex. Ct. Rep. 815, 97 S. W. 143; Jackson v. Mercantile Mut. Fire Ins. Co. [Wash.] 88 P. 127.

by the witness at a previous trial,[76] or where it is in fact given at the trial.[77] An adjournment or stay is properly allowed upon the granting of a commission to take testimony,[78] but newly discovered evidence which is merely cumulative, or tends only to contradict or discredit a party or opposing witness, is no ground for a continuance,[79] and the court should deny an oral motion to postpone to enable a party to procure documents where no excuse is offered for not procuring them before trial.[80]

Admission of testimony to avoid continuance.[81]—A continuance is properly denied where the affidavit is admitted by the opposite party and read to the jury,[82] but a statute providing that a cause shall not be postponed if the adverse party admits that an absent witness would testify as stated in the affidavit should not be construed so as to deprive a party to the cause of his privilege of being present at the trial,[83] though there may be circumstances where an admission of the expected testimony of one or two or more defendants is sufficient to prevent a continuance.[84] Where a continuance is denied with the understanding that the affidavit therefor may be read as the deposition of the desired witness, an objection that statements therein contained are too indefinite is untenable.[85]

(§ 2) *D. Surprise*[86] due to the amendment of a pleading is ground for continuance,[87] but the striking of part of an answer as surplusage is not where defendant is given the benefit of general allegations therein.[88] Nor will a continuance be granted for the introduction of evidence which should have been reasonably

76. Huber v. Mother Aurelia of St. Joseph's Hospital [Idaho] 89 P. 942.

77. Where testimony expected was introduced by movant on the trial. Blocker v. McClendon, 6 Ind. T. 481, 98 S. W. 166. Where alleged absent witnesses were present and testified. German Ins. Co. v. Goodfriend, 30 Ky. L. R. 218, 97 S. W. 1098. Where substance of testimony of absent witnesses was submitted to jury and flatly contradicted testimony of opposing party and the probable duration of their illness did not appear. Hiers v. Atlantic Coast Line R. Co., 75 S. C. 311, 55 S. E. 457. No abuse of discretion to refuse continuance on ground of absent witness, opposing party having before trial offered to allow his deposition to be taken waiving formalities, and the facts being testified to by others. Creech v. Aberdeen [Wash.] 87 P. 44.

78. Held error to deny a stay on granting a commission to take testimony where defendants acted with reasonable promptness. Roth v. Mautner, 115 App. Div. 148, 100 N. Y. S. 707. Calling of case for trial and introduction and objection to a commission on ground of defective execution held not such commencement of trial as to deprive municipal court of Buffalo of power to order an adjournment to permit correction of the commission. Winquist v. Preston, 117 App. Div. 796, 102 N. Y. S. 1023.

79. Phoenix Ins. Co. v. Wintersmith, 30 Ky. L. R. 369, 98 S. W. 917.

80. Berry v. Joiner [Tex. Civ. App.] 101 S. W. 289.

81. See 7 C. L. 760.

82. Admission that absent witnesses would testify as stated in affidavit. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784. Not error to refuse where opposite party admits that the evidence would be given. Mills' Ann. Code, § 177. Florence Oil & Refining Co. v. Oil Well Supply Co. [Colo.] 87 P. 1077.

83. Deacon v. Rasch [Ind App.] 81 N. E. 84.

84. No abuse to refuse a fourth continuance for absence of one defendant whose expected testimony plaintiff admitted he would give, where the other defendant was present. Traynor v. White [Wash.] 87 P. 823.

85. Holcomb-Lobb Co. v. Kaufman, 29 Ky. L. R. 1006, 96 S. W. 813.

86. See 7 C. L. 760.

87. Gurr v. Carter [Ga. App.] 58 S. E. 488. In suit for injuries, amendment alleging death of plaintiff's wife since commencement of action held ground for continuance. Chicago, etc., R. Co. v. Groner [Tex.] 100 S. W. 137. That original petition alleged that death would probably result, immaterial. Id. That some evidence of the kind defendant sought by continuance to obtain had been introduced by defendant at trial held not to affect his right. Id. Where plaintiff, after resting, filed amendment alleging fraud in a proof of loss and agreement set up in defense, held error to refuse continuance on showing of surprise and lack of preparation to meet the new issue, defendants only witness on such issue being out of the state. Flint v. Atlas Mut. Ins. Co. [Iowa] 112 N. W. 1. No surprise shown by amendment of answer authorizing postponement to enable plaintiff to send for certain books. Berry v. Joiner [Tex. Civ. App.] 101 S. W. 289. Not error to refuse continuance on ground of amendment of complaint after notice of trial it not appearing that defendant was surprised. Kennedy v. Agricultural Ins. Co. [S. D.] 110 N. W. 116. No abuse of discretion to refuse continuance for amendment of complaint in personal injury suit, defendant making no showing that he could not safely proceed. Lampe v. Jacobsen [Wash.] 90 P. 654.

88. Ratliff v. Tinar [Tex. Civ. App.] 102 S. W. 131.

anticipated,[89] or where a denial of the testimony claimed to have surprised would not have availed.[90] A short adjournment may be allowed to enable one to obtain written evidence where oral proof is objected to.[91] So, also, where a nonsuit is granted as against one of two defendants the other may have a continuance on the ground that he had prepared the case as one primarily against the other,[92] but unpreparedness due to a misapprehension as to what the ruling of the court would be is no ground for continuance, the ruling being correct.[93] One who fails to move for a continuance on account of the unexpected evidence of the adverse party is not entitled to a new trial on that ground after verdict.[94]

§ 3. *Proceedings to procure continuance or postponement.*[95]—The motion must be timely made.[96] In Georgia all grounds for a continuance must be insisted upon at once and after a decision upon one or more grounds no others afterwards urged will be considered.[97] A motion for leave to withdraw a juror is in effect a motion for a continuance.[98]

A motion for a continuance made in the midst of the trial and dictated into the record must be considered as being in writing, especially where treated by the court and parties as a motion in the case.[99] Facts, not mere conclusions, must be set out in the affidavit.[1] Where the absence of a witness is relied upon, his residence should be given,[2] and facts must be alleged showing diligence in attempting to procure his attendance.[3] It should also be stated that the application is not made for delay.[4] An affidavit based on the inability of a defendant to attend and testify on a day set for trial is insufficient where it does not state that defendant if present would

89. Where petition alleged injury to plaintiff's arm, and evidence showed dislocation of shoulder causing pain in arm, held the variance was not ground for continuance. City of Covington v. Whitney, 30 Ky. L. R. 659, 99 S. W. 337. In suit on fire policy, held no abuse of discretion to deny defendant a continuance on ground of surprise by testimony as to destruction of a carpet where under terms of policy such testimony could have been obtained by defendant before trial and contradictory evidence obtained. Phoenix Ins. Co. v. Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987. Unexpected production of deposition to prove material issue alleged in complaint where deposition had been filed, but thereafter withheld from files, until trial. El Paso S. W. R. Co. v. Barrett [Tex. Civ. App.] 101 S. W. 1025.

90. Where, under evidence and pleadings, verdict should have been for plaintiff even had testimony claimed to have surprised defendant been denied. Buffalo Coal Creek Min. Co. v. Troendle, 30 Ky. L. R. 740, 99 S. W. 622.

91. Short adjournment should have been granted where plaintiff was surprised by defendant's objection to oral proof of existence and probate of a will so as to allow production of records. Heiss v. Pfeiffer, 117 App. Div. 880, 103 N. Y. S. 478.

92. Where, in an injury action against a railroad and city, a nonsuit was granted as against the railroad, held discretionary with court to grant the city a continuance on ground that it had prepared case as one primarily against the railroad. Crotty v. Danbury, 79 Conn. 379, 65 A. 147.

93. On plea in abatement. St. Louis, etc., R. Co. v. Smith [Ark.] 100 S. W. 884.

94. Patton v. Sanborn, 133 Iowa, 650, 110 N. W. 1032.

95. See 7 C. L. 761.

96. After a cause has passed from the reserve to the ready section of the day calendar, it is too late to present grounds for postponement, except such as arise after the ready section is reached; hence it was error to postpone the case against defendant's objection after it had been placed on ready calendar and both parties had repeatedly answered "ready." Loehr v. Brooklyn Ferry Co., 115 App. Div. 666, 101 N. Y. S. 209.

97. Illness of counsel could not be urged after overruling of motion on ground of absence of witness. Civ. Code. 1895, § 5675. Aiken v. Carmichael, 127 Ga. 407, 56 S. E. 440.

98. Smith v. Chicago Junction R. Co., 127 Ill. App. 89.

99. Flint v. Atlas Mut. Ins. Co. [Iowa] 112 N. W. 1.

1. To justify a continuance on the ground of the illness of a party, facts, not merely conclusions, must be set out in the affidavit showing the necessity of his presence at the trial, or that his testimony is material. Mayo v. Frye Mfg. Co., 126 Ill. App. 577.

2. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 101 S. W. 554.

3. No abuse of discretion to refuse continuance where motion stated that witnesses had been summoned during a former term, but did not show that they had been in attendance, though case had been postponed from time to time. Summit Lumber Co. v. McGoogan [Ark.] 102 S. W. 389.

4. Not error to refuse continuance on account of absent witness where movant failed to show that application was not made for delay, though showing in other respects was complete. Aiken v. Carmichael, 127 Ga. 407, 56 S. E. 440.

testify as to the facts relied upon in defense,[5] and where it is sought to continue a cause over term the affidavit must show the inability of such defendant to attend on any subsequent day of the same term.[6]

§ 4. *Appellate procedure.*[7]—The necessity of objection and exception,[8] the right to take a direct appeal from the order on motion for continuance,[9] the sufficiency of the record to present the question,[10] review of discretion of lower court,[11] and the determination whether prejudice resulted from the ruling, [12] are all treated elsewhere.

Contract Labor Law, see latest topical index.

CONTRACTS.

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The scope of this topic is noted below.[13]

§ 1. *Nature and formal requisites. A. Definition and kinds of contracts.*[14]—A contract is an agreement between two or more persons, upon sufficient consideration, to do or not to do a particular thing.[15] Contracts are either express or implied. An express contract is one all the terms of which are settled by agreement.[16]

5, 6. Good v. Bonacum [Neb.] 111 N. W. 796.

7. See 5 C. L. 664.

8. See Saving Questions for Review, 8 C. L. 1822.

9. See Appeal and Review, § 4B, 9 C. L. 115.

10. See Appeal and Review, § 9D, 9 C. L. 161.

11. See Appeal and Review, § 13F 1, 9 C. L. 206.

12. See Harmless and Prejudicial Error, 8 C. L. 1.

13. This topic treats only of the general principles applicable to all contracts, such as the making of the contract, consideration and the question of public policy. Reality of consent (see Fraud and Undue Influence, 7 C. L. 1813; Incompetency, 8 C. L. 169; Mistake and Accident, 8 C. L. 1020; Infants, 8 C. L. 267; Husband and Wife, 8 C. L. 122, etc.) and matters relating to contracts implied in law (see Implied Contracts, 8 C. L. 155) are treated in separate topics. For matters relating to the construction and operation of Public Contracts (see 8 C. L. 1473), Building and Construction Contracts (see 9 C. L. 424), Deeds of Conveyance (see 7 C. L. 1103), sales of personalty (see Sales, 8 C. L. 1751), sales of realty (see Vendors and purchasers, 8 C. L. 2216), etc., reference should be had to the topics dealing particularly with those subjects.

14. See 7 C. L. 762.

15. Adkins & Co. v. Campbell [Del.] 64 A. 628.

16. Pleading alleging agreement by defendant that if plaintiff would furnish ma-

A contract implied in fact arises where the intention to contract is inferred from the acts or conduct of either or both of the parties.[17] A quasi contract, or contract implied in law, exists independently of intention, and is founded on the doctrine of unjust enrichment.[18] Proof of an express contract necessarily excludes a contemporaneous implied one in relation to the same matter.[19]

A written contract is one all the terms of which have been reduced to writing.[20]

An executed contract is one in which all of the parties thereto have performed all the obligations assumed by them, and an executory contract one in which something remains to be done by one or more of the parties.[21]

Parties.[22]—The same person cannot be both obligor and obligee.[23] As a general rule one not a party to a contract cannot be included in the rights or liabilities which the engagement creates.[24] In most jurisdictions, however, one may enforce a

terial, lay piping from water main past his house, etc., defendant would pay his proportional share of cost, held to declare on express contract. Ferris v. Edmonston, 124 Mo. App. 94, 100 S. W. 1119. Mutual meeting of minds upon matter of contract constitutes an express contract whether evidenced by formal offer and acceptance or otherwise. Instructions approved. Griffith v. Robertson, 73 Kan. 666, 85 P. 748. Contract by decedent to pay daughter for services may be shown by any competent testimony. Id.

17. Request to remove rubbish not required to be removed by terms of contract held to imply promise to pay reasonable cost of so doing. Hennessey v. Fleming Bros. [Colo.] 90 P. 77. Employe rendering services to joint stock company, with knowledge and consent of its representative, after termination of his contract of employment, held entitled to recover their reasonable value. Taber v. Breck, 192 Mass. 355, 78 N. E. 472. Evidence held sufficient to sustain finding that even if family relationship existed decedent intended to pay plaintiff for her services and plaintiff expected compensation. McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728. Defendant corporation held liable under implied contract to pay attorney's value of services rendered in its behalf with knowledge of its officers and under circumstances justifying inference that they approved and encouraged what was being done. Trimble v. Texarkana, & Ft. S. R. Co., 199 Mo. 44, 97 S. W. 164. Where defendants received and retained goods with knowledge of price plaintiff expected to receive and without any express or implied agreement for different price held that they were bound to pay invoice price, which was regular selling price and reasonable. Estey Organ Co. v. Lehman [Wis.] 111 N. W. 1097.

18. See Implied Contracts, 8 C. L. 155, for full treatment of this subject.

19. See § 9B, post, for right to sue on common counts for services rendered or goods furnished under an express contract. Bassford v. West [Mo. App.] 101 S. W. 610. Express warranty as to quality of cans sold held to exclude implied warranty on same subject. Wasatch Orchard Co. v. Morgan Canning Co. [Utah] 89 P. 1009. One suing on express contract cannot recover on quantum meruit. See § 9F, post, variance.

20. Two letters held to constitute written contract though one was addressed to firm and other to one of its members. Bauer v. Jerolman, 124 Ill. App. 151. Contract entered into by means of letters containing propositions, terms of which were subsequently accepted, held written contract. Bauer v. Hindley, 222 Ill. 319, 78 N. E. 626. Papers or tickets given to customer by stock broker after purchases or sales had been made orally and which were not signed by either party held not written agreements within parol evidence rule as matter of law. Picard v. Beers [Mass.] 81 N. E. 246. Writing held mere bill of parcels, and not written contract of sale within parol evidence rule. North Packing & Provision Co. v. Lynch [Mass.] 81 N. E. 891.

21. Contract of sale held executory. Mebius & Drescher Co. v. Mills [Cal.] 88 P. 917. Agreement entered into at time of contract of sale whereby note against seller held by purchaser was to be surrendered as part of payment to be made at that time may be treated by the court as fully executed, though note was not as a matter of fact surrendered until deed was delivered. Warns v. Jennie Reeck, 8 Ohio C. C. (N. S.) 401.

22. See 7 C. L. 763.

23. Agreement by children to pay certain sum monthly for support of mother held not void as having only one party. North v. Daniel, 1 Ga. App. 15, 57 S. E. 898.

24. Stranger to contract and its consideration and obligations cannot enforce it. Webb's Academy & Home for Shipbuilders v. Hidden, 118 App. Div. 711, 103 N. Y. S. 659. Mere stranger cannot claim by action the benefit of a contract between other parties, but there must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement. Jarmulowsky v. Susskind, 53 Misc. 603, 103 N. Y. S. 763. Partnership contract provided that if defendant elected to terminate partnership within three months, he might return money contributed by his copartner to plaintiff who had loaned it to latter. Held not to give plaintiff right to sue defendant for such sum on defendant's election to terminate partnership. Id. Seller of threshing machine warranted it and agreed to send expert to set it up and operate it. Buyer desired to thresh for plaintiff and latter told seller's agent that he was unwilling to have him do so unless seller sent expert, which agent agreed to do and did do. Held that, threshing being unsatisfactory, plaintiff could not sue seller for breach of contract, agent not having contracted with him, but what he did being pursuant to con-

contract made for his benefit even if he is not a party thereto.[25] His right of

tract with buyer. Case Threshing Mach. Co. v. Sanford, 30 Ky. L. R. 188, 97 S. W. 805. Assignment of lease without landlord's consent being void, held that there was no privity of contract between landlord and assignee, and neither was liable to other under terms of lease nor under any contract that lessee could lawfully have made with assignee under power to sublet. Morrow v. Camp [Tex. Civ. App.] 101 S. W. 819. Defendant held not liable on contracts signed by third person in absence of showing that he was in any way connected with or authorized to act for it, or that it ratified his acts, or even that signature was his. Bender-Martin Co. v. Apollo Co., 101 N. Y. S. 75. Evidence held insufficient to support finding that one of the defendants was party to contract sued on. Martin v. Trainer, 125 Ill. App. 474; Dick v. Biddle Bros. [Md.] 66 A. 21.

25. Bethlehem Iron Co. v. Hoadley, 152 F. 735; Ballard v. American Hemp Co., 30 Ky. L. R. 1080, 100 S. W. 271. Is not necessary that any consideration should move to him from promisor. Dilcher v. Nellany, 52 Misc. 364, 102 N. Y. S. 264. Need not be privy to the consideration, nor need he be specifically named. Northern Cent. R. Co. v. United Rys. Elec. Co. [Md.] 66 A. 444. May sue in own name though contract was made without his knowledge and without any consideration moving to him. Smith v. Bowman [Utah] 88 P. 687. Federal courts follow state decisions on this question. Bethlehem Iron Co. v. Hoadley, 152 F. 735.

Third person held entitled to sue: Where, as part of consideration of transfer to it of business of certain syndicate, defendant corporation agreed to pay latter's debts including note given by it to plaintiff, held that plaintiff was entitled to sue corporation on such agreement. Civ. Code, § 1559. Northup v. Altadena Min. & Investment Syndicate [Cal. App.] 91 P. 422. Contract to pay taxes on certain land held for direct benefit of plaintiffs. Abbott v. Scotten, 127 Ill. App. 58. Bond to secure performance of building contract held for benefit of materialmen and laborers so that they could sue thereon in their own names. Ochs v. Carnahan Co. [Ind. App.] 80 N. E. 163. Former opinion, Id., 76 N. E. 788. Street railway company was under legal obligation to city to keep in repair portions of bridges occupied by tracks and two feet on either side. Subsequently a railroad company became obligated to city to keep whole of said bridges in repair. Held that railroad company having made needed repairs was entitled to recover from street railway company that part of cost for which latter would have been liable had repairs been made by city. Northern Cent. R. Co. v. United Rys. & Elec. Co. [Md.] 66 A. 444. Insured assigned five-sixths interest in life insurance policy to bank in payment of certain notes, latter agreeing to pay full amount of all subsequent premiums. New policy was issued in which bank was designated as beneficiary for five-sixths of amount of policy and plaintiff as beneficiary of one-sixth. Held that bank's agreement to pay premiums was for plaintiff's benefit, so that she could recover for breach thereof. Scheele v. Lafayette Bk., 120 Mo. App. 611, 97 S. W. 621. Where land was conveyed to defendant's children in consideration of his promise to pay grantor's daughter certain sum, held that she could sue defendant therefor in her own name. Faust v. Faust [N. C.] 57 S. E. 22. Sealed agreement whereby one of two co-obligors in bond secured by mortgage executed by him alone agreed to release of other by obligee, in consideration of promise by other to pay half of any deficiency judgment that might be rendered on foreclosure of mortgage, held one made for benefit of obligee, and that he had a legal or equitable interest in its enforcement, and hence could sue thereon in name of promisor. Dilcher v. Nellany, 52 Misc. 364, 102 N. Y. S. 264. Where receiver turned over to company owning it plant and assets in his hands upon condition that all contracts and liabilities incurred by or incumbent upon him as receiver shall be assumed by it, held that suit against him as receiver for damages for personal injuries was included therein, and obligation thus assumed for benefit of others was enforcible by third person coming within its provisions. Kauffman Brewing Co. v. Betz, 8 Ohio C. C. (N. S.) 64. Direct promise to creditor is not necessary to create relationship of creditor and principal debtor, but it is sufficient that, if based on valuable and executed consideration, such promise is made to surety for direct benefit of creditor, and if, with knowledge thereof, creditor thereafter deals with promisor in relation to debt. Hoffman v. Habighorst [Or.] 89 P. 952. Contract between county court and railroad company whereby former agreed to provide pesthouse for persons suffering with smallpox and latter to transport such persons to pesthouse and to furnish and properly equip car for that purpose held made for benefit of persons suffering from that disease, so, that one of such persons could maintain suit in his own name against carrier either in assumpsit upon such contract or in tort for damages resulting from breach of its duty to him under such contract, or arising out of relation of carrier and passenger after he has been accepted as a passenger. Jenkins v. Chesapeake & O. R. Co., 61 W. Va. 597, 57 S. E. 48. Promise made by purchaser of property to seller to pay as part of consideration therefor, specified debt due from seller to third person is promise made for sole benefit of latter and one upon which he may maintain an action, he being privy in fact to promise and consideration. Fish v. First Nat. Bk. [C. C. A.] 150 F. 524. Promise of defendant to pay debt due third person held also enforcible by latter on theory that as between defendant and original debtor former became principal and latter surety. Id. Creditor suing third person who has agreed with original debtor to assume debt is subject to all equities growing out of contract. Id. Fact that one of owners of land, not a party to contract, was infant, and hence incapable of contracting, held not to preclude him from sharing benefit of agreement between certain other owners that one of them should purchase land at judicial sale for benefit of all owners. Griffin v. Schlenk [Ky.] 102 S. W. 837.

Third person held not entitled to sue: To

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action is, however, entirely subordinate to the contract as made, and he cannot acquire a better standing to enforce the agreement than that occupied by the parties themselves.[26]

A third person may be liable in tort for inducing the breach of a contract to which he is not a party.[27]

Execution.[28]—Whether a contract was signed by the person by whom it purports to have been signed is a question of fact.[29] A signature by a party's duly authorized agent is valid.[30] One may ratify a forged signature.[31] Failure of one party to notify the other that he has signed is immaterial where he in fact does sign and both parties act on the assumption that the contract has been executed.[32]

Delivery[33] is a question of intention.[34] A contract delivered conditionally does not become binding until the condition has been performed.[35]

(§ 1) *B. Offer and acceptance.*[36]—Since no contract is complete without the mutual assent of the parties, their minds must meet as to all of its essential terms.[37]

entitle third person to recover contract must have been made for his benefit, and he cannot do so if it appears from terms used that it was solely for benefit of parties thereto. Searles v. Flora, 225 Ill. 167, 80 N. E. 98. Bond to secure performance of contract with city held not intended to protect materialmen. Id. Paving contract between city and paving company, cost to be paid by assessment of abutting property, held not made for benefit of property owners so that city could not maintain action on contractor's bond in case of breach as trustee for their benefit, particularly where bond provided that certain named persons not including property owners, could sue thereon in case of breach. City of St. Louis v. Wright Contracting Co., 202 Mo. 451, 101 S. W. 6. Bond given to secure performance of contract to erect public building running in favor of trustees and all persons becoming entitled to liens held not to inure to benfit of materialmen, statute not authorizing filing of mechanic's liens against public buildings. Smith v. Bowman [Utah] 88 P. 687. Provision in mortgage held not, under circumstances, to give mechanic's lien priority over lien of such mortgage. Old Colony Trust Co. v. Standard Beet Sugar Co., 150 F. 677.

26. Where purchaser of goods agreed to pay certain debts of seller as part of purchase price, but sale was subsequently annulled in bankruptcy proceedings against seller, held that creditor for whose benefit promise was made could not enforce it. Davis v. Dunn, 121 Mo. App. 490, 97 S. W. 226. Where purchaser of goods agreed to pay certain debts of seller, including that owing to plaintiff, out of and as part of purchase price of said goods, to be ascertained by invoice, and it appeared that he had paid debts of seller to more than value of goods, held that plaintiff could not recover from purchaser amount of his claim. Id.

27. See Torts, 8 C. L. 2125.

28. See 7 C. L. 766.

29. Evidence held to show execution of certain notes by plaintiff. Glenn v. Zenovitch [Ga.] 58 S. E. 26.

30. See, also, Agency, 9 C. L. 58. Fact that teacher did not sign contract to teach in person held not to render it invalid where her name was signed thereto by third person by her authority. Turner v. Hampton, 30 Ky. L. R. 179, 97 S. W. 761.

31. Ratification must be made with full knowledge of facts in order to be binding. Bulger v. Gleason, 123 Ill. App. 42. Expressions of willingness to pay forged notes held not to authorize inference of ratification of signing so as to give rise to liability on notes. Id.

32. Stannard v. Reid Co., 118 App. Div. 304, 103 N. Y. S. 521.

33. See 7 C. L. 766. The necessity of delivery generally arises in connection with deeds or promissory notes and reference should be had to the topics dealing with those subjects. See Deeds of Conveyance, 7 C. L. 1103; Negotiable Instruments, 8 C. L. 1124.

34. Where contract had been in possession of person for whose benefit it was drawn since date of its execution, and was produced by him at trial, held that, in absence of anything tending to impeach validity or good faith of such possession, would be presumed that it was executed and delivered to him on day of its date. Kauffman v. Baillie [Wash.] 89 P. 548. Evidence held to show delivery. Hobe Lumber Co. v. McGrath [Minn.] 112 N. W. 1053.

35. See § 1B, post.

36. See 7 C. L. 766.

37. Case Threshing Mach. Co. v. Meyers [Neb.] 111 N. W. 602; San Antonio & A. P. R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418. Evidence held sufficient to take question whether or not decedent had made express contract to pay plaintiffs for their services to jury. Northrip's Adm'r v. Williams, 30 Ky. L. R. 1279, 100 S. W. 1192. Evidence held to warrant submission of question whether there was meeting of minds. Ferris v. Edmonston, 124 Mo. App. 94, 100 S. W. 1119. Neither letter nor conversation nor both together held to amount to contract to employ plaintiff's teams for any fixed period. Christie, Lowe & Heyworth v. Patton [Ala.] 42 So. 614. Held that defense that certain wagons were to be made merchantable before they were to be charged to defendant, who was plaintiff's agent, should have been

submitted to jury. Harrison Wagon Co. v. Brown, 145 Mich. 621, 13 Det. Leg. N. 614, 108 N. W. 1109. In absence of fraud, contract cannot be reformed to express intention of one party, but to warrant reformation mistake must be mutual. East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768. Where it did not appear that plaintiff was required to furnish labor to assist defendant in performing contract to furnish machinery, or that defendant agreed to pay for same, or that it was furnished at his request, held that plaintiff could not recover therefor. Munson v. James Smith Woolen Mach. Co., 118 App. Div. 398, 103 N. Y. S. 502. Acceptance and ratification by defendant of order for shipment of engine to plaintiff held not to constitute it a contract with plaintiff where order was signed by defendant's agent and not by plaintiff. Huber Mfg. Co. v. Wagner, 167 Ind. 98, 78 N. E. 329. Where there was complete misunderstanding as to price of goods, one party understanding it to be one sum and other party another, held that contract was not complete, and law could not imply promise to pay reasonable value. Esty Organ Co. v. Lehman [Wis.] 111 N. W. 1097. Where correspondence showed that parties were mutually mistaken as to what was being sold, and that plaintiff proposed to sell one thing and defendant to buy different one, held that there was no contract. Charles Holmes Mach. Co. v. Chalkley, 143 N. C. 181, 55 S. E. 524.

Evidence held to show contract: Between plaintiff and defendant whereby former was to weigh, tag, and deliver cotton. Sadler-Lusk Trading Co. v. Logan [Ark.] 104 S. W. 205. By defendant to repay such portion of advances made to him for purpose of conducting mission as were not repaid from collections taken at said mission. Craig v. Dowie [Cal. App.] 87 P. 250. To do certain advertising for defendants in certain publications at specified rates. Newell v. National Advertising Co. [Colo.] 89 P. 792. That deed was to be regarded as mortgage. Linkemann v. Knepper, 226 Ill. 473, 80 N. E. 1009. To compensate son and his wife for services rendered father. Finch v. Green, 225 Ill. 304, 80 N. E. 318. Whereby plaintiff was to have certain land at owner's death in consideration of supporting him for life. Powers v. Crandall [Iowa] 111 N. W. 1010. By decedent to pay her daughter for services. Griffith v. Robertson, 73 Kan. 666, 85 P. 748. For sale of berries. Voight v. Edwards [Kan.] 90 P. 1134. Direct and unequivocal promise by devisee to pay claim against estate of her testator. Withers' Adm'r v. Withers' Heirs, 30 Ky. L. R. 1099, 100 S. W. 253. By decedent to pay plaintiff for services. Weimer's Adm'r v. Smith, 30 Ky. L. R. 1311, 101 S. W. 327. To pay for domestic services, and that they were rendered with the expectation that they would be paid for. Eirley v. Eirley, 102 Md. 452, 62 A. 962. By decedent to pay married daughter for services as housekeeper. In re Milligan's Estate, 112 App. Div. 373, 98 N. Y. S. 480. By decedent to pay plaintiff certain sum in addition to her wages if she would remain with and care for him until his death. Hummel v. Hurd, 112 App. Div. 547, 98 N. Y. S. 801. Loan of money to defendant company to be repaid when it was financially able to do so. Porter v. Magnetic Separator Co., 115 App. Div. 333, 100 N. Y. S. 888. To pay plaintiff for services after certain date, but not for those previously rendered. Brunner v. Mosner, 116 App. Div. 298, 101 N. Y. S. 538. To pay subcontractor's claim if he would refrain from filing lien. Harness v. McKee-Brown Lumber Co., 17 Okl. 624, 89 P. 1020. By railroad company to construct crossing for plaintiff as part of consideration for deed of right of way. Perkiomen R. Co. v. Bromer, 217 Pa. 263, 66 A. 359. For services. Meikleham v. Clarke [R. I.] 67 A. 450. By predecessor of defendant railroad company to maintain certain highway bridge, and that defendant recognized and adopted same. Wertz v. Southern R. Co. [S. C.] 57 S. E. 194. To divide profits resulting from purchase and sale of coal lands. Williams v. Kendrick, 105 Va. 791, 54 S. E. 865. That plaintiff was to have interest in certain franchise. Russell v. Deutschman [Tex. Civ. App.] 100 S. W. 1164. Contract of employment. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867. Evidence held to support finding that certain provision was contained in oral subcontract. Carlile v. Corrigan [Ark.] 103 S. W. 620. Evidence held to sustain finding that money was given by plaintiff to defendant for certain purpose and used for that purpose and was not a loan. Johnson v. Bemis, 3 Cal. App. 82, 84 P. 441. Evidence held to sustain finding that work was done for defendants individually, authorizing judgment against them in that capacity, regardless of whether evidence was sufficient to prove partnership between them. Connolly v. Lost Horse Min. & Mill. Co., 3 Cal. App. 79, 84 P. 445. Correspondence held sufficient to establish contract, particularly when taken with fact that plaintiff treated letters as contract and attempted to carry it out. Bailey Co. v. West Lumber Co., 1 Ga. App. 398, 58 S. E. 120. Evidence held to authorize finding that contract was entered into whereby defendant was to do substructural work on any bridges for building of which plaintiff obtained contracts from government. Virginia Bridge & Iron Co. v. Crafts [Ga. App.] 58 S. E. 322. Evidence held to show that plaintiff intended to pay for board furnished her by her sister, and that both parties contemplated that same was to be credited on note sued on. Deatley v. Tolle, 29 Ky. L. R. 1111, 96 S. W. 920. Evidence held to show that value of board was sufficient to pay note sued on, after deducting admitted credit. Id. Evidence held to sustain finding that money was paid defendant by plaintiff as a depositary to be held by him until plaintiff had paid sum agreed upon for interest in defendant's business, and that plaintiff never actually became a full partner. Dusopole v. Manos [Mass.] 80 N. E. 481. Agreement to compensate one for domestic services may be inferred from circumstances. McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728. Evidence held to sustain finding that terms of contract whereby defendant agreed to answer to plaintiff for account of third person were as claimed by plaintiff. Wegmann v. Rothwell, 121 Mo. App. 413, 99 S. W. 59. Evidence in action for services in removing snow, evidenced by pay tickets issued to plaintiff's assignor or his servants, held to justify judgment for plaintiff. Herschkovitz v. Bradley, 98 N. Y. S. 756. Evidence held to show that printing was done under agreement that terms of former contract between parties were to determine right to compen-

An offer imposes no obligation until accepted,[38] and hence it may be withdrawn

sation and time of payment. Quayle v. Brandow Printing Co., 116 App. Div. 9, 101 N. Y. S. 323. Evidence held to support finding that defendant ordered materials furnished and services rendered by undertakers in burial of his son. Ruggiero v. Tufani, 104 N. Y. S. 691. Complaint alleging in effect that plaintiff had borrowed $4,000 on mortgage, $2,000 of which lender retained under agreement that he would pay it to plaintiff on demand, and demand and refusal of lender's administrator to pay, held to state cause of action. Guillaume v. Flannery [S. D.] 108 N. W. 255. Evidence held to sustain finding that contract required plaintiff to furnish plans for structure to cost not to exceed certain sum. Graham v. Bell-Irving [Wash.] 91 P. 8. Evidence held to support finding as to terms of contract for division of estate of decedent. Grochowski v. Grochowski [Neb.] 109 N. W. 742, 112 N. W. 335. Evidence held sufficient to prove that contract pleaded by plaintiff was made between him and defendant. Bell v. Keays [Tex. Civ. App.] 100 S. W. 813. Conversation between shipper and carrier's agent held to constitute oral contract to furnish cars at certain date. San Antonio & A. P. R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418.

Evidence held insufficient to show contract: Oral agreement modifying or abandoning prior written contract. Smith v. Miller, 79 Conn. 624, 66 A. 172. Contract of sale between plaintiff and defendant superseding one between plaintiff's predecessor and defendant. Durant Lumber Co. v. Sinclair Lumber Co. [Ga. App.] 58 S. E. 485. Relieving defendant from liability on note if certain negro did not work for him for full period of ten months. Dorsey v. Redwine, 1 Ga. App. 626, 57 S. E. 1073. By defendant to pay plaintiff's claim against third person. Bunnell v. Rosenberg, 126 Ill. App. 196. Between agent of threshing machine company and plaintiff to thresh latter's grain, but that his act in sending expert to set up and operate machine was in pursuance of contract between company and purchaser of machine with which work was done. Case Threshing Mach. Co. v. Sanford, 30 Ky. L. R. 188, 97 S. W. 805. Sale. Ayres v. Hinkle, 145 Mich. 283, 108 N. W. 702. Express or implied contract to pay plaintiff for services or to make any disposition of property in her favor by will or otherwise, notwithstanding declarations to third persons showing intention to will property to her. McClure v. Lenz [Ind. App.] 80 N. E. 988. By decedent to pay daughter, living in same family, for his board. Conway v. Cooney, 111 App. Div. 864, 98 N. Y. S. 171. By decedent to pay adult son for services. In re Milligan's Estate, 112 App. Div. 373, 98 N. Y. S. 480. By plaintiff to pay amount still due manufacturers of machine sold to defendant, and to deliver same to defendant free from incumbrances. Porter v. Magnetic Separator Co., 115 App. Div. 333, 100 N. Y. S. 888. Guaranty by defendant to make good any loss resulting from sale of certain bonds and reinvestment of proceeds. Linden v. Thieriot, 116 App. Div. 295, 101 N. Y. S. 568. By defendant to pay taxes on plaintiff's land. Freifeld v. Groh's Sons, 116 App. Div. 409, 101 N. Y. S. 863. Fact that defendant corporation's president had previously misused corporate funds for payment of such taxes held no evidence of valid agreement by defendant to continue such payment. Id. Contract whereby plaintiff was to write up defendant's mercantile books for indefinite period for monthly fee, but to show that contract was that plaintiff was to open set of books and give defendant three trial balancies for lump sum. Nugent v. O'Connor, 103 N. Y. S. 722. To support burden resting on plaintiff to prove loan. Dormos v. Vassilas, 103 N. Y. S. 813. Verbal contract for through shipment of cattle. Houston, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 107, 97 S. W. 836. By plaintiff to transfer his interest in franchise to defendant. Russell v. Deutschman [Tex. Civ. App.] 100 S. W. 1164. Evidence on question as to whether money was loaned to bank or its president personally held not to preponderate so strongly against verdict as to require reversal. Scow v. Farmers' & Merchants' Sav. Bk. [Iowa] 111 N. W. 32. Evidence held insufficient to show that writings expressed contract between parties. Hallowell v. McLaughlin Bros [Iowa] 111 N. W. 428. Evidence held to sustain finding that services were not to be rendered gratuitously, and that there was no agreement that they should be paid for by testamentary provision. Chandler v. Baker, 191 Mass. 579, 78 N. E. 387. Evidence held insufficient to sustain finding that contract sued on was made with defendants. Barr v. Schefer, 118 App. Div. 834, 103 N. Y. S. 733. Decision that money sent defendant by plaintiff was loan, and not payment on account of commission earned by defendant by sale of land, held contrary to weight of evidence. Jacoves v. Darwin, 103 N. Y. S. 934. Evidence held insufficient to show that defendant ordered certain extra work. New York Metal Ceiling Co. v. Minsky, 104 N. Y. S. 759. In absence of showing that plaintiff was responsible for acts of defendant in making changes in heating plant, whereby plastering in building which plaintiff was constructing for city was damaged, or of any obligation or promise on part of defendant to pay for repairs, held that plaintiff was not entitled to recover from defendant cost of repairs. Sullivan v. Tolin, 97 N. Y. S. 964. Evidence held to show that there was no agreement for sale of good will of business, and that it was not understood or agreed that giving of bond not to engage in similar business was condition precedent to giving of notes by defendant for purchase price of certain personalty. Kelly v. Pierce [N. D.] 112 N. W. 995. Evidence held insufficient to show that bond and mortgage were executed and delivered for money borrowed as claimed. Harrison's Estate, 31 Pa. Super. Ct. 485. Held neither such consent nor performance on plaintiff's part as entitled him to specific performance of contract whereby, in consideration of services, certain land was to go to him at other party's death. Nelson v. Lybeck [S. D.] 111 N. W. 546.

38. Order to defendant to ship engine to plaintiff held not a contract, but mere re-

at any time before acceptance.[39] An absolute and unconditional[40] acceptance[41] of a distinct[42] and definite[43] offer[44] within the time, if any, therein specified for

quest which according to its terms could not become contract until accepted by defendant at its home office. Huber Mfg. Co. v. Wagner, 167 Ind. 98, 78 N. E. 329. Evidence in action on contract in which acceptance of offer and performance was denied held insufficient to support burden of proof resting on plaintiff. Lennon v. Charig, 102 N. Y. S. 465.

39. Offer deemed to continue in force until it is answered unless previously withdrawn. McCleskey v. Howell Cotton Co., 147 Ala. 573, 42 So. 67. Withdrawal before acceptance held matter of defense, so that it was not necessary for complainant to show that it was pending at time of acceptance. Id.

40. Acceptance must conform exactly to offer, and if it contains new conditions there is no contract. Scott v. Fowler [Ill.] 81 N. E. 34. Words "ship promptly" in telegram of acceptance held not to add new term to offer. McCleskey v. Howell Cotton Co., 147 Ala. 573, 42 So. 67. Where plaintiff offered to sell ties to be delivered "this year and the next," and defendant in reply agreed to take all ties delivered at certain place within next twelve months, to which plaintiff assented by his conduct, held that there was completed contract. Louisville & N. R. Co. v. Coyle, 30 Ky. L. R. 567, 99 S. W. 237, 30 Ky. L. R. 201, 97 S. W. 772. Letter of acceptance held not departure from terms of offer. Metropolitan Coal Co. v. Boutell Transportation & Towing Co. [Mass.] 81 N. E. 645. Letter held unqualified acceptance of proposed modifications of original contract. Empire Rubber Mfg. Co. v. Morris, 73 N. J. Law, 602, 65 A. 450. Letter accepting offer of employment held not to reserve question of ownership of improvements made by employe for future consideration. Portland Iron Works v. Willett [Or.] 89 P. 421. Offer to accept in terms varying from those proposed amounts to a rejection of the offer and the substitution of a counter proposition which cannot become a contract until assented to by first proposer. Plaintiff's answer to defendant's letter held not unconditional acceptance, and hence not to constitute contract of sale. Sharp v. West, 150 F. 458. Resolution of town board directing secretary to notify bidder that his bid was accepted on condition that issue of bonds was authorized held not to make binding contract, and hence bidder was entitled to withdraw bid before steps were taken to notify him without sacrificing his deposit, particularly where he submitted two bids and notice did not state which was accepted. Northeastern Const. Co. v. North Hempstead, 105 N. Y. S. 581. Acceptance not in terms of offer held not to make binding contract, Cherokee Tanning Extract Co. v. Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777. Letters held not to constitute contract. Smith v. Perry, 32 Pa. Super. Ct. 421. Letters and telegrams held not to show contract of sale. Scaife & Sons Co. v. Standard Ice Co. [Wash.] 89 P. 882.

41. Offer when accepted becomes binding contract. Bailey v. Leishman [Utah] 89 P. 78. Offer need not be supported by consideration in order to make binding contract when it is accepted, question of consideration being important only in determining maker's right to revoke offer. Ellis's Adm'r v. Durkee, 79 Vt. 341, 65 A. 94. Proposal to purchase stock held to have become valid and enforcible contract by its acceptance. Hollis v. Libby, 101 Me. 302, 64 A. 621. Acceptance held sufficiently proven. Sawyer v. Walker, 204 Mo. 133, 102 S. W. 544. Contract to make loan held complete and binding. Holt v. United Security Life Ins. & Trust Co. [N. J. Law] 67 A. 118. Where defendant signed written acceptance of written proposal, held that he was bound thereby, and that if acceptance, prepared by plaintiff's agent, omitted any portion of agreement between parties he should have refused to sign until it was inserted. Happel v. Rosenthal, 103 N. Y. S. 715. Correspondence held to show contract for services. Portland Iron Works v. Willett [Or.] 89 P. 421. Contract held completed by telegrams of acceptance and confirmation, so that subsequent letter could not be considered in determining terms of contract, there being nothing in telegram of confirmation indicating that letter explaining terms of contract would follow. Greenwood Grocery Co. v. Canadian County Mill El. Co. [S. C.] 57 S. E. 867. Plaintiff's agent held, on averments of complaint, defendants' agent to communicate their offer and to receive plaintiff's acceptance thereof, without defendants actually receiving notice of it. McCleskey v. Howell Cotton Co., 147 Ala. 573, 42 So. 67. Letter containing proposition being merely a reduction to writing of previous oral agreement under which plaintiff had been acting, held that it was not necessary that he should make written acceptance of said proposition. Sawyer v. Walker, 204 Mo. 133, 102 S. W. 544. If proposal includes any qualifying conditions, its acceptance is an assent to such conditions and gives proposer right to understand that acceptance was in all things according to terms of offer. Bailey Co. v. West Lumber Co., 1 Ga. App. 398, 58 S. E. 120. When one attempts to accept in writing a written offer, there is no mutual agreement that certain specific written words shall stand as statement of trade ultimately struck between them, but only question is did person to whom offer was made accept it. Metropolitan Coal Co. v. Boutell Transportation & Towing Co. [Mass.] 81 N. E. 645. There being nothing inconsistent in accepting written offer both orally and in writing, held that, in such case, where writing because of unguarded expression therein was not, though intended to be, an acceptance, oral acceptance not open to that objection was good. Id.

42. Offer must be distinct as such and not merely an invitation to enter into negotiations upon a certain basis. Cherokee Tanning Extract Co. v. Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777.

43. Offer held to contemplate immediate sale on acceptance, though possession was not to be delivered until later, and not to be so conditional that its acceptance would not make valid contract from loss of which damages would flow. Purdom Naval Stores

acceptance [45] or performance [46] constitutes a binding contract. Acceptance may be implied from the acts and conduct of the party to whom the offer is made.[47] An acceptance by telegraph takes effect from the time of the delivery of the telegram to the telegraph company for transmission to the person making the offer.[48] In the absence of any suggestion as to the manner of acceptance, one transmitting an offer by mail is not bound by an acceptance sent in any other way until it is received or he has notice thereof.[49]

A contract to take effect upon condition does not become binding until the condition happens or is performed.[50] Where the parties make the reduction of the

Co. v. Western Union Tel. Co., 153 F. 327. Offer must specify quantity to be furnished, as a mere acceptance of an indefinite offer will not create binding contract. Cherokee Tanning Extract Co. v. Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777. Must be one which is intended of itself to create legal relations on acceptance, and not merely offer to open negotiations which will ultimately result in contract. Id. Letter held mere inquiry. Id.

44. Memorandum of sale held to constitute offer merely, which could be orally accepted. Bailey v. Leishman [Utah] 89 P. 78.

45. Offer requiring acceptance "at once" means within reasonable time under circumstances, what is reasonable time being question of fact. Lucas v. Western Union Tel. Co., 131 Iowa, 669, 109 N. W. 191. Letter held continuing offer to purchase stock good for six months, unless previously withdrawn, and for reasonable time thereafter. Ellis's Adm'r v. Durkee, 79 Vt. 341, 65 A. 94. What was reasonable time held question of fact. Id.

46. In order that proposition may be binding on party making it, opposite party must accept it before time fixed for performance of contract. Traylor, Spencer & Co. v. Brimbery [Ga. App.] 58 S. E. 371. Offer to pay fifty per cent of claims against third person in full settlement thereof held not binding on party making it as to creditor who did not accept offer until after date therein fixed for payment, there not being an acceptance within reasonable time. Id.

47. In action to recover commissions alleged to be due plaintiff as selling agent of defendant's plantation, held that sending of power of attorney by defendant to plaintiff was acceptance of plaintiff's offer to take agency and not mere offer requiring acceptance by plaintiff. Luckett Land & Emigration Co. v. Brown, 118 La. 943, 43 So. 628. Even if acceptance was necessary, held that it was accepted by letter and by action nature of contract showed it was intention without any consideration, held invalid, of defendant to allow. Id. Notice of withdrawal of land from market held recognition of pre-existing agency of plaintiff. Id. Understanding on part of both parties that binding contract has been made and steps taken by them thereunder with view to performance, are to be considered material evidence of great weight on question whether is in fact a completed contract. Stannard v. Robert H. Reid Co., 118 App. Div. 304, 103 N. Y. S. 521. Defendant signed and delivered printed application for surety bonds to plaintiff, and plaintiff executed and delivered bonds to defendant, who accepted them and received benefits arising therfrom. Held that execution of bonds constituted acceptance of application by plaintiff, and application thereby became completed contract, though it recited that defendant signed in consideration of mutual covenants of plaintiff, and plaintiff did not sign it. Aetna Indemnity Co. v. Ryan, 53 Misc. 614, 103 N. Y. S. 756. Acts of plaintiff in compliance with terms of offer held to show acceptance thereof in accordance with terms of offer, there being no evidence showing contrary purpose or understanding. Ott v. Boring [Wis.] 110 N. W. 824. Receipt and retention of written contracts held not to alone imply assent to terms thereof, but actual contract could be shown. Hallowell v. McLaughlin Bros. [Iowa] 111 N. W. 428. Both parties are bound by a written contract executed and delivered by one of them only, but accepted, retained, and acted upon by the other. Reed v. Coughran [S. D.] 111 N. W. 559. Party accepting papers as contract held bound by their terms and conditions as completely as though he had in form signed them. Bauer v. Jerolman, 124 Ill. App. 151. Extension agreement signed by maker of note and accepted and acted upon by holder held valid though not signed by latter. Abraham Lincoln B. & H. Ass'n v. Zuelk, 124 Ill. App. 109.

48. Telegram to defendant's agent delivered to telegraph company before plaintiff was notified of withdrawal of offer, held sufficient manifestation of acceptance. McCleskey v. Howell Cotton Co., 147 Ala. 573, 42 So. 67.

49. Acceptance by telegraph. Lucas v. Western Union Tel. Co., 131 Iowa, 669, 109 N. W. 191.

50. May show by parol that it was not to take effect until certain conditions precedent had been fulfilled. Barr Cash & Package Carrier Co. v. Brooks-Ozan Mercantile Co. [Ark.] 101 S. W. 408. Evidence held to show that only promise made by owner to laborers employed by contractor was that he would see them paid if contractor, who was temporarily absent, did not return, and that contractor did return, so that he was not liable on said promise. Mulliken v. Harrison [Fla.] 44 So. 426. Instruction based on theory of liability under contract with laborers held error. Id. Where order provided that sale by agent should be subject to acceptance by principal, held that it was not binding on latter where he rejected it as soon as received by him. Suffolk Peanut Co. v. Luden, 32 Pa. Super. Ct. 603. Letter containing all terms of proposed employment, and acceptance of proposal therein by plaintiff by going to work, held to constitute contract, fact that letter referred to authority of writer to act for company being imma-

contract to writing and its signature by them a condition precedent to its completion, it will not be a binding contract until reduced to writing and signed,[51] but where they orally assent to all its terms a mere reference to a future contract in writing will not negative the existence of a present completed one.[52]

An option [53] is a mere continuing offer not binding until accepted [54] within the time, if any, therein specified,[55] and which may be withdrawn at any time before acceptance, unless it is based on a valuable consideration.[56] An election to exercise it converts it into an executory contract.[57]

(§ 1) *C. Reality of consent.*[58]—Since the mutual assent of the parties is necessary,[59] there is no valid contract where either party is induced to enter into it through duress [60] mistake,[61] misrepresentation, fraud, or undue influence,[62] or where either party is mentally incapacitated.[63] So, too, neither party is bound by a contract made in jest.[64]

§ 2. *Consideration.*[65]—A legal consideration is essential to the validity of every contract.[66]

terial. Kennedy v. Supreme Lodge Knights of Pythias, 124 Ill. App. 55. Contract held one between plaintiff and one of the defendants only, which did not contemplate that it should not become complete until signed by certain other persons. Security Trust & Life Ins. Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125.

51. Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F. 641; McCrimmon v. Brundage [Fla.] 43 So. 431. Held that correspondence did not of itself constitute contract, but that it was intention that neither party should be bound until formal written contract was executed and money paid. Scott v. Fowler [Ill.] 81 N. E. 34.

52. Though parties to verbal agreement contemplate that it is to be reduced to writing and signed, yet, if understanding is that this is to be done simply as a memorial of the agreement, it is binding though it is never put in writing. Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F. 641. Intention to reduce agreement to writing held not to prevent it from being in force from date when it was made. Hudson v. Rodgers, 121 Mo. App. 168, 98 S. W. 778. Evidence held to sustain finding that parties understood that letters constituted valid, binding contract, and so intended. Peirce v. Cornell, 117 App. Div. 66, 102 N. Y. S. 102.

53. See 7 C. L. 770.

54. Options in lease held not binding on lessee until accepted by it. Overall v. Madisonville [Ky.] 102 S. W. 278. Contract to transfer interest in patent to corporation to be formed held not an agreement for an option, but executed agreement on part of one party and executory one on part of other. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F. 820.

55. Must be exercised within time limit or right will be lost. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481. Is continuing offer to sell, and, when limited to certain time, must be accepted within such time by compliance with its terms upon part of optionee. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830.

56. Where made for a consideration, it cannot be withdrawn during time fixed in contract within which party has right to exercise option. Baker v. Davis, 127 Ga. 649, 57 S. E. 62; Pittsburgh Vitrified Pav. & Bldg. Brick Co. v. Bailey [Kan.] 90 P. 803.

57. Option of purchase holds good until withdrawn and becomes binding on acceptance. Mebius & Drescher Co. v. Mills [Cal.] 88 P. 917. When optionee fully complies with terms of option within time limited, it becomes enforcible executory contract. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830. What is necessary to be done in order to convert option into contract depends upon terms of option. Trogden v. Williams [N. C.] 56 S. E. 865. Payment or tender of half purchase price and securing balance within time stipulated held necessary to convert option into contract. Id. Must accept unconditionally the offer as made and cannot impose new conditions. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830. Compliance with terms of option may be waived by optionor, and, where optionee within time limited for acceptance gives notice that he will accept it and comply with its terms, such compliance is waived if, in written acceptance of such notice, it is stipulated that optionor agrees to convey property and gives additional time in which to make survey and abstract of title. Id. Waiver of tender within time prescribed by option held not to give optionor right to demand that optionee purchase land, but it remained unaccepted offer to sell whenever latter paid purchase price. Trogden v. Williams [N. C.] 56 S. E. 865.

58. See 7 C. L. 771.

59. See § 1B, ante.

60. See Duress, 7 C. L. 1201.

61. See Mistake and Accident, 8 C. L. 1020.

62. See Fraud and Undue Influence, 7 C. L. 1813.

63. See Incompetency, 8 C. L. 169; Insane Persons, 8 C. L. 319.

64. Affidavit of defense alleging that defendant merely wrote and signed note sued on for purpose of showing his wife that he knew how to draw up note, and that she took possession thereof and refused to return it, and that he never authorized her to deliver it to plaintiff, and denying averments of indebtedness, etc., held to state defense. Williams v. Berkes, 32 Pa. Super. Ct. 266.

65. See 7 C. L. 771.

66. Provision in receipt limiting liability

Except where the rule has been changed by statute[67] a seal imports a consideration.[68] Promissory notes,[69] and, in some states, certain other written contracts,[70] import a consideration whether under seal or not.

What constitutes in general.[71]—Any benefit accruing to one party or any loss, trouble, or disadvantage undergone by, or any charge imposed upon, the other, is a sufficient consideration to support a contract.[72] Thus, the extension of time for

of express company to certain sum held unenforceable because not based on any consideration. Southern Express Co. v. Hill [Ark.] 98 S. W. 371. Release of carrier from liability for damages already accrued held unenforceable. St. Louis, etc., R. Co. v. Pearce [Ark.] 101 S. W. 760. Agreement to pay claim which court had previously determined decedent was not legally bound to pay held unenforceable without new consideration. Hargarten v. Berz, 126 Ill. App. 368. Mere naked parol promise to extend time of payment under contract for sale of land, without any consideration, held invalid. Bartlett v. Smith, 146 Mich. 188, 109 N. W. 260. Where original agreement provided that plaintiff's salary should begin at certain date, subsequent agreement providing for payment only when it could be made from operating expenses, being an attempted alteration without consideration, held not to deprive plaintiff of right to recover according to original terms. Grath v. Mound City Roofing Tile Co., 121 Mo. App. 245, 98 S. W. 812. Subsequent arrangement deviating from original in no material particular, held not to require new consideration. Id. Express promise to pay sum of money which promisor at time is under no legal, equitable, or moral obligation to pay is a mere nudum pactum. McKone v. Metropolitan Life Ins. Co. [Wis.] 110 N. W. 472. Promise by insurance company's agent to pay it amounts embezzled by subagent, for whose acts agent was not responsible though he believed he was, held without consideration. Id.

67. Comp. Laws, § 10, 185, providing that seal shall only be presumptive evidence of sufficient consideration, which may be rebutted, etc., held to place simple executory and sealed executory contracts on same footing so far as consideration is concerned. Danby Tp. v. Beebe, 147 Mich. 312, 110 N. W. 1066.

68. Obligation under seal for payment of money imports valid consideration until contrary appears from the evidence. Rogers v. Rogers [Del.] 66 A. 374. Person of sound mind and lawful age may give away his property or bind himself by an instrument under seal to pay money to another without any valuable consideration whatever. Id.

69. Doty v. Dickey, 29 Ky. L. R. 900, 96 S. W. 544.

70. Due bill held to import promise to pay, and hence to be within Rev. St. 1899, § 894, providing that written instruments promising to pay money shall import a consideration. Locher v. Kuechenmiester, 120 Mo. App. 701, 98 S. W. 92.

71. See 7 C. L. 772.

72. Valuable consideration is one that is either a benefit to party promising, or some trouble or prejudice to party to whom promise is made. In re Lehnhoff's Estate [Neb.] 109 N. W. 164, 112 N. W. 563. Any damage, suspension, or forbearance of a right will be sufficient to sustain a promise. Id. May consist of benefit moving to promisor or detriment agreed to be suffered by promise. Kinkead v. Peet [Iowa] 111 N. W. 48. May consist of benefit to third person or detriment to promisee. Hayes v. Shirk, 167 Ind. 569, 78 N. E. 653. Agreement by executor to pay assessment for street improvements on lands held by him in official capacity held binding on him personally, though void as to estate, where third person purchased improvement bonds on faith of such promise. Id. Detriment to promisee is as valid a consideration as a benefit to the promisor. Release by plaintiff of his claim against third person held sufficient consideration for promise by defendant to pay same. Milby v. Mowry, 125 Ill. App. 417. In order to constitute release of judgment record valuable consideration for conveyance by judgment debtor held that it was necessary to show that latter owned land to which lien of judgment had attached. Brown Hardware Co. v. Catrett [Tex. Civ. App.] 101 S. W. 559.

Contracts held to be supported by a sufficient consideration: Restrictive covenant, by sale of business. Harris v. Theus [Ala.] 43 So. 131. Though option given lessee under mining lease to purchase property was originally nudum pactum because not signed by lessee, held that it became enforceable contract of sale on payment of part of purchase price. Williams v. Eldora-Enterprise Gold Min. Co., 35 Colo. 127, 83 P. 780. Expressed consideration held to furnish basis both for present right to cut timber and for option or privilege of extension which contract provided might be had on making certain payment, so that latter was not nudum pactum. Baker v. Davis, 127 Ga. 649, 57 S. E. 62. Is sufficient consideration to support written contract or agreement to pay debt of another, if acting on faith thereof, party with whom it was made parted with his property. Small Co. v. Claxton, 1 Ga. App. 83, 57 S. E. 977. Deed from father to son, by services rendered and to be rendered by son and his wife, and care and trouble which grantor had caused them. Finch v. Green, 225 Ill. 304, 80 N. E. 318. Loaning of money by plaintiff to third person held to support trust deed given by defendant to secure it. Thackaberry v. Johnson [Ill.] 81 N. E. 828. Subsisting liability of surety held sufficient consideration for execution of mortgages by principal to indemnify surety from loss. Griffis v. First Nat. Bk. [Ind. App.] 79 N. E. 230. Agreement not to re-engage in business on sale of business. Jayne & Keve Bros. Lumber Co. v. Turner 132 Iowa, 7, 109 N. W. 307. Agreement by mortgagee under first mortgage who also held second mortgage as security for debt of second mortgagee to relieve latter or adjust such indebtedness, and release by wife of her dower interest in realty and her attachment of personalty, and her joinder in bill of sale of latter, held to support promise by second mortgagee to

pay wife of mortgagor certain sum. Kinkead v. Peet [Iowa] 111 N. W. 48. Second contract superseding original, where it contained provisions as to payment more favorable to plaintiff than those of original contract, and plaintiff thereby waived certain rights secured to him by original contract. Proctor Coal Co. v. Strunk, 29 Ky. L. R. 995, 96 S. W. 603. Since board of examiners had no authority to adopt books for use in schools until publisher had filed bond pursuant to St. 1903, § 4423, conditioned that it would sell books at price as low as that fixed for any other locality or state, held that contention that there was no consideration for execution of such bond was untenable. Graziani v. Burton, 30 Ky. L. R. 180, 97 S. W. 800. Promise of devisee who had received assets from estate of his testator to pay debt of estate, he being liable for debts to extent of assets received. Withers' Adm'r v. Withers' Heirs, 30 Ky. L. R. 1099, 100 S. W. 253. Agreement to indemnify plaintiff against loss, on his paying for stock in corporation to be formed in future by defendants, so that defendants could use money to prevent expiration of options held by them on certain land which was to be conveyed to such corporation, plaintiff being under no legal obligation to pay for stock until corporation was in fact organized. Harvey v. Bonta, 30 Ky. L. R. 1226, 100 S. W. 846. Modified contract, where it required plaintiffs to have logs ready for delivery at earlier date than that specified in original, and plaintiffs incurred extra expense and trouble in so doing. Asher v. Garrard [Ky.] 101 S. W. 889. Lease to city for year held to support option to city to renew it from year to year or to purchase premises at fixed price. Overall v. Madisonville [Ky.] 102 S. W. 278. Assumption of obligation by plaintiff to third person that it would not have otherwise assumed held to support undertaking to plaintiff by defendant. Ford v. Ingels Coal Co. [Ky.] 102 S. W. 332. Purchase of and pay for stock according to terms of contra held to support agreement by defendant to protect plaintiff and his partner from liability as indorsers or otherwise upon paper which it was agreed should be turned over by them in full payment of such stock. Patrick v. Barker [Neb.] 112 N. W. 358. Agreement to sell complainant's beer exclusively which was part of tranaction whereby defendant obtained large loan from complainant in which latter incurred both trouble and risk. Christian Feigenspan v. Nizolek [N. J. Eq.] 65 A. 703. Agreement by wife restricting her right to build on lot owned by her, where it tended to enhance purchase price of, and hence value of her dower interest in, an adjoining lot sold by her and her husband. Wahl v. Stoy [N. J. Eq.] 66 A. 176. Agreement to loan money, to be advanced to plaintiff when certain building was completed, and to be secured by mortgages and insurance policy on life of borrower and another, where, in performance of his part of agreement, borrower incurred expense for medical examiner's fees incurred in perfecting application for insurance, made contracts with materialmen on faith of agreement, and executed bond and mortgage. Holt v. United Security Life Ins. & Trust Co. [N. J. Eq.] 67 A. 118. Formal marriage articles whereby father of prospective bridegroom agreed to make no distinction between his children in distribution of his estate held supported by sufficient consideration to enable son, after his marriage and his father's death, to enforce same by suit for specific performance. Phalen v. United States Trust Co., 186 N. Y. 178, 78 N. E. 943, rvg. 100 App. Div. 264, 91 N. Y. S. 537. Forbearance of brokers to assert claim for commissions against vendor of realty, whereby vendee secured it at reduced price, held to support promise by vendee to pay them certain sum, regardless of whether they had valid claim against vendor. Cole v. Mendenhall, 117 App. Div. 786, 102 N. Y. S. 1030. Contract for sale of land, where vendor paid certain sum on making and delivery of contract and subsequently paid additional sum to secure extension of time of performance. Wadick v. Mace, 118 App. Div. 777, 103 N. Y. S. 889. Agreement made at time of sale of certain lot, and as an inducement thereto, and in part consideration therefor, that if vendee resold same vendor was to have profits realised on such resale. Bourne v. Sherrill, 143 N. C. 381, 55 S. E. 799. Promise by defendant to pay certain sum to child of grantor, by conveyance of land to defendant's children. Faust v. Faust [N. C.] 57 S. E. 22. Promise by owner to pay subcontractor's claim, by agreement of subcontractor not to file lien. Harness v. McKee-Brown Lumber Co., 17 Okl. 624, 89 P. 1020. Grantor and grantee owned undivided interests in land, and former conveyed his interest to latter for an expressed consideration, and grantee executed contemporaneous contract to reconvey. Purpose of transaction was to enable grantee to litigate title. Held that agreement to reconvey was supported by sufficient consideration. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760. Contract to divide profits resulting from purchase and sale of coal lands. Williams v. Kendrick, 105 Va. 791, 54 S. E. 865. Postnuptial settlement by husband, and covenant on part of wife's grantee to support her, by release of her inchoate right of dower. Beverlin v. Casto [W. Va.] 57 S. E. 411. Purchase by an individual of a stockholder's interest in a corporation affords sufficient consideration for contemporaneous agreement by seller not to engage in business carried on by such corporation. Kradwell v. Thiesen [Wis.] 111 N. W. 233. Agreement not to engage in similar business held part of equivalent for consideration for sale of business, plant, and good will. My Laundry Co. v. Schmeling, 127 Wis. 597, 109 N. W. 540. Release of defendant from liability on note, by services previously rendered. Rockefeller v. Wedge [C. C. A.] 149 F. 130. Held that there was implied agreement on part of creditor of corporation not to sue it or a new corporation to which it turned over most of its assets, which was sufficient consideration to support notes of new corporation for amount of his claim. Beebe v. Wells [C. C. A.] 153 F. 133. Modified contract whereby government paid over money it might otherwise have retained until completion of vessel in consideration of execution of release of claims for damages for delay or other breach, though but for delay vessel would have been completed. Cramp v. U. S., 41 Ct. Cl. 161.

Contracts held to be without consideration: Promise to pay broker's commission for negotiating exchange of property, where they

payment of a debt,[73] and the discontinuance of a suit,[74] have been held sufficient. In equity the termination of family controversies affords a sufficient consideration to support a promise made for that purpose.[75]

Mutual promises[76] operate as a consideration each for the other, provided both parties are bound thereby,[77] but mutual promises not for a common object or pur-

performed no services in effecting such exchange. Shanks v. Michael [Cal. App.] 88 P. 596. Agreement to pay lessee certain sum for surrendering his rights under void lease. Conqueror Gold Min. & Mill. Co. v. Ashton [Colo.] 90 P. 1124. Certain work held to have been done under license to use tunnel in mine, and not under lease to which one of licensees was not party, and hence that it did not accrue to benefit of owner by virtue of lease, and was no consideration for agreement to pay lessees for work. Id. Use of drift cut by licensees held no consideration for agreement to pay lessees for work done if they would abandon rights under void lease in which one of licensees had no interest. Id. Agreement of mortgagor to relinquish his right of redemption if mortgagee would release certain property covered by chattel mortgage, where mortgagor was entitled to credits sufficient to discharge chattel mortgage and part of that on realty. Ferguson v. Boyd [Ind. App.] 79 N. E. 549. Note executed by widow in satisfaction of note executed by her deceased husband, where she received no property subject to execution from his estate. Gilbert v. Brown, 29 Ky. L. R. 1248, 97 S. W. 40. Note given for legal services to be rendered, where litigation was useless as well as expensive, and client would have obtained her rights at proper time without it. Buckler v. Robinson, 29 Ky. L. R. 1174, 96 S. W. 1110. Bond whereby residents near stream agreed to pay certain sum into bridge fund if construction of bridge was ordered. Danby Tp. v. Beebe, 147 Mich. 312, 110 N. W. 1066. Promise to pay debt of another, if not appearing that creditor discharged original debtor and accepted defendant in lieu thereof. Davis v. Dunn, 121 Mo. App. 490, 97 S. W. 226. Agreement by stockholders to pay deficiency, if creditor would first exhaust his remedy against corporation. In re Lehnhoff's Estate [Neb.] 112 N. W. 563, 109 N. W. 164. Condition in deed by executors and trustees limiting use of premises, where estate which they represented owned no adjacent property, but they themselves owned adjacent property as individuals and condition was inserted for their individual benefit. Richter v. Distelhurst, 116 App. Div. 269, 101 N. Y. S. 634. Where plaintiff contracted to render services to corporation for specified time, contract made simultaneously by him with officer of such corporation whereby latter agreed to give him certain stock if he complied with contract with corporation. Petze v. Leary, 117 App. Div. 829, 102 N. Y. S. 960. Pass given to policeman held not based on valuable consideration because such passes were given to encourage and induce policemen to ride on cars on theory that their presence tended to preserve order and to protect interests of road, expected benefits being too remote. Marshall v. Nashville R. & Light Co. [Tenn.] 101 S. W. 419. Agreement by firm creditor with one partner, who on dissolution of firm agreed to pay firm debts, to extend time of payment. Barlow v. Frederick Stearns & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 43, 98 S. W. 455. Mere incidental benefit to plaintiff holding position as superintendent at will of insurance company resulting from payment of company's debts, or discharge of its obligations to third persons, held not consideration for his promise to pay amounts embezzled by subagent for which he was not responsible. McKone v. Metropolitan Life Ins. Co. [Wis.] 110 N. W. 472. Sureties on postmaster's bond were called upon to pay sum in excess of their liability, and inspector, without authority, granted them extension on condition that they execute note to government for full amount claimed, which they did. Held that note, having been obtained upon unwarranted assumption of authority and upon wrongful demand, was without consideration, and void. United States v. Kauhoe [C. C. A.] 147 F. 185.

73. Contract held not to provide for extension of time of payment of debt of corporation. In re Lehnhoff's Estate [Neb.] 109 N. W. 164, 112 N. W. 563. Extension of time in which to pay tax certificates at reduced rate of interest held sufficient consideration for note. Armijo v. Henry [N. M.] 89 P. 305. Agreement by creditor, at request of debtor's wife, to extend time for payment of debt, held to support mortgage by wife to secure its payment, though not put in form of enforceable contract for definite term, where it was in fact followed by long forbearance. Muir v. Greene, 115 App. Div. 173, 100 N. Y. S. 722.

74. Dismissal of suit for damages, brought by injured employe of railroad company, held to support contract for his future employment so long as his services were satisfactory. Lake Shore & Western R. Co. v. Tierney, 8 Ohio C. C. (N. S.) 521. Agreement by one having apparent title to land to abandon his claim thereto and to permit judgment to be taken against him by default, in suit against him in which it was sought to recover said land, held to support contract for sale of judgment to him even though he had no actual title. Moody & Co. v. Rowland [Tex. Civ. App.] 102 S. W. 911.

75. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81.

76. See 7 C. L. 774.

77. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867. Mutual agreement by children for support of aged mother. Code 1895, § 3661. Worth v. Daniel, 1 Ga. App. 15, 57 S. E. 898. Mutual agreements of parties to form new corporation, and subsequent agreement to use charter of old corporation and investment of moneys of new stockholders in enterprise, held to support agreement by defendant that stock in old corporation which he controlled should be issued to new stockholders.

pose and not mutually advantageous or detrimental are without consideration and unenforceable.[78]

Forbearance to sue[79] when one has a legal right to do so will support a contract.[80]

The compromise of a doubtful right[81] made in good faith is a sufficient consideration to support a promise, though the claim could not, in fact, have been supported in whole or in part:[82] but this rule has been held not to apply where the claim has no foundation whatever in fact.[83]

Love and affection.[84]—An equitable consideration founded on mere love or affection or gratuity will not ordinarily support an action to enforce an executory contract,[85] but an equitable obligation which would also be a legal one except for

Hladovec v. Paul, 222 Ill. 254, 78 N. E. 619. Mutual agreement of parties held sufficient to support agreement for extension of time in which to perform contract for sale of realty. Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619. Agreement by one party to annul contract is sufficient consideration for agreement by other party to annul it. Proctor Coal Co. v. Strunk, 29 Ky. L. R. 995, 96 S. W. 603. Implied promise arising, on acceptance of offer to sell seed, to accept and pay for same, held to support promise to sell. Bailey v. Leishman [Utah] 89 P. 78. Consideration for defendant's agreement to take certain stock held decedent's agreement to turn it over on terms named. Ellis's Adm'r v. Durkee, 79 Vt. 341, 65 A. 94. Claimant's agreement to remain on farm and render services, which she was under no obligation to do, held to support agreement to pay her certain sum for services. Pond v. Pond's Estate, 79 Vt. 352, 65 A. 97.

78. Agreement by stockholders to pay deficiency if creditor would first exhaust remedy against corporation held not sustainable as expressing mutual promises by subscribers to attain common object, object being to make provision for discharge of supposed legal obligations against them severally, which in fact did not exist. In re Lehnhoff's Estate [Neb.] 112 N. W. 563, 109 N. W. 164.

79. See 7 C. L. 775.

80. Forbearance of plaintiff to sue original debtor in response to request of third person held sufficient to support promise by latter to pay debt. Niles-Bement-Pond Co. v. Ury, 53 Misc. 305, 103 N. Y. S. 226. Abandonment by mortgagee of right to sue city for certain interest, or of her right to sue on bond therefor, and signing and delivery of satisfaction of mortgage and delivery of bond thereby, held to support check, given by mortgagor for said interest, though title to premises had previously vested in city under condemnation proceedings, and mortgagor was not indebted to mortgagee. Scanlon v. Wallach, 53 Misc. 104, 102 N. Y. S. 1090. Letter, written by defendant held request for forbearance and an assumption of his predecessor's indebtedness to plaintiff upon acquiescense in its terms and forbearance of plaintiff to sue for reasonable time. Niles-Bement-Pond Co. v. Ury, 53 Misc. 305, 103 N. Y. S. 226. Forbearance to sue held no consideration where it did not appear that party forbearing lost anything thereby. Bunnell v. Rosenberg, 126 Ill. App. 196.

81. See 7 C. L. 775.

82. Compromise of contention as to property rights, final outcome of which, if settled by litigation, parties consider to be doubtful, furnishes consideration sufficient to support compromise contract, regardless of whether matter is really in doubt. Belt v. Lazenby, 126 Ga. 757, 56 S. E. 81. Maker of note given in settlement of suit pending against him is bound thereby whether said suit was instituted upon a just and valid claim or not. Glenn v. Zenovitch [Ga.] 58 S. E. 26. Contract not to make a will but to permit property to descend under interstate laws, by reconveyance of property previously conveyed to trustees, and compromise of pending suit to procure such reconveyance. Jones v. Abbott [Ill.] 81 N. E. 791. Compromise of suit to recover possession of land whereby boundary line between plaintiff's land and that of defendants' grantor was agreed upon, and plaintiffs released claim to land on one side of such line and defendants' grantor to that on other, and it was agreed that suit was to be dismissed held valid, even if plaintiffs' possessory right was insufficient to defeat title of defendants' grantor. Martin v. Conley, 30 Ky. L. R. 728, 99 S. W. 613. Where opposition to probate of will is made in good faith, its withdrawal is valid consideration for promise by one interested in sustaining will. Grochowski v. Grochowski [Neb.] 109 N. W. 742, 112 N. W. 335. Note given in compromise of claim on tax certificates held enforceable though latter were void. Armijo v. Henry [N. M.] 89 P. 305. Evidence held to show that promise to pay employe bonus at expiration of term of service was not based on settlement of dispute as to terms of contract, nor to prevent him from quitting the service. Price v. Press Pub. Co., 117 App. Div. 854, 103 N. Y. S. 296. Compromise of claim for labor performed, for which lien had been filed, and which both parties believed to be valid, held to support notes, though lien might have been invalid in part. Baines v. Coos Bay, etc., Co. [Or.] 89 P. 371.

83. Compromise of pending action on notes given for money lost at gambling held no consideration for new notes. Union Collection Co. v. Buckman [Cal.] 88 P. 708. Where plaintiff was not entitled to any compensation for his services by reason of his failure to perform his contract, subsequent promise to pay him lump sum therefor held without consideration. McCrary v. Thompson, 123 Mo. App. 596, 100 S. W. 535.

84. See 5 C. L. 682.

85. Evidence held to show that contract to pay annuity was mere voluntary provision based on gratitude and affection, and hence

some legal disability, such as infancy or coverture, will support a new promise after such disability has ceased.[86] Natural love and affection will support a contract between parent and child.[87]

Marriage[88] or a promise to marry[89] is a valuable consideration.

Legal duty.[90]—An agreement to do, or the doing of what one is already legally bound to do,[91] or less than he is bound to do,[92] will not support a promise. Thus

unenforceable. Parsons v. Teller, 188 N. Y. 318, 80 N. E. 930, rvg. 111 App. Div. 637, 97 N. Y. S. 808.

86. If there is no valuable consideration for promise of infant, which would have supported same had he been of age, subsequent ratification after he becomes of age will not render it enforceable. Parsons v. Teller, 188 N. Y. 318, 80 N. E. 930.

87. Affection and sense of duty which should naturally exist on part of child toward aged and dependent parent is good consideration, and will support contract providing for her support. Worth v. Daniel, 1 Ga. App. 15, 57 S. E. 898. Will support assignment of insurance policy. Doty v. Dickey, 29 Ky. L. R. 900, 96 S. W. 544.

88. See 7 C. L. 776.

89. Legal contract and promise, made in good faith to marry another, is valuable consideration for conveyance of an estate, and will entitle grantee to hold it against subsequent purchasers or creditors of grantor. Huntress v. Hanley [Mass.] 80 N. E. 946. Promise to marry at once held to support assignment by man to woman of his interest in estate of deceased father though she had previously promised to marry him when he was able to support her. Id. Promise by woman to marry man, acting upon belief and assumption that he was capable of making valid contract of marriage, held sufficient consideration to support agreement by him to make marriage settlement, even though he was incapable. Hosmer v. Tiffany, 115 App. Div. 303, 100 N. Y. S. 797. Hence validity of his prior divorce held not open to attack in suit by his trustee in bankruptcy to set aside transfer of property pursuant to such settlement. Id. In suit by husband's trustee in bankruptcy to set aside transfers of property to wife, made pursuant to marriage settlement, held that plaintiff was entitled to show that wife had husband living when she agreed to marry and hence could not make valid contract to marry, so that contract based on her promise to marry was without consideration. Id. Agreement to marry is sufficient consideration to support antenuptial contract disposing of and definitely fixing property rights of parties. In re Appleby's Estate, 100 Minn. 408, 111 N. W. 305. Even though original engagement to marry is absolute, and is entered into some months preceding making and signing of contract, it remains consideration for such contract and is sufficient to support it, written agreement merging previous one. Id.

90. See 7 C. L. 776.

91. Snyder v. Stribling, 18 Okl. 168, 89 P. 222; Walker v. Tomlinson [Tex. Civ. App.] 17 Tex. Ct. Rep. 157, 98 S. W. 906. Promise to marry at once held to support assignment by man to woman of his interest in his deceased father's estate, though she had previously promised to marry him when he was able to support her, where death of his father did not necessarily bring about that result. Huntress v. Hanley [Mass.] 80 N. E. 946. Contract whereby defendant agreed to pay plaintiffs who had contracted to construct sewer for city, certain sum in consideration of their doing work so as not to affect certain of defendant's pipes in an alley and to pay all losses sustained in consequence of damage to said pipes, held to put them under broader obligation with respect to said pipes than was imposed upon them by their contract with city, and hence to be supported by consideration, particularly where it appeared that plaintiffs were compelled to divert sewer at increased expense in order to comply therewith. Hoffman v. St. Louis Refrigerator & Cold Storage Co., 120 Mo. App. 661, 97 S. W. 619. Neither party being bound by oral contract void under statute of frauds, held that it could not be said that new contract was not a contract because it involved performance of things parties were already bound to perform. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867. Contention that cattle were shipped under verbal contract with carrier, and that therefore there was no consideration for subsequent written contract signed after they were loaded held not supported by evidence. Houston & T. C. R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 107, 97 S. W. 836.

Contracts held to be without consideration: Agreement to pay witness subpoenaed to testify to question of fact. Hargarten v. Berz, 126 Ill. App. 368. Contract to pay witness testifying as to matters of fact greater amount than statutory fees, he being bound to attend and submit to examination when subpoenaed. Wright v. Somers, 125 Ill. App. 256. Agreement to pay physician extra compensation for expert testimony, it being his duty to give such testimony under subpoena. Burnett v. Freeman, 125 Mo. App. 683, 103 S. W. 121. Agreement by seller of goods to wait until future date for part payment, and then to accept buyer's note for balance, where contract of sale provided for payment on delivery of goods, and seller fully performed, there being no dispute as to indebtedness. Zerr v. Klug, 121 Mo. App. 286, 98 S. W. 822. Promise by one party to subsisting contract to opposite party to prevent breach of such contract by latter. Linz v. Schuck [Md.] 67 A. 286. Where constitution required creditor of corporation to exhaust remedy against corporation before proceeding against stockholders, held that agreement to do so would not support promise by stockholders to prorate and pay any deficiency. In re Lehnhoff's Estate [Neb.] 109 N. W. 164, 112 N. W. 563. Agreement to pay employe bonus at end of term of service where contract bound employe to serve for certain time at fixed yearly salaries. Price v. Press Pub. Co., 117 App. Div. 854, 103 N. Y. S. 296. Agreement by solvent corporation to distribute proceeds resulting from disposition of its assets equit-

an executed oral agreement to accept part performance of a written contract, or an unexecuted oral agreement to accept less than full payment in discharge of a present existing written contract, without further consideration, is unenforceable.[93] But where a party refuses to complete his contract because of some unforeseen and substantial difficulties of performance, not known or anticipated when it was made, and which cast upon him an additional burden not contemplated by the parties, a promise by the opposite party of additional pay or benefits for completion of the contract is enforceable.[94] So, too, it has been held that, where a party refuses to be longer bound by his contract, a new contract whereby the other party agrees to pay him increased compensation is supported by a sufficient consideration.[95] An acceptance of a part of a debt when due in satisfaction of the whole does not bar the recovery of the residue.[96] This rule does not, however, apply when the payment is made before the debt matures, or at a different place from that where it is payable.[97] An agreement by a debtor not to avail himself of the bankruptcy law will not support a compromise agreement by his creditor to accept less than the amount due in full settlement of a claim which would not be barred by a discharge.[98]

A mere moral obligation [99] is not ordinarily a sufficient consideration to support a contract unless it was once a legal one,[1] though there seems to be some conflict of authority in this regard.[2]

A past consideration [3] will not ordinarily support a promise,[4] but an antecedent debt will support a note and mortgage given to secure its payment.[5]

ably among its creditors held not to support agreement by creditor to forbear forcing collection of his claim. Mount Vernon Rattan Co. v. Joachimson, 103 N. Y. S. 1045. Agreement to pay amount admittedly due under insurance policy, there being no dispute. Manley v. Vermont Mut. Fire Ins. Co., 78 Vt. 331, 62 A. 1020. Payment of loss by insurance company to third person held no consideration for agent's promise to pay to company amounts embezzled by subagent, for which agent was not liable. McKone v. Metropolitan Life Ins. Co. [Wis.] 110 N. W. 472.

92. Since excavation operations on adjoining premises did not relieve tenant from obligation to pay rent reserved in lease, held that her agreement to pay less amount while such operations continued furnished no consideration for alleged agreement of landlord to accept reduced rent, and to waive provision giving him right to terminate lease on notice. Seymour v. Hughes, 105 N. Y. S. 249.

93. Defendant agreed to convey to plaintiff, for specified sum, ninety acres of land, five of which belonged to her and balance to her insane son. She was not guardian of son, and later refused to convey. It was then verbally agreed that she should have herself appointed son's guardian, obtain order authorizing sale of his land, and would convey to plaintiff part of son's land for amount originally agreed to be paid for whole tract, and part of her own land for an additional amount. Held different terms and conditions, whereby plaintiff was to get less land and pay more money, furnished consideration for new contract. Benton v. Magee [Kan.] 89 P. 902.

94. Is presumption in such case that rights and obligations of original contract are waived and those of new or modified contract substituted therefor. Linz v. Schuck [Md.] 67 A. 286. Agreement to pay additional cost of digging cellar held supported by sufficient consideration. Id. Actual rescission of original contract held not necessary. Id.

95. Where plaintiff informed defendant that he would no longer work under contract to do certain work for specified sum, held that new contract whereby defendant agreed to pay him such sum, after contract price was exhausted, as would insure him usual day wages for such work after paying all help employed by him, was based on sufficient consideration. Scanlon v. Northwood, 147 Mich. 139, 13 Det. Leg. N. 1013, 110 N. W. 493.

96. Flener v. Flener, 30 Ky. L. R. 543, 99 S. W. 258. Payment of part of liquidated sum due is not to be taken as satisfaction of full debt regardless of form of receipt given. Schlessinger v. Schlessinger [Colo.] 88 P. 970. Fact that defendant borrowed sum with which to make payment held immaterial, particularly where it was not alleged that plaintiff was informed of that fact. Id.

97. Flener v. Flener, 30 Ky. L. R. 543, 99 S. W. 258.

98. Neither executed agreement not to avail himself of law, nor threat to do so. Schlessinger v. Schlessinger [Colo.] 88 P. 970.

99. See 7. C. L. 776.

1. Finch v. Green 225 Ill. 304, 80 N. E. 318; Linz v. Schuck [Md.] 67 A. 286.

2. Though notes given by married woman for accommodation of her husband were unenforceable against her, held that moral obligation to pay them was sufficient consideration to support renewal notes given after husband's death. Rathfon v. Locher 215 Pa. 571, 64 A. 790.

3. See 7 C. L. 777.

4. Agreement to pay for services previous-

Adequacy.[6]—At common law mere inadequacy of consideration is not alone ground for avoiding a contract[7] unless so gross as to shock the conscience and amount to proof of fraud.[8] The civil law, however, requires that the consideration be serious, and not out of all proportion with the value of the contract.[9]

A failure of consideration[10] in whole or in part precludes a recovery on the contract pro tanto,[11] and may be ground for a rescission of the contract[12] and the

ly rendered without employment or request. Complaint held insufficient. Fulton v. Varney, 117 App. Div. 572, 102 N. Y. S. 608.

5. Carter v. Ware Commission Co. [Tex. Civ. App.] 101 S. W. 524.

6. See 7 C. L. 777.

7. In absence of satisfactory proof of fraud, smallness of consideration, so long as it is large enough to be measurable, is immaterial except in case of a contract to pay a definite sum of money at definite time. Rust v. Fitzhugh [Wis.] 112 N. W. 508. Consideration of $1 held sufficient to sustain contract for division of net proceeds of sale of land where prospective profits and time when they might be realized were uncertain. Id. Valid patent or right to sell patented article is sufficient consideration for note, though value of patent or right is greatly overestimated. Twentieth Century Co. v. Quilling 130 Wis. 318, 110 N. W. 174. Held immaterial whether consideration for release of wholly unliquidated demand was large or small. Allen v. Ruland, 79 Conn. 465, 65 A. 138. One dollar paid at execution of oil and gas lease and annual rental thereafter paid held sufficient to support contract. Pittsburg Vitrified Pav. & Bldg. Brick Co. v. Bailey [Kan.] 90 P. 803. Where consideration for sale of land was adequate when contract was made, fact that it had since increased in value held not to prevent specific performance. East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768. Promise that claimant should be paid $5,000 out of promisor's estate at his death in return for services, etc., held valid and enforceable against his estate though such sum was much beyond actual value of such services. In re Todd's Estate, 47 Misc. 35, 95 N. Y. S. 211. Contract to pay attorney contingent fee having been fairly entered into between parties of full contracting age, with full knowledge without any element of fraud, undue influence, oppression or concealment, held that it could not be annulled merely because it had proven advantageous and profitable to attorney and fee was exorbitant. Humphries v. McLachlan, 87 Miss. 532, 40 So. 151.

8. Inadequacy coupled with such degree of mental weakness as would justify inference that advantage had been taken of that weakness justifies interference of court of equity. Allen's Adm'rs v. Allen's Adm'rs, 79 Vt. 173, 64 A. 1110.

9. Consideration of $1 recited as having been paid, held insufficient to support oil and gas lease, and same held true of $2 to be paid for privilege of retiring therefrom at any time. Murray v. Barnhart, 117 La. 1023, 42 So. 489. Fifty dollars to be paid quarterly by lessee under oil and gas lease in case he failed to develop property and $100 to be paid by him in case he elected to retire from contract, held insignificant and lacking in seriousness. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481. No lesion where contract is aleatory. Rudolf v. Costa [La.] 44 So. 477. Where there is no lesion because contract is aleatory, contract is not void if there is a price, however small. Id. Contract of sale held supported by sufficient consideration where was an actual cash payment. Id. There being absolute sale, in consideration of annuity for term of years or for life, contention that there was no price because rental of property exceeded annuity held untenable. Id. Conveyance of property where grantor reserves enough for his support the consideration for which is obligation of grantee to provide grantor with home during his life and to bury him when dead, is an aleatory contract, which, save under exceptional circumstances, is not open to attack for lesion. Thielman v. Gahlman [La.] 44 So. 123. Evidence held not to warrant rescission of sale of realty on ground of lesion beyond moity. Cain v. Bauman 118 La. 82, 42 So. 654.

10. See 7 C. L. 777.

11. Where consideration moving to maker of contract is promise by other party of something to be fulfilled in future, latter must furnish consideration contemplated or defense of total or partial failure of consideration will be available to maker as defense to action on contract. Reynolds v. Nevin, 1 Ga. App. 269, 57 S. E. 918. Where uncontradicted evidence showed failure of consideration for notes sued on held proper to direct verdict for defendant. Id. Evidence held to sustain finding that notes and mortgage were given in payment for goods to be delivered in future, which were in fact never delivered. Alexander County Nat. Bk. v. Foster [Mo. App.] 101 S. W. 685. Acts of defendant in procuring payment of certain notes and undertakings held not induced by oral agreement whereby note sued on was to to be canceled in consideration of his making or procuring such payment, but to have been wholly independent thereof, and hence was failure of consideration for agreement to cancel. Utah Sav. & Trust Co. v. Bamberger [Utah] 86 P. 961. Deed made freely, voluntarily and without fraud passes title though consideration may fail in whole or in part. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276. Mere fact that part of consideration for transfer consisted of covenant against alienation which could not be legally enforced held not to make deed absolutely void, even if it could be held to be failure of consideration authorizing rescission. Id. Evidence held insufficient to support defense of want or failure of consideration for notes alleged to have been given for money loaned. Glenn v. Zenovitch [Ga.] 58 S. E. 26. Release of defendant from liability on stock subscription held not the consideration for release of his rights under such subscription, and hence contention that consideration for his contract had failed because release of his liability was void was untenable. Hladovec

recovery of the value of any property parted with pursuant thereto.[13] Equity will not interfere and declare a failure of consideration in whole or in part except in cases where the money could have been recovered back if paid.[14]

§ 3. *Validity of contract. A. General principles.*[15]—All men have an absolute right to contract or to refrain from contracting,[16] and to act in voluntary combination with respect to contracting or refraining from contracting regardless of their motives in so doing.[17] Under the civil law a contract is not necessarily unenforceable because innominate, particularly where it has been fully executed by one party.[18]

Matters relating to the contracts of domestic[19] and foreign corporations,[20] aliens,[21] infants,[22] and married women,[23] and to usurious[24] and gambling contracts,[25] contracts made on Sunday,[26] and to the effect of the interstate commerce law on contracts of transportation,[27] are treated elsewhere.

(§ 3) *B. Subject-matter or consideration.*[28]—There is a conflict of authority as to the validity of a sale by an heir of his expectancy.[29]

v. Paul, 222 Ill. 254, 78 N. E. 619. Allegations of answer that plaintiff undertook to turn over certain property to defendant held not supported by evidence or findings so that defense that only part of property was delivered and that value of property not delivered was greater than plaintiff's claim, and hence there was failure of consideration, was not established. Drovers' Live Stock Commission Co. v. Wolff Packing Co., 74 Kan. 330, 89 P. 465, 86 P. 128. Where plaintiff advanced money to insurance company to pay premium on policy in which defendant was named as beneficiary at defendant's instance and request, held fact that policies were void because application was not set out in or attached to policy was no defense to action on due bill given by defendant for money so advanced. Locker v. Kuechenmiester, 120 Mo. App. 701, 98 S. W. 92. In absence of fraud, note given in settlement of claim on certain tax certificates held not void for failure of consideration though certificates were in fact void. Armijo v. Henry [N. M.] 89 P. 305. Evidence held insufficient to show total failure of consideration for note sued on. Steven v. Henderson [Neb.] 110 N. W. 646. Where it was admitted that defendant executed and delivered his note to third person to be used by latter as part payment of purchase price of threshing machine purchased from plaintiff, held that defendant could not escape liability on note which had been turned over to plaintiff on ground of failure of consideration because third person failed to carry out his agreement, made at time note was given, to thresh defendant's grain, at customary price, in amount equal to face of note. Page v. Geiser Mfg. Co., 17 Okl. 110, 87 P. 851. Where county orders were adjudged fraudulent and void, held that there was total failure of consideration for their sale. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 N. W. 499.

12. See, also, § 8B, post. Where party in consideration of conveyance to him of land assumes maintenance and care of grantor, his failure to substantially perform authorizes rescission for failure of consideration. Alvey v. Alvey, 30 Ky. L. R. 234, 97 S. W. 1106.

13. One conveying land or other property to another pursuant to an oral agreement which latter refuses to perform and cannot be compelled to perform because within statute of frauds may recover value thereof on theory of failure of consideration. Cromwell v. Norton, 193 Mass. 291, 79 N. E. 433.

14. Not where is mistake of law as to liability where both parties know, or have means of obtaining knowledge, of all facts. Armijo v. Henry [N. M.] 89 P. 305.

15. See 7 C. L. 778.

16. Motives actuating one in refraining from contracting not open to inquiry. Booth v. Burgess [N. J. Eq.] 65 A. 226.

17. Booth v. Burgess [N. J. Eq.] 65 A. 226.

18. Conveyance of property, consideration for which is obligation of grantee to provide grantor with home for life and to bury him when dead, though neither a sale nor a donation, held not, after having been fully executed by grantee, open to attack by collateral heirs of grantor on ground that such contract is unknown to the law. Thielman v. Gahlman [La.] 44 So. 123.

19. See Corporations, 7 C. L. 862.

20. See Foreign Corporations, 7 C. L. 1725.

21. See Aliens, 9 C. L. 84.

22. See Infants, 8 C. L. 267.

23. See Husband and Wife, 8 C. L. 122.

24. See Usury, 8 C. L. 2211.

25. See Gambling Contracts, 7 C. L. 1858.

26. See Sunday, 8 C. L. 2045.

27. See Commerce, 9 C. L. 583.

28. See 7 C. L. 778.

29. See, also, Real Property, 8 C. L. 1676. **Indiana:** Though looked upon with suspicion and presumed to be fraudulent, such a sale is valid if made for fair price and with consent of ancestor. McAdams v. Bailey [Ind. App.] 80 N. E. 171. Sale held to estop grantor from claiming property. Id.. **Kentucky:** Expectancy of an heir to inherit estate of his ancestor cannot be subject of a sale. Elliott v. Leslie, 30 Ky. L. R. 743, 99 S. W. 619. Sum paid son by his father in consideration of his release of his interest in father's estate held to be treated as an advancement. Id. **Louisiana:** Sale of realty held not void as an attempt to dispose of an interest in the succession of living persons. Rudolf v. Costa [La.] 44 So. 477. Executed contract of sale of realty by husband and wife held not subject to be set aside on ground that it

Contracts which involve the doing of a thing prohibited by statute under penalty are generally held to be void, even though the statute does not expressly so provide,[30] particularly where the object sought is the protection of the public.[31] Some courts, however, hold that the penalty imposed excludes all others, and that such contracts are valid unless it clearly appears that the legislature intended otherwise.[32]

Definiteness and certainty of terms.[33]—In order to be enforceable, a contract must be reasonably definite and certain in its terms.[34] or capable of being made so.[35] Both contracting parties must be named or otherwise described.[36]

thereby became interest of each spouse that other should die first and interest of vendee that both should die as soon after sale as possible. Id.

30. For the effect on its contracts of the failure of a foreign corporation to comply with regulatory statutes see Foreign Corporations, 7 C. L. 1725. No recovery can be had for price of fertilizer sold without compliance with statute regulating sales thereof, nor on any note given for consideration thereof. Boyett v. Standard Chem. & Oil Co., 146 Ala. 554, 41 So. 756. Contract requiring advertisement of delinquent accounts for sale held terminated by statute subsequently enacted prohibiting such advertising under penalty. American Mercantile Exchange v. Blunt [Me.] 66 A. 212. Contract for construction of building calling for construction of roof in violation of St. 1892, c. 419, § 64, regulating construction of buildings. Eastern Expanded Metal Co. v. Webb Granite & Const. Co. [Mass.] 81 N. E. 251. Contract to carry interstate shipment of goods at less than published rate, in violation of interstate commerce act. Atchison, etc., R. Co. v. Holmes, 18 Okl. 92, 90 P. 22. Real estate dealers failing to pay privilege tax imposed by Acts 1901, p. 200, c. 128, § 4, held not entitled to recover on contracts to pay them commissions for procuring purchasers for certain lands. Pile v. Carpenter [Tenn.] 99 S. W. 360.

31. Penalty in such case is equivalent to express prohibition. Levison v. Boas [Cal.] 88 P. 825. Contract of pledge with pawnbroker held void where he failed to procure license or to make prescribed entries of his transactions in register, and hence was guilty of misdemeanor under Pen. Code §§ 338, 339. Id.

32. See 7 C. L. 778, n. 6.

33. See 7 C. L. 779.

34. Written instrument is not void for ambiguity where contract of the parties can be clearly and certainly ascertained therefrom. Ringle v. Quigg, 74 Kan. 581, 87 P. 724. Law leans against destruction of contracts on ground of uncertainty and contract will not be declared void on that ground unless after reading and interpreting it in light of circumstances under which it was made, and supplying or rejecting words necessary to carry into effect reasonable intention of parties, their intention cannot be fairly collected and effectuated. Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911. To warrant specific performance of contract for conveyance of realty it must contain such a description of property, either in terms or by reference, that it can be ascertained without parol evidence. Willmon v. Peck [Cal. App.] 91 P. 164.

Contracts held sufficiently definite and certain: Oil and gas lease. Ringle v. Quigg, 74 Kan. 581, 87 P. 724. To pay broker commission for selling land. Kepner v. Ford [N. D.] 111 N. W. 619. Memorandum of sale. Bailey v. Leishman [Utah] 89 P. 78. As to who was to make certain payments. Wills v. Pennell, 116 App. Div. 493, 101 N. Y. S. 1017. Contract to erect or cause to be erected store building on certain tract of land at some convenient place to be thereafter agreed on, but not more than specified distance from railroad, and to keep stock of merchandise therein and conduct general merchandise business, held sufficiently definite to support action for damages for its breach. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 N. W. 820. Contract held not too indefinite and uncertain to warrant recovery of substantial damages. Crichfield v. Julia [C. C. A.] 147 F. 65. Contract by children to pay certain sum monthly for support of mother, payment to be made to child with whom she should elect to stay, held not void on ground that it did not sufficiently appear to whom money was to be paid. Worth v. Daniel, 1 Ga. App. 15, 57 S. E. 898. Building contract held not so uncertain as to be impossible of performance as matter of law. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387. Note dated March 25, 1904, and payable on "the first day of November," without specifying a year, held, in absence of anything requiring contrary construction to be construed as maturing on first day of November, 1904. Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911. Contract for transfer of patent to corporation to be formed, etc., held sufficiently definite and certain to be enforceable in equity. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F. 820. Description of land held sufficiently definite to sustain bill for specific performance of oral contract to convey it. White v. Poole [N. H.] 65 A. 255.

Contract held void for uncertainty: Bunnell v. Rosenberg, 126 Ill. App. 196. Promise by decedent to plaintiff's mother to take plaintiff and do a good part by her. McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728. Contract to deliver telegram "toward Houston Heights." Klopf v. Western Union Tel. Co. [Tex. Civ. App.] 97 S. W. 829. Cannot be enforced where price is not definitely agreed upon. Butler v. Kemmerer [Pa.] 67 A. 332. Agreement by defendant that in case he made any profit out of business of certain company he would divide it upon a liberal basis with plaintiff held too indefinite to afford basis for recovery. Id. Even if transaction amounted to contract to employ plaintiff's teams, held that it was too indefinite as to duration to enable him to re-

(§ 3) *C. Mutuality.*[37]—As a general rule the contract must be mutual; that is, it must be capable of enforcement by either party against the other.[38] The

cover future profits alleged to have been lost by refusal to furnish such employment. Christie v. Patton [Ala.] 42 So. 614. Contract to furnish sewerage service fixing no time for its duration held incapable of specific performance. Soloman v. Wilmington Sewerage Co., 142 N. C. 439, 55 S. E. 300.

35. Contract for purchase and sale of salt held not void for uncertainty because buyer was given discretion as to grades where maximum amount which seller could be called upon to deliver and purchaser to take was absolutely fixed. Mebius & Drescher Co. v. Mills [Cal.] 88 P. 917. Contract for storage and financing held not too indefinite to be capable of enforcement. Pope v. Graniteville Mfg. Co., 1 Ga. App. 176, 57 S. E. 949. Mortgage on "all crops of cotton, corn, or other agricultural products" grown by mortgagor in certain county during certain year held valid. Read Phosphate Co. v. Weichselbaum Co. [Ga. App.] 58 S. E. 122. Mortgage on "all my crops corn, cotton, etc., now up and growing, on about 240 acres of land, all the above property is in Jackson district, county and state aforesaid," held good as between parties, parol evidence being admissible to identify property. Id. Agreement to reconvey land conveyed held sufficiently definite and certain to warrant decree of specific performance. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760.

36. Writing naming but one party held not contract of sale. North Packing & Provision Co. v. Lynch [Mass.] 81 N. E. 891.

37. See 7 C. L. 779.

38. Contracts held mutual: Agreement to allow defendant to build substructure of bridges for building of which plaintiff might receive contracts from government, since plaintiff could have compelled defendant to do substructure work, though at a loss. Virginia Bridge & Iron Co. v. Crafts [Ga. App.] 58 S. E. 322. Oral agreement whereby plaintiff was to store and finance certain cotton for defendant, and containing mutual promises. Pope v. Graniteville Mfg. Co., 1 Ga. App. 176, 57 S. E. 949. Contract not being within statute of frauds held that it was not rendered unilateral because only one of the parties signed subsequent letter stating its terms. Id. Defeasance agreement giving right to redeem from deed absolute in form intended as mortgage. Linkemann v. Knepper, 226 Ill. 473, 80 N. E. 1009. Gas and oil lease. Ringle v. Quigg, 74 Kan. 581, 87 P. 724. Contract for sale of land. Wadick v. Mace, 118 App. Div. 777, 103 N. Y. S. 889. Contract for sale of land signed by vendor alone. East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768. Contract to pay broker commission for procuring purchaser for land, though not signed by broker. Kepner v. Ford [N. D.] 111 N. W. 619. Contract for sale of salt. Mebius & Drescher Co. v. Mills [Cal.] 88 P. 917. Agreement to transfer patents to corporation to be formed in consideration of cash payments made and to be made, and certain portion of stock of said corporation. Wills v. Pennell, 116 App. Div. 493, 101 N. Y. S. 1017. Upon acceptance of offer contained in memorandum of sale, held that law would imply promise to accept and pay for goods on part of accepting party, so that promises thereupon became mutual and enforceable. Bailey v. Leishman [Utah] 89 P. 78. Contract held to bind seller to deliver as many ties as he could get by ordinary care and dilligence in time fixed. Louisville & N. R. Co. v. Coyle, 30 Ky. L. R. 567, 99 S. W. 237; Id., 30 Ky. L. R. 201, 97 S. W. 772. Lease binding lessor as long as lessee paid rent and lessee until he gave month's written notice of termination at end of year. Morris v. Healy Lumber Co. [Wash.] 91 P. 186. Contract of employment held to bind both parties for five years. Butterick Pub. Co. v. Whitcomb, 225 Ill. 605, 80 N. E. 247. Contract held not so lacking in mutuality as to preclude its enforcement in equity. General Elec. Co. v. Westinghouse Elec. Co., 151 F. 664. Contract under seal and reciting receipt of valuable consideration whereby plaintiff was to take charge of lands of testator, giving as much time to management thereof as might seem necessary to him, and to use his best judgment in disposing of same, and to receive half net proceeds of all sales. Mills v. Smith, 193 Mass. 11, 78 N. E. 765. Pledge of ring held not unilateral as failing to fix time within which pledgor might redeem after expiration of year when tender of amount necessary to redeem was made within reasonable time after expiration of year and kept good. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947. Contract founded on consideration is not invalid for want of mutuality because it is obligatory on one party and optional on other. Pittsburg Vitrified Pav. & Bldg. Brick Co. v. Bailey [Kan.] 90 P. 803. Lease as whole being supported by sufficient consideration held that fact that it did not bind lessor to furnish beer of its own manufacture did not preclude enforcement of covenant by lessee not to sell any other kind of beer, such covenant being mere restriction on use of premises. Schlitz Brewing Co. v. Nielsen [Neb.] 110 N. W. 746. Signing of mutual undertaking to perform a specific common object does not necessarily render contract unilateral. Worth v. Daniel, 1 Ga. App. 15, 57 S. E. 898. Agreement by children to pay certain sum monthly for support of mother held not unilateral. Id.

Contracts held lacking in mutuality: Contract for sale of ties since it did not bind plaintiffs to deliver any ties. Lowe v. Ayer-Lord Tie Co., 29 Ky. L. R. 1302, 97 S. W. 383. Covenant in mortgage binding mortgagor to erect saloon on mortgaged premises and to sell mortgagee's beer exclusively for period of ten years. Huebner-Toledo Breweries Co. v. Zevnik, 4 Ohio N. P. (N. S.) 193. Contract for sale of certain proportion of nut and slack produced from operation of coal mine, where it was left entirely optional with sellers whether or not they would separate any or all of nut and slack from run of mine. Artemus-Jellico Coal Co. v. Ulland, 7 Ohio C. C. (N. S.) 605. Contract to furnish ice for certain year at specified price, there being no obligation to sell any specified amount and no obligation on part of other party to buy. Tyler Ice Co. v. Coupland [Tex. Civ. App.] 99 S. W. 133. Agreement to fur-

rule does not, however, apply to contracts which have been executed in whole or in part.[39] Similarly, under the civil law, a protestative contract is void,[40] and a protestative obligation retains that character only so long as it has not been fulfilled in whole or in part.[41]

(§ 3) *D. Public policy in general.*[42]—A contract valid where made will not be enforced if contrary to the law or the public policy of the state where enforcement is sought.[43]

Contracts waiving exemptions provided by law,[44] or against the policy and spirit of particular statutes,[45] or to compensate an attorney for collecting gambling debts by paying him a percentage of the amount collected,[46] or to pay a witness extra com-

nish heat for building at specified rate per year as long as owner desired it to be supplied held not enforcible in equity at suit of either party. Fowler Utilities Co. v. Gray [Ind.] 79 N. E. 897. Contract to furnish sewerage service held so lacking in mutuality that specific performance could not be decreed, where defendant was bound to perform but could not compel plaintiffs to continue to pay. Soloman v. Wilmington Sewerage Co., 142 N. C. 439, 55 S. E. 300. Contract to prepare certain designs held unilateral one binding on plaintiff alone which did not bind defendant unless he accepted and approved them. American Fine Art Co. v. Simon [C. C. A.] 153 F. 1020. Question whether defendant so approved and accepted them as that such acceptance and approval constituted orders according to terms and conditions of contract held for jury. Id. Real and only consideration for oil and gas lease held to be obligation on part of lessee to develop property, so that where lessee was given option not to develop on making certain periodical payments lease was void. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481. Agreement for exchange of property of married woman signed by her husband on her behalf without proper authority held unenforceable by either party in absence of tender of conveyance by her. Shanks v. Michael [Cal. App.] 88 P. 596. Other party is not bound by executory contract made by agent requiring ratification by principal unless he assents thereto after such ratification, since before ratification contract was not mutual, and hence principal could not give it validity by ratification without consent of other party. Pacific Mill Co. v. Inman, Poulsen & Co. [Or.] 90 P. 1099.

39. Where performance of contract not required to be in writing by one party is not compulsory and he has an election to perform or not as he chooses, but he elects to perform, want of mutuality is thereby eliminated, and he may then have specific performance against other party, in proper case, though no cause of action would lie at all for performance on his part. Lowe v. Ayer-Lord Tie Co., 29 Ky. L. R. 1302, 97 S. W. 383. Where plaintiffs had right to refuse to deliver ties if they were not satisfied with defendant's inspection thereof, held that fact that plaintiffs manufactured merchantable ties which defendant refused to inspect or pay for was not such performance as would remove lack of mutuality. Id. Part performance held to have relieved contract to furnish ties from want of mutuality. Louisville & N. R. Co. v. Coyle, 30 Ky. L. R. 201, 97 S. W. 772, 30 Ky. L. R. 567, 99 S. W. 237. Contract by defendant to divide net proceeds of sale of lands held enforceable after sales were made, though other party did not promise anything and there was nothing in agreement whereby he could force a sale and a determination of net profits for division. Rust v. Fitzhugh [Wis.] 112 N. W. 508. Contract for sale of realty of insolvent corporation held not so lacking in mutuality as to defeat suit for specific performance because it contained unenforceable provision that vendor would procure resignation of directors of said corporation, where he in fact complied therewith prior to entry of decree. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31. Contract to transfer interest in patent to corporation held not unilateral, but an executed contract on part of one party and executory one on part of other. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F. 820.

40. Civ. Code, art. 2034. Oil and gas lease according to lessee right to put an end to it at any time on payment of merely nominal sum held purely protestative on part of lessee and hence void. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

41. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

42. See 7 C. L. 781.

43. See Conflict of Laws, 9 C. L. 596.

44. Stipulation in note held simply a waiver of exemptions. Teague v. Weeks [Miss.] 42 So. 172.

45. Contract whereby creditor agreed to pay trustee in bankruptcy certain sum over and above compensation provided for by bankruptcy act held void under § 48 of the act, and § 72 of the amendment of 1903. Devries v. Orem, 104 Md. 648, 65 A. 430. Where constitution fixed term of policeman's employment at two years, contract by city with policeman, in consideration of his employment, that he might be removed at any time by council or city marshal without notice or cause. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925. Complaint held not demurrable as showing that plaintiff's employment by city as engineer was attempt to provide for performance of regular duties of city engineer contrary to general statutory provisions on the subject. City of Decatur v. McKean, 167 Ind. 249, 78 N. E. 982.

46. Agreement by common gambler to pay attorney certain per cent of all claims he might collect which were defended or objected to on ground that they were gambling debts. Delahunty v. Canfield, 118 App. Div. 883, 103 N. Y. S. 939.

pensation for testimony which he is bound to give under his subpoena,[47] or which unreasonably interfere with the settlement of the estate of a decedent,[48] or which wholly exclude the jurisdiction of the courts,[49] or restraining the free sale and transfer of corporate stock,[50] or necessarily tending to require agents to serve two principals of antagonistic interests,[51] or to induce agents [52] or employes [53] to be false to their employers' interests, or which contemplate or necessarily involve the defrauding or victimizing of third persons,[54] or which impose a penalty upon litigating a claim for injury to person or property,[55] contracts between a municipality and a citizen which operate to relieve the latter from taxation,[56] secret agreements favoring a few creditors on the winding up of a partnership,[57] and contracts the object and effect of which is to chill a judicial sale and stifle competition thereat,[58] have been held to be void.

47. Contract to pay witness testifying as to matters of fact for his loss of time a greater sum than statutory fees. Wright v. Somers, 125 Ill. App. 256.

Agreement to pay medical expert extra compensation for testifying as to matters of professional opinion held contrary to public policy, though party having him subponaed knew that he was accustomed to make extra charge it being his duty to give such testimony under subpoena. Burnett v. Freeman, 125 Mo. App. 683, 103 S. W. 121.

48. Contract whereby plaintiff was to take entire charge of lands of other party and to dispose of same according to his best judgment, and which was made binding on such other party's executors, held not void as unreasonably and unlawfully interfering with settlement of latter's estate. Mills v. Smith, 193 Mass. 11, 78 N. E. 765.

49. Provision in paving contract authorizing city to withhold so much of contract price as would protect materialmen held valid. Carlisle v. Spain, 147 Mich. 158, 13 Det. Leg. N. 1002, 110 N. W. 532.

50. Agreement between persons about to form corporation limiting number of shares of corporate stock to be issued to each held valid and binding on them, though not binding on corporation. Hladovec v. Paul, 222 Ill. 254, 78 N. E. 619.

51. Secret agreement between agent and attorney whereby agent was to procure for attorney a contract of employment from his principal, in consideration for which he was to receive share of attorney's fee. Auerbach v. Curie, 104 N. Y. S. 233. Fact that agent obtained from principal contract employing attorney held not to show that he disclosed his contract with latter. Id. Agreement by architect to pay agent of trust company part of his commission if he would procure loan to architect's employer so as to enable him to build held valid. McCrary v. Thompson, 123 Mo. App. 596, 100 S. W. 535.

52. Agreement whereby plaintiff and defendant were to divide profits of sale of certain land which they induced owner's agent to sell to them at less price than they could obtain for it by agreeing to share profits with him. Williams v. Kendrick, 105 Va. 791, 54 S. E. 865.

53. Secret agreement between defendant and employe of rival company whereby employe was to abandon his contract with latter company, object being to deprive it as defendant's competitor of employe's skill and experience, held illegal and fraudulent, and not to furnish good consideration for defendant's promise to pay employe a salary. Rhoades v. Malta Vita Pure Food Co. [Mich.] 112 N. W. 940.

54. Scheme for sale of county rights to sell patented article. Twentieth Century Co. v. Quilling, 130 Wis. 318, 110 N. W. 174.

55. Provision in contract of membership in relief department that benefit shall be forfeited if action is brought against railroad company for damages for death of member. Chicago, etc., R. Co. v. Healy [Neb.] 111 N. W. 598.

56. Contract for repayment of money loaned city held valid. Glucose Sugar Refining Co. v. Marshalltown, 153 F. 620.

57. Secret agreement between attorneys for partner who had commenced proceedings for dissolution of partnership in which receiver was appointed and attorney for creditors who had instituted bankruptcy proceedings against firm, that, in consideration of dismissal of bankruptcy proceedings, attorneys for partner would pay him and his clients eighty per cent of allowances made to him by court for his services, evident intention being to obtain largest possible allowances. Fried v. Danziger, 105 N. Y. S. 44.

58. Contracts for purpose of suppressing and chilling competitive bidding in order to obtain property at an under value, or to obtain undue and unconscientious advantages. Henderson v. Henrie, 61 W. Va. 183, 56 S. E. 369. Combination of bidders to suppress competition at public sale required by law is fraudulent conspiracy in restraint of trade and contrary to public policy and renders any contract or transaction of vendor induced thereby voidable at his election and vests in him legal right to recover of any of conspirators value of all benefits he has received Sale of use of surplus money of county. In re Blake [C. C. A.] 150 F. 279. Agreement by prospective purchaser of property at foreclosure sale to sell it to third party in event that he becomes actual purchaser is not illegal unless intended to prevent competition and to sacrifice property to be sold. Venner v. Denver Union Water Co. [Colo.] 90 P. 623. Contract between two or more persons to purchase jointly property offered for sale at public auction is not invalid if free from fraud and collusion, and not made with intention of stifling and suppressing bidding in order to obtain property at an under value. Henderson v. Henrie, 61 W. Va. 183, 56 S. E.

Contracts not to dispose of one's property by will,[59] binding the vendee of copyright books not to resell them within a year,[60] binding an employe to assign to his employer an interest in all of a certain class of inventions made by him during his employment,[61] an agreement by one interested in defeating the probate of a will to interpose no objection thereto,[62] a parol compromise of a dispute as to a boundary line between adjoining tracts of land,[63] and an agreement by a surety to absolve the principal from all liability under an excise bond,[64] have been held to be valid. An agreement not to contest another's application for a patent to public land is valid, but an agreement not to protest against such application is contrary to public policy and void.[65]

Contracts to submit disputed questions of fact to arbitration are generally held to be valid and enforceable.[66] Such provisions are generally found in building contracts,[67] or contracts of insurance,[68] and reference should be had to the topics dealing with those subjects.

There is a conflict of authority as to the validity of provisions limiting the time within which an action may be brought on the contract.[69]

Provisions requiring notice to be given of any claim for damages for breach of contract as a condition precedent to the right to sue thereon are generally held to be valid if reasonable.[70]

369. Fact that agreement to make joint purchase may indirectly operate to prevent parties thereto from bidding is not enough to render transaction unlawful, but to have that effect it must appear that object of agreement was to avoid competition. Venner v. Denver Union Water Co. [Colo.] 90 P. 623. Agreement of bondholders for purchase of property at foreclosure sale through reorganization committee held valid. Id. Agreement to bid in property at foreclosure sale held made with design to have property bring full value, and to enable defendants to more conveniently acquire title, and to be valid. Satterfield v. Kindley [N. C.] 57 S. E. 145.

59. Owner of property may make valid and enforceable contract binding himself not to dispose of his property by will and to permit it to descend according to the laws of intestacy. Jones v. Abbott [Ill.] 81 N. E. 791.

60. Authors' & Newspaper Ass'n v. O'Gormann Co., 147 F. 616.

61. Wright v. Vocalion Organ Co. [C. C. A.] 148 F. 209.

62. Unless made collusively and in fraud of other parties interested, and where no other persons or interests are prejudicially affected thereby. Grochowski v. Grochowski [Neb.] 112 N. W. 335.

63. Whereby each released his claim to part of land in dispute. Martin v. Conley, 30 Ky. L. R. 728, 99 S. W. 613.

64. Agreement by surety company, in consideration of increased premium, that one for whom it gave excise bond should be entirely absolved from all financial responsibility. In re American Fidelity Co., 104 N. Y. S. 711.

65. Former is matter affecting party's own property, but latter amounts to agreement not to disclose facts which applicant has wrongfully concealed from land department. Roy v. Harney Peak Tin Min., Mill. & Mfg. Co. [S. D.] 110 N. W. 106.

66. Provisions for submission of amount in controversy as distinguished from cause of action itself, thus leaving right of action intact and capable of judicial enforcement if necessary. Stevens v. Norwich Union Fire Ins. Co., 120 Mo. App. 88, 96 S. W. 684.

67. See Building and Construction Contracts, 9 C. L. 424; Public Contracts, 8 C. L. 1473.

68. See Insurance, 8 C. L 377; Fraternal Mutual Benefit Associations, 7 C. L. 1777.

69. See 7 C. L. 784, n. 48-50. Limitation on time of bringing action against carrier, based on reduced rate, held valid. St. Louis, etc., R. Co. v. Burgin [Ark.] 104 S. W. 161. Provision that no action should be maintained against carrier unless commenced within six months after cause of action accrued held reasonable and valid. St. Louis, etc., R. Co. v. Pearce [Ark.] 101 S. W. 763.

70. See Carriers, 9 C. L. 466. Provision requiring shipper to give notice of claim for damages to stock within one day after its delivery at destination held reasonable and valid. St. Louis, etc., R. Co. v. Pearce [Ark.] 101 S. W. 760. Failure to give notice within time stipulated held to preclude recovery. St. Louis, etc., R. Co. v. Puckett [Ark.] 101 S. W. 762. Provision requiring shipper to give notice in writing of claim for damages to some officer of company or its nearest agent before stock was removed from place of destination held reasonable and valid, so that failure to give such notice precluded recovery. St. Louis, etc., R. Co. v. Phillips, 17 Okl. 264, 87 P. 470. Fact that shipper did not go in person or send agent with stock held not to excuse failure, since he should have sent copy of contract to consignee so that latter might have complied with stipulation. Id. Verbal notice held not compliance. Id. Whether time provided by contract for giving notice of loss is reasonable is question of fact to be determined by circumstances of case. Id. Provision requiring verified claim in writing to be filed with agent within five days after stock should be removed from cars held reason-

(§ 3) *E. Limitations of liability.*[71]—Contracts relieving a master from liability for the negligent injury of his servants are void.[72] So, too, common carriers[73] and other public service corporations[74] cannot relieve themselves from liability for their own negligence, though they may for a valuable consideration, limit their common-law liability, and prescribe conditions as to the manner of its enforcement.[75]

(§ 3) *F. Relating to marriage or divorce.*[76]—Contracts in restraint of marriage[77] or which tend to induce a separation of husband and wife[78] are void.

(§ 3) *G. Contracts tending to promote immorality*[79] are void.[80]

(§ 3) *H. Litigious agreements.*[81]—The validity of contracts making the fees of attorneys contingent on the successful outcome of litigation is treated elsewhere.[82]

(§ 3) *I. Compounding offenses.*[83]—Contracts having for their object the stifling of criminal prosecutions of any kind are void.[84]

(§ 3) *J. Interfering with public service.*[85]—Contracts to bribe public officials,[86] contracts by public officers tending to bring their private interests into conflict with those of the public,[87] or to serve for less than the compensation fixed by

able and valid. Pennsylvania Co. v. Shearer, 75 Ohio St. 249, 79 N. E. 431. Provision requiring notice to be filed within ninety-one days not enforceable unless reasonable. Southern Kansas R. Co. v. Curtis Bros. & Davidson [Tex. Civ. App.] 99 S. W. 566. Letter held not claim for damages for nondelivery of telegram. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117.

Contra: Provision that carrier should be relieved from liability for loss, damage, or detention unless claim was presented within ten days from date of unloading, etc., held void under Const. art. 11, § 4, prohibiting carriers from limiting their liability. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718.

71. See 7 C. L. 784.

72. See Master and Servant, 8 C. L. 840.

73. See Carriers, 9 C. L. 466.

74. See topics dealing with particular public service corporations.

75. For discussion of right to require notice of claim for damages, and validity of provisions limiting time within which action may be brought, see § 3D, ante.

76. See 7 C. L. 784.

77. Antenuptial contract held valid. In re Appleby's Estate, 100 Minn. 408, 111 N. W. 305.

78. Antenuptial contract held valid, particularly where it was fully performed by wife. In re Appleby's Estate, 100 Minn. 408, 111 N. W. 305. Husband and wife cannot make valid contract renouncing their marital rights and obligations. Hill v. Hill [N. H.] 67 A. 406. Parties to action for divorce may agree between themselves as to disposition to be made of property. Kinkead v. Peet [Iowa] 111 N. W. 48.

79. See 7 C. L. 785.

80. Contract part of consideration for which is agreement to live in adultery. McLane's Adm'r v. Dixon, 30 Ky. L. R. 683, 99 S. W. 601. Contract in consideration of past illicit cohabitation to support mother and bastard children is neither void nor immoral, even though illegal cohabitation continues, if there is no stipulation for future cohabitation. Burton v. Belvin, 142 N. C. 151, 55 S. E. 71.

81. See 7 C. L. 785.

82. See Champerty and Maintenance, 9 C. L. 553.

83. See 7 C. L. 785.

84. Guaranty by father to pay sons' debts if creditors would not prosecute them. Beal & Doyle Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58. Not necessary for party to be under arrest and actually in course of being prosecuted. Id. Whether or not sons were actually guilty held immaterial. Id. Is not necessary to show that crime alleged to have been compounded was in fact committed. Joyce Co. v. Rohan [Iowa] 111 N. W. 319. Question whether payee of note was plaintiff's agent in making criminal charge against maker, and in compounding offense by taking the note, so as to preclude recovery by plaintiff as indorsee thereof, held for jury. Id. Contract to suppress criminal prosecution for consideration personal to prosecutor. Deed given in consideration of suppression of prosecutions for misdemeanors. Deen v. Williams [Ga.] 57 S. E. 427. Agreement not to institute bastardy proceedings is good consideration for promise by putative father to support mother and child, such proceedings being civil and not criminal. Burton v. Belvin, 142 N. C. 151, 55 S. E. 71.

85. See 7 C. L. 785. See, also, § 3D, ante.

86. Money given agent to be used in paying expenses of trip by governor of province in Panama to capital to confer with president in regard to certain concessions sought by principal held not to be used for unlawful or immoral purpose. Allen v. O'Bryan, 118 App. Div. 213, 103 N. Y. S. 125.

87. Agreement between plaintiff who had claim against county and chairman of county board that plaintiff would accept county orders therefor and take his chances on collecting them held void where both parties had notice of threatened taxpayer's suit to cancel such orders or to enjoin collection of plaintiff's claim, since it operated to place chairman in hostility to such suit. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 N. W. 499. Assignment of claim of contractor against city for price of work performed by him for it, which work must be inspected and accepted for city by board of which mayor was chairman, to bank of which mayor was stockholder and president, held void as contrary to public policy, and under Kirby's Dig. §§ 5644-5647, though made in good faith. People's Sav. Bk. v. Big Rock Stone & Const. Co. [Ark.] 99 S. W. 836.

law,[88] a contract by a creditor to pay a trustee in bankruptcy extra compensation in consideration of his accepting the appointment,[89] agreements to suppress bidding on contracts for public work,[90] and contracts of a corporation whereby it disables itself from performing its duties to the public, or subordinates to its private interests the rights and conveniences which it impliedly undertakes to secure to the community,[91] have been held to be void.

(§ 3) *K. Restraint of trade.*[92]—Contracts in partial restraint of trade are not enforceable unless reasonable.[93] Contracts whereby one, for a valuable consideration, agrees not to engage in a particular business or trade for a limited time or in a limited territory are generally held to be valid if reasonable,[94] the test of reasonableness being whether the restraint imposed is such as to afford only a fair protection to the interests of the promisee without being so large in its operations as to interfere with the interests of the public.[95] Contracts having a tendency to stifle

88. Abbott v. Hayes County [Neb.] 111 N. W. 780. Agreement by public administrator to administer estate for less than fees fixed by law in consideration of agreement by heir not to object to his administering estate. In re Callaway [Mo. App.] 100 S. W. 565.

89. Devries v. Orem, 104 Md. 648, 65 A. 430.

90. Agreement among contractors for purpose of acquiring contract at higher price than could otherwise be obtained. Virginia Bridge & Iron Co. v. Crafts [Ga. App.] 58 S. E. 322. Rule does not render illegal bona fide partnership agreements for bidding for such contracts, or other bona fide arrangements between prospective bidders, whereby bid for entire contract is put in and parties to agreement are each to do part of work, object not being to suppress competition. Contract held valid. Id.

91. Attempt on part of irrigation company, a quasi-public corporation, to grant exclusive right for term of years to use water which, under the law, it was bound to furnish the public on equal terms. Sammons v. Kearney Power & Irr. Co. [Neb.] 110 N. W. 308. Contract with defendant railroad company whereby plaintiff was to build up its milk business for a term of years held valid Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51.

92. See 7 C. L. 787.

93. Must be reasonable as to time, place, terms, etc., manifesting intention to simply protect party relying on covenant in the reasonable restraint of unjust discrimination against him. Lanyon v. Garden City Sand Co., 223 Ill. 616, 79 N. E. 313; afg. Garden City Sand Co. v. Southern Fire Brick & Clay Co., 124 Ill. App. 599. Covenant in mortgage, given to secure repayment of borrowed money, binding mortgagor to erect saloon on mortgaged premises and to sell mortgagee's beer exclusively for period of ten years, such restriction to run with the land, held unreasonable and oppressive, and hence unenforceable. Huebner-Toledo Breweries Co. v. Zevnik, 4 Ohio N. P. (N. S.) 193. Unreasonable restraint is illegal though only partial. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264.

94. Contract accompanying sale of business not to re-engage in said business in certain locality is valid if reasonable in its provisions and based on sufficient consideration. Jayne & Keve Bros. Lumber Co. v. Turner, 132 Iowa, 7, 109 N. W. 307. Contract to discontinue publication of certain paper in certain town held valid. Vandiver v. Robertson, 125 Mo. App. 307, 102 S. W. 659. Implied agreement by one selling his interest in good will of dental business not to compete with purchaser held not invalid because unlimited as to time, it being regarded as restricted as to area. Foss v. Roby [Mass.] 81 N. E. 199.

95. Prejudice to public interest must clearly appear before court will be warranted in declaring contract void. Virginia Bridge & Iron Co. v. Crafts [Ga. App.] 58 S. E. 322.

Contracts held valid: Agreement accompanying sale of pine land leases that seller would not engage in naval stores business within ten miles of certain town so long as purchaser should be engaged in said business at said town. Harris v. Theus [Ala.] 43 So. 131. Agreement in contract for sale of business and good will not to engage in similar business, either directly or indirectly, for fifteen years, though unrestricted in space. United Shoe Mach. Co. v. Kimball, 193 Mass. 351, 79 N. E. 790. Contract whereby sellers of manufacturing business and good will agreed not to engage in such business for nine years in any of certain named states where they had previously done business. Angelica Jacket Co. v. Angelica, 121 Mo. App. 226, 98 S. W. 805. Contract by one selling out laundry business not to engage in similar business in certain city for five years, as employe or otherwise. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540. Evidence as to whether defendant was dependent for livelihood on work in or about a laundry held properly excluded, restraint being reasonable as to time, place, and purpose. Id. Contract by seller of shares of stock in incorporated drug company not to engage in drug business in certain town for five years. Kradwell v. Thiesen [Wis.] 111 N. W. 233.

Contracts held void: Lease by one corporation of its entire property to another whereby lessor agreed not to engage in business of compression of cotton within fifty miles of any plant operated by lessee, and to aid latter in discouraging unreasonable and unnecessary competition. Anderson v. Shawnee Compress Co., 17 Okl. 231, 87 P. 315. Covenant binding lessee not to sell beer of any other manufacture than that of lessor within one mile of leased premises. Huebner-

free and fair competition in trade and made for that purpose,[96] or tending to promote monopolies, are void as in restraint of trade,[97] and are expressly prohibited by statute in many states.[98] A contract giving a public telephone company the exclusive right to place telephones in a hotel has been held to be invalid.[99] A provision in a deed limiting the purposes for which rock taken from the premises might be used has been held to be valid.[1] There seems to be a conflict of authority as to

Toledo Breweries v. Singlar, 8 Ohio C. C. (N. S.) 49.

96. Contract between plaintiff and defendant that each should pay other certain sum per pound on all cotton purchased by them in certain territory, and that plaintiff when he desired to purchase cotton for certain mills should notify defendant and give him option to furnish it at price plaintiff was willing to pay, held void. Arnold & Co. v. Jones Cotton Co. [Ala.] 44 So. 662. Where direct and immediate effect of contract or combination between dealers is to destroy competition so that parties thereto may obtain higher prices for their commodities, it amounts to restraint of trade though contracts to buy at enhanced price are continually being made, total suppression of trade in commodity not being necessary. Park & Sons Co v. Hartman [C. C. A.] 153 F. 24. Covenants protecting seller of property against competition of buyer are upheld only where main purpose is to protect seller against competition directed against his retained business, and where they are no wider than is necessary for that purpose, and not where main purpose is to protect buyers against competition of each other. Id. System of contracts with wholesale and retail dealers whereby manufacturer of proprietary medicine under secret process not patented attempted to retain control of all sales and resales of such medicine held prima facie invalid, so that he was not entitled to preliminary injunction restraining person not party thereto from purchasing medicine from one who was, and reselling same at any price he might see fit, in absence of showing that system was necessary for protection of manufacturer's retained business. Id. Prime purpose of covenants restricting sales and resales held suppression of competition between those buying to sell again, any benefit resulting to retained business of manufacturer being merely incidental thereto. Id. Result held not changed by fact that covenants only operated to prevent injurious competition between dealers and resulted in maintenance of reasonable prices, actual proof of public prejudice or injury not being necessary. Id.

97. Contract whereby combination in restraint of trade purchased all the machinery of one of its constituent members, a corporation, and stipulated that such corporation should not compete in business with any of its members, and provided employment for its president, it appearing further that such machinery was purchased without any plan for its location and use and had remained unused by purchaser for eight months after its purchase, held void. Fisher v. Flickinger Wheel Co., 7 Ohio C. C. (N. S.) 533. Contract whereby railroad agreed to deliver all stock shipped over its lines to certain city to certain stockyards, and not to establish any other stockyards in said city, held void because promotive of monopoly and hurtful to public, and as in violation of Const. § 214, prohibiting preferential contracts for delivery, etc., of freight. Louisville & N. R. Co. v. Central Stockyards Co., 30 Ky. L. R. 18, 97 S. W. 778. Contract, combination, or trust among various producers and sellers of a commodity, direct and necessary or natural effect of which is to restrain competition and control prices, is void at common law. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264. Is immaterial whether commodity is of prime necessity if it is article of legitimate trade or commerce. Id. In order for combination or trust to be in unreasonable restraint of trade, it is not necessary that complete monopoly be formed, but is sufficient if it tends to monopoly and is to injury of the public. Id. In determining whether contract is in unreasonable restraint of trade, all its powers should be considered, and its character determined not alone by what has been done under it, but by what may be done under it when all its powers have been fully exercised. Id. Is no defense to show that prices have not been changed, or even that they have been lowered. Id. Contract whereby defendant appointed complainant sole sales agent for its coke, etc., held void. Id. If combination or trust is illegal because in unreasonable restraint of trade, contract whereby it is effectuated and established is void for same reason. Id. Contract held void because made for purpose of forming illegal trust or combination in violation of Federal anti-trust act. McConnell v. Camors-McConnell Co. [C. C. A.] 152 F. 321. Fact that trust corporation was not party to proceeding to enforce contract of constituent company held not a bar to defense that contract was void as part of arrangement for creation of monopoly. Id. Contract whereby defendant was to have exclusive right to sell plaintiff's machines in certain territory held valid. Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 75 S. C. 378, 55 S. E. 973. Contract with railroad company whereby plaintiff was to build up its milk business for term of years held not void as in restraint of trade or as tending to create monopoly. Delaware, L. & W. R. Co. v. Kutter [C. C. A.] 147 F. 51.

98. See Combinations and Monopolies, 9 C. L. 576.

99. Injurious to public at large. Central New York Tel. & T. Co. v. Averill, 105 N. Y. S. 378.

1. It not being open to construction of giving grantee right to remove any desired quantity of rock and restricting use after removal. Pavkovich v. Southern Pac. R. Co. [Cal.] 87 P. 1097.

whether products manufactured under a secret formula not patented or copyrighted are within the common-law rules in regard to restraint of trade and monopolies.[2]

(§ 3) *L. Effect of invalidity.*[3]—Neither a court of law nor a court of equity will lend its aid to the enforcement of contracts which are illegal, immoral, or contrary to public policy.[4] If the parties are in pari delicto, neither can maintain an action to enforce such a contract, or recover damages for its breach,[5] nor, if the contract has been executed, will the court interfere to disturb the acquired rights of either at the instance of the other.[6] This rule is, however, generally held not to apply to cases where to withhold relief would to a greater extent offend public morals than to grant it,[7] or where one party has been placed at a disadvantage through fraud, duress, or undue influence.[8] Where a contract valid in its inception becomes illegal

2. Manufactured product of a trade secret or private formula not protected by patent or copyright is not immune from common-law rules forbidding monopolies or unreasonable restraints of trade. Park & Sons Co. v. Hartman [C. C. A.] 153 F 24.

Contra: Agency contracts whereby manufacturer of medicine under secret formula sold to jobbers, retailers, and consumers at fixed and uniform prices, and jobbers agreed to sell only to retailers who had executed contracts, and retailers only to purchasers for consumption, held outside rule of restraint of trade, and valid. Dr. Miles Medical Co. v. Jaynes Drug Co., 149 F. 838.

3. See 7 C. L. 789

4. Contract by foreign corporation. Pittsburgh Const. Co. v. West Side Belt R. Co., 151 F. 125. No action in affirmance of illegal contract can be maintained. Union Collection Co. v. Buckman [Cal.] 88 P. 708. Contract calling for construction of building in manner prohibited by St. 1892, c. 419, § 64, held not enforceable in favor of owner, either as foundation of cross-action or as defense to action for labor and services. Eastern Expanded Metal Co. v. Webb Granite & Const. Co. [Mass.] 81 N. E. 251. Where one attempts to enforce illegal or unjust agreement courts will not interfere to give it validity. Fried v. Danziger, 105 N. Y. S. 44. Pleadings held to show on face that transactions on which suit and counterclaim were based were gambling transactions, so that neither party was entitled to any relief. Norris v. Logan [Tex. Civ. App.] 15 Tex. Ct. Rep. 41, 526, 94 S. W. 123. Courts will not enforce contract void as in restraint of trade because establishing unlawful combination. Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264.

5. One employed by year to manage gambling house cannot, on his discharge without cause before expiration of term, recover share of profits which he was to have received in lieu of salary, contract being void since its object was unlawful. Britt v. Davis Bros., 118 La. 597, 43 So. 248. Where contract for sale of land was rescinded because one of purchasers, without knowledge of purchasers, but with that of vendor, acted as agent of both parties and received commission from vendor, held that said agent was not entitled to recover amount paid by him to vendor, nor vendor commissions paid by him to agent. Houts v. Scharbauer [Tex. Civ. App.] 103 S. W. 679. No recovery can be had on quantum meruit for damages for nonperformance by government of an executory contract which is void because not in writing as required by statute. Johnston v. U. S., 41 Ct. Cl. 76.

6. Parties will be left where they placed themselves. Rudolf v. Costa [La.] 44 So. 477. Civ. Code, § 1608, held to apply only to contracts which are in part at least executory, and not to permit grantor of property who has received and retained consideration for his conveyance to recover property conveyed upon sole ground that consideration was unlawful in part. Ripperdan v. Weldy, 149 Cal. Sup. 667, 87 P. 276. Mere fact that part of consideration for transfer of realty consisted of covenant against alienation which could not be enforced held not to make deed void, even of it was ground for rescission. Id. Where life insurance policy, void for want of insurable interest, was issued on insured's fraudulent statement in application that beneficiary was his creditor to full amount of policy, and insurance was paid to such beneficiary, held that insured's administrator could not recover same from him, insured and beneficiary being in pari delicto. Howe's Ex'r v. Morris Griffin's Adm'r [Ky.] 103 S. W. 714 Courts will not enforce payment for sale of liquors made by one posssessing no license therefor. Moise v. Weymuller [Neb.] 110 N. W. 554. Where station agent and shipper agreed upon rate for interstate shipment which was less than published rate, in violation of interstate commerce law, but published rate was demanded and collected at destination, held that shipper could not recover difference. Atchison, etc., R. Co. v. Holmes, 18 Okl. 92, 90 P 22. Plaintiffs conveyed land to defendant pursuant to agreement by latter not to contest or protest plaintiff's application for patent therefor. Held that agreement not to protest being void plaintiff was not entitled to cancellation of deed on defendant's subsequent violation thereof, there being no allegation of fraud. Roy v. Harney Peak Tin Min., Mill. & Mfg. Co. [S. D.] 110 N. W. 106.

7. One induced to bet money upon false foot race under belief that race was fixed so that he would win, when in fact there was conspiracy that he should lose, and thus be swindled and cheated out of his money, held entitled to recover back his money from stakeholder where he demanded its return before race was run or stakeholder had parted with it. Falkenberg v. Allen, 18 Okl. 210, 90 P. 415. Evidence held to sustain finding that there was such a demand. Id.

8. Mere fact that party was unable to write his name held insufficient to show that

by subsequent statutory enactment, no recovery can be had thereon for nonperformance after such statute goes into effect, though the legality of acts done before that time is not affected.[9]

Money advanced to enable one to carry on an illegal business cannot be recovered,[10] nor can one recover the purchase price of goods sold with the knowledge and intention of both parties that they are to be used for an illegal purpose;[11] but a contrary rule prevails where such use is not in the contemplation of the parties when the sale is made, though there is a subsequent unlawful use.[12] It has been held that one furnishing labor and materials of benefit to real property, pursuant to a contract containing an element illegal under a prohibitory statute, may recover on a quantum meruit for their value, where the contract remains entirely executory in that part which is illegal, and is disaffirmed because of such illegality.[13]

The illegality of a contract vitiates all agreements or transactions entered into in furtherance thereof or based thereon,[14] but does not ordinarily affect collateral agreements in no way dependent thereon,[15] nor preclude a recovery on grounds of action existing independently thereof,[16] the test being whether the party seeking to recover can establish his case without relying on the illegal transaction.[17] Where a

he was deceived or imposed upon. Howe's Ex'r v. Morris Griffin's Adm'r [Ky.] 103 S. W. 714.

9. American Mercantile Exchange v. Blunt [Me.] 66 A. 212.

10. Note and mortgage given for money advanced for purpose of enabling defendant to continue in business of operating house of prostitution held void where payee knew that it was to be so used, and that defendant expected to obtain money to pay it from continuation of such business. Anderson v. Freeman [Tex. Civ. App.] 100 S. W. 350. Where it was not shown that money was loaned to firm for purpose and with intent of enabling it to violate laws of state, but on contrary to enable it to pay debts, held that lender was not precluded from recovering amount of loan even if firm was engaged in unlawful sale of intoxicating liquors, which was not shown. Grey v. Callan, 133 Iowa, 500, 110 N. W. 909.

11. One furnishing goods to enable another to conduct saloon under license issued to third person Moise v. Weymuller [Neb.] 110 N. W. 554. Sale of saloon fixtures and stock with understanding that they should be used in violation of liquor laws. Johns v. Reed [Neb.] 109 N. W. 738.

12. Johns v. Reed [Neb.] 109 N. W. 738.

13. Construction of lower portion of building which was entirely in conformity to St. 1892, c. 419, § 64, held not to have deprived plaintiff of right to repudiate contract before constructing roof in manner forbidden by such statute, particularly where it was ignorant of illegality when it executed contract. Eastern Expanded Metal Co. v. Webb Granite & Const. Co. [Mass.] 81 N. E. 251. Fact that some work was done on plans for roof by plaintiff's engineer as part of negotiations for new arrangement between parties, and which did not form part of building and for which no claim was made, held immaterial. Id.

14. Notes given in consideration of compromise of action on notes given for gambling debt held unenforceable. Union Collection Co. v. Buckman [Cal.] 88 P. 708. Award of arbitrator based on illegal contract will not be enforced. Pittsburgh Const. Co. v. West Side Belt R. Co., 151 F. 125.

15. Land was conveyed to defendant in consideration of suppression of criminal prosecutions. Plaintiff had previously acquired title and possession under valid deed. Held that fact that plaintiff participated in negotiations leading to execution of deed to defendant, and led latter to believe that grantor still had title, did not authorize defendant either to evict plaintiff, or, after eviction, sustain defense against assertion of plaintiff's title under principle in pari delicto, etc. Deen v. Williams [Ga.] 57 S. E. 427. H, a minor, who had been convicted of misdemeanor, agreed through his brother to work for plaintiff for ten months if latter would pay his fine and clothe and feed him. Plaintiff paid fine and $10 for clothing. Subsequently with consent of H, defendant gave plaintiff his note for $50 and took over contract with H, and latter worked for defendant for eight months. Held that note was valid regardless of validity of original contract. Dorsey v. Redwine, 1 Ga. App. 626, 57 S. E. 1073. Where plaintiff advanced money to pay premium on policy of insurance in which defendant was beneficiary at latter's instance and request, held no defense to action on due bill given by defendant therefor that policy was void for lack of insurable interest. Locher v. Kuechenmiester, 120 Mo. App. 701, 98 S. W. 92. Where lease was itself lawful and not contrary to public policy, and was supported by independent consideration, fact that lessor was member of unlawful combination held no bar to enforcement of provision therein that lessee should sell only particular kind of beer on premises. Schlitz Brewing Co. v. Nielsen [Neb.] 110 N. W. 746. Invalidity of collateral contract held not to affect validity of main contract. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

16. Brennan v. United Hatters of North America, 73 N. J. Law, 729, 65 A. 165.

17. Where evidence was such that court could not judicially determine that any portion of lease would have been entered into regardless of two unlawful provisions, held

contract not unlawful in itself has been fully performed and the parties have enjoyed the benefits, the fact that one of them has violated a penal statute in the approach to it will not prevent a court from enforcing payment by the other party.[18]

If the contract is an entire one, the illegality of a part of it renders the whole void.[19] If severable, the illegal portion may be rejected, and the legal portion retained and enforced.[20]

No action of the parties or their assignees can so validate an illegal contract as to justify a court in enforcing it where its illegality appears.[21] The illegality cannot be waived,[22] nor can validity be injected into the contract by way of estoppel.[23] The

that entire contract must fall. Anderson v. Shawnee Compress Co., 17 Okl. 231, 87 P. 315. Where plaintiff and defendant induced agent of owner of land to procure them option thereon, in violation of his duty to his employer, by agreeing to give him half of profits resulting from sale, held that plaintiff could not recover on agreement between himself and defendant to divide balance of such profits. Williams v. Kendrick, 105 Va. 791, 54 S. E. 865. Guaranty of performance of illegal contract held unenforceable. Pittsburgh Const. Co. v. West Side Belt R. Co. [C. C. A.] 154 F. 929.

18. Beilin v. Wein, 51 Misc. 595, 101 N. Y. S. 38. Where goods sold were accepted and used by defendant, held that fact that plaintiff, in violation of Pen. Code, § 384r, as amended by Laws 1904, c. 136, making such conduct a misdemeanor, paid commission to defendant's agent through whom sale was made, was no defense to action for purchase price. Sirkin v. Fourteenth St. Store, 105 N. Y. S. 179, afg. 105 N. Y. S. 638.

19. For distinction between entire and severable contracts, see § 4C, post. Illegality and prohibition held to go to whole substance of contract of pledge by pawnbroker and to affect whole transaction from its inception, prohibition being one of law against entering into contract at all. Levison v. Boas [Cal.] 88 P. 825. Covenant whereby husband and wife renounced their marital rights and obligations held to invalidate entire contract. Hill v. Hill [N. H.] 67 A. 406. Contract to do work for city held void where statutory steps had not been taken with reference to letting contract to do part of it. Rodgers v. New York, 51 Misc. 119, 100 N. Y. S. 745. Cannot rely on valid portion and disregard illegal portion, though former is written and latter oral. McConnell v. Camors-McConnell Co. [C. C. A.] 152 F. 321. One cannot show only such part of an entire agreement as is legal and sue on it alone. Continental Wall Paper Co. v. Lewis Voight & Sons Co. [C. C. A.] 148 F. 939. Contract to pay for goods included in account sued on held part of an entire agreement which included provisions invalid under anti-trust act, so that plaintiff was not entitled to recover. Id. If any part of entire consideration of a contract be vicious, whole contract is void. McLane's Adm'r v. Dixon, 30 Ky. L. R. 683, 99 S. W. 601. Contract part of consideration for which was agreement to live in adultery. Id. Where guaranty was in fact made to secure suppression of criminal prosecution, held that it was not made enforceable because legal consideration also entered into it. Beal & Doyle Dry Goods Co. v. Barton, 80 Ark. 326, 97 S. W. 58. Where part of a single consideration for one or more promises is illegal or one or more of several considerations for a single promise is illegal, whole contract is void. Wilson's Rev. & Ann. St. 1903, § 769. Arnett v. Wright, 18 Okl. 337, 89 P. 1116. Where sale and transfer of city liquor license which is prohibited by statute entered into and became part of consideration for promissory note, held that note and mortgage given to secure it were wholly void, both under statute and regardless of it. Id. Remedy on entire note held to fail because of taint of consideration in part. Anderson v. Freeman [Tex. Civ. App.] 100 S. W. 350. Where any material part of entire contract valid at its inception becomes invalid by subsequent statutory enactment, no recovery can be had thereon for nonperformance after statute goes into effect. American Mercantile Exchange v. Blunt [Me.] 66 A. 212.

20. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A. 695; Glucose Sugar Refining Co. v. Marshalltown, 153 F. 620. Where legal portion of consideration for mortgage could be separated from illegal portion and ascertained with certainty, held that it was valid to extent that consideration was legal. Lepper v. Conradt [Wyo.] 89 P. 575.

21. Notes given in consideration of compromise of action on notes given for gambling debt held unenforceable. Union Collection Co. v. Buckman [Cal.] 88 P. 708. Contract for school supplies executed by majority of members of board acting independently, though not binding on district, held not void as contrary to public policy so as to preclude subsequent ratification. Richards v. School Tp., 132 Iowa, 612, 109 N. W. 1093.

22. Boyett v. Standard Chem. & Oil Co., 146 Ala. 554, 41 So. 756; Pittsburgh Const. Co. v. West Side Belt R. Co., 151 F. 125. Where pleadings show on their face that transactions on which suit is based are gambling transactions, appellate court will direct dismissal of suit though neither party raised question of illegality. Norris v. Logan [Tex. Civ. App.] 15 Tex. Ct. Rep. 41, 526, 94 S. W. 123.

23. Fact that defendant interposed pleas to common counts, setting up payment of demands sued on by execution of notes, held not to estop him from setting up by way of defense to counts based on such notes that they were given in payment for fertilizer sold without complying with penal statute. Boyett v. Standard Chem. & Oil Co., 146 Ala. 554, 41 So. 756. Where deed was executed to prosecutor only for purpose of suppressing criminal prosecution, held that prosecutor, being himself in fault, could not, on strength

defense of want of notice of illegality is available only where the contract is a negotiable instrument in the hands of one who has acquired it for value before maturity and in the ordinary course of business.[24]

§ 4. *Interpretation. A. General rules.*[25]—This section includes only the general rules of construction applicable to all contracts with a few concrete applications thereof by way of illustration. In so far as possible the construction of particular contracts has been excluded to the topics dealing with the subjects to which they relate.[26]

If the contract is in writing, the expressed[27] intention of the parties,[28] to be de-

of deed alone, invoke aid of equitable estoppel against one not party to deed, in whom legal title was vested at time of its execution, in order to prevent true owner from asserting title. Deen v. Williams [Ga.] 57 S. E. 427.

24. Defense that original non-negotiable notes were given for gambling debt held available against assignee of new notes given in consideration of compromise of action thereon. Union Collection Co. v. Buckman [Cal.] 88 P. 708.

25. See 7 C. L. 791.

26. See Agency 9 C. L. 58; Deeds of Conveyance, 7 C. L. 1103; Sales, 8 C. L. 1751; Vendors and Purchasers, 8 C. L. 2216, and other like topics.

27. Intention must be determined from terms. Ochs v. Carnahan Co. [Ind. App.] 80 N. E. 163. Intention expressed by words used controls. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67. Where unequivocal meaning is to be determined from instrument itself. Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 105 Va. 785, 54 S. E. 884. Contract itself should be referred to to determine its character. Adkins & Co. v. Campbell [Del.] 64 A. 628. Is duty of court to enforce contract as made. Bennett v. Burkhalter [Ga.] 57 S. E. 231. Parties held to contract as made by them. Ringle v. Quigg, 74 Kan. 581, 87 P. 724. Contract to be enforced as written, duty of court being to ascertain terms of contract on which parties have in fact agreed and to give effect to it. Chesapeake & O. R. Co. v. Com., 105 Va. 297, 54 S. E. 331. Though court, in construing contract, may consider circumstances under which it was made, when breach is averred its language must determine to what parties have bound themselves. Stonega Coke & Coal Co. v. Louisville & N. R. Co., 106 Va. 223, 55 S. E. 551. Court cannot substitute new contract. Baraboo Land, Mining & Leasing Co. v. Winter, 130 Wis. 457, 110 N. W. 413; Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 N. W. 237; Old Colony Trust Co. v. Standard Beet Sugar Co., 150 F. 677. Where plaintiffs failed to procure release of chattel mortgage on personalty and permitted another mortgage thereon to be foreclosed and property to be sold, thus rendering performance on their part of agreement whereby such personalty was to be exchanged for realty impossible, held that court could not direct defendant to make conveyance of realty on payment by plaintiff of sum of money in lieu of personalty. Constantine v. Caswell [Wash.] 91 P. 7. In action on written promise to pay money, complete in itself and not ambiguous or uncertain in meaning, intention of maker and legal effect of terms used should be determined by court from inspection of terms used, and plea that intention of promisor differs from legal effect of terms used is demurrable. Langley v. Owens [Fla.] 42 So. 457. Plea that it was not intended that notes which were in law sealed instruments should be executed as sealed instruments held demurrable. Id. Contract being void under statute, held that it was not competent for plaintiff by averment and oral proof to change its character and legal effect. Woods v. Bates, 126 Ill. App. 180. Allegations as to what parties contemplated and intended cannot vary terms of contract as stated. Milligan v. Keyser [Fla.] 42 So. 367. Construction placed upon contract by one of the parties is not permissible to prove its meaning. Dakan v. Union Mut. Life Ins. Co., 125 Mo. App. 451, 102 S. W. 634. In controversy as to making of agreement, one of the parties to it may not testify as to what he had in mind in preliminary negotiations, nor state his unexpressed intent in such negotiations. Cornelius v. Atchison, etc., R. Co., 74 Kan. 599, 87 P. 751.

28. Shaw v. Pope [Conn.] 67 A. 495; Adkins & Co. v. Campbell [Del.] 64 A. 628; Scotch Mfg. Co. v. Carr [Fla.] 43 So. 427; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481; Grothe v. Lane [Neb.] 110 N. W. 305.

Construction of Particular Contracts. Agency contracts (See, also, Agency, 9 C. L. 58). Contract held to provide for weekly loans to agent, to contemplate repayment, and to pledge agent's contemplated commissions as collateral security therefor. New York Life Ins. Co. v. Wolfson [Mo. App.] 101 S. W. 162. Liability of agent on mortgage given to secure advances and which it was agreed should be paid out of renewal commissions held terminated where he lawfully exercised right to resign. Security Trust & Life Ins. Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125.

Contracts relating to corporate stock (See, also, Corporations, 7 C. L. 862). Where contract gave defendant option to purchase stock in corporation in case certain firm gave unfavorable opinion as to patentability of certain invention, and provided that he should determine whether he would or would not take it as soon as opinion was received, if it was unfavorable, held that he was not required to give formal notice of his determination not to take it, but his communication of his determination to treasurer of corporation and assignment to it of certificate of stock which had been placed in his name was sufficient. Randall v. Claflin [Mass.] 80 N. E. 594. Agreement to purchase stock at

end of first year held to mean at end of year from date of its issue to plaintiff. Edmonds v. Evarts, 146 Mich. 485, 13 Det. Leg. N. 867, 109 N. W. 844. Agreement to deliver certificates for ninety per cent. of capital stock of corporation held complied with by delivery of ninety per cent of that outstanding, though articles of incorporation provided for a larger amount of stock than was actually issued. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31.

Loans: Plaintiff and her husband gave sum of money to defendant under agreement that he might use it until they needed it, it to become defendant's property if not demanded in their lifetime. Held that death of plaintiff's husband did not convert transaction into gift or discharge defendant's obligation to repay money to plaintiff on demand, and that she could claim it and maintain action therefor on demand being refused. Weltsch v. Straub, 74 Kan. 292, 86 P. 148. Held nothing in contract to loan money to be advanced when building was completed on certain lot which prevented plaintiff from having it completed in any way he saw fit, either personally or by contract, and with or without outside assistance. Holt v. United Security Life Ins. & Trust Co. [N. J. Err. & App.] 67 A. 118. Provision in application for loan that charges for examining title to property offered as security, etc., should be paid whether loan was made or not held not to entitle plaintiff to recover such charges in case it refused to make loan capriciously, in bad faith, and without substantial reason. Title Guarantee & Trust Co. v. Wesolick, 115 App. Div. 608, 101 N. Y. S. 7. Uncanceled lis pendens filed against property in action for violation of tenement house act held sufficient reason for declining loan, in absence of evidence of bad faith, statute making fine imposed for such violation lien on property. Id. Plaintiff held to have made prima facie case by proving performance of services. Id.

Contracts of employment (See, also, Master and Servant, 8 C. L. 840). Agreement held only to preclude employe from disclosing processes of manufacturing steel covered by certain patents, and not from disclosing discoveries by complainant. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A. 695. Contract whereby defendant hired plaintiff for theatrical engagement of one week held not to require it to give her two weeks' notice before discharging her. Parker v. Hyde & Behman Amusement Co., 53 Misc. 549, 103 N. Y. S. 731. Contract whereby defendant agreed to and did "employ" plaintiff for certain period held to require it to keep him in its service during such period. White v. Lumiere North American Co., 79 Vt. 206, 64 A. 1121. Contract held not to require plaintiff's presence in America during certain years unless exigency occurred making it essential to promotion of best interests of defendants. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241. Contract requiring employe to assign to employer half interest in all inventions made by him "in or relative to organs" during term of employment held to cover inventions applicable alike to pianos and organs, but only in so far as they related to latter. Wright v. Vocalion Organ Co. [C. C. A.] 148 F. 209.

Option contracts (See, also Landlord and Tenant, 8 C. L. 656; Vendors and Purchasers, 8 C. L. 2216, etc.). Exercise by seller of certain business of his option to repurchase held not to render buyer liable for profits of business during his ownership. Kerting v. Hatcher, 216 Ill. 232, 74 N. E. 783 Option contract for sale of bonds obligating defendant to purchase certain other bonds on accepting "this option" held not to require purchase on delivery and acceptance of writing granting option, but only on election to exercise such option. Martyn v. Hitchings, 192 Mass. 71, 78 N. E. 380. Contract held one for purchase of certain options and not mere option to do so at defendant's election. Baraboo Land, Min. & Leasing Co. v. Winter, 130 Wis. 457, 110 N. W. 413.

Contracts relating to sales of realty (See, also, Vendors and Purchasers, 8 C. L. 2216). Provision that land should be sold "whenever regarded as most advantageous to both parties" held not necessarily to prevent sale until such time as it would result in profit to both parties, but sale might be made in order to prevent further loss. Mariner v. Ingraham, 127 Ill. App. 542. Language used by person with whom part of purchase price of land was deposited to secure removal of tenement house violation held not to bind him to pay over full amount of deposit to vendees in violation of express terms of agreement under which he held it, but that vendees were not entitled to recover any portion of it unless they removed violation, and then only reasonable cost of doing so. Rogers v. Wilkenfeld, 52 Misc. 511, 102 N. Y. S. 637. Contract guarantying that certain mills sold by plaintiff to defendant would be sold by latter in specified time held to require defendant to do selling and plaintiff to pay expenses thereof. Owens Co. v. Doughty [N. D.] 110 N. W. 78. Word "expenses" in contract for division of net proceeds of sale of land after deducting expenses, etc., held to include allowance to defendant for services in caring for land and making sales. Rust v. Fitzhugh [Wis.] 112 N. W. 508.

Sales of personalty (See, also, Sales, 8 C. L. 1751). Contract held not to require delivery of prints with backgrounds or borders in four different colors. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306, afg. 125 Ill. App. 602 Contract held not to require plaintiff to emboss certain prints. Id. Provision in contract for sale of corn as to amount to be delivered and payment by way of liquidated damages to be made in case of short crop construed. Bell v. Jordan [Me.] 65 A. 759. In action for breach of contract that notes given for interest in patent should be paid only out of profits realized from manufacture and sale of machines thereunder and from sale of right to manufacture and sell, and that notes should not be sold, held that fact that corporation was organized with acquiescence of all parties to acquire whole interest in patent, to which plaintiff and defendants assigned their interests in return for stock, did not terminate defendant's liability under contract. Myrick v. Purcell, 99 Minn. 457, 109 N. W. 995. Plaintiff's assignment of his interest to corporation held not sale to others of right to manufacture and sell within meaning of contract. Id. Contract held to require seller to furnish coal from particular mines. Hesser v. Chicago & Welleston Coal Co. [C. C. A.] 151 F. 211 Contract for sale of lumber

held not to absolutely require delivery of minimum number of feet. Demarest v. Dunton Lumber Co., 151 F. 508.

Restrictive covenants (See, also, Buildings and Building Restrictions, 9 C. L. 441; Deeds of Conveyance, 7 C. L. 1103). Agreement by defendant not to engage in turpentine business within ten miles of certain town so long as plaintiff should operate turpentine distillery "at" said town held to preclude defendant from engaging in said business while plaintiff operated still near said city, though outside its corporate limits. Harris v. Theus [Ala.] 43 So. 131. Agreement not to engage in lumber business held broken by procuring lumber for others as matter of accommodation, though defendant made no profit out of so doing. Rice v. O'Neal, 120 Ill. App. 259. Agreement on sale of secondhand business "not to engage in the business of conducting a secondhand store or to buy or sell secondhand goods" in certain city held not to preclude plaintiff from taking employment from another dealer in secondhand goods at periodical wages, without any ownership of goods, commissions on sales, or interest in business. Cool v. McDill, 38 Ind. App. 621, 78 N. E. 679. Agreement not to engage in certain business held broken by carrying on such business as trustee. Geiger v. Cawley, 146 Mich. 550, 13 Det. Leg. N. 848, 109 N. W. 1064. Contract "to discontinue the publication of" a certain paper in certain town held broken by sale of said paper with view of its continued publication in said town, and with covenant to warrant and defend purchaser's right to continue its publication under same name. Vandiver v. Robertson, 125 Mo. App. 307, 102 S. W. 659. Though contract whereby defendant agreed to sell complainant's beer exclusively did not in terms bind complainant to furnish beer, held that decree restraining its violation should provide that restraint should continue only so long as complainant continued to furnish beer to defendant at reasonable rates and of good quality. Christian Feigenspan v. Nizolek [N. J. Eq.] 65 A. 703. Contract held to preclude defendant from engaging in laundry business by entering into employ of person engaged in such business to work therein in any capacity whatever. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540. Contract held to preclude sale by defendant of any wire product resulting from certain experiments until he had informed complainant of the ingredients of which it was composed with their proportions and the formula for their combination, as well as submitting product to it in shape of wire, and until it had had thereafter a reasonable time in which to determine whether it would undertake its manufacture. Driver-Harris Wire Co. v. Driver [N. J. Err. & App.] 65 A. 981. Contract held to bind wife not to erect on her lot any building within five feet of line of adjoining lot conveyed by herself and her husband. Wahl v. Stoy [N. J. Eq.] 66 A. 176. Contract held to preclude erection of club house on certain property. Boyden v. Roberts [Wis.] 111 N. W. 701.

Contracts relating to railroads (See, also, Railroads, 8 C. L. 1590; Building and Construction Contracts, 9 C. L. 424). Agreement to construct branch line of railroad held to require construction of completed line, including laying of rails. Ford v. Ingles Coal Co. [Ky.] 102 S. W. 332. Contract obligating defendant to construct substructure of railroad branch and plaintiff to lay the track "and to maintain and operate the same" held to require plaintiff to replace bridge built by defendant and subsequently washed away. Louisville & N. R. Co. v. U. S. Iron Co. [Tenn.] 101 S. W. 414. Contract of defendant railroad company to pay for ties furnished by plaintiff by carrying freight for latter at certain rates, and providing that for ten years he should have exclusive privilege of shipping ties, etc., over defendant's road at said rates, held broken by defendant's refusal to have freight charges against third person, to whom he had assigned said exclusive privilege with defendant's consent, debited against plaintiff's claim at latter's request. Jonesboro, etc., R. Co. v. Watts, 80 Ark. 543, 98 S. W. 358. Assignment of shipping privileges held not intended to deprive plaintiff of his right to collect debt, but to contain implied provision authorizing application of freight charges against assignee on debt due plaintiff. Id. Where contract provided that railroad should pay plaintiff for ties by carrying freight for him, he to have ten years in which he could require satisfaction of debt in that manner, and that in case of refusal to pay in that manner he was to have immediate right of action for amount due him, held that on refusal to pay in services plaintiff had immediate right of action for payment in money, and was not obliged to wait until expiration of ten years or to renew demand for payment in services. Id.

Miscellaneous contracts: Where contract provided that parties, both of whom were residents of Idaho, should **organize corporation** to take over certain mining property, held that organization of plaintiff corporation by one of such parties without consent of other, and under laws of foreign state, was not compliance with contract, other party having right to insist on its organization under laws of Idaho. Olympia Min. Co. v. Kerns [Idaho] 91 P. 92. Decedent held not to have caused defendants **"any extra trouble"** within meaning of contract whereby he agreed to give them note in suit, in addition to amount paid them for caring for him, in case he did so. Harter v. Morris, 124 Ill. App. 377. Contract held in nature of **commission contract**, giving defendants right to return unsold goods received by them from plaintiff. David Bradley Mfg. Co. v. Tedford, 127 Ill. App. 1. Contract held to give defendant unrestricted **right to use of athletic park** by its members for exercise, etc., but not to its own pecuniary profit, and this without liability to account to plaintiff. Dockstader v. Young Men's Christian Ass'n [Iowa] 109 N. W. 906. Contract held not to require defendant to inaugurate any exhibitions or athletic meets, or to procure others to do so. Id. Defendant held not liable as for rental value of improvements made by plaintiff, latter's remedy, if any, being for damages. Id. Defendant held liable for any income, in excess of necessary expenditures, derived from sale of park privileges to its own members. Id. Fact that contract provided that defendant was not to be liable for any shortage in revenues derived from park held not to relieve it from

liability if it refused to permit park to be used for exhibitions, etc., for purpose of deriving revenue therefrom. Id. Contract held to require relator to execute all orders **for binding** received before its termination though work was not completed until afterwards, so that new contract rate was not applicable thereto. Smith Printing Co. v. State Auditors [Mich.] 112 N. W. 130. Granting privilege to another to make silhouettes held not breach of contract whereby plaintiff was granted **exclusive privilege** within certain concession **of taking and selling photographs,** and defendant agreed not to grant "like or similar" privileges to others. Frankel v. German Tyrolean Alps, 121 Mo. App. 51, 97 S. W. 961. **Advances** which under contract plaintiff was obliged to make held not limited by ordinary and customary advances to parties getting out wood for market, but only by sum actually and properly expended by defendants in so doing. St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701. Contract held to require defendant to pay half expenses of **maintaining and operating elevator** even after he ceased using it. Globe Ins. Co. v. Wayne, 75 Ohio St. 451, 80 N. E. 13. One who agrees **to pay debt of another** due on note is liable for attorney's fee therein stipulated for. Trabue v. Wade [Tex. Civ. App.] 17 Tex. Ct. Rep. 591, 95 S. W. 616. Contract whereby plaintiffs agreed **to publish and deliver reports** within ninety days from time when material was delivered to them held to contain implied agreement on part of defendants to furnish such material. Jones & Co. v. Gemmel Statesman Pub. Co. [Tex.] 99 S. W. 701, rvg. 94 S. W. 191. Contract held to require parties to it to furnish their mother **care and support** wherever she might choose to reside, and not to require such support to be furnished solely at expense of party with whom she resided. Payne v. Payne, 129 Wis. 450, 109 N. W. 105. Contract whereby plaintiff was **to use** his **best endeavor to secure concessions** to mine asphalt held not to require him to procure concession directly from government, but to have been performed by securing assignment of concession from another. Crichfield v. Julia [C. C. A.] 147 F. 65. Provision in contract for installation of sprinkler system that owner of building should be liable for any loss or damage by fire to plaintiff's **"material and equipment"** while in its building held to render owner liable for equipment destroyed by fire before completion of contract, though it had been attached to building, where plaintiff also reserved right to remove equipment in case of default in payment. Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co. [C. C. A.] 148 F. 159. Owner held liable for certain materials not actually destroyed where it appeared that they were completed portions of equipment, and, as such, became useless for the purposes of the contract when plant was destroyed. Id. Agreement by one to whom land was conveyed in consideration of his assuming certain debts of an insolvent firm, etc., that, if he obtained more than $8 per acre therefor "after all cost, expenses, and pay" for his trouble had been paid, he would turn over balance to grantor, held to refer to expense of selling land and not to expense of winding up business of firm. Bray v. Carroll [Ark.] 100 S. W. 744. Agreement whereby defendants assumed and agreed to pay all liabilities of bank, aggregating about certain sum, held not to limit their liability to amount so specified. Moore v. First Nat. Bank [Colo.] 88 P. 385. Character and quantity of goods to be furnished for sale by plaintiff held to have been left to defendant's discretion. Mathis v. Harrell, 1 Ga. App. 358, 58 S. E. 207. Contract between plaintiff and government for building bridges held not to prevent him from procuring any part of work to be done by others, and hence instruction that agreement between plaintiff and defendant that latter should do substructural work on such bridges was not binding because impossible of performance under plaintiff's contract with government was properly refused. Virginia Bridge & Iron Co. v. Crafts [Ga. App.] 58 S. E. 322. Where contract provided that defendant should do all substructural work on any bridges for construction of which plaintiff might obtain contracts from government, held that contention that reduction of time within which work was to be done under its bid was making of new contract in which defendant had no interest and which was not binding on him was properly refused. Id. Contract held to require not only delivery of certain specified trees in fall of 1903 but keeping of them alive and planting of them into an orchard in spring of 1904. Leathers v. Geitz [Iowa] 112 N. W. 191. Contract held not to require defendant to pay freight on certain machinery. Lowell Mfg. Co. v. Aultman Engine & Thresher Co. [Kan.] 90 P. 1132. Assignee of contract for cutting timber on government land held required, under contract of assignment, to repay assignor all money deposited by latter with government as security as soon as such deposit could, by rule of government, be applied annually in proportion to quantity of timber cut, in payment for timber cut. Yanish v. Neils Lumber Co., 101 Minn. 78, 111 N. W. 921. If duty to obtain consent of plaintiff's surety to application of deposit was on anyone, held that it rested on assignee. Id. Bank, to which interest in life insurance policy was assigned in payment of debt, agreed to pay mortuary calls, etc., contract did not require assignor to give bank notice of such calls as made, and policy provided when and where payments were to be made. Held that it was duty of bank to make periodical inquiries of insurer as to amount of premiums and to pay them when due. Scheele v. Lafayette Bank, 120 Mo. App. 611, 97 S. W. 621. Instrument held an assignment of a franchise, and not merely a grant of a right thereunder. In re Long Acre Light & Power Co., 117 App. Div. 80, 102 N. Y. S. 242. Provision authorizing defendants to sell goods consigned to them held inapplicable where failure to perform was not due to personal neglect or refusal of plaintiff and agreement had not expired by its own limitation. Napier v. Spielmann, 103 N. Y. S. 982. Agreement by creditor to forbear from forcibly collecting his claim held to contemplate merely collection by legal process, and not to have been violated by presentation for collection of note of debtor at bank where it was payable. Mount Vernon Rattan Co. v. Joachimson, 103 N. Y. S. 1045. Contract held to contemplate that defendants should continue in commission

rived from the entire instrument,[29] controls, and technical rules of construction must yield to it.[30] When the form and substance of the instrument conflict, the latter controls.[31] Words are to be given their usual and ordinary meaning [32] in the absence of anything showing a contrary intention.[33] Where a word having two well recognized meanings is used, the meaning intended must be determined by the context.[34] "And" may be read "or" when necessary to effectuate the intention.[35] Other contracts having reference to or bearing on the one in suit may be looked to.[36]

business and sell plaintiff's goods for whole of succeeding year. Wilson v. Wernwag, 217 Pa. 82, 66 A. 242. Contract held to guarantee plaintiff six barrels of rice per acre whether he raised that much or not. Linton v. Brownsville Land & Irrigation Co. [Tex. Civ. App.] 102 S. W. 433. Promise to execute notes payable in certain county for indebtedness found due on an accounting held promise to pay debt in that county. Parr v. McGowan [Tex. Civ. App.] 98 S. W. 950. Contract held one to give plaintiff certain interest in business when decedent, in exercise of honest and reasonable judgment, deemed that he was able to withdraw certain sum from said business consistently with keeping up most advisable volume of business. Ott v. Boring [Wis.] 110 N. W. 824. Agreement by tenants of building authorizing plaintiff to maintain bootblacking stand on sidewalk adjoining premises held not to confer any rights as against anyone but themselves, so that they were not guilty of breach because erection was prevented by city or landlord. Speliopoulos v. Schick, 129 Wis. 556, 109 N. W. 568. Contract authorizing bank to hold notes, etc., as security for indebtedness of correspondent bank held to refer only to such as were deposited with it or came into its hands as collateral security. Van Zandt v. Hanover Nat. Bank [C. C. A.] 149 F. 127. Complainant held entitled to decree requiring assignment to it of certain patents procured by one of defendants and assigned by him to other defendant who took with notice. Davis & Roesch Temperature Controlling Co. v. Tagliabue, 148 F. 705.

29. Mebius & Drescher Co. v. Mills [Cal.] 88 P. 917; Cool v. McDill, 38 Ind. App. 621, 78 N. E. 679; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Co. [La.] 44 So. 481; Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67; Bell v. Jordan [Me.] 65 A. 759; Skowhegan Water Co. v. Skowhegan Village Corp. [Mass.] 66 A. 714; People v. Gluck, 188 N. Y. 167, 80 N. E. 1022; Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134; Beverlin v. Casto [W. Va.] 57 S. E. 411.

30. Technical words will be limited and controlled in their effect by intention of parties gathered from instrument considered as whole in light of nature of subject-matter and purpose. Toothman v. Courtney [W. Va.] 57 S. E. 415 [Advance sheets only]. Instrument held lease though containing terms technically appropriate to conveyance of absolute estate. Id. Principles of technical nicety cannot be strictly applied in construction of everyday oral contracts made by plain business men in their course of trade or traffic. Scotch Mfg. Co. v. Carr [Fla.] 43 So. 427.

31. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022.

32. Cool v. McDill, 38 Ind. App. 621, 78 N. E. 679. Contract to drill oil and gas well. Collier v. Munger [Kan.] 89 P. 1011. Words taken in primary and general sense unless contrary intention shown. B. & C. Comp. § 709. Portland Iron Works v. Willett [Or.] 89 P. 421. Word "plant" in mortgage held not to include lands more than 200 miles from factory, though purchased for purpose of procuring additional raw material for its use. Old Colony Trust Co. v. Standard Beet Sugar Co., 150 F. 677. When words having definite legal meaning are knowingly used in written instrument, parties will be presumed to have intended them to have their proper meaning and effect, at least in absence of any contrary intent appearing by instrument. Langley v. Owens [Fla.] 42 So. 457. Note with device "(L. S.)" printed or written after name of promisor held sealed instrument. Id. Evidence held insufficient to sustain burden resting on plaintiff to show that term "six story building" as used in contract had some special meaning understood by parties, or which they could be fairly charged with as understanding, according to which building in question was not within its terms. Abrams v. Block, 101 N. Y. S. 109.

33. Particular word, phrase, or term may express meaning different from its common one when used in instruments concerning subject-matter in relation to which such different meaning is generally understood and accepted. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67. "Horse power" held to mean efficient horse power upon basis of seventy-five per cent of efficiency. Id.

34. Word "taxes" as used in grant of joint right to use line of railroad for 999 years providing that expense of maintenance shall be divided in proportion to use made of property, and that "taxes on property jointly used shall be included in the cost of maintenance," held to include special assessments for local improvements. Chicago Great Western R. Co. v. Kansas City North Western R. Co. [Kan.] 88 P. 1085.

35. To prevent incongruities and absurdities. Manson v. Dayton [C. C. A.] 153 F. 258. Word "and" read as "or" in agreement not to engage in business of selling "hardware, furniture, implements, buggies and wagons." Geiger v. Cawley, 146 Mich. 550, 13 Det. Leg. N. 848, 109 N. W. 1064.

36. Contract and chattel mortgage executed contemporaneously with deed held to be considered in determining whether it was intended as mortgage. Ferguson v. Boyd [Ind. App.] 79 N. E. 549. Held that first contract, though void, could be looked to for terms of any new arrangement made with express reference to its subject-matter. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867.

Words of broad signification will be interpreted with reference to the subject-matter of the contract, unless there is a clear intention to the contrary.[37] General words following an enumeration of particular things may include other things not ejusdem generis, if such appears to have been the intention of the parties.[38] The doctrine of expressio unius est exclusio alterius is not of universal application, but is always subject to the intention of the parties as evidenced by the contract.[39]

Words of doubtful meaning should be construed most strongly against the party using them,[40] and one will be bound by the meaning which he knew the other party supposed them to bear.[41] By statute in some states when different constructions of a provision are otherwise equally proper, that is to be adopted which is most favorable to the party in whose favor such provision was made.[42]

Of two conflicting clauses the one appearing to be the most important,[43] or which is the most in harmony with other parts of the contract,[44] should be given effect. Written and printed parts must if possible, be construed together,[45] but if in conflict, the written will prevail.[46] So too, where the contract is partly in writing and partly oral, the written and oral parts must be construed together.[47] A bilateral written contract purporting to set out the mutual undertakings of the parties will, however, be presumed to contain the whole contract between them.[48]

If possible the contract should be given a reasonable construction,[49] and one

37. Unless intention is clear that they should be taken in broad meaning. Van Zandt v. Hanover Nat. Bank [C. C. A.] 149 F. 127.

38. Shaw v. Pope [Conn.] 67 A. 495. Construed in light of attendant circumstances. Lindeke v. Associates Realty Co. [C. C. A.] 146 F. 630. Forfeiture clause held to apply to all covenants of lease. Id.

39. Provision of contract for extension of time for completion of work in case of delay caused by government held not to preclude recovery of damages resulting from such a delay. William Cramp & Sons v. United States, 41 Ct. Cl. 164.

40. In favor of him who has been misled and advanced his money upon it. Contract of guaranty. Loomis v. MacFarlane [Or.] 91 P. 466. Ambiguous contract, construed most strongly against person who prepared it. Small Co. v. Claxton, 1 Ga. App. 83, 57 S. E. 977. Contract prepared by one party by filling out printed blank used by him in his business. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022. Contracts prepared for general use. Van Zandt v. Hanover Nat. Bk. [C. C. A.] 149 F. 127. Language by which a party binds himself must be taken most strongly against him. Linton v. Brownsville Land & Irrigation Co. [Tex. Civ. App.] 102 S. W. 433. Rule that written instrument is to be construed most strongly against writer is last rule to be resorted to, and never to be relied on except where other canons of construction fail. Empire Rubber Mfg. Co. v. Morris, 73 N. J. Law, 602, 65 A. 450.

41. Where contract is in fact understood by one party in certain sense, and other party knows that he so understands it, then it is to be taken in that sense provided this can be done without making new contract. Snead & Co. Iron Works v. Merchants' Loan & Trust Co., 225 Ill. 442, 80 N. E. 237. Letter held to be taken as part of contract in so far as it gave meaning to part of original draft of building contract. Id. Where terms of agreement have been intended in different sense by parties, that sense is to prevail against either party in which he had reason to suppose other understood it. Code Civ. Proc. § 341. Patterson v. First Nat. Bk. [Neb.] 110 N. W. 721. Held that, if plaintiff understood, and bank officials had reason to suppose she understood, president of bank was acting in its behalf in executing and delivering to her document, in return for her check, by which he directed bank to pay her specified sum at certain time, bank was bound by that understanding, though no active fraud was alleged or proven. Id. If admits of two inferences, should be interpreted in sense in which promisor had reason to suppose it was understood by promisee. Wahl v. Stoy [N. J. Eq.] 66 A. 176. When terms have been intended in different sense by parties, that sense is to prevail against either in which he supposed other understood it. B. & C. Comp. § 712. Portland Iron Works v. Willett [Or.] 89 P. 421.

42. B. & C. Comp. § 712. Portland Iron Works v. Willett [Or.] 89 P. 421.

43. Grant of water for power. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67.

44. First held to prevail. Brady v. Caroline Steel Bridge & Const. Co. [S. C.] 56 S. E. 964.

45, 46. Perry v. Acme Oil Co. [Ind. App.] 80 N. E. 174.

47 American Mercantile Exchange v. Blunt [Me.] 66 A. 212.

48. Presumed that if minds of parties met upon any other conditions, elements, or propositions, they were abandoned except as embodied in writing. Foster v. Lowe [Wis.] 110 N. W. 829. Such presumption can be overcome, if at all, only by very clearest proof. Id. Finding in action on land contracts that it had not been overcome, held not contrary to preponderance of evidence. Id.

49. Cool v. McDill, 38 Ind. App. 621, 78 N. E. 679; Empire Rubber Mfg. Co. v. Morris, 73 N. J. Law, 602, 65 A. 459; New Jersey Co.

upholding it should be preferred to one rendering it inoperative.[50] Provisions for forfeitures will be strictly construed and never helped out by implication.[51] Whether a given stipulation is to be deemed a condition precedent, a condition subsequent, or an independent agreement, is purely a question of intent.[52]

Provisions necessary to effectuate the evident intention may be supplied by implication,[53] and when so implied are as much a part of the contract as though expressed.[54] The law enters into and becomes a part of every contract.[55]

v. Nathaniel Wise Co, 105 N. Y. S. 231. Construction making contract reasonable, fair, and just, preferred to one making it unreasonable, unfair, or unusual and extraordinary, where susceptible with two constructions equally consistent with language used. Stein v. Archibald [Cal.] 90 P. 536. Should not be given unreasonable meaning, or one that would result in imposing hard or inequitable conditions, if reasonably susceptible of different meaning, doubt being resolved in favor of milder meaning in such case. Linton v. Brownsville Land & Irrigation Co. [Tex. Civ. App.] 102 S. W. 433. Meaning should not be adopted which will make agreement absurd or so unreasonable that one could not fairly be thought to have so intended if different meaning can be found in the words which will avoid that result. Rust v. Fitzhugh [Wis.] 112 N. W. 508.

50. Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 105 Va. 785, 54 S. E. 884. Contract held only to bind employe not to disclose process of which he obtained knowledge while in complainant's service, and hence not to be void as restraining him from following his chosen profession. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A. 695. Between two permissible constructions, that which establishes valid contract should be preferred to that which does not. Mebius & Drescher Co. v. Mills [Cal.] 88 P. 917. Deed will not be so construed as to render it nullity as to any of the parties thereto, if, by any reasonable construction, such result can be avoided. Beverlin v. Casto [W. Va.] 57 S. E. 411. If possible, construed as being made for legal rather than illegal purpose. Delaware, L. & W. R. Co. v. Kutter [C. C. A.] 147 F. 51. Particularly when attacked by party thereto who has been benefited thereby. Virginia Bridge & Iron Co. v. Crafts [Ga. App.] 58 S. E. 322. Written correspondence manifesting bona fide intention on both sides to come to definite agreement should, if possible, be so construed as to effectuate the general purpose, and so as to constitute rather than defeat an agreement. Empire Rubber Mfg. Co. v. Morris, 73 N. J. Law, 602, 65 A. 450.

51. Contract whereby plaintiff sold leasehold to defendant held not to entitle plaintiff to forfeiture because defendant had not paid certain lumber bill, ground rent, or insurance, or because he failed to pay interest on purchase price monthly. Tetley v. McElmurry, 201 Mo. 382, 100 S. W. 37. Where contract contains enforceable provision for forfeiture upon certain default after specified notice, in order for forfeiture to take place, must appear that notice was given in compliance with contract both as to time and contents, and that default therein specified occurred. Georgia R. & Banking Co. v. Haas, 127 Ga. 187, 56 S. E. 313.

52. To be derived from consideration of whole contract, nature of act required, and subject-matter to which it relates. Skowhegan Water Co. v. Skowhegan Village Corp. [Me.] 66 A. 714. Stipulation for supply of potable water and hydrant service held condition precedent which was to be strictly performed each six months before defendant city could be held liable to pay installment. Id. Making payment in advance held suspensive condition or condition precedent, so that obligation of lessor under oil and gas lease did not come into existence unless such payment was made. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481. Rendition of services in promotion of corporation held not condition precedent, but condition subsequent to conveyance of stock to it. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F. 820. Agreement not to protest application for patent for public land held condition subsequent. Roy v. Harney Peak Tin Min., Mill. & Mfg. Co. [S. D.] 110 N. W. 106.

53. Law will imply agreement to do what the contracting parties understood was to be done in order that other party may have benefits of contract, where equity and justice require it, even though there was no express agreement to that effect. Creamer v. Metropolitan Securities Co., 105 N. Y. S. 28.

Provisions implied: Court may supply words "per annum" after words "with interest at eight per cent" in note in exercise of its duty of construing contract. Brooks v. Boyd, 1 Ga. App. 678, 57 S. E. 1093. Contract whereby plaintiff was to construct machine for defendant held to contain implied provision that plaintiff would use reasonably suitable material and do reasonably skilful work, and, if machine was a failure because of plaintiff's failure to do so, defendant was not bound to pay cost of its construction, though contract provided that defendant should pay all expenses incurred in getting up said machine whether it finally met with its approval or not. Foote & Davies Co. v. Houchin Mfg. Co. [Ga. App.] 58 S. E. 368. Sale of defendant's interest in good will of dental business held to imply agreement that defendant would so practice his profession as not to destroy or injure business he had sold, so that he would be enjoined from practicing in city though was no express agreement not to do so. Foss v. Roby [Mass.] 81 N. E. 199. Where state contracted with defendant to print and manufacture certain volumes of the supreme court reports, and contract provided that plates should be delivered to and become property of state, held that law would imply agreement on part of defendant not to use manuscripts and plates for any purpose other than that contemplated in contract, and violation of such implied agreement would render defendant liable for value of such unauthorized use, and for any injury done to such property

If the contract is ambiguous, the court should put itself as nearly as possible in the position of the parties when it was made, and to that end may take into consideration the subject-matter, the purpose, situation, and conduct of the parties, and all the surrounding circumstances.[56] In such case the practical construction adopted by the parties themselves, while engaged in its execution, and before any controversy

thereby. State v. State Journal Co. [Neb.] 110 N. W. 763. Contracts for sale of certain street car properties held to contain implied covenant requiring defendant to take action to exercise certain franchise in order that right to construct and operate railway under it might be tested in courts, and plaintiff was entitled to damages where defendants failed to comply with it until too late to secure action of court of appeals within time provided in contract, and franchise was forfeited. Creamer v. Metropolitan Securities Co., 105 N. Y. S. 28. Though contract for manufacture and sale of patented machines contained no special provision to that effect, held that it was implied duty of selling agent to exercise reasonable diligence and care in endeavoring to market same. Instructions approved. Wildman Mfg. Co. v. Adams Top Cutting Mach. Co. [C. C. A.] 149 F. 201.

Provisions not implied: Where literary matter intrusted to defendant to enable it to perform contract was not copyrighted and had been given to public and any citizen, therefore, had right to print and sell same on his own account, held that law would not imply agreement on defendant's part not to manufacture and sell volumes containing it on its own account, there being no such limitation in contract. State v. State Journal Co. [Neb.] 110 N. W. 763. Agreement by defendant to transfer certain lease to plaintiff on condition that assignee obtained new lease from trustees of lessor estate held not to contain implied covenant that lease and all renewals provided for therein were valid, nor could plaintiff hold defendant in case trustees were unwilling or unable to execute new lease. Pratt v. Clark, 118 App. Div. 633, 103 N. Y. S. 612. Contract whereby defendant employed plaintiff held not to carry with it any implication that plaintiff would serve defendants lessee, and attempted disposal of his services to latter did not prevent recovery for breach consequent upon lease. White v. Lumiere North American Co., 79 Vt. 206, 64 A. 1121. Covenants are implied only where it is clear that if attention had been called to them they would have been expressly agreed upon. Contract of agency held not to contain implied covenant that agent would not resign, or to preclude him from doing so after he had given business fair trial. Security Trust & Life Ins. Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125. Rule that law will imply that parties intended reasonable price when no price for goods is agreed upon held not to apply where was clear misunderstanding as to price, one party understanding it to be one sum and other party a different one. Estey Organ Co. v. Lehman [Wis.] 111 N. W. 1097.

54. Contract must be read and construed as if same were written therein. Howard v. Adkins, 167 Ind. 184, 78 N. E. 665. Breach of an implied agreement gives rise to cause of action same as though it had been expressed. Jones & Co. v. Gammel Statesman Pub. Co. [Tex.] 99 S. W. 701, 94 S. W. 191.

55. Where contract was unambiguous, held that it would be conclusively presumed that parties contracted with reference to Pol. Code, §§ 3209, 3222, prescribing standard of weights and measures and providing that contracts must be construed by such standard, and, contract providing for certain price per pound, extrinsic evidence of usage as to manner of computing weight of structural steel was inadmissible. Hale Bros v. Milliken [Cal. App.] 90 P. 365. Where there is agreement to pay interest, but no rate is stated, legal rate is implied. Patrick v. Kirkland [Fla.] 43 So. 969. Ordinance making it unlawful to use scales without having them inspected by inspector of weights and measures held part of contract whereby scale was sold under guaranty that it would weigh correctly, so that it was purchaser's duty to have same inspected. Wright v. Computing Scale Co. [Wash.] 91 P. 571. Interstate commerce act held part of contract between carrier and shipper to transport goods at then established rates for definite time, so that such contract is ineffective after higher rate has been filed and published as required by law. Armour Packing Co. v. U. S. [C. C. A.] 153 F. 1.

56. For cases dealing with the admissibility of parol evidence to show surrounding circumstances see Evidence, 7 C. L. 1511. Mebius & Drescher Co. v. Mills [Cal.] 88 P. 917; Calkins v. Pease, 125 Ill. App. 270; Howard v. Adkins, 167 Ind. 184, 78 N. E. 665; Cool v. McDill, 38 Ind. App. 621, 78 N. E. 679; Heinz v. Roberts [Iowa] 110 N. W. 1034; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481; Union Water Power Co. v. Inhabitants of Lewiston, 101 Me. 564, 65 A. 67; Bell v. Jordan [Me.] 65 A. 759; Grothe v. Lane [Neb.] 110 N. W. 305; Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A. 695; Loomis v. MacFarlane [Or.] 91 P. 466; Wilson v. Wernwag, 217 Pa. 82, 66 A. 242; Robinson v. American Linseed Co., 147 F. 885; Cook v. Foley [C. C. A.] 152 F. 41. Particularly where party abandons contract and sues for prospective profits on ground that other party failed to furnish material at time and place demanded, but it appears that there was material at other places that might have been used. Harris v. Faris-Kesl Const. Co. [Idaho] 89 P. 760. Circumstances surrounding and known to both parties when contract was executed. Stein v. Archibald [Cal.] 90 P. 536. In determining whether contract or combination is in unreasonable restraint of trade Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264. Contract containing patent ambiguity on its face. Kroeger v. Good [Idaho] 89 P. 632. Gas and oil lease construed in light of evident fact that purpose was to procure exploration of land. Dill v. Fraze [Ind.] 79 N. E. 971.

arose, may be looked to to determine their intention.[57] Each party will be held to the construction that his own actions have put upon it when such acts operate as an admission against his interests.[58]

The foregoing rules are equally applicable to the interpretation of oral contracts, but in such case the question is usually what the terms of the contract were, rather than what was meant by the language used,[59] which is a question of fact.[60]

(§ 4) *B. What is part of contract.*[61]—Several writings constituting one contract are to be construed together.[62] Several agreements between the same parties executed at the time and as parts of the same transaction will ordinarily be construed together as though constituting a single instrument.[63] Provisions in other contracts between different parties may be regarded as part of the one in suit when evidently so intended.[64] Several contracts with different persons, all of which are parts of a single system, will be taken as a whole in determining whether they are illegal as in restraint of trade.[65] The question, however, is largely one of intention.[66]

Printed notices indorsed on the contract by one of the parties, but not referred to therein, are generally held to be no part thereof unless called to the attention of, and accepted by, the other party.[67] So, too, a notice restricting the title of the pur-

Court held to have properly reserved construction of power of attorney, on which validity of contract depended, until such time as situation of parties and surrounding circumstances should be revealed by evidence. Shaw v. Pope [Conn.] 67 A. 495. Held that negotiations leading up to making of contracts could be considered in determining whether they constituted sale of machinery or lease thereof. Lambert Hoisting Engine Co. v. Carmody, 79 Conn. 419, 65 A. 141.

57. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306, afg. 125 Ill. App. 602; Harter v. Morris, 124 Ill. App. 377; David Bradley Mfg. Co. v. Tedford, 127 Ill. App. 1; Cleveland, etc., R. Co. v. Scott, 39 Ind. App. 420, 79 N. E. 226; Heinz v. Roberts [Iowa] 110 N. W. 1034; Tetley v. McElmurry, 201 Mo. 382, 100 S. W. 37; Webb's Academy & Home for Shipbuilders v. Hidden, 118 App. Div. 711, 103 N. Y. S. 659; Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134; Confederate Memorial Ass'n. v. Shaughnessy [C. C. A.] 146 F. 964; Delaware, L. & W. R. Co. v. Kutter [C. C. A.] 147 F. 51; Cook v. Foley [C. C. A.] 152 F. 41. Where ambiguous terms have been construed and acted upon by parties, such construction will be adopted though language used may more strongly suggest another construction. Pittsburg Vitrified Pav. & Bldg. Brick Co. v. Bailey [Kan.] 90 P. 803. In case of oral contract where evidence is conflicting as to language used, construction adopted by parties may be shown and will govern. Scotch Mfg. Co. v. Carr [Fla.] 43 So. 427

58. Treating deed absolute in form as mortgage. Ferguson v. Boyd [Ind. App.] 79 N. E. 549.

59. See § 1B, ante.

60. See § 9F, post.

61. See 7 C. L. 802.

62. Hunt v. Capital State Bank, 12 Idaho, 588, 87 P. 1129.

63. New York Life Ins. Co. v. Wolfson [Mo. App.] 101 S. W. 162; Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 60 W. Va. 508, 56 S. E. 264. Contract and bond given to secure its performance. Searles v. Flora, 225 Ill. 167, 80 N. E. 98. Memorandum, notes, mortgage, and deed, and other papers referred to therein. Ditchey v. Lee, 167 Ind. 267, 78 N. E. 972. Leathers v. Geitz [Iowa] 112 N. W. 191. Instruments providing for sale of goods and lease of store. Floyd v. Arky [Miss.] 42 So. 569. Consignment, receipt and deposit agreement. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022. Note, mortgage, and contracts delivered at same time. Security Trust & Life Ins. Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125. Deed and contracts. Boyden v. Roberts [Wis.] 111 N. W. 701. Deed and contemporaneous agreement held single transaction, so that when read together their effect was agreement to reconvey upon terms expressed, notwithstanding a recital of a consideration in the deed McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760.

64. Provisions in earlier contract between plaintiff and defendant held to have become part of subsequent contract between plaintiff and corporation. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306, afg. 125 Ill. App. 602.

65. Park & Sons Co. v. Hartman [C. C. A.] 153 F. 24.

66. To be determined from terms and formal character of documents read in light of circumstances under which they were made. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127. Contract under seal and contract formed by certain letters held not to constitute single indivisible contract, but that latter was separate collateral contract. Id. Evidence held to show three separate and independent contracts for sale of potatoes. Frommel v. Moss [Me.] 66 A. 382.

67. For effect of such indorsements on contracts of carriage, see Carriers, 9 C. L. 466. Notice endorsed on upper corner of contract. Toledo Compounding Scales Co. v. Garrison, 28 App. D. C. 243. Note exempting contractor from liability for delay due to strikes, appearing at head of letter containing contract, held no part of such contract, where respondent's attention was never called to it, and it was not seen by its contracting officers. Morse Dry Dock & Repair Co. v. Seaboard Transp. Co., 154 F. 90.

chaser of a copyright book, printed on the inside cover thereof, has been held to be no part of the contract of sale unless shown to have been communicated to and accepted by him.[68]

(§ 4) *C. Character; joint or several, entire or divisible, etc.*[69]—Whether a contract is joint, several, or joint and several, is generally a question of intention.[70] The matter is regulated by statute in some states.[71]

Whether a contract is entire or severable is a question of intention.[72]

(§ 4) *D. Custom and usage.*[73]—Contracts are presumed to have been made with reference to the known and established customs and usages of the business or trade to which they relate, and hence proof of such customs and usages is admissible to annex terms which the parties may be presumed to have tacitly adopted, or to ex-

68. Authors & Newspaper Ass'n v. O'Gorman Co., 147 F. 616.

69. See 7 C. L. 803.

70. Agreement by several parties to carry certain stock for benefit of third person "pro rata according to the amount of their several interests" in corporation held several as to number of shares to be carried by each, so that one of such parties could sue such third person for failure to take up stock according to agreement without joining others. Villard v. Moyer, 104 N. Y. S. 537. Petition held not to allege contract with the two defendants jointly but that it was contract of each of them, so that recovery was authorized on proof that either of them contracted. McDonald v. Cabiness [Tex. Civ. App.] 17 Tex Ct. Rep. 518, 98 S. W. 943. Agreement that notes given for interest in patent should be paid only out of profits realized from manufacture and sales of machines thereunder, and that notes should not be sold, held the joint obligation of all the defendants, and joint recovery against them for its breach was proper though two of the notes were payable to each of the three defendants. Myrick v. Purcell, 99 Minn. 457, 109 N. W. 995.

71. Contract whereby joint owners of mines agreed to pay plaintiff reasonable value of his services in operating and managing them when mines were sold held joint and several. Civ. Code, § 1659. Bell v. Adams [Cal.] 90 P. 118.

72. Intention as indicated by terms of agreement. Civ. Code 1895 § 3643. Bearden Mercantile Co. v. Madison Oil Co. [Ga.] 58 S. E. 200. Several nature of subject may assist in determining intention, but will not overcome intent to make entire contract, nor will mode of measuring price, as by ton, etc., change effect of agreement, even in entire contracts, from agreement for partial payments pending full performance. McKeefry v. U. S. Radiator Co., 31 Pa. Super. Ct. 263. Intention is paramount, and even where contract according to its language is entire in form its entirety may be broken by the concurrent acts of both parties. Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 S. W. 845.

Contracts held entire: Contract of pledge. Levison v. Boas [Cal.] 88 P. 825. Contract to furnish trading stamps, portraits, and frames to defendant and to procure orders therefor to be furnished free by defendant on presentation of certain amount of stamps. American Copying Co. v. Lehmann [Cal. App.] 91 P. 414. Contract for sale of corn to be shipped at different times. Henderson El. Co. v. North Georgia Mill. Co., 126 Ga. 279, 55 S. E. 50. Oil and gas lease. Murray v. Barnhart, 117 La. 1023, 42 So. 489. Contract for collection of accounts. American Mercantile Exchange v. Blunt [Me.] 66 A. 212. Contract for sale of goods and lease of store, evidenced by different instruments. Floyd v. Arky [Miss.] 42 So. 569. Contract to lay pavement and to do certain other work for city, all its material provisions being common and interdependent. Rodgers v. New York, 51 Misc. 119, 100 N. Y. S. 745. Contract for sale of pig iron at specified price per ton, to be delivered at rate of one car per week during certain months. McKeefry v. U. S. Radiator Co., 31 Pa. Super. Ct. 263. Contract for sale of paving block to be delivered at different times, payment to be made monthly for deliveries in previous month. Kelley Brick Co. v. Clay Product Supply Co., 32 Pa. Super. Ct. 408. Contract to remove wrecked vessel from channel, payment to be made upon satisfactory completion of work. Poynter v. U. S., 41 Ct. Cl. 443. Contract held none the less indivisible because only part of it was reduced to writing. McConnell v. Camors-McConnell Co. [C. C. A.] 152 F. 321. Contract to pay for goods included in account sued on held part of an entire agreement which included illegal stipulations. Continental Wall Paper Co. v. Lewis Voight & Sons Co. [C. C. A.] 148 F. 939.

Contracts held severable: Contract for sale of cotton seed hulls and cotton seed meal. Bearden Mercantile Co. v. Madison Oil Co. [Ga.] 58 S. E. 200. Contract for sale and delivery of three carloads of hogs, at specified price and of weight fixed between certain limits, one carload of which had been delivered and paid for, so that obtaining of judgment by seller for second carload did not bar him from suing for value of third. Fox v. Boner, 9 Ohio C. C. (N. S.) 11. Contract for sale of hats of several styles, so that acceptance of one kind was not acceptance of entire shipment. Schiller v. Blyth & Fargo Co. [Wyo.] 88 P. 648. Contract by city to borrow money and to create fund to repay it. Glucose Sugar Refining Co. v. Marshalltown, 153 F. 620. Even if contract could be construed as precluding employe from disclosing information acquired by him before entering complainant's employ, held that invalidity of such a provision would not affect valid provision precluding him from disclosing complainant's trade secrets. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A. 695.

73. See 7 C. L. 804.

plain ambiguities or technical terms, but not to vary or contradict the plain meaning of the language used.[74]

(§ 4) *E. As to place, time, and compensation. Place.*[75]—The place of performance is to be determined from the terms of the contract.[76]

Time.[77]—The time of performance[78] and the duration of the contract[79] are questions of intention, to be gathered from the language used. Where no time is fixed for performance, the law will imply that a reasonable time is to be allowed for that purpose.[80] As a general rule, if a contract calling for the rendition of services is so far incomplete that the period of its duration cannot be determined by a fair inference from its provisions, either party may terminate it at will on giving reasonable notice.[81] One having the right to perform on a specified day has the whole of that day in which to do so.[82]

Whether or not time is of the essence of a contract is largely a question of intention.[83] It is generally held not to be in equity unless made so by express provision

74. For a full discussion of this subject see Customs and Usages, 7 C. L. 1016.

75. See 7 C. L. 804.

76. Contracts for sale of potatoes held to contemplate delivery in New York in specified month. Frommel v. Moss [Me.] 66 A. 382.

77. See 7 C. L. 804.

78. Contract held to entitle executrix to withold purchase price of certain personalty from plaintiff's share of estate if he did not pay same within six years so that claim was not barred by limitations. Schneider v. Heilbron, 115 App. Div. 720, 101 N. Y. S. 152. Contract held to require defendant to furnish plaintiff sufficient brick to complete certain buildings at specified price without regard to date specified in contract, that date being important only as fixing time by which plaintiff was required to receive them if defendant delivered them. Rosenthal v. Empire Brick & Supply Co., 104 N. Y. S. 769. Contract to pay certain sum per foot for paving provided work was completed within four months held to require completion within four months from date of contract, and not from date when work was commenced. Barber Asphalt Pav. Co. v. Loughlin [Tex. Civ. App.] 17 Tex. Ct. Rep. 554, 98 S. W. 948.

79. Contract of employment held to bind both parties for five years. Butterick Pub. Co. v. Whitcomb, 225 Ill. 605, 80 N. E. 247. Provision that contract should be void and cease when certain note was paid held to refer only to provision for buying and selling cattle and not to provision that defendants would refrain from entering into butcher business for three years. Canady v. Knox, 43 Wash. 567, 86 P. 930. Contract for storage held prima facie to cover period of five years, so that defendant was bound to pay minimum rate for that period whether it availed itself of contract rights or not Robinson v. American Linseed Co., 147 F. 885.

80. Patrick v. Kirkland [Fla.] 43 So. 969; Bearden Mercantile Co. v. Madison Oil Co. [Ga.] 58 S. E. 200. Agreement by decedent to pay plaintiff one-third of profits derived from sale of lands to be purchased but fixing no time for making sale, held to require sale to be made within reasonable time, and that, where decedent died before making it and his representatives refused to sell and repudiated plaintiff's interest, plaintiff was entitled to recover third of value of land in cash after deducting purchase price, taxes etc. Kauffman v. Baillie [Wash.] 89 P. 548. Duties to be performed by defendant under contract to care for plaintiff's orchard, held required to be performed at certain seasons of year and not to permit of delay, so that instruction that they could have been done at any reasonable time was properly refused. Griffing Bros. Co. v Winfield [Fla.] 43 So. 687. Where oral contract contained no agreement as to time when agent's commissions were to be paid, held that evidence as to time usually fixed for such payment was admissible. Standard Plunger El. Co. v. Brumley [C. C. A.] 149 F. 184.

81. Where agreement by defendant railroad company, to transport cars free of charge if plaintiff's assignor would develop coal land, build connecting line, etc., fixed no time for its duration, held that defendant could terminate it at its election after notice. Stonega Coke & Coal Co. v. Louisville & N. R. Co., 106 Va. 223, 55 S. E. 551. Parol agreement whereby owner of lot agreed to erect building thereon in which other party was to place store fixtures, the rent to be divided between them, held terminable by either party on giving reasonable notice. Adams v. Wier [Tex. Civ. App.] 99 S. W. 726.

82. Where defendant agreed to sell and deliver to plaintiff certain corn at specified price during first half of December, held that he was entitled to at least whole of Dec. 15 in which to make delivery, so that plaintiff acted prematurely in purchasing corn elsewhere at two o'clock on that date, and demanding damages for failure to deliver in time. Hall-Baker Grain Co. v. Le Mar [Mo. App.] 101 S. W. 1098.

83. Time held of essence of contract: Where potatoes were sold for delivery in March, buyers to have right to say when they should be shipped, held that it was buyer's duty to direct shipments in season for seller to perform within time limited. Frommel v. Foss [Me.] 66 A. 382. Time of delivery of lath sold. Frost-Trigg Lumber Co. v. Forrester [Mo. App.] 101 S. W. 164. Of contract whereby defendant agreed to pay stipulated sum on construction of pavement, so that performance within time specified was condition precedent to recovery. Barber Asphalt Pav. Co. v. Loughlin [Tex. Civ. App.] 17 Tex. Ct. Rep. 554, 98 S. W. 948.

or necessary implication.[84] The matter is regulated by statute in some states.[85] Under the civil law, in a suit to rescind a contract to do for failure to perform within the time specified, the court may, according to circumstances, grant the obligor further time in which to perform.[86]

Compensation.[87]—Provisions of the contract as to compensation are to be construed according to the general rules heretofore stated.[88] The construction of particular provisions will be found in the note.[89] Where no compensation for services is agreed upon, the person rendering them is entitled to recover their reasonable value.[90]

(§ 4) *F. What law governs.*[91]—As a general rule the lex loci contractus gov-

Time held not of essence of contract: Subcontract for railroad construction work. Cleveland, etc., R. Co. v. Scott, 39 Ind. App. 420, 79 N. E. 226. Plaintiff's delay in furnishing title held not to relieve defendant from performance. Woodward v. McCollum [N. D.] 111 N. W. 623. Where plaintiff had until midnight on June 20th to deliver brick, delivery at 6:25 A. M. on June 21st held such a substantial performance as was contemplated by contract, contrary construction being contrary to intention of parties. New Jersey Co. v. Nathaniel Wise Co., 105 N. Y. S. 231.

84. Failure of vendee in contract for sale of land to perform on his part strictly at time fixed does not in equity discharge contract unless by contract itself, or circumstances proved in the case, time is made, or has become, of the essence of the contract, or delay has made specific performance inequitable. Saldutti v. Flynn [N. J. Eq.] 65 A. 246.

85. Georgia: Time is not generally of essence of contract, but by express stipulation or reasonable construction it may become so. Civ. Code 1895, § 3675, par. 8. Bearden Mercantile Co. v. Madison Oil Co. [Ga.] 58 S. E. 200. Time held of essence of provision of contract for sale of cotton seed hulls but not of provision for sale of cotton seed meal. Id. Is when nature of contract is such as to indicate that such must have been intention of parties. Traylor, Spencer & Co. v. Brimbery [Ga. App.] 58 S. E. 371.

Oklahoma: Is not, unless it is expressly so provided. Wilson's Rev. & Ann. St. 1903, art. 3, c. 15, § 809. Snyder v. Stribling, 18 Okl. 168, 89 P. 222. Held not of essence of contract for sale of cattle. Id.

86. Further time in which to perform conditions of oil and gas lease refused. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

87. See 7 C. L. 805.

88. See § 4A ante.

89. Contract between decedent and plaintiff held to entitle latter to one-tenth of entire fee received by decedent for procuring refund of money paid on void claim against Mexican government, and not merely one-tenth of amount which decedent had earned when contract was made. Slaughter v. Loeb, 28 App. D. C. 57. Compensation of engineer employed to superintend installation of pump for certain per cent "based on the contract price" held to be based on total sum paid seller, including extra amount which contract of sale required to be paid for superior efficiency. City of Chicago v. Hunt [Ill.] 81 N. E. 243. Provision in regard to payment "seventeen cents, three per cent," held to mean seventeen cents per pound, payable in sixty days, with discount of three per cent from face of bill if payment was made within ten days. Empire Rubber Mfg. Co. v. Morris, 73 N. J. Law, 602, 65 A. 450. Contract employing plaintiff's assignor to obtain reduction of any assessment that might be levied against her property, she to pay it a part of any reduction, held to entitle it to such part of reduction in proposed assessment, though it was not technically levied against property. United States Title Guaranty & Indemnity Co. v. Marks, 116 App. Div. 341, 101 N. Y. S. 483. Agreement to pay "cost" of certain job held to mean actual cost, so that judgment for an amount which included profit was erroneous. Raisler Heating Co. v. Dowd, 52 Misc. 656, 102 N. Y. S. 504. Agreement to pay plaintiff five per cent of total cost of construction of viaduct for services in preparing plans and superintending construction held not to entitle him to such commission on amount of judgment recovered by contractors as damages for breach of construction contract, such breach not having damaged plaintiff in any way, or required him to perfrom additional labor or incur additional expense. Boller v. New York, 117 App. Div. 458, 102 N. Y. S. 729. Agreement to pay plaintiff certain sum for services in searching title not being contingent upon success of application for loan on premises held that it was binding on defendant though plaintiff did not make loan, particularly where failure was due to fact that defendant did not cure defects in title. Title Guarantee & Trust Co. v. Stemberg, 103 N. Y. S. 857. Contract held not to entitle contracting agents and engineers to their share of profits on completion of each piece of work, but to entitle them to share of net profits arising from work in its entirety. Brady v. Caroline Steel Bridge & Const. Co. [S. C.] 56 S. E. 964. Contract whereby plaintiff was to be paid commissions on subscriptions obtained by him held not to entitle him to commission on original subscription which he had no part in procuring. Confederate Memorial Ass'n v. Shaughnessy [C. C. A.] 146 F. 964.

90. Requested instruction improperly refused. Chandler v. Baker, 191 Mass. 579, 78 N. E. 387. In determining value, court may consider valuation placed upon them by parties, especially by party to whom they are rendered, but such valuation is only evidence, and not the rule of damages. Id.

91. See 7 C. L. 806.

erns in determining the validity and effect of the contract, and the lex fori determines the course of procedure in giving redress thereon.[92]

§ 5. *Modification and merger.*[93]—The parties to an executory contract may at pleasure and by mutual assent,[94] alter or modify it,[95] or substitute a new one therefor.[96] As a general rule no further consideration is necessary than the mutual assent of the parties,[97] though there seems to be some conflict of authority in this regard.[98] On breach of a contract to give a new note to supersede the original one on performance of certain acts by the payee, the remedy of the latter is by an action on the contract and not by an action on the original note.[99]

Written contracts, not under seal and not required by law to be in writing, may ordinarily be modified by parol.[1] A contract under seal can only be altered by one of equal dignity [2] or by an executed oral agreement.[3] The matter is regulated by statute in some states.[4]

92. For a full discussion of this question see Conflict of Laws 9 C. L. 596.

93. See 7 C. L. 806.

94. Neither party can alter or change contract without consent of other. Staunton v. Smith [Del.] 65 A. 593. Change for benefit of contractor with his consent cannot be pleaded as defense to his failure to complete contract. Adams v. Haigler [Ga. App.] 58 S. E. 330. Where contract employing school teacher did not provide that it should be void if she did not begin school on certain date, statement by school trustee to that effect after contract had been made held no part of contract. Turner v. Hampton, 30 Ky. L. R. 179, 97 S. W. 761. Where defendant failed to make cash payment requested, held that it could not be contended that it consented to modification of any alleged existing contract. Scaife & Sons Co. v. Standard Ice Co. [Wash.] 89 P. 882.

95. Executed oral agreement held to modify provisions of note as to interest. Righetti v. Righetti [Cal. App.] 90 P. 50. Evidence held to sustain finding that original agreement for sale of mining claims was modified by purchaser agreeing unconditionally to pay sum sued for in consideration of waiver of right of forfeiture by vendor. Hatch v. Gorlinski [Utah] 88 P. 406. In absence of agreement to the contrary, acceptance of new note for balance due held to extend time for performance of condition in contract of conditional sale that property should belong to purchaser if original note was paid when due. Staunton v. Smith [Del.] 65 A. 593. Evidence held not to show intention to modify contract under seal by subsequent one evidenced by letters. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127. Evidence held insufficient to show modification or abandonment of written contract by any oral agreement. Smith v. Miller, 17 Conn. 624, 66 A. 172.

96. Agreement to pay for extra work in digging cellar made necessary by substantial and unforseen difficulties held to operate as waiver of rights and obligations of original contract, and substitution of those of new or modified contract therefor. Linz v. Schuck [Md.] 67 A. 286. Where plaintiff signed second contract and operated under it for nearly a year held that he could not thereafter claim that it did not take place of and supersede first. Proctor Coal Co. v. Strunk, 29 Ky. L. R. 995, 96 S. W. 603. Contract having been made when parties entered into oral agreement, held that paper afterwards given customer by broker did not, as matter of law, show rescission of that agreement and substitution of written contract. Picard v. Beers [Mass.] 81 N. E. 246. Written agreement by plaintiff to give defendant option on certain stock for four months held not to necessarily as matter of law show that former verbal agreement by plaintiff to purchase such stock on happening of certain contingency, which had happened, was thereby rescinded or merged in new agreement Corey v. Woodin [Mass.] 81 N. E. 260. Offer, after tender of notes in accordance with contract had been refused, to pay additional sum in cash, and to substitute other securities for deferred payments, held not to amount to new contract or an abandonment of original one. Viker v. Lien, 99 Minn. 524, 109 N. W. 1135. Evidence held to require finding that written contract prohibiting physician from practicing in certain county was not set aside, canceled, and superseded by subsequent parol agreement. Baker v. Montgomery [Neb.] 110 N. W. 695. Evidence held insufficient to show waiver or substitution of new contract. Hesser v. Chicago & Welleston Coal Co. [C. C. A.] 151 F. 211.

97. Original consideration is imported into modification. Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 N. W. 237.

98. Where defendant pleaded subsequent verbal contract modifying original one, but failed to plead or prove any consideration therefor, held error to submit anything on that question to jury. Walker v. Tomlinson [Tex. Civ. App.] 17 Tex. Ct. Rep. 157, 98 S. W. 906.

99. Held that plaintiff's action was not properly based on note given for certain trees, but could be maintained, if at all, only for failure to give negotiable note as stipulated in contract indorsed on back thereof, after orchard had been planted as agreed. Leathers v. Geitz [Iowa] 112 N. W. 191.

1. Roquemore v. Vulcan Iron Works Co. [Ala.] 44 So. 557; Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 N. W. 237.

2. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

3. Parol modification held binding only in so far as executed, so that defendants had

A subsequent contract which does not by express terms abrogate an earlier one will nevertheless operate as a discharge thereof if inconsistent therewith,[5] but, in so far as the two are consistent, they should be construed together.[6]

Merger[7] is generally a question of intention.[8] All prior and contemporaneous parol negotiations are presumed to have been merged in the written contract growing out of them.[9]

§ 6. *Discharge by performance or breach. A. General rules.*[10]—A breach arises on the unexcused[11] failure or refusal of one party to carry out his part[12] of an entire

right to repudiate it at any time and demand performance in future in accordance with original contract. Napier v. Spielmann, 103 N. Y. S. 982.

4. Oral agreement altering agreement in writing is not valid unless executed. Wilson's Rev. & Ann. St. 1903, § 781. Page v. Geiser Mfg. Co., 17 Okl. 110, 87 P. 851.

5. To do so must be clearly inconsistent with continued existence of original contract. Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134.

6. See, also, § 4 B, ante. Where new contract is made with reference to subject-matter of former one and contains provisions clearly inconsistent with certain of its provisions, obligations of original in so far as they are inconsistent with those of later contract will be abrogated and discharged, and two will be construed together, disregarding provisions of original which are inconsistent with those of the later. Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134. Written contracts executed and delivered at same time must, if possible, be so construed that they may stand together. Security Trust & Life Ins. Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125. Contracts dated on succeeding days held not so repugnant as to show intention that one should supersede other. Id.

7. See 7 C. L. 808.

8. Evidence held insufficient to sustain burden resting on defendants to show that executory agreement not to engage in manufacture of certain articles for indefinite period was merged in and superseded by subsequent contract not to do so for specified period, signed by only part of parties bound by former. Union Mills v. Harder, 116 App. Div. 22, 101 N. Y. S. 309.

9. See Evidence, 7 C. L. 1511.

10. See 7 C. L. 808.

11. For excuses for failure to perform see § 6C, post.

12. Evidence held to sustain finding of breach of contract to furnish steel for building within specified time. Hale Bros. v. Milliken [Cal. App.] 90 P. 365. Evidence held to show that defendant did not substantially perform contract to care for parents in consideration of conveyance of land to him. Alvey v. Alvey, 30 Ky. L. R. 234, 97 S. W. 1106. Defendant agreed to purchase land from parties introduced to him by plaintiff if he found any that suited him, it being agreed that he was not to pay any commissions, but that plaintiff was to look to owners therefor. Defendant entered into contract to purchase land from company to whom plaintiff introduced him, but subsequently failed to perform. Held that defendant was liable to plaintiff for amount of commissions latter would have earned from company had defendant performed. Eells v. Parsons, 132 Iowa, 543, 109 N. W. 1098. Where contract gave plaintiff entire charge of lands of other party, with power to dispose of them according to his best judgment, net proceeds of sales to be equally divided, and provided that it should be binding on other party's executors, and it was agreed that other party should make codicil to his will to that effect, held that neglect to make such codicil and assertion of executor and beneficiaries under other party's will of right to have estate administered regardless of such contract was breach rendering executor as such, liable for damages. Mills v. Smith, 193 Mass. 11, 78 N. E. 765. Repudiation by one party before other has completely performed is breach. Official catalogue Co. v. American Car & Foundry Co., 120 Mo. App. 575, 97 S. W. 231. Where evidence showed that certain person made silhouettes within defendant's concession with its knowledge and consent, held that, if making of them was breach of covenant granting plaintiff certain exclusive privileges, plaintiff was entitled to recover regardless of whether such person paid for concession from defendant to make them or not. Frankel v. German Tyrolean Alps, 121 Mo. App. 51, 97 S. W. 961. Evidence held to show that certain person made silhouettes within defendant's concession with its permission. Id. In action to recover money paid defendant under contract whereby he was to furnish plaintiff list of school lands which because of mineral character would entitle state to select other government land in lieu thereof, held that nonsuit was properly denied. Morse v. Odell [Or.] 89 P. 139. Where architect agreed to prepare plans for structure to cost not to exceed certain sum, and lowest bid under plans prepared largely exceeded such sum, held that he was not entitled to recover on contract. Graham v. Bell-Irving [Wash.] 91 P. 8. In action on contract whereby decedent agreed to give plaintiff certain interest in business when decedent deemed that he was able to withdraw certain sum from said business consistently with keeping up most advisable volume of business, acts of decedent held to show conclusively that, as against decedent and his representatives, time never did come when decedent was able to withdraw such sum, and hence no cause of action on contract or for its breach arose during his lifetime against which limitations could run. Ott v. Boring [Wis.] 110 N. W. 824. On his death, and refusal of his representatives to give plaintiff share in property, held that money cause of action arose in plaintiff's favor. Id. Right of plaintiff to recover on money demand held not barred by laches. Id. Where agent had right to resign, and right was lawfully exercised, held that resignation was not breach of contract. Security Trust

contract,[13] or where he voluntarily puts it out of his power to perform,[14] or prevents performance by the other party.[15] Failure to perform any one of the things contracted for by the terms of an entire continuing contract providing for performance in installments is a partial breach, giving rise to a separate and independent cause of action.[16] A breach of an independent part of a severable contract does not put an end to the whole contract, or excuse performance of other independent provisions by the other party.[17] Partial failure to perform is insufficient as a defense where it is entirely immaterial, or capable of being fully compensated by damages.[18] The motive inducing a breach is immaterial.[19] In the absence of a provision in the contract covering the matter, a party cannot recover damages because it becomes impossible for him to perform unless he was induced to enter into the contract through some act or omission by the other party amounting to deceit.[20]

If a party to an entire executory contract, before the time for performance arrives, distinctly and unequivocally [21] renounces or repudiates it, the other party may, at his election, treat his action as a breach.[22]

& Life Ins. Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125. Failure of defendant to procure actual issue to himself of certain stock held not breach, contract requiring plaintiff to procure assent of company to issue, and evidence showing that stock was to remain to defendant's credit on company's books and certificates to be issued to customers found by plaintiff. Davidor v. Bradford, 129 Wis. 542, 109 N. W. 576. Evidence held not to show breach of contract not to re-engage in lumber business, it not being shown that defendants were in any way financially interested in certain firm. Jayne & Keve Bros. Lumber Co. v. Turner & Son, 132 Iowa, 7, 109 N. W. 307. Defendant held to have been engaged in management of business in violation of covenant not to engage in such business, and not merely to have been engaged in following her trade for wages. Angelica Jacket Co. v. Angelica, 121 Mo. App. 226, 98 S. W. 805. Evidence held to support finding that plaintiff had broken agreement not to engage in newspaper or job printing business in certain city for ten years. Skinner v. Wilson [Neb.] 107 N. W. 771. Evidence held to support finding that defendant violated agreement not to engage in certain business. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540.

13. For distinction between entire and divisible contracts see § 4C, ante.

14. Transfer by employer of its entire plant and business held breach of contract of employment. White v. Lumiere North American Co., 79 Vt. 206, 64 A. 1121. Where contract obligated defendant to pay plaintiff certain sum in case defendant recovered judgment against a third person in a pending suit, held that plaintiff was entitled to recover said sum on defendant compromising said suit. Camden v. Jarrett [C. C. A.] 154 F. 788.

15. Party who is prevented by other party from performing may, at his election, treat contract as rescinded. Valente v. Weinberg [Conn.] 67 A. 369. Where contract required plaintiff to obtain options on two pieces of property, held that defendant by directing him not to procure one of them broke contract and plaintiff could recover damages for breach or on quantum meruit for services actually performed. Worthington v. McGarry [Ala.] 42 So. 988.

16. Jones & Co. v. Gammel Statesman Pub. Co. [Tex.] 99 S. W. 701, rvg. [Tex. Civ. App.] 94 S. W. 191.

17. Where defendant elected to treat contract as severable, held that it was bound to perform its part, and seek compensation in damages for breaches. Gates v. Detroit & M. R. Co. 147 Mich. 523, 111 N. W. 101. Covenant that defendant would not solicit orders, etc., from plaintiff's customers for three years after leaving his employ held an independent covenant entered into as a consideration of the employment, and that plaintiff was entitled to enjoin its breach, though defendant was discharged without notice, required by contract where he was tendered week's wages instead, covenant depending upon cessation of employment and not on manner of cessation. Mutual Milk & Cream Co. v. Heldt, 105 N. Y. S. 661

18. Defendant held not relieved from contract obligation to pay plaintiff $843, on terminating contract of employment by reason of plaintiff's refusal to deliver to it list of names of subscribers to paper, which it secured from other sources at expense of $60 before commencement of action. Redpath v. Evening Exp. Co. [Cal. App.] 88 P. 287.

19. In suit to restrain violation of agreement not to engage in certain business, evidence as to defendant's purpose in so doing held immaterial. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540.

20. Plaintiff contracted to construct receiving well for defendant on site to be fixed by defendant. After work was started its completion became impossible by reason of fact that water rushed up through old concealed test well, previously sunk by defendant on same site and flooded excavation. In action against defendant for damages resulting from plaintiff's inability to complete work, held error not to submit to jury question whether defendant, when it designated site, should have reasonably apprehended that presence of test well would render performance impossible and hence fraudulently imposed useless contract on plaintiff. Murtland v. Atlantic City [N. J. Err. App.] 65 A. 1049.

21. Rule equally applicable to both parties to a sale. McBath v. Jones Cotton Co. [C. C. A.] 149 F. 383. Fact that plaintiff tendered cotton not deliverable in performance held

(§ 6) *B. Acceptance and waiver.*[23]—Performance of the contract according to its terms may be waived by either party or his duly authorized agent,[24] either expressly [25] or by acts or conduct showing an intention not to require it.[26] Thus, the absolute and unconditional acceptance of an article contracted for, with knowledge of all the facts, is a waiver of any defects therein.[27] Waiver of the provisions of a

not to entitle defendant to cancel contract before expiration of time within which delivery could be made under its terms. Id. Where land was conveyed under oral agreement to reconvey on demand, fact that defendant sold part of land and accounted to plaintiff for proceeds held not to constitute repudiation of contract as to remaining land so as to start running of limitations. Cromwell v. Norton, 193 Mass. 291, 79 N. E. 433. Refusal to deliver corn before delivery was due held not to entitle purchaser to buy other corn and sue for difference in price. Hall-Baker Grain Co. v. Le Mar [Mo. App.] 101 S. W. 1098.

22. Where one party advises other that he does not intend to carry out his part of contract, other party is absolved from further performance and may recover any damages sustained. Hobbs v. Ray, 29 Ky. L. R. 999, 96 S. W. 589. May sue at once for breach without waiting for day of performance. Holt v. United Security Life Ins. & Trust Co. [N. J. Err. & App.] 67 A. 118. Where vendee of personalty refused to carry out his agreement to execute notes for purchase price. Kelly v. Pierce [N. D.] 112 N. W. 995. Declaration of plaintiff before full time for him to perform had expired that he would not perform, either by marketing certain stock or paying his half of price, held to constitute such an anticipatory breach as gave defendant right to treat contract as terminated. Davidor v. Bradford, 129 Wis. 524, 109 N. W. 576. Where contract for sale of goods is still executory on both sides, notice by purchaser to seller that he will not accept any pay for goods amounts to breach. Rounsaville v. Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030. Rule held inapplicable to mutual life insurance policy providing for payment of sum of money at insured's death, and hence renunciation by insurer did not entitle insured to sue at once for damages, but his remedy was in equity. Kelly v. Security Mut. Life Ins. Co., 186 N. Y. 16, 78 N. E. 584, rvg. 106 App. Div. 352, 94 N. Y. S. 601.

23. See 7 C. L. 810. See, also, Election and Waiver, 7 C. L. 1222.

24. See Agency, 9 C. L. 58.

25. Written agreement whereby plaintiff gave defendant authority to dispose of certain stock standing in her name held not of itself waiver of her rights under previous oral agreement by defendant to pay her certain sum for stock on happening of certain contingency which had happened before written agreement was made. Corey v. Woodin [Mass.] 81 N. E. 260. Evidence held to show conclusively that both parties had waived provision that plaintiff should furnish certain amount of timber for shipment and that defendant should furnish cars therefor as ordered. Gates v. Detroit & M. R. Co., 147 Mich. 523, 111 N. W. 101.

26. See, also Insurance, 8 C. L. 377; Sales, 8 C. L. 1751. By actions, declarations, acquiesence or silence. Requested instruction held improperly refused. Marine Iron Works v. Wiess [C. C. A.] 148 F. 145. In order that stipulation in contract which has gone into effect may be waived by course of dealing, must appear from the circumstances that it was mutual intention of parties to so change contract. Bearden Mercantile Co. v. Madison Oil Co. [Ga.] 58 S. E. 200.

Stipulations and breaches held waived: Defaults in delivery of and payment for lumber. Demarest v. Dunton Lumber Co., 151 F. 508. Delay in delivering abstract of title, where it was accepted and retained without objection on that ground. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31. Requirement that part of purchase price of land be deposited in bank, by defendant's repudiation of contract, etc. Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619. Allegations of answer held to show nullification of stipulation as to time of payment. Bearden Mercantile Co. v. Madison Oil Co. [Ga.] 58 S. E. 200.

Stipulations and breaches held not waived: Defendant's breach of contract by refusing to receive amount of potatoes called for thereby held not waived by subsequent delivery of potatoes to him. Graves v. Melia [Ark.] 99 S. W. 80. Allegations of answer held insufficient to show waiver of provision as to time of delivery. Bearden Mercantile Co. v. Madison Oil Co. [Ga.] 58 S. E. 200. Monthly payments for heat by lessee, and fact that action for damages was not commenced for nearly two years after she vacated house held not to necessarily estop her from recovering damages for breach of contract to furnish heat, though it was proper for jury to consider such facts in determining whether house was comfortably heated and whether she accepted heat furnished without complaint. Sargent v. Mason [Minn.] 112 N. W. 255. Acceptance of check less unauthorized discount held not waiver of discount. Taussig v. Southern Mill & Land Co. [Mo. App.] 101 S. W. 602. Letters seeking information held not waiver by telegraph company of provision requiring filing of written claim for damages for nondelivery of message. Eaker v. Western Union Tel. Co., 75 S. C. 97, 55 S. E. 129. Telegraph company held not to have waived requirement of notice of claim. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117. Evidence held insufficient to require submission of question of waiver of provision requiring vendor of land to furnish abstract. Hampton Stave Co. v. Gardner [C. C. A.] 154 F. 805.

27. See, also, Sales, 8 C. L. 1751. In view of peculiarities necessarily characterizing sale and delivery of water through system of waterworks held that mere receipt and consumption of water by city did not conclusively show an acceptance of the service as a performance of the contract. Skowhegan Water Co. v. Skowhegan Village Corp. [Me.] 66 A. 714. Contract to furnish heat held an agreement to perform services and not sale of personal property, so that rule

written contract may be shown by parol.[28] If the parties mutually adopt a mode of performance differing from the strict terms of the contract, or mutually relax its terms by adopting a loose mode of executing it, neither party can thereafter insist upon a breach because it was not performed according to its letter,[29] though he may require a return to the terms of the contract in the future [30] by giving the other party reasonable notice of his intention to do so.[31] So, too, one continuing to negotiate with a party in default cannot rescind without giving him reasonable notice to comply with the terms of the contract.[32]

(§ 6) *C. Excuses for failure to perform.*[33]—An unexcused breach of an entire contract by one party excuses performance by the other,[34] nor can one predicate any rights on a breach for which he is himself responsible.[35] A breach of an inde-

that voluntary payments preclude objection that property was deficient in quantity was inapplicable. Sargent v. Mason [Minn.] 112 N. W. 255. Defendant's use of plans held not to conclusively show waiver, so that instruction predicating waiver thereon was erroneous. Hudson v. Rodgers, 121 Mo. App. 168, 98 S. W. 778. Payment on account of plaintiff's services in drawing plans held not an acceptance or waiver where it was made without knowledge of defects. Dunne v. Robinson, 52 Misc. 545, 103 N. Y. S. 878. Payment on account held not an acceptance of plans where it was made before it was demonstrated by bids that they did not meet requirements of contract as to cost of construction. Graham v. Bell-Irving [Wash.] 91 P. 8. Knowledge of defects in boat held essential to waiver. Marine Iron Works v. Wiess [C. C. A.] 148 F. 145.

28. Agreement extending time for completing sale of land under contract under seal may be in parol. Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619. Though standing timber can be sold only by conveyance in writing, held that right to forfeit written contract of sale for failure to remove timber within time specified could be, and was, waived by parol agreement, extending time for removal. Wallace v. Kelly [Mich.] 14 Det. Leg. N. 230, 111 N. W. 1049.

29. Gates v. Detroit & M. R. Co., 147 Mich. 523, 111 N. W. 101.

30. Letter held not repudiation of method of performance up to that time. Gates v. Detroit & M. R. Co., 147 Mich. 523, 111 N. W. 101.

31. If in course of execution some of terms of contract are departed from, and money is paid and received on such departures for some time, then before one party can recover from other for failure to pursue letter of agreement he must notify latter with clearness of his purpose thenceforth to stand on original contract, departure, until such notice, being treated as in nature of new undertaking. Hasbrouck v. Bondurant, 127 Ga. 220, 56 S. E. 241. Civ. Code 1895, § 3642. Mathis v. Harrell, 1 Ga. App. 358, 58 S. E. 207. Evidence held sufficient to justify finding that defendant waived provision that plaintiff should not sell goods on credit, so that direction of verdict was erroneous. Id.

32. Circumstances held to preclude rescission without notice. St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701. Letter held wholly insufficient as notice of defendant's election to abandon contract unless plaintiff made advances by certain time. Id.

33. See 7 C. L. 813.

34. Contractor held not responsible for delay due to failure of architect to furnish drawings. Snead & Co. Iron Works v. Merchants' Loan & Trust Co., 225 Ill. 442, 80 N. E. 237. Instructions leaving it to jury to conjecture whether change in order of work was excuse for delay held erroneous where evidence entirely failed to prove allegations as to change, and, on contrary, showed that order was immaterial. First Nat. Bk. v. Carroll [Mont.] 88 P. 1012. Changes in specifications and extra work held not to excuse delay in completing vessel, it not appearing that delay was caused thereby, or that contractor notified owner that they would result in delay. Morse Dry Dock & Repair Co. v. Seaboard Transp. Co., 154 F. 90. Respondent's delay in delivering windlass held not proximate cause of failure to complete work in time. Id. Where contractor abandoned building contract because of failure of other party to pay installments due thereunder held that he was entitled to recover value of work actually performed thereunder. Peet v. East Grand Forks [Minn.] 112 N. W. 1003. Where one party advises other that he does not intend to carry out his part of contract, other party is excused from further performance. Hobbs v. Ray, 29 Ky. L. R. 999, 96 S. W. 589. Premature action of plaintiff in purchasing corn in market before expiration of time fixed by contract for delivery, and in notifying defendant of that fact and demanding damages for nondelivery, held to relieve defendant from necessity of complying with contract. Hall-Baker Grain Co. v. Le Mar [Mo. App.] 101 S. W. 1098. Evidence held not to require submission of issue of breach to jury. Hampton Stave Co. v. Gardner [C. C. A.] 154 F. 805.

35. Rule that if party contracts to do a thing within certain time without exceptions on account of contingencies which may arise he is liable for non performance within such time, though unavoidably prevented from performing, does not apply where he is hindered by fault of other party. Beattie Mfg. Co. v. Heinz, 120 Mo. App. 465, 97 S. W. 188. Party cannot make his own breach of executory contract basis of recovery of money paid by him pursuant to it. Balleisen v. Schiff, 105 N. Y. S. 692. Party who himself stopped work held not entitled to credit on contract price for causing work to be completed. Harrison v. Franklin [Mo.

pendent part of a severable contract does not, however, excuse performance of other independent provisions by the other party.[36]

As a general rule one who unqualifiedly undertakes to do a particular thing is not excused because performance is rendered impossible by some unforeseen contingency which might have been guarded against.[37] This rule does not, however, apply where performance is rendered impossible by operation of,[38] or a change in,[39] the law, or, in the case of contracts for personal services, by the death or disability of the party who is to perform them.[40]

One sued for breach of his contract cannot show that had he performed the other party would not have done so.[41] Repayment of a loan does not preclude enforcement of an agreement made as a part of the consideration therefor.[42] Excuses for delay do not excuse an absolute failure to perform.[43]

App.] 103 S. W. 585. Where seller had right to abandon contract because of buyer's default, held that buyer could not recoup damages for seller's failure to complete contract. Patten v. Iroquois Furnace Co., 124 Ill. App. 1. Where contract provided for deduction of specified sum for each day's delay in completing work, and plaintiff sought to excuse delay by showing that it was due to fault of defendant held that it was bound to measure delay for which defendant was to blame in periods of days, not leaving it to be guessed at from indefinite and uncertain evidence. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 S. E. 826. When causes of delay set in operation by defendant were removed, held that contract in all its force continued binding on plaintiff unless modification of contract on which it relied to excuse delay extended time, or character of modification, or conduct of defendant was such as to necessarily delay performance of original contract. Id. Where contractor failed to furnish material to subcontractor as required by contract so that latter could complete work in time and delay was unreasonable, held that subcontractor was justified in abandoning work, and was not liable for resulting damages to contractor. Seventh St. Planing Mill Co. v. Schaefer, 30 Ky. L. R. 623, 99 S. W. 341. Vendee held not to have prevented furnishing of abstract of title by vendor. Hampton Stave Co. v. Gardner [C. C. A.] 154 F. 805. Where by terms of contract for sale of land balance of purchase money was not due until survey was made and deed tendered, held that vendor could not complain of delay in making payment where there was no survey or tender. East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768. Failure to furnish and lay water pipe within time limited held not excused because inspector voluntarily appointed by purchaser, he not being required to furnish inspector, passed defective plates. First Nat. Bk. v. Carroll [Mont.] 88 P. 1012. Instructions held erroneous as leading jury to believe that they should take acts of inspector into consideration. Id. Requested instruction that if plaintiff requested change from contract in construction of boat he could not thereafter reject it because of such changes held improperly refused. Marine Iron Works v. Wiess [C. C A.] 148 F. 145.

36. See § 6A, ante.

37. Rule inapplicable where delay due to fault of other party. Beattie Mfg. Co. v. Heinz, 120 Mo. App. 465, 97 S. W. 188. Restrictive clause of lease providing that no beer save of a particular manufacture should be sold on premises held not annulled by fact that excepted beer could not be lawfully obtained, it being presumed that both parties knew law and contracted with reference to it. Schlitz Brewing Co. v. Nielsen [Neb.] 110 N. W. 746. Strike of carpenters held not to excuse failure to complete vessel on time, no such provision being contained in body of contract, and note at head of letter being ineffective because respondent's attention was never called to it, and it was not seen by its contracting officers. Morse Dry Dock & Repair Co. v. Seaboard Transportation Co., 154 F. 90.

38. Refusal of railroad company to make payment for ties by carrying freight for plaintiff as required by contract held excused where company was garnished in suit against plaintiff. Jonesboro etc., R. Co. v. Watts, 80 Ark. 543, 98 S. W. 358. Executive and managing officers of corporation will not be permitted to participate in its assets being administered through an insolvency proceeding on basis of breach of the contract of employment under their election to office, for that portion of period for which they were elected, unexpired and unearned at date of receivership. Williamson County Banking & Trust Co. v. Roberts-Buford Dry Goods Co. [Tenn.] 101 S. W. 421.

39. Where contract legal in its inception becomes invalid by subsequent statutory enactment, it is thereby wholly terminated as soon as statute takes effect though time fixed by its terms has not expired, and no recovery can be had for subsequent nonperformance, though acts previously done under such contract are not rendered invalid. American Mercantile Exchange v. Blunt [Me.] 66 A. 212.

40. Contract for legal services is personal in its nature, so that death or disability which renders performance impossible discharges it. Corson v. Lewis [Neb.] 109 N. W. 735.

41. Where vendor broke contract by failure to furnish abstract of title, held that evidence that vendee would not have taken and paid for land had abstract been furnished was inadmissible. Hampton Stave Co. v. Gardner [C. C. A.] 154 F. 805.

42. Agreement to sell complainant's beer exclusively. Christian Feigenspan v. Nizolek [N. J. Eq.] 65 A. 703.

The rights, duties, and liabilities of the parties to a building contract growing out of the destruction of the building before the completion of the work is treated elsewhere.[44]

(§ 6) *D. Sufficiency of performance.*[45]—Performance is such thorough fulfillment of a duty as puts an end to the obligation by leaving nothing more to be done.[46] A party is ordinarily bound to fulfil his contract according to its terms.[47] He can-

43. Where defendant finally failed to furnish machinery that would perform certain work as required by contract, held that it could not claim benefit of provision exempting it from liability for delay due to strikes. Munson v. James Smith Woolen Mach. Co., 118 App. Div. 398, 103 N. Y. S. 502. Also held immaterial whether delay was due to attempted furnishing of machinery first provided for, or of parts called for by subsequent modifications of original contract. Id.

44. See Building and Construction Contracts, 9 C. L. 424.

45. See 7 C. L. 815.

46. Contract whereby plaintiff agreed that if defendant would secure purchaser for property bid in at sale under deed of trust given to secure note indorsed by defendant, for sum sufficient to pay principal and interest of note and costs, plaintiff would surrender note to him held performed by defendant where he procured purchaser who was willing and able to purchase, and actually did so for sufficient amount, contract of sale between plaintiff and proposed purchaser having nothing to do with defendant's contract. Ubhoff v. Brandenberg, 26 App. D. C. 3. Contract between defendant and certain corporations after testator's death held not procured by testator, so as to entitle his estate to share of commissions earned under it. Hasell v. Buckley, 118 App. Div. 356, 103 N. Y. S. 377. Instruction that, in deciding whether plaintiff had exhibited skill and knowledge which contract implied he possessed, jury should consider defendant's knowledge of plaintiff's previous training and experience, held proper. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241.

Evidence held to show performance: By plaintiff of contract to support decedent during latter's lifetime. Powers v. Crandall [Iowa] 111 N. W. 1010. Organization of corporation by trustee pursuant to terms of contract. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F. 820. That work was done to satisfaction of defendant's superintendant as required by contract. Lang v. Crescent Coal Co. [Wash.] 87 P. 261. Contract to procure subscriptions for corporate stock. Tyler v. Coleman, 29 Ky. L. R. 1270, 97 S. W. 373. Fact that certain subscriptions were conditional held immaterial, defendant having authorized their acceptance upon conditions imposed. Id.

Evidence held not to show performance: Insufficient to support finding that defendant was instrumental in making sale of machinery so as to entitle him to agent's commission. Port Huron Co. v. Miller, 127 Ill. App. 324.

47. See, also, § 9A, post. Parties are entitled to have contract executed according to its terms, and not according to some notion of equity or justice or upon some fanciful theory of computation by court or jury. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 S. E. 826. Charge that party has right to recover when he has performed his service in pursuance of his contract held equivalent to instruction that services must have been such as were called for by contract and must have been performed according to its terms. Schofield v. Little [Ga. App.] 58 S. E. 666. Evidence held not to sustain burden resting on plaintiff to show performance in accordance with terms of contract. Ansorge v. Moriarty, 103 N. Y. S. 815. In action on contract for sale, delivery, and hanging of gas fixtures, held error to award plaintiff judgment for full contract price where it was admitted that he did not hang fixtures, and evidence showed that defendant did so at his own expense. Baldinger & Kupferman Mfg. Co. v. Christ, 105 N. Y. S. 193. In action to recover money advanced for purchase of ties which it was claimed were never delivered, instruction authorizing recovery if agreement was made and defendant failed to deliver sufficient number of ties under contract to repay amount advanced by plaintiff held not objectionable for failure to require that ties must have been delivered at place where it was claimed contract required them to be delivered, in view of other instructions and fact that question whether contract required ties to be delivered at such place was for jury. Holcomb-Lobb Co. v. Kaufman, 29 Ky. L. R. 1006, 96 S. W. 813. Small specks in borders of prints not due to defects in plates or printing but to dust particles held not to preclude recovery, uncontradicted evidence being that they could not be avoided. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306, afg. 125 Ill. App. 602. Approval and certification by land office of selection of indemnity school land by state having operated to exhaust bases offered in exchange, held that furnishing of list of such base land was no defense to action to recover money paid defendant to furnish list of valid base lands. Morse v. Odell [Or.] 89 P. 139. Plaintiffs held bound to substantially perform contract to prepare plans, so that if plans did not come within its terms they could not recover unless defendant waived deviation. Hudson v. Rodgers, 121 Mo. App. 168, 98 S. W. 778. Where contract required plaintiffs to prepare plans for building not to cost more than specified amount, by specified date, and plans as drawn called for building to cost more than said sum, held that they had no right to prepare second set after said date, and instruction authorizing recovery of reasonable value if defendant refused to permit them to make changes in plans necessary to make them conform to contract was error. Id. Evidence held to support finding that plans for drawing for which recovery was sought were defective and utterly unfit for use.

not accept those terms which are favorable to him and reject those which are onerous, but must accept or reject it in its entirety.[48] So, too, the terms of the contract are the only measure and criterion of his duty thereunder.[49] If a joint contract is performed by either of the promisors, the liability of the other party is complete.[50] Payment in full by one of several persons jointly liable is a defense to an action by the obligee against the others,[51] but a partial payment is only a defense pro tanto.[52]

In the case of building contracts a literal compliance is not required but a substantial performance in good faith authorizes a recovery of the contract price, less a reasonable allowance for inadvertent and trivial errors and omissions,[53] and this rule has been held applicable to certain other undertakings of a different character, under appropriate circumstances.[54]

Where the promisor undertakes to perform to the satisfaction of the promisee [55] or his agent,[56] an honest and reasonable objection by the latter precludes recovery.

Dunne v. Robinson, 53 Misc. 545, 103 N. Y. S. 878. Instruction that in determining whether certain plant constructed by plaintiff was antiquated and insufficient they might consider whether both parties intended that it should be modeled after certain other plant held proper. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241. In action for services in establishing alkali plant in which English machinery was installed, held that evidence as to cost of similar American machinery was properly excluded, plaintiff not being responsible, under circumstances, for not knowing that latter could be purchased more cheaply than former. Id. Evidence held to sustain finding that work, in so far as performed, was in substantial compliance with terms of contract. Peet v. East Grand Forks [Minn.] 112 N. W. 1003.

48. Where claimant accepted money paid under modification of contract, held that he was bound by provisions of release executed pursuant thereto. William Cramp & Sons v. U. S. 41 Ct. Cl. 164.

49. In action for damages for breach of written contract to care for and cultivate grove of fruit trees, held no defense that plaintiff did not care for and cultivate adjacent grove not included in contract so well as defendant did grove included in contract, terms of contract being only criterion and measure of defendant's duty. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687. There being no evidence that there was any agreement that defendant was to receive only certain per cent of profit on actual cost, held immaterial that plaintiff offered to let him do work on that basis, and hence instruction on theory that refusal of such offer released plaintiff from further liability on contract was properly refused. Virginia Bridge & Iron Co. v. Crafts [Ga. App.] 58 S. E. 322. Oil and gas lease held not to be void merely because lessor expected lessee to commence operations at once where by express terms of lease they could be delayed for five years. Ringle v. Quigg, 74 Kan. 581, 87 P. 724. Oil and gas lease held not void merely because lessee stipulated therein that at end of five years he should have option to keep lease in force by doing certain act which at date of lease he was unable to perform. Id. Certain firm held not to have given opinion that invention was patentable, so that, under terms of contract, defendant was not bound to take stock in corporation formed for purpose of utilizing it. Instruction approved. Randall v. Claflin [Mass.] 80 N. E. 594.

50. Reilly v. Reilly [Iowa] 110 N. W. 445.

51. Payment in full by part of subscribers for construction of building. Hastings Industrial Co. v. Baxter 125 Mo. App. 494, 102 S. W. 1075.

52. Fact that undertakers had been paid by estate of decedent sum deemed by surrogate to be reasonable funeral expenses held not to preclude them from recovering balance due under express contract for their services made with third person. Ruggiero v. Tufani, 104 N. Y. S. 691.

53. See Building and Construction Construction Contracts, 9 C. L. 424.

54. Contract to furnish municipality with water through system of waterworks. Skowhegan Water Co. v. Skowhegan Village Corp. [Me.] 66 A. 714. Doctrine held inapplicable to contract for making prints of pictures, which were refused. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306, afg. 125 Ill. App. 602.

55. Agreement to make coat for defendant out of skins furnished by her. Haehnel v. Trostler, 104 N. Y. S. 533. Where artist agreed to paint portrait to defendant's satisfaction, and defendant testified that he was not satisfied, held that judgment for plaintiff for contract price was erroneous. Clausen v. Vonnoh, 105 N. Y. S. 102. Where plaintiff agreed "to render satisfactory services in her specialties" during theatrical engagement of one week and was dischargd in good faith after one performance because her services were not satisfactory to defendant or public, held that she could not recover contract price for week's services. Parker v. Hyde & Behman Amusement Co., 53 Misc. 549, 103 N. Y. S. 731.

56. See, also, Building and Construction Contracts, 9 C. L. 424. Where plaintiff agreed to purchase school bonds "when legally issued to the satisfaction of our attorneys," held that approval of attorneys was condition precedent to completion of purchase, and, where they honestly and in good faith advised against legality of bonds, defendant was not entitled to forfeit deposit made by plaintiff to secure performance. Webb v. Trustees of Morganton Graded School Dist. 143 N. C. 299, 55 S. E. 719. Question as to validity of bonds held not so free from

(§ 6) *E. Demand or tender necessary to fix performance or breach.*[57]—A demand is prerequisite to the recovery of money payable at an indefinite future time.[58] It is sometimes held that no other demand than the bringing of an action therefor is necessary to recover money payable on demand.[59] Where plaintiff's action is based on an alleged right to refuse further performance, no demand is necessary to entitle defendant to recoup damages for plaintiff's breach.[60] Where the contract gives one party an option to demand performance by the other party or not, at his election, he is bound, if he desires performance, to so elect, notify the other party of that fact, and tender performance on his own part, either on the date fixed or within a reasonable time thereafter.[61]

Under the civil law where a contract to do is violated by not doing what was covenanted to be done within the time stipulated, a putting in default is not a prerequisite to a suit for rescission, but is necessary only when damages are sought to be recovered for the breach.[62] Nor is a putting in default necessary where the other party has put it out of his power to perform.[63]

Where the acts to be done by the parties are mutual and to be performed at the same time, it is only necessary for plaintiff to aver that he was ready and willing to perform his part.[64] An absolute refusal by one party to perform renders a tender by the other unnecessary.[65] So, too, a tender at the time fixed for performance is excused when rendered impossible by the acts of the other party.[66]

doubt as to make refusal to approve them arbitrary. Id.

57. See 7 C. L. 817.

58. Where decedent agreed upon certain contingency either to form partnership with plaintiff or to convey to him quarter of net assets of business after deducting certain sum, held that money liability could arise only on refusal of demand for performance, and limitations did not begin to run until such demand and refusal. Ott v. Boring [Wis.] 110 N. W. 824.

59. Complaint in indebitatus assumpsit alleging indebtedness of defendant to plaintiff for certain coins, delivered by latter to former, of value of specified sum, which sum defendant promised to pay on demand, held to state cause of action though it did not allege demand. Ex parte Horwitz, 2 Cal. App. 752, 84 P. 229.

60. Plaintiff's suit held to relieve defendant from necessity of demand for lumber according to terms of contract. Bailey Co. v. West Lumber Co., 1 Ga. App. 398, 58 S. E. 120.

61. Where defendants' intestate agreed to purchase stock at certain time and contract expressly gave plaintiffs option to sell or not. Hollis v. Libby, 101 Me. 302, 64 A. 621. Delay of one year and eight months held unreasonable under circumstances, and to preclude enforcement of contract. Id. Notices given to administrators before date fixed held not to constitute election, particularly as they were given for entirely different purpose. Id.

62. Where obligation is to do and is limited as to time of performance. Murray v. Barnhart, 117 La. 1023, 42 So. 489. Is prerequisite only to recovery of future damages. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481.

63. Where defendant himself put an end to plaintiff's agency for sale of land, had placed it out of his power to perform, and had withdrawn from prospective purchaser opportunity to show his good faith and ability to purchase, held not necessary for plaintiff to put him in default before suing for commissions. Luckett Land & Emigration Co. v. Brown, 118 La. 943, 43 So. 628.

64. See, also, § 9F, post. Douglas v. Hustead, 216 Pa. 292, 65 A. 670.

65. Witt v. Dersham, 146 Mich. 68, 13 Det. Leg. N. 660, 109 N. W. 25. Where other party repudiated contract before time for performance. Hobbs v. Ray, 29 Ky. L. R. 999, 96 S. W. 589. Where vendee refused to accept deed for undivided five-sixths of coal on ground that it was entitled to conveyance of entire interest, held that vendor's administrator, on subsequently discovering that he owned six-sevenths interest, was not required to tender deed for that interest. Farber v. Blubaker Coal Co., 216 Pa. 209, 65 A. 551. Where agent of vendor positively refused to deliver deed, held that actual tender of money was not required. Douglas v. Hustead, 216 Pa. 292, 65 A. 670. Where defendant denied making offer to purchase stock, and absolutely refused to take it. Ellis Adm'r v. Durkee, 79 Vt. 341, 65 A. 94. Where defendant repudiated contract before tender could be made, held that none was necessary, but it was sufficient that he offered in bill for specific performance, to bring money into court. Sharp v. West, 150 F. 458.

66. Where defendant agreed to repurchase stock from plaintiff one year from date of issue, but was out of state at that time so that no formal tender was possible, held that tender of stock to him within reasonable time after his return was in time. Edmonds v. Evarts, 146 Mich. 485, 13 Det. Leg. N. 867, 109 N. W. 844. Defendant having agreed to fix the matter up, duty of prompt action in future was shifted to him. Id.

(§ 6) *F. Rights after default.*[67]—Default in performance by one party generally excuses further performance by the other [68] and entitles him to rescind the contract,[69] or to sue in equity for specific performance,[70] or at law for his resulting damages.[71]

§ 7. *Damages for breach.*[72]—The subject of damages is fully treated elsewhere.[73]

§ 8. *Rescission and abandonment. A. By agreement or under special provisions of the contract.*[74]—A contract may be rescinded at any time by mutual consent [75] without any new consideration.[76] An agreement to rescind may be shown by such circumstances, or such a course of conduct, as clearly indicates such an intention.[77] The contract itself often provides for its rescission under certain specified circumstances.[78]

(§ 8) *B. Occasion or right to rescind or abandon without consent.*[79]—Before breach a valid contract can only be rescinded by mutual consent.[80] One may rescind a contract which he was induced to make through fraud, misrepresentation, or undue influence,[81] accident or mistake,[82] or duress,[83] unless he has waived the same,[84] or a contract made while mentally incompetent.[85]

67. See 7 C. L. 818.
68. See § 6C, ante.
69. See § 8B, post.
70. See Specific Performance, 8 C. L. 1946.
71. See § 9, post.
72. See 7 C. L. 819.
73. See Damages, 7 C. L. 1029.
74. See 7 C. L. 819.
75. Oral agreement to cancel or rescind title bond before rights of third parties intervened held valid. Asher v. Helton [Ky.] 101 S. W. 350. Before breach. Davenport v. Crowell 79 Vt. 419, 65 A. 557. Where contract remains executory. Proctor Coal Co. v. Strunk, 29 Ky. L. R. 995, 96 S. W. 603. Evidence held to sustain finding that bond was canceled. Asher v. Helton [Ky.] 101 S. W. 350. Where, upon termination of contract by mutual consent, parties in bona fide attempt to settle matter agreed upon certain sum as due plaintiff, held that such accord would be binding irrespective of their rights under the contract. Mathis v. Harrell, 1 Ga. App. 358, 58 S. E. 207. Evidence held insufficient to show cancellation of agreement to pay for stock. Wiger v. Carr [Wis.] 111 N. W. 657.

76. Agreement to annul on one side sufficient consideration for agreement on other. Proctor Coal Co. v. Strunk, 29 Ky. L. R. 995, 906 S. W. 603.

77. Evidence held to show rescission. Davenport v. Crowell 79 Vt. 419, 65 A. 557. Even if telegrams constituted completed contract, held that letters subsequently received by defendant amounted to conditional rescission in which defendant, by silence, acquiesced. Scaife & Sons Co. v. Standard Ice Co. [Wash.] 89 P. 882.

78. Where nonpayment of rent gave landlord, under terms of lease, continuing option to terminate lease at his election, held that notice of election to terminate was necessary prerequisite to bringing action of forcible entry and detainer. Lane v. Brooks, 120 Ill. App. 501. Though contract reserves right of rescission when party becomes dissatisfied, he must ordinarily have reasonable grounds for dissatisfaction. Clark v. Kelly [Iowa] 109 N. W. 292. Evidence held insufficient to warrant rescission of lease. Id. Contract held to give defendants right to withdraw from contract and declare it void while it remained executory on return of payment made thereunder, so that they were not liable in damages for so doing. Pierce v. Signor [Wis.] 111 N. W. 699.

79. See 7 C. L. 819.

80. Defendant held to have no right to repudiate contract whereby plaintiff was to weigh all cotton bought by him because sellers required that some other person should weigh same before they would sell. Sadler-Lusk Trading Co. v. Logan [Ark.] 104 S. W. 205. Party to executed agreement in regard to water rights held not entitled to repudiate it without other's consent. Bree v. Wheeler [Cal. App.] 87 P. 255. Where plaintiffs showed making of contract, its cancellation by defendant, and their damages, held error to dismiss complaint. Levine v. Markowitz, 102 N. Y. S. 511. Contract for joint use and maintenance of elevator held founded on mutuality, and terminable only by mutual consent. Globe Ins. Co. v. Wayne, 75 Ohio St. 451, 80 N. E. 13.

81. See Fraud and Undue Influence, 7 C. L. 1813. Purchaser of corporate stock held entitled to rescind for fraud of promoter. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494. Equity will rescind contract obtained by fraud. Tolley v. Poteet [W. Va.] 57 S. E. 811. Certain representations held no ground for rescission of sale of stock. Farwell v. Colonial Trust Co. [C. C. A.] 147 F. 480. Instruction that if jury found that defendant had been defrauded in sale of jewelry to him, and that his offer to return goods, followed by tender of same in court, operated as repudiation of contract on his part, they should find for plaintiffs for balance in defendant's hands for goods sold by him, approved. Lyon v. Lindblad, 145 Mich. 588, 13 Det. Leg. N. 574, 108 N. W. 969.

82. See Mistake and Accident, 8 C. L. 1020.
83. See Duress, 7 C. L. 1201.
84. Party voluntarily executing wholly executory contract after discovery of fraud

A failure of consideration for an entire contract,[86] or an unexcused [87] failure or refusal of one party to perform,[88] ordinarily authorizes a rescission by the innocent party, provided he has himself been guilty of no default;[89] but the breach of a covenant which does not go to the whole consideration, but is subordinate and incident to the main purpose,[90] or an insignificant breach which can be easily compensated for in damages,[91] or a failure to completely perform, where one party has derived substantial benefits or the other has suffered material losses,[92] does not. Though performance is to a certain extent divisible, yet if the default in one item of a continuous contract is accompanied by an announcement of intention of the party thus in default not to perform it on the agreed terms, the other party may treat the contract as at an end,[93]

cannot recover damages resulting from such execution. Richardson v. Lowe [C. C. A.] 149 F. 625. Waiver of right to rescind held not to preclude setting up fraud as defense. Id.

85. See, also, Incompetency, 8 C. L. 169. Insane Persons, 8 C. L. 319. Executed contract may be avoided upon the ground that the party was incapable of contracting when other party's property may be restored to him and he be placed in statu quo. Swartwood v. Chance, 131 Iowa, 714, 109 N. W. 297.

86. Alvey v. Alvey, 30 Ky. L. R. 234, 97 S. W. 1106. For discussion of what amounts to a failure of consideration see § 2, ante.

87. For excuses for failure to perform see § 6C, ante.

88. When it can be done in toto and parties put in statu quo. Whiting v. Derr, 105 N. Y. S. 854. May treat contract as rescinded and sue for damages where he is prevented from performing by other party. Valente v. Weinberg [Conn.] 67 A. 369. Refusal of purchaser of iron to pay in accordance with terms of contract held to justify seller in abandoning contract, and to entitle him to recover at contract price for iron delivered. Patten v. Iroquois Furnace Co., 124 Ill. App. 1. Petition alleging that defendant agreed to complete well within year, and that at time of bringing suit, four years after, it had not even made preparations for commencing well, held to set up cause of action for rescission. Murray v. Barnhart, 117 La. 1023, 42 So. 489. Unreasonable delay of plaintiffs having rendered it impossible for defendant to perform contracts of sale according to their terms, held that he was justified in declining to perform. Frommel v. Foss [Me.] 66 A. 382. Where contract provided that contractor should be paid in installments as work progressed, upon estimates of an engineer, failure to pay installments at time agreed upon held to justify contractor in abandoning contract. Peet v. East Grand Forks [Minn.] 112 N. W. 1003. Where time of delivery was of essence of contract of sale of lath, and plaintiff failed to deliver them within time fixed, held that defendants had right to repudiate whole contract. Frost-Trigg Lumber Co. v. Forrester [Mo. App.] 101 S. W. 164. Plaintiff held not to have broken contract so as to give defendant right to rescind. Holt v. United States Security Life Ins. & Trust Co. [N. J. Err. & App.] 67 A. 118. Where, after plaintiff's default, he was given reasonable time to perform but failed to do so, held that defendant had right to declare contract at an end. Pratt v. Clark, 118 App. Div. 633, 103 N. Y. S. 612. Where vendor sells realty and it is thereafter discovered that he has only an undivided interest therein, purchaser may either elect to accept such interest as vendor can convey, or decline to accept it and rescind the contract. Farber v. Blubaker Coal Co., 216 Pa. 209, 65 A. 551. Though simple breach of contract may entitle other party to abandon contract and recover for work actually done, he cannot recover prospective profits unless he is prevented from proceeding with performance by unauthorized acts of other party. Harris v. Faris-Kesl Const Co. [Idaho] 89 P. 760.

89. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

90. To operate as discharge of other party, covenant broken must be vital term of contract, breach of which makes performance impracticable and accomplishment of purposes impossible, otherwise party not in default must perform and sue for damages. Harris v. Faris-Kesl Const. Co. [Idaho] 89 P. 760. Agreement to render services to promote corporation held subordinate and incidental to main purpose of contract to convey patent to corporation and make certain transfers of stock, and not to go to whole consideration, so that only remedy for breach was recovery of damages. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F. 820.

91. Where contract employing teacher did not provide that it should be void if she did not begin school on specified date, and she was prevented by floods from reaching state at that time, and was two days late, held that school trustees had no authority to terminate contract, though teacher was liable to them for any damages resulting from her breach. Turner v. Hampton, 30 Ky. L. R. 179, 97 S. W. 761. Unauthorized deduction of two per cent discount from price of one of several carloads of lumber held not such a refusal to perform as would authorize defendant to cancel contract. Taussig v. Southern Mill & Land Co. [Mo. App.] 101 S. W. 602.

92. Only remedy in such case is recovery of damages for the breach. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F. 820.

93. Failure of purchaser to pay for goods already delivered, and insistance on having thirty days in which to pay for goods in future, to which it was not entitled under contract, held to entitle seller to rescind so that he was not liable in damages as for breach where he had otherwise performed. Peters

and the same is true if it appears that the failure to perform is deliberate and intentional, and not the result of mere inadvertence or inability to perform.[94] In the absence of a provision in the contract to the contrary, the violation of a condition subsequent does not ordinarily confer upon a party a right to a rescission of an executed contract where there has been no fraud or misrepresentations in the making of the contract, but the remedy is by an action to recover the consideration, or for damages.[95]

(§ 8) *C. Time and mode of rescission and abandonment.*[96]—Rescission is the act of canceling the contract by refusing to be longer bound thereby and restoring the conditions existing immediately before it was made.[97]

Since the remedy is largely equitable,[98] a party having the right to rescind must elect to do so within a reasonable time,[99] and must restore, or offer to restore,[1] every

Grocery Co. v. Collins Bag Co., 142 N. C. 174, 55 S. E 90.

94. Peters Grocery Co. v. Collins Bag Co., 142 N. C. 174, 55 S. E. 90.

95. Breach held not ground for cancellation of executed conveyance. Roy v. Harney Peak Tin Min., Mill. & Mfg. Co. [S. D.] 110 N. W. 106.

96. See 7 C. L. 821.

97. Where vendee of personalty sued to recover partial payments after vendor had fully performed, and pending suit vendor replevied goods from railroad company, making vendee party defendant and claiming absolute ownership, held that rescission was thereby effected, and vendee was entitled to recover such partial payments, though vendor's performance would otherwise have been good defense. Wagman v. Julius Kessler & Co. [Neb.] 110 N. W. 545. Mere words of disaffirmance followed by positive acts acquiescing in contract will not effect rescission of same. Owens Co. v. Doughty [N. D.] 110 N. W. 78. Rescission at law after delivery of goods sold consists of return of goods within reasonable time upon sufficient ground and refusal to pay stipulated price therefor. Main v. Procknow [Wis.] 111 N. W. 508.

98. For procedure in suits to rescind see Cancellation of Instruments, 9 C. L. 454.

99. Defendant held estopped to claim rescission by delay in giving notice to plaintiff. Drovers' Live Stock Commission Co. v. Wolff Packing Co., 74 Kan. 330, 86 P. 128, 89 P. 465. One seeking to rescind for duress must do so when it is removed. Calkins v. Pease, 125 Ill. App. 270. Right to rescind for fraud held waived. Richardson v. Lowe [C. C. A.] 149 F. 625; Burk v. Johnson [C. C. A.] 146 F. 209; American Educational Co. v. Taggert, 124 Ill. App. 567. Failure to promptly repudiate contract and tender back deeds held to preclude rescission for misrepresentations. Guthrie v. Lyon [Tex. Civ. App.] 17 Tex. Ct. Rep. 321, 98 S. W. 432. Delay held not, under circumstances, to preclude rescission for fraud. Freeman v. Gloyd, 43 Wash. 607, 86 P. 1051. To avoid contract on ground of excessive intoxication, one must rescind within reasonable time after recovering his senses, or, if he has received no money or property as consideration therefor, must within reasonable time disclaim liability thereon. Case Threshing Mach. Co. v. Meyers [Neb.] 111 N. W. 602. Right to avoid held lost through failure to disclaim. Id. Where defendants did not repudiate contract on discovery of alleged error therein, but, after they knew its contents, promised to perform and otherwise recognized its validity, held that they could not defend action for breach on ground that contract as written was not contract which they intended to execute. Hobe Lumber Co. v. McGrath [Minn.] 112 N. W. 1053. For breach. Owens Co. v. Doughty [N. D.] 110 N. W. 78. Defendant held to have waived right to rescind for plaintiff's delay in furnishing title by thereafter demanding that record title be perfected through probate proceedings. Woodward v. McCollum [N. D.] 111 N. W. 623. Payment of note held waiver of any duress in procuring its execution. Lilienthal v. Bechtel Brew. Co., 118 App Div. 205, 102 N. Y. S. 1051. Continued receipt of money advanced by plaintiff held to abrogate any existing right of defendant to rescind. St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701. If contract did not fully express defendant's understanding of agreement, held that it was his duty to rescind same promptly on discovering his mistake, and, by accepting its benefits with full knowledge of obligations, he was estopped from subsequently setting up defense that he was mistaken as to its effect. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A. 695. Where seller of judgment agreed to produce note on which part of it was based or to refund purchase price, but failed to do so, held that, if purchaser desired to rescind on that account, she was bound to assert right within reasonable time and tender reassignment of judgment, and that unreasonable delay and retention of judgment precluded recovery for breach of such collateral agreement without proof of damage. Newmyer v. Davidson, 31 Pa. Super. Ct. 468. Receipt of checks and giving of receipts after payment was overdue held to preclude rescission for failure to pay on time. Kelley Brick Co. v. Clay Product Supply Co., 32 Pa. Super. Ct. 408.

1. Marion Trust Co. v. Blish [Ind. App.] 79 N. E. 415; Murray v. Barnhart, 117 La. 1023, 42 So. 489; Houts v. Scharbauer [Tex. Civ. App.] 103 S. W. 679. May rescind only when both parties can be restored to condition in which they were before contract was made. Civ. Code 1895, § 3712. Purchaser who had accepted, paid for, and used part of corn delivered under contract held not entitled to rescind on ground that such part was inferior to that called for by contract. Henderson El. Co. v. North Georgia Mill. Co., 126 Ga. 279, 55 S. E. 50. Contract will not be rescinded by court where parties cannot

thing of value received by him from the other party unless such restoration is waived.[2] The rule requiring restoration has been held not to apply to an action by the state to cancel an illegal contract.[3] It has also been held that payments made by way of liquidated damages for delay in performance need not be returned on rescission for nonperformance.[4] One cannot complain of delay which he himself induced.[5] An entire contract cannot be rescinded in part and affirmed in part.[6]

(§ 8) *D. Remedies.*[7]—The rescission or abandonment of a contract ordinarily puts an end to it for all purposes and discharges both parties from any further lia-

be put in statu quo. Bray v. Carroll [Ark.] 100 S. W. 744. Plaintiff held not entitled to rescind contract for board and tuition at school for fraud, and recover consideration where she had received board and tuition for two weeks, it being impossible to return what she had received. American Educational Co. v. Taggert, 124 Ill. App. 567. Where plaintiffs agreed that defendant might use money in his hands to pay for certain stock, and defendant, in reliance thereon, bound himself to pay purchase price of stock, held that it was then too late for plaintiffs to cancel or rescind since defendant could not be placed in statu quo. Wiger v. Carr [Wis.] 111 N. W. 657. Vendor rescinding contract for sale of mineral rights in land must restore installment of purchase price received by him. Brock v. Tennes Coal Co., 30 Ky. L. R. 1370, 101 S. W. 300; Id., 29 Ky. L. R. 1283, 97 S. W. 46. Heirs of vendors held not entitled to have sale decreed void on ground of lesion without tendering back portion of purchase price paid in cash. Rudolph v. Costa [La.] 44 So. 477. Restoration to statu quo does not mean that parties should be replaced in every sense as they were, but that injured party should restore whatever he has received that he can restore and surrender any advantage he may have received. Whiting v. Derr, 105 N. Y. S. 854. Where contract to build boat was rescinded by plaintiff for failure of defendant to complete it in time, defendant held not entitled to recover money he had expended for labor or materials. Id. Title to boat being constructed by defendant for plaintiff being primarily in defendant, and vested in plaintiff only by force of the contract, held that plaintiff could not both disaffirm said contract and assert such title. Id. Sale of personalty followed by actual delivery cannot be rescinded unless property is returned promptly to seller, or its return tendered and refused, or its return waived. Owens Co. v. Doughty [N. D.] 110 N. W. 78. Held that sale could not be rescinded by return or offer to return that part of property not resold by purchaser. Id. Where defendant relied on breach of express warranty solely as defense to cause of action on contract of sale, held that he was bound to show rescission of contract by showing that he had returned or offered to return goods purchased by him. Roots Co. v. New York Foundry Co., 51 Misc. 627, 101 N. Y. S. 104. One producing play under license and permission from plaintiffs held not entitled to question right to receive royalties stipulated in contract. Outcault v. Bonheur, 104 N. Y. S. 1099. Answer alleging fraud in procuring contract giving bankrupt license to produce play held not to state defense where it failed to allege return or offer to return manuscripts, etc., received by bankrupt, or that bankrupt notified plaintiff of intention to rescind. Id. Plaintiff deeded land to defendant pursuant to an agreement to do so if defendant would not contest or protest plaintiff's application for patent thereto. Defendant did not contest, but, subsequent to entry, filed protest in violation of his agreement. Held that, in absence of allegation of fraud in procuring contract, plaintiffs were not entitled to rescind, since defendant could not be placed in statu quo, time for contest having expired. Roy v. Harney Peak Tin Min., Mill. & Mfg. Co. [S. D.] 110 N. W. 106. Evidence held not to show tender back of deed as claimed. Guthrie v. Lyon [Tex. Civ. App.] 17 Tex. Ct. Rep. 321, 98 S. W. 432. Held that there could be no rescission of sale of horse for fraud without return of horse or offer to return him. Dunham v. Salmon, 130 Wis. 164, 109 N. W. 959.

2. Evidence held to show waiver of technical tender back of amount paid for release which was claimed to have been obtained by fraud. Austin v. St. Louis Transit Co., 115 Mo. App. 146, 91 S. W. 450.

3. Since its officers have no authority to draw money for that purpose, all that is necessary being consent that other party may take judgment against state for amount paid by him. State v. Washington Dredging & Imp. Co., 43 Wash. 508, 86 P. 936.

4. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

5. Promoter held estopped to set up delay in suing to rescind stock subscription. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

6. Where contract for sale of lumber is entire, acceptance of material part by purchaser is acceptance of whole. Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 S. W. 845. Where vendee accepted portion of quantity of goods contracted for, fact that they were of inferior quality held not to entitle him to refuse to receive balance if it came up to contract standard. Henderson El. Co. v. North Georgia Mill. Co., 126 Ga. 279, 55 S. E. 50. In pleading rescission must appear that there has been rescission in toto. Marion Trust Co. v. Blish [Ind. App.] 79 N. E. 415. Cannot, on breach, ratify part of contract which is advantageous, and disaffirm unprofitable part. Owens Co. v. Doughty [N. D.] 110 N. W. 78. Defendants held not entitled to affirm part of contract of sale by counterclaiming upon it for damages for breach, and at same time disaffirm contract by return of goods and refusal to pay purchase price. Main v. Procknow [Wis.] 111 N. W. 508.

7. See 7 C. L. 823.

bility thereunder.[8] Either party may, however, recover back any money paid the other in furtherance of the contract.[9] After rescission the contract cannot be restored except by mutual consent.[10]

§ 9. *Remedies for breach. A. The right and its accrual.*[11]—No right of action for breach accrues until performance is due under the terms of the contract.[12] Damages may be recovered presently for breach of an agreement to deliver an obligation payable in the future.[13] As a general rule one cannot recover on, or compel performance of, an entire [14] contract unless he shows full performance on his own part of all the obligations imposed on him,[15] or a readiness and willingness to per-

8. Where plaintiff sued for amount agreed upon as due him on settlement on termination of contract by mutual consent, evidence tending to show that defendant had not furnished goods upon plaintiff's request as required by contract held inadmissible. Mathis v. Harrell, 1 Ga. App. 358, 58 S. E. 207. Agreement to treat contract of employment as terminated held waiver of breach by plaintiff in leaving without giving stipulated notice, and of right to recover damages therefor. Bailey v. Bowne Lumber Co. [R. I.] 67 A. 427.

9. Where contract has been rescinded by one party because of breach by other, action will lie for money had and received to recover back any money paid by either party to the other in furtherance of contract. Whiting v. Derr, 105 N. Y. S. 854.

10. Where contract was rescinded, held that nothing which supervened could operate to restore it without consent of other party. Peters Grocery Co. v. Collins Bag Co., 142 N. C. 174, 55 S. E. 90. Where plaintiffs notified defendant that they no longer desired performance and would sue for rescission, held too late for defendant to offer to perform. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

11. See 7 C. L. 823.

12. Action on building contract held not premature. Andrew Lohr Bottling Co v. Ferguson, 223 Ill. 88, 79 N. E. 35. Objection that action was prematurely brought held waived by denial of liability on other grounds. Id. Defendant purchased certain land for benefit of third person upon promise of latter to furnish him sufficient lumber to build house thereon and give him five years in which to pay for it. Plaintiff cut timber on third person's land and, with knowledge of contract, and on such third person's order, furnished lumber to defendant. Held that plaintiff was not entitled to recover for such lumber from defendant until payment was due under terms of latter's contract, since if plaintiff acquired third person's claim against defendant he acquired no greater rights thereunder than such third person had. Taylor v. Harvey, 30 Ky. L. R. 1045, 100 S. W. 258. Where plaintiff's suit was not premature under original contract, held that defendant was entitled to set up in his answer and after default fact that contract had been subsequently modified and an extension given, which subsequent agreement plaintiff had ignored and violated by suing as soon as he did. Interstate Bk. & Trust Co. v. Welsh, 118 La. 676, 43 So. 274. Life insurance policy was assigned to bank for joint benefit of itself and plaintiff, bank agreeing to pay all premiums. Policy provided that it should be payable ninety days after insured's death. Bank failed to pay premiums and policy lapsed. Held that plaintiff's right of action against bank for breach of contract accrued immediately on insured's death, since her rights under policy would have then become vested. Scheele v. Lafayette Bank, 120 Mo. App. 611, 97 S. W. 621. Where contract provided that plaintiff should be paid for printing after defendant had been paid therefor by state, held that plaintiff could not recover items for which defendant had not been paid at time when action was commenced, though he was paid therefor pending the action. Quayle v. Brandow Printing Co., 116 App. Div. 9, 101 N. Y. S. 323. Agreement to pay half of any deficiency judgment entered against mortgagor held not mere covenant to indemnify him against loss, but that latter could maintain action thereon without having paid judgment. Dilcher v. Nellany, 52 Misc. 364, 102 N. Y. S. 264.

13. Failure or refusal of defendant to execute notes for indebtedness found due on accounting as required by contract held breach giving plaintiff right to sue thereon immediately regardless of fact that part of debt would not have been due had notes been executed. Parr v. McGown [Tex. Civ. App.] 98 S. W. 950.

14. For distinction between entire and severable contracts see § 4C, ante.

15. For necessity of pleading performance see § 9F, post. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481; Hall-Baker Grain Co. v. Le Mar [Mo. App.] 101 S. W. 1098; Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241. One failing or refusing to perform cannot recover for subsequent breach by other party. Wood, Curtis & Co. v. Scurich [Cal. App.] 90 P. 51. Must prove performance or that he was prevented from performing by other party. Kelley Brick Co. v. Clay Product Supply Co., 32 Pa. Super. Ct. 408. Party performing in part held not entitled to recover on contract, particularly where it was guilty of fraud. American Copying Co. v. Lehmann [Cal. App.] 91 P. 414. Cannot recover for part performance unless full performance has been waived or prevented. Poynter v. U. S., 41 Ct. Cl. 443. Where contract required plaintiff to procure two separate options, held that he could not recover on contract where he only obtained one of them by alleging and proving that he was prevented from procuring other by defendant, but his remedy was by action for damages for breach. Worthington v. McGarry [Ala.] 42 So. 988. Where architect's plans were so defective that they could not be used by a builder, held that he was not entitled to any compensation for his services. Dunne v.

form,[16] or an excuse for failure to perform,[17] or a waiver of full performance.[18] A repudiation by one party before the time fixed for performance may dispense with or excuse an offer to perform by the other party before bringing his action, but it does not ordinarily excuse ability to perform.[19] If the obligation is dependent upon the happening of a contingency, it must be shown to have happened.[20] The necessity for demand and tender is treated in a previous section.[21]

Ordinarily there can be but one recovery for the total breach of an entire contract.[22] Failure to perform any one of the things contracted for by the terms of an

Robinson, 53 Misc. 545, 103 N. Y. S. 878. Where architect agreed to pay plaintiff part of his commission if it would procure loan for his employer, and plaintiff did not procure it, held that plaintiff could not recover. McCrary v. Thompson, 123 Mo. App. 596, 100 S. W. 535. Plaintiffs held not entitled to recover for plans not substantially in accordance with contract. Hudson v. Rodgers, 121 Mo. App. 168, 98 S. W. 778. Failure to charge that party seeking enforcement of alleged executed contract must show performance on his part held error where evidence was conflicting. Bennett v. Burkhalter [Ga.] 57 S. E. 231. Evidence held to show that plaintiff's right to compensation depended on his success in procuring passage of certain congressional act and that he never succeeded in procuring passage, so that verdict in his favor was erroneous. Swift v. U. S. Regulation Firearms Co., 118 App. Div. 855, 103 N. Y. S. 736. Where contract requires certificate to be obtained from architect before payment becomes due, and action is brought upon theory of full performance, plaintiff must, in order to recover, either procure certificate, or show that it has been unreasonably refused, or that defendant has waived its production. Traitel v. Oussani, 51 Misc. 667, 101 N. Y. S. 105. Return of defective cans to plaintiff's factory held condition precedent to right of recovery for failure of warranty as to quality. Wasatch Orchard Co. v. Morgan Canning Co. [Utah] 89 P. 1009. Contract held to make delivery of lambs and crediting of price by defendant and crediting of price thereof on promissory note concurrent acts, so that before plaintiff could recover damages for breach by defendant it was incumbent on him to allege and prove performance, or readiness and willingness to perform, or some legal excuse for nonperformance. Longfellow v. Huffman [Or.] 90 P. 907. Where it appeared that note was not in plaintiff's possession or under his control, he having transferred it as collateral security, held that he could not recover damages for defendant's failure to deliver lambs. Id. Where plaintiff agreed to erect store within specified time on certain tract of land at some convenient place to be thereafter agreed on, held that agreement as to location was not condition precedent to right of action for breach, but, if failure to perform was due to breach by other party, that was matter of defense. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 N. W. 820. Expenditure of funds given for advertising held not condition precedent to recovery of commissions earned, so that breach of that part of contract did not entitle defendant to withhold commissions for goods actually sold by plaintiff. Lowell Mfg. Co. v. Aultman Engine & Thresher Co. [Kan.] 90 P. 1132. In suit for specific performance, plaintiff must show performance on his part, or that he is able, ready, and willing to perform. Olympia Min. Co. v. Kerns [Idaho] 91 P. 92. Judgment which did not require performance of conditions precedent by plaintiff before decreeing specific performance held erroneous. Id. Transfer to defendant by corporation to be organized of certain of its stock fully paid and nonassessable until balance of stock had paid ten cents per share to corporation for development of certain mining claims held condition precedent to corporation's right to conveyance of claims to it. Id.

16. Statement by defendant that he was willing to carry out his contract held not to show that he was ready and offered to carry out contract where he contended for an erroneous construction thereof. Douglas v. Lowell [Mass.] 80 N. E. 510. Vendor of land who covenanted that it was free from incumbrances and to give warranty deed held not in position to demand payment or forfeit contract until he had discharged outstanding mortgage. Bartlett v. Smith, 146 Mich. 188, 109 N. W. 260. Plaintiff held not entitled to damages where he was completely disabled from performing by acts of third persons for which defendant was not responsible. Napier v. Spielmann, 103 N. Y. S. 982. If third company was bound by contract, it was merely in conjunction with plaintiff, so that its refusal to consign goods to defendants as required by plaintiff's contract was equivalent to refusal by plaintiff as matter of law. Id.

17. For excuses for failure to perform see § 6C, ante.

18. See § 6B, ante.

19. Where, on repudiation of contract by one party, other elects to keep it in force for purpose of recovering future profits, treating it as repudiated by other party, he must, as condition precedent to such recovery, allege and prove performance on his part, or legal excuse for nonperformance. Longfellow v. Huffman [Or.] 90 P. 907.

20. Condition of conditional promise to pay plaintiff amount withheld from purchase price of land having been performed, held that plaintiff was entitled to recover same. Choctaw, etc., Co. v. Bond, 6 Ind. T. 515, 98 S. W. 335.

21. See § 6E, ante.

22. Code 1899, c. 50, § 48, providing that where plaintiff has several demands on contract he must bring his action for all or be barred as to those not sued on, held not to require inclusion of demands not due at date of suit. Adams v. International Supply Co., 61 W. Va. 401, 56 S. E. 607. Held not to require joining demand on contract to receive, dress, and reload on cars certain lumber

entire continuing contract providing for performance in installments is a partial breach, giving rise to a separate and independent cause of action.[23]

(§ 9) *B. Particular remedies and election between them.*[24]—On the breach of a contract the party not in fault may either treat the contract at an end and recover on a quantum meruit so far as he has performed,[25] or treat the contract at an end for all purposes of performance and sue for his resulting damages,[26] or treat it as still in force for the benefit of both parties until the expiration of the time for performance and then sue on the contract.[27] He may also, in a proper case, sue in equity for specific performance,[28] or set up such breach as a defense in an action against him on the contract.[29] A party may not, however, after repudiation by the other party, complete performance and recover the contract price.[30] On breach of

where, at date of suit, lumber had not been reloaded. Id.

23. Action may be instituted for each breach. Jones & Co. v. Gammel Statesman Pub. Co. [Tex.] 99 S. W. 701, rvg. 94 S. W. 191. Judgment for one of such breaches held not to preclude recovery for breaches occurring after institution of action in which said judgment was recovered and prior to its rendition, though they might have been included in former action by amendment. Id.

24. See 7 C. L. 825.

25. Where one party stops performance by other, latter may either recover damages for breach or on quantum meruit for services actually performed. Worthington v. McGarry [Ala.] 42 So. 988. One who without fault on his own part is prevented by other party from completing performance may treat contract as rescinded and recover on quantum meruit for work already performed under it. Valente v. Weinberg [Conn.] 67 A. 369. If he does so measure of damages is value of work performed, and not contract price less what it cost to complete work and any payments previously received by him. Id. May recover on quantum meruit when prevented from performing by other party. Limerick v. Lee, 17 Okl. 165, 87 P. 859. Contractor prevented from installing iron work owing to delay of owner in getting building ready. Barnum v. Williams, 115 App. Div. 694, 102 N. Y. S. 874. Where plaintiff complied with contract as far as he went, but was prevented from completing work by defendant, held that proper form of action was for work and labor done at instance and request of defendant, contract furnishing measure for valuation of work done, and plaintiff being entitled to reasonable value of uncompleted work, having regard to contract price. Harrison v. Franklin [Mo. App.] 103 S. W. 585. Where vendor of realty is found to have only an undivided interest therein, vendee may either accept such interest as he can convey or rescind. Farber v. Blubaker Coal Co., 216 Pa. 209, 65 A. 551.

26. Where one party stops performance by other. Worthington v. McGarry [Ala.] 42 So. 988. Remedy of one prevented from performing is by action for damages for breach. Id. Where vendor of personalty is required by an entire contract to make successive deliveries of articles sold, and first deliveries fail to comply with terms of agreement, vendee may either terminate contract by promptly notifying vendor that he will refuse to further perform, or permit performance to proceed and rely on his damages for vendor's breach. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360.

27. See 7 C. L. 826, n. 38.

28. See Specific Performance, 8 C. L. 1946. Where defendant failed to execute notes for amount of indebtedness found to be due on accounting, held that plaintiff could either sue for specific performance of contract to do so or for amount of indebtedness. Parr v. McGown [Tex. Civ. App.] 98 S. W. 950.

29. Defendant held not required to prove notice of rescission where his defense was not predicated on rescission, but on plaintiff's refusal to perform. Wood, Curtis & Co. v. Scurich [Cal. App.] 90 P. 51. Where plaintiff failed to procure orders for picture frames as required by contract, its only attempt to do so being fraudulent alteration of orders for portraits procured by it, held that rescission by defendant was not necessary to defeat recovery on contract. American Copying Co. v. Lehmann [Cal. App.] 91 P. 414. Where contracting party failed to induce concern of which he was member to do what he agreed it should do, held that other contracting party was not bound to sue for specific performance, but could set up such breach as defense in action on contract. Napier v. Spielmann, 103 N. Y. S. 982. Where contract has been violated by obligor, the obligee who no longer desires that it should be performed is not bound to put obligor in default or to sue for rescission, but may refuse to allow contractor to perform, and, in case of suit by latter, plead breach by way of exception. Jennings-Heywood Oil Syndicate v. Houssiere-Latereille Oil Co. [La.] 44 So. 481.

30. See, also, Damages, 7 C. L. 1029. Party to executory contract may stop performance by other party by distinct, unequivocal, and absolute renunciation thereof, and thereafter right of such other party is limited to recovery of damages for breach of contract involved. Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702, 14 Det. Leg. N. 57, 111 N. W. 343. Where contract for sale of goods is repudiated by buyer, seller cannot thereafter deliver goods to common carrier consigned to buyer, and, having done so, treat contract as executed on his part by suing buyer for purchase price of goods sold and delivered. Rounsaville v. Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030. Where defendant rescinded contract for advertising, held that plaintiff was not entitled to complete performance and sue for contract price, but his remedy was an action for damages for breach. Official Catalogue Co. v. American

a contract to reimburse one for expenditures out of the income of specified property, the other party may either sue at law for damages or in equity for an accounting.[31] Whether a provision in the contract as to the rights of the parties in case of a breach is exclusive is a question of intention.[32]

One who fails to fully perform an entire contract cannot ordinarily recover on a quantum meruit[33] unless performance was prevented by the other party,[34] though he is sometimes permitted to do so if the other party has benefited by the partial performance.[35]

Since an express contract excludes an implied one on the same subject,[36] one cannot ordinarily recover the reasonable value of work or materials furnished under an express contract, but is limited to the contract price.[37] Where the contract is

Car & Foundry Co., 120 Mo. App. 575, 97 S. W. 231. Where, on repudiation of contract by defendant after part performance by plaintiff, plaintiff sued on contract for contract price, held that evidence of amount expended in part performance or of profit plaintiff would have made on full performance was inadmissible. Id. Employe wrongfully discharged held not at liberty to disregard dismissal by continuing his labor and claiming pay therefor after receiving notice of such discharge. White v. Lumiere North American Co., 79 Vt. 206, 64 A. 1121. Evidence tending to show that employe continued to act for employer held immaterial. Id.

31. Where contract provided that income of park should be used to reimburse plaintiff for expenditures, and defendant failed to turn over income received by it. Dockstader v. Young Men's Christian Ass'n [Iowa] 109 N. W. 906.

32. Penalty held not intended by parties as only price of breach of contract, so as to prevent injunction against breach. Heinz v. Roberts [Iowa] 110 N. W. 1034. Purchaser of jewelry held entitled to rescind for fraud though he had not exhausted provisions of contract authorizing exchange if goods were not satisfactory, etc. Lyon v. Lindblad, 145 Mich. 588, 108 N. W. 969. Plaintiff's remedy for failure of defendants to furnish necessary capital to carry on business held to seek reassignment of agency contract, and he was not entitled to maintain action for damages for breach of contract. Read v. Fox, 104 N. Y. S. 251. Provision for termination of contract on failure to pay minimum royalty held not exclusive, so that, by electing to terminate it, plaintiff did not waive payment according to contract during its continuance. Cummings v. Standard Harrow Co., 105 N. Y. S. 646. Corresponding extension of time for completion of battleship for delay caused by government in accordance with terms of contract held not to have deprived builder of right to maintain action for any damages it may have sustained by reason of said delay. William Cramp v. U. S., 41 Ct. Cl. 164.

33. Contract to erect at a certain time or within a reasonable time thereafter a sarcophagus of Scotch granite on a foundation furnished by the contractor. Contractor a year after time agreed upon, without communicating with the owners, erects a sarcophagus the base of which is of native granite and places it upon a foundation which he finds others are building. Fish v. Correll [Cal. App.] 88 P. 489. Where contractor abandoned work of removing sunken vessel from channel before completion, government not having received any real benefit therefrom. Poynter v. U. S., 41 Ct. Cl. 443. Where plans prepared by plaintiff were not in accordance with contract, and defendant neither accepted nor received any benefit from his work, and offered to return plans. Graham v. Bell-Irving [Wash.] 91 P. 8. Where contract to paint and paper buildings was an entire one, and payment thereunder did not become due until work was completed, held that plaintiff was not entitled to recover any amount for materials and labor furnished where he did not substantially perform. Tinley v. Van Wert, 104 N. Y. S. 3. One who voluntarily fails to complete work which he has contracted to perform on realty of another cannot recover on quantum meruit for work performed, since part done cannot be returned. Douglas v. Lowell [Mass.] 80 N. E. 510. Use of bridge by public held not an acceptance of work thereon. Id.

34. See ante, this section.

35. Though one cannot recover on contract from which he has departed, he may recover on common counts for reasonable value of benefit which, upon the whole, opposite party has derived from what has been done. Contract to furnish municipality with water through system of waterworks. Skowhegan Water Co. v. Skowhegan Village Corp [Mass.] 66 A. 714. Recovery may be had for part performance of an entire contract, though there be no cause or excuse for its abandonment, if part performed is beneficial. Subcontract for railroad construction work. Cleveland, etc., R. Co. v. Scott, 39 Ind. App. 420, 79 N. E. 226. Even where contractor has abandoned contract through no fault of owner he may recover on a quantum meruit for actual benefit received and retained by other party, less damages for nonfulfillment of his contract. Limerick v. Lee, 17 Okl. 165, 87 P. 859. Where plaintiff failed to furnish full amount of electric power called for by contract, but acted in good faith, and defendant used such power as was furnished, held that plaintiff was entitled to recover on quantum meruit for power furnished, less damages resulting to defendant from breach. Viles v. Barre & M. Trac. & Power Co., 79 Vt. 311, 65 A. 104. In action to recover on quantum meruit for power furnished under contract not fully performed, evidence tending to show that full performance was impossible held admissible for purpose of showing plaintiff's good faith. Id.

36. See § 1A, ante.

37. Requested instruction which failed to limit recovery for work done under special

fully executed, however, and nothing remains to be done but to pay the contract price in money, plaintiff may declare generally on the common counts or specially on the contract, at his election.[38] One may recover on the common counts for extra work not called for by the contract.[39]

One having several inconsistent remedies must elect between them[40] within a reasonable time.[41] An election once made is irrevocable.[42]

Equity will enjoin the breach of a contract where there is no adequate remedy at law or by way of specific performance, and also the malicious interference of third persons with the contract rights of another.[43]

Tort liabilities growing out of the manner of performance, the liability of third persons inducing one to break his contract, are treated elsewhere.[44]

(§ 9) *C. Defenses and counter rights.*[45]—Breach of the contract by plaintiff is a good defense to an action to enforce it.[46] A collateral agreement modifying the contract sued on is available only by way of counterclaim, or as the basis of an independent action for damages.[47] Fraud in procuring the contract may be set up as a defense[48] even though the right to rescind on that ground has been waived.[49] Failure of consideration in whole or in part is a defense pro tanto.[50]

(§ 9) *D. Limitations.*[51]—The action must, of course, be brought within the

contract to contract prices set forth in declaration held improper. Dick v. Biddle Bros. [Md.] 66 A. 21.

38. Bauer v. Hindley, 222 Ill. 319, 78 N. E. 626. Common indebitatus count is sufficient, it not being necessary to declare specially. Donegan v. Houston [Cal. App.] 90 P. 1073. Where complaint is in effect an indebitatus assumpsit count at common law, allegations of indebtedness and that services were rendered at defendant's request are unnecessary when the consideration as well as promise are implied from nature of transaction declared on. Id. As where complaint declares upon executed contract. Id. Such pleading held allowable under code and to carry with it general rule applicable to such counts. Id. Where full performance was shown, held that express promise to pay for work done under executed contract and implied promise as to extra work could be declared on in one count, since they together constituted indebtedness which law implied promise to pay. Id.

39. See, also, Building and Construction Contracts, 9 C. L. 424. Held that there was evidence tending to show defendant's liability for extra work. Dick v. Biddle Bros. [Md.] 66 A. 21.

40. Where purchaser of goods refused to accept them, and seller took them back as its own, and not to keep and store for purchaser, held that seller could not recover purchase price. Glasgow Mill. Co. v. Bugher, 122 Mo. App. 14, 97 S. W. 950. Action for specific performance and for damages for breach, being both based on contract and defendant's breach, held not inconsistent, so that suit for specific performance was not waiver of default. Balleisen v. Schiff, 105 N. Y. S. 692. Defendant held to have elected to rescind. Farber v. Blubaker Coal Co, 216 Pa. 209, 65 A. 551. Complaint or counterclaim seeking damages for breach is an affirmance of the contract, being inconsistent with claim that it has been rescinded or that party has right to rescind, and precludes rescission. Main v. Procknow [Wis.] 111 N. W. 508. Rescission of contract by government for failure of contractor to prosecute work held not to estop it from setting up fraud in its procurement when sued thereon. Atlantic Contracting Co. v. U. S., 40 Ct Cl. 244.

41. Must make election to rescind for breach promptly, and delay, vascillation, silence, or absence of immediate notice that he will not further perform, is election that performance shall proceed and that he will rely on his claim for damages. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360.

42. Farber v. Blubaker Coal Co, 216 Pa. 209, 65 A. 551. Where plaintiff declined to accept goods because of their inferior quality and so informed defendant, but latter refused to take them back or refund money, held that there was no such election of remedies as to preclude plaintiff from thereafter taking goods and suing for damages. Brooks v. Romano [Ala.] 42 So. 819.

43. See Injunction, 8 C. L. 279.

44. See Torts, 8 C. L 2125.

45. See 7 C. L. 929.

46. See §§ 9A, 9B, ante. As to what constitutes performance and breach see § 6, ante.

47. Held that collateral agreement modifying defendant's contract of indorsement could not be pleaded as defense to action on contract of indorsement. Hopkins v. Merrill, 79 Conn. 626, 66 A. 174.

48. Turner v. Ware [Ga. App.] 58 S. E. 310.

49. Where vendees had fully performed contract for purchase of mines prior to discovery of fraud, held that they could defend action on note given for purchase price on ground of total or partial failure of consideration because of such fraud, though they had waived right to rescind on that ground. Richardson v. Lowe [C. C. A.] 149 F. 625.

50. See § 2, ante.

51. See 7 C. L. 830, n. 83.

time fixed by the statute of limitations,[52] or by valid contract limitations, unless waived.[53]

(§ 9) *E. Procedure before trial.*[54]—Matters relating to process [55] and venue [56] are treated elsewhere.

(§ 9) *F. Parties, pleading, evidence, etc. Parties.*[57]—The subject of parties is fully treated elsewhere.[58]

Pleading.[59]—The general rules of pleading apply.[60] The nature of the action is a question of construction to be determined from the complaint.[61] Allegations should be definite and certain,[62] and facts rather than conclusions must be pleaded.[63] Matters of evidence need not be alleged.[64] One suing on a contract to which he is not a party must allege facts bringing him within the class for whose benefit it was made.[65] So, too, where it appears that plaintiff has previously parted with his interest in the contract sued on, the complaint must show his present interest and right to maintain the action.[66] The complaint must contain a statement of the cause of action relied on, set forth with sufficient certainty to notify the defendant of the charge he is to meet.[67] Plaintiff must allege facts showing the making of the con-

52. See Limitation of Actions, 8 C. L. 768.

53. As to validity of contract limitations see § 3D, ante. Failure to commence action against carrier within six months after cause of action accrued held bar to recovery, though carrier, within period of limitation, requested plaintiffs to wait a few days until claim could be investigated, where evidence showed that carrier notified plaintiffs one month and twenty days before limitation expired that claim was disallowed and liability denied. St. Louis & S. F. R. Co. v. Pearce [Ark.] 101 S. W. 763.

54. See 7 C. L. 829.

55. See Process, 8 C. L. 1449.

56. See Venue and Place of Trial, 8 C. L. 2236.

57. See 7 C. L. 830.

58. See Parties, 8 C. L. 1236.

59. See 7 C. L. 831.

60. See Pleading, 8 C. L. 1355.

61. Action held one for damages for breach of contract to support bastard, and not proceeding in bastardy. Burton v. Belvin, 142 N. C. 151, 55 S. E. 71. Complaint held to state cause of action for breach of contract to present note to maker for payment and to return same in case of nonpayment, and not one for negligent breach of duty imposed by law. Kiblinger Co. v. Sauk Bk. [Wis.] 111 N. W. 709.

62. Complaint in action for services held to sufficiently appraise defendant of nature and amount of plaintiff's claim and to be sufficient to enable court to determine that, if allegations were proved, plaintiff was entitled to judgment prayed for. Corcoran v. Halloran [S. D.] 107 N. W. 210. Complaint in action for money loaned held sufficiently definite and certain Citizens' Central Nat. Bk. v. Munn, 115 App. Div. 471, 101 N. Y. S. 435. Allegations as to damage held not sufficiently definite and specific. Hearn v. Gower, 1 Ga. App. 265, 57 S. E. 916.

63. Petition held to sufficiently allege making of new contract. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867.

Held conclusions: Allegation of duty and obligation of defendants under contract sued on, and count held demurrable where it did not contain allegations of fact showing such duty and obligation. Milligan v. Keyser [Fla.] 42 So. 367. Allegation that defendant broke contract held insufficient where no facts were stated on which to base it. Heart v. Gower, 1 Ga. App. 265, 57 S. E. 916. Allegation of indebtedness for money had and received, and complaint held demurrable where was no allegation of promise to repay, or of facts from which promise could be inferred. Tate v. American Woolen Co., 114 App. Div. 106, 99 N. Y. S. 678. Allegation that instrument not under seal and not negotiable was executed and delivered "for a valuable consideration," without setting up facts showing consideration. Fulton v. Varney, 117 App. Div. 572, 102 N. Y. S. 608.

64. In action for breach of contract to care for orchard, evidence as to certain disease being allowed to develop therein held admissible though there was no allegation in pleadings in regard to it, it being proper detail of injury resulting from defendant's neglect. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687.

65. Complaint alleging that defendants assumed and agreed to pay all liabilities of certain bank, and facts showing that bank was liable as indorser on note sued on, held sufficient. Moore v. First Nat. Bk. [Colo.] 88 P. 385.

66. Where it appeared that payee of chose in action suing thereon had previously parted with his title. Moore Bros. Glass Co. v. Drevet Mfg. Co., 154 F. 737.

67. Complaint in action to recover money advanced for defendant's benefit held sufficient. Craig v. Dowie [Cal. App.] 87 P. 250. Complaint in action for reasonable value of services rendered by plaintiff's assignee held sufficient. Union Collection Co. v. National Fertilizer Co., 2 Cal. App. 13, 82 P. 1129. Petition in action for breach of contract to maintain ditch, brought by successors in interest of party with whom it was made, held defective for failure to allege what lands were covered by said contract, and what part of them plaintiffs owned. Withers v. Wabash R. Co., 122 Mo. App. 282, 99 S. W. 34.

tract sued on,[68] that it was based on a valuable consideration,[69] performance on his part,[70] or an excuse for nonperformance,[71] the happening of any contingencies on which defendant's liability depends,[72] and a breach by defendant.[73] An allegation

68. Must show existing contract. Fulton v. Varney, 117 App. Div. 572, 102 N. Y. S. 608. Declaration held to sufficiently allege making of contract. Bethlehem Iron Co. v. Hoadley, 152 F. 735. Allegation that parties "entered into" certain written contract, held sufficient to admit proof of oral acceptance of offer contained in written memorandum. Bailey v. Leishman [Utah] 89 P. 78. Held that acceptance of offer to sell might be shown under allegations of demand for performance. Id. Allegation that contract was "entered into" held sufficient to admit proof of delivery if denied. Id. Averment that plaintiff had purchased of defendant specified quantity of given article at stated price to be delivered at stated time and place held sufficient allegation that plaintiff had agreed to receive same at said time and place and to pay for same. Watson v. Hazlehurst, 127 Ga. 298, 56 S. E. 459. Declaration held not to show agreement by third person to pay future judgments in favor of creditors, and hence to be insufficient to authorize recovery by creditor whose claim was merged in judgment after agreement was made. Bethlehem Iron Co. v. Hoadley, 152 F. 735.

69. Allegation that defendant, "for a suitable and proper consideration had and exchanged between them," granted plaintiff permission to construct logging road, held to sufficiently allege valuable consideration. Storseth v. Folsom [Wash.] 88 P. 632. Petition held to sufficiently show consideration. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867.

70. See, also, § 9A, ante. Where undertakings on part of plaintiff are to be performed before those on part of defendant, declaration must allege performance by plaintiff or excuse for failure. Milligan v. Keyser [Fla.] 42 So. 367. Allegation that it was duty of defendants under said contract to perform their part, without stating facts imposing such duty, held not equivalent to allegation that plaintiffs had performed their part. Id. Complaint held demurrable for failure to show performance by plaintiffs and consequent duty of defendants to perform. Id. Is not sufficient to aver generally, in action on bond containing reciprocal obligations, that plaintiff had performed all of them, but must set out manner of performance or compliance with particularity. United States Fidelity & Guaranty Co. v. Trustees of Baptist Church [Ky.] 102 S. W. 325. Complaint held insufficient for failure to allege performance of conditions precedent. Fulton v. Varney, 117 App. Div. 572, 102 N. Y. S. 608. Where contract provided that labor and services in preparation of certain booklets were to be paid for thirty days after delivery, complaint failing to allege delivery, held fatally defective. Powers Co. v. Gould Co., 104 N. Y. S. 345. In action to recover money paid under contract for building boat, which plaintiff had rescinded for failure of defendant to perform in time, allegation that defendant failed to complete and deliver boat held not to admit implication that defendant constructed boat until it was launched or fit for launching, and hence it was not incumbent on plaintiff to allege compliance with provision of contract that third payment must be made when boat was launched. Whitting v. Derr, 105 N. Y. S. 854. Complaint held demurrable for failure to allege compliance with provision of contract of affreightment requiring notice of loss or damage to stock. St. Louis, etc., R. Co. v. Phillips, 17 Okl. 264, 87 P. 470. Allegation that defendant accepted work held sufficient allegation that it was done to satisfaction of defendant's superintendent as required by contract. Lang v. Crescent Coal Co. [Wash.] 87 P. 261. Averments as to what was required of plaintiff and what it did held sufficient averments that it discharged its whole duty under contract. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 S. E. 826. Where complaint was in effect an indebitatus assumpsit count at common law and declared on executed contract, held that issue as to whether or not there was waiver of engineer's certificate required by contract was properly tried under implied allegation that contract had been fully performed by plaintiff and that nothing remained to be done but to pay money agreed upon. Donegan v. Houston [Cal. App.] 90 P. 1073. In action for breach of contract whereby plaintiff corporation agreed to increase its capital stock and defendant to buy a part thereof, where complaint alleged increase and tendered certificates, and allegations were specifically denied in answer, held that question of increase of stock and its legality was in issue. Pacific Mill Co. v. Inman, Poulsen & Co. [Or.] 90 P. 1099.

71. That defendants put it out of plaintiff's power to perform concurrent act, held not available where not pleaded in complaint. Longfellow v. Huffman [Or.] 90 P. 907. Averment by way of excuse for nonperformance within time specified of contract to manufacture and deliver machinery that plans to be furnished by defendant were not furnished until long after time specified for delivery of machinery held to sufficiently allege breach of implied duty of defendant to furnish them within reasonable time. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 S. E. 826.

72. Complaint alleging that plaintiff aided one of the defendants in procuring contract for erection of monument in consideration for which such defendant agreed that he was to be paid five per cent of selling price by purchaser out of first installment paid thereon, and that contract was assigned to other defendant, a corporation, which had received certain payments thereon, but containing no allegation of notice to corporation, or fraud or bad faith, held not to state cause of action, no facts being alleged bringing corporation within position of liability, and there being no allegations showing receipt of any money by other defendant, or breach of contract on his part. McKeough v. Hinsdale, 51 Misc. 239, 100 N. Y. S. 812. Complaint in action on conditional promise to pay out of profits of particular job held insufficient for failure to allege that any

of refusal to perform imports a demand.[74] In pleading rescission it must appear that there has been rescission in toto, and a disaffirmance of the contract and a restoration of or offer to restore status quo.[75] In an action on a written contract subsequently modified by parol, the contract as modified must be declared on.[76] One suing on an ambiguous contract and setting it out in haec verba must put a definite construction on it by averment.[77] A recovery quantum meruit may be had under the common counts in indebitatus assumpsit.[78] Failure of consideration [79] and payment [80] must be pleaded. A plea relying on matters which can only be proved by inadmissible evidence is bad.[81] Failure to plead illegality as a defense will not preclude the court from denying relief on that ground if such fact appears at any time during the progress of the trial.[82] So, too, where the answer contains a general denial, plaintiff must prove a valid, binding contract, and, if he fails to do so, his complaint may be dismissed, though the invalidity of the contract is not affirmatively pleaded as a defense.[83] The rule that an excuse for nonperformance cannot be shown where performance is alleged has no application where the contract is fairly performed.[84] Under a plea of the general issue, any fact may be shown

profits had been earned. Fulton v. Varney, 117 App. Div. 572, 102 N. Y. S. 608.

73. Allegation that defendant broke contract by stopping plaintiff from work held sufficient without alleging that his act in so doing was wrongful. Smith v. Davis [Ala.] 43 So. 729. In action for breach of contract providing that newspaper carrier for defendant might sell his route, subject to defendant's approval, allegations that plaintiff procured purchasers but that defendant persuaded them not to purchase, held not to state cause of action in absence of allegation that assignments were actually made to purchasers and that defendant refused to approve them. Redpath v. Evening Exp. Co. [Cal. App.] 88 P. 287. Where contract provided that defendant should not be liable to reimburse plaintiff for expenditures on park grounds, held that petition alleging contract and that no sufficient income had been received from park grounds to reimburse plaintiff was demurrable. Dockstader v. Young Men's Christian Ass'n [Iowa] 109 N. W. 906.

74. Allegation that defendants refused to deliver cotton. McCleskey v. Howell Cotton Co., 147 Ala. 573, 42 So. 67.

75. Allegation of rescission of subscription to corporate stock held insufficient, allegation that stock was at all times without value not being enough. Marion Trust Co. v. Blish [Ind. App.] 79 N. E. 415.

76. Whole matter is thrown into parol. Koons v. St. Louis Car Co. [Mo.] 101 S. W. 49. Cannot prove verbal modification unless it is pleaded. Taussig v. Southern Mill & Land Co. [Mo. App.] 101 S. W. 602.

77. This rule means merely that pleading must be sufficiently certain to support a judgment. Linton v. Brownsville Land & Irr. Co. [Tex. Civ. App.] 102 S. W. 433. Petition held sufficient where by facts averred and relief demanded pleader clearly indicated construction placed by him on contract. Id.

78. Technical quantum meruit count held not necessary in action to recover value of power furnished under contract not fully performed. Viles v. Barre & M. Trac. & Power Co., 79 Vt. 311, 65 A. 104.

79. Moods & Co. v. Rowland [Tex. Civ. App.] 102 S. W. 911. Admission of testimony tending to show that note sued on was for sum greater than defendant owed plaintiff held error where was no sworn plea impeaching consideration. Walker v. Tomlinson [Tex. Civ. App.] 17 Tex. Ct. Rep. 157, 98 S. W. 906. Under Rev. St. 1899, § 645, providing that, in suit upon writing for payment of money, defendant may prove want or failure of consideration in whole or in part, held that partial failure of consideration may be shown under plea of total failure. National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co., 201 Mo. 30, 98 S. W. 620.

80. Receipts held inadmissible as evidence of payment and settlement as an affirmative defense where such defense was not pleaded in answer. Auerbach v. Curie, 104 N. Y. S. 233.

81. In action for damages for breach of written contract under seal, plea is bad and subject to demurrer when it sets up matter which seeks to vary terms and patent import of such contract, and which would have to be established by parol evidence or evidence dehors the written instrument. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687. Allegations that things were understood or rights recognized in direct conflict with provisions of written agreement, understandingly entered into, must be ignored. Kerting v. Hatcher, 216 Ill 232, 74 N. E. 783.

82. See, also, § 3L, ante. Howe's Ex'r. v. Griffin's Adm'r [Ky.] 103 S. W. 714.

83. Secret agreement whereby agent was to share fees of attorney whom he procured principal to employ. Auerbach v. Curie, 104 N. Y. S. 233. Rule that certain defenses of illegality must be pleaded is inapplicable where plaintiff on his own showing discloses invalidity of contract. Id. Complaint alleging knowledge and consent of principals to agreement whereby agent was to share fees of attorney whom he procured principal to employ held to state good cause of action. Id.

84. New Jersey Co. v. Nathaniel Wise Co., 105 N. Y. S. 231.

which directly tends to disprove one or more of the allegations of the complaint, or to show that plaintiff never had a cause of action.[85]

Variance.[86]—Since a party must recover, if at all, on the cause of action set up in his pleadings, his allegations and proofs must correspond.[87]

Evidence. Presumptions and burden of proof.[88]—Plaintiff ordinarily has the burden of proving the contract alleged in the complaint,[89] performance on his part,[90] or an excuse for nonperformance,[91] and his damages.[92] The burden of proving that the damages sustained could have been mitigated rests on the party guilty of the breach.[93] In an action on the common counts to recover the reasonable value of services or materials on the theory of substantial performance, the burden is on

85. See, also, Pleading, 8 C. L. 1355. That money alleged to have been loaned was gift. Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597. That contract was void under statute of frauds. Glasgow Mill. Co. v. Bugher, 122 Mo. App. 14, 97 S. W. 950. That contract differed from that pleaded, or that no contract was in fact made. Sorenson v. Townsend [Neb.] 109 N. W. 749. That conditions precedent to making partial payments had not been performed. Adams v. Lawson [N. Y.] 81 N. E. 315. Prac. Act § 36, relating to actions against persons as joint obligors, held not to deprive a defendant of common-law right to show affirmatively under general issue a want of joint liability, but to give him right, by interposing verified plea in bar, to compel plaintiff to assume onus and show joint liability in first instance. Martin v. Trainer, 125 Ill. App. 474. One desiring to defeat recovery on quantum meruit by showing that services were rendered under express contract which fixed amount to be paid therefor, and that such express contract has been fully executed by full payment, must so specially plead in bar. Shaw v. Pope [Conn.] 67 A. 495.

86. See 7 C. L. 834. See, also, Pleading, 8 C. L. 1355.

87. Proof of new and independent contract held not within cause of action as limited by bill of particulars which claimed compensation for services rendered prior thereto. Rhodes v. Malta Vita Pure Food Co. [Mich.] 112 N. W. 940. Where plaintiff sued to recover certain sum alleged to have been loaned by him to defendant, held that he was not entitled to recover on theory that money had been given in payment for certain stock sold by defendant to him, and that defendant had broken contract of sale by failure to deliver said stock. Hahn Packing Co. v. Shaw [Tex. Civ. App.] 16 Tex. Ct. Rep. 967, 97 S. W. 712. Having elected to stand on written contract, cannot recover on contract partly in writing and partly oral, or upon quantum meruit for work and labor or services. Koons v. St. Louis Car Co. [Mo.] 101 S. W. 49. Action held one on contract, so that it could not be considered one on quantum meruit for purpose of admitting evidence otherwise inadmissible. Id. Even if alteration of plaintiff's duplicate copy of contract did not vitiate whole contract, held that he could not recover on defendant's copy because it was not sued on or offered in evidence. Id. Plaintiffs having proved oral contract materially different from that on which they declared held not entitled to recover without amendment. Friedman v. Urmann, 28 Pa. Super. Ct. 400. One suing on an express contract cannot recover on quantum meruit. Bennett v. Burkhalter [Ga.] 57 S. E. 231; Bassford v. West [Mo. App.] 101 S. W. 610; Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658. Defense held not to so change issues as to allow recovery on quantum meruit. Kineon v. Rich, 30 Ky. L. R. 1107, 100 S. W. 249. Where both parties alleged an express contract, differing only as to its terms, held that amount due was to be determined by terms of contract as found by jury, regardless of reasonable value of services. Instruction approved and requested instruction properly refused. Bell v. Keays [Tex. Civ. App.] 100 S. W. 813. Where complaint declared on express contract by defendant to pay proportional part of cost of doing certain work, evidence as to cost of work and its reasonable value held admissible, since law would protect defendant against unreasonable charge. Ferris v. Edmonston, 124 Mo. App. 94, 100 S. W. 1119.

88. See 7 C. L. 834. See, also, Evidence, 7 C. L. 1511.

89. Graham v. Bell-Irving [Wash.] 91 P. 8. Whether there was contract and whether it was as claimed by plaintiff. Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 N. W. 788. Burden on one seeking to recover money loaned to prove loan. Dormos v. Vassilas, 103 N. Y. S. 813.

90. Ansorge v. Moriarty, 103 N. Y. S. 815; Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241. Compliance with provision requiring notice of claim for damages. St. Louis & S. F. R. Co. v. Pearce [Ark.] 101 S. W. 760. Where plaintiff introduced contract in evidence in its entirety as foundation of his right to recover, held that burden was on him to prove full performance on his part, including performance of covenant not to sell other cement than that manufactured by defendant, performance not being admitted by answer. Vernon v. Vulcanite Portland Cement Co., 103 N. Y. S. 876. Burden of proof held on defendant to show that he made certain sale, so as to entitle him to agent's commission claimed by way of offset. Port Huron Co. v. Miller, 127 Ill. App. 324.

91. In action by contractor to recover for partial performance, to show that full performance was prevented by acts of owner. Clarke v. Koeppel, 104 N. Y. S. 65.

92. Jayne & Keve Bros. Lumber Co. v. Turner, 132 Iowa, 7, 109 N. W. 307.

93. Ramsey v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 65 A. 461.

plaintiff to prove the reasonable value of such work or materials.[94] But if plaintiff's breach of contract be such as to subject defendant to consequential damage, such damage may be the foundation for a legitimate claim for recoupment, in which case the burden of proving such damage rests upon defendant.[95] Defendant has the burden of proving his version of an oral contract sued on in so far as it differs from that alleged in the complaint.[96] The burden of proving that certain words in the contract were used in a special sense,[97] or that a contract valid on its face is invalid,[98] or that there has been a failure of consideration,[99] or that a contract has been merged in and superseded by a subsequent one,[1] or that the contract has been broken by the other party,[2] is on the party so claiming.

One seeking to recover compensation for work done to promote the welfare of a family to which he belongs has the burden of proving that the work was to be paid for,[3] but if no family relation exists the party who accepted the work must prove that it was done gratuitously, or make compensation.[4] One seeking to hold a person belonging to a class made incompetent by statute to contract except in certain specified cases must show affirmatively that his claim is within the statutory exceptions.[5]

Admissibility.[6]—Contracts forming a part of the same transaction as the one in suit are admissible.[7] In an action on quantum meruit for services rendered under a contract, the contract is admissible as evidence of their value.[8] One's financial condition may be relevant on the issue as to the making of the contract sued on,[9] or payment.[10]

94. Question of recoupment, properly so termed, is not involved in such case. Skowhegan Water Co. v. Skowhegan Village Corp. [Mass.] 66 A. 714. In action by waterworks company to recover hydrant rentals from city, held that plaintiff was not entitled to recover more than the value of the services rendered to the city over and above all damages sustained by latter by reason of plaintiff's failure to perform, and burden was on plaintiff to show actual value to city of water furnished. Id.

95. Skowhegan Water Co. v. Skowhegan Village Corp. [Mass.] 66 A. 714.

96. Burden held to be on defendant to prove allegation of answer, denied in reply, that if list of land furnished by him to be used as base of exchange for indemnity school lands was invalid he was to try to substitute other lands therefor, and that it was his duty to make such endeavor, and was not incumbent on plaintiff to demand other base when that originally procured failed. Morse v. Odell [Or.] 89 P. 139.

97. Party claiming that term "six story building" as used in contract had some special meaning understood by the parties, or which they could fairly be charged with as understanding, according to which building in question was not within its terms. Abrams v. Bloch, 101 N. Y. S. 109.

98. Gambling contract. Watson v. Hazlehurst, 127 Ga. 298, 56 S. E. 459.

99. Where defendant alleged partial failure of consideration for claims sued on, held that it was incumbent on him to introduce evidence of such failure and of what it consisted, and that introduction of evidence applicable to entire transaction generally did not warrant submission of issue to jury, but it should have been made to appear to what counts of petition such evidence was applicable. National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co. 201 Mo. 30, 98 S. W. 620.

1. Union Mills v. Harder, 116 App. Div. 22, 101 N. Y. S. 309.

2. Burden of showing that refusal to make loan was capricious held on defendant who asserted it for purpose of avoiding payment of cost of examining title, which contract required him to pay whether title was accepted or not. Title Guarantee & Trust Co. v. Wesolick, 115 App. Div. 608, 101 N. Y. S. 7. Burden of proving allegation that plaintiff was discharged as result of conspiracy between defendants and certain other persons held on plaintiff. Napier v. Spielmann, 103 N. Y. S. 982. Burden on defendant to show, as ground of counterclaim, that plaintiff had not performed in reasonably efficient manner, and resulting damages. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241.

3, 4. McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728.

5. That claim against married woman was for necessaries. Gilbert v. Brown, 29 Ky. L. R. 1248, 97 S. W. 40.

6. See 7 C. L. 835. See, also, Evidence, 7 C. L. 1511.

7. Contracts executed on same day as notes in suit. Kampmann v. McCormick [Tex. Civ. App.] 99 S. W. 1147.

8. City of St. Charles v. Stookey [C. C. A.] 154 F. 772. Where complaint was in effect an indebitatus assumpsit count at common law and declared on executed contract, held that contract was admissible to establish measure of compensation for labor performed under it. Donegan v. Houston [Cal. App.] 90 P. 1073.

9. In action to recover for services alleged to have been rendered decedent, evidence as to value of latter's estate. Leonard v. Gillette, 79 Conn. 664, 66 A. 502.

10. Where defendant testified to cash pay-

Cases dealing with the admissibility of particular evidence to show whether an offer was accepted within a reasonable time,[11] whether or not an oral contract was in fact made, and what were its terms,[12] the execution of a written contract,[13] as to whether or not time was of the essence of the contract,[14] consideration,[15] modi-

ment to plaintiff under contract, evidence that she was unable to pay her house rent just prior to that time, and was on that account compelled to vacate, held admissible on issue as to her ability to raise so much money. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658.

11. Letter held admissible, since it tended to explain delay in accepting continuing offer to purchase stock. Ellis, Adm'r v. Durkee, 79 Vt. 341, 65 A. 94.

12. Evidence held admissible: In action to recover for services rendered decedent where it appeared that plaintiff and decedent had stood in same relations to each other for sixteen years, evidence that at commencement of relation decedent had asked plaintiff to take care of him, on issue as to whether services during last six years, for which recovery was sought, were rendered at his request. Leonard v. Gillette, 79 Conn. 664, 66 A. 502. Declarations of plaintiff, on issue as to whether money was loan or gift. Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597. Sworn statements of plaintiff as to his taxable property, on issue as to whether he had given money to defendant. Id. Though there was complete oral contract, letter subsequently written by defendant and retained by plaintiffs stating terms of contract, on issue as to what oral contract was. Hudson v. Rodgers, 121 Mo. App. 168, 98 S. W. 778. Statement of decedent, to show positive agreement to pay her for her services. McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728. In action on alleged contract by defendant to purchase invention as soon as patented, letter written by plaintiff after making of alleged contract in which he urged defendant to procure patent on another invention and promised to repay cost of so doing when convenient. Broadwell v. Conover, 186 N. Y. 429, 79 N. E. 402. Fact that plaintiff had no other property or source of income than pension held evidence that money loaned by her was pension money. Rose v. Armstrong, 105 N. Y. S. 541. Where petition did not allege complete written agreement as basis of action for breach, but an ambiguous memorandum agreement was attached thereto, evidence that parties did agree upon a contract which was fully understood between them, and that plaintiff was ready and willing to perform his part, but was not permitted to do so. Kneipper v. Richards, 7 Ohio C. C. (N. S.) 581. Where complaint alleged that defendant agreed to return money paid him on certain condition, and allegation was denied in answer, evidence that after original contract was executed defendant promised to repay money. Morse v. Odell [Or.] 89 P. 139. Unsigned draft of contract, on issue as to terms of contract there being evidence tending to show that plaintiff had recognized it as the contract between them. Morgan v. Tims [Tex. Civ. App.] 97 S. W. 832. Letter embodying terms of proposed agreement, prepared by plaintiff for signature of defendant's representative, as part of conversations and negotiations between parties. Chilcott v. Washington State Colonization Co [Wash.] 88 P. 113. Certain evidence as to statements of bookkepers held admissible in rebuttal on issue as to contract price for doing certain work. Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 N. W. 788. Where plaintiff sued on oral contract for commissions and defendant set up different oral contract providing for much smaller commissions, evidence of reasonable value of services rendered, as bearing upon issue between them and probability that one or the other agreement was made. Standard Plunger El. Co. v. Brumley [C. C. A.] 149 F. 184.

Evidence held inadmissible: On issue as to existence of contract whereby plaintiff was to reshoe automobile tires for defendant, and as to breach of such contract, evidence as to whether tires needed reshoeing. Morris v. Fisk Rubber Co. [Ala.] 43 So. 483. On issue as to whether defendant agreed to pay half cost of constructing certain road, evidence as to quality of land in vicinity owned by defendant's wife and other relatives. Albin v. Gheens [Ky.] 101 S. W. 297. Evidence that on particular occasion decedent told plaintiff that if she would stay at home and help on some extra work she would pay her well for it held to have no tendency to prove promise to pay her for her services generally. McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728. In proceedings to establish claim against decedent's estate on alleged contract for services, evidence that claimant failed to assert her claim during certain negotiations between decedent and third person, negotiations not having progressed so far that claimant was called on to speak. Pond v. Pond's Estate, 79 Vt. 352, 65 A. 97.

13. Evidence as to changes in instrument after same was signed held admissible under issue raised by denial of execution. Dennie v. Clark, 3 Cal. App. 760, 87 P. 59. On issue of genuineness of signature to note which mentioned sale of harness stock as consideration, testimony of witness that he inventoried stock and made report to payee when latter and defendant were present, and that he heard nothing as to giving of note, held admissible as tending to corroborate defendant's testimony that he did not sign note. Ayrhart v. Wilhelmy [Iowa] 112 N. W. 782. On issue as to whether plaintiff had executed contract dated in 1895 where defendant testified that she had built house pursuant thereto in 1895, and had paid out money in so doing, one of the items claimed to have been so paid being bill of lumber purporting to have been bought in that year, testimony of lumber dealer that he was not in lumber business until 1896, that bill heads were not printed until after that date, and that he had dated bill 1897, but that date had been changed by someone else, held admissible. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658. Testimony of printer as to date when bill heads were printed held also admissible. Id.

14. Evidence that defendant had received benefits from paving of public street over

fication,[16] performance,[17] breach,[18] waiver,[19] and the reasonable value of services,[20] will be found in the notes.

which he had no control held inadmissible to show that time was not of essence of contract whereby he agreed to pay certain sum therefor if work was completed within specified time. Barber Asphalt Pav. Co. v. Laughlin [Tex. Civ. App.] 17 Tex. Ct. Rep. 554, 98 S. W. 948.

15. Where plaintiff pleaded pendency of action for divorce and attachment proceedings incident thereto as among facts leading up to, and entering into consideration for, agreement sued on, and answer contained general denial, held that papers in divorce case were properly admitted at her instance. Kinkead v. Peet [Iowa] 111 N. W. 48.

16. On issue as to whether plaintiff consented to vary oral contract of shipment so as to make it accord with terms of receipt limiting liability of carrier, evidence that he did not read such receipt held admissible. Coggswell v. Weir, 101 N. Y. S. 188.

17. **Evidence held admissible:** Where deceased upon payment of consideration named in contract was to receive deed of land from plaintiff, deed to him. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 N. W. 820. On issue as to whether contract sued on had been performed, held competent and relevant to show that work which plaintiffs should have done had to be done by others and that it cost defendant accordingly, and defendant was not precluded from showing such cost because counterclaim was not interposed. Ryan v. Brown, 104 N. Y. S. 871. Testimony that witness loaned plaintiff money to enable him to perform, on issue as to plaintiff's ability and readiness to perform. Ives v. Atlantic & N. C. R. Co., 142 N. C. 131, 55 S. E. 74. Fact that effect would be to render witness real plaintiff held no legal objection to it. Id. Evidence as to formation of certain company, it sufficiently appearing that it was the company organized pursuant to agreement that plaintiff was to have stock in company organized to take over concession to be procured by him. Crichfield v. Julia [C. C. A.] 147 F. 65. Testimony as to efficiency and up to date character of plant constructed by plaintiff, it being claimed that it was obsolete and insufficient. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241.

Evidence held inadmissible: In action on contract whereby defendant agreed to pay half cost of constructing certain road, evidence that contractor who built road got certain quantity of earth therefor, value of which was more than defendant's share of cost, held inadmissible under plea by way of counterclaim where written agreement, signed by defendant and showing his consent to taking earth, was introduced. Albin v. Gheens [Ky.] 101 S. W. 297.

18. Special circumstances, if any, known to both parties and which might have entered into making of contract, or those attending its breach, may be shown. Hale Bros. v. Millken [Cal. App.] 90 P. 365. In action on contract to plant orchard, etc., question asked defendant as to order given third person to replace certain dead trees held properly excluded where there was nothing to indicate that such person was in any way connected with plaintiff's assignor who made original contract. Leathers v. Geitz [Iowa] 112 N. W. 191. Evidence that orchard was worthless in fall held material as tending to show its condition in spring. Id. In action to recover money paid under contract whereby defendant was to furnish list of school lands which, because of mineral character, would entitle state to select other government land in lieu thereof, held that testimony of agent of state, whose duty it was to supervise such exchanges, that after lands in list furnished had been rejected by land office for failure to prove mineral character, no further proof was offered as required by decree of rejection, and no appeal was taken from such decision, was admissible. Morse v. Odell [Or.] 89 P. 139. Entries on back of receipt for tuition showing that defendant was granted leave of absence held admissible as negativing allegations that defendant had broken contract by remaining away without leave, and as tending to contradict plaintiff's testimony, though defendant did not in terms plead that she was absent with plaintiff's consent. Draughon v. Sterling [Tex. Civ. App.] 103 S. W. 689. In action for breach of contract that notes given for interest in patent should be paid out of profits of sale of machines manufactured thereunder, and sale of right to manufacture, and that notes should not be sold held that value of stock of corporation to which all parties assigned their interests in patent for stock was immaterial. Myrick v. Purcell, 99 Minn. 457, 109 N. W. 995. In action for breach of contract whereby tenants authorized plaintiff to erect bootblacking stand on sidewalk, held error to allow introduction of written permit of mayor for erection of stand where he had no authority to issue permits. Speliopoulos v. Schick, 129 Wis. 556, 109 N. W. 568.

19. Letters written by plaintiff held admissible for sole purpose of proving that he gave defendant notice and warning that he objected to manner in which it was complying with contract, and did not acquiesce therein. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687. Letters and conversation held admissible as tending to show that provision requiring erection of building was not waived. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 N. W. 820. In action on contract whereby defendant agreed to pay certain sum for paving if work was completed in specified time, evidence that he had been benefited by pavement held inadmissible as tending to show waiver of time limit, pavement having been constructed in public street over which defendant had no control, and benefit being no greater than that of other property owners. Barber Asphalt Pav. Co. v. Laughlin [Tex. Civ. App.] 17 Tex. Ct. Rep. 554, 98 S. W. 948.

20. In action for services as miner where plaintiff in effect alleged that his services were of value of three dollars per day, which was denied, held that evidence that ordinary miner's wages were three dollars per day was admissible. Corcoran v. Halloran [S. D.] 107 N. W. 210. Difference between claims of plaintiff and defendant as to contract rate for doing certain work held not so great as to render exclusion of evidence as to reasonable value thereof erroneous. Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 N. W. 788.

Parol evidence.[21]—As between the parties, extrinsic evidence is ordinarily inadmissible to vary, add to, or contradict the terms of a written contract.[22]

Failure of proof.[23]—There is a failure of proof where a party fails to substantially prove any of the material allegations of his pleadings.[24]

(§ 9) *G. Procedure at trial, verdict and judgment. Questions of law and fact.*[25]—The validity of a contract[26] and the legal consequences of a breach[27] are for the court. So, too, the construction of a written contract is generally a question of law for the court,[28] but, where the meaning can be understood only from extrinsic facts, it is a question for the jury,[29] unless there is no conflict in the evidence.[30]

The execution of a written contract,[31] the genuineness of signatures,[32] the existence, terms, and construction of oral contracts,[33] whether an offer was accepted,[34]

21. See 7 C. L. 838.

22. For a full discussion of this question see Evidence, 7 C. L. 1511.

23. See 7 C. L. 842.

24. Failure of plaintiffs to establish contract sued on held to necessitate verdict against them without regard to insufficiency of evidence to establish another contract relied on by defendant. Hess, Bases & Co. v. Shurtleft [N. H.] 65 A. 377. Failure to prove allegation that defendant guarantied plaintiff against loss from reinvestment of proceeds of sale of certain bonds held to preclude recovery of such losses, there being no liability in absence of such guaranty. Linden v. Thieriot, 116 App. Div. 295, 101 N. Y. S. 568. In action to recover money lent, granting of nonsuit on theory that it was not shown that money loaned was pension money as alleged in complaint held error, there being some evidence to that effect, and it not being necessary to prove that all the money was actually pension money. Rose v. Armstrong, 105 N. Y. S. 541.

25. See 7 C. L. 842.

26. Whether contract not to engage in business is reasonable or unreasonable. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540.

27. Instruction leaving it to jury to find legal consequences of failure to complete work held erroneous. Harrison v. Franklin [Mo. App.] 103 S. W. 585.

28. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306, afg. 125 Ill. App. 602; Georgetown Water, Gas, Elec. & Power Co. v. Smith, 30 Ky. L. R. 253, 97 S. W. 1119; Schuster v. Snawder [Ky.] 101 S. W. 1194; Ford v. Ingles Coal Co. [Ky.] 102 S. W. 332; New York Life Ins. Co. v. Wolfson [Mo. App.] 101 S. W. 162; Banks v. Blades Lumber Co., 142 N. C. 49, 54 S. E. 844; Pile v. Carpenter [Tenn.] 99 S. W. 360. Where contract was not in dispute under evidence. Payne v. Payne, 129 Wis. 450, 109 N. W. 105. Whether letters and sealed instrument constituted single indivisible contract. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

29. If construction depends upon extrinsic facts and circumstances, or construction adopted by parties, as well as meaning of words employed, and such facts are controverted, inference to be drawn is for jury, and whole question as to what contract was should be submitted to them under proper instructions. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306, afg. 125 Ill. App. 602. Meaning of words "invoice cost" in contract for sale of stock of goods, goods having twice been sold by invoice and there being issue of fact as to which invoice was to determine cost or value of goods. Clark v. Empire Mercantile Co. [Ga. App.] 58 S. E. 363. Meaning of words "sixty-five cents on the dollar" in contract of sale, where meaning was uncertain, and evidence properly admitted to explain its meaning was conflicting. Moritz v. Herskovitz [Wash.] 89 P. 560. Whether correspondence, etc., made contract binding on defendant, in view of evidence as to usage. New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co. [C. C. A.] 154 F. 296. Whether person whose name did not appear in body of contract intended by his signature to become bound as party or signed as witness only. Schuster v. Snawder [Ky.] 101 S. W. 1194. Construction of ambiguous provisions as to amount of work to be done. Jones & Laughlin Steel Co. v. Monogahela & Western Dredging Co. [C. C. A.] 150 F. 298. Issue as to identity of subject-matter of contract. McNealy v. Bartlett, 123 Mo. App. 58, 99 S. W. 767. Where agreement was that if plaintiff would procure customers for any lands defendant had for sale in certain states defendant would divide his commissions with him, question whether defendant had for sale at that time a certain tract, and hence whether it was included in contract. Sawyer v. Walker, 204 Mo. 133, 102 S. W. 544.

30. If facts are not controverted, it is not error for court to assume their existence and construe contract accordingly. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306, afg. 125 Ill. App. 602.

31. Nature of actual agreement, and whether written agreement had been executed or not, it being claimed that contract had been altered after execution. Dennie v. Clark, 3 Cal. App. 760, 87 P. 59.

32. Ayrhart v. Wilhelmy [Iowa] 112 N. W. 782.

33. What oral agreement was. Hudson v. Rodgers, 121 Mo. App. 168, 98 S. W. 778; Friedman v. Urmann, 28 Pa. Super. Ct. 440; Oliver v. Katz [Wis.] 111 N. W. 509. Whether understanding was that contract should not become effective until reduced to writing and signed. Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 F. 641. Effect of whole agreement where original contract was verbal and entire, and part of it was afterwards reduced to writing. Picard v. Beers [Mass.] 81 N. E. 246. Whether plaintiff consented to vary oral contract of shipment so as to be in accord with terms of receipt limiting liability of carrier. Coggswell v.

whether a letter was received by the addressee,[35] what is a reasonable time for the acceptance of an offer[36] or for performance,[37] whether the parties to an entire contract elected to treat it as divisible in fact,[38] whether the contract has been performed,[39] waiver,[40] whether there has been a settlement of differences between the parties,[41] when a demand for payment was made,[42] and the amount of damage resulting from a breach,[43] are questions for the jury where the evidence is conflicting.

The judgment[44] should not be for a greater sum than that claimed.[45]

CONTRACTS OF AFFREIGHTMENT; CONTRACTS OF HIRE, see latest topical index.

CONTRIBUTION.

§ 1. General Principles (720).
§ 2. The Right and Defenses as Between Joint Tort Feasors and Persons in Particular Relations (721).
§ 3. Proceedings to Enforce (722).

The scope of this topic is noted below.[46]

§ 1. *General principles.*[47]—One of two or more persons who discharges more

Weir, 101 N. Y. S. 188. Whether horses were sold under oral warranty. Hallowell v. McLaughlin Bros. [Iowa] 111 N. W. 428. Whether defendant agreed with lessee of plaintiff's land to pay plaintiff the rent. Ballard v. American Hemp Co., 30 Ky. L. R. 1080, 100 S. W. 271. Amount of compensation claimant was to receive for services to decedent. McNamara v. Michigan Trust Co. [Mich.] 14 Det. Leg. N. 250, 111 N. W. 1066. Whether plaintiff was employed by president of defendant corporation personally or in behalf of corporation. Ray v. Jefferson County Gas Co., 31 Pa. Super. Ct. 194. Whether there was contract to do certain work at stipulated rate, and if so what rate was agreed upon. Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 N. W. 788. Instruction held not objectionable as assuming existence of some contract. Id. Whether certain services were incident to, or rendered independently of, contract of agency. Standard Plunger El. Co. v. Brumley [C. C. A.] 149 F. 184. When certain commissions were payable, there being no provision on the subject. Id. Whether there was such a contract as that alleged held for court where evidence was undisputed. Freifeld v. Groh's Sons, 116 App. Div. 409, 101 N. Y. S. 863.

34. Bailey v. Leishman [Utah] 89 P. 78.

35. Where addressee denied receipt. Greenwood Grocery Co. v. Canadian County Mill El. Co. [S. C.] 57 S. E. 867.

36. Bailey v. Leishman [Utah] 89 P. 78. Where offer to sell realty required acceptance at once, question whether acceptance twenty-three or twenty-four hours after letter containing offer was received was in time to bind offerer. Lucas v. Western Union Tel. Co., 131 Iowa, 669, 109 N. W. 191.

37. Bearden Mercantile Co. v. Madison Oil Co. [Ga.] 58 S. E. 200; Oliver v. Katz [Wis.] 111 N. W. 509. Whether time within which shipper is required to present claim for damages to stock to carrier is reasonable. Southern Kansas R. Co. v. Curtis [Tex. Civ. App.] 99 S. W. 566.

38. Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 S. W. 845.

39. Whether defendant had delivered to plaintiff sufficient ties to repay it for advances made for purpose of purchasing them. Holcomb-Lobb Co. v. Kaufman, 29 Ky. L. R. 1006, 96 S. W. 813. Whether plaintiffs had performed contract as to furnishing advertising matter and other aids to making sales. Simpson v. Crane [Mich.] 13 Det. Leg. N. 1071, 110 N. W. 1081. Payment of money lent, which was admitted to have been received, plaintiff having made out prima facie case. Pressinger v. Woodhull, 101 N. Y. S. 36. Whether shipper gave required notice to carrier of injury to stock. Southern Kansas R. Co. v. Curtis [Tex. Civ. App.] 99 S. W. 566. Breach. Graves v. Melia [Ark.] 99 S. W. 80. Whether party was in default. Bailey v. Leishman [Utah] 89 P. 78. Whether plaintiff was prevented from erecting stand by defendant. Speliopoulos v. Schick, 129 Wis. 556, 109 N. W. 568.

40. Whether defendant, in making settlement or by his conduct pending continuation of business, waived provision that plaintiff should not sell goods on credit. Mathis v. Harrell, 1 Ga. App. 358, 58 S. E. 207. Waiver of provision requiring erection of building on certain land. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 N. W. 820. Whether plaintiff rescinded lease and his claim for damages for breach. Herpolsheimer v. Christopher [Neb.] 111 N. W. 359. Whether certain letters taken in connection with other facts and circumstances constituted acquiescence by employe in lease of business by employer and consequent breach of contract of employment. White v. Lumiere North American Co., 79 Vt. 206, 64 A. 1121.

41. Holcomb-Lobb Co. v. Kaufman, 29 Ky. L. R. 1006, 96 S. W. 813. Whether there had been settlement, and whether or not plaintiff had voluntarily relinquished his claim to money held by city in consideration of latter releasing him from further performance, there being sharp conflict in evidence. Conte v. New York, 116 App. Div. 356, 101 N. Y. S. 491.

42. Though plaintiff's testimony on that subject was not contradicted. Harrison v. Franklin [Mo. App.] 103 S. W. 585.

43. Friedman v. Urmann, 28 Pa. Super. Ct. 440.

44. See 5 C. L. 750.

45. Judgment reversed where jury found for greater sum than that claimed in bill of particulars. Dick v. Biddle Bros. [Md.] 66 A. 21.

46. **This topic includes** only the equitable doctrine of contribution and exoneration;

than his share of a liability common to all may recover from the others their proportionate shares of the excess [48] provided the equities of the parties are equal.[49]

§ 2. *The right and defenses as between joint tort feasors and persons in particular relations.*[50]—It is a long-established rule that there is no right of contribution between joint tort feasors,[51] but this rule is not applicable to a judgment for costs in the suit against the wrongdoers,[52] and is subject to so many other exceptions that it is perhaps more accurate to say that there can be no contribution where the tortious conduct shows moral guilt or intentional breach of legal duty,[53] but that it will lie where the breach is merely passive and involuntary.[54] Defendants in a joint judgment for a private wrong are given contribution by statute in Missouri.[55]

One of several sureties who pay equal amounts of the debt has no right of contribution against the others where he fails to abide by his agreement to prosecute to final determination with the others their claims against the principal for indemnity.[56]

Joint defendants who have paid an execution against themselves and others and procured a transfer of it from the judgment creditor may enforce the execution against the other joint defendants,[57] and even if the transfer was made for less than the full amount of the debt such enforcement may not be defeated by co-obligors who have not paid or tendered their shares of the amount actually paid.[58]

excluding contract and common law liability of several to contribute to a common object (Corporations, 7 C. L. 862; Partnership, 8 C. L. 1261, and like topics), rights growing out of joint tenancy (Tenants in Common and Joint Tenants, 8 C. L. 2114), rights of subrogation (Subrogation, 8 C. L. 2041), and rights under contracts of indemnity (Indemnity, 8 C. L. 173).

47. See 7 C. L. 844.

48. Plaintiff who alone had long performed contract of himself and defendants to support another could have contribution. Payne v. Payne, 129 Wis. 450, 109 N. W. 105 One of two mortgagors who was compelled to pay a balance of the debt, interest, and costs in order to save the land held entitled to collect one-half of amount so paid out of interest of co-mortgagor. Thompson v. Griggs, 31 Pa. Super. Ct. 608. Assignee of one of three vendees who paid for land held entitled to contribution from the other two, with interest and without deduction for expenses by the two in trying to perfect title. Ocean City Ass'n v. Cresswell [N. J. Err. & App.] 65 A. 454.

49. A judgment creditor of a husband, who redeems from foreclosure under a mortgage given by the husband and wife on lands belonging to both to secure a debt of the husband, has no right of contribution as against heirs of the wife, the equities of the parties not being equal. Schroeder v. Bozarth, 224 Ill. 310, 79 N. E. 583.

50. See 7 C. L. 845.

51. Fakes v. Price, 18 Okl. 413, 89 P. 1123. Where negligence of a traction company and of a railway company both proximately and concurrently caused a collision. Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 99 S. W. 869. Smelter company negligently maintaining pipe across railroad by which a switchman was injured, and railway company negligently failing to give warning, held joint tort feasors where negligence of both concurred, hence no contribution. Consolidated Kansas City Smelting & Refining Co. v. Binkley [Tex. Civ. App.] 99 S. W. 181. Right of action against quasi trustees as partners who have been guilty of fraudulent breach of duty toward copartners is ex delicto, and tort may be treated as several or joint, and defendants have no right of contribution as between themselves. Goldsmith v. Koopman [C. C. A.] 152 F. 173. Code Civ. Proc. § 709, providing that where more than a due proportion of a judgment against several is satisfied out of property of one he may have contribution, etc., did not change rule that there is no contribution between joint tort feasors, merely giving a judgment debtor entitled to contribution the summary remedy of using the judgment itself to enforce it. Forsythe v. Los Angeles R. Co., 149 Cal. 569, 87 P. 24.

52. Fakes v. Price, 18 Okl. 413, 89 P. 1123.

53. Eaton & Prince Co. v. Mississippi Valley Trust Co., 123 Mo. App. 117, 100 S. W. 551, and authorities cited.

54. Where death was caused without intentional wrongdoing, contribution lay both at common law and under Rev. St. 1899, § 2870, allowing contribution as between defendants in a joint judgment for a private wrong. Eaton & Prince Co. v. Mississippi Valley Trust Co., 123 Mo. App. 117, 100 S. W. 551. The rule that contribution does not exist between joint tort feasors does not apply to torts which are the result of mere negligence. Mayberry v. Northern Pac. R. Co., 100 Minn. 79, 110 N. W. 356.

55. The remedy lies if the tort feasors were guilty of only involuntary and passive breaches of duty which concurrently and proximately caused the damage though the parties were negligent in different respects, it not being necessary that they be negligent as to an identical care. Eaton & Prince Co. v. Mississippi Valley Trust Co., 123 Mo. App. 117, 100 S. W. 551.

56. Refusal to join in successful appeal. Pollard v. Pittman, 37 Ind. App. 475, 77 N. E. 293.

57, 58. Miller v. Perkerson [Ga.] 57 S. E. 787.

The statutes of Kentucky provide for contribution among devisees for debts of the testator, and the liability to contribute extends to a devisee of a devisee.[59]

Recovery over against persons primarily liable.[60]—One who is compelled to respond in damages as a legal but not an actual wrongdoer is entitled to exoneration from him who actually caused the injury.[61]

§ 3. *Proceedings to enforce.*[62]—The action must be timely brought.[63] Parties not necessary need not be joined,[64] hence plaintiff may proceed against any one or more persons liable to him for their proportionate share without joining all the persons so liable.[65] The complaint must show a common liability,[66] and the prayer must be consistent with the cause of action alleged.[67] In a suit for contribution for the payment of a joint judgment in tort, it is sufficient to allege that the judgment was obtained for the joint wrong of the parties, and that plaintiff was compelled to pay it, without setting out the particulars showing that defendant's negligence was the proximate cause.[68] Relevant evidence is properly admitted.[69] The recovery will be computed on the basis of plaintiff's actual outlay, any advantage gained in his settlement with the common creditor inuring to the benefit of his co-obigors.[70]

Contributory Negligence, see latest topical index.

CONVERSION AS TORT.

§ 1. What Constitutes (722).
§ 2. Property Subject to Conversion (724).
§ 3. Elements Necessary to Maintain the Action (724).
§ 4. Defenses (725).
§ 5. Practice and Procedure (726).

The scope of this topic is noted below.[71]

§ 1. *What constitutes.*[72]—Conversion is the unlawful and wrongful exercise

59. Ky. St. 1903, §§ 2084, 2088, 2073. But where a devisee of one of two devisees agreed to surrender to the executor sufficient funds to pay all the testator's debts, she was not required to contribute further to a payment made by another devisee. Ferguson v. Worrall [Ky.] 101 S. W. 966.

60. For rights arising in contract see Indemnity, 8 C. L. 173; Subrogation, 8 C. L. 2041, and kindred topics.

61. Mulcted city could recover over against one who maintained defective sidewalk. City of Seattle v. Puget Sound Imp. Co. [Wash.] 91 P. 255. A **connecting carrier** delivering goods to a wrong person without requiring production of the bill of lading is guilty of laches precluding a recovery over against the initial carrier of damages recovered by the consignee. Nashville, etc., R. Co. v. Grayson County Nat. Bk. [Tex. Civ. App.] 14 Tex. Ct. Rep. 602, 91 S. W. 1106. As between **principal and agent**, the latter who purchased land without inquiring into the title should stand loss resulting from judgment against both recovered by true owner, principal having taken no part Ayer & Lord Tie Co. v. Witherspoon's Adm'r, 30 Ky. 1067, 100 S. W. 259.

62. See 7 C. L. 845.

63. Too late thirty-two years after accrual of right. Schroeder v. Bozarth, 224 Ill. 310, 79 N. E. 583. Action maintainable against heirs of surety after two years from settlement of estate where complaint showed nonresidence, belief that note had been paid, insolvency of maker, etc. Clevenger v. Matthews [Ind. App.] 75 N. E. 23.

64. A purchaser of realty who assumes a mortgage given to secure performance of a joint contract for the support of another is not a necessary party to an action for contribution by one who has performed, no effort being made to enforce mortgage. Payne v. Payne, 129 Wis. 450, 109 N. W. 105.

65. Plaintiff's wife not a necessary party. Payne v. Payne, 129 Wis. 450, 109 N. W. 105.

66. Petition held not demurrable for not showing "concert of action" or that defendant was responsible with plaintiff for negligence causing death. Eaton & Prince Co. v. Mississippi Valley Trust Co., 123 Mo. App. 117, 100 S. W. 551.

67. Complaint not sufficient for accounting and contribution where prayer for relief was for a sum of money only. Jones v. McNally, 53 Misc. 59, 103 N. Y. S. 1011.

68. Prima facie case shown by proving this, casting burden on defendant to show why contribution should not be awarded. Eaton & Prince Co. v. Mississippi Valley Trust Co., 123 Mo. App. 117, 100 S. W. 551.

69. In suit for contribution between contractors for support of another, evidence of value of land conveyed to plaintiff and one of the defendants as consideration, health of person supported, and reasonable value of support, held relevant. Payne v. Payne, 129 Wis. 450, 109 N. W. 105.

70. One who, being surety with another for an insolvent decedent, and at the same time debtor to said decedent's estate, succeeds in having the whole amount of his debt to the estate applied to the reduction of the decedent's debt upon which he is one of the sureties, and then pays the balance thereof in money, cannot compel contribution of his cosurety for more than a moiety of the amount actually paid in money; whatever advantage he gains by the application of his own debt inures to the benefit of his cosurety. Gares v. Stever, 4 Ohio N. P. (N. S.) 462.

71. Many applications of the rules as to what constitutes conversion are inseparable

of dominion, ownership, or control by one person over the property of another to the exclusion of the exercise of the same rights by the owner,[73] and this may be effected either by taking actual corporal possession[74] with or without legal process,[75] or by an unlawful detention of the property,[76] or refusal to surrender possession on demand,[77] or by a wrongful pledge,[78] transfer,[79] delivery,[80] or sale,[81] under claim of ownership.[82] A mere temporary use of a chattel in good faith and with the consent

from the rights and liabilities of persons in particular relations, and topics dealing therewith (Agency, 9 C. L. 58. Bailments, 9 C. L. 323; Factors, 7 C. L. 1642; Pledges, 8 C. L. 1431; Warehousing and Deposits, 8 C. L. 2258, and like topics) should be consulted.

72. See 7 C. L. 846.

73. France v. Gibson [Tex. Civ. App.] 101 S. W. 536. Where a landowner refused to allow his cropper to harvest his crop, but gathered it herself, an instruction that conversion was "the turning or applying the property of another to one's own use" was a proper definition under the facts. Crow v. Ball [Tex. Civ. App.] 99 S. W. 583. There must be some repudiation of the owner's rights, or some exercise of dominion inconsistent with such rights, or some act done which has the effect of destroying or changing the character of the property. Merz v. Crozen [Minn.] 112 N. W. 890. That insurance company obtained possession of policy and canceled it, and paid insurance money to one not entitled, did not constitute conversion. Himmelman v. Des Moines Ins. Co., 132 Iowa, 668, 110 N. W. 155. Where president of a corporation surrendered to it ten shares of stock, and corporation then issued a certificate for ten shares to plaintiff, that president caused a new certificate to be issued to himself, and corporation refused to enter transfer to plaintiff on its books, did not show conversion of plaintiff's stock by the president. O'Dwyer v. Verdon, 115 App. Div. 37, 100 N. Y. S. 588. Question of conversion of sheep and wool held for jury. Hitson v. Hurt [Tex. Civ. App.] 101 S. W. 292. Complaint alleging title in plaintiff and demand and refusal to deliver held to show conversion so that a counterclaim could not be set up. McIntyre v. Smathers, 118 App. Div. 776, 103 N. Y. S. 873.

74. So as to exclude owner's rights. France v. Gibson [Tex. Civ. App.] 101 S. W. 536. The taking possession by a mortgagee of chattel property upon which another holds a prior lien affords ground for an action for conversion. Mackey v. George McAlpin Co., 8 Ohio C. C. (N. S.) 467. Evidence sufficient to sustain verdict in suit against vendee for taking more cattle than he was entitled to. Drumm-Flato Commission Co. v. Edmisson, 17 Okl. 344, 87 P. 311.

75. Evidence held to show that defendant took charge of lumber wrongfully levied on and placed it in custody of its agent. Three States Lumber Co. v. Blanks [Tenn.] 102 S. W. 79. A mere levy and sale of a mortgagor's interest in property, under legal process there being no delivery or change of possession, is not sufficient to render the officer guilty of conversion. Ayres v. Tinsman [N. J. Law] 65 A. 887. One who wrongfully claiming title from a vendor's agent replevies property from vendee at conditional sale and sells it is guilty of conversion. Westheimer v. State Loan Co. [Mass.] 81 N. E. 289 Second mortgagee held guilty of conversion in taking possession by replevin of property of which first mortgagee had previously taken possession under his mortgage. Dethoff v. Gattie, 103 N. Y. S. 589.

76. Where the minds of the parties do not meet so as to effect an attempted sale, but vendee keeps the article and converts it to his own use, he is liable for its value. Holmes Mach. Co. v. Chalkley, 143 N. C. 181, 55 S. E. 524. Refusal of buyer to pay for or return property sold for cash held to authorize action for conversion, seller not being required to sue for breach of contract. Lamb v. Utley, 146 Mich. 654, 110 N. W. 50.

77. Refusal to surrender stock on tender of amount for which it was held as collateral. Whipple v. Tucker, 123 Ill. App. 233. Where a sale was mutually rescinded, held not conversion for vendee to refuse to give up possession to vendor until repayment of payments made. Flaccus Glass Co v. Alvey Ferguson Co. [Ky.] 102 S. W. 870.

78. Where a trustee held bonds and a mortgage which were not valid as against the corporation issuing them, the fact that an officer of the corporation pledged the bonds to the trustee to secure an individual debt did not constitute conversion (Medina Gas & Elec. Light Co. v. Buffalo Loan, Trust & Safe Deposit Co, 104 N. Y. S. 625), but a subsequent pledge by the trustee to one who became a bona fide holder was conversion (Id.).

79. Unauthorized indorsement by agent of checks payable to principal. Conversion lay against indorsees. Blum Jr's Sons v. Whipple [Mass.] 80 N. E. 501. Where a pledgee made a voidable purchase of the property at foreclosure, and later exchanged it for other property of same value without pledgor's knowledge, there was no conversion of any of the property. Hebblethwaite v. Flint, 115 App. Div. 597, 101 N. Y. S. 43. Evidence held to show termination of a lease of fixtures and that lessee did not commit conversion in removing them and having them stored subject to disposal of lessor. Adams v. Weir [Tex. Civ. App.] 99 S. W. 726.

80. Wrong delivery by carrier. Atlantic Coast Line R. Co. v. Goodwin, 1 Ga. App. 351, 57 S. E. 1070. Evidence held to show a carrier's conversion by delivery to wrong person, and itself appropriating part of the goods. Moran Bolt & Nut Mfg. Co. v. Midland Valley R. Co., 120 Mo. App. 626, 97 S. W. 628.

81. Corporation held liable for purchasing a franchise with notice of plaintiff's interest therein Russell v. Deutschman [Tex. Civ. App.] 100 S. W. 1164.

82. Agent who mingles principal's stock with his own and sells it as his own property without reporting to principal held guilty of conversion. Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P. 39. Pledgee's renunciation of rights of pledgor and sale under claim of ownership. Lowe v. Ozmun, 3 Cal App. 387, 86 P. 729.

of an apparent owner in possession is not conversion,[83] and there can be no conversion for doing what one is authorized by contract to do.[84] The refusal to abide by the conditions of special property is not a conversion where a reasonable qualification is annexed thereto,[85] the question of the existence and reasonableness of the qualification being ordinarily for the jury.[86] For additional illustrations of what does or does not constitute conversion, reference should be had to the different articles dealing with particular legal relationships wherein property is held by persons having only a qualified or special interest in it,[87] and those treating of seizures under legal process,[88] the doctrine of bona fide purchasers and lienors,[89] and the like.

§ 2. *Property subject to conversion.*[90]—Trover will not lie for the alleged wrongful seizure of articles designed only for the violation of the law and the injuring of public morals.[91] Land wrongfully excavated from a right of way and sold is converted as personalty though loaded directly on the cars whereby transported to the purchaser.[92]

§ 3. *Elements necessary to maintain the action. Ownership and possession.*[93]—Ownership,[94] actual possession,[95] or the immediate right to possession,[96] is necessary to recovery.[97] In certain cases a mere lien holder, though out of posses-

83. Conversion not shown as matter of law. Merz v. Crozen [Minn.] 112 N. W. 890.

84. Where defendant association was authorized to open athletic grounds completed for it by plaintiff. Dockstader v. Young Men's Christian Ass'n [Iowa] 109 N. W. 906.

85. As where carrier refuses to deliver goods to consignee because of alleged mistake as to rates. Sutton v. Great Northern R. Co., 99 Minn. 376, 109 N. W. 815.

86. Sutton v. Great Northern R. Co., 99 Minn. 376, 109 N. W. 815.

87. See Agency, 9 C. L. 58, Bailment, 9 C. L. 323; Carriers, 9 C. L. 466; Chattel Mortgages, 9 C. L. 560; Factors, 7 C. L. 1642; Landlord and Tenant, 8 C. L. 656; Pledges, 8 C. L. 1431; Tenants in Common and Joint Tenants, 8 C. L. 2114; Warehousing and Deposits, 8 C. L. 2258; Trusts, 8 C. L. 2169, etc.

88. See Attachment, 9 C. L. 282; Executions, 7 C. L. 1614; Sheriffs and Constables, 8 C. L. 1897.

89. See Notice and Record of Title, 8 C. L. 1169.

90. See 7 C. L. 848.

91. Suit by keeper of gaming house for conversion of gambling paraphernalia. Robertson v. Porter, 1 Ga. App. 223, 57 S. E. 993.

92. Nashville, etc., R. Co. v. Karthaus [Ala.] 43 So. 791.

93. See 7 C. L. 848.

94. Evidence held to show title in plaintiff to certain whisky. Westheimer v. State Loan Co. [Mass.] 81 N. E. 289. Evidence insufficient to sustain finding that plaintiff was owner of grain alleged to have been converted. Bibb v. Roth, 101 Minn. 111, 111 N. W. 919. One who paid for a nontransferable mileage book held its owner, enabling him to maintain conversion though book was issued in another's name. Bartlett v. Cook, 115 App. Div. 836, 100 N. Y. S. 1036. Evidence held not to show ownership and possession of a desk and safe so as to sustain conversion by a company against its former president. Houston Transfer Co. v. Lee [Tex. Civ. App.] 97 S. W. 842. Where a lease provided that on its termination the lessor should receive live stock, tools, etc., equal in value to what was on farm when rented, neither party had absolute title as against the other at termination of lease without agreement or decree of court, hence lessor could not be held for conversion, no equitable relief being asked. Wilson v. Griswold [Conn.] 66 A. 783. After rescission of contract of sale, title was in original owner, rendering carrier liable for delivery to vendee. Morris v. St. Joseph & G. I. R. Co. [Mo. App.] 101 S. W. 159. Where, in a sale of chattels, conditions precedent are not performed, and consequently title does not pass, trover will lie to recover the goods or their equivalent in money. Wilson v. Comer, 125 Ga. 500, 54 S. E. 355. Purchaser of timber held to have cut and removed it within contract time so as not to be guilty of conversion. Plummer v. Reeves [Ark.] 102 S. W. 376.

95. A creditor who with the assent of a landowner and his hireling takes possession of the share of a crop set apart to the hireling, in satisfaction of a debt, may maintain conversion against a third person who removes the property. Farrow v. Wooley [Ala.] 43 So. 144. Delivery to plaintiff sufficient if owner and hireling directed plaintiff to go and take the cotton and apply it to the account. Id. Instruction on theory that it was necessary for plaintiff to buy the cotton from the landowner held properly refused. Id.

96. Present right of possession at time of conversion independent of ownership is sufficient to support action. Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143. The heirs of a decedent may maintain trover for sand taken from decedent's land during his lifetime, though there is an administrator, where he has never taken possession. Nashville, etc., R. Co. v. Karthaus [Ala.] 43 So. 791. Association, though owner, held not entitled to maintain conversion for books and documents in possession of lawful custodian. County Armagh Ladies Social & Benevolent Ass'n v. Lennon, 102 N. Y. S. 522. Chattel mortgagee not having right to possession could not maintain conversion against third persons before maturity of debt. Wilson v. Curry [Ala.] 42 So. 753.

97. In trover, plaintiff must show title in himself or the right of possession wrong-

sion, may maintain conversion against one who buys the property in disregard of his rights;[98] but the statutory lien of a hireling under a crop contract is not sufficient to support trover in Alabama.[99]

Demand and refusal[1] are necessary where a party comes lawfully into posssesion of the property,[2] except in cases where a demand would be useless[3] or where the conversion has already taken place.[4] A demand is sufficiently shown to be refused where it appears that defendant has wrongfully placed himself in a position which renders compliance impracticable.[5] Where property is accidentally destroyed while rightfully in one's possession, failure to comply with a demand afterwards made is not conversion.[6]

Who may maintain and persons liable.[7]—Part owners of property may sue for the conversion of their interest.[8] An administrator may recover against an heir for the conversion of a fund though the heir may be entitled to a portion of the fund in the distribution.[9] Where property is converted by a bailee, a subsequent purchaser from the bailor may sue.[10] One whose property has been taken in replevin against his agent or bailee may maintain conversion after delivery to plaintiff in the replevin suit,[11] but a plaintiff in replevin cannot be held for conversion pending trial of the cause unless he has sold or otherwise appropriated the property,[12] nor will conversion lie by a party to the replevin suit after judgment finding plaintiff therein entitled to possession on account of a special ownership unless he has done some act in relation to the property not authorized by the judgment.[13]

§ 4. *Defenses.*[14]—Estoppel,[15] abandonment of the property,[16] a mortgage or

fully withheld from him by defendant. Groover v. Iler, 1 Ga. App. 77, 57 S. E. 906. A mere promise by a tenant in possession that certain chattels should stand good for a debt due the landlord, nothing being said about price, held insufficient. Id. An employe, under contract to perform certain work in consideration of receiving camp buildings, who abandons the work without completing it, does not acquire title or right of possession essential to maintain conversion against the employer who retains possession Henry v. Manistique Iron Co., 147 Mich. 509, 111 N. W. 79. Attorney defending one charged with bringing stolen property into state held not entitled to the property under an order from accused given as compensation, though owner and prosecutor had agreed to turn it over to him after trial. Herman v. Northern Pac. R. Co., 43 Wash. 624, 86 P. 1068.

98. Thresher's lien. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 N. W. 843.

99. Hence assignee could not maintain the action. Farrow v. Wooley [Ala.] 43 So. 144.

1. See 7 C. L. 849.

2. This rule applies also to a vendee of such party. Action not maintainable against vendee of conditional sale vendee where without demand plaintiff allowed property to remain in conditional vendee's possession after default and no demand was made upon subvendee. Tompkins v. Fonda Glove Lining Co., 188 N. Y. 261, 80 N. E. 933. Where defendant had lawful possession, plaintiff must show either an unauthorized use of the property or a demand and refusal. Southwestern Port Huron Co. v. Cobble, 124 Mo. App. 647, 102 S. W. 9. Evidence held to sustain verdict for defendant. Id. A mortgagee who has only a lien without title or possession cannot maintain conversion against one who buys from the mortgagor until after default and demand by him upon the purchaser. Catlett v. Stokes [S. D.] 110 N. W. 84. Officer's retention of possession of property released from execution held not conversion in absence of demand. Wilson v. Curry [Ala.] 42 So. 753. In suit by administrator for conversion of goods belonging to estate, question whether defendant refused to allow administrator to take away the goods should have been submitted to jury. Schultz v. Becker [Wis.] 110 N. W. 214.

3. Conversion of wheat. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 N. W. 843.

4. Agent selling goods as his own. Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P. 39.

5. Where purchaser of stolen gems had so intermixed them with his own that they could not be identified. Rabe v. Jourdan [Tex. Civ. App.] 102 S. W. 1167.

6. Horse killed while tried by prospective buyer. Meise v. Wachtel, 104 N. Y. S. 915.

7. See 7 C. L. 850.

8. Lumber. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 So. 533.

9. Palmer v. O'Rourke, 130 Wis. 507, 110 N. W. 389.

10. Conversion did not deprive bailor of transferable title. New Liverpool Salt Co. v. Western Salt Co. [Cal.] 91 P. 152.

11. Not bound to intervene in replevin suit. Northwestern State Bk. v. Silberman [C. C. A.] 154 F. 809.

12, 13. Nelson v. Schmoller [Neb.] 110 N. W. 658.

14. See 7 C. L. 851.

15. Held for jury whether a sheriff in selling wood under execution relied on plaintiff's statement that he was not owner. Feinberg v. Allen, 118 App. Div. 497, 103 N. Y. S. 339. Not necessary to plead in order to prove reliance on such statement. Id.

16. Evidence insufficient to require sub-

other lien,[17] a bona fide purchaser,[18] that plaintiff had authorized the sale,[19] or title in defendant,[20] may be set up in defense; but, where both parties claim title through a common source, defendant may not show a superior title in a third person,[21] nor may he deny that plaintiff had a sufficient title to maintain the action after an unsuccessful attempt to claim under him.[22] That one commits a trespass by having property upon the premises of another does not authorize the latter to destroy it or convert it to his own use.[23] One who by the fraud of another is induced to appropriate the property of a third person will be protected only so far as he acted to his detriment upon the faith of an apparent ownership conferred by the owner.[24] A return of the property to the owner is not a bar, but operates only in mitigation of damages.[25]

§ 5. *Practice and Procedure.*[26]—Laches may bar the action.[27] Part of the property having been disposed of by the wrongdoer, conversion therefor is not waived by bringing replevin for that still retained,[28] and an unsuccessful suit against a marshal for an excessive levy under a writ of replevin is not a bar to a subsequent action against the party who procured the levy.[29] Where stock is sold in violation of an agreement by which it was held as security, and without notice or demand for payment, no tender is necessary to enable the owner to maintain conversion.[30]

Parties.[31]

The complaint[32] must set out a cause of action[33] not barred by limitations,[34]

mission to jury of question whether defendant had abandoned certain steel rails. Valentine v. Long Island R. Co. [N. Y.] 79 N. E. 849.

17. In conversion for a crop raised in C. county, defendant could not justify under a mortgage of a crop in T. county, nor claim that transactions in regard to crop in C. county were fraudulent as to his lien in T. county. Baker v. Cotney [Ala.] 43 So. 786. An unqualified refusal to deliver property on demand is a **waiver of a lien** thereon as a defense. Ginner's lien. Alabama Cotton Oil Co. v. Weeden [Ala.] 43 So. 926.

18. In suit against purchaser from a tenant, held for jury whether defendant had notice of plaintiff's lien as mortgagee and landlord. Alabama Cotton Products Co. v. Myrick [Ala.] 44 So. 587.

19. In suit against a purchaser, held for jury whether plaintiff had authorized his tenant to sell. Alabama Cotton Products Co. v. Myrick [Ala.] 44 So. 587. Evidence held to show that plaintiff had authorized a sale of cattle. Smith v. Armour Packing Co., 6 Ind. T. 479, 98 S. W. 165. In suit for conversion of goods consigned to a factor with authority to sell or reconsign, held, under the evidence, question was for jury whether a company of which factor was president had authority from principal to reconsign, draw a draft, and sell it to defendant bank. Smith v. Jefferson Bk., 120 Mo. App. 527, 97 S. W. 247. In suit against purchaser of samples from plaintiff's agent, evidence held to show a custom allowing agents to sell the samples, at end of season, and that defendant thus rightfully obtained title. Lauckheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55.

20. A carrier in good faith receiving property for transportation may plead in defense that it afterwards discovered it to be its own. Valentine v. Long Island R. Co. [N. Y.] 79 N. E. 849. In a suit for the conversion of a crop claimed by plaintiff under a rent lien, defendant could show that the tenant had turned the property over to him in payment of a debt (Baker v. Cotney [Ala.] 43 So. 786), and he could also show the extent of plaintiff's lien and whether it had been satisfied (Id.).

21. Pruitt v. Gunn [Ala.] 44 So. 569.

22. Suit for conversion of timber. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 So. 533

23. Lessor destroying and converting building and machinery of lessee. Duff v. Bailey, 29 Ky. L. R. 919, 96 S. W. 577.

24. As to part of cotton wrongfully pledged, held plaintiff did not clothe wrongdoer with ownership, and, as to remainder, advances were not made on faith of it. Kempner v. Thompson [Tex. Civ. App.] 100 S. W. 351.

25. Plummer v. Reeves [Ark.] 102 S. W. 376.

26. See 7 C. L. 851.

27. Delay of two years in notifying indorsees of checks wrongfully indorsed by an agent in principal's name held not laches or negligence sufficient to defeat conversion against indorsees where they did not change their position or suffer loss by the delay. Blum, Jr.'s Sons v. Whipple [Mass.] 80 N. E. 501.

28. Gehlert v. Quinn [Mont.] 90 P. 168.

29. Three States Lumber Co. v. Blanks [Tenn.] 102 S. W. 79.

30. Whipple v. Tucker, 123 Ill. App. 223.

31. See 3 C. L. 872.

32. See 7 C. L. 852.

33. A petition in trover which sets out a description of the property and its value, title in plaintiff, possession in defendant, and refusal to deliver on demand, is good as against a general demurrer. Bank of Sparta v. Butts, 1 Ga. App. 771, 57 S. E. 1061. Petition held to state cause of action for conversion of threshing outfit by vendor. Berry v. Geiser Mfg. Co., 15 Okl. 364, 85 P. 699.

34. In suit against an heir for conversion of a fund belonging to the estate, complaint held not to allege that conversion took place

and to this end must show title or right of possession,[35] and give a description of the property [36] and its value.[37] If the action depends upon proof of fraud, the facts constituting the fraud must be stated.[38] Where the tort is waived, it is not necessary to the court's jurisdiction or to plaintiff's right to recover that an express promise to pay be alleged.[39]

Answer or plea.[40]—In trover the plea of not guilty puts in issue every matter pleadable in bar except a release.[41] Special arrangements or contracts limiting defendant's liability,[42] or a subsequent ratification by plaintiff, must be pleaded as new matter.[43] An admission in the answer that defendant was bailee and plaintiffs joint bailors is an admisssion of the right to a joint recovery on proof of the alleged conversion.[44]

Evidence, issues, proof, variance.[45]—The burden is on plaintiff to establish his ownership [46] and to make out a prima facie case.[47] Where the conversion is based upon a breach of a contract between plaintiff and a third person, the burden is on plaintiff to prove the breach.[48] The general principles of evidence apply.[49] Under

at time when heir made a deposit, but later. Palmer v. O'Rouke, 130 Wis. 507, 110 N. W. 389.

35. Allegation that third person delivered the property to defendant does not tend to deny plaintiff's title, but merely aids in its description. Bank of Sparta v. Butts, 1 Ga. App. 771, 57 S. E. 1061. An allegation of rightful possession at the time of the taking is sufficient without stating the source of the right (Harvey v. Lidvall [Or.] 87 P. 895), hence additional defective allegations as to such source do not render the pleading objectionable as stating mere conclusions (Id.). Not fatal that complaint alleged that possession was as mortgagee without setting out the mortgage. Id. Plaintiff cannot be compelled to disclose the evidence by which he proposes to prove title. Bank of Sparta v. Butts, 1 Ga. App. 771, 57 S. E. 1061.

A trustee in bankruptcy should count both upon his own title or possession and that of the bankrupt in order to avoid any variance as to where title or possession was at the time of the alleged conversion (Burns v. O'Gorman Co., 150 F. 226), but if no point is made at the trial a claim of variance will not afterwards be heard (Id.). Contention that evidence was insufficient to show title in trustee at date of conversion as alleged, it being shown that title was in bankrupt. Id.

36. Complaint describing property as "Mexican dollars" not demurrable on ground that there are no "dollars" in Mexico. Ramirez v. Main [Ariz.] 89 P. 508.

37. In suit for value of Mexican money gambled away by plaintiff's servant, complaint not demurrable for alleging value at time money was lost, and not at time of demand on defendant. Ramirez v. Main [Ariz.] 89 P. 508.

38. That sale by plaintiff to defendant's vendor was procured by fraud. Virginia Timber & Lumber Co. v. Glenwood Lumber Co [Cal. App.] 90 P. 48.

39. Implied promise arises from conversion charged. Hitson v. Hurt [Tex. Civ. App.] 101 S. W. 292.

40. See 7 C. L. 852.

41. Ryan v. Young, 147 Ala. 660, 41 So. 954.

42. Suit against warehouseman. Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143.

43. Southern Car Mfg. & Supply Co. v. Wagner [N. M.] 89 P. 259.

44. Suit against warehouseman. Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143.

45. See 7 C. L. 853.

46. Not error to so charge, though defense was that he had sold the property to defendants, on ground that it compelled him to establish a negative. McLean v. Hattan, 127 Ga. 579, 56 S. E. 643.

47. Proof of a wrongful detention of property after demand and refusal makes a prima facie case though the evidence as to value may not be satisfactory. Error to dismiss complaint. Plunkett Plumbing & Heating Co. v. Bassford Realty Co., 52 Misc. 479, 102 N. Y. S. 483. Proof that plaintiff was in possession of the property at the time of the alleged conversion is sufficient as against one who shows no higher rights. Defect in plaintiff's mortgage not fatal. Harvey v. Lidvall [Or.] 87 P. 895.

48. Rice v. Knostman [Wash.] 88 P. 194. Findings held to sustain judgment for defendant, a purchaser from one who had contracted to cut timber for plaintiff and for himself, it not being shown that contractor sold timber cut for plaintiff. Id.

49. Declarations of defendant's agent explanatory of his possession held admissible to show that defendant was claiming exclusive custody of timber wrongfully levied on though statements were made some time after levy. Three States Lumber Co. v. Blanks [Tenn.] 102 S. W. 79. In suit for conversion of lumber, evidence that prior to alleged trespass defendant's agent "made overtures with reference to the purchase of timber on the lands mentioned," etc., held irrelevant. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 So. 533. In suit for conversion of a crop claimed by plaintiff for rent, evidence for defendant held admissible to show that tenant had turned crop over to defendant in payment of a debt (Baker v. Cotney [Ala.] 43 So. 786), and to show the extent of plaintiff's lien and whether it had been satisfied (Id.). Certain evidence held admissible to show that cotton removed from plaintiff's possession had been set apart by a landowner to his cropper and turned over to plaintiff in satisfaction of a debt. Farrow v. Wooley [Ala.] 43 So. 144. Where defend-

a general denial of plaintiff's ownership, title in another may be shown.[50] The proof must correspond to the pleadings.[51] An instruction defining conversion is properly refused where another correct definition has already been given.[52]

Verdict and judgment.[53]—An erroneous assessment of damages for detention and use may be disregarded as surplusage if the verdict otherwise sufficiently finds for plaintiff on the issue of conversion.[54] The judgment should be for damages and costs only without any provision for return of possession,[55] and, upon conversion being found, it is error to allow a counterclaim for storage.[56] Conversion being proven in a suit against an attaching creditor, and constable holding the property as his agent, verdict and judgment are properly rendered against both.[57]

Damages.[58]

CONVERSION IN EQUITY.

§ 1. Definition and Nature of Doctrine (728).
§ 2. How Effected (728).
§ 3. Reconversion (729).
§ 4. Effect of Conversion (729).

The scope of this topic is noted below.[59]

§ 1. *Definition and nature of doctrine.*[60]—Where realty is directed to be turned into money or money into realty, equity, regarding that as done which ought to be done, will treat the property as having been already converted though there has been no change in fact.[61]

§ 2. *How effected. By will.*[62]—The intention of the testator is controlling, and this may be shown either by a positive direction to sell[63] or by a necessity for a sale in order to carry out the testator's plans.[64] The intention being otherwise clear, the use of inapt terms is not controlling.[65]

ant sought to justify the taking under a mortgage which did not cover the property in question, evidence as to what the mortgagor did with the money he received for the mortgage was immaterial. Baker v. Cotney [Ala.] 43 So. 786.

50. Southern Car Mfg. & Supply Co. v. Wagner [N. M.] 89 P. 259.

51. In suit against purchaser of samples from plaintiff's agent, proof held to sufficiently correspond with allegations as to plaintiff's original ownership and agent's sale to defendant. Lauchheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55.

52. Where court had already correctly defined conversion, held not error to refuse instruction that conversion was an illegal assumption or claim of ownership of the property of another, and that one must have appropriated the property illegally to his own use. France v. Gibson [Tex. Civ. App.] 101 S. W. 536.

53. See 7 C. L. 854.

54. "We, the jury, find for plaintiff for the mare valued at $40, and assess $10 damages for detention and use," held sufficient. McGowan v. Lynch [Ala.] 44 So. 573.

55. Schwartz v. Marks, 52 Misc. 109, 101 N. Y. S. 792.

56. Beale Furniture Co. v. McGrorty, 52 Misc. 643, 103 N. Y. S. 221.

57. Pearne v. Coyne, 79 Conn. 570, 65 A. 973.

58. See 3 C. L. 874. See, also, Damages, 7 C. L. 1029.

59. This topic includes the general rules of equitable conversion and reconversion. **It excludes** the specific application of such rules in the interpretation of wills (Wills, 8 C. L. 2305), administration of decedent's estates (Estates of Decedents, 7 C. L. 1386), and the settlement of partnership affairs (see Partnership, 8 C. L. 1261).

60. See 7 C. L. 854.

61. Devise of land directed to be converted into money and distributed should be treated as devise of money. Darst v. Swearingen, 224 Ill. 229, 79 N. E. 635. Where will directed sale and division of proceeds one year after testator's death. Miller v. Payne, 28 App. D. C. 396.

62. See 7 C. L. 854.

63. Conversion takes place where duty to sell is made imperative. Stebbens v. Turner, 105 N. Y. S. 945. Positive direction in codicil. In re Caldwell, 188 N. Y. 115, 80 N. E. 663. Doctrine applicable where there was a positive direction to sell personalty and realty, income from proceeds to be paid to widow until children become of age. Llewellyn v. Llewellyn, 122 Mo. App. 467, 99 S. W. 809. That children sold their interests before they all became of age did not prevent distribution as directed. Id.

No conversion where will bequeathed residue of real and personal property after payment of debts and certain pecuniary legacies, and gave executors discretionary power to sell. Coann v. Culver, 188 N. Y. 9, 80 N. E. 362. Will held to make sale discretionary only. Stebbens v. Turner, 105 N. Y. S. 945.

64. Power of sale need not be express, but will be implied where necessary to carry out the plan of testator. Boehmcke v. McKeon, 103 N. Y. S. 930. Provision that after wife's death executors should turn over part of

If the committee of an incompetent by order of court increases the personal estate by a sale of land in ignorance of a valid devise of the land to him, the land though already sold will pass by the will as realty so as to entitle the committee to recover from the personal estate.[66] Where a power to convert realty is accompanied by a right to reserve ground rents, a sale for cash and ground rents still leaves as realty that part of the estate represented by the ground rents.[67] The rule that no conversion takes place when the heirs are made devisees in exactly the same proportions which they would have taken by descent has no application where there is a difference in either the amount or quality of the interest taken.[68]

The conversion generally dates from the death of the testator,[69] but this is also a question of intention to be gathered from the provisions of the will.[70]

By conveyance or contract.[71]—Partnership realty will be considered personalty for all purposes if such was the intent of the partners evidenced either by express agreement or by the facts and circumstances.[72]

§ 3. *Reconversion.*[73]—Where beneficiaries sui juris all concur,[74] they may elect to take without a conversion.[75] The removal of timber and execution of deeds is evidence of an election to treat the property as realty,[76] but the fact that the heirs instead of the executor execute a conveyance directed to be made does not show a reconversion where the proceeds are applied as though the executor himself had conveyed.[77]

§ 4. *Effect of conversion.*[78]—Where a will directs the conversion of land into personalty, it will be treated as such in the hands of the executors to the extent of its value.[79]

CONVICTS.[80]

The scope of this topic is noted below.[81]

The jurisdiction of the district court of the county in which the penitentiary is

residue of estate to a charitable institution in cash, and that other part should be used for its maintenance. St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 N. Y. S. 808. Where executors were given power to mortgage, sell, or lease as they deemed necessary to carry out provisions of will, and personalty was insufficient to pay legacies or annuities provided for. Boehmcke v. McKeon, 103 N. Y. S. 930. Devise of all property real and personal in trust during life of wife with power to sell realty much of which was unimproved. In re Faile, 51 Misc. 166, 100 N. Y. S. 856. Where necessary to execution of will, conversion takes place though power of sale is not in terms imperative. Keyser v. Mead, 53 Misc. 114, 103 N. Y. S. 1091.

65. Direction to "pay over" used in connection with "devise" and bequeath, power of sale being merely discretionary, and it otherwise appearing that no conversion was intended. Bascom v. Weed, 105 N. Y. S. 459. Conversion decreed though word ""devise" as well as "bequeath" was used. St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 N. Y. S. 808.

66. Brandreth v. Brandreth, 103 N. Y. S. 1074.

67. Executors could not charge commissions on principal of ground rents. In re Harrison's Estate, 217 Pa. 207, 66 A. 354.

68. Darst v. Swearingen, 223 Ill. 229, 79 N. E. 635.

69. Where will gave home farm to wife for life, then to be sold and proceeds divided among testator's children, held, at testator's death, children took vested interests in proceeds of farm as personalty so that distributees of child who died before widow were entitled to share in proceeds after latter's death. Miller's Ex'r v. Sageser, 30 Ky. L. R. 837, 99 S. W. 913.

70. Where land was to be sold after death or remarriage of wife to whom it was devised for life, but no one was named to make sale, there was no conversion prior to time of sale, hence heirs had attachable interest after testator's death. Williams v. Lobban [Mo.] 104 S. W. 58.

71. See 7 C. L. 856.

72. Evidence held to show intent to treat as personalty even as between personal representatives of deceased partner and heirs. Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913; Id., 15 App. Div. 413, 100 N. Y. S. 869.

73. See 7 C. L. 856.

74. All must concur. Darst v. Swearingen, 224 Ill. 229, 79 N. E. 635.

75. Where before actual conversion plaintiff acquired interests of all beneficiaries by conveyances and judicial proceedings, he could enjoin exercise of power of sale. Williams v. Lobban [Mo.] 104 S. W. 58.

76. Held election. Williams v. Jones [Wis.] 111 N. W. 505.

77. Miller v. Payne, 28 App. D. C. 396.

78. See 7 C. L. 857.

79. Hardin v. Hassell [Tenn.] 100 S. W. 720.

80. See 7 C. L. 857.

81. **This topic includes** the status, rights, and liabilities of convicts, and contracts for convict labor. **It excludes** procedure for con-

situated to inquire into the sanity of a convict under sentence of death, as provided by the Nebraska statute, is not affected by the fact that the warden fails to give notice that the convict appears to be insane.[82] A committee of the estate of a life convict may be appointed under the New York law of 1889, notwithstanding the convict becomes insane after his incarceration and is transferred to the state hospital for insane convicts.[83] Appointment of a committee by a court of general jurisdiction may not be collaterally attacked because a jurisdictional fact is not affirmatively shown by the record.[84] A convict may be tried and convicted for a crime committed while in prison.[85] That a warrant against a convict for an offense committed by him while in prison describes him as an "inmate" instead of a "convict" is not fatal under the Michigan statute,[86] and the prison warden may waive a mere technical defect in the warrant without prejudice to the rights of the accused.[87]

Convict labor contracts.[88]—In Georgia it is the duty of the county authorities to pay the fees of the court officers out of funds received by them for services of misdemeanor convicts and turn over to the county treasurer only whatever balance may remain.[89] After convict funds have been turned over to the county treasurer he has no authority to apply them to the payment of judgments in favor of officers of court for insolvent costs.[90] A lessee of convicts from the state may make a sublease with the consent of the prison commission,[91] and, though such sublease imposes upon the sublessee certain duties to the lessee and to the state,[92] it does not alter the obligations of the lessee to the state or to the convicts.[93] While the sublessee may not assign his contract without the consent of the lessee, the latter will be estopped to deny consent where he participates in arrangements to transfer the convicts to the place of service for the second sublessee with knowledge of the assignment.[94] A privilege of extension in the sublease passes by the assignment.[95] The prison commission has no jurisdiction of mere private disputes between a lessee and his sublessee as to who is entitled to the services of convicts where the protection or control of the convicts is not involved,[96] hence it may not merely at the request of the lessee deprive the sublessee of the services of the convicts and restore them to the control of the lessee, the sublessee not having failed in his duties toward the state.[97]

COPYRIGHTS.

Literary property independent of copyright is elsewhere treated.[98]

Acquisition, extent, and loss of copyright.[99]—Property in a copyright [1] and in

viction, sentence, and commitment (Indictment and Prosecution, 8 C. L. 189), nature and extent of punishment for crime (Criminal Law, 7 C. L. 1010), pardon and parole (Pardons and Paroles, 8 C. L. 1224), management and discipline of penal institutions (Prisons, Jails, and Reformatories, 8 C. L. 1448), and peonage laws (Slaves, 8 C. L. 1945).

82. Laws 1901, c. 105, p. 507, § 67. Application by defendant's attorney. Barker v. State [Neb.] 106 N. W. 450.

83. Laws 1889, p. 550, c. 401, applies, and was not repealed by implication by Code Civ. Proc. § 2323a, providing for the appointment of a committee where an incompetent person has been committed to a state institution and is an inmate thereof. Trust Co. of America v. State Safe Deposit Co. [N. Y.] 79 N. E. 996.

84. In suit by committee to recover property, objections to petition for plaintiff's appointment could not be raised by general demurrer Trust Co. of America v. State Safe Deposit Co. [N. Y.] 79 N. E. 996.

85. Huffaker v. Com., 30 Ky. L. R. 334, 98 S. W. 331.

86. Pub. Acts 1893, p. 170, Act No. 118. People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514.

87. People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514.

88. See 7 C. L. 858.

89. Sapp v. De Lacy, 127 Ga. 659, 56 S. E. 754.

90. Could not be compelled by mandamus. Sapp v. De Lacy, 127 Ga. 659, 56 S. E. 754.

91, 92, 93, 94. Hamby v. Georgia Iron & Coal Co., 127 Ga. 792, 56 S. E. 1033.

95. Lessee's estoppel applied to all provisions in sublease. Hamby v. Georgia Iron & Coal Co., 127 Ga. 762, 56 S. E. 1033. Provision for "renewing and extending contract" construed to grant a privilege of extension as distinguished from a privilege of renewal, hence no notice of election to continue was necessary. Id. Injunction properly granted restraining interference by lessee. Id.

96, 97. Hamby v. Georgia Iron & Coal Co., 127 Ga. 762, 56 S. E. 1033.

98. See Property, 8 C. L. 1471.

99. See 7 C. L. 859.

1. Assignee of right of copyright of original painting may take copyright though he

the article copyrighted [2] may be owned and transferred independently of each other. An author of a book may sell the copyright and retain right of dramatizing it,[3] but a contract authorizing publication of a story in a magazine does not constitute a sale of the copyright.[4] The copyright act does not give owner of the copyright the right to restrict the manner in which the article is to be sold,[5] and while it gives to a single publisher the right to do what he pleases with his copyrighted book, it does not confer upon him the right to commit acts in violation of the "Anti-Trust" law,[6] nor does the copyright of a pamphlet give its owner the right to the exclusive use of a plan of operation suggested therein.[7] The transferree of exclusive right to publish and vend a book during the terms of copyright is the equitable owner of copyright, and not a mere licensee.[8] The common-law right in literary property is superseded by the copyright act.[9] Registration of copyright in name of any person other than the owner thereof is invalid.[10] Filing of the title of a magazine is sufficient to secure copyright of articles therein if they are written or owned by proprietor of the magazine.[11] Failure to publish notice of American copyright in a British copyright edition does not waive the American copyright thereon,[12] and the publication of notice of American copyright in a British copyright edition which in its title and the contents of several pages differs from the American copyright is a violation of the statute.[13] The notice of copyright need not be placed upon the original painting or its mount.[14] Citizens of foreign nations whose laws grant to American citizens the benefit of copyright on the same basis as its own are in this country granted equal copyright protection.[15] Upon expiration of copyright, exclusive right to publish book or call it by its generic name ceases to exist.[16] Courts are not in accord on the question as to whether the copyright act should be strictly [17] or liberally [18] construed.

Infringement.[19]—Infringement may result from use of part as well as the entire publication protected by copyright,[20] but copyrighted works may be used for checking and independent revision.[21] A photograph of a copyrighted painting or statue is an infringement,[22] but a perforated sheet adapted to mechanical use is not

does not become the owner of the original painting. American Tobacco Co. v. Werckmeister [C. C. A.] 146 F. 375.

2. Owner of original painting may assign right to copyright thereof and retain ownership of painting. American Tobacco Co. v. Werckmeister [C. C. A.] 146 F. 375.

3. Ford v. Blaney Amusement Co., 148 F. 642.

4. Averment of sale of right to print and publish held insufficient to show sale of copyright. Ford v. Blaney Amusement Co., 148 F. 642.

5. Bobbs-Merrill Co. v. Straus [C. C. A.] 147 F. 15. He cannot, by a mere notice published in copyrighted article, fix the price at which it is to be sold. Id. See, also, Contracts, 9 C. L. 654; Combinations and Monopolies, 9 C. L. 576, as to contracts making such restrictions.

6. Mines v. Scribner, 147 F. 927.

7. Burk v. Johnson [C. C. A.] 146 F. 209.

8. Wooster v. Crane & Co. [C. C. A.] 147 F. 515.

9. Bobbs-Merrill Co. v. Straus [C. C. A.] 147 F. 15. Owner of common-law right elects to take protection offered by statute he, upon publication, surrenders his common-law rights, including right of limited publication. Id.

10. Averment that publisher secured copyright in his name as agent for author held insufficient. Ford v. Blaney Amusement Co., 148 F. 642.

11. Ford v. Blaney Amusement Co., 148 F. 642.

12. Sec. 4962, providing for the insertion of copyright notice, does not apply. Merriam Co. v. United Dictionary Co. [C. C. A.] 146 F. 354.

13. Rev. St. § 4962. Merriam Co. v. United Dictionary Co. [C. C. A.] 146 F. 354.

14. American Tobacco Co. v. Werckmeister [C. C. A.] 146 F. 375.

15. Merriam Co. v. United Dictionary Co. [C. C. A.] 146 F. 354.

16. Both "Webster's Dictionary" and the name "Webster" in connection therewith have become public property. Ogilvie v. Merriam Co., 149 F. 858.

17. Cannot be extended by resort to equitable considerations or strained interpretation. White-Smith Music Pub. Co. v. Apollo Co. [C. C. A.] 147 F. 226.

18. Ford v. Blaney Amusement Co., 148 F. 642; Bracken v. Rosenthal, 151 F. 136.

19. See 7 C. L. 860.

20. Merriam Co v. United Dictionary Co. [C. C. A.] 146 F. 354

21. Hartford Printing Co. v. Hartford Directory & Publishing Co., 146 F. 332. Copyrighted directory may be used for comparison if errors found are rectified by independent canvas. Id.

22. Bracken v. Rosenthal, 151 F. 136.

an infringement on copyright of a musical production.[23] Reproduction in this country of a British copyright edition of an American book which is copyrighted in this country, is an infringement of the American copyright.[24] Violation of restrictions imposed upon sales of copyrighted books is not an infringement.[25]

Laches.—Whether delay in commencing action constitutes laches depends upon circumstances.[26]

Remedies and procedure.[27]—Suit to enforce right secured by copyright laws thereby comes within jurisdiction of Federal court though involving contract through which complainant derives title,[28] and suits arising under copyright acts may be brought in any district in which defendant can be found.[29] The owner of equitable title to copyright may, in equity, sue infringers in his own name.[30] A restraining order will not be granted where it will interfere with defendant's business and complainant's right is doubtful,[31] nor to restrain infringement on copyright of future numbers of a periodical not yet published or copyrighted.[32] It must inform defendant with reasonable certainty of what is forbidden thereby.[33] Complaint in action for infringement of copyright must contain specific allegations showing that all requisites and conditions necessary to obtaining copyright have been complied with.[34] Bill to restrain infringement on four articles protected by separate copyrights and to set aside copyright obtained by fraud is not bad where parties and method of infringement are the same and it shows that defendants are conspiring to injure complainant.[35] Copied errors are surest tests of copying.[36] Where copied matter is inseparable from original work, relief is granted as to entire publication.[37] Where, at time of final judgment, copyright has lost its value, decree should be entered for accounting with costs.[38] Penalty for infringement of copyright to painting, as prescribed by Rev. St. § 4965, applies to every copy sold by defendant as well as every copy found in his possession.[39] The measure of damages for infringement

23. White-Smith Music Pub. Co. v. Apollo Co. [C. C. A.] 147 F. 226.

24. Merriam Co. v. United Dictionary Co. [C. C. A.] 146 F. 354.

25. Sale of lawfully printed copy at price lower than authorized by owner of copyright. Bobbs-Merrill Co. v. Straus [C. C. A.] 147 F. 15; Scribner v. Straus [C. C. A.] 147 F. 28; Authors' & Newspapers' Ass'n v. O'Gorman Co., 147 F. 616.

26. Delay of one year during which defendant proceeded openly with infringement is not laches where complainant during that time defended suit brought by one of defendants to cancel contract whereby he acquired title to copyright. Wooster v. Crane & Co. [C. C. A.] 147 F. 515.

27. See 7 C. L. 860.

28. Wooster v. Crane & Co. [C. C. A.] 147 F. 515.

29. Service in New York on resident of Minneapolis held to confer jurisdiction. Lederer v. Ferris, 149 F. 250.

30. Wooster v. Crane & Co. [C. C. A.] 147 F. 515.

31. But defendant may be required to give bond for complainant's protection. Louis De Jonge & Co. v. Breuker & Kessler Co., 147 F. 763. Evidence held insufficient to justify restraining order, but sufficient to require defendant to give bond. Gopsill v. Howe Co., 149 F. 905. Will be denied where affidavits tend to show that defendant had been given local license to produce opera at a stated royalty, and had been given no notice of the fact that owner of copyright had made contract giving another manager exclusive right to produce opera until defendant had expended large sums in preparation, and had made public announcement of its production. Ricordi & Co. v. Hammerstein, 150 F. 450. Will be denied where piracy is denied, complainant's right to copyright is questioned, and a counter charge of piracy is made by defendant, and the facts indicate that no material damage will result from delay. Sweet v. Bromley & Co., 154 F. 754.

32. Sweet v. Bromley & Co., 154 F. 754.

33. Order restraining "unlawful use" of complainant's publication or use of "duly copyrighted" matter held too general. Sweet v. Bromley & Co., 154 F. 754.

34. Must allege affirmatively that title of book and two copies thereof have been filed with librarian before publication, and the notice of copyright has been printed upon each copy issued. Ford v. Blaney Amusement Co., 148 F. 642.

35. Bracken v. Rosenthal, 151 F. 136.

36. Evidence held sufficient to show infringement of copyright of directory (Hartford Printing Co. v. Hartford Directory & Publishing Co., 146 F. 332), but may be explained by showing that such errors were made in copying from a voter's list (Gopsill v. Howe Co., 149 F. 905).

37. Hartford Printing Co. v. Hartford Directory & Publishing Co., 146 F. 332.

38. Where complainant's directory has been superseded by a later publication. Hartford Printing Co. v. Hartford Directory & Publishing Co., 146 F. 332.

39. American Lithographic Co. v. Werckmeister [C. C. A.] 146 F. 377.

on copyright of a directory is the difference between the cost of publishing the infringing directory and the gross amount realized from the sale thereof.[40]

CORAM NOBIS AND CORAM VOBIS, see latest topical index.

CORONERS.[41]

The scope of this topic is noted below.[42]

The Indiana statute authorizes a coroner to hold an inquest only when he has reasonable grounds to believe that death was caused by violence or casualty.[43] That the violence or death occurred in another county does not affect the jurisdiction of a coroner.[44] The determination of a coroner that a case requires an inquest is not conclusive against the county in passing upon his claim for fees,[45] but where the circumstances are such as to require it is a matter left largely to the discretion of the coroner,[46] and he will not be denied compensation in the absence of a showing of bad faith.[47] An inquest is a "criminal proceeding" within the meaning of a statute providing for salaries in lieu of all other fees.[48] Jurors and witness have no discretion justifying disobedience of the summons of a coroner,[49] hence cannot be denied compensation solely because it may afterward appear that the inquest was unnecessary.[50] That a statute requires a coroner to certify the fact of the services of a physician does not authorize him to appeal from a disallowance of the claim for the services, especially where the inquest was unauthorized.[51] A deputy coroner's certificate of death is admissible in evidence, in a prosecution for homicide, to prove the death and its cause.[52]

CORPORATIONS.

§ 1. Definition and Nature of Corporations (734).

§ 2. Classification of Corporations (735).

§ 3. Creation, Name and Existence of Corporations, and the Amendment, Extension, and Revival of Charters (735). Corporate Name (736). Purposes (736). Fees (737). Pleading and Proof of Incorporation (737). Amendment, Extension and Revival of Charters (737).

§ 4. Effect of Irregularities in Organization, and of Failure to Incorporate (738).

§ 5. Promotion of Corporations; Acts Prior to Incorporation (740). Incorporation of Partnerships (741). Fraud of Promotors (742).

§ 6. Citizenship and Residence or Domicile of Corporation (742).

§ 7. Powers of Corporations (742).

- A. In General (742).
- B. Power to Take and Hold Property (743).
- C. Power to Transfer or Incumber Property and Franchises (743). Mode of Transfer (744).
- D. Power to Contract and Incur Debts (744). Mode of Execution of Contracts (744).
- E. Power to Take and Hold Stock (745).

40. Moneys received from advertisers must be accounted for. Hartford Printing Co. v. Hartford Directory & Printing Co., 148 F. 470. Where more directories were published than were sold, all items of cost as would have been the same had no more copies been printed than were sold should be deducted from the gross receipts. Id.

41. See 7 C. L. 860.

42. **This topic includes** the powers, duties, liabilities, and compensation of coroners and the holding of inquests by them. **It excludes** the powers and duties of the coroner when acting as sheriff (Sheriffs and Constables, 8 C. L. 1897), admissibility on criminal trial of evidence given at inquest (Indictment and Prosecution, 8 C. L. 218), and verdict or finding at inquest as evidence in civil (see Evidence, 7 C. L. 1511, also Death by Wrongful Act, 7 C. L. 1083; Insurance, 8 C. L. 377) and criminal cases (see Homicide, 8 C. L. 106).

43. Could not recover fees where circumstances disclosed no reasonable basis for his action. Stults v. Allen County Com'rs [Ind.] 81 N. E. 471.

44. Jurisdiction conferred by his finding, and custody in his county of body of one who apparently came to death by violent, mysterious, or unknown means. Moore v. Box Butte County [Neb.] 111 N. W. 469.

45. County board may determine where inquest was reasonably required. Stults v. Allen County Com'rs [Ind.] 81 N. E. 471.

46, 47. Moore v. Box Butte County [Neb.] 111 N. W. 469.

48. Magistrate in Anderson county could not collect fees for holding inquest. Acker v. Anderson County [S. C.] 58 S. E. 337.

49, 50. Moore v. Box Butte County [Neb.] 111 N. W. 469.

51. Stults v. Allen County Comr's [Ind.] 81 N. E. 471.

52. Signature of deputy coroners presumed genuine. State v. Hopkins, 118 La. 99, 42 So. 660. Clerical mistake as to year of inquest, and fact that names of members of coroner's jury were not given, did not render it inadmissible. Id.

§ 8. Effect of Ultra Vires and Illegal Transactions (745).
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C. Subscriptions to Capital Stock and Other Agreements to Take Stock (759). Calls and Assessments (763).
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C. Rights of Corporate Mortgagees and Bondholders (801).
D. Officers and Stockholders as Creditors (803). Preferences (804).
E. Liability of Stockholders on Account of Unpaid Subscriptions and Remedies (804).
F. Personal Liability of Stockholder for Debts of Corporation, and Remedies (808).
G. Rights and Remedies of Creditors Against Directors and Other Officers (810).

The scope of this topic is noted below.[52a]

§ 1. *Definition and nature of corporations.*[53]—A corporation is a distinct entity, irrespective of and entirely distinct from the stockholders,[54] and such entity is not destroyed by the fact that one person owns all the stock.[55] As a general rule, therefore, the stockholders are not liable either for the contractual obligations of the corporations [56] or for its torts.[57] provided, of course, the incorporation is bona fide;[58]

52a. This article treats generally of domestic private corporations. Foreign corporations (see Foreign Corporations, 7 C. L. 1725), the taxation of corporations (see Taxes, 8 C. L. 2058), and the service of process on corporations (see Process, 8 C. L. 1449) are treated in separate articles. As to matters peculiar to corporations for particular purposes, see Banking and Finance, 9 C. L. 327; Building and Loan Associations, 9 C. L. 437; Fraternal Mutual Benefit Associations, 7 C. L. 1777; Exchanges and Boards of Trade, 7 C. L. 1613; Insurance, 8 C. L. 377; Religious Societies, 8 C. L. 1718; Railroads, 8 C. L. 1590; Street Railways, 8 C. L. 2004; Telegraphs and Telephones, 8 C. L. 2096; Waters and Water Supply, 8 C. L. 2262. Related topics are Associations and Societies, 9 C. L. 274; Franchises, 7 C. L. 1771, and Joint Stock Companies, 8 C. L. 521.

53. See 7 C. L. 863.

54, 55. Commonwealth v. Monongahela Bridge Co., 216 Pa. 108, 64 A. 909.

56. Stipulations as to good will on sale of corporation's business. Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. [C. C. A.] 146 F. 37. See post, § 16F, Personal Liability of Stockholders for Debts of Corporation.

57. See post, § 9, Torts, Penalties, and Crimes.

but in order to prevent a miscarriage of justice equity will look beyond the legal conception of a corporation as an entity distinct from its stockholders,[59] and in determining, with relation to Federal jurisdiction, whether a corporation is properly made plaintiff or defendant, the purpose of the corporation, and its real owners may be considered.[60] Whether a corporation is a "person" within the meaning of statutes depends upon the intention of the law-making body as derived from the construction of the statute.[61] The word "corporation" as used in statutes sometimes includes joint stock companies.[62]

§ 2. *Classification of corporations.*[63]—Corporations are variously classified for the purpose of taxation,[64] with relation to the right to do business in the state,[65] with relation to the purposes of their organization,[66] and with relation to their liability for negligence.[67]

§ 3. *Creation, name and existence of corporations, and the amendment, extension, and revival of charters.*[68]—A corporation may be created and organized ipso facto by statute.[69] On the other hand the state's power to incorporate is sometimes exercised through the medium of the courts.[70] Municipal authorities have no power to create corporations.[71] The certificate of incorporation must be confined to matters authorized by statute to be inserted therein, without regard to common-law power,[72] and all statutory requirements must be complied with.[73] Capacity to contract qualifies one to become an incorporator.[74] The charter of a stock corporation is a con-

58. Liability of stockholders for negligence. Holbrook, Cabot & Rollins Corp. v. Perkins [C. C. A.] 147 F. 166.

59. Where corporation, ninety-eight of whose one hundred shares of stock were owned by president, attempted to avoid specific performance of sale by president on ground that he had no authority. Roberts v. Hilton Land Co. [Wash.] 88 P. 946. Corporation **estopped** where stockholders are estopped. Chicago R. Equipment Co. v. National Hollow Brake Beam Co., 123 Ill. App. 533.

60. Where after the death of one of two partners who were residents of different states a holding corporation organized by them in the state where the survivor resided came under the entire control of such survivor through subservient directors, in a suit by the representative of decedent against the survivor, the corporation, and others, the corporation was properly sued as a defendant instead of being made a co-complainant. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159.

61. Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705. Anti-trust Law, Acts 1903, p. 268, c. 140, § 1, speaks of persons and corporations; section 2 mentions only corporations; section 3 mentions only persons; section 4 mentions persons and corporations. Held that section 3 did not include corporations. Id. Within Code, tit. 21, c. 9, relating to proceedings in name of state against "persons" unlawfully exercising public franchises. State v. Des Moines City R. [Iowa] 109 N. W. 867.

62. Const. § 208, providing that the word "corporation," as used in the constitution shall include joint stock companies, does not apply to construction of statutes. Commonwealth v. Adams Exp. Co., 29 Ky. L. R. 1280, 97 S. W. 386. Ky. St. 1903, § 457, providing that in construction of statutes the word corporation "may" be construed to include joint stock companies, does not require such construction. Id.

63. See 7 C. L. 863.

64. See Constitutional Law, 9 C. L. 610; Taxes, 8 C. L. 2058.

65. See Foreign Corporations, 7 C. L. 1725.

66. See Banking and Finance, 9 C. L. 327; Insurance, 8 C. L. 377; Railroads, 8 C. L. 1590; Municipal Corporations, 8 C. L. 1056, and other topics relating to particular kinds of corporations.

67. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691. See, post, § 9, Torts, Penalties, and Crimes.

68. See 7 C. L. 864.

69. Laws 1860-61, p. 54, entitled "An act to incorporate the Sisters of Mercy and the Female Academy of Ft. Smith." McDonald v. Shaw [Ark.] 98 S. W. 952.

70. Acts 1853-54, p. 32, c. 46, as amended by Acts 1855-56, p. 33, c. 36, Acts 1866-67, p. 577, c. 129, Code 1887, § 1145. Jordon's Adm'r v. Richmond Home for Ladies, 106 Va. 710, 56 S. E. 730.

71. Shreveport Traction Co. v. Kansas City S. & G. R. Co. [La.] 44 So. 457.

72. People v. Whalen, 104 N. Y. S. 555. See post, § 7C, Power to Transfer or Encumber Property and Franchises.

73. Requirements that **notice of incorporation** be published in some newspaper as "convenient" as practicable to the corporation's principal place of business requires publication in the nearest and most convenient paper suitable for that purpose. Clinton Novelty Iron Works v. Neiting [Iowa] 111 N. W. 974.

74. Statutes removing common-law disabilities of **married women** qualifies them to become incorporators. Good Land Co. v. Cole [Wis.] 110 N. W. 895. Incapacity of married woman to become husband's partner does not disqualify her to become a joint incorporator with him. Id.

tract between the state and the corporation, between state and the stockholders, and between the corporation and the stockholders.[75]

Corporate name.[76]—A corporation has a proprietary right in its name,[77] whether it be incorporated for pecuniary profit or not,[78] as against the right of another corporation to adopt [79] or use [80] the same name or one so similar as to be misleading. Whether an association was rightfully or wrongfully using a certain name at the time of its incorporation under the same name is immaterial where the legislature has the right to incorporate it under such name.[81] A statute changing a corporation's name may come within a prohibition against special legislation.[82] Irregularities in change of name can be raised only by the state in annullment proceedings.[83]

Provision is sometimes made requiring the corporation to print or publish its name in such manner as to apprise all who deal with it of its corporate character.[84]

Purposes.[85]—The purpose of the incorporation must be such as is authorized by statute,[86] and is determinable only from the articles of incorporation.[87]

75. Garey v. St. Joe Min. Co. [Utah] 91 P. 369. See, post, this section, subdivision Amendment, Extension, and Revival of Charters.

76. See 7 C. L. 866.

77. People v. Rose, 225 Ill. 496, 80 N. E. 293.

Loss of right: Incorporated society does not lose right to exclusive use of its corporate name in state of its domicile by joining in creation of national body and becoming member thereof, after seceding from national society. State Council v. National Council J. O. U. A. M. [N. J. Eq.] 64 A. 561.

78. People v. Rose, 225 Ill. 496, 80 N. E 293.

79. Similarity between "Polish National Catholic Church of St. Francis," and "St. Francis Roman Catholic Church," held to justify refusal to charter church under former name where the application was opposed by an existing church of the latter name. Polish Nat. Catholic Church of St. Francis, 31 Pa. Super. Ct. 87. Refusal to change name of corporation entitled Philadelphia Lying-in Charity to Central Maternity and Hospital for Women held not shown to be an abuse of discretion, though there were good reasons for change, where it did not appear that some other name would not do, and there was another corporation named Maternity Hospital. Philadelphia Lying-In Charity v. Maternity Hospital, 29 Pa. Super. Ct. 420. Mandamus to compel issue of certificate of incorporation under name of "National Liberty League" held properly refused where there was already another corporation in the state named "National Liberty Legion." People v. Rose, 225 Ill. 496, 80 N. E. 293. Use by person of own name as part of name of corporation in which he is interested does not necessarily forbid similar use in corporation subsequently organized to carry on competitive business with former. Bates Mfg. Co. v. Bates Mach. Co., 141 F. 213.

80. Injunction against use of corporation's name in state of its domicile by another corporation. State Council, v. National Council J. O. U. A. M. [N. J. Eq.] 64 A. 561. **As between foreign and domestic corporations** of similar names, priority in the use thereof is to be determined by the time of compliance by the foreign corporation with the statutes permitting it to transact business in the state. Central Trust Co. v. Central Trust Co., 149 F. 789. Domestic corporation held prior in right to use of corporate name similar to that of foreign corporation which had transacted business illegally in the state prior to incorporation of the domestic company. Id. Domestic corporation having established prior right to use name, bill would not lie by foreign corporation to compel delivery to it of all mail addressed with such name. Id.

81. National Council v. State Council of Virginia, 203 U. S. 151, 51 Law. Ed. 132.

82. Attempted change of name of Arizona Pioneers' Historical Society held special legislation, and void under the Harrison Act. Leatherwood v. Hill [Ariz.] 89 P. 521.

83. Irregularity in change of name is available only at instance of state in direct proceedings to annul the charter. See, Civ. Code 1902, § 1885. Sumpter Tobacco Warehouse Co. v. Phoenix Ins. Co. [S. C.] 156 S. E. 654.

84. "Inc." held not equivalent to "incorporated" within Ky. St. 1903, § 576, requiring latter word to be used on corporation's sign at its principal place of business. Commonwealth v. American Snuff Co., 30 Ky. L. R. 1373, 101 S. W. 364. Ky. St. 1903, § 576, requiring corporations to place word "incorporated" under its name on all its advertising and printed matter, being intended merely to require notice to those dealing with corporation, does not require such words to be placed on goods labeled with the corporate name. Jung Brewing Co. v. Com., 29 Ky. L. R. 939, 96 S. W. 476.

85. See 5 C. L. 768.

86. Under Acts 1853-54, p. 32, c. 46, as amended by Acts 1855-56, p. 33, c. 36, Acts 1866-67, p. 577, c. 129, Code 1887, § 1145, authority given to courts to incorporate for purpose of conducting any enterprise or business which might be conducted by an individual body politic or corporate, includes incorporation for purpose of providing home for indigent women. Jordan's Adm'r v. Richmond Home for Ladies, 106 Va. 710, 56 S. E. 730. Incorporation for purpose of providing home for indigent women of certain religious denomination held not within prohibition of Const. 1869, art. 5, §§ 14,

Fees.[88]

Pleading and proof of incorporation.[89]—A general allegation of incorporation is sufficient on demurrer,[90] and the use of a name importing a corporation may dispense with the necessity of any such allegation at all.[91] Where the contract sued on is inserted in the declaration, insufficiency of allegation of corporate existence of the defendant may be supplied by the recitals of the contract.[92] An allegation that defendant is a corporation of a certain state is equivalent to an allegation that it is a corporation existing under the laws of such state.[93] Nul tiel corporation must be pleaded in abatement,[94] and the plea give the plaintiff a better writ.[95] Such a plea is inconsistent with the general issue.[96]

When corporate existence is alleged, the burden is on the other party to disprove such existence,[97] and the rule is the same where the name imports a corporation, though incorporation be not pleaded.[98] The original charter, duly certified, is the highest evidence of incorporation,[99] but such fact may also be proved by copies [1] and public records.[2] Whether an application for a charter was merely tentative or not is a question of fact for the jury.[3] A general appearance by a corporation defendant is an admission of its corporate existence.[4] Of course, corporate existence need not be proved when it is not material.[5]

Amendment, extension and revival of charters.[6]—In granting charters or au-

17, against incorporation of religious societies. Id. See Religious Societies, 8 C. L. 1718.

87. Extrinsic evidence in suit for negligence not admissible to show that defendant was a charitable corporation. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691. Held not purely charitable corporation. Id.

88. See 7 C. L. 867.

89. See 7 C. L. 868.

90. On demurrer to complaint alleging merely incorporation and the filing of certificate of incorporation, without stating contents, it will be presumed that corporation was legally incorporated and that certificate contained information required by statute, remedy for indefiniteness or uncertainty in such regard being by motion to make more definite and certain. Avon Springs Sanitarium Co. v. Weed, 104 N. Y. S. 58.

91. Burden of proof on defendant to disprove corporate existence of plaintiff in suit by payee of note whose name imputed incorporation. Van Winkle Gin & Mach. Works v. Mathews [Ga. App.] 58 S. E. 396. Name "M Fust's Sons & Co." did not impart corporate existence so as to preclude amendment describing the concern as a partnership and giving names of partners. Austin v. Fust's Sons & Co. [Ga. App.] 58 S. E. 318. Assignment on certorari to review finding against illegality of execution that judgment was void because plaintiff was named as "Augusta Drug Co.," without allegation as to whether it was a corporation or partnership, overruled. Glenn v Augusta Drug Co., 127 Ga. 5, 55 S. E. 1032. Mere use of term "company" in pleading and acknowledgment of such name by defendant by appearance does not import corporate existence. Keystone Pub. Co. v. Hill Dryer Co., 105 N. Y. S. 894.

92, 93. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241.

94. Hence cannot be pleaded after overruling of motion for change of venue and filing of general issue. Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 81 N. E. 864.

95. Must point out the character of defendant, whether partnership, joint stock company, etc. Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 81 N. E. 864.

96. When filed with general issue it will be stricken. Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 81 N. E. 864.

97. In suit by corporate payee of note. Van Winkle Gin & Mach. Works v. Mathews [Ga. App.] 58 S. E. 396. Admission by defendant of execution of note sued on when coupled with presumption of incorporation arising from plaintiff's allegation of incorporation makes prima facie case and entitles defendant to open and close though he denies plaintiff's allegation of incorporation. Id.

98. Van Winkle Gin & Mach. Works v. Mathews [Ga. App.] 58 S. E. 396.

99. Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co [S. C.] 56 S. E. 654.

1. Certified copy of articles of incorporation makes a prima facie case of the legal existence of the corporation and its right to do business. Leavengood v. McGee [Or.] 91 P. 453.

2. By records of register of deeds. Fields v. U. S., 27 App. D. C. 433.

3. Hence examination of stockholder as to statements in application for charter held not inadmissible on ground that application was only tentative. North American Restaurant & Oyster House v. McElligott, 227 Ill. 317, 81 N. E. 388.

4. Southern R. Co. v. Hundley [Ala.] 44 So. 195; Pittsburg, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.

5. In action against maker of notes payable to a corporation and indorsed by it to plaintiff, proof of the indorsee's corporate existence is immaterial. Jones v. Evans [Cal. App.] 91 P. 532.

6. See 7 C. L. 864.

thorizing the creation of corporations under general laws, the state may expressly reserve the power to alter, amend, or repeal, and such reservation becomes a part of the contract between the state and the corporation and is binding not only upon the corporation but also upon the stockholders;[7] but such reserved power applies merely as between the corporation and the state and will not authorize a change of the fundamental character of the corporation, the impairment of grants or vested rights, or of the obligation of contract between the stockholders among themselves or between them and the corporation, except insofar as such effects result incidentally from the exercise of the power as between the state and the corporation.[8] Nor does the reservation of the right to alter or repeal corporation charters authorize the impairment of the contracts of corporations with third persons.[9] A proviso in an act authorizing an amendment that nothing shall be inserted contrary to the law under which the corporation was organized will not prevent the insertion of powers conferred by an amendment to the original law or by general laws relating to corporations in general,[10] nor will such proviso prevent any such general law from being read into the amended certificate of incorporation as an existing law;[11] but the intention not to repeal special charter provisions by subsequent general statutes will be presumed.[12] An amendment by the stockholders must, of course, be within the scope of their authority to amend.[13] The competency of witnesses to a petition for amendment is controlled by the same rules applicable in the trial of cases.[14] An extension of the life of a corporation lessor extends also the operation of a lease originally for a term extending beyond such lessor's corporate life.[15]

§ 4. *Effect of irregularities in organization, and of failure to incorporate.*[16]—Defects and irregularities may be cured by subsequent statutes,[17] or by complying with the provisions of statutes enacted for such purpose[18] or in some cases by compliance with the provisions which should have been complied with in the first instance.[19]

Stockholder as partner or agent.[20]—Somewhat analogous to the liability of in-

7. Garey v. St. Joe Min. Co. [Utah] 91 P. 369.

8. Contract between state and corporation and state and stockholders may be changed, etc., but not contract between corporation and stockholders. Garey v. St. Joe Min. Co. [Utah] 91 P. 369, discussing at length the extent to which the state may go under such a reserved power. Statute authorizing majority of stockholders to amend articles so as to make full paid stock which is expressly made nonassessable by original articles assessable held not within reserved power to alter, amend, etc. Id. Const. § 238 does not refer to powers conferred on corporation and which enter into its contract with subscribers. Bernstein v. Kaplan [Ala.] 43 So. 581.

9. See, Const. Neb. art. 11 b, § 1. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1.

10, 11. Colgate v. United States Leather Co. [N. J. Eq.] 67 A. 657.

12. In re Morgan's Louisiana, etc., Co., 117 La. 593, 42 So. 150 "Authorized by law" as used in a certificate of incorporation does not refer merely to law as it exists at time of filing of certificate, to the exclusion of subsequent changes in the law. Id.

13. Authority to change "location of its principal office" held to authorize change of place of "principal places of business." Bernstein v. Kaplan [Ala.] 43 So. 581.

14. Under Shannon's Code, § 2542, providing that the signatures of corporators to petition for amendment must be acknowledged or "proved by one witness before the county court," etc., any witness is competent who could testify in court about the matter involved, and hence interest in the charter will not disqualiy him. Pope v. Merchants' Trust Co. [Tenn.] 103 S. W. 792.

15. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854.

16. See 7 C. L. 868.

17. Any irregularity in organization of plaintiff consolidated railroad corporation held cured by Act No. 120, p. 281, of 1904. Shreveport Trac. Co. v. Kansas City S. & G. R. Co. [La. 44 So. 457.

18. Code 1896, § 1286, providing that incorporation in the name of individuals without using some word indicating the nature of the business to be carried on, followed by the word "company," or "corporation," shall be "void," must be construed in connection with section 1282, providing method of curing noncompliance with the statute, and as thus construed the word "void" means "voidable." State v. Collas [Ala.] 43 So. 190.

19. Corporation which has failed to file certificate as required by Hurd's Rev. St. 1905, p. 497, c. 32, may become de jure by filing such certificate. Marshall v. Keach, 227 Ill. 35, 81 N. E. 29.

20. See 7 C. L. 869.

corporators as partners or agents, though not identical with it, is the statutory liability growing out of defects in organization.[21]

De facto corporation.[22]—A de facto corporation results from a bona fide attempt to incorporate under a law providing for such incorporation, followed by a bona fide attempt to organize and to transact business,[23] or such a corporation may result from an attempted consolidation.[24] Such a corporation is recognized as a legal entity for most purposes,[25] even in criminal law,[26] such being the necessary result of the doctrine that the legality of its existence can be attacked only by the state,[27] the doctrine of collateral attack, and that of estoppel.[28]

21. Under Code, §§ 1614, 1616, stockholders are personally liable for corporation's debts where notice of incorporation required by § 1613 is not filed. Houts v. Sioux City Brass Works [Iowa] 110 N. W. 166. Pleading held to charge liability under Code, §§ 1614, 1616, and not as copartners, notwithstanding allegations of partnership. Id. Stockholder who became such within the three months allowed for publication of notice of incorporation held liable under Code, § 1616, for debt contracted thereafter, though he was not one of original incorporators. Clinton Novelty Iron Works v. Neiling [Iowa] 111 N. W. 974.

22. See 7 C. L. 869.

23. Marshall v. Keach, 227 Ill. 35, 81 N. E. 29; Leavengood v. McGee [Or.] 91 P. 453. Corporation acting as such pursuant to articles regularly filed, having a board of directors, and exercising corporate functions, held at least a de facto corporation. Marsters v. Umpqua Valley Oil Co. [Or.] 90 P. 151. De facto corporation held to result from bona fide attempt to organize improvement district under Kirby's Dig. §§ 5665-5666 where only defect was in signatures to petition for the incorporation and such defect was due to ambiguity of statute. Whipple v. Tuxworth [Ark.] 99 S. W. 86.

Transaction of business consists of doing some of the things which the corporation purports to be authorized to do, such as conveyance of property. Leavengood v. McGee [Or.] 91 P. 453.

Note: To create a de facto corporation there must be a law under which said corporation may be created, together with user under the law. American Trust Co. v. Minnesota & Northwestern Railroad Co., 157 Ill. 641, 42 N. E. 153. Where there was an honest attempt of the corporators to organize a corporation under the laws of the state, and all the necessary steps had been taken except that the final certificate had not been recorded by the recorder of deeds, and thereafter the necessary officers had been elected, who had proceeded to the transaction of business as a corporate body, these facts would establish a corporation de facto. Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 27 N. E. 596. A corporation is a de facto one where the law authorizes such corporation and where the company has made an effort to organize under that law and is transacting business in the corporate name. 1 Cook on Stock & Stockholders & Corporation Law (3d Ed.) § 234; 8 Am. & Eng. Ency. of Law (2d Ed.) p. 747. A de facto corporation, as long as it exists, is a reality. It has a substantial legal existence. Society v. Cleveland, 43 Ohio St. 481, 3 N. E. 357; 8 Am. & Eng. Ency. of Law (2d Ed.) p. 748, and cases there cited. It is the settled law that neither the eligibility of the directors of a de facto corporation nor the rightfulness of its existence can be inquired into collaterally. Cincinnati, Lafayette & Chicago Railroad Co. v. Danville & Vincennes R. Co., 75 Ill. 113, and cases there cited. See, also, Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324, 65 N. E. 329; People v. Pederson, 220 Ill. 554, 77 N. E. 251. Proof of the existence of a corporation de facto is sufficient on a plea of nul tiel corporation. Cozzens v. Chicago Brick Co., 166 Ill. 213, 46 N. E. 788; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621. The introduction of the charter of a corporation, with the proof of the exercise under it of the franchises and powers thereby granted, is sufficient to establish the existence of a corporation de facto. St. Louis, Alton & Terre Haute Railroad Co. v. Belleville City Railway Co., 158 Ill. 390, 41 N. E. 916. The directors and officers of the de facto corporation are not relieved from the liability imposed by section 18 of said chapter 32 on corporations. "There must be a corporation de jure in order to escape that liability." Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99, 110 Am. St. Rep. 230; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99. It was held, in Gade v. Forest Glen Brick & Tile Co., 165 Ill. 367, 46 N. E. 286, that the capital stock of a corporation might be reduced before recording the final certificate in the recorder's office, and that creditors, after notice of the reduction of such capital stock, would be confined to the reduced capital, as they did not become creditors until after the certificate was recorded and the notice of the reduction published as required by law. As to the various phases and duties of de facto corporations see Curtis v. Tracy, 169 Ill. 233, 48 N. E. 399, 61 Am. St. Rep. 168; McCormick v. Market Nat. Bank, 162 Ill. 100, 44 N. E. 381; Edwards v. Armour Packing Co., 190 Ill. 467; 60 N. E. 807; Gunderson v. Illinois Trust & Savings Bank, 199 Ill. 422; 65 N. E. 326; Gay v. Kohlsaat, 233 Ill. 260, 79 N. E. 77; Hudson v. Green Hill Seminary, 113 Ill. 618. From Marshall v. Keach [Ill.] 81 N. E. 29.

24. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501.

25. See post, this section, subdivision Collateral Attack. Power of eminent domain may be exercised by de facto corporation. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501. Conveyance of property by or to de facto corporation valid. Leavengood v. McGee [Ore.] 91 P. 453.

26. On indictment against corporation receiver for embezzlement, proof of a de facto corporation is sufficient. Fields v. U. S., 27 App. D. C. 433.

27. Leavengood v. McGee [Or.] 91 P. 453;

Collateral attack.[29]—The corporate existence of a de facto corporation cannot be collaterally attacked,[30] whether the irregularities or defects charged relate to its original organization,[31] amendments or changes in its charter,[32] consolidation with other corporations,[33] or forfeiture of its charter.[34]

Estoppel to deny incorporation.[35]—Persons dealing with a corporation as such are generally estopped to deny its corporate existence,[36] and a purported corporation may be likewise estopped,[37] but one is not usually estopped to assert total lack of corporate existence and powers on the part of a purported corporation,[38] nor is an alleged corporation estopped as against one who knew that it was not a corporation.[39] The state is not estopped to deny the corporate existence or to assert the illegality of the organization of a corporation by summoning it in quo warranto proceedings in its corporate name.[40]

§ 5. *Promotion of corporations; acts prior to incorporation.*[41]—A promoter is one who brings about the incorporation and organization of a corporation.[42] Whether in a particular case one was a promoter is a question of fact.[43] Subject to the doctrines relative to the fraud of promoters,[44] promoters may act in their own behalf as the parties interested in the creation of the corporation, and may take such steps as in their judgment will best promote the object in view.[45] They are not ordinarily obliged to protect the interests of the proposed corporation by drawing upon their own resources.[46] A corporation is not bound by the engagements in its behalf made

Marsters v. Umpqua Valley Oil Co., [Or.] 90 P. 151.

28. See next two subdivisions of this section.

29. See 7 C. L. 869.

30. In private suit. See Civ. Code, § 358, As amended by act of 1901. Robinson v. Blood [Cal.] 91 P. 258.

31. In proceedings to construe will, corporate existence of legatee held not assailable, for irregularities in organization. Smith v. Havens Relief Fund Soc., 118 App. Div. 678, 103 N. Y. S. 770. Decree in favor of de facto corporation not subject to collateral attack based on defects in organization. Whipple v. Tuxworth [Ark.] 99 S. W. 86.

32. Irregularities in change of name not available collaterally. Sumpter Tobacco Warehouse Co. v. Phoenix Ins. Co. [S. C.] 56 S. E. 654. Under Shannon's Code, §§ 2031, 2064, providing that neither corporation nor person dealing with it can set up want of legal organization, incompetency of witness to signatures of corporators to application for amendment to charter cannot be set up in action for subscription price of stock issued pursuant to the amendment. Pope v. Merchants' Trust Co. [Tenn.] 103 S. W. 792.

33. Where provisions relative to consolidation had been substantially complied with, and the consolidated corporation had, exercised corporate functions for seventeen years. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501.

34. Stockholder sued by judgment creditor of corporation could not question corporation's existence on ground that such existence had been forfeited. Robinson v. Blood [Cal.] 91 P. 258.

35. See 7 C. L. 870.

36. When corporation had been doing business several years before the defendant subscribed, and he thus had ample opportunity to learn the facts before subscribing. Farmers' Mut. Tel. Co. v. Howell, 132 Iowa, 22, 109 N. W. 294. Defendant in indictment against **corporation receiver** for embezzlement could not question corporation's existence where it was at least a de facto corporation. Fields v. U. S., 27 App. D. C. 433.

37. Concern doing business under name importing incorporation cannot, after its incorporation, deny its corporate existence at the time it executed a contract in manner and form implying corporate existence. Mutual Aid Ass'n v. Hogan, 124 Ill. App. 447.

38. Grantee of land not estopped to defend suit to foreclose mortgage given as security on ground that grantor had no corporate existence or powers whatever. Lafferty v. Evans, 17 Okl. 247, 87 P. 304.

39. Kohlsaat v. Gay, 126 Ill. App. 4, afd., 223 Ill. 260, 79 N. E. 77.

40. State v. Inner Belt R. Co., 74 Kan. 413, 87 P. 696.

41. See 7 C. L. 871.

42. Holder of options on coal in place who organizes corporation for ostensible purpose of mining and selling the coal, the stockholders and directors holding merely "qualification" stock, and the option being sold to the corporation, held a promoter. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

43. Evidence held insufficient to show that persons who sold property to corporation were promoters. South Missouri Pine Lumber Co. v. Crommer, 202 Mo. 504, 101 S. W. 22.

44. See post, this section, subdivision Fraud of Promoters.

45. Feitel v. Dreyfous, 117 La. 756, 42 So. 259.

46. Evidence held to show no obligation on part of promoters to convey to corporation property purchased by them after expiration of option which they had conveyed to the corporation. Gillett v. Dodge [Or.] 89 P. 741.

by its promoters,[47] but may ratify such engagements and take the benefit thereof [48] and become bound thereby.[49] Such ratification may be accomplished in the same manner as any other contract may be made,[50] but the mere continuation of a contract made by a promoter will not render the corporation liable thereunder prior to its assumption thereof.[51] The promoter will not be liable under his engagements in behalf of the corporation subsequently to their assumption by the corporation,[52] but he may contract for individual liability for services rendered after incorporation.[53] Questions relating to subscriptions to stock prior to incorporation are treated in a subsequent section in connection with subscriptions after incorporation.[54]

Incorporation of partnerships.[55]—A corporation taking over the business of a partnership is not liable for the debts of the latter not expressly assumed,[56] unless the incorporation amounts to a mere continuation of the partnership,[57] or constitutes a fraud upon the excluded creditors.[58] The interests of the partners in the stock received by them in payment for the partnership property may be reached in equity,[59] but bona fide purchasers or holders may acquire a good title not only as against this right [60] but also as against the right of creditors to follow the property of the partnership into the hands of the corporation.[61]

47. Bond v. Pike, 101 Minn. 127, 111 N. W. 916; Wright v. St. Louis Sugar Co., 146 Mich. 555, 13 Det. Leg. N. 866, 109 N. W. 1062. Contract of employment. Horowitz v. Broads Mfg. Co., 54 Misc. 569, 104 N. Y. S. 988.

48. Lease to promoter ratified by corporation became property of latter as between it and former. Central Trust Co. v. Lappe, 216 Pa. 549, 65 A. 1111.

49. Bona v. Pike, 101 Minn. 127, 111 N. W. 916.

50. By formal resolution of directors or action on part of officers, or acquiescence of corporation or officers, according to nature of case. Bond v. Pike, 101 Minn. 127, 111 N. W. 916. Where majority of directors had knowledge of transaction and corporation had benefit thereof, formal ratification by directors held unnecessary. Possell v. Smith [Colo.] 88 P. 1064. Question of contract with promoter and its acceptance by corporation held properly submitted to jury. Chicago v. Washington State Colonization Co. [Wash.] 88 P. 113. Where all the agreements entered into by promoters are carried out after incorporation, except one which fails through mistake, inadvertence, or fraud, the latter may be enforced. Agreement to assign patent to corporation held defense in suit against corporation for infringement. Cook v. Sterling Electric Co. [C. C. A.] 150 F. 766. Terms under which one transferring land options to promoter was to receive certain per cent of net profits in common stock held fulfilled, though business of corporation had not been completed and wound up. Selover v. Isle Harbor Land Co., 100 Minn. 253, 111 N. W. 155. Instruction held to state sufficiently that directors must have had **knowledge** of all the material facts in order that corporation might be held liable. Possel v. Smith [Colo.] 88 P. 1064.

Evidence: Letters drafted by plaintiff setting out proposed agreement between him and defendant's promoter, and delivered to such promoter to be signed by him and returned to plaintiff, but delivered to corporation instead, held admissible, though unsigned, as part of negotiations. Chilcott v. Washington State Colonization Co. [Wash.] 88 P. 113.

51, 52. Stone v. Fox Mach. Co., 145 Mich. 689, 13 Det. Leg. N. 931, 109 N. W. 659.

53. In absence of novation, one who employs agent to carry on his business cannot escape individual liability for the agent's services by creating a corporation and causing agent to be chosen as an officer thereof, and an employer who organizes corporation in which he owns all stock may be held liable under original contract with employe whom he caused to be elected president of the corporation for services of such employe rendered as such president. Bonsall v. Platt [C. C. A.] 153 F. 126.

54. See post, § 14C, Subscriptions to Stock and Other Agreements to Take Stock.

55. See 7 C. L. 872.

56. Baker Furniture Co. v. Hall [Neb.] 111 N. W. 129. Where the property of the corporation is lawfully acquired by the corporation, the latter is not thereby rendered liable for the former's debts. Culberson v. Alabama Const. Co., 127 Ga. 599, 56 S. E. 765. Corporation not bound by endorsement by its president of note in name of partnership which had been succeeded by the corporation, where note was never payable to corporation and was not executed in payment of any of its debts. National Union Bank v. Hollingsworth, 143 N. C. 520, 55 S. E. 809.

57. Baker Furniture Co. v. Hall [Neb.] 111 N. W. 129. Where a corporation is organized by same persons who compose partnership and who take or control all the stock, the purpose being merely to continue the same business. Duvivier & Co. v. Gallice [C. C. A.] 149 F. 118. Voluntary association cannot escape its liabilities by incorporation where the only change thus effected is in the form of its existence, its name, officers, membership, business, and methods being unchanged. Mutual Aid Ass'n v. Hogan, 124 Ill. App. 447. Corporation incorporated by partnership and creditor, the latter contributing funds and the former the partnership property, held not continuation of partnership. Id.

58, 59. Baker Furniture Co. v. Hall [Neb.] 111 N. W. 129.

60. Stockholder may be bona fide holder.

Fraud of promoters.[62]—Fraud practised by promoters who subsequently, on organization, become its only stockholders does not invalidate the transactions affected thereby.[63] The effect of the fraud of promoters upon stock subscriptions is treated in a subsequent section.[64] Parties to the fraud of promoters are equally liable with them.[65]

§ 6. *Citizenship and residence or domicile of corporation.*[66]—A corporation is a resident of the state in which it is incorporated.[67] though it may have a branch office in another state.[68] Consolidation between corporations of several states may result in a domestic corporation in each of the states.[69] A corporation is not a citizen of the United States within the provision of the Fourteenth Amendment forbidding the abridgment of the privileges of such citizens by the states.[70]

§ 7. *Powers of corporations. A. In general.*[71]—A corporation can exercise only such powers as are expressly granted.[72] or necessarily implied from those expressly granted,[73] and all reasonable doubts as to grant of power will be construed in favor of the public.[74] All of the provisions of the charter, however, may be looked to in order to ascertain the implied powers.[75] The powers of a corporation

Baker Furniture Co. v. Hall [Neb.] 111 N. W. 129.

61. Evidence held to sustain finding that purchaser of corporation's property had no notice of fraud in organization of corporation to take over the property from a partnership, to which the corporation succeeded, without paying the partnership debts. National Union Bk. v. Hollingsworth, 143 N. C. 520, 55 S. E. 809.

62. See 7 C. L. 872.

63. When promoters organized corporation through fictitious subscriptions, they themselves really owning all stock, and, having had themselves elected directors, sold property to corporation in excess of real value, the corporation could not complain. Old Dominion Copper Min. & Smelting Co. v. Lewisohn [C. C. A.] 148 F. 1020.

64. See post, § 14C, Subscriptions to Capital Stock and Other Agreements to Take Stock.

65. Vendors of property held, under the evidence, not party to fraud of promoters in raising price of property sold to corporation. South Missouri Pine Lumber Co. v. Crommer, 202 Mo. 504, 100 S. W. 22.

66. See 7 C. L. 873.

67. Baumgarten v. Alliance Assur. Co., 153 F. 301.

68. Maintenance of branch office in state does not prevent it from being foreign corporation for purpose of removal of cause to Federal court. Baumgarten v. Alliance Assur. Co., 153 F. 301.

69. Consolidation under Const. S. C., art. 9, § 8, and Code Laws 1902, § 2050, between domestic and foreign corporations, domesticates latter, except for purposes of Federal jurisdiction. Lee v. Atlantic Coast Line R. Co., 150 F. 775. Consolidation with foreign corporation does not make the domestic corporation foreign, especially when the statute authorizing such consolidation expressly provides the contrary (Staton v. Atlantic Coast Line R. Co., 144 N. C. 135, 56 S. E. 794), and may for certain purposes become domesticated in another state (Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501). Consolidation of railroads passing through several states domesticates each constituent company in each of the states. Id.

70. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.

71. See 7 C. L. 873.

72. Bankers' Mut. Casualty Co. v. First Nat. Bank, 131 Iowa, 456, 108 N. W. 1046; Pond v. Royal League, 127 Ill. App. 476

73. Bankers' Mut. Casualty Co. v. First Nat. Bk., 131 Iowa, 456, 108 N. W. 1046; Pond v. Royal League, 127 Ill. App. 476.

Powers implied: Railroad company has power to purchase land for reservoir if necessary or convenient to operation of its road. Choctaw, etc., R. Co. v. Bond, 6 Ind. T. 515, 98 S. W. 335. Mercantile corporation may make temporary loans of surplus funds. Garrison Canning Co. v. Stanley, 133 Iowa, 57, 110 N. W. 171. Authority to engage in general foundry and machine work and manufacture of tools and furnishings held to authorize manufacture of woven wire machines so as to authorize corporation succeeding to partnership business to hold patent for such machine. Bates v. Bates Machine Co., 120 Ill. App. 563. Arizona Pioneers' Historical Society held competent to accept appropriation made by Laws 1905, p. 144, No. 69, in trust for purpose of carrying on its work and duties. Leatherwood v. Hill [Ariz.] 89 P 521.

Powers not implied: Right to lay electric conductors under surface of streets does not imply right to construct conduits as against right of city to require such conductors to be placed in conduits constructed in accordance with a general plan authorized by statute. People v. Ellison, 188 N. Y. 523, 81 N. E. 447, afg. 115 App. Div. 254, 101 N. Y. S. 55, afg. 51 Misc. 413, 101 N. Y. S. 444. Corporation organized to operate summer hotel and develop mineral springs not authorized to subdivide its property, sell lots, and dedicate a portion thereof to public. Stacy v Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133.

74. Bankers' Mut. Casualty Co. v. First Nat. Bk., 131 Iowa, 456, 108 N. W. 1046; Millville Gaslight Co. v. Vineland Light & Power Co. [N. J. Eq.] 65 A. 504.

75. Nye v. Whittemore, 193 Mass. 208, 79 N. E. 253. Power to use property as camp meeting grounds and summer resort for spiritualists, implied from power to own property where wharf, hotel, and other pub-

as limited by the act under which it is incorporated cannot be enlarged by its certificate of incorporation,[76] and on the other hand the powers of a corporation organized under a general act may be impliedly limited by special acts providing for incorporation for particular purposes.[77] Averments of lack of power must be specific.[78]

(§ 7) *B. Power to take and hold property.*[79]—In Kentucky lands other than such as are necessary to the corporation's legitimate business are subject to escheat if held for more then five years.[80]

(§ 7) *C. Power to transfer or incumber property and franchises.*[81]—Special franchises, as distinguished from the franchise to be a corporation, may be transferred,[82] but not so as to immunity from the exercise of governmental power,[83] nor can a corporation charged with public duties divest itself thereof by a transfer of its property or franchises.[84] Only such provisions as to sale of the corporation's property may be inserted in the certificate of incorporation as are authorized by statute,[85] without regard to the inherent, common-law powers of the corporation in this regard.[86] The power to transfer may be implied.[87] A lease for a term extending beyond the limit of the lessor's corporate existence is valid to the extent of such limit.[88] Power to do any act incidental to or growing out of its business authorizes a corporation to pledge or mortgage its property as security for borrowed money.[89]

General power to mortgage property in the ordinary form is not taken away

lic buildings might be erected, and building lots sold or leased for private residence under regulations prescribed by the corporation. Id.

76. Fogg v. Ocean City [N. J. Law.] 65 A. 885.

77. Corporation organized under P. L. 1896, p. 277, cannot lay sewers in public streets, there being special acts for incorporation of sewer companies and special conditions attached to the right to exercise such powers. Fogg v. Ocean City [N. J. Law] 65 A. 885.

78. Averment that corporation had no power to make contract is merely a legal conclusion. Vonnoh v. Sixty-Seventh St. Atelier Bldg., 105 N. Y. S. 155.

79. See 7 C. L. 874.

80. Under Const. § 192, and Ky. St. 1903, § 567. Commonwealth v. Chicago, etc., R. Co., 30 Ky. L. R. 673, 99 S. W. 596. Under § 2971 such escheat may be recovered by school board of city of first class. Id.

81. See 7 C. L. 874.

82. Laws 1893, p. 1436, c. 638. In re Long Acre Light & Power Co., 117 App. Div. 80, 102 N. Y. S. 242, afg. 51 Misc. 407, 101 N. Y. S. 460.

83. Immunity from street paving obligation cannot be transferred by street railroad company. Rochester R. Co. v. Rochester, 205 N. S. 236, 51 Law. Ed. 784.

84. Georgia R. & Banking Co. v. Haas, 127 Ga. 187, 56 S. E. 313.

85. Provision for sale of entire property to foreign corporation with consent of two-thirds of stockholders is contrary to Stock Corporation Law, § 33, Laws 1892, p. 1823, c. 688, added by Laws 1893, p. 1436, c. 638, and amended by Laws 1901, p. 314, c. 130, authorizing sale by domestic corporation of its property situated in adjoining state to corporation of such state upon consent of ninety-five per centum of the stockholders. People v. Whalen, 104 N. Y. S. 555. Provision for sale of property is neither for regulation of corporation's business and conduct of its affairs, nor a limitation on corporation's powers, within Business Corporation Law, § 2, Laws 1892, p. 2642, c. 691, as amended by Laws 1895, p. 445, c. 671, Laws 1896, p. 314, c. 369, § 1, Laws 1896, p. 428, c. 460, and Laws 1901, p. 1279, c. 520, prescribing what may be inserted in certificate of incorporation. Id.

86. Conceding that a corporation has an inherent common-law right to dispose of its property to anyone it may choose upon the unanimous consent of the stockholders, a provision to such effect cannot be inserted in the certificate of incorporation where such insertion is not authorized by law. People v. Whalen, 104 N. Y. S. 555. Provision authorizing transfer of property with consent of two-thirds of stockholders to domestic corporation, without regard to nature of latter's business, is contrary to Stock Corporation Law, § 33, which authorizes such transfer only to domestic corporation engaged in business of same general character as transferror. Id.

87. Construction company held to have power to sell its properties to a trust company which was to complete work undertaken by the former. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127. Corporation has implied power to lease its property for a term of years in a proper case, where such action is rendered advisable by financial exigencies. Anderson v. Shawnee Compress Co., 17 Okl. 231, 87 P. 315.

88. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854. See, ante, § 3, as to effect of extension of lessor's corporate existence.

89, 90. Brown v. Citizens' Ice & Cold Storage Co. [N. J. Err. & App.] 66 A. 181.

by power to issue bonds secured by mortgage and to sell the same.[90] Power to execute bonds and mortgage for a certain purpose must be confined to such purposes.[91]

Mode of transfer.—Transfer of all the stock, franchises, and rights of a corporation operates to transfer its real property without the necessity of a deed.[92] Statutory modes of transfer are not necessarily exclusive.[93] As in other cases delivery is essential to the validity and operation of a corporation's deed as a conveyance of the property.[94] Acknowledgment of a corporation's deed has the same effect as in the case of an individual.[95]

(§ 7) *D. Power to contract and incur debts.*[96]—The right to contract for work involves the right to enter into incidental terms and obligations,[97] including a guarantee connected with the prosecution of the corporation's business.[98] Power to do any act incidental to or growing out of the business of the corporation implies the power to borrow money.[99] As a general rule a business corporation has no power to issue accommodation paper.[1] The power to contract bonded indebtedness depends, like all other powers, upon the terms of the charter or statute.[2]

Mode of execution of contracts.[3]—A corporation's contract need not be in writing [4] and may even be implied as in the case of individuals.[5] It need not necessarily be executed in the name of the corporation,[6] nor is a seal essential where none would be required on a similar instrument executed by an individual.[7] Where a

91. Power to issue bonds secured by mortgage for borrowed money held not to authorize issue of bonds by recapitalized corporation to promoter of recapitalization in exchange for properties, rights and agreements acquired by him under his plan of reorganization. In re Wyoming Valley Ice Co., 153 F. 787.

92. McCullough v. Sutherland, 153 F. 418.

93. Statute authorizing corporation to transfer property, through president or other head officer, does not exclude transfer through such other modes and agencies as the corporation may designate or adopt. Bliss v. Harris [Colo.] 87 P. 1076.

94. Mere authorization of conveyance by directors, and execution by the proper officers, held not sufficient to pass title or to give even equitable interest in absence of delivery. Holmes v. Salamanca Gold Min. & Mill. Co. [Cal. App.] 91 P. 160.

95. Mills' Ann. St. § 443, making instruments affecting title to realty prima facie evidence when duly acknowledged, applies to corporation's deed. Bliss v. Harris [Colo.] 87 P. 1076.

96. See 7 C. L. 875.

97. Incidentally to a contract for equipment, a manufacturing corporation may agree to insure the contractor against loss of his property by fire while engaged in the work. Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co. [C. C. A.] 148 F. 159.

98. Guarantee of notes of party about to go into saloon business in order to enable him to pay license, he agreeing to buy beer from guarantor, a corporation conducting a brewery. Blue Island Brewing Co. v. Fraatz, 123 Ill App. 26.

99. Brown v. Citizens' Ice & Cold Storage Co. [N. J. Err. & App.] 66 A. 181.

1. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641. Manufacturing corporation has no power to execute or indorse paper for accommodation. National Bank v. Snyder Mfg. Co., 117 App. Div. 370, 102 N. Y. S. 478.

2. Act March 27, 1878, Gen. St. p. 1613, § 33, authorizing gas light companies to increase their bonded indebtedness to certain amount, does not restrict powers of companies already having authority to create bonded debt in excess of amount named in act. Thatcher v. Consumers Gas & Fuel Co. [N. J. Eq.] 66 A. 934. Code 1896, § 1256, forbidding bonded indebtedness from exceeding capital stock, was repealed by Acts 1903, p. 314, § 7, subd. c., which fixes no limit on such amount. Palliser v. Home Tel. Co. [Ala.] 44 So. 575.

3. See 7 C. L. 876.

4. Freyberg v. Los Angeles Brew. Co. [Cal. App.] 88 P. 378.

5. Where corporation has officers and directors as required by law, it may be bound by an implied contract for services rendered under an express contract with another corporation which owns its stock and bonds and thus controls it through its directors. Trimble v. Texarkana & Ft. Worth S. R. Co., 199 Mo 44, 97 S. W. 164. Bound for money advanced regardless of personal agreement between lender and directors. Meridian Life & Trust Co. v. Eaton [Ind. App.] 81 N. E. 667.

6. Simple contract executed by officers personally, but reciting that they were acting for corporation and for its exclusive benefit, held admissible in action against corporation. Valente v. International Milling Co., 105 N. Y. S. 966. When the agent is contracting in behalf of his corporate principal, the principal will be bound though the agent signs the contract in his individual name. Hanks Foundry Co. v. Woodstock Iron Works, 127 Ga. 108, 56 S. E. 106. Signature as "manager" held, under the evidence, to bind the corporation. Metropolitan Coal Co. v. Boutell Transp. & Towing Co [Mass.] 81 N. E. 645.

7. Though Rev. St. 1899, § 893, Ann. St. 1906, p. 829, abolishing seals to written contracts excepts corporations, and § 982 requires croporate seal to conveyance of realty by corporation, such seal is not essential to

seal is required a scroll may be adopted.[8] The corporate seal is itself prima facie evidence that it was affixed by proper authority.[9] A contract under the corporate seal and signed by its president and secretary makes a prima facie showing of due execution.[10] and mere indorsement of the corporate name may be sufficient.[11] A contract is not rendered invalid by superfluous signatures.[12]

(§ 7) *E. Power to take and hold stock.*[13]—Power to invest in shares of another corporation is limited by the purposes and charter limitations of the investing corporation,[14] and may also depend upon the purpose of the purchase.[15] In the absence of charter or statutory prohibition a corporation may purchase its own stock[16] subject to the limitations upon the corporation's right to reduce its capital stock and to the rights of creditors,[17] and even where a corporation is without such power a purchase of such stock by its officers with its funds enures to the benefit of the corporation as against such officers,[18] and such stock cannot be reissued without the consent of the corporation.[19] Corporations are sometimes expressly authorized to purchase their own stock.[20]

§ 8. *Effect of ultra vires and illegal transactions.*[21]—Corporate transactions can be assailed as ultra vires only by those who are injured thereby[22] and who have acquired a proper status to complain.[23] Ultra vires acts cannot be validated by the consent of a majority of the stockholders.[24] Ultra vires is not available as a defense unless pleaded,[25] and the burden of proving ultra vires is on the party asserting it.[26]

Estoppel to assert ultra vires.[27]—A corporation cannot repudiate transactions of which it has received the benefit on account of mere defects of power not constitut-

validity of chattel mortgage. Strop v. Hughes, 123 Mo. App. 547, 101 S. W. 146.

8. Scroll after name of president who executed contract in behalf of corporation held seal of corporation. Conkey Co. v. Goldman, 125 Ill. App. 161.

9. Bliss v. Harris [Colo.] 87 P. 1076. See post, § 15J, subd. The Secretary.

10. Watkins v. Glas [Cal. App.] 89 P. 840.

11. Indorsement of note with corporate name of payee, without signature of any officer or agent and without corporate seal, held sufficient proof of transfer in absence of denial under oath. Sheffield v. Johnson County Sav. Bk. [Ga. App.] 58 S. E. 386.

12. Though officer making such signature has been succeeded by another incumbent. Houts v. Sioux City Brass Works [Iowa] 110 N. W. 166.

13. See 7 C. L. 876

14. Robinson v. Halbrook, 148 F. 107. Corporations in Ohio are expressly authorized to do all needful acts to carry into effect the objects for which they are created, and accordingly they may become members or stockholders of a mutual insurance association or company for the purpose of their own proper protection, and a contract so entered into is not ultra vires but valid, the general rule against incorporated companies purchasing shares in other companies notwithstanding. Stone v. C. D. & T. Traction Co., 4 Ohio N. P. (N. S.) 104.

15. Corporation cannot legally purchase stock of another corporation for the purpose of creating a monopoly, and whether purchase is in purchaser's name or that of others, it is ultra vires and void. Dunbar v. American Tel. & T. Co., 224 Ill. 9, 79 N. E. 423.

16. Agreement to redeem within certain time own stock given in part consideration of property purchased held valid. United States Mineral Co. v. Camden, 106 Va. 663, 56 S. E. 561.

17. See post, § 14B, Capital Stock and Shares of Stock, and § 14C, Subscriptions to Capital Stock and Other Agreements to Take Stock.

18, 19. Dacovich v. Canizas [Ala.] 44 So. 473.

20. Issue of stock as fully paid, but in fact not so paid, and the transfer of a portion thereof back to the corporation for the purpose of creating treasury stock to be resold in order to provide working capital, was not a "legitimate corporate purpose" for which corporation act of 1896 impliedly authorizes a corporation to purchase its own stock. Knickerbocker Importation Co. v. State Board of Assessors [N. J. Err. & App.] 65 A. 913.

21. See 7 C. L. 877.

22. Damages of newspaper publisher from display of advertisements in street cars held too remote to give him status to enjoin company from making such display on ground of ultra vires. Burns v. St. Paul City R. Co. [Minn.] 112 N. W. 412.

23. One who has made no offer to redeem from mortgage sale cannot question corporation's power to receive assignment certificate of redemption from junior mortgagee or its power to hold land thereunder. Youd v. German Savings & Loan Soc., 3 Cal. App. 706, 86 P. 991.

24. Issue of accommodation paper. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641.

25. Stone v. C., D. & T. Trac. Co., 4 Ohio N. P. (N. S.) 104.

26. Belch v. Big Store Co. [Wash.] 89 P. 174.

27. See 7 C. L. 878.

ing a violation of any charter or statutory provision as against one having no notice of such defects,[28] and the stockholders may likewise be estopped,[29] but such an estoppel is controlled by the general principles of estoppel and does not arise in the absence of benefit to the corporation or injury to the other party.[30] Where, therefore, one contracting with a corporation in regard to matters as to which its powers are specially limited has knowledge of such limitations, he contracts at his own peril,[31] and a fortiori he cannot assert an estoppel where he is charged with knowledge of the corporation's lack of power.[32] On the other hand, one dealing with a corporation is himself usually estopped to assert the corporation's lack of power in the premises.[33]

§ 9. *Torts, penalties and crimes.*[34]—A corporation is liable for injuries to persons and property resulting from the conduct of its business,[35] and, since a corporation can act only through its officers or agents,[36] all corporations, with certain exceptions,[37] are liable for the torts of such officers and agents committed in the exercise of their powers and duties,[38] or ratified by the corporation,[39] whether such

28. Railroad company could not avoid paying price of land purchased for reservoir. Choctaw, etc., R. Co. v. Bond, 6 Ind. T. 515, 98 S. W. 335. Corporation authorized to deal in real estate incidentally to its regular business held bound for cost of advertisement of sale of realty purchased for speculative purposes, where publisher had no notice of the peculiar nature of the transaction. Kansas City Star Pub. Co. v. Standard Warehouse Co., 123 Mo. App. 13, 99 S. W. 765. Accommodation indorsement by corporation having power to indorse commercial paper. First Nat. Bk. v. Darlington, 30 Pa. Super. Ct. 302. Street Railroad company held **liable as partner** with individual in regard to expenses of improving a park. Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37. Liability imposed in favor of creditors by reason of contract by corporation in furtherance of objects of its creation. Id. Loan to party who subsequently died insolvent could not be repudiated so as to give corporation preferred claim against estate. Garrison Canning Co. v. Stanley, 133 Iowa, 57, 110 N. W. 171.

29. Stockholders estopped by laches and receipt of benefits to repudiate lease by corporation as ultra vires. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854.

30. Where debtor formed corporation to take over his business and thereafter, as president, held the corporation to guarantee the payment of his debts, the corporation, having paid in full for the business without assuming the debt, and having received no benefit from the guarantee, was not estopped to repudiate it as ultra vires. Evans v. Johnson [C. C. A.] 149 F. 978. Fact that debtor afterwards acquired all the stock furnished no element of estoppel. Id.

31. One contracting with university corporation in regard to lands held under statute for special purpose held bound by provisions of statute. People v. Brooklyn Cooperage Co. [N. Y.] 79 N. E. 866.

32. General attorney for corporation presumed to know that franchise fee had not been paid when services were performed, and hence corporation not estopped to invoke Comp. Laws, § 8574, making contracts prior to such payment void. Wright v. St. Louis Sugar Co., 146 Mich. 555, 13 Det. Leg. N. 866, 109 N. W. 1062.

33. Tenant of corporation cannot question corporation's power to own and hold the leased property. Farmers' Deposit Nat. Bk. v. Western Pennsylvania Fuel Co., 29 Pa. Super. Ct. 69. A corporate grantee's power to take and hold title to realty or an interest therein cannot be questioned by the grantor. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747. Where insurance company's articles and the permit from state authorities both authorized it to write burglary insurance, the maker of a premium note for such a policy could not assert that the issue of the policy was ultra vires because not authorized by statute. Bankers' Mut. Casualty Co. v. First Nat. Bk., 131 Iowa, 456, 108 N. W. 1016.

34. See 7 C. L. 879.

35. Subject, of course, to the doctrine of eminent domain. Green v. Sun Co., 32 Pa. Super. Ct. 521.

36. Amendment by inserting after corporate name of defendant in complaint that the said defendant "in all things acting by and through its servants, agents, and employees" held proper. Marbury Lumber Co. v. Wainwright [Ala.] 43 So. 733.

37. Charitable corporations not liable for negligence of servants in absence of negligence in selecting them. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691. Held not purely charitable corporation so as not to be liable for negligence. Id.

38. Tort committed in protecting tenants and property from trespass. Century Bldg. Co. v. Lewkowitz, 1 Ga. App. 636, 57 S. E. 1036. Use of criminal process by corporation's agent in charge of property to secure possession thereof. White v. Apsley Rubber Co. [Mass.] 80 N. E. 500. Street car conductor as result of quarrel with passenger over fares fired pistol at passenger and killed plaintiff's wife who was passing along street. Savannah Elec. Co. v. Wheeler [Ga.] 58 S. E. 38. Where corporation's stenographer and chief clerk had dispute over company's business resulting in discharge of stenographer, company **held not liable** for assault by its clerk on stenographer three days later. Alabama & V. R. Co. v. Harz, 88 Miss. 681, 42 So. 201. Whether tort was within the scope of the agent's employment is a **question of fact** for the jury. Century Bldg. Co. v. Lewkowitz, 1 Ga. App. 636, 57 S. E. 1036.

39. Abuse of process by bookkeeper in order to get possession of leased premises

torts arise from negligence [40] or are willful and intentional [41] or malicious,[42] or fraudulent,[43] such as assault and battery,[44] conspiracy,[45] slander,[46] and malicious prosecution.[46a] A corporation will be liable for the torts of its lessee where such torts involve a breach of a public duty owed by the lessor.[47] Stockholders are not liable for the torts of their corporation,[48] and liability is not affected by the amount of stock held in absence of statute to such effect,[49] but incorporators cannot escape liability for their tortious acts by fictitious incorporation.[50] Where a fraud is committed in the name of the corporation by its officers for their own benefit, they will be personally liable,[51] and an agent will be liable for some torts regardless of the capacity in which he acted.[52]

The criminal liability of corporations is the result of gradual **evolution,** but is now well settled.[53] A corporation may be guilty of a criminal conspiracy,[54] even though its agent was not specially authorized to do the act upon which its responsibility is based,[55] and its agents through whom it acts may also be a party to the crime,[56] and the corporation may be a party so as to constitute the offense, though not itself indictable.[57] Except as otherwise provided, the general rules as to jurisdiction and procedure apply.[58] A corporation may, with reasonable restrictions, be

ratified by assent or failure to interfere on part of business manager and president. White v. Apsley Rubber Co. [Mass.] 80 N. E. 500.

40. Savannah Elec. Co. v. Wheeler [Ga.] 58 S. E. 38.

41. Savannah Elec. Co. v. Wheeler [Ga.] 58 S. E. 38; Marbury Lumber Co. v. Wainwright [Ala.] 43 So. 733.

42. Corporation is not liable for the malicious acts of an agent unless they were expressly authorized, or were within scope of his duties, or were in themselves a violation of the duty owed by the corporation to the party injured, or were ratified by the corporation. Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37. Railroad company liable for act of depot agent in insulting one rightfully at depot in connection with business conducted by company, but not if such act was at place to which party had no right to go, and such act was not ratified. Id.

43. Bank held liable where its directors and officers lent its assistance to a confidence game whereby persons were defrauded. Stewart v. Wright [C. C. A.] 147 F. 321.

44. Moore v. Camden & T. R. Co. [N. J. Err. & App.] 65 A. 1021.

45. Aberthaw Const. Co. v. Cameron [Mass.] 80 N. E. 478. In view of his official position and authority with respect to the corporation's business, corporation held liable in suit for conspiracy for acts of president. American Freehold Land Mortg. Co. v. Brown [Tex. Civ. App.] 17 Tex. Ct. Rep. 649, 101 S. W. 856.

46. Though uttered without corporation's knowledge, approval, or consent, and not ratified by it. Rivers v. Yazoo, etc., R. Co. [Miss.] 43 So. 471.

46a. Corporation liable for malicious prosecution by its agent within scope of authority or authorized or ratified by it. Farmers' Mut Fire Ins. Ass'n v. Stewart, 167 Ind. 544, 79 N. E. 490. Corporation held not liable for malicious prosecution by its superintendent who prosecuted plaintiff for embezzlement from the corporation. Canon v. Sharon & W. St. R. Co., 216 Pa. 408, 65 A. 795.

47. Georgia R. & Banking Co. v. Haas, 127 Ga. 187, 56 S. E. 313.

48. Stockholders as such are not liable for unfair competition practiced by their corporation, and will not be enjoined where only acts proved are those of the corporation. Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. [C. C. A.] 146 F. 37. Not liable for conversion of which he had no notice. Liebhardt v. Wilson [Colo.] 88 P. 173.

49. Liebhardt v. Wilson [Colo.] 88 P. 173. Board of directors held not so controlled by majority of stockholders as to render him liable for a conversion by the corporation. Id.

50. Where contractor organized corporation without capital and sublet contract to it, he was nevertheless liable for its negligence. Holbrook, Cabot & Rollins Corp. v. Perkins [C. C. A.] 147 F. 166.

51. Cox v. National Coal & Oil Inc. Co., 61 W. Va. 291, 56 S. E. 494.

52. Agent liable for malicious prosecution instituted by him regardless of whether he acted in personal or representative capacity. Farmers' Mut. Fire Ass'n v. Stewart, 167 Ind. 544, 79 N. E. 490.

53. Liable for act of agent furnishing or allowing to be furnished liquors to minor. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 S. E. 67.

54. Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705. Conspiracy to form monopoly of interstate commerce. See 26 Stat. 209, U. S. Comp. St. 1901, p. 3200. United States v. MacAndrews & Forbes Co., 149 F. 823.

55. Corporation held party to conspiracy under anti-trust law, Acts 1903, p. 268, c. 140, where salesman in carrying out order to secure cancellation of orders with competitors gave goods to customers, though not specially authorized to do so. Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705.

56. Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705.

57. Individual held guilty of conspiracy with corporation under Anti-trust law, Acts 1903, p. 268, c. 140, though corporation was not indictable under the statute. Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705.

58. Pen. Code, §§ 1390-1397, merely provides mode of procedure against corpora-

compelled to produce its books and papers on a criminal investigation against it[59] or others,[60] and may be punished for contempt in refusing to do so,[61] but when such books and papers are not within the control of the officers commanded to produce them their refusal to do so will not sustain a charge of contempt against either them or the corporation.[63] Stockholders cannot be held responsible for crimes committed prior to the acquisition of their stock.[64] Under the various statutes, officers are made criminally liable for false entries,[65] misappropriation of corporate funds,[66] and transaction of business for a corporation having no license.[67]

§ 10. *Actions by and against corporations.*[68]—Corporations may avail themselves of any legal or equitable remedy available to individuals under the same circumstances.[69] The bill in a suit by a corporation may be signed by counsel and need not be sealed with the corporate seal.[70] A corporation's pleadings may be verified by an officer,[71] agent,[72] or attorney.[73] In a proper case the name of a corpora-

tions charged with crime, and does not affect jurisdiction of a justice in a proper case under Const. art. 6, § 11, and Code Civ. Proc. § 115, and if procedure under Pen. Code, §§ 1390-1397, is inapplicable in proceedings before a justice resort must be had to procedure in trials of persons and to Code Civ. Proc. 187, authorizing any suitable procedure where course of procedure is not pointed out. People v. Palermo Land & Water Co. [Cal. App.] 89 P. 723.

59. Requirement to produce minute books for past three years, and letter copy books for three months and a half, held not unreasonable. United States v. American Tobacco Co., 146 F. 557.

60. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

61. For nonproduction of books and papers as required by Laws 1906, p. 79 No. 75. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

62. Remedy in such case is by subpoena duces tecum against the corporation itself. United States v. American Tobacco Co., 146 F. 557.

63. Such point is formal and technical, but available in contempt proceedings. United States v. American Tobacco Co., 146 F. 557.

64. Ownership of all the stock six days after commission of misdemeanor charged held insufficient to show ownership at time of such commission. State v. Bass, 101 Me. 481, 64 A. 884.

65. Sufficient to charge in language of statute crime, under Rev. Laws, c 208, § 58, of false entries by corporation's officer, without charging access to books. Section 59 making books to which defendant had access admissible, relates only to evidence and not to indictment. Commonwealth v. Dewhirst, 190 Mass. 293, 76 N. E. 1052. Statements of president in defendant's presence, and not denied by him, that defendant had made false entries, held admissible. Id That stockholders received dividends based on false and fraudulent entries by officer is no defense, since such dividends are themselves a fraud on creditors. Id. Check books on which false entries were made held books of entry of corporation within Rev. Laws, c. 208, § 58. Id.

66. Charge held to sufficiently charge an intent as element of crime, under Pub. St. 1901, c. 274, § 17, of misappropriation of corporate funds by officers, etc. State v. Davison [N. H.] 64 A. 761. Change in such prosecution held not objectionable as abuse of discretion in regard to charging on evidence. Id. Evidence held sufficient to sustain conviction under Pub. St. 1901, c. 274, § 17, for misappropriation of corporate funds by officers by payment, with corporate funds, of balance due by them on property sold by them to corporation in exchange for corporate stock. State v. Davison [N. H.] 64 A. 761.

67. Indictment under Ky. St. 1903, § 2223a, subsec. 11, against officer or agent of investment company for transacting business for it when it had no license, must show the particular capacity in which defendant acted and the business transacted in order to comply with Crim. Code Proc. § 122, requiring indictment to state offense in such manner as to enable person of common understanding to know what was intended. Commonwealth v. Loving, 29 Ky. L. R. 175, 92 S. W. 575.

68. See 7 C. L. 880.

69. Injunction by resident tax paying corporation to restrain diversion and misappropriation of public funds by city. Wolff Chemical Co. v. City of Philadelphia, 217 Pa. 215, 66 A. 344. Corporation may maintain an action for **libel** the same as an individual, and may maintain action without allegation of special damages where matter charged is libelous per se. Union Refrigerator Transit Co. v. S. S. McClure Co., 146 F. 623. May bring **replevin** for records and seal, notwithstanding that secretary is custodian thereof and might also sue therefor. Stovell v. Alert Gold Mining Co. [Colo.] 87 P. 1071.

70. Washington Nat. Building & Loan Ass'n v. Buser, 61 W. Va. 590, 57 S. E. 40.

71. Bill by incorporated religious society and its treasurer, sworn to by the treasurer, held sufficiently verified. First Baptist Soc. v. Dexter, 193 Mass. 187, 79 N. E. 342. Under Code Civ. Proc. § 525, subd. 1, requiring verification of pleadings of a domestic corporation to be by an officer thereof, members of liquidating committee appointed by authority of creditors and stockholders may make such verifications. Wills v. James Rowland & Co., 117 App. Div. 122, 102 N. Y. S. 386.

72. Under Rev. St. 1906, § 5102, authorizing verification of a corporation's pleadings by "an officer thereof, its agent, or attorney,"

tion defendant may be amended under statutory authorization of amendments as to names of parties.[74] When the plaintiff in an action against a corporation calls a stockholder as a witness, he may cross-examine him as being in reality a defendant.[75] By virtue of statute, corporations may be compelled to produce books and papers.[76] In the court of claims the usual practice is to examine the officers of corporate claimants.[77] A corporation may appeal from an order affecting its officers and agents as such, though not a party to the proceedings in which such order was entered.[78] Under the New York statute, proceedings supplementary to execution are not authorized upon judgments against corporations except in proceedings by or against the state.[79]

§ 11. *Legislative control over corporations.*[80]—Corporations exercising public franchises or privileges are subject to public control,[81] and when a corporation engages in interstate commerce it is subject to all the regulative provisions concerning such commerce constitutionally prescribed by congress.[82] Statutory regulations do not constitute a denial of equal protection where they apply to persons and corporations alike.[83] Regulative authority cannot be delegated,[84] but the state may exercise its power through duly constituted agencies.[85]

§ 12. *How corporations may be dissolved; forfeiture of charter; effect of dissolution; winding up under statutory provisions.*[86]—While a corporation may be dissolved ipso facto by operation of law,[87] as a general rule such is not the effect of acts, omissions, and conditions constituting grounds for dissolution but not made the basis of and adjudicated in dissolution proceedings,[88] and a forfeiture of charter

verification by an agent as distinguished from an officer must show that case is one of class comprehended by section 5109. Bullock Beresford Mfg. Co. v. Hedges, 76 Ohio St. 91, 81 N. E. 171.

73. Municipal court act, Laws 1902, p. 1541, c. 580, § 164, does not require corporation's pleadings to be verified by officer thereof. Verification may be made by attorney. Chadwick v. Waldorf Steam Laundry Co., 54 Misc. 618, 104 N. Y. S. 746.

74. Under Code, § 75, an amendment changing defendant from constituent corporation to consolidated corporation was properly allowed where it was consented to by consolidated corporation. Solmonovich v. Denver Consol. Tramway Co. [Colo.] 89 P. 57.

75. American Restaurant & Oyster House v. McElligott, 227 Ill. 317, 81 N. E. 388.

76. Proceedings under Laws 1906, p. 79, No. 75, providing for direct process against corporations to compel production of books and papers, operates as a subpoena duces tecum against individuals, and is not violative of 14th amendment as arbitrarily discriminative against corporations. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

77. But where all the stock of the plaintiff corporation is owned by two persons, they are in legal effect the parties claimant and may be examined by the government under Rev. St. § 1080. Atlantic Contracting Co. v. U. S., 40 Ct. Cl. 244.

78. Injunction at instance of minority stockholders against assumption of office by officers alleged to have been illegally elected. West Side Hospital v. Steele, 124 Ill. App. 534.

79. Code Civ. Proc. §§ 1812, 2463. Keystone Pub. Co. v. Hill Dryer Co., 105 N. Y. S. 894.

80. See 7 C. L. 884.

81. Corporation exercising eminent domain. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426.

82. Cassatt v. Mitchell Coal & Coke Co. [C. C. A.] 150 F. 32.

83. Employers' Liability Act 1893 (Burns' Ann. St. 1901, § 7083) held not unconstitutional as denial of equal protection of laws, since it applies to persons or companies, whether corporate or not, engaged in operating railroads. Pittsburg, C. & St. L. R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.

84. Regulation of increase of capital stock cannot be delegated to a commission. State v. Great Northern R. Co., 100 Minn. 445, 111 N. W. 289.

85. Creation of corporation commission vested with limited legislative, judicial, and executive powers held not violation of Bill of Rights, § 5, providing that such departments of the state shall be separate and distinct. Winchester & S. R. Co. v. Commonwealth, 106 Va. 264, 55 S. E. 692. Subjection of corporations to control of such commission held not denial of equal protection of laws. Id. Due process of law not denied where corporations are allowed full opportunity for complete hearing after due notice. Id. Supervising of increase of capital stock according to legislative regulations may be committed to commission. State v. Great Northern R. Co., 100 Minn. 445, 111 N. W. 289. Ascertainment of acts authorizing increase of stock according to terms prescribed by legislature, and authority to allow increase upon finding existence of such facts, may be delegated to commission. Id.

86. See 7 C. L. 885.

87. Consolidation and merger. See post, § 13, Succession of Corporations; Reorganization; Consolidation.

cannot be set up collaterally,[89] and as a general rule can be enforced only in a direct suit by or for the state.[90] A corporation is not dissolved by withdrawal from a voluntary association into which it has entered with other corporations.[91] Whether a corporation is within the terms of a statute defining grounds of forfeiture depends upon the construction of the statute.[92] Provisions relating to the forfeiture of the charters of particular kinds of corporations are not necessarily inconsistent with general laws providing for forefeiture of charters of corporations in general.[93] Failure of a private business corporation to carry out the purposes of its creation is ground for dissolution,[94] regardless of its solvency or insolvency,[95] at the suit of a single stockholder,[96] but the other stockholders must be made parties.[97] Demand on the officers of the corporation is not essential to the right of a stockholder to sue for a dissolution and distribution on the ground of abandonment of the corporate business, where no complaint is made against the managing officers,[98] nor is demand on the stockholders necessary, if at all, where the bill shows total abandonment of business and threatened sacrifice of the corporation's property;[99] but a bill to dissolve on the grounds of misconduct of officers cannot be maintained by a stockholder in the

88. Corporation does not ipso facto cease to exist because of insolvency and discontinuance of business and active organization. Fields v. U. S., 27 App. D. C. 433. Automatic dissolution not worked by failure of corporation not for pecuniary profits to file certificate of election of new directors as required by Act 1872, § 32. Potwin v. Grunewald, 123 Ill. App. 34. Corporation not dissolved by sale of its property and franchises under special fieri facias under Act 1870, P. L. 58, and such sale does not preclude subsequent adjudication in bankruptcy against the corporation. International Coal Min. Co. v. Pennsylvania R. Co., 152 F. 551. Claim for damages in favor of corporation passes to trustee in bankruptcy and not to purchaser at sale under special fieri facias. Id.

89. Kirch v. Louisville, 30 Ky. L. R. 1356, 101 S. W. 373.

90. In suit by taxpayer against city to have city water works company, all of whose stock had been acquired by city, placed in hands of receiver, plaintiff could not set up forfeiture of charter. See Civ. Code Prac. § 481, Ky. St. 1903, §§ 569, 573. Kirch v. Louisville, 30 Ky. L. R. 1356, 101 S. W. 373. Since Civ. Code Prac. § 481 requires proceedings for vacation of charters to be in name of commonwealth, and Ky. St. 1903, § 569, makes it duty of attorney general to institute proceedings to forfeit charters for violation thereof, § 573 authorizing the jury in their discretion to direct a forfeiture for exercising corporate powers inconsistent with act of 1893 was intended only to declare grounds of forfeiture. Id.

91. State Council v. National Council J. O. U. A. M. [N. J. Eq.] 64 A. 561. See Fraternal Mutual Benefit Associations, 7 C. L. 1777.

92. Penalty of dissolution under Laws 1903, p. 147, § 82, for failure to appoint resident agent as required by Civ. Code, tit. 13, §§ 23-176, held not to apply to corporations organized prior to the latter act and which have not elected to come under its provisions, such corporations being expressly excepted by the code provisions, though terms of Laws 1903 are broad enough to cover all corporations. Rillito Canal Co. v. Schmidt [Ariz.] 89 P. 523.

93. Acts 1897-98, p. 479, c. 443, § 4, making misuse by incorporated club of privilege of selling liquors ground for forfeiture of on complaint of anyone held not repealed by Laws 1902-04, p. 227, c. 148, § 144, providing for forfeiture of corporate club charters in general for failure to comply with act, nor by c. 270, § 51, making misuse of powers ground for forfeiture of corporate charters in general at instance of attorney general. Eureka Club. v. Com., 105 Va. 564, 54 S. E. 470.

94. Ross v. American Banana Co. [Ala.] 43 So. 817. Defense of mortgage foreclosure suit which was all the business a corporation had held to take it out of operation of Civ. Code, § 358, as amended by Act of 1901, providing for cessation of corporate existence for two years' failure to transact its business. Robinson v. Blood [Cal.] 91 P. 258. Rev. St. pt. 1, c. 18, tit. 3, § 7, requiring corporations to commence business within certain time, held complied with where corporation organized to lay electrical conductors in certain city obtained franchise from city to lay such conductors. People v. Ellison, 51 Misc. 413, 101 N. Y. S. 444.

95. Ross v. American Banana Co. [Ala.] 43 So. 817.

96. Ross v. American Banana Co. [Ala.] 43 So. 817. Minority stockholders may maintain a bill to dissolve on the ground of abandonment and that the property is gradually deteriorating in value so that it will soon be sacrificed to pay taxes, insurance, etc., though the corporation is not actually insolvent at the time. Central Land Co. v. Sullivan [Ala.] 44 So. 644.

Allegations that no meeting has been held for five years, that no officer or agent of the corporation resides in the state, and that the business for which the corporation was organized has never been attempted, held to show abandonment of duties and to sustain bill by stockholder to dissolve. Central Land Co. v. Sullivan [Ala.] 44 So. 644.

97. Ross v. American Banana Co. [Ala.] 43 So. 817.

absence of a prior demand upon the corporation to redress such wrongs or a good excuse for failure to make such demand.[1] Where insolvency is the basis of the suit, it must be sufficiently alleged.[2] The general rules as to multifariousness apply.[3] An officer cannot urge as grounds of forfeiture, acts and transactions in which he himself participated.[4] Except as otherwise provided by statute, the effect of dissolution is to terminate the existence of the corporation as a legal entity[5] and renders it incapable of suing and being sued in its corporate name.[6] Provision is generally made, however, for the prosecution and defense of suits by and against corporations after dissolution.[7] Where there is no statute providing for the continuation of the corporation for the purpose of settling its affairs,[8] provision is generally made for such settlement by certain designated persons,[9] and in such cases the corporation itself cannot sue or be sued.[10] Debts are not discharged by dissolution,[11] and in the absence of statutory provision in the premises, equity treats the assets as a trust fund for creditors and stockholders.[12] Forfeiture of corporate existence after judgment against the corporation will not affect the right to enforce the judgment against the stockholder.[13] Interests by way of special franchises are sometimes held to be independent of the life of the original corporation,[14] and hence a franchise may remain effective notwithstanding that the corporate owner thereof is guilty of acts or omissions constituting grounds of forfeiture.[15]

Dissolution by consent of stockholders or directors.[16]—A private corporation cannot surrender its charter and effect a dissolution without the consent of the state either previously expressed by statute of charter or by subsequent acceptance of the surrender.[17]

98, 99. Central Land Co. v. Sullivan [Ala.] 44 So. 644.

1. Ross v. American Banana Co. [Ala.] 43 So. 817.

2. Allegations of insolvency held contradicted by other allegations so as to leave bill without sufficient allegation of insolvency and hence not maintainable under Acts 1902, p. 338, § 50. Ross v. American Banana Co. [Ala.] 43 So. 817.

3. Bill by stockholder to dissolve and distribute assets and to declare certain proportion of stock fictitious held not multifarious where all the stock is affected by the matter upon which the charge of fictitiousness is based and hence all parties have common interest in the suit. Central Land Co. v. Sullivan [Ala.] 44 So. 644.

4. Leigh v. National Hollow Brake-Beam Co., 224 Ill. 76, 79 N. E. 318.

5. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335.

6. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335.

Judgment against dissolved corporation in such case may be collaterally impeached by any interested in distribution of assets either as creditor or stockholder. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335. Fact that stockholders are dismissed as parties to suit against them and corporation will not affect their right to attack judgment against corporation on ground that it had been dissolved. Id. Stockholders not estopped to attack judgment against dissolved corporation in suit against it and them where they denied its existence by verified answer, though service on corporation was accepted by president and demurrer filed in its behalf by attorney. Id. Dissolved corporation cannot be bound by **estoppel** to deny its existence. Id.

7. Gen. St. Conn. 1902, § 3396, applies to corporation organized under general laws and thereafter reorganized under special statute. Metropolitan Rubber Co. v. Place [C. C. A.] 147 F. 90. Corporation may be **adjudged bankrupt** after sale of its franchises and property under special fi. fa. pursuant to P. L. 1870, 58, for benefit of creditors. Cresson & Clearfield Coal & Coke Co. v. Stauffer [C. C. A.] 148 F. 981.

8. No such statute in California. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335.

9. Civ. Code, § 400, designates directors for such purpose where court appoints no one else. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335.

10, 11. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335.

12. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335. See, post, § 16B, subd. Assets for Creditors.

13. Robinson v. Blood [Cal.] 91 P. 258.

14. So held in New York. In re Long Acre Electric Light & Power Co. 51 Misc. 407, 101 N. Y. S. 460, afd. 117 App. Div. 80, 102 N. Y. S. 242. The continuation of special franchises are not dependent upon the continued existence of the corporation when they have been assigned. In re Long Acre Light & Power Co., 117 App. Div. 80, 102 N. Y. S. 242, afg., 51 Misc. 407, 101 N. Y. S. 460.

15. When franchise has not been revoked by grantor or state and state has not enforced grounds of forfeiture. In re Long Acre Elec. Light & Power Co., 51 Misc. 407, 101 N. Y. S. 460.

16. See 7 C. L. 886.

17. Such is effect of contractual nature of charter. In re North American Coal & Min. Co. [Minn.] 109 N. W. 1116.

Forfeiture of charter in proceedings by the state.[18]—A forfeiture will be declared only under express limitation or for such plain abuse of its powers as constitutes a failure to carry out the purpose of its incorporation,[19] and where the statute does not specifically designate the grounds of forfeiture and states such grounds in general terms, it will be liberally construed,[20] and a forfeiture will not be decreed for matters as to which the criminal statutes offered an adequate remedy,[21] but exercise of minor or incidental franchises will not excuse nonuser of the corporation's principal franchises.[22] Organization for an illegal purpose is ground for forfeiture,[23] but where the incorporation of an organization for a particular purpose is justified by express sanction of the legislature, and the sanction is not unconstitutional, the courts are not at liberty to dissolve the organization on the ground that its purpose is not beneficial to its members or to the public.[24] Forfeiture for nonpayment of debts is not obviated by a discharge in bankruptcy,[25] nor does the institution of bankruptcy proceedings excuse suspension of business.[26] That one person has acquired all the stock of a corporation is no ground for the forfeiture of its charter,[27] nor is it ground of forfeiture that a corporation of a mutual character not subsidiary to or controlled by a corporation for profit has officers, directors, and members who are also officers, directors, and stockholders of the latter corporation.[28] Statutory provisions as to forfeiture must be germane to the subject-matter of the act as expressed in its title.[29] The remedy of the state is by quo warranto at the instance of state officers,[30] and in such case the stockholders and officers are not necessary parties,[31] but may

18. See 7 C. L. 886.

19. Commonwealth v. Monongahela Bridge Co., 216 Pa. 108, 61 A. 909. Trivial irregularities and omissions of statutory requirements, in an attempt made in good faith to organize a corporation not for profit, are not a sufficient basis for a judgment of ouster, but the corporation will be recognized as a de facto organization and its board of directors as a de facto board, and a decree will be granted requiring that a legal organization be effected. State v. Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

20. Ky. St. 1903, § 569, providing for forfeiture for abuse of powers or violations of charter. Commonwealth v. Newport, L & A. Turnpike Co., 29 Ky. L. R. 1285, 97 S. W. 375.

21. Abuse of franchises by turnpike company. Commonwealth v. Newport, L. & A. Turnpike, Co. 29 Ky. L. R. 1285, 97 S. W. 375.

22. Where corporation chartered to construct fair grounds and to conduct agricultural and stock fairs and horse races willfully failed for long time to exercise any of its powers except to conduct such races, its franchises and charter were forfeited for nonuser. State v. Delmar Jockey Club, 200 Mo. 34, 98 S. W. 539, 92 S. W. 185. Where corporation was chartered to conduct agricultural and stock fairs and horse races, the state was not **estopped** to insist on forfeiture for willful failure to conduct fairs by acceptance of license fees for privilege of pool selling and bookmaking at corporation's races. Id.

23. State v. Inner Belt R. Co., 74 Kan. 413, 87 P. 696. Charter of Athletic club forfeited as being a mere scheme to evade the dramshop act. State v. Rose Hill Pastime Athletic Club. 121 Mo. App. 81, 97 S. W. 978; State v. Kirkwood Social Athletic Club, 121 Mo. App. 87, 97 S. W. 980; State v. Meramec Rod & Gun Club, 121 Mo. App. 364, 98 S. W. 815.

Filing of complaint: Under Acts 1897-98, p. 479, c. 443, § 4, complaint against social club for misuse of privilege of selling liquors need not be filed in clerk's office or returned to court, service on corporation ten days before hearing being all that is required. Eureka Club v. Com., 105 Va. 564, 54 S. E. 470.

24. State v. Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

25. Code Civ. Proc. § 1785, subd. 2, making failure to pay notes for year ground of dissolution. People v. Troy Chemical Co., 118 App. Div. 437, 104 N. Y. S. 22.

26. Under Code Civ. Proc. § 1785, subd. 3, making suspension of business for more than year ground for dissolution, suspension for such term after filing of petition in bankruptcy held ground for dissolution at suit of attorney general, under § 1786. People v Troy Chemical Co., 118 App. Div. 437, 104 N. Y. S. 22.

27. That city had acquired all stock of bridge company. Commonwealth v. Monongahela Bridge Co., 216 Pa. 108, 64 A. 909.

28. State v. Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

29. Provisions for forfeiture of charter held not germane to subject-matter of Acts 1906, p. 413, c. 257, entitled "An Act to amend chapter 469, of the Acts of 1849, entitled 'An act to incorporate the Cumberland and Pennsylvania Railroad Company,' and to amend the charter of said company so as to prohibit it" from doing certain acts for the doing of which the forfeiture was provided. State v. Cumberland & P. R. Co. [Md.] 66 A. 458.

30, 31, 32. State v. Inner Belt R. Co., 74 Kan. 413, 87 P. 696.

nevertheless be enjoined from assuming to act for the corporation after the decree of dissolution.[32] A demurrer may be filed to the answer to a petition seeking a forfeiture,[33] and an order dismissing the state's petition may be appealable.[34] Proceedings by state officers are not necessarily invalidated because such officers were moved to proceed by a creditor interested adversely to the corporation.[35] When the statutory grounds are clearly made out, the court has no discretion but to decree dissolution.[36]

Custody and sale of property.[37]—The right to redeem from a tax sale is an interest in lands within a provision for the sale of the lands of dissolved corporations.[38]

Statutory proceedings.[39]—Statutory proceedings to dissolve a corporation are in the nature of a proceeding in rem, and concludes all creditors of the corporation as well as all other persons interested in the res so far as the assets of the corporation within the court's jurisdiction and possession are concerned,[40] but cannot affect the right of creditors of whom no personal jurisdiction is acquired to sue on their claims.[41] A stockholders' petition for dissolution[42] must be made by a majority of the members of a nonstock corporation or a majority holder of a stock corporation.[43] Voluntary dissolution may be allowed on published notice.[44] Statutory requirements as to such proceedings are jurisdictional and must be strictly complied with,[45] but where the court has jurisdiction its decree will not be open to collateral attack.[46]

§ 13. *Succession of corporations; reorganization; consolidation.*[47]—The acquisition by one corporation of all the property of another does not render the former liable for the debts of the latter even though under the circumstances the creditors have the right to follow the specific property acquired or to hold the purchasing company liable to the extent of the value of such property,[48] but where the purchasing corporation is merely a continuation of the selling corporation, the former is the suc-

33. Though not in terms authorized by the act relating to such proceedings. See Code Pub. Gen. Laws, art. 23, § 367 et seq. State v. Cumberland & P. R. Co. [Md.] 66 A. 458.

34. Under Acts 1906, p. 413, c. 257, amending charter of Cumberland and Pennsylvania Railroad Company, and Code Pub. Gen. Laws, Art. 23, § 374, an order dismissing petition for forfeiture of charter of such corporation is appealable. State v. Cumberland & P. R. Co. [Md.] 66 A. 458.

35. Where suit under Code Civ. Proc. § 1786, was instituted by attorney general at instance of creditor interested in another corporation of same name, but it did not appear that attorney general was moved to act by any motive save that arising from official duty. People v. Troy Chemical Co., 118 App. Div. 437, 104 N. Y. S. 22.

36. Grounds specified in Code Civ. Proc. § 1785. People v. Troy Chemical Co., 118 App. Div. 437, 104 N. Y. S. 22.

37. See 7 C. L. 887.

38. Within Acts April 15, 1891, P. L. 15. Philadelphia v. Unknown, 30 Pa. Super. Ct. 516.

39. See 7 C. L. 888.

40, 41. Metropolitan Rubber Co. v. Place [C. C. A.] 147 F. 90.

42. Rev. Laws 1905, § 3175, relating to dissolution of corporation on petition of majority in number or interest of members, applies to both stock and nonstock corporations. In re North American Coal & Min. Co. [Minn.] 109 N. W. 1116.

43. Under Rev. Laws 1905, § 3175, authorizing dissolution on petition of majority in number or interest. In re North American Coal & Min. Co. [Minn.] 109 N. W. 1116. Court will not on such petition determine validity of outstanding stock. Id. Petition must be by majority holders of stock regularly issued and not adjudged invalid. Id.

44. Statutory provision to such effect held not unconstitutional as impairing obligation of contracts. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335.

45. Under Comp. Laws, c. 300, providing that on proceedings for voluntary dissolution the order to show cause shall be returnable not less than three months from date, an order to show cause within less than three months is not amendable nunc pro tunc so as to make the return day as required by the statute, and such an amendment is not aided by fact that the three weeks' publication required by statute is made before the return day fixed by the amendment. Taft v. Chapel, 146 Mich. 115, 13 Det. Leg. N. 688, 109 N. W. 44.

46. Decree of dissolution under Code Civ. Proc. §§ 1227-1233, not collaterally assailable because of false statement as to payment of debts. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335.

47. See 7 C. L. 888.

48. Sharples Co. v. Harding Creamery Co.

cessor of the latter and liable for its debts.[49] Where, therefore, one seeks to hold a corporation for the debt of another corporation which has succeeded to the property of the latter, he must prove either that the former merged the latter and became its successor or that it assumed the debt,[50] and any evidence tending to prove either of such theories is admissible.[51] A corporation by assuming the liabilities of another corporation is not bound to issue its own stock to the stockholders of the other corporation [52] but is only liable for whatever may be due to such stockholders as such.[53]

On reorganization the new corporation is not liable for debts of the old not expressly assumed,[54] unless the reincorporation is a mere continuation of the old corporation,[55] or the transaction amounts to a fraud upon the holders of such debts;[56] but the interests of the stockholders of the old corporation in stocks of the new received by them for the property transferred to the new corporation may be reached in equity,[57] subject to the rights of bona fide holders.[58] The mutual agreements of the reorganizers and the original stockholders constitute a sufficient consideration to bind the latter,[59] and in a proper case a breach of the reorganization agreement may be made the basis of a suit for an injunction to protect the rights of stockholders in the reorganized corporation.[60] The right to participate in reorganization is lost by failure to comply with the conditions attached to the plan of reorganization.[61] Persons to whom a corporation's properties are intrusted for the purpose of reorganization are trustees for the stockholders [62] and may be required to account [63] for a

[Neb.] 111 N. W. 783. See post, § 16B, subd. Assets for Creditors.

49. New corporation held liable for debt of old corporation, all of whose stock and most of whose property it received, where new company merely continued business of old, no change being made except in personnel of office. Taylor Co. v. Gulf Land & Lumber Co. [La.] 44 So. 187.

50. Lenehan v. Gulf Land & Lumber Co., 118 La. 217, 42 So. 780.

51. Charter of defendant corporation is admissible without restriction. Lenehan v. Gulf Land & Lumber Co, 118 La. 217, 42 So. 780. Sales of property to original debtor for which plaintiff paid, thus creating the debt sued on, held admissible. Id. Evidence that defendant had paid other debts of original debtor held admissible. Id. Evidence of sale of property by original debtor to defendant held admissible. Id. Evidence that notes of president of original debtor who afterwards became president of defendant were accepted by plaintiff under protest that he did not release defendant held admissible to disprove novation. Id.

52. Dupoyster v. First Nat. Bk., 29 Ky. L. R. 1153, 96 S. W. 830. In suit to compel corporation which had assumed liabilities of another to issue stock to stockholder in such other corporation, evidence held to show that old stock had been canceled by agreement between stockholder and the corporation. Id.

53. Dupoyster v. First Nat. Bk., 29 Ky. L. R. 1153, 96 S. W. 830.

54. Baker Furniture Co. v. Hall [Neb.] 111 N. W. 129. Where an adjunct corporation is reorganized by entirely different persons, the original corporation having nothing to do with such reorganization, the latter will not be liable for the debts of the reorganized corporation incurred after reorganization. Liebhardt v. Wilson [Colo.] 88 P. 173.

55. Baker Furniture Co. v. Hall [Neb.] 111 N. W. 129. Reincorporation of mutual insurance company under Laws 1892, p. 2011, c. 690, art. 6, § 206, as amended. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 N. Y. S. 465.

56, 57. Baker Furniture Co. v. Hall [Neb.] 111 N. W. 129.

58. Stockholder in new corporation may be bona fida holder. Baker Furniture Co. v. Hall [Neb.] 111 N. W. 129.

59. Agreement between subscriber for all stock of corporation, none of which had been issued, and persons acting for themselves and future subscribers whereby such subscriber released his subscription except for certain amount, held not invalid for want of consideration moving to such subscriber, though he was not released from liability to creditors on original subscription. Hladovec v. Paul, 124 Ill. App. 589, afd. 222 Ill. 254, 78 N. E. 619.

60. Stockholders in reorganized corporation who are not parties to mandamus suit by subscriber to stock in original corporation to compel issue of such stock to him cannot in such suit set up their rights to such stock under contract between plaintiff and other promoters of the reorganized corporation, and cannot compel the defendant officers to set up such defense, and hence are entitled to injunction against prosecution of the mandamus suit. Hladovec v. Paul, 222 Ill. 254, 78 N. E. 619.

61. Right lost by failure to pay assessment within time limited by reorganizing committee. Keane v. Moffly, 217 Pa. 240, 66 A. 319. Reception of assessments from stockholders after expiration of time limit imposed by reorganizing committee does not give other defaulting stockholders the right to pay their assessments and participate in the reorganization. Id.

62, 63. Mawhinney v. Bliss, 117 App. Div. 255, 102 N. Y. S. 279.

breach of the trust at any time.[64] A court of equity has power to order its receiver to transfer all of the property of a corporation to a new corporation organized to receive it,[65] and such an order is res adjudicata as to the validity of the transfer.[66]

The right to consolidate is usually confined to corporations of the same or similar character.[67] Authority to consolidate "with any other" corporation does not necessarily limit the number of corporations which may be consolidated.[68] A stockholder in a constituent company cannot, as a matter of right, prevent its consolidation with other companies,[69] for when at the time its stock is subscribed a corporation is authorized by law to consolidate with other corporations, its stockholders hold their stock subject to such right,[70] unless it has been waived.[71] The right to object to the exercise of the power to consolidate granted after the original organization of the corporation is vested only in those stockholders who became such prior to the grant of such powers.[72] Illegal or inequitable terms cannot be imposed on the stockholders,[73] but the courts will not pass upon the fairness, as a business proposition, of an offer of the consolidated corporation to settle the claims of the stockholders of

64. Allegations of bill by stockholder held to show such breach of trust as entitled him to accounting. Mawhinney v. Bliss, 117 App. Div. 255, 102 N. Y. S. 279.

65, 66. Robyn v. Pickard, 37 Ind. App. 161, 76 N. E. 642.

67. Since under membership corporation law only corporations organized for kindred purposes can be consolidated, such a corporation cannot be consolidated with a religious corporation, the general corporation laws, § 2, placing such corporations in different categories. Selkir v. Klein, 50 Misc. 194, 100 N. Y. S. 449. Corporation organized under Laws 1848, p. 447, c. 319, relating to incorporation of benevolent, etc., societies, but forbidding incorporation thereunder for purposes constituting purposes of incorporation under 2 Rev. Laws 1813, p. 212, c. 60, relating to religious societies, held not religious corporation. Id.

68. Burns' Ann. St. Ind. 1894, § 5257, authorizing any railroad company of the state to consolidate "with any other railroad," etc., construed as authorizing consolidation with more than one other road. Bonner v. Terre Haute & I. R. Co. [C. C. A.] 151 F. 985

69. Beling v. American Tobacco Co. [N. J. Eq.] 65 A. 725. Statutes providing for winding up of corporations before expiration of charter necessarily limit constituent stockholders' right to have his company continue its business, and authorize consolidation which is in effect a winding up, as against the stockholders' right to specific performance of the agreement of the constitutent company to continue its business. Id. A constituent stockholder cannot have the consolidation set aside as a matter of right by virtue of the agreement implied from his stock certificate that the constituent company will continue to carry out its functions until expiration of its charter, such an application being in effect an application for specific performance of such agreement, and specific performance being a matter within the court's judicial discretion. Id. See also, Dana v. American Tobacco Co. [N. J. Eq.] 65 A. 730.

70. Bonner v. Terre Haute & I. R. Co. [C. C. A.] 151 F. 985.

71. A statutory right to consolidate will not be held to have been waived by the terms of the stock certificates unless such is the clear or necessary effect of such certificates. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657.

72. Colgate v. U. S Leather Co. [N. J. Eq.] 67 A. 657. Since effect of filing and recording the certificate of incorporation under Rev. St. 1875, p. 8, § 13, was merely to constitute the corporators a corporation, the provision of Act March 21, 1893, relating to amendment of certificates, that the amended certificate shall relate back to the date of the original filing did not place the holders of stock issued after the amendment in the position of original stockholders, with respect to the right to object to the exercise of the power to consolidate conferred after the original filing and organization but before the issue of the stock under the amended certificate. Id. Provision of Act March 21, 1893, relating to amendment of certificates of incorporation, that nothing shall be inserted in the amended certificate contrary to the law under which the corporation was organized, does not prevent the amended certificate from including a power of consolidation not conferred by the original certificate or law under which it was filed, since an act and its supplements are considered as one law for purpose of construction, and if the consolidation act, being a general law, is not to be considered technically as an amendment of the general corporation law, then as the provision of Act 1893 above referred to refers only to the general corporation law, it does not forbid the insertion in the amended certificate of anything contained in the consolidation act or any other law relating to corporations in general, or prevent such law from being read into the certificate as an existing law. Id.

73. Under P. L. 1902, p 700, providing that on consolidation the dissenting stockholders may have their stock appraised, the directors are bound to propose an agreement which does not unfairly or inequitably impair the legal or equitable rights of any preferred stockholder, and such stockholder cannot be required to exercise any option of surrendering his stock on compensation until he has had an opportunity of joining in the consolidation on such terms and conditions as are equitable and legal as to him. Colgate v. U. S. Leather Co. [N. J. Eq] 67 A. 657.

the consolidated companies.[74] Whether an agreement for consolidation will be set aside at the instance of minority stockholders in the constituent companies depends upon all the circumstances of the case, such as the consideration paid for the constituent stock,[75] extent to which the consolidation agreement has been acted upon,[76] attitude of the other minority stockholders,[77] the laches of the complainants,[78] and the complainants' purpose in acquiring their stock.[79] A consolidation or merger is not invalidated because the constituent corporations have common directors,[80] or because it practically amounts to a sale of one of the corporations to the other which holds a majority of the stock of the former,[81] the sole question in such case being whether the consolidation or merger will unfairly or illegally dispose of the assets of the corporations as against the objecting stockholders.[82] When, pending a suit to enjoin consolidation, a consolidation is effected lawfully except as between the parties, the injunctive relief becomes obsolete and the cause cannot be retained for other relief without bringing in the parties who have acquired interests by reason of the consolidation.[83] Technically, there is a distinction between consolidation and merger, the former involving the dissolution of the consolidated corporations and the creation of a new one, while the latter involves the dissolution of only the corporations merged,[84] but the terms are not always used with technical accuracy,[85] and it is sometimes necessary to consider all the circumstances in order to determine whether there has been a consolidation or a merger.[86] In both cases, however, the resultant corporation succeeds to all the rights and liabilities of the corporations consolidated or merged,[87] including obligations to stockholders.[88] In this connection it is im-

74. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657.

75. Allotment of bonds of consolidated company held fair equivalent of preferred stock of constituent company held by complainant. Beling v. American Tobacco Co. [N. J. Eq.] 65 A. 725. Right of preferred stockholder to share in surplus on winding up of constituent company will not be considered in determining whether bonds of consolidated company issued in exchange for constituent preferred stock are the equivalent in value thereof, where the common constituent stockholders so greatly exceed the preferred stockholders as to warrant an inference that the former by their power, through directors elected by them, to declare dividends, would see to it that on winding up the preferred stockholders would get no more than par value of their stock. Id.

76. As where interests and properties of constituent companies have become so merged as to render separation almost impossible. Beling v. American Tobacco Co. [N. J. Eq.] 65 A. 725.

77. That other opposing stockholders acquiesced after casting vote against consolidation. Beling v. American Tobacco Co. [N. J. Eq.] 65 725.

78. In allowing without protest the merger to proceed until it became wellnigh impossible to undo it. Beling v. American Tobacco Co. [N. J. Eq.] 65 A. 725; Dana v. American Tobacco Co. [N. J. Eq.] 65 A. 730. Laches of complainant's assignor may also be considered. Beling v. American Tobacco Co. [N. J. Eq.] 65 A. 725.

79. As that he acquired it for purpose of suing to have consolidation set aside. Beling v. American Tobacco Co. [N. J. Eq.] 65 A. 725.

80. Since the consolidation or merger must be finally consummated by the stockholders themselves. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657.

81. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657. See post, § 15A, subd. Power of the majority.

82. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657.

83. Bonner v. Terre Haute & I. R. Co. [C. C. A.] 151 F. 985.

84. Lee v. Atlantic Coast Line R. Co., 150 F. 775. Under Mills' Ann. St. § 628, consolidation extinguishes original corporations notwithstanding § 630 providing that causes of action and suits against original corporations shall not be abated by consolidation. Solomonvich v. Denver Consol. Tramway Co. [Colo.] 89 P. 57. When one street railroad leased property of another and thereafter, under N. Y. Laws 1867, c. 254, as amended by Laws 1879, c. 503, acquired all of its stock, thus acquiring all its "estate, property, rights, privileges and franchises," the lessor ceased to exist and the lessee or merging company could not claim the lessor's immunity from burden of paying obligations on grounds that lessee still existed. Rochester R. Co. v. Rochester, 205 U. S. 236, 51 Law. Ed. 784.

85. Authority given railroad company "to consolidate with itself" other corporations held to contemplate merger and not technical consolidation. Lee v. Atlantic Coast Line R. Co., 150 F. 775.

86. Transaction held a merger. Lee v. Atlantic Coast Line R. Co., 150 F. 775.

87. Consolidation. Smith v. Cleveland, etc., R. [Ind.] 81 N. E. 501. Act 1893, § 4. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657. Consolidated company liable for debts of the constituent corporations. Howell v.

portant to distinguish between a consolidation and a sale.[89] Only such rights pass to the merging or consolidated company as are legally assignable or transferable,[90] and the statement and plan for consolidation cannot affect or vary the certificate of consolidation required by law to be filed.[91] On consolidation under the laws of several states, the question of compliance with requirements not wholly governed by the laws of one of the states cannot be raised collaterally in the courts of such state.[92] The effect of the consolidation of corporations of different states on their residence is treated elsewhere.[93] The authorized capital of a consolidated corporation is the amount stated in its certificate of consolidation.[94]

§ 14. *Stock and membership.*[95]—This section is confined primarily to the rights and relations of the corporation and the stockholders inter se.

(§ 14) *A. Membership in corporations in general.*[96]—The question as to whether or not one is a stockholder is determined by the laws of the state or county under whose laws the corporation was created,[97] and ordinarily the courts of another state will not take jurisdiction of a case involving such a question.[98] Where one is registered as a stockholder under color of authority,[99] the right to repudiate the relation of stockholder must be exercised properly.[1] Some corporations have an implied power of a motion,[2] and the trial of a member may be delegated to a committee and the corporation may act on its report.[3] In the absence of fraud or bad faith, the decision of a corporation tribunal upon the guilt of the accused will not be reviewed by the courts.[4] The stockholders may also by agreement among themselves,

Lansing & Suburban Trac. Co., 146 Mich. 450, 13 Det. Leg. N. 843, 109 N. W. 846.

Merger: Merging corporation held to succeed to claim for services fully performed before the merger by corporation merged, though contract under which such services were rendered was not assignable. United States Title Guaranty & Indemnity Co. v. Marks, 116 App. Div. 341, 101 N. Y. S. 483. Where one of the corporations is completely merged the consolidated corporation will, as a general rule, be entitled to all the property of the one merged. Atlantic & B. R. Co. v. Johnson, 127 Ga. 392, 56 S. E 482. Merging corporation liable for debts of one merged. Id.; Swing v. American Glucose Co., 123 Ill. App. 156.

88. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657.

The right to dividends already accumulated in the shape of individual profits, though declared as dividends, is not terminated, but the right to dividends out of future profits is terminated. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657. Charge upon accumulated profits in favor of preferred stock held not terminated by consolidation. Id.

89. Transfer of all corporate assets to new corporation in sole consideration of issue of stock of new corporation to stockholders of old corporation held a consolidation. Howell v. Lansing & Suburban Trac. Co., 146 Mich. 450, 13 Det. Leg. N. 843, 109 N. W. 846.

90. Immunity from street paving obligations does not pass as a "privilege," or otherwise under N. Y. Laws 1867, c. 254, as amended by Laws 1879, c. 503, authorizing lessee railroad company to acquire all stock of lessor, and vesting in such case all of the lessor's "estate, property, rights, privileges and franchises" in the lessee. Rochester R. Co. v. Rochester, 205 U .S. 236, 51 Law. Ed. 784.

91. So as to affect amount of bonus tax as measured by authorized capital. See Code Pub. Gen. Laws, art. 81, § 98. State v. Consolidated Gas, Elec. Light & Power Co., 104 Md. 364, 65 A. 40. As to amount of capital stock, see post, § 14B, Capital Stock and Shares of Stock.

92. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501.

93. See ante § 6, Citizenship, etc.

94. State v. Consolidated Gas, Elec. Light & Power Co., 104 Md. 364, 65 A. 40. See post, § 14B, Capital Stock and Shares of Stock.

95, 96. See 7 C. L. 892.

97, 98. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306.

99. Applications filed by underwriters with promoter to be used on certain conditions held to give color of authority though used in violation of conditions. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306.

1. Under laws of England. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306. Refusal to pay calls is not a repudiation. Id. Delay of two years and eight months held laches barring right to repudiate. Id. Seems that period of acquiescence runs even after suit to recover calls. Id.

2. Incorporated dental association having social features held to have right to exercise power of amotion for "unprofessional conduct," even in absence of express power to exercise power of amotion. Bryant v. District of Columbia Dental Soc., 26 App. D. C. 461.

3. Evidence need not be heard by all members on trial of member of dental association. Bryant v. District of Columbia Dental Soc , 26 App. D. C. 461.

4. Whether member of dental association

confer upon the majority the power to redeem the stock of any stockholder for specified reasons,[5] and such agreement when acted on in good faith by such majority may be enforced against any stockholder who was a party to the agreement.[6]

(§ 14) *B. Capital stock and shares of stock.*[7]—The capital stock of a corporation can be reduced only as authorized by law,[8] and the limitations thus imposed cannot be evaded by the exercise of other powers, such as the power to purchase its own stock[9] or the power to declare dividends.[10] An increase of capital stock must also be authorized by law.[11] An irregular increase may be ratified by the corporation.[12] but not so as to a mere overissue.[13] Such a ratification, however, operates by way of an estoppel, and is not available to charge a subscriber upon his merely executory contract to take such stock.[14] Stockholders have a pre-emptive right to participate in an issue of new stock to be sold for money in proportion to their holdings and on the same terms offered to outsiders,[15] and they cannot be deprived of this right without their consent,[16] and for a violation of such right they are entitled to damages,[17] or in a proper case they may invoke the aid of equity,[18] even though such relief involves the control of the corporation.[19] Such right, however, may be waived,[20] and must, therefore, be asserted in due time.[21] Such right may be assigned.[22] When the ownership

was guilty of "unprofessional conduct." Bryant v. District of Columbia Dental Soc. 26 App. D. C. 461.

5. Authority to redeem stock of any stockholder deemed an undesirable associate. Boggs v. Boggs, 217 Pa. 10, 66 A. 105.

6. Conclusion of majority that a stockholder was an undesirable associate held reached in good faith. Boggs v. Boggs, 217 Pa. 10, 66 A. 105. Finding of majority as to value at which stock was to be redeemed held sustained by the evidence. Id. Cash value of common stock within meaning of agreement for surrender and redemption held to be determinable without reference to good will of the corporation's business. Id.

7. See 7 C. L. 892.

8. Siegman v. Electric Vehicle Co. [N. J. Err. & App.] 65 A. 910. Revisal 1905, § 1192, prohibiting division, withdrawal, or reduction of capital stock except as therein provided, repeals all charter provisions in conflict therewith. See general repealing clause, § 5458. McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169.

9. McIntyre v. Bement's Sons, 146 Mich. 74, 13 Det. Leg. N. 674, 109 N. W. 45. See post, this section, subsection C. Subscriptions to capital stock and shares of stock.

10. See post, this section, subsection D. Miscellaneous Rights of Stockholders. Subdivision. The Right to Dividends.

11. Seems that corporation cannot by reason of power to hold stock in another corporation and to vote in same, increase the capital of the latter to a sum largely in excess of the authorized capital of former. Robinson v. Holbrook, 148 F. 107. Acts 1903, p. 335, § 46, providing, with certain exceptions, for increase of capital stock "formed under this act or heretofore incorporated," applies to corporations incorporated before the enactment of the act, notwithstanding section 54, providing that provisions of act shall not affect rights, powers, etc., of existing corporations, such section being general in its provisions, and hence subject to the special provisions of section 46. Palliser v. Home Tel. Co. [Ala.] 44 So 575.

12, 13, 14. Pacific Mill Co. v. Inman, Poulsen & Co. [Or.] 90 P. 1099.

15. Stokes v. Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090; Schmidt v. Pritchard [Iowa] 112 N. W. 801. Where defendant was prime mover in scheme to issue new stock and deprive plaintiff of control of corporation, he could not evade the duty of canceling issue to his own faction of plaintiff's pro rata on ground that stock was sold in open market and that he purchased none of it, he having been benefited at least to extent of his pro rata. Schmidt v. Pritchard [Iowa] 112 N. W. 801.

16. Stokes v. Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090.

17. Stokes v. Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090. Stockholder not entitled to difference between par value and market value of new stock, but to difference between market value and price fixed by the stockholders. Id.

18. When pro rata share was refused to stockholder in order that certain faction might retain control, holdings being such that such pro rata would give such stockholder control, and there was none of the stock on the market, he was entitled either to specific performance or a decree declaring him the owner of the stock. Schmidt v. Pritchard [Iowa] 112 N. W. 801.

19. Where plaintiffs were in control and defendants were attempting to oust them by manipulation of new stock. Schmidt v. Pritchard [Iowa] 112 N. W. 801.

20. Acceptance of less than a stockholder is entitled to does not waive his right to the balance of his pro rata. Schmidt v. Pritchard [Iowa] 112 N. W. 801. Where stockholder protested against sale of new stock to outsiders and offered to pay for his proportion at par, his failure to offer to pay for such proportion at a premium thereafter fixed did not waive his right to such proportion at the price fixed or his right to damages for a sale to outsiders at such price. Stokes v. Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090.

21. Counterclaim based on refusal of corporation to allow stockholder to purchase

of stock and of the income therefrom are severed, the right to subscribe to an increase of capital stock follows the ownership of the original stock,[23] but where such new stock is purchased with dividends declared at the time of its issue it will be treated as dividends.[24] The amount of authorized capital stock of a consolidated corporation is the amount stated in the certificate of consolidation required by law to be filed.[25] A suit to determine the title to stock, cancel the certificate thereof held by the defendant, and for injunction against the payment of money on account of such certificates, is a suit in equity.[26]

A certificate of stock is merely evidence of ownership and not property,[27] but the stock itself is personal property.[28] The manner in which stock shall be issued is usually within the discretion of the directors under the by-laws.[29] Preferred or guaranteed stock is entitled to priority only as to dividends and not as to the principal of the stock.[30] Shares in an elective incorporated club have no market value.[31]

(§ 14) *C. Subscriptions to capital stock, and other agreements to take stock.*[32]—A stock subscription must create mutual obligations between the corporation and the subscriber,[33] but it need not be in any particular form,[34] may be conditional,[35] and subject to cancellation at the option of the subscriber on failure of the condition,[36] and need not always be for an absolute number of shares.[37] The rule that subscriptions to original capital stock are upon condition that all the stock

his proportion of new stock held barred under Rev. Laws 1905, § 4076, by lapse of more than six years. Woodworth & Co. v. Carroll [Minn.] 112 N. W. 1054. Application held in time. Schmidt v. Pritchard [Iowa] 112 N. W. 801. Right to pro rata share not waived by delay where within sixty-six days after application stockholder gave check in settlement and on return thereof immediately offered to pay for his share, and was falsely told by officers in charge of issue that all stock had been sold, whereas they had kept it for themselves. Id.

22. Schmidt v. Pritchard [Iowa] 112 N. W. 801.

23. Proceeds of sale of such right by executor held to go to remainderman as against life tenant. Brown v. Brown [N. J. Eq.] 65 A. 739.

24. Brown v. Brown [N. J. Eq.] 65 A. 739.

25. Under Code Pub. Gen. Laws, art. 81, § 98, requiring bonus tax to be paid on authorized capital as condition precedent to exercise of corporate functions regardless of subsequent cancellation of such stock as is issued to one of constituent companies in exchange for stock of another constituent company, and though the amount so stated is merely a bookkeeping device to equalize the distribution of the consolidated stock State v. Consolidated Gas, Elec. Light & Power Co., 104 Md. 364, 65 A. 40.

26. Hence defendant in such suit is not entitled to jury under Code Civ. Proc. § 592. Noble v. Learned [Cal. App.] 87 P. 402.

27. Allegation of conversion of certificate held insufficient where there was no allegation of conversion or loss of stock itself. Richardson v. Busch, 198 Mo. 174, 95 S. W. 894. Not sufficient to give local administrator title to stocks so as to sustain local administration. Id.

28. Stock in real estate company descends as personalty. Elkhorn Land & Imp. Co. v. Childers, 30 Ky. L. R. 112, 100 S. W. 222.

29. Demand that twenty-five shares be issued in twenty-five certificates of one share each held prima facie unreasonable. Schell v. Alston Mfg. Co., 149 F. 439.

30. Shares equally with common stock on dissolution. People v. New York Building-Loan Banking Co., 50 Misc. 23, 100 N. Y. S. 459.

31. Only nominal damages can be recovered from member by nonmember for breach of contract of sale of shares. McAlpin v. Garden, 53 Misc. 401, 103 N. Y. S. 509.

32. See 7 C. L. 894.

33. Subscription which is not binding on corporation until certain amount is subscribed and accepted may be rescinded by either party at any time before the fulfillment of the conditions. Allen & Co. v. Hastings Industrial Co. [Ga. App.] 58 S. E. 504. Tentative contract with promoter to take certain number of shares on condition that certain number shall be subscribed held terminable by subscriber without consent of promoter at any time before performance of condition. Id.

34. Agreement by construction company to construct railroad in consideration of all of railroad company's stock not otherwise subscribed held a subscription. Sweeney v. Tennessee Cent. R. Co. [Tenn.] 100 S. W. 732.

35. Conditioned on favorable opinion of third party as to patentability of invention owned by corporation. Randall v. Claflin [Mass.] 80 N. E. 594.

36. Notice to corporation's treasurer and assignment of stock to corporation held sufficient notice of exercise of option not to keep the stock, no particular form of notice being required by the subscription. Randall v. Claflin [Mass.] 80 N. E. 594.

37. Subscriber could not contend that all stock had not been subscribed where another person had subscribed to all stock not otherwise subscribed. Sweeney v. Tennessee Cent. R. Co. [Tenn.] 100 S. W. 732.

should be subscribed [38] does not apply to an increased issue.[39] For certain purposes the books of the corporation constitute prima facie evidence of the stock subscriptions,[40] but the subscription is not conclusive of subscriber's right to the stock.[41] A subscription by a trustee for an undisclosed principal is binding on the trustee, and is a valid subscription.[42] Stock may be issued in exchange for services rendered [43] or to be rendered,[44] or in exchange for property.[45] A very common statutory provision is that it cannot be issued except in exchange for money, property, or services.[46] The right of a corporation to repurchase its own shares from the holders thereof is subject to the rights of creditors [47] and of the other stockholders,[48] and a contract with a subscriber to repurchase at his option is subject to the same limitation,[49] and the rule is the same as to a release of subscriptions,[50] but a subscription may be rescinded for fraud or misrepresentation whereby it was induced,[51] and a tender back of the

38. Such is general principle settled by the authorities. Pope v. Merchants' Trust Co. [Tenn.] 103 S. W. 792.

39. Pope v. Merchants' Trust Co. [Tenn.] 103 S. W. 792.

40. In condemnation proceedings as bearing on right of corporation to maintain same. State v. Clarke County Super. Ct. [Wash.] 88 P. 332.

41. Evidence held insufficient to sustain alleged subscriber's claim for certificates after delay of ten years. Taylor v. Johnson, 30 Ky. L. R. 656, 99 S. W. 320.

42. So as to make up subscription necessary to enable corporation to maintain condemnation proceedings. State v. Clarke County Super. Ct. [Wash.] 88 P. 332.

43. Attorney's services. Vogeler v. Punch [Mo.] 103 S. W. 1001.

44. Vogeler v. Punch [Mo.] 103 S. W. 1001.

45. Agreement to exchange property for full-paid stock cannot be enforced where property is not equal in value to stock and directors have not declared that it is of such value. Ecuadorian Ass'n v. Ecuador Co. [N. J. Err. & App.] 65 A. 1051. Bona fide belief that property and securities given in payment of a stock subscription will some day be worth the value placed upon them is insufficient to take the place of actual value. In re Wyoming Valley Ice Co., 153 F. 787. Full-paid stock issued for grossly inadequate price in money, property, or work is fraud on other stockholders. Vogeler v. Punch [Mo.] 103 S. W. 1001. But see Bostwick v. Young, 118 App. Div. 490, 103 N. Y. S. 607; Goodnow v. American Writing Paper Co. [N. J. Eq.] 66 A. 607. And see post, this section, subsection Calls and Assessments. Issue of stock in exchange for property at a **fictitious valuation** of the latter or without making any **appraisement** of such property is a fraud prohibited by statute. Strickland v. National Salt Co. [N. J. Eq.] 64 A. 982. Where stock is issued in exchange for **stock of another corporation**, the latter stock must be of equal value, according to a bona fide appraisal by the directors of the issuing company, with the stock issued. Id.

46. Issue of stock and depositing same with trust company for sale held in violation of Laws 1892, p. 1835, c. 688, § 42, prohibiting issue of stock except for money, labor, or property actually received. Brooklyn Heights Realty Co. v. Kurtz, 115 App. Div. 74, 100 N. Y. S. 723

47. McIntyre v. Bement's Sons, 146 Mich. 74, 13 Det. Leg. N. 674, 109 N. W. 45. Comp. Laws, § 7057, making stockholders liable to creditors to extent of amount refunded on repurchase of stock by corporation, is a limitation on the power of the corporation to repurchase. Id. Boley v. Sonora Development Co. [Mo. App.] 103 S. W. 975.

48. Boley v. Sonora Development Co. [Mo. App.] 103 S. W. 975.

49. Hence stockholder cannot exercise such option while corporation is insolvent. McIntyre v. Bement's Sons, 146 Mich. 74, 13 Det. Leg. N. 674, 109 N. W. 45. Hence such a subscriber cannot exercise such election and recover the price from the corporation. Boley v. Sonora Development Co. [Mo. App.] 103 S. W. 975.

50. Agreement between subscriber to all stock of corporation and certain persons acting for themselves and for future subscribers, whereby he released his subscription except for certain number of shares, such stock, however, to remain in his name until issued, held not invalid as a release of subscription, the effect being to create joint liability against such subscriber and future subscribers, as, under R. S. c. 32, § 8, in case of transfer of unpaid stock. Hladovec v. Paul, 124 Ill. App. 589, afd. 222 Ill 254, 78 N. E. 619. Such agreement held not an option or void as such. Id. Such agreement did not deprive the original subscriber of interest in the stock released while it remained unissued or relieve him of his liability to creditors on account of his original subscription. Id.

51. That certain number of subscriptions had been secured. Luetzke v. Roberts, 130 Wis. 97, 109 N. W. 949. Evidence held to show that some of alleged subscriptions were not bona fide. Id. A subscriber may rely upon representations of officers or agents soliciting his subscription as to the organization of the company, and need not go to public records. Marine v. Midland Inv. Co., 132 Iowa, 272, 109 N. W. 801. Where secretary falsely represented that Codes, §§ 1613, 1614, relative to publication of notice of corporation, had been complied with, stockholders being individually liable for debts where such notice is not published. Id. In suit to rescind, it makes no difference whether representations were made with knowledge of falsehood or not. Id. Right to rescind on account of misrepresentations as to legality of organization

stock prior to the institution of suit to rescind is not necessary.[52] The personal liability of the officer soliciting the subscription depends upon his good or bad faith in making the representations.[53] Failure of the corporation to deliver a certificate or a receipt for money paid on a subscription does not create the relation of debtor and creditor between the corporation and the subscriber.[54] Stock cannot be forfeited for breach of a collateral agreement.[55]

The corporation is not bound by agreements between promoters inter se,[56] and an application to promoters for shares is not binding on the promoters until accepted by them,[57] but one making a present subscription, as distinguished from an agreement to subscribe in the future, will be liable thereon upon acceptance by the corporation after organization,[58] especially where the act under which the corporation is organized contemplates such liability.[59] An agreement between promoters may give rise to an equitable right to stock,[60] and for a sufficient consideration the promoters may agree to indemnify a subscriber against loss on account of his subscription.[61] It is not essential to the validity of a subscription prior to incorporation that the corporation be organized by the parties to the subscription agreement or their representatives,[62] but the corporation must substantially carry out the prospectus upon which the subscription was secured,[63] and for fraud or variance in this regard the subscription may be rescinded.[64] A promoter, furthermore, is personally liable for money

inducing subscription **not waived** by attendance at stockholder's meeting at which no business was transacted. Id.

52. Offer in peititon to restore statu quo is sufficient. Maine v. Midland Inv. Co., 132 Iowa, 272, 109 N. W. 801.

53. Held not liable for misrepresentations as to legal organization of the company, but liable for misrepresentations as to its financial condition, provided subscriber was entitled to and did rely thereon. Maine v. Midland Inv. Co., 132 Iowa, 272, 109 N. W. 801.

54. Cooper v. Jennings Refining Co., 118 La. 181, 42 So. 766.

55. Where stock was issued to one person as fully paid, and such person transferred it to another, it could not be forfeited for breach of collateral agreements, either with transferror or corporation. Falk v. Schmitz Alaska Dredging & Min. Co. [Wash.] 87 P. 927.

56. Agreement between subscriber for all stock of corporation, none of which had been issued, and persons acting for themselves and future subscribers, whereby such subscriber agreed to release all his subscriptions except for ten shares, and the rest of stock was then to be issued in blocks of ten shares to the other parties and future subscribers, was not invalid, the corporation not being a party to the agreement, and hence not being precluded from issuing all unissued stock in case of necessity. Hladovec v. Paul, 124 Ill. App. 589, afd. 222 Ill. 254, 78 N. E. 619.

57. Though made on blank applications furnished by them. Feitel v. Dreyfous, 117 La. 756, 42 So. 259.

58. Louisville, etc., R. Co. v. Elliott, 115 App. Div. 884, 101 N. Y. S. 328. Stock subscriptions prior to incorporation become binding upon acceptance after incorporation. Avon Springs Sanitarium Co. v. Weed, 104 N. Y. S. 58. Allegations admitted by demurrer held to show agreement to form corporation and the kind of corporation to be formed. Id.

59. Laws 1892, p. 2052, c. 565, § 2, subd. 13, relating to incorporation of railroads, requires indorsement on certificate to show that certain amount of stock has been subscribed. Louisville, etc., R. Co. v. Elliott, 115 App. Div. 884, 101 N. Y. S. 328.

60. Where B. and M. agreed to form corporation of which all stock was to be issued to M. who was to transfer certain portion to B., and B. fully performed his part of the agreement. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606.

61. Where subscriber advanced price of subscription in order to save option about to be lost by promoter. Harvey v. Bonta, 30 Ky. L. R. 1226, 100 S. W. 846.

62. Avon Springs Sanitarium Co. v. Weed, 104 N. Y. S. 58.

63. Court may take judicial notice that villages mentioned in route proposed in subscription agreement to railroad stock were included between termini as stated in certificate of incorporation. Louisville, etc., R. Co. v. Elliott, 115 App. Div. 884, 101 N. Y. S. 328. Subscription to corporation to be organized to build railroad held equivalent to subscription to corporation to build, operate, and maintain such road, the latter objects being provided for by the statute under which the corporation was to be organized. Id.

64. Fraudulent prospectus. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494. Subscription secured by fraudulent prospectus may be rescinded by equity though fully executed. Id.

Waiver: Right to rescind on account of departure from objects contemplated by subscription held not waived by participation in notice of meeting and in meeting whereat vote was taken on adoption of articles in which such departure had been made, though the articles had already been filed, it being found that subscriber did not know that

paid upon subscriptions obtained by a fraudulent prospectus gotten out by him,[65] unless, of course, the subscriber elects to affirm the subscription after discovery of the fraud.[66] The plaintiff in a suit to recover such payments need not show that the defendant was benefited by the fraud.[67]

A promoter with whom an underwriter's agreement is made has no right to change the basis of the underwriting agreement,[68] and has no authority to use applications for stock filed with him by underwriters except upon the conditions stipulated by the underwriting agreement,[69] and the enterprise for which the corporation is organized must be brought out within the time stipulated by the prospectus upon which the underwriting agreement is based, or at least within a reasonable time thereafter,[70] but the underwriter may lose his right to repudiate the acts of the promoter by acquiescense therein,[71] and cannot escape liability on account of a variance from the prospectus as to matters left to the discretion of the promoter through whom the underwriter's application for stock is made and whose interests are presumably identical with those of the underwriter.[72] A tender of performance by the holder of an underwriter's certificate must conform to the terms of the certificate,[73] and failure to tender the stock covered thereby within the specified time is not excused by the worthlessness of the stock,[74] or by unsuccessful attempts to have the stock transferred to the defendant on the books of the corporation, where it does not appear how long before the day for delivery or how soon after the plaintiff acquired the certificate such attempt was made.[75] An underwriter is not liable to the corporation upon a contract made with a promoter for the underwriting of stock.[76]

the articles, by being filed, had already become binding on the corporation, and he having voted and protested against their adoption. Smith v. Burns Boiler & Mfg. Co. [Wis.] 111 N. W. 1123.

65. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494. Circulars and letters sent out by promoter are admissible in evidence, in action to recover for worthless stock sold, in so far as knowledge is thereby disclosed on part of promoter that representations made by himself and his agents were false, but such letters and representations, however fraudulent, are not admissible where they relate solely to some other enterprise than the one in which the plaintiff purchased an interest. Russell v. Weiler, 7 Ohio C. C. (N. S.) 596.

66. No affirmance where subscriber demanded return of money and was induced by promoter to wait until certain options could be sold. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

67. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S E. 494.

68. Where agreement bound underwriters to take certain percentage of stock not subscribed by public, they were entitled to benefit of reduction in amount of stock issued and offered to public, and could not be bound for an increased percentage of stock not taken by public. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306.

69. Where agreement provided that applications were to be filed by the promoter only in event of underwriters' failure, upon being called upon to do so, to make application for stock agreed to be taken. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306. Basis of right to insist on compliance with provision that applications filed with promoter shall be used only upon underwriters' failure, upon demand, to apply for stock, lies in distinction between an agreement to apply for shares and actually becoming a stockholder, in that in the former case the underwriter may refuse to become a stockholder, subject to his liability to the promoter for damages, whereas in the latter case he would have no such option. Id.

70. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306.

71. Acquiescence in subscription for greater amount of stock than authorized by underwriting agreement. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306. Underwriters held charged with notice that promoter had subscribed in their names for more stock than was authorized by agreement, and with knowledge of fact that they had not been called upon, as required by agreement, to subscribe. Id. Waiver of delay in bringing out corporation. Id. Seems that acquiescence in relation of payments on stock by underwriters would be waiver. Id.

72. Where no reference to the prospectus with regard to amount of working capital was made in the underwriting contract, underwriter held not released by reduction of such capital with consent of promoter. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306.

73. Where certificate called for delivery of stock certificates, tender of an assignment of shares with power of attorney to transfer, and an offer to surrender the shares to a trustee, thus giving the maker of the certificate an equitable title only, instead of the legal title called for by the certificate. Litchfield Sav. Soc. v. Dibble [Conn.] 67 A. 476.

74. Litchfield Sav. Soc. v. Dibble [Conn.] 67 A. 476.

75. For all that appeared in the case, such transfer might have been effected had it been applied for promptly. Litchfield Sav. Soc. v. Dibble [Conn.] 67 A 476.

76. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306.

Liability on subscriptions is not dependent upon the existence of debts,[77] and a receiver may sue for subscriptions when so authorized by the appointing court,[78] but he cannot be called to account by a delinquent stockholder for failure to enforce subscriptions,[79] nor is he chargeable with neglect in refraining from enforcing subscription liabilities while restrained from so doing by an order of court.[80] A tender of stock need not be followed up by tendering it in court in a suit on the subscription therefor.[81]

The question of estoppel of the subscriber to deny the corporation's existence is treated elsewhere.[82]

Calls and assessments.[83]—Power to assess full paid stock must be derived entirely from statute, charter provisions, or the consent of the stockholder,[84] and neither the corporation nor a receiver representing it can recover the price of stock issued as fully paid,[85] nor can such a claim be indirectly enforced.[86] Liability for a call or assessment in any case depends on privity of contract, and does not exist in absence of transfer where transfer is required by law in order to create such privity,[87] and in the absence of statutory or charter provision to the contrary such liability rests upon the legal or registered owner.[88] Liability is determined by the law of the state of the corporation's creation.[89] The power to assess may be exercised notwith-

77. Hence in voluntary liquidation proceedings the fact that all debts had been paid did not deprive receiver of right to recover subscription price of increased stock. Pope v. Merchants' Trust Co. [Tenn.] 103 S. W. 792.

78. Such is the doctrine relating to receivers in general. Kretschmar v. Stone [Miss.] 43 So. 177.

79, 80. Strauss v. Casey Mach. & Supply Co. [N. J. Eq.] 66 A. 958.

81. Farmers' Mut. Tel. Co. v. Howell, 132 Iowa, 22, 109 N. W. 294.

82. See ante, § 4, subd. Estoppel to Deny Incorporation.

83. See 7 C. L. 897.

84. When articles of incorporation gave directors power to assess stock to pay debts and expenses and that articles might be amended in any respect by majority of stockholders, a majority of stockholders had power to amend articles so as to make provision for such assessment whenever debts exceed ten per centum of outstanding capital stock, notwithstanding Rev. Laws 1898, § 338, providing that articles cannot be amended so as to change liability of full-paid stock for assessment without consent of all stockholders. Nelson v. Keith-O'Brien Co. [Utah] 91 P. 30. Charter provision of corporation of first class organized under Act Apr. 29, 1874, P. L. 73, § 6, that on six months' default in payment of assessment the treasurer "shall proceed to collect the same by process of law,' does not impose personal liability. Allegheny Valley Camp Meeting Ass'n v. Kountz, 29 Pa. Super. Ct. 110. Statute authorizing any majority of stockholders to amend articles so as to make full-paid stock which is expressly made nonassessable by the original articles assessable held not within reserved power to amend, alter, etc., the charter. Garey v. St. Joe Min. Co. [Utah] 91 P. 369. Assessment on full paid stock valid as against stockholder who, as director, assented to it and where it was made pursuant to stipulations of stock certificate at time they were purchased by the stockholder. Mirage Irr. Co. v. Sturgeon [Neb.] 108 N. W. 977. Where agreement was for assessment in consideration of company's note, stockholder was not bound by call for advance to be secured by company's note or certificate of indebtedness "payable at the option of the company." Carbon Spring Water Ice Co. v. Hawk, 29 Pa. Super. Ct. 13.

85. Liability on account of fictitiously paid up stock can be enforced by creditors alone. Bostwick v. Young, 118 App. Div. 490, 103 N. Y. S. 607. Stock issued in exchange for property at an admittedly over valuation. Goodnow v. American Writing Paper Co. [N. J. Eq.] 66 A. 607; In Vogeler v. Punch [Mo.] 103 S. W. 1001, it was held that issue of full-paid stock for grossly inadequate price is fraud on other stockholders.

86. By suppression of dividends. Goodnow v. American Writing Paper Co. [N. J. Eq.] 66 A. 607. See post, this section, subsection D, subdivision The Right to Dividends.

87. Distributee of decedent is not stockholder so as to be liable to corporation for calls and assessments where stock has not been transferred to him on corporation's books as required by Civ. Code, § 324. People's Home Sav. Bk. v. Stadtmuller, 150 Cal. 106, 88 P. 280.

88. Civ. Code, § 322, making equitable owners of stock liable as stockholders, relates only to liability to creditors, and hence trustee in whose name stock was registered was liable to assessment by corporation. Union Sav. Bk. v. Willard [Cal. App.] 88 P. 1098.

89. Liability for calls on subscription to stock in English corporation is determined by laws of England. Electric Welding Co. v. Prince [Mass.] 81 N. E. 306. Under the laws of England a registered stockholder must promptly repudiate his relation as

standing the existence of unissued treasury stock, where the disposal of such stock is within the discretion of the directors [90] and the conditions are such that nothing can be realized from the issue of such stock.[91] Statutes relating to the enforcement of statutory liability for assessments must be followed strictly,[92] and the statutory right of forfeiture and sale must be exercised within the time specified by the statue.[93] When an assessment is authorized, the presumption is that it was made in good faith,[94] and the burden of proving otherwise is upon the stockholder,[95] and, though a stockholder is not in default until a call has been made,[96] proof of the subscription and of a call duly made makes a prima facie case for the recovery of the amount of the call.[97] An assessment is not assailable collaterally on account of irregularities.[98]

(§ 14) *D. Miscellaneous rights of stockholders. The right to dividends.*[99]—Except as otherwise provided by charter or statute, accumulated profits are applicable to dividends,[1] and the right to accrued dividends cannot be affected by by-laws adopted after such accrual.[2] Dividends belong to those who are stockholders at the time of the declaration thereof,[3] and one has no right to participate in dividends declared after he has transferred his stock.[4] A preference as to dividends may be

such, or otherwise be liable to calls so long as he remains a registered shareholder. Id.

90. Where it was provided that such stock was to be disposed of by directors for development and conduct of corporation's affairs, but the stock had no salable or other substantial value at the time of the assessment. Jones v. Bonanza Min. & Mill. Co. [Utah.] 91 P. 273.

91. Nelson v. Keith-O'Brien Co. [Utah] 91 P. 30.

92. Waiver of right to sell stock for default in payment of assessment and personal action under Civ. Code, §§ 331-349, held unavailable where at time of waiver the right to sell had been lost by reason of unlawful extension of time for payment. National Parafine Oil Co. v. Chappellet [Cal. App.] 88 P. 506.

93. Civ. Code, § 345, authorizing extension of time for payment of statutory assessments for not over thirty days, does not authorize more than one exetnsion of thirty days or less each, but limits total time of extension to thirty days. National Parafine Oil Co. v. Chappellet [Cal. App.] 88 P. 506.

94. Allegheny Valley Camp Meeting Ass'n v. Kountz, 29 Pa. Super. Ct. 110

95. Offer of evidence which did not allege that assessment was larger than was required for year's expenses, or that the items mentioned in offer were only expenses to be met. Allegheny Valley Camp Meeting Ass'n v. Kountz, 29 Pa. Super. Ct. 110.

96. Gellermann v. Atlas Foundry & Mach. Co. [Wash.] 87 P. 1059.

97. Crawford v. Roney, 126 Ga. 763, 55 S. E. 499.

98. In suit to enjoin directors from acting as such. Jones v. Bonanza Min. & Mill. Co. [Utah] 91 P. 273.

99. See 7 C. L. 898.

1. Reference in certificate of incorporation to reserve capital "authorized to be reserved by law" to exclusion of dividends held not to refer merely to Act 1875, as amended by Act March 17, 1891 (P. L. p. 176, c. 106), in force at the time and authorizing such reservation to be made by directors, but referred also to P. L. 1896, p. 317, § 118, repealing Act 1875 and amendments thereto and placing right to make such reservation in stockholders. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657. Authority to apply surplus to acquisition of property for a working capital to the exclusion of dividends held to apply only to going concerns and does not relieve such surplus from charge in favor of preferred stock. Id.

2. Even though adopted for ostensible purpose of correcting mistake in by-law under which dividends accrued. Gellermann v. Atlas Foundry & Mach. Co. [Wash.] 87 P. 1059.

3. Zinn v. Germantown Farmers' Mut. Ins. Co. [Wis.] 111 N. W. 1107.

4. Court will not inquire as to when such dividends were earned. Corgan v. Lee Coal Co. [Pa.] 67 A. 655.

Note: As between life tenant and remainderman, the rule in New Jersey is that dividends earned prior to the severance of right to dividends from the ultimate ownership of the stock belong to the remainderman, while dividends earned thereafter belong to the life tenant. Brown v. Brown [N. J. Eq.] 65 A. 739. In reaching this conclusion the court said: "The rule to be applied, as between life tenants and remaindermen, with respect to dividends has been settled in this state by the case of Lang v. Lang's Ex'rs, 57 N. J. Eq. 325, 41 A. 705, followed in this court by Lister v. Weeks, 60 N. J. Eq. 215, p. 225, 46 A. 558, afd. 61 N. J. Eq. 675, 47 A. 1132. In the case first cited, at page 327 of 57 N. J. Eq., p. 705 of 41 A., the court says: 'The underlying principle applicable is that no corporate dividend declared after the right to the income has become severed from the ultimate ownership of the stock upon which such dividend is declared belongs in equity to the person entitled to income except so far as it is derived from the earning of the stock after such severance.' After alluding to the distinction which had been made in previous authorities between extraordinary dividends and ordinary or current dividends with respect to apportionment of those of the first class and not of the

given to the holders of preferred stock,[5] and under an unrestricted preference divi-

others, the court at page 328 of 57 N. J. Eq., p. 706 of 41 A., says that it cannot 'assent to the idea that some dividends should stand on a different footing from others,' and points out that to hold that, 'where a life estate begins one day before a dividend is declared, the entire dividend shall go to the life tenant, may be convenient but certainly is unjust.' At page 329 of 57 N. J. Eq., p. 706 of 41 A., the court applies the principle. That principle, as before stated, requires apportionment. There must, however, be evidence before the court of the periods for which the dividends were declared, the time of the previous dividend, the source from which it is derived—whether earnings currently made or surplus wholly earned before the decease of the stockholder—and other like matters." But in Iowa the respective rights of the parties are made to depend upon whether the dividends represent profits or capital. Kalbach v Clark, 133 Iowa, 215, 110 N. W. 599. The following is an extract from the court's opinion in this regard: "Does a stock dividend pass to a legatee of a life estate in the original shares of stock, or are they part of the estate which passes directly to the remainderman? This question has been variously answered by the different courts of the country, and we have never before had occasion to consider it. Three rules seem to have been established by the decisions of the other courts—one known as the American or Pennsylvania rule, another the Massachusetts or the rule in Minot's Case, and the third the English rule. Under the so-called 'American rule' the courts inquire as to when the stock dividends were earned. If before the life estate arose, it is treated as belonging to the corpus of the estate, and does not go to the life tenant; but, if the fund out of which it was paid was earned or accrued after the life tenancy arose, then the stock dividend goes to the life tenant. Earp's Appeal, 28 Pa. 368; Biddle's Appeal, 99 Pa. 278; Philadelphia Co.'s Appeal [Pa.] 16 A. 734; Spooner v. Phillips, 62 Conn. 62, 24 A. 524, 16 L. R. A. 461; Hite v. Hite, 93 Ky. 257, 20 S. W. 778, 40 Am. St. Rep. 189, 19 L. R. A. 173; Gilkey v. Paine, 80 Me. 319, 14 A. 205; Lord v. Brooks, 52 N. H. 72; Van Doren v. Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Riggs v. Cragg, 89 N. Y. 479; Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449; Cobb v. Fant, 36 S. C. 1, 14 S. E. 959. See 26 Am. Law Rev. (Feb. 1892) 1, and Moss' Appeal, 83 Pa. 264, 24 Am. Rep. 169. Under the Massachusetts rule, stock dividends, no matter when earned or however declared, are treated as capital and go to the remainderman. Cash dividends, however, go to the life tenant. Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Daland v. Williams, 101 Mass. 571; Gibbons v. Mahon, 136 U. S. 549, 34 Law Ed. 525. There have been some modifications of this rule, however, in Massachusetts. See Heard v. Eldredge, 109 Mass. 258, 12 Am. Rep. 687; Leland v. Hayden, 102 Mass. 542; Davis v. Jackson, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801; Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720; Parker v. Mason, 8 R. I. 427; Greene v. Smith, 17 R. I. 28, 19 A. 1081. See, also, 5 Am. Law Rev. 720; Perry on Trusts (3d Ed.) §§ 544, 545. Under the English rule, ordinary cash or stock dividends go to the life tenant, while extraordinary dividends are treated as belonging to the corpus and go to the remainderman. Witt v. Steere, 13 Vesey, 363; Bates v. McKinley, 31 Beav. 280; In re Barton Trust, L. R. 5 Eq. 238. The rule has not however, been adhered to in all cases in England. See Gugden v. Alsbury, 63 L. T. R. 576; Ellis v. Barfield, 64 L. T. R. 625; In re Bouch, L. R. 29 Ch. Div. 635. With such divergence of opinion, it is manifest that cogent reasons may be given in support of either of these propositions. We shall not attempt to review the cases cited in support of the different rules. Our duty is performed when we establish a rule for this state which we believe best sustained on principle and by authority. That rule more nearly approximates what is called the American than any other. Under it we start with the motion that all pure dividends, whether in cash or stock or other property, are a part of the income, and, when declared, should go to the life tenant, and not to the remainderman, as it is not a part of the corpus of the property, but a part of the income derived from the use and management thereof. Any dividends, so-called, presumptively belong to the life tenant, as they are, in the absence of a showing to the contrary, assumed to have been divided as profits. If, however, the so-called stock dividends represent the corporate capital—that is, represent nothing but the natural growth or increase in the value of the permanent property, so that there is merely a change in the form of ownership—such stock should go to the remainderman; for in such cases the dividend is a dividend of capital, representing simply an increase in the value of the physical property, good will or other thing of tangible value. This is the modified American rule announced in Spooner v. Phillips, 62 Conn. 62, 24 A. 524, 16 L. R. A. 461; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 40 Am. St. Rep. 189, 19 L. R. A. 173; Williams v. Tel. Co., 93 N. Y. 162; Lord v. Brooks, 52 N. H. 72; Moss' Appeal, 83 Pa. 264, 24 Am. Rep. 164; Thompson on Corp. §§ 2192, 2193. Under this rule it becomes a question of fact as to the actual nature of the dividend. The mere fact that the directors of the corporation call it either one thing or the other is not controlling. The Massachusetts rule has also been adopted by the Supreme Court of the United States, but has been most severely criticised, and the court which first announced it has departed somewhat from the hard and fast principle just announced. Originally the courts of that state held that the form of action taken by the corporation was conclusive; that is to say, if the stock was issued as a capital dividend, this was an end of the inquiry. But this loses sight of the real inquiry as to what is income which should go to the life tenant. As we have said, however, the Massachusetts court has receded somewhat from that position. Heard v. Eldredge, 109 Mass. 258, 12 Am. Rep. 687; Davis v. Jackson, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801. The Georgia decision heretofore cited seems to be based upon a statute of that state. See Code Ga. 1873, § 2256; Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720."—From Kalbach v. Clark [Iowa] 110 N. W. 599.

5. Where a corporation in consideration for property purchased issues its own stock

dends are cumulative until the amount guaranteed is paid to the exclusion of common stock,[6] and do not exclude participation in extra dividends paid on all stock regardless of its character.[7] A guaranty by a third person [8] of annual dividends on stock is impliedly conditioned on the continued existence of the corporation.[9] The question as to when dividends shall be declared may depend upon the terms of the statute,[10] or may not in the discretion of the directors.[11] A stockholder cannot sue for dividends until they have been declared,[12] but the corporation is the debtor of the stockholder as to dividends declared.[13] A mere agreement that dividends shall be declared periodically is enforceable only in equity.[14] Directors are not liable to stockholders for dividends declared until they have become segregated from the corporate funds so as to constitute trust funds in the hands of the directors,[15] a suit in equity against the directors being proper only when they have received the segregated dividends for distribution.[16] The remedy, therefore, for declared dividends in the possession of the corporation is by action at law against the corporation.[17] Dividends may be issued in stock,[18] and while it is a question of fact whether such dividends represent profits or capital,[19] they are presumptively profits.[20] Dividends cannot legally be paid out of capital stock,[21] and when such payment is positively prohibited it cannot be validated by either the action of the directors [22] or the stockholders,[23] and may be recovered back.[24]

and agrees to pay an additional cash consideration of a certain amount with each share so issued, such agreement will not constitute an attempt to guaranty dividends out of profits where the property purchased is worth the whole consideration paid and agreed to be paid. Strickland v. National Salt Co. [N. J. Eq.] 64 A. 982. Charge upon accumulated profits in favor of preferred stock held to give priority in all contingencies except such as are excepted, including dissolution by consolidation. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657.

6. Act March 4, 1850 (P. L. 129), incorporating Lehigh Valley Railroad Co., guaranteeing annual dividends of 10 per cent on preferred stock. Fidelity Trust Co. v. Lehigh Valley R. Co., 215 Pa. 610, 64 A. 829.

7. Fidelity Trust Co. v. Lehigh Valley R. Co., 215 Pa. 610, 64 A. 829.

8. Where defendant sold plaintiff an option on all shares of corporation and agreed to see that plaintiff would receive certain proportion of monthly profits applicable to dividends during life of option plaintiff's right to such dividends was not affected by increase of salary of president of corporation at close of option period and a charge off of profits on account of depreciation of corporation's properties (Miller v. Car Trust Inv. Co., 105 N. Y. S. 5), though agreement provided that disputes between plaintiff and defendant should be settled by corporation's directors (Id.).

9. Columbus Trust Co. v. Moshier, 51 Misc. 270, 100 N. Y. S. 1066.

10. Under by-law providing that trustees may declare dividends upon paid up stock, and that dividends on unpaid stock shall be applied upon subscription therefor, where dividends are declared on paid up stock they accrue also on unpaid stock as matter of course. Gellermann v. Atlas Foundry & Mach. Co. [Wash.] 87 P. 1059.

11. Matter of declaring dividends from surplus is within discretion of directors and not subject to control by courts. Schell v. Alston Mfg. Co., 149 F. 439.

12. Hence cannot recover dividends without allegation that they have been declared. Corgan v. Lee Coal Co. [Pa.] 67 A. 655.

13. Searles v. Gebbie, 115 App. Div. 778, 201 N. Y. S. 199.

14. Corgan v. Lee Coal Co. [Pa.] 67 A. 655.

15, 16. Searles v. Gebbie, 115 App. Div. 778, 101 N. Y. S. 199.

17. Searles v. Gebbie, 115 App. Div. 778, 101 N. Y. S. 199. Such action cannot be joined with suit to restrain directors from illegally increasing capital stock. Id.

18. Kalbach v. Clarke, 133 Iowa, 215, 110 N. W. 599.

19. Kalbach v. Clarke, 133 Iowa, 215, 110 N. W. 599. Stock dividend issued upon increase of capitalization held to represent capital. Id.

20. Kalbach v. Clarke, 133 Iowa, 215, 110 N. W. 599. Burden of proving otherwise is upon party seeking to overcome such presumption. Id.

21. Siegman v. Elec. Vehicle Co. [N. J. Err. & App.] 65 A. 910. Where stock is issued in exchange for property at an overvaluation, a dividend ascertained by reserving for capital the actual value of the property thus paid in is not a dividend out of the the capital stock. Goodnow v. American Writing Paper Co. [N. J. Eq.] 66 A. 607.

22. Action of directors in declaring dividend not conclusive that it was not paid out of the capital stock. Siegman v. Elec. Vehicle Co. [N. J. Err. & App.] 65 A. 910. New board of directors cannot validate the act of their predecessors by declaring, after due investigation, that the dividends were rightfully declared and by refusing to sue. Id.

23. P. L. 1896, §§ 27, 29, providing for reduction of capital stock, does not authorize payment of dividends out of such stock contrary to § 30. Siegman v. Elec. Vehicle Co. [N. J. Err. & App.] 65 A. 910.

24. Action of directors in declaring such dividends being contrary to positive prohibition of P. L. 1896, § 30 Siegman v. Elec. Vehicle Co. [N. J. Err. & App.] 65 A. 910.

Right to inspect the books and papers of the corporation.[25]—Stockholders have a common-law right to inspect the books and records of the corporation at reasonable times and for proper purposes,[26] and even where the right rests on statutes, it is not usually absolute and cannot be exercised for wrongful or frivolous purposes.[27] Where, however, the right is conferred in absolute terms, the purpose of the inspection becomes immaterial.[28] Even where a statement of the purpose of the inspection is essential, it is waived where the refusal is based on other grounds.[29] The right is purely personal to stockholders [30] and does not extend to a mere custodian holding the stock pending litigation in regard to the title thereto.[31] Whether a particular person comes within a statute conferring or defining such right depends, of course, upon the terms of the statute.[32] The stockholder has the right to use an accountant and a stenographer in the course of his inspection.[33] The remedy to enforce an absolute statutory right of inspection is a legal remedy,[34] and the usual remedy to enforce the right of inspection is mandamus.[35] This writ, however, lies only to enable stockholder to protect his interest as such.[36] Where the right to inspect is conferred in absolute terms, a petition for mandamus need not allege the purpose of the examination.[37]

25. See 7 C. L. 900.

26. State v. St. Louis Transit Co., 124 Mo. App. 111, 100 S. W. 1126; Varney v. Baker [Mass.] 80 N. E. 524. St. 1903, p. 433, c. 437, § 30, providing for examination of stock and transfer books, etc., does not enlarge or limit stockholder's right to examine corporation's books for purpose of ascertaining the condition of the corporation. Id.

Note: It was formerly held in England that this right could be exercised, against the will of the managing officers, only when there was a specific dispute about some corporate matter, between the stockholders and the officers. Rex v. Merchant Tailors' Co., 2 B. & Ad. 115. But this rule has been modified by statute. See St. 8 & 9 Vict. c 16, §§ 117, 119 and St. 25 & 26 Vict. c. 89, table A 78. The doctrine has not been adopted in America. The cases which go furthest in that direction holding that, if there is a dispute as to the alleged mismanagement of the corporation, it is enough to entitle the stockholder to an examination of the accounts to see whether there is a ground for an action. Com. v. Phoenix Iron Co., 105 Pa. 111, 51 Am. Rep 184; Phoenix Iron Co. v. Com., 113 Pa. 563, 6 A. 75. According to the general rule in this country, it is not necessary that there should be any particular dispute to entitle the stockholder to exercise this right. Nothing more is required than that, acting in good faith for the protection of the interests of the corporation and his own interests, he desires to ascertain the condition of the company's business. Guthrie v. Harkness, 199 U. S. 199 U. S. 148, 50 Law Ed. 130; In re Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; Huyler v. Cragin Cattle Co, 40 N. J. Eq. 392, 2 A. 274; State v. Pacific Brew & Malt. Co., 21 Wash 451 58 P. 584, 47 L. R. A. 208; Cockburn v. Union Bk., 13 La. Ann. 289; State v. Laughlin, 53 Mo. App. 542; Heminway v. Heminway, 58 Conn. 443, 19 A. 766. See Union Bank v. Knapp, 3 Pick. [Mass.] 96-108, 15 Am. Dec. 181.—From Varney v. Baker [Mass.] 80 N. E. 524.

27. State v. St. Louis Transit Co., 124 Mo. App. 111, 100 S. W. 1126.

28. Hub Const. Co. v. New England Breeders' Club [N. H.] 67 A. 574. Under by-law giving right of inspection to stockholders without restriction, an inspection may be had without regard to the purpose thereof. Wyoming Coal Min. Co. v. State [Wyo.] 87 P. 337.

29. State v. St. Louis Transit Co., 124 Mo. App. 111, 100 S. W. 1126.

30. In re Hastings, 105 N. Y. S. 834.

31. Temporary administrator and residuary legatee under will being contested. In re Hastings, 105 N. Y. S. 834.

32. Record stockholder who acquired stock from owner in order to procure inspection of stock books on own and owner's behalf with view to communication with other stockholders relative to buying or selling stock, such purpose not being hostile to corporation and having no relation to internal affairs, assets, or management of corporation, held entitled to inspection of stock books under Laws 1892, p. 1840 c. 688, § 53. Lawshe v. Royal Baking Powder Co., 54 Misc. 220, 104 N. Y. S. 361.

33. State v. St. Louis Transit Co., 124 Mo. App. 111, 100 S. W. 1126.

34. Not equitable remedy for discovery. Hub Const. Co. v. New England Breeders' Club. [N. H.] 67 A. 574.

35. Varney v. Baker [Mass.] 80 N. E. 524; Wyoming Coal Min. Co. v. State [Wyo.] 87 P. 337; State v. St. Louis Transit Co., 124 Mo. App. 111, 100 S. W. 1126. Petition to enforce right conferred by Pub. St. 1901, c. 148, § 12. Hub Const. Co. v. New England Breeders' Club [N. H.] 67 A. 574 Under definition of mandamus in Rev. St. 1899, § 4194. Wyoming Coal Co. v. State [Wyo.] 87 P. 984.

36. Does not lie in aid of suit by stockholder against directors for damages from false reports whereby plaintiff was induced to become a stockholder. Taylor v. Citizens' Nat. Bk. of Saratoga Springs, 117 App. Div. 348, 101 N. Y. S. 1039.

37. Hub Const. Co. v. New England Breeders' Club [N. H.] 67 A. 574.

Remedies for injuries to stockholders or to the corporation.[38]—A stockholder cannot complain of transactions consummated before he acquires his stock.[39] Fraud destroying the value of stock is actionable,[40] and the right of action is in the stockholders and not the corporation,[41] but no action lies in the first instance in behalf of a stockholder for injuries to the corporation whereby the value of its stock is destroyed.[42] A cause of action in favor of the corporation cannot be joined with one in favor of the stockholder personally,[43] and in the absence of fraud on the part of the defendants a corporation cannot be joined as defendant in a suit by a stockholder against corporate officers.[44] Stockholders must act promptly where the acts complained of are not per se illegal and do not involve moral turpitude.[45] In New Jersey executors and trustees under a will are not liable for losses caused by their holding stock, where they exercise good faith and reasonable discretion in holding the same.[46] An officer suing by virtue of statutory authority to redress corporate wrongs cannot obtain redress for personal grievances.[47]

Stockholders suing for corporation.[48]—Primarily the corporation itself is the proper party to redress its own wrongs and the only one that can do so,[49] but when the directors, after due and proper demand, refuse to sue, a stockholder may sue,[50] unless he is estopped by his own conduct.[51] The right of the stockholder to sue[52] arises only after he has made a demand upon the proper authorities to sue,[53] or when the circumstances are such as to excuse such demand.[54] The complaining stock-

38. See 7 C. L. 901.

39. Boldenweck v. Bullis [Colo.] 90 P. 634.

40. Fraudulent representations inducing plaintiff to unite with defendant in petition for dissolution, in order that defendant might acquire corporation's business. Vogt v. Vogt, 104 N. Y. S. 164.

41. Vogt v. Vogt, 104 N. Y. S. 164.

42. Dudley v. Armenia Ins. Co, 115 App. Div. 380, 100 N. Y. S. 818.

43. Brown v. Utopia Land Co., 118 App. Div. 364, 103 N. Y. S. 50.

44. Suit for accounting as to corporation's transactions for reissue of smaller stock certificates to complainant, ratification of issue of stock dividend, release of stock from lien, issue of additional stock dividend, and for damages. Schell v. Alston Mfg. Co., 149 F. 439. The facts constituting fraud must be alleged. Id.

45. That directorate of grantor was largely same as that of grantee and that stock of grantee was accepted in lieu of cash. Boldenweck v. Bullis [Colo.] 90 P. 634.

46. P. L. p. 236. Brown v. Brown [N. J. Eq.] 65 A. 739.

47. Suit by officer under Rev. St. 1898, §§ 32, 37, to redress alleged fraudulent wrongs committed by other officers. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied, Id., 130 Wis. 594, 110 N. W. 798.

48. See 7 C. L. 903.

49. Fraudulent and ultra vires acts of officers. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202. Where it does not appear that, at the time of the institution of the suit, a majority of the directors and stockholders are interested adversely to the company, the right of a stockholder to sue is doubtful. Kessler v. Ensley Land Co. [C. C. A.] 148 F. 1019.

50. Action against former director to recover dividends paid out of capital stock. Siegman v. Elec. Vehicle Co. [N. J. Err. & App.] 65 A. 910.

51. Cannot sue to avoid a transaction in favor of which his stock was voted before he acquired it. Boldenweck v. Bullis [Colo.] 90 P. 634. Delinquent stockholders cannot maintain a suit to compel payment by other delinquents. Suit dismissed without prejudice to suit by the corporation or in its behalf, after assessment or calls duly made, or to any suit in behalf of creditors, or by or in behalf of the corporation by any stockholders other than complainants. Sivin v. Mutual Match Co. [N. J. Eq.] 66 A. 921. Fact that stockholder had lost money speculating in wheat futures did not estop him from calling officers to an accounting in equity for funds of corporation lost in same way. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202.

52. Where in suit to determine plaintiff's status as a stockholder and for an accounting from officers only the former question was litigated and decided, the plaintiff's right to sue for the corporation was not res adjudicata. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202.

53. Brown v. Utopia Land Co., 118 App. Div. 364, 103 N. Y. S. 50. Suit for dissolution on account of misconduct of officers. Ross v. American Banana Co. [Ala.] 43 So. 817.

54. Ross v. American Banana Co. [Ala.] 43 So. 817. Where officers guilty of wrongs complained of constitute majority of directors and control majority of stock, no denial necessary. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202. Where directors are participants in fraud constituting basis of suit, demand upon them to sue is not necessary. Equity rule 94 does not apply in such case. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159. The mere fact that defendant owned large majority of stock is not sufficient to excuse demand. Law v. Fuller, 217 Pa. 439, 66 A. 754. Where stockholder acquiesced in unauthorized assigna-

holder must allege and prove such demand [55] or such facts as will excuse the failure to make the demand.[56] A general allegation of a demand is insufficient.[57] Failure to allege such demand is not cured by the filing of a cross bill by the corporation and the defendant's answer thereto, where the relief sought by the bill cannot be granted under the allegations of the cross bill.[58] These rules, however, do not apply to suits involving rights antedating the formation of the corporation.[59] Stockholders suing for their corporation can assert only the rights and equities which the corporation, if willing to sue, could assert,[60] and any defenses are available which would be available against the corporation.[61]

Costs and allowances.[62]—Where an officer is authorized by statute to sue to redress corporate wrongs, costs may be allowed against the corporation.[63]

Receivers and injunctions.[64]—In certain cases a receiver will be appointed at the instance of a minority stockholder,[65] but a receiver will not be appointed contrary to the charter and statutory right of the stockholders to have the affairs of the corporation liquidated in a particular way,[66] where such proceedings offer the petitioning stockholder adequate remedy.[67] Misappropriations by officers may be considered in determining the propriety of appointing a receiver,[68] and mismanagement is sometimes made a ground for receivership.[69] From a stockholder's standpoint an overissue of stock is not ground for a receiver.[70] A receivership on account of insolvency may be in conflict with the national bankruptcy law.[71] When special relief is sought

ment of corporation's contract by its president, until it became apparent that such contract was valuable, and then acquired a large interest in the corporation, he could not avoid the necessity of making demand upon proper authorities to sue to repudiate the assignment on the ground that he had no time to make such demand or convene the directors. Tevis v. Hammersmith [Ind. App.] 81 N. E. 614.

55. Law v. Fuller, 217 Pa. 439, 66 A. 754; Brown v. Utopia Land Co, 118 App. Div. 364, 103 N. Y. S. 50. Suit to cancel stock as having been issued without consideration. Vogeler v. Punch [Mo.] 103 S. W. 1001.

56. Law v. Fuller, 217 Pa. 439, 66 A. 754. As that defendant whose stock is sought to be canceled is in control of the corporation. Vogeler v. Punch [Mo.] 103 S. W. 1001.

57. Facts showing bona fide attempt to get the corporation to redress the wrong must be specifically alleged. Vogeler v. Punch [Mo.] 103 S. W. 1001.

58. Where bill alleged fraud in issue of stock to defendant and sought cancellation of the stock and cross bill alleged no fraud. Vogeler v. Punch [Mo.] 103 S. W. 1001.

59. Suit by assignees of promoter to compel another promoter to deliver stock agreed to be delivered to assignor. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606.

60. Kessler v. Ensley Land Co. [C. C. A.] 148 F. 1019. In suit by executor of deceased stockholder against coexecutor to recover salary paid latter as president of corporation, claims of plaintiff to estate against defendant could not be adjudicated. Hirsch v. Jones, 115 App Div. 156, 100 N. Y. S. 687.

61. Kessler v. Ensley Land Co. [C. C. A.] 148 F. 1019.

62. See 7 C. L. 905.

63. In suit by officer under Rev. St. 1898, §§ 3237-3239, to redress fraudulent wrongs by officers, corporation held liable for attorney's fees where no case is made out. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied, 130 Wis. 594, 110 N. W. 798.

64. See 7 C. L. 905.

65. To prevent corporations being wrecked by directors and majority stockholders in their own interest. Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S. W. 167.

66. Expressly so provided by Act, 1898, No. 159, p. 312. Russell v. Citizens' Ice Co., 118 La. 442, 43 So. 44. Receivership refused where affairs were in hands of commissioners appointed by stockholders pursuant to charter authority. Id.

67. Receiver will not be appointed at termination of liquidation by commissioners appointed by stockholders pursuant to statutory authority, since stockholders have adequate remedy by action in own name against commissioners for accounting. Russell v. Citizens' Ice Co., 118 La. 442, 43 So. 44.

68. Leigh v. National Hollow Brake-Beam Co., 223 Ill. 407, 79 N. E. 318.

69. Act No. 159, p. 312, of 1898, § 1 par. 2, authorizing receivership on account of mismanagement by officers, applies only to going concerns and not to one in hands of liquidators appointed by stockholders pursuant to charter authority. Russell v. Citizens' Ice Co., 118 La. 442, 43 So. 44.

70. Overissue of stock not alone ground for receivership at instance of pledgee of original stock who received it prior to such overissue. Virginia-Carolina Chemical Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 54 S. E. 929.

71. Pub. Laws 1905 p. 85, c. 85, providing for receiverships for insolvent corporations at instance of stockholders being in effect an insolvency law and hence ineffective on account of the Federal bankruptcy act, a receivership thereunder will be set aside at instance of attaching creditor of corporation. Moody v. Port Clyde Development Co. [Me.] 66 A. 967.

against a portion only of the defendants, the cause of complaint against them should be distinctly and separately stated,[72] and even then must stand the test of multifariousness.[73] The general rules as to amendment of a bill for a receiver apply.[74]

The corporation is a proper party to a bill to enjoin the holders of certain stock from exercising the rights of stockholders and to require the stock to be returned to the treasury.[75] A bill for an injunction and other relief must stand the test of multifariousness.[76]

Contribution between stockholders.[77]—A mutual agreement between stockholders to advance money for the payment of corporate debts must specify the time of payment [78] and be accepted by the corporation,[79] and can be enforced only on the terms on which it is made,[80] and the same is true as to an agreement to advance money to the corporation.[81]

(§ 14) *E. Transfer of shares.*[82]—Certificates of stock may be rendered negotiable by indorsements of transfer and power of attorney in blank.[83] Delivery and acceptance are necessary to consummate a transfer of stock.[84] In determining whether there has been a sale by a broker, the customs of brokers will be considered.[85] An assignor of stock does not warrant that the corporation is de jure,[86] and a contract

72. Special relief against some of defendants asked for on final hearing refused when main relief was refused. Pierce v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 65 A. 1005. Amendment on final hearing bringing in grievances against portion of defendants arising after filing of bill refused. Id.

73. Pierce v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 65 A. 1005.

74. Amendment on final hearing seeking injunction against misappropriation of assets refused. Pierce v. Old Dominion, Copper Mining & Smelting Co. [N. J. Eq.] 65 A. 1005.

75. Dacovich v. Canizos [Ala.] 44 So. 473.

76. Bill by stockholder for accounting as to corporation's transactions, reissue of smaller stock certificates, ratification of issue of stock dividends, issue of further stock dividends, accounting and damages, release of stock from lien, injunction against selling stock, and appointment of receiver to wind up corporation, held multifarious. Schell v. Alston Mfg. Co., 149 F. 439.

77. See 7 C. L. 907.

78, 79. Carbon Spring Water Ice Co. v. Hawk, 29 Pa. Super. Ct. 13.

80. Agreement to advance money on corporation's "note" is not enforceable on a call for the promised advance to be secured by a note "payable at the option of the company." Carbon Spring Water Ice Co. v. Hawk, 29 Pa. Super. Ct. 13.

81. Carbon Spring Water Ice Co. v. Hawk, 29 Pa. Super. Ct. 13.

82. See 7 C. L. 907.

83. Otis v. Newcomb [Colo.] 88 P. 167.

84. Delivery of order on corporation for shares of drawer in its possession to officers thereof held not delivery and acceptance so as to take sale of such shares to such officers out of statute of frauds. McIlroy v. Richards, 148 Mich. 694, 112 N. W. 489. Title not transferred by mere delivery to secretary of corporation of list of persons to whom owner wished stock to go at her death, and assignments to such persons endorsed on certificates, when owner retained control over such certificates and the stock until her death. Noble v. Learned [Cal. App.] 87 P. 402. Indorsement of the certificate by the owner and delivery to the transferrer is essential to the transfer of the legal title to stock. Haynes v. Brown, 18 Okl. 389, 89 P. 1124.

85. Fact that broker on reporting sale of stock transferred same to his clerks, who had no real interest in the stock, and that the stock, which was not transferred on corporation's books, was finally transferred by the broker to the pledgee who had placed it with him, did not show that there was no bona fide sale in the first instance, where it appeared that it was the custom among brokers to thus indorse stock to their clerks and then to sell it without disclosing their principal, and hence owner, having been credited with proceeds of sale, was not entitled to accounting from pledgee as to such stock. Smith v. Becker, 129 Wis. 396, 109 N. W. 131.

86. De facto existence sufficient to sustain contract for sale of shares. Marshall v. Keach, 227 Ill. 35, 81 N. E. 29.

Note: In Herter v. Eltzroth, 111 Ind. 159, it was held that there was no implied warranty on the part of the vendor of certificates of stock that the corporation issuing them was a corporation de jure, that, if the corporation was a de facto one, that was sufficient to relieve the vendor from liability as to any implied warranty as to the existence of the corporation. To the same effect is 26 Am. & Eng. Ency. of Law (2d Ed.) p. 258. The Indiana court cited, in support of its holding, Otis v. Cullum, 92 U. S. 447, 23 Law. Ed. 496, where, in a case involving the sale of authority, in passing on the question of implied warranty, the United States supreme municipal bonds issued without statutory court held: "The seller is liable ex delicto for bad faith, and ex contractu there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this." The supreme court of Indiana, after this quotation from the Otis Case, supra, said: "A less liberal rule, clearly, cannot be applied to the sale

of sale of shares in a de facto corporation may be specifically enforced.[87] As security for the payment of the purchase price of stock, the dividends thereon may be reserved to the seller by the contract of sale.[88] In a proper case an action for deceit will lie against the vendor of stock.[89]

Mode of transferring shares, registration, new certificates.[90]—Stock transfers may be regulated by by-laws,[91] subject, however, to the rights of persons holding and dealing in such stocks,[92] including the right to transfer them as property without unreasonable restraint.[93] As against third parties the transfer must usually be registered on the corporation's books.[94] Where registration is necessary to pass the title to stock,[95] if a transferee demands the registration of such transfer [96] a wrongful refusal of the corporation to register the transfer constitutes a conversion [97] for which the party entitled to such registration may recover his damages,[98] and a tender during the trial of such an action of the certificates demanded is no defense

and transfer of certificates of stock." This court, in Hinkley v. Champaign Nat. Bk., 216 Ill. 559, 75 N. E. 210, held that the assignment of a judgment carries an implied warranty that the judgment is genuine, that it was entered in due form of law, but that there is no implied warranty that the judgment was impregnable to attack, and we there quoted with approval from the Otis case supra, the following: "If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it is given. If not taken, he cannot occupy the vantage ground upon which it would have placed him." In Higgins v. Illinois Trust & Sav. Bk., 193 Ill. 394, 61 N. E. 1024, we held that the vendor of stock in a corporation impliedly warranted that the same was genuine, and that he was then the owner thereof and authorized to transfer title, and that, if the assignee desires further protection, he must exact a special guaranty.—From Marshall v. Keach [Ill.] 81 N. E. 29.

87. Where corporation had merely failed to file certificate as required by Hurd's Rev. St. 1905, p. 497, c. 32, § 4, but corporation was operating as such, had no debts and could become de jure by filing certificate. Marshall v. Keach, 227 Ill. 35, 81 N. E. 29.

88. Provision in contract of sale of stock that seller shall own dividends held intended merely to secure payment of notes given for purchase price, and hence not to prevent title from passing or to relieve purchaser from liability on notes. Commercial & Savings Bk. of San Jose v. Pott, 150 Cal. 358, 89 P. 431.

89 Complainant held not deceived. Van Cleve v. Radford [Mich.] 14 Det. Leg. N. 376, 112 N. W. 754. In action for deceit allegations of false representations as to capital stock and payments thereon and as to net profits not sustained by evidence of false statement of earnings in that expenses were concealed, and amendment conforming declaration to proof stated new cause of action. Id.

90. See 7 C. L. 909.

91, 92 Miller v. Farmers' Milling & Elevator Co. [Neb.] 110 N. W. 995.

93. Miller v. Farmers Milling & Elevator Co. [Neb.] 110 N W. 995. By-law limiting number of shares which one may hold or forbidding transfer to non-stockholders held unreasonable restraint. Id.

Charter provisions authorizing corporation to render interests of stockholders transferable held not to render transferability of stock dependent upon corporate action, but to impress the stock with such quality as consequence of incorporation. See Comp. St. 1903, c. 16, § 124, cl. 5. Miller v. Farmers' Milling & Elevator Co. [Neb.] 110 N. W. 995.

94. Haynes v. Brown, 18 Okl. 389, 89 P. 1124. Under Mills' Ann. St. § 508, requiring entry of transfer on corporation's books within 60 days after such transfer as condition to its validity except with reference to liability to creditors, transferee who failed for two years to have transfer made on corporation's books obtained no title or lien whatever as against subsequent pledgee of original transferror, and could not even question validity of such pledge. Pueblo Sav. Bank v. Richardson [Colo.[89 P. 799. Under Civ. Code, § 472, making transfer on corporation's books necessary to validity of transfer except as between parties, a transferee without transfer on books gets only equitable title and is chargeable with fraud of transferror's officers, in purchasing stock with corporate funds. Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co., 35 Mont. 351, 89 P. 66.

95. Such is case in Iowa. Dooley v. Gladiator Consol. Gold Mines & Milling Co. [Iowa] 109 N. W. 864.

96. Demand sufficient where made on secretary who referred plaintiff to manager, and demand was thereafter made on latter on street in front of his office and he declared absolutely that the transfer could not be registered. Dooley v. Consol. Gold Mines & Milling Co. [Iowa] 109 N. W. 864. Formal presentation of transfer in manager's office waived by failure of manager to object to time and place of demand. Id.

97. Dooley v. Gladiator Consol. Gold Mines & Milling Co. [Iowa] 109 N. W. 864.

98. May elect to sue for damages instead of resorting to mandamus to compel registration. Dooley v. Gladiator Consol. Gold Mines & Milling Co. [Iowa] 109 N. W. 864.

Measure of damages is full value of stock at time of demand for registration with interest to date of trial. Dooley v. Gladiator Consol. Gold Mines & Milling Co. [Iowa] 109 N. W. 864. Market value is value stock was selling for at time of demand for registration of transfer. Id.

to the previous conversion.[99] The cause of action, however, for a wrongful refusal to register a transfer is against the corporation and not the officer upon whom the demand was made.[1] Mere lapse of time will not bar the right to have stock transferred on the corporation's books.[2]

Pledge or mortgage of shares.[3]—The pledgor has no cause of action against the pledgee for injuries to the corporation whereby the stock when sold under the pledge had no value.[4] Where stock has been rendered negotiable by endorsement, a pledgee receiving it from the holder without notice acquires a valid title.[5] The pledgee is entitled to the aid of the courts to prevent the dissipation of the corporation's assets.[6]

§ 15. *Management of corporations. A. Control of corporation by the stockholders or members.*[7]—Stockholders acting in individual capacity cannot bind corporation,[8] though they own the majority of the stock,[9] or control the corporation.[10] but all the stockholders may, by joint individual contract, dispose of the property and franchises of their corporation.[11] Stockholders as such are not liable for mismanagement of the corporation,[12] but where the control of a corporation is reposed entirely with the common stockholders, they occupy a fiduciary relation towards the preferred stockholders.[13]

Power of the majority.[14]—Individual stockholders are not trustees for each other, but each may, as a member of the general corporate body, exercise his individual right and vote equally with other stockholders on matters in which he is interested.[15] The majority stockholders, therefore, have the right to control the busi-

99. Dooley v. Gladiator Consol. Gold Mines & Milling Co. [Iowa] 109 N. W. 864.

1. Transfer agent is not liable to the persons entitled to a transfer of stock for delay in making such transfer. Dunham v. City Trust Co., 115 App. Div. 584, 101 N. Y. S. 87. Where president refused to countersign new certificates sent him for signature and refused to deliver same to transferee who had surrendered old certificates to corporation. Cooley v. Curran, 54 Misc. 572, 104 N. Y. S. 751; Id., 54 Misc. 221, 104 N. Y. S. 424.

2. Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co., 35 Mont. 351, 89 P. 66.

3. See 7 C. L. 910.

4. Dudley v. Armenia Ins. Co. 115 App. Div. 380, 100 N. Y. S. 818.

5. One receiving stock indorsed in blank by owner from broker as collateral for loan to latter obtained good title against purchaser from owner who left it with broker for safe keeping. O'Mara v. Newcomb [Colo.] 88 P. 167.

6. Andrews Co. v. National Bank of Columbus [Ga.] 58 S. E. 633.

7. See 7 C. L. 911.

8. Liebhardt v. Wilson [Colo.] 88 P. 173; National Hollow Brake-Beam Co. v. Chicago R. Equipment Co., 226 Ill. 28, 80 N. E. 556; Lawson v. Black Diamond Coal Min. Co. [Wash.] 86 P. 1120. Can bind corporation only when acting as an organized body at a duly constituted meeting. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854.

9. National Hollow Brake-Beam Co. v. Chicago R. Equipment Co., 226 Ill. 28, 80 N. E. 556. One stockholder cannot accept settlement of corporate claims against another stockholder though the two own all the stock. Petersen v. Elholm, 130 Wis. 1, 109 N. W. 76.

10. Fact that stockholder controlled corporation, and that president was his personal agent, did not make stockholder agent of president or corporation so as to bind latter by his acts. Lawson v. Black Diamond Coal Min. Co. [Wash.] 86 P. 1120.

11. Corporation not necessary party to suit to specifically enforce such a contract. McCullough v. Sutherland, 153 F. 418. Question whether president was authorized to sell corporation's land held immaterial in suit for specific performance, where, of one hundred shares, the president held ninety-eight, corporation's attorney held one and other two held by president's secretary without consideration. Roberts v. Hilton Land Co. [Wash.] 88 P. 946.

12. Brown v. Utopia Land Co., 118 App. Div. 364, 103 N. Y. S. 50.

13. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

14. See 7 C. L. 911.

15. Corporation holding majority of stock in another may vote to have latter consolidated with former. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657. See ante, § 13. Succession of corporations; reorganization; consolidation. Mere fact that object of one in purchasing majority stock pooled for sale was to stop litigation by corporation against him, and to quiet his possession of property claimed by the corporation, was not sufficient to show fraud on his part or a conspiracy with directors and majority stockholders to deprive the company of its property. Hallenborg v. Cobre Grande Copper Co., 200 U. S. 239, 50 Law. Ed. 458. Pooling of majority of stock for sale, and its sale to one whose purpose was to stop litigation by corporation against him, and to quiet his possession of land claimed by corporation, held not fraud on corporation or minority stockholders where sale was made in good faith on advice of counsel, and the litigation had already, so far as it had been decided, been decided against corporation, and company's attorney

ness and policies of the corporation,[16] and the bona fide exercise of such right will not be interfered with by the courts.[17] The right of the majority either originally to direct or to affirm proceedings in which the directors or the majority are interested is subject, however, to the limitations imposed by the corporation's charter,[18] and to the qualification that they will not be allowed to act unjustly or unfairly to the injury of the minority,[19] and this limitation and qualification will be enforced by equity.[20] The minority, however, may waive their rights.[21] Fraud between one contracting with the majority and the officers through whom they act is not available to the objecting minority where such fraud does not enter into the inducement to the majority to act.[22]

The right to expel members [23] and the right to prevent illegal voting [24] are treated elsewhere.

(§ 15) *B. Dealings between a corporation and its stockholders.*[25]—Stockholders are not precluded from dealing with the corporation.[26] In a suit against a stockholder for conversion of corporate assets, any evidence is admissible which tends to show acquiescence by the corporation in the transaction,[27] or the bona fides thereof.[28]

(§ 15) *C. By-laws.*[29]—Express authority is not essential to the right to make by-laws,[30] but, where a corporation attempts to enforce a by-law involving a

was of opinion that it could not succeed therein. Id.

16. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202.

17. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202. Will not interfere on grounds of mere business policy. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied, Id., 110 N. W. 798. Ratification of sale of property by officers to corporation held not shown to be fraudulent. Id.

18. Robinson v. Holbrook, 148 F. 107.

19. Cannot divide assets among themselves to exclusion of minority. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657. Cannot, against consent of minority, lawfully apply the corporation's funds to alleged debts which it does not owe. Jacobs v. Morgenthaler [Mich.] 14 Det. Leg. N. 307, 112 N. W. 492.

20. Rule that courts will not interfere with internal management of corporations does not apply to matters ultra vires or prohibited by positive law. Siegman v. Elec. Vehicle Co. [N. J. Err. & App.] 65 A. 910. Receivership. Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S. W. 167. See ante, § 14D subd. Receivers and Injunctions. Right to have election held according to law and to cumulate their votes. West Side Hospital v. Steele, 124 Ill. App. 534. See post, this section, subsection Corporate Meetings and Elections. Purchase of stock by another corporation restrained at instance of minority stockholders on ground that effect would be to destroy the selling corporation. Dunbar v. American Tel. & T. Co., 224 Ill. 9, 79 N. E. 423. Creation of holding company with authorized capital largely in excess of the original corporation and transfer of properties, including stock, of latter to former, restrained by temporary injunction. Robinson v. Holbrook, 148 F. 107.

21. Minority stockholder bound by waiver of rights under contract by compromise of dispute arising thereunder. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026. Change in regard to depositary of securities to secure rentals of property leased by corporation, ratified by failure to object when such change was reported by president at regularly constituted meeting. Hill v. Atlantic & N. C. R. Co., 143 N. C. 93, 55 S. E. 854.

22. Sale of majority of stock to one whose purpose was to stop litigation against him, and to quiet his possession of land claimed by corporation, not rendered fraudulent by compensation paid to company's president who made and its attorneys who advised the sale, when such payments did not constitute an inducement to stockholders to sell. Hallenborg v. Cobre Grande Copper Co., 200 U. S. 239, 50 Law. Ed. 458.

23. See ante, this section, subsection A. Membership in Corporations in General.

24. See post, § 15E, The Right to Vote.

25. See 7 C. L. 911.

26. Civ. Code, § 309, prohibiting the declaring of dividends except from surplus profits, does not prevent transfer of corporation's property to stockholder for adequate consideration. Robinson v. Muir [Cal.] 90 P. 521.

27. In action by receiver against stockholder for conversion of assets, evidence was admissible to show that no action had been brought against other stockholders involved in same transaction. Jacobs v. Morganthaler [Mich.] 14 Det. Leg. N. 307, 112 N. W. 492.

28. It was proper to show that before the appropriation of assets to certain debt, which was charged as conversion, sufficient funds had been placed in hands of secretary to pay all debts except those due to consenting stockholders. Jacobs v. Morganthaler [Mich.] 14 Det. Leg. N. 307, 112 N. W. 492.

29. See 7 C. L. 911.

30. Dental association with social features has implied power. Bryant v. District of Columbia Dental Society, 26 App. D. C. 461.

forfeiture of vested rights, it must show authority under its charter or express legislative power to declare the forfeiture.[31] In all cases, statutory requirements must be complied with.[32] The right rests usually with the stockholders.[33] Stockholders are charged with notice of by-laws.[34]

(§ 15) *D. Corporate meetings and elections.*[35]—Annual or stated meetings are prima facie presumed to have been duly constituted.[36] Irregularities cannot be complained of by one having no right to vote,[37] and a stockholder may waive his right to object to transactions at an irregularly constituted meeting,[38] and so also even as to some matters connected with the calling of the meeting, but failure to object does not waive the right to have the voting done and counted in a legal manner.[39] Irregularity in method of voting an adjournment of a duly constituted meeting will not sustain the validity of a meeting by dissenters regardless of such adjournment.[40] Knowledge of the chairman as to how a voter wishes to vote will not cure defects in the ballot.[41] Where one is given an opportunity to correct his ballot, he cannot complain that it was rejected for fatal defects therein.[42] The principal is bound by the mistakes of his proxy in voting.[43]

Notice.[44]—Notice must be given to each stockholder of the time and place of meeting,[45] unless it is waived,[46] or unless the time and place are definitely fixed by statute,[47] charter,[48] or usage.[49] Notice of an annual meeting will be presumed in the absence of a contrary showing.[50] Notice may be sent to the persons in whose name the stock is registered.[51] Notice of a special meeting must specify the busi-

31. March v. Fairmount Creamery Ass'n, 32 Pa. Super. Ct. 517. Stock cannot be forfeited for violation of a by-law enacted subsequently to the acquisition of such stock by the owner thereof and not consented to by him. Id.

32. By-laws adopted by executive committee of mutual insurance company relating to election of directors held invalid in absence of publication required by General Corporation Law, § 29, Laws 1892, p. 1811, c. 687, where by-laws are adopted by directors. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 N. Y. S. 465.

33. Sole power to adopt by-laws for management of mutual insurance company is in policyholders under Laws 1892, p. 2013, c. 690, § 209. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 N. Y. S. 465.

34. Richardson v. Devine, 193 Mass. 336, 79 N. E. 771.

35. See 7 C. L. 912.

36. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854.

37. One not having such title as would entitle him to vote stock could not complain of irregularity in compliance with Laws 1892, p. 1831, c. 688, § 29, requiring the keeping of stock books. In re Utica Fire Alarm Tel. Co., 115 App. Div. 821, 101 N. Y. S. 109.

38. Where he delayed for more than year in making objection to lease by corporation, and lessee had incurred expenses, and rights of third parties had intervened. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854. Requirement that in calling a meeting to vote on change of charter the directors must pass a resolution recommending such change held substantially complied with where call was made without such recommendation, but all the directors and stockholders were present at the meeting, and a majority of the directors voted for the change. Bernstein v. Kaplan [Ala.] 43 So. 581.

39. In re Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

40. Where adjournment was declared by [illegible] viva voce vote according to custom, though by-laws provided for voting by shares, stockholders who thereupon organized a meeting and revoked the adjournment held dissenters though in majority, and officers elected at such meeting could not successfully claim title to office as against those holding over by reason of the adjournment. Schmidt v. Pritchard [Iowa] 112 N. W. 801.

41, 42, 43. In re Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

44. See 7 C. L. 912.

45. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854.

46. As by presence at meeting in person or by proxy. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854. Waived by presence of all stockholders in person or by proxy, though required by statute, § 1320, Rev. St. 1899, as amended by Laws 1903, p. 124. In re Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502. Unless waived by laches. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854. No waiver of notice where stockholder was not present, though attorneys representing him in subsequent proceedings to vacate the election did appear at the meeting, such attorneys, however, being themselves stockholders and not assuming to represent complainant at the meeting. In re Keller, 116 App. Div. 58, 101 N. Y. S. 133.

47, 48, 49. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854.

50. Hill v. Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854.

51. Where one acquiring stock as administrator of his father did not have it transferred to him on the corporation's books, and

ness to be transacted,[52] and so also where such specification is required by statute,[53] and when such specification is necessary, business not specified cannot legally be transacted.[54] Several matters may be covered by a single notice.[55] Irregularities in regard to notice may be cured by action taken at a subsequent duly constituted meeting.[56] Expenses reasonably necessary to insure to all stockholders notice of a special meeting of stockholders are properly chargeable to the corporation,[57] but not so as to notices designed to secure control of the corporation to a particular set of directors.[58]

Elections.[59]—Elections must be held at a duly authorized and constituted meeting of stockholders,[60] and the minority are entitled to representation. All irregularities in corporate elections, and even the legality thereof, as well as the legal qualifications of directors, are settled by the election so far as collateral attacks are concerned,[62] but equity will enforce the right to have an election legally conducted.[63] The right to review corporate elections is sometimes conferred by statute,[64] but the court cannot, in such proceedings, determine the equitable title to stock which would not affect the right to vote it.[65] The right to invoke judicial determination of whether there was any right to hold any election at all is not affected by the prob-

gave no specific directions as to where notices to him as a stockholder should be sent, notice to the father at latter's address was held sufficient. Dana v. American Tobacco Co. [N. J. Eq.] 65 A. 730. See, also, Beling v. American Tobacco Co. [N. J. Eq.] 65 A. 725.

52. Election at special meeting, notice of which did not refer to election, held invalid. Hall v. New York, etc., R. Co., 27 R. I. 525, 65 A. 278.

53. Under Acts 1903, p. 335, § 46, providing that notice of meeting to increase capital stock or bonded indebtedness shall state what increase is proposed to be made in such stock or indebtedness, and that on such notice an increase may be made equal to or less but no greater than the amount so stated, a notice specifying the maximum amount of the proposed increase is sufficient. Palliser v. Home Tel. Co. [Ala.] 44 So. 575.

54. Notice of annual meeting which did not specify election of directors held not notice of election. In re Empire State Lodge, 53 Misc. 344, 118 App. Div. 616, 103 N. Y. S. 465.

55. Under Acts 1903, p. 335, § 46, authorizing increase of capital stock and bonded indebtedness, a single notice is sufficient for both purposes. Palliser v. Home Tel. Co. [Ala.] 44 So. 575.

56. Transactions had at former meetings ratified at subsequent meeting. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854. Acceptance of president's report of transactions at prior meeting held ratification of such transactions. Id.

57. Expense of published notice where mailed notice would not have insured actual notice of meeting at which matters of special importance involving control of corporation were involved. Lawyers' Adv. Co. v. Consolidated R. Lighting & Refrigerating Co., 187 N. Y. 395, 80 N. E. 199.

58. Published notices designed to secure proxies to faction contending for control. Lawyers' Adv. Co. v. Consolidated R. Lighting & Refrigerating Co., 187 N. Y. 395, 80 N. E. 199.

59. See 5 C. L. 805.

60. Where by-laws authorized election of directors at annual meeting, and provided that special meetings might be held on call and notice to stockholders, or by unanimous consent, an election at special meeting held without notice or unanimous consent was invalid. Dunster v. Bernard's Land & Sand Co. [N. J. Law.] 65 A. 123.

61. Adjournment of annual meeting before election of directors, thus continuing the incumbents in office so as to allow them to elect the officers of the corporation and thus exclude the minority stockholders from representation on directory, which they could have secured by cumulation of votes on one candidate, held illegal. West Side Hospital v. Steele, 124 Ill. App. 534.

62. Jones v. Bonanza Min. & Mill. Co. [Utah] 91 P. 273.

63. Method of holding election and counting votes. West Side Hospital v. Steele, 124 Ill. App. 534. Bill held not to involve merely the legality of an election but the right of minority stockholders to have an election conducted according to law, and to cumulate their votes thereat. Id.

64. Laws 1892, p. 1811, c. 687, § 27, authorizing supreme court to review elections of "any corporation," includes mutual insurance companies. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 N. Y. S. 465. Stockholders or members may in state proceedings under Laws 1892, p. 1811, c. 687, § 27, to review corporate elections, remedy under Code, Civ. Proc., § 1948, at instance of attorney general not being exclusive of right of stockholders in this regard. Id. Requirement of Laws 1892, p. 1811, c. 687, § 27, that **notice of proceedings** in supreme court to review corporate election must be given to "adverse party or to those affected thereby," is complied with by notice to corporation and to directors whose election is challenged. Id. Objections to election not waived by failure to specify them in notice or motion under Laws 1892, p. 1810, c. 687, § 27, to set aside election, General Rules of Practice, § 37, not being applicable to such a case. In re Keller, 116 App. Div. 58, 191 N. Y. S. 132.

65. In re Utica Fire Alarm Tel. Co., 115 App. Div. 821, 101 N. Y. S. 109.

able outcome of a new election.[66] Failure to attend an illegal election will not estop a stockholder from attacking the same.[67] The method of voting prescribed for elections must be followed in voting upon a motion to set aside a previous election.[68] Where stockholders are allowed one vote for each share and to divide their votes between different candidates or cast them all for one, a stockholder may write upon his ballot the names of the persons he wishes to vote for and the number of votes which he wishes to cast for each,[69] and, unless the number of votes wished to be cast for each of the persons named is thus named, the ballot cannot be counted.[70] An election is not necessarily invalidated by the illegal voting of stock.[71]

(§ 15) *E. The right to vote.*[72]—The right to vote cannot be restricted by the stockholders in meeting.[73] Illegal voting may be restrained.[74] Stockholders are necessary parties to a suit to restrain the voting of their stock[75] unless it appears that they occupy such a position as necessarily to be bound by the decree when rendered.[76] The right to question one's right to vote may be precluded under the doctrine of res adjudicata.[77] The owner of pledged stock is sometimes granted the right to a proxy to vote it,[78] but a trustee of stock to secure a debt cannot be compelled to give proxies to the owner when the stock is not in the name of the trustee,[79] and when he does give them he may limit them so as to prevent their being used against the interests of the trust.[80] A seal is not essential to a proxy to vote for officers at a corporate election.[81]

(§ 15) *F. Appointment, election, and tenure of officers.*[82]—Eligibility may be dependent upon the performance of statutory conditions.[83] Where a resolution

66. As that it would result in election of same officers. In re Empire State Supreme Lodge, 53 Misc. 344, 103 N. Y. S. 465. Election set aside for failure to give notice, required by statute and by-laws, though it appeared that result would be same on new election. In re Keller, 116 App. Div. 58, 101 N. Y. S. 133.

67. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 N. Y. S. 465.

68. Under Rev. St. 1899, § 1320, vote must be by shares and not by heads. In re Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

69, 70. In re Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

71. Election not affected by voting of certain shares in favor of prevailing side where such side would have prevailed without such shares because the opposing side were not entitled to vote them. In re Utica Fire Alarm Tel. Co., 115 App. Div. 821, 101 N. Y. S. 109.

72. See 7 C. L. 913.

73. No right to limit voters to those who have paid certain amount to stock. Smith v. Burns Boiler & Mfg. Co. [Wis.] 111 N. W. 1123.

74. Voting of shares by another corporation having no power to hold them enjoined at instance of minority stockholders. Dunbar v. American Tel. & T. Co., 224 Ill. 9, 79 N. E. 423. Sale of stock to another corporation enjoined on ground that purchase by latter was ultra vires and void, and hence that such sale was in violation of minority stockholder's right to have only legal holders of stock vote the same. Id.

75. Jones v. Nassau Suburban Home Co. 53 Misc. 63, 103 N. Y. S. 1089.

76. Will not be presumed that stockholders who are directors at time of suit will be such when decree is entered. Jones v. Nassau Suburban Home Co., 53 Misc. 63, 103 N. Y. S. 1089

77. Determination of ownership of stock in proceedings instituted by stockholder for that purpose held res adjudicata as to right to vote such stock in subsequent suit by corporation where the parties to the first suit owned substantially all the stock. Leigh v. National Hollow Brake-Beam Co., 224 Ill. 76, 79 N. E. 318.

78. Under Laws 1901 p. 975, c. 355, § 20, giving owner right to proxies to vote pledged stock or stock held as security, where one purchased stock in own name pursuant to agreement that another was to have it upon payment of price by latter, but the latter paid only part of the price, the balance being paid by former, the latter was not entitled to proxies to vote the stock. In re Utica Fire Alarm Tel. Co., 115 App. Div. 821, 101 N. Y. S. 109.

79. Delaware Securities Co. v. Metropolitan Trust Co., 146 F. 600. Where different stocks are conveyed to trustee, the trust agreement cannot be divided so as to compel the trustee to give proxies for such stocks as have been transferred to him on corporation's books where the owner is party to proceedings to prevent the other stocks from being so transferred. Id.

80. Delaware Securities Co. v. Metropolitan Trust Co., 146 F. 600.

81. Hankens v. Newell [N. J. Law] 66 A. 929.

82. See 7 C. L. 914.

83. P. L. 1896, p. 288, § 33, rendering directors ineligible to re-election when stock transfer book is not produced at the election, was complied with where stock certificate book was only record of transfers kept and was produced. In re Election of

for the reduction of the number of directors does not take effect until filed as required by law,[84] the election of a director cannot be invalidated by reason of such a resolution which has not been so filed.[85] An officer may be such de facto though not de jure.[86] The title to office cannot be questioned collaterally,[87] and equity cannot entertain a bill to review a corporate election [88] or to oust parties in possession under claim of election,[89] but it will sometimes interfere to prevent usurpers from ousting those legally in control.[90] Quo warranto is the proper remedy to test the title to office in a private corporation [91] and may issue upon the suggestion of a single individual,[92] its purpose being primarily to oust the respondent from office and not to vacate an election, and the two proceedings may exist concurrently without conflict.[93] Provision is sometimes made for the holding over of old officers until the election of new.[94] Statutory cause for removal from office [95] is not condoned by re-election, tenure being treated as continuous.[96] An agreement constituting the consideration inducing an appointment to office is not necessarily canceled by a voluntary resignation.[97]

(§ 15) *G. Salary or other compensation of officers.*[98]—In the absence of some direct authorization or employment by the governing board of a corporation creating the obligation, the presumption is that services of officers are rendered without compensation,[99] and the subsequent voting of back salary in such case is without

Directors of United States Cast Iron Pipe & Foundry Co. [N. J. Law] 65 A. 849. It requires willful refusal to file report of election of directors within thirty days after annual election to render directors so failing to file same ineligible to re-election at next annual meeting. In re Election of Directors of Brooklyn Base-Ball Club [N. J. Law] 66 A. 1051.

84. Such is effect of stock corporation laws, § 21, Laws 1890, p. 1070, c. 564, as amended by Laws 1905, p. 2121, c. 750. In re Westchester Trust Co., 186 N. Y. 215, 78 N. E. 875.

85. Where five directors would have had to be elected under resolution to reduce number, while six would have had to be elected except for such resolution, and six were in fact voted for, complainant receiving the smallest number of votes. In re Westchester Trust Co., 186 N. Y. 215, 78 N. E. 875.

86. Potwin v. Grunewald, 123 Ill. App. 34. Director elected when there was no vacancy, and who assumed and performed duties of office, held de facto officer until ousted. Bishop v. Fuller [Neb.] 110 N. W. 715.

87. In replevin by corporation for records and seal, an answer, unsupported by evidence, alleging that defendant was plaintiff's secretary and entitled to possession, did not raise any question as to the right to office of secretary. Stovell v. Alert Gold Min. Co. [Colo.] 87 P. 1071.

88. Schmidt v. Pritchard [Iowa] 112 N. W. 801.

89. Schmidt v. Pritchard [Iowa] 112 N. W. 801. Bill in equity dismissed where it appeared that sole or main question was title to office, and it appeared that defendant was in possession under claim of election, and complainant's only standing was based on claimed election, remedy being by quo warranto. Hayes v. Burns, 25 App. D. C. 242. Bill in equity cannot be maintained to reinstate complainant as general manager and to remove the president from office, in the absence of some special ground of equitable cognizance. Dimmick v. Stokes [Ala.] 43 So. 854.

90. Schmidt v. Pritchard [Iowa] 112 N. W. 801.

91. Hankins v. Newell [N. J. Law] 66 A. 929. Act June 14, 1836, P. L. 621. Commonwealth v. Strauss, 32 Pa. Super. Ct. 389. As distinguished from mandamus to prevent exclusion from such office. Id. Mansf. Dig. c. 151, §§ 6464, 6466, 6470, substituting an action at law for scire facias and quo warranto to remove usurpers from office, and to induct thereinto the rightful claimant, held to apply only to public officers, and not to officers of private corporations. Le Bosquet v. Myers [Ind. T.] 103 S. W. 770.

92. Commonwealth v. Strauss, 32 Pa. Super. Ct. 389.

93. Act April 29, 1874, P. L. 73, relating to vacation of elections, held not to apply to or to conflict with quo warranto proceedings under Act June 14, 1836, P. L. 621. Commonwealth v. Strauss, 32 Pa. Super. Ct. 389. Act April 29, 1874, P. L. 73, providing for proceedings to vacate corporate elections upon petition of five stockholders, does not apply to quo warranto to oust an incumbent of a corporate office on ground that he was not elected at a legal election. Id.

94. General Corporation Law, § 23. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 N. Y. S. 465.

95. Issue of stock without authority and without consideration to the corporation held "misconduct" authorizing removal under Code Civ. Proc. § 1781, though the misconduct technically related to office of vice-president and secretary. People v. Lyon, 104 N. Y. S. 319.

96. People v. Lyon, 104 N. Y. S. 319.

97. Agreement constituting part consideration held not canceled by officer's voluntary resignation. Bates v. Bates Machine Co., 120 Ill. App. 563.

98. See 7 C. L. 914.

99. Services as director and president.

consideration and void.[1] A by-law provision for advancements on account of salary implies an agreement to pay a salary.[2] Salaries fixed by by-laws cannot be changed by mere resolution.[3] In the absence of any change of circumstances, a salary fixed for one year will continue until changed by proper action of the proper authorities,[4] and where there has been a change of circumstances the amount of the salary may be left to the jury,[5] but the mere lessening of the duties of an officer does not abrogate an agreement to pay him a salary.[6] When a salary is provided for but its amount is not fixed, the recoverable value of the incumbent's services is for the jury,[7] but one employed by an individual to perform services for a corporation cannot recover from his individual employer upon a quantum meruit.[8] All salaries contracted to be paid by a corporation to its officers are subject to the contingency of the corporation becoming insolvent,[9] and a claim for an unexpired term cannot participate in the distribution of assets by the court.[10] An increase of salary cannot be sustained by the officer's own vote,[11] but a salary is not rendered illegal merely because the officer elected controls the majority of the stock,[12] nor will the mere presence of an officer at a meeting at which compensation is voted to him render such compensation illegal.[13] An executor of a deceased stockholder is not disqualified to receive a salary as president, at least so far as the corporation is concerned.[14] Salaries paid under the authority of directors cannot be recovered back in the absence of fraud.[15] A set-off against an officer's salary must be pleaded in order to be allowed.[16] A stockholder may, by reason of his own conduct, be precluded from objecting to the salaries of officers.[17] Where an officer is paid for services in stock, subsequent increase in the value of the stock belongs to him.[18] Salaries of officers constitute current expenses of a going corporation.[19] Officers may be compensated for services performed prior to their assumption of office[20] or outside of their regular duties,[21]

Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159.

1. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159.

2. Metropolitan Rubber Co. v. Place [C. C. A.] 147 F. 90.

3. Kingston v. Montgomery, 121 Mo. 451, 97 S. W. 202.

4, 5, 6, 7. Metropolitan Rubber Co. v. Place [C. C. A.] 147 F. 90.

8. Especially where he agreed to accept stock in payment for such services. Tishomingo Elec. Light & Power Co. v. Burton, 6 Ind. T. 445, 98 S. W. 154.

9, 10 Williamson County Banking & Trust Co. v. Roberts-Buford Dry Goods Co. [Tenn.] 101 S. W. 421.

11. President cannot, over protest of minority directors and as against stockholders, sustain his claim for increase of salary secured by his own vote as member of board of directors. Schaffhauser v. Arnholt & Schaefer Brewing Co. [Pa.] 67 A. 417.

12. Executor of deceased stockholder not disqualified from receiving salary as president because he was elected after death of the stockholder, and because he and his co-executor controlled the majority of the stock, where the directors who elected him were elected prior to the stockholder's death, and there was no evidence of fraud. Hirsch v. Jones, 115 App. Div. 156, 100 N. Y. S. 687.

13. Resolution for compensating officer for special services held valid though his presence was necessary to make up quorum where he did not vote, and those voting for resolution constituted majority not only of quorum but of entire board. Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co. [Colo.] 90 P. 81.

14. Hirsch v. Jones, 115 App. Div. 156, 100 N. Y. S. 687.

15. Salary paid under authority of directors cannot be recovered back in absence of fraud. Hirsch v. Jones, 115 App. Div. 156, 100 N. Y. S. 687.

16. Set-off based on having furnished plaintiff office room used by him in his other business than that as officer of the corporation held not available because not pleaded. Bell v. Peper Tobacco Warehouse Co. [Mo.] 103 S. W. 1014.

17. Stockholder who had voted for and acquiesced in certain salaries to officers could not, on account of personal grievance, be heard in court of equity in suit in corporation's behalf to have such salaries reduced. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied, Id. 110 N. W. 798.

18. Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, 79 N. E. 276.

19. Application of property to president's salary not such preference of creditor as to constitute act of bankruptcy. Richmond Standard Steel Spike & Iron Co. v. Allen [C. C. A.] 148 F. 657; Bell v. Peper Tobacco Warehouse Co. [Mo.] 103 S. W. 1014.

20. Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, 79 N. E. 276.

21. Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, 79 N. E. 276. Evidence held to show that services of president for which compensation was voted were outside of regular duties as president or director. Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co. [Colo.] 90 P. 81.

and may contract with the corporation therefor,[22] and even in the absence of an express contract an officer may recover for the value of services outside of his regular duties,[23] but such recovery can be had only upon a quantum meruit,[24] and where a specific agreement is counted on the plaintiff must prove it.[25] Directors may hold their corporation upon a quantum meruit for advancements and services, though an express contract with themselves would be void,[26] and it would seem that this rule prevails as to de facto as well as de jure officers.[27] Relief against an officer as such cannot be allowed in a suit solely to recover back compensation paid to him.[28]

(§ 15) *H. How directors must act; directors' meetings, records, and stock books.*[29]—A director cannot bind the corporation by his individual acts [30] or speak for his board without express authority.[31] He can only act in his place as a member of the board of directors,[32] and acquires no additional authority on account of the amount of stock he owns.[33] No notice of regular meetings is necessary.[34] Recital in the minutes that a meeting was duly called by president raises a presumption of notice of the meeting.[35] Notice may be waived.[36] Irregularities in meetings may be invoked only by the corporation or its stockholders.[37] Where a majority of the quorum constitutes a majority of the board, such majority can do any act which the entire board could do,[38] and the interest of one of the members whose presence is

22. Director. Henry v. Michigan Sanitarium & Benev. Ass'n, 147 Mich. 142, 13 Det. Leg. N. 989, 110 N. W. 523. Must show that services were outside of regular duties, and that corporation understood that it was to pay therefor. Id. Evidence held not to show special employment of trustee by charitable corporation so as to bind corporation, mere acquiescence of trustees being insufficient. See Comp. Laws, §292. Id.

23. Where director was appointed consulting engineer "at such compensation as the board may hereafter determine," but no compensation was determined by the board, he could recover on a quantum meruit, especially where company paid such director another bill for similar services while holding such position. Bogart v. New York & L. S. R. Co., 118 App. Div. 50, 102 N. Y. S. 1088.

24. Bell v. Peper Tobacco Warehouse Co. [Mo.] 103 S. W. 1014.

25. Bell v. Peper Tobacco Warehouse Co. [Mo.] 103 S. W. 1014. No presumption of agreement for future services arises from resolution providing for payment of salary for past years. Id.

26. Shively v. Eureka Tellurium Gold Min. Co. [Cal. App.] 89 P. 1073. Judgment against plaintiffs in action on express contract evidenced by notes not conclusive of right to recover on quantum meruit. Id.

27. There being some evidence of regularity of election, finding of trial court that certain parties were directors was conclusive, thus obviating necessity of deciding rights of de facto officers. Shively v. Eureka Tellurium Gold Min. Co. [Cal. App.] 89 P. 1073.

28. Under Code Civ. Proc. § 603, authorizing preliminary injunction where it appears from complaint that plaintiff is entitled to injunction on final judgment where commission of act sought to be enjoined during pendency of action would injure plaintiff, general manager cannot be enjoined from acting as such pending suit to recover back compensation paid to him as manager where no final relief against him as manager is requested. Maine Products Co. v. Alexander, 115 App. Div. 109, 100 N. Y. S. 709. Under Code Civ. Proc. § 604, authorizing injunction against acts in violation of plaintiff's rights in regard to the subject-matter of the action, and tending to render the judgment ineffectual, general manager would not, in suit against him by corporation to recover back salary, be enjoined from acting as general manager where he disclaimed intention to do so, and it did not appear that any act of his as such manager could affect the judgment. Id. In suit to cancel stock issued to defendant as manager, court had no power to make summary order that defendant surrender to plaintiff all books, property, etc., of latter in his possession. Id.

29. See 7 C. L. 916.

30. Guillaume v. K. S. D. Land Co., 48 Or. 400, 86 P. 883, 88 P. 586. Misstatement in former opinion to effect that letter received by plaintiff was from director instead of stockholder held immaterial where no distinction was made between power of either to bind corporation by unauthorized acts. Id.

31. Dockstader v. Young Men's Christian Ass'n of Des Moines [Iowa] 109 N. W. 906.

32, 33. Clement v. Young-McShea Amusement Co. [N. J.] 67 A. 82.

34. Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co. [Colo.] 90 P. 81.

35. Robinson v. Blood [Cal.] 91 P. 258.

36. Where a majority of the director's were notified and attended the meeting, and those not notified, because they could not be found, afterwards filed a waiver of notice and the corporation acquiesced in the transactions had at such meeting, such transactions were valid. Stafford Springs St. R. Co. v. Middle River Mfg. Co. [Conn.] 66 A. 775.

37. Cannot be invoked by creditors. Marsters v. Umpqua Valley Oil Co. [Or.] 90 P. 151.

38. Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co. [Colo.] 90 P. 81.

Note: "In 2 Kent's Commentaries, 293, the rule is laid down as follows: 'The same principle prevails in these incorporated so-

necessary to constitute the quorum but not the majority will not invalidate the action of such majority where such member does not vote.[39] Where the result of the failure to comply with a provision of the articles requiring a new board to meet within a certain time is not specified, such provision will be held to be merely directory.[40]

cieties, as in the community at large, that the acts of the majority, in cases within the charter powers, bind the whole. The majority here means the major part of those who are present at a regular corporate meeting. There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act; but in the former a majority of the definite body must be present, and then a majority of the quorum may decide.' This doctrine as laid down by Chancellor Kent is cited with approval by the following authorities, among others: Angell & Ames on Corporations, § 501; Leavitt v. Oxford & G. S. M. Co., 3 Utah, 272, 1 Pac. 356; Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. 167; Foster v. Mullanphy, P. M. Co., 92 Mo. 88, 4 S. W. 260. In the case of Sargent v. Webster, 13 Metc. (Mass.) 504, 46 Am. Dec. 743, it is said: 'In ordinary cases, when there is no other express provision, a majority of the whole number of an aggregate body, who may act together, constitute a quorum, and a majority of those present may decide any question upon which they can act.' In Buell v. Buckingham & Co., 16 Iowa, 284, 85 Am. Dec. 516, it appears that at a meeting of the board of directors of the corporation at which Elijah Buell, president, and Robert Buell and Robert Spear, directors, were alone present, a quorum under the by-laws being the president and two directors certain property of the corporation was sold to Elijah Buell, in consideration of the indebtedness by the corporation to him. Cole, J., said: 'In this case, although the requisite number of directors was present, Elijah Buell was disqualified from acting in the matter of the sale to himself; and the question then is: Can a majority of the quorum, which is itself but a bare majority, do a binding act? Then, after citing what has heretofore been said as the utterance of Chancellor Kent, the justice proceeds: 'Mr. Dane illustrates the same rule, as follows: "If the charter requires twelve common councilmen to elect or do an act, seven of them at least must be present, though four of the seven may give the vote," etc., 5 Dane's Abridg. 150. See, also, Angell & Ames on Corp. § 571; Cahill v. Kalamazoo Insurance Company, 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; In re Insurance Campany, 22 Wend. (N. Y.) 591; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525. It follows, then, in the light of these authorities, that, since the president and two of the directors constituted a quorum it was competent for two, being a majority of that quorum, to bind the corporation; and, if two were able to act, aven as against the opposing vote of the other, they could, a fortiori act without his concurrence.' The Justice then proceeds to say that which is peculiarly applicable to this case (it being remembered that Mr. Wallace was the president of the corporation): 'The ordinary duties of the president are to preside, determine questions of order, give the casting vote in case of a tie, etc.; and, since the vote of the directors was unanimous, there was no occasion or opportunity for the president to cast his vote, even if he had not been disqualified, and the contract of sale was made by just as many directors as was required by the by-laws, or as it was possible to have in the corporation as constituted.' In the same case, at page 290, Dillon, J., says, 'Three constituted a quorum. So far all is clear. Advancing in the argument the first proposition I lay down is that a majority of the quorum, all being present, have the power to act, and to decide any question upon which they can act. This proposition is clear upon the authorities.' He then proceeds to cite a number of authorities in support of the doctrine, which it is not necessary to repeat here. Hax v. Davis Mill Co., 39 Mo. App. 453, is an action instituted to recover of the milling corporation a salary alleged to be due plaintiff as president of the corporation. The court says: 'There is no question as to the plaintiff's disqualification to vote on his own salary. * * * It appears, then, that a majority of all the directors voted on the question and that a majority of those voted for the resolution and in our opinion legally adopted it. In the absence of anything to the contrary in the charter or by-laws a majority will constitute a quorum and a majority of that quorum can do the business of the board. Morawetz, Corporations, §§ 467, 531. The fact that plaintiff was present at this meeting will not alter the rule. He abstained from voting for the reason that he could not vote on the question, and the proceedings will be given the same effect as if he had been absent.' In Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525, it is also said: 'To make a quorum of a select and definite body of men possessing the power to elect, a majority at least must be present; and then a majority of the quorum may decide.' In Wells v. Rahway White Rubber Co. et al., 19 N. J. Eq. 404, it was said: 'At this meeting, three of the five directors were present and, although there is some proof that the entry is incorrect in stating that all three concurred in the resolution, yet it appears that two did concur unconditionally, and as of five directors three are a quorum, and two a majority of the three, the resolution must be taken as valid and binding.' In view of these authorities and others of similar import, we adopt the rule that where the board of directors of a corporation consists of five members, and, under the by-laws, it requires four to constitute a quorum, a majority of the quorum, being a majority of the board, can legally do any act which the entire board would be authorized to do." Gumaer v. Cripple Creek Tunnel, Transportation & Min. Co. [Colo.] 90 P. 81.

39. Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co. [Colo.] 90 P. 81.

40. Jones v. Bonanza Min. & Mill. Co. [Utah] 91 P. 273.

Evidence.[41]—The minutes of a directors' meeting are only prima facie evidence of the facts stated therein,[42] and are not rendered incompetent because produced by a stockholder who is interested as such in the suit.[43] The records of the meeting are the best evidence of what occurred thereat.[44]

Penalties for refusal of inspection of stock book.[45]

(§ 15) *I. Powers of the directors or trustees.*[46]—The management of the corporation affairs may and is generally delegated to a board of directors or trustees,[47] and from such delegated power flows an implied power to do all things necessary to carry out the express powers, whether the latter be general[48] or specific.[49] In the absence of fraud and ultra vires, the courts will not interfere with the management of a corporation by its directors,[50] but directors cannot dispose of the corporation's property for their own benefit,[51] and have no right to manipulate the stock of their company for the purpose of securing control to any particular faction of stockholders,[52] and their good faith in the latter case will not validate the transaction.[53] A director has an absolute right to inspect the books of the corporation,[54] and such right may be enforced by mandamus after due demand and refusal. The acts of de facto directors are binding upon the corporation[55] and cannot be collaterally assailed.[56]

(§ 15) *J. Powers of officers and agents other than directors or trustees.*[57]—One dealing with a corporate officer or agent is bound to take notice of the extent of his authority,[58] and, a fortiori, an officer or agent cannot bind his corporation when he is known to be acting for himself,[59] even though the corporation has been neg-

41. See 7 C. L. 916.

42. In action on contract of corporation, defendant may introduce parol evidence to explain ambiguities in its minutes. Rose v. Independent Chevra Kadisho, 215 Pa. 69, 64 A. 401.

43. Morgan v. Lehigh Valley Coal Co., 215 Pa. 443, 64 A. 633.

44. Testimony that by reason of secretary's oversight records did not show that certain motion was carried or voted on held secondary evidence as being mere statement of what happened at time of meeting. Golden Age No. 2 Min. & Mill. Co. v. Langridge [Colo.] 88 P. 1070.

45, 46. See 7 C. L. 916.

47. Under Pub. St. 1901, c. 149, § 3, authority may be delegated to directors to conduct all affairs of corporation and to exercise all powers not required by statute, charter, or by-law to be otherwise exercised, and the stockholders may be prohibited from invalidating any prior acts of directors done in exercise of such authority. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

48. Held within discretion of directors to employ experienced hotel manager eight months before completion of hotel which he was to manage. Brooklyn Heights Realty Co. v. Kurtz, 115 App. Div. 74, 100 N. Y. S. 723.

49. Power to purchase property involves the power to assume a mortgage thereon. In re Beaver Knitting Mills [C. C. A.] 154 F. 320.

50. Will not interfere on grounds of mere business policy. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied, Id. 110 N. W. 798.

51. Directors, though authorized to sell the corporation's property, cannot do so for a consideration moving entirely to themselves. McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169. Cannot obligate their corporation or mortgage its property for their own benefit. Haines Mercantile Co. v. Highland Gold Mines Co. [Or.] 88 P. 865.

52. Issue of treasury stock to certain person identified in interest with certain faction held invalid though a fair consideration was paid therefor, especially where they were beneficiaries of such issue in that it would result in their being retained in power. Elliott v. Baker [Mass.] 80 N. E. 450.

53. Belief that it was for the good of the corporation that treasury stock should be issued to certain person in order to secure control to certain faction of stockholders. Elliott v. Baker [Mass.] 80 N. E. 450.

54. People v. Central Fish Co., 117 App. Div. 77, 101 N. Y. S. 1108. Fact that director was put on board to represent certain interests is immaterial, remedy for hostility to corporation being by removal. Id.

55. Brown v. Crown Gold Mill Co., 150 Cal. 376, 89 P. 86; Potwin v. Grunewald, 123 Ill. App. 34. Director held de facto director so far as rights of third persons were concerned, though he had ceased to be stockholder. Robinson v. Blood [Cal.] 91 P. 258.

56. Assessment not assailable collaterally because one of the directors making it was disqualified because he did not hold requisite number of shares. Jones v. Bonanza Min. & Mill. Co. [Utah] 91 P. 273.

57. See 7 C. L. 917.

58. Conqueror Gold Min. & Mill. Co. v. Ashton [Colo.] 90 P. 1124; Moroney v. Cole, 52 Misc. 451, 103 N. Y. S. 560.

59. Rogers v. Southern Fibre Co. [La.] 44 So. 442. One having notice that corporation's officer is using its credit for his own benefit is put upon inquiry as to the scope of the officer's authority. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 N. W. 29.

ligent in placing it within his power to abuse his agency for his own benefit,[60] and so also where the credit is extended to the officer or agent and not to the corporation.[61] When, however, the officer or agent has a general authority, the corporation will be bound by all acts within scope thereof,[62] provided, of course, as just stated, that the person dealing with him is not charged with notice of lack of authority in the premises. It is sufficient if the transaction is ostensibly for the benefit of the corporation and it need not be in the corporation's name,[63] and in such case it is immaterial that the corporation in fact receives no benefit.[64] A special authority carries with it the authority to do whatever is necessary to accomplish the purpose of the special authority.[65] A corporation is liable to one injured by a forgery perpetrated upon its officer in the course of his duties,[66] but it will not be bound by fraudulent transactions between officers and third persons,[67] or by acts of officers amounting to a theft of its property.[68] Under some charters officers other than directors have no powers except such as are designated by the directors,[69] and in the absence of such designation cannot bind their corporation or execute any contract for it.[70] Some powers, by reason of their very nature, must be derived from the directors.[71]

60. Corporation not bound by act of agents in delivering, in transaction for own individual account, bogus stock, though corporation knew of the untrustworthy character of agent but nevertheless placed power to issue such stock in him by giving him blank certificates, etc. Rogers v. Southern Fiber Co [Ala.] 44 So. 442.

61. Corporation not liable on sealed individual note of president secured by collateral owned by president individually, though it is alleged that note was understood to be for corporation's benefit and that it received the proceeds thereof, it appearing however, that it was not intended to charge the corporation. Andrews Co. v. National Bk. [Ga.] 58 S. E. 633.

62. Any contract pertaining to the corporation's affairs and within the general powers of officer will, when executed by him, be presumed to have been done by authority of the corporation. George E Lloyd & Co. v. Matthews, 223 Ill. 477, 79 N. E. 172. Any general officer may, regardless of the general scope of his powers and duties, engage medical service in an emergency occasioned by injury to employe while performing his duties. Salter v. Nebraska Tel. Co. [Neb.] 112 N. W. 600. In case no general officer is present, the person highest in authority then present may engage such services and bind the corporation therefor. Id. Emergency employment in such case will continue at least until person employed has time to communicate with corporation, and if it decline to be further responsible, for such further time as may be necessary to communicate with poor authorities, where person injured is entitled to public care. Id. Where one employed by a corporation's agent at a certain salary accepted, under protest to the corporation's bookkeeper, a less sum per month, and in so doing acted on the advice of such agent and upon the latter's assurance that the balance would be paid on the termination of the work, he did not thereby waive his claim for the balance. Kelly v. Jersey City Water Supply Co. [N. J. Err. & App.] 67 A. 108.

63. Martin & Co. v. Logan, 30 Ky. L. R. 799, 99 S. W. 648.

64. Loan to president which was really for his own benefit but lender had no knowledge of this fact. Martin & Co. v. Logan, 30 Ky. L. R. 799, 99 S. W. 648.

65. Special authority to draw checks upon "any banks in which this company may have deposits" implies authority to open new accounts in more than one bank. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641. Resolution authorizing execution of agreement in regard to extension of time on mortgage on property purchased by corporation held to authorize agreement assuming the mortgage. In re Beaver Knitting Mills [C. C. A.] 154 F. 320.

66. When corporation's transfer agent is deceived by forged authority to transfer bonds, both he and the corporation will be liable to the owner of the bonds. Clarkson Home v. Missouri, etc., R. Co., 182 N. Y. 47, 74 N. E. 571.

67. Officers have no power to accept in payment of debts due the corporation securities known to the parties to be worthless. National Hollow Brake Beam Co. v. Chicago R. Equipment Co., 226 Ill. 28, 80 N. E. 556.

68. Where treasurer of charitable corporation procured change of corporate bonds owned by his corporation into negotiable securities by means of forged resolution of directors and then negotiated them. Carlson Home v. Missouri, etc., R. Co., 182 N. Y. 47, 74 N. E. 571. Where agent of the corporation which issued the bond was deceived by the forgery and allowed the change of the bonds into negotiable securities, both he and his corporation were liable to the owner of the bonds. Id.

69. Jackson Brew. Co. v. Canton, 118 La. 823, 43 So. 454.

70. Broker appointed by officers whose powers had not been designated by directors held to have no authority to purchase land for corporation or to make contract for such purchase binding on either corporation or seller. Jackson Brew. Co. v. Canton, 118 La. 823, 43 So. 454.

71. Power to dedicate the corporation's lands to public must be derived from directors. Town of West Point v. Bland, 106 Va. 792, 56 S. E. 802.

Agents appointed by directors to execute a contract for the corporation are the agents of the latter and not of the directors.[72] Authority may be conferred by parol.[73] Designation of certain officers as authorized to "execute" contracts does not deprive other officers of the power to make oral contracts.[74] A mere reference by an officer disclaiming authority to another as having authority in the premises will not invest the latter with such authority,[75] and the mere consent of one officer that another officer may do an act requiring special authority from the corporation does not dispense with the necessity of such special authority.[76] Appointment to office will not make the officer the agent of the corporation as to prior engagements with third persons,[77] but the mere fact that an officer is a third party's agent in certain matters does not make him such party's agent in similar matters as to which he acts for the corporation.[78] A specific authority is not exhausted by an attempted exercise thereof which fails through mistake,[79] and an officer having power to make a contract also has power to re-execute it so as to take it out of the statute of frauds.[80] Authority delegated by directors is not ipso facto revoked by a change in the directorate.[81]

The president.[82]—While certain powers are held to be inherent in the president of a corporation as its executive head,[83] the powers of the president, like those of any other officer or agent, generally depend upon the scope of the authority that has specifically been delegated to him.[84] As a general rule he has no authority to sell

72. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

73. Authority to execute promissory notes. Crossley v. St. Philip Neri [N. J. Err. & App.] 67 A. 27.

74. By-law providing that all contracts "executed" by corporation should be executed by president and secretary held not to preclude making of oral contract by manager. Freyberg v. Los Angeles Brew. Co. [Cal. App.] 88 P. 378.

75. Corporation not bound by contract for purchase of goods made by one to whom manager referred seller by saying that he, the manager, had no authority in the premises and that whatever such other person did would be all right, such person, however, not being an officer, not being employed on the corporation's premises, and having no authority to bind the corporation. Greenwald v. Petite Cigar Mfg. C., 101 N. Y. S. 86.

76. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 N. W. 29.

77. One employed by purchaser of stock to secure its transfer remains personal agent of the stockholder as to such stock, though subsequently appointed secretary of corporation. Lucile Dreyfus Min. Co. v. Willard [Wash.] 89 P. 935.

78. Fact that secretary officially receiving stock for transfer is personal agent of owner as to other stock does not relieve corporation from liability for acts of secretary in regard to stock officially received. Lucile Dreyfus Min. Co. v. Willard [Wash.] 89 P. 935. Corporation not bound by act of secretary in issuing fraudulent certificates in lieu of stock which he undertook to purchase in open market for one employing him for that purpose, since in matter of depositing old certificates in exchange for those issued he was acting for his employer, though acting for corporation in issuing the new certificates, delivery of old certificates, however, being, to knowledge of secretary's employe, essential to issue of new. Id.

79. Where a bond with power to confess judgment was authorized by directors so as to be capable of being entered up at once, subject to the condition that no execution should issue thereon before a certain date unless other creditors sued or threatened suit, and a bond was executed payable on the specified date under mistaken idea that it could be entered up at once, the officers were authorized, without further action of the directors, to execute a new bond reforming the original so as to make it conform to the original agreement as authorized by the directors Bergen v. Rogers [N. J. Eq.] 67 A. 290.

80. Contract not to be performed within a year. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 S. W. 867.

81. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

82. See 7 C. L. 918.

83. Corporation held bound by promises of president to defer sale of stock pledged as collateral. Furber v. National Metal Co., 118 App. Div. 263, 103 N. Y. S. 490. Guaranty of note discounted for benefit of corporation held within general powers of president. Lloyd & Co. v. Matthews, 223 Ill. 477, 79 N. E. 172. General authority of president authorizes him to collect outstanding accounts and to sell and assign them for their face value Cogan v. Conover Mfg. Co., 69 N. J. Eq. 816, 65 A. 484.

84. Authority to act as chief executive in all corporation's operations and to supervise all other officers and all departments included authority to direct what services were to be performed by company's engineer so as to render company liable to pay therefor. Bogart v. New York & L. I. R. Co., 118 App. Div. 50, 102 N. Y. S. 1093. President of mining company had no inherent power to bind corporation by agreement to pay one claiming lease from company the expenses incurred in working the alleged leased property

the corporation's property,[85] especially where the sale is for his own benefit,[86] nor can he dedicate the corporation's lands to public use.[87]

The vice-president.[88]—The vice-president of a corporation has no inherent power to execute notes for the corporation [89] or to sell its land.[90]

The secretary.[91]—The secretary's powers outside of such as may be held to be inherent in the office depend upon the scope of the authority which has been delegated to him.[92] He is usually vested with authority to affix the corporate seal to its contracts,[93] but has no power ex officio to give corporate notes or obligate the corporation on commercial paper,[94] or to dispose of its property.[95]

The treasurer.[96]—A corporation's treasurer has no inherent power to execute notes for the corporation [97] or to dispose of its property.[98]

Business manager, salesman, etc.[99]—The manager of a corporation's business has only such powers as are necessary to the conduct of the business committed to his care.[1] With this limitation a corporation will be bound by the acts of anyone charged with the management of its business.[2] Whether a particular act is necessary or incident to the management of a corporation's business depends upon the character of the corporation and the nature of its business,[3] and the scope and character

in consideration of such person's abandonment of claim to such lease. Conqueror Gold Min. & Mill. Co. v. Ashton [Colo.] 90 P. 1124.

85. Salmon packing company not bound by agreement of its president to give certain broker the handling of the year's pack. Northwestern Packing Co. v. Whitney [Cal. App.] 89 P. 981. Deed executed by president pursuant to forged resolution of directors, the other directors and the stockholders having no knowledge of the transaction and the corporation receiving no benefit therefrom, held void. Ansley Land Co. v. Western Lumber Co., 152 F. 841.

86. Evidence held to show that rails sold by president of railroad company belonged to company. Saginaw Suburban R. Co. v. Connelly, 146 Mich. 395, 13 Det. Leg. N. 796, 109 N. W. 677. President estopped to deny company's title where he included property in statement of assets of company. Id. Purchaser of rails fixed to ties on corporation's railroad held charged with notice of company's title as against claim of president who sold them as his own. Id.

87. Town of West Point v. Bland, 106 Va. 792, 56 S. E. 802.

88. See 5 C. L. 810.

89. Dreeben v. First Nat. Bk. [Tex.] 17 Tex. Ct. Rep. 707, 99 S. W. 850.

90. Vice-president of land and cattle company has no inherent or presumptive authority to sell company's land. Hurlbut v. Gainor [Tex. Civ. App.]. 18 Tex. Ct. Rep. 142, 103 S. W. 409.

91. See 7 C. L. 919.

92. Corporation held bound by act of secretary in converting stock received for transfer and issuing fraudulent certificates in its stead. Lucile Dreyfus Min. Co. v. Willard [Wash.] 89 P. 935.

93. Where instrument under corporate seal is signed by secretary, it is presumed that the seal is that of corporation and that it was affixed by authority of corporation. Bliss v. Harris [Colo.] 87 P. 1076. Presumption that seal to instrument signed by secretary was affixed by authority of corporation not overcome by absence of showing of vote of directors or other governing body. Id.

94. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 N. W. 29. Has no power to bind his corporation by an accommodation indorsement of his own paper. Wheeling Ice & Storage Co. v. Connor, 61 W. Va. 111, 55 S. E. 982. Secretary of corporation organized to deal in land for hotel purposes, establish, erect, and maintain a hotel and to manage the hotel business, held to have no power to execute promissory notes for the corporation for accommodation or otherwise, especially where by-law required such notes to be otherwise executed. First Nat. Bk. v. Abilene Hotel Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 9, 103 S. W. 1120.

95. Has no inherent power to sell and assign corporation's choses in action. Maroney v. Cole, 52 Misc. 451, 103 N. Y. S. 560.

96. See 7 C. L. 919.

97. Dreeben v. First Nat. Bk. [Tex.] 17 Tex. Ct. Rep. 707, 99 S. W. 850.

98. Treasurer charged with custody of charitable corporation's contracts and securities held to have no power to have the register of non-negotiable bonds of another corporation owned by his corporation so changed as to render them negotiable and then to sell them. Clarkson Home v. Missouri, etc., R. Co., 182 N. Y. 47, 74 N. E. 571.

99. See 7 C. L. 919.

1. Manager could not bind mining corporation by agreement to pay to one claiming lease from corporation his expenses incurred in working leased property in consideration of abandonment of claim to the property. Conqueror Gold Min. & Mill. Co. v. Ashton [Colo.] 90 P. 1124.

2. Corporation held bound by contract relating to disposition, for benefit of levying creditors, of property levied on. Lewiston Lumber & Box Co. v. Garvey [Idaho] 89 P. 940. President charged with general management held to have had power to assign contract of corporation which it was unable to carry out. Tevis v. Hammersmith [Ind. App.] 81 N. E. 614.

3. General manager of corporation engaged in buying and selling saloons had

of particular duties assigned to him.[4] He has no inherent power to redeem outstanding stock,[5] or to dedicate the corporation's land to public use.[6] A salesman has no inherent authority to borrow money[7] or to indorse and transfer checks payable to the corporation.[8]

Pleading and evidence of authority.[9]—In an action by a corporation the authority of the officer who made the contract sued on is not in issue unless raised by the pleadings.[10] An allegation that an act was that of the corporation is a sufficient allegation of the authority of the officers acting for the corporation.[11] An answer denying the execution and delivery of an instrument purporting to be signed by the defendant corporation is sufficient to put such matters in issue.[12] One seeking to hold a corporation upon an agreement made with an alleged officer or agent has the burden of proving the status of such officer or agent,[13] and that he had the requisite authority in the premises,[14] but the introduction of an instrument purporting to be signed by the defendant corporation makes a prima facie case,[15] and when the execution and delivery of the instrument is denied by the corporation it has the burden of proof on the issue thus raised.[16] Where the act is not within the scope of the officer's duties, anyone relying upon the validity of the act must prove actual authority.[17] The date of an officer's election is immaterial when the act in question is performed during his tenure.[18] Where the act is done in the name of an officer by another person, the authority of the latter to act for the former must appear.[19] It must appear that the officer was acting for the corporation,[20] though this may be

power to sell furniture and fixtures of saloon and license to conduct same. Freyberg v. Los Angeles Brew. Co. [Cal. App.] 88 P. 378. Manager of land and cattle company has no presumptive authority to sell company's land. Hurlbut v. Gainor [Tex. Civ. App.] 18 Tex. Ct. Rep. 142, 103 S. W. 409. Manager of real estate company held authorized to undertake to lease property sold and to collect rents thereon and apply same to purchase price. Harvey v. Sparks Bros. [Wash.] 88 P. 1108. Employment of mining engineer held within general authority of manager of mining corporation. Golden Age No. 2 Min. & Mill. Co. v. Langridge [Colo.] 88 P. 1070. Corporation bound by manager's agreement to pay certain compensation for services performed in securing lands to be used in corporation's business. Chilcott v. Washington Colonization Co. [Wash.] 88 P. 113. Superintendent of street railroad company has no implied authority to prosecute for embezzlement of company's funds so as to render company liable for malicious prosecution. Canon v. Sharon & W. St. R. Co., 216 Pa. 408, 65 A. 795.

4. Corporation officer and agent having charge of corporation work, with general authority to hire employes has implied authority to so fix the compensation of employes hired by him. Kelly v. Jersey City Water Supply Co. [N. J. Err. & App.] 67 A. 108.

5. Richardson v. Devine, 193 Mass. 336, 79 N. E. 771. Evidence that all cases of withdrawal of sums on account of stock previous to payment to defendant in question, were acted on by directors before payment held admissible on question of authority of manager. Id.

6. Town of West Point v. Bland, 106 Va. 792, 56 S. E. 802.

7. Merchants' Nat. Bk. v. Nichols & Shepard Co., 223 Ill. 41, 79 N. E. 38.

8. Corporation may recover from indorsee. Blum, Jr.'s, Sons v. Whipple [Mass.] 80 N. E. 501.

9. See 7 C. L. 920.

10. No issue as to authority of defendant's manager to make contract sued on was raised by answer alleging that certain agreement relative to subject-matter of the contract was drafted and executed by plaintiff and corporation by its manager. Belch v. Big Store Co. [Wash.] 89 P. 174.

11. Execution of note. McKinley v. Mineral Hill Consol. Min. Co. [Wash.] 89 P. 495.

12. La Plant v. Pratt-Ford Greenhouse Co. [Minn.] 112 N. W. 889.

13. Interstate Bk. & Trust Co. v. Welsh, 118 La. 676, 43 So. 274.

14. Interstate Bk. & Trust Co. v. Welsh, 118 La. 676, 43 So. 274; Conqueror Gold Min. & Mill. Co. v. Ashton [Colo.] 90 P. 1124; Maroney v. Cole, 52 Misc. 451, 103 N. Y. S. 560.

15. See Gen. St. 1894, § 5751. La Plant v. Pratt-Ford Greenhouse Co. [Minn.] 112 N. W. 889.

16. La Plant v. Pratt-Ford Greenhouse Co. [Minn.] 112 N. W. 889.

17. Where secretary indorsed own note with name of corporation. Wheeling Ice & Storage Co. v. Connor, 61 W. Va. 111, 55 S. E. 982.

18. Allegation that officer was elected May 27, 1904, and continued in office during 1906, held supported by finding of election April 28, 1905, and continued in office during 1906, so far as material to authority in 1906. First Baptist Soc. v. Dexter, 193 Mass. 187, 79 N. E. 342.

19. Note signed by president's son. Dreeben v. First Nat. Bk. [Tex.] 17 Tex. Ct. Rep. 707, 99 S. W. 850.

20. Evidence that certain person, "manager for the plaintiff," a corporation, owed defendant a certain sum, did not show any claim against the corporation. Douglas

presumed from the circumstances.[21] Presumption of authority is indulged where a contract is under the seal of the corporation [22] but special authority will not be presumed where the instrument sued on is not under seal.[23] Present authority may be presumed from past authority.[24]

Evidence of prior acts of the same character is not admissible where it does not appear that the corporation had notice of such prior acts,[25] nor are declarations of the officer or agent, unknown to the corporation, admissible to prove his authority in the premises,[26] but the fact that a director referred to a certain officer as being authorized in the premises may be considered.[27] The testimony of the officer or agent is admissible on the question of his authority.[28] Telephone conversations with one claiming to be an officer are admissible for what they are worth.[29] Both the status and the authority of the alleged officer may be proved by parol evidence.[30] Statutes making written instruments admissible without proof of signature are held to be applicable to instruments executed by corporations.[31]

The authority of an officer or agent in a particular case is usually a question of fact,[32] whether the issue relates to the status of the alleged officer or agent,[33] the capacity in which he acted,[34] the scope of his authority,[35] or his authority to do the particular act in question.[36]

Planing Mill & Novelty Co. v. Anderson, 127 Ga. 571, 56 S. E. 635.

21. Manager presumed to have been acting under authority of corporation in making demand for its property from defendant in replevin. Stovell v. Alert Gold Min. Co [Colo.] 87 P. 1071.

22, 23. Maroney v. Cole, 52 Misc. 451, 103 N. Y. S. 560.

24. Where evidence is produced that a certain person was secretary of a corporation in a certain year, and that since that year the corporation had failed to file with secretary of state its annual statement giving the names of its officers as required by law, there was a presumption that such person was still secretary. Stafford Springs St. R. Co. v. Middle River Mfg. Co. [Conn.] 66 A. 775.

25. Dreeben v. First Nat. Bk. [Tex.] 17 Tex. Ct. Rep 707, 99 S. W. 850.

26. Dreeben v. First Nat. Bk. [Tex.] 17 Tex. Ct. Rep. 707, 99 S. W. 850. Admission of evidence of declarations of party conducting negotiations that he was corporation's manager held not error where corporate records showed that such person was manager. Chilcott v. Washington State Colonization Co. [Wash.] 88 P. 113.

27. Letter from director referring party to manager in regard to transaction in question held admissible to prove authority of manager. Golden Age No. 2 Min. & Mill. Co. v. Langridge [Colo.] 88 P. 1070.

28. Testimony of defendant's manager and surrounding circumstances held to show his authority to employ physician to attend injured employe. Freeman v. Junge Baking Co. [Mo. App.] 103 S. W. 565.

29. Telephone conversation with one representing himself as president held admissible for what it was worth, though other party did not know the president and could not identify his voice. Kansas City Star Pub. Co. v. Standard Warehouse Co., 123 Mo. App. 13, 99 S. W. 765.

30. Parol evidence admissible in action by corporation to show authority and capacity of officers who in plaintiff's behalf made the contract sued on. Independent Trembowler Young Men's Benev. Ass'n v. Somach, 52 Misc. 538, 102 N. Y. S. 495. That one who made demand for corporation's property was manager of corporation held provable by parol in replevin for such property. Stovell v. Alert Gold Min. Co. [Colo.] 87 P. 1071.

31. La Plant v. Pratt-Ford Greenhouse Co. [Minn.] 112 N. W. 889.

32. Kansas City Star Co. v. Standard Warehouse Co., 123 Mo. App. 13, 99 S. W. 765.

33. Evidence held to show that one signing contract as manager was such in fact. Metropolitan Coal Co. v. Boutell Transp. & Towing Co. [Mass.] 81 N. E. 645.

34. Where contract was negotiated by common officers of two corporations, on issue as to which corporation the contract was with, evidence that one owned large amount of stock in other was not admissible. Horseshoe Mining Co. v. Miners' Ore Sampling Co. [C. C. A.] 147 F. 517. Payments made by manager to holder of pass book purporting to be for shares withdrawn held to have been made as representative of corporation and not in personal capacity, so that shareholder was liable to receiver for money so received, the corporation being insolvent. Richardson v. Devine, 193 Mass. 336, 79 N. E. 771. Held question of fact whether president of corporation had individually succeeded to corporation's business at time he executed note in name of corporation. La Plant v. Pratt-Ford Greenhouse Co. [Minn.] 112 N. W. 889.

35. Scope of agent's powers held for jury where evidence is conflicting. Swing v. Bates Mach. Co., 32 Pa. Super. Ct. 403.

36. Where evidence was in conflict, authority of selling agent to purchase for principal held for jury. Swing v. Bates Mach. Co., 32 Pa Super Ct. 403. Evidence held insufficient to show authority, express or implied, to agree to composition agreement with creditors. Oscar Bonner Oil Co. v. Pennsylvania Oil Co., 150 Cal. 658, 89 P. 613. Authority of president to execute chattel

(§ 15) *K. Apparent authority of officers and agents and estoppel of the corporation and of others.*[37]—The presumptive or apparent authority of an agent of a corporation is the same as that of an agent of an individual,[38] and the corporation is bound by all acts of its officers and agents within the apparent scope of their authority,[39] without regard to secret limitations.[40] The authority of an officer or agent of a corporation, therefore, need not be express, but may be implied from the circumstances[41] or from acquiescence in a general course of business or conduct,[42] or in the particular act in question or similar acts.[43] Hence, when a corporation holds one out and permits him to act as an officer or agent, it will be liable for his acts within the scope of his apparent authority the same as if he had been vested with actual authority,[44] and where a corporation allows a person in a large measure to control its business transactions, his acts in the name of the corporation will be held to be the acts of the corporation until it has been shown affirmatively

mortgage was shown where it appeared that he and two others were the only persons interested in the corporation, and that all three were directors and were present at meeting authorizing the mortgage to be executed. Strop v. Hughes, 123 Mo. App. 547, 101 S. W. 146. Evidence held to show that letter written by stockholder repudiating contract between corporation and plaintiff who relied on such repudiation as excuse for his failure to tender performance was written by authority of corporation. Guillaume v. K. S. D. Land Co., 48 Or. 400, 86 P. 883, 88 P. 586. Evidence that general manager was corporation's agent in regard to certain lands, that he leased same with option to purchase, that the consideration therefor was paid to him by lessee, and by him turned over to the corporation, which retained it, held to show authority to make the lease and give the option. West v. Washington, etc., R. Co. [Or.] 90 P. 666.

37. See 7 C. L. 920.

38. Merchant's Nat. Bk v. Nichols & Shepard Co., 223 Ill. 41, 79 N. E. 38.

39. Pine Beach Inv. Corp. v. Columbia Amusement Co., 106 Va. 810, 56 S. E. 822; Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 S. E. 56. Evidence held to sustain finding of manager's apparent authority to charter tug and barges to plaintiff. Metropolitan Coal Co. v. Boutell Transp. & Towing Co. [Mass.] 81 N. E. 645. Employment of civil engineer by president who was in charge of corporation's land business held within apparent powers. Rowland v. Carroll Loan & Investment Co. [Wash.] 87 P. 482. Loan made to officer having apparent authority to negotiate it held binding on corporation in absence of notice to lender of true destination of the loan. Cook v American Tubing & Webbing Co. [R. I.] 65 A. 641. Apparent authority of general manager to purchase $600 dynamo for corporation's lighting plant held for jury. Grand Rapids Elec. Co. v. Walsh Mfg. Co., 142 Mich. 4, 105 N. W. 1.

40. Imposed by by-laws. Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 S. E. 56. By by-laws or otherwise. Pine Beach Inv. Corp. v. Columbia Amusement Co., 106 Va. 810, 56 S. E. 822. Power of general manager to purchase property. Buffalo Coal Creek Min. Co. v. Troendle, 30 Ky. L. R. 740, 99 S. W. 622, Where it was admitted that directors authorized manager to employ plaintiff, the corporation could not invoke a by-law requiring such employments to be by formal resolution. Golden Age No. 2 Min. & Mill. Co. v. Langridge [Colo.] 88 P. 1070. One dealing with manager of corporation who was authorized to make water contracts held not bound by limitations on power of manager as to form of contracts when other party had no knowledge of such limitations. Alston v. Broadus Cotton Mill [Ala.] 44 So. 654.

41. Jack v. National Bk., 17 Okl. 430, 89 P. 219; Crossley v. St. Philip Neri [N. J. Err. & App.] 67 A. 27. Trust company held justified in acepting from president of corporation a draft payable to corporation in payment of stockholders' note held by trust company and secured by pledge of stock, where president and other maker of such note were sole stockholders and affairs and property of corporation had all been turned over to such president for his management and control. Ward v. City Trust Co., 102 N. Y. S. 50. Circumstances held to sustain act of president of corporation in dedicating street to public use. City of West End v. Eaves [Ala.] 44 So. 588. From the **use of corporation's telephone,** same authority implied as from fact of being in charge of office. General Hospital Soc. v. New Haven Rendering Co., 79 Conn. 581, 65 A. 1065. Evidence that person telephoning to hospital in name of corporation said that latter would pay for its employes about to be sent to hospital held admissible on question of liability. Id.

42. Recognized custom of certain officers to sign promissory notes of corporation in certain way. Crossley v. St. Philip Neri [N. J. Err. & App.] 67 A. 27. Acquiescence of stockholders and directors held to constitute a holding out to public of president and manager as authorized to borrow money for corporation. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641.

43. Corporation held liable for care and treatment at hospital of its men injured in its employment, when men were taken to hospital in response to telephone call in name of corporation, and latter failed to repudiate its liability after having notice that hospital was looking to it for payment. General Hospital Soc. v. New Haven Rendering Co., 79 Conn. 581, 65 A. 1065. From course of previous conduct corporation estopped to deny right to manager to determine when its rice should be milled and sold. Mayville Canal Co. v. Lake Arthur Rice Milling Co. [La.] 44 So. 260.

44. Jack v. National Bk., 17 Okl. 430, 89 P. 219.

that they were unauthorized.[45] The corporation will not be liable for the acts of its agent outside of both his actual and apparent authority,[46] nor where the transaction is such as of itself negatives the authority of the officer or agent,[47] as where the transaction is obviously for the officer's or agent's personal benefit.[48] There seems to be some conflict as to the effect of matters which would have given rise to an implied authority if known to the party dealing with the officer or agent, but which were not in fact known to him.[49]

Whether a corporation is estopped in a particular case is usually a question of fact,[50] and the burden of establishing the estoppel is on the party asserting it.[51] As in other cases, knowledge on the part of the corporation is essential to an estoppel to deny an officer's or agent's authority,[52] and absence of notice on the other party's part as to any defect of authority.[53] One may also be precluded by his own negligence to assert an estopped against the corporation.[54] A stockholder may be estopped to assail the authority and qualifications of officers.[55]

Acceptance of benefits.[56]—A corporation cannot repudiate transactions of its officers and agents in its behalf of which it has accepted the benefits,[57] but

45. Notwithstanding Ballinger's Ann. Codes & St. § 4255, providing that corporate powers must be exercised by its board of trustees. McKinley v. Mineral Hill Consol. Min. Co. [Wash.] 89 P. 495.

46. Corporation held not bound by fraud of agent in issuing bogus stock, where it had not held him out as authorized to issue stock and had not been intrusted with blank certificates, stock books, or seal. Rogers v. Southern Fiber Co. [La.] 44 So. 442.

47. Published notices designed to secure proxies to faction of directors held to show on their face that they were beyond the scope of the authority of the directors causing the publication, and hence corporation was not liable to publisher. Lawyers' Advertising Co. v. Consolidated R., Lighting & Refrigerating Co., 187 N. Y. 395, 80 N. E. 199.

Absence of corporate seal upon an instrument given in behalf of the corporation is not sufficient to give notice that the officer representing the corporation is without authority in the premises, when the instrument is not such as to require a seal. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641.

48. When one received stock issued to issuing officer. Lucile Dreyfus Min. Co. v. Willard [Wash.] 89 P. 935. One receiving from officer corporation's draft in payment of debt due from such officer cannot rely on apparent authority of officer. Home Sav. Bk. v. Otterbach [Iowa] 112 N. W. 769. Request of officer borrowing money ostensibly for his corporation that check be made to himself did not charge lender with notice that loan was for officer's benefit where previous loan had been made in same manner and had been paid by corporation without complaint. Martin & Co. v. Logan, 30 Ky. L. R. 799, 99 S. W. 648.

49. One dealing with a corporate officer in ignorance of acts which might give rise to an implied authority cannot rely on such acts. First Nat. Bk. v. Abilene Hotel Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 9, 103 S. W. 1120. Where proper inquiry by one dealing with a corporate officer would have revealed an apparent authority in the premises, he is entitled to the benefit of such authority, though he made no inquiry. Ward v. City Trust Co., 117 App. Div. 130, 120 N. Y. S. 50.

50. Held question of fact whether corporation was estopped to deny authority of president, who had succeeded individually to the corporation's business, to execute note in name of corporation. La Plant v. Pratt-Ford Greenhouse Co. [Minn.] 112 N. W. 889.

51. Home Sav. Bk. v. Otterbach [Iowa] 112 N. W. 769.

52. Where corporation did not know that agent was overdrawing its bank account and did not lead bank to suppose that he had such authority, corporation not liable for overdraft. Merchants' Nat. Bk. v. Nichols & Shepard Co., 223 Ill. 41, 79 N. E. 38.

53. One receiving from officer the corporation's draft in payment of debt due from such officer cannot claim estoppel, there being no reliance and no apparent authority. Home Sav. Bk. v. Otterbach [Iowa] 112 N. W. 769.

54. Corporation not estopped to repudiate liability to bank for overdraft by agent by reason of its failure to examine pass book, where bank was negligent in failing to ascertain scope of agent's authority and sent pass book and notice of overdraft to agent instead of to the corporation. Merchants' Nat. Bk. v. Nichols & Shepard Co., 223 Ill. 41, 79 N. E. 38.

55. Stockholder who had opportunity to prevent transactions leading up to election of directors and certain course of management by them, but who acquiesced until rights of new stockholders had intervened and until directors had succeeded in saving corporation's property from loss, held estopped to assert disqualification of such directors by reason of alleged fraud of certain stockholders in acquiring their stock. Jones v. Bonanza Min. & Mill. Co. [Utah] 91 P. 273.

56. See 7 C. L. 921.

57. Held liable on note, the consideration of which it had received and enjoyed. McKinley v. Mineral Hill Consol. Min. Co. [Wash.] 89 P. 495. Where a corporation accepts services of one employed by officer. Kelly v. Jersey City Water Supply Co. [N. J. Err. & App.] 67 A. 108. Services of attorney.

this doctrine does not apply where the transactions are in behalf of the officer or agent personally.[58] Where the corporation's liability on account of acceptance of benefits depends upon such acceptance being a ratification, knowledge is essential to its liability.[59] Where the corporation wishes to repudiate the transaction, it must at least offer to restore the statu quo.[60]

(§ 15) *L. Ratification of unauthorized acts.*[61]—A corporation may ratify any act or contract made in its behalf which it might have lawfully done or made originally.[62] Unauthorized acts of the directors may be ratified by the stockholders [63] without formal meeting of stockholders,[64] and unauthorized acts of other officers and agents may be ratified by the directors without a formal meeting and resolution.[65] Subject to the qualification that full knowledge of the facts is essential to a ratification,[66] a ratification may arise from a demand for the completion of the transaction,[67] an attempt to enforce the obligations arising out of the transaction,[68]

Bernstein v. Lispenard Realty Co., 53 Misc. 273, 103 N. Y. S. 210. Acceptance of service and payment of wages of employe for seven months. Conkey Co. v. Goldman, 125 Ill. App. 161. Services of financier in assisting reorganization. Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, 79 N. E. 276. Unauthorized settlement of obligations due corporation. Petersen v. Elholm, 130 Wis. 1, 109 N. W. 76. In suit against maker of note payable to corporation and indorsed by it through its vice-president to plaintiff, authority of vice-president to make the indorsement sustained by acceptance of proceeds of note by corporation. Jones v. Evans [Cal. App.] 91 P. 532. Bond pledged to secure advance obtained and used by corporation. Farmers' Loan & Trust Co. v. Madison Mfg. Co., 153 F. 310. Acceptance of sale of stock made by agent employed by secretary who was unauthorized in the premises, with knowledge that agent was acting for corporation and that sale was made by him, estops the corporation from contesting the stipulations as to compensation made in agreement with agent, though it had no knowledge of such stipulations. Bauersmith v. Extreme Gold Min. & Mill. Co., 146 F. 95. Corporation bound by power to confess judgment under lease executed by its president, where it took possession of and occupied the premises under the lease which it had in its possession. Higbie Co. v. Weeghman Co., 126 Ill. App. 97.

58. Corporation not liable on individual note of officer though it received proceeds. Andrews Co. v. National Bk. [Ga.] 58 S. E. 633. Corporations not liable for overdraft on its bank account by its agent, though such overdrafts were applied to his legitimate expenses, when in fact they were made to cover defalcations by him. Merchants' Nat. Bk. Co. v. Nichols & Shepard Co., 223 Ill. 41, 79 N. E. 38.

59. Where corporation paid consideration recited in conveyance to one in whose name it procured grants from state without knowledge of agreement of its agent to pay such person a certain consideration, the acceptance and retention of the survey did not render it liable on such agreement. Hurlbut v. Gainn [Tex. Civ. App.] 18 Tex. Ct. Rep. 142, 103 S. W. 409.

60. Corporation cannot repudiate note, given in renewal of one concededly valid, on ground that officer signing it had gone out of office without offering to restore the status quo. Houts v. Sioux City Brass Works [Iowa] 110 N. W. 166.

61. See 7 C. L. 922.

62. Bishop v. Fuller [Neb.] 110 N. W. 715.

63. Note executed by president and secretary for advances to corporation by president held validated by ratification by board of directors. Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co. [Colo.] 90 P. 81.

64. Action of directors ratified by acceptance of benefits. Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, 79 N. E. 276.

65. Davis v. Brown County Coal Co. [S. D.] 110 N. W. 113. Where each member of board knew of and acquiesced in authorized contract made by president. Davis v. Brown County Coal Co. [S. D.] 110 N. W. 113.

66. Conqueror Gold Min. & Mill. Co. v. Ashton [Colo.] 90 P. 1124; Hurlbut v. Gainor [Tex. Civ. App.] 18 Tex. Ct. Rep. 142, 103 S. W. 409. Corporation held not charged with knowledge of entries by treasurer of credits on claims due corporation so as to estop it from repudiating such credits as fraudulent. National Hollow Brake-Beam Co. v. Chicago R. Equipment Co., 226 Ill. 28, 80 N. E. 556. Where picture was hung in church for exhibition and for accommodation of artist, the subsequent exhibition of such picture in same church after it had been removed therefrom did not charge congregation with notice of purchase by president of their corporation. Sword v. Reformed Congregation, 29 Pa. Super. Ct. 626. Use of one's name in order to practice fraud upon state in procuring land which it was not permitted under the law to purchase did not charge corporation with notice that its agent had agreed, without its authority, to convey such party a certain portion of its land. Hurlbut v. Gainor [Tex. Civ. App.] 18 Tex. Ct. Rep. 142, 103 S. W. 409.

Knowledge of directiors subsequently elected after the transaction has been fully ratified is immaterial, as where employment of accountants by authority of president was ratified by incumbent directors, and the president concealed such employment from new directors elected before completion of such employment. Teele v. Consolidated Amusement Co., 102 N. Y. S. 666.

67. Demand by plaintiff corporation for fulfillment of what it conceived to be terms of contract held sufficient ratification to make proof of authority of its president to sign

acceptance of indemnity from the officers or agents,[69] acquiesence,[70] or failure to repudiate,[71] or acceptance of benefits,[72] but not from a mere attempt to hold the officer liable,[73] or from the acts or admissions of officers acting in their personal capacity,[74] nor can the corporation ratify after repudiation by the other party.[75] A ratification is unavailable unless pleaded,[76] but the allegation may be in general terms.[77]

(§ 15) *M. Notice to or knowledge of officers or agents as notice to or knowledge of corporation.*[78]—The rule that notice to an officer or agent is notice to the corporation[79] applies only where it is the duty of the officer to communicate his knowledge to the corporation,[80] and the circumstances are such as not to rebut the presumption of the performance of such duty.[81] The knowledege of an officer will not, therefore, be imputed to the corporation unless received in an official capacity,[82] or under such circumstances as, in fidelity to the corporation, require him to impart it to the corporation,[83] nor will the officer's knowledge be imputed to the corporation where it does not relate to matters within the scope of his duties,[84] but under some circumstances notice to an officer in one capacity may be notice to him in another capacity and thus operates as notice to the corporation.[85] The presumption of performance of duty by communication to the corporation may be rebutted by the personal interest of the officer in the transaction,[86] but such is not the necessary result

contract unnecessary. Mebius & Drescher Co. v. Mills, 150 Cal. 229, 88 P. 917.

68. Suit by corporation on contract executed by president held sufficient ratification, in absence of issue as to authority to sign, to dispense with proof of original signing by corporation. Melbius & Drescher Co. v. Mills, 150 Cal. 229, 88 P. 917.

69. Bank accepting unauthorized check released from liability by corporation's waiver of the tort of its officers and acceptance from them of security for repayment of amount of check. Security Warehousing Co. v. American Exch. Nat. Bk., 118 App. Div. 350, 103 N. Y. S. 399.

70. Torts of agent. White v. Apsley Rubber Co [Mass.] 80 N. E. 500

71. Freygang v. Vera Cruz & P. R. Co. [C. C. A.] 154 F. 640. Failure to repudiate cannot be invoked without a showing of an opportunity to ratify or repudiate. Conqueror Gold Min. & Mill. Co. v. Ashton [Colo.] 90 P. 1124.

72. Director's repudiation of contract for sale of land in consideration of commissions on sales of other lands by vendee held ratified by corporation's retention of commissions due vendee and defense of suit for specific performance with knowledge of director's repudiation. Guillaume v. K. S. D. Land Co., 48 Or. 400, 86 P. 883, 88 P. 586.

73. Appropriation of funds by officer for payment of own debt not ratified by attempt to hold officer liable. Home Sav. Bk. v. Otterbach [Iowa] 112 N. W. 769. Where officer paid personal debt with corporation's funds, an attempt to enforce his liability for the conversion was not an election of remedies releasing the party receiving such funds with knowledge of officer's lack of authority from his joint liability for conversion. Id. Criminal prosecution against officer held not election of remedies releasing party receiving the funds. Id.

74. Mexican Nat. Coal, Timber & Iron Co., 154 F. 217.

75. Jackson Brewing Co. v. Canton, 118 La. 823, 43 So. 454.

76. Hurlbut v. Gainor [Tex. Civ. App.] 18 Tex. Ct. Rep. 142, 103 S. W. 409.

77. General allegation not objectionable as being allegation of conclusion. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 S. W. 867.

78. See 7 C. L. 923.

79. Knowledge of executive officer of unauthorized settlement of claim due corporation held knowledge of corporation so as to bind it by acquiescence and acceptance of benefits. Petersen v. Elholm, 130 Wis. 1, 109 N. W. 76. Notice to anyone in charge of train is notice to company as to disease among livestock being carried. Council v. St. Louis, etc., R. Co., 123 Mo. App. 432, 100 S. W. 57.

80. Clement v. Young-McShea Amusement Co. [N. J. Law] 67 A. 82.

81. Woodworth & Co. v. Carroll [Minn.] 112 N. W. 1054.

82. Knowledge of directors. Reed v. Munn [C. C. A.] 148 F. 737.

83. Reed v. Munn [C. C. A.] 148 F. 737. Corporation enjoined from using trade secrets learned from its president, a former director of the owner of such secrets, knowledge of such president being imputable to his corporation so as to charge latter with notice of its president's breach of confidence. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A. 339.

84. Notice to president of unauthorized acts of predecessor as to matters not within scope of duties and authority of office of presidency is not notice to the corporation. Sword v. Reformed Congregation, 29 Pa. Super. Ct. 626.

85. Knowledge of contract made by general manager imputed to corporation where same party was also superintendent, secretary, and treasurer. Lewiston Lumber & Box Co. v. Garvey [Idaho] 89 P. 940.

86. Corporation not bound by knowledge of officer or agent acting in own interest. Pueblo Sav. Bk. v. Richardson [Colo.] 89 P. 799. Notice that note executed to president was merely for accommodation. Wood-

where the officer or agent is acting in the joint interest of himself and the corporation.[87] Notice to a stockholder or director prior to the organization of the corporation will not ordinarily constitute notice to the corporation,[88] but when a promoter becomes to all intents and purposes the corporation, the latter will be charged with knowledge of the former acquired before organization.[89]

(§ 15) *N. Admissions, declarations, and representations of officers and agents.*[90]—A corporation is bound by the admissions and declarations of its officers and agents within the scope of their authority and duties,[91] but not otherwise,[92] unless ratified by the corporation.[93] The corporation is not bound by the personal declarations of its officers or agents.[94]

(§ 15) *O. Delegation of authority by directors.*[95]—A general delegation of authority to an executive committee extends only to regular routine business which may be transacted by directors during their term.[96]

(§ 15) *P. Personal liability of officers and agents.*[97]—The officers and agents are not personally bound by the stipulations of a contract entered into by them in behalf of their corporation,[98] but they are liable to the corporation for acts of spoliation and misfeasance resulting in loss to the corporation,[99] and may be called to an

worth & Co. v. Carroll [Minn.] 112 N. W. 1054. Knowledge of lessor's president of illegal purpose of lease did not prevent recovery of rent where such president was interested in the illegal enterprise. Brooklyn Distilling Co. v. Standard Distilling & Distributing Co., 105 N. Y. S. 264. Notice to agent of overdraft by him on corporation's bank account not notice to corporation, presumption being that agent would not communicate such notice to corporation. Merchants' Nat Bk. v. Nichols & Shepard Co., 223 Ill 41, 79 N. E. 38.

87. Where agent was president and general manager, owned most of the stock and constituted the corporation in all its outside relations, and acted for same in extending credit to another corporation, his knowledge that stock of latter was fictitiously paid up was imputable to his corporation, though he was personally interested in the transaction where he acquired his knowledge while acting jointly in a personal capacity and for the corporation. Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 42 So. 415.

88. Notice of equitable claim against property purchased by corporation. Reed v. Munn [C. C. A.] 148 F. 737.

89. Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 42 So. 415.

90. See 7 C. L. 924.

91. Admission of president of corporate payee of note that same was note of another corporation and not personal note of president of such corporation held binding on payee. Dunbar Box & Lumber Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91. Declaration of officer superintending construction of bridge that they were going across river to get certain timber held admissible to negative claim of corporation that cutting of some of such timber was accidental. Gray Lumber Co. v. Harris, 127 Ga. 693, 56 S. E. 252. Declarations of manager relative to contract of employment made four months after making of contract held admissible. Brown v. Crown Gold Mill. Co., 150 Cal. 376, 89 P. 86. On an issue as to the honesty of a corporation's dealings, letters written by its officers admitting the fraudulent character of such dealings are admissible. Weiss v. Haight & Freese Co., 148 F. 399. Director's admission of insolvency of corporation and willingness to be adjudged bankrupt held **predicated upon sufficient corporate existence** to be binding and constitute an act of bankruptcy, though franchise and property of the corporation had been sold under special fi. fa. pursuant to P. L. 1870, 58, for benefit of creditors. Cresson & Clearfield Coal & Coke Co. v. Stauffer [C. C. A.] 148 F. 981.

92. Declarations of president as to knowledge of unauthorized acts of predecessor do not bind corporation. Sword v. Reformed Congregation, 29 Pa. Super. Ct. 626.

93. Declaration in affidavit of canvassing agent that a certain property owner refused to consent to construction of street railroad held ratified by the railroad company where the affidavit was made a part of the papers upon which application for permission to construct the road was made. Shaw v. New York El. R. Co. [N. Y.] 79 N. E. 984.

94. Mere fact that officers as individuals insisted that there was a lien against complainant's stock, or that it was worth less than par, or that surplus was less than it really was, cannot subject the corporation to a charge of fraud or conspiracy. Schell v. Alston Mfg. Co., 149 F. 439.

95. See 7 C. L. 925.

96. Did not extend to contract extending beyond term of directors and binding corporation to become sales agent for another corporation engaged in same business. Commercial Wood & Cement Co. v. Northhampton Portland Cement Co., 115 App. Div. 388, 100 N. Y. S. 960.

97. See 7 C. L. 925.

98. Stipulation as to good will on sale of corporation's business. Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. [C. C. A.] 146 F. 37.

99. Liable for corporate funds lost in gaming speculations in futures. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202. Alternate facts as alleged held to sustain cause of action against officers for misfeasance and spoliation. People v. Equitable Life Assur. Soc., 51 Misc. 339, 101 N. Y. S. 354.

accounting therefor in equity,[1] and the liability in such cases may be enforced by the corporation's receiver.[2] In a suit for an accounting, all the officers concerned in the loss may be joined,[3] but a cause of action against the officers and one against the corporation alone cannot be joined.[4] In an action at law, defenses involving intricate accounts cannot be set up.[5] Limitations do not commence to run against misappropriations until they occur, though made pursuant to a scheme previously concocted,[6] nor until there is knowledge or notice of the misappropriations.[7] Taking secured notes in settlement of a claim against a director for funds misappropriated does not constitute the making of a loan to him.[8]

Statutory liabilities.[9]—Mere absence from the meetings at which a prohibited loan is made and ratified does not render a director liable.[10] Liability for the violation of a positive statutory prohibition cannot be waived.[11] Equity has jurisdiction of suits to recover losses made recoverable by statute, but not of suits to recover statutory penalties.[12] Statutes making directors liable as sureties for their fellow directors and other officers [13] are strictly construed.[14]

1. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 822, 103 N. Y. S. 840. Officer, through control of directors, secured investment by corporation in worthless bonds of another corporation in which he was interested. Pepper v. Addicks, 153 F. 383 Bill in suit against president for accounting held sufficiently definite and certain. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 822, 103 N. Y. S. 840. Only **single cause of action** for an accounting arises out of several appropriations or disbursements during continuous incumbency. Id.

Pleading: Allegation of systematic payment of excessive salaries held to sufficiently suggest a waste of assets through misfeasance. People v. Equitable Life Assur. Soc., 51 Misc. 339, 101 N. Y. S. 354. Allegation of payment of salaries "in excess of the value of services rendered" held an allegation of fact. Id. Allegation that defendants caused corporation's funds to be lent at small rate of interest to corporation in which they were stockholders, and to which the lending corporation was paying interest at a greater rate in fictitious loans, held not susceptible to construction as involving mere matter of business judgment, especially when taken in connection with allegation that defendants permitted assets to be wasted and acquired to themselves or transferred to others the funds which the corporation was permitted to lose. Id. Allegation that defendants voted personally on the transaction charged as constituting a spoliation is not essential, allegation that they caused and permitted it being sufficient. Id. Under Code Civ. Proc. §§ 1781, 1782, authorizing **suit by attorney general** to compel officers to repay to the corporation value of corporation's property which they have acquired to themselves or lost or wasted through violation of their duties, the attorney general may bring such suit in equity where loss is through misfeasance, as well as where it is through malfeasance and fraud, though the corporation could only sue at law for misfeasance. Id.

2. Claim against officer for money misappropriated by him may be enforced by corporation's receiver. Richardson v. Agnew [Wash.] 89 P. 404. Petition by receiver held to state cause of action against officers for unlawfully appropriating corporation's funds. McGregor v. Witham, 126 Ga. 702, 56 S. E. 55.

3. Though such acts were at different times and the periods of the officers' service do not coincide, the separate instances of loss not being separate causes of action, but necessary allegations of fact to support one cause of action for an accounting. People v. Equitable Life Assur. Soc., 51 Misc. 339, 101 N. Y. S. 354.

4. In suit by attorney general, under Code Civ. Proc. §§ 1781, 1782, against corporation officers for an accounting as to losses through misfeasance, it was improper to join a cause of action for failure to distribute surplus to stockholders, such cause of action being against the corporation alone. People v. Equitable Life Assur. Soc., 51 Misc. 339, 101 N. Y. S. 354. There was also defect of parties as to latter cause of action, in that all stockholders were not joined. Id.

5. In action at law by corporation against officer for misappropriation of funds, defendant cannot set up a settlement with the only other stockholder besides himself involving intricate accounts. Leigh v. National Hollow Brake-Beam Co., 223 Ill. 407, 79 N. E. 175.

6. McGregor v. Witham, 126 Ga. 702, 56 S. E. 55.

7. Limitations did not begin to run against suit against officers for misapropriations so long as neither the directors nor stockholders were cognizant of such misappropriations and could not have discovered them by due diligence. McGregor v. Witham, 126 Ga. 702, 56 S. E. 55.

8. Murphy v. Penniman [Md.] 66. A 282. Hence a bill is demurrable where it does not show whether the losses charged resulted from such a transaction or from other transactions alleged as constituting loans. Id.

9. See 7 C. L. 926.

10. Murphy v. Penniman [Md.] 66 A. 282; Thomas v. Penniman [Md.] 66 A. 281.

11. Liability of a director for voting for the payment of dividends out of the capital stock cannot be waived by either the directors or a majority of the stockholders, since P. L. 1896, § 30, positively prohibits such payment. Siegman v. Electric Vehicle Co. [N. J. Err. & App.] 65 A. 910.

12. Under a statute authorizing recovery

(§ 15) *Q. Liability of officers for mismanagement.*[15] The officers of a corporation are personally liable for losses flowing from their mismanagement of the corporate affairs.[16] This liability grows out of the fiduciary position held by the officers,[17] and the act charged must be a corporate act.[18] Liability may fall upon a de facto as well as a de jure officer.[19] The suit to recover such losses may be brought by the corporation[20] or its receiver,[21] and against all persons concerned in such losses.[22] A stockholder may be estopped to sue.[23] Several acts of mismanagement or spoliation occuring during an officer's incumbency constitute a single cause of action.[24] The bill or complaint[25] must allege that defendants were directors or officers.[26] The cause of the losses complained of may be alleged in the alternative as being either the defendant's participation in wrongful transactions or his negligence.[27] A settlement with and release of a portion of the defendants does not necessarily release the others.[28]

of amount loaned to director and losses and expenses resulting therefrom the latter may be recovered in equity, but not the former independently of the latter. Murphy v. Penniman [Md.] 66 A. 282.

13. Const. art. 12, § 3, making directors liable for money embezzled or misappropriated by officers of the corporation, creates only a suretyship liability. Hercules Oil Refining Co. v. Hocknell [Cal. App.] 91 P. 341.

14. Act of officer having no stock to sell for corporation in selling in own behalf stock for future delivery, and subsequent purchasing of treasury stock at less price and delivering same to purchasers, held not misappropriation where he paid fair value for stock at time of his purchase. Hercules Oil Refining Co. v. Hocknell [Cal. App.] 91 P. 341.

15. See 7 C. L. 926.

16. Continuing an officer in office after knowledge of defalcations and misappropriations by him. Murphy v. Penniman [Md.] 66 A. 282. Allowing officer's bond to lapse after knowledge of misappropriations covered thereby. Id. Where, in order to show sufficient reserve to entitle corporation to do business in foreign state, a reserve company was created, a certain number of shares of which were purchased by directors and resold to their corporation, the desired result being accomplished, but the shares thus sold being worthless, and subsequently, in order to make another such report, the same shares were purchased by the directors from their corporation with money taken from its treasury. Bowers v. Male, 186 N. Y. S. 28, 78 N. E. 577. **Ignorance** of matters which it is the duty of the officers to know will not excuse them. Elliott v. Farmers' Bk., 61 W. Va. 641, 57 S. E. 242.

17. Elliott v. Farmers' Bk, 61 W. Va. 641, 57 S. E. 242.

18. Director's knowledge of purpose of unauthorized loan to president and his unofficial consent thereto which did not enable the president to obtain the money did not render director liable therefor. Hirsch v. Jones, 115 App. Div. 156, 100 N. Y. S. 687.

19. Mutual Life Ins. Co. v. McCurdy, 118 App. Div 815, 103 N. Y. S. 829.

20. Suit against officers to recover funds wrongfully withdrawn by them from a depositary. McRee v. Mexican Gulf Oil & Mineral Co., 127 Ga. 383, 56 S. E. 451.

21. Where directors sold worthless stock to corporation as part of plan to raise reserve required by statute. Bowers v. Male, 186 N. Y. S. 28, 78 N. E. 577. Fact that one of directors sought to be charged in a suit by receivers is also a receiver, and as such a party plaintiff, is not ground for demurrer where the case for the plaintiff is really controlled by attorney appointed by the court. Murphy v. Penniman [Md.] 66 A. 282.

22. Bill not subject to objection for multifariousness on account of the various causes of action stated where it alleges that all the defendants were connected with all the acts complained of. Murphy v. Penniman [Md.] 66 A. 282.

23. Evidence in suit by stockholder held sufficient to warrant inference that stockholder knew of and acquiesced in practices of director charged as mismanagement in suit by stockholder. Davenport v. Crowell, 79 Vt. 419, 65 A. 557. Holder of stock will not be heard to complain on the ground that it was illegally sold by the directors to the president. Gumaer v. Cripple Creek Tunnel Transp. & Min. Co. [Colo.] 90 P. 81.

24. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 815, 103 N. Y. S. 829.

25. Bill held not demurrable for uncertainty in alleging the cause of action against the defendants. Murphy v. Penniman [Md.] 66 A. 282. Petition against president and secretary for withdrawal of corporate funds from depositary for wrongful purpose held good on demurrer. McRee v. Mexican Gulf Oil & Mineral Co., 127 Ga. 383, 56 S. E. 451.

26. Since stockholders are not liable for mismanagement. Brown v. Utopia Land Co., 118 App. Div. 364, 103 N. Y. S. 50.

27. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 815, 103 N. Y. S. 829.

28. Other defendants only entitled to credit on recovery against them. Murphy v. Penniman [Md.] 66 A. 282. Court order authorizing receivers to settle with portion of defendants did not authorize release under seal, and hence such release did not discharge other defendants. Id. Where portion of defendants settled with receivers on understanding that release under seal would be executed to them, and such release was so executed, but without authority of court, the other defendants were not released, but the effect of the sealed release could be avoided by repayment of the amount paid by the defendants who were parties to the release. Id.

Statutory actions against directors.[29]

(§ 15) *R. Dealings between a corporation and the directors or other officers, and personal interest in transactions.*[30]—The officers of a corporation cannot represent it in matters in which they are interested.[31] An officer, therefore, cannot in his official capacity deal with himself in a personal capacity,[32] but the mere lending of the corporation's credit in a transaction in which an officer is interested is not necessarily fraudulent.[33] Nor will a transaction necessarily be stamped as fraudulent merely because an officer secures an advantage by superior diligence in looking after his rights,[34] nor by irregular bookkeeping by which a transaction is kept off the books of the corporation.[35] Nor is a director bound by an agreement with his codirectors to do an ultra vires act.[36] But officers and agents will not be allowed to use their official powers and authority to acquire benefits to themselves at the expense of the corporation,[37] or to otherwise acquire benefits in violation of their trust relation,[38] and they will be treated as trustees ex maleficio for the corporation as to all property [39] or profits [40] thus acquired, unless to do so might work detriment to the interests of the other party to the transaction,[41] and the officer is liable to an accounting in equity therefor,[42] and in a proper case an injunction may issue in aid of such accounting,[43]

29. See 5 C. L. 817.

30. See 7 C. L. 927.

31. Haines Mercantile Co. v. Highland Gold Mines Co. [Or.] 88 P. 865. Notes and mortgage executed to director to pay for stock purchased from him by another director held invalid as to creditor of corporation. Id.

32. Officer having power to lend money cannot lend money to himself or to others for his own benefit when such others know purpose of loan. McGregor v. Witham, 126 Ga. 702, 56 S. E. 55.

33. When manager borrowed money on corporation's note and turned same over to his wife, also an officer and the largest stockholder, and who paid both note and interest. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied. Id., 110 N. W. 798. Where officers pledged own property to secure personal loan, a pledge at the same time of corporation's property to secure loan the proceeds of which went to corporation held not rendered fraudulent by clause in pledge agreement that property might be held for all debts of pledgor to pledgee where such clause was afterwards canceled. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581.

34. A judgment against a corporation in favor of the wife of a director will not be vacated at the instance of its receiver merely because procured through selfish activity of such director and the purposeless inactivity of the other directors. Gen. Corp. Act, §§ 64, 86, Gen. St. pp. 919, 924, providing that on final dissolution of corporation its property shall be vested in its stockholders as tenants in common, having no application to such a case. Shinn v. Kummerle [N. J. Eq.] 66 A. 949.

35. Where manager borrowed money for his wife on corporation's note which was not charged to the wife, who was also an officer, but the note was treated as her obligation, and she paid it and the interest thereon. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied. Id., 110 N. W. 798.

36. Where the corporation has no power to purchase its own stock, a director may disregard an agreement with his codirectors to purchase for the corporation and may purchase for himself. Dacovich v. Canizas [Ala.] 44 So. 473.

37. President, acting as general manager, occupies fiduciary relation towards stockholders, and cannot in the course of such management secure to himself any advantage or profit not known to the stockholders. Levis v. Hammersmith [Ind. App.] 81 N. E. 614.

38. Cannot acquire for own benefit lease of premises occupied by corporation. Jacksonville Cigar Co. v. Dozier [Fla.] 43 So. 523.

39. Lease of premises occupied by corporation and acquired by director. Jacksonville Cigar Co. v. Dozier [Fla.] 43 So. 523. Stock purchased with corporate funds is held in trust for corporation though it has no power to purchase such stock. Dacovich v. Canizas [Ala.] 44 So. 473. Stock of corporation purchased with corporate funds. Barker v. Montana Gold, Silver, Platinum & Telurium Min. Co., 35 Mont. 351, 89 P. 66. It is immaterial whether such profits are derived directly or indirectly from the corporate funds. Id. When corporation's stock was purchased by officer partly with corporate and partly with own funds, he was entitled to amount of stock proportionate to amount of own funds invested. Id.

40. Sale of goods to corporation by partnership of which the manager, purchasing agent, and director of corporation was secret member. Lozier Motor Co. v. Ball, 53 Misc. 375, 104 N. Y. S. 771. Where purchasing agent purchased goods from partnership of which he was secret member. Rickert v. White, 54 Misc. 114, 105 N. Y. S. 653.

41. Enforcement of trust as to lease to director of premises occupied by corporation refused where it appeared that director requested lease to corporation which was refused by lessors for reasons which did not appear, and lease to director stipulated against subleasing. Jacksonville Cigar Co. v. Dozier [Fla.] 43 So. 523.

42. Lozier Motor Co. v. Ball, 53 Misc. 375, 104 N. Y. S. 771; Rickert v. White, 54 Misc. 114, 105 N. Y. S. 653.

or to restrain a violation of the trust relation,[44] but equity has no jurisdiction of a mere action for damages predicated upon the fraud of directors and persons associated with them.[45] The policy which forbids personal transactions between a corporation and its directors includes a director's wife,[46] especially where it appears that the husband is personally interested in such transaction and that it is not openly and fairly conducted.[47] The same policy is applicable to those in privity with corporate officers and having notice of the latter's breach of trust,[48] and to transactions after the termination of the trust relationship.[49] Dealings between a corporation and its officers are not, however, void per se [50] in the absence of fraud,[51] though they constitute bad business policy,[52] and even where the transaction is such that the officer cannot act without a breach of trust, it is only voidable [53] and may be ratified or adopted by the corporation or its stockholders,[54] and hence stockholders cannot sue to

Limitations: Where the acts of the officers are utterly incompatible with innocent construction and are actually known to the corporation, the doctrine that the right of action for an accounting does not accrue until the termination of the fiduciary relation has no application. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied, Id., 110 N. W. 798. Right to equitable relief held to have accrued so as to be barred by six years' limitations, whether the cause of action be considered as cognizable in both law and equity, hence barring equitable relief regardless of time of discovery of fraud, or whether the cause of action be considered as one cognizable prior to Feb. 28, 1857 only in equity, and hence as accruing only upon discovery of fraud. Id. No demand upon the officers charged with the fraud is necessary to start limitations to running from the discovery of the fraud. Id. Suit by stockholder under Rev. St. 1898, §§ 3237, 3239, to redress fraudulent wrongs to corporation by officers thereof, held not based on contractual relations within section 4226, fixing limitation on actions on open accounts. Id.

43. Where partnership of which corporation officer was secret member sold goods to corporation and finally sold the partnership business to corporation in consideration of the latter's notes, the partners being irresponsible, injunction was issued to prevent transfer of notes pending accounting. Lozier Motor Co. v. Ball, 53 Misc. 375, 104 N. Y. S. 771.

44. Corporation enjoined from using trade secrets acquired from its president, a former director of the owner of such secrets. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A. 339.

45. Godfrey v. McConnell, 151 F. 783.

46. Voorhees v. Nixon [N. J. Eq.] 66 A. 192.

47. Evidence held to warrant abatement of mortgage by corporation to wife of director to secure price of property sold by the wife to the corporation, except to extent of price paid for the property by the wife. Voorhees v. Nixon [N. J. Eq.] 66 A. 192.

48. Pledgee of stock issued to corporation's issuing officer held chargeable with notice of fraud in issue. Lucile Dreyfus Min. Co. v. Willard [Wash.] 89 P. 935. Corporation enjoined from making use of trade secrets of another corporation acquired from its president, a former director of the latter, being charged with notice by reason of notice to such president. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A. 339. Issue of treasury stock for purpose of retaining control of corporation held invalid in hands of person to whom it was issued where he was chargeable with notice of the purpose of the issue. Elliott v. Baker [Mass.] 80 N. E. 450. Assignee of mortgage voidable on account of relationship between mortgagee and corporation takes it subject to all defenses. Voorhees v. Nixon [N. J. Eq.] 66 A. 192. Declaration against offsets executed by the delinquent parties acting as president and secretary of the corporation without action of directors, and at time when corporation was, to the knowledge of the assignee, under restraint by order of court from transferring its property rights, held unavailable. Id.

49. Former director enjoined from using trade secrets learned in his capacity as director. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A. 339.

50. Lease from corporation. Vonnoh v. Sixty-Seventh St. Atelier Bldg., 105 N. Y. S. 155. May sell property to corporation. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied, Id., 110 N. W. 798. Director may borrow money from corporation. Garrison Canning Co. v. Stanley, 133 Iowa, 57, 110 N. W. 171.

51. Sale held free from fraud. Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581. Rehearing denied, Id., 110 N. W. 798. Dealings between a corporation and a syndicate of which directors were members held not shown to be fraudulent. Bonner v. Terre Haute & I. R. Co. [C. C. A.] 151 F. 985. Director borrowing funds from corporation held not to have had such knowledge of his insolvency as to constitute fraud. Garrison Canning Co. v. Stanley, 133 Iowa, 57, 110 N. W. 171. Evidence held to show no fraud in the obtaining of judgment against corporation by its secretary and its attorney for services and advances, and the issue of execution on such judgment and the purchase of the corporation's property under such execution by such secretary and attorney. Knox v. Downs [Colo.] 90 P. 1130. Settlement by defendant in suit against one of the corporations by stockholder in other held not to show fraud. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

52. Figge v Bergenthal, 130 Wis 594, 109 N. W. 581, 110 N. W. 798.

53. Marsters v. Umqua Valley Oil Co. [Or.] 90 P. 151.

54. Marsters v. Umqua Valley Oil Co. [Or.] 90 P. 151.

repudiate such acts without a previous demand upon the corporation to act in the premises,[55] nor at all where they have acquiesced in such acts.[56] An indirect benefit to the corporation will not validate a transaction which is invalid because of the interest of the directors,[57] but, where the sole beneficiaries of the transaction are the corporation's only stockholders, the corporation cannot avoid the transaction.[58] A corporation is not bound to return property purchased from a director as a condition to its right to sue him for secret profits.[59] In such a suit it is no defense that other directors not joined as defendants are equally guilty with the defendant.[60] The burden of proving the good faith of transactions between a corporation and its officers is upon the latter,[61] or persons, other than bona fide purchasers for value without notice, claiming under them.[62] A transaction between two corporations may be rendered invalid by reason of the interest of the officers consummating it as officers of both of the corporations,[63] but a dispute between two corporations arising under a contract between them does not necessarily require directors common to both corporations to resign,[64] and as members of their respective boards they may properly act for the interest of the respective corporations.[65] Incapacity by reason of directors being interested in or controlled by another corporation relates to the directors, and not to the corporation,[66] and the principle under which contracts between corporations with common directors may be avoided at the suit of a stockholder relates only to those contracts in which the action of the common directors concludes the contract and binds the corporations and their stockholders,[67] and since the avoidance of such contracts is the enforcement of a right of the corporation as such,[68] and such contracts

Creditors must rely entirely on fraudulent nature of such transactions, and cannot invoke the fiduciary relation between the participants. Marsters v. Umqua Valley Oil Co. [Or.] 90 P. 151. See post, § 16B Rights and remedies of creditors. Sale of corporation's property with intent to appropriate proceeds. Levis v. Hammersmith [Ind. App.] 81 N. E. 641. Secret profit by director in sale of property to corporation held not ratified. Brooklyn Heights Realty Co. v. Kurtz, 115 App. Div. 74, 100 N. Y. S. 723.

Laches in repudiating transaction not imputable to corporation where practically all of the stockholders were ignorant of the facts and were deceived by defendants as to such facts. Voorhees v. Nixon [N. J. Eq.] 66 A. 192.

55. Levis v. Hammersmith [Ind. App.] 81 N. E. 614. Right to avoid transactions by reason of interest of the directors is in the corporation and not the minority stockholders. Contract made between two corporations by common directors. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

56. Acquiescence by failure to repudiate in due time before third parties had invested their money on faith of such acts. Levis v. Hammersmith [Ind. App.] 81 N. E. 614.

57. Mortgage and note executed to director to pay for stock purchased from him by another director not validated by fact that overissue of stock for which corporation was liable was thereby taken up. Haines Mercantile Co. v. Highland Gold Mines Co. [Or.] 88 P. 865.

58. Old Dominion Copper Mining & Smelting Co. v. Lewisohn [C. C. A.] 148 F. 1020.

59, 60. Brooklyn Heights Realty Co. v. Kurtz, 115 App. Div. 71, 100 N. Y. S. 723.

61. Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co., 35 Mont. 35, 89 P. 66.

62. Equitable owner of stock purchased from officer who acquired it with corporate funds. Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co., 35 Mont. 351, 89 P. 66.

63. Transfer of worthless securities by officer from himself as officer of one corporation to himself as officer of another corporation in payment of debt due latter from former held invalid, especially as the officer was personally interested in such transfer. National Hollow Brake-Beam Co. v. Chicago Ry. Equipment Co., 226 Ill. 28, 80 N. E. 556. Where, in anticipation of the acceptance of a proposed contract whereby another corporation was to have control of the corporation making the proposal, directors elected upon the nomination of such other corporation were not disqualified to act upon matters between the two corporations in the interval between their election and the acceptance of the contract. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

64. Appointment of committee having no common interest to settle the dispute held proper. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

65. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

66. Contract with another corporation not invalidated because executed subsequently to the election of directors nominated by such other corporation where such execution was pursuant to a prior resolution of directors none of whom were interested in such other corporation. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

67. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657.

68. Judgment is for corporation though

may be ratified by the corporation acting through its stockholders,[69] such principle does not extend to cases where the acts of the directors must finally be approved and consummated by the stockholders.[70]

Purchase of corporate property.[71]—A sale by a corporation to one of its officers is not presumptively fraudulent,[72] but the officer will not be allowed to gain an unfair advantage,[73] and persons in privity with him and having notice stand in the same position relative to the sale as the stockholder.[74] It is not necessary to prove actual fraud in order to set aside a sale of corporate property to directors,[75] or to a corporate vendee controlled by them,[76] and such a sale may be attacked by corporation creditors.[77] In the enforcement of an execution in his favor against the corporation, a director may purchase at the execution sale,[78] and the sale will not be set aside unless it appear that some undue advantage has been taken by him by reason of his fiduciary position.[79] In a proper case a preliminary injunction may issue to prevent delivery of the property.[80]

Purchase of corporate obligations.[81]

§ 16. *Rights and remedies of creditors of corporations. A. The relation of creditors.*[82]—The question as to whether one is a creditor of a corporation is often purely one of fact.[83] Whether one is a stockholder or creditor is treated elsewhere.[84] A judgment plaintiff in garnishment against a corporation is subrogated to the rights of the original creditor.[85]

(§ 16) *B. Rights and remedies of creditors against the corporation.*[86]—The corporation is a necessary party to a suit by a creditor to set aside a conveyance

suit is by stockholders. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657.

69. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657. Fact that majority of directors of lessor corporation were directors of lessee rendered the lease voidable only at the most, and the lease was therefore capable of ratification by stockholders of lessor. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

70. Consolidation. Colgate v. U. S. Leather Co. [N. J. Eq.] 67 A. 657. See ante, § 13, Succession of Corporations; Reorganization; Consolidation.

71. See 7 C. L. 928.

72. Transfer of notes given for stock to director and former promoter. Beach v. McKinnon, 148 F. 734. A bare allegation that certain property transferred to a director still remains the property of the corporation is insufficient to sustain a bill against such director for a **discovery,** some allegation of fraud or breach of trust being necessary. Id.

73. Agreement between two or more promoters, stockholders, and officers that one of them should be supplied with lumber for personal use at cost held not binding on other stockholders, the corporation, its liquidators, or receiver, and latter might sue for market price of lumber at time of sale. Shreveport Nat. Bk. v. Maples [La.] 43 So. 905.

74. Joint vendee. Schmidt v. Perkins [N. J. Law] 67 A. 77.

75. Mitchell v. United Box Board & Paper Co. [N. J. Eq.] 66 A. 938.

76. Where the property of a corporation is sold to a new corporation controlled by directors of the vendor, the latter, or any of its stockholders in its behalf, may sue to set the sale aside without regard to an offer to its stockholders of stock in the new corporation, where such offer made such stockholders liable for additional payments and required their participation in the new company controlled by others. Mitchell v. United Box Board & Paper Co. [N. J. Eq.] 66 A. 938.

77. Schmidt v. Perkins [N. J. Law] 67 A. 77. Attachment of property is an election to avoid the sale and challenges its validity. Id. Sale to director in satisfaction of antecedent debt is invalid as against attaching creditors where corporation is insolvent. Id.

78. Marr v. Marr [N. J. Eq.] 66 A. 182; Law v. Fuller, 217 Pa. 439, 66 A. 754.

79. Marr v. Marr [N. J. Eq.] 66 A. 182. Mere inadequacy of price will not move equity to set the sale aside, the remedy in such case being by application to the law court from which the execution issued. Id. Failure to give notice other than statutory notice to all stockholders is not sufficient to show undue advantage where it appears that such notice would have been futile. Id. Evidence held to show no undue advantage. Id. Evidence in suit to set aside sale held not to show bad faith on part of defendant. Law v. Fuller, 217 Pa. 439, 66 A. 754.

80. In order to render decree in favor of corporation effective if made. Mitchell v. Box Board & Paper Co. [N. J. Eq.] 66 A. 938.

81, 82. See 7 C. L. 930.

83. Whether plaintiff in action against corporation for services was employed by the corporation or by its president personally held a question of fact for the jury. Ray v. Jefferson County Gas Co., 31 Pa. Super. Ct. 194.

84. See this section, subsection Officers and Stockholders as Creditors.

85. Montgomery v. Whitehead [Colo.] 90 P. 509.

86. See 7 C. L. 930.

to a stockholder as fraudulent.[87] A statute giving creditors an absolute right to inspect the corporation's books in connection with their claims creates a legal remedy,[88] and such right may be enforced by mandamus.[89] A petition to enforce such a right must show specifically the relation between the creditor's claim and the papers or books sought to be inspected, a general allegation that they are related being insufficient.[90] This may be done, however, by an allegation of the information desired and a request to examine all papers and records containing such information.[91] Where the right is absolute, the purpose of the demand to inspect is immaterial,[92] as is also the question whether such records or papers would be admissible under general rules of evidence.[93]

Voluntary preferences.[94]—Subject to the rights of bona fide purchasers for value without notice,[95] a voluntary preference by an insolvent corporation is invalid,[96] even though the creditor has no notice of the corporation's insolvency.[97] An intent to defraud is essential to constitute a preference within the meaning of some statutes.[98] Where the creditor in good faith surrenders security which cannot be restored to him, in consideration of payment or of new security, the transaction does not constitute a preference,[99] but the rule is different as to the excess, or where the security released has no further value to the corporation,[1] or where the security consists of personal indorsements.[2]

Priorities between claims.[3]—In administering the assets of an insolvent corporation, the court must have due regard for the rights of preferred creditors as they are fixed by law.[4] Preference is sometimes given by statute to claims for labor or services.[5] Creditors do not stand in the position of the corporation or its stockholders

87. Lathrop, Shea & Henwood Co. v. Bryne, 115 App. Div. 846, 100 N. Y. S. 1041.

88. Not equitable remedy for discovery. See Pub. St. 1901, c. 148, § 12. Hub Const. Co. v. New England Breeders' Club [N. H.] 67 A. 574.

Penalty prescribed by Pub. St. 1901, c. 148, § 14, for refusal of clerk or agent to furnish copy of papers or records, held not to attach to refusal of right of inspection conferred by § 12. Hub. Const. Co. v. New England Breeders' Club [N. H.] 67 A. 574.

89, 90, 91. Hub Const. Co. v. New England Breeders' Club [N. H.] 67 A. 574.

92. Pub. St. 1901, c. 148, § 12, confers absolute right to examine papers and records related to claim. Hub Const. Co. v. New England Breeders' Club [N. H.] 67 A. 574.

93. Hub Const. Co. v. New England Breeders' Club [N. H.] 67 A. 574.

94. See 7 C. L. 930.

95. Purchaser of patents from corporation's assignee held without notice of any defect in assignee's title by reason of the assignment being fraudulent preference. Van Slyck v. Woodruff, 118 App. Div. 47, 103 N. Y. S. 139.

96. Furber v. Williams-Flower Co. [S. D.] 111 N. W. 548. Payment of secured claims on day before petition in bankruptcy was filed against corporation held preference within Laws 1901, p. 970, c. 351, § 48. Wright v. Gansevoort Bk., 52 Misc. 214, 103 N. Y. S. 47.

97. Furber v. Williams-Flower Co. [S. D.] 111 N. W. 548.

98. Intent to defraud is an essential element of preference prohibited by Laws 1892, p. 1838, c. 688, § 48, and it must appear that the transfer was because of insolvency and in contemplation thereof. Van Slyck v. Warner, 118 App. Div. 40, 103 N. Y. S. 1. Van Slyck v. Woodruff, 118 App. Div. 47, 103 N. Y. S. 139. Transfer of patents held not fraudulent preference. Id.

99. Security for old debt given to bank under guise of new loan with security. Perry v. Van Norden Trust Co., 118 App. Div. 288, 103 N. Y. S. 543. Redemption of securities already held by creditor is not preference to the extent of the value of such securities. Wright v. Gansevoort Bk., 118 App. Div. 281, 103 N. Y. S. 548. Where corporation assigned patents subject to previous assignment, and second assignee paid off debt secured by first assignment from proceeds of sales under such patents, the first assignee was not accountable to corporation's receiver for funds received from second assignee. Van Slyck v. Warner, 118 App. Div. 40, 103 N. Y. S. 1.

1. Payment of notes secured by indorsements. Wright v. Gansevoort Bk., 118 App. Div. 281, 103 N. Y. S. 548.

2. Doctrine of bona fide holder for value cannot be invoked by reason of acceptance of payment of notes secured by indorsement, since, the payment being held invalid, the sureties are not released. Wright v. Gansevoort Bk., 118 App. Div. 281, 103 N. Y. S. 548.

3. See 7 C. L. 931.

4. Franchise tax imposed by Gen. St. N. J. p. 3335, § 6, is a preferred claim against assets of insolvent corporation in hands of receiver apponted by court, state or Federal within state, such tax being in nature of a preferred debt created by contract pursuant to general statute. Conklin v. U. S. Shipbuilding Co., 148 F. 129.

5. P. L. 1896, p. 303, § 83, giving preference to persons performing "labor or service" in regular employ of corporation, being

relative to transactions between the corporation and its officers,[6] nor can they invoke mere irregularities in the execution of prior liens.[7]

Assets for creditors.[8]—The assets of an insolvent corporation constitute a trust fund for its creditors[9] and may be followed into the hands of anyone who receives them with notice of the trust,[10] and the recipients will be liable to the full extent of the assets so received.[11] The exhaustion of his legal remedies gives the creditor a standing in equity to follow such assets though he has acquired no specific lien thereon.[12] Such a suit is not based upon subrogation of the creditor to the rights of the corporation but upon a constructive trust, and is in the nature of a creditors' suit to reach assets fraudulently transferred,[13] and limitations begin to run not from the time of the transfer but from the accrual of the creditor's right to sue.[14] The rule is the same where the transfer is to another corporation. Hence a corporation taking over the assets of another corporation with knowledge of its indebtedness takes such assets cum onere,[15] and the payment of a valuable consideration will not defeat the claims of creditors;[16] but where a new corporation takes over all the assets of an old corporation, giving its stock therefor but is not a continuation of the old corporation, it is liable to creditors only to the extent of the value of the property so taken over,[17] and the creditor's remedy is in equity only.[18] A transfer of property between two corporations whose chief officers are practically identical is presumptively a fraud upon creditors,[19] but this presumption is merely one of fact and may be overcome by clear proof of good faith.[20] Where property of a corporation is purchased in good faith and for value, the trust in favor of creditors does not attach to the property but only to the proceeds,[21] and the purchaser is not liable for the general debts of the corporation or concerned in any controversy between the corporation's creditors and the stockholders who made the exchanges,[22] and even in the case

construed as intended to prevent exodus of employes in time of corporation's embarassment, must be construed to give a preference to the general manager of a printing company. Buvinger v. Evening Union Printing Co. [N. J. Eq.] 65 A. 482. Under corporation act, § 84, labor claims are postponed to chattel mortgages recorded more than two months prior to institution of insolvency proceedings against the corporation. Id. The fact that an employe is a **director** and a member of the board that employed him does not deprive him of his statutory preference as an employe. Id.

6. The right of a subsequent lienor to attack a prior lien in favor of an officer or director depends entirely upon whether such lien was fraudulently obtained. Marsters v. Umqua Valley Oil Co. [Or.] 90 P. 151.

7. Cannot raise questions as to compliance with by-laws, directors' meetings, quorums, etc. Marsters v. Umqua Valley Oil Co. [Or.] 90 P. 151.

8. See 7 C. L. 932.

9. Furber v. Williams-Flower Co. [S. D.] 111 N. W. 548; McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169.

10. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012.

11. Where the recipients are stockholders, the rules limiting a stockholder's liability to a pro rata and the remedies in such case do not apply. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012.

12, 13. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012.

14. Right accrues upon obtaining judgment against corporation, issue of execution, and return thereof nulla bona. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012.

15. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012. Corporation which purchased with its own stock at par valuation, though it was worth only 50 per cent. of par, the entire property of another corporation, part of such stock being issued to the selling directors personally and balance being retained to pay debts of seller, held not bona fide purchaser without notice. McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E 169. Where one corporation received all assets of another with knowledge that consideration did not go to selling corporations but to trustees thereof for their own benefit Carstens & Earles v. Hafius [Wash.] 87 P. 631. Where the transfer is not in the ordinary course of business and includes all the transferror's property, the very circumstances of the transfer constitute **notice.** Williams v. Commercial Nat. Bk. [Or.] 90 P 1012.

16. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012.

17, 18. Sharples Co. v. Harding Creamery Co. [Neb.] 111 N. W. 783.

19, 20. Barrie v. United Rys., 125 Mo. App. 96, 102 S. W. 1078.

21. Barrie v. United Rys. Co., 125 Mo. App 96, 102 S. W. 1078; Hagemann v. Southern Elec. R. Co., 202 Mo. 249, 100 S. W. 1081.

22. Barrie v. United Rys. Co., 125 Mo. App. 96, 102 S. W. 1078. Where all of corporation's stock was purchased, consideration being paid to stockholders, and thereafter all its property was transferred to purchaser for nominal consideration. Id.

of a fraudulent conveyance the purchaser will be held liable only to the extent of the value of the property received.[23] Under the trust fund doctrine a corporation's property cannot be distributed as dividends as against the claims of existing creditors,[24] but subsequent creditors cannot complain of such a distribution.[25] Such doctrine, however, is not available to defeat the title of a bona fide holder of a corporation's commercial paper.[26]

Winding up proceedings, assignment, receivership.[27]—In the absence of statutory authority, equity has no inherent power to appoint a receiver solely on the ground of insolvency.[28] The remedy, therefore, being merely ancillary, must fail where the main action is not sustained.[29] Total suspension of business is not an absolute test as to insolvency authorizing a receivership.[30] A receiver may be appointed on the ground of fraud upon and deception of creditors.[31] A managing receivership is never granted except with a view of winding up the corporation's affairs.[32] A contract creditor of a corporation will not be heard to ask for the appointment of a receiver to collect unpaid stock subscriptions until he has reduced his claim to judgment and execution has been returned unsatisfied,[33] nor will the cause be retained for the benefit of such cross petitioners.[34] A statutory right to have a receiver is not affected by the motives of the applicant,[35] and may extend to nonresident creditors suing in a Federal court.[36] A statute providing for receiverships is not repealed by a subsequent statute providing for forfeiture proceedings where the two remedies are not inconsistent.[37] The authority of the receiver depends upon the terms of the order of the court.[38] The rights and liabilities of the creditors and

23. Barrie v. United Rys., 125 Mo. App. 96, 102 S. W. 1078.

24, 25. Montgomery v. Whitehead [Colo.] 90 P. 509.

26. Trust company held, under circumstances of case, bona fide holder of draft payable to a corporation which the trust company received from the president of the corporation in payment of a note executed to the trust company of the stockholders of the corporation. Ward v. City Trust Co., 117 App. Div. 130, 102 N. Y. S. 50.

27. See 7 C. L. 932.

28. Hobson v. Pacific States Mercantile Co. [Cal. App.] 89 P. 866; American Fruit & Steamship Co. v. Elsworth Dox, 4 Ohio N. P. (N. S.) 155. Code Civ. Proc. § 564, subd. 5, authorizing appointment of receiver where corporation is insolvent, gives only ancillary right. Hobson v. Pacific States Mercantile Co. [Cal. App.] 89 P. 866.

29. As where declaration in main action did not sufficiently state cause of action. Hobson v. Pacific States Mercantile Co. [Cal. App.] 89 P. 866.

30. A going corporation which was losing money was seriously embarrassed for current funds to carry on its ordinary business and without funds to satisfy a call loan, and was being pressed for payment of a mortgage which it was unable to pay, held subject to receivership under Corporation Act 1896, p. 298, ch. 88, § 65, authorizing appointment of receiver for corporations which are insolvent or which have suspended business and are not about to resume same. Catlin v. Vichachi Min. Co. [N. J. Eq.] 67 A. 194.

31. Where corporation conducted bucket shop under pretense that it carried on legitimate stock broking business, and thus induced complainant to become its patron and creditor. Weiss v. Haight & Freese Co., 148 F. 399.

32. Gutterson v. Lebanon Iron & Steel Co., 151 F. 72.

33, 34. American Fruit & Steamship Co. v. Dox, 4 Ohio N. P. (N. S.) 155.

35. Creditors' application under Corporation Act 1896, p. 298, c. 188, § 65, for receiver for corporation, not affected by motives of applicants in that they desire to obtain control of the corporation. Catlin v. Vichachi Min. Co. [N. J. Eq.] 67 A. 194.

36. Nonresident creditors of a bond and investment company selling bonds, etc., on installments may invoke the aid of Federal courts of equity to enforce provisions of Act. Mo. Apr. 21, 1893 [Laws 1893, p. 121], providing for deposit of securities by such companies with state treasurer, and such a court may take possession of such securities and administer the trust created by the statute. Morrill v. American Reserve Bond Co., 151 F. 305. Suit by single stockholder against such a company and state treasurer to enforce payment of his claim out of securities deposited with such treasurer did not divest jurisdiction of Federal court to administer the trust for the benefit of all the stockholders. Id.

37. Forfeiture proceedings at instance of attorney general against bond and investment companies selling bonds, etc., on installment, provided for by Laws No. 1897, p. 90, are not inconsistent with and hence are not exclusive of right of bondholders to apply for receiver under Act Mo. Apr. 21, 1893 [Laws 1893, p. 121] § 4. Morrill v. American Reserve Bond Co., 151 F. 305.

38. A receiver appointed on the application of creditors of an insolvent corporation, and authorized to take possession of its books and collect debts due to it, has no authority

debtors of an insolvent corporation are determinable as of the time of the appointment of a receiver.[39] The possession of the receiver under order of court is exclusive of the right of the corporate officers to deal with the property,[40] and such possession will be protected by a court of equity.[41] Merely presenting their claims to the receiver will not give creditors, not parties to the receivership proceedings, the right to appeal.[42] Federal court will not, through receivers appointed by it for a corporation, prevent the corporation from appealing from judgment against it.[43] A creditor's share on distribution of assets cannot be curtailed on account of security held by him.[44] Stockholders as such cannot be paid anything out of the assets until the creditors are satisfied.[45] The expenses of winding up take precedence even over prior encumbrances.[46] On the discharge of the receiver the corporation's property may be restored to the corporation subject to existing liabilities.[47] Assessment against stockholders is treated elsewhere.[48]

(§ 16) *C. Rights of corporate mortgagees and bondholders.*[49]—The existence and sufficiency of the consideration enters into the validity of corporate mortgages[50] and bonds.[51] The burden of proving the invalidity of a bond is upon the party al-

to sell its land, and nunc pro tunc order ratifying private sale of land by such a receiver held, under the evidence, erroneous. Mason v. Hubner, 104 Md. 554, 65 A. 367.

Right to sue: Where receiver appointed by Federal court for domiciliary district was authorized to sue to recover assets, an ancillary receiver appointed by a Federal court for another district, with all powers given the principal receiver, could sue in the ancillary district to recover assets. Bay State Gas Co. v. Rogers, 147 F. 557.

Bill by receiver against mortgagee of corporation under chattel mortgage alleged to be void for accounting held to allege sufficiently that debts were due by corporation to others besides defendant, and that others were interested in estate of corporation, and that its assets were insufficient to pay its debs. Pryor v. Gray [N. J. Err. & App.] 65 A. 1016.

39. Defenses available at such time against bonds of the corporation are available as against one who thereafter takes them with notice. Hynes v. Illinois Trust & Sav. Bk., 226 Ill. 95, 80 N. E. 753. See post, § E, Liability of Stockholders on Account of Unpaid Subscription and Remedies.

40. McKinnon-Young Co. v. Stockton [Fla.] 44 So. 237.

41. Injunction against interference with property by one claiming under a transfer from corporation's president. McKinnon-Young Co. v. Stockton [Fla.] 44 So. 237. Officers cannot even execute written evidence of prior verbal agreement with corporation, but party must resort to court for leave to enforce his contract or to have it evidenced in writing. Id.

42. Scott v. Great Western Coal & Coke Co., 223 Ill. 271, 79 N. E. 53.

43. Bowker v. Haight & Freese Co., 147 F. 923.

44. Buttler v. Com. Tobacco Co. [N. J. Eq.] 67 A. 514. P. L. 1896, p. 304, § 86, providing that creditors shall be paid proportionately to the amount of their respective debts, except mortgage and judgment creditors, does not require the surrender of collateral security as condition to right to participate in dividends on distribution. Id.

45. Sparrow v. Bement & Sons, 146 Mich. 326, 13 Det. Leg. N. 772, 109 N. W. 419.

46. Certificates issued by a receiver of a private corporation can be given priority over prior encumbrances only to the extent of the necessary expenses incident to the winding up of the business and the settlement of the receivership. International Trust Co. v. Decker Bros. [C. C. A.] 152 F. 78.

47. When corporation was not insolvent discharge of receiver and reservation of its property "subject to existing liabilities" did not relieve it from liability for breach of contract made prior to receivership. Stannard v. Reid & Co., 118 App. Div. 304, 103 N. Y. S. 521.

48. See post, this section, subdivisions E, and F.

49. See 7 C. L. 933.

50. Mortgage securing notes executed without consideration to officers of corporation and transferred to persons having notice of facts. In re Builders' Lumber Co., 148 F. 244.

51. Honest belief that property and securities given in exchange for an issue of corporate bonds will some day be worth the face value of the bonds is insufficient to supply the place of actual value required by statute. In re Wyoming Valley Ice Co., 153 F. 787. Bonds issued in disregard of a requirement that they must be sustained by a consideration equal in value to their face value are void in toto, and cannot be considered as bonds even for the amount actually given in exchange for them. Id. Transfer of only $27,500 worth of property in exchange for $90,000 in bonds, in addition to $200,000 in stock, held sustained by only a colorable consideration, and not to meet requirements Const. Pa. art. 16, § 7, and P. L. 1874, p. 81, forbidding issue of bonds and stock except for equivalent value. Id. Where a promoter of the reorganization of a corporation upon an increased capitalization acquired all the stock of the original corporation for a cash consideration, but such stock was not assigned to the new corporation, being retained by the parties furnishing the cash consideration, neither the property of the old corporation nor its stock

leging it.[52] The validity of bonds is determinable as of the time of their execution,[53] but a creditor may attack the validity of bonds regardless of whether his claim arose prior or subsequently to the bond issue,[54] and a fortiori the validity of bonds may be attacked by judgment creditors whose judgments were rendered upon obligations created prior to the bond issue.[55] Bondholders cannot attack the validity of the contract under which their bonds were issued as against other holders of bonds of the same series and issued under the same contract.[56] The rights of a bondholder are determinable by the law of the state in which the bonds were executed, delivered, and payable.[57] An indorsement of mortgage bonds by the trustee merely for the purpose of identification does not constitute a guarantee of the recitals of the bonds as to the character of the security.[58] Demand upon the corporation to sue is not a condition precedent to the right of a bondholder to sue for the annulment of other liens and the enforcement of his own,[59] but the remedy for the illegal disposition of bonds legally issued is not the annulment of the bonds but their restoration to the proper custody.[60] A bill by a bondholder in the nature of a creditors' bill to convene its common creditors, ascertain priorities, and sell the corporation's property to satisfy its debts,[61] should not invite common creditors to join in the suit, but bondholders and general creditors may join in a suit attacking the legality of other bonds and mortgages.[62] Grounds of forfeiture under the provisions of a mortgage [63] must be specified in the bondholder's request for foreclosure.[64] Whether all the bonds of a series are issued and outstanding at the time of a suit to foreclose is a question of fact.[65] A forfeiture is not cured by subsequent compliance with the provisions violated.[66] Insolvency matures bonds though they are expressly payable at a future date.[67]

could be considered in determining the consideration given by the promoter for bonds of the new corporation. Id. An option on total issue of shares of a corporation with a view to its reorganization on increased capitalization having been executed by purchase of such shares and their distribution among the persons furnishing the consideration for their purchase, the assignment of such option to the new or recapitalized corporation was no consideration for the issue of its bonds to the assignor. Id. Where stock of corporation is purchased by promoter of reorganization of corporation upon increased capitalization, it cannot be considered at its original value in determining the consideration of bonds issued by the recapitalized corporation, but if it can be considered at all its value must be taken as decreased in proportion as the capitalization is increased. Id. Prospective increase of value of stocks, properties, and agreements acquired by a promoter of a reorganized corporation, in view of a monopoly proposed to be established by the transfer of such stock, etc., to the reorganized corporation, cannot be considered in determining consideration paid by such promoter for bonds of reorganized corporation. Id.

52. In suit by receiver against bondholder, burden of proof on complainant to show that corporation was insolvent, within Laws 1896, p. 298, c. 185, § 34, when bond was executed, held not sustained. Bergen v. Rogers [N. J. Eq.] 67 A. 290. Bond given for money advanced held not executed in contemplation of insolvency. Id.

53. Bond executed in reformation of one formerly given so as to make the latter conform to resolution authorizing it held not affected by evidence of fraud, intention to prefer, and insolvency as of time of its execution, there being no evidence of such matters as of time of such resolution. Bergen v. Rogers [N. J. Eq.] 67 A. 290.

54. On ground that bonds were voluntary in hands of participants in issue. In re Wyoming Valley Ice Co., 153 F. 787.

55. Obligation created same day as bond issue but before latter had been finally voted by directors. In re Wyoming Valley Ice. Co., 153 F. 787.

56. Farmers' Loan & Trust Co. v. Madison Mfg. Co., 153 F. 310.

57. Doty v. Oriental Print Works Co. [R. I.] 67 A. 586.

58. Indorsement that "This bond is one of a series of bonds mentioned and described in the mortgage within referred to." Tschetiman v. City Trust Co., 186 N. Y. 432, 79 N. E. 401.

59, 60, 61, 62. Keystone Nat. Bk. v. Palos Coal & Coke Co. [Ala.] 43 So. 570.

63. Failure to pay taxes on stock is within a provision for forfeiture if the company "suffer any lawful tax or charges to fall in arrear, or any lien to be obtained on the said property whereby the security of this mortgage may be impaired." Union Trust Co. of Maryland v. Thomas [Md.] 66 A. 450.

64. Bondholders' request to mortgagee to foreclose held sufficiently definite in specification of grounds of forfeiture. Union Trust Co. of Maryland v. Thomas [Md.] 66 A. 450

65. In suit to foreclose, evidence held to sustain finding that whole series of bonds secured by the mortgage had been issued and were outstanding. Farmers' Loan & Trust Co. v. Madison Mfg. Co., 153 F. 310.

66. Payment of taxes after default in re-

A bona fide holder for value without notice of negotiable bonds is not affected by defects in his predecessor's title,[68] but participants in a bond issue cannot avoid the effect of defects in such issue on the ground that they are bona fide holders.[69] A suit in equity will lie to cancel fraudulent corporate bonds in the hands of holders with notice,[70] but holders without notice will be protected,[71] and the corporation cannot avoid its bonds because fraudulently issued by an officer unless it is injured.[72] A bondholder's rights against the corporation are not affected by his acceptance of security from the officer who wrongfully or fraudulently negotiated the bonds to him.[73]

(§ 16) *D. Officers and stockholders as creditors.*[74]—The status of a stockholder as a creditor[75] is a question of fact in so far as it depends upon whether advancements by him constituted a loan or the purchase price of stock,[76] and the corporation's account books are not admissible to show that advancements by a stockholder were for stock which was never delivered.[77] A resolution prohibiting stockholders from holding more than a certain amount of stock will not make a stockholder a creditor as to the excess held by him.[78] As against other creditors a stockholder cannot claim to be a creditor for payments on invalid stock where the invalidity is due to his own negligence or breach of duty.[79] An officer who owes an ac-

gard thereto will not relieve from forfeiture on ground of nonpayment when due. Union Trust Co. of Maryland v. Thomas [Md.] 66 A. 450.

67. Adjudicated insolvency matures the principal of bonds and authorizes foreclosure and sale, notwithstanding provision that such principal shall not become due before date fixed by bonds except for causes mentioned in the mortgage stipulations, which do not include insolvency, where, by reason of impending distribution of general assets under insolvency laws, the bondholders will otherwise be left without remedy for any deficiency on subsequent sale of the mortgaged property. Union Trust Co. of Maryland v. Thomas [Md.] 66 A. 450.

68. Knowledge that pledgor of bonds payable to bearer is director of the corporation does not charge pledgee with notice of defects in pledgor's title. Farmers' Loan & Trust Co. v. Madison Mfg. Co., 153 F. 310.

69. In re Wyoming Valley Ice Co., 153 F. 787.

70. Fact that fraud would be defense at law as against holders constitutes no reason why equity should not act, since such defense might be cut off by a transfer to innocent purchasers. Pere Marquette R. Co. v. Bradford, 149 F. 492. In such case a preliminary injunction will issue to prevent transfer of such bonds. Id.

71. Where a purchaser is charged with notice that negotiation of bonds can be done only by secretary and president, he is not thereby charged with notice that the treasurer in negotiating the bonds was not acting also by authority of president. Doty v. Oriental Print Works Co. [R. I.] 67 A. 586. Where bonds were secured from proper custodian, and recited that they were executed and delivered pursuant to vote of stockholders and directors, and no invitation was extended to examine corporation's records for verification of such statement, the purchaser was not charged with notice of any defect in the power of the custodian to issue the bonds, though the mortgage was referred to, the place of record of the mortgage, however, not being given, and inspection of the mortgage being invited only with reference to terms of payment. Id.

72. Corporation not injured so as to affect right of purchaser of bonds from secretary who negotiated them without authority, where it appeared that corporation was indebted to treasurer in excess of amount received from the bonds and retained by him. Doty v. Oriental Print Works Co. [R. I.] 67 A. 586.

73. Doty v. Oriental Print Works Co. [R. I.] 67 A. 586.

74. See 7 C. L. 936.

75. Status of stockholder, with reference to appeal, as creditor in proceedings by receiver against stockholders, cannot be questioned for first time on appeal. Easton Nat. Bk. v. American Brick & Tile Co., 70 N. J. Eq. 722, 64 A. 917.

76. Evidence held to show that advances by stockholder were as loan and not for preferred stock. Jacobs v. Morgenthaler [Mich.] 14 Det. Leg. N. 307, 112 N. W. 492. Evidence held to show that certain stock was issued in consideration of advances and not as security therefor, thus creating relation of stockholder and not of creditor. Iserman v. International Stoker Co. [N. J. Eq.] 66 A. 605.

77. Jacobs v. Morgenthaler [Mich.] 14 Det. Leg. N. 307, 112 N. W. 492.

78. Richardson v. Devine, 193 Mass. 336, 79 N. E. 771.

79. Where a reorganization was agreed upon between stockholders and creditors in order to save corporation from going into liquidation, it was duty of stockholders to see that preferred stock issued to them in consideration of their payment of corporation's debts was regularly issued, and where the stock was invalid on account of failure to file certificate as required by Acts Mar. 1903, p. 427, c. 437, § 14, the stockholders could not, as against subsequent creditors, claim the rights of creditors as to amount paid for their stock by way of the payment of the old company's debts. Manufacturers' Paper Co. v. Allen-Higgins Co., 154 F. 906.

counting to the corporation cannot recover from it items constituting a part of such accounting until the accounting has been rendered.[80]

The status of officers as creditors on account of services is treated elsewhere.[81]

Preferences.[82]—A director will not be allowed to use his office to secure a preference over other creditors,[83] and the same rule applies to creditors associated with a director and having knowledge of his fiduciary capacity.[84] Nor can the directors of an insolvent corporation redeem outstanding stock and thus prefer the stockholder.[85] Directors may even be postponed to other creditors by reason of losses through mismanagement of the corporation.[86] Even where voluntary preferences are allowed, directors cannot be preferred by an insolvent corporation.[87] The priority of a stockholder as a creditor under a decree of court depends upon the terms of the decree.[88] A corporation may apply the proceeds of a sale of its property to the repayment of advancements by stockholders [89] or to the indemnity of officers and stockholders who have assumed corporate obligations.[90]

(§ 16) *E. Liability of stockholders on account of unpaid subscriptions and remedies.*[91]—Unpaid subscriptions constitute a part of the assets constituting a trust fund for creditors,[92] and as against creditors without notice a corporation cannot either directly or indirectly forgive subscriptions,[93] and it is immaterial whether the claims of the creditors accrued prior or subsequently to such attempted forgiveness.[94] The liability on subscriptions prior to incorporation attaches upon the execution of the certificate of incorporation and the corporation becomes a corporation de facto,[95] though the stockholder does not participate in the organization of the corporation.[96] That the subscription was induced by fraud is no defense as against creditors,[97] unless the subscription was repudiated before the debts were incurred.[98] The mere pos-

80. Manager, secretary, or treasurer. Hewitt v. Williams, 118 La. 236, 42 So. 786.

81. See ante, § 15, G., Salary or Other Compensation and Officers.

82. See 7 C. L. 937.

83. Sale to director to satisfy debt vacated at instance of attaching creditors. Schmidt v. Perkins [N. J. Err. & App.] 67 A. 77.

84. Schmidt v. Perkins [N. J. Err. & App.] 67 A. 77.

85. Richardson v. Devine, 193 Mass. 336, 79 N. E. 771.

86. Elliott v. Farmers' Bk., 61 W. Va. 641, 57 S. E. 242. Claim of director postponed to claim of other creditors over whom he attempted to obtain unfair advantage. Watrous v. Hilliard [Colo.] 88 P. 185.

87. Moody v. Chicago Title & Trust Co., 126 Ill. App. 68. The president of a corporation receiving a voluntary preference from it as one of its creditors is charged with knowledge of its financial condition. Id. Transfer of corporate assets to president in consideration of payment by him of debt of corporation as to which he was guarantor held preference of creditor. Id.

88. Decree against receiver of reorganized corporation for value of stock which should have been issued to complainant as member of old corporation, which provided that it should be a claim against assets in hands of receiver, did not give complainant a prior lien on such assets as against creditors. Sparrow v. Bement, 146 Mich. 326, 13 Det. Leg. N. 772, 109 N. W. 419.

89. Arrangement to apply proceeds of sale of corporation's property to repayment of advancement by stockholder held not fraudulent. Jacobs v. Morgenthaler [Mich.] 14 Det. Leg. N. 307, 112 N. W. 492.

90. Mooney v. Chicago, B. & I. R., 125 Mo. App. 651, 103 S. W. 119.

91. See 7 C. L. 937.

92. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30.

93. Alabama Terminal & Imp. Co. v. Hall [Ala.] 44 So. 592. Bill against subscribers alleged to have sold their subscriptions to the corporation in fraud of creditors and the corporation may be amended by alleging that the corporation was a party to the scheme. Id. Where bill was based on unauthorized act of president in purchasing the stock of defendant subscribers with corporate funds pursuant to agreement made prior to payment of such subscriptions, an amendment alleging that the acts of the president were authorized was not a departure. Id.

94. Alabama Terminal & Improvement Co. v. Hall [Ala.] 44 So. 592.

95, 96. McCarter v. Ketcham [N. J. Err. & App.] 67 A. 610.

97. Receiver suing on such subscription represents creditors as well as corporation. Marion Trust Co. v. Blish [Ind. App.] 79 N. E. 415. Reply of receiver meeting defense of fraud set up in answer held not departure from complaint in relying on status of receiver as representative of creditor, complaint being construed to make case for benefit of creditors. Id.

98. Defendant's pleadings in action by receiver which failed to allege time of repudiation of subscription, except that it was as soon as defendant learned of the fraud, and which failed to allege tender of return of stock certificate or request for return of stock note, held not to show repudiation of contract. Marion Trust Co. v. Blish [Ind.

session of a stock certificate is insufficient to fix liability as a subscriber,[99] and a stockholder purchasing stock at par is entitled to the presumption that the original subscriber therefor paid for the stock in full, and a claim on account of unpaid subscription will not lie against such purchaser,[1] nor is a subscriber to full paid stock through the medium of the holder of an option thereon rendered liable because the corporation issues to him unpaid stock of another series.[2] One's right to enforce the liability to creditors on unpaid subscriptions depends upon his status as a creditor.[3] A secured creditor may pursue the stockholders,[4] but the stockholders are entitled to the benefits of the proper application of the securities.[5] Such liability may be enforced by the corporation's receiver[6] or trustee in bankruptcy.[7] In winding up proceedings the court may finally adjudge the amount of assessment on stockholders necessary to be made,[8] but not the liability of any persons as stockholders who are not parties to the suit by personal service.[9] As a general rule all the stockholders are necessary parties to a suit to enforce their subscription liability,[10] and where only a part of the stockholders are joined, the corporation, as the principal debtor, is, if still existent, an indispensable party,[11] and if it has been dissolved then all the stockholders must be made parties,[12] but in some jurisdictions it is held that each stockholder must be separately sued,[13] and then equity has no jurisdiction of a suit against several stockholders on the ground of multiplicity.[14] The defendant must have become a stockholder within legal contemplation,[15] and subscribers whose stock has been forfeited need not be joined.[16] A re-

App.] 79 N. E. 415. Fact that non-negotiable note was given for subscription and was dishonored before debts were contracted does not render defense of fraud in procurement of subscription available, where subscription was not actually rescinded before debts were incurred. Id.

99. Where stockholders were instrumental in causing transfer of fully paid stock to certain persons who neither subscribed nor agreed to pay therefor, and the stock was, furthermore, worthless, such stockholders could not, as creditors, maintain a suit against such persons as for unpaid subscriptions. Continental Adjustment Co. v. Cook, 152 F. 652.

1. Roebling Sons Co. v. Shawnee Valley Coal & Iron Co., 4 Ohio N. P. (N. S.) 113.

2. In re Remington Automobile & Motor Co. [C. C. A.] 153 F. 345.

3. Where as part of consideration for property purchased a corporation assumed part of purchase price owed by its vendor, the vendor of the latter became a creditor of the corporation within Laws 1901, p. 971, c. 354, § 54. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30.

4. Where creditor who held mortgage purchased mortgaged property at sale under his execution. Vaughn v. Alabama Nat. Bk., 143 Ala. 572, 42 So. 64.

5. Vaughn v. Alabama Nat. Bk., 143 Ala. 572, 42 So. 64.

6. Receiver may maintain a bill of discovery against broker who purchased stock for the purpose of disclosing stockholders. Brown v. Magee, 146 F. 765; Kurtz v. Brown [C. C. A.] 152 F. 372.

7. Practice is for trustee to file petition in bankruptcy court for order directing him to make assessment. In re Remington Automobile & Motor Co. [C. C. A.] 153 F. 345. On petition by trustee for order requiring assessment, court must determine whether stock is full paid, and payments on such as is not full paid, and whether corporation is indebted in excess of assets and amount of indebtedness. Id. In plenary action by trustee to recover assessment ordered by bankruptcy court, indebtedness of corporation need not be proved by findings of bankruptcy court, but may be shown by proofs of claim. Id. Decision of court on petition by trustee for order of assessment is res judicata in subsequent proceedings between trustee and stockholders who received notice of such proceedings, and stockholders cannot question findings as to amount paid on stock, indebtedness of corporation, or amount of assessment. Id.

8, 9. Howell v. Malmgren [Neb.] 112 N. W. 313.

10. All stockholders are necessary parties in suit in equity by creditor under Laws 1901, p. 971, c. 354, § 54. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30. Liability under Laws 1901, p. 971, c. 354, making stockholders "personally" liable to creditors to extent of unpaid stock, cannot be enforced in action at law against single stockholder. Dyer v. Drucker, 104 N. Y. S. 166.

11, 12 Continental Adjustment Co. v. Cook, 152 F. 652.

13. Whether the remedy be considered as legal or equitable. People's National Bk. v. Saville, 25 App. D. C. 139.

14. People's Nat. Bk. v. Saville, 25 App. D. C. 139.

15. Stockholders who never paid the 10 per cent of their subscriptions necessary under Stock Corporation Law, § 41, in order to make them stockholders, were not necessary parties. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30.

16. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30. In pleading forfeiture of stock as excuse for not making subscribers parties, the evidentiary facts leading to resolution

covery of judgment against the corporation is unnecessary where it will be fruitless.[17] The complaint must allege a promise, either express or implied, to pay for the stock,[18] but payment need not be denied expressly.[19] Subscription liability is not necessarily discharged by a discharge in bankruptcy.[20] Where the liability of stockholders is several, a recovery will be apportioned against the defendants in the proportion that the amount due from each bears to the amount due from them all, and not in the proportion that the amount due from each bears to the total amount of unpaid subscriptions.[21] It is sometimes provided that a judgment in a suit by a single creditor will inure to the benefit of all on certain conditions.[22] The decree may expressly reserve the right to make defenses not concluded by the decree.[23] In some instances subscription liability may be enforced by way of set-off,[24] but the rights of creditors will not be concluded by the corporation's failure to avail itself of this remedy.[25] A creditor's liability as a subscriber cannot be set off by the defendant stockholders, though the corporation is made a nominal party,[26] but the plaintiff will be made to bear his proper proportion.[27]

Fictitiously paid up stock.[28]—Holders of fictitiously full paid stock are liable as for unpaid subscriptions to the extent of the actual deficiency,[29] regardless of

declaring forfeiture of such stock need not be pleaded. Id.

17. Allegation of insolvency, dissolution proceedings, conversion of assets into money, and inadequacy of same to pay debts, showed that judgment against corporation would have been fruitless. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30.

18. Contract to construct railroad in consideration of bonds and stock held not alone to give rise to implied agreement to pay for stock otherwise than in work or property. Bostwick v. Young, 118 App. Div. 490, 103 N. Y. S. 607. Allegation of conclusion that contract to construct railroad in exchange for stock was mere fraudulent scheme to get stock without payment held not sustained by allegations of fact. Id. Allegation of subscription, number of shares, par value thereof, the amount paid, and the balance due thereon, is sufficient without alleging express promise of subscriber to pay. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30.

19. Fair construction of complaint alleging subscription, number of shares subscribed, par value thereof, amount paid, and balance due thereon, held to negative suggestion that stock may have been paid for in property or labor. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30.

20. Where liability was not properly scheduled, no notice of proceedings was served on corporation, and it did not appear that claim for such liability had ever been liquidated. Roehling Sons Co. v. Shawnee Valley Coal & Iron Co., 4 Ohio N. P. (N. S.) 113.

21. Blood v. La Serena Land & Water Co., 150 Cal. 764, 89 P. 1090.

22. Judgment in suit by creditor under Laws 1901, p. 971, c. 354, § 54, inures to benefit of all creditors who prove their claims and contribute their proportion to expenses of litigation. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30.

23. Decree determining necessity and amount of assessment and authorizing receiver to sue for same held not nullified by proviso that it was without prejudice to the rights of any person named therein to assert any defense he may have in a suit against him on such assessment, such proviso merely being intended to reserve defenses not concluded by the degree. McCarter v. Ketcham [N. J. Err. & App.] 67 A. 610.

24. Subscription liability may be set off in equity against the corporation's bonds in the hands of one who received them after the appointment of a receiver and with notice of his assignor's subscription liability. Hynes v. Illinois Trust & Savings Bk., 226 Ill. 95, 80 N. E. 753.

25. Failure of corporation to set off in action at law claims against plaintiff on account of stock subscriptions will not preclude the setting off such claims in suit to marshal assets and to distribute same. Elliott v. Farmers' Bk. of Philippi, 61 W. Va. 641, 57 S. E. 242.

26, 27. Blood v. La Serena Land & Water Co., 150 Cal. 764, 89 P. 1090.

28. See 7 C. L. 945.

29. Stock issued in exchange for patent at grossly excessive valuation. Honeyman v. Haughey [N. J. Eq.] 66 A. 582; Vaughn v. Alabama Nat. Bk., 143 Ala 572, 42 So 64; Vogeler v. Punch [Mo.] 103 S. W. 1001. Under general corporation act of 1875 [Gen. St. p. 907], agreement to issue stock without valuable consideration is void as contrary to spirit and policy of act. Easton Nat. Bk. v. American Brick & Tile Co., 70 N. J. Eq. 732, 64 A. 917. Under Laws N. J. 1896, making stockholders liable to assessment to extent of par value of stock held by them, and unpaid purchasers of stock "issued to be sold at $25 per share," held liable to assessment to extent of difference between such amount and par value. In re Remington Automobile & Motor Co. [C. C. A.] 153 F. 345. Stock held not "issued for property purchased" within meaning of Gen. St. p. 907. Easton Nat. Bk. v. American Brick & Tile Co., 70 N. J. Eq. 722, 64 A. 1045.

Held full paid: Stock issued as full paid for less than par in money, and in additional consideration of free site for corporation's business, such site being accepted by directors, held full paid and nonassessable. See

fraudulent intent on the part of the directors,[30] and the illegality of the transaction is no defense.[31] When liability is fixed by the state constitution, it cannot be changed by charter provisions.[32] The stockholder's liability can be enforced only by creditors.[33] There is some conflict as to the effect of the creditor's knowledge of the facts, it being held on the one hand that creditors who extend credit with knowledge that stock is fictitiously paid up cannot hold the stockholder as for unpaid subscriptions,[34] while on the other hand it is held that the creditor's knowledge that stock issued as fully paid is not such will not relieve the stockholder from liability,[35] and participation in the issue of fictitiously paid up stock and receipt of a part thereof will not estop the stockholder from participating, as a creditor, in proceedings to collect unpaid subscriptions,[36] or estop him under the doctrine of in pari delicto, etc.[37] The fraudulent contract under which the stock was issued need not be set aside in an independent suit before suing to enforce the stockholder's liability.[38] Bona fide purchasers in open market are not liable on account of the fictitiousness of the original consideration given for the stock.[39]

Limitations[40] begin to run only from the accrual of cause of action,[41] unless other limitation is imposed by statute.[42] Receivership or other act of insolvency starts limitations to running,[43] but the running of limitations is tolled by an injunction against suits against the corporation.[44] Where the suit is brought by the beneficiaries of the judgment sued on, the legal owner may be brought in by amendment without affecting limitations.[45]

Laws N. J. 1896, p. 293, c. 185, § 49, making directors' judgment as to value of property received in exchange for stock conclusive in absence of fraud. In re Remington Automobile & Motor Co. [C. C. A.] 153 F. 345. Such stock held full paid in hands of persons to whom it was issued, for the stipulated money consideration under direction of the parties furnishing the site. Id.

Held not full paid: Evidence held to sustain finding that stock was not fully paid. Anheuser-Busch Brewing Ass'n v. Park Novelty Co., 120 Mo. App. 513, 97 S. W. 209.

30. Anheuser-Busch Brewing Ass'n v. Park Novelty Co., 120 Mo. App. 513, 97 S. W. 209.

31. Vaughn v. Alabama Nat. Bk., 143 Ala. 572, 42 So. 64.

32. Liability for full amount of unpaid stock under W. Va. Const., not affected by provision of charter that stock should be issued as full paid for certain amount which was less than par. Security Trust Co. v. Ford, 75 Ohio St. 322, 79 N. E. 474. Provision of West Virginia Constitution that stockholders shall be liable to "amount of their stock subscribed" imposed liability for "par" value and not merely for price fixed by charter. Id. Provision of constitution of West Virginia that stockholders shall be liable for "amount of their stock subscribed, and no more," is not a new limitation on power of legislature to impose liability in excess of par value, but also imposes an absolute liability on stockholders for unpaid subscriptions to extent of par value. Id.

33. Bostwick v. Young, 118 App. Div. 490, 103 N. Y. S. 607.

34. Where creditor knew that land conveyed in exchange for stock was overvalued. Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 42 So. 415.

35. Easton Nat. Bk. v. American Brick & Tile Co., 70 N. J. Eq. 732, 64 A. 917.

36. Since the other stockholders also knew that stock was fictitiously paid up. Easton Nat. Bk. v. American Brick & Tile Co., 70 N. J. Eq. 732, 64 A. 917.

37. Agreement not to collect subscriptions for "fully paid stock" being absolutely void. Easton Nat. Bk. v. American Brick & Tile Co., 70 N. J. Eq. 732, 64 A. 917.

38. Suit by receiver. Easton Nat. Bk. v. American Brick & Tile Co., 70 N. J. Eq. 722, 64 A. 1095.

39. Purchasers, not original subscribers, in open market of stock marked full paid, who are informed by the corporation's officers that it is full paid, are not liable as for unpaid subscriptions, though the stock be not in fact full paid. In re Remington Automobile & Motor Co. [C. C. A.] 153 F. 345.

Evidence held to show that purchasers from original subscribers had notice that stock was not full paid as represented. Anheuser-Busch Brewing Ass'n v. Park Novelty Co., 120 Mo. App. 513, 97 S. W. 209.

40. See 7 C. L. 946.

41. Cause of action does not accrue under Code 1896, § 823, until judgment and execution against the corporation and return of nulla bona. Vaughn v. Alabama Nat. Bk., 143 Ala. 572, 42 So. 64.

42. Under Stock Corporation Law, § 55, providing that stockholder shall not be liable for any debt of corporation not payable within two years after it is contracted, where corporation assumes debt of another, the time runs from the date of such assumption. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30.

43. Roebling Sons Co. v. Shawnee Valley Coal & Iron Co., 4 Ohio N. P. (N. S.) 113.

44. Limitation under Stock Corporation Law, § 55, requiring suit to be brought within two years after debt becomes due. Ford v. Chase, 118 App. Div. 605, 103 N. Y. S. 30.

45. Alabama Terminal & Improvement Co. v. Hall [Ala.] 44 So. 592.

(§ 16) *F. Personal liability of stockholder for debts of corporation, and remedies.*[46]—Stockholders or incorporators will be liable on transactions negotiated on their own credit,[47] but otherwise and aside from their subscription liability their liability to creditors is dependent entirely upon statute.[48] This statutory obligation or liability of stockholders cannot be increased without running counter of the Federal constitutional inhibition against impairment of contracts,[49] but the remedy for the enforcement of such liability may be changed so as to make it more efficient.[50] Where the rights of the creditor are fixed by dissolution, they are not affected by the subsequent extinction of the right of action against the corporation.[51] A discharge in bankruptcy does not necessarily discharge the bankrupt's statutory liability as a corporate stockholder.[52] Law and equity may have concurrent jurisdiction to enforce the statutory liability of stockholders,[53] and though such liability is not entirely contractual, being primarily upon the statute, it may nevertheless, in the absence of statute to the contrary, be enforced in foreign jurisdictions.[54]

Persons liable as stockholders.[55]—Statutory liability attaches to all who are stockholders [56] at the time of the enforcement of such liability, regardless of the date on which they became stockholders.[57] Under a will providing that all debts of

46. See 7 C. L. 946.

47. Where parties associated in a joint enterprise act or appear to act as individuals and for their individual benefit in obtaining money from a bank, they will be individually liable therefor regardless of whether they had formed a corporation either de jure or de facto or whether as corporators they have become liable through abandonment of their venture. Ijams v. Andrews [C. C. A.] 151 F. 725.

48. Rights of action against stockholders under Comp. Laws, Kan. 1885, c. 23, art. 5, § 44, accruing prior to the repealing act, Acts 1898, p. 36, c. 10, § 17, were not affected by such repeal. Ramsden v. Knowles, 151 F. 718. The amendment of § 3 of Article XIII of the constitution of the state, which went into effect November 23, 1903, repealed by implication the provision of § 3258 as to double liability of stockholders, which was in force at that time. Sheets Mfg. Co. v. Neer Mfg. Co., 4 Ohio N. P. (N. S.) 201. It follows, therefore, that stockholders in Ohio corporations are relieved from double liability for debts incurred by such corporations, not only from and after the legislative enactment of April 25, 1904, but from going into effect of the constitutional amendment on November 23, 1903. Id. Moreover, the provision of the constitutional amendment of Nov. 23, 1903, that "in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her," does not merely indicate a line of policy without supplying the means by which such policy is to be carried into effects, but is absolutely prohibitory in its character and became self-executing. Id. Corporation organized to purchase stock and assets of implement manufacturing corporation and also for purpose of manufacturing mechanical implements, engines, etc., held not a corporation organized for purpose of carrying on manufacturing or mechanical business within Minn. Const. Art. 10, § 3, making description as to stockholder's liability in favor of such kind of corporations. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163.

49. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163.

50. Minn. Gen. Laws 1899, c. 272, held not invalid under U. S. Const., Art. 1, § 10. Bernheimer v. Converse, 206 N. S. 516, 51 Law. Ed. 1163. Act 1899 not unconstitutional because it provided for assessment without service on stockholder, while act 1894 did not, former act not authorizing personal judgment against stockholder. Id. Fact that Act 1899 imposes on stockholder additional expense incident to enforcement of liability in other states and against other parties does not constitute an unlawful increase of the statutory liability. Id.

51. Right of action against stockholders in Kansas corporation under Comp. Laws, Kan. 1885, c. 23, art. 5, § 44, held fixed by dissolution of corporation and not affected by subsequent running of limitation. Ramsden v. Knowles, 151 F. 718.

52. Where it appears that the claim was not properly scheduled, and no notice of the bankruptcy proceedings was served on the corporation, and there is no showing that the claim was ever liquidated. Roebling Sons Co. v. Shawnee Valley Coal & Iron Co., 4 Ohio N. P. (N. S.) 113.

53. Gen. Laws 1899, c. 272, providing for action at law, did not repeal Gen. Laws 1878, c. 76, §§ 16, 17, providing for suit in equity. Willius v. Albrecht, 100 Minn. 436, 111 N. W. 387.

54. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163.

55. See 7 C. L. 947.

56. Refusal of defendant to produce evidence in its possession as to ownership of stock in another corporation construed as evidence of ownership in the former corporation itself. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012. Corporation to whose stockholders and officers stock in liquidated corporation was issued held the real owner of such stock. Id.

57. Umsteatter v. Newark Sav. Bk. Co. 4 Ohio N. P. (N. S.) 150. In action to enforce statutory liability of stockholders, demurrer will lie to allegation in answer that de-

the estate shall first be paid, the stock of an insolvent corporation comes into the hands of the executor as a liability and not as an asset,[58] but where the executor is the sole devisee, and the stock is not specifically mentioned in the will and is not accepted by the devisee, the statutory liability cannot be enforced against him personally.[59] The liability of other stockholders must be exhausted before enforcing that of one who has assigned his stock in good faith.[60]

Ascertainment of corporate liability and exhaustion of remedy against it.[61]—While an action to enforce stockholders' liability ought usually to be postponed until an ascertainment has been made by the receiver of the corporation as to what its assets will be, an action brought by a creditor prior to such ascertainment is not demurrable on that ground.[62] As a general rule the remedies against the corporation must first be exhausted,[63] and where this rule applies [64] an agreement to do so will not support a promise from the stockholders to pay the balance left unpaid.[65]

Limitations.[66]—The term of limitation depends, of course, upon the various statutes.[67] General limitations upon "liabilities created by statute," apply to a stockholder's statutory liability.[68] Where the rights of the creditor are fixed by dissolution, the statute begins to run upon dissolution.[69] Where there are two remedies the statute runs from time when right to pursue either accrues.[70] Demurrer will lie to an allegation by the executor of a deceased stockholder that he has fully settled up the estate where he does not plead the statute of limitations.[71] The limitation upon an action upon an assessment begins to run from the accrual of the right to sue.[72]

Parties.[73]—A court by reason of its jurisdiction of proceedings to wind up a corporation acquires no jurisdiction to render a personal judgment against a stockholder not served,[74] or to adjudicate the fact of such stockholder's membership in the corporation,[75] but it may be legally provided that assessments may be made against

fendant was not stockholder at time debt mentioned in the petition was contracted. Id.

58, 59. Roebling Sons Co. v. Shawnee Valley Coal & Iron Co., 4 Ohio N. P. (N. S.) 113.

60. Liability of all other stockholders within court's jurisdiction must be exhausted, though the debt involved was incurred prior to such assignment and the assignee is solvent. Poston v. Hull, 75 Ohio St. 502, 80 N. E. 11.

61. See 7 C. L. 948.

62. Umsteatter v. Newark Sav. Bk. Co., 4 Ohio N. P. (N. S.) 150

63. It is well established that secondary liability of stockholders as guarantors of corporate debts to extent of their statutory liability cannot be enforced, except upon claim against corporation which has been reduced to judgment and execution returned nulla bona. Harris v. Chicago, etc., R. Co., 4 Ohio N. P. (N. S.) 31. Neither this rule nor exception thereunder, which saves holder of meritorious claim from unnecessary and perhaps fatal delay, permits insolvency of incorporated company being pleaded by the holder of bond of one of the constituent companies, and not yet due, as ground for enforcing double liability of the stockholders. Id.

64. Const. art. 11b, § 4. In re Lehnhoff's Estate [Neb.] 109 N. W. 164. Under Banking Law, Laws 1892, p. 1913, c. 689, § 162, judgment must be obtained against a trust company before liability of stockholder can be enforced where company is undissolved and subject to suit. Gause v. Boldt [N. Y.] 80 N. E. 566.

65. In re Lehnhoff's Estate [Neb.] 109 N. W. 164. Such an agreement cannot be supported on the theory that it is between the stockholders for the benefit of the creditor. Id.

66. See 7 C. L. 950.

67. Acion to enforce stockholder's statutory liability is barred in six years under Pub. St. Mass. c. 197, § 1. Ramsden v. Knowles, 151 F. 718; Id. [C. C. A.] 151 F. 721.

68. Action in Kansas to enforce liability under Comp. Laws, Kan. 1885, c. 23, § 44, is barred in three years, under general limitation applicable to "liability created by statute." Ramsden v. Knowles [C. C. A.] 151 F. 721.

69. Liability under Comp. Laws, Kan. 1885, c. 23, § 44, accrues upon dissolution of corporation. Ramsden v. Knowles [C. C. A.] 151 F. 721.

70. Willius v. Albrecht, 100 Minn. 436, 111 N. W. 387.

71. Umsteatter v. Newark Sav. Bk. Co., 4 Ohio N. P. (N. S.) 150.

72. The cause of action does not accrue upon an assessment of liability imposed by Minn. Const., art. 10, § 3, until the receiver can sue upon such assessment after the stockholder has failed to pay, as required by the order of the court making the assessment. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163.

73. See 7 C. L. 950.

74. Suit by receiver of mutual insurance company against policy holder. Howell v. Malmgren [Neb.] 112 N. W. 313.

75. Howell v. Malmgren [Neb.] 112 N. W. 313.

the stockholders in liquidation proceedings against the corporation without service on the stockholders,[76] and such is the usual practice sanctioned by the courts.[77] A receiver may maintain an action to enforce the liability in a foreign jurisdiction when so authorized by the statute.[78]

Defenses.[79]—A defense against subscription liability is no defense against the superadded statutory liability.[80]

Procedure.[81]—Where liability is proportionate to the amount of stock subscribed, such amount must be alleged.[82]

(§ 16) *G. Rights and remedies of creditors against directors and other officers.*[83]—As a general rule officers are not liable for the debts of their corporation in the absence of a personal assumption of the debt.[84] They are not personally bound by their official signatures,[85] and where the signature is ambiguous, it may be explained [86] by parol evidence.[87] It is not incumbent upon the officer to show that the corporation was authorized to execute the obligation,[88] or that he was authorized by the directors to execute it,[89] and parties dealing with de facto officers cannot question their authority for the purpose of fixing personal liability upon them.[90] Where the directors are the sole stockholders, they will not, on account of a sale of the corporate property, be liable in excess of the corporation's liabilities to creditors.[91] Under the various statutes officers may be rendered personally liable on account of a conversion of the corporate property,[92] or gross mismanagement,[93] failure to make reports,[94] making false reports,[95] or misfeasance, and as against the last

76. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163.

77. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163. Decree making assessment on stockholders which is binding on resident members of corporation is binding on foreign members, members being represented by the corporation in such cases. Swing v. American Glucose Co., 123 Ill. App. 156. Judgment against the corporation is conclusive upon the stockholders as to the validity and amount of the claim. In suit against stockholders to recover fraudulent dividends. Montgomery v. Whitehead [Colo.] 90 P. 509.

78. May sue in Federal court in another state. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163.

79. See 7 C. L. 951.

80. Where the insolvent corporation is a bank organized under the laws of Ohio, an allegation that a defendant stockholder is not liable for anything beyond the subscription price of his stock does not state a good defense to an action to enforce the stockholders' liability. Umsteatter v. Newark Sav. Bk. Co., 4 Ohio N. P. (N. S.) 150.

81. See 7 C. L. 951.

82. Allegation of amount "issued" not equivalent to allegation of amount "subscribed" within Const. art 12, § 3, making stockholders liable in proportion of amount owned by them to total amount "subscribed." San Francisco Commercial Agency v. Miller [Cal. App.] 87 P. 630.

83. See 7 C. L. 952.

84. Evidence held not to show personal promise of officer to pay for property sold to corporation. Tullis v. Stone, 117 App. Div. 227, 101 N. Y. S. 1082.

85. Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574. See Laws 1899, p. 694, c. 356, §§ 1675-20, relieving from personal liability persons signing in representative capacity. Id. An officer signing a corporate obligation in an official capacity is not rendered personally liable by the obligees misinterpretation of the face of the obligation as where officer made no representations as to capacity in which he signed the obligation, liability thereon depends upon legal effect of signature, regardless of obligee's understanding in regard thereto. Western Grocer Co. v. Lackman [Kan.] 88 P. 527.

86. Signature "Vareck Contracting Company. John L. Martin," held in suit against estate of said Martin, subject to proof that note was not his personal note. Dunbar Box & Lumber Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91.

87. Germania Nat. Bk. v. Mariner, 129 Wis. 544, 109 N. W. 574. That note signed in corporate name followed by signatures of officers was corporate obligation. Western Grocer Co. v. Lackman [Kan.] 88 P. 527.

88, 89. Western Grocer Co. v. Lackman [Kan.] 88 P. 527.

90. Potwin v. Grunwald, 123 Ill. App. 34.

91. In suit by receiver. McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169.

92. Under Ballinger's Ann. Codes & St. § 4265, making trustees liable to creditors where they participate in division of stock, a trustee was liable where he participated in and should profit by transfer of all corporate assets, though transferree, in addition to paying a consideration to stockholders, agreed to assume debts of transferror. Carstens & Earles v. Hofius [Wash.] 87 P. 631.

93. Officers and directors are liable to creditors for losses incurred through gross mismanagement. Elliott v. Farmers' Bk. of Philippi, 61 W. Va. 641, 57 S. E. 242.

94. Under Pub. Acts 1903, p. 372, No. 232, § 12, as amended by Pub. Acts 1905, No. 191, p. 283, directors are not liable where the required annual report is mailed, though it is not received by the secretary of state. Ford

a statutory exemption from liability in general is no defense.[96] A statute imposing personal liability upon officers of a pretended corporation [97] may apply in the case of a de facto corporation.[98] Statutes imposing liability on officers for the corporation's debts must be strictly construed.[99] Where a statutory liability is for the benefit of all the creditors it can be enforced only in equity.[100] The question of parties to an action to enforce a statutory liability may depend upon the terms of the statute.[101] A receiver may sue in behalf of creditors.[102]

CORPSES AND BURIAL.[1]

This topic includes only the right of sepulture and property rights in dead bodies, rights in cemetery lots being elsewhere treated.[2]

The primary right to the possession and control of the body of a deceased husband or wife for preservation or burial is in the surviving spouse.[3] The lawful custodians of a deceased body may maintain an action for its desecration,[4] and in such action, damages will be allowed for mental suffering and injury to

River Lumber Co. v. Perron, 148 Mich. 399, 13 Det. Leg. N. 201, 111 N. W. 1074.

95. False statement as to manner of paying stock subscriptions. Rev Laws. c. 110, § 58, cl. 5. Harvey-Watts Co. v. Worchester Umbrella Co., 193 Mass. 138, 78 N. E. 886. Under Rev. Laws, c. 110, § 44, requiring the filing with state secretary of detailed statement as to property received in payment for stock, a statement that stock was paid for in cash and invested in property rendered directors liable under Rev. Laws, c. 110, § 58, cl. 5, where the stock was paid for by check which was returned to the subscribers in exchange for their business which the corporation was organized to conduct. Id. Payment in cash which is returned to subscriber by way of loan on his note held equivalent to acceptance of note in first instance, which is forbidden by Rev. Laws, c. 110, § 44. Id. Knowledge of return of subscription money to subscriber by way of loan not imputable to director merely because by-laws provided that no loan shall be made except upon vote of directors, where no vote on loan in question is shown. Id. Evidence held to charge directors with knowledge that money received for stock was returned to subscriber by way of loan. Id. Where director does not know that stock was not paid for in cash, he cannot be charged on ground that he acted recklessly in making oath to settlement that it was so paid. Id. False statement that stock subscribed had been paid for in cash held excused by **advice of counsel** that the transaction constituted cash payment. Id. Attorney not incapacitated to give such advice by fact that he subscribed and paid in cash for several shares of stock. Id.

96. Charter exemption of stockholders from liability for debts, defaults, or torts of other stockholders will not exempt stockholders from joint liability as directors for wrongfully disposing of the corporation's property. McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169.

97. Remedy under Corporation Act, § 18, against officers of pretended stock corporation, is at law, and hence is unavailable in suit in equity for accounting. Kohlsaat v. Gay, 126 Ill. App. 4, afd. 233 Ill. 260, 79 N. E. 77.

98. Remedy provided by Corporation Act, § 18, against officers of any "pretended" stock corporation, is applicable to a de facto corporation resulting from abandonment of attempt to form corporation. See Kohlsaat v. Gay, 126 Ill. App. 4, afd. 223 Ill. 260, 79 N. E. 77.

99. Corporation Act, § 16, imposing liability on directors and officers of a "stock corporation," held to apply only to corporations de jure. Kohlsaat v. Gay, 126 Ill. App. 4, afd. 223 Ill. 260, 79 N. E. 77.

100. Liability of director for assenting to creation of indebtedness in excess of two-thirds of capital stock paid in. Lyman v. Hilliard [C. C. A.] 154 F. 339.

101. All directors held necessary parties to suit based on liability of directors under provision that "every director shall be personally liable for the debts incurred by the corporation during his administration to an amount not exceeding $5,000." Bauer v. Hawes, 115 App. Div. 492, 101 N. Y. S. 455. In suit against directors, a several interlocutory judgment appointing referee to take proof of claims could not be rendered, and there being no separate issues of law and fact, thus rendering Code Civ. Proc. § 1220, authorizing division of actions where such several issues are involved, § 1205 did not authorize judgment against director not appealing without new trial after reversal on appeal by another director. Id.

102. Where directors sold worthless stock to corporation as part of plan to raise reserve required by statute. Bowers v. Male, 186 N. Y. 28, 78 N. E. 577.

1. See 7 C. L. 953.

2. See Cemeteries, 9 C. L. 541.

3. McGann v. McGann [R. I.] 66 A. 52. Husband could sue for mutilation of wife's body. Medical College v. Rushing, 1 Ga. App. 468, 57 S. E. 1083.

4. Husband and wife could join in action for breach of contract for proper burial of their child. Wright v. Beardsley [Wash.] 89 P. 172. A husband may maintain an action for any unlawful and unauthorized mutilation of the body of his wife who died in a hospital. Medical College v. Rushing, 1 Ga. App. 468, 57 S. E. 1083. Petition held to state cause of action against a medical college. Id.

the feelings though no actual pecuniary loss is alleged or proved.[5] A wife who buries her husband's body in a lot belonging to her father, and who is authorized as administratrix to erect a monument to her husband's memory, may erect a monument within the prescribed cost limit bearing such proper inscriptions as she and her father may agree upon not in violation of the cemetery rules.[6] In such case the father may impose a condition to the erection of the monument that the widow shall also place the names of her father and mother thereon,[7] and the heirs of the deceased may not enjoin the maintenance of such names upon the monument.[8]

In a proper case a court of equity has power to render a decree authorizing relatives of a deceased person to disinter and remove the remains buried in a cemetery maintained by a religious congregation.[9] In the absence of any regulation of the congregation as to who shall determine the right to disinter, such right will be determined by the general principles of equity, and not by ecclesiastical law.[10] Mere membership in a congregation is insufficient to justify an inference that the member had subscribed to a rule prohibiting disinterment.[11]

A "morgue" is a place or house where the bodies of persons found dead are exposed for identification, or so that they may be claimed by their friends.[12] A statute prohibiting the establishment of any morgue in residence districts without the consent of persons residing near the proposed place does not prohibit the location of an undertaking establishment on a residence street,[13] nor make it unlawful to receive in a private room of such establishment bodies of known and identified persons brought by friends or relatives that funeral services may be there conducted.[14]

Corpus Deliciti; Corroborative Evidence, see latest topical index.

COSTS.

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§ 1. *Scope, nature, and definition.*[15]—As here used the term costs includes not only costs proper but disbursements and allowances made to litigants as part

5. Medical College v. Rushing, 1 Ga. App. 468, 57 S. E. 1083. In suit by parents for breach of contract for proper burial of child. Wright v. Beardsley [Wash.] 89 P. 172.

6, 7. McGann v. McGann [R. I.] 66 A. 52.

8. That monument was erected from proceeds of estate did not give heirs title according to their distributive shares, but title was in administratrix during her life. McGann v. McGann [R. I.] 66 A. 52.

9. Cohen v. Congregation Shearith Israel, 114 App. Div. 117, 99 N. Y. S. 732.

10. Question of right to disinter under Jewish Law immaterial. Cohen v. Congregation Shearith Israel, 114 App. Div. 117, 99 N. Y. S. 732.

11. Cohen v. Congregation Shearith Israel, 114 App. Div. 117, 99 N. Y. S. 732.

12. Koebler v. Pennewell, 75 Ohio St. 278, 79 N. E. 471.

13. Rev. St. 1906, § 3586a. Koebler v. Pennewell, 75 Ohio St. 278, 79 N. E. 471.

14. Koebler v. Pennewell, 75 Ohio St. 278, 79 N. E. 471.

15, 16, 17. See 7 C. L. 956.

of or incident to the judgment by way of compensation to the successful party and against the other.[16]

§ 2. *Power to award costs.*[17]—The right to costs does not exist at common law, and courts can allow[18] or apportion[19] costs only where expressly authorized by statute,[20] subject to any constitutional limitations.[21] Where an act is repealed with proviso that it shall not affect pending actions, costs are saved.[22] It is for the court and not for the jury to determine what are proper costs, and by whom they are to be paid.[23]

§ 3. *Prepayment or security and suits in forma pauperis.*[24]—A court of equity has discretionary power to require a complainant to give security for costs,[25] and courts of law are sometimes held to have a similar discretion.[26] Security for costs is required in prosecutions at the instance of a private person[27] who becomes liable on acquittal of accused unless the court certifies that there was probable cause for the prosecution.[28] In civil cases the most common statutory ground for security is the nonresidence of plaintiff.[29] But, in the case of a nonresident suing in a representative capacity, the right to security is not absolute, but discretionary,[30] except where appointment was made in another jurisdiction.[31] A solicitor may be liable for costs where complainant is a nonresident and security is not first filed.[32] But a judgment by default for a non-resident plaintiff will not be set aside for failure to file security.[33] Security is waived by failure to move for it in the trial court.[34]

18. Railroad dismissed condemnation proceedings, subject to taxation of legal costs. St. Louis & G. R. Co. v. Cape Girardeau, etc., R. Co. [Mo. App.] 102 S. W. 1042. Prosecution for abatement of liquor nuisance Plank v. Hertha, 132 Iowa, 213, 109 N. W. 732. Attempt to make both parties pay for an additional transcript where reporter had absconded. Langan v. Whalen [Neb.] 110 N. W. 668. Applicant manifestly entitled to counsel fees, but no statutory authority in case of proof of claim before receiver. Porch v. Agnew Co. [N. J. Eq.] 65 A. 485. "Courts cannot create a fee bill." Smith v. Equitable Trust Co., 215 Pa. 413, 64 A. 591.

19. Action to rescind widow's election. Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845. Location of highway. Knight v. Acton [Iowa] 109 N. W. 1089. Discretionary where judgment affirmed as to some and reversed as to others. Hurley v. Walter, 129 Wis. 508, 109 N. W. 558.

20. McGilvray v. Manistee Circuit Judge, 146 Mich. 480, 13 Det. Leg. N. 835, 109 N. W. 852.

21. Statute allowing attorney's fees to successful mechanic's lien claimants is unconstitutional. Union Lumber Co. v. Simon [Cal.] 89 P. 1081. Imposing costs on successful claimant to land conveyed by tax deed is class legislation, so is relieving a city from furnishing security on appeals. Malone v. Williams [Tenn.] 103 S. W. 798.

22. To those defending actions relating to unauthorized application for sale of or loans on real property. Beilin v. Wein, 51 Misc. 595, 101 N. Y. S. 38.

23. Adkins & Co. v. Campbell [Del.] 64 A. 628.

24. See 7 C. L. 956.

25. Independently of statute on the matter. Comp. Laws 1897, § 9992. Goodenough v. Burton, 146 Mich. 50, 13 Det. Leg. N. 693, 109 N. W. 52.

26. Bonds assigned to an irresponsible person to collect; defendant set up defense of illegality of bonds. Hagar v. Radam Microbe Killer Co., 104 N. Y. S. 896.

27. Private person not liable where made a truthful statement of facts to prosecutor who authorized prosecution without requiring any security. Board of Missaukee County Sup'rs v. Van Liew [Mich.] 112 N. W. 131.

28. Comp. Laws, § 12,014. Board of Missaukee County Com'rs v. Van Liew [Mich.] 112 N. W. 131.

29. No dismissal, as removal for three months to another state to secure employment, but with intention to return, did not show a nonresident. Erwin v. Allen, 30 Ky. L. R. 607, 99 S. W. 322. On defendant's motion, court may in its discretion set limit, which will not be interfered with on appeal unless discretion abused. Cranmer v. Dinsmore [N. D.] 109 N. W. 317.

30. In action for death of intestate where administrator and all the next of kin are nonresidents, and no property in state, security should be required. McKeaggan v. Post, 117 App. Div. 129, 102 N. Y. S. 276; Meaney v. Post, 117 App. Div. 563, 102 N. Y. S. 611. Will not be required unless manifest that bad faith involved. Clarendon v. Milliken Bros., 116 App. Div. 930, 101 N. Y. S. 1105. Where action tried, dismissed, and plaintiff has appealed, it will not be required though execution has been returned unsatisfied on judgment already entered, it not being clear that the appeal is without merit. Cowen v. Rouss, 49 Misc. 338, 99 N. Y. S. 302.

31. Code Civ. Proc. § 3268 requires security of nonresidents, while section 3271 makes it discretionary where sues in representative capacity. Myers v. Stephens, 52 Misc. 632, 102 N. Y. S. 929.

32. Liable for costs on bill and cross bill. Reed v. Benzine-ated Soap Co. [N. J. Eq.] 65 A. 1008.

33. Ind. T. Ann. St. 1899, §§ 730, 731, requires bond, and if not filed dismissal on motion unless in a reasonable time bond is

Even then the application may be denied for laches,[35] for the absolute right to security is usually waived unless it is asserted before answer.[36] After answer it will be granted, not as a matter of right, but only if sufficient excuse is shown.[37] In Louisiana, however, the right of defendant to require security is not confined to the inception of the litigation.[38] A motion for security may be properly denied where plaintiff files an affidavit that he is a resident, though subsequently at the trial it appears he was not a bona fide resident.[39] An order denying a motion to compel a nonresident plaintiff to give security for costs is not appealable.[40] An order for additional security vacates an order setting the case for trial.[41] In requiring security to be filed, the court must allow at least as much time as the statute gives.[42] On showing that a bond has not been filed within the time set by the court, the action may be dismissed [43] unless defendant waives his right by proceeding with the case,[44] or it appears that plaintiff is unable to file additional security.[45] In the same suit, judgment may be entered as well against the surety as against plaintiff.[46] Only respondents in whose favor the bond runs are entitled to costs in involuntary bankruptcy proceedings.[47] In Texas a replevin bond does not secure the costs.[48]

In forma pauperis.[49]—In many jurisdictions one may be released from the payment of fees on filing an affidavit that he is a poor person,[50] and in such case the court cannot require a promise of reimbursement out of the proceeds,[51] or impose other conditions.[52] An ex parte order requiring security can only be vacated on motion regularly made and proper showing of poverty.[53] Mandamus lies to compel a court to allow a poor person to sue,[54] but defects in application cannot be amended

filed. Poole v. Peoria Cordage Co., 6 Ind. T. 298, 97 S. W. 1015.

34. Question cannot be raised for first time on appeal. Payton v. M. Spiesberger & Son Co. [Colo.] 90 P. 605.

35. Granted where filed with or soon after answer. Goodenough v. Burton, 146 Mich. 50, 13 Det. Leg. N. 693, 109 N. W. 52.

36. Order made on application made after answer and not showing lack of knowledge of nonresidence when action begun should be vacated (Cannon v. New York City R. Co., 52 Misc. 633, 103 N. Y. S. 997), unless some excuse other than nonresidence or press of business (Fabrik Schiller'scher Verschluesse Actien Gesellschaft, v. Nease, 117 App. Div. 379, 102 N. Y. S. 672).

37. Sufficient excuse where defendant's attorney absent from state at funeral of relative, and in another city on professional business, and complaint did not show nonresidence. Knaggs v. Easton, 104 N. Y. S. 508.

38. Here the second order requiring additional bond was not properly served on plaintiff and was discharged. Glain v. Sparandeo [La.] 44 So. 120.

39. No error where no request made to alter ruling at trial. Illinois So. R. Co. v. Hamlll, 226 Ill. 88, 80 N. E. 745.

40. Enderlein v. Coghlan, 52 Misc. 658, 102 N. Y. S. 467. Not final in its nature, and record did not show nonresidence as application making such statement was not sworn to. Boggs v. Inter-American Min. & Smelting Co. [Md.] 66 A. 259.

41. Must be new notice of trial. In re Dean's Estate, 149 Cal. 487, 87 P. 13.

42. Order requiring security to be filed in ten days was ineffectual where statute allowed thirty days. In re Dean's Estate, 149 Cal. 487, 87 P. 13.

43. Without further notice. Cranmer v. Dinsmore [N. D.] 109 N. W. 317. If reasonable opportunity given. Goodenough v. Burton., 146 Mich. 50, 13 Det. Leg. N. 693, 109 N. W. 52. Must be filed within ten days after rule of court. Union Iron Works v. Vekol Min. & Mill. Co. [Ariz.] 89 P. 539. That the court allowed sixty days instead of ten days gives no cause of complaint to plaintiff. Id.

44. The waiver inures to benefit of solicitor. Reed v. Benzine-ated Soap Co. [N. J. Eq.] 65 A. 1008.

45. Fact that attorney took case on a contingent basis put him under no obligation to give security for plaintiff. Stevens v. Sheriff [Kan.] 90 P. 799.

46. Comp. Laws, § 10,353. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 N. W. 161.

47. Any additional parties should move for additional bond. In re Spalding [C. C. A.] 150 F. 120.

48. Judgment to be entered against them for value of property replevied. Pipkin v. Tinch [Tex. Civ. App.] 97 S. W. 1077.

49. See 7 C. L. 957.

50. Not necessary to show an actual pauper. People v. Chytraus [Ill.] 81 N. E. 844.

51. Rule of court requiring written agreement of applicant or attorney to file agreement to pay fees out of first proceeds is invalid. People v. Chytraus [Ill.] 81 N. E. 844.

52. That if applicant not known to attorney for one year he must have affidavit of reputable citizen that he believes him honest. People v. Chytraus [Ill.] 81 N. E. 844.

53. Buccolo v. New York Life Ins. Co., 117 App. Div. 423, 102 N. Y. S. 794.

54. Refusal on account of invalid rule of court. People v. Chytraus [Ill.] 81 N. E. 844.

in the appellate court,[55] and the statutory provisions must be strictly complied with.[56] In Federal courts, in such cases, the attorney, without regard to his contract, is entitled to reasonable compensation, to be determined by the court;[57] but, where plaintiff's attorney is financially interested in the result of an action, plaintiff cannot sue in forma pauperis without a showing that the attorney was unable to give security.[58] Where suit has been dismissed, plaintiff cannot bring another suit on the same cause of action without paying costs of first suit, or filing a pauper affidavit.[59] But this is unnecessary if second action is brought against additional parties.[60] One suing in a representative capacity may sue as a poor person and be relieved of payment of costs of previous action for same cause.[61]

§ 4. *Parties entitled to or liable for costs in general.*[62]—In the absence of statute, costs will be imposed against representatives individually.[63] This will always be so where the representative is really acting in his individual capacity,[64] or where acting in bad faith.[65] But frequently representatives will be allowed costs and counsel fees in litigation against the estate.[66] Where they are liable, representatives and others may be taxed jointly, in the discretion of the court.[67] Costs cannot be taxed against the state in the absence of statutory authority,[68] but, where it is permitted, the state, and not relators, should be taxed where the state was solely benefited by the proceeding.[69] Costs may be allowed against public

55. Trial court only one authorized to try contest of affidavit of poverty. Cunningham v. Skinner [Tex. Civ. App.] 97 S. W. 509.

56. Rev. St. 1895, art. 1401, requiring affidavit before county judge in case of appeal, not complied with by making affidavit before a notary public. Wood v. St. Louis S. W. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 982, 97 S. W. 323.

57. A state court in a guardianship proceeding will not attempt to determine the amount. In re Tyndall, 117 App. Div. 294, 102 N. Y. S. 211.

58. Contingent fee of one-third, nor was plaintiff after two mistrials entitled to an order rescinding the contract, and assigning him counsel by the court. Phillips v. Louisville & N. R. Co., 153 F. 795. Otherwise in some states. Stevens v. Sheriff [Kan.] 90 P. 799.

59. Failure a ground for plea in abatement. Board of Education of Tennille v. Kelley, 126 Ga. 479, 55 S. E. 238. That clerk of court at request of counsel for plaintiff charged the cost to counsel did not constitute payment thereof. Id. Two previous suits for same cause of action dismissed, and as proper affidavit had been filed in third it was immaterial if costs of first suit had not been paid or affidavit filed in second suit. Seaboard Air-Line R. v. Randolph, 126 Ga. 238, 55 S. E. 47. No showing that dismissal was intended to harass defendant, or burden him with unnecessary costs. Hobbs v. Louisville, etc., R. Co. [Ky.] 102 S. W. 818. Court has discretion to refuse to dismiss a third action, where costs on two previous dismissals had not been paid, on showing plaintiff unable to pay and had a meritorious case. In first case, evidence ruled out and plaintiff allowed to amend on payment of costs which he failed to make and case dismissed; in second case there was voluntary nonsuit on account of surprise by certain evidence. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809.

60. First suit against individual dismissed, and another on same account brought against the same defendant and another as partners, without paying costs of first or filing pauper affidavit. Doody & Co. v. Jeffcoat, 127 Ga. 301, 56 S. E. 421.

61. Where action dismissed for want of proof of freedom from contributory negligence, moving papers merely alleging no contributory negligence, without showing facts witnesses will testify to, are insufficient. In re Cannice, 52 Misc. 6, 101 N. Y. S. 1054.

62. See 7 C. L. 958.

63. May seek reimbursement from estate if fairly entitled to it. Meyer v. O'Rourke [Cal.] 88 P. 706.

64. Defending a suit brought by a beneficiary to terminate a trust. Lanius v. Fletcher [Tex. Civ. App.] 99 S. W. 169.

65. Not necessary for there to be a finding of bad faith, since costs are but an incident of judgment. Meyer v. O'Rourke [Cal.] 88 P. 706. May be awarded against executor who unsuccessfully defends a will, though no finding made that his undue influence procured its execution. Dowie v. Sutton, 126 Ill. App. 47.

66. Though the executors may be entitled to a remainder in the estate. In re Groff's Estate, 215 Pa. 586, 64 A. 783.

67. Action against administrators and one to whom they had fraudulently sold certain stock. Moore v. Woodson [Tex. Civ. App.] 99 S. W. 116.

68. Costs of cross bill accordingly taxed against solicitor. Mill v. State [Ga. App.] 58 S. E. 673. Where action for benefit of infant was brought in name of state instead of next friend, no costs will be given successful defendant. Too late after verdict to make objection, and on reversal of judgment no costs can be entered against the state or infant. Annapolis, etc., R. Co. v. State, 104 Md. 659, 65 A. 434.

69. Appeal on disbarment proceeding which was modified as to costs. State v. Martin [Wash.] 87 P. 1054.

boards[70] or officers[71] in proper cases.[72] But no costs will be awarded in a suit between officials where it concerns a matter of public interest.[73] Costs can only be taxed against parties before the court.[74] A party of record continues liable until his name is stricken out,[75] though it is proper not to assess costs against nominal parties.[76] Persons beneficially interested are sometimes made liable for costs the same as parties to the suit.[77] So, on an assignment of a cause of action after action has been begun, the assignee is liable for all costs.[78] In Maryland, if an action is marked for the use of another, he is liable for costs, and execution may be issued against him.[79] A person served and defending is entitled to costs though he is not the person intended to be made defendant.[80] In Texas where husband and wife are jointly sued she is not liable for costs out of her separate estate.[81]

§ 5. *Right dependent on event of action or proceeding. A. Prevailing party in general.*[82]—Except as affected by the qualified interest of a party,[83] or rules applicable to particular courts[84] or proceedings,[85] the prevailing party is ordinarily entitled to recover costs.[86] Thus a defendant is entitled to costs on the dismissal of an action,[87] but where he is not the sole defendant[88] this may be discretionary.[89] A party injured is the prevailing party in contempt proceedings.[90] Where a party

70. Jacobson v. Board of Education [N. J. Law.] 64 A. 609.

71. Peremptory writ of mandamus against a mayor and councilmen to canvass a city election and issue proper certificates where they had refused to do so. State v. Kendall [Wash.] 87 P. 821.

72. An action citing as defendants municipal officers to a bill which does not make a case against them until amended after their term has expired will be dismissed with costs against relator. North Troy Graded School Dist. v. Troy [Vt.] 66 A. 1033.

73. Suit between superintendent of poor and county board of auditors as to right to raise more than $1,000 a year for insane hospital building. Superintendents of Wayne County v. Wayne County Auditors, 147 Mich. 384, 13 Det. Leg. N. 1019, 110 N. W. 1080.

74. One of defendants in justice court not before circuit court, so costs could not be taxed against him. Pruitt v. Gunn [Ala.] 44 So. 569.

75. Liable for costs of appeal where name had not been struck out, though stricken out in lower court. Ruddell v. Green, 104 Ind. 371, 65 A. 42.

76. Suit against assignee of judgment and sheriff to restrain sale of real estate, all costs taxed against the assignee. Lane v. Moon [Tex. Civ. App.] 103 S. W. 211. Widow's action against daughter, and administrator, and others, to rescind her election under husband's will, and administrator not taxed with costs. Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845.

77. Statute authorizing agent of owner of milk cans to recover for their detention in his own name. Pierson v. Clark, 116 App. Div. 519, 101 N. Y. S. 719. He sued in behalf of certain persons, though with notice that they had transferred their interest to a corporation. Such persons were not liable for costs. Id.

78. Purchaser of judgment not liable for costs of action to set the same aside, of which he had no notice. Walker v. Doty [S. C.] 57 S. E. 181.

79. Though he is such only as security for a debt due him from plaintiff. Ruddell v. Green, 104 Md. 371, 65 A. 42.

80. Name like that on summons except for middle initial. City of New York v. Ackerman, 51 Misc. 424, 101 N. Y. S. 687.

81. Trespass against husband and wife who both set up an alleged contract as a defense. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658.

82. See 7 C. L. 958.

83. See § 4, ante.

84. See § 6, post.

85. See § 7, post.

86. Court directed verdict for a party of its own accord which was set aside on appeal, but said party was taxed with costs as he had not demanded that the case be submitted to the jury. Haak v. Kellogg, 146 Mich. 541, 13 Det. Leg. N. 855, 109 N. W. 1068. Expenses of citing a nonresident defendant by publication, and fees of his attorney appointed by the court, should not be taxed against plaintiff who prevailed in an action to cancel a forged deed. Bruce v. Knodell [Tex. Civ. App.] 103 S. W. 433. Defendant prevailed and entitled to full costs including witness fees to term of court from which there had been a change of venue. American Foundry & Furnace Co. v. Berlin Board of Education [Wis.] 110 N. W. 403.

87. Person defending was not the person intended to be sued though his name was same as in summons except middle initial omitted, and he was properly served, not coming in officiously as a defendant. City of New York v. Ackerman, 51 Misc. 424, 101 N. Y. S. 687.

88. Dismissal as to one party, and plaintiff liable. Bruce v. Knodell [Tex. Civ. App.] 103 S. W. 433.

89. Discretionary; where court awards without application, the remedy is an order striking from judgment that part awarding costs. Ljungqvist v. Hartmetz, 104 N. Y. S. 498.

90. Costs and expenses go to the party incurring them; that the judgment awarded them as indemnity was not prejudicial. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540.

prevails on all the issues, the court has no discretion to refuse him costs,[91] but a party may recover costs though not all the relief demanded was granted,[92] as where he merely prevails on a question of costs,[93] or reduces the amount of a judgment.[94] But a defendant may have costs which accrued solely in defense of counts in which he prevailed.[95] So a plaintiff recovers costs if he prevails on one count.[96] Sometimes where there are two causes of action each is entitled to costs against the other unless it is certified that the substantial cause of action is the same.[97] One prevailing on a cross bill is entitled to costs,[98] so he will be, if he fails when the other party also fails,[99] but, where plaintiff establishes his cause of action and defendant his counterclaim, costs will be apportioned.[1] Costs will be taxed against all the defendants,[2] but, where separate defenses are made, costs may be apportioned among the defendants.[3] A prevailing plaintiff can only have costs against such defendants whose claims were not sustained,[4] and successful defendants appearing by separate attorneys are entitled to separate bills of costs.[5] A prevailing party is not entitled to costs where he files no verified pleading or written notice of appearance,[6] or where he fails to take proper action in the lower court.[7] The fact that defendant admits plaintiff's claim will not relieve him from costs,[8] but costs were not allowed to a plaintiff where to avoid a new trial defendant consented to have judgment against him for a small amount and for an equitable apportionment of expenses.[9] Costs

91. Where several counts, or several defenses, anyone of which is insufficient, costs are discretionary under Rev. St. 1899, §§ 1547-1550. Minor v. Garhart, 122 Mo. App. 124, 98 S. W. 88.

92. Suit for statutory penalties for usury, for cancellation of deed, and to redeem, in which court merely found there was certain money due complainant. Kerr v. Tierney, 146 Mich. 97, 13 Det. Leg. N. 693, 108 N. W. 1099. Plaintiff in replevin recovering judgment for possession of goods is entitled to costs (Constanzo v. Central R. Co. [N. J. Law.] 64 A. 1067), notwithstanding failure to secure damages (Id.). Plaintiff prevailed as to part of land in action to quiet title, defendants having denied plaintiff's right to any property. Grant v. Oregon R. & Nav. Co. [Or.] 90 P. 1099. Suit to quiet title to water right which defendant unsuccessfully defended. Schmidt v. Olympia Water, Light & Power Co. [Wash.] 90 P. 212.

93. Costs erroneously awarded in trial court on disbarment proceedings, so relief was of substantial nature. State v. Martin [Wash.] 87 P. 1054. In boundary suit, appellant taxed with costs in lower court which in appellate court were divided. Strunz v. Hood [Wash.] 87 P. 45.

94. And as so modified is affirmed. Lyttle v. Goldberg [Wis.] 111 N. W. 718.

95. Defendant prevailed on two of three counts. Buckman v. Missouri, K. & T. R. Co., 121 Mo. App. 299, 98 S. W. 820.

96. No power to apportion in action at law. Buckman v. Missouri, K. & T. R. Co., 121 Mo. App. 299, 98 S. W. 820.

97. Plaintiff recovered more than minimum amount on one cause of action and entitled to all the costs. Lo Rosa v. Wilner, 104 N. Y. S. 952.

98. Action for deceit in contract of sale; cross bill to terminate contract and declare payments forfeited. Eberlein v. Randall, 99 Minn. 528, 109 N. W. 1133.

99. Trespass for taking timber from land, defendants claimed title; neither proved title. Le Moyn v. Anderson, 29 Ky. L. R. 1017, 96 S. W. 843.

1. Division of costs in action by client to recover money collected by attorney, in which latter proved counterclaim. Dorr v. Dudley [Iowa] 112 N. W. 203. Plaintiff four-fifths, defendant one-fifth, though judgment was for plaintiff. Id.

2. Trespass and no appearance or answer. Morris v. Edwards [Wis.] 112 N. W. 248.

3. Code, § 603. No costs charged against administrator who was nominal defendant in action to set aside a widow's election. Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845.

4. Suit for construction of will, plaintiff prevailed except as against residuary legatees. Trustees for Poor Catholic Men's Home v. Coleman, 29 Ky. L. R. 75, 92 S. W. 342. A defendant who is a bona fide purchaser in a suit for specific performance is entitled to costs; plaintiff must look for relief to the defendant vendor. Smith v. Umstead [N. J. Eq.] 65 A. 442.

5. No showing that parties were united in interest and collusively and in bad faith tried to enhance costs. Rowe v. Granger, 118 App. Div. 459, 103 N. Y. S. 439. Ejectment. Unnecessary duplication not allowed. Wegge v. Madler, 129 Wis. 412, 109 N. W. 223.

6. Judgment for $17.41 costs, modified. Livingston Press v. Genet, 101 N. Y. S. 26. No costs on oral pleadings in municipal court. Pickhardt v. Pratt, 105 N. Y. S. 236. Court in its discretion refused where successful party did not appear. Hurley v. Walther, 129 Wis. 508, 109 N. W. 558.

7. Mechanic's lien judgment modified in amount of $5.75, but appellant made no effort to correct in trial court. Spafford v. McNally, 130 Wis. 537, 110 N. W. 387.

8. In suit to recover possession of street, defendant on trial admitted right of village, and offered at once to surrender possession. Village of Shumway v. Leturno [Ill.] 80 N. E. 403.

9. Practically all costs incurred on items

are frequently awarded to abide the event,[10] but, where there is a reversal and judgment absolute, a party is entitled to costs all through.[11] Costs will be adjudged against the judgment debtor up to the time he made his application for an allowance in lieu of homestead; costs made thereafter must be paid by the execution creditor.[12]

(§ 5) *B. Waiver of right and effect of tender or offer of judgment.*[13]—Where a defendant offers to allow judgment for a certain sum and accrued costs, and on rejection plaintiff fails to recover a sum equal thereto, he cannot recover subsequently accruing costs.[14] Where plaintiff recovers a certain sum which together with interest is more than defendant's offer, he may tax costs.[15] To make a tender effectual, the money should be paid into court and proper disclaimer made and proved at trial.[16] It is not necessary that offer of judgment in admiralty should include docket or deposition fees.[17] If an offer is withdrawn, costs should be taxed as if it had not been made.[18]

§ 6. *Right dependent on minimum amount of demand or recovery.*[19]—Where except for the amount claimed an action could have been brought in a lower court,[20] particularly before a justice of the peace,[21] and the jurisdictional or other fixed amount is not recovered,[22] no costs will be awarded a successful plaintiff unless defendant was not personally served,[23] or the lower court did not have jurisdiction,[24] as on account of the fact that defendant was a city.[25] An appellant from a justice court is liable for costs in appellate court if he recovers less than he did below.[26]

on which plaintiff was beaten. Krause v. Redman [Iowa] 112 N. W. 91.

10. Where same party succeeds on second trial, he is entitled to costs of both trials. Mossein v. Empire State Surety Co., 117 App. Div. 782, 102 N. Y. S. 1012. Where court sets aside a verdict because inadequate, it may award costs to defendant to abide event as he was not absolutely entitled to them where it did not appear the erroneous verdict resulted from fault of other party. Waltz v. Utica & M. V. R. Co., 116 App. Div. 563, 101 N. Y. S. 968.

11. Appellate term reversed judgment for plaintiff with costs to abide event, and appeal to appellate division on stipulation that if affirmance there should be judgment absolute for defendants. On affirmance defendants entitled to costs of one trial, and both appeals. Feltenstein v. Ernst, 104 N. Y. S. 423.

12. Warns v. Reeck, 8 Ohio C. C. (N. S.) 401.

13. See 7 C. L. 960.

14. Code Civ. Proc. § 1004, contemplates an offer made in terms which when accepted entitles plaintiff to judgment therefor and costs. Palmer v. Styles [Neb.] 110 N. W. 1004. Code, § 3818. Query as to effect of plaintiff's recovering more then the offer on trial and its reduction in appellate court. Castner v. Chicago, B. & Q. R. Co. [Iowa] 112 N. W. 88. Fact plaintiff not entitled to costs does not in itself entitle defendant to costs. Patterson v. Woodbury Dermatological Inst., 117 App. Div. 600, 102 N. Y. S. 790. Action for value of stock, defendant admitted $50 due, and paid into court, and verdict for that sum. No costs awarded plaintiff. Goldman v. Swartwout, 117 App. Div. 185, 102 N. Y. S. 302.

15. Appellate court reduced judgment, and not decided whether statute applies in such case. Castner v. Chicago, B. & Q. R. Co. [Iowa] 112 N. W. 88.

16. No claim of title, and trespass involuntary, and no costs to either party. Law as to contract no application here. Babbitt v. Shearer, 192 Mass. 600, 78 N. E. 769.

17. Where offer sufficient, respondent entitled to tax for taking of testimony taken before offer was made. The Claverburn, 148 F. 139.

18. Defendant offered to allow judgment for specified sum, which plaintiff accepted on condition that it should include costs, which was the legal effect of such offer, but this was rejected by defendant, which amounted to a withdrawal of the offer. Palmer v. Styles [Neb.] 110 N. W. 1004.

19. See 7 C. L. 961.

20. No application to costs on appeal. La Rosa v. Wilner, 104 N. Y. S. 952.

21. In Delaware $50 on affidavit that there is a just cause of action for more than $50 being required, an affidavit of demand that there is due plaintiff $157.68 is insufficient. Adkins & Co. v. Campbell [Del.] 64 A. 628. But allowed with nominal damages in suit for return of note for sum beyond jurisdiction of justice. Kiblinger Co. v. Sauk Bk. [Wis.] 111 N. W. 709.

22. Unless more than $20 is recovered in superior court, or certificate of judge that easement or title to land was in question. Babbitt v. Shearer, 192 Mass. 600, 78 N. E. 769.

23. Voluntary appearance equivalent to personal service. Swartz v. New York City R. Co., 105 N. Y. S. 352.

24. Costs given in action for neglect to return a note where amount of note was in excess of jurisdiction of justice of peace, though only nominal damages were awarded. Kiblinger Co. v. Sauk Bk. [Wis.] 111 N. W. 709.

25. Costs allowed in supreme court though less than $500 was recovered, as city could not be sued in city court. O'Connor v. New York, 51 Misc. 560, 101 N. Y. S. 295.

26. Rev. St. 1895, art. 1436; subject to court's discretion. Julius Kessler & Co. v.

Frequently in actions of tort where the damages recovered are less than a certain fixed amount there can be no more costs than there are damages recovered,[27] unless a certificate of the judge is made that greater damages should have been awarded.[28] No costs are awarded in Federal court if the recovery is less than five hundred dollars.[29] A plaintiff's action in remitting part of the damages has the same effect as if the verdict had originally been returned for that sum.[30]

§ 7. *Right affected by nature of action or proceeding, or character of tribunal. A. In general.*[31]—An action on liquor dealer's bond is an action on a contract and not for a penalty, and it carries costs.[32] In admiralty the prevailing libelant is entitled to costs unless the libel is prematurely brought,[33] or the recovery is less than an offer,[34] or there are cross appeals.[35] A libelant is not liable for costs of third party unnecessarily brought in by the claimant.[36]

(§ 7) *B. In equity and equitable code actions.*[37]—Costs are largely discretionary with the trial judge in chancery suits,[38] such as an accounting,[39] suits to quiet title,[40] actions to construe wills,[41] or suits to determine water rights;[42] but such discretion is not to be exercised arbitrarily.[43] The court may for good cause apportion the costs in foreclosure,[44] cross actions,[45] boundary line suits,[46] or where prevailing party was at fault.[47] In petition proceedings, costs are apportioned ac-

Burckell [Tex. Civ. App.] 99 S. W. 173. In justice court, plaintiff demanded judgment of $175, but defendant insisting judgment should be according to evidence, it was given for $187.50; on appeal plaintiff recovered only $175, but was allowed costs in both courts. St. Louis S. W. R. Co. v. Bennett [Tex. Civ. App.] 102 S. W. 137.

27. Plaintiff recovered $1 and allowed $1 costs where originally contract, and the tort count had been subsequently added, costs being discretionary as to the contract count. Scharff v. Schultz, 79 Conn. 304, 64 A. 737. Twenty dollars, or certificate of judge that greater sum should have been awarded, but this has application to circuit, not to county courts. Clark v. Jernigan [Ala.] 42 So. 833.

28. Action of trial judge cannot be reviewed on appeal by mandamus or otherwise. Buford v. Christian [Ala.] 42 So. 997.

29. Does not apply to action by receiver to recover assets of national bank. Murray v. Chambers, 151 F. 142.

30. Done to avoid granting of new trial. Babbitt v. Shearer, 192 Mass. 600, 78 N. E. 769.

31. See 7 C. L. 961.

32. Cullinan v. Federal Union Surety Co., 113 App. Div. 912, 100 N. Y. S. 515.

33. Costs allowed. The Rebecca Shepherd, 148 F. 727.

34. Suit for salvage, and allowed to recover merely for towage. The Robert S. Besnard, 144 F. 992.

35. Decree affirmed without costs where both sides appealed. The Wrestler [C. C. A.] 144 F. 334. Costs not allowed in collision case where both sides appealed. The Sicilian Prince [C. C. A.] 144 F. 951.

36. Both libel and petition bringing in third party were dismissed. The Charles Tiberghien, 148 F. 1016.

37. See 7 C. L. 961.

38. Charged to one defendant in receivership caused by his conduct. Leigh v. National Hollow Brake-Beam Co., 224 Ill. 76, 79 N. E. 318. No costs awarded in action against administrator for breach of contract of sale, though judgment was secured for amount of earnest money. Wilson v. Root [Conn.] 67 A. 482.

39. Divided equally. Walker v. Walker, 17 Okl. 467, 88 P. 1127. Did not order paid out of partnership assets. Brown v. Rogers [S. C.] 56 S. E. 680.

40. Had received money in full payment of his claim, but answered and delayed proceedings, and refused to execute a quitclaim deed. Glos v. Ptacek, 226 Ill. 188, 80 N. E. 727.

41. Executor did not join in either appeal and was not taxed, and was authorized to apply to proper court for allowance out of estate. Iglehart v. Iglehart, 204 U. S. 478, 51 Law. Ed. 575. St. 1898, § 2918. Costs awarded to successful party. In re Davis' Will [Wis.] 111 N. W. 503.

42. Cross appeal justifiable and allowed costs. Gardner v. Wright [Or.] 91 P. 286.

43. Where both in part successful, costs of trial and appeal were divided, but this did not include expenses of receivership. Kell v. Trenchard [C. C. A.] 146 F. 245.

44. Foreclosure of mortgage of crops, three-fifths against first mortgagee, one-fifth against transferee, and one-fifth against her mortgagee. Beaumont Rice Mills v. Bridges [Tex. Civ. App.] 101 S. W. 511. Includes actions to foreclose mechanic's liens. Boesen v. Preston, 130 Wis. 418, 110 N. W. 208.

45. Hoyt v. Hart, 149 Cal. 722, 87 P. 569. Though statute allowed costs to plaintiff on judgment in his favor where title to land involved. Here suit for trespass to easement for waterway, and cross suit to divide the waters. Id.

46. Equal division is equitable in suit to establish lost line. Strunz v. Hood [Wash.] 87 P. 45.

47. Marthinson v. King [C. C. A.] 150 F. 48. Where the defendant does not raise the question of jurisdiction until the final hearing on the merits, he will be taxed with part of the costs. The objection should have been raised by demurrer, since thereby great expense would have been avoided. Id.

cording to the interests of the parties,[48] or should be paid out of estate,[49] and should include a reasonable fee to attorney bringing partition suit [50] except in controverted cases.[51] The defeated claimant in interpleader,[52] or a stakeholder, who files an unnecessary interpleader, are properly taxed with costs.[53] Costs will not be given to plaintiff unless substantial relief is obtained,[54] and will not be awarded against one of defendants who did not contest the claim of successful plainitff,[55] or who might have conceded the same if opportunity given.[56] Counsel fees may be allowed in equitable actions, but not for filing claims with a receiver.[57]

(§ 7) *C. In inferior courts.*[58]

(§ 7) *D. In interlocutory or special proceedings, or proceedings other than actions.*[59]—Costs are discretionary in mandamus and certiorari proceedings,[60] in actions to settle location of highways,[61] and in disbarment proceedings.[62] Where condemnation proceedings are abandoned or dismissed, costs are properly taxed against petitioner; [63] in some states attorney's fees may be included,[64] but not in all.[65] A prosecution of liquor nuisance,[66] or successful contestees in a contest of election for removal of county seat, are entitled to costs.[67] In Louisiana in unsuccessful application for appointment of administrator, costs of inventory may be imposed upon the mass.[68] All parties to a special proceeding liable for referee's and stenographer's fees.[69]

48. Civ. Code Prac. § 499, subsec. 13. While where made in division of estates of deceased persons, courts have judicial discretion. Mead v. Mead [Ky.] 101 S. W. 330.

49. Taxing on complainants improper. McCoy v. McCoy, 105 Va. 829, 54 S. E. 995.

50. Rev. St. 1899, § 4422. Court may allow as costs a reasonable attorney's fee. Padgett v. Smith [Mo.] 103 S. W. 943.

51. Really adversaries and should pay own proper costs. Bowles v. Wood [Miss.] 44 So. 169.

52. Properly assessed against defeated claimant in interpleader. Sovereign Camp, Woodmen of the World v. Wood, 14 Mo. App. 471, 89 S. W. 891.

53. Insurance company had put in a plea in the nature of an interpleader, and then instituted an independent action. Nixon v. Malone [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

54. Not allowed to taxpayers in suit to obtain cancellation of city's contract for water supply where the court merely decreed that certain minor provisions were invalid. Lackey v. Fayetteville Water Co., 80 Ark. 108, 96 S. W. 622.

55. Suit for reformation of deed. Swinebroad v. Wood, 30 Ky. L. R. 946, 99 S. W. 1162.

56. Bill to subject lands to a mortgage to which complainant was not entitled amended to ask for reformation of a deed which it did not appear defendant had ever been requested to make. Grayson v. Haislip [Ala.] 41 So. 951.

57. Though claim is contested and is sustained on appeal. Porch v. Agnew Co. [N. J. Eq.] 65 A. 485.

58. See 7 C. L. 963. See, also, § 6, ante.

59. See 7 C. L. 964.

60. In mandamus, costs should not be awarded against real party in interest who had moved appeal from justice court be dismissed as taken too late, where he did not appear on mandamus proceedings against a judge who opposed in order to settle the law. State v. Ritchie [Utah] 91 P. 24. Taxed against a judicial officer who was applicant. Harris v. Sheffield [Ga.] 57 S. E. 305. Where judgment authorized against surety on appeal bond, it may be entered against surety on certiorari bond on dismissal of certiorari to review a justice's judgment for damages, costs, and interest. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 N. W. 161.

61. Costs apportioned among the parties other than the county and road supervisor who were made defendants merely to protect the county's interests. Knight v. Acton [Iowa] 109 N. W. 1089.

62. No costs awarded in trial court, but allowed on appeal. State v. Martin [Wash.] 87 P. 1054.

63. In suit for opening street, city passed ordinance vacating the same, and held it was liable for costs. Sensenig v. Lancaster County, 30 Pa. Super. Ct. 224.

64. Act authorized commissioners to condemn site for public building. Condemnation act authorizing taxation of costs against a petitioner who dismisses proceedings prevailed over act providing defendant shall not recover costs in any action on behalf of the state. Deneen v. Unverzagt, 225 Ill. 378, 80 N. E. 321.

65. Right to attorney's fees must be established in a separate action where full hearing can be had. St. Louis & G. R. Co. v. Cape Girardeau & Thebes Bridge Terminal R. Co. [Mo. App.] 102 S. W. 1042.

66. Plaintiff entitled to tax attorney's fees whether action prosecuted in his name or in the name of the state. Plank v. Hertha, 132 Iowa, 213, 109 N. W. 732.

67. Costs of deposition taken before validity of election was conceded, but no right to cost of copying stenographer's notes, as not included in statute. Reese v. Cannon, 80 Ark. 574, 98 S. W. 370.

68. Beneficial, but all other costs should be imposed on applicant. Succession of Weincke, 118 La. 206, 42 So. 776.

69. Attorney has power to bind client for

(§ 7) *E. On appeal or error.*[70]—Costs are ordinarily allowed the prevailing party,[71] though on reversal only part of respondents may be taxed where there are separate interests [72] or they file separate briefs.[73] But on cross appeals,[74] or where the judgment is affirmed as to some and reversed as to others,[75] or where a question of public interest is involved,[76] costs may be discretionary. A prevailing party is not entitled to costs where he was responsible for the error, as where he pursued the wrong remedy,[77] or failed to call trial court's attention to the error,[78] urging it for the first time in the appellate court,[79] or where he merely raises an academic question.[80] So appellants are not liable for costs where the order appealed from was erroneous at the time of appeal, though the error thereafter became harmless.[81] An unsuccessful respondent is liable for the costs of an appeal though he finally prevails,[82] so, though costs are given to a party to abide the event, the other party cannot tax the costs of that appeal on his subsequently prevailing.[83] Where a plea in bar to a writ of error was sustained and amendment allowed on payment of costs, plaintiff in error cannot on reversal tax costs of briefs filed before the amendment.[84]

(§ 7) *F. In criminal prosecutions.*—Proper costs [85] should be taxed to those

their payment. Here stipulation that estate liable for reference in proceedings to have administrator's bond increased. Bottome v. Neely, 104 N. Y. S. 429.

70. See 7 C. L 965.

71. Contention that only motion costs should be taxed, but appeal was taken from whole judgment. Shepard v. Campbell, 51 Misc. 93, 100 N. Y. S. 751. Court on its own motion directed a verdict which was set aside on appeal. Respondent might not have been taxed had he suggested case should have been left to the jury. Haak v. Kellogg, 146 Mich. 541, 109 N. W. 1068. Respondent succeeded because no proper assignment of error. Hurley v. Walter, 129 Wis. 508, 109 N. W. 558.

72. Unjust to force a defendant who has established validity of his purchase to litigate the matter anew. Chapman v. Hughes, 3 Cal. App. 622, 86 P. 908.

73. Otherwise if same solicitor employed. Augusta Trust Co. v. Federal Trust Co. [C. C. A.] 153 F. 157.

74. One appeal dismissed, the other affirmed. Costs one-third to appellee, and two-thirds to appellant. Knight v. Acton [Iowa] 109 N. W. 1089. Defendant having defeated plaintiff, cross appeal is entitled to costs though liable for them in lower court. Schmidt v. Olympia Water Light & Power Co. [Wash.] 90 P. 212.

75. Rev. St. 1898, § 2949. Not given to respondent who succeeds because no proper assignment of error. Hurley v. Walter, 129 Wis. 508, 109 N. W. 558. Partial new trial on one issue, and court refused judgment against sureties on prosecution bond, but left each party to pay his own costs. Raburn v. Pennsylvania Casualty Co., 142 N. C. 376, 55 S. E. 296.

76. Suit between county officials as to insane hospital. Superintendent of Poor of Wayne County v. Wayne County Auditors, 147 Mich. 384, 13 Det. Leg. N. 1019, 110 N. W. 1080. Sale of a court house was forbidden, but purchase of other land from respondent allowable, and all respondents were not taxed with costs on reversal of judgment. Dupuy v. Police Jury of Iberville, 116 La. 783, 41 So. 91.

77. Defendant sued out writ of certiorari to review certain order, and on affirmance secured a writ of error, when the affirmance was reversed, as the court had no right of review by certiorari. Taylor Provision Co. v. Adams Exp. Co., 72 N. J. Law, 220, 65 A. 508. Showed right to relief and costs divided on the original petition, he had filed unnecessary petition in error when relief could have been obtained on a cross petition. Crane v. Cameron [Kan.] 87 P. 466.

78. Maker, in suit by indorsee of note held as collateral, did not call trial court's attention to fact judgment was given for amount of debt instead of for amount of note. Martin v. German American Nat. Bank [Tex. Civ. App.] 102 S. W. 131.

79. Judgment in action on bond being in effect one to recover penalties should not allow interest. White v. Manning [Tex. Civ. App.] 102 S. W. 1160. Modification of mechanic's lien judgment. Spafford v. McNally, 130 Wis. 537, 110 N. W. 387. Where trial court had no jurisdiction, appellate court has jurisdiction to reverse erroneous judgment and to require each party to pay costs, as neither raised question of jurisdiction in lower court. Columbia N. S. D. Co. v. Merton, 28 App. D. C. 288.

80. Order setting aside service was unjustifiably reopened on defendant's voluntary appearance. Caritey v. Eggers, 114 App. Div. 907, 100 N. Y. S. 603.

81. Order allowing county judge's salary. At time of hearing it had been earned. Cobb v. Hammock [Ark.] 102 S. W. 382.

82. Costs on appeal, motion for new trial, arrest of judgment, affidavit for appeal, transcript, etc. Buckman v. Missouri, K. & T. R. Co., 121 Mo. App. 299, 98 S. W. 820.

83. Plaintiff secured judgment; defendant reversal with costs to him to abide event. On second trial defendant secured judgment, and plaintiff a reversal with costs to abide event. Plaintiff securing judgment on third trial not allowed to tax costs of first appeal. Adams v. Massey, 51 Misc. 230, 100 N. Y. S. 836.

84. Delia v. Caprio [Conn.] 65 A. 971 [advance sheets only].

85. State not allowed to tax for unnecessary printing. State v. Richardson [N. D.] 109 N. W. 1026. Under Acts 29th Leg. p. 220,

entitled thereto even though the accused be discharged, but formal judgment against the state or county is not essential,[86] and in some states not allowable.[87] The county is liable for fees for subpoenas served with approval of district attorney,[88] but no fees will be allowed to officers who are at fault [89] or who fail to acquire jurisdiction over the accused.[90] In change of venue the original county is liable for the additional expense caused the county to which the case was removed.[91] Taxation against the prosecuting witness is sometimes allowed [92] where the case has not been presented to the grand jury.[93]

§ 8. *Amount and items. After trial.*[94]—Only such items as are prescribed by statute [95] or authorized by express agreement of parties [96] without unnecessary duplication [97] can be taxed. In absence of statute giving discretion,[98] court cannot by order impose additional costs,[99] witness fees,[1] though witnesses were special excise agents,[2] or were in attendance at court from which a change of venue was had,[3] are allowed, together with their mileage for the distance that a subpoena is effective,[4] as within the county [5] or state,[6] or for certain limited distance prescribed by statute.[7] They are in some jurisdictions taxable though the testimony was taken in a foreign country.[8] Other common items are term fees,[9] trial fees,[10] clerk's fees,[11] fees for

when on appeal in a criminal case a stenographic report of the evidence is made and sent up, the clerk is not required or authorized to transcribe the testimony into the record made out by him, and hence is not entitled to costs for so doing, and they will be taxed against him. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 126, 93 S. W. 735. Justice's court costs for holding examining trial may not be taxed as part of the costs against one convicted of a criminal offense. Wade v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 370, 90 S. W. 503.

86. Claim must be audited by board of supervisors. McGuire v. Iowa County, 133 Iowa, 636, 111 N. W. 34.

87. No provision of law for taxing costs against the state, so, where there was no right on part of state to bring a cross bill of exceptions, costs were taxed against the solicitor. Mill v. State [Ga. App.] 58 S. E. 673.

88. But not where served at request of private prosecutrix. Newton v. Luzerne County, 30 Pa. Super. Ct. 347.

89. Criminal appeal dismissed without costs to clerk, as transcript was in inexcusable confusion. Sharp v. State, 117 Tenn. 537, 97 S. W. 812.

90. Mere jurat to schedule of claims not a sufficient affidavit. Evidence mileage run up when no reasonable prospect of apprehending accused. McGuire v. Iowa County, 133 Iowa, 636, 111 N. W. 34.

91. Liable for fees of jurors who sat on case. Dawes County v. Sioux County [Neb.] 110 N. W. 378.

92. Under Rev. St. 1899, § 2836, providing that where a defendant in a criminal prosecution is acquitted judgment shall be rendered against the prosecuting witness for costs, an execution cannot be issued against a prosecuting witness for such costs until a judgment has been rendered against him therefor. State v. Leidy, 115 Mo. App. 62, 90 S. W. 759.

93. County held liable for costs on return "ignoramus" of defective indictment. Conniff v. Luzerne County, 30 Pa. Super. Ct. 383.

94. See 7 C. L. 967.

95. No right to cost of copying stenographer's notes. Reese v. Cannon, 122 Ark. 164, 98 S. W. 370.

96. In Georgia court has power to enter up judgment in favor of stenographer against the parties liable, but this does not authorize him to enter ex parte judgment against one who had ordered a transcript, as this was a matter of contract between the parties. Seaboard Air Line R. v. Memory, 126 Ga. 183, 55 S. E. 15.

97. Ejectment with separate defendants, and judgments for costs. Wegge v. Madler, 129 Wis. 412, 109 N. W. 223.

98. In absence of a rule of court, cost of printing exhibits in patent cases is not taxable. Keasbey & Mattison Co. v. American Magnesia & Covering Co., 149 F. 439.

99. Reporter had absconded after being paid in advance and court improperly ordered each party to bear half the expense of a new transcript. Langan v. Whalen [Neb.] 110 N. W. 668.

1. Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 N. W. 237.

2. Action on liquor dealer's bond. Cullinan v. Federal Union Surety Co., 113 App. Div. 912, 100 N. Y. S. 515.

3. Otherwise under statute (Rev. St. 1898, § 2625) if application for change of venue had been made on ten days' notice. American Foundry & Furnace Co. v. Board of Education of Berlin [Wis.] 110 N. W. 403.

4. Nonresident not entitled where not subpoenaed within jurisdiction of court. Buckman v. Missouri, K. & T. R. Co., 121 Mo. App. 299, 98 S. W. 820.

5. In Nebraska, in civil actions, witnesses can be required to attend only in county of residence. Smith v. Bartlett [Neb.] 110 N. W. 991.

6. Voluntary witness who resided in another state. State v. Baird [Idaho] 89 P. 298.

7. Not more than twenty miles. Moritz v. Herskovitz [Wash.] 89 P. 560.

8. Mileage not exceeding one hundred miles allowed by analogy of rules as to witnesses attending trial. Agius v. Perkins Co., 151 F. 958.

9. No right to one paid before amendment which destroyed original issue. Mossein v

proceedings before trial,[12] and for copies of documents when actually and necessarily used.[13] A sheriff is entitled to expenses in keeping attached property,[14] but one is not liable for expenses in keeping attached property of which defendant was not the owner.[15]

In the absence of a constitutional [16] statute, counsel fees cannot be recovered by the adverse party,[17] much less may one maintain an independent action for attorney's fees against an unsuccessful party.[18] But they are frequently authorized or discretionary in suits in equity,[19] in contempt proceedings,[20] on dissolution of injunctions,[21] in bankruptcy proceedings,[22] in prosecutions under liquor laws,[23] on dismissal of condemnation proceedings,[24] on dissolution of attachment,[25] in slander and libel cases,[26] in suits by a pledgee,[27] in suits by or against executors [28] or trustees,[29] on allowance of new trials,[30] and in suits on behalf of the public.[31] Where attorney's fees allowed by statute, it is sometimes construed as requiring the jury to pass upon them,[32] but usually they are fixed by the court.[33]

Empire State Surety Co., 117 App. Div. 782, 102 N. Y. S. 1012.

10. Only entitled where an issue of fact. On certiorari to review tax assessment not allowed where accepted offer of settlement. People v. O'Donnel, 52 Misc. 311, 102 N. Y. S. 189.

11. One fee (twenty cents) for motion and order made thereon, and five cents for filing bill of exceptions. Buckman v. Missouri, K. & T. R. Co., 121 Mo. App. 299, 98 S. W. 820.

12. In Michigan $10, and but one allowed though several trials. McGilvray v. Manistee Circuit Judge, 146 Mich. 480, 13 Det. Leg. N. 835, 109 N. W. 852.

13. Copy of testimony taken before referee disallowed. Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 N. W. 237.

14. Made on sheriff's affidavit showing items. Beeman & Cashin Mercantile Co. v. Sorenson [Wyo.] 89 P. 745.

15. Defendant's right on motion to tax sheriff's expenses to show he was not the owner. Beeman & Cashin Mercantile Co. v. Sorenson [Wyo.] 89 P. 745.

16. Allowance to successful mechanic's lien claimants is unconstitutional. Union Lumber Co. v. Simon [Cal.] 89 P. 1081.

17. After debt paid for which goods had been pledged, no right to hold balance for counsel fees and expenses of litigation. Smith v. Equitable Trust Co., 215 Pa. 413, 64 A. 591.

18. Action in tort for recovery of insurance policies was successful, and then another action against same defendant to recover attorney's fee. Seligman v. Rosenzweig, 98 N. Y. S. 221.

19. Claim against receiver is strictly a legal one. Porch v. Agnew Co. [N. J. Eq.] 65 A. 485. In an action brought by a husband to wrest from his wife an interest in land belonging to him, and also the interest belonging to the wife and the interest belonging to their son, the wife and son cannot be compelled to pay as part of the costs the counsel fees due from the husband and earned in his undertaking to deprive them of their property. Hopple v. Hopple, 4 Ohio N. P. (N. S.) 255. Proper allowance half that of trial court in an injunction suit. Curphy & Mundy v. Terrell [Miss.] 42 So. 235.

20. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540.

21. Five hundred dollars. Chancellor in fixing the value may exercise his independent judgment exclusive of testimony. Hunt v. Pronger, 126 Ill. App. 403. For services in both courts. Curphy v. Terrell [Miss.] 42 So. 235.

22. Fifteen thousand dollars allowed where preference of over $70,000, and imposed on estate of testator who had secured the preference. Page v. Rogers [C. C. A.] 149 F. 194.

23. For attorney general or assistant. Title of prohibtory act broad enough to authorize this. Ex parte Ellis [Kan.] 91 P. 81. Proceedings to enjoin liquor nuisances. Statutory $25 must be taxed though attorney was not employed by plaintiff, but had merely used his name, and was otherwise compensated. Plank v. Hertha, 132 Iowa, 213, 109 N. W. 732.

24. Defendants entitled to fees for services actually performed though the attorneys had not been actually paid. Deneen v. Unverzagt, 225 Ill. 378, 80 N. E. 321.

25. Though defendant had not in fact paid for the services of attorney, contract price was admissible to show what was reasonable, but was not conclusive against defendant. Plymouth Gold Min. Co. v. United States Fidelity & Guaranty Co. [Mont.] 88 P. 565.

26. Allowed to either party on dismissal. Gaffey v. Mann [Cal. App.] 91 P. 172.

27. But improper to allow where suit brought in name of pledgor. Graham v. Light [Cal App.] 88 P. 373.

28. Resisting litigation which they had reasonable grounds to believe unjust. In re Groff's Estate, 215 Pa. 586, 64 A. 783.

29. Thirty dollars for three years' service to trust estate of $12,000. Mylin's Estate, 32 Pa. Super. Ct. 504.

30. May have $25 attorney's fees for each trial where nothing said in order granting new trial. McGilvray v. Manistee Circuit Judge, 146 Mich. 480, 13 Det. Leg. N. 835, 109 N. W. 852.

31. Attorney's fees allowed in suit regarding sale of courthouse. Dupuy v. Police Jury of Iberville, 116 La. 783, 41 So. 91.

32. No fees allowed after verdict under act for enticing away a cropper. Jones v. Roughton, 1 Ga. App. 759, 57 S. E. 1061.

33. Irrespective of contract, attorney's fees of one suing in forma pauperis are to be fixed by court. In re Tyndall, 117 App. Div. 294, 102 N. Y. S. 211.

Interlocutory proceedings.[34]—On sustaining demurrer to answer, plaintiff is only entitled to costs of proceedings after notice of trial.[35]

Extra allowances.[36]—In difficult and extraordinary cases one may, under the New York statute, be entitled to an additional allowance,[37] but not where the case was disposed of on stipulation of the parties.[38] Extra costs are allowed where defendant makes a counterclaim and he does not appear,[39] where judgments for the payment of money are superseded,[40] and in other cases.[41]

On appeal or error.[42]—Necessary disbursements made to secure a review may be allowed, as costs incurred in lower court after entry of appeal. Cost of transcript of record [43] or any amendment thereof,[44] but not a resettlement.[45] Cost of printing may be taxed [46] except of matter not in the proper form,[47] or which was duplicated,[48] or contained a large amount of irrelevant and unnecessary matter.[49] Cost of printing such matter will be disallowed though appellee consented to its settlement,[50] but the court will be cautious in holding that there is unnecessary matter.[51] Sometimes a penalty is imposed on frivolous [52] or dilatory appeals,[53] or those not taken in good

34. See 7 C. L. 969.

35. Separate defense. Perifield v. New York, 53 Misc. 39, 102 N. Y. S. 784. Costs for service of summons taxable only on entry of final judgment. Hill v. Muller, 53 Misc. 262, 103 N. Y. S. 96.

36. See 7 C. L. 970.

37. Reviewable on appeal in court of appeals as question of law where facts undisputed. Campbell v. Emslie [N. Y.] 81 N. E. 458. Addressed to discretion of trial court and reviewable only for abuse of discretion. Rowe v. Granger, 118 App. Div. 459, 103 N. Y. S. 439. Not allowed for expense in procuring record of trial in another state on plea of res judicata. Campbell v. Emslie [N. Y.] 81 N. E. 458.

38. Agreed on disposition of case without trial, though no agreement as to facts. Campbell v. Emslie [N. Y.] 81 N. E. 458.

39. Fifteen dollars, but not allowed where counterclaim dismissed. Benning v. Pouker, 104 N. Y. S. 409.

40. Judgment ordering a party to pay specific sum of money into court, and authorizing adverse party to withdraw it as soon as paid, is a judgment for the payment of money, and entitled to ten per cent damages. Robinson Norton & Co. v. Corsican Cotton Factory [Ky.] 102 S. W. 869.

41. St. 1865-66, p. 66, c. 91, allowing, in San Francisco, the prevailing party five per cent, not exceeding $100 on the amount recovered, together with disbursements is not repealed. Doyle v. Eschen [Cal. App.] 89 P. 836

42. See 7 C. L. 970.

43. All being properly a part of the appellate proceedings therein. McGourin v. DeFuniak Springs [Fla.] 42 So. 187.

44. Additional abstract filed by appellee being necessary to supply omissions. Manufacturers' Fuel Co. v. White [Ill.] 81 N. E. 841.

45. To insert matters overlooked by his attorney and necessitated reprinting of record. Volhard v. Volhard, 115 App. Div. 548, 101 N. Y. S. 453.

46. Though done at instance of plaintiff in error, and not of clerk, where it was accepted and no objection made. Jayne v. Loder [C. C. A.] 153 F. 739. Clerk taxed the reasonable cost which was overruled. Receipted bills attached to affidavit and was liable for actual cost. Portland Iron Works v. Willett [Or.] 90 P. 1000.

47. Printed pages six and one-half inches in length, when rule 18 required them to be seven inches, and taxation therefor refused. Clark v. Else [S. D.] 111 N. W. 543.

48. Insurance companies took separate appeals with separate transcripts which were consolidated in appellate court, and costs not allowed on separate transcripts. Nixon v. Malone [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

49. Appellant taxed one-third for unduly prolix bill of exceptions. Bessemer Coal, Iron & Land Co. v. Doak [Ala.] 44 So. 627. Charges given or refused may be brought up for review with exceptions noted under statute or in the ordinary bill of exceptions, but not in both ways and if it is done the transcript then contains unnecessary matter which cannot be taxed. West v. State [Fla.] 43 So. 445. Rule 7 provides record of former appeal may be placed with the new, and accordingly cost of copying transcript of former appeal was disallowed. Sandy River Cannel Coal Co. v. White House Cannel Coal Co. [Ky.] 102 S. W. 320. Deducted the cost of printing twenty-eight pages of respondent's brief containing unnecessary matter reprinted from the abstract. State v. Richardson [N. D.] 109 N. W. 1026. Pleas of privilege and bills of exceptions not made the basis of any assignment of error. Missouri, etc., R. Co. v. Williams [Tex. Civ. App.] 16 Tex. Ct. Rep. 847, 96 S. W. 1087.

50. Full copy of stenographer's minutes amounting to three hundred and ninety-four pages where one hundred pages would have been sufficient. Fruit Dispatch Co. v. Le Seno, 147 Mich. 149, 110 N. W. 526.

51. Papers inserted by appellee had some bearing on the case, and master's report, though prolix, was not padded. Reid v. Southern Development Co. [Fla.] 42 So. 206.

52. Penalty ten per cent. Florence Oil & Refining Co. v. First Nat. Bk. [Colo.] 88 P. 182.

53. Appeal from refusal to direct verdict where conflicting evidence of negligence and correct instructions. Kansas City Southern R. Co. v. Edwards, 80 Ark. 273, 96 S. W. 1061. Needlessly consumed time of court, and har-

faith.[54] In Kentucky, where a supersedeas is filed and the judgment is for the payment of money, ten per cent damages may be awarded.[55]

§ 9. *Procedure to tax costs; correction and review.*[56]—The clerk can only tax costs against a party to the record [57] and in accordance with the decision of the court.[58] The usual procedure is within a fixed time from the judgment [59] to serve a memorandum of the costs on the adverse party,[60] which when duly verified is prima facie evidence thereof.[61] Objections thereto should be verified [62] and limit a party from asserting other objections.[63] The clerk having once taxed costs has no authority to alter them.[64] There will be no relief on retaxation, unless items were objected to and motion made within the proper time,[65] except for illegal items.[66] Any correction must be credited on the execution.[67] The taxation of costs in criminal cases is not conclusive on the county.[68] Sometimes the only way to review the taxation of the lower court is by appeal,[69] sometimes by mandamus.[70] In some jurisdictions the matter of costs per se is not a proper subject of appeal, but may be

assed collection of debt. Twenty per cent. penalty. Florence Oil & Refining Co. v. McRae [Colo.] 90 P. 507.

54. An appeal in order to obtain a review by the U. S. supreme court, though there was no question presented to state supreme court, was not penalized. Bonner v. Gorman [Ark.] 101 S. W. 1153.

55. Does not apply to action to enjoin collection of a tax where injunction continued and bond given pending an appeal Bell's Trustee v. Lexington, 30 Ky. L. R. 609, 99 S. W. 344.

56. See 7 C. L. 973.

57. Liability can be adjudged only on rule to show cause. Walker v. Doty [S. C.] 57 S. E. 181.

58. Action to declare deed a mortgage. Opinion was no part of the findings and decision and without legal effect when in conflict with them. Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93.

59. Where filed within ten days from signing the judgment, but more than ten days after it was ordered and entered on the minutes, it was too late. Kinsley v. New Vulture Min. Co. [Ariz.] 90 P. 438.

60. One seeking to have costs awarded generally in appellate court, taxed in lower court, must comply, for otherwise one would be deprived of his property without due process of law. Bell v. Superior Court of San Francisco [Cal.] 87 P. 1031. Costs taxed without notice may be vacated on motion at subsequent term. Beeman & Cashin Mercantile Co. v. Sorenson [Wyo.] 89 P. 745. Defendant duly taxed costs on notice, from which plaintiff appealed, and proper to enter costs without notice on filing of remittitur, as party had had his day in court. Gaffey v. Mann [Cal. App.] 91 P. 172. Where the statute allows $15 costs and disbursements, a confession of judgment including $16.68 costs and disbursements is not irregular, although it does not appear that they were formally taxed by the clerk, he having certified the judgment. Anderson v. Shutts, 114 App. Div. 308, 99 N. Y. S. 893.

61. Burden of showing the contrary on party disputing them unless they appear bad on their face. Brande v. Babcock Hardware Co. [Mont.] 88 P. 949.

62. Though not verified, but accompanied by supplemental affidavit, that is a sufficient compliance. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 87 P. 530.

63. Where a party appears and objects to items of taxation, he cannot thereafter move for a retaxation on the ground that the first had been prematurely made. Statute required memorandum to be filed five days after verdict or notice of decision, defendant filed memorandum after special finding of jury but before conclusions were made by court, and plaintiff contested on the merits. Smith v. Alvord [Utah] 88 P. 16.

64. Struck out item on his own initiative. La Rosa v. Wilner, 104 N. Y. S. 952.

65. On review only such papers can be used as were before the clerk. La Rosa v. Wilner, 104 N. Y. S. 952. Too late at subsequent term except for statutory cause allowing court to set aside or modify a judgment. Meade Plumbing, Heating & Lighting Co. v. Irwin [Neb.] 109 N. W. 391. Witness allowed mileage of more than twenty miles, but too late to retax after three months had elapsed. Moritz v. Herskovitz [Wash.] 89 P. 560.

66. Witnesses subpoenaed from another county can only be allowed mileage for distance traveled in county of trial. Smith v. Bartlett [Neb.] 110 N. W. 991.

67. Cannot be stricken from bill. La Rosa v. Wilner, 104 N. Y. S 952.

68. Board of supervisors have power to audit though taxed by justice of peace to a constable. McGuire v. Iowa County, 133 Iowa, 636, 111 N. W. 34.

69. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 87 P. 530. Error to tax $100 for transcribing stenographer's notes used in lower court. An executor taxed with costs personally is not entitled to a review unless he makes himself a party individually. Meyer v. O'Rourke [Cal.] 88 P. 706. Where improper charges imposed on party amending, it may be corrected on appeal, and he is not required to tender proper amount. Williams v. Myer [Cal.] 89 P. 972. Duty of parties to file statement of items and upon failure to do so the court will not, after expiration of term, order a retaxation. McGouri v. DeFuniak Springs [Fla.] 42 So. 187.

70. Taxed by clerk, retaxation on appeal to circuit court. McGilvray v. Manistee Circuit Judge, 146 Mich. 480, 13 Det. Leg. N. 835, 109 N. W. 852.

considered incidentally in connection with appeal from the whole decree.[71] The appeal will be dismissed if not taken within proper time,[72] which runs from time taxation was finally completed.[73] On dismissal the question cannot be reviewed on the bill of exceptions.[74] The appellate court has no authority to tax costs,[75] and where discretionary will not alter on appeal unless abuse shown.[76] A judgment that a decree is reversed with costs is sufficient,[77] and, in absence of statute, costs in supreme court should be taxed by clerk, subject to review by court.[78] The judgment may be entered against sureties on appeal bonds.[79] Costs taxed by appellate court cannot be altered by clerk of lower court.[80]

§ 10. *Enforcement and payment.*[81]—The failure to pay motion costs operates as a stay of all proceedings except those to review or vacate the order.[82] It is proper to impose condition on amendment,[83] or grant of a discretionary new trial,[84] that party shall pay accrued costs. Before one is entitled to a voluntary dismissal of an appeal, costs must be paid.[85] The failure[86] to pay required docketing fee in advance[87] will not deprive the court of jurisdiction,[88] but costs must be paid before an appeal can be perfected.[89] Where security is given, one may recover in one action costs of trial and appeal.[90] The judgment for costs on an appeal may be offset

71. Special appeal from order requiring intervenor in equity suit to pay costs dismissed with costs. Fifth Congregational Church v. Bright, 28 App. D. C. 229.

72. Rev. St. 1887, § 4807, subd. 3, required appeal to be taken within sixty days. Campbell v. First Nat. Bank [Idaho] 88 P. 639.

73. Meeting on Sept. 24 was an adjournment from Sept. 6, and not finally completed until Oct. 2. Keasbey & Mattison Co. v. American Magnesia & Covering Co., 149 Fed. 439.

74. Campbell v. First Nat. Bank [Idaho] 88 P. 639. Bill of exceptions will be stricken from transcript. Id.

75. Where reversal for failure to allow plaintiff's attorney's fees in a successful prosecution of a liquor nuisance. Plank v. Hertha, 132 Iowa, 213, 109 N. W. 732. Motion to retax costs in appellate court only questions propriety of costs in that court, not of costs in trial court. Terminal R. Ass'n v. Larkins, 127 Ill. App. 80.

76. Partial costs allowed in mechanic's lien foreclosure. Boesen v. Preston, 130 Wis. 418, 110 N. W. 208. No review of action of trial judge in giving certificate that plaintiff was entitled to greater damages, which prevents costs from being limited to the amount of the damages. Buford v. Christian [Ala.] 42 So. 997.

77. Carries the costs duly taxed by the clerk. Santa Clara Valley Mill & Lumber Co. v. Prescott, 127 Ill. App. 644.

78. Statute held to apply only to trial court, and required objections to be verified. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 87 P. 530.

79. Comp. Laws, § 933, as well as against appellant. Also applies where appeal by writ of certiorari. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 N. W. 161.

80. Claim not entitled because no notice of argument or any oral or written argument made; can only be urged on motion for resettlement of order. Hill v. Muller, 53 Misc. 262, 103 N. Y. S. 96. But may make its judgment conform to mandate. Chapman v. Hughes, 3 Cal. App. 622, 86 P. 908.

81. See 7 C. L. 975.

82. But where amended answer was permitted, but was not served on account of defendant's sickness, it was excusable and he was entitled to an order requiring plaintiff to accept answer, and he could make a trial amendment notwithstanding failure to pay costs. Tracy v. Lichtenstadter, 113 App. Div. 754, 99 N. Y. S. 331.

83. Not merely costs of motion. Palazzo v. Degnon MacLean Contracting Co., 115 App. Div. 172, 100 N. Y. S. 681. Accrued taxable costs, not merely costs of motion. Parties improperly joined. Town of Palatine v. Canajoharie Water Supply Co., 116 App. Div. 530, 101 N. Y. S. 810. Entitled to costs after notice and before trial, including a trial fee. Costs on demurrer not properly taxable under order of appellate term granting leave to plead over. Hill v. Muller, 53 Misc. 262, 103 N. Y. S. 96. May require party to pay costs already incurred and counsel fees, but cannot oblige party to pay county expenses, as to per diem and mileage of jurors. Williams v. Myer [Cal.] 89 P. 972.

84. Hart v. Kaplan, 52 Misc. 653, 101 N. Y. S. 763.

85. Fort v. Fort [Tenn.] 101 S. W. 433.

86. To pay docket fees does not deprive court of jurisdiction of appeal from justice court. Whether should operate a continuance is for court to determine on motion. Johnson v. Anna Bldg. & Loan Ass'n, 126 Ill. App. 592.

87. If filing fee on appeal from justice court is not paid, other party entitled to pay and have appeal dismissed, such payment not being voluntary. Little v. Blank [Utah] 87 P. 708.

88. Action to determine validity of general statement of consent for sale of liquor in county, and refused to dismiss for failure to pay docketing fee where case had already been docketed. Dye v. Augur [Iowa] 110 N. W. 323.

89. All costs in Corning City court except attorney's fee. Rising v. Sebring, 104 N. Y. S. 486.

90. Not separate causes of action. Dollard v. American Surety Co., 104 N. Y. S. 494.

against judgment in lower court.[91] A fee bill issued by clerk may be levied by sheriff upon goods and chattels.[92] Action of debt may be brought on transcript of judgment for costs entered in another jurisdiction.[93] A county is liable to suit for constable fees.[94]

COUNTERFEITING.[95]

To constitute a counterfeit of national currency there must be either a direct imitation thereof or such resemblance as not only to deceive a person of ordinary intelligence but to afford a fair inference of intent to deceive.[96]

COUNTIES.

§ 1. Creation and Organization (827). Boundaries (827). County Buildings (828). Removal of County Seats (829).
§ 2. Officers; Personal Rights and Liabilities (830).
§ 3. Public Powers, Duties, and Liabilities (830).
A. General Powers, Duties and Liabilities (830).
B. Public Powers and Duties of Officers (831).
C. Suits and Demands (833).
D. Contracts, Debts, and Expenditures (834). Debts and Expenditures (834). Bonds (834).
E. Torts (835).
F. Property and Funds (835). Depositories (835).
G. Presentation, Allowance, Enforcement, and Payment of Claims (836).
H. Warrants, Issuance and Enforcement (837).
I. Appeals from Orders of County Boards (838).

Scope of title. Matters peculiarly applicable to counties only are treated in this article. Laws relating to public corporations generally,[97] public securities,[98] contracts,[99] facilities,[1] officers,[2] and taxation,[3] being treated in appropriate topics.

§ 1. *Creation and organization.*[4]—The creation of new counties is frequently governed by general laws [5] though bodies other than the legislature may have power of creation.[6] The merger with a municipality of so much of a county as is within the corporate limits of the latter is not a continuation of the former county, but the creation of a new one.[7] Even if the district court in Minnesota has power to grant an application to test the validity of proceedings for the creation of a county by quo warranto at the suit of a private individual,[8] it is discretionary and will be granted only in exceptional cases.[9]

Boundaries.[10]—Survey of boundaries and resurvey of inadequately marked lines [11] are regulated by statute,[12] which must provide compensation for resultant in-

91. Van Cise v. Peterman, 100 N. Y. S. 536. Notwithstanding that attorney has a contingent interest therein, appeal was for benefit of both. Id.

92. Kirby's Dig. § 3530. No authority to levy on land. Minton v. Bennight [Ark.] 103 S. W. 168.

93. Need not be accompanied by transcript from whole record. Santa Clara Valley Mill & Lumber Co. v. Prescott, 127 Ill. App. 644.

94. On failure of county officers to pay, claims made in other cases are admissible as showing lack of good faith. McGuire v. Iowa County, 133 Iowa, 636, 111 N. W. 34.

95. See 7 C. L. 976.

96. Genuine but worthless state bank note not counterfeit of United States note. United States v. Beebe, 149 F. 618.

97. See Municipal Corporations, 8 C. L. 1056. The scope of this article is relatively the same as that of Municipal Corporations, wherein excluded matters are enumerated.

98. See Municipal Bonds, 8 C. L. 1046.

99. See Public Contracts, 8 C. L. 1473.

1. See Public Works and Improvements, 8 C. L. 1506; Bridges, 9 C. L. 408; Highways and Streets, 8 C. L. 40; Sewers and Drains, 8 C. L. 1882; Toll Roads and Bridges, 8 C. L. 2123.

2 See Officers and Public Employes, 8 C. L 1191.

3. See Taxes, 8 C. L. 2058.

4. See 7 C. L. 977.

5. Rev. Laws 1905, § 380 et seq., held a continuation of existing statutes on creation of new counties, and not new independent enactments. State v. McDonald [Minn.] 112 N. W. 278.

6. A constitutional convention has power to create and define all counties within the limits of the proposed state. Frantz v. Autry [Okl.] 91 P. 193.

7. Uzzell v. Anderson [Colo.] 89 P. 785.

8. Court intimate without deciding that in such case it will issue only to test the right to office, and not the existence of the office itself. State v. McDonald [Minn.] 112 N. W. 278.

9. Leave to institute quo warranto held properly denied. State v. McDonald [Minn.] 112 N. W. 278.

10. See 7 C. L. 978.

11. Pol. Code, § 3969, authorizing resurvey of inadequately marked boundary lines,

jury.[13] And in the absence of a constitutional inhibition, provision therefor may be made by special act,[14] but to justify a resurvey, conditions contemplated by the statute must exist.[15] The legislature may, in advance of actual survey, declare a line to be subsequently marked the legal boundary of the county [16] and may declare the line established conclusive, though it varies from the statutory designation.[17] Meander lines on water boundaries are not favored,[18] the thread of the stream being usually taken as the true boundary.[19] The validity of an extension of county boundaries cannot be collaterally attacked,[20] but an illegal change of boundaries may be enjoined at the suit of a resident citizen and taxpayer.[21] Though counties cannot vary boundaries established by statute, their conduct may be of aid in construing an ambiguous statute.[22]

County buildings.[23]—The construction,[24] management, and control [25] of county

contemplates the remarking of the line previously established, and not the making of a new and independent line, though former line did not correspond with latitudinal boundary declared by statute. Trinity County v. Mendocino County [Cal.] 90 P. 685.

12. Pol. Code, §§ 3969-3972, providing for joint survey of inadequately marked boundaries by county surveyors or by surveyor general, and Sp. Act Mar. 30, 1872, providing for survey commission for certain counties with power to appoint surveyor to run and mark previously established line, held not so inconsistent as to repeal either. Trinity County v. Mendocino County [Cal.] 90 P. 685. Pol. Code, §§ 3914, 3918, 3919, providing that fortieth parallel of north latitude should constitute common boundary of certain counties, held a codification of prior laws on subject, and it therefor did not repeal Sp. Act Mar. 30, 1872, providing for survey commission to run and mark such boundaries, nor nullify survey made thereunder. Id.

13. In fixing county boundaries, the state has no power to destroy private property without providing compensation to the owners. Laws 1902, p. 1125, c. 473, appropriating $40,000 to pay expenses of survey of disputed boundaries, held not to provide compensation for injury to private property caused thereby. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

14. Legislature may provide for survey of boundaries by special act though general law contains provision therefor. Trinity County v. Mendocino County [Cal.] 90 P. 685.

15. Pol. Code, § 3969, authorizing resurvey of inadequately marked boundary lines, does not authorize such survey where line has been run and marked pursuant to Sp. Act March 30, 1872, merely because line did not coincide with previously declared but unmarked latitudinal boundary unless monuments had been destroyed so that line was no longer adequately marked. Trinity County v. Mendocino County [Cal.] 90 P. 685.

16. May in advance of survey declare line subsequently run and marked according to a previously declared latitudinal boundary conclusive without rendering the act void as an unconstitutional delegation of power. Trinity County v. Mendocino County [Cal.] 90 P. 685.

17. Words "accurately run" and thoroughly mark boundary line of county according to fortieth parallel of north latitude, in act authorizing creation of survey commission with power to appoint surveyor to run and mark county boundaries, held directory merely, and line surveyed pursuant thereto constituted the true boundary though it did not coincide with latitudinal line. Trinity County v. Mendocino County [Cal.] 90 P. 685.

18. Parish of Red River v. Caddo Parish, 118 La. 938, 43 So. 556.

19. Where a swamp or lake whose shores were undefined and uncertain was fixed as a boundary, it was presumed that a well defined bayou of which the waters mentioned were the overflow was intended. Parish of Red River v. Caddo Parish, 118 La. 938, 43 So. 556. Water boundary construed and thread of stream through lake caused by overflow held line between two parishes. Parish of Caddo v. De Soto Parish [La.] 43 So. 978. Where an island in an unnavigable stream forming the boundary line between two counties lies substantially south of what would be the middle thread of the entire stream, extending only eight or ten feet north thereof, and the channel south of the island is not more than half the width of that on the north, the boundary line follows the thread of the northern channel, and the island lies in the southern county. Overly v. State, 8 Ohio C. C. (N. S.) 390.

20. Ward v. Gradin [N. D.] 109 N. W. 57.

21. Town of Roswell v. Ezzard [Ga.] 57 S. E. 114.

22. Interpretation adopted and acted upon by counties concerned for a number of years. Parish of Red River v. Caddo Parish, 119 La. 938, 43 So. 556.

23. See 7 C. L. 978.

24. The legislature may confer upon a special commission full power to construct public buildings. Commission created under 97 Ohio Laws, p. 111, as amended by 98 Ohio Laws, p. 53, held to have full power to construct courthouse, §§ 794-801, Rev. St., not being applicable. Mackenzie v. State [Ohio] 81 N. E. 638. Board of supervisors held to have power to construct an additional courthouse where county was divided into more than one jury district. Lyon v. Steuben County Sup'rs, 115 App Div. 193, 100 N. Y. S. 676. Building committee appointed under P. L. 1901, p. 79, empowered to construct county buildings, has power to construct a county jail. Christie v. Freeholders of Bergen County [N. J. Law] 66 A. 1073. Hospital for the insane, constructed by a county, is a county building though conducted at expense of state, and hence erection of an extension thereto comes within an inhibition

buildings is entirely a matter of statutory regulation. Under the Oklahoma separate school act, an alienable title to school buildings constructed by the county does not vest in it,[26] and the county board has no power to interfere with school officers in the control and management of schools.[27] A constitutional convention assembled to revise and amend a constitution has no power to enact an ordinance providing for additional court houses in certain counties.[28]

Removal of county seats.[29]—Common statutory conditions to removal of county seats are the giving of proper notice,[30] the filing of a petition,[31] and a bond conditioned to pay all expenses of election in the event of the project being voted down,[32] and the consent of the electors as signified by a majority vote [33] at an election held pursuant to a valid statute.[34] Irregularities in the election not affecting the result [35] do not render it nugatroy, nor does the fact that some of the commissioners voting for submission were remotely interested vitiate an otherwise valid removal.[36] Strict compliance with a statute requiring publication of notice of election is not required,[37] substantial compliance being sufficient.[38] That a prior election was defective does not prevent resubmission.[39] Failure of public officers to take action within the time required by law does not cause proceedings to lapse.[40] A change of site for the location of county buildings does not come within the purview of an act relating to the change of the county seat itself,[41] nor does the building of an additional courthouse

against expenditure of more than $1,000 in any year for public building without submission to vote of people. Superintendents of Poor of Wayne County v. Auditors of Wayne Cunty, 147 Mich. 384, 13 Det. Leg. N. 1019, 110 N. W. 1080.

25. The board of revenue, possessing powers formerly held by court of county commissioners, has full power and control over public buildings, and may assign and reassign rooms in courthouse to different county officers. White v. Hewlett, 143 Ala. 374, 42 So. 78.

26. School Dist. No. 71 v. Overholser, 17 Okl. 147, 87 P. 665.

27. May not direct which class of children shall attend district and separate schools. School Dist. No. 71 v. Overholser, 17 Okl. 147, 87 P. 665.

28. Ordinance was not attached to, nor submitted to, people with proposed constitution. Ex parte Birmingham & A. R. Co., 145 Ala. 514, 42 So. 118.

29. See 7 C. L. 978.

30. Mandamus to board to hear and determine petition for removal without directing giving of notice required by Rev. Laws 1905, § 396, held erroneous. Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364.

31. Several petitions for relocation of a county seat at the same place, and praying for an election to be held at the same time, constitute but one petition. One bond suffices for all. Chambers v. Cline, 60 W. Va. 588, 55 S. E. 999.

32. Bond held sufficient and to have been tendered in time. Chambers v. Cline, 60 W. Va. 588, 55 S. E. 999.

33. Const. § 41, requiring majority vote of qualified voters of county as condition to removal, held to mean a majority of votes cast, and not a majority of all qualified electors. Ex parte Owens [Ala.] 42 So. 676.

34. Acts 1903, p. 117, regulating removal of county seats and providing for all counties according to their needs, held not to infringe constitutional requirement of uniformity of election laws. Ex parte Owens [Ala.] 42 So. 676.

35. Failure of board to furnish inspectors holding election a certified list of registered voters in each precinct of county, or failure of voters to produce certificates of registration, and receipts of tax collector showing payment of poll taxes, etc., held a mere irregularity in absence of showing that illegal ballots were received which affected result. Court of Com'rs of Washington County v. State [Ala.] 44 So. 465.

36. That two commissioners were stockholders in corporation donating site for courthouse in proposed location does not invalidate removal. Court of Com'rs of Washington County v. State [Ala.] 44 So. 465.

37. Sufficient if such notice was given that great body of electors were in fact informed of the time and purposes of the election. Court of Com'rs of Washington County v. State [Ala.] 44 So. 465.

38. Publication held sufficient though notice was not published for four consecutive weeks within time required by statute. Court of Com'rs of Washington County v. State [Ala.] 44 So. 465.

39. Where an election to determine the question of removal of a county seat has been held a nullity, the matter may be again submitted at an election called for that purpose. Chambers v. Cline, 60 W. Va. 588, 55 S. E. 999.

40. Erroneous order of court requiring board to hear and determine petition for removal without directing giving of statutory notice held not to prevent consideration of petition upon giving of notice. Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364.

41. P. L. 1903, p. 47, authorizing change of location of county buildings, and requiring submission to vote, construed as relating only to a removal of the county seat. Christie v. Freeholders of Bergen County [N. J. Law] 66 A. 1073.

in a different city constitute a removal.[42] Under an act authorizing removal to any city, town, or village, a village selected need not be incorporated,[43] and the fact that in such case its limits are necessarily undefined is immaterial.[44] A judgment compelling the county board to reconvene to hear and determine a petition for the removal of a county seat is conclusive of the jurisdiction of the board in a subsequent action to restrain removal.[45] Under a statute making proceedings of county court for removal of a county seat final, a writ of error does not lie to review its determination.[46] A territorial act submitting the question of removal to the voters of the county may be subsequently ratified by congress.[47]

§ 2. *Officers; personal rights and liabilities.*[48]—The eligibility, appointment or election, mode of qualifying, term of office, right to deputies, compensation, and civil and criminal liability of county officers, and the liability of their bondsmen, in so far as the law governing same is equally applicable to other public officers, is treated in a separate article.[49] A general provision as to holding over yields to a special provision that, upon consummation of consolidation, terms of officers of consolidated municipality shall cease.[50]

§ 3. *Public powers, duties, and liabilities. A. General powers, duties and liabilities.*[51]—Counties being involuntary governmental corporations[52] can exercise only such powers as are expressly conferred, or necessarily implied, or essential to carry out the powers conferred.[53] The levy and collection of taxes,[54] establishment and maintenance of roads,[55] bridges,[56] drainage works,[57] the regulation of health,[58] and the care of paupers,[59] and analagous matters, are delegated more or less to counties. These matters are treated in appropriate articles.

Among the usual county liabilities are expenses incurred in the preservation of health,[60] the care of criminals under arrest,[61] and the burial of the dead.[62] The

42. County divided into more than one jury district. Lyon v. Steuben County Sup'rs, 115 App. Div. 193, 100 N. Y. S. 676.

43. Incorporation is unnecessary to render an assemblage of houses in the county a village. Community containing one store, one residence, a post office, saw mill, and one other building in course of construction, held sufficient. Court of Com'rs of Washington County v. State [Ala.] 44 So. 465.

44. Purpose of act is to enable voters to understand to what locality, in county, seat is to be removed, and not to fix with particularity the spot on which buildings would be erected, hence that lot selected was 600 feet from post office and beyond range of improvements in village selected is immaterial. Court of Com'rs of Washington County v. State [Ala.] 44 So. 465.

45. Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364.

46. Whether proposed location was nearer center of county than present county seat, a mere majority of votes being sufficient if it was, otherwise three-fifths of voters of county. Loomis v. Hodson, 224 Ill. 147, 79 N. E. 590, afg. 122 Ill. App. 75.

47. Act Congress Mar. 3, 1906 (34 Stat. 50, ch. 512), legalized removal of county seat from Cloud Chief to town of New Cordell in Washita county. Ter. v. Yates, 17 Okl. 465, 87 P. 863.

48. See 7 C. L. 979.

49. See Officers and Public Employes, 8 C. L. 1191.

50. Under Const. art. 20, § 3, providing that upon merger of city of Denver and a portion of Arapahoe county all county officer's terms shall expire, commissioners residing within city are not commissioners of city and county of Denver, notwithstanding provision that in counties of over 70,000 inhabitants board may consist of five members, and Sess. Laws 1901, c. 57, providing that officers of remaining portion of county shall hold office until terms expire. Uzzell v. Anderson [Colo.] 89 P. 785.

51. See 7 C. L. 983.

52. A county is an involuntary corporation formed for governmental purposes. Frantz v. Autry [Okl.] 91 P. 193. A county is an involuntary governmental corporation and, in no sense a business corporation, and its powers and liabilities are such only as the law expressly or impliedly imposes. Silver v. Clay County Com'rs. [Kan.] 91 P. 55. Counties differ from private or purely municipal corporations in that they are not voluntary bodies corporate (Montezuma County Com'rs v. Wheeler [Colo.] 89 P. 50), and their powers, duties, and liabilities are determined entirely by statute (Id.).

53. Counties have implied power to carry into effect powers expressly delegated. Wright v. Floyd County, 1 Ga. App. 582, 58 S. E. 72.

54. See Taxes, 8 C. L. 2058.

55. See Highways and Streets, 8 C. L. 40.

56. See Bridges, 9 C. L. 408.

57. See Sewers and Drains, 8 C. L. 1882.

58. See Health, 8 C. L. 36.

59. See Paupers, 8 C. L. 1324.

60. Under Kirby's Dig. § 1455, rendering county liable for reasonable value of services in nursing persons afflicted with con-

county may be liable for costs [63] and fees [64] in criminal cases, but only when expenses are legally incurred.[65]

(§ 3) *B. Public powers and duties of officers.*[66]*—County boards,*[67] sometimes called supervisors, county or fiscal courts, or police juries, are the general representatives of counties, and have only such jurisdiction or powers as are expressly conferred by statute [68] or are necessarily implied to permit the proper exercise of express grants of powers,[69] and these powers are subject to legislative control within constitutionally defined limits.[70] They frequently possess judicial powers, in which case their determinations have the same force and effect as judgments [71] and cannot be collaterally attacked [72] unless void,[73] nor can they be reconsidered by the board

tagious diseases, and § 1457, providing that no greater sum shall be allowed than is usual for similar services in other cases, one nursing smallpox patients and performing all work of household in addition is entitled to recover what both classes of services would be worth if performed in cases other than smallpox. Marion County v. Bonds [Ark.] 99 S. W. 532.

61. Under St. 1899, § 8134 (Ann. St. 1906, p. 3853), authorizing jailer to procure medical attention for sick prisoners, the cost thereof to be taxed and paid as other costs in criminal cases, a physician furnishing such services cannot recover from county, the statute prescribing method of payment. Miller v. Douglas County, 204 Mo. 194, 102 S. W. 996.

62. Undertaker burying body on direction of coroner will not be denied compensation therefor merely because inquest was unnecessary. Darling v. Box Butte County [Neb.] 111 N. W. 470.

63. Formal judgment against either state or county for costs in a criminal case is not essential to having them audited by the board of supervisors. McGuire v. Iowa County, 133 Iowa, 636, 111 N. W. 34.

64. Under Code, § 5314, county is liable for services of attorney appointed by court to defend an indigent person accused of crime, though it is not a party to the action. Korf v. Jasper County, 132 Iowa, 682, 108 N. W. 1031. A decision of the court as to the poverty of the accused is final. Id.

65. The board of county commissioners is without power to appoint a special officer in proceedings in which the county has no interest. May not appoint a special solicitor to prosecute criminal action. Bechtel v. Fry, 217 Pa. 591, 66 A. 992. See, also, Costs, 9 C. L. 812.

66. See 7 C. L. 984

67. See titles Clerks of Courts, 9 C. L. 572; Attorneys and Counselors (Public Attorneys), 9 C. L. 300; Sheriffs and Constables, 8 C. L. 1897; Coroners, 9 C. L. 733.

68. The county board exercises naked statutory powers, and cannot enter into any contract, confer any right, or impose any obligation, without statutory authority therefor. Kraus v. Lehman [Ind. App.] 80 N. E. 550. Have no power to issue bonds for other than county purposes in absence of specific delegation. State v. King County [Wash.] 88 P. 935. Cannot contract an indebtedness payable in the future. Contract payable in installments for each of which a separate warrant should be issued held void as incurring future indebtedness. Harrison County v. Ogden, 133 Iowa, 9, 110 N. W. 32. Authority to provide for removal of obstructions caused by erection of booms or collecting of logs or rafts by any individual in navigable waters, and to direct time in which, and places where, persons having logs, rafts, and boats therein shall be allowed to remain, does not empower board to contract for removal of old obstructions not caused in such manner. Gainer v. Nelson, 147 Mich. 113, 13 Det. Leg. N. 983, 110 N. W. 511. Under act authorizing county board to pay out road tax for work done on roads in such places as it may determine, and to determine the manner in which same shall be expended, whether by contract or otherwise, board has no power to purchase road grading machines. Harrison County v. Ogden, 133 Iowa, 9, 110 N. W. 32. The fiscal court possesses limited jurisdiction and can appropriate county funds only in the manner and for the purposes expressly authorized by statute. Kline v. Jefferson County, 30 Ky. L. R. 1344, 101 S. W. 356

69. State v. King County [Wash.] 88 P. 935. Board of county supervisors has only such powers as are expressly or impliedly conferred by law. Marsh v. People, 226 Ill. 464, 80 N. E. 1006. Under general powers to manage county finances and direct payment of county funds, commissioner's court may order tax collector to pay commissions to person collecting delinquent taxes under contract with county. Bailey v. Aransas County [Tex. Civ. App.] 102 S. W. 1159. May compel lessee of railway constructed under a highway to reconstruct same and widen the highway where latter had been washed away thereby and narrowed so as to be inadequate for travel. Bartlett v. New York Cent. & H. R. Co. [Mass.] 81 N. E. 204.

70. May limit power of county court to tax. State v. Braxton County Court, 60 W. Va. 399, 55 S. E. 382.

71. A board of county commissioners duly organized constitutes a court clothed with judicial functions and ministerial duties, and their final decrees until set aside are entitled to the same degree of conclusiveness as judgments of judicial tribunals. Bartlett v. New York Cent. & H. R. Co. [Mass.] 81 N. E. 204. In passing on claims against the county, the board acts judicially, and its allowance or disallowance is final unless appealed from. Lincoln Tp. v. Kearney County [Neb.] 112 N. W. 608.

72. Bartlett v. New York Cent. & H. R. Co. [Mass.] 81 N. E. 204.

73. An order signed by members of fiscal court while it was not in session is void and may be collaterally attacked. McDon-

itself.[74] Discretionary acts will not be reviewed by the courts in the absence of fraud or illegality.[75] Where, however, certain conditions are necessary to jurisdiction, the actual existence of such conditions is essential, and is not satisfied by a mere finding of their existence.[76] The time and place[77] of meetings, calling of special meetings,[78] and the power and effect of adjournment,[79] are largely matters of statutory regulation. An act changing the time for holding the annual meeting of the county board does not apply to the board for the current year where the date fixed antedated the passage of the act,[80] nor does it operate to abolish such meeting for that particular year.[81] The board is not a continuous body,[82] hence its determinations are final after its existence has ceased.[83] It cannot usurp functions pertaining to other bodies,[84] and, where proceedings for the appointment of a co-ordinate board are complied with, the powers of the county board over such matters as are delegated to the former cease.[85] The chairman of the board is merely its presiding officer and

ald's Adm'x v. Franklin County, 30 Ky. L. R. 1245, 100 S. W. 861. The county is not bound to appeal from a void order for the payment of money in order to sue for amount paid on warrant. Id. Orders beyond the jurisdiction of the board are void and may be collaterally attacked. Order allowing member of board illegal compensation. Kootenai County v. Dittemore, 12 Idaho, 758, 88 P. 232.

74. The right of the board of chosen freeholders to reconsider a matter involving the determination of judicial or quasi judicial questions ceases when such determination has been had. Gulnac v. Chosen Freeholders of Bergen County [N. J. Err. & App.] 64 A. 998.

75. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 So. 979. Under § 7246, Rev. St. the amount which commissioners may allow attorney for services in defending indigent persons is discretionary with them, subject to limitations therein, although court approves a larger amount. Long v. Miami County Com'rs, 75 Ohio St. 539, 80 N. E. 188. As the board of revenue possesses power to change assignments of county officer's rooms in courthouse, its action in doing so involves questions of public convenience and discretion which will not be reviewed in equity. White v. Hewlett, 143 Ala. 374, 42 So. 78.

76. Under Burns' Ann. St. 1901, § 5589A, requiring petition signed by 500 resident freeholders as condition to entering into a contract for construction of courthouse in counties having population of 25,000 or more, the existence of a proper petition and not a finding by the board of such fact determines its power to act. Kraus v. Lehman [Ind. App.] 80 N. E. 550. Rehearing denied by equally divided court. Id., 81 N. E. 727.

77. In the absence of a statute requiring commissioners to meet in the county seat, its orders made anywhere in the county are valid. Court of Com'rs of Washington County v. State [Ala.] 44 So. 465. Pending the erection, or procuring of proper accommodations, in a newly located county seat, orders of the board made in the former seat of the county are valid. Id. Orders for construction of courthouse and jail in new seat. Id.

78. Special meetings of the board must be called in the manner specified by statute. Board cannot confer power on its chairman to call a special meeting dispensing with statutory formalities by adjourning subject to call by him. Marsh v. People, 226 Ill. 464, 80 N. E. 1006.

79. Court by proper orders in the minutes may prolong a regular term until the succeeding term (Court of Com'rs of Washington County v. State [Ala.] 44 So. 465), and as sittings during the regular term are not special meetings no notice is required (Id.). Upon adjournment to a named date, the chairman of the board has no power to change such date though the meeting adjourned "subject to call of the chairman." Marsh v. People, 226 Ill. 464, 80 N. E. 1006. Failure of the board to meet on adjourned date terminates the session from which it was adjourned as effectively as if adjournment was sine die, and it cannot be prolonged by calling a special meeting for a subsequent date. Id.

80. Act Feb. 15, 1905, if construed as changing date of holding annual meeting from first Wednesday in May to the first of January, does not apply to the board for the year 1905. Wright v. Campbell [N. J. Err. & App.] 67 A. 186.

81. Wright v. Campbell [N. J. Err. & App.] 67 A. 186.

82. Though only a portion of the members go out of office each year. Gulnac v. Chosen Freeholders of Bergen County [N. J. Err. & App.] 64 A. 998. The mere fact that the corporation itself is perpetual does not render the body exercising the powers conferred on it perpetual also. Id. Mere rules of procedure as to reconsideration of questions at succeeding meetings affect only the body adopting them, and do not govern their successors. Id.

83. Determination of questions of a judicial or quasi judicial character is final when existence of body ends. Gulnac v. Chosen Freeholders of Bergen County [N. J. Err. & App.] 64 A. 998.

84. Board of supervisors in a county under township organization has no power, in absence of specific grant to enter into a contract with person to search for property omitted from taxation, that duty resting with board of review. Campbell v. Workman, 124 Ill. App. 404.

85. Building commission appointed under Act of 1901, as amended by Act 1902 (P. L. 1902, p. 42), has full power to acquire land

has no powers superior to any other member.[86] Acts of the board are legal and binding on county only when convened as a board at a regular or special session,[87] and as its acts and proceedings can only be known by its record, an act not appearing therein is a nullity.[88] The board is without power to amend its record nunc pro tunc where public interests would thereby be affected injuriously.[89] Statutes frequently require the publication of an annual report.[90] Unauthorized action may be enjoined.[91]

Powers and duties of other county officers.[92]—The official powers and duties of the various county officers are entirely dependent upon statute.[93]

(§ 3) *C. Suits and demands.*[94]—A county is not liable to suit for any cause of action unless made so by statute.[95] In some states, action may be maintained by a taxpayer in behalf of a county[96] or to restrain illegal action on its part,[97] but in the latter case the action is not in a representative capacity.[98] A statute authorizing

for and construct necessary county buildings, and may compel board of freeholders to issue bonds in payment of necessary expenditures. Christie v. Chosen Freeholders of Bergen County [N. J. Law] 66 A. 1073.

86. Notice by chairman of call of special meeting does not legalize session, statutory formalities not being complied with. Marsh v. People, 226 Ill. 464, 80 N. E. 1006.

87. Grand jury selected at a meeting improperly called is not a legal body. Marsh v. People, 226 Ill. 464, 80 N. E. 1006. An order for the payment of money signed by all members of fiscal court while it was not in session is not an act of the court, and is void. McDonald's Adm'x v. Franklin County, 30 Ky. L. R. 1245, 100 S. W. 861.

88. Under St. 1903, § 1837, a contract of employment is void where same does not appear in the records of the fiscal court. McDonald's Adm'x v. Franklin County, 30 Ky. L. R. 1245, 100 S. W. 861.

89. The board has no authority to amend its record nunc pro tunc either on its own motion or an ex parte application where it adjudicates a fact directly affecting public interests, especially a finding from which the right of appeal exists. Amendment of record so as to show compliance with mulct law for consent to sale of intoxicants four years after canvass. Brickley v. Westphal [Iowa] 111 N. W. 829.

90. The annual financial report of the county commissioners made up and published in two columns, one consisting of the names of the persons to whom the items are paid and the purposes for which the items are paid, and the other consisting of the amounts in figures of each payment, separated from the column of words by sufficient blank space to make each column distinct to the eye, is a fair compliance with § 917, Rev. St., providing for such report. Knorr v. Darke County, 4 Ohio N. P. (N. S.) 35.

91. Injunction to restrain construction of courthouse because of insufficiency of petition therefor. Macy v. Miami County Com'rs [Ind. App.] 80 N. E. 553. Illegal action by the police jury may be restrained at the suit of a taxpayer. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 So. 979.

92. See 7 C. L. 987.

93. County officers have such powers as are incidentally necessary to carry into effect delegated powers. Christner v. Hayes County [Neb.] 112 N. W. 347.

County attorney may bring an action in name of county to recover road poll taxes from employers liable therefor. Kootenai County v. Hope Lumber Co. [Idaho 89 P. 1054. County attorney may bind county to pay reasonable and necessary expenses incident to litigation, which he is ordered to institute for benefit of county. Christner v. Hayes County [Neb.] 112 N. W. 347. County solicitor has no power to appoint an assistant even though acting by delegation from the board of commissioners. Bechtel v. Fry, 217 Pa. 591, 66 A. 992. Showing on motion to dismiss for want of authority of county solictior to file bill that records were searched from first Monday in December, 1900 to July 22, 1901, day on which bill was filed, and that no authority was found therein, held insufficient, as authority might have been granted prior thereto. Butts v. Peoria County, 226 Ill. 270, 80 N. E. 765. County attorney held to have been authorized by board to perfect an appeal from decision adverse to county. Kootenai County v. Hope Lumber Co. [Idaho] 89 P. 1054.

County judge: County judge acting as county court may direct county attorney to bring an action in name of county to recover money wrongfully appropriated by the fiscal court where latter body declines to authorize such proceeding. Hopkins County v. Givens, 29 Ky. L. R. 993, 96 S. W. 819.

Ordinary is without power to make county liable for commissions on a fund which he did not receive as a county fund. Worth County v. Sykes [Ga. App.] 58 S. E. 380.

94. See 7 C. L. 988.

95. Brunson v. Caskie, 127 Ga. 501, 56 S. E. 621. In the absence of statute expressly or by necessary implication creating such liability, a county is not liable to suit. Terrell County v. York, 127 Ga. 166, 56 S. E. 309.

96. In New Jersey, upon failure or refusal of board of freeholders to prosecute an action in behalf of the county, a taxpayer upon obtaining leave of court may do so. P. L., p. 547. Complaint must allege that such leave has been obtained. Allen v. Humphrey [N. J. Law] 65 A. 881.

97. Meistrell v. Ellis County Com'rs [Kan.] 91 P. 65.

98. An action by a taxpayer to restrain illegal action by a county is in his individual and not in a representative capacity, and relief may be barred by laches. Meistrell v. Ellis County Com'rs [Kan.] 91 P. 65.

the county attorney to sue for the recovery of county funds misappropriated, or illegally withheld, does not confer a new cause of action,[99] and accordingly does not bar defenses which might have been set up in such an action prior to the passage of the act.[1]

(§ 3) *D. Contracts, debts, and expenditures.*[2]—Contracts by public governmental bodies are fully treated in a separate article.[3] Practically the only questions arising from such contracts which may be properly treated here are ratification and estoppel to assert the invalidity of unauthorized contracts. Ultra vires contracts are void [4] and cannot be ratified by unauthorized acts of county officers,[5] nor do such acts operate as an estoppel.[6]

Debts and expenditures.[7]—The nature and extent of the indebtedness which a county may legally incur, and the manner in which its funds may be expended, are usually limited by constitutional [8] and statutory provisions, among the most common of which are inhibitions against expenditure for other than county purposes,[9] or beyond a certain percentage of the current tax levy,[10] or in excess of the taxing power of the county; but it has been held that such a provision does not apply to ordinary and incidental expenses.[11] The estimate made by the board of probable county expenditures does not constitute a rule for the disbursement of county funds,[12] nor does such an estimate operate as an appropriation of the levy based upon it, or as an apportionment among the several purposes specified.[13] A new county is liable for all usual current expenses of the county from which it was taken incurred after its creation, but during the year of its creation and before its organization.[14]

Bonds.[15]—The power to issue and purposes for which bonds may be lawfully issued, together with necessary preliminaries to issuance, is treated in a separate ar-

99. Section 1277, Rev. St., as amended April 25, 1898, merely confers authority on prosecuting attorney to represent public. State v. Fronizer, 8 Ohio C. C. (N. S.) 216

1. Res adjudicata or voluntary payment. State v. Fronizer, 8 Ohio C. C. (N. S.) 216

2. See 7 C. L. 989.

3. See Public Contracts, 8 C. L. 1473; Public Works and Improvements, 8 C. L. 1506.

4. Contract for purchase of road grading machines held void. Harrison County v. Ogden, 133 Iowa, 9 110 N. W. 32.

5. Action of county board in directing issuance of warrants for payment of interest on warrants illegally issued held not to amount to ratification. Harrison County v. Ogden, 133 Iowa, 9, 110 N. W. 32. Specific and precise contract for the appointment of a special officer must precede the performance of services to render the county liable therefor, as the doctrine of ratification is inapplicable. Assistant solicitor. Bechtel v. Fry, 217 Pa. 591, 66 A. 992.

6. Admission by auditor that he knew of the use of road machines illegally purchased does not estop county. Harrison County v. Ogden, 133 Iowa, 9, 110 N. W. 32. County is not estopped by unauthorized acts of its officers. Auditing previous bill for similar services. People v. Westchester County Sup'rs, 116 App. Div. 844, 102 N. Y. S. 402.

7. See 7 C. L. 991.

8. In the absence of a constitutional limitation upon expenses incurred for county purposes, the legislature has plenary power to authorize such expenditures as it may deem proper. Board of Com'rs of Escambia County v. Port of Pensacola Pilot Com'rs [Fla.] 42 So. 697.

9. County funds can be expended only for county purposes. What is a county purpose is to be determined from the facts of each case, but, where a particular purpose is designated by the legislature as a county purpose, courts will not interfere except in cases free from reasonable doubt. Board of Com'rs of Escambia County v. Port of Pensacola Pilot Com'rs [Fla.] 42 So. 697.

10. An inhibition against appropriation of more than ninety per cent of taxes levied for year does not prevent an appropriation of additional sums out of funds other than those raised by current taxation. Kerwin v. Caldwell, 80 Ark. 280, 96 S. W. 1058.

11. Incidental and necessary expenditures constitute valid obligations, though in excess of statutory limitations, upon the taxing power of the county. Repair of courthouse. Upton v. Strommer, 101 Minn. 97, 111 N. W. 956.

12. That estimate did not include payment of outstanding orders while other probable expenditures were enumerated did not limit application of money realized on levy to payment of orders for the effectuation of purposes named, nor preclude payment therefrom of any order lawfully drawn upon the treasury. State v. Melton [W. Va.] 57 S. E. 729.

13. State v. Melton [W. Va.] 57 S. E. 729.

14. Contract for a new bridge is not a usual, ordinary, and current expense. Yow v. Sullivan [Ga.] 58 S. E. 662.

15. See 7 C. L. 992.

ticle.[16] The county board may be compelled by mandamus to issue bonds to meet expenditures incurred by authorized officers.[17]

(§ 3) *E. Torts.*[18]—A county is not liable for negligent or wrongful acts of its officers unless liability is imposed by statute.[19] This rule, however, does not apply to the tortious acts of county officers in taking or damaging private property for a public use,[20] but in such an action the complaint must show that the acts complained of were performed under the authority of the proper county officers.[21]

(§ 3) *F. Property and funds.*[22]—Where for purposes of appropriation county moneys are divided into separate funds, receipts [23] must be allotted to and appropriations [24] made from designated funds.

Depositories.[25]—Statutes of most states provide for the selection of county depositories, frequently requiring banks selected to be situated in the county,[26] and limiting the amount which may be deposited in any of several depositories.[27] Such statutes are not unconstitutional because discriminating in favor of state or national as against private banks [28] or natural persons.[29] Power to designate county depositories does not confer power on the board to specify the amount which must be deposited in each,[30] this, in such case, being discretionary with the treasurer, subject to statu-

16. Municipal Bonds, 8 C. L. 1046.

17. P. L. 1901, p. 79, as amended by P. L. 1902, p. 42, providing "it shall be lawful" for board of freeholders to issue bonds for construction of public buildings, held not to make such issuance discretionary, power to construct such building being reposed in building commission, and obligations thereunder having been incurred by them. Christie v. Board of Freeholders of Bergen County [N. J. Law.] 66 A. 1073.

18. See 7 C. L. 994.

19. Removal of bridge isolating plaintiff's land. Silver v. Clay County Com'rs [Kan.] 91 P. 55. In the exercise of powers pertaining to local government, the county occupies the same position as the state, and is not liable for damages at the suit of a private individual. Negligent operation of elevator in county courthouse. Moest v. Buffalo, 116 App. Div. 657, 101 N. Y. S. 996.

20. Must be shown that acts were proximately connected with making of a public improvement. Terrell County v. York, 127 Ga. 166, 56 S. E. 309.

21. In action for appropriating private property for road purposes, petition alleging that work was done by superintendent of public roads employed by county under the alternative road law, and that work was done and land appropriated by him and the county authorities, held sufficient. Terrell County v. York, 127 Ga. 166, 56 S. E. 309.

22. See 7 C. L. 994.

23. Interest received from depositories must be credited to the general fund, and can be disbursed only as other moneys belonging to that fund. Where general fund of certain years cannot be drawn on to pay warrants issued against levy for subsequent year, interest thereon cannot be used for such purpose. State v. Clark [Neb.] 112 N. W. 857.

24. Where highway damages are payable out of the general fund, an appropriation out of road funds for a particular district is improper. Carroll v. Griffith. 117 Tenn. 500, 97 S. W. 66. A statute authorizing payment out of the general fund in certain cases does not authorize a transfer from such fund to another fund. Brown v. Klemmer [Cal.] 89 P. 325.

25. See 7 C. L. 995.

26. A trust company, having its situs for taxation, executive management and business administration in Cuyahoga county, cannot by reason of the fact that it maintains a branch bank in Summit county be regarded as "situated" in Summit county within the meaning of the act providing for county depositories (98 O. L. 274), nor is the manifest purpose of the act to keep the public funds of a particular county within the natural and usual channels of trade in that county, subserved by an award of these funds to a bank situated in another part of the state. State v. Oviatt, 4 Ohio N. P. (N. S.) 481.

27. That treasurer had on deposit in a county depository a sum $1,100 in excess of its pro rata share held not to render him liable therefor, no bad faith being shown, and such sum not being in excess of prohibition against deposit of more than half amount of bond. Holt County v. Cronin [Neb.] 112 N. W. 561.

28. The Ohio act providing for county depositories (98 O. L. 274), does not fail of uniform operation throughout the state by reason of the provision that in counties where there are located banks or trust companies incorporated under the laws of the state of Ohio, or of the United States, such banks only shall be regarded as eligible to bid for and receive the county funds, but, in counties where there are no such banks located, private banks may be awarded these funds. State v. Oviatt, 4 Ohio N. P. (N. S.) 481.

29. The Ohio act providing for county depositories (98 O. L. 274) is not in contravention of sections 1 or 2 of article 1 of the state constitution, or of the fourteenth amendment of the constitution of the United States, by reason of the fact that it discriminates against natural persons and in favor of banks and trust companies. State v. Oviatt, 4 Ohio N. P. (N. S.) 481.

30. Kay County Com'rs v. Dunlop, 17 Okl.

tory limitations.[31] Where preliminary steps have been complied with, designation may be made nunc pro tunc.[32] An unauthorized depositary may be required to account for interest received on public funds.[33] The relations between counties and their depositories is that of debtor and creditor,[34] hence a depository is not a public officer,[35] and the bond given by him is not in the strict sense an official bond.[36] This being true, the debt is a continuous one and the sureties are liable, although losses occurred during a period covered by a prior bond.[37] Statutes governing county depositaries will be read into the conditions of the bond.[37] Mere irregularities in the bond do not affect the liability of the sureties,[39] and, as against them, a bond is valid although no preliminary order designating the depository was entered.[40] Failure of the depositary to pay public funds in his possession on demand creates an actionable breach of the bond.[41] The depositary's sureties are not liable for defalcations of the county treasurer.[42]

(§ 3) *G. Presentation, allowance, enforcement, and payment of claims.*[43]—The authority[44] and necessity for auditing a claim,[45] the time within which it must be presented,[46] procedure on disallowance,[47] and manner of payment,[48] are fixed by

52, 87 P. 590. Under Sess Laws 1905, c. 11, art. 2, power of board ends when depositaries are selected. Id

31. Under Sess. Laws 1905, c. 11, art 2, amount deposited with any depositary must not exceed its capital stock nor the amount of the bond given as security. Kay County Com'rs v. Dunlap, 17 Okl. 52, 87 P. 590.

32. Where memoranda on a depositary's bond showed filing and approval by presiding judge, a nunc pro tunc order designating such depositary is proper. Order entered two years after filing of bond. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

33. Where a county treasurer, without authority under the depository law, deposits the public funds with a bank which receives the funds with full knowledge of their character and loans the same at interest, such bank will be required to account to the public for the interest so received. State v. National Banks, 4 Ohio N. P. (N. S.) 245.

34. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

35. May use public funds coming into his hands. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

36. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

37. Where preceding depositary did not turn over to his successor at end of his term county funds in his possession, and latter paid all drafts presented by treasurer until insolvency, sureties on his bond were held liable though deficit occurred prior to execution of bond. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

38. Sureties will be held to contract with a view to such statutes. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

39. Where faith and credit have been given a bond, and funds have been turned over to the depositary thereunder, sureties cannot invoke immaterial variances from the statutory form to escape liability. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

40. By filing a bond and accepting the duties and responsibilities required, the principal becomes a de facto depositary. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

41. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

42. A county treasurer, short in his accounts, cannot shift responsibility therefor from his bondsmen to the sureties of the depositary by procuring depositary to discount his note for shortage and credit same up as county funds on deposit. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20.

43. See 7 C. L. 995.

44. Special act of 1873, imposing upon county commissioners of Franklin county duty to "audit and allow all claims against the county for extra services rendered by any county officer," held not to have been repealed by general act of 1881. Franklin County v. Crow [Ga.] 57 S. E. 784. Under Act No. 7, p. 6, Pub. Acts 1903, auditing of bills incurred by the public in cases of infectious and dangerous diseases is lodged in board of supervisors. Dawe v. Board of Health of Monroe, 146 Mich. 316, 13 Det. Leg. N. 741, 109 N. W. 433.

45. Term "competent tribunal" in 1 Ballinger's Ann. Codes & St. § 393, providing that auditor shall draw warrants for claims allowed by county commissioners and for other lawful claims approved by a competent tribunal, means a court or judge, hence claim of fruit inspector for salary must be presented and allowed by county board, though under act creating office commissioner of horticulture is required to issue certificate of number of days' work performed on which he shall receive payment from county. State v. Blumberg [Wash.] 89 P. 708. A judgment for costs against a county in a criminal case cannot be enforced except upon presentation to the board of supervisors for allowance, and in the event of a refusal to allow same by suit against the county therefor. McGuire v. Iowa County, 133 Iowa, 636, 111 N. W. 34.

46. Pol. Code 1895, § 362, requires claims against counties to be presented to proper authorities in writing within twelve months after accrual, or same are barred. Elbert County v. Swift [Ga. App.] 58 S. E. 396.

47. Notice of disallowance of a claim of town held sufficient where it was mailed to one who was a town officer at time of filing of claim, but who had resigned prior to receipt of notice, same having been turned

statute. As a rule, in actions against the county, the complaint must allege presentation,[49] though it need not allege that a reduction thereof was without claimant's consent.[50] Payment of a claim by the proper officer terminates the county's liability therefor, though such payment was in fact unauthorized.[51] Statutes frequently require an appropriation for the payment of a claim as a condition to its allowance,[52] but such an appropriation is not essential as to claims not within the statute.[53] Mandamus will not lie to compel the payment of a judgment for which the county could not constitutionally levy a tax,[54] and, where the pleadings upon which the judgment is founded show that the county was not liable for the acts complained of, the principle of res adjudicata does not apply.[55] Under a statute providing that segregated territory shall continue liable for its proportionate share of bonded debt upon the order of the old county, the latter may compel contribution,[56] and a judgment directing the levy of a tax is proper though it does not include segregated territory.[57]

(§ 3) *H. Warrants; issuance and enforcement.*[58]—Warrants issued on a void claim are a nullity.[59] The treasurer may refuse to pay an illegal warrant though approved by the proper officer.[60] A warrant issued against the general fund for a certain year is not payable out of the same fund for a subsequent year.[61] County orders are payable on demand [62] in the order of their presentation for payment,[63] and as a rule are assignable.[64] A general law fixing the rate of interest in the absence of an agreement does not apply to counties,[65] and a law allowing interest on warrants

over by him to his successor within statutory time for giving of notice. Lincoln Tp. v. Kearney County [Neb.] 112 N. W. 608.

48. Under an act directing the auditing of accounts for certain services at the annual meeting, the board has no authority to order payment therefor in monthly installments. People v. Warner, 104 N. Y. S. 279.

49. Petition held to allege that claim had been presented for allowance in accordance with statute. Sheridan County Com'rs v. Denebrink [Wyo.] 89 P. 7.

50. Failure of complaint to aver that reduction of claim by board was refused by claimant does not render it bad on demurrer. Calhoun County v. Watson [Ala.] 44 So. 702.

51. Payment by sheriff in violation of direction of fiscal court held to bar recovery on same claim by subsequent assignee. Perry County v. Eversole, 30 Ky. L. R. 453, 98 S. W. 1019.

52. The county auditor cannot be compelled to draw a warrant for the payment of a claim against the county, in the absence of a showing that a sufficient amount of money had been appropriated and remained in the treasury unexpended for the payment of such warrant. State v. Parks [Ind.] 81 N. E. 76.

53. An act prohibiting an allowance of a claim against county, in absence of an appropriation by the county council for its payment, has no application to a claim of a township for money unlawfully collected from it by the auditor for procuring and delivering lists of road taxes to the township trustee. Jay County Com'rs v. Pike Civil Tp. [Ind.] 81 N. E. 489.

54. Brunson v. Caskie, 127 Ga. 501, 56 S. E. 621.

55. Mandamus refused to compel levy for payment of judgment for damages caused by defective road Brunson v. Caskie, 127 Ga. 501, 56 S. E 621.

56. Territory v. Santa Fe County Com'rs [N. M.] 89 P. 252.

57. Remedy of old county is by action to compel contribution. Territory v. Santa Fe County Com'rs [N. M.] 89 P. 252.

58. See 7 C. L. 997.

59. Warrants issued on a contract payable in installments are void under a statutory prohibition against incurring future indebtedness. Harrison County v. Ogden, 133 Iowa, 9, 110 N. W. 32. Orders appearing on their face to have been drawn for the payment of a claim for which the county was not liable are absolutely void. Franklin County v. Crow [Ga.] 57 S. E. 784. A warrant issued on a void claim cannot form the basis of an action either on the warrant itself or on the quantum meruit. Harrison County v. Ogden, 133 Iowa, 9, 110 N. W. 32.

60. Mandamus will not lie to compel payment, as certificate of approval by comptroller does not render legality of warrant conclusive. Bechtel v. Fry, 217 Pa. 591, 66 A. 992.

61. Unless included in estimate for latter year, or unless after deducting items included in estimate sufficient remains to pay warrant. State v. Clark [Neb.] 112 N. W. 857.

62. When payment is insisted upon. State v. Melton [W. Va.] 57 S. E. 729.

63. Where particular fund is exhausted by drawing of orders thereon, the county court cannot vary the order of payment so as to favor holders of certain orders to detriment of holders of others, nor can it prevent payment of outstanding orders in order that necessary current charges against county not yet due may have priority on becoming due. State v. Melton [W. Va.] 57 S. E. 729.

64. Subject to right of sheriff or collector to deduct taxes due from payee thereof. State v. Melton [W. Va.] 57 S. E. 729. See Assignments, 9 C. L. 262.

65. Mill's Ann. St. § 2252, allowing in-

and other certificates of indebtedness does not authorize recovery of interest prior to the issuance of warrants.[66]

The cancellation and reissue of warrants, procedure thereon,[67] notice[68] and publication required,[69] and presentation of outstanding warrants,[70] are entirely matters of statutory regulation. One not injured by an invalid portion of an order for presentation and reissue cannot object to same on that ground.[71]

(§ 3) *I. Appeals from orders of county boards.*[72]—Appeal and certiorari[73] are the usual methods provided for the review of judicial[74] as distinguished from discretionary[75] or administrative[76] acts of the board. The remedy is available to the persons designated in the statute only,[77] and, where the appellant was not a party[78] to the proceeding, he is usually required to show that he was adversely affected by the decision appealed from. The right to appeal is frequently limited by the amount in controversy[79] and may be waived.[80] Separate appeals may be prosecuted by any of several parties differently affected.[81] While failure on the part of the auditor to file a transcript of the proceedings before the board within the statutory period will not prejudice an objector's right to appeal,[82] the latter must not be guilty of laches in compelling action by that officer.[83] Where no appeal lies from an order of the county

terest at rate of eight per cent on all moneys or accounts after they become due, held not to render counties chargeable. Montezuma County Com'rs v. Wheeler [Colo.] 89 P. 50.

66. Montezuma County Com'rs v. Wheeler [Colo.] 89 P. 50.

67. Under Kirby's Dig. § 1178, authorizing county court to call in warrants annually, such an order need not recite that no order of same character had been made within a year. Yell County v. Wills [Ark.] 103 S. W. 618.

68. Under an order requiring sheriff to post notices on courthouse "door," a return that notices were posted at each "entrance" held sufficient. Yell County v. Wills [Ark.] 103 S. W. 618.

69. Publication of notice of presentation held sufficient when published in one newspaper having a bona fide circulation in county where proceedings were had, under Kirby's Dig. § 4923, if construed as repealing section 1176, providing specifically for notice in such cases. Yell County v. Wills [Ark.] 103 S. W. 618.

70. Under Kirby's Dig. § 1175, requiring that time for presentation shall be at least three months from date of order, an order made April 6, requiring presentation "on or before" July 26, held sufficient. Yell County v. Wills [Ark.] 103 S. W. 618.

71. One holding county warrants cannot object to validity of order calling for cancellation on reissue of same on ground that order included county certificates of indebtedness other than warrants. Yell County v. Wills [Ark.] 103 S. W. 618.

72. See 7 C. L. 998.

73. The regularity of proceedings of the board and the validity of its decisions can be reviewed on certiorari only. Bartlett v. New York, etc., R. Co. [Mass.] 81 N. E. 204.

74. An appeal lies from a final order of the board of a judicial character. Board acts judicially in vacating streets and alleys. MacGinnitie v. Silvers, 167 Ind. 321, 78 N. E. 1013.

75. An appeal does not lie from a discretionary order of the county board. Allowance to attorney defending indigent persons. Long v. Miami County Com'rs, 75 Ohio St. 539, 80 N. E. 188.

76. An appeal does not lie from administrative acts of the county board. Entering into contract with architects for preparation of plans for and superintendence of construction of county courthouse. Kraus v. Miami County Com'rs, 39 Ind App. 624, 80 N. E. 544. Decision of county board to proceed to construct a courthouse is not appealable. Kraus v. Lehman [Ind. App.] 80 N. E. 550.

77. A county cannot appeal from an adverse order by its own board of commissioners. Rev. St. 1887, as amended by Sess. Laws 1899, p. 248, authorizes an appeal by any taxpayer or person aggrieved. Kootenai County v. Dittemore, 12 Idaho, 758, 88 P. 232.

78. The filing of a remonstrance with the board of county commissioners in proceedings to vacate streets and alleys makes the person filing it a party, and to entitle him to appeal he need not file an affidavit of his interest and that he was aggrieved by the decision. MacGinnitie v. Silvers, 167 Ind. 321, 78 N. E. 1013.

79. Under St. 1903, § 978, allowing an appeal from the fiscal court where amount in controversy exceeds $25, a health officer whose claim for $500 was reduced to $100 may appeal. Butler County v. Gardner, 29 Ky. L. R. 922, 96 S. W. 582.

80. Acceptance of benefits of determination of the county board is a waiver of the right to appeal therefrom. After review by supervisors of claim appealed from town board, claimant accepted payment of amount allowed. People v. Rockland County Sup'rs 105 N. Y. S. 19.

81. Where the interests of remonstrators are distinct, a separate appeal may be prosecuted by each. Proceedings to vacate streets and alleys, remonstrators having signed a single document showing diverse interests. MacGinnitie v. Silvers, 167 Ind. 321, 78 N. E. 1013.

82. Burns' Ann. St. 1901, § 4225, requires auditor to file transcript within twenty days after filing of bond on appeal. Kelly v. Lawson, 39 Ind. App. 613, 80 N. E. 553.

83. Delay of fourteen months held fatal,

board, an objecting party is not concluded by it,[84] but may resort to other remedies to prevent illegal action by the board.[85]

COUNTS AND PARAGRAPHS; COUNTY COMMISSIONERS OR SUPERVISORS; COUNTY SEAT; COUPLING CARS; COUPONS; COURT COMMISSIONERS, see latest topical index.

COURTS.

§ 1. Creation, Change, and Alteration (839).
§ 2. Officers and Instrumentalities of Courts (840).
§ 3. Places, Terms, and Sessions of Courts (840).
§ 4. Conduct and Regulation of Business (843). Under the Conformity Act (844).
§ 5. Rules for Decision; Decisions and Reports Thereof (844). Publication of Judicial Opinions (845).

This topic excludes the jurisdiction of courts[86] and the powers of judges.[87]

§ 1. *Creation, change, and alteration.*[88]—A court consists of persons officially assembled[89] under authority of law at the proper time and place,[90] and if such court has a judge, clerk, and seal, it is one of record.[91] Within constitutional limitations,[92]

appellant having informed auditor that both parties would furnish memorandum for transcript, and same not having been furnished Kelly v. Lawson, 39 Ind. App. 613, 80 N. E. 553.

84. Kraus v. Lehman [Ind. App.] 80 N. E. 550.

85. Decision by board to enter into contract to construct courthouse and employment of architect to prepare plans not being appealable, taxpayer may object to allowance of claim based on illegality of contract. Kraus v. Lehman [Ind. App.] 80 N. E. 550.

86. See Jurisdiction, 8 C. L. 579.

87. See Judges, 8 C. L. 522.

88. See 7 C. L. 999.

89. Order signed by individual members thereof is not order of court. Marsden v. Harlocker [Or.] 85 P. 328. Const. Art. 7, § 11, provides that county court shall be held by county judge, section 12 authorizes legislature to provide for election of two commissioners to sit with him while transacting county business. B. & C. Comp. § 2533 so provides. Held that judge and commissioners do not constitute separate tribunal, but judge and commissioners together, as well as judge alone, constitute county court. State v. MacElrath [Or.] 89 P. 803. Held immaterial whether duties imposed by local option law on county court be discharged by county court when presided over by judge alone or by judge and commissioners. Id.

90. See post, § 3.

91. State v. Weber, 96 Minn. 422, 105 N. W. 490.

92. Acts 1907, p. 7 c. 5, creating superior courts in counties of Elkhart and Saint Joseph held not unconstitutional as violative of Const. art. 4, § 19, relating to title. (Board of Com'rs of Elkhart County v. Albright [Ind.] 81 N. E. 578), because of provision that judge should not receive less than judge of S. J. circuit court (Id.), because sheriff and clerk were given extra compensation for additional services, nor as permitting them to hold two lucrative offices (Id.), because prosecuting attorney of circuit court is made ex officio the prosecutor in superior court (Id.); nor is title delusive in that while purporting to create a superior court it creates a court of same jurisdiction as the circuit court (Id.). Provision requiring county commissioners to provide place for holding court held not attempt to regulate county business in violation of Const. art. 4, § 22. Id. Const. art. 7 § 1, as amended 1881, providing that judicial power shall be vested in supreme court, in circuit courts, and in such "other courts" as general assembly might establish, does not prevent general assembly from creating a superior court with same jurisdiction as circuit court. Board of Com'rs of Elkhart County v. Albright [Ind.] 81 N. E. 578. Unconstitutionality of 3rd proviso of § 11, c. 5, p. 10, Acts 1907, relating to venue, held not to invalidate the entire act. Id. Const. art. 6, §§ 23-26, relating to "courts of Cook County," does not limit power of general assembly under § 1 to establish other city courts in Cook County. Chicago Terminal Transfer R. Co. v. Greer, 223 Ill. 104, 79 N. E. 46. Legislature may create court by special act. Board of Com'rs of Elkhart County v. Albright [Ind.] 81 N. E. 578; Act March 26, 1874, § 21 (1 Starr v. C. Ann. St. 1896, p. 1200), as amended by Act May 10, 1901 (Hurd's Rev. St. 1905, p. 631), establishing city court in cities of 3,000 or more, etc., held not unconstitutional as special legislation (Chicago Terminal Transfer R. Co. v. Greer, 223 Ill. 104, 79 N. E. 46), nor as infringing Const. art. 6, § 29, probe of general and uniform operation (Id.). Laws 1905, p. 182, c. 117, establishing juvenile courts, held not unconstitutional because conferring on them jurisdiction previously exercised by district courts, especially in view of Const. art. 8, § 1 (Mill v. Brown [Utah] 88 P. 609), nor as special legislation, because it creates such courts in cities of first and second class, and confers exclusive jurisdiction on them over juvenile offenders (Id.), and being complete in itself, and not purporting to amend another, it is not amending act within constitution as to titles of such acts (Id.). Unconstitutionality of § 7 thereof held not to render entire act invalid. Mill v. Brown [Utah] 88 P. 609. Special courts created by act of 1894 (Acts 1894, p. 80) are all of same grade and class,

the legislature may create or abolish [93] courts, but it cannot delegate such power.[94] In Mississippi courts can be created only by the legislature.[95] The court of appeals of Georgia was established as of the date of governor's proclamation declaring the creative constitutional amendment ratified.[96] A change of name of a court does not affect existing judgments.[97] Upon the abolishment of a court, a transfer of pending business is usually provided by the act,[98] but, under a general act in Georgia, the creation of a new county transfers suits pending in county or counties from which it is created to its courts.[99]

§ 2. *Officers and instrumentalities of courts.*[1]—Criers and bailiffs [2] and court commissioners appointed to make sales and to pay out proceeds under decree [3] are officers of the court.

§ 3. *Places, terms, and sessions of courts.*[4]—The place for holding court must be designated as prescribed by statute [5] by the proper authority,[6] and court must be

and act is not violative of constitutional provision contained in Civ. Code 1895, § 5859, requiring jurisdiction, powers, etc., of courts of same grade to be uniform. Kennedy v. Meara, 127 Ga. 68, 56 S. E. 243. Acts 1896-97, p. 802, creating county court of Cleburne County are not unconstitutional for conferring on county court same jurisdiction and powers as circuit. State v. Fuller, 147 Ala. 164, 41 So. 990. Acts 1905, p. 596, dividing Union County into two judicial districts, is not unconstitutional as taking private property without compensation, since provision that court shall be held in public hall of bank building, etc., contemplates consent, and, if withheld, county court may provide place elsewhere. Pryor v. Murphy, 80 Ark. 150, 96 S. W. 445. Acts 1901, p. 120, dividing court of twenty-fifth judicial circuit into two divisions, providing for two judges, etc., held not unconstitutional as containing subject-matter not expressed in title, although matter of change of venue is not mentioned in title, it having a natural connection therewith. Coffey v. Carthage, 200 Mo. 616, 98 S. W. 562,

93. District court of district of Alaska, created by Organic Act 1884, c. 53 (23 Stat. 24), held supplanted by courts created by Alaska Code (Act June 6, 1900, c. 786 [31 Stat. 32.]). United States v. Newth, 149 F. 302.

94. Fact that final operation of statute depends on determination by council of advisability or necessity of establishment of court and as to number of judges, does not constitute delegation of legislative power. Chicago Terminal Transfer R. Co. v. Greer, 223 Ill. 104, 79 N. E. 46. Act March 26, 1874, § 21 (1 Starr & C. Ann. St. 1896, p. 1200), as amended by Act May 10, 1901 (Hurd's Rev. St. 1905, p. 631), providing for establishment of city court in cities of 3,000 or more whenever council shall adopt ordinance or resolution submitting question to voters, and two-thirds votes cast shall favor establishment, held not to delegate legislative power to council in determining whether city has 3,000 inhabitants. Id.

95. Amendment of Feb. 17, 1904, to Vicksburg City Charter 1884 passed in manner provided by Code 1892, § 3039, creating office of police justice, and designating him as presiding officer of city court which, in his absence, should be presided over by mayor, held not to create new court but only new presiding officers. Ex parte Dickson [Miss.] 42 So. 233.

96. Hence it has jurisdiction of writ of error signed thereafter but before qualification of judges and organization of court. Gainesville Midland R. Co. v. Jackson, 1 Ga. App. 632, 57 S. E. 1007.

97. Laws 1883, p. 20, c. 26, changing name of marine court of the City of New York to the city court of New York held not to render former an extinct court whose judgment could not be made basis of action. Peace v. Wilson, 186 N. Y. 403, 79 N. E. 329.

98. Order of district court of Alaska abolishing precinct, annexing its territory to that of another, and directing commissioner to "deliver records and property of his office" to commissioner of precinct to which it is annexed, transfers pending probate matters. Cheney v. Alaska Treadwell Gold Min. Co. [C. C. A.] 148 F. 808.

99. Acts 1905, p. 46, and hence, where motion for new trial is made in new county, bill of exceptions and transcript should be transmitted by clerk of court of new county. Atlantic & B. R. Co. v. Johnson, 127 Ga. 392, 56 S. E. 482.

1. See 7 C. L. 1000.

This section treats only of the relation of such officers to the court, their appointment, powers, etc., being elsewhere treated. See Clerks of Court, 9 C. L. 572; Sheriffs and Constables, 8 C. L. 1897.

2. Will take judicial notice of duty to be present and personal order of court is not necessary. Kelly v. The United States, 41 Ct. Cl. 246. Attorney general has no power to take from crier his salary as such on appointing him to office of deputy marshal Allen v. The United States, 41 Ct. Cl. 235.

3. Must not take sides in controversy, and it is error to include in report documentary evidence that particular claimant has no lien on funds. Watts v. Newberry [Va.] 57 S. E. 657.

4. See 7 C. L. 1000.

5. Act No. 272, p. 418, Pub. Acts 1905, requiring judge after 1905 to designate place when fixing time for holding court is sufficiently complied with by order designating place, but leaving time as previously fixed. McCall v. Calhoun Circuit Judge, 146 Mich. 319, 13 Det. Leg. N. 757, 109 N. W. 601. Object of Act No. 272, p. 418, Pub. Acts 1905, being to designate places for holding circuit court in certain circuit, its title "An act to

held thereat.[7] The county seat is usually designated,[8] and, where it is provided generally that court shall be held at the court house,[9] an act designating the county seat is sufficiently definite.[10] The failure, however, to designate the particular building will not ordinarily invalidate the proceedings.[11] In Kentucky, if there is a town larger than the county seat, but not larger than fourth class, and not less than twelve miles [12] by the most convenient route usually traveled from the county seat,[13] alternate sessions of the circuit court must be held thereat. Offices of court officials must also be maintained at the places designated.[14] The date of the beginning of a term is usually prescribed by statute [15] or otherwise, and court must be held at the time fixed.[16] When the court has been duly convened, the term continues until legally adjourned by the court [17] or by operation of law,[18] and it rests within the discretion of the judge as to how often it shall be opened for incidental business after the close of the regular business.[19] Whether the commencement of another term in the same county [20] or another [21] adjourns a pending term depends upon local statute. An ad-

designate the places for holding the circuit court in 37th judicial circuit" is sufficient although act provides details carrying out its provisions. Id.

6. Act No. 272, p. 418, Pub. Acts 1905, held not delegation of legislative power because of proviso that council or citizens of place to which two terms were to be removed should furnish suitable building, jail, and vaults, which were to be subject to approval of judge. McCall v. Calhoun Circuit Judge, 146 Mich. 319, 13 Det. Leg. N. 757, 109 N. W. 601.

7. Motion for change of venue under Revisal of 1905, § 425, cannot be made out of district where action is pending. Garrett & Co. v. Bear [N. C.] 56 S. E. 479.

8. Except as provided by statute, district court must sit at county seat for trial of actions or proceedings involving facts, unless parties consent to trial elsewhere. Bell v. Jarvis, 98 Minn. 109, 107 N. W. 547. Applicable to election contest. Id. Where due objections are made to court being held elsewhere they are not waived by taking part in subsequent proceeding. Id.

9. Act No. 272, p. 418, Pub. Acts 1905, providing that two terms of court of certain circuit shall be held at county seat and two at another city modifies Comp. Laws 1897, § 305, providing that terms shall be held at courthouse, only so far as repugnant. McCall v. Calhoun Circuit Judge, 146 Mich. 319, 13 Det. Leg. N. 757, 109 N. W. 601.

10. Act No. 272, p. 418, Pub. Acts 1905. McCall v. Calhoun Circuit Judge, 146 Mich. 319, 13 Det. Leg. N. 757, 109 N. W. 601.

11. Held not to affect conviction in absence of showing of prejudice. In re Moran, 203 U. S. 96, 51 Law. Ed. 105.

12. Acts 1906, p. 339, c. 71, § 1, held not applicable where limits of larger town are between nine and nine and one-half miles from limits of county seat along county road, and distance over railroad by which most of the travel takes place is eleven miles between limits, but thirteen miles between stations. City of Middlesborough v. Pineville, 30 Ky. L. R. 331, 98 S. W. 298.

13. "County seat" held not to refer to county buildings, but to town in which they are located. City of Middlesborough v. Pineville, 30 Ky. L. R. 331, 98 S. W. 298.

14. Code 1896, § 656, requiring register in chancery to keep his office at place at which court is held, only requires that it be in same town or city, but not necessarily in same room, or even in courthouse. White v. Hewlett, 143 Ala. 374, 42 So. 78.

15. Acts 1903, p. 539, fixing time for holding court in seventh circuit though local law is not within § 106, Const. 1901, as to giving notice before passage. Ex parte Birmingham & A. R. Co., 145 Ala. 514, 42 So. 118. Where act establishing courthouse at particular place is void, dependent act fixing time for holding court therein becomes inoperative. Id.

16. Where county judge and county commissioners assembled at time other than prescribed by B. & C. Comp. 915, or fixed by general order of court made and entered on journal, etc., they did not compose county court. State v. Rhodes [Or.] 85 P. 332. Act of 1905, fixing time for holding court of general sessions in Cherokee County, held not to repeal Code Civ. Proc. 1902, § 27, providing that if any business remains before court of general sessions on day fixed for holding court of common pleas the latter may be adjourned. State v. Hasty [S. C.] 56 S. E. 669.

17. Judge of district court may adjourn regular term without day and order to clerk before time fixed for holding is sufficient. Russell v. State [Neb.] 110 N. W. 380. Under Rev. St. 1898, § 673, authorizing adjournment to day certain, adjournment subject to call ends term. Myers v. East Bench Irr. Co. [Utah] 89 P. 1005.

18. Where judge is not present at time set for opening term, and court is not adjourned as provided by Rev. St. 1898 § 703, term ends. Myers v. East Bench Irr. Co. [Utah] 89 P. 1005.

19. United States district court opened for entry of orders and decrees in bankruptcy. Owen v. The United States, 41 Ct. Cl. 69.

20. Where two terms of same court may be held at same time, commencement of new term does not terminate current one. People v. Warden of City Prison, 117 App. Div. 154, 102 N. Y. S. 374. Under § 909, Comp. Laws 1897, term of district court continues until day fixed for commencement of another term, unless sooner adjourned. Territory v. Armijo [N. M.] 89 P. 267. Code Civ. Proc. § 45, and Code Cr. Proc. § 432, providing that term may be continued after time appointed, to

journment of the court is an adjournment of the term, unless the order or a statute otherwise provides.[22] Under a statute providing that a term "shall continue until the causes therein pending are disposed of," the term continues by operation of law.[23] Trial of a cause at the wrong term,[24] or when the court is not regularly in session,[25] unless the parties consent thereto,[26] is generally an irregularity only, though in some states the proceedings are held void without regard to consent of parties.[27]

The Louisiana court of appeals may hold adjourned sessions.[28] Under the statutes of many states, a judge may convene special terms[29] under certain conditions,[30] by proper order,[31] and upon due notice.[32] In Kentucky an order calling a special term of circuit court for trial of chancery cases need not specify the causes to be tried thereat,[33] and, where the call is regular, failure of the clerk to enter the order on the minutes does not defeat jurisdiction.[34] The terms of court held at Mayaguez at the time regularly designated by the judge are not "special terms."[35]

continue a case, apply only to terms which terminate at a particular time by statute or otherwise. People v. Warden of City Prison, 117 App. Div. 154, 102 N. Y. S. 374.

21. Holding of another term of district court in another county by same judge does not terminate. Territory v. Armijo [N. M.] 89 P. 267. Under Kirby's Dig. §§ 1320, 1531, intervention of regular term in another county ends current term unless continued by order of court. Roberts & Shafter Co. v. Jones [Ark.] 101 S. W. 165.

22. Record entry under certain date that court convened and continued in session during the day "when it adjourned" held adjournment of term, notwithstanding a subsequent direct order. Marengo Sav. Bank v. Byington [Iowa] 112 N. W. 192.

23. No act on part of court is necessary. Smith v. Chapman & Co. [Ala.] 42 So. 817.

24. Although, under act creating October term of Chatham superior court, case was properly triable at December court and could not be tried at October term except by consent of parties, yet, if so tried without consent, judgment was irregular and not void. Horrigan v. Savannah Grocery Co., 126 Ga. 127, 54 S. E. 961. Issue of law raised by demurrer may be tried at special term for motions on consent. Peabody v. West, 103 N. Y. S. 942.

25. Under statute providing that court is always open to hear actions except issues of fact, judgment in contested case rendered when not regularly in session is irregular only and cannot be vacated after time of appeal has elapsed. Lockard v. Lockard [S. D.] 110 N. W. 104.

26. Judgment in a term case rendered out of statutory term is valid if parties consent thereto. Hayward v. Fisher [Neb.] 110 N. W. 984.

27. Myers v. East Bench Irr. Co. [Utah] 89 P. 1005.

28. Brown v. Louisiana & N. W. R. Co., 118 La. 87, 42 So. 656. It will be presumed that session was an adjourned session rather than special session in absence of showing, such session being authorized. Id. Appearance and trial on merits waives lack of due notice of time of holding adjourned session. Id.

29. Cobbey's Ann. St. 1903, § 4735. Russel v. State [Neb.] 110 N. W. 380. Under Code 1896, §§ 928, 930, circuit judge may hold special term during session of regular term. Williams v. State, 147 Ala. 10, 41 So. 992. Under Const. art. 5, § 7, providing that legislature shall have power to authorize holding of special term, legislature may empower judge to fix date thereof. Ex parte Boyd [Tex. Cr. App.] 17 Tex. Ct. Rep. 64, 96 S. W. 1079. Under Const. art. 5, § 29, commissioners' court has exclusive power of fixing time for any term, and Code Cr. Proc. 1895, art. 572, authorizing county judge to hold special terms for trial of certain criminal cases, is unconstitutional. Ex parte Cole [Tex. Cr. App.] 101 S. W. 249. Record on appeal from judgment rendered at special term which does not show organization of court, or that term was held in compliance with statute, does not show appealable judgment. Tidmore v. Perritt [Ala.] 42 So. 818.

30. Under Ky. St. 1903, § 964, circuit judge may call special term to try two persons jointly indicted for murder. Fitzgerald v. Commonwealth, 30 Ky. L. R. 349, 98 S. W. 319. Special term may be called for purpose of passing sentence under statute enacted subsequent to conviction, it not being objectionable as ex post facto. Ex parte Boyd [Tex. Cr. App.] 17 Tex. Ct. Rep. 64, 96 S. W. 1079.

31. Acts 29th Leg. (Gen. Laws 1905, p. 116, c. 83, § 1) held to repeal provision of Sayles' Rev. Civ. St. tit. 28, c. 4, requiring order to be made at preceding term, and hence order may be made during vacation. Ex parte Boyd [Tex. Cr. App.] 17 Tex. Ct. Rep. 64, 96 S. W. 1079.

32. Under Acts 29th Leg. (Gen Laws 1905, p. 116, c. 83, § 1), together with Rev. St. 1895, arts. 1113, 1114 providing that judge of district court may call special term during vacation, and that former laws are repealed only so far as inconsistent, posting of thirty days' notice in compliance with Rev. St. 1895, art. 1115, is proper. Ex parte Boyd [Tex. Cr. App.] 17 Tex. Ct. Rep. 64, 96 S. W. 1079. Const. 1898, art. 117, making sessions of district court continuous for ten months, and authorizing judge to hold court when in his opinion it may be necessary, held to supersede Rev. St. 1870, § 1932, requiring posting and publishing of notice. State v. Freddy, 118 La. 468, 43 So. 53.

33. Order under Gen. St. p. 370, c. 28, art. 6, § 1. Potter v. Potter's Receiver [Ky.] 101 S. W. 905.

34. Ex parte Neil [Miss.] 43 So. 615.

35. Act April 12, 1900, § 34, construed to mean that time for holding term should

§ 4. *Conduct and regulation of business.*[36]—Courts of record may adopt reasonable and necessary rules for the transaction and regulation of their business,[37] provided they do not contravene positive statute,[38] or substantially impair a statutory right,[39] and may prescribe reasonable penalties for the violation thereof,[40] the infliction of which rests in the discretion of the court.[41] A rule once established continues until abrogated or superseded,[42] and can be waived only by the beneficiary.[43] The practice and procedure to be followed in particular inferior courts are frequently prescribed by statute.[44]

be "specially" designated by judge, and not that term should be special one. American R. Co. v. Castro, 204 U. S. 453, 51 Law. Ed. 564.

36. See 7 C. L. 1002. Conduct of trials, see Trial, 8 C. L. 2161.

37. Where jurisdiction over subject-matter is conferred, but details of procedure are not provided court may establish such procedure as may be necessary. Election contest. Whaley v. Bayer, 99 Minn. 397, 109 N. W. 596, 820. Under St. 1869, p. 733, c. 416, standing justice of district court may promulgate reasonable rules. Gardner v. Butler, 193 Mass. 96, 78 N. E. 885.

Particular rules sustained and applied: Prohibiting change in pleadings after case is set for trial except upon good cause shown. Chicago Title & Trust Co. v. Core, 126 Ill. App. 272. Supreme Court Rule 12 (28 South. iv), denying rehearing on orders granting or refusing a rule nisi on application for mandamus, sustained. State v. Summit Lumber Co., 117 La. 643, 42 So. 195. Rule 4, § 1, providing for certain proceedings in vacation, held not to exceed authority conferred on court en banc to adopt rules. Conery v. His Creditors, 118 La. 864, 43 So. 530. Rule 6, requiring bonds in district court to be acknowledged in like manner as deeds before same shall be received or filed, being valid exercise of power under Comp. Laws, § 874, has force and effect of a statute. Hendry v. Cartwright [N. M.] 89 P. 309. Rule of circuit court held to permit judge to hear contested motions in its discretion without placing it on contested motion calendar. Hunt v. Pronger, 126 Ill. App. 403. Rule 14, subd. 3, proving for production of an "article or property" for inspection, does not authorize order compelling assembling and operation of machine. Pina Maya-Sosal Co. v. Squire Mfg. Co., 105 N. Y. S. 482. Rule 4 held to authorize hearing of opposition to appointment of syndics in vacation time. Conery v. His Creditors, 118 La. 864, 43 So. 530.

Where a right is asserted under rule of court, record promulgating such rule must be put in evidence. Chicago City R. Co. v. Gregory, 123 Ill. App. 259.

38. Where rule violates statute, latter controls. Twaddle v. Winters [Nev.] 89 P. 289. Rule requiring new notes of issue to be filed for purpose of making new calendar held void in so far as it conflicted with Code Civ. Proc. § 977. Rauchberger v. Interurban St. R. Co., 52 Misc. 518, 102 N. Y. S. 561. Code Civ. Proc. § 803, authorizing court to compel production of a "book, document, or other paper," does not authorize rule 14 subd. 3, requiring production of personal property generally. Pina Maya-Sisal Co. v. Squire Mfg. Co., 105 N. Y. S. 482. Supreme Court Rule 9, providing for substitution of personal representative upon death of party to appeal, does not conflict with Comp. Laws, § 3111, the statute being broader. Twaddle v. Winters [Nev.] 89 P. 289. Rev. St. 1898, § 3131, providing that cases shall be placed on calendar in order and remain there until disposed of or dropped by consent of parties or order of court, does not prevent adoption of rule requiring that cases shall be noticed for trial before being placed on calendar, although on previous calendar. Riddle v. Quinn [Utah] 90 P. 893. Nor is such rule in conflict with Rev. St. § 3132, providing that either party may bring issue to trial in absence of other party, which is applicable only to cases on calendar. Id.

39. Rule requiring party to make requests for instructions before he "rests his case," and to cite authorities supporting same, is void in view of Rev. St. 1898, § 2853, conferring right to have correct and appreciable instruction given. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809.

40. Where new note of issue was made out and failure to file was due to neglect of law clerk or clerk of court dismissal of action for failure to comply with rule is too harsh where statute of limitations will prevent new action. Rauchberger v. Interurban St. R. Co., 52 Misc. 518, 102 N. Y. S. 561.

41. Appeal dismissed for failure to timely file briefs. Missouri, K. & T. R. Co. v. Kidd [C. C. A.] 146 F. 499.

42. Rule established by one judge is binding though successor does not formally adopt same. Berthelot v. Hotard, 117 La. 524, 42 So. 90.

43. Court may violate rule for its benefit unless injustice will result to parties. Hunt v. Pronger, 126 Ill. App. 403. Parties cannot by stipulation waive rules formulated for court's benefit. Timely filing of briefs. Missouri, K. & T. R. Co. v. Kidd [C. C. A.] 146 F. 499.

44. General law regulating practice in county courts and "city courts" established on recommendation of grand juries (Cr. Code 1895, § 777 et seq.) does not apply in **criminal court of Atlanta,** but its practice is regulated by act Sept. 6, 1891, Acts 1890-91, p. 935. Mitchell v. State, 126 Ga. 84, 54 S. E. 931. Under B. & C. Comp. § 1100, **county court** while exercising **probate jurisdiction** should follow practice in equity as distinguished from law. In re Morrison's Estate [Or.] 87 P. 1043. While, generally, rules of practice in superior court are applicable to **city court of Washington** as to cases returnable to monthly term practice in superior court in regard to appearance days, allowance of thirty days in which to open defaults, and

Under the conformity act,[45] the practice and procedure in inferior [46] Federal courts in actions at law must conform as near as may be to that of the state wherein the action is brought,[47] unless otherwise expressly provided by act of congress.[48] While state statutes creating substantive rights are controlling on the Federal equity courts,[49] those relating to practice and procedure are not,[50] though they are frequently followed.[51] During the term [52] all proceedings are under the control of the court,[53] and records may be corrected [54] while sitting in the same county.[55] Every court has inherent power to control execution of its processes to the end of preventing an abuse thereof.[56]

§ 5. *Rules of decision; decisions and reports thereof.*—The necessity of findings by trial [57] and appellate courts,[58] the doctrine of stare decisis, and the effect of decisions as precedents,[59] are elsewhere treated. Where an appellate court is composed of several members, a concurrence of a majority [60] as constituted at time of decision [61] is necessary to a decision.[62]

discretionary power to do so thereafter, is not applicable. Thurmond v. Groves & Co., 126 Ga. 779, 55 S. E. 915. Power and practice of **territorial court** in revival of suit upon death of party is governed by territorial statutes, and not by acts of congress. Wilhite v. Skelton [C. C. A.] 149 F. 67. Except as provided by rules and code of civil procedure, practice in **court of claims** is same as in supreme court. Code Civ. Proc. 265. Spencer v. State, 187 N. Y. 484, 80 N. E. 375. Rule that failure to renew motion for nonsuit at end of case is admission of question for jury and waiver of right of dismissal as matter of law held applicable. Id. Code Alaska, § 911, providing that if course of proceeding be not specifically pointed out by code any suitable process or mode of proceeding may be adopted, most conformable to spirit of code, applies only where jurisdiction has been regularly acquired, and course of proceeding has not been prescribed. Martin v. White [C. C. A.] 146 F. 461.

45. See 7 C. L. 1002.

46. Has no application to Federal appellate courts. Francisco v. Chicago & A. R. Co. [C. C. A.] 149 F. 354.

47. Rev. Laws Mass. c. 167, § 80, as to ground of attachment. United Waterworks Co. v. Stone, 143 F. 1022. Under Rev. St. Mo. 1899, § 596 (Ann. St. 1906, p. 622), want of jurisdiction may be raised by answer. Cole v. Carson [C. C. A.] 153 F. 278. While Federal court may follow in service of writ of scire facias methods of service of similar writs of state courts, it may prescribe its own service according to course of common law. Collin County Nat. Bk. v. Hughes [C. C. A.] 152 F. 414. U. S. Rev. St. § 1014, requiring proceedings relating to arrest, bail, etc., to conform to state practice, has no application to inquiry on application for removal of one indicted to another district for trial. Tinsley v. Treat, 205 U. S. 20, 51 Law. Ed. 689.

48. Competency of interested witnesses in the Federal courts is controlled by Rev. St. U. S. § 858 (U. S. Comp. St. 1901, p. 659), and not by state statute. Huntington Nat. Bk. v. Huntington Distilling Co., 152 F. 240.

49. Code Civ. Proc. N. Y. § 66, creating attorney's lien on cause of action, etc., and providing for enforcement thereof, held not mere practice act, but to create substantive rights. In re Baxter & Co. 154 F. 22.

50. Under Rev. St. § 913 (U. S. Comp. St. 1901, p. 683), must conform to rules and usages which belong to equity courts and to rules of court. Bryant Bros. Co. v. Robinson [C. C. A.] 149 F. 321. Power and practice are derived from constitution, acts of congress, common law, ancient English statutes, and rules and practice of United States courts unaffected by state statutes of practice of their courts. Francisco v. Chicago & A. R. Co. [C. C. A.] 149 F. 354. State statute prohibiting appointment of nonresident receivers does not control Federal court. City of Defiance v. McGonigale [C. C. A.] 150 F. 689.

51. State statutes regulating service of subpoenas on foreign corporations will be followed by Federal court in equity. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

52. Court at special term cannot amend verdict rendered at trial term after end thereof, though same judge presides. Fleming v. Jacob, 103 N. Y. S. 209. Court may at subsequent term correct its record falsely reciting date of filing motion where cause was continued to next term. York v. Stigall, 204 Mo. 407, 102 S. W. 987.

53. May set aside confirmation of sale. Hansford v. Tate, 61 W. Va. 207, 56 S. E. 372.

54. Erroneous entry of term adjournment may be corrected by entry nunc pro tunc. Marengo Sav. Bk. v. Byington [Iowa] 112 N. W. 192.

55. District judge while holding court in one county has no power to correct court records of another county in his district. Williams v. Dean [Iowa] 111 N. W. 931.

56. To stay execution to allow investigation of prisoner's sanity. Ex parte State [Ala.] 43 So. 490.

57. See Verdicts and Findings, 8 C. L. 2245.

58. See Appeal and Review, § 15D, 9 C. L. 226.

59. See Stare Decisis, 8 C. L. 1965.

60. Mugge v. Tate, Jones & Co. [Fla.] 41 So. 603. Where three justices of district court of appeals are unable to agree, writ of habeas corpus must be denied under Const. art. 6, § 4. Ex parte Sauer, 3 Cal. App. 237, 84 P. 995. Although case was argued before special judge, sitting in place of chief justice, and two regular judges, opinion read by chief justice and concurred in by two regular

Publication of judicial opinions.—Where decisions are published by the state uncopyrighted, they may thereafter be privately published [63] by anyone not restricted by contract [64] or by his relation to the state,[65] but a publisher has only a restricted right of access thereto for the purpose of making copies.[66] The clerk may furnish copies in advance of the official publication,[67] and if uncertified at less than the rate prescribed for certified copies.[68] The supreme court has jurisdiction to act on the petition of its clerk for a construction of the law as to his duties in respect to its opinions.[69]

COVENANT, ACTION OF.[70]

Covenant is the appropriate action to recover damages for the breach of a contract under seal.[71] Allegations negativing the words of the covenant are usually sufficient averments of the breach.[72] In Illinois plaintiff may proceed to trial although all of the defendants have not been served.[73]

Covenants, see latest topical index.

COVENANTS FOR TITLE.

§ 1. Making of Covenants; Persons and Estates Benefited or Bound (846).
§ 2. Performance or Breach (846).
§ 3. Enforcement of Covenants (847).

Scope of title.—This article treats only of covenants usually contained in deeds. Those in leases,[74] covenants restrictive of the use of land [75] and relative to affirmative burdens not pertaining to title,[76] and warranty in the sale of personal property,[77] are treated in appropriate topics.

judges is valid. Bowles v. Wood [Miss.] 44 So. 169. Not necessary that full bench participate in decision. Greene County v. Wright, 127 Ga. 150, 56 S. E. 288. See Appeal and Review, 9 C. L. 108.

61. Where case was argued and submitted before constitutional supreme court was changed from three to seven numbers, but was decided thereafter, no valid opinion could be given by two judges. Denver & R. G. R. Co. v. Burchard, 35 Colo. 539, 86 P. 749.

62. Where evenly divided, judgment stands affirmed by operation of law. Mugge v. Tate, Jones & Co. [Fla.] 41 So. 603; Clark v. Wabash R. Co., 132 Iowa, 11, 109 N. W. 309.

63. State v. State Journal Co. [Neb.] 110 N. W. 763.

64. Where right to publish reports has become public, agreement not to publish will not be implied from contract with state to print and manufacture reports for state and to deliver plates to state. State v. State Journal Co. [Neb.] 110 N. W. 763.

65. Contract between state and another that latter should print and manufacture for former certain supreme court reports, and that "plates" so used should become property of state, does not constitute such person agent of state in the "publishing business" so as to prevent him from publishing on own account. State v. State Journal Co. [Neb.] 110 N. W. 763. But law will imply agreement not to use property of state for any purpose not contemplated by contract. Id.

66. Clerk may prescribe reasonable rules and regulations. Ex parte Brown, 166 Ind. 593, 78 N. E. 553.

67. Notwithstanding Const. art. 7, § 6, directing legislature to provide for publication and prohibiting any judge from publishing same. Ex parte Brown, 166 Ind. 593, 78 N. E. 553.

68. Burns' Ann. St. 1901, § 7798 (Rev. St. 1881, § 5831), prescribing the fee to be charged by clerk for copies of opinions, applies only to certified copies. (Ex parte Brown, 116 Ind. 593, 78 N. E. 553), and clerk may furnish uncertified carbon copies at less rate (Id.).

69. As to his right to furnish uncertified copies of opinions at less than statutory rate for certified copies, and his rights and duties as to permitting a publisher access to office for purpose of making copies. Ex parte Brown, 166 Ind. 593, 78 N. E. 553.

70. See 7 C. L. 1004.

71. Assumpsit will not lie. Fry v. Talbott [Md.] 66 A. 664. For breach of covenants for title. Hayden v. Patterson [Colo.] 88 P. 437. Suit by subcontractor in name of United States against contractor, by virtue of act of congress of Aug. 13, 1894, for work and material furnished contractor under contract, is upon bond of contractor, and not on contract to furnish labor and materials, hence covenant lies though latter contract is not under seal. Purington v. U. S., 126 Ill. App. 323.

72. Special averments are necessary only when general assignment does not show breach. Damren v. Trask [Me.] 65 A. 513. Petition construed to sufficiently allege breach of covenant in refusing to pay for clapboards taken, and in refusing to take and pay for the remainder. Id.

73. Under Practice Act (R. S. c. 110, § 10), others may be made parties to judgment by scire facias. Purington v. U. S., 126 Ill. App. 323.

74. See Landlord and Tenant, 8 C. L. 656.

75. See Buildings and Building Restrictions, 9 C. L. 441.

76. See Real Property, 8 C. L. 1676.

77. See Sales, 8 C. L. 1751.

§ 1. *Making of covenants; persons and estates benefited or bound.*[78]—In some states, covenants are implied from the use of certain words unless a contrary intent is clearly manifest.[79] Knowledge by the covenantee that a part of the land is enclosed by another does not restrict the covenants.[80] While a warranty by an executor in his official capacity binds him personally unless a contrary intent is clear,[81] yet, if the restriction is placed on the title warranted, it will be given effect.[82] The mere excepting of a particular incumbrance from the covenant in respect thereto does not impose any burden upon the covenantee,[83] or create any rights in favor of the holder thereof.[84] The general doctrine of covenants running with the land is discussed elsewhere.[85]

§ 2. *Performance or breach.*[86]—Where covenants are independent,[87] violation of any one gives a cause of action.

Against incumbrances.[88]—The covenant against incumbrances is a personal covenant in praesenti and does not run with the land.[89] An incumbrance is a right subsisting in a third person to the diminution of the value of the estate but consistent with a fee in the convenantor.[90] While the covenant is broken by a lien established after the execution of the deed, but which attaches by operation of law as of a prior date,[91] it is not broken by an incumbrance assumed by the covenantee as a part of the consideration,[92] nor is a covenant against "incumbrance made by me" violated by an easement acquired by eminent domain.[93]

The covenant of seisin and right to convey[94] is broken when made[95] as to land

78. See 7 C. L. 1004.

79. Under Rev. St. 1901, par. 728, covenant against incumbrances is implied from use of word "grant" or "convey" in fee simple conveyance unless negatived by express terms. Sherman v. Goodwin [Ariz.] 89 P. 517. Assignment of contract conveying trees as realty in the words "do hereby sell, assign, transfer and set over unto said party of the second part all his right, title, and interest in and to a certain contract" held not to imply a warranty. Pierce v. Coryn, 126 Ill. App. 244.

80. Where title fails because of adverse possession of part, warrantor is liable although covenantee knew such part was inclosed by another. Mayer v. Wooten [Tex. Civ. App.] 102 S. W. 423.

81. Mere words "executor as aforesaid" after name of the warrantor held insufficient to restrict. Baxter & Co. v. Camp, 126 Ga. 354, 54 S. E. 1036.

82. Warranty of such title "as vested in him as executor as aforesaid" held not a warranty of the title generally. Baxter & Co. v. Camp, 126 Ga. 354, 54 S. E. 1036.

83. Excepting of street assessments does not impose obligation on grantee to pay same. Waldschmidt v. Bowland, 4 Ohio N. P. (N. S.) 411.

84. Covenant against incumbrances except dower of certain person, "which claim for dower said second party is to procure without cost to party of first part" held not to create trust in favor of widow with lien on lot for value thereof. Cain's Adm'r v. Kentucky & Indiana Bridge & R. Co., 30 Ky. L. R. 593, 99 S. W. 297. Nor did it impose upon the vendee any obligation to compel widow to assert her claim or to take legal steps to divest her of it. Id. Recital in covenant of warranty, "except maturing street assessments on Floral avenue which the grantee assumes and agrees to pay," construed to relieve grantor from liability on account of said assessment, and not contract inuring to benefit of municipality. Bell v. Norwood, 8 Ohio C. C. (N. S.) 435.

85. See Real Property, 8 C. L. 1676.

86. See 7 C. L. 1005.

87. Covenant against incumbrances and covenant to warrant and defend held independent. Weeks v. Grace [Mass.] 80 N. E. 220.

88. See 7 C. L. 1005.

89. Hence covenantee may sue thereon though he has conveyed land. Thompson v. Richmond [Me.] 66 A. 649.

90. **Held an incumbrance:** Tax lien. White v. Gibson, 146 Mich. 547, 13 Det. Leg. N. 872, 109 N. W. 1049. Unexpired lease. Sugarman v. Goldberg, 100 N. Y. S. 1012.

Held not an incumbrance: Cost of curbing until included in assessment of land taxes. Bowers v. Narragansett Real Estate Co. [R. I.] 67 A. 521. Agreement between lot owner and city whereby latter was to have five feet of lot for widening street if done within one year is not an incumbrance after expiration of year for performance. Fleet v. Wait [Vt.] 66 A. 1031.

91. Confirmation of drainage assessment creating lien attaching as of time of filing of petition for drain. Pierse v. Bronnenberg's Estate [Ind. App.] 79 N. E. 419.

92. Where consideration is stated generally in deed, such assumption may be shown by parol evidence though deed is executed pursuant to written contract which did not cite such consideration. Pierse v. Bronnenberg's Estate [Ind. App.] 79 N. E. 419.

93. Weeks v. Grace [Mass.] 80 N. E. 220.

94. See 7 C. L. 1005.

95. Legal title in trustee. Jones v. Hasseltine, 124 Mo. App. 674, 102 S. W. 40. Or at least upon rendition of decree establishing adverse title. Hayden v. Patterson [Colo.] 88 P. 437. Hence covenantee may sue

covered thereby [96] without an eviction.[97] In Missouri however, the covenant implied from the use of words "grant, bargain, and sell" is one of indemnity and runs with the land,[98] the action for substantial damages accruing upon eviction.[99]

The covenant of warranty,[1] while unbroken,[2] runs with the land,[3] and is not broken until eviction, actual or constructive,[4] entire or partial,[5] under paramount title.[6] The covenant does not extend to land mistakenly included in the deed,[7] and the use of the words "more or less" after the acreage statement is usually construed to limit the warranty to unreasonable deficiencies.[8] Failure of title through covenantee's default is a valid defense.[9] A warranty against claims arising "by, through, or under me" is not broken by an easement acquired by eminent domain.[10] An intermediate covenantee cannot sue his covenantor until he has been held by his covenantee in damages.[11]

The covenant for quiet enjoyment [12] is broken only by an eviction [13] under a lawful claim.[14] The covenant may be limited by appropriate language.[15]

§ 3. *Enforcement of covenants.*[16]—The suit must be instituted within the time

though he has sold land. Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405.

96. Habendum, in deed conveying two tracks, was to have and to hold "the aforesaid tracts" together with rights to entire property known as R. property. Covenant of seisin, which was continuation of habendum, was to "said premises." Held that covenant extended to C. tract though not part of R. tract. Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405.

97. Eviction or threatened litigation not necessary. Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405. Damages resulting from outstanding title is sufficient without eviction. Jones v. Haseltine, 124 Mo. App. 674, 102 S. W. 40.

98. Quick v. Walker, 125 Mo. App. 257, 102 S. W. 33.

99. Leet v. Gratz [Mo. App.] 101 S. W. 696.

1. See 7 C. L. 1006. Action held on special covenant to refund for acreage shortage, and not on general warranty. Holt v. Mynhier's Adm'x, 29 Ky. L. R. 819, 96 S. W. 477.

2. After breach a covenant of warranty becomes a mere chose in action and does not run with the land. DeLong v. Spring Lake Beach Improvement Co. [N. J. Law.] 66 A. 591.

3. Quick v. Walker, 125 Mo. App. 257, 102 S. W. 33.

4. Held broken when covenantee of vacant property purchases paramount title to protect own. Hayden v. Patterson [Colo.] 88 P. 437. Where decree of partition orders sale, and covenantee purchases, there is constructive eviction. Morgan v. Haley [Va.] 58 S. E. 564. Judgment against covenantee in ejectment prosecuted by him is sufficient eviction. Hubbard v. Stanaford, 30 Ky. L. R. 1044, 100 S. W. 232. And he need not await the pleasure of the covenantor in bringing the action. Id.

5. Sale, under Code Civ. Proc. § 1617 et seq., to satisfy dower interest, surplus being paid to covenantee constitutes partial eviction. Olmstead v. Rawson [N. Y.] 81 N. E. 456.

6. Warranty does not extend to unlawful claims. Pierce v. Coryn, 126 Ill. App. 244. Allegation of eviction by city under agreement between covenantor and city that latter was to have five feet of lot for widening street if done within year without showing entry within year is demurrable. Fleet v. Wait [Vt.] 66 A. 1031.

7. Laufer v. Moppins [Tex. Civ. App.] 99 S. W. 109.

8. Kitzman v. Carl, 133 Iowa, 340, 110 N. W. 587. Words equivalent to "more or less" do not excuse shortage of 12.9 acres which had been lost from 80 acre tract by adverse possession. Mayer v. Wooten [Tex. Civ. App.] 102 S. W. 423. In conveyance of "The S. E. ¼ of the S. W. ¼ and the east 30 acres of the S. W. ¼ of section 34 * * *, containing 70 acres more or less," held that phrase "more or less" applies to 30 acre tract as well as other. Kitzman v. Carl, 133 Iowa, 340, 110 N. W. 587.

9. Nonperformance of agreement to attend to securing of patent and to notify covenantor of defect therein. Menasha Wooden Ware Co. v. Nelson [Wash.] 88 P. 1018. That covenantor was prevented from perfecting title by securing patent by covenantee's selection of other land without notice to covenantor, or without giving opportunity to perfect title constitutes a defense. Id. Evidence held insufficient to show that party making selection was acting for covenantee. Id.

10. Such easement being independent, and not derivative. Weeks v. Grace [Mass.] 80 N. E. 220.

11. Thompson v. Richmond [Me.] 66 A. 649.

12. See 7 C. L. 1006.

13. Covenant for quiet enjoyment of vacant land is broken when covenantee purchases paramount title to protect owner. Hayden v. Patterson [Colo.] 88 P. 437.

14. Does not extend to unlawful claims or seizure. Pierce v. Coryn, 126 Ill. App. 244.

15. Covenant that "said party of the second part shall have quiet possession of the premises hereby conveyed with covenants of special warranty," is merely covenant of special warranty for quiet possession. Campbell v. Watkins' Ex'rs, 105 Va. 824, 54 S. E. 989.

16. See 7 C. L. 1006. See, also, Covenant, Action of, 9 C. L. 845.

prescribed by statute [17] after the accrual of the cause of action.[18] A petition based on the covenant against incumbrances must show a valid incumbrance,[19] and the plea must meet the cause of action alleged.[20] Contrary to the common law, the codes usually impose the burden of proving a breach of the covenant of seisin on plaintiff,[21] unless admitted by the answer.[22] Purely affirmative defensive matter must be proven by the defendant.[23] In an action on the covenants of warranty and against incumbrances, plaintiff must establish the covenants and a violation thereof.[24] In some actions [25] the covenantee may call in his warrantor by proper notice [26] and thereby render the judgment therein conclusive as to the paramountcy of the asserted claim,[27] but, if the land involved is not covered by the description in the deed, its identity cannot be shown by parol, in the absence of appropriate pleadings.[28] Judgment in an eviction suit to which covenantor was not a party is admissible to show eviction.[29] While in the absence of allegations of fraud or mistake,[30] parol evidence is inadmissible to contradict a covenant, it is competent to show the meaning intended by the parties in case of ambiguity.[31] Where eviction is necessary, as in the case of warranty and the Missouri implied covenant of seisin, an action for partial eviction is no bar to a subsequent action for further eviction.[32]

Damages.[33]

COVERTURE; CREDIT INSURANCE, see latest topical index.

17. Action for breach of covenants held within Mills' Ann. St. § 2905, prescribing three years' limitation for personal actions on contract unless otherwise limited. Hayden v. Patterson [Colo.] 88 P. 437. Rev. St. 1879, art. 3201 (art. 3352, Sayles' Ann. Civ. St. 1897), as amended and approved on April 1, 1895, removing disabilities of married women entitled to commence suit for recovery of real property under the article, but postponing its operation until one year "after the passage of this act," held to postpone for one year from taking effect, hence suit on March 29, 1901, was timely. Shook v. Laufer [Tex. Civ. App.] 100 S. W. 1042.

18. In Missouri, statute of limitations does not begin to run on the covenant of seisin until covenantee suffers actual loss. Jones v. Haseltine, 124 Mo. App. 674, 102 S. W. 40.

For time of accrual generally see ante, § 2.

19. Failed to show demand on owner by surveyor of highway for payment of cost of street improvement, such demand being essential to valid assessment. Bowers v. Narragansett Real Estate Co. [R. I.] 67 A. 324.

20. Where eviction by public is charged, alleging that at time of conveyance from plaintiff's grantor to plaintiff certain lot owners had easements over the premises and that such easements were excepted from conveyance, held not to show eviction within the exception. De Long v. Spring Lake Beach Improvement Co. [N. J. Law.] 66 A. 591.

21. Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405.

22. Where defendant denied breach, but subsequently admits that he had no title as to one tract, but sets up affirmative defense, breach is admitted. Eames v Armstrong, 142 N. C. 506, 55 S. E. 405.

23. As that grantee agreed not to hold grantor, but desired covenants to facilitate a sale. Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405.

24. Proof of execution of general deed of warranty, failure of title, amount of consideration paid, and demand therefor, makes prima facie case. Menasha Wooden Ware Co. v. Nelson [Wash.] 88 P. 1018. Introduction of chains of title upon which judgment of eviction had been rendered in prior suit held to authorize refusal of binding instruction for warrantor, irrespective of whether judgment was conclusive. Sachse v. Loeb [Tex. Civ. App.] 101 S. W. 450. Evidence held to show that adverse title had ripened before sale. Mayer & Schmidt v. Wooten [Tex. Civ. App.] 102 S. W. 423. Tax deed reciting that land was bid off to state on certain date prior to sale does not establish validity of tax. White v. Gibson, 146 Mich. 547, 13 Det. Leg. N. 872, 109 N. W. 1049.

25. Neither in petitory action nor in action of boundary can plaintiff call his warrantor. Clapham v. Clayton, 118 La. 419, 43 So. 36.

26. Notice to covenantor of pending suit without demand that he appear and defend is insufficient. Morgan v. Haley [Va.] 58 S. E. 564. Evidence held sufficient to show notice by covenantee's attorney in eviction suit to warrantor to defend. Sachse v. Loeb [Tex. Civ. App.] 101 S. W. 450.

27. Proof of judgment in ejectment, without proof that suit involved issue as to whether title of plaintiff therein was paramount to that conveyed by warrantor, is insufficient to establish a paramount title. Peterson v. Steinhoff [Wash.] 87 P. 118.

28. Pecot v. Prevost, 117 La. 765, 42 So. 263.

29. But not to show paramount title unless he is called in. Sachse v. Loeb [Tex. Civ. App.] 101 S. W. 450.

30. Allegations of fraud and mistake held insufficient to permit proof that quit claim was intended. Menasha Wooden Ware Co. v. Nelson [Wash.] 88 P. 1018.

31. Use of words "more or less" after statement of acreage. Kitzman v. Carl, 133 Iowa, 340, 110 N. W. 587.

32. Purchased interests of holders of

CREDITORS' SUIT.

§ 1. Nature and Grounds of Remedy (849).
§ 2. Property Which May be Reached (850).
§ 3. Pleading and Procedure (850).

The scope of this topic is noted below.[34]

§ 1. *Nature and grounds of remedy.*[35]—One object of a creditor's bill is to uncover property which the debtor has sought by fraud or concealment to place beyond the reach of his creditors,[36] and another is to subject to the payment of plaintiff's judgment equitable assets or choses in action of the debtor, which cannot be reached by general execution;[37] but creditors' suit is not available to determine and set apart the interest of an heir to real property.[38] The courts will distinguish between cases where judgment gives a lien and cases where the creditor seeks property that cannot be reached at law,[39] but a creditors' bill is not maintainable except where legal remedies have proven ineffectual,[40] or there has been an affirmative showing of insolvency,[41] or the exhaustion of legal remedies is waived,[42] however, having execution returned nulla bona is the most that the law can or does require,[43] and in some jurisdictions this is not essential.[44] It is not necesasry to resort to mandamus,[45] and the defendant is estopped to show as a defense that the judgment, whereon a creditor's bill is based, is void.[46]

General creditors' suits.[47]—The creditors of a corporation have the same right to pursue its funds that the corporation itself would have.[48]

Intervention.[49]—Having a claim for less than $2,000 will not prevent intervention in a suit in Federal court.[50]

Limitations and laches.[51]—The statute of limitations begins to run against a creditor's suit after judgment execution has been returned nulla bona,[52] and the equitable doctrine of laches also applies.[53]

paramount title separately. Leet v. Gratz [Mo. App.] 101 S. W. 696. Independent causes of action, and not a splitting of a single cause. Id.

33. See 5 C. L. 879. See, also, Damages, 7 C. L. 1029.

34. This topic includes only creditors' bills in aid of execution; suits to set aside fraudulent conveyances generally (Fraudulent Conveyances, 7 C. L. 1841), or to obtain the appointment of a receiver (Receivers, 8 C. L. 1679) being excluded.

35. See 7 C. L. 1007.

36. Kalona Sav. Bank v. Eash, 133 Iowa, 190, 109 N. W. 887.

37. Code § 4087 held not available to judgment creditors to reach property subject to general execution. Kalona Sav. Bank v. Eash, 133 Iowa, 190, 109 N. W. 887.

38. Because any interest of defendant in real estate was subject to levy and sale under judgment even though the interest was undivided and subject to undetermined claims. Kalona Sav. Bank v. Eash, 133 Iowa, 190, 109 N. W. 887.

39. Williams v. Commercial Nat. Bank [Or.] 90 P. 1012.

40, 41. Kalona Sav. Bank v. Eash, 133 Iowa, 190, 102 N. W. 887.

42. Defendant voluntarily appeared, confessed the debt, admitted its insolvency, and joined in asking for the appointment of a receiver, although the bill was filed by creditors who had neither judgment nor other lien. Horne v. Pere Marquette R. Co., 151 F. 626.

43. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012.

44. Return nulla bona not essential to bill in aid of execution to remove fraudulent conveyance. First Nat. Bk. v. Dawson, 127 Ill. App. 295.

45. The debtor a municipal corporation. Southern R. Co. v. Hartshorne [Ala.] 43 So. 583.

46. Defendant had failed to account as guardian, questioned the jurisdiction of the court that appointed him, and offered to show that his successor, the plaintiff, had not qualified. His remedy would be to move to vacate the judgment. Havens v. Ahlering, 29 Ky. L. R. 1265, 97 S. W. 344.

47. See 7 C. L. 1008.

48. The corporation's president bought land with money belonging to the corporation and failed to prove that the corporation owed him the money. Arbuckle Bros. v. Columbia Grocery Co. [Ala.] 43 So. 781.

49. See 5 C. L. 882.

50. Huff v. Bidwell, 151 F. 563.

51. See 7 C. L. 1008.

52. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012.

53. Delay of four years held not such laches as to bar creditors' suit. Bennett v. Boshold, 123 Ill. App. 311.

The decree.[54]—If of advantage to the debtor, the court should direct division of the land subjected to his debt and sale of a part of it only.[55] The court should know the total debt that property is subject to before decreeing a sale of it.[56] It may be ordered that a debtor's contingent interest in a policy of insurance on his life be ascertained by sale, appraisal, or other means within the ordinary procedure of the court,[57] and his interest in a partnership by finding the balance due him after paying the firm debts and adjusting the accounts of the partners.[58]

§ 2. *Property which may be reached.*[59]—A creditors' suit will reach any assignable property interest,[60] including a life estate by the curtesy [61] and the remainder thereof,[62] the debtor's real estate held in the name of a third person,[63] and property under control of a probate court,[64] also property of an insolvent corporation in the hands of a stockholder,[65] and property given away after judgment,[66] but not stock only nominally owned.[67] Equitable assets can only be reached after the remedies at law have been exhausted.[68]

§ 3. *Pleading and procedure.*[69]—A creditors' bill is not multifarious because it seeks discovery both as to misapplication of assets and as to the amount due on stock subscriptions.[70] If the property sought is equitable, plaintiff must allege facts which bring the case within the domain of equity,[71] but that the debtor has an equitable interest in certain property is a sufficient allegation.[72] The clerk's endorsement that a transcript of judgment was filed is insufficient basis for a creditors' bill.[73] It is necessary to allege that the legal remedies have been exhausted against both of two joint judgment creditors,[74] but not when they are joint and several,[75] and not

54. See 7 C. L. 1008.

55. Held error for the court to assume the divisibility. Buckley's Assignee v. Stevenson, 30 Ky. L. R. 952, 99 S. W. 961.

56. The holder of a mortgage on the property, though served, neither answered nor appeared. The court found that the mortgage was a first lien and ordered the property sold. Held that the mortgagee should have been ruled to answer to show the amount claimed before decree of sale was entered. Buckley's Assignee v. Stevenson, 30 Ky. L. R. 952, 99 S. W. 961.

57. The value of debtor's interest in his endowment policy depended on whether he or his wife would survive. Biggert v. Straub, 193 Mass. 77, 78 N. E. 770.

58. Gay v. Ray [Mass.] 80 N. E. 693.

59. See 7 C. L. 1009.

60. The judgment had an assignable interest in the remainder of a certain trust fund. N. Y. Code Civ. Proc. § 1879, held not to apply to an assignable interest. See 7 C. L. 1099, n. 26. Bergmann v. Lord, 51 Misc. 213, 100 N. Y. S. 990.

61. For joint debt of husband and deceased wife. Buchley's Assignee v. Stevenson, 30 Ky. L. R. 952, 99 S. W. 961.

62. Where the remainder was in the children and the mother's estate was the debtor. Some of the remaindermen were infants and one was absent. Buckley's Assignee v. Stevenson, 30 Ky. L. R. 952, 99 S. W. 961.

63. Provided he be either insolvent or that a judgment lien exists or will arise upon the setting aside of the transfer. Prior to the judgment, the land had been fraudulently transferred to relatives of the debtor. Drahos v. Kopesky, 132 Iowa, 497, 109 N. W. 1021.

64. The creditor had judgment and, on it, execution and sale to himself of certain real property belonging to an estate in probate court, whereof the debtor was heir. The creditor was not required to present his claim to the probate court and his rights were not affected by subsequent distribution of the property to the debtor. Martinovitch v. Marsicano [Cal.] 89 P. 333.

65. Defendant corporation, which was the chief stockholder of the insolvent corporation, had absorbed it and was charged with a trust to pay its debts. Williams v. Commercial Nat. Bank [Or.] 90 P. 1012.

66. Defendant municipal corporation, after judgment, paid the price of certain land so that it might be given to defendant Railway Company. Southern R. Co. v. Hartshorne [Ala.] 43 So. 583.

67. The debtor held stock merely to enable him to act as director of the corporation and had no beneficial use of it. Herancourt v. Taylor, 29 Ky. L. R. 1299, 97 S. W. 359.

68. McNeal v. Hayes Mach. Co., 118 App. Div. 130, 103 N. Y. S. 312.

69. See 7 C. L. 1009.

70. The stockholders had fraudulently divided the assets of the corporation and only 50 per cent of the stock had been paid up. The creditors wished to reach the stock subscriptions in case the misappropriated assets should prove insufficient. Jahn v. Champagne Lumber Co., 147 F. 631.

71. Kalona Sav. Bk. v. Eash, 133 Iowa, 190, 109 N. W. 887.

72. The debtor had only his equity in land that his brothers held as security for his debt to them of unknown amount. Nichols-Shepard Co. v. Ringler [Iowa] 112 N. W. 543.

73. Nothing further appeared except date and explanations of counsel. Green v. Forney [Iowa] 111 N. W. 976.

74. The complaint left to inference that

necessarily as against a surety.[76] A statutory rule for equitable action to reach jointly held personal property has no analogy to the rule for real property held jointly.[77] Persons interested in trust funds sought to be reached are proper parties defendant.[78] but of several assignees only the final one is necessary,[79] and the debtor's grantor is not necessary.[80] The judgment debtor is not a necessary party to a bill in aid of execution to subject property fraudulently conveyed.[81] A creditor may maintain an equity suit against a judgment creditor under any name by which it transacts business unless it pleads the misnomer.[82] To give a Federal court jurisdiction, it is not necessary that each of the creditors have a claim for over $2,000.[83] Jurisdiction over a debtor's interest in his life insurance policy is where the company is located,[84] and the question of jurisdiction is the same as in an action at law to reach property by trustee process.[85] The courts have jurisdiction to determine priority of liens.[86]

CRIMINAL CONVERSATION, see latest topical index.

CRIMINAL LAW.

§ 1. **Elements of Crime (851).** Sources of the Criminal Law (852). Criminal Intent (852). Felonies (852). Infamous Crmes (852).
§ 2. **Defenses (852).**
§ 3. **Capacity to Commit Crime (853).**
§ 4. **Parties in Crime (853).**
§ 5. **Former Adjudication and Second Jeopardy (854).**
§ 6. **Punishment of Crime (856).** Extent of Punishment (856). Place of Imprisonment (856). Second Offenses (857).
§ 7. **Rights in Property the Subject of Crime (857).**

This topic includes only the general rules of the substantive law of crimes; criminal procedure,[87] and matters peculiar to particular crimes[88] being elsewhere treated.

§ 1. *Elements of crime.*[89]—A single act may constitute several distinct crimes,[90] and except as affected by the doctrine of autrefois convict[91] may be separately punished.

the two debtors were partners and demurrer was sustained. Egan v. Hagan, 104 N. Y. S. 247.

75, 76. Egan v. Hagan, 104 N. Y. S. 247.

77. Code §§ 3977 and 3978, held to concern personal property only. They provide for execution against personal property held jointly and for equitable action to determine the nature and extent of joint property and to enforce alien against it. Kalona Sav. Bank v. Eash, 133 Iowa, 190, 109 N. W. 887.

78. The debtor having a part interest in the remainder of a trust fund, the person having the balance of the interest, was properly made a party where the amount of the fund with certain accretions thereto was to be determined. Bergman v. Lord, 51 Misc. 213, 100 N. Y. S. 990. See 7 C. L. 1009, n. 26.

79. The judgment debtor fraudulently assigned to a third party who did likewise to another who had notice of the fraud. McNeal v. Hayes Mach. Co., 118 App. Div. 130, 103 N. Y. S. 312.

80. One defendant paid the grantor for conveying land to the other defendant. Southern R. Co. v. Hartshorne [Ala.] 43 So. 583.

81. First Nat. Bk. v. Dawson, 127 Ill. App. 295.

82. The "John J. Hayes Machine Company" on its sign board had the words "Hayes Machine Campany" and was generally known by that name. The answer used the same name as the petition and made no objection to it. McNeal v. Hayes Mach. Co., 118 App. Div. 130, 103 N. Y. S. 312.

83. Of two creditors one had a claim for over $2000, the other for less. Defendant's assets were over $2000. Huff v. Bidwell, 151 F. 563.

84. The insurance company was a Massachusetts corporation and the debtor a citizen and resident of another state. Biggert v. Straub, 193 Mass. 77, 78 N. E. 770.

85. Biggert v. Straub, 193 Mass. 77, 78 N. E. 770.

86. The property of defendant was so encumbered by taxes and other liens that it could not have been sold to the advantage of plaintiffs without a previous determination of the priority of the lien holders. Huff v. Bidwell, 151 F. 563.

87. See Arrest and Binding Over, 9 C. L. 249; Indictment and Prosecution, 8 C. L. 189.

88. See topic dealing with the particular crime in question, as Homicide, 8 C. L. 106; Larceny, 8 C. L. 699, etc.

89. See 7 C. L. 1011.

90. Same act constituting both forgery and swindling. Abel v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 361, 97 S. W. 1055. Combination and monopoly are separate offenses under the Sherman Act. United States v. McAndrews & Forbes Co., 149 F. 836.

91. See post, § 10.

Sources of the criminal law.[92]—Crimes may be created and defined by municipalities within the scope of their delegated power [93] and by the state and Federal governments within the respective province of each,[94] subject to constitutional limitations preserving the rights of citizens,[95] and those regulating the enactment of statutes.[96] While common-law crimes are now recognized in but a few states,[97] where the statute creates an offense eo nomine, the court will look to the common law for its definition.[98] It is no objection to a statute that it does not provide a minimum penalty.[99] Failure of the legislature to grade an offense as required by Louisiana constitution does not invalidate statute creating it.[1]

Criminal intent.[2]—Except where the statutes require a specific intent,[3] the intent to do the act which the statute forbids is all that is required,[4] but mistake of fact will sometimes operate as an excuse.[5]

Felonies [6] include all offenses declared by statute to be such,[7] and in most states all offenses punishable by imprisonment in the state prison,[8] the penalty which the statute authorizes and not that imposed in the particular case being determinative.[9] Where a woman's prison is established to which female offenders of all grades are sentenced, the grade of an offense by a woman is to be determined by the place of imprisonment of a man convicted of such offense.[10]

Infamous crimes.—Whether an offense is infamous is now important solely with reference to the necessity of prosecuting by indictment, and its determination is elsewhere treated.[11]

§ 2. *Defenses.*[12]—One serving a life sentence for crime may be tried for the murder of a fellow convict.[13] It is no defense that other offenders against the same statute have not been punished,[14] that another has been convicted of the same offense,[15] or that defendant was illegally arrested.[16] Entrapment is a defense only when it leads to the formation of the original intent.[17] Duress must be of such character as to authorize a reasonable fear of death or great bodily harm.[18] That a

92. See 7 C. L. 1011.
93. See Municipal Corporations, 8 C. L. 1056.
94. See Constitutional Law, 9 C. L. 610.
95. See Constitutional Law, 9 C. L. 610. Regulations of procedure are not within the prohibition of ex post facto laws. Statute allowing calling of special term for sentence. Ex parte Boyd [Tex. Cr. App.] 17 Tex. Ct. Rep. 64, 96 S. W. 1079.
96. An act creating a crime and fixing the penalty does not relate to two subjects in violation of Const. § 51. Diamond v. Com., 30 Ky. L. R. 655, 99 S. W. 232.
See, also, Statutes, 8 C. L. 1976.
97. There are no common-law crimes in Indiana. Burns' Ann. St. 1901, § 237. Sopher v. State [Ind.] 81 N. E. 913.
98. Nuisance. Sopher v. State [Ind.] 81 N. E. 913.
99. Siren v. State [Neb.] 111 N. W. 798.
1. State v. Robira, 118 La. 251, 42 So. 792.
2. See 7 C. L. 1011.
3. See Homicide, 8 C. L. 106; Rape, 8 C. L. 1667, and like topics.
4. Armour Packing Co. v. United States, 153 F. 1. Permitting mechanics on public work to work more than eight hours per day, under mistaken belief that emergency existed. Ellis v. United States, 206 U. S. 246, 51 Law. Ed. 1047. Marriage in reliance on void divorce. State v. Westmoreland [S. C.] 56 S. E. 673.
5. Sale of drink believed in good faith on reasonable grounds to be nonintoxicating. State v. Powell, 141 N. C. 780, 53 S. E. 515.
6. See 7 C. L. 1011
7. State v. Eubanks, 199 Mo. 122, 97 S. W. 876.
8. Assault with intent to do great bodily harm, felony. State v. Farnham, 35 Mont. 375, 89 P. 728.
9. State v. Ostmann, 123 Mo. App. 114, 100 S. W. 696; Quillen v. Com., 105 Va. 874, 54 S. E. 333.
10. Ex parte Brown, 151 F. 710.
11. See Indictment and Prosecution, 8 C. L. 189.
12. See 7 C. L. 1012.
As to mistake as a defense, see ante § 1, criminal intent.
13. Huffaker v. Com., 30 Ky. L. R. 334, 98 S. W. 331. See, also, People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514.
14. State v. Wilhite, 132 Iowa, 226, 109 N. W. 730.
15. Craig v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 507, 92 S. W. 416.
16. Mitchell v. State, 126 Ga. 84, 54 S. E. 931; Roland v. State, 147 Ala. 149, 41 So. 963; People v. Markowitz, 104 N. Y. S. 872.
17. Acts of detective held no defense to indictment for larceny. Crowder v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 101, 96 S. W. 934.
18. Evidence held not to show duress by mob violence at time of contracting bigamous marriage. Burton v. State [Tex. Cr.

minor acts in obedience to parental command may rebut an inference of fraudulent intent.[19] Composition with the injured person is no defense.[20]

§ 3. *Capacity to commit crime.*[21]—At common law and by statute in most states, the burden is on the prosecution to show the capacity of a child over seven and under fourteen years of age,[22] and his capacity is to be determined as of the time of the offense [23] and should be submitted to the jury,[24] while as to persons over fourteen, no incapacity from infancy alone can be claimed, even as to crimes whose gist is the making of a contract.[25]

If a man has reason sufficient to distinguish between right and wrong in respect to the act charged, he is criminally responsible,[26] neither transitory frenzy,[27] weakness of mind,[28] nor partial insanity being a defense unless it produces incapacity to distinguish between right and wrong.[29]

Voluntary drunkenness is no defense to crime not involving specific interest,[30] but may be considered in determining the capacity to entertain such an intent,[31] unless the intent was formed before accused became intoxicated.[32] One who from drugs, or drugs and intoxicating liquor combined does not know what he is doing is not responsible.[33]

§ 4. *Parties in crime.*[34]—One present aiding and abetting is guilty as principal.[35] Mere presence is not enough, but accused must have assisted or encouraged the commission of the crime.[36] A principal in the second degree may be convicted notwithstanding the acquittal of the principal in the first degree.[37] Scienter and intent are essential to an accessary after the fact.[38] To convict the members of a corporation of a corporate crime, evidence of individual knowledge and participation is essential.[39] The purpose to assist a felon is essential in making out the crime of

App.] 101 S. W. 226. Affirmative proof of duress must be made before evidence of the desperate character of the person by whom the alleged duress was exerted can be given. McLeod v. State [Ga.] 57 S. E. 83.

19. Leaving employment with intent to defraud employer. Anthony v. State, 126 Ga. 632, 55 S. E. 479.

20. Receipt by prosecutrix in rape of money compensation after the offense does not conclusively establish consent. State v. Fowler [Idaho] 89 P. 757.

21. See 7 C. L. 1012.

22. Evidence held sufficient to show that boy of eleven knew that offense of theft was criminal and would subject him to punishment. Binkley v. State [Tex. Cr. App.] 100 S. W. 780. Evidence held insufficient to show that child of thirteen had capacity to commit burglary. Simmons v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 380, 97 S. W. 1052. Evidence of person who knew accused, that he was a bright boy and talked good sense, admissible. Neville v. State [Ala.] 41 So. 1011. Instruction held to invade province of the jury. Id.

23. Instruction held erroneous. Neville v. State [Ala.] 41 So. 1011.

24. Failure to submit held error. Owsley v. Com. [Ky.] 101 S. W. 366.

25. Swindling by false pretenses on sale. Neal v. State [Tex. Cr. App.] 101 S. W. 212. A minor who is of sufficient age to be criminally responsible is liable for a crime, the gist of which is breach of contract, though by reason of his minority the contract is not civally enforcible. Fraudulently leaving employment. Anthony v. State 126 Ga. 632, 55 S. E. 479.

26. Kelley v. State [Tex. Cr. App.] 101 S. W. 230.

27. Commonwealth v. Renzo, 216 Pa. 147, 65 A. 30.

28. That defendant was of weak mind immaterial where he is neither an idiot nor insane. Rogers v. State [Ga.] 57 S. E. 227.

29. State v. Paulsgrove [Mo.] 101 S. W. 27; People v. Willard [Cal.] 89 P. 124.

30. Manslaughter. Laws v. State, 144 Ala. 118, 42 So. 40.

31. People v. Owens, 3 Cal. App. 750, 86 P. 980. Exposing child with intent to abandon it. State v. Sparegrove [Iowa] 112 N. W. 83. Indictment for detaining female with intent to have carnal knowledge of her. Robb v. Com. [Ky.] 101 S. W. 918.

32. Voluntary intoxication after determination to commit offense. People v. Koerner, 117 App. Div. 40, 102 N. Y. S. 93.

33. Phillips v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 757, 98 S. W. 868.

34. See 7 C. L. 1013.

35. State v. Handy [Del.] 66 A. 336; State v. Hunter [S. C.] 57 S. E. 637; Kittrell v. State [Miss.] 42 So. 609. Where one is present advising and encouraging the commission of a crime, it is presumed that his acts induced the same. Bast v. Com., 30 Ky. L. R. 967, 99 S. W. 978.

36. Father present at crime by son. Swinger v. State [Tex. Cr. App.] 102 S. W. 114.

37. Reed v. Com., 30 Ky. L. R. 1212, 100 S. W. 856.

38. Rev. St. 1899, § 2365. State v. Modlin, 197 Mo. 376, 95 S. W. 345.

39. Unlawful publication by newspaper. State v. Bass, 101 Me. 481, 64 A. 884.

being an accessary after the fact by concealment[40] and therein it is distinguished from such crimes as obstructing justice or receiving stolen goods.[41]

§ 5. *Former adjudication and second jeopardy.*[42]—Unless the constitution expressly so provides,[43] the prohibition of second jeopardy does not preclude separate prosecutions where the same act offends against two jurisdictions,[44, 45] but it applies to prevent prosecution in two tribunals deriving their powers from the same jurisdiction.[46] Jeopardy begins when a jury is impaneled and sworn,[47, 48] for the trial of an issue joined,[49] on a valid indictment,[50] in a court of competent jurisdiction,[51] and, if the trial be thereafter terminated without verdict except for inability of the jury to agree[52] or other imperative necessity[53] without the consent of accused,[54] or by dismissal on the merits,[55] he cannot be again put on trial for the same offense. To sustain a plea of former acquittal, the two indictments must be sustainable by the same proof, while a former conviction is a bar if the transactions are the same.[56, 57] The test of identity is whether the facts necessary to conviction under the last indictment would have warranted a conviction under the first.[58, 59] Parol evidence

40, 41. Ex parte Goldman [Cal. App.] 88 P. 819.

42. See 7 C. L. 1013. See, also, Former Adjudication, 7 C. L. 1750, as to effect of conviction or acquittal on civil action to which accused is party.

43. By Const. § 168, there can be but one prosecution though the offense is against two jurisdictions. White v. Com., 28 Ky. L. R. 1312, 92 S. W. 285.

44, 45. Ordinance and state law. Ehrlick v. Com. [Ky.] 102 S. W. 289; Shuler v. Willis, 126 Ga. 73, 54 S. E. 965.

46. An acquittal by a general court martial having jurisdiction bars prosecution in any court deriving its jurisdiction from the United States for the same acts. Grafton v. U. S., 206 U. S. 333, 51 Law. Ed. 1084.

47, 48. State v. Hows [Utah] 87 P. 163. Allowing juror to be challenged after the jury is sworn entitles defendant to discharge. Gillespie v. State [Ind.] 80 N. E. 829. Where indictment is nolled before jury is complete, there is no jeopardy. O'Donnell v. People, 224 Ill. 218, 79 N. E. 639. Arrest and binding over is not jeopardy. Bennett v. Briggs [N. J. Law] 65 A. 717.

49. No jeopardy where trial was begun without a plea. Mays v. State [Tex. Cr. App.] 101 S. W. 233.

50. Barber v. State [Ala.] 43 So. 808. Defendant on whose motion indictment was quashed cannot maintain that it was valid. Carroll v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 789, 98 S. W. 859. Trial on information made on information and belief held no jeopardy. Steinkuhler v. State [Neb.] 109 N. W. 395.

51. Peterson v. State [Neb.] 112 N. W. 306; Barber v. State [Ala.] 43 So. 808. Collusive commitment without legal authority does not give county judge jurisdiction and discharge by him is unavailing. McDermott v. Com., 30 Ky. L. R. 1227, 100 S. W. 830. Magistrate having dismissed felony charge held to have no jurisdiction to try accused for misdemeanor and his proceeding was accordingly no bar to subsequent prosecution for felony. People v. Swain [Cal. App.] 90 P. 720.

52. Discharge after two hours sustained. State v. Harris [La.] 44 So. 22. Finding of inability to agree held sufficient though jury had only been out one and one-half hours. State v. Huff [Kan.] 90 P. 279.

53. Showing as to misconduct held insufficient to warrant discharge. People v. Parker, 145 Mich. 488, 13 Det. Leg. N. 581, 108 N. W. 999. A prosecution before a justice abated by his death pending the proceeding is not a bar to a second prosecution. State v. Miesen, 96 Minn. 466, 105 N. W. 555. Continuance after trial has begun on account of absence of witness. State v. Williams, 117 Mo. App. 564, 92 S. W. 151. Ordering mistrial in absence of accused is an acquittal. Bagwell v. State [Ga.] 58 S. E. 650. Dismissal over defendant's objection after jeopardy attaches is equivalent to acquittal. State v. Reed [Ind.] 81 N. E. 571.

54. Withdrawal of plea of guilty after trial for assessment of penalty had begun and reassignment of case for trial deemed to have been with defendant's consent. Williams v. Com. [Ky.] 101 S. W. 381. Dismissal on demurrer to indictment after jury is sworn no bar. Jones v. Com., 30 Ky. L. R. 288, 97 S. W. 1118. Discharge of jury at defendant's request because he is physically unable to proceed not an acquittal. Sacra v. Com., 29 Ky. L. R. 1010, 96 S. W. 858. Erroneous granting of defendant's motion to dismiss indictment on ground that statute had been repealed not an acquittal. Territory v. Ruval [Ariz.] 84 P. 1096.

55. Dismissal at close of prosecutor's case for insufficiency of evidence is bar. State v. Hardenburgh [Kan.] 90 P. 1133.

56, 57. Kellett v. State [Tex. Cr. App.] 103 S. W. 882.

58, 59. Commonwealth v. Shoener, 216 Pa. 71, 64 A. 890. Acquittal on conviction only bars offenses in issue. State v. Pianfetti, 79 Vt. 236, 65 A. 84.

Held identical: Keeping a place where intoxicating liquors are "sold" and for keeping a place where intoxicating liquors are "kept for sale" based on the same acts. Weaver v. State, 74 Ohio St. 53, 77 N. E. 273. A conviction for allowing water pipes to remain out of order for more than two days bars prosecution as to all dates prior to affidavit on which first prosecution was based. Crumpler v. Vicksburg [Miss.] 42 So. 673. Various injuries inflicted in the course of one assault constitute but a single of-

that the offenses were part of the same transaction is admissible.[60] An offense of which one has been acquitted may be shown on the issue of intent on trial for another offense.[61] Action on a plea in abatement is no bar,[62] nor in the absence of statute [63] is failure of the grand jury to indict.[64] Acquittal of one jointly charged no defense, though offense was committed pursuant to conspiracy.[65] By statute in Kentucky the sustaining of a demurrer to the indictment is no bar unless it was done at the trial or because the indictment alleged facts constituting a defense,[66] and dismissal at the trial for a material variance is no bar.[67] Setting aside of a conviction on motion before judgment is not an acquittal.[68] The authorities are in conflict as to whether a conviction of a lower degree of crime than that charged is such an acquittal of the offense charged as will on a new trial being granted preclude conviction of any higher degree than that found on the first trial.[69] Reversal of conviction for withholding public money because no demand had been made not a bar to a second prosecution after demand.[70] Conviction on indictment containing several counts by verdict which did not identify the count on which it was based does not acquit of all but one,[71] and on reversal of judgment on such a verdict, the case stands on all counts as if there had been no trial.[72] Where the same offense is charged in

fense. Purdy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 295, 97 S. W. 480. Acquittal of larceny bars prosecution for embezzlement of same property. State v. Fields, 117 La. 929, 42 So. 428. Homicide as defined by art. 404 of the Penal Code of the Philippine Islands and assassination as defined by article 403. Grafton v. U. S., 206 U. S. 233, 51 Law Ed. 1084.

Held not identical: Acquittal of using language disturbing the peace of the inhabitants of a private house no bar to prosecution for using language calculated to provoke a breach of the peace, though based on the same acts. Kellett v. State [Tex. Civ. App.] 103 S. W. 882. Acquittal of conspiracy to assault Federal officer no bar to prosecution for disturbing peace and quiet of family by assault. Wilcox v. U. S. [Ind. T.] 103 S. W. 774. Statutory rape and defilement of minor female confided to defendant's protection not identical. State v. Oakes, 202 Mo. 86, 100 S. W. 434. A conviction of an affray by fighting with one person is not a bar to a prosecution for an assault upon another. Bickham v. State [Tex. Cr. App.] 101 S. W. 210. Conviction of permitting drinking by one person at storage warehouse in local option district no bar to prosecution for permitting drinking by another at same time. Teague v. State [Tex. Cr. App.] 102 S. W. 1142. Sale of liquor to two persons at about the same time two offenses. Harris v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 270, 97 S. W. 704. Conviction of assault on one not bar to prosecution for assault on another at the same time not growing out of a joint attack on accused by the persons assaulted. Fews v. State, 1 Ga. App. 122, 58 S. E. 64. Indictment for breach of trust on a certain day and one for breach of trust of funds of same person on later day. State v. Dewees [S. C.] 56 S. E. 674. Forgery of two instruments on same day and as part of same transaction constitutes two offenses. United States v. Carpenter, 151 F. 214. A substantial variance is presented where an indictment charges the theft of property belonging to John W. E. ——, and a subsequent indictment charges the theft of property belonging to Joseph W. E. ——, and a conviction or acquittal under the first indictment is not a bar to prosecution under the second indictment. Horner v. State, 8 Ohio C. C. (N. S.) 441. Inasmuch as it cannot be said that a second indictment charges the same offense as a previous indictment under which the defendant was properly tried before a jury, the court in the second prosecution cannot take judicial notice of what took place at the first trial. Id. Acquittal of "giving away" liquors not bar to prosecution for "selling" though based on the same transaction. State v. Reed [Ind.] 81 N. E. 571. Each overt act of crime pursuant to a conspiracy warrants a separate indictment for the conspiracy under Rev. St. § 5440. Francis v. U. S. [C. C. A.] 152 F. 155.

60. Taylor v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 817, 98 S. W. 839.

61. Stovall v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 299, 97 S. W. 92.

62. Savell v. State [Ala.] 43 So. 201.

63. By statute refusal of two grand juries to indict is a bar. Elliott v. State, 1 Ga. App. 113, 57 S. E. 972.

64. Failure of grand jury to indict for grand larceny no bar to prosecution for petit larceny. People v. Flaherty, 104 N. Y. S. 173.

65. State v. Crofford, 133 Iowa, 478, 110 N. W. 921.

66. Commonwealth v. Bray, 29 Ky. L. R. 757, 96 S. W. 522.

67. Variance held material and dismissal therefore a bar to second indictment. Drake v. Com., 29 Ky. L. R. 981, 96 S. W. 580.

68. Booker v. State [Ala.] 44 So. 56.

69. That it is, see, State v. Smith, 132 Iowa, 645, 109 N. W. 115; People v. Farrell, 146 Mich. 264, 13 Det. Leg. N. 777, 109 N. W. 440; Huntington v. Superior Ct. [Cal.] 90 P. 141; State v. Walker 133 Iowa, 489, 110 N. W. 925.

70. Commonwealth v. Shoener, 216 Pa. 71, 64 A. 890.

71, 72. State v. Pianfetti, 79 Vt. 236, 65 A. 84.

two counts, abandonment of one on the trial does not bar further prosecution of the other.[73]

§ 6. *Punishment of crime*[74] depends wholly on statute.[75] Cumulative sentences may be imposed,[76] and where the second of three cumulative terms is invalid, the third begins on the expiration of the first.[77] The written opinion of the supreme court affirming a capital conviction being the only judgment which it renders is sufficient basis for the issuance of the warrant for execution.[78]

Extent of punishment.[79]—In the absence of constitutional prohibition of excessive punishment,[80] extent of penalty which may be imposed is wholly a legislative question,[81] the inhibition of cruel and unusual punishment going to the nature rather than the extent of the penalty.[82] One cannot contend that an alternative provision under which he was not sentenced authorizes cruel and unusual punishment.[83] An excessive sentence by a justice of the peace in Michigan is valid to the extent of his power.[84] The Michigan indeterminate sentence law is held to be valid[85] and not to affect sentences previously passed.[86]

Place of imprisonment.[87]—It is provided by statute in many states that persons

73. State v. Huff [Kan.] 90 P. 279.

74. See 7 C. L. 1015. See Indictment and Prosecution, 8 C. L. 189 (imposition of sentence); Fines, 7 C. L. 1656; Prisons, Reformatories and Jails, 8 C. L. 1448.

75. Laws 1854, c. 261, as to sentence of disorderly persons in Duchess county is not repealed by the code, so that person convicted thereunder is not entitled to release on giving bond for good behavior. People v. Champlin, 105 N. Y. S. 349. Place of imprisonment is under such statute in discretion of magistrate. Id.

76. Sentence for crime committed while on parole may be made to commence at expiration of unexpired part of original sentence. State v. Finch [Kan.] 89 P. 922.

77. United States v. Carpenter [C. C. A.] 151 F. 214.

78. Busse v. Barr, 132 Iowa, 463, 109 N. W. 920.

79. See 7 C. L. 1015.

80. Held not excessive: Five thousand dollars fine for contempt in corruptly obstructing justice. French v. Com., 30 Ky. L. R. 98, 97 S. W. 427. Two years for assault with intent to kill. State v. Spaugh, 199 Mo. 147, 97 S. W. 910. Twenty dollars fine for refusal of licensed hackman to carry passenger. Atlantic City v. Brown, 72 N. J. Law, 207, 62 A. 428. A game law does not impose excessive fines because the fine is for each bird killed in violation of it. In re Schwartz [La.] 44 So. 20. Two hundred dollars fine for each of sixteen offenses of selling liquor. Fletcher v. Com., 106 Va. 804, 56 S. E. 149. Three to ten years for allowing wife to remain in house of prostitution. People v. Conness [Cal.] 88 P. 821. Fine of $50 for failure to conform with requirement as to keeping on hand of goods for thirty days. Phillips v. State, 4 Ohio N. P. (N. S.) 398.

Held excessive: Sentence of fifteen years for first offense of robbery with no aggravating circumstances reduced to ten years. Buckley v. State [Neb.] 112 N. W. 283. Ten years imprisonment for assault with intent to rape reduced to two years. State v. Neil [Idaho] 90 P. 860. A constitutional inhibition against the imposition of excessive fines includes penalties. Act imposing penalty of $200 per day for failure to pay gross earnings tax, same amounting to more than 4,000 per cent of amount detained held unreasonable and void. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

81. Neb. Cr. Code, § 124, imposing fine of double amount embezzled by public officer irrespective of restitution, in addition to sentence, same to operate as a judgment against his estate held constitutional. Coffey v. Harlan County, 204 U. S. 659, 51 Law. Ed. 666. Legislature may impose greater penalty for conspiracy to do an act than for the doing of it. Johnson v. People, 124 Ill. App. 213.

82. Indeterminate sentence act held not unconstitutional as imposing a cruel and unusual punishment. People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514. Act providing fine of $5,000 or imprisonment at hard labor for five years or both for depositing lewd and obscene matter in the mails held not to constitute a cruel and unusual punishment. Rinker v. U. S. [C. C. A.] 151 F. 755. Failure of county commissioners to discharge one imprisoned for nonpayment of fine and shown to be unable to pay it does not make his imprisonment a cruel and unusual punishment. Courts cannot intervene by habeas corpus. Ex parte Ellis [Kan.] 91 P. 81. Six months in county jail with diet of bread and water for ten days for failure to support wife not cruel and unusual. Spencer v. State [Wis.] 112 N. W. 462. A statute imposing fine not to exceed $5,000 or imprisonment not to exceed five years or both for mailing obscene matter does not impose cruel or unusual punishment. Comp. St. 1901, § 2658. Rinker v. U. S. [C. C. A.] 151 F. 755.

83. Spencer v. State [Wis.] 112 N. W. 462.

84. In re Kenney, 147 Mich. 678, 111 N. W. 189.

85. In re Manaca, 146 Mich. 697, 13 Det. Leg. N. 919, 110 N. W. 75; People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 N. W. 514.

86. In re Manaca, 146 Mich. 697, 13 Det. Leg. N. 919, 110 N. W. 75.

87. See 7 C. L. 1015.

below a stated age must or may [88] be sentenced to the reformatory. The adjudication that accused is of such age as to be properly sentenced to the reformatory cannot be reviewed on habeas corpus.[89]

Second offenses.[90]—The previous conviction must be alleged [91] and the record thereof is admissible.[92]

§ 7. *Rights in property the subject of crime.*[93]

Criminal Procedure; Crops; Cross Bills and Complaints; Crossings; Cruel and Unusual Punishments; Cruelty; Cumulative Evidence; Cumulative Punishments; Cumulative Votes; Curative Acts, see latest topical index.

CURTESY.[94]

The statute in force at the time of the acquisition of the property by the wife usually determines the interest of the husband therein.[95] At common law there must be birth of lawful issue,[96] and under the statute of Nebraska the wife must be seised of at least a freehold interest.[97] The estate of curtesy initiate has been abolished in Arkansas.[98] The married woman's act of Missouri does not render the estate by the curtesy consummate subject to the wife's debts.[99] A contract giving the wife "full control" of the property of each does not release curtesy interests.[1]

CUSTOMS AND USAGES.

§ 1. Definition and Elements (857).
§ 2 Application to Contracts and Other Dealings (858).
§ 3. Pleadings and Proof (859).

The scope of this topic is noted below.[2]

§ 1. *Definition and elements.*[3]—In a strict sense, a "usage" denotes a course of action adopted in a particular place or in a particular business, which has legal force only when contracts are made with reference thereto.[4] while a "custom" refers

88. Sentence of boy of 16 to penitentiary held not abuse of discretion. Davis v. Com. [Ky.] 101 S. W. 352. Where accused is under sixteen and punishment is assessed at five years or less the jury may in their discretion sentence him to the reformatory. Brown v. State [Tex. Cr. App.] 99 S. W. 1001.

89. Ex parte Wallace [Kan.] 89 P. 687.

90. See 7 C. L. 1015.

91. Paetz v. State, 129 Wis. 174, 107 N. W. 1090.

92. State v. Vaughan, 199 Mo. 108, 97 S. W. 879.

93. See 5 C. L. 893. Right to search arrested person, see Arrest and Binding Over, 9 C. L. 249.

94. See 7 C. L. 1016.

95. Though marriage took place before enactment of March 15, 1894 (Ky. St. 1903, c. 66), changing husband's interest in estate of wife, as to land purchased thereafter, husband acquires only life interest in one-third thereof under § 2132, Ky. St. 1903. Hall v. Craft [Ky.] 100 S. W. 236. Where marriage occurred and property was owned before enactment of § 4340 (Ann. St. 1906, p. 2382), making estate of married woman her separate property and giving her the rents and profits thereof, husband's common-law rights remain unaffected thereby. Myers v. Hansbrough, 202 Mo. 495, 100 S. W. 1137.

96. Under Pub. St. 1901, c. 195, § 9, declaratory of the common law, adoption of child is insufficient. Murdock v. Murdock [N. H.] 65 A. 392.

97. Does not attach to lands held under contract of purchase. In re Grandjean's Estate [Neb.] 110 N. W. 1108.

98. Constitution of Arkansas of 1874 left only possibility of estate by the curtesy consummate. Loyd v. Planters' Mut. Ins. Ass'n, 80 Ark. 486, 97 S. W. 658.

99. Married woman's act, Rev. St. 1899, §§ 4335, 4340 (Ann. St. 1906, pp. 2378, 2382). Myers v. Hansbrough, 202 Mo. 495, 100 S. W. 1137.

1. Contract in consideration of dismissal of divorce suit. Williams v. Coffman [Ky.] 101 S. W. 919.

2. **This topic excludes** usage as bearing on the issue of negligence. See Negligence, 8 C. L. 1090; Master and Servant, 8 C. L. 840. Some cases as to the effect of usage in particular transactions are also treated elsewhere. See Agency, 9 C. L. 58; Carriers, 9 C. L. 466; Telegraphs and Telephones, 8 C. L. 2096, and like topics.

3. See 7 C. L. 1016.

4. Byrd v. Beall [Ala.] 43 So. 749. Usage, in its most comprehensive meaning, includes custom, but in its narrower sense refers only to a general habit or course of proceeding. Wilmington City R. Co. v. White [Del.] 66 A. 1009. In order for a practice to become a usage, it must exist for sufficient length of time to become generally

to a usage which has been universally recognized for so long a period as to have acquired the force of law.[5] This distinction, however, is not generally observed by the courts, and hence the words are here used interchangeably.

§ 2. *Application to contracts and other dealings.*[6]—Since commercial contracts are usually [7] made with reference to the established usages of the business, such usages are admissible in explanation thereof,[8] especially if ambiguous,[9] but not to vary their expressed terms [10] or to excuse non-compliance therewith.[11] Such usage, however, must be shown to have been known to the party sought to be bound thereby or so generally known as to raise a presumption of knowledge,[12] and must not be in violation of a statute [13] or opposed to settled principles of law.[14] One depositing commercial paper with a bank for collection is presumed to consent to the usages in

known. Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 S. W. 845. Testimony that it was custom to make inspection of lumber and report within ten days held not to show that practice had been in vogue sufficiently long to become a usage. Id.

5. Binding without assent of individual. Byrd v. Beall [Ala.] 43 So. 749. Course of action becomes a custom only when it has existed so long as to become generally known. Lockney v. Police Beneficiary Ass'n, 217 Pa. 568, 66 A. 844. Held for jury whether practice of giving notice of assessments to ex-police members in police benefit society had become established custom. Lockney v. Police Beneficiary Ass'n, 217 Pa. 568, 66 A. 844. Answer to question whether there was any custom among lumbermen for settlement of count and inspection guarantied, that the custom was for millmen and shippers to settle on reports of consignee, and that he had never known a millman to refuse, held not to show usage so general as to be binding. Byrd v. Beall [Ala.] 43 So. 749.

6. See 7 C. L. 1016.

7. Defendant authorized broker to sell oil cake "F. O. B. New Roads," and negotiated sale was accepted by wire without mention of place of sale. On receipt of contract, defendant refused to sign because it called for delivery at shipping port, as was trade custom, held for jury whether contract was made in view of custom. New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co. [C. C. A.] 154 F. 296.

8. To show what constitutes carload of lumber. Floyd v. Mann, 146 Mich. 356, 13 Det. Leg. N. 811, 109 N. W. 679 Constitutes bale of cotton. Watson v. Hazlehurst, 127 Ga. 298, 56 S. E. 459. What "surfacing" means in railroad construction contract. Henderson-Boyd Lumber Co. v Cook [Ala.] 42 So. 838. Contract of sale stipulated that prices were f. o. b. cars and bill of lading contained notation "Inspection allowed." Evidence of custom, known to seller, giving purchaser right of inspection on arrival and right of rejection, held admissible to show that same was part of contract and to explain words in bill. Fort Produce Co. v. Dissen [Tex. Civ. App.] 101 S. W. 477.

9. Where there was no ambiguity in order for purchase of cord wood, nor in act of seller in filling same, evidence of custom among fuel dealers to buy light at that season is immaterial. Engeldinger v. Stevens [Wis.] 112 N. W. 507. Where written contract provides that seller will sell and deliver grapes at certain price, etc., and "payment will be made as the grapes are delivered," custom limiting amount of daily deliveries cannot be shown. Leonhart v. California Wine Ass'n [Cal. App.] 89 P. 847.

10. Trade usage will be read into contract only when consistent with its terms. New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co. [C. C. A.] 154 F. 296. Where stockbroker held stocks under special contract, proof of custom to justify sale thereof is incompetent when inconsistent with contract. Whipple v. Tucker, 123 Ill. App. 223. One contracting to erect Scotch granite sarcophagus composed of bottom base, second base, etc., cannot show custom to make bottom base of native granite. Fish v. Correll [Cal. App.] 88 P. 489. Custom to inspect lumber at place of reception by consignee is inadmissible where both parties testify to express contract excluding custom. Stearns v. Grand Trunk R. Co. [Mich.] 14 Det. Leg. N. 108, 111 N. W. 769. Where contract of employment as shown by evidence was for definite period, custom in respect to term of employment is immaterial. Stovall v. Gardner [Tex. Civ. App.] 103 S. W. 405. Where samples of colortype pictures were not "roughed," but were afterwards roughed at defendant's request, and order given for pictures as represented by proofs, custom of colortype trade not to rough except by special contract is not admissible where only question is whether contract refers to original samples or roughed samples, especially where independent offer to rough was made and rejected. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306.

11. Where insured failed to keep books as required by policy, it is no defense that slip records are generally employed among merchants. Henry v. Green Ins. Co. of America [Tex. Civ. App.] 103 S. W. 836.

12. Byrd v. Beall [Ala.] 43 So. 749; Bowles v. Rice [Va.] 57 S. E. 575; Sherwood v. Home Sav. Bk., 131 Iowa, 528, 109 N. W. 9. Usage of trade of which one party was not a member. New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co. [C. C. A.] 154 F. 296. Where goods were sold "sixty-five cents on the dollar," local custom at place of sale as to adding freight charges is inadmissible to explain meaning of phrase where it is not shown that other party knew of custom or contracted with respect thereto. Moritz v. Herskovitz [Wash.] 89 P. 560.

13. Under Kirby's Dig. § 527, forbidding warehousemen from delivering cotton without written consent of holder of receipts, custom of treating receipts as made to

respect thereto.[15] Usages are also important as bearing upon implied contractual rights,[16] as showing corporate power [17] or the authority of an acknowledged agent,[18] in determining negligence,[19] the timeliness of presentation of negotiable paper [20] and the bona fides of a purchaser thereof,[21] but not to prove or disprove the existence of a contract.[22] The custom among commission merchants to charge a buyer with goods sold, and to credit him with goods purchased from him is not binding on a principal.[23] Where a custom is set up as a defense, the case must be brought within it.[24]

§ 3. *Pleadings and proof.*[25]—While a custom relied upon as constituting a part of a contract must be pleaded,[26] one merely explanatory of words used,[27] or purely evidentiary,[28] need not be. Knowledge on the part of the person sought to be charged must be alleged.[29] A usage relied upon to relieve one from contributory negligence need not be pleaded.[30]

bearer could not justify delivery of cotton under receipt relating to other cotton. Citizens' Bank v. Arkansas Compress & Warehouse Co., 80 Ark. 601, 96 S. W. 997.

14. Custom compelling shipper of lumber under contract guarantying "count and inspection" to settle on unsworn report of consignee based upon unsworn statement of purchaser held illegal as depriving him of right to have default established by usual proof. Byrd v. Beall [Ala.] 43 So. 749.

15. Custom of San Francisco banks on receiving checks on banks out of city to forward to bank on which drawn or to another for presentment, and not to become liable until it receives money, held to relieve from default of collecting bank. San Francisco Nat. Bk. v. American Nat. Bk. [Cal. App.] 90 P. 558.

16. In action by one physician against another on implied contract for consultation over a patient of latter, custom of consulting physicians to look exclusively to patient for fee is admissible to disprove implied contract. Baer v. Williams [N. J. Law] 66 A. 961. Where it is uniform and established practice for consignees at particular port to pay wharfage charges, and consignee gives no notice to carrier of intention not to be bound by custom, he becomes liable for charges for goods unloaded at wharf. Riddick v. Dunn [N. C.] 58 S. E. 439. Where railroad contractor does extra work, it is competent to prove the customary charges therefor. Henderson-Boyd Lumber Co. v. Cook [Ala.] 42 So. 838. Where, in action for commissions on sale of land which reverted for failure of purchaser to pay full consideration, existence of contract in respect thereto is disputed, evidence of usage is admissible as basis on which to act if jury finds that there was no agreement. Morgan v. Barber [Tex. Civ. App.] 99 S. W. 730.

17. Where, in action for loss of securities deposited with bank, bank disclaims power to receive such securities, local custom of banks, including defendant, to so receive is admissible to show power. Sherwood v. Home Sav. Bk., 131 Iowa, 528, 109 N. W. 9

18. Custom of traveling salesmen to sell samples at end of season. Lauchheimer & Sons v. Jacobs, 126 Ga. 261, 55 S. E. 55.

19. See Negligence, 8 C. L. 1090, and specific topics which treat of negligence.

20. Under Code Supp. 1902, § 3060 a71, providing that, in determining what is reasonable time for presentation of bill of exchange, regard must be had for usage of trade or business, usage of bank is admissible on timeliness of presentment to bind indorser whether he had knowledge of usage or not. Plover Sav. Bk. v. Moodie [Iowa] 110 N. W. 29. Custom of banks to present checks through other banks is one of so general observance that knowledge thereof will be presumed on part of persons dealing with them. Id.

21. Under local custom respecting bills of lading, held that elapse of seven months from date of issue did not create suspicion of defects. Hardie & Co. v. Vicksburg, etc., R. Co., 118 La. 253, 42 So. 793.

22. Proof of a contract vel non cannot be shown by the customary manner of a party in respect to such contracts. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93.

23. Liebhardt v. Wilson [Colo.] 88 P. 173.

24. Custom of compress company to deliver cotton to party who had placed it with company upon surrender of receipt which he "owned" for equal number of bales whether receipts were originally issued to him or not held not to justify delivery on receipts not owned. Citizens' Bk. v. Arkansas Compress & Warehouse Co., 88 Ark. 601, 96 S. W. 997.

25. See 7 C. L. 1018.

26. Sherwood v. Home Sav. Bk., 131 Iowa, 528, 109 N. W. 9. Especially if obtaining only in particular district or locality. Wilmington City R. Co. v. White [Del.] 66 A. 1009. In action by lessee of hotel against landlord to recover water rents paid by former, allegation of general custom for lessor to pay such rents is sufficient without specifically alleging that it applied to hotels. Smart v. Haase, 79 Conn. 587, 65 A. 972.

27. Whether solar or standard time was to determine when fire insurance policy expired. Globe & Rutgers Fire Ins. Co. v. David Moffatt Co. [C. C. A.] 154 F. 13.

28. Custom of local banks to receive valuable papers for deposit as evidence of power of bank to receive and on authority of cashier to act for bank. Sherwood v. Home Sav. Bk., 131 Iowa, 528, 109 N. W. 9.

29. In action by tenant against landlord to recover water rents paid by former, allegation that it has for many years been the generally known and established rule and practice in said city, and the generally known and established custom, etc., for landlord to pay rents, held sufficient. Smart v. Haase, 79 Conn. 587, 65 A. 972.

30. Practice of stopping street cars to

Except as to customs of which the courts will take judicial notice,[31] they must be established by satisfactory evidence.[32] A witness must qualify by showing a familiarity with a custom before he can testify in respect thereto.[33] While the existence of a custom may be declared as a matter of law where the evidence is unequivocal and uncontradicted,[34] it is usually a question for the jury.[35] Evidence in rebuttal of an asserted custom is admissible.[36]

CUSTOMS LAWS.

§ 1. Interpretation and Operation of Customs Laws in General (860).
§ 2. Dutiable Articles and Classification of the Same (861).
§ 3. Administration of Customs Laws (865). Entry (867). Reliquidation (867). Enforcement of Duties (867). Refund for Salvage (867). Protests and Appeals (867).
§ 4. Violatons of Customs Laws and Consequences Thereof (869).

§ 1. *Interpretation and operation of customs laws in general.*[37]—Imports from Cuba entered prior to the date when the treaty signed in 1902 went into effect were not entitled to tariff reductions provided therein.[38] Merchandise imported into Cuba from the United States by an American citizen during the military occupation of the island and after the treaty of Paris was not exempt from duties imposed by the military government for necessary governmental purposes incident to the occupation.[39] The provision of the Foraker act that goods imported from Porto Rico prior to its passage and entered under bond for warehousing shall be subject to the duties imposed by that act does not apply to goods wrongfully warehoused by the collector for nonpayment of duty.[40] The Isle of Pines is a "foreign country" within the meaning of the Dingley act, so as to render importations therefrom subject to duty.[41] It was legal for congress by the act of 1906 to ratify the illegal collection of duties on imports to the Philippine Islands levied under the president's order before the enactment of a traiff of duties for those islands.[42] States may not levy duties on

permit funeral processions to pass uninterrupted. Wilmington City R. Co. v. White [Del.] 66 A. 1009.

31. Take judicial notice of custom only when general as to territory and not limited to certain class. Schultz v. Ford Bros., 133 Iowa, 402, 109 N. W. 614. Custom and usage among traveling salesmen to include in sales those solicited which employer accepts held not so general as to enable court to take judicial notice thereof. Id.

32. Held not sufficient to allege that privilege of sawing timber into lumber on premises is customary consequence of its sale Bowles v. Rice [Va.] 57 S. E. 575.

33. Schultz v. Ford Bros., 133 Iowa, 402, 109 N. W. 614. Where member of stock exchange has not testified to knowledge of its rules or customs, or that there was any general custom or that appellee had knowledge thereof, proper foundation has not been laid for proof of supposed custom. Whipple v. Tucker, 123 Ill. App. 223. It cannot be held as matter of law that retail fur merchants have not sufficient knowledge of custom between wholesalers and retailers to sell goods conditionally to testify thereto. Hess v Shurtleft [N. H.] 65 A. 377.

34. Laucheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55. Cannot be held as matter of law that evidence of retail fur merchants as to custom of wholesalers to sell to them conditionally was not sufficient to establish custom. Hess v. Shurtleft [N. H.] 65 A. 377.

35. Whether trade custom or usage is established by evidence, whether it was known to party contracting or was so generally known as to raise presumption of knowledge, held for jury. New Roads Oil-mill & Mfg. Co. v. Kline, Wilson & Co. [C. C. A.] 154 F. 296.

36. Where plaintiff asserts that sales, because of usage of traveling salesmen, include sales solicited and afterwards accepted by house, evidence that there was no such custom is admissible. Schultz v. Ford Bros., 133 Iowa, 402, 109 N. W. 614. In action seeking to hold defendant for failing to ship plaintiff's car of corn "closed," claiming that such was method of doing business existing between them, defendant may show that he made "open" shipments to plaintiff's father-in-law. Smith v. Landa [Tex. Civ. App.] 101 S. W. 470.

37. See 7 C. L. 1019.

38. Did not take effect until Dec. 27, 1903. Dalton Co. v. U. S., 151 F. 143; United States v. Dalton Co., 151 F. 144.

39. Galban & Co. v. U. S., 40 Ct. Cl. 495.

40. Where goods were not subject to tariff laws at time of importation Bidwell v. Levi, Blumenstiel & Co. [C. C. A.] 147 F. 225.

41. Pearcy v. Stranahan, 205 U. S. 257, 51 Law. Ed. 793.

42. United States v. Heinszen, 206 U. S. 370, 51 Law. Ed. 1098. Ratification did not deprive of property without due process though importers had commenced an action to recover the duties collected. Id.

imports or exports without the consent of congress, except such as may be necessary for the execution of inspection laws.[43]

While no inference can be drawn against a particular construction of a schedule merely because it results in imposing double or treble duties by the addition of duty for each stage in manufacture,[44] doubts arising from ambiguities should be resolved in favor of the importer,[45] and a uniform construction of a particular provision by the treasury department for a number of years will not be lightly overruled by the courts.[46]

§ 2. *Dutiable articles and classification of same.*[47]—Apparatus imported for educational institutions are not free unless reasonable regulations of the secretary of treasury are complied with.[48] Household effects need not be used abroad continuously for a year in order to be admitted free, it being sufficient if the periods of use aggregate one year,[49] and the fact that a machine is extensively repaired shortly before importation does not render it subject to duty as an entirety where the value of the new manufacture may be easily determined.[50] Fruit condemned by local health officials while being unloaded and after being freed from customs supervision, but before passing into the actual control of the importer should be treated as a non-importation not dutiable.[51]

A long and uniform construction of an expression by congress or the customs authorities is generally controlling on the question of classification.[52] In its absence, the general rule is that specific provisions control general ones,[53] and the commercial meaning of a term or phrase prevails over the popular [54] unless previous legislation shows that it was used in its popular sense;[55] but where no trade designation is established, the ordinary dictionary definitions prevail.[56] That an article of a given name has previously been properly classified at a certain rate is not

43. A tax on exported property which operates indirectly as a duty on the export is as pernicious as the laying of a duty directly (Commonwealth v. Sellinger, 30 Ky. L. R. 451, 98 S. W. 1040), but a state statute levying a tax on all personalty owned by resident citizens, wherever situated, is not an attempt to levy a tax on exported property because it is exported (Id.).

44. Present schedules being based on principle of protection to American industry. Burditt & Williams Co. v. U. S. [C. C. A.] 153 F. 67.

45. As to whether berries should be measured by dry or liquid quart. United States v. Boak Fish Co., 146 F. 104.

46. Rule applied, and held articles manufactured from coated steel wire are not subject to additional duty for the coating. Burditt & Williams Co. v. U. S. [C. C. A.] 153 F. 67.

47. See 7 C. L. 1020.

48. Failure to comply with regulation requiring filing of certificate of delivery to institution within ninety days after entry. Eimer & Amend v. U. S., 146 F. 144.

49. Use of automobile interrupted by intervening use in this country. Hillhouse v. U. S. [C. C. A.] 152 F. 163.

50. Old parts, and cost of overhauling, cleaning, readjusting, etc., may be free. An automobile. Hillhouse v. U. S. [C. C. A.] 152 F. 163.

51. United States v. Courtin, 153 F. 594.

52. United States v. Kuttroff, Pickhardt & Co., 147 F. 758; Dunham & Co. v. U. S. [C. C. A.] 150 F. 562.

53. Hat crowns composed chiefly of gelatin spangles dutiable under provision for "articles composed in part of spangles made of gelatin," and not under that for "manufactures of gelatin." Metzger v. U. S. [C. C. A.] 146 F. 132. Where an article is designated by a specific name and the act imposes a duty upon it by such name, general terms subsequently used are not applicable. Nash & Co. v. U. S. 152 F. 573. Goods partly of wool but in chief value of cotton more specifically enumerated as "manufactures of cotton" than as "manufactures in part of wool." Benoit v. U. S., 150 F. 687. As to pyroxylin smokers' articles, "all smokers' articles whatsoever not specially provided for" is more specific than "all compounds of pyroxylin in finished or partly finished articles." United States v. Knauth, 150 F. 610. Articles of cotton table damask woven in the piece held "cotton table damask," and not "cotton cloth." Wilson v. U. S. [C. C. A.] 146 F. 64. Dress goods dutiable as silk woven goods rather than as dress goods in part of wool. United States v. Scruggs, etc., Dry Goods Co., 147 Fed. 888.

54. United States v. Hemptead & Son, 153 F. 483. "Embroidery cottons." Loeb v. U. S. [C. C. A.] 150 F. 327. In an action to recover duties paid under an alleged erroneous classification, evidence is admissible as to whether a name has a commercial meaning differing from its ordinary signification. Mills v. Robertson, 147 F. 634.

55. Dunham & Co. v. U. S. [C. C. A.] 150 F. 562.

56. "Hides of cattle." United States v. Schmoll, 154 F. 734.

conclusive as to the subsequent classification of an article of the same name.[57] If two or more rates apply, the article pays duty at the highest of such rates.[58] On the question of whether a commodity is fit for other than a certain use, the fact that it can be used for other purposes is not controlling.[59] The slicing of vegetables solely to facilitate a natural drying operation is not sufficient to remove them from their natural state.[60] To justify a classification of fruit boxes as having been made abroad from domestic shooks, the evidence must be definite as to the quantity in each importation so made.[61] To be entitled to the benefits of reciprocal commercial agreements, importers must show that the articles imported are included within their terms,[62] and must furnish satisfactory evidence that they were not only imported from but produced in a country with which the agreement was made.[63] Imported raw material is not entitled to a draw back of duty when exported unless some new article has been produced by the process of manufacture applied to it in this country.[64] Products of crude petroleum are subject to countervailing duty where produced in chief value of petroleum.[65] The component material of chief value is to be determined with reference to the values of the components in the country where the compound is produced,[66] and the value of a component at the time when it goes into the article should be considered, and not its value as subsequently increased.[67] Additional cases on the classification of particular imports will be found in the footnotes.[68] Importers may adjust themselves to the tariff laws, and in the absence

57. Decisions on classification of "dead oil" not conclusive in absence of proof that such oil was the same as that in question. Schoellkopf v. U. S., 147 F. 855.

58. Rates for "manufactures of cotton" and "manufactures in part of wool" not equally applicable to cloth in part of wool but in chief value of cotton. Benoit v. U. S., 150 F. 687.

59. Niger-seed oil commonly used in soap making held free, as "fit" only for such use though it "could" be used for other purposes. United States v. Colby & Co. [C. C. A.] 153 F. 883.

60. Sliced mushrooms dried in sun dutiable as vegetables in natural state, and not as vegetables prepared or preserved. Zanmati & Co. v. U. S. [C. C. A.] 153 F. 880.

61. Not sufficient to establish a probability that many of the boxes were of such origin. Westervelt & Co. v. U. S., 150 F. 378.

62. Bronze statuary not included in "statuary" as used in commercial agreement with Italy. Richard & Co. v. U. S., 151 F. 954.

63. Deposition by importer that the goods were consigned to him direct from France, but not showing any further personal knowledge, held incompetent. Migliavacca Wine Co. v. U. S., 148 F. 142.

64. Spanish bottle corks not entitled to draw back though sterilized, cleansed, softened, and coated for use in beer bottles. Anheuser-Busch Brewing Co. v. U. S., 41 Ct. Cl. 389.

65. "Products of crude petroleum" subject to countervailing duty under proviso of par. 626 of Free List includes only articles produced in chief value of petroleum, regardless of quantity. United States v. Downing & Co. [C. C. A.] 146 F. 56. Paraffin though separately enumerated in par. 633 of Free List is subject to countervaling duty under par. 626 when a product of petroleum. Id.

66. Evidence of value of one component material in one country and of another in another country insufficient to overcome sworn statement of manufacturer. United States v. Downing & Co. [C. C. A.] 146 F. 56.

67. Article held in chief value of cotton though varnish had greater value in completed article by reason of labor bestowed in applying it. United States v. Johnson [C. C. A.] 154 F. 39. Component material of chief value in certain catheters and bougies made of a fabric covered with a varnish composed of linseed oil and copal was the varnish where it exceeded in value the fabric, though the latter exceeded in value the linseed oil or the copal. Kraemer v. U. S., 146 F. 148.

68. **Agricultural and vegetable products and provisions:** Fire proofed lumber dutiable as sawed lumber. Myers & Co. v. U. S. [C. C. A.] 147 F. 204. Round timbers for wharves or electric light poles not free. Perfection Pile-Preserving Co. v. U. S., 147 F. 922. "Round unmanufactured timber including pulp woods" held to include pulp wood subjected to the rossing process. United States v. Pierce [C. C. A.] 147 F. 199. Wood flour dutiable as a manufacture of wood, and not as "wood pulp," nor as "waste." Nairn Linoleum Co. v. U. S., 151 F. 955. Splash mats or screens though crudely decorated dutiable as manufactures of wood. Woolworth & Co. v. U. S., 152 F. 483. Bamboo dyers' sticks free as bamboo, and hardwood dyers' sticks dutiable as unmanufactured wood, and not as manufactures of wood. United States v. Knipscher & Maas Silk Dyeing Co., 152 F. 590. Seedlings of rhododendrons and laurels remaining green constantly dutiable as "evergreen seedlings." United States v. Ouwerkerk, 153 F. 916. Double-warp Dundee baggage dutiable as "jute baggage." Corbitt & Macleay Co. v. U. S., 153 F. 648. Certain baskets dutiable as manufactures of willow, and not of "chip." Ollesheimer & Bros. v. U. S., 154 F. 167. Reeds with outside removed dutiable as reeds wrought from rattans. Foppes v.

U. S., 154 F. 866. Crude balata free, as "india rubber, crude." Earle Bros. v. U. S., 153 F. 773. Braids in chief value of straw free as braids of straw. United States v. Rheims, 154 F. 865. Arrowroot in its starchy form dutiable as preparations fit for use as starch. Middleton & Co. v. U. S. [C. C. A.] 151 F. 16. Lily of the valley roots sprouted, and imported for forcing dutiable as lily of valley plants, and not as moss, seaweeds, and vegetable substances. McAllister v. U. S., 147 F. 773. Broken rice held not dutiable as rice which would pass through a number twelve sieve where it would not pass through a number twelve sieve selected by the secretary of treasury though such sieve had smaller meshes than other number twelve sieves. Wakem v. U. S., 147 F. 874. Apricot kernals are dutiable as "nuts not specially provided for," not as shelled almonds. Spencer & Co. v. U. S., 146 F. 112. Boiled chestnuts preserved in syrup not dutiable directly or by similitude as nuts, but as "comfits." United States v. Schall & Co., 147 F. 760. Orange and lemon peel in brine held free as "not preserved." Causse Mfg. Co. v. U. S., 150 F. 419. Cherries washed, pitted, and packed in water containing not more than four per cent of salt are dutiable as "edible fruits prepared in any manner," and are not "fruits in their own juices" or "fruits in brine." Causse Mfg. Co. v. U. S. [C. C. A.] 151 F. 4. "Prepared in any manner" not limited to drying process. Id. Persian berry extract used in staining food products and also as a dyestuff dutiable as an unenumerated manufactured article. United States v. Berlin Aniline Works, 154 F. 925. Pineapples in their own juice with sugar added only for flavoring held dutiable as pineapples preserved in their own juice, and not as fruit preserved in sugar. United States v. Johnson & Co. [C. C. A.] 152 F. 164; Dudley & Co. v. U. S. [C. C. A.] 153 F. 881, rvg. 148 F. 333. But sugar, though not capable of use without refining, dutiable as "sugar above number sixteen Dutch standard in color." Franklin Sugar Refining Co. v. U. S., 153 F. 653. So-called dragees, small sugar and starch pellets with silver coatings used for decorating cakes or confectionery, held not "confectionery" or "sugar candy." La Manna v. U. S., 154 F. 955. Wafers and biscuits with sweet centers and pastry envelopes not dutiable directly or by similitude as confectionery. United States v. Meadows & Co., 147 F. 757. Dried mushrooms in sealed tins dutiable as mushrooms "prepared or preserved in tins." Choy Chong Woh & Co. v. U. S. [C. C. A.] 153 F. 879.

Animals and animal products: Pieces of fur sewn together for convenience or safety only dutiable as "dressed furs on the skin," and not as articles made of fur. Fleet v. U. S., 148 F. 335. "Hares combings" used as adulterant in cheap hats dutiable as waste, and not as furs undressed or furs prepared, for hatters' use. United States v. Hatters' Fur Exch., 153 F. 595. Hides of East India buffalo dutiable as "hides of cattle." United States v. Schmoll, 154 F. 734. Mocha hair on the skin held free as skins and hides not specially provided for, and not dutiable as "wool" on the skin. Goat & Sheepskin Import Co. v. U. S., 206 U. S. 194, 51 Law. Ed. 1022. "Ghee" dutiable as butter and substitutes therefor. Sahadi Bros. v. U. S., 152 F. 486. "Wool grease" includes a refined wool grease commercially known as wool grease. Swan & Finch Co. v. U. S., 149 F. 304. Blood charcoal composed chiefly of carbon and used for decolorizing sugar not carbon, but either bone char by similitude, or unenumerated manufacture. United States v. Lueders & Co., 148 F. 398. Mother-of-pearl in slabs for knife handles, etc., held dutiable as manufactures of mother-of-pearl. Morris European & American Exp. Co. v. U. S., 150 F. 608. Unenumerated feather boas strung on cotton cord dutiable as feathers dressed or advanced. Legg v. U. S., 154 F. 858.

Art goods, toys, and ornaments: Highly artistic bronze and ivory statue held "statuary." Tiffany & Co. v. U. S., 154 F. 168. China with brown stain on sloping underside dutiable as decorated china. United States v. Thurnauer & Bro., 152 F. 660. Beads should not be classified as "not threaded or strung" because strung only temporarily. Frankenberg Co. v. U. S. [C. C. A.] 146 F. 63; Id., 206 U. S. 224, 51 Law. Ed. 1034. Metal figures of animals generally used as mantel or cabinet ornaments, not toys, but articles of metal. Samstag & Hilder Bros Co. v. U. S., 154 F. 756. Leaves treated so as to restore natural appearance and prevent decay dutiable as artificial or ornamental leaves though some were in wreaths on frames. Kreshower v. U. S., 152 F. 485. Miniature frames of precious metals set with precious stones but not used for personal adornment not jewelry, but articles composed in part of metal. United States v. Knoedler & Co., 154 F. 928. Chatelaine purses plated in imitation of gold and silver not jewelry. Steinhardt & Co. v. U. S., 148 F. 512.

Books and papers: "Books containing illuminated lithographic prints" does not include books with only one print on front cover. Dutton & Co. v. U. S., 154 F. 214. Marbleized paper, though hand made, dutiable as surface-coated paper. Seyd v. U. S., 152 F. 657. Hand-made India transfer paper used for lithographic transfers and in printing dutiable as hand-made papers. Benneche & Bro. v. U. S. [C. C. A.] 153 F. 861. Filtering paper dutiable as such though cut into disks ready for filtering. Murphy & Co. v. U. S., 148 F. 336. Lace paper doilies, covers, etc., for packing confectionery, with names and addresses of merchants on them, dutiable not as paper or printed matter but as manufactures of paper. United States v. Hensel, Bruckmann & Lorbacher, 152 F. 578. Box tops made of surface-coated paper with designs printed by litographic process held dutiable as printed surface-coated papers and not as lithographic prints. Devoy v. U. S., 147 F. 765.

Beverages: "Sake" is dutiable as an unenumerated manufacture and not by similitude as beer or wine. Stratton v. Komada & Co., 148 F. 125.

Chemicals and medicines: So-called bleachers' blue used solely as a bleaching mixture dutiable as coal tar products, not colors or dyes. Abram De Ronde & Co. v. U. S., 148 F. 653. Bromofluorescic acid dutiable as a coal tar color or dye. United States v. Kuttroff, Pickhardt & Co., 147 F. 758. Dried lizzards for Chinese medicine held drugs. Wing On Wo v. U. S., 148 F. 334. Powdered opium dutiable not as "opium crude or manufactured" but as a drug advanced in value or condition. Merck v. U. S. [C. C. A.] 151

F. 14. Floral waters dutiable as unenumerated manufactured articles, and not as medicinal preparations. Euler & Robeson v. U. S., 147 F. 765. Fruit juice concentrated and medicated but used only as an ingredient in the preparation of medicine not a medicinal preparation. Richard & Co. v. U. S, 147 F. 891. Creolin-Pearson not a medical preparation. Merck & Co. v. U. S., 147 F. 895. Paraldehyde dutiable as a medical preparation in preparation of which alcohol is not used. Merck & Co. v. U. S, 147 F. 895. Hexamethylentetramin dutiable as a medicinal preparation in which alcohol is not used. Lehn & Fink v. U. S., 147 F. 640. "Bone-size substitute" consisting of chemical starch, dextrin, etc., and used for stiffening backs of fabrics, held not a preparation fit for use as starch, but a chemical compound. United States v. Ducas & Co., 149 F. 253. Olive oil in five-gallon tins, sold in such form not to consumer but to hotels and retail dealers, dutiable as olive oil not specially provided for. United States v. La Manna, Azema & Farnan, 154 F. 927. "Oils commonly used in soap making, and fit only for such uses," does not include so-called "oleic acid" or red oil, fit for other uses though commonly used as soap stock. Edward Hill's Sons & Co. v. U. S. [C. C. A.] 151 F. 475. Sheep dip not free where used also as a disinfectant and otherwise. Shallus v. Stone, 150 F. 605; Moody v. Patterson, 153 F. 830.

Minerals, metals, and manufactures thereof: Molders' patterns used as models about which to form sand molds in which castings may be made held free. United States v. Hoe & Co. [C. C. A.] 147 F. 201. "Castings" does not include articles advanced in condition after casting. Bromley & Sons v. U. S., 154 F. 399. Fitted and finished machinery parts dutiable as manufactures of metal. Lehigh Mfg. Co. v. U. S., 153 F. 596. So-called arched Purves furnaces dutiable as boiler tubes or flues. Thomas v. Vandegrift & Co., 153 F. 591. Certain machine forgings not within provision for "forgings of whatever degree or stage of manufacture." Prosser & Son v. U. S., 154 F. 721. Draw plates and wortles manufactured from steel bars or plates dutiable as articles wholly or in part of steel. United States v. Newman Wire Co., 152 F. 488. Nickel plates for suspension in a bath for nickel plating dutiable as manufactures of nickel. Hermann Boker & Co. v. U. S., 152 F. 589. Steel strips whose only polish or brightening is that incidentally acquired in the cold-rolling not dutiable as strips brightened or polished better than "cold-rolled smoothed only." United States v. Crucible Steel Co., 147 F. 537. Wire screw rods cold rolled merely to facilitate their insertion in screw-making machines, and thus incidentally polished, dutiable as wire screw rods, and not as polished iron rods. Nash & Co. v. U. S., 152 F. 573. Thin and narrow coils of steel from fifty to two hundred feet long not "sheet steel in strips." Boker & Co. v. U. S., 154 F. 174. Steel wool dutiable under provision for "steel in all forms and shapes." United States v. Buehne Steel Wool Co., 154 F. 93. Old fish plates good only as scrap steel not dutiable as railway fish plates, but as scrap steel fit only to be manufactured. Ginsburg & Sons v. U. S., 147 F. 531. New steel rails, though defective, not scrap steel, but dutiable as rails, though intended to be used as scrap iron. Illinois Cent. R. Co. v. McCall, 147 F. 925. Old iron chains not free as old junk, but dutiable as scrap iron fit only for remanufacture. Sheldon & Co. v. U. S., 152 F. 318.

Miscellaneous manufactures: Fancy bottles with metal mountings dutiable as manufactures of metal and glass, and not as "plain glass bottles." Cross Co. v. U. S., 150 F. 610. Glassware ornamented with metal filigree work, dutiable as ornamented articles of glass, and this regardless of component of chief value. Gallenkamp v. Rachman, 147 F. 769. Needle cases with steel needles constituting the element of chief value dutiable as unenumerated manufactures in chief value of needles. Dieckerhoff, Raffler & Co. v. U. S., 151 F. 957. Needle books containing needles held dutiable as unusual coverings designed for a use otherwise than in bona fide transportation. Guthman, Solomons & Co. v. U. S., 148 F. 332. Metal button shanks dutiable as "button molds." Hormann, Schutte & Co. v. U. S. [C. C. A.] 153 F. 868. Provision for buttons should be construed as including molds. Id. Flat, circular toilet powder puffs, dutiable as manufacture of wool, and not as "brushes." United States v. Borgfeldt & Co., 153 F. 480. Magnesite brick dutiable as brick other than fire brick. United States v. Hempstead & Son, 153 F. 483. Hauteville stone for decorative work in buildings dutiable as marble, and not as limestone not provided for. Bockmann v. U. S., 154 F. 1000. Whetstone blocks roughly dressed dutiable as crude minerals not advanced by grinding, etc. Johnson & Co. v. U. S., 152 F. 656. An automobile held free as "household effects" used abroad not less than a year. Hillhouse v. U. S. [C. C. A.] 152 F. 163.

Pearls and precious stones: "Imitation precious stones not exceeding an inch in 'dimensions'" includes stones exceeding an inch in only one direction. Lorsch & Co. v. U. S. [C. C. A.] 146 F. 379. Cut pieces of agate used as scale bearings dutiable as precious stones, and not as manufactures of agate. United States v Albert Lorsch & Co., 152 F. 591. **Contra.** Smith v. Computing Scale Co., 147 F. 890. Sapphires for bearings for electrical instruments dutiable as precious stones. United States v. American Exp. Co., 147 F. 894.

Textiles and manufactures thereof; wearing apparel: Cotton cloth with black dots produced by work threads not necessary to complete fabric dutiable under par. 313. Gitterman & Co. v. U. S., 154 F. 169. "Cotton table damask" held to include finished article as well as goods in piece. Dunham & Co. v. U. S. [C. C. A.] 150 F. 562. Finished cotton blankets with whipped or hemmed edges dutiable as cotton cloth. United States v. Bernhard, 150 F. 375. "Embroidery cottons" held not to include so-called No. 60 5-ply thread or yarn used in embroidering machines. Loeb & Schoenfeld v. U. S. [C. C. A.] 150 F. 327. Openwork fabrics held dutiable as "cotton cloth not exceeding one hundred threads to square inch, counting warp and filling," though substantial portions had no warp and other substantial portions no filling. Quaintance v. U. S., 147 F. 753; Schade & Co. v. U. S., 147 F. 893. Fabrics held dutiable as goods in chief value of flax, and not as goods in part of

of deception they have the right to obtain the lowest classification for their goods.[69]

§ 3. *Administration of customs laws. In general.*[70]—Merchandise withdrawn from a bonded warehouse must be assessed on the basis of weight at the time of original entry, though it has lost in weight through evaporation of moisture.[71] Other cases on the ascertainment of dutiable quantity and quality are given below.[72]

Duties must be assessed in accordance with the actual market value in the country whence the goods are imported, and in the condition in which they are there bought and sold for exportation.[73] So-called converters' commissions are properly included in the appraised value so far as it covers services in having goods dyed and finished.[74] An appraiser may not legally advance the value of merchandise not actually before him and not represented by samples, though he may have before him

wool. United States v. Walsh, 154 F. 749; United States v. Wilkinson Co., 154 F. 751; United States v. Johnson & Co., 154 F. 752. Provision that "all manufactures of which wool is a component material shall be classified as manufactures of wool" relates only to goods composed of wool and silk. United States v. Walsh, 154 F. 749; United States v. Wilkinson Co., 154 F. 751; United States v. Walsh [C. C. A.] 154 F. 770. "Cotton laces." Mills v. Robertson, 147 F. 634. "Crochet yokes" used on yoke of women's vests held ornaments, and not trimmings or lace. Loewenthal & Co. v. U. S., 147 F. 774. Straw laces sewn together with cotton thread not covered by provisions relative to articles "composed wholly" of straw. Schmitz v. U. S. [C. C. A.] 146 F. 127. Cotton lace collars held articles made of lace though not made of lace bought and sold by the yard. Goldenberg Bros. & Co. v. U. S., 152 F. 658. Women's collars and cuffs made of braids and ornamented with threads not articles of lace. Hesse & Bro. v. U. S., 154 F. 171. Artificial silk yarn held dutiable by similitude as cotton yarn, and not as silk yarn. Hardt Von Bernuth & Co. v. U. S. [C. C. A.] 146 F. 61. Ribbons chiefly of silk but in part of cotton dutiable as manufactures of silk, and not as ribbons of cotton. Gartner, Sons & Co. v. U. S., 154 F. 957. Silk embroidered screens with wooden frames dutiable as silk embroidered articles. Lichtenstein Millinery Co. v. U. S., 154 F 736. "Silk cocoons and silk waste" enumerated as free includes only articles not manufactured at all. Fawcett v. U. S., 146 F. 83. Silk combed, though afterwards caught in the machines and rendered dirty, is dutiable as combed silk. Id. "Panne velvets" dutiable as "plush," and not as "velvets" United States v. Silberstein, Castell & Co. [C. C. A.] 153 F. 965. Goods made on Jacquard loom and containing two or more colors in filling. Bassett, McNab & Co. v. U. S., 154 F 681. Certain "drawnwork" goods dutiable as embroidered articles. Beach v. Sharpe, 154 F. 543. Hats with fur bodies but with silk trimmings as chief value dutiable as silk wearing apparel, and not as hats in chief value of fur Rheims Co. v. U. S, 154 F. 969.

69. Stone & Downer Co. v. U. S., 147 F. 603.

70. See 7 C. L. 1024.

71. Leaf tobacco so dutiable under § 33 of act of 1897 despite § 20 of customs administrative act providing that same rate shall be collected as may be imposed by law upon like merchandise at time of withdrawal. United States v. Falk & Bro., 204 U. S. 143, 51 Law. Ed. 411. **Contra.** American Cigar Co. v. U. S. [C. C. A.] 146 F. 484

72. The wine or liquid gallon is the only one adopted or recognized by the Federal government. Dry olives should be measured by the liquid gallon, and not by the dry. Ceballos v. U. S. [C. C. A.] 146 F. 380. Where a commodity is dutiable at a certain rate per gallon, the actual quantity should be ascertained though the importation is in gallon cans. Quantity of olive oil ascertained by weight though described as being in "gallon tin cans." United States v. Zucca & Co., 154 F 172. Under the provision for fish in tins, the actual capacity of the tins, rather than the quantity of fish in them should be considered. Gandolfi & Co. v. U. S., 152 F. 656. Where water is added to berries put up in barrels, to serve only as a cushion to prevent crushing, in assessing duty "per quart" the dry, not the liquid, quart should be used. United States v. Boak Fish Co., 146 F. 104. Congress assumed to have known of practice of treasury department to consider fifty-seven pounds of onions as a bushel. Hills Bros. Co. v. U. S. [C. C. A.] 151 F. 476. Fractions of degrees though small will not be disregarded in making polariscopic tests of sugar. 56,025 held "56 and above." United States v. Lueder [C. C. A.] 154 F. 1. The method employed by the customs officials in the ascertainment of dutiable quantity should not be disturbed in the absence of a clear showing of unfairness or injustice. United States v. Zucca & Co., 154 F. 172.

73. White and colored wool sold together at one price abroad without distinction as to color should be assessed at that price. Gulbenkian & Co. v. U. S. [C. C. A.] 153 F. 858. It is the duty of appraisers to find the actual market value of the merchandise, regardless of invoices or statements of cost. Appraisement from erroneous pro forma invoice simply because stated value was sufficiently high held invalid. United States v. Muller, Maclean & Co., 152 F. 575.

74. And as to other items, inclusion will be presumed correct in absence of evidence to contrary. Erlanger, Blumgart & Co. v. U. S. [C. C. A.] 154 F. 949; Id., 152 F. 576.

one package out of ten.[75] It will be presumed that in making a reappraisement return the board of general appraisers included the value of coverings where they fail to state whether the coverings were included.[76] In making an addition to the invoice value at the time of entry in order to prevent penal duties, an importer should state the added value with sufficient definiteness to enable the customs officials to ascertain the amount,[77] but mere reference to an item is sufficient if the amount is officially known to the officials.[78] An appraisement by the local appraiser is presumed valid,[79] and, in the absence of evidence showing it to be invalid, it cannot be set aside by a mere appeal resulting in no valid reappraisement,[80] but the rule that an appraisement is conclusive unless reviewed by reappraisement does not apply where the appraiser proceeds on a wrong principle.[81]

Whether goods are subject to double or treble duty depends upon the construction of the particular provisions under which they fall.[82] The additional duty imposed for unusual coverings used otherwise than in the bona fide transportation to the United States should be imposed in addition to the duty on the covering as a shipping box or package and not only as a substitute.[83] Where the value of goods is understated in the entry, and the quantity is understated in the invoice, additional duties should be collected on the excess in quantity over that stated in the invoice as well as on the value in excess of that declared in the entry.[84] Wool which has been changed in its character or condition for the purpose of evading duty is subject to twice the duty to which it would otherwise be subject.[85] Countervailing duties on the products of crude petroleum should be based on the duty imposed by the country where the products are produced.[86]

The customs administrative act empowers the secretary of treasury to authorize the board of general appraisers to adopt rules for the avoidance of conflicting decisions,[87] and where in accordance with a rule duly and regularly adopted [88] a case

75. The ten must be of the same kind of goods to render one a sufficient representation. United States v. Beer [C. C. A.] 150 F. 566.

76. Importers held entitled to deductions for the value of coverings under provision relating to dutiable value of chocolate. United States v. Thomas Leeming & Co., 153 F. 489.

77. Woodruff & Co. v. U. S., 154 F. 861.

78. Direction to add a specified sum subject to reduction for charges for bringing goods to importer's residence. Woodruff & Co. v. U. S., 154 F. 861.

79. United States v. Curnen [C. C. A.] 146 F. 45. It will be presumed that a collector properly discharged his duty by the appointment of a duly qualified merchant appraiser as required by statute, and the burden is on him who seeks to show incompetency. Must be clearly shown that appointee was not familiar with the character and value of the goods. Evidence insufficient. Erhardt v. Ballin [C. C. A.] 150 F. 529.

80. Duty assessable on value found by local appraiser rather than invoice value. United States v. Curnen [C. C. A.] 146 F. 45.

81. Advancing values of goods not represented by samples before him. United States v. Beer [C. C. A.] 150 F. 566. Where appraisement is evidently made contrary to law. United States v. Muller, Maclean & Co., 152 F. 575. Where it was claimed commissions had been improperly included in dutiable value. Erlanger, Blumgart & Co. v. U. S., 152 F. 576. Appraisers' valuation may be attacked where it includes items independent of actual value. Erlanger Blumgart & Co. v. U. S. [C. C. A.] 154 F. 949.

82. Statute construed, and held figured cotton cloth valued at over eleven, twelve, and twelve and one-half cents a square yard is liable to ad valorem duty imposed by par. 306, 307, in addition to duty imposed by par. 313. United States v. George Riggs & Co., 203 U. S. 136, 51 Law. Ed. 127. Articles made of coated steel wire are not subject to additional duty for the coating. Burditt & Williams Co. v. U. S. [C. C. A.] 153 F. 67; rvg. Id., 147 F. 892.

83. United States v. Park & Tilford [C. C. A.] 152 F. 142.

84. United States v. Thomas Leeming & Co., 153 F. 489.

85. Mechanical or chemical change not necessary, but mixture of white and black Iceland wools which have always been dealt in separately held within the statute. Stone & Downer Co. v. U. S., 147 F. 603. Provision for doubling duty applicable only to better kind (Id.), and duty doubled is that which would have been applicable to the better kind if imported unmixed (Id.). Provision for determining rate of duty according to average aggregate value of package not applicable where wool is mixed for purpose of obtaining lower duty. Id.

86. Paraffin imported from Germany held dutiable according to German duty though made from petroleum produced in Russia. United States v. Downing & Co. [C. C. A.] 146 F. 56; rvg. 135 F. 250.

87. Prosser & Son v. U. S., 154 F. 721.

is transferred to another board after a decision has been prepared but not handed down, the decision of the second board is valid.[89]

Entry.[90]—While the statutory provision authorizing the exaction of storage charges in cases where the entry is incomplete or where it is made without the specification of particulars was not affected by the section of the customs administrative act abolishing all fees,[91] it was modified by the statute legalizing the incomplete entry of "packed packages," so that no charge may be exacted in connection with the entry of such packages because it is incomplete,[92] and a fee charged by the collector to defray the expense of administering the law relative to such packages is unauthorized.[93]

Reliquidation.[94]—In the absence of fraud or protest, a settlement of duties or passage of goods free is final after the expiration of one year from the time of entry,[95] but it is not conclusive on the government before the expiration of that time,[96] and hence a collector may reliquidate an entry and assess increased duties at any time within the year, though duties first assessed have been paid and the goods withdrawn for consumption.[97] The presence of a protest relating only to a portion of an importation does not, however, give the collector the right to reliquidate as to portions to which the protest does not relate.[98] A decision of the board of general appraisers directing a reliquidation "from the invoices, samples, or record" does not require the collector to consider data outside the record made before the board.[99]

Enforcement of duties.[1]—An action to recover duties alleged to have been illegally imposed at Manila during the Philippine insurrection is not an action to recover for a tort, so as to deprive the court of claims of jurisdiction.[2] The importer and consignee will be held liable for the amount of a reliquidation.[3] In an action for unpaid duties, the circuit court has ample power to suspend the trial until the importer by payment of the duties assessed may place himself in a position to try the question of classification before the board of general appraisers.[4] The government's right to exact a proper duty cannot be destroyed by long delay on the part of the customs officials in forwarding protests to the board of general appraisers whereby the importer's evidence is impaired.[5] Liquidated duties bear interest after demand on the importer.[6]

Refund for salvage.[7]

Protests and appeals. Procedure.[8]—The board of general appraisers has jurisdiction of protests against the exaction of fees in connection with the entry of packed

88. Ratification of a regulation presumed where, after its adoption by board, the secretary of treasury conferred power to adopt it. Prosser & Son v. U. S., 154 F. 721.

89. Prosser & Son v. U. S., 154 F. 721.

90. See 7 C. L. 1027.

91. Charge not being a "fee." United States v. American Exp Co., 154 F. 996.

92. Rev. St. § 2926 modified by Act May 1, 1876. United States v. American Exp. Co., 154 F. 996.

93. United States v. American Exp. Co., 154 F. 996.

94. See 7 C. L. 1027.

95. "Entry" does not mean the entire transaction leading up to liquidation, but the act of importer in presenting to collector the document known as an entry. Cassel v. U. S., 146 F. 146.

96. United States v. Mexican International R. Co. [C. C. A.] 151 F. 545. Liquidation not necessarily final until after delivery of goods to importer. American Cigar Co. v. U. S. [C. C. A.] 146 F. 484.

97. United States v. Mexican International R. Co. [C. C. A.] 151 F. 545.

98. Cassel v. U. S., 146 F. 146.

99. United States v. Hunter [C. C. A.] 153 F. 873.

1. See 7 C. L. 1027.

2. Warner, Barnes & Co. v. U. S., 40 Ct. Cl. 1.

3. Evidence sufficient to show that a railway company through its agents was really the importer and consignee of certain goods, so as to be liable for the amount of a reliquidation. United States v. Mexican International R. Co. [C. C. A.] 151 F. 545.

4. United States v. Tiffany [C. C. A.] 153 F. 969; Id., 154 F. 740. Mere delay in payment of duties does not divest jurisdiction of board. Id.

5. Especially where delay was not intentional or negligent. Franklin Sugar Refining Co. v. U. S., 153 F. 653.

6. In cases of reliquidation, interest should be computed from date of demand at legal rate. United States v. Mexican International R. Co., 154 F. 519; United States v. Urmston, 154 F. 532.

7. See 5 C. L. 902.

8. See 7 C. L. 1027.

packages, though no entry may have been made at the custom house.[9] Importers seeking an allowance for decay of perishable imports need not avail themselves of the statute relating to abandonment of merchandise.[10] A liquidation or reliquidation is conclusive on the owner or importer unless notice of objection is given within ten days,[11] but as to merchandise in bonded warehouse a protest that the duty should be assessed on the basis of weight at time of withdrawal cannot be made until withdrawal of the merchandise from bond,[12] and is timely if made within ten days after demand for reliquidation at time of withdrawal.[13] As to goods entered for consumption, the collector's decision as to amount and rate of duty will be final, as it will also unless the importer makes payment, under timely protest, of the full amount of the duties assessed.[14] Protests must state the reasons for objections distinctly and specifically.[15] Treasury regulations relative to government tests are made for the guidance of customs officials in the assessment and collection of duties when no protest is made, and not as judicial rules on appeal to the board of general appraisers.[16]

On appeal to the circuit court, the findings of the board of general appraisers are presumed proper and justifiable.[17] An assignment of error stating that the merchandise should have been held to be covered by a certain paragraph of the free list is not sufficient where the merchandise in fact comes within another paragraph,[18] and an additional general assignment that the protest should have been sustained does not make the protest a part of the petition so as to remedy the omission.[19] Assignments of error may not be amended after expiration of time for taking additional evidence and after the case has come to trial.[20] Importers who give no evidence before the board of general appraisers other than an affidavit and samples should not be permitted to introduce "further evidence" on appeal to the circuit court,[21] but the fact that no evidence is introduced before the board or on appeal is no ground for dismissing the appeal.[22] The ordinary rules of evidence are applicable in taking proofs before appraisers, and ex parte affidavits of manufacturers are not admissible before a general appraiser sitting as referee for the introduction of evidence in the circuit court.[23] In proving the character of merchandise, actual samples are not essential, the testimony of witnesses familiar with the goods being sufficient.[24]

9. United States v. American Exp. Co., 154 F. 996.

10. Claim that fruit was decayed and not dutiable. Villari v. U. S., 147 F. 766.

11. United States v. International R. Co. [C. C. A.] 151 F. 545.

12. Protest held premature. American Cigar Co. v. U. S. [C. C. A.] 146 F. 484.

13. American Cigar Co. v. U. S. [C. C. A.] 146 F. 484.

14. Legality of rates not litigable in suit by collector, no payment having been made under protest. United States v. Tiffiany & Co [C. C. A.] 151 F. 473.

15. Protest against action of collector in considering a certain amount as entered value held sufficient. Woodruff & Co. v. U. S., 154 F. 861. Protest against rates on lithographic prints, etc., held sufficient. Fuld & Co. v. U. S. [C. C. A.] 152 F. 165. Where goods should have been classified free as "jute baggage," a protest that they should be free as "burlaps" was insufficient. Corbitt & Macleay Co. v. U. S., 153 F. 648. Objection that "said merchandise was dutiable at the appropriate rate, and under the proper paragraph according to the appropriate material of chief value," held too general. Rosenberg v. U. S., 146 F. 84.

16. In making polariscopic of sugar drainings, the board of general appraisers need not confine the evidence to government tests made according to treasury regulations, but may consider other evidence in addition. United States v. Lueder, 146 F. 149.

17. Where record was defective for loss of evidence. Schoellkopf v. U. S., 147 F. 855. Presumption of correctness of classification not overcome by testimony of officer that he was in doubt as to whether he had not erred. Thorpe & Co. v. U. S., 154 F. 864.

18, 19, 20. Vandegrift & Co. v. U. S., 154 F. 923.

21. Under provision of customs administrative act that court "may" refer case for further evidence. Mendelson & Co. v. U. S., 146 F. 78. Importers should present to the board of general appraisers all the evidence obtainable, and little weight will be given mere cumulative evidence on appeal, where it could easily have been produced before the board. Bromley & Sons v. U. S., 154 F. 399.

22. Case may be heard on facts appearing in certificate of collector. Lehigh Mfg. Co. v. U. S., 153 F. 596.

23. White & Co. v. U. S., 154 F. 175.

24. United States v. Hermann [C. C. A.] 154 F. 196.

Where of two alternative contentions in a protest the board of appraisers sustains the wrong one, and it is assigned as error that the board's decision was erroneous and that the goods were properly assessed, it may be decided on further appeal that the goods are dutiable under the other alternative.[25] A judgment of the circuit court may be reformed for the purpose of correcting computations made under it, though the term at which it was entered has ended.[26]

§ 4. *Violations of customs laws and consequences thereof.*[27]—Jurisdiction of a proceeding for a forfeiture exists only in the district where the seizure is made, which is the district in which the goods are found.[28] Proceedings must be commenced within three years after accrual of the forfeiture.[29] The provision for forfeiture and other penalties for the fraudulent entry of goods should be construed strictly,[30] and does not apply to mere errors of judgment or mistakes in description unaccompanied by any intent to defraud the government.[31] Section four of the administration act requiring the production of an invoice or declaration of merchandise,[32] and the first part of the forfeiture provision relating to entries by means of false or fraudulent statements or practices, apply only where the importation is not concealed.[33] Precious stones carried loose in a pocket of a passenger are baggage within the meaning of the customs law, and the passenger is bound to declare them the same as articles contained in his trunk.[34] An immigrant who lands and willfully omits to mention to the officials merchandise concealed upon his person is guilty of a willful act or omission by means of which the United States is deprived of lawful duties, within the meaning of the statute,[35] and is also guilty of unloading merchandise without a permit.[36] To constitute smuggling, it is not necessary that the goods shall have gone beyond the customs lines established on the dock.[37] Except in the case of common carriers, property used in transportation of smuggled merchandise is subject to forfeiture regardless of knowledge on the part of its owner of the purposes for which it is used.[38] A native and citizen of Porto Rico may maintain an action in the United States court of claims to recover the amount of a penalty exacted from him for his alleged smuggling of goods imported from the United States at a time when such goods were entitled to free entry.[39] On judgment for claimant of property seized as fraudulently imported, a certificate of reasonable cause should be entered by the court, though the verdict was clearly right where it affirmatively appears that the officers acted in good faith and on reasonable ground of suspicion.[40]

DAMAGES.

§ 1. Kinds of Damages and Their Characteristics (870). Nominal Damages (870). Liquidated Damages (870). Exemplary Damages (872). Statutory, Double, and Treble Damages (873).

§ 2. General Principles for Ascertaining

25. United States v. Hatters Fur Exchange, 153 F. 595.

26. As to amount of penal duties. Woodruff & Co. v. U. S. 154 F. 861.

27. See 7 C. L. 1028.

28. Collector could not carry goods into another district and there confer jurisdiction by formal seizure. United States v. Larkin [C. C. A.] 153 F. 113.

29. Five year forfeiture statute not applicable. United States v. Witteman [C. C. A.] 152 F. 377. Proceedings under customs administrative act for forfeiture of undervalued importations held within three year statute, and barred. Id.

30. United States v. Seventy-Five Bales of Tobacco [C. C. A.] 147 F. 127.

31. Entry of mixed wrapper and filler tobacco as "tobacco fillers" held not ground for forfeiture. United States v. Seventy-Five Bales of Tobacco [C. C. A.] 147 F. 127.

32, 33, 34. United States v. 218 1-2 Carats Loose Emeralds, 153 F. 643; Id. [C. C. A.] 154 F. 839.

35, 36. United States v. 218½ Carats Loose Emeralds, 153 F. 643.

37. Smuggling complete where passenger arrived on shore and falsely stated he had no precious stones on his person. United States v. 218½ Carats Loose Emeralds, 153 F. 643.

38. Horse and wagon, owner and driver, being without knowledge. United States v. One Black Horse, 147 F. 770.

39. Order of provisional court without jurisdiction. Narciso Basso v. U. S., 40 Ct. Cl. 202. Action did not sound in tort. Id.

40. United States v. 83 Sacks of Wood & 5,974 Sheepskins, 147 F. 747.

(874). Limitation to Natural and Proximate Consequences (874). Speculative and Prospective Damages (874). Loss of Profits (875). Difficulty or Uncertainty of Proof of Amount as Bar (875). Mitigation and Aggravation of Damages (875). Avoidable Consequences (876). Mental Suffering (876). Interest (877). Attorney's Fees (878).

§ 3. Recovery as Affected by Status of Plaintiff or Limited Interest in Property Affected (878).

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§ 6. Inadequate and Excessive Damages (906).

§ 7. Pleading, Evidence, and Procedure (912).

A. Pleading (912).
B. Evidence as to Damages (915).
C. Instructions (920).
D. Trial (924).
E. Verdicts and Findings (924).

The scope of this topic is noted below.[41]

§ 1. *Kinds of damages and their characteristics. Special damages*[42] are such as arise naturally but necessarily from the wrong complained of.[43]

Nominal damages[44] are such damages as are awarded merely in recognition of a plaintiff's right and its technical infraction.[45] They should be allowed where a breach of duty owed is established but no actual damages are proved,[46] or where there is a failure of proof as to amount of damage.[47]

Liquidated damages[48] are those the amount of which has been determined by anticipatory agreement between the parties.[49] Whether a sum stipulated to be paid

41. **This topic excludes** measure of compensation for taking property for public use (See Eminent Domain, 7 C. L. 1276) and damages for death by wrongful act (See Death by Wrongful Act, 7 C. L. 1083). What law governs as to allowance of damages is also excluded. Conflict of Laws, 9 C. L. 596.

42. See 7 C. L. 1030.

43. See post, §§ 4A, 4F, and as to pleading special damages, see § 7.

44. See 7 C. L. 1030.

45. One illegally removed from office may, on reinstatement by mandamus, recover only nominal damages, since on restoration he was entitled to all accrued emoluments. Hill v. Mayor of Boston, 193 Mass. 569, 79 N. E. 825.

46. For breach of contract to complete a theater building by a certain date, at least nominal damages. Dunnevant v. Mocksoud, 122 Mo. App. 428, 99 S. W. 515. Nominal damages should be allowed for breach of contract if no actual damages are established. American Structural Steel Co. v. Rush, 100 N. Y. S. 1019. Where liability is shown, a plaintiff is entitled to at least nominal damages. Prewitt v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 101 S. W. 812.

47. Where in an action for obstructing a passway it appears that plaintiff's rights have been invaded, he is entitled to some damages though he does not show pecuniary loss. Dewire v. Hanley, 79 Conn. 454, 65 A. 573. One suing for breach of contract has the burden of proving actual damages, otherwise a verdict for substantial damages is unauthorized. Milledgeville Water Co. v. Fowler [Ga.] 58 S. E. 643.

48. See 7 C. L. 1031.

49. Where a specified sum is stated as liquidated damages in case of breach of contract, the measure is limited to such sum. Donovan v. Hanauer [Utah] 90 P. 569. Where the owner of a building in process of construction contracted for materials and called attention to the necessity of having them furnished within a specified time, and it was agreed that the furnisher would pay $10 for each day's delay, such stipulation fixed the measure of damages. Morrison v. Richardson [Mass.] 80 N. E. 468. The fact that the owner rented a portion of the building and used a portion of the materials would not defeat recovery. Id. For breach of contract to carry mails, the bondsmen are liable for the face of the bond irrespective of actual damages sustained where the bond was given in pursuance of 18 Stat. 235, providing that the sureties shall be liable for the face of such bond as liquidated damages. United States v. U. S. Fidelity & Guaranty Co., 151 F. 534. The stipulated amount was not excessive, was not a penalty, and would be enforced. Morrison v. Richardson [Mass.] 80 N. E. 468. It is presumed that a deposit made during negotiations for a lease is made as security for damages in case of default. Brodfeld v. Schlanger, 104 N. Y. S. 369. Award of liquidated damages for breach of contract for sale of good will sustained. Skinner v. Wilson [Neb.] 107 N. W. 771.

in case of breach of contract is to be regarded as liquidated damages or a penalty is to be determined from the intention of the parties [50] as gathered from the entire contract.[51] The fact that the contract designates the sum named as one or the other is not conclusive.[52] If the damages for breach of contract are uncertain and difficult of ascertainment, the sum stipulated is usually held to be liquidated damages.[53] A provision for liquidated damages is waived when a party by his own act renders the contract incapable of performance within the time specified,[54] but not by changes in specifications which do not require extra time.[55] A stipulation for liquidated damages in case of delay in completing a contract does not apply where the contract is abandoned.[56] Liquidated damages stipulated for breach of contract may be recovered without proof of actual damages.[57] Where the right thereto depends on condition precedent, such condition must be complied with.[58] The surety for the performance of a contract is bound by a provision therein for liquidation of damages.[59]

50. Where it appears that damage approximating the amount stipulated in case of breach of contract has been sustained, the amount stipulated can be recovered. Ford v. Ingles Coal Co. [Ky.] 102 S. W. 332.

51. Whether a stipulation to pay a certain amount in case of breach of contract is one for a penalty or for liquidated damages is a question of law. Geiger v. Cawley, 146 Mich. 550, 13 Det. Leg. N. 848, 109 N. W. 1064.

Held liquidated damages: A provision in a contract for the exchange of property that either party would forfeit to the other $500 in case of breach is not to be construed as a penalty. Howard v. Adkins, 167 Ind. 184, 78 N. E. 665. An agreement to pay $200 in case of breach of a contract not to enter into a certain line of business in a certain place for five years. Geiger v. Cawley, 146 Mich. 550, 13 Det. Leg. N. 848, 109 N. W. 1064. Where in a sale of buildings the owners agreed that if at the time the sale was closed building department certificates could not be furnished, a sum should be deposited as security for damages which might flow because of such failure, but liability of vendors should not be limited thereto. Harris v. Snyder, 105 N. Y. S. 502. Where a contract for the construction of a certain appliance indicated clearly that time was deemed of great importance, a deduction of $35 per day for each day's delay will be held liquidated damages, and not penalty. United States v. Bethlehem Steel Co., 205 U. S. 105, 51 Law. Ed. 731. Contract for liquidated damages for delay in completing building sustained. Jenkins v. American Surety Co. [Wash.] 88 P. 1112.

Held a penalty: Where a mail carrier at $5.50 per year gave a bond for $800 recovered as liquidated damages, and not as a penalty. Coker v. Brevard & Co. [Miss.] 43 So. 177. Where the parties in their correspondence and contract designate a per diem sum to be withheld as a "penalty" for delay, and the sum would amount in a year to thirty-five per cent of the cost of the article, the court cannot find that it was intended as liquidated damages. Bethlehem Steel Co. v. U. S., 41 Ct. Cl. 19. A stipulation in a contract to do railroad work for $350 per mile that $50 per mile should be held back as a guaranty that the work would be completed. Henderson-Boyd Lumber Co. v. Cook [Ala.] 42 So. 838. A stipulation in a contract for the sale of land binding the vendor to keep premises in repair, insure buildings, and furnish an abstract within thirty days, and that either party would pay $500 for his breach of the contract. Boulware v. Crohn, 122 Mo. App. 571, 99 S. W. 796.

52. A stipulation in a contract that either party would pay a certain "penal sum" in case of breach is a stipulation for liquidated damages. Westbay v. Terry [Ark.] 103 S. W. 160.

53. An agreement to pay $600 in case of breach of **contract to construct a depot** in a certain place is one for liquidated damages. Jonesboro, etc., R. Co. v. Crigger [Ark.] 103 S. W. 1153. A stipulation for a certain sum per day for liquidated damages in case of failure to complete a contract within a certain time is conclusive where it is recited that the measure of damage is hard to ascertain and it so appears. Chapman Decorative Co. v. Security Mut. Life Ins. Co. [C. C. A.] 149 F. 189.

54. Callahan Road Imp. Co. v. Oneonta, 117 App. Div. 332, 101 N. Y. S. 1056.

55. Where one contracted to convert a ship into a barge within a specified time or pay a certain sum per day liquidated damages, he is not released from such liability on the ground that delay was occasioned by changes in specifications and extra work which did not affect the time required, but where delay was occasioned by a strike for which no provision had been made. Morse Dry Dock & Repair Co. v. Seaboard Transportation Co., 154 F. 90.

56. National Contracting Co. v. Hudson River Water Power Co., 118 App. Div. 665, 103 N. Y. S. 641.

57. Geiger v. Cawley, 146 Mich. 550, 13 Det. Leg. N. 848, 109 N. W. 1064; Howard v. Adkins, 167 Ind. 84, 78 N. E. 665.

58. Where a contract provides for liquidated damages in case of delay in completion unless delay is caused by owner or architect, in which case claim must be made to the owner or architect within twenty-four hours, the latter provision is binding. Clapman Decorative Co. v. Security Mut. Life Ins. Co., 149 F. 189. Where an architect's certificate was required as proof that a contract was not completed within the time specified liquidated damages could not be recovered where no such certificate was procured. Swift Co. v. Dolle, 39 Ind. App. 653, 80 N. E. 678.

59. Mercantile Trust Co. v. Hensey, 27 App. D. C. 210.

Exemplary damages.[60]—Exemplary, punitive, or vindictive damages are those awarded, not as compensation, but as punishment, and are ordinarily recoverable only in actions ex delicto.[61] In some states, provision for the allowance of such damages is made by statute.[62] Where the wrongful act was done willfully, maliciously,[3] or wantonly, violently or under other circumstances of aggravation,[64] or in conscious disregard of another's rights,[65] or where there has been such a want of care as to amount to a reckless and conscious disregard of consequences,[66] exemplary damages may be allowed. But they may not be allowed in cases of simple negligence,[67] nor

60. See 7 C. L. 1032.

61. See, however, post, § 4A. See, also, for allowance of such damages in special case, post, § 4F. The mere bringing of an unfounded action against a person is not grounds upon which to allow punitive damages. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 99 S. W. 580. Punitive damages cannot be recovered for breach of contract unless fraud is alleged and proved. Prince v. State Mut. Life Ins. Co. [S. C.] 57 S. E. 766.

62. 23 St. at Large, p. 1071, allowing punitive damages in actions for negligence of a railroad company, does not take property without due process. Osteen v. Southern R. Co. [S. C.] 57 S. E. 196.

63. Exemplary damages may be recovered where a railroad company negligently, wantonly, and maliciously **permits noxious weeds to go to seed** on the right of way and spread onto adjacent land. Doeppenschmidt v. International & G. N. R. Co. [Tex. Civ. App.] 102 S. W. 950. Exemplary damages may be given where the words uttered are slanderous per se. Held justifiable where defendant called plaintiff a thief. Conwisher v. Johnson, 127 Ill. App. 602.

64. May be recovered by one who went into a pit under an engine on the engineer's assurance that the engine would not be moved, but the engineer did move it. Chesapeake & O. R. Co. v. Satterfield, 30 Ky. L. R. 1168, 100 S. W. 844. Properly awarded where a motorman running his car at a high speed fails to get it under control until too late to prevent collision with a person whom he sees or should have seen in time to avoid the injury. South Covington & C. St. R. Co. v. Cleveland, 30 Ky. L. R. 1072, 100 S. W. 283. An action under Civ. Code 1902, §§ 2851, 2852, for wrongful death, is a new cause of action, and not the survival of an action accruing to deceased, and authorizes exemplary damages where negligence was the result of malice or willfulness. Osteen v. Southern R. Co. [S. C.] 57 S. E. 196. Punitive damages properly allowed where employes of a railroad company attempted to lay a track in a street against the protest of the city authorities. Cincinnati, H. & D. R. Co. v. Klute, 8 Ohio C. C. (N. S.) 409. Evidence of shooting at trespasser held to warrant exemplary damages. Lewis v. Fleer, 30 Pa. Super. Ct. 237.

65. Exemplary damages may be allowed where injury complained of was inflicted in a lawless manner and in utter disregard of the rights of others. Held proper in case of assault without provocation. Coal Belt Elec. R. Co. v. Young, 126 Ill. App. 651. Punitive damages may be recovered where it appears that defendants, with full knowledge of the fact that plaintiff's husband had been twice confined in an asylum because of excessive use of liquor, continued to sell him liquor. Leverenz v. Stevens, 124 Ill. App. 401. Where one who became intoxicated before entering a car, but conducted himself with moderation after the relation of passenger was established, was subjected to an unjustifiable and unprovoked assault and ejectment, a verdict in his favor will not be set aside because for a substantial sum and out of proportion to the physical injuries which he sustained. Scioto Valley Trac. Co. v. Graybill, 8 Ohio C. C. (N. S.) 469. Where railroad employes by reckless negligence caused a collision between a train and a street car at a crossing, exemplary damages are recoverable. Louisville, etc., R. Co. v. Kessee [Ky.] 103 S. W. 261. Evidence of persistent neglect to repair reservoir, by leakage of which plaintiff's land was damaged, held to warrant exemplary damages. Greeney v. Pennsylvania Water Co., 29 Pa. Super. Ct. 136. In an action under Civ. Code 1902, § 2139, for violation of § 2132, relating to signals at crossings, the jury may give punitive damages. Osteen v. Southern R. Co. [S. C.] 57 S. E. 196. The act of a railroad company in leaving a hole close to a frequented path is some evidence of wanton disregard of the rights of users of the path. Ruddell v. Seaboard Air Line R. Co., 75 S. C. 290, 55 S. E. 528.

66. Under Rev. St. Mo. 1899, § 2866, in action for wrongful death, exemplary damages may be recovered where the decedent could have recovered such damages had he lived and not otherwise. Otto Kuehne Preserving Co. v. Allen [C. C. A.] 148 F. 666. To authorize such recovery the negligent party must have acted maliciously or wantonly, or have been grossly negligent. Id. Exemplary damages are not recoverable from the bailee where, after notice from a purchaser of the subject-matter of the bailment from the bailor of his acquisition thereof, the bailee denies the title of the purchaser, justifying his conversion of the property on the theory that the property belongs to another. Riddle v. Blair [Ala.] 42 So. 560.

67. Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 S. W. 675; Covington & C. Bridge Co. v. Lillard, 29 Ky. L. R. 871, 96 S. W. 538. Error to authorize such recovery if an act was done "negligently, intentionally, or wantonly." Birmingham R. Light & Power Co. v. Wise [Ala.] 42 So. 821. Exemplary damages held not allowable for failure to give passenger reasonable time to embark. Choctaw, O. & G. R. Co. v. Cantwell, 78 Ark. 331, 95 S. W. 771. Civ. Code, § 3294, authorizing punitive damages for wrong not arising out of contract where there is oppression, fraud, or malice, does not authorize recovery of such damages for simple negligence. Spen-

where the unlawful act is done in good faith under a belief of right [68] or upon provocation.[69] An injured person is not entitled to such damages as a matter of right in any case, and whether they shall be awarded is a matter wholly within the discretion of the jury.[70] In Connecticut exemplary damages may not exceed the natural expenses of litigation in excess of taxable costs.[71] A principal is not liable in punitive damage for an act of his agent, in the absence of previous authorization or subsequent ratification,[72] but may be held so liable if such fact exists.[73]

Statutory, double, and treble damages.[74]—Statutes commonly provide for the recovery of multifold damages in certain cases.[75] Such statutes are penal and are strictly construed, and one seeking recovery thereunder must show that the statute is applicable [76] and that his case falls within its terms.[77]

cer v. San Francisco Brick Co. [Cal. App.] 89 P. 851.

Not recoverable for anything short of gross negligence. Henderson City R. Co. v. Lockett, 30 Ky. L. R. 321, 98 S. W. 303. Cannot be awarded in an action for injuries unless there is gross negligence or wanton disregard for the safety of others. Illinois Cent. R. Co. v. Lence, 30 Ky. L. R. 988, 100 S. W. 215. Where injuries occurred because of the **spreading of rails,** the mere fact that some of the ties of the road were rotten did not warrant a finding of gross negligence justifying recovery of exemplary damages. Id. Gross negligence without any evidence of willfulness, wantoness, or conscious indifference to consequences, does not justify punitive damages. Harris Lumber Co. v. Morris, 80 Ark. 260, 96 S. W. 1067.

Evidence insufficient to show gross negligence warranting recovery of punitive damages where a person was injured while alighting from a train. Louisville & N. R. Co. v. Mount [Ky.] 101 S. W. 1182. To justify recovery of punitive damages under Civ. Code, § 3294, where a negligently constructed bulk head gave way and injured property. Spencer v. San Francisco Brick Co. [Cal. App.] 89 P. 857. Evidence that a car was running at unusual speed when derailed presents a question of gross negligence, so as to authorize punitive damages. Louisville St. R. Co. v. Brownfield, 29 Ky. L. R. 1097, 96 S. W. 912.

68. Punitive damages are not recoverable for painting a sign on a wall without the owner's consent where the painter believed in good faith that he had a right to do so. Louisville Gunning System v. Knighton [Ky.] 104 S. W. 332. Refusal to permit an inspection of cotton books as prescribed by 21 St. at Large, p. 793, under advice of counsel, is a matter from which the jury may infer actual and punitive damages. Parks v. Laurens Cotton Mills, 75 S. C. 560, 56 S. E. 234.

69. Punitive damages are not allowed in action by father for illegal carnal assault on his daughter where it appears that her conduct with defendant at time of assault fell but little short of consent. Palmer v. Baum, 123 Ill. App. 584.

70. The awarding of punitive damages rests in the discretion of the jury when the evidence discloses a proper case for such award. Sneve v. Lunder, 100 Minn. 5, 110 N. W. 99. It is error for the court to direct such award in any case. Id. Punitive damages may not be directed in an action for criminal conversation. Eupes v. Nephue, 105 N. Y. S. 542.

71. Shupack v. Gordon, 79 Conn. 298, 64 A. 740.

72. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 99 S. W. 580. No evidence that an insurer authorized its agent to make false representations to an insured, or knew that they were made. Id.; Texas & P. R. Co. v. Beezley [Tex. Civ. App.] 101 S. W. 1051. Punitive damages cannot be given against a master for a tort committed by servant. East v. Brooklyn Heights R. Co., 115 App. Div. 683, 101 N. Y. S. 364. Exemplary damages recoverable against carrier for willful attack of conductor on passenger. Artherholt v. Erie Elec. Motor Co., 27 Pa. Super. Ct. 141. A carrier can be charged with punitive damages for the act of its employe only when the latter acted willfully and maliciously, or under circumstances of violence, oppression, wanton recklessness. Greenwood v. Union Trac. Co., 30 Pa. Super. Ct. 488. Punitive damages held not authorized where the conductor after declining to receive an intoxicated man pushes him from the car without ill will or violence when he attempts to board, though it throws him to the ground. Id.

73. A client may be held for exemplary damages for acts done by his attorney, though such attorney is not held liable. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 58. In an action against a walking delegate and a labor union for **procuring the discharge of a person** from his employment by means of threats to his employers, punitive damages could be recovered from the union if it directed the delegate to do the acts complained of or afterwards approved such acts. Wyeman v. Deady, 79 Conn. 414, 65 A. 129.

74. See 7 C. L. 1035.

75. Under Rev. St. 1899, § 449, ten per cent of the principal is allowed as damages for wrongful refusal to accept a foreign bill of exchange. State Bk. of Iowa Falls v. American Hardwood Lumber Co., 121 Mo. App. 324, 98 S. W. 786. Treble damages are allowed under § 7862, Gen. St. 1901, for injury in value to things therein specified by doing the acts therein specified. Atchison, etc., R. Co. v. Grant [Kan.] 89 P. 658. Under Ball. Ann. Codes & St. § 5542, double damages may be recovered in forcible entry for refusal to surrender possession on termination of lease for nonpayment or any other cause, and are not limited to cases where detainer be after default in payment of rent. Hinckley v. Casey [Wash.] 88 P. 753.

76. An action for treble damages under Code Civ. Proc. §§ 1667, 1668, for cutting or despoiling trees, can be brought only by the

§ 2. *General principles for ascertaining. Rule of strictness as between contracts and torts.*[78]—The damages recoverable for breach of contract are such as result directly and proximately therefrom,[79] or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made as a probable result of the breach.[80] In actions for tort all damages naturally and proximately resulting from the injury complained of may be recovered.[81]

Limitation to natural and proximate consequences.[82]—Only such damages as result naturally and proximately from the wrongful act complained of may be recovered.[83]

Speculative and prospective damages.[84]—Remote, conjectural, or purely theoretic and speculative,[85] or contingent damages,[86] are not recoverable.

owner of the fee. Keller v. Central Tel. & T. Co., 105 N. Y. S. 63. Where one other than the fee owner sues, he may recover actual damages only. Id. Under Rev. Pen. Code, § 712, prescribing treble damages for malicious injury to property, one in possession of the property, but not the owner thereof, cannot recover such damages. Scott v. Trebilcock [S. D.] 112 N. W. 847.

77. Treble the depreciation in the value of a farm cannot be recovered when the loss in value results not directly from the taking of soil, but from using and flooding a portion of the land by reason of a dike built in part on the farm and part on an adjoining farm of earth taken from the farm. Atchison, etc., R. Co. v. Grant [Kan.] 89 P. 658. Willfully and intentionally, within Kirby's Dig. § 1899, permitting double damages for destruction or obstruction of telephone property, implies evil intent without justification, and does not apply for destruction at time supposed to be unlawful obstruction of railroad right of way and which was a menace to safe operation. St. Louis, etc., R. Co. v. Batesville & Winerva Tel. Co., 80 Ark. 499, 97 S. W. 660.

78. See 7 C. L. 1035.

79. See post, § 4A.

80. Under a contract for water service for fire purposes, loss by fire in consequence of breach may be supposed to have been contemplated. Hunt Bros. Co. v. San Lorenzo Water Co. [Cal.] 87 P. 1093. Contract between a water company and manufacturer for installation of water service for fire protection construed and held that damages for loss by fire prior to installation of hydrant were not contemplated. Id. For breach of contract to purchase a business, the seller cannot recover damages sustained by reason of his selling his residence below market value so that he could immediately move away. Bennett v. Dyer [Me.] 66 A. 725. Where a son sent a message, evidence held insufficient to charge the company with notice that he acted as agent for his father or that the father might suffer mental anguish for delay in delivering the message. Helms v. Western Union Tel. Co., 143 N. C. 386, 55 S. E. 831. One person agreed to loan another a certain sum to aid him to furnish a place as a saloon, and the latter procured a lease, took possession of the premises, and paid two months' rent. Defendant refused to make the loan. Held defendant was not chargeable with the amount of rent paid in the absence of proof that it was in excess of the usable value of the property. Treanor v. New York Breweries Co., 51 Misc. 607, 101 N. Y. S. 189.

81. See post, § 5.

82. See 7 C. L. 1035.

83. One who is blasting with dynamite should foresee danger to persons in a house 175 yards distant from blasting without properly smothering the blast. Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778. One who is not mentioned in a telegram or whose interest is not communicated to the company cannot recover for mental anguish for delay in delivery. Helms v. Western Union Tel. Co., 143 N. C. 386, 55 S. E. 831. Evidence held insufficient to give to the jury as to whether failure of carrier to stop train was proximate cause of exposure and result of illness of plaintiff. International & G. N. R. Co v. Addison [Tex.] 17 Tex. Ct. Rep. 162, 97 S. W. 1037. Failure of carrier to give passenger proper ticket held proximate cause of inconvenience suffered by him. Texas & P. R. Co. v. Wynn [Tex. Civ. App.] 16 Tex. Ct. Rep. 817, 97 S. W. 506. Negligence of carrier in allowing passenger to alight at wrong place held not proximate cause of injury to her through fright. Florida East Coast R. Co. v. Wade [Fla.] 43 So. 775. Only such damages as naturally and proximately result from a wrongful act can be recovered. Held that warehouseman who removes goods stored from room in which he contracted to store them in another room where they were destroyed by fire is not liable for resultant loss. McRae v. Hill, 126 Ill. App. 349. Where injury resulted in part from natural causes and in part from defendant's negligence, he is liable for the injury caused by him. Carhart v. State, 115 App. Div. 1, 100 N. Y. S. 499. Where one enters the house of a woman far advanced in pregnancy and by threats against the husband causes nervous excitement which results in miscarriage, he is liable for the bodily pain suffered though no physical violence was offered (Engle v. Simmons [Ala.] 41 So. 1023), and the wife may sue therefor in her own name (Id.). Under Code 1896, §§ 2523, 2527, making damages recovered by a married woman for personal injuries her separate property, and authorizing her to sue therefor. Id.

84. See 7 C. L. 1036.

85. Bowen v. Isenburg Bros. Co. [Del.] 67 A. 152. Purely theoretic and speculative damages are too indefinite and uncertain. Chase v. Cochran [Me.] 67 A. 320. Complaint for cutting and carrying away trees held to allege purely speculative damages. Handcock v. Massee & Felton Lumber Co., 127 Ga. 698, 56 S. E. 1021. Damages based on prospec-

Loss of profits.[87]—Prospective profits which are not too speculative and remote and where they arise directly and as a natural consequence of the injury complained of may be recovered.[88] One rescinding a contract on breach by the other party cannot recover prospective profits,[89] unless the breach is of such a nature as to justify refusal to complete the contract.[90] The rule for determining prospective profits recoverable is to ascertain the difference between the cost of doing the work and what claimant was to receive, and make reasonable deduction for the less time engaged and for release from care, trouble, risk, and responsibility.[91]

Difficulty or uncertainty of proof of amount as bar.[92]—That damages are uncertain and difficult of ascertainment is no ground for disallowance.[93]

Mitigation and aggravation of damages.[94]—It is the duty of a person injured by the default of another to mitigate his damages as much as possible,[95] providing it is within his power to do so.[96]

tive operation of a sawmill are speculative. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008. For wrongful attachment of cars, profits which might have been made by hiring them out are not recoverable. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422. Where on defendant's petition a commission was appointed to investigate a contract for purchase of machines, and plaintiff claimed such petition was libelous, expenses incurred by him in defending the contract before the commission were too remote to be recovered in an action for libel. Lanston Monotype Mach. Co. v. Mergenthaler Linotype Co., 147 F. 871. No recovery can be had for damages which may result in the future by reason of excavating under the surface of land and the failure to sufficiently support it. Catlin Coal Co. v. Lloyd, 124 Ill. App. 394. Profits on a deal which might have been consummated if a telegram had been delivered promptly. Western Union Tel. Co. v. Lehman [Md.] 67 A. 241.

86. In an action on a guaranty defendant may not set off damages for breach of contract to extend credit which resulted in a debtor being closed out of business and defendant prevented from collecting a debt against him. Lefkovits v. First Nat. Bk. [Ala.] 44 So. 613.

87. See 7 C. L. 1036.

88. Profits may be recovered if it reasonably appears that they would have been made but for the breach of the contract. Wilson v. Wernwag, 217 Pa. 82, 66 A. 242. Where one seeks a recovery for electric power furnished where he failed to furnish the quantity he agreed to furnish, it may be shown that failure to do so caused the defendant to lose patronage and earnings. Vilas v. Barre & M. Trac. & Power Co., 79 Vt. 311, 65 A. 104. The rule that prospective profits cannot be recovered in a suit for breach of contract does not apply to a contract for the doing of work which the contractor expects to perform himself in part with the expectation of getting good wages or of making something out of the job. Leffler v. Witten, 8 Ohio C. C. (N. S.) 192.

Too contingent: For failure to furnish material for construction of a pipe line to carry water to a city, loss of profits on the water which would have been carried are not recoverable where such profits were dependent on various contingencies. First Nat. Bk. of Portland v. Carroll, 35 Mont. 302, 88 P. 1012. Where two parties entered into a contract for the construction of a pipe line to furnish water to a city, and one of them breached such contract, it was held that the other was not entitled to recover speculative profits nor expenditures made prior to the contract, the measure being the amount expended in reliance on the contract. Curran v. Smith [C. C. A.] 149 F. 945. No recovery can be had for speculative, conjectural or possible profits. Fact that if machinery ordered had been delivered on time purchaser could have manufactured and sold goods at a profit is too remote. Cobb Chocolate Co. v. Crocker-Wheeler Co., 125 Ill. App. 241. Loss of profits may be recovered for if direct and certain. Smith v. Kaufman, 30 Pa. Super. Ct. 265; Virginia Bridge & Iron Co. v. Crafts [Ga. App.] 58 S. E. 322.

89. Official Catalogue Co. v. American Car & Foundry Co., 120 Mo. 575, 97 S. W. 231; Meacham v. Gardner, 27 Pa. Super. Ct. 296.

90. Peet v. East Grand Forks [Minn.] 112 N. W. 1003.

91. Harris v. Faris-Kesl Const. Co. [Idaho] 89 P. 760.

92. See 7 C. L. 1038. See post, § 7B.

93. For breach of contract, Iowa-Minnesota Land Co. v. Conner [Iowa] 112 N. W. 820. When a person agreed to pay a certain portion of preferred stock to a promoter for services in organizing a corporation to exploit an asphalt mine, the promoter was not precluded from recovering the value of the stock because of uncertainty of its value for the reason that defendant willfully refrained from issuing preferred stock so that there was no market value. Crichfield v. Julia [C. C. A.] 147 F. 65. The value of such stock is to be determined with reference to the value of the assets of the corporation and its activities. Id.

94. See 7 C. L. 1038.

95. When one agreed to take from a broker the entire output of certain silk mills and provide a store for the sale of the goods, he could not, on the broker's failure to perform, continue his equipment for performance on his part and charge the broker store rent and clerk hire. Napier v. Spielmann, 103 N. Y. S. 982. It is proper to show that all means known to medical skill were resorted to by an injured person. Birmingham R. Light & Power Co. v. Moore [Ala.] 42 So. 1024.

96. In an action for breach of contract to furnish lumber to keep a mill running at full

Avoidable consequences.[97]—A person injured by the wrongful act of another may recover only such damages as an exercise of reasonable care by him would not have prevented:[98] hence, where one party to a contract breaches it, it is the duty of the other to minimize his damages.[99] Where the person injured attempts in good faith to arrest his loss but his acts result in increasing the injury, he may recover for all loss sustained.[1] An injured person must exercise ordinary care to obtain proper medical attention and treatment, but such duty extends only to the selection of a physician of ordinary skill, and he is not responsible for mistakes of the physician [2] or his lack of skill.[3]

Mental suffering.[4]—Damages for mental suffering are ordinarily allowable only where there has been bodily injury causing physical pain and the mental suffering cannot be distinguished from the physical,[5] or where there has been a malicious or willful invasion of legal rights.[6] Many courts hold that there can be no recovery

capacity, the defendant may not complain that plaintiff did nothing to lessen his damage, he being under no duty to buy lumber to keep the mill going, defendants having objected to his doing work for others. Beckman Lumber Co. v. Kittrell, 80 Ark. 228, 96 S. W. 988.

97. See 7 C. L. 1038.

98. If fraud inducing a purchase of property has been waived as a ground of rescission and the vendee has not fully performed, he may not, with full knowledge of the vitiating circumstances, continue performance voluntarily subjecting himself to damages and afterwards recover therefor. Richardson v. Lowe [C. C. A.] 149 F. 625. Damages which might have been avoided by due care on the part of one wrongfully ejected from his house may not be recovered. Davis v. Poland [Me.] 66 A. 380. On breach of a contract it is the duty of the plaintiff to do all which he reasonably can to mitigate the damages which he sustains. Taussig v. Southern Mill & Land Co. [Mo. App.] 101 S. W. 602. On breach of a contract to erect a building for plaintiff's use, it is his duty to use reasonable diligence to procure a suitable building elsewhere. Ward v. Brand, 30 Ky. L. R. 827, 99 S. W. 626. Must reduce damages. On breach of contract to put cars on private track, shipper must transport goods to place where cars are and cannot refuse to ship and claim loss of profits. Mystic Mill. Co. v. Chicago, etc., R. Co., 131 Iowa, 10, 107 N. W. 943. Where shipment of stock has been delayed, it is duty of shipper to sell on the first available market. Carrier, however, cannot complain of a failure to so sell where a higher price is eventually obtained. Tiller v. Chicago, B. & Q. R. Co. [Iowa] 112 N. W. 631.

For wrongful attachment of cars it may be shown that the owner could for a small sum have procured a replevin bond, it being his duty to lessen, etc., the injury. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422.

99. Where one party procured another to invest in mining stock on representations that he would resell the same at a profit and thereafter refused to perform his contract, the other party properly procured a surrender of a portion of the stock at the price paid. Davidor v. Bradford, 129 Wis. 524, 109 N. W. 576. Where a contractor fails to fulfill his contract, it is the duty of the other party to make reasonable exertions to mitigate damages. Ramsey v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 65 A. 461. Where a manufacturer contracted to install machinery within a certain time but foresaw that he could not comply and so warned the purchaser, it was the purchaser's duty to mitigate his losses as much as possible. Tompkins Co. v. Monticello Cotton Oil Co., 153 F. 817. On breach of contract to furnish and erect the iron work of a building it is the duty of the plaintiff to procure the work to be done with reasonable diligence and mitigate damages as much as possible. Peirce v. Cornell, 117 App. Div. 66, 102 N. Y. S. 1002. Where a party contracting for advertising for a certain time breaches his contract and rescinds, the publisher is not required to split up time or space covered by the contract, nor need he refrain from selling other unoccupied space and deprive himself of profits which but for the breach of contract he would have secured. Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702, 112 N. W. 708.

1. When an injured person in good faith attempts to arrest the loss but his acts result in increasing it, he may recover for all loss sustained. Mogollon Gold & Copper Co. v. Stout [N. M.] 91 P. 724.

2. An injured person is only required to exercise ordinary diligence, to employ a physician of reasonable skill, and injuries resulting from mistakes of the physician or from failure of means employed to effect a cure are a part of the immediate effects flowing from the original injury. Variety Mfg. Co. v. Landaker [Ill.] 81 N. E. 47.

3. Where one is injured he must do all he can to reduce the injuries, but if he puts himself in the hands of a physician and follows his advice, he is not responsible for lack of skill or judgment. O'Donnell v. Rhode Island Co. [R. I.] 66 A. 578. In an action for personal injuries, if the injured person employed a surgeon of ordinary skill and followed his directions, he may recover compensation for all damages sustained though the surgeon may not have used requisite skill or may have erred in judgment and by unskillful treatment postponed recovery. Hooper v. Bacon, 101 Me. 533, 64 A. 950.

4. See 7 C. L. 1039. See, also post, § 4F.

5, 6. Rowan v. Western Union Tel. Co. 149 F. 550.

for mere mental anguish [7] or fright [8] unaccompanied by physical injury, unless malice, inhumanity, or insult is apparent,[9] but there may be a recovery for fright which causes bodily injury.[10] The mental anguish or suffering which can be recovered for is only such as is endured as a direct consequence of the injury.[11] In many jurisdictions mental anguish alone is a proper element of recovery.[12] The right to recover for mental anguish alone is governed by the law of the place where the transaction out of which it arose was initiated.[13] Recovery may be had for mental suffering directly resulting from deformation.[14] A passenger wrongfully ejected is entitled to compensation for humiliation and mental suffering,[15] but a passenger who testified that he willingly allowed himself to be ejected in order that he might bring an action for damages cannot recover for humiliation.[16]

Interest [17] as an element of damages is recoverable if damages are liquidated,[18] but not otherwise.[19] As to whether interest as such is recoverable in tort actions, there is a conflict of authority.[20]

7. Damages for mental anguish unaccompanied by physical injury cannot be recovered for delay in delivering a death telegram by reason of which one was prevented from attending a funeral. Rowan v. Western Union Tel. Co., 149 F. 550. Mental anguish and fright are not elements where there is no bodily hurt. Harless v. Southwest Mo. Elec. R. Co., 123 Mo. App. 22, 99 S. W. 793. Mental pain and anguish alone is not ground for recovery in Georgia. Glenn v. Western Union Tel. Co., 1 Ga. App. 821, 58 S. E. 83. Doctrine disapproved. Id.

8. Fright alone is not an element of damages, but where it is followed by physical ills or gives rise to nervous and physical disturbances, an action will lie. Simone v. Rhode Island Co. [R. I.] 66 A. 202. Fright alone is not an element. Lesch v. Great Northern R. Co., 97 Minn. 503, 100 N. W. 955. Fright unattended by physical or mental injury is not ground for recovery. Williamson v. Central of Georgia R. Co., 127 Ga. 125, 56 S. E. 119.

9. Mental pain and anguish though not connected with bodily injury are elements where the charge includes matters of malice, insult, or inhumanity. Smith v. Atchison, etc., R. Co., 122 Mo. App. 85, 97 S. W. 1007.

10. For fright which nearly causes miscarriage of a woman and wrecks her nervous system, recovery may be had. Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778. Where physical injury results from fright, recovery may be had. El Paso Elec. R. Co. v. Furber [Tex. Civ. App.] 100 S. W. 1041. Where a child of tender years was willfully ejected by a street car conductor on a bleak and wintry day on the outskirts of a city, held the act of the conductor was inhuman and willful and justified recovery for mental suffering and fright, though no physical injury was sustained. Harless v. Southwest Mo. Elec. R. Co., 123 Mo. App. 22, 99 S. W. 793.

11. Bahr v. Northern Pac. R. Co. [Minn.] 112 N. W. 267. Evidence as to the number and ages of injured person's children is not admissible. Id.

12. Mental anguish is an element where the sender of a message informed the agent at the time that he wished to reach home that night in order to be with his family. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117.

13. The right to recover for mental anguish for failure to deliver a telegram sent from Virginia to North Carolina is governed by the laws of Virginia. Johnson v. Western Union Tel. Co. [N. C.] 57 S. E. 122. For mistake in sending telegram which occurred in South Carolina, damages for mental anguish of the sendee could be recovered there though it is not proven that the common-law rule as to mental anguish had been changed in Louisiana where the sendee resided. Walker v. Western Union Tel. Co., 75 S. C. 512, 56 S. E. 38.

14. Washington Times Co. v. Downey, 26 App. D. C. 258.

15. Lindsay v. Oregon Short Line R. Co. [Idaho] 90 P. 984.

16. Brenner v. Jonesboro, etc., R. Co. [Ark.] 100 S. W. 893.

17. See 7 C. L. 1041.

18. Where one was induced by fraud to part with property, the value of property is measure. Rutherford v. Irby, 1 Ga. App. 499, 57 S. E. 927. Interest is recoverable on a balance due under a written contract from the date it became due. Bauer v. Jerolman, 124 Ill. App. 151. Under Civ. Code, § 4280, providing for recovery of interest on liquidated damages, interest is allowable on a balance due a physician for professional services. Leggat v. Gerrick, 35 Mont. 91, 88 P. 788. Where architect's certificates showed that owner of a building had been damaged in a certain sum, interest was recoverable thereon from date of certificate. Tally v. Ganahl [Cal.] 90 P. 1049.

19. Interest is not allowable on unliquidated damages for breach of contract. Munson v. James Smith Woolen Machinery Co., 118 App. Div. 398, 103 N. Y. S. 502. Interest may not be recovered on an award for an unliquidated claim Devine v. Kerwin, 52 Misc. 535, 102 N. Y. S. 841.

20. Interest may not be allowed on an award for unliquidated damages. Bleakley v. Sheridan, 115 App. Div. 657, 100 N. Y. S. 1029. Interest is not recoverable on a sum awarded as damages for delay in delivering a telegram. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. In tort actions it is not obligatory upon the court or jury assessing damages to add interest from the date of the injury. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67. In an action for destruction of property, interest is

Attorney's fees[21] are not ordinarily recoverable as damages.[22] For purpose of assessing counsel's fees as damages upon dissolution of injunction, court will take judicial notice of amount of work involved in certain litigation.[23]

§ 3. *Recovery as affected by status of plaintiff or limited interest in property affected.*[24]—Recovery is allowed only to the extent of the plaintiff's ownership in the subject-matter of the action.[25] A parent suing for injuries to a child may recover expenses for medical attention furnished him.[26] A minor suing for injuries may not recover for medical expenses paid by his parent.[27] Lost earnings of an infant during minority may be recovered by the parent[28] only,[29] unless the infant has been emancipated.[30] A husband suing for injuries to his wife may recover for loss of services, society, and earnings[31] which result from the injury,[32] but not for loss of wages of other children who nursed her.[33] In Alabama a wife may recover medical expenses paid,[34] but in Georgia she may not recover for loss of wages by her husband where he is injured.[35] Defendant in an action for damages to a

not recoverable eo nomine but may be allowed as damages if the verdict does not exceed the prayer. St. Louis, etc., R. Co. v. Hooser [Tex. Civ. App.] 17 Tex. Ct. Rep. 27, 97 S. W. 708. In Florida interest is recoverable on damages awarded in tort or for breach of contract from date of accrual of cause of action. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687. The fact that damages are unliquidated is not of itself reason for disallowance of interest if they are to be computed from a fixed time and according to fixed rules of evidence. Fell v. Union Pac. R. Co. [Utah] 88 P. 1003.

21. See 7 C. L. 1041.

22. Under Rev. St. 1892, § 1724, attorney's fees are not an element in replevin. Gregory v. Woodbery [Fla.] 43 So. 504. In an action on an injunction bond attorney's fees paid in procuring its dissolution are a proper element of damages. Sullivan v. Cartier [C. C. A.] 147 F. 222.

23. Marks v. Chicago Yacht Club, 121 Ill. App. 308. Fact that knowledge acquired by counsel in working on motion to dissolve might have been used on the merits does not deprive defendant of right to counsel's fees for such work as damages upon dissolution of injunction. Id.

24. See 7 C. L. 1041.

25. An undertaking given a claimant of attached goods under Rev. St. 1906, § 5446, takes the place of the property to the extent of the interest therein which claimant may establish in a suit on the bond, and the value of said interest with interest from date of delivery of the bond to the claimant is his measure of damages. Adamson Co. v. Izor, 76 Ohio St. 64, 80 N. E. 1037. Under Rev. Laws, c. 173, § 4, an assignee of a contract can recover no greater damages for its breach than his assignor could have recovered. Earnshaw v. Whittemore [Mass.] 80 N. E. 520.

26. A parent seeking recovery for injuries to his child may recover expenses of restoring or attempting to restore the child to a healthy condition so that it could earn wages. Johnson v. St. Paul & W. Coal Co. [Wis.] 111 N. W. 722. A parent may recover expenses in nursing a child which are in excess of the ordinary services the parent is bound to render to the child. Simons v. Rhode Island Co. [R. I.] 66 A. 202. A parent suing for injuries to his child may recover for his own loss of time and expenditures in caring for the child but not for mental anguish suffered by him. Brinkman v. St. Landry Cotton Oil Co., 118 La. 835, 43 So. 458.

27. In an action by a minor for injuries, medical expenses paid by his father are not elements. Tucker v. Buffalo Cotton Mills [S. C.] 57 S. E. 626.

28. Value of loss of services of minor child is justified where extent of injuries and fact that he lived at home are shown. Drogmund v. Metropolitan St. R. Co. [Mo. App.] 98 S. W. 1091. Value of nursing rendered by parent may be recovered though there is no proof of value. Id.

29. It is error to allow a minor to recover for value of services during minority which services presumptively belong to his parents. Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789. Such error was held to have been cured by a remittitur. Id.

30. In an action by an emancipated minor testimony of value of time lost is admissible. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222.

31. For injury to wife, husband may recover for loss of services, society, aid, and comfort and compensation for diminished earning capacity. Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778. Damages to husband for loss of services of wife are inferred from the fact of injury and need not be alleged and proven. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128.

32. Damages claimed because of loss of services and companionship of wife, and expense incurred in giving her medical attention, were not the proximate consequences of the acts complained of. Sappington v. Atlanta & W. P. R. Co., 127 Ga. 178, 56 S. E. 311.

33. In an action by a husband for loss of services of his wife, loss of wages of his daughters who remained at home while the wife was incapacitated was not an element of damages. Kenan v. Metropolitan St. R. Co., 118 App. Div. 36, 103 N. Y. S. 61.

34. Under Code 1896, §§ 2521, 2526, 2527, 2529, expenses paid by a wife on account of injuries are an element. Town of Elba v. Bullard [Ala.] 44 So. 412.

35. In Georgia a wife cannot recover damages for wages or salary lost by her husband. Glenn v. Western Union Tel. Co., 1 Ga. App. 821, 58 S. E. 83.

married woman's property by the operation of trains adjacent thereto is not liable for repairs to the plaintiff's property made and paid for by her husband,[36] nor for repairs to her house made necessary by its age and natural wear and tear.[37]

§ 4. *Measure of damages for breach of contract. A. In general; miscellaneous contracts.*[38]—The damages recoverable for breach of contract are such as may be fairly and reasonably considered to arise naturally from the breach,[39] and likely to result therefrom in the ordinary course of events,[40] or such as may reasonably be supposed to have been in contemplation of the parties at the time the contract was made as a probable result of a breach.[41] Special damages can be recovered only where the party in default had notice of the special circumstances out of which such damages naturally arose.[42] Profits which it is reasonably certain would have been realized but for the breach are recoverable.[43] The application of these general prin-

36, 37. Baltimore Belt R. Co. v. Sattler [Md.] 65 A. 752.

38. See 7 C. L. 1042.

39. Only those damages which are the natural and probable result of a breach of contract and which the parties reasonably anticipate may result from its breach under the particular circumstances of the case are recoverable. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360. For breach of contract the measure is compensation for all detriment proximately caused or which in the ordinary course of things would be likely to result therefrom. Southwestern Cotton Seed Oil Co. v. Stribling, 18 Okl. 417, 89 P. 1129. All direct and proximate loss sustained, including expenses incurred in getting ready to perform, loss of time, and personal services, may be recovered. Taylor v. Spencer [Kan.] 88 P. 544. To entitle one to recover damages for breach of contract, he must show that the wrong done and the injury sustained bear towards each other the relation of cause and effect. The damages must be the proximate result of the wrong complained of. Bahr v. Manke [Neb.] 110 N. W. 300. Where one liable for certain interest contracted with another to pay it but had notice that such other person was not paying it and having neglected to pay it himself he was entitled to recover from the party liable only sums he neglected to pay with interest. Gardner v. Welch [S. D.] 110 N. W. 110. Where one is sued for breach of contract to perform certain work, it was error to allow plaintiff for labor furnished to aid defendant where plaintiff was not requested nor required to perform such work. Munson v. Smith Woolen Mach. Co., 110 App. Div. 398, 103 N. Y. S. 502. For breach of contract, not what has been suffered by the party who performed by performing, but what was suffered by failure of the other party to perform. Pope v. Graniteville Mfg. Co., 1 Ga. App. 176, 57 S. E. 949.

40. Under Civ. Code, § 3300, fixing the measure for breach of contract as the amount likely to result in the ordinary course of things, the damages are only such as may reasonably be supposed to have been contemplated by the parties at the time the contract was made in light of facts known. Hunt Bros. Co. v. San Lorenzo Water Co. [Cal.] 87 P. 1093. For breach of contract by an owner of mineral springs to furnish water to a dealer who is to have the exclusive sale thereof in a certain place, the above rule applies. Id. One who is to procure laborers and be reimbursed cannot recover for amounts paid arbitrarily and beyond the current local rate of wages. Westendorf v. Dininny, 103 App. Div. 593, 92 N. Y. S. 858.

41. The measure for breach of contract is compensation for the direct consequences of the breach such as usually occur from the infraction of like contracts and were within the contemplation of the parties at the time the contract was entered into. Sargent v. Mason [Minn.] 112 N. W. 255. Error to fail to so instruct. It must appear from the complaint that damages alleged were contemplated by the parties at the time the contract was made. Morrison-Trammell Brick Co. v. McWilliams, 127 Ga. 159, 56 S. E. 306. Under a contract whereby a party agreed to erect a store building on certain premises and conduct a general mercantile business therein, the parties may be presumed to have contracted with reference to what was usual and customary in the vicinity. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 N. W. 820. Loss of the purchaser of a scale by reason of its under-weighing held not within contemplation of parties. Wright v. Computing Scale Co. [Wash.] 91 P. 571.

42. Damages not ordinarily resulting from breach of contract are not ordinarily recoverable unless the party sought to be charged had notice of the special circumstances. Western Union Tel. Co. v. Twaddell [Tex. Civ. App.] 103 S. W. 1120. Proof of knowledge by the defaulting party at the time he makes a contract of special circumstances which make other damages than those ordinarily implied by the contract and naturally flowing from its breach will warrant recovery thereof. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360. For breach of contract to install a fire protection system within a reasonable period, damages by reason of destruction of the plant by fire before such equipment was installed may not be recoverable. Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co. [C. C. A.] 148 F. 159. For breach of contract to complete work within a specified time, notice to the defaulting party of special circumstances warranting special recovery must be proved. Korin v. Rutz, 98 N. Y. S. 845.

43. To furnish a certain amount of lumber to be planed, the profits which would have been made by doing the work. Beekman Lumber Co. v. Kittrell, 80 Ark. 228, 96 S. W. 988. For **breach of contract to furnish** enough lumber to keep a planing mill running at full capacity, damages may not be

ciples to specific contracts is illustrated in the foot note.[44] Express contracts generally furnish the basis for estimating damages.[45]

limited to what profits would have been made had lumber been furnished for ripping only as this would have left a part of the machinery idle. Id. Where two parties enter into construction work and one who agrees to furnish material fails to do so for the purpose of making the other breach his contract, the latter may recover prospective profits. Harris v. Faris-Kesl Const. Co. [Idaho] 89 P. 760.

44. **Breach of building and construction contracts:** Where a contractor was prevented by the owner from completing his contract, the measure is the contract price less what it would cost him to complete the contract. Spafford v. McNally, 130 Wis. 537, 110 N. W. 387. Where an owner prevents a contractor from completing his contract, is the value of labor performed and not the total contract price less the cost of completing the work. Valente v. Weinberg [Conn.] 67 A. 369. A certain building held, under the circumstances, not "wholly completed" on a certain date within the meaning of a **contract imposing damages for delay.** Phaneuf v. Corey, 190 Mass. 237, 76 N. E. 718. For breach of a contract to complete a structure in accordance with its terms, where the contractor had agreed with a materialman that if he did not so complete it the materialman might do so and recover all damages incurred, the second party was not limited to reasonable cost of completion but could recover actual sum expended in good faith. Baer v. Sleicher [C. C. A.] 153 F. 129. In an action to recover on a **contract for building a water tower,** which the answer alleges has not been constructed in accordance with the specifications, the proper finding for the jury to make is not the amount of money which would be required to make the tower conform to the specifications, but the diminished value of the tower by reason of the failure to construct in accordance with the specifications. Village of Madisonville v. Rosser, 8 Ohio C. C. (N. S.) 387. For breach of building contract, the sum necessary to make the building conform to the contract, or the difference in value in the building as constructed, and what it would have been worth had the contract been complied with. Forbes v. Hunter [Ky.] 102 S. W. 246. The owner may show cost of completing the house. Smith v. Davis [Ala.] 43 So. 729. It is error to authorize recovery for both profits and value of work and materials. Id. It is error to allow cost of completing work without deducting contract price. Brown v. Mader, 105 N. Y. S. 70. For breach of contract **to furnish and erect the iron work of a building,** the measure is the difference between the contract price and the cost of work. Peirce v Cornell, 117 App. Div. 66, 102 N. Y. S. 102.

For abandoning a contract before completion of a house and using inferior material in construction, the amount necessary to remedy defects and complete the building in accordance with the contract. American Surety Co. v. Lyons [Tex. Civ. App.] 16 Tex. Ct. Rep. 947, 97 S. W. 1080. Where a contractor abandons work before completing it, the measure is the difference between the cost of completing it and what the owner would have had to pay the contractor. National Contracting Co. v. Hudson River Water Power Co., 118 App. Div. 665, 103 N. Y. S. 641. Where a contractor abandons the work and the owner completes it, he will not be allowed compensation for unreasonable expenditures in completing the work. Id. Where a **contractor completes work let to subcontractor,** the reasonable expense of so doing. Seventh St. Planing Mill Co. v. Schaefer, 30 Ky. L. R. 623, 99 S. W. 341. Where **deduction from contract price** is claimed because of work done by the owner, such deduction will be allowed if it appears that it was work which the contractor should have done. Noyes v. Noullet & Co., 118 La. 888, 43 So. 539. To complete a building within the time limited, the rental value thereof. Tally v. Ganahl [Cal.] 90 P. 1049. For breach of contract to furnish labor and materials, the measure is the difference between the contract price and reasonable cost of completing the work. Jacobs v. Mandel, 104 N. Y. S. 721. Where parties enter into construction and one who has agreed to furnish material fails to do so through no fault of his own, the measure of damages is the value of the work already done and damages sustained by reason of delays and cost of appliances for executing the contract. Harris v. Faris-Kesl Const. Co. [Idaho] 89 P. 760.

For failure to deliver a life policy in accordance with agreement, the amount of premium paid. Prince v. State Mut. Life Ins. Co. [S. C.] 57 S. E. 766.

To bore a gas well 2,000 feet deep unless gas was sooner discovered and it appeared that the well was bored but 1,500 feet, the cost of cleaning and casing the well and sinking it the remaining distance. Corbin Oil & Gas Co. v. Mull, 30 Ky. L. R. 91, 97 S. W. 385.

To keep up premiums on a life policy, the amount the beneficiary would have received had the contract been performed with interest. Scheele v. Lafayette Bk., 120 Mo. App. 611, 97 S. W. 621. For **wrongfully cutting out a subscriber's telephone,** actual damages, inconvenience and annoyance. Cumberland Tel. & T. Co. v. Hobart [Miss.] 42 So. 349. For **wrongfully shutting off water,** illness of a member of the user's family is not an element unless the company had notice of such fact. Freeman v. Macon Gas Light & Water Co. [Ga.] 56 S. E. 61. For wrongfully shutting off water, evidence that the injured person had contracted for sale of water for 21 days at $20 per day does not show $420 damage, it not appearing when water was to be furnished or whether any was furnished. Calkins v. Sorosis Fruit Co. [Cal.] 88 P. 1094. Where a **manufacturer of a machine contracted with a dealer to exhibit** it at a fair but did not do so, and it was not exhibited the dealer cannot recover what it would have cost to exhibit it. Winston Cigarette Mach. Co. v. Wells-Whitehead Tobacco Co. [N. C.] 57 S. E. 148.

To bury body of child in usual manner, actual damages for mental anguish may be recovered. Wright v. Beardsley [Wash.] 89 P. 172.

For negligently performing a contract to excavate and place underpinning under a house so that the house fell, the measure is the difference between the value of the house before and after the fall. Olson v. Goerig [Wash.] 88 P. 1017.

To furnish not less than 500 cars for switching at $4 per car, the full contract price may be recovered where it appears that such rate was influenced by other provisions of the contract. International R. Co. v. Central Ice Co., 105 N. Y. S. 579.

To furnish operator and apparatus for giving a moving picture exhibition where plaintiff had purchased films is the difference between the cost and market value of the films. Pappas v. Miles, 104 N. Y. S. 369.

To take from a broker the entire output of certain silk mills, the measure is the value of the contract to the broker if performed. Napier v. Spielmann, 103 N. Y. S. 982. Under an **agreement to pay cost of doing a job** where it appears that actual cost was intended, the person doing the work is not entitled to any profit. Raisler Heating Co. v. Dowd, 52 Misc. 656, 102 N. Y. S. 504. In an action for breach of contract **to rent a hall for a dance** where the only damages proved were nominal with the exception of the deposit and sums paid to watchmen to warn people that the ball would not be held, nominal damages was all that could be recovered. Independent Trembowler Young Men's Benev. Ass'n v. Somach, 52 Misc. 538, 102 N. Y. S. 495. For breach of contract **not to engage in business within a prescribed territory,** measure of damages held to be the amount paid as consideration for such contract. Vandiver v. Robertson, 125 Mo. App. 307, 102 S. W. 659. The measure of damages for breach of a **contract to board** with plaintiff is the difference between the cost of furnishing the board contracted for and the price agreed to be paid. Dock v. Pratt, 30 Pa. Super. Ct. 598.

To return a note by a certain time in case of failure to collect, but where it does not appear that it could have been collected if returned, nominal damages only can be recovered. Kiblinger Co. v. Sauk Bk. [Wis.] 111 N. W. 709.

Contract to furnish advertising matter and other aid in making sales, the measure is the amount of loss suffered by reason of such default. Simpson v. Crane [Mich.] 13 Det. Leg. N. 1071, 110 N. W. 1081. Where a contractor fixed up athletic grounds under an agreement that he was to be paid out of the revenues, and thereafter the owner refused to permit the use of the grounds for revenue, the measure of the contractor's damages was the amount of revenues he was prevented from deriving and not the amount he expended. Dockstader v. Young Men's Christian Ass'n of Des Moines [Iowa] 109 N. W. 906. Where a company through its agent took a dealer's order for a quantity of stock food, and at the time the order was taken the agent agreed to help create a market for it and sell it but immediately thereafter quit the company, the measure of the buyer's damages was the value of the services the agent agreed to furnish. Myers Royal Spice Co. v. Griswold [Neb.] 109 N. W. 736. Where persons entered into a contract to purchase corporate stock and one party agreed to sell the stock at a profit but thereafter refused to comply, the other had a cause of action against him for damages. Davidor v. Bradford, 129 Wis. 524, 109 N. W. 576.

Not **to enter into similar business** where the plaintiff showed that his employes left and went to a firm with which defendant was connected, and it did not appear that they would not have gone there in any event, evidence held insufficient to support a judgment for damages for breach of the contract. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540. Where a **discharged bankrupt agreed to pay a discharged debt** in monthly installments and breached such contract, only installment due at the date of commencement of action could be recoverd. Nathan v. Leland, 193 Mass. 576, 79 N. E. 793.

A **stockholder who has not been given an opportunity to subscribe for his proportionate share of new stock** at the price fixed by stockholders, and who has offered to take his share at par, is entitled to the difference between the market value and the fixed price, and not the difference between the market value and the price he offered. Stokes v. Continental Trust Co. of New York, 186 N. Y. 285, 78 N. E. 1090. Where a building contract did not prescribe a penalty **for nonperformance within the time specified,** and time was not of the essence of the contract, but there was no extension of time or waiver, the measure for nonperformance within the time prescribed is the rental value. Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F. 672. Where a **contract relates to the drilling of an oil well,** the plaintiff averring that he was not permitted to perform the work, a judgment for one-half of the amount claimed as the probable difference between the cost of the work and the amount to be paid therefor will not be disturbed, in view of the expenses to be incurred and the hazards of the work. Leffler v. Witten, 8 Ohio C. C. (N. S.) 192. Where an agent agreed to sell a manufacturer goods for a year, the manufacturer to guaranty him against losses for one per cent and the agent breached the contract, the manufacturer could recover the one per cent guaranty on total sales less the losses. Wilson v. Wernwag, 217 Pa. 82, 66 A. 242. Where a person agreed to act as selling agent for a manufacturer for a year and thereafter breached the contract and the manufacturer had agreed to guaranty him against loss for failures to the extent of one per cent on sales, the sales made and the losses sustained by the agent's successor could be taken as the data on which to estimate profits due on the guaranty. Id. For **breach of warranty of an ice plant,** the measure is the difference in the value of the plant installed and its value if it had been as warranted together with the amount of expenditures occasoned or made necessary because of such breach of warranty. Wilmington Candy Co. v. Remington Mach. Co., 5 Pen. (Del.) 543, 65 A. 74.

To plow land the difference between the contract price and what it was worth to do the work. Hill v. Leigh [Tex. Civ. App.] 100 S. W. 351.

To permit one to cut and remove timber from land, the value of the timber lost. Fidelity & Deposit Co. v. Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272. For **breach of covenant** by a vendee **to erect a party wall** where it did

(§ 4) *B. Contracts for sale or purchase of land.*[46]—The measure of damages for breach of contract to sell or purchase land is ordinarily the difference between the contract price and market value[47] at the time of the breach,[48] but particular circumstances may preclude the application of this rule[49] and entitle the defaulting party to greater rights.[50] For breach of contract to convey land for a right of way the measure is the value of the land.[51]

not appear that the vendor intended to erect a building on the adjoining lot or had lost a sale of such lot because of failure to erect such wall, he was not entitled to recover damage for failure to erect such wall within the time specified in the covenant. Hagins v Sewell, 30 Ky. L. R. 750, 99 S. W. 673.

To care for growing trees for a term of years, the difference between the value of the land at the end of the term had the contract been performed and its value as it then was. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687. In an action for breach of contract **to erect a store building on certain land and conduct a mercantile business** therein, evidence held to show that if the store had been built it would have increased the value of the land $4 per acre. Iowa-Minnesota Land Co. v Conner [Iowa] 112 N. W. 820. For breach of contract to construct a store building on certain premises and conduct a general mercantile business therein, the measure is the amount the improvements would have increased the value of the land. Id. For breach of contract to construct and deliver a building free from liens, **reasonable attorney's fees are an element** where the owner was compelled to defend against mechanic's liens. Tally v. Ganahl [Cal.] 90 P. 1049. Where one having a right by contract to cut timber from certain land was sued to enjoin such cutting and for damages for trespass and hired counsel to defend such action, such **counsel fees are a proper element** of damages in an action on the injunction bond. Fidelity & Deposit Co. v. Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272.

For wrongful dishonor of a check, such temperate damages as would be reasonable compensation for the injury. Hilton v. Jesup Banking Co. [Ga.] 57 S. E. 78. In an action for wrongful dishonor of a check, evidence as to the customer's financial credit and standing is admissible though there is no claim for special damages. Id.

Where compensation is to be made in some other thing than money, and there is a refusal to perform, recovery may be had for what the specific thing is worth, to be ascertained in the usual method of finding the value of personal property. Ware v. McMurray [N. J. Law.] 64 A. 967. For failure to exercise the required degree of skill and care in tearing down a house, such damages as result from such failure. McBurnie v. Stelsly, 29 Ky. L. R. 1191, 97 S. W. 42. Where insurance agents **contracted with another to procure insurance** on his property, policies to take effecet in the future, and such policies were refused before the time they were to take effect, the agent could not recover the amount of commissions he would have received. Weingrad v. Kletzky, 52 Misc. 129, 101 N. Y. S. 588.

45. Where a contract which provided a unit price for each class of work was abandoned and completed by the owner who proved cost of completing certain items without showing anything wtih reference to other work, held the owner was not entitled to recover amount shown by his evidence, as other work might have been done for less than the contract price entitling him to a credit. National Contracting Co. v. Hudson River Water Power Co., 118 App. Div. 665, 103 N. Y. S. 641. Where the contractor proved estimated profits on other classes of work, held he was entitled to deduct such profits from the damages proved by the owner. Id. Where a building contract provided that in case of breach by the contractor an architect's certificate should show the amount expended in completing the contract, such certificate was admissible against the contractor suing to recover, though no set off was filed. Smith v. Davis [Ala.] 43 So. 729. Where a sale is not complete but the purchaser keeps the article, he is liable for its value. Holmes Mach. Co. v. Chalkley, 143 N. C. 181, 55 S. E. 524.

46. See 7 C. L. 1045.

47. For failure to convey land, the difference between the contract price and market value. Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S. W. 880. Upon breach by a vendor of a covenant to furnish an abstract in a contract which grants a time option to purchase, the measure is the difference between the contract price of the land and its value, the issue whether the vendee would have bought if the abstract was furnished is too remote. Hampton Stave Co. v. Gardner [C. C A.] 154 F. 805. Measure of damages for breach of contract to sell land is price paid and expenses incurred on faith of contract, unless fraud be shown. Glasse v. Stewart, 32 Pa. Super. Ct. 385. The measure of damages for breach of a parol contract for the sale of land is, in the absence of fraud, the purchase money paid and the actual damages incurred by the purchaser. Stephens v. Barnes, 30 Pa. Super. Ct. 127.

48. Not deficiency in price of another sale. Cowdery v. Greenlee, 126 Ga. 786, 55 S. E. 918.

49. For breach of contract to sell land where the vendor acted in good faith is **the deposit with interest and cost of investigating title** if he did not act in good faith, the excess of market value over contract price may also be recovered. Horner v. Beasley [Md.] 65 A. 820. Where the vendor in an **unrecorded contract** breached it by selling to another, the measure of the vendee's damages was the amount of payments made and value of improvements. Bartlett v. Smith, 146 Mich. 188, 13 Det. Leg. N. 713, 109 N. W. 260.

50. Where persons moved onto a farm under an oral contract to support the owner in consideration of his contract to deed them the farm, held on the breach of such contract by the landowner he was entitled to set off against the claim of the other parties proceeds of the farm used by them. Bovee v. Barrett, 116 App. Div. 20, 101 N. Y. S. 322.

51. For breach of contract to convey, a right of way is the value of the land and

(§ 4) *C. Breach of covenant as to title.*[52]—The measure of damages for breach of covenant of warranty is the purchase price paid [53] with interest [54] and costs of litigation.[55] For breach of covenant against incumbrances by the existence of a continuous easement the measure is the injury to the property at time of conveying.[56] Breach of covenant of seisin carries nominal damages.[57]

(§ 4) *D. Contracts to give lease and liabilities as between lessor and lessee.*[58] For breach of the covenant of quiet enjoyment [59] or to keep the lessee in possession,[60] wrongful eviction [61] or refusal to carry out a contract to rent premises,[62] the measure of damages is the difference between the rent reserved and the rental value, and if a landlord intentionally renders the premises uninhabitable, punitive damages may be recovered.[63] Acceptance of premises after the date specified in the lease

does not include expenses of condemning land for a right of way. Cape Girardeau & C. R. Co. v. Wingerter [Mo. App.] 101 S. W. 1113. For breach of contract to convey a right of way, where the company agreed to relocate its road, expenses incurred in relocation cannot be recovered. Id.

52. See 5 C. L. 917.

53. For breach of covenant of warranty where the purchase price was paid in goods, the value of the goods. Mayer v. Wooten [Tex. Civ. App.] 102 S. W. 423. In fixing damages for breach of covenant in a deed where it became necessary to determine value of corporate stock conveyed with the land, its value should be determined as of the date the covenant was made and not by subsequent financial condition of the corporation. Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629. For breach of the **covenant of quiet enjoyment** where the title wholly fails is the purchase price. Sweet v. Howell, 96 App. Div. 45, 89 N. Y. S. 21; Olmstead v. Rawson, 110 App. Div. 809, 97 N. Y. S. 239. In action on covenant of seisin and warranty, plaintiff may recover actual loss unless it exceeds consideration, in which case consideration with interest thereon for time for which he has been compelled to respond to evictor for mesne profits is measure of damages. Quick v. Walker, 125 Mo. App. 257, 102 S. W. 33.

54. For breach of covenant of warranty of wild land, the sum paid with interest. Yazoo & M. V. R. Co. v. Barrow [Miss.] 42 So. 345. For breach of covenant of warranty where the covenantee was liable for rent after the judgment of eviction, was entitled to interest on damages recovered. Mayer v. Wooten [Tex. Civ. App.] 102 S. W. 423.

55. For breach of covenant of warranty, the purchase price with costs of litigation. Mayer v. Wooten [Tex. Civ. App.] 102 S. W. 423. Warrantee may recover costs, attorney's fees, and for time spent in defending suit by owners of paramount title, though notice was not given where it was impossible. As where warrantor was dead and administrator had not been appointed. Quick v. Walker, 125 Mo. App. 257, 102 S. W. 33. Where by statute the covenant to warrant and defend includes covenant for possession, the covenantee may recover money necessarily expended in acquiring possession. Weatherbee v. Lillybeck, 86 Miss. 156, 38 So. 284. Cannot recover for money expended in purchasing personal trade fixtures of the tenants, though purchased to get possession. Id. But see Shook v. Laufer [Tex. Civ. App.] 100 S. W. 1042, holding that the covenantee may not recover costs of eviction suit (Shook v. Laufer [Tex. Civ. App.] 100 S. W. 1042), or attorney's fees paid in defending the title (Id.). Counsel fees incurred by a covenantee in defense of suit for eviction cannot be recovered in action for breach of covenant of warranty. Morgan v. Haley [Va.] 58 S. E. 564.

56. Error to allow the damage to the estate as of the date of trial. Bailey v. Agawam Nat. Bk., 190 Mass. 20, 76 N. E. 449.

57. Jones v. Haseltine, 124 Mo. App. 674, 102 S. W. 40. Where covenantee retained part of consideration with which to perfect title, and secured patent direct from government for less sum he can recover only nominal damages for breach of covenant of seisin. Castor v. Dufur, 133 Iowa, 536, 111 N. W. 43.

58. See 7 C. L. 1045.

59. For breach of covenant of quiet enjoyment, the measure is the difference between the rental value and the rent reserved, together with such special damages as are pleaded and proven. Herpolsheimer v. Christopher [Neb.] 111 N. W. 359.

60. For breach of covenant by a lessor to keep a lessee in possession the difference between rent reserved and rental value with such special damages as are alleged and proven. Devers v. May, 30 Ky. L. R. 528, 99 S. W. 255. All damage sustained may be recovered in one action. For breach of covenant by lessor to keep lessee in possession, evidence that the premises were worth a specified sum in excess of the rent reserved is admissible. Id. For breach of covenant by lessor to keep lessee in possession, **the lessee need not plead and prove effort to rent other land** or engage in other occupation, recovery not being for loss of time. Id.

61. The measure for wrongful eviction of a tenant is ordinarily the rental value of the premises for the unexpired term less the rent reserved. Shutt v. Lockner [Neb.] 109 N. W. 383. Special damages in addition may be awarded if they are the certain and natural result of the wrong complained of. Id.

62. For breach of contract to rent a farm for a certain rental, the difference between rent reserved and rental value. Palmer v. Ingram [Ga. App.] 58 S. E. 362. Not the difference between rent reserved and gross value of products of farm. Id. For breach of lease to let a tenant into possession, the agreed rental value. Broussard v. Hinds [Tex. Civ. App.] 101 S. W. 855.

63. Where a landlord makes his tenant's premises uninhabitable with intention of causing him to abandon his lease, punitive

is not a waiver of damages already accrued.[64] The measure for failure to give possession though founded on a legal rule, is also based upon equitable considerations.[65] Where a lessee breaches his contract of lease, the measure is the rent reserved.[66] For failure of a tenant to keep the premises free from foul weeds, the measure is the cost of restoring the land to its proper condition.[67] The measure for disturbing a light and air easement is the depreciated rental value.[68] For breach of covenant to make repairs, the cost of such repairs is the measure[69] or the difference of rental value of the premises as existing and as they would have been had the agreement been performed.[70]

(§ 4) *E. Contracts for sale or purchase of chattels.*[71]—The measure of damages for breach of contract of sale of chattels is governed by the general principles of damages applicable to all contracts.[72] The measure generally allowed is the difference between the contract price and market value,[73] together with such special dam-

damages may be recovered. Darnell v. Columbus Show Case Co. [Ga.] 58 S. E. 631.

64. Huntington Easy Payment Co. v. Parsons [W. Va.] 57 S. E. 253.

65. Which bind the tenant to such reasonable exertion as will mitigate the injury and prevent such damages as he can. Huntington Easy Payment Co. v. Parsons [W. Va.] 57 S. E. 253. Where a landlord fails to give possession on the date specified but tenders possession shortly thereafter, at which time the lessee can accept without serious inconvenience, he is limited to general damages for breach of covenant of quiet enjoyment for the period possession was withheld. Id.

66. For breach of contract of lease where the landlord elected to stand on the lease, his recovery was not lessened by the fact that he could have re-rented the premises. Davidson v. Hirsh [Tex. Civ. App.] 101 S. W. 269.

67. For breach of stipulation by a tenant to keep land free from brush and burrs, the measure is the depreciation in rental value during the period necessary to eradicate the foul growth and expense and labor necessary to restore the land to a proper condition. Brown Land Co. v. Lehman [Iowa] 112 N. W. 185. In an action against a tenant for breach of contract to keep the land free from foul weeds, where there was evidence that a special course of treatment was necessary to eradicate the foul weeds, an instruction eliminating the expense and labor so required was erroneous. Id.

68. For disturbing easement of light and air, depreciated rental value. Darnell v. Columbus Show Case Co. [Ga.] 58 S. E. 631.

69. For breach of contract of a landlord to make repairs where the ceiling fell and injured the tenant, the measure of damages is the expense of doing the work which the landlord failed to do. Schiff v. Pottlitzer, 51 Misc. 611, 101 N. Y. S. 249.

70. Gorman v. Miller, 27 Pa. Super. Ct. 62.

71. See 7 C. L. 1046.

72. See ante, § 4A. Such damages as would naturally and probably be in the contemplation of the parties at the time the contract was made. Tompkins Co. v. Monticello Cotton Oil Co., 153 F. 817. Where a **seller of machinery contracted to install machines within a specified time** and the buyer thereafter made contracts dependent for fulfillment on such installation, the seller of machinery was not liable for losses on such contracts because he failed to so install. Id. Where one agreed to install certain manufacturing machinery within a prescribed time, and in reliance on such contract the purchaser purchased a large quantity of raw material, the measure of damages is the difference between the value of the material at the time the machinery should have been ready and when it was installed. Id. Where there was no proof of such values, only the cost of putting the material in shape and value of material damaged could be recovered. Id. Under Laws 1897, p. 542, providing that on **breach of conditional sale** the vendor may recover the property, where the vendee's successor refuses to deliver it, the measure of damages is the sum of purchase price remaining unpaid. Davis v. Bliss [N. Y.] 79 N. E. 851. For breach of contract to furnish machinery for a mill, it is error to charge defendant with rental value of the mill where it did not appear that in the performance of the contract the entire mill was necessary. Munson v. Smith Woolen Mach. Co., 118 App. Div. 398, 103 N. Y. S. 502. In an action for **failure to supply mill machinery within the time specified,** evidence of rental value shown by estimate of profits the mill might have made with a satisfactory market for purchase of supplies is incompetent because too remote. Callahan Co. v. Chickasha Cotton Oil Co., 17 Okl. 544, 87 P. 331.

73. Anderson Carriage Co. v. Gilmore, 123 Mo. App. 19, 99 S. W. 766; Ansorge v. Moriarty, 103 N. Y. S. 815; Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768. This is the rule whether goods were bought for specific purpose or general purpose of buyer's business. Id. This is the rule defendant had notice of special circumstances affecting damages. Tillinghast v. Providence Cotton Mills, 143 N. C. 268, 55 S. E. 621. For breach of **contract to furnish cement,** the measure is the difference between the contract price and what it could be purchased for on the open market, and not profits which could have been made on the order. Atlas Portland Cement Co. v. Hopper, 116 App. Div. 445, 101 N. Y. S. 948. For breach of **contract to sell metal.** Moers v. Dietz, 52 Misc. 173, 101 N. Y. S. 590. For breach of **contract to sell lumber** is the difference between the contract price and the

ages as were contemplated by the parties at the time the contract was made,[74] but not those not contemplated.[75] If there is no market value for the goods, the actual value[76] as shown by the evidence[77] or lost profits[78] may be recovered. Where a vendee refuses to accept goods ready for delivery, the measure is the difference between the sale price and market value,[79] or the vendor may resell and recover the

market price at place of delivery and not the difference between the contract price and the price for which the buyer had contracted to sell it. Floyd v. Mann, 146 Mich. 356, 13 Det. Leg. N. 811, 109 N. W. 679. For **failure of a wholesaler to deliver coal within the contract time,** a retailer is not entitled to recover the difference between the wholesale price and the retail price at time and place of delivery under the contract. Stecker v. Weaver Coal & Coke Co., 116 App. Div. 772, 102 N. Y. S. 89. The measure is the difference between the contract price and the wholesale market price on delivery date. Id. A buyer seeking to recover for failure of seller to deliver goods may show what efforts he made to procure the goods in open market. Falcott v. Freedman [Mich.] 113 N. W. 13.

For breach of contract of exchange of property, the measure is the value of the property which has been received. Fagan v. Hook [Iowa] 111 N. W. 981. Where an exchange of property is rescinded for a valid reason by one party after he has parted with possession of his property his measure of damages is the value of his property. Id.

74. For failure to deliver goods sold, the natural consequences flowing from the breach and contemplated by the parties. Green v. Lineville Drug Co. [Ala.] 43 So. 216. For breach of contract to furnish wire for use in manufacture of tubing where it appeared that the buyer was required to shut down his plant because of the breach, he could recover, in addition to loss of profits, loss of rent and interest on capital invested. Nicholls v. American Steel & Wire Co., 117 App. Div. 21, 102 N. Y. S. 227. For breach of contract by a manufacturer in furnishing defective steel pipe bands, which he knew were to be used to bind certain wooden pipes, the measure is the cost of hauling, loading, unloading, distributing, counting, painting, etc. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360. But damages for loss of time, trouble, and extra work of superintendence are too remote. Id. The measure of damages for refusal of a buyer to receive the goods is the seller's loss of profit and any expense he has been put to. Ketcham v. U. S., 40 Ct. Cl. 220.

75. For refusal of a buyer to take yarn contracted for, the manufacturer cannot recover for loss on resale of wool bought two years before it was required and reserved for the contract. River Spinning Co. v. Atlantic Mills, 155 F. 466. For delay in delivering saw mill machinery, there can be no recovery for loss because of inability to fill a contract for lumber, where the carrier had no notice of such contract. Louisville & N. R. Co. v. Mink [Ky.] 103 S. W. 294. For delay in delivering oil to an ice plant, damages are not recoverable for being compelled to shut down the plant, loss while idle, profits, etc. Haberzettle v. Trinity & B. V. R. Co. [Tex. Civ. App.] 103 S. W. 219. Where a manufacturer takes an order from a jobber without notice that the jobber expects to use the goods as part of his stock in trade to offer to his customers, he is not liable for profits the jobber might have made if he had not failed to deliver in time. Holloway v. White-Dunham Shoe Co. [C. C. A.] 151 F. 216.

76. For breach of contract to take from a manufacturer certain stoves ordered where some of them had been completely manufactured and as to others parts had not been assembled, the measure is the contract price less net price received by the manufacturer for some of the stoves sold by him, also deducting cost of "assembling" stoves not completed. St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. 438, 96 S. W. 1040.

77. **For breach of contract to take stoves specially made** so that they had no market value, the reasonable value at time and place of delivery is to be ascertained by evidence of actual sales of the stoves made, and testimony of persons familiar with the stove trade. St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438, 96 S. W. 1040. Where goods had no market value, authorizing the jury to award **"reasonable selling value"** was not error. Id.

78. For refusal of seller to deliver goods, the difference between the contract and market price if the goods can be procured in the open market, otherwise lost profits. Talcott v. Freedman [Mich.] 113 N. W. 13.

79. St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438, 96 S. W. 1040; Benjamin v. Maloney, 155 F. 494; Allen v. Rushforth [Neb.] 110 N. W. 687; Hanks Foundry Co. v. Woodstock Iron Works, 127 Ga. 108, 56 S. E. 106. For breach of **contract of a railroad company to purchase ties,** the difference between contract price and cost of making the ties. Duke v. Norfolk & W. R. Co., 106 Va. 152, 55 S. E. 548. For breach of **contract to accept certain beams and channels** ordered the seller, who had ordered the material from another, could not recover the difference between the contract price and cost of material to him where the material had not been manufactured or paid for or liability incurred on the order. Isaacs v. Terry & Tench Co., 103 N. Y. S. 103. For breach of **contract to give notes for the purchase price** of property, the measure is the contract price of the property. Kelly v. Pierce [N. D.] 112 N. W. 995. For breach of **contract to purchase coal from a mining company** by refusing to take the quantity ordered, where a custom among coal dealers rendered it necessary to make such contract and the company contracted with others only for the balance of its output, the damages may be computed by deducting from the contract price, the original cost and expense of mining the coal. Thistle Coal Co. v. Rex Coal & Mining Co., 132 Iowa, 592, 109 N. W. 1094. For **refusal to accept**

difference between the contract price and price received on resale.[80] For breach of warranty as to quality, the measure is the difference between the actual value and the value if the goods had been as represented.[81] For a breach of warranty as to quality of seed sold for planting, the measure is the difference between the value of the crop produced and what would have been produced had the seed been as warranted.[82] Prospective profits reasonably certain to have been made are recoverable [83] if specially pleaded,[84] and the loss thereof was contemplated when the contract was made.[85] A purchaser of goods who discovers their unfitness for the purpose for which they were bought may not increase damages by using them.[86]

and pay for a crop of corn, the measure is the value of the corn raised less what it was worth to the grower. Pancost v. Vail [Del.] 65 A. 512. For breach of **contract to accept corporate stock** which was to be taken from one who claimed to own it, the measure is the contract price. Lydon v. Sullivan [Ky.] 101 S. W. 940. One who receives and accepts goods ordered under a contract to pay a specified price is liable for reasonable market value irrespective of invalidity of contract or the fact that the goods were of an inferior grade. Stewart v. Sachs & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 845, 96 S. W. 1091. Where one **purchased all timber on certain land** at a certain price per thousand to be removed within a certain time, but cut only large trees, the owner could recover for all timber on the land. Coat Lumber Co. v. Pope [Miss.] 43 So. 434. For breach of contract to purchase a stock of goods, evidence as to amount of fire insurance collected on the goods and disposition made of the money is admissible in reducing damages. Moritz v. Herskovitz [Wash.] 89 P. 560.

80. Reese v. Hoffecker [Del.] 65 A. 588. For breach of **contract to accept railroad ties** where there is no market value, the difference between the contract price and the price at which the owner was required to sell. Louisville & N. R. Co. v. Coyle, 30 Ky. L. R. 201, 97 S. W. 772. As to ties not manufactured at time of breach, difference between contract and selling price. Id.

81. Mark v. Williams Cooperage Co., 204 Mo. 242, 103 S. W. 20; Miller v. Aldrich, 123 Ill. App. 464. The difference in value between the goods furnished and those contracted to be furnished is the measure recoverable by the vendee in the absence of notice to the vendor of special circumstances which make other damages natural and probable. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360. For **breach of warranty of title** to personalty purchased, the measure of damages is the amount the purchaser paid because of the transaction. Caproon v. Mitchell [Neb.] 110 N. W. 378. For breach of **warranty of a machine,** the measure is the difference between the value of the machine as warranted and its actual value. Isaacs v. Wanamaker [N. Y.] 81 N. E. 763. For breach of **warranty as to quality of phosphate rock** sold, the measure is the difference between the value in the port of delivery of the rock of the quality called for and of the rock furnished. Petrified Bone Min. Co. v. Rogers, 150 F. 445. The price at which it was sold after its inferior quality was discovered is some evidence of the market value but not conclusive. Id. For **breach of warranty in sale of a horse,** the measure is the difference between its value as warranted and its value in its unsound condition. Ellison v. Simmons [Del.] 65 A. 591.

82. For breach of guaranty in sale of seed, the difference between the value of the crop grown and the value of the crop which would have been grown had the seed been as guaranteed. De Pew v. Peck Hardware Co., 105 N. Y. S. 390. In an action for selling defective seed which was so full of foul seed that the crop raised was worthless, the expense of refitting the ground and the cost of seed for second sowing were proper items of damage. Id. Where in an action for selling defective seeds the buyer proved that the seed contained seeds of weeds so that it was necessary to plow the crop under to destroy such growth, it was not necessary to prove the value of the crop which would have grown had the field not been plowed. Id. Where in an action for sale of defective seed the buyer gave evidence that the crop produced was worthless, and the seller gave no proof on the subject, it was proper to charge that the buyer was entitled to recover the value of the crop if the seed had been as represented. Id.

83. For failure of a manufacturer to deliver goods to a retailer, the profits the retailer would have made and the increase in price of the goods from the date of purchase of date delivery should have been made. Roberts, Wicks & Co. v. Lee [Ky.] 102 S. W. 300. For **refusal of buyer to take goods, specially manufactured** for him, the profit the manufacturer would have made. River Spinning Co. v. Atlantic Mills, 155 F. 466. Where one contracted with a city to furnish a boiler and then entered into a contract with a manufacturer to make it and the latter breached his contract and the boiler could not be purchased on the open market but the contractor furnished one which was accepted by the city in lieu of it, he could recover from the manufacturer the profit lost on the contract by abandoning it, or perform his contract (Crowley v. Burns Boiler & Mfg. Co., 100 Minn. 178, 110 N. W. 969), and having elected to pursue the latter course, he could recover the difference between the contract price of the manufacturer and the amount paid for the substituted boiler (Id.).

84. For breach of a wholesaler to deliver goods to a retailer, profits of the retailer is not an element to be considered unless pleaded. Stecker v. Weaver Coal & Coke Co., 116 App. Div. 772, 102 N. Y. S. 89.

85. For failure to install machinery within the time prescribed, the purchaser

(4) *F. Liability of bailees, carriers, and telegraph companies.*[87]—For loss of or nondelivery of goods, a carrier is liable for their value at the time and place they should have been delivered.[88] Where goods having no market value are lost in transportation, evidence of value at place of shipment is admissible,[89] or, if they have no market value at any place, the rule of damages is its value to the plaintiff, and in ascertaining this value inquiry may be made into the elements of the cost to plaintiff in producing it,[90] and if there is no proof of value the valuation prescribed by the bill of lading controls.[91] There is a conflict of authority as to whether a carrier can limit its liability for its negligence.[92] For delay in delivery [93] or for injury to goods in transit,[94] the measure is the depreciation in value [95] or the value of the use of the goods during the period of delay,[96] and necessary expense incurred in tracing the

may not recover profits on the manufacture and sale of a large quantity of raw material which he purchased and might have manufactured and sold if the machinery had been installed in time. Tompkins Co. v. Monticello Cotton Oil Co., 153 F. 817.

86. Unfitness of steam pipe while instaling it may not increase damage by using it. Mark v. Williams Cooperage Co., 204 Mo. 242, 103 S. W. 20.

87. See 7 C. L. 1047.

88. Not profits which the consignee would have made had he received them. Cincinnati, etc., R. Co. v. Hansford, 30 Ky. L. R. 1105, 100 S. W. 251. Where title had passed to the consignee, the value of the goods and not the cost price. Texas & P. R. Co. v. Wilson's Hack Line [Tex. Civ. App.] 101 S. W. 1042. Where **secondhand** goods have no market value, their actual value. Id. For **failure of a carrier to deliver freight damaged by Act of God** while in its possession, its value in its damaged condition. Starr-Hardnett & Edmiston Co. v. Missouri, etc., R. Co., 122 Mo. App. 26, 97 S. W. 959. In absence of evidence of peculiar conditions affecting market value at place of delivery, it may be presumed that general market value in the neighborhood of place of delivery affords measure of damages. Chaney v. Hotchkiss, 79 Conn. 104, 63 A. 947.

89. Ross v. Chicago, etc., R. Co, 190 Mo. App. 290, 95 S. W. 977.

90. Rule applied to manuscript of literary production. Southern Exp. Co. v. Owens, 146 Ala. 412, 41 So. 752.

91. For goods lost by a carrier which was not valued and there was no proof as to carrier's negligence, a clause in the bill of lading limiting the liability of the carrier to $50 was binding. Norton v. Adams Exp. Co., 123 Mo. App. 233, 100 S. W. 502.

92. Where a shipper accepted a bill of lading stamped "valuation restricted to $5 per 100 lbs.," the recovery will be limited to the amount stated, though the agent of the shipper testified that she did not understand the provision. Lansing v. New York, etc., R. Co., 52 Misc. 334, 102 N. Y. S. 1092. A stipulation in a receipt given by a carrier at time of receipt of the goods as to the value is not binding on the owner unless expressly agreed to by him. Southern Exp. Co. v. Briggs, 1 Ga. App. 294, 57 S. E. 1066. A carrier cannot limit its liability for negligence in transporting goods. McConnell Bros. v. Southern R. Co. [N. C.] 56 S. E. 965.

93. For delay in transporting merchandise, the depreciation in market value of the goods and expense caused by the delay. McKerall v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 965.

For unreasonable delay by a carrier in transportation of goods, the depreciated market value, in the absence of notice of special circumstances. Illinois Cent. R. Co. v. Nelson, 30 Ky. L. R. 114, 97 S. W. 757. Notice of special circumstances to an agent after failure of goods to arrive within a reasonable time is not sufficient to warrant recovery of special damages. Id.

94. Damages to property injured in transit are estimated on the basis of net value at place of delivery, notwithstanding a stipulation that measure should be value at point of shipment since such stipulation is void. McConnell Bros. v. Southern R. Co. [N. C.] 56 S. E. 559. A shipper of stock is not limited to damage apparent when the stock was delivered to him at the end of the carrier's line, but may show injuries subsequently discovered. Cincinnati, etc., R. Co. v. Logan, 29 Ky. L. R. 1123, 96 S. W. 910. In an action against a carrier for **wrongful exposure of hogs in transit to a virulent disease,** evidence that subsequent to the transportation the hogs communicated the disease to other hogs is admissible. Council v. St. Louis & S. F. R. Co., 123 Mo. App. 432, 100 S. W. 57.

95. For delay in shipment of goods, the difference between market value at date it should have arrived as shown by the contract price and the market price when sold, with storage charges and other necessary expense made necessary by the delay. Norfolk & W. R. Co. v. Wilkinson, 106 Va. 775, 56 S. E. 808. On contradictory evidence as to whether a shipping contract was oral or written, and the evidence tended to show actionable negligence under either theory, damages can be recovered according to the contract established. Cornelius v. Atchison, etc., R. Co., 74 Kan. 599, 87 P. 751. In an action by a buyer for the seller's refusal to deliver goods, evidence as to a fire in the buyer's store several months after the transaction is immaterial. Falcott v. Freedman [Mich.] 113 N. W. 13. Measure of damages for delay in transportation is the difference in value of article shipped at time of shipment and upon its arrival at its destination. Wabash R. Co. v. Foster, 127 Ill. App. 201.

96. For delay in delivery of baggage consisting of wearing apparel of wife and child, the value of the use of such articles during the period of delay, the fact that the wife deprived herself of certain clothing for the

goods,[97] or the measure prescribed by statute.[98] Punitive damages may be recovered for willful and wanton delay in delivering baggage,[99] but willful disregard of the shipper's rights must be apparent.[1] Injury to feelings is not an element for refusal to deliver goods until certain charges are paid.[2] Mental anguish is an element in action for mutilation of a corpse.[3] Special damages are not recoverable [4] unless the carrier had notice of the special circumstances.[5] For delay [6] or failure [7] to furnish

benefit of the child, however much to her discomfort, is no basis upon which to estimate damages. Texas & N. O. R. Co. v. Russell [Tex. Civ. App.] 17 Tex. Ct. Rep. 607, 97 S. W. 1090. A complaint by a traveling salesman against a carrier for **delay in transporting baggage** through willful negligence thereby making it impossible for him to sell goods and causing him inconvenience and loss of time does not relate to remote or special damages not within the contemplation of the parties. Webb v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 954.

97. For delay of carrier in delivering goods, the value of the use of goods during delay and expense incurred in informing company of nonreceipt. Yazoo & M. V. R. Co. v. Christmas [Miss.] 42 So. 169. For delay in delivering goods a carrier is liable for expense of telegraphing in endeavoring to trace the shipment. Haverzettle v. Trinity & B. V. R. Co. [Tex Civ. App.] 103 S. W. 219.

98. For failure of a carrier to deliver goods within a reasonable time, the measure is prescribed by Civ. Code 1895, § 2319, and where the goods have been rendered valueless by delay, the full value at time and place of delivery may be recovered. Southern Exp. Co. v. Briggs, 1 Ga. App. 294, 57 S. E. 1066. Under the statute of Arkansas permitting recovery of attorney's fees in actions against a railroad company for violation of any law regulating transportation of freight or passengers, such fee cannot be recovered where no statute was violated. St. Louis, etc., R. Co. v. Knight [Ark.] 99 S. W. 684.

99. Any willful or wanton failure to transport baggage with reasonable dispatch is a willful violation of a public duty for which punitive damages may be recovered. Webb v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 954. Punitive damages may be recovered for delay of a carrier in transporting baggage where the negligence is so gross and reckless as to assume the nature of wantonness or willfullness. Id. Punitive damages may be recovered for four days' delay in delivering baggage where there were three separate and distinct acts of negligence on the part of the carrier. Id.

1. Mistake of a carrier's clerk in billing goods to wrong destination, which was immediately corrected by sending out a tracer, and refusal of connecting carrier to deliver without payment for extra haul resulting from the mistake, does not show willful disregard of shipper's rights authorizing punitive damages. Yazoo & M. V. R. Co. v. Christmas [Miss.] 42 So. 169.

2. Recovery may not be had for injury to feelings in an action against a carrier for refusal to deliver goods until certain charges are paid. Gates v. Bekins [Wash.] 87 P. 505.

3. Mental anguish is an element in an action at the suit of a husband against a carrier for soiling and ruining the casket containing the body of his dead wife and for mutilating and disfiguring the corpse by negligently exposing it to rain. Lindh v. Great Northern R. Co., 99 Minn. 408, 109 N. W. 823.

4. Special damages cannot be recovered for delay in delivering baggage unless the carrier had notice of the special circumstances. Strange v. Atlantic Coast Line R. Co. [S. C.] 57 S. E. 724. For delay in delivery of feed for cattle where the carrier was not informed of the special elements of damages until after the contract was made, special damages could not be recovered. Patterson v. Illinois Cent. R. Co., 30 Ky. L. R. 78, 97 S. W. 426. Where a shipper notified a carrier that goods shipped were for a special purpose and were required within a limited time, it was not such notice as would render the carrier liable for special damages. McKerall v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 965. Special damages are not recoverable for delay in delivering cotton seed meal and hulls where at the time the goods were received the carrier had no notice of the urgent necessity for prompt delivery or notice of the purpose for which the shipment was intended. Illinois Cent. R. Co. v. Nelson, 30 Ky. L. R. 114, 97 S. W. 757. Cotton seed meal and hulls are not of such character as to charge a carrier with notice that prompt delivery was necessary to avoid loss on cattle to be fed. Id. For delay in delivering baggage, a passenger cannot recover for what he would have made with tools therein without allegation and proof that the carrier had notice of circumstances under which special damages are claimed. Milhous v. Atlantic Coast Line R. Co., 75 S. C. 351, 55 S. E. 764.

5. For delay in delivering baggage where the carrier had notice that it was required at a certain place at a certain time for a special purpose, the injury to such purpose, together with expense and loss of time incurred in searching for the baggage. Strange v. Atlantic Coast Line R. Co. [S. C.] 57 S. E. 724. For delay in delivering freight, such damages as normally result, as well as such as result from special circumstances known to the carrier, may be recovered. Louisville & N. R. Co. v. Mink [Ky.] 103 S. W. 294.

6. For delay in delivering cars for transportation of cattle damages caused by cattle losing flesh, and by declination of market. San Antonio, etc., R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418. For delay in transportation of cattle, shipper held entitled to recover for expense in holding the cattle until purchaser could be found, for their loss of weight, and for decline in the market price. Texas & P. R. Co. v. Arnett [Tex. Civ. App.] 101 S. W. 834.

7. For breach of contract to furnish cars for transportation of cattle, plaintiff may have full recovery, though the cattle were

cars for the delivery of cattle, the measure is the damage occasioned by declination of the market and loss of weight by the cattle,[8] and extra expense for feed.[9] A provision in a shipping contract requiring notice of damage does not apply to injuries not specified in the contract.[10]

For breach of a carrier's duty owed a passenger, at least nominal damages should be awarded,[11] and the passenger is entitled to compensation for actual damage sustained.[12] Such damages include compensation for physical inconvenience and discomfort,[13] humiliation and wounded feelings,[14] and mental and physical pain,[15] providing the circumstances are such as to give rise to mental suffering.[16]

owned jointly by himself, his brothers and father. Southern Kansas R. Co. v. Morris [Tex. Civ. App.] 99 S. W. 433.

8. For delay in furnishing cars to carry horses to T., where the horses were unloaded and sold at W., values at T. should control on the question of damages. Texas & P. R. Co. v. Shipman [Tex. Civ. App.] 17 Tex. Ct. Rep. 152, 98 S. W. 449. In an action for failure to deliver cattle in time for a certain market, evidence was admissible to show the difference in market value at the time the market was held and at the time of delivery. Baltimore & O. R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033. In an action for delay in transporting and delivering cattle in time for a certain market, it may be shown by circumstances of the case that the railroad company knew that they were intended for such market on a particular day. Id. For negligent delays in transporting cattle, the measure is the loss sustained because of decline of the market where the cattle were delivered. Missouri, etc., R. Co. v. Fry, 74 Kan. 546, 87 P. 754.

9. For delay in shipment of cattle, extra expense for feed at destination is recoverable. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152.

10. A provision in a live stock shipping contract that notice in writing of the shipper's claim for damages shall be a condition precedent to recovery for loss or injury to stock does not cover damages such as loss of market or other losses occasioned by delay. Cornelius v. Atchison, etc., R. Co., 74 Kan. 599, 87 P. 751.

11. For breach of a carrier's contract to carry a passenger to a particular place, at least nominal damages. Williamson v. Central of Georgia R. Co., 127 Ga. 125, 56 S. E. 119. For carrying a passenger beyond destination, at least nominal damages. Sappington v. Atlanta, etc., R. Co., 127 Ga. 178, 56 S. E. 311.

12. Where a carrier negligently refuses to stop, for a passenger standing at a flag station, such person may recover damages resulting, whether the action be brought ex contractu or ex delicto. Williams v. Carolina & N. W. R. Co. [N. C.] 57 S. E. 216. For ejection of a passenger who did not have a ticket because of a mistake of the ticket agent in failing to place the ticket in an envelope given the passenger, the measure of damages is the amount of the fare. Gulf, etc., R. Co. v. McCormick [Tex. Civ. App.] 100 S. W. 202. For wrongful ejection of a passenger from a train who held a ticket providing that any claim for damages resulting from bona fide mistake of the conductor should be limited to the value of the ticket, where the conductor did not act in good faith, substantial damages could be recovered. Pierson v. Illinois Cent. R. Co. [Mich.] 112 N. W. 923. The measure for wrongful ejection of a passenger is such sum as the jury believe to be fair compensation. De Board v. Camden Interstate R. Co. [W. Va.] 57 S. E. 279. Where by reason of negligence of an engineer in not seeing a signal he does not stop for a person at a flag station, such person is entitled to actual but not to punitive damages. Williams v. Carolina & N. W. R. Co. [N. C.] 57 S. E. 216.

13. Compensatory damages may be recovered for physical inconvenience, discomfort, and pain resulting from a breach of contract to reserve a drawing room in a sleeping car for a man and his wife, who in consequence are compelled to sit up the greater part of the night and to change cars twice, and a verdict of $125 recovered therefor is not excessive. Pullman Co. v. Willett, 7 Ohio C. C. (N. S.) 173. Where a carrier negligently fails to stop for a person at a flag station, such person need not wait for the next train but may walk to the next station and recover any damages he sustains. Williams v. Carolina & N. W. R. Co. [N. C.] 57 S. E. 216.

14. A passenger may recover for humiliation and wounded feelings caused by an insult offered by the carrier's servant. Wolfe v. Georgia R. & Elec. Co. [Ga. App.] 58 S. E. 899. Shame and mortification are elements for public ejection of passenger from car. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 S. W. 495. For ejection from a street car where no force or insulting language was used, compensation for humiliation, and fare paid. Camden Interstate R. Co. v. Frazier, 30 Ky. L. R. 186, 97 S. W. 776. Mortification and humiliation resulting to a passenger from being put off at the wrong station may be recovered for though punitive damages are not recoverable. Tennessee Cent. R. Co. v. Brasher's Guardian, 29 Ky. L. R. 1277, 97 S. W. 349.

15. Where a passenger was put off at a wrong station, testimony that the weather was damp and cold, roads rough, that the passenger suffered mental and physical pain, and contracted illness, was admissible. St. Louis Southwestern R. Co. v. Foster [Tex. Civ. App.] 103 S. W. 194. The company could not escape liability on the theory that damages were not contemplated. Id. A passenger put off at a wrong station may recover for a sprained ankle resulting from the mistake though caused by the long walk and not by being forced to alight from the moving train as alleged. Tennessee Cent. R. Co. v. Brasher's Guardian, 29 Ky. L. R. 1277, 97 S. W. 349.

16. Mental suffering is not an element where a carrier refused to honor mileage

Disrespectful treatment offered a passenger may be considered in aggravation of damages,[17] and disrespectful conduct on the part of the passenger may be considered in mitigation.[18] It is the duty of a passenger put off at a wrong station to mitigate damages as much as possible.[19] Punitive damages may be awarded if the circumstances show reckless disregard of consequences,[20] or of the rights of a passenger,[21] but not otherwise.[22]

Actions for failure to or delay in delivering telegrams,[23] or for erroneous transmission of a message, are usually considered ex contractu and the damages recoverable are measured by the rules applicable to other contracts.[24] The damages recoverable are such as arise naturally and directly from the wrongful act or negligence of the telegraph company,[25] or such as may reasonably be supposed to

and the holder thereof was required to borrow money from her brother to pay her fare. St. Louis S. W. R. Co. v. Crane [Tex. Civ. App.] 102 S. W. 738. Mental anguish or wounded feelings arising solely from the circumstance that a passenger was carried beyond his destination are not recoverable for. Sapington v. Atlanta & W. P. R. Co, 127 Ga. 178, 56 S. E. 311. For delay of a carrier in delivering a ticket purchased to bring one from a distant town, a carrier is not liable for the mere prolongation of mental anguish caused by such delay. Southern Pac. Co. v. Milner [Tex. Civ. App.] 100 S. W. 1170.

17. Disrespectful treatment by a master of a vessel to a woman passenger on her making a complaint that she had been assaulted and robbed may be considered in aggravation of damages. The Western States, 151 F. 929. Where one who became intoxicated before entering a car, but conducted himself with moderation after the relation of passenger was established, was subjected to an unjustifiable and unprovoked assault and ejectment, a verdict in his favor will not be set aside because for a substantial sum and out of proportion to the physical injuries which he sustained. Scioto Valley Trac. Co. v. Graybill, 8 Ohio C. C. (N. S.) 469. An instruction that a railway company is liable for actual damages caused by abusive conduct of its conductor. St. Louis S. W. R. Co. v. Granger [Tex. Civ. App.] 100 S. W. 987.

18. In an action for insults offered passengers by a conductor, a charge that the fact that the passengers insulted the conductor could be considered in mitigation of damages was erroneous as not confining such matter to unprovoked insults. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574.

19. Where a passenger has been inadvertently informed that a through train stops at a local station, she must on discovering the error minimize damages as much as possible and cannot go to the next station beyond and walk back nine miles through heat and rain. Carter v. Southern R. Co., 75 S. C. 355, 55 S. E. 771.

20. Where a passenger was pushed from a slowly moving train by the conductor at a station at which he did not wish to alight, it was proper to instruct on the question of punitive damages. Atlanta, etc., R. Co. v. Potts [Ga.] 57 S. E. 686. For willful misconduct in inducing a passenger to leave a train in the nighttime at a dangerous place, punitive damages may be recovered. Williamson v. Central of Georgia R. Co., 127 Ga. 125, 56 S. E. 119.

21. Where an engineer sees a passenger standing at a flag station and willfully refuses to stop, punitive damages may be recovered. Williams v. Carolina & N. W. R. Co. [N. C.] 57 S. E. 216. Exemplary damages may be recovered for the malicious, wanton, or willful act of a conductor in arresting and imprisoning a person on a train. Davis v. Chesapeake & O. R. Co., 61 W. Va. 246, 56 S. E. 400.

22. A passenger who gets off at the wrong station in reliance on the assurance of the conductor, who was new on the run may not recover punitive damages. Tennessee Cent. R. Co. v. Brasher's Guardian, 29 Ky. L. R. 1277, 97 S. W. 349.

23. It is not essential that the particular loss or injury should have been contemplated. Western Union Tel. Co. v. Milton [Fla.] 43 So. 539. For delay in delivering telegram the tolls paid, though the sender was not otherwise damaged. Klopf v. Western Union Tel. Co. [Tex. Civ. App.] 97 S. W. 829.

24. See ante § 4A. For incorrectly transmitting a telegram, compensation for injury proximately resulting, which were contemplated or should have been foreseen. Western Union Telegraph Co. v. Milton [Fla.] 43 So. 495. Where the sender of a telegram was unable to purchase certain goods because of delay in delivering a telegram, probable profits which might have been made were **too conjectural.** Bird v. Western Union Tel. Co. [S. C.] 56 S. E. 973. Where sender lost the sale of apples, he could recover the difference between price he would have received and price he could then have procured, and not the difference between what he would have received and what he did receive over thirty days later, plus loss for decay, repacking, etc. Thorp v. Western Union Tel. Co., 118 Mo. App. 398, 94 S. W. 554.

25. For breach of contract to transmit a telegram, **at least nominal damages.** Glenn v. Western Union Tel. Co, 1 Ga. App. 821, 58 S. E. 83. The sendee of a telegram proves a case by proving long delay in delivery and damages. Kirby v. Western Union Tel. Co. [S. C.] 58 S. E. 10. Where one was required to make a certain trip because of failure to deliver a telegram, evidence of what it cost a third person to make such trip is inadmissible, plaintiff being entitled to recover only actual expense. Salinger v. Western Union Tel. Co. [Iowa] 111 N. W. 820. Where the sender of a telegram told the agent that

have been in the contemplation of the parties as a probable result of a breach.[26] As in other contracts, it is the duty of the injured party to minimize his damages.[27] Special damages are not recoverable unless the company had notice of the special circumstances,[28] but if the message on its face furnishes such notice, the company is liable.[29]

In many jurisdictions mental anguish is an element irrespective of pecuniary loss,[30] especially where the company has notice that such consequences will result

he wanted to get home that night and the message showed contemplated use of a horse and carriage, whether suffering caused by exposure could have been avoided had the message been delivered held for the jury. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117. The fact that plaintiff remained in a livery barn exposed to cold was **not the result of delay** in delivering a telegram and the only recovery should be cost of sending message. Jones v. Western Union Tel. Co., 75 S. C. 208, 55 S. E. 318. For delay in delivering a telegram which answered a letter offering barrels for sale, where the message did not accept the terms of the offer, **no final contract was completed** and nominal damages only could be recovered. Cherokee Tanning Extract Co. v. Western Union Telegraph Co., 143 N. C. 376, 55 S. E. 777.

Evidence held insufficient to show that delay in delivering telegram resulted in detention of a person in a quarantined town for several weeks and exposure to smallpox. Mitchiner v. Western Union Tel. Co., 75 S. C. 182, 55 S. E. 222. Compensatory damages cannot be recovered for failure to deliver a telegram, constituting **a mere proposal** to sell. Bashinsky v. Western Union Tel. Co., 1 Ga. App. 761, 58 S. E. 91. Delay in transmitting a telegram asking permission to bid on a stock of goods, does not give rise to a cause of action where the sendee had not agreed to bid but only to furnish the sender money on conditions which there is no evidence the sendee could have complied with. Bird v. Western Union Tel. Co. [S. C.] 56 S. E. 973. For delay in delivering a telegram, the fact that the sendee was prevented from being present at the death of his wife to console his daughter is not an element. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760.

26. For delay in delivering a telegram, the measure is the loss arising from breach of contract to deliver promptly and were presumed to have been in the contemplation of the parties. Western Union Tel. Co. v. Lehman & Bro. [Md.] 66 A. 266. For failure to deliver telegram to a father informing him of the death of his son and requesting him to come, the length of time the body was kept and failure of the father to accompany it may be considered as contemplated by the parties. Walker v. Western Union Tel. Co., 75 S. C. 512, 56 S. E. 38. For failure to deliver a telegram, exposure and hardship caused by walking eight miles could not have been in the contemplation of the parties nor anticipated by them as a probable result of breach of the contract. Key v. Western Union Tel. Co. [S. C.] 56 S. E. 962.

27. Whether one used all means to minimize suffering because of delay in delivering a telegram held for the jury. Dempsey v. Western Union Tel. Co. [S. C.] 58 S. E. 9. Where in an action for failure to deliver a telegram it is set up that the sendee did not use means to diminish damages, evidence that he received the message in unintelligible form and tried to but could not telephone was admissible. Walker v. Western Union Tel. Co., 75 S. C. 512, 56 S. E. 38.

28. Where failure to deliver a telegram "Will be in Perry on morning train" resulted in sickness and exposure, it cannot be said as a matter of law that such result could have been anticipated. Dempsey v. Western Union Tel. Co. [S. C.] 58 S. E. 9. A message "Your mother is dead, come at once," would not give the company notice that delay in delivery would cause the sendee to miss a conveyance sent for her. Kirby v. Western Union Tel. Co. [S. C.] 58 S. E. 10. Where because of failure to deliver a telegram the sendee was compelled to sit in a cold waiting room at night, she having no money to pay hotel bill, she cannot recover therefor unless the company had notice of such fact. Id.

29. Where a message was given a company for transmission and it showed on its face that immediate delivery was essential, and other circumstances charged the company with notice that it was important, profits which would have been made held recoverable. Western Union Tel. Co. v. True [Tex. Civ. App.] 103 S. W. 1180.

30. A grandchild may recover for mental anguish for delay in delivery of a telegram announcing death of his grandparent and bidding him to come. Western Union Tel. Co. v. Prevatt [Ala.] 43 S. 106. Where it appears that delay in delivering a telegram resulted in the sendees being unable to attend his brother's funeral, the consequent grief is an element. Western Union Tel. Co. v. Caldwell [Ky.] 102 S. W. 840. Mental anguish is an element for delay in delivering a message announcing sickness of one. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. Grief and mental suffering are elements in an action for failure to deliver a telegram. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. Damages for mental suffering can be recovered because of delay in delivering a telegram which prevented the sendee from being present at his brother's funeral, but not because he was unable to be present with other relatives. Buchanan v. Western Union Tel. Co. [Tex. Civ. App.] 100 S. W. 974. In an action for delay in delivering a telegram, whereby one's wife was exposed to smallpox, the greatest length of time for which damages for mental anguish could be recovered is from receipt of telegram to when the person could be removed from such danger. Mitchiner v. Western Union Tel. Co., 75 S. C. 182, 55 S. E. 222.

Only fair compensation can be awarded

if the message is not promptly delivered,[31] but not otherwise.[32] Such element is not to be considered as to persons not mentioned in the telegram,[33] nor where the nature of the message is not such that failure to deliver should give rise to mental anguish.[34] Such element is to be considered if damages therefor are allowable in the state from which the message was sent.[35] Statutes permitting recovery for mental anguish apply only to personal or social messages.[36]

Punitive damages may be recovered for gross breach of duty toward a patron,[37] or gross negligence in transmitting the message,[38] or willful delay in delivering,[39] but where an effort is made to make delivery, such damages are not recoverable.[40]

for mental anguish for delay in telegram and it is error to authorize recovery, according to the feelings of the jury. Shepard v. Western Union Tel. Co., 143 N. C. 244, 55 S. E. 704. Where in an action for mental suffering for delay in delivering a telegram which prevented the sendee from being present at his brother's funeral, the company adduced proof to overcome the presumption that the degree of mental anguish a brother ordinarily feels under such circumstances, it was error to exclude plaintiff's testimony as to grief he felt. Buchanan v. Western Union Tel. Co. [Tex. Civ. App.] 100 S. W. 974. For failure to deliver a telegram anouncing death of grandchild, evidence that the sendee was unusually fond of the child was not objectionable as proof of abnormal sensibility. Doster v. Western Union Tel. Co. [S. C.] 57 S. E. 671.

31. Where a message shows on its face that a death has taken place and the sender sought to provide for prompt reception of the body, the company was charged with notice that mental suffering would result if the message was not delivered. Lyles v. Western Union Tel. Co. [S. C.] 57 S. E. 725. Where for failure to deliver a telegram recovery for mental suffering is sought because of failure of sendee to be with sender and comfort him after the death of his wife, it must appear that the company had notice of the peculiarly tender relations existing between the parties. Butler v. Western Union Tel. Co. [S. C.] 57 S. E. 759. Delay in delivering a telegram stating that the sendee's mother was very low, and stating where the sendee was to get money to go home with, is sufficient to charge the company with notice that mental suffering would result if the message was not delivered. Western Union Tel. Co. v. Blackmer [Ark.] 102 S. W. 366. Where a telegram announced death and requested an answer as to whether sendee could come, the company had notice that delivery was expected at once. Smith v. Western Union Tel. Co. [S. C.] 58 S. E. 6.

32. Mental anguish is not an element for delay in delivering a telegram in the absence of notice to the company of its probable occurrence. Western Union Tel. Co. v. Butler [Tex. Civ. App.] 99 S. W. 704. Delay in delivering telegram "Can make big money next month, come at once," does not charge the company with notice that commissions will be lost because of failure to deliver. Western Union Tel. Co. v. Twaddell [Tex. Civ. App.] 103 S. W. 1120.

33. Mental anguish suffered by a wife and children cannot be recovered for where they were not mentioned in the telegram. Todd v. Western Union Tel. Co. [S. C.] 58 S. E. 433.

34. Mental anguish is not an element for failure to deliver a telegram from sister to brother "meet me to-night," though because of such delay her brother did not meet her. Western Union Tel. Co. v. Westmoreland [Ala.] 44 So. 382. Mental anguish by reason of nondelivery of a telegram is not shown by testimony that the sendee could not have suffered mental anguish if she could have seen her sister before her death, where such nondelivery prevented her from attending the funeral. Roberts v. Western Union Tel. Co. [S. C.] 56 S. E. 960.

35. Mental anguish unaccompanied by physical pain is an element for failure to deliver a telegram where it is an element in the state to which the message was sent, though not at the point where received. Gentle v. Western Union Tel. Co. [Ark.] 100 S. W. 742.

36. A statute making telegraph companies liable for mental anguish does not authorize such recovery for mere worry and uneasiness over business affairs, but is limited to social and personal matters. Western Union Tel. Co. v. Shenep [Ark.] 104 S. W. 154.

37. Where an agent when asked about nondelivery of a message laughs and gives offensive answers, punitive damages may be recovered. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117.

38. Where a message was transmitted at night from a day blank which meant "transmit at once" and no information was given the receiving office or effort made to deliver it until next day, the company was liable for punitive damages and mental anguish, though effort was made to deliver it next day, and if delivery had been made the sendee could not have attended the funeral of his mother. Bolton v. Western Union Tel. Co. [S. C.] 57 S. E. 543. Wantonness may be inferred from failure of a company to repeat a message when opportunity is furnished it, though it is received in unintelligible terms. Walker v. Western Union Tel. Co., 75 S. C. 512, 56 S. E. 38.

39. On an issue of willfulness in delay in delivering a telegram, it may be shown that the receiving office was a small one and the agent was operator, railroad, and express agent. Doster v. Western Union Tel. Co. [S. C.] 57 S. E. 671. Failure of an agent to hear a call on Sunday while working in the freight office and giving an important message to a passerby to deliver is evidence for the jury on the question of willfulness. Id. It is not error to charge that punitive damages can be re-

A provision on the telegraph blank that claims for damages must be presented within a specified time is binding,[41] unless waived by the company,[42] but the company cannot by stipuation on its blanks limit its liability to the sum paid for the message.[43]

(§ 4) *G. Contracts for services.*[44]—The measure for wrongful discharge is the compensation for the remainder of the term,[45] less what the employe has or could by the exercise of reasonable diligence have earned [46] in procuring other work of like nature.[47] Where compensation is to be determined by profits made, such pro-

covered for failure to deliver a telegram, it being charged that they could be given only on proof of willfulness. Dempsey v. Western Union Tel. Co. [S. C.] 58 S. E. 9. Unexplained delay of seventeen hours in delivery of telegram raises question of willfulness. Id. Punitive damages may be recovered for willful failure to deliver a telegram if proven. Harrison v. Western Union Tel. Co., 75 S. C. 267, 55 S. E. 450. Punitive damages **not recoverable** for failure to promptly deliver a message from sister to brother "Meet me to-night." Western Union Tel. Co. v. Westmoreland [Ala.] 44 So 382.

40. Uncontradicted testimony of an attempt to deliver a telegram precludes recovery of punitive damages. Butler v. Western Union Tel. Co. [S. C.] 57 S. E. 757; Foster v. Western Union Tel Co. [S. C.] 57 S. E. 759. Where there is undisputed evidence of an attempt to deliver a telegram, and it is not delivered because the sendee is located too late to render the message of any avail, punitive damages cannot be recovered. Todd v. Western Union Tel. Co. [S. C.] 58 S. E. 433. Punitive damages should not be awarded for failure to deliver a telegram where it was received out of office hours in a small town and the sendee was not known to the agent who finally located him by telephone, and a message was sent over the telephone to the assistant superintendent who promised to deliver it but did not. Key v. Western Union Tel. Co. [S. C.] 56 S. E. 962.

41. A stipulation on the back of a telegraph blank that claims for damages must be presented within a certain time is binding on one who has the agent write the message for him. Western Union Tel. Co. v. Prevatt [Ala.] 43 So. 106. Asking an explanation of discourtesy of an agent and demanding an apology is not a claim for damages within a stipulation that such claims should be presented within sixty days. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117.

42. A provision on a telegraph blank that claims for damages must be presented within sixty days may be waived. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. A waiver may rest in parol. Id. The head man of a local office may waive it. Id. Evidence insufficient to show waiver by a telegraph company of a stipulation that claims for damages should be presented within sixty days. Toale v. Western Union Tel Co. [S. C.] 57 S. E. 117.

43. A telegraph company cannot by stipulation on its blanks limit its liability to the sum paid for the message. Western Union Tel. Co. v. Milton [Fla.] 43 So. 495.

44. See 7 C. L. 1053.

45. For wrongful discharge of a school teacher under a contract for employment from June 1 until the following May 31, where the discharge occurred in January, and it appeared that teachers were usually employed in May or June, it being his duty to get other employment. Peacock v. Coltrane [Tex. Civ. App.] 99 S. W. 107. For breach of contract of employment, the remainder of the contract price unpaid is the measure, unless the employer shows that the discharged employe might have obtained other employment. American China Development Co. v. Boyd, 148 F. 258. The measure of damages for the breach of a contract for employment, so long as the services are satisfactory, is the amount of money which the employe would have earned at the stipulated salary from the time of his discharge to the time of the trial, together with the amount he could in future earn in the time during which he could reasonably be expected to serve, taking into account his age and state of health, and deducting whatever amounts he could reasonably have earned at other employment since his discharge, and what he might so earn in the future by reasonable diligence. Lake Shore & Western R. Co. v. Tierney, 8 Ohio C. C. (N. S.) 521. Where an attorney is employed to conduct a suit at an agreed compensation and fully performs his contract until discharged, he may recover the unpaid balance of the contract price. Sessions v. Warwick [Wash.] 89 P. 482.

46. Wages of workmen, and hire of machinery kept idle by delay in execution of subcontract, are elements, in an action by the contractor, but ordinarily a general contractor is not entitled to recover for loss of his own time where he is at liberty to obtain other contracts, nor for injury to business reputation, nor damages not within contemplation of parties when contract was made. Noyes v. Noullet & Co., 118 La. 888, 43 So. 539. An employe suing for wrongful discharge must render an accounting showing what he has earned by other employment. Kansas Union Life Ins. Co. v. Burman [C. C. A.] 141 F. 835.

47. In an action for breach of contract of employment it was proper to refuse an instruction that if the employe did not make reasonable effort to secure other work of similar kind he could not recover where the element that he could have procured such work had he tried was not included. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867. In an action for breach of contract of employment it was proper to refuse to instruct that if the employe did not make reasonable effort to procure employment, he

portion of profits reasonably certain to have been made are recoverable,[48] but remote consequences,[49] or elements not constituting a part of the contract,[50] are not to be considered. The fact that the employe could have procured other employment is a matter of defense.[51]

(§ 4) *H. Promise of marriage.*[52]—Injury to feelings, reputation, and standing, are elements to be considered.[53] Seduction may be set up as an element of punitive damages.[54]

§ 5. *Measure and elements of damages for torts. A. In general; miscellaneous torts.*[55]—Generally speaking, in actions ex delicto, damages may be recovered for all the natural and probable consequences of the wrongful act,[56] and if the tort was willful, punitive damages may be recovered,[57] but remote or conjectural damages may not be recovered.[58] In Georgia the damages recoverable are restricted to injuries to person, property, or reputation.[59]

Assault and battery.—For unjustified assault and battery, the measure recoverable is compensation for all injuries sustained,[60] together with such punitive

could not recover, where the instruction did not require that such work continue throughout the term. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867.

48. Prospective profits may be recovered where an employe has been prevented from performing his contract to conduct a business for one-half the profits. Belch v. Big Store Co. [Wash.] 89 P. 174. Recovery in such case being limited to amount deemed reasonably certain had breach not occurred. Where a contract by which an employe was to receive a share of the profits was terminated by a sale of the business, in determining the measure of damages, it was proper to consider only the average profits for three years past and not consider a previous year during which profits were exceedingly large. Smith v. Smith, 116 App. Div. 165, 101 N. Y. S. 521. Where one agreed to work for another an entire year for a percentage of gross receipts but only worked two and one-half months, he could not recover the average rate for the entire year. Tradesman Co. v. Superior Mfg Co., 147 Mich. 702, 14 Det. Leg. N. 57, 111 N. W. 343.

49. For wrongful discharge of a boy employed for a term at specified wages and what he could earn from outside mounts, he could not recover for loss of outside earnings. Tucker v Horn [Ky.] 103 S. W. 717.

50. For breach of contract of employment for one year the employe may not show what he has paid out for board in the absence of proof that it was part of the expense which his employer had agreed to pay. Seago v. White [Tex. Civ. App.] 100 S. W. 1015.

51. The fact that an employe wrongfully discharged could have obtained other employment is a matter of defense, and must be alleged and proven by the defendant. Peacock v. Coltrane [Tex. Civ. App.] 99 S. W. 107. For breach of contract of employment the employer has the burden to prove that the employe could have procured work for the balance of the term at the same salary. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867.

52. See 7 C. L. 1054. See, also, Breach of Marriage Promise, 9 C. L. 407.

53. Injury to feeling, reputation, and standing, are elements in breach of marriage promise. Johnson v. Levy, 118 La. 447, 43 So. 46.

54. Seduction may be pleaded as an element of punitive damage in breach of promise notwithstanding Code Civ. Proc. § 374, giving a woman a right of action for her own seduction. Lanigan v. Neely [Cal. App.] 89 P. 441.

55. See 7 C. L. 1054.

56. For **premature foreclosure of a trust deed,** the difference between the reasonable value of the property and the amount of the debt secured at date of foreclosure. Missouri Real Estate Syndicate v. Sims, 121 Mo. App. 156, 98 S. W. 783. A relator in mandamus can recover for false return to an alternative writ only what he could recover in an independent action, and counsel fees or other expenses of the suit may not be included. Code Civ. Proc. § 2088. People v. New York Cent. & H. R. Co., 116 App. Div. 849, 102 N. Y. S. 385. Where a cotton buyer knew that there was a statute requiring him to allow inspection of books and yet refused, the motive which prompted the refusal was a question for the jury on the issue of damages. Park v. Laurens Cotton Mills, 75 S. C. 560, 56 S. E. 234. In an action for conspiracy in procuring a false imprisonment, one who procured money for the purpose of procuring release, but was not a party to the conspiracy, is liable for the money he procured only. Lupinek v. Woytisek, 110 App. Div. 688, 97 N. Y. S. 471.

57. Compensatory and punitive damages may be recovered for willful tort. Wilson Lumber Co. v. Anderson & Sons Co., 75 S. C. 299, 55 S. E. 447. Exemplary damages may be recovered **for wrongful eviction** where there is evidence of aggravation. Sperry v. Seidel [Pa.] 66 A. 853.

58. Where smallpox was negligently communicated to a person, losses to his business on account of people being kept away for fear of contracting the disease is not too remote to furnish basis of recovery. Missouri, etc., R. Co. v. Raney [Tex. Civ. App.] 99 S. W. 589.

59. There can be no recovery for annoyance and wrong. Georgia R. & Elec. Co. v. Baker, 1 Ga. App. 832, 58 S. E. 88.

60. Actual damages sustained may be re-

damages as the jury see fit to award,[61] if the assault was accompanied by malice or wantonness.[62] Damages not contemplated as a probable result of the assault may not be recovered.[63] In assessing damages, mitigating circumstances are to be considered.[64] Loss of services and expenses resulting from confinement,[65] disgrace suffered by himself and family, are proper elements of damages in an action by the father for illegal carnal assault of his daughter,[66] but no money expended for support of child resulting from illegal carnal assault.[67]

For alienation of affections.[68]—Mental suffering is an element,[69] and exemplary damages based on the financial condition of the defendant may be awarded.[70]

Fraud and deceit.[71]—The measure of damages for fraud and deceit is the loss sustained by reason thereof,[72] and proved by the evidence.[73] Counsel fees paid

covered for unjustified assault. Lovelace v. Miller [Ala.] 43 So. 734. Where a conductor in wrongfully ejecting a passenger from a street car hit him in the face in the presence of a car full of people and forcibly ejected him, recovery could be had for **injury to feelings and indignity,** though pecuniary damage was not proved. Samuels v. New York City R. Co., 52 Misc. 137, 101 N. Y. S. 534. Where an assault was accompanied by circumstances of malice and oppression, and life or great bodily harm was threatened, damages may be recovered **for pain and mental anguish,** although no physical injury resulted. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 S. W. 495. In an action for damages caused by the infliction of an unnecessary and cruel physical injury in a personal encounter where there was some provocation on both sides, it was held there was no error in allowing plaintiff a little more than the actual expenses and loss of time resulting from the injury. Milam v. Milam [Wash.] 90 P. 595.

61. Punitive damages are recoverable only when the assault is characterized by express malice, violence, oppression, or wanton recklessness, and their allowance should always be left to the discretion of the jury. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 S. W. 495. Allowance of punitive damages for assault and battery is not a violation of a provision against a person being twice punished for the same offense, though he has been previously punished. Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7.

62. Exemplary damages may be awarded in an action for assault and battery where there is malice premeditated or wantonness in the assault. Shupack v. Gordon, 79 Conn. 298, 64 A. 740. In an action for assault in leading a person through a store during business hours and taking certain money from her, compensatory damages may be recovered as may punitive damages under circumstances of peculiar indignity. Henderson v. Agon [Mich.] 14 Det. Leg. N. 106, 111 N. W. 778. Allegations of petition in action for assault and battery held to support a claim for punitive damages under the Georgia statute, Clv. Code, § 3906. Morgan v. Langford, 126 Ga. 58, 54 S. E. 818. In an action for assault in ejecting a person from a hotel, an instruction authorizing exemplary damages if defendant was guilty of "culpable negligence" is erroneous, culpable negligence not implying malice or recklessness. Noonan v. Luther, 104 N. Y. S. 684.

63. For assault and battery committed on a person in the presence of his wife, recovery may not be had for injuries to his wife occasioned by fright and loss of services of his wife. Hutchinson v. Stern, 115 App. Div. 791, 101 N. Y. S. 145.

64. The fact that a passenger applied to the conductor who assaulted him an opprobious epithet may be considered in mitigation of damages. Mitchell v. United Rys. Co., 125 Mo. App. 1, 102 S. W. 661. Where one committing an assault on information of an insult offered his daughter, evidence as to what he heard half an hour prior to the assault was admissible. Lovelace v. Miller [Ala.] 43 So. 734.

65, 66, 67. Palmer v. Baum, 123 Ill. App. 584.

68. See 7 C. L. 1054.

69. In an action for alienation of affections of a husband, proof of mental suffering is admissible without allegation of special damage. Klein v. Klein [Ky.] 101 S. W. 382.

70. In actions involving malice where exemplary damages may be awarded, the financial condition of the defendant may be shown. White v White [Kan.] 90 P. 1087. Alienation of affections. Id.

71. See 7 C. L. 1054.

72. See, also, Fraud and Undue Influence, 7 C. L. 1813. Phillips v. Hebden [R. I.] 65 A. 266. For **fraud in taking an invoice of a stock** of merchandise for sale, the difference between the actual value and the price according to invoice. Smith v. Owsley [Ky.] 102 S. W. 277. For **false representations made by vendor as to rents received,** the measure is the difference in market value if the rents had been as represented and the actual market value. Ettlinger v. Well, 184 N. Y. 179, 77 N. E. 31. The measure for **fraud inducing one to discharge a mutual benefit society from liability on its contract** is the difference between the amount paid by the society for the release and the actual value of the certificate released. Supreme Council of Knights and Ladies of Columbia v. Apman, 39 Ind. App. 670, 80 N. E. 640. For fraud **in the sale of goods,** the difference between the price paid and the market value. Cerny v. Paxton & Gallagher Co. [Neb.] 110 N. W. 882. For false representations **inducing the purchase of corporate stock,** the good will of the company is to be considered in determining the value of the stock.

because of fraud may be recovered.[74] Punitive damages are not recoverable.[75]

Malicious prosecution and abuse of process.[76]—The measure recoverable for malicious prosecution is compensation for the injury sustained,[77] reasonable attorney's fees,[78] and punitive damages,[79] where actual malice is shown.[80] For the issuance and levy of a wrongful attachment, compensatory damages may be recovered.[81] Prospective profits are recoverable,[82] unless it appears with reasonable certainty that none would have been realized.[83] Injury to feelings or reputation is not an element.[84] Expense of dissolving an attachment is not recoverable where none was incurred.[85] Loss because of decline of the market is not recoverable where it could have been averted by the owner.[86] As to whether attorney's fees are recoverable, there is a conflict of authority.[87] Punitive damages may be recovered,[88] if the cause

Von Au v. Magenheimer, 115 App. Div. 84, 100 N. Y. S. 659. For **deceit in lease of premises,** the measure is the difference between the value of the lease for the unexpired term and the stipulated rent, with cost of moving and not prospective profits. Brown v. Morrill, 105 N. Y. S. 191. For **false representations as to title,** recovery may not be had for expense in procuring plans for a building on the land unless he shows that such plans are worthless for all other purposes. Curtley v. Security Sav. Soc. [Wash.] 89 P. 180. The measure of damages for fraud in **procuring an application for a life policy and a note for the first year's premium** is the amount the defrauded person was required to pay because of the note and such other damages as proximately resulted. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 N. E. 595.

73. In an action for fraud in procuring an application for a life policy, where evidence showed the amount of actual damages and none other, a verdict in excess of such amount was excessive. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 N. E. 595.

74. For fraud, reasonable attorney's fees paid out because of the fraud are recoverable. Curtley v. Security Sav. Soc. [Wash.] 89 P. 180.

75. Punitive damages cannot be recovered against an agent for fraud in procuring an application for a life policy, and a note for the first premium. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 N. E. 595. The agent not being liable for such damages, the insurer was not. Id.

76. See 7 C. L. 1055.

77. Where in an action for malicious prosecution plaintiff alleged that he lost time and incurred expense in defending the prosecution, evidence as to such expense, loss of time, and earnings prior to the prosecution is admissible. Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78. In an action for malicious prosecution, testimony that plaintiff went around hanging his head and acting as if he was in deep trouble and not in his right mind is not proof of mental suffering and disgrace. Id.

78. For malicious prosecution, reasonable attorney's fees in the prosecution may be recovered. Stanford v. Messick Grocery Co., 143 N. C. 419, 55 S. E. 815.

79. Punitive damages are recoverable for institution of malicious prosecution for arson. Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78.

80. Actual malice is essential to the recovery of punitive damages in malicious prosecution. Stanford v. Messick Grocery Co., 143 N. C. 419, 55 S. E. 815.

81. An officer who levies a wrongful writ of execution is the agent of the person for whom it is levied and is liable for compensatory damages to the person injured. Duff & Repp Furniture Co. v. Read, 74 Kan. 730, 88 P. 263. For **wrongful attachment of tools,** the measure is value of their use and injury to them and not what the owner might have made with them during the period of detention. McGill v. Fuller & Co. [Wash.] 88 P. 1038. For wrongful **attachment of cars,** the measure is interest on the value increased or diminished by deterioration while in daily use or while tied up. Pittsburgh, etc., R. Co. v. Wakefield Hardware Co., 126 N. C. 621, 55 S. E. 422. Where stock in trade was wrongfully levied upon, cost of fitting up store could not be recovered but value of use of detained premises may be. McGill v. Fuller & Co. [Wash.] 88 P. 1038.

82. For wrongful attachment, **recovery may be had for loss of profits** arising from established business. McGill v. Fuller & Co. [Wash.] 88 P. 1038. Under Civ. Code Prac. § 643, lost profits may be recovered in an action on an attachment bond. Manning v. Grinstead, 28 Ky. L. R. 787, 90 S. W. 553.

83. Prospective profits may not be recovered for wrongful attachment where it appears that the business was disrupted and disorganized. McGill v. Fuller & Co. [Wash.] 88 P. 1038.

84. Damages for injury to reputation, pride, or feelings may not be recovered in an action for wrongful attachment. McGill v. Fuller & Co. [Wash.] 88 P. 1038.

85. McGill v. Fuller & Co. [Wash.] 88 P. 1038.

86. For wrongful attachment loss by reason of decline of market cannot be recovered where the sheriff had informed the owner of the goods that he might sell them and deposit the proceeds in court. Bell v. Thompson [Ky.] 102 S. W. 830.

87. Statutory costs but not attorney's fees may be recovered in an action for wrongful attachment. McGill v. Fuller & Co. [Wash.] 88 P. 1038. Attorney's fees are not an element of damages in an action on a bond for wrongful attachment. Chisenhall v. Hines [Tex. Civ. App.] 100 S. W. 362. For wrongful attachment a reasonable attorney's fee is recoverable, and where he had not agreed to pay a stipulated fee, it was proper to leave the amount to the jury. State v. Allen [Mo. App.] 103 S. W.

falls within the statute by which they are authorized,[89] but may not be awarded if no actual damage results.[90] In some states multifold damages are authorized by statute.[91]

False imprisonment.[92]—The damages recoverable for false imprisonment are peculiarly a question for the jury.[93] Compensation should be allowed for physical inconvenience, mental suffering, and humiliation,[94] and expense of procuring release.[95]

(§ 5) *B. Loss of, or injury to, property.*[96]—The measure of damages for temporary injury to land is the depreciation in rental value[97] together with cost of repairs[98] or other necessary expense,[99] unless such cost exceeds the value of the land,

1090. Under Civ. Code Prac. § 643, attorney's fees are not recoverable in an action on an execution bond. Manning v. Grinstead, 28 Ky. L. R. 787, 90 S. W. 553.

88. Punitive damages as well as damages for mental suffering and expenses of suit are recoverable against a party causing a wrongful levy of execution. Duff & Repp Furniture Co. v. Read, 74 Kan. 730, 88 P. 263. Where an attorney for a creditor went to a debtor's store with a United States marshal, and after reading a writ told the debtor that if he did not give up property peaceably they would take it anyway and arrest him, and he surrendered it under threat of arrest, there was sufficient evidence to justify exemplary damages. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108.

89. Under Ball. Ann. Codes & St. § 5857, authorizing punitive damages for wrongful attachment if malicious, such damages are not recoverable in a common-law action for suing out a writ of attachment. McGill v. Fuller & Co. [Wash.] 88 P. 1038.

90. Exemplary damages are not recoverable for wrongfully suing out a writ of attachment where no actual damage results. Stewart v. Smallwood [Tex. Civ. App.] 102 S. W. 159.

91. Mill's Ann. St. § 2564, authorizing recovery of three times the value of property taken by wrongful levy, applies to an execution creditor who knowingly ratifies the act of an officer. Seerie v. Brewer [Colo.] 90 P. 508.

92. See 5 C. L. 924.

93. Baker v. Tyler [R. I.] 67 A. 430. In an action for false imprisonment where unlawful restraint and special damages were alleged, general damages would follow from proof of imprisonment and nonsuit was properly denied. Neves v. Costa [Cal. App.] 89 P. 860.

94. Physical inconvenience, mental suffering, and humiliation, are elements of general and compensatory damages in false imprisonment. Neves v. Costa [Cal. App.] 89 P. 860. Mental suffering is an element. Illinois Cent. R. Co. v. Wilson [Ky.] 103 S. W. 364.

95. Neves v. Costa [Cal. App.] 89 P. 860.

96. See 7 C. L. 1055.

97. For injury to land the principle of compensation controls Young v. Extension Ditch Co. [Idaho] 89 P. 296. The measure of damages for injury to real estate is the cost of restoration or the difference in market value, according to which is the lesser amount. Swanson v. Nelson, 127 Ill. App. 144. Where land is not injured but **owner is prevented from raising a crop,** the measure is rental value with interest. Young v. Extension Ditch Co. [Idaho] 89 P. 296. For **burning over meadow land where roots of grass were destroyed** so as to require reseeding, the value of the grass destroyed and rental value of land for succeeding year, but not loss of crop and pasturage for the next year. Knight v. Chicago, etc., R. Co. [Mo. App.] 98 S. W. 81. In an action against the owner of underlying coal mines for failure to support the surface if the injury is reparable, cost of repairs may be recovered, but if such cost is greater than diminution in value, the latter is the measure. Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 A. 545. The owner of underlying mines who fails to support the surface is liable for the destruction of springs resulting from his failure to construct surface supports, but is not liable if such injury results from the removal of coal which he has a right to remove. Id. For trespass by cattle where it does not appear that they were on the land during an entire season, the measure is the damage to the crop and not rental value of the land. Cole v. Thompson [Iowa] 112 N. W. 178.

98. The measure for injury to premises caused by escaping chlorine gas may be either the depreciated value of the premises, or, if it is reasonably possible to restore the premises to their former condition the cost of such restoration. Senglaup v. Acker Process Co., 105 N. Y. S. 470. For temporary injury to land, the cost of repairs with interest. Young v. Extension Ditch Co. [Idaho] 89 P. 296. If the thing injured be an appurtenant of the land, its value as such may be considered as a basis of recovery, but indirect injuries caused by a trespass specified in the statute and others not specified cannot be trebled and recovered. Atchison, etc., R. Co. v. Grant [Kan.] 89 P. 658. An allegation in trespass of cutting and removing trees to plaintiff's damage authorizes recovery of value of timber and for injuries to the land. Davis v. Wall, 142 N. C. 450, 55 S. E. 350.

99. Where contractors in erecting a building did the work so negligently that a house on adjoining premises had to be vacated, the tenant could recover for discomfort, cost of storing his goods and difference between cost of living in the house and in a hotel. McFadden v. Thompson-Starrett Co., 116 App. Div. 285, 101 N. Y. S. 467. For injury to an abutting lot by filling in a street, the cost of filling the lot is not an element of damages unless it is necessary to fill in order to preserve the property from further damage, but destruction

in which case the value of the land is the measure.[1] Compensation may also be had for other injuries which necessarily result.[2] If the injury is permanent, the measure is generally the depreciation in value.[3] The measure of damages for injury to growing crops is the market value less cost of harvesting and marketing.[4] For

of sod and shrubbery may be shown as relevant to the uses to which the property was adaptable. Godbey v. Bluefield, 61 W. Va. 604, 57 S. E. 45. Measure of damages for injury to premises is ordinarily the cost of restoring them to their original condition together with compensation for the loss or impairment of the use during the meantime. Herr v. Altoona, 31 Pa. Super. Ct. 375; Keats v. Gas Co. of Luzerne County, 29 Pa. Super. Ct. 480. Measure of damages of mill owner for pollution of stream is cost of removing deposits in water and compensation for impairment of use of property during the continuance thereof. Bricker v. Conemaugh Stone Co., 32 Pa. Super Ct. 283.

1. Bigham v. Pittsburg Const. Co., 29 Pa. Super. Ct. 86; Glasgow v. Altoona, 27 Pa. Super. Ct. 55.

2. Where in an action for flooding property plaintiff claimed that he contracted rheumatism by wading, such issue together with his contributory negligence in wading was properly submitted. International & G. N. R. Co. v. Stewart [Tex. Civ. App.] 101 S. W. 282. Where one was caused inconvenience in getting to and from his premises by reason of flooding, and claimed no damages for injury to the land, the jury could allow damages without evidence as to the money value thereof. Id.

3. Young v. Extension Ditch Co. [Idaho] 89 P. 296. If land is taken or destroyed, the cash value with interest is the measure. Id. In determining damages to adjoining owners for **negligent operation of a spur track,** it is proper to consider depreciation in value of the property, inconvenience, discomfort, and unpleasantness. Thomason v. Seaboard Air Line R. Co., 142 N. C. 300, 55 S. E. 198. It was also proper to consider injury to furniture by smoke and cinders. Id. It is also error to authorize consideration as an element of permanent damage, of liability of lot to be flooded by surface water collected by the street, since that injury is recurring and intermittent. Godbey v. Bluefield, 61 W. Va. 604, 57 S. E. 45. For invasion of a forest and **cutting trees** therein, the diminution in value to the whole premises may be shown. Morrison v. American Tel. & T. Co., 115 App. Div. 744, 101 N. Y. S. 140. In trespass for cutting a strip through a woodland and erecting a telephone line, the measure of damages was properly based on the timber cut, making of road, etc, to the commencement of the action, but since future actions might be maintained, it was not proper to allow therefor on the theory that trespass might be permanent. Id.

For burning over land, the difference in value before and after the fire. Southern R. Co. v. Herrington [Ga.] 57 S. E. 694. For injuries to land by **digging up grass roots,** the measure is the depreciated value in the land. Warrick v. Reinhardt [Iowa] 111 N. W. 983.

Failure to furnish subjacent support: Where underlying coal is sold, the measure of damages for injuries to land for failure to give support to the surface is the depreciation in the value of the land. Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 A. 545. In an action against the owner of underlying mines for failure to support the surface, evidence of the value of springs destroyed is admissible on the question of depreciation in value of the land, but not as an independent item not connected with such general value. Id. The measure for **injury to a building** caused by the negligent digging of a ditch in the cellar of an adjacent house near a party wall is the depreciation in value of the property, and not the cost of restoring it to its former condition. Hopkins v. American Pneumatic Service Co. [Mass.] 80 N. E. 624. The fact that the source of injury was settling of the party wall did not affect this measure. Id. For injury to a lot by filling in the street on which it abuts, the difference in value less special benefits between the market value before and after the fill. Godbey v. Bluefield, 61 W. Va. 604, 57 S. E. 45. For **destruction of a spring of percolating water,** the measure is compensation for injury sustained estimated in connection with diminished value of the farm. Little v. American Tel. & T. Co. [Del.] 67 A. 169. For **injuries to land by flooding** caused by defective culverts, where injury is permanent, the depreciation in the value of the land. Missouri, etc., R. Co v. Green [Tex. Civ. App.] 99 S. W. 573; Gebhardt v. St. Louis, etc., R. Co., 122 Mo. App. 503, 99 S. W. 773. Injury occurring after filing of suit may be recovered for. Id.

For flooding land the fair rental value of that portion of the land on which no crop could be grown and for that portion upon which crops were grown, the difference in value between the crop grown and which could have been produced had the land not been flooded. Jones v. Cooley Lake Club, 122 Mo. App. 113, 98 S. W. 82. For **injury to lot by change of grade** of an alley, the difference in value just before and just after the injury. McMillan v. Columbia, 122 Mo. App. 34, 97 S. W. 953. In an action for injuries to property by construction and maintenance of a line of railroad, depot and cattle pens, an instruction not to consider general benefits enjoyed by the community in general, but to consider special benefits was proper. Dallas, etc., R. Co. v. Langston [Tex. Civ. App.] 17 Tex. Ct. Rep. 316, 98 S. W. 425.

4. For injuries to growing crops by flooding, the measure is the value of the crops when destroyed together with the value to mature and harvest them. St. Louis Merchants' Bridge Terminal R. Ass'n v. Schultz, 226 Ill. 409, 80 N. E. 879. Proof of market value of crops without proof of cost of harvesting is erroneous in an action for destruction of crops. Fleming v. Pullen [Tex. Civ. App.] 116 Tex. Ct. Rep. 891, 97 S. W. 109. For destruction and injury to crops by flooding, fair compensation with interest. Little Rock & Ft. Smith R. Co. v.

destruction of a crop, the market value at the time [5] as shown by evidence of probable yield [6] and value.[7] The injured party has the burden to prove the extent of his damage.[8] The measure for injury and destruction of fruit trees is the value of such trees,[9] or the depreciation in the value of the land upon which they stand.[10] As in other cases it is the duty of the injured person to diminish his damages as much as possible,[11] and he may not recover for injuries which result from his own negligence.[12]

The measure recoverable for destruction of personal property is its actual value at the time it was destroyed.[13] If the property has no market value, the value

Wallis [Ark.] 102 S. W. 390. Evidence sufficient to sustain findings as to amount of damages for trespass by cattle on growing crops. Durkee v. Chino Land & Water Co. [Cal.] 91 P. 389. In an action for trespass by cattle where there is no proof of damage except rental value, an instruction that plaintiff must prove that the cattle trespassed and the amount of damage done in order to recover was erroneous for failure to point out the measure of damages because at most plaintiff was entitled to nominal damages. Cole v. Thompson [Iowa] 112 N. W. 178.

5. For destruction of crop, too late to be replanted, the value of the crop at the time it was destroyed. Hunt v. St. Louis, etc., R. Co. [Mo. App.] 103 S. W. 133; Teller v. Bay & River Dredging Co. [Cal.] 90 P. 942; Dennis v. Crocker-Huffman Land & Water Co. [Cal. App.] 91 P. 425; Suderman-Dolson Co. v. Rogers [Tex. Civ. App.] 104 S. W. 193. For herding and grazing sheep on lands of another, the measure is the value of crops at time of destruction. Risse v. Collins, 12 Idaho, 689, 87 P. 1006. Where evidence shows that there is a market value for growing crop destroyed, it is error to submit an issue as to reasonable value. Suderman-Dolson Co. v. Rogers [Tex. Civ. App.] 104 S. W. 193.

6. Where a crop was destroyed, testimony of the owner as to the yield of the land for several years prior to the flood is admissible. Dennis v. Crocker-Huffman Land & Water Co. [Cal. App.] 91 P. 425. Where a growing crop of potatoes was destroyed, other growers who were growing crops on land of the same character and under the same conditions could testify as to the yield of their lands. Id.

7. In determining the value of crops destroyed, the jury must consider facts showing most profitable use of the crop, the nearest period marketable, and labor and expense necessary to bring it to marketable condition. Risse v. Collins, 12 Idaho, 689, 87 P. 1006. An instruction that in determining the value of a growing crop to find the probable yield and value thereof and deduct therefrom the cost of producing and marketing the crop. Feller v. Bay & River Dredging Co. [Cal.] 90 P. 943.

8. Where stock belonging to several owners trespassed at different times and committed distinct and separate injuries, and there was no proof from which to estimate the damages done by the stock of a particular owner, nominal damages only could be allowed. Foster v. Bussey, 132 Iowa, 640, 109 N. W. 1105. In an action for grass destroyed by cattle where, it appears that the plaintiff's own cattle were also on the land and no other proof of damages were proven, evidence was held insufficient on the question of amount of damage. Fleming v. Pullen [Tex. Civ. App.] 16 Tex. Ct. Rep. 891, 97 S. W. 109.

9. For burning an orchard, the value of trees destroyed and difference in value before and after the fire of those injured and not depreciation in value of the entire farm. Louisville & N. R. Co. v. Beeler [Ky.] 103 S. W. 300. Where in an action for cutting vines the plaintiff gave testimony as to the value of the vines and their ornamental effect on the premises, it was error to reject evidence on the same points offered by defendant. Martin v. Erwin [N. J. Law] 65 A. 888.

10. For destruction of fruit trees and vines, the depreciation in value of the land, or the value of the trees. Mogollon Gold & Copper Co. v. Stout [N. M.] 91 P. 724. In an action for damages to growing trees, evidence of the effect of the destruction of the trees on the value of the land is admissible where the nature of the trees destroyed is such that they have no value except as part of the real estate. Alberts v. Husenetter [Neb.] 110 N. W. 657.

11. An instruction that if one whose land was injured by overflow of a ditch did not exercise ordinary care to protect her crop if it was within her power she was negligent was objectionable as leading the jury to consider such fact as a complete defense when it was only relevant in mitigation. Belnap v. Widdison [Utah] 90 P. 393. Where surface water has been wrongfully diverted onto one's premises, he must exercise ordinary care to protect his property. Louisville & N. R. Co. v. Moore [Ky.] 101 S. W. 934. Where land was burned over and grass roots destroyed, the owners who were farmers were required to protect themselves against future loss as far as possible by tilling the land. Knight v. Chicago, etc., R. Co. [Mo. App.] 98 S. W. 81. Whether a reasonable effort to diminish the loss was made by feeding timothy hay to cattle and otherwise seeding the land held a question for the jury. Id.

12. Where one's property was injured by surface water negligently permitted to flow on his property by a city, the fact that his own negligence contributed to the injury is admissible in mitigation of damages but not as a defense to his action. Cromer v. Logansport, 38 Ind. App. 661, 78 N. E. 1045.

13. The measure for **total destruction of a vessel** in collision is its value at time of destruction to be determined by estimates of experts qualified to testify as to such value. The Mobila, 147 F. 882. The value of **cattle killed** may be found from evi-

to the owner may be recovered.[14] The measure for injury to property is the depreciation in value,[15] or the value of use and cost of repairs.[16]

(§ 5) *C. Maintaining nuisance.*[17]—For maintaining a nuisance, recovery may be for sickness resulting,[18] physical discomfort,[19] and costs of abating the nuisance.[20]

dence as to number, condition, and weight of cattle at time of shipping, and average shrinkage during transportation, and market value at destination. St. Louis, etc., R. Co. v. Dodson [Tex. Civ. App.] 16 Tex. Ct. Rep. 109, 97 S. W. 523. For **killing a mule,** its value at date of injury not including interest from such date. St. Louis S. W. R. Co. v. Guthrie [Tex. Civ. App.] 103 S. W. 211. Where a windmill company negligently constructed a windmill upon a barn and it fell and injured the barn and property stored therein, the owner was entitled to recover for the property stored in the barn. Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N. E. 503.

For cordwood burned, its value in the place where it was standing and not its value standing less cost of cutting. Hart v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 559. An instruction that the measure for wood burned was its value in the locality where it was, was not erroneous because of use of "locality," since such word would be understood to mean place. Id. For **cutting and converting timber,** the value of the logs severed from the land. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 So. 533. Damages may be recovered by a husband **for mutilation of corpse** of his wife. Medical College of Georgia v. Rushing, 1 Ga. App. 468, 57 S. E. 1083. Mental suffering and injury to feelings are elements though no an action against a municipality **for destruction of a frame building** maintained pecuniary loss has been sustained. Id. In within fire limits in violation of ordinance and contract, expense of owner in removing his stock from the building may not be shown. Wheeler v. Aberdeen [Wash.] 87 P. 1061. In an action against a municipality for destruction of a frame building maintained within fire limits in violation of contract and ordinance, it is not admissible to show that the city had not removed other like buildings Id. For destruction by a municipality of a building maintained within fire limits in violaton of contract and ordinance, recovery may not be had for injury to leasehold, mental distress, shame, humiliation, or disgrace. Id. For **destruction of building** by fire, what it would cost to replace it, though there is no demand for such building. Cincinnati, etc., R. Co. v. Falconer, 30 Ky. L. R. 152, 97 S. W. 727. Finding as to value of a build'ng held sustained. LaCotts v. Quertermous [Ark.] 103 S. W. 182.

14. Where property lost has no market value, the monetary worth thereof to the owner may be recovered. Austin v. Millspaugh & Co. [Miss.] 43 So. 305. For **destruction of hand painted china** which has no market value, the actual value to the owner. St. Louis, etc., R. Co. v. Green [Tex. Civ. App.] 17 Tex. Ct. Rep. 197 S. W. 531.

15. For injury to goods in transit, amount of loss with interest from time of delivery. Fell v. Union Pac. R. Co. [Utah] 88 P. 1003. For **injury to cloth** delivered to a cleaner to be sponged, the measure is the depreciated value. Miller v. Levy, 104 N. Y. S. 368. For **loss of two steers and injury to a third,** the difference in value just before and just after the injury plus necessary expense bestowed upon the injured steer. Hat v. Quincy, etc., R. Co., 123 Mo. App. 172, 100 S. W. 693. For **injury to personal property,** the difference between the market value just before and just after the injury with interest from date of injury. Galveston, etc., R. Co. v. Levy [Tex. Civ. App.] 100 S. W. 195. Not cost of repairs. Louisville & N. R. Co. v. Mertz, Ibach & Co. [Ala.] 43 So. 7. For **injury to colts** in transit, the difference between the market value thereof at the time they were delivered to the carrier and the value when delivered to the owner. Cincinnati, etc., R. Co. v. Logan, 29 Ky. L. R. 1123, 96 S. W. 910. The condition, temper, disposition, and character of yearling colts and the effect of these traits on racing horses and that injuries would affect the value is admissible on an issue of damages. Id. Evidence held insufficient to raise an issue as to the value of calves at a certain place in their damaged condition. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 99 S. W. 431. Allowance of $150 for **injuries to automobile** where there was no testimony that it was used for any business purpose or that a vehicle was hired in its stead, but the verdict was based on expert testimony as to what the use of the machine was worth. Foley v. Forty-Second St., etc., R. Co., 52 Misc. 183, 101 N. Y. S. 780.

16. For injuries to a vessel, reasonable cost of repairs and value of use of vessel while laid up. Southern R. Co. v. Reeder [Ala.] 44 So. 699. For temporary disabled and **permanently injured horse,** reasonable hire during disability and diminution in market value, limited to the actual value of the horse, and also expenses in treating the injury. Telfair County v. Clements, 1 Ga. App. 437, 57 S. E. 1059. For **injuries to a horse** the measure is compensation for actual injury including loss of use and expenses incurred in attempting to cure him. Stidham v. Delaware City [Del.] 67 A. 175.

17. See 7 C. L. 1057. See, also, Nuisance, 8 C. L. 1180.

18. Evidence insufficient to show that typhoid fever was the result of maintaining stagnant water near plaintiff's premises. Gulf, etc., R. Co. v. Craft [Tex. Civ. App.] 102 S. W. 170.

19. In an action for nuisance it is admissible to show that odors arising therefrom caused plaintiff and his family physical discomfort. Town of Vernon v. Edgeworth [Ala.] 42 So. 749. On an issue as to whether a privy was a nuisance, plaintiff may show that while sitting in his dining room he could see paper and droppings fall. Id.

20. Under Civ. Code, § 4330, providing that the measure of damages for breach of

(§ 5) *D. Trespass on lands.*[21]—The ordinary rule of damages in trespass quare clausum is the amount of injury to the freehold,[22] and if no actual damage results, nominal damages at least should be awarded.[23] Punitive damages are recoverable if it appears that the injury was done maliciously.[24]

(§ 5) *E. Conversion.*[25]—The measure of damages for conversion is the value of the goods converted,[26] unless the goods have been recovered by the owner.[27] For conversion of ore under a bona fide belief of right, a reasonable royalty.[28] For the cutting and conversion of growing timber, the measure of damages is the value of timber before cutting where the defendant acted under mistake and exercised such diligence as a prudent person would under the same circumstances to ascertain the ownership.[29] For conversion of mortgaged property by mortgagee, the measure is the difference between value of the goods and the amount of the mortgage debt.[30]

(§ 5) *F. Wrongful taking or detention of property.*[31]—For the wrongful detention of property, recovery may be had for all damages proven.[32] The measure

obligation not arising out of contract is compensation for detriment resulting, the cost of abating a nuisance after neglect to do so by one maintaining it after request to abate it is recoverable. Murray v. Butte, 35 Mont. 161, 88 P. 789.

21. See 7 C. L. 1058.

22. In trespass quare clausum for cutting timber, the measure is the difference in value of the land before and after the trespass. Davis v. Miller Brent Lumber Co. [Ala.] 44 So. 639. Measure of damages for willful trespass and conversion of trees. Cummings & Co. v. Masterson [Tex. Civ. App.] 15 Tex. Ct. Rep. 33, 93 S. W. 500.

23. For trespass on land, at least nominal damages can be recovered if no special damages are proven. Postal Telegraph-Cable Co. v. Kuhnen, 127 Ga. 20, 55 S. E. 967. Where an adjacent owner pursuant to orders from a building inspector committed a technical trespass by putting in a retaining wall and extending it over his line, and his acts were known to and tacitly assented in by the other owner, the latter was estopped from claiming given nominal damages. Sharpless v. Boldt [Pa.] 67 A. 652. Nominal damages should be allowed for a trespass which would ripen into title by adverse user. Wing v. Seske [Iowa] 109 N. W. 717. The rule that failure to give nominal damages is not reversible error does not apply in such case. Id.

24. Miller v. Rambo, 73 N. J. Law, 726, 64 A. 1053.

25. See 7 C. L. 1058.

26. For **conversion of goods by a wholesaler,** the wholesale price or value only. New Liverpool Salt Co. v. Western Salt Co. [Cal.] 91 P. 152. Where grain was converted and the person guilty of the conversion dealt with it as of a certain value and received a sum of money for it, he cannot complain that the judgment was for that sum though technical market value was not proven. More v. Burger [N. D.] 107 N. W. 200. Where a carrier refused to deliver stock shipped except on payment of more freight alleged to be due because of erroneous classification, but thereafter placed the stock in a livery barn and notified the owner that it was there at his expense, the owner was held entitled to recover the ordinary measure of damages in conversion. Sutton v. Great Northern R. Co., 99 Minn. 376, 109 N. W. 815. The **market value of corporate stock converted** is the price it was selling at on the open market at the date of the conversion. Dooley v. Gladiator Consol. Gold Mines & Mill. Co. [Iowa] 109 N. W. 864. The rule that one suing for the **conversion of household goods** may recover the value of the goods to him based on actual money loss from being deprived of their use applies to books kept for personal use. Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143. Where refusal of a corporation to register a transfer of stock constitutes a conversion, the value of the stock with interest from date of refusal constitutes the measure of damages. Dooley v. Gladiator Consol. Gold Mines & Mill. Co. [Iowa] 109 N. W. 864. For **unauthorized sale of futures by a broker,** the measure is the difference between the price paid and the highest market price between date of sale and date the broker received the last letter repudiating the sale and stating that he would be held. Hurt v. Miller, 105 N. Y. S. 775. Where brokers made an unauthorized sale of stock, the measure is the difference between the price received and the highest market price a reasonable time thereafter, and not a reasonable time after learning of the conversion. Burnham v. Lawson, 118 App. Div. 389, 103 N. Y. S. 482.

27. In case of technical conversion where the owner receives back the goods in as good condition as they were in when taken, nominal damages and costs is all that can be recovered. Sutton v. Great Northern R. Co., 99 Minn. 376, 109 N. W. 815.

28. For removal and conversion of ore under a bona fide belief of right, a reasonable royalty on the amount recovered. Sandy River Cannel Coal Co. v. White House Cannel Coal Co., 30 Ky. L. R. 1308, 101 S. W. 319.

29. Young v. Pine Ridge Lumber Co. [Tex. Civ. App.] 100 S. W. 784.

30. Lusch v. Huber Mfg. Co. [Neb.] 112 N. W. 284.

31. See 7 C. L. 1059

32. For wrongful detention of property the damage proven, and if none are proven nominal damages. Hyde v. Elmer [N. M.] 88 P. 1132. Under Hurd's Rev. St. 1905, c. 119, § 22, providing that if property replevied was held for the payment of any

is generally the value of the use of the property less cost of caring for it.[33] If no actual damages are proven, nominal damages only can be recovered.[34] If no willful wrong or fraud be shown, punitive damages are not recoverable.[35] For infringement of a ferry privilege, compensation for tolls lost may be recovered.[36] For infringement of a trade mark,[37] at least nominal damages,[38] but punitive damages may not be awarded.[39]

(§ 5) *G. Libel and slander.*[40]—The damages recoverable for libel and slander include compensation for injury to reputation.[41] Punitive damages are recoverable in case of actual malice.[42] Where punitive damages are claimed, evidence of the wealth of the defendant is admissible.[43] Special damages due to repetition of the slander by others are not recoverable.[44] Limited publication is to be considered.[45]

money the judgment may be in the alternative that plaintiff pay the sum for which the property is held or make return of the property, held, where property taken by the sheriff on execution was replevied and plaintiff after judgment against him failed to return the property, the measure of damages in an action on the replevin bond was the amount of the alternative judgment in the replevin suit. Martin v. Hertz, 224 Ill. 84, 79 N. E. 558. Where one holding property under conditional sale sells the same after more than one-fourth the purchase price has been paid, the original vendor may not retake the property without tender of the amount paid by the second vendee less value of use, and if he does such amount is the measure of damages. 95 Ohio Laws, p. 60. National Cash Register Co. v. Cervone, 76 Ohio St. 12, 80 N. E. 1033.

For conversion the value of the property with interest. Corn Exch. Bk. v. Peabody, 111 App. Div. 553, 98 N. Y. S. 78; Jones v. Minnesota & M. R. Co., 97 Minn. 232, 106 N. W. 1048.

33. In claim and delivery, an instruction to assess damages at value of use of property from time of taking was error as the jury should have been told to deduct from such value expense in caring for it. Haggerty Bros. v. Lash, 34 Mont. 517, 87 P. 907.

34. Where a complaint for value of certificates of corporate stock was on the theory of complete deprivation of property, and after issue joined defendant returned the certificates, nominal damages only could be recovered. Owen v. Williams [Colo.] 89 P. 778. One seeking to recover for articles not returned by a laundry to which they were sent may not recover where he does not prove the value of goods not returned, the only proof of value being the value of all goods sent and it not appearing that all were not returned. West Side Laundry Co. v. Calumet Hotel Co., 103 N. Y. S. 820.

35. In replevin where testimony does not show willful wrong, fraud, or malice, punitive damages may not be recovered. Gregory v. Woodbery [Fla.] 43 So. 504.

36. Hatten v. Turman [Ky.] 97 S. W. 770. Damages for infringement of a ferry right are presumed from diminution in receipts and use of prohibited ferry by the public. Id.

37. In a suit by joint owners of a patent for infringement thereof, profits which accrued from infringement prior to the date of joint ownership cannot be recovered. Canda Bros. v. Michigan Malleable Iron Co. [C. C. A.] 152 F. 178. In an action for infringement of a patent, the infringer may not deduct from profits made during a certain period losses subsequently incurred in a separate transaction, only losses occurring concurrently may be deducted. Id.

38. For infringement of trade mark, at least nominal damages though no actual are shown. Lampert v. Judge & Dolph Drug Co. [Mo. App.] 100 S. W. 659.

39. Punitive damages may not be recovered for infringement of a trade mark. Lampert v. Judge & Dolph Drug Co. [Mo. App.] 100 S. W. 659.

40. See 7 C. L 1059. See, also, Libel and Slander, 8 C. L. 713.

41. Loss of or injury to reputation are elements in slander though there is no specific proof of such loss or injury. Rosenbaum v. Roche [Tex. Civ. App.] 101 S. W. 1164. In an action for libel it is not essential to a recovery for injury to feelings resulting from the publication that her reputation be worse after the publication than before. McArthur v. Sault News Printing Co. [Mich.] 112 N. W. 126. Proof of reputation in denial of slander must be confined to proof of the trait of character involved in the offense charged in slander. Earley v. Winn, 129 Wis. 291, 109 N. W. 633. In slander for charging one with having beaten her mother, proof of her reputation for having illtreated her mother but without physical abuse is admissible. Id.

42. Under Civ. Code § 3294, providing that malice warranting recovery of exemplary damages may be either express or implied, when a publication actionable per se is set forth in an action for libel, malice is presumed and exemplary damages may be recovered. Tingley v. Times Mirror Co. [Cal.] 89 P. 1097. In libel where actual and punitive damages are sought, evidence of prior and subsequent publication of similar articles is admissible on the question of malice. Id.

43. Where punitive damages are claimed in libel, evidence as to wealth of defendant is admissible though a corporation. Tingley v. Times Mirror Co. [Cal.] 89 P. 1097.

44. Where special damages sustained were due to a repetition of slander by third persons which repetition was actionable, the consequences thereof were not chargeable to the defendant. German Sav. Bk. v. Fritz [Iowa] 109 N. W. 1008.

45. Under Ann. Code Miss. 1892, § 1301, making it a misdemeanor for a telegraph operator to disclose the contents of a message to any one except the sendee in an action for publishing a libelous telegram

(§ 5) *H. Personal injuries.*[46]—For personal injuries there may be recovery for mental and physical pain and suffering,[47] for physical inconvenience,[48] and for permanent impairment of mental and physical powers,[49] for necessary and reasonable[50] expenditures,[51] for medical care and attention and medicines,[53] for loss of time and wages,[53] and where injuries are permanent, loss resulting from impaired

where it did not appear that the contents were known to anyone except the operators, such fact should be considered. Western Union Tel. Co. v. Cashman [C. C. A.] 149 F. 367.

46. See 7 C. L. 1060.

47. Consolidated Trac. Co. v. Schritter, 124 Ill. App. 578; Malone v. Sierra R. Co. [Cal.] 91 P. 522. Mental suffering which is the natural result of physical injury is an element of damages. Chicago Consol. Trac. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820. Mental suffering is an element where proof shows serious injury, great pain for two years, and disfigurement. St. Louis, etc., R. Co. v. Leamons [Ark.] 102 S. W. 363. Mental suffering is an element as to a child four years of age. Gulf, etc., R. Co. v. Sauter [Tex. Civ. App.] 103 S. W. 201.

48. Damages may be recovered for physical or personal inconvenience. McRae v. Metropolitan St. R. Co., 125 Mo. App. 562, 102 S. W. 1032. It is not erroneous to charge that the fact that an injured person will be deprived of the pleasure and satisfaction of life that only those persons can enjoy who are possessed of a sound body. Pittsburgh, etc., R. Co. v. Cozatt, 39 Ind. App. 682, 79 N. E. 534.

49. It is permissible to show that a **nervous condition** is a result of injuries. Galveston, etc., R. Co. v. Stoy [Tex. Civ. App.] 99 S. W. 135. Where it appeared that **appendicitis** resulted from an injury it was competent to show results following the disease. Birmingham R. Light & Power Co. v. Moore [Ala.] 42 So 1024.

Deafness resulting from a nervous shock is a proper element. Dreyfus v. St. Louis & S. R. Co., 124 Mo. App. 585, 102 S. W. 53. Diminution of health and vigor are elements where one **contracted pneumonia** in a cold waiting room and was ill for several weeks. St. Louis, etc., R. Co. v. Hook [Ark.] 104 S. W. 217.

50. Recovery may not be had for medical expenses in the absence of proof of the amount. Gibler v. Terminal R. Ass'n of St. Louis [Mo.] 101 S. W. 37. Recovery for medical services and nursing should be confined to reasonable value thereof and not what was actually paid York v. Everton, 121 Mo. App. 286, 97 S. W. 604. Money paid out for medicines cannot be recovered where it does not appear that the medicines were prescribed or necessary or that the amount paid therefor was the reasonable value. Elzig v. Bales [Iowa] 112 N. W. 540. The amount paid for medical services is not necessarily the measure of recovery. The reasonableness of the charge must be established. Storm v. Butte, 35 Mont. 385, 89 P. 726. Value of physician's services rendered an injured person may be considered if the attention given was reasonably proper under the circumstances. Allen v. Durham Trac. Co. [N. C.] 56 S. E. 942.

51. An instruction submitting the question of expenditures for medical expenses is proper where it is alleged and proved that such expenses have been incurred. Young v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 135.

52. An orphan under guardianship of a curator may recover for injuries all sums paid for medical treatment or for which liabilitiy had been incurred on her behalf. Stotler v. Chicago & A. R. Co., 200 Mo. 107, 98 S. W. 509. In an action by a married woman for injuries, evidence held to show that she paid medical expenses. Town of Elba v. Bullard [Ala.] 44 So. 412. A minor suing by his next friend may recover for sums paid for medical services and medicines. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222. Medical treatment cannot be recovered for where there is no proof of its value, or that any sum was paid or contracted to be paid. Gulf, etc., R. Co. v. Craft [Tex. Civ. App.] 102 S. W. 170. The right to recover expense of medical attendance is not affected by the fact, that the injured party has paid therefor. Sotebier v. St. Louis Transit Co., 203 Mo. 702, 102 S. W. 651. Evidence of the value of nurse hire is admissible though the injured person was nursed by his wife. Indianapolis & E. R. Co. v. Bennett, 39 Ind. App. 141, 79 N. E. 389. Where injuries render a person to some extent unable to care for herself necessitating hiring of a servant, such fact is an element to be considered. Kline v. Santa Barbara Consol. R. Co. [Cal.] 90 P. 125.

53. An injured person may state what vocation he followed prior to injury. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 99 S. W. 867. The fact that an injured person is an insurance solicitor and his earnings contingent does not preclude recovery for loss of time. Gregory v. Slaughter, 30 Ky. L. R. 500, 99 S. W. 247. A milliner may recover for loss of business during disability. York v. Everton, 121 Mo. App. 286, 97 S. W. 604. An injured person may testify as to what wages he had received for three or four months prior to his injury. West Pratt Coal Co. v. Andrews [Ala.] 43 So. 348. The fact that wages have been lost may be assumed where the uncontradicted testimony shows that the injured person was earning certain wages and was totally disabled by the injury. Sotebier v. St. Louis Transit Co., 203 Mo. 702, 102 S. W. 651. Where one was injured by being wrongfully ejected from a street car and testified that he was prevented by his injuries from carrying on his business and lost profits thereby and it appeared that he was a jobber working without capital, it was proper to permit him to show that he made $500 per month before the injury and but $50 or $75 thereafter. Chicago Union Trac. Co. v. Brethauer, 223 Ill. 521, 79 N. E. 287. The value of time lost by the injured person as distinguished from wages he might have earned is an element. Sibley v. Nason [Mass.] 81 N. E. 887. Where there

earning ability.[54] In short, the damages recoverable are those which will compensate the injured person.[55] Compensation for future pain and suffering,[56] or future

was no evidence as to what an injured person earned but his occupation or employment was proven, he was entitled to more than nominal damages. Malone v. Sierra R. Co. [Cal.] 91 P. 522. A complaint for injuries to a minor child alleging physical injuries and confinement to bed authorizes recovery for loss of services, nursing, and other medical expenses. Johnson v. St. Paul & W. Coal Co. [Wis.] 111 N. W. 722.

54. Evidence as to whether injuries were permanent held for the jury. Chenoweth v. Sutherland [Mo. App.] 101 S. W. 1105. [Advance sheets only.] Allegations that an injured person had been unable to work from date of injury and would be for a long time incapacitated for work and was crippled for life are sufficient to admit proof of earning capacity and character of occupation. Union Pac. R. Co. v. Stovall [Colo.] 89 P. 764. In an action for injuries the defendant may introduce evidence as to the plaintiff's prior physical condition. Missouri, K. T. R. Co. v. Lindsey [Tex. Civ. App.] 101 S. W. 863. Issue of impaired earning ability properly submitted where **fingers were injured** and were stiff and crooked and and one-half years after the injury. St. Louis & S. F. R. Co. v. Neeley [Tex. Civ. App.] 101 S. W. 481. On the question of earning capacity of a man employed a portion of his time in different lines of work, it is permissible to show how much time he devoted to each line and what he received in each. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 100 S. W. 176. Evidence showing condition and nature of injuries, character of business, and effect of injuries on capacity to perform business, authorizes recovery for diminished earning capacity. International & G. M. R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 987, 98 S. W. 423. Diminished earning capacity is an element for permanent injuries disabling one from performing labor Town of Elba v. Bullard [Ala.] 44 So. 412. Where a girl fifteen years of age, healthy and capable of performing labor, was permanently injured and earning capacity diminished, she could recover therefor though it did not appear that she ever had worked or would be compelled to. Stotler v. Chicago & A. R. Co., 200 Mo. 107, 98 S. W. 509. Evidence as to impaired earning capacity held for the jury. St. Louis, etc., R. Co. v. Leamons [Ark.] 102 S. W. 363. Where the fingers of a four year old child were permanently injured, evidence as to musical talent was admissible on the question of impaired earning capacity. Gulf, etc., R. Co. v. Sauter [Tex. Civ. App.] 103 S. W. 201. The fact that an injured person is not wholly incapacitated for work does not preclude recovery for such decreased earning capacity. Spencer v. Bruner [Mo. App.] 103 S. W. 578. Where a machinist had his **thumb and little finger torn off** and had been unable to work at his trade since his injury and his capacity to perform labor of any kind had been impaired, held sufficient to justify a recovery for decreased earning capacity. Chicago Consol. Trac. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820 Where two physicians examined an injured person and testified to his condition and the injured person and his wife testified as to his diminished earning capacity, as to his annual earning in his usual vocation, and inability to longer pursue it, evidence held sufficient to justify recovery for diminished earning capacity. Lewless v. Detroit United R. Co., 146 Mich. 531, 109 N. W. 1051. In an action for injuries which prevent a person from following his usual vocation, loss of earnings is an element of damages and evidence of average monthly earnings is admissible. Chicago, etc., R. Co. v. Stibbs, 17 Okl. 97, 87 P. 293. Where in an action for injuries resulting from coming in contact with a live wire experts testified that the injured person might recover under proper treatment, it was proper to refuse an instruction that no recovery could be had for permanent injuries as she would probably recover within two or three years. Colorado Springs Elec. Co. v. Soper [Colo.] 88 P. 165.

55. An instruction to consider nature and extent of injuries so far as proved his suffering, loss of time, and inability to work, money expended for medical bills, and allow such sum as would reasonably compensate so far as alleged and proved, was proper. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 N. E. 857. For injuries resulting because of unskillful operation of a surgeon, compensation for bodily and mental pain and suffering and impairment of ability to earn money. Dorris v. Warford, 30 Ky. L. R. 912, 100 S. W. 312. Where no loss of time or expense is alleged, the measure is reasonable compensation for mental and physical pain and suffering and permanent impairment of earning capacity, and compensation for temporary injury may not be recovered. Cincinnati, etc., R. Co. v. Giboney, 30 Ky. L. R. 1005, 100 S. W. 216. For personal injuries such damages as the jury think proper under the evidence not exceeding the amount prayed. Southern R. Co. v. McGowan [Ala.] 43 So. 378. Pain, suffering, disfigurement and pecuniary loss. Payne v. Georgetown Lumber Co., 117 La. 983, 42 So. 475. For injuries sustained in a collision with a street car at a crossing because of negligence of the company, the measure is compensation for injuries to person, horse, wagon, and harness, pain and suffering may be considered as well as medical expense and loss of time. Heidelbaugh v. People's R. Co. [Del.] 65 A. 587. The measure for personal injuries negligently inflicted is reasonable compensation for injuries proved, including loss of time and wages, pain and suffering, past and future, and also for any permanent injuries. Simeone v. Lindsay [Del.] 65 A. 778; Bowring v. Wilmington Malleable Iron Co., 5 Pen. (Del.) 594, 66 A. 369. For personal injuries, reasonable compensation for injury, including pain and suffering and all disability which may result. Reiss v. Wilmington City R. Co. [Del.] 67 A. 153; Smithers v. Wilmington City R. Co. [Del.] 67 A. 167; Heinel v. People's R. Co. [Del.] 67 A. 173. An instruction to consider every particular and phase of the injury, loss of time, impaired earning capacity, and physical powers, pain,

loss or expense,[57] may be recovered, providing it is shown with reasonable certainty that such pain and suffering[58] or loss will result.[59] Loss of time and inability to work during minority are not elements of damages for injury to infant.[60] An aggravation of an existing disability may be recovered for.[61] An injured person cannot recover for aggravation of an injury resulting from his own negligence in obtaining medical attendance,[62] but the wrongdoer is liable for all the consequences of the wrongful act,[63] though the injury may have been aggravated by unskillful treatment of attending physicians.[64] Suffering caused by unskillful treatment

and suffering, past and future, and personal disfigurement, was proper. Pittsburgh, etc., R. Co. v. Collins [Ind.] 80 N. E. 415. Such instruction was not erroneous as not requiring a verdict based on the evidence. Id. One who seeks to recover for the death of a child may recover damages measured by the same rule as if the action had been brought by the decedent during his life time. Wilmot v. McPadden, 79 Conn. 367, 65 A. 157.

56. Huggard v. Glucose Sugar Refining Co., 132 Iowa, 724, 109 N. W. 475. Where an injured person was still suffering from his injuries at the time of the trial, compensation for future suffering was properly allowed. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 N. E. 857.

57. Where injuries are shown to be permanent and the injured person will necessarily have to expend money for future medical treatment, such fact may be considered. Northern Texas Trac. Co. v. Mullins [Tex. Civ. App.] 99 S. W. 433. Loss of future earnings is to be considered where injured person was a healthy man earning wages at the time he was injured and the injuries were permanent. Dean v. Kansas City, etc., R. Co., 199 Mo. 386, 97 S. W. 910. Future medical treatment is an element where the injured person is a hopeless paralytic and will continue to grow worse. Sotebier v. St. Louis Transit Co, 203 Mo. 702, 102 S. W. 651. Where a married woman was injured it was competent to show the extent of her family and that she took care of them prior to the injury and had not been able to do so since. Latimer v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 1102. Where an injured person had not fully recovered at the time of the trial an instruction that the past could be considered was proper. Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 81 N. E 864.

58. Future suffering is not an element where the action is brought fourteen years after the injury and the wound has entirely healed up. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 S. W. 162 For personal injuries damages for future consequences of such injury may be recovered only with respect to such consequences as are shown reasonably certain to ensue. Daigneau v. Grand Trunk R. Co., 153 F. 593. Recovery may be had only for such future pain and suffering as is reasonably certain to result as distinguished from such as may possibly result. Chicago, etc., R. Co. v. Newsome [C. C. A.] 154 F. 665. Where in an action for injuries to a leg it was a matter of conjecture whether amputation would be necessary, testimony of a physician as to the process of amputation and its effect upon the nervous system was not admissible. Elzig v. Bales [Iowa] 112 N. W. 540. To justify recovery for future suffering, it must appear with reasonable certainty that such consequences will follow. Cordiner v. Los Angeles Trac. Co. [Cal. App.] 91 P. 436. Civ. Code, § 3283, providing for recovery for detriment resulting or certain to result does not authorize an instruction to estimate prospective damages on what the jury believed might be the future suffering. Malone v. Sierra R. Co. [Cal.] 91 P. 522.

59. Testimony that an injured person was a tomato grower and prior to receiving his injuries was an active man does not authorize recovery for diminished earning capacity. St. Louis S. W. R. Co. v. Acker [Tex. Civ. App.] 99 S. W. 121.

60. Richardson v. Nelson, 123 Ill. App. 550; Id. 221 Ill. 254, 77 N. E. 583.

61. Actual damage resulting may be recovered though they would have been much less except for the diseased and weakened condition of the injured person at the time of the injury. Ross v. Great Northern R. Co., 101 Minn. 122, 111 N. W. 951. Where it appeared that an injured person had been previously injured in the same place and had recovered therefor, an instruction was required that he could recover only for increase or aggravation of troubles which existed when he received the injuries sued for. St. Louis S. W. R. Co. v. Johnson [Tex.] 17 Tex. Ct. Rep. 167, 97 S. W. 1039. For maintaining a dangerous sidewalk a city is liable for injury caused though the person injured was at the time suffering from a disease which aggravated the consequences of the injury. City of Roswell v. Davenport [N. M.] 89 P. 256.

62. Louisville & N. R. Co v. Mount [Ky.] 101 S. W. 1182.

63. Where a complaint alleged that an injured person had been **rendered impotent** and proof thereof was introduced, it was not error to refuse to instruct the jury to disregard such evidence. Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136. Where one was thrown from a street car an injury to the shoulder was a proper element of damages whether caused directly by the fall or by **ligating the arm after the fracture** was reduced. O'Donnell v. Rhode Island Co. [R. I.] 66 A. 578. Where it was claimed that as a result of the accident the injured person **gave birth to a still born child** evidence as to the child's weight and whether it was well developed was material on the question whether the accident was the cause of its being still born. Chicago Union Trac. Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816. The fact that **blood poisoning** subsequently develops from an injury does not preclude recovery unless the treatment given was negligent. Rosier v. Metropolitan St. R. Co. [Mo. App.] 101 S. W. 1111.

64. In an action for personal injuries evidence of the condition of the injury up

by physician of injury sustained by reason of defendant's negligence is an element of damages, if ordinary care was used in the selection of physician.[65] Medical expenses may be recovered though discharged in bankruptcy,[66] but not if the injured person incurred no liability therefor.[67] Loss of time is an element though the injured person has received full pay from his employer during disability,[68] but is not an element if no pecuniary loss was sustained because of such loss of time.[69] Mere unhappiness resulting from impaired freedom of action is not an element.[70] The damages recoverable for impaired earning ability is the difference between the wages the injured person was capable of earning before and after the injury.[71]

§ 6. *Inadequate and excessive damages.*[72]—Verdicts for damages will be interfered with only where they show willful disregard of the evidence,[73] or are so grossly disproportionate to the actual damage shown as to clearly indicate passion or prejudice.[74] An excessive verdict may be cured by remittitur,[75] unless it is based

to the time of trial and to what extent that condition was due to the negligent act and to what extent due to malpractice of attending surgeon is admissible. Chicago, M. & St. P. R Co. v. Heil [C. C. A.] 154 F. 626.

65. Village of Bethany v. Lee, 124 Ill. App. 397.

66. An injured person is not precluded from recovering medical bills by the fact that such debts have been discharged in bankruptcy. Sibley v. Nason [Mass.] 81 N. E. 887.

67. Expenses of nursing is not an element where the injured person is cared for by members of his own family and there is not contract to pay them. Gibney v. St. Louis Transit Co., 204 Mo. 704, 103 S. W. 43.

68. An injured person is not precluded from recovering for lost time because of the fact that his employer continues to pay him his salary as a gratuity. Gulf, etc., R. Co. v. Wittnebert [Tex. Civ. App.] 104 S. W. 424.

69. In an action for personal injuries profits in a lunch business cannot be recovered, it not appearing that the injured person had particular skill in preparing food or that the business could not have been as successfully conducted by employes. Weir v. Union R. Co., 188 N. Y. 416, 81 N. E. 168.

70. Unhappiness resulting from impaired freedom of action and from being deprived of social intercourse with his friends are not elements. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978.

71. For diminished earning capacity the difference in earnings before and after the injury. Town of Elba v. Bullard [Ala.] 44 So. 412. An injured person was properly permitted to testify that several years prior to the accident he was earning $40 per week as a wheelwright and had been earning more since as a broker as tending to show earning capacity at time of injury. Southern R. Co. v. Stockdon, 106 Va. 693, 56 S. E. 713.

72. See 7 C. L. 1063.

73. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. City of Columbus v. Allen [Ind. App.] 81 N. E. 114. Where a jury in an action for injuries awards inadequate damages, the court may refuse to receive the verdict and direct the jury to reconsider it. Douglas v. Metropolitan St. R. Co., 104 N. Y. S. 452. The damages awarded must be sustained by ascertained and established facts. Poels v. Brown [Neb.] 111 N. W. 798. Verdict sustained on conflicting evidence of medical experts as to character of plaintiff's injuries. Johnstone v. Seattle, R. & S. R. Co. [Wash.] 87 P. 1125. Where there was some evidence that the value of the property destroyed equalled the amount of the verdict, it will not be set aside as excessive. Hennessey v. Baugh & Sons Co., 29 Pa. Super. Ct. 310. Findings of chancellor upon question of damages upon dissolution of injunction will not be disturbed unless wholly against weight of evidence. Marks v. Chicago Yacht Club, 121 Ill. App. 308.

Recovery held adequate: Five hundred dollars for permanent injury to elbow of boy eleven years of age, which injury caused constant pain. Richardson v. Missouri Fire Brick Co., 122 Mo. App. 529, 99 S. W. 778. One thousand one hundred thirty-five dollars for slight injuries to a married woman where it did not appear that subsequent fits of hysteria was the result of the injury. Des Moineaux v. New York City R. Co., 118 App. Div. 848, 103 N. Y. S. 618. Three thousand, five hundred dollars held a sufficient award. Smith v. Smith, 116 App. Div. 165, 101 N. Y. S. 521. One thousand dollars for injuries resulting in hemorrhages from the lungs. Schierloh v. Interurban St. R. Co., 115 App. Div. 455, 101 N. Y. S. 437.

74. Ordinarily a new trial will not be awarded because of inadequacy of damages for a tort. Lufkin v. Hitchcock [Mass.] 80 N. E. 456. Where the verdict of the jury is excessive, a new trial may be granted on motion. Von Au v. Magenheimer, 115 App. Div. 84, 100 N. Y. S. 659. An award which is not so excessive as to indicate passion, partiality, or prejudice, will not be disturbed. Southern R. Co. v. Clarke, 106 Va. 496, 56 S. E. 274.

Recovery held inadequate: Two hundred fifty dollars for injuries to spine and ribs, broken arm, and great pain suffered, where it appeared that a juror was guilty of misconduct. Bird v. Texas Midland R. Co. [Tex. Civ. App.] 99 S. W. 734. Two hundred dollars for two ribs broken, back and spine injured, confined to bed for six weeks, had frequent fainting spells, and sustained permanent injury to knee. Tourtelotte v. Westchester Elec. R. Co., 105 N. Y. S. 50.

upon passion or prejudice or a misconception of the evidence.[76] The holdings as to excessiveness of verdicts are grouped in the notes.[77]

75. An appellate court will require a reduction only where the verdict seems unreasonably large under th most favorable aspect of the testimony. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 100 S. W. 176. Where a verdict is plainly in excess of the amount recoverable as to interest, the court may properly allow a remittitur. Bush v. Brandecker, 123 Mo. App. 470, 100 S. W. 48. Code 1906, § 4910, authorizing the supreme court to reverse unless a portion of the verdict is remitted, is void as preventing a complete disposition of rights in the forum provided by organic law. Yazoo & M. V. R. Co. v. Wallace [Miss.] 43 So. 469; Daigneau v. Grand Trunk R. Co., 153 F. 593.

76. Belt R. Co. v. Charters, 123 Ill. App. 322

77. Recoveries Held Not Excessive. Breach of contract: Three hundred fifty dollars for breach of building contract where proof showed that fourteen windows leaked. Forbes v. Hunter [Ky.] 102 S. W. 246. One thousand, six hundred dollars for breach of warranty that all colts of a stallion would be black, brown, or bay, that seventy-five per cent of all mares bred would produce colts, and breach of agreement not to sell stallion of same breed, within twenty miles of buyer's residence. Merchants' Nat Bk. v. Ford, 30 Ky. L. R. 558, 99 S. W. 260. One hundred fifty dollars for wrongfully cutting out a subscriber's telephone. Cumberland Tel. & T. Co. v. Hobart [Miss.] 42 So. 349. For death of a minor child it was proper to allow $178 for burial expenses and transportation of the body to the parent's home. Dean v. Oregon R. & Nav. Co. [Wash.] 87 P. 824. Three thousand four hundred sixty-eight dollars and fifty-five cents held to be the value of water diverted in excess of the contract right to divert. Union Water Power Co. v. Lewiston, 101 Me. 564, 66 A. 67. One thousand dollars for **infringement of ferry right** for five years where receipt had diminished about $1.50 per day. Hatten v. Turman [Ky.] 97 S. W. 770.

Torts in general: Eight thousand dollars for **breach of marriage promise and seduction** by one worth $15,000. Langigan v. Neeley [Cal.] 89 P. 441.

Conversion: Three hundred dollars for conversion of a machine, that being the contract price. Norris v. St. Joseph & G. I. R. Co. [Mo App.] 101 S. W. 159.

Malicious prosecution: Twelve thousand five hundred dollars for malicious prosecution for arson. Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78. One hundred and fifty dollars for malicious prosecution. Coyle v. Shelenburg, 30 Pa. Super. Ct. 246.

Alienation of affections: Five thousand dollars for alienation of affections of a husband where proof showed malicious intermeddling and deliberate attempt to belittle the wife and cause separation. Klein v. Klein [Ky.] 101 S. W. 382. Three thousand dollars for alienation of affections of a husband by his parents. White v. White [Minn.] 112 N. W. 627. Five thousand dollars for willful **assault and battery** from which great pain and permanent impairment of sight was suffered, and for which punitive damages could be awarded. Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7. Five hundred dollars for violent assault, without provocation, subjecting plaintiff to indignity and humiliation. Coal Belt Elec. R. Co. v. Young, 126 Ill. App. 651. Five hundred dollars as punitive damages for assault. Cody v. Gremmler, 121 Mo. App. 359, 99 S. W. 46.

Libel and slander: One thousand dollars for slander in charging a white woman with having intercourse with a negro. Smitley v. Pinch [Mich.] 112 N. W. 686. Five hundred dollars for slander. Flannigan v. Stauss [Wis.] 111 N. W. 216. That a woman slandered as to chastity, is "a woman extremely common if not coarse," is insufficient to show that $500 is excessive. Id. Five thousand dollars for libel denouncing a man as a political trickster and as a man of vile and criminal character. Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257. Five hundred dollars for wanton and unprovoked use of words slanderous per se. Conwisher v. Johnson, 127 Ill. App 602. One thousand dollars for **unauthorized display of plaintiff's photograph.** Rhodes v. Sperry & Hutchinson Co., 104 N. Y. S. 1102. Five hundred dollars for **false imprisonment** over night. Robie v. Canadian Northern R. Co., 101 Minn. 534, 111 N. W. 1134. Two thousand five hundred dollars for false imprisonment where plaintiff was maliciously and wantonly arrested while making a complaint to an officer. Smith v. Macomber [R. I.] 66 A. 570. One thousand dollars for false imprisonment where after release the plaintiff suffered from nervousness. Illinois Cent. R. Co. v. Wilson [Ky.] 103 S. W. 364.

Injury to trees: Two hundred and fifty dollars held not excessive for destruction of ornamental trees. Alberts v. Husenetter [Neb.] 110 N. W. 657. Two thousand dollars for injury to an orchard by fire where testimony was conflicting as to value of trees. Louisville & N. R. Co. v. Beeler [Ky.] 103 S. W. 300.

Injuries to animals: For killing a cow a verdict for $80 is supported by testimony of the owner that the cow was worth $150 and testimony of the company that she was worth but $75. Texarkana & Ft. S. R Co. v. Bell [Tex. Civ. App.] 101 S. W. 1167. One hundred and five dollars for loss of three steers valued at from $30 to $35 per head. Hax v. Quincy, etc., R. Co., 123 Mo. App. 172, 100 S. W. 693. Seventy-five dollars for a horse where testimony as to value ranged from $35 to $100. Southern R. Co. v. Taylor [Ala.] 42 So. 625.

Breach of duty owed passenger: Five hundred dollars for wrongful ejection of a woman passenger where she was without money and was aided in telegraphing her husband and obtaining a night's lodging. Marlow v. Southern Pac. Co. [Cal.] 90 P. 928. One thousand five hundred dollars for wrongful ejection of a passenger, with abusive language and violent conduct, the circumstances warranting punitive damages. St. Louis, etc., R. Co. v. Mynott [Ark.] 102 S. W. 380. Three hundred dollars for wrongful ejection from train. Southern Pac. Co. v. Craner [Tex. Civ. App.] 101 S. W. 534. Two hundred and fifty dol-

lars for cursing and threatening a woman because of refusal to pay fare of a child with her. St. Louis S. W. R. Co. v. Granger [Tex. Civ. App.] 100 S. W. 987. Two hundred and fifty dollars for wrongful ejection of a boy from a train. St. Louis S. W. R. Co. v. Furlow [Ark.] 99 S. W. 689. Seventy-five dollars where a passenger was carried two miles beyond his destination and contracted sickness while walking back. St. Louis, etc., R. Co. v. Knight [Ark.] 99 S. W. 684. Two thousand four hundred and ninety-six dollars for failure to furnish cars for transportation of timber where the evidence showed that timber deteriorated that much in value. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 S. W. 375. Seven hundred and seventy-five dollars for insult and abuse of passenger. Georgia R & Elec. Co. v. Baker, 1 Ga. App. 832, 58 S. E. 88. Six hundred dollars where passenger was put off at wrong station and contracted sickness driving to her destination. St. Louis S. W. R. Co. v. Foster [Tex. Civ. App.] 103 S. W. 194 One hundred and seventy-five dollars for wrongful ejection of passenger from street car after he had presented a good transfer. Arnold v. Rhode Island Co. [R. I.] 66 A. 60.

Delay in delivering telegram: Two hundred and fifty dollars for delay in delivering a telegram whereby one was prevented from attending a funeral and there was evidence for the jury on the question of punitive damages. Doster v. Western Union Tel. Co. [S. C.] 57 S. E. 671. One thousand dollars for delay in delivering a telegram which prevented one from being present at his brother's funeral. Western Union Tel. Co. v. Caldwell [Ky.] 102 S. W. 840. One thousand dollars for delay in delivering a telegram which prevented a son from reaching his mother, to whom he was very much attached, until after her death. Western Union Tel. Co. v. Blackmer [Ark.] 102 S. W. 366. Two thousand dollars for delay in delivering a telegram preventing one from attending his mother's funeral. Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 101 S. W. 541. Five hundred dollars for delay in delivering a telegram which prevented a husband being present during the last hours of his wife's life and at her funeral. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. One thousand nine hundred and ninety-five dollars for delay in transmitting a telegram which prevented a parent from being present before his son's death. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354.

Personal injuries: Two thousand five hundred dollars for painful and permanent injuries. Miller v. Canton, 123 Mo. App. 325, 100 S. W. 571. Three thousand dollars for permanent injuries, ribs broken, flesh lost since injury, and disease contracted as result of injury. Galveston, etc., R. Co. v. Gracia [Tex. Civ. App.] 100 S. W. 198. Six hundred and forty dollars for injury to boy when based upon doctor's bill and wages lost by reason of his being unable to work. Chicago Union Trac. Co. v. Brody, 123 Ill. App. 331. One thousand one hundred and fifty dollars for pain suffered by child three years old, resulting from broken leg. Village of East Alton v. Franklin, 126 Ill. App. 564. Seven thousand dollars permanent injuries affecting personal appearance and comfort and causing great mental and physical pain. St. Louis, etc., R. Co. v. Andrews [Tex. Civ. App.] 99 S. W. 871. Eight hundred dollars for severe cuts and bruises about head and body, some teeth knocked loose, and $125 for medical expenses. Winfrey v. St. Louis Transit Co., 122 Mo. App. 388, 99 S. W. 458. Seven hundred dollars for injuries causing great pain, severe if not permanent. City of Brownsville v. Arbuckle, 30 Ky. L. R. 414, 99 S. W. 239. Four hundred dollars for injuries necessitating physician's care and confinement for several days and destruction of buggy. Henderson City R. Co. v. Lockett, 30 Ky. L. R. 321, 98 S. W. 303. Two thousand five hundred dollars for serious and permanent injuries. Houston, etc., R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202. One thousand dollars for large gash on face, one eye slightly but permanently injured, shoulder and hip hurt, prevented from working for seventeen weeks. Kielty v. Buehler-Cooney Const. Co., 121 Mo. App. 58, 97 S. W. 998. Five hundred dollars for slight injuries and mental and physical pain suffered. Wallace v. Bach, 30 Ky. L. R. 948, 97 S. W. 418. Six thousand five hundred dollars for injuries to healthy girl thirteen years of age resulting in inflammtion of sciatic nerve. Intense suffering, and necessitating use of crutch. Louisville R. Co. v. Owens, 29 Ky. L. R. 1294, 97 S. W. 356. Five thousand one hundred dollars for injuries which reduced weight of a woman from one hundred and thirty to one hundred and ten pounds in eight months, rendering her unable to work, sexual organs disordered, cure could be effected only by a dangerous operation. Louisville St. R. Co. v. Brownfield, 29 Ky. L. R. 1097, 96 S. W. 912. Three thousand four hundred dollars for permanent injuries tending to shorten life, organic heart trouble having developed. Montgomery Trac. Co. v. Bozeman [Ala.] 44 So. 559. Fifteen thousand dollars for injury to married woman twenty-nine years old who prior to accident was in good health and did all her housework and earned $300 per year doing millinery work, who became after injury a confirmed invalid unable to work or walk without suffering pain. Chicago Union Trac. Co. v. May, 125 Ill. App. 144. Three thousand seven hundred and twenty-five dollars for injuries causing appendicitis necessitating an operation. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 So. 1024. Three thousand three hundred and seventy-five dollars for permanent injuries resulting in miscarriage and necessitating medical treatment for sixteen months. Sparks v. North Tonawanda, 106 N. Y. S. 44. Five thousand two hundred dollars for injuries resulting from coming in contact with live wire. Injured person was continuously sick after the injury. Dover v. Gloucester Elec. Co., 155 F. 256. Five thousand dollars for severe bodily injuries. St. Louis, etc., R. Co. v. Price [Ark.] 104 S. W. 157. Five thousand dollars for permanent hernia, circumstances authorizing punitive damages. Louisville, etc., R. Co. v. Kessee [Ky.] 103 S. W. 261. Seven thousand five hundred dollars for permanent injuries to womb resulting in miscarriage. O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 S. W. 54. Four thousand two hundred

and four dollars and sixty-six cents for loss of services and companionship of wife, and for expenditure of $1,000 attorney's fees held not excessive. Wood v. Maine Cent. R. Co., 101 Me. 469, 64 A. 833. Seven thousand five hundred dollars for severe and permanent injuries. Reinhardt v. Central Land Co. [N. J. Law] 64 A. 990. One thousand dollars for bruised, cut, and torn flesh. Hedges v. Metropolitan St. R. Co., 125 Mo. App. 583, 102 S. W. 1086. A verdict of $1,200 for injuries to aged and infirm passenger. Toledo, Bowling Green & So. Trac. Co. v. McFall, 8 Ohio C. C. (N. S.) 271. One thousand dollars for loss of child's services, for four years, nine months. Johnson v. St. Paul & W. Coal Co. [Wis.] 111 N. W. 722. Two thousand six hundred dollars for injuries causing a floating kidney. Baggett v. St. Paul City R. Co., 101 Minn. 532, 111 N. W. 1132. Three thousand dollars for serious if not permanent injuries. Curtis v. Barber Asphalt Pav. Co. [Wash.] 87 P. 345. Six thousand dollars reduced to $4,500 for injuries to a child caused by coming in contact with live wire. Colorado Springs Elec. Co. v. Soper [Colo.] 88 P. 161. Five thousand dollars for injuries resulting in femoral hernia. Hodd v. Tacoma [Wash.] 88 P. 842. One thousand and twenty-five dollars for broken ribs and other injuries. Ashley v. Aberdeen [Wash.] 90 P. 210.

Temporary pain and disability: One thousand two hundred and fifty dollars for injuries rendering one unable to follow his usual occupation, and requiring a serious and painful operation to effect a cure. Louisville R. Co. v. Pulliam, 30 Ky. L. R. 1325, 101 S. W. 295. Six hundred dollars for injuries not significant, painful, or permanent. Johnson v. St. Paul Gaslight Co., 98 Minn. 512, 108 N. W. 816. Three hundred and fifty dollars for injuries to foot. Four weeks' time lost at $40 per week and $35 doctor's bills. Barry v. Kurshan, 103 N. Y. S. 120. Two thousand five hundred dollars for injuries causing a weakened physical condition necessitating the injured person to cease work. Murphy v. South St. Paul [Minn.] 112 N. W. 259. Five hundred dollars for injuries to one keeping him from work six weeks and $75 doctor's bill. Norman v. Bellingham [Wash.] 89 P. 559.

Complete and permanent disability: Ten thousand dollars for permanent and complete destruction of physical ability. Sotebier v. St. Louis Transit Co., 203 Mo. 702, 102 S. W. 651. Fifteen thousand dollars where one has suffered intense pain and had been rendered an invalid and cripple for life. International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000. Six thousand dollars for death of man twenty-two years of age earning $50 to $100 per month. International & G. N. R. Co. v. Hays [Tex. Civ. App.] 17 Tex. Ct. Rep. 605, 98 S. W. 911. Fifteen thousand for severe injuries to feet, hands, legs, and body, where evidence tended to show that condition would grow worse and ultimately result in paralysis and death. Galveston, etc., R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 616, 98 S. W. 932. Five thousand dollars where injury transforms plaintiff from a strong man in prime of life and in good health to a sick, prematurely aged man, wholly deaf in one ear, partially in the other, and with an inguinal hernia so large that it interferes with his movements. Chicago Union Trac. Co. v. Lowenrosen, 125 Ill. App. 194. Twenty thousand dollars for complete destruction of physical ability of man forty-nine years of age earning $2,000 per year. Galveston, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 505, 98 S. W. 898. Five thousand dollars where section hand was struck by a piece of coal thrown from passing train, rendered unable to work or walk without aid, inflammation, pain and sleeplessness resulted, several hundred dollars medical expenses. Dean v. Kansas City, etc., R. Co., 199 Mo. 386, 97 S. W. 910. Twenty-seven thousand five hundred dollars for loss of both legs below the knee. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368. Seventeen thousand dollars for injuries resulting in a perfect physical and mental condition becoming a physical and mental wreck, where the evidence showed that such sum was not in excess of present worth of earnings based on expectancy of life. Dupuis v. Saginaw Valley Trac. Co., 146 Mich. 151, 13 Det. Leg. N. 767, 109 N. W. 413. Thirty-two thousand nine hundred and sixteen dollars for injuries resulting in paralysis from small of back down, bladder so injured that urine could not be controlled, bowels uncontrollable, sexual powers lost, constant pain endured, and nursing for remainder of life required. Huggard v. Glucose Sugar Refining Co., 132 Iowa, 724, 109 N. W. 475. Ten thousand dollars for permanent disability of locomotive engineer forty-four years of age earning $1,800 per year. Texas & N. O. R. Co. v. Middleton [Tex. Civ. App.] 103 S. W. 203. Twenty thousand nine hundred and fifty dollars for leg crushed and amputated, toe of other foot lost, severe wounds on head, intense suffering, child four years old. Missouri, K. & T. R. Co. v. Nesbit [Tex. Civ. App.] 97 S. W. 825. A verdict of $13,500 for injuries of a disabling character to a locomotive engineer in the prime of life, though perhaps larger than the judges of the reviewing court would have named, does not under the circumstances of this case indicate passion or prejudice on the part of the jury, or any such error in computation as would require a remittitur. Lake Shore, etc., R. Co. v. Burtscher, 8 Ohio C. C. (N. S.) 137.

Hearing and eyesight: Two thousand five hundred dollars where hearing and eyesight were permanently impaired. Galveston, etc., R. Co. v. Bean [Tex. Civ. App.] 99 S. W. 721. Five thousand dollars for deep burn on leg, injury to eyesight, and loss of hearing of locomotive engineer. Texas & N. O. R. Co. v. Walton [Tex. Civ. App.] 104 S. W. 415. Verdict for $5,000 for loss of eye. Hocking v. Windsor Spring Co. [Wis.] 111 N. W. 685.

Injuries to head: Two thousand four hundred dollars for injury and disfigurement of face causing partial deafness and great pain. St. Louis, etc., R. Co. v. Leamons [Ark.] 102 S. W. 363. Ten thousand dollars where portion of skull was removed, sight, hearing, and nervous system impaired, and permanent incapacity from following vocation. Indianapolis St. R. Co. v. Kane [Ind.] 80 N. E. 841. Twenty thousand dollars where bright, intelligent boy eight years of age lost both legs. Pittsburgh, etc., R. Co. v. Simons [Ind.] 79 N. E. 911. Nine thousand five hundred dollars for death of a mail clerk thirty-two years of age earning $1,000

per year. Malott v. Central Trust Co. [Ind.] 79 N. E. 369. Four thousand two hundred dollars for permanent and painful injury to head from which the injured person had suffered and would continue to suffer. Peltomaa v. Katahdin Pulp & Paper Co., 149 F. 282. Four thousand five hundred dollars for broken nose, nerves destroyed, mind weakened, and sight impaired. Latimer v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 1102. Five thousand dollars for injuries to jaw, lip, and neck, rendering it impossible for the injured person to turn his head without turning his entire body a year after the injury. Commercial Tel. Co. v. Davis [Tex. Civ. App.] 16 Tex. Ct. Rep. 645, 96 S. W. 939. Two thousand two hundred and fifty dollars for injuries to head and neck necessitating medical attention for six months. Louisville & E. R. Co. v. Vincent, 29 Ky. L. R. 1049, 96 S. W. 898. Five thousand dollars for severe bruises about head, face, and arms, and loss of arm. Missouri, K. & T. R. Co. v. Schroeder [Tex. Civ. App.] 100 S. W. 808. Fourteen thousand for injuries to the head resulting in fracture of skull and hemorrhage, bone would never form, condition would probably grow worse until insanity or death resulted. Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 112 N. W. 443. One thousand dollars for cut on head, tooth knocked out, hips bruised, and other injuries where defendant did not insist that damages were excessive. Kelly v. Butte, 34 Mont. 530, 87 P. 968. Three thousand dollars for scalp wounds and injury to spine causing partial loss of control of bladder and bowels. Louisville R. Co. v. Bohon, 30 Ky. L. R. 862, 99 S. W. 915.

Spinal and nervous injuries: Three thousand five hundred dollars for permanent injuries to spine resulting in loss of control of bowels and bladder. Louisville R. Co. v. Worley [Ky.] 101 S. W. 926. Three thousand five hundred dollars for permanent injuries, painful and disfiguring and affecting the nervous system. Parmelee Co. v. Wheelock, 127 Ill. App. 500. Ten thousand dollars for permanent injury to memory, nerves of motion, voice, hearing, and eyesight of plaintiff who suffered fracture of the skull and concussion of brain by being wrongfully ejected from a train. Chicago Union Trac. Co. v. Brethauer, 125 Ill. App. 204. Two thousand dollars for injuries to boy of fourteen, laying him up for four weeks and resulting in curvature of spine and wasting of muscles. Hanchett v. Haas, 125 Ill. App. 111; Id., 219 Ill. 546, 76 N. E. 845. Three thousand seven hundred and fifty dollars for injuries to child causing nervous affliction, slight curvature of spine, and enlarged chest. Colorado Springs Elec. Co. v. Soper [Colo.] 88 P. 165. Eight thousand dollars for severe injuries to spine and chest of a boy fourteen years old from which he suffered acute pain and from which he would never recover. Ferguson v. Truax [Wis.] 110 N. W. 395. One thousand five hundred dollars for painful bruises on back from which plaintiff had not recovered five months after injury and would not recover for three months longer. Loss of wages of $300. Mack v. Chicago, etc., R. Co., 123 Mo. App. 531, 101 S. W. 142. Two thousand five hundred dollars for injuries to foot, spinal system, back and kidneys. Kentucky & I. Bridge & R. Co. v. Nuttall, 29 Ky. L. R. 1167, 96 S. W. 1131. Four thousand dollars for injuries destroying health and nervous system of woman and rendering her in need of constant care. Kupke v. St. Louis Transit Co., 122 Mo. App. 355, 99 S. W. 472.

Fractures, dislocations, and injuries to or loss of limbs: Seven thousand five hundred dollars for both legs of boy fourteen years of age. Macon & B. R. Co. v. Parker, 127 Ga. 471, 56 S. E. 616. Four thousand dollars for broken leg, head wound, and injuries to thigh, foot crushed, under treatment several months. Burleigh v. St. Louis Transit Co., 124 Mo. App. 724, 102 S. W. 621. Ten thousand dollars where ligaments holding bones of foot are torn, and plaintiff could not walk without crutch for seven months and use of foot will always give pain. Field v. Winheim, 123 Ill. App. 227. Three thousand dollars where plaintiff, a laborer, received serious and painful injuries and one of his legs is permanently injured and his capacity for work reduced. Chicago, etc., R. Co. v. Steckman, 125 Ill. App. 299. Ten thousand dollars to plaintiff, twenty-four years old, earning twenty cents per hour who by reason of injury lost his left arm, plaintiff being left handed, and received injury to leg from which he constantly suffers. Republic Iron & Steel Co. v. Lee, 126 Ill. App. 297. Five hundred dollars for injuries to ankle, leg, hip, and neck, necessitating loss of work and causing much pain and inconvenience. Southern R. Co. v. Johnson [Ky.] 101 S. W. 929. One thousand dollars for sprained ankle where there was evidence of willfulness. Atlanta, etc., R. Co. v. Potts [Ga.] 57 S. E. 686. Five hundred dollars for injuries to knee. Thompson v. Poplar Bluff [Mo. App.] 101 S. W. 709. Fifteen thousand dollars for loss of leg of brakeman twenty-three years old, $230 expended for medical services. Missouri, K. & T. R. Co. v. Harris [Tex. Civ. App.] 101 S. W. 506. Six hundred dollars for injury to fingers, which were stiff and crooked, one and one-half years after the injury, $50 wages lost. St. Louis & S. F. R. Co. v. Neely [Tex. Civ. App.] 101 S. W. 481. Seven thousand dollars for fractured leg and collar bone and scalp wound, eyesight and hearing impaired, injured person rendered an invalid. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 101 S. W. 250. Fifteen thousand dollars for collar bone broken in two places and right arm broken, use of arm permanently impaired, disease resulted. Injured person fifty years of age earning from $4,000 to $8,000 per year. Galveston, etc., R. Co. v. Young [Tex. Civ. App.] 100 S. W. 993. Two thousand five hundred dollars for permanent injury to hand. Confined for several weeks. Gregory v. Slaughter, 30 Ky. L. R. 500, 99 S. W. 247. Eight thousand dollars for injuries to knee preventing person from following vocation for which he had fitted himself and causing great shock to nervous system. Galveston, etc., R. Co. v. Stoy [Tex. Civ. App.] 99 S. W. 135. Ten thousand dollars for loss of foot and great suffering of boy ten years of age. St. Louis, etc., R. Co. v. Sparks [Ark.] 99 S. W. 73. Ten thousand dollars for loss of right arm above elbow. At time injured person was twenty-one years of age and earning $80 to $100 per month. St. Louis S. W. R. Co. v. Groves [Tex. Civ. App.] 16 Tex. Ct. Rep. 895, 97 S. W. 1084. Four hundred dollars for injuries to ankle causing

great pain and inconvenience to date of trial two months after the injury. Weiskopf v. Ritter, 29 Ky. L. R. 1268, 97 S. W. 1120. Four thousand five hundred dollars for both legs broken, severe cut in groin, one leg permanently shortened, $1,000 lost wages, and $143 for medical treatment. Burke v. St. Louis S. W. R. Co., 120 Mo. App. 683, 97 S. W. 981. One thousand five hundred dollars for fractured leg permanently distorted. Morgan v. Hager & Sons Hinge Mfg. Co., 120 Mo. App. 590, 97 S. W. 638. Two thousand dollars for permanent injuries to knee so that leg cannot be extended, and producing constant pain and will probably grow worse. Winn v. Metropolitan St. R. Co., 121 Mo. App. 623, 97 S. W. 547. Fifteen thousand dollars for leg and injuries to head. Central of Georgia R. Co. v. Forehand [Ga.] 58 S. E. 44. One thousand nine hundred dollars for broken leg of boy twelve years of age causing it to become shorter. Louisville R. Co. v. Hofgesand [Ky.] 104 S. W. 361. One thousand two hundred and fifty dollars for smashed hand and permanently injured fingers of child four years of age. Gulf, etc., R. Co. v. Sauter [Tex. Civ. App.] 103 S. W. 201. Six thousand dollars for loss of arm of longshoreman twenty-two years old, earning $25 per week during season of navigation on the Great Lakes. The Buffalo, 147 F. 304. A verdict of $1,000 in favor of a woman injured by reason of a defective sidewalk is not excessive where the injury consisted of a broken elbow, which has caused her great pain and will prevent her ever straightening her arm or opening or closing her hand, and as a consequence she has become dependent upon charity, and the fact that she is being supported in an infirmary at public expense does not deprive her of her right to recover. City of Toledo v. Fuller, 7 Ohio C. C. (N. S.) 598. Four thousand dollars for broken leg and other severe injuries. Oolitic Stone Co. v. Ridge [Ind. App.] 80 N. E. 441. Three hundred dollars for severe ankle sprain, injured person confined to her bed for eight or ten days, and her ankle being weak and sore for a much longer period. Evansville Elec. R. Co. v. Lerch [Ind. App.] 81 N. E. 225. Five thousand dollars for injury to person twenty-two years old, ankle dislocated, and lower end of fibula fractured, ligament joining tibia to foot broken which would probably never unite and would cause suffering for many years. City of Bloomington v. Woodworth [Ind. App.] 81 N. E. 611. Two thousand dollars for fractured leg and ligaments torn loose from the ankle. Northrup v. Hayward, 99 Minn. 299, 109 N. W. 241. Thirteen thousand five hundred dollars for loss of leg of man sixty-four years old earning $1,200 to $1,500 per year. Other leg broken, wrist broken, suffered acute pain for several months in hospital. Parker v. Fairbanks Morse Bldg. Co., 130 Wis. 525, 110 N. W. 409. Eight thousand five hundred dollars for loss of leg of man thirty-six years of age. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809. Four thousand dollars for broken leg. Leg shortened and ankle stiffened, and was result of pain ten months after the injury. City of Louisville v. Adams, 30 Ky. L. R. 1129, 100 S. W. 218. Eight thousand five hundred dollars for injured leg, broken ribs, injured head, and internal injuries, earning capacity reduced one-half. Foster v. Chicago, etc., R. Co. [Iowa] 111 N. W. 415. Five thousand dollars for loss of hand of laborer forty years of age earning good wages. Walker v. Simmons Mfg. Co. [Wis.] 111 N. W. 694. Nine thousand three hundred and thirty-eight dollars and sixty cents for loss of leg below the knee. In hospital seven weeks and suffered pain. After healing stump caused pain. McCoy v. New York Cent., etc., R. Co., 103 N. Y. S. 1083. Three thousand dollars for compound fracture of leg, though injury may not be permanent, but earning capacity will be diminished. Maloney v. Stetson & Post Mill Co. [Wash.] 90 P. 1046. One thousand two hundred dollars for bruised, strained, and dislocated knee. Alabama G. So. R. Co. v. Davis, 127 Ga. 89, 55 S. E. 1046.

Recoveries Held Excessive. Breach of duty to passenger: Two thousand five hundred dollars for slapping a passenger where there was some provocation. Louisville & N. R. Co. v. Williamson, 29 Ky. L. R. 1165, 96 S. W. 1130. Five hundred dollars for refusal of sleeping car conductor to give plaintiff a berth for which he had contracted, refusal being due to a mistake of the company's agent. Pullman Co. v. Pennock [Tenn.] 102 S. W. 73. Five hundred dollars for ejectment from street car, no force or insulting language used. Camden Interstate R. Co. v. Frazier, 30 Ky. L. R. 186, 97 S. W. 776. Two thousand dollars for catching cold because of insufficiently heated railway coach. Frigstad v. Great Northern R. Co., 101 Minn. 40, 111 N. W. 838.

Torts in general: One thousand dollars for provoked assault on a passenger where punitive damages could not be recovered. Mitchell v. United Rys. Co., 125 Mo. App. 1, 102 S. W. 661. Six hundred dollars for assault where injuries were neither severe nor permanent. Nagle v. Cohn [R. I.] 67 A. 419. Two hundred dollars held excessive by $150 for obstruction of a way where it appeared that there was left enough room to pass. Poole v. Greer [Del.] 65 A. 767. Five hundred dollars for **malicious prosecution** where there was no humiliation and actual damages proved amounted to $20. Sasse v. Rogers [Ind. App.] 81 N. E 590. Two thousand five hundred and ten dollars for **improper burial of a child.** Wright v. Beardsley [Wash.] 89 P. 172.

Injuries to property: Three hundred dollars for a house burned where the undisputed evidence showed it to be worth but $200. Dodd & Co. v. Read [Ark.] 98 S. W. 703. Evidence insufficient to sustain a verdict for injuries to a carriage caused by a collision with an automobile. Mendleson v. Van Rensselaer, 118 App. Div. 516, 103 N. Y. S. 578. Six hundred dollars for injuries to property which a carpenter testified could be repaired for $25 but which the owner testified was worth $155. Spencer v. San Francisco Brick Co. [Cal.] 89 P. 851. Seventy-five dollars for injuries to a mule, the highest proved value of which was $100 and which was afterwards sold for $35. Atlanta Ice & Coal Co. v. Mixon, 126 Ga. 457, 55 S. E. 237.

Personal injuries: Thirty thousand dollars for injuries rendering a woman fifty-two years of age an invalid, but as to the permanency of the injuries the testimony of experts was conflicting. Gibney v. St. Louis Transit Co., 204 Mo. 704, 103 S. W. 43. Twen-

§ 7. *Pleading, evidence, and procedure.* *A. Pleading.*[78]—A complaint should show that the damages claimed are the proximate result of the injury,[79] and the amount [80] and the elements of damages should be definitely alleged [81] and with

ty-one thousand dollars for injury resulting from miscarriage and an aggravation of a dislocated kidney not causing total disability. Vester v. Rhode Island Co. [R. I.] 67 A. 444. Seven thousand dollars held excessive, for loss of part of foot causing merely a slight limp. Belt R. Co. of Chicago v. Charters, 123 Ill. App. 322. Twelve thousand five hundred dollars for internal injuries and two ribs broken and verdict based on conflicting expert testimony. Masteller v. Great Northern R. Co., 100 Minn. 236, 110 N. W. 869. Two hundred and twenty-nine dollars for loss of society of wife where evidence showed that she was confined to bed for three weeks and did not go out for three or four weeks, but there was no evidence of loss of services. Schulz v. Union R. Co., 104 N. Y. S. 722.

Fractures, dislocations, and injuries to and loss of limbs: One thousand five hundred dollars for mashed and bruised toes but no bones broken. St. Louis, etc., R. Co. v. Snell [Ark.] 100 S. W. 67.

Injuries to head: Eight thousand dollars for scalp wound completely healed and permanent injury to shoulder. No evidence as to how much earning capacity had been diminished. Southern R. Co. v. Goddard, 30 Ky. L. R. 126, 97 S. W. 392.

Reduced verdicts: Four hundred and fifty dollars held excessive by $200 **injuries to land** caused by construction of a road bed in such manner that land was washed away. Dickinson v. Pere Marquette R. Co. [Mich.] 14 Det. Leg. N. 252, 111 N. W. 1078. Five hundred dollars reduced to $300 for **flooding land** and causing inconvenience in getting to and from premises. International & G. N. R. Co. v. Stewart [Tex. Civ. App.] 101 S. W. 282.

Torts in general: Fifteen thousand dollars reduced to $5,000 for assault on woman passenger on a vessel in her state room by unknown assailant and subsequent acts of aggravation by officers. The Western States, 151 F. 929. Five hundred dollars reduced to $100 for assault on a passenger where no serious injury was suffered. Burfeindt v. New York City R. Co., 52 Misc. 651, 101 N. Y. S. 589. One thousand dollars reduced to $500 for illness of temporary character resulting from being required to leave a train because of negligence in exchange of tickets. Shannon v. Northern Pac. R. Co. [Wash.] 87 P. 351.

Personal injuries: Three thousand dollars reduced to $2,000 for broken ribs and eight weeks' time lost at $25 per week. Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 S. W. 675. Six thousand five hundred dollars reduced to $4,500 for sprained back. Daigneau v. Grand Trunk R. Co., 153 F. 593. Two thousand dollars reduced to $1,000 for injuries not permanent to hip joint and spine. Yarbrough v. Swift & Co. [La.] 44 So. 121. Nine thousand eight hundred and sixty-six dollars and thirty-three cents for serious and painful injuries reduced to $6,000. Wood v. Maine Cent. R. Co., 101 Me. 469, 64 A. 833. Seven thousand five hundred and fifty-eight dollars and ninety-two cents for severe and painful injuries to woman reduced to $4,500. Thirty thousand dollars reduced to $20,000 **for burns inflicting painful and permanent injuries** and incapacitating from labor. Strand v. Great Northern R. Co., 101 Minn. 85, 111 N. W. 958. One thousand five hundred dollars reduced to $1,000 for injuries from which one was confined in a hospital about two weeks. Comrade v. Atlas Lumber & Shingle Co. [Wash.] 87 P. 517. Two thousand seven hundred dollars reduced to $1,700 for severe but not permanent **scalds.** Meyers v. Syndicate Heat & Power Co. [Wash.] 91 P. 549.

Loss of or injuries to limbs: Fifteen thousand dollars reduced to $10,000 for loss of foot of switchman. Brady v. Kansas City, etc., R. Co. [Mo.] 102 S. W. 978. Twenty thousand dollars reduced to $15,000 for **injuries to foot and ankle** necessitating amputation a few inches below the knee after several months' pain and suffering. Artificial leg caused some pain. Injured person thirty years of age earning $100 per month. Texas & N. O. R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 S. W. 1070. Four thousand six hundred and ten dollars reduced to $3,500 for fractured leg and other minor injuries. Ten months' time lost and injured person was earning $100 per month. Koepsel v. Minneapolis, etc., R. Co., 100 Minn. 202, 110 N. W. 974. Nine thousand dollars reduced to $5,266.20 for fracture between ankle and knee. Ross v. Metropolitan St. R. Co., 116 App. Div. 507, 101 N. Y. S. 932. Seven thousand five hundred dollars for loss of four fingers of right hand reduced to $5,000. Campbell v. Wheelihan-Weidauer Co. [Wash.] 89 P. 161.

78. See 7 C. L. 1068.

79. Complaint for damages for failure to deliver a telegram held not to show how damages were sustained because of such failure. Bashinsky v. Western Union Tel. Co., 1 Ga. App. 761, 58 S. E. 91. Complaint for loss of profits which could have been made if a bailee had returned tents promptly, held good against general demurrer. Baker & Lockwood Mfg. Co. v. Clayton [Tex. Civ. App.] 103 S. W. 197. A complaint in an action for injuries to hotel business by reason of false publication which alleges that by reason of such publication large numbers of persons were dissuaded from making contemplated contracts for board and from paying a designated sum is too uncertain as to damages. Wright v. Cowles [Cal.] 87 P. 809. A complaint for damages to fruit by freezing owing to destruction of covering by fire should show notice that such result might reasonably be expected to follow from the burning. Atlantic Coast Line R. Co. v. Benedict Pineapple Co. [Fla.] 42 So. 529.

80. A pleading for breach of contract must set up facts showing the right to such damages and the amount. Benjamin v. Maloney, 155 F. 494. An allegation of loss in a certain sum because of destruction of property is equivalent to an allegation of damages in such sum. McVay v. Central California Inv. Co. [Cal. App.] 91 P. 745. A complaint for killing horses that damages in a certain sum had been sus-

certainty.[82] A complaint will support a recovery for no greater sum than is claimed.[83] The recovery is limited to the elements of damages alleged.[84] All damages that necessarily flow from the wrongful act complained of may be recovered under the ad damnum clause without special averment,[85] but damages which result

tained in tantamount to an allegation of value. Ft. Worth, etc., R. Co. v. Hickox [Tex. Civ. App.] 103 S. W. 202. A petition for assault asking damages for mental suffering and for humiliation and disgrace does not demand double damages, though the latter may be a form of mental suffering. Galveston, etc., R. Co. v. Bean [Tex. Civ. App.] 99 S. W. 721. In complaint for conversion, it is proper to allege the usable value of the property. Berry v. Geiser Mfg Co., 15 Okl. 364, 85 P. 699.

81. Cagle v. Shepard, 1 Ga. App. 192, 57 S. E. 946. Complaint for injuries to land by permitting spread of seed of noxious weeds thereon held not wanting in particularity as to the elements and items of damage. Doeppenschmidt v. International & G. N. R. Co. [Tex. Civ. App.] 102 S. W. 950. A complaint for delay in delivering a trunk containing wearing apparel of wife and child, setting up value of use of same as a certain sum, held not insufficient for failure to itemize articles of wearing apparel delayed. Texas & N. O. R. Co. v. Russell [Tex. Civ. App.] 17 Tex. Ct. Rep. 607, 97 S. W. 1090. Allegations of impairment of earning capacity, and the amount of damages by reason thereof, authorizes recovery thereof without allegations of amount earned before and after injury. International & G. N. R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 987, 98 S. W. 423. Allegations of injury to face, head, and other parts of the body are not bad because not designating what particular part of face, head, and body were injured. Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 17 Tex. Ct. Rep. 598, 98 S. W. 909.

82. An allegation that it was reasonably certain that plaintiff would suffer future mental and physical pain does not raise the issue because not alleging that she "would." Bell v. Central Elec. R. Co., 125 Mo. App. 660, 103 S. W. 144. An allegation that an injured person's mind had become seriously affected is an allegation of fact and sufficient without setting out in detail the manner thereof. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222. A complaint by a parent for injuries to a child asking damages because of its crippled condition must allege the respects in which expenses for its care, education, and maintenance will be increased, and itemize expenses incurred for medical treatment, medicine and nursing. Houston, etc., R. Co. v. Adams [Tex. Civ. App.] 17 Tex. Ct. Rep. 58, 98 S. W. 222. Declaration for conversion of bricks held to claim damage for loss of the value of the brick as well as for delay of plaintiff's work. Malnati v. Thomas, 26 App. D. C. 277.

83. Damages specifically alleged and itemized in an action on an injunction bond are the limit recoverable. Sullivan v. Cartier, 147 F. 222.

84. Where in an action for delay in furnishing cars for transportation of cattle damages were claimed only for loss occurring before the cattle were put onto the cars, there could be no recovery for loss occurring on the road. San Antonio & A. P. R. Co. v. Timon [Tex. Civ. App.] 99 S. W. 418. Injuries not within the scope of those specified in the complaint may not be recovered for. Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 17 Tex. Ct. Rep. 598, 98 S. W. 909. A complaint that defendant is indebted to plaintiff for horses sold, accompanied by an itemized bill, does not authorize recovery for difference between the contract price and price obtained on a resale. Campbell & Reid & Western Sale Stables v. Myers, 122 Mo. App. 272, 99 S. W. 45. Where an injured person by his complaint limits his claim for expenses for medicines and medical services paid, he may not recover for debts owing by him for medicines. Texas Short Line R. Co. v. Patton [Tex. Civ. App.] 16 Tex. Ct. Rep. 809, 96 S. W. 774.

85. General damages are such as defendant is presumed will necessarily flow from his wrongful act. Irby v. Wilde [Ala.] 43 So. 674. General damages are such as necessarily flow from the wrongful acts alleged and are recoverable under general averments of damage. Epstin v. Berman [S. C.] 58 S. E. 1013.

Personal injuries: Under a general allegation for damages in an action for personal injuries, a recovery may be had for all injuries resulting from the negligence complained of. Fritz v. Watertown [S. D.] 111 N. W. 630. A complaint alleging serious injury to hand, shoulder, and arm, bruised body, pain and suffering, permanent incapacity from carrying on usual occupation, amount of income and amount expended for medical services, and that he has been damaged in the sum of $4,000, is not bad for failure to set out the occupation. Id. Complaint alleging partial paralysis, nervous system injured, severe pains suffered, confinement to bed, is broad enough to allow recovery for physical inconvenience. McRae v. Metropolitan St. R. Co., 125 Mo. App. 562, 102 S. W. 1032. Allegations that plaintiff was injured, that his right arm and leg were badly bruised and sprained, * * * and that he was otherwise made sick and sore and detained from business for thirty days, will admit proof of extent and duration of injuries alleged. Jones v. Ogden City [Utah] 89 P. 1006. Allegations that a person was thrown down, his ankle broken, foot, leg, and other parts of his body bruised and crushed, and he was shocked, crippled, and disfigured, authorizes proof of rupture and broken leg above the ankle. Birmingham R., Light & Power Co. v. Brown [Ala.] 43 So. 342. A husband suing for injuries to his wife may testify that her condition was such that he could not leave her alone at night as bearing on the extent of injuries, though such fact was not alleged. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128. In an action for **injuries to a horse,** the fact that the animal was of a superior class and available for breeding purposes was not special. Texas & P. R. Co. v. Newsome [Tex. Civ.

naturally and proximately, but not necessarily or by implication of law from the alleged wrongful act must be specially pleaded,[86] hence there can be recovery for loss of time or earning,[87] or for expenditures on account of the injury alleged [88] only to the extent to which such damages are alleged.[89] Physical suffering need not be specially alleged.[90] An injured person may allege that expedients were resorted to to lessen the damages,[91] but as a general rule this is a matter of defense which must be set up by the defendant.[92] Damages resulting from fraud must be alleged and proven.[93] Punitive damages may be recovered under a pleading which states a cause of action, which entitles the plaintiff to such damages,[94] but are not recoverable under a mere allegation that the injured person is entitled thereto.[95] Pleadings in justice courts are not governed by the strict rules applicable to courts of general jurisdiction.[96] Unliquidated damages arising from tort may not be set off in an

App.] 98 S. W. 646. A complaint for **injuries to a steer** that the ribs and shoulder were injured, and that he was otherwise bruised and injured, will admit proof of injuries to other parts of his body. Hax v. Quincy, etc., R. Co., 123 Mo. App. 172, 100 S. W. 693. Complaint for **injuries to a house** by reason of change of grade of street held good against demurrer and sufficient to admit proof of diminution in value of property. Barnes v. Grafton, 61 W. Va. 408, 56 S. E. 608.

86. Special damages are such as naturally and proximately, but not necessarily, accrue from the unlawful acts alleged and are not recoverable unless specially pleaded. Epstin v. Berman [S. C.] 58 S. E. 1013; Irby v. Wilde [Ala.] 43 So. 674.

Personal injuries: Evidence of heart trouble held not an element though evidence had been admitted without objection where such affection was not a necessary consequence of the injury alleged. Colbert v. Rhode Island Co. [R. I.] 67 A. 446. Where in an action for **maintaining a nuisance** there was no claim for damages for sickness, there could be no recovery therefor. Gulf, etc., R. Co. v. Craft [Tex. Civ. App.] 102 S. W. 170. For wrongful **release of a judgment debtor,** pleadings held insufficient to authorize evidence as to solvency of debtor released. Moody & Co. v. Rowland [Tex.] 99 S. W. 1112. A complaint for **assault and battery** in code form covers only general damages necessarily resulting and elements of special damages must be specially pleaded. Irby v. Wilde [Ala.] 43 So. 574.

87. Loss of time must be specially pleaded. Louisville & N. R. Co. v. Dickey [Ky.] 104 S. W. 329.

Contra: Loss of time may be proven without special allegation in case of partial disability. El Paso S. W. R. Co. v. Barrett [Tex. Civ. App.] 101 S. W. 1025.

88. A declaration in an action for personal injuries which demands judgment for money paid out only will not authorize recovery of a medical bill not paid. Simeone v. Lindsay [Del.] 65 A. 778. For assault and battery, physical pain, loss of time, and amount paid physician, are elements of special not of general damages. Irby v. Wilde [Ala.] 43 So. 574.

89. In an action upon an offer to pay for corporate stock, recovery cannot be had for the assessment on the stock in the absence of allegations of special damage. Ellis' Adm'r v. Durkee, 79 Vt. 341, 65 A. 94. Allegation that an injured person has been compelled to pay a certain sum for medical expenses is a sufficient allegation that the expenditures were made. Detrich v. Metropolitan St. R. Co., 125 Mo. App. 608, 102 S. W. 1044.

90. Physical suffering may be recovered for though not specially alleged. Louisville & N. R. Co. v. Dickey [Ky.] 104 S. W. 329. The rule that special defenses must be specially pleaded does not apply to the admission of evidence as to the extent of suffering, since such testimony is admissible under general denial. Ft. Worth & D. C. R. Co. v. Travis [Tex. Civ. App.] 99 S. W. 1141.

91. It is proper for an injured person to allege that she resorted to expedients to avoid or lessen injuries. Atlantic Coast Line R. Co. v. Powell, 127 Ga 805, 56 S. E. 1006.

92. The fact that an injured person failed to procure proper treatment for his injuries or consult a physician must be specially pleaded and cannot be proved under a general denial. Cincinnati, etc., R. Co. v. Crabtree, 30 Ky. L. R. 1000, 100 S. W. 318.

93. It is incumbent on one to allege and prove damages resulting from fraud. Bass v. Postal Telegraph-Cable Co., 127 Ga. 423, 56 S. E. 465.

94. A complaint for libel alleging that defendant wickedly and maliciously with intent to injure and disgrace plaintiff and bring her into public discredit published defamatory, false, and malicious statements concerning her is sufficient to support a claim for punitive damages. Tingley v. Times-Mirror Co. [Cal.] 89 P. 1097. Willful or wanton injury is not sufficiently charged by allegations that a conductor willfully and wantonly caused a car to start while a passenger was leaving it. Birmingham R., Light & Power Co. v. Brown [Ala.] 43 So. 342. Purpose of inflicting injury not shown. Id. Allegations that an injury was negligently and wantonly inflicted held sufficient against demurrer that it did not show wanton or intentional injury. Birmingham R., Light & Power Co. v. Wise [Ala.] 42 So. 821. Punitive damages need not be claimed in terms. Greeney v. Pennsylvania Water Co., 29 Pa. Super. Ct. 136.

95. A complaint against a carrier for refusal to deliver certain cars of lumber except on payment of charges alleged to be illegal and which places actual damages at $200. A mere allegation that plaintiff is entitled to $2,000 punitive damages states no cause for recovery. Clement v. Louisville & N. R. Co., 153 F. 979.

96. For injuries to horse in an action in

action for breach of contract,[97] nor can damages for an independent tort of a landlord be set off against rent.[98] Objectionable matter in a complaint is properly reached by motion to strike.[99] Under general issue defendant may recoup any damages he sustained by reason of plaintiff's noncompliance with the terms of the contract sued on or the breach of any warranty therein contained.[1]

(§ 7) *B. Evidence as to damages. Burden of proof and sufficiency of evidence.*[2]—A plaintiff has the burden to prove that he has sustained actual damage[3] and the amount thereof,[4] and that special damages are the proximate result of the injury complained of.[5] The burden of proof of facts operating to mitigate damages is on the defendant.[6] Where expense has been incurred the party making the expenditures has the burden of proving the reasonableness thereof.[7] Damages must

justice court, recovery could be had for sums expended in trying to cure the horse, and value of his services while disabled though the complaint contained a mere general allegation of damages. Long v. Nute, 123 Mo. App. 204, 100 S. W. 511.

97. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687.

98. Damages flowing from an independent tort of a landlord cannot be set off against rent. Smith v. Green [Ga.] 57 S. E. 98.

99. A motion to strike improper elements of damage from the complaint is a proper method of reaching the objectionable matter. Gregory v. Woodbery [Fla.] 43 So. 504. A motion to strike from a complaint a portion thereof setting up speculative damages is a proper method of reaching such matter. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008.

1. Bauer v. Jerolman, 124 Ill. App. 151.

2. See 7 C. L. 1072.

3. Evidence establishing a breach of contract but not showing the amount of damages arising therefrom will not authorize a verdict. Shaw-Wilker Co. v. Fitzsimons [Mich.] 112 N. W. 501. Evidence insufficient to warrant a recovery of more than nominal damages in an action for malicious prosecution. Cook v. Bartlett, 115 App. Div. 829, 100 N. Y. S. 1032. Recovery may not be had for injuries as to which there is no evidence. Gates v. Bekins [Wash.] 87 P. 505. Instruction disapproved. Id. Evidence insufficient to show that rotting of lumber was due to negligence of defendant. Deitz v. Lensinger, 77 Ark. 274, 91 S. W. 755. It is proper to charge that a person who claims compensation for an alleged wrong must prove loss and the amount thereof. Haggerty v. Lash, 34 Mont. 517, 87 P. 507. Where special injury is sustained from obstruction of a navigable stream, damages may be recovered without proof of negligence. Drews v. Burton & Co. [S. C.] 57 S. E. 176. In an action for a work done on a contract where there was no proof of value of such work, there can be no recovery. Polstein v. Miller, 49 Misc. 615, 97 N. Y. S. 211. For breach of contract to furnish goods within a certain time, in order to recover for loss of orders, plaintiff must show that the persons who ordered from him had canceled their orders and had a right to do so. Korin v. Rutz, 98 N. Y. S. 845.

4. In an action for injuries where the injured person was laid up for four weeks and procured a boy for $5 per week and there was no other evidence of damages or cost of board for the boy, the evidence was held insufficient to sustain a verdict for more than $5 per week for four weeks. Friedman v. Brooklyn Heights R. Co., 52 Misc. 477, 102 N. Y. S. 525. In suits for unliquidated damages notwithstanding absence of plea or answer, plaintiff must prove amount of damage. Palmer v. Ingram [Ga. App.] 58 S. E. 362. Expenses for medical treatment cannot be recovered unless the amount thereof be proved. St. Louis, etc., R. Co. v. Leamons [Ark.] 102 S. W. 363. Where there was no evidence as to value in an action for failure to deliver rice as per contract, there could be no recovery. Davis v. Reisinger, 105 N. Y. S. 603. One suing for injuries to land kept for lambing purpose has the burden to prove extent or damage and value of use of land. Painter & Co. v. Stahley Bros. [Wyo.] 90 P. 375.

5. An injured person has the burden to prove that his injuries caused appendicitis. Birmingham R. Light & Power Co. v. Moore [Ala.] 42 So. 1024. Evidence that an injured person was suffering from rheumatism resulting from the injury held for the jury. Detrich v. Metropolitan St. R. Co., 125 Mo. App. 608, 102 S. W. 1044. A plaintiff in an action for breach of contract does not lose his right to damages by reason of failure to offer evidence as to the loss he has sustained, where by a ruling of the court he has been deprived of the testimony necessary to make out his case, and a court is not authorized under such circumstances to direct a verdict for the defendant. Kneipper v. Richards, 7 Ohio C. C. (N. S.) 581.

6. Such proof must be sufficient to cover all the essential elements of such facts. Huntington Easy Payment Co. v. Parsons [W. Va.] 57 S. E. 253. The burden of proving that damages for breach of contract could have been mitigated rests on the party guilty of the breach. Ramsey v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 65 A. 461. Evidence insufficient to show that loss could have been mitigated. Id.

7. Money expended for medicines may not be recovered in the absence of proof of reasonable value. Ft. Worth & R. G. R. Co. v. Morris [Tex. Civ. App.] 101 S. W. 1038. A contractor who sues a subcontractor for expense of completing work which subcontractor refused to do has the burden to prove that expenses incurred were necessary. Seventh St. Planing Mill Co. v. Schaefer, 30 Ky. L. R. 623, 99 S. W. 341. In an action for medical expenses and loss of services of his wife where medical expenses were proved but loss of services was not, the verdict

be proven with some degree of certainty.[8] The quantum of proof required is a preponderance of the evidence,[9] and where there is some evidence of damages,[10] or where the damages are not susceptible of proof,[11] or where the testimony is conflicting,[12] the question becomes one for the jury. Reasonable rather than absolute certainty of future pain and anguish is all that is required to justify recovery therefor.[13] The law infers mental[14] and physical suffering from serious bodily injury.[15]

Admissibility in general.[16]—Proof should be confined to the issues made by the pleadings.[17] Opinion evidence is competent on the various elements of damage claimed[18] where the witness is shown to be qualified.[19] Holdings as to the ad-

should be limited to medical expenses. Friedman v. Horn, 104 N. Y. S. 745. Expense of nursing cannot be recovered where no evidence that expense had been incurred but it appeared that the injured person had been cared for by his friends and such care was worth $15 or $20. Jones & Adams Co. v. George, 227 Ill. 64, 81 N. E. 4. Where the jury were not authorized to allow recovery to a husband for loss of services by a wife suing for injuries, evidence as to the wife's inability to work was not objectionable as tending to show such damage. Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 696.

8. Damages for injury to land must be proven with some degree of certainty and cannot be left to guess, conjecture, or speculation. Young v. Extension Ditch Co. [Idaho] 89 P. 296.

9. Impairment of earning capacity need be proved only by a preponderance of evidence, clear and convincing proof not required. Rowe v. Whatcom County R. & Light Co. [Wash.] 87 P. 921.

Evidence held sufficient upon which to base an estimate of the damage done to an animal, though proof as to amount was not made in usual manner. McKissick v. Oregon Short Line R. Co. [Idaho] 89 P. 629.

10. In an action for failure to deliver a telegram where there was some evidence of damage, the question was for the jury. Harrison v. Western Union Tel. Co., 75 S. C. 267, 55 S. E. 450. Question of damages for injury to land kept for lambing purposes held for jury. Painter & Co. v. Stahley Bros. [Wyo.] 90 P. 375. Where an injured person presents himself and such evidence as he has before the jury, it is their province to say what sum will compensate him. Cleaver v. Louisville & N. R. Co., 30 Ky. L. R. 1059, 100 S. W. 223.

11. The assessment of damages for loss of society of a wife is within the discretion of the jury and specific proof of value thereof is not required. Northern Texas Trac. Co. v. Mullins [Tex. Civ. App.] 99 S. W. 433.

12. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 So. 1024; Hale v. Milliken [Cal.] 90 P. 365. On conflicting evidence as to whether injuries were the result of an accident or were due to prior physical conditions, the question is for the jury. Simone v. Rhode Island Co. R. I.] 66 A. 202.

13. Huggard v. Glucose Sugar Refining Co., 132 Iowa, 724, 109 N. W. 475.

14. Galveston R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 616, 98 S. W. 932. Galveston H. & S. A. R. Co. v. Stoy [Tex. Civ. App.] 99 S. W. 135. Mental suffering is an element in an action for injuries though not specially alleged. Louisville & N. R. Co. v. Dickey [Ky.] 104 S. W. 329. An issue as to mental suffering may be submitted on proof of physical injuries from which such suffering can be inferred. Galveston, etc., R. Co. v. Gracia [Tex. Civ. App.] 100 S. W. 198. Serious and continuing bodily injury will support recovery for mental suffering. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 100 S. W. 1175.

15. Where in an action against a surgeon for performing an unauthorized operation the evidence showed that he had removed the uterus, pain and suffering would be inferred for which damages could be had. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562.

16. See 7 C. L. 1073.

17. Evidence of pelvic injury is admissible where notice of such injury was given to defendant's surgeon and immediately reported to its counsel. O'Donnell v. Rhode Island Co. [R. I.] 66 A. 578. A husband suing for injuries to his wife, who alleges that her services consisted in keeping house for him, could not prove that she assisted him in his office. Keenan v. Metropolitan St. R. Co., 118 App. Div. 56, 103 N. Y. S. 61. Where in an action for injuries caused by wreck of a tank car of petroleum and permitting the oil to run into a water tank damages to land were not alleged, evidence as to value of the land before and after the injury was not admissible. Houston, etc., R. Co. v. Anderson [Tex. Civ. App.] 17 Tex. Ct. Rep. 122, 98 S. W. 440. Where in an action for delay in delivering a telegram there was no allegation of mental suffering because of a baby, evidence of circumstances from which mental suffering would result on such account was not admissible. Mitchiner v. Western Union Tel. Co., 75 S. C. 182, 55 S. E. 222. Where there was no allegation of loss of business, evidence as to loss by reason of inability to attend to it was not admissible. Dunn & Lallande Bros. v. Gunn [Ala.] 42 So. 686. In libel where plaintiff's testimony was that she had a large acquaintance and suffered much mental distress because of the publication, cross-examination as to family ties, public controversies, etc., is not admissible in determining susceptibility to mental sufferng. Tingley v. Times-Mirror Co. [Cal.] 89 P. 1097. Where defendant testified that plaintiff had stated that his damages were less than the sum claimed, plaintiff could prove that such statement was made by way of compromise. Jones v. Cooley Lake Club, 122 Mo. App. 113, 98 S. W 82.

18. Exclusion of expert testimony as to rental **value of real estate** to show that it

missibility of evidence to show value of property destroyed or injured,[20] loss of

was equal to representations is error. Ettlinger v. Weil, 184 N. Y. 179, 77 N. E. 31. Expert testimony is admissible as to the **length of time necessary to eradicate foul weeds** permitted by a tenant to grow in violation of the contract, as bearing on the depreciated rental value of the land. Brown Land Co. v. Lehman [Iowa] 112 N. W. 185. In an action for injuries to cattle, an expert may give his opinion as to weight and shrinkage. St. Louis, etc., R. Co. v. Dodson [Tex. Civ. App.] 16 Tex. Ct. Rep. 109, 97 S. W. 523.

19. One who has been engaged in mercantile business for a considerable period may testify as to the value of his services. Howard v. McCabe [Neb.] 112 N. W. 305. Where rental value of a mill was claimed as an element of damage, one who had not been in the mill for fifteen years and knew of its machinery only by hearsay was not competent to give an opinion as to rental value. Munson v. James Smith Woolen Mach. Co., 118 App. Div. 830, 103 N. Y. S. 502. A rancher in the habit of buying cows and familiar with prices paid at sales is competent to testify as to the value of a cow. Texarkana & Ft. S. R. Co. v. Bell [Tex. Civ. App.] 101 S. W. 1167. An experienced cattleman may give his opinion as to shrinkage in weight caused by delay and reshipment. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152. Sheep men who have been in the sheep business for many years and are familiar with market value and know the sheep in question are competent on the question of value. Rich v. Utah Commercial & Sav. Bk., 30 Utah, 334, 84 P. 1105. Carriage dealers and repairers are competent to give an opinion as to value of secondhand carriages. Texas & P. R. Co. v. Wilson Hack Line [Tex. Civ. App.] 101 S. W. 1042. An experienced cattleman who knew the market price of cattle on a certain date and who is familiar with the class of cattle in question may give his opinion as to what they would have sold for. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 99 S. W. 152. One who has personal knowledge of the market value of horses is competent to testify as to such value. Ft. Worth, etc., R. Co. v. Hickox [Tex. Civ. App.] 103 S. W. 202.

20. Value of land may be proved by testimony of one familiar with values of land in the neighborhood and who examined the land in question. Horner v. Beasley [Md.] 65 A. 820. In an action for depreciated value, rental value of the premises prior to commencement of the action is admissible. Senglaup v. Acker Process Co., 105 N. Y. S. 470. Value of real estate may be proved by amount of rentals, unless the rentals actually received depend on special consideration. Ettlinger v. Weil, 184 N. Y. 179, 77 N. E. 31. In an action for failure to furnish subjacent support, a witness who is familiar with the **soil** and the uses to which it is adapted may so testify. Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 A. 545. On an issue as to **value of growing crop,** it is admissible to show the yield of the balance of the field, market value of the crop, and cost of harvesting. Hunt v. St. Louis, etc., R. Co. [Mo. App.] 103 S. W. 133. Where one whose land was flooded mingled the crop grown on the flooded land with crops not grown there, such fact did not prevent him from showing the yield of adjoining lands on the ground that by mingling the crops he destroyed the best evidence. Dennis v. Crocker-Huffman Land & Water Co. [Cal. App.] 91 P. 425. Market **value of crops** may be shown where the amount of grain destroyed is shown. Warwick v. Reinhardt [Iowa] 111 N. W. 983.

Value of goods: Actual cost of personal property may be shown only where it appears that it has no market value. Galveston, etc., R. Co. v. Levy [Tex. Civ. App.] 100 S. W. 195. Where the property destroyed has no market value, evidence as to its original cost and its condition and extent of depreciation at the time of its destruction is admissible. Laubaugh v. Pennsylvania R. Co., 28 Pa. Super. Ct. 247. On an issue as to damage to growing crops, evidence as to what the value of the crops would have been at harvest is too remote. Taylor v. Canton, 30 Pa. Super. Ct. 305. The **value of secondhand goods** having no market value is to be determined from cost when new, condition, selling price, and all facts concerning them. Texas & P. R. Co. v. Wilson Hack Line [Tex. Civ. App.] 101 S. W. 1042. In determining **value of household goods** destroyed, their original cost may be shown in connection with length of time they were used and their condition at time of destruction. Colorado Midland R. Co. v. Snider [Colo.] 88 P. 453. Cost of household goods may be considered in connection with testimony as to actual value. Smith v. Mine & Smelter Supply Co. [Utah] 88 P. 683. That restoration may not be practicable as to all items of damage does not preclude proof as to items in respect to which repair may be made. Senglaup v. Acker Process Co., 105 N. Y. S. 470.

Receipt bills for goods are competent to prove value. Miller v. Levy, 104 N. Y. S. 368. Where the measure of damages is depreciation in value of the property injured, evidence that other elements entered into the injury is admissible. Hopkins v. American Pneumatic Service Co. [Mass.] 80 N. E. 624.

For injuries to a ship a plaintiff may testify as to amounts paid for repairs within his personal knowledge where expenditures were not made as agent of defendant without producing vouchers. Drews v. Burton & Co. [S. C.] 57 S. E. 176.

Amount paid for repairs of an injured vessel is not test as to value of such repairs, but if reasonable is admissible on issue of value. Southern R. Co. v. Reeder [Ala.] 44 So. 699. Evidence as to what property was valued at in a trade three years prior to its injury is too remote to show value at time of injury. Dallas, etc., R. Co. v. Langston [Tex. Civ. App.] 17 Tex. Ct. Rep. 316, 98 S. W. 425. On an issue as to damages to a lot by change of grade of an alley, a witness may not testify that he would not purchase the lot in its then condition though he had once contemplated buying it. McMillan v. Columbia, 122 Mo. App. 34, 97 S. W. 953. Value of property cannot be proved by offers to purchase it. Horner v. Beasley [Md.] 65 A. 820. Value of property may be

profits,[21] damages sustained by breach of contract,[22] are illustrated in the notes. The question of amount of damages is solely for the jury and evidence as to amount is not admissible.[23]

Personal injury actions.[24]—An injured person is competent to testify as to his injuries and their effect on his health [25] and earning capacity,[26] unless at the time of the injury he was engaged in an illegal occupation.[27] It is not permissible to

shown by parol when such property was traded for land, title to which failed. Mayer v. Wooten [Tex. Civ. App.] 102 S. W. 423.

Value of animals: In an action for **loss of a horse,** a witness who owned the horse a year or so previously could testify as to its value if it was as sound as when he owned it, the remoteness of time going only to the weight of the testimony. McKenzie v. Boutwell, 79 Vt. 383, 65 A. 99. Where in an action for injuries to colts in transit the shipper proved difference in value of colts before and after the injury by estimating value before shipment and what they brought at a sale at destination, the carrier could show that the sale was a failure and that the price offered was not a fair test of value. Cincinnati, etc., R. Co. v. Logan, 29 Ky. L. R. 1123, 96 S. W. 910. The **value of a dog** may be proven as that of any other property by evidence of breed and qualities and by witnesses familiar with market value of dogs. Columbus R. Co. v. Woolfolk [Ga.] 58 S. E. 152. On the question of the **value of hogs,** the owner may detail the records of one of them as a prize winner at stock shows. Council v. St. Louis, etc., R. Co., 123 Mo. App. 432, 100 S. W. 57. A **certificate of a breeders' association,** is admissible to show the pedigree of a hog as a basis of valuation. Warwick v. Reinhardt [Iowa] 111 N. W. 983. In an action for damage for failure to deliver cattle in time for a certain market after plaintiff had testified as to what he actually received for the cattle, it was proper to ask him if that was the best price they would then bring. Baltimore & O. R. Co. v. Whitehall, 104 Md. 295, 64 A. 1033. On an issue as to the value of highly bred cattle shipped from Ohio to Dakota and from thence to Arkansas, evidence as to value in West Virginia, South Dakota and Ohio is competent in the absence of evidence of a closer market. St. Louis S. W. R. Co. v. Kilberry [Ark.] 102 S. W. 894.

Damages to hotel business by false newspaper publication may be proved by evidence of facts which would naturally tend to diminish the trade, and evidence that it was actually diminished, and the name or description of each guest driven away need not be shown. Wright v. Coules [Cal. App.] 87 P. 809. The fact that one was released from **false imprisonment** by habeas corpus is admissible under an allegation of expense incurred in such proceeding. Neves v. Costa [Cal. App.] 89 P. 860.

21. Loss of profits may be proved with all definiteness of which such fact is capable of proof. Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E. 1087. Difference between profits made by plaintiff, a jeweler, from his business before and after injury, is provable. Chicago Union Trac. Co. v. Brethauer, 125 Ill. App. 204.

22. For **deprivation of a physician of telephone** service, loss of practice cannot be proved by testimony of a physician that certain persons had told him that they had tried to reach him over the phone but could not. Cumberland Tel. & T. Co. v. Hicks [Miss.] 42 So. 285. In an action for **insulting conduct offered a passenger** by a conductor, evidence of the presence of others in the car at the time is admissible. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 99 S. W. 574. The fact that **mental anguish** is presumed to result from delay in delivering a telegram does not preclude direct evidence on such point. Shepard v. Western Union Tel. Co., 143 N. C. 244, 55 S. E. 704.

23. A witness may not give his opinion as to amount of damage done to animal and wagon struck by a train but may testify as to value of animal killed. Central of Georgia R. Co. v. Barnett [Ala.] 44 So. 392. A physician may not testify as to what per cent his ability to practice has been diminished. Dunn v. Gunn [Ala.] 42 So. 686.

24. See 7 C. L. 1075.

25. Where an injured person set up that tuberculosis resulted from her injury, she was entitled to prove the condition of her health from the period of adolescence to the time of injury. Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 101. S. W. 632. An injured person may testify as to whether his physical condition is as good as it was prior to the injury and explain in what particular it is worse. Southern R. Co. v. Hobbs [Ala.] 43 So. 844. A physician who is injured may testify as to his average practice prior to injury, and whether he could care for it as conveniently as before. Dunn v. Gunn [Ala.] 42 So. 686. On an issue as to whether injury was permanent, plaintiff may show that after the injury he took medicine to relieve his pain. Southern R. Co. v. Cunningham [Ala.] 44 So. 658.

26. Evidence that prior to marriage a woman had taught school and clerked is competent to show previous good health and ability to perform duties as housewife. Missouri, K. & T. R. Co. v. Corse [Tex. Civ. App.] 101 S. W. 522. A husband suing for injuries to his wife may testify as to work done by her around the house prior to the injury, though he did not see her do it. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128. A housewife who has no other employment may testify in her own behalf as to the amount of labor she performed prior to and after her injury. Patton v. Sanborn, 133 Iowa, 650, 110 N. W. 1032. Where earning capacity has been impaired, evidence concerning the injured person's habits of sobriety and industry prior to injury is admissible. Buffalo Creek Coal Min. Co. v. Hodges, 30 Ky. L. R. 346, 98 S. W. 274.

27. The amount earned by one while working for a race bookmaker in violation of Pen. Code, § 351, immediately prior to his injury, cannot be considered in determining damage for time lost. Murray v.

show that an injured person has a family.[28] Expert testimony is admissible to show extent of injuries,[29] their cause,[30] and effect.[31] Any person is competent to testify as to extent of suffering.[32] Evidence of extent of earnings during the year preceding the injury is admissible.[33] Miscellaneous holdings as to admissibility of evidence to show extent of injuries[34] and suffering,[35] and as to the medical treatment given,[36] are collated in the notes.

Proof of life expectancy[37] is admissible where permanent injury or diminished earning capacity is shown,[38] or the question of future pain and suffering is in issue,[39] but not if the injured person is abnormal.[40]

Interurban St. R. Co., 118 App. Div. 35, 102 N. Y. S. 1026.

28. It is not admissible to show that an injured person had a wife and children. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459; Chicago, etc., R. Co. v. Steckman, 125 Ill. App. 299. It is error to permit an injured person to prove that he is a married man and has three children. Jones & Adams Co. v. George, 227 Ill. 64, 81 N. E. 4. Such error is not cured by requiring a remittitur. Id.

29. A physician may testify as to present condition of an injured person and as to whether headaches resulted from wound on head. Southern R. Co. v. Hobbs [Ala.] 43 So. 844. A physician may testify from observation of an injured person as to the time of her ultimate recovery. Simone v. Rhode Island Co. [R. I.] 66 A. 202.

30. A physician may testify as to what he thought caused the infirmities and as to whether they were the result of injuries or disease. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128. A physician who attended an injured person immediately after his injury and for some time thereafter was competent to testify as to what was the cause of his nervousness and insomnia. Indianapolis & E. R. Co. v. Bennett, 39 Ind. App. 141, 79 N. E. 389.

31. Where a fracture at base of brain was sustained, testimony of physicians that in a majority of such cases epilepsy, paralysis, or mental deterioration resulted was admissible to prove future suffering. Cordiner v. Los Angeles Trac. Co. [Cal. App.] 91 P. 436. Where an expert asked whether he could state that the injuries were painful answered "yes," such answer does not constitute testimony that the injury was painful. Barry v. Kurshan, 103 N. Y. S. 120.

32. Kline v. Santa Barbara Consol, R. Co. [Cal.] 90 P. 125.

33. Chicago Union Trac. Co. v. May, 125 Ill. App. 144; Id. 221 Ill. 530, 77 N. E. 933.

34. Injury to sexual organs may be proved by evidence of inability to have sexual intercourse and that prior to the injury the injured person had begotten one child. Deering Harvester Co. v. Barzak, 227 Ill. 71, 81 N. E. 1. Proof that since marriage the injured person had begotten one child was admissible on the question of his virility alleged to have been destroyed by the injury. Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136. Where a complaint showed physical injuries resulting, evidence that at the time of trial the injured person was suffering from **tuberculosis** is admissible though not specially pleaded where other evidence tends to show that it was the natural result of the injury. Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 101 S. W. 632.

Records of the health department showing date of birth of a child held material on an issue of damages for injuries causing such premature birth. Finer v. Nichols, 122 Mo. App. 497, 99 S. W. 808. On allegation of injury to head, eyes, spinal cord, evidence of loss of memory and injury to eyes is admissible. Young v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 135. Where a fireman was compelled to jump from the engine because of impending collision, he could show the **speed of the train** to prove violence of his fall. Davis v. Atlantic Coast Line R. Co. [N. C.] 58 S. E. 798. He could also show the general effect of the collision, wrecked condition of engine and cars. Id. Where appendicitis resulted from an injury, **medical books** relating to the disease are admissible. Birmingham R. Light & Power Co. v. Moore [Ala.] 42 So. 1024. The fact that a physician did not see an injured person until two years after the injury did not render his testimony that she was suffering from tuberculosis, probably the result of the injury, incompetent where other evidence showed that hemorrhages occurred immediately after the injury and continued to date of trial. Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 101 S. W. 632. Where in an action for injuries alleged to have caused a rupture where the injured person and his wife testified that he had never been affected with a rupture, testimony as to another action for injuries alleging that they had resulted in a rupture is competent. Ruemer v. Clark, 105 N. Y. S. 659. In an action for injury to a leg a witness may not testify as to the probability of absorption "in a case of scar tissue that has been there for more than a year" where there was no showing that scar tissue had existed for that length of time. Elzig v. Bales [Iowa.] 112 N. W. 540.

35. In an action by a Christian Scientist for physical and mental suffering, evidence as to her belief that she suffered only when she thought so and not otherwise was pertinent as to the issue of suffering. Ft. Worth & D. C. R. Co. v. Travis [Tex. Civ. App.] 99 S. W. 1141.

36. Admission of evidence as to proper medical treatment in an action by a child for injuries held not prejudicial, since the action was brought by the child and not by the parents whose duty it was to furnish proper medical treatment. Colorado Springs Elec. Co. v. Soper [Colo.] 88 P. 165. A physician may testify as to remedies used, the value of his services being in question. Southern R. Co. v. Hobbs [Ala.] 43 So. 844.

37. See 7 C. L. 1076.

38. Carlisle tables of mortality are ad-

Physical examination and exhibition of injuries.[41]—As a general rule an injured person is not required to submit to physical examination [42] unless he calls as a witness his own physician.[43] An application by the defendant for a physical examination may be refused where he has had opportunity to make such examination before trial.[44] An injured person may exhibit his injuries to the jury.[45]

(§ 7) *C. Instructions.*[46]—Instructions should furnish the jury the measure of damages.[47] They should clearly and properly submit the issues [48] and should

missible where injury is permanent. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Where an injured person contends that injuries are permanent and offers competent evidence in support of such contention, mortality tables are admissible. Hodd v. Tacoma [Wash.] 88 P. 842; Southern R. Co. v. Cunningham [Ala.] 44 So. 658; Howard v. McCabe [Neb.] 112 N. W. 305; Pittsburg, etc., R. Co. v. Ross [Ind.] 80 N. E. 845; Banks v. Braman [Mass.] 80 N. E. 799. Carlisle expectancy tables **which make no reference to sex** are admissible to show expectancy of life of a female. Croft v. Chicago, etc., R. Co. [Iowa] 109 N. W. 723. Mortality **tables prepared pursuant to § 1471a, Code Supplement,** are admissible. Clark v. Van Vleck [Iowa] 112 N. W. 648. Where the question of permanent injury was the subject of extended cross-examination, defendant waived objection to introduction of mortality tables. O'Donnell v. Rhode Island Co. [R. I.] 66 A. 578. An expectancy table **not shown to be established or recognized** as authority but was simply prepared by actuaries of a life insurance company is not admissible. Banks v. Braman [Mass.] 80 N. E. 799.

39. Where the question of **future** pain and suffering is in issue. Patton v. Sanborn, 133 Iowa, 650, 110 N. W. 1032.

40. Life tables are not admissible where the person injured is abnormal or has an incurable disease. Colbert v. Rhode Island Co. [R. I.] 67 A. 446.

41. See 7 C. L. 1076.

42. Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. In an action for injuries, defendant may prove that plaintiff refused prior to trial to submit to physical examination, but may ask her on the stand if she is willing to submit to such an examination. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128.

43. Where an injured person calls her physician to testify in her behalf, the court may direct that she submit to examination by two other reputable physicians on defendant's behalf. Johnston v. Southern Pac. Co. [Cal.] 89 P. 348.

44. Where an injured person had offered to submit to physical examination and offered while on the stand to permit defendant's experts to examine his arm, and it appeared that two of such experts had examined it and another given an opportunity to do so, it was not error to refuse defendant's application for a physical examination. Malone v. Sierra R. Co. [Cal.] 91 P. 522.

45. An injured foot may be exhibited to the jury and the injured person may testify that it is stiff at the ankle joint and by movements show the effects of the injury. Pittsburg, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Though ordinarily plaintiff in an action for personal injuries may exhibit the injured member to the jury, yet where it has been amputated it is harmless error for the court to refuse an exhibit of the injury. Ford v. Providence Coal Co., 30 Ky. L. R. 698, 99 S. W. 609.

46. See 7 C. L. 1077.

47. In every case the jury should be instructed as to the measure of damages applicable to the particular facts. Georgia R. & Elec. Co. v. Baker, 1 Ga. App. 832, 58 S. E. 88. The entire question of damages should not be submitted without any criterion for the determination of the damages recoverable. Western Union Tel. Co. v. Lehman [Md.] 67 A. 241. It is error to instruct to assess damages for unreasonable delay of a carrier in delivering goods without giving any rule by which damages for such delay could be measured. Yazoo & M. V. R. Co. v. Christmas [Miss.] 42 So. 169. Where action is founded on breach of oral contract, the court should charge as to the elements of damage and prescribe rules by which the jury can ascertain damages recoverable. Southwestern Cotton Seed Oil Co. v. Stribling, 18 Okl. 417, 89 P. 1129. An instruction that if defendant's conduct indicated reckless disregard of its duty to plaintiff the jury might increase the allowance of damages for that reason authorizes recovery of punitive damages. Wilson v. Atlantic Coast Line R. Co., 142 N. C. 333, 55 S. E. 257. It is erroneous to charge the provisions of Civ. Code 1895, § 3907, relative to actions for torts where entire injury alleged is to place, happiness, or feelings where damages are claimed for lost time, medical expenses, and decreased earning capacity. Southern R. Co. v. Broughton [Ga.] 58 S. E. 470. Civ. Code, § 3333, provides that one injured because of negligence of another may recover compensation for all detriment proximately resulting. Held an instruction to allow damages for all suffering present and future and such sum as in "your best judgment will fairly and fully compensate for any injury received" was not erroneous as permitting the jury to award damages according to any feeling they might have. Hersberger v. Pacific Lumber Co. [Cal. App.] 88 P. 587. An instruction permitting recovery for pain and "anguish" shown to be the direct result of the injury does not authorize recovery for humiliation and mental annoyance. Evanston v. Richards, 224 Ill. 444, 79 N. E. 673. Authorizing "such further sum as would fairly compensate her for loss of her foot" is erroneous. Lexington R. Co. v. Herring, 30 Ky. L. R. 269, 97 S. W. 1127. An instruction that it was fair for the jury to award what they would accept under similar circumstances for the pain and suffering endured is erroneous. Rhodes v. Union R. Co., 52 Misc. 501, 102 N. Y. S. 510. It is error to authorize recovery on the basis of what

not invade the province of the jury.[49] They should be clear [50] and not misleading,[51]

jurors would "want" if standing in plaintiff's place. Greer v. Union R. Co., 53 Misc. 638, 103 N. Y. S. 88. In an action for injuries to land by flooding, the introduction of evidence as to value of seed and expense laid out on the crop planted was prejudicial, though the damages sustained were properly proved, the jury not having been instructed as to the impropriety of the testimony. Jones v. Cooley Lake Club, 122 Mo. App. 113, 98 S. W. 82. Such error was not cured by submitting the correct measure of damages but not referring to the testimony. Id.

48. The word "caring" is synonymous with nursing in an action for injuries. Johnson v. St. Paul & W. Coal Co. [Wis.] 111 N. W. 722. Instruction as to care required of an injured person as to his wounds subsequent to the injury held to exact no greater degree than that required of an ordinary, prudent man, and not objectionable. Rowe v. Whatcom County R. & Light Co. [Wash.] 87 P. 921. In an action for injuries resulting from obstruction of a watercourse where damages are claimed for permanent injuries for inundation, and being compelled to go a circuitous route to cross a stream, a charge to allow the damages claimed for the overflow if the obstruction did not prolong the time which the water stood on the land, properly refused as ignoring an element of damages. International & G. N. R. Co. v. Walker [Tex. Civ. App.] 17 Tex. Ct. Rep. 268, 97 S. W. 1081.

49. An instruction that for injury to a wife a husband could recover for loss of services for such time in the future as it was reasonably certain he would sustain, loss in view of the nature of the injury, expectancy of life according to mortality tables, her health, habits of life, and all other evidence is not erroneous as arbitrarily fixing the expectany of life by the tables. Croft v. Chicago, etc., R. Co. [Iowa] 109 N. W. 723. In an action for unliquidated damages, it is error for the court to intimate that the question of the amount of damages is not for the jury or to indicate the amount the court considers adequate. Douglas v. Metropolitan St. R. Co., 104 N. Y. S. 452. Instruction as to measure of damages applicable only in the event that the jury made certain finding held not objectionable on the weight of evidence. Missouri, K. & T. R. Co. v. Garrett [Tex. Civ. App.] 96 S. W. 53. An instruction in assault and battery that plaintiff was not entitled to recover exemplary damages, though issues were found in his favor, invades the province of the jury. Barlow v. Hamilton [Ala.] 44 So. 657. An instruction that the expectancy of life of a person sixteen years of age is forty-four years invades the province of the jury. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222.

Assumption of facts: In an action by a married woman, instructions held erroneous as assuming that money paid for medical expenses as paid by the husband. Town of Elba v. Bullard [Ala.] 44 So. 412. When it is conceded that goods had some value, it is not error to assume such fact. Stewart v. Jacob Sachs & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 845, 96 S. W. 1091. An instruction to allow what had been paid in effecting a cure, medical and nursing bills, is erroneous as assuming that such bills had been paid. York v. Everton, 121 Mo. App. 286, 97 S. W. 604. An instruction that the measure for injury to property was its diminished value and that such difference should be the amount of the verdict held to assume that the property had been injured by the defendant. Dallas, etc., R. Co. v. Langston [Tex. Civ. App.] 17 Tex. Ct. Rep. 316, 98 S. W. 425. Instructions as to measure of damages held not to assume facts. Chicago, etc., R. Co. v. Stibbs, 17 Okl. 97, 87 P. 293.

50. Instruction as to the measure of damages for injuries held not confusing, nor to authorize double damages not other damages not shown by the evidence. Texas & N. O. R. Co. v. Middleton [Tex. Civ. App.] 103 S. W. 203. Instruction in an action for breach of contract to allow " * * * and which the parties could reasonably anticipate would result and which were known to them when the contract was made" was erroneous as meaningless and limiting damages to such as the parties knew at the time would result. First Nat. Bk. v. Carroll, 35 Mont. 302, 88 P. 1012. An instruction "If you find he will suffer in the future you may allow therefor" is too favorable to defendant because requiring absolute certainty of future suffering. Huggard v. Glucose Sugar Refining Co., 132 Iowa, 724, 109 N. W. 475. An instruction to allow compensation for plan or suffering endured as a result of any injury which he had sustained up to the present time, if any, held not objectionable as permitting recovery for injuries not the result of negligence complained of. Kelly v. Butte, 34 Mont. 530, 87 P. 968. Instruction on the issue of damages in an action for libel held not to authorize recovery for the publication as a whole, though there may have been justification for a portion of it. Meriweather v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257.

51. In an action on an injunction bond, an instruction that the damages recoverable could not exceed the amount prayed for but that "all damages" that had their origin in the restraining order should be considered held not erroneous as misleading the jury to consider elements not alleged. Sullivan v. Cartier, 147 F. 222. An instruction in an action for false imprisonment that unless the jury believe that punitive damages should be awarded only actual damages should be awarded, and if no actual damages were sustained then only nominal damages, is misleading. Gambill v. Fuqua [Ala.] 42 So. 735. An instruction in an action for putting a passenger off at the wrong station to allow damages for mental and physical pain and humiliation or mortification does not authorize punitive damages. Tennessee Cent. R. Co. v. Brasher's Guardian, 29 Ky. L. R. 1277, 97 S. W. 349. Authorizing recovery of smart money if it was found that the assault was made wantonly and maliciously is not erroneous in failing to require that such finding be based on the evidence. Cody v. Gremmler, 121 Mo. App. 359, 99 S. W. 46. Instruction au-

predicated on the issues made by the pleadings and evidence,[52] and should be so

thorizing recovery by a parent for injuries to minor son for loss of services prior to majority held not erroneous for failure to direct deduction because of present payment. El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 99 S. W. 587. Authorizing recovery for any mental or physical pain a person "may" suffer is not erroneous though the word "will" would have been preferable. South Covington & C. St. R. Co. v. Cleveland, 30 Ky. L. R. 1072, 100 S. W. 283. In an action for breach of contract to take stoves specially manufactured, where the parts of a portion of the stoves had not been assembled and the testimony as to whether the stoves were worthless was conflicting, it was held error to refer to the property left on plaintiff's hands as "material" out of which to complete stoves. St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438, 96 S. W. 1040. An instruction authorizing the jury to consider the question whether property was new or secondhand does not submit an issue as to whether it was new. Texas & P. R. Co. v. Wilson Hack Line [Tex. Civ. App.] 101 S. W. 1042.

52. An instruction as to a particular measure of damages should be refused if the evidence does not permit of its application. Keroes v. Weaver, 27 App. D. C. 384. Instructions should confine measure of recovery to such damages as are sustained. Instruction to find in such amount as jury believes evidence warrants erroneous except where vindictive damages are recoverable. Haisler v. Hayden, Jr., 124 Ill. App. 264.

Not supported by evidence: In an action for injury to an abutting lot by filling in a street, it is error to authorize recovery of such damages as the jury believe the owner entitled to, and authorize them to consider cost of filling, injuries to trees and shrubbery, there being no evidence as to such cost or injury and no other rule being given. Godbey v. Bluefield, 61 W. Va. 604, 57 S. E. 45. Where a discharged employe testified that his services were worth a certain sum after wrongful discharge, but did not testify that he had been able to earn such sum, it was improper to authorize deduction of such amount. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867. No evidence of injury to spine. Chenoweth v. Sutherland [Mo. App.] 101 S. W. 1105 [advance sheets only]. Where in an action for fraud in procuring an application for a life policy punitive damages were not recoverable and a verdict was returned for $282.33, and actual damages proved was $32.32, error in allowing punitive damages was prejudicial. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 N. E. 595. In an action for permanent injury as the result of the negligent setting of a bone, an instruction authorizing recovery for impairment of health was erroneous in the absence of evidence of injury to plaintiff's general health. Albertson v. Lewis, 132 Iowa, 243, 109 N. W. 705. In an action for malpractice in setting a fractured arm, where there was no evidence that a future operation was contemplated, it was error to authorize the consideration of such expense. Id. No evidence of impairment of earning capacity. Henderson City R. Co. v. Lockett, 30 Ky. L. R. 321, 98 S. W. 303. An instruction on loss of profits, not supported by evidence nor applicable to the pleadings. First Nat. Bk. v. Carroll, 35 Mont. 302, 88 P. 1012. No evidence that money had been expended for physician's services or medicines. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222. No evidence upon which to base a recovery for a particular element. Southern R. Co. v. Broughton [Ga.] 58 S. E. 470. Elements of damage not covered by the evidence. Western Coal & Min. Co. v. Buchanan [Ark.] 102 S. W. 694. It is error to authorize recovery of punitive damages in an action for wrongful distress for rent where there was no evidence that the distress warrant was wantonly or recklessly sued out. Manchester Home Bldg. & Loan Ass'n v. Porter, 106 Va. 528, 56 S. E. 337. It is proper to refuse an instruction limiting a recovery to nominal damages where evidence showed actual loss by reason of failure of a railroad to promptly transport cattle. Baltimore & O. R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033.

Not based on pleadings: Punitive not claimed. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 101 S. W. 554. Where there was no allegation of loss of time or expense of cure and no evidence of impairment of earning ability, it was error to authorize recovery of such sum as would compensate for the injury, including suffering. Louisville & N. R. Co. v. Farris, 30 Ky. L. R. 1193, 100 S. W. 870. Refusal to charge relative to punitive damages where only compensatory damages were prayed for was not prejudicial to defendant. Colorado Springs Elec. Co. v. Soper [Colo.] 88 P. 161. Where in an action for liquidated damages the amount stipulated was prayed for but actual damages were not, it was error to give a charge permitting recovery of actual damages. Work v. Cross [Tex. Civ. App.] 16 Tex. Ct. Rep. 865, 98 S. W. 208. An instruction as to special damages is erroneous where no claim therefor. First Nat. Bk. v. Carroll, 35 Mont. 302, 88 P. 1012. No allegation of diminished earning capacity. Central of Georgia R. Co. v. McNab [Ala.] 43 So. 222. It is error to authorize punitive damages where there is no allegation nor evidence that injury was willful, wanton, or reckless. Wilson v. Atlantic Coast Line R. Co., 142 N. C. 333, 55 S. E. 257. In an action for damages on account of the wrongful injury of an infant, it is erroneous to instruct the jury to special damages, when the petition does not allege nor the evidence show special damages, and so as to time lost and diminished earning capacity when there is not evidence relating thereto, and no evidence of the emancipation of the minor. Cincinnati Trac. Co. v. Wooley, 4 Ohio N. P. (N. S.) 122.

Held proper: An instruction in assault and battery permitting recovery of compensation for pain, suffering, and humiliation, and also punitive damages does not authorize such punitive damages as punishment without regard to plaintiff's loss. Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7. Instruction to allow compensation for mental and physical pain which may be suffered in the future and for permanent injuries sustained if he has sustained permanent in-

framed as not to permit double recovery.[53] An instruction is not erroneous because mentioning the amount sued for, if jury are instructed that they are not bound thereby.[54] Technical terms should be defined.[55] Instructions covered by other instructions given may be refused.[56] The jury should not be permitted to consider evidence without regard to its bearing on the issue of damages.[57] All instructions given should be construed together.[58] An erroneous instruction may be cured by the

jury does not permit recovery therefor unless they are reasonably certain to result. O'Keefe v. United Rys. Co. [Mo. App.] 101 S. W. 1144. Where in an action for injuries plaintiff alleged that he had expended large sums and had obligated himself to pay out large sums, an instruction to consider what he had expended or obligated himself to expend was not beyond the issues. Chicago Consol. Trac. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820. Where uncontradicted testimony shows mental distress for failure to deliver a telegram, it was error to submit as an issuable fact whether mental distress was suffered. Prewitt v. S. W. Tel. & T. Co. [Tex. Civ. App.] 101 S. W. 812. An instruction that an injured person may recover for any loss of earnings she "may" suffer in the future is not objectionable as authorizing such recovery without proof that such loss is reasonably certain to occur. Dean v. St. Louis Transit Co., 121 Mo. App. 379, 99 S. W. 33.

53. **Rule violated:** Instruction authorizing recovery for past and future mental and physical pain, impairment of ability to follow pursuits of other girls and to enjoy life, and for decreased capacity to enjoy life and perform services, is erroneous as permitting double damages. Houston, etc., R. Co. v. Adams [Tex. Civ. App.] 17 Tex. Ct. Rep. 58, 98 S. W. 222. Double damages are allowed by an instruction authorizing recovery for services while one was totally disabled, and diminished earning capacity without limiting recovery under the second item to time succeeding period of confinement. Ft. Worth & R. G. R. Co. v. Morris [Tex. Civ. App.] 101 S. W. 1038.

Rule not violated: Instruction to allow compensation for lost time and for permanent impairment of earning capacity not erroneous as permitting recovery of double damages. Louisville & N. R. Co. v. Barrickman [Ky.] 104 S. W. 273. Instruction to assess damages at such sum "as if paid now will fairly compensate him for the injury" does not allow double damages. Beaumont Trac. Co. v. Edge [Tex. Civ. App.] 102 S. W. 746. An instruction in an action for loss of an eye that the injured person was entitled to recover such sum as would fully compensate him for his loss, disadvantage, and disfigurement, and inconvenience reasonably certain to result was not misleading as allowing double damages. Hocking v. Windsor Spring Co. [Wis.] 111 N. W. 685. An instruction to allow compensation for loss by impairment of earning capacity, pain, suffering, and mental anguish, and if injuries are permanent such further sum, etc. Galveston, etc., R. Co. v. Fink [Tex. Civ. App.] 99 S. W. 204. An instruction in assault to consider mental pain and humiliation suffered in consequence of the assault. Galveston, etc., R. Co. v. Bean [Tex. Civ. App.] 99 S. W. 721.

54. Williams v. Meadville & Cambridge Springs Street R. Co., 31 Pa. Super. Ct. 580.

55. It is the duty of the court to explain to the jury the meaning of punitive damages and to state the conditions and circumstances under which such damages may be recovered. Sneve v. Lunder, 100 Minn. 5, 110 N. W. 99. Failure to define "actual," "remote," and "speculative" is erroneous where the charge in which the terms are used would confuse the jury. First Nat. Bk. v. Carroll, 35 Mont. 302, 88 P. 1012. In instructing the jury that if they find an assault was made wantonly and maliciously they may assess punitive damages, failure to specifically define the meaning of "wantonly" is not error. Cody v. Gremmler, 121 Mo. App. 359, 99 S. W. 46.

56. Instructions in an action for delay in delivering a telegram to allow compensation for mental anguish suffered renders refusal to charge that there can be no recovery for grief at hearing news of death not error. Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 101 S. W. 541.

57. An instruction that the measure of damages was reasonable compensation, that in estimating the amount the jury should consider whether the injury was permanent, the effect upon his health, physical pain and mental anguish, time lost and future consequences, "together with all facts and circumstances in evidence," was erroneous. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind.] 81 N. E. 492. An instruction authorizing the jury, in assessing damages, to consider "all the circumstances of the case as shown by the evidence" and "all the evidence" is erroneous. Knoefel v. Atkins [Ind. App.] 81 N. E. 600.

58. Instructions considered as a whole held not erroneous. Chicago City R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716. Definition of wilfullness warranting recovery of punitive damages, taken in connection with other instructions, held proper. Talbert v. Charleston & W. C. R., 75 S. C. 136, 55 S. E. 138. In action against carrier for injury resulting from unheated depot, instructions held to sufficiently present the nonliability of the carrier for subsequent exposure to cold elsewhere. St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 17 Tex. Ct. Rep. 265, 97 S. W. 1087. An instruction which leaves the jury free to exercise its judgment as to the amount of damages without regard to the evidence, is cured by one which requires it to predicate its verdict upon the evidence. National Biscuit Co. v. Wilson [Ind. App.] 80 N. E. 33. It is not error to instruct the jury to limit the verdict to the amount prayed for where the court also instructed to find only such sum as the evidence warranted. St. Louis, etc., R. Co. v. Snell [Ark.] 100 S. W. 67. Instruction authorizing recovery for pain and anguish "which plaintiff may hereafter suffer" is

verdict.[59] Erroneous instruction as to measure of damages is not ground for reversal where damages awarded are in accordance with law and justified by the evidence.[60]

(§ 7) *D. Trial.*[61]—If an action is primarily for the recovery of a money judgment for damages, the question of amount is for the jury,[62] but if the right to damages is merely incidental and the suit is primarily for injunctive relief, the court may assess the damages without the intervention of a jury.[63] Damages ex delicto may be recovered though they may have arisen by reason of breach of contract.[64] For a single tort only one award of damages may be had.[65] Damages for tort may be assessed without calculating altogether the pecuniary loss of the party.[66] Questions propounded to experts should embrace all the elements upon which the opinion is to be based.[67] Evidence in support of a set-off is not admissible in a hearing for assessment of damages after default.[68] Where suit is brought for specific performance against a defendant who has no title, and his want of title was known to the plaintiff at the time of the bringing of the suit, the petition cannot be retained for assessment of damages.[69] Damages recoverable for breach of contract are governed by the law of the place where the breach occurred.[70]

(§ 7) *E. Verdicts and findings.*[71]—Jury trying issue upon plea in abatement

not erroneous where it is otherwise instructed that damages should be limited to pain and suffering shown by the evidence. Dean v. Kansas City, etc., R. Co., 199 Mo. 386, 97 S. W. 910. Instructions considered as a whole held to show that a charge as to pain and suffering which, if standing alone, would be erroneous, referred to measure of damages therefor and not to right to recover therefor. Goodwyn v. Central of Georgia R. Co. [Ga. App.] 58 S. E. 688. An instruction to allow compensation in whatever sum it is found the crop was injured is to be read in connection with an instruction stating the measure of damages. Hunt v. St. Louis, etc., R. Co. [Mo. App.] 103 S. W. 133.

Error not cured: Error in permitting recovery of punitive damages without mentioning the term is not cured by a charge that punitive damages could not be recovered. Wilson v. Atlantic Coast Line R. Co., 142 N. C. 333, 55 S. E. 257. In an action for delay in delivering a telegram where the court details the duty of the jury in regard to the facts, it is not error to charge that such damages may be awarded as resulted from the negligence. Harrison v. Western Union Tel. Co., 75 S. C. 267, 55 S. E. 450. Error in permitting recovery on a wrong basis not cured by subsequent correct instruction. Malone v. Sierra R. Co. [Cal.] 91 P. 522.

59. Instruction that punitive damages "that is damages by way of punishment" held not ground for reversal where damages allowed were not excessive. Weiskopf v. Ritter, 29 Ky. L. R. 1268, 97 S. W. 1120. Where the sum of $25,000 was prayed for, error in mentioning such sum in an instruction is cured by a verdict for $10,000. Houston, etc., R. Co. v. Adams [Tex. Civ. App.] 17 Tex. Ct. Rep. 58, 98 S. W. 222.

60. Miller v. Aldrich, 123 Ill. App. 464. And see Harmless and Prejudicial Error, 8 C. L. 1.

61. See 7 C. L. 1081.

62. Mogollon Gold & Copper Co. v. Stout [N. M.] 91 P. 724. The amount of damage is for the jury though the only direct evidence as to such amount is the testimony of the plaintiff himself. St. Louis S. W. R. Co. v. Thompson [Tex. Civ. App.] 103 S. W. 684.

63. Mogollon Gold & Copper Co. v. Stout [N. M.] 91 P. 724. Where a complaint claimed damages for medical bills paid but it was developed on cross-examination that they had not been paid by failing to move to strike all the evidence relative thereto, defendant waived its right to object to an instruction authorizing recovery therefor. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 N. E. 857.

64. Where a landlord wrongfully deprives a tenant of the use of the leased premises. Wood v. Monteleone, 118 La. 1005, 43 So. 657.

65. Where a compromise judgment was entered in a personal injury action at a time when only two fingers had been lost, but after such entry it became necessary to amputate other fingers because of the injury, no recovery could be had for additional injury. Painter v. Norfolk & W. R. Co. [N. C.] 57 S. E. 151.

66. Wood v. Monteleone, 118 La. 1005, 43 So. 657.

67. Value of personal property. Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143. Questions asked a physician as to whether or not in making up his opinion as to permanency of injuries he considered condition of injured person for some time before and after the injury, etc., held proper. Southern R. Co. v. Hobbs [Ala.] 43 So. 844.

68. Barnes v. Squier, 193 Mass. 21, 78 N. E. 731.

69. Ferguson v. Kelley, 4 Ohio N. P. (N. S.) 126.

70. For loss of goods in Kentucky where the contract was made in New York and the loss occurred in Kentucky, the carrier's liability is governed by the law of Kentucky. Cincinnati, etc., R. Co. v. Hansford, 30 Ky. L. R. 1105, 100 S. W. 251.

71. See 7 C. L. 1082.

may by the same verdict assess plaintiff's damages.[72] Under a statute permitting multifold damages, the court may add the statutory amount to the verdict.[73] A rule permitting the court to grant a new trial does not authorize it to reduce a verdict to nominal damages.[74] An erroneous verdict may be cured by remittitur,[75] but a verdict based on an erroneous theory will not be permitted to stand.[76] A verdict returned on a form submitted is presumed predicated on damages allowed by such form.[77] A verdict need not separate items of damages under different heads.[78] In Louisiana the supreme court may reverse a verdict and render final judgment.[79]

Damnum Absque Injuria; Dams; Date; Days; Dead Bodies, see latest topical index.

DEAF MUTES.[80]

DEATH AND SURVIVORSHIP.[81]

This topic treats of the presumption and proof of death and of survivorship. It excludes statutory administration of estates of absentees.[82]

A rebuttable presumption [83] of death arises from a continuous and unexplained absence from home or place of residence for seven years,[84] and the party asserting continued life has burden of proving the same.[85] There is no presumption of survivorship between those perishing in a common disaster or that they died at the same instant,[86] but in New York property is distributed as of simultaneous death in the absence of proof of survivorship,[87] and hence one claiming under a legatee

72. Chicago, etc., R. Co. v. Suta, 123 Ill. App. 125.

73. Where a statute permits multifold damages, it is immaterial whether the jury return the sum to which plaintiff is entitled or only actual damages, and the court may direct entry of judgment in accordance with the statute. Richards v. Sanderson [Colo.] 89 P. 769.

74. Under Code Civ. Proc, § 999, providing that a trial judge may in his discretion entertain a motion to set aside a verdict and grant a new trial because of excessive damages, the court has no authority to reduce the verdict to nominal damages and direct judgment to be so entered. Howard v. Bank of Metropolis, 115 App. Div. 326, 100 N. Y. S. 1003.

75. Where the jury agreed that plaintiff was entitled to recover $900, any error in arriving at a verdict by lot for $950 is cured by remitting any sum in excess of $900. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 16 Tex. Ct. Rep. 860, 98 S. W. 226.

76. A verdict will be reversed where based on an erroneous instruction and is greatly in excess of damages sustained. Gibler v. Terminal R. Ass'n [Mo.] 101 S. W. 37.

77. Where in libel plaintiff sued for $5,000 actual and $5,000 punitive damages, and the court submitted two forms of verdict, one for actual damages and one for both actual and punitive damages, and the jury returned a verdict for $5,000 on the form used for actual damages, held that such verdict could not be considered as containing any actual damages. Merlwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257.

78. A verdict will not be set aside because it separates the damages under different heads. Telfair County v. Clements, 1 Ga. App. 437, 57 S. E. 1059. Where in an action for ejection of a child from a street car the right to recover depended on a finding of willful and malicious negligence, and if the act was wanton and malicious the jury were authorized to find exemplary damages, the fact that a verdict for exemplary damages was not returned does not establish that the act of the conductor was not malicious and inhuman. Harless v. Southwest Mo. Elec. R. Co., 123 Mo. App. 22, 99 S. W. 793.

79. Gomez v. Tracey, 115 La. 824, 40 So. 234.

80. See 5 C. L. 944. No cases have been found during the period covered for this topic, which includes only the capacity of deaf mutes to contract. As to degree of care required of persons under disability to avoid accident, see such topics as Railroads, 8 C. L. 1590; Street Railways, 8 C. L. 2004.

81. See 7 C. L. 1082.

82. See Absentees, 9 C. L. 9.

83. Where inference may be drawn from the evidence that decedent left with intention not to return, the question of death is for jury. Heagany v. National Union, 143 Mich. 186, 12 Det. Leg. N. 943, 106 N. W. 700.

84. Appeal of Hackett, 27 R. I. 587, 65 A. 268; Holdredge v. Livingston [Neb.] 112 N. 341.

85. Holdrege v. Livingston [Neb.] 112 N. W. 341.

86, 87. St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 N. Y. S. 808; In re McInnes, 104 N. Y. S. 147.

has the burden of showing survivorship.[88] Survivorship is always subject to proof as a fact.[89]

DEATH BY WRONGFUL ACT.

§ 1. Nature and Elements of Liability and Release or Bar Thereof (926).
§ 2. Who May Bring Action (928).
§ 3. Beneficiaries of the Right of Action (928).
§ 4. Damages (929).
§ 5. Remedies and Procedure (932).
§ 6. Distributive Rights in Amount Recovered (935).

The scope of this topic is limited to the nature and extent of the liability, including damages, for tortiously causing another's death. It excludes the general law of negligence or tort on which such liability is based and also all questions of practice, evidence, and pleading in negligence or tort cases, except such as are peculiar to the action for death.[90] The survivability of particular causes of action is also excluded.[91]

§ 1. *Nature and elements of liability and release or bar thereof.*[92]—At common law, all right of action died with the party injured except for direct affirmative losses,[93] and hence recovery can be had only when the statutory law[94] of the place where the wrongful act occurs[95] provides therefor, though such statutes provide that it is enforcible only in domestic courts.[96] The right of action existing, it may be enforced in any state unless contrary to the positive law or the settled policy thereof[97] at the time of the wrongful act,[98] but all inherent limitations must be observed.[99] The case must come clearly within the statute,[1] and hence the Missouri

88. St. John v. Andrews Inst. for Girls, 117 App. Div. 698, 102 N. Y. S. 808. Evidence held to sustain finding that legatee survived testator in fire. Id. Evidence held to show that husband survived wife who perished in same shipwreck. In re McInnes, 104 N. Y. S. 147.

89. Evidence sufficient to support finding of auditor approved by court that husband survived his wife so as to entitle him to inherit. Johnson's Estate, 29 Pa. Super. Ct. 255.

90. See Carriers, 9 C. L. 466; Master and Servant, 8 C. L. 840; Negligence, 8 C. L. 1090; Railroads, 8 C. L. 1590, and similar topics.

91. See Abatement and Revival, 9 C. L. 1.

92. See 7 C. L. 1083.

93. Husband can recover for loss of time and funeral expenses resulting directly from death of wife. Philby v. Northern Pac. R. Co. [Wash.] 89 P. 468.

94. Act No. 280, Pub. Acts 1905, p. 432, providing that, in action for damages "heretofore or hereafter" sustained to either party to marriage relation from the wrongful act of another, it shall be no bar to action that legal impediment existed to a lawful marriage if contracted in good faith, held unconstitutional as creating new cause of action as to case where death had already occurred. Philip v. Heraty, 147 Mich. 473, 111 N. W. 93.

95. Gurofsky v. Lehigh Valley R. Co., 105 N. Y. S. 514. Though brought in state where administrator qualified. Cason's Adm'r v. Covington & C. El. R., Transfer & Bridge Co., 30 Ky. L. R. 352, 98 S. W. 304. Where vessels colliding belong in state of Delaware, laws of such state determine whether cause of action exists. The Hamilton [C. C. A.] 146 F. 724.

96. Const. U. S., art. 4, § 1, does not require the courts of Texas to recognize the validity of a New Mexico statute containing that provision. Atchison, etc., R. Co. v. Sowers [Tex. Civ. App.] 99 S. W. 190.

97. Will be enforced unless statutes are so dissimilar as to establish substantially different policies. Keep v. National Tube Co., 154 F. 121. Right of action under Gen. St. Kan. 1897, c. 95, §§ 418, 419, may be enforced in Missouri. Charlton v. St. Louis & S. F. R. Co., 200 Mo. 413, 98 S. W. 529. Fact that statute of North Carolina leaves recovery in hands of administrator for general distribution, while that of South Carolina designates particular beneficiaries, does not show different policy. Free v. Southern R. Co. [S. C.] 58 S. E. 952. Fact that Minnesota statute limited maximum recovery allowed certain claims to be paid therefrom allowed two years for bringing suit, contrary to New Jersey statute, held not to establish different policy. Keep v. National Tube Co., 154 F. 121. Action under West Virginia law maintainable in Virginia. Norfolk & W. R. Co. v. Denny's Adm'r [Va.] 56 S. E. 321. An action will lie in Utah for wrongful death occurring in another state brought by the administrator in the county where he resided. Stone v. Union Pac. R. Co. [Utah] 89 P. 715.

98. State cannot by statute enacted after death close its courts to one having cause of action under statute of sister state. Right to sue becomes vested. Brennan v. Electrical Installation Co., 120 Ill. App. 461. Act of May 13, 1903, amending act of February 12, 1853, and providing that "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state," held not to apply to causes of action existing at time of enactment. Id.

99. Swisher v. Atchison, T. & S. F. R. Co [Kan.] 90 P. 812. Act 1903, § 1, of New Mexico, requiring noice of injury, claim, etc..

statute rendering carriers liable in certain instances does not create liability on the part of their employes.[2] In Massachusetts street railway companies are liable for death due to corporate negligence,[3] or to the gross negligence of employes,[4] and procedure therein prescribed must obtain.[5] Under the Indiana Employers' Liability Act, it is not necessary that the negligence of the vice principal be in the discharge of duties as such.[6] A municipality is liable in Alabama for a death due to its wrongful act.[7] In Louisiana no recovery can be held for the death of an illegitimate child,[8] but in Colorado a cause exists for the death of an adult leaving no spouse or children.[9] Both lessor and lessee railroad are liable for death caused by lessee road.[10]

The statutes quite generally allow recovery only where decedent would have had a cause of action for his injuries had he survived,[11] and hence negligence [12]

held to go to right of action itself and not merely relating to procedure. Id. Le Bar v. New York, etc., R. Co. [Pa.] 67 A. 413. Suit for injuries received in Indiana which employed under a contract made and to be performed there, governed by Indiana law. Christensen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97. Fellow-servant rule of foreign state applied. Morrison v. San Pedro, etc., R. Co. [Utah] 88 P. 998.

1. Private telephone company held within Rev. St. 1895 art. 3017. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 99 S. W. 879 Rev. St. 1895, § 3017, giving cause of action for death due to negligence of owner, proprietor, etc., of "any railroad, steamboat, stage coach or other vehicle for conveyance of goods or passengers," held inapplicable to private tram railroad. Ott v. Johnson [Tex. Civ. App.] 101 S. W. 534. Rev. St. 1899, § 2864, providing that whenever any person shall die from injury resulting from negligence of any servant while running any car, etc., held to apply to street railways. McQuade v. St. Louis & S. R. Co., 200 Mo. 150, 98 S. W. 552. Negligence specified by Rev. St. 1899, § 2864, includes failure to discharge duty imposed by statute or ordinance. Id. Rev. Laws, c. 111, § 268, giving right of action for death at railroad crossing, etc., is not available to one killed while walking on roadbed. Durbin v. New York, etc., R. Co. [Mass.] 80 N. E. 219. Conceding that Rev. St. 1895, § 3017, giving action against railroad for death caused by unfitness, negligence, or carelessness of servants, requires act to be "negligently" as distinguished from "willfully" done, it is not essential that act be unintentionally done, as where compress air hose is turned on one in sport. Galveston, etc., R. Co. v. Currie [Tex.] 16 Tex. Ct. Rep. 870, 96 S. W. 1073. Under Rev. Laws, c. 111, § 267, no recovery can be had for death of trespasser upon roadbed of railroad company unless due to reckless or willful conduct of company. Durbin v. New York, etc., R. Co. [Mass.] 80 N. E. 219. Duty of electrical company to keep wires insulated held to render liable for death under Rev. St. 1895, § 3017, where it was left uninsulated for long time, though so left through negligence of servants. San Antonio Gas & Elec. Co. v. Badders [Tex. Civ. App.] 103 S. W. 229.

2. Rev. St. 1899, § 2864, as amended by Laws 1905, pp. 135-137, making one who "owns, operates or conducts" certain conveyances, liable, held to apply to employer exclusively. Chicago, etc., R. Co. v. Stepp, 151 F. 908.

3. Negligence of motorman held not to so clearly establish his incompetency as to show negligence on the part of defendant in employing him, within Rev. Laws, c. 111 § 267. Moran v. Milford & U. St. R. Co., 193 Mass. 52, 78 N. E. 736.

4. Negligence of motorman in running down pedestrian held not so wanton as to constitute "gross negligence" within Rev. Laws, c. 111, § 267. Moran v. Milford & U. St. R. Co., 193 Mass. 52, 78 N. E. 736.

5. Where widow sued in her own right for death of husband instead of as executrix, as required by New Jersey law, held too late to amend after statute of limitations had become a bar. La Bar v. New York, etc., R. Co. [Pa.] 67 A. 413.

Contra: Such an amendment was allowed on the ground that it did not substitute a new party or make a new cause of action so as to open the case to the statute of limitations. Atlanta, K. & N. R. Co. v. Smith [Ga. App.] 58 S. E. 106. Amendments. Id.

6. Sufficient if conductor is negligent while in charge of train under first part of subd. of § 1, of Employers' Liability Act (Burns' Ann. St. 1901, § 7083). Chicago, I. & L. R. Co. v. Williams [Ind.] 79 N. E. 442.

7. Code 1896, § 27, making any "person or persons, or corporation," etc., liable, held to include municipalities. City of Anniston v. Ivey [Ala.] 44 So. 48.

8. Act No. 71, p. 94, of 1884, held to refer to legitimate child only. Lynch v. Knoop, 118 La. 611, 43 So. 252. Acknowledgment without legitimation gives no right to sue. Landry v. American Creosote Works [La.] 43 So. 1016.

9. Mills' Ann. St. Colo. § 1508, construed to give cause of action to father where adult female died without husband, children, or mother. Hopper v. Denver & R. G. R. Co. [C. C. A.] 155 F. 273.

10. Jointly liable for statutory penalty imposed by Rev. St. 1899, § 2864. Johnson v. St. Joseph Terminal R. Co. [Mo.] 101 S. W. 641.

11. Under Gen. St. Kan. 1897, c. 95, § 418, issue in action for death is whether decedent could have recovered for injuries. Charlton v. St. Louis & S. F. R. Co., 200 Mo. 413, 98 S. W. 529.

12. Rice v. Chicago, etc., R. Co. [C. C. A.] 149 F. 79.

or illegal conduct [13] on his part proximately contributing to the death defeats recovery. Likewise, a release by decedent,[14] or a settlement by the sole beneficiary,[15] or the personal representative where he is authorized to sue, unless fraudulent,[16] constitutes a bar. The right of action for wrongful death does not survive the wrongdoer in Missouri.[17]

§ 2. *Who may bring action.*[18]—The action must be prosecuted by the party designated by the statute [19] of the state in which the cause arose,[20] such person usually being the representative of the deceased [24] or the surviving spouse.[22] There seems to be a conflict as to the sufficiency of the claim to authorize the appointment of a representative.[23] In Georgia minor children only [24] can bring suit for the death of a father where there is no widow. Persons having no pecuniary interest in decedent's life are not proper parties plaintiff,[25] and all the beneficiaries are not necessary parties in Louisiana.[26]

§ 3. *Beneficiaries of the right of action.*[27]—The action can be maintained only for the benefit of those designated by statute,[28] the same being strictly construed.[29]

13. Boy under fifteen years of age killed while running elevator in violation of penal statute. Mallory v. American Hide & Leather Co., 148 F. 482.

14. Held bar to action by personal representative under Rev. St. c. 70, § 1. Bruns v. Welte, 126 Ill. App. 541.

15. Where after dismissal of action by father for death of infant son father compromised and settled claim, he being sole beneficiary under Code Civ. Proc. § 2732 subd. 7. Settlement is binding on widow. McGorty v. New Amsterdam Gas Co., 115 App. Div. 668, 101 N. Y. S. 235. Sole heir to estate may make valid settlement of claim for suffering of decedent though action must be brought by administrator where estate is sufficient to meet claims of creditors. McKelgue v. Chicago & N. W. R. Co., 130 Wis. 543, 110 N. W. 384. Where contract of membership in relief department of Chicago, Burlington & Quincy R. Company provided that receipt of benefits thereunder should bar action for damages for death of member, receipt by widow bars her right of action but not that as administrator for benefit of minor children. Chicago, B. & Q. R. Co. v. Healy [Neb.] 111 N. W. 598.

16. Fraudulent settlement between administrator and party liable is no bar to action by succeeding administrator. Aho v. Jesmore [Minn.] 112 N. W. 538. Hence fraudulent settlement by administrator does not render him personally liable. Id.

17. Rev. St. 1899, §§ 96, 97, and §§ 2864, 2865, 2866, construed. Bates v. Sylvester [Mo.] 104 S. W. 73.

18. See 7 C. L. 1085.

19. Since courts of Kansas have construed words "next of kin" in Gen. St. Kan. 1897, c. 95, §§ 418, 419, to mean those who inherit under c. 109, § 19, providing that where intestate leaves no issue nor wife his estate shall go to parents, father and mother may sue for death of son, dying intestate without wife or issue, in consequence of injuries received in Kansas. Charlton v. St. Louis & S. F. R. Co., 200 Mo. 413, 98 S. W. 529.

20. Hoodmacher v. Lehigh Valley R. Co. [Pa.] 66 A. 975. Where decedent was injured and died in New Jersey, suit must be brought in name of personal representative, though prosecuted in Pennsylvania. La Bar v. New York, etc., R. Co. [Pa.] 67 A. 413; Hoodmacher v. Lehigh Valley R. Co. [Pa.] 66 A. 975.

21. Woodstock Iron Works v. Kline [Ala.] 43 So. 362. Foreign administrator may sue in Arkansas under Lord Campbell's Act (Kirby's Dig. §§ 6289, 6290) for injury in that state. St. Louis Southwestern R. Co. v. Graham [Ark.] 102 S. W. 700. Personal representative qualified in one state cannot sue in another without authorization by latter, and Ky. St. 1903, §§ 3878, 3879, authorizing county court to empower foreign administrator to sue for "debts" due decedent, does not apply to claim for death. Brooks v. Southern Pac. Co., 148 F. 986.

22. In Tennessee surviving right of action may be prosecuted by widow or by personal representative. Atlanta, K. & N. R. Co. v. Smith, 1 Ga. App. 162, 58 S. E. 106.

23. Held sufficient: Requested instruction that no recovery could be had if decedent had no property in state at time of death held properly refused. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 So. 1034.

Not sufficient: Right of action created under Mansf. Dig. Ark. §§ 5225, 5226, for exclusive benefit of widow and next of kin, held not asset of decedent's estate so as to authorize appointment of an administrator in Texas. Cooper v. Gulf, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 9, 93 S. W. 201. Where administrator of decedent's estate was appointed in Texas for sole purpose of maintaining suit, defendant may attack appointment. Id.

24. Civ. Code 1895, § 3828, hence demurrer raising objection that adult children were improperly joined should be sustained. Civ. Code 1895, § 4940. Western & A. R. Co. v. Harris [Ga.] 57 S. E. 722.

25. San Antonio & A. P. R. Co. v. Mertink [Tex. Civ. App.] 102 S. W. 153.

26. Widow and minor children by second marriage may prosecute action under Act No. 71, p. 94, of 1884, without joining, as plaintiffs, decedent's children by former marriage. Robideaux v. Herbert, 118 La. 1089, 43 So. 887.

27. See 7 C. L. 1085.

28. Under Ohio statute providing that re-

In Massachusetts a next of kin can recover for death of an employe only when dependent upon his wages for support.[30] A putative widow by a bigamous marriage cannot recover in Louisiana.[31] Whether a right of action exists in favor of a nonresident alien depends upon the statute creating the liability.[32] A separation does not divest a wife of her right of recovery for the death of her husband.[33]

§ 4. *Damages.*[34]—The damages recoverable depend largely upon the statute creating the right of action,[35] but generally they are strictly compensatory and limited to the pecuniary loss of the beneficiaries.[36] In determining the pecuniary loss sustained, direct financial outlays,[37] the decedent's earning capacity,[38] and the probable diminution thereof with the advance of age,[39] the amount of earnings

covery, in absence of surviving spouse or children, shall be for benefit of parents and next of kin "to be apportioned among the beneficiaries with reference to their age and condition and the laws of descent and distribution of personal estates," parents are entitled to a part thereof although personal estates descend exclusively to brothers and sisters. Toledo, etc., R. Co. v. Connolly [C. C. A.] 149 F. 398. In action by administrator, question of right to recover for benefit of other members of intestate's family is not raised by instruction to find for defendant if decedent was guilty of contributory negligence. Smith v. Lehigh Valley R. Co. [N. Y.] 80 N. E. 566.

29. Recovery limited to those specifically named. Vaughan v. Dalton-Lard Lumber Co. [La.] 43 So. 926.

30. Evidence that widowed mother had no other means of support is sufficient to submit question of dependence to jury. Morena v. Winston [Mass.] 80 N. E. 473.

31. Art. 2315, Civ. Code of 1870, as amended by Act No. 71, p. 94, of 1884, held not to create cause of action, especially where lawful widow survives. Vaughan v. Dalton-Lard Lumber Co. [La.] 43 So. 926. Such statutory right is not one of the civil effects of marriage which inures to benefit of putative wife under arts. 117, 118, of Civ. Code. Id.

32. Right exists Under Mills' Ann. St. §§ 1508-1510, giving right of action, first to "the husband or wife," second, to "the heir or heirs," and third, to "the father and mother." Petek v. American Smelting & Refining Co. [C. C. A.] 154 F. 190. Under Va. Code 1904, § 2902 et seq. Low Moor Iron Co. v. La Bianca's Adm'r, 106 Va. 83, 55 S. E. 532.

Held not to exist: Under Act Pa. 1855 (P. L. 309, § 1). Gurofsky v. Lehigh Valley R. Co., 105 N. Y. S. 514. Federal court, following construction placed on Act 1851, as amended by Act April 26, 1855 (P. L. 309), by Pennsylvania supreme court. Zeiger v. Pennsylvania R. Co., 151 F. 348. Treaty between U. S. and Italy securing to citizens of Italy same protection for persons or property in the U. S. as citizens of U. S. gives no standing to maintain action under Act April 26, 1855 (P. L. 309). Maiorano v. Baltimore & O. R. Co., 216 Pa. 402, 65 A. 1077.

33. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144.

34. See 7 C. L. 1086.

35. Acts 1905, p. 120, No. 89, providing that in actions for negligent injury "hereinafter" prosecuted by executor or administrator under statute declaring that such action shall survive measure shall be fair and just compensation for pecuniary injury, etc., applies only to actions begun after act took effect. Davis v. Michigan Cent. R. Co., 147 Mich. 479, 111 N. W. 76. Maximum limit fixed by Rev. St. 1901, par. 2765, is not to be taken as measure of most valuable life and all others assessed upon such basis, but merely as a limit to amount of recovery. De Amado v. Friedman [Ariz.] 89 P. 588. Instruction following Rev. St. 1899, § 2866 (Ann. St. 1906, p. 1646), and confining recovery to amount that is fair and just, having reference to the necessary injury, held proper in absence of request for more specific instruction as to element. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 S. W. 608.

36. Falender v. Blackwell, 39 Ind. App. 121, 79 N. E. 393. Consisting of that to which they would have been legally entitled and of that which they might reasonably expect from moral obligation. Sneed v. Marysville Gas & Elec. Co., 149 Cal. 704, 87 P. 376. Pecuniary loss includes not only money but anything which can be measured in money, excluding loss of society and compensation for grief and sorrow. Houston & T. C. R. Co. v. Rutland [Tex. Civ. App.] 101 S. W. 529. Under Hurds' Rev. St. 1905, p. 1152, c. 70, where next of kin are collateral and have not received pecuniary aid from decedent and are not in a situation to require it, only nominal damages are recoverable. Rhoads v. Chicago & A. R. Co., 227 Ill. 328, 81 N. E. 371. Under Code of Laws, § 2852 (Code Civ. Proc. 1902), pecuniary loss is not essential to recovery of damages, but is an element of damages. Barksdale v. Seaboard Air Line R. Co. [S. C.] 56 S. E. 906. Where there was no evidence of pecuniary loss, court may so instruct and charge jury to consider all elements of compensatory damages excepting that based on pecuniary loss. Id.

37. Costs of transporting body of minor son home and of burial held recoverable. Dean v. Oregon R. & Nav. Co. [Wash.] 87 P. 824.

38. May show that deceased was skilled in other trades than one at which he was working at time of death where he had not permanently abandoned same. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 So. 1034.

39. Decrease of earning capacity which naturally results from advanced age, probable loss of employment, and inability to constantly labor and to secure work, may be considered. Central of Georgia R. Co. v. Ray [Ga.] 58 S. E. 844.

saved,[40] and his age and expectancy of life as inconclusively[41] shown by mortality tables,[42] may be considered, but not the life expectancy of the beneficiaries,[43] nor can compensation be allowed for grief and mental suffering.[44] Where the benefits were of a voluntary character, the probability of a continuance thereof must be considered.[45] In some states the damages are based upon the loss to decedent's estate by the destruction of his earning power,[46] in which case the physical and mental sufferings of decedent are not elements of damage.[47]

In determining the pecuniary loss to a child by the death of a parent, compensation may be allowed for the loss of parental care, support, education, and moral training,[48] unless the right thereto has been divested.[49] A parent may recover for the death of a child the pecuniary value of its life during minority,[50] together with the expenses attendant upon the injury and burial,[51] and the loss of any benefits to be reasonably expected after majority,[52] but not the loss of love,

40. Life insurance collected after death cannot be considered with savings. Nevers Lumber Co. v. Fields [Ala.] 44 So. 81.

41. Mortality tables are not conclusive of decedent's life expectancy, but his general health, vocation, habits, etc., may be considered. Louisville & N. R. Co. v. Anderson [Ala.] 43 So. 566; Bussey v. Charleston & W. C. R. Co. [S. C.] 58 S. E. 1015; Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 99 S. W. 200. Instruction held not objectionable as making mortality tables conclusive upon expectancy of life in absence of requested instructions on health, etc. Davis v. Michigan Cent. R. Co., 147 Mich. 479, 111 N. W. 76. Not error for court to state that mortality tables showed a life expectancy of so many years where he further instructed that they were not conclusive. Northern Alabama R. Co. v. Key [Ala.] 43 So. 794.

42. Where only evidence of decedent's health shows it to have been "first class," mortality tables are controlling. Davis v. Michigan Cent. R. Co., 147 Mich. 479, 111 N. W. 76. Although evidence tends to show that decedent was in advanced stage of dropsy, mortality tables are still admissible under appropriate instructions where there is contrary evidence. Memphis St. R. Co. v. Berry [Tenn.] 102 S. W. 85.

43. Of parents. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 So. 1034. Not error to show life expectancy of beneficiaries where court instructs that in no event can recovery be had for period longer than probable natural life of decedent. Valente v. Sierra R. Co. [Cal.] 91 P. 481.

44. Suffered by widow for loss of husband. Dobyns v. Yazoo & M. V. R. Co. [La.] 43 So. 934. Instruction though in language of statute held erroneous as allowing for grief and sorrow. Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 S. W. 675.

45. Evidence that decedent had extended financial aid from her earnings to her married daughters held to make question for jury as to probability of continuance. Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502. Seventeen thousand dollars for death of son 30 years of age, with earning capacity of $4,000 to $7,000 per year, held excessive, as reasonable expectation of continuance of services could not extend over year or two. Scofield v. Pennsylvania Co., 149 F. 601.

46. Big Hill Coal Co. v. Abney's Adm'r, 30 Ky. L. R. 1304, 101 S. W. 394; Louisville & N. R. Co. v. Lucas' Adm'r, 30 Ky. L. R. 359, 98 S. W. 308. And which would have gone to next of kin. Coughlin v. Philadelphia, B. & W. R. Co. [Del.] 67 A. 148. In action for death of minor child under Rev. St. 1901, par. 2765, instructions as to ascertainment of damages to decedent's estate approved. De Amado v. Freedman [Ariz.] 89 P. 588.

47. Paducah City R. Co., v. Alexander's Adm'r [Ky.] 104 S. W. 375.

48. Houston & T. C. R. Co. v. Rutland [Tex. Civ. App.] 101 S. W. 529. Care. Indianapolis Traction & Terminal Co. v. Romans [Ind. App.] 79 N. E. 1068; Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502. Moral training. Goddard v. Enzler, 123 Ill. App. 108. Instruction and moral training. Goddard v. Enzler, 222 Ill. 462, 78 N. E. 805. In determining value of father's nurture and care to his children, physical condition of mother is admissible. International & G. N. R. Co. v. McVey [Tex. Civ. App.] 102 S. W. 172. Where it is shown that decedent was kind to his children and sent them to school as much as his means would permit, instruction to consider loss of parental training and instruction if the jury believed there was such loss is proper. St. Louis I. M. & S. R. Co. v. Standifer [Ark.] 99 S. W. 81.

49. Minor child is not divested of his right to care and support of father by judgment to which he is not party divorcing father and mother and giving mother custody to him. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 S. W. 608.

50. Instruction though in language of the statute held erroneous as allowing compensation for benefits accruing during whole life. Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 S. W. 675. Instruction authorizing recovery of "such sum as would fairly compensate the father for the loss of the son's wages" until majority held not erroneous as deducting anything for expenses, in absence of request for specific instruction. Bodcaw Lumber Co. v. Ford [Ark.] 102 S. W. 896.

51. Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 S. W. 675.

52. Missouri, K. & T. R. Co. v. Snowden [Tex. Civ. App.] 99 S. W. 865. Under Rev. St. 1898, § 2912, measure of damages to parents for death of adult son is not value of his life as judged from his earning capacity, but benefits which parents would have received financially and otherwise. Rogers v. Rio Grande W. R. Co.

society, and companionship.[53] Where an adult child intended to repay advancements by instalments, the present worth thereof only should be allowed.[54] Where the action for injuries survives, the measure of damages is the same as if the action had been brought by decedent in his lifetime.[55]

Exemplary damages[56] are allowed by the statutes of some states[57] where death occurs under circumstances of oppression and malice.[58]

The amount of recovery.[59]—Actual damages to parents are presumed from the death of a child,[60] but in all cases the assessment must be founded upon the evidence adduced.[61]

[Utah] 90 P. 1075. Evidence that decedent, upon death of mother, had been placed with aunt when only two years old and had remained until sixteen when she was placed in school by father to be fitted for teaching, that she was ambitious, industrious, and fond of her father, held to support finding that there was reasonable expectation of substantial financial benefit. Hopper v. Denver & R. G. R. Co. [C. C. A.] 155 F. 273. Where an adult child continues to give his services to his parents, they may recover for the loss thereof (Scofield v. Pennsylvania Co., 149 F. 601), but such recovery must be limited to compensation for such services as are reasonably to be anticipated (Id.). Instruction that when decedent had attained his majority he would not have owed any obligation to support next of kin unless they were paupers, and that he was just as liable to be a pauper as they, held properly refused. Chicago & A. R. Co. v. Louderback, 125 Ill. App. 323.

53. Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 S. W. 675. Companionship. Dando v. Home Tel. Co. [Mo. App.] 103 S. W. 103.

54. Instruction allowing full recovery held not reversible error in absence of request for specific instruction. St. Louis Southwestern R. Co. v. Graham [Ark.] 102 S. W. 700.

55. Wilmot v. McPadden, 79 Conn. 367, 65 A. 157.

56. See 7 C. L. 1088.

57. Act April 4, 1868. Palmer v. Philadelphia, B. & W. R. Co. [Pa.] 66 A. 1127. Under Civ. Code 1902, §§ 2851, 2852, punitive damages are recoverable where wrongful negligence was result of willfulness or malice (Osteen v. Southern Ry., Carolina Division [S. C.] 57 S. E. 196), and is not unconstitutional as depriving carriers of property without due process of law (Id.; Hull v. Seaboard Air Line Ry. [S. C.] 57 S. E. 28). Rev. St. Mo. 1899, § 2866, authorizing jury in assessing damages to have "regard to the mitigating or aggravating circumstances," etc., held to authorize punitive damages only in cases where decedent would have been entitled thereto had he lived. Otto Kuehne Preserving Co. v. Allen [C. C. A.] 148 F. 666. Code Civ. Proc. § 4290, authorizing punitive damages "in any action for a breach of an obligation not arising from contract, where defendant has been guilty of oppression, etc., held applicatble to § 579, giving cause of action for wrongful death. Olsen v. Montana Ore Purchasing Co., 35 Mont. 400, 89 P. 731.

58. Under Const. § 241, and express provisions of Ky. St. 1903, c. 1, § 6, question of punitive damages held properly submitted where railroad company was grossly negligent in running train over unsafe track at high rate of speed. Illinois Cent. R. Co. v. Sheegog's Adm'r [Ky.] 103 S. W. 323. In action for death caused by barrel falling from second story window, evidence held to require instruction to allow punitive damages if barrel was thrown out or recklessly thrown onto box by window, otherwise only compensatory. Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 S. W. 675.

59. See 7 C. L. 1088.

60. Adult child. Huff v. Peoria & Eastern R. Co., 127 Ill. App. 242. Unmarried adult. Grace & Hyde Co. v. Strong, 127 Ill. App. 336. Recovery is limited to nominal damages only when there are no heirs at law. Woodstock Iron Works v. Kline [Ala.] 43 So. 362.

61. Instruction directing jury to assess damages at amount of pecuniary loss, if any, suffered by next of kin, held not reversible error in not referring jury to evidence in assessing same. Chicago & A. R. Co. v. Louderback, 125 Ill. App. 323. Proof of decedent's earning capacity, his age, life expectancy, habits of industry, etc., held sufficient upon which to award damages. Woodstock Iron Works v. Kline [Ala.] 43 So. 362; Black v. Michigan Cent. R. Co., 146 Mich. 568, 13 Det. Leg. N. 863, 109 N. W. 1052. In action for death of minor son, evidence of what he was earning at place of accident held sufficient to take question of damages to jury, although he intended to return home. Dean v. Oregon R. & Navigation Co. [Wash.] 87 P. 824. Where there is evidence that some of next of kin sustained pecuniary injury, more than nominal damages are recoverable. Grace Co. v. Strong, 224 Ill. 630, 79 N. E. 967. Under evidence held proper to refuse to confine recovery to nominal damages though evidence failed to show amount deceased was earning at time of death. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 S. W. 608.

Held not Excessive. Adults: Seven thousand five hundred dollars for death of son 25 years old earning $100 to $130 per month and turning over about $1,000 of wages to mother per year. Baker v. Philadelphia & R. R. Co., 149 F. 882. Nine thousand five hundred dollars for mail clerk 32 years old earning $1,000 per year. Malott v. Central Trust Co. [Ind.] 79 N. E. 369. Five thousand dollars for laborer fifty-eight years old earning $10.50 per week. Indianapolis Trac. & T. Co. v. Romans [Ind. App.] 79 N. E. 1068. Three thousand dollars, there being nothing to indicate passion. Falender v. Blackwell, 39 Ind. App. 121, 79 N. E. 393. Five thousand dollars for man 54 years old,

§ 5. *Remedies and procedure.*[62]—Where a marshal unnecessarily and maliciously kills one arrested for a misdemeanor, recovery may be had on his official bond.[63]

The action must be instituted in the proper county [64] and court [65] within the time prescribed by statute,[66] the lex fori controlling, and where time is inherent in the right of action itself, it must be observed.[67]

who was providing well for wife and two children. Johnson v. Smith Lumber Co., 99 Minn. 343, 109 N. W. 810. Six thousand dollars for man 25 years old, living with father 49 years of age, and earning $12 per week. Sembler v. Cowperthwait, 53 Misc. 28, 103 N. Y. S. 979. One thousand dollars to widow and $3,000 to two minor children of one earning $1.50 per day and having life expectancy of 21 years. Robideaux v. Hebert, 118 La. 1089, 43 So. 887. One thousand dollars for farmer about 60 years old making about $1,500 per year. Louisville & N. R. Co. v. Ueltschi's Ex'rs, 29 Ky. L. R. 1136, 97 S. W. 14. Eight thousand dollars for mail carrier 35 years old earning $50 per month. Louisville & N. R. Co. v. Lucas' Adm'r, 30 Ky. L. R. 359, 98 S. W. 308. Six thousand dollars for man 22 years old earning from $50 to $100, most of which was given to mother 54 years of age. International & G. N. R. Co. v. Hays [Tex. Civ. App.] 17 Tex. Ct. Rep. 605, 98 S. W. 911. Two thousand dollars to widow 29 years old, and to each of seven children, for death of man 36 years old earning $700 to $800 a year. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144. Fifteen thousand dollars for death of man having life expectancy of about twenty-five years and earning $75, practically all of which was given to plaintiff. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 99 S. W. 200. Five thousand dollars for deaf mute 32 years old, a successful farmer, maintaining his family and giving aid to mother. International & G. N. R. Co. v. Munn [Tex. Civ. App.] 102 S. W. 442. Two thousand dollars for strong, vigorous man 35 years old earning, when employed, from $10 to $15 per week. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 S. W. 608. Five thousand five hundred dollars to widow and $1,500 to each of three minor children for boiler makers' helper, earning $48 to $50 per month and 37 years old. Houston & T. C. R. Co. v. Rutland [Tex. Civ. App.] 101 S. W. 529. Three thousand five hundred dollars to widowed mother, age 64 years, for death of married son who supported her. Texas & N. O. R. Co. v. Scarborough [Tex. Civ. App.] 104 S. W. 408. Two thousand dollars for adult, unmarried son, contributing $5 to $10 per month toward support of parents. Grace & Co. v. Strong, 127 Ill. App. 336. Five thousand dollars for death of college student, 22 years old, who earned $2 per day during vacation. Swift & Co. v. Gaylord, 126 Ill. App. 281.

Held Excessive. Adults: Twenty-five thousand dollars for freight conductor, 32 years old, earning $1,200. Cut to $10,000. Dobyns v. Yazoo & M. V. R. Co. [La.] 43 So. 934. Five thousand dollars for locomotive fireman 22 years old, who had contributed about $200 to parents, $100 during year preceding death. Cut to $3,500. Texas & N. O. R. Co. v. Kenny [Tex. Civ. App.] 102 S. W. 909. Four thousand dollars where decedent was in advanced stages of dropsy. Reduced to $2,000. Memphis St. R. Co. v. Berry [Tenn.] 102 S. W. 85. Cut to $10,000 for teamster 32 years old. Gorman v. Hand Brewing Co. [R. I.] 66 A. 209.

Held Reasonable. Children: Four thousand eight hundred dollars as injury to estate of boy four years old. De Amado v. Friedman [Ariz.] 89 P. 588. Three thousand dollars for girl 15 years old. Ellis v. Republic Oil Co., 133 Iowa, 11, 110 N. W. 20. One thousand five hundred dollars for child seven years old. Black v. Michigan Cent. R. Co., 146 Mich. 568, 13 Det. Leg. N. 863, 109 N. W. 1052. Three thousand five hundred dollars for son eighteen years old earning $80 per month, parents being dependent upon him. Hayes v. Chicago, etc., R. Co. [Wis.] 111 N. W. 471. One thousand dollars for child 7 years old. Indianapolis Trac. & T. Co. v. Beckman [Ind. App.] 81 N. E. 82. Five thousand dollars for death of boy fourteen years old, healthy, bright, and intelligent, and who had attended school for six years. Illinois Cent. R. Co. v. Johnson, 123 Ill. App. 300. Verdict for $14,500 for death of two children, being within statutory limit, will not be set aside by appellate court in absence of special evidence showing excessiveness or passion and prejudice on part of jury. Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 P. 212.

62. See 7 C. L. 1090.

63. Action under Ky. St. 1903, § 4, on bond given under § 3690. Growbarger v. U. S. Fidelity & Guaranty Co. [Ky.] 102 S. W. 873.

64. Laws 1903, p. 76, c. 92, providing that transitory action arising out of state in favor of resident shall be brought in county where such resident resides, etc., held to authorize resident administrator to sue in own county for death occurring in Wyoming. Stone v. Union Pac. R. Co. [Utah] 89 P. 715.

65. Rev. Laws, Mass, c. 106, §§ 71-74, authorizing damages to be "assessed with reference to the degree of culpability of the employer," etc., held not so penal in character as to be unenforceable in Federal courts. Malloy v. American Hide & Leather Co., 148 F. 482.

66. Where widow has dismissed suit brought within six months after death of husband, she may renew suit within year after death though another wrongdoer is made party. McQuade v. St. Louis & S. R. Co., 200 Mo. 150, 98 S. W. 552. Where decedent was killed on November 13, 1901, and suit was commenced November 12, 1902, amendment filed December 4, 1905, within the lis pendens, was not barred. Woodstock Iron Works v. Kline [Ala.] 43 So. 362. Where suit is erroneously brought by widow in her own name instead of as executrix, amendment cannot be made after limitation has become a bar. La Bar v. New York, etc., R. Co. [Pa.] 67 A. 413.

67. Time allowed by the Minnesota stat-

Distinct causes of action[68] must be stated in separate counts. The petition must show a right of action in the plaintiff,[69] in what capacity he sues,[70] damage to the next of kin,[71] and must demand the full "penalty" prescribed by statute.[72] In Alabama it is not necessary to allege and prove that decedent left surviving heirs at law.[73] Where parents sue on the cause of action surviving their son, they need not allege the relation of master and servant.[74] The usual rules as to amendments apply,[75] the practice of the lex fori controlling.[76]

Where the action is brought by a personal representative, due appointment and qualification[77] must be shown unless admitted by the pleadings.[78] The usual rules against hearsay evidence,[79] and self-serving statements,[80] and concerning relevancy[81] and expert opinions,[82] are applicable. Courts will take judicial notice of

ute held to inhere in cause of action. Keep v. National Tube Co., 154 F. 121.

68. Right of action given by § 2864, Rev. St. 1899, for death caused by negligence of officer or employe operating defendant's locomotive, car, or train of cars, etc., is distinct from that given by §§ 2865, 2866, which is for negligence of defendant or of servants in particular other than specified in § 2864. Casey v. St. Louis Transit Co. [Mo.] 103 S. W. 1146.

69. Rev. St. 1899, § 4311 (Ann. St. 1906, p. 2370), held to render marriage under age of 14 years void, hence parents suing for death of child under such age need not allege that he was unmarried. Bellamy v. Whitsell, 123 Mo. App. 610, 100 S. W. 514. Where statute gives right of action to representative without designating any beneficiaries, nonsuit should not be granted because complaint alleged that recovery was for benefit of parents. May be treated as surplusage. Free v. Southern R. Co. [S. C.] 58 S. E. 952.

70. Indefiniteness of complaint for death of minor child as to whether father sues in his individual or representative capacity does not render it subject to general demurrer. Motion to make more definite proper remedy. De Amado v. Friedman [Ariz.] 89 P. 588. Where right of action is given to widow claim filed in admiralty by M., "widow and executrix," is sufficient, allegation that she was executrix being descripio personae and surplusage. The Hamilton [C. C. A.] 146 F. 724. Amendment showing that petitioner claimed as widow held proper. Id.

71. Allegation that decedent left surviving him, as his next of kin, his father, mother, a sister and two brothers, "who have sustained damages by his death" in specifically named amount, sufficiently avers damage to next of kin. Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636.

72. Petition under Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637). Casey v. St. Louis Transit Co. [Mo.] 103 S. W. 1146. Held entitled to amend where petition was drawn in reliance on decision of Kansas City court of appeals. Id. Where allegations of petition and evidence brings case within § 2864, Rev. St. 1899 (Ann. St. 1906, p. 1637), except that only $4,500 damages were demanded, instruction limiting recovery to such amount is erroneous, as full $5,000 should have been demanded. Gormley v. St. Louis Transit Co. [Mo. App.] 103 S. W. 1147.

73. Will be presumed. Woodstock Iron Works v. Kline [Ala.] 43 So. 362.

74. Bellamy v. Whitsell, 123 Mo. App. 610, 100 S. W. 514.

75. Where married sisters are designated by Christian names of their husbands with prefix "Mrs.," petition may be amended so as to give own Christian names, there being no change of cause of action. Grace & Hyde Co. v. Strong, 224 Ill. 630, 79 N. E. 967. Where suit is brought in name of father for death of infant son, and verdict is returned for full damages to both parents, mother may be made party by amendment. Waltz v. Pennsylvania R. R. Co., 31 Pa. Super. Ct. 286. Where action may be brought by widow or by personal representative as nominal plaintiff for benefit of widow, action by widow as representative may be amended so as to stand in widow's right, especially under Civ. Code 1895, § 5106. Atlanta, K. & N. R. Co. v. Smith, 1 Ga. App. 162, 58 S. E. 106.

76. Atlanta, K. & N. R. Co. v. Smith, 1 Ga. App. 162, 58 S. E. 106.

77. Due qualification relates back to time of appointment. Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 81 N. E. 152.

78. Where original asnwer admitted that plaintiff was duly appointed and qualified administrator, leave to amend at time of trial two years later to deny such fact so as to take advantage of statute of limitations should be denied. Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 81 N. E. 152. Where original answer admits due appointment and qualification of plaintiff, and amended answer reaffirms all allegations except that plaintiff was duly qualified and avers that he was appointed and qualified at subsequent date admission of due appointment stands. Id.

79. Declarations or admissions of decedent are hearsay in action by widow, under Rev. St. 1892, §§ 2342, 2343. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516.

80. In action for death of minor son who had left home without consent of parents, letters and conversations indicating an intention to return are not inadmissible as self-serving. Dean v. Oregon R. & Nav. Co. [Wash.] 87 P. 824.

81. Where in action by parents for death of minor son undutiful conduct of son towards mother is shown, evidence as to what mother said when called a liar is immaterial. Bellamy v. Whitsell, 123 Mo. App. 610, 100 S. W. 514.

82. Where physician was called to see deceased as soon as he was taken from locomotive tank which he was painting, he

standard mortality tables.[83] Where no witnesses survive the accident, the manner and cause thereof may be shown by circumstantial evidence,[84] and evidence of decedent's careful habits is admissible to show due care.[85] The admissibility of evidence to show decedent's earning capacity,[86] and the damage to the beneficiaries,[87] is treated in the notes. Although it is presumed in Nebraska that the widow and children were dependent upon deceased,[88] direct proof thereof is admissible.[89] Where decedent was not supporting his wife at the time of death, facts relieving him from the legal obligation to do so may be shown.[90]

The burden of proving negligence on the part of defendant,[91] proximately causing death,[92] is on plaintiff, but contributory negligence is an affirmative defense in most states,[93] though the burden of disproving it rests upon plaintiff in a few.[94] Where action is brought by one married to decedent in due form of law, dissolution

may testify as expert that death was caused by inhaling fumes of paint, basing his opinion on observation and on undisputed statements of circumstances under which decedent died. Houston & T. C. R. Co. v. Rutland [Tex. Civ. App.] 101 S. W. 529.

83. Valente v. Sierra R. Co. [Cal.] 91 P. 481. Admission thereof without proof of authenticity and reliability is discretionary with court. Id.

84. Where accident results in death of all persons connected therewith and there is no direct proof as to how it happened, manner of occurrence may be shown by circumstantial evidence from which jury may infer manner and cause of accident, if inference is reasonable though not a necessary resulting fact. Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 P. 212.

85. Chicago & A. R. Co. v. Wilson, 225 Ill. 50, 80 N. E. 56.

86. Fact that returns from farming depend largely upon weather conditions does not render proof of what decedent usually made inadmissible. Wrightsville & T. R. Co. v. Gornto [Ga.] 58 S. E. 769. Fact that home of decedent was mortgaged is incompetent where offered in derogation of earning capacity, value of business as fire insurance agent is competent, as is testimony by wife as to affability and other personal characteristics of assistance to him in securing business. Wheeling & Lake Erie R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28.

87. Where it appeared that decedent cared for her children besides doing other work, evidence of number and age of children is admissible. Lord v. Manchester St. R. Co. [N. H.] 67 A. 639. Evidence that deceased had agreed to reimburse father for expenses of education by aiding in education of sisters is admissible. Huff v. Peoria & Eastern R. Co., 127 Ill. App. 242. In action by widow under Minors Act, she may testify as to the number of minor children so as to assess entire damages in one action. Kellyville Coal Co. v. Bruzas, 125 Ill. App. 464. Evidence that decedent and witness walked from sister state to place of employment and on way begged food and slept in barns is immaterial. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 So. 1034.

88. Hence of pecuniary injury. Standard Oil Co. v. Parkinson [C. C. A.] 152 F. 681.

89. Presumption being rebuttable, direct proof in support thereof is not incompetent or immaterial. Standard Oil Co. v. Parkinson [C. C. A.] 152 F. 681.

90. Where recovery is limited to "a fair and just compensation for the pecuniary injury," etc., and it is admitted that decedent has contributed nothing to widow's support for 15 years, evidence that during all of such time she was notoriously living in adultery is admissible as relieving him from duty to support. Orendorf v. New York Cent. & H. R. R. Co., 104 N. Y. S. 222.

91. Where only evidence of negligence is inference drawn from circumstances, and other circumstances are proven, from which inference of absence of negligence is clearly a more natural and stronger inference, and verdict is for plaintiff, it is duty of court to see that party on whom burden is cast sustains that burden, and to set aside verdict, which is in effect based upon conjecture of jury that defendant was negligent. Hamilton v. Lake Shore & M. S. R. Co., 4 Ohio N. P. (N. S.) 249. See negligence, 8 C. L. 1090.

92. Evidence held sufficient to show that accident was proximate cause of death. Kelly v. Wills, 116 App. Div. 758, 102 N. Y. S. 223. Question of cause of death is for jury, and they are not required to find that cause beyond reasonable doubt, nor to find specific affliction with certainty of a medical determination, and they may disregard medical testimony. Id. Where causal connection between injury and death is not sufficiently shown, order setting aside verdict for plaintiff is proper, but judgment dismissing complaint is erroneous as deficiency may be supplied on new trial. McIntyre v. Interurban St. R. Co., 105 N. Y. S. 106.

93. Baker v. Philadelphia & R. R. Co., 149 F. 882. In action by widow for death of husband under Rev. St. 1892, §§ 2342, 2343, burden of pleading and proving contributory negligence is on defendant. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516. Where no witness saw accident, administrator is entitled to presumption of due care. Ellis v. Republic Oil Co., 133 Iowa, 11, 110 N. W. 20. Presumption of due care on part of decedent is inapplicable where surrounding circumstance negatives such care. Rich v. Chicago, etc., R. Co. [C. C. A.] 149 F. 79. See Negligence, 8 C. L. 1090.

94. Proof that decedent, engineer, was found dead on floor of hallway between revolving fly wheel and wall of building with skull cut off, held insufficient to show due care. McCarty v. Clinton Gaslight Co., 193 Mass. 76, 78 N. E. 739.

of a former marriage prior thereto will be presumed.[95] Where legitimacy of decedent is attacked and marriage of parents denied, the mother suing has burden of proving marriage.[96] Burden of proving that homicide was committed in self-defense is on the defendant.[97]

Instructions must not be abstract.[98]

§ 6. *Distributive rights in amount recovered.*[99]—In most states the amount recovered does not become an asset of decedent's estate [1] but is distributed among designated beneficiaries.[2] In New York the surrogate court may allow reasonable funeral expenses therefrom.[3] Generally speaking, defendant cannot complain of the manner in which the verdict is apportioned among the plaintiffs.[4]

Death Certificates; Debentures; Debt, see latest topical index.

DEBT, ACTION OF.[5]

An action of debt will not lie where the mutual obligations of the parties can be adjusted only in equity.[6] An assignee of rent who has not the reversion may maintain debt or rents.[7] An action to recover a statutory penalty for usury is one of debt.[8]

Debts of Decedents, see latest topical index.

DECEIT.

§ 1. Nature and Elements (936). | § 2. Action and Procedure (938).

Scope of topic.—The topic embraces fraud as a ground of action for damages whether in the common law form for deceit or an equivalent action under the code. Fraud as a ground for relief other than the recovery of damages is elsewhere treated.[9]

95. Defendant must prove contrary though it necessitates the proof of a negative. Johnson v. St. Joseph Terminal R. Co. [Mo.] 101 S. W. 641.

96. Lynch v. Knoop, 118 La. 611, 43 So. 252.

97. Where evidence shows that defendant intentionally stabbed decedent, and only theory upon which act would not be unlawful would be that of self-defense, charge that there was presumption that defendant did not unlawfully kill decedent is erroneous. Cobb v. Owens [Ala.] 43 So. 826.

98. Request to charge that if jury believe that, in natural course of events, decedent would have spent all his earnings on his maintenance during his life if he had lived his expectancy, plaintiff cannot recover, held abstract. Woodstock Iron Works v. Kline [Ala.] 43 So. 362.

99. See 7 C. L. 1092.

1. Hence surrogate has jurisdiction under Code Civ. Proc. § 1903, to make distribution before expiration of year from appointment of administrator and without advertisement to creditors. In re McDonald's Estate, 51 Misc. 318, 101 N. Y. S. 275.

2. Under Civ. Code 1895, §§ 3828, 3829, minor child is entitled to distributive share in amount recovered by widow and may, through legal representative, maintain action therefor. Griffith v. Griffith [Ga.] 57 S. E. 698.

3. Hence not necessary to postpone settlement under Code Civ. Proc. § 1903, until termination of action in supreme court for funeral expenses. In re McDonald's Estate, 51 Misc. 318, 101 N. Y. S. 275. Under Code Civ. Proc. § 1903, as amended by Laws 1904, p. 1285, c. 515, providing that from sum recovered by administrator for death of decedent he "may deduct" the reasonable funeral expenses of the decedent, held that leave should be granted to one who has recovered a judgment for funeral expenses against the administrator to issue an execution thereon to be paid out of amount in his hands as proceeds of suit by him for death by wrongful act of his decedent after payment of costs of such suit. In re McDermott's Estate, 49 Misc. 402, 99 N. Y. S. 829.

4. Especially where facts justify submission of issue as to whether each of plaintiffs has suffered injury. International & G. N. R. Co. v. Munn [Tex. Civ. App.] 102 S. W. 442. Where defendant does not complain that verdict as whole is too large, he cannot complain that particular beneficiary received too much. Texas & N. O. R. Co. v. Scarborough [Tex. Civ. App.] 104 S. W. 408.

5. See 7 C. L. 1092.

6. Parties to joint adventure. Jones v. McNally, 53 Misc. 59, 103 N. Y. S. 1011.

7. F. Groos & Co. v. Chittim [Tex. Civ. App.] 100 S. W. 1006.

8. Waitman v. Empire Loan Co. [Tex. Civ. App.] 101 S. W. 499.

9. See Fraud and Undue Influence, 7 C. L. 1813; Reformation of Instruments, 8 C. L. 1708; Wills, 8 C. L. 2305.

§ 1. *Nature and elements.*[10]—The essential elements of an action for deceit are representation,[11] falsity,[12] scienter,[13] deception,[14] and damage.[15] It may consist in any artifice used to circumvent or deceive another.[16] One who is executor and residuary legatee under a will and who fraudulently induces testator who depended upon him for business advice to execute a codicil so that it is invalid is liable in action for damages brought by the intended legatee.[17]

There must be some representation,[18] though under some circumstances mere concealment is sufficient,[19] but the maker of false representation is not liable to one whom he had no reason to believe would be misled by them.[20] It is a sufficient basis for an action against a principal if made by his authorized agent,[21] but representation by one partner will not bind his firm unless done in the course of the firm's business.[22]

The representation must be a fact [23] past or existing,[24] and not a mere expres-

10. See 7 C. L. 1093.

11. Goldstein v. Messing, 104 N. Y. S. 724.

12. Giving worthless check for existing indebtedness does not constitute fraud. Goldstein v. Messing, 104 N. Y. S. 724.

13. Kranz v. Lewis, 115 App. Div. 106, 100 N. Y. S. 674; Curtley v. Security Sav. Soc. [Wash.] 89 P. 180. To warrant action for damages, representations must have been knowingly made with intent to deceive. American Educational Co. v. Taggert, 124 Ill. App. 567.

14. Where before entering into contract plaintiff knew representations were false, there can be no recovery. Ransier v. Dwyer [Mich.] 112 N. W. 1120.

15. Tregner v. Hazen, 116 App. Div. 829, 102 N. Y. S. 139.

16. Representation that an option has been secured on land at certain price upon which others rely in entering into contract for its purchase jointly with those making such statements amounts to fraud where in fact a rebate was to be made from the price though upon inquiry it might have been learned that the statements were false. Vennum v. Palmer, 123 Ill. App. 619. Vendor of merchandise stock assisting in taking inventory for purpose of arriving at price at which it is to be sold, who gives the values thereof in excess of price marked thereon, is guilty of fraudulent misrepresentation. Smith v. Owsley [Ky.] 102 S. W. 277. False statement that certain property was clear of incumbrance and that a mortgage given thereon is a first lien amounts to fraud where a mortgage was given and filed an hour before but not spread on record until next day. Hill v. Coates, 127 Ill. App. 196. An action for damages will lie in favor of a party who, by false representations, was induced to change his position to his injury. Farquhar v. Farquhar [Mass.] 80 N. E. 654. Facts considered and held sufficient to constitute actionable fraud where plaintiff and defendant were joint owners of a mine and defendant represented to plaintiff that he had a purchaser therefor at a certain sum and induced plaintiff to convey his interest to him for purpose of sale, whereas price he received therefor was in excess of sum named to plaintiff of which fact plaintiff was ignorant. Christy v. Campbell, 36 Colo. 261, 87 P. 548.

17. But complaint must show facts excluding possibility of testator changing his mind before will took effect. Lewis v. Corbin [Mass.] 81 N. E. 248.

18. See 7 C. L. 1094. Goldstein v. Messing, 104 N. Y. S. 724. Evidence held insufficient to show fraudulent representation. Woodman v. Blue Grass Land Co. [Minn.] 112 N. W. 1033.

19. Where insurance agent undertakes to fully explain policy in procuring application, but willfully neglects to inform applicant of certain onerous conditions his silence on that subject amounts to fraudulent concealment. Hartford L. Ins. Co. v. Hope [Ind. App.] 81 N. E. 595.

20. Western Union Tel. Co. v. Schriver [C. C. A.] 141 F. 538.

21. Principal is liable for false representation of agent as to validity of a bill of sale and as to ability of a third party to pay, made to induce plaintiff to loan money to said third party with which latter paid indebtedness to defendant. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061.

22. False statement by one partner as to financial standing of a customer does not render partnership liable. Bartles v. Courtney, 6 Ind. T. 379, 98 S. W. 133.

23. See 7 C. L. 1094. Positive and detailed statement of financial responsibility may be construed as a statement of fact. Phillips v. Hebden [R. I.] 63 A. 266. Statement by agents of insurance company that such company was issuing certain policy under which certain benefits would be derived in the future is of existing fact. Hartford L. Ins. Co. v. Hope [Ind. App.] 81 N. E. 595. Positive statements of value of stock in a corporation and the dividends it will earn, made by its president, are statements of fact. Gilluly v. Hosford [Wash.] 88 P. 1027. Where controlling considerations inducing plaintiff to enter into contract were statements of existing fact, fact that he may also have been induced by false promises as to future transactions is immaterial. Damers v. Sternberger, 102 N. Y. S. 739. Whether certain statements as to value of company's assets were statements of fact or matters of opinion held a question for jury. Hawley v. Wicker, 117 App. Div. 638, 102 N. Y. S. 711.

24. Statement made to plaintiff that he could perform certain work in a given time whereas it required double the time stated is an expression of opinion. Chamberlayne v. American Law Book Co., 148 F. 316.

sion of opinion,[25] but a fraudulent statement of an intent which does not exist may give basis for an action for deceit,[26] as may also a promise to perform with the present intention not to do so,[27] though some courts hold that promises to perform some act in the future does not, though made with an intention not to perform.[28] The representation must be false [29] and the question of its falsity is generally one of fact.[30]

The maker must know it to be false [31] or make it with such disregard of its truthfulness as to be equivalent to actual fraud.[32]

The falsity must have been willful and made with intent to deceive.[33]

The representation must be material,[34] and the question of materiality is generally one of fact.[35]

The representation must be relied upon[36] and the person injured thereby deceived.[37]

It must be such that the defrauded person is entitled to rely upon,[38] and such as will mislead a reasonably prudent man,[39] unless the parties occupy fiduciary relations toward each other.[40] That the defrauded party should have discovered the fraud before changing his position to his injury is no defense.[41]

25. Statement that third party is "a 'nice young man' and will probably make a good customer" cannot give basis for action for deceit, though he is in fact insolvent and unable to pay his bills. Bretzfelder, Bronner & Co. v. Waddle, 122 Mo. App. 462, 99 S. W. 806.

26. Statement of intention to purchase property on which plaintiff held option on condition that he make no effort to sell others, thereby inducing him to hold property until option expired and then purchase from owner, is a fraudulent representation. Complaint in action for fraudulent representations as to defendant's intent resulting in damage to plaintiff held good as against demurrer. Rogers v. Virginia-Carolina Chem. Co. [C. C. A.] 149 F. 1.

27. Promise to see that property is sold at a certain figure under foreclosure without intent to perform, made to induce plaintiff to give mortgage, is a false statement of an existing fact. Cerny v. Paxton & Gallagher Co. [Neb.] 110 N. W. 882.

28. Plaintiff was induced to invest in corporation upon representation that defendant would invest a considerable sum and give his time to the business. Defendant did not perform. Held to give no cause of action for deceit. Chambers v. Mitchell, 123 Ill. App. 595.

29. Evidence must show that representations were false, that they were made knowingly and with intent to deceive. Ames v. Thren, 125 Ill. App. 312; Hartford L. Ins. Co. v. Hope [Ind. App.] 81 N. E. 595.

30. Whether or not certain statements were true held a question for jury. Hawley v. Wicker, 117 App. Div. 638, 102 N. Y. S. 711.

31. See 7 C. L. 1095. False statement made through carelessness and without reasonable ground for believing it to be true does not amount to fraud. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co. [C. C. A.] 148 F. 674. Representation concerning credit of another, though false, is not the basis for deceit if honestly made. Bartles v. Courtney, 6 Ind. T. 379, 98 S. W. 133.

32. In order to justify recovery for vendor's false representations as to title, it must appear that he knew of their falsity or made them under such circumstance that knowledge will be implied. Curtley v. Security Sav. Soc. [Wash.] 89 P. 180. Evidence that defendant did not know whether endorser of note had certain property held sufficient to show that he knew his statement to that effect was false, the indorser in fact owning no such property. Farmer v. Lynch [R. I.] 67 A. 449.

33. See 7 C. L. 1095. Where in negotiation for sale of its property defendant supplied plaintiff with inaccurate statement thereof, which had been made for its own use prior to such negotiations, without knowledge of its falsity, deceit will not lie. Pittsburgh Life & Trust Co. v. Northern Cent. Life Ins. Co. [C. C. A.] 148 F. 674.

34. See 5 C. L. 955. Kranz v. Lewis, 115 App. Div. 106, 100 N. Y. S. 674.

35. Whether representation that a well known financier was trying to purchase stock in a certain corporation was a statement of material fact is for jury. Hawley v. Wicker, 117 App. Div. 638, 102 N. Y. S. 711.

36. See 7 C. L. 1095. Where for three years after defendant's statement as to his solvency indebtedness for transactions aggregating $5,000 was paid monthly, held that plaintiff relied on fact of defendant paying promptly and not upon statement. Phillips v. Hebden [R. I.] 65 A. 266.

37. Where before entering into contract plaintiff knew representations made were false, there can be no recovery. Ransier v. Dwyer [Mich.] 112 N. W. 1120.

38. See 7 C. L. 1095. False statement by real estate agent as to the price at which owner holds land is not. Bosley v. Monahan [Iowa] 112 N. W. 1102.

39. One who had an opportunity to investigate statements made cannot claim to have been misled. Bosley v. Monahan [Iowa] 112 N. W. 1102.

40. Fact that parties sustained friendly relations toward each other does not make their relations fiduciary. Bosley v. Monahan [Iowa] 112 N. W. 1102.

41. Where plaintiff knew nothing of the

It is essential that damage result.[42]

§ 2. *Action and procedure.*[43]—One who acted as agent for defrauded party cannot bring action in his own name.[44] In action for damages for deceit whereby plaintiff was induced to enter into a written lease, the cause of action is not governed by the lease.[45] Court of law has jurisdiction of action by party defrauded in buying into a firm.[46]

Pleading.[47]—The facts constituting fraud must be specifically alleged.[48] The complaint must show the relation of cause in effect between the fraud and the damage alleged,[49] and must definitely state the damage suffered.[50] It must show that the representations were in fact false,[51] that the defendant was aware of their falsity,[52] and that defrauded party relied upon them and acted thereon to his injury.[53]

Evidence.[54] The evidence adduced must be sufficient to sustain the allegations of the complaint,[55] but the necessity of proving the falsity of the representations is confined to those necessary to show facts sufficient to sustain recovery.[56] Relaxation of the rule res inter alias acta,[57] and of the parol evidence rule, is permitted.[58] In action for damages resulting from fraud, judgment roll is admissible to show that it had been rendered for breach of contract caused by such fraud but not to show grounds on which it was rendered.[59] Where fraud in representing an instrument to be valid security is the gist of an action for deceit, it is

condition of corporation and chose to rely on defendant's statements, recovery cannot be defeated on ground that plaintiff should have made investigation. Gilluly v. Hosford [Wash.] 88 P. 1027. Party making false representations as to validity of mortgage and solvency of third party cannot claim that plaintiff should have informed himself of their falsity. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061. The fact that vendee could have by an examination of records discovered that representations as to title were false is no defense. Curtley v. Security Sav. Soc. [Wash.] 89 P. 180.

42. See 7 C. L. 1096. Fact that worthless check was antedated and given for existing indebtedness conclusively rebuts claim of damages. Goldstein v. Messing, 104 N. Y. S. 724. Misrepresentation that premises are leased at certain rate results in no damage where the rental value equals or exceeds that rate. Ettlinger v. Weil, 184 N. Y. 179, 77 N. E. 31.

43. See 7 C. L. 1096.

44. Farmer v. Lynch [R. I.] 67 A. 449.

45. Brown v. Morrill, 105 N. Y. S. 191.

46. Such action does not involve accounting between parties. Vennum v. Palmer, 123 Ill. App. 619.

47. See 7 C. L. 1097.

48. The allegations must be made in such a way that court can determine whether the representations were false in any material particular and to what extent facts were misrepresented. Kranz v. Lewis, 115 App. Div. 106, 100 N. Y. S. 674.

49. Complaint alleged that plaintiff assumed mortgage on farm received in exchange for house upon false representation by defendant that interest was paid. Mortgage was afterwards foreclosed for nonpayment of interest. Held that damage resulting from loss of house could not be based on these facts. Russell v. Stoops [Md.] 66 A. 698.

50. Allegation that if defendant had not made false statements the contract of employment entered into would have been made for a larger consideration is too speculative and incapable of proof. Chamberlayne v. American Law Book Co., 148 F. 316.

51. Complaint which fails to allege that defendant did not perform the undertaking upon which plaintiff relied is bad. Chambers v. Mitchell, 123 Ill. App. 595; Brown v. Morrill, 105 N. Y. S. 191.

52. Brown v. Morrill, 105 N. Y. S. 191.

53. Dahlman v. Antes [Iowa] 109 N. W. 784.

54. See 7 C. L. 1097.

55. Evidence of a statement that dealings between defendant and his customer had been satisfactory is insufficient to sustain allegation of statement that he was prompt, satisfactorily carried out his contracts, and is worthy of credit. Bartles v. Courtney, 6 Ind. T. 379, 98 S. W. 133.

56. Where plaintiff was induced to loan money to third party upon false representations by defendant as to solvency of third party and his associates, fraud was sufficiently shown by evidence of insolvency of such party. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061.

57. Evidence of similar false representations to others is admissible as bearing on the question of intent. Hartford L. Ins. Co. v. Hope [Ind. App.] 81 N. E. 595.

58. Oral evidence is admissible to prove false representations though it adds to or varies a written contract. American Educational Co. v. Taggert, 124 Ill. App. 567. In action for deceit whereby plaintiff was induced to make a written lease, evidence of oral representations cannot be excluded on the ground that it varies the terms of the lease. Brown v. Morrill, 105 N. Y. S. 191.

59. Curtley v. Security Sav. Soc. [Wash.] 89 P. 180.

immaterial that the instrument alleged to be a mortgage is in fact a bill of sale.[60] Any evidence that throws light on the issues is admissible. Where fraud in representing an instrument to be valid security is the gist of the action, it is admissible without proof of its execution.[62]

Instructions[63] in actions for deceit are governed by rules which control in other forms of action.[64] The measure of damages is the actual loss sustained.[65] together with outlays proximately attributable to fraud.[66] In suit against vendor for false representation as to title, vendee cannot recover for entire amount of money expended for plans of house which he intended to erect on premises in absence of proof that plans were of no value for any purpose except for construction of house on said premises.[67] Under proper circumstances punitive damages may be given.[68]

Declarations; Decoy Letters, see latest topical index.

DEDICATION.

§ 1. What is Dedication (939).
§ 2. The Right to Dedicate (939)
§ 3. The Purposes of Dedication (940).
§ 4. Mode of Dedication (940). Acceptance (940). Filing of Plat or Sale of Lots with Reference to a Plat (941). Dedication is a Question of Fact (942).
§ 5. Effect of Dedication (942).
§ 6. Remedies (942).

§ 1. *What is dedication.*[69]

§ 2. *The right to dedicate.*[70]—A corporation organized to operate a hotel and mineral springs has no power to dedicate part of its land.[71]

60. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061.

61. Where there is undisputed evidence that party making false representations was defendant's agent and that defendant had ratified his act, it was not error to permit plaintiff to show that he informed defendant's manager of the falsity of agent's statements. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061.

62. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061.

63. See 7 C. L. 1098.

64. Where there is direct conflict as to whether certain statements were made, an instruction that where a transaction is capable of two constructions that in favor of honesty should be accepted is erroneous. Russell v. Stoops [Md.] 66 A. 698. If the materiality of representations is undisputed, it is proper to refuse a special instruction on that subject. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061. Rule that withholding of information when asked or use of trick for concealment may amount to fraud has no application to action for damages against defendant for false statements as to credit standing of his customer, and instruction to that effect in such action is erroneous. Bartles v. Courtney, 6 Ind. T. 379, 98 S. W. 133.

65. Where plaintiff was fraudulently induced to give note for certain sum which he paid, but did not suffer any other damages, verdict in excess of note and interest is to that extent excessive. Hartford L. Ins. Co. v. Hope [Ind. App.] 81 N. E. 595. Measure of damages for failure to keep promise fraudulently made, to see that at foreclosure sale of property it brought a certain sum, is difference between what sale brought and value of goods at time of sale. Cerny v. Paxton & Gallagher Co. [Neb.] 110 N. W. 882. In determining value of stock whose sale is induced by deceit, good will of corporate business is an element of value. Von Au v. Magenheimer, 115 App. Div. 84, 100 N. Y. S. 659. Defendant's fraud whereby he induced plaintiff to buy lot without receiving title resulted in breach of contract by plaintiff for the erection of a house thereon. Held that the fact that plaintiff could have had the house built on another lot cannot be considered in mitigation of damages. Curtley v. Security Sav. Soc. [Wash.] 89 P. 180. Where plaintiff exchanged house for defendant's farm and assumed mortgage on farm and defendant falsely represented that interest on mortgage had been paid, and mortgage was afterwards foreclosed by reason of nonpayment of interest, which plaintiff made no effort to pay or have defendant pay, the damages plaintiff is entitled to is the interest and not the value of the house. Russell v. Stoops [Md.] 66 A. 698.

66. Measure of damages for deceit inducing plaintiff to execute lease is difference between rental value of premises and sum stipulated and moving expenses. Brown v. Morrill, 105 N. Y. S. 191.

67. Reasonable attorney's fees paid out in defending action by third party directly attributable to the fraud of defendant may be recovered. Curtley v. Security Sav. Soc. [Wash.] 89 P. 180.

68. Where representations were false and designedly made to injure plaintiff. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061.

69, 70. See 7 C. L. 1098.

71. Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133.

§ 3. *The purposes of dedication.*[72]

§ 4. *Mode of dedication.*[73]—A statutory dedication can only result from a compliance with the requirements of the statute,[74] but curative acts may rectify the error.[75] Common-law dedication need not be in any particular form[76] and may be by parol.[77] Intention to dedicate is essential,[78] and accordingly, mere user is insufficient,[79] but must be accompanied by circumstances showing intent to dedicate.[80] Dedication may, of course, be by deed,[81] and it is not necessary to a common-law dedication that there should be a specific grantee or that legal title should pass out of the owner.[82]

Acceptance[83] by the public before the offer is withdrawn is necessary.[84] Acceptance need not ordinarily be in any particular form[85] and may be implied,[86] assumption of control,[87] or user and improvement at the public expense, being ordina-

72, 73. See 7 C. L. 1099.

74. Plat not made by surveyor as required by Rev. Laws 1833, p. 599, § 1. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914. Acknowledgment of plat by two of the three county commissioners not a compliance with Rev. Laws 1828-29, p. 184, § 3. Spalding v. Macomb & W. I. R. Co., 225 Ill. 585, 80 N. E. 327.

Note: Under the laws of the state of Illinois, which provided that when an addition was surveyed and a plat made and certified by the county surveyor and acknowledged by the proprietor the fee to the streets and alleys would pass to the city, it was held that plat made and certified by a deputy surveyor and acknowledged by the agent of the proprietor was insufficient to constitute a statutory dedication. Wilder v. Aurora, etc., Traction Co., 216 Ill. 493, 75 N. E. 194.

While this is according to precedent in Illinois (Village of Auburn v. Goodwin, 128 Ill. 57, overruling Gebhardt v. Reeves, 75 Ill. 305; Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133), it seems somewhat arbitrary. A more satisfactory result could be obtained by applying the following rule, proposed by Judge Elliott (Roads and Streets, § 119), "to resolve doubts in such cases against the donor, within reasonable limits to construe the dedication so as to benefit the public rather than the donor," or, as expressed by Dillon in his Municipal Corporations (note 2, § 628), "If the plat as recorded * * * contains enough to show that it was intended by the owner to be a dedication under the statute, it would seem to the author to be right, notwithstanding a defective acknowledgment, or the like, to hold the proprietor estopped to make the objection that he did not comply with the statute."—See Regan v. McCoy, 29 Mo. 356. See 4 Mich. L. R. 242.

75. Error in acknowledgment held cured. Parriott v. Hampton [Iowa] 111 N. W. 440.

76. Miller v. Jonathan Creek Com'rs of Highways, 125 Ill. App. 431.

77. City of West End v. Eaves [Ala.] 44 So. 588.

78. Town of West Point v. Bland, 106 Va. 792, 56 S. E. 802; Newton v. Dunkirk, 121 App. Div. 296, 106 N. Y. S. 125; Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133.

79. Permitting user held not sufficient evidence of intention. Cincinnati & M. V. R. Co. v. Roseville, 76 Ohio St. 108, 81 N. E. 178; Town of West Point v. Bland, 106 Va. 792, 56 S. E. 802.

80. Opening and paving a street by the landowner and permitting the city to use it without obstruction for twenty years amounts to a dedication. Canton Co. v. Baltimore, 104 Md. 582, 65 A. 324. Opening of road by landowner and permission of use by public for twenty years. Dover Tp. Ocean County v. Brackenbridge, [N. J. Law] 67 A. 689. Permitting for four years deposit on land as lateral support for street grade is dedication. Williams v. Hudson, 130 Wis. 297, 110 N. W. 239.

81. Deed designed to cure failure of dedicator's wife to join held not to change the description of the land dedicated. Meachem v. Seattle [Wash.] 88 P. 628. Reservation in deed held to be dedication. Gordon County v. Calhoun [Ga.] 58 S. E. 360.

82. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914. Dedication by state of park is not invalid because to "the people of New Orleans." Saucier v. New Orleans [La.] 43 So. 999.

83. See 7 C. L. 1100.

84. Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133; Arnold v. Orange [N. J. Eq.] 66 A. 1052; Newton v. Dunkirk, 121 App. Div. 296, 106 N. Y. S. 125. Until acceptance, municipality has no right in the property. Darling v. Jersey City [N. J. Eq.] 67 A. 709. Under the statute in force in Washington in 1869, no acceptance of a plat was necessary. Meachem v. Seattle [Wash.] 88 P. 628.

85. Miller v. Jonathan Creek Com'rs of Highways, 125 Ill. App. 431. An ordinance prescribing mode of acceptance does not exclude common-law acceptance. Arnold v. Orange [N. J. Eq.] 66 A. 1052.

86. An answer by a city alleging that certain land had been dedicated to it is not of itself sufficient as an acceptance of a dedication where the answer specifically alleges certain acts as constituting acceptance by it, and these are insufficient as a matter of law. Darling v. Jersey City [N. J. Eq.] 67 A. 709.

87. Resolution changing grade competent evidence of acceptance. Palmer v. East River Gas Co., 115 App. Div. 677, 101 N. Y. S. 347.

rily evidence of acceptance.[88] Acceptance is sometimes, however, required to be by official action,[89] it being said in Virginia that there is a difference in this respect between city streets and rural highways.[90] User, while evidence of acceptance, is not prerequisite thereto.[91] Acceptance may be at any time[92] if before withdrawal of the offer,[93] or the running of limitations in favor of an adverse occupant.[94] Acceptance by a town after incorporation obviates the fact that it was not incorporated at the time of dedication.[95] Purchase of land with reference to plat is acceptance of streets thereby dedicated,[96] and one holding under a deed referring to plat is estopped to deny acceptance by city of streets therein mentioned.[97]

Filing of plat or sale of lots with reference to a plat[98] by the owner[99] operates as a dedication of streets indicated[1] on the plat as filed;[2] and it is no objection that dedicator did not at the time of platting own the land if he ratified it by subsequent conveyances with reference to the plat.[3] It is usually said to be a common-law dedication,[4] based on estoppel.[5] Platting may be a statutory dedication if the statute is strictly complied with,[6] or if the defect is obviated by curative acts,[7] or by a subse-

Order of county commissioners that plat be filed held acceptance of dedication thereby. Meachem v. Seattle [Wash.] 88 P. 628.

88. City of Americus v. Johnson [Ga. App.] 58 S. E. 518. User for greater portion of time during a period of years held sufficient. Brewer v. Pine Bluffs, 80 Ark. 489, 97 S. W. 1034. A statutory dedication of highways over the public domain is accepted by public user. Dedication by Rev. St. U. S. § 2477. Montgomery v. Somers [Or.] 90 P. 674. Construction of sewer in dedicated street is acceptance. Arnold v. Orange [N. J. Eq.] 66 A. 1052. Payment by city for maintenance of street light on dedicated street does not amount to acceptance. Id. Establishment of sewer system is acceptance. Burroughs v. Cherokee [Iowa] 109 N. W. 876. Assumption of control and making of improvements sustains finding of acceptance. Lyons v. Mullen [Neb.] 110 N. W. 743. Opening of some of the streets indicated by a plat is an acceptance of all, those not opened not being presently needed. Parriott v. Hampton [Iowa] 111 N. W. 440.

89. The Iowa statute that acceptance must be by ordinance does not apply to towns. Code 1873, § 527. Burroughs v. Cherokee [Iowa] 109 N. W. 876; Parriott v. Hampton [Iowa] 111 N. W. 440. User without official action held not acceptance. Cincinnati & M. V. R. Co. v. Roseville, 76 Ohio St. 108, 81 N. E. 178.

90. Acceptance of highway may be shown by any circumstances while acceptance of street can only be shown by official action. Lynchburg Trac. & Light Co. v. Guill [Va.] 57 S. E. 644.

91. City of Tyler v. Boyette [Tex. Civ. App.] 16 Tex. Ct. Rep. 833, 96 S. W. 935.

92. Need not open at once all streets dedicated by plat. Krause v. El Paso [Tex. Civ. App.] 101 S. W. 828.

93. Tender of dedication cannot be revoked. Darling v. Jersey City [N. J. Eq.] 67 A. 709.

94. Permitting private use not inconsistent with public easement not a refusal. Burroughs v. Cherokee [Iowa] 109 N. W. 876. Where the owner after an offer to dedicate continues in possession excluding the public for twenty years, there is no dedication. Canton Co. v. Baltimore [Md.] 66 A. 679.

95. Gordon County v. Calhoun [Ga.] 58 S. E. 360.

96. Christian v. Eugene [Or.] 89 P. 419.

97. City of Covington v. Hall, 30 Ky. L. R. 356, 98 S. W. 317.

98. See 7 C. L. 1101.

99. Recording of plat by a stranger to the title is of no effect. Incorporated Town of Hope v. Shiver, 77 Ark. 177, 90 S. W. 1003.

1. Elliott v. Louisville, 28 Ky. L. R. 967, 90 S. W. 990; Brewer v. Pine Bluff, 80 Ark. 489, 97 S. W. 1034; Christian v. Eugene [Or.] 89 P. 419; Oliver v. Newberg [Or.] 91 P. 470; State v. Southard [Del.] 66 A. 372; Street v. Leete, 79 Conn. 352, 65 A. 373; Board of Com'rs of Keyport v. Freehold & A. H. R. Co. [N. J. Err. & App.] 65 A. 1035; Burroughs v. Cherokee [Iowa] 109 N. W. 876. Proof of conveyance with reference to park shown by unrecorded plat held insufficient, there being no identification of the plat referred to. Canton Co. v. Baltimore [Md.] 66 A. 679, 67 A. 274. Williams v. Poole [Ky.] 103 S. W. 336. Deed referring to plat held to dedicate alley. Wiess v. Goodhue [Tex. Civ. App.] 102 S. W. 793. Evidence held insufficient to show that owner knew of street on plat which was not shown by recorded plat. City of Peoria v. Central Nat. Bk., 224 Ill. 43, 79 N. E. 296.

2. Where before filing a map lines were drawn cutting off half the width of a street and adding it to abutting lots only the street as so narrowed was dedicated. Elliot v. Atlantic City, 149 F. 849.

3. Meachem v. Seattle [Wash.] 88 P. 628

4. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914.

5. King v. Dugan [Cal.] 88 P. 925.

6. Plat not made by surveyor as required by Rev. Laws 1833, p. 599, § 1. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914.

7. Defect in acknowledgment held cured. Parriott v. Hampton [Iowa] 111 N. W. 440.

quent deed to the dedicator.[8] Recordation of plat and deeds with reference thereto is notice of dedication to subsequent purchaser.[9]

Dedication is a question of fact,[10] the burden of proof being on him who alleges it,[11] and the question being ordinarily one for the jury on all the facts.[12]

§ 5. *Effect of dedication.*[13]—A dedication takes effect[14] and becomes irrevocable[15] on acceptance. While the rights of city to dedicate lands cannot be lost by estoppel,[16] the owner of the fee may by adverse possession for the statutory time, with such acquiescence by the public as to show an abandonment, exclude the public easement,[17] and that he excepted the offered property in a mortgage given by him during the period of occupancy does not avoid this result.[18] In the absence of statute,[19] dedication does not divest the dedicator of title but only subjects the land to the public easement,[20] and on disuse it will revert.[21] Likewise, where the dedication was for a specific use, it must not be departed from,[22] and it is only by the exercise of the power of eminent domain that the legislature can divert property to a purpose other than that for which it was delegated.[23]

§ 6. *Remedies.*[24]—The remedy of a dedicator to cure an error in the plat is by bill in equity joining all persons interested.[25] Though dedication was by deed to county, the municipality in which it is situated is a proper party to sue to preserve the use for which dedication was made.[26]

8. Meachem v. Seattle [Wash.] 88 P. 628.

9. Street v. Leete, 79 Conn. 352, 65 A. 373.

10. See 7 C. L. 1101. Newton v. Dunkirk, 121 App. Div. 296, 106 N. Y. S. 125. Dedication held inferrable from averments of complaint as to filing of plats. Bothwell v. Denver Union Stockyard Co. [Colo.] 90 P. 1127.

11. City of West End v. Eaves [Ala.] 44 So. 588. Burden of proving acceptance is on the municipality. Darling v. Jersey City [N. J. Eq.] 67 A. 709. User must continue for the term required to create a prescriptive way to raise a presumption of dedication. Cochrane v. Purser [Ala.] 44 So. 579.

12. Evidence of the permanent character of obstructions interposed by owner is admissible on issue of dedication. Davis v. Oregon Short Line R. Co. [Utah] 88 P. 2. Building of fences along street lines by dedicator is evidence of dedication. State v. Southard [Del.] 66 A. 372. Evidence of dedication by contract with third person **held sufficient.** City of West End v. Eaves [Ala.] 44 So. 588. Evidence of dedication held for jury. Evans v. Scott [Tex. Civ. App.] 16 Tex. Ct. Rep. 885, 97 S. W. 116. Evidence held to warrant finding of dedication notwithstanding action of alleged dedicator in erecting signs warning all persons off the property. Newton v. Dunkirk, 121 App. Div. 296, 106 N. Y. S. 125. Ten years' use of highway by public with acquiescence of owner is sufficient to establish dedication and acceptance. Brandt v. v. Olson [Neb.] 113 N. W. 151. Proof of improvement by the public is not indispensible where no improvement was necessary to the public use. Id. Acceptance of road and assignment of men to work it. Guinn v. Eaves, 117 Tenn. 524, 101 S. W. 1154. Evidence showing only user **held insufficient.** Town of West Point v. Bland, 106 Va. 792, 56 S. E. 802. Recollection of corporate officer as to resolution to dedicate held insufficient where corporation continued to pay taxes and exercise dominion. Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133.

13. See 7 C. L. 1102.

14. Rights of public on common-law dedication attach from acceptance. City of West End v. Eaves [Ala.] 44 So. 588.

15. Cannot be revoked after acceptance while public use continues. City of West End v. Eaves [Ala.] 44 So. 588; La Bounty v. Seattle [Wash.] 89 P. 480. After dedication by conveyance with reference to street, the grantor cannot revoke by a conveyance which includes the platted street. State v. Southard [Del.] 66 A. 372.

16. Krause v. El Paso [Tex. Civ. App.] 101 S. W. 828.

17. Evidence of abandonment insufficient. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914. Permitting private use of street for many years and collection of taxes held to estop city from claiming street. City of Peoria v. Central Nat. Bk., 224 Ill. 43, 79 N. E. 296.

18. Canton Co. v. Baltimore [Md.] 66 A. 679.

19. In Iowa dedication by filing of plat conveys indicated streets in fee simple. Code 1873, § 561. Burroughs v. Cherokee [Iowa] 109 N. W. 876.

20, 21. Robbins v. White [Fla.] 42 So. 841.

22. Erection of a library building on land dedicated as "a public place for the enjoyment of the community" is not an inconsistent use (Spires v. Los Angeles [Cal.] 87 P. 1026), but no part of such building can be used as offices for public officers not connected with its management (Id.). Board of education. Id.

23. Louisville & N. R. Co. v. Cincinnati, 76 Ohio St. 481, 81 N. E. 983.

24. See 7 C. L. 1103.

25. Cannot enjoin city from use of street. Christian v. Eugene [Or.] 89 P. 419.

26. Gordon County v. Calhoun [Ga.] 58 S. E. 360.

DEEDS OF CONVEYANCE.

§ 1. Nature, Form, and Requisites (943). Requisites (945). Delivery (947). Acceptance (950). Validity of Assent (950). Consideration (950).
§ 2. Recordation (951).
§ 3. Interpretation and Effect (951). Covenants (953). Designation of Parties (954). Description of Property Conveyed (954). Quantum of Estate Conveyed (955). A Reservation (957). Conditions and Restrictions (958). Restrictions (959). Extinguishment of Rights (959).

§ 1. *Nature, form, and requisites. Deeds distinguished from other instruments.*[27]—An instrument in form a deed is presumed to be what it purports to be,[28] and where it purports to pass a present interest, it will not be held a testamentary disposition,[29] though enjoyment of the estate conveyed is postponed until after the grantor's death,[30] but where it plainly appears that the intention of the maker was to execute a will, it will be given effect as such [31] and held void if not properly executed as a will.[32]

A deed absolute on its face may be shown to be in fact a mortgage,[33] if it was so

27. See 7 C. L. 1103.

28. Not a testamentary disposition. Fellbush v. Fellbush, 216 Pa. 141, 65 A. 28. An instrument in form of a deed but reserving in the habendum "Except a lifetime lease on the land in three days after said party of the first part is deceased this deed shall be in full force" held a deed with reservation of a life estate and not a will. Pentico v. Hays [Kan.] 88 P. 738. An instrument in form a deed is what it purports to be where there has been a valid delivery, though there is evidence that the grantor told the draughtsman that he desired to make a will. Griswold v. Griswold [Ala.] 42 So. 554. Instrument held to be a power of attorney and not a deed. Taylor v. Burns, 203 U. S. 120, 51 Law. Ed. 116.

29. An instrument in form a deed, reciting an agreement to reconvey when called upon to do so, and a power of attorney executed by the grantee authorizing the grantor to collect rent during life, held a deed and not a will. Stamper v. Venable, 117 Tenn. 557, 97 S. W. 812.

30. Held a deed: An instrument in form a deed conveying certain property "together with all the rights and privileges thereunto belonging, at my death, forever, in fee simple." Kytle v. Kytle [Ga.] 57 S. E. 748. Deed from husband to his wife and child reciting that it was executed in order that the grantees should be provided for after the grantor's death. Ecklar's Adm'r v. Robinson, 29 Ky. L. R. 1038, 96 S. W. 845. Instrument by which one conveyed to a grandson, reserving a life estate and also providing that the instrument should not take effect until after the grantor's death. Venters v. Wickens, 224 Ill. 569, 79 N. E. 946. An instrument conveying all the grantor's property in consideration of one dollar and future services "to take effect and be of force after the grantor's death." Rogers v. Rogers [Miss.] 43 So. 434. Where a deed is placed in the hands of a third person to be delivered to the grantee on death of the grantor, a provision therein that it shall not take effect until the death of the grantor, will in the absence of other circumstances be construed to mean that title is to vest at once, the enjoyment being postponed. Nolan v. Otney [Kan.] 89 P. 690. Where deeds were deposited with a third person to be delivered after the grantor's death and a will executed the same day referred to the deeds and recited that the grantor should have a life estate in crops, held the deeds constituted a present grant reserving a use of the rents and profits. Schillinger v. Bawek [Iowa] 112 N. W. 210. A recital that the grantee is to care for the grantor during his life is not inconsistent with such interpretation. Id.

31. Where deeds were placed in the hands of a stranger to be delivered after the grantor's death and were referred to in a will. Schillinger v. Bawek [Iowa] 112 N. W. 210. A deed cannot be delivered to take effect as a will and to be effective only in case the grantee survive the grantor. Russel v. Mitchell, 223 Ill. 438, 79 N. E. 141. Instrument construed and held that it was the intention of the testator to make a testamentary disposition. Aldridge v. Aldridge, 202 Mo. 565, 101 S. W. 42. Where an aged woman and her husband desired to make testamentary disposition of her property and she executed a deed to him to take effect at her death, and such deed was deposited in bank, evidence held to show that the wife did not intend to part with control of it and that it was testamentary. Sappingfield v. King [Or.] 89 P. 142.

32. Where a grantor delivered a deed to her son with directions to sell the land after her death and distribute the proceeds, she continued in possession during her life, held the conveyance was void as a testamentary disposition. Oswald v. Caldwell, 225 Ill. 224, 80 N. E. 131.

33. See, also, Mortgages, 8 C. L. 1022. Lebensburger v. Scofield [C. C. A.] 155 F. 85; Hill's Guardian v. Hill, 29 Ky. L. R. 201, 92 S. W. 924. **It may be shown in a suit to foreclose** that a deed was intended as a mortgage. Hill v. Griffin [Kan.] 90 P. 808. A deed intended as a mortgage does not pass title. Texas So. R. Co. v. Harle [Tex. Civ. App.] 101 S. W. 878. A deed may be shown to be a mortgage as between the grantor and a third person. Stumpe v. Kopp, 201 Mo. 412, 99 S. W. 1073. May be shown by parol to be a mortgage **where the**

intended at the time of its inception,[34] as evinced by the surrounding circumstances,[35] and there is a subsisting debt after execution.[36] Whether it is a mortgage must be determined from the circumstances of each case.[37] The fact that it is a mortgage may be established by parol,[38] but he who asserts it has the burden of proving such fact[39] by clear and satisfactory proof.[40]

grantee has not taken possession of the property. Askew v. Thompson [Ga.] 58 S. E. 854. An act purporting to be a vente a remere but made for an inadequate consideration and unaccompanied by delivery of possession will be treated in the absence of sufficient countervailing evidence, as a contract by which the thing nominally sold stands as security. Leger v. Leger, 118 La. 322, 42 So. 951. Where a **deed was procured from ignorant persons on representations that it was a mortgage.** Abercrombie v. Carpenter [Ala.] 43 So. 746. An absolute deed intended as a mortgage remains a mortgage. Ferguson v. Boyd [Ind. App.] 79 N. E. 549.

34. Parties to a deed having treated it as a mortgage are bound by their construction. Ferguson v. Boyd [Ind. App.] 79 N. E. 549. Where an agent of a creditor authorized to foreclose a mortgage instead of doing so takes a deed with an agreement that rents and profits are to be applied on the debt, and the land reconveyed when the debt is paid, and the creditor accepts the conveyance, he does so subject to the conditions which render it a mortgage. De Bartlett v. De Wilson [Fla.] 42 So. 189.

35. A deed executed contemporaneously with other instruments which show that the deed was intended as a mortgage, will be given effect as such. Ferguson v. Boyd [Ind. App.] 79 N. E. 549. A deed to husband and wife jointly where the wife is named as grantee to secure payment to her of a loan to her husband to make the purchase is as to her a mortgage, and when the loan is paid her interest terminates. Hubbard v. Cheney [Kan.] 91 P. 793. In a controversy between the heirs of such grantees as to whether the deed was a mortgage, declarations of the husband at the time of the purchase and while he was in possession of the land, explaining the rights of his wife, are admissible. Id. Relations existing between the parties at the time the instrument was executed may be considered in determining whether a deed was intended as a mortgage. De Bartlett v. De Wilson [Fla.] 42 So. 189.

36. An agreement to reconvey land if the grantee would pay a certain debt with interest together with any other indebtedness that might accrue showed the continued existence of a debt. Francis v. Francis [S. C.] 58 S. E. 804. Whether a conveyance with promise to reconvey on payment of a debt constitutes a mortgage or conditional sale depends largely on whether the debt continued or was discharged by the conveyance. Id. A deed given to satisfy a debt **is not a mortgage** though accompanied by a promise to reconvey upon being reimbursed the amount of the debt. Rotan Grocery Co. v. Turner [Tex. Civ. App.] 102 S. W. 932.

37. Where parties sustain the relation of debtor and creditor and the grantee surrenders the evidence of indebtedness and such debt is intended to be satisfied, the transaction will be held a deed. Harrah v Smith [Neb.] 112 N. W. 337.

38. Omlie v. O'Toole [N. D.] 112 N. W. 677; De Bartlett v. De Wilson [Fla.] 42 So. 189; Hubbard v. Cheney [Kan.] 91 P. 793. That a person loaned money to another to purchase land and took the deed in his own name as security may be shown by parol. Krebs v. Lauser, 133 Iowa, 241, 110 N. W. 443. The defeasance agreement may rest in parol. Linkeman v. Knepper, 226 Ill. 473, 80 N. E. 1009; Abrams v. Abrams, 74 Kan. 888, 88 P. 70; Jennings v. Demmon [Mass.] 80 N. E. 471. This rule does not violate the statute of Frauds. Id.

39. Powell v. Crow, 204 Mo. 481, 102 S. W. 1024; Lowry v. Carter [Tex. Civ App.] 102 S. W. 930; Irvin v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 343, 98 S. W. 405.

40. Reich v. Cochran, 102 N. Y. S. 827; Irvin v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 343, 98 S. W. 405; Harper v. Hays Co. [Ala.] 43 So. 360. The rule that a deed absolute is what it purports to be does not require that the record of an appeal from a judgment declaring a deed to be a mortgage must be entirely plain and convincing to the appellate court. Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93. Complaint to have a deed declared a mortgage held sufficient. Id. In a suit to have a deed absolute decreed a mortgage, self-serving declarations of the grantor are not admissible. Wilson v. Terry [N. J. Err. & App.] 65 A. 983.

Evidence insufficient to show a deed to be a mortgage. Rotan Grocery Co. v. Turner [Tex. Civ. App.] 102 S. W. 932; Lemke v. Lemke [Neb.] 111 N. W. 138. Where the value of the equity conveyed did not greatly exceed the consideration, the grantor knowing the difference between a deed and a mortgage and the attorney for the grantee refusing to take a mortgage. Sahlin v. Gregson [Wash.] 90 P. 592. Evidence sufficient to show a deed with an option to repurchase to be a deed and not a mortgage. Hinchman v. Cook [Wash.] 88 P. 931. Evidence sufficient to show that a deed was what it purported to be. Osborne v. Osborne [Wash.] 89 P. 881; Cooper v. Strauber [Or.] 89 P. 641. Conveyance and contract to reconvey construed and held a conditional sale and not a mortgage. Maxwell v. Herzfeld [Ala.] 42 So. 987.

Evidence sufficient to show a deed to be a mortgage. Meeker v. Shuster [Cal. App.] 87 P. 1102; Harper v. Hays Co. [Ala.] 43 So. 360; Cusick v. Spencer [Mich.] 112 N. W. 1111; Harrah v. Smith [Neb.] 112 N. W. 337; Lynch v. Ryan [Wis.] 111 N. W. 707; Leach v. Grube, 147 Mich. 348, 13 Det. Leg. N. 1053, 110 N. W. 1076; Krebs v. Lauser, 133 Iowa. 241, 110 N. W. 443; Linkemann v. Knepper, 226 Ill. 473, 80 N. E. 1009; Jennings v. Demmon [Mass.] 80 N. E. 471; Fish v. First Nat. Bk. [C. C. A.] 150 F. 524. The court should

Requisites.[41]—A deed executed in the manner prescribed by law is necessary to pass title.[42] As a general rule no particular form of instrument is necessary,[43] but the intention to pass a title presently must be apparent.[44]

A deed must be executed by one who has some estate in the property or authority to convey,[45] but an owner may ratify an unauthorized signature,[46] and a conveyance by an infant may be ratified after he attains majority;[47] and it has been held that joining in a deed by one not named therein is effective as a conveyance by him.[48] It must contain a definite and certain description of the property,[49] or one capable

not charge that proof must be clear and satisfactory as such charge is on the weight of evidence. Irvin v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 343, 98 S. W. 405.

41. See 7 C. L. 1105.

42. Where a married woman purchased the assets of a railroad company in receivership proceedings and a new compnay was organized to take over the property, the issue of stock to the married woman in payment of her interest did not operate to transfer her title. Texas So. R. Co. v. Harle [Tex. Civ. App.] 101 S. W. 878. Third persons who took stock in liquidation of judgments against the company, who had notice of the condition of the title, did not acquire title to any portion of the property. Id. Where title is shown to be in a person, it cannot be divested except by writing under seal. Adams v. Bristol, 114 App. Div. 390, 100 N. Y. S. 145.

43. Any writing, signed and sealed, by which for a valuable consideration one person sells land to another, is a bargain and sale deed passing title. Code 1906, § 3033. Waldron v. Pigeon Coal Co., 61 W. Va. 280, 56 S. E. 492. A restrictive agreement executed so as to be entitled to record affects title to real estate within St. 1898, § 2242, defining a conveyance. Boyden v. Roberts [Wis.] 111 N. W. 701.

44. Instrument signed by both parties reciting that one had conveyed "with deed in fee" certain lands to the other, on condition that such other make certain payments, and reciting that a lien was retained, held a contract and not a deed. Powell v. Hunter, 204 Mo. 393, 102 S. W. 1020.

45. Where a grantor signed by his initials but his full Christian name was recited in the body of the deed, held sufficient. Woodward v. McCollum [N. D.] 111 N. W. 623. A deed from Henry S. Woodworth signed "Harry S. Woodworth" held sufficient, the identity of the person being apparent. Id. In order that a deed made by a receiver may be offered in evidence, it must be shown by the record of the court wherein the cause was pending that the receiver qualified by giving the required bond. Hagan v. Holderby [W. Va.] 57 S. E. 289. It must also appear that the court authorized the execution of the deed, and that it had jurisdiction to do so. Id. A recital in a deed of a special receiver showing his appointment and authority to execute the same is not evidence of such authority as against persons not claiming under it. Id. Deed reciting "that I, D. R. Crawford, agent of D. M. Crawford, have granted," etc., signed, "D. R. Crawford, agent for D. M. Crawford," is not effectual as the deed of D. M. Crawford. Crawford v. Crawford [S. C.] 57 S. E. 837. A deed executed by an agent in his own name is not the deed of his principal. Wilson v. Hammond, 146 Ala. 987, 40 So. 343.

46. A person may execute a deed by having another sign for him or by accepting the signature as his own after another has signed. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760. Evidence sufficient to show ratification of an agent's acts in executing a deed where the principal accepted the purchase price and had full notice of the fact that a deed had been executed. Kirkpatrick v. Pease, 202 Mo. 471, 101 S. W. 651.

47. McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997.

48. Sterling v. Park [Ga.] 58 S. E. 828. **Note:** This case is contrary to the weight of authority, which holds that in order to convey by deed the party possessing the right must be grantor and must use apt and proper words of conveyance, and merely signing, sealing and acknowledging an instrument in which another person is grantor is not sufficient. Agricultural Bk. v. Rice, 4 How. [U. S.] 225, 11 Law. Ed. 949; Catlin v. Ware, 9 Mass. 218, 6 Am. Dec. 56; Peabody v. Hewitt, 52 Me. 33, 83 Am. Dec. 486; Adams v. Medeker, 25 W. Va. 127; Purcell v. Goshern, 17 Ohio, 105; Stone v. Sledge, 87 Tex. 49, 47 Am. St. Rep. 65. There are a few cases which hold that the signing shows an intention to be bound. Elliott v. Sleeper, 2 N. H. 525; Armstrong v. Stovall, 26 Miss. 275; Harris v. Digmore, 86 Ky. 653; Hronska v. Janke, 66 Wis. 252.—From 6 Mich. L. R. 254.

49. A sheriff's deed does not require a more definite description than a voluntary deed. Gallup v. Flood [Tex. Civ. App.] 103 S. W. 426.

Description held sufficiently definite. Gallup v. Flood [Tex. Civ. App.] 103 S. W. 426. Fifteen acres "more or less" of the southwest corner of a quarter section signified a sale in gross of fifteen acres and was not uncertain because of the words quoted. Early & Co. v. Long, 89 Miss. 285, 42 So. 348. "Fifteen acres, more or less, of the southwest corner of the northeast quarter" of a section meant fifteen acres to be taken in a square body and not fifteen acres to be taken off the west end of the S. ½ of the N. E. ¼. Id. A description "twenty acres of the E. ½ of the N. W. ¼" of a certain section is the same as "a strip of land consisting of twenty acres off from the west side of" said section. Glos v. Holmes, 228 Ill. 436, 81 N. E. 1064. "All the property and estate whatsoever and wheresoever situated and being of K. and howsoever the same may have been acquired." Lewis v. Kinnaird, 104 Md. 653, 65 A. 365. "One tract containing 320 acres patented by J. H. Dur-

of being made definite.[50] The fact that the description is imperfect will not invalidate a deed if it is sufficient to identify the property.[51] It must specify a grantee [52] competent to take,[53] but a grantee's name may be inserted after delivery.[54] Where father and son have the same name as a grantee in a conveyance, in the absence of other circumstances, the father will be presumed the grantee.[55] Such presumption is rebutted by the fact that the son gave the father a mortgage on the land, which the father accepted and recorded.[56] Where a seal is required it must be affixed,[57] and attestation as prescribed by law is essential.[58] Statutory requirements must be complied with.[59]

Execution and genuineness are questions of fact if denied,[60] and are to be proven in the manner prescribed by law.[61] The execution and delivery of a deed may

ritt, Jr. on the waters of Dill Creek in Nacogdoches Co." Perry v. Stevens [Tex. Civ. App.] 16 Tex. Ct. Rep. 944, 97 S. W. 1075.

Held too indefinite: "Part of the southwest east quarter, containing 31¼ acres." Early & Co. v. Long, 89 Miss. 285, 42 So. 348. A description of a tract by metes and bounds is insufficient as to certain lots unless it appears that the lots are within such description. Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756. A description "Beginning at the N. E. side of N's survey, thence to the south line of said survey, containing 400 acres, to run off N's tract and adjoining the west line of B's survey," is void unless the west line of B's survey can be located. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665. A description as commencing on the northern side of a certain bayou where the eastern line of a survey intersects it is void where the survey does not touch the bayou at such point. Id. A description as 1612 acres of land, being a part of the headright league of a decedent, situated in a certain bayou. Id.

50. Where a description reciting that the land was patented to a certain person is sufficiently definite when read in connection with the patent to show the land conveyed, it is enough. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275. Where the description in a tax deed is so indefinite as to make it impossible to locate the land, the holder of the deed cannot bring to his aid a plat in the auditor's office to which no reference is made in the deed, and such a deed is void for want of certainty. Marmet-Halm Coal & Coke Co. v. Cincinnati, etc., Elec. R. Co., 7 Ohio C. C. (N. S.) 554. One claiming land to be within an exception to a patent has the burden to prove such fact. East Lake Lumber Co. v. East Coast Cedar Co., 142 N. C. 412, 55 S. E. 304. Description of an exception to a patent held not void for uncertainty of identification. Id.

51. Sylvester v. State [Wash.] 91 P. 15.

52. Where the grantor had a sister and daughter of the same name, evidence held to show that the conveyance was made to the sister and not to the daughter. Luty v. Cresta [Cal. App.] 88 P. 642. Evidence sufficient to sustain a finding as to the identity of a grantee. Leidenthal v. Leidenthal, 105 N. Y. S. 807. A deed to Henry S., Frank E., and Chauncey C., Woodworth held to vest a two-thirds interest in two of the grantees. Woodward v. McCollum [N. D.] 111 N. W. 623. Where it is claimed that the grantee in a deed is a fictitious person and the grantor testifies that he lived in a certain locality, persons living in such locality may testify that no such person lived there. Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756.

53. Evidence insufficient to show that the beneficiary of a deed of trust was a freed woman so as to be capable of taking as a beneficiary. Wright v. Nona Mills Co. [Tex. Civ App.] 17 Tex. Ct. Rep. 620, 98 S. W. 917. A deed to a church community which was not a corporation, de facto nor de jure, and not stating who constituted the community and under which no possession was ever taken passed no title. Rixford v. Zeigler [Cal.] 88 P. 1092.

54. Where the space for the grantee's name is left blank but the deed is delivered to a person to whom it is intended to pass title, title vests in the person whose name is inserted. Hall v. Kary, 133 Iowa, 465, 110 N. W. 930.

55, 56. Hess v. Stockard, 99 Minn. 504, 109 N. W. 1113.

57. Under Va. Code 1904, p. 1175, a seal is necessary. The mere recital "witness the following signature and seal" is insufficient. Burnette v. Young [Va.] 57 S. E. 641. It may be shown by parol that no seal was affixed to the grantor's signature at the time of execution but that it was added after recordation. Id.

58. Under the Florida statute any attestation clause which clearly denotes that the persons signing were witnesses is sufficient. Richbourg v. Rose [Fla.] 44 So. 69. Attestation held sufficient where the names of two persons were subscribed in the place for witnesses with "Wit." written above them and the testificandum clause is "In witness whereof we have hereunto," etc., other facts showing delivery. Id.

59. Under Hurd's Rev. St. 1905, c. 52, a deed to a homestead not signed by both husband and wife is not valid unless possession is taken thereunder. Venters v. Wickens, 224 Ill. 569, 79 N. E. 946.

60. Evidence as to genuineness of a deed held for the jury. West v. Houston Oil Co. [Tex. Civ. App.] 102 S. W. 927. Question of forgery of a deed held for the jury. Helm v Lynchburg Trust & Sav. Bk., 106 Va. 603, 56 S. E. 598.

61. Code 1896, § 1797, expressly provides that the execution of a deed may be proven by the grantor's testimony. Sellers v. Farmer [Ala.] 43 So. 967. Under Revisal 1905, § 981, requiring for registration of an ancient deed an affidavit to the effect that

be shown by circumstantial evidence.[62] A preponderance of evidence is all that is required.[63] A defective execution may be cured by acknowledgment and delivery.[64]

A conveyance of a future estate need not be limited on a particular estate.[65]

Delivery [66] to the grantee or to some person for him,[67] with intent to pass title,[68] and in such manner as to terminate the grantor's control over the instrument,[69] is essential, and where a grantee obtains possession of the deed wrongfully there is no delivery,[70] unless his act is subsequently ratified.[71] The question of delivery is one

affiant believes such deed to be the deed of the grantor named in addition to proof that witnesses were dead, and affidavit that affiant claims title under such deed is insufficient. Allen v. Burch, 142 N. C. 524, 55 S. E. 354. Where a certified copy of a deed is offered in evidence and is met by an affidavit of forgery as prescribed by Civ. Code 1895, § 3628, the party offering the deed has the burden to prove it to be genuine, notwithstanding the fact of recordation or that it appears to be 30 years old. Chatman v. Hodnett, 127 Ga. 360, 56 S. E. 439.

62. Jante v. Culbreth [Tex. Civ. App.] 101 S. W. 279.

63. A preponderance of evidence is sufficient to establish execution of a deed. Brewer v. Cochran [Tex. Civ. App.] 99 S. W. 1033. Evidence insufficient to show execution. McSurley v. Venters [Ky.] 104 S. W. 365; Burke v. Pence [Mo.] 104 S. W. 23; Dukes v. Davis, 30 Ky. L. R. 1348, 101 S. W. 390. Statement of a witness that there was a deed from the heirs of a certain person was **not sufficient** proof of execution. Poland v. Porter [Tex. Civ. App.] 98 S. W. 214. Evidence of a conspiracy of heirs of the grantor to deprive the grantee of the land is admissible as an admission that the deed existed. Chew v. Jackson [Tex. Civ. App.] 102 S. W. 427. Certain letters, recitals in an ancient deed as well as entries in account books, held admissible on the question of execution of a deed. Brewer v. Cochran [Tex. Civ. App.] 99 S. W. 1033.

64. London v. Crow [Tex. Civ. App.] 102 S. W. 177.

65. Under Civ. Code, § 767, providing that future estates need not be limited upon precedent estates, a conveyance, to take effect on the grantor's death, and reserving to him the use of the property for life is valid. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276.

66. See 7 C. L. 1107. Davis v. Robinson, 32 Pa. Super. Ct. 90; Drinkwater v. Hollar [Cal. App.] 91 P. 664. Delivery either actual or constructive is essential. Garrett v. Goff, 61 W. Va. 221, 56 S. E. 351. It is incomplete until delivery. Id. There can be no acceptance by the grantee without delivery. Id.

67. Where a father executed a deed to his son but did not deliver it during his lifetime, his wife could not make it effective by signing and delivering it after his death. Jolly v. Graham, 222 Ill. 550, 78 N. E. 919. Where deeds were placed in the hands of a third person to be delivered after the grantor's death and were so delivered, there was a good delivery. Schillinger v. Bawek [Iowa] 112 N. W. 210. Where a sale of land was made through brokers and the owner when he delivered the deed to the brokers instructed them not to deliver it to the grantee until he investigated the value of corporate stock, which was a part of the consideration, but the brokers desregarded his instructions, held no delivery. Drinkwater v. Hollar [Cal. App.] 91 P. 664. Where a deed was executed and delivered to a certain person but before recording the name of the grantee was stricken and the name of his wife inserted without the knowledge of the grantor, held it passed no title to her because there was no delivery nor meeting of minds. Perry v. Hackney, 142 N. C. 368, 55 S. E. 289.

68. Delivery must be made with intent to pass title. Broom v. Herring [Tex. Civ. App.] 101 S. W. 1023. It must appear that the grantor intended to part with title and that he parted with the deed by placing it beyond his control. Central Trust Co. v Stoddard [Cal. App.] 88 P. 806. Mere delivery is ineffective without intention to pass title. Oswald v. Caldwell, 225 Ill. 224, 80 N. E. 131. Where deeds were executed from wife to husband to take effect only in case he survived her, and shortly prior to the grantor's death she asserted ownership of the property, there was no delivery. Russell v. Mitchell, 223 Ill. 438, 79 N. E. 141. Where a grantor executed certain deeds and deposited them with a third person to be delivered after his death, there was held a delivery. Wells v. Wells [Wis.] 111 N. W. 1111. Evidence sufficient to show that delivery was without the grantor's consent and therefore ineffective. Birdsall v. Leavitt [Utah] 89 P. 397.

69. There is no delivery not in escrow where the instrument is to take effect only upon the happening of a contingency. Russell v. Mitchell, 223 Ill. 438, 79 N. E. 141. Where a deed is delivered by the grantor to a third person to be delivered to the grantee after the grantor's death, and no control over the instrument is reserved, there is delivery. Wilson v. Wilson [Utah.] 89 P. 643. Where a deed is delivered to a third person to be delivered to the grantee after the death of the grantor, who parts with all control over it, the fact that the custodian was to retain possession of the instrument until certain conditions were performed, does not render the delivery ineffective, such conditions being capable of performance during the lifetime of the grantor. Nolan v. Otney [Kan.] 89 P. 690. Where a grantor directed the conveyance to deliver the deeds to the grantee, which was done, the fact that the grantor subsequently had access to it did not render the delivery ineffective. Wilson v. Wilson [Utah] 89 P. 643.

70. Evidence sufficient to show that a grantee obtained possession of the deed wrongfully and without the knowledge of the grantor. Holmes v. Salamanca Gold Min. & Mill. Co. [Cal. App.] 91 P. 160. No delivery where the grantee obtains possession of the deed by fraud. Burns v. Kennedy [Or.] 90 P. 1102.

71. A deed procured without delivery may subsequently be ratified by the grantor.

of intention [72] to be determined from the circumstances of each particular case,[73] and no particular form or ceremony is necessary.[74] Manual delivery is not essential.[75] A

Phelps v. Pratt, 225 Ill. 85, 80 N. E. 69. Evidence sufficient to show such ratification. Id.

72. Whether there has been a delivery is a question of fact, depending on the intention of the grantor. Garrett v. Goff, 61 W. Va. 221, 56 S. E. 351. In a controversy between heirs involving delivery of a deed, the defense could show that on the day of decedent's death plaintiff took a package of papers from her trunk. Napier v. Elliott [Ala.] 44 So. 552. Delivery is a question of intention and may be effected by any act or word manifesting an unequivocal intention to surrender the instrument so as to deprive the grantor of all control over it. Sappingfield v. King [Or.] 89 P. 142.

73. In a controversy between heirs involving delivery of a deed, the grantee could show all circumstances attending the execution of the deed. Napier v. Elliott [Ala.] 44 So. 552. Central Trust Co. v. Stoddard [Cal. App.] 88 P. 806.

Evidence of delivery: Declarations of a grantor that he had given his boys the land are admissible as against interest on an issue as to delivery. Chew v. Jackson [Tex. Civ. App.] 102 S. W. 427. Testimony that a grantor did not deliver a deed is a conclusion. Id. Where a grantor executed a deed and thereafter divised the same land and the grantee sought to probate the will but could not because of a prior will and then recorded the deed, held that the fact that he offered the first will for probate was no evidence of nondelivery. Smithwick v. Moore [N. C.] 58 S. E. 908. Where delivery of a deed from husband to wife was denied, statement of the wife prior to the husband's death that he had given her all his property was admissible though in her own favor. Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 S. W. 198. Evidence corroborative of her testimony held admissible. Id. While between grantor and grantee the question of delivery is one to be determined by a preponderance of evidence, where rights of third persons have intervened, proof of nondelivery must be clear and convincing. Central Trust Co. v. Stoddard [Cal. App.] 88 P. 806. A prima facie delivery shown by proof of delivery to the agent of the grantee who turns over to the grantor the purchase money may be rebutted by proof that the deed was to have been made to a third person, and as soon as the mistake was discovered it was returned to the grantor for correction. Scarborough v. Holder, 127 Ga. 256, 56 S. E. 293.

74. Delivery **may be inferred** from the fact of execution and filing in name of the grantee. Cantwell v. Nunn [Wash.] 88 P. 1023.

Held a sufficient delivery: Where a creditor wrote a debtor offering a certain price for land and told him to go to his attorneys and fix it up and he did so, and the deed was placed with the creditor's papers, held a sufficient delivery though the creditor was not notified of the deed. Elliott v. Morris [Tex. Civ. App.] 17 Tex. Ct. Rep. 259, 98 S. W. 220. The delivery to a third person with directions to deliver to the grantee after the grantor's death is a valid delivery where the grantor reserves no control over the instrument. Griswold v. Griswold [Ala.] 42 So. 554. Where a mother executed a deed to her 9 year old child reserving a life estate, and the deed is not actually delivered but is retained by the mother until her death, there is sufficient delivery where the circumstances show that the mother intended that title should pass. Pentico v. Hays [Kan.] 88 P. 738. Where a mortgage was executed, placed in a strong box, and the key given to a third person with instructions to get the mortgage and deliver it to the mortgagee, which was done after the mortgagor's death. Booker v. Booker, 104 N. Y. S. 21. Where a grantor handed a deed to the grantee who gave it to a third person who was to keep it and record it after the grantor's death, and it was understood that the grantor was to have a life estate. Ranken v. Donovan, 115 App. Div. 651, 100 N. Y. S. 1049. Where a grantor gave a deed to the grantee's husband and directed him to deliver it to his wife, but the husband placed it among his private papers. Russell v. Mitchell, 223 Ill. 438, 79 N. E. 141. Where husband and wife executed a deed but agreed between themselves that there should be no actual delivery until after the wife's death, of which agreement the grantee had no notice, and the deed was delivered and recorded during the wife's lifetime. Blake v. Ogden, 223 Ill. 204, 79 N. E. 68.

Delivery insufficient: Where a grantor sent a deed to her agent for delivery but prior to delivery the grantee had notice that since the execution of the deed the grantor had changed her mind and directed the agent not to deliver, held the delivery did not execute the sale. Burke-Mobray v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 827, 97 S. W. 321. A grantor executed and recorded a deed to a niece who lived in another state. He remained in possession until he conveyed the premises to a son who took possession. The niece was not under disability and did not know of the deed. Held no delivery. Abrams v. Beale, 224 Ill. 496, 79 N. E. 671. Where a grantor delivered a deed to his son with directions to place them in the grantor's desk and if he died to record them, otherwise to destroy them, there was no delivery. Phelps v. Pratt, 225 Ill. 85, 80 N. E. 69. A deed from wife to husband delivered to him with intention that it should not take effect until after death of wife, and if she survived her husband it was to be destroyed, held not delivered. Elliott v. Murray, 225 Ill. 107, 80 N. E. 77.

Evidence insufficient to show want of delivery. Jolly v. Graham, 222 Ill. 550, 78 N. E. 919; Gleason v. Stonehouse [Mich.] 113 N. W. 315; Leidenthal v. Leidenthal, 105 N. Y. S. 807. Though the deed was recorded. McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997. Where a corporation authorized execution of a deed and it was executed and the officers retained it in their possession until after the grantee commenced suit, when it was recorded. It did not appear that the grantee paid any part of the consideration or that immediate delivery was intended. Holmes v. Salamanca Gold Min. & Mill. Co. [Cal.] App.] 91 P. 160. Where parents executed a deed to their home-

strong presumption of delivery arises from the fact of possession by the grantee,[76] and one of nondelivery from finding the instrument among the grantor's effects after his death,[77] but such presumptions are not conclusive.[78] A presumption of delivery arises from the fact of recordation [79] or acknowledgment.[80] The presumption of delivery arising from the fact of recordation of a deed running to a person standing in a fiduciary relation to the grantor does not apply where the grantee is an adult not laboring under disability,[81] and is rebutted by proof that the grantor did not intend the deed to take effect immediately.[82] A grantor may be estopped to deny delivery.[83] Delivery in escrow cannot be made to the grantee.[84] A deed is presumed to have been delivered as of the day of its date,[85] and to be in the grantee's possession.[86]

stead to their children reserving a life use of the property, but the deed was not delivered during the lifetime of the wife, it was held void. Meikle v. Cloquet [Wash.] 87 P. 841.

Evidence sufficient to show delivery. Broom v. Herring [Tex. Civ. App.] 101 S. W. 1023; Akers v. Shoemaker [Ky.] 102 S. W. 842. Where a father executed a deed to his daughter reserving a life estate and deposited it with a third person to be delivered to the grantee after his death. Young v. McWilliams [Kan.] 89 P. 12. Where a grantor executed and delivered a deed to the grantor's son and told him to return the deed if he did not want it, and several months later wrote the grantee demanding the purchase price. Smith v. Stephens [Ark.] 100 S. W. 78. Where a deed was delivered to one of the grantees with instructions to deliver it to the proper parties after the grantor's death, title passed at the time. Strickland v. Griswold [Ala.] 43 So. 105. An answer denying that a deed was delivered is insufficient to show nondelivery. Gulf Red Cedar Lumber Co. v. Crenshaw, [Ala.] 42 So. 564. Question of **delivery held for the jury** where a deed was delivered to one of several grantees with instructions to deliver it to the proper parties after the grantor's death. Strickland v. Griswold [Ala.] 43 So. 105.

75. Delivery may be shown by acts of the grantor showing an intention to pass title, and evidence that after the execution of the deed the grantor treated the property as belonging to the grantee. Chew v. Jackson [Tex. Civ. App.] 102 S. W. 427. Finding of constructive delivery held warranted where the grantee took possession and held the premises for two years, paid taxes and interest, etc., without objection of the grantor. Balin v. Osoba [Kan.] 91 P. 57. Where a grantor places a deed on record with intention to pass title, manual delivery is not essential. Fryer v. Fryer [Neb.] 109 N. W. 175. Acts of grantee showing acceptance coupled with acts of grantor showing delivery. Atkins v. Atkins [Mass.] 80 N. E. 806. Acts of grantee showing acceptance, coupled with a purpose of the grantee to treat the deed as delivered, is sufficient. Creeden v. Mahoney, 193 Mass. 402, 79 N. E. 776.

76. Where a deed is in the hands of the grantee, there is a strong implication of delivery which can be overcome only by clear proof to the contrary. Blake v. Ogden, 223 Ill. 204, 79 N. E. 68. Possession by a grantee is prima facie evidence of delivery. Morton v. Morton [Ark.] 102 S. W. 213. Where a deed duly signed is found in possession of the grantee, satisfactory evidence to overcome presumption of delivery is required. Central Trust Co. v. Stoddard [Cal. App.] 88 P. 806.

77. Where a deed was found among the grantor's papers after his death and there was testimony that the grantee never saw the deed and the scrivener who drew it stated that he delivered it to the grantor. Evidence held insufficient to show delivery. Ostrom v. De Yoe [Cal. App.] 87 P. 811.

78. While possession is prima facie evidence of delivery, it may be rebutted by evidence that the grantor never made delivery with intent to pass title. Drinkwater v. Hollar [Cal. App.] 91 P. 664. Where a married woman executed deeds to her husband and placed them in a safe deposit vault to which he had access, held that the fact that they were found there after his death was not evidence of delivery. Hamlin v. Hamlin, 51 Misc. 111, 100 N. Y. S. 701. This is especially so where the acts of the husband were consistent with his wife's ownership. Id.

79. McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997; Smithwick v. Moore [N. C.] 58 S. E. 908; Blake v. Ogden, 223 Ill. 204, 79 W. E 68. Where a grantor executed and recorded a deed for the purpose of enabling the grantee to execute a mortgage on the premises, which was done, held, though there had been no delivery, the grantor could not invoke. Rev. Laws, c. 127, § 5, providing that recordation shall be conclusive evidence of delivery as to bona fide purchasers. Creeden v. Mahoney, 193 Mass. 402, 79 N. E. 776.

80. Under Rev. St. 1899, § 932, acknowledgment is prima facie evidence of execution and delivery. Burk v. Pence [Mo.] 104 S. W. 23. Such presumption may, however, be assailed under a general denial. Id.

81. Grantee not aware of existence of deed. Abrams v. Beale, 224 Ill. 496, 79 N. E. 671.

82. Abrams v. Beale, 224 Ill. 496, 79 N. E. 671.

83. Where for four years after the grantee secured the deed the grantor retained the purchase price and did nothing to have the conveyance set aside. Burke-Mobray v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 827, 97 S. W. 321. Evidence sufficient to show that a grantor was estopped to deny delivery of a deed. Akers v. Shoemaker [Ky.] 102 S. W. 842.

84. Russell v. Mitchell, 223 Ill. 438, 79 N. E. 141.

85. Ranken v. Donovan, 115 App. Div. 651, 100 N. Y. S. 1049. In the absence of evidence to the contrary, it will be presumed that a deed was delivered on the date of its execution. Oehler v. Walsh, 7 Ohio C. C. (N. S.) 572.

86. It is presumed that a deed is in the

Acceptance[87] is essential,[88] but is presumed if the deed is beneficial to the grantee,[89] and may be inferred from acts of the grantee.[90]

Validity of assent.[91]—A deed may be void because of fraud or undue influence,[92] or of mutual mistake or accident,[93] or incapacity of the parties,[94] which prevents any real assent.

Consideration.[95]—Like other contracts, a deed should be based on a consideration,[96] but a consideration is not essential to validity,[97] and the fact that the consideration fails does not affect the operation of the deed.[98] Adequate consideration is presumed after a long lapse of time.[99] The rule that if any portion of a single consideration is unlawful the contract is void does not apply where the grantor has retained the consideration.[1] The recital of consideration in a deed is not conclusive,[2]

grantee's possession, and where it appears that the grantee is a nonresident and that the deed is unrecorded, testimony of the grantor that executed the deed is admissible. Sellers v. Farmer [Ala.] 43 So. 967.

87. See 7 C. L. 1109.

88. The deed must not only pass from the control of the grantor but the grantee must accept it. McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997.

89. If beneficial to the grantee, acceptance is presumed. McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997. Infant grantee. Akers v. Shoemaker [Ky.] 102 S. W. 842.

90. Acceptance is shown where the grantee **accepted the recording ticket** and subsequently accepted and held the deed and expressly claimed title to the land. Hartman v. Thompson, 104 Md. 389, 65 A. 117. The execution by the grantee of a mortgage on the premises is an acceptance. Blackwell v. Blackwell [Mass.] 81 N. E. 910. A grantor was the grantee's general agent and looked after all private papers. He recorded the deed and retained possession of it with other papers of the grantee. Held an acceptance as agent. Id.

91. See 7 C. L. 1109.

92. See Fraud and Undue Influence, 7 C. L. 1813. A conveyance procured by fraud will not operate by way of estoppel against the grantor. Goodwin v. Fall [Me.] 66 A. 727. A deed by joint tenants may be declared void as to one of them for fraud and held valid as to the other. Shepherd v. Turner, 29 Ky. L. R. 1241, 97 S. W. 41.

93. See Mistake and Accident, 8 C. L. 1020.

94. See Incompetency, 8 C. L. 169. A deed will not be set aside because of incompetency of the grantor until he has been adjudged an incompetent by a court of equity. Smith v. Ryan, 116 App. Div. 397, 101 N. Y. S. 1011.

95. See 7 C. L. 1109.

96. A deed of bargain and sale is effective under the statute of uses and must be based on a consideration. Redmond v. Cass, 226 Ill. 120, 80 N. E. 708.

Consideration held sufficient: Release of a judgment lien is sufficient consideration. Brown Hardware Co. v. Catrett [Tex. Civ. App.] 101 S. W. 559. The consideration of love and affection is sufficient to support a deed from a parent to his child. Rittenhouse v. Swango, 30 Ky. L. R. 145, 97 S. W. 743. A preexisting debt. Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957. Services rendered a grantor by his son's wife are a valuable consideration for a deed to the son. Finch v. Green, 225 Ill. 304, 80 N. E. 318. A deed from parent to child based on a consideration of love and affection will not prevail against a prior contract between the parent and a third person based on valuable consideration. Lawson v. Mullinix, 104 Md. 156, 64 A. 938. Where aged persons conveyed to their children in consideration of their maintenance for life, held the children were required to support them though they reserved a house and a portion of the land. Alvey v. Alvey, 30 Ky. L. R. 234, 97 S. W. 1106. Such a conveyance will be rescinded upon the failure of the children to substantially perform the contract. Id.

97. A consideration is not essential where the grantor is of sound mind and the transaction is free from fraud. Stamper v. Venable, 117 Tenn. 557, 97 S. W. 812.

98. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276. A deed based on a consideration of the grantor's support will not be cancelled because the grantee fails to furnish such support. Thompson v. Lanfair, 127 Ga. 557, 56 S. E. 770. A deed based on a consideration of love and affection and providing that the grantee is to support the grantor when accepted by the grantee binds him to perform the covenants, and if he failed to do so action would lie for the reasonable value of the support. Kytle v. Kytle [Ga.] 57 S. E. 748.

99. Gougenheim's Heirs v. Ermann, 118 La. 577, 43 So. 170.

1. Under Civ. Code, § 1608, providing that where any part of a single consideration for a contract is unlawful the contract is void, does not apply to a grantor who has retained the consideration which was unlawful in part. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276.

2. The true consideration may be shown by parol. Faust v. Faust, 144 N. C. 383, 57 S. E. 22. Is only prima facie evidence. Morton v. Morton [Ark.] 102 S. W. 213. May be shown by parol or circumstances to be untrue. Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325. In a hypothecary action to enforce a judicial mortgage, parol evidence is not admissible to prove that the purchase price of the property was not paid in cash, as recited in the deed to defendants' author, but that the true consideration was partly cash, a special mortgage held by the purchaser, and his assumpsit of a vendor's lien and mortgage held by a third person. Abbeyville Rice Mill v. Shambaugh, 115 La. 1047, 40 So. 453. Where a deed is delivered and accepted, it is an executed transaction and the consideration may be shown by parol. Blackwell v. Blackwell [Mass.] 81

but a grantee may be estopped to deny that the consideration recited is the true one,[3] and the recital of a consideration cannot be contradicted by parol for the purpose of avoiding the instrument.[4]

§ 2. *Recordation*[5] is not essential to the validity of a deed.[6] The rules of law relative to the registration of instruments,[7] and the doctrine of bona fide purchaser,[8] are elsewhere treated.

§ 3. *Interpretation and effect. General rules.*[9]—A deed supersedes all prior contracts of which it is the consummation.[10] It is presumed that a deed evidences the intention of the parties,[11] and that the grantor had and conveys the estate described.[12] The object and purpose of construction is to ascertain and give effect to the intention of the parties[13] as evinced by the language employed.[14] Where con-

N. E. 910. Evidence sufficient to show that a deed was intended as an advancement and was not executed in consideration of the purchase price named therein. Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325.

3. Where a deed from parent to child recited a consideration of love and affection, the child could not show a valuable consideration to defeat a contract by the parent to sell to a stranger where the child had full notice of the contract and did not set up her claim until six years after her parent's death. Lawson v. Mullinix, 104 Md. 156, 64 A. 938.

4. In a warranty deed. Redmond v. Cass, 226 Ill. 120, 80 N. E. 708.

5. See 7 C. L. 1110.

6. That a deed delivered to the grantee was not deposited for record until after the grantor's death does not prevent it from becoming operative as of date of execution. In re Lane's Estate, 79 Vt. 323, 65 A. 102. Where a person claims title through a deceased clerk of court, he may show title in him by a deed though it was improperly indexed. Mitchell v. Cleveland [S. C.] 57 S. E. 33.

7, 8. See Notice and Record of Title, 8 C. L. 1169.

9. See 7 C. L. 1110.

10. All prior contracts are merged in the deed. Lawson v. Mullinix, 104 Md. 156, 64 A. 938.

11. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67. One who executes a deed to a life tenant, remainder to her heirs, must be presumed to know that the lines of inheritance are governed by statute, subject to alteration. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697.

12. It is presumed that a deed duly executed conveys title and that the grantor had the title he purported to convey. Stetson v. Grant [Me.] 66 A. 480. A grantor in a deed which has been delivered is estopped by his covenants from claiming legal title. Creeden v. Mahoney, 193 Mass. 402, 79 N. E. 776. A clause in a quitclaim deed that the grantor makes no representations as to title is not a disclaimer of title, nor does it show a prior abandonment of the land. State Finance Co. v. Myers [N. D.] 112 N. W. 76.

13. Waldron v. Pigeon Coal Co., 61 W. Va. 280, 56 S. E. 492; McSurley v. Venters [Ky.] 104 S. W. 365. Where a mistake has been made in the calls of a deed and it is a question of fact whether the vendee was notified of the mistake and elected to take under the description, construction is a question of fact. Williams v. Virginia-Pocahontas Coal Co., 60 W. Va. 239, 53 S. E. 923. The intention **must prevail unless contrary to law.** Sharp v. Sharp, 148 Mich. 278, 111 N. W. 767. In a suit in equity, where both sides are seeking to quiet title to a strip of land, and the evidence shows that the purpose of the original grantor was to give to his two sons-in-law equal portions of the disputed strip and a line midway of the strip was acquiesced in by them as the dividing line, a decree will be granted making such line the established boundary between subsequent grantees and heirs, notwithstanding an ambiguity in the original deeds gives color to the claim of the plaintiff to a legal title in the whole strip. Challen v. Martin, 8 Ohio C. C. (N. S.) 473. A clause near the beginning of a deed reciting a consideration of one dollar and stating that other considerations will be set forth in the deed discloses an intent to make the reservation clause part of the consideration, there being no other provision for the benefit of the grantor. Beverlin v. Castro [W. Va.] 57 S. E. 411. Where the granting clause granted to a woman, "her heirs and assigns," and the habendum was "to have and to hold" to said woman, her heirs and assigns in fee and after her death to such children as she may have, held to convey a life estate to the woman, remainder to her children. Cobb v. Wrightsville & T. R. Co. [Ga.] 58 S. E. 862. Trust deed construed and held to convey legal title in the trustee until death or sale at the request of the grantor, and that it being the trustee's duty to convey on request of the grantor, the statute of uses did not execute the trust. Pope v. Patterson [S. C.] 58 S. E. 945. Equity will not cancel a deed from daughter because it was not signed by the daughter's husband, where it appeared that the mother in fairness should hold the legal title. Laythe v. Minnesota Loan & Investment Co. [Minn.] 112 N. W. 65.

Estates credited: A deed to "H. and her two children B. & C. and any succeeding heirs of her body," to have and to hold to H. and her heirs and assigns forever, lets in after born children. Southern R. Co. v. Hayes [Ala.] 43 So. 487. A conveyance in trust for the use of one for life and at her death to her lineal heirs forever carries a conditional fee to the first taker, remainder to her lineal heirs by inheritance. Clark v. Neves [S. C.] 57 S. E. 614. A deed of trust for the use of one for life remains to her surviving children passes a life estate to the

flicting intentions are apparent in different clauses, that intention should be given effect which appears in the most important clause.[15] A deed is to be construed as a whole,[16] and all parts of it given effect if possible.[17] Where executed contemporaneously with other instruments, they are to be construed together.[18] A deed is to be construed against the grantor and favorably to the grantee.[19] This rule is of less force where the language of the instrument is selected by both parties.[20] Technical words are presumed to have been used in their technical sense,[21] unless the contrary appears.[22]

first taker, remainder to the children as purchasers. Id. A conveyance of a life estate with remainder over but providing that the life tenant might sell the fee if the remainderman died before attaining majority, held not to vest the fee in the life tenant where the remainderman died after attaining majority. Mitchell v. Cleveland [S. C.] 57 S. E. 33. Where land was conveyed in trust, income to be paid to a beneficiary with right on her part to sell the land at any time, an attempted limitation over after the death of such beneficiary was void for repugnancy and uncertainty. Morgan v. Morgan, 60 W. Va. 327, 55 S. E. 389. Where a deed was executed to one for life, and remainder to his wife if she survived him, otherwise to a corporation which furnished no part of the consideration, such corporation had no interest in the property if the wife was the survivor. Webb's Academy & Home for Shipbuilders v. Hidden, 118 App. Div. 711, 103 N. Y. S. 659. A conveyance in trust to one for life "and after her death to her heirs at law" passes the remainder to heirs in existence at the time of her death and not to those living at the date of the conveyance. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697, Deed construed and held that the word "heirs" therein was a word of purchase and not of limitation, and that certain heirs took a remainder in fee contingent upon their surviving the grantor. Ex parte Porter, 30 Ky. L. R. 118, 97 S. W. 391. A deed from husband to wife conveying a life estate and providing for a reverter to the husband or his heirs, held not to vest an estate in their only child, six years old, and that a deed joined in by both would pass a fee. Due v. Woodward [Ala.] 44 So. 44.

14. The cardinal rule of construction is to ascertain the true intent and purpose of the maker from a consideration of all parts of the instrument and the surrounding circumstances. Aldridge v. Aldridge, 202 Mo. 565, 101 S. W. 42. Where language of a deed is ambiguous and susceptible of more than one meaning, the parties are bound by the sense in which it was mutually used. West v. Hermann [Tex. Civ. App.] 104 S. W. 428. In a conveyance for the purpose and with a limitation that rock taken by the grantee is to be used by him only and for railroad purposes, and another clause providing for forfeiture if a railroad was not constructed within two years, held that the premises and subsequent clauses were not in irreconcilable conflict, but the latter qualified the former and reserved to grantor a contingent estate. Pavkovich v. So. Pac. R. Co. [Cal.] 87 P. 1097. The deed was not to be construed as giving to grantee the right to remove all the rock he desired with a limitation on the use he might make of it. It is not the law that if it was not the intention of a husband to pass title by a deed to his wife the instrument would not be operative, without regard to the grantee, knowledge of such intent or the recited consideration. Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 S. W. 198.

15. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67.

16. All of its parts must be considered and all its provisions made effective if possible. Beverlin v. Casto [W. Va.] 57 S. E. 411.

17. It will not be so construed as to render it a nullity as to any of the parties if by any reasonable construction such result can be avoided. Beverlin v. Casto [W. Va.] 57 S. E. 411.

18. Where a deed given in January recites that it was made in lieu of one for the same property executed the preceding October, and it does not appear that there has been change of consideration or circumstances during the interval, both deeds are to be considered part of the same transaction. Rihner v. Jacobs [Neb.] 113 N. W. 220.

19. Edwards v. Brusha, 18 Okl. 234, 90 P. 727. A description "20 acres off the north end" of a certain tract being all the portion remaining unsold, passes all of such tract, though it contains more than 20 acres. Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691. The expressions in the deed with reference to payment of a street assessment will be construed in favor of the grantee where of an indefinite character, or where the agreement to pay an assessment is found in a separate clause and not as a part of the purchase price, nor does the language of the warranty that the premises are free and clear of all incumbrances except certain unpaid street assessments impose upon the grantee per se the obligation to pay such assessments. Waldschmidt v. Bowland, 4 Ohio N. P. (N. S.) 411. Declarations in the deed relating to annuity, aleatory conditions, and the disposition the vendors proposed to make of the proceeds of sale, do not affect rights of grantee. Rudolf v. Costa [La.] 44 So. 477. It will not be presumed that a grantor executing and recording a deed to enable the grantee to mortgage the premises intended to perpetrate a fraud on the mortgagee, when in fact no title passed, though Rev. Laws, c. 127, § 5, provides that recordation shall be evidence of delivery as to bona fide purchasers. Creeden v. Mahoney, 193 Mass. 402, 79 N. E. 776.

20. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67. The rule that a deed is to be construed most strongly against the grantor does not prevail where its terms are ambiguous and it appears that the parties used the language in a permissible, but special, sense. West v. Hermann [Tex. Civ. App.] 104 S. W. 428.

21. In construing an ancient deed, the

The fact that the scrivener who drew the deed was unskilled in such work is to be considered.[23] In case of ambiguity, resort may be had to parol evidence of attending circumstances,[24] but the effect of an unambiguous deed cannot be limited by parol.[25] The practical construction given by the parties is to be considered.[26] The first part of a deed prevails over later portions.[27] The habendum clause may sometimes enlarge the estate in the thing granted but it cannot enlarge the thing itself.[29] Where general words follow particular words, they must be so construed as to limit their meaning to the estate embraced in the latter.[29] The rule that a specific or particular description controls a general one does not apply where it appears that the former is incomplete or defective.[30] A general clause erroneously referring to a particular source of the title of the interests conveyed by the granting clause will not serve to restrict the interests thus conveyed.[31] In case of conflict between the printed and written parts of a deed, the latter is to be given effect.[32]

Covenants[33] are implied from the use of certain words,[34] and are to be so construed as to effectuate the intention of the parties.[35] A covenant is not to be read into a deed,[36] but if expressed is affected by a subsequent exception.[37]

fact that the person who drew it understood the meaning of technical, apt and fitting terms is to be considered. Contemporaneous deeds of like import may also be considered. Hoysrandt v. Delaware, L. & W. R. Co., 151 F. 321. A particular word, phrase or term may express a meaning different from its common meaning when used in instruments concerning a subject-matter in relation to which such different meaning is generally understood and accepted. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67. The word "quitclaim" in what purports to be a deed is sufficient to pass the interest of the grantor. Barnard v. Duncan [Neb.] 112 N. W. 353.

22. Though technical words should ordinarily be given their technical meaning, if such use would be meaningless, any other use in which they may appear to have been employed will be favored. McSurley v. Venters [Ky.] 104 S. W. 365.

23. Where a deed is drawn by one not skilled in such work, greater latitude is permitted and less attention paid to technical words than would otherwise be the case. Miller v. Mowers, 227 Ill. 392, 81 N. E. 420.

24. Negotiations leading up to the execution of the instrument are admissible. McSurley v. Venters [Ky.] 104 S. W. 365. The intention of the parties as gathered from surrounding circumstances existing at the time of execution is to be given effect. Miller v. Mowers, 227 Ill. 392, 81 N. E. 420.

25. Where a deed is unambiguous, its effect cannot be limited by parol. Northeastern Tel. & T. Co v. Hepburn [N. J. Eq.] 65 A. 747. Parol evidence is not admissible to show that a deed to the state is upon condition that the property should be used for a capitol building. Sylvester v. State [Wash.] 91 P. 15. In the absence of a plea of fraud or mistake, parol evidence is not admissible to show any other intention of the grantor than that expressed in the deed McCreary v. Skidmore [Ky.] 99 S. W. 219. Where a deed described certain property, a subsequent clause reciting that it consisted of the grantor's share in an inheritance, which was an erroneous statement of the source of title, did not render the deed ambiguous nor authorize parol evidence to vary the meaning of the terms of the grant. West v. Hermann [Tex. Civ. App.] 104 S. W. 428. Parol testimony is not competent to alter the terms of warranty in a deed but is competent to show the meaning given by the parties themselves to terms used where such meaning is doubtful. Kitzman v. Carl, 133 Iowa, 340, 110 N. W. 587.

26. Where a deed was to one and her heirs "during her natural lifetime" and was for 26 years treated as passing a life estate only, held to pass a life estate, the word "heirs" not bringing it within the rule in Shelley's Case. Miller v. Mowers, 227 Ill. 392, 81 N. E. 420. A petition by sole heirs of a grantor to set aside a deed will be dismissed where it appears that the grantor left a will devising the same land which has been filed for probate and a caveat filed by the heirs at law and the issue thereby made is still pending in the court of ordinary. Murray v. McGuire [Ga.] 58 S. E. 841.

27. Where the granting clause conveyed property in fee, a provision in the habendum that if the grantee should die without issue and before her husband the property should revert to her husband was void. Carllee v. Ellsberry [Ark.] 101 S. W. 407.

28. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67.

29. Quitclaim deed construed and held not to pass certain interest in the land owned by the grantor. Dooley v. Greening, 201 Mo. 343, 100 S. W. 43.

30. Cornett v. Creech, 30 Ky. L. R. 1265, 100 S. W. 1188.

31. West v. Hermann [Tex. Civ. App.] 104 S. W. 428.

32. Miller v. Mowers, 227 Ill. 392, 81 N. E. 420.

33. See 7 C. L. 1113. See, also, Covenants for Title, 9 C. L. 845.

34. Under Rev. St. 1901, par. 728, a conveyance of a fee in which the word "grant" or "convey" is used impliedly covenants that the estate is free from incumbrances. Sherman v. Goodwin [Ariz.] 89 P. 517.

35. Where a deed contained a stipulation against warranty as to acreage, letters

Designation of parties.[38]—A typographical error in the name of a grantee will be disregarded.[39]

Description of property conveyed.[40]—As a general rule a particular description controls a general one.[41] This rule is limited to the evident subject-matter of the conveyance,[42] and applies where the specific description is unambiguous.[43] A description with reference to other instruments will be construed as embodying such instruments,[44] unless it appears that such reference was only used to designate the source of title.[45] Where two descriptions of the same land are irreconcilable, evidence of extrinsic facts is admissible,[46] and one found not true must be rejected.[47] Neither controls if one is no less certain than the other,[48] and the doctrine of election does not apply where no election has been made.[49] A call omitted by mistake or inadvertence may be supplied.[50] In case of plain mistake a call may be read according to the intention of the parties.[51] Surplusage may be rejected.[52] The description is to be taken most strongly against the grantor,[53] and the intention of the parties effectuated if possible.[54] Parol evidence is admissible to explain a latent ambiguity,[55]

from the grantor to his attorney shown to the grantee prior to the execution of the deed were admissible as showing the surrounding circumstances. Latta v. Schuler [Tex. Civ. App.] 100 S. W. 166. The words "More or less" ordinarily mean that the grantor does not warrant the precise quantity of land named, so that if there is but a reasonable deficit there is no breach of covenant. Kitzman v. Carl, 133 Iowa, 340, 110 N. W. 587.

36. A deed describing the property by metes and bounds and as extending to a 20 foot alley in the rear, held not to constitute a warranty that the alley existed. Fulmer v. Bates [Tenn.] 102 S. W. 900.

37. An exception in the covenant of freedom from incumbrances does not limit the effect or extent of a prior unconditional grant. Martin v. Smith [Me.] 65 A. 257.

38. See 7 C. L. 1113.

39. Where a deed showed on its face that it was made to a male grantee, the fact that it ran to "Elizah" instead of "Elijah" would be presumed a typographical error. Bernheim v. Heyman [Ky.] 104 S. W. 388.

40. See 7 C. L. 1114.

41. Tate v. Betts [Tex. Civ. App.] 97 S. W. 707.

42. Description is limited. It does not require the inclusion of other matter. Peasley v. Dinsko [Me.] 65 A. 24.

43. Haskell v. Friend [Mass.] 81 N. E. 962.

44. Where land is described as a lot laid off and designated on a certain plat of survey, the plat becomes a part of the deed. Schwalm v. Beardsley, 106 Va. 407, 56 S. E. 135. Where a recorded plat is referred to as related to a matter of description, unless controlled by other facts, it is to be considered as furnishing a true description. Quade v. Pillard [Iowa] 112 N. W. 646.

45. A description "the same deeded to me by B" may only indicate the source of the grantor's title or locate and identify the land; it does not necessarily adopt the boundaries named in the prior deed. Peasley v. Drisko [Me.] 65 A. 24. A deed containing such description and also "meaning and intending to convey meadow land" held to convey meadow land only. Id.

46. Where two descriptions intended to apply to the same land are not reconcilable evidence of extrinsic facts, is admissible to show intention of the parties. Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691.

47. Where a deed contains two descriptions, one of which when applied to the land is found not true, it must be rejected. Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691.

48. Where two descriptions are conflicting and one is no less certain and definite than the other, one does not control the other. Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691.

49. The rule that where two descriptions conflict the grantee may elect does not apply where the grantee has never made an election and neither is more favorable to him than the other. Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691.

50. Cornett v. Creech, 30 Ky. L. R. 1265, 100 S. W. 1188.

51. "Southeast" read "Southwest." Siedschlag v. Griffin [Wis.] 112 N. W. 18. Where it is claimed that the scrivener who drew the deed made a mistake in describing the property, a recital in a conveyance that the land transferred was deeded to the grantor by a certain person is evidence of the description and intention of the parties. Rankin v. Moore [Tex. Civ. App.] 101 S. W. 1049.

52. Where there is no patent ambiguity and it appears that land was sold and intended to be conveyed, a false portion of the description should be rejected as surplusage. West v. Houston Oil Co. [Tex. Civ. App.] 102 S. W. 927.

53. Quade v. Pillard [Iowa] 112 N. W. 646. In a sale of land having so many arpents front by so many in depth, it is presumed that side lines run perpendicular to front lines, and this presumption where it appears that one side line falls perpendicular to the front line. Ramos Lumber & Mfg. Co. v. Sanders, 117 La. 615, 42 So. 158.

54. Where the description contained in a deed reads "north with the half section line," the phrase denotes direction and not necessarily that the line intended is identical with the half section line, and the line connecting the corners and not the half section line must be taken as the dividing

but not to aid a patent one.[56] The situation of the property and the contemplated use are to be considered.[57]

Quantum of estate conveyed.[58]—A deed is presumed to pass the greatest estate consistent with the terms employed,[59] and where it contains inconsistent provisions it will be held to pass such estate as was intended.[60] The quantum or nature of the estate conveyed is often a matter of intention to be determined by construing the instrument.[61] A deed passes title to all it purports to convey,[62] but conveys no

line. Puntt v. Zimmer, 8 Ohio C. C. (N. S.) 455. "Containing by estimate" is equivalent to "more or less" where land is described by metes and bounds. Mayer v. Wooten [Tex. Civ. App.] 102 S. W. 423.

55. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665. Where adjacent owners give boundary deeds to each other to establish a line and the location of objects called for is necessary to an understanding of the case, testimony of one present when the line was run is admissible. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

56. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665.

57. Deed of milling property construed as to right of flowage conveyed. Grothe v. Lane [Neb.] 110 N. W. 305.

58. See 7 C. L. 1114.

59. The grant of a right to maintain a telephone line over certain premises confers to right to construct a single line of poles with any number of arms thereon. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747. A deed of a right of way for a pipe line with right to set up telegraph or telephone line thereon does not confine the right to use the telephone exclusively for purposes of the water plant and pipe line, but it could be used for commercial purposes. Id. Where a deed conveyed certain land reserving certain rights previously granted which had been terminated, held to convey a fee subject only to the possible servitude of the right previously granted. Burlington & C. R. Co. v. Colorado Eastern R. Co. [Colo.] 88 P. 154. A deed from father to son for a nominal consideration of an interest in community lands is prima facie a discharge of the son's community claim. Locust v. Randle [Tex. Civ. App.] 102 S. W. 946. Deed by devisees under a will construed and held to pass a fee. Sheppard v. Jones [S. C.] 57 S. E. 844. A clause in a deed from parents to son "the parties of the first part do hereby reserve a lifetime dower and support of one the above land set joint in this deed" secures the grantors' support for life but gives them no estate in the land. Beverlin v. Casto [W. Va.] 57 S. E. 411. A deed to one "for her lifetime and at her decease to her lawful heirs * * * heirs and assigns forever" conveys a fee to the grantee. Poston v. Midland Lumber Co. [S. C.] 56 S. E. 546. A deed conveying all land between certain streets including specified plats as shown by certain maps, which showed that two of the lots were bounded by a plat of land laid out as an excavated canal, passed title to canal land. In re Canal Place in City of New York, 115 App. Div. 458, 101 N. Y. S. 397.

60. Where a deed contains inconsistent provisions, one indicating that a life estate is granted and one indicating that a fee is conveyed, it will be held to pass such estate as was intended upon a consideration of the entire instrument. Deed construed and held to pass an equitable fee. Morgan v. Morgan, 60 W. Va. 327, 55 S. E. 389.

61. A deed in usual form reciting that the grantor reserved the use of the premises for life and that the deed was not to take effect until his death gave the grantor a life interest and the grantee a remainder. Dudley v. Herring, 30 Ky. L. R. 270, 98 S. W. 289. A deed to husband in trust for his wife for their joint lives, and if she survived him to her in fee, and if she died during coveture, leaving children, to the children, gives the wife an equitable estate for the joint lives of herself and husband with a contingent remainder dependent on her surviving him. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287. A provision in the deed that the wife could not alienate without the consent of trustee applied to her power to sell her estate and did not indicate an intention to permit her to dispose of a greater estate than she possessed. Id. Where parents conveyed to their children, reserving a life estate, by deed providing that if any of the children should die without heirs of their body the land received should revert to the survivors, held not to create a life estate nor defeasible fee in the children, but to pass the title to any child dying without issue during the lives of the grantors to the survivors. Cosby v. Newby, 30 Ky. L. R. 1375, 101 S. W. 306. A deed to a trustee reserving to the grantor the net profits of the land during life as well as absolute power of disposition, and directing the trustee to convey to such persons as the grantor may designate, and upon his death to convey the residue to certain persons, held the grantor retained an equitable estate in fee. Meyer v. Barnett, 60 W. Va. 467, 56 S. E. 206. Deed to Y "her and her children and her assigns forever," with warranty, Y having had no children, held to convey a conditional fee to Y and a deed from her and her grantee to another passes the fee. Dillard v. Yarboro [S. C.] 57 S. E. 841. Where land was conveyed to a married woman for life, remainder to her children, at the death of the mother the interest of the children became vested. May v. May, 29 Ky. L. R. 1033, 96 S. W. 840. Where a wife advanced the principal part of the consideration and it was understood that the husband and wife should have a life estate and their child a remainder, and such a deed was delivered but never recorded, a deed made by the grantor to the wife for life, remainder to the child, after the husband's death, should not be set aside, the former deed being lost. Noble v. Noble, 30 Ky. L. R. 629, 99 S. W. 339.

62. Where the granting clause described certain land and continued "and the said party of the second part is hereby granted

greater estate than the grantor has,[63] nor no more land [64] nor other interests than it purports to convey,[65] nor does it pass a mere chose in action arising out of the land.[66] It is generally provided by statute that fee tail estates are converted into fee simple [67] or life estates only,[68] but to warrant the application of such statutes the instrument must fall within their terms.[69] Under the rule in Shelley's Case a deed to one for life, remainder to his heirs, creates a fee in the first taken.[70] A warranty deed passes title subsequently acquired by the grantor,[71] but a deed containing no cove-

free access to a certain mineral spring," held the grant of access to the spring was as much a part of the deed as if mentioned in the granting clause. An instrument granting "the sole and exclusive right and privilege to operate for all purposes under the franchise" transfers the franchise and not a mere right under it. In re Long Acre Light & Power Co., 117 App. Div. 80, 102 N. Y. S. 242. A deed purporting to convey one-half of a government quarter section of land that has not been previously subdivided by plat or survey or otherwise is operative as a conveyance of a quantitative half of the tract without regard to the rules of the Federal land department with reference to the subdivision of such tracts. Kirkpatrick v. Schaal [Neb.] 110 N. W. 730. Where from all the circumstances it appears that it was the intention to sell all the property of succession, it will be held to have passed though the description according to plats and maps omitted a portion of it. Chaffe v. Minden Lumber Co., 118 La. 753, 43 So. 397.

63. A deed conveying all the grantor's right, title, and interest is satisfied by a life estate. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

64. A deed of one-third of a league, the head right of the grantor, does not include any part of a league donated to the grantor by the legislature. Wright v. Nona Mills Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 620, 98 S. W. 917. A deed executed in 1854 of a league and labor of land donated to the grantor for losses suffered during the Mexican invasion does not include a league donated the grantor in 1858 because of wounds received in the service of the republic of Texas. Id. That a grantor was wounded in the service of the Republic of Texas is no evidence that a league of land claimed to have been included in his deed of 1854 then belonged to him by virtue of Laws 1837, p. 93, providing that persons permanently wounded in such service were entitled to land, where the extent of his injuries did not appear. Id.

65. A quitclaim deed by one partner of all interest of the partnership conveys only the interest of the partner who executes the deed. Jackson v. Gunton [Pa.] 67 A. 467. Where one as heir of her father deeded her interest as such heir in certain property the deed did not pass her interest as heir of her mother. West v. Hermann [Tex. Civ. App.] 104 S. W. 428. Deeds from a person as heir of her parents held not to pass any interest in the lands acquired by her as heir of her brothers and sisters. Id. A deed releasing a railroad company from all claims for damages to property occasioned by construction and operation of its tracks in the street does not release damages caused by surface water flowing onto the premises because of a change of grade. Yazoo & M. V. R. Co. v. Smith [Miss.] 43 So. 611. A provision in a deed that it is subject to all railroad rights of way of all railroads "now located over said lands" does not confer rights on a company which was a mere trespasser. Clak v. Wabash R. Co., 132 Iowa, 11, 109 N. W. 309.

66. The right to damages in eminent domain where property is taken for street purposes at once accrues to the owner and does not pass by a deed, though the amount is not ascertained until after the deed is executed. In re Trinity Avenue of New York, 116 App. Div. 252, 101 N. Y. S. 613; Harris v. Kingston Realty Co., 116 App. Div. 704, 101 N. Y. S. 1104; Black v. Skinner Mfg. Co. [Fla.] 43 So. 919.

67. A conveyance from husband to wife "and the heirs of her body begotten by me," creates an estate tail which is by Shannon's Code, § 3673, converted into a fee. Speight v. Askins [Tenn.] 102 S. W. 74.

68. Under a statute converting fees tail into life estates, a deed to one for life remainder to heirs of her body, and she had two children, one who died in infancy and another who survived her, the surviving child took a fee. Dick v. Ricker, 222 Ill. 413, 78 N. E. 823. Under Ky. St., § 2345, providing that where there is a limitation over to bodily heirs or descendants the first taker takes but a life estate, a deed to one for life, remainder to bodily heirs or nearest blood, gives the father but a life estate and his only child could not convey a fee during his father's lifetime. Clubb v. King, 30 Ky. L. R. 830, 99 S. W. 935.

69. Deed from parent to children during their natural lives without power to alienate, remainder to their bodily heirs, held to give the first takers a life estate and not a fee tail which was converted into a fee by Ky. St. § 2343. Jones v. Carlin, 29 Ky. L. R. 1077, 96 S. W. 885.

70. In a deed to a man and wife "for their joint lives and for the life of the survivor of them" and "to their joint heirs," the use of the word "joint" before "heirs" does not render the rule in Shelleys Case inapplicable as designating who is to take after the termination of the life estates. Waller v. Pollitt, 104 Md. 172, 64 A. 1040. A deed showing that the grantor intended that the grantee should hold the legal title with power to convey it after her youngest child should attain the age of 21 years and containing a limitation over, held not within the rule in Shelley's Case, but to give the children a remainder. Berry v. Spivey [Tex. Civ. App.] 17 Tex. Ct. Rep. 11, 97 S. W. 511.

71. Under the rule that a conveyance of a fee implies a covenant of freedom from incumbrances, a title procured by the grantor on foreclosure of a mortgage given by them inures to the benefit of their grantee.

nants of warranty does not.[72] A confirmatory deed passes no estate not included in the original.[73] Where a deed contains a void limitation on his power of alienation, the grantee takes a fee.[74] As to whether a deed signed by one not described as grantor passes his estate, there is a conflict of authority.[75] A grantee takes subject to the conditions expressed in the deed.[76] A reference to streets for the purpose of boundary is not a claim of title to the streets.[77] At common law the word "heirs" was necessary in order to pass a fee,[78] but in some states a fee may pass without the use of such term.[79] Words of succession are not necessary to the granting of a fee to the state.[80] In Arkansas a deed to two or more creates a tenancy in common.[81] Parol evidence is not admissible to limit the estate conveyed,[82] but evidence of the conduct of the parties is admissible to show a verbal reservation of a growing crop.[83]

A reservation[84] is the creation of some new right issuing out of the thing granted which did not exist before as an independent right.[85] An exception withholds

Lowry v. Carter [Tex. Civ. App.] 102 S. W. 930. A conveyance containing covenants of warranty and against incumbrances estops the grantor from afterward enforcing a mortgage, unless subsequent grantees convey subject to mortgage, thereby setting of one estoppel against another. Tappan v. Huntington, 97 Minn. 31, 106 N. W. 98.

72. Rich v. Victoria Cooper Min. Co. [C. C. A.] 147 F. 380.

73. A quitclaim deed given for the purpose of releasing a vendor's lien, held insufficient to pass title to lots described therein which were not described in the original deed. Sanborn v. Crowdus Bros. & Co. [Tex.] 102 S. W. 719. Quitclaim deed discharging a vendor's lien held sufficient to pass title to lots therein described but not described by the first deed. Sanborn v. Crowdus Bros. & Co. [Tex. Civ. App.] 99 S. W. 444.

74. Suspending power of alienation for 21 years is void. Booker v. Booker, 104 N. Y. S. 21

75. The signing of a deed by one who is not mentioned or described in the body of the instrument as a grantor has no effect to convey such party's estate. Jason v. Johnson [N. J. Err. & App.] 67 A. 42. One who signs, seals, and delivers a deed, though not named as grantor, is bound as grantor and the deed conveys his estate. Sterling v. Park [Ga.] 58 S. E. 828.

76. Where one conveyed to a drainage district with condition that the grantee maintain a ditch and levee to protect other lands of the grantor, such deed when accepted becomes a valid contract between the parties, and the grantee takes the land burdened with the provisions of the deed. Sanitary Dist. of Chicago v. Martin, 227 Ill. 260, 81 N. E. 417. Where the grantee failed to perform such conditions and the grantor's remaining land was flooded, he was entitled to damages. Id. One who purchases an equitable fee subject to be divested by the death of the grantor prior to that of the life tenant takes subject to such contingency. Clay v. Chenault, 29 Ky. L. R. 1085, 96 S. W. 1125.

77. Where conveyances of lots on both sides of an abandoned street which had never been opened refer to it and lots are bounded by the center and side of it, such description is for the purposes of boundary only and not a claim of the streets. Lewisohn v. Lansing Co., 51 Misc. 274, 100 N. Y. S. 1077.

78. No estate of inheritance is created by a deed which mentions heirs only in the warranty clause. Wilson v. Garland [S. C.] 57 S. E. 728.

79. A deed to a grantee "his children and assigns forever" conveys a fee under Rev. St. 1899, § 4590. Tygard v. Hartwell, 204 Mo. 200, 102 S. W. 989. The use of the word "heirs" or other words of perpetuity in a trust deed are not necessary to vest a fee simple title in a trustee where the face of the deed discloses a purpose to grant power of sale to the trustee. Vaughan v. Zitscher, 4 Ohio N. P. (N. S.) 90. The omission to name successors in a trust deed is without significance so far as sales by the original trustee are concerned, and should a new trustee be appointed he can be empowered to carry out the purpose of the trust so far as is found necessary. Id.

80. A deed to the Territory of Washington did not require words of succession in order to pass a fee, because it was to the government which has an uninterrupted existence, though the form was changed from territory to state. Sylvester v. State [Wash.] 91 P. 15.

81. Kirby's Dig. § 739, expressly provides that an estate granted to two or more persons is deemed to create a tenancy in common unless expressly declared otherwise. Lester v. Kirtley [Ark.] 104 S. W. 213.

82. When a deed is broad enough to include growing crops, parol evidence is not admissible to deny or contradict its terms. Carter v. Childress [Tex. Civ. App.] 99 S. W. 714.

83. Where a deed was sufficient to carry title to crops, the fact that the grantee permitted the grantor to cut a crop and then offered to buy it was admissible to explain the conduct of the parties and rebut the grantee's claim to the crop. Carter v. Childress [Tex. Civ. App.] 99 S. W. 714. Where a deed was broad enough to include a growing crop but the grantee permitted the grantor to cut it and then offered to buy it, whether there was a verbal contract reserving the crop was for the jury. Id.

84. See 7 C. L. 1118.

85. Edwards v. Brusha, 18 Okl. 234, 90 P. 727. A provision in a deed conveying land by metes and bounds, reserving certain strips of land for street purposes, creates a reservation and the fee passes to the grantor. Id. Where a grantor reserved out of a tract conveyed to a cemetery asso-

from the operation of the deed some part of the estate which would otherwise pass.[86] A reservation cannot be made to a stranger to the title.[87] A reservation or exception is to be construed in favor of the grantor.[88] An exception which refers to certain conveyances which in fact exist is sufficiently certain.[89]

Conditions and restrictions.[90]—The law favors the present vesting of estates and will lean to a construction which makes a condition subsequent rather than precedent.[91] If the act upon which the estate depends must be performed before the estate can vest, it is a common precedent,[92] but if the performance of the act does not necessarily precede the vesting of title but may accompany or follow it, it is a condition subsequent.[93] Conditions subsequent[94] are not favored[95] and must be created by express terms,[96] and if it is doubtful whether terms used create a condition or covenant, they will be construed as creating the latter,[97]

ciation a certain lot for burial purposes, such lot was not a part of his estate subject to partition among his heirs. Sharp v. Sharp, 148 Mich. 278, 111 N. W. 767. Where at the time of execution of a deed all rights of the owner of a ditch across the property had been terminated, a provision reserving such rights was neither an exception nor reservation. Burlington & C. R. Co. v. Colorado Eastern R. Co. [Colo.] 88 P. 154. Exception in a deed held not a reservation to grantor but a disavowal of title to the excepted land. Kran v. Case, 123 Ill. App. 214.

86. Edwards v. Brusha, 18 Okl. 234, 90 P. 727; Spencer v. Wabash R. Co., 132 Iowa, 129, 109 N. W. 453. It differs from a reservation in that the latter creates a new right issuing out of the thing granted which did not exist before as an independent right. Id. A reservation of all standing timber, with a right to remove it within 40 years held an exception of such timber which passed to his heirs and they must remove it within the period prescribed. Williams v. Jones [Wis.] 111 N. W. 505. Where a railroad right of way was excepted, on abandonment of the road, the land reverted to the grantor and not to the grantee. Hall v. Wabash R. Co., 133 Iowa, 714, 110 N. W. 1039.

87. Reservation of rent held void. In re Palin [R. I.] 65 A. 282; Brace v. Van Eps [S. D.] 109 N. W. 147; Edwards v. Brusha, 18 Okl. 234, 90 P. 727.

88. Pavkovich v. Southern Pac. R. Co. [Cal.] 87 P. 1097. An exception of land occupied by a railroad as a right of way, excepts the soil itself and not merely an easement. Hall v. Wabash R. Co., 133 Iowa, 714, 110 N. W. 1039. A deed to a tract of land reserving timber held to reserve to the grantor all dead timber suitable for sawmill purposes, except so much thereof as was necessary for plantation purposes which passed to the grantee. A reservation of a life estate in the grantor does not give him power to sell growing timber. Gulf Red Cedar Lumber Co. v. Crenshaw [Ala.] 42 So. 564.

89. Clause excepting portions of premises conveyed by four certain persons held to include land conveyed by an unrecorded deed. Sanford v. Stilwell, 101 Me. 466, 64 A. 843.

90. See 7 C. L. 1119.

91. Spies v. Arvondale & C. R. Co., 60 W. Va. 389, 55 S. E. 464. A condition in a grant of underlying coal that it should be void unless a railroad was built into the region within five years is a condition subsequent and not precedent. Wilmore Coal Co. v. Brown, 147 F. 931.

92. Spies v. Arvondale & C. R. Co., 60 W. Va. 389, 55 S. E. 464. Where a deed was executed to one upon her agreement to pay a certain sum within a certain time, the payment of such sum was not a condition precedent to vesting of title. Mackey v. Kerwin, 222 Ill. 371, 78 N. E. 817.

93. Spies v. Arvondale & C. R. Co., 60 W. Va. 389, 55 S. E. 464.

94. Conveyance construed and held upon condition subsequent that the grantee and his heirs should build and forever maintain a line fence. McCue v. Barrett, 99 Minn. 352, 109 N. W. 594. A conveyance in trust to the use of the preacher who shall preside at a certain church and for no other purpose, the land to revert if otherwise used, is upon condition subsequent. White v. Britton, 75 S. C. 428, 56 S. E. 232. A provision that the grantee should pay a certain annual sum to the grantor for life and on failure to do so the deed should be void held a condition subsequent upon a breach of which title revested in the grantor free from a mortgage executed by the grantee. Minneapolis Threshing Mach. Co. v. Hanson [Minn.] 112 N. W. 217.

95. An expressed term will not be held to impart such a condition. Wilmore Coal Co. v. Brown, 147 F. 931.

96. A conveyance to a city of land for park purposes on condition that the premises should be held for no other purposes is in trust and not upon condition and may not be recovered on the ground that it was not so used within a reasonable time. Ashuelot Nat. Bank v. Keene [N. H.] 65 A. 826. A provision that upon final abandonment of a right of way over the premises the rights granted should revert to the grantors should be construed as a limitation and not a condition subsequent, and upon happening of the contingency the use of the property vested in the owner of the fee without reentry. Burlington & Co. R. Co. v. Colorado Eastern R. Co. [Colo.] 88 P. 154.

97. A provision that the grantees shall not permit the property to be used as a cemetery is a covenant and not a condition subsequent. St. Peter's Church v. Bragaw, 144 N. C. 126, 56 S. E. 699. A provision in a deed of a right of way requiring a station house to be erected and all trains stopped at a certain place held a covenant and not a condition. Minard v. Delaware etc., R. Co. [C. C. A.] 153 F. 578.

but where the intent of the parties is clear, their rights are determined and enforced as in other contracts.[98] Conditions subsequent are to be strictly construed against the grantor,[99] and will not be enforced if in the nature of a penalty [1] without allowing the grantee a reasonable time within which to perform,[2] and nothing will be held to constitute a breach of such condition which is not a clear violation of its terms,[3] a forfeiture for breach of condition subsequent may be waived by acts as well as by express agreement,[4] and where once waived the grantor cannot again take advantage of it.[5] An estate upon condition subsequent is not defeated by mere breach of the condition, but such breach must be followed by re-entry,[6] and re-entry can be made only by the grantor or his privies in blood.[7] The question of method of forfeiture for breach of condition subsequent can be taken advantage of by the grantee only.[8]

Restrictions.[9]

Extinguishment of rights.[10]—Though delivery back of an unrecorded deed does not affect the legal title, yet where it is done with intention that it be destroyed and for the purpose of revesting title, it passes the equitable title.[11]

98. Where a grantee forfeited land by breach of condition subsequent to paying the grantor an annual sum, he could after default and re-entry by the grantor establish a mortgage lien by making payments past due. Minneapolis Threshing Mach Co. v. Hansen [Minn.] 112 N. W. 217. Where a state held a deed from a certain person and secured another deed from his heirs reciting that unless the land remain as a capitol site the deed should be void, it is estopped to assert that it holds under different tenure from that expressed in the later deed. Sylvester v. State [Wash.] 91 P. 15. A conveyance on condition subsequent is in legal effect a conveyance of an absolute title with a mortgage back. Ordway v. Farrow, 79 Vt. 192, 64 A. 1116. Where land is conveyed for railroad purposes only the grantor could recover a part of the land abandoned. Mobile, etc., R. Co. v. Kamper, 88 Miss. 817, 41 So. 513.

99. McCue v. Barrett, 99 Minn. 352, 109 N. W. 594. Provisions for forfeiture for breach of condition are strictly construed and viewed with disfavor. Richter v. Distelhurst, 116 App. Div. 269, 101 N. Y. S. 634.

1. A provision for forfeiture in case of failure to comply with a building restriction is a penalty and is not enforceable. Klasener v. Robinson, 30 Ky. L. R. 1032, 100 S. W. 255.

2. Where a deed is upon condition subsequent that the grantee must remove timber within three years, a forfeiture will not be decreed but the grantee will be allowed a reasonable time to perform after the expiration of the period. Ordway v. Farrow, 79 Vt. 192, 64 A. 1116.

3. Where land was conveyed "for railroad purposes only," the grantor could not have the deed canceled on the ground that it was understood that a main line would be located on the land and it was used for a branch line. Mobile, etc., R. Co. v. Kamper, 88 Miss. 817, 41 So. 513. A condition in a deed to underlying coal that the grant should be void "if a railroad be not commenced within five years from date" is satisfied by a road constructed close enough to the coal fields to carry the coal to market. Wilmore Coal Co. v. Brown, 147 F. 931. A condition subsequent that the land shall be occupied only by the pastor of a certain church is not breached by an offer by one of the trustees, to sell, nor by the fact that it is occupied by the pastor of another church, the church having been attached to another circuit having a parsonage and the occupation being only temporary. White v. Britton, 75 S. C. 428, 56 S. E. 232. A provision that in case the grantees abandoned the property it should revert is not violated by a sale of the property by the grantee. St. Peter's Church v. Bragaw, 144 N. C. 126, 56 S. E. 688. A provision for forfeiture in case a certain class of building is erected on the tract is equivalent to a provision for re-entry by the grantor. Richter v. Distelhurst, 116 App. Div. 269, 101 N. Y. S. 634. A provision for re-entry on breach of condition subsequent must be based on a consideration. Id.

4. Forfeiture for breach of condition subsequent to build and maintain a line fence held waived where it was removed and remained down for 12 years. McCue v. Barrett, 99 Minn. 352, 109 N. W. 594. The right to claim a forfeiture for failure to maintain a school building on certain land is waived where after the school building was removed for seven years the grantor permitted it to be relocated on the land. Trustees of Common School Dist. No. 7 v Patrick [Ky.] 102 S. W. 237.

5. McCue v. Barrett, 99 Minn. 352, 109 N. W. 594.

6. White v. Britton, 75 S. C. 428, 56 S. E 232.

7. A condition subsequent inures only to the benefit of the grantor and his privies in blood. Wilmore Coal Co. v. Brown, 147 F. 931. Where a provision in a deed executed by trustees provided for forfeiture for breach of condition, it could not be construed to authorize re-entry by heirs of the trustees. Richter v. Distelhurst, 116 App. Div. 269, 101 N. Y. S. 634.

8. Not by a lienor. Mosca Town Co. v. Wellington [Colo.] 89 P. 783.

9. See 7 C. L. 1121. See, also, Buildings and Building Restrictions, 9 C. L. 441.

10. See 7 C. L. 1121.

11. Crossman v. Keister, 223 Ill. 69, 79 N. E. 58.

DEFAULTS.

§ 1. Elements and Indicia of Default (960).
§ 2 Procedure on Default; Taking Judgment (961).
§ 3. Opening Defaults (961). Appeal (963).
§ 4. Operation and Effect of Default and Proof of Damages (963).

§ 1. *Elements and indicia of default.*[12]—A default is the failure of a party to an action to take some step therein required of law, such as the failure to plead[13] within the statutory time[14] or an extension thereof,[15] in the first instance or after the original pleading has been stricken out.[16] Likewise, the failure to file a pleading[17] or to call the court's attention to a pleading filed.[18] may place a party in default. Before one can be in default, however, he must be under a legal duty to act, hence the court must have acquired jurisdiction[19] by valid process[20] legally served.[21] Where issue has been joined, mere failure to be present at the trial thereof,[22] or to present evidence thereon,[23] does not generally put a party in default, although the contrary is held in New York.[24] A case may be noticed for trial before the expiration of the time within which defendant may amend his answer, and a default

12. See 7 C. L. 1122.

13. Presence of defendant on answer day in court of Coffeyville without answering does not prevent default. Stockman v. Williams [Kan.] 91 P. 64. Where answer is returned under Code Civ. Proc. § 528, because of insufficient verification, defendant has reasonable time to cure defect, and default judgment entered within three hours is premature. Rosenthal v. Cohn, 105 N. Y. S. 943. Where complaint alleges sale which was denied and defendant avers by counterclaim that goods were shipped to be sold on commission and demands judgment for sale price less commissions, complaint puts answer in issue so that plaintiff is not in default. Tillinghast v. Providence Cotton Mills, 143 N. C. 268, 55 S. E. 621. Motion for default against defendants for failing to answer within statutory period cannot be sustained where not made until after defendants have filed meritorious motion to make complaint more certain. Washington Dredging & Improvement Co. v. Cannel Coal Co. [Wash.] 88 P. 836.

14. Rule of court of common pleas, adopted under Act April 22, 1889 (P. L. 41), providing that judgment in assumpsit may be entered on failure of defendant to plead within 15 days after return day, etc., held not in conflict with act May 25, 1887 (P. L. 271). Johnson v. Royal Ins. Co. of Liverpool [Pa.] 67 A. 749.

15. Where court permits untimely filing of pleading, default cannot thereafter be entered. Tillinghast v. Providence Cotton Mills, 143 N. C. 268, 55 S. E. 621. Where court strikes answer to interrogatories submitted under Ballinger's Ann. Code. St. § 6009, and demands a more specific answer, he should fix time for filing same so as to fix time of default. Lawson v. Black Diamond Coal Min. Co. [Wash.] 86 P. 1120.

16. Where answer is stricken out as "sham and unverified" and defendant elects to stand thereon he may be adjudged in default and judgment entered without specific ruling on motion for security for costs. Pilant v. Hirsch & Co. [N. M.] 88 P. 1129.

17. Under Rev. St. 1898, § 2999, providing that pleadings subsequent to complaint must be filed with clerk and copy thereof served on adverse party or attorney, service on attorney by leaving copy of demurrer at residence and mailing of original to clerk at time when it could not reach him within time for filing does not prevent default. Cutler v. Haycock [Utah] 90 P. 897.

18. Bartlett v. Jones Co. [Tex. Civ. App.] 103 S. W. 705.

19. Where court had jurisdiction of subject-matter and record recited that defendant appeared by counsel and moved to dismiss cause and that default was entered for failure to plead as required by rule, court had prima facie jurisdiction. Everett v. Wilson, 34 Colo. 476, 83 P. 211.

20. Under Sayles' Rev. Civ. St. 1897, art. 1214, requiring citation to command officer to summon the "defendant," citation directing that agent of defendant corporation be summoned is insufficient. Mutual Life Ins. Co. v. Uecker [Tex. Civ. App.] 101 S. W. 872. For validity of process, see Process, 8 C. L. 1449.

21. Default judgment against foreign corporation based on service upon one not its agent is void. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 89 P. 535. For service of process, see Process, 8 C. L. 1449.

22. Leahy v. Wayne Circuit Judge, 144 Mich. 304, 13 Det. Leg. N. 158, 107 N. W. 1060. Plaintiff must prove his case. First Nat. Bank v. Sutton Mercantile Co. [Neb.] 110 N. W. 306. Where defendant filed plea to jurisdiction of court over his person which was denied, judgment entered on trial thereof is not by default. Davis v. Robinson [Mo. App.] 102 S. W. 1048.

23. Where contestants of will offer no evidence, there is no default as to them or as to one who could have become party but did not. Seward v. Johnson, 27 R. I. 396, 62 A. 569.

24. Where, on day peremptorily set for trial, court had before it unfinished case and another ready for trial and which was tried, and defendant's counsel was engaged in supreme court, plaintiff should not have been allowed to take an inquest until case was actually called for trial. Pierce, B. & P. Mfg. Co. v. Kleinfeld, 103 N. Y. S. 86.

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DEFAULTS—Cont'd.

created thereby stands unless defendant amends.[25] The filing of a pleading after a default has been taken does not affect the same.[26] In Washington a default may be interposed for failure to answer material [27] interrogatories, but not for a failure to produce documents called for.[28] A default judgment, however, cannot be entered unless plaintiff's pleadings authorize a recovery.[29]

§ 2. *Procedure on default; taking judgment.*[30]—A special appearance does not entitle defendant to notice before entry of default.[31] After default has been duty entered,[32] a judgment may be had thereon [33] upon legal proof of jurisdictional facts,[34] and the filing of the instrument sued on where required by statute.[35] The county court of Nebraska cannot enter final judgment on the day of defendant's defaults.[36]

§ 3. *Opening defaults. Grounds.*[37]—The opening of default judgments is elsewhere treated.[38] In the exercise of its judicial discretion,[39] unless prohibited by statute or court rule,[40] a court may on timely application,[41] and upon a sufficient excuse being shown,[42] open a default and allow a defense upon reasonable terms.[43]

25. Code Civ. Proc. § 977. Cook v. Empire Furniture Co., 103 N. Y. S. 581.

26. Code Civ. Proc. § 542, and plaintiff may proceed to inquest. Langer v. Swasey, 54 Misc. 301, 103 N. Y. S. 1086.

27. Ballinger's Ann. Codes & St. § 6013, providing for striking of pleading and entry of judgment upon failure of party to answer interrogatories submitted under § 6009, held to apply only to material interrogatories, hence not unconstitutional as taking property without due process of law. (Lawson v. Black Diamond Coal Min. Co. [Wash.] 86 P. 1190), and one seeking to have pleadings stricken and default entered must allege and prove materially of interrogatories (Id.).

28. Ballinger's Ann. Codes & St. § 6047, prescribes remedy for failure to produce documents called for, and it is error to strike pleadings and render default under § 6013. Lawson v. Black Diamond Coal Min. Co. [Wash.] 86 P. 1120.

29. Complaint alleging that defendant was indebted in specific sum for merchandise sold, that specified sum had been paid, leaving named balance due, and which made a verified account a part of complaint, held sufficient. Poole v. Peoria Cordage Co., 6 Ind. T. 298, 97 S. W. 1015. Allegation that defendants became indebted to plaintiff in certain sum is sufficient averment of indebtedness to sustain default judgment as against objection that it is conclusion of law. Kililea v. Wilson [Cal. App.] 89 P. 621.

30. See 7 C. L. 1123.

31. Under chancery rule 5. Hews v. Hews, 145 Mich. 247, 13 Det. Leg. N. 482, 108 N. W. 694.

32. Entry "Def'lt" on judge's docket held sufficient entry of fact that no defense had been filed. Brawner v. Maddox, 1 Ga. App. 332, 58 S. E. 278. Entry of final judgment by clerk of circuit court on appearance day in face of duly filed appearance without prior entry of default is absolutely void. King v. Dekle [Fla.] 43 So. 586.

33. Court of Coffeyville may render judgment by default at any time after expiration of time for answering. Schockman v. Williams [Kan.] 91 P. 64. Ballinger's Ann. Codes & St. § 5090, providing that in action on contract for recovery of money only plaintiff may file proof of personal service of summons and complaint on defendant, and court "shall" thereupon enter judgment, held not to require immediate entry so that court could not enter default judgment four years after filing of proof. Peirce v. National Bank of Germantown [Wash.] 87 P. 488. Under Rev. St. 1899, § 597, as amended by Laws 1901, p. 86 (Ann. St. 1906, p. 623), and § 826 (Ann. St. 1906, p. 796), where personal service was made more than 30 days before first day of term at which summons was returnable, and, upon change of venue, transcript and papers were filed more than 10 days before opening of term of court to which transferred, judgment rendered at such term was not premature. Davis v. Robinson [Mo. App.] 102 S. W. 1048.

34. Recital in decree pro confesso that it was "made known" to register that party personally served was president of defendant corporation, held insufficient as it might have been made known without legal proof. Boyett v. Frankfort Chair Co. [Ala.] 44 So. 546.

35. Where final judgment entered by clerk in action on promissory notes and open account states that plaintiff "produced and filed in this court the original notes of the defendant and his sworn account," etc., it furnishes sufficient statement of the evidence upon which judgment was entered. Lord v. Dowling Co. [Fla.] 42 So. 585.

36. Oakdale Heat & Light Co. v. Seymour [Neb.] 110 N. W. 541.

37. See 7 C. L. 1124.

38. See Judgment. 8 C. L. 530.

39. Opening of default at trial term after defendant conforms to conditions imposed by Civ. Code 1895, § 5072, is discretionary. Brawner v. Maddox, 1 Ga. App. 332, 58 S. E. 278. Held no abuse to open where default occurred through sickness of counsel. Id. Where default is taken off and defendant again defaults, it is not abuse of discretion to deny motion to take off second default. Squier v. Barnes, 193 Mass. 21, 78 N. E. 731.

40. It is not competent to vacate judg-

Procedure.[44]—Application to set aside a default confers jurisdiction.[45] The facts set forth in the return of the officer serving the summons cannot be attacked on a motion to open a default judgment.[46] The answer filed with the application must set forth facts.[47] Showing a full and complete defense to so much of the claim as it is directed against,[48] and it must appear that there is a reasonable probability of establishing such defense on the trial.[49] Fraud need not be directly alleged.[50] The court must pass upon all the consistent grounds of the motion.[51] Where the appli-

ment on motion for new trial, so as to allow opening of default on ground that there were no "proceedings taken after default," thus indirectly violating rule 12, subd. b (64 N. W. 4). Travelers' Ins. Co. v. Kent Circuit Judge, 144 Mich. 687, 13 Det. Leg. N. 279, 108 N. W. 363.

41. Right of party under Civ. Code 1895, § 5070, to open default within 30 days by payment of costs cannot be taken away by dating default as of previous term. Currie v. Deaver, 1 Ga. App. 11, 57 S. E. 897. Under Acts 1905, pp. 404, 405, §§ 17, 18, judge of city court of Washington cannot open default after trial term, rules of superior court in respect thereto being inapplicable. Thurmond v. Groves & Co., 126 Ga. 779, 55 S. E. 915. Code Civ. Proc. § 473, authorizing court to vacate default judgment if application is made within reasonable time after entry, in no case extending more than six months, does not prevent denial for untimely application though six months has not elapsed. Smith v. Pelton Water Wheel Co. [Cal.] 90 P. 932, 934, 1135. Where application was not made for four months after counsel had knowledge of judgment and only excuse offered was illness of non-resident counsel and that local counsel thought that appeal from denial of motion for change of venue stayed proceedings, held untimely. Id. Where inquiry of damages is required, office judgment does not become final on last day of succeeding term of court, but defendant may plead at any time before inquiry. Code 1899, c. 125, §§ 46, 47, construed. Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515; Federation Window Glass Co. v. Cameron Glass Co., 58 W. Va. 477, 52 S. E. 518.

42. Inexcusable failure to employ counsel to enter appearance held no ground for opening default. Benedict v. Hadlow Co. [Fla.] 42 So. 239. Where case in which rule nisi to foreclose mortgage had been granted was taken out of order at first term and rule absolute granted for lack of answer, motion to reinstate and for leave to file defense held properly granted on showing of meritorious defense, and that it would have been filed in due time if case had been taken up in order. Nays v. Harkness, 127 Ga. 182, 56 S. E. 291. Where answer discloses meritorious defense and there is reasonable excuse for delay resulting in default, default should be opened where no prejudice has resulted to plaintiff. Barrie v. Northern Assur. Co., 99 Minn. 272, 109 N. W. 248. Where it was agreed between counsel that it would be all right for defendant's counsel to take a particular train to place of trial, and plaintiff's attorney failed to advise court of situation although train was due soon, default should be opened. Id. For the power of a court to open and the grounds for opening a default judgment, see Judgments, 8 C. L. 530.

43. Court may impose costs as condition of opening default even as against a poor litigant. Cohen v. Meryesh, 48 Misc. 628, 96 N. Y. S. 264. Where default judgment is entered notwithstanding affidavit of engagement entitling defendant to adjournment as matter of right, must be opened unconditionally. Dorfman v. Hirschfield, 53 Misc. 538, 103 N. Y. S. 698. Where defendant has been in default for 56 days, it is not abuse of discretion to grant leave to answer to merits only, refusing to allow plea that plaintiff, a foreign corporation, had not complied with § 39, c. 23, Gen. St. 1901. Kansas Torpedo Co. v. Erie Petroleum Co. [Kan.] 89 P. 913.

44. See 7 C. L. 1126.

45. Motion to set aside default for lack of service should not be denied on ground that no default exists, since motion confers jurisdiction. Waldman v. Mann, 101 N. Y. S. 757.

46. Especially those facts which it was officer's duty to set forth and where return is sufficient on its face. Talbott v. Southern Oil Co., 60 W. Va. 423, 55 S. E. 1009.

47. In motion to set aside default judgment in action to quiet title, applicant must set forth facts upon which he relies, and answer denying allegation of plaintiff's petition is insufficient. Peterson v. Plunkett [Cal. App.] 88 P. 283.

48. Need not cover entire claim. Williams v. Kiowa County Com'rs, 74 Kan. 693, 88 P. 70. Defendant's claim must appear from answer and whole case to be meritorious. Kremer v. Sponholz, 129 Wis. 549, 109 N. W. 527. Although affidavits filed are insufficient as affidavits of merit, answer denying all material allegations of complaint is sufficient. Montijo v. Robert Sherer & Co. [Cal. App.] 91 P. 261. Where evidence on cause of defendant's default is conflicting, issue should not be decided upon affidavits but opened on proper terms. Monroe Bank v. Lichtenstein, 96 N. Y. S. 260.

49. Truth of allegations of proposed answer may be tested by proofs produced on motion as to probability that claim can be established on trial. Kremer v. Sponholz, 129 Wis. 549, 109 N. W. 527. Allegations of answer and facts of case held so inconsistent as to authorize court to refuse to open judgment because of improbability of defendant's ability to establish claim. Id.

50. Complaint to vacate judgment alleging willful disregard of court rule in setting case for trial without notice, whereby complainant was prejudiced, held sufficient though not directly alleging fraud. Riddle v. Quinn [Utah] 90 P. 893.

51. Where defendant moved to open judgment by default on ground that summons was not personally served and also under Code Civ. Proc. § 195, finding of due service does not render statutory provision inapplicable so as to dispose thereof. Vander Veen v. Wheeler [S. C.] 56 S. E. 679.

cant fails to appear at the hearing, the motion should be dismissed and not denied,[52] but if denied such order is valid until set aside or reversed.[53]

Appeal.[54]—A default judgment,[55] and an order opening a default[56] are not appealable in the first instance except as provided by statute.[57] An order denying motion to set aside a default and the judgment entered thereon are appealable.[58] Mandamus to compel a judge to vacate an order setting aside a default and order of reference will not lie until motion to vacate has been made.[59]

§ 4. *Operation and effect of default and proof of damages.*[60]—Where both parties appear on return day in the municipal court, failure of plaintiff to appear on day of trial does not deprive court of jurisdiction.[61] A default entitles the adverse party to a judgment thereon,[62] although the defaulting party subsequently performs if the default has been duly entered.[63] In some states plaintiff must prove particular causes of action, notwithstanding defendant's default.[64] Unless admitted,[65] unliquidated damages[66] must be established by legal proof,[67] unless otherwise provided by statute.[68] A defendant in default cannot introduce evidence upon inquest of damages which tends to establish a defense,[69] or an affirmative claim.[70]

Defenses; Definite Pleading; Del Credere Agency; Demand; Demurrage; Demurrers; Demurrer to Evidence; Dentists; Departure; Depositories, see latest topical index.

52. Levine v. Munchik, 51 Misc. 556, 101 N. Y. S. 14.

53. Cannot be evaded by applying to different judge for same relief. Levine v. Munchik, 51 Misc. 556, 101 N. Y. S. 14.

54. See 7 C. L. 1127.

55. Municipal court default judgment. Rogg v. Simelowitz, 102 N. Y. S. 535. Appeal from default judgment will be dismissed where motion to open default has not been made. Chute Co. v. Westby, 52 Misc. 115, 101 N. Y. S. 527.

56. Order of municipal court (Wolter v. Liebmann, 52 Misc. 517, 102 N. Y. S. 487) is not appealable in first instance. Laws 1902, p. 1563 (Dutch v. Parker, 51 Misc. 664, 101 N. Y. S. 271).

57. Order opening but not vacating a default judgment is appealable under Municipal Court Act, Laws 1902, p. 1486, c. 580. Dorfman v. Hirschfield, 53 Misc. 538, 103 N. Y. S. 698. Where default judgment is based on insufficient order for substituted service, remedy is by appeal as provided by Municipal Court Act, Laws 1902, p. 1578, c. 580, §§ 310, 311, not by motion to set aside order for substituted service. Wolter v. Liebmann, 52 Misc. 517, 102 N. Y. S. 487.

58. Barrie v. Northern Assur. Co., 99 Minn. 272, 109 N. W. 248.

59. Aitken v. Chippewa Circuit Judge, 146 Mich. 129, 13 Det. Leg. N. 708, 109 N. W. 223.

60. See 7 C. L. 1128.

61. May open default judgment entered. Droege v. Hertz, 48 Misc. 346, 95 N. Y. S. 570.

62. Where demurrer to petition on ground that it does not state cause of action is sustained, judgment may be entered if plaintiff does not take leave to amend. Gordon v. Omaha [Neb.] 110 N. W. 313.

63. Filed pleading. Cutler v. Haycock [Utah] 90 P. 897.

64. In actions commenced by attachment, plaintiff must prove his demand. Civ. Code 1895, § 4961, providing that averments not denied shall be taken as true being inapplicable. Fincher v. Stanley Elec. Mfg. Co., 127 Ga. 362, 56 S. E. 440. Evidence on confirmation of default in actiou for separation from bed and board held sufficient as to defendant's earnings to support judgment entered, excluding incompetent evidence admitted. O'Brien v. D'Hemecourt, 118 La. 996, 43 So. 654. Not necessary under Code Civ. Proc. § 585, for plaintiff in action to determine adverse claims to prove case upon default. City of Los Angeles v. Los Angeles Farming & Milling Co. [Cal.] 89 P. 615.

65. Judgment by nil dicit does not admit amount of damages, and defendant is entitled to have same assessed by jury. Loellke v. Grant, 120 Ill. App. 74.

66. Fact that insurer of plate glass window agreed with insured as to damage does not render damages liquidated as against tort feasor breaking same. Maryland Casualty Co. v. Lanham, 124 Ga. 859, 53 S. E. 395.

67. Judgment entered in justice's court on unliquidated claim for damages without proof thereof other than plaintiff's affidavit is illegal. Maddox v. Central of Georgia R. Co., 1 Ga. App. 46, 57 S. E. 1062.

68. Under Code 1899, c. 125, §§ 46, 47, inquiry of damages is necessary in action of assumpsit on common counts. Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515. Where declaration contains common counts, necessity of inquiry is not avoided under Code 1899, c. 125, § 45, because of special count upon promissory notes. Federation Window Glass Co. v. Cameron Glass Co., 58 W. Va. 477, 52 S. E. 518.

69. That work for which suit was brought was defectively done. Jerseyville Shoe Mfg. Co. v. Bell, 125 Ill. App. 496.

70. Defendant cannot assert his set off upon hearing for assessment of damages after default. Squier v. Barnes, 193 Mass. 21, 78 N. E. 731.

DEPOSITIONS.

§ 1. Occasion or Necessity; Right to Take (964).
§ 2. Procedure to Obtain Deposition (964).
§ 3. Taking the Testimony or Evidence Adduced (966). Officers Authorized to Take (966). Notice of Hearing and Attendance of Witness (966). Proceedings at Hearing (966). Cost of Taking and Transcribing (967).
§ 4. Returning and Filing (967).
§ 5. Suppression and Objections before Trial (967).
§ 6. Use as Evidence (968). Objections (969).

§ 1. *Occasion or necessity; right to take.*[71]—The power to award a commission to take depositions depends solely upon statute.[72] Usually authority is given to issue a commission to examine a party to the action as well as a witness.[73] The statute determines in what actions depositions may be taken,[74] though in the absence of statute the court may sometimes provide by rule.[75] The issuance of a commission is sometimes made mandatory upon satisfactory proof of facts authorizing it.[76] Where a judicial discretion is vested in the court, it is not a proper exercise of that discretion to issue a commission when it clearly appears that the witnesses will not swear to the facts sought to be established.[77] A commission will not be refused on the ground that the evidence sought is privileged.[78] In New York it is error to vacate an ex parte order for the examination of a defendant on the sole ground that the action is pending before a referee.[79] The Federal courts are not given discretion to take depositions not authorized by Federal law.[80]

§ 2. *Procedure to obtain deposition.*[81]—Usually, but not always,[82] it is neces-

71. See 7 C. L. 1129.

72. Gardner v. Roycrofters, 103 N. Y. S. 637.

73. Under Code Civ. Proc. § 887, such commission may issue in proper case. Oakes v. Riter, 118 App. Div. 772, 103 N. Y. S. 849. See, also, Discovery and Inspection, 7 C. L. 1167.

74. Under Code Civ. Proc. §§ 887, 888, a commission to take testimony of nonresident witnesses upon written interrogatories will issue where an issue of fact has been joined in action pending in court of record and the testimony is material to applicant in the prosecution or defense thereof. Oakes v. Riter, 118 App. Div. 772, 103 N. Y. S. 849; Tirpak v. Hoe, 53 Misc. 529, 103 N. Y. S. 798; Cullinan v. Dwight, 51 Misc. 221, 100 N. Y. S. 896; Gardner v. Roycrofters, 103 N. Y. S 637. An application cannot be granted under this statute to take testimony of witnesses material to a motion yet to be made to punish for contempt, upon which no issues have been joined. Gardner v. Roycrofters, 103 N. Y. S. 637. Nor can such an application be granted under Code Civ. Proc. § 894, authorizing an open commission where the testimony is "material and necessary in the prosecution or defense of the action." Id. A reference by agreement, pursuant to Code Civ. Proc. § 2718, of a disputed claim against an estate is an action in the supreme court in which an issue of fact has been joined, within the meaning of § 893, authorizing in such case the issuance of a commission to take depositions of witness without the state upon oral questions. Deery v. Byrne, 104 N. Y. S. 836.

75. Rule 7, § 4, of the rules of the circuit court for the Eastern District of Pennsylvania, providing for taking of depositions on rules to show cause, is valid and does not conflict with any federal statute or any state note adopted by the Conformity act. Despeaux v. Pennsylvania R. Co., 147 F. 926.

76. Section 889, Code Civ Proc., requiring issuance of commission to take testimony upon written interrogatories upon satisfactory proof of the facts authorizing its issuance under §§ 887, 888, is mandatory in the absence of bad faith. Oakes v. Riter, 118 App. Div. 772, 103 N. Y. S. 849. Under Rev. St. 1899, § 2878 (Ann. St. 1906, p. 1660), commission to take testimony of nonresident witness issues as a matter of right. Hendricks v. St. Louis Transit Co. [Mo. App.] 101 S. W. 675.

77. So held upon motion under Code Civ. Proc. § 885, to obtain depositions to be used upon motion for new trial. Davis v. William Rosenzweig Realty Operating Co., 53 Misc. 1, 102 N. Y. S. 868. But it was held proper under this statute to grant such motion where witness refused to verify proposed affidavit on ground that he had no knowledge of the matters therein contained, but, nevertheless, refused to make any affidavit himself. Id.

78. Evidence sought from employes of defendant, a manufacturer, in regard to formula of preparation sold as a medicine. Cullinan v. Dwight, 51 Misc. 221, 100 N. Y. S. 896.

79. Code Civ. Proc. § 870. Hallenberg v. Greene, 105 N. Y. S. 664.

80. Smith v. International Mercantile Co., 154 F. 786. The Act Cong. March 9, 1892, c. 14, 27 Stat. 7 (U. S. Comp. St. 1901, p. 664), did not enlarge the power of the Federal courts in this respect. Id. The depositions authorized by P. L. N. J. 1903, p. 537, § 140, cannot be taken in cases in Federal courts sitting in New Jersey. Id.

81. See 7 C. L. 1130.

82. Under Code Pub. Gen. Laws, art. 35, §§ 16-18, it is not necessary in order to take

sary in order to take depositions that a commission should be issued by the court. The commission is issued upon motion accompanied by affidavit showing the facts necessary to authorize its issuance.[83] The affidavit used on a motion for a commission to examine a nonresident witness need not set out the exact place of his residence.[84] The class of commission to be issued to take the testimony of a witness without the state must rest in judicial discretion, to be exercised according to the particular facts presented.[85] An oral examination is permitted only when very strong and special reasons therefor are shown to exist.[86] Upon granting an open commission to examine witnesses in a remote jurisdiction, defendants may be given the option, either to prepare their cross interrogatories after the direct testimony has been returned, or at that time to elect orally to cross-examine the witnesses.[87] As a condition precedent to granting an open commission, the court may require the moving party to pay a reasonable amount for the expenses that it will entail upon the adverse party.[88] In a case where the adverse party cannot be thus protected, an open commission will not be granted.[89] Interrogatories must be framed in compliance with statutory requirements.[90] Motion for commission may be barred by laches.[91] Unless applicant has been guilty of laches or bad faith, it is customary to grant a reasonable stay with the order for a commission.[92] The issuance of a commission may be waived.[93]

depositions of nonresident witnesses not parties, in court of equity, that a commission should be issued from court. Such depositions may be taken on notice to opposite party. Clark v. Callahan [Md.] 66 A. 618.

83. Under Code Civ. Proc. § 889, moving papers must set up necessary facts authorizing issuance of commission as prescribed in §§ 887, 888. Oakes v. Riter, 118 App. Div. 772, 103 N. Y. S. 849. Affidavit accompanying motion for commission to take testimony of witness absent from state held to comply with rule 82, general rules of practice, which requires that "the affidavit shall specify the facts and circumstances which show, in conformity with subdivision 4 of section 872, that the examination of the person is material and necessary." Moriarta v. Raymond, 105 N. Y. S. 973. Affidavit averring facts sufficient with reference to merits of action and materiality of evidence sought under Code Civ. Proc. §§ 888, 894. Cullinan v. Dwight, 51 Misc. 221, 100 N. Y. S. 896. Under the New York statutes, where affidavit accompanying motion for commission to take testimony of witness absent from state names the person from whom information as to the facts to which the absent witness would testify was obtained, an affidavit of such person need not be attached to the moving papers or its absence accounted for. Moriarta v. Raymond, 105 N. Y. S. 973.

84. Tirpak v. Hoe, 53 Misc. 529, 103 N. Y. S. 798. It need not give the name of the street or the number at which he resides. Id.

85. Deery v. Byrne, 104 N. Y. S. 836.

86. No such reason shown in this case. Depue v. Depue, 115 App. Div. 466, 101 N. Y. S. 412. Commission to take testimony on oral questions will not be granted if moving affidavits fail to state good reasons or necessity for putting either party to expense incident thereto. Mark v. Fox, 102 N. Y. S. 464. Facts warranting issuance of commission to take depositions upon oral questions. Deery v. Byrne, 104 N. Y. S. 836. Facts not warranting grant of open commission. Cullinan v. Dwight, 51 Misc. 221, 100 N. Y. S. 896.

87. Maryland Trust Co. v. Kirby Lumber Co., 149 F. 443. In latter event witnesses must be produced for cross-examination on reasonable notice. Id.

88. Derry v. Byrne, 104 N. Y. S. 836.

89. Where proponent of a will applied for and was granted an open commission to take testimony in England, the court holding that it was without power to grant an allowance asked by the special guardian of an infant heir opposing probate, to cover expenses that such commission would entail, order for allowance of open commission was vacated and closed commission issued. In re Sentell's Estate, 53 Misc. 165, 104 N. Y. S. 477.

90. Under Code Civ. Proc. § 912, interrogatories to witnesses in a foreign country may be framed both in English and in the foreign language where it appears by the attorney's affidavit that he is informed by his clients, who have seen the witnesses, that they do not speak nor understand English. Roth v. Mautner, 115 App. Div. 148, 100 N. Y. S. 707.

91. Not so barred where facts were discovered several months before motion but were not made known to movant's attorney because their importance was not appreciated, there being no delay after attorney learned them. Davis v. William Rosenzweig Realty Operating Co., 53 Misc. 1, 102 N. Y. S. 868. Though defendant is tardy in moving for commission to take deposition of nonresident witness, if motion is made before cause appears on day calendar for trial, and there is nothing to indicate that plaintiff has been prejudiced by the delay, the motion will not be denied on ground of laches. Tirpak v. Hoe, 53 Misc. 529, 103 N. Y. S. 798.

92. Held in view of nature of case applicants not shown to have been guilty of such

§ 3. *Taking the testimony or evidence adduced. Officers authorized to take.*[94] In New York an order for a commission to take testimony of nonresident witnesses upon interrogatories, must name the person to whom it is issued.[95] Depositions taken by a referee appointed by consent of the parties will not be excluded because such referee is not a notary public as is stated in the order appointing him.[96]

Notice of hearing and attendance of witness.[97]—Notice of the taking of testimony is generally required to be given to the opposite party.[98] It must be served on such party or his counsel,[99] must state the time and place of taking the depositions,[1] and give the names of the witnesses proposed to be examined;[2] but it need not, in the absence of express statutory requirement, state that the person proposed to be examined is a material witness and a nonresident.[3] Defects in notice may be waived.[4] In the absence of objection the time for taking depositions may be postponed to a time later than that fixed by the notice.[5]

Proceedings at hearing.[6]—The authority to take depositions can only be exercised in pursuance of the notice given.[7] The testimony must be taken in proper form,[8] and the statutory requirements in that regard must be complied with.[9] The form in which the answers shall be made is sometimes controlled by stipulation of counsel.[10] In the absence of restriction a full examination of the witness may be

laches as to have acted in bad faith. Roth v. Mautner, 115 App. Div. 148, 100 N. Y. S. 707.

93. It is waived where adverse party receives notices that depositions are to be taken and appears at the times and places designated and cross-examines witnesses without objecting that no commission had issued. Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403.

94. See 7 C. L. 1131.

95. Code Civ. Proc. § 887. Spurr v. Empire State Surety Co., 117 App. Div. 816, 102 N. Y. S. 1065.

96. Owings v. Turner, 48 Or. 462, 87 P. 160.

97. See 7 C. L. 1131.

98. Notice required of taking depositions of nonresident witnesses, not parties, in equity suit, under Code Pub. Gen. Laws, art. 35, §§ 16-18. Clark v. Callahan [Md.] 66 A. 618.

99. This is the rule under Civ. Code 1895, § 5299. Wright v. Sparks, 127 Ga. 365, 56 S. E. 442. If a party dies and his legal representative has not been made a party, notice served upon counsel who represented deceased in his lifetime is not sufficient. Id. Und · Kirby's Dig. §§ 3168, 6275, notice to take depositions can be served on attorney of adverse party only when such party does not reside in county in which action is pending. Miles v. Caraker [Ark.] 101 S. W. 174.

1. State v. Omaha El. Co. [Neb.] 110 N. W. 874. Must state the place, the day, and between what hours of the day depositions will be taken, and that, if not completed on that day, the taking will continue at same place and between same hours from day to day until completed. Ex parte Green [Mo. App.] 103 S. W. 503. Notice that deposition would be taken "at the office of Sketon & Morrow in the Quincy building in the city of Denver, county of Arapahoe, and state of Colorado," sufficiently specific. Sheibley v. Fales [Neb.] 106 N. W. 1032.

2. Hartman v. Thompson, 104 Md. 389, 65 A. 117.

3. No such requirement under § 45 et seq. of Revised Evidence Act (Laws 1900, P. L. p. 362). Ferguson v. Central R. Co. [N. J. Err. & App.] 67 A. 602.

4. Objection that notice was that depositions would be taken at the same time in two different places is waived if counsel of party notified appears at one of such places and cross-examines witness without objecting to notice. Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613.

5. In this case due notice was given defendants of the time of taking, and on the day specified an agent of theirs attended before the notary and made no objection to postponement. Missouri, etc., R. Co. v. Williams [Tex. Civ. App.] 16 Tex. Ct. Rep. 847, 96 S. W. 1087.

6. See 7 C. L. 1132.

7. Ex parte Green [Mo. App.] 103 S. W. 503.

8. Testimony de bene esse may be taken in typewriting. Edgefield Mfg. Co. v. Maryland Casualty Co. [S. C.] 58 S. E. 969. Evidence is not in proper form where witness in answer to interrogatories stated that her recollection was refreshed from a copy of stenographic notes taken by her and that she believed the copy to be correct, and then endorsed the several pages which were certified by the commissioner as exhibits. In re Tift's Will, 115 App. Div. 915, 101 N. Y. S. 1072.

9. Under Rev. St. 1899, § 2878 (Ann. St. 1906, p. 1660), and § 2882 (Ann. St. 1906, p. 1661), deposition of nonresident witness need not be taken on interrogatories but may be taken in narrative form. Hendricks v. St. Louis Transit Co. [Mo. App.] 101 S. W. 675. Under Code Civ. Proc. § 380, a deposition must be reduced to writing in presence of officer taking same, either by officer, witness, or some disinterested person. American Bonding Co. v. Pulver [Neb.] 109 N. W. 156.

10. Where counsel agreed that any disinterested party might act as sole commissioner but that answers must be written by witness personally, the stipulation is complied with when witness dictates his answer to another who writes them out on a type-

had.[11] In taking the testimony of a witness by virtue of notice given agreeably to the New Jersey statute,[12] strict rules of cross-examination do not apply.[13] It is too late after witness is sworn to object to the production by him of a letter and to questions concerning it, on the ground that it is a privileged communication, where the order for the deposition directed the production of the letter and no appeal was taken therefrom.[14] Objection to the manner in which the oath is administered may be waived.[15] If for any reason the taxing of depositions is adjourned to the following day, the cause therefor should be noted by the commissions.[16]

Cost of taking and transcribing.—The compensation to be paid for taking a deposition and transcribing it from shorthand is determined by statute.[17]

§ 4. *Returning and filing.*[18]—The officer taking depositions must return them to court duly certified.[19] The court may allow the return to be amended.[20] In Maryland depositions returned must remain in court ten days, subject to exceptions, before the cause is taken up for hearing.[21]

§ 5. *Suppression of objections before trial.*[22]—For formal defects objection must be made by motion to suppress the deposition.[23] Motion to suppress must be made before trial,[24] and greater promptness is sometimes required.[25] It is ground for suppression that the adverse party was not notified of the time and place of taking

writer and then, being sworn and having answers read to him, witness signs same. Glenn v. Zenovitch [Ga.] 58 S. E. 26.

11. Under Code Civ. Proc. § 885, where an order directing the taking of a deposition does not limit its scope, a full examination of the witness may be had. Bankers' Money Order Ass'n v. Nachod, 105 N. Y. S. 773.

12. Evidence act of 1900 (P. L. p. 375).

13. Crosby v. Wells [N. J. Err. & App.] 67 A. 295.

14. Bankers' Money Order Ass'n v. Nachod, 105 N. Y. S. 773.

15. It is waived if not made at the hearing when the deposition is taken. Breeden v. Martens [S. D.] 112 N. W. 960.

16. Ex parte Green [Mo. App.] 103 S. W. 503.

17. Under Ky. St. 1903, § 1741, and act of March 26, 1904 (Acts 1904, p. 298, c. 121), when by consent of parties a deposition is taken in shorthand, the officer for transcribing it is entitled to the fees fixed by latter act in addition to per diem compensation allowed by former. Reuscher v. Attorney General, 30 Ky. L. R. 109, 97 S. W. 397; Co-Op. Mfg. Produce & Home Co. v. Rusche, 30 Ky. L. R. 790, 99 S. W. 677.

18. See 7 C. L. 1132.

19. It must appear from return that depositions were taken in pursuance of the notice given. Ex parte Green [Mo. App.] 103 S. W. 503. Caption of deposition and certificate of officer sufficiently identifying case in which deposition was taken. McFaddin v. Sims [Tex. Civ. App.] 16 Tex. Ct. Rep. 757, 97 S. W. 335. In absence of statutory requirement, where testimony de bene esse is taken in typewriting, certificate of the officer need not show that it was reduced to writing by him or by witness in his presence. Edgefield Mfg. Co. v. Maryland Casualty Co. [S. C.] 58 S. E. 969. Certificate defective in not showing that deposition was taken at time and place specified in notice as required by Code Civ. Proc. § 385. American Bonding Co. v. Pulver [Neb.] 109 N. W. 156. Certificate defective in not showing that testimony was reduced to writing by a disinterested person as required by Code Civ. Proc. §§ 380, 385. Id. Statement in notary's certificate that deposition was "read to * * * witness, and, being by him corrected, was by him subscribed in my presence," is a sufficient compliance with Code Civ. Proc. § 2032. Short v. Frink [Cal.] 90 P. 200. Certificate held not to comply with requirement of Rev. St. 1895, art. 2284, that officer certify that witness signed and swore to answers before him. McFaddin v. Sims [Tex. Civ. App.] 16 Tex. Ct. Rep. 757, 97 S. W. 335. Where depositions are taken before commissioner appointed by dedimus, no certificate of official character is required. Temby v. William Brunt Pottery Co., 127 Ill. App. 441.

20. Haggin v. Rogers, 29 Ky. L. R. 1263, 97 S. W. 362. Though certificate fails to state whether either party was present during examination of witnesses as required by Civ. Code Proc. § 582, the statute is complied with if, after exception taken, officer files a writing under oath showing that neither party was present. Id.

21. Code Pub. Gen. Laws, art. 16, § 241. Clark v. Callahan [Md.] 66 A. 618. By consenting to take up case before expiration of ten days, this requirement is waived. Id.

22. See 7 C. L. 1133.

23. Illinois Cent. R. Co. v. Panebiango, 227 Ill. 170, 81 N. E. 53. Lack of preliminary proof of books of account and failure to attach the original books to the deposition must be raised by motion to quash. Williams v. Press Pub. Co., 126 Ill. App. 109.

24. This is the rule under Burns' Ann. St. 1901, § 443. Louisville & S. Trac. Co. v. Leaf [Ind. App.] 79 N. E. 1066. Under Rev. St. 1895, art. 2289, motion to suppress, where objection is to form and manner of taking deposition, must be made before trial. Ellis v. Lewis [Tex. Civ. App.] 100 S. W. 189.

25. Motion to suppress for technical defect is too late when not made until three months after filing. Temby v. William Brunt Pottery Co., 127 Ill. App. 441.

depositions,[26] that witness did not give direct answers to cross interrogatories, the evidence sought being material,[27] that the officer's certificate does not comply with statutory requirements,[28] that interrogatories served on defendant in a case in a Federal court are not authorized by Federal law,[29] but depositions will not be suppressed because no proper oath was administered to the witnesses, if such objection was not made when the depositions were taken,[30] nor because substantially the same answers were given by the witnesses to the same questions asked each of them.[31] An objection must be made at the time prescribed by statute.[32] Where testimony upon interrogatories has not been obtained in proper form, an order directing that a further commission issue should be granted.[33]

§ 6. *Use as evidence.*[34]—A party may read in evidence a deposition taken by his adversary,[35] and this is sometimes expressly authorized by statute.[36] In South Dakota a deposition taken in a former action between the same parties, upon due notice, is admissible.[37] The parties may stipulate for the admission of depositions taken in another case.[38] The rule that the admissions of a party against his interest are admissible as original evidence in favor of the adverse party applies to admissions made in depositions.[39] A deposition will be excluded if it was taken without proper notice having been given to the adverse party.[40] Proper foundation for the

26. Unless notice was waived. State v. Omaha El. Co. [Neb.] 110 N. W. 874.

27. Morris Co. v. Southern Shoe Co. [Tex. Civ. App.] 99 S. W. 178. Witness did not specifically answer a cross interrogatory, and his answer to another cross interrogatory did not state in detail the sources of his information as required. Id.

28. Certificate failed to show that deposition was signed and sworn to by witness before officer. McFaddin v. Sims [Tex. Civ. App.] 16 Tex. Ct. Rep. 757, 97 S. W. 335.

29. Objection need not be deferred in such case until answers are offered in evidence. Smith v. International Mercantile Co., 154 F. 786.

30. Breeden v. Martens [S. D.] 112 N. W. 960.

31. In such case the conclusion would not necessarily result that the witnesses did not each independently testify as to facts within their knowledge. St. Louis, etc., R. Co. v. White [Tex. Civ. App.] 103 S. W. 673.

32. Under Civ. Code 1895, § 5668, objection that an interrogatory is misleading will not be considered if not made and filed with the interrogatories before the issuing of the commission. Gress Bros. v. Berry Bros. [Ga. App.] 58 S. E. 384. Under Rev. St. 1895, art. 2289, objection to the form of answer to interrogatory must be made and acted upon at the first term after the deposition is filed. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 99 S. W. 128. That officer taking deposition did not give the parties at least five days' notice in writing of time and place of taking, as required by Act 1905, p. 107, c. 76, art. 2282, is not ground for suppression at any time after filing, under art. 2284, but such objection is governed by art. 2289. El Paso & S. W. R. Co. v. Barrett [Tex. Civ. App.] 101 S. W. 1025. Irregularities in the proceedings of the commissioner are waived by failure to take timely objection. Hooe v. U. S., 41 Ct. Cl. 378.

33. In re Tifft's Will, 115 App. Div. 915, 101 N. Y. S. 1072.

34. See 7 C. L. 1135.

35. Plaintiff may read in evidence a deposition taken by defendant. Chesapeake Stone Co. v. Fossett, 30 Ky. L. R. 1175, 100 S. W. 825.

36. Under Cobbey's Ann. St. 1903, § 1368, a deposition and exhibit thereto attached when properly identified by deponent may, when material to the case, be given in evidence by the party not taking the deposition. Keller v. Chicago, etc., R. Co. [Neb.] 111 N. W. 384.

37. Such a deposition is admissible though not filed in the present action previous to trial, where counsel for party objecting to its admission was present when it was taken and cross-examined the witness, it not being shown that any prejudice resulted from failure to file it. Rev. Code Proc. § 519. Edwards v. Chicago, etc., R. Co. [S. D.] 110 N. W. 832.

38. In suit for libel where parties stipulate that depositions taken in another case may be admitted in evidence, such depositions will be admitted for the purpose of showing absence of malice, although they constitute evidence of facts relating to plaintiff unknown to defendant at the time of publication of the libel. Butler v. Gazette Co., 104 N. Y. S. 637.

39. Southern Bk. v. Nichols, 202 Mo. 309, 100 S. W. 613. But the party making the admission is entitled to have so much of the deposition read as bears upon the question in regard to which he has been interrogated. Id.

40. Answers to interrogatories are not admissible in evidence unless it appears that notice of intention to take testimony was given to opposite party or his counsel in manner prescribed by law, or that such notice was waived. Wright v. Sparks, 127 Ga. 365, 56 S. E. 442. A deposition is properly excluded if the name of the witness was not inserted in the notice of the names of the witnesses proposed to be examined. Hartman v. Thompson, 104 Md. 389, 65 A. 117. But a deposition will not be excluded on ground that it was taken without notice if

introduction of a deposition must be laid.[41] That testimony is contained in a deposition does not give it additional credence.[42] In Kentucky a party is not concluded by a deposition read by him in evidence, but may contradict it by other testimony.[43]

Objections.[44]—The objection that evidence in a deposition is incompetent is properly made when such evidence is offered at the trial.[45] but objections not going to the competency of the testimony or of the witness are generally required to be made before trial, and come too late when the deposition is offered in evidence.[46] That an interrogatory was not correctly propounded by the commissioner will not necessarily preclude the admission in evidence of such interrogatory and the answer thereto.[47] An answer not responsive to the interrogatory propounded should be excluded.[48] The rules applicable to the admission of evidence and the examination of witnesses apply to testimony in a deposition.[49] Where a deposition was taken before

notary certifies that it was taken before him pursuant to notice attached, and no exceptions are taken to insufficiency of notice. Helm v. Lynchburg Trust & Sav. Bk., 106 Va. 603, 56 S. E. 598.

41. Rev. St. 1899, c. 18, § 2904 (Ann. St. 1906, p. 1669), providing that facts authorizing reading of deposition may be established by testimony of deposing witness or officer taking same, does not exclude resort to other sources to lay proper foundation for introduction of deposition. Doyle v. St. Louis Transit Co. [Mo. App.] 101 S. W. 598. Rev. St. 1899, c. 18, § 2904 (Ann. St. 1906, p. 1669), does not require as prerequisite to introduction of deposition that deposing judge, lawyer, or physician shall have been summoned as a witness. If deponent be a physician or lawyer, it only requires that he shall be engaged in discharge of professional duties at time of trial. Id. Under the Illinois statute it is not essential to use a deposition as evidence that it should be accompanied by certificate of official character of officer taking it, but such certificate may be produced at hearing and official character of such officer then established. Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403. Under Kirby's Dig. §§ 3157, 3158, if a deposition discloses that witness was a resident of another state, and he is not in attendance upon the court, the deposition is admissible. Hayes v. Brandt, 80 Ark. 592, 98 S. W. 368.

42. Instruction to this effect not error. Johnson County Sav. Bk. v. Walker, 79 Conn. 348, 65 A. 132.

43. Civ. Code Prac. § 596. Chesapeake Stone Co. v. Fossett, 30 Ky. L. R. 1175, 100 S. W. 825.

44. See 7 C. L. 1136.

45. Illinois Cent. R. Co. v. Paneblango, 227 Ill. 170, 81 N. E. 53. Overruling motion, presented after jury is sworn, to suppress depositions on ground that evidence is incompetent and hearsay, and reserving ruling on evidence until it is offered on the trial, is not erroneous. Hilt v. Griffin [Kan.] 90 P. 808. Under Civ. Code § 587, subsec. 2, objections to competency of witness or relevancy or competency of testimony may be taken at any time before or during trial. Robertson v. Sebastian, 30 Ky. L. R. 883, 99 S. W. 933.

46. Exceptions to the regularity of a deposition should be disposed of before trial and cannot be raised when it is proposed to introduce the deposition in evidence at the trial. Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613. Deposition will not be excluded on ground that it was not filed in time, if it was filed two months before entry of decree, and no exceptions were taken to time of filing. Helm v. Lynchburg Trust & Sav. Bk., 106 Va. 603, 56 S. E. 598. Under Rev. St. 1895, art. 2289, the general rule is that all objections to the position of a witness, except such as challenge the admissibility of the testimony because of its intrinsic character, or on account of incompetency of the witness, must be made before trial. Ellis v. Lewis [Tex. Civ. App.] 100 S. W. 189. In Alabama, where interrogatories are filed and no objections are filed to them, if the depositions given in answer are responsive thereto and material to the issues, objection to them at the trial is too late. Mississippi Lumber Co. v. Smith & Co. [Ala.] 44 So. 475. Objection to deposition on ground that evidence is secondary made after trial has begun and when deposition is being read to jury is too late. Id.

47. Interrogatory propounded was whether witness had received from defendant letter with relation to termination of lease "dated May 28, 1904, or thereabouts," and as propounded by commissioner was whether witness had received such letter "dated May 24, 1904, or thereabouts." It was held refusal to strike out interrogatory and answer was not error. Crawford v. Kline [N. J. Law] 65 A. 441.

48. Answer not responsive to cross interrogatory. Central Tex. Grocery Co. v. Globe Tobacco Co. [Tex. Civ App.] 99 S. W. 1144. An answer to a general and final interrogatory should be excluded when it contains material and important testimony of a fact of which opposite party was not put on notice, either by the question embraced in the particular interrogatory or when taken in connection with preceding interrogatories. Taylor v. Globe Refinery Co., 127 Ga. 138, 56 S. E. 292. But in Alabama it is held that even if answers to interrogatories are not responsive the objection cannot prevail when made for first time during trial. Mississippi Lumber Co. v. Smith & Co. [Ala.] 44 So. 475.

49. Immaterial and irrelevant testimony inadmissible. Short v. Frink [Cal.] 90 P. 200.

Leading questions: The rule that the allowance of leading questions is largely within the discretion of the trial court applies to depositions. Breiner v. Nugent [Iowa] 111 N. W. 446; Gress & Co. v. Berry Bros. [Ga. App.] 58 S.E. 384. Interrogatory held

the trial judge who ruled on the objections when made and allowed exceptions, it is not necessary to renew such exceptions at the trial.[50] Objections to a deposition must be specific if any part thereof is admissible in any view of the case.[51] In Texas an objection to the form and manner of taking a deposition can be considered only when presented in writing.[52] Objection to testimony in a deposition may be waived.[53]

DEPOSITS; DEPUTY, see latest topical index.

DESCENT AND DISTRIBUTION.

§ 1. Law Governing Descent (970).
§ 2. Persons Entitled to Share or Inherit (970).
§ 3. Inheritable and Distributable Property (971).
§ 4. Course of Descent and Distribution (972).
§ 5. Quantity of Estate or Share Acquired (973).
§ 6. Husband or Wife as Heir (973).

The scope of this topic[54] is noted below.

§ 1. *Law governing descent.*[55]—The right to inherit the property of a decedent is not a natural one, but is purely statutory, and hence the legislature may alter the same at pleasure,[56] and may impose such burdens thereon as it sees fit.[57]

The descent of realty is governed by the law of its situs.[58]

§ 2. *Persons entitled to share or inherit.*[59]—One claiming title to land by collateral descent must establish all the different links in the chain of descent from the former owner to himself, together with the extinction of all lines which could claim any preference to him.[60]

not leading. Gress Co. v. Berry Bros. [Ga. App.] 58 S. E. 384.

Plaintiff disqualified from testifying after defendant's death: Plaintiff gave notice to take depositions and defendant's deposition was taken on plaintiff's behalf. Subsequently plaintiff was introduced as a witness in his own behalf and, pending his examination in chief, defendant died. Plaintiff's examination was thereafter resumed and his deposition taken over objection of administrator. It was held that after defendant's death plaintiff was disqualified from testifying by Code 1904, § 3346. Puckett v. Mullins Adm'r, 106 Va. 248, 55 S. E. 676.

Where strict rules of cross-examination not applicable: When by consent there is read, at the trial of one action, the testimony of a witness out of the state, taken originally in another action, the propriety of a question and answer, part of the cross-examination in such other action but really part of the examination in chief in the latter action is not tested by the strict rules of cross-examination. Crosby v. Wells [N. J. Err. & App.] 67 A. 295.

50. Chicago, etc., R. Co. v. Alexander [Wash.] 91 P. 626.

51. State v. Simmons, 74 Kan. 799, 88 P. 57. The party objecting must specify each question or answer upon which he desires a ruling, and the particular grounds of his objection, unless he objects to the admissibility of the deposition as a whole, in which case he should specify his grounds therefor. Id. A general exception to each and every question and answer in a deposition, without specifying the objection, is too broad to raise the question of error in admitting a single answer alleged to be hearsay. Jarvis v. Andrews, 80 Ark. 277, 96 S. W. 1064. But if on the face of a question in a deposition there appears no purpose for which the evidence asked could be admissible, a general objection of irrelevancy, incompetency, and immateriality is sufficient. Short v. Frink [Cal.] 90 P. 200. A motion to strike out the testimony after it is read is not essential in such case. Id. But such motion is essential where it is not apparent from the question that the response would be inadmissible. Id.

52. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 99 S. W. 128.

53. Right to object to answer to a settled interrogatory in deposition, which is strictly responsive to question, is waived by allowing it to be read without objection. Arellanes v. Arellanes [Cal.] 90 P. 1059.

54. This topic treats only of the rules governing the disposition of the property of those dying intestate. The construction and effect of wills (See Wills, 8 C. L. 2305), and the administration and management of the estates of decedents (See Estates of Decedents, 7 C. L. 1386), are excluded.

55. See 7 C. L. 1137.

56. Ferguson v. Gentry [Mo.] 104 S. W. 104. Rights of children of husband by first marriage in property passing to childless second wife on his death are to be determined by law in force at her death, before which time they have no vested interest. Griffis v. First Nat. Bk. [Ind. App.] 79 N. E. 230.

57. May impose inheritance tax, it being tax on privilege and not on property inherited. In re Touhy's Estate, 35 Mont. 431, 90 P. 170.

58. See, also, Conflict of Laws, 9 C. L. 596. Montgomery v. Montgomery [Tex. Civ. App.] 99 S. W. 1145.

59. See 7 C. L. 1137.

60. Must show who was last entitled, his

One becomes an heir only on the death of his ancestor,[61] and the heirs at law and next of kin to whom the estate of an intestate passes are to be determined as of that date.[62]

The right of aliens,[63] adopted children,[64] bastards,[65] and Indians[66] to inherit, and of others to inherit from them, is fully treated elsewhere. Posthumous children ordinarily inherit in like manner as if they had been born during the lifetime of the intestate and had survived him.[67] By statute in many states the posthumous and pretermitted children of one dying testate are entitled to the same shares they would have taken had the parent died intestate.[68]

§ 3. *Inheritable and distributable property.*[69]—Property not disposed of, or ineffectually disposed of, by the will of one dying testate passes to his heirs or distributees under the intestate laws.[70] The equitable title to realty[71] vested remainders,[72] and a claim of a preference right to purchase tide lands,[73] have been held to be inheritable. A right in gross to take fish from a pond is not.[74] Under the Federal statutes the heirs of a timber culture entryman who dies before patent is issued take title thereto as donees of the government and not by inheritance.[75]

The title to lands or any interest therein ordinarily vests in the heir, and the title to personalty in the administrator, immediately upon the death of the ancestor.[76] The character of the estate cast upon the heir is the same as that held by the ancestor.[77] He takes it subject to all existing liens and charges,[78] and subject to the payment of the ancestor's debts.[79] He cannot ordinarily be heard to allege the turpitude of the person under whom he claims, nor to assert any claim which the latter would

death without issue, and all different links in chain of descent which will show that the one last entitled and claimant descended from same common ancestor, together with extinction of all lines of descent which could claim any preference to him. Gorham v. Settgast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665. Evidence held to present question for jury whether intervenors had shown title by heirship. Id.

61. For right to dispose of expectancy, see Real Property, 8 C. L. 1676. Heirs have no interest by inheritance until death of ancestor. Crenshaw v. Kener, 127 Ga. 742, 57 S. E. 57.

62. Trust fund, disposition of which was not provided for on death of beneficiary without issue. Grinnell v. Howland, 51 Misc. 123, 100 N. Y. S. 765.

63. See Aliens, 9 C. L. 84. See, also, 7 C. L. 1138.

64. See Adoption of Children, 9 C. L. 34. See, also, 7 C. L. 1137.

65. See Bastards, 9 C. L. 383. See, also, 7 C. L. 1138.

66. See Indians, 8 C. L. 179. See, also, 7 C. L. 1139.

67. Revisal 1905, § 1556. Is considered absolutely born for all beneficial purposes of heirship. Deal v. Sexton, 144 N. C. 157, 56 S. E. 691. Child held in no way bound by partition proceedings to which she was in no way made party, and she could recover land from remote vendee of purchaser at partition sale. Id.

68. For full discussion of this question see Wills, 8 C. L. 2305. See, also, 7 C. L. 1139, n. 12, 13.

69. See 7 C. L. 1139.

70. See Wills, 8 C. L. 2305.

71. Vendee in possession of land under contract of sale on which part of purchase price had been paid held to hold equitable title to the land which, on his death, descended to his heirs. In re Grandjean's Estate [Neb.] 110 N. W. 1108.

72. Shares of vested remaindermen dying before coming into possession held to have passed to their heirs or survivors by descent or representation. Shafer v. Tereso, 133 Iowa, 342, 110 N. W. 846.

73. Descends to claimant's heirs and legal representatives as other property rights descend. Hotchkin v. Bussell [Wash.] 89 P. 183.

74. Mallet v. McCord, 127 Ga. 761, 56 S. E. 1015.

75. Act June 14, 1878, c. 190, 20 St. 113. Walker v. Ehresman [Neb.] 113 N. W. 218.

76. For full discussion of this question, including right to bring actions for recovery of, or injury to, property, see Estates of Decedents, 7 C. L. 1386. See, also, 7 C. L. 1140, 1141.

77. Quality of title not changed. Kalona Sav. Bk. v. Eash, 133 Iowa, 190, 109 N. W. 887. Where title in fee descends to heir, judgment against him immediately becomes lien on property enforceable by levy and sale under general execution, and creditor cannot maintain suit in equity to have his interest determined and set aside to satisfy judgment. Id.

78. Land sold at partition sale was deeded to third person who furnished money to bidder, and who agreed to convey to latter on repayment. Bidder died before making payment, and his administratrix made payment and received deed. Held that administratrix took title in trust for estate and next of kin, on being awarded half interest, were properly charged with half amount paid by her. Montgomery v. Montgomery [Tex. Civ. App.] 99 S. W. 1145.

79. For full discussion of this question see Estates of Decedents, 7 C. L. 1386.

be estopped to assert.[80] A forced heir under the civil law may, however, attack the alleged illegal, fraudulent, or simulated conveyances of the person to whom he occupies that relation to the extent necessary to protect his legitime.[81] An ancestor's warranty can only be enforced against his heirs to the extent of the land acquired by them by descent.[82]

§ 4. *Course of descent and distribution.*[83]—A sister inherits immediately from her brother and not mediately through the father.[84] Children of different marriages ordinarily share equally in the estate of their common parent.[85] Brothers and sisters of the full blood generally take to the exclusion of those of the half blood.[86] Where the heir is a married woman at the time of descent cast, the whole of the estate goes to her, her husband's interest in it being carved out of her estate after it has vested in her.[87] Brothers and sisters, by renouncing in favor of their mother the succession of a deceased brother, do not estop themselves to contest the right of persons claiming as children of such deceased brother to share in the mother's estate.[88]

In New York, if there is no widow and no children, and no representatives of a child, the whole surplus of the personalty goes to the next of kin in equal degree to the deceased and their legal representatives.[89] If the surviving next of kin are of unequal degrees of kindred, the surplus is to be apportioned among those entitled thereto according to their respective stocks, those taking in their own right receiving equal shares, and those by representation the share to which the parent whom they represent would have been entitled if living.[90] In Texas, if there are no children, father or mother, brothers or sisters, or husband or wife, half of the estate goes to the paternal and half to the maternal, kindred.[91] If there is a surviving

80. Ordinary heir as distinguished from forced heir. Jones v. Jones [La.] 44 So. 429. Collateral heirs have no standing to attack for fraud, or as simulated, or as a donation made in violation of Civ. Code art. 1497, a contract made by their de cujus and fully executed by other contracting party. Thielman v. Gahlman [La.] 44 So. 123. Collateral heirs cannot attack conveyance which is neither sale nor donation on ground that such contract is unknown to the law, where it has been fully executed by other party. Id.

81. Rule denying to creditor right to assail acts of his debtor committed prior to creation of his debt does not apply to right of action of forced heir for reduction of an excessive donation, which, though arising only upon death of donor, relates back to date anterior to donation. Jones v. Jones [La.] 44 So. 429. Forced heirs attacking contract as simulation must allege extent of their interest and in what respect such interest has been affected by said contract. Rudolf v. Costa [La.] 44 So. 477.

82. Farber v. Blubaker Coal Co., 216 Pa. 209, 65 A. 551. Where owner of land agreed to convey all underlying coal, but on his death it appeared that he owned only an undivided interest, held that his widow and heirs were not required to purchase outstanding interest to enable administrator to convey fee, nor to convey any interest held or purchased by them after vendor's death. Id.

83. See 7 C. L. 1141.

84. Where father died leaving son and two daughters, held that, on subsequent death of son and one of the daughters, other daughter inherited share of father's estate which went to her deceased brother and sister as their heir and not as heir of her father. West v. Hermann [Tex. Civ. App.] 104 S. W. 428.

85. Wife paid principal part of consideration for land. Bond for title ran to husband, but was intention, understood by all parties, that land should be conveyed to husband and wife for their lives with remainder to their child. This was done, but deed was not recorded and was lost. After husband's death vendor made new deed to widow for life with remainder to child. Held error to set aside latter deed on theory that children of husband by former marriage had interest in land. Noble v. Noble, 30 Ky. L. R. 629, 99 S. W. 339.

86. Under Spanish law, in force in republic of Texas prior to 1840. Kirby v. Hayden [Tex. Civ. App.] 99 S. W. 746.

87. Husband takes no part of it by descent. De Hatre v. Edmunds, 200 Mo. 246, 98 S. W. 744. Hence, where land was in adverse possession of another at time of descent to married woman, held that limitations continued to run against whole estate and not merely against husband's interest. Id.

88. Does not amount to a claim of anything previously renounced. Succession of Gabisso [La.] 44 So. 438.

89. Code Civ. Proc. § 2732, par. 5. In re Prote, 54 Misc. 495, 104 N. Y. S. 581.

90. Code Civ. Proc. § 2732, par. 11. Where sole heirs and next of kin were three nephews and child of a deceased nephew, held that each was entitled to one-fourth. In re Prote, 54 Misc. 495, 104 N. Y. S. 581.

91. Rev. St. 1895, art. 1688, § 4. Gorham

parent and brothers and sisters, half goes to the former and the other half to the latter.[92]

In the District of Columbia, where there are no nearer relatives, realty acquired by purchase goes to the descendants of the intestate's maternal grandfather, to be distributed per stirpes.[93] In New Jersey first cousins and the descendants of deceased first cousins take to the exclusion of descendants of great-great-grand parents and of great uncles and aunts not coming within that description, the descendants of the deceased cousins taking per stirpes.[94]

§ 5. *Quantity of estate or share acquired.*[95]—The shares of the heirs or next of kin may be increased or decreased by transfers of property made between them and the ancestor during the latter's lifetime, depending upon whether such transactions are gifts,[96] or advancements.[97]

§ 6. *Husband or wife as heir.*[98]—The right to curtesy[99] and dower,[1] the widow's right of quarantine, family allowances, and the like,[2] the descent of the homestead[3] and of community property,[4] and the effect of antenuptial and other agreements on the rights of the surviving spouse,[5] are fully treated elsewhere.

In some states, where there are no lineal descendants, the widow is entitled to half the realty.[6] In Texas it goes half to her and half to the next of kin.[7] In West Virginia, under such circumstances, she takes all the personalty,[8] and in Pennsylvania half of it.[9] In some states, where there are children, she takes a third of the personalty after the payment of debts and expenses.[10] In Minnesota, where there

v. Settgast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665.

92. On death of one of decedent's two children, held that decedent's widow inherited an interest from such child which, on widow's death, descended to her child by her second marriage. Meurin v. Kopplin [Tex. Civ. App.] 100 S. W. 984.

93. D. C. Code, §§ 940-950, providing that, where there are no nearer relatives, realty acquired by purchase shall descend to descendants of intestate's maternal grandfather "in equal degree equally," and § 955, providing that children of deceased father or mother shall take parents' share by representation, construed, and held that in case distribution should be per stirpes of said maternal grandfather. McManus v. Lynch, 28 App. D. C. 381. Nearest relatives of intestate were descendants of maternal grandfather, who had four children, all of whom had since died. One of them had a child A., another a child B., another a child C., the intestate, and the fourth three children D., E., and F. D. died leaving five children and F. died leaving one child. Held that one-third of property went to A., one-third to B., one-third of one-third to E., one-third of one-third to child of F., and one-fifth of one-third of one-third to each of children of D. Id.

94. Estate distributed among living first cousins and descendants of deceased first cousins per stirpes. Orphan's Court Act 1898, § 168, and § 169 as amended in 1899. Smith v. McDonald [N. J. Err. & App.] 65 A. 840, afg. 69 N. J. Eq. 765, 61 A. 453.

95. See 7 C. L. 1142.

96. See Gifts, 7 C. L. 1878.

97. See Estates of Decedents, 7 C. L. 1386.

98. See 7 C. L. 1142.

99. See Curtsey, 9 C. L. 857.

1. See Dower, 7 C. L. 1197.

2. See Estates of Decedents, § 5D, 7 C. L. 1416.

3. See Homesteads, 8 C. L. 93.

4. See Husband and Wife, 8 C. L. 122.

5. See Husband and Wife, 8 C. L. 122.

6. Under Kirby's Dig. § 2709, is endowed in fee simple of half realty of which he died seised and which he acquired after the marriage. Drinkwater v. Crist [Ark.] 103 S. W. 733. Under Rev. Laws, c. 140, § 3, cl. 3, she takes estate of inheritance in half his realty as his statutory heir. Holmes v. Holmes [Mass.] 80 N. E. 614. Widow electing to take against will held entitled to half realty absolutely, and a homestead, to value of $1,500 in remainder. Coleman v. Coleman, 122 Mo. App. 715, 99 S. W. 459.

7. Rev. St. 1895, art. 1689. Montgomery v. Montgomery [Tex. Civ. App.] 99 S. W. 1145.

8. Rule denying widow right to contest will where there are children, being based on ground that she may renounce will and thereby obtain same interest as if it was set aside, held not to apply where there are no children, since in such case she would, under Code 1906, § 3175, be entitled to entire residue of personalty instead of third thereof to which she would be entitled in case of renunciation. Freeman v. Freeman, 61 W. Va. 682, 57 S. E. 292.

9. Where lessor did not forfeit coal lease for breach of conditions but treated it as in force up to his death, held that, it being a sale of coal in place, widow electing to take against will was entitled to half royalties received by executor, and that latter could not deprive her of same by declaring forfeiture and substituting new lease for original one. In re Murray's Estate, 216 Pa. 270, 65 A. 675.

10. Widow not provided for in will, in absence of showing that she had in any way

are no children, one spouse cannot dispose of all of his or her personalty to the entire exclusion of the other.[11] In Michigan the realty of one dying without issue, and leaving a widow and father, goes to the former for life, with remainder to the latter.[12]

In Indiana a widow, having children by a previous marriage, who remarries cannot alienate realty acquired by virtue of such previous marriage, unless the children are all of age and join in conveyance.[13] A childless second wife in that state takes a fourth of her deceased husband's realty, subject to the right of her husband's children by his first marriage, to inherit the same at her death.[14]

In some states the widow may, at her election,[15] take a child's part in lieu of dower,[16] or of the provision made for her in the will.[17]

In Missouri, where there are no descendants, the surviving husband takes half of his deceased wife's realty and personalty.[18] In Massachusetts, where there are children, he takes no part of her realty as heir.[19] In Kentucky, before the enactment of the present statute, the husband took all the surplus of the wife's personalty absolutely, and an estate for life as tenant by the curtesy in her realty, if there were issue born of the the marriage.[20] In order to entitle a surviving husband to the

waived or barred her rights. Matthews v. Targarona, 104 Md. 442, 65 A. 60. Where widow renounces will, she is entitled to one-third of personalty after payment of debts, in compuing which value of personalty at time of distribution must be taken rather than its value a time of husband's death. Lewis v. Sedgwick, 223 Ill. 213, 79 N. E. 14.

11. Laws 1899, c. 46, § 70, as amended by Laws 1903, c. 334, held to entitle such survivor to same interest in both realty and personalty, unaffected by contrary testamentary provision. In re Hayden [Minn.] 111 N. W. 278.

12. Comp. Laws 1857, pp. 858, 859. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

13. Burns' Ann. St. 1901, § 2641. Mortgage executed after remarriage held void. Polley v. Pogue, 38 Ind. App. 678, 78 N. E. 1051.

14. Interest of children of first husband held not vested one. Griffis v. First Nat. Bk. [Ind. App.] 79 N. E. 230. Acts 1899, p. 132, c. 99, § 3, providing that conveyance in fee by said children during wife's lifetime shall convey interest descending to them through her at her death, and estop them and their heirs from claiming such fee, held to apply to mortgage describing fee and containing covenants of warranty. Id.

15. As to right to elect and manner of election, see Election and Waiver, 7 C. L. 1222.

16. See, also, Dower, 7 C. L. 1197. Civ. Code 1895, § 3355. Rountree v. Gaulden [Ga.] 58 S. E. 346. Code 1896, § 1462, providing that personalty is to be distributed in same manner as realty and according to same rules, except that widow takes child's part if there are children, or all, if not, construed in connection with § 1454 relating to descent of realty, and providing that children of deceased child shall take parent's share by right of representation, and held that word "child" or "children," as used in § 1462, means child or children represented in distribution of estate, whether living or represented by descendants, so that where decedent left wife and no children, but was survived by children of deceased son, widow was not entitled to whole estate. Phillips v. Lawing [Ala.] 43 So. 494. Rev. St. 1899, § 2944, providing that if husband dies leaving a child or children, or other descendants, widow, "if she has a child or children by such husband living," may elect to take child's part in lieu of dower construed, and held that word "children" as used therein includes grandchildren, so that widow may elect to take child's part where deceased leaves no children, but only a daughter of a deceased child of himself and said widow. Keeney v. McVoy [Mo.] 103 S. W. 946.

17. See Election and Waiver, 7 C. L. 1222. For discussion of question whether provisions of will were intended to be in lieu of, or in addition to, dower, see Wills, 8 C. L. 2305. Word "child" as used in Ann. Code 1892, § 1545, held to mean such child as shall have right under law to share in estate of intestate father, and not to include children who have been portioned off and have contracted with father by written releases that they have no further interest in estate. Callicott v. Callicott [Miss.] 43 So. 616. §§ 4496 and 1545 to be construed together. Id.

18. Act March 2, 1895 (Acts 1895, p. 169, Rev. St. 1899, § 2938), held not to violate Const. art. 4, § 28, providing that no bill shall contain more than one subject which shall be clearly expressed in its title. (Ferguson v. Gentry [Mo.] 104 S. W. 104), nor Const. art. 2, § 15, prohibiting the passage of laws retrospective in their operation, even where wife married and owned property before its passage. (Id.); Ferguson's Estate v. Gentry [Mo.] 104 S. W. 108.

19. Under Pub. St. c. 125, § 1. Gardner v. Skinner [Mass.] 80 N. E. 825.

20. St. 1903, § 2132, fixing rights of husband and wife in each other's property, does not apply to case where marriage was contracted and property acquired before its passage, but in such case Gen. St. c. 52, art. 4, § 1, governs. Williams v. Coffman [Ky.] 101 S. W. 919.

marital fourth under the laws of Louisiana, he must show that his wife died rich, leaving him in necessitous circumstances.[21]

DETECTIVES; DETERMINATION OF CONFLICTING CLAIMS TO REALTY, see latest topical index.

DETINUE.[22]

Detinue is the common-law action to recover personal property wrongfully detained,[23] and damages for the detention thereof [24] being now generally succeeded by the statutory action of replevin.[25] While plaintiff must usually show title,[26] mere possession is sufficient as against one wrongfully taking the same,[27] and where both claim through a common source, defendant cannot assert an outstanding title.[28] A suggested defendant under the Alabama statute need not file the affidavit required of defendants generally,[29] and, upon voluntarily coming in, he becomes liable for damages for wrongful detention.[30] Where plaintiff claims under a mortgage, defendant is entitled to have the amount thereof ascertained in Alabama only when he claims under the mortgagor.[31] In detinue for a "yoke of oxen," the value of the oxen need not be separately assessed.[32] Where defendant fails to deliver property within thirty days after affirmance of adverse judgment, he forfeits his forthcoming bond.[33]

DEVIATION; DILATORY PLEAS, see latest topical index.

DIRECTING VERDICT AND DEMURRER TO EVIDENCE.

§ 1. **Directing Verdict (976).** Grounds and Occasions (976). The Motion (979). Effect of Ruling; Appeal; Waiver (980).

§ 2. **Demurrers to Evidence (981).** Effect (981). Waiver (981).

Only the general rules applicable are treated in this article, the insufficiency of the evidence in particular cases to justify withdrawal from the jury being treated in appropriate topics.[34]

21. Colored woman leaving estate valued at less than $500 cannot be said to have died rich within meaning of Civ. Code, art. 2382. Crockett v. Madison, 118 La. 728, 43 So. 388.

22. See 7 C. L. 1145.

23. Lies to recover property delivered to wrong person by carrier. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co., 146 Ala. 691, 40 So. 503. Where G's agent obtained possession of carload of apples without consent of owner or any one authorized to bind him, owner may maintain detinue therefor. Merchants' Nat. Bk. v. Bales [Ala.] 41 So. 516.

Prima facie case is made by proof of mortgage from one in possession under claim of ownership and present possession by defendant. Beal v. McKee [Ala.] 43 So. 235, is immaterial. Pruitt v. Gunn [Ala.] 44 So. 569.

24. Measure is damage to plaintiff and not benefits to defendant, hence evidence as to how much defendant used property. May include deterioration in value of perishable fruit while wrongfully detained. Merchant's Nat. Bk. v. Bales [Ala.] 41 So. 511.

25. See Replevin, 8 C. L. 1732.

26. Where, in detinue to recover mule claimed under mortgage, there was no proof that W. W. W., plaintiff, was same person as W. H. W., mortgagee, except testimony of witness that mule was one covered by mortgage, identity of parties was for jury. Williams v. Vining [Ala.] 43 So. 744. In detinue to recover mule claimed under mortgage, question whether mortgagor authorized son to trade mule or whether he ratified trade held for jury. Id.

27. Where plaintiff shows possession at time of taking, defendant must show title in themselves or in one under whom they claim. Hardison v. Plummer [Ala.] 44 So. 591.

28. Pruitt v. Gunn [Ala.] 44 So. 569.

29. Suggested and brought in under Code 1896, § 2634. Carleton v. Kimbrough [Ala.] 43 So. 817.

30. Where he assumes defense, it will be presumed that original defendant held property for his benefit. Merchant's Nat. Bk. v. Bales [Ala.] 41 So. 516.

31. Code 1896, § 1477. Beal v. McKee [Ala.] 43 So. 235. Where, in detinue under mortgage, defendant did not claim under mortgagor, evidence of amount plaintiff advanced on mortgage is irrelevant. Id.

32. Especially in absence of evidence of separate value. Hammond Bros. & Co. v. Lusk [Ala.] 43 So. 573.

33. Duty of sheriff to return bond with indorsement of such fact thereon. Howard v. Deens [Ala.] 44 So. 550.

34. See Carriers, 9 C. L. 466; Master and Servant, 8 C. L. 840; Negligence, 8 C. L. 1090;

§ 1. *Directing verdict.*[35]—It is not only within the power but it is the duty of the trial court to direct a verdict in the proper case.[36] At the close of the evidence in the Federal courts a question of law arises as to whether there is any substantial testimony which would warrant a verdict for plaintiff.[37]

Grounds and occasions.[38]—It is only where there is a total failure of proof[39] or where, admitting the truth of the evidence, it is insufficient, that a verdict may be directed.[40] Direction of verdict is improper unless the conclusion follows as matter of law that no recovery can be had upon any view of the facts which the evidence tends to establish,[41] or the undisputed testimony demands the verdict directed;[42] hence where the evidence on a material issue[43] is conflicting,[44] or where though

Railroads, 8 C. L. 1590; Street Railways, 8 C. L. 2004. For extent of appellate review of verdicts, see Appeal and Review, 9 C. L. 108.

35. See 7 C. L. 1146.

36. Hibner v. Westover [Neb.] 110 N. W. 732.

37. Crookston Lumber Co. v. Boutin [C. C. A.] 149 F. 680.

38. See 7 C. L. 1146.

39. Where there is an entire failure of proof as to facts put in issue by the answer, a direction is proper. Keckler v. Modern Brotherhood of America [Neb.] 109 N. W. 157; Hatch v. Varner [Ala.] 43 So. 481; National Ass'n of Ry. Postal Clerks v. Scott [C. C. A.] 155 F. 92; Milliken v. Thyson Commission Co., 202 Mo. 637, 100 S. W. 604; Meyn v. Chicago Great Western R. Co. [Iowa] 109 N. W. 1096; Daug v. North German Lloyd S. S. Co., 73 N. J. Law 770, 65 A. 199. Where there is no evidence to sustain a recovery by plaintiff, it is error to refuse instructions to that effect. Newsome v. Western Union Tel. Co., 144 N. C. 178, 56 S. E. 863.

40. Kelly v. Insurance Co. of North America, 126 Ill. App. 528; Chicago & Eastern I. R. R. Co. v. Henderson, 126 Ill. App. 530; Swift & Co. v. Haislip, 126 Ill. App. 560. A motion to direct a verdict should be granted unless there is substantial evidence in support of plaintiff's case. Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F. 641; First Nat. Gold Min. Co. v. Altvater [C. C. A.] 149 F. 393.

41. Baltimore & O. R. Co. v. Belinski [Md.] 67 A. 249. Where evidence is such that viewed in its most favorable aspect for plaintiff it could not sustain a recovery, a verdict is properly directed. Murphy v. Galveston, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 606, 96 S. W. 940. A verdict for the defendant is properly directed where plaintiff's evidence, when taken to be true, is not sufficient to create a prima facie case. Young v. Chandler [Me.] 66 A. 539. Where evidence is not sufficient to sustain a verdict, direction is proper. Lasher v. Colton, 126 Ill. App. 119.

42. The court is without power to direct a verdict except in cases where there is no conflict in the evidence, and where that introduced with all reasonable deductions or inferences therefrom demands a particular verdict. Wilcox v. Evans, 127 Ga. 580, 56 S. E. 635. When the facts are not in dispute and the inferences from them not in doubt, the question at issue is one of law and a verdict may properly be directed. Belcher v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 399; Ryle v. Manchester Bldg & Loan Ass'n [N. J. Err. & App.] 67 A. 87. Where evidence is undisputed, there being no issue of fact to be submitted to the jury, a verdict may properly be directed. Kempner v. Thompson [Tex. Civ. App.] 17 Tex. Ct. Rep. 890, 100 S. W. 351. Where the evidence of one of the parties is sufficient to sustain recovery and no evidence has been introduced in behalf of his adversary appreciably tending to overcome it, it is the duty of the court to direct a verdict for the former. Kuykendall v. Fisher, 61 W. Va. 87, 56 S. E. 48; Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A. 303. Where there is no conflict of testimony on a material issue and the evidence demands a finding in favor of one of the parties, a verdict should be directed accordingly. Shumate v. Ryan, 127 Ga. 118, 56 S. E. 103. Properly directed where right of recovery is established by undisputed evidence. Smith v. Green [Ga.] 57 S. E. 98; Blackburn v. Woodward [Ga.] 57 S. E. 318; Reynolds v. Nevin, 1 Ga. App. 269, 57 S. E. 918; Baxley Tie Co. v. Simpson, 1 Ga. App. 670, 57 S. E. 1090. Where undisputed evidence would not warrant verdict for plaintiff, general charge is proper. Tutwiler Coal, Coke & Iron Co. v. Wheeler [Ala.] 43 So. 15; Mugge v. Jackson [Fla.] 43 So. 91. Where evidence is undisputed and establishes prima facie right to recover, the general charge may be given. Roe v. Doe [Ala.] 43 So. 856. Where there is no dispute as to the facts and the inferences from them are not in doubt, the question at issue is one of law and a verdict may be directed. Belcher v. Manchester Bldg. & Loan Ass'n [N. J. Err. & App.] 67 A. 399. Direction proper where undisputed evidence showed interpleader entitled to recover. Vermillion v. Parsons, 118 Mo. App. 260, 94 S. W. 298.

43. Beeland v. Standard Brick Co., 1 Ga. App. 194, 57 S. E. 983; Davis v. Kirkland, 1 Ga. App. 5, 58 S. E. 209; Roberts v. Western Union Tel. Co. [S. C.] 56 S. E. 960; Smallwood v. Jones [Ga.] 57 S. E. 99; McFarland v. Darien & W. R. Co., 127 Ga. 97, 56 S. E. 74. Immaterial conflicts in the evidence will not prevent a directed verdict where it is apparent from the evidence and all inferences therefrom that a contrary verdict would be erroneous. Skinner v. Braswell, 126 Ga. 761, 55 S. E. 914. In an action for freight charges, custom of consignors in delivering cars without orders to avoid demurrage charges. Choctaw, O. & S. R. Co. v. Garrison, 18 Okl. 461, 90 P. 730.

44. Propper v. Wohlwend [N. D.] 112 N. W. 967; Hester v. Gairdner [Ga.] 58 S. E. 165; Seiber v. Johnson Mercantile Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 293, 90 S. W. 516;

the facts are undisputed they admit of different constructions or inferences,[45] or where the credibility of witnesses is involved,[46] a verdict cannot properly be directed, notwithstanding a preponderance in favor of the verdict sought to be directed.[47] It follows that a directed verdict is improper where there is any evidence[48] tending to support the claims of the party against whom the direction is asked[49] in whole or in part[50] on which the jury might reasonably have rendered a verdict in his favor,[51] or upon which reasonable minds might differ in the conclusions reached,[52]

Bailey v. Porter, 30 Ky. L. R. 915, 99 S. W. 932; Gillis v. Paddock's Estate [Neb.] 109 N. W. 734; Husenetter v. Little [Neb.] 110 N. W. 541; Edwards v. Chicago, etc., R. Co. [S. D.] 110 N. W. 832; Zink v. Lahart [N. D.] 110 N. W. 931; Aultman Engine & Thresher Co. v. Boyd [S. D.] 112 N. W. 151; Logan v. Lake Shore & M. S. R. Co. [Mich.] 112 N. W. 506; Plant v. Chicago, B. & Q. R. Co. [Neb.] 112 N. W. 561; Snyder v. Mutual Tel. Co. [Iowa] 112 N. W. 776; Fredrickson v. Schmittroth [Neb.] 112 N. W. 564, rvg. 110 N. W. 653; Royal Bk. of New York v. Goldschmidt, 51 Misc. 622, 101 N. Y. S. 101; Conte v. New York, 116 App. Div. 356, 101 N. Y. S. 491; Menasha Wooden Ware Co. v. Nelson [Wash.] 88 P. 1018; Mutinomah County v. Willamette Towing Co. [Or.] 89 P. 389; Raymer v. Standard Steel Works, 216 Pa. 101, 64 A. 902; Vandegrift Const. Co. v. Camden & T. R. Co., [N. J. Err. & App.] 65 A. 986; Crosby v. Wells [N. J. Err. & App.] 67 A. 295; Crothers v. Philadelphia Elec. Co. [Pa.] 67 A. 206; Quinn v. Rhode Island Co. [R. I.] 67 A. 364; Newburger Cotton Co. v. York Cotton Mills [C. C. A.] 152 F. 398; Buchanan v. Western Union Tel. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 45, 100 S. W. 974; Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 S. W. 1072; Pumphrey v. Fowler, 124 Mo. App. 61, 100 S. W. 1101; Cunniff v. McDonnell [Mass.] 81 N. E. 879; Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636; Openshaw v. Rickmeyer [Tex. Civ. App.] 18 Tex. Ct. Rep. 103, 102 S. W. 467. An affirmative charge is improper where the evidence is conflicting. Reeder v. Huffman [Ala.] 41 So. 177; Birmingham R., Light & Power Co. v. Martin [Ala.] 42 So. 618; Southern R. Co. v. Hobbs [Ala.] 43 So. 844; McCormick Harvesting Mach. Co. v. Lowe [Ala.] 44 So. 47; Roquemore v. Vulcan Iron Works Co. [Ala.] 44 So. 557. A verdict should not be directed unless there is no issue of fact. Davis v. Kirkland, 1 Ga. App. 5, 58 S. E. 209. Negative and positive testimony as to giving of signals held to create a conflict. Chesapeake & O. R. Co. v. Nipp's Adm'x, 30 Ky. L .R. 1131, 100 S. W. 246; Detroit Southern R. Co. v. Lambert [C. C. A.] 150 F. 555.

45. Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 S. W. 1072.

46. Skillern v. Baker [Ark.] 100 S. W. 764.

47. That evidence preponderates not sufficient to warrant direction. Erie R. Co. v. Farrell [C. C. A.] 147 F. 220. Refusal to direct verdict on conflicting evidence will not be disturbed though evidence preponderates in favor of such a direction. Wood v. Public Service Corp. [N. J. Law] 64 A. 980.

48. A peremptory, instruction is improper if there is any evidence. Provident Sav. Life Assur. Soc. v. Johnson, 30 Ky. L. R., 1031, 99 S. W. 1159. Notice of easement under unrecorded deed. Rand v. Armm [N. J. Err. & App.] 67 A. 71. Libel. Lubrano v. Curzio, 27 R. I. 594, 65 A. 273.

49. A motion to take a case from the jury presents the naked legal question whether there is any evidence in the record tending to supply plaintiff's case. Chicago, etc., R. Co. v. Henderson, 126 Ill. App. 530. Improper where evidence fairly tends to sustain plaintiff's cause of action. Lynch v. Lynn Box Co. [Mass.] 80 N. E. 580; Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652; Pittsburgh, etc., R. Co. v. Cozatt, 39 Ind. App. 682, 79 N. E. 534; Gordon v. Park, 202 Mo. 236, 100 S. W. 621; Illinois C. R. Co. v. Bailey, 127 Ill. App. 41; National Enameling & Stamping Co. v. Kinder, 126 Ill. App. 642; Dalton v. Ogden Gas Co., 126 Ill. App. 502; Sandberg v. Brink's Chicago City Exp. Co., 126 Ill. App. 175; Scofield's Adm'x v. Metropolitan Life Ins. Co., 79 Vt. 161, 64 A. 1107; Fleming Bros. v. Linder [Iowa] 109 N. W. 771; Continental Lumber Co. v. Munshaw & Co. [Neb.] 109 N. W. 760; Indianapolis Trac. & T. Co. v. Romans [Ind. App.] 79 N. E. 1068; Roscoe v. Metropolitan St. R. Co. 202 Mo. 576, 101 S. W. 32; Adams v. Simpson [Ky.] 103 S. W. 247. Where facts proved with reasonable inferences drawn therefrom tend to support plaintiff's case, a directed verdict is improper. Freyer v. Aurora, etc., R. Co., 123 Ill. App. 423; Libby, v. Kearney, 124 Ill. App. 339; Czajkowski v. Robinson, 124 Ill. App. 97. A motion should not be granted if plaintiff's case is supported by substantial evidence, no matter how strong the opposing evidence may be. Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F. 641; Wilmington & S. Coal Co. v. Sloan, 225 Ill. 467, 80 N. E. 265. Improper where evidence would sustain verdict though there are reasonable inferences conflicting therewith. Clark v. Slaughter, 129 Wis. 642, 109 N. W. 556.

50. Where the evidence is such as to permit of a partial recovery, an instruction which in effect directs the jury to return a verdict for the plaintiff or defendant as to the entire premises is erroneous. Hogg v. Gammon, 127 Ga. 296, 56 S. E. 404. The court may refuse to instruct the jury to find for the defendant on one count where another count is sustained by the evidence. United Breweries Co. v. O'Donnell, 124 Ill. App. 24.

51. A case should not be taken from the jury unless there is no evidence which if true, with all inferences to be drawn therefrom, would sustain a verdict for plaintiff. Linderman Box & Veneer Co. v. Thompson, 127 Ill. App. 134; Pittsburgh, etc., R. Co. v. Cozatt, 39 Ind. App. 682, 79 N. E. 534. A verdict may be directed only when conceding the truth of the evidence and giving effect to legitimate inferences it is plain that plaintiff has not made out a case entitling him to recover. Dodge v. Rush, 28 App. D. C. 149. If there is any evidence which with rea-

or where the evidence establishes a prima facie case.[53] In many states the rule is that a verdict may properly be directed where a contrary verdict would be set aside,[54] but this is not the rule in Illinois.[55] A verdict may be directed for the plaintiff as well as for the defendant,[56] but in some states direction in favor of the party having the burden of the issue [57] is improper where the motion is based on oral testimony.[58] Defects in pleadings [59] or a material [60] variance between the allegations and proof may be made the basis of the motion, and in the latter case the same questions arise as upon a motion to direct because of the insufficiency of the evidence.[61] A directed

sonable inferences therefrom would support a verdict, it is improper to direct one. Berry v. Chase [C. C. A.] 146 F. 625; Sunderland v. Cowan [Md.] 67 A. 141; Ewing v. U. S. [Ariz.] 89 P. 593; Wells v. Cochran [Neb.] 111 N. W. 381; Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516; Meager v. Linder Lumber Co., 1 Ga. App. 426, 57 S. E. 1004; Jennings v. Stripling, 127 Ga. 778, 56 S. E. 1026; Dobbs v. Malcolm, 127 Ga. 487, 56 S. E. 622; Davis v. Albritton, 127 Ga. 517, 56 S. E. 514; Southern R. Co. v. Reynolds, 126 Ga. 657, 55 S. E. 1039; Williams v. Virginia-Pocahontas Coal Co., 60 W. Va. 239, 53 S. E. 823. Improper where jury could have reasonably found that material averments of the declaration were proved. City of Chicago v. Jarvis, 226 Ill. 614, 80 N. E. 1079. Where inferences from evidence support verdict, affirmative charge is improper. Mobile & O. R. R. Co. v. Glover [Ala.] 43 So. 719. Where plaintiff's evidence would sustain recovery, a direction is improper, no matter how strong conflicting evidence may be. Presumption of negligence from defect in track causing wreck is sufficient to take case to jury. Galveston, etc., R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 616, 98 S. W. 932.

52. To warrant the direction of a verdict on the ground of failure of proof, the undisputed evidence must be so conclusive that all reasonable men in the exercise of an honest and impartial judgment could draw but one conclusion from it. Crookston Lumber Co v. Boutin [C. C. A.] 149 F. 680; Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 S. W. 1072; Sandberg v. Brink's Chicago City Exp. Co., 126 Ill. App. 175; United States Leather Co. v. Howell [C. C. A.] 151 F. 444; Young v. Chandler [Me.] 66 A. 539; Weston v. Pennsylvania R. Co. [N. J. Err. & App.] 65 A. 1015; Choctaw, O. & G. R. Co. v. Garrison, 18 Okl. 461, 90 P. 730; Aultman Engine & Thresher Co. v. Boyd [S. D.] 112 N. W. 151; Gillis v. Paddock's Estate [Neb.] 109 N. W. 734; Butz v. Murch Bros. Const. Co., 199 Mo. 279, 97 S. W. 895; Titterington v. Harry [Tex. Civ. App.] 17 Tex. Ct. Rep. 109, 97 S. W. 840; Lane v. Choctaw, O. & G. R. Co. [Okl.] 91 P. 883; Edwards v. Chicago, etc., R. Co. [S. D.] 110 N. W. 832. Improper where reasonable minds acting within limitations prescribed by law might reach different conclusions. Kimball v. Cruikshank, 123 Ill. App. 580. A verdict will not be directed where fair minded men might honestly differ as to the conclusions to be drawn from the facts in evidence, whether controverted or not. Hummer v. Lehigh Valley R. Co. [N. J. Law] 65 A. 126.

53. Perry County v. Eversole, 30 Ky. L. R. 453, 98 S. W. 1019. Motion to direct properly refused where petition states a cause of action and plaintiff establishes a prima facie case. Missouri Real Estate Syndicate v. Sims, 121 Mo. App. 156, 98 S. W. 783.

54. Greenwald v. Ford [S. D.] 109 N. W. 516; Russell v. Oregon Short Line R. Co. [C. C. A.] 155 F. 22; St. Louis & S. F. R. Co. v. Dewees [C. C. A.] 153 F. 56; Ozanne v. Illinois Cent. R. Co., 151 F. 900; Crookston Lumber Co. v. Boutin [C. C. A.] 149 F. 680; Crosby v. Wells [N. J. Err. & App.] 67 A. 295; Chicago Hardware Co. v. Matthews, 124 Ill. App. 89; Metropolitan R. Co. v. Fonville [Okl.] 91 P. 902; Guss v. Federal Trust Co. [Okl.] 91 P. 1045; Mahaffey v. Rumbarger Lumber Co., 61 W. Va. 571, 56 S. E. 893. Davis v. Kirkland, 1 Ga. App. 5, 58 S. E. 209; Brockham v. Hirsch [Ga.] 58 S. E. 468; Walker v. O'Neill Mfg. Co. [Ga.] 58 S. E. 475; Stone v. Crewdson [Wash.] 87 P. 945; White v. Prudential Ins. Co. of America, 105 N. Y. S. 87; National City Bk. v. Pacific Co., 117 App. Div. 12, 101 N. Y. S. 1098; Ewing v. U. S. [Ariz.] 89 P. 593; Vandergrift Const. Co. v. Camden & T. R. Co. [N. J. Err. & App.] 65 A. 986; Young v. Chandler [Me.] 66 A. 539. Where verdict for plaintiff on evidence offered by him would have been set aside, a peremptory instruction for defendant is proper. Wooten v. Mobile & O. R. Co., 89 Miss. 322, 42 So. 131.

55. A peremptory instruction can be given only when the evidence given at the trial with all inferences which could reasonably be drawn therefrom is so insufficient to support a verdict for plaintiff that the verdict must be set aside on that ground. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833; Chicago, etc., R. Co. v. Steckman, 224 Ill. 124, 79 N. E. 602.

56. Crosby v. Wells [N. J. Err. & App.] 67 A. 295.

57. In North Carolina, court cannot direct a verdict on the plea of contributory negligence. Rev. Laws 1905, § 483. United States Leather Co. v. Howell [C. C. A.] 151 F. 444. Under Burns' Ann. St. 1901, § 359a, contributory negligence is an affirmative defense and a verdict thereon can be directed only in favor of plaintiff. Indianapolis St. R. Co. v. Coyner, 39 Ind. App. 510, 80 N. E. 168.

58. Contributory negligence under Burns' Ann. St. 1903, § 359a, is a matter of defense. Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636.

59. Defects in a declaration sufficient to require an arrest of judgment may be reached by a motion to direct. Declaration held to allege negligence of master resulting in injury to servant. Grace & Hyde Co. v. Sanborn, 124 Ill. App. 472.

60. Variance between proof and unnecessary allegations held immaterial. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136.

61. Request for verdict for defendant on

verdict for the defendant cannot be predicated upon failure of proof where by the court's ruling plaintiff was prevented from introducing the testimony required.[62] In some states the insufficiency of the plaintiff's evidence is not ground for the direction of a verdict,[63] and in states where a contrary rule prevails the insufficiency of the evidence must be clear and obvious,[64] but a mere scintilla of evidence will not suffice.[65] Where the allegations of the petition are denied and evidence is submitted to sustain the issues joined, a verdict is improperly directed for the plaintiff though the defendant introduces no evidence in his own behalf,[66] and where the defendant introduces no evidence, a verdict is improperly directed in his favor though plaintiff has failed to prove his case.[67] Where the court rules against plaintiff as a matter of law on an issue and the only remaining issue is abandoned, a verdict is properly directed for the defendant.[68] Upon a denial of plaintiff's motion for a continuance, the court may impanel a jury and in the absence of evidence direct a verdict for defendant.[69]

The motion.[70]—A motion for a peremptory instruction must be determined solely on plaintiff's evidence [71] which it admits to be true together with all reasonable inferences which may be deduced therefrom [72] for the purpose of denying its sufficiency in point of law.[73] The party against whom a direction is sought is entitled to the benefit of all fair and reasonable inferences from the testimony,[74] and the view most favorable to him will be adopted.[75] The court is without power to weigh the evidence [76] or to determine the credibility of witnesses [77] except to ascertain its

account of variance is same as request on ground of insufficiency of evidence, and its refusal raises only question as to whether the evidence fairly tended to support cause of action. Chicago Union Trac. Co. v. Brethauer, 223 Ill. 521, 79 N. E. 287.

62. A plaintiff in an action for breach of contract does not lose his right to damages by reason of failure to offer evidence as to the loss he has sustained where by a ruling of the court he has been deprived of the testimony necessary to make out his case, and a court is not authorized under such circumstances to direct a verdict for the defendant. Kneipper v. Richards, 7 Ohio C. C. (N. S.) 581.

63. When the plaintiff fails to make out a prima facie case, it is the better practice to render a judgment of nonsuit rather than direct a verdict for the defendant. Oliver v. Warren, 124 Ga. 549, 53 S. E. 100; Zipperer v. Savannah [Ga.] 57 S. E. 311.

64. Sunderland v. Cowan [Md.] 67 A. 141.

65. Berry v. Chase [C. C. A.] 146 F. 625.

66. Milliken v. Thyson Commission Co., 202 Mo. 637, 100 S. W. 604.

67. Caudell v. Southern Ry. Co. [Ga. App.] 58 S. E. 689.

68. Ruling that no damages could be recovered and issue as to conversion was abandoned. Roberts v. First Nat. Bk. [Mich.] 112 N. W. 1129.

69. Leamon's Adm'x v. Louisville, etc., R. Co., 30 Ky. L. R. 443, 98 S. W. 1016.

70. See 7 C. L. 1151.

71. Case Threshing Mach. Co. v. Sanford, 30 Ky. L. R. 188, 97 S. W. 805.

72. Kimball Co. v. Cruikshank, 123 Ill. App. 580. On a motion to direct, the court must consider as established every fact which plaintiff's evidence fairly tends to prove. Hartman v. Chicago, G. W. R. Co., 122 Iowa, 582, 110 N. W. 10. On motion to direct, plaintiff's testimony will be taken as true. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 N. E. 65. On a motion to direct, the court must take as established all facts proved and all inferences which can be logically and reasonably taken from the evidence. Harris v. Lincoln Trac. Co. [Neb.] 111 N. W. 580.

73. In considering motion, court cannot ignore favorable testimony of plaintiff's witnesses nor testimony of plaintiff on direct examination because testimony of latter on cross-examination was at variance therewith. Hayward v. North Jersey St. R. Co. [N. J. Law] 65 A. 737.

74. Williams v. Choctaw, etc., R. Co. [C. C. A.] 149 F. 104; Ozanne v. Illinois Cent. R. Co., 151 F. 900; Crookston Lumber Co. v. Boutin [C. C. A.] 149 F. 680.

75. Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F. 641; Detroit Southern R. Co. v. Lambert [C. C. A.] 150 F. 555; Williams v. Choctaw, etc., R. Co. [C. C. A.] 149 F. 104; Murphy v. Galveston, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 606, 96 S. W. 940.

76. Bunnell v. Rosenberg, 126 Ill. App. 196; Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F. 641; Plant v. Chicago, etc., R. Co. [Neb.] 112 N. W. 561. In passing on a motion to direct a verdict, it is not the province of the judge to weigh the evidence. Berry v. Chase [C. C. A.] 146 F. 625. Motion never presents a question as to the weight of the testimony. Chicago, etc., R. Co. v. Henderson, 126 Ill. App. 530. Direction is not authorized merely because in judgment of court a prima facie case has been overcome by contrary evidence. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833.

77. The court is not at liberty to review the probabilities of the case or the weight or credibility of the testimony. Weston v. Pennsylvania R. Co. [N. J. Err. & App.] 65 A.

probative force.[78] The motion must set forth the grounds upon which it is based,[79] but a rule requiring a motion for a nonsuit to be based on specific reasons will not be extended so as to include a motion to direct a verdict.[80] The court need not specify its reasons for directing a verdict.[81] There is no difference between "permitting" and "directing" a verdict so far as the action of the court is concerned.[82] Where a direction would be improper at the close of plaintiff's case, it is also improper at the close of all the evidence,[83] but the converse is true, and where it would have been proper it may be made at the close of all the evidence unless defendant's evidence has added to plaintiff's case.[84]

A joint motion for a directed verdict submits the facts to the court for decision as a matter of law,[85] and its decision thereon has the same binding force as a verdict of the jury.[86] Until final action [87] is taken, either of the parties to the motion may request submission, but even in such case, where there is more than one issue of fact, the party asking submission must specifically point out the issues which he desires submitted.[88] The submission of requests for instructions with or following a motion to direct a verdict does not constitute a withdrawal of the latter where both parties join in the motion.[89]

Effect of ruling; appeal; waiver.[90]—A motion for a directed verdict is waived by proceeding with the trial upon its denial,[91] but a waiver of a motion for a nonsuit at the close of plaintiff's evidence does not preclude defendant from seeking a directed verdict at the close of all the evidence.[92] The denial of a motion for a directed verdict will not be reviewed where no grounds were stated in the motion.[93] On review of an order directing a verdict, only the plaintiff's evidence will be considered,[94] and will be construed most favorably to him.[95] When the pleadings warrant the

1015; Engel v. New York City R. Co., 105 N. Y. S. 80.

78. When, at the close of plaintiff's evidence, defendant moves the court to direct a verdict, it is the right and duty of the judge to weigh the evidence in order to determine its probative force and effect. Quay v. Quay, 4 Ohio N. P. (N. S.) 529.

79. Wood v. Public Service Corp. [N. J. Law] 64 A. 980.

80, 81. Owens v. San Pedro, etc., R. Co. [Utah] 89 P. 825.

82. Trial judge having power to control proper conduct of business of court, what he permits to be done is equivalent to a direction. Word "permitted" used in bill of exceptions. Brooks v. Boyd, 1 Ga. App. 65, 57 S. E. 1093.

83, 84. Bunnell v. Rosenberg, 126 Ill. App. 196.

85. Dilcher v. Nellany, 52 Misc. 364, 102 N. Y. S. 264. Facts concluded where both parties request directed verdict unless unsupported by any evidence. Mead v. Chesbrough Bldg. Co. [C. C. A.] 151 F. 998. And only question for review is correctness of finding on law. City of Defiance v. McGonigale [C. C. A.] 150 F. 689. A motion by both parties for a directed verdict is an assertion by each that on the entire evidence he is entitled to prevail. Empire State Cattle Co. v. Atchison, etc., R. Co. [C. C. A.] 147 F. 457.

86. Cannot be disturbed if supported by any substantial evidence. Bankers' Mut. Casualty Co. v. State Bk. of Goffs [C. C. A.] 150 F. 78. Where a party asks direction of a verdict and one is directed against him, his position is the same on all controverted and inferable facts as though an adverse verdict had been rendered by the jury. City Trust, Safe Deposit & Surety Co. v. U. S. [C. C. A.] 147 F. 155.

87. Where after court had stated "I will direct a verdict for plaintiffs," and before the verdict was recorded defendant asked for submission, held not too late. Brown v. Joy S. S. Co., 105 N. Y. S. 81. Too late when request for submission is made after verdict is directed for adverse party and subsequent declaration of court that plaintiff was too late and repetition of direction does not alter case. Solomon v. Levine, 54 Misc. 270, 104 N. Y. S. 443.

88. Motion for submission to jury on entire case may be denied, though made in time. Solomon v. Levine, 54 Misc. 270, 104 N. Y. S. 443.

89. Empire State Cattle Co. v. Atchison, etc., R. Co. [C. C. A.] 147 F. 457.

90. See 7 C. L. 1153.

91. A motion to direct a verdict is waived where defendant introduces testimony after the denial of the motion. Riggs v. Turnbull [Md.] 66 A. 13; Fidelity & Casualty Co. v. Thompson [C. C. A.] 154 F. 484. Unless the motion is renewed at the close of the whole case. Nashville R. & Light Co. v. Henderson [Tenn.] 99 S. W. 700. Error in denying a motion to direct verdict will not be reviewed on appeal where it was not renewed at the close of all of the evidence. Rogers v. Gladiator Gold Min. & Mill. Co. [S. D.] 113 N. W. 86.

92. Gardner v. Porter [Wash.] 88 P. 121.

93. Wood v. Public Service Corp. [N. J. Law] 64 A. 980.

94. Dalton v. Ogden Gas Co., 126 Ill. App. 502.

95. Dalton v. Ogden Gas Co., 126 Ill. App. 502. On appeal from a judgment for defend-

verdict and the evidence is not preserved, it will be presumed on appeal that the action of the trial court in directing a verdict was proper.[96] The erroneous direction of a verdict instead of a nonsuit may be corrected and the appeal affirmed with directions.[97]

§ 2. *Demurrers to evidence.*[98]—Motions to exclude, to direct a verdict,[99] or to grant a nonsuit,[1] are in the nature of demurrers to the evidence. In an action tried before a chancellor, a demurrer to the evidence is not permissible.[2] A demurrer to the evidence should be overruled where the facts are disputed, or the inferences deducible from them are in doubt,[3] or where the evidence fairly tends to sustain plaintiff's case,[4] and it is not necessary that he should meet affirmative issues raised by the reply.[5] It should be sustained where the evidence wholly fails to support the claim of the party against whom the demurrer is directed.[6] Though on joinder in demurrer the usual practice is to to discharge the jury,[7] an order sustaining the demurrer is in effect a finding that the evidence is insufficient to warrant submission to the jury, and the court may thereupon properly direct a verdict.[8]

Effect.[9]—The demurrer must be determined on plaintiff's evidence only [10] which must be taken as true,[11] and every reasonable inference must be drawn therefrom in his favor.[12] If defendant's evidence adds to plaintiff's case, it may also be taken into account.[13] The court can consider only those facts and inferences which are favorable to plaintiff.[14]

Waiver.[15]

Disclaimers, see latest topical index.

ant on a directed verdict, the court must consider all facts in the case as favorable to the plaintiff as the evidence will justify. Laidley v. Musser Lumber & Mfg. Co. [Wash.] 88 P. 124.

96. Hifner v. Westover [Neb.] 110 N. W. 732.

97. Where plaintiff failed to make out a prima facie case and a verdict was directed, no errors appearing on the trial, the judgment will be affirmed with directions that plaintiff have leave to vacate the verdict and substitute therefor a judgment of nonsuit, when the remittitur is made the judgment of the lower court. Zipperer v. Savannah [Ga.] 57 S. E. 311.

98. See 7 C. L. 1154.

99. Ball v. The Tribune Co., 123 Ill. App. 235; Kimball v. Cruikshank, 123 Ill. App. 580; Harris v. Lincoln Traction Co. [Neb.] 111 N. W. 580.

1. Hayward v. North Jersey St. R. Co. [N. J. Law] 65 A. 737; Doyle v. Eschen [Cal. App.] 89 P. 836.

2. Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056.

3. If facts bearing on issue are disputed or undisputed but admit of different constructions and inferences, a demurrer to the evidence is improperly sustained. Powers v. St. Louis Transit Co., 202 Mo. 267, 100 S. W. 655.

4. Where plaintiff's testimony tends to sustain the material allegations of the petition, a demurrer to the evidence is improperly allowed. Collier v. Munger [Kan.] 89 P. 1011. Where the jury would be justified in finding for the plaintiff, a demurrer to the evidence should be overruled. Massey's Adm'x v. Southern R. Co., 106 Va. 515, 56 S. E. 275.

5. Collier v. Munger [Kan.] 89 P. 1011.

6. Milliken v. Thyson Commission Co., 202 Mo. 637, 100 S. W. 604; Willoughby v. Ball, 18 Okl. 535, 90 P. 1017.

7, 8. Myers v. Hodges [Fla.] 44 So. 357.

9. See 7 C. L. 1155.

10. In passing on a demurrer to the evidence, ordinarily the plaintiff's evidence alone should be considered. Jordan v. St. Louis Transit Co., 202 Mo. 418, 101 S. W. 11.

11. Harris v. Lincoln Trac. Co. [Neb.] 111 N. W. 580. A demurrer to the evidence, by operation of law, admits the truth of the facts proved. Bensiek v. St. Louis Transit Co., 125 Mo. App. 121, 102 S. W. 587. Admits not only all the evidence proves but all it tends to prove. Ball v. The Tribune Co., 123 Ill. App. 235; Jones v. Adair [Kan.] 91 P. 78; Ferguson v. St. Louis, etc., R. Co., 123 Mo. App. 590, 100 S. W. 537; Coon v. Atchison, etc., R. Co. [Kan.] 89 P. 682.

12. Ferguson v. St. Louis, etc., R. Co., 123 Mo. App. 590, 100 S. W. 537; Charlton v. St. Louis, etc., R. Co., 200 Mo. 413, 98 S. W. 529

13. Jordan v. St. Louis Transit Co., 202 Mo. 418, 101 S. W. 11.

14. On demurrer to plaintiff's evidence, the court cannot disregard or disbelieve that offered in his behalf which tends to sustain his cause of action. Jones v. Adair [Kan.] 91 P. 78. Cannot consider fact that plaintiff's testimony on cross-examination was at variance with that on direct and with that of favorable testimony of other witnesses. Hayward v. North Jersey St. R. Co. [N. J. Law] 65 A. 737.

15. See 7 C. L. 1155.

DISCONTINUANCE, DISMISSAL AND NONSUIT.

§ 1. Voluntary Nonsuit or Discontinuance (982).
§ 2. Involuntary Dismissal or Nonsuit (984). Grounds in General (984). Jurisdiction (984). Defects in Pleadings; Parties (985). Failure of Prosecution (985). Nonsuit for Failure of Proof (986). Variance (987). Motion for Nonsuit; Effect (987). Effect of Dismissal or Nonsuit (988). Setting Aside Order; Reinstating Cause (989). Practice on Appeal (989).

§ 1. *Voluntary nonsuit or discontinuance.*[16]—Where no affirmative relief is claimed by the answer, plaintiff may discontinue the action,[17] except where the rights of defendant, third persons, or the public would be thereby substantially prejudiced,[18] or he may dismiss as to one defendant where such action would not prejudice the rights of a codefendant.[19] Payment of the costs may be required but the court has no power to impose unreasonable terms.[20] Strictly a discontinuance cannot be had without leave of court,[21] but in many states such leave is assumed in the first instance [22] and may be implied from orders of the court subsequent to attempted discontinuance.[23] Usually the motion is required to be in writing,[24] and of such a character as clearly to indicate an intention to dismiss.[25] An agreement to dismiss made out of court, for a valuable consideration, does not affect the jurisdiction of the court to proceed,[26] but advantage of it may be taken by a plea in abatement [27] or cross bill.[28] An order of dismissal by mistake erroneously reciting the name of the party dismissing may be corrected.[29] A motion to set aside a discontinuance is addressed to the discretion of the court.[30]

An attorney [31] of record in California controls the action, and it is held that as

16. See 7 C. L. 1155.

17. Telephonine Co. of America v. Douthitt, 115 App. Div. 626, 100 N. Y. S. 781. Upon denial of a motion for a continuance the plaintiff may dismiss without prejudice. Leamon's Adm'x v. Louisville, etc., R. Co., 30 Ky. L. R. 443, 98 S. W. 1016.

18. Action on public officer's bond, held that no rights were prejudiced by dismissal. School Dist. No. 11 v. Clifcorn [Wis.] 112 N. W. 1099.

19. The court, with plaintiff's consent, may dismiss as to a defendant against whom his codefendants have no legal claim. Where on foreclosure of a mortgage plaintiff would have the right of subrogation as to a defendant claiming under a prior mortgage, but no such right existed in a codefendant, a dismissal as to such defendant with plaintiff's consent was proper. Edmonston v. Wilbur, 99 Minn. 495, 110 N. W. 3.

20. In an action at law where no counterclaim has been interposed and where no equities exist in favor of the defendant, plaintiff may discontinue upon payment of costs, but the court has no power to impose terms that plaintiff stipulate not to assign a claim to a resident for the purpose of bringing suit thereon. Telephonine Co. of America v. Douthitt, 115 App. Div. 362, 100 N. Y. S. 781.

21. Consolidated Nat. Bk. v. McManus, 217 Pa. 190, 66 A. 250. The plaintiff has no such control over the action as to entitle him to dismiss without action by the court. School Dist. No. 11 v. Clifcorn [Wis.] 112 N. W. 1099.

22. Consolidated Nat. Bk. v. McManus, 217 Pa. 190, 66 A. 250.

23. The discharge of a rule to take off a continuance is equivalent to a grant of leave to discontinue. Consolidated Nat. Bk. v. McManus, 217 Pa. 190, 66 A. 250.

24. Under Code Civ. Proc. § 581, subd. 1, requiring filing of written request for dismissal, a motion in open court by plaintiff's attorney will not suffice though plaintiff had previously filed such a request signed by himself alone, his attorney being required to join therein. Boca & L. R. Co. v. Lassen County, Super. Ct., 150 Cal. 153, 88 P. 718.

25. A notice by plaintiff that he has lost personal interest in the action intended merely to relieve the plaintiff from costs does not authorize the court to discontinue the action. Such a notice does not amount to stipulation for a consent to discontinuance. Brown v. Cole, 54 Misc. 278, 104 N. Y. S. 109.

26. McFadden v. Heisen [C. C. A.] 150 F. 568.

27. Is waived by pleading to the merits McFadden v. Heisen [C. C. A.] 150 F. 568.

28. An executory agreement to discontinue is available only on cross bill and will not be disposed of summarily where complaint does not appear to consent thereto. Snyder v. De Forest Wireless Tel. Co., 154 F. 142.

29. Where an infant sued by her next friend, the caption reciting that the latter also sued individually, but there being no allegation showing that personal recovery was sought, a dismissal by the latter so far as she sued personally by mistake reciting that same was by the infant held properly corrected. Louisville, etc., R. Co. v. Kessee [Ky.] 103 S. W. 261.

30. Consolidated Nat. Bk. v. McManus, 217 Pa. 190, 66 A. 250. Will not be granted unless discontinuance works hardship on defendant. Id.

31. See 7 C. L. 1157.

a party cannot appear in an action both in person and by attorney, the latter has sole power to dismiss,[32] and in such case where the plaintiff attempts to dismiss by his own action, a subsequent motion by his attorney of record not in compliance with the statute will not suffice.[33] The attorney, however, has no such personal interest in the litigation as to entitle him to object to a dismissal upon a settlement by the parties.[34]

Where affirmative relief is demanded.[35]—At common law the plaintiff having full control of the action might dismiss though defendant interposed a counterclaim,[36] but under the practice acts in most states this rule has been changed,[37] and in such states dismissal can only be had without prejudice to defendant's right to relief.[38] The status of the action at the time of the filing of the motion determines the right to dismiss.[39] It has been held, however, that statutes prohibiting dismissal where the answer seeks affirmative relief have no application to the dismissal of a count of the petition.[40] While plaintiff may dismiss the action where interveners claim no affirmative relief,[41] he cannot, after the court has determined that a party has a litigable interest in the subject-matter of the suit, dismiss as to such parties and proceed to obtain relief as to other defendants,[42] in the absence of an order vacating permission to intervene.[43]

When right to voluntary nonsuit is lost.[44]

Discontinuance by operation of law.[45]

Effect of discontinuance.[46]—A dismissal terminates the pending action,[47] but, as in bringing an action for injuries to a child the parent acts as trustee, the court does not lose jurisdiction over the action by a mere formal order of dismissal entered upon stipulation but may for good cause shown set aside the dismissal and order the cause reinstated.[48] A voluntary dismissal, as a rule, is not a bar to a subsequent proceeding,[49] and only such orders as were entered in the

32. Boca & L. R. Co. v. Lassen County Super. Ct., 150 Cal. 153, 88 P. 718. Code Civ. Proc. § 581, subd. 1, provides that an action may be dismissed "by the plaintiff himself" by filing a written request therefor and paying costs, no affirmative relief being sought by answer, held not to authorize a plaintiff who appeared and was still represented by an attorney of record to dismiss upon complying with its provisions. Id.

33. Code Civ. Proc. § 581, subd. 1, requires filing of request in writing for dismissal. Held that subsequent motion of attorney for dismissal in open court did not validate a prior written request therefor signed by the plaintiff alone. Boca & L. R. Co. v. Lassen County Super. Ct., 150 Cal. 153, 88 P. 718.

34. An attorney for one of the parties cannot object to a voluntary dismissal except upon terms merely because under his contract of employment he was to receive a share of the proceeds of the litigation which had not been paid. Russo v. Darmstadt, 116 App. Div. 887, 102 N. Y. S. 209.

35. See 7 C. L. 1157.

36. Boothe v. Armstrong [Conn.] 67 A. 484.

37. Boothe v. Armstrong [Conn.] 67 A. 484. In action on note answer set up facts sufficient if alleged by way of complaint to hold plaintiff for conversion of the note. Held discontinuance was properly denied. Block v. Ottenberg, 53 Misc. 647, 103 N. Y. S. 739.

38. Cross petition demanding an accounting in an action to quiet title. Hanson v. Hanson [Neb.] 111 N. Y. S. 368.

39. Amendment of answer after filing of motion so as to allege a counterclaim does not affect the motion. Doll v. Slaughter [Colo.] 88 P. 848.

40. Under Code, § 3764, plaintiff may dismiss a count of his petition notwithstanding § 3766 providing that, where a counterclaim is interposed, defendant shall have the right to proceed thereon regardless of a dismissal by plaintiff of his cause of action. Houts v. Sioux City Brass Works [Iowa] 110 N. W. 166.

41. In action to quiet title where intervener prays that plaintiff take nothing. Townsend v. Driver [Cal. App.] 90 P. 1071.

42, 43. Townsend v. Driver [Cal. App.] 90 P. 1071.

44. See 5 C. L. 1012.

45. See 5 C. L. 1013.

46. See 7 C. L. 1157.

47. Where after all defendants with one exception had confessed judgment the suit was ordered "filed away," the court was without power at a subsequent term to enter judgment against the defendant who had not confessed, such order being equivalent to a dismissal. Aikman v. South, 29 Ky. L. R. 1201, 97 S. W. 4.

48. Facts held to justify setting aside of dismissal entered upon stipulation signed by parent of minor child. Picciano v. Duluth, M. & N. Ry. Co. [Minn.] 112 N. W. 885.

49. Stipulation dismissing, action without

proceeding itself are affected thereby.[50] A dismissal as to one of two defendants not jointly liable does not affect plaintiff's rights as against the other.[51] Where a motion by defendant to reinstate a cause which plaintiff was without power to withdraw was granted, the court may order plaintiff's action against defendant restored.[52] An order setting aside a dismissal is appealable as it prevents the entry of judgment.[53]

Retraxit.[54]—An agreement between the parties to a suit settling their dispute and dismissing the action is a retraxit [55] and has the same effect as a decision on the merits,[56] but a mere dismissal on stipulation [57] has no such effect.

§ 2. *Involuntary dismissal or nonsuit.*[58]—The granting of an involuntary nonsuit in the proper case does not contravene constitutional guarantees of the right to a jury trial.[59] Where evidence discloses liability on the part of only one or two persons sued jointly, the action may be dismissed as to the other and continued as to the one liable.[60]

Grounds in general.[61]—The admission of incompetent testimony does not warrant a nonsuit,[62] nor is the erroneous granting of a new trial after verdict ground for nonsuit or a subsequent trial,[62a] but refusal to obey orders of the court concerning the proceedings in the action is usually ground for dismissal.[63] As failure to answer admits the allegation of the petition, a nonsuit is improperly directed in favor of a defaulting defendant where the petition states a cause of action.[64] The right to a dismissal is waived by proceeding with the trial after a denial of the motion,[65] or after the right accrues.[66]

Jurisdiction.[67]—Want of jurisdiction is ground for dismissal,[68] but a jurisdictional defect is waived by a general appearance.[69]

costs to either party held without prejudice. State Medical Examining Board v. Stewart [Wash.] 89 P. 475.

50. On dismissal of a partition suit in which a receiver was appointed the court cannot order an accounting by the receiver as to rents and profits received by him under appointment in another action. Horn v. Horn, 115 App. Div. 292, 100 N. Y. S. 790.

51. Liability of city for injuries caused by unguarded excavation is not affected by dismissal as to codefendant responsible for condition. Keithley v. Independence, 120 Mo. App. 255, 96 S. W. 733.

52. Defendant interposed a counterclaim and plaintiff attempted to dismiss. Boothe v. Armstrong [Conn.] 67 A. 484.

53. Picciano v. Duluth, M. & N. R. Co. [Minn.] 112 N. W. 885.

54. See 3 C. L. 1100.

55, 56. State Medical Examining Board v. Stewart [Wash.] 89 P. 475.

57. Stipulation that "the above cause now pending be dismissed without costs to either party" held not a retraxit. State Medical Examining Board v. Stewart [Wash.] 89 P. 475.

58. See 7 C. L. 1157.

59. Bohn v. Pacific Elec. R. Co. [Cal. App.] 91 P. 115.

60. Action against contractor and subcontractor for negligence for which former only was responsible. Steele v. Grahl-Peterson Co. [Iowa] 109 N. W. 882.

61. See 7 C. L. 1157.

62. Kennedy v. Greenville [S. C.] 58 S. E. 989; Lee v. Unkefer [S. C.] 58 S. E. 343.

62a. Kennedy v. Greenville [S. C.] 58 S. E. 989.

63. Refusal to obey order requiring plaintiff to elect as to which of improperly joined parties he would proceed. French v. Central Const. Co., 76 Ohio St. 509, 81 N. E. 751. Under Code Civ. Proc. § 430, court may in its discretion dismiss a petition without prejudice for failure of plaintiff to comply with an order requiring him to make same more definite and certain. Howell v. Malmgren [Neb.] 112 N. W. 313.

64. Caudell v. Caudell, 127 Ga. 1, 55 S. E. 1028.

65. Introduction of evidence after denial of motion for nonsuit waives it. Wees v. Page [Wash.] 91 P. 766.

66. Under the Iowa statute directing dismissal as to defendants who are not residents of the county where the action is dismissed as to resident defendants, or there is a failure to obtain judgment against them, a nonresident does not waive his right to dismissal by any act prior to termination of action against resident codefendants. Lyon v. Barnes, 132 Iowa, 717, 111 N. W. 9.

67. See 7 C. L. 1158.

68. Where by a favorable ruling on a demurrer plaintiff's demand was reduced to a sum less than the amount of which the court would have jurisdiction, the action should be dismissed. International & G. N. R. Co. v. Voss [Tex. Civ. App.] 17 Tex. Ct. Rep. 419, 99 S. W. 189.

69. Failure of plaintiff in replevin to direct sheriff in writing that possession was not required. Pedrick v. Kuemmell [N. J. Law] 65 A. 906.

Defects in pleadings; parties.[70]—Where it is apparent from the petition that plaintiff is not entitled to a recovery, the court may of its own motion raise the question and entertain a motion to dismiss,[71] but the failure of a complaint to state a cause of action against one defendant does not entitle a codefendant to dismissal.[72] Want of capacity to sue,[73] or nonjoinder of necessary parties, is ground for dismissal,[74] but by statute in most states misjoinder of causes of action or parties does not constitute a ground.[75] The filing of an answer does not preclude defendant from moving to dismiss on the ground of the insufficiency of the complaint where the answer adds nothing in aid of its allegations.[76] Where by amendment the petition fails to state a cause of action against one defendant, it may be dismissed as to him at any time.[77]

Failure of prosecution.[78]—Independent of statute,[79] the court may order a dismissal for failure of prosecution,[80] no sufficient excuse therefor being presented.[81] While dismissal for failure to comply with a rule of court is discretionary, such discretion must not be exercised arbitrarily or so as to work injustice.[82] In determining a motion to dismiss for want of diligent prosecution, the court may consider all facts appearing in the record bearing upon the question of dili-

70. See 7 C. L. 1159.

71. Robinson-Humphrey Co. v. Wilcox County [Ga.] 58 S. E. 644.

72. Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co., 117 App. Div. 215, 102 N. Y. S. 122.

73. Action by foreign administrator who has not qualified in state in which action was brought. McClellan's Adm'r v. Troendle, 30 Ky. L. R. 611, 99 S. W. 329.

74. Without prejudice. Harper v. Hays Co. [Ala.] 43 So. 360.

75. In Louisiana the misjoinder of causes of action is not ground for the dismissal to the pending suit but merely the rejection of the suit sought to be engrafted. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153. Neither misjoinder of parties nor misjoinder of causes of action is ground for dismissal. Mansf. Dig. § 5028, provides that defect of parties shall be ground for demurrer, and § 5016 provides for the striking out of causes of action improperly joined. Tishomingo Elec. Light Power Co. v. Burton, 6 Ind. T. 445, 98 S. W. 154.

76. Painter v. Norfolk & W. R. Co., 144 N. C. 436, 57 S. E. 151.

77. Amendment showing that certain defendants described as principals in the original petition were in fact agents. Lovelace v. Browne, 126 Ga. 802, 55 S. E. 1041.

78. See 7 C. L. 1159.

79. Failure to serve defendant with process, though a resident of county until more than four years after filing petition for condemnation, land having increased in value and petitioner insisting that value be determined as of date of filing petition, held ground for dismissal. Sanitary Dist. of Chicago v. Chapin, 226 Ill. 490, 80 N. E. 1017.

80. Facts held to show lack of due diligence in serving process on nonresident defendants warranting dismissal. Pitkin v. Flagg, 198 Mo. 646, 97 S. W. 162. Nonsuit is properly granted where plaintiff fails to bring on a case for trial pursuant to his own notice, though case was still at issue, the replication not having been filed. Stein v. Goodenough, 73 N. J. Law, 812, 64 A. 961. Delay of eight years after action was placed on calendar, some of defendants not being served with process, held ground for dismissal. Watson v. Loomis, 51 Misc. 227, 100 N. Y. S. 958. Failure to put cause on calendar for three years after joinder of issue held to require unconditional dismissal. Anderson v. Hedden & Sons Co., 116 App. Div. 231, 101 N. Y. S. 585. Delay of eleven years in bringing case to trial after joinder of issues establishes prima facie unreasonable neglect which plaintiff must overcome. St. Paul's Church v. Mt. Vernon Suburban Land Co., 103 N. Y. S. 858.

81. Dismissal for failure to proceed to trial on date set held an abuse of discretion, plaintiff's attorney presenting a sufficient excuse at that time and being prepared to proceed on the following day. Bane v. Cox [Kan.] 88 P. 1083. Affidavit of plaintiff's attorney in explaining delay of eleven years in bringing case to trial that his recollection was that delay was due to pendency of negotiations for settlement held insufficient, especially in view of positive contradiction by defendant. St. Paul's Church v. Mt. Vernon Suburban Land Co., 103 N. Y. S. 858. Affidavit of plaintiff that attorney repeatedly told him case would be taken care of, and of latter that on account of press of business he was unable to give it his attention, held not a sufficient excuse for a delay of nearly five years in bringing case to trial. Krauss v. Wood, 104 N. Y. S. 455.

82. Dismissal by court on its own motion without request of defendant and despite excuse and protest of plaintiff for failure to comply with court rule requiring dismissal, where no progress had been made for period of one year, held arbitrary and unjust. Cleaveland v. Nubian Min. Co. [Colo.] 88 P. 179. Dismissal for failure to comply with rule of court of doubtful validity requiring undisposed of cases on preceding calendar to be noticed for succeeding term held harsh and unreasonable, where plaintiff in good faith attempted to comply therewith and believed he had done so. Rauchberger v. Interurban St. R. Co., 52 Misc. 518, 102 N. Y. S. 561.

gence, whether same occurred before the action was begun or afterward.[83] Statutes requiring dismissal for failure to return summons with proof of service within a specified time after the commencement of the action apply only to actions which have not been tried,[84] and while failure to enter a judgment or default within a reasonable time after filing the summons and proof of service is ground for dismissal,[85] the entry of judgment prior to the making of the motion to dismiss forecloses the right to dismissal.[86] In Iowa failure to give a bond for costs within the time prescribed by law does not require dismissal,[87] as the court may extend the time therefor and an order denying a motion to dismiss is equivalent to an extension.[88] The right to dismissal for want of prosecution may be waived.[89]

Nonsuit for failure of proof.[90]—A nonsuit is properly directed where there is no evidence,[91] or where that offered is legally insufficient to establish the cause of action, or where a verdict for the party against whom it is directed would be set aside,[93] but where the proof lacking is not such as could not be supplied on a second trial.[94] or where plaintiff may avail him of defects in the answer,[95] the dismissal should be without prejudice.[96] Failure to prove facts not in issue is not ground for dismissal.[97] Where plaintiff fails to establish a cause of action, the municipal court of the City of New York can only order a dismissal without prejudice.[98] Though a nonsuit may be granted on the opening statement of counsel,[99] it is improper unless facts stated together with the reasonable inferences therefrom would be insufficient to support a verdict for the plaintiff.[1] A nonsuit is improper if there is any evidence tending to support the claim alleged,[2] or where

83. Action held properly dismissed though only a few days over a year had elapsed from joinder of issue, delay in bringing action and a further delay of three years before moving to transfer to proper county indicating that same was not brought in good faith. People's Home Sav. Bk. v. Sherman, 150 Cal. 793, 90 P. 133.

84. Jones v. Gunn, 149 Cal. 687, 87 P. 577. Code Civ. Proc. § 581, sub. 7, requiring dismissal for failure to return within three years, held not ground for setting aside judgment regularly entered for failure to file proof of service. Id.

85. Peirce v. National Bk. [Wash.] 87 P. 488. Delay of four years. Id.

86. Peirce v. National Bk. [Wash.] 87 P. 488.

87. Bond filed one day late. Funk v. Church, 132 Iowa, 1, 109 N. W. 286.

88. Code, § 3848, provides that action shall be dismissed if bond is not filed in such time as the court allows. Funk v. Church, 132 Iowa, 1, 109 N. W. 286.

89. Defendant waives the right to dismissal where all continuances were either at its request or by its consent. McHugh v. Metropolitan St. R. Co., 51 Misc. 588, 101 N. Y. S. 95. Failure to file declaration within time prescribed is waived by pleading to it and nonsuit is improper. Donnelly v. Chicago City R. Co., 124 Ill. App. 18.

90. See 7 C. L. 1160.

91. Jackson v. Ross, 1 Ga. App. 192, 57 S. E. 913; McCook v. Dublin & S. W. R. Co. [Ga. App.] 58 S. E. 491; Caudell v. Caudell, 127 Ga. 1, 55 S. E. 1028; Crotty v. Danbury, 79 Conn. 379, 65 A. 147; Baker v. Swift & Co. [Neb.] 110 N. W. 654.

92. Caudell v. Southern R. Co. [Ga. App.] 58 S. E. 689; Hercules Oil Refining Co. v. Hocknell [Cal. App.] 91 P. 341; Tallon v. New York Cont. Co., 104 N. Y. S. 723; Regulus Cigar Co. v. Flannery, 105 N. Y. S. 95; McKee v. Owen, 104 N. Y. S. 373. Contributory negligence in driving into visible depression in street established. Smith v. Philadelphia, 217 Pa. 118, 66 A. 142.

93. Bohn v. Pacific Elec. R. Co. [Cal. App.] 91 P. 115; Coulter v. Union Laundry Co., 34 Mont. 590, 87 P. 973.

94. Colborn v. Arbecam, 54 Misc. 623, 104 N. Y. S. 986.

95. Negative pregnant or conjunctive denial in answer. Colborn v. Arbecam, 54 Misc. 623, 104 N. Y. S. 986.

96. Dixon v. Marlow, 104 N. Y. S. 762. Upon failure to make out a prima facie case, the court should order a nonsuit rather than direct a verdict. Zipperer v. Savannah [Ga.] 57 S. E. 311; Oliver v. Warren, 124 Ga. 549, 53 S. E. 100. Where the evidence is insufficient to sustain the declaration, the court should order a nonsuit rather than a dismissal on the pleadings and evidence. Hughes v. Georgia R. & Elec. Co., 126 Ga. 462, 55 S. E. 229.

97. Plaintiff's legal capacity to sue. Independent Trembowler Young Men's Benev. Ass'n v. Somach, 52 Misc. 538, 102 N. Y. S. 495.

98. Laws 1902, p. 1561, c. 580, § 248. Error to direct judgment for plaintiff. Aetna Life Ins. Co. v. Duparquet, Hout & Moncuse Co., 53 Misc. 581, 103 N. Y. S. 800.

99. Kelly v. Bergen County Gas Co. [N. J. Err. & App.] 67 A. 21.

1. Opening statement held insufficient to show contributory negligence. Kelly v. Bergen County Gas Co. [N. J. Err. & App.] 67 A. 21.

2. Central Brew. Co. v. New York City

the evidence is conflicting,[3] or establishes a prima facie case,[4] or is sufficient to sustain a verdict[5] on any permissible theory.[6]

Variance[7] between the pleadings and evidence may warrant a nonsuit.[8]

Motion for nonsuit; effect.[9]—A motion for a nonsuit is in effect a demurrer to the evidence[10] presenting purely a question of law.[11] The court must consider all relevant testimony though erroneously admitted,[12] and is without power to determine the credibility of the witnesses,[13] to weigh the evidence,[14] or to pass on the merits or adjudicate the rights of the parties.[15] The rules as to granting of nonsuits are the same whether the trial is by the court or by a jury.[16] The party against whom a nonsuit is sought is entitled to the most favorable construction of the evidence[17] which must be assumed to be true,[18] and he is entitled to the

R. Co., 102 N. Y. S. 509; Hercules Oil Refining Co. v. Hocknell [Cal. App.] 91 P. 341; Levy v. Redfern, 52 Misc. 575, 102 N. Y. S. 494; People v. Stillman, 117 App. Div. 170, 102 N. Y. S. 351. A nonsuit should not be ordered where the evidence, though slight, amounts to more than a mere scintilla, or if there is any evidence which would justify the truth of disputed facts. Bellman v. Pittsburg & A. Valley R. Co., 31 Pa. Super. Ct. 389. Cannot order nonsuit where evidence tends to establish material averments of the complaint. Archibald Estate v. Matteson [Cal. App.] 90 P. 723. Improper if there is any evidence to go to the jury. Jonesville Mfg. Co. v. Southern R. Co. [S. C.] 58 S. E. 422. Where evidence is legally sufficient to prove the material allegations of the complaint, the motion should be denied. Archibald Estate v. Matteson [Cal. App.] 90 P. 723.

3. Carr v. Prudential Ins. Co., 115 App. Div. 755, 101 N. Y. S. 158; Heckmuller v. New York City R. Co., 54 Misc. 541, 104 N. Y. S. 679; Deal v. Beck [Ark.] 103 S. W. 736.

4. Plunkett Plumbing & Heating Co. v. Bassford Realty Co., 52 Misc. 479, 102 N. Y. S. 483; Klein v. New York City R. Co., 53 Misc. 571, 103 N. Y. S. 751; Blinn Lumber Co. v. McArthur, 150 Cal. 610, 89 P. 436; Joiner v. Stallings, 127 Ga. 203, 56 S. E. 304; Rounsaville v. Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030; Jonesville Mfg. Co. v. Southern R. Co. [S. C.] 58 S. E. 422; Jenkins v. Jones [Ga.] 58 S. E. 354. Proof of ownership and right to possession in replevin. Kebabian v. Adams Exp. Co., 27 R. I. 564, 65 A. 271. Though testimony is not free from inherent improbabilities. Pressinger v. Woodhull, 101 N. Y. S. 36.

5. Sikes v. Life Ins. Co., 144 N. C. 626, 57 S. E. 391; Moore v. Central of Georgia R. Co., 1 Ga. App. 574, 58 S. E. 63; Dobbs v Malcolm, 127 Ga. 487, 56 S. E. 622; Forest v. Georgia R. & Banking Co. [Ga.] 57 S. E. 98; Southern R. Co. v. Reynolds, 126 Ga. 657, 55 S. E. 1039; Williams v. Virginia-Pocahontas Coal Co., 60 W. Va. 239, 53 S. E. 923; Connelly v. Connelly, 126 Ga. 656, 55 S. E. 916; Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho, 637, 89 P. 624; Ellingsen v. Lindstrand, 105 N. Y. S. 598.

6. In action against railroad for negligent killing of cattle, proper to refuse nonsuit where though evidence is insufficient to establish negligent killing it is sufficient to show conversion of the dead animals. Atchison, etc., R. Co. v. Adcock [Colo.] 88 P. 180. Proof of one of several actionable wrongs alleged will prevent a nonsuit. Brooks v. Atlanta, 1 Ga. App. 678, 57 S. E. 1081.

7. See 7 C. L. 1163.

8. Action for services, proof showing breach of contract to enter into partnership. Hale v. Hale, 32 Pa. Super. Ct. 37. Variance between contract entered into and contract declared on. Tuck v. Earle & Prew Exp. Co. [R. I.] 67 A. 428. Nonsuit held proper where proof in an action for damages caused by fire showed that plaintiff's grantee was owner of land. Woodward v. Northern Pac. R. Co. [N. D.] 111 N. W. 627.

9. See 7 C. L. 1164.

10. Archibald Estate v. Matteson [Cal. App.] 90 P. 723. See, also, Directing Verdict and Demurrer to Evidence, 9 C. L. 975.

11. Archibald Estate v. Matteson [Cal. App.] 90 P. 723. A motion for a nonsuit is a waiver of the right to have judgment on the merits and submits the single question of whether the plaintiff has proven a case sufficient to be submitted to the jury. Carroll v. Grande Ronde Elec. Co. [Or.] 90 P. 903.

12. Archibald Estate v. Matteson [Cal. App.] 90 P. 723.

13. The question of the credibility of witnesses cannot arise on the motion except in so far as the rule requires for the purposes of the motion that the testimony shall be given the full benefit of its probative power. Archibald Estate v. Matteson [Cal. App.] 90 P. 723.

14. Doyle v. Eschen [Cal. App.] 89 P. 836.

15. Finding of contributory negligence in order sustaining motion does not render nonsuit a judgment on the merits so as to operate as a bar to a subsequent action. Carroll v. Grande Ronde Elec. Co. [Or.] 90 P. 903.

16. Hercules Oil Refining Co. v. Hocknell [Cal. App.] 91 P. 341. Where a jury is waived the court cannot base its determination by what it might do in dealing with the facts as a jury, the sole question to be determined being whether plaintiff has established a prima facie case. Archibald Estate v. Matteson [Cal. App.] 90 P. 723.

17. In considering motion court cannot ignore favorable testimony of plaintiff's witnesses nor testimony of plaintiff on direct examination because testimony of latter on cross-examination was at variance therewith. Hayward v. North Jersey St. R. Co. [N. J. Err. & App.] 65 A. 737. Testimony must be reviewed in the strongest and most favorable light for the plaintiff. Archibald

benefit of reasonable inferences which can be drawn from the evidence.[19] Where a motion to dismiss is made on the opening statement, every allegation of fact in the pleading must be taken as admitted and plaintiff is entitled to the benefit of every fair and reasonable presumption which may justifiably be implied therefrom.[20] A motion to dismiss for failure of proof should be made at the close of plaintiff's evidence and before the issues are submitted on their merits.[21] As a rule a motion for a nonsuit must state the grounds upon which the moving party relies,[22] and where the defect could have been remedied at the time by further evidence, failure to state the grounds of the motion constitutes a waiver.[23] The introduction of evidence after a denial of a motion to grant a nonsuit waives it[24] where it was not renewed at the close of all the evidence,[25] and this rule has been held to apply to the New York court of claims.[26] By submitting evidence after a denial of a motion for a nonsuit, defendant assumes the risk of supplying deficiencies in plaintiff's proof.[27] The fact that the judgment of discontinuance did not condemn the plaintiff to pay the costs of the action does not render it a nullity.[28]

Effect of dismissal or nonsuit.[29]—In actions ex contractu a discontinuance as to a party served, not on account of any defense personal to him, operates as a discontinuance of the entire cause.[30] Under the Oregon statute an involuntary judgment of nonsuit is not a bar to a subsequent action for the same cause,[31] and recitals in the order sustaining the motion cannot make it a judgment on the merits.[32] Where an action is dismissed for want of capacity in plaintiff to sue, a counterclaim interposed in the action falls with it.[33]

Estate v. Matteson [Cal. App.] 90 P. 723; Biles v. Seaboard Air Line R. Co., 143 N. C. 78, 55 S. E. 512. The evidence must be interpreted in its strongest light against the defendant. Doyle v. Eschen [Cal. App.] 89 P. 836; Hercules Oil Refining Co. v. Hocknell [Cal. App.] 91 P. 341.

18. Motion admits verity of evidence in point of fact for the purpose of denying its sufficiency in point of law. Hayward v. North Jersey St. R. Co. [N. J. Err. & App.] 65 A. 737. On a motion to dismiss plaintiff's evidence must be taken as true. Plunkett Plumbing & Heating Co. v. Bassford Realty Co., 52 Misc. 479, 102 N. Y. S. 483; Central Brew. Co. v. New York City R. Co., 102 N. Y. S. 509; Lewine Bros. v. Potar, 102 N. Y. S. 536; Graff v. Blumberg, 53 Misc. 296, 103 N. Y. S. 184; Sikes v. Life Ins. Co., 144 N. C. 626, 57 S. E. 391; Biles v. Seaboard Air Line R. Co., 143 N. C. 78, 55 S. E. 512; Adams v. Haigler [Ga. App.] 58 S. E. 330; Archibald Estate v. Matteson [Cal. App.] 90 P. 723; Hercules Oil Refining Co. v. Hocknell [Cal. App.] 91 P. 341. Court must assume such facts as true which the jury may properly find under the evidence. Putnam v. Stalker [Or.] 91 P. 363. Every fact which plaintiff's evidence proves or tends to prove must be taken as true. Doyle v. Eschen [Cal. App.] 89 P. 836.

19. Plunkett Plumbing & Heating Co. v. Bassford Realty Co., 52 Misc. 479, 102 N. Y. S. 483; Graff v. Blumberg, 53 Misc. 296, 103 N. Y. S. 184; Lewine Bros. v. Potar, 102 N. Y. S. 536; Putnam v. Stalker [Or.] 91 P. 363; Bellman v. Pittsburg & A. Valley R. Co., 31 Pa. Super. Ct. 389.

20. Locker v. American Tobacco Co., 121 App. Div. 443, 106 N. Y. S. 115.

21. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127.

22. Not necessary where court would have been justified in dismissing of its own motion. Kavanaugh v. Flavin, 35 Mont. 133, 88 P. 764.

23. Clark v. Middleton [N. H.] 66 A. 115.

24. Northwestern S. S. Co. v. Griggs [C. C. A.] 146 F. 472; Gardner v. Porter [Wash.] 88 P. 121.

25. Spencer v. State, 187 N. Y. 484, 80 N. E. 375.

26. Code Civ. Proc. § 263 et seq., makes board and court of claims a judicial tribunal, and provides that it may make rules for its government and except as otherwise provided practice shall be same as in supreme court. Spencer v. State, 187 N. Y. 484, 80 N. E. 375.

27. Van Vranken v. Granite County, 35 Mont. 427, 90 P. 164.

28. Is not subject to collateral attack. De Renzes v. His Wife, 117 La. 817, 42 So. 327.

29. See 7 C. L. 1164.

30. Ashby Brick Co. v. Ely & Walker Dry Goods Co. [Ala.] 44 So. 96.

31. B. & C. Comp. §§ 182, 184. Carroll v. Grande Ronde Elec. Co. [Or.] 90 P. 903.

32. Finding in action for wrongful death that contributory negligence of deceased was proximate cause held not to render order sustaining motion a judgment on the merits. Carroll v. Grande Ronde Elec. Co. [Or.] 90 P. 903.

33. Civ. Code of Prac. § 372, providing that voluntary dismissal shall not prejudice counterclaim, does not apply. McClellan's Adm'r v. Troendle, 30 Ky. L. R. 611, 99 S. W. 329.

Setting aside order; reinstating cause.[34]—A judgment of dismissal and a default entered thereon must be set aside before a cause can be restored to the calendar.[35] Reinstatement of an action is discretionary,[36] and when granted cures error in improperly dismissing the action.[37] It can be had only within the time and on the ground applicable to grants of new trials and the vacation of determinative orders.[38] A motion to reinstate is to be regarded as filed when actually presented to the court for action.[39]

Practice on appeal.[40]—Reinstatement[41] or refusal to nonsuit[42] being discretionary will not ordinarily be reveiwed. A nonsuit entered by consent[43] will not be received, but where the rulings of the court preclude recovery, a nonsuit entered thereon is not voluntary.[44] All facts essential to review must appear in the record[45] which may be considered in its entirety.[46] A nonsuit improperly granted on one ground will not be sustained on appeal on another ground,[47] but where the court was justified in granting a nonsuit, formal defects will not work a reversal.[48] Error in admitting evidence for the plaintiff cannot be reviewed on appeal from a judgment of nonsuit.[49] Where plaintiff's case is meritorious and the statute of limitations has run against the cause of action, the action of the trial court in dismissing the complaint for lack of prosecution may be reversed on terms.[50] Plaintiff's evidence and all reasonable inferences deducible therefrom will be considered in the view most favorable to him,[51] and where the dis-

34. See 7 C. L. 1165.

35. Gottlieb v. Kurlander, 52 Misc. 89, 101 N. Y. S. 751.

36. Action dismissed for want of prosecution. Strachan & Co. v. Wolf [Ga. App.] 58 S. E. 492.

37. Howe v. Parker, 18 Okl. 282, 90 P. 15.

38. Liquidators of Joseph David Co. v. Berthelot Bros., 118 La. 380, 42 So. 971.

39. Though written entry of filing by clerk is not made until later. Strachan & Co. v. Wolf [Ga. App] 58 S. E. 492.

40. See 7 C. L. 1166.

41. Reinstating action dismissed for want of prosecution. Strachan & Co. v. Wolf [Ga. App.] 58 S. E. 492.

42. As a rule no exception lies to the refusal of the court to direct a nonsuit. Anderton v. Blais [R. I.] 65 A. 602.

43. A voluntary nonsuit will not be reviewed on behalf of the party consenting to it. Dunnevant v. Mocksoud, 122 Mo. App. 428, 99 S. W. 515.

44. Exclusion of all evidence of damages. Dunnevant v. Mocksoud, 122 Mo. App. 428, 99 S. W. 515. Where the court intimates that plaintiff cannot recover, a submission to a nonsuit is not a voluntary judgment of nonsuit so as to preclude an appeal. Morton v. Blades Lumber Co., 144 N. C. 31, 56 S. E. 551. Contra. Adamson v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 1097.

45. Error in denying a nonsuit will not be reviewed where all the evidence taken at the trial does not affirmatively appear to be contained in the record. Van Vranken v. Granite County, 35 Mont. 427, 90 P. 164. Where the record fails to show an adverse ruling warranting the plaintiff in taking a nonsuit an order setting same aside because of error in the ruling will be reversed. Upon suggestion of court that he could not recover, plaintiff took a nonsuit, subsequently filing a motion to set same aside because of "error in sustaining defendant's demurrer to the evidence," the record showing no such demurrer. Adamson v. Metropolitan St. R. Co. [Mo. App.] 103 S. W. 1097.

46. In reviewing the action of the superior court on a motion to dismiss an action for want of diligence in prosecution, the court may consider facts in the record of the case, whether occurring before or after the commencement of the action, since such facts could be considered by the superior court. People's Home Sav. Bk. v. Sherman, 150 Cal. 793, 90 P. 133.

47. Where plaintiff was improperly nonsuited because not showing that negligence was proximate cause of injury, same will not be sustained because of insufficiency of evidence to show due care on plaintiff's part. Wendell v. Leo, 115 App. Div. 850, 101 N. Y. S. 51. Where a nonsuit was granted on the ground of plaintiff's contributory negligence, on appeal same cannot be justified on other grounds. Kennedy v. Greenville [S. C.] 58 S. E. 989.

48. That the motion did not distinctly point out the grounds relied on is not reversible error. Kavanaugh v. Flavin, 35 Mont. 133, 88 P. 764.

49. Archibald Estate v. Matteson [Cal. App.] 90 P. 723.

50. Gunn v. Metropolitan St. R. Co., 52 Misc. 108, 101 N. Y. S. 791.

51. Upon appeal from a nonsuit plaintiff is entitled to every fact which the jury could have found from the evidence adduced on his part and to all favorable inferences therefrom, and if two inferences arise, one favorable and one unfavorable, only the favorable one can be considered. Barth v. Borden's Condensed Milk Co., 52 Misc. 487, 102 N. Y. S. 498; Klein v. New York City R. Co., 53 Misc. 571, 103 N. Y. S. 751. Where an action is dismissed on plaintiff's testimony, he is entitled on appeal to the most favorable inferences that can be reasonably drawn from the evidence. Monroe v. Proctor, 100

missal is on the complaint alone, its allegations will be construed liberally in his favor.[52]

DISCOVERY AND INSPECTION.

§ 1. Discovery in Equity (990).
§ 2. Production and Inspection of Books and Papers or Survey of Property (991).
§ 3. Examintation or Interrogation of Parties Before Trial (992).
§ 4. Physical Examination to Prepare for Trial (995).

This article does not include the taking of depositions[53] or the production of documentary evidence[54] for use on the trial, nor the examination of parties at the trial,[55] or upon supplementary proceedings,[56] the power of a court to compel a contumacious witness to answer,[57] nor interrogatories under the admiralty practice.[58]

§ 1. *Discovery in equity.*[59]—Statutes authorizing the examination of parties as witnesses, the filing of interrogatories, and providing for the production of books, etc., do not divest a court of equity[60] of its power to grant discovery, in the absence of express provisions.[61] Where the subject-matter of a suit in a Federal court is clearly equitable in character,[62] a discovery may be had. The bill lies, however, only as to matters material[63] to the cause of action.[64] Where the applicant's relation to the person against whom discovery is sought entitles him to an inspection of books, etc., the rules[65] are relaxed.

In a suit against a corporation for discovery, it is proper to join the officer from whom the information is sought,[66] and the petition need not allege what facts are within his knowledge.[67] A petition for discovery is amendable as other

N. Y. S. 1021; Tannhauser v. Uptegrove, 114 App. Div. 764, 100 N. Y. S. 245; Rogers v. Jones, 115 App. Div. 576, 100 N. Y. S. 1013; Duffy v. Interurban St. R. Co., 52 Misc. 177, 101 N. Y. S. 767; Frauhauf v. Interborough Rapid Transit Co., 52 Misc. 135, 101 N. Y. S. 781; Thayer v. New York Cent., etc., R. Co., 117 App. Div. 318, 102 N. Y. S. 135; Baldwin v. Schnectady R. Co., 118 App. Div. 441, 103 N Y. S. 514; Goforth v. Southern R. Co., 144 N. C. 569, 57 S. E. 209.

52. On appeal from an order dismissing a complaint, the plaintiff is entitled to the most favorable construction of its allegations and to the benefit of all that is directly or inferentially charged or that may fairly be inferred from its allegations. Rawson v. Silo, 114 App. Div. 358, 99 N. Y. S. 934.

53. See Depositions, 9 C. L. 964.

54. See Evidence, 7 C. L. 1511; Witnesses, 8 C. L. 2347.

55. See Trial, 8 C. L. 2161.

56. See Supplementary Proceedings, 8 C. L 2046.

57. See Contempt, 9 C. L. 640; Witnesses, 8 C. L. 2347.

58. See Admiralty, 9 C. L. 29.

59. See 7 C. L. 1167.

60. Under Const. art. 6, § 5, granting to superior courts jurisdiction in all cases in equity, such courts may compel discovery in all cases in which under the established rules of chancery practice existing at time of adoption of constitution a party would have been entitled to such relief. Union Collection Co. v. San Francisco Super. Ct., 149 Cal. 790, 87 P. 1035.

61. Statutes held not to deprive equity of such jurisdiction. Nixon v. Clear Creek Lumber Co. [Ala.] 43 So. 805.

62. Suit to restrain collection of judgment by one defendant for benefit of others against whom complainant has set-offs, held clearly equitable. Brown v. Pegram, 149 F. 515.

63. Where facts within knowledge of defendants are material and incidental to relief sought, bill of discovery will issue. Napier v. Westerhoff, 153 F. 985. Where contract for construction of machines to be used in South America provided for test there upon freshly cut material, court will not compel test elsewhere upon dried material where such test would be immaterial. Pina Maya-Sisal Co. v. Squire Mfg. Co., 105 N. Y. S. 482. Bill for discovery held proper where administrator had reason to expect to find certain property in safety vaults, which was not there, and defendants had admitted taking some property in surreptitious manner. Millard v. Millard, 123 Ill. App. 264. Receiver for insolvent corporation who has been ordered to collect instalment due from stockholder may maintain bill of discovery against broker to compel disclosure of real ownership of purchased stock (Brown v. Magee, 146 F. 765) placed in name of irresponsible person (Kurtz v. Brown [C. C. A.] 152 F. 372).

64. Union Collection Co. v. San Francisco Super. Ct., 149 Cal. 790, 87 P. 1035. Does not lie to discover whereabouts of defendants for purpose of getting service. Id.

65. Production of books and accounts relating to trust accounts may be compelled though answer does not admit possession thereof. Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114.

66, 67. Nixon v. Clear Creek Lumber Co. [Ala.] 43 So. 805.

petitions in equity.[68] Where a bill in equity seeks relief in addition to discovery, an answer under oath may be waived in Illinois.[69]

§ 2. *Production and inspection of books and papers or survey of property.*[70]—By statute[71] and rules of court[72] in many states, the production of non-privileged papers[73] for inspection may be compelled where justice requires it,[74] or where necessary to enable a party to plead or to prepare for trial,[75] if the application therefor is timely made[76] in good faith.[77] While ordinarily inspection is granted only in furtherance of the applicant's case, it may be allowed to meet a defense.[78] Where a foreign corporation invokes the aid of a state court, it may be compelled to produce papers beyond the state.[79] Where the applicant has a contract right of inspection[80] or a right arising from the relation of the parties,[81] the rules are relaxed in his favor. The extent of the inspection permitted de-

68. Where insolvency of defendant is insufficiently alleged, it is amendable defect and not ground of dismissal. Nixon v. Clear Creek Lumber Co. [Ala.] 43. So. 805.

69. Millard v. Millard, 123 Ill. App. 264.

70. See 7 C. L. 1168.

71. Rev. St. § 724 (U. S. Comp. St. 1901, p. 583), providing that on trial of actions at law Federal courts may require parties to produce books or writings, etc., held not to authorize order compelling production for inspection before trial. Cassatt v. Mitchell Coal & Coke Co. [C. C. A.] 150 F. 32.

72. Court rule 14, subd. 3, providing for inspection of personal property, held inconsistent with Code Civ. Proc. § 803, except as to inspection of "a book, document, or other paper," and not authorized by § 804 (Pina Maya-Sisal Co. v. Squire Mfg. Co., 105 N. Y. S. 482), and if valid held not to authorize order compelling defendant to assemble, install, and run a machine for plaintiff's inspecton (Id.).

73. Where letter and cablegrams to lawyer relate to his employment as attorney in fact to sell real estate, they are not privileged. Avery v. Lee, 117 App. Div. 244, 102 N. Y. S. 12.

74. Party may be required to produce books and papers under Rev. St. § 724 (U. S. Comp. St. 1901, p. 583) in advance of trial only when clear that ends of justice require it. American Banana Co. v. United Fruit Co., 153 F. 943.

75. In action on contract of employment for wrongful discharge in which commissions are not sought, held that there was no necessity for inspection of defendant's books to enable plaintiff to prepare for trial as to authorize inspection under Code Civ. Proc. § 803, and Gen. Prac. Rules 14 and 15. Sivins v. Mooney, 54 Misc. 66, 104 N. Y. S. 503. Where insurance policy gave holder thereof certain options at end of dividend paying period which could be intelligently exercised only by inspection of books of company showing its financial condition, held proper to order inspection under St. 1898, § 4183, and Circuit Court Rule 19, subd. 1, § 1 (new rule 18). Ellinger v. Equitable Life Assur. Soc. [Wis]. 111 N. W. 567. Where, in action for services rendered, defendant sets up counterclaim for fifty items of money alleged to have been misappropriated by plaintiff, and which presumably appear on defendant's books, inspection thereof should be granted. Edmonds v. Attucks Music Pub. Co., 117 App. Div. 486, 102 N. Y. S. 636. Where in action against carrier for non-delivery defendant alleges delivery to expressman on order signed by plaintiff and plaintiff denies signing, plaintiff may inspect copy and photograph such order and may inspect and copy entries in defendant's forms and books relative to such transaction. Kamber v. Ben Franklin Transp. Co., 52 Misc. 640, 102 N. Y. S. 804. Where executors and trustees under will bring action for construction of will and compromise agreement and seek permission to sell real estate, inspection of books, inventories, and records of estate is proper. Muller v. Philadelphia, 118 App. Div. 276, 103 N. Y. S. 387; Id., 104 N. Y. S. 781.

76. Where application was not made until case had been set for trial on short cause calendar, and had several times appeared on day calendar and had been marked "Ready," held barred by laches. Sivins v. Mooney, 54 Misc. 66, 104 N. Y. S. 503.

77. In action based on alleged maintenance of monopoly in violation of Laws 1899, p. 1514, c. 690, application of attorney general for examination of books, etc., under §§ 4-7 will not be presumed to proceed from bad motives upon mere allegation to that effect in defendant's affidavits. People v. American Ice Co., 54 Misc. 67, 105 N. Y. S. 650.

78. Where, in action for royalties, defendant sets up written release of claim and agreement accepting another as debtor, plaintiff may compel inspection where he is ignorant of such alleged papers. DeKoven v. Ziegfeld, 52 Misc. 93, 101 N. Y. S. 586.

79. National Distilling Co. v. Van Emden, 105 N. Y. S. 657.

80. Discovery may be had under rule 50 (87 N. W. vi) without showing of indispensable necessity of inspection and without alleging that subpoena duces tecum will not compel production at trial. London Guarantee & Accident Co. v. Wayne Circuit Judge, 146 Mich. 477, 13 Det. Leg. N. 834, 109 N. W. 1049.

81. Where, in action based on alleged maintenance of monopoly in violation of Laws 1899, p. 1514, c. 690, attorney general applies for order directing production of books, papers, etc., as authorized by Laws 1899, pp. 1515, 1516, his position is somewhat analogous to one having right to inspect before commencement of action and strict rules should not be applied. People v. American Ice Co., 54 Misc. 67, 105 N. Y. S. 650.

pends upon the nature of the action and the issues involved.[82] While, ordinarily, inspection of the originals must be granted,[83] production of certified copies may be allowed where great inconvenience would otherwise result,[84] and the cost thereof charged to the party benefited.[85] An order allowing inspection of one paper is not res adjudicata as to another.[86]

§ 3. *Examination or interrogation of parties before trial.*[87]—The statutes of many states authorize the examination of a party[88] to a civil action[89] before trial where it is necessary to enable the examining party to properly plead[90] or to prepare his case for trial.[91] The examination is usually limited to such matters as are material, nonprivileged,[92] and admissible on the trial[93] to establish

82. In action against ice company under Laws 1899, p. 1514, c. 690, to avoid contracts alleged to have been made to establish a monopoly, inspection of books, etc., held properly allowed to extend back to organization of company (People v. American Ice Co., 54 Misc. 67, 105 N. Y. S. 650) and not confined to present administration period (People v. American Ice Co., 104 N. Y. S. 858). Order held to improperly allow plaintiff to examine every scrap of paper in mere hope of discovering something to sustain complaint (Id.), to inspect books and vouchers showing profits (Id.), and stock books, since inspection thereof would not reveal whether defendant owned stock of other corporations (Id.).

83. If applicant is entitled to any relief at all under Code Civ. Proc. §§ 803, 804, and Gen. Rules of Prac. 14, subd. 3, he is entitled to inspect books and records themselves, and order directing defendant to furnish sworn statements and copies is erroneous. Pfaelzer v. Gassner, 54 Misc. 579, 104 N. Y. S. 847.

84. Where papers required to be produced are in a foreign jurisdiction, proviso in order of inspection authorizing production of certified copies (Muller v. Philadelphia, 118 App. Div. 276, 103 N. Y. S. 387), with right to inspect originals at home office, held proper (National Distilling Co. v. Van Emden, 105 N. Y. S. 657).

85. Where, in action by executors and trustees of will for construction of will and compromise agreement, certified copies of papers in foreign jurisdiction are ordered for inspection, cost thereof is properly charged to estate. Muller v. Philadelphia, 118 App. Div. 276, 103 N. Y. S. 387.

86. Application for inspection held to relate to different affidavit. Memphis Trotting Ass'n v. Smather, 118 App. Div. 362, 103 N. Y. S. 498.

87. See 7 C. L. 1170.

88. In action against corporation, examination of its officers apart from examination of corporation cannot be had, under Code Civ. Proc. §§ 870, 872, 873. Shumaker v. Doubleday, Page & Co., 116 App. Div. 302, 101 N. Y. S. 587; Meade v. Southern Tier Masonic Relief Ass'n, 104 N. Y. S. 523. Where it is clear that applicant desired order for examination of corporation by examination of officer and moving papers are sufficient to sustain such order, on motion to vacate order running against secretary alone, it should be modified into proper form. Id.

89. Under Code 1896, § 1850, it is proper to permit interrogatories to be filed by plaintiff to defendant in an action of trover. Nashville, C. & St. L. R. v. Karthaus [Ala.] 43 So. 791.

90. Examination of defendant held not necessary to enable plaintiff to draw complaint for accounting. Pierce v. McLaughlin Real Estate Co., 121 App. Div. 501, 106 N. Y. S. 28. Under Code Civ. Proc. §§ 870-872, where plaintiff has some kind of a cause of action against defendant, he is entitled to examination of defendant before framing his allegations either in fraud, in conversion, on contract, or for accounting, and though he had framed complaint for accounting in another state which was futile and was terminated. Hill v. McKane, 115 App. Div. 537, 101 N. Y. S. 411.

91. Where, in action for personal injuries, defendant is ignorant as to manner in which injuries were sustained, he may examine plaintiff in respect thereto under Code Civ. Proc. § 870. Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. S. 795. Examination before trial may be allowed in action on note where plaintiff's testimony is material to defense that he was not a bona fide taker. Koppel v. Hatch, 50 Misc. 626, 98 N. Y. S. 619. Where, in action for rent due for space in department store, defendant alleged that he rented upon false representations of plaintiff as to number of his charge customers and that he had paid plaintiff sum for advertising in excess of proper charge therefor, defendant may examine plaintiff as to accounts with customers and his advertising. Ehrich v. Winter & Co., 52 Misc. 641, 103 N. Y. S. 1023. Where, in action for specific performance of contract of sale of real estate, it appears that sale was subject to approval of party sought to be examined and question of approval is in issue, examination may be had under Code Civ. Proc. §§ 870, 872, 873. Bender v. Bork, 52 Misc. 295, 102 N. Y. S. 152. In action by committee of incompetent against one formerly acting as attorney for such incompetent for fraud in conducting business, held error to so modify order for examination as to prevent true state of affairs from being brought out. Malcom v. Gibson, 104 N. Y. S. 753.

92. Defendant, in action by administrator to recover property claimed to have belonged to decedent and to have been fraudulently obtained and disposed of by defendant and to be concealed and withheld, may refuse to be examined in respect thereto on ground that answers might tend to accuse him of crime. Const. art. 1, § 6, Code Proc. § 837, and Pen. Code, § 142, construed. Chappell v. Chappell, 116 App. Div. 573, 101 N. Y. S. 846. Order for examination should not be withheld because witness may be

the applicant's cause of action.[94] Where a party makes a case within the New York statute, he is entitled to an order for examination as a matter of right,[95] if sought in good faith,[96] and not merely for the purpose of prying into his adversary's evidence[97] or defense.[98] The evidence taken under such statute being also for use at the trail, it is immaterial that the applicant has personal knowledge,[99] that the information may be obtained from another source[1] or in another manner,[2] that the party to be examined denies knowledge[3] or will appear at the trial.[4] While such state statutes are not applicable to the Federal courts,[5] under the Revised Statutes a claimant[6] against the government may be examined within the jurisdiction of the court,[7] and it is immaterial that the facts are within the knowledge of the defendant.[8] While defendant need not answer interrogatories

privileged, as privilege should be asserted on examination. Meade v. Southern Tier Masonic Relief Ass'n, 104 N. Y. S. 523. In action to enjoin illegal combination under Valentine Anti-Trust Law for damages resulting from such combination, plaintiff when called, under Rev. St. 5243, for examination before notary is not at liberty, on ground that it is a trade secret and therefore privileged, to refuse to disclose names of dealers from whom he has succeeded in obtaining partial supply of goods the combination had refused to furnish him. Jones v. Goode, 7 Ohio C. C. (N. S.) 589. But such questions being irrelevant in examination under § 5243, refusal of witness to answer them must be sustained. Id.

93. In action for libel defendant cannot examine plaintiff as to specific acts of misconduct for purpose of proving that her reputation for chastity was bad, such evidence being inadmissible on trial. Oakes v. Star Co., 104 N. Y. S. 244.

94. Plaintiff cannot examine before trial officers of one defendant corporation to ascertain on whom to serve summons to bring in another defendant. Grant v. Greene Consol. Copper Co., 118 App. Div. 853, 103 N. Y. S. 676.

95. Where application contains requisite facts as set forth in Code Civ. Proc. §§ 870, 872, 873, such application "must" be granted. Shonts v. Thomas, 116 App. Div. 854, 102 N. Y. S. 324; Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. S. 795.

96. Although language of Code Civ. Proc. §§ 870, 872, 873, is mandatory, application may be refused where it appears that it is made for purpose of annoyance or delay. Bender v. Bork, 52 Misc. 295, 102 N. Y. S. 152. Where real purpose of motion for order to examine officers of corporation is to obtain inspection of defendant's books and papers, and officers never had any personal knowledge concerning such records, hence no memory to be refreshed, motion should be denied. Shumaker v. Doubleday, Page & Co., 116 App. Div. 302, 101 N. Y. S. 587.

97. In action to compel abatement of obstructions to natural watercourses, plaintiff cannot examine engineers of defendant city and compel inspection of maps, etc., respecting investigation relating to plaintiff's cause of action. Lewis v. Buffalo, 115 App. Div. 735, 100 N. Y. S. 1052.

98. Where plaintiff alleges specific contract and defendant admits a contract but denies it is in form alleged, examination in respect thereto must be denied. Merrill v. Woolworth, 53 Misc. 253, 103 N. Y. S. 57. Where in action for breach of promise to marry defendant alleges a release in defense, he is not entitled to examine plaintiff as to whether she admits or denies signing same. Pitt v. Dunlap, 54 Misc. 115, 105 N. Y. S. 846.

99. Where defendants denied plaintiff's allegation that they were doing business under a certain name plaintiff was entitled, under Code Civ. Proc. § 870, to examine defendants before trial in respect thereto, though complaint was not upon information and belief, personal knowledge of facts being immaterial. Istok v. Senderling, 118 App. Div. 162, 103 N. Y. S. 13. No defense that plaintiff had access to books of defendant at one time where information sought could not be obtained therefrom. Turck v. Chisholm, 53 Misc. 110, 103 N. Y. S. 1095.

1. In absence of bad faith, party may examine adversary before trial as to facts shown to be material and of which he has knowledge and to take his deposition for use on trial, though party could procure evidence from other persons and could subpoena adverse party. Grant v. Greene, 118 App. Div. 850, 103 N. Y. S. 674; McKeand v. Locke, 115 App. Div. 174, 100 N. Y. S. 704.

2. As by bill of particulars. Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. S. 795.

3. Turck v. Chisholm, 53 Misc. 110, 103 N. Y. S. 1095.

4. Turck v. Chisholm, 53 Misc. 110, 103 N. Y. S. 1095; Bender v. Bork, 52 Misc. 295, 102 N. Y. S. 152.

5. P. L. N. J. 1903, p. 537, § 140, authorizing party to submit interrogatories to adversary, etc., held inapplicable to Federal courts sitting in New Jersey. Smith v. International Mercantile Co., 154 F. 786. Notwithstanding Act. Cong. March 9th, 1892, c. 14, 27 Stat. 7 (U. S. Comp. St. 1901, p. 664), authorizing depositions to be taken in mode prescribed by laws of state where court sits. Id. Party may raise objection thereto by motion to strike and need not wait until answers are offered in evidence. Id.

6. Although nominal claimant is corporation, where two persons own practically all the stock, they may be examined as claimants under Rev. St. § 1080. Atlantic Cont. Co. v. U. S., 40 Ct. Cl. 244.

7. Held not unreasonable to compel claimants to come within jurisdiction of court for examination. Atlantic Cont. Co. v. U. S., 40 Ct. Cl. 244.

8. Atlantic Cont. Co. v. U. S., 40 Ct. Cl. 244.

attached to a bill for discovery where complainant waives answer under oath,[9] yet, if he undertakes to do so, he must state whether he has knowledge or information respecting the matter.[10] Where plaintiff, having no counter letter, proceeds in limine to interrogate defendant in respect thereto, defendant's answer stands as a part of the pleadings.[11]

Procedure.—The petition for an order for examination must make a statutory showing [12] and be properly verified.[13] While the affidavit must contain facts showing the materiality of the information sought,[14] it need not expressly state that the deposition is for use upon the trial.[15] The Iowa statute does not require that the interrogatories be annexed to the petition when filed,[16] but exceptions thereunder must be taken before the entry of an order to answer,[17] and a party assenting to such order waives all objections to the regularity and propriety of the interrogatories.[18] The order for examination must comply with the statute as to time of service.[19] A subpoena duces tecum may issue with the order for examination [20] to compel the production of papers. Where answers to interrogatories are evasive and mere conclusions,[21] they have no prohibative force in Maryland unless sustained by proof.[22] The refusal of an ex parte application to vacate an order for examination is no bar to a formal motion on notice.[23]

While a court has inherent power to enforce its orders,[24] the statutes usually prescribe the penalty for refusing to be examined or to answer interrogatories.[25]

9. Bloede Co. v. Carter, 148 F. 127.

10. Bloede Co. v. Carter, 148 F. 127. Answer that defendants did not know and could not set forth as to their belief, etc., is insufficient, since, though denying knowledge, it does not deny information. Id.

11. Hence, where destructive of plaintiff's case, exception of no cause of action will lie. Wells v. Wells, 116 La. 1065, 41 So. 316.

12. Where it appears that plaintiff must establish course of action between several corporations in which it is alleged that defendant had taken part, held to sufficiently aver knowledge by defendant as against objection that his relation to corporation was stated as a conclusion. Grant v. Greene, 118 App. Div. 850, 103 N. Y. S. 674. Affidavit, referring to unverified complaint attached to and made a part thereof, sufficiently shows nature of action, though reference thereto is not a verification so as to permit complaint to be read and considered as an affidavit. Grant v. Greene, 118 App. Div. 850, 103 N. Y. S. 674. Affidavit is sufficient under Code Civ. Proc. § 873 which states name of secretary, as officer of corporation desired to be examined, and specifies papers desired to be inspected, without formally stating that it is the corporation that plaintiff desires to examine. Donaldson v. Brooklyn Heights R. Co., 104 N. Y. S. 178.

13. Where petition for order for examination of defendant is verified out of state, signature of officer must be accompanied by certificate as required by Code Civ. Proc. § 844. Miller v. Nevins, 115 App. Div. 139, 100 N. Y. S. 703. Affidavit upon information and belief is not insufficient because not accompanied by affidavit of informer where information was partly obtained from documents purporting to have been issued by adverse party. Meade v. Southern Tier Masonic Relief Ass'n, 104 N. Y. S. 523.

14. Where moving papers for examination of plaintiffs to enable defendant to answer show that defendant possesses all information necessary to enable him to tender issues, application must be denied under Code Civ. Proc. § 872, subd. 4, and Gen. Rules Prac. 82. Waitzfelder v. Moses' Sons & Co., 104 N. Y. S. 796.

15. Sufficient if such fact fairly appears. Ehrich v. Winter & Co., 52 Misc. 641, 103 N. Y. S. 1023.

16. Code, § 3604, held not to prevent subsequent annexation within discretion of court. Free v. Western Union Tel. Co. [Iowa] 110 N. W. 143.

17. Code, § 3606. Free v. Western Union Tel. Co. [Iowa] 110 N. W. 143.

18. As untimely annexation to petition. Free v. Western Union Tel. Co. [Iowa] 110 N. W. 143.

19. Where order for examination of defendant directs service thereof less than five days before examination, it must be vacated unless it recites circumstances which render such shortened service necessary, as required by Code Civ. Proc. § 873. Miller v. Nevins, 115 App. Div. 139, 100 N. Y. S. 703.

20. Where it appears from nature of the matters to be investigated and from party's attitude that he will not or cannot testify without reference to books, subpoena duces tecum may issue before examination has commenced. Crompton v. Dobbs, 104 N. Y. S. 698.

21. As an answer that deeds were delivered and accepted on date of delivery, and that whole transaction emanated from grantor without suggestion and was her voluntary act, to interrogatory calling upon defendant to state when and under what circumstances deeds came into his possession. Horner v. Bell, 102 Md. 435, 62 A. 736.

22. Code Pub. Gen. Laws, art. 16, § 160. Horner v. Bell, 102 Md. 435, 62 A. 736.

23. Though on request of justice adverse party was informally notified of hearing thereon. Grant v. Green Consol. Copper Co., 118 App. Div. 853, 103 N. Y. S. 676.

24. Independent of Code, § 3611, author-

§ 4. *Physical examination to prepare for trial.*[26]—A physical examination of the plaintiff in actions for personal injuries[27] is authorized by the statutes of some states.[28]

Discretion; Disfranchisement; Dismissal and Nonsuit, see latest topical index.

DISORDERLY CONDUCT.[29]

Disorderly conduct as herein treated includes not only the common-law offense of the breach of the peace,[30] but also violations of statutory acts prohibiting specific acts of disorderly conduct, as the use of loud and vociferous language calculated to disturb others,[31] using profane language in the presence of a female,[32] disturbing the peace of the family by thereatening to fight and fighting,[33] using violent, obscene, or profane language so as to disturb the peace of a neighborhood or family,[34] or doing acts generally tending to disturb the public peace.[35] In some states abandonment of family[36] and neglect and refusal to support it, thereby leaving its members in danger of becoming a public charge, constitute a breach of the peace,[37] but the abandonment must be voluntary.[38] Statutes defining this offense are strictly construed.[39] The indictment must charge facts bringing the case clearly within the statute,[40] and must be fully sustained by the proof,[41] but it is sufficient if it charge the offense in the language of the statute.[42] The general rules of evidence applicable to criminal prosecutions apply.[43] An acquittal

izing court to compel answers by contempt and by striking pleadings, court has authority to enforce its orders requiring answers. Free v. Western Union Tel. Co. [Iowa] 110 N. W. 143. Where before time for examination stay is secured on motion to vacate order, which is granted but reversed on appeal, failure to appear as directed by subsequent order puts party in contempt. Grant v. Greene, 105 N. Y. S. 641. Inclusion in order refusing to vacate order for examination of plaintiff, a stay of proceedings until she submitted thereto is improper where no motion to that effect was before court. Oakes v. Star Co., 104 N. Y. S. 244.

25. Before failure of party to answer interrogatories shall be taken to sustain claim of adverse party under Code, § 3610, he must be given opportunity to answer by order fixing a time therefor, and penalty cannot be invoked where time for answering has elapsed without extending same. Free v. Western Union Tel. Co. [Iowa] 110 N. W. 143. Where defendant's amended answer admits all facts sought to be elicited, court cannot strike pleadings and enter default as authorized by Code, §§ 3610, 3611. Id.

26. See 7 C. L. 1173. Physical examination at trial, see Damages, 9 C. L. 869.

27. Action for breach of promise to marry in which seduction and pregnancy are alleged in aggravation of damages is not one for personal injuries within Code Civ. Proc. § 873. Pitt v. Dunlap, 54 Misc. 115, 105 N. Y. S. 846.

28. Under Code Civ. Proc. § 870 et seq., defendant held entitled to physical examination of plaintiff to ascertain nature and extent of injuries. Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. S. 795.

29. See 7 C. L. 1173.

30. See **Clark and M. on Crimes, p. 628.**

31. Lockett v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 733, 99 S. W. 1010.

32. Nicholson v. State [Ala.] 43 So. 365.

33. Wilcox v. U. S. [Ind. T.] 103 S. W. 774. Striking a person with a hard substance does not come within statutory definition of breach of the peace. Miles v. U. S. [Ind. T.] 103 S. W. 598.

34. Miles v. U. S. [Ind. T.] 103 S. W. 598.

35. Trying to push by a guard at a train in order to ride without giving him a ticket. People v. Markowitz, 104 N. Y. S. 872.

36. People v. Demos, 115 App. Div. 410, 100 N. Y. S. 968.

37. Terhune v. Reed [N. J. Law] 67 A. 180. Both these elements must concur in order to justify conviction. People v. Demos, 115 App. Div. 410, 100 N. Y. S. 966.

38. Failure to support wife who refuses to live with defendant does not amount to abandonment. People v. Demos, 115 App. Div. 410, 100 N. Y. S. 968. The order made on the verdict of a jury convicting defendant of disorderly conduct on the ground that he failed to support his family must adjudge him to be a disorderly person and specify the amount he is to pay for the support of his family. Terhune v. Reed [N. J. Law] 67 A. 180.

39. Where statute prohibits use of violent or obscene language in or sufficiently near the dwelling house of another, instruction that it embraces the yard, etc., is erroneous. Mobley v. State [Ala.] 44 So. 379.

40. One charging defendant with disturbing peace of one person is insufficient under statute prohibiting disturbance of peace of any town, village, or family. Miles v. U. S. [Ind. T.] 103 S. W. 598.

41. Indictment charging use of violent and vociferous language is not sustained by proof of yelling and whooping. Lockett v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 733, 99 S. W. 1010.

42. State v. Brower [Kan.] 88 P. 884.

43. Evidence that party assaulted was

on the charge of conspiracy to assault an officer does not bar prosecution for disturbing the peace of a family by fighting.[44] In Vermont, if the fine for breach of the peace is not paid within twenty-four hours, defendant may be imprisoned in the house of correction as many days as thrice the number of dollars he is required by the sentence to pay.[45]

DISORDERLY HOUSES.[46]

This topic includes the criminal offense of keeping or frequenting a bawdy house;[47] the keeping of gaming houses,[48] offenses against the liquor laws,[49] and the remedies against bawdy houses as nuisances[50] are elsewhere treated.

Disorderly houses have been variously defined as those kept for purposes of fornication,[51] those of common resort for the commission of petty offenses against the law, though not otherwise disorderly,[52] those in which persons are permitted to gather and gamble in violation of law however quietly it may be done,[53] and as common, ill governed, and disorderly houses to the encouragement of idleness and drinking,[54] but a club house for the exclusive use of its members in which liquor is dispensed is not a disorderly house,[55] and in New Jersey it is provided by statute that where the offense consists wholly of the unlawful sale of liquor it shall be unlawful to convict for keeping a disorderly house.[56] The general reputation of a house being kept as a lewd house is admissible,[57] but unless otherwise corroborated will not sustain conviction.[58] In some states the keeper of a house of prostitution is liable for permitting an unmarried female under 18 years of age[59] to become an inmate thereof.[60] An indictment in two counts, for "keeping and maintaining a lewd house" and "keeping a disorderly house," is not void for duplicity.[61] Upon trial of accused as owner of house used as bawdy house, deeds tending to show title in another are admissible,[62] but where the owner of a house or his agent who

given to use of violent and abusive language is inadmissible as tending to establish self-defense in action for disturbing peace of a family by fighting. Wilcox v. U. S. [Ind. T.] 103 S. W. 774. On trial for using abusive language in the presence of a female, it is competent to show by prosecutrix what she said to accused and what accused said to her at time he used language charged. Nicholson v. State [Ala.] 43 So. 365. Evidence that defendants were together on day previous to committing assault on another person is admissible under charge of disturbing peace by fighting as tending to prove a conspiracy. Wilcox v. U. S. [Ind. T.] 103 S. W. 774. Evidence of agreement between defendants to entice victim to designated place for purpose of assaulting him is admissible under charge of disturbing the peace by fighting to show concert of action. Id.

44. Wilcox v. U. S. [Ind. T.] 103 S. W. 774.

45. Held that these provisions are not repealed by Act 1906, p. 210, No. 200, § 8, providing for imprisonment in county jail. In re Sammon, 79 Vt. 521, 65 A. 577.

46. See 7 C. L. 1174.

47. See Indecency, Lewdness and Obscenity, 8 C. L. 171.

48. See Betting and Gaming, 9 C. L. 388.

49. See Intoxicating Liquors, 8 C. L. 486.

50. See Nuisance, 8 C. L. 1180.

51. Majors v. People [Colo.] 88 P. 636.

52. People v. Hoffman, 118 App. Div. 862, 103 N. Y. S. 1000.

53. Arenz v. Com. [Ky.] 102 S. W. 238.

54. Jones v. State [Ga. App.] 58 S. E. 559.

55. Mossman v. Fort Collins [Colo.] 90 P. 605.

56. In a proper case held error to refuse to charge jury to acquit if they believed the unlawful sale of liquor is the only offense shown. State v. Goff [N. J. Law] 65 A. 854.

57. Fact that woman of immoral character had been an inmate of house is admissible. McConnell v. State [Ga. App.] 58 S. E. 546; Botts v. U. S. [C. C. A.] 155 F. 50; Hall v. U. S. [C. C. A.] 155 F. 52.

58. Conviction is not sustained where it is shown that inmates are of good character and that during ten years they lived in the house the house was watched by authorities but no act of lewdness discovered. Jones v. State [Ga. App.] 58 S. E. 559; Botts v. U. S. [C. C. A.] 155 F. 50; Hall v. U. S. [C. C. A.] 155 F. 52. Evidence that three females lived together and that men were seen frequenting their place by night and by day together with evidence of general reputation of the place and its inmates is sufficient to sustain conviction. Mimbs v. State [Ga. App.] 58 S. E. 499.

59. Fact that procuress advised prosecutrix to state her age as over 19 years is admissible. Raymond v. People, 226 Ill. 433, 80 N. E. 996.

60. Raymond v. People, 226 Ill. 433, 80 N. E. 996.

61. Jones v. State [Ga. App.] 58 S. E. 559.

62, 63. Rosencranz v. U. S. [C. C. A.] 155 F. 38.

knowingly rents it to another to be used as a bawdy house is punishable as a principal, it is immaterial.[63] In New York a keeper of a disorderly house may be required to give a bond conditional upon good behavior or committed to imprisonment at hard labor for not exceeding six months,[64] and the place of commitment is within the discretion of the magistrate.[65] The punishment within the limits of the statute is within the discretion of the trial court.[66]

Dissolution; Distress; District Attorneys; District of Columbia, see latest topical

DISTURBANCE OF PUBLIC ASSEMBLAGES.[67]

The offense may be committed by conduct in[68] or outside the meeting,[69] if clearly causing a disturbance.[70] Continuation by defendants of their disorderly conduct after the congregation had dispersed may be shown.[71]

Ditches; Dividends; Division of Opinion, see latest topical index.

DIVORCE.

§ 1. **Jurisdiction and Domicile of Complainant (997).** Service of Process on a Nonresident Defendant (998).
§ 2. **Grounds for Divorce (998).** Desertion (999). Cruel and Inhuman Treatment and Indignities (1000). Habitual Drunkenness (1001). Conviction of Crime (1001). Adultery (1001). Impotency (1001). Failure of Refusal of the Husband to Support the Wife (1001).
§ 3. **Defenses and Facts Constituting a Bar (1001).** Collusion (1001). Connivance (1001). Condonation (1002). Recrimination (1002).
§ 4. **Practice and Procedure (1002).** Appeal and Review (1004).
§ 5. **Custody and Support of Children (1005).**
§ 6. **Adjustment of Property Rights (1006).**
§ 7. **Effect of Divorce (1007).**
§ 8. **Foreign Divorces (1007).**

Scope of article.—Alimony is the subject of a separate article,[72] though the final division of property between the parties is here discussed. Suits for annulment[73] and for support and separate maintenance[74] are treated in connection with other titles.

§ 1. *Jurisdiction and domicile of complainant.*[75]—It is usually provided by statute that the complainant in a divorce suit must be an actual bona fide resident of the state,[76] and residence for a specified period before suit is usually required.[77] A

64. Not repealed by provisions of criminal and penal codes. People v. Champlin, 105 N. Y. S. 349.
65. People v. Champlin, 105 N. Y. S. 349.
66. Where it is shown that defendant has been keeping a bawdy house for some time prior to her arrest, infliction of maximum penalty is not an abuse of discretion. Majors v. People [Colo.] 88 P. 636.
67. See 7 C. L. 1175.
68. Loud and discordant singing and interruptions of sermon by drunken man held to sustain conviction. Shirley v. State, 1 Ga. App. 143, 57 S. E. 912.
69. Riot near church held within statute. State v. Jones [S. C.] 58 S. E. 8.
70. Talking outside of church, there being no evidence that any member of the congregation was disturbed, held not within Pen. Code, § 148. Taylor v. State, 1 Ga. App. 539, 57 S. E. 1049.
71. State v. Jones [S. C.] 58 S. E. 8.
72. See Alimony, 9 C. L. 89.
73. See Marriage, 8 C. L. 833.
74. See Husband and Wife, 8 C. L. 122.
75. See 7 C. L. 1176.
76. Also of county for six months. Brashear v. Brashear [Tex. Civ. App.] 99 S. W. 568. The prerequisite of residence in the state for the statutory period is jurisdictional and must be both alleged and proved, except in case of adultery. Beekman v. Beekman [Fla.] 43 So. 923. A statute requiring the complainant to be "an actual resident" is construed to mean a legal domicile or established residence as distinguished from a mere temporary abode. Departure from an established domicile and residence elsewhere depends largely on the party's intention and the circumstances of the case. Beehtel v. Bechtel [Minn.] 112 N. W. 883. Sufficient proof of plaintiff's residence. Heer v. Heer [N. J. Eq.] 65 A. 1013.
77. Where statute requires proof of at least two years' residence previous to time of filing petition, testimony a month thereafter that petitioner had been a resident for two years is insufficient to confer jurisdiction. West v. West, 38 Ind. App. 659, 78 N. E. 987. If the offense for which divorce is sought was committed in the state, it is sufficient that complainant be an actual res-

wife may acquire a separate domicile if her welfare demands it or she may adopt that of her husband.[78] If a husband deserts his wife her domicile continues in state of the matrimonial domicile unless she acquires a new domicile elsewhere.[79] The state in which parties married and resided, and in which the husband deserted his wife, is the matrimonial domicile, and courts of such state have jurisdiction though the husband could not be served with process.[80] In Louisiana the practice is for the court to assign a residence to the wife pending suit for divorce.[81] Where, after a decree of divorce was set aside or bill of review and the original bill amended so as to meet a demurrer, and defendant filed a cross bill, the court had jurisdiction, as both parties were before it.[82]

Service of processs on a nonresident defendant.[83]—Where the defendant in a divorce suit is a nonresident of the state, service by publication is usually provided for by statute.[84] The affidavit for an order of publication is jurisdictional, and failure to follow the statutory requirements thereof is fatal,[85] rendering void a decree of divorce based thereon.[86] If plaintiff secure an order of publication on affidavit of his attorney that defendant's residence was unknown, when in fact it was known by plaintiff, a divorce founded on such service will be set aside though defendant appears generally.[87] Though the defendant be absent from the state for an indefinite time, service of process upon him as a nonresident is insufficient if he have a legal residence and family domicile in the state at which service could have been perfected on him personally or by leaving a copy,[88] but if a subpoena is issued and returned without service, a statutory order of publication duly made and served on the defendant in another state is a sufficient service.[88a] The Minnesota statutes make no substantial change in the law as to service by publication in divorce suits.[89]

§ 2. *Grounds for divorce.*[90]—Courts have no power to grant divorces except for statutory cause.[91]

ident at the time of filing the bill. Dings v. Dings, 123 Ill. App. 318.

78. Wife may sue in state where she and husband resided at time he left and went to England to reside temporarily. Ensign v. Ensign, 54 Misc. 289, 291, 105 N. Y. S. 917. A wife by leaving her husband for just cause may acquire a residence in another state in which she may sue for divorce. Ransom v. Ranson, 54 Misc. 410, 104 N. Y. S. 198. Action for separation by wife, after husband failing to obtain divorce, went to another state to seek it, is properly brought in court of original domicile, and service may be had on him without the state. Woolworth v. Woolworth, 115 App. Div. 405, 100 N. Y. S. 865.

79. No presumption as to place of birth being domicile of wife. Hibbert v. Hibbert [N. J. Eq.] 65 A. 1028.

80. Such desertion by husband does not affect wife's domicile for purposes of divorce. State v. Morse, 31 Utah, 213, 87 P. 705.

81. Rosenthal v. Rosenthal, 117 La. 786, 42 So. 270. After a husband has obtained a judgment of separation from bed and board for abandonment, the wife is justified in disobeying a summons to return to the matrimonial domicile, if the court has assigned her another and different domicile pending the suit for divorce. Rohr v. Stechman [La.] 43 So. 991.

82. Davenport v. Davenport, 106 Va. 736, 56 S. E. 562.

83. See 7 C. L. 1177.

84. Proof that newspaper in which notice of suit was published was one of general circulation. Ruth v. Ruth, 39 Ind. App. 296, 79 N. E. 523.

85. Where statute allows order of service by publication to be based on allegation in petition, the petition must be sworn to by the plaintiff in person, and if not so sworn to it cannot be amended by a verification on the day of final decree, defendant not having appeared. Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015.

86. Cordray v. Cordray [Okl.] 91 P. 781. Judgment for costs based on improper service is void. Burch v. Burch, 116 App. Div. 865, 102 N. Y. S. 305.

87. Such order being obtained by fraud on the court. Metzler v. Metzler [Wis.] 113 N. W. 49.

88. Insufficiency of substituted service on attorney in such case. Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469.

88a. Jurisdiction thus acquired will incidentally support a decree for alimony and custody of children. McGuinness v. McGuinness [N J. Eq.] 62 A. 937, commented on in 4 Mich. L. R. 556.

89. Insufficiency of affidavit to justify order of publication. Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243.

90. See 7 C. L. 1177.

91. Under Code Pub. Gen. Laws, art. 16, § 37, adultery is no ground for divorce a mense et thoro. Stewart v. Stewart [Md.] 66 A. 16.

Desertion.[92]—The desertion by either consort of the other constitutes a ground for divorce under most statutes,[93] if willful [94] and unexcused [95] and against the will of the deserted spouse [96] and without his fault,[97] and continued for the statutory period [98] despite the efforts of the deserted spouse to procure a reconciliation.[99] It is not necessary that the intent to desert should have been formed at the time of leaving, a subsequent determination and persistence therein being sufficient.[1] It is the wife's duty to accept such residence as the husband may select without unwarranted stubbornness or parsimony on his part,[2] but if a husband ejects his wife from her domicile under such circumstances as to justify her refusal to return, he is not entitled to a judgment of separation from bed and board as a basis for absolute divorce.[3] For a husband to so treat his wife as to render it unsafe for her to live in safety with him is as much a desertion on his part as if he left her with intent never to return.[4] A wife's refusal to have sexual intercourse with her husband is no desertion if they continue to live together.[5] "Abandonment" is the voluntary separation of one party from the other without justification, and the intention of not returning.[6]

92. See 7 C. L. 1177.

93. Pfannebecker v. Pfannebecker, 133 Iowa, 425, 110 N. W. 618. Sufficient proof of abandonment. Johnson v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 644, 102 S. W. 943; Heer v. Heer [N. J. Eq.] 65 A. 1013. Wife leaving husband at marriage altar, never living with him, and willfully refusing to do so for the statutory period, entitles him to divorce for desertion. Castilow v. Castilow, 60 W. Va. 586, 55 S. E. 592. Husband's desertion of wife with whom he lived but few months, and continued abandonment for statutory period, entitles her to divorce. Cain v. Cain, 29 Ky. L. R. 1163, 96 S. W. 1113. In Louisiana repeated abandonment of the wife, coupled with defamatory and insulting letters, are sufficient grounds for separation from bed and board. Dowden v. Dowden [La.] 44 So. 115.

94. To constitute desertion there must not only be a separation but also an intent to cease to live together with abnegation of marital duties. Kupka v. Kupka, 132 Iowa, 191, 109 N. W. 610. The intention to desert must be shown by some act or statement, as mere absence is insufficient. Stevens v. Stevens, 29 Ky. L. R. 953, 96 S. W. 811. Proof of the continuance of the separation is not sufficient unless the original separation is shown to have been a desertion. Desertion by plaintiff herself, who returned to her father's home in another state, and defendant merely failed to visit her. Sharp v. Sharp [N. J. Eq.] 64 A. 985. Husband, after removing from foreign country, wrote wife to prepare to come over, she replying that she did not then want to come and requested him to send her money, which he did for some time, not sufficient proof of her desertion from date of refusal. Mizorowsky v. Mizorowsky [N. J. Eq.] 65 A. 456.

95. Nagging by wife no excuse for desertion. McAndrews v. McAndrews, 31 Pa. Super. Ct. 252.

96. In suit by wife for alimony, husband's agreement to pay it and also transportation to her father's home does not show that he is willing for her to leave, as affecting his right to divorce for desertion, if he was obliged to agree to it or let the court fix the amount. Klein v. Klein, 29 Ky. L. R. 1042, 96 S. W. 848. If parties agree by antenuptial contract to continue to live separately for awhile after marriage, the wife could not maintain a suit on the ground of abandonment until she had made an effort to require her husband to live with her. Dennison v. Dennison, 52 Misc. 37, 102 N. Y. S. 621. Under a statute making abandonment for a certain period ground for divorce, a husband whose wife remains absent for that period is entitled to a divorce, though he never urged her to return. Patterson v. Patterson [Wash.] 88 P. 196.

97. A party seeking a divorce on the statutory ground of abandonment by defendant without plaintiff's fault has the burden of proving that he was not to blame for the desertion. Adair v. Adair [Ky.] 104 S. W. 365.

98. Vercade v. Vercade, 147 Mich. 398, 13 Det. Leg. N. 1033, 110 N. W. 942.

99. Evidence held to show that husband did not make proper effort to persuade his wife to return. Smith v. Smith [N. J. Eq.] 65 A. 986.

1. Foote v. Foote [N. J. Err. & App.] 65 A. 205.

2. If she leave the home of husband's parents where she was comfortably cared for merely because of difference with mother-in-law, and remain without state for statutory period, he is entitled to divorce. Klein v. Klein, 29 Ky. L. R. 1042, 96 S. W. 848.

3. Baurens v. Giroux, 117 La. 696, 42 So. 224.

4. Wife left husband because of ill treatment. Davenport v. Davenport, 106 Va. 736, 56 S. E. 562.

5. Especially if her physical condition justifies her refusal. Pfannebecker v. Pfannebecker, 133 Iowa, 425, 110 N. W. 618. Continued refusal of sexual intercourse by wife is not a desertion under Rev. St. 1899, § 2921. Williams v. Williams, 121 Mo. App. 349, 99 S. W. 42.

6. Single night's absence from home by husband not ground for wife leaving home and suing for divorce for abandonment. Heyman v. Heyman, 104 N. Y. S. 227.

Cruel and inhuman treatment and indignities[7] are ground for divorce in most states, what constitutes such treatment varying under different statutes.[8] For a wife to consistently refuse to cohabit with her husband has been held extreme cruelty warranting a divorce,[9] but similar refusal has been held not "indignity to the person" within the Pennsylvania statute.[10] What constitutes cruel treatment is a question of law for the court.[11]

7. See 7 C. L. 1179.

8. **Physical violence and threats thereof:** A husband who withholds from his wife the affectionate regard due her, uses abusive language to her, and seizes her person with violence and threats of greater injury, is guilty of cruelty. Davenport v. Davenport, 106 Va. 736, 56 S. E. 562. Personal violence and abusive language on several occasions sufficient. Hullinger v. Hullinger, 133 Iowa, 269, 110 N. W. 470. Infrequent acts of cruelty culminating in physical violence and abusive words are grounds for divorce, especially if plaintiff be mere girl. Boyle v. Boyle [N. J. Eq.] 67 A. 690. Blows and threats amounting to cruelty. Sharp v. Sharp [Md.] 66 A. 463. Kicking and beating wife and falsely accusing her of adultery as constituting cruelty. McNulty v. McNulty, 104 N. Y. S. 251. Threats of mistreatment of such flagrant and violent kind as to cause reasonable and abiding fear of bodily violence are ground for divorce. Beekman v. Beekman [Fla.] 43 So. 923. An assault on a husband by the wife's brother, brought on by an attempt of the wife to get possession of her child, is not an act of cruelty entitling the husband to a divorce. Galigher v. Galigher [Or.] 89 P. 146. Repeated physical violence coupled with abuse held sufficient. Quick v. Quick, 132 Iowa, 302, 109 N. W. 783; Guerin v. Guerin [Wash.] 88 P. 928. Forcible removal of wife from room on one occasion because she was using obscene language not cruelty. Bain v. Bain [Neb.] 113 N. W. 141.

Verbal abuse and false accusations: Repeated false charges by wife of adultery producing constant turmoil and bringing husband into public disrepute held sufficient. Williams v. Williams [Minn.] 112 N. W. 528. Continuous fault finding, threats, etc., intended to annoy the other party, may cause such mental suffering as to be ground for divorce, though each act be trifling in itself. Mosher v. Mosher [N. D.] 113 N. W. 99. For a wife to habitually use obscene and profane language before her husband and third persons against his wishes is ground for divorce, if it causes him humiliation and mental suffering. Id. Nagging and accusations of infidelity may endanger life, but whether they do or not is a question of fact. Husband's life held not endangered thereby. Pfannebecker v. Pfannebecker, 133 Iowa, 425, 110 N. W. 618. Repeated false accusations of adultery publicly made, coupled with neglect, held sufficient. Massey v. Massey [Ind. App.] 80 N. E. 977. Accusations of adultery amounting to cruelty. Markowski v. Markowski [Wash.] 87 P. 914. Abusive language towards and groundless charges of unchastity against the wife do not entitle her to a divorce, if she left nearly a year afterwards for entirely different reasons. Gray v. Gray [Ark.] 98 S. W. 975. Threats, false accusations, and constant fault finding and abuse by husband held sufficient. Viertel v. Viertel, 123 Mo. App. 63, 99 S. W. 759. But for a wife to repeatedly and causelessly accuse her husband of adultery in the presence of others is held to be extreme cruelty. Campbell v. Campbell [Mich.] 112 N. W. 481. Mere occasional ill temper will not justify a divorce on the ground of extreme cruelty. Haines v. Haines [Neb.] 113 N. W. 125. Statements which might be ground for divorce, if not caused by the conduct of the other party, do not constitute such ground if so caused. Mosher v. Mosher [N. D.] 113 N. W. 99. In Florida the habitual indulgence of a violent temper is ground for divorce, but mere petulence and temporary irritation or capriciousness is not habitual indulgence in violent temper. Beekman v. Beekman [Fla.] 43 So. 923. Telling wife that other men would provide money for her aid to get it from them, and that he had good time with other women, as to whom if she was half as pretty he would not be ashamed of her. Wares v. Wares, 122 Mo. App. 129, 98 S. W. 91. Persistent villification and abuse of wife ruining her health held cruelty. Gehrkin v. Kinberger, 118 La. 458, 43 So. 50. Abusive language not shown to have seriously wounded feelings of wife or destroyed her peace of mind insufficient. Whitney v. Whitney [Neb.] 110 N. W. 555. Irritability and occasional outbreaks of temper held insufficient. Gray v. Gray [Ark.] 98 S. W. 975.

Neglect of domestic duty: Continued neglect by wife of household duties and frequent protracted absence at religious meetings not "indignities." Johnson v. Johnson, 31 Pa. Super. Ct. 53. That husband was gambler and neglected his family and wasted his money therein not sufficient. Wisner v. Wisner [Mich.] 112 N. W. 948. Failure to prepare meals and perform other duties held not cruelty. Smith v. Smith, 146 Mich. 686, 13 Det. Leg. N. 929, 110 N. W. 59; 111 N. W. 342.

Conduct productive of mental anguish: Husband's habit of stealing goods and concealing them about house as ground for divorce. Galigher v. Galigher [Or.] 89 P. 146. In the absence of physical violence, cruelty as a ground for divorce must produce a degree of mental anguish which threatens to impair health, or renders cohabitation unsafe. Bush v. Bush [Tex. Civ. App.] 18 Tex. Ct. Rep. 757, 103 S. W. 217; Beekman v. Beekman [Fla.] 43 So. 923. Evidence of persistent undue familiarities by wife with other men held to render cohabitation insupportable. Duvall v. Duvall [Tex. Civ. App.] 18 Tex. Ct. Rep. 975, 101 S. W. 521.

9. Campbell v. Campbell [Mich.] 112 N. W. 481.

10. Johnson v. Johnson, 31 Pa. Super. Ct. 53.

11. Definition under Code 1895, § 2427. Brown v. Brown [Ga.] 58 S. E. 825.

Habitual drunkenness [12] as a cause of divorce requires both drinking to intoxication [13] and that the same shall be habitual.[14]

Conviction of crime.[15]—Condemnation to an infamous punishment is ground for divorce even after a full pardon has been granted.[16]

Adultery.[17]—The adultery of either party usually entitles the other to a divorce,[18] but the uncorroborated evidence of one party which is contradicted by the other is insufficient proof of adultery.[19] In New York, if the defendant in a suit for adultery puts the act of adultery in issue, he is entitled to a jury trial of such issue.[20]

Impotency.[21]—If owing to a malformation the wife is prevented from having sexual intercourse, and she knew of her incapacity before marriage without informing her husband thereof, he is entitled to a divorce.[22]

Failure or refusal of the husband to support the wife.[23]—In some states failure or refusal of the husband to support the wife is a good ground for divorce.[24] An antenuptial agreement releasing the husband from liability for support, is void as against public policy, and is no defense to a suit for divorce by the wife for refusal to support her on request.[25]

§ 3. *Defenses and facts constituting a bar.*[26]—If the court believes that an absent party who has only been served by publication, has a good defense, it may continue the hearing and order an investigation by the prosecuting attorney.[27] Insanity at the time of committing adultery precludes a divorce on that ground,[28] but insanity at the time of trial is no bar.[29]

Collusion.[30]—The defendant's consent to a divorce will not authorize a decree therefor in the absence of proof to sustain the grounds alleged.[31]

Connivance.[32]—Plaintiff's connivance of an act of adultery by defendant is a good defense.[33]

12. See 7 C. L. 1180.

13. Schaub v. Schaub, 117 La. 727, 42 So. 249; Bain v. Bain [Neb.] 113 N. W. 141.

14. Rapp v. Rapp [Mich.] 112 N. W. 709.

15. See 7 C. L. 1180.

16. But as between a charge by wife against husband of his conviction of crime, and a charge by husband against wife of her continued adultery and concubinage, the latter is the more urgent ground for divorce. Abshire v. Hanks [La.] 44 So. 186.

17. See 7 C. L. 1180.

18. Sufficient proof of adultery. Rasch v. Rasch [Md.] 66 A. 499; Davis v. Davis [Cal.] 91 P. 485. Circumstantial evidence sufficient. Flagrant and imprudent association of wife and paramour. McCune v. McCune, 31 Pa. Super. Ct. 248. Occupying same apartments for long period. Dings v. Dings, 123 Ill. App. 318. Mere imprudent conduct justifying suspicion not enough. Jones v. Jones, 124 Ill. App. 201. Evidence of opportunity and inclination held insufficient. Hutchinson v. Hutchinson, 53 Misc. 438, 104 N. Y. S. 1074. In suits for adultery the measure of proof is the preponderance of the evidence with the presumption of innocence being weighed in favor of the accused. Taft v. Taft [Vt.] 67 A. 703. After proof of two acts of adultery and an adulterous disposition, evidence of other opportunities is admissible. Id. Though the cause of divorce must have existed before commencement of suit, evidence tending to prove adultery since its commencement is admissible to show a lustful relationship with the co-respondent prior to that time. Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753.

19. Chappell v. Chappell [Ark.] 104 S. W. 203. Insufficient proof of immoral conduct of wife. Galigher v. Galigher [Or.] 89 P. 146. Insufficient proof in suit for adultery against wife to show nonaccess by husband during period of child's conception. Wallace v. Wallace [N. J. Err. & App.] 67 A. 612.

20. Notice of intention to demand jury trial. Defense of insanity at time of adultery not triable by jury. Wilcox v. Wilcox, 116 App. Div. 423, 101 N. Y. S. 828.

21. See 7 C. L. 1180.

22. Though a surgical operation might have removed the abnormal formation. Mutter v. Mutter, 30 Ky. L. R. 76, 97 S. W. 393.

23. See 7 C. L. 1181.

24. Sufficient proof of nonsupport. Seigmund v. Seigmund [Wash.] 90 P. 913.

25. Dennison v. Dennison, 52 Misc. 37, 102 N. Y. S. 621.

26. See 7 C. L. 1181.

27. Patterson v. Patterson [Wash.] 88 P. 196.

28. Kretz v. Kretz [N. J. Eq.] 67 A. 378.

29. Nor is it ground for refusing to try the cause during the continuance of such insanity. State v. Murphy [Nev.] 85 P. 1004.

30. See 7 C. L. 1181.

31. But consent to alimony is effective and binding. Patrick v. Patrick, 30 Ky. L. R. 1364, 101 S. W. 328.

32. See 7 C. L. 1181.

33. Plaintiff arranging with third person an opportunity for defendant and co-re-

Condonation.[34]—Condonation is a forgiveness followed by a reconciliation and reinstatement to such conjugal cohabitation as is adaptable to the circumstances.[35] Such reconciliation of the parties after the fact which might have been ground for separation extinguishes the cause of action,[36] but merely living in the same house without resumption of marital relations is no proof of condonation.[37] Condonation is revoked and the original cause for divorce revived by the guilty party resuming the former misconduct.[38] The possibility of a reconciliation by a reasonable effort on the plaintiff's part may preclude the necessity for granting a divorce.[39]

Recrimination.[40]—Recrimination need not be of the same nature as the ground relied on by the plaintiff, but it must be such as would be a legal ground for divorce.[41] If each party alleges and proves cruelty on the part of the other, neither is entitled to a divorce on that ground.[42]

§ 4. *Practice and procedure.*[43]—Where the same charge is ground for either absolute divorce or divorce a mensa et thoro, the court may in its discretion grant either.[44] If, in a suit for divorce by the wife, the husband obtains a decree for divorce on a counterclaim, he is liable for her costs including a reasonable attorney's fee.[45] In divorce suits the chancery court will enforce purely equitable rules and maxims against the complainant.[46]

Pleading.[47]—The petition must allege residence for the statutory period before the filing thereof in order to show jurisdiction.[48] Demurrer is the proper method of taking advantage of a petition which does not contain such allegation as would warrant a divorce, but of the objection goes to the whole petition except the prayer for

spondent to spend evening alone is guilty of connivance. Noyes v. Noyes [Mass.] 79 N. E. 814. A husband will not be granted a divorce for a single act of adultery by his wife if he connived at it and in legal contemplation consented to it. Delaney v. Delaney [N. J. Err. & App.] 65 A. 217. Insufficiency of proof of plaintiff's connivance in scheme to cause adultery. Lindbarger v. Lindbarger [N. J. Eq.] 65 A. 870. Fact that plaintiff's detective went with defendant to house of prostitution is not a connivance at his deliberate act of adultery. Tuck v. Tuck, 117 App. Div. 421, 102 N. Y. S. 688.

34. See 7 C. L. 1181.

35. Offer by wife to keep house but expressly refusing to continue "wifely relations" not a condonation. Taber v. Taber [N. J. Eq.] 66 A. 1082. Where husband living separate from wife with knowledge of her infidelity sends her word of his illness and she thereupon comes and waits on him until his recovery, condonation will be implied. Phelps v. Phelps, 28 App. D. C. 577.

36. Schaub v. Schaub, 117 La. 727, 42 So. 249.

37. Wife returning to husband's house with no intention of resuming marital relations but merely to gain advantage in order to get divorce. Lindsay v. Lindsay, 226 Ill. 309, 80 N. E. 876.

38. Mosher v. Mosher [N. D.] 113 N. W. 99; Viertel v. Viertel, 123 Mo. App. 63, 99 S. W. 759. Condonation is a conditional forgiveness of all antecedent acts of cruelty, and if they have been condoned by subsequent cohabitation such acts will not be revived as a ground for divorce, except by fresh acts of cruelty. Brown v. Brown [Ga.] 58 S. E. 825.

39. Wife who had abandoned husband offered to return if he would get rid of an intermeddling cousin who lived with him. Friemann v. Friemann, 120 Mo. App. 430, 97 S. W. 186.

40. See 7 C. L. 1182.

41. Wife charged adultery and husband set up desertion as recrimination. Court cannot find against the desertion and dismiss the complaint on the ground that the wife was not mindful of her marital obligations. Cushman v. Cushman [Mass.] 79 N. E. 809. Defense of plaintiff's adultery must be properly pleaded and supported by enough proof to sustain a divorce on that ground. De Marco v. De Marco, 116 App. Div. 304, 101 N. Y. S. 600. In suit by wife for desertion, proof of her adultery is a good defense, though husband also be guilty of adultery. Hawkins v. Hawkins, 105 N. Y. S. 889.

42. Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659.

43. See 7 C. L. 1182.

44. Gray v. Gray [Ark.] 98 S. W. 975.

45. Mutter v. Mutter, 30 Ky. L. R. 76, 97 S. W. 393. But if husband dies pending appeal by wife, his estate is not liable for her counsel fees in prosecuting the appeal, the suit then involving only property rights. Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659.

46. Though there may be some doubt of its right to do so. Kretz v. Kretz [N. J. Eq.] 67 A. 378.

47. See 7 C. L. 1182.

48. And if it fail to do so an allegation in the cross petition cannot cure the defect. Coulter v. Coulter, 124 Mo. App. 149, 100 S. W. 1134. A suit to annul the marriage, on the ground that at the time of the marriage the plaintiff was of unsound mind, is a proceeding for divorce, and the complaint must be verified to give the court jurisdiction. Johnson v. Johnson, 142 N. C. 462, 55 S. E. 341.

alimony, the defense is properly made by answer, as a demurrer would admit the charge.[49] Unless the time and place of the adultery charged and the name of the co-respondent are alleged, they cannot be proved.[50] A petition alleging unfounded accusations of immorality and slanderous repetition of same to third persons is not open to general demurrer where the statute makes treatment rendering living together "insupportable" a ground for divorce.[51] Though plaintiff be unable to maintain a charge of desertion, divorce may be granted defendant on a cross bill alleging abandonment by plaintiff without cause, if such allegation be sustained.[52] An answer, in a divorce suit on the ground of desertion, stating that the absence was caused by the plaintiff leaving home ostensibly in search of work and that defendant sent him money and urged him to return is sufficient.[53] An answer in which the defendant by way of cross petition prays for alimony and injunction should be verified.[54] Mere clerical errors not affecting the merits of the case be amended by leave of court, but until properly corrected a decree should not be granted, if the errors make the record confusing or misleading.[55]

Evidence and proof.[56]—The evidence of witnesses to prove grounds of divorce must be weighed as in other cases.[57] If all the evidence proves the grounds alleged, it is error to dismiss the petition.[58] It is reversible error for the court after hearing plaintiff's evidence to interrupt defendant's testimony and grant a divorce denying defendant's prayer of cross complaint.[59] Where the parties lived together and were recognized by society as husband and wife, the burden is on the party denying the marriage if the evidence thereto is conflicting,[60] but proof of marriage by one uncontradicted witness is sufficient to establish it.[61] A divorce for desertion will not be granted merely on the uncorroborated testimony of the party seeking it,[62] but a statute requiring corrobative evidence does not necessitate the testimony of the other witnesses.[63] Where evidence of good character is made inadmissible in civil suits by statute, proof of a wife's good character is not admissible in a suit against her for adultery.[64]

Procedure where husband disregards order for temporary alimony.[65]—If a husband disregarded an order of temporary alimony, an order to show cause why he should not be punished for contempt is the proper procedure.[66]

49. Stewart v. Stewart [Md.] 66 A. 16. Sufficiency of petition as to allegations of ownership of property. Variance between petition and citation held immaterial. Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 S. W. 419. Insufficiency of allegation to warrant court in enjoining sale of property by defendant. Stewart v. Stewart [Md.] 66 A. 16.

50. Jenkins v. Maier, 118 La. 130, 42 So. 722.

51. But if it fails to specify what constitutes the slander or name the party to whom made, it is open to special demurrer. Denning v. Denning [Tex. Civ. App.] 17 Tex. Ct. Rep. 888, 99 S. W. 1029.

52. Rigsby v. Rigsby [Ark.] 101 S. W. 727.

53. Under Civ. Code Prac. § 95. Stevens v. Stevens, 29 Ky. L. R. 953, 96 S. W. 811.

54. Sufficiency of affidavit. McLaughlin v. McLaughlin [Ga.] 58 S. E. 156.

55. Misnomer in endorsements on papers. Owens v. Owens [N. J. Eq.] 66 A. 929.

56. See 7 C. L. 1183.

57. Fact that witness testifying to adultery was hired for that purpose by complainant should be considered. Taft v. Taft [Vt.] 67 A. 703.

58. Goodpaster v. Goodpaster [Ky.] 102 S. W. 324. Though a wife appear indifferent on the witness stand as to her husband's again living with her, a divorce may be decreed as a matter of law. Swain v. Swain [Wash.] 87 P. 1126.

59. Anderson v. Anderson [Cal. App.] 87 P. 558.

60. Potter v. Potter [Wash.] 88 P. 625.

61. Overing v. Provensal, 117 La. 653, 42 So. 211.

62. Sharp v. Sharp [N. J. Eq.] 64 A. 985.

63. Circumstances as shown by defendant's conduct and expressions, and letters of the parties, may sufficiently corroborate plaintiff's testimony. Foote v. Foote [N. J. Err. & App.] 65 A. 205, three judges dissenting.

64. Nor is evidence of co-respondent's good character admissible. Van Horn v. Van Horn [Cal. App.] 91 P. 260.

65. See 7 C. L. 1184.

66. But fine must be limited to amount due when order made. Woolworth v. Woolworth, 115 App. Div. 405, 100 N. Y. S. 865. Copy of decree for alimony must be served on defendant and demand made therefor. Stanley v. Stanley, 116 App. Div. 544, 101 N. Y. S. 725. Code Civ. Proc. § 1773, spe-

Finding of desertion must state that it was without reasonable cause and continued without reasonable cause for statutory period.[67]

Conclusiveness of decrees; vacation and modification.[68]—A verdict of the jury resting on only one party's testimony will not be set aside if both parties are competent,[69] but though the court announce that a divorce decree would be granted and the property disposed of in a certain way, if at the request of both parties no decree was entered or signed, the plaintiff is estopped to assert in a subsequent suit that the former was valid and binding.[70] Though a decree of divorce was not entered by the clerk until after one of the parties had remarried, a proper entry nunc pro tunc may be made.[71] Where by fraud of defendant a divorce decree makes no provision for alimony, such decree may be impeached and alimony granted without disturbing the divorce decree.[72] A divorce suit being personal, the decree for divorce will not be set aside, after the death of the successful party, for lack of jurisdiction,[73] but a decree which is void because of insufficiency of the petition is subject to collateral attack.[74] A petition to reopen a judgment of divorce must allege sufficient reasons therefor.[75] A motion by plaintiff to set aside a divorce decree, for want of jurisdiction, cannot be opposed by intervention of a third party on the ground that his title to property will be affected thereby.[76]

Appeal and review.[77]—No appeal lies in divorce suits except by statutory or constitutional provision, and though so provided for in most states, no such right is conferred in Rhode Island in either divorces a vinculo or a mensa et thoro.[78] If all the facts are before the appellate court, it will finally determine what the decree should be and direct the lower court to enter it.[79] The weight and sufficiency of the evidence in divorce suits will not usually be reviewed on appeal.[80] It will be

cially authorizes such contempt proceedings, and § 1241 has no application thereto. Id. Jurisdiction for contempt proceedings over party who has left state. Woolworth v. Woolworth, 115 App. Div. 405, 100 N. Y. S. 865.

67. Fricke v. Fricke, 124 Ill. App. 39.

68. See 7 C. L. 1185.

69. Only issues presented to jury were raised by allegations in petition, verdict finding "material allegations to be true" not fatally defective. Barrow v. Barrow [Tex. Civ. App.] 16 Tex. Ct. Rep. 951, 97 S. W. 120.

70. As the former suit was never concluded no nunc pro tunc decree should be entered, especially where third persons had acquired rights under the decree in the second suit. State v. Superior Court [Wash.] 90 P. 258.

71. Mock v. Chaney, 36 Colo. 60, 87 P. 538. Though judgment of divorce is not entered by the clerk when rendered, a nunc pro tunc entry is sufficient to dissolve the marriage as of the date of the rendition of the judgment. Sufficiency of "declaration by the court" judgment. Zahorka v. Geith, 129 Wis. 498, 109 N. W. 552.

72. In re Smith, 74 Kan. 452, 87 P. 189. Court may vacate order for payment of attorney's fees if made on wife's misrepresentation that she had no property. Glass v. Glass [Cal. App.] 88 P. 734.

73. And the executor of the deceased party has no authority to consent to setting it aside. Dwyer v. Nolan, 40 Wash. 459, 82 P. 746, commented on in 9 Harv. L. R. 384. Under Civ. Code, § 132, court having jurisdiction in divorce suit may enter judgment after death of party, if the issue has been decided prior thereto. John v. Los Angeles County Super. Ct. [Cal. App.] 90 P. 53.

74. Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015.

75. Mere allegation that petitioner was deceived by the other party into not making a defense without averment of his intent to deceive insufficient. Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 S. W. 419. Defendant regularly cited is bound by confirmation of default judgment of separation. O'Brien v. D'Hemecourt, 118 La. 996, 43 So. 654. A divorce case should not be reopened for the taking of additional testimony if the necessity for it should have been known and could have been obtained. Smith v. Smith [N. J. Eq.] 65 A. 986. A charge stating generally the grounds of divorce alleged and directing the jury to render verdict for plaintiff if they should find the material allegations true, sufficiently indicates what the material allegations are. Barrow v. Barrow [Tex. Civ. App.] 16 Tex. Ct. Rep. 951, 97 S. W. 120.

76. Johnson v. Johnson, 142 N. C. 462, 55 S. E. 341.

77. See 7 C. L. 1186.

78. Acts 1905, § 328, p. 95, confers no such right of appeal. Fidler v. Fidler [R. I.] 65 A. 609.

79. Lindsay v. Lindsay, 226 Ill. 309, 50 N. E. 876. Where an appellate court reverses the decree of the lower court and directs a decree for divorce in favor of the appellant, the cause is remanded with directions that the lower court make its own decree as to alimony and costs as provided by statute. Davenport v. Davenport, 106 Va. 736, 56 S. E. 562.

80. Taft v. Taft [Vt.] 67 A. 703; Williams

presumed on appeal, where the evidence is not preserved and made part of the record, that the decree of the lower court was sustained by the proof.[81] A decree for divorce and order dividing the property are so independent that a new trial may be asked and appeal taken as to the order of division alone.[82] On appeal from a divorce decree determining property rights, the case must be reviewed in order to adjust the property rights, notwithstanding plaintiff's subsequent death.[83] At any time before final decree the entire proceedings may be reviewed and new evidence introduced.[84] It is too late for plaintiff to urge for the first time on appeal that defendant should have obeyed the court's order to return home or submitted to the order of separation.[85]

§ 5. *Custody and support of children.*[86]—The disposition of the infant children of divorced parents rests largely in the discretion of the court,[87] and will not be inquired into by a reviewing court except on a charge of abuse of discretion or that a grave mistake has been made,[88] but the court will look to the children's best interest and award their custody to the party better qualified to raise them.[89] Where a divorce is granted for the husband's misconduct and he be unqualified to have control of the children, they should be given into the mother's custody, if she be a woman of good repute.[90] The affluence of relatives who owe the children no duty is not controlling as against the care and interest of their mother.[91] Upon the issue of the proper custody of children, evidence of the character and means of the parent is usually relevant.[92] A decree in a divorce suit providing for the custody of children is prima facie evidence of the legal right to their custody in the person to whom awarded by the decree.[93] If necessary to promote the welfare of the children, the court may take them away from both parents and award their custody to a third party,[94] but a child awarded to a third person may be returned to the mother's cus-

v. Vernardo, 117 La. 905, 42 So. 419. Sufficiency of evidence to sustain judgment where defendant makes no appearance and offers no evidence. O'Brien v. D'Hemecourt, 118 La. 996, 43 So. 654. The discretion of the trial judge will not be interfered with on appeal where the evidence as to the validity of the marriage is conflicting. Fowler v. Fowler [Ga.] 57 S. E. 682.

81. When the parties to a divorce suit are entitled to a jury, the rule that a chancery decree will be reversed unless the evidence be preserved does not apply. Berg v. Berg, 223 Ill. 209, 79 N. E. 13.

82. Thus not requiring the statutory notice, etc., of a divorce appeal. Kremer v. Kremer [Kan.] 90 P. 998. Though on appeal from an award of alimony an appellate court have no power to disturb the divorce decree, it may review the facts so far as they relate to the alimony. Patrick v. Patrick, 30 Ky. L. R. 1364, 101 S. W. 328.

83. Controversy becomes property contest between defendant and plaintiff's heirs who must be made parties. Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659.

84. Proof of libelee giving birth to child after decree nisi, and legitimacy of such child. Koffman v. Koffman, 193 Mass. 593, 79 N. E. 780.

85. Should have taken judgment by default. Baurens v. Giroux, 117 La. 696, 42 So. 224.

86. See 7 C. L. 1186.

87. Evidence of wife's good character inadmissible in determining disposition of child's custody, where divorce granted for her adultery. Van Horn v. Van Horn [Cal. App.] 91 P. 260.

88. Graviess v. Graviess, 7 Ohio C. C. (N. S.) 135. Award of child's custody pending suit to father, by lower court, will not be disturbed on appeal, no abuse of discretion appearing. Hatfield v. Hatfield [Ga.] 57 S. E. 682.

89. If divorce be given wife for desertion, she is entitled to custody of children. Johnson v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 644, 102 S. W. 943. Husband obtaining divorce for desertion entitled to custody of child returned to him by wife after her desertion. Hayden v. Hayden, 74 Kan. 725, 88 P. 257. Wife obtaining divorce for nonsupport entitled to custody of children. Seigmund v. Seigmund [Wash.] 90 P. 913.

90. Guerin v. Guerin [Wash.] 88 P. 928. The fact that long before marriage the wife was immoral does not establish her unfitness for the custody of the children, if there is no proof of any subsequent misconduct. Curtis v. Curtis [Wash.] 91 P. 188.

91. Graviess v. Graviess, 7 Ohio C. C. (N. S.) 135.

92. As is also that of third persons with whom the parent would take the children to live. Bush v. Bush [Tex. Civ. App.] 18 Tex. Ct. Rep. 757, 103 S. W. 217.

93. But not conclusive in habeas corpus proceedings where it appears that from causes arising since the decree their welfare requires that they be taken from such custody. Hollenbeck v. Glover [Ga.] 57 S. E. 108.

94. Though he reside beyond the judicial district. Collins v. Collins [Kan.] 90 P. 809.

tody if she become able to support it and is a proper person to raise it.[95] Though a father be deprived of the custody of his children by a divorce decree for his misconduct, he is not thereby relieved of his obligation to support them.[96] Where a decree awarding the custody of a child to one parent is made subject to the order of the court, it may be modified by proof that changed conditions have made it for the best interest of the child to be given into the control of the other parent.[97] Where all the prayers of plaintiff as to custody of children and share of property are granted, the decree cannot be subsequently modified so as to require defendant to pay an additional sum for the care and education of the children.[98]

§ 6. *Adjustment of property rights.*[99]—Generally the court granting the divorce has exclusive jurisdiction over the adjustment of property rights growing out of the divorce.[1] Though divorce be denied, the court has jurisdiction to determine property rights arising therefrom.[2] An agreement between the parties to a

95. Decree will be so modified without proof that child's welfare demanded the change, and mother is not estopped from requesting it by her previous consent to custody in the third person. Curtis v. Curtis [Wash.] 91 P. 188.

96. Nor is decree for alimony for wife, res adjudicata of children's right to support. Amount of allowance to children based on father's earnings. Graham v. Graham [Colo.] 88 P. 852. An infant child of divorced parents is not deprived of his right to the support of his father by the fact that the custody of such infant is given to the mother. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 S. W. 608. Though children whose custody was awarded by a divorce decree to the mother be illegally removed by her from the state, the father is not thereby relieved from an obligation imposed on him by the court to provide for their support without complaint to the court of such removal. Feinberg v. Feinberg [N. J. Eq.] 66 A. 610. The dissensions of parents do not release the father from the obligation to support his children, and the fact that he has obtained a decree of divorce in another state, after a separation which continued for many years, does not bar recovery by the wife from him of money expended in the support of their children prior to the granting of the decree, nor can aggression on her part be inferred as a matter affecting the rights of children, where the decree assigns no cause for the divorce and makes no provision for alimony or for the children. Clark v. Clark, 4 Ohio N. P. (N. S.) 142.

97. Chappell v. Chappell [Wash.] 89 P. 166. Modification of decree according to wishes of children and proof that their interests require it. Burritt v. Burritt, 53 Misc. 24, 102 N. Y. S. 475. Interlocutory judgment disposing of children's custody cannot be modified by another court. Powers v. Powers, 104 N. Y. S. 94. An order denying a petition by a mother for the restoration of young children, awarded to the father's custody by a divorce decree, should provide that it is without prejudice to her right to again apply for the privilege based on her future good conduct. Bakley v. Bakley [N. J. Eq.] 65 A. 440. The continuing jurisdiction which is vested in the court of common pleas with reference to the custody of children for the purpose of modifying orders in divorce proceedings does not authorize a rehearing of a matter theretofore submitted and determined, but is only to be called into exercise when a substantial change in the condition of the parties requires a modification of the former order. Graviess v. Graviess, 7 Ohio C. C. (N. C.) 135. On a petition for modification of a decree awarding the custody of a child to the husband, testimony of the wife's understanding of an agreement relating thereto should be excluded if conflicting with the record. Where the court's finding was "from the evidence adduced." Chappell v. Chappell [Wash.] 89 P. 166. Order awarding custody of young children to mother may be modified, when boy becomes old enough to require father's control, by permitting him to go to father, and younger ones to remain with mother, if she is still the better one to raise them. Schultze v. Schultze [N. J. Eq.] 66 A. 950. Decree permitting husband to have children with him for certain time provided they consent will not be modified so as to allow him to take them without their consent. Hullinger v. Hullinger, 133 Iowa, 269, 110 N. W. 470. Under Vermont statute giving court granting divorce power to make such further order as appears proper concerning the custody of minor children, an adjudication on a habeas corpus before a supreme court judge as to child's custody does not affect jurisdiction by court which divorced its parents to determine the question. Whittier v. McFarland, 79 Vt. 365, 65 A. 81.

98. Though Civ. Code, § 138, gives the court power to modify decrees as to custody and education of children. Calegaris v. Calegaris [Cal. App.] 87 P. 561.

99. See 7 C. L. 1189.

1. Conway v. U. S., 149 F. 261. In granting a divorce the court may determine the disposition of the homestead if such question was made an issue in the case. John v. Los Angeles County Super. Ct. [Cal. App.] 90 P. 53. As the adjustment of property rights is incidental to a divorce proceeding, a disposition thereof cannot generally be made in an independent suit. Ambrose v. Moore [Wash.] 90 P. 588. Where statutory power is given chancery courts to alter decrees regarding the wife's support, an action at law will not lie on a decree for alimony. Nixon v. Wright, 146 Mich. 231, 13 Det. Leg. N. 711, 109 N. W. 274.

divorce suit for a division of their property is valid.[2] In adjusting the property rights of the parties the courts exercise a wide discretion in making as equitable adjustment as possible.[4] Where the court is empowered by statute to divide the husband's estate with the wife as it might deem right, a division by entirety is proper.[5] The court may award to the wife specific articles of personal property from the husband's estate.[6] If community property is not disposed of by the divorce decree, it is thereafter held by the parties as tenants in common.[7] If the wife out of her earnings has paid off a mortgage on the homestead, she is entitled to be subrogated to the rights of the mortgagee, though the divorce be rendered in the husband's favor.[8] By statute in some states property obtained by one party from the other in consideration or by reason of the marriage must upon divorce be restored.[9] A third party who is joint owner of lands that might be in controversy in a divorce suit may become a party by interpleader to have partition thereof.[10]

§ 7. *Effect of divorce.*[11]—Decrees of divorce mensa et thoro do not involve any severance of the marital relation.[12] The disabilities of coverture are not removed by a void divorce, but continue until the death of the consort.[13] In Louisiana a marriage between one who has been divorced for adultery and the accomplice in such adultery is absolutely void and has no civil effect, if the accomplice knew that the other party was married at the time of the adultery.[14]

§ 8. *Foreign divorces.*[15]—A divorce decree rendered in a foreign state is void and may be collaterally attacked, if the plaintiff therein was not at the time a resident of such foreign state but of the state of the forum, and hence a subsequent marriage in the foreign state is invalid in the state of the forum.[16] Though under the

2. Jenkins v. Maier, 118 La. 130, 42 So. 722.

3. Kinkead v. Peet, [Iowa] 111 N. W. 48. Though in a divorce suit the court has no jurisdiction to dispose of the separate property of the parties, yet if they both submit the adjustment to the court it acquires jurisdiction to determine the question. May quiet title to the rightful owner. Glass v. Glass [Cal. App.] 88 P. 734.

4. Wife having no earning capacity and being in ill health may be awarded all the community property. Markowski v. Markowski [Wash.] 87 P. 914. Husband worth $12,000, wife worth $1,400, decree allowing her all household furniture and requiring him to pay her $5,000, proper. Campbell v. Campbell [Mich.] 112 N. W. 481. Right of wife of Indian to share of land patented to him where divorce is granted her for his fault. Conway v. U. S. 149 F. 261. Where it is impracticable to divide land, a money judgment may be given in lieu of wife's share. Richardson v. Richardson [Wash.] 87 P. 511. Decree granting wife land standing in her name and directing husband to pay all his debts for which wife might be liable merely confirms her title, and husband cannot complain. Luick v. Luick, 132 Iowa, 302, 109 N. W. 783. A certain divorce suit by the wife held "pending" at the time of a fraudulent transfer of property by the husband though there was no valid service of process until later, so that upon decree setting aside said transfer, the decree in the divorce suit transferring the property to the wife, operated to convey title to the wife, as against the husband and his grantee and a subsequent purchaser who acquired title with constructive notice and without value. Hamilton v. Rudy, 4 Ohio N. P. (N. S.) 427.

5. Jeske v. Jeske, 147 Mich. 367, 13 Det. Leg. N. 1016, 110 N. W. 1060. Proof of equitable title in both parties equally and legal title in only one. Kremer v. Kremer [Kan.] 90 P. 998.

6. Washington v. Washington, [Neb.] 111 N. W. 787.

7. Tabler v. Peverill, [Cal. App.] 88 P. 994. If not brought before the court, the property rights of each are considered waived. Ambrose v. Moore [Wash.] 90 P. 588.

8. Nor can she be charged with rent. Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753.

9. The word "consideration" means the act of marriage or some contract relating thereto, and "by reason of" refers to property obtained by operation of law. Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753. Statute requiring property obtained in consideration of marriage shall be restored cannot be applied by husband to wife's property to which he had no rights by virtue of the marriage. Harris v. Harris [Ky.] 104 S. W. 387.

10. Weaver v. Manley [Tex. Civ. App.] 18 Tex. Ct. Rep. 200, 101 S. W. 848.

11. See 7 C. L. 1190.

12. Dower and curtsey rights not affected. McGuinness v. McGuinness [N. J. Eq.] 62 A. 937, commented on in 4 Mich. L. R. 556.

13. Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015.

14. The record of the divorce suit naming the accomplice is complete identification of such accomplice for the purposes of the prohibitory statute. Succession of Gabisso [La.] 44 So. 438.

15. See 7 C. L. 1191.

16. Non-residence may be proved by parol

laws of a state where a divorce is obtained a party cannot marry for a certain period, yet a marriage within that time in another state is valid from the date the disability is removed, though the party returned to the first state.[17]

DOCKETS, CALENDARS AND TRIAL LISTS.

Right to Go on the Calendar (1008).
Placing Cause on Calendar (1008).
Posting of Trial List (1009).
Passing or Advancing Cause (1009).
Transfer, Correction, or Striking Off (1009).
Short-Cause Calendar (1009).
Reinstatement and Restoration (1010).

The topic treats only of the calendars of trial courts,[18] and excludes docket entries as judicial records,[19] and consolidation or severance of cases at trial.[20]

Right to go on the calendar.[21]—The statutes usually prescribe the conditions upon which cases are entitled to go on the calendar.[22] Where an appellate court remands with directions to amend the decree in specified particulars, the case need not be placed on the chancery calendar for a rehearing.[23] A contested motion may be heard in Illinois without placing it on the contested motion calendar.[24] The special term in allowing an amendment to the complaint may preserve the position of the case on the trial term calendar;[25] nonpayment of docketing fee does not authorize the dismissal of an appeal to the district court from the action of the supervisors on a statement of consent for sale of liquors.[26]

Placing cause on calendar.[27]—Although a case has been placed upon the calendar of the Utah district court, it is not entitled to go upon the calendar of succeeding terms unless noticed therefor.[28] While the allotment of a case in the civil district court of Louisiana may be waived, a litigant may insist thereon.[29] Where the clerk does not docket a case because of a pending motion to strike a plea, upon disposing thereof, the court may order it docketed for the same term.[30] By statute in many states a preference is given to certain classes of cases,[31] unless the party en-

though record contains averment of citizenship. State v. Westmoreland [S. C.] 56 S. E. 673. Though defendant knew of the decree and suggested a separation. But if the foreign court had jurisdiction by reason of the husband's domicile and the domicile of matrimony being in that state, it may consider it still the domicile of the wife though she has left the state, thus rendering its decree valid in other states. Post v. Post, 105 N. Y. S. 910. After husband who had deserted wife obtained default decree of divorce in foreign state, a decree of separation subsequently obtained by the wife in home state is an adjudication of the invalidity of such foreign divorce in home state. Olmsted v. Olmsted, 51 Misc. 309, 100 N. Y. S. 1083.

17. Mock v. Chaney, 36 Colo. 60, 87 P. 538.

18. Calendars of appellate courts, see Appeal and Review, 9 C. L. 182.

19. See Records and Files, 8 C. L. 1697.

20. See Trial, 8 C. L. 2161.

21. See 7 C. L. 1192.

22. Under Code, § 366, and Civ. Code 1906, p. 13, an equitable action in which some of defendants were not summoned but appeared during term and joined issue is not triable at such term unless plaintiff consents that answer be taken as true. Howard v. Maxwell's Ex'r, 30 Ky. L. R. 448, 98 S. W. 1013.

23. South Chicago Brew. Co. v. Taylor, 126 Ill. App. 498.

24. Circuit court rule 4. Hunt v. Pronger, 126 Ill. App. 403.

25. Has power to so provide. Mossein v. Empire State Surety Co., 117 App. Div. 820, 102 N. Y. S. 1013.

26. Dye v. Augur [Iowa] 110 N. W. 323.

27. See 7 C. L. 1192.

28. District court rule 21, providing that clerk shall make up trial calendar five days before first day of each term and include all cases at issue noticed for the term prior to making up of calendar held not void as conflicting with Rev. St. 1898, §§ 3131, 3132 (Riddle v. Quinn [Utah.] 90 P. 893), and to require service of notice before each term. (Id).

29. Succession of Kranz, 117 La. 647, 42 So. 197.

30. Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706.

31. Code Civ. Proc. § 791, subd. 13 (Laws 1902, p. 943, c. 357), giving preference to actions for "absolute" divorce, etc., held to be inapplicable to action for separation. Seligman v. Seligman, 52 Misc. 9, 100 N. Y. S. 770. Fact that preferred case has resulted in three mistrials and is disorganizing business of court does not justify court in refusing to set case for trial. State v. Reid [La.] 44 So. 689. In absence of special circumstances, fact that sole de-

titled thereto waives the right by untimely application.[32] A motion for preference because of plaintiff's failing health and probable death is addressed to the discretion of the court.[33] The taking of the statutory preference does not preclude a party from advancing his case under the rules of court as a case triable in two hours.[34]

Posting of trial list.[35]

Passing or advancing cause.[36]—The passing or advancing of a case upon the calendar rests largely within the discretion of the trial court.[37]

Transfer, correction, or striking off.[38]—Where an equity suit is erroneously brought in the law court,[39] or a law action in the chancery court,[40] or the nature of the action is changed after it is properly instituted,[41] it may be transferred to the proper docket upon timely application.[42] Where a case has been abandoned,[43] or is otherwise improperly upon the calendar, it may be stricken off on timely motion.[44]

Short-cause calendar.[45]—Lack of sufficient notice to place a case on the short-cause calendar is not a jurisdictional irregularity.[46]

fendant is executor only entitles case to preference over non-preferred issues, noticed for same term. Gegan v. Union Trust Co., 105 N. Y. S. 243.

32. Where state officer failed to move for trial on day stated in notice for trial, he waived his right and his motion for order declaring case a preferred one, and setting it for trial at later date was addressed to discretion of court. Clement v. Mast, 103 N. Y. S. 1025. Failure to assert right to preference when issues are first noticed for trial waives right. Gegan v. Union Trust Co., 105 N. Y. S. 243. And it is not revived by amendment of complaint not changing cause of action. Id. Where both parties noticed case for trial at November term and plaintiff, an infant, gave notice of motion for preference but defaulted on hearing, he waived his right to preference, and subsequent notice for another term does not avoid the effect thereof. Meyerson v. Levy, 117 App. Div. 475, 102 N. Y. S. 704.

33. Ortner v. New York City R. Co., 54 Misc. 83, 104 N. Y. S. 502. Affidavit of physician held not to show such immediate necessity and compelling circumstances as to warrant preference. Id. Appellate division will not interfere with order of trial judge preferring a case and setting it for trial on day certain because of extreme age of plaintiff. Hickman v. Schimper & Co., 105 N. Y. S. 636.

34. Plaintiff, in action against corporation on note, by obtaining preference under Code Civ. Proc. § 791, authorizing preference in such actions, does not preclude himself from having cause advanced under city court of New York rule 2, as case triable in two hours. Ferraca v. Aaron Miller Realty Co., 54 Misc. 84, 104 N. Y. S. 496.

35. See 5 C. L. 1039.

36. See 7 C. L. 1193.

37. Where parties answer ready to call of case on reserve section of day calendar, case will not be passed when reached on ready section in absence of excuse. Loehr v. Brooklyn Ferry Co., 115 App. Div. 666, 101 N. Y. S. 209.

38. See 7 C. L. 1193.

39. Fact that long and complicated account is involved does not entitle party as a matter of right to transfer to equity docket, since law court has jurisdiction. Bagnell Tie & Timber Co. v. Goodrich [Ark.] 102 S. W. 228. In Arkansas it is held that, where answer presents defense at law, it is error to transfer case to equity. Equitable Mfg. Co. v. Thomasson, 78 Ark. 240, 95 S. W. 459.

40. Where law case is transferred to equity, parties believing that certain statute made action equitable, upon repeal thereof either party may have case transferred to law docket. Sharrock v. Kreiger, 6 Ind. T. 466, 98 S. W. 161. Where plaintiff sued in equity for specific performance to which relief he was not entitled, case was properly transferred to law calendar for trial where cause of action for damages was stated. Robinson v. Luther [Iowa] 109 N. W. 775.

41. Where, after jury was impaneled, plaintiff filed amendment petition changing cause of action from one to settle boundary to suit to quiet title, court properly transferred case to equity calendar. Boltz v. Colsch [Iowa] 109 N. W. 1106. Where amended petition changing cause of action from one in equity to one at law is stricken out, motion to transfer case to law docket is properly denied. Saunders v. Wells [Iowa] 112 N. W. 205

42. In Kentucky motion to transfer to equity docket is too late after jury sworn. Gray Tie Co. v. Clark, 30 Ky. L. R. 409, 98 S. W. 1000.

43. Where circuit court clerk, without plaintiff's consent, left case off docket until ordered by court to reinstate same and defendant thereafter obtained a continuance, it is proper to refuse to strike on ground that case had been discontinued. Sellers v. Farmer [Ala.] 43 So. 967.

44. Where process was served on heir of ancestor dying pendente lite, and default judgment taken, motion to strike action from docket because of untimely revival made four years after judgment is too late. City of Louisville v. Hughes, 30 Ky. L. R. 231, 97 S. W. 1096. Civ. Code Prac. § 510, held not to authorize striking of case after court had lost control of judgment. Id.

45. See 7 C. L. 1194.

46. Christie v. Walker, 126 Ill. App. 424.

Reinstatement and restoration.[47]—The right to reinstate a case may be lost by laches.[48]

Documents in Evidence, see latest topical index.

DOMICILE.

Domicile for particular purposes, such as voting,[49] jurisdiction.[50] and the probate of wills,[51] is more fully treated in appropriate topics. Effect of the lex domicilii in foreign jurisdictions is also treated elsewhere.[52]

Definition, elements, and establishment.[53]—Domicile is the actual or constructive presence of a person in a given place, coupled with the intention to remain there permanently.[54] It is distinguishable from "citizenship" in that the latter is a matter of public, while the former is of private, concern.[55] "Inhabitant" or "resident" ordinarily indicates a person with a fixed domicile,[56] but the word "residence" will not be construed as synonymous with "domicile" if, thereby, the usefulness of a law will be impaired.[57] A residence may be claimed apart from domicile on question of venue.[58] Where a dwelling is on a dividing line, residence is determined by the location of that part most closely connected with the primary purposes of a dwelling.[59] The husband's domicile is the wife's even though she maintain a separate establishment in another state,[60] or is deserted by him.[61] Minors are incapable of choosing a domicile,[62] hence, the father's [63] or guardian's domicile is theirs.[64] Where both parents are dead the minor's domicile is fixed by that of the last surviving parent,[65] hence, the domicile of the child changes with that of the father [66] and is not affected by agreement between the parents,[67] nor, except temporarily, by a

47. See 7 C. L. 1194.

48. Motion to reinstate on day calendar, supported by affidavit showing that case was on such calendar from June 20th, 1903, to April 6th, 1905, when it was marked off by consent will be granted though motion was not noticed until Jan. 11th, 1907, where defendant has made no motion to dismiss action for non-prosecution and will not be prejudiced. Schnupp v. Interurban St. R. Co., 103 N. Y. S. 737.

49. See Elections, 7 C. L. 1230.

50. See Jurisdiction, 8 C. L. 579; also Divorce, 9 C. L. 997.

51. See Wills, 8 C. L. 2305.

52. See Conflict of Laws, 9 C. L. 596.

53. See 7 C. L. 1194.

54. People v. Hendrickson, 54 Misc. 337, 104 N. Y. S. 122.

55. State v. Jackson, 79 Vt. 504, 65 A. 657. See Citizens, 9 C. L. 569.

56. Bechtel v. Bechtel [Minn.] 112 N. W. 883.

57. Residence given broader meaning in Laws 1894, c. 556, § 36, relating to right to attend school. People v. Hendrickson, 54 Misc. 337, 104 N. Y. S. 122.

58. One domiciled in New York, but doing business and residing in Texas for fourteen months prior to the time action was brought against him, properly sued in Texas. Taylor v. Wilson [Tex.] 15 Tex. Ct. Rep. 577, 93 S. W. 109, afg. [Tex. Civ. App.] 14 Tex. Ct. Rep. 900, 93 S. W. 108.

59. Residence on side comprising woodshed and pantry and all of bedroom and kitchen, except small portion of each. East Montpelier v. Barre, 79 Vt. 542, 66 A. 100.

60. In re Hartman's Estate, 70 N. J. Eq. 664, 62 A. 560.

61. Deserted wife domiciled at place of domicile on desertion, though to support herself she was obliged to remain out of the state most of the time, but with no fixed purpose to make a home elsewhere. Hibbert v. Hibbert [N. J. Eq.] 65 A 1028.

62, 63. Beekman v. Beekman [Fla.] 43 So. 923.

64. People v. Hendrickson, 54 Misc. 337, 104 N. Y. S. 122; Hering v. Mosher, 144 Mich. 152, 13 Det. Leg. N. 183, 107 N. W. 917.

65. People v. Hendrickson, 54 Misc. 337, 104 N. Y. S. 122. Father of minor died at his domicile in Arkansas. At time of action minor resided in North Carolina. No evidence that mother had changed her status after the father's death. Minor's domicile was where father died. Nunn v. Robertson, 80 Ark. 350, 97 S. W. 293.

66. Hering v. Mosher, 144 Mich. 152, 13 Det. Leg. N. 183, 107 N. W. 917; Lanning v. Gregory [Tex.] 17 Tex. Ct. Rep. 587, 99 S. W. 542, followed in [Tex. Civ. App.] 18 Tex. Ct. Rep. 136, 101 S. W. 484.

67. Parents domiciled and divorced in Texas. Agreement between them that father should give mother custody and control of child whenever she desired it. Father removed to Louisiana, which was held to be the domicile of the child, notwithstanding the agreement. Lanning v. Gregory [Tex.] 17 Tex. Ct. Rep. 587, 99 S. W. 542, followed in [Tex. Civ. App.] 18 Tex. Ct. Rep. 136, 101 S. W. 484.

judgment of a court not having jurisdiction.[68] At the father's death, however, the grandfather, having lawful control of the minor, may change its domicile.[69] The domicile of a female minor is not changed by marriage.[70] The wife of an insane husband may change her domicile.[71] Abandoment of a wife by the husband will not effect such change,[72] nor will the annexation of territory work a change of residence, unless the party is then dwelling upon the land, actually or in legal contemplation.[73] To accomplish a change of domicile, not only must the intent to do so exist.[74] but there must be an actual removal accompanied with such intent.[75] A change of domicile will not operate to change allegiance.[76]

Issues and evidence.[77]—The presumption that a minor's domicile is with the parent may be rebutted by showing a different state of facts.[78] Residence, once established, is presumed to continue till the conrtary is shown,[79] therefore, permanent change of residence will not be inferred from removal alone,[80] and the law will not presume the place of birth the domicile unless the last domicile was definitely abandoned and no new one adopted.[81] The unauthorized statements of third parties are insufficient to prove a change of domicile.[82] Domicile is a question of fact,[83] or law and fact, to be determined under the evidence.[84] So, too, a change of domicile is ordinarily a question of fact depending on the intent.[85] as evidenced by acts and declarations.[86] On motion for change of venue because plaintiff not domiciled where suit brought, burden of proof is on movant.[87]

68. Minor domiciled with father in Louisiana. On visit of minor to Texas mother brought habeas corpus proceedings for possession, which was awarded her. On appeal, judgment reversed and possession restored to father. Lanning v. Gregory [Tex.] 17 Tex. Ct. Rep. 587, 99 S. W. 542, followed in [Tex. Civ. App.] 18 Tex. Ct. Rep. 210, 101 S. W. 484.

69. The father, on the death of the mother, and pursuant to agreement between them, placed his infant in the custody of its grandfather, where it remained for years. The grandfather's domicile was that of the infant's domicile of origin. The father went to a distant country, leaving the child behind, and died. The grandfather properly made application for guardianship in the county of his domicile. Hering v. Mosher, 144 Mich. 152, 13 Det. Leg. N. 183, 107 N. W. 917.

70. Minor domiciled with her parents in Ohio does not change her domicile by marriage with a man domiciled in Florida. Beekman v. Beekman [Fla.] 43 So. 923.

71. Husband insane and in confinement, wife becomes head of the family and may change her domicile to another state, leaving her husband behind. McKnight v. Dudley [C. C. A.] 148 F. 204.

72. Haddock v. Haddock, 201 U. S. 562, 50 Law Ed. 867; Hibbert v. Hibbert [N. J. Eq.] 65 A. 1028. Husband and wife living in Utah. His abandonment of her and leaving the state did not effect a change in her domicile. State v. Morse, 31 Utah, 213, 87 P., 705.

73. Party's residential property was situated in the town of Barre. By act, the boundary line between said town and the city of Barre was so changed as to include the property in the latter place. At the time the act was passed the party was living in East Montpelier. East Montpelier v. Barre, 79 Vt. 542, 66 A. 100.

74. Dresser v. Mercantile Trust Co., 53 Misc. 18, 102 N. Y. S. 569; Bechtel v. Bechtel [Minn.] 112 N. W. 883. Residence away from established domicile held without intent to change. Pickering v. Winch, 48 Or. 500, 87 P. 763. Return to domicile of origin shortly before death held to have been with intent to re-establish such domicile. Thorn v. Thorn, 28 App. D. C. 120.

75. Beekman v. Beekman [Fla.] 43 So. 923.

76. State v. Jackson, 79 Vt. 504, 65 A. 57.

77. See 7 C. L. 1196.

78. Wirsig v. Scott [Neb.] 112 N. W. 655.

79. State v. Jackson, 79 Vt. 504, 65 A. 657.

80. Dixon v. Dixon [N. J. Eq.] 66 A. 597. Presumption from residence of family, and voting not overcome by protracted absence on business and voting elsewhere on one occasion. Gaddie v. Mann, 147 F. 955.

81. Married woman, deserted by her husband, was forced to seek employment which kept her in foreign states nearly all the time. There was no evidence that she had acquired a new domicile or entertained any fixed purpose to do so. Hibbert v. Hibbert [N. J. Eq.] 65 A. 1028.

82. A father, whose daughter had separated from her husband, wrote him that she had "moved" out of the state. This statement, being unauthorized, was insufficient to bind the daughter. Dixon v. Dixon [N. J. Eq.] 66 A. 597.

83. Hering v. Mosher, 144 Mich. 152, 13 Det. Leg. N. 183, 107 N. W. 917.

84. Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469.

85. A married woman who is compelled to leave her husband's residence and reside in another state does not thereby change her domicile. Bechtel v. Bechtel [Minn.] 112 N. W. 883.

86. Party born in New Jersey, where he lived 45 years, went to New York and resided in a boarding house during the winters, returning to New Jersey in summer.

DOWER.

§ 1. Nature of Right; Persons Entitled; Election (1012).
§ 2. In What Dower May be Had (1013).
§ 3. Extinguishment, Release or Bar, and Revial of Dower (1013).
§ 4. Liens and Charges on Dower (1014).
§ 5. Assignment of Dower and Money Awards (1015).
§ 6. Remedies and Procedure (1015).

This topic excludes right and duty of widow to elect between the will and the statute,[88] rights of homestead,[89] and quarantine.[90]

§ 1. *Nature of right; persons entitled; election.*[91]—The law favors dower,[92] but it is entirely within the control of the legislature until it becomes vested by the death of the husband,[93] and common-law dower has in many states been abolished or modified by statute.[94] The right is governed by the law in force at the death of the husband.[95] Where pending administration of his estate in bankruptcy the bankrupt dies, his widow's right to draw is governed by the Federal bankrupt act and not by the laws of the particular state in which the property is situate.[96] The wife's inchoate right prior to her husband's death is not a vested interest,[97] and it is generally held that it does not become vested until assignment,[98] but it is an incumbrance upon the husband's real estate.[99] In Indiana, if upon a judicial sale of a husband's land, the wife's inchoate dower interest is not directed to be sold, such interest will become absolute in the wife when the legal title to the property sold vests in the purchaser.[1] The income from the dower estate during its existence

He owned no property in New York but voted and paid personal tax there several years prior to his death. Some months prior to death he left New York, expressing intent not to return but to remain in New Jersey, where he was at his decease. He was a resident of New Jersey. In re White's Estate, 116 App. Div. 183, 101 N. Y. S. 551. Evidence that party had left witness' house, taking all his clothes, declaring he was going west, and that he never returned, was sufficient to show non-residence. Kelson v. Detroit, etc., Co., 146 Mich. 563, 13 Det. Leg. N. 850, 109 N. W. 1057.

87. Dresser v. Mercantile Trust Co., 53 Misc. 18, 102 N. Y. S. 569.

88. See Wills, 8 C. L. 2305; Election and Waiver, 7 C. L. 1222.

89. See Homesteads, 8 C. L. 93.

90. See Estates of Decedents, 7 C. L. 1386.

91. See 7 C. L. 1197.

92. Chrisman v. Linderman, 202 Mo. 605, 100 S. W. 1090; Brown v. Brown, 117 App. Div. 199, 102 N. Y. S. 291.

93. Griswold v. McGee [Minn.] 112 N. W. 1020; Hilton v. Thatcher, 31 Utah, 360, 88 P. 20. Until vested legislature may modify, abrogate, increase, or diminish it at pleasure, at least as it affects the wife. Id.

94. Abolished in Minnesota. Griswold v. McGee [Minn.] 112 N. W. 1020. Under § 17 organic act establishing a territorial government, and Const. art. 24, § 2, the common law respecting dower was in force while Utah was a territory, and continued in force after it became a state, except as modified by statutory enactment. Hilton v. Thatcher, 31 Utah, 360, 88 P. 20. It was in force continuously from 1887 to Jan. 1, 1898. Id. Rev. St. § 2832, which provides that "there shall be neither dower nor curtesy," construed in connection with § 2826, held not to bar recovery by widow of a third interest in property conveyed by husband without her consent previous to enactment to those sections. Id. Widow, upon husband's death, held to have become seized in fee simple of one-third interest in his interest in addition to property given her by will. Warner v. Hamill [Iowa] 111 N. W. 939.

95. Hilton v. Thatcher, 31 Utah, 360, 188 P. 20. Statutes creating a substitute for common-law dower speak as of the date of the death of the husband. Griswold v. McGee [Minn.] 112 N. W. 1020. Widow cannot take under a law repealed prior to that time. Id.

96. Except in so far only as such laws act for the determination of such right. are adopted and preserved by the bankrupt. Hurley v. Devlin, 151 F. 919.

97. Griswold v. McGee [Minn.] 112 N. W. 1020; Arnold v. Buffalo, etc., R. Co., 32 Pa. Super. Ct. 452. The wife's right under the Minnesota statutes is inchoate and does not become vested until the husband's death. Griswold v. McGee [Minn.] 112 N. W. 1020.

98. Fishel v. Browning [N. C.] 58 S. E. 759. Until dower has been lawfully assigned, the right thereto is a nearer chose in action, and confers no title to or seizure of the land itself. Munsey v. Hanly [Me.] 67 A. 217. Dower after death of husband and before assignment is not an estate in the realty and is unassignable. Francis v. Sandlin [Ala.] 43 So. 829. Until assignment the widow has no right to retain possession of her deceased husband's lands against the heir or those claiming under him. Fishel v. Browning [N. C.] 58 S. E. 759.

99. Saldutti v. Flynn [N. J. Eq.] 65 A. 246. It is such an incumbrance prior to assignment. Fishel v. Browning [N. C.] 58 S. E. 759. Where land is sold by administration to pay debts prior to assignment of dower, the wife's inchoate right works a breach of covenant against incumbrances contained in purchaser's deed. Id.

1. Act 1875, p. 178, c. 123, § 1 (Burn's Am. St. 1901, § 2669). Where the sale is

belongs to the widow absolutely.[2] Dower is not lost to the widow by reason of her being insane.[3] In Georgia a widow is permitted to take in lieu of dower a child's share in her husband's estate.[4]

§ 2. *In what dower may be had.*[5]—The right of dower attaches to all the realty.[6] The widow is entitled to dower in lands in which her husband had a perfect equitable estate in fee simple,[7] and dower in the husband's equitable estates is sometimes conferred by statute.[8] At common law a widow was not dowable of an equity of redemption.[9] No dower attaches to an estate in remainder.[10] In New Jersey, in the case of an estate tail, the widow of the life tenant is entitled to dower.[11] Dower attaches to determinable estate.[12] An interest equivalent to dower is sometimes allowed by statute in the fund arising from the sale of husband's lands.[13] In Kentucky an adult child has no such interest in the homestead occupied by his widowed mother as will entitle his widow to dower when he dies before his mother.[14]

§ 3. *Extinguishment, release or bar, and revival of dower.*[15]—The right to dower may be barred or extinguished by an antenuptial contract,[16] by a contract and settlement of property rights after marriage,[17] by the execution by wife of a quitclaim deed,[18] or by her joining in her husband's deed;[19] but unless a statute so

upon the foreclosure of a mortgage, the wife's dower interest becomes absolute when the year of redemption expires. Green v. Estabrook [Ind.] 79 N. E. 373. Under this statute the wife's dower interest vests and becomes absolute in her as against her husband as well as against creditors. Id.

2, 3. Crenshaw v. Kener, 127 Ga. 742, 57 S. E. 57.

4. Civ. Code 1895, § 3395. Rountree v. Caulden [Ga.] 58 S. E. 346, Such election must be exercised within 12 months from grant of letters testamentary or of administration. Civ. Code 1895, § 4689. Id. Election to take a child's part must affirmatively appear. Id. But if the widow deals with an interest in her husband's real estate as if she was absolute owner, an inference will arise that she has elected to take a child's part and the burden of proof will shift. Id. This is true though widow through mistake of law claims one-sixth interest when she is entitled to one-fifth. Id.

5. See 7 C. L. 1198.

6. Delaney v. Wanshum, 146 Mich. 525, 13 Det. Leg. N. 876, 109 N. W. 1051. Attaches to growing trees (Id.), and to clay, stone, mineral, and other valuable deposits beneath the soil. (Id.)

7. Meyer v. Barnett, 60 W. Va. 467, 56 S. E. 206.

8. A title bond or contract for deed creates an equitable estate in real property, within Code, § 3368, providing that widow shall, with certain exceptions, be entitled to one-third of all the "legal and equitable estates in real property" possessed by husband during coverture. Hutchinson v. Olberding [Iowa] 112 N. W. 647.

9. Harris v. Powers [Ga.] 59 S. E. 1038. In Georgia where one makes deed to secure indebtedness and takes bond for reconveyance upon payment of debt, and dies without having paid any part of debt, or having obtained a reconveyance, his widow is not entitled to dower either in the land as a whole or in the equity of redemption, at least not without first redeeming the property. Id.

10. A wife has no dower interest in lands where the interest of the husband therein is but a vested remainder expectant upon a life estate. Russell v. Wales, 104 N. Y. S. 143. Where a trust is created by will to continue during the life of testator's widow with remainder over to his children, a son's wife has no inchoate dower right in the property during life of testator's widow. In re Faile, 51 Misc. 166, 100 N. Y. S. 856.

11. Descent act, § 11. In re Dowe, 68 N. J. Eq. 11, 64 A. 803.

12. Midyette v. Grubbs [N. C.] 58 S. E. 795. A grant of the standing timber on certain land to be removed within a time specified creates a qualified fee in such timber to which dower attaches, but the dower right is determinable as to timber not removed within the time specified. Id.

13. Sale under P. L. 1857 p. 488, authorizing sale of lands limited over to infants or in contingency in cases where such sale will be beneficial. In re Dowe, 68 N. J. Eq. 11, 64 A. 803.

14. Cate v. Ganter [Ky.] 104 S. W. 296.

15. See 7 C. L. 1199.

16. If there is reasonable doubt as to whether provisions in an antenuptial contract are made in lieu of dower, the widow will take both. Provisions in this case held in addition to and not in lieu of dower. Brown v. Brown, 117 App. Div. 199, 102 N. Y. S. 291.

17. Bechtel v. Barton, 147 Mich. 318, 13 Det. Leg. N. 1047, 110 N. W. 935. But the contract and settlement must be equitable and fair. In this case it was not. Id.

18. Quitclaim deed of wife, whose husband was under guardianship held effectual under Rev. St. 1899, § 4334 (Am. St. 1906, p. 2377), to convey all her marital interests in the real estate of her husband sold by his curator. Dooley v. Greening, 201 Mo. 343, 100 S. W. 43. Where a husband conveys fee of certain lands, wife not joining

provides, no contract of sale or conveyance made by a husband without the signature of the wife will operate to deprive her of her dower.[20] Under statutes in some states, however, dower may be extinguished by a conveyance of the husband alone, or by an execution or other judicial sale,[21] and inchoate dower is extinguished by the exercise of the power of eminent domain.[22] Where a wife accepts a deed in fee simple from her husband, her inchoate dower right is merged in the fee,[23] but a gift to the wife of lands not expressed to be in satisfaction of dower will not bar her dower in other lands of the husband.[24] An estoppel to claim dower may arise against the wife,[25] and, of course, her death extinguishes her interest, unless by statute the fee is conferred upon her.[26] A widow is not deprived of her dower on remarriage by a statute which makes her homestead right determinable in that event.[27]

§ 4. *Liens and charges on dower.*[28]—The general doctrine is that the dower right is subject to every lien or incumbrance at law or in equity existing before it attaches,[29] but a conveyance made on the eve of marriage with fraudulent intent to defeat the wife's marital right is void.[30] A judgment creditor of the husband, as such, has no claim upon the wife's dower interest.[31]

in conveyance, and subsequently wife executes a quitclaim deed to purchaser in which husband does not join, she thereby releases her dower right, under Code, § 2919. Fowler v. Chadima [Iowa.] 111 N. W. 808.

19. A deed executed and acknowledged by husband and wife extinguishes inchoate right of dower. (Saldutti v. Flynn [N. J. Eq.] 65 A. 246), but an agreement to convey, though signed by wife, will not extinguish her inchoate right if she does not acknowledge it. Id. Under Code 1906, § 3079, where a wife joins in a deed conveying her husband's land, she thereby relinquishes her inchoate right of dower, and this notwithstanding a reservation clause reserving to grantors a "lifetime dower and support" in the land. Beverlin v. Casto [W. Va.] 57 S. E. 411.

20. Delaney v. Manshum, 146 Mich. 525, 13 Det. Leg. N. 876, 109 N. W. 1051. The foreclosure of a mortgage executed by a husband alone will not debar the wife of her inchoate right of dower in the premises mortgaged. Anderson v. McNeeley, 105 N. Y. S. 278.

21. Under Gen. Laws 1901, p. 34, c. 33, an execution sale of husband's lands prior to his death divests wife of her inchoate interest in such lands. Griswold v. McGee [Minn.] 112 N. W. 1020. This statute applies to cases in which marriage and seisin occurred prior to its enactment. Id. It is constitutional. Id. Under Gen. St. 1901, § 2510, excluding a nonresident wife from any interest in lands in Kansas of which the husband has made a conveyance, or which have been sold on execution or other judicial sale, such wife cannot be excluded by a judgment which husband fraudulently procures to be rendered against him, and under which he causes the land to be sold on execution, and title to be passed to a party to the fraud. McKelvey v. McKelvey [Kan.] 89 P. 663. Under the Iowa statutes a sale under a trust deed executed by husband to secure a debt, if made in strict accordance with terms of deed, will bar dower right in property conveyed. Pierce v. O'Neil, 132 Iowa 530, 109 N. W. 1082.

22. Arnold v. Buffalo, etc., R. Co., 32 Pa. Super. Ct. 452.

23. Scheuer v. Chloupek, 130 Wis. 72, 109 N. W. 1035.

24. In re Dowe, 68 N. J. Eq. 11, 64 A. 803; Cowdrey v. Cowdrey [N. J. Err. & App.] 67 A 111, reversing [N. J. Eq.] 64 A. 98.

25. By renunciation of her dower a wife is estopped from claiming title as against a mortgagee of husband. Wilkins v. Baker [S. C.] 57 S. E. 851. Certificate of notary that renunciation was made by wife upon private examination by him as required by statute is conclusive against an innocent purchaser or mortgagee. Id. Where after a sale of land decreed at suit of cotenants judgment creditors of one of them sought to have proceeds subjected to payment of their judgments, and the wife of such cotenant filed cross complaints asking that her right in such proceeds be decreed superior to that of creditors, she is estopped to claim that her interest in the land did not pass by the sale. Staser v. Gaar, Scott & Co. [Ind.] 79 N. E. 404. Facts held not to estop wife from asserting her dower right against husband's grantee. Stevens v. Wooderson, 38 Ind. App. 617, 78 N. E. 681.

26. Under Ky. St. 1903, widow's death extinguishes dower interest. Cain's Admr. v. Kentucky & Indiana Bridge & R. Co., 30 Ky. L. R. 593, 99 S. W. 297.

27. Laws 1895, pp. 185, 186. Chrisman v. Lindeman, 202 Mo. 605, 100 S. W. 1090. Under Rev. St. 1899, §§ 2933, 3620, 3621 (Am. St. 1906, pp. 1690, 2039, 2042), where a widow is vested with a homestead on the death of her husband (that being all the real estate of which he died seized), there is no merger of the homestead and dower interests, and the widow upon remarriage does not lose her dower Id.

28. See 7 C. L. 1200.

29. Wilson v. Wilson [Utah] 89 P. 643.

30. Wilson v. Wilson [Utah] 89 P. 643. The wife cannot complain, however, of a conveyance at such time and without her knowledge of lands which the husband held merely as trustee. Id.

31. Stasar v. Gaar, Scott & Co. [Ind.] 79 N. E. 404. Where land in partition pro-

§ 5. *Assignment of dower and money awards.*[32]—The measure of the dower interest to which the widow is entitled is generally determined by statute.[33] The assignment of dower must be made according to the statute in force at the time of the death of the husband,[34] except as against the existing rights of third persons in the lands of the husband, acquired by contract. in which case the assignment must be made under the law in force at the time of the contract.[35] The exception does not cover a judgment lien which is a creation of statute and not of contract.[36] The interest of the widow is in the land itself, to be apportioned to her out of each specific parcel.[37] This rule is sometimes modified by statute.[38] In Kentucky the widow is entitled to one-third of rents and profits of her husband's real estate from his death until dower is assigned, or until her death if she dies before assignment.[39] The effect of assignment is to change the widow's inchoate right into a vested estate.[40] The right to have dower assigned ends at the death of the widow.[41] The return of commissioners laying out dower is not admissible as tending to show title in the estate of the deceased husband as against persons who were neither parties nor privies to such assignment.[42]

§ 6. *Remedies and procedure.*[43]—The jurisdiction to determine the right of a widow to dower in the property of her bankrupt husband, deceased during the pending of proceedings under the bankruptcy act,[44] is exclusively in the Federal district court of the state of the bankrupt's residence.[45] Where administration of husband's estate is pending in the probate court, notice of application for dower

ceedings, the wife of one of the cotenants is entitled, under Act 1875, p. 178, c. 123, § 1, Burn's Ann. St. 1901, § 2669), as against his judgment creditors, to such partition of the proceeds of the sale as is equivalent to her dower. Id. Stasar v. Gaar, Scott & Co., 38 Ind. App. 696, 78 N. E. 987.

32. See 7 C. L. 1200.

33. Under Laws 1896, c. 547, p. 584, § 170, widow is entitled to a third "of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage." Brown v. Brown, 117 App. Div. 199, 102 N. Y. S. 291. Kirby's Dig. § 2709, providing that if husband dies leaving widow and "no children" widow shall be endowed of one-half of personal estate as against collateral heirs, does not apply where husband leaves no children but does leave a grandchild. Britton v. Oldham, 80 Ark. 252, 96 S. W. 1066. Code 1896, § 1506, construed in connection with §§ 1505, 1507, and 1462, does not deny dower to a widow whose husband dies without lineal descendants, where the widow at his death possesses a statutory separate estate greater in value than her dower interest, but of less value than the personal estate. The restriction of § 1507, however, applies in such case, and the widow will only be allowed so much as will, when added to the value of her separate estate, equal the value of her estimated dower interest and distributive share. Guice v. Guice [Ala.] 43 So. 199. Rev. St. 1899, § 3621, diminishing dower by amount of interest of widow in homestead, has no application where widow elects, in lieu of dower, to take child's portion under § 2944. Quail v. Lomas, 200 Mo. 674, 98 S. W. 617.

34. Davidson v. Richardson [Or.] 89 P. 742. In an action for the establishment of dower the calculation of the dower interest by the law in force at the time is not rendered incorrect by the subsequent repeal of such law by a statute which diminishes the dower interest. Dougherty v. Dougherty, 204 Mo. 228, 102 S. W. 1099.

35. Davidson v. Richardson [Or.] 89 P. 742. Where husband conveys lands without wife's consent, the measure of her interest therein after his death is determined by the law in force at the time of the conveyance. Hilton v. Thatcher, 31 Utah, 360, 88 P. 20; In re Park's Estate, 31 Utah, 255, 87 P. 900.

36. Davidson v. Richardson [Or.] 89 P. 742. The fact that the lien is based upon a confession of judgment as the consideration for a loan does not make it a creation of contract. Id.

37. In re Park's Estate, 31 Utah, 255, 87 p. 900. She cannot have the value of such interest set apart to her out of her husband's estate. Id.

38. Under Revisal 1905, § 3084, where husband conveys portions of his land for valuable consideration without joinder of wife, the purchasers may require that dower be allotted out of lands descended if there be sufficient for the purpose. Harrington v. Harrington, 142 N. C. 517, 55 S. E. 409.

39. Ky. St. 1903, § 2138. Cain's Admr. v. Kentucky & Indiana Bridge & R. Co., 30 Ky. L. R. 593, 99 S. W. 297.

40. Fishel v. Browning [N. C.] 58 S. E. 759; Francis v. Sandlin [Ala.] 43 So. 828; Munsey v. Hanly [Me.] 67 A. 217.

41. This is the rule under Ky. St. 1903, § 2132. Cain's Admr v. Kentucky & Indiana Bridge & R. Co., 30 Ky. L. R. 593, 99 S. W. 297.

42. Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004.

43. See 7 C. L. 1200.

44. Act July 1, 1898, c. 541, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424).

45. In this case dower was claimed in lands located in a state other than that of the bankrupt's residence. Hurley v. Devlin, 151 F. 919.

may be given as well before as after the filing of the application.[46] The widow may sue upon the bond of her husband's administrator for his failure to pay her dower.[47] Where the interest conferred upon the widow by statute is not an inheritance, she may maintain ejectment against one unlawfully in possession.[48] As to whether a widow is entitled to bring an action to protect her interest against a trespassor prior to assignment of dower, there is some conflict of authority.[49] Where the widow did not join in an assignment for the benefit of credtors, she may maintain a common law action of dower against a purchaser from the assignee.[50] In an action to have the dower interest set off, the petition must allege facts showing the widow's right.[51] The mode of trying the issue in an action for admeasurement of dower is determined by statute.[52] Where the record of the probate court is silent as to notice of application for dower, the presumption is that it was duly given.[53] An adjudication of the probate court allowing dower is conclusive in any subsequent suit as to any defenses which might have been but were not set up.[54] The statute of limitations runs against an action of ejectment by a widow to recover her statutory interest from the date of her husband's death.[55]

DRAINS; DRUGS; DRUGGISTS; DRUNKENNESS, see latest topical index.

DUELING.[56]

DUE PROCESS; DUPLICITY, see latest topical index.

DURESS.[57]

Duress is the unlawful constraint of one's will under which he executes a contract [58] or surrenders rights or property,[59] and may be brought about either by the

46. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289.

47. Where sheriff gives bond as administrator under Kirby's Dig. § 257, widow in proceeding against him for failure to pay dower must exhaust her remedies on such bond before having recourse on his official bond as sheriff, and if she is a surety on former bond she cannot recover on latter. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289.

48. Widow claiming under Gen. St. 1901, § 2510, may maintain ejectment against one in possession whose title was acquired by a fraudulent conspiracy entered into with the husband to defraud her of her interest. McKelvey v. McKelvey [Kan.] 89 P. 663.

49. In Maine it has been held that she cannot prior to assignment maintain trespass quare clausum for an injury to the land (Munsey v. Hanly [Me.] 67 A. 217), but in Michigan it has been held that she may sue to enjoin a trespass without waiting for assignment and without joining the other tenants (Delaney v. Manshum, 146 Mich. 525, 13 Det. Leg. N. 876, 109 N. W. 1051).

50. McFadden v. McFadden, 32 Pa. Super. Ct. 534, discussing procedure in such actions.

51. In action to have dower set off in lands in which husband had an equitable estate, in assignment of which by him widow did not join, petition must allege that defendants were purchasers with notice of plaintiff's claim. Hutchinson v. Olberding [Iowa] 112 N. W. 647.

52. Action for admeasurement of dower is governed by Code Civ. Proc. § 275, under which court may order whole issue or any specific question of fact involved therein to be tried by a jury, or may refer it as provided in §§ 292 and 293. Frierson v. Jenkins, 75 S. C. 471, 55 S. E. 890.

53. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289.

54. And this whether such subsequent suit is founded on the same or a different cause. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289. Adjudication as to amount of liability of administration to widow for dower is conclusive against his sureties in action on his bond. Id.

55. McKelvey v. McKelvey [Kan.] 89 P. 663.

56. No cases have been found for this subject since the last article. See 3 C. L. 1147.

57. See 7 C. L. 1201.

58. Seaman wrongfully discharged not bound by receipt in full of all claims exacted before he could get his wages, where he had no means to obtain legal redress. Caffyn v. Peabody, 149 F. 294. Evidence held to show that wife's signature was not obtained by coercion or threats of a mortgagee, but rather under coercion from her husband of which mortgagee was ignorant. Long v. Branham, 30 Ky. L. R. 552, 99 S. W. 271. Officer's certificate of acknowledgment could not be collaterally impeached. Id. Evidence insufficient to show that oil lease was executed under duress. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481.

59. Transaction whereby a partner was induced to surrender a horse and buggy on

unlawful confinement of one's person [60] or detention of one's property,[61] or by persuasions and importunities;[62] but a threat of arrest or prosecution is not duress unless one is charged with having committed an act constituting a crime or misdemeanor,[63] and a mere threat to institute a civil action,[64] or the imposition of conditions for foregoing enforcement of legal rights, does not amount to duress.[65] One may plead duress by threat to prosecute though he be guilty, where the offense does not relate to nor injure the threatening party.[66] Money paid under duress may be recovered [67] in the absence of waiver.[68] A plea of duress must set out facts sufficient to show duress in law,[69] and the evidence must establish the duress as alleged.[70] Where the only issue submitted to the jury is whether a deed was procured by force and threats, evidence of the value of the property or the consideration paid is immaterial.[71]

DYING DECLARATIONS, see latest topical index.

EASEMENTS.

§ 1. Nature and Creation (1017).
§ 2. Location, Maintenance, and Extent of Right (1022).
§ 3. Transfer and Assignment (1023).
§ 4. Extinguishment and Revival (1024).
§ 5. Interference with Easements and Remedies and Procedure in Respect Thereto (1025).

This topic excludes public easements,[72] mutual rights in boundary fences [73] and party "walls," [74] easements of drainage,[75] and of lateral and subjacent support,[76] and easements affecting particular kinds of property.[77]

§ 1. *Nature and creation.*[78]—An easement is a right to use the land of

representation of copartner that stock could not pay debts, and through fear of prosecution for having withdrawn partnership funds, held invalid. Greenwell v. Negley [Ky.] 101 S. W. 961.

60. Action of a county in compelling one to pay an illegal license tax in order to procure his release from custody for failure to pay it. Wheeler v. Plumas County, 149 Cal. 782, 87 P. 802.

61. Evidence held not to show duress of goods left with a tailor to be made into coats, there being no pressing need for the coats nor any showing that detention would result in damage, or as to when work was to be completed. Siegel v. Arken, 104 N. Y. S. 778.

62. Evidence of importunities of friends and spiritual advisers of person of weak mind held to show that a deed was given under duress. Birdsall v. Leavitt [Utah] 89 P. 397.

63. Threat of prosecution for driving a horse beyond agreement. Bond v. Kidd, 1 Ga. App. 798, 57 S. E. 944.

64. Threat to bring suit to cancel contract for purchase of land unless holder would accept a lease surrendering all rights under the contract held not duress. Chambers v. Irish, 132 Iowa, 319, 109 N. W. 787. Mere threat to foreclose landlord's lien by attaching property in tenant's possession not duress rendering tenant's payment involuntary. Paulson v. Barger, 132 Iowa, 547, 109 N. W. 1081.

65. Threat to enforce payment of matured notes unless defendant would agree to cancel a certain contract and give another note held not duress. Lilienthal v. George Bechtel Brew. Co., 118 App. Div. 205, 102 N. Y. S. 1051.

66. Defense to note obtained by threat to prosecute for making false affidavit. Thompson v. Hicks [Tex. Civ. App.] 17 Tex. Ct. Rep. 669, 100 S. W. 357.

67. Money deposited for support of wife under duress of judicial decree procured by fraud. Colon v. Hebbard, 105 N. Y. S. 805. See Implied Contracts, 8 C. L. 155.

68. Payment of a note obtained under duress waives the duress, and the money paid cannot thereafter be recovered. Lilienthal v. George Bechtel Brew. Co., 118 App. Div. 205, 102 N. Y. S. 1051.

69. That notes were given through fear of prosecution "on some pretended charge or crime which defendant had not committed" held insufficient. Bond v. Kidd, 1 Ga. App. 798, 57 S. E. 944. Plea must connect plaintiff with the alleged duress. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 So. 481.

70. Evidence insufficient to sustain allegations that defendants were married and that the duress was brought about by co-defendant. Claxton v. Lovett [Ga.] 58 S. E. 830.

71. Bartek v. Kolacek [Tex. Civ. App.] 17 Tex. Ct. Rep. 100, 99 S. W. 114.

72. See Dedication, 9 C. L. 939; Highwtys and Streets, 8 C. L. 40; Navigable Waters, 8 C. L. 1083.

73. See Fences, 7 C. L. 1654.

74. See Party Walls, 8 C. L. 1284.

75. See Waters and Water Supply, 8 C. L. 2262.

76. See Adjoining Owners, 9 C. L. 28.

77. See Mines and Minerals, 8 C. L. 985; Waters and Water Supply, 8 C. L. 2262, and like topics.

78. See 7 C. L. 1203.

another [79] for a special purpose.[80] An easement is distinguished from a license in that it is an interest in land,[81] and hence it cannot be created by parol grant.[82] It may be acquired by grant,[83] dedication,[84] estoppel,[85] eminent domain,[86] or prescription which presupposes a grant.[87] Several consistent easements may exist in the same land.[88] If the beneficiary exercises the use of a personal right, the easement is

79. No prescriptive rights can accrue while both the dominant and servient tenements are owned by the same person. Wells v. Parker [N. H.] 66 A. 121; Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071.

80. Right to build a reservoir and collect therein and withdraw therefrom water (Sked v. Pennington Spring Water Co. [N. J. Eq.] ff:65 A. 713), and right to draw all the water from a spring, is only an easement (Id.). Strip of land under eaves of barn held by adverse possession not under easement. Weeks v. Upton, 99 Minn. 410, 109 N. W. 828. The right to use the space in a mine from which the minerals have been removed (the grant being the mineral under the land) for the transportation of minerals from other mines is not an easement Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6. Dumping waste from plaster quarry on plaintiff's land restrained on ground that there was no necessity for it. White v. Lansing, 103 N. Y. S. 1040.

81. Grant of right to lay pipes held to give an irrevocable interest. Standard Oil Co. v. Buchi [N. J. Eq.] 66 A. 427.

Easement: Right to use land for newspaper office not a mere license. Frederic v. Mayers, 89 Miss. 127, 43 So. 677. An alley established by adjoining landowners, one-half on each lot, for mutual convenience is an easement, not a license. Jensen v. Showalter [Neb.] 113 N. W. 202. "Privilege of free access and use of the waters of a certain mineral spring nearby" is an easement. Rittenhouse v. Swango, 30 Ky. L. R. 145, 97 S. W. 743. An appurtenant profit a prendre to take gravel given for a consideration is regarded as an easement, not a license. Hopper v. Herring [N. J. Law] 67 A. 714.

License: Grant of right of way held to be license only and revocable. McBride v. Blair [Iowa] 112 N. W. 169. Unrecorded paper not under seal granting use of alley is a license and ineffectual against a later registered deed of the locus. Tise v. Whitaker-Harvey Co., 144 N. C. 507, 57 S. E. 210.

82. Whether an agreement is to operate as a license or the basis for a claim of right depends primarily upon the language of the parties. Where the language purports to give a right of way and the use is continued under claim of right for twenty years, an easement is gained. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071; Jensen v. Showalter [Neb.] 113 N. W. 202; Gyra v. Windler [Colo.] 91 P. 36; Lechman v. Mills [Wash.] 91 P. 11. Uninterrupted possession under a parol grant, treated as passing an estate, may be deemed to exist under a claim of right with the knowledge of the owner (Wells v. Parker [N. H.] 66 A. 121), and it is a question of fact for the jury (Id.). License to use alley only estops licensee from denying landlord's title during existence of license. Tise v. Whitaker-Harvey Co., 144 N. C. 507, 57 S. E. 210.

83. Where a declaration by owners of land abutting on a private way reciting that the land occupied by said way was set apart forever "twenty-four feet wide, as a private way for all present and future abutters thereon," and deeds were given granting a "right to pass and repass at pleasure over any part of said private way, twenty-four feet wide adjoining the premises," conveyed, an easement was granted. Gray v. Kelley [Mass.] 80 N. E. 651. The right in highways which individuals and the public may acquire by long use or dedication may also be acquired by grant, express or implied. Bent v. Trimboli, 61 W. Va. 509, 56 S. E. 881. Grant of land calling for a street gives the grantee an easement of way. Andreas v. Steigerwalt, 29 Pa. Super. Ct. 1.

84. Map showing street construed to dedicate a way 50 feet in width over locus. Elliot v. Atlantic City, 149 F. 849. Evidence of dedication and acceptance by more than 30 years' use by the public of highway under U. S. Rev. St. § 2477 (U. S. Comp. St. 1901, p. 1559), granting a right of way for construction of highways over public lands not reserved for public uses. Van Wanning v. Deeter [Neb.] 110 N. W. 703. The rule of law as to easements by dedication, where lots are bounded on a street or described by reference to a map on which streets are shown, is a rule of presumption resting on an implied grant or reservation and vanishes when deed indicates a contrary intention. Lewisohn v. Lansing Co., 104 N. Y. S. 543, afg. 51 Misc. 274, 100 N. Y. S. 1077. There being no express reservation and fee of street being granted, no easement was intended to be conveyed. Id. Evidence held insufficient to establish a dedication. Canton Co. of Baltimore v. Baltimore [Md.] 67 A. 274. Where the sea eats away land within the lines of a street as dedicated and later the land is formed again by accretion, such new land is subject to the easement. Elliot v. Atlantic City, 149 F. 849. See, also, Dedication, 9 C. L. 939.

85. One who is a party to a sale of land which had exercised an easement and who shortly before the sale had acquired the servient land is estopped to deny such easement to the purchaser. Livengood v. Stauffer, 31 Pa. Super. Ct. 495.

86. See, also, Eminent Domain, 7 C. L. 1276. The right of easement of one railroad to a right of way across another railroad is necessarily implied from its very creation. Shreveport Trac. Co. v. Kansas City S. & C. R. Co. [La.] 44 So. 457.

87. Burke v. Manhattan R. Co., 105 N. Y. S. 828.

88. Easements in street in favor of both landlord and tenant. Goldstrom v. Interborough Rapid Transit Co., 115 App. Div. 323, 100 N. Y. S. 911. Right to erect telephone and telegraph poles may be granted on a railroad right of way under Rev. St. 1899, c. 12, art. 6, § 1252 [Ann. St. 1906, p. 1028], and c. 12, art. 7, § 1272 [Ann. St. 1906, p. 1044].

in gross,[89] but if enjoyed as owner of another piece of land, it is appurtenant.[90] The owner of property abutting on a public [91] or private street has an easement of view, air, light, and access therein.[92]

A grant [93] will be construed in the light of the intended purpose,[94] and to effectuate the intention of the parties as shown by surrounding circumstances.[95] The word "heirs" is essential to the creation of an easement in perpetuity,[96] where the owner of two pieces of land so arranges and uses them as to create a quasi easement, or sale, mortgage,[97] or lease of either gives rise to an easement of implied grant in favor of the other,[98] if apparent [99] and reasonably necessary.[1] Such easement, however, will be implied more readily [2] and interpreted more favorably to the grantee than to the grantor.[3] The use of such easement must be reasonable.[4]

American Tel. & T. Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576.

89. Grant of right of fishery held to be in gross. Mallet v. McCord, 127 Ga. 761, 56 S. E. 1015. A grant under seal for a consideration of a right to lay pipes to transport petroleum within defined limits is not a mere easement in gross. Standard Oil Co. v. Buchi [N. J. Eq.] 66 A. 427.

90. **Held to be appurtenant:** Right of way in a street shown on plan on which lots sold abuts is appurtenant to the lot. Poole v. Greer [Del.] 65 A. 767. Right of way acquired by implication or dedication. Bliss v. Mayer, 54 Misc. 119, 103 N. Y. S. 1077. Private easements of access, light, air, and view. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330; Mitchell v. Reid, 118 App. Div. 641, 103 N. Y. S. 806; Lewisohn v. Lansing Co., 104 N. Y. S. 543. Right of way. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071. Way reserved. Big Sandy R. Co. v. Bays [Ky.] 102 S. W. 302. Profit a prendre to take gravel. Hopper v. Herring [N. J. Law] 67 A. 714. Evidence insufficient to establish right of way appurtenant to land leased. Ahern v. Hindman, 101 Minn. 34, 111 N. W. 734.

91. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330.

92. Grant of lot bounded on road running through grantor's land, the fee in the road being retained, carries a private easement for street purposes of air, light, and access. Lewisohn v. Lansing Co., 104 N. Y. S. 543. Private easement based on purchase with reference to map carries right to have the portion of the street on which lot borders open at both ends. Reis v. New York, 188 N. Y. 58, 80 N. E. 573. This right is complied with if there is access to a cross street in each direction. Id. Held to be an easement of way in favor of lot. In re East 178th St. in City of N. Y. [N. Y.] 80 N. E. 1109. No public easement in street in favor of nonabutter who has other means of access to public way. Reis v. New York, 188 N. Y. 58, 80 N. E. 573. No private easement destroyed, question of light and air not invalid. Id.

93. See 7 C. L. 1205.

94. Agreement in conveyance to a railroad of a strip of land through a farm that railroad should provide a suitable and convenient road crossing the track construed to grant a farm crossing only. Speer v. Erie R. Co. [N. J. Err. & App.] 65 A. 1024.

95. Grant construed to reserve an easement of light, air and prospect. Mitchell v. Reid, 118 App. Div. 641, 103 N. Y. S. 805. Provision in deed that overlapping jets of ells of adjoining houses "are both to remain as they now are with the privilege of all necessary repairs" operates not to restrain right to build but to guard against claims that either jet was on or overhung land of either owner. Peduzzi v. Restulli, 79 Vt. 349, 64 A. 1128.

96. This rule is abrogated in New York by 1 Rev. St. (1st ed.) pt. 2, c. 1, p. 748, tit. 5, § 1, providing that words of inheritance shall not be necessary to create or convey an estate in fee. Schaefer v. Thompson, 116 App. Div. 775, 102 N. Y. S. 121.

97. A mortgage of land and buildings which extend upon and over an adjoining strip owned by the mortgagor carries easement to use the part of the strip on which buildings extend (Carrigg v. Mechanics' Sav. Bk. [Iowa] 111 N. W. 329), and the mortgagee is not liable to pay rent for the use of the strip by the building (Id.). Implied easement for permanent building extending upon another lot. Smith v. Lockwood, 100 Minn. 221, 110 N. W. 980. Easement of use of watercourse for excess water used in mining. Hall v. Morton, 125 Mo. App. 315, 102 S. W. 570.

98. Lease of tenement in house carries with it implied grant of light and air from adjoining land of landlord if necessary to its beneficial use. Darnell v. Columbus Show Case Co. [Ga.] 58 S. E. 631.

99. Building extending upon and over adjoining strip if land. Carrigg v. Mechanics' Sav. Bk. [Iowa] 111 N. W. 329.

1. Implied easement to extent necessary to support of building. Carrigg v. Mechanics' Sav. Bk. [Iowa] 111 N. W. 329; Smith v. Lockwood, 100 Minn. 221, 110 N. W. 980. Lessee must show that implied grant of light and air is a real necessity and that other lights cannot be obtained over his own land at reasonable cost. Darnell v. Columbus Show Case Co. [Ga.] 58 S. E. 631.

2. Question of fact where evidence was conflicting, assumed in favor of grantee to support easement. In re East 178th St. in City of N. Y. [N. Y.] 80 N. E. 1109.

3. Question of extent of way. O'Beirne v. Gildersleeve, 116 App. Div. 902, 102 N. Y. S. 391.

4. Right to use watercourse for drainage in the customary manner prevailing in the mining district in which it was situated. Hall v. Morton, 125 Mo. App. 315, 102 S. W. 570.

A way of necessity [5] is implied from the grant of lands so situated as to be accessible only over other lands of the grantor.[6]

Creation by prescription.[7]—To create an easement by prescription an adverse,[8] open,[9] continuously hostile use,[10] exclusive [11] under claim of right,[12] with the knowledge of the fee owner, actual or constructive,[13] must concur.[14] It is not indispen-

5. See 7 C. L. 1206.

6. Rule applies whether transfer be voluntary or involuntary. Proudfoot v. Saffle [W. Va.] 57 S. E. 256.

7. See 7 C. L. 1206.

8. Way, public or private. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071. Possession and uses of way under parol grant is adverse. Id.; Lechman v. Mills [Wash.] 91 P. 11; Gyra v. Windler [Colo.] 91 P. 36. Adverse use **presumed** after open, visible, continuous, and unmolested use for 30 years. Fleming v. Howard, 150 Cal. 28, 87 P. 908; Lechman v. Mills [Wash.] 91 P. 11. Use by public of well defined road for more than 20 years is evidence of adverse user. State v. Toale, 74 S. C. 425, 54 S. E. 608. Adverse possession by actual inclosure proved. Carton Co. of Baltimore v. Baltimore [Md.] 67 A. 274. Casts the **burden** of proof on party alleging use was permissive. Fleming v. Howard, 150 Cal. 28, 87 P. 908; Jones v. Jones [Ky.] 101 S. W. 980. Burden of showing that use of an alley established by adjoining landowners, one-half on each lot, for mutual convenience was under a license, not sustained. Jensen v. Showalter [Neb.] 113 N. W. 202. No proof of any permission. Walton v. Knight [W. Va.] 58 S. E. 1025. Burden not sustained. Bryars v. Rash [Ky.] 100 S. W. 306. Burden of proving adverse possession is on the defendant. Wells v. Parker [N. H.] 66 A. 121. Connellsville Gas Coal Co. v. Baltimore & O. R. Co., 216 Pa. 309, 65 A. 669. A railroad company which takes land without compensation cannot claim title under the statute of limitations or as a prescriptive easement. Use of spring water not adverse in that none was used which owner required. Jobling v. Tuttle [Kan.] 89 P. 699. Strip of land under eaves of barn was held not by easement but under title gained by adverse possession. Weeks v. Upton, 99 Minn. 410, 109 N. W. 828. Evidence insufficient to show an adverse user. Hofherr v. Mede, 226 Ill. 320, 80 N. E. 893; City of Chicago v. Galt, 224 Ill. 421, 79 N. E. 701.

9. Hofherr v. Mede, 226 Ill. 320, 80 N. E. 893. Roadway open to free use for 40 years. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071. Evidence showed a rise so open and notorious that it could not have escaped the notice of anyone seeing it. Canton Co. of Baltimore v. Baltimore [Md.] 67 A. 274. To establish a prescriptive right in the public to pass over private property, a certain and well defined line of travel which has existed for the statutory period must be shown. Proof of occasional travel thereon to avoid ruts and bad places in the highway is insufficient. City of Chicago v. Galt, 224 Ill. 421, 79 N. E. 701.

10. Hofherr v. Mede, 226 Ill. 320, 80 N. E. 893. Uninterrupted use and one so hostile and exclusive as to have completely prevented the exercise of the right. Canton Co. of Baltimore v. Baltimore [Md.] 67 A. 274. Evidence showed interruptions in the user. City of Chicago v. Galt, 224 Ill. 421, 79 N. E. 701.

11. Hofherr v. Mede, 226 Ill. 320, 80 N. E. 893. "Exclusive use" means that the right to use belongs to the user and does not depend on a like right in others (Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071), others may use a way and yet the use be exclusive (Id.).

12. Hofherr v. Mede, 226 Ill. 320, 80 N. E. 893. A user under a contract void under the statute of frauds is a good claim of right. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071. The visible, open, continuous, and unmolested use of a way for 30 years raises **presumption** of claim of right. Fleming v. Howard, 150 Cal. 28, 87 P. 908. Such claim of right must be **bona fides,** and when there has been a user for the statutory period the bona fides of the claim is established. Walton v. Knight [W. Va.] 58 S. E. 1025. Mere user of a way for 33 years but without evidence of a claim of right is insufficient to establish a way by prescription under Code, § 3004, providing that mere use of an easement is not evidence of a claim of right which must be established by independent evidence. McBride v. Blair [Iowa] 112 N. W. 169. Evidence insufficient to establish claim. City of Chicago v. Galt, 224 Ill. 421, 79 N. E. 701. Question for the jury whether use under claim of right. Wells v. Parker [N. H.] 66 A. 121.

13. Knowledge need not be proved by actual notice but may be inferred from circumstances. Wells v. Parker [N. H.] 66 A. 121. User for 10 years without more is taken to be with the knowledge and acquiescence of the owner and prima facie gives the right. Walton v. Knight [W. Va.] 58 S. E. 1025. Evidence showed no knowledge by the owner of a continuous user in such a way as to indicate that the public had any right in the locus. City of Chicago v. Galt 224 Ill. 42. 79 N. E. 701. Express notice of claim of right required under Code, § 3004. McBride v. Blair [Iowa] 112 N. W. 169. Recognition of user's rights clear. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071.

14. Evidence held insufficient to show the creation of a public way by prescription under Laws 1871-72, p. 675, § 1, Laws 1883, p. 137, and Starr & C. Ann. St. 1896, c. 121, § 1, providing that all roads used by the public as highways for the periods prescribed therein should be highways. Village of Peotone v. Illinois Cent. R. Co., 224 Ill. 101, 79 N. E. 678. An elevated road may acquire by prescription easements of abutting owners. (Goldstrom v. Interborough Rapid Transit Co., 115 App. Div. 323, 100 N. Y. S. 911), and the intention of the owner not to dedicate the way is immaterial (Id.). The words "improved lands" in Civ. Code 1895, § 3065, which provides for a right of way by prescription by 7 years uninterrupted user through improved lands, includes an entire

sable to the existence and enjoyment of an easement that the dominant and servient tenements should be contiguous.[15] No prescriptive rights can be acquired by permissive use[16] or under a license.[17] The adverse user must continue for the statutory period.[18] As a prescriptive easement presupposes a grant,[19] it can only arise where a valid grant could have been made in the first instance.[20] In Kentucky an easement in the nature of a passageway along or across a railway right of way cannot be acquired by prescription.[21]

Creation by estoppel.[22]—An easement may be created by estoppel, as where a licensor has allowed a licensee to expend money and labor to make use of the license,[23] or where lots are sold with reference to a plat or map showing streets.[24]

The condemnation of private lands for private ways.[25]—A way may be opened by statute to afford a private person access to the public highway.[26] A way so opened

tract though only part be cultivated. Woodland which adjoins cultivated land is not "wild land." Hopkins v. Roach, 127 Ga. 153, 56 S. E. 303. A right of way by prescription may be gained over open and uncultivated land as well as over closed and cultivated. Walton v. Knight [W. Va.] 58 S. E. 1025. Necessary elements lacking to show user of spring water by prescription. Jobling v. Tuttle [Kan.] 89 P. 699.

Easements by prescription: Use of land for railroad for more than 20 years. McCutchen v. Texas & P. R. Co., 118 La. 436, 43 So. 42. Use of land for newspaper office under claim of right under grant with knowledge, for 20 years. Frederic v. Mayers, 89 Miss. 127, 43 So. 677. Ten to twenty years adverse user of alley between blocks. Scott v. Dishough [Ark.] 103 S. W. 1153. Easement to maintain stairway projecting into city street gained by 20 years' open, notorious, peaceable, uninterrupted adverse user. Agnew v. Pawnee City [Neb.] 113 N. W. 236. User for more than 20 years of land then acquired by railroad for its roadbed. Trustees of Cincinnati Southern R. Co. v. Slaughter [Ky.] 104 S. W. 291. Continuous user of way by public for 15 years under claim of right. Bryars v. Rash [Ky.] 100 S. W. 306.

15. But there should be such a connection between the use and the thing used as to suggest to a purchaser that the one estate is servient to the other. Jobling v. Tuttle [Kan.] 89 P. 699.

16. See ante, this section. Use of spring held permissive. Jobbling v. Tuttle [Kan.] 89 P. 699. Use by public and plaintiff held to be permissive. Potter v. Magruder, 30 Ky. L. R. 276, 97 S. W. 732. Permissive use of highway. Prewitt v. Houstonville Cemetery Co. [Ky.] 101 S. W. 892.

17. Right to use surplus water from a spring is a mere license which cannot harden into a prescriptive right. Jobling v. Tuttle [Kan.] 89 P. 699.

18. Use uninterrupted for 40 years. Canton Co. v. Baltimore [Md.] 67 A. 274. No prescriptive right to maintain dam at given height. Cobia v. Ellis [Ala.] 42 So. 751. Ten years sufficient. Walton v. Knight. [W. Va.] 58 S. E. 1025. User for 11 years insufficient. Kern Island Irr. Co. v. Bakersfield [Cal.] 90 P. 1052.

19. Grant presumed from a tenant for years in favor of elevated railway after 20 years adverse possession. Burke v. Manhattan R. Co., 105 N. Y. S. 828. The recognition by elevated railways of the rights of the owner of property in a street is not a recognition of similar rights by a tenant so as to rebut the presumption of a grant by the tenant. Id. Action by tenant for injuries to his easement does not interrupt the running of the statute against the landlord. Goldstrom v. Interborough Rapid Transit Co., 115 App. Div. 323, 100 N. Y. S. 911. Continuous use of way as of right for 15 years, if unexplained, creates presumption (Bryars v. Rash [Ky.] 100 S. W. 306), but only a prima facie presumption which may be repelled (Walton v. Knight [W. Va.] 58 S. E. 1025). Grant of easement of way along or across a railway right of way never presumed. Louisville & N. R. Co. v. Smith [Ky.] 101 S. W. 317.

20. Tenant for years has an interest in street apart from that of his landlord which can be transferred. Burke v. Manhattan R. Co., 105 N. Y. S. 828.

21. Rule held not to apply. Louisville & N. R. Co. v. Smith [Ky.] 101 S. W. 317. Such a right may be acquired before the railroad acquires its way, especially if it does not interfere with the operation of the road. Trustees of Cincinnati Southern R. Co. v. Slaughter [Ky.] 104 S. W. 291.

22. See 7 C. L. 1208.

23. Right of way. Gyra v. Windler [Colo.] 91 P. 36. Expenditure of money upon a building on land. Frederic v. Mayers, 89 Miss. 127, 43 So. 677.

24. Right of way by bounding lot on street shown on map referred to. Bliss v. Mayer, 54 Misc. 119, 1033 N. Y. S. 1077; Lewissohn v. Lansing Co., 104 N. Y. S. 543. Where lands are platted and lots sold with reference thereto, the purchasers acquire appurtenant easements in streets shown thereon in which lots abut. Poole v. Greer [Del.] 65 A. 767.

25. See 7 C. L. 1208. See, also, Eminent Domain 7 C. L. 1276.

26. Under Rev. St. 1887, § 933, providing for the opening of private roads, one signature is sufficient to authorize board of county commissioners to act. Latah County v. Hasfurther, 12 Idaho, 797, 88 P. 433. Under Rev. St. § 923, requiring the board to appoint three viewers, one a surveyor, the county surveyor need not be appointed, but if he is he must be sworn. Id. Under Code 1896, § 2497, the road must be opened by the applicants therefor. Cieckler v .Morrow [Ala.] 43 So. 784.

is a public road,[27] but land damages must be paid,[28] and the road kept in repair by the persons for whose benefit the road is established.[29] In Alabama, on appeal from the county commissioners, the questions of necessity or reasonable demand for the road are not open.[30] The Georgia statute does not give power to remove obstructions from private ways.[31]

Natural easements[32] of drainage,[33] of lateral and subjacent support, exist in favor of adjacent and surface owners.[34]

Negative easements[35] may be created by restrictive agreements as to the use of land.[36]

§ 2. *Location, maintenance, and extent of right.*[37]—The extent and location of an easement are to be ascertained from the terms of the grant,[38] and, if general, reference may be had to the intended purpose and acts of the parties.[39] A practical location by the parties will control.[40]

Maintenance.[41]

Extent of use.[42]—The use to which an easement may be put depends upon the terms of the grant[43] and the purpose for which it was created.[44] A practical con-

27. Rev. St. 1887, § 933. Public in that anyone may use it. Latah County v. Hasfurther, 12 Idaho, 797, 88 P. 433.

28. Landowners have appeal from board of county commissioners to district court if aggrieved by the award and can have a trial de novo (Latah County v. Hasfurther, 12 Idaho, 797, 88 P. 433), or they may refuse to accept the award and thus compel condemnation proceedings by the county (Id.). Under Code of 1896, § 2450, the only question on appeal to circuit court is the amount of damages. Cleckler v. Morrow [Ala.] 43 So. 784.

29. Latah County v. Hasfurther, 12 Idaho, 797, 88 P. 433. Code 1896, § 2497. Cleckler v. Morrow [Ala.] 43 So. 784.

30. Nor the question whether the report of the viewer shall be set aside. Bell v. Louisville Water Co., 29 Ky. L. R. 866, 96 S. W. 572.

31. Acts 1904, p. 252. Word "roads" interpreted not to include private ways. Griffin v. Sanborn, 127 Ga. 17, 56 S. E. 71.

32. See 7 C. L. 1208.

33. See Waters and Water Supply, 8 C. L. 2262.

34. See Adjoining Owners, 9 C. L. 28.

35. See 7 C. L. 1209.

36. See Buildings and Building Restrictions, 9 C. L. 441.

37. See 7 C. L. 1209.

38. Where owners of land laid out a private way of a given width and conveyed land adjacent to it with a "right to pass and repass at pleasure over any part of said private way twenty-four feet wide, adjoining the premises" conveyed, an easement was granted which entitled the grantees to have the way "kept open and unobstructed to its full width." Gray v. Kelley [Mass.] 80 N. E. 651. Easement of light, air, and prospect reserved. Mitchell v. Reid, 118 App. Div. 641, 103 N. Y. S. 805. Where a passageway is clearly defined the owner is entitled to the whole way and is not confined to a reasonable and convenient way within its limits. Dewire v. Hanley, 79 Conn. 454, 65 A. 573.

39. Only such a right of way as is reasonably necessary and convenient for the purpose for which it was created (O'Beirne v. Gildersleeve, 116 App. Div. 902, 102 N. Y. S. 391), even though way was of a given width when easement was reserved and it was to be "forever kept open and unobstructed" (Id.). Letters and plat used by the parties at time of contract admissible to explain ambiguity as to actual location of proposed road. Bent v. Trimboli, 61 W. Va. 509, 56 S. E. 881.

40. Right of way granted by deed was pointed out by grantor as located by a fence and held to have been accepted in location specified. Peduzzi v. Restulli, 79 Vt. 349, 64 A. 1128. Possession taken and used for 12 years or more under a check for "two hundred dollars, for passway," held to identify passway. Jones v. Jones [Ky.] 101 S. W. 980.

41, 42. See 7 C. L. 1209.

43. Where the grant of a right to maintain a pipe line is within defined limits, the laying of two pipes does not fix the extent of the use and prevent laying a third pipe. Standard Oil Co. v. Buchi [N. J. Eq.] 66 A. 427. Right of way of defined width to maintain pipe line, with a right to maintain a telegraph and telephone line, construed not to confine the right to a noncommercial line for use for the pipe line but to be assignable for use as a commercial line. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747. Word "with" in the grant construed as "also" or "and." Id. An agreement that a private way "as now laid out . . . shall be forever kept open and unobstructed as a street . . . for the use and benefit of all parties thereto their heirs and assigns" held to give right to exclude any one not a party to the agreement or not serving some purpose of the parties thereto. O'Beirne v. Gildersleeve, 116 App. Div. 902, 102 N. Y. S. 391. Grant construed to give a farm crossing only. Speer v. Erie R. Co. [N. J. Err. & App.] 65 A. 1024.

44. Lease of a "right of way 50 feet wide to be used for logging purposes either for a road, flume, tram or in any manner the party of the second part may decide upon as will best meet their needs, in the transportation of their logs," construed to allow use of a stream admittedly within the limits of the grant. Fox v. Miller [C. C. A.] 150 F. 320.

struction of an easement general in its terms by exercise in a particular manner fixes the extent of the use.[45] The owner of the dominant estate must so exercise his rights as not unnecessarily to injure the servient tenement.[46] The owner of an easement cannot materially increase the burden of it upon the servient estate,[47] but where the limits of the grant are clearly defined, mere lapse of time does not prevent additional use.[48] In the absence of any proof defining same, the court may not specify the width of the right of way.[49] A prescriptive right cannot be increased except by use for the statutory period.[50]

§ 3. *Transfer and assignment.*[51]—Appurtenant easements are inseparable from the land[52] and pass with the conveyance of the dominant estate[53] without special mention.[54] Easements in gross are personal to the beneficiary and hence do not pass with the land with which they are used,[55] nor are they inheritable.[56] An easement cannot be granted or joined so as to affect the rights of a prior mortgagee.[57] A purchaser of the servient estate with actual[58] or constructive notice[59] of the

45. The rule is that when a grant is made in terms so general and indefinite that its construction is uncertain and ambiguous, the contemporaneous acts of the parties giving a practical construction to it is taken to be a manifestation of the intention of the parties. Sked v. Pennington Spring Water Co [N. J. Eq.] 65 A. 713, Construction and use of reservoir for 10 years deemed to fix the extent of the use and enlargement of easement enjoined. Id. This rule does not apply where the limits of the grant are clearly defined. Standard Oil Co. v. Buchi [N. J. Eq.] 66 A. 247. Use of a five inch pipe and ditches and wooden culverts precluded use of six inch pipes in place thereof. Colegrove Water Co. v. Hollywood [Cal.] 90 P. 1053. Where the right, not definitely limited by grant, has become fixed by the manner of its use, it cannot be enlarged without the consent of the parties who may be affected, under Civ. Code, § 806, which provides that the extent of a servitude is determined by the terms of grant or the enjoyment by which it is acquired. Kern Island Irr. Co. v. Bakersfield [Cal.] 90 P. 1052. Use of small water ditch forbade enlargement or new ditch on a new course. Id.

46. Injunction to compel owner of easement to alter his use so that the owner of the servient tenement might be able to comply with the requirements of the tenement house department refused. Bachrach v. E. Seidenberg, Stiefel & Co., 54 Misc. 59, 105 N. Y. S. 369.

47. Easement to discharge surface water through a ditch. Elser v. Village of Gross Point, 223 Ill. 230, 79 N. E. 27. Where the grant is to maintain a telephone line or lines adding of additional wires does not increase the servitude beyond the scope of the grant. Northeastern Tel. & T. Co. v. Hepburn, [N. J. Eq.] 65 A. 747. Owner of servient estate may protect himself against improper discharge of surface water by dikes Thiessen v. Claussen [Iowa] 112 N. W. 545.

48. Injunction against laying third pipe refused. Standard Oil Co. v. Buchi [N. J. Eq.] 66 A. 427.

49. Gyra v. Windler [Colo.] 91 P. 36.

50. Use of dam 4 feet high gave no prescriptive right to increase it to 7 feet unless increase existed for more than 10 years. Cobia v. Ellis [Ala.] 42 So. 751.

51. See 7 C. L. 1210.

52. Easements of air, light, and prospect run with land and pass by conveyance. Mitchell v. Reid, 118 App. Div. 641, 103 N. Y. S. 805. Reservation of right of way if appurtenant descends with title to heirs (Big Sandy R. Co. v. Bays [Ky.] 102 S. W. 302), and subsequent grantees (Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071). **The right to and burden of an** appurtenant profit a prendre to take gravel passes to the heirs, devisees, and grantees of the original owners of the two tenements. Hopper v. Herring [N. J. Law] 67 A. 714.

53. Poole v. Greer [Del.] 65 A. 767. A reservation of a right of way is deemed a grant and passes with a conveyance of the land "with appurtenances." Schaeffer v. Thompson, 116 App. Div. 775, 102 N. Y. S. 121. Way of necessity passes with each successive transfer of the title, whether voluntary or involuntary. Proudfoot v. Saffle [W. Va.] 57 S. E. 256. Easement of light, air, and access in street. Lewisohn v. Lansing Co., 104 N. Y. S. 543.

54. Poole v. Greer [Del.] 65 A. 767. A conveyance with all easements and appurtenances carries right to quasi easement. Carigg v. Mechanics' Sav. Bk. [Iowa] 111 N. W. 329. Stairway projecting into city street, apparent to an ordinary observer and naturally and necessarily belonging to the premises. Agnew v. Pawnee City [Neb.] 113 N. W. 236.

55. Right of fishery. Mallet v. McCord, 127 Ga. 761, 56 S. E. 1015. A grant under seal for a consideration of a right to lay pipes to carry petroleum within defined limits is not an easement in gross and is assignable. Standard Oil Co. v. Buchi [N. J. Eq.] 66 A. 427. Right of way held not to be in gross. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071.

56. Right of fishery. Mallet v. McCord, 127 Ga. 761, 56 S. E. 1015.

57. In order to cut off a prescriptive right which has attached subsequent to a mortgage, the owner must be joined in the foreclosure action. Jensen v. Showalter [Neb.] 113 N. W. 202.

58. A bona fide purchaser without actual knowledge who buys the servient tenement from the owner of both tracts takes free from an implied easement. Smith v. Lockwood, 100 Minn. 221, 110 N. W. 980. Actual notice of rights in a spring. Rittenhouse v. Swango, 30 Ky. L. R. 145, 97 S. W. 743. Use

easement takes it subject thereto, and damages for interference with it by him will be given.[60] Rights under grants of rights of way for pipe lines,[61] and telephone and telegraph lines, are assignable.[62] A bona fide assignee of an easement without notice is not bound by an oral agreement limiting the use.[63]

§ 4. *Extinguishment and revival.*[64]—By the terms of a grant the grantor may have the right to terminate the easement upon the happening of certain events.[65] An easement may be extinguished by adverse user [66] by the owner of the servient tenement for the statutory period.[67] An easement can be renounced, modified, or extinguished by parol.[68] A prescriptive right of way is not lost by an occasional variation from the definite route,[69] nor by slight changes in the course.[70] A way of necessity cannot be extinguished so long as the necessity exists.[71]

Abandonment.[72]—An easement may be extinguished by abandonment, but to constitute an abandonment there must be a nonuser [73] accompanied by an intent to abandon.[74]

Merger.[75]

Revival.[76]—An easement lost by the encroachment of the sea and eating away of the land is revived where land is formed again by accretion.[77] Where a new way

of spring water without distinctive qualities to make it apparent to a purchaser without notice and lying in parol grant not binding without actual notice. Jobling v. Tuttle [Kan.] 89 P. 699. Public way. Grantor not estopped by operative words or covenants in deed which included the way from maintaining his right therein as incident to ownership of another parcel of land. Tise v. Whitaker Harvey Co., 144 N. C. 507, 57 S. E. 210.

59. Settler on public land over which there has been a road in common and general use for more than 30 years takes subject to the public easement in said road. Van Wanning v. Deeter [Neb.] 110 N. W. 703. Railroad charged with notice of prescriptive right of way over its right of way. Trustees of Cincinnati Southern R. Co. v. Slaughter [Ky.] 104 S. W. 291. Purchaser held not chargeable with knowledge of greater appurtenant water right than that measured in deed granting it. Schmidt v. Olympia Water, Light & Power Co. [Wash.] 90 P. 212. The rule applies also to a lessee. Darnell v. Columbus Show Case Co. [Ga.] 58 S. E. 631. Purchaser is chargeable with an easement which is discoverable on examination. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071. Obtaining permission to erect gates indicates full notice of right of way. Id. Constructive notice of right of way. Jones v. Jones [Ky.] 101 S. W. 980.

60. Right of way in street appurtenant to abutting lot. Poole v. Greer [Del.] 65 A. 747. No estoppel to claim damages for obstruction of way with notice of which purchaser is chargeable. Big Sandy R. Co. v. Bays [Ky.] 102 S. W. 302.

61. Standard Oil Co. v. Buchi [N. J. Eq.] 66 A 427.

62. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747.

63. Not bound by agreement that a telephone line should only be used in connection with waterworks plant. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747.

64. See 7 C. L. 1210.

65. Right to use land for newspaper office building so long as it was used for that purpose. Frederic v. Mayers, 89 Miss. 127, 43 So. 677.

66. Occupation of part of way by half of a boundary wall for more than 15 years gives no right to land covered by adverse user. Dewire v. Hanley, 79 Conn. 454, 65 A. 573.

67. Actual enclosure of locus and no use allowed except by express permission. Canton Co. of Baltimore v. Baltimore [Md.] 67 A. 274. Bed of street fenced for 50 years. Lewisohn v. Lansing Co., 104 N. Y. S. 543.

68. Easement to drain across land by means of tile. Dunn v. Youmans, 224 Ill. 34, 79 N. E. 321.

69. Variation to avoid muddy or worn places. Walton v. Knight [W. Va.] 58 S. E. 1025.

70. Immaterial changes made without intention of abandoning the way. Trustees of Cincinnati So. R. Co. v. Slaughter [Ky.] 104 S. W. 291.

71. Proudfoot v. Saffle [W. Va.] 57 S. E. 256.

72. See 7 C. L. 1211.

73. Inability to use the whole of way because of part of boundary wall on it does not constitute an abandonment. Dewire v. Hanley, 79 Conn. 454, 65 A. 579. Nonuser for 4 years insufficient to raise presumption of abandonment. Agnew v. Pawnee City [Neb.] 113 N. W. 236.

74. A claim of ownership of fee of a street and user of the land before street is opened does not show an intent to abandon easement for street purposes. Lewisohn v. Lansing Co., 104 N. Y. S. 543, overruling 51 Misc. 274, 100 N. Y. S. 1077. Abandonment must be pleaded and proved and the burden on owner of servient estate. Burden not sustained. Agnew v. Pawnee City [Neb.] 113 N. W. 236. A mere nonuser of an easement for more than 20 years will not afford conclusive evidence of its abandonment. Canton Co. of Baltimore v. Baltimore [Md.] 67 A. 274.

75, 76. See 7 C. L. 1211.

77. Street over which there was an easement by dedication. Elliot v. Atlantic City, 149 F. 849.

opened by agreement in place of an old way is closed or obstructed, the right to the old way revives.[78]

Reverter.[79]—There is a reverter where an easement for a particular purpose is abandoned.[80]

§ 5. *Interference with easements and remedies and procedure in respect thereto.*[81]—Ordinarily the owner of the servient tenement may use it in any manner not unreasonably interfering with the use granted.[82] The beneficiary of an easement of way may remove obstructions unlawfully placed therein.[83] An easement cannot be taken without compensation.[84] A secondary easement for a public use cannot be condemned which will destroy the public use of the first easement.[85]

Form of remedy.[86]—The appropriate remedy for the disturbance of an easement is an action at law for damages [87] or a suit to enjoin the interference,[88] in which damages may also be awarded,[89] or if it is a public easement by an indictment.[90] Equity, however, will not assume jurisdiction unless the right to the easement is clear.[91]

78. Jones v. Jones [Ky.] 101 S. W. 980.

79. See 7 C. L. 1211.

80. Grant of land for newspaper office building so long as it was so used held to be not revertible till such use abandoned. Frederic v. Mayers, 89 Miss. 127, 43 So. 677.

81. See 7 C. L. 1211.

82. Erection of a building which would cut off use of easement of light, air, and prospect. Mitchell v. Reid, 118 App. Div. 641, 103 N. Y. S. 805. Owner of fee may use a way so as not to interfere with use to which it is dedicated O'Beirne v. Gildersleeve, 116 App. Div. 902, 102 N. Y. S. 391.

83. Right to remove gates peaceably as an abatement of a private nuisance. Schmidt v. Brown, 226 Ill. 590, 80 N. E. 1071. This rule applies to land devoted to use as a public or prviate way. Colegrove Water Co. v. Hollywood [Cal.] 90 P. 1053. Occupation of land, over which public has easement for highway, for water pipes proper so long as no public use is impeded. Id. This right carries with it right to excavate street to lay pipes. Id.

84. Where a street is originally dedicated 50 feet wide, a city cannot by ordinance widen it except by condemnation proceedings. Elliot v. Atlantic City, 149 F. 849.

85. **Eminent domain:** Rev. St. Mo. 1899, § 1272. This is a question for the court, not the jury. American Tel. & T. Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576. Question decided in the negative. Id.

86. See 7 C. L. 1211.

87. Injury to private easements in street. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330. Obstruction of right of way. Poole v. Greer [Del.] 65 A. 767.

Measure of damages for obstruction of a way is the difference in value of property with the way closed and with the way open. Bell v. Louisville Water Co., 29 Ky. L. R. 866, 96 S. W. 572. Damages for loss of subjacent support can only be recovered to time of suit. Catlin Coal Co. v. Lloyd, 124 Ill. App. 394. If the obstruction is remediable the diminution in value of the use of the property during the time the obstruction continued until the filing of the suit may be recovered. Id. Sickness caused by water accumulated by obstruction too remote. Big Sandy R. Co. v. Bays [Ky.] 102 S. W. 302. Measure of damages for **permanent** obstruction of an appurtenant right of way is the difference between the reasonable market value of the land before it was known the way was to be obstructed and the value of it immediately after it was destroyed. Id.

88. Obstruction of a public or private road will be enjoined at the instance of one suffering special and peculiar injury therefrom. Bent v. Trimbolli, 61 W. Va. 509, 56 S. E. 881. Private way. Dewire v. Hanley, 79 Conn. 454, 65 A. 573; Gray v. Kelley [Mass.] 80 N. E. 651; Gyra v. Windler [Colo.] 91 P. 36. Material impairment of a right of way by an excavation enjoined. Bliss v. Mayer, 54 Misc. 119, 103 N. Y. S. 1077. Application for preliminary injunction continued to hearing. Tise v. Whitaker Harvey Co., 144 N. C. 507, 57 S. E. 210. Removal of outside stairway enjoined. Agnew v. Pawnee City [Neb.] 113 N. W. 236. Enlargement of easement granted enjoined. Sked v. Pennington Spring Water Co. [N. J. Eq.] 65 A. 713. Cutting telephone and telegraph wires and poles on right of way enjoined. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747. Right to injunction against maintenance of obstruction barred after its maintenance with knowledge or express or implied consent of owner of dominant tenement for 10 years or more. Thiessen v. Claussen [Iowa] 112 N. W. 545. Injunction to compel owner of dominant tenement to change his use of it for the benefit of the servient tenement refused. Bachrach v. Seidenberg, Stiefel & Co., 54 Misc. 59, 105 N. Y. S. 369.

89. When plaintiff's rights are invalid, he is entitled to some damage, although no specific pecuniary loss or expense on account of defendant's acts shown. Dewire v. Hanley, 79 Conn. 454, 65 A. 573. Specific performance of contract to construct a way by a water company by requiring the removal of obstructions permanently destroying it refused on ground that public service forbade it. Damages given. Bell v. Louisville Water Co., 29 Ky. L. R. 866, 96 S. W. 572.

90. The indictment for obstructing neighborhood road, exclusion of deed reserving to defendant's grantor use of all necessary road not harmful. Evidence immaterial. State v. Toale, 74 S. C. 425, 54 S. E. 608.

91. Rights of parties not too uncertain to

Parties.[92]

Pleadings and evidence.[93]—A petition to enjoin interference must show the existence of the easement [94] and its location.[95] An action to enjoin the obstruction of a way may be maintained by one of several owners similarly affected.[96] Before damages will be given the plaintiff must show an easement, the extent of it, and interference actual or threatened.[97]

Eavesdropping; Ecclesiastical Law; Eight-hour Laws, see latest topical index.

EJECTMENT (AND WRIT OF ENTRY).

§ 1. **Cause of Action and Nature of Remedy (1026.)** Title or Prior Possession in Plaintiff (1027). Nature of the Remedy (1028).
§ 2. **Defenses (1028).**
§ 3. **Parties (1030).**
§ 4. **Process and Pleading (1030).**
§ 5. **Evidence (1031).**
§ 6. **Trial and Judgment (1035).**
§ 7. **New Trial (1036).**
§ 8. **Mesne Profits and Damages (1036).**
§ 9. **Allowance for Improvements and Expenditures (1037).**

§ 1. *Cause of action and nature of remedy.*[98]—Ejectment is an action to recover the immediate possession of real property; [99] not only the surface of the ground but, within reasonable limitations, the space above and the part beneath.[1] In Maryland it will not lie to recover an incorporeal right or easement in land,[2] but in New Jersey it may be brought by a municipality against a person unlawfully encroaching upon a public highway under its control.[3] It will not lie to recover personal property.[4] Plaintiff must have the immediate right of possession [5] at the time of suit.[6]

warrant mandatory injunction. Dewire v. Hanley, 79 Conn. 454, 65 A. 573. Rule held not to apply and injunction granted. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747.

92. See 5 C. L. 1055.

93. See 7 C. L. 1212.

94. Failure to allege exclusive adverse possession for 10 years under claim of right immaterial after judgment where proof establishes those facts. Agnew v. Pawnee City [Neb.] 113 N. W. 236. Under an allegation that a private way has been opened and in use continuously for more than 7 years in a petition to remove obstructions therefrom, under Pol. Code 1895, § 679, proof that the way has been in use as a private way for more than a year and has been closed by the owner without giving the 30 days' notice required by Pol. Code 1895, § 673, insufficient. Nugent v. Watkins [Ga.] 58 S. E. 888.

95. A declaration which described the right of way as "toward Holcomb Road" but not otherwise designating the terminus held too vague and should have been the subject of special demurrer. Poole v. Greer [Del.] 65 A. 767.

96. Abutting owner may enjoin obstruction of private easements in street although it constitutes a similar injury to similar easements of others. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330.

97. Burden on plaintiff. Must show that he has sustained damage. Poole v. Greer [Del.] 65 A. 767.

98. See 7 C. L. 1212.

99. Code Civ. Proc. § 3343, subd. 20. Butter v. Frontier Tel. Co., 186 N. Y. 486, 79 N. E. 716. Strictly speaking it is a possessory action and the issue may or may not involve title. Fulton v. Mathers [Kan.] 90 P. 256.

Land occupied by partition fence: Ejectment will lie for the recovery of land unlawfully occupied by a partition fence. Rose v. Linderman, 147 Mich. 372, 110 N. W. 939.

Land covered by tide water: Is proper action for recovery of possession of land covered by tide water. City of Providence v. Comstock, 27 R. I. 537, 65 A. 307.

Land overflowed by dam: Ejectment, for the purpose of determining the legal rights of the parties, may be maintained for land overflowed by the erection of a dam, where the defendant claims a perpetual right of overflow. Reynolds v. Munch, 100 Minn. 114, 110 N. W. 368.

1. Butler v. Frontier Tel. Co., 186 N. Y. 486, 79 N. E. 716.

Telephone wire: Will lie where a telephone wire is stretched across plaintiff's premises a few feet above soil, although surface is not touched. Butler v. Frontier Tel. Co., 186 N. Y. 486, 79 N. E. 716.

Projection of foundation of building: Will lie to recover possession of property from which plaintiff has been ousted by projection beyond his line of foundation of building erected by adjoining proprietor, although projection is entirely below surface. Wachstein v. Christopher [Ga.] 57 S. E. 511.

2. Canton Co. v. Baltimore [Md.] 66 A. 679.

3. Riverside Tp. v. Pennsylvania R. Co. [N. J. Err. & App.] 66 A. 433.

4. Keystone Coal Co. v. Williams, 216 Pa. 217, 65 A. 407.

5. Carpenter v. Joiner [Ala.] 44 So. 424; Eridenbaugh v. Bryant [Neb.] 112 N. W. 571.

6. Smith v. Ryan, 116 App. Div. 397, 101 N. Y. S. 1011. Ejectment will not lie against

Unlawful detention by the defendent is an essential element,[7] and, therefore, it can only be brought against one in possession.[8] The Missouri statute has not changed this rule,[9] but in Wisconsin the action may be brought for unoccupied lands against one claiming title to them.[10] In Pennsylvania one claiming title may be required to bring ejectment upon petition of one in possession.[11]

Title or prior possession in plaintiff.[12]—Plaintiff must recover on the strength of his title, not on the weakness of defendants.[13] He must have the legal title,[14] or must show that he was in actual possession and was ousted by defendant.[15] Except

one who holds under deed regular upon its face and properly executed and delivered, if grantor has not been adjudged an incompetent. Id.

7. Bridenbaugh v. Bryant [Neb.] 112 N. W. 571.

8. Hunter v. Wethington [Mo.] 103 S. W. 543; Bridenbaugh v. Bryant [Neb.] 112 N. W. 571; Heppenstall v. Leng, 217 Pa. 491, 66 A. 991. At common law one not in possession, but claiming title may maintain ejectment against any one in possession claiming adversely to him. Id. Where a vendee is in possession, vendor cannot bring ejectment against an adverse claimant not in possession. Id.

9. Rev. St. 1899, § 3056 (Ann. St. 1906, p. 1756). Hunter v. Wethington [Mo.] 103 S. W. 543; Houghton v. Pierce, 203 Mo. 723, 102 S. W. 553.

10. Wisconsin River Land Co. v. Paine Lumber Co., 130 Wis. 393, 110 N. W. 220.

11. Act March 8, 1889, as amended by Act April 16, 1903 (P. L. 212). Fearl v. Johnstown, 216 Pa. 205, 65 A. 549. But rule should not be granted if there is substantial conflict as to fact of possession or if evidence leaves that fact in doubt. Id. Where court has found that petitioner's claim to title has been sufficiently shown and that he is in possession of part of tract claimed, it should under Act April 16, 1903 (P. L. 212), grant rule on defendant to bring ejectment for so much of land as petitioner is found to be in possession of. Welsh v. Clough, 216 Pa. 276, 65 A. 677. In such proceeding it cannot be determined whether petitioner's possession is under a title superior to his own. Id.

Note: A similar statute in Maine allows a proceeding to compel a claimant to bring a suit to quiet title. See Quieting Title, 8 C. L. 1572, n. 64 et seq.

12. Sec. 7 C. L. 1214.

13. Mahan v. Smith [Ala.] 44 So. 375; Carpenter v. Joiner [Ala.] 44 So. 424; Bothwell v. Denver Union Stockyard Co. [Colo.] 90 P. 1127; Moran v. Denison, 79 Conn. 325, 65 A. 291; Thomas v. Young, 79 Conn. 493, 65 A. 955; Nevin v. Dlsharoon [Del. Super.] 66 A. 362; Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756; Stetson v. Grant [Me.] 66 A. 480; Cottrell v. Pickering [Utah] 88 P. 696; Meyers v. Wisconsin Cent. R. Co. [Wis.] 112 N. W. 673. When plaintiff's testimony shows defendant in possession under claim of ownership, plaintiff must recover on superiority of his title. Runkle v. Welty [Neb.] 113 N. W. 160, 111 N. W. 463. A plaintiff who has failed to show a prima facie title in himself cannot complain that defendant is a mere trespasser and therefore not entitled to set up an outstanding title to defeat his action. De Land v. Dixon Power & Lighting Co., 225 Ill. 212, 80 N. E. 125.

But in Kansas a cotenant may recover the whole property against one who has no title. Horner v. Ellis [Kan.] 90 P. 275.

14. Carpenter v. Joiner [Ala.] 44 So. 424. Harris v. Butler [Fla.] 42 So. 186; Winn v. Coggins [Fla.] 42 So. 897; Sanborn v. Loud [Mich.] 113 N. W. 309; Bridenbaugh v. Bryant [Neb.] 112 N. W. 571. Plaintiff must show a regular chain of title back to some grantor in possession or to Federal government. Henry v. Brannan [Ala.] 42 So. 995. But complainant need not deraign his title into a grant from state where he and defendant both claim from a common source. Rucker v. Hyde [Tenn.] 100 S. W. 739. Where both parties claim under the same grantor, defendant is estopped from questioning his title. Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784. Plaintiff who establishes legal title need not have had actual possession to entitle him to maintain the action. Froman v. Madden [Idaho] 88 P. 894. A purchaser of real estate for valuable consideration without notice of a prior conveyance, if his deed was first recorded, may maintain ejectment against a prior purchaser who did not acquire possession until after plaintiff's purchase. Rev. St. 1887, § 3001. Id. Where a bar of the statute of limitations is complete in favor of grantee in tax deed, he or one claiming under him has absolute title to land and may maintain ejectment therefor against former owner. Wisconsin River Land Co v. Paine Lumber Co., 130 Wis. 393, 110 N. W. 220.

15. Harris v. Butler [Fla.] 42 So. 186; Winn v. Coggins [Fla.] 42 So. 897. Plaintiff must show that he was formerly in possession, that he was ousted or deprived of possession, and that he has a right to re-enter and take possession. Butler v. Frontier Tel. Co., 186 N. Y. 486, 79 N. E. 716. But the ouster need not be entire or absolute. Id. It is sufficient if defendant is in partial possession of premises while plaintiff is in possession of remainder. Id. If there is a visible and tangible structure by which possession is withheld to the extent of the space occupied thereby, ejectment will lie. Id. Any physical, exclusive and permanent occupation of space above land is a disseisin of the owner to that extent. Id. One who had prior possession of lands under claim of title may maintain ejectment against one afterwards found in possession, unless the latter set up paramount title in himself or in some other person. Rogers v. Keith [Ala.] 42 So. 446. Where neither party has legal title, plaintiff, in order to recover on a possession prior to that of defendant, must show a possession continuing up to time when defendant or those under whom he claims entered or an animus revertendi. Fletcher v. Riley [Ala.] 42 So. 548. Under

where the rule has been changed by statute, recovery cannot be had upon the equitable title alone.[16] A mortgagee, although his mortgage is in the form of a deed absolute on its face, cannot maintain ejectment against the mortgagor in possession.[17] A purchaser at execution sale of land fraudulently conveyed by a debtor previous to judgment against him may recover possession in ejectment.[18] A plaintiff who has failed to show a prima facie title in himself cannot recover on the ground that the defendant is estopped upon equitable grounds from asserting his title.[19] At common law a grantee may recover although the defendant was in adverse possession at the time of the grant,[20] and this is the rule under the North Carolina statute,[21] but the contrary rule prevails under the statutes in Alabama and Kentucky.[22] Where the action is brought by the person in possession against the grantee, the Kentucky statute is of no avail to the plaintiff if the jury has found his possession was not adverse.[23]

Nature of the remedy.[24]—Ejectment is a legal action and equitable rights and interests cannot be determined,[25] and the rules of courts of equity do not obtain,[26] but ejectment and a suit in equity are sometimes concurrent remedies.[27]

§ 2. *Defenses.*[28]—That the plaintiff is not entitled to possession,[29] and that the legal title is in defendant,[30] are good defenses, but the defendant cannot set up an equitable estate or interest,[31] except in states where by statute such defense is made available.[32] As to whether the fact that plaintiff's title was obtained by fraud is a

Civ. Code 1895, § 5008, plaintiff may recover on his prior possession alone, even though he may have relinquished such possession, if such relinquishment was animo revertendi. Jackson v. Strickland, 127 Ga. 106, 56 S. E. 107.

16. Mead v. Chesbrough Bldg. Co. [C. C. A.] 151 F. 998. This is the rule of the Federal courts even when they are sitting in states in which equitable titles are triable in ejectment. Id. Plaintiff cannot recover upon ground that conveyances pursuant to foreclosures were obtained through a breach of fiduciary duties of trustees, or were fraudulent in the view of a court of equity (Id.), but he may recover on ground that such conveyances were actually fraudulent and therefore void ab initio (Id.).

17. Mortgage in form of deed absolute was given to secure one who furnished purchase money, and mortgagor took possession and made valuable and lasting improvements. Abrams v. Abrams, 74 Kan. 888, 88 P. 70.

18. Where creditor purchases at such sale he may so recover without going into equity to set aside fraudulent conveyance. Ward v. Sturdivant [Ark.] 98 S. W. 690.

19. De Land v. Dixon Power & Lighting Co., 225 Ill. 212, 80 N. E. 125.

20. Doe v. Moog [Ala.] 43 So. 710.

21. Code 1883, § 177 (Revisal 1905, § 400). Bland v. Beasley [N. C.] 58 S. E. 993.

22. Manhan v. Smith [Ala.] 44 So. 375; Chambers v. Morris [Ala.] 42 So. 549; Cowles v. Carrier [Ky.] 101 S. W. 916. But grantee may recover where defendant's possession was permissive and in recognition of grantor's title. Chambers v. Morris [Ala.] 42 So. 549.

23. Westerfield v. McDonald, 30 Ky. L. R. 1034, 100 S. W. 230.

24. See 7 C. L. 1215.

25. Taylor v. Roniger, 147 Mich. 99, 13 Det. Leg. N. 994, 110 N. W. 503.

26. Mead v. Chesbrough Bldg. Co. [C. C. A.] 151 F. 998.

27. If a person has legal title to lands and is entitled to possession thereof as against another wrongfully withholding same, and his right involves fraud of such other which must be established by evidence alieunde, he may sue in ejectment though he may also sue in equity. Steinberg v. Saltzman, 130 Wis. 419, 110 N. W. 198.

28. See 7 C. L. 1215

29. In an action by administrator, widow and heirs of intestate, where sole ground of recovery relied on is administrator's right of possession pending settlement of estate, defendant is not estopped by leases taken by him from widow and heirs, to which administrator was not a party, from denying the latter's right of possession. Thomas v. Young, 79 Conn. 493, 65 A. 955.

30. Defendant having shown a prior recorded deed conveying title out of plaintiff's grantor, and having connected her own possession with such outstanding title. It was immaterial whether or not it was given for purpose of securing a debt, and the court did not err in directing verdict for defendant. Hamilton v. Cargile, 127 Ga. 762, 56 S. E. 1022.

31. Taylor v. Roniger, 147 Mich. 99, 13 Det. Leg. N. 994, 110 N. W. 503. The equitable estate of a purchaser under a parol agreement is not available as a defense to an action by the owner of the legal title. Atlantic City R. Co. v. Johanson [N. J. Eq.] 65 A. 719. A parol gift from plaintiff's testator without transfer of possession is not a good defense. Wood v. Praul, 217 Pa. 293, 66 A. 528. A beneficial interest cannot be interposed upon a motion for a nonsuit. Mitchell v. Cleveland [S. C.] 57 S. E. 33.

32. Under system of procedure in force in California, where special forms of action have been abolished, a defendant may set up by way of equitable defense any matter

good defense, the authorities are not in entire accord.[33] It is a good defense that the defendant has acquired title by adverse possession,[34] that the action is barred by the statute of limitations [35] or by laches,[36] or that an estoppel has arisen against plaintiff precluding his recovery.[37] In an action by a subsequent purchaser whose deed was first recorded against a prior purchaser, it is a good defense that plaintiff received his deed with knowledge of the prior conveyance.[38] A conveyance by plaintiff of the land sued for, pending the action, is a good defense.[39] So it is a good defense that

which would, if presented by him as basis of an original bill in equity, have entitled him to a judgment for the relief sought by his answer. Doherty v. Courtney, 150 Cal. 606, 89 P. 434. A tenant of an administrator may set up defense that intestate's deed under which plaintiff claims was procured by undue influence. Id. Where plaintiff prior to suit had, with full knowledge of defendant's equities in the property in dispute, obtained a decree quieting her title against the holder of the legal title, the effect of such decree was to make plaintiff the successor, with notice of defendants' equities, of the rights of the legal holder, and therefore such equities are a good defense to the ejectment suit. King v. Dugan, 150 Cal. 258, 88 P. 925.

33. In Michigan it cannot be determined in ejectment whether a deed under which plaintiff claims was obtained by fraud. Loranger v. Carpenter, 148 Mich. 549, 112 N. W. 125. But in Illinois it is a good defense that deed under which plaintiff claims was made by guardian for purpose of defrauding his ward. Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756. It is not a bar to recovery by widow of her statutory interest in her deceased husband's estate that he parted with his title in such a fraudulent manner as to preclude recovery by his heirs. McKelvey v. McKelvey [Kan.] 89 P. 663.

34. Defendant in adverse possession for more than twenty years claiming under deed by which it was intended to convey premises in dispute, though by mistake in description they were not included. Mutual Trust Co. v. Polymero, 54 Misc. 379, 105 N. Y. S. 1024. Where defendant has not shown twenty years' adverse possession, and plaintiff has legal title, as law carries seisin to him when neither party is in possession, he is not precluded from maintaining ejectment by Revisal 1905, § 383, which bars recovery unless it appears that plaintiff was "seized or possessed of the premises" within twenty years before beginning action. Bland v. Reasley [N. C.] 58 S. E. 993. Where evidence shows a mixed possession by both parties, the party having the legal title is entitled to possession. Nevin v. Disharoon [Del. Super.] 66 A. 362. Defendant in order to sustain defense of adverse possession is not compelled to admit that suit was properly brought against him as the person in possession, where his tenant was in actual possession at time suit was brought, the character of possession required in the two cases being different. Hunter v. Wethington [Mo.] 103 S. W. 543. Where suit is brought by heir to recover land in which intestate's widow had dower interest, defendant cannot set up adverse possession prior to widow's death. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

35. The three years' limitation prescribed by Code 1896, § 4089 (Code 1886, § 606), does not apply where possession is acquired, under auditor's deed, of land bid in by state at tax sales and resold under provisions of Act Feb 9, 1895 (Acts 1894-95, p. 488). Doe v. Moog [Ala.] 43 So. 710. Where petition demanded damages for injury to property, amendment relating to damages filed more than statutory period after cause of action accrued held not to set up new cause of action within prohibition of statute. Anderson v. Acheson, 132 Iowa, 744, 110 N. W. 335. Statute of limitations does not begin to run against action by widow to recover her statutory interest in her husband's realty until death of husband. McKelvey v. McKelvey [Kan.] 89 P. 663. Where tax deed holder sues within the two year period of limitation, Gen. St. 1901, § 4444, and recovers judgment, running of statute is arrested, and subsequent delay in taking other steps to remove defendants from premises will not put statute in motion. Fulton v. Mathers [Kan.] 90 P. 256.

36. Facts held not to constitute laches precluding plaintiff from suing to recover possession of bed of non-navigable lake. Rhodes v. Cissell [Ark.] 101 S. W. 758.

37. If one who held legal title to land, though unrecorded, represented that title was in another person, who appeared from record to be the owner, and that such other person had right to sell and make a bond for title, and thus induced an innocent purchaser for value to accept a bond for title from the other person, to give notes for purchase money, and to pay some or all of them, the person so acting would be estopped from denying title of such third person. Sewell v. Norris [Ga.] 58 S. E. 637. But if the whole agreement of sale was a mere sham to defeat creditors of real owner, and taker of bond participated in such scheme and knew the real facts, no equitable estoppel would arise in his favor so as to prevent the holder of the legal title from asserting it, if he could do so without relying on or taking advantage of the fraudulent transaction. Id. Where plaintiff's case rests upon theory that a third person had no interest in property, he is estopped to complain that such person was not made a party to foreclosure proceedings under which defendant claims. Wright v. Jessup [Wash.] 87 P. 930. Facts held not to estop plaintiff from claiming ownership against defendant of bed of non-navigable lake after disappearance of water therefrom. Rhodes v. Cissell [Ark.] 101 S. W. 758. Facts held not to estop plaintiff from claiming that a certain line was the true boundary line between his property and defendants. Cottrell v. Pickering [Utah] 88 P. 696.

38. Froman v. Madden [Idaho] 88 P. 894.

39. So held where plaintiff had acquired title by purchase at execution sale, and de-

plaintiff has, since attaining majority, ratified a sale of the land made during his infancy by one assuming to act as his trustee.[40] Where there is some evidence that the parties claim title from a common source, a nonsuit will not be granted.[41] The abandonment of possession by defendant after suit brought will not defeat the action.[42] It is no defense to an action of ejectment and for damages to the property by a tenant in common where the acts complained of are in the nature of an ouster of possession and the commission of waste that they were consented to by plaintiff's cotenant.[43]

§ 3. *Parties.*[44]—The persons in possession of the premises at the commencement of the action are necessary parties,[45] and they are, in the absence of statutory requirement, the only necessary parties defendant.[46] If different tenants occupy separate portions of the premises, they should be separately sued.[47] The proper mode of making an infant a party plaintiff is to bring the action in the name of the infant by his guardian ad litem.[48]

§ 4. *Process and pleading.*[49]—All averments in the pleadings that go beyond the forms prescribed by statute should be struck out.[50]

Process.[51]

The complaint.[52]—Complaint must allege title,[53] and is sufficient if it conforms to statutory requirements in this respect,[54] but if in addition the title and source of title of each of the parties is set out, a demurrer will bring up for consideration all the facts pleaded.[55] Where plaintiff relies on prior possession he need not aver that defendant is a trespasser.[56] There must be reasonable certainty in the description of the premises.[57] Irrelevant or redundant matter does not destroy nor vitiate the facts well pleaded, nor change the nature and character of the action.[58]

fendant, the execution debtor, had remained in possession. Sellers v. Farmer [Ala.] 43 So. 967.

40. Ratification by remaindermen of sale and conveyance by life tenant assuming to act as trustee under void order of court. Webb v. Hicks, 127 Ga. 170, 56 S. E. 307.

41. Mitchell v. Cleveland [S. C.] 57 S. E. 33.

42. Butler v. Frontier Tel. Co., 186 N. Y. 486, 79 N. E. 716. Removal of telephone wire stretched across plaintiff's premises. Butler v. Frontier Tel. Co. 186 N. Y. 486, 79 N. E. 716.

43. Desecration of graves in cemetery lot by removal of bodies and tombstone. Anderson v. Acheson, 132 Iowa, 744, 110 N. W. 335.

44. See 7 C. L. 1216.

45. Houghton v. Pierce, 203 Mo. 723, 102 S. W. 553. Under Rev. St. 1899, § 3056 (Ann. St. 1906, p. 1756), requiring ejectment to be brought against person in possession if landlord is off premises and tenant in actual possession, action may be brought against both, but not against landlord alone. Hunter v. Wethington [Mo.] 103 S. W. 543.

46. Fulton v. Mathers [Kan.] 90 P. 256. Judgment is not void as to defendants in actual possession because holder of legal title not in possession was not made a party. Id.

47. Hunter v. Wethington [Mo.] 103 S. W. 543

48. Mitchell v. Cleveland [S. C.] 57 S. E. 33.

49. See 7 C. L. 1216.

50. Mt. Pleasant Cemetery Co. v. Erie R. Co. [N. J. Law] 65 A. 192. The court may strike out such averments of its own motion. Id.

51. See 5 C. L. 1059.

52. See 7 C. L. 1216.

53. Allegations of complaint held not to show any title in plaintiff. Bothwell v. Denver Union Stockyards Co. [Colo.] 90 P. 1127. Where plaintiff bases his title to land formerly constituting parts of certain streets on ground of a reversion to original grantor and a deed from him, he must allege in his complaint how and when title reverted. Id. In Kentucky it is not necessary to set out the choice of title relied on. Morris v. Martin [Ky.] 101 S. W. 914. It is sufficient to state that plaintiff is owner of and entitled to possession of land, describing it, and that defendant wrongfully holds possession thereof. Id.

54. A petition which merely sets forth the statutory requirements of a cause of action is good against demurrer. Jones v. Carnes, 17 Okl. 470, 87 P. 652. Complaint held sufficient under Rev. St. 1898, § 3077, it alleging all the facts required thereby. Wisconsin River Land Co. v. Paine Lumber Co., 130 Wis. 393, 110 N. W. 220.

55. Jones v. Carnes, 17 Okl. 470, 87 P. 652.

56. Jackson v. Strickland, 127 Ga. 106, 56 S. E. 107.

57. Hunter v. Wethington [Mo.] 103 S. W. 543. Premises must be described with such certainty that, if plaintiff recovers, a writ of possession issued upon judgment and describing the premises as laid in petition will so identify them that sheriff in execution of writ can deliver possession in accordance with its mandate. Clark v. Knowles [Ga.] 58 S. E. 841. Description of premises in petition held insufficient. Id.

58. Wisconsin River Land Co. v. Paine Lumber Co. 130 Wis. 393, 110 N. W. 220.

Demurrer.—In Iowa, where face of petition shows a nonjoinder of parties, defendant must demur and failure to do so constitutes a waiver.[59]

Answer.[60]—The question raised by the general issue is who has the better title.[61] In New Jersey the defendant is confined to the plea of not guilty,[62] but in Illinois such plea does not put in issue the possession of the premises by defendant or that he claims title or interest therein,[63] but such questions must be put in issue by special pleas verified by affidavit.[64] Where defendant relies on a tax deed it is not necessary to allege all the initial proceedings culminating in the issuance of the deed.[65] In California, if defendant seeks affirmative relief affecting the property to which the action relates, he may, in addition to his answer, file a cross complaint.[66]

Pleadings subsequent to answer.—If defendant sets up a deed good on its face, a reply is necessary to raise the issue as to whether it was fraudulent.[67] Where the replication alleges that defendant claims title or interest, a rejoinder denying such title or interest puts the question in issue.[68] In Illinois where defendant takes a new trial under the statute, the granting of his motion for leave to file rejoinders to the replications, not made until the case is called for trial, is in the sound discretion of the court.[69]

Amendments.[70]—The statutes are very liberal in allowing amendments to pleadings.[71]

§ 5. *Evidence.*[72]—The burden is upon the plaintiff to show title [73] as alleged,[74] or an estoppel precluding defendant from disputing the same,[75] and the fact that defendant affirmatively sets up title in himself does not shift the burden.[76] If plaintiff relies on prior actual possession and ouster, he must prove it.[77] Where the only plea is not guilty, plaintiff need not prove possession in defendant or that he claims title or interest in the premises.[78] Plaintiff need not prove his title beyond a

59. Code, § 3561. Anderson v. Acheson, 132 Iowa, 744, 110 N. W. 335.

60. See 7 C. L. 1217.

61. Stetson v. Grant [Me.] 66 A. 480.

62. Gen. St. p. 1282. Mt. Pleasant Cemetery Co. v. Erie R. Co. [N. J. Law] 65 A. 192.

63. Glos v. Spitzer, 226 Ill. 82, 80 N. E. 743; Village of Shumway v. Laturno, 225 Ill. 601, 80 N. E. 403.

64. Glos v. Spitzer, 226 Ill. 82, 80 N. E. 743.

65. Treasury Tunnel, Min. & Reduction Co. v. Gregory [Colo.] 88 P. 445.

66. Code Civ. Proc. § 442. Martin v. Molera [Cal. App.] 87 P. 1104.

67. But an exception may be treated as a reply if it sets out the facts fully. Ward v. Sturdivant [Ark.] 98 S. W. 690.

68. Replication admitted truth of pleas that defendants were not in possession, but averred that they claimed title or interest in premises. Glos v. Spitzer, 226 Ill. 82, 80 N. E. 743.

69. Discretion held not abused where no reason given for delay. Glos v. Swanson, 227 Ill. 179, 81 N. E. 386.

70. See 7 C. L. 1217.

71. In Georgia, if answer denies possession in defendant, court may, at trial term, allow amendment withdrawing such denial and refuse to enter disclaimer at plaintiff's instance. Moore v. Moore, 126 Ga. 735, 55 S. E. 950.

72. See 7 C. L. 1217.

73. Thomas v. Young, 79 Conn. 493, 65 A. 955; Moran v. Denison, 79 Conn. 325, 65 A. 291; De Land v. Dixon Power & Lighting Co., 225 Ill. 212, 80 N. E. 125; Sutton v. Whetstone [S. D.] 112 N. W. 850. Administrator must prove title in his intestate. Thomas v. Young, 79 Conn. 493, 65 A. 955. To establish title through the foreclosure of a mortgage, the burden is upon demandant to show that there was a breach of the condition of the mortgage at the time of foreclosure. Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

74. Plaintiff must sustain his allegations that he is owner and entitled to possession of land in dispute. Young v. Duggin, 30 Ky. L. R. 634, 99 S. W. 655. The plaintiff is bound to prove his allegations of seisin within twenty years. Stetson v. Grant [Me.] 66 A. 480. The demandant in a writ of entry must prove not only a right of entry at the time of the commencement of the action, but also such an estate in the premises as he has alleged. Id.

75. Thomas v. Young, 78 Conn. 493, 65 A. 955. The fact that defendant claims under plaintiff's grantor is equivalent to an admission of title in the grantor, and dispenses with further proof of title in him. Deen v. Williams [Ga.] 57 S. E. 427.

76. Young v. Duggin, 30 Ky. L. R. 634, 99 S. W. 655.

77. Evidence held not to warrant judgment for plaintiff. Harris v. Butler [Fla.] 42 So. 186. Evidence of prior possession of plaintiff too vague and uncertain to justify direction of verdict for him. Fletcher v. Riley [Ala.] 42 So. 548.

78. Glos v. Spitzer, 226 Ill. 82, 80 N. E. 743; Village of Shumway v. Laturno [Ill.] 80 N. E. 403.

reasonable doubt. It is sufficient if he prove it by a preponderance of the evidence.[79] Title may be proved by the deeds,[80] wills, and descents under which it is claimed,[81] or by showing adverse possession for the required period before the commencement of the action.[82] If plaintiff relies on a record or paper title, he must show a regular claim of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims.[83] But to avoid a nonsuit, he need only show prima facie title as against defendant.[84] The instrument under which plaintiff claims must so describe the property conveyed as to identify it.[85] When plaintiff establishes a prima facie case, he is entitled to recover unless affirmative evidence is introduced to meet it.[86] This burden defendant may meet by showing a superior title, title in himself,[87] or that plaintiff has no title [88] or is estopped

79. Nevin v. Disharoon [Del.] 66 A. 362.

80. Nevin v. Disharoon [Del.] 66 A. 362. Where plaintiff claims under a deed of conveyance duly executed and recorded, the presumption is that title passed, that grantor had sufficient seisin to enable him to convey, and that seisin and title correspond with each other. Stetson v. Grant [Me.] 66 A. 480. A guardian's deed is insufficient to establish title in plaintiff where the record fails to show an order authorizing sale, or an order confirming it. Phelps v. Nazworthy, 226 Ill 254, 80 N. E. 756.

81. Nevin v. Disharoon [Del.] 66 A. 362.

82. Twenty years in Delaware. Nevin v. Disharoon [Del.] 66 A. 362. In action by heir, deed purporting to convey to intestate fee simple title, and oral evidence that he was in possession during thirty years immediately preceding his death, will warrant judgment against defendant who disclaims title. Tucker v. Duncan, 224 Ill. 453, 79 N. E. 613 Where plaintiff, an administrator, relies upon proof of possession in his intestate at time of his death, and evidence only shows that he was then in possession of small portion of tract, which it fails to identify, verdict for defendant is demanded regardless of evidence offered in support of his title. Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004. Evidence held not to prove title by adverse possession in ancestor through whom plaintiffs claim. Winn v. Coggins [Fla.] 42 So. 897. Adverse possession by ancestor being shown, proof of conveyance to plaintiff by all other heirs is admissible. Henry v. Frohlichstein [Ala.] 43 So. 126.

83. Runkle v. Welty [Neb.] 111 N. W. 463.

If chain does not reach back to sovereign or to a common source, plaintiff must prove that he, or at least one of the grantors in his chain, had, at same time, been in possession of premises. Runkle v. Welty [Neb.] 113 N. W. 160.

In action by village to recover land forming part of street, evidence of chain of conveyances from government to P., and plat made by him of village, and deed from him to plaintiff executed subsequent to date of plat, held sufficient to establish title in plaintiff. Village of Shumway v. Laturno [Ill.] 80 N. E. 403.

Deeds and patents held to establish plaintiff's title. Cowles v. Carrier [Ky.] 101 S. W. 916.

Usual duplicate receipt of a receiver of a United States land office, in full force and unimpeached, is sufficient evidence of title, except as against one having a patent to same land, or persons claiming under him. Oldfather v. Ericsson [Neb.] 112 N. W. 356.

Informal deed: The fact that a deed in plaintiff's chain of title, executed by a nonresident of the state, was not signed and acknowledged by grantor's wife, will not preclude recovery. Rev. St. 1898, § 2160. Washburn Land Co. v. Swanby [Wis.] 110 N. W. 806.

Deed from one apparently a stranger to paramount title, and who does not appear to have ever been in possession, is insufficient to show title in grantee. Nesmith v. Hand [Ga.] 57 S. E. 763. And fact that such grantee has a homestead set apart in land does not strengthen his title thereto, nor the title of the beneficiaries of such homestead, as his heirs at law, nor prevent prescription running against any of them. Id.

84. This he does by producing his deed and in connection therewith a survey clearly identifying the premises and showing possession under the deed. Cottrell v. Pickering [Utah] 88 P. 696. Under Rev. St. 1898, § 2861, such a deed and survey establishes prima facie code of right of possession of all the land contained in deed, notwithstanding survey shows erection of a division fence cutting off part of such land. Id.

85. Description held insufficient to prove conveyance of certain lots. Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756.

86. Temple v. Phelps, 193 Mass. 297, 79 N. E. 482. Where plaintiff claims title through foreclosure of mortgage, it is only in case failure to pay according to terms of mortgage is established by him, or prima facie evidence of it introduced, the effect of which defendant seeks to avoid by proof of a subsequent payment, that burden is on defendant to establish payment. Id. A grant of lands from state under Pub. Laws N. C. 1835, p. 7, c. 6, as amended by Pub. Laws 1836-37, p. 29, c. 7, re-enacted 1 Rev. St. N. C. 1837, c. 42, §§ 1, 36, is sufficient to establish a prima facie case, and to shift the burden of proof to defendant. Bealmear v. Hutchins [C. C. A.] 148 F. 545.

87. Evidence in action against railroad company held to show that land in dispute was within defendant's right of way at time deeds to plaintiffs were executed. Meyers v. Wisconsin Cent. R. Co. [Wis.] 112 N. W. 673.

88. Where plaintiff bases claim upon fact that his ancestor died in possession of realty sued for, proof that it was set apart as a year's support to ancestor's widow,

from setting it up.[89] Where the defendant sets up adverse possession as a defense, the burden rests upon him to prove it[90] but when he has established a prima facie case, the burden shifts to plaintiff.[91] Evidence to be admissible must bear upon an issue made by the pleadings.[92] Irrelevant evidence is excluded.[93] A patent,[94] a deed[95] or the record thereof,[96] a mortgage,[97] or a will,[98] is admissible to prove title,

and that plaintiff is not her heir, requires finding for defendant. Moore v. Moore, 126 Ga. 735, 55 S. E. 950.

89. Evidence held to show an agreed line, with improvements, constituting an estoppel against plaintiff. Stumpe v. Kopp, 201 Mo. 412, 99 S. W. 1073. Evidence held to sustain finding that there was no agreement between parties respecting boundary line. Cottrell v. Pickering [Utah] 88 P. 696.

90. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380; Nevin v. Disharoon [Del.] 66 A. 362. He must show continuous adverse possession for the required period. Bland v. Beasley [N. C.] 58 S. E. 993. Evidence held to show adverse possession for statutory period. Stumpe v. Kopp, 201 Mo. 412, 99 S. W. 1073. Evidence held insufficient to show adverse possession under color of title. Hunter v. Wethington [Mo.] 103 S. W. 543. In Nevada it has been held that, where defendant alleges an agreement that she shall be left in possession of lands in dispute and shall receive a conveyance thereof, the burden remains upon plaintiff to present evidence of something to overcome defendant's possession for a time sufficient to give title under statute of limitations. Adams v. Child, 28 Nev. 169, 88 P. 1087.

91. Evidence held not to establish either interruption of possession or seisin or possession by plaintiff's ancestor within twenty years before commencement of action. Closuit v. John Arpin Lumber Co., 130 Wis. 258, 110 N. W. 222.

92. Under the general issue, it is competent to disprove plaintiff's allegation of seisin by showing title in a third party, even though defendants do not claim under him. Stetson v. Grant [Me.] 66 A. 480. But if plaintiff shows seisin within twenty years, defendant cannot show a subsequent conveyance to a third party under whom he does not claim. Id. Where it is alleged that one of the defendants was in the actual occupancy of the premises, and that the others each claimed same title or interest therein, testimony that they did not claim any title or interest is inadmissible in the absence of a denial by verified plea. Glos v. Swanson, 227 Ill. 179, 81 N. E. 386.

93. Irrelevant: Where defendant claims under parol gift, from one since deceased, opinions of neighbors as to who appeared to be head of house. Wood v. Praul, 217 Pa. 293, 66 A. 528. Evidence that heirs of one under whom plaintiff claims, who held only legal title, redeemed property from foreclosure sale, offered for purpose of showing beneficial interest in estate of intestate. Sutton v. Whetstone [S. D.] 112 N. W. 850. A letter to one, since deceased, through whom plaintiff claims, from his brother, asserting title in their mother, in absence of testimony showing what response was made thereto. Mitchell v. Cleveland [S. C.] 57 S. E. 33. Question to witness for defendant as to whether he found record of deed to deceased clerk of court through whom plaintiff claims. Id.

Relevant: Evidence that boundary lines as established by early settlers are in harmony with disputed monuments relevant as tending to show that such monuments are true corners. Bridenbaugh v. Bryant [Neb.] 112 N. W. 571. Where answer alleged that plaintiff's grantor obtained deed from one deceased by undue influence, and deed to plaintiff was without consideration, evidence tending to show that plaintiff paid no consideration admissible to prove that property in hands of plaintiff was subject to infirmity attaching to title of his grantor. Doherty v. Courtney, 150 Cal. 606, 89 P. 434. Question held relevant to issue raised by answer as to mental and physical condition of grantor under whom plaintiff claims at time of execution of deed. Id. Patent and deeds which form defendant's title to land to which he claims land in suit is an accretion. Stoner v. Royar, 200 Ala. 444, 98 S. W. 601. Receipt from state treasurer for purchase money for land sought to be recovered, paid by one from whom plaintiff claims as heir, admissible in connection with other evidence of purchase. Rogers v. Keith [Ala.] 42 So. 446. Item in will of plaintiff's ancestor held to convey title. Webb v. Hicks, 127 Ga. 170, 56 S. E. 307.

94. Patent from United States and deeds following admissible to prove title. Stoner v. Royar, 200 Mo. 444, 98 S. W. 601. Error in excluding such patent and deeds for this purpose is not cured by allowing their introduction as showing color of title in support of claim of title by adverse possession. Id.

95. Instrument held to be a deed, and admissible as part of defendant's chain of title. Hamilton v. Cargile, 127 Ga. 762, 56 S. E. 1022. Valid tax deed admissible to prove defendant's title. Treasury Tunnel, Min. & Reduction Co. v. Gregory [Colo.] 88 P. 445. When such a deed, valid on its face, is excluded on sole ground that it is void upon its face, defendant need not offer proof that statutory notice was given of expiration of time for redemption, or that assessment was less than $500. Id.

96. Brucke v. Hubbard, 74 S. C. 144, 54 S. E. 249.

97. Unpaid mortgage admissible as a link in plaintiff's chain of title, though there is endorsed thereon receipt for part payment of mortgage debt, dated several years after law day of mortgage, and after default in payment thereof. Foster v. Carlisle [Ala.] 42 So. 441.

98. But in Alabama plaintiff's recovery cannot be defeated by a will which has not been probated and proven. Griswold v. Griswold [Ala.] 42 So. 554. In New York, if defendant relies upon an unprobated will to sustain his title, plaintiff is entitled to prove that at time of execution testator had not testamentary capacity. Smith v. Ryan, 116 App. Div. 397, 101 N. Y. S. 1011. Where

or as a link in a chain of title. Proof that land was the homestead of defendant's father admissible where such homestead vested ipso facto in widow and in children.[99] As a rule, the only objection that can be raised to the admission of a grant or deed is that the probate is defective.[1] A deed from executors will not be excluded on the ground of informality in the sale.[2] And though a deed be void for uncertainty, and inadmissible as a muniment of title, it may be admissible to show color of title.[3] But a deed is not admissible where the property sought to be conveyed was derived by purchase at a void sale.[4] A tax deed is admissible for the purpose of bringing in the defense of the statute of limitations,[5] but a deed in which the description of the land intended to be conveyed is so indefinite that it cannot be located is not admissible for such purpose.[6] Under a rule of court requiring parties to file copies of their abstracts of title, the proponent of an abstract is not entitled to have it admitted in its entirety as affirmative evidence in his favor.[7] Evidence of a survey made to ascertain the land intended to be conveyed is admissible.[8] Tax receipts are admissible to show that the party paying the taxes claimed the land.[9] Evidence is admissible to show that the deed under which plaintiff claims was made to a fictitious person.[10] Statements of one under whom plaintiff claims in regard to his title are inadmissible in plaintiff's favor.[11] In South Carolina a plaintiff is not precluded from testifying that he left the deed under which he claims title with the grantor for safe-keeping by the fact that the grantor is dead.[12] Evidence that a deed under which plaintiff claims was obtained by fraud,[13] or tending to impeach the fairness of plaintiff's method in procuring his deed,[14] is not admissible. Evidence is admissible to show that defendant's possession was not adverse.[15] Expert testimony as to locations is

defendant claims under will, he is estopped from objecting to its admission on ground that there has been no valid probate thereof. Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784.

99. Homestead under $500 in value. Snell v. Roach [Ala.] 43 So. 189.

1. State grant offered by plaintiff. Bealmear v. Hutchins [C. C. A.] 148 F. 545.

2. Hamilton v. Cargile, 127 Ga. 762, 56 S. E. 1022.

3. Admissible where there is evidence that claiming under it purchaser took possession of particular lands in suit. Rogers v. Keith [Ala.] 42 So. 446.

4. Deed from state auditor to defendant not admissible where title sought to be conveyed was derived by state by purchase at tax sale founded on an assessment of property of one who had no title to the land and whose acts of possession were solely as agent for plaintiffs. Rogers v. Keith [Ala.] 42 So. 446.

5. Doe v. Moog [Ala.] 43 So. 710.

6. Even though it be shown that the grantee entered into possession of same land under grantor. Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004.

7. The purpose of such rule is to enable court to learn whether parties trace title from a common source, and, if so, to limit proofs to subsequent conveyances and transactions. Davis v. Jennie Bros. [C. C. A.] 152 F. 696.

8. Staub v. Hampton, 117 Tenn. 706, 101 S. W. 776. And in case of conflict, the marks thereof will control the description in the deed, and this though the same result is reached as if a bill in equity had been filed to correct the deed. Staub v. Hampton, 117 Tenn. 706, 101 S. W. 776. Record of a certificate and plat of survey found in book kept by county surveyor not admissible where survey does not purport to be official act of such surveyor. Stumpe v. Kopp, 201 Mo. 412, 99 S. W. 1073.

9. Langston v. Cothran [S. C.] 58 S. E. 956.

10. Where grantor testifies that grantee lived in a certain township, evidence of persons well acquainted with inhabitants of such township is admissible to prove that no such person ever lived there. Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756.

11. Sutton v. Whetstone [S. D.] 112 N. W. 850. A complaint of intervention sought to be filed by one under whom plaintiff claims, in a suit to which defendant was a party, is inadmissible for purpose of showing title in such person. Id.

12. Code Civ. Proc. 1902, § 450, does not apply in such case. Brucke v. Hubbard, 74 S. C. 144, 54 S. E. 249.

13. Loranger v. Carpenter, 148 Mich. 549, 14 Det. Leg. N. 273, 112 N. W. 125.

14. Rix v. Smith, 145 Mich. 203, 13 Det. Leg. N. 508, 108 N. W. 691.

15. Evidence tending to show that defendant's possession has been as lessee of plaintiffs. Thomas v. Young, 79 Conn. 493, 65 A. 955. The leases admissible for this purpose. Id. It is permissible for plaintiff to testify as to his reason for allowing defendant to remain in possession. Brucke v. Hubbard, 74 S. C. 144, 54 S. E. 249. It is not permissible to ask plaintiff if he was in possession of the land in controversy without specifying any time. In action against one claiming title by adverse possession. Flanagan v. Fabens [Neb.] 110 N. W. 655.

admissible.[16] The general rules as to declarations,[17] admissions,[18] and opinion testimony [19] apply.

§ 6. *Trial and judgment.*[20]—The question of plaintiff's title is one of law, to be decided by the court upon the title papers introduced,[21] but the questions whether the land sued for is covered by the deeds which form defendant's proper title,[22] and whether relinquishment by plaintiff of his prior possession was animo revertendi,[23] are questions of fact for the jury.

Instructions.[24]—The instructions must conform to the pleadings [25] and the evidence.[26] They must not submit a question of law to the jury,[27] or charge upon the facts,[28] or assume a fact which should be submitted to the jury.[29] Charges which are argumentative, or which single out and give undue prominence to certain testimony adduced at the expense of other testimony, are bad.[30] It is not reversible error to add explanatory words to a requested charge which do not change the proposition of law embodied therein.[31]

Verdict and judgment.[32]—The verdict [33] and findings [34] must be sustained by the evidence. Special findings of the court must be consistent with its general conclusions.[35] The court cannot determine the rights of persons not parties to the suit.[36] Where there are several defendants, the default of one does not relieve the plaintiff from the necessity of establishing his case as against those who appear and plead.[37] Judgment must be rendered upon the issue raised by the pleadings [38]

16. Where issue is as to the location of a certain lot, expert testimony as to the location of lands and boundaries is admissible. Chappel v. Roberts [Ala.] 43 So 489.

17. Declarations of defendant's grantor contemporaneous with making of deed, made for the purpose of settling a boundary, are admissible. Rix v. Smith, 145 Mich. 203, 13 Det. Leg. N. 508, 108 N. W. 691. But his declarations relative to plaintiff's title, made after execution of deed, are not admissible. Id. Declarations of such grantor, while in possession, that she held under her father's will, are admissible. Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784.

18. Advertisement of land for sale by one as administrator held not admissible, in action brought by his successor in office against him as an individual, as an admission of prior possession of intestate. Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004.

19. Sister of grantor under whom plaintiff claims, who had been living with her, competent, under Code Civ. Proc § 1870, to give opinion respecting her mental condition. Doherty v. Courtney, 150 Cal. 606, 89 P. 434.

20. See 7 C. L. 1220.

21. Cowles v. Carrier [Ky.] 101 S. W. 916.

22. Stoner v. Royar, 200 Mo. 444, 98 S. W. 601.

23. Jackson v. Strickland, 127 Ga. 106, 56 S. E. 107.

24. See 7 C. L. 1220.

25. Cowles v. Carrier [Ky.] 101 S. W. 916. It is proper to refuse to charge that the defense rests entirely upon theory of adverse possession when answer denies title in plaintiffs. Langston v. Cothran [S. C.] 58 S E. 956.

26. Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004. It is proper to refuse a requested charge if there is no evidence to support it. Langston v. Cothran [S. C.] 58 S. E. 956. Where plaintiff by his testimony eliminates a claim made in one count of his complaint, court need not instruct in reference thereto. Chappell v. Roberts [Ala.] 43 So. 489.

27. Charge instructing jury to find for defendant if they find he was in adverse possession at time of conveyance to plaintiff is erroneous in not setting forth constituents of adverse possession. Chambers v. Morris [Ala.] 42 So. 549.

28. Charge not violative of constitutional inhibition. Mitchell v. Cleveland [S. C.] 57 S. E. 33.

29. Instruction assuming fact that land sued for is covered by deeds forming defendant's paper title. Stoner v. Royar, 200 Mo. 444, 98 S. W. 601.

30. Chappell v. Roberts [Ala.] 43 So. 489.

31. Explanatory words added to requested charge that if jury find plaintiff has shown good title then she is presumed to be owner until contrary is shown. Langston v. Cothran [S. C.] 58 S. E. 956.

32. See 7 C. L. 1220.

33. Verdict as to boundary held sustained by evidence. Smith v. Nelson [Neb.] 111 N. W. 779.

34. Special findings of jury establishing a vacancy between certain surveys, upon which another survey was located and patented, held supported by evidence. Bridgeport Coal Co. v. Wise County Coal Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 678, 99 S. W. 409. Evidence upon question of surveys and boundaries held to support finding of court. Bridenbaugh v. Bryant [Neb.] 112 N. W. 571.

35. Special findings upon question of boundaries held to conform to this requirement. Bridenbaugh v. Bryant [Neb.] 112 N. W. 571.

36. Scharff v. McGaugh [Mo.] 103 S. W. 550. Cannot adjudge that persons not parties to suit hold as trustees property standing in their names as individuals. Sanborn v. Loud [Mich.] 14 Det. Leg. N. 586, 113 N. W. 309.

37. Glos v. Swanson, 227 Ill. 179, 81 N. E. 386.

and must be sustained by the evidence.[39] Judgment may be given for a portion of the land sued for.[40] In a proper case the sale of the land under execution on the judgment will be restrained by injunction,[41] and upon sufficient affidavit an injunction pendente lite will issue to restrain defendants from removing a growing crop.[42]

Writ of possession.[43]—The writ of habere facias possessionem cannot be made to include personal property.[44] The execution of a writ of ejectment will be enjoined if it appears that defendant has an equitable estate in the locus in quo.[45]

Costs.[46]—If judgment is given for plaintiff, defendant, if he admitted possession, must pay costs,[47] and this is so though defendant offers to surrender possession.[48]

§ 7. *New trial.*[49]—An erroneous instruction as to plaintiff's right of recovery is ground for a new trial.[50] In New York defendant is entitled to a new trial as of right upon payment of costs within three years from the entry of judgment.[51] The Pennsylvania statute providing that one judgment in ejectment shall be conclusive between the parties is not retroactive.[52]

§ 8. *Mesne profits and damages.*[53]—In Iowa damages for withholding possession or using or injuring the premises may be recovered,[54] but in Alabama mesne profits only are recoverable.[55] Where the court finds title in the plaintiff, it is proper, in instructing the jury upon the question of compensation to be allowed for timber cut upon the land, to assume plaintiff's ownership.[56] In Arkansas, where judgment for defendant has been reversed as to part of the lands and the cause remanded,

38. Simmons v. Sharpe [Ala.] 42 So. 441. Where complaint describes property claimed as a fractional portion of two streets and claims title by reversion to original grantor and conveyance from him, plaintiff cannot recover on ground of title acquired by ownership of abutting lots. Bothwell v. Denver Union Stockyard Co. [Colo.] 90 P. 1127. Where plaintiff relied on sheriff's deed or execution sale and defendants, one being defendant in execution and others mortgagees who acquired their right to separate parcels of the land sued for, joined in a plea of not guilty, a judgment against all the defendants was held proper. Simmons v. Sharpe [Ala.] 42 So. 441.

39. Judgment as to boundary held sustained by evidence. Smith v. Nelson [Neb.] 111 N. W. 779.

40. For that portion which pleadings and facts show plaintiff entitled to. Edwards v. Brusha, 18 Okl. 234, 90 P. 727. See, also, Board of Education of Glynn County v. Day [Ga.] 57 S. E. 359. Provided verdict specifies with certainty the portion that is found to be his property. Alexander v. Thompson [Ga.] 58 S. E. 836.

41. Injunction will issue at suit of defendant who is equitable owner of a mortgage on land. Taylor v. Roniger, 147 Mich. 99, 13 Det. Leg. N. 994, 110 N. W. 503.

42. Affidavit sufficient where defendants made no showing against application. O'Connor v. Oliver [Wash.] 88 P. 1025.

43. See 7 C. L. 1220.

44. Keystone Coal Co. v. Williams, 216 Pa. 217, 65 A. 407. If such property is seized under writ, it may be recovered in a common-law action, and a rule to open judgment and set aside writ, so far as it relates to personalty, should be discharged. Id.

45. In this case after defendant had purchased the locus in quo by parol agreement from predecessor in title of plaintiff, plaintiff purchased from record owner at time when defendant was in visible possession under his prior purchase. Atlantic City R. Co. v. Johanson [N. J. Eq.] 65 A. 719. The fact that locus in quo is a highway, and that possession of defendant consists of occupancy thereof with a steam railway, is no ground for refusing to enjoin execution of writ. Id.

46. See 7 C. L. 1220.

47. Village of Shumway v. Laturno [Ill.] 80 N. E. 403. Defendant who pleaded not guilty cannot escape liability on theory that he had no interest in property. Thomson v. Camper, 106 Va. 315, 55 S. E. 674.

48. Village of Shumway v. Laturno [Ill.] 80 N. E. 403.

49. See 5 C. L. 1064. See, also, New Trial and Arrest of Judgment, 8 C. L. 1153.

50. Alexander v. Thompson [Ga.] 58 S. E. 836.

51. Code Civ. Proc. § 1525. Collection of costs by execution against defendant, which is satisfied by sale of whatever interest he has in the premises from which he was ejected, constitutes a payment of cost within the meaning of this statute. Townshend v. Keenan, 117 App. Div. 484, 102 N. Y. S. 792.

52. Act May 8, 1901. Neeld v. Cunningham, 216 Pa. 523, 65 A. 1095.

53. See 7 C. L. 1221.

54. Code, §§ 4187, 4199. Anderson v. Acheson, 132 Iowa, 744, 110 N. W. 335. Where petition asks for damages for injury to premises, they may be recovered though proof does not warrant a writ of ejectment. Code, § 3639. Id.

55. Mesne profits only and not damages for trespass are recoverable under Code 1896, § 1555. Henry v. Davis [Ala.] 43 So. 122.

56. Cowles v. Carrier [Ky.] 101 S. W. 916.

the trial court may assess damages sustained by plaintiff from the cutting of timber subsequent to date of final decree.[57]

§ 9. *Allowance for improvements and expenditures.*[58]—Value of permanent improvements may be recovered by way of set-off.[59] In a second ejectment by defendant after judgment against him, he may recover for improvements.[60]

ELECTION AND WAIVER.

§ 1. Election in General (1037).
§ 2. Occasions for Elections (1037).
A. Of Remedies (1037).
B. Of Rights and Estates (1038).
§ 3. Waiver in General (1039).
§ 4. Acts and Indicia of Election and Waiver (1039).
§ 5. Consequences of an Election or Waiver (1040).
§ 6. Pleading (1041).

Only a general treatment of the doctrines of election and waiver is here attempted. For application of the principles involved, reference must be had to the topic dealing with the subject-matter concerned. Election between counts [1] and the waiver of objections in judicial proceedings [2] are specially treated elsewhere, as are the doctrines of estoppel [3] and laches.[4]

§ 1. *Election in general. Definition.*[5]—An election is a choice between two or more available, inconsistent rights or remedies.[6]

§ 2. *Occasions for elections. A. Of remedies.*[7]—One may elect between available and coexistent remedies,[8] but he cannot at the same time have remedies which are inconsistent.[9] A distinction must be made between an election and a mistake of remedy.[10] Hence an attempt to apply a remedy not in existence does not bar the right to subsequently invoke the proper one.[11] At common law one could waive a

57. Kirby's Dig. § 2755; Collins v. Paepcke-Light Lumber Co. [Ark.] 100 S. W. 86. Supplementary complaint defective in not stating that timber was cut since date of final decree. Id.

58. See 7 C. L. 1221.

Right to recover, under occupying claimant's acts, is elsewhere treated, as the question does not always arise in ejectment. See Accession and Confusion of Property, 9 C. L. 10.

59. Webb v. Hicks, 127 Ga. 170, 56 S. E. 307.

60. Neeld v. Cunningham, 216 Pa. 523, 65 A. 1095.

1. See Pleading, 8 C. L. 1355.

2. See Saving Questions for Review, 8 C. L. 1822; Appeal and Review, 9 C. L. 108.

3. See Estoppel, 7 C. L. 1489.

4. See Equity, 7 C. L. 1323.

5. See 7 C. L. 1222.

6. See post, § 2.

7. See 7 C. L. 1222.

8. Under Code 1887, §§ 2902, 2903, 2906, and act Jan. 29, 1894, where one injured by another's negligence dies pending suit, his administrator may either continue the action or sue for wrongful death. Brammer's Adm'r v. Norfolk & W. R. Co. [Va.] 57 S. E. 593. One from whom money has been fraudulently obtained may either sue in tort for damages or proceed under the law authorizing recovery of the money itself. Morgan's Louisiana, etc., Co. v. Stewart [La.] 44 So. 138. A conditional sale contract will not be held to give to the vendor both the right to retake possession on default and the right to enter judgment for the full amount of the price unless it so provides expressly or by necessary implication. Ketcham v. Davis, 31 Pa. Super. Ct. 583.

9. Party who obtained a judgment for price of lumber sold could not claim the material as against a vendor of land under an alleged agreement with vendee. Mosca Town Co. v. Wellington [Colo.] 89 P. 783. Where title to certain materials was in plaintiff only by virtue of a contract, he could not disaffirm and also claim title. Whiting v. Derr, 105 N. Y. S. 854. A purchaser of a horse may not recover actual damages and also statutory damages for false statements as to pedigree. Galbraith v. Carmode, 43 Wash. 456, 86 P. 624. Suit by infant against attorneys who wrongfully paid proceeds of a suit to his father as next friend not inconsistent with previous suit by infant against father for the money. Wood v. Claiborne [Ark.] 102 S. W. 219. Applicant for school land put to election between enforcing rights as purchaser and accepting statement of land commissioner that he had lost his opportunity and was entitled to only his cash payment. Hamilton v. Gouldy [Tex. Civ. App.] 19 Tex. Ct. Rep. 12, 103 S. W. 1117.

10. Rule that adoption of one of two or more inconsistent remedies bars resort to the others does not apply where there is only one remedy. Clark v. Heath, 101 Me. 530, 64 A. 913. The party must have had two valid, available, and inconsistent remedies, and must have undertaken to pursue one of them. Bandy v. Cates [Tex. Cr. App.] 16 Tex. Ct. Rep. 811, 97 S. W. 710. An effort to enforce a supposed but nonexisting remedy does not constitute an election. Id.

11. Attempt to foreclose a lien when debt was barred held not to preclude right

tort and sue in assumpsit only in cases of conversion or where a contract relation existed between the parties.[12] A cestue que trust may elect between ratifying and disaffirming an unauthorized transaction and will be concluded by an election once made.[13] Statutory rights of action for different kinds of negligence confer no right of election.[14] Where a right already exists at law or equity a new remedy given by statute is cumulative.[15]

(§ 2) *B. Of rights and estates.*[16]—One may not take under and against a will or other instrument at the same time,[17] hence a widow is often put to an election between testamentary provisions and dower,[18] but she cannot be required to elect unless an intention to deprive her of dower is expressly stated or clearly implied,[19] and in the absence of a will no election is necessary to entitle a widow to common-law dower.[20] A wife's or husband's right of election is purely a personal one,[21] hence it cannot be enforced to suit the creditors of the survivor.[22] A statutory pro-

to have trustee foreclose out of court. Bandy v. Cates [Tex. Cr. App.] 16 Tex. Ct. Rep. 811, 97 S. W. 710. Conditional sale vendor by attempting to enforce a lien under mistaken theory that title had passed held not precluded from subsequently suing in replevin. Bierce v. Hutchins, 205 U. S. 340, 51 Law. Ed. 828. Rejected request of conditional sale vendee to be permitted to treat contract as a lease held not to preclude his right to redeem where not made until after time for payment of last installment. Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929. Bringing **trover** did not bar **assumpsit** where the latter was the only remedy. Clark v. Heath, 101 Me. 530, 64 A. 913. Bringing of assumpsit against an officer wrongfully levying upon property but before sale does not waive the tort, since the officer was not liable until sale. Holmes v. Smith [Mich.] 112 N. W. 912. Suit for rescission of contract for exchange of property not a bar to subsequent suit for damages where first suit was dismissed for bad pleading. Dooley v. Crabtree [Iowa] 109 N. W. 889. An unnecessary and unsustainable suit on a judgment against administrators, dismissed before service of summons, held no election of remedy. Shively v. Harris [Cal. App.] 90 P. 971. Proving claim in bankruptcy of brokerage firm no bar to recovery from member of stock exchange who did the buying. Doucette v. Baldwin [Mass.] 80 N. E. 444. In suit to compel conveyance of land bought at receiver's sale, a plea that plaintiff had proceeded by error to have the sale set aside should have been overruled where on its face the writ was fatally defective, though its validity had not then been passed upon. Miller v. Drought [Tex. Civ. App.] 19 Tex. Ct. Rep. 416, 102 S. W. 145.

12. Husband could not waive tort and sue in assumpsit for medical expense for his wife injured by defendant's negligence. Plefka v. Detroit United R. Co., 147 Mich. 641, 14 Det. Leg. N. 33, 111 N. W. 194.

13. Where executors exchanged realty without authority, a devisee's assignment of his interest in proceeds of a foreclosure sale of land received in exchange held a ratification. Hine v. Hine, 118 App. Div. 585, 103 N. Y. S. 535. Where executors instead of foreclosing certain mortgages took title to mortgaged premises and sold them action of interested persons in holding executors responsible for full amount which should have been collected on the mortgages held to bar recovery of proceeds of sale. Id.

14. Right of action under Rev. St. 1899, § 2864, for death caused by negligence of a defendant's officers or employes is distinct from that given by §§ 2865, 2866, for death caused by defendant's negligence, and for death resulting from negligence of character specified under § 2864 one may not elect to sue under the subsequent sections. Casey v. St. Louis Transit Co. [Mo.] 103 S. W. 1146.

15. Statute providing for mechanic's lien on personalty, and giving remedy for its enforcement, did not take away pre-existing right of lien holder to attach the property without losing lien. That other remedies may exist for the abatement of a public nuisance does not affect the power in this regard conferred on a district attorney by statute. People v. McCue, 150 Cal. 195, 88 P. 899.

16. See 7 C. L. 1224.

17. Wife seeking fee of a house under a writing from her husband held required in equity to release her dower in two other houses. Cowdrey v. Cowdrey [N. J. Eq.] 64 A. 98. One may not take under and against a will. Tolley v. Poteet [W. Va.] 57 S. E. 811. Widow's failure to renounce will and to surrender interests acquired thereby after obtaining knowledge that she had a joint interest in land devised held to preclude her from claiming any further interest. Id.

18. Under Shannon's Code, § 4146, where all the personalty is given to a wife, and the realty so long as she remains single, she is required to make an election within one year between dower and the provisions of the will. Chamness v. Parrish [Tenn.] 103 S. W. 822.

19. Where will gave $1,000 and life estate in all other property, but there was no declaration that it was in lieu of dower. Warner v. Hamill [Iowa] 111 N. W. 939. See also Wills, 8 C. L. 2305.

20. Keeney v. McVoy [Mo.] 103 S. W. 946.

21. In re Fleming's Estate, 217 Pa. 610, 66 A. 874.

22. Husband could not be compelled to take against wife's will for discharge of trust liabilities. In re Fleming's Estate, 217 Pa. 610, 66 A. 874.

vision as to the rights of a widow who renounces her husband's will assumes the existence of a valid will, and hence it does not preclude the widow from contesting a will as sole heir.[23] A widow's long delay in making an election does not constitute laches where the election is in fact made within the time allowed by law.[24] Under the Missouri statutes the mere passive enjoyment by a widow of her quarantine right does not defeat her right to elect to take a child's part,[25] nor can an heir defeat such right by filing a suit for the assignment of dower and for partition.[26]

§ 3. *Waiver in general. Definition.*[27]—A waiver is a voluntary relinquishment of a known right.[28]

§ 4. *Acts and indicia of election and waiver.*[29]—An election is generally made by the doing of some decisive act indicating a choice,[30] but full knowledge of all the facts and circumstances is essential.[31] A failure to act is sometimes held to constitute an election.[32] That a widow deals with an interest in her husband's realty as if she owned it in fee raises an inference of a seasonable election to take a child's part in lieu of dower.[33] In the absence of estoppel,[34] acts done prior to the commencement of judicial proceedings and indicating an intent to rely on a particular remedial right do not constitute an election.[35]

A waiver may consist of acts clearly showing an intention to abandon a certain right[36] or which are inconsistent with an intention to insist upon it.[37] An ante-

23. Freeman v. Freeman, 61 W. Va. 682, 57 S. E. 292.

24. There being no administration, twenty years' delay not laches, statute allowing one year after granting of letters. Child's part. Keeney v. McVoy [Mo.] 103 S. W. 946.

25, 26. Keeney v. McVoy [Mo.] 103 S. W. 946.

27. See 7 C. L. 1225.

28. See post, § 4.

29. See 7 C. L. 1225.

30. Acts held to constitute an election: Filing mechanic's lien for balance unpaid on a heating plant held election to abandon title and recover price. Kirk v. Crystal, 118 App. Div. 32, 103 N. Y. S. 17. Refusal to accept an undivided interest in coal under contract for the fee held an election to rescind the contract. Farber v. Blubaker Coal Co., 216 Pa. 209, 65 A. 551. Evidence that a husband delivered certain articles to be disposed of as directed in his wife's will held admissible to show that he elected to take under will. In re Church's Estate [Vt.] 67 A. 549.

Held no election: Tenant's allegation in former action that landlord had agreed to protect him from leaks in the roof of leased building held not such election to sue on contract as to bar action to enforce common-law liability. Pratt, Hurst & Co. v. Tailer, 53 Misc. 82, 103 N. Y. S. 1094. That testatrix's children accepted from husband deeds to land in part acquired by him under the will did not preclude them from suing to set aside the probate. Holland v. Couts [Tex.] 17 Tex. Ct. Rep. 113, 98 S. W. 236.

31. Ignorance of nature of property or rights justifies revocation of election unless outside rights have intervened. Talley v. Poteet [W. Va.] 57 S. E. 811. Replevin suit no bar to subsequent recovery of certain expenses caused by defendant, but not known to plaintiff when first suit was brought. Haughawaut v. Royse, 122 Mo. App. 72, 98 S. W. 101.

32. Failure of husband to assert rights against life tenants under wife's will held no bar to his claim against remaindermen, the latter not having been misled or injured. Davis v. Fenner, 30 Pa. Super. Ct. 389.

33. This so though widow by mistake claimed less than she was entitled to. Rountree v. Gaulden [Ga.] 58 S. E. 346.

34. See Estoppel, 7 C. L. 1489.

35. Vendee's rejected offer to return goods and demand for return of price not a bar to subsequent suit for damages. Brooks v. Romano [Ala.] 42 So. 819.

36. Where an administratrix claimed as a gift property returned by her as assets, an objection to the surrogate's jurisdiction did not admit that administratrix was entitled to the property or waive contestant's claim that the property was assets. In re Cavanagh, 105 N. Y. S. 850. Securing injunction held not to preclude recovery of damages for injury to property before it was obtained or for period covered by its restraint. Miller v. Rambo, 73 N. J. Law, 726, 64 A. 1053.

37. Acts held waived: Buyer's fraud in failing to take up a note in six hours as agreed held waived by sellers keeping him in his employ for several weeks and failing to bring suit until after a month. Warren v. Osborne [Tex. Civ. App.] 97 S. W. 851. Failure to set up claim to certain land in suit on a bond held to preclude assertion of claim under bond fifteen years later. Cornett v. Moore, 30 Ky. L. R. 280, 97 S. W. 380. Father recovering damages for son held "estopped" from thereafter himself recovering such damages. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784.

Held no waiver: Reconveyance of part of land obtained by fraudulent deed did not prevent setting aside of first deed where grantor was ignorant of her rights in the land and of the effect of the deeds. Tolley v. Poteet [W. Va.] 57 S. E. 811. Mere institution of suit in justice court no bar to

nuptial provision does not waive dower unless made in lieu thereof.[38] An agistor's lien is waived by an attachment of the property to satisfy the claim.[39]

§ 5. *Consequences of an election or waiver.*[40]—A deliberate and intelligent election between inconsistent rights or remedies bars a second election.[41] Consistent remedies may be concurrently pursued,[42] but full satisfaction in one is a satisfaction in all.[43] The particular results attendant upon acceptance or renunciation of testamentary provisions will depend upon the statute and the provisions of the will.[44]

claim of larger amount in a court of record. Papineau v. White, 117 Ill. App. 51. Vendee's collection of rent and advertising land for sale held no waiver of right to recover price for want of good title. Moore v. Price [Tex. Civ. App.] 18 Tex. Ct. Rep. 693, 103 S. W. 234. That assignee of a mortgage consented to assignor's returning to another a conditional sale note held as additional security did not waive his right to enforce mortgage as a superior lien pursuant to agreement between owner of note and mortgagee. Hyatt v. Bell [Ark.] 103 S. W. 748.

Irregular proceedings: Creditor's action in trover against trustee in bankruptcy held affirmance of a sale free from liens. In re Platteville Foundry & Mach. Co., 147 F. 828. Irregularity in report of road commissioner waived by filing claim for damages on account of establishment of road. Hoye v. Diehls [Neb.] 110 N. W. 714. City could not accept money in settlement of special assessments and afterwards contend that stipulation and judgment under which it was received were invalid. State v. Spokane [Wash.] 87 P. 944.

Invalid statutes: One who seeks damages under a statute providing for an improvement cannot contest the constitutionality of the taking thereunder or the method provided for the assessment of the damages. American Unitarian Ass'n v. Com., 193 Mass. 470, 79 N. E. 878. Appellant could not urge unconstitutionality of statute under which he was in court. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 So. 979. Probate judge by accepting services of clerk and deputies elected under unconstitutional statute held to have waived unconstitutionality so far as such assistants were concerned, and he was required to pay them for their services. Henderson v. Koenig, 192 Mo. 690, 91 S. W. 88. Held too late to attack street improvement ordinance after permitting city to incur expense and assess benefits. Durrell v. Woodbury [N. J. Law] 65 A. 198.

Contract provisions: Provision for written notice to vendor of machinery held waived by agents going and attempting to make it comply with warranty. Harrison v. Russell & Co., 12 Idaho, 624, 87 P. 784. Purchaser's removal of stone held waiver of provision for inspection on cars. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856. Failure to deliver abstract of title within ten days waived by its acceptance later. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31. Plaintiff's presence at building of a boat and requesting changes held waiver of stipulation as to amount of draft. Marine Iron Works v. Wiess [C. C. A.] 148 F. 145. Vendee held not to have waived tender of deed. Lefferts v. Dolton, 217 Pa. 299, 66 A. 527. Acceptance of rent held waiver of right to forfeit mineral lease up to that date. Monarch Oil, Gas & Coal Co. v. Richardson, 30 Ky. L. R. 824, 99 S. W. 668. Evidence insufficient to show waiver by carrier of stipulation requiring shipper to give written notice of claim for damages. St. Louis, etc., R. Co. v. Phillips, 17 Okl. 264, 87 P. 470.

38. Contract construed not to bar dower. Brown v. Brown, 117 App. Div. 199, 102 N. Y. S. 291.

39. The two liens are inconsistent. Crismon v. Barse Live Stock Commission Co., 17 Okl. 117, 87 P. 876.

40. See 7 C. L. 1229.

41. Election of a creditor to prove his claim against estate of a corporation held waiver of right to set aside receivership proceedings for fraud. Watrous v. Hilliard [Colo.] 88 P. 185. Administrator who continued decedent's suit for negligence held barred from subsequent action for wrongful death. Brammer's Adm'r v. Norfolk & W. R. Co. [Va.] 57 S. E. 593. Where, after nonsuit as against a street railway company, plaintiff elected to continue the case against a city, he was bound by the judgment. Crotty v. Danbury, 79 Conn. 379, 65 A. 147. Recovery of damages for pollution of water held bar to recovery of penalty for violation of injunction against pollution. Gorham v. New Haven, 79 Conn. 670, 66 A. 505. Requesting return of cash payment held to bar an applicant for school land from claiming rights as purchaser. Hamilton v. Gouldy [Tex. Civ. App.] 19 Tex. Ct. Rep. 12, 103 S. W. 1117.

42. McLendon Bros. v. Finch [Ga. App.] 58 S. E. 690. Specific performance of a contract and action for breach held not inconsistent (Balleisen v. Schiff, 105 N. Y. S. 692), hence commencement of suit for specific performance did not waive defendant's default (Id.). Infant who had sued by his father as next friend could proceed against attorneys for paying judgment to father though he had previously brought suit against father. Wood v. Claiborne [Ark.] 102 S. W. 219. No election of remedies by bank's proceeding against its cashier for wrongfully diverted funds so as to preclude action against party to whom cashier paid them, they being both jointly liable for the conversion. Home Sav. Bk. v. Otterbach [Iowa] 112 N. W. 769.

43. Acceptance from one of damages for cutting right of way held to preclude action against another for same wrong. McLendon Bros. v. Finch [Ga. App.] 58 S. E. 690. Settlement with partnership held to estop individual members who participated. Id.

44. Brother's election to take realty under a will held to preclude his administrator from proceeds of a life policy at the same time bequeathed brother's daughter. Mo-

Children portioned off in the lifetime of a testator will not be considered in determining the amount of the widow's child's part.[45]

An authorized waiver by an agent will bind his principal.[46]

§ 6. *Pleading.*[47]—To be available in a judicial proceeding a waiver must be pleaded.[48]

ELECTIONS.

§ 1. Definition of Election, Legal Authorization, Time, Place and Notice (1041).
§ 2. Eligibility and Registration of Elections (1043).
§ 3. Nominations by Convention or Petition (1045).
§ 4. Official Ballot 1047).
§ 5. Primary Elections (1048).
§ 6. Officers of Election (1049).
§ 7. Polling and Receiving the Vote (1050).
§ 8. Marking and Signing Ballot; Irregularities and Ambiguities Therein (1050).
§ 9. Secrecy of Ballot and Distinguishing Marks (1050).
§ 10. Count, Return, and Canvass, Custody of Ballots and Recount; Determination of Result and Certificates (1051).
§ 11. Judicial Control and Supervision (1052).
§ 12. Judicial Proceedings to Contest or Review (1055). Grounds for Contest or Review (1056). Jurisdiction (1057). Notice or Summons; Pleadings and Issues (1058). Dismissal (1058). Preservation and Production of Ballots (1058). Evidence (1059). Costs (1060). Decision and Review Thereof (1060). Security for Appeal; Costs (1060).
§ 13. Offenses Against Election Laws (1060).

This topic excludes elections for specific purposes other than the election of officers, except as general rules apply.[49]

§ 1. *Definition of election, legal authorization, time, place, and notice.*[50]—Election laws should be construed liberally to give effect to the will of the people.[51] It is essential to the validity of an election that legal provision should have been made for holding it.[52] When the legislature submits a constitutional amendment to the vote of the people at a general election, it will be presumed that it intends the requirements of the general election law to be observed.[53] But where a law containing a referendum clause provides the method by which it is to be submitted, that method must be followed.[54] In Texas the general election law[55] does not control

rath's Ex'r v. Weber's Adm'r, 30 Ky. L. R. 284, 98 S. W. 321. A widow's election to take against her husband's will providing for payment to her in the future of a portion of a **trust fund** entitles her at once to receive her statutory portion, and the same does not become a part of the trust fund. Holmes v. Holmes [Mass.] 80 N. E. 614. Where will gave wife the homestead and the income from a certain trust fund for life, her renunciation of will held to result in giving the fund to the children and making homestead part of general estate. Callicott v. Callicott [Miss.] 43 So. 616. A widow's election to take dower instead of a legacy to herself and children for her life with remainder to the children, with the assent of the executor, destroys her interest under the will, but not the **interest of the children,** nor does it undo the assent of the executor as to them. Toombs v. Spratlin, 127 Ga. 766, 57 S. E. 59. Election did not cause merger of particular estate and remainder. Id. A widow who takes under her husband's will **cannot share in a residuum** left undisposed of by the will. Construing Rev. St. 1878, § 3935, subd. 6. Chapman v. Chapman, 128 Wis. 413, 107 N. W. 668. Widow barred, by election to take under will, from sharing in intestate property resulting from invalid provisions. Grant v. Stimpson, 79 Conn. 617, 66 A. 166. Where a husband accepted his wife's bequest for life of the interest on notes she held against him, it suspended **limitations** for that period. In re Church's Estate [Vt.] 67 A. 549.

45. Callicott v. Callicott [Miss.] 43 So. 616.

46. Stipulation against validity of an agent's promises in respect to payments, workings of machinery, etc., held not to preclude agent's waiver of provision for written notice to vendor by his going and attempting to make machinery conform to warranty. Harrison v. Russell & Co., 12 Idaho, 624, 87 P. 784.

47. See 3 C. L. 1181.

48. Waiver of right of widow to elect to take a child's part. Keeney v. McVoy [Mo.] 103 S. W. 946.

49. See Counties (county seat removal), 9 C. L. 827; Municipal Bonds, 8 C. L. 1046; Intoxicating Liquors (votes on local option), 8 C. L. 486, and like topics.

50. See 7 C. L. 1230.

51. In re Independent Nominations, 186 N. Y. 266, 79 N. E. 708.

52. Police Jury of Parish of Tangipahoa v. Ponchatoula, 118 La. 138, 42 So. 725.

53. State v. Winnett [Neb.] 110 N. W. 1113.

54. And this is so though there is a general law which would control the manner of submission but for the special provision. Swigart v. Chicago, 223 Ill. 371, 79 N. E. 48.

55. Sayles Ann. Civ. St. Supp. 1906, pp. 161-223.

in the conduct and management of local option elections where it is in conflict with the local option statute,[56] as a prerequisite to a special election upon a question of local interest, an order of a local board is sometimes required,[57] and it is often provided that such elections shall be initiated by a petition of voters.[58]

Constitutional guaranties and limitations.[59]—Election laws must conform to constitutional requirements.[60] Among the constitutional provisions having express relation to elections are the requirements that elections shall be "free and equal," [61] that they shall be by ballot,[62] that all election laws shall be uniform throughout the state,[63] and that constitutional amendments shall be so submitted as to enable the electors to vote on each amendment separately.[64] The constitutions of some of the state require, in relation to elections upon certain questions of local interest, that the proposition shall be carried by a majority of the legal voters voting at the election.[65]

Time.[66]—An election must be held on the date which the law relating to it designates.[67] A statute fixing the time of an election must conform to constitutional

56. Rev. St. 1895, arts. 3394-3399. Walker v. Mobley [Tex.] 18 Tex. Ct. Rep. 793, 103 S. W. 490.

57. In Iowa, before proposition to vote a school tax can be submitted to the voters of a school corporation, it must be adopted and ordered submitted by the board of directors of such corporation. Kinney v. Howard, 133 Iowa, 94, 110 N. W. 282. Record of meeting of board held to show that it adopted proposition to vote tax to build schoolhouse. Id. Proviso in resolution of board of revenue ordering stock-law election held surplusage, and not to invalidate order. Henry v. Jefferson County Revenue [Ala.] 44 So. 110.

58. Stock-law election held not to be invalid because of alleged insufficiency of petition upon which election was ordered. Houston & T. C. R. Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 888, 97 S. W. 106. Petition for stock-law election insufficient under Acts 26th Leg. p. 220, c. 128, § 3, and election ordered thereupon void. Missouri, K. & T. R. Co. v. Tolbert [Tex. Civ. App.] 18 Tex. Ct. Rep. 454, 101 S. W. 1014; Id. [Tex.] 18 Tex. Ct. Rep. 94, 101 S. W. 206. Signers of petition for local option election may withdraw their names at any time before it is acted on, and if withdrawals reduce number of petitioners to less than number required to warrant granting petition the election cannot be called. O'Neal v. Minary, 30 Ky. L. R. 888, 101 S. W. 951. Where attorneys for same parties file one petition for local option election in a county and another for such an election in a city in such county, upon their failure to make required deposit for city election, county judge may allow withdrawal of petition therefor, notwithstanding objection on behalf of a minority of petitioners not constituting the number required to warrant granting a petition. Id.

59. See 7 C. L. 1232.

60. Act March 27, 1907, art. 3, § 1, subsec. 38, and art. 8, §§ 14, 15, 23, conferring upon the municipal council of Memphis power to control and regulate all elections held within the municipality, is, when considered in connection with Acts 1897, p. 139, c. 16, controlling and regulating all elections, state, county, and municipal, violative of Const. art. 1, § 8, as not due process of law, and of art. 11, § 8, as being class legislation. Malone v. Williams [Tenn.] 103 S. W. 798.

61. Under constitution of Kentucky declaring that elections shall be "free and equal," illegal voting, intimidation, and violence may contribute to render an election void. Scholl v. Bell [Ky.] 102 S. W. 248.

62. Any method of conducting elections sanctioned by legislative authority which will secure to the elector the privilege of exercising his right of franchise secretly and effectively is a substantial compliance with the constitutional mandate, Const. art. 7, § 6, that elections shall be by ballot. Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698.

63. This requirement in Constitution of Alabama, § 190, is not violated by a law making a provision for all the counties according to their several needs. Ex parte Owens [Ala.] 42 So. 676.

64. Under Const. art. 17, § 1, subject only to the limitation stated in the text, the manner of voting upon a constitutional amendment and the general conduct of the election are for the legislature to provide. State v. Winnett [Neb.] 110 N. W. 1113.

65. Constitution, § 41, providing that "no court house or county seat shall be removed except by a majority vote of the qualified electors of said county voting at an election held for such purpose," only requires a majority of the qualified electors who vote at the election. Ex parte Owens [Ala.] 42 So. by vote of majority of those voting at election on that question, conflicts with Const. art. 9, § 8, requiring a majority of legal voters of county voting at a general election. State v. Munn, 201 Mo. 214, 99 S. W. 1073.

66. See 7 C. L. 1232.

67. Vickery v. Wilson [Colo.] 90 P. 1034. Denver City and County Charter, requiring ordinance to be submitted to popular vote at "next general election" after petition therefor is filed, is the general city and county election provided for by § 166 of the charter, and not the biennial state and county election. Vickery v. Wilson [Colo.] 90 P. 1034. Time of election to fill vacancy in office of commonwealth's attorney under Const. §§ 97, 152. Robinson v. McCandless,

requirements.[68] Power to fix the time of an election is sometimes delegated to judicial officers,[69] and in such case the officer must conform to the requirements of the law delegating the authority.[70] When the power to fix the time when the polls shall be opened and closed is delegated, it can only be fixed by the officers authorized.[71]

Place.[72]—Where the power to fix the place of election is delegated, it must be fixed by the officers to whom it is delegated.[73]

Election districts.[74]—The New Jersey statute[75] dividing the counties in the state into assembly districts for the purpose of electing members of the general assembly is unconstitutional.[76] The Tennessee act of 1903 redistricting Knox county has been sustained.[77] The New York act creating metropolitan election districts does not infringe the home rule provision of the constitution because the superintendent of elections therein provided for is not chosen in the district.[78]

Resubmission.[79]

Notice.[80]—It is sometimes required by statute that a list of the polling places shall be published in advance of an election.[81] It is a very frequent requirement that notice shall be given of the propositions to be submitted at an election,[82] and where a constitutional amendment is to be submitted it is usually required that it shall be published in advance.[83] Ordinances providing for municipal elections sometimes prescribe the character of notice to be given.[84]

§ 2. *Eligibility and registration of elections.*[85]—In Iowa women are eligible to vote upon a proposition to vote a school tax.[86]

29 Ky. L. R. 1088, 96 S. W. 877. Under Comp. St. 1903, § 114, when a constitutional amendment creates a public office, such office may be filled at same election at which amendment is adopted. State v. Winnett [Neb.] 110 N. W. 1113.

68. Where by statute an additional judge of a circuit court is provided for, the legislature has not, under Const. § 152, power to provide that an election to fill the office shall be held at a time when there is no election in the county to elect other state, district or county officers. Yates v. McDonald, 29 Ky. L. R. 1056, 96 S. W. 865.

69. Under local option laws, although a day is named in petition for local option election, county judge may fix another day in his discretion not earlier than sixty days after application is lodged with him. O'Neal v. Minary, 30 Ky. L. R. 888, 101 S. W. 951.

70. When application is made by proper petition under Ky. St. 1903, § 2554, for a local option election in an entire county, county judge must so fix the time for election as to give to citizens of any city of the first, second, third, or fourth class, within the county, an opportunity to apply, by petition, for a vote upon same day. Yates v. Nunnelly, 30 Ky. L. R. 984, 102 S. W. 292.

71. Power conferred upon police jury where election upon question of licensing sale of intoxicating liquors, and president of jury not authorized. Police Jury of Parish of Tangipahoa v. Ponchatoula, 118 La. 138, 42 So. 725.

72. See 7 C. L. 1232.

73. Police jury empowered to fix place where election shall be held to determine whether sale of intoxicating liquors shall be licensed, and president of jury not authorized to fix such place. Police Jury of Parish of Tangipahoa v. Ponchatoula, 118 La. 138, 42 So. 725.

74. See 7 C. L. 1232.

75. P. L. 1906, p. 246.

76. Smith v. Baker [N. J. Err. & App.] 64 A. 1067.

77. Act 1903, p. 1220, c. 424. Maxey v. Powers, 117 Tenn. 381, 101 S. W. 181.

78. Act 1898, c. 676, as amended 1905. Morgan v. Furey, 186 N. Y. 202, 78 N. E. 869.

79, 80. See 7 C. L. 1233.

81. A statute requiring publication of a list of polling places in a certain borough to be made in newspapers "advocating the principles" of a certain political party is satisfied by publication in newspapers which advocate the principles but do not support the candidates or platform of such party. People v. Voorhis, 187 N. Y. 327, 80 N. E. 196, afg. 115 App. Div. 218, 100 N. Y. S. 927.

82. The mode of giving notice of propositions to be submitted to annual meeting of voters of a school corporation is governed by Code, § 2746, and not by § 2763. Kinney v. Howard, 133 Iowa, 94, 110 N. W. 282.

83. Where there is a substantial compliance with requirement of Const. art. 17, § 1, as to publication of proposed amendment thereto prior to submission to vote of people, the fact that publication was made for one week less than required time in one county will not invalidate amendment. State v. Winnett [Neb.] 110 N. W. 1113.

84. Notice sufficient under ordinance providing for election to determine advisability of issuing municipal bonds. State v. Wilder 200 Mo. 97, 98 S. W. 465.

85. See 7 C. L. 1233. Qualification of officers (See Officers and Public Employes, 8 C. L. 1191), jurors (see Jury, 8 C. L. 617) as defendant on right to vote are excluded.

86. Code, § 2747. But save for sex they must have the same qualifications as men. Kinney v. Howard, 133 Iowa, 94, 110 N. W. 282.

Residence.[87]—Residence within the state and election district is always a prerequisite to the right to vote therein. The residence of a married man is the place where his family reside.[88] The law is otherwise as to an unmarried man who has no family or home except the home of his parents or his rooming or boarding place.[89] Whether inmates and employes of a national soldiers' home are entitled to vote in the state where the home is located depends upon whether they reside within the without the home.[90]

Registration.[91]—Registration as a prerequisite to voting is now an almost universal requirement.[92] But the Kentucky registration law applies only to voters residing in a city or town.[93] In Pennsylvania the registration commissioners cannot order the name of a petitioner to be added to the register unless he has complied with the statutory requirements.[94] An appeal lies from the decision of the commissioners refusing an application for registration.[95] In Maryland an appeal lies to the courts from a decision of the board of registry, but the jurisdiction of the courts is appellate only.[96] In Kentucky, where a special election is ordered, a special registration must be ordered.[97] Notice by publication of the location of the registration places is usually required.[98]

Payment of taxes.—In many jurisdictions, payment of a poll tax is an essential prerequisite to the right to vote,[99] and in some states only property taxpayers can vote at certain elections.[1] In South Carolina proof of payment of taxes for the previous year, including the poll tax, is essential.[2]

87. See 7 C. L. 1234.

88. The mere temporary absence of the family does not change his residence. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453.

89. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453.

90. Inmates, officers, and employes of National Soldiers' Home in Tennessee, who reside within the home, are not residents of the state entitled to vote as such. under Const. 1870, art. 4, § 1. State v. Willett, 117 Tenn. 334, 97 S. W. 299. But inmates and employes who, with more or less regularity, eat their meals at the home, but have homes and families outside where they spend their nights, are residents of the state, entitled to vote as such. Id.

91. See 7 C. L. 1236.

92. Under Const. art. 2, § 4, and Code 1902, §213, production of certificate of registration is a condition precedent to the casting of a legal ballot. Wright v. State Board of Canvassers [S. C.] 57 S. E. 536.

93. Duff v. Crawford, 30 Ky. L. R. 323, 97 S. W. 1123. Under Laws 1904, p. 31, c. 6, when a local option election is held in territory embracing part of a city, the voters residing within the city cannot vote unless they shall have presented to election officers their certificates of registration. De Haven v. Bowner [Ky.] 102 S. W. 306.

94. Where one claiming right to vote by reason of naturalization has not produced to registrars his naturalization papers or a certified copy thereof, and does not allege that he was prevented from registering by illness or unavoidable absence, registration commissioners cannot order his name to be added to register. Registration Act Feb. 17, 1906 (P. L. 49). In re Mulholland's case, 217 Pa. 631, 66 A. 1105.

95. Under § 15 (P. L. 59), an appeal may be taken to court of common pleas, but no further appeal is given. In re Laurman [Pa.] 67 A. 418. But no appeal lies where petitioner neglected to take required steps to entitle him to registration, or to allege that he was prevented by illness or unavoidable absence from doing so. In re Mulholland's case, 217 Pa. 631, 66 A. 1105.

96. Code 1904, art. 33, § 24. If no action is taken by board upon objections properly before them as to registration of disqualified person, the courts are without jurisdiction. Smith v. McCormick [Md.] 65 A. 929.

97. Ky. St. 1903, § 1495. De Haven v. Bowmer [Ky.] 102 S. W. 306.

98. A statute requiring publication of a list of places for the registration of votes in a certain borough to be made in newspapers "advocating the principles" of a certain political party is satisfied by publication in newspapers which advocate the principles but do not support the candidates or platform of such party. People v. Voorhis, 187 N. Y. 327, 80 N. E. 196, afg. 115 App. Div. 218, 100 N. Y. S. 927.

99. This is an essential requirement in South Carolina. Wright v. State Board of Canvassers [S. C.] 57 S. E. 536. Under the constitution of Louisiana, payment of poll tax two years preceding is essential prerequisite to right to vote at special election to raise a tax. Gruner v. Police Jury of Claiborne Parish [La.] 44 So. 295.

1. **Proposition to issue bonds for certain municipal purposes:** Loc. Acts 1905, p. 470, No. 536, limiting right to vote upon submission of such proposition to taxpayers, held not violative of Const. art. 7, § 1. Menton v. Cook, 147 Mich. 540, 111 N. W. 94.

Elections relating to schools: In Louisiana only property taxpayers are entitled to vote at a special election for voting a special tax in aid of public schools. Const. 1898, art. 232. Flores v. Police Jury of De Soto Parish, 116 La. 428, 40 So. 785. This qualification can be shown only by an assess-

§ 3. *Nominations by convention or petition. Conventions and nominations.*[3] The mode in which nominations shall be made is generally prescribed by statute.[4] In New York the majority of the democratic state committee which controls the party conventions and nominations, cannot expel members of the committee representing the democratic electors of a county.[5]

Petitions.[6]—Provision is generally made for nominations by petition.[7] A material alteration in a petition, made without authority, after it has been signed by electors, will invalidate it.[8] But if no objection is made on that ground prior to election, the election of the candidate named will not be invalidated thereby.[9] A signer of a petition is usually required to add to his signature his residence, and sometimes his place of business also.[10]

Certificates and declination and vacancies.[11]—Laws in reference to certificates of nomination by independent bodies are liberally construed.[12] Under the New York election law, a certificate is not invalid because it names more than one candidate,[13] nor will the fact that the districts of the candidates are not coterminous invalidate it where a thousand bona fide residents of both districts have signed it.[14] The certificate must be signed by the number of electors required by statute.[15] The electors signing certificate must add to their signatures their residence, and must make affidavit thereto,[16] to which fact the notary must certify.[17] But if the requisite

ment, but if the voter has been assessed, and the assessment is final as to him, he is entitled to vote though the assessment roll has not been filed. Id. The requirement of art. 270, Const. 1898, excluding taxpayers appearing for first time on current assessment, has no application to special tax elections under art. 232. Id. In Oregon ownership of property is an essential prerequisite to the right to vote at school elections. The ownership must appear from the assessment and cannot be shown by extrinsic evidence. B. & C. § 3386. Setterlun v. Keene, 48 Or. 520, 87 P. 763. The statute is constitutional, as Const. art. 2, § 2, defining qualifications of voters, does not apply to school elections. Id.

2. Const. art. 2, § 4, subsec. e, and Code 1902, § 213. Wright v. State Board of Canvassers [S. C.] 57 S. E. 536.

3. See 7 C. L. 1237.

4. Under Laws 1896, p. 922, c. 909, § 56, nominations for village officers can be made only at a primary or caucus properly called, or by a properly appointed or duly authorized committee. In re Freund, 53 Misc. 354, 103 N. Y. S. 420.

5. Cummings v. Bailey, 53 Misc. 142, 104 N. Y. S. 233.

6. See 7 C. L. 1237.

7. In New York nominations for village officers, if not made by a political party, must be made by a petition signed by one hundred or more electors. In re Freund, 53 Misc. 354, 103 N. Y. S. 420.

8. Where an election is to be held both for full term of an office and for unexpired term, and by statute separate nomination papers are required, and, after nomination papers of a candidate are signed by qualified electors, they are changed by the candidate by the interlineation of the words "for the unexpired term," such alteration being wrongful and without authority, the papers do not entitle the candidate to nomination for the unexpired term. State v. Bunnell [Wis.] 110 N. W. 177.

9. State v. Bunnell [Wis.] 110 N. W. 177.

10. Under Rev. Pol. Code, § 1902, where petition is signed by more than required number, but less than that number add to their signatures their places of residence, it is fatally defective. Harris v. King [S. D.] 109 N. W. 644. The requirement of Rev. St. 1898, § 30, subd. 3, that each voter signing a nomination paper shall "add to his signature his business and residence," is sufficiently complied with where a voter places ditto marks below the business or residence of some former subscriber. State v. Bunnell [Wis.] 110 N. W. 177.

11. See 7 C. L. 1238.

12. In re Independence League Nominations, 51 Misc. 486, 100 N. Y. S. 760.

13. In re Fitzgerald, 51 Misc. 491, 100 N. Y. S. 753; In re Farrell, 51 Misc. 493, 100 N. Y. S. 754. Under the New York election law when certificates for independent nominations are required to be filed in the same office, any one of such certificates is not to be held invalid because it is made for the nomination of more than one candidate; the electors making it being qualified to make a certificate for the nomination of all the candidates mentioned therein. In re Independent Nominations, 186 N. Y. 266, 79 N. E. 708, rvg. In re Bennet, 116 App. Div. 138, 102 N. Y. S. 353.

14. In re Farrell, 51 Misc. 493, 100 N. Y. S. 754.

15. In re Quimby, 116 App. Div. 142, 102 N. Y. S. 201. Where certificate is insufficient because papers do not contain the requisite number of names, affidavits that sheets containing a number of names sufficient to supply deficiency were abstracted after filing will not supply deficiency in proof where neither the names of alleged signers are given nor any proof submitted from any of them that they did sign, or that papers were properly executed and acknowledged. Id.

16. In re Fitzgerald, 51 Misc. 491, 100 N. Y. S. 753; In re Farrell, 51 Misc. 493, 100 N.

number of signers add their residence, the fact that some do not will not invalidate the certificate.[18] If it appears on the face of the certificate that the residence of a subscriber is outside the district for which the nomination is made, the name of such subscriber must be rejected.[19] Illiterate electors should sign the certificate by mark properly authenticated.[20] Under the New York election law,[21] the signatures to a certificate need not all be appended to one paper.[22] Wholly indecipherable and illegible signatures should be rejected.[23] To constitute a legal filing of a certificate, it must be placed in the hands of the proper custodian at the proper time and place.[24] In New York defects in a certificate which is not wholly void may be supplied by a committee appointed by the certificate for that purpose.[25] In Texas the certificate of the chairman of a district nominating convention is conclusive as to who was nominated.[26] Nominations to fill vacancies caused by the declination of candidates are sometimes made by a committee of the party,[27] and under the New York election law,[28] it is expressly provided that such a vacancy shall be filled by a committee selected by the nominators.[29] Whether certificate making the original nominations is void, that portion of it which assumes to appoint a committee to fill vacancies is

Y. S. 754. See certificates of nomination made under Laws 1891, pp. 144, 145, § 6, each elector is required not only to sign the certificate but to sign the oath that he is a voter and has truly stated his residence. Cowie v. Means [Colo.] 88 P. 485. Where signature is accompanied by street address of signer, and assembly and senate district is designated, and signer makes affidavit that he is a duly qualified elector of district for which nominations are made, such signature is not rendered invalid under election law by omission to designate city as borough. In re Farrell, 51 Misc. 493, 100 N. Y. S. 754.

17. Commissioner must satisfy himself from examination of certificate itself that notary has certified that electors who subscribed certificate appeared before him and made required oath. In re Independence League Nominations, 51 Misc. 486, 100 N. Y. S. 760. Where sheets of two certificates for separate offices are joined together, the signatures being the same to each sheet, it should appear from notary's certificate that persons who subscribed both certificates made oath as to each. Id.

18. In re Fitzgerald, 51 Misc. 491, 100 N. Y. S. 753.

19. In re Independence League Nominations, 51 Misc. 486, 100 N. Y. S. 760. In such case, extrinsic evidence will not be received to show that such elector resides in district. Id. In determining whether such an elector resides in district, commissioner and court may take notice of boundaries of election districts and location of street numbers, or may receive evidence that residence given is outside district. Id.

20. In re Independence League Nominations, 51 Misc. 486, 100 U. Y. S. 760.

21. Laws 1896, p. 926, c. 909, § 57.

22. In re Independence League Nominations, 51 Misc. 486, 100 N. Y. S. 760; In re Fitzgerald, 51 Misc. 491, 100 N. Y. S. 753; In re Farrell, 51 Misc. 493, 100 N. Y. S. 754. It is not fatal to the validity of such certificate that some of the sheets containing it were delivered to commissioner while it was incomplete on its face for lack of sufficient names, if such names are added within time fixed by law for filing such certificates. But it does not become a certificate of nomination until it is complete in this respect. In re Independence League Nominations, 51 Misc. 486, 100 N. Y. S. 760.

23. In re Independence League Nominations, 51 Misc. 486, 100 N. Y. S. 760. But commissioner may use notary's certificate to aid him in reading signatures. Id.

24. Cowie v. Means [Colo.] 88 P. 485. Under Pol. Code, § 1192, as amended in 1901, providing that certificates of nominations may be filed not less than twenty days before the day of election, if the election is on Nov. 6th, an offer of filing on Oct. 17th is not too late. Cosgriff v. San Francisco Election Com'rs [Cal.] 91 P. 98. If a registrar of votes keeps his office open after prescribed hours, it is his duty to receive and file a certificate of nomination presented while the office is open, but after lawful hours. Id.

25. Laws 1896, p. 931, c. 909, § 66. In re Independence League Nominations, 51 Misc. 486, 100 N. Y. S. 760. Where member of assembly is only officer to be elected from assembly district, omission from certificate of nomination for such district of name of the officer, required to be given by Laws 1896, p. 922, c. 909, § 56, may be supplied by such committee. Id.

26. Laws 1905, p. 550, § 120. There is no power of review in the party executive committee. Mays v. Cobb [Tex.] 16 Tex. Ct. Rep. 792, 96 S. W. 1079.

27. Composition of committee according to custom and usage of party with sanction of conventions of party will not be disturbed by the courts, and a nomination made by such committee will be upheld. Potter v. Deuel [Mich.] 14 Det. Leg. N. 471, 112 N. W. 1071. It is not a violation of Comp. Laws, § 11466, for a senatorial committee to fill a vacancy therein, caused by absence of a delegate from a county, by seating a citizen of that county. Id.

28. Laws 1896, p. 893, c. 909.

29. It cannot be filled by a certificate filed by independent voters. In re Brevillier, 116 App. Div. 144, 102 N. Y. S. 217, afd. 186 N. Y. 268, 79 N. E. 708.

likewise void.[30] A certificate to fill vacancies must be filed at the time and place prescribed by statute.[31]

Contests and disputes.[32]—In New York the board of elections has jurisdiction to determine issues of fact raised by objections to certificates of nomination.[33] The legitimacy of the candidacy of alleged nominees of an independent political body must be established by competent evidence.[34] The question of the qualifications of the nominee for the office cannot be determined in proceedings with reference to certificate of nomination.[35] Provision is generally made for review by the courts of the action of officers having jurisdiction over certificates of nomination.[36] An appeal can only be brought by one who was a party to the proceedings before such officers.[37] In New York, after the time for filing certificates to fill vacancies has expired, the supreme court is without jurisdiction to entertain summary proceedings to review the determination of the commissioner as to defects in such certificates.[38]

§ 4. *Official ballot.*[39]—Where a regular certificate of nomination is presented to the proper officers, they must place upon the official ballot the names of the nominees in the proper place and under the party name and title.[40] In form the official ballot must conform to the statutory requirements.[41] Where a statute prescribes the form of ballot to be used at a special election, its provisions must be conformed to though such ballot does not conform to the requirements of the general election law.[42] Where the power to prescribe the form of ballot is delegated, it must be exercised by the officers authorized.[43] If none of the voters are misled thereby,

30. Cowie v. Means [Colo.] 88 P. 485.

31. In Colorado a certificate to fill vacancies upon a state or district ticket must be tendered for filing at office of secretary of state during business hours, and less than eight days prior to election. Handling certificate to secretary of state at railroad station is not sufficient. Cowie v. Means [Colo.] 88 P. 485. If the election is on Tuesday, such certificate must be tendered not later than the second Saturday prior thereto. Id.

32. See 7 C. L. 1238.

33. In re Independent Nominations, 186 N. Y. 266, 79 N. E. 708.

34. When such a body engages in nominating candidates for office, and there is established an organization consisting of an executive committee and local committees, affidavits of the executive officers are competent evidence as to whether particular candidates are the legitimate candidates of such body or mere intruders. In re Quimby, 116 App. Div. 142, 102 N. Y. S. 201.

35. So held where it was urged that nominee for assembly was disqualified because a commissioner of deeds. In re Independent Nominations, 186 N. Y. 266, 79 N. E. 708.

36. Section 170 of the "Australian ballot law" (Cobbey's Ann. St. 1903, § 5775) is not unconstitutional, and confers power on county courts and upon judges of district and supreme courts at chambers to summarily review action of officer with whom an original certificate of nomination is filed, and to make such order therein as law requires. State v. Hallowell [Neb.] 110 N. W. 717. The determination by the board of elections of issues of fact raised by objections to certificates of nomination is subject to review by the supreme court in both branches, but not by the court of appeals. In re Independent Nominations, 186 N. Y. 266, 79 N. E. 708.

37. An appeal from the determination of the board of elections as to the validity of certificates of nomination will not lie at the suit of one who was not a party to the proceedings. In re Independent Nominations, 186 N. Y. 266, 79 N. E. 708. Where objections to a certificate of nomination are sustained by the board of elections, the decision can only be reviewed on the application of the candidate or of the committee representing his nominations. In re Logan, 116 App. Div. 146, 102 N. Y. S. 200.

38. In re Independence League Nominations, 51 Misc. 486, 100 N. Y. S. 760.

39. See 7 C. L. 1238.

40. Burns' Ann. St. 1901, §§ 6215, 6222, imposing this duty on board of election commissioners, is mandatory. State v. Marshall County Election Com'rs, 167 Ind. 276, 78 N. E. 1016.

41. The requirement of Laws 1905, p. 520, c. 11, that presiding judge of election indorse with his signature official ballots is mandatory, and is, under § 93, applicable to local option elections. Brigance v. Horlock [Tex. Civ. App.] 17 Tex. Ct. Rep. 62, 97 S. W. 1060. Under § 4 of Pub. Acts, No. 272, the general law providing for printing of ballots, prohibiting printing name of a candidate more than once, is applicable to candidates for delegate to constitutional convention. Helme v. Lenawee County Election Com'rs [Mich.] 14 Det. Leg. N. 469, 594, 113 N. W. 6.

42. Swigart v. Chicago, 223 Ill. 371, 79 N. E. 48. The official ballot prescribed by Terrell Election Law (§ 46 Sayle's Ann. Civ. St. Supp. 1906), is not required to be used at local option elections; Rev St. 1895, art. 3388, governing as to form of ballot in such case. Walker v. Mobley [Tex.] 18 Tex. Ct. Rep. 793, 103 S. W. 490.

43. Power being given to police jury,

technical defects in form should be disregarded.[44] If the ballots in a precinct are lost or stolen, the proper officer should supply new ones if he can do so in time to hold the election.[45]

Questions submitted.[46]—In the absence of an express requirement, it is not necessary that a constitutional amendment submitted to the popular vote should be printed in full upon the official ballot.[47] When a statute containing a referendum clause prescribes the form of ballot, that form is sufficient though it does not indicate the substance of the measure to be voted on as required by the general election law.[48] The validity of an election is not affected by an immaterial variance, as to the question submitted, between the order for the election and the official ballot.[49]

Use of party name and emblem.[5]—The candidates whose names are entitled to appear under the name and emblem of a party are those nominated by a convention called by the regularly constituted party authorities.[51] Priority of adoption determines the right of a political organization to use a certain emblem.[52]

§ 5. *Primary elections.*[53]—A primary election law does not govern in a county where the conditions upon which it is to come in force have not been complied with.[54] Notice of a primary and of the officers to be elected must be given in the manner prescribed by statute.[55] Every voter in a party has a right, which the law will protect, to vote at the primaries of that party,[56] but the legislature may demand, as a prerequisite to the exercise of that right, that certain requirements, either statutory or adopted by the properly authorized party authorities, shall be complied with.[57]

president of jury cannot exercise it. Police Jury v. Ponchatoula, 118 La. 138, 42 So. 725.

44. Kinney v. Howard, 133 Iowa, 94, 110 N. W. 282.

45. Scholl v. Bell [Ky.] 102 S. W. 248.

46. See 7 C. L. 1239.

47. Under Const. art. 17, § 1, it is only necessary that so much of the amendment be printed upon the ballot as to identify it and show its character and purpose. State v. Winnett [Neb.] 110 N. W. 1113.

48. Ballot prescribed by Act May 18, 1905 (Laws 1905, p. 105) § 4, sufficient though not conforming in this respect to requirement of Hurd's Rev. St. 1905, p. 931, C. 46, § 16, Swigart v. Chicago, 223 Ill. 371, 79 N. E. 48.

49. The order of court for a local option election directed an election to be held upon the proposition whether or not "spirituous, vinous, malt, or other intoxicating liquors" should be sold, but the ballots read, "Do you favor prohibiting the sale * * * of spirituous, vinous, and malt liquors." It was held that in view of the provisions of the local option laws the variance was not material. O'Neal v. Minary, 30 Ky. L. R. 888, 101 S. W. 951.

50. See 7 C. L. 1240.

51. Under Burns' Ann. St. 1901, § 6215, where two factions of a party in a county claim to be entitled to party name and device, the names of nominees of convention held at time and place designated in call of the county central committee of such party are entitled to appear under such party name and device. State v. Marshall County Election Com'rs, 167 Ind. 276, 78 N. E. 1016.

52. Where certificate of nomination of a candidate of a political organization designates an emblem which has previously been adopted by such organization, such candidate is entitled to use the emblem to the exclusion of candidate of another party whose certificate of nomination designating emblem was first filed. In re Fitzgerald, 57 Misc. 491, 100 N. Y. S. 753.

53. See 7 C. L. 1240.

54. Neither the primary election, law Laws 1899, p. 968, c. 473, nor the town enrollment act, Laws 1902, c. 195, are in force in a county where neither § 14 of the former nor § 1 of the latter act has been complied with; but §§ 50 to 55 of election law, Laws 1896, p. 920, c. 909, is in force in such county. Brown v. Cole, 105 N. Y. S. 196.

55. The requirements of the primary election law, § 3, Act Feb. 17, 1906 (P. L. 36), as to time at which notice of officers to be elected at next election shall be given by secretary of commonwealth to county commissioners, and as to time of publication by commissioners of names of such officers are mandatory. But where a vacancy becomes known too late for such requirements to be complied with, § 3 is not applicable, but the alternative provisions of § 12 govern. Commonwealth v. Blankenburg [Pa.] 67 A. 645. Under Laws 1896, p. 922, c. 909, § 56, a primary or caucus for the nomination of village officers can be held only after a suitable call or notice emanating from the organization representing the political party in the village. In re Freund, 53 Misc. 354, 103 N. Y. S. 420.

56. Brown v. Cole, 105 N. Y. S. 196.

57. Pol. Code, § 1366a, requiring each elector at time of registering to declare name of political party with which he intends to affiliate at ensuing primary election, and § 1361a, empowering political parties to prescribe additional tests, are not violation of Const. art. 2, § 2½. Schostag v. Cator [Cal.] 91 P. 502. Nor does the former provision conflict with Const. art. 2, § 1. Id. And it is not void on ground of unreasonableness (Id.), or because, in the

Persons who have voted at the primary of one party cannot thereafter vote at the primary of another party.[58] In New York, upon the removal of an enrolled elector from the election district, it is the mandatory duty of the court to strike his name from the primary enrollment book.[59] In Wisconsin where a canvass of a primary election has been made and a certificate issued, the certificate holder cannot be deprived of his right by any subsequent action of the canvassing board.[60]

Control by party committees.[61]

Ballots for primaries. Review and contest of primary.[62]—The validity of ballots cast at primary elections is to be determined by the provisions of the primary election laws.[63] Under the New York primary law when the oral proclamation and the written statement of the result of a primary election vary, the latter will control.[64] The special term of the supreme court in New York has jurisdiction of primary election contests.[65] In Wisconsin the original jurisdiction of the supreme court is properly exercised in determining abstract questions as to the proper construction of a primary election law operating throughout the state.[66]

§ 6. *Officers of election.*[67]—Officers of election must be selected and appointed in the manner and by the persons authorized by statute.[68] The statutory method

event that one political party determines not to nominate candidates, members of that party will be deprived of right to vote at ensuing primary (Id.). And the fact that it contains a saving clause permitting electors registered before its enactment to vote at ensuing primary, though their affidavits of registration contain no declaration of affiliation with any party, does not render it unconstitutional on ground of nonuniformity in is operation. Id. The requirements as to qualifications of a voter at a party primary, under Laws 1896, p. 922, c. 909, § 53, must be regularly adopted by county convention or committee duly authorized by such convention, and must not conflict with any provision of the statute. Brown v. Cole, 54 Misc. 278, 104 N. Y. S. 109, 105 N. Y. S. 196. The requirements cannot be such as will exclude a party voter, nor can it be left to an enrolling board to say whether one may be enrolled, but the applicant may be required to qualify under oath. Id.

58. In re Freund, 53 Misc. 354, 103 N. Y. S. 420.

59. Laws 1898, p. 332, c. 179, § 3, subd. 11, as amended by Laws 1904, p. 900, c. 350. Affidavits held not to constitute sufficient evidence that elector had removed from district. In re Titus, 117 App. Div. 621, 102 N. Y. S. 851; In re O'Brien, 117 App. Div. 628, 102 N. Y. S. 845.

60. Laws 1903, p. 762, c. 451, §§ 16, 25. State v. Goff, 129 Wis. 668, 109 N. W. 628.

61, 62. See 7 C. L. 1242.

63. Under Acts 1898, § 59, made applicable to primary elections by P. L. 1903, p. 603, a ballot at a primary election is not invalid because cast for one who is a member of another political party. Freeman v. Metuchen [N. J. Law] 67 A. 713. Under Acts 1898, §§ 58, 59, which are made applicable to primary elections by P. L. 1903, p. 603, ballots at a primary election cannot be rejected as marked ballots because upon each of them the name of the same candidate is written in the same handwriting. Id. Under Primary Election Law, Laws 1903, pp. 758, 759, 760, 762, 763, 766, c. 451, §§ 9, 12, 16, 18, 20, 25, construed in connection with Rev. St. 1898, § 41, where upon an official primary election ballot the name of no candidate appears for a certain office, voters may write in the name of one who, not having filed nomination papers, is not entitled to have his name printed on ballot. State v. Yankee, 129 Wis. 662, 109 N. W. 550.

64. Walsh v. Church, 115 App. Div. 82, 100 N. Y. S. 764.

65. Has jurisdiction upon proper application to set aside statement of canvass made by inspectors to direct them to reconvene forthwith and mark and file with custodian of primary records statement showing result of election to be as adjudged, to nullify certificates of election, and to direct issue of certificates to candidates lawfully entitled to them. Walsh v. Church, 115 App. Div. 82, 100 N. Y. S. 764.

66. Where in an original action brought in supreme court to determine which of two candidates at a primary election was entitled to have his name placed on official ballot, it appeared that abstract questions were involved concerning proper construction of a new primary election law making a radical change in conduct of all elections, and involving duty of all election officers in state, it was proper for the court to exercise its original jurisdiction for determination of such questions, but not for determination of question at issue between the two candidates. State v. Goff, 129 Wis. 668, 109 N. W. 628.

67. See 7 C. L. 1243.

68. The mode prescribed by Act May 18, 1905 (Laws 1905, p. 203), § 33 for selecting and appointing judges of election, is mandatory. People v. Edgar County Sup'rs, 223 Ill. 187, 79 N. E. 123. By this statute the precinct or district and not the township is made the unit in selecting judges. Id. Under Gen. Laws 1896, c. 11, § 32, requiring town council to appoint supervisors of election from lists presented by town committees of the political parties, the existing committee of a party, which has been duly elected and subsequently recognized by the state central committee, is the committee from whose list supervisors must be ap-

of appointment must, of course, be constitutional.[69] The appointment can be made only by the persons authorized.[70] In Texas a state or county officer cannot act as a judge of election.[71] The powers of judges of election are determined by statute.[72] A moderator of an electors' meeting is not liable in damages for erroneously rejecting a ballot where he acts in good faith and without malice.[73]

§ 7. *Polling and receiving the vote.*[74] *Voting by machine.*[75]—Statutes authorizing the use of voting machines must conform to constitutional requirements.[76]

§ 8. *Marking and signing ballot; irregularities and ambiguities therein.*[77] *The marks.*[78]—Under the Australian ballot law the lines forming the cross must intersect within the proper circle or square.[79] If a ballot has a cross in the square before the names of each of opposing candidates for the same office, it should be counted for neither.[80] A ballot which shows in the square opposite the word "yes," which follows the question, a diagonal mark and nothing more is illegal and cannot be counted,[81] nor will a ballot be counted for an office if the elector mark more names than there are persons to be elected.[82]

The writing in of names.[83]—Where a voter is permitted to write upon a ballot the name of the office to be filled and of the person for whom he desires to vote, the fact that such names are written by one other than the voter is of no consequence, if the voter adopts the ballot.[84]

§ 9. *Secrecy of ballot and distinguishing marks.*[85]—There are constitutional or statutory enactments in all, or nearly all, the states requiring that voting shall be secret.[86] Under the secret ballot system a voter must mark his bal-

pointed. Tarbox v. Garlick [R. I.] 65 A. 604. Ky. St. 1903, § 1596a, subsec. 3, does not require that a county board of election commissioners shall alternate in the appointment of clerks and sheriffs at voting places so as to give each party one-half of the clerks and sheriffs, but it is only required that the sheriff and clerk at each voting place shall be of a different party. Tribble v. McElroy [Ky.] 104 S. W. 286.

69. Act May 18, 1905 (Laws 1905, p. 203), § 33, prescribing the manner of selecting and appointing judges of election, is not special legislation in conflict with Const. art. 4, § 22, nor is it unconstitutional as a delegation of legislative power. People v. Edgar County Sup'rs, 223 Ill. 187, 79 N. E. 128.

70. Police jury empowered to appoint officers of election upon question of licensing sale of intoxicating liquors, and president of jury cannot make appointment. Police Jury v. Ponchataula, 118 La. 138, 42 So. 725.

71. Sayle's Ann. Civ. St. Supp. 1906, § 46. The chairman of executive committee of a political party does not come within this prohibition. Walker v. Mobley [Tex.] 18 Tex. Ct. Rep. 793, 103 S. W. 490.

72. Under Laws 1903, p. 133, c. 101, §§ 37, 65, a presiding judge of election has no authority, without a warrant, to order arrest of a voter whose only offense is carrying into voting booth a paper containing initials of persons for whom he desires to vote. Smyth v. State [Tex. Cr. App.] 103 S. W. 899.

73. The moderator acts in a quasi judicial capacity. Blake v. Brothers, 79 Conn. 676, 66 A. 501.

74. See 7 C. L. 1243.

75. See 7 C. L. 1244.

76. Laws 1905, p. 400, c. 267, authorizing use of voting machines at elections, does not contravene constitutional mandate, Const. art. 7, § 6, that elections shall be by ballot. Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, and the power delegated to voting machine commission created by this statute to determine efficiency of voting machine thereby authorized is administrative in character and is not a violation of constitutional inhibition, Const. art. 3, § 1, against delegation of legislative or judicial powers (Id.), but Pub. Acts 1907, No. 287, § 10, providing for use of voting machines which do not afford opportunity to all to vote a secret ballot, is unconstitutional (Helme v. Lenawee County Election Com'rs [Mich.] 14 Det. Leg. N. 469, 594, 113 N. W. 6).

77. See 7 C. L. 1244.

78. See 7 C. L. 1245.

79. If it does not do so the ballot should not be counted. Smith v. Reid, 223 Ill. 493, 79 N. E. 148.

80. Smith v. Reid, 223 Ill. 493, 79 N. E. 148.

81. Rev. Laws, c. 11, § 227. Brewster v. Sherman [Mass.] 80 N. E. 821.

82. Ky. St. 1903, § 1471. Stegeman v. Cook [Ky.] 102 S. W. 872.

83. See 7 C. L. 1246.

84. Carlough v. Ackerman [N. J. Law] 64 A. 964. Under P. L. 1898, p. 268, § 59, a voter may write upon the official ballot the name of any person for whom he desires to vote, and also in the name of the office, when such office is to be filled at the election, and its name is not printed on the ballot. Id.

85. See 7 C. L. 1246.

86. Constitution, § 179, requiring all elections to be "by ballot," does not imply such

lot while in a booth to himself, and this even though he cannot read.[87] Ballots having marks made by the voter which are clearly distinguishing will be discarded.[88] The test to determine whether a mark is distinguishing is whether it discloses the identity of the voter to any person other than himself.[89] The elector cannot be heard to say that he did not intend the mark for the purpose of identification.[90] Capital letters apparently the initials of the name of the voter,[91] and rectangular marks or blotches instead of crosses in the squares opposite the names of candidates,[92] have been held to be distinguishing marks, but the following have been held not to be distinguishing marks: The name of elector written on back of ballot and then completely erased;[93] the word "nit" written after name of candidate;[94] the words "May the best man win" written after the names of several candidates for a certain office;[95] the words "For Mayor, Charles S. Roswell" where a mayor is to be elected and the name of the office is omitted from the ballot;[96] and names written in pencil as candidates for offices other than the one involved in the contest where such names are printed in other places on the ballot as candidates for the same offices.[97]

§ 10. *Count, return, and canvass, custody of ballots and recount; determination of result and certificates.*[98]—The statutory requirements as to counting the vote and announcing the result must be complied with.[99] The Nebraska statute [1] providing for counting straight party votes for a constitutional amendment when such party has indorsed such amendment is not unconstitutional.[2] A ballot will not be counted if the voter's choice cannot be determined,[3] or if the ballot consists of parts of a ballot of each political party pasted and folded together,[4] but ordinarily a ballot will not be rejected for an error that is purely technical.[5] Where in the return of a stock law election the managers style themselves "We the undersigned inspectors of an election," the return is not objectionable because they sign their individual names thereto.[6] In New York, if unofficial ballots are voted, they must be returned in a package with the void and protested ballots.[7] Where the power to prescribe how the votes shall be canvassed

absolute secrecy as to render unconstitutional Acts 1903, p. 117, which provides that ballots shall be numbered to correspond with numbers on poll list, and ballots and poll lists sent up together. Ex parte Owens [Ala.] 42 So. 676.

87. In Kentucky a voter who cannot read but who is not blind or physically disabled must mark his ballot in the booth to himself after clerk of election has indicated in pencil where mark is to go, and if instead he marks it openly or in presence of a judge of election, his vote is void. Combs v. Combs, 30 Ky. L. R. 161, 97 S. W. 1127.

88. Smith v. Reid, 223 Ill. 493, 79 N. E. 148.

89, 90, 91. Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698.

92. Strosnider v. Turner [Nev.] 90 P. 581. But where crosses are stamped in squares, the fact that in one square an impression is left of rectangular outline of stamp surrounding cross will not vitiate ballot. Id.

93, 94, 95. Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698.

96. Carlough v. Ackerman [N. J. Law] 64 A. 964.

97. Smith v. Reid, 223 Ill. 493, 79 N. E. 148. And even if such names are not printed on ballot, the written names will not be regarded as distiguishing marks in absence of evidence showing that they were so intended. Id.

98. See 7 C. L. 1247.

99. Under Laws 1890, p. 1218, c. 569, § 39, as renumbered by Laws 1897, p. 610, c. 481, and amended by Laws 1899, p. 321, c. 168, it is the duty of inspectors of a town meeting, as soon as polls are closed, to canvass votes publicly, and clerk must read result of canvass to persons assembled and enter it at length in minutes of meeting. People v. Armstrong, 116 App. Div. 103, 101 N. Y. S. 712.

1. Act of 1901 (Sess. Laws 1901, p. 337, 3. 29), amending general law.

2. State v. Winnett [Neb.] 110 N. W. 113.

3. Rev. Laws, c. 11, § 238. Brewster v. Sherman [Mass.] 80 N. E 821.

4. Lipscomb v. Perry [Tex. Civ. App.] 98 S. W. 1101

5. Under Ky. St. 1903, § 1471, providing that "no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice," a ballot whose only infirmity is absence of clerk's name on back should be counted. Orr v. Kevil, 30 Ky. L. R. 761, 100 S. W. 314.

6. Henry v. Revenue of Jefferson County [Ala.] 44 So. 110.

7. Laws 1896, p. 964, c. 909, § 111. People

and returns made is delegated, it must be exercised by the officers authorized.[8] The duty of canvassing boards is purely ministerial and confined to tabulating and ascertaining the result of an election as shown by the face of the returns.[9] A board cannot refuse to canvass the returns on the ground that the election was illegal,[10] and although mandatory, statutory requirements are disobeyed in the preparation of the official ballots, such ballots, when voted, will not on that account be rejected,[11] nor will the fact that nomination papers were altered without authority, where no objection was made thereto prior to election, warrant the rejection of votes cast for the nominee,[12] but "questioned ballots" not preserved in the manner required will not be counted.[13]

Recount of ballots.[14]—Upon a recount the ballots are the best evidence if it is shown that they have been properly preserved.[15] In West Virginia the successful candidate in a recount, by which the result shown by the face of the returns was not changed, has no right of action against the unsuccessful candidate for his costs and expenses.[16]

Determination of result; certificates.[17]—A certificate of election, when issued by the proper officers, is the authority which the successful party has for qualifying for the office.[18] The certificate of the board of canvassers declaring the result of the election is conclusive in a controversy arising collaterally.[19] Sometimes, in elections upon questions of local interest, the determination of the result by the canvassing officers is made final without right of appeal.[20]

§ 11. *Judicial control and supervision.*[21] *Mandamus.*[22]—Mandamus will lie to compel the designation of the newspapers in which the list of registration and polling places is to be published,[23] to compel a statement of the result of a primary election,[24] to compel the proper officers to receive and file a certificate

v. Beam, 117 App. Div. 374, 103 N. Y. S. 818; Id., 188 N. Y. 266, 80 N. E. 921.

8. Power being given to police jury, president of jury cannot exercise it. Police Jury v. Ponchatoula, 118 La. 138, 42 So. 725.

9. State v. Mason [Wash.] 88 P. 126; Lehman v. Pettingell [Colo.] 89 P. 48. A board of canvassers has no discretion to refuse or reject returns because of irregularities when there is but one set of returns made and the result of the election can be determined from an inspection thereof. Id.

10. State v. Mason [Wash.] 88 P. 126.

11. Peabody v. Burch [Kan.] 89 P. 1076. The statutory provision, Gen. St. 1901, § 2718; Laws 1903, p. 397, c. 228, § 4; Laws 1905, p. 369, c. 222, § 3, that "no ballots other than those provided, printed and endorsed in accordance with the provisions of this act shall be delivered to a voter, deposited in the ballot box, or counted," does not authorize the canvassing officers to reject any votes because of some wrongful act or omission by the officer who prepared the ballots. Id.

12. State v. Bunnell [Wis.] 110 N. W. 177.

13. Childress v. Pinson [Ky.] 100 S. W. 278.

14. See 7 C. L. 1247.

15. Smith v. Reid, 223 Ill. 493, 79 N. E. 148. Where before recount parties stipulated that the ballots had been properly preserved, and there is a discrepancy between number of names on poll books and number of ballots found, and no evidence of fraud, the ballots will be received as the best evidence. Id.

16. Construing Code 1899, c. 3, § 68 (Code 1906, § 87). Goff v. Young, 61 Va. 693, 57 S. E. 328.

17. See 7 C. L. 1248.

18. Childress v. Pinson [Ky.] 100 S. W. 278. Entry in order book made by board of election commissioners held not a certificate of election. Id.

19. Certificate of election as member of common council issued to D. conclusive in mandamus proceedings to which he is not a party to compel mayor to recognize relator as entitled to such office. Hoy v. State [Ind.] 81 N. E. 509.

20. By Laws 1906, p. 185, c. 167, relating to election upon question of division of county, the counting of votes, canvassing of returns, and declaration of result, are expressly committed to election commission and board of supervisors of county without appeal to courts. Native Lumber Co. v. Harrison County Sup'rs, 89 Miss. 171, 42 So. 665.

21. See 7 C. L. 1248.

22. See 7 C. L. 1249.

23. Where it is shown that no legal designation has been made by the board of elections, the court may, notwithstanding the prayer for an order, require that a particular newspaper be designated, command the board to perform the duty devolving on it by law. People v. Voorhis, 115 App. Div. 218, 100 N. Y. S. 927.

24. To compel board of registry and election to make up and sign such a statement as is required by P. L. 1903, p. 617, § 15. Freeman v. Registry & Election of Metuchen [N. J. Law] 67 A. 713. In such case

of nominations,[25] to compel the officer charged with that duty to order an election,[26] to compel the placing upon the official ballot the name of a nominee,[27] to compel the appointment of legally selected judges of election,[28] to compel registrars of votes not to count an improperly marked ballot,[29] to compel a proper return of unofficial ballots voted,[30] to compel a canvassing board to canvass the returns and issue certificates in accordance with the result,[31] and to compel a recount;[32] but the writ will not issue to compel election officers to do an impossible or an unnecessary thing,[33] to compel registrars of election to erase from the registration books the names of persons illegally registered where the statutes do not confer such power upon registrars,[34] or where an adequate remedy is given by statute,[35] or where the persons alleged to be illegally registered have not been brought into court or served with notice,[36] or to control the action of a canvassing board in recounting the votes.[37] An election contest cannot be determined in mandamus proceedings.[38] Mandamus proceedings to compel a mayor and council to canvass the returns of a municipal election may be instituted by a candidate claiming election,[39] or by any citizen.[40] In Massachusetts a voter and

the ballot boxes may be opened if such statement cannot be prepared without doing so. Id.

25. Cosgriff v. San Francisco Election Com'rs [Cal.] 91 P. 98.

26. When application is made by proper petition under Ky. St. 1903, § 2554, for local option election in county, mandamus will issue to compel county judge to order such election. Yates v. Nunnelly [Ky.] 102 S. W. 292; O'Neal v. Minary, 30 Ky. L. R. 888, 101 S. W. 951. Where the annual town meeting or the election of officers required by V. S. 2972 is warned and the voters assemble, but without electing officers adjourn without day, mandamus will lie at the suit of a legal voter to compel the selectmen to call a special meeting. Jenny v. Alden, 79 Vt. 156, 64 A. 609.

27. Robinson v. McCandless, 29 Ky. L. R. 1088, 96 S. W. 877. One to whom a certificate of nomination has been issued. State v. Goff, 129 Wis. 668, 109 N. W. 628.

28. Facts held to show a sufficient demand upon and refusal by county board of supervisors to appoint as judges of election persons legally selected by minority members of such board, as required by Act May 18, 1905 (Laws 1905, p. 203), § 33, to authorize petition for mandamus to compel such board to perform this duty. People v. Edgar County Sup'rs, 223 Ill. 187, 79 N. E. 123.

29. Under Rev. Laws, c. 11, § 421, the supreme judicial court has jurisdiction to issue mandamus to compel registrars not to count such a ballot cast at a local option election. Brewster v. Sherman [Mass.] 80 N. E. 821.

30. To enforce duty of inspectors of village election under Laws 1896, p. 933, c. 909, § 111, to return unofficial ballots voted in a package with void and protested ballots. People v. Beam, 117 App. Div. 374, 103 N. Y. S. 818.

31. Lehman v. Pettingell [Colo.] 89 P. 48, State v. Mason [Wash.] 88 P. 126. If board has adjourned without completing its work, it may be compelled to reconvene. Lehman v. Pettingell [Colo.] 89 P. 48. Where the duty of canvassing returns is imposed upon mayor and council of a town, mandamus will issue to enforce that duty. State v. Kendall [Wash.] 87 P. 821. Where inspectors of town meeting have neglected to canvass the votes and publicly announce result as required by Laws 1890, p. 1218, c. 569, § 39, as renumbered by Laws 1897, p. 610, c. 481, and amended by Laws 1899, p. 321, c. 168, mandamus will issue to compel them to perform that duty. People v. Armstrong, 116 App. Div. 103, 101 N. Y. S. 712.

32. Laws 1896, p. 964, c. 909, § 111. People v. Beam, 188 N. Y. 266, 80 N. E. 921.

33. Where "questioned" ballots were lodged with clerk of county court for safe keeping, but had not been preserved in manner required by law, it was held mandamus would not issue to require election officers to assemble and certify as to whether such ballots returned by them had been counted, and, if so, for whom. Childress v. Pinson [Ky.] 100 S. W. 278. Mandamus will not issue to compel election officers to sign certificate attached to stub book from their precinct, where duplicate certificate used by election commissioners in canvassing returns has been presented and signed by officers. Id.

34. Shannon's Code, §§ 1189-1219, and Shannon's Supplement, §§ 1136-1377, confer no such power upon registrars. State v. Willett, 117 Tenn. 334, 97 S. W. 299.

35. Adequate remedy is given by Code 1904, §§ 83a, 86. Spitler v. Guy [Va.] 58 S. E. 769.

36. Shannon's Code §§ 5335, 5337. State v. Willett, 117 Tenn. 334, 97 S. W. 299.

37. If the recount is erroneous, the remedy by quo warranto is open. . Dickenson v. Cheboygan County Canvassers, 148 Mich. 513, 14 Det. Leg. N. 196, 111 N. W. 1075.

38. Lauritsen v. Seward, 99 Minn. 313, 109 N. W. 404. Mandamus cannot be invoked to settle a doubtful claim to an office or to have the title to an office adjudicated upon as between adverse claimants. Hoy v. State [Ind.] 81 N. E. 509.

39. Candidate claiming election to council. State v. Kendall [Wash.] 87 P. 821.

40. State v. Mason [Wash.] 88 P. 126.

taxpayer of a town may institute mandamus proceedings to compel the registrars of voters not to count an improperly marked ballot cast at a local option election.[41] Two candidates on the same ticket, claiming election, may join in a petition for mandamus to compel a canvass of the returns and issuance of certificates of election.[42] Mandamus proceedings to compel the performance of a duty incumbent upon a board of officers should be brought against the board as such and not against the members as individuals.[43] The mayor of a town who is the presiding officer of the council is a proper party to mandamus proceedings to compel the council to canvass the returns of a municipal election.[44] The petition for mandamus must designate the duty sought to be enforced [45] and state facts sufficient to warrant its enforcement.[46] In Washington, where mandamus issues to compel a town council to canvass the returns of an election, service of the writ on a majority of the council is sufficient.[47] Where mandamus is issued to compel a canvassing board to canvass the returns of an election, costs may be awarded against the board.[48] The fact that election officers have performed some of the acts commanded by mandamus does not preclude their appealing from the order granting the writ.[49]

Injunction.[50]—An injunction will be granted to restrain a county clerk from certifying to judges of election fraudulent and fictitious registrations,[51] and a temporary injunction will issue to restrain a county committee of a political party from enforcing an illegal system of enrollment for party primaries,[52] but an injunction will not issue to direct or control the mode in which an election shall be held,[53] to restrain the placing of the names of candidates duly nominated upon the official ballot on the ground that there is no vacancy to be filled at the election,[54] or to restrain a county clerk from canvassing the vote on the question

41. Rev. Laws, c. 192, § 5. Brewster v. Sherman [Mass.] 80 N. E. 821.

42. Candidate claiming election to a municipal council. State v. Kendall [Wash.] 87 P. 821. The candidates for sheriff and treasurer of a county on the same ticket may join, under Code Civ. Prac. § 10. Lehman v. Pettingell [Colo.] 89 P. 48.

43. Mandamus proceeding to compel calling of election to vote upon disincorporation of a city, as required by Henning's Gen. Law, p. 989, § 1, must be brought against board of trustees. Taylor v. Burks [Cal. App.] 91 P. 814.

44. State v. Kendall [Wash.] 87 P. 821.

45. Where petition is for mandamus to compel inspectors of town meeting to declare and clerk to enter result of meeting, if inspectors have failed to count ballots, such count is fairly within prayer of petition, and proceeding will not fail because it is not expressly requested. People v. Armstrong, 116 App. Div. 103, 101 N. Y. S. 712.

46. Petition for mandamus to erase from registration books residents and members of Soldiers' Home will not be granted where names of such persons are not stated and some of them are entitled to registration. State v. Willett, 117 Tenn. 334, 97 S. W. 299. Petition for mandamus to compel election commissioners to place the names of nominees upon official ballot under name and device of a certain party is insufficient if it fails to allege that certificate of nomination designated such title and device as required by Burn's Ann. St. 1901, § 6215. State v. Board of Election Com'rs of Marshall County, 167 Ind. 276, 78 N. E. 1016.

47. Pierce's Code, §§ 1420, 3521. State v. Kendall [Wash.] 87 P. 821.

48. Costs awarded against board where writ issued at suit of candidate claiming election. State v. Kendall [Wash.] 87 P. 821.

49. People v. Voorhis, 186 N. Y. 263, 78 N. E. 1001.

50. See 7 C. L. 1249.

51. Granting such an injunction does not violate Const. art. 2, § 5, which declares "that all elections shall be free and open, and that no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Aichele v. People [Colo.] 90 P. 1122.

52. Brown v. Cole, 54 Misc. 278, 104 N. Y. S. 109. But a permanent injunction will not be granted restraining chairman of such a committee from putting into operation certain alleged illegal rules and regulations for conduct of primaries, where primaries have been held and there was no effort to enforce such rules and regulations, and neither party claims that he has any interest in alleged cause of action, or that such rules and regulations are in force or threatened to be enforced (Brown v. Cole, 105 N. Y. S. 196), but upon dismissal of such suit, if the rules and regulations are illegal, no costs will be allowed (Id.).

53. Injunction will not issue to restrain use of voting machines. United States Standard Voting Mach. Co. v. Hobson, 132 Iowa, 38, 109 N. W. 458.

54. Sherlock v. District Ct. [Colo.] 88 P. 396.

of granting a franchise on the ground that the election was illegal.[55] In Colorado the district court has jurisdiction to issue an injunction to restrain the county clerk from certifying to judges of election fraudulent and fictitious registrations made by him.[56] Any member of a political party may sue to enjoin the county committee of such party from enforcing an illegal system of enrollment for party primaries.[57] The complaint in an action for injunction must allege facts sufficient to constitute a cause of action.[58] Certiorari may be brought to annul an injunction on the ground that it is issued without jurisdiction where the remedy by appeal is inadequate.[59]

§ 12. *Judicial proceedings to contest or review. Rights and remedies.*[60]—Statutes providing for the trial of election contests must conform to constitutional requirements,[61] and their provisions must be appropriate to the particular contest to which they have reference.[62] The charter of the city and county of Denver [63] did not create a right to contest a franchise election.[64] The statutes must be looked to to determine who is entitled to institute an election contest.[65] A defeated candidate may bring suit to set aside an election upon statutory grounds even though his petition does not show that he himself was elected to the office.[66] The validity of a stock-law election may be inquired into in a suit against a railroad for injuries to stock.[67] When jurisdiction to hear election contests is conferred upon a court, and the details of the procedure are not provided for, the court will adopt such procedure as is necessary to render the grant of jurisdiction effective.[68] Contests must be instituted within the time prescribed by statute.[69] The test to be applied in a contest where illegal votes have

55. Such question can be determined in the proceeding provided by Civ. Code, § 289, to test validity of franchise. Vickery v. Wilson [Colo.] 90 P. 1034. Such an injunction will not be granted because, pending determination of validity of franchise by proceedings in quo warranto, plaintiff will suffer loss from depreciation of value of his stock in a rival company. Id.

56. Aichele v. People [Colo.] 90 P. 1122.

57. Brown v. Cole, 54 Misc. 278, 104 N. Y. S. 109.

58. Facts alleged in complaint in action to enjoin county committee of political party from enforcing illegal system of enrollment for party primaries held to constitute cause of action. Brown v. Cole, 54 Misc. 278, 104 N. Y. S. 109.

59. Injunction restraining use of voting machines where appeal cannot be heard until after election. United States Standard Voting Mach. Co. v. Hobson, 132 Iowa, 38, 109 N. W. 458.

60. See 7 C. L. 1250.

61. Laws 1907, c. 538, providing for a hearing and determination by supreme court of an election contest upon petition of a candidate, confined to such questions as arise on an inspection of the ballots, is not void as imposing only ministerial duties on the court (Metz v. Maddox, 105 N. Y. S. 702), nor is such statute unconstitutional under Const. art. 2, § 6, requiring that all laws creating boards or officers for counting votes shall secure equal representation to two largest political parties (Id.). The constitutional requirement, Const. art. 1, § 2, that trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, is not violated by Laws 1907, c. 538, creating a new proceeding that did not exist when constitution was adopted for trial of election contests at suit of a contestant, because it does not provide for trial by jury. Id. Gen. Acts 1903, p. 431, § 7, providing that election to determine whether stock shall be prohibited from running at large may be contested on same ground and in same manner as contests of election of constable, is not violative of Const. art. 4, § 45, which provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only. Beason v. Shaw [Ala.] 42 So. 611.

62. Although Gen. Acts 1903, p. 434, § 7, relating to elections to determine whether stock shall be prohibited from remaining at large, provides that such elections may be contested in same manner as contests of election of constable, Code 1896, § 1697, the latter provision being inappropriate to a contest under the former statute cannot be resorted to. Beason v. Shaw [Ala.] 42 So. 611.

63. Section 182.

64. Williams v. People [Colo.] 88 P. 463.

65. One cannot contest an election for the office of county treasurer, under Cobbey's Ann. St. 1903, unless he is an elector of the county in and for which contestant is declared elected. Dodson v. Bowlby [Neb.] 110 N. W. 698.

66. Scholl v. Bell [Ky.] 102 S. W. 248.

67. Missouri, etc., R. Co v. Tolbert [Tex. Civ. App.] 18 Tex. Ct. Rep. 454, 104 S. W. 1014.

68. Whaley v. Bayer, 99 Minn. 397, 109 N. W. 820. Procedure established by general election law adaptable to hearing of contests instituted under Rev. Laws 1905, § 203, conferring jurisdiction on district courts. Id.

69. Colorado statute requiring election contests to be instituted "within ten days

been secretly cast is to see whether the contestant will be elected if all the illegal votes are deducted from contestee's vote.[70] As one holding an election certificate is not a usurper, quo warranto cannot be brought against him by the defeated candidate.[71]

Grounds for contest or review.[72]—A contest may be based on the ground that the contestee was not eligible to the office at the time of the election,[73] that no valid election was held on account of the deterrent effect of an injunction,[74] that the contestee was guilty of bribery,[75] or that his election was the result of fraud or irregularities in the conduct of the election,[76] the disfranchisement of voters,[77]

after the date when the votes are canvassed" does not begin to run until entire vote is canvassed, although at first meeting of board of canvassers the votes from all but one precinct were canvassed, and the returns therefrom will not affect result as between candidates for any single office. Vigil v. Garcia, 36 Colo. 430, 87 P. 543.

70. Scholl v. Bell [Ky.] 102 S. W. 248.

71. Civ. Code Prac. § 480. Scholl v. Bell [Ky.] 102 S. W. 248.

72. See 7 C. L. 1251.

73. There is ground under P. L. 1898, p. 312, § 163. Smith v. Ashmead [N. J. Law] 65 A. 877. Under Act April 16, 1846 (Rev. St. 1846, tit. 30, c. 21), as amended April 12, 1876 (P. L. p. 98; Gen. St. p. 3141), and Act of 1897 (P. L. 1897, pp. 285, 287, §§ 2, 6), a resident of a borough which has a population of less than 3,000 is eligible to the office of chosen freeholder for the township in which the borough lies. Id. That a statute provides that no officer of any corporation having any contract with a city shall be "eligible to any office" in such city is not ground for treating as nullities votes cast for such an officer for a city office, but the voters may reasonably assume that the candidate if elected will free himself from the disability before beginning his term, and thereby qualify himself to hold the office. Hoy v. State [Ind.] 81 N. E. 509. In Georgia where a person who is ineligible to hold the office receives a majority of votes cast in an election, the office does not go to the qualified person having the next highest number of votes, but the election is invalid, and a new one must be held. Dobbs v. Buford [Ga.] 57 S. E. 777.

74. An election is void which is not a full, free, and fair expression of the will of the voters on account of the deterrent effect of an injunction against holding such election. Brown's Estate v. Seattle, 43 Wash. 26, 85 P. 854.

75. Under Const. art. 2, § 6, the election of township trustee may be contested on the ground that the candidate gave or offered to give a bribe to secure his election. Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355. Contest held to be based on this provision and not on § 2328, Burns' Ann. St. 1901, and therefore that conviction under the statute was not an essential prerequisite to contest. Id. Under the statutes relating to bribery, Rev. St. 1898, §§ 4478, 4478a, 4481, to warrant ouster upon quo warranto proceedings of one elected on face of returns, it must appear that he "induced or procured" an "elector to vote for him * * * by bribery." State v. Bunnell [Wis.] 110 N. W. 177.

76. **An election will not be declared void on ground of fraud** unless fraud shown to have been perpetrated was sufficient to warrant conclusion that express will of legal voters was defeated. Childress v. Pinson [Ky.] 100 S. W. 278.

When irregularities will warrant setting election aside: A special election will not be set aside for irregularities which do not affect the fairness of the election or its result. Flores v. Police Jury of De Soto Parish, 116 La. 428, 40 So. 785.

When fraud and irregularities warrant excluding precinct: Where they occur in conduct of election to such extent that it is impossible to separate with reasonable certainty legal from illegal or spurious votes. Vigil v. Garcia, 36 Colo. 430, 87 P. 543. And even though actual fraud be not apparent, if negligence and misconduct of election officials has effect of destroying integrity of returns and avoiding prima facie character which they ought to bear, such returns will be rejected. Id. But if the integrity of the ballot has not been impaired, and illegal ballots can be easily separated from legal ones, the vote of a precinct will not be excluded. Id.

Fraud and bribery: Where it appears from an inspection of the whole record that there has been such fraud and bribery in an election that neither contestants nor contestees can be adjudged to have been fairly elected, the election will be declared void under Ky. St. 1903, § 1596a, subsec. 12. Orr v. Kevil, 30 Ky. L. R. 761, 100 S. W. 314.

Against whom fraudulent vote must be charged: Where it is shown that a fraudulent vote has been cast, but for whom it was cast cannot be established, it should not be charged against either party. Childress v. Pinson [Ky.] 100 S. W. 278.

77. **Disfranchised voters** are persons denied the right to vote, or persons whose votes by reason of fraud or other wrong have not been counted at all, or have not been counted as cast. Scholl v. Bell [Ky.] 102 S. W. 248.

Where there is no election in a precinct, all voters therein are disfranchised, in absence of proof that any of registered voters were illegal voters, ill, or absent from state on election day. Scholl v. Bell [Ky.] 102 S. W. 248.

Where there is no valid certificate of the election officers of a precinct, and the ballots therein have not been properly preserved, the precinct is wholly disfranchised. Scholl v. Bell [Ky.] 102 S. W. 248.

Polls kept open only during portion of hours prescribed: Where the polls in a precinct are kept open only during a portion

or the votes of persons not entitled to vote.[78] The refusal of a county clerk to place a candidate's name upon the ticket is not a ground for contest under the New Jersey statute.[79] The fact that the validity of a ballot was not questioned before the election officers will not prevent the defeated candidate from contesting it on a contest of the election.[80]

Jurisdiction.[81]—Jurisdiction to try contested election cases exists only when it is conferred by statute.[82] Such jurisdiction is generally conferred upon the courts,[83] but is sometimes vested in canvassing boards[84] or in municipal councils.[85] Statutes conferring such jurisdiction must not violate any constitutional requirement or inhibition.[86]

of the hours prescribed, all voters who thereby are denied the right to vote are disfranchised, and their number will be determined by deducting the number of those who voted from the registered vote of the precinct. Scholl v. Bell [Ky.] 102 S. W. 248.

Fraud, violence, and intimidation: Where, in a precinct, fraud, violence, and intimidation are resorted to, and the polling place is dominated and controlled by a partisan police, and many illegal votes are cast, all tending to render the result uncertain, the vote of the precinct will be considered as disfranchised. Scholl v. Bell [Ky.] 102 S. W. 248. And where fraud, intimidation, and violence result in the disfranchisement of enough voters to make it impossible to determine who is elected, the election is void and will be set aside. Id. Under Ky. St. 1903, § 1596a, subsec. 12, the court of appeals will set aside any election where fraud, intimidation, bribery, or violence affects the result to such an extent that it cannot be determined who was elected, even though contestee was ignorant thereof. Id.

78. Where there was a failure to provide for a special registration as required by statute, and voters were allowed to vote without presenting their registration certificates, the election was held to be invalid. De Haven v. Bowmer [Ky.] 102 S. W. 306. That votes in a town precinct, which embraces territory not within the town, exceed number of voters registered, does not show illegality where registration law applies only to voters in towns and cities. Duff v. Crawford, 30 Ky. L. R. 323, 97 S. W. 1123. Where seventy-six old men from a charitable institution were voted openly without having been required to take the statutory oath, it was held, the record not showing how they voted, that their votes should be counted as cast. Scholl v. Bell [Ky.] 102 S. W. 248. The entire vote of a precinct will not be rejected on ground that a number of illiterates voted illegally where it is not shown for whom they voted. Duff v. Crawford, 30 Ky. L. R. 323, 97 S. W. 1123.

79. P. L. 1898, p. 312, § 163. Smith v. Ashmead [N. J. Law] 65 A. 877.

80. Stegeman v. Cook [Ky.] 102 S. W. 872.

81. See 5 C. L. 1075.

82. Patterson v. Knapp [Ky.] 101 S. W. 379. In Kentucky, there being no provision for contesting result of election as to whether a tax should be imposed in aid of a graded school, the courts have no jurisdiction of such a contest. Id. As a general rule where lawmaking power provides for election to determine any question which it is proper to submit to popular vote, and there is no provision in the law, nor any general law authorizing judicial interference, and the right to interfere cannot be derived from the common law, a court of equity has no jurisdiction over matter, and all questions arising out of election must be determined alone by tribunal constituted by lawmaking power for that purpose. Ivey v. Rome [Ga.] 58 S. E. 852.

83. Under Hurd's Rev. St. 1905, c. 46, §§ 97, 98, the circuit court has jurisdiction to determine a contest as to election of city clerk. Smith v. Reid, 223 Ill. 493, 79 N. E. 148. Rev. Laws 1905, § 203, authorizes the district courts to hear and determine election contests instituted thereunder in the manner authorized by § 203. Whaley v. Bayer, 99 Minn. 397, 109 N. W. 820. The power conferred upon a city council by Kirby's Dig. § 5602, in relation to election of its members, is merely to pass upon face of returns. Jurisdiction to determine election contests for membership in councils is in the circuit court, under Kirby's Dig. c. 155. Doherty v. Cripps [Ark.] 102 S. W. 394. Where a contest involves title to office of each member of general council or aldermanic board of a city, Ky. St. 1903, § 2771, is not applicable, but the circuit court has jurisdiction under § 1596a, subsec. 12. Scholl v. Bell [Ky.] 102 S. W. 248. The county judge and the two justices of the peace residing nearest the courthouse have jurisdiction to hear and determine contests of local option elections, notwithstanding Acts of 1898 and 1900, investing election commissioners with power to determine contested elections. De Haven v. Bowmer [Ky.] 102 S. W. 306.

84. Under Code 1902, §§ 205, 216, 217, a board of county canvassers has jurisdiction of a contest of a special election in a county on the dispensary question. Wright v. State Board of Canvassers [S. C.] 57 S. E. 536.

85. Under Gen. Laws 1895, p. 48, c. 8, § 114, the city council and the district court have concurrent jurisdiction to hear and determine an election contest for the office of alderman. State v. Craig, 100 Minn. 352, 111 N. W. 3. This statute was not repealed by Gen. Laws 1901, p. 584, c. 365, or by Rev. Laws 1905, § 336. Id. Ky. St. 1903, § 3486, providing that board of council of a city of fourth class shall judge of eligibility and election returns of its members, does not give such board jurisdiction where the election of members of board is contested. Orr v. Kevil, 30 Ky. L. R. 761, 100 S. W. 314.

86. Rev. St. 1905, § 203, in so far as it attempts to confer upon supreme court origi-

Notice or summons, pleadings and issues.[87]—In Missouri the contestant must give notice of intention to file petition, stating the place[88] and time[89] of filing. But such notice may be waived.[90] The contestant's initial pleading must state facts showing his right to bring the suit[91] and the grounds of contest.[92] In Kentucky the contestee cannot rely on any grounds of contest against contestant except such as are specifically alleged in his answer.[93] The answer need not plead facts which are admitted by the notice of contest.[94] The allowance of an amendment to answer introducing new matter is within the sound discretion of the court.[95] Where an exception to an amended answer refers to a statute which makes applicable to election contests the general rules controlling amendment of pleadings, it invokes those rules.[96]

Dismissal.[97]—Dismissal of an election contest on contestant's motion will not bar him from instituting another contest.[98]

Preservation and production of ballots.[99]—Disputed ballots cannot be considered where not certified as required by statute, although placed in an envelope and properly sealed.[1] An order removing ballot boxes from the custody of their legal custodians will be vacated if there is no evidence showing reasonable grounds for fear that they will be tampered with.[2] An order that the board of elections preserve in the ballot boxes the ballots cast at a municipal election will not be vacated where there is no public necessity requiring the immediate use of the bal-

nal jurisdiction in election contests, is unconstitutional. Lauritsen v. Seward, 99 Minn. 313, 109 N. W. 404. Section 182, Charter of City and County of Denver, providing that election contests shall be heard by the county court, contravenes Const. art. 6, § 23, and art. 7, §§ 11, 12, and is void. Williams v. People [Colo.] 88 P. 463. Kirby's Dig. § 2856, conferring original jurisdiction upon circuit court to hear and determine contests for office of county and probate judge, is not unconstitutional under Const. art. 7, § 51. Sumpter v. Duffie, 80 Ark. 369, 97 S. W. 435.

87. See 7 C. L. 1251.

88. Where notice required by Rev. St. 1899, § 7057, states that it will be filed "in the circuit court," the place of filing is sufficiently designated though § 7062 requires petition to be filed "in the office of the clerk of the circuit court." State v. McElhinney, 199 Mo. 67, 97 S. W. 159. Such notice is not rendered invalid by fact that it states that petition will also be filed with a certain judge. Id.

89. Notice of intention to file petition ten days after service of notice, and within forty days after election, is sufficiently definite as to time of filing where period of forty days after election ends on a Sunday, and the ten days after service of notice on the Saturday preceding. State v. McElhinney, 199 Mo. 67, 97 S. W. 159.

90. It is waived where contestee appears in court and files answer to merits of case which is in part a cross complaint. State v. McElhinney, 199 Mo. 67, 97 S. W. 159.

91. In a contest for the office of county treasurer, under Cobbey's Ann. St. 1903, §§ 5682, 5683, it is necessary to allege that contestant is an elector of county in and for which contestee is declared elected. Dodson v. Bowlby [Neb.] 110 N. W. 698.

92. Statement of contest on ground of bribery based upon Const. art. 2, § 6, held sufficient. Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355.

93. Ky. St. 1903, § 1596a. Neely v. Rice, 29 Ky. L. R. 1142, 30 Ky. L. R. 164, 97 S. W. 737.

94. Where notice of contest discloses that defendant was entitled to office unless he was under constitutional age when elected, he need not plead the fact thus admitted. Breeden v. Martens [S. D.] 112 N. W. 960.

95. Lipscomb v. Perry [Tex.] 16 Tex. Ct. Rep. 787, 96 S. W. 1069. A party attacking the exercise of that discretion must show that it has been abused to his injury. Id. Sustaining exceptions to new matter introduced by amended answer, under circumstances of this case, no abuse of discretion. Lipscomb v. Perry [Tex.] 16 Tex. Ct. Rep. 787, 96 S. W. 1069, rvg. [Tex. Civ. App.] 98 S. W. 1101. The fact that reference in exception to a particular statute under which it was alleged new matter came too late was erroneous did not limit the court's discretion. Id.

96. Lipscomb v. Perry [Tex.] 16 Tex. Ct. Rep. 787, 96 S. W. 1069.

97. See 7 C. L. 1253.

98. This is so though dismissal is after answer and replication, and over contestee's objection. Vigel v. Garcia, 36 Colo. 430, 87 P. 543.

99. See 7 C. L. 1253.

1. Combs v. Combs, 30 Ky. L. R. 161, 97 S. W. 1127. If requirements of Ky. St. 1903, § 148, in regard to sealing disputed ballots, and certifying in relation thereto, are not complied with, such ballots cannot be counted. Neely v. Rice, 29 Ky. L. R. 1142, 30 Ky. L. R. 164, 97 S. W. 737; Duff v. Crawford, 30 Ky. L. R. 323, 97 S. W. 1123.

2. Boxes in custody of officers who, under Laws 1896, p. 963, c. 909, § 111, were their legal custodians. People v. McClellan, 52 Misc. 614, 103 N. Y. S. 827.

lot boxes, and the ballots may be essential to a recanvass of the votes, or to a trial of the title to the office.[3] Application for vacation of such order should be made by the board of elections against whom it operates, and not by the successful candidate.[4]

Evidence.[5]—In an election contest, the burden of proof is upon the contestant.[6] The rule that the evidence must be relevant to the question at issue prevails in election contests.[7] Testimony of a witness that one representing himself as contestee came to him in the dark and offered him a bribe is admissible, though witness does not positively identify contestee as such person.[8] Illegal votes cast by secret ballot are admissible to show the general uncertainty of an election, without proving for whom they were cast.[9] For whom illegal votes were cast may be shown by the evidence of the officers of election,[10] and it must be shown by them if the ballots were cast openly.[11] But where they were cast by secret ballot, the voters alone can prove for whom they were cast.[12] The result of an election cannot be established by parol proof.[13] It must be shown by the certificate of the election officers or by the ballots themselves.[14] The certificate is prima facie correct,[15] but the ballots themselves, when preserved as the law directs, are the better evidence, and must prevail where there is a difference.[16] But if the ballots are not so preserved the certificate must control.[17] Cases dealing with the sufficiency of the evidence to prove particular facts will be found in the note.[18]

3, 4. Hearst v. McClellan, 117 App. Div. 240, 102 N. Y. S. 47.

5. See 7 C. L. 1253.

6. Smith v. Ashmead [N. J. Law] 65 A. 877. In a contest of the office of county treasurer, under Cobbey's Ann. St. 1903, §§ 5682, 5683, it is necessary to prove that contestant is an elector of the county in and for which contestee is declared elected. Dodson v. Bowlby [Neb.] 110 N. W. 698. A candidate who undertakes to purge the ballots of illegal votes must show for whom they were cast. Duff v. Crawford, 30 Ky. L. R. 323, 97 S. W. 1123; Scholl v. Bell [Ky.] 102 S. W. 248. Thus, where a vote is contested on the ground that it was not secretly marked, the burden is upon contestant not only to show that fact but also for whom it was cast. Combs v. Combs, 30 Ky. L. R. 161, 97 S. W. 1127. In an action under Ky. St. 1903, § 1596, subsec. 12, to set aside an election for fraud, intimidation, bribery, or violence, the burden does not rest upon contestant to show that he would have been elected but for the wrongdoing, but only to show that such wrongdoing existed to such an extent that it cannot be determined who was elected. Scholl v. Bell [Ky.] 102 S. W. 248.

7. A witness who has testified that he received a bribe cannot on cross-examination be questioned as to his motive in accepting it. Tinkler v. Wallace, 167 Ind. 382, 79 N. E. 355. Where evidence has been admitted that contestee when challenged at the polls for bribery failed to make the required affidavit, it is proper to ask contestee if he requested certain persons to seek the advice of anybody else, foundation having been laid therefor by an offer to show that he sought advice as to the affidavit he would be required to make in order to vote. But a ruling sustaining objection to such question is not reversible error. Id.

8. Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355.

9. Scholl v. Bell [Ky.] 102 S. W. 248.

10. Illiterates voting in violation of law. Duff v. Crawford, 30 Ky. L. R. 323, 97 S. W. 1123.

11. Scholl v. Bell [Ky.] 102 S. W. 248. But in Combs v. Combs, 30 Ky. L. R. 161, 97 S. W. 1127, and Duff v. Crawford, 30 Ky. L. R. 323, 97 S. W. 1123, it was held that voters who voted openly may testify as to whom they voted for.

12. But they are protected against such disclosure by the privilege against self-incrimination. Scholl v. Bell [Ky.] 102 S. W. 248. But see Duff v. Crawford, 30 Ky. L. R. 323, 97 S. W. 1123.

13. Scholl v. Bell [Ky.] 102 S. W. 248.

14. Scholl v. Bell [Ky.] 102 S. W. 248. If there is no valid certificate from a precinct, and the ballots therein have not been properly preserved, the result of the election cannot be established, and the precinct is therefore wholly disfranchised. Id.

15. Scholl v. Bell [Ky.] 102 S. W. 248.

16. Scholl v. Bell [Ky.] 102 S. W. 248; Lester v. Fogarty, 30 Ky. L. R. 759, 99 S. W. 910.

17. Scholl v. Bell [Ky.] 102 S. W. 248. The contents of ballots cannot be proved by parol. Id. A lost or destroyed ballot cannot be supplied like a lost deed for the purpose of counting the vote. Id.

18. Evidence held sufficient to prove conspiracy of managers of democratic campaign to carry election by fraud, theft, and violence. Scholl v. Bell [Ky.] 102 S. W. 248.

Affidavit of election officers that ballots in box are in condition in which they were cast by voters is sufficient to establish validity of some of such ballots, in absence of opposing evidence, although as to others affidavit is shown to be untrue. Lipscomb v. Perry [Tex. Civ. App.] 98 S. W. 1101.

Evidence insufficient to prove that fraudu-

Costs.[19]—In Arkansas a contestee in a contest of an election for the removal of a county seat is entitled to the costs of depositions taken by him before the regularity of the election was conceded, but not to costs of copying stenographer's notes, the statute not providing therefor.[20]

Decision and review thereof.[21]—In South Dakota a contestant of an election for the removal of a county seat is not entitled to a judgment by default where an elector has appeared to defend before application for such judgment,[22] nor where the affidavit for judgment fails to state that no elector has answered or appeared.[23] In Kentucky the court will settle a tie by lot.[24] The findings of the court must be sustained by the evidence,[25] and the judgment must be supported by the findings.[26] The statutes generally authorize an appeal from the decision in an election contest.[27] If rulings of the trial court are not assigned as error, they cannot be considered on appeal.[28] The appellate court will not weigh conflicting evidence, but will affirm the judgment below if there is sufficient evidence to sustain it,[29] and findings of fact will not be set aside if they are supported by competent testimony.[30] Upon certiorari the court cannot review the findings of fact or the merits, but may determine whether the lower court exceeded its jurisdiction.[31] Certiorari will not lie to determine whether petitioners have been elected members of a political committee.[32] Where the remedy by appeal is adequate to afford full relief, a writ of prohibition will not issue to review the decision or restrain the action of the trial court.[33]

Security for appeal; costs.[34]

§ 13. *Offenses against election laws.*[35]—In all the states there are statutes prescribing penalties for offenses against the election laws.[36] The constitutionality of the Missouri statute has been upheld.[37] In Minnesota no person is per-

lent votes were cast for deomcratic ticket. Childress v. Pinson [Ky.] 100 S. W. 278.

19. See 7 C. L. 1255.

20. Reese v. Cannon, 80 Ark. 574, 98 S. W. 370.

21. See 7 C. L. 1255.

22. And this is so though contestant never received notice of such appearance mailed to him. Griffin v. Walworth County Com'rs [S. D.] 104 N. W. 1117.

23. Griffin v. Walworth County Com'rs [S. D.] 104 N. W. 1117.

24. Ky. St. 1903, § 1596, subsec. 12. Stegeman v. Cook [Ky.] 102 S. W. 872.

25. Evidence held to sustain finding that defendant was of age required by constitution when elected. Breeden v. Martens [S. D.] 112 N. W. 960.

26. In an election contest a judgment that the office is vacant is authorized by findings which show that contestee has been guilty of bribery, although it is not found that any opposing candidate is entitled to the office. Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355.

27. Under Ky. St. 1903, § 2567, from a decision of the contest board refusing to assume jurisdiction of a local option election contest, an appeal lies to the circuit court. De Haven v. Bowmer [Ky.] 102 S. W. 306. Under Code 1902, §§ 205, 223-228, an appeal lies from a decision of a board of county canvassers, in a contest of a special election on the dispensary question, to the board of state canvassers. Wright v. State Board of Canvassers [S. C.] 57 S. E. 536.

28. Rulings rejecting ballots. Strosnider v. Turner [Nev.] 90 P. 581.

29. Contest grounded on bribery. Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355.

30. Vigil v. Garcia, 36 Colo. 430, 87 P. 543.

31. In re Mulholland's Case, 217 Pa. 631, 66 A. 1105.

32. Dwyer v. Canvassers and Registration of Providence [R. I.] 67 A. 597. Certiorari will not lie to review decision of board of canvassers and registration that a caucus for election of political committee was void, and to obtain a decision sustaining election of petitioners. Id.

33. Will not issue, in such case, to restrain judge of district court from canvassing returns of a certain precinct. Turner v. Langan [Nev.] 88 P. 1088. The writ of prohibition will not issue to review alleged irregularities and defects in the proceedings of a city council in determining an election contest where the council is acting within its jurisdiction. State v. Craig, 100 Minn. 352, 111 N. W. 3. The question of nonjoinder of parties defendant may be reviewed by appeal or writ of error, but not by a writ of prohibition. State v. McElhinney, 199 Mo. 97, 97 S. W. 159.

34. See 5 C. L. 1078.

35. See 7 C. L. 1256.

36. Under 20 Del. Laws 1897, c. 393, §§ 16, 17, 29, any person stealing, willfully destroying, mutilating, defacing, falsifying, or fraudulently removing or secreting ballots or fraudulently making any entry, erasure, or alteration in them, is guilty of a misdemeanor. State v. Tyre [Del.] 67 A. 199.

37. Act March 24, 1903 (Laws 1903, p. 155).

mitted to hold any elective office procured. with his knowledge or consent, in violation of any of the provisions of the corrupt practices act.[38] A presiding judge of election who, without a warrant, orders the arrest of a voter whose only offense is carrying into the voting booth the initials of persons for whom he desires to vote, is liable for false imprisonment.[39]

The indictment.[40]—An indictment must be found within the time prescribed.[41] Usually the sufficiency of an indictment for an election offense is to be tested by the rules applicable to indictments in general, but a statute requiring a liberal construction of the election law, so as to prevent any evasion of its prohibitions and penalties by shifts or device, must be read in connection with the statutory requirements as to the essential elements of a good indictment.[42] The indictment, information, or complaint must charge all the essential elements of the offense,[43] but it need not allege a fact of which the court will take judicial notice.[44] An erroneous indorsement on the back of an indictment will not render it void.[45]

Variance.[46]—An immaterial variance between the indictment and the proof

amending Rev. St. 1899, c. 15, art. 6. State v. Keating, 202 Mo. 197, 100 S. W. 648.

38. Within meaning of this act, Laws 1895, c. 277, p. 664, a political aspirant becomes a candidate at time of filing his affidavit of intention of becoming a candidate for a specified office, in accordance with Rev. Laws 1905, § 184. The verified statement which he is required to file need not include items of expenses incurred or paid anterior to filing such affidavit. State v. Bates [Minn.] 112 N. W. 1026.

39. Smyth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 338, 103 S. W. 899.

40. See 7 C. L. 1257.

41. In a prosecution for violation of primary election law, 20 Del. Laws (1897), c. 393, § 17, an indictment is in time if found within two years from time offense was committed. State v. Tyre [Del.] 67 A. 199.

42. Ky. St. 1903, § 1591, while it does not abrogate the code provisions relating to essential elements of a good indictment, should be read in connection with them as illustrating the legislative intent concerning prosecutions of offenses against election laws. Commonwealth v. Drewry [Ky.] 103 S. W. 266.

43. **Fraudulent registration:** In prosecution under Sess. Acts 1903, p. 155, § 2120j, information held insufficient in not charging all essential elements of offense. State v. Keating, 202 Mo. 197, 100 S. W. 648; State v. Walsh, 203 Mo. 605, 102 S. W. 513.

Illegal voting: Information insufficient in that it fails to allege defendant voted at more than one election precinct. State v. Helderle, 203 Mo. 574, 102 S. W. 558. In a prosecution under Gen. Laws 1896, c. 14, § 2, an allegation in complaint that defendant voted at a meeting of electors of the "town of North Providence * * * for the choice of town officers, state officers, and a representative in congress" is sufficient without alleging for what town and state, or that the representative in congress was for the congress of the United States. State v. Custer [R. I.] 66 A. 306. In a prosecution under this statute, defendant's disqualification to vote in a certain town is sufficiently alleged by averment that he "did not then have his residence and home in said town." Id. And the complaint is sufficient if it allege that defendant did "give in his vote," without alleging for whom he voted or how his ballot was marked. Id.

Offenses by aliens against Federal statutes: An indictment which alleges that defendant had in his possession a false certificate of naturalization, "with intent then and there unlawfully to use the same for the purpose of having himself registered as a voter," sufficiently charges an offense under Rev. St. U. S. 5425 (U. S. Comp. St. 1901, p. 3669), although it fails to allege that purpose was consummated. Green v. U. S. [C. C. A.] 150 F. 560. Where an indictment charges defendant with having falsely made affidavit before a registration officer that he was a naturalized citizen of the United States, for the purpose of causing himself to be registered as a voter at a state election, it sufficiently charges an offense under Rev. St. U. S. § 5428 (U. S. Comp. St. 1901, p. 3670). Id.

Certifying to improper certificate of election: It is not a fatal defect in an indictment under Ky. St. 1903, § 1585a, making it a crime for an officer of election to "knowingly and willfully" certify to an improper certificate of election, that the accusatory part charges defendant with "unlawfully and feloniously" certifying, etc., where the statutory words are employed in body of indictment. Commonwealth v. Drewry [Ky.] 103 S. W. 266. Indictment under this statute held to contain sufficient averment that defendant was an officer of election. Id.

44. Complaint in prosecution for illegal voting sufficient, though it does not allege date of election, as court will take judicial notice of date. State v. Custer [R. I.] 66 A. 306.

45. An indictment for violation of the primary election law, 20 Del. Laws 1897, c. 393, against one not an officer of election, under § 17, is not fatally defective because of an indorsement on the back by the attorney general that it is for violation of § 16 which relates to same offenses when committed by an officer of election. State v. Tyre [Del.] 67 A. 199.

46. See 7 C. L. 1257.

is not fatal.[47] Satisfactory proof of the commission of any one of several offenses charged in separate counts of an indictment will support the indictment.[48]

Burden of proof and evidence.[49]—In a prosecution for an offense against the election laws, hearsay evidence is inadmissible.[50] To warrant a conviction upon such a prosecution, the evidence must be sufficient to show the existence of all the elements of the offense.[51]

Opening of ballot boxes may be ordered to procure evidence from the ballots.[52]

Question for the jury.[53]

ELECTRICITY.

§ 1. Electric Franchise (1062).
§ 2. Contracts (1063).
§ 3. Duty of Care Respecting Electricity (1063).
§ 4. Causes of Action; Remedies and Procedure (1065).

This topic treats of the duties owed by persons furnishing or using electricity to others not in their employ,[54] except so far as such rights and duties are peculiar to a specific application of electricity, as its use in propelling street cars,[55] or in transmitting messages.[56] The general principles of negligence,[57] and the rules of damages,[58] are treated elsewhere.

§ 1. *Electric franchise.*[59]—The right of an electric company to occupy streets depends largely upon statute,[60] the consent of the city usually being required.[61] Permission to construct a conduit does not become a contract right until acted upon,[62] but a franchise for such purpose is irrevocable except under

47. State v. Tyre [Del.] 67 A. 199. In prosecution for violating primary election law, 20 Del. Laws (1897), c. 393, § 17, it is not essential to conviction that proof should show commission of offense on day charged in indictment. Id. Where accused is charged with committing an offense with respect to a specified number of ballots, he may be convicted upon proof that he committed it with respect to any less or greater number. Id.

48. So held where by separate counts accused was charged with destroying, mutilating, defacing, falsifying, removing, and altering ballots cast at a primary election. State v. Tyre [Del.] 67 A. 199.

49. See 7 C. L. 1257.

50. In a prosecution for illegal registration, testimony by state's witness in rebuttal as to what a certain person told him as to defendant's place of residence is hearsay and inadmissible. State v. Walsh, 203 Mo. 605, 102 S. W. 513.

51. In prosecution for fraudulent registration, evidence held sufficient to show, in absence of proof to contrary, that defendant did not reside in precinct where it is charged he registered. State v. Keating, 202 Mo. 197, 100 S. W. 648. Evidence in prosecution for unlawful registration held insufficient to prove that defendant fraudulently registered as a qualified voter in a precinct in which he did not reside. State v. Walsh, 203 Mo. 605, 102 S. W. 513. Evidence in prosecution for illegal voting held to sustain verdict of guilty. State v. Armstrong, 203 Mo. 554, 102 S. W. 503 Participation in election fraud by clerk held sufficiently shown to sustain conviction of conspiracy. Commonwealth v. Williams, 31 Pa. Super. Ct. 372.

52. Commissioner may be appointed to open ballot box. Commonwealth v. Hartman, 31 Pa. Super. Ct. 364.

53. See 7 C. L. 1258.

54. See Master and Servant, 8 C. L. 840.

55. See Street Railways, 8 C. L. 2004.

56. See Telegraphs and Telephones, 8 C. L. 2096.

57. See Negligence, 8 C. L. 1090.

58. See Damages, 9 C. L. 869.

59. See 7 C. L. 1258.

60. St. 1901, p. 154, c. 214, § 3, construed and held to authorize Old Colony St. R. Co. to maintain poles and feed wires, with consent of aldermen, for transmission of electricity in streets in which it had right to operate a railway. Williams v. Old Colony St. R. Co., 193 Mass. 305, 79 N. E. 484.

61. Where company incorporated under Act April 29, 1874 (P. L. 73), to manufacture light obtained permission to occupy streets, it was not obliged to renew its permission upon reorganizing under Act May 8, 1889 (P. L. 136), with power to supply light, heat, and power by electricity. Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A. 72. If, under Acts 1888, p. 1060, c. 583, tit. 16, § 2, action of department of parks of Brooklyn in authorizing Flatbush Gas Company to lay electric wires in Ocean Parkway required consent of city council, such consent must be presumed where no objection is made for 10 years. People v. Coler, 54 Misc. 21, 103 N. Y. S. 590.

62. Within protection of constitution, People v. Ellison, 115 App. Div. 254, 101 N.

the terms thereof.[63] Permission to occupy the streets confers the right to lay conduits under the sidewalks.[64] Where the statute under which a company organizes gives it the right to "alter," etc., its system, it may change from a pole to a conduit system without municipal consent.[65] The right of an individual to object to the maintenance of a conduit in front of his property may be lost by laches.[66]

§ 2. *Contracts.*[67]—Where a customer makes a defective connection which would render the company liable to a third person in case of injury, the current may be shut off without liability.[68]

§ 3. *Duty of care respecting electricity.*[69]—While the courts seem to differ as to the degree of care required of persons using electricity, exacting from ordinary [70] to the highest care,[71] the true rule probably is that the care must be commensurate with the danger,[72] having regard to the dangerous character of the agency employed [73] as dependent upon the voltage used,[74] the probability of persons coming in contact with the wires,[75] and their right to be in close prox-

Y. S. 55. Under Laws 1885, p. 853, c. 499, § 4, providing that if no suitable plan for construction of conduits be proposed within 60 days from passage of act, the board of commissioners shall devise general plan, etc., permission to construct a conduit lapsed where not used within sixty days (People v. Ellison, 51 Misc. 413, 101 N. Y. S. 444), especially where no attempt was made to act thereunder for twenty years. (People v. Ellison, 115 App. Div. 254, 101 N. Y. S. 55).

63. People v. Ellison, 51 Misc. 413, 101 N. Y. S. 444.

64. Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A. 72.

65. Organized under Act May 8, 1889. Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A. 72.

66. Where company changes from pole to conduit system without municipal objection, and individuals make no complaint for six years, it is too late for individual to compel removal. Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A. 72.

67. See 7 C. L. 1259.

68. Especialy where customer refuses to remedy defect on request. Benson v. American Illuminating Co., 102 N. Y. S. 206.

69. See 7 C. L. 1259.

70. Ordinary care in view of the danger to be apprehended. Toledo Rys. & Light Co. v. Rippon, 8 Ohio C. C. (N. S.) 334; Goddard v. Enzler, 123 Ill. App. 108. Telephone company is not insurer against shocks while using its instruments, but must exercise such care as a prudent person would exercise under same circumstances. Brucker v. Gainesboro Tel. Co., 30 Ky. L. R. 1162, 100 S. W. 240. Party is not held to anticipation of extraordinary events, but storms deranging to some extent wires of electrical companies are not extraordinary events, so unusual or unprecedented as to relieve such companies from legal necessity of reasonable precautions to protect others from dangers caused thereby. Toledo Rys. & Light Co. v. Rippon, 8 Ohio C. C. (N. S.) 334. Is presumed to have knowledge of conditions of its wires which would have been discovered by ordinary prudence. Citizens Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 879.

71. Electric company furnishes light to private dwelling must exercise highest degree of care to keep wires in safe condition. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815.

72. Village of Palestine v. Siler, 225 Ill. 630, 80 N. E. 345.

73. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516.

74. Those handling electricity where voltage is such as to endanger life must exercise a very high degree of care, while those using a lesser voltage need only exercise ordinary care. Brucker v. Gainesboro Tel. Co., 30 Ky. L. R. 1162, 100 S. W. 240. Where telephone company so plans wires that if they break they will fall over heavily charged power wires and become charged thereby, it must exercise same care as though own wires were charged with such current. Citizens' Tel. Co. v. Thomas [Tex .Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 879.

75. Where electric light company places light where persons may come in contact therewith, it must keep insulation perfect. Thomas v. Somerset, 30 Ky. L. R. 131, 97 S. W. 420. Company running wires through trees must take notice of habit of boys to climb same. Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 42 So. 874. Where wires are strung across roof which was easily accessible to and frequented by public, city maintaining wires must apprehend that people may come in contact therewith. City of Greenville v. Pitts [Tex. Civ. App.] 18 Tex. Ct. Rep. 217, 102 S. W. 451. It is not mere possibility but reasonable probability, of accessibility of electrical appliances to children which invokes rule that electric company, placing appliances where cildren may come in contact therewith, must exercise highest degree of care to prevent injury. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815. Where boy was injured by coming in contact with wire while climbing pier of bridge, electric company held not liable on theory of "turntable cases" (Graves v. Washington Water Power Co. [Wash.] 87 P. 956), nor on doctrine that one must so use his property as to avoid injury to another, since company could not reasonably anticipate such injury (Id.).

imity thereto.[76] The care owed is nonassignable,[77] and upon failure to exercise it[78] one becomes liable for injuries proximately[79] resulting from his negligence,[80] unless the party injured is also negligent,[81] has assumed the risk,[82] or is main-

76. Policeman on roof endeavoring to ascertain whether gambling is going on in adjacent building is not a trespasser. City of Greenville v. Pitts [Tex. Civ. App.] 18 Tex. Ct. Rep. 217, 102 S. W. 451. One attempting to warm hands on electric globe, which was so placed as to be easily accessible, held not a trespasser. Thomas v. Somerset, 30 Ky. L. R. 131, 97 S. W. 420. Where servants of a telephone company go upon the poles of another company without its consent or knowledge, no recovery can be had for mere negligence. Louisville Home Tel. Co. v. Beeler's Adm'r [Ky.] 101 S. W. 397. Whether deceased was bare licensee or not on land of H., when he was killed by coming into contact with defendant's live wire, defendant is liable where it had knowledge of dangerous condition of its wire and that persons were in habit of going near place of danger. Connell v. Keokuk Elec. R. & Power Co., 131 Iowa, 622, 109 N. W. 177. It is electric company's duty to have its wires, to which persons whose duty calls them in close proximity thereto exposed, insulated. San Antonio Gas & Elec. Co. v. Badders [Tex. Civ. App.] 19 Tex. Ct. Rep. 507, 103 S. W. 229. Rule of law requiring persons dealing with electricity to exercise highest degree of care to protect persons in places where general public have right to be held is applicable to case of boy injured by coming into contact with wire while climbing pier of bridge. Graves v. Washington Water Power Co. [Wash.] 87 P. 956.

77. Cannot escape on ground that negligence was that of its servants. Citizens Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 879. Where employe of independent contractor painting poles carrying wires receives fatal shock because of defective condition of cap, principal is liable. Smith v. Twin City Rapid Transit Co. [Minn.] 112 N. W. 1001.

78. Held negligence to fail to inspect pole to see if it carried feed wires before directing plaintiff to climb same. Postal Tel. Cable Co. v. Likes, 124 Ill. App. 459. Held negligent as matter of law in placing wires through trees so that wire carrying 2,300 volts was within 26 inches of one of low potentiability. Grimm v. Omaha Elec. Light & Power Co. [Neb.] 112 N. W. 620. Negligent in not discovering and repairing wires left uninsulated by workmen several weeks before on account of rain. San Antonio Gas Electric Co. v. Badders [Tex. Civ. App.] 19 Tex. Ct. Rep. 507, 103 S. W. 229. It is as much duty of telephone company to remedy dangerous condition of its line because of close proximity of electric wires as if it had produced condition in first instance. Drown v. New England Tel. & T. Co. [Vt.] 66 A. 801. Where city operating electric light plant negligently left wire in position to cause injury, immaterial that it was not in use at time of accident. Todd v. Crete [Neb.] 113 N. W. 172.

79. Where telephone company on abandoning system left wire in tree and one come in contact with live trolley wire and carried current to fence, resulting in death of one touching fence, held that negligence of company in leaving wires in tree was proximate cause. Home Tel. Co. v. Fields [Ala.] 43 So. 711. Where guy wire becomes charged through defective insulation, fact that it would not have harmed decedent had he not also come in contact with hay wire attached to pole, held that proximate cause was current on guy wire. Yazoo City v. Birchett, 89 Miss. 700, 42 So. 569. Where broken wire dangling in street was taken by man and wrapped around post and decedent came in contact while tieing horse to post, negligence of company and not act of man was proximate cause. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 99 S. W. 879, 17 Tex. Ct. Rep. 532. If, in exercise of ordinary foresight and light of circumstances, negligent escape of powerful current from wires of power company to those of telegraph company should have been anticipated by former as likely to occur, such negligence will be deemed proximate cause of death or injury of employe of telegraph company occasioned by his contract while in performance of his duties, with his employer's wires so charged. Toledo Rys. & Light Co. v. Rippon, 8 Ohio C. C. (N. S.) 334. Where unused telegraph wire fell across electric light wire and pulled it down, fact that decedent came into contact with latter wire does not necessarily relieve telegraph company. Dannenhower v. Western Union Tel. Co. [Pa.] 67 A. 207.

80. Error to instruct that if plaintiff received injury from electric shock in stepping on defendant's tracks it is liable though defendant exonerated itself. Sullivan v. Brooklyn Heights R. Co., 117 App. Div. 784, 102 N. Y. S. 982. Error not cured by instruction that plaintiff must prove that injury was due to electric shock * * * and that jury has no right to speculate. Id. Evidence held to justify finding that deceased was thrown from pole by shock and did not accidentally fall. Smith v. Twin City Rapid Transit Co. [Minn.] 112 N. W. 100. Evidence held to show that decedent's death was caused by coming in contact with defendant's wire. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 879. Evidence held to support finding that plaintiff was jerked from top of car by sagging wire. Todd v. Crete [Neb.] 113 N. W. 172.

81. Citizens' Tel. Co. v. Westcott's Adm'x, 30 Ky. L. R. 922, 99 S. W. 1153. Where uncontradicted testimony shows that decedent had been warned that telephone was crossed with light wire and was dangerous, that he saw sparks flying from telephone box, that in sport he touched box with hand and wire and finally received fatal shock, peremptory instruction for defendant is proper. Id. Failure of deceased lineman to use rubber gloves held under evidence not to render him negligent as matter of law. Snyder v. Mutual Tel. Co. [Iowa] 112 N. W. 776.

taining the system in violation of ordinance.[83] Failure to insulate wires as required by ordinance is per se negligence.[84] A municipality operating an electric plant as a business enterprise[85] incurs the same liability as a private corporation.[86] The assurance of an employe beyond his agency that a wire is dead does not render his principal liable for an injury in reliance thereon.[87]

§ 4. *Causes of action; remedies and procedure.*[88] *Pleading.*[89]—The general rules respecting allegations of negligence[90] and proximate cause[91] obtain.

Evidence.[92]—Plaintiff must prove all the material elements of his cause of action,[93] including defendant's[94] negligence[95] as alleged,[96] or facts raising a presumption thereof.[97] Burden of proving contributory negligence generally rests

Where lineman was injured while climbing pole by coming in contact with exposed wire, held not negligent as matter of law where a man had safely preceded him and he looked at wire from ground without seeing defect. Gloucester Elec. Co. v. Dover [C. C. A.] 153 F. 139. Right to assume that electric company has properly insulated its wires does not relieve person of duty to exercise care of an ordinarily prudent man. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815. Where city constructs and maintains its electric light plant in careless manner, it cannot relieve itself from liability by casting burden of notice of danger on party injured. Village of Palestine v. Siler, 225 Ill. 630, 80 N. E. 345.

82. Where telephone lineman is injured by wire of third party while engaged in his work, held that doctrine of contributory negligence and not assumption of risks applied. Gloucester Elec. Co. v. Dover [C. C. A.] 153 F. 139. One undertaking to paint poles does not assume risk arising from defective cap. Smith v. Twin City Rapid Transit Co. [Minn.] 112 N. W. 100. For assumption of risk proper, see Master and Servant, 8 C. L. 840.

83. Where plaintiff caused electric light extension to be made without obtaining permit and without complying with regulations of national board of underwriters, as required by Lowell City Ordinance July 26, 1899, §§ 9, 10, 11, and he received shock because of such failure, no recovery can be had. Brunelle v. Lowell Elec. Light Corp. [Mass.] 80 N. E. 466

84. San Antonio Gas & Elec. Co. v. Badders [Tex. Civ. App.] 19 Tex. Ct. Rep. 507, 103 S. W. 229.

85. City of second class of less than 5,000 inhabitants may operate electric lighting plant for commercial purposes. Todd v. Crete [Neb.] 113 N. W. 172.

86. See Municipal Corporations, 8 C. L. 1056.

87. Sent to burning building to look after company's property. Trouton v. New Omaha Thomson-Houston Elec. Light Co., [Neb.] 110 N. W. 569.

88, 89. See 7 C. L. 1263.

90. Petition construed to allege negligence only in failing to keep wire properly insulated and not in placing in improper place in house. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815. Allegation of negligence in permitting wire to fall and remain down held to imply charge of negligence in manner of maintaining wire and in permitting to remain around post after it had been wrapped there by third person. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 879. Where it was alleged that defendant maintained electric wires so close to telephone pole on which plaintiff had to work as to injure him by current, injury was prima facie evidence of negligence and it was not necessary to allege the fact of imperfect insulation and escape of electricity. Brown v. New England Tel. & T. Co. [Vt.] 66 A. 801.

91. Where complaint shows that defendant negligently permitted wire to become weak and rotten and that fall of wire was proximate cause of accident, but which does not allege that fall resulted from defective condition, is insufficient. Aiken v. Columbus, 167 Ind. 139, 78 N. E. 657.

92. See 7 C. L. 1264.

93. Prima facie case is made against telephone company in evidence that its wire fell over heavily charged wire of power company at 8 o'clock p. m., that after mule came in contact therewith was severely injured man took wire from street and attached to pole, and that decedent was killed about 6 a. m. while tieing horse to pole. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 879.

94. Evidence that city installed electric globe and received compensation therefor held to sufficiently show duty to keep it properly insulated. Thomas v. Somerset, 39 Ky. L. R. 131, 98 S. W. 420. Blue print made day after accident and put in evidence by the Western Union Telegraph Co., defendant, on which wire causing accident was marked "W. U. Telegraph wire," held to supply formal proof of ownership. Dannenhower v. Western Union Tel. Co. [Pa.] 67 A. 207.

95. It is not essential to establish negligence in use of electricity to show precisely how injury occurred and particular defective agency. Goddard v. Enzler, 123 Ill. App. 108.

96. Where gist of action was negligence in permitting live wire to fall upon plaintiff's gate, variance between allegation that defendant negligently constructed wire across plaintiff's premises and proof that wires were constructed along sidewalk is not fatal. Houston Lighting Power Co. v. Hooper [Tex. Civ. App.] 19 Tex. Ct. Rep. 410, 102 S. W. 133.

97. Injury resulting from live wire

upon defendant.[98] The general rules respecting relevancy,[99] expert testimony,[1] evidence of prior accidents,[2] and subsequent conditions,[3] are applicable. Evidence of practice of a public officer not to make inspections as required by ordinance is not admissible to show that inspection would not have been made if application had been filed.[4]

Questions for jury.[5]—While the construction of an ordinance is for the court,[6] questions of fact, such as the cause of the injury,[7] defendant's negligence,[8] plaintiff's contributory negligence,[9] etc., are usually for the jury.

Instructions must not submit grounds of negligence not alleged,[10] issues not supported by evidence,[11] or influence the jury in favor of either party.[12] Again,

raises presumption of negligence. Goddard v. Enzler, 123 Ill. App. 108. Where death results from failure of transformer to reduce voltage, presumption of negligence arises. Quincy Gas & Elec. Co. v. Schmitt, 123 Ill. App. 647

98. Intimation in charge that presumption exists and remains throughout case that plaintiff was not guilty of contributory negligence but exercised ordinary care was not prejudicial as requiring anything more than that negligence of plaintiff need be shown by preponderance of evidence only. Toledo Rys. & Light Co. v. Rippon, 8 Ohio C. C. (N. S.) 334.

99. Although only negligence alleged is failure to keep wires properly insulated, evidence as to location is admissible as bearing on degree of care [Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815.), but court should instruct that such evidence should not be considered as showing independent negligence (Id.).

1. In action for death caused by breaking of wire and falling across another heavily charged, expert may testify whether there is any method whereby wires of upper system may be prevented from falling across those of lower system, but unless followed by proof of practibility of such method, it may be stricken. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 879. In action for failure to keep wires properly insulated, expert may testify whether in his opinion, based on certain assumption of fact which some of the evidence tended to show, wire was properly insulated. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815.

2. In action against telephone company for injury from shock received while telephoning, evidence that prior thereto third person was injured at another phone is inadmissible. Brucker v. Gainesboro Tel. Co., 30 Ky. L. R. 1162, 100 S. W. 240.

3. Held not error to receive testimony of connection between service wire and guy wire two or three days after accident where witness stated that at time of accident there seemed to be a connection and there was nothing to show change of conditions. Snyder v. Mutual Tel. Co. [Iowa] 112 N. W. 776.

4. Brunelle v. Lowell Elec. Light Corp. [Mass.] 80 N. E. 466.

5. See 7 C. L. 1266.

6. Error to permit city inspector to testify that in his opinion it was duty of no one but himself to enforce ordinance relating to change in wiring system. Brunnelle v. Lowell Elec. Light Corp. [Mass.] 80 N. E. 466.

7. In action for death of lineman, question whether circuit was caused by decedent's foot coming in contact with guy wire or by his grasping two service wires held for jury. Snyder v. Mutual Tel. Co. [Iowa.] 112 N. W. 776.

8. Held for jury: In placing heavily charged wires within 18 inches of each other and on opposite sides of pole likely to be climbed by workmen, and in permitting one to become uninsulated. Memphis Consol. Gas & Elec. Co. v. Bell [C. C. A.] 152 F. 677. Where telephone wire fell over power wire and became charged thereby. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 879. In action for loss due to lightning entering house over telephone wires left after removal of telephone box, negligence of defendant and of plaintiff. Evans v. Eastern Kentucky Tel. & T. Co., 30 Ky. L. R. 833, 99 S. W. 936.

9. Held for jury: Shock received while attempting to replace glass insulator. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815. In taking held of electric light bulb, knowing that a boy had shortly before received shock therefrom. Grimm v. Omaha Elec. Light & Power Co. [Neb.] 112 N. W. 620. Of one injured by coming in contact with defectively insulated wire while climbing pole in failing to discover defect. Dover v. Gloucester Elec. Co., 155 F. 256. Of one coming in contact while climbing pole with wire which had become uninsulated at splice, after warning to treat such wire as uninsulated because of strong voltage, held for jury. Memphis Consol. Gas. & Elec. Co. v. Bell [C. C. A.] 152 F. 677.

10. Where only negligence alleged is failure to keep wires properly insulated, instruction submitting negligence in improperly placing is erroneous. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815.

11. Where there was no evidence that breaking of wire or its being permitted to remain in dangerous condition was due to negligence of servants not error to refuse to submit such question. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 899.

12. In action against telephone com-

they need not submit issues where only one inference can be drawn in respect thereto.[13]

ELEVATORS, see latest topical index.

EMBEZZLEMENT.

§ 1. Nature and Elements of Offense (1067). | § 2. Prosecution and Punishment (1069).

This topic includes, in addition to embezzlement proper, the equivalent statutory offenses denominated larceny, larceny by bailee, larceny after trust, etc.

§ 1. *Nature and elements of offense.*[14]—Embezzlement is purely a statutory offense[15] and, in determining whether the acts charged constitute embezzlement, the terms of the statute are controlling.[16] It consists in the violation of a trust or fiduciary relation by the wrongful conversion or misappropriation of the trust property,[17] and it is the violation of this relation which distinguishes embezzlement from larceny.[18] Hence, while a mere agent de facto may commit this offense[19] one who does not hold himself out as agent and who stands in no re-

pany and electric company, instruction that, if jury found against both companies, to find for telephone company against electric company held not error as tending to influence jury to find against electric company. San Antonio Gas & Elec. Co. v. Badders [Tex. Civ. App.] 19 Tex. Ct. Rep. 507, 103 S. W. 229.

13. Where location of defendant's wire was such that it was bound to foresee that it would fall across heavily charged power wire if it should break, the likelihood of forseeing such consequences need not be submitted. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 S. W. 879.

14. See 7 C. L. 1268.

15. State v. Pellerin, 118 La. 547, 43 So. 159.

16. State v. Pellerin, 118 La. 547, 43 So. 159. There must at least be some act indicating an intent to segregate and hold for one's self the propery converted, or deprive the owner of the same, or convert it to one's own use, and accused must have assumed personal dominion over it. Knight v. State [Ala.] 44 So. 585. Corporate officers knowingly using corporate money to pay private debt for a printing press bought by them, and later sold to corporation, held to violate Pub. St. 1901, c. 274, § 7. State v. Davison [N. H.] 64 A. 761. Agent guilty of embezzlement for refusing to pay over money admitted to be due because of principal's refusal to settle as he desired. National Life & Acc. Ins. Co. v. Gibson [Ky.] 101 S. W. 895. Vendee not guilty for retaining a ring after default where vendor did not comply with conditions entitling him to the property. People v. Gluch, 188 N. Y. 167, 80 N. E. 1022, rvg. 117 App. Div. 432, 102 N. Y. S. 758.

17. Embezzling is the wrongful and felonious appropriation to himself by a servant, employe, or other person designated in the statute, of property intrusted to him by his employer. State v. Pellerin, 118 La. 547, 43 So. 159. Gravamen is that one who has come rightfully in possession as agent, servant, etc., converts or secretes the property. Knight v. State [Ala.] 44 So. 585. Breach of trust gist of offense under Gen. St. 1906, § 3311, and its provisions do not apply unless accused held a relation of confidence or trust, had possession by virtue thereof, and converted it in violation of the trust reposed in him. Tipton v. State [Fla.] 43 So. 684.

18. Defendant properly found guilty of embezzlement though acts would have been larcey if not committed in violation of fiduciary relation. State v. Pellerin, 118 La. 547, 43 So. 159. One who assists an employe having possession of property in removing it with intent to appropriate it is guilty of embezzlement and not of theft. Pearce v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 447, 98 S. W. 861.

NOTE. Who are bailees: Statutes punishing embezzlement by bailees have been held to apply to an innkeeper in possession of a guest's baggage (People v. Husband, 36 Mich. 306), to a person to whom money was delivered to buy goods for another (Reg. v. Arden, 12 Cox C. C. 512), to a person to whom accepted orders for goods were delivered (Hutchinson v. Com., 82 Pa. 472), to an attorney employed to collect money on percentage (Wallis v. State, 54 Ark. 611), but a person who receives money on property for another does not necessarily become a bailee within the meaning of such statutes. Thus, it is held that an employer is not a bailee as to money deposited by his agent to secure faithful performance by the latter of his duties (Mulford v. People, 139 Ill. 586), nor is one a bailee as to an excessive payment made to him by mistake (Fulcher v. State, 32 Tex. Ct. Rep. 621), nor is one to whom goods are delivered on conditional sale a bailee (Krause v. Com., 93 Pa. 418).—Adapted from Clark & M. Crimes, p. 518.

19. Tipton v. State [Fla.] 43 So. 684.

lation of trust or confidence may not be found guilty.[20] To constitute embezzlement by an agent or servant, it must appear that accused was an agent or servant,[21] that the property came into his hands as that of his employer,[22] that he received it in the course of his employment,[23] and that he appropriated it to his own use with intent to steal it.[24] Criminal intent is essential[25] and must exist at the time of the conversion,[26] but must be gathered from the acts of the agent and the circumstances of the case rather than from his express declarations,[27] and defendant's motive is immaterial if the property is in fact fraudulently converted.[28] Unless made an element by statute, a demand is not necessary where the conversion is complete without a refusal,[29] and it is not necessary to show what disposition was made of the money.[30]

Property held by defendant in partnership with prosecutor cannot be embezzled as the latter's property;[31] but an agent may embezzle funds collected for his principal though he be entitled to a percentage commission.[32] One is not guilty of embezzlement in making an authorized sale though he may subsequently embezzle the proceeds,[33] and, where he holds as purchaser, he cannot embezzle the property or the proceeds of a sale.[34]

The willful failure of a custodian of public funds to pay them over to his successor at the expiration of his term is an offense under the Arkansas statute regardless of whether there has been a previous misappropriation.[35] The Federal statute extends the crime of embezzlement of public money to any person who is guilty of the acts therein enumerated.[36] Money coming into a bank

20. Evidence insufficient to sustain conviction. Tipton v. State [La.] 43 So. 684.

21. People v. Hemple [Cal. App.] 87 P. 227.

22. People v. Hemple [Cal. App.] 87 P. 227. Insurance taxes collected by state auditor without authority not money of the state within Acts 1905, p. 670, c. 169, § 389. Sherrick v. State, 167 Ind. 345, 79 N. E. 193.

23. People v. Hemple [Cal. App.] 87 P. 227. Evidence insufficient to show that defendant received the money alleged to have been embezzled. Id. State auditor could not be held for converting insurance taxes collected by him without authority and which should have been collected by the treasurer. Sherrick v. State, 167 Ind. 345, 79 N. E. 193. That state sued on his bond was not such ratification of the collection as rendered him guilty of embezzlement by withholding the money from the state. Id.

24. People v. Hemple [Cal. App.] 87 P. 227.

25. No felonious intent where conditional sale vendee refused to return a ring for non-performance of conditions by vendor. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022. In proceeding for violation of Penal Code, § 528, evidence insufficient to show criminal intent in officer of insurance company who contributed to a campaign, at president's request, and received reimbursement. People v. Moss, 187 N. Y. 410, 80 N. E. 383.

26. Pawning ring with intent to redeem, and without intent to permanently deprive owner thereof, not theft as bailee. Taylor v. State [Tex. Cr. App.] 97 S. W. 473.

27. Agent knowingly appropriating principal's money guilty of embezzlement though at the time he intends to restore it. National Life & Acc. Ins. Co. v. Gibson [Ky.] 101 S. W. 895.

28. Not error to charge jury need not trouble about motive if defendant embezzled the property. State v. Allen [S. D.] 110 N. W. 92.

29. Not necessary on proof of wrongful appropriation to employe's own use. State v. Pellerin, 118 La. 547, 43 So. 159. Prosecution barred. Ex parte Vice [Cal. App.] 89 P. 983. Not necessary under Acts 1902, p. 151, c. 66, in prosecution against trustee. Commonwealth v. Kelly, 30 Ky. L. R. 1293, 101 S. W. 315. Offense of larceny after trust complete without demand, under Pen. Code 1895, § 194, when bailment and fraudulent conversion are shown. Goodman v. State [Ga. App.] 58 S. E. 558.

30. Knight v. State [Ala.] 44 So. 585.

31. Evidence held to show partnership in an organ and proceeds of sale. McCrary v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 309, 103 S. W. 924; Id. [Tex. Civ. App.] 19 Tex. Ct. Rep. 309, 103 S. W. 924.

32. Converting entire amount a violation of Ky. St. 1903, § 1202. Commonwealth v. Jacobs [Ky.] 103 S. W. 345.

33. McCrary v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 309, 103 S. W. 924.

34. Where accused was to take the property from prosecutor at cost, sell, and divide proceeds. McCrary v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 350, 103 S. W. 926.

35. Davis v. State, 80 Ark. 310, 97 S. W. 54. Must appear, however, that the money was in his possession at expiration of his term. Id. See post, Indictment.

36. Not directed only against bank offi-

through the collection by it of checks drawn by a state agent on third persons for goods bought from a penitentiary is state money, and the agent's subsequent appropriation thereof is an appropriation of money of the state.[37] That a state officer assumes to collect money for the state does not estop him from asserting that he is not in the class of persons mentioned in the statute.[38] Conversion of bank funds is "larceny in the bank" though committed outside the premises of the bank.[39] Subquent restitution [40] or the fact that security was given will not purge of criminality.[41]

§ 2. *Prosecution and punishment. Limitations and venue.*[42]—Limitations will commence to run without a demand where the conversion is otherwise clearly shown.[43] Venue lies only in the county where the crime was completed,[44] but the trial may be had in the county in which defendant received the property and in which he was to return it, though he took it into another county.[45]

The indictment.[46]—The general rules against uncertainty,[47] duplicity,[48] and repugnancy [49] apply. The identical words of the statute need not be employed so long as the words used unequivocally convey the meaning of the statute and apprise accused of the charge,[50] and, under a statute requiring the facts to be set out with clearness and certainty, accused is not entitled to a bill of particulars,[51] especially where he is a public officer having peculiar knowledge.[52] Though

cers and the like United States v. Greene, 146 F. 778.

37. Checks admissible. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

38. State auditor not estopped to deny his authority to collect taxes for state so as to avoid charge of embezzlement of state funds. Sherrick v. State, 167 Ind. 345, 79 N. E. 193.

39. Under Comp. Laws, § 11,562. People v. Messer, 148 Mich. 168, 14 Det. Leg. N. 157, 111 N. W. 854.

40. State v. Pellerin, 118 La. 547, 43 So. 159; Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

41. Proper to instruct that jury should not consider evidence thereof. State v. Allen [S. D.] 110 N. W. 92.

42. See 7 C. L. 1271. These are treated more fully in Indictment and Prosecution, 8 C. L. 189.

43. Prosecution barred after three years from time ticket agent converted money and left employ of company, though instituted shortly after demand. Ex parte Vice [Cal. App.] 89 P. 983.

44. Under Pen. Code 1895, § 191, the crime may consist in either a wrongful appropriation to one's own use or a disposition of the property and failure to account for its value on demand. The crime is complete in the first case upon the wrongful appropriation to one's own use, in the second, upon failure to account for the value of the property. Venue lies only in the county where the crime is thus completed. Raiden v. State, 1 Ga. App. 532, 57 S. E. 989.

45. Code Cr. Proc. § 72, providing for venue where offense is committed in two counties. State v. Allen [S. D.] 110 N. W. 92.

46. See 7 C. L. 1271.

47. Indictment against deputy sheriff sufficiently direct and certain as to incumbency of sheriff at time of conversion. Sias v. Territory [Ariz.] 89 P. 539. Indictment against commission merchant for conversion of proceeds of consignment held sufficiently definite and specific. State v. Teasdale, 120 Mo. App. 692, 87 S. W. 995. An allegation that accused received the property "as bailee" is sufficient to advise him that he came into possession of the property of another to be held for the latter for a special purpose. Storms v. State [Ark.] 98 S. W. 678. Indictment for embezzelement of public money held to sufficiently describe offense charged. United States v. Greene, 146 F. 778.

48. Indictment not double for alleging that defendant as bailee converted money to his own use, "and stole, took, and carried away" the same. Storms v. State [Ark.] 98 S. W. 678. A charge that defendant embezzled "and fraudulently converted" certain funds is not uncertain or double, though the quoted words may also be used in the statute to describe a different phase of larceny. Under Comp. Laws, § 11,562, for embezzlement by cashier of a bank. People v. Messer, 148 Mich. 168, 14 Det. Leg. N. 157, 111 N. W. 854. Additional allegation that defendant did "take, steal, and carry away" the property held mere surplusage so as not to make complaint charge two offenses. State v. Allen [S. D.] 110 N. W. 92. A count charging embezzlement of a draft and one charging embezzlement of the money obtained thereon held to charge the same offense. People v. Peck, 147 Mich. 84, 13 Det. Leg. N. 1004, 110 N. W. 495.

49. Indictment for defalcations of assistant financial agent of a penitentiary not repugnant for alleging that accused was an officer of the government and a clerk and employe of such officer. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

50. Words "unlawfully," "willfully," "fraudulently," and "feloniously" include the word "wrongfully." State v. Pellerin, 118 La. 547, 43 So. 159.

51. Sherrick v. State, 167 Ind. 345, 79 N. E. 193.

52. State auditor not entitled to be informed by such bill as to how, on what ac-

Christian names should be given, an averment of the owner's name by initials is sufficient.[53]

Ownership[54] and wrongful appropriation must be shown,[55] and the indictment must state that the funds came lawfully into defendant's possession by virtue of his relation or employment,[56] and that the trust had continued up to the time of the conversion.[57] Under the Arkansas statute an indictment for the embezzlement of public funds must allege either a misappropriation of the funds or that the officer willfully failed to pay over to his successor funds in his hands at the expiration of his term.[58] In New Mexico it must be charged that he was "unable to meet the demands of any person lawfully demanding the same."[59] Demand need not be alleged where not necessary to constitute the crime.[60] An indictment for fraudulent conversion of bailee need not allege theft of the property or that it was obtained by false pretenses or fraudulent representations.[61]

Evidence.[62]—The burden is on the state to prove that the offense was committed in the county of venue.[63] An apparent default being shown against a public official, the burden is on him to produce exculpatory evidence peculiarly within his knowledge.[64]

Subject to the ordinary rules,[65] evidence is admissible bearing on defendant's receipt of the money or property,[66] his defalcation,[67] and criminal intent.[68] A

count, etc., the property came into his hands. Sherrick v. State, 167 Ind. 345, 79 N. E. 193.

53. Knight v. State [Ala.] 44 So. 585.

54. A sheriff has such special property in public moneys collected by his deputy as will support an allegation of ownership in the former in an indictment against the latter. Sias v. Territory [Ariz.] 89 P. 539.

55. A mere allegation that defendant appropriated to his own use certain money of his employer does not sufficiently charge that the appropriation was to a use not in the due and lawful execution of his trust. People v. McMahill [Cal. App.] 87 P. 404.

56. Indictment for embezzling money order funds defective. United States v. Allen, 150 F. 152. Language of Rev. St. § 4046 not sufficient. Id. Prosecution under Burns' Ann. St. 1901, § 2022. Vinnedge v. State, 167 Ind. 415, 79 N. E. 353. Language of Burns' Ann. St. 1901, § 2022, insufficient. Id. An allegation that accused as employe had control and possession is not sufficient to show that the possession and control was by virtue of his employment. Id.; Wright v. State [Ind.] 81 N. E. 660. But an allegation that accused was a cashier of a bank is equivalent, under the Michigan statute, to an express charge that the money was in his possession by virtue of his office. Under Com. Laws, § 11,562. People v. Messer, 148 Mich. 168, 14 Det. Leg. N. 157, 111 N. W. 854.

57. Charge that defendant received the money as agent or servant and embezzled and appropriated same to his own use, and not in the one and lawful execution of the trust, held to sufficiently show continuance of the trust up to time of alleged conversion. People v. Hemple [Cal. App.] 87 P. 227.

58. Not sufficient to allege that at expiration of term officer failed to pay over funds which had previously come into his hands. Davis v. State, 80 Ark. 310, 97 S. W. 54.

59. Failure to allege that county treasurer was "unable to meet the demands of any person lawfully demanding the same" held fatal under Comp. Laws 1897, § 1125. Territory v. Abeytia [N. M.] 89 P. 254.

60. Not necessary in indictment against trustee under Acts 1902, p. 151, c. 66, for conversion of trust property. Commonwealth v. Kelly, 30 Ky. L. R. 1293, 101 S. W. 315.

61. Sufficient under Pen. Code 1895, art. 877, to allege that property was obtained by contract of hiring, and subsequently converted. Jeffreys v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 334, 103 S. W. 886.

62. See 7 C. L. 1272.

63. Evidence insufficient where defendant was given money to deposit in another county. Knight v. State [Ala.] 44 So. 585.

64. Burden on financial agent of a penitentiary to eliminate his private funds from those of state. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

65. In prosecution for embezzlement of penitentiary funds, held not error to exclude evidence of payment for certain goods to a convict bookkeeper, there being no evidence that accused was charged with that amount. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638. Where evidence showed that a financial agent had placed money to the credit of a certain company, held not error to exclude evidence that witness had examined account of accused with the company and that accused had never made a claim against the company for the money. Id.

66. Evidence of certain checks, orders, and items held admissible in prosecution of financial agent of a penitentiary for embezzlement of state funds. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

67. Testimony of expert bookkeepers appointed to examine the books of accused and report is admissible. Prosecution of agent of a penitentiary. Busby v. State

bank officer is within the terms of the Michigan statute permitting the admission of evidence of acts of embezzlement committed within six months next after the time stated in the indictment.[69] It may be shown that a check that was used was a mere memorandum.[70]

A civil judgment against accused and his bondsmen is not admissible,[71] and books of account with the state should not be admitted unless kept by accused or under his direct supervision, or unless it appears that they were properly kept and were books of original entries.[72] So, also, self-serving declarations of defendant's successor in service,[73] and items barred by limitations, should be excluded.[74]

Sufficiency of evidence.[75]—Where the receipt and failure to account for public funds is shown only slight additional evidence is required to show fraudulent intent,[76] but fraudulent intent at the time when property was received cannot be presumed from proof of a subsequent failure to return it, since that would make the offense larceny.[77]

Variance.[78]

Questions for jury; instructions.[79]—Questions of fact, such as whether accused had purchased the property,[80] or whether he fled to escape arrest,[81] are for the jury.

An instruction requiring unnecessary proof is properly denied,[82] but if the evidence warrants it the court should grant requested instructions on defendant's theory of defense,[83] such as the absence of criminal intent,[84] or that another might

[Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

68. That accused had been buncoed at cards held admissible to show why he had not redeemed a borrowed ring which he had pawned with intention to redeem. Taylor v. State [Tex. Cr. App.] 97 S. W. 473. Evidence of **similar transactions** by accused before and after that relied on is admissible on the question of intent. Storms v. State [Ark.] 98 S. W. 678.

69. "Clerk, servant, or agent" in Comp. Laws, § 11,782, includes bank cashier. People v. Messer, 148 Mich. 168, 14 Det. Leg. N. 157, 111 N. W. 854.

70. Where bank cashier obtained currency from another bank. People v. Messer, 148 Mich. 168, 14 Det. Leg. N. 157, 111 N. W. 854.

71. In prosecution for embezzlement of public funds, though state was plaintiff in the civil suit and the same defalcation was involved. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

72. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

73. Testimony of ticket agent who followed accused in selling tickets, from memorandum made by him as to what stubs and unsold tickets showed, these having been by him destroyed. People v. Hemple [Cal. App.] 87 P. 227.

74. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

75. See 7 C. L. 1273.

Evidence sufficient: To support conviction of commission merchant for failure to pay over proceeds of a consignment, in violation of Rev. St. 1899, § 1943. State v. Teasdale, 120 Mo. App. 692, 97 S. W. 995. To justify finding that the defendant was the person who hired a team. Jeffreys v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 334, 103 S. W. 866. To justify finding that conversion took place in county of hiring. Id. Held to show that defendant individually, and not any corporation of the name under which he acted, received and converted the money. Goodman v. State [Ga. App.] 58 S. E. 558. Evidence that cashier of national bank overdrew his account by checks not charged thereto, but kept in drawer, sufficient to warrant conviction of misapplication of bank's funds, in violation of Rev. St. § 5209. Brock v. U. S. [C. C. A.] 149 F. 173. Evidence insufficient to show that corporate officers used their own money to pay a debt, or that the corporation had assumed the debt. State v. Davidson [N. H.] 64 A. 761.

76. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

77. Knight v. State [Ala.] 44 So. 585.

78, 79. See 7 C. L. 1274.

80. Whether defendant had purchased stock from plaintiff or was broker. People v. West, 146 Mich. 537, 13 Det. Leg. N. 71, 882, 109 N. W. 1041.

81. People v. Hemple [Cal. App.] 87 P. 227.

82. Where statute provided that proof of amount of money taken should be sufficient without proof of the particular kind. Storms v. State [Ark.] 98 S. W. 678.

83. Though a charge requested by defendant was not properly worded, court should have instructed that if he delivered a certain package of money to an express messenger as he was required to do, or if jury had a reasonable doubt of such fact, he should be acquitted. Wadhams v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 727, 99 S. W. 1014.

84. Court should have specifically charged on the defense of mistake and inadver-

have committed the crime.[85] The jury should be instructed to disregard items of defalcation shown to be barred by limitations.[86]

The verdict.[87]

The judgment.[88]

Punishment.[89]—The imposition of a fine in double the amount of an embezzlement of public funds, irrespective of restitution, the same to operate as a judgment against the property of the convict, is not a denial af due process of law where he was given a full opportunity to be heard in his defense.[90]

EMBLEMENTS AND NATURAL PRODUCTS.[91]

This topic excludes cropping contracts and liens[92] and leasing on shares.[93]

"Crops" in the broadest sense of the term means all products of the soil grown and gathered within a single season.[94] "Crops grown and to be grown" includes crops raised by tenants and share croppers.[95] Growing trees constitute part of the realty[96] and must be conveyed as such.[97] Trees sold with a view of immediate severance and sale are converted into personalty,[98] but if not severed within the time specified or within a reasonable time thereafter, they cease to be chattels and are restored to their rightful position as part of the realty.[99] The remedy for conversion is determined by the nature of the emblements as real or personal.[1] Hay is personalty when sold.[2] All growing and unharvested crops raised annually by labor or planting upon a leasehold go to the administrator or personal representatives as assets of the estate upon death of tenant,[3] and the same is true if crops are raised after death of the lessee but during the life of the lease, unless there be an exemption.[4] An outgoing tenant is not entitled to crops that mature after termination of his lease unless it be by custom of the country or by express agreement,[5] though the landlord may by act or conduct estop himself from denying his tenant such right.[6]

tence. Where evidence showed that state officer was negligent in making reports and was misled by failure of a bank to report collections. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638. Instruction not objectionable as excluding belief under which corporate officers acted in paying a private debt with corporate funds. State v. Davidson [N. H.] 64 A 761.

85. Error to refuse. People v. Hemple [Cal. App.] 87 P. 227.

86. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 S. W. 638.

87. See 7 C. L. 1274.

88, 89. See 7 C. L. 1275.

90. Pursuant to Neb. Cr. Code, § 124. Coffey v. Harlan County, 204 U. S. 659, 51 Law. Ed. 666.

91. See 7 C. L. 1275.

92. See Agriculture, 9 C. L. 82.

93. See Landlord and Tenant, 8 C. L. 656.

94. State Mut. Ins. Co. v. Clevenger, 17 Okl. 49, 87 P. 583. Within § 5, art. 1, Okl. Sess. Laws 1899, allowing insurance of "wheat, rye, barley, flax, oats, and other crops," growing cotton is included. Id.

95. Delta Cotton Co. v. Arkansas Cotton Oil Co., 80 Ark. 431, 97 S. W. 440.

96. Ga. Code 1895, § 3045. Marthinson v. King [C. C. A.] 150 F. 48. Tremaine v. Williams, 144 N. C. 114, 56 S. E. 694. See Forestry and Timber, 7 C. L. 1739.

97. By an instrument in writing. Zimmerman Mfg. Co. v. Daffin [Ala.] 42 So. 858. Mere permission in writing to enter and cut timber at a certain price per thousand and a promise to pay such price held insufficient conveyance. Tremaine v. Williams, 144 N. C. 114, 56 S. E. 694.

98. Do not embrace such landed estate as to make them subject to specific performance. Mathinson v. King [C. C. A.] 150 F. 48.

99. No removal in time specified, trees held to have reverted into realty. Bell County Land & Coal Co. v. Moss, 30 Ky. L. R. 6, 97 S. W. 354. Failure by a purchaser of standing timber to remove trees within the time specified in the contract, or within a reasonable time thereafter, works a forfeiture of title. Id.

Contra. Zimmerman Mfg. Co. v. Daffin [Ala.] 42 So. 858.

1. A life tenant cannot maintain trover for conversion of trees (Zimmerman Mfg. Co. v. Daffin [Ala.] 42 So. 858), nor trespass de bonis for taking them (Id.), but he may maintain trespass quare clausum fregit for entering upon premises (Id.).

2. "Hay now cut or that shall be cut this year" held to be personal property. Allen v. Bryant [Cal. App.] 88 P. 294.

3. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710.

4. Homestead exemption. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710.

5. Leave for three years and crops matured after time had elapsed. Carmine v. Bowen, 104 Md. 198, 64 A. 932.

6. Landlord acquiesced in tenants' claim.

EMBRACERY.[7]

EMINENT DOMAIN.[7a]

§ 1. The Power of the State and Delegations of it (1073).
A. Definitions and Nature of Power (1073).
B. Who May Exercise the Right; Delegation of Power (1074).
C. Extent of Power (1075).
§ 2. Purposes and Uses of a Public Character (1076).
§ 3. Property Liable to Appropriation and Estates Therein Which May be Acquired (1079).
§ 4. What is a "Taking," "Injuring," or "Damaging" of Property (1081).
§ 5. Conditions Precedent to the Exercise of the Power; Location of Route (1084).
§ 6. Measure and Sufficiency of Compensation (1085).
§ 7. Who is liable for compensation (1091).
§ 8 Condemnation Proceedings in General (1091).
§ 9. Jurisdiction (1094).
§ 10. Applications; Petitions; Pleadings (1094).
§ 11. Process, Notice, Citation, Publication (1095).
§ 12. Hearing and Determination of Right to Condemn (1096).
§ 13. Commissioners or Other Tribunal to Assess Damages; Trial by Jury (1096).
§ 14. The Trial or Inquest, and Hearings on the question of Damages (1097).
§ 15. View of Appropriated Premises (1101).
§ 16. Verdict, Report or Award; Judgement Thereon and Lien or Enforcement of Judgment (1102).
§ 17. Costs and Expenses (1103).
§ 18. Review of Condemnation Proceedings (1104).
§ 19. Remedy of Owner by Action or Suit (1106).
A. Actions for Tort, Damages or Trespass; Recovery of Property (1106).
B. Suits in Equity; Injunction (1106).
§ 20 Payment and Distribution of Sum Awarded; Title or Interest Requiring Compensation (1107).
§ 21. Ownership or Interest Acquired (1108).
§ 22. Transfer of Possession and Passing of Title (1109).
§ 23. Relinquishment or Abandonment of Rights Acquired (1109).

§ 1. *The power of the state and delegations of it. A. Definitions and nature of power.*[8]—Eminent domain is the superior right of property subsisting in a sovereignty by which private property may, in certain cases, be taken for the public benefit without regard to the wishes of the owner.[9] It is an incident of sovereignty inherent in the several states by virtue of their sovereignty.[10] In the United States private rights may not be taken without the owner's consent in any other manner,[11] and, when taken by the exercise of this power, it is generally conditioned on compensation first made or secured,[12] and statutes denying this

to crop, well knowing that tenant sowed thinking he had a right to reap. Carmine v. Bowen, 104 Md. 198, 64 A. 932.

7. See 5 C. L. 1097. No cases have been found during the period covered by this volume. Misconduct affecting jury as contempt, see Contempt, 9 C. L. 640; as ground for new trial, see New Trial and Arrest of Judgment, 8 C. L. 1153; Indictment and Prosecution, 8 C. L. 189.

7a. This topic excludes the powers given to drainage and reclamation districts (Sewers and Drains, 8 C. L. 1882), irrigation districts (see Waters and Water Supply, 8 C. L. 2262), and the like. See, also, Highways and Streets, 8 C. L. 40, as to establishment of roads and streets.

8. See 7 C. L. 1276.

9. See Cyc. Law Dict. Eminent Domain, p. 314.

10. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426.

11. Where owners of lots on the opposite side of a street adjoining a harbor had filled them out into the harbor as authorized by statute, they acquired a right to maintain wharves of which they could not be deprived except by the exercise of the power of eminent domain. City of Baltimore v. Baltimore & Philadelphia Steamboat Co., 104 Md. 485, 65 A. 353. Where a street as originally dedicated was but fifty feet wide the city could not acquire a greater width except by condemnation, not by ordinance. Elliot v. Atlantic City, 149 F. 849.

12. Where a county takes land of a private owner to widen a road such owner is entitled to compensation for the land taken and for injury to remaining land. Terrell County v. York, 127 Ga. 166, 56 S. E. 309. Under the constitutional provision that private property shall not be taken without compensation, the legislature may not authorize boom companies to overflow lands of riparian owners without having acquired the right to do so by contract or condemnation. Burrows v. Grays Harbor Boom Co. [Wash.] 87 P. 937. A statute authorizing a city to take and hold land and privileges necessary for the construction of waterworks and to have appraisers appointed where compensation cannot be agreed upon contemplates that compensation shall be made, and it cannot without consent of an owner divert water from a stream without paying nominal damages. Breckerle v. Danbury [Conn.] 67 A. 371. Under Rev. St. 1895, authorizing canal companies to construct deep water channels for the purposes of navigation from salt water to the mainland to aid navigation, held that in crossing the mainland the ca-

right [13] or not providing for compensation [14] in definite and certain terms [15] will not be sustained. A waiver of compensation by a property owner must be clear and certain.[16] Statutes delegating the power to exercise the right [17] must do so expressly or by clear implication.[18] A grant of the right carries with it the right of public supervision or control.[19] The power is subject to constitutional limitations as to due process of law, impairment of contracts and the like,[20] and if a right secured by the Federal constitution is impaired, relief may be had in the Federal courts.[21]

(§ 1) *B. Who may exercise the right; delegation of power.*[22]—The right to exercise the power exists only where conferred by statute.[23] It is generally delegated to public service private corporations, such as railroad companies,[24] street railway [25] and interurban railway companies,[26] and to municipalities.[27] In some states the

nal company acted under the power of eminent domain rather than under the sovereign right to improve navigation, and was liable to a riparian owner for polluting waters of a bayou. Bigham Bros. v. Port Arthur Canal Dock [Tex.] 17 Tex. Ct. Rep. 4, 97 S. W. 686. The fact that change of grade is made in conformity to municipal ordinance does not preclude an abutting owner from recovering consequential damages. Const. 1877 (par. 1, § 3, Bill of Rights) gives a citizen this right. City of Macon v. Daley [Ga. App.] 58 S. E. 540. A railroad company incorporated by Laws 1846, p. 64, providing that the state may, after the expiration of a certain period, repeal the act providing the company is compensated is on repeal of the act entitled to compensation for loss of its franchise. Michigan Cent. R. Co. v. State, 148 Mich. 151, 14 Det. Leg. N. 88, 111 N. W. 735.

13. Acts 1901, p. 272, denying property owners in certain cities the right to compensation for change of street grade, is void. Coyne v. Memphis [Tenn.] 102 S. W. 355.

14. Under Drainage Act May 29,. 1879 (Hurd's Rev. St. 1905, c. 42), providing for acquisition of ditch rights of way for drainage purposes is insufficient because not providing for ascertainment of damages for land taken. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

15. Statutes providing for the exercise of the power must be definite and certain in their provisions for compensation. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

16. The fact that an owner petitions for the opening of a street in front of her property does not of itself grant the city the right to take any of his property without compensation. Hab v. Georgetown [Wash.] 91 P. 10.

17. Laws 1893, p. 135, relative to condemnation by cities of the fourth class, has not been superseded by subsequent legislation. State v. Pierce County Super. Ct. [Wash.] 87 P. 521. Such statute authorizes condemnation of streets and alleys as well as property to be used by the corporation itself. Id.

18. An injury to private property cannot be justified by the plea of statutory sanction unless the latter is expressly given or may be so clearly implied from other powers as to be said to be within legislative contemplation. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. Laws 1902, p. 1125, directing the state engineer to locate and mark the boundary between certain counties, but containing no provision for payment of property taken, did not authorize the exercise of the power of eminent domain. Id.

19. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426.

20. A statute permitting a corporation which has acquired three-fourths of the stock of another to condemn the remainder is valid. Conn. Gen. St. §§ 3694, 3695. Offield v. New York, etc., R. Co., 203 U. S. 372, 51 Law. Ed. 231.

21. Relief denied. Sauer v. New York City, 206 U. S. 536, 51 Law. Ed. 1176.

22. See 7 C. L. 1278.

23. Power of municipality. Stowe v. Newborn, 127 Ga. 421, 56 S. E. 516.

24. A company organized under the laws governing the organization of railroads has the right to exercise the power. Proof that it is so organized and has filed its proper application for such purpose establishes a prima facie case. Caretta R. Co. v. Virginia-Pocahontas Coal Co. [W. Va.] 57 S. E. 401. The right to exercise the power conferred on corporations organized under tit. 1, c. 34, Gen. St. 1894, was reenacted by the Revised Laws. In re Minneapolis & St. P. Suburban R. Co. [Minn.] 112 N. W. 13.

25. Acts 1903, pp. 92, 94, expressly confers upon street or interurban railway companies power to condemn land for a transmission line which may be on its line of road or elsewhere Mull v. Indianapolis & C. Trac. Co. [Ind.] 81 N. E. 657.

26. Under the statutes of Wisconsin, electric interurban railways as well as street railways have authority to exercise the power of eminent domain. In re Milwaukee Light, Heat & Trac. Co. [Wis.] 112 N. W. 663. An interurban railway company held organized to execute a work of internal improvement and to be a common carrier, though it was not stated in its articles of incorporation that its object was to carry freight, and held entitled to exercise the power of eminent domain. In re Minneapolis & St. P. Interurban R. Co. [Minn.] 112 N. W. 13.

27. The charter of a town empowering the council to open and lay out streets and alleys by paying the owners therefor by necessary implication confers the power. Stowe v. Newborn, 127 Ga. 421, 56 S. E. 516.

power is conferred upon school boards.[28] Foreign corporations may not exercise the power unless it is expressly delegated to them.[29] A corporation which asserts the right to exercise the power must show itself to be within the provisions of the enabling act [30] and must comply with its provisions,[31] but it is held that a de facto corporation may exercise the power,[32] and a consolidated railroad company has the power if the constituent companies had.[33]

Rights of transferees, agents, or receivers, or delegates.[34]—The right of a private corporation to exercise the power is not such a property right as can be transferred by deed to another corporation,[35] but where a corporation after instituting proceedings transfers all its property and rights to another which has the same statutory powers as the transferror, the transferree becomes vested with the right to continue the proceedings.[36] The lessee of a railway company may exercise the power if authorized by statute to do so.[37]

Exhaustion of power [38] does not result from a partial exercise of it.[39]

(§ 1) *C. Extent of power.*[40]—Statutes conferring the power are to be strictly construed in favor of the property owner.[41] They cannot be extended by implica-

28. The members of board of education of city of Hoboken in office at time of approval of general school act of 1903 became a body corporate under that act and were given the power to condemn lands for public school purposes. Their successors elected prior to the adoption of such act have such power. Wendel v. Board of Education of Hoboken [N. J. Law] 66 A. 1075.

29. Under the statutes and constitution of Washington, a foreign railroad corporation may come into the state and exercise the power upon compliance with c. 9, p. 288, Laws 1889-90, without regard to any line of road previously constructed. State v. Griffin [Wash.] 90 P. 661. Under the Laws of Montana a foreign corporation authorized by the law of its domicile to construct a dam on a river in Montana has not the power of eminent domain. Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 P. 773. Under Code 1906, §§ 925, 929, a foreign telephone company may exercise the power to secure a right of way along a railroad right of way. Cumberland Tel. & T. Co. v. Yazoo & M. V. R. Co. [Miss.] 44 So. 166. Under Code 1906, § 929, the construction of a telephone line between two cities between which the company had no direct line is a new line.

30. The fact that a charter for a railroad has been granted to a corporation does not conclusively establish its right to exercise the power. Caretta R. Co. v. Virginia-Pocahontas Coal Co. [W. Va.] 57 S. E. 401. The fact that a railroad lies entirely within the corporate limits of a city will not prevent it from being a railroad. Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624. It cannot be said that because a railroad is but three miles long it is not a railroad. Id.

31. When an elevated railway company constructed a railway without legislative consent, it could not institute condemnation proceedings, but might be considered as acting in good faith by acquiring easements from abutting owners. Knoth v. Manhattan Ry. Co. [N. Y.] 79 N. E. 1015.

32. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501.

33. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501. Under Act No. 100, p. 125, of 1898, on the consolidation of companies, one of which has the power, the consolidated company has the power. Shreveport Trac. Co. v. Kansas City S. & G. R. Co. [La.] 44 So. 457.

34. See 7 C. L. 1279.

35. Contra Costa Water Co. v. Van Rensselaer, 155 F. 140.

36. Where a corporation entitled to exercise the power of eminent domain after instituting proceedings transferred all its property rights to another corporation having the same rights, the transferree became invested by operation of law with the right to continue such proceeding, and was therefore entitled to be substituted as petitioner in the proceeding under Code Civ. Proc. Cal. § 385. Contra Costa Water Co. v. Van Rensselaer, 155 F. 140.

37. Acts 1903, pp. 92, 94, conferring the power on street railway companies, confers it upon lessees of street and interurban lines. Mull v. Indianapolis & C. Trac. Co. [Ind.] 81 N. E. 657. The lessee of a railroad cannot condemn land for use appurtenant to a way of the lessor unless authorized by statute. Id.

38. See 7 C. L. 1279.

39. Under Acts 1903, p. 218, c. 121, providing that if after location of a railroad line it appears that the line is inconvenient or expensive to operate because of grades, local alterations may be made and necessary land taken, held, widening and raising an embankment to eliminate a grade was local. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501. The fact that the predecessor of a railroad company had taken land for embankment purposes did not debar the present company from taking additional land for such embankment. Id.

40. See 7 C. L. 1280.

41. Gillette v. Aurora Rys. Co., 228 Ill. 261, 81 N. E. 1005. Every requirement must be strictly complied with, and such compliance must appear from the face of the record. Manda v. Orange [N. J. Law] 66 A. 917. Acts 1905, p. 61, construed and held not to permit a taking without compensation.

tion [42] and must be strictly complied with,[43] but a constitutional provision limiting the power in the state and in municipalities as its agents is remedial, and is to be liberally construed.[44] The extent of the power granted is largely one of construction,[45] and one to whom it is granted may exercise it to the extent that such construction will permit,[46] but to no greater extent.[47]

§ 2. *Purposes and uses of a public character.*[48]—The purposes or uses for which private property [49] may be taken must be public.[50] The question of whether or not a use is a public one is a judicial question,[51] and, while deference will be

Vandalia Coal Co. v. Indianapolis & L. R. Co. [Ind.] 79 N. E. 1082. Railroad held not authorized by Acts 1899-1900, p. 423, and Va. Code 1904, § 1105f, to exercise the power in the construction of a certain line of road. Norfolk & W. R. Co. v. Lynchburg Cotton Mills Co., 106 Va. 376, 56 S. E. 146. That a city intends to use an alley for a sewer does not alter its power to condemn land therefor. State v. Pierce County Super. Ct. [Wash.] 87 P. 521. When a railroad, authorized by its charter to construct a line between certain points, had permanently located its road, it could not thereafter condemn land for the purpose of constructing pieces of roadway in order to straighten and improve the line. Cairo, V. & C. R. Co. v. Woodward, 226 Ill. 331, 80 N. E. 882. Laws 1889-90, p. 470, providing that boom companies may acquire property by condemnation if they cannot agree with the owners, does not authorize such companies to interfere with navigation of streams or use of abutting land by riparian owners. Burrows v. Grays Harbor Boom Co. [Wash.] 87 P. 937.

42. Leffmann v. Long Island R. Co., 105 N. Y. S. 487. Under Priv. Acts 1901, p. 88, conferring the power on logging companies, and Revisal 1905, § 2575, giving the right to enter land and lay out a route and grounds required for depots, etc., in the absence of agreement, this right of entry is only for the purpose of laying out the line. State v. Wells, 142 N. C. 590, 55 S. E. 210. A petition for condemnation for the purpose of supplying inhabitants of a town and other places in a county with water does not show that the use is exclusively a public one within Code Civ. Proc. § 1238, authorizing the exercise of the power in procuring ditches, etc., for conducting and storing water for counties and towns. Hercules Water Co. v. Fernandez [Cal. App.] 91 P. 401.

43. In proceeding to condemn right to lay water pipes under Gen. St. p. 646, §§ 902, 925, it is essential that act April 21, 1876, should have been complied with by the city. Manda v. Orange [N. J. Law] 66 A. 917.

44. City of Macon v. Daley [Ga. App.] 58 S. E. 540.

45. A railroad company authorized to construct a line between certain places subsequently, under Hurd's Rev. St. 1905, c. 32, §§ 50-58, by resolution of its stockholders, sought to enlarge the purposes of the corporation so that it could construct certain pieces of road which would shorten the original line, held its power with reference to exercising the right of eminent domain was not changed. Cairo, V. & C. R. Co. v. Woodward, 226 Ill. 331, 80 N. E. 882.

46. Burns' Ann. St. § 5153, expressly empowers a railroad to take land necessary for cuttings, embankments, etc., in excess of the six rods ordinarily allowed. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501. Under Hurd's Rev. St. 1905, p. 365, empowering commissioners to enlarge or change the channel of Des Plaines River, and acquire property necessary for the purposes of the sanitary district, it has power to acquire land necessary for the protection of remaining land of a party, a portion of whose land was taken. Sanitary Dist. of Chicago v. Martin, 227 Ill. 260, 81 N. E. 417. Under 22 St. at Large, p. 934, giving light and water companies power to condemn rights of way and water courses, they have power to condemn land. Ingleside Mfg. Co. v. Charleston Light & Water Co. [S. C.] 56 S. E. 664. A railroad company which has leased its line may, if the lease so provides, extend its lines to benefit its lessee, and for this purpose may condemn land in its own name. Beckman v. Lincoln & N. W. R. Co. [Neb.] 112 N. W. 348. Where a railroad, limited in the number of tracks it may use, consolidated with a company which is unlimited, and the agreement contains no limit, the consolidated company is not limited. New York Cent., etc., R. Co. v. Yonkers, 103 N. Y. S. 252. Civ. Code § 894, stating the width of the right of way a railway company may acquire, does not limit the power of the company to secure land for side tracks, shops, depots, etc. State v. Meagher County Dist. Ct., 34 Mont. 535, 88 P. 44. Civ. Code, §§ 526, 894, providing that a railroad company may secure a right of way 200 feet wide, and land for appendages, material, etc., where a greater width is needed for cuts, embankments, etc., no more may be taken than is necessary for such purposes. Id.

47. A railroad company can exercise the power only to take so much land as is necessary for the location, construction, and convenient use of its own road, and may not take land for the use of another company. Beckman v. Lincoln & N. W. R. Co. [Neb.] 112 N. W. 348.

48. See 7 C. L. 1280.

49. Property of a railroad company is private property and cannot be taken for private use. Mays v. Seaboard Air Line R. Co., 75 S. C. 455, 56 S. E. 30.

50. The right may not be exercised for a private purpose. Bridwell v. Gate City Terminal Co., 27 Ga. 520, 56 S. E. 624. Private property may not be taken for private use. Hench v. Pritt [W. Va.] 57 S. E. 808. Code 1906, § 2370, so far as it attempts to confer the power upon the owners or lessees of timber lands to be exercised for their private benefit in procuring rights of way, is void. Id.

51. Shasta Power Co. v. Walker, 149 F. 563; Hench v. Pritt [W. Va.] 57 S. E. 808;

paid to legislative judgment in the matter,[52] it is not conclusive.[53] The necessity of taking,[54] the extent to which property may be taken,[55] the instrumentalities by which it may be done,[56] and the mode of procedure to be observed, are matters resting wholly within the province of the legislature.[57] The term "public use" is a flexible one depending somewhat upon the nature and wants of the community at the time,[58] and hence has necessarily been of constant growth.[59] As used in the Idaho constitution the term means public usefulness and productive of general benefits,[60] and is not dependent on the restricted meaning given the term by some courts.[61] It is not essential that the entire community should be benefited or share in the use or enjoyment of the improvement.[62] Whether a use is public is to be determined by its character.[63] It is essential that every one shall have a right to share in the use if he has occasion to do so.[64] A use declared by the constitution to be a public one is conclusively so.[65] If the uses for which property may be taken are enumerated by statute, they are the only ones prima facie public,[66] and the finding of a trial court that a use is one authorized by statute is conclusive.[67] A use may be a public one though temporary in character.[68] If the taking is for a public use, it

Caretta R. Co. v. Virginia-Pocahontas Coal Co. [W. Va.] 57 S. E. 401. But it is for the courts to determine whether the statutory conditions authorizing the exercise of the power exist in a particular case. Gillette v. Aurora Rys. Co., 228 Ill. 261, 81 N. E. 1005.

52. A use declared by the legislature to be a public one will be so held by the courts unless it clearly appears to be otherwise. Caretta R. Co. v. Virginia-Pocahontas Coal Co. [W. Va.] 57 S. E. 401.

53. Hench v. Pritt [W. Va.] 57 S. E. 808.

54. Shasta Power Co. v. Walker, 149 F. 568. Under the constitution of Maine, the question of public necessity or necessity for taking is a legislative one and not open to judicial revision. Hayford v. Municipal Officers of Bangor [Me.] 66 A. 731. Under what conditions the power may be exercised is a purely legislative question. Gillette v. Aurora Rys. Co., 228 Ill. 261, 81 N. E. 1005. Section 86, c. 4, Rev. St., relative to taking suitable lands for library buildings by cities, does not say that any specific piece of land shall be taken, but declares a public exigency. In such case, municipal authorities do not pass on question of necessity. Hayford v. Municipal Officers of Bangor [Me.] 66 A. 731.

55. Not only is the question of exigency or necessity for the taking a matter for the legislature, but the extent to which property may be taken is also a matter for the legislature. Hayford v. Municipal Officers of Bangor [Me.] 66 A. 731.

56, 57. Shasta Power Co. v. Walker, 149 F. 568.

58. The power is given a degree of elasticity, thus making it capable of meeting new conditions of the increasing necessities of society. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426.

59. The term is a flexible one and necessarily has been of constant growth as new public uses have developed. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426.

60. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426.

61. The right to exercise the power under the constitution of Idaho is not dependent upon the narrow and restricted meaning of the phrase "Public use" as defined by the courts of some states. Potlatch Lumber Co. v. Peterson, 12 Idaho, 786, 88 P. 426. In this state the general welfare and benefit of the public is considered, and if the taking is necessary to the complete development of the material resources of the state, such taking is for a public use. Id

62. The fact that a railroad is through a mountainous and sparsely settled district and that few persons will use it is immaterial if all have a right to use it. Caretta R. Co. v. Virginia-Pocahontas Coal Co. [W. Va.] 57 S. E. 401.

63. Not by the number of persons who enjoy it. Caretta R. Co. v. Virginia-Pocahontas Coal Co. [W. Va.] 57 S. E. 401. Where a railroad company is otherwise authorized to condemn a street, the fact that it does not carry freight, but only passengers, baggage, and express, does not prevent it from condemning property. Gillette v. Aurora Rys. Co., 228 Ill. 261, 81 N. E. 1005.

64. In order to entitle a private corporation to exercise the power, the use which forms the basis of its application therefor must be such as will subserve the public in some appreciable way. Shasta Power Co. v. Walker, 149 F. 568. Such as it might demand the service of the corporation as of right, and not merely in accordance with the latter's will and pleasure. Id.

65. The legislature cannot prohibit the exercise of the power for any of the purposes specified by the constitution. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426.

66. A finding of a trial court that a use not enumerated in the statute is a public one is not binding on appeal. Hercules Water Co. v. Fernandez [Cal. App.] 91 P. 401.

67. Hercules Water Co. v. Fernandez [Cal. App.] 91 P. 401.

68. An application to condemn land for flowage purposes to increase power will not be denied because it appears that improvement would meet demands only during succeeding six years. Will not be denied because for temporary purpose. State v. Olympia Light & Power Co. [Wash.] 90 P. 656.

is no objection that incidental and private advantages will result to the petitioner.[69] The fact that a railroad agrees not to maintain stations in the vicinity of the source of a water supply does not destroy the public character of the road.[70] There must be a public exigency or necessity.[71] The term "necessary" means reasonably necessary under the circumstances.[72] The determination of commissioners as to the existence of necessity is entitled to great weight.[73]

Particular purposes and uses.[74]—Among the uses ordinarily deemed public are the construction of ferries,[75] facilities for transporting water for irrigation and mining purposes,[76] or for furnishing the public with water, light, and heat,[77] and the development of the natural resources of the community.[78] Where the use is a

69. The fact that a corporation authorized to exercise the power to increase its water power to operate street railway and lighting systems is authorized by its articles to furnish power to individuals, which is not a public use, will not deprive it of its right to exercise the power. State v. Olympia Light & Power Co. [Wash.] 90 P. 656. Where the legislature has authorized the taking of land for a certain use, courts will not decline to acknowledge it a public use merely because of incidental private advantage unless it is manifest that the use does not imply a right in the general public to its enjoyment. Mull v. Indianapolis & C. Trac. Co. [Ind.] 81 N. E. 657.

70. The fact that a railway company agrees not to maintain stations for a distance of ten or twelve miles in a certain locality, so as to prevent the water supply of a city from being contaminated, does not take away the public character of the road. State v. King County Super. Ct. [Wash.] 90 P. 663.

71. Evidence sufficient to show a present necessity for taking land for drainage purposes. Laguna Drainage Dist. v. Martin Co. [Cal. App.] 89 P. 993.

72. Does not mean absolute necessity and that there shall be no other place for location of road. State v. King County Super. Ct. [Wash.] 90 P. 663. Reasonable, not absolute necessity, is all that is required to justify establishment of an alley, and evidence that a city had used land for an alley is properly excluded. State v. Pierce County Super. Ct. [Wash.] 87 P. 521.

73. Under Railroad Laws (Laws 1892, p. 1395), providing that no railroad shall commence construction until railroad commissioners certify public convenience and necessity, and that if such certificate is refused application may be made to the supreme court, held the applicant has the burden to show that the commissioners erred in their determination. In re Rochester, C. E. Track Co., 102 N. Y. S. 1112. On such application great weight should be given to the decision of the commissioners. Id. One who seeks to enjoin the exercise of the power on the ground that it is being exercised for the benefit of a company other than the petitioner has the burden to prove such fact. Beckman v. Lincoln & N. W. R. Co. [Neb.] 112 N. W. 348.

74. See 7 C. L. 1282.

75. Hurd's Rev. St. 1905, c. 24, providing that a city may acquire ferries by "purchase, lease, or gift," confers the right to condemn land for such purpose. Helm v. Grayville, 224 Ill. 274, 79 N. E. 689. Under Hurd's Rev. St. 1905, c. 24, § 194, c. 55, § 23, a city has a right to condemn property for a ferry. Id. It is no defense to a proceeding to condemn land for a ferry landing that one landing will be in another state. Id.

76. Under Alaska Code (31 Stat. 522), providing that the right of eminent domain may be exercised for the purpose of procuring canals and flumes for transportation, and to supply water for mining and agricultural purposes, a mining corporation can exercise it to procure a right of way to carry water to work mining claims. Miocene Ditch Co. v. Jacobsen [C. C. A.] 146 F. 680. Flooding land by a dam erected for the purpose for supplying electric power for mines, water for irrigation, etc., held a public use under Const. art. 3, § 15. Helena Power Transportation Co. v. Spratt, 35 Mont. 108, 88 P. 773.

77. Rev. Laws 1905, § 2841, authorizing the taking of property necessary for the transaction of the "public business" for which the corporation is formed, includes the construction of works for supplying the public with water, light, heat, and power. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 N. W. 395. Under such statutes the power may be exercised to aid in the construction of canals and reservoirs to be used to create and distribute electric power for public use. Id. Complaint to condemn ditch right of way alleging that the corporation had acquired a franchise to sell inhabitants of a town light, heat, and power, and that it was necessary to the operation of its plant to conduct water in a ditch over the property sought to be condemned, shows that the property is sought for public use. Shasta Power Co. v. Walter, 149 F. 568.

78. The necessary use of lands for the complete development of the material resources of the state is a public use. Const. art. 1 § 14. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426. Complaint to condemn land for improvement of a river for storing of water for floating logs held to state a cause of action. Id. Under Rev. St. 1887, § 5210, improvement and floatability of all streams may be obtained by the exercise of the power. Id. "Streams not navigable" as used in this statute means not navigable in fact. Id. In enacting Rev. St. 1887, § 5210, the legislative intent was to make the provisions thereof applicable to all streams not navigable in fact. Id. Under the constitution of Idaho the power may be exercised in **development of lumber industry** as it is one of the material resources of the state. Id.

public one, the power may be exercised to such extent as to make the improvement effective.[79]

§ 3. *Property liable to appropriation and estates therein which may be acquired.*[80]—Except where exempt or used for other public purposes,[81] any kind of private property [82] or estate therein may be taken,[83] but interference with a navigable stream should not be permitted until plans are approved by Federal authorities.[84] No more can be taken than is necessary for the public use.[85]

Property in actual and necessary use for a public purpose.[86]—The right to take property already subjected to a public use must rest in express legislative grant [87] and does not follow from a general grant of the power,[88] but it is generally provided that such property may be taken when required for a more necessary use,[89] and when the two uses do not conflict the estate or easement necessary for the re-

79. Though a spur track was not used by the public, but only as a switch, adjacent owners could recover without showing that it was a nuisance. Houston & T. C. R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 662, 100 S. W. 1013. Under Civ. Code, §§ 826, 890, 894, and Code Civ. Proc. § 2211, providing that where necessary a railroad may change the course of a stream, it may condemn land for such purpose. State v. Meagher County Dist. Ct., 34 Mont. 535, 88 P. 44.

80. See 7 C. L. 1283.

81. See post, this section, property in use for other public purposes.

82. Under Pol. Code, §§ 3454, 3471, authorizing trustees of reclamation district to take right of way for construction of works and ditches, the **"right of way"** is private property within Code Civ. Proc. § 1240, providing that rights of way are private property for the purposes mentioned in § 1238, among which are railroad purposes. Reclamation Dist. No. 551 v. Sacramento County Super. Ct. [Cal.] 90 P. 545. Under Ball. Ann. Codes & St. §§ 4143, 4146, riparian rights in **non-navigable streams** are subject to condemnation. State v. Stevens County Super. Ct. [Wash.] 90 P. 650. Riparian rights in a stream acquired by a public carrier of water while an irrigation company in prosecuting its construction work are subject to condemnation under Ball. Ann. Codes & St. § 4156. Id.

A logging railroad built by a lumber company, located where there was no public business tributary to it, and having no cars for carrying freight or passengers, held a private enterprise which could be condemned. State v. King County Super. Ct. [Wash.] 90 P. 663. Under Va. Code 1904, §§ 1105 c, 1105 f, amended by Acts 1906, p. 452, revising Code 1873, c. 56, and Code 1887, c. 46, a public service corporation may condemn **water rights of an inferior riparian proprietor** by condemning the right to divert water without condemning the land over which it flows. Clear Creek Water Co. v. Gladeville Imp. Co. [Va.] 58 S. E. 586. A company **may not condemn** a part of an alley and a strip of an abutter's lot and leave the lot and remainder of the alley separate and the former within the right of way. Folsom v. Gate City Terminal Co. [Ga.] 57 S. E. 314.

83. Whatever rights the fee owner has left after certain easements have been appropriated are subject to condemnation. State v. King County Super. Ct. [Wash.] 90 P. 663.

84. A corporation should not be permitted to exercise the power, where the enterprise involves interference with a navigable stream, until the plans are approved by Federal authority. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 N. W. 395.

85. United States v. Baltimore & O. R. Co., 27 App. D. C. 105.

86. See 7 C. L. 1284.

87. Only in the exercise of the power of eminent domain can the legislature authorize property dedicated to a specific public use to be used for an inconsistent purpose. Louisville & N. R. Co. v. Cincinnati, 76 Ohio St. 481, 81 N. E. 983. Property devoted to a public use cannot be taken unless the legislature has expressly or by necessary implication authorized it to be taken. Gillette v. Aurora R. Co., 228 Ill. 261, 81 N. E. 1005. The provisions of Consolidation Act, Laws 1882, p. 262, and greater New York Charter, relative to acquisition of land for streets, does not authorize taking of land previously taken for a railroad. In re East 161st St., 52 Misc. 596, 102 N. Y. S. 500.

88. A navigable stream may not be interfered with unless the statute expressly so provides. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 N. W. 395. Under the general law, one railroad company cannot take property of another if such taking materially interferes with the prior use. Birmingham & A. R. Co. v. Louisville & N. R. Co. [Ala.] 44 So. 679. The general power conferred by the legislature upon a local board to condemn lands for highways does not authorize it to condemn land previously taken for another public purpose. Station grounds of railroad company. Chicago, etc., R. Co. v. Williams, 148 F. 442. The taking of private property only is authorized by statutes providing for the exercise of the power of eminent domain unless there is express or clearly implied authority to extend them to public property. State v. Boone County [Neb.] 110 N. W. 629.

89. Evidence held to show a reasonable necessity authorizing taking of land devoted to one public service for another public service. State v. Skamania County Super. Ct. [Wash.] 91 P. 637. On the question of reasonable necessity for taking land devoted to one public service for another, the comparative expense in maintaining the latter (railroad) elsewhere may be considered. Id.

quirements of the latter corporation may be taken,[90] but necessity therefor must exist.[91] Whether the two uses will materially conflict is a judicial question.[92] A right in one railroad company to condemn a way across the line of another does not give it power to arbitrarily select its route.[93] The general power of condemnation will not authorize the taking of an abandoned right of way upon which there is a prior location where no necessity therefor exists,[94] nor will a specific right to condemn abandoned rights of way authorize condemnation of an abandoned right of way on which there is a prior street railway location.[95] A railway company may not by running its preliminary line preempt the property against another company.[96]

90. Section 2915, Rev. Laws 1905, authorizing one railroad company to condemn a right of way across the line of another, applies to companies organized under prior statutes as well as to those organized under the laws of 1905. In re Minneapolis & St. P. Suburban R. Co. [Minn.] 112 N. W. 13. One railroad company may take the land of another where there is necessity therefor, and it can be taken without material detriment to the owner. State v. Clarke County Super. Ct. [Wash.] 88 P. 332. Power in one railroad company to take a right of way across another line is implied from the law authorizing its construction. In this particular street railways cannot be differentiated from commercial railways, Shreveport Trac. Co. v. Kansas City S. & G. R. Co. [La.] 44 So. 457. Under Ann. St. 1906, pp. 1082, 1044, **a telephone and telegraph company may condemn an easement on a railroad right of way** to maintain its poles and wires. American Tel. & T. Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576. Construction of proposed telephone and telegraph line on railroad right of way held not to materially interfere with enjoyment of easement of the railroad company. Id. Under Ball. Ann. Codes & St. § 4335, one railroad may condemn a way across another and take a portion of its right of way if it can be done without material detriment to the other. State v. King County Super. Ct. [Wash.] 90 P. 663. Where the legislature has provided that the right of way of a reclamation district may be crossed by another right of way or subjected to a common use with another public service corporation, it cannot be said that the court is without jurisdiction to a proceeding to take a levee right of way for a railroad right of way merely because the complaint shows that the strip is subject to an easement for a levee constructed thereon. Reclamation Dist. No. 551 v. Sacramento County Super. Ct. [Cal.] 90 P. 545. Under Civ. Code 1902, § 1895, providing that certain private carrier corporations have power to condemn a way across existing railroads, evidence held to show that it was essential to the conduct of the business of private railway company and reasonable necessity for condemnation of a crossing over an existing railroad. Salem R. Co. v. Alderman & Sons Co. [S. C.] 58 S. E. 940.

91. Under Rev. St. Idaho 1887, § 5212, providing that property already condemned shall not be taken except for a more necessary public use, held where defendant had acquired a right to drive a tunnel through plaintiff's mining claims, plaintiff did not acquire a right to use such tunnel to work their own mines on the theory that defendants condemnation was for a public use, necessity for such common use not appearing. It is no defense to a proceeding by a telegraph company to condemn a right of way along a railroad, where the height of the poles did not exceed the distance from their location to the end of the cross ties, that the right of way was already incumbered with one line, and the effect of another would be to menace the safety of its tracks and trains. Georgia R. & Banking Co. v. Atlantic Postal Tel. Cable Co., 152 F. 991.

92. Whether the proposed easement of a telegraph and telephone company on a railroad right of way would destroy or materially interfere with the use of the railroad easement is a judicial question. American Tel. & T. Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576. Where, in proceedings by a telegraph company to take such easement, the railroad filed a petition setting forth reasons and answers showing that the proposed use would materially ininterfere with its easement, the overruling thereof by the court constituted a judicial determination of the question. Id. Refusal of an instruction challenging sufficiency of evidence and in the nature of a demurrer held to constitute a judicial determination of the question. Id. In a proceeding by a railway company to take as a right of way, a right of way acquired by a reclamation district, where it is alleged that the two uses will not conflict the court cannot say as a matter of law that the uses cannot be so regulated as not to interfere with each other. Reclamation Dist. No. 551 v. Sacramento County Super. Ct. [Cal.] 90 P. 545.

93. Ball. Ann. Codes & St. § 4335, providing that one railway company may procure a right of way across another, does not give power to arbitrarily condemn a right of way across the terminals of another company. State v. Whitman County Super. Ct. [Wash.] 88 P. 201. Evidence held to show that public necessity did not require that petitioner's route be established as proposed. Id.

94. Fayetteville St. R. Co. v. Aberdeen & R. R. Co., 142 N. C. 423, 55 S. E. 345.

95. Fayetteville St. R. Co. v. Aberdeen & R. R. Co., 142 N. C. 423, 55 S. E. 345. A street railway company which has located a right of way may protect the same by injunction against another company which seeks to condemn the same. Id.

96. A railroad company cannot by simply running its preliminary line and pur-

Private owners may not object to the taking of property devoted to one public use for another such use.[97]

Statutory authority to petitioner to choose his own location may be given,[98] and such selection will be sustained in the absence of bad faith.[99]

§ 4. *What is a "taking," "injuring," or "damaging" of property.*[1]—Any direct injury to [2] or interference with [3] private property [4] which materially lessens its value,[5] or by which the owner's right to its use and enjoinment is in any substantial degree abridged or destroyed,[6] is a taking. The injury must be actual, susceptible of proof, and capable of being approximately measured.[7] The mere expression of an intention to take is not a taking.[8]

Exercises of police or taxing power.[9]—The requirement of compensation does not impose any restriction upon the exercise of the police [10] or taxing power,[11] but

chasing as an ordinary purchaser the land over which its line has been extended so impress the land with a public character as to preempt it against another company. Southern Indiana R. Co. v. Indianapolis & L. R. Co. [Ind.] 81 N. E. 65. When the law under which two railroad companies are incorporated does not grant them a right of way, and one company seeks to condemn land purchased by another, their rights must be solved by priority of location accompanied by some public act tending to commit to a definite location. Id.

97. Private owners of land sought to be taken by a railroad company for additional tracks may not object to the right of the company to take part of a public park. New York Cent. & H. R. R. Co. v. Yonkers, 103 N. Y. S. 252.

98. See 7 C. L. 1285.

99. Where, in a suit to ex-propriate land for a railroad, evidence fails to disclose that petitioner, in selecting its route, was actuated by wanton purpose to inflict injury, but it appears that the route was selected in good faith, the right of the petitioner to select its route will not be subjected to judicial control. Colorado So. etc., R. Co. v. Boagni, 118 La. 268, 42 So. 932. Under Ann. St. 1906, pp. 1028, 1044, the discretion of a telegraph company in selecting its route cannot be interfered with in the absence of bad faith, malicious motive, or that such taking would entail great loss. American Tel. & T. Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576.

1. See 7 C. L. 1285.

2. The cutting of a ditch through private premises is a taking. Fraser v. Mulany, 129 Wis. 377, 109 N. W. 139.

3. In the absence of proof that a spur track was a temporary expedient, it is sufficiently permanent in character to entitle adjacent owners to recovery. Houston, & T. C. R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 662, 100 S. W. 1013.

4. "Private way" as used in Comp. Laws 1897, § 6234, providing that compensation must be made for private ways taken, includes a private way created by a conveyance of a tract with right of way over an adjacent track. Detroit Leather Specialty Co. v. Michigan Cent. R. Co. [Mich.] 14 Det. Leg. N. 588, 113 N. W. 14. Where the bed of a stream is taken, the owner is entitled to compensation. In re City of Buffalo, 116 App. Div. 525, 101 N. Y. S. 966. The right of a riparian owner to take water from a stream is property, within a provision that property shall not be taken without compensation. Bigham v. Port Arthur Canal & Dock Co. [Tex.] 17 Tex. Ct. Rep. 4, 97 S. W. 686.

5. Where a railway company takes a vacated street for its right of way, it is liable to abutting owners for depreciation in the value of his property. Blackwell, etc., R. Co. v. Gist, 18 Okl. 516, 90 P. 889.

6. Under Const. Neb. 1875, art. 1, § 21, a property owner is entitled to compensation for special injury though no part of his property is actually taken. Mason City & Ft. D. R. Co. v. Wolf [C. C. A.] 148 F. 961. Damages may be recovered for noise, smoke, and cinders from railroad. Id. Where one was entitled to easements of way across a railroad, which easements were destroyed when an additional strip was taken, he was held entitled to damages therefor, the statute relative to farm crossings being of questionable applicability. New York Cent. & H. R. R. Co. v. Marshall, 105 N. Y. S. 686. The pollution of water by tide water flowing into a bayou rendering the fresh waters unfit for irrigation purposes, is a taking of riparian rights. Bigham v. Port Arthur Canal & Dock Co. [Tex.] 17 Tex. Ct. Rep. 4, 97 S. W. 686.

7. Interference of easements of light, air, and access which were the only rights affected by the running of trains held not to constitute basis of recovery. Wolf v. Manhattan R. Co., 51 Misc. 426, 101 N. Y. S. 493. Where a city and private owner acquired their property by purchase with reference to a map showing streets and the property appeared to be laid out on a certain street, held that so long as the street remains open in front of the blocks upon which the private owner's property abuts, and it does not appear that the erection of a building on the portion of the street sought to be vacated will interfere with light and air, he is not deprived of any private easement. Reis v. New York, 188 N. Y. 58, 80 N. E. 573.

8. The platting of a street through land is not a taking. In re South Twelfth Street, 217 Pa. 362, 66 A. 568.

9. See 7 C. L. 1286.

10. Act March 15, 1906, art. 2, providing that on an **assignment of a lien** where such assignment is not of record the original holder shall be liable, is not a taking. Shrader v. Semonin, 29 Ky. L. R. 1089, 96

the fact that the taking is for a public purpose does not avoid the necessity of compensation.[12]

Establishment or vacation of streets.[13]—On vacation of a street only, an owner whose property abuts on such street and whose means of access thereto is interfered with is entitled to compensation,[14] but, under a rule allowing damages for vacation of streets, an abutter is entitled to damages where a street is narrowed.[15] There is a conflict of authority as to whether an abutting owner is entitled to compensation for loss of lateral support caused by grading a street.[16]

Change of grade of streets.[17]—At common law a municipality is not liable for injuries to abutting property caused by change of street grade.[18] But in many states this rule is changed by statute,[19] and recovery may be had though the grade is reasonable and the work properly done.[20] In some states, damages may be had for improvements on the premises.[21]

S. W. 904. Code 1904, § 1729a, providing for **abatement of public nuisances,** does not authorize a taking of private property for public use. Jeremy Imp. Co. v. Com., 106 Va. 482, 56 S. E. 224. Ann. St. 1906, p. 3608, **making it unlawful to have in his possession the carcass of a deer** which does not show the evidence of its sex, is not in violation of the provision that property shall not be taken for public use without compensation though it applies to domesticated deer. State v. Weber [Mo.] 102 S. W. 955. Ordinance requiring owners or occupants of property to **remove snow from adjoining sidewalks** is not a taking without compensation. State v. McCrillis [R. I.] 66 A. 301. Code, § 2297, providing that relatives of insane persons shall be liable to the county for sums paid by it to the state for hospital expenses of such insane persons, is not a taking. Guthrie County v. Conrad, 133 Iowa, 171, 110 N. W. 454. Making of alterations in a bridge to **remove obstruction of navigation** is not a taking for which compensation must be made. Act Mar. 3, 1899, § 18. Union Bridge Co. v. U. S., 204 U. S. 364, 51 Law. Ed. 523. And see Stone v. Southern Illinois & Mo. Bridge Co., 206 U. S. 267, 51 Law. Ed. 1057.

11. An **assessment against abutting property for paving a street** is not a taking where the city can only use the amount of the assessment for the paving. Nalle v. Austin [Tex. Civ. App.] 18 Tex. Ct. Rep. 54, 103 S. W. 825. Under Comp. St. 1897, § 101b, **special assessments** may be levied to pay for property taken for boulevard purposes upon all property benefited, and is not limited to property which abuts on the boulevard. State v. Several Parcels of Land [Neb.] 113 N. W. 248.

12. Though elevated railway tracks were built in streets under the police power, an abutting owner was entitled to compensation for impairment of his easements of light and access. Coyne v. Memphis [Tenn.] 102 S. W. 355. Under the rule that private property cannot be taken for public use without compensation, held, where a railroad erected a watertank which constituted a nuisance to a neighboring dwelling, necessity for location of the tank is no defense to an action for damages. Texas & P. R. Co. v. Edrington [Tex.] 18 Tex. Ct. Rep. 175, 101 S. W. 441.

13. See 7 C. L. 1287.

14. Only property owners **whose property abuts on a street vacated and whose access to their property is cut off are entitled to compensation because of the vacation.** Enders v. Friday [Neb.] 111 N. W. 140.

15. Under Laws 1895, p. 2037, providing for damages when streets are closed, an owner held entitled to compensation where a street was narrowed. People v. Delany, 105 N. Y. S. 746. Mandamus will lie to compel the appointment of commissioners to determine compensation where a street is narrowed, though the strip taken is narrow and the damage small. Id.

16. Where in grading a street a substantial portion of an abutting owner's land falls in because of removal of lateral support, it constitutes a taking of the soil and not a mere consequential injury, and the assessments of damages and benefits does not cover such taking. Dahlman v. Milwaukee [Wis.] 111 N. W. 675. Where a city owning the fee of streets in establishing a grade removes lateral support from the land of an abutting owner, it is not a taking. Talcott Bros. v. Des Moines [Iowa] 109 N. W. 311.

17. See 7 C. L. 1287. See, also, Highways and Streets, 8 C. L. 40.

18. Laws of New York providing for changes in railroad viaduct in a street so as to increase the size thereof is not unconstitutional as depriving an adjoining owner of his property, consisting of light and air easements, without compensation. Foster v. New York Cent. & H. R. R. Co., 118 App. Div. 143, 103 N. Y. S. 531.

19. Laws 1883, p. 100, amended by Laws 1884, p. 342, gave an abutter on a city street right to compensation for change of grade, which right is not destroyed by repeal of the statute as to one whose rights accrued under contract in a conveyance by him of his property to the village for a street while the statute was in force. Lawton v. New Rochelle, 51 Misc. 184, 100 N. Y. S. 771. This obligation is assumed by a city to which is transferred the obligations and duties of the village. Id. In changing grade of a street, a municipality is liable for impairment of the easement of access to and from an abutting lot. Coyne v. Memphis [Tenn.] 102 S. W. 355.

20. Under Laws 1893, p. 207, Ball. Ann. Codes & St. § 821, a city is liable to an abutting owner for damage caused by change of grade of a street though the

Railroads or other ways or structures on city streets.[22]—Though an abutting owner owns the fee of a street, it is subject to the paramount right of the public to use it for all proper street purposes,[23] but for additional servitude thereon, such as the use thereof for steam railroads [24] or telephone lines,[25] he is entitled to compensation. The right of the public to use the streets includes the right to use the subsurface if necessary for travel, but an elevated railway cannot be constructed unless the abutters are compensated.[27] A state decision that an elevated railroad in the street is not an additional servitude impairs no right protected by the Federal constitution.[28]

Use of rural highways for purposes other than general public travel.[29]—The construction of telephone lines [30] or laying of gas mains in a rural highway is an additional servitude,[31] but recovery may not be had for laying a railroad upon a highway until it interferes with the abutting owner's enjoyment of his property.[32]

Additional servitudes on railways.[33]—The more increase in freight business [34] or the laying of additional tracks on a right of way is not an additional servitude.[35]

grade is a reasonable one, and the work is properly done. Fletcher v. Seattle [Wash.] 88 P. 843. Borough held liable to abutting owners for change of street grade where the street was formerly an old township road and became a street of the borough. Klenke v. West Homestead Borough, 216 Pa. 476, 65 A. 1079.

21. Under the constitution of Utah a city is liable for injuries to improvements on property resulting from change of street grade. Hempstead v. Salt Lake City [Utah] 90 P. 397. Complaint for damages for change of street grade held to state a cause of action where it was alleged that prior to the grade the house set on a natural level and afterwards it was eight feet below the level of the street. Barnes v. Grafton, 61 W. Va. 408, 56 S. E. 608.

22. See 7 C. L. 1288.

23. Such as laying of gas mains. Baltimore County Water & Elec. Co. v. Dubreuil [Md.] 66 A. 439. The operation of **interurban cars on streets** for the carriage of passengers, express, and light freight is not an additional servitude. Kinsey v. Union Trac. Co. [Ind.] 81 N. E. 922. Under the laws of New York the city of New York is not entitled to compensation for use of a street by a **telephone company.** Street acquired under Laws 1893, c. 189, Laws 1883, c. 490, Laws 1877, p. 512. State Line Tel. Co. v. Ellison, 121 App. Div. 499, 106 N. Y. S. 130.

24. Where the fee of a street is in an abutting owner, the location of a railroad in the street is a taking of his property. Taber v. New York, P. & B. R. Co. [R. I.] 67 A. 9. The use of a street for steam railroad purposes is an additional servitude. Spalding v. MacComb & W. I. R. Co., 225 Ill. 585, 80 N. E. 327. The legislature may authorize a commercial steam railway company to lay its tracks in the street, but such permission is subject to the constitutional restraint that private property cannot be taken without compensation, and an abutting owner who is injured must be first compensated. Athens Terminal Co. v. Athens Foundry & Mach. Works [Ga.] 58 S. E. 891. An abutting owner may recover damages because of construction of a railroad in the street though the ordinance authorizing such construction vacates the portion of the street to be so used. Stehr v. Mason City & H. D. R. Co. [Neb.] 110 N. W. 701.

25. Telephone lines on a street constitute an additional servitude though the city uses the poles for its fire alarms and police signals. De Kalb County Tel. Co. v. Dutton, 228 Ill. 178, 81 N. E. 838. Telephone poles and wires in streets not an additional servitude. Shinzel v. Bell Tel. Co., 31 Pa. Super. Ct. 221.

26. The right of the public to use of the street includes the right to use the subsurface if necessary for travel. Potter v. Interborough Rapid Transit Co., 54 Misc. 423, 105 N. Y. S. 1071.

27. A street railway company which has a prescriptive right to use the surface of the street cannot construct an elevated track without compensating the owner for his easements of light, air, and access. Leffmann v. Long Island R. Co., 105 N. Y. S. 487.

28. Sauer v. New York, 206 U. S. 536, 51 Law. Ed. 1176.

29. See 7 C. L. 1289.

30. A telephone line in a public highway is an additional burden. Burrall v. American Tel. & T. Co., 224 Ill. 266, 79 N. E. 705; Frazier v. East Tennessee Tel. Co., 115 Tenn. 416, 90 S. W. 620.

31. Laying of gas mains in a country highway is an additional servitude. Paine's Guardian v. Calor Oil & Gas Co. [Ky.] 103 S. W. 309.

32. An abutting owner may not recover damages for the location of a railroad upon the public highway until it cuts off or materially injures his means of access or imposes an additional burden on his soil. Scrutchfield v. Choctaw, O. & W. R. Co., 18 Okl. 308, 88 P. 1048.

33. See 7 C. L. 1290.

34. The mere increase of freight business on a road is not an additional servitude. Birmingham Belt R. Co. v. Lockwood [Ala.] 43 So. 819.

35. A railroad is not liable for laying additional tracks on a strip taken for railroad purposes, though such tracks were not contemplated at the time of taking, in the absence of negligence in operation of

§ 5. *Conditions precedent to the exercise of the power; location of route.*[36]—Condemnation proceedings are purely statutory, and all statutory conditions must be complied with.[37] It is universally required that provision for compensation pre-exist the taking [38] and that compensation be first paid [39] or secured,[40] but payment need not necessarily precede the taking.[41] The exercise of the power is sometimes made conditional upon the filing of maps.[42] As to whether negotiations for a purchase are necessary depends upon statutes.[43] If required a bona fide attempt to agree [44] with the owner [45] is necessary unless it otherwise appears that such attempt

the road. Louisville & N. R. Co. v. Scomp, 30 Ky. L. R. 487, 98 S. W. 1024.

36. See 7. C. L. 1290.

37. Acts 1901, p. 240, amended by Acts 1903, p. 1415, should be read as supplementing, and not as repealing, Acts 1891, p. 6, and not therefore void because failing to provide for assessment and payment of damages for land taken in highway proceedings. Carroll v. Griffith, 117 Tenn. 500, 97 S. W. 66. It is no ground for attack on Acts 1905, p. 59, that the statute authorizes the taking of possession before matters are settled on appeal. Smith v. Cleveland, etc. R. Co. [Ind.] 87 N. E. 501.

38. Remington v. State, 116 App. Div. 522, 101 N. Y. S. 952. Injunction will lie to restrain a railroad company from taking possession of land unless compensation be made. Butterworth-Judson Co. v. Central R. Co. [N. J. Eq.] 66 A. 198. Under Acts 1891, p. 6, providing that damages in highway proceedings shall be paid out of the general fund, it is error to direct payment out of the road funds of a particular district. Carroll v. Griffith, 117 Tenn. 500, 97 S. W. 66.

39. Const. § 17, providing that compensation be made where property is taken, while intended for formal condemnation proceedings, is applicable when property is otherwise damaged for public use. King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 42 So. 204.

40. Under Code Civ. Proc. § 1254, a court may issue a writ of possession pending appeal where petitioner has paid into court amount of judgment and such further sum as the court may direct for cost and further damages. Heilbron v. Sacramento County Super. Ct. [Cal.] 90 P. 706. Comp. St. 1897, § 101b, together with the general liability of a municipality for property taken, provide a safe and adequae fund for property taken for boulevard purposes. State v. Several Parcels of Land [Neb.] 113 N. W. 248. Gen. St. 1902, § 3681, providing that steam railroads shall deposit with the state treasurer a certain sum for each mile of proposed road, considered in connection with subsequent legislation, held not to apply to street railway companies. Stafford Springs St. R. Co. v. Middle River Mfg. Co. [Conn.] 66 A. 775.

41. Under Const. art. 1, § 21, providing that private property shall not be taken without just compensation. State v. Several Parcels of Land [Neb.] 113 N. W. 248.

42. Laws 1905, p. 2022, providing that a municipality shall not condemn lands for new or additional sources of water supply until it has submitted maps and profiles thereof to the state commission does not apply to a proceeding to take a fully equipped plant. Village of Waverly v. Waverly Water Co., 117 App. Div. 536, 101 N. Y. S. 1070. Under Laws 1903, p. 337, providing for the taking of land for canals, held that the filing of the map, survey, and certificate and giving notice are essential to an appropriation which will authorize entry on and use of land for a canal. United Trac. Co. v. Ferguson Cont. Co., 117 App. Div. 305, 102 N. Y. S. 190. Laws 1889-90, p. 718, § 42, considered in connection with §§ 44-54, held not to require filing of a map as a condition precedent to condemn riparian rights. State v. Stevens County Super. Ct. [Wash.] 90 P. 650. A map which gives no idea of the width of the right of way, or as to whether a single line shown thereon is the median line of right of way or otherwise, is insufficient. Indiana So. R. Co. v. Indianapolis & L. R. Co. [Ind.] 81 N. E. 65. An insufficient map showing location of a railroad is not cured by a sufficient description in recorded deeds. Id. Under Burns' Ann. St. 1901, § 5152, filing of a map and profile need not precede condemnation. Id.

43. Ball. Ann. Codes & St. § 4335, requiring an attempt to agree, does not apply where a railroad company seeks to condemn a right of way across property of a boom company, another public service corporation. State v. Skamania County Super. Ct. [Wash.] 91 P. 637. Ball. Ann. Codes & St. § 1292 does not require an attempt to agree with the owner before condemning land for an alley. State v. Pierce County Super. Ct. [Wash.] 87 P. 521.

44. **An offer of a fair price which is refused is sufficient** negotiations to authorize commencement of proceedings. Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624.

Evidence held to show that an agreement could not be reached with a landowner though the agent negotiating misunderstood the exact location of the land desired. New York Cent. & H. R. R. Co. v. Yonkers, 103 N. Y. S. 252. Where a landowner refused to give right of way for improvement of a ditch, and stated to the commissioner that he would contest proceedings, no further attempt to agree was necessary, and the commissioner was authorized to institute condemnation proceedings under Comp. Laws, §§ 4322, 4325, 4326. Patterson v. Mead, 148 Mich. 659, 112 N. W. 742. Evidence that the agent of a corporation seeking appointment of appraisers had negotiated with a third person claiming to represent landowner, and had in his possession deeds executed to it, held admissible to show negotiations with the owner. Stafford Springs St. R. Co. v. Middle River Mfg. Co. [Conn.] 66 A. 775. Evidence that a per-

would be fruitless.[46] The obtaining from a municipality of a franchise is not a condition precedent,[47] but in Pennsylvania it is held that a railway company entering a city must first obtain municipal consent.[48] Public service corporations authorized to exercise the power become subject to governmental regulation and control,[49] but the actual exercise of the state's power to so regulate is not a condition precedent to the exercise of the power of eminent domain by the corporation.[50]

§ 6. *Measure and sufficiency of compensation.*[51]—The measure of compensation to be awarded in condemnation proceedings is governed by the general rules applicable to damages,[52] and the fair market value of the property [53] at the time of

son listed property of a corporation for taxation is admissible on the question of his agency. Id. Negotiations with landowners mutually precedes condemnation, but where it appears that negotiations were held prior to location of the road, it is not necessary that they be renewed after location. Id.

45. Under Gen. St. 1902, § 3687, providing for appointment of appraisers if parties cannot agree, it is not enough to show that negotiations had been had in the best of faith with one not the owner, though he represented himself to be the owner. Stafford Springs St. R. Co. v. Middle River Mfg. Co. [Conn.] 66 A. 775.

46. Even if such statute does apply, the effort need not be made where it would be fruitless because of the fact that the boom company denies the right of the railroad company to take. State v. Skamania County Super. Ct. [Wash.] 91 P. 637.

47. Under Rev. Laws 1905, § 2916, a railway company has the right to condemn a way across streets and alleys of cities without securing a franchise from the city. In re Minneapolis & St. P. Interurban R. Co. [Minn.] 112 N. W. 13. A public service corporation authorized to exercise the power for the purpose of furnishing the public with light, heat, and power need not first obtain a municipal franchise. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 N. W. 395.

48. Where, before municipal consent to condemnation is obtained, a railroad company attempts to condemn a building, and before consent is obtained the lease is extended, the tenant is entitled to compensation for the extended term. McMillan Printing Co. v. Pittsburg, C. & W. R. Co. [Pa.] 65 A. 1091; Shipley v. Pittsburg, C. & W. R. Co., 216 Pa. 512, 65 A. 1094.

49, 50. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 N. W. 395.

51. See 7 C. L. 1291.

52. See Damages, 9 C. L. 869. Damage to a riparian owner is shown where it appears that the taking will prevent the natural and usual flow of water of the stream. State v. Olympia Light & Power Co. [Wash.] 90 P. 656. Evidence held to show that abutting property was not injured by construction of railroad tunnel in the street. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822.

53. Taber v. New York, P. & B. R. Co. [R. I.] 67 A. 9. The market value of the property is the measure. The owner's desire or unwillingness to sell is immaterial. Port Townsend So. R. Co. v. Barbare [Wash.] 89 P. 710. Evidence held to show that an award of $10,000 should be reduced to $8,000 for taking a right of way through a farm. Yazoo, etc., R. Co. v. Jennings [Miss.] 43 So. 469. A landowner through whose land a railroad right of way is taken should be paid **full value.** Colorado So. etc., R. Co. v. Boagni, 118 La. 268, 42 So. 932. The value of the property to the owner, and not its value to the petitioner, is the measure. In re East River Gas Co. of Long Island City, 104 N. Y. S. 239. When compensation is made to abutting owners it is for the land taken, and not for abutting land. State Line Tel. Co. v. Ellison, 121 App. Div. 499, 106 N. Y. S. 130.

In determining compensation where the sewer system of a town is taken the town may show what it would cost to restore the system to its original efficiency. United States v. Nahant [C. C. A.] 153 F. 520. In determining the market value, consequential enhancement as well as consequential damage is to be considered. Instructions approved. City of Macon v. Daley [Ga. App.] 58 S. E. 540. In determining value, a lot having a space of twenty-five feet between it and an adjoining building giving it light and air on three sides is not to be considered as an ordinary inside lot. In re Amsterdam Ave., 53 Misc. 342, 104 N. Y. S. 821. Instructions held to properly submit the elements of damages. Houston & T. C. R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 662, 100 S. W. 1013. In arriving at damages any special benefits accrued should be deducted from special damages. Taber v. New York, P. & B. R. Co. [R. I.] 67 A. 9.

Definitions: Market value does not mean speculative value, but the fair value of the property as it stands. Opelousas, etc., R. Co. v. Bradford, 118 La. 506, 43 So. 79.

Due compensation is such amount as will make the owner whole pecuniarily for the taking of injury done his property. King v. Vicksburg R. & Light Co., 88 Miss. 456, 42 So. 204.

Just compensation is such as will put the owner in as good a position pecuniarily as he would have been in had his property not been taken. United States v. Nahant [C. C. A.] 153 F. 520. Evidence insufficient to show that property had been **wholly destroyed** for school purposes by the construction of a railroad. San Pedro, etc., R. Co. v. Board of Education of Salt Lake City [Utah] 90 P. 565. In **taking a street,** compensation is to be made on account of an easement or similar appurtenant. Folsom v. Gate City Terminal Co. [Ga.] 57 S. E. 314. Where certain **railroad crossings were abolished** and grades separated, the owner of a leasehold could only recover damages sustained because of the improvement on which

taking [54] or date of filing the petition,[55] based on a consideration of the most profitable use to which it could be put,[56] with interest from the date of taking,[57] is to be allowed. The question of negligence in constructing the improvement is immaterial.[58]

Damages are not limited to land taken, but include injuries to land not taken [59] and such damages as the owner sustains to either his real or personal property by reason of the taking.[60] Where land is injured but not taken, the measure is the dimi-

his property abutted. City of Detroit v. Little Co., 146 Mich. 373, 13 Det. Leg. N. 803, 109 N. W. 671. Where a city released all of a street to a railroad for the purpose of constructing a tunnel, but it appeared that a **portion of the street was not closed,** held, an abutting owner was not entitled to recover on the theory that the street was discontinued. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822. Rev. Laws, c. 48, § 22, where **an easement of way is taken** for a highway, the fee owner, mortgagee, and owner of the easement were not entitled to the full market value of the land, but only to damages sustained. Boston Chamber of Commerce v. Boston [Mass.] 81 N. E. 244.

54. Damages are to be assessed with reference to conditions existing at the time of the taking. Boston Chamber of Commerce v. Boston [Mass.] 81 N. E. 244. The measure is the value of the property as a whole, in its condition at the time of taking. Ranck v. Cedar Rapids [Iowa] 111 N. W. 1027. Under Civ. Code, art. 2633, the value is to be estimated as of the time of taking, and not when the improvement was proposed and the increase in value resulting from such improvement deducted. Opelousas, etc., R. Co. v. St. Landry Cotton Oil Co., 118 La. 290, 42 So. 940. Rev. Laws, c. 50, § 3, providing that damages shall be fixed as of the time of taking, means that they are not to be enhanced by any increase of value resulting from the improvement, and does not mean that when an easement taken if of less value than the land the value of the land is to be allowed. Boston Chamber of Commerce v. Boston [Mass.] 81 N. E. 244. Under Burns' Ann. St. 1901, § 5468e, providing that street railways may exercise the power of eminent domain and shall file an instrument of appropriation, etc., held, the filing of the instrument of appropriation was a taking of the land upon which title passed, and the right to resulting damages vested in the then owner as a personal claim. Ft. Wayne & S. W. Trac. Co. v. Ft. Wayne & W. R. Co. [Ind.] 80 N. E. 837.

55. All damages for rights taken and resulting to remaining lands, both present and prospective, which are the natural and reasonable incidents of the proposed improvement, must relate to the time of filing the complaint. New Jersey, etc., R. Co. v. Tutt [Ind.] 80 N. E. 420. The value of the property is to be fixed as of the date of filing the petition. Sanitary Dist. of Chicago v. Chapin, 226 Ill. 499, 80 N. E. 1017. Damages are to be ascertained as of the date of **filing bond** to pay damages. Schonhardt v. Pennsylvania R. Co., 216 Pa. 224, 65 A. 543.

56. The criterion of value is the fair market value in view of any and all uses to which the property may be put. Opelousas, etc., R. Co. v. Bradford, 118 La. 506, 43 So. 79. The market value may be shown with reference to the **most available and valuable use** to which the land may be put. Chicago, etc., R. Co. v. Alexander [Wash.] 91 P. 626. Evidence that the **property had been used for a certain purpose for many years,** and such use had tended to increase its value for such purpose, is admissible. Ranck v. Cedar Rapids [Iowa] 111 N. W. 1027. Evidence that one whose property was taken had **fitted it up for a special purpose,** and it was adapted to such purpose, is admissible. Ranck v. Cedar Rapids [Iowa] 111 N. W. 1027. An owner may testify that the land was good meadow land and as to how much hay he got from it yearly. Creighton v. Board of Water Com'rs, 143 N. C. 171, 55 S. E. 511.

57. Kimball v. Salt Lake City [Utah] 90 P. 395; In re Morris Ave., 118 App. Div. 117, 103 N. Y. S. 180. One who sues to recover value of right of way taken may recover interest from the date he acquired title to the property. Clark v. Wabash R. Co., 132 Iowa, 11, 109 N. W. 309. Interest is to be awarded from the time possession is taken, and cannot be allowed if such date is not proved. Guinn v. Iowa & St. L. R. Co., 131 Iowa, 680, 109 N. W. 209. Interest is not allowable from institution of proceedings where no property has been actually taken up to the time of trial, and compensation is based on cost of repairing property injured. United States v. Nahant [C. C. A.] 153 F. 520. On appeal from a finding of the jury of view as to value, the owner is entitled to interest from the date of order of condemnation where the appellate court finds for the same amount. Snowden v. Shelby County [Tenn.] 102 S. W. 90.

58. Recovery may be had without proof of negligence in the construction or operation of the road. Houston & T. C. R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 662, 100 S. W. 1013.

59. Recovery may be had for injury to land though none be taken. Houston & T. C. R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Rep. 662, 100 S. W. 1013. Under Act 1904, p. 147, v. 87, §§ 8, 9, providing the method of assessing damages where a burnt district commission of Baltimore exercises the power of eminent domain, the commission is bound in estimating damages to consider injuries to property not taken. City of Baltimore v. Baltimore & Philadelphia Steamboat Co., 104 Md. 485, 65 A. 353. Under Const. art. 16, § 2, compensation is not limited to abutting property, but extends to any work sufficiently near to make injury immediate and substantial. Robbins v. Scranton, 217 Pa. 577, 66 A. 977.

60. Arkansas Valley & W. R. Co. v. Witt [Okl.] 91 P. 897.

nution of value,[61] determined by ascertaining the difference in value immediately before and after the construction of the improvement.[62] Damage to land not taken must be determined by offsetting of special damages against special benefits.[63] Compensation should be made for all injuries which cause diminution in the value of the property,[64] and all damages present and future must be the recovered.[65] Every element which would be considered by the parties in negotiating a voluntary sale is to be considered.[66] The market value cannot be increased by the fact that it was taken

61. Terrell County v. York, 127 Ga. 166, 56 S. E. 309; Mason City & Ft. D. R. Co. v. Wolf [C. C. A.] 148 F. 961. Where a street is partially vacated and access to property diminished, the measure is the depreciation in value, unaffected by conditions which affect general values in the vicinity. Gillespie v. South Omaha [Neb.] 112 N. W. 582. In determining such damages, diversions in travel, inconvenience in access, and diminution in business are to be considered. Id. Testimony showing excavations, embankments, and other obstructions to the flow of surface water is admissible to show injury to land not taken. Arkansas Valley & W. R. Co. v. Witt [Okl.] 91 P. 897. In an action for damages caused by change of street grade, evidence of the damage by fixing the value before and subtracting cost of bringing lot to new grade was admissible. Bond v. Philadelphia [Pa.] 67 A. 805. The measure for change of grade is depreciation in the market value of the property. Cost of filling is admissible. City of Macon v. Daley [Ga. App.] 58 S. E. 540. The measure is the diminution in value by reason of the construction of the railroad. Birmingham Belt R. Co. v. Lockwood [Ala.] 43 So. 819. Complaint for damages because of change of street grade held sufficient to admit evidence of diminution in value. Barnes v. Grafton, 61 W. Va. 408, 56 S. E. 608.

62. Morrison v. Fairmont & C. Trac. Co., 60 W. Va. 441, 55 S. E. 669. The damages which the taking occasions should be first ascertained, then the special benefits should be ascertained and deducted and the difference awarded. Tidewater R. Co. v. Cowan, 106 Va. 817, 56 S. E. 819. Method of ascertaining amount of compensation where a right of way was condemned approved. Id. Where a railroad company had a prescriptive right to use a structure in the street of specified dimensions, an abutting owner was entitled to the net difference between the effect of a new structure and the old one on her property, less benefits conferred by the latter. Foster v. New York Cent., etc., R. Co., 118 App. Div. 143, 103 N. Y. S. 531. Where a railroad **right of way is taken diagonally through a farm** of sixty-five acres, damages should be assessed for the entire farm. Union Trac. Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052. Where an **electric road is run across a farm,** the measure of damages is the difference in the value of the farm before and after the construction of the road. In determining such value it is proper to consider value made by improvements. Buffalo, etc., R. Co. v. Phelps, 52 Misc. 315, 102 N. Y. S. 214. When property is injured because of **change of grade,** the measure is the difference in market value between date of commencement of the work and date of its completion, less direct benefits. Kimball v. Salt Lake City [Utah] 90 P. 395. For taking **riparian rights** the depreciation in the value of the entire tract adjacent to the stream. Hercules Water Co. v. Fernandez [Cal. App.] 91 P. 401. Where a **viaduct was built to cut off a dangerous grade crossing,** cutting off access to a mill from one direction, but no land was taken, the jury could consider the entire situation before and after the improvement. Robbins v. Scranton, 217 Pa. 577, 66 A. 977.

63. Taber v. New York, P. & B. R. Co. [R. I.] 67 A. 9. Where a railroad is located in a street, the fee of which is in abutting owner, he may recover the value of the land covered by the railroad at the time of location, subject to the public easement, and damages to remainder of the tract by reason of taking part for a railroad. Id.

64. Where a leasehold interest is taken, it cannot be complained of that the tenant recovered cost of removing machinery in addition to value of lease where the case was tried on the theory of such recovery. McMillan Printing Co. v. Pittsburg, C. & W. R. Co. [Pa.] 65 A. 1091. The measure where a quarry is condemned is the value of the stone in place, and, as to stone severed from the ledge, its value at the place where appropriated. Cole v. Ellwood Power Co., 216 Pa. 283, 65 A. 678. An owner is entitled to compensation for disturbance of a special right which he possesses in connection with his property, by reason of which disturbance he sustains special damages. Stehr v. Mason City & Ft. D. R. Co. [Neb.] 110 N. W. 701.

65. Land taken for railroad. Union Trac. Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052. Where, in a proceeding to condemn land for widening a street, it appeared that claimant's improvements consisted of continuous frame structures, it could not be presumed that damages were allowed only for the portion of improvements on the land condemned. City of Baltimore v. Baltimore & Philadelphia Steamboat Co., 104 Md. 485, 65 A. 353. A statute authorizing a town to permit a street railway to change grade of a street without compensating abutting owners is not void, since compensation for such injury was made when the land was taken for a highway. Hyde v. Boston & W. St. R. Co. [Mass.] 80 N. E. 517. Where land has been condemned, matters of ingress and egress to and from remaining land are presumed to have been considered at the time of taking. Louisville & N. R. Co. v. Scomp, 30 Ky. L. R. 487, 98 S. W. 1024. It is presumed that all damages sustained or to result from the taking are included in the award. Where the legislature required a surface railway to be replaced with an elevated one, the abutting owners were not entitled to additional damages. Leffmann v. Long Island R. Co., 105 N. Y. S. 487.

66. Every element of value which would be considered if the parties were negotiat-

for such purpose.[67] When the right taken has no market value the measure is to be determined from the surrounding circumstances.[68] Mere speculative damages should not be allowed.[69] Double damages should not be allowed.[70]

Benefits.[71]—Except where authorized by law,[72] benefits resulting from the improvement may not be set off against the value of land taken,[73] but benefits direct

ing a voluntary sale, including value of land after the right of way is taken. Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963. Where a railroad was authorized to destroy a drain, it may be assumed that it would exercise its legal rights, and the effect of such destruction is to be considered. New Jersey, I. & I. R. Co. v. Tutt [Ind.] 80 N. E. 420. Where a railroad was located in a street, the fee of which was in abutting owner, damages caused to tide land adjoining upland on the street is not an element because such tide land was owned by the state, but the damages might be considered in ascertaining value of upland. Taber v. New York, P. & B. R. Co. [R. I.] 67 A. 9. Fixtures which have become part of the land are an element of damages. Heavy machinery. In re Acquiring Certain Property on North River in New York, 103 N. Y. S. 908.

67. Taken by a town for water supply purposes. Sargent v. Merrimac [Mass.] 81 N. E. 970. Where land is taken for water purposes, the owner is entitled to its fair value when taken plus such sum as a purchaser would have added on the chance that it might be used for water purposes at some future time. Id.

68. Where a railroad company had improved its right of way through swampy land and forests, and there was one telegraph line on the right of way, it could not be said that the easement for another line was of no more than nominal value. American Tel. & T. Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576. Instruction as to elements of damages where a telegraph company sought to condemn an easement along a railroad right of way held erroneous. Id. Where in a proceeding to take land owned by a gas company it appeared that it had maintained a gas holder on the land for many years and connections therewith, the city could not complain that compensation was awarded for the gas holder though the company had no franchise to connect mains with it. In re Water Front on North River in City of New York, 105 N. Y. S. 750.

69. Speculative or imaginary damages affecting only the natural beauty of the property cannot be recovered. Elbert County v. Swift [Ga. App.] 58 S. E. 396. Remote or speculative **loss in the conduct of a business** is not a basis upon which to estimate damages. Robbins v. Scranton, 217 Pa. 577, 66 A. 977. Evidence that the best use the property could be put was the erection of apartment houses thereon which would cost $75,000, and that $14,000 per annum rents would be derived therefrom, held inadmissible as uncertain and speculative. In re Blackwells Island Bridge, 118 App. Div. 272, 103 N. Y. S. 441. Possibility that a river would ever be dredged so as to be navigable for ocean vessels held too remote to be an element of damage. Chicago, etc., R. Co. v. Alexander [Wash.] 91 P. 626. Incidental damage to other land not physically taken cannot be allowed. No allowance for gas from sewer. Seufferle v. Macfarland, 28 App. D. C. 94. In proceedings to take land under a river where the fee owner is not a riparian owner, and evidence as to value was speculative and conflicting, an award of nominal damages will not be disturbed. In re City of Buffalo [N. Y.] 81 N. E. 954.

Inconvenience resulting from loss of home and in moving is not an element. Madisonville, H. & E. R. Co. v. Ross [Ky.] 103 S. W. 330. A tract of land adjacent to a river and an island in the river could not be considered together for the purpose of assessing damages for a right of way through the main land, though the owner claimed he purchased the mainland to use in connection with the island as a sheltered nook to feed cattle, where nothing had been done to prepare the land for such use. St. Louis, etc., R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867.

70. Where land was taken by a city from a gas company, and as a result the company was required to construct mains to another source of supply, and the company was awarded compensation for a gas holder on the land as a part of a going concern was held such compensation was sufficient as against an objection that compensation would be made for construction of another main. In re Water Front on North River in City of New York, 105 N. Y. S. 750. Rev. Laws, c. 48, § 22, providing that where several persons have estates in the land, the jury shall set forth the total amount of damage, and other sections of the statute are intended to give compensation for land taken or injured, but do not give to any one more damages than he sustains. Boston Chamber of Commerce v. Boston [Mass.] 81 N. E. 244.

71. See 7 C. L. 1294.

72. Laws 1901, p. 351, authorizing the city to acquire lands for improvement of the water front, construed, and held that, where two parcels were taken, special benefits resulting to parcels not taken were properly deducted from compensation for the land taken. In re Water Front on North River in City of New York, 105 N. Y. S. 750. Special benefits may be set off, in proceedings to condemn a right of way, against the value of the part taken, and damages shown to have accrued to the remainder. In re Mantorville R. & Transfer Co. [Minn.] 112 N. W. 1033. The local advantages and disadvantages should be considered. Pattonville & Woodbury Turnpike Road Co., 32 Pa. Super. Ct. 122.

73. Benefits can be set off only against damages to residue of the land, not against value of land taken. Morrison v. Fairmont & C. Trac. Co., 60 W. Va. 441, 55 S. E. 669. When land is taken for an electric interurban railroad company, no deduction should be made for benefits accruing to the land-

and peculiar to the landowner,[74] as distinguished from those shared by him in common with other citizens,[75] and which are not speculative, contingent, or remote,[76] should be set off against damages to land not taken.[77] In determining whether benefits are special the test is whether the benefits are in fact such as add to the convenience, accessibility, and use of the property as distinguished from incidental benefits enjoyed by the public generally.[78] Property may be specially benefited though the benefit is shared by other property.[79] The term "special benefits," as used in condemnation of railway right of way, is the same as when used in highway, drainage, or ordinary municipal improvement proceedings only in so far as private property is taken by such proceedings.[80] Such benefits must be pro tanto a fair equivalent for the land parted with and damages inflicted.[81] The lien of a street assessment against property appropriated by the city for park purposes is merged in the higher title of the feet hereby acquired, and the city is entitled to retain the present value of assessments remaining unpaid from the amount assessed as compensation to the landowner.[82] Public parks not subject to taxation are not liable for special assessments,[83] but in Illinois streets are subject to drainage assessments.[84] Such benefits are to be determined by commissioners,[85] but land taken is not subject thereto.[86]

Particular elements of damage.[87]—Every element of value which would be con-

owner. Union Trac. Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052.

74. In determining damage to property not taken, **benefits enhancing value** must be deducted though they are common to property in the vicinity. Peoria, B. & C. Trac. Co. v. Vance, 225 Ill. 270, 80 N. E. 134. Instruction held prejudicial. Id. The benefits contemplated by Code 1904, p. 516, providing for establishment of highway, are confined to those direct and peculiar to the owner. Williamson v. Read, 106 Va. 453, 56 S. E. 174. Evidence that the improvement would benefit the property in the community is admissible. Ranck v. Cedar Rapids [Iowa] 111 N. W. 1027.

75. Benefits common to other landowners, parts of whose lands were not taken or benefits incidently derived from **construction of a railroad into a new country,** are not special. St. Louis, etc., R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011.

76. No special benefits shown by establishing road through a farm where the only advantage was the cutting the farm into small lots and selling the same at increased value. Williamson v. Read, 106 Va. 453, 56 S. E. 174.

77. Special benefits are to be offset against damages where the owner's dominion over his property is not interfered with, but the property is only damaged. There is no invasion of property by a tunnel in the street which does not invade the half to which the property is adjacent. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822. Enhancement of value pleaded may be shown in offset to damages claimed. Id.

78. Hempstead v. Salt Lake City [Utah] 90 P. 397. The usual beneficial results of the mutually advantageous arrangement between a state and a railway company having the right to exercise the power are not special benefits. In re Mantorville R. & Transfer Co. [Minn.] 112 N. W. 1033. Mere increase in facilities of transportation is not a special benefit. Id. Where a viaduct is built, cutting off access to a mill from one direction, it is for the jury to say whether the substitution of a safe way, though a little longer, does not benefit the property. Robbins v. Scranton, 217 Pa. 577, 66 A. 977. Where a road was built through land which without it was of no immediate value, but with it was of some value, held such value was not a special benefit. In re Mantorville R. & Transfer Co. [Minn.] 112 N. W. 1033.

79. Such benefits as accrue by reason of the construction of the improvement must be deducted. Eldorado, M. & S. W. R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281.

80. In re Mantorville R. & Transfer Co. [Minn.] 112 N. W. 1033. Distinctions drawn as to meaning when used under various circumstances.

81. Must be special, not general; direct, not consequential; substantial, not speculative; proximate, not remote; actual, not constructive. In re Mantorville R. & Transfer Co. [Minn.] 112 N. W. 1033.

82. William Scully v. Cincinnati, 9 Ohio C. C. (N. S.) 63.

83. State v. Several Parcels of Land [Neb.] 113 N. W. 248.

84. Drainage Act May 20, 1879, § 55, and Hurd's Rev. St. 1905, c. 121, do not confer on the drainage district power to assess benefits to public streets without the consent of the city. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

85. Where a jury in proceedings to condemn a right of way for a drainage district determine that land not taken is not damaged, drainage district commissioners may determine whether it is benefited and assess benefits. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

86. Lots actually taken for drainage purposes under Hurd's Rev. St. 1905, c. 42, cannot be assessed for benefits. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

87. See 7 C. L. 1295.

sidered on a private sale is to be taken into account.[88] All injuries reducing the salability of the property [89] and all rights of the owner impaired by the taking are to be considered.[90] As to whether the probability of fire from passing locomotives is an element, there is a conflict of authority.[91] It is generally held that danger to live stock from passing trains is not recoverable,[92] nor can recovery be had for other remote and speculative elements.[93] The value of improvements on the property is an element [94] if placed there before the property is taken,[95] but where land is taken for

88. Where it appeared that a plant sought to be taken could be developed and extended, an instruction to consider the hindrance to the extension did not authorize estimate based on future possibilities. St. Louis, etc., R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011. Where there was evidence that the tract, a part of which was to be taken, should be considered as one body though it was crossed by two roads, it was not error to instruct that if the tract was used as one body the depreciation in value of the entire tract should be awarded. St. Louis, etc., R. Co. v. Drummond Realty & Investment Co. [Mo.] 103 S. W. 977. Where in taking a portion of a manufacturing plant there was evidence with reference to the feasibility of a switch to the plant, it was proper to charge that the owner would be required to bear the expense of building the switch even if he could procure its installation. St. Louis, etc., R. Co. v. Continenal Brick Co., 198 Mo. 698, 96 S. W. 1011. Where a city permitted streets to be rendered impassable before taking necessary proceedings for changing grades, it could not contend that because buildings were moved before judicial proceedings were commenced the owner could not recover for such removal. City of Detroit v. C. H. Little Co., 146 Mich. 373, 13 Det. Leg. N. 803, 109 N. W. 671.

89. Recovery may be had for vibrations, noises, smoke, etc., by operation of trains, which depreciates the value of the property. Novich v. Trinity & B. V. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 264, 101 S. W. 476.

90. Where a landowner had a passageway for cattle and for a water course under a private way which was taken for a public way, and the public constructed a stone culvert in its stead suitable as a pass way for cattle. The public could, fifty years thereafter, substitute a pipe without liability for loss of pass way for cattle. Snively v. Washington Tp. [Pa.] 67 A. 465. Evidence that drainage of a laguna would deprive an owner of seepage during summer months is admissible. Laguna Drainage Dist. v. Charles Martin Co. [Cal. App.] 89 P. 993.

91. In proceedings to condemn a right of way, damages liable to be caused by fire for which the railroad would be liable in another action cannot be recovered. Eldorado, etc., R. So. v. Everett, 225 Ill. 529, 80 N. E. 281. The probability that crop will be set on fire by sparks from locomotives can be considered only in so far as it affects the market value of the land. Id. The danger of fire from passing locomotives, and danger to cattle do not constitute independent elements of damage, but may be considered in determining the value of land not taken. St. Louis, etc., R. Co. v. Oliver, 17 Okl. 589, 87 P. 423. If one's property is **specially exposed to fire** from passing locomotives, different from other property in the vicinity, and is thereby depreciated in value, such depreciation is an element. St. Louis, etc., R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011. The increased hazard from fire being set by passing locomotives is an element. New Jersey, etc., R. Co. v. Tutt [Ind.] 80 N. E. 420.

92. Damages resulting from danger to persons or stock from the operation of a trolley line are too remote. Indianapolis & C. Traction Co. v. Larrabee [Ind.] 80 N. E. 413. Under Acts 1903, p. 426, interurban railway companies are required to fence their tracts, and danger to animals on land not taken is too speculative to be considered as an element. Id. That live stock would be killed by trains is not an element. Yazoo & M. V. R. Co. v. Jennings [Miss.] 43 So. 469.

93. That laborers on farm would stop to look at trains, mules ran away, and weeds scattered over the farm, are not elements. Yazoo & M. V. R. Co. v. Jennings [Miss.] 43 So. 469.

94. Under Laws 1875, p. 243, providing that owners of piers may erect sheds thereon under license, a shed erected pursuant to license is a proper element of damage when the pier is taken. In re Piers Old Nos. 19, 20, East River, 117 App. Div. 553, 102 N. Y. S. 667. This is so though the owner of the shed leased a portion of the pier from the city. Id. Under Rev. St. 1898, § 282, making a city liable for injury to improvements by change of street grade, the city is liable where improvements are made after a grade is established but not carried into effect. Kimball v. Salt Lake City [Utah] 90 P. 395. The fact that improvements were made on property taken prior to enactment of a constitutional provision that private property shall not be taken without just compensation does not preclude recovery. Id.

95. One who erects a building on a lot after appointment of commissioners of estimate and assessment is entitled to compensation, the city not having yet acquired title. In re Briggs Ave., 118 App. Div. 224, 102 N. Y. S. 1102. Where an owner moved building onto premises before they were taken, but after commissioners had begun hearings, he was entitled to recover therefor. In re Baychester Ave., 105 N. Y. S. 241. Where a building was moved onto a lot after damage map had been filed, the cost of removing it should be considered where it appeared that it could be moved onto other land without damaging it. Id. Where

a street no recovery can be had for improvements made after the street had been platted.[96] There can be no recovery for a mere right to improve property.[97] All elements which tend to depreciate the value of the property [98] and which are capable of proof [99] are to be considered. A mere personal right is not to be considered.[1] Recovery may be had for unlawful and unjustifiable use of the right taken.[2]

Amount of damages as dependent on estate or interest appropriated or owned.[3] No compensation is to be allowed for property not taken.[4] It may be shown that petitioner already has an estate in the premises.[5] Where a leasehold estate is taken, the tenant may recover the value thereof [6] as ascertained from the facts of the particular case.[7]

§ 7. *Who is liable for compensation.*[8]

§ 8. *Condemnation proceedings in general.*[9]—The proceeding to acquire property under the power of eminent domain is wholly statutory,[10] and statutes must be

it appeared that a building had been moved onto the premises after the damage map was filed, an adjournment should have been allowed to enable the city to ascertain its exact location with respect to the widened street. In re Baychester Ave., 105 N. Y. S. 241.

96. Where after a street had been platted the owner of the land constructed buildings thereon, the fact that no compensation could be recovered for the buildings when the street was opened could not be considered as affecting value. In re South Twelfth St., 217 Pa. 362, 66 A. 568.

97. Where the owner of a pier had erected a shed thereon under revocable permission, he was not entitled to compensation on the theory that it was a shedded pier, because the taking of the pier by the city constituted a revocation of the permission to maintain the shed. In re Piers Old Nos. 19 and 20, 50 Misc. 477, 100 N. Y. S. 626. A possible right to obtain a permit to erect a shed on a pier as authorized by Laws 1875, p. 243, is not an element of damages where the pier is taken (In re Piers Old Nos. 19, 20, East River, 117 App. Div. 553, 102 N. Y. S. 667), but a contract right to maintain a shed on a pier is a proper element of damage when the pier is taken (Id.).

98. Cutting of fields into inconvenient shapes, interruption of ways for animals to pass, additional fencing required, are elements. New Jersey, etc., R. Co. v. Tutt [Ind.] 80 N. E. 420.

99. A tenant at will may show with all possible definiteness that he was able to conduct a profitable business on the premises. Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E. 1087. In determining the value of an easement for telegraph poles and wires on a railroad right of way, it is proper to consider the improved condition of the right of way. American Tel. & T. Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576.

1. The right to compensation where a sewer system of a town is taken extends to sewer pipes, but not to easements in the streets, nor to material spread upon the ground which has become part of the land. United States v. Nahant, 153 F. 520. Inconvenience or injury to traveling public cannot be considered, where a highway is destroyed by railway company, in estimating damages sustained by the county, but only cost of repairing it. Big Sandy R. Co. v. Floyd County [Ky.] 101 S. W. 354.

2. An interurban railway company operating heavy cars on city streets at a high rate of speed, and causing houses on abutting lots to shake and plaster to fall therein, is liable to the owner thereof in special damages. Kinsey v. Union Trac. Co. [Ind.] 81 N. E. 922.

3. See 7 C. L. 1296.

4. Where, in a proceeding to take land owned by a gas company, gas mains in the land were not taken, their value was not an element of compensation. In re Water Front in New York, 118 App. Div. 865, 105 N. Y. S. 750. Where, in a proceeding to condemn a railroad right of way, it did not appear that removal of coal from beneath such right of way would impair its usefulness as a railroad, it was error to refuse to permit the company to file a stipulation that it would not claim underlying coal. Eldorado, etc., R. Co. v. Sims, 228 Ill. 9, 81 N. E. 782.

5. Has an easement in the land for ditch purposes. Creighton v. Charlotte Water Com'rs, 143 N. C. 171, 55 S. E. 511.

6. In ascertaining the value of a lease, it is proper to determine what interest the tenant has, the rent he pays, and obligations he assumes and will assume. In re Delancey St., 105 N. Y. S. 779.

7. The value of the estate of a tenant at will must be determined from facts and circumstances. Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E. 1087. Where building is condemned, cost to tenant of removing machinery may be considered as bearing on value of leasehold interest. McMillin Printing Co. v. Pittsburg, etc., R. Co. [Pa.] 65 A. 1091. In proceedings for separation of street and railroad crossing grades, a tenant of property injured was entitled to compensation for interruption of his business and injury thereto caused by changed condition of locality. City of Detroit v. C. H. Little Co., 146 Mich. 373, 13 Det. Leg. N. 803, 109 N. W. 671.

8, 9. See 7 C. L. 1297.

10. Appropriation of private lands for boulevard purposes is governed by Comp. St. 1897, § 101b, c. 12a. State v. Several Parcels of Land [Neb.] 113 N. W. 248. Laws 1901, p. 351, authorizing the city to acquire wharf property and lands under water for improvement of the water front, and pre-

complied with [11] according to the construction given them,[12] and in special cases, if no method of procedure is prescribed, the general rules apply.[13] In Oklahoma the procedure prescribed by the enabling act is not exclusive.[14] After a railroad has entered on land of an owner with or without his consent, either party may institute condemnation proceedings to determine their respective rights and ascertain damages.[15] The proceeding must be prosecuted with diligence.[16] The entire damages

scribing the method of ascertaining compensation, does not violate the 14th amendment of the Federal constitution. In re Water Front in New York, 118 App. Div. 865, 105 N. Y. S. 750. Laws 1893, p. 135, procedure where cities of fourth class take land, is not unconstitutional. State v. Pierce County Super. Ct. [Wash.] 87 P. 521. The procedure by which land may be taken has been prescribed by statute in Idaho. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426. In proceedings under Ann. St. 1906, p. 4345, to establish a private road, the question of damages is the only one for the jury; those relating to necessity and dimensions are for the court. Allen v. Welch, 125 Mo. App. 278, 102 S. W. 665. Railroad held to have been incorporated under Priv. Laws 1861-62, p. 116, and that act together with its amendments regulate the power and method of acquisition of its right of way. Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263. Under Const. 1901, § 235, the right to damages for injury to land by construction of works, highways, or improvements of a corporation is placed on the same basis as taking of land and the same remedies and limitations apply. Birmingham Belt. R. Co. v. Lockwood [Ala.] 43 So. 819. Proceedings to condemn an abutting lot will not be enjoined on the ground that the lot owner's interest in the street was not condemned. Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624. Under Starr & C. Ann. St. 1896, c. 146, providing for change of venue where several defendants are joined, the court need not direct separate trials in his own court before a change of venue may be granted. Gillette v. Aurora R. Co., 228 Ill. 261, 81 N. E. 1005. Error in denying such change is not waived by going to trial where exception is taken. Id. In proceedings in a state court where different owners are joined under a statute permitting them to be joined or proceeded against separately, there is a separable controversy as to each owner, and owners who reside in different states may remove the cause as to themselves to the Federal court. Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co., 152 F. 824.

11. Proceedings under Hurd's Rev. St. 1905, c. 24, to condemn land for ferry purposes, held not defective because showing that the city had no power to condemn the land sought to be condemned. Helm v. Grayville, 224 Ill. 274, 79 N. E. 689. Objections urged to defeat condemnations held not to be in bar or abatement within Laws 1905, p. 61, c. 48. Vandalia Coal Co. v. Indianapolis & L. R. Co. [Ind.] 79 N. E. 1082. Under Laws 1903, p. 50, and Ball. Ann. Codes & St. § 5620, where a trial by jury of the question of compensation, is not waived, failure to select the jury in the manner prescribed by law is prejudicial error. Oregon R. & Nav. Co. v. McCormick [Wash.] 89 P. 186. Where "taking" was not contested, the service of notice on the owner that the land had been condemned was not a commencement of proceedings. In re Wittkowsky's Land, 143 N. C. 247, 55 S. E. 617. Abutting owner held bound by proceedings under an act confirming agreement between a city and a railway company whereby the company acquired rights in a street. Leffmann v. Long Island R. Co., 105 N. Y. S. 487.

12. The power may be exercised by the president of a railroad company to whom is delegated the management of the business, subject to the approval of the directors, before the directors have approved the location of the line. Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624. Condemnation proceedings instituted to condemn a line not in violation of the charter are not void. Id. Where important rights affecting the public are involved and the substantial rights of all are protected, a technical objection is entitled to but little weight. Kittery Water Dist. v. Agamentious Water Co. [Me.] 67 A. 631. A proceeding instituted after the executive committee of the board of directors of a railroad company had adopted a resolution delegating the matter to certain officers was instituted after authority therefor had been given. New York, etc., R. Co. v. Yonkers, 103 N. Y. S. 252.

13. If the power is conferred upon a municipality by its charter, and no provision is made for its exercise, the general law of the state (Acts 1894, p. 176) is by implication a part of the law delegating the power. Stowe v. Newborn, 127 Ga. 421, 56 S. E. 516. Under the constitution of Mississippi, providing that the question whether the use is a public one is a judicial question and no method or tribunal is provided to try such question, held, it must be raised by injunction, enjoining the taking on the ground that the use is not a public one. Vinegar Bend Lumber Co. v. Oak Grove & G. R. Co., 89 Miss. 84, 43 So. 292. Where charter of a railroad did not prescribe method of computing damages, held, they must be determined by construction given Const. art. 1, § 16, providing for compensation when private property is taken. Taber v. New York, etc., R. Co. [R. I.] 67 A. 9.

14. The statutes of Oklahoma authorizing railroad companies to exercise the power, and prescribing the procedure by which damages are to be ascertained, are not exclusive as to remedy, and the common-law remedy may be pursued by the landowner at his election. Blackwell, etc., R. Co. v. Bebout [Okl.] 91 P. 877.

15. Blackwell, etc., R. Co. v. Bebout [Okl.] 91 P. 877.

16. Where a proceeding was commenced in 1902 and summons returned "not found" two months later, and no further proceedings were taken until 1906, at which time

should be ascertained in a single proceeding.[17] An owner is entitled to a judicial hearing on the question of damages.[18] In a proceeding by a city to condemn land for a street, the defendant may deny that the council has ordered condemnation.[19] In Kentucky the validity of the organization of the petitioner may be raised.[20] In Washington a lis pendens of the proceeding may be filed,[21] and when filed it creates a defect in the title.[22]

Discontinuance or abandonment.[23]—Proceedings must be abandoned within the period prescribed.[24] Proceedings may be discontinued as to a portion of the property,[25] if such action is timely taken,[26] in order to preclude the owner from recovering compensation.[27] An abandonment of the proceedings may be inferred from unreasonable delay in making compensation.[28]

Parties.[29]—All persons who claim an interest in the property must be made parties,[30] and where after proceedings are commenced it is ascertained that another

the property had greatly increased in value, held, the proceeding was properly dismissed for want of prosecution. Sanitary Dist. of Chicago v. Chapin, 226 Ill. 499, 80 N. E. 1017.

17. In re Lake Shore & M. S. R. Co., 53 Misc. 340, 103 N. Y. S. 294.

18. St. Laws 1889, p. 127, authorizing a city to condemn land by having same appraised by a jury of twelve men selected by the marshal, from which the mayor was entitled to strike three and the owner three, and containing no provision for appeal, is void as in violation of due process clause. Tucker v. Paris [Tex. Civ. App.] 17 Tex. Ct. Rep. 998, 99 S. W. 1127. Failure to appear, however, does not invalidate the proceedings, but the court must determine whether the use is a public one and ascertain the damages. Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963. The deposit in court of the amount of an award, its acceptance by the owner, and the taking of possession by the petitioner, does not preclude the filing of exceptions and a jury trial on the commissioner's report. St. Louis, etc., R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867. Though the amount of compensation is paid into court as a condition precedent to taking possession, and the money is taken by the owner, either party may file exceptions and litigate the question. St. Louis, etc., R. Co. v. Drummond Realty & Investment Co. [Mo.] 103 S. W. 977.

19. City of Bluefield v. Bailey [W. Va.] 57 S. E. 805.

20. Under the statutes of Kentucky an owner of land sought to be condemned may in such proceeding raise the question of incorporation where it does not appear that statutory requirements have been complied with. Warden v. Madisonville, etc., R. Co. [Ky.] 101 S. W. 914.

21. Ball. Ann. Codes & St. § 4887, authorizes the filing of lis pendens in proceedings to condemn land for a railroad right of way. Portland & S. R. Co. v. Ladd [Wash.] 91 P. 573.

22. The institution of condemnation proceedings and filing lis pendens thereof creates a defect in the title of the property, a portion of which is to be taken. Miller v. Calvin Philips & Co. [Wash.] 87 P. 264.

23. See 5 C. L. 1121.

24. Under Act March 20, 1900 (P. L. 1900, p. 85), one condemning land may not abandon the proceedings on payment of the owner's costs and expenses where he delays more than twenty days after the filing of the report of the commissioners. Walsh v. Board of Education of Newark, 73 N. J. Law, 643, 64 A. 1088.

25. Under Laws 1901, p. 426, providing that the board of estimate and approval of Greater New York may discontinue proceedings to acquire land for a street at any time before title is acquired, held, it may discontinue as to a portion of the property affected. In re City of New York, 52 Misc. 319, 102 N. Y. S. 159.

26. Under Shannon's Code, Tenn. §§ 1859, 1861, 1863, 1865, where a judgment has been entered on appeal, the petitioner may not discontinue as to a part of the land sought to be condemned merely because it believes damages awarded are excessive. Union R. Co. v. Standard Wheel Co. [C. C. A.] 149 F. 698.

27. After the council of the town of Stamford had approved the record of the board of appropriation and apportionment for lands taken under 14 Sp. Laws, p. 857, the city council could not rescind its action within the thirty days provided for publication of notice. Bohemian v. Stamford [Conn.] 67 A. 372. Under 14 Sp. Laws, p. 857, authorizing the City of Stamford to take land for park purposes, and the payment of compensation to owners of land taken after thirty days' publication, held, on completion of the proceedings for condemnation the city became absolutely indebted for the damages awarded though they were not payable for thirty days. Id.

28. Payment of the compensation must be made within a reasonable time if no time is fixed, otherwise the proceeding is deemed abandoned. Port Townsend So. R. Co. v. Barbare [Wash.] 89 P. 710.

29. See 7 C. L. 1298.

30. Under Code Civ. Proc. § 2219, providing that all persons claiming an interest may appear, and § 2231, making general provisions of the code applicable to such proceedings, one claiming an interest must appear, and if he does not he cannot be heard in subsequent proceedings. Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963. Under Rev. Laws, c. 48, §§ 17, 18, 20, 22, providing that several persons having an estate in the property taken may demand damages, and all damages may be assessed by the same jury, a lessee who sustains damages by change

party is interested, he may be joined by amendment [31] in order that their rights may be adjudicated,[32] but one who has parted with all his interest need not be joined.[53] A lessee from the petitioner is not estopped, because of the existence of the relation of landlord and tenant, from asserting his rights.[34]

§ 9. *Jurisdiction.*[35]—In Mississippi the special court of eminent domain has jurisdiction only to determine the question of compensation.[36]

§ 10. *Applications; petitions; pleadings.*[37]—Formal pleadings are not required in some jurisdictions.[38] Where a complaint or petition is required, it must show the existence of statutory authority,[39] conform to statutory requirements,[40] and

of grade may recover though the freehold has not been injured and the owner thereof is not a party. Galeano v. Boston [Mass.] 80 N. E. 579.

31. Under Code Civ. Proc. § 721, and § 3368, where it was ascertained after proceedings were commenced that another person owned an interest in the property, it was proper to allow the petition to be amended. In re Lake Shore & M. S. R. Co., 53 Misc. 340, 103 N. Y. S. 294.

32. Where one intervened in proceedings but was dismissed over his protest, it was petitioner's duty to see that he was made a party and retained, even to the extent of appealing from the order dismissing him in order to protect itself. Storms v. Mundy [Tex. Civ. App.] 18 Tex. Ct. Rep. 924, 101 S. W. 258.

33. A mortgagor who has been foreclosed and has sold his equity of redemption has no interest and is not a necessary party to condemnation proceedings though formal conveyance had not been executed when proceedings were instituted. Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co., 152 F. 824.

34. In a proceeding in rem to condemn property rights, a lessee from the city is not estopped because of the relation of landlord and tenant from asserting certain rights in the property which it has as incident to its lease. City of Baltimore v. Baltimore & P. Steamboat Co., 104 Md. 485, 65 A. 353.

35. See 7 C. L. 1299.

36. Under the constitution and statutes of Mississippi, the special court of eminent domain is of limited powers, and the question of compensation is the only one it can determine. Vinegar Bend Lumber Co. v. Oak Grove & G. R. Co., 89 Miss. 84, 43 So. 292. The special court of eminent domain created by Code 1892, c. 40, being authorized to determine only the question of compensation, the question of right to condemn cannot be raised on appeal from such court, and a trial de novo in the circuit court. Id.

37. See 7 C. L. 1299.

38. In such proceeding, insufficiency of statement is immaterial as the case may be tried without a statement. Klenke v. West Homestead Borough, 216 Pa. 476, 65 A. 1079.

39. Complaint held to sufficiently show that parties were unable to agree as to compensation. Fulton v. Methow Trading Co. [Wash.] 88 P. 117. When a complaint substantially follows the statute, other matters which would afford sufficient grounds of objection to the taking should be brought forward by defendant. Southern Ind. R. Co. v. Indianapolis & L. R. Co. [Ind.] 81 N. E. 65. A petition under Act May 24, 1874 (P. L. 129), stating that a borough excavated in a street upon which plaintiff's property abutted, removed support, and destroyed fences and trees, states a change of grade, and it is not necessary to allege that the change was without consent of the owner or failure to agree as to the amount of compensation. Klenke v. West Homestead Borough, 216 Pa. 476, 65 A. 1079. The proceedings to condemn land incident to a change of line, the filing of a map showing the proposed change instead of the original was not a substantial defect where such map was shown to be authentic and correct. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501. Where, in an action for injury to property by construction of a tunnel to the street, the petition treated the abutting property as a whole, the fact that the numbers of the lots were given did not make the suit one for damages to each lot separately. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822. A motion to dismiss a complaint for the assessment of damages serves the purpose of a demurrer, and is not to be regarded as a dilatory plea, the question raised being whether the complainant has stated sufficient grounds to maintain his complaint. Hurley v. South Thomaston, 101 Me. 538, 64 A. 1050. When such motion is overruled and exceptions taken, the case should proceed to trial, and only after trial on the merits should exceptions be taken to a court of law. Id.

40. Complaint in proceedings to condemn a right of way for an irrigation ditch held sufficient under Sess. Laws 1899, p. 261, requiring such complaint to allege ownership of land to be irrigated. Fulton v. Methow Trading Co. [Wash.] 88 P. 117. Under Acts 1905, p. 60, providing that the complaint shall state the names of all owners and claimants of property, it is not necessary to jurisdiction that all persons interested be joined, and persons joined cannot object to failure to join others. Darrow v. Chicago, etc., R. Co. [Ind.] 81 N. E. 1081. Complaint alleging name of corporation desiring to condemn, name of owner of property, use, location of right of way, and description of the property, and that an agreement could not be reached without the owners, held sufficient. Vandalia Coal Co. v. Indianapolis & L. R. Co. [Ind.] 79 N. E. 1082. Under Gen. Acts 1903, p. 374, requiring the application to state the names of owners if known, a trustee is the only proper party, and it is not necessary to name the beneficiary. Birmingham & A. R.

show the necessity for taking.[41] It must contain a description of the property sufficiently definite to identify it.[42] The general rules as to the requisites of pleadings apply.[43] In New York the sufficiency of the petition may be questioned in the trial court.[44] In Indiana a petition may be amended after verdict as to description.[45] Filing a complaint in open court complies with a rule requiring it to be filed with the clerk of court.[46]

§ 11. *Process, notice, citation, publication.*[47]—As a general rule, notice of proceedings to the adverse party is essential,[48] and notice must be in strict conformity to statute.[49] A notice stating that it was desired to condemn a fee will be limited by the statute to the estate necessary,[50] and may be amended on appeal to conform to the statute.[51] Failure to serve map and profile with the summons may be cured by

Co. v. Louisville & N. R. Co. [Ala.] 44 So. 679. The interest of the beneficiary should be fully protected by the trustee. Id.

41. Under Ky. St. 1903, § 786, authorizing railroads to condemn land adjacent to the highway, it is only necessary to allege that the taking is necessary. Warden v. Madisonville, etc., R. Co. [Ky.] 101 S. W. 914. A petition in proceeding by a city under Hurd's Rev. St. 1905, c. 24, to condemn land to establish an additional ferry, held to show that it was for a public purpose. Helm v. Grayville, 224 Ill. 274, 79 N. E. 689.

42. Petition by a telegraph company to condemn an easement on a railroad right of way held to describe the proposed easement with sufficient certainty. American Tel. & T. Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576. The petition must describe the land sought to be condemned. Petition held defective. Helm v. Grayville, 224 Ill. 274, 79 N. E. 689. A description is sufficient if it will enable one skilled in such matters to locate the property. Darrow v. Chicago, etc., R. Co. [Ind.] 81 N. E. 1081. Description of land to be taken for a transmission line held sufficient under Acts 1905, p. 60, c. 48. Mull v. Indianapolis & C. Traction Co. [Ind.] 81 N. E. 657. A petition is not insufficient for failure to allege in terms that the land is in the county where action is brought where it showed the congressional township and range. Southern Ind. R. Co. v. Indianapolis & L. R. Co. [Ind.] 81 N. E. 65. Under Code Civ. Proc. § 3360, requiring the petition to specifically describe the property, a petition for condemnation of a right of way for a telephone, and among other things the right to trim trees necessary to protect the line, without describing the extent to which such trimming would be necessary, is insufficient. Bell Tel. Co. v. Parker [N. Y.] 79 N. E. 1008. A petition for the appointment of commissioners to assess damages for taking land described it as land upon the "Beach" front. Held, the description showed the land to be between high and low water mark. Johnson v. Ocean City [N. J. Law] 64 A. 987. Under Acts 1905, p. 60, providing that the petition shall contain a description of the property, it is not necessary to describe any part of the defendant's property except the portion to be taken. Darrow v. Chicago, etc., R. Co. [Ind.] 81 N. E. 1081. A complaint which describes a definite route and dimensions of the ditch sufficiently describes the quantity of land, within Laws 1899, p. 262. Fulton v. Methow Trading Co. [Wash.] 88 P. 117. A description stating the width of the right of way required on the line now located and staked over a certain donation claim in a certain township and county is sufficient. State v. Skamania County Super. Ct. [Wash.] 88 P. 334.

43. Complaint for damages for changes of grade, that the city and railway company combined, confederated, etc. Coyne v. Memphis [Tenn.] 102 S. W. 355. Damage to land not actually traversed by the right of way is not special in the sense that it must be specially pleaded. Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963. A railroad company which fails to mention in his petition land not taken or damages thereto cannot object that damage to part not described is special. Id. The statutes of Montana does not require the defendant to set up his claim for damages by answer or counter claim. Id.

44. The sufficiency of a petition for condemnation may be raised by objections filed by the property owner in the trial court. Bell Tel. Co. v. Parker [N. Y.] 79 N. E. 1008.

45. Under Acts 1905, p. 61, c. 48, providing that pleadings may be amended, the petition may be amended as to the description after verdict. Darrow v. Chicago, etc., R. Co. [Ind.] 81 N. E. 1081.

46. Filing complaint in open court under under Acts 1905, p. 59, is a substantial compliance with the provision requiring complaint to be filed in the office of the clerk of court. Darrow v. Chicago, etc., R. Co. [Ind.] 81 N. E. 1081.

47. See 7 C. L. 1301.

48. Laws 1901, p. 198, amended by Laws 1905, p. 93, providing for condemning land for a highway, and that a person aggrieved may within six months apply for a jury to assess damages, does not in terms require notice of such appointment to township trustees, but such notice is required by the general law of the land. In re Wittkowsky's Land, 143 N. C. 247, 55 S. E. 617.

49. An owner cannot be placed in default by ratification of a notice void when given. Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624.

50. Though a notice stated that it was desired to condemn a fee, the statute would attach to such proceeding the restriction that only such interest would be acquired as was necessary for the purposes for which the property was taken. Georgia Granite R. Co. v. Venable [Ga.] 58 S. E. 864.

51. Where a notice stated that it was desired to condemn a fee, an amendment

amendment.[52] The notice is not defective because signed by the clerk in three capacities, one of which was that in which he was required to sign.[53] Notice to owners need not state in what capacity they are notified.[54] Personal service on nonresident owners is not required in some states.[55]

§ 12. *Hearing and determination of right to condemn.*[56]—Upon a preliminary hearing the only issues allowable are such as go to defeat or abate the asserted right to exercise the power,[57] and no pleadings other than the complaint and written objections thereto filed by the defendant are allowed.[58] On application for approval of bond, the court should confine itself to the questions presented by the bond.[59] Questions for the determination of the trial court cannot be determined on prohibition to restrain the court from proceeding with the trial,[60] nor can the determination of questions referred by statute to one tribunal be referred to another.[61] A petitioner must see that statutory requirements as to trial are complied with.[62] If no proof of necessity is required, none is necessary.[63] The president of a petitioning corporation though a witness may not be excluded from the court room though other witnesses are put under rule.[64] Where Federal questions are involved the cause may be removed to a Federal court.[65] A removal to the Federal court by one of several owners joined as permitted by statute does not carry with it proceedings against other owners.[66]

§ 13. *Commissioners or other tribunal to assess damages; trial by jury.*[67]—In many states the parties have a constitutional right to a trial by jury.[68] Such jury

could be made on appeal stating that the proceeding was under the statute, and it was really desired to condemn such interest as the statute authorized. Georgia Granite R. Co. v. Venable [Ga.] 58 S. E. 864. Where the notice recited previous negotiations for a fee, it could be amended on appeal to recite that such negotiations were for a right of way. Id. It was also competent to amend by alleging that after assessment the company had tendered and the owners accepted the award. This did not prevent appeal, but waived irregularity in notice or assessment. Id.

52. Failure to serve map and profile with summons, as required by Revisal 1905, § 2599, may be cured by amendment. State v. Wells, 142 N. C. 590, 55 S. E. 210.

53. Waite v. Green River Special Drainage Dist. Com'rs, 226 Ill. 207, 80 N. E. 725.

54. Form of notice approved as substantially complying with Hurd's Rev. St. 1905, p. 804, c. 42, § 93. Waite v. Green River Special Drainage Dist. Com'rs., 226 Ill. 207, 80 N. E. 725.

55. Comp. Laws, § 4324, providing for service of citation in proceedings to establish a drain, does not require personal service on non-resident owners. Patterson v. Mead, 148 Mich. 659, 112 N. W. 742.

56. See 7 C. L. 1302.

57. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501.

58. In proceedings by a consolidated railway company, collateral interrogatories were properly stricken. Smith v. Cleveland, etc., R. Co. [Ind.] 81 N. E. 501.

59. Katharine Water Co., 32 Pa. Super. Ct. 94.

60. Whether the taxing is justified. Reclamation Dist. No. 551 v. Sacramento County Super. Ct. [Cal.] 90 P. 545.

61. Under the Charter of New York City (Laws 1901, p. 217), it is the duty of the board of estimate and apportionment to determine what land shall be taken for water supply purpose, and such determination cannot be interfered with by court or commissioners, and commissioners of appraisal must provide for compensation for all lands shown on the map adopted by such board. In re City of New York, 116 App. Div. 801, 102 N. Y. S. 116.

62. A petitioner who on failure of an owner to appear moves for selection of a jury to award compensation, must see that it is selected in the manner prescribed by Laws 1905, p. 270. Oregon R. & Nav. Co. v. McCormick [Wash.] 89 P. 186.

63. Under Laws 1891, p. 225, authorizing the City of Buffalo to take land for corporate purposes, but requiring no proof of necessity, it is not necessary to show necessity. In re City of Buffalo [N. Y.] 81 N. E. 954.

64. Warden v. Madisonville, H. & E. R. Co. [Ky.] 101 S. W. 914.

65. A suit by a railroad company to enjoin the condemnation of a telegraph right of way along the railroad, which alleges that such construction would menace the safety of trains and obstruct business, is removable to the Federal court. Georgia R. & Banking Co. v. Atlantic Postal Tel. Cable Co., 152 F. 991.

66. Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co., 152 F. 824.

67. See 7 C. L. 1303.

68. Under the constitution and statutes of Missouri, though proceedings may be commenced by appointment of commissioners, either party is entitled to a jury trial of the question of damages. St. Louis, etc., R. Co. v. Drummond Realty & Investment Co., 103 S. W. 977. Laws 1897, p. 15, expressly provides that where a landowner appeals from an award by commissioners he is entitled to have his damages assessed

is to be selected in the manner prescribed by law.[69] In states where compensation is assessed by commissioners, such commissioners must be fair and unprejudiced,[70] but mere suggestion of possibility of interest is not sufficient to disqualify a commissioner.[71] The appointment of commissioners[72] and their compensation[73] is determined by statute. Appraisers authorized to assess damages have no power to decide any other question.[74] On vacation of a street, damages sustained by owners must be ascertained by five disinterested householders of the city.[75]

§ 14. *The trial or inquest, and hearings on the question of damages.*[76]—The action to recover compensation must be brought within the statutory period.[77] The landowner is not confined to the element of damages claimed by him before the jury of view.[78]

Admissibility of evidence.[79]—One asserting damages has the burden of proof.[80]

by a jury on the appeal. Wilkins v. Manchester [N. H.] 67 A. 560. Under Stanford City Charter, § 8, creating a board of appropriation and apportionment for condemnation of land, the mayor being a member of such board with power to vote in case of a tie, held, in case of tie in a proceeding under 14, Sp. Laws 1905, p. 858, the mayor's vote was sufficient to make a majority. Bohamman v. Stanford [Conn.] 67 A. 372. The constitutional right to the verdict of a jury as to compensation is not violated by a provision that the court may fix the amount of an additional fund to protect an owner in case the property is not taken, since the verdict for the taking would cover loss for temporary taking. Helibron v. Sacramento Super. Ct. [Cal.] 90 P. 706.

69. Ball. Ann. Codes & St. § 5640, requiring the sheriff to summon a jury to determine compensation, is repealed by Laws 1905, p. 270, providing a general method of selecting jurors in the superior court. Oregon Nav. Co. v. McCormick [Wash.] 89 P. 186.

70. Evidence sufficient to show that a commissioner had represented the railway company in procuring rights of way so as to disqualify him from acting as commissioner. Rochester, S. & E. R. Co. v. Tolan, 116 App. Div. 696, 101 N. Y. S. 433.

71. Suspicion must be based on established facts. Terminal R. Co. of Buffalo v. Gerbereux, 104 N. Y. S. 737. Evidence insufficient to show that a commissioner was disqualified because of partiality. Terminal R. Co. of Buffalo v. Gerbereux, 104 N. Y. S. 737. Where a railroad took no steps to learn whether one of the damage commisioners was a freeholder, it may not attack the report on the ground that one was not qualified where it does not appear that such fact was prejudicial to it. Tidewater R. Co. v. Cowan, 106 Va. 817, 56 S. E. 819.

72. Under Code W. Va. 1906, §§ 1363, 1366, providing for application to the court for appointment of commissioners to ascertain compensation, and requiring 10 days notice of such application to be given to owners, such notice may be given either before or after application is presented. Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co., 152 F. 824. After an ordinance had laid out a street by a particular description pursuant to statute some of the owners within the described street dedicated the land, held not necessary that the order appointing commissioners to assess damages should particularly describe remaining land. Johnson v. Ocean City [N. J. Law] 64 A. 987. Under Gen. St. 1902, § 3687, providing that a judge shall appoint appraisers, where the amount of compensation cannot be agreed upon, where notice of an application to appoint appraisers has been given and a party admits an allegation of interest, the judge may not determine whether his claim is well founded. New York, etc., R. Co. v. Illy, 79 Conn. 526, 65 A. 965.

73. Laws 1906, c. 658, preventing extra allowances to commissioners in condemnation proceedings, does not apply to proceedings pending at the time it was enacted in which steps have been taken by commissioners. In re West Twentieth St. N. R., 102 N. Y. S. 836; In re Twenty-Seventh and Twenty-Eighth St., 52 Misc. 602, 102 N. Y. S. 837.

74. Question of title. Pinney v. Winsted, 79 Conn. 606, 66 A. 337. In Georgia appraisers appointed in a proceeding by a telegraph company to condemn a right of way along the right of way of a railroad company have no authority except to assess damages. Georgia R. & Banking Co. v. Atlantic Postal Tel. Cable Co., 152 F. 991. A drainage district organized under Hurd's Rev. St. 1905, c. 42, may proceed to condemn property for right of way and assess damages, and commissioners may not asses benefits against property, a part of which is to be taken, until the damages are assessed by a jury in condemnation proceedings. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

75. Blackwell, etc., R. Co. v. Gist, 18 Okl. 516, 90 P. 889.

76. See 7 C. L. 1304.

77. Under the Omaha Charter of 1893, a cause of action upon an award to one whose property was taken for a street did not accrue until a lapse of time reasonably sufficient for the creation of a special fund for the payment of such damages. Rogers v. Omaha [Neb.] 107 N. W. 212.

78. Home v. Montgomery County [Pa.] 67 A. 209.

79. See 7 C. L. 1305.

80. In an action for laying car tracks in a street, evidence held insufficient to show damages as a matter of law. Camden Interstate R. Co. v. Stein, 30 Ky. L. R. 140, 97 S. W. 394.

The evidence introduced must be relevant to the issues made.[81] All evidence tending to show the effect of the improvement on the property is admissible.[82] Evidence as to all matters reducing damages is admissible.[83] Testimony as to the price asked for land in the vicinity,[84] or offers of purchase,[85] or price paid by petitioner for other lands in the vicinity,[86] is not admissible. Proof of recent sales of similar property is admissible,[87] but proof of remote sales is not.[88] Expert testimony as to value is not admissible where the value can be proved in the usual manner.[89] The amount of rents received [90] and the rendition of property for taxes is admissible on the ques-

81. Evidence of the taking and appropriation of land is admissible under an allegation that defendant laid its track upon and along the land. Morrison v. Fairmont & C. Trac. Co., 60 W. Va. 441, 55 S. E. 669.

82. Evidence as to the **effect** an elevated road would have **on rental value** is admissible. Lewis v. Englewood El. R. Co., 223 Ill. 223, 79 N. E. 44. It was not error to admit **reproduction of sounds made by operation of trains by means of phonograph.** Boyne City, etc., R. Co. v. Anderson, 146 Mich. 328, 13 Det. Leg. N. 739, 109 N. W. 429. Where the act of condemnation of a right of way gave the company the right to take materials for the construction and repair of the road, and the right to convey water by drains, such provisions were for the benefit of the company and did not require it to restore a surface water drain. New Jersey, etc., R. Co. v. Tutt [Ind.] 80 N. E. 420. Where a railroad had placed a tile drain in a natural surface water drain, it was proper to show that the drain clogged and water backed up from time to time. Where at the time of trial a railroad had been partially constructed and an embankment built across a drain, evidence as to the extent water had already been set back was admissible. Id. Where a change of street grade placed the surface of a lot sixteen instead of five feet below the street, the cost of raising the lot eleven feet was admissible. Bond v. Philadelphia [Pa.] 67 A. 805. Testimony held admissible as amountng merely to evidence that the same general course in values of property would have prevailed as to land in front of which an elevated railroad had been built, as in the case of other lands, but for the road. Shaw v. New York El. R. Co. [N. Y.] 79 N. E. 984.

83. Where the fact that one party owned all land in the vicinity affected value, it was proper to consider such fact. Pullman Co. v. Chicago, 224 Ill. 248, 79 N. E. 572. In an action for damages caused by change of street grade, the city may show that the elevation was a part of its general scheme of improvement. Bond v. Philadelphia [Pa.] 67 A. 805. In assessing damages to abutting lot caused by change of grade, the fact of additional elevation of the street as affecting value of the property after change of grade may be shown, but not the cost of lifting the whole surface to the new grade. Id. A property owner was not prejudiced by the fact that a witness in estimating damages considered the character of a crossing already constructed, where the petitioner had indicated the crossing it would construct. Guinn v. Iowa & St. L. R. Co., 131 Iowa, 680, 109 N. W. 209. A defendant was not prejudiced by questions tending to show that it owned all the property in the vicinity. Pullman Co. v. Chicago, 224 Ill. 248, 79 N. E. 572.

84. Chicago, etc., R. Co. v. Alexander [Wash.] 91 P. 626.

85. Chicago etc., R. Co. v. Alexander [Wash.] 91 P. 626. Evidence of offers for similar land in the locality is not competent. Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963. Incompetent as depending on a determination of collateral issues. Id. Efforts to compromise are not admissible. St. Louis, etc., R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011.

86. Proof of purchases by petitioner is inadmissible. Port Townsend So. R. Co. v. Barbare [Wash.] 89 P. 710. Testimony as to what the petitioner paid for other land is not admissible. Union R. Co. v. Maulden [Tenn.] 102 S. W. 342 [advance sheets only]. What the petitioner and other railroads paid for land in the vicinity is inadmissible. Chicago & A. R. Co. v. Scott, 225 Ill. 352, 80 N. E. 404. What a railroad company paid for a right of way across another tract half a mile distant is incompetent. Eldorado, etc., R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281. Where witnesses for petitioner testified as to sales of other land in the vicinity to petitioner, it was error to exclude testimony as to the reasons for paying the prices paid. Port Townsend So. R. Co. v. Barbare [Wash.] 89 P. 710.

87. Proof of sales of similar property at about the time of taking is admissible. Port Townsend So. R. Co. v. Barbare [Wash.] 89 P. 710. Where in proceeding to condemn a railroad right of way damages for property not taken were claimed, the company could introduce evidence as to sale of land similarly located which had recently been made. Eldorado, etc., R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281.

88. A railroad condemning land cannot show what the landowner paid for it seventeen years before. Davis v. Pennsylvania R. Co., 215 Pa. 581, 64 A. 774.

89. In a proceeding by a town to condemn land for water supply purposes, expert testimony as to value of the land for water purposes held properly excluded because it did not appear that such value could not have been proven in the usual manner. Sargent v. Merrimac [Mass.] 81 N. E. 970.

90. Amount of rents received is admissible to show value of fee. In re Blackwell's Island Bridge, 118 App. Div. 272, 103 N. Y. S. 441. When evidence was offered as to rents received from property in the neighborhood, it was proper to show that there were a number of vacant houses there. Pullman Co. v. Chicago, 224 Ill. 248, 79 N. E. 572.

tion of value.[91] Evidence as to the value of improvements apart from the value of the property is not admissible.[92] A witness may not state that the property would be specially benefited,[93] but opinions on the question are admissible.[94] Testimony as to a value for the particular use is not admissible.[95] Speculative [96] or immaterial testimony is not admissible.[97] The rule excluding secondary evidence evidence is not inflexibly applied to such proceedings.[98] Evidence as to an element not asserted is not admissible.[99] Where the report of one commission is not confirmed, evidence introduced before it is admissible on a subsequent hearing.[1]

Witnesses and examination thereof.[2]—The number of witnesses each party may introduce may be limited.[3] Witnesses who are adequately informed as to values of property similar to that in controversy may give their opinion as to value [4] and may be permitted to testify as to the facts upon which their opinion is based,[5] but one not

91. Rendition of property for taxes is admissible on question of value. Burton Lumber Corporation v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822.

92. Evidence of structural value of buildings on property apart from the market value of the property is not admissible. In re Blackwell's Island Bridge, 118 App. Div. 272, 103 N. Y. S. 441. The value of a quarry on the land as personal property cannot be established separate from the land. St. Louis Belt & Terminal R. Co. v. Cartan Real Estate Co., 204 Mo. 565, 103 S. W. 519.

93. A witness may not state what special benefit his land would derive from the construction of a railroad. Taber v. New York, etc., R. Co. [R. I.] 67 A. 9.

94. A witness may give his opinion as to whether a railroad would be a future benefit to the property under conditions which are not impossible. Taber v. New York, etc., R. Co. [R. I.] 67 A. 9.

95. In a proceeding by a town to take land for water supply purposes, testimony as to what municipalities or communities could use the water in the land as a water supply is inadmissible. Sargent v. Merrimac [Mass.] 81 N. E. 970.

96. Evidence of rents derived from other property in the vicinity and of income that could be derived from other vacant property if improved is inadequate. Pullman Co. v. Chicago, 224 Ill. 248, 79 N. E. 572.

97. Where there was no claim that the land was specially valuable for a saw mill plant, it was not proper rebuttal to show that it could be so used when divided by the right of way. Chicago, etc., R. Co. v. Alexander [Wash.] 91 P. 626. An admission made by petitioner's attorney for the purpose of expediting a former trial, to the effect that certain witnesses if called would testify to a certain fact, is not admissible. City of Detroit v. C. H. Little Co., 146 Mich. 373, 13 Det. Leg. N. 803, 109 N. W. 671. The fact that school grounds, a portion of which had been condemned for railroad purposes, had been abandoned is not admissible on an issue as to whether the entire grounds had been rendered unfit for school purposes. San Pedro, etc., R. Co. v. Board of Education of Salt Lake City [Utah] 90 P. 565. Instruction held erroneous as charging that if authorities acted conscientiously in abandoning the premises, the property might be regarded as wholly destroyed for school purposes. Id. In proceeding to condemn a right of way through a brick making plant, evidence that petitioner had offered to give the owner the clay excavated from the land and that he refused it is not admissible. St. Louis, etc., R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011. Testimony as to the existence of coal in adjoining land is incompetent to show existence of coal in the land sought to be condemned. Eldorado, etc., R. Co. v. Sims, 228 Ill. 9, 81 N. E. 782.

98. Witness permitted to state contents of written contract. Stafford Springs St. R. Co. v. Middle River Mfg. Co. [Conn.] 66 A. 775. Certain maps showing location of road held admissible though not made by one who made the survey. Portland & Seattle R. Co. v. Ladd [Wash.] 91 P. 73. Upon trial of an appeal from award of appraisers, an unproved may showing location of a route of another company is not admissible; if the map had been proved, it was error to admit testimony that the center line of the route passed over the property in question. In re Central R. Co. [N. J. Law] 65 A. 905.

99. Where an owner disclaimed any right to recover for increased fire risk, evidence as to insurance rates in the vicinity is not admissible. Boyne City, etc., R. Co. v. Anderson, 146 Mich. 328, 13 Det. Leg. N. 739, 109 N. W. 429.

1. Where report of commissioners of estimate and apportionment was not confirmed and new commissioners were directed to revise it or make a new report, it was error to reject testimony given before the first commission. In re Amsterdam Ave., 53 Misc. 342, 104 N. Y. S. 821.

2. See 7 C. L. 1308.

3. Limiting the number of witnesses on the question of compensation to four on each side is not arbitrary and erroneous. St. Louis, etc., R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867.

4. Witnesses familiar with brick making and the value of property similar to that sought to be condemned are competent, though they were not familiar with values in the vicinity. St. Louis, etc., R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011. Where a witness testifies to his observation of the effect of an elevated road near a business house, his testimony cannot be rejected because he moved away from the house before the road was built. Lewis v. Englewood El. R. Co., 223 Ill. 223, 79 N. E. 44.

5. Witnesses may be permitted as a basis of opinion of value to describe char-

qualified may not give an opinion.[6] The general rules as to examination of witnesses apply.[7] A witness may not be asked to state a conclusion.[8] In examination of witnesses it may be assumed that a railroad will be properly constructed.[9]

Illustrations.[10]—Instructions are to be considered as a whole [11] in the light of issues made.[12] They must be based on the issues made by the pleadings and evidence,[13] must not assume controverted facts,[14] nor be upon the weight of the evi-

acter of soil and various crops to which it is adapted. New Jersey, I. & I. R. Co. v. Tutt [Ind.] 80 N. E. 420.

6. A witness who had had no opportunity to observe the locality where the land lay except in a single instance is incompetent to testify as to value because of lack of special knowledge. Walsh v. Board of Education of Newark, 73 N. J. Law, 643, 64 A. 1088.

7. See Examination of Witnesses, 7 C. L. 1598. On cross-examination a landowner's witnesses may be asked as to the value of a part of the land after it had been cut off by the railroad seeking to condemn it. Davis v. Pennsylvania R. Co., 215 Pa. 581, 64 A. 774. Where a complainant has placed the market value of his property at a certain sum, he cannot be asked on cross-examination what other property in the neighborhood has been sold for within two years. Schonhardt v. Pennsylaania R. Co., 216 Pa. 224, 65 A. 543. Experts may not be permitted to testify on redirect examination as to sales of pieces of property about which they had not been questioned on cross-examination. In re Blackwell's Island Bridge, 118 App. Div. 272, 103 N. Y. S. 441. Where a witness testified that certain adjoining property had sold for $10,000 two years before, the owner was not prejudiced by an improper question as to whether or not he knew that the property had been assessed at $7,000. Pullman Co. v. Chicago, 224 Ill. 248, 79 N. E. 572. A witness for the landowner, who testified that value of remainder of tract would be depreciated may be asked whether he knew of any farm which had been depreciated in value because of a railroad running through it. Eldorado, etc., R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281.

8. A witness may not state the effect of building a railroad on abutting property, so far as the net result is concerned, by deducting special damages from special benefits, as that is a question for the jury. Taber v. New York, P. & B. R. Co. [R. I.] 67 A. 9. It was not prejudicial error to permit experts to testify as to amount of depreciation in value instead of requiring them to state the value before and after the improvemnt. Hempstead v. Salt Lake City [Utah] 90 P. 397.

9. Guinn v. Iowa & St. L. R. Co., 131 Iowa, 680, 109 N. W. 209.

10. See 7 C. L. 1308.

11. Erroneous instruction as to damages held cured by other instructions. St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 S. W. 583. Where the court charged that if an owner's property was injured he was entitled to compensation, refusal to charge that the fact that the taking was a public necessity did not relieve petitioner was not error. Burton Lumber Corporation v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822. Instructions held not to authorize speculative damages. Union Trac. Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052. It is not error to charge that in computing damages all doubts as to amount are to be resolved in favor of the property owner. Taber v. New York, etc., R. Co. [R. I.] 67 A. 9. Where instructions enumerate the different elements of damage and include all advantages and disadvantages to be considered, a claimant was not prejudiced by refusal to charge that the taking of dock rights which had not been condemned should be considered. City of Baltimore v. Baltimore & Philadelphia Steamboat Co., 104 Md. 485, 65 A. 353.

12. Where the jury understood that the only issue was as to whether property had been damaged, and such issue was to be determined by a preponderance of evidence, it was not error to charge that the burden of proof was on the owner. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822. Error in instruction to consider value of land at time of taking instead of at time of commissioner's report is harmless where it was of the same value on both dates. St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 S. W. 593. An instruction that the jury should not consider the award previously made by commissioners but should confine themselves exclusively to the testimony was correct where the award was not introduced. Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963.

13. Giving of special charge authorizing consideration of cost of fencing held to allow double damages, as such element was authorized under the general charge. Wise County v. McClain [Tex. Civ. App.] 18 Tex. Ct. Rep. 76, 100 S. W. 802. Instruction not confined to special benefits held properly refused. Hempstead v. Salt Lake City [Utah] 90 P. 397. Where it was claimed that a landowner derived special benefits from a depot erected a short distance from the land but it did not appear that such depot could be reached by any road from the farm, the action of the court in refusing to permit petitioner to show a special benefit of $5 per acre to the land was proper where the jury were properly charged. St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 S. W. 583. Where a jury has viewed the premises it is error to charge them to fix damages from the evidence without requiring them to consider the knowledge they obtained from the view. Chicago & A. R. Co. v. Scott, 225 Ill. 352, 80 N. E. 404. Where there were no improvements on the land it was error to charge that the fact that improvements would be cut off from other portions of the land should be considered. Eldorado, etc., R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281. Where it did not appear that there were buildings on the premises which would be jarred by operation of trains and no one lived in the vicin-

dence.[15] They must be clear and definite,[16] and if given under agreement by the parties cannot be complained of.[17] A court need not qualify an instruction relative to damages unless requested.[18] Erroneous admission of evidence may be cured by instructions.[19]

§ 15. *View of appropriated premises.*[20]—Permission to view the premises rests in the discretion of the court.[21] The purpose of a view is to enable the jury to understand and apply the evidence.[22]

ity to be inconvenienced by smoke or noise, it was error to charge that incidental injuries resulting from perpetual moving of trains should be considered. Id. Instruction held not bad for failing to confine the right to construct watermains across the right of way to such as were reasonably necessary. Union Trac. Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052. Where the only issue was as to the amount of damages, it was proper to refuse an instruction that jurors should be open to influence by argument of other jurors, but should not agree to a compromise which did violence to his belief, the jury having been charged that damages must be found from the evidence. Id. In proceeding to condemn wharf rights, a request to charge that the city had never asserted any wharf rights at the wharf in question which would interfere with claimant's rights properly refused. City of Baltimore v. Baltimore & Philadelphia Steamboat Co., 104 Md. 485, 65 A. 353. Refusal to allow compensation for loss of emoluments to arise from wharfage held proper, there being no evidence that revenues had ever been received from such source. Id. Where no claim of injury to business is made and no evidence in support thereof was introduced, it was not error to refuse an instruction that no recovery should be allowed therefor. Ranck v. Cedar Rapids [Iowa] 111 N. W. 1027. It is not error to refuse to charge that ownership of an entire tract which was crossed by several roads was sufficient to divide it into several tracts and preclude recovery as to tracts not injured. St. Louis, etc., R. Co. v. Drummond Realty & Investment Co. [Mo.] 103 S. W. 977. Where there was no evidence that damage would be occasioned by smoke or noise from passing trains, and buildings were located 150 feet from the track, it was held error to instruct as to such element. Chicago & A. R. Co. v. Scott, 225 Ill. 352, 80 N. E. 804. When damages were claimed because of injury to a quarry, but it appeared that the quarry could be worked only by injuring lands of the petitioner, the jury were properly charged to disregard evidence as to that element. Portland & S. R. Co. v. Ladd [Wash.] 91 P. 573.

14. Instruction held erroneous as assuming that a landowner refused crossings. St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 S. W. 583.

15. Use of word "peculiar" in an instruction held not to render it objectionable as intimating that in the opinion of the court there was something peculiar in the location of the road. St. Louis, etc., R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011.

16. Instructions held not misleading in failing to require the jury to find from the evidence. Union Trac. Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052. Use of "adjacent" held not misleading where it clearly appeared where the road was located, though three lots intervened between the tracks and land involved. Houston & I. C. R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 662, 100 S. W. 1013. Instruction as to measure of damages held not misleading. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822. Where an appeal is taken to the court and the case is tried to a jury, the jury should not be informed of the amount of the commissioner's award, and where the right to interest depends on whether the award of the jury exceeds that of the commissioners, that question should be reserved for the determination of the court. St. Louis, etc., R. Co. v. Oliver, 17 Okl. 589, 87 P. 423.

17. Instructions as to elements of damages given under agreement of both parties may not be complained of. Tidewater R. Co. v. Cowan, 106 Va. 817, 56 S. E. 819.

18. Sargent v. Merrimac [Mass.] 81 N. E. 970.

19. Where the jury were charged to disregard rental value as a separate item of damages, the admission of evidence of rental value was harmless. Hempstead v. Salt Lake City [Utah] 90 P. 397. Evidence that improvements on property were rendered unfit for a residence by change of grade was not prejudicial where the jury were charged that such evidence should be considered only as affecting market value of the property. Id. Where there was no dispute as to the location of the line or area of land sought to be taken, error in admitting certain maps which did not coincide in all particulars was harmless. Portland & S. R. Co. v. Ladd [Wash.] 91 P. 573. Error in admission of evidence as to how much property depreciated because of laying of car track in the street held cured by correct instructions as to elements to be considered. Camden Interstate R. Co. v. Stein, 30 Ky. L. R. 140, 97 S. W. 394.

20. See 7 C. L. 1309.

21. On an appeal from an award of viewers, it is discretionary with the court to allow a view. Bond v. Philadelphia [Pa.] 67 A. 805. Act May 21, 1895, providing for a view as a matter of right, does not apply to an appeal from an award of viewers. Id.

22. It is proper to charge that the purpose of view is to enable the jury to understand the testimony and apply it, and that they must consider the testimony in the light of their view, but determine the facts from the evidence Guinn v. Iowa & St. L. R. Co., 131 Iowa, 680, 109 N. W. 209.

§ 16. *Verdict, report, or award; judgment thereon and lien or enforcement of judgment.*[23]—The judgment rendered must be in conformity to statute.[24] It should at least refer to the description of the land taken as set forth in the petition.[25] The award can be amended only by the assessors themselves under permission of the court.[26] Taxes levied after the property is taken cannot be deducted from the award.[27]

Effect or conclusiveness.[28]—Verdicts of a jury [29] or awards of commissioners,[30] if supported by evidence,[31] will not be disturbed unless clearly excessive [32] or predicated on erroneous evidence.[33] Where a party is entitled to interest, and there is nothing to show whether or not such element was considered by the jury, it will be presumed that interest was included.[34]

Judgment or confirmation and enforcement.[35]—A judgment conforming to the statute is sufficient,[36] and informalities therein may be cured by the record.[37] A

23. See 7 C. L. 1309.

24. Gen. St. 1902, § 4120, providing that where it is found that property is subject to a life estate the judge may order that the income be paid to the life tenant, applies only where the judge is authorized to determine the compensation, and not in a proceeding under § 3687, etc., where appraisers are appointed. New York, etc., R. Co. v. Illy, 79 Conn. 526, 65 A. 965.

25. Should not merely give an amount for land taken and an additional sum for land injured. Helm v. Grayville, 224 Ill. 274, 79 N. E. 689.

26. Cannot be done by mere act of parties. Georgia Granite R. Co. v. Venable [Ga.] 58 S. E. 864.

27. In re Morris Ave. in New York, 118 App. Div. 117, 103 N. Y. S. 180.

28. See 7 C. L. 1311.

29. The verdict of a jury as to value of land and necessity for width of right of way taken will not be interfered with on appeal unless clearly erroneous. Opelousas, etc., R. Co. v. Bradford, 118 La. 506, 43 So. 79. Evidence sufficient to sustain a judgment for the amount of damages awarded. Bremer v. New York Cent., etc., R. Co., 118 App. Div. 139, 103 N. Y. S. 318. An appellate court will not disturb an award which is supported by evidence. St. Louis Belt & Terminal Co. v. Cartan Real Estate Co., 204 Mo. 565, 103 S. W. 519. A jury of farmers is well qualified to deal with the question of compensation to be awarded for a railroad right of way through a plantation, and their finding is to be given great weight. Colorado So., etc., R. Co. v. Boagni, 118 La. 268, 42 So. 932.

30. The award of commissioners will not be disturbed except for error of law plainly manifest. In re Redmond, 105 N. Y. S. 936. A court will not in reviewing rewards of commissioners disturb them unless the commissioners acted upon wrong principles or their award is grossly inadequate. Buffalo L. & R. R. Co. v. Phelps, 52 Misc. 315, 102 N. Y. S. 214. Evidence held to show such gross inadequacy of an award as to justify refusal to confirm it. Id. Under Laws 1901, p. 417, allowing an appeal from report of commissioners of estimate and apportionment, providing that the appeal shall not stay the proceedings except as to the parcel involved in the appeal, where one of the parties did not appeal, he had no standing to move to vacate an order extending the time for the appellant to file appeal papers. In re Foster Ave. in New York, 104 N. Y. S. 71. Report of viewers as to amount will not be disturbed unless they were controlled by wrong principles or the record shows inadequate damages. Williamson v. Read, 106 Va. 453, 56 S. E. 174. Commissioners decided that land not taken would not be injured. Eight witnesses testified that it would be injured and six witnesses testified that it would not. No showing of corruption. Held, report properly confirmed. Barnes v. Tidewater R. Co. [Va.] 58 S. E. 594.

31. An assessment by a jury which viewed the premises, where the damages allowed were within the range of value testified to will not be held inadequate because far less than the owner's witnesses testified to, their estimates being based on a particular improvement. Pullman Co. v. Chicago, 224 Ill. 248, 79 N. E. 572. An award will be confirmed where the evidence is sufficient to sustain it though a greater award might be justified. New York Cent., etc., R. Co. v. Sayles, 52 Misc. 601, 103 N. Y. S. 826. Evidence insufficient to show that commissioners adopted an erroneous theory of appraisement or disregarded competent evidence. In re East River Gas Co. of Long Island City, 104 N. Y. S. 239.

32. Verdict allowing the landowner more damages than he himself claimed held excessive and unsustainable. Chicago & A. R. Co. v. Scott, 225 Ill. 352, 80 N. E. 404.

33. An award will be set aside where numerous errors appear in the admission and exclusion of testimony and there is a considerable discrepancy between the allowance and the value of the property. In re Blackwell's Island Bridge, 118 App. Div. 272, 103 N. Y. S. 441.

34. Blackwell, etc., R. Co. v. Bebout [Okl.] 91 P. 877. Under a statute providing that the jury shall find the amount of recovery, where they were instructed to find damages as of the date of summons and allow interest from time of actual occupancy, where the jury returned a verdict in a specific sum, held, the court was not justified in adding interest. Butte Elec. R. Co. v. Mathews, 34 Mont. 487, 87 P. 460.

35. See 7 C. L. 1311.

36. Where in condemnation proceeding an order was made declaring the use a public one, held, on trial of issue as to value, it was proper under Ball. Ann. Codes & St.

judgment may be reformed to conform to the facts,[38] and such facts may be shown by parol.[39] A judgment may be set aside for errors at the trial,[40] but unless void it is not subject to collateral attack.[41] Only matters involved are determined by the judgment.[42] The rule of res judicata applies in condemnation proceedings unless the circumstances of the second suit show greater or different necessity.[43] A judgment is not conclusive against one not a party, especially where petitioner had notice of the outstanding claim.[44] Limitations run from the date judgment is payable.[45]

Interest runs against the municipality from the confirmation of the award.[46]

§ 17. *Costs and expenses.*[47]—Eminent domain statutes generally provide that one whose property is taken is entitled to costs and attorney's fees[48] and other expenses incident to the proceeding,[49] especially where the petitioner dismisses,[50] or where the award exceeds the amount of the offer to purchase.[51]

§§ 5641, 5642, to enter judgment on the verdict, and on payment of compensation another judgment of appropriation. Port Townsend So. R. Co. v. Barbare [Wash.] 89 P. 710. Upon an application for assessment of damages for change of grade, municipal authorities indorsed that they assessed no damages for the reason that no liability of the town was shown held, such decision afforded the applicant a remedy by complaint to the supreme judicial court under Rev. St. 223, § 68. Hurley v. South Thomaston, 101 Me. 538, 64 A. 1050.

37. Any informality in the decree in not conforming to Laws 1899, p. 262, requiring that the decree provide that the money be paid to the clerk of court before work commences, is cured by a showing that it was so paid. Fulton v. Methow Trading Co. [Wash.] 88 P. 117.

38. Where an award referred to the petition for a description of the property, and the petition failed to describe a portion of the land, but the commissioners knowing what land was to be taken out did not read the petition, the award and judgment could be reformed to conform to the facts where the owner was at the hearing. Getzendaner v. Trinity & B. V. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 511, 102 S. W. 161.

39. Where there was a mistake of one party to the record which would amount to legal fraud on the other if not corrected, parol evidence is admissible to show the facts as a basis to correct the award and judgment. Getzendaner v. Trinity & B. V. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 511, 102 S. W. 161.

40. The judgment for damages may be set aside for erroneous instructions. Union R. Co. v. Maulden [Tenn.] 102 S. W. 342 [advance sheets only].

41. A judgment of the circuit court, on an appeal from an award of assessors, dismissing the proceedings and declaring that rights of parties had not become vested, is not void though erroneous, and is not subject to collateral attack. Darrow v. Chicago, etc., R. Co. [Ind.] 81 N. E. 1081.

42. Where condemnation proceedings were prosecuted to take a particularly described strip for the purpose of widening a street, vesting title to such strip in the public, such proceeding did not constitute an adjudication of title between the strip condemned and the street. Pinney v. Winsted, 79 Conn. 606, 66 A. 337. Where borough authorities condemned property to widen a street, neither the fact that complainant accepted an award nor the fact that the statement recited that the property was needed to widen the street estopped them to claim title to a strip between the strip condemned and the street. Id.

43. Laguna Drainage Dist. v. Martin Co. [Cal. App.] 89 P. 993. One contesting the second suit has the burden to prove that there are no facts to justify taking, and that none existed at the time of the first suit. Id. A complainant in a second suit is not bound by the first where it appears that the first was in effect withdrawn in consideration of a conveyance of other rights. Id.

44. Storms v. Mundy [Tex. Civ. App.] 18 Tex. Ct. Rep. 924, 101 S. W. 258.

45. Under Rev. Laws, c. 48, § 13, providing that damages awarded for laying out a highway are not payable until entry for purpose of the improvement, the award is payable the day work commences, and limitations commence to run from such date. Averill v. Boston, 193 Mass. 488, 80 N. E. 583. An agreement by property owners requiring postponement of collection of damages until amount due after setting off betterments is determined not accepted by the city, and without consideration, does not toll the statute. Id.

46. King v. Brown, 31 Pa. Super. Ct. 50.

47. See 7 C. L. 1311.

48. Where it was necessary for owners to employ counsel to present their claims, held, they were entitled to reasonable attorney's fees, to the extent of five per cent of the award, not exceeding $1,000. In re Board of Rapid Transit R. Com'rs, 117 App. Div. 160, 102 N. Y. S. 400. In a proceeding to recover the value of property taken, attorney's fees are recoverable. Clark v. Wabash R. Co., 132 Iowa, 11, 109 N. W. 309. Under § 17, c. 33 (Hurd's Rev. St. 1905, p. 556), where after verdict commissioners elected to dismiss proceedings, the landowner is entitled to reasonable attorney's fees and costs. Deneen v. Unverzagt, 225 Ill. 378, 80 N. E. 321. Under Comp. Laws 1897, § 6240, authorizing the court to allow attorney's fees, the trial judge is arbiter of the amount. Boyne City G. & A. R. Co. v. Anderson, 146 Mich. 328, 13 Det. Leg. N. 739, 109 N. W. 429. Under Code, § 2007, authorizing attorney's fees, the court may hear testimony as to the value of such services. Hall v. Wabash R. Co., 133 Iowa, 714, 110 N. W. 1039.

49. Where a railway company abandons proceedings after assessment of damages

§ 18. *Review of condemnation proceedings. The right to review.*[52]—The right to appeal must be conferred by statute,[53] but such right exists wherever granted[54] unless waived.[55] Where a local board attempts to exercise a power of eminent domain not conferred upon it by the legislature, its acts are reviewable by state and Federal courts.[56]

Saving questions for review.[57]—One desiring to appeal must save the questions he desires reviewed[58] by specific exception to the rulings thereon.[59]

Taking and perfecting an appeal.[60]—The appeal must be taken and the required bond given within the statutory period.[61] The bond must conform to statutory requirements.[62] A misdescription of the property is not fatal.[63] In Mississippi a bill of exceptions is not necessary.[64]

or after it has a right of entry, it is liable to the owner for attorney fees. Kirn v. Cape Girardeau & C. R. Co. [Mo. App.] 101 S. W. 673. It is also liable for his loss of time in attending proceedings. Id. In such case it is not necessary that the attorney's fees should have actually been paid, but only that the owner is under obligation to pay them. Id.

50. Under § 10, eminent domain act (c. 47, Hurd's Rev. St. 1905), providing that if petitioners fail to take land condemned the court may order them to pay costs and attorney's fees, defendants are entitled to recover reasonable attorney's fees though the same had not been paid. Deneen v. Unverzagt, 225 Ill. 378, 80 N. E. 321. Under Ann. St. 1906, p. 1043, providing that cost of proceeding by a railroad company shall be paid by the company up to time of filing report of commissioners, a railroad may dismiss the same as a matter of right subject only to taxation of costs. St. Louis & G. R. Co. v. Cape Girardeau & Thebes Bridge Terminal R. Co. [Mo. App.] 102 S. W. 1042. On motion to dismiss, the court could not require the payment of costs and attorney's fees of adverse party which he could recover only by separate suit. Id.

51. Under Code Civ. Proc. § 3372, providing for allowance of cost where award is less than or in excess of an offer made for the property, held, where one who contested proceedings was unsuccessful, but was awarded more than the offer, he was entitled to his costs before the commissioners, but the petitioner was entitled to costs of the court proceedings. In re Village of Theresa, 105 N. Y. S. 568.

52. See 7 C. L. 1312.

53. The legislature having the constitutional right to take lands for a public purpose and to delegate such power to municipal officers, the act of taking is the exercise of a legislative function, and not reviewable by the courts. Hayford v. Municipal Officers of Bangor [Me.] 66 A. 731. Landowner in Butler county may, under acts Apr. 15, 1891, and May 26, 1891, appeal to common pleas from report of road jury refusing him damages. Kohler v. Butler County, 31 Pa. Super. Ct. 305.

54. Under Shannon's Code, §§ 1858-1861, providing that report of jury shall be in writing, returned to court, and confirmed where no objection is made, but authorizing appeal and trial anew, a party filing exceptions to the report is not, where they are overruled, precluded from appealing, the remedies by exceptions and appeal being concurrent. Eldridge v. Overton County R. Co. [Tenn.] 98 S. W. 1051. The proceeding is a controversy concerning title to land. Gives jurisdiction for a writ of error. City of Bluefield v. Bailey [W. Va.] 57 S. E. 805.

55. Under Const. art. 3, § 17, and Code 1892, §§ 1693, 1696, where petitioner after taking an appeal deposited the amount of the award in court and took possession of the land, it thereby waived its right of appeal. Helm & N. W. R. Co. v. Turner, 89 Miss. 334, 42 So. 377. Under Ky. St. 1903, p. 1839, providing for appeal on execution of bond, and that upon payment into court the railroad may take possession, payment of damages and costs into court is not an abandonment of an appeal. Madisonville, etc., R. Co. v. Ross [Ky.] 103 S. W. 330.

56. Chicago, etc., R. Co. v. Williams, 148 F. 442.

57. See 7 C. L. 1312.

58. A motion for new trial is not authorized and is not necessary to present for review a ruling of the court at a preliminary hearing for the appointment of appraisers under Acts 1905, p. 59. Darrow v. Chicago, etc., R. Co. [Ind.] 81 N. E. 1081. An owner may appeal from a default judgment fixing damages for error in summoning the jury without first moving to vacate the judgment or bringing the question before the trial court. Oregon R. & Nav. Co. v. McCormick [Wash.] 89 P. 186.

59. An objection that the proceedings were not instituted according to law, and that the court has no jurisdiction, made under Acts 1905, pp. 59, 61, is too general to raise the question as to defect of parties. Darrow v. Chicago, etc., R. Co. [Ind.] 81 N. E. 1081.

60. See 7 C. L. 1313.

61. Under Gen. St. 1902, §§ 791, 792, 807, in proceedings for appointment of appraisers of damages for land taken for railroad purposes, the judge may extend the time for filing the appeal for more than ten days after the filing of his finding. New York, etc., R. Co. v. Illy, 79 Conn. 526, 65 A. 965.

62. Bond, on appeal from assessment of damages for land taken for a highway, not approved by the president of the board, not payable to the county, not filed until after adjournment of the board, as required by Ann. Code 1892, § 3896, held void and insufficient to sustain an appeal. Evans v. Sharkey County, 89 Miss. 302, 42 So. 173.

63. A misdescription of the property in an appeal bond and notice of appeal will

Decisions reviewable.[65]—As a general rule all final orders and judgments are applicable [66] unless the right to appeal is denied.[67] In many states it is provided by statute that certain orders may be appealed from,[68] and that the determination of certain other questions by the inferior tribunal is conclusive.[69] A landowner may appeal from an award though it was made in the name of one not the owner.[70]

Hearing and scope of review.[71]—Review proper is confined to questions raised below [72] and properly saved,[73] and matters not reviewable cannot be brought up.[74] In reviewing condemnation proceedings instituted for the purpose of establishing a county road, whether the use is a public one is open to consideration.[75] The

not defeat the appeal where they refer to the proceedings for establishing the road in question and the award appealed from. Board of Com'rs of Brown County v. Burkhalter [Kan.] 89 P. 655.

64. Under Ann. Code 1892, § 3896, providing for review by the court of proceedings of board of supervisors in laying out a highway, a bill of exceptions is not required where the appeal is simply to have the jury assess damages. Evans v. Sharkey County, 89 Miss. 302, 42 So. 173.

65. See 7 C. L. 1313.

66. Where an order of the probate court dismissing a condemnation proceeding was appealed to the circuit court, under Comp. Laws 1897, § 669, and such court heard the matter on its merits instead of reversing and remanding it, such action did not render its order interlocutory, but it was final, and reviewable by certiorari. Pere Marquette R. Co. v. U. S. Gypsum Co., 148 Mich. 308, 14 Det. Leg. N. 155, 111 N. W. 913. Writ of error lies from an order that a railroad company has a right to take land and appointing commissioners to determine compensation. White Oak R. Co. v. Gordon, 61 W. Va. 519, 56 S. E. 837. An order that there is a right to condemn and appointing commissioners to assess damages, and an order filing report of commissioners and allowing money to be paid into court, are final and writ of error lies therefrom, but not where the only question is amount of compensation. City of Bluefield v. Bailey [W. Va.] 57 S. E. 805.

67. Under Code Civ. Proc. § 1238, the determination of the trustees of a drainage district as to the necessity for draining is final, and not reviewable by the courts. Laguna Drainage Dist. v. Martin & Co. [Cal. App.] 89 P. 993. No appeal lies from an order of condemnation in a proceeding to establish a county road. Sess. Laws 1901, p. 213. State v Pierce County Super. Ct. [Wash.] 89 P. 178.

68. Where report of commissioners is set aside at a special term and new commissioners appointed, such order is not an exercise of power conferred on the court by Laws 1893, pp. 325, 328, but is independent thereof, so that the second commissioner's report is an original one and is appealable. In re Daly [N. Y.] 81 N. E. 560.

69. Under Laws 1893, p. 325, providing for an appeal to the supreme court from an appraisal of commissioners, and that the court may direct a new appraisal which shall be final and conclusive, no appeal lies from an order confirming the report on a second appraisal. In re Daly, 116 App. Div. 798, 102 N. Y. S. 22.

70. Board of Com'rs of Brown County v. Burkhalter [Kan.] 89 P. 655.

71. See 7 C. L. 1314.

72. Where the landowner does not raise the question of necessity of taking in the lower court, the appellate court is not required to decide it. Vandalia Coal Co. v. Indianapolis & L. R. Co. [Ind.] 79 N. E. 1082. Where, on filing the petition as an initiatory step under Laws 1889-90, p. 719, for condemning riparian rights, the party affected appeared generally and did not object to want of notice required by § 45, such objection could not be considered on writ of review or the judgment. State v. Stevens County Super. Ct. [Wash.] 90 P. 650.

73. Where proceedings were carried to the order of condemnation, it is presumed that issues were properly made, and plaintiff cannot object that defendants failed to answer. Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963. An owner who appeared pursuant to notice for appointment of commissioners to ascertain compensation to be made, and failed to question the regularity of the proceedings, is estopped to raise such question on appeal from an order confirming the award. In re City of Buffalo, 101 N. Y. S. 966. The objection that benefits are not shown to be special if not raised in the trial court cannot be raised on appeal. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822. Record of appeal showing the manner in which a jury was selected held to bring error therein before the appellate court. Oregon R. & Nav. Co. v. McCormick [Wash.] 89 P. 186. When it was claimed that there were certain irregularities in a proceeding, but the parties agreed to waive them and proceed with the assessment, which was done, on appeal from the award such irregularities could not be availed of though it was also agreed that any question might be raised which could have been made before assessment. Georgia Granite R. Co. v. Venable [Ga.] 58 S. E. 864.

74. The right of the petitioner to show prior ownership in part of the waters awarded him by the judgment by way or reduction of damages will not be considered on review of the judgment, as such question belongs to the hearing on question of damages. State v. Stevens County Super. Ct. [Wash.] 90 P. 650.

75. State v. Pierce County Super. Ct. [Wash.] 89 P. 178.

judgment of the commissioners on questions of fact cannot be interfered with unless manifestly wrong.[76].

§ 19. *Remedy of owner by action or suit. A. Actions for tort, damages, or trespass; recovery of property.*[77]—Where condemnation proceedings have been instituted, the owner's remedy is usually therein, and not by action,[78] but if such proceedings have not been instituted, he has a remedy by injunction [79] or for damages [80] unless he has consented to the taking [81] or has lost his rights by limitations or laches.[82] Where an owner has lost his right to recover damages by delay he cannot resort to an action on contract.[83] A judgment in a possessory action will be stayed to allow condemnation.[84]

(§ 19) *B. Suits in equity; injunction.*[85]—Injunction will issue against the taking of property without condemnation [86] subject to the usual considerations of

76. Seufferle v. Macfarland, 28 App. D. C. 94.

77. See 7 C. L. 1315.

78. When condemnation proceedings have been commenced for the purpose of ascertaining the rights of the parties and compensation, a landowner cannot maintain an action at law to recover damages for injury done his property. Blackwell, etc., R. Co. v. Bebout [Okl.] 91 P. 877. Where in constructing a railroad no act not reasonably necessary is done if injury results, the remedy is not by action but under the statute. Todd v. Old Colony R. Co. [Mass.] 80 N. E. 462. Where an owner sues to enjoin condemnation proceedings and trespass, and the injunction is denied, the court will not retain jurisdiction to award damages, but will leave the owner to establish the same in condemnation proceedings. American Ice Co. v. New York, 51 Misc. 114, 100 N. Y. S. 748. In proceedings under Laws 1882, p. 1, on application for payment of the award to unknown owners, where the comptroller erroneously retained a portion of the award, the rights of one entitled to it could be determined in such proceeding, and she should not be remitted to a proceeding against the comptroller. In re Morris Ave. in New York, 118 App. Div. 117, 103 N. Y. S. 180.

79. See post, § 19B. Where a railroad company trespasses, the owner may sue for damages, or enjoin the trespass, or institute condemnation proceedings. Clark v. Wabash R. Co., 132 Iowa, 11, 109 N. W. 309.

80. Under Revisal 1905, § 2575, authorizing entry for purpose of laying out a road, and § 2587, providing that in case of appraisal by commissioners the company may enter on payment of amount into court, a company may not, pending appraisal, enter land for the purpose of building its road in the absence of contract. State v. Wells, 142 N. C. 590, 55 S. E. 210. Where one with power to condemn land enters without condemning, he is liable in damages, but may condemn at any time after entry on payment of future damages. Ingleside Mfg. Co. v. Charleston Light & Water Co. [S. C.] 56 S. E. 664. Two years' delay in seeking to remove an additional servitude from a street is not laches precluding the abutting owner from relief. Spalding v. Macomb & W. I. R. Co., 225 Ill. 585, 80 N. E. 327.

81. A riparian owner who consents to acts done by a city in taking land and water privileges cannot obtain damages nor an injunction. Beckerle v. Danbury [Conn.] 67 A. 371. A party who has proceeded under St. 1902, p. 471, providing that a person whose property is injured by improvement of state house grounds, etc., may file his petition for a jury to determine such damages, is thereafter estopped to allege the invalidity of the taking or method of assessing damages. American Unitarian Ass'n v. Com., 193 Mass. 470, 79 N. E. 878.

82. Laws 1901, p. 198, amended by Laws 1905, p. 932, providing that a person aggrieved by laying out of a new highway may within six months apply for a jury to assess damages, means that the proceeding should be instituted not later than six months. In re Wittkowsky's Land, 143 N. C. 247, 55 S. E. 617. Under the statutes of Massachusetts where an easement in gross or profit a prendre is taken or injured, the owner must sue for his damages within two years. Carville v. Com., 192 Mass. 570, 78 N. E. 735.

83. Hodgdon v. Haverhill, 193 Mass. 327, 79 N. E. 818.

84. Where a railroad company has taken land for its right of way without compensation, the owner may maintain ejectment, but a judgment will be stayed to allow condemnation proceedings. Connellsville Gas Coal Co. v. Baltimore & O. R. Co., 216 Pa. 309, 65 A. 669.

85. See 7 C. L. 1317.

86. Injunction will lie to prevent the location of a railroad over private premises without allegations of irreparable injury or insolvency when the statutory requirements as to condemnation have not been complied with. Harman v. Caretta R. Co., 61 W. Va. 356, 56 S. E. 520. Noncompliance with such statutes is all the showing necessary. Id. The taking of private property for public use before compensation is made may be enjoined regardless of the solvency of defendant or the adequacy of legal remedy. Southern R. Co. v. Hayes [Ala.] 43 So. 487. Where a telephone company has constructed its line along a public highway without the consent of the owners, an abutting owner may enjoin the continuance thereof at any time within the limitation period. Bunall v. American Tel. & T. Co., 224 Ill. 266, 79 N. E. 705. The fact that a great number of messages were sent over the line daily is no defense. Id. City which sought to condemn piers held not chargeable with trespass, authorizing an injunction against it. American Ice Co. v. New York, 51 Misc. 114,

laches,[87] irreparable injury,[88] and other equitable considerations;[89] but important public work will not be enjoined unless threatened destruction of property of great value, by acts of wanton lawlessness which must result in irreparable damage, will be prevented.[90] It is no answer to an obligation to procure the right to use private property that the expense of condemnation would be great.[91] An owner of lands not necessary to the public use, but which would be damaged thereby, cannot compel the condemnation of his property, but is remitted to his action for damages.[92]

Parties.[93]—The successor in interest of one entitled to enjoin may sue out an injunction.[94]

Pleading and proof.[95]—A complaint for an injunction must plainly show facts authorizing such relief.[96]

§ 20. *Payment and distribution of sum awarded; title or interest requiring compensation.*[97]—The owner at the time of the taking is entitled to the damages.[98]

100 N. Y. S. 748. An abutting owner who owns the fee of the entire street may enjoin the construction of a steam railroad thereon. Seaboard Air Line R. Co. v. Southern Inv. Co. [Fla.] 44 So. 351. The probate court in condemnation sits as a court of law with no equity jurisdiction, and a general court may entertain a bill to enjoin condemnation. Birmingham & A. R. Co. v. Louisville & N. R. Co. [Ala.] 44 So. 679. A railroad company which has appropriated land may be enjoined from operating its road until condemnation. Mobile & W. R. Co. v. Fowl River Lumber Co. [Ala.] 44 So. 471.

87. Where a mining company entitled to condemn a ditch right of way constructed a ditch without resort to condemnation and maintained it without objection for two years, the owners being entitled to damages only could be enjoined from destroying the ditch. Miocene Ditch Co. v. Jacobsen [C. C. A.] 146 F. 680. Where a corporation, entitled to condemn right of way for a ditch constructed a ditch without condemning and maintained it without objection for two years, and the owners then refused to sell the right of way, but offered to sell their claims, they could not treat the construction of the ditch as a trespass. Id. Where a railroad enters land with consent or acquiescence of the owner and operates its line for twenty years, the owner may not recover his land free from the servitude, nor interfere with the operation of the road. McCutchen v. Texas & P. St. R. Co., 118 La. 436, 43 So. 42. Evidence held to show that an abutting owner was not guilty of laches in seeking to enjoin maintenance of a railroad in the street where he had not been compensated. Athens Terminal Co. v. Athens Foundry & Mach. Works [Ga.] 58 S. E. 891.

88. A preliminary injunction will not be granted on a bill by a township to enjoin a railroad company from taking a longitudinal strip of highway to straighten and widen its road. Crescent v. Pittsburg & L. E. R. Co., 216 Pa. 48, 65 A. 942. Where one who had constructed a tower in the street without authority had a right to exercise the power of eminent domain to procure such right, it was held not an abuse of discretion to refuse a temporary injunction requiring its removal. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330.

89. Where defendant erected in 1894, in good faith, but without legislative authority, a third elevated railway track in front of plaintiff's premises involving a substantial depreciation in value of her property, and spent a large sum in acquiring easements from abutting owners, held, plaintiff had not an absolute right to compel its removal, but would be required to accept a money judgment. Knoth v. Manhattan R. Co. [N. Y.] 79 N. E. 1015. An abutting owner may not enjoin the erection of telephone poles in that portion of the street of which he does not own the fee and upon which his property does not abut. De Kalb County Tel. Co. v. Dutton, 228 Ill. 178, 81 N. E. 838.

90. Roberts v. West Jersey & S. R. Co. [N. J. Eq.] 65 A. 460.

91. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330.

92. United States v. Baltimore & O. R. Co., 27 App. D. C. 105.

93. See 7 C. L. 1319.

94. Where a remainderman could have enjoined maintenance of an elevated road in front of the premises, a purchaser acquired his rights. Muller v. Manhattan R. Co., 53 Misc. 133, 102 N. Y. S. 454.

95. See 7 C. L. 1319.

96. Complaint against a city for diverting water from a stream which alleges threatened increased diversion, but which fails to state that such increased diversion will work an irreparable injury, does not entitle plaintiff to an injunction. Beckerle v. Danbury [Conn.] 67 A. 371. Equity has no jurisdiction of a suit by an owner of property in a block through which an elevated railroad is to be constructed, vacating a street on which the property abutted, to enjoin such construction unless the right of the owner in that part of the street to be vacated is plainly established. Roberts v. West Jersey & S. R. Co. [N. J. Eq.] 65 A. 460. Evidence insufficient. Id. Petition to enjoin construction of railroad in a street held to show that petitioner owned the fee of the entire street. Seaboard Air Line R. v. Southern Inv. Co. [Fla.] 44 So. 351.

97. See 7 C. L. 1319.

98. Right to such damages, though not fixed and ascertained, does not pass by a conveyance of the land. In re Trinity Ave. in New York, 116 App. Div. 252, 101 N. Y. S. 613. Right to compensation is in the owner at the time of taking. Mobile & W. R. Co. v. Fowl River Lumber Co. [Ala.] 44 So. 471. The right to the award vests in the then

This is a personal right and does not pass by a conveyance of the land,[99] especially where reserved by the conveyance.[1] All persons who have an interest in the land are entitled to share in the compensation [2] to the extent of their respective interests.[3]

§ 21. *Ownership or interest acquired.*[4]—The estate or interest allowed to be acquired by the statute may be taken,[5] but as a general rule the quantity of land [6] or interest therein which may be acquired [7] are limited to the necessities of the public

owner, and passes to his estate on his death. In re Reubel, 52 Misc. 604, 103 N. Y. S. 804. Under Code Civ. Proc. § 2227, providing that payment of compensation be made to persons entitled, **one who holds legal title** subject to a trust agreement is prima facie entitled to the compensation. Forbis v. Cannon, 35 Mont. 424, 90 P. 161. An owner of property abutting on a street upon which interurban cars are run may recover special damages resulting from improper operation of the cars, though he sells the property pending the action, and seeks to enjoin the wrong complained of. Kinsey v. Union Trac. Co. [Ind.] 81 N. E. 922.

99. Where a railroad company enters land with the consent or acquiescence of the owner, the right to recover damages is personal and does not pass to a vendee. McCutchen v. Texas & P. R. Co., 118 La. 436, 43 So. 42; Birmingham Belt R. Co. v. Lockwood [Ala.] 43 So. 319.

1. Where a deed from a former owner of property contained a reservation of such owner's right of action for damages for the operation of an elevated railroad in front of the premises, the present owner was not entitled to any portion of such damages. Friedman v. New York Cent., etc., R. Co., 52 Misc. 20, 100 N. Y. S. 981.

2. Where a quarry is leased by parol, reserving royalties, and is taken in condemnation proceedings, the **lessee is entitled to damages** for his loss. Cole v. Ellwood Power Co., 216 Pa. 283, 65 A. 678. On conflicting evidence as to whether the lease had been terminated before the property was taken, the question is for the jury. Id. Under Revision 1900, P. L. p. 79, providing for compensation to all persons who have an interest, **one who has an easement** over the land taken is entitled to compensation. Butterworth-Judson Co. v. Central R. Co. [N. J. Eq.] 66 A. 198. Where a **town has acquired land for sewers and constructed expensive improvements thereon** and maintained the same without objection for several years, it has such an interest as entitles it to compensation, where the same are taken by the United States without regard to the regularity of the proceedings by which it acquired its rights. United States v. Nahant, 153 F. 520. Under Laws 1901, p. 423, c. 466, providing that where lands of a city are required for street purposes it is entitled to compensation, where a street is laid out over land acquired by the city for waterworks purposes, the city is entitled to compensation, the payment for the land as first acquired being made in a different manner. In re Van Cortlandt Ave. [N. Y.] 78 N. E. 952. Where mortgaged property is taken, and on foreclosure the sum realized was insufficient to cancel the debt, the **mortgagee** has a lien on a portion of the award sufficient to make up the deficiency. In re Morris Ave. in New York, 118 App. Div. 117, 103 N. Y. S. 180. The fee owner is not entitled to the entire award where **easements of light, air, and access are vested in another.** In re Jerome Ave. of New York, 105 N. Y. S. 319.

3. Where lots of a tract are sold subject to building restrictions, owners of lots not taken have not such an easement in those taken as entitles them to compensation. Wharton v. U. S. [C. C. A.] 153 F. 876. Where one platted land and sold all the lots with reference to a proposed street, after which the street was laid out, he was entitled to nominal damages only. Wilkins v. Manchester [N. H.] 67 A. 560. Where land reserved by an owner as a canal, though subject to an easement of use by abutting owners, was taken, owners of easement could not complain that the owner of the canal was awarded value of the fee. In re Canal Place of New York, 115 App. Div. 458, 101 N. Y. S. 397.

4. See 7. C. L. 1320.

5. Under Laws 1858, p. 452, the City of New York in taking property necessary for the construction of the bridge over Harlem River took a fee without right of reversion. In re Jerome Ave. of New York, 105 N. Y. S 1009. Where the state prays damages for injury to land on the basis of permanent appropriation, and the land is platted and recorded as land appropriated, and the owner accepts the damages with knowledge of such facts, the state acquires the title to the lands. People v. Fisher, 116 App. Div. 677, 101 N. Y. S. 1047.

6. Where a water company sought to condemn the riparian rights of a fee owner which were appurtenant to and co-extensive with his estate, held, they must participate in the water on the basis that the riparian owner's rights were appurtenant, and must expropriate his perpetual easement. Clear Creek Water Co. v. Gladeville Imp. Co. [Va.] 58 S. E. 586.

7. In proceedings to open a highway, the court should not divest the owner of title, but should give the public an easement only. Carroll v. Griffith, 117 Tenn. 500, 97 S. W. 66. Only the interest required by the necessities of the contemplated use is acquired. Reed v. Winona Park Com'rs, 100 Minn. 167, 110 N. W. 1119. Where an interurban railway condemned a right of way, it acquired the right to construct any number of tracks thereon, and to run any number of cars. Union Trac. Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052. Under Const. art. 2, § 13, providing that where land is taken for railroad tracks the fee remains in the owner, the owner has the right to mine coal beneath the right of way. Eldorado, etc., R. Co. v. Sims, 228 Ill 9, 81 N. E. 782. A watercourse on land taken cannot be closed to the detriment of the owner of the remainder of the tract. Reed v. Winona Park Com'rs, 100 Minn. 167, 110 N. W. 1119.

use,[8] but the rights of the petitioner in the estate taken are superior to any individual right retained by the fee owner.[9] One who exercises the power in improving the floatibility of non-navigable streams does not thereby become entitled to the exclusive use of such streams.[10] Where land is taken subject to taxes, the petitioner is estopped to deny the validity of tax liens.[11] In condemning land a railroad company may limit by stipulation the rights or easements which it seems to acquire.[12] Successors in interest of the petitioner are bound by covenants made by the petitioner which run with the land.[13] Dower is extinguished by condemnation proceedings during the husband's life.[14]

§ 22. *Transfer of possession and passing of title.*[15]—In Texas no deed is necessary.[16] In Illinois there must be an order of the court.[17]

§ 23. *Relinquishment or abandonment of rights acquired.*[18]—The question of abandonment is one to be determined from the facts of each case.[19] In New York city, streets may be vacated only in the method prescribed by law.[20]

Employer's Liability; Entry, Writ of; Equitable Assignments; Equitable Attachment; Equitable Defenses, see latest topical index.

8. Such interest is taken as is necessary to enable the corporation to carry out its purposes, with reversion in case it should cease. Folsom v. Gate City Terminal Co. [Ga.] 57 S. E. 314. No greater right is acquired than is necessary to satisfy the purpose of the statute. Leffmann v. Long Island R. Co., 105 N. Y. S. 487. Title acquired by the Lake Superior & Mississippi Railway Company under c. 93, p. 323, Laws 1857, was in the nature of an easement or terminable fee, and the lands revert to the owner where abandoned for the purposes required. Chambers v. Great Northern Power Co., 100 Minn. 214, 110 N. W. 1128. Unless the language of the statute clearly authorizes the taking of a fee, only an easement will be taken. Where land is taken for park purposes. Reed v. Winona Park Com'rs, 100 Minn. 167, 110 N. W. 1119. Where a leased building and leasehold interest is condemned, the railroad cannot exercise the landlord's right under the lease to compel the tenant to vacate on ten days' notice. Shipley v. Pittsburg, etc., R. Co., 216 Pa. 512, 65 A. 1094. The only right the public acquires in country highways is an easement of passage, and the laying of gas or water mains is an additional servitude. Baltimore County Water & Elec. Co. v. Dubreuil [Md.] 66 A. 439. The right which a railroad acquires by condemnation is for railroad purposes only, and it cannot for profit permit a private use; such as that by a telegraph company. Pittock v. Central Dist. & Printing Tel. Co., 31 Pa. Super. Ct. 589.

9. Where land has been taken for a high way, the rights of the public therein are superior to any right of individual owners of the soil. Snively v. Washington [Pa.] 67 A. 465.

10. Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 88 P. 426.

11. Where land is taken under a judgment of appraisal providing that there shall be no deductions for taxes or assessments, the land being taken subject to all special and general taxes, the city is estopped to deny the validity of liens. City Safe Deposit & Agency Co. v. Omaha [Neb.] 112 N. W. 598.

12. Such stipulation is binding on landowner. State v. King County Super. Ct. [Wash.] 90 P. 663.

13. Reservations and stipulations placed on an easement acquired in condemnation proceedings have the effect of covenants running with the land, and are binding on successors of petitioner. American Tel. & T. Co. v. St. Louis, etc., R. Co., 202 Mo. 656, 101 S. W. 576.

14. Arnold v. Buffalo, etc., R. Co., 32 Pa. Super. Ct. 452.

15. See 7 C. L. 1321.

16. The right of the state to take is complete when compensation is agreed upon and paid. Getzendaner v. Trinity & B. V. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 511, 102 S. W. 161.

17. Title is not acquired by proceedings under Rev. St. 1845, c. 71, to acquire land for a dam, though the land-owner has been paid damages assessed, where no order of court granting leave to build the dam has been obtained. De Land v. Dixon Power & Lighting Co., 225 Ill. 212, 80 N. E. 125.

18. See 7 C. L. 1322.

19. Abandonment of right of way is shown by failure to operate trains thereon for ten years, removing track, and constructing a new line which answered the same purposes. Chambers v. Great Northern Power Co., 100 Minn. 214, 110 N. W. 1128. Nonremoval of certain stone abutments, and leasing of right to maintain telegraph line, held not sufficient to establish an intention not to abandon. Id.

20. Under the Charter of Greater New York the board of estimate and apportionment may not vacate streets by a proceeding instituted on its own account and not inaugurated by a local board. Reis v. New York, 188 N. Y. 58, 80 N. E. 573.

EQUITY.

§ 1. Nature of, and General Principles Controlling, Equity (1110).
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§ 15. Bill of Review (1150).
§ 16. Other Equitable Remedies for Which no Specific Title is Provided (1152). Bill Quia Timet (1152). Bills of Peace (1152).

Scope of title.—This topic is confined to a general treatment of equity principles and procedure, the specific application of such principles to particular subjects,[1] and the consideration of particular equitable remedies,[2] being more particularly and exhaustively treated under their appropriate titles. Separate articles have also been devoted to certain matters of practice,[3] and so far as pleading in equity has been made by statute to conform to the rules applicable to pleading in actions at law, it has been treated in connection therewith.[4] Masters in chancery are the subject of a separate topic,[5] and the equity jurisdiction of particular courts is also treated elsewhere.[6]

§ 1. *Nature of, and general principles controlling, equity.*[7]

§ 2. *Equity jurisdiction and occasions for relief. A. In general.*[8]—It is difficult to lay down any definite rule as to what special circumstances will enable an injured party to invoke the aid of equity. Each case must rest in a large degree upon its own particular facts.[9] The test of jurisdiction is ordinarily to be found in the nature of the case made by the bill and the relief sought,[10] but even jurisdic-

1. See such topics as Estoppel, 7 C. L. 1489; Fraud and Undue Influence, 7 C. L. 1813; Fraudulent Conveyances, 7 C. L. 1841; Liens, 8 C. L. 755; Mistake and Accident, 8 C. L. 1020; Trusts, 8 C. L. 2169.

2. See such topics as Accounting, Action for, 9 C. L. 17; Cancellation of Instruments, 9 C. L. 454; Creditors' Suit, 9 C. L. 849; Foreclosure of Mortgages on Land, 7 C. L. 1678; Injunction, 8 C. L. 279; Specific Performance, 8 C. L. 1946.

3. See such titles as Appeal and Review, 9 C. L. 108; Argument and Conduct of Counsel, 9 C. L. 239; Continuance and Postponement, 9 C. L. 649; Costs, 9 C. L. 812; Interpleader, 8 C. L. 483; Process, 8 C. L. 1449; Reference, 8 C. L. 1702; Trial, 8 C. L. 2161; Venue and Place of Trial, 8 C. L. 2236.

4. See Pleading, 8 C. L. 1355.

5. See Masters and Commissioners, 8 C. L. 951.

6. See Jurisdiction, 8 C. L. 579.

7. See 7 C. L. 1323. Determination whether particular suits are legal or equitable, see Forms of Action, 7 C. L. 1769.

8. See 7. C. L. 1324.

9. Illinois Steel Co. v. Schroeder [Wis.] 113 N. W. 51.

10. Becker v. California Super. Ct. [Cal.] 90 P. 689. When fraud is sufficiently alleged with proper parties to a bill, a demurrer will not lie (Wheeling Ice & Storage Co. v. Connor, 61 W. Va. 111, 55 S. E. 982), except where it would be equally available at law (Fludd v. Equitable Life Assur. Soc., 75 S. C. 315, 55 S. E. 762; Poling v. Poling, 61 W. Va. 78, 55 S. E. 993). The court must look to the allegations of the complaint in limine to ascertain whether it has jurisdiction. Complaint to quiet title stating possession of plaintiff and his title and asking to have same quieted shows equity jurisdiction. Earle Imp. Co. v. Chatfield [Ark.] 99 S. W. 84. Equitable relief is not granted as a matter of course but only when an adequate appeal has been made and such facts shown as bring the case within a recognized principle of equitable jurisdiction. Bill to cancel a deed for lack of proper signature cannot be maintained where the title

tional allegations are unavailing unless supported by proof.[11] but on motion to dismiss the burden is on defendant to disprove the jurisdictional averments.[12] The fact, however, that a complainant does not succeed in establishing all that he claims does not oust the court of its jurisdiction to give judgment for so much as is established,[13] but this rule cannot be employed as a mere pretext for bringing law cases into a court of equity.[14] Where a proper case for equity is presented, a bill asking both equitable and legal relief is maintainable.[15] Equity may obtain jurisdiction over the action through a cross complaint, although plaintiff's complaint is insufficient to confer jurisdiction.[16] Where allegations showing equity jurisdictions are made in the complaint, a motion to transfer to the law court stating contrary facts does not rob equity of its jurisdiction.[17] In a case of doubtful jurisdiction the pleadings should make out a clear case.[18] Where equity acquires jurisdiction to determine a right, it will retain jurisdiction to afford a remedy.[19] Where the court has jurisdiction of the person of the defendants, it thereby has plenary power to compel them to act, in cases of fraud, contract, or trust, in relation to their property outside its territorial jurisdiction.[20] There is a conflict of authority as to whether or not the question of jurisdiction may be raised after issue made and trial on the facts,[21] but it is very generally held that jurisdictional objections cannot be raised for the first time on appeal.[22]

Effect of code or statutory provisions.[23]—Distinctions between legal and equitable actions have been abolished by statute in many states so that all controversies may be determined in one action.[24] Statutes creating special remedies for wrongs already cognizable in equity do not impliedly deprive equity of jurisdiction,[25] and

was fairly in the grantee named therein. Laythe v. Minnesota Loan & Investment Co. [Minn.] 112 N. W. 65. Charges of fraud and conspiracy and prayers for injunctions and cancellation of deeds do not confer jurisdiction in equity when the bill taken as a whole shows a complete remedy at law. Marthinson v. King [C. C. A.] 150 F. 48.

11. Larkey v. Gardner, 105 Va. 718, 54 S. E. 886; Hume v. Burns [Or.] 90 P. 1009.

12. Diversity of citizenship. Gaddie v. Mann, 147 F. 955.

13. Becker v. California Super. Ct. [Cal.] 90 P. 689.

14. Bill to recover amount of two bonds in the hands of defendant seeking discovery of the amount and description of the bonds, which did not aver that discovery was indispensable, did not state a case for discovery and relief. Larkey v. Gardner, 105 Va. 718, 54 S. E. 886.

15. Bill to recover amount of two bonds in the defendant's possession and seeking discovery of the amount and description. Larkey v. Gardner, 105 Va. 718, 54 S. E. 886.

16 The complaint alleged that the lands in suit were wild and unoccupied, that plaintiff had title thereto and prayed that same be quieted. Defendant filed a cross bill claiming title by adverse possession. Plaintiff then amended his complaint by admitting possession in defendant. Held the cross bill gave equity jurisdiction. Gaither v. Gage & Co. [Ark.] 100 S. W. 80.

17. Bill to quiet title. Motion to trans-
Co. v. Chatfield [Ark.] 99 S. W. 84.

18. Bill to enjoin trespass. Bledsoe v. Robinett, 105 Va. 723, 54 S. E. 861.
fer alleged title in defendants. Earle Imp.

19. See infra, Doing Complete Justice.

20. Court having jurisdiction in Indian Territory over defendant could operate mine on leasehold property in Oklahoma. Wilhite v. Skelton [C. C. A.] 149 F. 67. A suit to set aside a probate order of distribution and to prevent the dissipation of funds and declare the parties holding it trustees is against the persons so that the court is not deprived of jurisdiction, though the property is without the state. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 N. W. 187. Equity has power to compel conveyance of land in another state when the persons interested are within the jurisdiction, but it acts upon the person only and cannot affect the title to land. Divorce court of Washington decreed a division of husband's lands located in Nebraska as alimony. Fall v. Fall [Neb.] 113 N. W. 175.

21. Objection to the jurisdiction on the ground of an adequate remedy at law can only be interposed in the earlier stages and will not be considered after the case is at issue and has been heard by a master. Quirk v. Quirk, 155 F. 199. Objection waived by pleading and going to trial. Brown v. Baldwin [Wash.] 89 P. 483.

22. Goldsmith v. Koopman [C. C. A.] 152 F. 173.

23. See 7 C. L. 1325.

24. Brown v. Baldwin [Wash.] 89 P. 483; Clark v. Chase, 101 Me. 270, 64 A. 493. Claim for money and to establish a mechanic's lien. Becker v. California Super. Ct. [Cal.] 90 P. 689.

25. Hudson v. Wright, 204 Mo. 412, 103 S. W. 8; Hutchinson v. Dennis, 217 Pa. 290, 66 A. 524. But there is considerable conflict of authority as to bills of discovery. Nixon v. Clear Creek Lumber Co. [Ala.] 43 So. 805. Recovery of a legacy or distributive share. Van Dyke v. Van Dyke [N. J. Eq.] 65 A. 215.

in fact an adverse decision on the legal remedy sought may not bar a subsequent suit to obtain equitable relief.[26] The legislature has no power to divest courts of jurisdiction where such is granted by the constitution,[27] but it may change the practice and procedure.[28] The legislature of a state cannot enlarge the equitable jurisdiction of courts of the United States, but at the same time it may provide for the enlargement of equitable rights, and such rights may be enforced by the circuit court of the United States by virtue of its equitable jurisdiction in the same manner as such rights are enforced in the state courts.[29] Equity cannot supplant or exercise any supervisory jurisdiction over the probate court, but must act if at all in aid of that court.[30]

(§ 2) *B. Maxims and principles controlling the application of equitable relief. General principles and maxims.*[31]—Conscience and good faith are necessary to call a court of equity into activity.[32] A court of equity will not exercise its jurisdiction uselessly,[33] or to enforce a hard and unconscionable bargain.[34] Equity seeks the substantial rights of parties and applies the remedy in such a manner as to relieve those having the controlling equities.[35] He who seeks equity must do equity.[36] In some cases it is held that the offer to do equity must be contained in the bill,[37] but in most instances this principle is satisfied by the court's making in its decree the relief awarded the plaintiff conditioned upon his equitable performance,[38] but even where a petition was held defective in that it contained no offer to do equity, the defendant waived his rights to attack it on that ground where he answered to the merits and went to trial.[39] Equity aids the vigilant.[40] That will be regarded as

26. Motion to set aside verdict denied, suit in equity to vacate judgment for the same cause not barred. Bacon v. Bacon, 150 Cal. 477, 89 P. 317.

27, 28. Bacon v. Bacon, 150 Cal. 477, 89 P. 317.

29. Bill to quiet title. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

30. Under U. S. § 1665, providing an appeal to the supreme court from the probate court. Clark v. Peck's Ex'rs, 79 Vt. 275, 65 A. 11.

31. See 7 C. L. 1327.

32. Bill brought for sole purpose of forcing good settlement. Old Colony Zinc & Smelting Co. v. Garrick [C. C. A.] 153 F. 173. Equity will not enforce a contract for doing of an illegal or immoral thing or one contrary to statute or public policy, whether criminal or not. Wood v. Stewart [Ark.] 98 S. W. 711. Refuses to aid speculation. Jahn v. Champagne Lumber Co., 152 F. 669. The statute of frauds will not operate as a bar to the enforcement of a parol agreement to convey an interest in lands if the same has been partly performed so as to render it a fraud on the vendee to permit the vendor to avail himself of the statute. Agreement to convey easement. Burrell v. Middleton [N. J. Eq.] 65 A. 978.

33. Equity will not reform an instrument merely for the sake of reforming it but only to enable a party to assert some right thereunder. Travelli v. Bowman, 150 Cal. 587, 89 P. 347.

34. Will enjoin enforcement of a judgment which in justice and good conscience should not be collected. Brown v. Pegram, 149 F. 515. An equity court has power to stay and prohibit the enforcement of a legal judgment, even one regularly rendered by a court of general jurisdiction, when the inequity of enforcing it is made to appear. Clark v. Chase, 101 Me. 270, 64 A. 493. See, also, Specific Performance, 8 C. L. 1946.

35. Party applied and paid for an accident policy on her husband in which she was to be named as beneficiary. Action brought by a creditor of husband to obtain an amount due under the policy as belonging to husband. Weckerly v. Taylor [Neb.] 110 N. W. 738.

36. Platte Valley Mill. Co. v. Malmsten [Neb.] 113 N. W. 229. Where an absolute conveyance is made with a separate agreement for a defeasance, the equity of redemption may be released by parol or by such transactions between the parties as would render it inequitable that the mortgagor redeem. Ferguson v. Boyd [Ind.] 81 N. E. 71. This maxim does not apply to a bill to set aside by the heirs a grant of homestead void for failure of the wife to join, and it is not necessary to tender the amount of grantor's debt for which grant was made, as a homestead is exempt from debt. Woods v. Campbell, 87 Miss. 782, 40 So. 874. Delay by taxpayers in bringing suit to enjoin work on a bridge until six months after contractor has commenced work. Meistrell v. Ellis County Com'rs [Kan.] 91 P. 65. Wards brought bill against guardian after his death and nine years after youngest ward had become of age. Clark v. Chase, 101 Me. 270, 64 A. 493. See, also, Cancellation of Instruments, 9 C. L. 454.

37. Platte Valley Mill. Co. v. Malmsten [Neb.] 113 N. W. 229.

38. Bill to prevent satisfaction of taxes out of land. Plaintiff did not offer to pay those which were a lien on the property. Platte Valley Mill. Co. v. Malmsten [Neb.] 113 N. W. 229.

39. Smith v. Smith [Kan.] 89 P. 896.

40. Bill brought forty-six years after

done which ought to be done.[41] A court of equity is reluctant to enforce a forfeiture,[42] and will sometimes relieve against the consequences of a breach of a condition and save an estate from forfeiture.[43] The smallness of a claim may be a ground for refusing jurisdiction.[44]

Clean hands.[45]—He who comes into equity must do so with clean hands,[46] for equity will not grant relief where parties are in pari delicto.[47] This is subject to the exception that where public interest requires equity will intervene, although the result is to grant a benefit to one party who is of equal guilt with the other.[48] Where the party suing is not equally in the wrong, a court should grant relief.[49] It is only with regard to the plaintiff's rights against the defendant that the plaintiff must come into court with clean hands.[50] The bad faith or the unconscionable conduct that will justify the application of this maxim must be based upon actual knowledge or willful fraud.[51]

Existence of adequate remedy at law.[52]—Lack of adequate remedy at law is not only an independent ground of equity jurisdiction[53] but is the fundamental

alleged right arose. Elliott v. Clark [Cal. App.] 89 P. 455.

41. Where payments were made to a person without a written assignment, although according to the intent of the party to whom first due, the executor of the first party cannot recover from the payor a second payment. Benziger v. Steinhauser, 154 F. 151. And where an agreement relative to the conveyance of real estate is executed by one of the parties and executory on the part of the other, the latter holds his interest therein by operation of law, in trust for the former in accordance with the terms of the contract. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606. Where one agrees to transfer stock to another upon the performance by that other of some act and the latter performs his part of the agreement, he and his assigns are equitably entitled to a transfer and are deemed the equitable owners thereof. Id.

42. Forfeiture of right of way. Spies v. Arvondale & C. R. Co., 60 W. Va. 389, 55 S. E. 464. See, also, Penalties and Forfeitures, 8 C. L. 1339.

43. Spies v. Arvondale & C. R. Co., 60 W. Va. 389, 55 S. E. 464.

44. Court refused to refer case to master as plaintiff's damages amounted at most to only a few dollars. Giragosian v Chutjian [Mass.] 80 N. E. 647.

45. See 7 C. L. 1328.

46. Where certain promoters responsible for false statements with regard to a corporation were no longer connected with it, the corporation was not debarred from requesting relief in equity against these promoters. Cuba Colony Co. v. Kirby [Mich.] 14 Det. Leg. N. 494, 112 N. W. 1133. Equity will not aid a donor to recover money back which was paid for sexual intercourse. Platt v. Elias, 186 N. Y. 374, 79 N. E. 1. Where one learns of a secret process through no breach of confidence but through one who has thus obtained the knowledge, he is not guilty of such unconscionable conduct as will prevent his seeking relief in equity against one who has fraudulently learned the process and is making use of it. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A. 339. Equity sometimes refuses aid to claims obtained without consideration for speculation to protect honest creditors, but where the defendant confesses himself guilty of fraud, he will not be protected by a plea of speculation from making discovery Jahn v. Champagne Lumber Co, 152 F. 669.

47. Wood v. Stewart [Ark.] 98 S. W. 711.

48. Equity will enjoin sales by alderman to the city under constitutional provision prohibiting such, although the complainant when an alderman had also made sales. Noxubee County Hardware Co. v. Macon [Miss.] 43 So. 304.

49. Wood v. Stewart [Ark.] 98 S. W. 711.

50. Beekman v. Marsters [Mass.] 80 N. E. 817. Mere general iniquitous conduct unconnected with the matter in suit is not sufficient to cause equity to refuse relief. Peters v. Case [W. Va.] 57 S. E. 733. Where a stockholder sued for the benefit of the corporation to recover losses of funds by the directors in gambling transactions in grain, and it appeared that the plaintiff on his own account had similarly speculated and lost, he was not barred on the ground of lack of clean hands. Hingston v. Montgomery, 121 Mo. App. 451, 97 S. W. 202.

51. The fraud of an agent who learns a trade secret that is by mere imputation chargeable upon a complainant will not render the hands of the latter unclean so that equity will not enjoin the use of such trade secret by a third party who has fraudulently obtained it. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A. 339. Claims of a patent medicine held not to be such a fraud on the public as to amount to unclean hands preventing an injunction against unfair competition. Dr. Fahrney v. Ruminer [C. C. A.] 153 F. 735.

52. See 7 C. L. 1329.

53. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159; Beekman v. Marsters [Mass.] 80 N. E. 817. Where a landowner seeks to interfere with the operation of a railroad on the ground of defective title to its right of way, equity has jurisdiction to enjoin such act, for the remedy at law is insufficient, since to compel a railroad to stop operation until its rights could be determined would work irreparable injury to the railroad and the public. Nittany Valley R. Co. v. Empire Steel & Iron Co. [Pa.] 67 A. 349. Where a parol agreement cannot be specifically enforced because of un-

basis thereof.[54] Even where there is concurrent jurisdiction at law and in equity,

certainty or of the statute of frauds, if there is no adequate remedy at law equity will decree a return of the purchase money paid and the value of lasting improvements. Agreement between husband and wife that if she supplied the money for the purchase of lands the title should be in her name. Cross v. Iler, 103 Md. 592, 64 A. 33.

54. Equity has no jurisdiction to grant relief where there is an adequate remedy at law. Brophy v. Sheppard, 124 Ill. App. 512; Northwestern Traveling Men's Ass'n v. Crawford, 126 Ill. App. 468; Day v. Bullen, 127 Ill. App. 155. No matter how gross a fraud may be, equity will not interfere if there is a complete remedy at law. Bill to abate purchase price for fraudulent representation as to value of land. Purchase price not all paid and notes given for balance. If it is attempted to collect on these notes there is a good defense at law. Williams v. Neal [Ala.] 44 So. 551.

Illustrations: See also topics dealing with the various matters here cited as illustrations.

Cases in Which the Legal Remedy Has Been Held Adequate. Accounting: Action at law adequate where no complicated accounting for damages for waste and trespass. Godfrey v. McConnell, 151 F. 783. A bill for an accounting alleging a contract with a railroad company to do certain work, a portion of which was sublet to a subcontractor to receive ten per cent off the contract price and that contractor took full charge after part performance by the subcontractor, making payments on his behalf does not state a cause for equity jurisdiction, there being an adequate remedy at law, since all amounts are readily ascertainable. Hunt v. O'Connor, 151 F. 707. Where complete relief can be obtained in the surrogate's court, the supreme court will refuse to exercise its equitable powers to entertain an action for an accounting. In re Smith, 105 N. Y. S. 223. Complainant contracted to deliver bonds to the defendant at the same price he was to receive for them from a third party. Defendant fraudulently misrepresented the price which he received. There was no adequate remedy at law for the balance. Martin v. Wilson [C. C. A.] 155 F. 97. A bill against a county treasurer for excess collection charges which shows the exact amounts claimed raises a question for a law court only. Board of Sup'rs of Nottoway County v. Powell, 106 Va. 51, 56 S. E. 812.

Bankruptcy: Equity is without jurisdiction to grant relief to a trustee in bankruptcy against a mere preferential payment by a bankrupt where he has not exhausted his remedy at law. Brock v. Oliver [Ala.] 43 So. 357.

Boundary disputes: The settlement of boundary disputes is not a matter for equitable jurisdiction. Orr v. Cox, 61 W. Va. 361, 56 S. E. 522; Watkins v. Childs, 79 Vt. 234, 65 A. 81. Courts of equity have jurisdiction to appoint commissions to ascertain confused boundaries (Watkins v. Childs [Vt.] 66 A. 805), but only where some equity exists superinduced by the act of the defendant. Fraud or misconduct; a relation between the parties making it the luty of one to preserve the boundaries (Id.), or a danger of multiplicity of suits (Id.).

Contracts: Where complainant's bill was for specific performance but it appeared that he could be adequately compensated for a breach in an action at law and there was no allegation that the defendant was insolvent, his suit could not be maintained. Marthinson v. King [C. C. A.] 150 F. 48 Legal remedy adequate to recover from administrator money loaned to decedent, neither discovery or accounting being necessary. McKee v. Allen, 204 Mo. 655, 103 S. W. 76.

Corporations: Suit at equity against directors of a corporation does not lie to enforce payment of a declared dividend. There is an adequate remedy at law. Searles v. Gebbie, 115 App. Div. 778, 101 N. Y. S. 199. But where a particular fund has been set aside for the payment of a dividend and is within the control of the directors, they are trustees and a bill may be maintained to reach the fund and charge the directors with misconduct. Id.

Covenant of title: Where land is sold with express warranty of title, equity is without power to grant relief unless the vendor is insolvent. Grant what relief it can whether purchaser has a deed and is in possession or not. Yarbrough v. Thornton, 147 Ala. 221, 42 So. 402.

Damages: A bill cannot be retained solely for the purpose of awarding pecuniary damages, there being a plain and adequate remedy at law. Barnes v. Roy, 27 R. I. 534, 65 A. 277. Executors, removal of. Clark v. Peck's Ex'rs, 79 Vt. 275, 65 A. 14.

Right to property or possession: Equity will not assume jurisdiction to try a controverted legal title to an easement of way. Burrell v. Middleton [N. J. Eq.] 65 A. 978.

Trespass: Where the relief asked for is pecuniary damages for waste and for trespass and no complicated accounting is sought and no discovery, there is an adequate remedy at law. Godfrey v. M'Connell, 151 F. 783.

Cases in Which the Legal Remedy has Been Held Inadequate. Accounting: There is no adequate remedy at law on accounts where, although the account is only on one side, it is complicated and difficult and discovery is sought. Miller v. Russell, 224 Ill. 68, 79 N. E. 434. Where real estate brokers informed an owner that $5,062 was the highest obtainable offer when in fact they had an offer of $5,500 and she thereupon executed a deed receiving only $5,062 out of the $5,500 paid, a bill praying for an accounting is not demurrable on the ground of an adequate remedy at law. Dawson v. Leschziner [N. J. Eq.] 65 A. 449.

Cancellation of instruments: A suit to cancel a note and mortgage is properly brought in equity as there is no issue at law. Leigh v. Citizens' Sav. Bk. [Ky.] 102 S. W. 233.

Contracts: An action at law for damages for breach of a contract to convey lands

the jurisdiction of the latter will not ordinarily be exercised where the remedy at law is adequate and there are no independent grounds of equity jurisdiction,[55] but a concurrent remedy at law does not necessarily oust equity of jurisdiction.[56] Where jurisdiction of law and equity is concurrent, the decision of a law court in sending a case to the equity court will not be reversed after trial of the case except for manifest error.[57] The adequate remedy at law which will deprive a court of equity of jurisdiction must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity.[58] It is unnecessary to allege the lack of

does not afford an adequate remedy as a suit for specific performance. Wilhite v. Skelton [C. C. A.] 149 F. 67. Failure to execute a trust with which contract to convey land is charged. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606. There is no adequate remedy at law for breach of an agreement by which land is transferred to be built upon by the defendant who fails to carry out the agreement. Mosier v. Walter, 17 Okl. 305, 87 P. 877. An action at law does not afford an adequate remedy for breach of a contract to convey land. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606. There is no adequate remedy at law where the plaintiff claims a breach of contract, but there is no right of action upon the contract because of fraud by the defendant in writing it. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 S. W. 686.

Corporations: Where a particular fund has been set aside for the payment of a dividend and is within the control of the directors, they are trustees and a bill may be maintained to reach the fund and charge the directors with misconduct. Searles v. Gebbie, 115 App. Div. 778, 101 N. Y. S. 199.

Deeds: Where a deed has been delivered in escrow and before time for delivery to the grantee the grantor transfers the land to another, the first grantee has no adequate remedy at law and his proper remedy for relief is in equity. Wilkins v. Somerville [Vt.] 66 A. 893.

Estates of decedents: There is no adequate remedy at law barring equitable jurisdiction to set aside a probate decree obtained by fraud and to protect the estate on behalf of the legatees. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 N. W. 87.

Injury to business: Where it appears that defendant unlawfully threatens to interfere or interferes with plaintiff's business or rights, and it further appears that damages will not afford an adequate remedy, equity will issue an injunction. Interference by defendant to break plaintiff's contract with an exposition company to be its sole agent. Beekman v. Marsters [Mass.] 80 N. E. 817.

Insolvency: Remedy at law not adequate where an agreement to sell complainant's beer exclusively is broken by the defendant because of the difficulty of proving the extent of the violation and the profits complainant would have made, the necessity of a multitude of suits, and the uncertainty of defendant's financial responsibility. Feigenspan v. Nizolek [N. J. Eq.] 65 A. 703.

Lien: Equity has jurisdiction to enforce a lien and will not leave plaintiff to his remedy at law. Suit to enforce lien on timber for nonpayment of taxes by vendee of timber. Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 14 Det. Leg. N. 47, 111 N. W. 177.

Negotiable instruments: No adequate remedy at law to protect one from whom a note has been obtained by fraud and without consideration, since the note may find its way into the hands of a bona fide holder for value and the payor be utterly ruined by being obliged to pay the same. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159. Bill to cancel note and mortgage. Leigh v. Citizens' Sav. Bk. [Ky.] 102 S. W. 233.

Right to property or possession: Where in a bill to quiet title complainant alleges possession and at the hearing proves possession, he has no adequate remedy at law. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

Trespass: Equity will enjoin trespass for which there is an adequate remedy at law only when irreparable loss or injury is alleged and shown. Bledsoe v. Robinett, 105 Va. 723, 54 S. E. 861.

Trusts: Where the subject-matter of a suit in equity was the gains and profits arising out of a trust, equity will retain jurisdiction although the amount claimed could be liquidated in cash. Bay State Gas Co. v. Rogers, 147 F. 557.

55. Dawson v. Leschziner [N. J. Eq.] 65 A. 449.

56. Contract of sale. Fraud. Dawson v. Leschziner [N. J. Eq.] 65 A. 449. Where a bill in equity is filed in the court of chancery for an accounting by trustees who subsequently file an account, without knowledge of the bill, in the prerogative court, but before service of subpoena, the jurisdiction of the chancery court has been properly invoked and that court will maintain jurisdiction since it has first taken it. Gillen v. Hadley [N. J. Eq.] 66 A. 1087.

57. Harris v. Remmel [Ark.] 102 S. W. 716. Right at law to petition the court for an order upon an administratrix to file a petition for sale of real estate to pay a judgment or for her removal is not as certain, complete, etc., as a bill to subject the land to the payment of the judgment. Brun v. Mann [C. C. A.] 151 F. 145.

58. Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8; Farwell v. Colonial Trust Co. [C. C. A.] 147 F. 480. An action at law for damages against the vendor of corporate stock is not as adequate and efficient as a suit in equity against the vendor and corporation to rescind the sale, to recover the purchase price, and to relieve the complainant from liability to the corporation on account of his stock. Id. Relief demanded by minority stockholders against

an adequate remedy at law, but facts should be pleaded from which that conclusion can be drawn.[59] Objection to jurisdiction on the ground of adequate remedy at law can only be interposed in the earlier stages and will not be considered after the case is at issue,[60] and cannot be first raised on appeal.[61] In the Federal courts the defense is one of substance and may be raised at any time or by the court of its own volition, but should best be raised by demurrer.[62] The fact that a complainant in a bill in a Federal court has an adequate remedy at law in the state court does not affect the jurisdiction of the Federal court.[63] A Federal court will not turn a complainant in equity over a remedy at law in a state court, but only to the law side of the Federal court.[64] A defendant who is prevented from making a complete defense in an action at law may enjoin the same and make his defense in equity,[65] but equity cannot bar an innocent suitor from his legal rights because of any hardship their enforcement may cause others.[66]

Doing complete justice.[67]—If equity acquires jurisdiction it will continue to hold the cause for the purpose of doing complete justice,[68] not only in determining

an unlawful adjournment to prevent them from cumulating their stock vote on one candidate for director will not be denied on the ground that they have an adequate remedy at law. West Side Hospital v. Steele, 124 Ill. App. 534. It is not necessary that there be an entire want of legal remedy. It is sufficient if such remedy is inadequate or will not effect complete justice. Apollo Trust Co. v. Safe Deposit & Title Guar. Co., 31 Pa. Super. Ct. 524. Where the cause is such that equity can grant relief in addition to that which could be procured at law, the case is not so foreign to equity jurisdiction that the court will dismiss of its own motion. Shedd v. Seefeld, 126 Ill. App. 375. Equity cannot acquire jurisdiction on the ground of no adequate remedy at law where a party is very old and requires a speedy adjustment of a matter. Clark v. Peck's Ex'rs., 79 Vt. 275, 65 A. 14.

59. Mosier v. Walter, 17 Okl. 305, 87 P. 877.

60. Case heard by a master. Quirk v. Quirk, 155 F. 199. Objection that plaintiff's remedy is at law made after the hearing comes too late. Shedd v. Seefeld, 126 Ill. App. 375; Brown v. Baldwin [Wash.] 89 P. 483; Feigenspan v. Nizolek [N. J. Eq.] 65 A. 703. Failure to move to transfer an action at law to equity is a waiver of the right to be heard in equity. Wilson v. White [Ark.] 102 S. W. 201.

61. Goldsmith v. Koopman [C. C. A.] 152 F. 173.

62. Marthinson v. King [C. C. A.] 150 F. 48.

63. Bill to subject real estate to payment of a judgment. County court could compel sale or remove administratrix. Brun v. Mann [C. C. A.] 151 F. 145.

64. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

65. Suit by treasurer against his predecessor may be enjoined by his surety and the surety permitted to make his defense in a court of equity. United States Fidelity & Guaranty Co. v. Jordan [Va.] 58 S. E. 567. Injunction to restrain action at law where defendant's estate can only be asserted in equity. Ferrell v. Strong, [N. J. Eq.] 66 A. 920. Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, equity will not stay the proceedings at law. Injunction to restrain an action for recovery of an indebtedness. Continental Compressed Air Co. v. Franklyn [N. J. Eq.] 66 A. 897.

66. Clark v. Chase, 101 Me. 270, 64 A. 493.

67. See 7 C. L. 1335.

68. Nixon v. Clear Creek Lumber Co., [Ala.] 43 So. 805; Becker v. California Super. Ct. [Cal.] 90 P. 689. Regardless of the fact that the amount involved would not have been sued for originally in the court granting relief. Houston Rice Mill. Co. v. Hankamer [Tex. Civ. App.] 16 Tex. Ct. Rep. 880, 97 S. W. 119. In a suit between guardian and ward where equity obtained jurisdiction to vacate a probate order allowing a final account, it would retain jurisdiction for the purpose of doing complete justice between the ward and the guardian's sureties who were parties. Baum v. Hartmann, 226 Ill. 160, 80 N. E. 711. Equity having otherwise acquired jurisdiction will determine which of two sets of officers of a private corporation are the lawful officers. West Side Hospital v. Steele, 124 Ill. App. 534. In a suit in equity for the sale of property to satisfy the claim of complainant, the court acquires jurisdiction of the property and parties, and subsequent proceedings by any of the parties in other courts without leave are ineffectual to establish claims adverse to those of the complainant; hence, it is the duty of the court first acquiring jurisdiction to hear and determine such claims when properly presented. In suit against administratrix to subject real estate to payment of a judgment, the court should permit her to file a cross bill for expenses and allowance as widow and determine such claims. Brun v. Mann [C. C. A.] 151 F. 145. Equity has jurisdiction to afford relief to one who has been induced by fraud of the officers to subscribe to the stock of a corporation, and may rescind the contract, though fully executed, and compel restitution of payments. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494. Jurisdiction to establish partition of a de-

the rights involved but in affording remedies for their enjoyment,[69] and any relief to which any of the parties are entitled may be granted,[70] regardless of whether such relief is legal or equitable.[71] Where there are substantial grounds of equity jurisdiction, legal relief may be granted although equitable relief is denied on account of the particular circumstances of the case,[72] or on account of matters arising pending suit which render equitable relief impossible.[73] A cause will not, however, be retained to grant purely legal relief where it appears from the pleadings that complainant is not entitled to equitable relief.[74] Where equity has jurisdiction of the subject-matter of a suit, it will not retain jurisdiction to determine counsel fees except by consent of parties.[75]

Multiplicity of suits.[76]—Where jurisdiction of the subject-matter and parties to a controversy has been acquired, equity may and should grant complete relief to the end that litigation may cease and a multiplicity of suits be avoided.[77] Whether a court of equity will take jurisdiction to prevent a multiplicity of suits depends upon the circumstances of each case.[78] A court of equity will not take jurisdiction

cedent's land may be retained to adjudge claim against the estate. Lester v. Kirtley [Ark.] 104 S. W. 213. Cross demands and counterclaims may be enforced by way of set-off in equity even though they are legal claims, and for unliquidated damages whenever the circumstances are such as to warrant the interference of equity. Bill to restrain collection of judgment and a set-off of claims against judgment creditors. Brown v. Pegram, 149 F. 515.

69. Bill to determine claim of lien on land of testator and declare rights of parties. The court having made a finding was not bound to remand the cause to the probate court for the enforcement of the rights established. Quinton v. Neville [C. C. A.] 154 F. 432.

70. Where equity has jurisdiction of a suit by tenants in common of standing timber against a cotenant for an accounting, the jurisdiction is not ousted by one cotenant setting up an issue of title, for the court will proceed to determine the whole controversy. Gulf Red Cedar Lumber Co. v. Crenshaw [Ala.] 42 So. 564. Where defendant in an action to quiet title by counterclaim alleges ownership of the land and demands that his title be quieted, the court may determine the issue thus presented. Fox v. Cornett, 29 Ky. L. R. 246, 92 S. W. 959. Where a court has jurisdiction over a bill by a trust creditor, it may after decreeing the amount due retain the cause and administer the trust either through the old or new trustees appointed by it, or through its own commissioners. Washington Nat. Bld'g & Loan Ass'n v. Buser, 61 W. Va. 590, 57 S. E. 40. It is the duty of defendants to present all their defenses and plaintiff will be protected from them after judgment. Asher v. Uhl, 29 Ky. L. R. 396, 93 S. W. 29.

71. When a court of equity acquires jurisdiction for one purpose, it acquires it for all purposes, and it makes no difference that some of the rights may be legal rights which could not otherwise be enforced outside of a court of law. Revive a judgment in suit to quiet title. Wehrheim v. Smith, 226 Ill. 346, 80 N. E. 908. Where the prevailing party in ejectment elects to take judgment for the value of the land, a court of equity does not lose jurisdiction to enforce on behalf of the party against whom judgment is entered a lien against the land, as the court has jurisdiction of the parties and the subject-matter and could make such decree as equity demanded. Taylor v. Roniger, 147 Mich. 99, 13 Det. Leg. N. 994, 110 N. W. 503. Under Gen. St. 1906, §§ 1939-1946, in partition proceedings, one whose bona fide object is partition among owners, one or more of whom are complainants and the balance defendants, all controversies as to the legal and equitable title should be settled by the chancellor. Williams v. Clyatt [Fla.] 43 So. 441.

72. Equity will not require a railway to restore a way, which it has excavated, to its prior condition where it will subject the company to great inconvenience and the plaintiff has unreasonably delayed enforcement of his right, but will retain the bill to assess damages. Levi v. Worcester Consol. St. R. Co., 193 Mass. 116, 78 N. E. 853.

73. Where the court obtains equity jurisdiction for the purpose of granting equitable relief and it appears from facts ascertained at the hearing but not previously known to the plaintiff that such relief is impracticable, equity will retain jurisdiction to grant the alternative legal relief of damages. Suit to cancel notes transferred to bona fide holders without plaintiff's knowledge. Luetzke v. Roberts, 130 Wis. 97, 109 N. W. 949. Where equity has jurisdiction to enforce a lien, such jurisdiction will not be defeated by the fact that before the case was brought to a hearing the articles to which a lien might attach were removed by defendant. Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 14 Det. Leg. N. 47, 111 N. W. 177.

74. Marthinson v. King [C. C. A.] 150 F. 48; Barnes v. Roy, 27 R. I. 534, 65 A. 277. A suit to enjoin a trespass cannot be used as a substitute for a proceeding to try title or to establish a boundary. Hume v. Burns [Or.] 90 P. 1009.

75. An order of reference by consent to fix a fee is not such consent as will give equity jurisdiction. Cauthen v. Cauthen [S. C.] 56 S. E. 978.

76. See 7 C. L. 1336.

77. In re Blake [C. C. A.] 150 F. 279.

78. Feigenspan v. Nizolek [N. J. Eq.]

over a matter to prevent circuity of action if by so doing it deprives one of the defendants of a substantial defense against the claim of the complainant.[79] Parties cannot maintain a bill in equity for the sole purpose of preventing a multiplicity of their own suits.[80] Equity will not take jurisdiction merely to prevent several parties from being separately sued on several independent claims arising from the same cause where the adjudication of one suit would settle nothing as to others.[81]

(§ 2) *C. Occasions for, and subjects of, equitable relief.*[82]—The very origin and fundamental basis of equity precludes any attempt at exhaustive classification of its remedies, but some of these remedies have assumed such definite form as to be susceptible of specific classification, such as specific performance,[83] discovery,[84] subrogation,[85] reformation,[86] cancellation and rescission,[87] creditors' bills,[88] account-

65 A. 703. Construction of an open ditch through which sewage would flow is a continuing nuisance for which suits might be brought every day in the year. Desberger v. University Heights Realty & Devel. Co. [Mo. App.] 102 S. W. 1060. Where an agent to collect money does so and deposits the same in another's hands, who refuses to give it to the principal, a bill in equity may be maintained against the agent and depositary, for no suit at law could be maintained against them jointly, and settle and adjust the various rights of the parties. Mazzolla v. Wilkie [N. J. Eq.] 66 A. 584. Where there is an adequate remedy at law for breach of contract and bond given to secure performance, there is no such danger of a multiplicity of suits as will give equity jurisdiction. Lewman & Co. v. Ogden Bros., 143 Ala. 351, 42 So. 102. Equity has jurisdiction of a suit by several depositors of an insolvent bank against the directors for fraud, in order to prevent a multiplicity of suits, although the cause of action of each if asserted alone would be at law. Blumer v. Ulmer [Miss.] 44 So. 161.

79. Release of a prior lien in favor of a second mortgagee. Foreclosure by second mortgagee and sale. Bill by first mortgagee against second mortgagee and purchaser. Cross bill by purchaser against second mortgagee upon covenant of good title. **Held** that a decree was improperly entered against the second mortgagee on the cross bill. Marsden v. White [N. J. Err. & App.] 65 A. 181.

80. Headrick v. Larson [C. C. A.] 152 F. 93.

81. Equity will not retain a bill to enforce liability against stockholders where it appears that each complainant has an independent claim, the adjudication of one of which would settle nothing with relation to the other. Miller v. Willett [N. J. Err. & App.] 65 A. 981.

82. See 7 C. L. 1337.

83. Webb v. Marlar [Ark.] 104 S. W. 144. Specific performance is a matter of judicial discretion, but courts of equity enforce contracts to convey land as a matter of course and will be controlled by the fundamental principles of equity in the case of contracts relating to personalty, and, if chattels have a peculiar value above their market value, contracts concerning them will be specifically enforced. Marthinson v. King [C. C. A.] 150 F. 48. Contract to convey land. Seven Mile Beach Co. v. Dolley [N. J. Err. & App.] 66 A. 191. To enforce contract to supply tomatoes to a canning factory where the market is uncertain. Curtice Bros. Co. v. Catts [N. J. Eq.] 66 A. 935. Equity will enforce an agreement for a valuable consideration to grant a right of way by a decree for specific performance. Burrell v. Middleton [N. J. Eq.] 65 A. 978. Option to purchase land. Marthinson v. King [C. C. A.] 150 F. 48. Will not enforce contracts interfering with judicial proceedings or wrongfully imposing on the jurisdiction of the courts. Court will not enjoin enforcement of a judgment which was obtained against the complainant by agreement between him and the defendant for the purpose of obtaining jurisdiction over a third party, the understanding being that it would not be enforced against complainant. Wood v. Stewart [Ark.] 98 S. W. 711. Contract relating to real estate. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606. See, also, Specific Performance, 8 C. L. 1946.

84. Bill for discovery. Bloede Co. v. Carter, 148 F. 127. A complainant is entitled to probe the conscience of each individual defendant, but is not entitled to have each or any enter upon an exhaustive search to discover and marshal facts necessary to the complainant's case. Park v. Bruen, 147 F. 884. Complainant cannot by propounding interrogatories require the defendant to enter into a tedious and expensive investigation. Id. Where equity has jurisdiction of the subject-matter of a suit, the complainant may have all the discovery relevant and necessary in aid of relief he is entitled to. Bill to restrain collection of judgment. Discovery to ascertain equitable owners of judgment and against whom plaintiff had set-offs. Brown v. Pegram, 149 F. 515. Equity will discover property wrongfully withheld and concealed from the owner and compel the wrongdoer to an accounting. Millard v. Millard, 123 Ill. App. 264. The fact that defendant admits having property for the recovery of which complainant has resorted to equity does not deprive this court of jurisdiction if other property might in the investigation be discovered, and jurisdiction is not lost though, in fact, no additional property is discovered. Id. See, also, Discovery and Inspection, 9 C. L. 990.

85. See Subrogation, 8 C. L. 2041.

86. Equity has exclusive jurisdiction to reform deeds for mistake. Martin v. Smith [Me.] 65 A. 257. To permit of reformation on the ground of mistake, evidence must be clear that deed does not express the agreement. Graham v. Carnegie Steel Co., 217 Pa. 34, 66 A. 103. Reformation of deed to

ing,[89] injunctions,[90] quieting title, and removal of clouds.[91] Another and broader

land to comply with oral agreement is not permitted where a subsequent oral agreement has been acted on in conflict with original oral agreement. Urich v. Watts, 69 N. J. Eq. 604, 66 A. 432. Bill to reform a trust deed given to secure a note barred by the statute of limitations. Title under deed remained in trustees until amount of debt was paid, and to reform the deed was to perfect a valuable right. Travelli v. Bowman, 150 Cal. 587, 89 P. 347. Equity will correct a deed to give it intended effect. Smyth v. Wallace, 30 Ky. L. R. 1232, 100 S. W. 1186. See, also, Reformation of Instruments, 8 C. L. 1708.

87. Jurisdiction of the court to cancel a deed is a matter of sound discretion in a court of equity to be assumed or refused according to its own ideas of what is reasonable and right. Mosier v. Walter, 17 Okl. 305, 87 P. 877. Equity may cancel a negotiable note obtained by fraud. Sipola v. Winship [N. H.] 66 A. 962. Inadequacy of consideration will not warrant the cancellation of a contract in equity, but, if combined with such a degree of mental weakness as to justify the inference that advantage had been taken of such weakness, such an inference is sufficient to warrant equitable interference. Allen's Adm'rs v. Allen's Adm'rs., 79 Vt. 173, 64 A. 1110. Evidence showing mental incapacity on the part of the grantor, and undue influence exercised upon him, warranted a setting aside of certain deeds. Id. Cancellation of a contract substituted for the original contract by fraud. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 S. W. 686. Note and mortgage. Leigh v. Citizens Sav. Bk. [Ky.] 102 S. W. 233. Equity jurisdiction to cancel an instrument does not depend upon the inadequacy of the remedy at law, but is a matter of sound discretion in a court of equity. Mosier v. Walter, 17 Okl. 305, 87 P. 877. Where from the evidence it appears that a bill is brought in equity for rescission for the purpose only of forcing a good settlement, equity will not grant a decree. Old Colony Zinc & Smelting Co. v. Garrick [C. C. A.] 153 F. 173. See, also, Cancellation of Instruments, 9 C. L. 454.

88. A creditor's bill filed by an assignee of a judgment for $2,500 is not demurrable for want of equity as a mere speculative venture because the assignment recited the consideration to be $15 and other sufficient and valuable consideration. Jahn v. Champagne Lumber Co., 147 F. 631. Where the property of a judgment debtor is so incumbered with liens that, although the judgment is a lien thereon under the law of the state, such lien cannot be effectively enforced by execution, the creditor may maintain a bill in equity for the adjustment of the rights and priorities of the several lien holders. Huff v. Bidwell [C. C. A.] 151 F. 563.

89. Harris v. Remmel [Ark.] 102 S. W. 716. A court of equity is justified in taking jurisdiction where the facts are not disputed but only a question of law on the construction of a writing which involved complainant's right to an account. Gallagher v. Hicks, 216 Pa. 243, 65 A. 623. A court of equity has jurisdiction over the accounts of guardians. Stevenson v. Markley [N. J. Eq.] 66 A. 185. Accounting between owners in common of water rights where one uses more than his share. Roberts v. Claremont R. & Lighting Co. [N. H.] 66 A. 485. Accounting of a cotenant's interest in gold dust extracted from a mine. Dettering v. Nordstrom [C. C. A.] 148 F. 81. The circuit court of the United States sitting in equity has no jurisdiction of a bill for an accounting between an insured under a tontine policy and the insurer. Peters v. Equitable Life Assur. Soc., 149 F. 290. Accounting by a president of a company into whose custody or under whose control, as president and trustee, property of the company came and was withdrawn from the company by him or with his consent and disbursed without authority and for unlawful purposes. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 822, 103 N. Y. S. 840. Accounting between agent to collect rents and principal. Quirk v. Quirk, 155 F. 199. A court of equity will review settlements of accounts made in the orphan's courts for fraud or mistake. Van Dyke v. Van Dyke [N. J. Eq.] 65 A. 215. Equity will set aside a guardian's account obtained in a court of law by misconduct. Scoville v. Brock, 79 Vt. 449, 65 A. 577. See, also, Creditors' Suit, 9 C. L. 849

90. Against nuisances. Inhabitants of Houlton v. Titcomb [Me.] 66 A. 733. Crematory and fertilizer plant. Laird v. Atlantic Coast Sanitary Co. [N. J. Eq.] 67 A. 387. Injunction to restrain violation of building restrictions Barton v. Slifer [N. J. Eq.] 66 A. 899. Injunction against boycotting. Jonas Glass Co. v. Glass Bottle Blowers Ass'n [N. J. Eq.] 66 A. 953. Injunction against picketing. Id. Enjoin breach of trust. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A. 339. Enjoin conspiracy to suppress competition. Spaulding v. Evenson, 149 F. 913; Evenson v. Spaulding [C. C. A.] 150 F. 517. Will restrain ticket scalpers from dealing in cut rate, nontransferable tickets issued and to be issued. Pennsylvania Co. v. Bay, 150 F. 770. Restrain combination to suppress competition. Dunbar v. American Tel. & T. Co., 224 Ill. 9, 79 N. E. 423. Enjoin use of trade name. Giragosian v. Chutjian [Mass.] 80 N. E. 647. Enjoin action at law. Benziger v. Steinhauser, 154 F. 151. Enjoin obstruction of highway. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914. Enjoin trespass when it threatens destruction or irreparable injury. Hume v. Burns [Or.] 90 P. 1009; Bledsoe v. Robinett, 105 Va. 723, 54 S. E. 861. Injunction to hold in statu quo a deed delivered in escrow where grantor has withdrawn the deed and attempted a transfer to a third party. Wilkins v. Somerville [Vt.] 66 A. 893. See, also, Injunction, 8 C. L. 279.

91. Asher v. Uhl, 29 Ky. L. R., 396, 93 S. W. 29. A suit to redeem real estate from an admitted tax lien is not one to quiet title or remove a cloud within the rule of the Federal courts that equity is without jurisdiction of such suits against a defendant in possession. Klenk v. Byrne, 143 F. 1008. May maintain bill to quiet title where

classification may be based upon the subject-matters in connection with which equitable relief may be invoked, such as relations of confidence,[92] and trust,[93] contracts [94] and rights arising out of contract but not resting on privity of contract,[95] constitutional rights,[96] corporations [97] and corporate stock and stockholders,[98] estates of de-

premises sold to one who will not accept title by reason of adverse claim of defendant. Heffenstall v. Leng, 217 Pa. 491, 66 A. 991. In a bill to quiet title, it is necessary to allege actual or constructive possession in the complainant. Merritt v. Alabama Pyrites Co., 145 Ala. 252, 40 So. 1028. Equity will prevent the execution of a deed on the ground that it will cloud the plaintiff's title. Tax deed to the state containing a description legally sufficient to charge property with delinquent taxes. San Diego Realty Co. v. Cornell, 150 Cal. 637, 89 P. 603. See, Quieting Title, 8 C. L. 1570.

92. An unfair feature of a family arrangement may be set aside without destroying the entire settlement. No provision for the support of one not capable of understanding the arrangement should he survive others. Nichols v. Nichols, 79 Conn. 644, 66 A. 161. Equity will enforce contracts the consideration for which is a termination of family controversies. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81.

93. Every cestui qui trust is entitled to the aid of a court of equity to avail himself of the benefit of the trust, and the forbearance of the trustee may not prejudice him. Bill to enforce a trust created by the deposit of bonds for the benefit of claimants against the depositors. Morrill v. American Reserve Bond Co., 151 F. 305. Evidence insufficient to show that land purchased with money of a husband and standing in the name of the wife was held in trust, and not an absolute gift. Lipp v. Fielder [N. J. Err. & App.] 66 A. 189. Beneficiary of a benefit policy who agrees with the insured to hold part of the funds for another is a trustee for such other. Clark v. Callahan [Md.] 66 A. 618; Coyne v. Supreme Conclave of Improved Order of Heptasophs [Md.] 66 A 704. Courts of equity do not have original jurisdiction of all trusts. Clark v. Peck's Ex'rs, 79 Vt. 275, 65 A. 14. Where a deed is delivered in escrow, the grantor is as to the land a trustee for the grantee and the grantee as to the money a trustee for the grantor, and one who takes title from the grantor subsequently with notice stands in the same equity as his grantor, and will be compelled to perform the contract by a conveyance of the land. Wilkins v. Somerville [Vt.] 66 A. 893. Where a director of a company operating under a secret trade formula holds a written copy of the formula in trust, severs his connection with the company, and starts a competing company, using such formula, his act is a breach of trust which equity will enjoin. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A. 339. A joint stockholder is entitled to an accounting where upon the death of one member certain members operate the property under a declaration of trust and the trustees fail to divide the profits. Taber v. Breck, 192 Mass. 355, 78 N. E. 472. Evidence held to establish a mere loan, and not a voluntary trust. McKee v. Allen, 204 Mo 655, 103 S. W. 76.

94. As to specific performance, cancellation, etc., of contracts, see supra, in this section. Equity will enforce negative covenants in a contract. Agreement to sell complainant's beer exclusively. Feigenspan v. Nizolek [N. J. Eq.] 65 A. 703. Equity will take cognizance of and enforce a valid contract for the testamentary disposition of the estate of a decedent. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81.

95. Assignee of a part interest of a cestui qui trust may maintain a suit without the consent of the assignor to enforce an execution of the trust. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606.

96. Where penal ordinances injuriously affect existing property rights, their legality or constitutionality may be inquired into by a court of equity, and their execution in a proper case enjoined. Ordinance excluding the erection of baseball parks within certain limits. New Orleans Baseball & Amusement Co. v. New Orleans, 118 La. 228, 42 So. 784. Federal courts have equity jurisdiction to determine the constitutionality of state statute. Passenger rate law. St. Louis, etc., R. Co. v. Hadley, 155 F. 220.

97. Courts of equity have jurisdiction of causes brought to enforce director's liability. Bill by receivers against directors Murphy v. Penniman [Md.] 66 A. 282. An allegation that a director is liable for illegal loans because of his failure to attend a meeting at which such loan is made is demurrable. Id. Where negotiable bonds were procured to be issued by fraud, the corporation may maintain a suit in equity against holders with notice for cancellation and to enjoin their transfer. Control of corporation obtained, and bond issued for purpose of buying up stock held by parties getting the control, at an inflated value. Pere Marquette R. Co. v. Bradford, 149 F. 492. If a director violates the duties which he owes to the corporation, courts of equity will intervene. New York Automobile Co. v. Franklin, 49 Misc. 8, 97 N. Y. S. 781. A corporation or, upon its refusal, a stockholder may maintain a bill to restrain directors from conspiring to increase the capital stock in an illegal and improper manner for their personal aggrandizement. Searles v. Gebbie, 115 App. Div. 778, 101 N. Y. S. 199.

98. Stockholders may bring a bill in the Federal courts to enjoin the corporation from complying with an unconstitutional statute where after request the directors refuse to not comply with such statute. Perkins v. Northern Pac. R. Co. 155 F. 445. Where contracts made by directors are voidable, in the absence of any conspiracy or actual fraud, thede is no ground upon which equity could entertain a suit by a stockholder to recover a money judgment against directors or other party to the contract. Godfrey v. McConnell, 151 F. 783. Every lawful owner of stock has a right to say that others assuming to vote shares of stock which they have no legal right to vote shall be restrained. Dunbar v. Ameri-

cedents,[99] estoppel,[1] forfeitures,[2] fraudulent conveyances,[3] highways and streets,[4] husband and wife,[5] injury to business,[6] judgments,[7] lost instruments,[8] nuisances,[9] par-

can Tel. & T. Co., 224 Ill. 9, 79 N. E 423. Stockholder has right to restrain fraudulent acts against the corporation, such as an attempt to acquire control by a competitor to stifle competition. Id. Stockholder against corporation to prevent carrying out of a contract. Mitchell v. United Box Board & Paper Co. [N. J. Eq.] 66 A. 938. Where a stockholder was formerly a director and knew of the practice of the directors of exchanging notes with another corporation, he is estopped from subsequently bringing suit to recover losses due to such practice. Davenport v. Crowell, 79 Vt. 419, 65 A. 557. Equity will protect minority stockholders against an unlawful adjournment for the purpose of preventing them from electing a director by cumulating their stock vote. West Side Hospital v. Steele, 124 Ill. App. 534.

99. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 N. W. 187; Rensford v. Magnus & Co. [Ala.] 43 So. 853. Equity has jurisdiction to settle estates devised by wills, St. John v. St. John [Ala.] 43 So. 580. Equity will take cognizance of and enforce a valid contract for the testamentary disposition of the estate of a decedent. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81. A debt due an administrator from a firm of which he is a member is collectible only in equity. Strother's Adm'x v. Strother, 106 Va. 420, 56 S. E. 170.

1. Shaw v. Ward [Wis.] 111 N. W. 671. One petitioning for paving of a street is not estopped to enjoin proceedings where a change of grade is contemplated for which she has received no damages. Town of New Decatur v. Smith [Ala.] 41 So. 1028.

2. The rule that courts of equity will not enforce forfeitures is not absolute, and in cases otherwise properly cognizable in equity a forfeiture will be enforced when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief. Forfeiture of lease for breach of covenant. Lindeke v. Associates Realty Co. [C. C. A.] 146 F. 630. Courts have no right to disregard any provisions of a contract or to save rights that are lost thereunder through the act of the party seeking relief, unless it is made to appear inequitable or unconscionable to do or not to do so. Failure to renew option on lease. Furniture & Carpet Installment House v. Berets [Utah] 91 P. 279. Equity will enforce forfeitures of mere opportunities where no property rights are lost. Failure to take up option to renew lease. Id. Equity will grant relief, where valuable rights will be forfeited according to the provisions of a contract, if reasonable compensation is made. Clause that vendee should forfeit title to land if failed to pay vendor interest and taxes. Mead v. Morse [Mass.] 80 N. E. 513. Contract permitting defendant to cut and remove timber. Time for removal expired and there was an oral agreement for more time if the defendant paid taxes which he did. Timber was not all removed and plaintiff sought to enjoin removal. Wallace v. Kelly, 148 Mich. 336, 14 Det. Leg. N. 230, 111 N. W. 1049. B. & C. Comp. § 4946, authorized an action to declare a lease of a county road forfeited. Tillamook County v. Wilson River Road Co. [Or.] 89 P. 958.

3. Suit by judgment creditor to set aside conveyance to wife as fraudulent. Farr v. Hauenstein [N. J. Err. & App.] 67 A. 877. Evidence sufficient to sustain a decree in equity setting aside a conveyance of real estate as fraudulent. McCauley v. Shockey [Md.] 66 A. 625.

4. Enjoin obstruction of highway. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914. Abuttor may enjoin construction of street railway. Spalding v. Macomb & W. I. R. Co., 225 Ill. 585, 80 N. E. 327. Violation of contract between city and street railway company permitting the use of the city's streets by the company. Asbury Park & S. G. R. Co. v. Neptune Committee Tp. [N. J. Eq.] 67 A. 790. Equity will enjoin a municipality from ordering the removal of tracks laid by a street railway under authority of a municipal ordinance granting that right. Id. Equity will not intervene to restrain the use of streets by the defendant where the complainant's right to occupy is being contested by the city. Tacoma R. & Power Co. v. Pacific Trac. Co., 155 F. 259. Contract to lay tracks between turnpike company and street railway will be specifically enforced as to location by an injunction. Chester & Darby Telford Road Co. v. Chester D. & P. R. Co., 217 Pa. 272, 66 A. 358.

5. A contract between husband and wife with reference to the wife's separate property can be enforced against him by her in equity when properly established. Wife furnished money to husband for purchase of land, title to be in her. Title was taken in husband's name and upon his death she brought a bill against the children to establish her right to funds. Cross v. Iler, 103 Md. 592, 64 A. 33. Equity has exclusive jurisdiction of contracts entered into between husband and wife because of their incapacity at law to contract together. Separation agreement. Buttlar v. Buttlar [N. J. Eq.] 65 A. 485.

6. Conspiracy to suppress competition will be enjoined. Dunbar v. American Tel. & T. Co., 224 Ill. 9, 79 N. E. 423; Spaulding v. Evenson, 149 F. 913; Evenson v. Spaulding [C. C. A.] 150 F. 517. Enjoin ticket scalping. Pennsylvania Co. v. Bay, 150 F. 770. Use of trade name. Giragosian v. Chutjian [Mass.] 80 N. E. 647. A bill to restrain the use of patented articles except under the terms of a license is maintainable in a Federal court of equity, irrespective of the validity of the contract to license. Indian Mfg. Co. v. Case Threshing Mach. Co. [C. C. A.] 154 F. 365. Enjoin unfair competition in foreign countries. Vacuum Oil Co. v. Eagle Oil Co., 154 F. 867. Equity will enjoin an intentional taking away from a plaintiff of his contractual rights. Defendant sought to have an exposition company break its contract with plaintiff to be its sole New England agent to secure patronage. Beekman v. Marsters

tition,[10] receivers,[11] vexatious litigation,[12] wills,[13] frauds,[14] and mistake [15] are subjects

[Mass.] 80 N. E. 817. Will restrain use of a trade name which misleads the public Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 65 A. 870.

7. May prevent the use of a judgment procured by fraud as a defense. Scoville v. Brock, 79 Vt. 449, 65 A. 577. Equity will enjoin the collection of a judgment which in justice and good conscience should not be collected. Brown v. Pegram, 149 F. 515. That decrees probating wills are not subject to review in equity for fraud or mistake, and that this is an exception to the general rule, see Bacon v. Bacon, 150 Cal. 477, 89 P. 317. Enjoin enforcement of judgment obtained by fraud. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 N. W. 187. Notice of hearing not given defendant as agreed. Steyermark v. Landau, 121 Mo. App. 402, 99 S. W. 41. Bill to set aside guardian's account. Scoville v. Brock, 79 Vt. 449, 65 A. 577. Equity will set aside judgments obtained without jurisdiction. Barron v. Feist, 51 Misc. 589, 101 N Y. S. 72. Equity has power to stay and prohibit the enforcement of a legal judgment. even one regularly rendered by a court of general jurisdiction, when the inequity of enforcing it is made to appear. Clark v. Chase, 101 Me. 270, 64 A. 493. The remedial powers of a court of equity may be exercised as well after a judgment in an action at law as before. If it should transpire that equitable rights do exist which the court at law is unable to enforce by reason of their limitations, the remedial powers of this court may be extended to such conditions as well after as before judgment. Continental Compressed Air Co. v. Franklyn [N. J. Eq.] 66 A. 897. Equity will assume jurisdiction where it appears that a judgment was obtained by perjured testimony and that it was impossible to prove it at the trial, and will restrain the operation of the judgment. Sargent Co. v. Baublis, 127 Ill. App. 631. Equity will relieve against judgments and grant a new trial resting upon fraud where the party seeking relief is free from negligence and the prevailing party has secured an illegal and inconscionable advantage. Id.

8. Equity has jurisdiction to establish a lost deed. White v. Smith [N. J. Eq.] 65 A. 1017.

9. Alabama Great So. R. Co. v Prouty [Ala.] 43 So. 352. A court of equity at common law has jurisdiction to restrain nuisances (Inhabitants of Houlton v. Titcomb [Me.] 66 A. 733), and has specific jurisdiction in some states by statute [Rev. St. c. 79, § 6, par. 5] (Id.) May enjoin operation of a crematory and fertilizer plant the operation of which amounts to a nuisance. Laird v. Atlantic Coast Sanitary Co. [N. J. Eq.] 67 A. 387. Equity does not always as a matter of course afford relief by way of injunction in cases of nuisance where a right of action exists. Royce v. Carpenter [Vt.] 66 A. 888. Equitable jurisdiction regarding private nuisances is based upon the ground of restraining irreparable mischief. Backing up of water owing to maintenance of a dam (Id.), or of preventing vexatious litigation (Id.), or a multiplicity of suits (Id.); but to justify the interposition of a court of equity there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law (Id.), or such as from its continuance or permanent mischief must occasion a constantly recurring grievance which cannot be otherwise prevented but by an injunction (Id.). Action resulting in permanent injury to neighbor will be restrained. Desberger v. University Heights Realty & Development Co. [Mo. App.] 102 S. W. 1060.

10. Equity has jurisdiction over suits for partition between tenants in common. § 5770, Kirby's Digest. Lester v. Kirtley [Ark.] 104 S. W. 213.

11. Equity may appoint a receiver against the legal title in a strong case of fraud combined with danger to the property. Horner v. Bell [Md.] 66 A. 39. Appointment of receivers of corporations for the protection of stockholders and creditors. Culver Lumber Co. v. Culver [Ark.] 99 S. W. 391.

12. Royce v. Carpenter [Vt.] 66 A. 888; Marsden v. White [N. J. Err. & App.] 65 A. 181.

13. Court of equity has no jurisdiction to construe a will. Clark v. Peck's Ex'rs., 79 Vt. 275, 65 A. 14. A party cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of a will where there is only a legal estate and no trust Gillen v. Hadley [N. J. Eq.] 66 A. 1087. Where a bill in equity prays for the determination of the title to real estate under provisions of a will, and also for an accounting by trustees. the bill makes a case within the jurisdiction of the court independent of the title to real estate. Id. That decrees probating wills are not subject to review in equity for fraud or mistake, and that this is an exception to the general rule, see Bacon v. Bacon, 150 Cal. 477, 89 P. 317. Equity has jurisdiction to settle estates devised by will. St. John v. St. John [Ala.] 43 So 580. Under N. J. Chancery Act 1907, § 79 (P. L. 1902, p. 537), in an action in chancery if a question arises as to the validity of a devise, and the reading of the clause in question does not settle the matter, the court may hold the bill until an action at law is brought to establish the title, or it may refer the question to a court of law for an opinion. Gillen v. Hadley [N. J. Eq.] 66 A. 1087.

14. Where a fraudulent sale has been made by a trustee, the beneficiary may pursue the proceeds without attempting to disturb the transfers. Nichols v. Nichols, 79 Conn. 644, 66 A. 161. Equity will avoid a contract or sale where there has been a material misrepresentation which was an inducement to contract, deceived the vendee, and caused damage. Farwell v. Colonial Trust Co. [C. C. A.] 147 F. 480. To rescind for fraud, one must act promptly or he waives his right. Purchase of mines. Richardson v. Lowe [C. C. A.] 149 F. 625. A complaint which alleges that an old woman was fraudulently induced by her son-in-law, a lawyer, and a probate judge to repudiate her husband's will and take under the law states a cause of action entitling her to avoid her election. Whitesell v. Strickler,

of equity jurisdiction concurrent, however, with that of law. New Jersey equity courts have a general jurisdiction in cases of fraud as well where there is a plain, adequate, and complete remedy at law as in other cases.[16] The courts may interfere to prevent a wrong of a repeated and continuing character [17] or which occasions damages which are estimable only by conjecture and not by an accurate standard.[18] Equity has power to declare deeds absolute on their faces to be mortgages.[19] A bill in equity cannot ordinarily be sustained for the mere violation of a municipal ordinance [20] unless it would amount to a nuisance if done.[21] Equity will sustain a bill to determine the ownership of a fund for the payment of damages to land where the findings of the board of assessors allowing damages is not reviewable.[22] Equity has no power to control the exercise of legislative functions.[23]

§ 3. *Laches and acquiescence.*[24]—Independently of the statute of limitations, courts of equity have inherent power to refuse relief after undue and inexcusable delay.[25] Such delay is called laches and will bar equitable relief.[26] Laches is a question of fact to be determined by the circumstances of each case.[27] It will be used

167 Ind. 602, 78 N. E. 845. Equity jurisdiction does not extend to false representations as to character and quality of property, nor the title thereto, which involve no breach of trust or contract. Aberthaw Const. Co. v. Ransome, 192 Mass. 434, 78 N. E. 485.

15. Equity will relieve against the consequences of inadvertence and mistake. A lessee for a term of ten years, with an option to renew upon six months' notice, failed for nineteen days to give such notice, being abroad and unable to return earlier. The lessor suffered no damage by delay and the lessee had built up a big business. Equity would relieve. Doepfner v. Bowers, 53 Misc. 7, 102 N. Y. S. 920. Reform deeds for mistakes. Graham v. Carnegie Steel Co., 217 Pa. 34, 66 A. 103; Martin v. Smith [Me.] 65 A. 257. Judgments obtained by mistake may be set aside. Bacon v. Bacon, 150 Cal. 477, 89 P. 317. A decree of distribution is subject to review in equity upon a showing that it was procured by fraud or mistake. Id. A judgment may be set aside for mistake of the court or of the injured party. The amount named $10,000 in a will mistaken for $2,000. Id.

16. Mazzolla v. Wilkie [N. J. Eq.] 66 A. 584.

17. Nittany Valley R. Co. v. Empire Steel & Iron Co. [Pa.] 67 A 349.

18. Bill to enjoin interference with operation of a railroad and for damages. Nittany Valley R. Co. v. Empire Steel & Iron Co. [Pa.] 67 A. 349.

19. Davisson v. Smith, 60 W. Va. 413, 55 S. E. 466. Equity will declare a deed a mortgage where there has been some collateral agreement for a defeasance. Ferguson v. Boyd [Ind.] 81 N. E. 71.

20, 21. Inhabitants of Houlton v. Titcomb [Me.] 66 A. 733.

22. Johnson v. Pettit, 105 N. Y. S. 730.

23. Will not enjoin submission of proposed constitutional amendments to the vote of the people. Walck v. Murray [Okl.] 91 P. 238; Frantz v. Autry [Okl.] 91 P. 193.

24. See 7 C. L. 1347.

25. That statutes of limitation in actions at law have been enacted does not necessarily give a party invoking equity the full statutory time in which to do so. Clark v. Chase, 101 Me. 270, 64 A. 493. In an action to quiet title it was held that the statute limiting actions to a period of thirty years did not apply. Haarstick v. Gabriel, 200 Mo. 237, 98 S. W. 760. Where a married woman and not subject to the statute of limitations fails to assert her title to land but watches the defendant improve the same for ten years, she is guilty of laches. Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922.

26. Ferguson v. Boyd [Ind.] 81 N. E. 71. Where a deed to secure a debt was not recorded and no attempt made to assert a lien under it for 9 years, and meantime other parties had secured interests therein, equity will not aid. Sturdivant v. Cook [Ark.] 98 S. W. 964. Stockholders of a mining corporation who had the means of knowledge but who have not actually investigated the levying of an assessment must act promptly if they desire to arrest the consequences of such levy. Jones v. Bonanza Min. & Mill. Co. [Utah] 91 P. 273.

27. Whether a court will sustain a demurrer to a bill on the allegation of laches is a matter of discretion. Stevenson v. Markley [N. J. Eq.] 66 A. 185. No precise limit of time can be defined within which a bill to rescind a contract for fraud should be brought, and what is a reasonable time lies within the discretion of the court to say in each case. Suit to rescind lease seven years after it was made was not barred. Garrett v. Finch [Va.] 57 S. E. 604.

Illustrations. Conduct Amounting to Laches. Accounting: Where wards wait nine years after the coming of age of the youngest and until the guardian is dead before attempting to question his accounts. Clark v. Chase, 101 Me. 270, 64 A. 493. Where a person negotiating with a corporation agreed to turn over to it the model of a machine if he were made manager and later it was turned over to another corporation, the first mentioned corporation cannot, after a lapse of more than three years, maintain an action for an accounting for profits earned by use of the model. New York Automobile Co. v. Franklin, 49 Misc. 8, 97 N. Y. S. 781.

Cotenants: Where a tenant redeems from a mortgage sale, two years is a reasonable time for the exercise by his cotenants of

their right to elect to contribute and reinstate their title, and if they do not attempt to do so for ten years they are barred by laches. Savage v. Bradley [Ala.] 43 So. 20.

Fraudulent conveyance: Where a judgment creditor of a husband failed to file a bill to set aside a conveyance to his wife for thirteen years. Farr v. Hauenstein [N. J. Err. & App.] 67 A. 377.

Estates of decedents: Where complainants as heirs knew at the time of a sale of realty that one of the executors furnished nearly half the purchase price but take no steps for four years towards ascertaining the facts but allow the purchaser to remain in possession. Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 N. E. 1056. Devise to wife for life remainder to nephew. The wife made no claim of dower and after her death the nephew entered possession. None of the heirs for thirteen years claimed any interest in the property which changed hands several times without any notice of any claims and increased in value. One purchasing the claim of the heirs. Warner v. Hamill [Iowa] 111 N. W. 939. Where a testator died in 1894 and his widow in 1900 and his will was not offered for probate until 1906, a claim for support of the widow by one of the executors. Lester v. Kirtley [Ark.] 104 S. W. 213. Nine years' delay by adult heirs to have administrator appointed to try priority between vendor's lien and unrecorded deed. Chisholm v. Crye [Ark.] 104 S. W. 167. Three years' delay in procuring probate of a second will held laches barring bill to review decree based on probate of former will. McGowan v. Elroy, 28 App. D. C. 188.

Highways: Where an electric company has for six years been engaged in moving its wires from poles to conduits without complaint from any one, equity will not decree a removal of the conduits. Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A. 72.

Lease by beneficiary: Bill to cancel release of lease by lessee acting as trustee. The trustee operated a leased coal mine for ten years at a loss and released the remaining term to the owners. This bill brought five years later. Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 F. 217.

Mine: In a suit to recover a decedent's interest in a mining claim it appeared that the plaintiff had notice 12 years prior to bringing suit that the interest of the decedent had been forfeited by law, that the plaintiff did not know when application for patent had been made or when it was unnecessary to continue the assessment work on the claim, that since patent issued plaintiff had not paid taxes and had not been on the claim for several years Kavanaugh v. Flavin, 36 Mont. 133, 88 P. 764.

Municipality: Failure by taxpayers to object to the construction of a bridge until six months after work was commenced by the contractor. Meistrell v. Ellis County Com'rs [Kan.] 91 P. 65. Where a defendant in a suit to quiet title by one claiming under a will filed a claim to the premises in 1904 averring his right under a partnership agreement made in 1880, and the testator died in 1895, and the defendant knew the executors were holding adversely and further the testator's wife died in 1900 leaving the premises to trustees, and five years prior to the testator's death both resided in the same city, and the trustees and the testator and testatrix had paid taxes under color of title for many years. Samuel & Jessie Kenney Presbyterian Home v. Kenney [Wash.] 88 P. 108.

Street railway: Acquiescence by a landowner and his representatives in the operation of a street railway for a long time, Taylor v. Erie City Pass. R. Co., 212 Pa. 487, 61 A. 992.

Title to land: Where a married woman not subject to the statute of limitations fails to assert her title to land and watches the defendant improve and occupy the same for ten years. Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922. Where the obligee of a title bond assigned the same to his son, half absolutely and half under a secret trust to support the father, and the son assigned the bond to a creditor and the obligee concurred by vacating the land, the obligee after many years cannot invoke equity to aid in revoking his election, especially where the value of the land has changed. Sheffield v. Hurst [Ky.] 104 S. W. 350.

Trusts: Failure to establish a secret trust in regard to a mining claim for fourteen years. Reed v. Munn [C. C. A.] 148 F. 737. Where a bill was brought to establish a trust and for an accounting forty-six years after creation of alleged trust and both original parties were dead, it was impossible for equity to do complete justice and the court will refuse relief. Elliott v. Clark [Cal. App.] 89 P. 455.

Conduct Not Amounting to Laches. Action at law: Where payments of royalties were made by a publisher to parties other than the author but not upon a written assignment, the publisher is not guilty of laches in failing to require such parties to establish their rights until sued by the administrator for a second payment. Benziger v. Steinhauser, 154 F. 151. Where a judgment was obtained by default against a plaintiff because he was not served with process and he filed a motion to set it aside, which was denied, he is not barred by laches in bringing a suit in equity to restrain its enforcement two years after it was rendered, but one month only after motion to set aside was denied. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 89 P. 535.

Creditor's suit: Delay of four years does not bar the prosecution of a creditor's bill. Bennett v. Boshold, 123 Ill. App. 311.

Deed: Where trustees seek to reform a deed for a misdescription of land, it is not laches not to have brought a bill for seven years and until the mistake was discovered, for one is not bound to discover mistakes by party executing. Travelli v. Bowman, 150 Cal. 587, 89 P. 347. Failure to bring bill to declare a deed in reality a mortgage for a long period held not to constitute laches barring relief. Davisson v. Smith, 60 W. Va. 413, 55 S. E. 466.

Estate of decedents: Where heirs by concealment of a will obtained an order of distribution of an estate and the legatees on dicovering the will brought proceedings to probate it, a suit in equity four years later, and while the probate proceedings were still pending, to have the order of distribution set aside and to protect the funds was not barred by laches. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 N. W. 187. Failure to request setting aside of sale of

to promote but never to defeat justice,[28] and is particularly favored as a defense where the situation of parties has changed and new rights arisen during the delay.[29] A party cannot be chargeable with delay until his rights have been repudiated, or until he has knowledge or notice of the same.[30] In suits between parties standing

land fraudulently made by executors held not to amount to laches. Beall v. Dingman, 227 Ill. 294, 81 N. E. 366.

Husband and wife: The failure of either husband or wife to prosecute each other in equity during the continuance of the marital relation is not evidence of laches in the absence of special equitable circumstance. Bennett v. Finnegan [N. J. Eq.] 65 A. 239. It has never been policy of law to apply doctrine of laches with nice particularity between husband and wife. Hudson v. Wright, 204 Mo. 412, 103 S. W. 8.

Lease: Bill to rescind lease for fraud after a lapse of seven years is not barred. Garrett v. Finch [Va.] 57 S. E. 604.

Nuisances: Where adjoining owners do not object to the erection of a garbage crematory nor to its operation for several years while the amount of offensive matter dealt with was small, they are not guilty of laches preventing relief from a much greater use of offensive matter amounting to a nuisance. Laird v. Atlantic Coast Sanitary Co. [N. J. Eq.] 67 A. 387. Where work on a ditch which would constitute a nuisance was begun several years prior to suit some distance from the complainant's land, but complainant did not know just what defendant contemplated until within a few days of bringing suit, there was no laches. Desberger v. University Heights Realty & Development Co. [Mo. App.] 102 S. W. 1060.

Partition: There is no laches in the failure to bring partition proceedings by one tenant in common against another for a year after ouster, though the defendant had taken possession for more than ten years. Stern v. Selleck [Iowa] 111 N. W. 451. Evidence held insufficient to show that tenants in common were guilty of laches in bringing bill for partition. Oneal v. Stimson, 61 W. Va. 551, 56 S. E. 889.

Restrictions: Where a property owner sought to enjoin the violation of restrictions placed upon buildings erected on adjoining property, he was not guilty of laches in allowing the building to become partially erected before filing his bill. Barton v. Slifer [N. J. Eq.] 66 A. 899.

Title to property: In a suit to quiet title under a judgment for back taxes brought in 1902, where a defendant acquired title in 1899, he is not barred by laches from asserting that the taxes had been improperly assessed. Manwarring v. Missouri Lumber & Min. Co., 200 Mo. 718, 98 S. W. 762.

Trusts: Where land was purchased in trust for complainants, the understanding being that it would be transferred to complainants on payment of purchase price, it is not laches to bring a bill six years later where upon application by complainants to have land transferred to them the purchaser refuses except at an advance. Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667.

28. Brun v. Mann [C. C. A.] 151 F. 145.

29. Delay of many years and until after death of guardian before questioning his accounts. Clarke v. Chase, 101 Me. 270, 64 A. 493. Heirs did not assert claim to land for several years, during which time it changed hands several times and increased in value. Warner v. Hamill [Iowa] 111 N. W. 939. Bill to establish a trust and for an accounting forty-six years after it was created and after the death of both original parties. Elliott v. Clark [Cal. App.] 89 P. 455. Bill to restrain work by municipality six months after contractor had commenced work (Meistrell v. Ellis County Com'rs [Kan.] 91 P. 65), but a party seeking to enforce a building restriction is not barred by allowing the structure to become partially erected (Barton v. Slifer [N. J. Eq.] 66 A. 899). Bill to cancel release of mining lease after a lapse of five years and after the acquiring of interests by others. Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 F. 217. Where a married woman not subject to the statute of limitations fails to assert her title to land and watches the defendant improve and occupy the same for ten years, she is guilty of laches. Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922. The rule refusing aid to stale claims is especially applicable where the difficulty of doing entire justice arises through the death of the principal participants, or of a witness, or by reason of the original transactions having become so obscured by time as to render the ascertainment of exact facts impossible. Kavanaugh v. Flavin, 35 Mont. 133, 88 P. 764. Six years' delay in commencing suit after discovery of tax title in agent of mining claim which was greatly enhanced in value meanwhile by conduct of holder of tax title. Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333.

30. Insanity of complainant and ignorance of the necessity for taking steps. Nichols v. Nichols, 79 Conn. 644, 66 A. 161. Where property was sold by brokers and fraud on their part was not discovered for six months and a bill was filed four months later, this delay in seeking relief is not laches for which the bill should be dismissed. Dawson v. Leschziner [N. J. Eq.] 65 A. 449. Receiver of a corporation brought a bill to set aside a mortgage given by it to the wife of an officer. Practically all of the stockholders were ignorant of this fact and had been deceived by the officer. Voorhees v. Nixon [N. J. Eq.] 66 A. 192. Where a bill to recover profits of a trustee was filed six years after the alleged profits were made, the complainant is not guilty of laches where the facts were not known until shortly before the bill was brought. Bay State Gas Co. v. Rogers, 147 F. 557. Where a woman was misled by her husband, one of the executors of a will, as to the amount of her legacy and did not learn of her mistake until after a divorce and shortly thereafter began an action to vacate the probate decree, she was not guilty of laches. Bacon v. Bacon, 150 Cal. 477, 89 P. 317. In suits to enforce a trust against an express trustee, the courts do not follow analogies of statutes of limitation at law.

in a purely fiduciary capacity it is not favored,[31] nor in cases of fraud.[32] Laches is no defense to a prayer for an injunction to restrain future misconduct,[33] nor will it act as a bar where the defendant voluntarily concedes the complainant's right.[34] Where laches has commenced to run against an ancestor, it continues to run against a minor heir the same as the statute of limitations.[35] The defense of laches may be taken advantage of by demurrer where laches is apparent on the face of the bill,[36] and if not apparent on the face of the bill it is a defense to be presented by plea or answer.[37] In some jurisdictions the defense of laches must be set up by plea or answer.[38]

Excusable delay.[39]—Delay may be excused by lack of knowledge or notice of the wrong.[40] Ignorance of the law will not protect from the operation of the rule of laches.[41] Delay may be excused by negotiations looking to a settlement.[42] Where circumstances enforce delay, laches does not result.[43] The burden is on the plaintiff to excuse his laches.[44]

Application of analogous statutes of limitation.[45]—While statutes of limitation do not in terms extend to suits in equity, it is true that equitable remedies must be sought without unreasonable delay, and that in anology to such statutes courts of equity ordinarily apply rules of limitation which will bar remedies in equity that are barred at law,[46] but if unusual conditions or extraordinary circumstances make it

Purchase of land for benefit of another. Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667.

31. A claim by a beneficiary is not barred by laches where there has been no settlement between beneficiary and trustee. Miller v. Saxton, 75 S. C. 237, 55 S. E. 310. Guardian and ward. Stevenson v. Markley [N. J. Eq.] 66 A. 185.

32. Acts complained of, namely the fraudulent certification of tickets by ticket brokers, are in violation of law and a fraud on complainant. Pennsylvania Co. v. Bay, 150 F. 770.

33. Unfair competition. Acquiescence in the use of similar trade name will not prevent injunction. Dr. Fahrney & Sons Co. v. Ruminer [C. C. A.] 153 F. 735.

34. Letters from one partner admitting willingness to have an accounting. Doncourt v. Denton, 105 N. Y. S. 906.

35. Warner v. Hamill [Iowa] 111 N. W. 939.

36. Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93.

37. King v. Dekle [Fla.] 43 So. 586.

38. So as to afford the complainant an opportunity to amend his bill. Spalding v. Macomb & W. I. R. Co., 225 Ill. 585, 80 N. E. 327.

39. See 7 C. L. 1350.

40. Insanity of complainant and ignorance of his rights. Nichols v. Nichols, 79 Conn. 644, 66 A. 161. Fraud of brokers in making sale not discovered. Dawson v. Leschziner [N. J. Eq.] 65 A. 449. Stockholders ignorant of acts of officers. Voorhees v. Nixon [N. J. Eq.] 66 A. 192. Profits by a trustee. Bay State Gas v. Rogers, 147 F. 557. Woman misled by husband. Learned of her rights after divorce. Bacon v. Bacon, 150 Cal. 477, 89 P. 317. Where by fraud a widow was induced to repudiate her husband's will by a lawyer and a probate judge and was told not to tell that the judge had advised her, her laches were sufficiently excused in not bringing the suit until she learned of the fraud. Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845. Laches does not apply when the person seeking such relief has no knowledge of the necessity of taking any action to protect his interests and is not chargeable with negligence, and the rights of the third parties have not been prejudiced by delay. Insanity of complainant and ignorance of the necessity of taking any steps. Nichols v. Nichols, 79 Conn. 644, 66 A. 161.

41. Warner v. Hamill [Iowa] 111 N. W. 939.

42. Where one who has purchased stock of a corporation upon false representations demands a rescission and return of his money but allows the corporation time within which to make good and does not bring suit for a year, during which time no other rights have intervened, he is not guilty of laches. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

43. Where long delay in proceeding was due to the fact that party was unable to obtain necessary proof to enable him to proceed, and it appears that he used due diligence in procuring it, he is not guilty of laches. Roth v. Burnham, 126 Ill. App. 222. Where premises are occupied by widow of deceased as a homestead, delay in selling it to pay debts of estate until the homestead rights expired does not constitute laches. Miller v. Hammond, 126 Ill. App. 267.

44. Where neglect and abandonment of claims to land are shown with equitable circumstances in favor of the defendant from which laches may be imputed to the plaintiff, the burden rests on him to excuse such laches. Warner v. Hamill [Iowa] 111 N. W. 939. Fact that material allegation as to reason for delay in bringing suit was not denied by answer held not to have relieved plaintiff from supporting it by proof. Shuld v. Wilson, 225 Ill. 336, 80 N. E. 259.

45. See 7 C. L. 1350.

46. Nichols v. Nichols, 79 Conn. 644, 66 A. 161. Payment of taxes for a long period

inequitable to allow the prosecution after a briefer,[47] or to forbid its maintenance after a longer period than that fixed by statute, the chancellor will not be bound by the statute but will determine the extraordinary case in accordance with the equities which condition it,[48] and delay less than the time required for the running of the statute may constitute laches.[49] The question whether or not the statute of limitations applies to bills in equity is an open one in some states,[50] but in matters affecting continuing trusts the statutes do not begin to run until after their termination.[51]

§ 4. *Practice and procedure in general.*[52]—Where a defendant goes to trial upon all the issues, his objection that the statutory order of procedure was not observed cannot be made for the first time upon a motion for a new trial.[53] A court of equity may reserve consideration of any questions of law until final hearing, notwithstanding the filing of a demurrer.[54] Pleas in abatement filed with pleas to the merits and on the same day as answer filed are too late.[55] The practice and procedure in

of time but less than that provided for in a statute of limitations, together with an increased value in the land, would not ordinarily bar the owner because of laches Updegraff v. Marked Tree Lumber Co [Ark.] 103 S. W. 606. Bill to cancel tax sale where defendants had paid taxes for five years. Statute of limitations gave title after seven years' payment. Fact that land had greatly increased in value did not require application of doctrine of laches. Earle Imp. Co. v. Chatfield [Ark.] 99 S. W. 84. Courts of equity are not bound by, but they usually act or refuse to act in, analogy to the statute of limitations relating to actions of law of like character. Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333. A state statute of limitations limiting all actions to four years except to recover real estate will be applied to a bill to cancel a release of a mining lease and the suit held barred by laches. Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 F. 217. Under ordinary circumstances a suit in equity will not be stayed on account of laches before, and it will be stayed after, the analogous statutes of limitations at law. Brun v. Mann [C. C. A.] 151 F. 145. A suit by a widow to rescind her election to repudiate the will and take at law because of fraud may be brought at any time within the six years limited by statute, provided she give sufficient excuse for laches. Whitsell v. Strickler, 167 Ind. 602, 78 N. E. 845. Where the remedies are concurrent equity will follow the law and refuse to enforce a claim barred by the statute of limitations. Carey-Lombard Lumber Co v. Daugherty, 125 Ill. App. 258.

47. Brun v. Mann [C. C. A.] 151 F. 145. Independently of any limitation prescribed for guidance of courts of law, equity may in the exercise of its own inherent powers refuse relief where it is sought after undue and unexplained delay, and where injustice would be done by granting the relief prayed for in the particular case. Sturdivant v. Cook [Ark.] 98 S. W. 964. When a suit is brought within the time limited by the analogous statute, the burden is on the defendants to show from the face of the bill or from their answer that extraordinary circumstances exist which require the application of the doctrine of laches in order to secure a just result. Brun v. Mann [C C. A.] 151 F. 145. A purely money demand which would not be barred by the statute of limitations at law would not be concurrently barred in equity unless there were some peculiar basis in reference thereto. Bay State Gas Co. v. Rogers, 147 F. 557. Radical changes in the condition and value of property often induce them to apply the doctrine of laches in shorter time than that fixed by statutes Six years' delay in commencing suit after discovery of tax title in agent of mining property which was greatly enhanced in value meanwhile by conduct of holder of tax title. Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333. That statutes for limitations of action have been enacted does not necessarily give a party invoking the equity powers of the court the full statutory time in which to do so. Action nine years after right accrued and not brought until the death of the other party. Clarke v. Chase, 101 Me. 270, 64 A. 493 Delay for a time less than the period of limitation does not amount to laches unless it occasions or may be presumed to occasion a wrong or prejudice to the other party. Failure to petition for the vacation of an allowance granted in divorce proceedings. Cohen v. Cohen, 150 Cal. 99, 88 P. 267. Parties dead. Every fact known and possession acquiesced in for years. Potter v. Potter's Receiver [Ky.] 101 S. W. 905.

48. Brun v. Mann [C. C. A.] 151 F. 145. Where in an action to quiet title plaintiff had held legal title for nearly forty years, but no one had ever been in possession or paid taxes for more than thirty years, plaintiff's action was not barred by the thirty year statute of limitations. Haarstick v. Gabriel, 200 Mo. 237, 98 S. W. 760. Applied only when equity demands. In a suit to enforce a trust in land purchased in the name of another, the court will not follow the analogy of the statute of limitation Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667.

49. McNicholas v. Tinsler, 127 Ill. App. 381.

50. Stevenson v. Markley [N. J. Eq.] 66 A. 185.

51. Guardian and ward. Stevenson v. Markley [N. J. Eq.] 66 A. 185.

52. See 7 C. L. 1351.

53. Smith v. Smith [Kan.] 89 P. 896.

54. Burden of sifting out all the pleadings too great. Snyder v. De Forrest Wireless Tel Co., 154 F. 142.

55. Town of New Decatur v. Smith [Ala.] 41 So. 1028.

equity cases in Federal courts is governed by Federal law and uniform rules, and is the same no matter in what state the court is sitting.[56] Federal courts when sitting in equity administer the principles of equity as they prevail in these courts without regard to any state legislation as to the remedy.[57] Cases construing equity rules are cited below.[58]

§ 5. *Parties.*[59]—It is the general rule that all persons interested in the subject of an equitable action should be made parties to prevent a multiplicity of suits and to secure a final determination of their rights.[60] Equity recognizes three classes of parties, namely: formal,[61] substantial,[62] and necessary.[63] A bill will be dismisseed for

56. Demurrer and answers filed to whole bill according to the state court practice on appeal to Federal court ordered that demurrers be stricken from record. Bryant Bros. Co. v. Robinson [C. C. A.] 149 F. 321.

57. Equity will cancel usurious mortgage without an averment in the bill of an offer to pay amount of loan with legal interest as provided by state usury laws. Olds v. Curlette, 145 F. 661.

58. Federal equity **rule 67**, as amended May 17, 1893, does not authorize the court to require an unwilling party to adduce his evidence orally in open court on final hearing, though it may at its discretion permit such procedure Hyams v. Federal Coal & Coke Co. [C. C. A.] 152 F. 970. A witness cannot refuse to answer questions where his testimony is being taken orally before an examiner under rule 67 on the ground that it is immaterial or irrelevant, although there may be cases where the evidence is so clearly outside the issues that he will be protected by the court. New England Phonograph Co. v. National Phonograph Co., 148 F. 324. Where a bill charges fraud and prays discovery, a plea to the whole bill under Federal equity **rule 32** must be supported by an answer denying the fraud and giving discovery. Jahn v. Champagne Lumber Co., 152 F. 669. Where an order fixing the time and place of hearing is made by consent, if one side fail to appear at such time and place, the court cannot hear the case unless fifteen days' notice has been given under Rule 15 of the Court of Chancery. In re Rule Chancery Ct. [N. J. Eq.] 64 A. 982.

59. See 7 C. L. 1352. See, also, Parties, 8 C. L. 1236, as to matters common to law and equity.

60. Sarasota, Ice, Fish & Power Co. v. Lyle & Co. [Fla.] 43 So. 602. Action to set aside deed. Nichols v. Nichols, 79 Conn. 644, 66 A. 161. Where the aid of equity is sought to determine confused boundaries, all persons interested, whether their estates are present or future, must be made parties Watkins v. Childs [Vt.] 66 A. 805. Bill to remove cloud on title. Grantor of a deed in the chain of title not a party. Gibson v. Tuttle [Fla.] 43 So. 310. Where equity has jurisdiction to administer estates, all persons interested in the administration of an estate in any manner must be made parties. St. John v. St. John [Ala.] 43 So. 580.

61. Perkins v. Hendryx, 149 F. 526.

62. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606. Parties who would have an interest in the result and ought to be joined if they are within the jurisdiction, but whose interests are separable so that full equity may be done to the parties joined. Perkins v. Hendryx, 149 F. 526. In a suit for discovery against a corporation, it is proper to join the officer from whom information is sought. Nixon v. Clear Creek Lumber Co. [Ala.] 43 So. 805. If a proper party is incapable of being made a party because beyond the jurisdiction or if his joinder would oust jurisdiction of the court as to the other parties, the suit may proceed without him and the decree will not affect his interests. One who assigned his rights is not an indispensable party. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606. To a bill of review to vacate a decree in favor of a partnership where the partnership has been dissolved and one of the partners deceased, his administrators are substantial but not necessary parties and if not brought in because out of the jurisdiction the bill will not be dismissed but will proceed against the other partners. Perkins v. Hendryx, 149 F. 526.

63. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606. Those whose absence would prevent a determination consistent with equity and good conscience. Perkins v. Hendryx, 149 F. 526. Indispensable parties are those whose claims are so interwoven with those of other defendants that no decree could be made by the court without affecting their rights. A decree declaring complainant owner of certain lands and restraining others from asserting title does not affect the claims of still others against the property. North Carolina Min. Co. v. Westfeldt, 151 F. 290. Bill to enjoin operation of a railroad the terminus of which was at the sawmill of a compnay having an interest in the railroad's right of way. The company a necessary party. Arkansas S. E. R. Co. v. Union Sawmill Co. [C. C. A.] 154 F. 304. In a bill to declare the deed of an intestate a mortgage, his heirs are necessary parties. Wynn v. Fitzwater [Ala.] 44 So. 97. Necessary parties are all persons having a material interest in the litigation, or who are legally or beneficially interested in the subject-matter of the suit and whose rights or interests are sought to be concluded thereby. Id. Minors are necessary parties and must be specifically named as defendants and not as wards of a guardian named. Oneal v. Stimson, 61 W. Va. 551, 56 S. E. 889. Where heirs bring a bill to set aside a judgment recovered against an administratrix as such who has long since been discharged, she is not a necessary party. King v. Deckle [Fla.] 43 So 586. If parties will not be in any way affected by a decree, they are not necessary parties. Nichols v. Nichols, 79 Conn. 644, 66 A. 161.

want of jurisdiction over nonresident defendants who are necessary parties,[64] and it cannot be cured by dismissing the suit as to such parties;[65] but where the court has jurisdiction of the subject-matter and parties except such as are not indispensable, a bill may be dismissed as to the parties not indispensable and retained as to the others.[66] There must be a community of interests among defendants to warrant their being joined in a single suit in the absence of fraud.[67] The question of misjoinder of defendant can only be raised by the party claiming to be wrongfully joined.[68] The objection as to parties may be raised by demurrer,[69] but the court may notice without objection by demurrer the failure to join necessary parties,[70] and consideration of the question of misjoinder of parties and causes of action may properly be left to a final hearing and not be taken up on demurrer.[71] It is not misjoinder of parties to make two parties defendant who appear to have title to land in question despite the fact that the interests of one defendant are identical with that of the plaintiff.[72]

Bringing in new parties.[73]—It is sometimes necessary to amend a bill and bring in new parties.[74] A person summoned but not made a party to a bill becomes a party without amendment by appearing and demurring.[75]

Intervention.[76]—The right of intervention in equity proceedings is governed by the general rules of equity,[77] and to entitle a party to intervene he must appear to have a sufficient interest in the subject-matter of the suit,[78] and where intervention is attempted after hearing, the question of granting or refusing leave to do so is in the discretion of the court.[79] Parties cannot intervene and make charges making a

In a suit to recover profits made by one of three trustees, the others need not be joined where there is no claim that he shared the profits with the others. Bay State Gas Co. v. Rogers, 147 F. 557.

64. Jones v. Gould [C. C. A.] 149 F. 153.

65. Oneal v. Stimson, 61 W. Va. 551, 56 S. E. 889.

66. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

67. Accounting by stockholder, corporation president and secretary joined. Schell v Alston Mfg. Co., 149 F. 439.

68. Rensford v. Magnus & Co. [Ala.] 43 So. 853. Defendant cannot demur because other parties are improperly joined. Herman v. Essex County Chosen Freeholders [N. J. Eq.] 64 A. 742. In equity a defendant cannot demur merely because other parties are improperly joined as defendants, but such objection can only be made by defendants improperly joined as to whom bill will be dismissed on their demurrer or at hearing. Id.

69. Where an injunction is sought by a voluntary association, the bill being brought in the name of such association and not in the names of the members, the question of the capacity to sue in the associate name should be raised by demurrer or a motion to dissolve the injunction. Flannery v. People, 225 Ill. 62, 80 N. E. 60.

70. Wynn v. Fitzwater [Ala.] 44 So. 97.

71. Commonwealth of Virginia v. West Virginia, 206 U. S. 290, 51 Law. Ed. 1068.

72. Hudson v. Wright, 204 Mo. 412, 103 S. W. 8.

73. See 7 C. L. 1353.

74. On a petition for divorce where property rights are involved, it is necessary to bring in the heirs as parties if the husband dies. Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659. Where after the filing of a bill by a stockholder to enjoin the consolidation of two roads a preliminary injunction is denied and consolidation is effected, the bill cannot be preserved for granting other relief even if it states grounds therefor, unless other parties rendered necessary by the consolidation are brought in. Bonner v. Terre Haute & I. R. Co [C. C. A.] 151 F. 985. Assignee of a part interest of a cestui que trust without the consent of the assignor may maintain a suit to enforce an execution of the trust upon condition that other part owners are made parties, but the failure to join these parties who are not indispensable is curable by amendment bringing in other owners or showing an excuse for their absence. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F. 606.

75. Where a defendant not named in a bill is summoned in and appears and demurs to the allegations of the bill raising practically the same issue as the defendant named in the bill, the plaintiffs are not required to amend their bill in order to obtain a judgment upon that issue binding upon such defendant. Pinney v. Winsted, 79 Conn. 606, 66 A. 337.

76. See 7 C. L. 1353.

77. Day v. Bullen, 127 Ill. App. 155.

78. The interest which will entitle a party to intervene in equity must be in the subject-matter of the litigation, and such that he will either gain or lose by the direct legal operation and effect of the judgment. Day v. Bullen, 127 Ill. App. 155. Holder of bonds secured by deed of trust may intervene in suit to foreclose deed of trust. Parsons v. Little, 28 App. D. C. 218.

79. Whether or not after a cause has been taken under advisement leave should

new cause.[80] Other parties cannot complain that the intervention should have been by supplemental bill.[81]

§ 6. *Pleading. A. General rules.*[82]—Every intendment is to be taken against the pleader.[83] Questions not put in issue by the pleadings will not be considered.[84] A defendant is not entitled to further time to plead over where he has had an opportunity to plead twice and has been overruled and has argued his case in court and had judgment rendered against him.[85]

(§ 6) *B. Original bill, petition, or complaint.*[86]—All facts material to the plaintiff's case must be averred positively and with certainty.[87] The bill must formally, or in some plain, distinct way, makes parties plaintiff and defendant, otherwise it is fatally defective.[88] A bill should not join an action at law and in equity.[89] Where a bill is filed in two aspects, relief must be allowable of the same general character in each aspect.[90] A bill brought by a corporation and signed by counsel is sufficiently authenticated and need not be sealed by the corporate seal.[91] A party is not required to file with his bill the original papers which form the basis of his claim but may aver their contents and file copies as exhibits at his leisure.[92] Verification of a bill by one of several complainants is sufficient.[93] A bill to establish a vendor's lien for the price of land need not be verified.[94] Question of lack of proper verification cannot be raised for the first time on appeal.[95] Verification by one of several complainants is sufficient under Mass. Equity Rule 2.[96] The allegations of a bill are controlled by exhibits annexed thereto.[97]

Sufficiency of allegations.[98]—Every fact essential to entitle plaintiff to the relief which he seeks must be averred in his bill [99] positively and with certainty,[1] but

be granted a third party to intervene is within the discretion of the chancellor. Wills v. Babb, 123 Ill. App. 511.

80. Petition to intervene in a suit to enjoin holding an election, on the ground that bill was brought to delay by collusion of parties. Bush v. Ross [Miss.] 43 So. 70.

81. Fifth Congregational Church v. Bright, 28 App. D. C. 229.

82. See 7 C. L. 1354.

83. Plea of pendency of an action of forcible detainer to bill to quiet title. This involves only naked right of possession and pleader may be merely a tenant, hence the plea is insufficient. Engle v. Tennis Coal Co., 30 Ky. L. R. 1269, 101 S. W 309.

84. Bill for specific performance of an option. Defendant sought to avoid on ground of improper acknowledgment of option which was not set out in pleadings. Truslow v. Parkersburg Bridge & Terminal R. Co., 61 W. Va. 628, 57 S. E. 51.

85. Williams v. Clyatt [Fla.] 43 So. 441.

86. See 7 C. L. 1354.

87. Watkins v. Childs [Vt.] 66 A. 805.

88. Bill of partition against a guardian of minors not naming the minors as defendants or alleging their interest. Oneal v. Stimson, 61 W. Va. 551, 56 S. E. 889.

89. Bill to restrain issue of stock by directors and to recover a declared dividend was bad for misjoinder. Searles v. Gebbie, 115 App. Div. 778, 101 N. Y. S. 199.

90. Bill to charge the same debt on the same land against the same parties but by alternative rights. By a mortgage if valid, by a vendors' lien if invalid. No repugnancy. Winkleman v. White, 147 Ala. 481, 42 So. 411.

91. Washington Nat. Bldg. & Loan Ass'n v. Buser, 61 W. Va. 590, 57 S. E. 40.

92. Gaulley Coal Land Ass'n v. Spies, 61 W. Va. 19, 55 S. E. 903.

93. Bill to set aside probate decree. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 N. W. 187.

94. Shaw v. Tabor, 146 Mich. 544, 13 Det. Leg. N. 856, 109 N. W. 1046.

95, 96. First Baptist Soc. in Brookfield v. Dexter, 193 Mass. 187, 79 N. E. 342.

97. A bill to enjoin cutting of timber alleged a lease for 99 years and that the appraisal of the leasehold value was based on the quantity and quality of merchantable timber. The lease filed as an exhibit did not sustain this allegation. Held the lease must control with respect to the appraisal. Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290.

98. See 7 C. L. 1355.

99. Luther v. Luther, 216 Pa. 1, 64 A. 868.

Illustrations: Allegations of fraud in procuring contract sufficient to entitle plaintiff to a hearing. Garrett v. Finch [Va.] 57 S. E. 604. Allegations that defendant was claiming land and had cut and sold wood thereon at two different times and that he was insolvent did not state a case for equitable relief showing irreparable injury and was demurrable on the ground of adequate remedy at law. Bledsoe v. Robinett, 105 Va. 723, 54 S. E. 861. Allegations when considered with reference to certain plans held sufficient. Spalding v. Macomb & W. I. R. Co., 225 Ill. 585, 80 N. E. 327. Bill in equity seeking to set aside a decree rendered in another suit as a cloud on title which does not allege fraud in obtaining decree, or that complainant's title was equitable, or that the lands were wild or that he was in possession of them, shows no ground for equity. Ropes v. Goldman

an allegation of fact within the defendant's knowledge, of which discovery is sought, is sufficient though made on information and belief.[2] In suit against a fiduciary for an accounting, the plaintiff is not required to make allegations with the same certainty and definiteness as in other suits.[3] If the allegations set out the case intended to be made, with certainty, this is sufficient.[4] Where a complaint fails to state a cause cognizable in equity but the answer makes out a cause, equity acquires exclusive jurisdiction of the entire suit.[5] The allegations of the bill must show a prima facie case in support of complainant's claim,[6] and a prima facie case is sufficient to sustain jurisdiction in the absence of an answer or affidavit denying the averments of the bill.[7] It is better practice to aver the residence of parties and it is sometimes necessary to do so in order to show jurisdiction,[8] but where the complainant is within the jurisdiction of the court and the defendant appears unconditionally, the failure to aver residence of the parties is immaterial.[9] It is not necessary to state the age of the parties as they are presumed to be sui generis.[10] No matters should be alleged by way of recitation in a bill of complaint, which are not material, on which an issue can be made and evidence taken as essential to the cause of action.[11] An allegation made in an ambiguous or alternative form must be taken most strongly against the pleader.[12]

Multifariousness.[13]—There is no absolute standard by which to determine whether or not a bill is multifarious and it is impossible to state a rule applicable to all cases.[14] The question is largely within the discretion of the court and is dependent to a very considerable degree upon the particular facts of each case.[15]

[Fla.] 42 So. 322. Bill to quiet title contained allegations in substantial compliance with statute. North Carolina Min. Co. v. Westfeldt, 151 F. 290 To state a cause of action in equity it is necessary to allege such facts as would authorize a court in setting aside a written contract. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 S. W. 686. In a bill for relief against a judgment obtained by fraud, the allegations must show that the complainant has a meritorious defense. Steyermark v. Landan, 121 Mo. App. 402, 99 S. W. 41.

1. Watkins v. Childs [Vt.] 66 A. 805. It is incumbent upon a complainant to allege in his bill every fact clearly and definitely that is necessary to entitle him to relief, and if he omits essential facts therefrom or states such facts as show that he is not entitled to relief in a court of equity, he must suffer the consequences of his so doing. Facts entitling to relief not clearly stated. Weeks v. Turner Lumber Co. [Fla.] 44 So. 173.

2. Watkins v. Childs [Vt.] 66 A. 805. Less certainty is required concerning facts upon which a discovery is sought. Brown v. Pegram, 149 F. 515.

3. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 822, 103 N. Y. S. 840.

4. Brown v. Pegram, 149 F. 515. Where a bill to restrain collection by a judgment creditor against the judgment creditor and other defendants alleges facts showing the intimate connection of all defendants with a certain judgment, and he cannot know with a certainty who owns the beneficial interest therein, it is not essential that he should aver positively who is the owner of the beneficial interest. Brown v. Pegram, 149 F. 515.

5. No cause stated in complaint. Answer filed setting up tax title and possession thereunder and asking to have the same quieted. Burns v. McBeasley [Ark.] 98 S. W. 977.

6. In a suit to enjoin trespass the bill must show a prima facie case in support of title. Deed should be set out or possession shown. Bledsoe v. Robinett, 105 Va. 723, 54 S. E. 861. In assailing a prima facie right or title by a bill in equity, the plaintiff must aver and prove facts sufficient to overcome it. Ordinarily, otherwise he cannot put the defendant to the proof of a perfect indefeasible title or right. Bill to enjoin gas pipe line in street. Hardman v. Cabot, 60 W. Va. 644, 55 S. E. 756.

7. Spaulding v. Evenson, 149 F 913; Evenson v. Spaulding [C. C. A.] 150 F. 517.

8, 9. Not necessary where the subject-matter of the bill, land, is within the jurisdiction. City Loan & Banking Co. v. Poole [Ala.] 43 So. 13.

10. City Loan & Banking Co. v. Poole [Ala.] 43 So. 13.

11. Nature and value of complainant's business and properties in a suit to restrain simulation of complainant's business. Board of Trade of Chicago v. Kansas City, Mo., Natl. Board of Trade, 154 F. 238.

12. Suit to prevent sale under a power contained in an instrument described as "a mortgage or security deed." Baggett v. Edwards, 126 Ga. 463, 55 S. E. 250.

13. See 7 C. L. 1355.

14. Regester v. Regester, 104 Md. 359, 65 A. 12.

15. Horner-Gaylord Co. v. Miller, 147 F. 295. Bill to restrain the infringement of four distinct copyrights, the defendants being the same and the methods of infringement the same. Bracken v. Rosenthal, 151 F. 136. Accounting to determine balance

The essence of multifariousness is the improper blending of distinct demands or independent matters in one bill,[16] and it may consist of the misjoinder of parties[17] or causes of action[18] or both.[19] In cases involving the question of fraud a great latitude is allowed in pleading, provided one connected scheme to defraud be averred.[20] The combination of a legal and equitable demand in a bill does not ren-

due complainant in own name and as trustee. Commonwealth of Virginia v. West Virginia, 206 U. S. 290, 51 Law. Ed. 732.

16. There must be a community of interest in the subject-matter of the controversy or a common title from which all the separate claims and all the questions at issue arise. Bill by single plaintiff to eject several defendants from separate and distinct tracts of same piece of land. Illinois Steel Co. v. Schroeder [Wis.] 113 N. W. 51. The test must be applied to the facts of each particular case in the light of the general principles, regulating singleness in pleading, which forbid the blending in the same suit entirely distinct and separate matters relating to different parties. Regester v. Regester, 104 Md. 359, 65 A. 12. Claims are not separate and distinct where there is a common right to be established by several against one or more. White v. North Georgia Elec. Co. [Ga.] 58 S. E. 33.

17. Merritt v. Alabama Pyrites Co., 145 Ala. 252, 40 So. 1028.

Held not multifarious: Several parties not in privity may join in a bill to prevent an injury which would affect them all in the same manner, though not to the same degree. Encroachment of railroad on highway. Riley v. Pennsylvania Co., 32 Pa. Super. Ct. 579. A bill praying that a deed executed by the complainants be declared a mortgage where it appeared that title to different lots were in different complainants, but that the purchase was their joint money and that title was taken thus by agreement and all occupied the land as a homestead and all signed the said deed jointly, is not multifarious. Abercrombie v. Carpenter [Ala.] 43 So. 746. A bill is not multifarious which seeks to restrain the collection of a judgment and alleges various items of setoff against various original parties to the judgment who have assigned to the defendant. Brown v. Pegram, 149 F. 515. Bill to restrain several separate organizations of ticket scalpers from dealing in cut rate tickets is not multifarious. Pennsylvania Co. v. Bay, 150 F. 770. A bill to restrain operation of a railroad rate law was not multifarious because it joined the attorney general and the railroad and warehouse commission. Perkins v. Northern Pac. R. Co., 155 F. 445. A bill to recover a claim in complainant's own right and also as administrator against a partnership in which he was a partner is not multifarious. Strother's Adm'x v. Strother, 106 Va. 420, 56 S. E. 170. A bill for the appointment of a receiver to take charge of property fraudulently conveyed is not multifarious because many claimants were joined, they being the various alleged fraudulent transferees. Horner-Gaylord Co. v. Miller, 147 F. 295. A bill to remove administration of an estate from the probate to the chancery court is not multifarious because it joins defendant as administrator and personally. Rensford v. Magnus & Co. [Ala.] 43 So. 853.

18. **Held multifarious:** Bill to enforce certain contracts and to set aside others for the transfer of land. Cecil v. Karnes, 61 W. Va. 543, 56 S. E. 885. Father filed bill against children claiming money and real estate standing in deceased mother's name. Hutchinson v. Dennis, 217 Pa. 290, 66 A. 524. Bill sought to have a trust declared in land and to have alimony decreed to complainant. Prickett v. Prickett, 147 Ala. 494, 42 So. 408. Bill to restrain enforcement of several distinct contracts made by defendant with separate and distinct parties is multifarious. Williams v. Harper, 127 Ill. App. 619.

Held not multifarious: An action for an accounting by a president of property coming into his custody is a single cause of action. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 822, 103 N. Y. S. 840. A creditor's bill seeking to reach the property of a dissolved corporation and to have the stockholders make payment of amounts due on their subscriptions if necessary to pay debts is not multifarious, the object of the bill being to reach the corporate assets. Jahn v. Champagne Lumber Co., 147 F. 631. A bill by a corporation alleging conspiracy and praying the cancellation of notes and the return of a payment made by its secretary without its knowledge to his codefendants is not multifarious. A bill by a stockholder seeking distribution of assets and also to have two-thirds of the stock declared void is not multifarious. Wheeling Ice & Storage Co. v. Connor, 61 W. Va. 111, 55 S. E. 982; Central Land Co. v. Sullivan [Ala.] 44 So. 644.

19. Bill by a stockholder against a corporation and its president and secretary charged misconduct and prayed for an accounting, the reissue of smaller stock certificates, ratification of certain stock dividends, the issue of another stock dividend, an accounting of damages incurred, that complainant's stock be declared free of a lien, for an injunction from selling further stock, and that a receiver be appointed. Multifarious as to both subject-matter and parties. Schell v. Alston Mfg. Co., 149 F. 439. Where there are two distinct claims, one of which interests some of the plaintiffs and some of the defendants to the exclusion of the others, and the other claim involves the remaining plaintiffs and defendants but not those interested in the first claim, the bill is multifarious. White v. North Georgia Elec. Co. [Ga.] 58 S. E. 33. A bill having three distinct grievances against two railroad companies may be multifarious. Alabama Great So. R. Co. v. Prouty [Ala.] 43 So. 352.

20. Bill to cancel contract for fraud. Garrett v. Finch [Va.] 57 S. E. 604. A series of acts involving different conveyances and fraudulent judgments made to different parties at different times may properly be the subject of one bill to reach the property for creditors providing only that it is al-

der it multifarious unless the causes of action are wholly distinct and each one is sufficient as stated in the bill.[21] Where a bill charges all the defendants with responsibility for all alleged improper acts, it is not multifarious.[22] Causes of action between complainant and defendant arising out of the same instrument may be dealt with in one suit.[23] It is not indispensable that all the defendants should have an interest in all the matters in litigation.[24] The mere fact that part of the relief sought is not appropriate does not render a bill multifarious.[25] Where a bill was multifarious for joining two distinct parties but was dismissed as against one by consent, it was relieved of the defect of multifariousness.[26] Where a demurrer to a bill on the ground of multifariousness is sustained, the bill is dismissed without opportunity to amend.[27] A hearing on the merits waives multifariousness,[28] and so does consent to the issuance of a preliminary injunction.[29]

Prayer.[30]—A party seeking equitable relief must specifically demand it unless the nature of the cause itself indicates that the relief sought is equitable.[31] Prayers for relief must be supported by allegations averring the necessity therefor,[32] and prayer for improper relief does not deprive the court of jurisdiction to grant other relief properly prayed.[33] In a case of doubt a complainant may so frame his bill as to entitle him to an alternative prayer for relief.[34]

(§ 6) *C. Amended and supplemental bills, complaints, or petitions.*[35]—Bills may be amended and the allowance of such amendment is within the discretion of the court,[36] and a decree will not be set aside for refusal of an amendment unless it

leged that the same was done pursuant to a single and forbidden scheme. Wright v. Simon, 118 App. Div. 774, 103 N. Y. S. 911. A bill is not multifarious which joins a corporation, its stockholders, and other parties to a fraudulent sale where conspiracy is alleged. Andrews Co. v. National Bk. of Columbus [Ga.] 58 S. E. 633. Execution returned nulla bona, bill brought to set aside transfers as fraudulent. Regester v. Regester, 104 Md. 359, 65 A. 12. Bill for rescission of a lease alleged that complainant had been induced to contract by fraudulent representations, warranties, and statements of the lessors and their agents, and that he would not have contracted but for his faith in these representations. Garrett v. Finch [Va.] 57 S. E. 604.

21. Claim of complainant in his own right and as administrator against a partnership of which he is a member. Strother's Adm'x v. Strother, 106 Va. 420, 56 S. E. 170.

22. Board of directors was made up of same body of men during entire time when different alleged improper acts were performed. Murphy v. Penniman [Md.] 66 A. 282.

23. Asbury Park & S. G. R. Co v. Neptune Tp. Committee [N. J. Eq.] 67 A. 790.

24. Bill to restrain judgment creditor alleging various items of set-off against the various original judgment creditors who have all assigned to one. Brown v. Pegram, 149 F. 515. Bill to reach property fraudulently conveyed joined with the debtor a number of grantees to whom separate parts of is property had been transferred. Regester v. Regester, 104 Md. 359, 65 A. 12.

25. Andrews Co. v. National Bk. of Columbus [Ga.] 58 S. E. 633. An averment of the general liability of a city upon bonds in connection with an equitable cause created by statute does not render the bill multifarious, for if a good equitable cause of action has been stated in the bill no error of judgment in framing a prayer which confuses legal distinction will conclude the court. Olmstead v. Superior, 155 F. 172.

26. Alabama Great So. R. Co. v. Prouty [Ala.] 43 So. 352.

27. Cecil v. Karne, 61 W. Va. 543, 56 S. E. 885. A multifarious bill is demurrable and it is error to grant the relief prayed after such objection. White v. North Georgia Elec. Co. [Ga.] 58 S. E. 33.

28. Allegations of trespass and nuisance. Vaughan v. Bridgham, 193 Mass. 392, 79 N. E. 739.

29. Bill to restrain ticket scalpers from fraudulently trading in nontransferable excursion tickets. Pennsylvania Co. v. Bay. 150 F. 770.

30. See 7 C. L. 1357.

31. A prayer in a bill by a distributee against an administrator for a determination of his distributive share justifies a decree for the payment of the amount when ascertained. Van Dyke v. Van Dyke [N. J. Eq.] 65 A. 215.

32. A prayer for damages where the bill contained no allegations of damage is insufficient to enable a complainant to recover the same. Barnes v. Roy, 27 R. I. 534, 65 A. 277.

33. Graithwaite v. Henneberry, 124 Ill. App. 407.

34. He cannot, however, recognize and approve a transaction and pray for its enforcement and at the same time repudiate it and ask to have it set aside for fraud, especially where he does not specify any act or fraud vitiating it. Cella v. Brown [C. C. A.] 144 F. 742.

35. See 7 C. L. 1358.

36. Scheuer v. Chloupek, 130 Wis. 72, 109 N. W. 1035. Bill to quiet title failed to aver no other suit pending. Court allowed 20 days within which to amend. Corona Coal & Iron

clearly appears that such discretion was abused.[37] Amendments may be allowed at almost any stage of the proceeding,[38] and in Maryland either party in equity upon application to the court has the right to amend the pleadings at any time before final decree, upon a payment of such costs as the court may direct, so as to bring the merits of the controversy fairly to trial.[39] Amendments, however, to the substance of the bill itself or for putting new matter in issue to meet allegations in the answer will not be allowed.[40] Plaintiff may amend his bill so that he may obtain complete relief [41] so that his pleading will conform to his proof [42] to meet a defense pleaded,[43] to acquire jurisdiction,[44] to make the bill coincide with an exhibit,[45] to bring in new parties.[46] Where an amended bill strikes out before answer all averments of the original bill, no matter contained in the original bill is before the court.[47] When, on a motion to dismiss, it appears from the bill that amendments can be made which would entitle the complainant to relief, such amendments will be considered as made and the motion be denied,[48] but such amendments when made should not have to contain new and independent facts.[49] Where, however, a

Co. v. Swindle [Ala.] 44 So. 549. Where none of the claims in a bill for title to real estate have been sustained by the evidence, an amendment asking that an agreement be treated as a mortgage and that the complainant be allowed to redeem it after the debts it was given to secure have been barred by the statute of limitations is properly refused. McKenna v. Houlihan [R. I.] 66 A 834.

37. Refusal of amendment after trial when necessity of amendment was pointed out at commencement thereof. Scheuer v. Chloupek, 130 Wis. 72, 109 N. W. 1035.

38. Amendment after evidence all in. Filston Farm Co. v. Henderson & Co. [Md.] 67 A. 228. Original bill for an injunction at time of hearing of prayer for preliminary injunction presented only a cause of action at law, and complainant was allowed an amendment supplying the necessary allegations. Spaulding v. Evenson, 149 F. 913; Evenson v. Spaulding [C. C. A.] F. 517. After demurrer to the whole bill has been sustained. Scoville v. Brock, 79 Vt. 449, 65 A. 577.

39. Amendment to a bill to enforce mechanics' lien making specific the vague and general allegations allowed after the taking of testimony. Filston Farm Co. v. Henderson & Co. [Md.] 67 A. 228.

40. Complaint for infringement of patent in Eastern dist. of New York. Plaintiff after appearance and answer sought to amend its bill by alleging infringement elsewhere in the United States. Western Wheeled Scraper Co. v. Gahagan, 152 F. 648.

41. Plaintiff may amend his bill by filing additional counts necessary to determine his rights at law. City of Manchester v. Hodge, 73 N. H. 617, 64 A. 23.

42. Where a bill against a former administrator and his wife of an estate is based on the theory that such administrator abstracted $20,000 from the estate which was used by his wife in buying two mortgages of $10,000 each, and the evidence showed that only $15,000 of this money was used in buying the mortgages, the other $5,000 being used for other purposes, the plaintiff was entitled to amend his bill in such a way as to claim alternative relief against the defendants for the $5,000 to be enforced against the interest of the wife in the mortgage represented by the borrowed money she had paid therefor. Sargent v. Wood [Mass.] 81 N. E. 901. Federal courts sitting in equity always have the power to permit amendments of the pleadings to conform them to the proof after the hearing. Bankruptcy petition. In re Broadway Sav. Trust Co. [C. C. A.] 152 F. 152.

43. Where a discharge in bankruptcy is pleaded to a bill, it is properly met by an amendment stating facts to which bankruptcy is no bar. Judgment recovered more than four months prior to filing of petition. Brunson v. Rosenheim [Ala.] 43 So. 31.

44. Amendments to a bill on the hearing for a preliminary injunction may be made before answer and demurrer under equity rule 28. Amendment alleging a threatened continuance of acts to be enjoined, also an amendment joining further defendants. Evenson v. Spaulding [C. C. A.] 150 F. 517. Whether an original bill contained equity is not material under an inquiry to determine whether an amendment constitutes a departure. Alabama Terminal & Imp. Co. v. Hall [Ala.] 44 So. 592. After a demurrer to the whole bill has been sustained. Scoville v. Brock, 79 Vt. 449, 65 A. 577.

45. An exhibit is part of a bill and in the case of a discrepancy between the two the court may go by the exhibit and allow an amendment to the bill. Bill stated judgment rendered Sept. 23, 1905, and execution thereon Dec. 4, 1905. Judgment annexed to bill showed it was issued Oct. 18, 1905, and execution issued Dec. 6, 1905. Richardson v. Ebert, 61 W. Va. 523, 56 S. E. 887.

46. See § 5 supra, Bringing In New Parties.

47. Where original bill set out a will and amended bill set out a new theory of recovery and an amendment thereto specifically abandoned all allegations of original bill, the will was not before the court. Johnson v. Potterfield [Ala.] 43 So. 228.

48. Merritt v. Alabama Pyrites Co., 145 Ala. 252, 40 So. 1028.

49. On a motion to dismiss for laches, an amendment showing infancy of complainants will not be presumed. Savage v. Bradley [Ala.] 43 So. 20.

demurrer to a multifarious bill is sustained, the bill is dismissed without an opportunity to amend.[50] An amendment must be restricted to the matter allowed in an order granting leave to amend.[51] Parties who have appeared in a suit in equity have a reasonable time to demur or answer an amended pleading.[52] An amendment to a bill in a Federal court does not entitle a defendant who has answered the original bill to demur, plead, or answer anew to the entire bill,[53] but where a party fails to appear and answer within the time limited, he waives his rights and is not entitled to notice of amendments unless the substance of the original petition has been radically changed, in which case equity might grant an opportunity to answer the amended bill.[54] A complaint which is sworn to may be amended to include subjects appearing to be germane when the amendment is accompanied by an affidavit excusing the failure to include the matter in the original bill, and when such amendment is necessary to make the pleading sufficient in furtherance of justice.[55] The refusal to allow such amendments is an abuse of discretion which may be reviewed on appeal.[56] Statutes provide in some states for amendments as a matter of right before final decree, subject only to the limitation that the amendment shall not entirely change the parties or cause of action.[57] Under Federal court practice the defendant cannot require the complainant to amend his bill.[58]

A supplemental bill[59] is proper where it is necessary to bring in matters arising pending the suit,[60] even though it turns the action into one for damages.[61] Discovery may be had on a supplemental bill if the facts are material and incidental to relief sought and within defendant's knowledge.[62] Where the demurrer to an entire bill has been sustained and the complaint amends, the defendant is entitled to answer anew and waive answer to the original bill.[63]

(§ 6) *D. Cross bill or petition.*[64]—A cross bill is a bill filed by the defendant against other parties touching the subject-matter of the original bill.[65] A defendant

50. Cecil v. Karnes, 61 W. Va. 543, 56 S. E. 885.

51. Under an order granting leave to amend a bill so as to excuse delay, an amendment strengthening the original allegations of the bill is not permissible. Stevenson v. Markley [N. J. Eq.] 66 A. 185.

52. Amended bankruptcy petition. In re Broadway Sav. Trust Co. [C. C. A.] 152 F. 152.

53. Bill amended joining a new defendant. North Chicago St. R. Co. v. Chicago Union Trac. Co., 150 F. 612.

54. Petition in bankruptcy. In re Broadway Sav. Trust Co. [C. C. A.] 152 F. 152.

55. Bill to restrain closing of entrance to cemetery. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914.

56. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914.

57. New parties and new matter necessary to a complete determination may be introduced or different relief prayed for. Alabama Terminal & Imp. Co. v. Hall [Ala.] 44 So. 592. Code 1899, § 12, c. 125. Suit to cancel stock subscription for fraud. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

58. Motion that complainants annex an agreement set out in the bill. North Chicago St. R. Co. v. Chicago Union Trac. Co., 150 F. 612.

59. See 7 C. L. 1359.

60. A supplemental bill is usually brought because of some change in the rights or status of the parties which must be brought in and which could have been covered by an amendment to the original bill. Bill to restrain enforcement of passenger rate law. While pending another statute was passed and was properly introduced by a supplemental bill. St. Louis & S. F. R. Co. v. Hadley, 155 F. 220. Where equity had jurisdiction to enforce a lien for taxes, complainant might file a supplemental bill to recover for taxes and interest the claim for which accrued after filing original bill. Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 14 Det. Leg. 47, 111 N. W. 177. Dissolution of partnership and accounting. Napier v. Westerhoff, 153 F. 985.

61. A plaintiff who has filed a bill to enjoin the sale of lands under an execution obtained by fraud, and a preliminary injunction having been refused has paid the execution to prevent a sale, may file a supplemental bill alleging such payment and pray for damages in lieu of an injunction. Everett v. Tabor, 127 Ga. 103, 56 S. E. 123.

62. Napier v. Westerhoff, 153 F. 985.

63. Scoville v. Brock, 79 Vt. 449, 65 A. 577.

64. See 7 C. L. 1359.

65. Where a defendant has equities arising out of the subject-matter of litigation which entitle him to affirmative relief against other parties thereto, he may as a matter of right present such equities by way of crossbills. Venner v. Denver Union Water Co. [Colo.] 90 P. 623. Where a defendant in a suit for an accounting, etc., under an oil lease answers and files a cross bill alleging that others made claim to the oil lands and praying that their rights

may file a cross bill against a co-defendant [66] and, while a cross bill filed against a co-defendant must rest on considerations of equity, a different and more liberal rule applies when the cross bill is filed against the complainant.[67] To grant or refuse permission to file a cross bill [68] and the time for filing the same are matters within the discretion of the court,[69] and, unless it affirmatively appears that the party against whom the bill was filed was prejudiced by reason of its being filed at the time it was, the discretion of the court will not be disturbed.[70] Cross bill should not introduce new and distinct matters [71] or new parties.[72] Although the general rule is that a defendant is entitled to no affirmative relief without a cross bill,[73] yet a cross bill is not entertained when the party filing it can obtain the full relief to which he is entitled in the original suit.[74] A cross bill for affirmative relief must contain within itself sufficient averments to entitle the cross complainant to the relief asked for, or for some equitable relief.[75] A cross bill must not be founded solely on matters which can properly be availed of by way of answer.[76] The dismissal of the original bill generally carries with it the cross bill, and this is especially true when the subject-matter is simply defensive.[77] The court may strike out part of a

be determined by the court, and such defendants appeared, the bill filed by the original defendant was not a bill of interpleader but a cross bill setting up matters necessary to be determined as preliminary to a decision on the original bill. Robinson v. Brast [C. C. A.] 149 F. 149. Where a complaint is brought upon an ordinance granting a location of tracts upon payment of certain sums, but no reference to compensation is made in the original bill, a cross bill asking for an accounting may be filed and is not subject to the objection that it introduces new matter not within the scope of the original suit. Asbury Park & S. G. R. Co. v. Neptune Tp. Committee [N. J. Eq.] 67 A. 790.

66. Miller v. Rickey, 146 F. 574.

67. Cross bill praying for an accounting. Asbury Park & S. G. R. Co. v. Neptune Tp. Committee [N. J. Eq.] 67 A. 790.

68. Where five years after bill was filed and after hearing and finding the defendants filed a petition for leave to file a cross bill, it was proper to deny it. Huff v. Bidwell [C. C. A.] 151 F. 563.

69. Venner v. Denver Union Water Co. [Colo.] 90 P. 623. Cross bills are not favored after the merits of original bill have been passed on. Huff v. Bidwell [C. C. A.] 151 F. 563.

70. Venner v. Denver Union Water Co [Colo.] 90 P. 623.

71. Venner v. Denver Union Water Co. [Colo.] 90 P. 623; Cecil v. Karnes, 61 W. Va. 543, 56 S. E. 885. Bill to remove obstructions in a private way which plaintiff entitled to use. Defendant could not file a cross bill praying removal by plaintiff of obstructions in another part. Peters v. Case [W. Va.] 57 S. E. 733. In a suit to quiet title to an alleged appropriation of a water right, a cross bill claiming priority might be filed by one defendant against a codefendant. Rickey Land & Cattle Co. v. Wood [C. C. A.] 152 F. 22. In foreclosure proceedings a cross bill by one defendant against another for professional services is not related to the subject-matter of the suit, and cannot be maintained. Novak v. Novak [Iowa] 111 N. W. 10. Third parties and codefendants can only be brought in where the cause of action affects the subject-matter of the principal action. By statute, § 6088, Kirby's Digest. Bill to quiet title. Defendants sought by cross bill to recover other lands in hands of other persons. Naler v. Ballew [Ark.] 99 S. W. 72.

72. New parties cannot be introduced into a cause by cross bill. Newton v. Gage, 155 F. 598. A cross bill is bad which sets up matter necessary to a complete determination of the cause, but yet goes further and brings in new parties with distinct interests and an independent contract on which a separate suit for specific performance could be maintained. Cecil v. Karnes, 61 W. Va. 543, 56 S. E. 885.

73. Winkleman v. White, 147 Ala. 481, 42 So. 411; Downes v. Worch [R. I.] 65 A. 603; Rosenbleet v. Rosenbleet, 122 Ill. App. 408 Upon a bill for an injunction, affirmative relief by way of foreclosure should not be granted to a defendant upon an answer in the absence of a cross bill. Smith v. Connor [Fla.] 44 So. 340.

74. Foreclosure suit by holder of two of several notes secured by a mortgage. Affirmative relief may be decreed to defendants holding other notes without cross bill. Winkleman v. White, 147 Ala. 481, 42 So. 401. A cross bill is not necessary in a bill for an accounting, for it is implied that there is an uncertain balance to be determined which the plaintiff will pay if it is found to be against him. Downes v. Worch [R. I.] 65 A. 603. Where defendant who is merely a nominal party and against whom no relief is prayed, files a cross bill, and if a decree is rendered on the original bill he will get all the relief he is entitled to, it is proper to dismiss the cross bill. Dunbar v. American Tel. & T. Co, 224 Ill. 9, 79 N. E. 423.

75. Miller v. Rickey, 146 F. 574.

76. In a suit to enjoin diversion of water, a cross bill merely alleging priority in the defendant and diversion by complainant, and praying affirmative relief, sets up only matter of defense which may properly be taken by answer, and is demurrable. Miller v. Rickey, 146 F. 574.

77. Spies v. Arvondale & Co. R. Co., 60 W. Va. 389, 55 S. E. 464.

cross complaint which is bad.[78] To go to trial without answering a cross complaint is an election to treat the allegations of the cross complaint as issues in the case,[79] and the failure to answer is waived by going to trial without objection.[80] A demurrer is the appropriate form of objection to an answer in the nature of a cross bill setting up new matter.[81]

(§ 6) *E. Demurrer. Grounds.*[82]—A demurrer lies for defects and objections appearing on the face of the pleading,[83] such as laches,[84] multifariousness,[85] lack of jurisdiction of the parties,[86] or incapacity of parties,[87] an answer in the nature of a cross bill setting up new matter.[88] A demurrer will not lie where fraud is sufficiently alleged with proper parties,[89] nor for failure to state the age of parties in the bill except when it shows incapacity of the parties to sue or be sued,[90] or because complainant has not filed original papers which form the basis of his suit.[91]

Form.[92]—A demurrer must not introduce contrary or additional averments to those alleged in the bill. Such a demurrer is known as a "speaking demurrer" and will be overruled.[92] Two or more parties desiring to demur separately to the same pleading on the same ground may unite in the same paper.[94]

Effect of, and procedure on, demurrer.[95]—A demurrer admits the truth of the material facts of the bill, but denies that they are sufficient to authorize the relief prayed for,[96] and it also admits all facts that can be implied from the allegations by reasonable intendment,[97] but it admits only facts well pleaded.[98] Where facts are alleged on information and belief, a demurrer merely admits the information and belief, and not the facts,[99] but if the allegation based on information and belief is an allegation which according to the rules of equity may be properly charged, it is admitted by demurrer.[1] A demurrer does not admit an allegation of lack of signature to a certain notice where such notice is annexed to and made a part of the bill

78. Naler v. Ballew [Ark.] 99 S. W. 72.

79, 80. Updegraff v. Marked Tree Lumber Co. [Ark.] 103 S. W. 606.

81. Peters v. Case [W. Va.] 57 S. E. 733.

82. See 7 C. L. 1361.

83. Alabama Great So. R. Co. v. Prouty [Ala.] 43 So. 352; King v. Deckle [Fla.] 43 So. 586; Elliott v. Clark [Cal. App.] 89 P. 455; Prickett v. Prickett, 147 Ala. 494, 42 So. 408. Demurrer to bill raises question whether under its allegations complainant is entitled to any relief. Braithwaite v. Henneberry, 124 Ill. App. 407.

84. Where cause of action arose in 1889 and bill was filed stating that the complainants were minors in 1889, but not stating when disability ceased, laches is so questionable that it cannot be properly determined on a general demurrer. King v. Deckle [Fla.] 43 So. 586. Objection to relief prayed for on the ground of laches may be considered on demurrer. McNicholas v. Tinsler, 127 Ill. App. 381. Bill to establish a trust and for an accounting brought in forty-six years after alleged trust created. Elliott v. Clark [Cal. App.] 89 P. 455.

85. Alabama Great So. R. Co. v. Prouty [Ala.] 43 So. 352.

86. Where it affirmatively appears on the face of the bill that the respondent is sued out of the county of his residence, it is demurrable. Prickett v. Prickett, 147 Ala. 494, 42 So. 408.

87. City Loan & Banking Co. v. Poole [Ala.] 43 So. 13.

88. Peters v. Case [W. Va.] 57 S. E. 733.

89. Conspiracy to defraud. Wheeling Ice & Storage Co. v. Connor, 61 W. Va. 111, 55 S. E. 982.

90. City Loan & Building Co. v. Poole [Ala.] 43 So. 13.

91. Gaulley Coal Land Ass'n v. Spies, 61 W. Va. 19, 55 S. E. 903.

92. See 7 C. L. 1362.

93. Demurrer averred a judgment of all questions raised by bill. Pew v. Minor, 216 Pa. 343, 65 A. 787.

94. Each separately and severally demurs, etc. Whitesell v. Strickler, 167 Ind. 602, 78 NE 845.

95. See 7 C. L. 1362.

96. Pew v. Minor, 216 Pa. 343, 65 A. 787; Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. S. 571. Where a bill avers that plaintiff is the legal guardian of a minor and files his order of appointment, a demurrer on the ground that the bill does not show that the guardian was properly appointed will be dismissed, for it admits that he is the legal guardian, and though the order does not fully prove appointment, yet it does not contradict the averment of the bill which is admitted as true. Wells v. Simmons, 61 W. Va. 105, 55 S. E. 990. The demurrer admits all material allegations of the bill which are well pleaded. Eisendrath Co. v. Gebhardt, 124 Ill. App. 325.

97. Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. S. 751.

98, 99. Watkins v. Childs [Vt.] 66 A. 805.

1. Allegation of removal of boundary stakes by defendant, in an action to determine a boundary, is admitted by demurrer. Watkins v. Childs [Vt.] 66 A. 805.

and is there shown to be signed as a matter of fact.[2] A general demurrer goes to the whole bill[3] and will be overruled if, upon the whole bill, the complainant is entitled to any equitable relief.[4] General demurrers are not favored when interposed to a bill charging fraud and conspiracy.[5] Where a bill is good in part and bad in part, the demurrer should not be to the whole bill but should specify what is alleged to be bad,[6] and, where questions of great importance are presented, the court will give allegations a liberal construction.[7] A bill is properly dismissed upon demurrer which fails to show that the complainant is entitled to relief,[8] and the entire case is, strictly speaking, out of court; but by rules of court it is now generally established that the court will permit the orator to make out a new case by amending his bill,[9] in which case the defendant is entitled to answer anew and waive answer to the original bill.[10] As a general rule a plea or answer to the whole or part of a bill, the whole of which is demurred to, overrules the demurrer.[11] Where a demurrer has been filed but no mention is made thereof in the final decree, it will be treated as having been overruled,[12] and where a demurrer is not expressly passed upon, but hearing is had on the demurrer and the relief prayed for is granted, the demurrer is impliedly overruled.[13] Where upon appeal a demurrer is sustained, the bill fails and all subsequent proceedings go with it.[14] Where a demurrer to a bill is joint and several, it may be good as to one and bad as to the other,[15] but where it is joint it must be good as to each of them.[16] Allowance of right to answer over an overruling of demurrer rests in discretion.[17] A demurrer may be amended.[18] Where a joint demurrer is overruled, an appeal by one defendant is irregular, for appeal should be taken in the name of both defendants;[19] such irregularity is waived

2. Williams v. Olson, 141 Mich. 580, 12 Det Leg. N. 560, 104 N. W. 1101.

3. Murphy v. Penniman [Md.] 66 A. 282. Where the pertinent fact in a bill of complaint raises a doubt as to the complainant's right to relief, a general specification of a want of equity in a demurrer is sufficient. Bill to restrain action at law to recover under devise in a will. Steelman v. Wheaton [N. J. Eq.] 66 A. 195

4. Where a bill is demurred to generally, the bill will be sustained if it is possible from the charges contained in it to spell out an equity in favor of the complainant. Bill ambiguous as to fraud charged. Mazzolla v. Wilkie [N. J. Eq.] 66 A. 584. Not all proper parties joined Watkins v. Childs [Vt.] 66 A. 805. When the validity of a pleading is challenged by demurrer as not stating facts sufficient to constitute a cause of action, all facts stated will be held true, and the bill will also be held to state all facts that can be implied from the allegations by reasonable intendment. Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. S. 571. Where bills present questions of great importance, the court will give allegations a liberal construction in ruling upon demurrer. Reasonableness of railroad rates Houston & T. C. R. Co. v. Storey, 149 F. 499. Demurrers to the whole bill cannot be sustained if there be sufficient in the whole bill to require an answer, although some parts may be defective. Uncertain and conflicting allegations. Murphy v. Penniman [N. J.] 66 A. 282. A general demurrer to the whole bill will not be sustained where the bill contains matters triable by a court of equity and others triable by a court of law. Id.

5. Jahn v. Champagne Lumber Co., 147 F. 631.

6. Bill contained matter of law and of equity. Murphy v. Penniman [Md.] 66 A. 282. Where a demurrer goes to only one paragraph of a bill, but seeks to object to the whole bill, it will be overruled. Southern R. Co. v. Hayes [Ala.] 43 So. 487.

7. Railroad rate law. Houston & T. C. R. Co. v. Storey, 149 F. 499.

8. Morgan v. Jones [Fla.] 42 So. 242.

9, 10. Scoville v. Brock, 79 Vt. 449, 65 A. 577.

11. Where demurrer to whole bill in equity prays judgment in usual form whether defendant should be required to answer, demurrer is waived by answer to whole matter demurred to. McDevitt v. Connell [N. J. Eq.] 63 A. 504. In the Federal courts a defendant cannot demur to a whole bill and at the same time answer the entire bill (Bryant Bros. Co. v. Robinson [C. C. A.] 149 F. 321), and if such pleadings are filed, the effect of the answer is to overrule the demurrer (Id.).

12. Cecil v. Karnes, 61 W. Va. 543, 56 S. E. 885.

13. Bledsoe v. Robinett, 105 Va. 723, 54 S. E. 861.

14. Can be no decree without proper pleadings. Cecil v. Karnes, 61 W. Va. 543, 56 S. E. 885.

15, 16. Taylor v. Mathews [Fla.] 44 So. 146.

17. Vanek v. Senft, 124 Ill. App. 573.

18. Where a defendant demurs to a petition, but dies before the expiration of the time within which he may demur, his administrator is entitled to such time as is equal to the balance of the time remaining at his death, and may amend the demurrer within such time. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81.

19, 20. Rensford v. Magnus & Co. [Ala.] 43 So. 853.

by the joinder in error of the plaintiff on the record.[20] No ground for demurrer can be considered on appeal which was not assigned in the trial court unless the trial court was without jurisdiction.[21]

(§ 6) *F. Plea.*[22]—The object of a plea is to reduce the cause to a single point,[23] and a plea setting up more than one defense is bad for duplicity.[24] A negative plea denies some material allegation in the bill, and the burden is on the complainant.[25] An affirmative plea is one that sets up some matter dehors the bill, and the burden is on the defendant.[26] Some of the matters which may be made the subject of pleas are incapacity of the complainant to sue,[27] another suit pending,[28] laches.[29] A plea to a bill which states the existence of a certain statute allowing acts complained of in the bill, but which fails to state that the defendant acted pursuant thereto, states no justification under the statute.[30] To contest the sufficiency of a plea, the cause must be set down for a hearing on bill and plea. This operates as a demurrer to the plea.[31] At a hearing upon plea and general replication, no fact is in issue but the truth of the matter pleaded.[32] Matters which have been adjudged on a plea not to constitute a defense cannot be again set up in the answer.[33] Defendants are entitled to answer over where their plea is based on a statute which was repealed pending suit.[34] Where by statute all matters of defense may be incorporated in the answer and no special pleading is required, yet to entitle the defendant to dismissal on account of a plea not set down for a hearing, but fully proved by the evidence, the plea must have been set up independently or incorporated in the answer as a plea.[35] But if the plea is sufficient as a defense in the matter set up in it, the plaintiff may then take issue on the plea or set up matter in evidence, which latter is accomplished by an appropriate amendment to the bill.[36] When a plea is filed, the same may be set down on hearing on its sufficiency in law as a defense.[37] If this is not done and issue is taken on the plea which is sustained by the evidence, the defendant is entitled to a decree although the matter set up is immaterial.[38]

(§ 6) *G. Answer.*[39]—Answer must be at appearance term unless the rules permit answer at a later day.[40] Where a defendant fails to answer a petition, allega-

21. Strother's Adm'x v. Strother, 106 Va 420, 56 S. E. 170.

22. See 7 C. L. 1364.

23. Complaint alleged that defendant made and sold an infringement of a patent. Plea denied existence of letters patent. Schnauffer v. Aste, 148 F. 867.

24. Creditor's bill against two stockholders of a dissolved corporation. Plea set up other stockholders, and that assignment of cause of action to complainant was speculative. Jahn v. Champagne Lumber Co., 152 F. 669.

25, 26. Bill said acts were done in U. S. and foreign countries. Plea that acts were done in foreign countries only. Vacuum Oil Co. v. Eagle Oil Co., 154 F. 867.

27. City Loan & Banking Co. v. Poole [Ala.] 43 So. 13.

28. Unless the record shows the pendency of another suit for the same matter, the plea must be overruled. Van Houten v. Stevenson, 68 N. J. Eq. 490, 64 A. 1058. If the plea does not expressly aver that the suits are for the same subject, it must specifically state the facts indicating it. Id., 69 N. J. Eq. 626, 64 A. 1094. A bill quia timet brought under the provision of statute to quiet title is not barred by a plea of the pendency of an action of forcible detainer. Under the **Kentucky** statute a person having title and possession of land may sue in equity to quiet title, notwithstanding the pendency of an action of forcible entry and detainer brought by the defendant against him. Engle v. Tennis Coal Co., 30 Ky. L. R. 1269, 101 S. W. 309.

29. See §3, supra.

30. Barnes v. Roy, 27 R. I. 534, 65 A. 277.

31. Schoettle v. Hengen [N. J. Eq.] 66 A. 922. By setting down a plea for argument, the complainant admits the facts therein pleaded. Schnauffer v. Aste, 148 F. 867.

32. Vacuum Oil Co. v. Eagle Oil Co., 154 F. 867.

33. Miller v. Rickey, 146 F. 574.

34. Bill to enjoin. Barnes v. Roy, 27 R. I. 534, 65 A. 277.

35. A defense of discharge in bankruptcy set up in the answer concluding with the statement that it was a plea in bar does not constitute a plea in form incorporated in the answer. Brunson v. Rosenheim [Ala.] 43 So. 31.

36. Plea of bankruptcy. Amendment that judgment sued on obtained more than four months prior to filing of petition. Brunson v. Rosenheim [Ala.] 43 So. 31.

37, 38. Brunson v. Rosenheim [Ala.] 43 So. 31.

39. See 7 C. L. 1365.

40. Parties not served, summoned, or notified cannot avail themselves of the provisions

tions as to him stand as confessed by him.[41] Amendments to answers may be allowed in the discretion of the court which is not reviewable in the absence of a showing of its abuse,[42] but after issue made and trial had thereon, defendant cannot file an amended answer asserting an inconsistent claim.[43] An answer is not impertinent if it be relevant or can have any influence in the decisionn of the suit either as to subject-matter, relief, or costs.[44] Where a bill alleges unnecessary facts tending to reflect upon defendant's integrity, an answer responsive thereto is not impertinent.[45] A prima facie case is sufficient to sustain jurisdiction in the absence of an answer or affidavit denying the averments of the bill.[46] Where a court has no jurisdiction to entertain a bill, no relief can be given upon an answer asking for affirmative relief.[47] Where exceptions are filed to the defendant's answer some of which are good and some bad, and the result of sustaining such as are good would leave the answer in a disjointed condition, the defendant will be required to file a new answer.[48] Where complainant is permitted to amend his bill the defendant is entitled to answer anew and waive answer to the original bill.[49] Setting a cause down for hearing on bill and answer admits all allegations in the answer and waives all informalities.[50]

Verification.[51]—Where the answer to a bill need not be under oath, it is not demurrable.[52] An answer, although in the nature of a cross bill, need not be signed by the defendant personally when an answer on oath is waived in the bill under Chancery Rules 1a, 10e.[53]

Effect of answer.[54]—All allegations of the bill properly pleaded and not denied by the answer are admitted,[55] and where a cause is submitted upon bill and answer, the defendant is entitled to the benefit of all denials in the answer of matters set forth in the bill and all matter properly pleaded in the answer.[56] It is the general rule but subject to the discretion of the court that filing an answer dissolves an injunction granted ex parte,[57] but an answer admitting the material equities of the

of the Chancery act permitting defendants to file an answer after appearance term. Jenkins & Reynolds Co. v. Wells, 123 Ill App. 280.

41. Waddington v. Lane, 202 Mo. 387, 100 S. W. 1139.

42. Amended answer allowed and such answer to be sworn to and signed after filing. Haile v. Venable [Fla.] 44 So. 76.

43. Where in a suit to restrain issuing of patents to defendants they claimed lands to be vacant and unappropriated, they cannot after trial of this issue amend their answer by alleging that they hold lands by a prior patent. Asher v. Uhl, 29 Ky. L. R. 396, 93 S. W. 29.

44, 45. Holzendorf v. Terrell [Fla.] 42 So. 584.

46. Spaulding v. Evenson, 149 F. 913; Evenson v. Spaulding [C. C. A.] 150 F. 517.

47. Bill to enforce forfeiture. Answer requested injunction. Spies v. Arvondale & C. R. Co., 60 W. Va. 389, 55 S. E. 464.

48. Dr. Miles Medical Co. v. Snellenburg, 152 F. 661.

49. Scoville v. Brock, 79 Vt. 449, 65 A. 577.

50. Where there is no way to attack the substance of an answer, except to bring the matter forward for hearing on the bill and answer which admits all allegations in the answer and waives all informalities, and the bill is set down for such hearing in good faith and a separate defense in the answer is insufficient, the bill will not be dismissed but the insufficient defense will be stricken out and the complainant granted leave to file a replication on payment of half the costs. Besson & Co. v. Goodman, 147 F. 887.

51. See 7 C. L. 1366.

52. Answer to a bill of discovery not required to be under oath by statute. Palliser v. Home Tel. Co. [Ala.] 44 So. 575.

53. O'Donnell v. St. Clair Circuit Judge, 146 Mich. 442, 13 Det. Leg. N. 830, 109 N. W. 769.

54. See 7 C. L. 1366.

55. Culver Lumber Co. v. Culver [Ark.] 99 S. W. 391. In suit to enjoin obstruction of street, general denial of allegations in bill as to dedication of street and as to its subsequent opening and use pursuant thereto held sufficient to raise an issue, charges in such allegations not being prima facie within knowledge of defendants. City of Mobile v. Fowler, 147 Ala. 403, 41 So. 468.

56. Where a replication is withdrawn and the case is set down for hearing on the bill and answer, the complainant admits every averment of fact in the answer and obtains no benefit from allegations of the bill which are denied in the answer. Besson & Co. v. Goodman, 147 F. 887. In a suit for partition the bare denial of complainant's title on information and belief by defendants who do not claim adversely does not put such title in issue so as to require a stay until it has been established at law. Carlson v. Sullivan [C. C. A.] 146 F. 476.

57. Injunction to restrain sale of bonds

bill and setting up new matter in avoidance will not dissolve an injunction.[58] An answer filed by a person not properly a party is without effect.[59] Answer wavies demurrer as a general rule.[60] An answer by one of several co-defendants which goes to the whole bill and under which plaintiff is unable to show that he is entitled to relief causes a dismissal of the whole bill and plaintiff is not entitled to a decree against defaulting defendants.[61]

As evidence.[62]—Where oath to answer has been waived, the answer though sworn to has only the evidential weight of an ex parte affidavit upon motion for preliminary injunction.[63] New matter set up in an answer and not responsive to the bill is not evidence.[64] An answer to a bill of discovery under oath has certain probative force, while an answer not under oath becomes a mere pleading.[65] Defendant cannot avail himself of facts specifically denied in the answer.[66]

Admissions.[67]

(§ 6) *H. Replication, exceptions, and motions.*[68]—By filing replication to a plea the complainant admits the sufficiency of the facts stated as a defense, the only question being as to their truth.[69] Where an answer setting up new matter is filed and an issue made by a replication thereto. it is incumbent upon the defendant to make out a prima facie case before plaintiff must make proof of the allegations of the bill.[70] An exception to a bill of complaint is in some respects like a demurrer. If it go to the whole bill and any part of it be good, the exception cannot be sustained, and if it be taken to a whole paragraph any part of which is good, the exception must be denied as a whole.[71] The sufficiency of the answer may be tested by exceptions,[72] but the exception must not be too broad nor should it be sustained if the answer would thereby be mutilated or falsified.[73] A motion to strike is proper where the bill itself raises a doubt as to the complainant's right to equitable relief,[74] and it may be treated as essentially a demurrer to the bill.[75] Motions against answers are confined to striking out parts of the answer as insufficient,

obtained by fraud. If injunction dissolved would be sold to innocent purchasers for value and lost. Pere Marquette R. Co. v. Bradford, 149 F. 492.

58. Motion for preliminary injunction. Answer of estoppel and ratification. Pere Marquette R. Co. v. Bradford, 149 F. 492.

59. Minors not specifically named in a bill but only as wards of a guardian. Guardian ad litem appointed who filed an answer which was of no effect. Oneal v. Stimson, 61 W. Va. 551, 56 S. E. 889.

60. McDevitt v. Connell [N. J. Eq.] 63 A. 504; Bryant Bros. Co. v. Robinson [C. C. A.] 149 F. 321.

61. Grider v. Corbin, 116 App. Div. 818, 102 N. Y. S. 181.

62. See 7 C. L. 1367.

63. Pere Marquette R. Co. v. Bradford, 149 F. 492.

64. Persons v. Ramsey [Fla.] 43 So. 503. An answer in equity is evidence only when responsive to the bill and its statements are not made on information and belief. County of Henry v. Stevens, 120 Ill. App. 344.

65. Bloede v. Carter, 148 F. 127. Code 1896, § 679, provides that when a bill is filed for any other purpose than discovery only the plaintiff may waive answer under oath, in which case the answer is entitled to no more weight as evidence than the bill. Palliser v. Home Tel. Co. [Ala.] 44 So. 575.

66. Millard v. Millard, 123 Ill. App. 264.

67, 68. See 7 C. L. 1368.

69. Plea in bar that former complaint of like effect had been dismissed. Complainant filed a replication and after a finding of the truth of the facts pleaded in bar contended that the matter pleaded was insufficient in law to operate as a bar. Schoettle v. Hengen [N. J. Eq.] 66 A. 922.

70. Bill to foreclose. Answer in confession and avoidance of payment. Parsons v. Ramsey [Fla.] 43 So. 503.

71. Board of Trade of Chicago v. National Kansas City Mo. Board of Trade, 154 F. 238.

72. Interrogatories to show that defendants held as trustees for plaintiffs. Defendants answered under oath denying the trust. Wells v. Wells, 116 La. 1065, 41 So. 316. The objection that an answer does not answer specific interrogatories in a bill should be reached by exceptions rather than a motion. Van Dyke v. Van Dyke [N. J. Eq.] 65 A. 215.

73. Holzendorf v. Terrell [Fla.] 42 So. 584. Setting a bill down for hearing on bill and answer is a waiver by complainant of all irregularities in the answer and they can only be reached by exceptions. Besson & Co. v. Goodman, 147 F. 887. Unless it appears that an exception has been passed upon by the lower court, it will be treated as waived despite the fact that it is claimed that the statement in a decree that exceptions were waived is incorrect. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830.

74. Effect of a clause in a will. Steelman v. Wheaton [N. J. Eq.] 66 A. 195.

75. Chancery rule 213. Holton v. Holton [N. J. Eq.] 65 A. 481.

scandalous, or impertinent, and have not been entertained to strike out the entire answer.[76]

Motions to dismiss[77] and exceptions to reports of masters and auditors are treated elsewhere.[78]

(§ 6) *I. Issues, proof, and variance.*[79]—A total variance between the pleadings and the proof is fatal to recovery.[80] The court cannot grant relief inconsistent with the theory upon which the bill is drawn,[81] nor can defendant avail himself of a defense not pleaded.[82]

(§ 6) *J. Objections and waiver thereof.*[83]—Questions as to the legal sufficiency of a pleading are waived by failure to raise them in proper time and manner,[84] and also by filing further pleadings,[85] or having a hearing on the mertis.[86] Where a witness refuses to answer a question at a hearing before a master and the question is certified to the court but the motion to compel an answer is not pressed, the right to answer is waived.[87]

§ 7. *Taking bill as confessed or on default.*[88]—The entry of a decree pro confesso shows the defendant has not presented a defense to the suit and permits the plaintiff to proceed ex parte,[89] and the defendant is not entitled to notice of further proceedings.[90] A decree pro confesso cannot legally be entered against a defendant who is not shown to have been within the jurisdiction of the court.[91] Under the codes in some states where a bill is taken for confessed, a motion to reverse or correct the decree must be made in the court entering the decree.[92] Under Acts 1905, p. 1007, c. 472, a bill may be taken pro confesso on the second day of the term.[93]

76. Van Dyke v. Van Dyke, [N. J. Eq.] 65 A. 215.

77. See post, § 9, Dissmissal.

78. See post, § 10, Trial by Jury or Master, etc.

79. See 7 C. L. 1369.

80. Evidence held to show variance. Pankau v. Morrissey, 224 Ill. 177, 79 N. E. 643. Where complainant claims sole ownership of a note, evidence is inadmissible to show joint ownership with defendant. Rosenbleet v. Rosenbleet, 122 Ill. App. 408.

81. Where bill for specific performance is in affirmance of a contract and the relief prayed for is denied, the court properly refused to retain the bill for purpose of assessing damages for nonperformance. Braithwaite v. Henneberry, 124 Ill. App. 407.

82. Millard v. Millard, 123 Ill. App. 264.

83. See 7 C. L. 1369.

84. In a suit to foreclose a lien on railroad property, an objection to an order of sale on the ground that receivership proceedings are pending in a Federal court cannot be raised for the first time on appeal. Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458. By proceeding as though the allegations of a complaint were put in issue, the objection that the answer was not sufficient to raise one has been waived. Allegations of fraud claimed admitted by answer. Venner v. Denver Union Water Co. [Colo.] 90 P. 623. Under V. S. 939, a master need not state his decision in admitting or rejecting evidence unless requested so to do, but may treat the objection thereto as waived. Allen's Adm'rs v. Allen's Adm'rs, 79 Vt. 173, 64 A. 1110.

85. Answer waives demurrer as a general rule. McDevitt v. Connell [N. J. Eq.] 63 A. 504; Bryant Bros. Co. v. Robinson [C. C. A.] 149 F. 321. By statute, answer waives a defect of misjoinder of parties. Rev. St. 1899, § 598. Hudson v. Wright, 204 Mo. 412, 103 S. W. 8.

86. Allegations of trespass and nuisance. Vaughan v. Bridgham, 193 Mass. 392, 79 N. E. 739. Objection raised for the first time on appeal. Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458. Consent to the issuance of a preliminary injunction waives any question of multifarlousness. Pennsylvania Co. v. Bay, 150 F. 770. The right to object to a failure to answer a cross complaint is waived by going to trial without objection. Updegraff v. Marked Tree Lumber Co. [Ark.] 103 S. W. 606. Objection that an action should be at law instead of equity is waived by pleading and going to trial. Feigenspan v. Nizolek [N. J. Eq.] 65 A. 703. Ejectment instead of action to quiet title. Brown v. Baldwin [Wash.] 89 P. 483.

87. Dr. Fahrney & Sons Co. v. Ruminer [C. C. A.] 153 F. 735.

88. See 7 C. L. 1369.

89. Where the defendant was present and without objection argues the case at the final hearing, he cannot complain that no decree pro confesso was entered. Williams v. Clyatt [Fla.] 43 So. 441.

90. Taking of depositions. Johnson v. Potterfield [Ala.] 43 So. 228.

91. No service made, no publication, no appearance to submit to jurisdiction. Sarasota Ice, Fish & Power Co. v. Lyle & Co. [Fla.] 43 So. 602.

92. Code 1899, § 5, c. 135. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830. Under § 5, c. 134, Code 1899, a decree pro confesso cannot be set aside after the term at which it was entered except on motion in the circuit court for error on the face thereof for which an appellate court could reverse it or by a bill of review. Richmond v. Richmond [W. Va.] 57 S. E. 736.

93. Tipton v. Tipton [Tenn.] 104 S. W. 237.

§ 8. *Abatement and revival.*[94]—A suit in equity abates upon the death of a defendant who has appeared, so far as proceedings against him are concerned, and if he were an indispensable party, all proceedings must be suspended till his representatives have been brought in; but if his interest wholly ceases by his death, or wholly survives to one of the other parties, no revivor is necessary,[95] but where a decree determining the property rights of the parties was rendered during the lifetime of both, the subsequent death of one, after submission on appeal, does not abate the suit and such decree is reviewable on appeal.[96]

§ 9. *Dismissal. Voluntary dismissal.*[97]—A complainant has an absolute right to dismiss his suit without prejudice at any time before hearing on payment of costs and without terms, where the dismissal will deprive the defendant of no substantial right acquired since suit, and he is not entitled to and has not prayed for any affirmative relief.[98] Where, however, other parties have acquired rights, the complainant no longer has power to control the suit and it is proper to refuse a nonsuit.[99] Where an agreement to dismiss is made out of court and has never been acted upon by the court and no one properly representing the complainant attempts to discontinue the case, the court is not called on to give the agreement effect, but the defendant will be left to the proper proceeding by cross bill.[1]

Involuntary dismissal.[2]—A motion to dismiss lies for failure to join necessary parties,[3] want of jurisdiction,[4] because of adequate remedy at law,[5] pendency of another suit involving the same issues,[6] and because of the passing of the necessity or possibility of relief.[7] By statute in some states if the complainant has commenced proceedings in the wrong court it is no ground for dismissal, but the same should be transferred to the proper court.[8] If the appellate court is of the opinion that on final hearing a bill must be dismissed, it should make final disposition of the cause at once despite the fact that the appeal is from an interlocutory order.[9] Part of a bill which is not indispensable may be dismissed and the rest retained.[10] Where a bill shows equity, any defects should be reached by demurrer and not by a motion to dismiss.[11] Courts are not required in all cases to dismiss a bill because a person appears upon both sides of the record.[12] A dismissal of a bill for want of equity where the equity of the bill is directly challenged is as proper in vacation as in

94. See 7 C. L. 1370.

95. Worley v. Dade County Security Co. [Fla.] 42 So. 527.

96. Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659.

97. See 7 C. L. 1371.

98. Morton Trust Co. v. Keith, 150 F. 606.

99. Creditors had intervened, final decree been rendered, and property sold. Culver Lumber Co. v. Culver [Ark.] 99 S. W. 391.

1. Snyder v. De Forrest Wireless Tel. Co., 154 F. 142.

2. See 7 C. L. 1371.

3. Jones v. Gould [C. C. A.] 149 F. 153.

4. Larkey v. Gardner, 105 Va. 718, 54 S. E. 886; Arkansas S. E. R. Co. v. Union Sawmill Co. [C. C. A.] 154 F. 304. Motion to dismiss will lie where no equity is apparent on the face of the bill or the court has no jurisdiction. Sargent Co. v. Baublis, 127 Ill. App. 631.

5. Upon trial evidence showed only a legal title involved. Hubatka v. Maierhoefer [N. J. Eq.] 65 A. 1002. A motion to dismiss a bill for want of equity raises only the question whether the bill presents a case for equitable relief. Williams v. Neill, 147 Ala. 691, 40 So. 943.

6. Action of ejectment pending on a motion for new trial. Donatelli v. Casciola, 215 Pa. 21, 64 A. 319.

7. Where sale under a power in a mortgage is restrained because notice is insufficient, equity will not retain the bill after the date advertised has passed, there remaining nothing further upon which equity could act. Baggett v. Edwards, 126 Ga. 463, 55 S. E. 250.

8. Wood v. Stewart [Ark.] 98 S. W. 711.

9. Bill should have joined a third party but when joined Federal court lost jurisdiction, hence injunction dissolved and bill remanded to be dismissed. Arkansas S. E. R. Co. v. Union Sawmill Co. [C. C. A.] 154 F. 304.

10. Where the court has jurisdiction of the subject-matter and parties except such as are not indispensable, a bill may be dismissed as to such parties and retained as to the others. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

11. Bill to dissolve partnership and for an accounting. Mayfield v. Schoolar [Ala.] 43 So. 12.

12. Bill by receivers to enforce director's liability. One of the receivers was also a director. Demurrer overruled. Murphy v. Penniman [Md.] 66 A. 282.

term time.[13] Where a defect in a bill is amendable a motion to dismiss will not be sustained.[14] Dismissal after submission for want of prosecution held error, since nothing remained for parties to do.[15]

Effect.[16]—Where a bill is brought against two parties for separate and distinct acts, a dismissal of one party does not dismiss the other on the ground that they are joint tort feasors.[17]

Vacation of order.[18]—A dismissal by agreement may be set aside if procured by fraud of defendant.[19]

§ 10. *Trial by jury or master, their verdicts and findings.*[20]—Except by statute, there is no absolute right to a trial by jury in a suit in equity,[21] the matter resting in the sound discretion of the trial court.[22] The courts differ as to whether or not this discretion is reviewable on appeal.[23] Where a case is submitted to a jury, their verdict is advisory only, and may be disregarded by the court,[24] hence the court cannot commit reversible error in the giving or refusal of instructions[25] or

13. Merritt v. Alabama Pyrites Co., 145 Ala. 252, 40 So. 1028.

14. A bill to enjoin the obstruction of a way which states the conclusion that it was a "public way" without further facts alleged is demurrable but will withstand the attack of a motion to dismiss. Cochrane v. Purser [Ala.] 44 So. 579. Bill will not be dismissed for want of equity unless it is clear that no amendment can aid it (Sargent Co. v. Baublis, 127 Ill. App. 631), for a bill will be presumed to be amended so as to grant equity when such amendments when made would not have to contain new and independent facts (Merritt v. Alabama Pyrites Co., 145 Ala. 252, 40 So. 1028). On a motion to dismiss for laches, an amendment showing infancy of complainants will not be presumed. Savage v. Bradley [Ala.] 43 So. 20.

15. Bates v. Baker [Ky.] 101 S. W. 340.

16. See 7 C. L. 1371.

17. Alabama Great So. R. Co. v. Prouty [Ala.] 43 So. 352.

18. See 5 C. L. 1174.

19. Agreement for dismissal of divorce suit set aside because procured by fraud. Krieger v. Krieger, 221 Ill. 479, 77 N. E. 909.

20. See 7 C. L. 1372. See, also, Jury, 8 C. L. 617; Masters and Commissioners, 8 C. L. 951.

21. Arellanes v. Arellanes [Cal.] 90 P. 1059. The right to a jury trial is not absolute, but should only be granted by the court in the exercise of its discretion. Stevens v. Duckett [Va.] 57 S. E. 601. An action in support of an adverse claim to a mining claim is in effect a suit in equity, and a defendant is not entitled to a jury trial as of right. Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 P. 302.

22. Stevens v. Duckett [Va.] 57 S. E. 601. In Kentucky by code where the issue presented by the pleadings is a legal one, upon the determination of which depend all the other questions of the case, either of the parties has a right to demand a jury trial. Bill to enjoin trespass. Issue as to which party was owner. Kountze v. Hatfield, 30 Ky. L. R. 589, 99 S. W. 262; Wisdom v. Nichols-Shepherd Co., 29 Ky. L. R. 1128, 97 S. W. 18. The defendant cannot be deprived of a right to a decision by the court unless the conflict of evidence is so great and its weight so nearly evenly balanced that the court is unable to determine on which side the preponderance is. Stevens v. Duckett [Va.] 57 S. E. 601. A jury issue will not be directed when the claim is altogether unsupported by evidence. Id.

23. Fludd v. Equitable Life Assur. Soc., 75 S. C. 315, 55 S. E. 762, holds that it is not appealable. Partnership accounting. Evidence held not to warrant reference to jury. Stevens v. Duckett [Va.] 57 S. E. 601.

24. Wisdom v. Nichols-Shepherd Co., 29 Ky. L. R. 1128, 97 S. W. 18; In re Peterson [Neb.] 107 N. W. 993; Burdall v. Johnson, 122 Mo. App. 119, 99 S. W. 2; Waddington v. Lane, 202 Mo. 387, 100 S. W. 1139; Southern Bk. of Fulton v. Nichols, 202 Mo. 309, 100 S. W. 613. In an action to set aside a deed, a party is not entitled to a trial by jury as of right, and if a jury is called in it acts simply in an advisory capacity, the court being compelled to make findings of its own and in so doing to adopt or reject the findings of the jury as it deems proper. Arellanes v. Arellanes [Cal.] 90 P. 1059. Special verdict of jury is advisory, and the court has the right to disregard it. Ostrom v. De Yoe [Cal. App.] 87 P. 811. Question as to contract to make a will and to set aside certain deeds. Ostrom v. De Yoe [Cal. App.] 87 P. 811. The court is not bound by the verdict of a jury if it does not commend itself to its conscience. Robinson v. Brast [C. C. A.] 149 F. 149. The verdict by a jury on the legal issues in a bill for specific performance is not conclusive of all equitable issues, and parties are entitled to submit any equities arising to the determination of the court. The equitable issue of laches is open. Poston v. Ingraham [S. C.] 56 S. E. 780. Where a feigned issue is framed in equity to be tried before a jury, the trial judge may direct a verdict if the evidence is such that a contrary verdict could not stand. Sparks v. Ross [N. J. Eq.] 65 A. 977.

25. In re Peterson [Neb.] 107 N. W. 993; Hudson v. Wright, 204 Mo. 412, 103 S. W. 8. In a suit in equity, if the court adopted the verdict of the jury under instructions given at the suggestion of the respective parties, the appellate court is authorized to conclude that the finding was based upon the same theory embodied in the instructions. Burdall v. Johnson, 122 Mo. App. 119, 99 S. W. 2. Instructions to a jury to find for the

rulings upon the admissibility of evidence.[26] While the finding of a chancellor in directing a verdict by a jury will be deferred to somewhat, yet the appellate court reserves the right to review the evidence and determine whether the chancellor came to the right conclusion.[27] The finding of the jury upon one issue properly submitted will not be affected by the improper submission of other questions.[28] The matter of referring a case to a master is generally within the discretion of the court [29] and, if a cause has been sent to a master, the court is not bound by the master's report,[30] and even where it is adopted the parties are not deprived of a hearing before the court.[31] The order should not be made until all the issues are properly made up.[32] A trial of the main issue should first be had before the court, which being disposed of and it then appearing that an accounting is necessary, it may be provided for in the interlocutory decree.[33] If the party at whose instance a reference is made does not have the order of reference executed within the required time, it is within the discretion of the chancellor to dismiss the bill.[34] Courts of equity may infer such facts from a master's report as necessarily or fairly result therefrom.[35] A master's finding approved by the court and not against the manifest weight of evidence is conclusive on appeal [36] unless fraud or corruption is shown, there being evidence to sustain the findings.[37] It is within the discretion of the court to allow exceptions to a master's report at the hearing,[38] and in passing on exceptions to a master's report a judge may cause issues to be framed and submitted to the jury if the facts depend upon conflicting and doubtful testimony.[39] The report of a master is not subject to exceptions where it simply follows the decree directing the reference and makes a report based on a finding contained in such decree.[40] In the absence of exceptions to a report, the only question open on appeal is whether the decree was warranted by the pleadings and report,[41] for the appellate court will review the evidence contained in the record, determine what is competent,

defendant upon the issues submitted is not error if the finding is authorized by the evidence, for in effect this is a finding of the chancellor of his own motion. Southern Bk. of Fulton v. Nichols, 202 Mo. 309, 100 S. W. 613.

26. Waddington v. Lane, 202 Mo. 387, 100 S. W. 1139.

27. Southern Bk. of Fulton v. Nichols, 202 Mo. 309, 100 S. W. 613.

28. Waddington v. Lane, 202 Mo. 387, 100 S. W. 1139.

29. Damages very small, court not bound to refer to master. Giragosian v. Chutjian [Mass.] 80 N. E. 647.

30. Robinson v. Brast [C. C. A.] 149 F. 149.

31. The fact that the court adopts the conclusions of a master does not deprive the complainant of a hearing before the court, nor does it follow that the master exercised judicial power. Leigh v. Laughlin, 222 Ill. 265, 78 N. E. 563.

32. Sarasota Ice, Fish, & Power Co. v. Lyle & Co. [Fla.] 43 So. 602; Worley v. Dade County Security Co. [Fla.] 42 So. 527.

33. Bill for an accounting between principal and agent. The real controversy appeared to be as to the basis of commissioners. Prince Line v. Seager Co., 118 App. Div. 697, 103 N. Y. S. 677.

34. Under Code 1896, § 741. McGrath v. Stein [Ala.] 42 So. 454.

35. Davenport v. Crowell, 79 Vt. 419, 65 A. 557.

36. Mining lease. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902.

37. Allen's Adm'rs v. Allen's Adm'rs, 79 Vt. 173, 64 A. 1110.

38. Exchange Bk. v. McMillan [S. C.] 57 S. E. 630.

39. Value of securities. State v. Johnson, 144 N. C. 257, 274, 56 S. E. 922.

40. Young v. Rose, 80 Ark. 513, 98 S. W. 370. For further specific instances of the consideration of exceptions see the following cases: Requests and suggestions merely, but no objections to a master's report filed with him, do not comply with Mass. equity rule 31 so as to authorize consideration of exceptions to the report in the absence of a special order allowing them. Huntress v. Hanley [Mass.] 80 N. E. 946. Where a fund is being administered in equity, one who filed a petition in the case asserting a judgment lien has a right to except to a master's report giving priority to another judgment and to prove the other judgment void. Crockett v. Etter, 105 Va. 679, 54 S. E. 864. A failure by an auditor to file his report within the time required by the court does not render it a nullity, but the parties may, by exceptions filed in due time, raise the objection of delinquency and have the case recommitted. Donalson v. Fain, 127 Ga. 682, 56 S. E. 1023. Where a master in chancery is appointed, it is no objection that all the judges did not sign the appointment. Gottschalk v. Noyes, 225 Ill. 94, 80 N. E. 72.

41. Huntress v. Allen [Mass.] 80 N. E. 949.

and make its own conclusions.[42] Where a decree appointing a master to hear evidence and report his findings to the court did not require a report of the evidence, his findings of fact are final.[43] A master need not report all the facts on which an ultimate finding is based even though the findings be a conclusion resulting from mixed questions of law and fact.[44] It is not necessary that an account decreed in a suit in equity should be stated by a master, but it is within the discretion of the court, if for any reason it deems it proper to do so, to state the account itself.[45] Exceptions should be definite and specific.[46] A motion to recommit a case to a master and reopen it for further testimony should be addressed to the court [47] and is a matter within the discretion of the chancellor.[48] Where a cause is re-referred to a master to hear evidence on a specific matter evidence of other matters is properly excluded.[49] A master's report will be liberally construed in aid of the relief awarded.[50]

§ 11. *Evidence.*[51]—An appellate court will not consider exceptions to the admissibility of evidence in a suit, in equity.[52] It is within a master's discretion to hear further evidence after objections to the report have been heard.[53] Where depositions taken in rebuttal in a Federal equity court contain proper rebuttal, and also testimony in chief, the defendant may have an extension of time to take testimony to meet such new evidence,[54] but this may be done by a bill of discovery or subpoena duces tecum.[55] A motion to suppress depositions taken in rebuttal because they contain testimony in chief must be overruled if any of such testimony is proper rebuttal and cannot be separated from that not in rebuttal.[56] Equity is unwilling to order the production of records upon affidavits based solely on information and belief as to the contents.[57] Where the answer denies the allegations of the bill and the testimony is evenly divided, the bill must be dismissed.[58]

§ 12. *Hearing or trial.*[59]

§ 13. *Findings by the court and decree, judgment, or order.*[60]—The trial judge should find and state in connected and paragraphic form his findings of fact and conclusions of law,[61] but failure to make findings is not fatal in Illinois.[62]

42. Waddington v. Lane, 202 Mo. 387, 100 S. W. 1139.

43. Hodgkins v. Bowser [Mass.] 80 N. E. 796; Taber v. Breck, 192 Mass. 355, 78 N. E. 472. Where reference to a master does not require a report of the evidence, it is sufficient if he set forth the facts on which his rulings of law are based. Id.

44. Allen's Adm'rs v. Allen's Adm'rs, 79 Vt. 173, 64 A. 1110.

45. Bill for an accounting against trustee. Pepper v. Addicks, 153 F. 383.

46. Where a report has been sent back to a master for restatement upon exceptions by plaintiff, an exception to the second report, reciting that the plaintiff excepted for reasons stated in his exceptions in the first report, is too indefinite to require review on appeal. Walworth v. Birch [Ark.] 98 S. W. 717.

47. A master's refusal to grant such a motion is not a matter of exception. Taber v. Breck, 192 Mass. 355, 78 N. E. 472.

48. Allen's Adm'rs v. Allen's Adm'rs, 79 Vt. 173, 64 A. 1110.

49. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902. Where a party requests a restatement of a master's report and the same is ordered, but without direction to take further evidence, an objection to the second report that further evidence was not taken cannot be maintained. Master to follow directions. Walworth v. Birch [Ark.] 98 S. W. 717.

50. Kershaw v. Merritt [Mass.] 80 N. E. 213.

51. See 7 C. L. 1375.

52. Kuzek v. Magaha [C. C. A.] 148 F. 618.

53. New York Bank Note Co. v. Kidder Press Mfg. Co., 192 Mass. 391, 78 N. E. 463.

54, 55, 56. West Pub. Co. v. Thompson Co., 152 F. 1019.

57. Affidavits and notice of motion served, asking the court to compel the production of record of shipments. West Pub. Co. v. Thompson Co., 151 F. 138.

58. Northwest Eckington Imp. Co. v. Campbell, 28 App. D. C. 483.

59. See 7 C. L. 1376.

60. See 7 C. L. 1376. See, also, Judgments, 8 C. L. 530; Verdicts and Findings, 8 C. L. 2245.

61. Equity rule 62. Hastings Water Co. v. Hastings Borough, 216 Pa. 178, 65 A. 403. It is not good practice for a judge to make his findings both of fact and law in the form of answers to requests by one of the parties. He should find the facts and state his conclusions of law distinctly and af-

Decree.[63]—The relief afforded by a decree in equity must conform to the pleadings,[64] the relief sought,[65] and the proof.[66] A decree not supported by any pleading in writing is void.[67] A decree rendered in a suit in which all persons in interest are not specifically made parties is null and void.[68] Where no answer has been filed nor decrees taken pro confesso, a submission for final decree is premature.[69]

Effect and construction.[70]—The plain and unambiguous terms of a decree cannot be extended or contracted by construction in the absence of proof to a reasonable certainty that such was the purpose of the court.[71] A decree granting an injunction will not be construed on application for such construction, but only upon proceedings requiring its construction and application to acts alleged to be done or omitted under it.[72] Where no appeal is taken and a bill of review is denied, all matters within the pleadings and jurisdiction of the court expressed in a decree are res judicata.[73] A judgment on the merits is conclusive between the parties not only as to every matter offered but as to every admissible matter which might have been offered to sustain or defeat the claim or demand,[74] but, where two or more defendants make issues with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been, but was not, put in issue by proper pleading.[75] The effect of a decree is limited by the pleadings and proof.[76] A decree dismissing a bill is a final decree, and not a mere order for a decree.[77] A decree which settles the rights of the parties and leaves nothing to a master but a statement of an account on a basis fixed by the decree is a final judgment.[78]

Measure of relief.[79]—Although, as a general rule, the relief granted by a de-

firmatively, in his own order, and in his own way. Dickey v. Norris, 216 Pa. 184, 65 A. 541. The statutory provision requiring findings of fact and conclusions of law to be separately stated does not apply to equitable actions. Peirce v. Wheeler [Wash.] 87 P. 361.

62. Where the bill sets forth facts sufficient to sustain the decree which was entered upon overruling a demurrer, the fact that the decree is not supported by the finding of facts is immaterial. Eisendrath Co. v. Gebhardt, 124 Ill. App. 325.

63. See 7 C. L. 1377.

64. Bill for specific performance. Decree cannot declare the defendant a trustee. Luther v. Luther, 216 Pa. 1, 64 A. 868. A decree must conform to relief consistent with the facts set out in the bill. Bill to enforce unrecorded trust interest. Reed v. Munn [C. C. A.] 148 F. 737. On a bill for specific performance of an option, defendant sought to avoid on the ground of improper acknowledgment of options. This matter was not set out in the pleadings and defendant could not avail himself of it. Truslow v. Parkersburg Bridge & Terminal R. Co., 61 W. Va. 628, 57 S. E. 51.

65. Decree granting relief not justified by the allegations of the bill or the relief sought is erroneous. Rosenbleet v. Rosenbleet, 122 Ill. App. 408. Where there were sufficient facts alleged and proved to warrant decree, held that it was proper under prayer for general relief, though there was no prayer for the specific relief granted. Rankin v. Rankin, 117 Ill. App. 636.

66. Luther v. Luther, 216 Pa. 1, 64 A. 868. A decree should not be broader than the bill. Beall v. Dingman, 227 Ill. 294, 81 N. E. 366. A decree cannot be based merely upon the allegations of the bill unless they are admitted by the answer. McNicholas v. Tinsler, 127 Ill. App. 381.

67. Adjudication as to a matter which had never been brought to an issue between the parties. Perkins v. Pfalzgraff, 60 W. Va. 121, 53 S. E. 913.

68. Bill for partition. Minors made parties only as wards of their guardian who was made a defendant. Oneal v. Stimson, 61 W. Va. 551, 56 S. E. 889.

69. Durr v. Hanover Nat. Bk. [Ala.] 42 So. 599.

70. See 7 C. L. 1378.

71. Right to joint use of "right of way" of railroad. St. Louis, etc., R. Co. v. Wabash R. Co. [C. C. A.] 152 F. 849.

72. Decree restraining the use of a trade name. Application made for a construction of the decree to determine if the defendant might use the trade name in a certain manner. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 65 A. 870.

73. Not reviewable on an appeal from a supplemental bill. Quinton v. Neville [C. C. A.] 154 F. 432.

74. St. Louis, etc., R. Co. v. Wabash R. Co. [C. C. A.] 152 F. 849.

75. Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845.

76. A decree setting aside a conveyance as obtained by undue influence is not conclusive of the defendant's rights under a conveyance of the same property made after another conveyance between the same parties. Horner v. Bell [Md.] 66 A. 39.

77. Lakin v. Lawrence [Mass.] 80 N. E. 578.

78. Young v. Rose, 80 Ark. 513, 98 S. W. 370. Decree held to adjudicate the principles of a cause and to be appealable under clause 7, § 1, c. 135, Code 1899. Richmond v. Richmond [W. Va.] 57 S. E. 736.

79. See 7 C. L. 1378.

cree must conform to the pleadings and proof,[80] yet, where equity has jurisdiction and the facts are before the court it should adapt its remedy to those facts even though an amendment to conform the pleadings to the facts is necessary,[81] and will grant full relief.[82] A decree for the payment of money will not run against the body of the defendant if it appears that he is unable to obey the decree.[83]

Modification and amendment; vacation and setting aside; collateral attack.[84]—After the expiraton of the term at which a judgment is rendered, the court is without power to amend it in any matter of substance[85] and, as a general rule, an enrolled decree cannot be set aside upon motion or petition[86] except for fraud, surprise, or irregularity in its procurement, or to allow the defendant to make a defense on the merits,[87] unless it be that in a case where subsequent to its entry such radical changes in the situation, rights, or relations of the parties have been wrought that equity demands such terms or forbids enforcement.[88] The court may also vacate a decree when rendered by mistake,[89] or fraud,[90] or without jurisdiction,[91] or for errors of law

80. Luther v. Luther, 216 Pa. 1, 64 A. 868, and see § 13, supra.

81. Bill to set aside a conveyance on the ground that it was not made until the happening of a contingency which had occurred. Facts showed transfer was made to secure a payment. Court should not have dismissed the bill. White v. Fromme, 105 N. Y. S. 634.

82. Where there is only a general prayer for relief, the court in a suit to set aside a sale of land has power to take an accounting between parties and to fix terms upon which relief is granted. Beall v. Dingman, 227 Ill. 294, 81 N. E. 366. If upon final hearing of petition for injunction it appears that the equitable relief prayed for cannot be granted because of a change of status since bringing the bill, the plaintiff may be awarded damages in lieu of the equitable relief sought. Bill to enjoin sale of land under an execution obtained by fraud. Preliminary injunction refused and, to prevent sale, plaintiff paid executions and amended his petition stating the same. This amounted to fixing his damages should he prevail. Everett v. Tabor, 127 Ga. 103, 56 S. E. 123. By code the court may grant any relief that the parties may show themselves entitled to, whether it is specifically prayed for or not, if the petition contained a prayer for general relief. Fraudulent conveyance. Decree for sale of land. Heckling v. Gehring's Ex'r, 30 Ky. L. R. 1198, 100 S. W. 824.

83. Decree against a surviving partner who had wrongfully misappropriated funds. Haggerty v. Badkin [N. J. Eq.] 66 A. 420.

84. See 7 C. L. 1378.

85. Venner v. Denver Union Water Co. [Colo.] 90 P. 623.

86. Motion to set aside and for a rehearing on the ground that no notice was given defendants. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830.

87. White v. Smith [N. J. Eq.] 65 A. 1017.

88. Decree granting joint use of railroad right of way. St. Louis, etc., R. Co. v. Wabash R. Co. [C. C. A.] 152 F. 849.

89. A court of equity which has by mistake entered up a decree against a married woman may vacate the same upon petition filed four years later, in the absence of laches or intervention of rights of other parties. Rice v. Cummings [Fla.] 40 So. 889.

90. A decree obtained by fraud cannot be set aside by a bill of review, this must be done by an original bill in the nature of a bill of review. Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 F. 524. A decree against infants will not be set aside because their guardian did not present facts readily discoverable on the ground of newly discovered evidence, though if his failure was due to gross negligence or fraud the relief would be granted. Probate records. Harris v. Bigley [Iowa] 111 N. W. 432. A bill to impeach a decree for fraud and enjoin its enforcement is not the same in purpose as an appeal, and the court rendering the decree has jurisdiction to entertain such a bill although an appeal from the decree is pending. Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 F. 524. An original bill may be filed by a minor to impeach a decree for fraud or for errors of law appearing upon the face of the record. Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906. To entitle a party to relief against a decree on the ground of fraud, it must appear that he had a defense on the merits which he was prevented from interposing owing to the fraud of the prevailing party. Bill to foreclose. Venner v. Denver Union Water Co. [Colo.] 90 P. 623. By statute, infant defendants during their minority, or six months after, may maintain a bill showing such error, fraud, or surprise as entitles them to a reversal of the decree. Poling v. Poling, 61 W. Va. 78, 55 S. E. 993. Where a bill originally brought to establish a lien for rent against the proceeds of the sale of a tenant's goods is amended after trial so as to ask judgment against defendants for the amount of the rent, thus changing the action from one at equity to one at law, the defendants are entitled to have the decree set aside and have a trial by jury. Hartwig v. Iles, 131 Iowa, 501, 109 N. W. 18.

91. Suit on lost note. Statute required affidavit of loss. No affidavit. Judgment for complainant set aside by chancellor. Hudson v. Wright, 204 Mo. 412, 103 S. W. 8. A defendant by failing to move to transfer an action at law to equity waived his right to have the case heard in equity, and is not entitled to a reversal of a decree merely because the action was brought in the wrong court. Wilson v. White, [Ark.] 102 S. W. 201.

appearing on the face of the record.[92] On granting leave to plead after decree, the decree should not be set aside unless a defense is made out.[93] Rights of a bona fide purchaser acquired under a final decree are not lost by a reversal thereof.[94] A bill of review or an original bill may be filed to impeach a decree.[95] Where, however, there has not been a final decree, a petition to rehear may be entertained,[96] but the rights of other parties must not have intervened,[97] and the party seeking relief must not be guilty of laches.[98] The appellate court has no power to revoke, on appeal, a final decree after entry,[99] but the discretion of the lower court is reviewable, and the appellate court may modify a decree of dismissal so that it shall be without prejudice.[1] Where a decree does equity, is within the pleadings, and is based on record facts, it may be sustained despite the reasons therefor of the chancellor.[2] A decree will not be reversed because of improper notice of final hearing where the parties were present and proceeded without objection.[3] Where judgments are of the character contemplated by the complaints, they are not void even though rendered on insufficient evidence or upon insufficient complaints, and will not be corrected in a suit to annul the decree, but can only be reviewed on appeal or writ of error.[4] Where there has been a finding on sufficient evidence, judgment will not be reversed and the case sent back for amendment to allege a necessary fact, but the complaint will be considered as amended.[5] Where on an appeal no evidence is reported, findings of fact are conclusive,[6] and the only matter open to the defendant is to argue that the decree does not correspond with the allegations and prayers of the bill and could not lawfully be entered on the facts found.[7] A decree will not be set aside as against the evidence unless there is manifest error [8] appearing on the record.[9] The corrections

92. Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906.

93. Under Chancery rule 19. Jenkins & Reynolds Co. v. Wells, 123 Ill. App. 280. Leave to plead to a bill after a decree has been entered thereon does not operate to set aside the decree. Id.

94. Perkins v. Pfalzgraff, 60 W. Va. 121, 53 S. E. 913.

95. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830; Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 F. 524.

96. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830. A judgment which does not put an end to the proceedings, but leaves them in fieri as in foreclosure proceedings, the appointment of a commissioner to sell and report may be amended. Venner v. Denver Union Water Co. [Colo.] 90 P. 623.

97. Rice v. Cummings [Fla.] 40 So. 889. Where a court entering a decree had jurisdiction of the parties and subject-matter, and others not parties have acquired rights relying on the decree, the court will not set the decree aside. Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906.

98. Rice v. Cummings [Fla.] 40 So. 889. Where after plaintiff has obtained judgment it is set aside on appeal because of the failure to join a certain defendant, and plaintiff starts the second trial without making such party a defendant, and later refuses to proceed, he is guilty of laches, barring his right to have judgment set aside. Lederer v. Adler, 51 Misc. 572, 101 N. Y. S. 53.

99. Lakin v. Lawrence [Mass.] 80 N. E. 578.

1. Lakin v. Lawrence [Mass.] 80 N. E. 578. Where a bill to quiet title has been dismissed after petition for rehearing, it is error for the court to amend the decree dismising the bill, making it without prejudice to the complainant to institute further action, especially after court has found that the title of complainant is fatally defective. Morgan v. Jones [Fla.] 42 So. 242.

2. Hudson v. Wright, 204 Mo. 412, 103 S. W. 8.

3. When defendant was present without objection and argued his case at final hearing, he cannot assign as error a failure to set the case down for final hearing and to give notice. Williams v. Clyatt [Fla.] 43 So. 441. Decree reciting that it was granted after the cause was set down for hearing on bill, answer, and replication not otherwise erroneous will not be reversed because notice given by defendant of hearing more than three months after filing of replication stated it was to be on bill and answer. Haile v. Venable [Fla.] 44 So. 76.

4. Foreclosure decree included property not described in the mortgage or complaint. Venner v. Denver Union Water Co. [Colo.] 90 P. 623.

5. Brown v. Baldwin [Wash.] 89 P. 483.

6. First Baptist Soc. in Brookfield v. Dexter, 193 Mass. 187, 79 N. E. 342.

7. Bill by an incorporated religious society and its treasurer alleging an execution and a claim by a third party of his right as treasurer to collect. Prayer to determine lawful treasurer and injunctions. Decree recited complainant to be treasurer and enjoined third party from attempting to collect. Decree corresponded with allegations and prayers of bill, etc. First Baptist Soc. in Brookfield v. Dexter, 193 Mass. 187, 79 N. E. 342.

8. Waddington v. Lane, 202 Mo. 387, 100 S. W. 1139; Wisdom v. Nichols-Shepherd Co.,

of a decree must be tested by the record as it was at the time the decree was pronounced.[10] The admission of testimony in a case which is tried de novo on appeal is not ground for reversal.[11] Under a general leave reserved for further directions, an alteration of the decree made on the original hearing cannot be made, nor a decree inconsistent with it.[12] A decree cannot be attacked collaterally by a party because of mistakes made by the chancellor in construing testimony,[13] but it may be for want of jurisdiction.[14] The Rhode Island Practice Act does not warrant the superior court in setting aside decrees entered by consent.[15]

§ 14. *Rehearing.*[16]—Equity will not grant leave for a bill of review and for a rehearing on the ground of newly-discovered evidence which is inadmissible.[17] In a suit to quiet title under the New Jersey statute, a motion for a new trial of an issue submitted for trial at law will be denied by the court of chancery without examining the merits, for the decision of the court of law and of the court of chancery are both appealable to the same court.[18] Notice of intention to apply for a writ of error is satisfied by notice before hearing and after application.[19] The supreme court of R. I. may issue writ of certiorari to review proceedings in the superior court sitting in equity.[20] Death of the complainant after a decree in his favor and after adjournment of the court does not deprive the defendant of the right to a writ of error.[21]

§ 15. *Bill of review.*[22]—A bill of review is a new suit [23] having for its object, strictly speaking, the correction of the final decree in the former suit.[24] A bill of review cannot be filed pending an appeal from a final decree.[25] After affirmance on appeal a decree may be questioned by a bill of review challenging the jurisdiction where the conditions exist justifying the filing thereof.[26] In some jurisdictions, however, a bill of review cannot be filed after a decree has been affirmed on appeal, at least where the ground is newly-discovered evidence, unless a right is reserved in the decree or permission be given.[27] Where one succeeds on a bill of review in having the original decree reversed as to him alone, he cannot on appeal, where he does not himself appeal, go beyond supporting the modified decree and opposing every assignment of error.[28] An objection that a person should have been made a party to a bill to review a decree comes too late when raised for the first time on the hearing of a demurrer to the bill of review, where the fact of such person's existence does not

29 Ky. L. R. 1128, 97 S. W. 18. The mere fact that the evidence offered in a suit to quiet title would not have been sufficient on an appeal to sustain the decree is not of itself ground for setting the decree aside. Harris v. Bigley [Iowa] 111 N. W. 432. Where evidence conflicting as to value, appellate court will not set aside a decree approving sale of land by a commissioner. Culver Lumber Co. v. Culver [Ark.] 99 S. W. 391.

9. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

10. If the record at the time decree was entered did not show the absence of necessary parties, it cannot thereafter be made to so appear. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830.

11. Brown v. Baldwin [Wash.] 89 P. 483.

12. Decree restraining use of trade name. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 65 A. 870.

13. Bill to set aside a decree as cloud on title. Ropes v. Goldman [Fla.] 42 So. 322.

14. Hudson v. Wright, 204 Mo. 412, 103 S. W. 8.

15. Hyde v. Superior Ct. [R. I.] 66 A. 292.

16. See 7 C. L. 1380.

17. Hearsay evidence. Ward v. Ward [C. C. A.] 149 F. 204.

18. Schmidt v. Traphagen [N. J. Eq.] 66 A. 805.

19. Shannon's Code, § 4419. Tipton v. Tipton [Tenn.] 104 S. W. 237.

20. Hyde v. Superior Ct. [R. I.] 66 A. 292.

21. Tipton v. Tipton [Tenn.] 104 S. W. 237.

22. See 7 C. L. 1380.

23. Rights acquired by a bona fide purchaser under a final decree are not lost by a reversal thereof. Perkins v. Pfalzgraff, 60 W. Va. 121, 53 S. E. 913.

24. Perkins v. Pfalzgraff, 60 W. Va. 121, 53 S. E. 913. Where a decree is final, a bill of review or an original bill may be filed to impeach a decree. Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830.

25. Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 F. 524.

26. Cook v. Weigley, 69 N. J. Eq. 836, 65 A. 480.

27. Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 F. 524.

28. Trust established as to one on bill of review. Landrum v. Jordan, 203 U. S. 56, 51 Law. Ed. 88.

appear of record,[29] nor can absence of leave to bring the bill be first raised on appeal.[30]

Time for bill; laches.[31]—The right to file a bill of review may be lost by laches,[32] and where there is no limitations by statute, they should be brought within the period limited for bringing writs of error.[33] Laches may be excused for good cause shown.[34]

Grounds.[35]—The function of a bill of review is to obtain a reversal of a decree by the court which rendered it, either for error of law apparent on the record[36] or newly-discovered evidence.[37] It lies to review a decree on account of fraud in its procurement, but where the fraud relates to matters upon which the bill was rendered, it will lie to review the bill only on the ground of newly-discovered evidence.[38] In some jurisdictions a bill of review can be sustained only for errors apparent on the face of pleadings, proceedings, or decree,[39] and the whole record is drawn under consideration of the court and advantage may be taken of any error or irregularity, including all such as might have been urged on review.[40] A bill of review will not be entertained to question jurisdiction to render the decree, where the original bill was of a class of which equity has jurisdiction and no objection to the jurisdiction was made.[41] When the bill is for errors of law, consideration can be given to the record of the original cause only and the evidence cannot be examined and any facts averred in the bill of review inconsistent with the pleadings, and decree in the main case can have no effect in determining the correctness of the decree.[42] A bill of review

29. Landram v. Jordan, 203 U. S. 56, 51 Law. Ed. 88. Objection to want of formal parties cannot be first made on appeal. McGowan v. Elroy, 28 App. D. C. 84.

30. McGowan v. Elroy, 28 App. D. C. 188.

31. See 7 C. L. 1381.

32. Stevenson v. Stevenson, 224 Ill. 482, 79 N. E. 608; McGowan v. Elroy, 28 App. D. C. 188. In the case of a bill of review based on after-discovered evidence, the question of diligence is necessarily a preliminary one to be passed upon at the time the application is made for leave to file the bill which will be denied, unless it appears that the party has been diligent and the evidence was not fairly within its reach. Birdsboro Steel Foundry & Mach. Co. v. Kelley, 147 F. 713.

33. Five years statute of limitations for writs of error. Bill of review brought six years after decree. Stevenson v. Stevenson, 224 Ill. 482, 79 N. E. 608. No question of laches is involved upon the issuance of a writ of certiorari at any time during the period prescribed by the statute. Reeves v. Jones [N. J. Law] 66 A. 113. A petition to open a final decree for error appearing on the record must be brought within the time allowed for an appeal or writ of error, unless the petitioner has been under some disability during that period. Kelsey v. Dilks [N. J. Eq.] 66 A. 420.

34. Stevenson v. Stevenson. 224 Ill. 482, 79 N. E. 608; Kelsey v. Dilks [N. J. Eq.] 66 A. 420. Where a complainant was slow in bringing a bill of review because he was first under a misapprehension that he was a victim of fraud rather than of mistake, and then he was delayed by illness or other causes so that he did not avail himself of all the opportunities offered by the courts, and was further deterred by the fear that the relief granted might only involve further litigation, he is not guilty of laches preventing the court from doing justice. Perkins v. Hendryx, 149 F. 526.

35. See 7 C. L. 1381.

36. Quinton v. Neville [C. C. A.] 152 F. 879. Where a decree is founded upon matter set up in a cross bill improperly allowed, it may be reversed on a bill of review. Peters v. Case [W. Va.] 57 S. E. 733. A bill of review lies either for errors of law appearing in the body of the decree or for matter discovered after decree. McGowan v. Elroy, 28 App. D. C. 188.

37. Quinton v. Neville [C. C. A.] 152 F. 879. Allegations of an oral contract known to the defendant but not pleaded, but after decree substantiated by letters. Richmond v. Richmond [W. Va.] 57 S. E. 736. Decree dismissing bill entered on a bill and answer when the case had not in fact been set down for hearing on bill and answer. Perkins v. Hendryx, 149 F. 526. Bill of review will lie on the ground of newly-discovered evidence only when there is a showing that the evidence could not, by the exericse of due diligence, have been obtained in time to be used at the original hearing. Lancaster v. Springer, 126 Ill. App. 140; Karsten v. Winkelman, 126 Ill. App. 418.

38. Lancaster v. Springer, 126 Ill. App. 140.

39. Notes attached to the report of a register are mere evidence and not properly a part of the proceedings. Birmingham Realty Co. v. Barron [Ala.] 43 So. 346. In the case of a bill of review there must be error in substance of prejudice to the party complaining apparent on the face of the pleadings, proceedings, or decree. Winkleman v. White, 147 Ala. 481, 42 So. 411. A bill of review lies only for error apparent on the face of the decree. Richmond v. Richmond [W. Va.] 57 S. E. 736.

40. Winkleman v. White, 147 Ala. 481, 42 So. 411.

41. McGowan v. Elroy, 28 App. D. C. 188.

42. Quinton v. Neville [C. C. A.] 152 F. 879.

for newly-discovered evidence will not be granted where it is merely cumulative, corroboratory,[43] impeaching,[44] or immaterial.[45] Where footnote to bill to foreclose is not signed by counsel, such defect is not ground for reversal on bill of review.[46] Repugnancy and multifariousness are not open to impeachment on bill of review.[47] A bill of review cannot be brought to set aside a decree for fraud but this must be done by an original bill in the nature of review.[48]

Application and proceedings.[49]—Where the bill or review merely charges fraud in the procurement of a decree,[50] or error appearing on the face of the record, leave to file is unnecessary,[51] but where the charge of fraud is united with an averment of newly-discovered evidence, leave of court must be obtained before filing the bill.[52] The discretion of chancellor in granting or denying motion for leave to file bill of review will not be interfered with unless abused.[53] The character and effect of newly-discovered evidence and the reason why it was not presented at the original hearing are to be considered by the court in determining whether leave to file bill of review will be granted.[54]

§ 16. *Other equitable remedies for which no specific title is provided.*[55]

Bill quia timet.[56]

Bills of peace.[57]

Error Coram Nobis; Error, Writ of, see latest topical index.

ESCAPE AND RESCUE.[58]

In Alabama one escaping from the county jail before being transferred to the penitentiary to which he has been sentenced is properly indicted under Code 1896, § 4707.[59]

ESCHEAT.[60]

Disability of particular classes of persons to inherit is elsewhere treated.[61]

In the proper exercise of its police power estate may declare new causes of escheat of lands within its limits.[62] Under a constitutional provision enabling aliens to acquire land by inheritance, the right of a state to declare an escheat of land held by an alien having heirs is lost on his death and the land descends to his alien heirs.[63] Such right is also lost when the land is conveyed to a citizen for a valuable considera-

43. Richardson v. Lowe [C. C. A.] 149 F. 625. Allegations in the bill of an oral contract known to the defendant, which contract was later substantiated by letters, the plaintiff seeking to set decree aside so that they might be introduced in evidence. Richmond v. Richmond [W. Va.] 57 S. E. 736. Inadmissible. Hearsay. Ward v. Ward [C. C. A.] 149 F. 204.

44. Karsten v. Winkelman, 126 Ill. App. 418.

45. Court found that complainants had waived their right to rescind a contract on the ground of fraud by delay. Further evidence of fraud was immaterial. Richardson v. Lowe [C. C. A.] 149 F. 625.

46, 47. Winkleman v. White, 147 Ala. 481, 42 So. 411.

48. Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 F. 524.

49. See 7 C. L. 1382.

50. Lancaster v. Springer, 126 Ill. App. 140.

51. Karsten v. Winkelman, 126 Ill. App. 418.

52. Lancaster v. Springer, 126 Ill. App. 140. Bill of review on the ground of newly-discovered evidence cannot be filed without special leave of court. Karsten v. Winkelman, 126 Ill. App. 418. Bill of review based on newly-discovered evidence will be dismissed if filed without leave of court. Lancaster v. Springer, 126 Ill. App. 140. Leave is required only when the bill is brought for matter discovered after decree, not where it is based on error in the decree. McGowan v. Elroy, 28 App. D. C. 188.

53, 54. Karsten v. Winkelman, 126 Ill. App. 418.

55, 56, 57, 58. See 7 C. L. 1383.

59. Bradford v. State [Ala.] 42 So. 990.

60. See 7 C. L. 1384.

61. See Aliens, 9 C. L. 84; Bastards, 9 C. L. 383.

62. Could provide for escheat of lands held by a corporation for over five years except where necessary to carry on its business. Commonwealth v. Chicago, etc., R Co., 30 Ky. L. R. 673, 99 S. W. 596

63. Abrams v. State [Wash.] 88 P 327.

tion.[64] Where mortgaged property escheats,[65] the state may not be divested of title by foreclosure without its consent.[66] In Kentucky a school board in cities of the first class may sue to recover land escheated from a corporation.[67]

ESCROWS.[68]

There must be an intention to surrender all present control over the instrument,[69] and delivery in escrow cannot be made to the grantee[70] or obligee.[71] If no time is specified for performance of conditions, a reasonable time will be implied by law.[72] Title does not pass until compliance with the conditions even though such conditions be in violation of the terms of the contract,[73] but equity will grant relief in favor of a vendee whose grantor by his conduct has disabled himself to perform, where the rights of innocent purchasers have not intervened.[74] If the grantor dies before delivery by the depositary, a subsequent delivery relates back to that of the grantor by fiction of law,[75] but the doctrine of relation is inapplicable in a case where the death of the grantor renders the subsequent performance of conditions impossible.[76] A contract to sell and delivery of the deed in escrow does not revoke a prior specific devise of the land,[77] and hence if performance does not take place until after the grantor's death, the devisee takes the proceeds of the sale despite the doctrine of relation.[78] A subsequent return of the deed by the depositary to the grantor without the consent or knowledge of the grantee and its destruction by the grantor does not deprive the grantee of his interest.[79] Erroneous delivery by the depositary may be cured by an estoppel against a grantor who retains the consideration and recognizes the transfer.[80] A depositary of funds is entitled to prove any facts which will defeat the depositor's claim thereto.[81] A second grantee pending deposit is not bound to look beyond the terms of an apparently complete escrow agreement filed with the depositary,[82] and new conditions may not be added by parol.[83]

64. State v. World Real Estate Commercial Co. [Wash.] 89 P. 471.

65. Evidence held to justify finding that a mortgagor died without heirs capable of inheriting so that at his death the equity vested in the state by escheat. Seitz v. Messerschmitt, 117 App. Div. 401, 102 N. Y. S. 732.

66. Seitz v. Messerschmitt, 117 App. Div. 401, 102 N. Y. S. 732. Making attorney general party and his demand for surplus did not authorize foreclosure of state's interest. Id.

67. Statutes construed. Commonwealth v. Chicago, etc., R. Co., 30 Ky. L. R. 673, 99 S. W. 596. Ky. St. 1903, § 2971, not special legislation. Id.

68. See 7 C. L. 1384. See, also, Frauds, Statute of, 7 C. L. 1826, as to delivery in escrow as compliance with statute.

69. Finding of intent to make an absolute delivery conclusive where grantor, expecting to die presently, delivered deed to third person to give to her sons after her death. In re Cornelius' Estate [Cal.] 91 P. 329.

70. Russell v. Mitchell, 223 Ill. 438, 79 N. E. 141.

71. Contract of guaranty could not be delivered to obligee himself. Lefkovits v. First Nat. Bk. [Ala.] 44 So. 613.

72. Wilkins v. Somerville [Vt.] 66 A 893.

73. Condition imposed by grantor as to time of withdrawal of deed. Wilkins v. Somerville [Vt.] 66 A. 893.

74. Where before expiration of time for performance of conditions grantor demanded withdrawal of deed and conveyed title to another who had notice. Wilkins v. Somerville [Vt.] 66 A. 893. Equity would maintain statu quo by injunction and grant further reasonable time for grantee to perform. Id.

75. Van Tassel v. Burger, 104 N. Y. S. 273.

76. Where condition was execution of a mortgage to secure payment of annuity to grantor and his wife McIntyre v. McIntyre, 147 Mich. 365, 13 Det. Leg. N. 1032, 110 N. W. 960.

77, 78. Van Tassel v. Burger, 104 N. Y. S. 273.

79. Where deed was to be delivered after grantor's death. In re Cornelius' Estate [Cal.] 91 P. 329.

80. Dempwolf v. Greybill, 213 Pa. 163, 62 A. 645.

81. Evidence showing that depositor had fraudulently obtained possession of deed for which deposit was made. Brockway v. Reynolds [Neb.] 109 N. W. 154.

82. Womble v. Wilbur, 3 Cal. App 535, 86 P. 916.

83. As to interest. Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916.

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The scope of this topic is noted below.[84]

§ 1. *Necessity or occasion for administration and kinds thereof.*[85]—The

84. Matters relating to the descent of property under the intestate laws (see Descent and Distribution, 9 C. L. 970), the validity, probate, and interpretation of wills (see Wills, 8 C. L. 2305), testamentary trusts (see Trusts, 8 C. L. 2169), the administration of partnership property by the surviving partner (see Partnership, 8 C. L. 1261), and of community property by the survivor of the community (see Husband and Wife, 8 C. L. 122), administration on the estates of absentees (see Absentees, 9 C. L. 9), and inheritance and succession taxes (see Taxes, 8 C. L. 2058), are treated in separate articles. Matters relating to the taxation of costs (see Costs, 9 C. L. 812) and the allowance of attorney's fees (see Attorneys and Counselors, 9 C. L. 300), in actions by and against representatives have been excluded, but allowances to the representative for costs and attorney's fees incurred by him on behalf of the estate have been treated.

85. See 7 C. L. 1387.

estate of a deceased ward cannot be settled in the guardianship proceedings, but administration is necessary for that purpose.[86] The fact that the estate has been finally settled and the representative discharged does not prevent the subsequent issue of letters on the discovery of unadministered property belonging to the estate, or if it becomes necessary or proper for any other reason.[87] It has been held to be unnecessary to have a representative appointed and made a party to a suit by a legatee to subject realty in the hands of a grantee to the payment of an annuity charged on the entire estate, where there was no personalty remaining unadministered and no debts.[88]

In some states the heirs may, by mutual agreement, settle the estate without administration.[89] In others on the death of the husband without lineal descendants the wife is his sole heir, and, upon payment of his debts, if any, may take possession of his estate without administration.[90] In Louisiana the question whether a succession shall be placed under administration rests to a large extent in the sound discretion of the trial judge.[91]

Temporary administrators.[92]—The right to appoint a temporary administrator or administrator pro tem. depends on the statutes of the various states.[93]

86. Cannot determine validity of agreement by heirs that guardian shall have whole estate, nor whether there are any claims against it. In re Lindsay's Guardianship, 132 Iowa, 119, 109 N. W. 473.

87. Does not prevent subsequent issue of letters testamentary, or of administration, or of administration with will annexed. Otero v. Otero [Ariz.] 90 P. 601. Petition held sufficient to give court jurisdiction to appoint administrator to administer on unadministered assets, though it also prayed for vacation of order of final discharge which court had no jurisdiction to grant because term in which it was rendered had expired. Id. Order appointing administrator held not void so as to be subject to collateral attack because it also purported to revoke previous order discharging administrator, which court had no jurisdiction to do. Id.

88. Dixon v. Roessler [S. C.] 57 S. E. 203.

89. For construction and effect of agreements between interested parties in regard to distribution of estate, see § 17 A, post. Under Kirby's Dig. § 15, heirs may sue for and collect demands left by intestate without administration provided all heirs and distributees are of full age, and intestate was under no legal disability at time of his death. Chisholm v. Crye [Ark.] 104 S. W. 167. Heirs may settle estate and render administration unnecessary. In re Lindsay's Guardianship, 132 Iowa, 119, 109 N. W. 473. Rule held inapplicable to agreement made by heirs of ward before latter's death that guardian should have whole of ward's estate, particularly in proceeding to wind up guardianship in which only question was liability of guardian to estate of deceased ward. Id. Even if all persons interested in estate could, by mutual agreement, dispose of all or part of assets, held that settlement of controversy in regard to assets by one of them alone was without validity. Williamson v. Robinson [Iowa] 111 N. W. 1012. In order to dispense with necessity of administration there must be no debts, heirs entitled to share in distribution must all be of full age, and must unanimously agree, either expressly or by acts, to dispense with administration. Griesel v. Jones, 123 Mo. App. 45, 99 S. W. 769.

90. Where widow as sole heir took possession of husband's estate without administration under Civ. Code 1895, § 3355, par. 1, claiming that there were no debts, held that, on suit by her to recover property claimed to have belonged to husband, requested instruction that any debt which husband might have owed, which was not known to wife and was not brought to her knowledge, would not defeat title to any of the property vesting in her, and that law only contemplated payment of such debts as were brought to her knowledge, was properly refused. Demmons v. Booker [Ga.] 57 S. E. 108.

91. Where intestate succession owes no debts save those incurred in connection with last illness, death, and burial of decedent, which are trifling compared with assets, and holders of which appear and disclaim any desire for administration, and there are no minors, administration should not be ordered at instance of one of eight major heirs who applies to be appointed administrator, even though he claims the benefit of inventory. Succession of Weincke, 118 La. 206, 42 So. 776. District court held not to have abused its discretion in holding that appointment of administrator was necessary. Miguez v. Delcambre, 118 La. 1062, 43 So. 703. Placing of succession under administration held proper, though it owed no debts, where one of heirs was resident of another state, and there were several minor heirs, and there was no opposition. Succession of Trahan, 118 La. 762, 43 So. 400. After administrator had filed his account, held too late to litigate issue as to necessity of administration, in direct action against administrator to have his appointment, and all subsequent proceedings annulled. Id.

92. See 5 C. L. 1185.

93. Probate court held to have no authority, either under Hurd's Rev. St. 1905, c. 3, §§ 11, 17, 72, or otherwise, to appoint temporary administrator or administrator

§ 2. *Jurisdiction and courts controlling administration.*[94] *In general.*[95]—The residence of decedent at the time of his death,[96] or the existence of assets within the state or county,[97] generally fix jurisdiction to administer on his estate. In the absence of a statutory provision on the subject, the estate need not be of any given value.[98] Ancillary administration may be granted before primary administration.[99]

The jurisdiction of the various courts over proceedings to administer on the estates of Indians,[1] to revoke letters,[2] to contest or collect claims,[3] to sell realty,[4]

pro tem on petition of legatee, to sue executrix to recover property which legatee claimed she had converted, and which executrix claimed belonged to her personally. Day v. Bullen, 226 Ill. 72, 80 N. E. 739, afg. 127 Ill. App. 155.

94. See also, Jurisdiction, 8 C. L. 579.

95. See 7 C. L. 1389.

96. Evidence held to sustain finding that domicile of decedent was in District of Columbia. Thorn v. Thorn, 28 App. D. C. 120. Under Burns' Ann. St. 1901, § 2381, letters must be granted in county where, at his death, intestate was an inhabitant. Williams v. Dougherty, 39 Ind. App. 9, 78 N. E. 1067.

97. Existence of property within state is necessary to appointment of an ancillary administrator. Miller v. Hoover, 121 Mo. App. 568, 97 S. W. 210. Situs of judgment debt held place where judgment debtor resides, so that where intestate recovered judgment before he died, and judgment debtor removed to another state, ancillary administrator could be appointed in latter state to collect judgment. Id. Resident of Ohio executed deed for property in that state, but died before delivery of deed or payment of purchase price. Thereafter, and in order to perfect title, grantor's heirs who resided in Missouri conveyed property to third person, who conveyed to purchaser, and collected purchase price, out of which he paid mortgage on said property and took balance, which he admitted he held as representative of estate, into Missouri. Were creditors in latter state. Held that said balance was assets in Missouri authorizing appointment of administrator in that state. Turner v. Campbell [Mo. App.] 101 S. W. 119. Interest of nonresident decedent in trust estate in process of settlement in court having jurisdiction of subject-matter and trustee held property within state authorizing appointment of administrator. Rev. Laws, c. 137, § 1, and c. 162, § 3 construed. Vinton v. Sargent [Mass.] 80 N. E. 826.

98. Motion to vacate administration held not sustainable on ground of want of assets. Turner v. Campbell [Mo. App.] 101 S. W. 119. Rev. St. 1899, § 2, authorizing court to refuse administration where value of estate will not exceed allowance to widow or minor children, held inapplicable where decedent left neither widow nor children. Id.

99. Will extend only to that part of estate within jurisdiction granting it. Turner v. Campbell [Mo. App.] 101 S. W. 119.

1. Under Laws 1892, p. 1575, c. 679, § 5, held that surrogate's court had jurisdiction to appoint administrator where petitioners were without other remedy to enforce their claims for lack of peacemaker's court or other Indian judicial tribunal. In re Printup's Estate, 121 App. Div. 322, 105 N. Y. S. 74. Laws 1900, c. 252, ratifying constitution of Seneca Nation of Indians which provides for creation of surrogate's courts for that nation, held not in violation of Const. art. 3, § 16, providing that no local bill shall embrace more than one subject which shall be expressed in its title. Jimeson v. Lehley, 51 Misc. 352, 101 N. Y. S. 215. Surrogate's court held to have no jurisdiction over estates of Indians, or authority to admit their wills to probate. In re Jack's Will, 52 Misc. 424, 102 N. Y. S. 383.

2. Power of surrogate, on application to revoke letters on ground that they were issued because of false representation that estate was fully administered, to determine truth or falsity of allegations of petition for appointment, held to carry with it power to determine whether, under will and circumstances, estate was fully administered. In re Rathyen, 115 App. Div. 644, 101 N. Y. S. 289.

3. As to jurisdiction of courts of equity see post, this section.

New Jersey: Where a claim against an insolvent estate is excepted to, orphan's court has jurisdiction to adjudicate thereon unless claimant elects to proceed against representative at law or in equity. Wheedon v. Nichols [N. J. Eq.] 65 A. 445. Representative cannot elect to so proceed against himself to enforce his personal claim, but in such case jurisdiction of orphans' court is exclusive. Id.

New York: Answer to petition for payment of certain claims held evasive and not to state any fact tending to show that executors had good defense, so that surrogate properly refused to dismiss same. Code Civ. Proc. § 2722. In re De Forrest's Will, 104 N. Y. S. 342. Fact that it did not appear therefrom that there was money applicable to pay claim under contract calling for monthly payments, which could be so applied without injuriously affecting interests of others, held not to require dismissal, executors having made previous payments, treated estate as sufficient for that purpose, and having discontinued them on other grounds. Id. Under Code Civ. Proc. § 1903, as amended, surrogate held to have jurisdiction, in proceedings for settlement of accounts of administratrix, to direct allowance and payment of claim for funeral expenses out of sum recovered for wrongful death of decedent, which constituted only property coming into her hands. In re McDonald's Estate, 51 Misc. 455, 101 N. Y. S. 275. Hence proceedings for settlement would not be postponed pending trial of action brought against administratrix in supreme court to recover same. Id.

4. Since under Revisal 1905, § 129, superior court has concurrent jurisdiction

for the setting off of the widow's allowance,[5] to recover property in the hands of third persons alleged to belong to the estate,[6] to determine whether property belongs to the representative individually or to the estate,[7] to determine the validity of the representative's official bond,[8] for an accounting by the representative,[9] for the recovery of legacies or distributive shares,[10] to determine conflicting interests of heirs or distributees and third persons,[11] and to determine questions incidentally involved in such proceedings, is largely regulated by statute, and varies in the different states. The same is true in regard to the equitable jurisdiction of courts of probate.[12]

Jurisdiction of courts of equity.[13]—As in other cases, courts of equity will not

with probate court to settle estates and subject realty to payment of debs. held that said court had jurisdiction on motion of judgment creditor, to order sale of realty to pay judgment recovered in action before it to which all interested persons were parties. Shober v. Wheeler, 144 N. C. 403, 57 S. E. 152.

5. Issue as to whether one filing in probate court notice of her claim to be admitted to certain rights in estate as widow, and for allowance, was in fact married to decedent, may be determined by that court. Bechtel v. Barton, 147 Mich. 318, 13 Det. Leg. N. 1047, 110 N. W. 935.

6. Surrogate held to have discretionary power to direct examination of person cited under Code Civ. Proc. § 2707 as having in her possession property belonging to estate though she filed verified answer claiming ownership, it being claim of title supported by facts shown upon examination, and not allegations of answer, which requires him to dismiss proceedings. In re Packard's Estate, 53 Misc. 163, 104 N. Y. S. 474. Surrogate held to have no jurisdiction of proceeding by surety of temporary administrator against third person to compel latter to restore assets alleged to have been fraudulently obtained by him from said administrator. In re Weisell's Estate, 51 Misc. 325, 101 N. Y. S. 273.

7. New York: Surrogate may determine issue on accounting. Code Civ. Proc. § 2731. In re Archer's Estate, 51 Misc. 260, 100 N. Y. S. 1095; In re Cavanagh, 105 N. Y. S. 850.

Pennsylvania: Administrator's title to savings deposits standing in decedent's name can only be determined by orphans' court, and he cannot maintain bill in equity for that purpose. Hutchinson v. Dennis, 217 Pa. 290, 66 A. 524.

8. Surrogate in New York has no jurisdiction to determine validity of administrator's bond. Fidelity & Deposit Co. v. Moshier, 151 F. 806.

9. See, also, post, this section, Jurisdiction of Courts of Equity. Supreme court will exercise its concurrent jurisdiction to compel an accounting only when complete relief cannot be obtained in surrogate's court. In re Fogarty's Estate, 117 App. Div. 583, 102 N. Y. S. 776; Volhard v. Volhard, 104 N. Y. S. 578; In re Smith, 105 N. Y. S. 223. Surrogate having no jurisdiction to try title to realty, held that where, on proceeding to compel accounting, it appeared that question relating to title to realty was involved which ought to be decided before accounting was ordered, proceeding should have been dismissed. In re Fogarty's Estate, 117 App. Div. 583, 102 N. Y. S. 776. Surrogate has authority to compel temporary administrator to account as to all matters connected with his trust. In re Goetz, 104 N. Y. S. 832. Pendency in supreme court of action brought by temporary administrator for construction of will held no defense to application to require him to account in surrogate's court. Id.

10. Under Code Pub. Gen. Laws, art. 16, § 93, equity has jurisdiction of suit to recover legacy even where bond has been given to pay debts and legacies. Matthews v. Targarona, 104 Md. 442, 65 A. 60. Statutory remedy by action at law to recover legacy or distributive share is in addition to that existing in equity, and in no way limits or qualifies jurisdiction of court of chancery over the subject. Van Dyke v. Van Dyke [N. J. Eq.] 65 A. 215.

11. Michigan: Probate court distributes and assigns property of intestate to those apparently entitled to its possession, but has no power to adjudicate in respect to extent of their titles or validity of titles and interests of others, and hence does not, by orders, originate or establish any muniments of title in distributees. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

Nebraska: Since, under Federal statute, heirs of timber culture entryman who dies before patent is issued take title as donees of government and not by inheritance, and entryman's interest is therefore not devisable, held that county court had not jurisdiction to determine title by adjudging that devisees of entryman were owners to exclusion of heirs to whom patent was issued. Walker v. Ehresman [Neb.] 113 N. W. 218.

New York: Surrogate cannot determine rights between legatee and assignee. In re Faile, 51 Misc. 166, 100 N. Y. S. 856.

12. Alaska: Probate court held to have no jurisdiction to determine whether partnership existed between decedent and another, and whether certain property belonged to it. Bartleson v. Feidler, 14 F. 299.

Colorado: Probate court held to have no jurisdiction in equity to enjoin consummation of scheme to despoil estate and get control of its interests represented by outside corporation. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159.

New York: Surrogate held to have no jurisdiction to pass on claim made on accounting that executrix should be surcharged with value of certain bonds and mortgages, assignment of which was alleged to have been procured by fraud. In re Dittrich, 53 Misc. 511, 105 N. Y. S. 301.

13. See 7 C. L. 1293. See, also, Equity,

assume jurisdiction of matters relating to estates of decedents where there is an adequate remedy at law.[14] They generally have jurisdiction to set aside decrees of the probate court obtained through fraud[15] or mistake,[16] but will not act in this regard while the matter is still pending in the latter court.[17]

Where the probate court has exclusive jurisdiction over the administration of estates, equity cannot interfere except in cases where that court has not adequate power to give full and complete relief,[18] as where it is necessary to protect

9 C. L. 1110; urisdiction, 8 C. L. 579. For jurisdiction of courts of equity in particular proceedings see, also, ante, this section.

14. Adequate remedy at law which will deprive court of equity of jurisdiction must be as certain, complete, prompt, and efficient as that in equity. Brun v. Mann [C. C. A.] 151 F. 145. Where administratrix refused to commence procedings to sell realty to pay judgment recovered in Federal court, held that remedy by application to county court for direction to her to do so, or by application for her removal, was much less prompt and efficient than suit in equity in said Federal court to subject such realty to payment of its judgment. Id. Is an absence of an adequate remedy at law in the Federal courts, and that alone, which conditions jurisdiction in equity in those courts, fact that there is remedy at law in state courts being immaterial. Id. One seeking to recover money intrusted to decedent for investment, and alleged to have been in latter's possession at time of his death, held to have adequate remedy at law against decedent's estate. McKee v. Allen, 204 Mo. 655, 103 S. W. 76. Rev. St. 1899, § 187, providing that actions commenced against representative after decedent's death shall be considered demands legally exhibited against estate from time of service of original process on representative, held to have reference merely to time when claims shall be exhibited within meaning of § 185, and not to be authority for holding that bill in equity was proper proceeding to obtain allowance for money judgment. Id. Claims for attorney's fees and for services rendered by real estate agent in procuring purchaser for realty being entitled to priority, held that equity had jurisdiction of suit to enforce them since under Rev. St. 1899, §§ 184, 187, 191, 208, they could have only been allowed as claims of fifth class. Matson v. Pearson, 121 Mo. App. 120, 97 S. W. 983. Remedy for improper issuance of letters of administration by surrogate of Seneca Nation of Indians held by appeal to council of the nation, so that suit in equity for revocation of letters could not be maintained. Jimeson v. Lehley, 51 Misc. 352, 101 N. Y. S. 215. Where husband took out letters of administration on estate of his deceased wife, and thereby obtained possession of savings deposits standing in her name, but which he claimed belonged to him personally, held that his title to money could only be adjudicated in orphans' court, and he could not maintain bill in equity for that purpose. Hutchinson v. Dennis, 217 Pa. 290, 66 A. 524. Claim of administrator, who was husband of decedent, that realty standing in decedent's name belonged to him by virtue of resulting trust from payment of purchase money, held proper basis of equity jurisdiction. Hutchinson v. Dennis, 217 Pa. 290, 66 A. 524.

15. Is no adequate remedy at law barring suit in equity to set aside decree of distribution alleged to have been obtained through fraudulent suppression of will, and to protect estate in meantime. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 N. W. 187. Suit held one against persons of defendants, so that court was not deprived of jurisdiction because property was outside of state. Id.

16. Decree of distribution is subject to review in equity upon a showing that it was procured by fraud or mistake, it not being part of same proceeding as decree probating will in such sense as to preclude such review. Bacon v. Bacon, 150 Cal. 477, 89 P. 317. Code Civ. Proc. § 1666, providing that decree is conclusive unless reversed, set aside, or modified on appeal, held not to prevent such review. Id. Code Civ. Proc. § 473, authorizing relief by motion in case in which decree was rendered, held not exclusive. Id. Relief may be given where judgment was result of mistake, unmixed with fraud, and not result of negligence of injured party. Id. Decree awarding plaintiff smaller legacy than will gave her set aside for mistake of parties. Id.; Soule v. Bacon, 150 Cal. 495, 89 P. 324. Mistake held not one of court, there never having been any real contest as to amount of legacy. Bacon v. Bacon, 150 Cal. 477,. 89 P. 317. Suit is direct attack on said decree, and will is admissible to prove mistake, right of plaintiff, and injury to her from erroneous decree. Id.

17. Complaint in action in district court to set aside sale to pay debts alleging sale pursuant to decree, execution of administrator's deed, and that several years had elapsed, held to sufficiently show that matter had been finally disposed of in county court, though it was not expressly alleged that report of sale had been filed or that sale had been confirmed, or that estate had been finally settled, statute requiring report of sale to be made at next term of court, and that conveyance shall not be made until sale has been approved, and sale being special proceeding, distinct from administration proper. Ryan v. Geigel [Colo.] 89 P. 775.

18. Must appear that interference is necessary. Clark v. Peck's Ex'rs, 79 Vt. 275, 65 A. 14. Chancery does not have jurisdiction on ground that trust is involved, where trust relation is that of an executor, over which jurisdiction is given to probate court exclusively. Id. Bill for injunction to restrain widower from disposing of estate and destroying books, etc., relating thereto, held not to clearly show that he was in possession of estate or was wasting or threatening to waste same so as to warrant such relief. Id. Bill held to show that if es-

the funds of the estate,[19] or to prevent the despoiling of the estate,[20] or to prevent oppressive and vexatious litigation.[21] It cannot exercise any supervisory jurisdiction nor restrict or supplant the jurisdiction of the probate court, but must act, if at all, in aid of that court.[22] Where the jurisdiction is concurrent, equity will not ordinarily assume jurisdiction except on a showing of special circumstances rendering the remedy in the probate court inadequate.[23] In some states

tate was being misappropriated it was being done by permission of executors, and hence that probate court could give as full and adequate relief by removing executors as would be obtained by injunction. Id. Held that court of chancery would not take charge of settlement of estate merely to prevent multiplicity of suits, there being no special reasons alleged for doing so other than those which might be urged in every testate estate. Id. Cannot take jurisdiction on ground that plaintiff is old and needs annuity claimed to be given him by will. Id. Fact that conspiracy existed between executors and widower to rob estate held not to give chancery court jurisdiction, probate court having full power to call executors to account, remove them, and appoint others in their stead. Id.

19. To prevent distribution under decree in administration proceedings pending proceedings for probate of will alleged to have been fraudulently concealed. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 N. W. 187.

20. Remedy at law held inadequate, and not to prevent injunction to restrain despoiling of estate, etc. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159. Fact that probate court displaced derelict executor, and appointed administrator with will annexed in his place, held not to require dismissal of bill against him and others by his coexecutor to enjoin them from carrying out scheme to despoil estate and get control of its interests represented by an outside corporation, probate court having no jurisdiction to enjoin such acts. Id.

21. Equity has jurisdiction to enjoin pending or threatened proceedings in county court to prevent oppressive and vexatious litigation, particularly when such litigation is not brought in good faith, but is instituted for an illegal and wrongful purpose. Alderman v. Tillamook County [Or.] 91 P. 298. Administratrix held entitled to enjoin prosecution of proceeding for her removal instituted in county court by attorneys for county pursuant to conspiracy between them and county judge, object of which was to prevent her from continuing to defend estate against claim filed by county, in prosecution of which county judge had been most active. Id. Suit for such an injunction held not an interference with exclusive jurisdiction of county court over appointment and removal of administrators, decree if rendered operating only on parties, and not on court. Id. Remedy of plaintiff by appearance in county court, contesting removal, and appealing from adverse decree, held not adequate under circumstances, since attempt to make defense there would be unavailing, and appeal from order of removal would not stay such order. Id. Expiration of term of county judge held no ground for abatement of suit. Id.

22. Clark v. Peck's Ex'rs, 79 Vt. 275, 65 A. 14.

23. Jurisdiction of chancery court to remove the settlement of estate from orphans' court, and itself conclude such settlement, will not be exercised except upon satisfactory showing of fraud or mistake in procurement of account, or in proceedings before orphans' court. Vineland Historical & Antiquarian Soc. v. Landis [N. J. Eq.] 66 A. 946. Will entertain bill against representative for discovery of matters in regard to which information is appropriately needed, and in regard to which the orphans' court has no means of procuring disclosure. Id. Executrix interested in estate compelled to disclose all property belonging to estate which she held or had held in her own name. Id. Will not compel executrix by answer in advance to restate her accounts, or to give any statement of accounts, or to state any matters in nature of accounts which are properly procurable in orphans' court and can be easily reached by that court by its ordinary procedure. Id. When jurisdiction has been assumed by orphans' court, next of kin has no right to change forum of settlement at his pleasure, but chancellor must, in his discretion, judge of propriety of court of chancery's interference. Van Dyke v. Van Dyke [N. J. Eq.] 65 A. 215. If any progress has been made in settlement of accounts, court of chancery should not interfere unless some good reason for so doing is shown. Id. Ordinarily fraud or mistake in procurement of settlement are only grounds upon which chancery will look behind settlement of an account in orphans' court, and defects and errors in account should be remedied in latter court. Id. Where bill by next of kin for ascertainment of complainant's distributive share alleged fraud in accounts filed in orphans' court, and sought, by series of special interrogatories, information in regard to certain securities which had come into defendant's hands, held that allegations of answer that there had been settlement in orphans' court in which complainant had participated did not excuse defendant from answering all material averments and interrogatories, after which court would determine whether it would review proceedings already had in orphans' court. Id. Supreme court will not exercise its concurrent jurisdiction to compel temporary administrator to account where surrogate has full and complete jurisdiction in premises. In re Goetz, 104 N. Y. S. 832. Will not take jurisdiction of proceeding to compel accounting unless under circumstances requiring interposition of court of equity. Volhard v. Volhard, 104 N. Y. S. 578. Allegation of petition that, under Code Civ. Proc. § 2729, governing admission of evidence as to payments by executors where no vouchers can be produced, executor would be unable in surrogate's

any interested party[24] other than the representative may, by a bill filed for that purpose,[25] to which all persons in any manner interested in the estate are made parties,[26] remove an administration from the probate to the chancery court,[27] as a matter of right and without the assignment of any special reason,[28] at any time before the concurrent jurisdiction of the probate court has attached by the institution of proceedings having substantially the same object.[29] If, however, such proceedings have been commenced in the probate court, or if the power of the chancery court be invoked by the personal representative, some special equitable reason for removal must be assigned.[30] After removal the chancery court is controlled by and must follow the rules of law which would obtain on a settlement in the probate court.[31]

Jurisdiction of Federal courts.[32]—A Federal court has no jurisdiction of the administration of the estates of deceased persons as such.[33] It has, however, jurisdiction over controversies arising during the pendency of the administration in the state courts, which involve the enforcement of its own judgments or decrees,[34] or the rights of aliens, citizens of other states, or other parties who might invoke its action and jurisdiction had the controversy arisen otherwise,[35] and its adjudications of such issues prevail over state statutes and the decisions of state courts.[36] So, too, where the other jurisdictional requisites exist, rights and remedies provided by state statutes to be pursued in the state courts of general jurisdiction may be enforced and administered in the Federal courts either at law or in equity, as the case may be.[37] An executor who is a nonresident citizen is not pre-

court to testify as to payment made by him or to introduce all his evidence tending to show payment, held no reason why supreme court should take jurisdiction, said section being equally applicable to accountings in that court. In re Smith, 105 N. Y. S. 223. Supreme court will exercise jurisdiction where title to realty is involved. In re Fogarty's Estate, 117 App. Div. 583, 102 N. Y. S. 776; Bushe v. Wright, 118 App. Div. 320, 103 N. Y. S. 410.

24. Heir distributee, or legatee. St. John v. St. Jonh [Ala.] 43 So. 580. Creditor is interested party. Rensford v. Magnus & Co. [Ala.] 43 So. 853.

25. Averments of bill held sufficient on demurrer. Cronk v. Cronk [Ala.] 42 So. 450. Bill praying sale of realty for distribution held not one seeking sale independent of orderly administration of estate, but to invoke court's action to that end in due course of administration. St. John v. St. John [Ala.] 43 So. 580. Bill held not multifarious in joining administrator in both his representative and individual capacity. Rensford v. Magnus & Co. [Ala.] 43 So. 853.

26. St. John v. St. John [Ala.] 43 So. 580.

27. Chancery court has original and general jurisdiction over administration and settlement of estates. Rensford v. Magnus & Co. [Ala.] 43 So. 853. Is not in any way affected or taken away by concurrent jurisdiction of probate court, but concurrent jurisdiction is expressly recognized by Const. 1901, § 149. Id.

28. St. John v. St. John [Ala.] 43 So. 580.

29. At any time before probate court has taken steps for, or entered upon, final settlement. St. John v. St. John [Ala.] 43 So. 580. Code 1896, § 331, providing that no suit shall be commenced against executor until six months, etc., held to have no application to suit to remove administration. Id. Code § 2263, inapplicable. Rensford v. Magnus & Co. [Ala.] 43 So. 853.

30. Order of probate court directing sale of personalty on petition of administrator for that purpose held not a proceeding upon which jurisdiction of probate court for final settlement would attach so as to require assignment of special reason. Rensford v. Magnus & Co. [Ala.] 43 So. 853.

31. Cronk v. Cronk [Ala.] 42 So. 450.

32. See 7 C. L. 1395. See, also, Jurisdiction, 8 C. L. 579.

33. Brun v. Mann [C. C. A.] 151 F. 145.

34. State statutes cannot deprive Federal courts of power to enforce their judgments. Brun v. Mann [C. C. A.] 151 F. 145. Only limit on this power of Federal courts is that they may not seize or take from another court property in its exclusive legal custody. Id. Where decree of Federal court was allowed as only claim against estate in process of administration, and administratrix refused to institute proceedings for sale of certain realty, the only property of the estate, claiming that it was exempt, held that Federal court in which said decree was rendered had jurisdiction of suit in equity by judgment creditor to compel sale of land. Id.

35. Brun v. Mann [C. C. A.] 151 F. 145.

36. Not deprived of jurisdiction by state statutes granting exclusive jurisdiction over estates of decedents to county courts. Brun v. Mann [C. C. A.] 151 F. 145. Fact that state statute required representative to institute proceeding to sell realty to pay debts held not to prevent judgment creditor from instituting such proceedings in Federal court in his own name for purpose of enforcing judgment recovered in said court. Id.

37. Since statutes of Colorado (Mills' Ann. St. § 4751) give district courts juris-

cluded from suing in the Federal courts by reason of the fact that another executor may have qualified in the state of the situs of the estate.[38] Jurisdiction of a Federal court when once acquired cannot be ousted by a change in the personnel of the representatives.[39] As a general rule, where the state and Federal courts have concurrent jurisdiction, the court first acquiring jurisdiction of specific property in a suit or proceeding to enforce a lien against it, or to subject it to sale, wherein it may be necessary to take possession or dominion of it, may retain the exclusive legal custody of it until the suit is at an end, or until ample time for its termination has elapsed,[40] and the duty is imposed upon it to hear and determine every claim to a lien upon, to an interest in, or to a right to, that property.[41]

§ 3. *The persons who administer and their letters. A. Selection and nomination.*[42]—The executor named in the will ordinarily has an absolute right to the appointment[43] unless he is within the class of persons declared by statute to be incompetent,[44] or unless he renounces his right either expressly or by failure to apply for letters within the time prescribed by law.[45]

In case the executor named in the will dies, is incompetent, or fails to qualify, letters of administration with the will annexed should ordinarily be issued to the person or persons who would have been entitled to administrator had decedent died intestate.[46]

diction to entertain suits in chancery for sale of realty of decedents to pay debts while administration is pending in county courts, held that Federal court of equity had jurisdiction to decree sale to satisfy judgment rendered by it against deceased during his lifetime, or claim of foreign creditor. Brun v. Mann [C. C. A.] 151 F. 145.

38. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159.

39. Jurisdiction of suit by one executor against his coexecutor to enjoin threatened danger to interests of estate cannot be ousted by substitution of an administrator with will annexed for derelict executor. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159.

40. Brun v. Mann [C. C. A.] 151 F. 145. Where no proceeding for sale of land to pay debts had been instituted in county court, and state statute conferred concurrent jurisdiction on state district court to make such sale, held that fact that land was in custody of county court did not deprive Federal court of jurisdiction of suit to procure its sale, county court's custody and jurisdiction being limited by grant to district court. Id. Since, if suit had been instituted in state district court, legal custody of property for purpose of sale would have passed to it, and since party loses no right or remedy by going into Federal court, held that institution of suit in Federal court divested plenary jurisdiction of property from county court and vested it in Federal court for purposes of sale. Id. After commencement of suit in Federal court, held that proceedings in county court by administratrix for allowance for administration expenses, and for allowance to her as widow, were of no avail in so far as proceeds of said realty were concerned. Id.

41. Where Federal court of equity acquired jurisdiction of proceedings to sell realty of decedent to pay judgment previously rendered by it, held that it should have determined claim of administratrix for allowance of expenses of administration, and for allowance to her as widow, out of proceeds of sale. Brun v. Mann [C. C. A.] 151 F. 145.

42. See 7 C. L. 1395.

43. Executor derives his authority to act from will, granting of letters testamentary being pro forma act to give effect to will of testator, and can be deprived of his right to administer only by his own renunciation or by failure to appear when cited to prove will and take out letters. In re Miller's Estate, 216 Pa. 247, 65 A. 681. Until executor has refused or renounced trust, register has no authority to grant letters of administration with the will annexed. Act March 15, 1832 (P. L. 140, § 18). Id.

44. Admission of will to probate by register is judicial determination of its validity and, unappealed from, conclusive as to appointment of person named therein as executor. In re Miller's Estate, 216 Pa. 247, 65 A. 681. Where register admitted will, held that he had no authority to take testimony as to executor's sanity and refuse to grant him letters on ground that he was insane, remedy in case of his insanity being by proceedings for his removal. Id. Testimony held to sustain finding of orphans' court on appeal from register that executor was sane and competent to act. Id.

45. Time within which it is imperative for executor to accept or renounce is when he is cited to do so. In re Miller's Estate, 216 Pa. 247, 65 A. 681.

46. Under Rev. St. c. 66, § 22, where there is no person who can be appointed executor, or executor fails to qualify. Farnsworth v. Whiting [Me.] 66 A. 833. Where sole executor named in will died before testator, held that order directing appointment of next of kin as administrator with will an-

Letters of administration on the estate of one dying intestate must be granted in the order of preference prescribed by statute.[47] The right is generally given first to the surviving husband or wife,[48] and then to the next of kin,[49] if competent and suitable.[50] Where there is a public administrator, his right is generally prior to that of a stranger.[51] In some states a guardian takes the place of his ward in so far as the right to administer is concerned.[52]

The right of nonresidents[53] and corporations[54] to act as representative depends on the statutes of the various states. In some states the person having the preferential right to the appointment may designate any competent person to serve in his stead.[55] The right to do so is sometimes limited to cases where the person having the preferential right is himself competent to serve.[56]

nexed was proper. Id. Under Code Civ. Proc. §§ 2643, 2644, stranger cannot be appointed without citation or renunciation of all legatees, heirs, devisees, next of kin, and creditors. In re Wiggins, 103 N. Y. S. 518.

47. Probate court cannot deviate from order so fixed. Hollingsworth v. Jeffries, 121 Mo. App. 660, 97 S. W. 632. When cause for administration exists and application is made to proper court, neither fact that it is made by person not entitled to administration, nor that person not so entitled is appointed, renders appointment wholly void so as to be subject to collateral attack. Steinberg v. Saltzman, 130 Wis. 419, 110 N. W. 198.

48. Application for letters made on ground that widow, who was entitled to prior right, had not applied, denied where it appeared that she had obtained letters of administration on decedent's estate under different name, there being no question that two applications related to same person. In re Zerwinski's Estate, 51 Misc. 661, 102 N. Y. S. 203. If any doubt as to whether letters bore proper name, held that proceedings should be instituted to amend them. Id.

49. Allegation in application otherwise sufficient that applicant was entitled to appointment "being one of the next of kin of the deceased" held not to show want of jurisdiction to make appointment on theory that it meant that applicant was such at time of application and not at time of decedent's death, though it appeared that sixty-eight years had elapsed between decedent's death and date of application. Medlin v. Downing Lumber Co. [Ga.] 57 S. E. 232. Order directing appointment of next of kin, if qualified and suitable, as administrator with will annexed, held proper. Rev. St. c. 66, § 18. Farnsworth v. Whiting [Me.] 66 A. 833. Verdict that certain person died intestate, that petitioner was his next of kin, was more than twenty-one years old, and was suitable person to be administratrix, held in due form, it affirmatively finding facts entitling petitioner to be appointed under Court & Prac. Act 1905, p. 237, § 824. Sayles v. Probate Ct., 27 R. I. 563, 65 A. 272. Rev. St. 1898, §§ 3812, 3813, 3814, construed, and held that, though relative applying within three months would be entitled to preference over creditor, letters issued to creditor, instead of to nominee of relative who filed petition within that time, were not void for want of jurisdiction, but voidable only, and would be treated as valid until revoked in proceeding properly instituted for that purpose. In re Owen's Estate [Utah] 91 P. 283.

50. Where petitioner was entitled to appointment if a suitable person, and it was found that she was, held that evidence as to qualifications of another person was properly excluded. Sayles v. Probate Ct., 27 R. I. 563, 65 A. 272. Evidence as to competency of another than petitioner held properly excluded where his competency was not disputed. Id. Question asked petitioner as to how many counsel she had had held properly excluded as immaterial. Id.

51. Person nominated in petition who is not of next of kin or creditor is not entitled to appointment in preference to public administrator without being joined with others having right to such appointment prior to public administrator. Code Civ. Proc. § 2660. In re Printup's Estate, 121 App. Div. 322, 106 N. Y. S. 74.

52. Guardian of minor who, if of age, would be entitled to administer, is in right of his ward entitled to letters in preference to strangers, and stands, so far as his right to administer is concerned, in shoes of ward, and to that extent represents him. In re Weeks' Estate [Ind. App.] 81 N. E. 107.

53. Nonresident next of kin held to have no right to administer. Spayd's Adm'r v. Brown [Ky.] 102 S. W. 823. One otherwise entitled to letters or to designate person to be appointed held not incapacitated because a nonresident. Rev. St. 1895, arts. 1910, 1922, 2027. Stevens v. Cameron [Tex.] 18 Tex. Ct. Rep. 241, 101 S. W. 791, rvg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 877, 96 S. W. 1086. Fact that person who administered was nonresident held not such fraud as to vitiate administration proceedings though it would have been ground for refusing to appoint him or for his removal. Meikle v. Cloquet [Wash.] 87 P. 841. Letters must be granted to persons entitled thereto under statute if they are residents of state, regardless of whether they are residents of county or not. In re Weeks' Estate [Ind. App.] 81 N. E. 107.

54. Appointment of corporation as executor or administrator held not contemplated or authorized by statute. Continental Trust Co. v. Peterson [Neb.] 107 N. W. 786, 110 N. W. 316.

55. Widow. Rev. St. 1895, art. 1916. Stevens v. Cameron [Tex.] 18 Tex. Ct. Rep. 241, 101 S. W. 791, rvg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 877, 96 S. W. 1086.

56. Nonresident next of kin held to have no right to administrator, and hence could

The public administrator[57] is not ex officio administrator of any estate, but must procure letters like any other applicant.[58]

(§ 3) *B. Procedure to obtain administration and grant of letters.*[59]—The petition for letters must substantially comply with the statutory requirements, and show facts entitling the applicant to the appointment.[60] Provision is generally made for the filing and hearing of objections.[61] The required notice must be given[62] unless waived.[63] The filing of the will in the state within a specified time after decedent's death is sometimes made a prerequisite to the grant of ancillary letters to a foreign executor.[64] The order of appointment is generally effective from the date of its rendition rather than that of its entry.[65]

(§ 3) *C. Security or bond, and oath.*[66]—The representative is generally required to give a bond conditioned on the faithful performance of his duties[67] unless the will provides to the contrary, and even in such cases the court may ordinarily require him to do so on a proper showing.[68] In some states, corporations desiring to act as executors are required to deposit securities of a specified value with the state treasurer.[69]

not dictate who should be appointed, St. 1903, §§ 3896, 3897, requiring appointment of relatives if they apply before expiration of second county court day after decedent's death, and to set aside appointment of stranger previously made if relative applies within such time, having no application where next of kin are nonresidents. Spayd's Adm'r v. Brown [Ky.] 102 S. W. 823.

57. See 7 C. L. 1398.

58. O'Rourke v. Harper, 35 Mont. 346, 89 P. 65.

59. See 7 C. L. 1398.

60. Since, under Code Civ. Proc. §§ 2643, 2644, stranger to estate cannot be appointed administrator with will annexed without citation or renunciation of all legatees, next of kin, heirs, devisees, and creditors, held that petition which failed to show that there was no person entitled to letters prior in right to person whose appointment was sought, unless such person prior in right was cited or had renounced, was insufficient. In re Wiggins, 103 N. Y. S. 518. Second petition referred to as amended petition, filed without order permitting it, not referring to original, and on which no citation was issued, held to have no proper place in proceeding, and to be disregarded. Id. Petition for revocation of order discharging administrator, and that he be required to administer on newly-discovered assets, held sufficient as petition for appointment of administrator, there being complete compliance with Rev. St. 1901, par. 1597. Otero v. Otero [Ariz.] 90 P. 601.

61. Code Civ. Proc. § 1349. In re Kilborn [Cal. App.] 89 P. 985. Where an opposition to appointment of administrator is filed before expiration of delay required for publication of application, and before clerk has made any order of appointment, issuance of letters before such opposition has been heard is premature and unauthorized, and letters will be annulled. Succession of Weincke, 118 La. 206, 42 So. 776.

62. Rev. St. 1899, §§ 292, 293, 8, construed, and held that granting of letters to public administrator and act of latter in taking charge of estate were not improvident because citation provided for in § 8 was not issued to an heir of whose existence neither court nor administrator had knowledge. Hollingsworth v. Jeffries, 121 Mo. App. 660, 97 S. W. 632.

63. Appearance and taking part in proceedings held to preclude objection of want of notice. Otero v. Otero [Ariz.] 90 P. 601.

64. Statute held to prohibit grant of letters to foreign executrix where more than four years had elapsed between decedent's death and filing of will. Webster v. Clarke [Tex.] 17 Tex. Ct. Rep. 773, 99 S. W. 1019, afg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 320, 94 S. W. 1088.

65. Order appointing administrator. Louisville & N. R. Co. v. Perkins [Ala.] 44 So. 602.

66. See 7 C. L. 1400. For rights and liabilities of sureties and actions on bonds see § 9G, post.

67. Failure to require bond as provided by Code, § 3301, or postponement of fixing of amount thereof, held not to deprive court of jurisdiction, or subject appointment to collateral attack in will contest. In re Wiltsey's Will [Iowa] 109 N. W. 776. Failure to require bond held cured where it was given and approved after objection had been raised in proceedings to which administrator was party, no prejudice being shown. Id.

68. Code 1896, § 67, giving devisees right to require bond upon showing their interest in estate, and alleging that such interest is or will be endangered for want of security, held equally applicable where administration is removed to court of equity. Cronk v. Cronk [Ala.] 42 So. 450. Averments of bill by remaindermen to remove administration to court of equity and to compel executor, who was also life tenant and had power of sale, to give bond, held sufficient on demurrer. Id.

69. St. 1891, c. 264, providing that when corporation having paid up capital of specified amount, and authorized by its articles to act, is named as executor in will, it must be appointed without bond or security other than that afforded by deposit of securities of specified value with state treasurer, and that before accepting trust it must procure certificate from board of bank commission-

Oath.[70]—Whether or not the representative is required to file an oath depends upon the statutes of the various states.

(§ 3) *D. Removals.*[71]—The representative should be removed only for good cause shown.[72] The power of removal is given for the protection of the estate, and should not ordinarily be exercised when the purpose of the petitioner is clearly not to protect the estate, but to punish the representative.[73] Among the common grounds for removal are want of jurisdiction to make the appointment,[74] or failure to comply with the statutory procedure,[75] the false suggestion of a material fact in the petition for letters,[76] and that the person seeking revocation has the prior right to the appointment.[77] Provision is generally made for the citing or bringing in of the representative [78] and for a hearing.[79] Letters of administration granted on the supposition of intestacy are generally ipso facto revoked by the subsequent admission of a will to probate,[80] though in some states an order of revocation is necessary.[81] In some states, letters granted to a feme sole abate by operation of law on her marriage.[82]

A judgment of removal renders the representative functus officio.[83] After revocation the same procedure and formalities are necessary to the grant of new letters as are necessary to the grant of letters in the first instance.[84]

ers stating that it has complied with said law, held not unconstitutional as granting special privilege or immunity to corporation, court having power to refuse to appoint it on showing that it is not financially responsible, or to require additional security. In re Kilborn [Cal. App.] 89 P. 985. Under Code Civ. Proc. § 1349, providing that court may, upon objections, decline to appoint executor named in will, held that court may inquire into financial responsibility of corporation so named, though it has complied with St. 1891, c. 264, certificate of bank examiners not being conclusive on that question. Id.

70, 71. See 7 C. L. 1400.

72. Statute requiring court to confirm letters granted by clerk in vacation, unless for good cause shown they shall be revoked, held mandatory, and court has no authority to arbitrarily revoke them. In re Weeks' Estate [Ind. App.] 81 N. E. 107.

73. Fact that executor had invested funds of estate in securities not authorized by law held not ground for his removal, it appearing that his accounts had been settled and approved, that he had acted in good faith, and that no loss had resulted to estate. In re Burr, 118 App. Div. 482, 104 N. Y. S. 29.

74. Letters of administration properly annulled and appointment set aside where administrator was appointed by court of county other than that where decedent resided at his death. Williams v. Dougherty, 39 Ind. App. 9, 78 N. E. 1067.

75. Letters will be canceled where issued before hearing on opposition filed in due time. Succession of Weineke, 118 La. 206, 42 So. 776.

76. Omission of material facts from petition for appointment of administrator c. t. a. held false suggestion of material fact justifying revocation, regardless of whether petitioner acted under honest mistake or with evil intent. In re Rathyen, 115 App. Div. 644, 101 N. Y. S. 289.

77. Letters issued to public administrator held properly revoked on petition of heir having prior right, but whose existence was unknown when appointment was made. Rev. St. 1899, §§ 7, 8, 9, 294. Hollingsworth v. Jeffries, 121 Mo. App. 660, 97 S. W. 632. Letters granted to person designated by creditor will not be revoked on subsequent application of next of kin within time prescribed by law for issuance of letters to person named by them where they are nonresidents, and hence not entitled to appointment, St. 1903, §§ 3896, 3897, having no application to such a case. Spayd's Adm'r v. Brown [Ky.] 102 S. W. 823.

78. Order removing administrator held ineffectual where he was not cited to appear and no attachment was ordered against his body. Rev. St. c. 3, §§ 30, 113. Horn v. White, 127 Ill. App. 222, afd. 224 Ill. 238, 79 N. E. 629.

79. Where answer filed by executor on return of citation raised material questions of fact, held that decree of removal would be reversed where surrogate took no evidence and made no findings of fact or conclusions of law. In re Dittrich, 105 N. Y. S. 303.

80. Hence judicial annulment of letters previously granted is not necessary prerequisite to admission of will. In re Mears' Estate, 75 S. C. 482, 56 S. E. 7.

81. Under Revisal 1905, § 37, on production of will, probate court must make order revoking letters, and cause it to be served on administrator. Shober v. Wheeler, 144 N. C. 403, 57 S. E. 152.

82. Under Code of 1866. Letters granted to widow. Wilson v. Wood, 127 Ga. 316, 56 S. E. 457.

83. One removed from administration by county judge having jurisdiction of subject-matter and parties has no locus standi as administrator to file bill for purpose of having estate administered in court of equity. Milton v. Hundley [Fla.] 42 So. 185.

84. Code Civ. Proc. § 2693. Belden v. Belden, 118 App. Div. 296, 103 N. Y. S. 346. Revocation of letters of administration in decree admitting will to probate held to

§ 4. *The authority, title, interest, and relationship of personal representatives.* A. *In general.*[85]—An executor's interest is derived from the will and his qualification relates back to the death of decedent.[86] By declining to serve, or resigning, he surrenders only such powers as relate strictly to the office of executor.[87] An administrator derives his authority by virtue of the order appointing him.[88] His qualification relates back to the time of his appointment as regards acts done by him in the interim which are for the benefit of the estate,[89] but the doctrine of relation does not authorize one not an administrator to seize and take possession of the property of a decedent from one in possession and claiming to be the owner thereof or to appoint an agent to do so.[90] Acts of an administrator otherwise valid are not rendered void by the subsequent probate of a will.[91] So, too, where the court has jurisdiction, letters which are voidable or are irregularly issued, while unrevoked, furnish complete protection to an administrator acting under them,[92] and his acts thereunder are not invalidated by their subsequent revocation.[93] The authority of the representative continues until his resignation, removal, or discharge.[94] In some states letters granted to a feme sole abate on her marriage.[95]

The representative is generally bound by the admissions of his decedent to the same extent that the latter would be bound thereby if living.[96]

have put an end to administrator's authority, and subsequent decree revoking probate did not operate to reinstate him, particularly where revocation of letters released surety from further liability. Id.

85. See 7 C. L. 1402.

86. Purchase of decedent's interest in partnership by executor held voidable though he did not qualify until after it was consummated. In re Silkman, 105 N. Y. S. 872.

87. Where trust is annexed to office of executor, resignation of latter office carries with it relinquishment of former place. Cushman v. Cushman, 116 App. Div. 763, 102 N. Y. S. 258. Widow, by declining executorship, held to have surrendered none of the powers given her by will except those relating strictly to office of executrix. Trout v. Pratt, 106 Va. 431, 56 S. E. 165.

88. Letter written by debtor to heir before his appointment as administratof held not such an acknowledgment as to revive cause of action in favor of estate barred by limitations, he not being authorized to represent estate. Visher v. Wilbur [Cal. App.] 90 P. 1065.

89. Qualification held to relate back to commencement of action for death by wrongful act. Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 81 N. E. 152. Rule held applicable though amount recovered would go to next of kin only. Id.

90. Agent appointed by widow for that purpose, before widow was appointed administratrix, took possession of cattle in possession of another on which decedent had mortgage. Held that subsequent appointment of widow as administratrix did not render agent's acts lawful, or preclude recovery of cattle by party from whom they were taken. James v. Nunley, 6 Ind. T. 336, 97 S. W. 1028.

91. Under Revisal 1905, § 37, providing that on production of will probate court shall make order revoking letters of administration previously issued, and cause it to be served on administrator, and that all of latter's acts done in good faith before service of order shall be valid, held that letters of administration were not rendered void by subsequent probate of will, and judgment recovered against administrator could not be attacked on that ground in proceeding to subject realty to its payment. Shober v. Wheeler, 144 N. C. 403, 57 S. E. 152.

92. Action of court of county other than that where decedent resided in appointing administrator, though voidable on direct attack, held not void on subject to collateral attack. Williams v. Dougherty, 39 Ind. App. 9, 78 N. E. 1067.

93. Administrator acting in good faith under letters which, though voidable, were not void for want of jurisdiction, held entitled, on subsequent revocation of letters, to reimbursement for costs and expenses and to commissions, in view of Code Civ. Proc. § 4043. In re Owen's Estate [Utah] 91 P. 283. Though fact that person applying for letters of administration is nonresident is good ground for refusing appointment or for removing him after his appointment, his acts as administrator when once appointed are not void or voidable, and cannot be set aside for that reason, particularly in collateral proceeding. Meikle v. Cloquet [Wash.] 87 P. 841.

94. See § 14, post.

95. Under Code of 1866, letters granted to widow abated on her remarriage, provision to that effect not having been impliedly repealed by married woman's act of that year (Civ. Code 1895, § 2474). Wilson v. Wood, 127 Ga. 316, 56 S. E. 457. Second husband could assume administration until ordinary appointed another administrator, but unless he actually did so, or ordinary appointed successor, effect of remarriage was to leave estate unrepresented. Id. Rule changed by Civ. Code 1895, § 3368, and letters do not now abate. Id.

96. Sealed bond for debt given by decedent to creditor held conclusive as against administrator as to amount of creditor's insurable interest in life of decedent. Woody's Adm'r v. Schaaf, 106 Va. 799, 56 S. E. 807.

The administration of an estate commenced by a public administrator and not completed on the expiration of his term of office is nevertheless to be completed by him and does not devolve on his successor.[97]

The authority of a special or temporary administrator is ordinarily limited to the preservation of the estate,[98] and ceases on the appointment of a permanent representative.[99]

In the absence of a statutory provision to the contrary,[1] an administrator de bonis non can recover from his predecessor or his representatives only such property as remains in specie, the right to recover for assets wasted or converted being in the distributees.[2]

An administrator with the will annexed succeeds to the powers conferred upon the executor as such, but not to those devolved on him as trustee with trust duties to perform.[3]

One is not bound personally by the judgment in a suit to which he is a party as representative,[4] nor can a personal judgment be rendered against one sued as representative.[5] A representative cannot sue in his individual capacity on a judgment recovered by his decedent.[6]

97. O'Rourke v. Harper, 35 Mont. 346, 89 P. 65.

98. May defend against claims, and, without special authority from probate court, appeal from allowance of claim. McNamara v. Michigan Trust Co., 148 Mich. 346, 14 Det. Leg. N. 250, 111 N. W. 1066. Temporary administrator of deceased stockholder, who was also residuary legatee under will which was being contested, held not entitled to maintain proceeding for inspection of corporation's books, he being stranger to corporation, and proceeding not being necessary to preserve decedent's interest therein. In re Hastings, 105 N. Y. S. 834. Temporary administrator has no standing to maintain action to construe will, he having no authority to distribute estate, but only to preserve it and account therefor to court appointing him, except that he may pay out rents as directed by surrogate under Code Civ. Proc. § 2675. In re Goetz, 104 N. Y. S. 832. Cannot maintain action as one to determine conflicting claims to rents in his hands, since he can be discharged from liability and obligation of his surety be canceled by accounting to surrogate and paying money into court or to party entitled thereto. Id.

99. On appointment of administrator with will annexed. Code Civ. Proc. § 2670. In re Goetz, 104 N. Y. S. 832.

1. Pending suit by administrator d. b. n. under act Feb. 24, 1834, § 31, P. L. 70, against sureties of insolvent deceased administrator to recover assets misappropriated by latter, held error for orphans' court to award balance found due from said administrator to guardian of decedent's heir rather than to administrator d. b. n., particularly where guardian and administrator were same person and demanded that award be to him as administrator. Hill's Estate, 32 Pa. Super. Ct. 508.

2. Motion to strike name of one suing as administrator de bonis non from complaint, in action to recover property alleged to have been converted by defendants and deceased executrix, held properly sustained. Yager's Adm'r v. Bank of Kentucky, 30 Ky. L. R. 1287, 100 S. W. 818. All heirs at law must be made parties, either as plaintiffs or defendants, to action to recover property alleged to have been converted by deceased executrix and third persons. Id. Money deposited in bank to credit of one as executor held unadministered assets so that, on his death, right to collect it passed to administrator de bonis non and not to administrator of executor. Clark's Adm'r v. Farmers' Nat. Bk., 30 Ky. L. R. 738, 99 S. W. 674.

3. Held, under Neb. Comp. St. 1903, §§ 2983, 2987, charged with execution of trusts conferred upon executor. Quinton v. Neville [C. C. A.] 152 F. 879. Has all powers of executor, except such as arise from personal trust or confidence. Civ. Code 1895, § 3309. Hodges v. Stuart Lumber Co. [Ga.] 58 S. E. 354. Held charged with duty under Shannon's Code, § 3976, to sell land and personalty which will directed executors to sell. Hardin v. Hassell [Tenn.] 100 S. W. 720. Code Civ. Proc. § 2613, providing that administrators with will annexed shall have same rights and powers as if named as executors in will, held not to confer on him capacity to exercise discretionary power of sale. Coann v. Culver, 188 N. Y. 9, 80 N. E. 362, rvg. 108 App. Div. 360, 95 N. Y. S. 1122. Held not to succeed to implied power of sale devolving upon executor as testamentary trustee. Casselman v. McCooley [N. J.] 67 A. 436. Where executor and testamentary trustee had fully performed all duties devolving on him in former capacity, held that he thereafter held property as trustee and on his subsequent death county court had no jurisdiction to appoint administrator with will annexed, but further administration of trust could only be accomplished by trustee and that district court had jurisdiction to appoint trustee for that purpose. McClelland v. McClelland [Tex. Civ. App.] 18 Tex. Ct. Rep. 120, 101 S. W. 1171.

4. Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004. Fact that former administrator individually was made party to motion to open judgment authorizing him in his representative capacity to sell land held not to dispense with necessity of joining him as administrator. Whittey Grocery Co. v. Jones [Ga.] 58 S. E. 623.

5. In action to restrain shutting off of

Only ministerial acts may be delegated.[7]

Letters testamentary or of administration have no legal force or effect beyond the territorial limits of the state in which they are granted,[8] and hence the representative as such ordinarily has no authority nor liability,[9] acquires no title to property,[10] and cannot sue or be sued [11] in any other state until he qualifies under its laws. Such qualification is not, however, a necessary prerequisite to a sale under a power of sale expressly conferred on him by a mortgage,[12] though the will must, in such case, be proved and recorded in the state where the land is situated.[13] A judgment against a representative in one state does not bind either a representative or the assets of the estate in another.[14] It has, however, been held that a valid judgment against a foreign administrator, rendered in a state other than that of his appointment, is conclusive on the local administrator in that state, and a bar to a subsequent suit by him involving the same issue, and the parties to which are otherwise the same.[15]

water furnished plaintiffs for irrigation purposes, held that judgment could not be rendered against defendant individually where it appeared that water pipes belonged to estate of decedent, and that she was acting only as administratrix, nor would estate which she represented be bound by any judgment rendered against her personally. Perrin v. Smith [Colo.] 89 P. 648.

6. Administrator held not entitled to do so in foreign state, he not being party of record thereto. Miller v. Hoover, 121 Mo. App. 568, 97 S. W. 210.

7. Even if executor had power, in absence of order of probate court, to settle controversy in regard to property of estate, held that he could not delegate such power to widow. Williamson v. Robinson [Iowa] 111 N. W. 1012.

8. Miller v. Hoover, 121 Mo. App. 568, 97 S. W. 210. No proceedings may be maintained for recovery of claim due decedent without taking out letters of administration in state where action is brought. Vinton v. Sargent [Mass.] 80 N. E. 826. Courts will not enforce debts due foreign decedent until ancillary administration is obtained. Brown v. Smith [Me.] 64 A. 915. Probate of will in state other than that of decedent's domicile does not entitle party named therein as executrix to act as such therein, but issuance of letters to her in that state is also necessary. Webster v. Clark [Tex.] 17 Tex. Ct. Rep. 773, 99 S. W. 1019, afg. 16 Tex. Ct. Rep. 320, 94 S. W. 1088.

9. Power and authority over estate is confined to sovereignty by virtue of whose laws he is appointed. Brown v. Smith [Me.] 64 A. 915. Administrator has no authority over debt due estate by resident of state other than that of his appointment, and cannot assign same so as to entitle assignee to sue thereon. Id. Debt follows debtor after death of creditor. Id. Administrator cannot, by virtue of original letters, assign mortgage on land situated in another state so as to entitle assignee to enforce payment thereof in latter state. Id. Executors cannot, by virtue of any authority conferred by will, sell land in foreign state until they have qualified in state where land is situated. Scott v. Blades Lumber Co., 144 N. C. 44, 56 S. E. 548. Conveyance of mortgaged premises by executors of mortgage held, in effect, nothing more than an assignment of mortgage debt and mortgage, which did not deprive them of power of sale conferred upon them by said mortgage. Id.

10. Miller v. Hoover, 121 Mo. App. 568, 97 S. W. 210.

11. See § 10, post.

12. Where mortgage expressly confers power of sale on executors, they derive their authority to sell by virtue of contract and not from will. Scott v. Blades Lumber Co., 144 N. C. 44, 56 S. E. 548. Under Revisal 1905, § 1031, power of sale in mortgage may be exercised by mortgagee's executors as an incident of the contract, though mortgage does not expressly so provide. Id.

13. Scott v. Blades Lumber Co., 144 N. C. 44, 56 S. E. 548. Such probate made after the conveyance will, however, relate back and validate it, provided no rights of third parties have intervened. Id.

14. Defendant was both executrix and devisee of New York will. Suit against decedent was revived against her as executrix only, in that state and judgment rendered against her in that capacity. Held that such judgment only operated to subject assets within that jurisdiction, and did not establish such debt against her as an individual so that action could be maintained thereon against her as devisee in Texas to subject lands in that state received by her as devisee to its payment. Webster v. Clarke [Tex.] 17 Tex. Ct. Rep. 773, 99 S. W. 1019, afg. 16 Tex. Ct. Rep. 320, 94 S. W. 1088. Domiciliary executor and estate in state of decedent's domicile cannot be affected by acts of foreign administrator, or by any judgment or decree rendered against latter in state of his appointment. Brown v. Fletcher's Estate, 146 Mich. 401, 13 Det. Leg. N. 818, 109 N. W. 686. Rule not changed because suit in which judgment was rendered was pending in foreign jurisdiction at time of testator's death. Id. Stipulation entered into by decedent before his death, whereby cause was referred to arbitrator by court, and decedent bound himself, his executors and administrators to abide by award, pursuant to which decree was rendered, held not to change rule. Id. Decree against ancillary administrator in state where he was appointed held satisfied as to him when, giving it due credit, he had distributed estate according to law of forum. Id.

15. Judgment of state court which had obtained jurisdiction over foreign admin-

(§ 4) *B. Contracts, conveyances, charges, and investments. Contracts.*[16]—The representative is generally held to be personally liable on all contracts made by him, though acting in his official capacity and for the benefit of the estate.[17] and persons rendering services thereunder must look to him alone for their compensation,[18] though disbursements by reason thereof, when necessary and reasonable in amount, will constitute a charge in his favor against the estate.[19] It is sometimes held that he has power to bind the assets of the estate in his hands whenever authority to do so is conferred upon him by statute or the will, and that within these limitations claims arising out of his contracts are demands against the estate, and, as such, enforceable at law against it.[20] It has also been held that the court having charge of the administration will enforce as against an attorney a contract for legal services entered into between himself and the representative, where it is reasonable and beneficial to the estate.[21] A testator has no power to control executors in the choice of the attorneys or counsel who shall act for them in their representative capacity.[22]

In the absence of a provision to the contrary in the will, the representative has no authority to carry on the business of the decedent.[23]

istrator. Benker v. Meyer [C. C. A.] 154 F. 290.

16. See 7 C. L. 1404.

17. Where administrator contracted in representative capacity to convey land of decedent, and on demand failed to perform, held that vendee could sue for specific performance with prayer for alternative relief for return of money paid on account, with interest and expenses, in case administrator had no authority to make contract, though latter made contract under mistaken idea as to his authority. Elliott v. Asiel, 105 N. Y. S. 655. Executor leasing property of estate may sue out distress warrant in his individual capacity, and terms indicating representative capacity, if used, may be treated as descriptio personae and disregarded as surplusage. Dean v. Donaldson [Ga.] 58 S. E. 679. Held no variance between judgment rendered and affidavit and warrant. Id. Where administrator contracted to sell realty of estate "the deed to be given as soon as possible after estate is advertised and the deed can be given," and probate court refused to make order of sale, held that administrator was not liable in damages for breach of contract. Wilson v. Root [Conn.] 67 A. 482. Fact that, after presenting matter to court, he discovered that property was worth more than contract price, and so informed heirs and court, held not to estop him from relying on fact that condition precedent never came into existence. Id. Where he did not purport to represent heirs, held that contention that he was guilty of fraud in leading plaintiffs to believe that he had authority of heirs to sell was untenable. Id.

18. Representative, and not estate, is personally and primarily liable for legal services rendered for benefit of estate at his instance and request. Besancon v. Wegner [N. D.] 112 N. W. 965. Attorney has no cause of action against estate for recovery of value of such services. Id. Executor personally liable to counsel employed by him. In re Flaacke's Estate [N. J. Eq.] 64 A. 1020.

19. See § 9D, post.

20. Claims for attorney's fees incurred in management of estate held enforceable by attorneys directly against it. Matson v. Pearson, 121 Mo. App. 120, 97 S. W. 983. Where will gave executor power to sell land, held that he could bind estate by contract to pay real estate agent for services in procuring purchaser therefor to the extent that he would himself be entitled under statute to compensation for same services. Id. Since under Rev. St. 1899, § 223, providing that representative is entitled to commission of 5 per cent on money arising from sale of realty, he is not entitled to such commissions unless sale is actually made, held that agent could not recover from estate for services in procuring purchaser where sale was not consummated. Id.

21. Attorney who has induced representative to employ him to represent estate by use of such language as would reasonably induce representative to believe that compensation will not exceed specified sum is estopped to demand greater sum than that suggested as an inducement to his employment. In re Rapp's Estate [Neb.] 110 N. W. 661.

22. Provision in will in reference to attorneys to be employed held to be regarded merely as expressive of wish on part of testator which it was proper for executors to observe if in accordance with their judgment, but which they were otherwise not bound to regard. In re Caldwell, 188 N. Y 115, 80 N. E. 663, rvg. 100 N. Y. S. 1109. Provision in will appointing attorney to assist executor in settling estate held to be construed as advisory provision merely, which executor could follow or disregard according to his own judgment, and not to disqualify such person as attesting witness or from testifying in support of will. In re Pickett's Will [Or.] 89 P. 377.

23. Agreement between administrator and others whereby business of decedent, who died largely indebted, was to be continued for benefit of decedent's sons, held one in violation of N. Y. Code Civ. Proc. §§ 2717-2719, prescribing duties of representatives. Fidelity & Deposit Co. v. Moshier, 151 F. 806.

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ESTATES OF DECEDENTS—Cont'd.

Conveyances.[24]—A representative has no power to sell and convey realty belonging to the estate except under an order of court for the payment of debts,[25] or for the purpose of distribution,[26] or for some other purpose authorized by statute,[27] or under a power of sale conferred upon him by will.[28]

Investments.[29]—Statutes in some states provide in what securities the funds of the estate may be invested.[30] The representative is not liable for losses due to the shrinkage of securities where their purchase and retention is within the discretionary power conferred on him by the will.[31] He is sometimes relieved from liability for losses due to the depreciation of securities owned by decedent during his lifetime where he continues to hold the same in the exercise of good faith and reasonable discretion.[32] In some states he cannot sell any dividend bearing securities owned by the decedent at the time of his death until so ordered by a court of equity.[33]

(§ 4) *C. Title, interest, or right in decedent's property.*[34]—Except where the rule is changed by will,[35] or by statute, the legal title to the personalty of a decedent vests in the executor or administrator on his qualification or appointment.[36] He holds the same in trust, however, for the creditors and the distributees or beneficiaries under the will.[37]

The legal title to realty vests in the heir or devisee immediately on the death of the decedent,[38] subject to the statutory right to sell the same for the payment of debts,[39] or for purposes of distribution,[40] and to any powers of sale conferred by the will.[41] The character of the estate cast upon the heir is the same as that held by the ancestor.[42]

In Georgia, when an executor assents to a devise or legacy, all interest of the estate in the property passes out of him.[43] The assent is generally irrevocable, even though the assets remaining are insufficient to pay the debts.[44] A presumption of assent may arise from lapse of time.[45]

§ 5. *The property, its collection, management and disposal by personal representatives. A. Assets.*[46]—The title to, and right to possession of, the realty[47] of a

24. See 7 C. L. 1405.
25. See § 7, post.
26. See § 12, post.
27. See § 5E, post.
28. See § 5E, post. For construction of wills to determine what powers of sale are thereby conferred, see Wills, 8 C. L. 2305.
29. See 7 C. L. 1406.
30. Authority to sell and reinvest held not to relieve executors from liability beyond exercise of good faith and reasonable judgment for losses due to depreciation of securities which were not investments authorized by law. Brown v. Brown [N. J. Eq.] 65 A. 739.
31. In re Hawk's Estate, 54 Misc. 187, 105 N. Y. S. 856.
32. Act March 23, 1899 (P. L. 236). Brown v. Brown [N. J. Eq.] 65 A. 739.
33. St. 1903, § 4707, held to refer only to stocks actually earning dividends, and not to those upon which dividends may be paid. Chappell v. Chappell, 30 Ky. L. R. 935, 99 S. W. 959.
34. See 7 C. L. 1406.
35. See § 5E, post, and also Wills, 8 C. L. 2305.
36. See § 5A, post.
37. Executor takes legal title to personalty as trustee for particular purpose. Pond v. Pond's Estate, 79 Vt. 352, 65 A. 97. Where estate consists entirely of personalty, relation of trustee and cestui que trust exists between executor and legatee, so that in litigation which affects amount or value of such an estate executor represents legatee, and privity between them is complete. Id. In proceeding to establish claim, held that fact that claimant was estopped to assert claim as against legatee was available to executor as defense. Id.
38. See § 5A, post.
39. See §§ 7, 8, post.
40. See § 12, post.
41. See § 5 E, post. See, also, Wills, 8 C. L. 2305.
42. Kalona Sav. Bk. v. Eash, 133 Iowa, 190, 109 N. W. 887.
43. Hodges v. Stuart Lumber Co. [Ga.] 58 S. E. 354. Evidence held to show assent to legacy creating use for benefit of widow and children during widow's life. Toombs v. Spratlin, 127 Ga. 766, 57 S. E. 59. Assent to life estate or use held to carry with it assent to remainder also. Id. Widows subsequent election to take dower in lieu of legacy held not to have affected assent so far as remaindermen were concerned. Id.
44. Hodges v. Stuart Lumber Co. [Ga.] 58 S. E. 354.
45. After twenty years. Hodges v. Stuart Lumber Co. [Ga.] 58 S. E. 354.
46. See 7 C. L. 1407.
47. Conveyance of standing timber to be removed within specified time held to

decedent, ordinarily passes to his heirs or devisees immediately upon his death [48] subject to the statutory right to sell the same for the payment of his debts.[49] or for purposes of distribution,[50] and to any powers of sale conferred by the will.[51] Hence, in the absence of a statutory provision to the contrary,[52] all actions in respect thereto must be brought by or against them.[53] In some states the representative may keep possession until the land is specifically assigned to the individuals entitled thereto by partition or otherwise.[54] Under the Federal statutes the heirs of a timber cul-

create a determinable fee in realty, which, on grantee's death, passed to his heirs subject to widow's dower interest. Midyette v. Grubbs [N. C.] 58 S. E. 795. Estate held by son under will held not within St. 1903, § 3861, providing that estates for life of another shall go to personal representatives and be assets in his hands to be applied and distributed as the personal estate, but son's child took father's interest. Wirth v. Wirth's Guardian, 30 Ky. L. R. 960, 100 S. W. 298.

48. Tippecanoe Loan & Trust Co. v. Carr [Ind. App.] 78 N. E. 1043; Coann v. Culver, 188 N. Y. 9, 80 N. E. 362, rvg. 108 App. Div. 360, 95 N. Y. S. 1122; Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380. Rev. St. 1887, § 5701. Reed v. Stewart, 12 Idaho, 699, 87 P. 1002, 1152. Heirs succeed to realty, at least conditionally. Shute v. Patterson [C. C. A.] 147 F. 509. Rights of devisees cannot be defeated or impaired by subsequent legislation attempting to subject land to liability not imposed thereon when they became invested with legal title. In re Moon's Estate [Or.] 88 P. 673. Will created void trust in realty, but trustee, assuming its validity, conveyed trust property. Creditor of certain of testator's heirs obtained judgment against them before testator's death, and after conveyance by trustee levied execution on interests of said heirs. Held that property descended to heirs, that trustee's deed conveyed no title, and that title acquired under execution sale was superior to that of those claiming under grantee of trustee. Lyons Nat. Bk. v. Schuler, 115 App. Div. 859, 101 N. Y. S. 62. Administrator in individual capacity and heirs at law were sued for specific performance of contract for sale of land made by former alone, in his official capacity. Court having found against contention that administrator acted as agent of heirs, plaintiff expressly disclaimed all right to have specific performance as against latter. Held that disclaimer precluded decree of specific performance as against administrator, since title was in heirs. Wilson v. Root [Conn.] 67 A. 482. All heirs of one of purchasers of land, for which part of purchase price had been paid, held proper parties to suit against vendors for specific performance, though decedent left no debts and it was agreed by certain of said heirs that their interest should go to others on payment by them of balance of purchase price, since vendors would act at peril in conveying to part of heirs only. Jackson v. Jackson, 127 Ga. 183, 56 S. E. 318.

49. See §§ 7, 8, post.

50. See § 12, post.

51. As to sales under powers, see § 5E, post. For construction of wills in this regard, see Wills, 8 C. L. 2305. Residuary legatees and devisees held not necessary parties to suit to foreclose mortgage on property forming part of estate where will, by imperative power of sale, worked conversion of realty into personalty. Boehmcke v. McKeon, 103 N. Y. S. 930. Under Kan. Gen. St. 1901, §§ 7961, 7966, relating to recording of foreign wills, and Id. § 3009, empowering foreign executors or administrators to sue or be sued in that state, held that, where will authorized sale of land, foreign administrator c. t. a. who, by laws of state where he was appointed, was charged with execution of trust conferred on executor by will, and who had filed copy of letters and recorded will in Kansas, and was in possession, had such title and possession as authorized him to sue in Kansas to remove cloud on title to realty in that state, and to redeem from equitable lien thereon created by testator. Quinton v. Neville [C. C. A.] 152 F. 879.

52. For right of representative to maintain action see § 5B, post. Under law as it existed in 1840, held that heirs of deceased mortgagor were not necessary parties to suit to foreclose mortgage. Flack v. Braman [Tex. Civ. App.] 18 Tex. Ct. Rep. 107, 101 S. W. 537. Fact that attempt to bind nonresident heirs by published notice was without statutory authority held immaterial. Id. Presumed on collateral attack that mortgagor's administrator was properly served. Id. Even if service by publication was insufficient to authorize judgment against nonresident heirs, held that judgment against administrator was sufficient to bind property of estate against which foreclosure was had. Id.

53. Heirs held entitled to maintain trover for sand taken from lands of decedent during his lifetime, though there was administrator, where latter had never taken possession or control of land, some act by administrator being necessary to deprive heir of his right to inheritance, with all common-law incidents. Nashville, etc., R. v. Karthaus [Ala.] 43 So. 791.

54. One of several heirs cannot assert right of possession to particular area of ancestor's land in possession of administrator until she becomes vested with title in severalty to such area either by agreement among her coheirs or by a partition judgment. Haden v. Sims, 127 Ga. 717, 56 S. E. 989. Pendente lite decree in equitable partition suit appointing partitioners and directing assignment of interest of heir out of particular land lot held only to adjudicate that her interest was to be assigned out of such lot, heir not being vested with title in severalty to any of land until her share is actually allotted by partitioners, and their return is made judgment of court. Id.

ture entryman who dies before patent is issued take title thereto as grantees from the government, and not by inheritance.[55]

Except where the rule is changed by will [56] or by statute, the legal title to and the right to possession of [57] personalty [58] belonging to a decedent [59] passes to his personal representatives, and all actions for its recovery must be brought by them.[60]

Rents of realty accruing during decedent's lifetime ordinarily go to the representative, and those accruing after his death to the persons then entitled to the land.[61]

55. Act June 14, 1878, c. 190, 20 St. 113. Entryman has no devisable interest. Walker v. Ehresman [Neb.] 113 N. W. 218. Heirs held not estopped to assert rights. Id.

56. See Wills, 8 C. L. 2305.

57. Merchants' Nat. Bk. v. McClellan [Ind. App.] 80 N. E. 854; Griesel v. Jones, 123 Mo. App. 45, 99 S. W. 769; In re Morrison's Estate, 48 Or. 612, 87 P. 1043; Shute v. Patterson [C. C. A.] 147 F. 509. Civ. Code 1895, § 3353. Strickland v. Thornton [Ga. App.] 58 S. E. 540. Administrator may recover personalty converted by heir to his own use though latter may ultimately be entitled to part thereof. Palmer v. O'Rourke, 130 Wis. 507, 110 N. W. 389, is entitled to possession as against widow and heirs. Lambert v. Tucker [Ark.] 104 S. W. 131. Since administrator has right to replevy personalty belonging to estate, and code authorizes any person interested in property to become party to replevin action and to litigate his claim therein, held that administrator, on his appointment, could intervene in replevin action previously instituted by widow against heirs to recover personalty belonging to decedent, and recover property as against both her and heirs. Id. Widow's rights to allowance, etc., may be worked out through orderly administration, and are not dependent on her possession of any property belonging to estate. Id. Sale under deed of trust given to secure debt held invalid where it was not made until after creditor's death intestate, and there had been no administrator appointed for her estate, in absence of clear proof that she left no unsatisfied debts, and that it was agreed between her sole distributee and the debtor that said sale might be made. Armistead v. Kirby, 106 Va. 585, 56 S. E. 570.

58. Leasehold held chattel real, which, except for homestead interest, passed to administrator. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710. Growing and unharvested crops on land of decedent at time of his death, such as are raised annually or periodically by labor or planting, go to representative as assets, particularly when upon a leasehold. Id. Crops planted after death of lessee on premises leased by him during his lifetime belong to estate unless there is an exemption thereof. Id. Not entitled to crops planted upon homestead and grown by himself and widow after decedent's death. Id. Shares of stock in corporation organized to own and sell realty, etc., are personalty. Elkhorn Land & Imp. Co. v. Childers, 30 Ky. L. R. 1121, 100 S. W. 222. Under Rev. St. 1899, § 96, held that cause of action for injuries to realty accruing in decedent's lifetime passed to administrator. Mitchell v. St. Louis, etc., R. Co., 123 Mo. App. 545, 101 S. W. 127. Decedent's claim for an accounting against executors of an estate in which he was interested held to have passed to representatives. Bushe v. Wright, 118 App. Div. 320, 103 N. Y. S. 410. Realty acquired by executors under mortgage foreclosure held to be regarded as personalty and assets in their hands. Hine v. Hine, 103 N. Y. S. 535.

59. Complaint in action for conversion brought by administrator against heir held not to sufficiently allege that decedent at time of his death owned any personalty. Tippecanoe Loan & Trust Co. v. Carr [Ind. App.] 78 N. E. 1043. Widow's dower interest under St. 1903, § 2132, being extinguished by her death, right to have dower assigned does not pass to her representative. Cain's Adm'r v. Kentucky & Ind. Bridge & R. Co., 30 Ky. L. R. 593, 99 S. W. 297. Money deposited in bank to credit of one as executor held unadministered assets, so that right to collect it passed to administrator de bonis non, and not to administrator of executor. Clark's Adm'r v. Farmers' Nat. Bk., 30 Ky. L. R. 738, 99 S. W. 674. Title to money turned over to defendant by testator held to have vested in defendant, whether he was strictly a trustee or not, so that executor was not entitled to recover same. Morris v. Wucher, 115 App. Div. 278, 100 N. Y. S. 878. In action to recover money alleged to have been turned over to defendant by plaintiff to be deposited for latter's benefit, evidence held insufficient to sustain defense that money belonged to plaintiff in her capacity as administratrix of her deceased husband and not individually. Crane v. Phillips, 105 N. Y. S. 417. Where note and mortgage securing it provided that no part of principal should be paid during payee's lifetime if interest was paid as therein provided, and that, at latter's death, note should become property of payee's granddaughter, held that interest accruing between last annual interest payment and death of payee belonged to granddaughter, and not to payee's estate. Rogers v. Osborne, 146 Mich. 613, 13 Det. Leg. N. 898, 109 N. W. 1123. Where father transferred property to son for benefit of father's heirs, held that any right of action accruing after father's death by reason of wrongful conduct of son as trustee belonged to heirs as beneficiaries of trust, and not to father's administrator. Griesel v. Jones, 123 Mo. App. 45, 99 S. W. 769.

60. See § 5B, post.

61. Rent is personalty within Civil Code 1895, § 3353, and right to collect and distribute it is in personal representative. Strickland v. Thornton [Ga. App.] 58 S. E. 540. Rule not changed by fact that rent was payable in cotton instead of money. Id. Held error to sustain demurrer to petition brought by administratrix, alleging

Damages recovered for wrongful death are ordinarily not assets of the estate unless none of the relatives for whose benefit the right of action is given are living.[62]

(§ 5) *B. Collection and reduction to possession.*[63]—Since the legal title and right to the possession of personalty is in the representative,[64] actions for its recovery must ordinarily be brought by him [65] unless he refuses to bring them,[66] or unless there are no debts and administration has been dispensed with by a valid agreement on the part of all the heirs entitled to share in the distribution.[67] Set-

that intestate, at time of his death, was in possession of land which he had rented for year, during which he died, and that rent, consisting of cotton, had been taken possession of by defendants without right or authority, and with notice of plaintiff's right to same, and sold, and asking judgment for proceeds on ground that action could not be maintained because plaintiff had not title to cotton. Id. Rents of lands, belonging to heirs as tenants in common, accruing while in possession of administrator, belong, after deducting expenses of administration, to the several tenants in common in proportion to their interest in entire estate at time administrator took charge of land. Haden v. Sims, 127 Ga. 717, 56 S. E. 989. Administrator held not entitled, in suit by assignee of heir at law to recover distributive share, to set off claim for rents of dower lands accruing after death of doweress and collected by plaintiff who had acquired life estate of doweress, it not being alleged that plaintiff's tenants ever attorned to administrator, or that plaintiff's possession was held under him, and fact that plaintiff tortiously remained in possession after death of life tenant not giving rise to implied promise to pay or account for rent. De La Perriere v. Bowles, 127 Ga. 18, 55 S. E. 1030. Administrator held to have right of action for trespass which, however, could not be set off in action on contract. Id. Rents accruing before decedent's death go to representative as assets, but those accruing thereafter are to be apportioned among those entitled to realty and in same proportions. St. 1903, § 3865. Eastwood v. Sisk [Ky.] 102 S. W. 828. Latter not surplus personalty within meaning of § 2132, giving survivor half of surplus personalty. Id. Since usufructuary is entitled to fruits and revenues from day to day, held that where husband died before expiration of lease the succession was entitled to so much of the rental as had been earned at the date that the succession was opened, though rent was not due until the end of the term, and widow was not entitled to whole amount as usufructuary. Gaspard v. Coco, 116 La. 1096, 41 So. 326. In absence of order of probate court requiring or authorizing administrator to lease or rent lands for purpose of paying debts or otherwise, held that rents and profits belonged to heirs. Royalties under mining leases. Cleveland Co-Operative Stove Co. v. Baldwin, 121 Mo. App. 397, 99 S. W. 47. Where by terms of will realty passed directly to devisees, held that executor could not sue to recover rents and profits. Coann v. Culver, 188 N. Y. 9, 80 N. E. 362, rvg. 108 App. Div. 360, 95 N. Y. S. 1122. Administrator with will annexed not being entitled to rents, held that he was not entitled to have temporary administrator account to him therefor, or to pay them over to him. In re Goetz, 104 N. Y. S. 830. Code Civ. Proc. § 2675, authorizing appointment of temporary administrator to collect rents in certain cases, held not to change rule. Id.

62. See, also, Death by Wrongful Act, 9 C. L. 926.

63. See 7 C. L. 1411.

64. See § 5A, ante.

65. Heir cannot sue to recover bank deposits made by intestate unless he shows that there is no administration on estate. Merchants' Nat. Bk. v. McClellan [Ind. App.] 80 N. E. 854. To recover personalty from son who was alleged to have obtained it from decedent by fraud and undue influence. Griesel v. Jones, 123 Mo. App. 45, 99 S. W. 769. If there is no representative, one must be appointed before action can be maintained. Williams v. Coffman [Ky.] 101 S. W. 919. Heirs or devisees cannot maintain suit in equity to recover money due estate, alleged to be held in trust by defendants while estate is in process of administration in county court. Prusa v. Everett [Neb.] 110 N. W. 568.

66. Williams v. Coffman [Ky.] 101 S. W. 919.

67. Under Kirby's Dig. § 15, authorizing heirs to sue for and collect demands left by intestate without administration where all heirs and distributees are of full age, and intestate was under no legal liability at time of his death, held that heirs could not sue until all were of full age. Chisholm v. Crye [Ark.] 104 S. W. 167. Limitations held not to have commenced to run against right of heirs until all became of age. Id. Heirs held barred by laches from asserting, as against mortgagee, that lien of purchase money notes was superior to that of mortgage subsequently given by purchaser, since adult heirs could have instituted administration proceedings for purpose of collecting notes before minor heirs became of age, though they could not have sued in their own names before that time, and since minor heirs delayed unreasonable time after becoming of age. Id. Claim against purchaser held not barred by laches. Id. Laws of state where suit was instituted, where debtor resided, and where property on which vendor's lien was sought to be enforced, held to control as to right of heirs to sue. Id. Where widow and son were only heirs, held that complaint, in action to recover bank deposits for son's benefit, alleging that there were no unpaid claims, and no debts against estate, and no administration, was good on demurrer though it did not aver payment of widow's allowance, since, widow's claim being fixed by law, it showed that plaintiff was entitled to judgment in some amount. Merchants' Nat. Bk. v. McClellan [Ind. App.] 80 N. E.

tlements of claims in favor of the estate by the sole heir have, however, been sustained against a representative subsequently appointed where there were ample assets for the payment of debts.[68] Limitations against a cause of action in favor of the estate accruing after decedent's death do not begin to run until his appointment.[69]

As a general rule the heirs alone have the right to bring actions in regard to realty.[70] In some states the representative has the sole right to do so unless there is no administration or he consents to a suit by the heirs.[71] Lack of administration may be shown by the testimony of any person who has made an examination of the records.[72] In Louisiana the widow in community, administering the succession of her deceased husband as natural tutrix of her minor children, is authorized to bring an action for the ejectment of an alleged lessee from succession and community property.[73] An heir cannot ordinarily attack conveyances of his ancestor as in fraud of creditors,[74] though the representative is sometimes permitted to do so.[75] It has been held that the representative may redeem realty from a tax sale where the personalty is insufficient for the payment of debts.[76]

Statutes in some states provide for a summary proceeding in the probate court for the recovery of assets,[77] or for the examination of persons alleged to have possession or knowledge of any deeds or other documents bearing on the right, title, or interest of the decedent in any property.[78]

854. In order to dispense with necessity of administration, there must be no debts, heirs entitled to share must all be of full age, and must be unanimity among them, as expressed by their agreement or acts, to dispense with administration. Griesel v. Jones, 123 Mo. App. 45, 99 S. W. 769.

68. Settlement by sole heir of claim for damages for sufferings of deceased as result of personal injuries due to defendant's negligence held binding on administrator subsequently appointed, and a bar to an action by him for same injuries, where it was alleged that he had ample property for payment of claims allowed, and that time for presentation of claims had expired. McKeigue v. Chicago & N. W. R. Co., 130 Wis. 543, 110 N. W. 384.

69. Griesel v. Jones, 123 Mo. App. 45, 99 S. W. 769.

70. See § 5A, ante.

71. Burden on heirs seeking to recover land to allege and prove such facts. Wilson v. Wood, 127 Ga. 316, 56 S. E. 457.

72. By testimony of any person that he has examined records in ordinary's office of county in which letters should have been taken out, and that records do not show that letters were granted. Wilson v. Wood, 127 Ga. 316, 56 S. E. 457. Witness cannot testify that no administration was had until it is made to appear that he has examined records. Id. Partial examination insufficient. Id. Evidence held insufficient to show absence of administration. Id.

73. Campbell v. Hart, 118 La. 871, 43 So. 533.

74. See Fraudulent Conveyances, 7 C. L. 1841.

75. St. 1898, § 3832, authorizing administrator to recover property transferred by his intestate in fraud of creditors, held to only contemplate redress of wrongs to creditors by debtors after decease of latter, and not to apply to action by special administrator to rescind for fraud and undue influence contract whereby decedent conveyed all his property to defendant, and for accounting. Borchert v. Borchert [Wis.] 113 N. W. 35.

76. Since under Code 1899, c. 86, § 7, has right to institute suit to charge lands with payment of debts. Hogan v. Piggott, 60 W. Va. 541, 56 S. E. 189. May, under such circumstances, and in exercise of power to subject realty by means of suit in equity, have invalid tax deed to land set aside in such suit, or in independent suit brought for that purpose, where circumstances warrant its institution and maintenance. Id.

77. Since deposit of money in bank creates relation of debtor and creditor, held that administratrix could not collect funds so deposited by decedent during his lifetime by summary proceeding under Code Civ. Proc. § 2707, that section not contemplating collection of debt by summary process. In re White's Estate, 103 N. Y. S. 868. Fact that bank filed no answer held immaterial. Id. Evidence held insufficient to justify finding that bank had retained identical money deposited, even if such a finding. would have been material. Id. Hurd's Rev. St. 1905, c. 3, §§ 81, 82, authorizing probate court, on statement under oath being made by any person interested in estate that any person has in his possession, or has concealed or embezzled property belonging to decedent, to require person so charged to appear for hearing, and to make such order in premises as case may require, held broad enough to include not only property which belonged to deceased at time of his death and has not been changed or altered since, but also proceeds or value of property which came to hands of person charged and has been altered. Day v. Bullen, 226 Ill. 72, 80 N. E. 739, afg. 127 Ill. App. 155. Statute held applicable to case where executrix claimed property in her individual capacity which legatee claimed belonged to estate. Id.

78. Petition of administrator under Code Civ. Proc. § 2571, alleging that certain

The representative may sell the crops growing on leasehold premises at the time of decedent's death, or he may care for, cultivate, and harvest them, using all the property of the estate upon the premises for that purpose.[79] He may sell a leasehold belonging to the estate, unless exempt, or may continue the lease, being responsible in any event for the rents.[80] He has no power to bind the estate by making a contract of indorsement,[81] though he may assign negotiable paper without indorsement.[82] He cannot apply choses of action belonging to the estate to the payment of his individual debts,[83] and one accepting them as security for or in payment of such debts takes with notice of his breach of duty.[84] He may, however, pledge them to secure the debts of, or to borrow money for, the estate,[85] in which case the pledgee is not required to follow the money lent, and see that it is applied to the benefit of the estate.[86] Except where the rule is changed by statute, he may compromise claims in favor of the estate,[87] subject to a personal liability in case it is determined on final accounting that he has not acted for the best interests of the estate.[88] In some states he may not compromise claims against the estate.[89] It is sometimes provided that he may procure an execution on a judgment recovered by decedent on motion, and is not required to bring an action at law for that purpose.[90] There is nothing to prevent him from negotiating for or procuring money for the benefit of the estate beyond the border of the state in which his letters were granted.[91] Taxes on realty accruing during the lifetime of decedent should be paid by the representatives from the estate and charged to principal.[92] He is not bound to pay inheritance taxes until the expiration of the period allowed him by law in which to settle the estate.[93]

A surviving partner has a right to the possession and control of partnership property superior to that of the administrator of a deceased partner, and the latter can claim only so much of it as remains after the payment of the partnership debts.[94]

(§ 5) *C. Inventory and appraisal.*[95]—At most the inventory and appraisement are only prima facie evidence of value.[96] The correction of the inventory by reducing the amount of decedent's interest in a mortgage as shown therein is not the

named persons had some knowledge relating to title to certain interests in property of estate, and praying that they be cited to appear and be examined under oath, and required to bring deeds, books etc., bearing on matter, held fatally defective in failing to allege that any of said persons had possession or knowledge of any deeds, etc., containing evidence of or tending to disclose right, title, or interest of decedent to said property. State v. Second Judicial Dist. Ct., 35 Mont. 318, 89 P. 62.

79, 80. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710.

81. Packard v. Dunfee, 104 N. Y. S. 140.

82. Executor taking up note indorsed to bank by testator. Packard v. Dunfee, 104 N. Y. S. 140.

83. Farmers' & Merchants' Bk. v. Sanford [Ala.] 43 So. 226.

84. Must be held answerable for them. Farmers' & Merchants' Bk. v. Sanford [Ala.] 43 So. 226.

85. Farmers' & Merchants' Bk. v. Sanford [Ala.] 43 So. 226.

86. May enforce security regardless of misappropriation of funds provided he has no notice of intention to misapply. Farmers' & Merchants' Bk. v. Sanford [Ala.] 43 So. 226. Fact that note, to secure which notes belonging to estate were pledged as collateral security, was not executed by executor in his official capacity, held not of itself sufficient to inform pledgees that money was not obtained by him as executor for benefit of estate. Id.

87. Code 1896, § 138, authorizing him, by authority of probate court, to compromise or settle a doubtful or bad claim, held not to preclude him from settling without such authority. Loveman v. Birmingham R., L. & P. Co. [Ala.] 43 So. 411. Plea, held not demurrable for failure to allege that administrator received reasonable amount in settlement, and that settlement was auhorized by probate court. Id.

88. As to liability for losses due to improvident settlement see § 9A, post.

89. Administrator having no power to settle demand against estate, held that settlement of case against decedent pending at his death was not binding on party with whom it was made. In re Hensley's Allowance, 121 Mo. App. 695, 97 S. W. 645.

90. Code Civ. Proc. § 686. Weldon v. Rogers [Cal.] 90 P. 1062.

91. Farmers' & Merchants' Bk. v. Sanford [Ala.] 43 So. 226.

92. Brown v. Brown [N. J. Eq.] 65 A. 739.

93. Until expiration of year. Wyckoff v. O'Neil [N. J. Err. & App.] 67 A. 32, rvg. [N. J. Eq.] 63 A. 982.

94. For full discussion of the rights of each in partnership property see Partnership, 8 C. L. 1261.

95. See 7 C. L. 1416.

96. In re Silkman, 105 N. Y. S. 872.

proof of a claim against the estate so as to require compliance with the formalities incident to the proof of claims.[97]

(§ 5) *D. Property allowed widow or children.*[98]—In many states the widow is entitled to remain in possession of the mansion house of her husband and the land thereto attached for a specified period after his death, or until her dower is assigned.[99] She is sometimes given a third of the rents and profits of the estate until her dower is assigned.[1] The right to quarantine is lost by the widow's election to take a child's part in lieu of dower.[2]

The widow and minor children are generally given an extended estate of homestead in the decedent's land free from any liability for his debts.[3]

The widow is generally given an allowance for the support of herself and the minor children during the period of administration.[4] In some states where the value of the estate does not exceed a specified sum, she is entitled to the whole of it for that purpose,[5] and the administration comes to an end on its being assigned to her.[6] The procedure to obtain the allowance,[7] and whether it is to be regarded as a debt against

97. In re Hallenbeck, 104 N. Y. S. 568.

98. See 7 C. L. 1416.

99. Question whether widow was, in absence of statute, entitled to common-law right of quarantine held not presented where it did not appear that mansion house was situated on land in controversy. Fishel v. Browning [N. C.] 58 S. E. 759.

1. St. 1903, § 2138. Cain's Adm'r v. Kentucky & Indiana Bridge & R. Co., 30 Ky. L. R. 593, 99 S. W. 297. Petition in action by widow against lessee to recover rent accruing after husband's death held fatally defective in failing to allege that dower had not been assigned her after husband's death and before accrual of rent sued for. Eastwood v. Sisk [Ky.] 102 S. W. 828.

2. Mere passive enjoyment of quarantine rights conferred by Rev. St. 1899, §§ 251, 2954, does not, however, operate to fix her status as common-law doweress and defeat her right to elect to take child's part. Keeney v. McVoy [Mo.] 103 S. W. 946.

3. See Homesteads, 8 C. L. 93, for full discussion of this subject. Homestead goes to widow, and she is entitled to use and occupy it for at least one year. Code, § 2985. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710. Under Rev. Code 1870, art. 3252, homestead claim of widow and minor children left in necessitous circumstances is superior to expenses of last illness. Succession of Campbell, 115 La. 1035, 40 So. 449.

4. Widow residing in state at time of husband's death held entitled to have year's provision set off to her out of debt due husband in said state, though husband, at time of his death, resided in another state. Revisal 1905, §§ 3091, 3098. Jones v. Layne, 144 N. C. 600, 57 S. E. 372. Statute directing setting apart of certain property to widow "or infant child or children," or money allowance in lieu thereof for support of widow and each infant child living with her, held to refer to infant child or children of intestate, and not to include infant children of wife by former marriage, though they were members of decedent's family during his lifetime. Howland's Adm'r v. Harr, 30 Ky. L. R. 53, 97 S. W. 358. Title to land set apart to widow as year's support vests in her, and upon her death descends to heirs. Civ. Code 1895, § 3468. Moore v. Moore, 126 Ga. 735, 55 S. E. 950. If homestead property, homestead is extinguished. Id. When plaintiff based claim for recovery of land upon fact that ancestor died in possession of it, proof that it was set apart as year's support to ancestor's widow, and that plaintiff was not her heir, held to require finding for defendant. Id. Though title to lands set apart as year's support to widow and minor child vests in them jointly, widow may sell and convey land in fee simple for purpose of deriving from proceeds support for herself and child. Bridges v. Barbree, 127 Ga. 679, 56 S. E. 1025. If child becomes of age, marries, and removes from land, widow may sell and convey the same for her own support and maintenance (Id.), and her right to do so is not affected by the fact that she marries again (Id.). No presumption that she intends to use proceeds for improper or illegal purpose in absence of allegation to that effect. Id. Child, in such case, has no right to demand, as tenant in common with widow, a partition of said land. Id. Postnuptial agreement held not to bar right to allowance provided for by Comp. Laws 1897, § 8940. Bliss v. Montague [Mich.] 14 Det. Leg. N. 373, 112 N. W. 911.

5. Where does not exceed $1,500. Code Civ. Proc. § 1469, Wills v. Booth [Cal. App.] 91 P. 759. Under Civ. Code 1895, § 3465, where, on just appraisal, appraisers find that estate does not exceed $500 in value, it is their duty to set apart whole of it for year's support. Moore v. Moore, 126 Ga. 735, 55 S. E. 950.

6. Under Code Civ. Proc. § 1469, providing that, in such case, there shall be no further proceedings in the administration, notice to creditors cannot thereafter be given, nor can claims of creditors be filed, allowed, or otherwise acted upon, nor an action on a claim be maintained against representative. Wills v. Booth [Cal. App.] 91 P. 759.

7. Widow's right to allowance held not to authorize her to recover possession of any part of personalty from heirs as against administrator, since all her rights could be worked out through orderly administration of estate and were not dependent on possession. Lambert v. Tucker [Ark.] 104 S.

the estate,[8] depends on the statutes of the various states. Where the widow is entitled to both her homestead and her award, her representatives may, at her death, enforce a sale of the former to pay an unpaid balance due on the latter regardless of the lapse of time.[9]

The widow, or widow and minor children, are often given the wearing apparel of her deceased husband,[10] the household furniture,[11] and certain other enumerated articles of personalty not to exceed a specified value.[12] In some states the same property is given the husband out of the estate of his deceased wife.[13] The widow is sometimes entitled to an allowance for mourning apparel [14] and sustenance.[15] In

W. 131. Notice by publication not necessary under Code Civ. Proc. §§ 1633, 1635, 1638. Wills v. Booth [Cal. App.] 91 P. 759. Motion for new trial held not proper procedure after court had made order setting apart homestead and exempt property to widow and making her family allowance under Code Civ. Proc. §§ 1465, 1466, it being duty of court to make such orders ex parte and without petition. Shipman v. Unangst, 150 Cal. 425, 88 P. 1090. In case land is set apart as year's support, description thereof in judgment must be such as to render it capable of identification. McSwain v. Ricketson [Ga.] 58 S. E. 655. Description held so vague and indefinite that judgment was void so far as land was concerned, return of appraisers not purporting to set apart entire estate. Id. Heirs held not estopped to assert title, it not appearing that they had derived any benefit from widow's dealings with property. Id. Finding or return of appraisers is prima facie correct unless it shows on its face that they acted in reckless disregard of their duty. Moore v. Moore, 126 Ga. 735, 55 S. E. 950. Mere fact that return showed that they acted upon information derived from widow held not to invalidate it, nor to affect description of land described as all the estate. Id. When report of appraisers shows that they appraised whole estate and designated whole of it as year's support to be allowed widow, held that failure to minutely describe property did not render proceeding void. Id. Widow need do nothing in way of claiming her award until appraisement has been made out and returned to county court, and representative notifies her of such appraisement. Crittenden v. Finlay, 123 Ill. App. 523. Where, as soon as appraisement had been made, widow made selection of property at appraised value and elected to take unpaid portion of award in cash, held that she was not guilty of laches. Id. Objections to application for allowance held too late when filed after ordinary had passed order, at first term of court and after regular application, notice to administrator, citation, and publication, that return of appraisers should be recorded. Civ. Code 1895, § 3467. Foster v. Turnbull, 126 Ga. 654, 55 S. E. 925. Objections may be made at or before first term, but matter stands for final disposition at said term, and, if objections are not made until said term, should be made before final action is taken on application. Id. Held no abuse of discretion in refusing to open judgment to permit filing of objections. Id.

8. Allowance in favor of widow which she elected to take in money held judgment in her favor as claim of seventh class in same sense in which allowance of other claims of that class were judgments against estate. Miller v. Hammond, 126 Ill. App. 267. Allegation that there was no existing indebtedness, or that debts had been fully paid, held not equivalent of an averment that allowance had been paid, or that estate had been released from its payment, it not being a debt against estate. Merchants' Nat. Bk. v. McClellan [Ind. App.] 80 N. E. 854.

9. Balance of her award which she elected to take in money, where she occupies homestead until her death. Miller v. Hammond, 126 Ill. App. 267.

10. Watch and ring worn by decedent held wearing apparel within Code 1896, § 2072. Phillips v. Phillips [Ala.] 44 So. 391.

11. Silver card receiver used on hat rack and piano and piano stool held "household furniture necessary for the use and comfort of the family" within meaning of Code 1896, § 2072. Phillips v. Phillips [Ala.] 44 So. 391. Where household furniture to be set off to widow under Code Civ. Proc. § 2713, subd. 4, did not equal $150 in value, held that difference could not be made up in cows and property of that class. In re Griffin's Estate, 118 App. Div. 515, 103 N. Y. S. 345.

12. Under Rev. St. 1898, § 2829, widow and minor children held to have absolute right to have exempt personalty set off to them. In re Syndergaard's Estate, 31 Utah, 190, 88 P. 616. Said section held not in conflict with, and not repealed by, Sess. Laws 1903, p. 51, c. 57, amending § 3847, relating to family support, etc. Property owned jointly by decedent and another cannot be set off to widow as exempt. In re Hallenbeck, 104 N. Y. S. 568.

13. Rev. St. 1899, § 111, providing that, if wife dies intestate owning personalty in her own name, husband, "in addition to curtesy," shall be allowed to keep all articles and property to which widow would have been entitled on his death, intestate held to entitle him to such articles regardless of whether he is entitled to curtesy in her realty or not. Ferguson's Estate v. Gentry [Mo.] 104 S. W. 108. Estate of deceased husband held properly allowed $150 in lieu of exemptions, and said sum charged against estate of wife who predeceased him. Code Civ. Proc. §§ 2713, 2724. In re Pearce's Estate, 53 Misc. 215, 104 N. Y. S. 469.

14. Payment of $200 to widow held proper. In re Weaver's Estate, 53 Misc. 244, 104 N. Y. S. 475.

15. Payment of $200 held proper. In re Weaver's Estate, 53 Misc. 244, 104 N. Y. S. 475.

some states all exemptions allowed to the husband as head of the family are, on his death, set apart to the widow as her property.[16] Whether deficiencies in the value of exemptions may be made up by a cash allowance in lieu thereof,[17] and whether the widow's rights are superior to those of creditors,[18] depends on the statutes of the various states.

(§ 5) *E. Management, custody, and control of estate.*[19]—It is the duty of the representative to insure the property, and he is responsible for losses resulting from his failure to do so.[20] The fact that the owner of property sought to be sold for taxes is dead and his succession is under administration does not preclude the tax collector from proceeding with the sale.[21] In Georgia, during the pendency of the administration proceedings, an independent executrix who is a married woman may receive assets of the estate and execute all instruments necessary thereto without reference to her husband.[22] The management and disposal of property under testamentary trusts is treated elsewhere.[23]

Control by courts.[24]—Whether the court will instruct executors as to their duties under the will is largely a matter of discretion.[25] A court of equity will not ordinarily take the execution of discretionary powers conferred on an executor by the will out of his hands unless he has abused it or refused for a reasonable time to execute it.[26] Where, however, he fails to sell land as directed by the will, the court may order a sale in a suit instituted for that purpose.[27]

16. Widow held not to have waived exemptions by failure to object to appraisement not setting apart to her all the property to which she was entitled. Code, § 4017. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710.

17. Where there were no articles of nature described in Code Civ. Proc. § 2713, held that sum of money equivalent to their value could be allowed widow in lieu thereof. In re Berns' Estate, 52 Misc. 426, 103 N. Y. S. 167. Payment to widow of $150 in lieu of articles specified in Code Civ. Proc. § 2713, subd. 5, held proper. In re Weaver's Estate, 53 Misc. 244, 104 N. Y. S. 475. Payment of $300 to widow in lieu of articles specified in Code Civ. Proc. § 2713, subds. 3, 4, disallowed. Id.

18. Money set apart to widow in lieu of exemptions provided for by Code Civ. Proc. § 2713, is liable for payment of undertaker's bill where there are not sufficient other funds available for that purpose. In re Berns' Estate, 52 Misc. 426, 103 N. Y. S. 167.

19. See 7 C. L. 1419.

20. Fact that deceased was unwilling to have been insured in her lifetime held not to excuse executor for failure to insure it, and he was not entitled to credit for rebuilding it after its destruction by fire. In re Ramsey's Estate [N. J. Eq.] 66 A. 410.

21. Property not in custody of court in such sense that legal sale could not be made otherwise than through regular machinery of courts as in matters of probate sale. Soniat v. Donovan, 118 La. 847, 43 So. 462.

22. May receive payment of note given for purchase price of land, which was lien thereon, and had been transferred to decedent, and release lien without having husband join therein. Stevens v. Taylor [Tex. Civ. App.] 19 Tex. Ct. Rep. 428, 102 S. W. 791. Tender to her alone would, however, be unauthorized after administration had closed, and note had become her separate property under will, and accrued interest community property of herself and husband. Id. Where defendants relied on tender to her, held that burden was on them to show affirmatively existence of all facts necessary to her qualification and right to receive money and execute releases alone, failure in that regard being failure to sustain tender. Id.

23. See Trusts, 8 C. L. 2169.

24. See 7 C. L. 1419.

25. See, also, Wills, 8 C. L. 2305. Will not, in advance, advise executors how they should exercise discretionary power to compromise, compound, and discharge debts due estate, but they must, at their own peril, use their own judgment in matter and court will approve or disapprove conduct after they have acted, test being whether action was for best interest of estate. Brown v. Brown [N. J.] 65 A. 739.

26. Where will gave executors discretionary power to partition land, and no demand was made on them for partition, held that court would not decree partition shortly after probate of will at instance of a devisee to whom executors had conveyed her interest by deed of partition, no abuse of discretion having been shown. Fischer v. Butz, 224 Ill. 379, 79 N. E. 659. Claim of certain woman that she was decedent's common-law wife, alleged to be cloud on title, held not sufficient ground for decreeing partition, she having made no move to establish such claim, and executors and heirs being in possession of abundant evidence that she was not, in fact, married to decedent. Id. Partition in equity held not rendered necessary because it could not be determined when bill was filed whether personalty would be sufficient to pay debts, it not appearing that any emergency existed requiring partition before expiration of time allowed by law for determination of that question in probate court. Id.

27. Mitchell v. Carrollton Nat. Bk., 29 Ky. L. R. 1228, 97 S. W. 45.

Contracts for the sale or conveyance of land by or to decedent.[28]—By statute in some states the court may direct specific performance of a decedent's contract to convey realty.[29]

Right to sell realty.[30]—An executor's authority to sell or otherwise dispose of realty is limited to that conferred on him by the will,[31] and to the right to sell it under an order of court for the payment of debts,[32] or for division among those entitled thereto.[33] Persons dealing with him are charged with notice of limitations on his authority in this regard.[34] One purchasing land sold by an executor under a power of sale cannot, after the execution of the deed and a payment of a part of the purchase price, maintain a bill to construe the will for the purpose of having his right to sell determined.[35] Where a power is conferred on several executors, all who qualify must unite in making the sale.[36] Heirs or beneficiaries accepting the proceeds of or any benefits arising from a sale cannot ordinarily question its validity.[37]

28. See 7 C. L. 1420.

29. Administrator's deed held, under Sayles' Rev. Civ. St., art. 2153, prima facie evidence that all requirements of law had been complied with in obtaining same, and of title in grantee, so that it was properly admitted in evidence without additional proof. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525. Bal. Ann. Codes & St. § 6381, held not impliedly repealed by Id., § 4640, enacted later, providing that title to realty shall vest in heirs immediately on death of ancestor, subject to decedent's debts, etc. Griggs Land Co. v. Smith [Wash.] 89 P. 477.

30. See 7 C. L. 1420.

31. Where will directed sale of land, held that executor had no authority to turn it over to corporation organized by him to manage it, and persons entitled to proceeds of sale were not required to accept stock in said corporation in lieu thereof. Mitchell v. Carrollton Nat. Bk., 29 Ky. L. R. 1228, 97 S. W. 45. Power of sale held not to authorize executrix to partition property owned by testator and another as tenants in common. Sengens v. Fennell, 54 Misc. 133, 103 N. Y. S. 510. Executors held to have no authority to exchange realty received on foreclosure of mortgage for other realty, so that they were personally responsible to account for its value at time of conveyance unless persons entitled to share in that portion of estate consented to transaction or in effect ratified it. Hine v. Hine, 118 App. Div. 585, 103 N. Y. S. 535. Assignment by plaintiff of his share, if any, in surplus arising on mortgage foreclosure sale of property acquired held ratification of exchange. Id. Executors having naked power of sale held not to have power to ratify or revive void option contract to purchase after same had expired by its terms, where, in meantime, devisees had elected to take land without conversion and had entered into contract to sell it to third persons. Trogden v. Williams, 144 N. C. 192, 56 S. E. 865. Power to sell held not to include power to execute option for ninety days. Id.

32. See § 7, post.

33. See § 12, post.

34. All persons dealing with corporation, organized by executor to take over farm belonging to estate which will directed should be sold, and taking stock of said corporation issued for said land, held charged with notice of executor's powers under will which was recorded, so that none of them could claim to be innocent purchaser. Mitchell v. Carrollton Nat. Bk., 29 Ky. L. R. 1228, 97 S. W. 45.

35. Trustee to whom will gave power of sale and legatees for whose benefit land was to be sold held not proper parties to suit by purchaser to determine validity of sale by executrix, and for proper relief in premises, so that their joinder did not authorize maintenance of suit as one to construe will. Clark v. Carter, 200 Mo. 515, 98 S. W. 594. If purchaser failed to acquire any title because of want of power in executrix to convey and was seeking to recover purchase money paid and to have note and deed of trust given to secure balance, held that his remedy, if any, was against estate of deceased executrix, and trustees in deed of trust on ground of mistake and want of consideration. Id. Bill held not to state cause of action for cancellation of note and deed of trust and recovery of purchase money paid. Id. Bill held not to state cause of action on theory that plaintiff had right to have judgment as to proper party to whom balance of purchase money should be paid, since payment could only be made to representative of deceased executrix. Id.

36. Where two executors qualify, both must join in deed made under power authorizing executors to sell land at private sale. Civ. Code 1895, § 3317. Board of Education of Glynn County v. Day [Ga.] 57 S. E. 359. Fact that one executor moved to another county and ceased to actively participate in administration held not to change rule where he had neither resigned nor been removed. Id. Both must join in conveyance, and hence change in terms of option to purchase realty made by one executor was not binding on other and was of no effect. Trogden v. Williams, 144 N. C. 192, 56 S. E. 865. Other executor held not to have power to ratify change after expiration of void option, where devisees had, in meantime, elected to take land without conversion, and had sold same to third persons, of which executors had notice. Id.

37. In action to recover land sold under void order of probate court, evidence held insufficient to show that proceeds of sale were used for benefit of estate so as to estop heirs from questioning it, its fairness not having been impeached. Bolen v. Hoven [Ala.] 43 So. 736. Two executors conveyed land under power of sale, taking

The right of a representative to sell or mortgage realty in a foreign state has been treated in a previous section.[38]

Where the sale is made under order of court, a resale may generally be ordered in case the purchaser fails or refuses to comply with the terms of the sale.[39] Only persons interested in the estate have a right to complain of informalities in the sale for the purpose of having it set aside.[40]

Sales of personalty.[41]—In the absence of an express statutory provision to the contrary,[42] the representative may ordinarily sell personalty at private sale and without an order of court,[43] subject only to his liability to account for losses due to his negligence.[44] Sales of personalty under order of court for the purpose of paying debts and the expenses of administration are provided for in some states.[45] A creditor cannot ordinarily maintain an action to set aside a transfer of personalty by the representative as fraudulent,[46] though distributees are sometimes permitted to do so.[47] Whether a sale of decedent's business under an order of court passes profits realized between the date of the order and the date of the sale depends upon the terms of the order.[48]

§ 6. *Debts and liabilities of estate; their establishment and satisfaction.*

mortgage to secure part of purchase price. One of said executors bid in land at foreclosure sale as it was conveyed to him. Later he alone conveyed it to third person. His returns showed cash receipt as final payment from original purchaser. Held that, in litigation between grantee of third person and widow in regard to land, it was error to exclude deed, and evidence that executor bid in land under agreement with mortgagor that he should do so and allow mortgagor reasonable time in which to redeem, and that such agreement was carried out, and redemption was made, and conveyance to third person was in consummation thereof. Board of Education of Glen County v. Day [Ga.] 57 S. E. 359. Devisees could not, after redemption and conveyance, with knowledge of facts, claim proceeds of contract and also land itself on ground that executor had no authority to make agreement. Id. Suit by devisee against executor to recover proceeds of unauthorized conveyance would amount to election to confirm and ratify it, if begun with knowledge or notice of facts. Id.

38. See § 4A, ante.

39. Code Civ. Proc. § 1554. Ordering resale for failure of purchaser to pay purchase price on tender of deed held not an abuse of discretion. In re Long's Estate [Cal. App.] 91 P. 169.

40. Hamilton v. Cargile, 127 Ga. 762, 56 S. E. 1022.

41. See 7 C. L. 1421.

42. St. 1903, § 4707, prohibiting executors or administrators from selling "any dividend paying stocks" owned by decedent at time of his death until so ordered by court of equity, held to refer only to stocks actually earning dividends, and not to those upon which dividends may be paid. Chappell v. Chappell, 30 Ky. L. R. 935, 99 S. W. 959.

43. Provided he acts in good faith and exercises such degree of care and diligence as reasonably prudent man would have exercised under like circumstances. Christy v. Christy, 125 Ill. App. 442, afd. on other grounds, 226 Ill. 547, 80 N. E. 242. Corporate stock being personalty, held that administrator had authority to sell nondividend paying stock without order of court, particularly in view of St. 1903, § 4707, prohibiting sale of dividend paying stock owned by decedent at time of his death without order of court of equity. Chappell v. Chappell, 30 Ky. L. R. 935, 99 S. W. 959. Code, § 1412, permitting representatives to apply to clerk for order to sell insolvent evidences of debt and providing for sale at public auction, held directory only, and not to deistrator had authority to sell nondividend prive administrator of common-law authority to sell at private sale at his own risk. Odell v. House, 144 N. C. 647, 57 S. E. 395.

44. See § 9A, ante.

45. Administrator obtained order of court for sale of all property, including realty and personalty, on petition praying for distribution of proceeds among heirs after paying debts and costs. Expenses of administration were due and demandable, and there were no funds wherewith to pay them. Major heirs had not accepted succession unconditionally, nor offered to pay said expenses. Movables alone were sold. Held that sale of movables was not a nullity, though administrator had no authority to have property sold to effect a partition without following formalities required by law, since he did have a right to apply for and have movables sold to pay expenses of last illness and legal expenses of opening succession. Succession of Trahan, 118 La. 762, 43 So. 400.

46. Authority to do so not conferred by Laws 1897, c. 417. Magoun v. Quigley, 115 App. Div. 226, 100 N. Y. S. 1037.

47. Petition in suit by distributees to set aside sale of corporate stock by administrator for fraud must allege the facts constituting the fraud. Chappell v. Chappell, 30 Ky. L. R. 935, 99 S. W. 959. Evidence held insufficient to show fraud on part of purchaser. Id.

48. Administrator held properly required to account for profits of decedent's business from date he was authorized to sell it until date of sale, he having carried it on in meantime, sale not passing such profits since he was not authorized to sell them. Roberts v. Weimer, 227 Ill. 138, 81 N. E. 40.

A. Claims provable [49] embrace the personal obligations [50] of the decedent growing out of valid contracts, express [51] or implied,[52] which are not extinguished by his death, and torts which survive.[53] They must subsist in law and be enforceable against a plea of limitations,[54] or of the statute of frauds,[55] or other like defense.[56]

Funeral expenses [57] are presumed to have been incurred on the credit of the estate of the deceased.[58] One paying them may recover them back from the estate provided the amount so paid is reasonable.[59] Payment by the estate to the undertaker of an amount deemed reasonable by the probate court does not affect his right to recover the difference between the amount so paid and a sum which a third person expressly agreed to pay him for his services.[60]

(§ 6) *B. Exhibition, establishment, allowance, and enforcement of claims. Jurisdiction.*[61]—The jurisdiction of the various courts to pass on and allow claims has been discussed in a previous section.[62]

Occasion and necessity of proving claims.[63]—In most states all claims must be presented to and allowed by the probate court or the representative before they can be paid or enforced.[64] This rule does not, however, ordinarily apply to claims on which suit is pending at decedent's death where the action is subsequently revived against his representative.[65] As a general rule mortgages and other liens on land may be foreclosed without presenting claims for the debts secured thereby, an exception being sometimes made in the case of liens on the homestead.[66] Provision is generally made for the presentation and allowance of contingent claims, and for the retention of sufficient funds to pay them when they become due.[67] In some states

49. See 7 C. L. 1422.

50. Party wall agreement held not personal obligation of decedent, but covenant running with land, so that obligation to pay half cost of wall when used was not debt due from decedent's estate but liability of owner of land when wall was used. Ferguson v. Worrall [Ky.] 101 S. W. 966. Contract by testatrix to pay plaintiff's assignor for obtaining reduction of assessments on certain lots held personal one so that, on her death, claim upon it became one against her executors, and not against her heirs or devisees. United States Title Guaranty & Indemnity Co. v. Marks, 116 App. Div. 341, 101 N. Y. S. 483.

51. See Contracts, 9 C. L. 654.

52. See Implied Contracts, 8 C. L. 155.

53. See Abatement and Revival, 9 C. L. 1.

54. See Limitation of Actions, 8 C. L. 768.

55. See Frauds, Statute of, 7 C. L. 1826.

56. See Duress, 9 C. L. 1016; Fraud and Undue Influence, 7 C. L. 1813, and like topics.

57. For allowance to administer on accounting see § 9D, ante.

58. Evidence held not to overcome presumption so far as defendant was concerned. Rice v. New York Cent., etc., R. Co. [Mass.] 81 N. E. 285.

59. May recover on implied contract based on duty of representative to provide funeral out of assets of estate. Water v. Register [S. C.] 56 S. E. 849. In action to recover funeral expenses, evidence as to wholesale value of casket furnished held properly excluded, since inquiry should be directed to market value at retail. Id. Wife of decedent, or one acting on her authority. Golsen v. Golsen, 127 Ill. App. 84.

60. Ruggiero v. Tufani, 54 Misc. 497, 104 N. Y. S. 691.

61. See 7 C. L. 1422.

62. See § 2, ante.

63. See 7 C. L. 1422. See, also, post, this section, Time for Presentation.

64. Correction of inventory by reducing amount of decedent's interest in mortgage as shown therein held in no sense proof of claim against estate so as to require formalities incident to such proof. In re Hallenbeck, 104 N. Y. S. 568.

65. Under Rev. St. 1899, § 186, providing that all actions pending against decedent at time of his death which survive shall be considered demands legally exhibited against his estate from time such action shall be revived, held that, where decedent died pending his appeal from a judgment against him, notice to administrator that said judgment would be exhibited against estate was unnecessary. In re Hensley's Allowance, 121 Mo. App. 695, 97 S. W. 645.

66. Under Code Civ. Proc. § 1475, claim secured by mortgage on homestead must be presented for allowance, same as any other claim, and paid out of general funds of estate so far as they are available, lien being enforceable only for any deficiency remaining after such payment. Hibernia Sav. & Loan Soc. v. Hinz [Cal. App.] 88 P. 730. Failure to present claim held to deprive mortgagee of right to enforce mortgage for any part of claim, or to sue on note secured thereby independent of mortgage, in view of § 1500, providing that no holder of any claim shall maintain any action thereon unless first presented to representative. Id. Burden held on plaintiff to establish claim that § 1475 was inapplicable because decedent left no family and therefore homestead ceased to exist. Id.

67. Claim based on contract liability of decedent to pay petitioner half loss incurred in certain joint adventure, to cover a part of which deficiency there was fixed liability on part of third person, only amount

claims are enforced by direct action against the representative, and need not be filed unless the estate is administered as insolvent.[68] Any person having any interest, either legal or equitable, may make the required presentation.[69]

Time for presentation; limitations.[70]—A claim is ordinarily barred unless filed or presented within the time fixed by statute [71] or by order of court,[72] in the absence of peculiar circumstances excusing the delay.[73] Contingent claims may generally be filed within a specified time after they become due.[74] In states where claims are enforced by a direct action against the representative, the action is generally barred unless brought within a specified time after his appointment.[75] After a claim is once

of which was undetermined, held one which "is or may become justly due" within meaning of Rev. Laws, c. 141, § 13, authorizing court in certain cases to direct representative to retain sufficient funds to satisfy claims not accruing within two years after filing of administration bond. Peabody v. Allen [Mass.] 80 N. E. 582. Cause of action held not to have arisen until settlement of suit to enforce liability of said third person. Id.

68. Adjudication of insolvency stays pending suits unless leave of court is obtained for further prosecution, and requires presentation of claim to commissioner within prescribed time. Stevens v. King [N. H.] 65 A. 944. Where action was commenced against executors under Pub. St. 1901, c. 245, § 4, providing that, if trustee dies pending proceedings against him, his executor may be summoned in as party and shall be liable as if action had been brought against him as trustee, and estate was being administered as insolvent, held that claim against principal defendant was barred under Pub. St. 1901, c. 193, § 18, where it was not presented to commissioner before close of commission. Id. Fact that plaintiff was ignorant of insolvency proceedings held not to excuse failure to file, where it was not induced by bad faith of executors. Id. Pub. St. 1901, c. 191, § 7, authorizing prosecution of action pending against representative when estate is decreed to be insolvent to be continued by leave of court in which it is pending, held not to apply to actions in which representative is sued as trustee. Id.

69. Heirs at law of creditor may do so. Hunt v. Curtis [Ala.] 44 So. 54.

70. See 7 C. L. 1424.

71. Where decedent died pending his appeal from a judgment against him, held that it was duty of judgment creditor to have action revived within two years from date of letters of administration, and, where he failed to do so, claim was barred under Rev. St. 1899, § 185, barring claims not exhibited within two years. In re Hensley's Allowance, 121 Mo. App. 695, 97 S. W. 645. Administratrix disallowed claim. After her death, and before short statute of limitations (Code Civ. Proc. § 1822) had run, administrator de bonis non admitted claim and promised to pay it. Held that claim was not barred. In re Hallenback, 104 N. Y. S. 568.

72. Claim which accrues or becomes absolute before expiration of time fixed. Comp. St. 1903, c. 23, § 226. Burling v. Allvord's Estate [Neb.] 110 N. W. 683. Claim of vendee of realty against vendor for false and fraudulent representations with respect to title held to have accrued immediately upon perpetration of fraud, and not to have been postponed to such time as he sustained actual loss. Id. Under Rev. St. 1898, § 3840, held that court, after giving of required notice, had discretionary power to extend time originally fixed on verified petition without hearing evidence in support thereof. Seidemann v. Karstaedt, 130 Wis. 117, 109 N. W. 942. Evasive answer held not to have wholly destroyed probative force of petition, but to have left matter for determination of county court in exercise of its discretion. Id.

73. Where a creditor requested an attorney to represent his claim, and attorney promptly notified him that he could not act as he was employed by administrator, held that creditor was not excused from presenting claim on ground that attorney was derelict in advising him of his rights. Meikle v. Cloquet [Wash.] 87 P. 841. Administrator held not to have misled claimant or to have been guilty of any act whereby he was induced not to file his claim in time. Id. Fact that claimant did not discover fraud on which his claim was based until after expiration of time fixed for filing claims held not to extend time for filing, statute of nonclaim making no exception in favor of such cases. Burling v. Allvord's Estate [Neb.] 110 N. W. 683.

74. Contract of guaranty held contingent one so that Rev. St. 1899, § 185, barring demands not presented within two years after publication of notice of letters, did not begin to run against claim thereon until liability became fixed. Binz v. Hyatt, 200 Mo. 299, 98 S. W. 637.

75. Claim is absolutely extinguished if not sued within two years from publication of notice of appointment of representative. Kenyon v. Probate Ct. of East Greenwich, 27 R. I. 566, 65 A. 267. Judgment was rendered against administrators of deceased surety on a bond in suit in equity to which they were parties in 1871, within year after his death, but, owing to litigation carried on by representatives, decree adjudging amount of estate's liability was not entered in said cause until 1902. Held that the court was not deprived of jurisdiction to enter latter decree by lapse of time, running of limitations having necessarily been suspended to enable court to determine liability of estate, nor by Code 1887, § 2920, providing that right of action against decedent's estate accruing after his death shall not continue longer than five years. Sipe v. Taylor, 106 Va. 231, 55 S. E. 542. Decree of 1902 held conclusive that limitations had not run against claim when said decree was rendered. Id.

barred the representative ordinarily has no power to renew or reinstate it.[76] The running of the general statute of limitations is ordinarily suspended by the filing of the claim within the time fixed.[77] Payments on a claim by the representative,[78] or a promise by him to pay the same,[79] stop the running of the general statute of limitations as to him, but not as to heirs or devisees.

Notice.[80]—The representative may authorize his attorney to sign the notice to creditors for him and in his behalf.[81] Notice is sometimes dispensed with where there is no property applicable to the payment of debts.[82]

The claim; its form and substance.[83]—As a general rule the claim filed must show the amount and nature of the demand [84] and must be verified.[85]

Contests and actions on claims.[86]—In actions against the representative on claims the usual rules of pleading [87] and evidence [88] apply. Where presentation or

76. See, also, Contests and Actions on Claims, post, this section. Gen. Laws 1896, c. 215, § 2, does not authorize administrator to waive special statute of limitations requiring actions on claims to be brought within two years, and administrator paying claim after it is barred thereby is not entitled to credit therefor. Kenyon v. East Greenwich Probate Ct., 27 R. I. 566, 65 A. 267.

77. See, also, Limitation of Actions, 8 C. L. 768. Held arrested by filing claim, together with administrator's consent to its allowance. DeClerque v. Campbell, 125 Ill. App. 357. Claim was thereafter allowed, but order of allowance was subsequently vacated. Claim remained on docket, but no order was entered specially continuing it from term to term. Held that county court was not deprived of jurisdiction, nor cause discontinued by absence of order of continuance so as to again start running of limitations. Id.

78. Withers' Adm'r v. Withers' Heirs, 30 Ky. L. R. 1099, 100 S. W. 253.

79. Binds only personalty in his hands. Withers' Adm'r v. Withers' Heirs, 30 Ky. L. R. 1099, 100 S. W. 253.

80. See 7 C. L. 1427.

81. Meikle v. Cloquet [Wash.] 87 P. 841.

82. Unnecessary where decedent leaves no estate, and only property in hands of administrator is amount recovered in action for his wrongful death, which cannot be taken for payment of debts. In re McDonald's Estate, 51 Misc. 318, 101 N. Y. S. 275. Where whole estate does not exceed $1,500 in value and is assigned to widow for her support under Code Civ. Proc. § 1469, administration is ended, and action cannot thereafter be maintained against representative on note of decedent, nor can notice to creditors be published. Wills v. Booth [Cal. App.] 91 P. 759.

83. See 7 C. L. 1427.

84. Should sufficiently indicate nature and amount of demand to enable representative and judge of probate to act advisedly upon it. Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911. It need not state facts with all preciseness and detail required in a complaint, nor is its sufficiency to be tested by rules applicable to pleadings. Id. Claim held sufficient. Id. Should give representative notice of amount and nature of claim and dates between which it accrued. Hoskins v. Saunders [Conn.] 66 A. 785. Claim held sufficient. Id. All that is required is that statement of claim shall show nature of claim so that representative may know what he has to defend against. Claim based on services rendered decedent held sufficient. Christianson v. McDermott's Estate, 123 Mo. App. 448, 100 S. W. 63. Statement of claim for services rendered under contract held sufficiently specific. Smith v. Williams, 123 Mo. App. 479, 100 S. W. 55.

85. Defect in verification resulting from omission of words "after allowing all proper credits" (Code 1896, § 133) may be cured by amendment. Gillespie v. Campbell [Ala.] 43 So. 28. When claimant is corporation, should appear from affidavit that person acting on its behalf is officer thereof, presumed from his official position to have sufficient knowledge of its affairs, or, if made by some other person, that his relation to company is such as is calculated to place him in possession of requisite information. Maier Packing Co. v. Frey [Cal. App.] 89 P. 875. Affidavit made and signed by certain company by its president held insufficient under Code Civ. Proc. § 1494 for failure to assign any reason why it was not made by claimant, there being no statement in it showing that said company was incorporated, and court not being authorized to presume that fact. Id. Affidavits held not in conformity with St. 1903, § 3870, and hence to be insufficient. Spradlin v. Stanley's Adm'r, 30 Ky. L. R. 928, 99 S. W. 965. Under Ky. St. 1903, § 3870, if demand be other than obligation signed by decedent or a judgment, must also be verified by person other than claimant, who must state facts showing that claim is just, in addition to statement that he believes it to be just and correct. Id. Where party to suit to settle estate and to sell land to pay debts who was sui juris stood by and permitted commissioner's report allowing claims not properly verified to be confirmed and a judgment to be entered without objection, held that he could not raise objection on appeal. Id. Rule does not apply to infants, but erroneous judgment against them may, in such case, be reversed on appeal where their condition appears in record, or error may be corrected by court rendering judgment under Civ. Code Prac. § 518, when it does not. Id.

86. See 7 C. L. 1428.

87. Complaint in action on claim for services held not demurrable as failing to state for what indebtedness was incurred, or whether work was done for administrator or decedent, or that work was done during

filing is necessary, it must be alleged [89] and proved.[90] In some states the representative is not bound to plead matter by way of answer, except set-off or counterclaim.[91] Recovery must be had, if at all, on the cause of action set up in the claim as filed or presented.[92] Ordinarily the representative is bound to interpose the defense of limitations,[93] though there seems to be some conflict of authority in this regard.[94] Where the estate is settled by a court of equity in a suit instituted for that purpose, different creditors having separate demands may unite in a bill to subject the assets of the estate to their payment.[95] In such suits interested persons are generally given the right to file objections to claims and provision is made for a hearing thereon.[96]

Allowance and rejection.[97]—The rule that the allowance of claims by the probate court is tantamount to a judgment applies only to such claims as were debts against the decedent himself, and not to expenses or disbursements of the administrator.[98] In states where estates are settled by the institution of a suit in equity for

decedent's lifetime, or as failing to show whether it was for account stated or for work and labor. Gillespie v. Campbell [Ala.] 43 So. 28. Petition held to sufficiently show that all legal offsets, credits, and payments had been allowed. Dashiell v. Moody & Co. [Tex. Civ. App.] 97 S. W. 843.

88. In action on claim for services rendered decedent during his last illness, held error to admit evidence as to what administrator paid another person for similar services. Gillespie v. Campbell [Ala.] 43 So. 28. Verified claim first presented held admissible as admission against interest in action on claim in different terms subsequently filed. Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911. Claim held not within rule that where party amends a pleading statements in superseded pleading cannot be used as admissions, it not being a pleading, and there being no provision for amendment of claims. Id.

89. Complaint held sufficient as against objection that it did not show that sufficient claim was filed in probate court within prescribed time. Gillespie v. Campbell [Ala.] 43 So. 28. In action on note complaint must allege that claim accompanied by copy of note has been presented to administratrix in accordance with requirements of Code Civ. Proc. § 1494, and rejected. Wills v. Booth [Cal. App.] 91 P. 759.

90. Highest and best evidence of filing and docketing of claim in probate court is docket entries there made. Gillespie v. Campbell [Ala.] 43 So. 28.

91. Under Burns' Ann. St. 1901, § 2479, held not necessary for administrator sued on note to file verified plea of non est factum in order to impose on plaintiff burden of proving execution of note and of assignments of same. Digan v. Mandel, 167 Ind. 586, 79 N. E. 899.

92. Cannot recover upon any other cause of action. Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911. Variance between claim as presented, and allegations of complaint, proofs, and findings in action thereon, held immaterial. Id. Where claim as filed was based on written agreement, held that claimant could not recover on proof of oral one. Leonard v. Leonard [Iowa] 111 N. W. 409. Where claim as filed did not indicate whether it was based on express or implied contract, held that pleading filed in proceedings on contest alleging express contract was properly allowed to be amended so as to seek recovery on implied contract, though more than year had elapsed since filing of original claim. Sarchfield v. Hayes [Iowa] 112 N. W. 1100. In view of liberal rules in respect to such matters in county courts, and treatment of filed claim as complaint on appeal to circuit court, held not error for latter court to permit amendment by adding that work for which compensation was sought was done under agreement that it should be paid for at decedent's death, where original claim, though indefinite, included enough to suggest that it was based on agreement of some sort, and that right thereunder was not barred by limitations. Longwell v. Mierow, 130 Wis. 208, 109 N. W. 943. Fact that amendment was not reduced to writing and filed held immaterial, where cause was tried on theory that it had been made. Id.

93. Special statute requiring action to be brought within two years after appointment of representative. Kenyon v. East Greenwich Probate Ct., 27 R. I. 566, 65 A. 267.

94. Where claimant against insolvent estate elects to proceed against representative by action at law or suit in equity, latter is not bound to interpose defense of general statute of limitations, nor is statute a bar to allowance of personal claim of representative which is necessarily tried in orphans' court. Wheedon v. Nichols [N. J. Eq.] 65 A. 445.

95. To subject realty and personalty. Mann v. Brazie, 61 W. Va. 613, 57 S. E. 43.

96. Where will gave estate to one for life to be used and enjoyed by her as she might desire, with remainder over of so much as was left after her death, held that remainderman was not interested in claims against life tenant's estate and could not object to their allowance. Cumberland University v. Roberson, 30 Ky. L. R. 947, 99 S. W. 1152. In suit to settle estate and to sell land to pay debts, held that objection that some of claims were barred by limitations must be made in circuit court by written exceptions, and that if exceptions were filed claimants should be allowed reasonable time to take proof. Spradlin v. Stanley's Adm'r, 30 Ky. L. R. 928, 99 S. W. 965.

97. See 7 C. L. 1428.

98. Latter are not conclusively determined until final settlement by administrator and judgment thereon by probate court.

that purpose, claims are generally referred to commissioners to examine and pass upon them.[99]

Evidence and proof.[1]—Claims are generally required to be established by very satisfactory evidence.[2] Where the statute requires the creditor to purge his claim from usury by his oath or affidavit before the same will be allowed, a judgment recovered against the decedent is not conclusive as against that defense.[3] Cases dealing with the question as to when contracts to pay for services and the like will be implied, and the sufficiency of the evidence to establish implied [4] or express contracts,[5] are treated elsewhere.

Set-off.[6]—As a general rule, in actions by the representative asserting a demand in favor of the estate, the defendant may set off any demands he may have had against the decedent at the time of his death, subject to the usual rules in regard to set-off and counterclaim.[7]

Judgments in actions on claims and enforcement thereof.[8]—As a general rule a judgment against the representative in an action on a claim against the estate operates merely to establish the claim.[9] The right to take land under an execution

In re Erickson's Estate [Neb.] 111 N. W. 356.

99. In order that report of a commissioner allowing a claim shall be sustained, it is essential that said claim shall have been proven before him by competent testimony. Brown v. Cresap, 61 W. Va. 315, 56 S. E. 603. Allowance for attorney's fees disallowed on appeal where report of commissioner did not specify what services were rendered, when they were performed, and that they were not paid for, and there was no evidence in record in regard to them. Id. Order in suit to settle estate confirming commissioner's report on claim, to which no exceptions had been filed, and allowing claim, held interlocutory merely, and not to prevent consideration by chancellor of exceptions alleging payment subsequently filed. McClure's Ex'r v. Anchor Roller Mills' Assignee, 30 Ky. L. R. 509, 99 S. W. 221.

1. See 7 C. L. 1430.

2. Claims for services in caring for decedent, etc., made by members of his family, should be carefully scrutinized and should be allowed only on clear and satisfactory proof that they were rendered under mutual understanding or agreement that they would be paid for. Hoskins v. Saunders [Conn.] 66 A. 785. Evidence held not to show settlement of claim but to justify its allowance. McClure's Ex'r v. Anchor Roller Mills' Assignee, 30 Ky. L. R. 509, 99 S. W. 221. Suspicious claim against a succession will be rejected unless supported by very strong proof. Richards v. McLain, 118 La. 424, 43 So. 38. Evidence held insufficient. Id. Public policy requires that claims should be established by very satisfactory evidence. Stafford v. Brown, 104 N. Y. S. 801.

3. Judgment on note held not conclusive as against defense of usury so as to require administrator to pay same and then sue at law to recover back money, but he could interpose usury as defense to claim on judgment in action to settle estate consolidated with suit commenced by decedent to vacate judgment. Owsley v. Boles' Adm'r, 30 Ky. L. R. 1016, 99 S. W. 1157.

4. See Implied Contracts, 8 C. L. 155.

5. See Contracts, 9 C. L. 654.

6. See 7 C. L. 1431.

7. Under Burns' Ann. St. 1901, § 355, providing that neither of two persons entitled to set-offs shall be deprived thereof by death of other, held that holder of claim against intestate, acquired during latter's lifetime but not reduced to judgment until after his death, could set it off against lien on property of claimant which intestate's administrator had secured by assignment, pursuant to agreement made by intestate, claim being one which could have been pleaded as set-off if intestate had acquired and attempted to enforce lien in his lifetime. Hatfield v. Mahoney, 39 Ind. App. 499, 79 N. E. 408, 1086. Judgment against defendant for debt due by him to estate held erroneous, where estate was insolvent, and he was liable, as decedent's surety, to third person for sum largely in excess of amount of said debt. Barnes v. Barnes' Adm'r, 106 Va. 319, 56 S. E. 172. Where defendant having claim against estate filed answer alleging that he had in his hands for collection notes belonging to estate in amount larger than his claim, and commissioner reported that he should retain amount of his claim out of funds in his hands when collected, held not error, after his death, for court to decree amount of claim to his personal representatives on answer filed for that purpose, there being no proof that he collected and retained amount thereof in his lifetime, nor any contention that claim was not just charge against estate. Brown v. Cresap, 61 W. Va. 315, 56 S. E. 603. Under St. 1898, § 3847, held that a defendant pleading a counterclaim was not bound to plead affirmatively facts showing that his demand was not affected fatally by any statute of limitations, that being matter of defense. Rust v. Fitzhugh [Wis.] 112 N. W. 508.

8. See 7 C. L. 1432.

9. Limitations do not run against such a judgment pending administration, and no action thereon is necessary to keep it alive. Code Civ. Proc. § 1504. Shively v. Harris [Cal. App.] 90 P. 971. Filing of complaint in action of such judgment, which was abandoned before service of summons, held

on a judgment rendered against decedent during his lifetime,[10] or against his representative after his death,[11] depends on the statutes of the various states.

(§ 6) *C. Classification, preferences, and priorities.*[12]—Claims are generally classified by statute and provision made for their payment in the order of such classification.[13] The preferential right of the widow to her allowance and statutory exemptions has been treated in a previous section.[14]

(§ 6) *D. Funds, assets, and securities for payment.*[15]—Debts secured by mortgage should ordinarily be paid out of the general personal assets of the estate, if adequate for that purpose.[16] In some states claims secured by a mortgage on the homestead must be presented for allowance and paid out of the general funds of the estate in so far as they are available for that purpose, the lien being enforceable only for any deficiency.[17] As a general rule firm creditors are entitled to priority of payment out of partnership assets and individual creditors out of individual assets.[18] Creditors of a business conducted by the representative, whose claims accrue after decedent's death, are, in equity, entitled to a preferential right to payment out of the profits of the business, if any, or out of the funds and assets invested therein, where said business is conducted with the consent of all interested parties.[19] Where there are funds in two different states it is the duty of the executor to so marshal the assets as to reduce the amount of transfer taxes to be paid by the legatees to the smallest

not election of remedies estopping judgment creditor from asserting it against estate. Id.

10. See § 8, post.

11. Claimant concluded by judgment in claim case has no right in equity to enjoin the fi. fa., which is against an executor de bonis testatoris until an accounting can be had with executor on ground of alleged insolvency of estate in latter's hands, so as to ascertain relative priority of the judgment lien and other claims with view of lessening amount for which judgment may be enforced. Hollinshead v. Woodward [Ga.] 57 S. E. 79. Under probate act of 1840 there was no authority for sale of property of estate in process of administration under execution issued out of district court upon judgment against administrator foreclosing mortgage executed by decedent, but judgment should have been collected through probate court. Flack v. Braman [Tex. Civ. App.] 18 Tex. Ct. Rep. 107, 101 S. W. 537. Party instituting suit for foreclosure of purchase-money mortgage and procuring sale held estopped to question title of purchaser. Id. Right of heirs of mortgagor to question sale held barred by delay of sixty years. Id.

12. See 7 C. L. 1432.

13. Since priority granted by Code 1904, § 2660, to debts due as trustee for persons under disabilities, as guardian, etc., is limited by its language to guardians who qualify in the state, held that debt owing by decedent as guardian de son tort was not entitled to priority. Watts v. Newberry [Va.] 57 S. E. 657. Ward held not entitled to priority of payment out of estate of guardian de son tort for money misappropriated by latter on theory that fund never became part of estate, where guardian had so commingled it with his own property that it could not be identified or traced. Id.

14. See § 5D, ante.

15. See 7 C. L. 1433.

16. Will devised certain realty to executrix for life with remainder over. At time of its purchase he assumed payment of mortgage thereon as part of consideration. Held that, as mortgage debt was personal debt of testator, and lawful charge against estate, it was lawful for executrix to pay it. Mosier v. Bowser, 226 Ill. 46, 80 N. E. 730.

17. Code Civ. Proc. § 1475. Hibernia Sav. & Loan Co. v. Hinz [Cal. App.] 88 P. 730.

18. See, also, Partnership, 8 C. L. 1261. Neither creditors of commercial firm of which deceased was member, nor surviving partner, whether as liquidator or individually, can be maintained in possession and use of succession and community property to prejudice of right of creditors, in general, of succession, and of widow in community and minor children of deceased, to demand that his individual property be administered in his succession for benefit of all concerned, and not in liquidation of his business for benefit of portion of his creditors. Campbell v. Hart, 118 La. 871, 43 So. 533. Defense to action seeking to eject lessee held sufficient. Id.

19. Where administrator carried on business of decedent, held that creditor of such business, whose claim arose after decedent's death, could in equity show that administrator was insolvent and that estate derived profit from business, and ask to have such profit applied on their debt, or show that business was continued with consent af all parties, and ask to have funds and assets invested in it first used in payment of their claims. American Surety Co. v. McGuire, 54 Misc. 79, 103 N. Y. S. 753. Motion of creditor to be made party to proceedings by surety of deceased administrator, to compel his executor and the administrator de bonis non to account, granted. Id. Fact that receiver was custodian of trade funds, or that surety might not be liable to petitioner, held immaterial. Id.

possible amount.[20] In some states the estate must be presumed and treated as solvent in suits by creditors until its insolvency has been ascertained and declared by a decree of the probate court, and the actual lack of assets does not relieve a representative from liability on a bond conditioned on the payment of claims for failure to pay a judgment recovered against him by a creditor, where he fails to take the necessary steps to have the estate administered as insolvent.[21] The abatement of legacies for the payment of debts is treated elsewhere.[22]

(§ 6) *E. Payment and satisfaction.*[23]—On paying off secured debts the representative should take an assignment of the security.[24] Payment of claims not properly proved and allowed is at the representative's own risk,[25] nor is he entitled to credit for the amount expended in paying claims barred by the statutes of nonclaim.[26] If he negligently allows an invalid claim to go to judgment, the judgment will afford him no protection, and he may properly be charged with the amount paid thereon.[27] In some states he has no authority to settle claims.[28] Persons assenting to the payment of claims are estopped to question them on accounting.[29]

§ 7. *Subjection of realty to payment of debts under order of court. A. Right to resort to realty.*[30]—The right to resort to realty for the payment of debts is to be determined by the law in force at the time of decedent's death.[31]

The personalty being insufficient for that purpose,[32] so much of decedent's[33]

20. Where decedent who resided in New Jersey left money in that state and in New York, held that executor had right, and it was his duty, to pay taxable legacies out of New Jersey assets, and to distribute New York assets to persons who, under laws of that state, were exempt from any tax whatever. In re McEwan's Estate, 51 Misc. 455, 101 N. Y. S. 733.

21. Fact that testator left no estate held no defense to action by judgment creditor on bond of executrix conditioned on payment of claims for which judgment had been rendered against her, where she failed to comply with Rev. Laws, c. 142, §§ 1, 2, by representing to probate court that estate was insolvent, or to file inventory or account. McIntyre v. Parker [Mass.] 80 N. E. 798.

22. See Wills, 8 C. L. 2305.

23. See 7 C. L. 1434.

24. Administrator satisfying mortgage on land of estate out of proceeds of sale of land under order of court for payment of debts held not entitled to credit for amount so paid where he failed to take assignment of mortgage as condition precedent to its payment. Denman v. Payne [Ala.] 44 So. 635.

25. Where in suit to settle estate executor was directed to settle his accounts and order of reference was made directing those having claims to present them to commissioner, held that executor had no right to proceed with settlement of estate, and subsequent payment of claims was at his own risk. Hannen v. Harrod, 30 Ky. L. R. 976, 99 S. W. 976. If there is no judgment effective for his protection, must at least show that in paying claim he employed such prudence and diligence as, in general, prudent men of discretion and intelligence employ in their own like affairs. In re Watson, 115 App. Div. 310, 100 N. Y. S. 993.

26. Kenyon v. East Greenwich Probate Ct., 27 R. I. 566, 65 A. 267.

27. Executors charged with amount of invalid claim, where, though doubtful as to its validity, they failed to make any defense, or even to disclose facts. In re Watson, 115 App. Div. 310, 100 N. Y. S. 993.

28. Settlement of case pending against decedent at his death held not binding on party with whom it was made. In re Hensley's Allowance, 121 Mo. App. 695, 97 S. W. 645.

29. Persons interested in estate who signed paper protecting executors in payment of certain claims, and releasing them from any responsibility in so doing. In re Robinson's Will, 53 Misc. 205, 104 N. Y. S. 599.

30. See 7 C. L. 1435.

31. Where B. & C. Comp. § 1172, making personalty not specifically bequeathed primarily liable for payment of debts, was in force at testator's death, held that court had no authority to order sale of realty to pay debts where there was personalty not specifically bequeathed undisposed of notwithstanding passage in meantime of Laws 1905, p. 233, authorizing sale of realty before disposing of personalty when it is made to appear that best interests of all concerned would be subserved thereby, and though said act provided that it should apply to estates in process of administration. In re Noon's Estate [Or.] 88 P. 673.

32. Orphans' court cannot order sale of lands to pay debts until executor has applied all personal estate to their payment, including specific legacies. In re Whitaker [N. J. Eq.] 65 A. 124. Though specific legacies and lands devised must contribute ratably after application of balance of estate, legatee's right to contribution cannot be considered in the proceeding to sell the land. Id.

33. Deed offered for purpose of showing title in decedent held competent. Code 1896, § 186. Hunt v. Curtis [Ala.] 44 So. 54. Fact that name of grantee in deed did not include one of middle initials contained in decedent's name as given in petition held not to render deed inadmissible, particularly

realty,[34] not exempt from sale on execution,[35] as may be necessary,[36] may be sold for the payment of his debts.[37] In the absence of a statute to the contrary,[38] a sale by the heir passes only his interest, and does not preclude a subsequent sale to pay debts.[39] The representative is, in such case, limited to his right to sell the land, and cannot recover the proceeds of the sale by the heir from him.[40]

Proceedings to procure a sale must be instituted within the time limited by statute,[41] or, if no time is fixed, within a reasonable time.[42]

(§ 7) *B. Procedure to obtain order.*[43]—The proceedings may ordinarily be instituted by the representative or by a creditor.[44] The procedure being purely statutory, the statutory requirements must be substantially complied with.[45] Facts show-

where testimony identified decedent as grantee. Id.

34. Under Hurd's Rev. St. 1901, c. 3, § 111, probate court may order sale of realty of which decedent is seized with legal or equitable title where payment for same has not been completed and estate is not able to make complete payment with advantage. Fitzgerrell v. Turner, 223 Ill. 322, 79 N. E. 76. Decedent held to have equitable interest where he had been in possession under bond for title, and had made payments for thirty-five years, though notes were not paid when due. Id.

35. Surviving husband's title to homestead under Code Civ. Proc. § 1474 held not affected by subsequent order of sale. Fisher v. Bartholomew [Cal. App.] 88 P. 608. Purchaser takes no title to homestead where sale was made as if no question of homestead was involved. Steinberg v. Saltzman, 130 Wis. 419, 110 N. W. 198.

36. Representative seeking to have land sold must show that personalty is insufficient. Hunt v. Curtis [Ala.] 44 So. 54. Value of personalty must be established by proof of disinterested witnesses taken by deposition. Id. Witnesses should not be permitted to give their opinions as to whether personalty is sufficient to pay debts, but should depose to facts, and court should draw conclusion. Id. Though devisee whose land is sold may thereafter compel contribution by other devisees, orphans' court has no authority to direct sale of all of realty for purpose of securing ratable contribution among devisees. In re Whitaker [N. J. Eq.] 65 A. 124. May direct sale of all of it only when sale of part would diminish value of remainder. Id. Order directing sale of several houses and lots held erroneous. In re Whitaker [N. J. Eq.] 65 A. 124.

37. Realty held to descend directly to heir, subject only to right of administrator to sell same under order of court to pay debts. Tippecanoe Loan & Trust Co. v. Carr [Ind. App.] 78 N. E. 1043. Devisees take subject to debts. Lake v. Hathaway [Kan.] 89 P. 666. Interests of widow and children in deceased husband's property held subject to his debts, whether liens thereon or not. Lyons Nat. Bk. v. Schuler, 115 App. Div. 859, 101 N. Y. S. 62. Decree charging claim against realty held proper, it having been established, and it appearing that there was not sufficient personalty to pay it, and decree on settlement having directed sale of realty. Brown v. Cresap, 61 W. Va. 315, 56 S. E. 603.

38. Under Civ. Code 1902, § 2572, et seq., held that lands sold by devisees in good faith before action for that purpose was brought could not be sold to pay debts, neither vendor nor vendee having knowledge of existence of claims sought to be so enforced, will not having charged debts on land, and purchaser not having obligated himself to pay them. Galloway v. Galloway [S. C.] 57 S. E. 528. Fact that sale was made within twelve months after testator's death, within which time executor was exempt from suit for recovery of debts, held not to change rule. Id. Interest of vendee held also exempt from payment of any proportion of fee awarded plaintiff's counsel in suit by executors to procure sale and for partition. Id.

39. Tippecanoe Loan & Trust Co. v. Carr [Ind. App.] 78 N. E. 1043.

40. Since it is realty, and not proceeds of sale thereof by heir, which statute authorizes administrator to convert into assets. Tippecanoe Loan & Trust Co. v. Carr [Ind. App.] 78 N. E. 1043. Burns' Ann. St. 1901, § 2413, relating to intermeddlers, has no application to such case. Id.

41. Statute providing no period of limitation within which administrator must file petition, held that, by analogy to statute relating to lien of judgments, must be done within seven years unless delay is satisfactorily explained. Cruttenden v. Finlay, 123 Ill. App. 523. Petition held not to show satisfactory excuse for delay. Id.

42. Since homestead not exceeding $1,000 in value cannot be sold to pay debts until after termination of exemption in favor of widow, held that it is not laches to delay selling same until premises cease to be so occupied, regardless of length of delay. Miller v. Hammond, 126 Ill. App. 267.

43. See 7 C. L. 1436.

44. Where administratrix after written demand refused to institute proceedings, held that creditor could do so in his own name, making her a defendant. Brun v. Mann [C. C. A.] 151 F. 145.

45. Is land, and not proceeds of sale thereof by heir, which representative is authorized to convert into assets. Tippecanoe Loan & Trust Co. v. Carr [Ind. App.] 78 N. E. 1043. Where whole estate, both real and personal, is insufficient to pay debts, held that petition for sale of realty should be made under orphans' court act 1898, § 92-110 (P. L. 1898, p. p. 748-756), relating to insolvent estates, instead of under Id. §§ 82-90. In re Godfrey's Estate [N. J. Eq.] 65 A. 202. Where, on return of rule to show cause issued on petition under §§ 82-90 based on insufficiency of personalty,

ing the necessity for a sale must be alleged and proved.[46] It must be shown that there are valid existing debts against the estate.[47] The required notice must be given.[48]

In some states a court of equity may, on a proper showing, direct a sale to satisfy a judgment previously rendered by it.[49] The fact that a state statute requires the representative to institute proceedings to procure a sale does not preclude a judgment creditor from instituting a suit in a Federal court of equity in his own name to procure a sale to satisfy a judgment recovered by him in that court.[50] Where the estate is settled by a court of equity in a suit instituted for that purpose, different creditors having separate demands may unite in a bill to subject the realty to their payment.[51] The proof of claims in such suits is treated in a previous section.[52]

(§ 7) *C. The order.*[53]—The right to enforce the execution of an order of sale may be lost by laches.[54] The conclusiveness of the order and its immunity from collateral attack are treated in a subsequent section.[55]

(§ 7) *D. The Sale.*[56]—The purchaser takes only the interest of the decedent in the property sold,[57] and the rule of caveat emptor applies.[58] Representations,

it appears that personalty and realty are, and are known to administrator to be, together insufficient to satisfy debts claimed, court may decline to make order on ground that application should have been made under §§ 92-110. Id. Proofs held to justify inference that administrator acted in bad faith in making application under §§ 82-90, so that it was proper for orphans' court to decline to make order of sale on that ground. Id.

46. Petition alleging that personalty was insufficient to pay debts and that sale was necessary for that purpose, held sufficient to confer jurisdiction, being substantial following of language of Code 1896, § 156. Peavy v. Griffin [Ala.] 44 So. 400. Order directing sale held not open to objection that it was made without proofs required by P. L. 1898, p. 745, § 83, in view of recitals therein. In re Whitaker [N. J. Eq.] 65 A. 124.

47. That claims for said debts have been properly presented by some one authorized to present them. Hunt v. Curtis [Ala.] 44 So. 54. Administratrix is not required to prove existence of debts by depositions of witnesses, but may do so by oral examination. Id. Where contestants offered evidence to show that claimants' ancestor had received rent cotton from lands prior to his death which should have been credited on claim, held proper to show that rents received were from other lands owned by her, and that deed to such lands was admissible to show ownership. Id

48. One attaching interest of heir in decedent's realty and subsequently recovering judgment against him held person interested in said realty within meaning of Code, § 3324, and entitled to notice of proceedings. Mullin v. White [Iowa] 112 N. W. 164. Proceeding is adversary and not one in rem, so that notice is jurisdictional. Id.

49. Where chancery court, to which administration had been removed, decreed that estate was indebted to administrator with will annexed, authorized him to reimburse himself out of assets, and decree provided that all matters in regard to same were subject to further orders and decrees of court, held that court could, on showing that there was no other way of satisfying said indebtedness, order sale of realty belonging to estate to satisfy said decree though will conferred power of sale on executor, particularly in view of contention that amounts for which decree was rendered did not come within power. Johnson v. Porterfield [Ala.] 43 So. 228. Fact that petition was defective for failure to allege which of parties were married women, and because minor was not joined, should have been raised by demurrer or motion, and was not grounds for reversal. Id. Contention that order of sale was erroneous because it was not proven what rents had been collected, and what was balance due, held untenable, there being nothing to show that any rents had been collected, and matter being one to be determined on final settlement. Id. Decree directing sale held not erroneous for failure to ascertain decedent's debts. Id. Where petition alleged that sale was necessary, and such allegation was not controverted, and there was no showing that sale of part only would probably produce amount sufficient to satisfy decree, held order directing sale of all the realty was not erroneous. Id.

50. Brun v. Mann [C. C. A.] 151 F. 145.

51. Mann v. Brazie, 61 W. Va. 613, 57 S. E. 43.

52. See § 6 B, ante.

53. See 7 C. L. 1438.

54. Petition to enforce execution of order held, in absence of good excuse for delay, barred after twenty years by analogy to statute of limitations relating to liens of judgment, there being no express statutory provision on the subject. White v. Horn, 224 Ill. 238, 79 N. E. 629, afg. 127 Ill. App. 222. Existence of dower interest, and fact that lands had been worth nothing in market until shortly before petition was filed, held not to excuse delay of twenty-three years. Id.

55. See § 15, post.

56. See 7 C. L. 1438.

57. Subject of sale is title of decedent at his death. Denman v. Payne [Ala.] 44 So. 635. Purchaser at sale of decedent's equitable interest under bond for deed held to take place of decedent and his heirs, and to be entitled to conveyance from vendor

agreements, and warranties of the representative are not binding on the estate.[59] Confirmation passes the equitable title to the purchaser,[60] fixes his liability for the amount of his bid,[61] and cures irregularities of procedure.[62] A purchaser buying land at a specific price cannot afterwards contend that what he bought included and carried back to him any portion of the money he expressly agreed to give.[63]

The heirs may have the sale set aside for fraud,[64] or where the representative,[65] or a commissioner appointed to make the sale,[66] himself becomes the purchaser. The reversal of a decree, in a suit in equity for the settlement of the estate, confirming the commissioner's report of debts and ordering a sale for their payment, because of irregularities in the proof of claims, does not affect the title of the purchaser.[67] Infant heirs need not wait until they become of age before suing to set aside a sale invalid as to them, and hence the chancellor may order a resale on petition of the representative because of such invalidity where they, by their guardian, join in the application.[68]

§ 8. *Subjection of property in hands of heirs or beneficiaries to payment of debts.*[69]—By statute in many states, heirs and devisees are liable to the extent of the

only upon paying balance of purchase price, vendor not being confined to remedy of collecting claim for balance against estate in same manner as other creditors. Fitzgerell v. Turner, 223 Ill. 322, 79 N. E. 76.

58. Denman v. Payne [Ala.] 44 So. 635.

59. Agreement between representative and mortgagee that mortgaged land should be sold under order of court to pay debts, that purchaser should get whole title, and that mortgage should be paid out of proceeds, held not to have relieved administrator of duty to take assignment of mortgage on payment of mortgage debt, since nothing but deceased mortgagor's equity of redemption was sold, and sale did not affect liability of estate for debt. Denman v. Payne [Ala.] 44 So. 635.

60. Confirmation of sale made pursuant to order of court, granted after hearing upon due notice, held to have passed equitable title to land to innocent purchaser, and to have entitled him to deed on payment or tender of purchase price. Lake v. Hathaway [Kan.] 89 P. 666. Fact that after sale was ordered, and before it was made, heirs of testator, including executrix, entered into contract to settle indebtedness without sale of realty, which contract was not brought to notice of purchaser or attention of court until after sale was confirmed and deed approved, held not to have deprived court of jurisdiction to confirm sale, nor to have affected rights of purchaser. Id.

61. Dull v. Slater, 31 Pa. Super. Ct. 488.

62. Fact that sale was made on terms differing from those prescribed held irregularity cured by confirmation. Sipe v. Taylor, 106 Va. 231, 55 S. E. 542. Any objection to validity of sale must be made by purchaser at the return of the sale, and if he submits to decree confirming it he cannot afterwards attack validity of sale in action to enforce it, or contend that what he bought included portion of money he agreed to pay for land. Dull v. Slater, 31 Pa. Super. Ct. 488.

63. Dull v. Slater, 31 Pa. Super. Ct. 488. Where land sold was charged with sum of money, interest of which was payable to decedent's mother for life, and principal after her death to heirs of decedent's father, and sale was made subject to such charge, part of purchase price to be retained by purchaser to satisfy it, and sale was confirmed without objection, held that purchaser could not, after widow's death, contend that shares of certain of the heirs merged in estate which he acquired by said purchase. Id.

64. Where heirs seeking to recover property sold must, in order to prove title, resort to evidence aliunde the record, and facts showing fraud on part of adversary, they may sue in equity or in ejectment. Steinberg v. Saltzman, 130 Wis. 419, 110 N. W. 198. Complaint held to show probable ground for relief, notwithstanding delay. Id. Complaint in action to set aside sale held to sufficiently allege fraud. Id. Allegations on information and belief challenging title on ground that no license to sell was granted held insufficient, matter being one of public record in regard to which truth was readily ascertainable. Id.

65. See § 9A, post.

66. Where commissioner purchased land through third person, held that there was no sale, but title remained in heirs. Penn v. Rhoades, 30 Ky. L. R. 997, 100 S. W. 288. Heirs held not estopped by conduct from questioning validity of sale. Id. Heirs held properly required to refund purchase money as condition precedent to having title quieted in them. Id.

67. Spradlin v. Stanley's Adm'r, 30 Ky. L. R. 928, 99 S. W. 965.

68. Land was sold without appraisement required by statute, and purchased by widow as administratrix. Subsequently she, believing title to be invalid, instituted suit to set sale aside and for resale. Infant children, by guardian, answered, admitting allegations of petition and joining in prayer for resale. Chancellor ordered resale at which larger price was obtained. Held that chancellor had jurisdiction to order resale, and that purchasers acquired good title, action serving same purpose as though instituted by children. Grunewald v. Cox [Ky.] 103 S. W. 275.

69. See 7 C. L. 1441.

estate received by them for the debts and liabilities of the testator,[70] not barred by limitations.[71] An heir or devisee discharging such a liability is entitled to contribution from each of the others in proportion to the value of the estate received.[72] The right to take land under an execution on a judgment rendered against decedent during his lifetime,[73] or against his representative after his death,[74] depends on the statutes of the various states. In some states, on a sale of realty in an action for partition, provision may be made for the payment of debts outstanding against the

70. St. 1903, §§ 2084, 2088. Ferguson v. Worrall [Ky.] 101 S. W. 966. To extent of assets received, if heir dies and estate received by him from testator passes to his heir or devisee, it is liable as if in hands of original devisee. Id. Where there is no personalty, remedy of creditors is to subject realty to their demands or to obtain personal judgment against devisees on account of assets received, under St. 1903, § 2084. Withers' Adm'r v. Withers' Heirs, 30 Ky. L. R. 1099, 100 S. W. 253. Promise by devisee to pay funeral expenses for which she was liable to extent of assets received by her, and which were lien on property devised to her, held not within statute of frauds. Id. Promise held not without consideration, she having received assets of estate, and being to that extent liable for debts under St. 1903, § 2084. Id. Action by creditor, under Code Civ. Proc. § 1483 et seq., against sole heir to recover amount due on promissory note executed by decedent, praying that same be collected out of property descending to heir, or, in case of its sale in pending partition proceeding, that it be charged as lien upon, and paid out of, defendant's share of proceeds, held one on contract and for recovery of money only, justifying attachment under §§ 635, 636, where defendant was nonresident. Avery v. Avery, 52 Misc. 297, 102 N. Y. S. 955. Where property has passed into hands of sole devisee and independent executor, held that he held same subject to debts of estate and might be sued by creditor of estate and property condemned to payment of debt regardless of in which capacity he held it. Tison v. Gass [Tex. Civ. App.] 102 S. W. 751. Petition in suit for that purpose held not multifarious. Id. Judgment disposing of all issues as to all parties held final though it did not in terms dispose of case against defendant in his capacity as executor. Id. Where defendant had taken possession of estate as owner under will making him sole devisee and independent executor, held that, in suit to reach and condemn property to satisfaction of plaintiff's claim against decedent, defendant could not set up rights of other creditors as defense without at least making them parties and seeking to have property in his hands properly applied to payment of all debts. Id.

71. Claim for funeral expenses based on oral contract held governed by five year statute of limitations. Withers' Adm'r v. Withers' Heirs, 30 Ky. L. R. 1099, 100 S. W. 253. Promise by executor to pay debt held only to bind personal estate in his hands, and not to prevent running of limitations in favor of heirs to whom title to realty passed directly under will. Id. Evidence held to show direct and unequivocal promise by devisees to pay claim. Id. Absence of devisees from state held to have estopped running of limitations as to them. Id. Fact that by will property is devised subject to debts and funeral expenses merely gives creditors lien on property, and does not affect running of limitations as to funeral expenses or debts. Id. Action by bank against heirs and distributees to recover amount of overdraft by testator and to enjoin executor from paying out funds to them held barred when not brought until more than two years after grant of letters, though overdraft was not discovered until after that time owing to mistake in bookkeeping. Lawrence County Bk. v. Arendt, 80 Ark. 523, 98 S. W. 356. Judgment was rendered against administrators of deceased surety on bond in suit in equity on bond, to which they were parties, in 1871, but, owing to litigation carried on by them, decree adjudging amount of estate's liability was not entered in said cause until 1902. Held that suit against heirs at law to charge realty in their hands with amount found due, instituted within five years after decree of 1902, was not barred by Code 1904, § 2920, limiting time within which claims may be proved to five years after qualification of representative, claim having been proved by judgment of 1871, and decree of 1902, being conclusive that debt was not barred by limitations as against estate. Sipe v. Taylor, 106 Va. 231, 55 S. E. 542.

72. St. 1903, § 2073. Recovery of judgment by creditor against heir or devisee not condition precedent to right of contribution, though payment before judgment is at risk of person making it. Ferguson v. Worrall [Ky.] 101 S. W. 966. Defendant held to have been discharged from liability by agreement settling will contest. Id.

73. Since death of one against whom judgment has been recovered puts an end to it until it has been revived against his representatives, held that execution issued after death of one of several judgment defendants, without revivor, was void as to him, and did not stop running of limitations. People's Bk. of Kentucky's Assignee v. Barbour, 30 Ky. L. R. 712, 99 S. W. 608. Judgment creditor of decedent, more than ten years after rendition of judgment, served on his widow and children notice of application for leave to issue execution under Code Civ. Proc. § 1380. Thereafter widow and children gave mortgage on property to third person who took with notice, and certain of the children conveyed their interest to mother. Held that lien of judgment creditor was superior to mortgage and deed, though, under § 1252, notice of levy could not be recorded until execution was issued, which could not be done until leave was obtained. Lyons Nat. Bk. v. Schuler, 115 App. Div. 859, 101 N. Y. S. 62.

74. See § 6B, ante.

estate of a decedent, to whose interest one of the parties has succeeded as devisee and representative, by directing the retention from his share of a sufficient sum for that purpose.[75]

§ 9. *Rights and liabilities between representative and estate. A. Management of and dealings with estate.*[76]—The representative is chargeable with and must account for all the assets of the estate coming into his hands,[77] and is entitled to credit for all sums actually expended by him in paying valid claims against the estate,[78]

75. Green v. Cannady [S. C.] 57 S. E. 832.
76. See 7 C. L. 1443.
77. Administrator held properly charged with face of mortgage due estate, which had been paid, and interest up to time of appraisal of assets, but not with interest after that time, it being presumed, in absence of proof, that past due debts were promptly collected. Knapp v. Jessup, 146 Mich. 348, 109 N. W. 666. Claim against executor for rents of portion of estate received during settlement held properly allowed. In re Van Auken's Estate [Neb.] 111 N. W. 782. In action by distributees against administrator and surety for account and settlement and to recover sum due them, held that plaintiffs were not compelled to take sale of certain securities, alleged to have been made by administrator, at time he made it, as conclusive evidence of their value, but could establish actual market value by any competent evidence. State v. Johnson, 144 N. C. 257, 56 S. E. 922. Administrator charged with value of certain personalty belonging to estate and disposed of by him. Wolfe v. Morgan, 61 W. Va. 287, 56 S. E. 504. Findings of commissioner, based on conflicting evidence and approved by chancellor, charging administrator with value of certain lumber sold, and certain sum for rentals, sustained on appeal. Id. Judgment for plaintiff, in suit by executor and others for settlement of estate in which claim of defendants that executor and another had jointly converted assets of estate was determined in executor's favor, held bar to another action against executor individually and said third person for same conversion, at least in so far as executor was concerned, though third person was not party to original suit. Clement v. Clement [Tex. Civ. App.] 17 Tex. Ct. Rep. 575, 99 S. W. 138. Evidence held insufficient to support finding that defendant's testator received certain property as executor of his first wife. Volhard v. Volhard, 104 N. Y. S. 578. Evidence held not to show that decedent turned over money to person afterwards appointed administrator for purpose of defrauding his creditors, so as to preclude heirs from recovering same. Kirby v. Moore, 30 Ky. L. R. 1020, 99 S. W. 1156. Evidence held to show that fund deposited by decedent in name of himself and his daughter, who was his executrix, was so deposited for purpose of restoring to her money earned by her and deposited with him for safe keeping, so that it was error to surcharge her account with the amount thereof. Carlin v. Carlin [N. J. Eq.] 64 A. 1018. Objection to jurisdiction of surrogate to pass on claim of administratrix that all property returned by her as assets belonged to her personally held not an admission that she was in possession of property under claim of gift, or that she personally owned it. In re Cavanagh, 105 N. Y. S. 850. Evidence held insufficient to show that deposits assigned by decedent to executor belonged to estate. In re Archer's Estate, 51 Misc. 260, 100 N. Y. S. 1095. Evidence held to sustain finding that decedent gave certain sum to administrator. Yeager's Estate, 31 Pa. Super. Ct. 202.

78. Payment by executor of mortgage on lands devised to him held unauthorized, so that item therefor was properly disallowed. In re Humphrey, 54 Misc. 198, 105 N. Y. S. 922. Evidence held insufficient to show agreement by testatrix to pay mortgage on land devised to executor, but at most to show intention to make gift which she afterwards decided not to do. Id. Every person having vested interest in estate having signed paper protecting executors in payment of certain claims, and releasing them from any responsibility for so doing, held that they were estopped to question same on accounting, and that item therefor would be allowed, there being nothing to show that claims were not just and proper. In re Robinson, 53 Misc. 205, 104 N. Y. S. 599. Burden held on contestant to show impropriety of payment to counsel for services rendered deceased during her lifetime. In re Dittrich, 53 Misc. 511, 105 N. Y. S. 301. An accounting of natural tutrix of minor heirs administering succession of her deceased husband, held that evidence did not sustain claim for note donated by husband and not paid by tutrix as averred. Gaspard v. Coco, 116 La. 1096, 41 So. 326. Evidence held to sustain finding that natural tutrix of minor heirs administering succession of her deceased husband had paid certain claims against his estate for which she was entitled to credit. Id. Evidence held to justify credit to administrator for caring for widow, it being understood by heirs that he should do so. Knapp v. Jessup, 146 Mich. 348, 109 N. W. 666. Evidence held to show that claim for services rendered decedent, and for which he agreed to pay fair compensation, was reasonable, so that executrix was properly allowed sum expended in paying it, particularly as objectors acquiesced in its allowance. In re Branch's Estate, 123 Mo. App. 573, 100 S. W. 516. Executor credited with amount paid for nursing deceased. In re Ramsey's Estate [N. J. Eq.] 66 A. 410. Item for board of children of executor and decedent disallowed, evidence showing that he never intended to charge therefor. Id. Executor held entitled to credit for payment on account of principal sum of mortgage given by testatrix on land belonging to estate, in which executor and his children were equally interested. Id. Also for interest paid on mortgages given by decedent during her lifetime. Id. Administrator held

and the expenses of administration.[79] On his removal he must account to his successor for all such property.[80] He is not personally responsible for property held by decedent as life tenant which never came into his hands.[81] The representative of a deceased representative can only be charged with so much of the property of the estate as comes into his hands.[82] Though a temporary administrator has no authority to pay legacies, he will be given credit on accounting for the amount of a legacy paid by him, provided the party receiving it is entitled to it, and the estate is able and liable to pay it after all prior charges are provided for.[83]

The rights, duties, and liabilities of testamentary trustees are entirely separate and distinct from those of the executor.[84] Where the same person is both executor and testamentary trustee,[85] or representative and guardian,[86] his liability in one capacity does not cease, nor his liability in the other commence, until he has turned the property held by him in the former capacity over to himself in the latter capacity.

In the management of the estate the representative is bound to act with that decree of skill and diligence which an ordinarily prudent man would exercise in the direction and management of his own affairs under like circumstances,[87] and where he does so, is not ordinarily liable for losses.[88] He is, however, liable for losses

entitled to credit for balance found due creditor of estate, which he paid. Wolfe v. Morgan, 61 W. Va. 287, 56 S. E. 504. Where executor paid claims barred by limitations, etc., and which were not proved according to law, after making of order directing him to settle his accounts and order of reference to commissioner in suit to settle estate, held that he did so at his own risk, and that loss must fall on him rather than on estate, particularly where petition in action for settlement alleged that he was about to pay barred claims, and he knew that it did. Hannen v. Harrod, 30 Ky. L. R. 976, 99 S. W. 976. Not entitled to credit for amount expended in paying claim barred by special statute of limitations. Kenyon v. East Greenwich Probate Ct., 27 R. I. 566, 65 A. 267.

79. See § 9D, post.

80. For right of administrator de bonis non to recover property converted by his successor, see § 4A, ante.

81. In action against executrix to recover property alleged to have been received by her testator under will giving him estate for life with remainder over, held that she could only be compelled to account therefor as executrix, and no personal judgment could be recovered against her. Volhard v. Volhard, 104 N. Y. S. 578.

82. Estate of deceased executor held properly charged with interest on mortgage investment traced into his hands. In re Rossell, 105 N. Y. S. 1098. Evidence held insufficient to support finding that legacy was in hands of executor at time of his death, so that his estate was improperly charged therewith. Id.

83. Administrator pendente lite. Steelman v. Wheaton [N. J. Eq.] 66 A. 195.

84. Where trustees assumed duties of testamentary trust, held that neither beneficiary of trust nor her administrator could call upon executor to execute trust or compel him to account as trustee, nor compel him to account for trust fund if he failed to pay it over to trustee. Atwill v. Dole [N. H.] 67 A. 403. Failure of testamentary trustees to give official bond held not to have imposed upon executor duties of administering trust. Id.

85. Mere retention of fund by executor and trustee held not to have operated to terminate his liability as executor and to have imposed liability on him as trustee, in absence of an affirmative act showing his intention to hold it as trustee. Fleming v. Walker [Ala.] 44 So. 536.

86. Where administratrix was also guardian of decedent's minor children, held that receipt by her as guardian to herself as administratrix for sum belonging to minors, without any actual payment of the money, did not operate to discharge herself and her sureties as administratrix, or to impose any liability on herself or her sureties as guardian. In re Switzer, 201 Mo 66, 98 S. W. 461. See. also, State v. Whitehouse [Conn.] 67 A. 503.

87. If his acts stand test of this rule, cannot be held liable for any loss sustained by estate. Christy v. Christy, 226 Ill. 547, 80 N. E. 242, afg. 125 Ill. App. 442. Must at least show that he exercised such prudence and diligence in paying claim where there is no judgment effective for his protection. In re Watson, 115 App. Div. 310, 100 N. Y. S. 993. Direction in will to sell land as soon as same could be sold without sacrifice held to refer to time when land could be sold, and to have in no way lessened measure of executrix's duty when she decided to sell. In re Branch's Estate, 123 Mo. App. 573, 100 S. W. 516. Discretionary power given executors by will to compromise, compound, and discharge debts must be exercised by them at their peril, and their action will be approved or disapproved according to whether, in view of all facts, it was for best interests of estate. Brown v. Brown [N. J. Eq.] 65 A. 739.

88. Administrator held not liable for loss due to failure to collect purchase price of lands sold under order of court where purchaser was insolvent. Denman v. Payne [Ala.] 44 So. 635. Administrator held not liable for failure to obtain higher price for corporate stock, there being no evidence of fraud or bad faith. Christy v. Christy, 226 Ill. 547,

due to his negligence,[89] or to his unauthorized acts or omissions.[90] It is his duty to administer the estate as directed by the will, and he is personally liable to legatees for the amount of their legacies where he fails to do so.[91]

In the performance of his duties, the representative must act with the highest degree of fidelity and the utmost good faith.[92] As in the case of other trustees, he may not use or deal with the property of the estate to his own personal advantage.[93]

80 N. E. 242, afg., 125 Ill. App. 442. Failure to obtain order of court for sale of personalty held to impose no higher degree of diligence than he would be otherwise bound to exercise. Id. Not liable for error of judgment, in absence of showing of bad faith or negligence. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710. Not liable for failure to make opportune sale though has order for sale of all personalty. Id. Fact that he acted upon request of the widow or heirs will excuse him, in absence of showing of bad faith. Id. Where widow requested him not to sell personalty to one making offer therefor, held that fact that he did not do so did not render him personally liable for expenses thereafter incurred in caring for it, or deprive him of right to compensation for so doing. Id. Administrator held not liable for loss due to failure of bank where there was nothing to show that he was negligent in depositing funds therein. Knapp v. Jessup, 146 Mich. 348, 109 N. W. 666. Evidence held to show that executrix obtained full rental value of land leased by her. In re Branch's Estate, 123 Mo. App. 573, 100 S. W. 516. Where purchase and retention of securities by executors and trustees was within scope of discretionary power given them by will, held that they would not be charged with any loss incurred by reason of shrinkage in value. In re Hawk's Estate, 54 Misc. 187, 105 N. Y. S. 856.

89. Administrator held not liable for loss due to failure of bank in which funds were deposited on ground that he was dilatory in settlement of estate where he had right to retain funds for care of widow, and it was understood by heirs that he should do so. Knapp v. Jessup, 146 Mich. 348, 109 N. W. 666. Executrix held not negligent in selling land to son because she did not try to obtain other bids or place land on market. In re Branch's Estate, 123 Mo. App. 573, 100 S. W. 516. Evidence held to show that executrix sold land for reasonable market value. Id. Evidence held not to show that better price could have been obtained. Id. Executor held guilty of negligence in paying claim. In re Watson, 115 App. Div. 310, 100 N. Y. S. 993. If he negligently allows an invalid claim to go to judgment, judgment will afford him no protection, and he may be properly charged with amount paid thereon. Id. Executors surcharged with amount of invalid claim where, though doubtful as to its validity, they failed to make any defense or even to disclose facts. Id. Executor held not chargeable with waste under Vt. St. 2412, providing that when administrator neglects or unreasonably delays to raise money by collecting debts or selling property of estate, or neglects to pay over money in his hands, and value of estate is thereby lessened, or unnecessary cost or interest accrues, or persons interested suffer loss, same shall be deemed waste, and damages sustained may be charged and allowed against him in his account, or he shall be liable therefor on his bond. In re Lane's Estate, 79 Vt. 323, 65 A. 102.

90. Where paper purporting to be consent decree, in case to which administrator was party, was inoperative as judgment because court was without jurisdiction, held that, even though it was operative as agreement to which administrator was party, it did not preclude heirs from calling administrator to account for any matter therein charging estate with claims with which it was not chargeable, or which provided for distribution of assets in any other manner than that authorized by law. Sapp v. Williamson [Ga.] 58 S. E. 447. It being duty of representative to insure barn, held that, where he did not do so, he was not entitled to credit for amount expended in rebuilding it after its destruction by fire, even though deceased was unwilling to have it insured in her lifetime. In re Ramsey's Estate [N. J. Eq.] 66 A. 410. Administrator selling chattels and taking neither cash nor security for purchase money held chargeable with amount thereof. Wolfe v. Morgan, 61 W. Va. 287, 56 S. E. 504.

91. Where administrators with will annexed failed to convert realty and personalty into money and pay legacy out of proceeds as directed by will, though it appeared that there was sufficient property for that purpose, but administered estate regardless of will, held that they were properly charged with amount of legacies as found in their hands, at instance of one having interest in remainder therein. Hardin v. Hassell [Tenn.] 100 S. W. 720.

92. Christy v. Christy, 226 Ill. 547, 80 N. E. 242, afg. 125 Ill. App. 442. Where administratrix assented to an amicable action on claim against estate, made no defense thereto, gave testimony in favor of plaintiff, and was beneficially interested in obtaining an award in plaintiff's favor, held that law would infer fraud and collusion, administratrix having placed herself in position where her duty as such and her personal interest were in conflict. White v. Penuel [Del.] 66 A. 362.

93. Cannot take assignment of mortgage on his intestate's land and exercise power of sale therein to foreclose interests of heirs. Morton v. Blades Lumber Co., 144 N. C. 31, 56 S. E. 551. May with his own funds purchase and take an assignment of a note outstanding against his intestate and avail himself of any securities held by creditor. Id. Will, in such case, be subrogated to rights of creditor, but can collect from estate only amount paid out by him with interest, and will not be permitted to speculate upon or make a profit by buying in debts of his intestate, nor to use any ad-

A purchase by him of the property of the estate at his own sale is generally held to be voidable [94] at the election of the heirs or other interested parties.[95] So, too, transfers by heirs and legatees to the representative of their interests in the estate are generally held to be void at their election.[96]

vantage in way of securities or otherwise which he has thus acquired to injury of creditors, distributees, or heirs. Id. Judgment of nonsuit, in suit by minor heirs to set aside mortgage foreclosure sale, held erroneous in view of allegations of fraud and collusion, etc., in complaint. Id. Executors held to hold realty acquired by mortgage foreclosure in their representative capacity though deed was made to them individually. Hine v. Hine, 118 App. Div. 285, 103 N. Y. S. 535. Deceased left money in firm business, standing to her credit at time of her death. Executors turned business into corporation, and issued to themselves, as executors, stock in payment of money due by them to estate. Held that they should be charged with amount standing due deceased at time of her death, with interest, even though they were guilty of no wrongdoing. In re Boyer, 54 Misc. 182, 105 N. Y. S. 857. Title to property purchased at partition sale was taken in name of third person who furnished money to pay purchase price, and who agreed to convey to bidder on repayment thereof, bidder giving him his note for amount so paid. On death of bidder his administratrix paid note out of funds belonging to estate, and took deed in her individual capacity. Held that, note being debt of estate which she was bound to pay, she took title in trust for estate. Montgomery v. Montgomery [Tex. Civ. App.] 17 Tex. Ct. Rep. 1018, 99 S. W. 1145.

94. Cannot purchase at his own sale directly or through agent. Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 N. E. 1056. Cannot purchase property and so manipulate it as to acquire title, particularly when widow and heirs are misled and imposed upon by him by reason of confidence reposed in him. Roberts v. Weimer, 227 Ill. 138, 81 N. E. 40. Administrator sold decedent's business to widow and was ordered to distribute part of purchase price to heirs. Widow subsequently transferred property to corporation organized by administrator and in which he was principal stockholder, and he paid heirs in stock at par value in lieu of cash, crediting himself with amount he was required to pay them. Held that heirs, on discovering that stock was practically worthless, had right to return stock to him and require him to account for money, and to charge himself with amount for which he had taken credit as paid. Id. Held proper to charge administrator with full amount reported as having been received by him from sale, though in excess of appraised value, and to refuse to set aside sale to corporation, since heirs had right to ratify same. Id. Heirs held not estopped to ask payment in cash and that administrator be required to account for profits of business up to time of sale to widow, they having relied on his misrepresentations and repudiated stock transfer promptly on discovering facts. Id. Executrix procured order to sell certain tract of land to pay debts, but delayed making sale, and procured sale of said tract under trust deed thereon for purpose of herself becoming purchaser. She did in fact purchase at said sale with her own funds for amount of mortgage debt with costs. Held that she would be divested of title so acquired at suit of heirs, and title revested in estate, but that she would be subrogated to rights of cestui que trust under trust deed. Stitt v. Stitt [Mo.] 103 S. W. 547. Sale of stock in trade to third person, from whom it was immediately repurchased by administratrix, held collusive, so that latter acquired no rights therein as against estate, but was bound to account for property as administratrix. In re Frey's Estate [N. J. Eq.] 67 A. 192. Complaint to set aside purchase of property of estate by executor held to state cause of action. Smith v. Stevenson Brew. Co., 117 App. Div. 690, 102 N. Y. S. 672. Where one executor procured transfer of property of estate to corporation formed by him for his personal benefit, held that his coexecutor was entitled to sue in his representative capacity to have transaction set aside though part of stock in said corporation had been transferred to him without consideration, and, as he claimed, without knowledge of fraud. Id. Complaint by executor alleging that his coexecutor had fraudulently procured transfer of property of estate to corporation formed by him for his personal benefit, that part of stock of said corporation had been transferred to plaintiff individually without consideration, that there were no bona fide stockholders, joining all stockholders, and praying that transfers and conveyances be declared void, or that all stock be declared to be property of executors and transferred to them, held to state cause of action in favor of plaintiff individually. Id. Sale of boat by executors to themselves, they having subsequently turned it over to corporation which they organized, held void, so that they were chargeable with it at its inventory value. In re Boyer, 54 Misc. 182, 105 N. Y. S. 857. Sale of decedent's interest in partnership by executor who had qualified to one named as executor in will who had not yet qualified, but afterwards did so, held voidable at option of residuary legatee, who was entitled to require executors to account for profits thereof, and for value of good will. In re Silkman, 105 N. Y. S. 872. Evidence held to sustain surrogate's findings as to profits. Id. Value of good will determined. Id.

95. Such a purchase is not void, but voidable only, and right to set it aside may be lost by unreasonable delay in asserting it. Brinkerhoff v. Brinkerhoff, 226 Ill. 550, 80 N. E. 1056. Where heirs, knowing that executor had furnished part of purchase price, took no steps for four years to ascertain his interest, and permitted purchaser to remain in possession during that time, held that bill to set aside sale was properly dismissed for want of equity. Id. Evidence held to show that parties seeking to set aside sale knew from day it was made, or shortly thereafter, that executor had furnished part of money put into land. Id.

96. Rule with relation to transactions between parties occupying relation of confi-

The representative is not chargeable with the rental value of property while it is occupied by persons whom the will provides may occupy it rent free,[97] nor after it has been turned over to a legatee in satisfaction of his legacy,[98] nor of property in which he has a personal interest as tenant in common where it is doubtful whether any rental could have been obtained therefor.[99]

The burden of showing that the representative has received property for which he has not accounted is on the party so contending.[1]

In Louisiana the remedy of an heir seeking to charge the representative with property claimed by him personally is by a direct action against him for its recovery,[2] and the remedy of one seeking to hold him personally liable for his acts is by opposition to his account.[3]

Subrogation of representative to rights of estate or third persons.[4]—A representative purchasing with his own funds an outstanding claim against the estate, and taking an assignment of a mortgage given to secure it, will be subrogated to the rights of the creditor to the extent of the amount paid with interest.[5] The same is true of a representative purchasing property of the estate at a sale under a trust deed.[6]

Executors de son tort.[7]—One taking possession of an estate without any administration is ordinarily chargeable with the value of all the property received by him, less all payments for which a lawful representative would have been entitled to

dence held inapplicable where administrator personally took no interest in estate under deed of heir conveying to him all his interest in estate in trust for creditors. Boddie v. Ward [Ala.] 44 So. 105. Held that purchaser for value from administrator was entitled to protection where he did not participate in or have notice of undue influence practiced by his grantor in securing deed from heir, though he had knowledge or notice of existence of confidential relation. Id. Bill seeking to set aside conveyance alleged to have resulted from representations of administrator where such representations were not alleged to have been false in any respect. Id. Where deed by heir recited that estate had been judicially decreed to be insolvent, held that it was necessary for bill seeking to set aside deed and conveyance thereunder to innocent third party to negative said recital and affirm solvency of estate, claimant having no interest in estate if it was insolvent. Id. As in case of other trustees, limitations begin to run when representative repudiates his trust, and knowledge of that fact is brought home to heir. Jolly v. Miller, 30 Ky. L. R. 341, 98 S. W. 326. Heirs gave administrator power of attorney authorizing him to compromise claims belonging to estate and to sell realty. Subsequently an heir sold his entire interest in estate to administrator. In action to set aside said sale, held that heir's deed revoked power of attorney executed by him, and severed trust relation existing between himself and administrator by virtue of latter's office, and that limitations commenced to run in favor of administrator when said deed was executed and delivered. Id.

97. Clift v. Newell [Ky.] 102 S. W. 832.

98. House belonging to testator was occupied by executor and his wife at testator's death. It was subsequently agreed that wife, who was residuary legatee, should take house and lot in payment of her legacy, and executor conveyed same to her through their person. Held that executor who continued to occupy property until his death was not liable for rental value thereof after execution and delivery of deed therefor, it not appearing that transaction was not advantageous to estate. In re Lane's Estate, 79 Vt. 323, 65 A. 102.

99. In re Robinson, 53 Misc. 205, 104 N. Y. S. 599.

1. Heirs and universal legatees claiming that executor had received certain money from decedent during her lifetime for investment, which he had not accounted for or inventoried, and that he had purchased certain realty in his own name with part of said fund, which should be inventoried, held to have burden of proving those facts. Succession of Hough [La.] 44 So. 190. Evidence held insufficient to sustain allegations. Id.

2. Executrix, who in her individual capacity holds and claims as owner, under a conveyance from her testator, property which is claimed by coheir as belonging to succession, has right to demand that any attack on her title be made by means of a direct and independent action, regularly docketed and allotted, and her objection, made in limine, that such action has been begun in the succession, without allotment, is properly sustained. Const. art. 134. Succession of Kranz, 117 La. 647, 42 So. 197.

3. Proper remedy of one seeking to hold administrator personally responsible for his acts, and to contest existence of amount of expenses incurred, and distribution of balance among heirs, held to be by opposition to account filed by him, and not by direct, separate action against him. Succession of Trahan, 118 La. 762, 43 So. 400.

4. See 7 C. L. 1448.

5. Will not be permitted to make profit out of transaction. Morton v. Blades Lumber Co., 144 N. C. 31, 56 S. E. 551.

6. Executrix purchasing property at sale under trust deed held subrogated to rights of cestui que trust. Stitt v. Stitt [Mo.] 103 S. W. 547.

7. See 7 C. L. 1448.

credit.[8] Statutes relating to intermeddlers have no application to a sale of realty belonging to the estate by an heir.[9]

(§ 9) *B. Representative as debtor or creditor.*[10]—As a general rule the representative is chargeable with his personal indebtedness to the estate as so much money in his hands for the usual purposes of administration,[11] in the absence of a showing that he was hopelessly insolvent at the time of his appointment, and continued in that condition during all the time of his administration up to and including the time of his final settlement,[12] the burden of establishing such insolvency being on him.[13] He cannot be permitted by virtue of his trust position to gain any advantage with reference to his own indebtedness which he would not otherwise possess.[14]

Personal claims of the representative against the estate must ordinarily be presented, proved, and allowed in the same manner as other claims,[15] and will share in the distribution of assets on the same basis as those of other creditors.[16] In states

8. Gen. St. vol. 2, p. 1426, § 3. Widow. Tuite v. Tuite [N. J. Eq.] 66 A. 1090. Complainants permitted to amend bill seeking to charge defendant as trustee so as to make it one for an accounting from her as executor de son tort, making a representative of estate a party. Id.

9. Since he has right to sell his interest, and sale by him passes only such interest as he has, and does not preclude subsequent sale by administrator to pay debts, Burns' Ann. St. 1901, § 2413. Held to have no application. Tippecanoe Loan & Trust Co. v. Carr [Ind. App.] 78 N. E. 1043.

10. See 7 C. L. 1449.

11. State v. Johnson, 144 N. C. 257, 56 S. E. 922. He and his sureties are liable therefor on his official bond. Kirby v. Moore, 30 Ky. L. R. 1020, 99 S. W. 1156. Where administrator had property belonging to decedent in his hands immediately before his appointment, held that it devolved upon him and his surety, if they desired to show that it did not come into his hands as administrator, to show some disposition of it before date of his qualification. Id. Evidence held to show that administrator held money of decedent as his agent, so that it became assets in his hands on his qualification. Id. Administrator held properly charged with indebtedness, evidence being insufficient to show payment. Denman v. Payne [Ala.] 44 So. 635. Administrator by accepting letters held to have become chargeable with amount of indebtedness, represented by notes and checks, of firm of which he was member. In re Ablowich, 118 App. Div. 626, 103 N. Y. S. 699. Fact that letters were revoked before estate was administered, and that he turned notes and checks over to his successor, who accepted them, held not to have released original administrator from such liability. Id.

12. State v. Johnson, 144 N. C. 257, 56 S. E. 922. Evidence held to sustain finding that administrator was solvent when appointed. Id. On issue of solvency application of administrator to surety company for his official bond, in which he stated value of his estate over his liabilities, and on which bond was issued, held admissible as against him and surety. Id. Evidence as to number of docketed judgments in administrator's favor held admissible. Id.

13. State v. Johnson, 144 N. C. 257, 56 S. E. 922.

14. Son, acting as agent of his mother, collected certain rents of realty belonging to her, and, without her consent, but with that of his brother, expended them upon property in which he and his brother were jointly interested. Brother and mother died and son was appointed latter's administrator. Held that minor children of brother could compel administrator to pay to estate which he represented amount of rents so collected, though they had received by inheritance the property on which they were expended. Coffey v. Coffey, 193 Mass. 398, 79 N. E. 742.

15. Where letters provided that all claims not filed within year should be barred, held that administrator's personal claim was barred when not so filed. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710. Claim that he did not know that it was necessary held no excuse, his mistake being purely one of law, and due to his own neglect. Id. Where parties failed to agree upon arbitration under Rev. Laws, c. 141, §§ 6, 7, to pass upon personal claim of administrator, held that it became duty of court to pass upon it, as well as upon all other matters involved in his account. Wood v. Farwell [Mass.] 81 N. E. 294. Representative administering insolvent estate under the statute may present his own claim, and, unless it is made to appear to be dishonest or fraudulent, may be admitted to participate in distribution of assets on same footing as other creditors. Wheedon v. Nichols [N. J. Eq.] 65 A. 445. Mere fact that general statute of limitations has run against claim does not, without further proof, justify inference that claim is dishonest. Id. He cannot, in such case, elect to proceed at law or in equity against himself as other claimants might do, but jurisdiction of orphans' court is exclusive. Id. Claim of executor for services rendered decedent during his lifetime cannot be allowed where it does not appear that any price therefor was agreed on, and reasonable value of such services is not shown. In re Flaacke's Estate [N. J. Eq.] 64 A. 1020. Claim allowed in part and rejected in part. Id.

16. Wheedon v. Nichols [N. J. Eq.] 65 A. 445. Executor of insolvent estate cannot retain full amount of debt owing to him by estate, but must accept dividend same as other creditors. In re Wiley's Estate [N. J. Eq.] 65 A. 212.

where the representative may waive the general statute of limitations, his personal claim cannot be disallowed solely on the ground of the running of limitations unless it is shown to be dishonest or fraudulent.[17]

(§ 9) *C. Interest on property or funds.*[18]—As a general rule the representative is not chargeable with interest unless he has actually received it, or where, from culpable delay in settling his accounts, it may be fairly inferred that he has made a profit out of the funds in his hands,[19] nor with interest on funds in his hands uninvested during the period allowed by law for the settlement of the estate.[20] He will, however, be charged with interest on money paid out without authority of law,[21] or used by him for his own individual benefit.[22]

In calculating interest it should ordinarily be charged on each year's balance from its close,[23] with annual rests.[24]

(§ 9) *D. Allowance for expenses, costs, counsel fees, and funeral expenses.*[25]—The representative is entitled to a reasonable allowance for all necessary expenses incurred by him in the care, management, and settlement of the estate,[26] even when acting, in good faith, under a voidable order of appointment,[27] but not for expenses incurred because of his own negligence or neglect of duty.[28] Thus, he has been held to be entitled to credit for sums necessarily expended for traveling expenses,[29] repairs,[30] taxes,[31] insurance,[32] caring for crops on leased land,[33] and collecting claims.[34]

17. Since statute relating to administration of insolvent estates does not require representative to interpose limitations as defense against claim of third person, on which latter elects to proceed by action at law or suit in equity, running of limitations is not bar to his own honest claim which is necessarily tried before orphans' court. Wheedon v. Nichols [N. J. Eq.] 65 A. 445.

18. See 7 C. L. 1450.

19. Administrator held not chargeable personally with interest on funds held by him pending his appeal from decree of distribution, appeal not being frivolous, he not having made any profit on said fund, and it not appearing that he could have profitably invested it. In re Davis' Estate, 35 Mont. 273, 88 P. 957.

20. During year allowed for settlement. Wyckoff v. O'Neil [N. J. Err. & App.] 67 A. 32, afg. [N. J. Eq.] 63 A. 982.

21. Executor not being entitled to commissions until his accounts have been settled and allowed by court, held that he would be charged with interest to time of accounting on money withdrawn on account of commissions prior to settlement. Wyckoff v. O'Neil [N. J. Err. & App.] 67 A. 32, afg. [N. J. Eq.] 63 A. 982. Burden held on contestant to show that executor could with reasonable diligence have received six per cent interest on funds wrongfully withdrawn. In re Silkman, 105 N. Y. S. 872.

22. Where executors turned decedent's business into corporation, and issued to themselves as executors stock therein in payment of money due by them to estate, held that they would be charged with amount standing due deceased from business at her death, with interest. In re Boyer, 54 Misc. 182, 105 N. Y. S. 857.

23. Wolfe v. Morgan, 61 W. Va. 287, 56 S. E. 504.

24. Court in statement of administrator's account made annual stops and rests, crediting him with current expenses of administration, and charging him with interest at eight per cent on balance from year to year to date of final settlement, though usual exculpatory affidavit was filed. Held that distributees were not purejudiced. Howard v. Rutherford [Ala.] 43 So. 30.

25. See 7 C. L. 1450.

26. Is within judicial discretion of chancery court to appropriate corpus of estate to reimbursement of administrator for expenses incurred in and about estate in matters which would have been authorized by court had previous application been made therefor. Johnson v. Porterfield [Ala.] 43 So. 228. Oath of administrator held to justify allowance of items for expenses of administration. Wolfe v. Morgan, 61 W. Va. 287, 56 S. E. 504.

27. On revocation of appointment, where letters were not void for want of jurisdiction. Code Civ. Proc. § 4043. In re Owen's Estate [Utah] 91 P. 283.

28. Executor held not entitled to allowance for penalty collected for failure to pay inheritance taxes on time, or for interest on amount of such tax after expiration of year, at which time he was bound to pay them. Wyckoff v. O'Neil [N. J. Err. & App.] 67 A. 32, rvg. [N. J. Eq.] 63 A 982.

29. Expenses incurred in dealing with certain mortgage securities. Wyckoff v. O'Neil [N. J. Err. & App.] 67 A. 32, rvg. [N. J. Eq.] 63 A. 982.

30. Executor held entitled to credit for amount spent in repairing and painting house in which he and his two children resided, both property and fund from which payment was made belonging to the three equally, and also for painting another house. In re Ramsey's Estate [N. J. Eq.] 66 A. 410.

31. State and county taxes assessed against estate and paid by him. Howard v. Rutherford [Ala.] 43 So. 30. Collateral inheritance taxes paid by him on legacies, and interest collected thereon under statute for one year at six per cent, though it was his duty to deduct such tax at settlement with

There is a conflict of authority as to whether he is entitled to be reimbursed for the cost of a surety bond.[35]

He is entitled to a reasonable allowance for necessary attorney's fees[36] and the costs and expenses of litigation necessarily incurred,[37] even though such litigation is unsuccessful,[38] but not for attorney's fees incurred in litigation for his individual benefit,[39] or rendered necessary by his improper conduct,[40] nor for the performance

legatees. Wyckoff v. O'Neil [N. J. Err. & App.] 67 A. 32, rvg. [N. J. Eq.] 63 A. 982. Held error to charge executrix personally with amount of tax paid Federal government which was not proper charge against estate, it being conceded that same could be recovered back under law as interpreted by Federal courts. In re Marx, 117 App. Div. 890, 103 N. Y. S. 446.

32. Item for insurance premiums disallowed, there being no evidence to support it. In re Wiley's Estate [N. J. Eq.] 65 A. 212.

33. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710.

34. Money paid society for obtaining money from debtor of intestate in Germany, and taking proceedings to recover half of it from intestate's father, the exceptant, to whom it was improperly paid. In re Frey's Estate [N. J. Eq.], 67 A. 192.

35. Administrator held not entitled to allowance for sum paid guaranty company for becoming surety on his bond, it being his duty to furnish bond. Hays v. Johnson's Adm'r, 30 Ky. L. R. 614, 99 S. W. 332.

36. Where counsel are employed and render services in prosecuting and defending claims, etc., administrators are entitled to be allowed reasonable counsel fees, paid or to be paid. Ward v. Koenig [Md.] 67 A. 236. Previous order of orphans' court authorizing employment is not necessary to justify allowance. Id. Compensation should not be greater because three counsel were employed instead of one. Id.

Propriety of allowance for particular services and amount to be allowed determined. Howard v. Rutherford [Ala.] 43 So. 30; Hays v. Johnson's Adm'r, 30 Ky. L. R. 614, 99 S. W. 332; Ward v. Koenig [Md.] 67 A. 236; Wyckoff v. O'Neil [N. J. Err. & App.] 67 A. 32, rvg. [N. J. Eq.] 63 A. 982; In re Wiley's Estate [N. J. Eq.] 65 A. 212; In re Flaacke's Estate [N. J. Eq.] 64 A. 1020. For successfully resisting motion to remove executor. In re Boyer, 54 Misc. 182, 105 N. Y. S. 857. For successfully defending suit attacking title of testator to realty and his right to dispose of same by will, and for damages, whether suit was technically one against him as executor or individually. Ackermann v. Ackermann [Tex. Civ. App.] 18 Tex. Ct. Rep. 425, 99 S. W. 889. Where agreement by devisees established legacy and gave legatee lien on certain realty for amount thereof, held that it was duty of executor to defend suit by devisees attacking status of legatee's claim, and that he was entitled to employ counsel at expense of estate for that purpose, though legatee also employed counsel. Id.

Items for fees disallowed: Fees for extra counsel, where no reason appeared why counsel regularly retained at regular salary could not have conducted litigation. In re Davis' Estate, 35 Mont. 273, 88 P. 957. For advising administratrix, where latter mismanaged estate and objections to account were sustained. In re Frey's Estate [N. J. Eq.], 67 A. 192. Fees incurred in resisting application for additional time in which to elect between will and dower, interests of estate not having required such resistance. In re Flaacke's Estate [N. J. Eq.] 64 A. 1020. Fees incurred in unsuccessful attempt to procure removal of coexecutor. In re Archer's Estate, 51 Misc. 260, 100 N. Y. S. 1095. For services on probate of will, as not necessary or beneficial, executor, who was himself an attorney, having done all the work. In re Wick's Estate, 53 Misc. 211, 104 N. Y. S. 717. Fees in defending small claim and allowance therefor limited to taxable costs and disbursements. Id.

37. Will not be charged personally with costs of action or defense unless it appears that he was guilty of mismanagement or bad faith with reference thereto. Code Civ. Proc. § 1859. In re Davis' Estate, 35 Mont. 273, 88 P. 957. Where representatives of two estates appealed, using one transcript and one brief, held that cost of preparing same should be divided and representative on one of said estates was not entitled to allowance of more than half amount so expended. Id.

Items allowed: Costs and guardian ad litem fees. Howard v. Rutherford [Ala.] 43 So. 30. Sum paid security company for becoming security on administrator's appeal bond to supersede judgment against estate. Hays v. Johnson's Adm'r, 30 Ky. L. R. 614, 99 S. W. 332. Costs and expenses of litigation and costs of appeal. In re Davis' Estate, 35 Mont. 273, 88 P. 957. Amount paid for copies of answers in chancery suits which executor was justified in defending. In re Flaacke's Estate [N. J. Eq.] 64 A. 1020.

38. Fact that services may have proved unsuccessful does not preclude allowance, where there was reasonable grounds for instituting or defending proceedings. Ward v. Koenig [Md.] 67 A. 236. Appeal by administrator with will annexed held justified so that he was properly credited with costs thereof though unsuccessful. In re Davis' Estate, 35 Mont. 273, 88 P. 957.

39. Fees incurred by executrix in suit instituted by her in which she set up claim in hostility to estate. Brown v. Cresap, 61 W. Va. 315, 56 S. E. 603.

40. Executor failing to appeal from assessment of collateral inheritance taxes in foreign state within time allowed by law held not entitled to allowance for fees expended in subsequent attempt to have such assessment opened for purpose of discharging himself from liability. In re Flaacke's Estate [N. J. Eq.] 64 A. 1020. Refusal of executor to render account on demand held not to preclude allowance to him for fees incurred in defending account in suit for accounting, etc., by heirs, it appearing that if he had rendered them the account filed in said suit they would not have been satisfied therewith, and suit would still have been necessary to settle

of services which it was his duty to personally perform.[41] He will, ordinarily be allowed the expense of probating the will and procuring the appointment of a representative.[42] There is a conflict of authority as to whether he will be reimbursed for expenses incurred in defending a will admitted to probate.[43]

The burden is on the representative to show that the expenditures for which he seeks reimbursement were in fact made,[44] and that they were necessary.[45]

Funeral expenses.[46]—The reasonable funeral expenses of deceased are a proper charge against his estate.[47]

(§ 9) *E. Rights and liabilities of corepresentatives.*[48]—An executor to whom the will gives the right to use the personalty for life as legatee is entitled to exclusive possession thereof as against his coexecutor.[49] Knowledge of one representative in regard to the affairs of the estate is generally the knowledge of all.[50] An attorney employed by one of several representatives will be held to represent them all where the others know that he is acting for the estate and do not object.[51] All corepresentatives must ordinarily join in the exercise of powers conferred on them jointly.[52] One representative may sue his corepresentative where questions arise between the estate and the latter jeopardizing the rights of person interested in the estate.[53] A representative who refuses to or cannot join in a complaint by his corepresentative may be made a party defendant.[54]

41. Ackerman v. Ackerman [Tex. Civ. App.] 18 Tex. Ct. Rep. 425, 99 S. W. 889.

41. Not for preparing account. In re Ramsey's Estate [N. J. Eq.] 66 A. 410. Not for services in preparing and defending account, where executor was member of bar, and it did not appear that he did not prepare his own account, and account was surcharged with excessive amount paid for counsel fees. In re Flaacke's Estate [N. J. Eq.] 64 A. 1020. Not for services in examining contents of safe, etc., and assorting and arranging papers and accounts of deceased, or in preparing final account. In re Wiley's Estate [N. J. Eq.] 65 A. 212. Not for services not of legal character, which should have been performed by executor personally. In re Archer's Estate, 51 Misc. 260, 100 N. Y. S. 1095.

42. Expense of probating will and procuring letters of administration with will annexed on death of executor allowed. In re Pearce's Estate, 53 Misc. 215, 104 N. Y. S. 469. Fifty dollars allowed for services of counsel in advising executor as to manner of probating will, course he should pursue, and attendance at court to prove will. In re Wiley's Estate [N. J. Eq.] 65 A. 212.

43. Duty of executor to defend will from attack does not confer upon him an unqualified right to incur and charge against estate all items of expenditure in so doing that he may see fit, but he can only be allowed for such expenditures as are necessary and are made in defending attack upon original probate in good faith, in view of fact that Code Civ. Proc. § 1332, gives court discretionary power to determine whether, when resistance is unsuccessful, executor shall be charged with them or they shall be paid out of estate. In re Dillon's Estate, 149 Cal. 683, 87 P. 379. Where account of executor was filed pending determination of petition to revoke probate and to admit alleged later will, held error to allow items for expenditures in defending first will, but such items should have been retired from account for consideration after contest had been determined. Id. Held duty of executor to defend ejectment suit brought to test validity of will, so that he was entitled to reasonable counsel fee for that purpose. In re Flaacke's Estate [N. J. Eq.] 64 A. 1020.

44. Items excepted to. In re Wiley's Estate [N. J. Eq.] 65 A. 212. Evidence held to show payment for burial lot, headstone, etc. In re Frey's Estate [N. J. Eq.] 67 A. 192. Representative is himself competent witness on question of payment. Id.

45. That expenditures for attorney's fees were rendered necessary by requirements of estate. In re Davis' Estate, 35 Mont. 273, 88 P. 957.

46. See 7 C. L. 1453.

47. For right of persons other than representative to recover against estate for funeral expenses paid by them, see § 6A, ante. Wolfe v. Morgan, 61 W. Va. 287, 56 S. E. 504. Reasonable amount for constructing burial vault and for keeping same in repair. Knapp v. Jessup, 146 Mich. 348, 109 N. W. 666. Items for funeral expenses, digging grave, and marking monument allowed. In re Pearce's Estate, 53 Misc. 215, 104 N. Y. S. 469. Reasonable expenses of wake held allowable. McCullough v. McCready, 52 Misc. 542, 102 N. Y. S. 633.

48. See 7 C. L. 1454.

49. Wife to whom will gave certain personalty to have income thereof for life, with right to use principal if she should need it, and remainder over. In re Trelease, 115 App. Div. 654, 100 N. Y. S. 1051, afg. 49 Misc. 205, 96 N. Y. S. 318.

50. As to claim. In re Watson, 115 App. Div. 310, 100 N. Y. S. 993.

51. Where did not disclaim their services, or advise his coadministrator of his disapproval of their employment. Ward v. Koenig [Md.] 67 A. 236.

52. See §§ 5E, ante, 12 post.

53. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159.

54. As where executor seeks to enjoin coexecutor from threatened acts for his

As a general rule a representative is not responsible for the devastavit of his co-representative,[55] provided he has not himself been guilty of a breach of trust or a negligent omission of duty.[56]

(§ 9) *F. Compensation.*[57]—The compensation of testamentary trustees is treated elsewhere.[58]

In the absence of a statutory provision on the subject, the representative should be allowed a fair compensation for the responsibility incurred and the labor performed, the amount being discretionary with the court having charge of the administration proceedings.[59] By statute in many states he is given a fixed commission based on the value of the property passing through his hands.[60] In others, the maximum amount which may be allowed him is fixed, the amount being discretionary within the limit so fixed.[61] Provision is sometimes made for the allowance of additional compensation for extraordinary services.[62] A representative acting in good

individual benefit. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159.

55. Provided he has not intentionally or otherwise contributed to it, and has not made himself liable by execution of bond. Fleming v. Walker [Ala.] 44 So. 536. Executor held not liable for devastavit of co-executor who had sole control, custody, and management of fund. Id. In absence of proof that executor had transferred fund to himself as trustee, held that his co-executor and trustee could not be held liable as cotrustee for his devastavit. Id. Evidence held not to show transfer. Id.

56. Where executor, by signing checks in blank, enabled coexecutor to draw and misappropriate funds of estate, held that his account was properly surcharged with amount misappropriated. In re Ramsey's Estate [N. J. Eq.] 66 A. 410. Executor held not guilty of breach of trust or negligent omission of duty because he left management of estate to the coexecutor, where he was in poor health and coexecutor was an attorney in good practice who had acted as decedent's attorney before latter's death and was apparently competent and trustworthy in every respect. Hine v. Hine, 118 App. Div. 585, 103 N. Y. S. 535.

57. See 7 C. L. 1455.

58. See Trusts, 8 C. L. 2169.

59. If there has been no liability incurred or service performed, is not entitled to any compensation whatever. In re Harrison's Estate, 217 Pa. 207, 66 A. 354. Where, pursuant to authority conferred by will, executors sold realty for certain sum, and reserved ground rent capitalized at another sum, two sums aggregating full value of whole property, held that they were not entitled to commissions on the capitalization of the ground rent, since it remained realty and was not subject to executor's account, they having received commissions on rentals, provision having been made for paying them commissions on annual rentals, and they and their broker having been compensated for making sale. Id. Claim of executor for caring for estate held properly reduced. In re Van Auken's Estate [Neb.] 111 N. W. 782.

60. Compensation determined. In re Ring's Estate, 132 Iowa, 216, 109 N. W. 710. Unproductive property, not shown to have required least care or attention from executors, cannot serve as basis for commission. In re Pierce [La.] 44 So. 446. Where executors' services went both to administration of separate estates of spouses and community, held that commission was properly allowed on appraised value of community property. In re Pierce [La.] 44 So. 446. Allowance of statutory fees held proper. Knapp v. Jessup, 146 Mich. 348, 109 N. W. 666. Executor held not entitled to commissions on appraised value of testator's interest in foreign partnership which never came into his hands and for which he was in no wise responsible, but which was bequeathed to surviving witness subject to payment to widow which could be made without his intervention. In re Flaacke's Estate [N. J. Eq.] 64 A. 1020. Nor on sum standing to widow's credit on books of partnership to which testator belonged. Id. Under Code Civ. Proc. § 2730, providing for commissions on "all sums of money" received and paid out, executors held not entitled to commissions on unsold realty, title to which never passed to executors as such but devolved upon them as trustees, subject to power of sale given executors. In re Wanninger, 105 N. Y. S. 4. Even if will showed intention to work conversion, realty could not be considered as money for purpose of awarding commissions until actual conversion. Id. Where life tenant was entitled to possession of property on giving bond to remainderman, held that executors were entitled to commissions thereon irrespective of whether it was reduced to cash or not. In re Fleming's Estate, 51 Misc. 662, 102 N. Y. S. 204. Commissions held properly allowed on amount received and paid out, but not including amount by which account was surcharged. In re Silkman, 105 N. Y. S. 872.

61. Where statute provided that allowance should not exceed five per cent. on sums received and distributed, held that administrator was not entitled to additional allowance for extraordinary services. Hays v. Johnson's Adm'r, 30 Ky. L. R. 614, 99 S. W. 332. Allowance reduced. Id.

62. In absence of showing to contrary, will be presumed that compensation beyond that fixed by statute was for extraordinary services. Anderson v. Sabin, 132 Iowa, 507, 109 N. W. 1080. Annual salary of executors as fixed by orders of court held intended to be in addition to statutory percentage, and to fix salary from time of appointment. Id.

faith under voidable letters is entitled to commissions on their subsequent revocation.[63]

Where an estate is administered by successive representatives, the compensation should be apportioned among them according to the services rendered.[64] Double commissions can be allowed to one acting both as executor and testamentary trustee only when his duties in each capacity are distinct and severable.[65] One acting as representative and guardian is entitled to commissions in each capacity though the property passing through his hands is the same.[66]

Compensation may be withheld where the representative has mismanaged the estate,[67] or, in some states, where he fails to settle his accounts within the time prescribed by law.[68] The right to commissions may be waived,[69] and agreements as to the amount to be paid are generally held to be valid,[70] provided they do not amount to a trafficking in the office of representative.[71]

As a general rule commissions are allowed on the settlement of the final account.[72] Commissions of an ancillary representative on personalty should be deducted before the same is transferred to the state of decedent's domicile.[73]

Administration being pending before court, held not necessary to fix salary by way of extra compensation in advance. Id. Allowance of extra compensation held proper. Id. Claim of executor for allowance for extraordinary services disallowed. In re Van Auken's Estate [Neb.] 111 N. W. 782. Executor held not entitled to an allowance for "extra services" for himself serving citations. In re Wick's Estate, 53 Misc. 211, 104 N. Y. S. 717.

63. Where court granting letters had jurisdiction. In re Owen's Estate [Utah] 91 P. 283.

64. In view of fact that statute provided for allowance of but one aggregate sum for commissions, held that there was no basis for making apportionment until closing of estate, and hence allowance to first administrator before that time was premature. In re Owen's Estate [Utah] 91 P. 283.

65. Only when will contemplates severable and separate action in each capacity. In re Hunt, 105 N. Y. S. 696, rvg. 110 App. Div. 533, 97 N. Y. S. 403. Double commissions allowed. Id. So long as characters of executor and trustee are coexistent, only one commission can be allowed, but when condition arises during administration where such duties become distinct, separate commissions are properly allowable In re Rafferty's Estate, 52 Misc. 69, 102 N. Y. S. 432. Executor held entitled to full commissions on final accounting as such, where all further duties imposed on him by will would be performed in his capacity as testamentary trustee. Id.

66. Person acting as administrator of two estates and also as guardian of minor. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

67. For irregular management. In re Frey's Estate [N. J. Eq.] 67 A. 192. Mere failure of executor to file accounts required by statute held not, as matter of law, to deprive him of right to compensation, where his duties were otherwise faithfully performed. In re Lane's Estate, 79 Vt. 323, 65 A. 102.

68. Wolfe v. Morgan, 61 W. Va. 287, 56 S. E. 504.

69. Evidence held to show that executrix did not agree to waive compensation. In re Branch's Estate, 123 Mo. App. 573, 100 S. W. 516.

70. Agreement to serve for less compensation than that fixed by law. In re Callaway [Mo. App.] 100 S. W. 565. Where testator directed executor to continue business, held that arrangement whereby he was to receive commission based on amount of such business, and whereby he received same sum as he received from deceased for managing said business during latter's lifetime, was valid. In re Kempf's Estate, 53 Misc. 200, 104 N. Y. S. 585. Evidence held not to show that allowance to one of executors of attorney's fee for services, pursuant to stipulation, was on condition that no further demand for substantial compensation was to be made by either executor. Anderson v. Sabin, 132 Iowa, 507, 109 N. W. 1080.

71. Agreement by public administrator with heir to administer estate for sum less than compensation fixed by law, in consideration of heir making no objection to his acting as administrator, held void as contrary to public policy. In re Callaway [Mo. App.] 100 S. W. 565.

72. Claim for services as administrator held not conclusively determined until final settlement and judgment thereon by probate court, rule that allowance of claim by probate court is tantamount to judgment being inapplicable. In re Erickson's Estate [Neb.] 111 N. W. 356. Executor not entitled to commissions until his accounts have been settled and allowed by court. Wyckoff v. O'Neil [N. J. Err. & App.] 67 A. 32, afg. [N. J. Eq.] 63 A. 982. Are to be deducted as of date of settlement of account and not as of date of filing it. In re Pearce's Estate, 53 Misc. 215, 104 N. Y. S. 469. Proper time for allowance of commissions for services of deceased administratrix is on accounting by her representative for her acts in her official capacity. In re Hallenbeck, 104 N. Y. S. 568.

73. Where this is not done they cannot be deducted from another fund remaining within jurisdiction. In re Pierce [La.] 44 So. 446.

(§ 9) *G. Rights and liabilities of sureties and actions on bonds.*[74]—As a general rule liability on the bond arises on a misappropriation by the representative of the funds of the estate in his hands, or his failure to pay them over to distributees [75] or creditors.[76] The sureties are ordinarily liable for the personal indebtedness of the representative to the estate as for so much money in his hands.[77] Sureties on the second official bond of a public administrator, who serves two terms, are not liable for his default in the matter of an estate entrusted to him during his first term, though it occurs during his second term.[78] The sureties on the bond given by a sheriff as public administrator on assuming the administration of a particular estate, rather than those on his official bond as sheriff, are primarily liable for losses due to his failure to properly administer said estate.[79] As in other cases any fraudulent concealment of a material fact on the part of those for whose benefit the bond is given releases the surety.[80] A purchase of a distributee's interest in the estate by the at-

74. See 7 C. L. 1456.

75. Administrator appropriated funds of estate to his own use, and was thereafter appointed guardian of minor distributees in foreign state. He did not in fact transfer funds of estate belonging to minors to himself as guardian, or any other funds in lieu therof, though he claimed to have done so and filed account in foreign court in which he charged himself with such sum as guardian. Held that sureties on his bond as administrator were not relieved from liability for funds belonging to minors by reason of fact that, at time of his appointment as guardian, he was solvent and owned property from which he could have realized sufficient funds to repay amount taken from estate, or which he could have transferred to minors or their guardian in lieu thereof, facts failing to show actual or constructive transfer. State v. Whitehouse [Conn.] 67 A. 503. Fact that he acknowledged his liability as guardian, and that he as guardian, and sureties on his guardian's bond, might be held liable for his failure to collect from himself as administrator, held not to relieve sureties on his administrator's bond from liability for his misappropriation of funds as administrator. Id. Proceedings in foreign court for removal of guardian and in which he was directed to pay over funds in his hands to his successor, in which minors were not represented, held not to preclude new guardian from contending that administrator had never turned over to himself as guardian minor's share of estate. Id. His account as guardian filed in foreign court, but never approved by such court, held properly admitted as evidence of fact whether funds were transferred to him as guardian, but that court correctly ruled that it was not such evidence as should transfer in law if there was none in fact. Id. Power of attorney given by distributee to administrator authorizing latter to manage all his affairs in relation to estate, etc., held not to have authorized administrator to claim moneys coming into his hands as such to himself as distributee's attorney in fact, and thereby absolutely absolve his surety from liability therefor. Lahn v. Sullivan, 116 App. Div. 669, 101 N. Y. S. 920. Under such construction held that surety was not prejudiced by giving of said power. Id.

76. Where bond of executrix, given without sureties, bound her to pay, if demanded and estate was solvent, all debts, judgments for which had been rendered against her as executrix, and she failed to comply with Rev. Laws, c. 142, §§ 1, 2, by representing to probate court that estate was insolvent, and did not file an inventory or account, held that she was liable on said bond to creditor who had recovered judgment which she had not paid on demand, though testator in fact left no estate. McIntyre v. Parker [Mass.] 80 N. E. 798. Claim evidenced by final decree in equity held proved according to law within meaning of Gen. Laws 1896, c. 218, § 27, providing that, if executor neglects or refuses to pay over what he has in his hands to creditors "whose claims have been presented and allowed or proved according to law," and, on being cited before probate court, shall fail to show reasonable cause therefor, said court may decree that he is guilty of unfaithful administration, and thereupon an action may be brought upon his bond by any such creditor damnified thereby. Williams v. Starkweather [R. I.] 66 A. 67. Decree cannot be collaterally attacked in such proceeding. Id. Executor held estopped to contend that estate was insolvent where he made no attempt to have it declared so within statutory period, and his attempt to attain that result by bill in equity was unsuccessful. Id.

77. For liability of representative under such circumstances, see § 9B, ante. Kirby v. Moore, 30 Ky. L. R. 1020, 99 S. W. 1156.

78. Pol. Code, § 4511, construed. O'Rourke v. Harper, 35 Mont. 346, 89 P. 65.

79. Where sheriff gave bond as required by Kirby's Dig. § 257, on assuming administration, and widow became surety thereon, held that widow on failure of administrator to pay her dower, as directed by probate court, was required to exhaust her remedies on said bond, and had no recourse on administrator's official bond as sheriff. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289

80. Creditor, who was party to agreement whereby administrator was to administer estate in violation of law, and one who succeeded without consideration to rights of another party thereto, held not entitled to recover on bond or failure of administrator to account for money coming

torney for a surety has been held to be valid.[81] Interest is not chargeable on the penalty of the bond before judgment, though the judgment bears interest from the date of its rendition.[82] One of several sureties may compel contribution by the others.[83]

A valid judgment fixing the liability of the representative is, in most states, conclusive as against the sureties as to the amount due.[84] In some states a judgment may be rendered against the sureties in a summary proceeding brought by an administrator de bonis non to compel his predecessor to make final settlement, provided they are made parties thereto.[85]

§ 10. *Actions by and against representatives and costs therein.*[86]—Matters relating to the abatement of actions by the death of a party and their subsequent revival by or against his representative,[87] and to actions for damages for death by wrongful act,[88] are treated elsewhere.

The complaint in an action by a representative must show his interest in the cause of action.[89] His appointment can, ordinarily, only be questioned by special plea.[90] A person representing two estates should not appear both as plaintiff and defendant in an action involving a controversy between them, but should be placed on the same side in both capacities.[91] A representative who refuses to or cannot join in a complaint by his corepresentative may be made a party defendant.[92]

into his hands. Fidelity & Deposit Co. v. Moshier, 151 F. 806.

81. State v. Johnson, 144 N. C. 257, 274, 56 S. E. 922.

82. Revisal 1905, § 1954. State v. Johnson, 144 N. C. 257, 274, 56 S. E. 922.

83. If pays more than his share may recover from solvent cosureties pro rata amount of sum paid by him, based upon number of solvent cosureties, and excluding insolvent ones. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289.

84. Adjudication of probate court as to amount of liability of administrator to widow for dower. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289. Where administrator was served with notice of proceeding in probate court wherein he was charged with certain fund, and appeared by attorney, held that he had plain remedy by appeal if judgment was erroneous. Gorman v. Bonner, 80 Ark. 339, 97 S. W. 282. In action against administrator's sureties for amount with which he was charged by probate court, answer alleging that neither he nor sureties were present when probate court made settlement held not to show that he was not served with notice or that recital in said judgment that he appeared by attorney was not true, so that demurrer thereto was properly sustained. Id. Judgment of circuit court against sureties based on judgment of probate court charging administrator with certain fund held conclusive as to validity of latter judgment as against sureties who were parties thereto. Id. Held that equity would not enjoin enforcement of judgment of circuit court because of errors in action, no fraud being alleged. Id. Since under code party may interpose equitable defenses in action at law, held that sureties should have set up defense that judgment of probate court charging administrator with certain fund was void when sued at law for his failure to pay over said fund, and, having let judgment go against them, could not enjoin its enforcement on that ground. Id. Judgment of supreme court that administrator had no right to pay unprobated claims, and that he was not entitled to credit for amount expended in so doing. State v. Canterbury, 124 Mo. App. 241, 101 S. W. 678. In absence of fraud surety is bound by decree on accounting. In re Bodine, 104 N. Y. S. 138.

85. In proceeding under Rev. St. 1899, § 48, judgment should be rendered against both. State v. Canterbury, 124 Mo. App. 241, 101 S. W. 678. Judgment against administrator which failed to pass on liability of sureties held not final judgment so that case was still pending against sureties and should be disposed of by setting aside judgment, trying case again, and rendering such a judgment as would dispose of case as to all defendants, which would render subsequent separate action against sureties unnecessary and result in its dismissal. Id.

86. See 7 C. L. 1459.

87. See Abatement and Revival, 9 C. L. 1.

88. See Death by Wrongful Act, 9 C. L. 926.

89. Fact that complaint in action by devisees and executor to enjoin waste did not show that executor had any interest in realty held immaterial where judgment was rendered against him. Cross v. Hendry, 39 Ind. App. 246, 79 N. E. 531.

90. Only by special plea in nature of a plea in abatement, and is not put in issue by a general denial. Gross v. Watts [Mo.] 104 S. W. 30. Plea denying plaintiff's representative capacity at time action by him was instituted held formally correct. Louisville & N. R. Co. v. Perkins [Ala.] 44 So. 602.

91. Held irregular for one as administrator of testator's widow to be one of the defendants in action brought by himself and another as executors of testator's will and affecting widow's estate. Medlin v. Simpson, 144 N. C. 397, 57 S. E. 24. Held that, if instead of moving to strike his name as party defendant, motion had been to transfer and make him a plaintiff, it should have been granted. Id.

92. As where executor seeks to enjoin

Since the letters of the representative have no legal force or effect beyond the territorial limits of the state in which they are granted,[93] he cannot, in the absence of a statutory provision to the contrary, sue or be sued in his representative capacity in a state other than that of his appointment,[94] but in most states the disability is removed on his filing an authenticated copy of his letters,[95] or complying with certain other formalities.[96] A defendant may waive want of capacity of a foreign representative to sue and plead to the merits,[97] and when he does so and pleads a counterclaim, may recover the full amount to which he shows himself entitled.[98]

Costs and counsel fees.[99]—All matters relating to costs [1] and to the allowance of counsel fees [2] in actions by and against representatives are fully treated in separate topics. Allowances to the representative on accounting for costs and counsel fees paid by him have been treated in a previous section.[3]

§ 11. *Accounting and settlement by representatives. A. The right and duty.*[4] An accounting is a necessary prerequisite to an order directing the representative of a deceased representative to pay over to the administrator de bonis non a sum found due the estate.[5] Proceedings to compel an accounting must, of course, be brought within the time fixed by the statute of limitations.[6] The representative is a trustee within the rule that limitations do not commence to run in favor of a trustee against one otherwise entitled to an account until he has repudiated his trust.[7]

(§ 11) *B. Who may require.*[8]—Anyone interested in the estate may, ordinarily, compel an accounting by the representative.[9] As a general rule proceedings

coexecutor from threatened acts for his individual benefit. Monmouth Inv. Co. v. Means [C. C. A.] 151 F. 159.

93. See § 4A, ante.

94. Claim for damages for tort will not support exercise of power given by Ky. St. 1903, §§ 3878, 3879, authorizing county court to empower foreign administrator to sue for "debts" due decedent. Brooks v. Southern Pac. Co., 148 F. 986. Foreign administrator cannot sue or be sued without qualifying and giving bond in state where action is brought. Action held properly dismissed for want of capacity to sue. McClellan's Adm'r v. Troendle, 30 Ky. L. R. 611, 99 S. W. 329. Dismissal of action brought by foreign administrator held to carry counterclaim with it, Civ. Code Prac. § 372, providing that counterclaim shall not be affected by voluntary dismissal having no application. Id. Cannot sue to collect assets without qualifying in state where action is brought. Turner v. Campbell, 124 Mo. App. 133, 101 S. W. 119. Not on judgment recovered by intestate. Miller v. Hoover, 121 Mo. App. 568, 97 S. W. 210.

95. Kan. Gen. St. 1901, § 3009. Quinton v. Neville [C. C. A.] 152 F. 879.

96. Under Neb. Comp. St. 1901, § 2838, providing that foreign representative may sue in like manner and under like restrictions as any other nonresident, held that foreign administrator who voluntarily instituted proceeding in error to review judgment of district court subjecting lands of estate to attachment thereby subjected himself to jurisdiction of court, and its decision was binding upon him and the property, proceedings in error being, in effect, an original action in that state. Benker v. Meyer [C. C. A.] 154 F. 290.

97. Palm's Adm'rs v. Howard [Ky.] 102 S. W. 267, 1199.

98. Since counterclaim is entirety and cannot be split so as to allow part of it to be used as defense and remainder as cause of action in separate suit. Palm's Adm'rs v. Howard [Ky.] 102 S. W. 267, 1199.

99. See 7 C. L. 1462. See, also, Costs, 9 C. L. 812. For allowance to representative on accounting, see § 9D, ante. For imposition of costs in various probate proceedings, see sections dealing with proceedings referred to. For costs in will contests, see Wills, 8 C. L. 2305.

1. See Costs, 9 C. L. 812.

2. See Attorneys and Counselors, 9 C. L. 300.

3. See § 9D, ante.

4. See 7 C. L. 1462.

5. Order of orphans' court directing executors and trustees to make payment to administrator d. b. n. c. t. a. held erroneous as in disregard of rights of other possible creditors of equal standing when made in advance of any statement of account. In re Graham's Estate [Pa.] 67 A. 462.

6. Right of successor of deceased executor to compel accounting by latter's representative under Code Civ. Proc. § 2606, held not barred until after expiration of ten years from appointment of new administrator. In re Lesser's Estate, 104 N. Y. S. 213. Right accrues on appointment of representative of deceased representative. Right of person interested, if any, held barred. Bushe v. Wright, 118 App. Div. 320, 103 N. Y. S. 410.

7. Where third party was created by will trustee, for term not yet expired, of personalty, of which executor took possession, held that lapse of twenty years was not bar to proceeding by one interested in trust as contingent remainderman, not yet entitled to receive any benefit therefrom, to compel such executor to account. In re Ashheim's Estate, 185 N. Y. 609, 78 N. E. 1099, afg. 97 N. Y. S. 607.

8. See 7 C. L. 1463.

9. Heir who had conveyed his interest in

to compel the representatives of a deceased representative to account must be brought by the latter's successor.[10]

§ (11) *C. Scope and contents of account.*[11]—As a general rule the account should show all payments made by the representative as such.[12] In some states, it should not embrace charges against distributees on their distributive shares, but such charges should be made and allowed the administrator against the distributive share after ascertaining the share of each distributee in the settlement of the estate.[13] In most states the account must be accompanied by vouchers covering all expenditures or all those over a certain specified amount.[14]

(§ 11) *D. Procedure.*[15]—The procedure on accounting in the probate court is purely statutory and varies in the different states.[16] A petition to compel the filing of a final account must allege facts showing that the estate has been fully administered, where the duty of the representative to account is dependent on that fact.[17]

estate to administrator held not entitled to accounting by latter until he had succeeded in having conveyance set aside. Jolly v. Miller, 30 Ky. L. R. 341, 98 S. W. 326. Legatee is person interested within meaning of Laws 1898, p. 757, c. 233, § 116. In re Bastendenbeck [N. J. Eq.] 67 A. 179. Where, upon appearance in response to citation, executrix entitled to all personal estate after payment of debts and legacies shows that she has recorded full release, receipt, and discharge from legatee seeking accounting, she is exonerated from duty of accounting and settling estate, unless court expressly orders her to do so. Laws 1898, c. 233, § 120. Id. Where no such receipt was filed, held that executrix was not excused from accounting at instance of representative of deceased legatee by showing that she had certain claims, not aggregating amount of legacy, against legatee for payments made by her on latter's account, which were proper set off against legacy, and offering to pay balance. Id.

10. In action by executor to settle accounts, held that he could not be compelled to account for his testator's acts as executor to a defendant who was representative of a deceased legatee or devisee under will, and also his legatee and devisee, remedy being by proceeding for accounting brought by successor of deceased executor against latter's representative under Code Civ. Proc. § 2606. Bushe v. Wright, 118 App. Div. 320, 103 N. Y. S. 410. Allegations and separate findings of referee that debts and legacies of estate represented by testator had all been paid, and that no one was interested in estate except testator's executor and the legatee seeking the accounting, held not to change rule, it appearing that no judicial settlement of accounts of testator as executor had ever been had, and being manifest that limitations might not yet have run against creditors or legatees of estate which he represented, and referee's said finding not being open to consideration because not embraced in his report. Id. Even if action could have been maintained by representative of deceased beneficiary of estate represented by testator, or by such beneficiary's legatee or devisee, held that testator's successor in trust was necessary party. Id. Rule authorizing bringing in of necessary parties held not to avail defendant, it being inapplicable to case where new issue is sought to be presented in which parties other than those already before court are interested. Id. Representative being responsible only to estate which he represents, held that executrix of deceased executor could be compelled to account for property received by latter in official capacity only to representative of estate which he represented, so that appointment of representative was necessary to compel such an accounting. Volhard v. Volhard, 104 N. Y. S. 578.

11. See 7 C. L. 1464.

12. Amount of inheritance taxes paid by him, though statute provides for deduction of tax from each legacy on settlement with legatee. Wyckoff v. O'Neil [N. J. Err. & App.] 67 A. 32, rvg. [N. J. Eq.] 63 A. 982.

13. Howard v. Rutherford [Ala.] 43 So. 30. Irregularity in form held not reversible error where distributees received under the final decree their full distributive shares and all that they were entitled to receive as distributees. Id.

14. Payments cannot be allowed unless vouchers are filed or other evidence given as required by Code Civ. Proc. § 2729. In re Pearce's Estate, 53 Misc. 215, 104 N. Y. S. 469. Code Civ. Proc. § 2729, providing that only items of expenditure of less than twenty dollars can be allowed without vouchers, and that whole amount of items so allowed shall not exceed in aggregate $500, held applicable to accountings in supreme court. In re Smith, 105 N. Y. S. 223. Items for which there were no vouchers held properly disallowed. Wolfe v. Morgan, 61 W. Va. 287, 56 S. E. 504.

15. See 7 C. L. 1464.

16. Practice in proceedings in county court on petition for final accounting is in nature of that in suits in equity rather than actions at law. B. & C. Comp. § 1100. In re Morrison's Estate, 48 Or. 612, 87 P. 1043.

17. In view of B. & C. Comp. § 1202, making it duty of representative to file final account "when the estate is fully administered," held that petition must allege that estate is ready for final settlement and fully administered. In re Morrison's Estate, 48 Or. 612, 87 P. 1043. Petition by certain distributees, who were entitled to only part of estate, showing that several notes and claims remained to be collected, and failing to allege any contract between all distributees for their distribution in kind, held fatally defective. Id.

The required notice must be given [18] unless waived.[19] Any person interested is ordinarily given the right to file objections.[20] The burden is upon the accountant to present a true account and verify it by his oath.[21]

(§ 11) *E. The decree or order.*[22]—The inclusion of items of property in annual accounts as belonging to the estate has been held not to estop the representative from alleging on final settlement that they in fact belonged to the widow.[23] The costs and expenses of an accounting are ordinarily payable out of the estate. The conclusiveness of the decree on the representative's sureties in a subsequent action on the bond,[24] and its immunity from collateral attack,[25] are treated in other sections.

§ 12. *Distribution and disposal of funds.*[26]—The jurisdiction of the various courts over proceedings to obtain distribution, and to determine matters incidentally involved therein, has been treated in a previous section.[27]

Occasion and time for distribution.[28]—Provisions in the will as to the time when legacies shall be paid are, of course, controlling.[29] By statute in some states, when no time is fixed by the will, the representative is given a year from its admission to probate in which to pay them.[30] A discretionary power to determine whether a condition on which payment is to be made to a legatee has been performed, vested in several executors, may be exercised by one of them after the others have resigned.[31] The payment of a legacy,[32] or distribution,[33] may sometimes be presumed from lapse of time.

18. Giving of notice required by Code Civ. Proc. § 2791, is an indispensable requirement, and order of allowance will not be binding unless it is given. In re Davis' Estate, 35 Mont. 273, 88 P. 957. Under Code Civ. Proc. § 2796, finding in order of settlement that clerk had given notice of settlement of account in manner and for time theretofore ordered by court held conclusive upon parties on appeal from said order. Id. Surety not entitled to notice. In re Bodine, 104 N. Y. S. 138.

19. Since notice takes place of summons, held that service of notice was waived by appearance of parties and their participation in proceedings. In re Davis' Estate, 35 Mont. 273, 88 P. 957.

20. While, upon request, court may order filing of specifications of alleged errors if accountant seems to need them for his information, such course is not necessary to jurisdiction. Wood v. Farwell [Mass.] 81 N. E. 294. Creditor may file exceptions to account of administrator on his resignation where assets are insufficient to pay debts, or if there has been waste. Rev. St. 1899, §§ 268, 271. Taylor v. Bader, 117 Mo. App. 72, 98 S. W. 80. Exceptions held to sufficiently show that assets were insufficient to pay debts. Id. Persons averring that they were heirs who filed objections to final account held entitled to have them disposed of in orderly and legal manner, so that it was improper to summarily dismiss them on motion of administrator on mere assumption, without proof, that they were not heirs, that being question of fact to be determined upon evidence regularly offered and submitted. In re Olischlager's Estate [Or.] 89 P. 1049. Records and files in previous guardianship proceedings held not properly considered on accounting on issue as to whether persons offering objections were heirs, where it was not offered or admitted in evidence. Id.

21. Rev. Laws, c. 150, §§ 1-3. Account cannot be allowed until court is satisfied by affirmative evidence that it is correct, both as to credits and expenditures. Wood v. Farwell [Mass.] 81 N. E. 294.

22. See 7 C. L. 1465.

23. Medlin v. Simpson, 144 N. C. 397, 57 S. E. 24.

24. See § 9G, ante.

25. See § 15, post.

26. See 7 C. L. 1466.

27. See § 2, ante.

28. See 7 C. L. 1466.

29. Where under will legatees were not entitled to legacies until death of executrix, who was also life tenant, held that she was not bound to pay them until that time. Mosier v. Bowser, 226 Ill. 46, 80 N. E. 730.

30. Gen. St. p. 1938, § 1. Where order of orphans' court admitting will was suspended by appeals, held that executor had year from date when certified copies of decrees of appellate courts were filed with surrogate and probate adjudged by him in which to pay legacies. Smith v. Smith [N. J. Eq.] 65 A. 869.

31. Power of judgment as to performance of condition on which corpus of estate was to be paid over. Cushman v. Cushman, 116 App. Div. 763, 102 N. Y. S. 258.

32. Presumption does not arise until after expiration of twenty years from time of accrual of right to it. Paterson Gen. Hospital Ass'n v. Blauveit [N. J. Eq.] 66 A. 1055.

33. After lapse of twenty years from date of qualification of representative, as general rule it is legitimate to presume that estate has been fully administered and distribution had according to law or the will, if terms of will do not negative such inference. Hodges v. Stuart Lumber Co. [Ga.] 58 S. E. 354. Presumption is not conclusive, but burden is upon representative seeking to assert right or title of estate, as where he sues for trespass to realty, to show facts sufficient to remove same. Id.

Persons entitled to receive payment or transfer of share.[34]—Distribution should be made to those entitled under the will,[35] or under the statutes of descent and distribution. The validity of contracts between the heirs and distributees affecting the manner of distribution,[36] the effect of the assignment of shares to third persons,[37] and the jurisdiction of the various courts to pass on such matters,[38] are treated in other sections.

Procedure to obtain order for final distribution.[39]—A petition for distribution may ordinarily be filed at any time after the period fixed by the statute for the settlement of the estate.[40] The required notice must be given.[41]

Adjustment of shares.[42]—Adult legatees acquiescing in a distribution in conformity to the construction given to the will by the executors are estopped from thereafter contending for a different construction.[43] A legatee accepting and retaining an article purchased by the executor as in full satisfaction of a legacy to her for the purchase of such an article cannot thereafter complain that the full amount authorized was not expended.[44] Where the subject of a specific bequest is rightfully

34. See 7 C. L. 1467.

35. Where will bequeathed stock and certificates of indebtedness to one with provision that they should go over to another in event he died without leaving a family, and decree in suit in chancery directed executor to at once turn over to legatee property bequeathed to him to be held by him under terms of will, held that executor had right, before surrendering certificates, to indorse thereon that they were held by legatee under the terms of the will. De Loney v. Hull [Ga.] 58 S. E. 349. Where will gave widow, who was also executrix, certain personalty to have income thereof for life, with right to use principal if she should need it, held that she had right to possession of said personalty and to pay same to herself as legatee. In re Trelease, 115 App. Div. 654, 100 N. Y. S. 1051, afg. 49 Misc. 205, 96 N. Y. S. 318. Legatee held not deprived of her right to any part of her annuity because, by reason of her unsuccessful opposition to probate of will, executor was prevented from immediately making investments required to provide it, estate having, in meantime, been in hands of administrator pendente lite, and it not appearing that latter did not keep money invested. Steelman v. Wheaton [N. J. Eq.] 66 A. 195. Where auditor was asked to indicate person to receive share of legatee, but no particular person was indicated to him, held that it was not error for him to distribute it to "the trustee appointed or hereafter to be appointed" of said legatee. Gorman's Estate, 32 Pa. Super. Ct. 494.

36. See § 17, post.

37. See § 18, post.

38. See § 2, ante.

39. See 7 C. L. 1468.

40. Under Code Civ. Proc. § 1663, held that petition of legatee filed after lapse of one year from issuance of letters was not premature, although supplement to will was probated as a part of it after granting of said letters. In re Mayhew's Estate [Cal. App.] 87 P. 417.

41. No final settlement shall be made and approved unless heirs have been notified thereof in such manner as court may direct. Hurd's Rev. St. 1905, c. 3, § 112. Reizer v. Mertz, 223 Ill. 555, 79 N. E. 283, rvg. 125 Ill. App. 425. Fixing by court of manner in which notice of final settlement and application for discharge is to be given, where notice is constructive, is jurisdictional, and no constructive notice can be given to nonresident devisee of final settlement and application for discharge which will bind him unless court has fixed manner of giving notice by order entered of record prior to time such notice is given. Id. Where county court did not order publication of notice, held that publication was without authority of law, and hence Hurd's Rev. St. 1905, c. 100, §§ 1, 3, providing that when any notice shall be required by law or order of court to be published publisher's certificate shall be sufficient evidence of publication, had no application, and such publication failed to confer jurisdiction of person of nonresident devisee, and order approving final report and discharging executor was void as to such devisee. Id. Recital in order approving report and discharging executor that latter had made due proof of publication of notice held not a finding that executor made proof that nonresident devisee had been duly notified by publication in accordance with direction of court. Id. There being no proper notice to nonresident, held that order directing his share to be paid to other heirs and discharging executor was no bar to action by such nonresident to vacate such order and to require executor to pay her her distributive share. Id. Order assigning land to widow held nullity, where there was no proof that any order appointing time for hearing was made, or that any notice of application was given, as required by Comp. Laws Mich. 1897, § 9448. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

42. See 7 C. L. 1469.

43. Where receive part of estate in conformity thereto. In re Marx, 117 App. Div. 890, 103 N. Y. S. 446.

44. Where will gave daughter $600 to purchase piano and administrator purchased one for $550, which was accepted and retained by her in satisfaction of bequest, and administrator was credited with latter amount on settlement, held that she could not thereafter complain that full amount

consumed by the executor, the legatee should be allowed its value from the estate.[45] The distributee must account for advancements received by him from the decedent,[46] and for partial distributions and anticipations.[47]

Interest on legacies.[48]—Legacies do not draw interest until they become payable under the terms of the will.[49] Interest on arrears of an annuity provided for in the will is sometimes allowed from the end of the year in which the first instalment becomes due.[50]

Setting out and retaining funds and precedent interests.[51]—A sufficient sum should be set aside to pay annuities provided for by the will.[52] An annuity fund created by the testator which is concededly larger than is necessary to produce the surviving annuities may be reduced to a proper amount, and the excess transferred to the residuary fund.[53]

Partition of realty among heirs or devisees.[54]—The rule of caveat emptor applies to sales under order of court for the purpose of distribution.[55] In Louisiana there is nothing to prevent the heirs from consenting to a sale of particular properties in the succession or to a partial partition thereof.[56]

Refunding bonds.[57]—Life tenants before receiving the property should ordinarily be required to give bond to the remaindermen conditioned that it will be forthcoming at the termination of the particular estate.[58]

was not expended, or recover $600 from administrator, particularly in view of her laches. Clift v. Newell [Ky.] 102 S. W. 832.

45. Testatrix buried in dress which had been specifically bequeathed. In re Pullen's Estate, 102 N. Y. S. 435.

46. See § 17B, post.

47. Items of board against distributees held properly allowed against their distributive shares. Code 1896, §§ 227, 239. Howard v. Rutherford [Ala.] 43 So. 30. Court, in order to ascertain amount due distributees on final settlement, deducted from share of each distributee allowances and advances made to him by administrator during the particular year, and charged administrator with interest on balance from rest or stop so made. Held not injurious to distributees. Id. In accounting between heirs in partition suit to determine their distributive shares, husband of decedent held properly charged with money and certificates of deposit belonging to her and taken by him after her death as payments made to him on account of his share in her estate, regardless of three years' statute of limitations. Goodnough v. Webber [Kan.] 88 P. 879. Evidence held to show that certain distributees received their shares. Knapp v. Jessup, 146 Mich. 348, 109 N. W. 666. Evidence held to show that income from trust fund was paid to beneficiary's husband and others on her account and with her consent, so that executors were entitled to credit for such payments as payments to her. In re Sheldon's Estate, 101 N. Y. S. 729.

48. See 7 C. L. 1470.

49. Where will left certain sum in defendant's hands for plaintiff "to be given her when he thinks best," held that interest did not begin to run until payment was demanded. Harrison v. Watkins, 127 Ga. 314, 56 S. E. 437. Held error to give in charge. Civ. Code 1895, § 3498. Id.

50. Interest held properly allowed. Wilcox v. Wilcox, 106 Va. 626, 56 S. E. 588.

51. See 7 C. L. 1470.

52. Executor held justified in setting aside immediately a sum sufficient to indemnify him against payment of annuity. Steelman v. Wheaton [N. J. Eq.] 66 A. 195. Where legatee acquiesced in failure of executor to set apart and invest fund to secure payment of annuity charged on entire estate, held that those claiming under her could not complain for purpose of exonerating realty. Dixon v. Roessler [S. C.] 57 S. E. 203.

53. Where fund established by executors, pursuant to directions of will, later became too large owing to death of some annuitants, held that it might be reduced by court to proper sum, and excess and unappropriated income be transferred to residuary estate. Griffen v. Keese, 187 N. Y. 454, 80 N. E. 367, modifying 115 App. Div. 264, 100 N. Y. S. 903.

54. See 7 C. L. 1472. See, also, Partition, 8 C. L. 1246.

55. Where land was sold, for purpose of division among legatees, under valid decree of court of competent jurisdiction, and was duly advertised and regularly sold to highest bidder. Mercer v. Sager [Ga.] 58 S. E. 1037. Being no misrepresentation or fraud on part of executrix or anyone conducting sale, and it appearing that alleged defects could have been discovered as well before as after sale, held that purchaser was bound by his bid, and court properly decreed specific performance though purchaser claimed that distribution was premature under terms of will, and that sale was not binding on contingent beneficiaries not parties to the proceedings. Id.

56. Carrollton Land & Imp. Co. v. Eureka Homestead Soc. [La.] 44 So. 434.

57. See 7 C. L. 1471.

58. See Life Estates, Reversions, and Remainders, 8 C. L. 762.

Suits for payment of shares or settlement.[59]—The representative is not a necessary party to a contest over the distribution of the estate.[60] Where there is no personalty, an administrator de bonis non has no right to maintain an action for the settlement of the estate.[61] In some states a bill in equity may be filed for the recovery of a legacy or distributive share either before or after a settlement in the probate court.[62] The right of a legatee to follow funds of the estate into property in which they have been wrongfully invested is treated elsewhere.[63] Actions or proceedings for the recovery of legacies must, of course, be brought within the time fixed by the statute of limitations.[64] The right to enforce payment of a legacy may be lost by laches.[65]

Decree of distribution; its form, enforcement, and effect.[66]—A decree of distribution is a protection to an administrator who acts under it in good faith.[67] Where the proceeding is regarded as in the nature of a proceeding in rem, a decree otherwise regular is not void for want of jurisdiction though the property is not assigned to those entitled thereto.[68] The final decree of distribution closes the estate in so far as any claims against it are concerned.[69] The conclusiveness of the decree and its immunity from collateral attack are treated in a subsequent section.[70]

59. See 7 C. L. 1471.

60. All devisees, legatees, and persons claiming an interest in estate having been made parties to suit to compel specific performance of decedent's contract to leave property in particular manner by will, held that executor was not necessary party. Stewart v. Smith [Cal. App.] 91 P. 667.

61. Nothing to settle so far as he is concerned. Withers' Adm'r v. Withers' Heirs, 30 Ky. L. R. 1099, 100 S. W. 253.

62. Statutory remedy by action at law, which can be maintained only after decree of distribution, is in addition to that existing in equity, and in no way limits or qualifies jurisdiction of court of chancery over the subject. Van Dyke v. Van Dyke [N. J. Eq.] 65 A. 215. Bill held not defective for failure to contain specific prayer that amount, when ascertained, be decreed to be paid to complainant, the sureties of the administrators being made parties, so that decree ascertaining complainant's distributive share would fix extent of their liability and afford basis for action on bond, and prayer for general relief justifying decree for payment of such share. Id.

63. See Trusts, 8 C. L. 2169.

64. Agreement by executor to pay legacy in instalments held to have created an express trust between himself and the legatee, and that limitations did not begin to run against legatee's right to recover balance due her until there was demand and refusal to pay. Glennon v. Harris [Ala.] 42 So. 1003. Trust relation not changed by executor's erroneous impression as to amount of legacy, but legatee was entitled to recover amount paid by him to residuary legatee through mistake. Id. Where will left certain sum in hands of defendant for plaintiff "to be given her when he thinks best," held that limitations did not begin to run as against legatee until date when payment was demanded by her. Harrison v. Watkins, 127 Ga. 314, 56 S. E. 437. Code Civ. Proc. § 1819, providing that, for purposes of statute of limitations, cause of action for recovery of legacy is deemed to accrue when representative's account is judicially settled, held not to apply to special proceeding in surrogate's court to compel payment of legacy, but limitations in such case begin to run after one year from granting of letters. In re Cooper, 51 Misc. 381, 101 N. Y. S. 283. Though limitations did not begin to run against minor legatee until she became of age, held that proceeding in surrogate's court begun twenty years after that time was barred. Id.

65. Suit by beneficiary attacking final settlement of administrator, and seeking to recover property alleged to be due her, held barred where not brought until twelve years after such settlement, and eleven years after she became of age. Clift v. Newell [Ky.] 102 S. W. 832. Legatee held not barred from enforcing legacy as lien on land belonging to residue on which it was charged. Paterson Gen'l Hospital Ass'n v. Blauvelt [N. J. Eq.] 66 A. 1055. Daughter held not guilty of laches so as to bar her right to enforce payment of annuity by answer in suit to construe will. Willcox v. Willcox, 106 Va. 626, 56 S. E. 588.

66. See 7 C. L. 1472.

67. Cleaveland v. Draper [Mass.] 80 N. E. 227. Decree of distribution made to correct former decree, regularly made, in which certain heirs were, by mistake, not provided for, held to have properly provided for protection of administrator in reference to payments made under first decree. Id. Evidence held not to show such negligence on part of administrator in connection with making of first decree as would deprive him of right to rely thereon. Id.

68. Though by mistake property was not assigned to real next of kin. Cleaveland v. Draper [Mass.] 80 N. E. 227.

69. Held that creditor of insolvent bank could not maintain action against executors of deceased stockholder to recover his proportionate share of bank's indebtedness after final decree of distribution, notwithstanding pendency of appeals therefrom which merely attacked that part of it determining who were rightful distributees. Childs v. De Laveaga, 150 Cal. 281, 89 P. 82.

§ 13. *Enforcement of orders and decrees by attachment as for a contempt.*[71]

§ 14. *Discharge of personal representative.*[72]—The authority of the representative continues until his resignation, removal, or discharge.[73] The trust relation between a representative and a legatee growing out of the representative's promise to pay the legacy in instalments is not changed by his discharge as representative.[74]

§ 15. *Probate orders and decrees.*[75]—Courts having charge of the administration of estates are usually regarded as courts of general jurisdiction in regard to probate matters, and hence, when such is the case, their judgments and decrees are as binding on parties and their privies,[76] and, until vacated, or reversed, set aside, or modified on appeal, as conclusive as to matters necessarily involved in the determination of the questions passed upon,[77] as those of any other court. The existence

Same held true in case of action by insolvent bank to collect assessment on decedent's stock. Union Sav. Bk. v. De Laveaga, 150 Cal. 395, 89 P. 84. After decree of distribution and pending an appeal therefrom, which merely attacked that part of it determining who were rightful distributees, creditor of insolvent bank sued executor of deceased stockholder for his proportionate share of indebtedness. Thereafter decree of distribution was reversed, and amended decree was entered below and executor discharged, no appeal being taken therefrom. Held that judgment for defendant in creditor's action would be affirmed, there being no executor of said decedent and no administration pending, so that no relief asked for by creditor could be made applicable or enforced. Childs v. De Laveaga, 150 Cal. 281, 89 P. 82. Same held true in case of action by insolvent bank to collect assessment on decedent's stock. Union Sav. Bk. v. De Laveaga, 150 Cal. 395, 89 P. 84.

70. See § 15, post.

71, 72. See 7 C. L. 1473.

73. His functions do not necessarily cease upon final settlement and approval of his account, but he may, if occasion arises, pursue his duties further for the benefit of estate, unless probate records show formal discharge from trust. Root v. Beymer, 146 Mich. 692, 13 Det. Leg. N. 932, 110 N. W. 57. Where administration continues through existence of a dower estate, on falling in of dower administrator may take possession of land, if for no other purpose than to distribute it among heirs at law. Haden v. Sims, 127 Ga. 717, 56 S. E. 989. Former administratrix held not necessary party to bill filed by heirs at law after her discharge, seeking to set aside judgment recovered against her in representative capacity and sheriff's sale and deed of lands of estate made to satisfy said judgment, she having no right or interest, either personal, representative, or proprietary, in subject-matter of litigation that could be affected thereby. King v. Dekle [Fla.], 43 So. 586.

74. Agreement by executor to pay legacy in monthly instalments having created express trust between him and legatee as to the fund, held that subsequent final settlement of his accounts in probate court, and his discharge as executor, did not change his trust relation as to amount of said legacy then remaining in his hands, nor did subsequent payment of said sum over to residuary legatee through mistake. Glennon v. Harris [Ala.] 42 So. 1003.

75. See 7 C. L. 1473.

76. See, also, Former Adjudication, 7 C. L. 1750. Decree of surrogate is not conclusive upon parties in establishing rule of law which will control in later administration of estate, though, if not appealed from, it will serve as complete protection to accounting executor or trustee, against all parties duly cited, as to all questions concerning correctness of his accounts thereby approved, and the disbursements therein directed. In re Hurlbut's Estate, 51 Misc. 263, 100 N. Y. S. 1098. Jurisdiction to construe will or to define rights of beneficiaries of trust as between themselves is limited to necessities of accounting then before him. Id.

77. **Appointment of representative:** Order appointing administrator conclusive as to necessity of administration. Lambert v. Tucker [Ark.] 104 S. W. 131.

Sale of realty: Order of probate court directing sale of land of deceased wife held not a judicial determination that no valid homestead existed in property in favor of husband, so as to preclude latter from attacking same in action to quiet title. Fisher v. Bartholomew [Cal. App.] 88 P. 608. Orders of sale and confirmation from which no appeal was taken held to have conclusively established that sale was necessary to pay debts, and that land was regularly and legally sold for fair and adequate consideration. Lake v. Hathaway [Kan.] 89 P. 666.

Accounting: After appointment of ancillary administrator for estate of nonresident decedent, another person was appointed and qualified as administratrix. Ancillary administrator gave no bond, estate owned no debts in state, and sole property in jurisdiction was certain legacy. On accounting proceeding to which both were parties, legacy was awarded to administratrix, administrator taking no appeal. Held that said decree was final, and administrator, having waived all his rights under his letters by failing to appeal, could not maintain proceeding to revoke letters of administratrix on ground of his prior appointment. In re Schmid, 116 App. Div. 706, 102 N. Y. S. 80. Administrator filed account showing equal division of residue of estate between himself and adopted daughter of decedent as her sole heirs, accompanied by her receipt for her share. Adoption was under statute afterward declared unconstitutional. Held that order, made in accord-

of all facts necessary to give jurisdiction will be presumed unless the contrary appears,[78] and such judgments and decrees cannot be collaterally attacked [79] except for want of jurisdiction apparent on the face of the record,[80] or fraud or collusion.[81]

ance with prayer of administrator's petition, settling and allowing his account and ordering his discharge, was not res adjudicata as to daughter's right to property, nor did it on receipt vest title in her, latter being given under erroneous belief that she was entitled to share in estate, and no money having in fact been received by her, and hence on her death her heir was not entitled to recover any part thereof. Doyle v. Campbell, 147 Mich. 544, 14 Det. Leg. N. 26, 111 N. W. 165.

Distribution: Order of probate court of Alaska distributing property to heirs held not conclusive adjudication that partnership did not exist between decedent and another to which property belonged, as against creditor of alleged partner who sought to follow property into hands of heirs, court not having chancery powers necessary to be exercised in hearing and deciding such questions. Bartleson v. Feidler, 149 F. 299

78. See, also, Judgments, 8 C. L. 530. Records, orders, judgments, and decrees of probate courts shall have accorded to them like force and effect and legal presumptions as those of district court. Rev. St. 1901, par. 1597. Otero v. Otero [Ariz.] 90 P. 601. Where order directing payment of widow's dower was silent as to whether notice of application therefor was given, held that it would be presumed that it was given. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289. On collateral attack, unless record affirmatively shows that there was no vacancy, it will be presumed, in the appointment of an administrator de bonis non, that a vacancy existed. Peavy v. Griffin [Ala.] 44 So. 400. Every fact necessary to make judgment of court of ordinary valid and binding will be presumed in its favor. Medlin v. Downing Lumber Co. [Ga.] 57 S. E. 232.

79. See, also, Judgments, 8 C. L. 530. Action by nonresident heir, whose share court directed to be paid to other heirs, to vacate order approving final report, and discharging him, held not collateral attack on such order. Reizer v. Mertz, 223 Ill. 555, 79 N. E. 283, rvg. 125 Ill. App. 425.

Appointment of representative: Decree appointing administrator cannot be collaterally attacked in action brought by him because it had not been formally entered on minutes of court when action was brought. Louisville & N. R. Co. v. Perkins [Ala.] 44 So. 602. Order held sufficient as order appointing administrator to administer on newly-discovered assets, and, being based on sufficient petition, not subject to collateral attack because it also purported to revoke order discharging original administrator after lapse of term in which it was made. Otero v. Otero [Ariz.] 90 P. 601. Cannot be collaterally attacked on ground that administration was unnecessary. Lambert v. Tucker [Ark.] 104 S. W. 131. Pleadings held not to show that applicant was not next of kin of decedent at latter's death. Medlin v. Downing Lumber Co. [Ga.] 57 S. E. 232. Not subject to collateral attack because made by court of county other than that in which decedent resided. Williams v. Dougherty, 39 Ind. App. 9, 78 N. E. 1067. Failure to require administrator to give bond, as provided by Code, § 3301, or postponement of fixing of amount thereof, held not to deprive court of jurisdiction or to subject order of appointment to collateral attack in proceeding in which administrator claims right to act in pursuance of appointment and letters. In re Wiltsey's Will [Iowa] 109 N. W. 776. Validity of letters cannot be collaterally attacked in action by administrator. Griesel v. Jones, 123 Mo. App. 45, 99 S. W. 769. Appointment of administratrix after ancillary letters had issued to another held not void or without jurisdiction, and not subject to collateral attack. In re Schmid, 116 App. Div. 706, 102 N. Y. S. 80. When cause for administering estate exists, and application is made therefor to proper court, neither fact that it is not made by person entitled to administration, nor that person not so entitled to administer is appointed, renders appointment wholly void and subject to collateral attack, but it is voidable only by some appropriate direct proceeding. Steinberg v. Saltzman, 130 Wis. 119, 110 N. W. 198.

Sales of realty: Decree confirming sale to pay debts. Dull v. Slater, 31 Pa. Super. Ct. 488. On collateral attack, validity of sale of realty to pay debts does not depend upon irregularities in proceedings, but upon whether court had jurisdiction to order and confirm sale. Lake v. Hathaway [Kan.] 89 P. 666. Fact that, after sale was ordered, and before it was made, heirs of testator, including executrix, entered into contract to settle indebtedness without a sale, which contract was not brought to notice of purchaser nor to attention of court until after sale was confirmed, held not to have deprived court of jurisdiction to confirm sale, nor to have affected rights of purchaser. Id.

80. Parties voluntarily appealing and taking part in administration held not entitled to collaterally attack appointment of administrator for want of notice. Otero v. Otero [Ariz.] 90 P. 601. Pleadings held not to show want of jurisdiction to appoint administrator, as failing to show that applicant was of next of kin of decedent at his death. Medlin v. Downing Lumber Co. [Ga.] 57 S. E. 232. Proceeding to sell realty for payment of debts being adversary, and not one in rem, creditor of heir, who had attached his interest, and who was not served with notice thereof, held entitled to attack sale collaterally in action to enforce his judgment. Mullin v. White [Iowa] 112 N. W. 164. Decree of county court determining title to realty not belonging to estate, and adjudging that devisees took title to it to exclusion of heirs to whom patent issued from Federal government, held subject to collateral attack. Walker v. Ehresman [Neb.] 113 N. W. 218.

81. Fact that person who administered was nonresident held not such fraud as to

Probate orders are generally effective from the date of their rendition rather than that of their entry.[82]

The right of the court to vacate or modify its decrees and the procedure for so doing, depends upon the statutory provisions of the various states.[83] Courts of equity will generally set aside judgments or decrees of the probate court obtained through fraud or mistake,[84] provided limitations have not run,[85] and if the party seeking relief has not been guilty of negligence [86] or laches.[87]

§ 16. *Appeals in probate proceedings.*[88]—This section is confined to appeals from courts of probate to intermediate courts of general jurisdiction, appeals to the ordinary reviewing courts being governed by the rules applicable to appeals in general.[89]

vitiate administration proceedings, or to render them subject to collateral attack. Meikle v. Cloquet [Wash.] 87 P. 841.

82. Order appointing administrator is effective from date of its rendition, and not from date of its entry on minutes of probate court. Louisville & N. R. Co. v. Perkins [Ala.] 44 So. 602. Proceedings nunc pro tunc, or appeal to authority conferred on probate judge by Code 1896, §3372, to complete incomplete minute entries and decrees on application, would be improper where entry of order is made within three months as precribed by § 3365. Id.

83. See, also, Judgments, 8 C. L. 530.

Arizona: Order discharging administrator held final one which probate court did not have jurisdiction to set aside after lapse of term in which it was entered. Otero v. Otero [Ariz.] 90 P. 601.

Georgia: Administrator is necessary party to motion to set aside judgment of court of ordinary authorizing sale of land by him. Whitley Grocery Co. v. Jones [Ga.] 58 S. E. 623. If letters of dismissal have been granted to him, judgment discharging him must be reopened before motion can be entertained. Id. Rule not changed by fact that purchasers at sale and those holding under them, and former administrator as an individual, are made parties. Id. Held no abuse of discretion in refusing to open judgment of ordinary, made after due notice, directing recording of return of appraisers on application of widow for year's support, to permit filing of objections not filed in time. Foster v. Turnbull, 126 Ga. 654, 55 S. E. 925.

New York: Code Civ. Proc. § 2481 construed, and held that surrogate had no authority to vacate decree on accounting after time for appeal had expired and refer matter back to referee on ground that contestants had been guilty of laches, that on account of delays, etc., many of administrator's books, vouchers, and papers had been lost so that he could not exculpate himself, and that his counsel had stated that next of kin had agreed to abandon claims, or because referee acted upon proof that he had no right to consider, place to urge such objections being before referee and surrogate on application to confirm his report, and remedy being by appeal. In re Bodine, 104 N. Y. S. 138. Surrogate held entitled to correct default decree of distribution entered on motion of public administrator distributing estate to collateral relatives who had not appeared and who were not entitled to it. In re Hoes, 104 N. Y. S. 529. After expiration of time to appeal, surrogate has power to vacate so much of his decree assessing transfer tax as was made without jurisdiction. In re Jones' Estate, 54 Misc. 202, 105 N. Y. S. 932. Contestant held not prejudiced by order correcting former order directing filing of supplemental account so as to permit surrogate to pass on any claim for expenses and commissions due executor, it not authorizing allowance of any claims not legal and proper charges against estate. In re Hull's Estate, 105 N. Y. S. 961.

Pennsylvania: Where orphans' court awarded all personalty to decedent's husband and administrator in accordance with laws of Pennsylvania, when it should have awarded him only half of it in accordance with laws of Maryland where decedent was domiciled at time of her death, held that it had power to revoke decree and make proper distribution. Ehrhart's Estate, 31 Pa. Super. Ct. 120.

84. See § 2, ante, Jurisdiction of Courts of Equity.

85. Limitations held not to have commenced to run against suit to set aside decree of distribution for mistake until mistake was discovered. Bacon v. Bacon, 150 Cal. 477, 89 P. 317.

86. Plaintiff in suit to set aside decree of distribution for mistake held not to have been guilty of negligence. Bacon v. Bacon, 150 Cal. 477, 89 P. 317. Failure of plaintiff to sooner discover true amount due him held not such negligence as to bar relief as matter of law, question being at most one of fact. Soule v. Bacon, 150 Cal. 495, 89 P. 324.

87. Plaintiff in suit to review decree of distribution for mistake held not to have been guilty of laches, she having brought suit shortly after discovery of mistake. Bacon v. Bacon, 150 Cal. 477, 89 P. 317. Plaintiffs in suit to set aside decree of distribution alleged to have been obtained through fraud, and to protect estate pending establishment of will alleged to have been fraudulently suppressed, held not guilty of laches. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 N. W. 187.

88. See 7 C. L. 1479.

89. See Appeal and Review, 9 C. L. 108.

90. Settlement held final one from which appeal to circuit court could be taken. Taylor v. Bader, 117 Mo. App. 72, 93 S. W. 80.

Appeals are generally allowed from all final orders or decrees,[90] and may be taken by any interested party aggrieved thereby.[91] The steps necessary to perfect the appeal and the practice in the appellate court depend on the statutes of the various states.[92] All persons whose rights may be affected by a reversal must be made

91. It being duty of special administrator to defend against claims, held that he could, without special authority from probate court, appeal from allowance of claim. McNamara v. Michigan Trust Co., 148 Mich. 346, 14 Det. Leg. N. 250, 111 N. W. 1066. Creditor entitled to file exceptions to settlement held entitled to appeal from judgment of probate court if aggrieved thereby. Taylor v. Bader, 117 Mo. App. 72, 98 S. W. 80.

92. **Time of taking:** Objection that appeal to prerogative court from decree of orphans' court surcharging account of executrix was taken too late held waived by taking testimony, though untimely motion to dismiss on that ground had been previously made and refused. Carlin v. Carlin [N. J. Eq.] 64 A. 1018.

Allowance of appeal: Order allowing appeal from probate to circuit court is unnecessary. Pruden v. Clark, 148 Mich. 163, 14 Det. Leg. N. 102, 111, N. W. 853. Order directing service of notice of appeal on administrator, and certified by probate judge as order allowing appeal, held sufficient though it did not in terms state that appeal was allowed. Id. Under Act March 15, 1832, § 1, P. L. 135, appeal to orphans' court from order of register of wills revoking letters of administration is matter of right, and allowance of appeal by orphans' court is not necessary. Laukhuff's Estate, 32 Pa. Super. Ct. 538. After case is brought up, proper practice is for appellant to present petition to court setting forth facts, upon which citation will be granted on parties interested to show cause why appeal should not be sustained and decision complained of set aside. Id.

Bonds: Rev. St. 1907, par. 1947, providing that where appeal if taken by executor or administrator no bond shall be required unless such appeal personally concerns him, in which case he must give bond, held not to authorize appeal without bond from order revoking letters of administration granted to appellant and appointing another in his place, he being personally interested. In re Morale's Estate [Ariz.] 89 P. 540. In any event, appeal held one taken in his individual rather than his representative capacity. Id. Is discretionary with surrogate whether he will determine sufficiency of sureties or undertakings on appeal from their affidavits of justification, or whether he will require them to attend and be examined before approving such undertaking, Code Civ. Proc. § 1335 being inapplicable to appeals from surrogate's court, but, after he has approved undertaking and indorsed approval thereon, it is sufficient for all purposes. In re Sheldon's Will, 117 App. Div. 357, 103 N. Y. S. 177.

Record, transcript, etc.: On appeal to circuit court from order allowing claim, copy of report of commissioners on claims must be filed, that being record of allowance appealed from. Pruden v. Clark, 148 Mich. 163, 14 Det. Leg. N. 102, 111 N. W. 853. Appeal should not be dismissed for failure to file it within thirty days, provided it is filed before motion to dismiss is actually heard. Id. Proceedings in county court to compel final accounting being in nature of suit in equity, on appeal to circuit court from decree therein, suit must be tried on transcript and evidence accompanying it as prescribed by B. & C. Comp. § 555, and, if no evidence is taken up, only question open to consideration is whether pleadings support decree. In re Morrison's Estate, 48 Or. 612, 87 P. 1043. Where it clearly appeared from transcript that case was decided by county court without the taking of testimony, held that such record could not be enlarged or contradicted by an ex parte certificate of the county judge filed in circuit court after cause had been there argued and submitted. In re Ollschlager's Estate [Or.] 89 P. 1049. An appeal to orphans' court from order of register of wills revoking letters of administration, held immaterial that paper filed as appeal did not by its caption certify that case was in orphans' court where record of docket entries showed that such an appeal was filed, defect being one of form. Laukhuff's Estate, 32 Pa. Super. Ct. 538.

Transfer of jurisdiction: Where judgment of county court on appeal from probate court was entered by clerk pursuant to order of court, and then certified to probate court pursuant to Vt. St. 2599, held that county court had no further control over case, and no power at following term, on motion, to vacate and set aside said judgment. Nichols v. Nichols' Estate [Vt.] 67 A. 531.

Assignment of errors, etc.: Under Rev. Laws, c. 162, § 10, on appeal from probate court to supreme judicial court, objections to decree appealed from must be filed in latter court simultaneously with entry of appeal, jurisdiction depending on compliance with statute. Codwise v. Livermore [Mass.] 80 N. E. 609. Filing of statement by executor held to have conferred jurisdiction on appellate court. Id. Objections are in nature of assignment of errors, and must disclose issue to be tried, but are not to be construed with strictness applicable to pleading at common law. Id. Statement filed by executor held to have sufficiently notified other party of objections relied on, though argumentative, etc. Id. Matters not presented in notice of claim or petition on appeal, decree on exceptions to account cannot be considered. In re Frey's Estate [N. J. Eq.] 67 A. 192.

Practice on appeal in general: Appeal seeking to bring up for review action of commissioners in disallowing a single claim presented by single party, and in allowing claim in favor of another party for sum of money for which decedent was accountable either to latter or to appellants, and an accounting for which to either would inure to benefit of appellants, in behalf of whom decedent had assumed to receive it, held not

parties.[93] As a general rule the trial is de novo [94] and the scope of the review is confined to the issues raised below.[95] The right to a jury trial depends on the statutes of the various states.[96] An appeal from an order removing a representative ordinarily does not operate as a stay, but his duties devolve on the person appointed in his place.[97]

§ 17. *Rights and liabilities between beneficiaries of estate. A. In general.*[98]—Contracts between the parties interested in the estate in regard to its distribution are generally held to be binding on them and enforceable,[99] if otherwise valid.[1] They

void as single appeal from action of commissioners in dealing with independent claims of two creditors in severalty, and action of superior court in erasing it from docket as void was erroneous. Bennett's Appeal, 79 Conn. 578, 65 A. 946. Combining two appeals in single paper held not to have deprived superior court of jurisdiction, but to have been, at most, an irregularity and ground for plea in abatement. Id. Decree in circuit on appeal from judgment of county court denying petition to compel final accounting being based on petition, such petition must be treated as complaint, and objection that it does not state facts sufficient to entitle petitioner to relief prayed for is not waived by answering over after demurrer thereto is overruled. In re Morrison's Estate, 48 Or. 612, 87 P. 1043.

Dismissal: Granting of motion to dismiss appeal to circuit court from order allowing claim held error where notice required by rule 19 was not given. Pruden v. Clark, 148 Mich. 163, 14 Det. Leg. N. 102, 111 N. W. 853.

Decision and determination: Under Rev. Civ. Code Proc. § 151, providing that court may, at any time within one year after notice thereof, relieve party from judgment taken against him through mistake, inadvertence, etc., held that where, on appeal from county court to circuit court from order appointing administrator, circuit court in affirming judgment, through mistake or inadvertence, assumed to determine who were heirs and to distribute estate, which were matters not involved, it was proper to vacate such order and enter new one simply affirming order appealed from. In re Skelly's Estate [S. D.] 113 N. W. 91. Where all persons who had filed petitions in county court and were proceeding to establish their claims to heirship joined in application to show cause why judgment should not be vacated, held that such showing was sufficient to authorize correction of judgment though no affidavits of merits were filed. Id. Where, on appeal to circuit court, judgment of county court was affirmed by stipulation, held that no findings were necessary. Id. Stipulation that judgment of county court might be affirmed held to authorize circuit court, on vacating original order of affirmance for mistake in including therein matters not before it, to affirm judgment without ordering trial de novo. Id. Where circuit court by mistake included in order affirming judgment of county court matters not properly before it, held that on vacating same it was proper to direct that new order of affirmance should be entered nunc pro tunc as of date of original order, no rights of third persons having intervened. Id.

93. Minor heirs held adverse parties, so that their guardian ad litem should have been served with notice of appeal by purchaser of realty from order confirming sale. Reed v. Stewart, 12 Idaho, 699, 87 P. 1002, 1152. Where guardian ad litem of heirs appeared in proceeding to sell realty and consented to sale, held that he was entitled to be served with notice of appeal from order confirming sale though he did not appear at hearing for confirmation, both being parts of same proceeding. Id.

94. On appeal to circuit court from order of county court directing sale of realty, hearing is de novo, and circuit court has authority to change or modify order appealed from. Horn v. White, 127 Ill. App. 222, afd. (advance sheets only) 79 N. E. 629. Hearing on appeal from register to orphans' court is de novo, and orphans' court is required to take testimony and make it part of proceedings. Act March 15, 1832, § 40 (P. L. 146). In re Miller's Estate, 216 Pa. 247, 65 A. 681.

95. Though Rev. Prob. Code, § 359, provides that on appeal from county to circuit court "on questions of both law and fact the trial must be de novo," only issues that can be tried on such an appeal are those presented by record in county court and passed upon by that court. In re Skelly's Estate [S. D.] 113 N. W. 91. Failure of circuit court to adjudge that certain person was widow of decedent held not error where it did not affirmatively appear by order appealed from that county court passed on that question. Id. On appeal to circuit court from order of county court disallowing claim, held error to allow amendment setting up entirely new items. In re Taylor's Estate [Wis.] 111 N. W. 229.

96. Under Code Proc. 1902, § 60, held that, on appeal to circuit court from decree of probate court refusing letters of administration, court had discretionary power to frame issue as to applicant's relationship for submission to a jury, and that it was not necessary before doing so to require prima facie showing of such relationship. Ex parte Gantt, 75 S. C. 364, 55 S. E. 892. Submission of issue as to whether applicant was bastard held proper. Id.

97. Alderman v. Tillamook County [Or.] 91 P. 298.

98. See 7 C. L. 1483.

99. For discussion of right of interested parties to settle estate without administration, see § 1, ante. Evidence as to what was done at meeting of decedent's heirs, at which they agreed upon division of all his property among them, and as to what agreement and proceeding there entered into actually was, held relevant in action by administrator against certain of such heirs and son-in-law of decedent to recover money alleged to have been left by dece-

are not, however, binding on the representative subsequently appointed.[2] The acceptance by heirs from decedent during his lifetime of a sum in full settlement and extinguishment of their rights estops them and their heirs from claiming any further interest in the estate.[3] The abatement of legacies for the payment of debts and other charges is treated elsewhere.[4]

(§ 17) *B. Advancements.*[5]—Whether a transfer of property is to be deemed an advancement is ordinarily a question of intention[6] unless the statute declares what shall be deemed an advancement, in which case the intention of the donor is immaterial.[7] Whether a conveyance of land was an advancement or a sale is a question of fact.[8] As a general rule a gift or loan cannot be changed into an advancement without the consent of both parties.[9]

dent and converted by them. Zimmerman v. Beatson, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165. Proof of statements of other heirs, not parties to action, as to what was done at meeting of all heirs at which division of estate was agreed upon, held not admissible as admissions of interested parties. Id. Legatee held entitled, under agreement compromising suit for cancellation of contract between himself and devisee, to judgment canceling contract, and for certain sum of money which should be lien on land devised. Raher v. Raher, 130 Iowa, 734, 107 N. W. 810. Agreement among devisees authorizing executors to turn over to one of them more than his share of personalty upon understanding that he would account for excess in subsequent division of realty held to constitute equitable assignment of his share of realty to extent necessary to satisfy agreement. Thompson's Ex'rs v. Stiltz, 29 Ky. L. R. 1075, 96 S. W. 884. Description of land held sufficient to satisfy statute of frauds. Id. Holders of such an unrecorded equitable assignment held entitled to preference over rights acquired by execution creditors of assignor who, with notice, thereafter perfected lien of execution and bid in property at execution sale. Id. Creditors held to have acquired no lien until levy of execution, and then to have acquired only lien which did not ripen into title until sale and conveyance. Id. Agreement settling will contest held, as against other devisees of decedent's testator who were parties thereto, to have relieved devisee from any liability for claim against testator. Ferguson v. Worrall [Ky.] 101 S. W. 966. Compromise agreement whereby devisee was paid certain sum because of depreciation in property devised to him held binding on minor devisee where will provided for revaluation in order to produce equality and that other devisees should contribute to make up any deficiency, and it appeared that settlement was to minor's advantage and that her husband was present when it was made. Clift v. Newell [Ky.] 102 S. W. 832. Parties interested in an estate, who are of age, may distribute it among themselves, and, in absence of fraud, such distribution will be held binding on them. Dodin v. Dodin, 116 App. Div. 327, 101 N. Y. S. 488. Mother held to have had right to waive her interest in homestead property, and to distribute it among children, and to pay minor child amount which estate owed her because of sale of land in which she had an interest by deeding her extra number of lots, at least as against adult children who consented thereto. Id. Agreement between devisees whereby legacy was to be charged on certain lot in consideration of her consenting to conveyance of other realty free of any incumbrance by reason of said legacy held to establish her right to legacy and lien on said lot, though it did not appear that testator left enough personalty to pay legacy, so that there would otherwise have been question as to extent to which legacy had effect. Ackermann v. Ackermann [Tex. Civ. App.] 18 Tex. Ct. Rep. 425, 99 S. W. 889.

1. Widow held entitled to rescind contract with other distributees where, when she signed it, she was mistaken as to her rights under law. Griffing v. Gislason [S. D.] 109 N. W. 646.

2. In proceeding by administrator of deceased ward to compel guardian to account, held that guardian could not relieve himself from paying over amount found to be in his hands by showing agreement between himself and heirs of ward, made before latter's death, that he was to have all ward's property, since there had been no adjudication with reference to such agreement, nor as to whether there were any claims against ward's estate, and could be none in guardianship proceedings. In re Lindsay's Guardianship, 132 Iowa, 119, 109 N. W. 473.

3. Receipts given by children held in nature of contracts, estopping them and their heirs. Callicott v. Callicott [Miss.] 43 So. 616.

4. See Wills, 8 C. L. 2305.

5. See 7 C. L. 1485.

6. Stock issued to legatees by testator's direction before his death held to be deemed advancements in their shares. In re Moran's Will, 53 Misc. 169, 104 N. Y. S. 478.

7. Under statute, intention is never consulted and is immaterial whether he intended to charge heir with property donated or not, or what his intention was in making advancement. Elliott v. Leslie, 30 Ky. L. R. 743, 99 S. W. 619. Sum paid son by father under void contract whereby, in consideration thereof, son released all his interest in father's estate, held to be charged to son as advancement. Id.

8. Evidence held to show that conveyance to daughter and her husband was an advancement, and not sale of land at price recited as consideration for deed. Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325.

9. After the death of one to whom has been made a gift or loan, the distributive

Hotchpot.[10]—Persons receiving advancements must ordinarily bring them into hotchpot before they will be allowed to share in the distribution of the estate.[11]

Advancements must be accounted for at their real value,[12] at the time when the transfer is perfected.[13] One receiving land by way of advancement need not account for rents.[14] Any enhancement in value due to lasting permanent improvements made by him should be deducted,[15] but not the value of repairs and the like.[16]

Under the civil law, children coming to the succession of their parents must ordinarily collate what they have received from them by donation inter vivos, either directly or indirectly.[17] Collation should not, however, be required where the act of donation evidences an intention to give the property as an extra portion.[18]

§ 18. *Rights and liabilities between beneficiaries and third persons.*[19]—A sale by an heir of his interest in the estate, after the death of his ancestor, is valid and enforceable if based on a sufficient consideration and without fraud.[20] There is a conflict of authority as to the validity of a sale by an heir of his expectancy during the lifetime of his ancestor.[21] Orders given by legatees directing the executors to make payments to certain of their creditors out of their shares of the estate, when accepted, entitle said creditors to the fund due the legatees to that

shares of the children of the debtor or donee, as heirs at law of the creditor or donor, cannot, without their consent, be diminished by charging such gift or loan as an advancement to their ancestor, it not having acquired that character during the latter's lifetime. Comp. St. 1903, c. 23, § 37, construed. In re Hessler's Estate [Neb.] 113 N. W. 147.

10. See 7 C. L. 1486.

11. Rev. St. 1899, § 2913, providing that whenever any of intestate's children shall have received in his lifetime any realty or personalty by way of advancement, and chooses to come into partition with other parceners, such advancement will be brought into hotchpot with the estate descended, held to apply to grandchildren, and to require them to account for that part of estate which their parent has received as his share. Johnson v. Antrikin [Mo.] 103 S. W. 936. Statute held not to require collateral heirs or their descendants to bring in gifts made to them before they could participate with other collateral heirs in distribution of estate. Id. Held that advancements made by testator to son could be stated and adjudicated in suit for construction of will and partition of realty as to which it was determined decedent died intestate. Shepperd v. Fisher [Mo.] 103 S. W. 989. Descendant who has received advancement is not compelled to await expiration of year from date of order appointing first personal representative before instituting suit in equity for purpose of bringing estate into hotchpot. Meyer v. Meyer, 60 W. Va. 473, 56 S. E. 209. Bill held not merely for an injunction, but also for purpose of bringing estate into hotchpot. Id. Temporary injunction restraining collection of judgment on note against heir, which latter claimed was advancement, held improperly dissolved. Id.

12. Valuation fixed by parent at time may be considered, but is not conclusive, since statute requires each child to account for what he has received, and parent's intention or views cannot control facts unless he expresses his intention by will disposing of estate. Ward v. Johnson, 30 Ky. L. R. 240, 417, 97 S. W. 1110.

13. Daughters held charged with value of land when it was conveyed to them, and not when they were put in possession under promise to convey. Ward v. Johnson, 30 Ky. L. R. 240, 417, 97 S. W. 1110.

14. Though there was delay in making deeds after parties had gone into possession. Ward v. Johnson, 30 Ky. L. R. 240, 417, 97 S. W. 1110.

15. Not cost of improvements, but enhancement in value. Ward v. Johnson, 30 Ky. L. R. 240, 417, 97 S. W. 1110.

16. Not mere repairs, or such things as were needed to meet ordinary wear and tear, or to keep place in as good condition as when received. Ward v. Johnson, 30 Ky. L. R. 240, 417, 97 S. W. 1110.

17. Price of land sold by father to son held not inadequate so as to require son to collate difference. Succession of Sharp, 117 La. 751, 42 So. 255. Son not required to collate commissions paid him by father out of profits arising from sale of vegetables, he having rendered services in raising and selling them. Id.

18. Where mother made donation to one of her children declaring that she did so "to equalize the advance in money and otherwise which she had made to her other children," held that property was not subject to collation, even though, as matter of fact, no advances had been made to other heirs which were collatable. Darby v. Darby, 118 La. 328, 42 So. 953.

19. See 7 C. L. 1487.

20. Sales to representatives are treated in § 9A, ante. Sale of interest by forced heir held not procured by fraud. Gougenheim's Heirs v. Ermann, 118 La. 577, 43 So. 170. Purchase of distributee's interests by attorney for surety on administrator's bond held valid as to distributees. State v. Johnson, 144 N. C. 257, 274, 56 S. E. 922. Sale of interest in estate for inadequate price upheld, there being no evidence of fraud. In re Singer's Estate, 217 Pa. 295, 66 A. 548.

21. See Assignments, 9 C. L. 262; Contracts, 9 C. L. 654.

extent.[22] A representative paying a legacy to the assignor after notice of its assignment is liable therefor to the assignee.[23] The lien of one attaching realty devised in an action against the devisee is not affected by a subsequent decree of distribution.[24] Where the fee title to realty descends to the heir, a judgment against him immediately becomes a lien on the property, enforceable by levy and sale under general execution.[25] Persons deriving benefits under contracts made by a decedent are bound by the corresponding obligations imposed thereby.[26] The right of the vendor of realty to forfeit a contract of sale is not affected by the death of the vendee.[27]

ESTATES TAIL, see latest topical index.

ESTOPPEL.

§ 1. **In General (1217).**
§ 2. **Estoppel by Record (1218).**
§ 3. **Estoppel by Deed (1218).**
§ 4. **Estoppel in Pais (1219).** Pleading and Proof; Questions of Law and Fact (1227).
§ 5. **Extent of Operation of Doctrine of Estoppel (1227).**

Scope of title.—Many common applications of the doctrine of estoppel are so closely related to other subject-matters that it is deemed best to treat them elsewhere; thus, estoppel to assert the doctrine of ultra vires or to aver want of authority in a corporate officer or agent,[1] to question the existence or scope of an agent's authority,[2] to deny partnership,[3] the estoppel of a tenant to deny his landlord's title,[4] and questions of estoppel peculiar to insurance,[5] are elsewhere discussed. Waiver of or election between rights which lacks some elements of an estoppel, but is sometimes so termed, is also treated in a separate article.[6]

§ 1. *In general. Kinds of estoppel.*[7]—Estoppels are usually of three classes, namely, estoppels by record, by deed, and by matter in pais.[8] Conflicting estoppels set the matter at large.[9]

22. Orders held made and accepted in view of provisions of will, and where will directed sale of land and division of proceeds, holders of said orders had right to payment in money and could join in suit to compel sale same as legatees could have done. Mitchell v. Carrollton Nat. Bk., 29 Ky. L. R. 1228, 97 S. W. 45.

23. Notice of assignment of legacy held sufficient to put testamentary trustee on notice. Seger v. Farmers' Loan & Trust Co. [N. Y.] 79 N. E. 977, afg. 112 App. Div. 911, 98 N. Y. S. 1114.

24. Creditor of devisee attaching realty devised to him held not required to present his claim to probate court, and not entitled to participate in distribution of his estate, but property when distributed continued subject to lien of attachment. Martinovich v. Marsicano, 150 Cal. 597, 89 P. 333.

25. Creditor cannot maintain suit in equity to have his interest determined and set aside to satisfy judgment. Kalona Sav. Bk. v. Esch, 133 Iowa, 190, 109 N. W. 887.

26. Where heirs and administrator of vendee of timber continued, after latter's death, to cut timber under contract of sale, deriving large profits therefrom, held that decree against them all requiring them to perform provision of contract that vendee should pay taxes on land during its continuance was proper. Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 14 Det. Leg. N. 47, 111 N. W. 177. Where third person held land under agreement to convey to decedent on payment of note for purchase price given him by latter, and after decedent's death administratrix paid note out of assets of estate, held that heir to whom half of land descended was properly required to pay half of amount so paid. Montgomery v. Montgomery [Tex. Civ. App.] 17 Tex. Ct. Rep. 1018, 99 S. W. 1145.

27. Vendee of land died before making any payments, leaving widow and minor children. Vendor subsequently forfeited contract for nonpayment, as he was authorized to do by its terms, and sold part of it, agreeing to convey rest of it to widow for difference between sum thus realized and price named in decedent's contract. Transaction was approved by court on final settlement of estate. Held that petition of children claiming interest in part sold, and asking for partition, was properly dismissed for want of equity. Harris v. Graf [Iowa] 111 N. W. 434.

1. See Corporations, 9 C. L. 733.
2. See Agency, 9 C. L. 58.
3. See Partnership, 8 C. L. 1261.
4. See Landlord and Tenant, 8 C. L. 656.
5. See Insurance, 8 C. L. 377.
6. See Election and Waiver, 9 C. L. 1037.
7. See 7 C. L. 1489.
8. See post, §§ 2, 3, 4.
9. Adverse claimants to water rights being both estopped by recitals in deeds in their chains of title, their rights will be adjusted without regard to estoppel. Schmidt v. Olympia Light & Power Co. [Wash.] 90 P. 212.

§ 2 *Estoppel by record.*[10]—Estoppel by judgment [11] and the conclusiveness of public records in general [12] will be found treated in separate articles.

§ 3. *Estoppel by deed.*[13]—Parties and privies [14] are estopped by recitals of fact in instruments under seal.[15]

One who assumes to convey property by deed may not defeat his grantee's title by saying he had no title at the time of the conveyance,[16] nor may he deny to the deed its full effect [17] in the absence of fraud.[18] Accordingly a grantor who covenants against incumbrances is estopped to assert, as against his grantee, a title subsequently acquired through foreclosure of an incumbrance existing at the time of the grant,[19] and a wife's renunciation of dower by instrument in proper form precludes her from thereafter asserting title.[20]

10. See 7 C. L. 1489.
11. See Former Adjudication, 7 C. L. 1750.
12. See Evidence, 7 C. L. 1511.
13. See 7 C. L. 1489.
14. Third persons are not estopped by recitals in a deed to which they are not parties. Lyons v. Lawrence, 118 La. 461, 43 So. 51.
15. Where an instrument under seal contains a recital of facts, upon the truth of which the validity of the contract depends, the recital is conclusive on the parties thereto in the absence of a reformation on the ground of mistake, especially where contract has been executed. Altman v. McMillin, 115 App. Div. 234, 100 N. Y. S. 970. Daughter taking deed reciting as consideration $5 and love and affection held precluded from showing that real consideration was a previous agreement with father as against one purchasing before execution of deed to daughter. Lawson v. Mullinix, 104 Md. 156, 64 A. 938. Party to oil and gas contract estopped by recited consideration of $1 as against assignee. Dill v. Fraze [Ind.] 79 N. E. 971. Landlord estopped to deny terms of lease. Mueller v. Rhein [Conn.] 66 A. 770. One who executes a **power of attorney** is estopped by recitals of fact therein as against one who buys in reliance thereon. Recital by married woman that she was sole. Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417.

Delivery bond conclusive that defendant had possession of property at time of seizure in replevin. Indiana Union Trac. Co. v Bick [Ind. App.] 81 N. E. 617. Recital in **contractor's bond** that contract was valid and subsisting held to preclude sureties from asserting that it was ultra vires. Bell v. Kirkland [Minn.] 113 N. W. 271.
16. Gardner v. Wright [Or.] 91 P. 286. Expectant heirs who had taken quitclaim deed from stepmother and executed a statutory warranty mortgage held estopped to assert that their title was imperfect as against mortgagee and those having claims founded on mortgage. Griffis v. First Nat. Bk. [Ind.] 81 N. E. 490.

After acquired title: Equitable estate subsequently acquired by grantor with warranty held to pass to grantee under Kirby's Dig. § 734. Osceola Land Co. v. Chicago Mill & Lumber Co. [Ark.] 103 S. W. 609. An after-acquired title does not inure where the grantee knew that the grantor had no title and did not expect to procure any (Gardner v. Wright [Or.] 91 P. 286), or where only an inchoate interest is purported to be conveyed, the completion or forfeiture of which depends upon acts or diligence on the part of the grantee. Water privileges (Id.). As against one of two grantees of possessory title and water rights, grantor is not estopped to assert after-acquired title to interest conveyed to the other who had made only an oral transfer of his rights to cograntee, there having then been no diversion, nor prior to diversion by grantor. Id.

Quitclaim by holder of bond for deed did not pass title subsequently acquired. Tabler v. Peverill [Cal. App.] 88 P. 994.

Grantor may acquire interests not inconsistent with previous grant: Assignor of timber lease could acquire rights to take effect after expiration of assigned lease. Baker v. Davis, 127 Ga. 649, 57 S. E. 62. Grantor who did not undertake to convey that portion of certain land lying east of a supposed meander line held not estopped to assert title thereto by subsequent patent. Barringer v. Davis [Iowa] 112 N. W. 208.

Adverse possession of water rights. Gardner v. Wright [Or.] 91 P. 286.
17. Gardner v. Wright [Or.] 91 P. 286. Grantor estopped, by executing and recording deed, to enable grantee to execute a mortgage though deed was not manually delivered. Creeden v. Mahoney, 193 Mass. 402, 79 N. E. 776. Devisees partitioning by mutual exchange of warranty deeds in fee estopped to claim any right of survivorship under will. Walker v. Taylor, 144 N. C. 175, 56 S. E. 877. A warranty deed of the interest of one as heir expectant, if executed in good faith, estops the grantor from thereafter asserting any **interest in** the **expectancy** though he received no part of the consideration paid. McAdams v. Bailey [Ind. App.] 80 N. E. 171. Plaintiff, as heir of another, could not ignore, on ground of absolute nullity, a transfer of legal title by mother to her mother. Cain v. Bauman, 118 La. 82, 42 So. 654. Grantees of one who had previously conveyed water rights with reservations estopped to object to defendants' use of water so long as reservations were not impaired. Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 P. 338. Plaintiff's privity with first deed did not estop him from making appropriation of water in lake subject to appropriation, or from objecting to use of water in excess of rights granted if such use interfered with right of appropriation. Id.
18. A deed obtained by fraud does not estop the grantor. Misrepresentations whereby deed was made to include more timber than parties intended. Goodwin v. Fall [Me.] 66 A. 727.
19. Under statute providing that word "grant" or "convey" implies a covenant, that

A person will not be permitted to impeach a title under which he claims,[21] but one in possession may purchase an outstanding claim without prejudice to his rights already existing,[22] and a deed providing that it shall be void upon breach of conditions does not estop the grantee after breach from asserting title under an earlier deed from another.[23]

A grantee who assumes the payment of a mortgage is estopped to thereafter assert its invalidity,[24] but one who has received no benefits is not estopped to set up usury.[25]

A defendant in ejectment is estopped to question the title of a common grantor.[26]

§ 4. *Estoppel in pais*[27] precludes one from repudiating his own representations or conduct to the injury of persons who have acted thereon in good faith.[28] It is now applied as liberally in courts of law as in courts of equity,[29] the only estoppels available in equity being such as relate to titles and relations not cognizable at law.[30] It will be cautiously applied, however, where it is sought to divest title to land.[31]

Elements.[32]—It must appear that the party claimed to be estopped has made some misrepresentation[33] or wrongful concealment[34] of material existing facts[35]

fee or inheritance is free from incumbrances. Lowry v. Carter [Tex. Civ. App.] 19 Tex. Ct. Rep. 482, 102 S. W. 930.

20. Certificate of notary and signature of wife control as to whether she was separately examined Wilkins v. Baker [S. C.] 57 S. E. 851.

21. Where one buys property from a married woman, he cannot, when sued by her to annul the contract, set up that the property never belonged to her, but to the community existing between her and her husband at time of purchase. Keating v. Wilbert & A. Wilbert's Sons Lumber & Shingle Co. [La.] 44 So. 265. Where in suit for conversion of timber defendant claimed under plaintiffs, it could not deny their title. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 So. 533. One who claims title and possession under a deed excepting from its operation land dedicated for streets by a plat therein referred to is estopped to assert that the city has not accepted a street dedicated by that plat or that the same is not a street. City of Covington v. Hall, 30 Ky. L. R. 356, 98 S. W. 317. One who indirectly claims under a will is estopped to question the validity of the probate of the will. Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784. See, also, Bailment, 9 C. L. 323.

22. Taking quitclaim deed by one in possession did not work estoppel to deny grantor's title. Holderman v. Holderman, 30 Ky. L. R. 319, 98 S. W. 277.

23. State holding valid deed from S. and taking second deed from his heirs. Sylvester v. State [Wash.] 91 P. 15.

24. Sherman v. Goodwin [Ariz.] 89 P. 517. See Mortgages, 8 C L. 1022, and Vendors and Purchasers, 8 C. L. 2216.

25. Where wife took title merely to prevent dissipation of it by spendthrift husband. First Nat. Bk. v. Drew, 226 Ill. 622, 80 N. E. 1082.

26. Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784. See Ejectment, 9 C. L. 1026.

27. See 7 C. L. 1492.

28. See post, Elements, and Illustrative applications.

29. Marine Iron Works v. Wiess [C. C. A.] 148 F. 145.

30. Estoppel could be set up in assumpsit for share of commissions. Wefel v. Stillman [Ala.] 44 So. 203.

31. Estoppel in pais will not bar one's right to assert title to land where conduct is due only to ignorance of legal rights and there is no intent to mislead. Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736. That guardian procured sale of part of land believed by her to belong to minors did not estop her from asserting title to remainder as against subsequent purchaser from one of the heirs. Id.

32. See 7 C. L. 1492.

33. Bank not estopped to claim funds diverted by cashier, it not having induced defendant to rely on cashier's authority. Home Sav. Bk. v. Otterbach [Iowa] 112 N. W. 769. Assignee of accounts as collateral held not to have authorized or induced payments to assignors. City Bank of New Haven v. Wilson, 193 Mass. 164, 79 N. E. 246. Second vendee not estopped because first vendee had made improvements, he having committed no act or made any statements calculated to mislead. Froman v. Madden [Idaho] 88 P. 894. Owner of standing timber not estopped by quitclaim deed of attorney who bought at tax sale to protect timber rights. Beaufort Lumber Co. v. Price, 144 N. C. 50, 56 S. E. 684. Father who held a mortgage on son's land held not to have induced a sale of the land to another who was ignorant of the incumbrance. Clark v. Lyster [C. C. A.] 155 F. 513.

34. Plea not showing any duty to object to construction of sewer polluting a stream held bad. Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 S. E. 216. Failure of judgment debtor to give notice of his defenses and set-offs did not estop him from restraining its enforcement as against attorneys who had taken an assignment for services. De Laval Separator Co. v. Sharpless [Iowa] 111 N. W. 438.

35. Must have made some misrepresentation or concealment of material facts.

with knowledge thereof, actual or constructive,[36] and with the intention, real or imputed,[37] that it should be acted upon by the party asserting the estoppel,[38] and that this party was excusably without knowledge [39] or the means of acquiring knowledge of the facts,[40] and reasonably relied and acted upon the representation or concealment [41] to his prejudice.[42] Ordinarily, also, one may not be estopped for representations made in a different capacity.[43]

Walker v. Ehresman [Neb.] 113 N. W. 218. Petitioners for highway not estopped to deny legality of location. Chase v. Cochran [Me.] 67 A. 320.

36. Walker v. Ehresman [Neb.] 113 N. W. 218. That defendant rehired claimant held not to estop him from setting up shortage of services where he was misled as to character of services during preceding year. Mason v. St. Albans Furniture Co., 149 F. 898. Member of building and loan association not estopped to question its depositing securities, including his bond and mortgage, for benefit of members in another state giving them preference, he not having known thereof until after insolvency of association. Clarke v. Darr [Ind.] 80 N. E. 19. City not estopped where evidence did not show that city authorities knew that certain land was used for private purposes. City of Lincoln v. McLaughlin [Neb.] 112 N. W. 363. Failure of landowner to object to location of a church and graveyard did not work estoppel, he being mistaken as to division line. Davis v. Owen [Va.] 58 S. E. 581. Buyer of staves not estopped to insist on correction of count unless he knew that seller was dealing with an insolvent vendor and would sustain loss by any mistake and was negligent in count or in failing to report mistake in reasonable time. Hasty v. Hampton Stave Co., 80 Ark. 405, 97 S. W. 675.

37. Must have been made with intention that it should be acted upon. Walker v. Ehresman [Neb.] 113 N. W. 218. Not necessary that acts or declarations should be made to mislead; sufficient if they were calculated to, and did in fact, mislead. Marine Iron Works v. Wiess [C. C. A.] 148 F. 145.

38. That guardian procured sale of part of land which she believed belonged to wards held not to estop her from claiming remainder subsequently sold by one of the wards to a stranger. Mullins v. Shrewsbury, 60 W. Va. 694, 25 S. E. 736.

39. Married woman giving mortgage on separate property not estopped by affidavit that she considered claim her debt, creditor having knowledge of all facts. Indianapolis Brew. Co. v. Behnke [Ind. App.] 81 N. E. 119. City not estopped by decree for complainant, in suit to recover land, where complainant's grantee subsequently purchased without examining records showing that decree had been opened, but simply relied on statements of complainant's counsel, on which he had no right to rely. Elliott v. Atlantic City, 149 F. 849. Expenditures under claim of water rights no estoppel, defendant having served written notice of its claim. Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 P. 338. Buyer of land at judicial sale could not assert estoppel against city, she not showing that she was ignorant of city's further lien. Kraut v. Dayton, 30 Ky. L. R. 191, 97 S. W. 1101. Plaintiff not having been misled, defendant held not estopped to show that a contract was made on Sunday because dated on preceding Saturday. International Textbook Co. v. Ohl [Mich.] 14 Det. Leg. N. 100, 111 N. W. 768. Where assignee of a note knew the facts, maker held not estopped to assert that note was not indorsed as required by statute. Lawson v. First Nat. Bk. [Ky.] 102 S. W. 324.

40. Must have been without knowledge or means of acquiring knowledge. Walker v. Ehresman [Neb.] 113 N. W. 218. Purchaser at sale to satisfy street improvement lien bound to know by record that city had a further lien. Kraut v. Dayton, 30 Ky. L. R. 191, 97 S. W. 1101.

41. Beaufort Lumber Co. v. Price, 144 N. C. 50, 56 S. E. 684. Statements not acted upon no ground for estoppel. Chase v. Cochran [Me.] 67 A. 320. Evidence of a conversation had with plaintiff after defendant had acted held inadmissible. Watts v. Ainsworth, 89 Miss. 40, 42 So. 672. Acquiescence in building of dam did not estop upper mill owner. Royce v. Carpenter [Vt.] 66 A. 888. Silence of assignee when informed of a second assignment long after it was made no estoppel as against second assignee. Huntress v. Hanley [Mass.] 80 N. E. 946. City not estopped by resolution for payment of contractor's claim, it having been rescinded before action taken thereon by contractor's assignees. Carlisle v. Spain, 147 Mich. 158, 13 Det. Leg. N. 1002, 110 N. W. 532. In suit against tenant's surety, landlord not estopped to deny that tenant was in default at a previous time by failure to deny surety's allegation that landlord had told him tenant was in default. Raved v. Kibbe, 102 N. Y. S. 490. Surety not estopped by admissions or conduct relative to sums claimed to be due from a guardian, creditors not having relied thereon. Rich v. Fidelity & Deposit Co., 126 Ga. 466, 55 S. E. 336. Seller on condition not estopped as against vendee's mortgagee who did not rely on seller's conduct. Huston v. Peterson [Colo.] 87 P. 1074. Offer to return goods bought, and demand for return of price, held not to estop one who thereafter sued for breach of contract. Brooks v. Romano [Ala.] 42 So. 819. Where principal did not know of agent's sale of a horse until long after it was made, his acts then could not estop him to assert title. Grubel v. Busche [Kan.] 91 P. 73. Third persons making advances on faith of an apparent ownership of property created by another will be protected only in so far as they acted to their detriment on faith of such ownership. Kempner v. Thompson [Tex. Civ. App.] 17 Tex. Ct. Rep. 890, 100 S. W. 351. Delay of five years in buying land, in alleged reliance on a certain suit. Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736. Riparian owner not estopped by delay in suing for possession of bed of a lake, occupant knowing plaintiff did not know he had

Illustrative applications of doctrine.[44]—One who was silent when he should have spoken [45] will not thereafter be permitted to speak to the injury of others.[46] One who induces or encourages others to become interested in property in ignorance of his own rights therein [47] will not thereafter be heard to their prejudice. One

an interest in the land, and plaintiff having told him he would have all that belonged to him. Rhodes v. Cissell [Ark.] 101 S. W. 758. No estoppel where defendant did not purchase timber in reliance on statements of plaintiff's manager as to dividing line. Moore v. Luehrmann Hardwood Lumber Co. [Ark.] 102 S. W. 385. Member of law firm not estopped because firm appeared incidentally, and as a mere favor to attorney employed to foreclose a mortgage in which property was described and referred to. Railsback v. Leonard, 118 La. 916, 43 So. 548. Wife not estopped, judgment creditor not relying on her statements or record title allowed to remain in husband. Hudson v. Wright, 204 Mo. 412, 103 S. W. 8. Wife's administrator, by posting notice and attending sale, held not to have misled attaching officer into selling property as that of husband. Major v. Brewster, 148 Mich. 623, 14 Det. Leg. N. 323, 112 N. W. 490. Vendee, by collecting rent and advertising land for sale, not estopped to recover purchase price for vendor's failure to give good title. Moore v. Price [Tex. Civ. App.] 18 Tex. Ct. Rep. 693, 103 S. W. 234. Widow not estopped to assert her right to a child's part, grand-daughter and her husband not having changed their situation in belief that she was entitled to dower only. Keeney v. McVoy [Mo.] 103 S. W. 946.

42. Must have relied and acted upon it to his prejudice. Walker v. Ehresman [Neb.] 113 N. W. 218. Failure of husband for seven years to assert his rights against life tenants under wife's will held no estoppel as against remaindermen. Davis v. Fenner, 30 Pa. Super. Ct. 389.

43. Suit by guardian, as such, to sell part of land believed to belong to wards, did not estop plaintiff as individual to subsequently claim remainder. Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736.

44. See 7 C. L. 1498.

45. That silence or acquiescence may estop, the facts must have been known. City of Lincoln v. McLaughlin [Neb.] 112 N. W. 363. Question for jury whether plaintiff asserted claim to property as against mortgagee from husband. Holmes v. Smith [Mich.] 14 Det. Leg. N. 447, 112 N. W. 912.

46. Landlord could not claim crops maturing after termination of lease where he failed to reply to tenant's remark that he anticipated no trouble in harvesting them. Carmine v. Bowen, 104 Md. 198, 64 A. 932. Daughter estopped from asserting claim for services against mother's estate where she was silent, though present, when mother negotiated with another to receive her personal estate at her death. Pond v. Pond's Estate, 79 Vt. 352, 65 A. 97.

Permitting expenditures: Unquestioned **possession and improvement of realty** for over twenty years held to estop others from claiming land on ground that a lease from certain Indians was invalid. McDonald v. White [Wash.] 89 P. 891. Long acquiescence in defendant's possession, and improvement of strip claimed by plaintiff as an alley held to work estoppel. Forster v. Raznik [Wash.] 91 P. 252. Owner of land estopped to question right of assignee to maintain office for publication of a newspaper, he having acquiesced in transfer and improvements. Frederic v. Mayers, 89 Miss. 127, 43 So. 677.

Lessor estopped to deny lessee use of hotel and bar erected by latter by former's suggestion and approval though not in writing as lease provided. Pine Beach Inv. Corp. v. Columbia Amusement Co., 106 Va. 810, 56 S. E. 822. Lessor, by permitting lessee to expend money in developing oil land, held estopped to forfeit lease under an ambiguous notice. Campbell v. Rock Oil Co. [C. C. A.] 151 F. 191. Allowing one to expend labor and money in **raising a crop** under claim of lease. Minks v. Miller [Kan.] 90 P. 1132. Property owner standing by until **street improvement** is completed may not thereafter attack proceedings collaterally Boswell v. Marion [Ind. App.] 79 N. E. 1056. Allowing **building of a boat** to proceed and requesting changes held to estop one from rejecting it on account of excessive draft. Marine Iron Works v. Wiess [C. C. A.] 148 F. 145. City estopped to revoke **permission to remove buildings,** plaintiff having incurred expense in reliance thereon. Hinman v. Clarke, 105 N. Y. S. 725.

Acquiescing in transfer of property: Party to action allowing land to be sold as that of a decedent. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275. One who acquiesces in sale of his property with that of a bankrupt is not thereafter entitled to its full value from proceeds. In re Great Western Mfg. Co. [C. C. A.] 152 F. 123. Where member of a partnership whose coal mine was sold failed to make known to purchaser his title to land through which a drain had been constructed. Livengood v. Stauffer, 31 Pa. Super. Ct. 495. Great lapse of time, partition proceedings, and sales to innocent purchasers, held to estop tenant in common to claim an interest in land sold by cotenant by metes and bounds. Currens v. Lauderdale [Tenn.] 101 S. W. 431. Plaintiff not entitled to land exempted from consent decree in his favor where during appeals and retrials same had passed to innocent purchasers. St. Francis Mill Co. v. Sugg [Mo.] 104 S. W. 45. Purchaser of school land, by long acquiescence in forfeiture proceeding, held estopped as against subsequent purchaser. Burgess v. Hixon [Kan.] 88 P. 1076.

Bank's failure to assert lien on railroad property transferred to one who contemplated a purchase free from debts. Frankfort & C. R. Co. v. State Nat. Bk. [Ky.] 102 S. W. 243. Seller on condition, acquiescing in resale by buyer, could not claim title against bona fide purchasers. Huston v. Peterson [Colo.] 87 P. 1074. Acquiescence and subsequent conduct held to estop pledgor to assert invalidity of **private sale of bonds.** Rose v. Doe [Cal. App.] 89 P. 135. Standing by and acquiescing in **unauthorized delivery of title bond.** Sheffield v. Hurst [Ky.] 104 S. W. 350.

47. **Creating apparent ownership:** Wife

will not be permitted to repudiate a transaction from which he has derived benefits,[48] or in which he participated,[49] or to which he gave his assent.[50] A purchaser

estopped to assert title to land against creditor's relying on husband's apparent ownership. McCormick Harvesting Mach. Co. v. Perkins [Iowa] 110 N. W. 15. An owner of land will not be held estopped to deny the title of a fraudulent grantee as against a general creditor of the latter who does not clearly show that he relied upon the grantee's apparent ownership and who was as negligent in extending credit as was the grantor in giving the deed. Rihner v. Jacobs [Neb.] 113 N. W. 220. Cases involving voluntary trust relationships distinguished from those where the trust arises ex maleficio. Id. One making advances on faith of an apparent ownership created by another will be protected in so far, and only in so far, as he acted to his detriment on faith of such ownership. Kempner v. Thompson [Tex. Civ. App.] 17 Tex. Ct. Rep. 890, 100 S. W. 351. Where agent sold property without authority, principal not estopped because he saw vendee in possession. Grubel v. Busche [Kan.] 91 P. 73. Vendor delivering bill of sale and possession estopped to deny title in subsequent purchaser. Gilroy v. Everson-Hickok Co., 118 App. Div. 733, 103 N. Y. S. 620.

Inducing purchase or incumbrance: Inducing purchase of land upon assurance that a deed was good worked estoppel to deny delivery. Akers v. Shoemaker [Ky.] 102 S. W. 842. Plaintiff having induced another to buy land from X, and pay for it, could not thereafter assert a lien against the land for money paid by him on a subsequent contract of purchase from X. Edmiston v. Hurley, 30 Ky. L. R. 557, 99 S. W. 259. Person inducing another to convey land, receiving consideration and placing grantee in possession, held estopped to deny title in grantee. Lodwick Lumber Co. v. Taylor [Tex. Civ. App.] 17 Tex. Ct. Rep. 633, 99 S. W. 192. Holder of patent and deeds assuring purchaser that he did not claim beyond line shown by deeds held estopped to claim to line established by patent. Bates v. Polly, 29 Ky. L. R. 1298, 97 S. W. 340. Landowner representing title and right to sell in another estopped to deny title of innocent buyer. Sewell v. Norris [Ga.] 58 S. E. 637. Son's disowning interest in premises conveyed by father and leasing them for thirty days in which to vacate. Nagelspach v. Shaw, 146 Mich. 493, 13 Det. Leg. N. 839, 109 N. W. 843. When a member of a law firm having charge of settlement of a succession purchases land belonging thereto at a sale presumably provoked by him or his firm, he is estopped to set up the title as against an innocent purchaser of the same land at a subsequent sale similarly provoked. Railsback v. Leonard, 118 La. 916, 43 So. 548. Lessor estopped **as against lien claimant,** having previously told him a building belonged to tenant. Allen v. Houston Ice & Brew. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 942, 97 S. W. 1063. Remaindermen estopped to assert that a mortgage did not cover their interest, they and their attorney having intended that it should, and mortgagee having been misled. Dickinson v. Blake, 116 App. Div. 545, 101 N. Y. S. 709.

Mortgagee **inducing another to form partnership** with mortgagor estopped to assert rights against property becoming part of partnership assets and represented by him to be unincumbered. Booker v. Bass, 127 Ga. 133, 56 S. E. 283.

48. Persons who accept a decree of a court of a sister state as final and enjoy the benefits of it by making **distribution of realty** in accordance with its terms are estopped to assert that it was interlocutory or that it was rendered without jurisdiction. McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997. Plaintiff whose rights of homestead entry and original patent were based upon rights acquired through conveyances from defendants held estopped to assert that he received nothing, though certain deeds, under which defendants held were void. Castor v. Dufur, 133 Iowa, 536, 111 N. W. 43. Legatees receiving substantial portions of estate conformably to a certain construction of the will held estopped to assert a different basis for distribution. In re Marx, 117 App. Div. 890, 103 N. Y. S. 446. Administrator **procuring foreclosure decree** and sale of land instead of compelling payment in probate of mortgagor's estate held estopped to assert invalidity of proceedings to pass title to purchaser. Flack v. Bramen [Tex. Civ. App.] 18 Tex. Ct. Rep. 107, 101 S. W. 537. Landowner who for fifteen years received benefits of **building restriction** contract estopped to assert its invalidity in suit against a purchaser for specific performance. Altman v. McMillin, 115 App. Div. 234, 100 N. Y. S. 970. Assignee of **lease executed by guardian** estopped to assert its invalidity in suit on note given in consideration, he having received the benefits therefrom. Norton v. Stroud State Bk., 17 Okl. 295, 87 P. 848. City accepting money in settlement of **special assessments** estopped to afterwards assert invalidity of stipulation and judgment therefor. State v. Spokane [Wash.] 87 P. 944. Licenser of right to construct road receiving consideration and permitting expenditures estopped to deny his ownership of the land in suit for breach. Storseth v. Folsom [Wash.] 88 P. 632. If a child receives money knowing it to be the proceeds of a **sale of his own property** by his father, he will be estopped to thereafter assert title (Garbutt v. Mayo [Ga.] 57 S. E. 495), but not where he has no such knowledge, though in this case he may be required to account (Id.). Creditor **participating in insolvency proceeding** estopped to question title of purchaser of realty situated in another state. Kirkendall v. Weatherley [Neb.] 109 N. W. 757. Street railway companies by agreements and by acceptance of benefits in way of rent held estopped to question validity **of transfer of stock** in which they claimed an interest, or validity of certain bonds and mortgages. North Chicago St. R. Co. v. Chicago Union Trac. Co., 150 F. 612. Estoppel held to extend also to a release given to transferrer of stock so as to preclude action against him as trustee. Id. Levee district selling land and taking notes and cash estopped to assert it could sell only for cash, having thus received benefits of sale. Book v. Polk [Ark.] 98 S. W. 1049. Defendant in execution de-

at judicial sale is estopped to assert the invalidity of apparent liens deducted in the appraisement [51] whether he be the judgment plaintiff or a stranger.[52] Other applications of the doctrine [53] and cases where it did not apply [54] are shown in the notes.

riving **benefits of forthcoming bond** could not deny its validity in action thereon. Hatton v. Brown, 1 Ga. App. 747, 57 S. E. 1044. One who accepts the benefits of services which he sees performed for him is estopped to deny that they were rendered at his request. **Broker's services.** Ice v. Maxwell [W. Va.] 55 S. E. 899.

49. Suit to set aside fraudulent transfers of property and fraudulent issues of bonds not maintainable after assignment by complainant of his claim to one who participated in the transactions. Canton Roll & Mach. Co. v. Rolling Mill Co., 155 F. 321. Lessee of convicts estopped to deny that assignment of contract with sublessee was with his consent where knowing of assignment he participated in transferring convicts. Hamby v. Georgia Iron & Coal Co., 127 Ga. 792, 56 S. E. 1033. Estoppel extended also to provision in contract for its extension. Id. Corporation and its receiver estopped to recover par value of stock in cash on theory that a contract whereby such stock was paid for in work and property was fraudulent where all its officers consented and co-operated in all that was done. Bostwick v. Young, 118 App. Div. 490, 103 N. Y. S. 607. An officer of a corporation and party to its illegal acts is not entitled to urge such acts as ground for forfeiture of its charter. Leigh v. National Hollow Brake Beam Co., 224 Ill. 76, 79 N. E. 318.

50. Plaintiff estopped to complain of removal of dirt from street in front of his land in so far as the same was assented to by him. Wheat v. Van Tine [Mich.] 14 Det. Leg. N. 430, 112 N. W. 933. Stockholder held estopped to maintain suit against director for loss through corporation's exchange of notices where he had acquiesced therein for many years. Davenport v. Crowell, 79 Vt. 419, 65 A. 557. Stockholders estopped to question validity of assessment on stock where they had knowledge and could have arrested its consequences. Jones v. Bonanza Min. & Mill. Co. [Utah] 91 P. 273. Abutting owner taking no steps to prevent vacation of street, and railway company constructing its road on vacated portion, held both estopped to question validity of ordinance of vacation. Blackwell, etc., R. Co. v. Gist, 18 Okl. 516, 90 P. 889.

51. State v. Several Parcels of Land, [Neb.] 110 N. W. 544. Stipulation that liens were void did not waive estoppel. Id.

52. State v. Several Parcels of Land [Neb.] 110 N. W. 544.

53. Acquiescence by grantor in **violations of building restrictions** by numerous grantees held to preclude enforcement as against a single one. Chelsea Land & Imp. Co. v. Adams [N. J. Err. & App.] 66 A. 180. Evidence of **false representations** whereby defendant obtained from plaintiff a **deed of timber** should have been admitted on question of estoppel. Goodwin v. Fall [Me.] 66 A. 727. Filing of plat and sale of land with reference thereto works **estoppel to deny dedication** of streets thereby indicated. King v. Dugan, 150 Cal. 258, 88 P. 925, and see Dedication, 9 C. L. 939. Corporation by accepting certain securities as rent held estopped **to forfeit lease.** Chicago R. Equip. Co. v. National Hollow Brake Beam Co., 123 Ill. App. 533. Silence and representations held to estop defendant to assert in defense of an **action for broker's services,** as against an assignee, that broker was first to procure a loan on certain clay works. Blake v. Miller [Iowa] 112 N. W. 158.

Contractor's surety subsequently contracting with city for completion of work presumed to have done so with knowledge of all the facts, so as to estop him from asserting irregularities in advertising for bids. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561.

Attorney and his client estopped by waiver of objection to bill of exceptions. Memphis Consol. Gas & Elec. Co. v. Simpson [Tenn.] 103 S. W. 788. Parent by abandonment and indifference held equitably estopped to assert legal right to **custody of child.** Andrino v. Yates, 12 Idaho, 618, 87 P. 787.

Recognizing another's title: Creditor treating property as belonging to debtor, and crediting proceeds on debt, estopped to assert against surety that debtor was not owner. Crosby v. Woodbury, 37 Colo. 1, 89 P. 34. In action for conversion, bailee estopped to deny **title of bailor,** no paramount title having intervened. Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143.

Partner taking mortgage on entire property to secure payment of his interest estopped to deny that copartners had complete title. Simmons v. Rowe [Cal. App.] 89 P. 621.

54. Riparian owner not estopped by conversation had with occupant of bed of lake before such owner acquired his interest. Rhodes v. Cissell [Ark.] 101 S. W. 758. State's approval of survey made thirty-seven years after passage of swamp land act, and showing certain land to be swamp, did not estop it to show that land was submerged and not swamp. Olds v. Commissioner of State Land Office [Mich.] 14 Det. Leg. N. 451, 112 N. W. 952. Passage of survey and sale act of 1899 did not estop, legislature not intending to subject the lands to entry under swamp land scrip. Id. That landowner insisted that something be done by a railroad company to relieve her of damage caused her by a dam did not estop her from objecting to manner of cutting a ditch and carrying off the water. Alabama Great So. R. Co. v. Prouty [Ala.] 43 So. 352. Plaintiff's request that highway commissioners should contest laying out a highway did not estop him from contesting commissioners' claims not only for attorney's services but also for expenses of an action by attorney to recover for the services. McCoy v. McClarty, 53 Misc. 69, 104 N. Y. S. 80. Holder of equitable lien on land transferred to a bankrupt's wife held not estopped to en-

force it because of a compromise agreement between wife and the trustee, and because of having proved the claim against the estate. Eisman v. Whalen, 39 Ind. App. 350, 79 N. E. 514. Assessment, **collection, and approval of taxes** not conclusive on county where taxpayer was guilty of fraud in making statements to assessors. Judy v. National State Bk., 133 Iowa, 252, 110 N. W. 605.

Dismissal of attachment sued out on ground of transfer of property in fraud of creditors, in consideration of judgment for plaintiff did not preclude him from showing in subsequent suit that transfer was fraudulent. Scharff v. McGaugh [Mo.] 103 S. W. 550. Borrower from loan association not estopped to assert **usury** where he did not know that loan was not made pursuant to by-law as required by statute. Free Home Bldg., Loan & Homestead Ass'n v. Edwards, 223 Ill. 126, 79 N. E. 64.

A **conditional sale** vendor is not estopped to assert title as against an innocent subvendee in absence of actual or constructive authorization of resale by his vendee. Watts v. Ainsworth, 89 Misc. 40, 42 So. 672; Fairbanks v. Graves [Miss.] 43 So. 675. Vendees of machinery not estopped by **making payments** under belief and promise that vendors would make it work. Harrison v. Russell & Co., 12 Idaho, 624, 87 P. 784. Where stone sold was not inspected on cars as stipulated though seller insisted thereon that seller continued to ship stone and appealed from later decision of engineer did not estop him from insisting that removal without inspection constituted an acceptance. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856.

In suit against an agent for making an open shipment on plaintiff's order so as to enable consignee to obtain goods without payment, defendant not estopped by form of bill of lading sent by him to plaintiff. Smith v. Landa [Tex. Civ. App.] 18 Tex. Ct. Rep. 130, 101 S. W. 470. Subagent to sell land not estopped to claim commissions for sale under independent contract with owner. Wefel v. Stillman [Ala.] 44 So. 203. Principal not estopped to enforce constructive trust against agent by making payments to agent called "rent," but which were really interest on money advanced by agent. Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667. That defendant stored wagons as his own did not estop him from showing he held them merely as plaintiff's agent. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71. Where attorneys improperly acquired title to land belonging to their client suing for divorce, client's acquiescence in divorce decree and subsequent recognition of title in attorneys did not estop her, she placing implicit **confidence in the attorneys.** Bucher v. Hohl, 199 Mo. 320, 97 S. W. 922. Alleged **guarantors** not estopped to deny obligation because principal delivered certain notes to them as protection, which notes were returned. William Deering & Co. v. Mortell [S. D.] 110 N. W. 86. Corporation assuming partnership debts without a list of debts could not assert estoppel because a list was furnished which omitted a certain claim. Dutch Creek Lumber Co. v. Damon [Ark.] 103 S. W. 183. Stockholders sued with corporation not estopped to deny its then existence, though a demurrer had inadvertently been filed for it and one stockholder had accepted service as its president, they having denied the corporate existence early in the action. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335.

Merely placing personalty in possession of another does not work estoppel against owner, no matter how much a third person may rely on the possession. Kershaw v. Merritt [Mass.] 80 N. E. 213.

Silence, knowledge, or inaction: To preclude equitable relief, acquiescence in wrongful acts must be with knowledge of their injurious consequences, and must last so long as to make it inequitable to grant such relief. Royce v. Carpenter [Vt.] 66 A. 888. Consent to, or acquiescence in, the taking of that to which one supposes he had no title will not prevent recovery of the thing taken when the true title is subsequently discovered. Where plaintiff's agent pointed out dividing line between timber lots under mistake as to true location. Moore v. Luehrmann Hardwood Lumber Co. [Ark.] 102 S. W. 385. Evidence insufficient to show plaintiff's acquiescence in improvements of property in an alleyway. Williams v. Poolo [Ky.] 103 S. W. 336. That one bought land knowing that a stream was being polluted did not estop him from suing therefor. Virginia Hot Springs Co. v. Grose, 106 Va. 476, 56 S. E. 222. Failure to object to probate proceedings no estoppel to assert title to land not subject to devise elements of knowledge, intention and reliance being lacking. Walker v. Ehresman [Neb.] 113 N. W. 218. Failure to assert claim that line dividing water frontage should not run due north and making of map recognizing due north line, held not to preclude proof of true line. Columbia Land Co. v. Van Dusen Inv. Co. [Or.] 91 P. 469. Where amount of a lien was paid to a trustee to prevent a sale of land, but trustee failed to satisfy the lien and land was sold, that owner was a party to the action and failed to object to sale did not estop her as against trustee. Field v. Yeaman [Ky.] 101 S. W. 368.

Accepting payments or benefits: Receipt by school district of less than its proper share of a trust fund not binding, defendants not having changed their situation in reliance thereon. North Troy Graded School Dist. v. Troy [Vt.] 66 A. 1033. Where defendant was not entitled to a second trial of an action to recover realty, neither plaintiff's acceptance of costs and disbursements awarded by judgment, nor delay in moving to strike demand for second trial, estopped him from questioning defendant's right to such trial. Buffalo Land & Exploration Co. v. Strong, 101 Minn. 27, 111 N. W. 728. Cashing a check for rent accepted on condition that lease might be terminated by sale did not preclude recovery of possession, check having been first tendered tenant, and subsequently the unearned rent. Thomason v. Oates [Tex. Civ. App.] 18 Tex. Ct. Rep. 996, 103 S. W. 1114. Heirs confiding in administrator and accepting from him stock instead of cash not estopped to require accounting in cash, they having repudiated stock transfer when they discovered true value of stock. Roberts v. Welmer, 227 Ill. 138, 81 N. E. 40. Where one spent rents belonging to his mother on property in which he and his brother were interested and, after the death of his mother and brother, became his mother's administrator, children of the de-

Certain holdings strictly pertinent to another topic [55] are herewith included [56]

ceased brother could insist that survivor pay the rents back to mother's estate though they had received by inheritance the property on which they were expended. Coffey v. Coffey, 193 Mass. 398, 79 N. E. 742. Heirs not estopped to assert title to land not having received any benefit from mother's dealing with it as her own. McSwain v. Ricketson [Ga.] 58 S. E. 655. Evidence insufficient to show that property owner received a consideration for signing a petition for local improvements so as to estop him from questioning validity of assessments. State v. Several Parcels of Land [Neb.] 110 N. W. 665. Failure to return a trust deed held not to preclude repudiation on ground of fraud, no other benefits having been received. Jockusch, Davison & Co. v. Lyon [Tex.] 18 Tex. Ct. Rep. 492, 102 S. W. 396.

55. See Election and Waiver, 9 C. L. 1037.

56. "Estoppel" to contest validity of foreclosure decree on ground that property was personalty where objector was given opportunity to be heard. San Gabriel Valley Bk. v. Lake View Town Co. [Cal. App.] 89 P. 360. Holder of bond for title estopped to assert title thereunder to certain land not claimed in suit for specific performance fifteen years before. Cornett v. Moore, 30 Ky. L. R. 280, 97 S. W. 380. Delay of beneficiaries in deed of trust held to preclude repudiation of contract for misrepresentations of grantor. Guthrie v. Lyon [Tex. Civ. App.] 17 Tex. Ct. Rep. 321, 98 S. W. 432. Creditor estopped by accepting benefits of unauthorized settlement with debtor. Sparks v. Howard, 30 Ky. L. R. 236, 97 S. W. 1105. Removing stone without inspection held to estop buyer from showing it did not comply with contract. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856. Defendant in garnishment estopped to claim commissions from garnishee for sale of land, he having turned sale over to another together with right to commissions. Munson v. Mabon [Iowa] 112 N. W. 775. Creditor to whom stock of goods was sold to dispose of and account for held to have ratified act of debtor in exchanging stock for realty by transferring title to stock to purchaser. Doolittle v. Murray & Co. [Iowa] 111 N. W. 999. Brother's taking under sister's will held to estop his administrator from claiming proceeds of a life policy bequeathed by the will. Morath's Ex'r v. Weber's Adm'r, 30 Ky. L. R. 284, 98 S. W. 321. Where testatrix devised all her property to her husband, that children accepted deeds of land from husband, part of which he had acquired by the devise, did not estop them from suing to set aside her will. Holland v. Couts [Tex.] 17 Tex. Ct. Rep. 113, 98 S. W. 236. Denied request of conditional sale vendee to be permitted to return the property and be discharged held not to estop him from redeeming. Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929.

"Estoppel" by recitals and agreements: A receipt for property levied on, providing that receiptor is estopped to deny the levy and the ownership and value of the property, is valid (Dejon v. Street, 79 Conn. 333, 65 A. 145), and, in an action on the receipt, defendant may not show a different ownership or value (Id.). Married woman estopped to deny that title to realty was wholly in her where her agent filed **tax list** in her name representing her as sole owner. City of Waterbury v. O'Loughlin, 79 Conn. 630, 66 A. 173. One who lists and returns property in name of another may not complain of irregularities in tax proceedings arising solely from that cause. Moore v. Furnas County Live Stock Co. [Neb.] 111 N. W. 464.

Lien claimant estopped by **sworn statement** as to when he ceased work. Canton Roll & Mach. Co. v. Rolling Mill Co., 155 F. 321. Guardian **not estopped** to assert settlement with ward, though after alleged settlement he filed petition in bankruptcy showing **indebtedness to ward**, where he explained that he had failed to take a receipt and, before filing petition, ward claimed there had been no settlement. Robb's Estate v. Robb [Iowa] 111 N. W. 803. Executors' **return of items as assets** of estate did not estop them from showing on final settlement that the amounts belonged to testator's widow. Medlin v. Simpson, 144 N. C. 397, 57 S. E. 24. Letter written by defendant held not to estop him from denying execution of a note. Acme Food Co. v. Tousey, 148 Mich. 697, 14 Det. Leg. N. 298, 112 N. W. 484.

Estoppel by **partition deeds** in accordance with alleged invalid decree of another state. McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997. Heir accepting **conveyance in full satisfaction** of all claims against estates of deceased parents held estopped from claiming further interest. Savoie v. Savoie [Iowa] 112 N. W. 162. Persons executing instrument protecting executor in payment of claims held estopped to question propriety of payments. In re Robinson, 53 Misc. 205, 104 N. Y. S. 599. In suit for premature mortgage foreclosure, holder held estopped to assert that one who contemplated a purchase of the property was not a party to an agreement of extension. Missouri Real Estate Syndicate v. Sims, 121 Mo. App. 156, 98 S. W. 783. Plaintiff in foreclosure held bound by **compromise** with other mortgage claimants. Pharr v. Coudroy, 118 La. 499, 43 So. 76. Lessor estopped by **division of oil as royalty.** Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744. One who voluntarily gives a **liquor dealer's bond,** conditioned under penalties provided by law, may not, in a suit theron, complain that the law is unconstitutional as imposing excessive fines. White v. Manning [Tex. Civ. App.] 18 Tex. Ct. Rep. 655, 102 S. W. 1160. Conditional sale vendor inducing another to take a mortgage under agreement that same should be superior to conditional sale note could not assert title as against mortgagee's assignee. Hyatt v. Bell [Ark.] 103 S. W. 748. Brothers and sisters renouncing, in favor of mother, succession of deceased brother, **not estopped** to contest right of persons claiming as children of deceased brother to share in mother's estate. Succession of Gabisso [La.] 44 So. 438. Creditor of insolvent corporation not estopped to contest validity of a mortgage in bankruptcy proceedings because of agreement with mortgagees looking to sale of debtor's property. In re Builders' Lumber Co., 148 F. 244.

Inconsistent positions in litigation: Where

a contractor, in a suit by another against a subcontractor, sets up a claim which is made the basis of the judgment in that action, he cannot set up an inconsistent claim in another litigation between him and the subcontractor. Noyes v. Noullet & Co., 118 La. 888, 43 So. 539. Contractor admitting right of lien claimant to money due from owner held estopped to thereafter claim it himself. Union Lumber Co. v. Simon, 150 Cal. App. 751, 89 P. 1077, 1081. Claimant to land levied on, admitting levy and describing the property, but losing claim, held estopped, in subsequent suit to recover possession, to assert **that levy was defective** as to description. Walden v. Walden [Ga.] 57 S. E. 323. Mortgagors estopped to assert **invalidity of judgment** which they had contended was valid in previous suit to foreclose. Bailey v. Wright [S. D.] 112 N. W. 853. Defendant estopped to assert that stock belonged to a corporation where in former suit he had maintained that it belonged jointly to himself and complainant. Leigh v. National Hollow Brake-Beam Co., 224 Ill. 76, 79 N. E. 318. Agent sued for value of wheat estopped to assert that he received it for principal, having taken contrary position in previous suit for principal. Wees v. Page [Wash.] 91 P. 766.

One certifying that he was not plaintiff's partner held estopped from thereafter making contrary claim. Lasher v. Colton, 225 Ill. 234, 80 N. E. 122. Tenant by **instructions and conduct** in previous detainer suit held estopped to assert he did not elect to stay and pay increased rent. Columbia Brew. Co. v. Miller, 124 Mo. App. 384, 101 S. W. 711. One whose claim for breach of agreement to pay for work in houses was disallowed for failure of proof of loss precluded from presenting claim for quantum meruit against a new fund. In re Real Esate Inv. Co.'s Assigned Estate [Pa.] 67 A. 457. Defendants **procuring dismissal of suit** by allowing entry of judgment, whereby land was conveyed to plaintiff by third person, held estopped to deny its legal effect. Townsend v. Scurlock [Tex. Civ. App.] 17 Tex. Ct. Rep. 732, 99 S. W. 123. Father who recovered damages for son estopped from thereafter recovering such damages for himself. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784. Railroad company which in its application for leave to construct a road had included a property owner as one who refused to consent could not thereafter as against his claim for damages insist that he had consented. Shaw v. New York El. R. Co. [N. Y.] 79 N. E. 984. Wife who asked that her right to proceeds of sale of land be decreed superior to claims of creditors could not assert that title did not pass. Staser v. Gaar, Scott & Co. [Ind.] 79 N. E. 404. Party who petitioned court to render judgment on arbitration award, appeared and introduced evidence, and stipulated for winding up of controversy, could not question court's jurisdiction to act on exceptions. Waisner v. Waisner [Wyo.] 89 P. 580. Person claiming title under decree of court may not question **authority of attorney** to enter into stipulation upon which decree was based. Peterson v. Ramsey [Neb.] 110 N. W. 728.

Claims inconsistent with pleadings: Person suing by assumed name estopped to deny validity of judgment against her in subsequent garnishment proceedings to enforce it. Clark v. Wyche, 126 Ga. 24, 54 S. E. 909. Claim, of an appellant, of adverse possession, and that he was entitled to a lien on land purchased by him on execution, held inconsistent with complaint. Carroll v. Hill Imp. Co. [Wash.] 87 P. 835. Trustee in bankruptcy who affirmed validity of company's transactions by sworn answer could not shift ground in subsequent suit. Canton Roll & Mach. Co. v. Rolling-Mill Co., 155 F. 321. Attorney who prepared answer denying fraudulent sale of bonds could not attack validity of transaction as subsequent owner of claims sued on. Id. Insurer pleading arbitration agreement in abatement could not thereafter have another trial by pleading it in bar. Providence Washington Ins. Co. v. Wolf [Ind.] 80 N. E. 26. Receiver could not defend on ground that he was a temporary receiver only where his answer stated he was a permanent one. Prince v. Schlesinger, 116 App. Div. 500, 101 N. Y. S. 1031. Where answer of a receiver recited that former dispossession proceedings were "duly instituted," receiver could not contend that they were void because the attorney general did not have notice. Id. Answer of one made party in trespass to try title that he and defendant owned the land held not to estop him or his heirs in a subsequent suit. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. Where defendants affirmatively alleged that plaintiffs had assigned a tax bill sued upon, they could not claim under general denial that he had not acquired ownership. Dickey v. Porter, 203 Mo. 1, 101 S. W. 586. Where defendant in replevin procured a claim to be struck, he could not assert in a subsequent action that it had been adjudicated in the replevin suit. Haughawaut v. Royse, 122 Mo. App. 72, 98 S. W. 101.

One cannot urge the unconstitutionality of a statute by the authority of which he is in the appellate court. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 So. 979. One could not contest the validity of a statute under which he sought damages for an improvement. American Unitarian Ass'n v. Com., 193 Mass. 470, 79 N. E. 878.

Conduct in litigation held not to work estoppel: Certain litigation held not to estop state from asserting that certain lands were submerged, and not swamp lands. Olds v. State Land Office Com'r [Mich.] 14 Det. Leg. N. 451, 112 N. W. 952. That a case was previously tried on different theory did not preclude plaintiff in trover from proving anything that was material. Farrow v. Wooley [Ala.] 43 So. 144. Mere **statements of counsel** in argument as to construction of a paper, not acted on by court or adjudicated correct, do not estop client to assert a different construcion, especially where adverse party did not rely thereon to his injury. Baker v. Davis, 127 Ga. 649, 57 S. E. 62. That mother appeared and objected to abatement of suit by father for sale of liquor to a minor did not estop her from maintaining the action. Brooks v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 967, 98 S. W. 936

Proving a claim in bankruptcy of brokerage firm no bar to recovery from member of stock exchange employed by firm to do the buying. Doucette v. Baldwin [Mass.] 80 N. E. 444.

owing to the general sense in which the word "estoppel" is often used, and because of their close relation to real estoppels.

Pleading and proof; questions of law and fact.[57]—The party seeking to establish an estoppel in pais has the burden of pleading [58] and proving it.[59] A plea which omits any essential element of estoppel is insufficient.[60]

§ 5. *Extent of operation of doctrine of estoppel.*[61]—An estoppel affects parties and privies.[62] Hence an ordinary heir cannot be heard to allege the turpitude of the person under whom he claims, or to assert any claim which such person would be estopped to assert,[63] but a forced heir is not estopped to attack, to the extent necessary to protect his legitime, the alleged illegal, fraudulent, or simulated conveyances of the person to whom he occupies that relation,[64] and a grantee of one in possession is not estopped by prior statements of his grantor of which he had no knowledge.[65] As to personalty, an executor is in privity with a legatee so as to enable him to avail himself of an estoppel in favor of the latter.[66]

While the doctrine of estoppel applies to infants of years of discretion for intentional and fraudulent conduct,[67] estoppel by contract or for mere silence does not apply to them,[68] and the unauthorized acts of a guardian with reference to his ward's estate will not estop an infant.[69] A married woman may be estopped [70] if her conduct amounts to fraud.[71] The doctrine has also been successfully invoked

57. See 7 C. L. 1507.

58. Must be pleaded where it is the basis of suit or defense. Saginaw Suburban R. Co. v. Connelly, 146 Mich. 395, 13 Det. Leg. N. 796, 109 N. W. 677. If there is opportunity to do so. Christian v. Eugene [Or.] 89 P. 419. Estoppel of widow to elect to take child's part not provable unless pleaded. Keeney v. McVoy [Mo.] 103 S. W. 946. An estoppel in pais **need not be pleaded.** Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 A. 134.

59. Claim of title to land by estoppel. Beaufort Lumber Co. v. Price, 144 N. C. 50, 56 S. E. 684. Burden on defendant to show that a bank was estopped to claim funds diverted by cashier. Home Sav. Bk. v. Otterbach [Iowa] 112 N. W. 769. Mortgagee bound to allege and prove matters in estoppel against creditors of partnership and partner who did not sign as required by statute. Lellman v. Mills [Wyo.] 87 P. 985. **Evidence insufficient,** where presence of wife, when husband's notes were taken in reliance on realty, was merely a matter of surmise. McCormick Harvesting Mach. Co. v. Perkins [Iowa] 110 N. W. 15.

60. Plea demurrable for failure to allege that when defendant purchased land she was ignorant that city had a further lien thereon. Kraut v. Dayton, 30 Ky. L. R. 191, 97 S. W. 1101. A plea of estoppel for acquiescence in defendant's conduct must show a duty on plaintiff's part to have made objection. Plea that plaintiff was estopped by acquiescence in construction of sewer polluting a stream. Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 S. E. 216.

61. See 7 C. L. 1508.

62. An **assignee** of one estopped to claim rents. Carrigg v. Mechanics' Sav. Bk. [Iowa] 111 N. W. 329. Where defendant in garnishment was estopped to claim commissions from garnishee, **plaintiff in garnishment** was also estopped. Munson v. Mabon [Iowa] 112 N. W. 775.

Client bound by attorney's estoppel to object to bill of exceptions. Memphis Consol. Gas & Elec. Co. v. Simpson [Tenn.] 103 S. W. 788.

The estoppel of stockholders affects corporation. Chicago R. Equip. Co. v. National Hollow Brake Beam Co., 123 Ill. App. 533.

63, 64. Jones v. Jones [La.] 44 So. 429.

65. Chase v. Cochran [Me.] 67 A. 320. Grantee of a servient estate not estopped by prior statements by his grantor inducing one to purchase dominant estate, though grantee of easement was in possession, where contract creating easement was on record. Metcalfe v. Faucher [Tex. Civ. App.] 99 S. W. 1038.

66. Executor could set up estoppel of testatrix's daughter to assert a claim against estate as against legatee. Pond v. Pond's Estate, 79 Vt. 352, 65 A. 97.

67. Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744.

68. Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744. Infant not bound by silence as against father's execution creditor, there being no intentional and fraudulent conduct. Harper v. Utsey [Tex. Civ. App.] 17 Tex. Ct. Rep. 17, 97 S. W. 508.

69. That guardian agreed to and did receive less oil as rent than that to which infants were entitled. Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744. Infants continuing to receive same amount after maturity not estopped. Id.

70. Release of dower. Wilkins v. Baker [S. C.] 57 S. E. 851. Married woman estopped by power of attorney reciting she was a feme sole. Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417. A married woman is not estopped if the other party knew all the facts, notwithstanding a statute providing that married women shall be bound by estoppel in pais. Indianapolis Brew. Co. v. Behnke [Ind. App.] 81 N. E. 119.

71. In absence of misrepresentations or deception, married woman not estopped to assert title to property not legally transfer-

against a city,[72] but neither a municipality[73] nor the state[74] will be held estopped by the unauthorized acts of its agents.

Estoppel is intended only to prevent injustice, and imposes silence on one only when in conscience and honesty he should not be allowed to speak.[75] It follows that one may be estopped only as to matters to which his representations or conduct related,[76] and persons who are not misled may not take advantage of an estoppel,[77] nor may it be asserted by one whose hands are not clean.[78]

While one who has been active in procuring the adoption of an invalid law and who has received the full benefit thereof may be estopped from contesting the collection of a tax to pay for such benefit according to the terms of the law,[79] he will not be concluded as to acts done not strictly thereunder,[80] nor as to matters yet remaining to be done, or expenses not yet incurred.[81]

Estoppel cannot be invoked so as to frustrate the public policy of the state.[82]

EVIDENCE.

§ 1. Necessity and Duty of Adducing Evidence (1229).
A. Judicial Notice (1229).
B. Presumptions and Burden of Proof (1232).
§ 2. Relevancy and Materiality (1237).

red because of participation in organization of a company to acquire her property, and because she received stock therefor. Texas So. R. Co. v. Harle [Tex. Civ. App.] 18 Tex. Ct. Rep. 317, 101 S. W. 878.

72. City estopped to claim **land for a street** where it permitted its use for private buildings for over sixty years, collected taxes, and consented to construction of costly docks. City of Peoria v. Central Nat. Bk., 224 Ill. 43, 79 N. E. 296. But see Krause v. El Paso [Tex. Civ. App.] 19 Tex. Ct. Rep. 586, 101 S. W. 828.

City not estopped to assert title to land for failure to reply to notice of adverse claimant's intention to build thereon, and because it levied taxes. City of Providence v. Comstock, 27 R. I. 537, 65 A. 307. Lapse of time and adverse occupancy not sufficient to create estoppel against city. Christian v. Eugene [Or.] 89 P. 419.

73. Township not estopped by its officers not objecting to laying of street railway tracks in highway without authority. Bangor Tp. v. Bay City Trac. & Elec. Co., 147 Mich. 165, 13 Det. Leg. N. 999, 110 N. W. 490.

74. Mistake of state land commissioner, whereby applicant for school land lost chance to buy, held not to charge the state. Hamilton v. Gouldy [Tex. Civ. App.] 19 Tex. Ct. Rep. 12, 103 S. W. 1117.

75. Grantor not estopped as against grantees to assert water rights by subsequent adverse possession and appropriation. Gardner v. Wright [Or.] 91 P. 286.

76. One accepting deed of part only of property bought by grantor at execution not estopped to deny his title to remainder. Carroll v. Hill Tract. Imp. Co. [Wash.] 87 P. 835. That one accepts part of an **arbitration award** does not estop him from questioning the validity of another divisible part. Partner accepting personalty could question award as to realty. Waisner v. Waisner [Wyo.] 89 P. 580. Overseeing building of a boat and requesting changes did not estop plaintiff as to a guaranty of speed unless he knew that changes requested would affect speed. Marine Iron Works v. Wiess [C. C. A.] 148 F. 145.

77. That two creditors relied on the apparent ownership of realty in an insolvent did not justify trustee in bringing all the realty into the estate to be disposed of in favor of 800 creditors. Ellison v. Ganiard, 167 Ind. 471, 79 N. E. 450.

78. Grantee in consideration of suppression of criminal prosecution could not assert estoppel against prior grantee who failed to disclose his title. Deen v. Williams [Ga.] 57 S. E. 427. Doctrine of pari delicto not applicable. Id. Grantee from record owner knowingly participating in scheme to defraud true owner's creditors not entitled to set up estoppel in suit by true owner to recover land. Sewell v. Norris [Ga.] 58 S. E. 637.

79. Sellers v. Cox, 127 Ga. 246, 56 S. E. 284.

80. That school officers had borrowed money outside authority of invalid school law did not estop plaintiff from contesting validity of the law. Sellers v. Cox, 127 Ga. 246, 56 S. E. 284.

81. Executory contracts with teachers, and purchase of a mule on credit, did not estop taxpayer from questioning validity of law for organization of school district. Sellers v. Cox, 127 Ga. 246, 56 S. E. 284.

82. In action by foreign corporation against its agent for money received for its use, agent is not estopped to defend on ground that plaintiff has not complied with laws of state. Thomas Mfg. Co. v. Knapp [Minn.] 112 N. W. 989. Could defend suit on promissory note. Id. That one buys goods from a foreign corporation does not estop him from defending an action for the price on the ground that plaintiff was not authorized to do business in the state. United Lead Co. v. Reedy El. Mfg. Co., 124 Ill. App. 174. Defendant's knowledge that plaintiff was a foreign corporation no estoppel to plead noncompliance with statutes. Osborne & Co. v. Shilling, 74 Kan. 675, 88 P. 258. Counterclaim held not to waive defense. Id.

§ 3. Competency or kind of Evidence in General (1244).
§ 4. Best and Secondary Evidence (1244).
§ 5. Parol Evidence to Explain or Vary Writings (1250).
§ 6. Hearsay (1263).
A. General Rules (1263). Matters of Pedigree (1266). Market Reports (1267). Census Reports (1267).
B. Res Gestae (1267).
C. Admissions or Declarations Against Interest (1271). Silence or Acquiescence (1274).
D. Declarations of a Person Since Deceased (1279).
§ 7. Documentary Evidence (1279).
A. In General (1279).
B. Books of Account (1283).
C. Public and Judicial Records and Documents (1286).
D. Proceedings to Procure Production of Documentary Evidence (1287).
§ 8. Evidence Adduced in Former Proceedings (1288).
§ 9. Expert and Opinion Evidence (1289).
A. Conclusions and Nonexpert Opinions (1289).
B. Subjects of Expert Testimony (1295)
C. Qualifications of Experts (1298).
D. Basis of Expert Testimony and Examination of Experts (1301).
§ 10. Real or Demonstrative Evidence (1304).
§ 11. Quantity Required and Probative Effect (1307).

Scope of article.[83]—This article treats specifically of the competency of evidence; the competency of witnesses, and the rules governing their examination being entirely excluded,[84] and questions of relevancy and sufficiency of evidence, except so far as they illustrate some general rule, being excluded to titles dealing with the particular subject or issue to which the evidence is addressed. Evidence in criminal prosecutions is also treated elsewhere,[85] though occasional holdings of undoubted general application are here retained.

§ 1. *Necessity and duty of adducing evidence.*[86]—Evidence need not be adduced to prove facts admitted in the pleadings, or by stipulation of counsel, or by admission in open court,[87] and evidence to support admitted facts may properly be excluded.[88]

(§ 1) *A. Judicial notice.*[89]—Judicial notice takes the place of proof and is of equal force.[90] Courts take judicial notice of their own records and proceedings so far as they are relevant to causes pending before them,[91] but will not judicially notice the records of other causes pending before them,[92] nor will a state court take judicial notice of a proceeding in a Federal court.[93] An appellate court will take judicial notice of the terms of a lower court [94] and of the personnel of such court,[95] but not of its rules.[96]

83. See 7 C. L. 1511.
84. See Witnesses, 8 C. L. 2347.
85. See Indictment and Prosecution, 8 C. L. 189.
86. See 7 C. L. 1511.
87. Admission of authority of agent, in open court, held to obviate necessity of proof of written authority to sell land. Chouteau Land & Lumber Co. v. Chrisman, 204 Mo. 371, 102 S. W. 973. Admission in open court of a specific liability obviates the necessity of proving any of the facts which would have been necessary to prove such liability. Fidelity & Casualty Co. v. Morrison, 129 Ill. App. 360. Admission in colloquy of counsel of facts showing bar by former adjudication. Matousek v. Bohemian Roman Catholic First Cent. Union, 192 Mo. 588, 91 S. W. 538.
88. McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132; Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 N. W. 788.
89. See 7 C. L. 1512.
90. See 7 C. L. 1512, n. 96.
91. Seymour v. Berg, 127 Ill. App. 369; Wilson v. Calculagraph Co. [C. C. A.] 153 F. 961. In Oklahoma, attorneys are licensed and authorized to practice by the supreme court, and the courts of the territory may take judicial notice of the fact that one appearing and acting as an attorney is, or is not, duly authorized. Nolan v. St. Louis & S. F. R. Co. [Okl.] 91 P. 1128. The court takes judicial notice of its own orders and actions. Ferriman v. People, 128 Ill. App. 230.
92. Murphy v. Citizens Bk. of Junction City [Ark.] 100 S. W. 894. In passing upon the final account of an administrator, objections to which have been filed, the court will not take judicial notice of the record of a guardianship proceeding in the same court to find whether the objectors were heirs. In re Ollschlager's Estate [Or.] 89 P. 1049.
93. Proceedings in bankruptcy. Hunter v. Lissner [Ga. App.] 58 S. E. 54.
94. See 7 C. L. 1512, n. 1.
Contra: Supreme court cannot take judicial notice of the beginning or ending of a term of the district court in the absence of any statutory or constitutional provision fixing the same. Felt v. Cook, 31 Utah, 299, 87 P. 1092.
95. Supreme court will take judicial notice of appointment and subsequent election of a person as circuit judge to fill the unexpired term of a deceased. Mayes v. Palmer [Mo.] 103 S. W. 1140.
96. Supreme court will not take judicial notice of the rules adopted by the district judges of the several districts of the state. Powell v. Springston Lumber Co., 12 Idaho, 723, 88 P. 97. **Contra.** Johnson-Wynne Co. v. Wright, 28 App. D. C. 375.

State courts take judicial notice of public domestic statutes, including corporate charters enacted by public statutes,[97] of the constitution of the state and of the adoption of amendments thereto,[98] of the date of a general election,[99] of Federal statutes and of the regulations and organization of the departments of the Federal courts,[1] of public documents and records [2] and legislative records when a statute so provides,[3] of the official seal and signature of a notary public,[4] of the system of public surveys,[5] of the boundaries of counties and the location of incorporated cities,[6] that a certain city is a county seat, de jure [7] or de facto,[8] that a certain city is incorporated and of the salient facts of the geography and history of such a city,[9] and of the population as shown by the census,[10] of the permanent location of important railroads,[11] of their termini within the state,[12] and whether certain cities are on the line of such roads.[13]

Courts will not take judicial notice of the statutes of another state [14] or nation, nor of the laws of an Indian nation,[15] nor of city ordinances [16] or charters,[17] in

97. Corporate charters enacted by the legislature. Commonwealth v. Newport, L. & A. Turnpike Co., 30 Ky. L. R. 1235, 100 S. W. 871; Commonwealth v. Kinniconick & F. S. R. Co. [Ky.] 104 S. W. 290. Acts of incorporation being public acts of which courts must take judicial notice (Rev. Laws Mass. c. 175, § 72), court knows that a certain corporation was not organized under a particular act and hence was not subject to a provision thereof. American Steele & Wire Co. v. Bearse [Mass.] 80 N. E. 623.

98. Court will take judicial notice that governor declared an amendment to the constitution adopted at an election and that the amendment then became prima facie the law. State v. Silver Bow County Com'rs, 34 Mont. 426, 87 P. 450. Where a constitutional amendment has been declared adopted by the executive of the state, the court will not admit evidence of irregularities in its adoption not pleaded, since the proclamation makes the amendment prima facie the law. Id.

99. State v. Custer [R. I.] 66 A. 306.

1. Of acts of congress. Jordan v. McDonnell [Ala.] 44 So. 101. That the District of Columbia is the seat of the government and of the act of Congress of March 3, 1863, establishing a judicial system in the District. Milliken v. Dotson, 117 App. Div. 527, 102 N. Y. S. 564. That the Federal district court for the Northern District of New York has but one clerk's office. Bouten v. Wheeler, 118 App. Div. 426, 104 N. Y. S. 33. Indian Territory court of appeals takes judicial notice of acts of congress requiring fees to be advanced before clerk of district court may file transcript from commissioners' court and docket the case. Perry v. Morris [Ind. T.] 104 S. W. 571.

2. Reports of railroad companies to corporation commission. Staton v. Atlantic Coast Line R. Co., 144 N. C. 135, 56 S. E. 794.

3. Const. Tenn. art. 2, § 21, requires the legislature to keep a journal of proceedings and publish them, except such parts as the welfare of the state may require to be kept secret. Hence courts will take judicial notice of entries therein relating to legislation. State v. Swiggart [Tenn.] 102 S. W. 75.

Contra: Supreme court cannot take judicial notice of contents of original journals of branches of the legislature. Erford v. Peoria [Ill.] 82 N. E. 374.

4. McDonald v. People, 123 Ill. App. 346.

5. Bank of Lemoore v. Fulgham [Cal.] 90 P. 936.

6. District courts of the state take judicial notice of the boundaries of counties, the location of incorporated cities within their districts, and whether a certain place definitely located by distances and directions from an incorporated city is within the county where court is being held. Atchison, etc., R. Co. v. Paxton [Kan.] 88 P. 1082. Location of towns in a certain county Cleveland, etc., R. Co. v. Miller [Ind. App.] 81 N. E. 517.

7. City of Brownsville v. Arbuckle, 30 Ky. L. R. 414, 99 S. W. 239.

8. Board of Com'rs of Day County v. Kansas [Okl.] 91 P. 699.

9. Included time when incorporated. Agnew v. Pawnee City [Neb.] 113 N. W. 236. Supreme court, appellate term, may take judicial notice of location and direction of streets in New York City. Gruber v. New York City R. Co., 103 N. Y. S. 216.

10. Gannett v. Independent Tel. Co., 55 Misc. 555, 106 N. Y. S. 3.

11. Texas Cent. R. Co. v. Marrs [Tex. Civ. App.] 18 Tex. Ct. Rep. 229, 101 S. W. 1177.

12. Lowville, etc., R. Co. v. Elliott, 115 App. Div. 884, 101 N. Y. S. 328; Texas Cent. R. Co. v. Marrs [Tex. Civ. App.] 18 Tex. Ct. Rep. 229, 101 S. W. 1177.

13. Green v. Lineville Drug Co. [Ala.] 43 So. 216.

14. Crane v. Blackman, 126 Ill. App. 631; Loyal Mystic Legion of America v. Brewer [Kan.] 90 P. 247; App v. App, 106 Va. 253, 55 S. E. 672; Watford v. Alabama & Florida Lumber Co. [Ala.] 44 So. 567. The law of a different jurisdiction than that of the forum (if different from the lex fori) cannot be applied in the decision of a cause unless alleged and proved. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 17 Tex. Ct. Rep. 600, 100 S. W. 354.

15. The court of appeals of the Indian Territory will not take judicial notice of what the law of the Chickasaw Nation is; this must be alleged and proved the same as foreign law, or by publications thereof,

the absence of statute requiring such judicial recognition. A Federal court will take judicial notice of a general statute of the state in which it sits.[18] Upon the question whether the courts of one state will take judicial notice of the laws of another state, in an action upon a judgment of a court of such other state, the authorities are in conflict.[19] It is said that the safer rule is to require proof of the laws of other states in cases of this kind as well as in others.[20] It is held in Georgia that while a foreign statute which is relied upon must be pleaded and proved, yet no particular kind or quantum of proof is required,[21] and the court may even proceed upon its own knowledge of such law when necessary to render a correct decision.[22] In that state there is a statute which is said to authorize judicial recognition of foreign statutes.[23]

All courts take judicial notice of matters of common and general knowledge [24]

or by the testimony of some person learned therein. Elliott v. Garvin [Ind. T.] 104 S. W. 878.

16. Sachs v. Lyons, 53 Misc. 640, 103 N. Y. S. 149.

17. Where validity of city charter is in issue and it is a special act containing no provision that judicial notice may be taken of it, it should be proved. City of Paris v. Tucker [Tex.] 19 Tex. Ct. Rep. 725, 104 S. W. 1046.

18. And will presume that a city ordinance was enacted under a statute conferring authority on the city. North American Cold Storage Co. v. Chicago, 151 F 120.

19. Some hold that a Federal question is involved in such case and that the full faith and credit clause of the constitution requires judicial notice to be taken of the laws of other states. Hunt v. Monroe [Utah] 91 P. 269.

20. Hunt v. Monroe [Utah] 91 P. 269.

21. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93. Foreign statutes may be proved by testimony of witnesses shown to be familiar with them, or by certified or authenticated copy. Id.

22. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93.

23. Civ. Code 1895. § 5231. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 S. E. 93

24. That the scythe is a common tool properly used on any ground where the mower can stand to cut weeds, grass, grain, etc. Post v. Chicago, B. & Q. R. Co., 121 Mo. App. 562, 97 S. W. 233. Of the fact that railroads transport grain in cars. Atchison, etc., R. Co. v. People, 128 Ill. App. 38. Of the fact that rainfall is heavy in certain localities at certain seasons and that freshets are liable to result therefrom. Elser v. Gross Point, 223 Ill. 230, 79 N. E. 27. That the beer is intoxicating. White v. Manning [Tex. Civ. App.] 18 Tex. Ct. Rep. 655, 102 S. W. 1160. That in the operation of street cars they stop at street crossings for the purpose of letting off and taking on passengers and that such a stoppage is in the nature of a general invitation to all persons who desire passage to get aboard, whether the car be crowded or otherwise. Baskett v. Metropolitan St. R. Co., 123 Mo. App. 725, 101 S. W. 138. That common carriers doing an interstate business also run trains over its lines wholly within the state. United States v. Adair, 152 F. 737. Of purpose of installing perforated water pipes in cellars and subcellars and having them connected up with valves on the outside of the building. Lantry v. Hoffman, 105 N. Y. S. 353. That Lenoir, N. C., and Erie, Pa., are connected by railroads, that freight sent by express is transported in less time than as ordinary freight, and that 14 days is too long a time for express matter between the two cities, but courts cannot judicially know how much too long that time is. Harper Furniture Co. v. Southern Exp. Co., 144 N. C. 639, 57 S. E. 458. That railway cars and locomotive cowcatcher extend beyond the rails of the track. San Antonio & A. P. R. Co. v. Mertink [Tex. Civ. App.] 18 Tex. Ct. Rep. 201, 102 S. W. 153. That rapidly moving body creates a partial vacuum in its path which draws objects near, causing them to be thrown forward with force proportionate to speed of its movement. Id. That the great majority of medical writers and practitioners advocate vaccination as a means of preventing smallpox. Auten v. Little Rock Special School Dist. Directors [Ark.] 104 S. W. 130. Of standard mortality tables and may in their discretion admit them in evidence without preliminary proof of authenticity. Valente v. Sierra R. Co. [Cal.] 91 P. 481. Of the navigability of important streams or lakes, but not of small streams; the navigability of such streams must be shown by evidence. Harrison v. Fite [C. C. A.] 148 F. 781. Of the point where the current of the Potomac river is first impeded by tide. Seufferle v. Macfarland, 28 App. D. C. 94. Of the variation between mean high and mean low tide at a certain point. Id. Where evidence showed that child about 10 years old was injured by having his hand drawn into the cogs of a corn cutter, breaking his thumb and bruising and injuring his hand, the court would take judicial notice that he suffered pain. Bolton v. Ovitt [Vt.] 67 A. 881. Of years during which Boer war was in progress. Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395.

Not judicially noticed: Seals of private corporations. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687. Distance within which train going at certain speed could be stopped. Southern R. Co. v. Gullatt [Ala.] 43 So. 577. That "rough on rats" contains arsenic, or that name is always applied to the same compound, or that two packages, similarly sealed and labeled, taken from the same stock, contain the same article. State v. Blydenburg [Iowa] 112 N. W. 634. That insurance society is a fraternal organization,

and of general customs and usages.[25] An existent fact, which is per se neither the subject of legislation nor adjudication, can be judicially known and recognized as a fact,[26] and such judicial recognition does not amount to the exercise of legislative functions.[27] Thus, courts may take judicial notice of social status, and of the superiority and inferiority of races[28] without affecting the civil rights of the citizen.[29]

A court may take evidence to refresh its memory as to facts of which it takes judicial notice,[30] and is not precluded, by the introduction of other evidence, from making use of its own knowledge of a fact in passing upon a particular issue.[31]

(§ 1) *B. Presumptions and burden of proof.*[32]—Presumptions of law are such inferences as are warranted by the legal experience of courts in administering justice and are usually founded on reasons of public policy and social convenience and safety.[33] They are conclusive, and have become rules of law; others are rebuttable.[34] Only rebuttable presumptions are here treated, conclusive presumptions being discussed in connection with the subject-matter to which they relate.[35]

Presumptions of fact are inferences which enlightened common sense and experience may draw from the connection, relation, and coincidence of facts and circumstances with each other.[36] Presumptions of fact must always be drawn by the

as alleged in a bill of interpleader, where the claimant alleges it is an old time company. Smith v. Grand Lodge A. O. U. W. of Missouri, 124 Mo. App. 181, 101 S. W. 662. In a proceeding by the state to abate a dam as a public nuisance, the complaint alleging that the stream is navigable, on a demurrer to the complaint, that the stream is nonnavigable and so prevent any proof by the state. State v. Norcross [Wis.] 112 N. W. 40. That certain electrical devices will not cure certain diseases, and that claims to that effect are false, but in a proceeding to revoke a physician's license these facts should be proved. Macomber v. State Board of Health [R. I.] 65 A. 263. In determining reasonableness of ordinance prohibiting maintenance of signs extending more than 18 inches from the building, the court cannot take judicial notice of conditions at a particular place. City of St. Louis v. St. Louis Theatre Co., 202 Mo. 690, 100 S. W. 627. Of solvency of a foreign state so as to support a finding that its bonds are of par value. Hebblethwaite v. Flint, 115 App. Div. 597, 101 N. Y. S. 43.

25. General custom of carriers to transport sample trunks as personal baggage. Fleischman, Morris & Co. v. Southern R. Co. [S. C.] 56 S. E. 974. To authorize courts to take judicial notice of a custom or usage, it must be general as to territory and not limited to a certain class. Schultz v. Ford Bros., 133 Iowa, 402, 109 N. W. 614. An alleged custom or usage among traveling salesmen whereby the words "sales," "sell," and "sold" include the soliciting of sales which the employer is willing to accept, or which he does accept or fill, held not so general as to warrant the court in taking judicial notice of it. Id. Courts will take judicial notice of the general custom whereby persons desiring to take out life insurance are required to sign applications stating material facts and will presume that this custom was followed in a given instance in the absence of contrary evidence. Taylor v. Grand Lodge A. O. U. W. of Minnesota, 101 Minn. 72, 111 N. W. 919.

26, 27. Wolfe v. Georgia R. & Elec. Co. [Ga. App.] 58 S. E. 899.

28. Superiority of white over black race. Wolfe v. Georgia R. & Elec. Co. [Ga. App.] 58 S. E. 899.

29. So held in determining that to call a white man a negro, or to intimate that he is of African descent, may be an insult. Wolfe v. Georgia R. & Elec. Co. [Ga. App.] 58 S. E. 899.

30. State v. Silver Bow County Com'rs, 34 Mont. 426, 87 P. 450.

31. In determining the value of attorneys, services expert opinion is a useful guide but is not controlling, and the court should make use of its own knowledge of the value of such services. Dinkelspiel v. Pons [La.] 43 So. 1018. Knowledge gained by the court from a view of premises is independent evidence to be taken into consideration by the court in determining the issues of the case. (Cases holding to the contrary cited). Hatton v. Gregg [Cal. App.] 88 P. 592.

32. See 7 C. L. 1515.

33. City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499.

34. City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499. Irrebuttable presumptions, or presumptions of law, are those which proceed from an arbitrary rule of law that a particular inference of fact shall necessarily be drawn from certain established facts. Sowders v. St. Louis & S. F. R. Co. [Mo. App.] 104 S. W. 1122. There are, however, some presumptions of law, so-called, which are rebuttable. Id.

35. See, for example, Adverse Possession, 9 C. L. 39, as to presumption of grant from adverse occupancy.

36. City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499. Presumptions of fact proceed from other facts in proof and supply an omitted fact in accord with the dictates of human experience in like matters. Sowders v. St. Louis & S. F. R. Co. [Mo. App.] 104 S. W. 1122.

trial court or jury from the evidence, and the only presumptions of fact which the law recognizes are such immediate inferences as the court or jury may reasonably draw from facts proved.[37] A presumption of fact cannot be based upon another disputable presumption.[38] Presumptions or inferences of fact are always disputable,[39] and whether they have in fact been overcome is a question for the trial court or jury.[40]

Among the commonly recognized presumptions of fact are the following:[41] Where a fact is proved which is in its nature continuous, it is presumed to exist until the contrary is proved,[42] even though there is a general presumption against the condition so shown,[43] but no presumption arises that such conditions existed anterior to the date proved.[44] Proof that a letter was properly addressed, stamped, and mailed[45] warrants the inference that it was received in due course,[46] but receipt of a letter purporting to be signed by a certain person is no evidence that it was written or signed by such person,[47] unless it also purports to be a reply to a letter written to such person.[48] Absence from a person's domicile for seven years, and the fact that he is not heard from for that period, raises a presumption of death,[49] but

37. Error to instruct that person injured was presumed to be without fault at time of accident. City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499. While the court cannot infer facts not proven, it may draw all the inferences from proven facts that naturally follow therefrom. Home Inv. Co. v. Clarson [S. D.] 109 N. W. 507. It cannot be presumed that a newspaper is published daily from the mere fact that the word "daily" occurs in its name. Fox v. Wright [Cal.] 91 P. 1005.

38. Georgia R. & Elec. Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076; Haynie v. Hammond Packing Co. [Mo. App.] 103 S. W. 581; Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 S. W. 665.

39. Sowders v. St. Louis & S. F. R Co. [Mo. App.] 104 S. W. 1122.

40. Harper Furniture Co. v. Southern Exp. Co., 144 N. C. 639, 57 S. E. 458.

41. See, also, 7 C. L. 1516.

42. Thus residence, once established, is presumed to continue until a change is shown. State v. Jackson, 79 Vt. 504, 65 A. 657. Where there is testimony that a note and mortgage had never been paid, there is a presumption that the person to whom it was made and delivered was still the owner. Marsters v. Umpqua Valley Oil Co. [Or.] 90 P. 151. Proof that several years before action a certain person had been treasurer of a domestic corporation and that no list of officers had been annually filed thereafter as required by law held to justify presumption that he was still the treasurer. Stafford Springs St. R. Co. v. Middle River Mfg. Co. [Conn.] 66 A. 775. Where railway tracks were shown to belong to defendant, its possession and use thereof would be presumed to be exclusive until the contrary was shown. Jennings v. Brooklyn Heights R. Co., 121 App. Div. 587, 106 N. Y. S. 279. Possession once established is presumed to continue. Burgener v. Lippold, 128 Ill. App. 590.

43. Insanity once shown is presumed to continue until mental soundness is shown. Beard v. Southern R. Co., 143 N. C. 137, 55 S. E. 505. Where it is alleged that grantor in deed was 85 years old and mentally incompetent, allegations that she was not restored to soundness of mind are unnecessary, since the presumption would be that she remained incompetent. Studebaker v. Faylor [Ind. App.] 80 N. E. 861. Every person is presumed to be of sound mind until the contrary is shown, and one asserting mental unsoundness has the burden of proving it. Rogers v. Rogers [Del.] 66 A. 374. The law presumes mental soundness, and where legal incompetency is alleged to show an instrument invalid, the burden is upon him who asserts such incompetency to prove it by a fair preponderance of the evidence. Ireland v. White [Me.] 66 A. 477.

44. Proof of property at a certain date is no proof of title a year previous. Gibson v. Clark, 131 Iowa, 325, 108 N. W. 527.

45. Bankers' Mut. Casualty Co. v. People's Bk. of Talbotton, 127 Ga. 326, 56 S. E. 429. Testimony of witness that he wrote a letter and left it as usual on a mailing table from which it was customary for boy who did that work to take and mail it held sufficient to warrant inference that letter was properly addressed, stamped, mailed, and received. Smith v. Heitman Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 124, 98 S. W. 1074. Where letter was addressed "Mulberry street" (New York) without street number, the presumption of delivery could not prevail against positive testimony of the addressee that he never received it. Cagliostro v. Indelli, 53 Misc. 44, 102 N. Y. S. 918.

46. Beard v. Southern R. Co., 143 N. C. 137, 55 S. E. 505. Presumed that papers to be served on a nonresident defendant contained in a securely enclosed, postpaid wrapper, properly directed to the correct address of the defendant, was received by defendant. Mishkind-Feinberg Realty Co. v. Sidorsky [N. Y.] 82 N. E. 448. Held to apply to the mailing of attachment notice. Smith v. Berz, 125 Ill. App. 122.

47. Beard v. Southern R. Co., 143 N. C. 137, 55 S. E. 505.

48. American Bonding Co. v. Ensey [Md.] 65 A. 921. Letter signed by corporate name "per G." held admissible, though "G" was not the president. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768.

no such presumption is raised by a showing that a person has left the state to establish a new domicile and has not been heard from for seven years; absence from the new domicile would in such case be necessary.[50]

Failure or refusal of a party to testify to facts within his knowledge,[51] or an attempt to suppress evidence,[52] or failure to call available witnesses or produce available evidence,[53] may be considered by the jury,[54] and such failure or refusal to testify or produce evidence, if unexplained, raises the presumption that the testimony or evidence if produced would be unfavorable to the party suppressing it.[55] To meet this presumption it may be shown that persons who had knowledge of the facts in issue could not be produced to testify.[56] Where it does not appear that a party holds back evidence within his power to produce, the nonproduction of more full and definite evidence than he presents raises no presumption against him.[57]

49, 50. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665.

51. Testimony tending to show that one of defendants was avoiding service of a subpoena by plaintiff and that he had been in the city but failed to appear in court held admissible. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658. When a party refuses to answer interrogatories submitted before trial, they may be taken as confessed. Locust v. Randle [Tex. Civ. App.] 18 Tex. Ct. Rep. 673, 102 S. W. 946.

52. Where in a disbarment proceeding it was shown that the attorney sought to be disbarred had attempted to intimidate a person who had signed a deposition, in the action in which improper conduct was claimed, to change the deposition, the deposition was admissible, the facts tending to show a consciousness of guilt. In re Durant [Conn.] 67 A. 497. All reasonable presumptions will be indulged against one who destroys evidence pertinent to the issue. William Grace Co. v. Larsons, 129 Ill. App. 290.

53. Jury has a right to consider the unexplained absence of witnesses, and failure to submit evidence presumably within a party's control. Southern Indiana R. Co. v. Osborn, 39 Ind. App. 333, 78 N. E. 248, 79 N. E. 1067. Failure to produce an available witness warrants inference by jury that his testimony would be unfavorable. Hartford Life Ins. Co. v. Sherman, 123 Ill. App. 202. In action for injuries based on failure to provide proper means to transfer passengers safely from one train to another, evidence that there were two other passengers in the coach with plaintiff, and that they were not called as witnesses, though plaintiff knew where they resided, was held admissible. Texas & N. O. R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653.

54. It has been held in New York that failure to produce an available witness raises no presumption unfavorable to the party but is a circumstance to be considered by the jury in weighing the evidence. Ferrari v. Interurban St. R. Co., 118 App. Div. 155, 103 N. Y. S. 134. While no presumption attaches to failure to call a witness who might corroborate, the jury has the right to consider the failure to call him or explain his absence. Richter v. Solomon, 104 N. Y. S. 405.

55. Where corporation withheld records and books under its control, presumption was that if produced the evidence would be unfavorable to it. Williams v. Commercial Nat. Bk. [Or.] 90 P. 1012. If evidence material to the issues is shown to be particularly within the possession and control of either party and he has neither produced it nor accounted for his failure to do so, it is to be presumed that such evidence if produced would not be to the advantage of such party. Order of United Commercial Travelers of America v. Barnes [Kan.] 90 P. 293. In action for injuries caused by breaking of defective coupling, the company removed the defective part and failed to produce it at the trial, though notified to do so. Held the presumption arose that the appearance of the defective part would not be evidence in favor of the company. Galveston, etc., R. Co. v. Young [Tex. Civ. App.] 18 Tex. Ct. Rep. 929, 100 S. W. 993.

56. Lord v. Manchester St. R. [N. H.] 67 A. 639. Where agent who delivered insurance policy was not in company's employ at time of suit on the policy, and his whereabouts was unknown to it, failure to produce him as a witness was no ground for the indulgence of any unfavorable presumption against the company. Mutual Industrial Indemnity Co. v. Perkins [Ark.] 98 S. W. 709.

57. Failure to swear motorman who knew nothing of accident did not raise any presumption. Shields v. Georgia R. & Elec. Co., 1 Ga. App. 172, 57 S. E. 980. In action for injuries to passenger it did not appear that passenger's wife, who accompanied him, knew anything about the occurence. Held no unfavorable inference could be drawn from failure to call her as a witness. Tauger v. New York City R. Co., 104 N. Y. S. 681. In action for injuries to employe, failure of defendant to have at the trial as witnesses certain persons who saw the accident could not be considered as a circumstance tending to show negligence. Missouri, K. & T. R. Co. of Texas v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 954, 101 S. W. 453. Held that no inference could be drawn from failure of defendant railroad to produce engineer in collision case. Southern R. Co. v. Hobbs [Ala.] 43 So. 844. Where a witness was equally accessible to both parties and could have been called by either to prove or disprove a statement by one party as a witness, it was error to allow counsel to argue that the absence of the witness was the basis for an unfavorable inference against plaintiff. Sears v. Duling, 79 Vt. 334, 65 A. 90.

Where a plaintiff fails to make out a prima facie case, failure of the defendant to call witnesses, or any particular witness, raises no presumption unfavorable to him,[58] nor can such failure of the defendant assist the plaintiff [59] or relieve him from the burden of proving his case.[60] An attempt to bribe a witness favorable to the adverse party raises no presumption against the party guilty of such act, but is a fact to be considered by the jury in weighing the testimony.[61]

As already observed, there are certain rebuttable presumptions indulged by the courts on grounds of public policy. Thus, the law presumes the validity and regularity of the official acts of public officers within the line of their official duties, and this presumption obtains until overcome by proof as to such acts.[62] Judicial proceedings of a court of competent jurisdiction are presumed to be regular and valid.[63] All persons are presumed to know the law,[64] and, in general, compliance with the law will be presumed until the contrary is made to appear.[65] Similarly, the presumption is in favor of innocency, legitimacy,[66] and right and proper conduct in compliance with one's obligations,[67] and fraud and wrong conduct will not be presumed,[68] and such presumption will prevail in case of conflicting presumptions.[69] A written instrument will be presumed to have been executed on the day of its date.[70]

58. Southern R. Co. v. Gullatt [Ala.] 43 So. 577; Cooper v. Upton [W. Va.] 56 S. E. 180 [Advance sheets only].

59. Southern R. Co. v. Gullatt [Ala.] 43 So. 577.

60. Cooper v. Upton [W. Va.] 56 S. E. 180 [Advance sheets only.]

61. Ferrari v. Interurban St. R. Co., 118 App. Div. 155, 103 N. Y. S. 134.

62. Craft v. Lent, 53 Misc. 481, 103 N. Y. S. 366; City of San Antonio v. Tobin [Tex. Civ. App.] 18 Tex. Ct. Rep. 919, 101 S. W. 269; Remington v. State, 116 App. Div. 522, 101 N. Y. S. 952. Presumption is that customs officer appointed another who had statutory qualifications as his duty required of him. Erhardt v. Ballin [C. C. A.] 150 F. 529. Court will not presume, in the absence of evidence, that acts of county commissioners were illegal in letting contracts. State v. Switzer [Neb.] 112 N. W. 297. Presumption is that a law as certified to by secretary of state is in the same form as when passed and signed by the governor. Erford v. Peoria [Ill.] 82 N. E. 374. Where return of process was signed by sheriff by his deputy, it was presumed, in absence of evidence to contrary, that it was in fact served by that officer. Eversole v. Eastern Kentucky Asylum for the Insane, 30 Ky. L. R. 989, 100 S. W. 300. While presumption is that clerk of court properly dated a summons, this presumption is disputable. Gehlert v. Quinn, 35 Mont. 451, 90 P. 168.

63. Martel v. Jennings-Heywood Oil Syndicate, 118 La. 391, 42 So. 975.

64. State statute prohibited savings banks from borrowing money for ordinary purposes. Another bank in the state was conclusively presumed to know that law. State v. Corning State Sav. Bk. [Iowa] 113 N. W. 500.

65. Presumption indulged that insane person was present at inquest as required by law. Eversole v. Eastern Kentucky Asylum for the Insane, 30 Ky. L. R. 989, 100 S. W. 300. Where county clerk's certificate attached to abstract of judgment recited that abstract was entered on judgment index, etc., it was presumed that it had been indexed in alphabetical order as required by statute. Abee v. Bargas [Tex. Civ. App.] 18 Tex. Ct. Rep. 616, 100 S. W. 191.

66. The presumption is in favor of the legitimacy of the relation of persons living together as husband and wife. In re Thewlis's Estate, 217 Pa. 307, 66 A. 519.

67. Trust deed vested title in trustee with duty to convey on written request, and trustee gave a deed. Held, 20 years after, a written request to convey would be presumed. Pope v. Patterson [S. C.] 58 S. E. 945. Seals of private corporations do not prove themselves, but where it is shown or admitted that an instrument is signed for the corporation by its proper officer, the presumption is that it is duly executed, and this presumption includes the authenticity of the seal shown. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687. Manager of corporation is presumed to act with authority of corporation in making demand for corporate property. Stovell v. Alert Gold Min. Co. [Colo.] 87 P. 1071. The seal of a corporation on an instrument, accompanied by signature of secretary, is presumptive proof of authority of the corporation to execute the instrument, and this presumption is not overcome by proof that there was no vote of the directors or other body authorizing the act. Bliss v. Harris [Colo.] 87 P. 1076.

68. Creeden v. Mahoney, 193 Mass. 402, 79 N. E. 776. It should be presumed that an applicant for the purchase of school lands proceeded legally and regularly rather than fraudulently and illegally. Henshall v. Marsh [Cal.] 90 P. 693. The presumption is that contracts for future delivery of grain are valid and are to be performed, and one who attempts to show that there was no intention to carry them out has the burden of proof. Charge v. Laidley [C. C. A.] 149 F. 346.

69. On proof of prior valid marriage by one suing as widow, divorce rather than bigamy will be inferred. Johnson v. St. Joseph Terminal R. Co., 203 Mo. 381, 101 S. W. 641. The presumption of identity of person from identity of name yields to that against official misconduct. Shuler v. State, 125 Ga. 778, 54 S. E. 689.

70. Kauffman v. Baillie [Wash.] 89 P. 548.

There is a presumption against suicide,[71] where the circumstances are equally consistent with death from some other natural cause,[72] and there is also a presumption, arising from the instinct of self-preservation, that a person accidentally killed was in the exercise of due care at the time, in the absence of evidence as to the facts.[73]

Where there is no proof of the law of another state, it will be presumed that the common law prevails in that state[74] and that its law is the same as that of the forum,[75] but it is only the common law of the forum which is presumed to be the same as that of the sister state. There is no presumption that the statute law of the forum prevails in another state.[76] There, are, however, authorities to the contrary.[77] The common law of England will not be presumed to prevail in a state never subject to that law.[78]

It is presumed that a letter is written on the date appearing on the top thereof, but this presumption is rebuttable by evidence clearly showing it to be a clerical error. Dowie v. Sutton, 126 Ill. App. 47.

71. Presumption is that death resulted from natural cause and was not self-inflicted. Hildebrand v. United Artisans [Or.] 91 P. 542. See, also, Insurance, 8 C. L. 377.

72. White v. Prudential Ins. Co., 105 N. Y. S. 87.

73. In the absence of evidence to the contrary, it will be presumed that a man who was killed was exercising due diligence at the time of his death. Meier v. Way, Johnson, Lee & Co. [Iowa] 111 N. W. 420. Where person injured was left unconscious and could not testify directly to her acts, the presumption would prevail that she exercised due care in the absence of contrary evidence. Statler v. Chicago & A. R. Co., 200 Mo. 107, 98 S. W. 509. Where person was killed by car, presumption is that decedent was in the exercise of due care and saw the car. Powers v. St. Louis Transit Co., 202 Mo. 267, 100 S. W. 655. Where there were no eye witnesses to accident causing death of deceased, and only circumstantial evidence to show the manner of his death, the presumption was held to arise that he was in the exercise of due care. Cahill v. Chicago & A. R. Co. [Mo.] 103 S. W. 532. In an action for death of a person run down by a train, it was held that the presumption arising from the instinct of self-preservation would be sufficient to sustain the burden of proof in the first instance that deceased was not at fault, though this presumption could not prevail against evidence showing he could not have used due care. Christopherson v. Chicago, M. & St. P. R. Co. [Iowa] 109 N. W. 1077. In action for wrongful death, the presumption that decedent exercised due care has no weight when the circumstances attending the accident are shown. Savage v. Rhode Island Co. [R. I.] 67 A. 633. See, also, Death by Wrongful Act, 9 C. L. 926.

74. Crane v. Blackman, 126 Ill. App. 631; Ellington v. Harris, 127 Ga. 85, 56 S. E. 134. Presumed that the common law prevails in Illinois in the absence of proof of statute law on the subject. Jordan v. Pence, 123 Mo. App. 321, 100 S. W. 529. On a common-law question courts of one state will assume that common law prevails in a sister state in the absence of contrary proof. Forsyth v. Barnes, 228 Ill. 326, 81 N. E. 1028. Ordinarily, in absence of proof of law of sister state, the common law is presumed to prevail if it has a "common law." Waterford v. Alabama & Florida Lumber Co. [Ala.] 44 So. 567.

75. In the absence of proof of the law of a sister state, it will be presumed that the common law prevails and that such common law is the same as that of the forum. Demelman v. Brazier, 193 Mass. 588, 79 N. E. 812; Hodgkins v. Bowser [Mass.] 80 N. E. 796; Commonwealth v. Stevens [Mass.] 82 N. E. 33. Law of Wisconsin not being proved in action in South Carolina, it will be presumed to be the common law as understood and enforced in South Carolina. Jonesville Mfg. Co. v. Southern R. [S. C.] 58 S. E. 422. Law of Arkansas presumed same as that of Tennessee in absence of proof. Star Clothing Mfg. Co. v. Nordeman [Tenn.] 100 S. W. 93. In the absence of evidence to the contrary, the presumption is that the laws of New Mexico are same as those of Texas. Southern Kansas R. Co. v. Curtis [Tex. Civ. App.] 17 Tex. Ct. Rep. 743, 99 S. W. 566. Law of West Virginia regarding duties of railroad companies to employes walking on the track presumed same as those of Virginia, except a statute with regard to remedy for death which was set out in declaration. Norfolk & W. R. Co. v. Denny's Adm'r, 106 Va. 383, 56 S. E. 321.

76. It will not be presumed that New York has statute similar to Mass. Rev. Laws, c. 73, § 103, abolishing days of grace on promissory notes. Demelman v. Brazier, 193 Mass. 588, 79 N. E. 812. Statute law of a sister state can be considered only so far as proved. Commonwealth v. Stevens [Mass.] 82 N. E. 33.

77. In absence of contrary proof, general incorporation laws of sister state will be presumed to be the same as of the forum. Bannard v. Duncan [Neb.] 112 N. W. 353. In the absence of proof to the contrary, courts of Nebraska presume the constitution and statutes of another state to be the same as those of Nebraska. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718. A party desiring to avail himself of the usury law of another state must plead and prove such laws; otherwise they will be presumed to be the same as those of the forum. Betz v. Wilson, 17 Okl. 383, 87 P. 844. Statute of another state as to showing relation of party to note by parol may be presumed same as the lex fori, in the absence of positive evidence. Windhorst v. Bergendahl [S. D.] 111 N. W. 544.

78. Since Florida was one of the English colonies, and since English common law was not the source of its jurisprudence, the

The burden of proof.[79]—The burden of proof is on the party who substantially asserts the affirmative of the issue, whether he be nominally plaintiff or defendant,[80] and it does not shift during the progress of the trial,[81] though the burden or duty of adducing evidence may shift.[82]

§ 2. *Relevancy and materiality.*[83]—Any fact is relevant which logically tends to prove or disprove a fact in issue,[84] and such fact is admissible,[85] unless some

common law cannot be presumed to prevail there, in the absence of proof of its law, in an action in Alabama. Watford v. Alabama & Florida Lumber Co. [Ala.] 44 So. 567.

79. See 7 C. L. 1520.

80. Walker v. Carpenter, 144 N. C. 674, 57 S. E. 461. Averment in replication to special plea that money claimed did not arise out of a partnership, but was a separate debt, casts the burden of proving it on the plaintiff. Hartzell v. Murray, 127 Ill. App. 608. Held to apply to one asserting that proceedings to secure a lien on personal property were fraudulent. Smith v. Berz, 125 Ill. App. 122. Burden of proving defense in confession and avoidance is on defendant. Bogart v. Tannebaum, 53 Misc. 310, 103 N. Y. S. 98. Where defendant counterclaims and an issue is raised thereon, the burden is upon him to establish his claim. Hollander v. Farber, 117 App. Div. 908, 102 N. Y. S. 506. In replevin suit by administrator to recover property from decedent's father, the burden was on defendant to prove his defense that he bought the property. Gibson v. Swofford, 122 Mo. App. 126, 97 S. W. 1007. Burden of showing lack of consideration for note and mortgage is on party seeking to invalidate them, since they import a consideration. Borden v. Lynch, 34 Mont. 503, 87 P. 609. In suit for money had, where defendant admitted receiving the money but claimed he retained it with plaintiff's permission to pay certain debts of plaintiff, the burden was on defendant to prove that defense. Bailey v. Porter, 30 Ky. L. R. 915, 99 S. W. 932. Where defendant in his answer states facts by way of a defense or in avoidance of the averments of the petition, the burden is upon him to establish such facts and not upon plaintiff to disprove them in making his case. Collier v. Munger [Kan.] 89 P. 1011. Evidence insufficient to sustain counterclaim for value of goods not returned in action for price of laundry work. West Side Laundry Co. v. Calumet Hotel Co., 103 N. Y. S. 820. A negative allegation to bring a case within an exception must be proved by defendant. Cleveland, etc., R. Co. v. Moore [Ind.] 82 N. E. 52.

81. The burden of proof does not shift during the trial but remains where it was fixed by the pleadings. Roberts v. Padgett [Ark.] 101 S. W. 753. The terms "prima facie" and "presumption" do not impart that the burden of the issue is changed, but that on the facts indicated the plaintiff is entitled to have his cause submitted to the jury under a proper charge as to the existence or nonexistence, and the effect of any presumption which may attach. Harper Furniture Co. v. Southern Exp. Co., 144 N. C. 639, 57 S. E. 458.

82. In an action on a note by the assignee defendant admitted its execution and pleaded want of consideration and transfer, after maturity, and that plaintiff was not a bona fide holder. The burden of proof was held to be upon defendant and did not shift upon introduction of proof of fraud in procuring the note and failure of consideration, though plaintiff was then obliged to adduce proof of bona fide holdership. Roberts v. Padgett [Ark.] 101 S. W. 753.

83. See 7 C. L. 1520.

84. The test of the admissibility of evidence is whether it has a tendency to effect belief in the mind of a reasonably cautious person who should receive and weigh it with judicial fairness. Brewer v. Cochran [Tex. Civ. App.] 17 Tex. Ct. Rep. 796, 99 S. W. 1033. Evidence is any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. Page v. Hazelton [N. H.] 66 A. 1049. It is relevant to put in evidence any circumstances which tend to make the propositions at issue either more or less probable. Todd v. German-American Ins. Co. [Ga. App.] 59 S. E. 94. Where there is a direct conflict in the evidence of witnesses relating to a material issue, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant. Shepherd v. Lincoln Trac. Co. [Neb.] 113 N. W. 627.

85. Held relevant: Whether it was dangerous to let seven empty cars down an incline of a certain height was relevant in an action for death of a minor servant riding on cars which were being let down under those circumstances. Woodstock Iron Works v. Kline [Ala.] 43 So. 362. On issue of reasonableness of railroad rates on a particular division, evidence of the through rate and the division thereof at each end was held admissible. E. L. Halliday Mill. Co. v. Louisiana & N. W. R. Co., 80 Ark. 536, 98 S. W. 374. On the question as to whether a note is forged, evidence as to the financial situations of the parties at the time of its alleged execution is admissible. Gregory v. Estate of Gregory, 129 Ill. App. 96. Letter containing continuing offer to purchase stock held admissible in action on contract resulting from acceptance, where it tended to sustain some, though not all, of the material allegations of declaration. Ellis Adm'r v. Durkee, 79 Vt. 341, 65 A. 94. In ejectment by one claiming under a deceased owner the answer alleged that at the time of giving the deed deceased was much impaired in mind and body and weak and incapable of properly caring for his property. Held the condition of the grantor's mind at the date of executing the deed was material. Doherty v. Courtney, 150 Cal. 606, 89 P. 434. Issue being whether a powder magazine which exploded on March 5, 1904, was a nuisance, proof of the condition of the magazine on February 18, 1904, was not too remote. Ker-

other specific rule of evidence forbids.[86] Where evidence is competent for one purpose, the fact that it tends to show a cause of action not pleaded does not render it inadmissible.[87] Evidence as to collateral matters, not directly in issue,[88] and not related to or connected with the transaction or matter in issue,[89] and furnishing no legal inference as to the truth or falsity, existence, or nonexistence, of facts in dispute,[90] is irrelvant and inadmissible.[91] To prove the existence or nature of a par-

baugh v. Caldwell [C. C. A.] 151 F. 194. Physician, suing for value of services, may show his high standing in his profession. Marshall v. Bahnsen, 1 Ga. App. 485, 57 S. E. 1006. Evidence tending to establish the issue is admissible though not of itself sufficient. Nugent v. Watkins [Ga.] 58 S. E. 888. Evidence of condition of orchard in December, in connection with proof that trees had not leaved out in the summer, is material on the issue of its condition in the spring. Leathers v. Geitz [Iowa] 112 N. W. 191. Where good faith of party to a deed given as security was in issue, proof of information on which he acted at the time was admissible though he acted thereon four years later. Ferguson v. Boyd [Ind.] 81 N. E. 71. Where pendency of divorce action was pleaded, papers in that action were admissible to show basis of contract on which suit was brought. Kinkead v. Peet [Iowa] 111 N. W. 48. In an action to recover on a promissory note, a copy of which is set forth in the petition, proof of loss of the note and of its execution and contents may be received though no mention of the loss is made in the petition. Bare v. Ford, 74 Kan. 593, 87 P. 731. Proof of an intention or preparation of a party to commit an assault may be shown. Conklin v. Consolidated R. Co. [Mass.] 82 N. E. 23. On issue of good faith of transfer of property to plaintiff before seizure under attachment as property of defendant, the fact that the bill of sale to plaintiff had been recorded on the day of its date, at a certain hour, was relevant. Gehlart v. Quinn, 35 Mont. 451, 90 P. 168. In action for damage to goods caused by bleaching liquid, defendant introduced proof that he had bleached some of the same goods without injuring them. Held evidence that the same fluid was used for all the goods was relevant. Davis v. Oakland Chem. Co., 105 N. Y. S. 693. Testimony of a practical bleacher that he had used the same fluid on goods without injuring them was also relevant. Id. Evidence that a claimant stated to a witness, at a time when he claimed a decedent was indebted to him, that he needed money and could not pay his note, and that he did not try to collect the alleged debt of decedent, had a tendency to prove that the alleged debt did not exist. Page v. Hazleton [N. H.] 66 A. 1049. In action for injuries to person struck by street car, motorman testified that he was running the car at three-fourths the maximum rate. Held evidence of a qualified witness who had tested the car as to its maximum speed was admissible. San Antonio Trac. Co. v. Haines [Tex. Civ. App.] 18 Tex. Ct. Rep. 606, 100 S. W. 788. In action for damages to shipment of cattle, held not error to allow witness to state that it was the general rule of railroads to transport cattle as quickly as possible. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 17 Tex. Ct. Rep. 571, 99 S. W. 152. Where there was a question whether a partnership contract covered a certain paint, proof of a custom covering the disputed matter was proper. Morgan v. Barber [Tex. Civ. App.] 17 Tex. Ct. Rep. 914, 99 S. W. 730. Where defendant testified to a cash payment of $2,400, evidence that she had shortly before been compelled to vacate the house she was occupying because of failure to pay rent was admissible to show inability to make alleged payment. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658. Where a judge was charged with having conspired with others to defeat and delay collection of taxes and with belonging to a party having that end in view, what he said and did prior to his election was admissible to sustain a charge as to acts after his election. Perry v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 180, 98 S. W. 411. Where delivery and validity of deed from husband to wife was questioned, a statement by the wife, prior to the husband's death, that he had given her all his property, was held competent as tending to show knowledge of and acceptance of the deed. Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 S. W. 198. Proof that steam escaped from an engine and obscured the engineer's view of the track on an occasion other than that in question held admissible without proof of similarity of conditions, the evidence not being of an experiment. Stone v. Union Pac. R. Co. [Utah] 89 P. 715.

86. All facts having rational probative value are admissible unless some specific rule forbids. Kirchner v. Smith, 61 W. Va. 434, 58 S. E. 614.

87. Evidence tending to show that plaintiff exercised ordinary care cannot be excluded because it likewise tends to show that master did not furnish him with a safe place within which to work, the latter question not being in issue. United States Wind Engine & Pump Co. v. Butcher, 126 Ill. App. 302.

88. If an issue raised by the pleadings is wholly immaterial, evidence in regard thereto should be excluded. Allen v. Ruland, 79 Conn. 405, 65 A. 138.

89. Proof of facts not shown to have any connection with any issue in the cause is properly excluded. Leathers v. Geitz [Iowa] 112 N. W. 191. Stock certificate held inadmissible where stock was in no way concerned in litigation. Jackson v. Gallagher [Ga.] 57 S. E. 750.

90. All evidence should be excluded which is incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. On issue of falsity of representations made to induce acceptance of trust deed, evidence that subsequently the grantor owned a valuable residence and corporate stock was irrelevant. Guthrie v. O. T. Lyon [Tex. Civ. App.] 17 Tex. Ct. Rep. 321, 98 S. W. 432. Evidence the rele-

ticular fact or transaction, or the intention of parties in a particular instance, evidence of wholly independent transactions,[92] such as those between parties other than

vancy of which is not made to appear is properly excluded. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 N. W. 577.

91. Held irrelevant: Evidence of the amount spent for labor in installing an equipment in a building is inadmissible to prove an element of the loss recoverable on insurance policy without proof of the reasonableness of such expenditures for labor. Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co. [C. C. A.] 148 F. 159. Evidence in action for injuries to child at railway crossing, tending to show abandonment of the road, held inadmissible. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 S. W. 162. Where the question whether railway company had been instructed as to kind of shipment to make was in issue, held proper to exclude testimony of shipping clerk that he would not have made shipment on credit, where it did not appear that he had authority to determine the kind of shipments. Smith v. Landa [Tex. Civ. App.] 18 Tex. Ct. Rep. 130, 101 S. W. 470. In action for purchase price of stock, whether stock could have a fictitious market value was irrelevant where there was no evidence that the stock in question had a fictitious market value. Commercial & Sav. Bk. v. Pott, 150 Cal. 358, 89 P. 43. Where witness stated he did not know whether a railroad coach in question contained a certain sign, it was proper to exclude his answer to a question as to the contents of signs ordinarily placed in cars as to standing on platforms. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Where contract was for jewelry cases that would look like "Field's," evidence as to the manner in which they worked was irrelevant. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S. E. 222. In action on a draft, the issue being whether plaintiff bank was the agent of the drawee, drawers being defendants, evidence as to the quality of apples for which draft was given was inadmissible. Shacklett v. Henderson County Sav. Bk. [Ky.] 100 S. W. 241. In an action to recover the value of land which defendant wrongfully refused to reconvey in accordance with an oral promise so to do, proof of friendly relations between the parties was irrelevant. Cromwell v. Norton, 193 Mass. 291, 79 N. E. 433. Where both parties testify to an express contract which excludes a general custom, evidence of such custom is inadmissible. Stearns v. Grand Trunk R. Co., 148 Mich. 271, 14 Det. Leg. N. 108, 111 N. W. 769. In action for price of building material, testimony of one who had figured the work for the seller as to what he figured was held irrelevant on issue of what contract called for. Rikerd Lumber Co. v. Hoertz, 146 Mich. 386, 13 Det. Leg. N. 809, 109 N. W. 664. In action for common-law negligence, ordinance offered by plaintiff, which he claimed defendant had violated, held properly excluded, no such violation being alleged. Fechley v. Springfield Trac. Co., 119 Mo. App. 358, 96 S. W. 421. Where evidence all tended to show that elevators which burned had been fired from the outside, evidence that spontaneous combustion was more liable to occur in elevators than other buildings was irrelevant. Aetna Ins. Co. v. Missouri Pac. R. Co., 123 Mo. App. 513, 100 S. W. 569. Summons in other action introduced to contradict a witness held inadmissible where there was no evidence which was contradicted thereby. Gunn v. Mumford [N. J. Err. & App.] 65 A. 989. In an action to recover the value of a horse alleged to have been killed by hard driving, whether the same distance had been covered by another with a single horse was irrelevant. Welch v. Fransioli [Wash.] 90 P. 644. Where witness testified that he had conducted a bakery on certain premises with profit, evidence that he had done so previous to the time when premises were mortgaged was irrelevant. Stillman v. Thompson [Conn.] 67 A. 528. Evidence as to rights of third person whom the judgment would not affect immaterial. Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534. Where plaintiff did not call upon defendant for an account but claimed damages for violation of particular contract declared on, on specific ground set up in petition, held that admission of evidence having in view settlement of accounts between the parties was erroneous. Mayville Canal Co. v. Lake Arthur Rice Mill. Co. [La.] 44 So. 260. In action for services in establishing alkali plant, where witness was permitted to state fully all the facts and to give his opinion as to insufficiency and obsolete character of plant as constructed, held proper to refuse to allow him to testify as to reasons for failure of negotiations for consolidation of works with those with which witness was identified. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241. On an issue as to whether a corporation has complied with an unambiguous written contract, a party is not entitled to go into the material affairs of the corporation and demand its records and papers. Doddridge County Oil & Gas Co. v. Smith, 154 F. 970. Where issue was whether horse was vicious, photographs of the horse on two occasions showing him at rest were irrelevant. Morgan v. Hendricks [Vt.] 67 A. 702. In action against a physician for malpractice in treating a broken leg, testimony of plaintiff's brother that he had furnished plaintiff with money to go to another city for treatment was immaterial. Sheldon v. Wright [Vt.] 67 A. 807.

92. Where defense in action for price of engine was breach of warranty, evidence that other engines built by plaintiff were unsatisfactory was irrelevant. Hammerschlag Mfg. Co. v. Struthers-Wells Co. [C. C. A.] 154 F. 326. Where issue was whether lumber sold came up to warranty, testimony of the seller that he had sold lumber of the same kind to other customers and never had any trouble with them was irrelevant. Hutchinson Lumber Co. v. Dickerson, 127 Ga. 328, 56 S. E. 491. In action for causing death by explosion of dynamite in breaking up iron machinery, defense was that work was done by an independent contractor. Evidence that this person worked for others the same way as for defendant was inadmissible. Falender v. Blackwell, 39 Ind App. 121, 79 N. E. 393. In action for damage to furniture being carted over a street alleged to be in a defective condition, testimony of a witness that

those connected with the transaction in issue,[93] is inadmissible unless a close similarity[94] or some connection[95] be shown, or unless such proof is introduced for the

she had observed other teams and loads at the place in question, and what the effect was in such other cases, was properly excluded. Yore v. Newton [Mass.] 80 N. E. 472. In action for negligent failure to furnish cars for carriage of goods, a requisition for cars on a different occasion was inadmissible. Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., 104 Md. 693, 65 A. 425. In action for damages for illegal sale of liquor to a certain person, proof of an illegal sale to another on the same day was inadmissible. Hilliker v. Farr [Mich.] 14 Det. Leg. N. 497, 112 N. W. 1116. In action to reform policy of insurance on ground of mistake, evidence that the agent who made it had made a similar mistake in another policy was irrelevant. Arnold v. Farmers' Fire Ins. Ass'n, 116 App. Div. 60, 101 N. Y. S. 132. In action for medical services rendered at request of defendant's station agent, the issue being the authority of the agent, evidence that in other cases since the time in question defendant had paid plaintiff for services requested by station agents was irrelevant. Hall v. New York, etc., R. Co., 27 R. I. 525, 65 A. 278. In action for damages to land flooded by a railroad embankment, evidence of the overflow of other lands not shown to be similar and similarly situated was inadmissible. Gulf, etc., R. Co. v. Caldwell [Tex. Civ. App.] 18 Tex Ct. Rep. 539, 102 S. W. 461. In action for slander for charging plaintiff with having whipped her mother, evidence of specific instances of verbal quarrels between plaintiff and her mother was held inadmissible to prove the truth of the charge of whipping. Earley v. Winn, 129 Wis. 291, 109 N. W. 633. In trial of charges against police officer for failure to close a disorderly house, the defense was that the police commissioner's secretary had ordered him not to proceed. Held evidence that he had taken and obeyed orders from the secretary in other similar cases was admissible. People v. Bingham, 121 App. Div. 593, 106 N. Y. S. 330. In condemnation, evidence of existence of coal on neighboring land was inadmissible to show existence of coal in land in question. Eldorado, etc., R. Co. v. Sims, 228 Ill. 9, 81 N. E. 782.

93. In action for services rendered to a decedent during his last illness, evidence of what the administrator paid others for similar services was irrelevant. Gillespie v. Campbell [Ala.] 43 So. 28. On issue of value of services of man and teams, evidence of what the witness' father paid for teams was irrelevant. Maurice v. Hunt, 80 Ark. 476, 97 S. W. 664. In action by physician for services, what he charged another is irrelevant. Marshall v. Bahnsen, 1 Ga. App. 485, 57 S. E. 1006. In action to recover money paid to an attorney, evidence that the attorney had failed to pay over money collected for others was irrelevant. Paul Jones & Co. v. Gilbert, 117 App. Div. 775, 102 N. Y. S. 983. In proceeding to review action of police commissioner in dismissing a policeman for threatening another over the telephone, evidence that there had been an altercation between policemen, one of whom was the relator (who was dismissed) on the previous day, was irrelevant. People v. McAdoo, 117 App. Div. 438, 102 N. Y. S. 656. In action for legal services, evidence of what was paid to another attorney in the same case is inadmissible. Heblich v. Slater, 217 Pa. 404, 66 A. 655. In action against two companies for injuries received by a passenger on the car of one which collided with the train of the other, evidence that the former company had settled with same passengers for injuries received was inadmissible. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83, 99 S. W. 867. In an action on a lost note, execution of which was denied, held error to allow third person to whom note was delivered to state that he was given some money at the same time. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 So. 112. Where contract of construction of waterworks system spoke for itself, other contracts with other persons, and reports thereunder, prior to the execution of the contract in question, were inadmissible to explain contract in issue. Langford v. Manchester [Mass.] 81 N. E. 884.

94. Where delay in shipping cattle was basis of action, witness was properly allowed to state in what time prior shipments over same route had been made. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 17 Tex. Ct. Rep. 571, 99 S. W. 152. In action for loss of goods claimed to have been in a certain box, evidence that goods of the same amount and description had been packed by witnesses in a similar box was relevant. Mussellam v. Cincinnati, etc., R. Co. [Ky.] 104 S. W. 337. In action for damages for destruction of crop of potatoes by a flood, evidence of the yield on other lands similarly situated, and having similar soil, and proof of yields in former years on the land flooded, was relevant. Dennis v. Crocker-Huffman Land & Water Co. [Cal.] App.] 91 P. 425. In action for damages for breach of pasturage contract by failure to supply water, evidence as to condition of another pasture was held admissible in connection with evidence as to the condition of the two lots of cattle pastured in the two pastures. Tuttle v. Robert Moody [Tex.] 17 Tex. Ct. Rep. 161, 97 S. W. 1037. Action for negligently issuing a torn transfer ticket to plaintiff, on presentation of which plaintiff was ejected from a car. It appeared that plaintiff bought two tickets at the same time, one being given to his companion. There was proof of the manner in which the tickets were cut and their appearance. Held the other transfer was admissible to show how the torn one would look when issued and to explain how it became torn. Montgomery-Trac. Co. v. Fitzpatrick [Ala.] 43 So. 136. In action to recover for grading, held proper to show by witnesses familiar with the work what "surfacing" meant and whether it was necessary in the grading done, and what was customary in such cases, and what the customary charges were. Henderson-Boyd Lumber Co. v. Cook [Ala.] 42 So. 838.

95. Issue being validity of assignments and genuineness of signatures thereon, proof that names of witnesses and of children were forged as well as that of insured, was

purpose of showing a course of business [96] or a fraudulent intent.[97] If evidence, though relevant, is so remote as to have little or no evidenciary value, it may be excluded; [98] the admission or exclusion of evidence of this character is largely discretionary with the trial court.[99]

On the issue of negligence, alleged as the cause of injury, evidence of other similar accidents or occurrences is inadmissible [1] except to show notice.[2] To prove the

competent, all being a part of the same transaction. Illch v. Mutual Benefit Life Ins. Co., 104 N. Y. S. 297.

96. On issue whether money was loaned to a corporation or to its president, to whose order checks for the money had been made payable, evidence of a similar prior transaction in which the corporation had ratified the deal and repaid the money without protest was admissible. Martin & Co. v. Logan, 30 Ky. L. R. 799, 99 S. W. 648. In action on partnership note, signed by one partner, a contract relating to the partnership business signed by the partner who signed the note, and in the same way, was admissible, in connection with evidence tending to show that this partner sometimes signed contracts of he firm in his own name. Churchill v. Mace, 148 Mich. 456, 14 Det. Leg. N. 213, 111 N. W. 1034.

97. On issue whether claim by constable was fraudulent, claims presented in other cases similar in character were held admissible to show systematic scheme to defraud county. McGuire v. Iowa County, 133 Iowa, 636, 111 N. W. 34. Where fraud in selling stock at par and representing that that was its value was alleged, it was proper to show that at the same time defendant was offering stock at 55 cents on the dollar. Gilluly v. Hosford [Wash.] 88 P. 1027. Action to recover money alleged to have been obtained by means of confidence game, conspiracy between defendants being alleged. Held evidence regarding other transactions of the same character wherein defendants acted in c ncert was admissible. Stewart v. Wright [C. C. A.] 147 F. 321. Where fraud is alleged considerable latitude is permissible in the introduction of testimony, even when it is only remotely connected with the transaction in question. Fraud cannot always be proved by direct evidence. Dantzler v. Cox, 75 S. C. 334, 55 S. E. 774. Acts of a party similar to the one under investigation may be offered for the purpose of showing the knowledge, intent, or design of such party which are elements of his fraudulent conduct toward the other party. Crosby v. Wells [N. J. Err. & App.] 67 A. 295. Offers to other persons of oil shares, and what plaintiff said about such shares, held relevant where defendant set up fraud by plaintiff in sale of shares to him (defendant). Id. In action for fraudulent representations in procuring an application and note for premium of life insurance policy, proof of similar representations made to others for the same purpose was admissible on the issue of intent. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 N. E. 595. In action for breach of warranty of variety of seed wheat sold, where there was evidence that defendant had no wheat of the variety which it was claimed, and which he denied he had warranted that sold to be, evidence that he had sold wheat to others and had made the same warranty to them was admissible. Moody v. Peirano [Cal. App.] 88 P. 380.

98. On issue of whether will was executed under undue influence, evidence regarding acts of defendant several years before was held too remote and irrelevant to establish undue influence by him at the time the will was made by testatrix. Vannest v. Murphy [Iowa] 112 N. W. 236. In action for libel for publishing statement that a woman had a record known to the police at the time of her marriage, testimony by persons who were policemen two or three years before her marriage was admissible; testimony of persons who were policemen after that time but before publication of the alleged libel was inadmissible. Harriman v. New Nonpareil Co., 132 Iowa, 616, 110 N. W. 33. Value of corporate property being in issue, a speech of the president calling attention to profits and proof of such profits several years after the time in question was inadmissible. People v. Barker, 121 App. Div. 661, 106 N. Y. S. 336. Mortgage given five years prior to deed in question held irrelevant on issue whether description in deed included a particular tract. Goyette v. Keenan [Mass.] 82 N. E. 427. In action for injuries caused by horse becoming frightened by an automobile, evidence of condition of highway 300 feet from place where accident occurred held too remote. Strand v. Grinnell Automobile Garage Co. [Iowa] 113 N. W. 488.

99. If evidence is relevant, the fact that it is remote does not make its admission error. Page v. Hazleton [N. H.] 66 A. 1049. The introduction of irrelevant [remotely relevant?] testimony must be left largely to the discretion of the trial court. Dantzler v. Cox, 75 S. C. 334, 55 S. E. 774. Code Civ. Proc. Cal. §§ 1868, 1870, 1958, 1960, provide that evidence must be relevant to the question in dispute, and that evidence of any facts may be given from which a fact in issue is logically inferrable. Held that the admission of collateral facts to prove a fact in issue is largely discretionary and will not be reversed if the admitted evidence has any tendency to prove a disputed fact. Moody v. Peirano [Cal. App.] 88 P. 380.

1. On the issue of contributory negligence, evidence on the question as to whether or not plaintiff at other times suffered a similar injury is inadmissible. Chicago & A. R. Co. v Johnson, 128 Ill. App. 20. In personal injury cases upon an issue as to the cause of plaintiff's injuries, testimony as to the cause f a similar injury to another person is inadmissible. City of Chicago v. Saldman, 129 Ill. App. 282. In cases of negligence the evidence must be confined to the time, place, and circumstances of the injury in question, and the fact that the same person has been guilty of negligence on certain other specified occasions can have no legitimate bearing upon the question of his carelessness or competency at the time in controversy.

existence of a certain condition or state of facts at a certain time, evidence of the condition or situation before or after the time in question is admissible,[3] if not too remote,[4] and when it appears that no substantial change has taken place.[5] Proof of conditions at places other than that in question is inadmissible, unless a close similarity or some other connection is shown.[6] Proof of what is usually or customarily done under the same circumstances is held admissible on the issue of negligence,[7]

Damren v. Trask [Me.] 65 A. 513. In action for injuries received by workman in a cinder pit, evidence that a similar accident occurred in the pit a month later, and that another pit not shown to be similar, had a certain barrier was held inadmissible. Atchison, etc., R. Co. v. Dickens [Ind. T.] 103 S. W. 750. In action for injuries caused by electric shock while using a telephone, testimony that witness had received a shock while using another telephone in the same city at another time was inadmissible. Brucker v. Gainesboro Tel. Co., 30 Ky. L. R. 1162, 100 S. W. 240. Where question is whether a person has been negligent in doing or failing to do a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence or even habitually negligent on similar occasions. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 S. W. 162. In action for personal injuries, evidence of a prior statement of a witness that he nearly lost both hands in the morning was held inadmissible in the absence of proof showing a similarity of circumstances with the accident in suit. Loughlin v. Brassil [N. Y.] 79 N. E. 854. In action against telephone company for failure to deliver a call, evidence of other acts of negligence was irrelevant. Sabine Valley Tel. Co. v. Oliver [Tex. Civ. App.] 18 Tex. Ct. Rep. 579, 102 S. W. 925.

2. Evidence of previous similar injury to another held admissible to show whether shaft was dangerous. McGinnis v. R. M. Rigby Printing Co., 122 Mo. App. 227, 99 S. W. 4. Evidence that others of about plaintiff's age had been injured by machine which injured plaintiff held admissible to show notice. Leathers v. Blackwell Durham Tobacco Co., 144 N. C. 330, 57 S. E. 11. Evidence that several other people had fallen at a coal hole in the walk held admissible as tending to show the place dangerous and to raise a presumption of knowledge of its character. City of Chicago v. Jarvis, 226 Ill. 614, 80 N. E. 1079. In an action for damages based on statute making the owner of an animal liable for all damages caused by the animal when suffered to remain at large by the owner, evidence that the bull which caused the damage had escaped through a fence three times before was admissible as tending to show that the owner suffered him to be at large. Hadtke v. Grzyll, 130 Wis. 275, 110 N. W. 225. In action for injuries caused by the kick of an alleged vicious horse, proof of previous acts of viciousness was competent to show notice to the owner of the habit of the animal. Morgan v. Hendricks [Vt.] 67 A. 702. In action for injuries to a person's hand caught between two cars passing on parallel tracks, evidence that similar cars had been seen and felt to scrape in passing at the place in question was admissible. Staples v. Rhode Island Suburban R. Co. [R. I.] 67 A. 431.

3. In action for injuries from falling over coal hole, proof of its condition an hour and a half later was admissible, since there was no evidence of a change in its character. City of Chicago v. Jarvis, 226 Ill. 614, 80 N. E. 1079. Testimony of doctor as to condition of plaintiff several months after accident is admissible where other testimony shows that such condition existed since the accident but not prior thereto. Hanchett v. Haas, 125 Ill. App. 111. Amount of work done by housewife before and after she was injured held admissible to show extent of injury and its effect. Patton v. Sanborn, 133 Iowa, 650, 110 N. W. 1032. Evidence of defective condition of engine before and after an accident admissible on the issue of its defective condition at the time, and also (as to prior condition) to show notice by the company. Union Pac. R. Co. v. Edmondson [Neb.] 110 N. W. 650. It is error to exclude testimony as to the condition of a room immediately prior to and after the accident. Pana Coal Co. v. Becker, 130 Ill. App. 40.

4. Condition of planks taken out of a walk soon after an accident caused by defect in walk may be shown on issue of condition of walk at time of injury. Patton v. Sanborn, 133 Iowa, 650, 110 N. W. 1032.

5. In action for injuries caused by alleged defective machinery, evidence of an expert that the machinery worked well at a particular time was admissible where there was also evidence that the condition of the machinery at that time was the same as at the time of the accident. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809. Where it is charged that deceased was killed by coming into contact with primary wire, evidence that another person received a shock by coming into contact with secondary wires after primary current had been cut off is inadmissible. Goddard v. Enzler, 123 Ill. App. 108. See 222 Ill. 462, 78 N. E. 805. In action for injuries caused by alleged defective machine, where there was evidence of material changes in the machine since the accident, it was held error to admit evidence that the machine worked well at the time of trial. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809.

6. In action for injuries caused by defect in sidewalk, plaintiff may show poor condition of walk in the close vicinity and is not confined to the particular board which caused the injury. Thompson v. Poplar Bluff [Mo. App.] 101 S. W. 709. Where injuries in suit were caused by fall of part of roof of round house, evidence that other parts of the roof similarly situated were out of repair was admissible. Lamb v. Philaldelphia & R. R. Co., 217 Pa. 564, 66 A. 762.

7. Evidence as to usual and ordinary mode of fastening pile drivers held admissible on issue of negligence in fastening a pile driver whereby an injury was caused. Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789. Proof of a general custom of street cars

but not to excuse negligence.[8] Proof of repairs or other precautions to prevent injury subsequent to the occurrence in question is excluded on the issue of negligence,[9] but may be competent to show the practicability of maintaining the place in question in a condition of safety.[10]

On the issue of the market value of land or other property, evidence of sales in the usual course of business of other similarly situated property in the vicinity is admissible;[11] proof of mere offers,[12] or of a price asked by an owner,[13] or of a price received at a forced or tax sale,[14] is inadmissible. The price actually paid[15] or agreed to be paid[16] is some evidence of the value of property at the time, but is not evidence of market value at another place or time.[17] In condemnation proceedings, what the petitioner paid for other property may not be shown.[18]

stopping to allow steam trains to pass held proper in collision case. Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 18 Tex. Ct. Rep. 88, 99 S. W. 869. Customary speed of car may be shown as tending to show speed at a particular time. Lord v. Manchester St. R. Co. [N. H.] 67 A. 639.

8. Previous course of defendant with reference to inspection and repair of belt lacing held irrelevant on issue of due care where a particular belt broke. Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 A. 4.

9. Proof of repairs after an accident is inadmissible. Matteson v. New York, etc., R. Co. [Pa.] 67 A. 847. Where negligence alleged was maintenance of platform too small to accommodate passengers and traffic proof that after accident, wherein a passenger was crowded off, the platform was enlarged was held proper to show practicability of maintaining larger one, but not to show negligence. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507.

10. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507.

11. Value or market price of an article may be proved by direct or circumstantial evidence or both. Atlantic Coast Line R. Co. v. Harris, 1 Ga. App. 667, 57 S. E. 1030. Sales of land similarly situated and prices paid may be shown. Eldorado, etc., R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281. Market value of property may be shown by public sales of the same in the ordinary course of business. Rau v. Seidenberg, 53 Misc. 386, 104 N. Y. S. 798. Evidence of the price at which land is actually sold is relevant upon the question of market value at the time. Wolff v. Meyer [N. J. Law] 66 A. 959. While the value or selling price of similar property may be taken into consideration in determining the value of the piece of property in litigation, it is well settled that the character and location of such property should be similar and the sales reasonably near in point of time to the time when the value of the property in litigation is in question. Hewitt v. Price, 204 Mo. 31, 102 S. W. 647. In action for depreciation in value of property caused by railroad and appurtenances operated near it, where a witness testified that he had bought property in the vicinity in the year the road was built at a certain figure, evidence of a value placed on the property in a deal three years before, conditions not being shown the same, was too remote. Dallas, etc., R. Co. v. Langston [Tex. Civ. App.] 17 Tex. Ct. Rep. 316, 98 S. W. 425.

12. Offers cannot be proved either by the offerer or offerree. Chicago, etc., R. Co. v. Alexander [Wash.] 91 P. 626. Offers for similar lands in vicinity held inadmissible as hearsay in condemnation proceedings. Yellowstone Park R. Co. v. Bridger Coal Co., 34 Mont. 545, 87 P. 963. Specific offers to purchase property are inadmissible on issue of value, in action for breach of contract of sale of house. Horner v. Beasley [Md.] 65 A. 820. Evidence of isolated sales or offers is not competent on the value of personalty. Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 S. W. 453. On issue of damages to lot by change of grade of alley, testimony of witness that he would not buy lot after the change, though he had thought of buying it, was improper. McMillen v. Columbia, 122 Mo. App. 34, 97 S. W. 953.

13. What plaintiff would or would not take for his property is no criterion of market value. Town of Vernon v. Edgeworth [Ala.] 42 So. 749. In condemnation proceeding, owner of land in vicinity cannot testify as to what he holds his land at. Chicago, etc., R. Co. v. Alexander [Wash.] 91 P. 626.

14. Actual market value cannot be shown by what property would bring and usually brought at tax sales. Stark v. Cummings, 127 Ga. 107, 56 S. E. 130.

15. Price paid for property at actual bona fide sale is presumptive evidence of value. Rathbone v. Ayer, 105 N. Y. S. 1041. In action against county on contract to purchase a turnpike, evidence of the original cost of construction of the road, and what the construction would cost when the county took it was admissible on the issue of the value of the road when taken. Nelson County v. Bardstown & L. Turnpike Road Co., 30 Ky. L. R. 1254, 100 S. W. 1181.

16. Contract price is some evidence of value where action for goods is on the common counts for value. Lehigh v. Standard Tie Co. [Mich.] 14 Det. Leg. N. 283, 112 N. W. 481.

17. In action for injuries to cattle shown to have market value at destination, evidence of what plaintiff paid was immaterial. Missouri, etc., R. Co. v. Garrett [Tex. Civ. App.] 96 S. W. 53.

18. What railroad paid for right of way over land a half mile distant is irrelevant. Eldorado, etc., R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281. Error to allow defendant to show what petitioner and other roads paid per acre for other lands in the vicinity.

Proof of specific acts is inadmissible to prove the reputation of a person,[19] but such proof is competent where a person's character is in issue,[20] but by some courts it is held that character cannot be proved by specific acts but only by proof of reputation.[21] A person's habits of intoxication cannot be proved to contradict direct testimony that he was not intoxicated at a particular time.[22]

§ 3. *Competency or kind of evidence in general.*[23]—Where one party has introduced evidence of a certain kind or relating to a particular matter without objection, the other party may introduce similar evidence in a rebuttal,[24] though such evidence should have been excluded on the ground of incompetency or irrelevancy if a proper objection had been made in the first instance.

§ 4. *Best and secondary evidence.*[25]—What is the best evidence of a fact to be proved depends upon the nature of the fact and the circumstances of the case.[26] Evidence which carries on its face no indication that better evidence exists is not

Chicago & A. R. Co. v. Scott, 225 Ill. 352, 80 N. E. 404. In a condemnation proceeding, what the condemning party paid for other lands is inadmissible. Union R. Co. v. Maulden [Tenn.] 102 S. W. 342 [advance sheets only]. See, also, Eminent Domain, 9 C. L. 1073.

19. Specific instances, even of same act as that charged in an alleged slander, held inadmissible to prove reputation of plaintiff in action for slander. Earley v. Winn, 129 Wis. 291, 109 N. W. 633.

20. In habeas corpus proceeding by mother to recover a child which had been placed in an orphans' home, on the ground that the mother was notoriously immoral and unfit to bring up the child, proof of the reputation of the mother, and of specific acts of immorality, was held competent. Moore v. Dozier [Ga.] 57 S. E. 110.

21. Colburn v. Marble [Mass.] 82 N. E. 28.

22. Hamsy v. Mudarri [Mass.] 81 N. E. 266.

23. See 7 C. L. 1528.

24. Indianapolis Trac. & T. Co. v. Romans [Ind. App.] 79 N. E. 1068; Fetter v. Zeller, 104 N. Y. S. 229; Milhous v. Southern R. Co. [S. C.] 57 S. E. 474; Douglas Land Co. v. Thayer Co. [Va.] 58 S. E. 1101. A party who has introduced evidence on a certain issue cannot object to evidence of the same kind by the other party on the ground that it is inadmissible under the pleadings. Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513. In action for damages to land, defendants proved that plaintiffs had stated they would take a sum less than that claimed in the suit. Held competent for plaintiffs to show that sum named was to be received in case of a compromise with all parties. Jones v. Cooley Lake Club, 122 Mo. App. 113, 98 S. W. 82. Where all or part of a conversation is put in evidence by one party, the other is entitled to explain, vary, or contradict it. Stanley v. Beckham [C. C. A.] 153 F. 152. Where suit was based on contract and one party had placed in evidence his interpretation of it, the other was entitled to introduce the contract in its entirety. Holt v. Zwisohn, 51 Misc. 576, 101 N. Y. S. 191. Written memorandum of proposed contract held admissible as part of negotiations and conversations though unsigned. Chilcott v. Washington State Colonization Co. [Wash.] 88 P. 113. Where a writing was introduced on the cross-examination of plaintiff and both parties were examined as to their understanding of it, and the court was not asked to construe it, one of the parties could not object to such evidence. Whitney v. Haskell, 216 Pa. 622, 66 A. 101. Where a claimant to sustain his claim against a decedent's estate introduced entries from decedent's account-book, other entries rebutting the inference sought to be drawn therefrom were competent on the part of the executor. Page v. Hazleton [N. H.] 66 A. 1049.

25. See 7 C. L. 1529.

26. Record of entries of credits on mortgage is best evidence of such credits. Baker v. Cotney [Ala.] 43 So. 786. Bank books are the best evidence of a depositor's account; not a statement of the account. Berry v. Joiner [Tex. Civ. App.] 18 Tex. Ct. Rep. 282, 101 S. W. 289. Where corporate minutes showed employment of secretary and stated when his employment should begin but failed to state the amount of salary or when it should be paid, oral evidence was competent to show the omitted facts. Grath v. Mound City Roofing Tile Co., 121 Mo. App. 245, 98 S. W. 812. Declaration of plaintiff that he felt no pain, made to physician, held properly excluded where plaintiff himself testified fully as to his pain and injuries. Goodwyn v. Central of Georgia R. Co. [Ga. App.] 58 S. E. 688. A certificate of the pedigree of a sow, issued by a breeders' association, and authenticated by the secretary and seal of the association, is competent evidence that the sow is a thoroughbred. Warrick v. Reinhardt [Iowa] 111 N. W. 983. Copy of **telegram** as sent admissible without notice to defendant to produce original where counsel stated defendant did not have the original, having never received it. Kohl v. Bradley, Clark & Co., 130 Wis. 201, 110 N. W. 265. In action for damages for delay in delivering a message, "relay messages" were inadmissible, since, if copies, the originals were not accounted for, and if original records, it was not shown that they came from the proper custody or were correct. Buchanan v. Western Union Tel. Co. [Tex. Civ. App.] 18 Tex. Ct Rep. 45, 100 S. W. 974.

Photographs, whether introduced to represent the originals, or as demonstrative evidence, are the best evidence of what appears on them. Physician cannot testify to what he saw on an X-ray photograph. Elzig v. Bales [Iowa] 112 N. W. 540.

objectionable as secondary,[27] but evidence which shows on its face that there exists better or more original evidence cannot be introduced without first accounting for such other evidence.[28] Thus, oral evidence cannot be substituted for any instrument which the law requires to be in writing,[29] or for any written evidence of a contract which the parties have reduced to writing,[30] or for any writing the existence or contents of which is disputed and which is material to the issues raised.[31] Oral evidence is usually held incompetent to prove facts shown by original entries in books of account,[32] though a summarization of complicated accounts is usually permitted.[33] Similarly, copies of writings cannot be substituted for originals, when it does not appear that the originals cannot be produced.[34]

The rule under discussion, however, requires only that the best evidence available shall be produced. Thus, secondary proof is admissible of facts which have been reduced to writing or made a matter of record, when the proper foundation has been

27. Where a loan to a deceased was not based on a written contract, it is provable by verbal admissions to third parties. Schell v. Weaver, 225 Ill. 159, 80 N. E. 95. Oral proof of presentation of claim against estate and payment thereof held not objectionable as not the best evidence though the claim was filed. Joyce v. Joyce [Conn.] 67 A. 374. Third person with interest may prove that title pleaded to oust him is simulated, and parol evidence is competent for that purpose. Lyons v. Lawrence, 118 La. 461, 43 So. 51. Oral evidence is competent to show the performance of a religious marriage ceremony between certain parties. Even if a writing is required, oral testimony is competent and is the best evidence of the identity of the parties. Massuco v. Tomasi [Vt.] 67 A. 551.

28. Where it did not appear that stenographer's notes of testimony of deceased witness could not be procured, it was proper to reject testimony of a witness who heard the deceased witness testify. Studebaker v. Faylor [Ind. App.] 80 N. E. 861. Parol proof of letter and printed matter on letter head held incompetent where no foundation was laid. Bush v. McCarty Co., 127 Ga. 308, 56 S. E. 430. In action for injuries to crops and land by reason of diversion of water, oral proof of what appeared on a topographical map prepared by the U. S. government survey was incompetent. Evansville & Princeton Trac. Co. v. Broermann [Ind. App.] 80 N. E. 972. In an action to charge defendant with assets of plaintiff's debtor, a tabulated statement of all assets received from defendant and all liabilities assumed under contract with defendant was held inadmissible, defendant's books being the best evidence. Barrie v. United Rys. Co., 125 Mo. App. 96, 102 S. W. 1078. Verbal statement of counsel as to contents of instrument cannot be taken as evidence; the instruments, or records, or certified copies, should be produced. Volhard v. Volhard, 104 N. Y. S. 578. Where contents of letters were sought to be shown in order to show the sanity of the writer, the letters themselves were the best evidence. Heath v. Slaughter, 127 Ga. 747, 57 S. E. 69. Parol evidence is inadmissible to show the powers or character of a corporation, the best evidence thereof being the articles of incorporation. Oral proof that corporation was charitable organization inadmissible. Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n [Utah] 88 P. 691.

29. Parol evidence is incompetent to prove or destroy legal title to real property. Tutwiler Coal, Coke & Iron Co. v. Wheeler [Ala.] 43 So. 15; Munsey v. Hanly [Me.] 67 A. 217. But possession and parol evidence of title suffices to prove ownership of land. Missouri K. & T. R. Co. v. Green [Tex. Civ. App.] 99 S. W. 573. Declarations of subordinate employes of railroad held incompetent in action to establish title to railroad right of way Perkiomen R. Co. v. Kremer [Pa.] 67 A. 913.

30. Bill of lading. Texas Cent. R. Co. v. Fowler [Tex. Civ. App.] 18 Tex. Ct. Rep. 564, 102 S. W. 732.

31. Witness may not testify that a certain act was contrary to rules of railroad company, the rules themselves being the best evidence. Barschow v. Lake Shore & M. S. R. Co., 147 Mich. 226, 13 Det. Leg. N. 1060, 110 N. W. 1057.

32. Davis v. Royal Arcanum Sup. Council [Mass.] 81 N. E. 294; Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513. But see § 7b, post, as to when entries are secondary proof.

33. See 7 C. L. 1531, n. 51.

34. Copy of bill of lading. Morris & Co. v. Southern Shoe Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 564, 99 S. W. 178. Three bills of lading were made, one signed by shipper and sent to auditor of company, one received by the shipper, and the third, on which signatures were copied, was filed. Held, third was a copy, inadmissible without proof of loss of originals. Walker v. So. R. Co. [S. C.] 56 S. E. 952. Execution of contract being in issue, and plaintiff having introduced a letter claimed to have been received from defendant relating to the contract, and defendant having denied the writing or sending of the letter and having offered a copy of a letter which he claimed to have sent, it was held error to admit the copy without accounting for original. Barton-Parker Mfg. Co. v. Miller Mercantile Co., 18 Okl. 137, 89 P. 1128.

Carbon copy of letter held incompetent where it appeared that original had been received by addressee and was at his office in another city, and that no effort had been made to obtain it. State v. Teasdale, 120 Mo. App. 692, 97 S. W. 995.

laid,[35] as by showing that the original written or documentary evidence has been lost or destroyed,[36] and that diligent but fruitless search has been made for it [37] in places where it was most likely to be found,[38] or that it is in the possession of the adverse party or his attorney [39] who has failed to produce it after notice to do so,[40] and that

35. Held proper, as preliminary to proof of contents of ledger which was destroyed, to ask witness if it contained an account with a certain person. Luty v. Cresta [Cal. App.] 88 P. 642. Under Hurd's Rev. St. 1905, c. 30, § 35, and c. 109, § 2, location of lots cannot be proved by secondary evidence without preliminary proof that the original plat is not in the control of the party offering it. People v. Wiemers, 225 Ill. 17, 80 N. E. 45.

36. Choctaw R. & Lighting Co. v. McAlester [Ind. T.] 104 S. W. 821; Fuller v. Keesee [Ky.] 104 S. W. 700; Kries v. Holladay-Klotz Land & Lumber Co., 121 Mo. App. 184, 98 S. W. 1086; International & G. N. R. Co. v. Lynch [Tex. Civ. App.] 17 Tex. Ct. Rep. 97, 99 S. W. 160. Where records in adoption case were lost, the fact that there was a decree could be established by evidence that the clerk of the court read such decree to witness, though the contents could not be proved by the witness, he never having read the decree. Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767. Where order of publication in tax lien case and certified copy given the printer were both lost, it was proper to admit the files of the paper containing the published order, where the editor testified that the published order was a correct copy of the copy given him by the clerk for publication. Davis v. Montgomery [Mo.] 103 S. W. 979. Where city established a sewer district and made an estimate and map, which were lost, parol evidence was competent to show the original plan so as to enable the city to carry it out. Silva v. Newport [Ky.] 104 S. W. 314. Contents of court files and records in adoption proceedings provable by parol, records having been burned. Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767. Where affidavit of tax collector acompanying delinquent tax list had been lost, oral evidence to establish it was competent, Kirby's Dig. § 7083, not requiring that it be recorded. Brasch v. Western Tie & Timber Co., 80 Ark. 425, 97 S. W. 445. Memoranda from which will was made, having been destroyed (will also having been destroyed), oral proof was competent to show contents. In re Roger's Will [Vt.] 67 A. 726. Where bills of fare had been destroyed, parol proof that a certain person's name appeared at the head of them was competent on the issue of ownership of the restaurant. North American Restaurant & Oyster House v. McElligott, 227 Ill. 317, 81 N. E. 388. Where it appeared that an inventory of stock had been kept in accordance with the terms of an insurance policy, and that after a fire the inventory had been turned over to an adjuster and had been lost, parol proof of the inventory was competent. Arkansas Mut. Fire Ins. Co. v. Woolverton [Ark.] 102 S. W. 226. Fire policy required insured to keep books showing condition of business. In action on policy, it appearing that a cash book was lost, cash sales were provable by other books, supplemented by parol evidence. McMillan v. Insurance Co. [S. C.] 58 S. E. 1020.

37. In scire facias on a bail bond, the bond having been lost or misplaced and not being found after diligent search, secondary proof of its contents was admissible without substitution of the bond. Day v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 166, 101 S. W. 806. Where attorney testified that title bond had been given him to record, that he had mislaid it and had searched for but could not find it, and that it was not intentionally concealed, oral evidence of its contents was competent. Burkhart v. Loughridge, 30 Ky. L. R. 303, 98 S. W. 291. To establish the execution of a deed by circumstances, predicate must be laid by proof of a search for the deed and inability to find it. Punchard v. Masterson [Tex. Civ. App.] 103 S. W. 826. Mere statement of party that he could not find letters held not to make secondary proof of their contents admissible. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71. A mere showing that inquiry was made "among his kinsfolk" for a last deed was held insufficient to warrant proof of the contents of the deed by parol. Taliaferro v. Rice [Tex. Civ. App.] 18 Tex. Ct. Rep. 865, 103 S. W. 464. Oral testimony as to contents of letters which witness said had passed between him and another held incompetent where witness merely said he did not have the letter, but did not say what had become of it. Bagnell Tie & Timber Co. v. Goodrich [Ark.] 102 S. W. 228. Copies of letters held inadmissible because no sufficient search for originals shown. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768. Mere evidence by a constable that he does not know what has become of one of the notices which he posted of the sale of property levied upon does not authorize parol proof of the contents of the paper. O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 S. E. 739. Proof that trustee to whom mortgage was delivered did not know where it was, but that his last recollection was that it was in a safe at a store, and that person who had charge of papers in the store had destroyed many papers thought to be worthless, but that he did not know whether mortgage was among them, held insufficient to warrant secondary proof of mortgage. McEntyre v. Hairston [Ala.] 44 So. 417.

38. Secondary proof of contents of letter held incompetent where only preliminary proof was search among the files in the action for it. McGill v. Fuller & Co. [Wash.] 88 P. 1038. In action on indemnity policy, plaintiff proved that it had carried insurance for a number of years, renewing its policies from year to year. It also proved that after a thorough search among its papers and books the policy could not be found. Held the policy for the preceding year, offered as a copy except as to dates, was admissible without proof of search among private papers of officers of the corporation plaintiff. Edgefield Mfg. Co. v. Maryland Casualty Co. [S. C.] 58 S. E. 969.

39. Where evidence showed that original notices had been served on railroad com-

the secondary evidence, if a copy, is correct and properly authenticated.[41] Whether a proper foundation has been laid for the introduction of secondary evidence is a matter resting largely in the discretion of the trial court.[42] The existence, execution, and genuineness of a writing must usually be shown before secondary proof of its contents is admissible.[43] For this purpose the genuineness of a writing may be established by direct or circumstantial evidence.[44]

pany, and that plaintiff had kept exact copies, the copies were competent. Chicago, etc., R. Co. v. Fitzhugh [Ark.] 100 S. W. 1149. Contents of letter may be shown by secondary evidence where the party offering it does not have possession or control over the original, or legal means of procuring it. White v. White [Kan.] 90 P. 1087. Plaintiff's testimony that he had executed a deed held competent against himself in an action of ejectment, where it appeared deed was executed and unrecorded and that grantee was a nonresident, the presumption being that deed was in grantee's possession. Sellers v. Farmer [Ala.] 43 So. 967. Insured gave insurer's agent a list of articles destroyed, after a fire, and requested it to be returned, which was not done. Held duplicate was admissible in action on policy. Spring Garden Ins. Co. v. Whayland, 103 Md. 699, 64 A. 925. A policy of insurance produced by defendant in a suit thereon was claimed by plaintiff not to be genuine, or the policy issued, and plaintiff offered a copy claimed to have been made at the time of making proof of death. Held, defendant not having proved the policy produced by it to be the original, and not having produced original, the copy was competent. Carr v. Prudential Ins. Co., 115 App. Div. 755, 101 N. Y. S. 158.

40. Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056. Where copy was not admitted or proved to be correct, and no notice to produce original was given, it was properly excluded. Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613. Party desiring to use policy in possession of the other as evidence must give reasonable notice to produce it. Thompson Bros. v. Piedmont Mut. Ins. Co. [S. C.] 57 S. E. 848. Secondary evidence of the contents of a paper in the possession of the adverse party cannot be given except after a reasonable notice to produce the original. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. E. 342, 55 S. E. 768. Due notice having been given the mortgagee to produce the original mortgage, a certified copy was admissible. Sims v. Scheussler [Ga. App.] 58 S. E. 693. If a paper is not produced after notice to the party who has it to produce it, secondary evidence of its contents is admissible. Mussellam v. Cincinnati, etc., R. Co. [Ky.] 104 S. W. 337. In action on contract a witness testified that he had made out a written proposal which had been received and accepted by one of the defendants, and he had failed to produce it after notice to do so. Secondary proof of its contents was competent. Dick v. Biddle Bros. [Md.] 66 A. 21. In action for injuries resulting from failure of carrier to furnish accommodation and protection to passenger, oral evidence was competent to show the class of the ticket, where it had been surrendered to the company, and notice given to produce it. McCollum v. Southern Pac. Co., 31 Utah, 494, 88 P. 663. Rev. St. 1898 § 3410, relating to secondary proof after notice to produce original, held applicable to railway ticket. Id. The action being in tort and not on the contract, the rule that diligent effort to procure the original must first be shown was not applicable. Id.

41. Where a writing purporting to be a copy of a letter is offered in evidence, it must be shown to be a true copy. Hall & Co. v. Callingham [N. J. Law] 65 A 123. Where sheriff's deed was offered, a judgment identical in dates, amounts, and parties with that recited in the deed, but different as to the court and the rate of interest, was held to make the deed competent, the original papers in the case being lost or destroyed. Clark v. Rice Institute for Advancement of Literature, Science & Art [Tex. Civ. App.] 19 Tex. Ct. Rep. 608, 103 S. W. 1110. A certified copy of a will cannot be objected to on the ground that certain erasures and discrepancies appeared in the original; the objection should be made to the copy offered. Stone v. Smith, 127 Ga. 483, 56 S. E. 640. Where copy of writing was offerred as a "substantial copy," and it was not claimed to have been made at the time the original was executed, or before the action was commenced, and it was evident that it was made from memory, it was proper to exclude it. Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613. Where original applications for insurance were at insurance company's home office, and no showing was made as to correctness of copies produced at trial, they were incompetent. Aetna Life Ins. Co. v. Duparquet, Hout & Moneuse Co., 53 Misc. 581, 103 N. Y. S. 800.

42. Turner v. Elliott, 127 Ga. 338, 56 S. E. 434; Thompson v. Piedmont Mut. Ins. Co. [S. C.] 57 S. E. 848; Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768.

43. One who relies upon a lost deed to establish his title to land must prove the execution of the deed, the material parts thereof, and its loss, by clear, satisfactory, and convincing evidence. Houghtalling v. Houghtalling [Iowa] 112 N. W. 197. Where abstract of title contained abstract of a lost deed showing date, acknowledgment, description, consideration, where recorded, etc., and there was proof that the record was made from the original, and the abstract was made from the record by a former recorder, there was sufficient proof to warrant proof of contents by secondary evidence. Kries v. Holladay-Klotz Land & Lumber Co., 121 Mo. App. 184, 98 S. W. 1086. Where a certified copy of a recorded deed is offered in evidence and is met by an affidavit of forgery provided for in Civ. Code 1895, § 3628, the burden is on the party offering it to show the existence and genuineness of the

The best evidence rule does not apply to proof of merely collateral facts,[45] and does not exclude oral proof that an act was done or a writing or record made, where it is not sought to show the contents of the writing or record by parol.[46] The right to have the best evidence produced may be waived.[47]

In case of duplicates each is primary evidence and one may be introduced without the other,[48] but secondary evidence of the contents of one is incompetent without proof of the loss of both.[49]

original without reference to the fact that it has been recorded, and this is so even though it appears that the original was more than 30 years old. Chatman v. Hodnett, 127 Ga. 360, 56 S. E. 439. Civ. Code 1895, § 3628, does not apply to a will duly probated and admitted to record, and the procedure authorized by that section is not applicable except in case of registered deeds. Stone v. Smith, 127 Ga. 483, 56 S. E. 640. A copy of an instrument required by law to be recorded taken from the proper registry and duly certified is presumptive evidence of the existence of an original. Sims v. Scheussler [Ga. App.] 58 S. E. 693.

44. Proctor & Gamble Co. v. Blakeley Oil & Fertilizer Co. [Ga.] 57 S. E. 879. When so proved, an authenticated copy of the instrument is competent. Id.

45. International & G. N. R. Co. v. Lynch [Tex. Civ. App.] 17 Tex. Ct. Rep. 97, 99 S. W. 160. Parol evidence competent to prove a person the manager of a corporation, this fact being a collateral one in a replevin suit to recover corporate property. Stovell v. Alert Gold Min. Co. [Colo.] 87 P. 1071. Justice of peace may testify that he held the office of justice at a particular time without producing election certificate, when that fact is only collateral and not a material issue. Breeden v. Martens [S. D.] 112 N. W. 960. In action against carrier for loss of rice being transported, oral proof of the purchase of a certain quantity of rice is competent, the contract between the seller and purchaser being collateral. Charles v. Atlantic Coast Line R. Co. [S. C.] 58 S. E. 927. Contents of rules of railway company may be shown by testimony of witnesses where the existence of such rules was not brought out by the pleadings but only in the course of the evidence, and defendant had a printed copy of the rules in its possession. Northern Alabama R. Co. v. Key [Ala.] 43 So. 794. Where a letter by a party to a third person was material only to show that negotiations for a trade were pending, letters were competent, and proof of substance of one by oral evidence was competent. Gulliford v. McQuillen [Kan.] 89 P. 927. Indebtedness is a fact which may be proved by oral evidence, notes being merely collateral; hence failure to produce or account for notes would not make oral proof inadmissible to prove such fact. Stein v. Local Board of Review [Iowa] 113 N. W. 339. Parol evidence may be admitted to show that witness was at the instance of plaintiff placed under a conservator in explanation of previous statement by witness that she was hostile to plaintiff because of his treatment of her. Blair v. Blair, 125 Ill. App. 341.

46. Proof of a shipment may be made without producing the bill of lading. Dorough v. Harrington [Ala.] 42 So. 557. County treasurer may testify that he issued a liquor tax certificate, his endorsement thereon not being the sole evidence of the fact under Liquor Tax Law, § 17, subd. 11. Cullinan v. Horan, 116 App. Div. 711, 102 N. Y. S. 132. Witness may state that there had been litigation between certain parties, but record would be best evidence of facts of the litigation. Ball v. Laughridge, 30 Ky. L. R. 1123, 100 S. W. 275. Question to witness whether he had not brought another action for same injury held not to call for secondary evidence, since the contents of a complaint as such was not called for. Ruemer v. Clark, 105 N. Y. S. 659. Bill of lading is not best proof of receipt of goods; receipt of drayman is competent. Dorough v. Harrington [Ala.] 42 So. 557. A question whether a labor inspector had made a report on a plant held not open to objection of not being the best evidence. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 N. W. 577. Statement of justice that he made a certain entry in his docket is not objectionable as not the best evidence. Breeden v. Martens [S. D.] 112 N. W. 960. In suit to set aside a judgment on the ground that plaintiff was not a party thereto, his attorney in that action may testify that plaintiff voluntarily made himself a party thereto. Cage v. Owens [Tex. Civ. App.] 19 Tex. Ct. Rep. 6, 103 S. W. 1191.

Contra: The best evidence of the filing and docketing of a claim in the probate court is the docket entries there made. Gillespie v. Campbell [Ala.] 43 So. 28.

47. Where opposing party's counsel was called and testified without objection that a certain exhibit was a correct copy of an original paper which had been sent up with the transcript on appeal, thereby becoming part of a public record, the objection that it was not the best evidence (P. & C. Comp. St. § 742, requiring original or certified copy of records) was waived, the instrument having been identified. First Nat. Bk. v. Miller, 48 Or. 587, 87 P. 892.

48. International Harvester Co. v. Elfstrom [Minn.] 112 N. W. 252; Cole v. Ellwood Power Co., 216 Pa. 283, 65 A. 678. Where three copies of an instrument were made at the same time by one impression of the pencil, it was held they were triplicate originals, and one was competent evidence without notice to produce others. Virginia Carolina Chem. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

Carbon copies of an entire instrument, including the signature, produced by the same act as produced the copy actually written upon, are entitled to be treated as originals and each is admissible without accounting for others. International Harvester Co. of America v. Elfstrom [Minn.] 112 N. W. 252. Letter-press copies distinguished. Id. And see 7 C. L. 1535, n. 83.

49. See 7 C. L. 1535, n. 81.

Facts which, if they exist, would be shown by a public record, cannot be proved by parol or other secondary evidence.[50] Such records are themselves the best evidence of their contents,[51] but owing to the nature of public documents and records and the inconvenience or impossibility of producing them in court, copies or transcripts certified and authenticated in the manner required by law are competent proof of their contents in practically all jurisdictions. Similarly, instruments required or allowed by law to be filed are usually provable by a properly authenticated copy,[52] and where a certified copy of the record can be procured, oral evidence of the contents of such an instrument is incompetent.[53] Extraneous facts relating to matters shown by a record, or facts omitted therefrom,[54] or not made a matter of record,[55] may be shown by parol, and extrinsic proof is competent to supplement or explain a record.[56] Oral

50. Appraised value of property for taxes, shown by grand tax list, cannot be shown by parol. Town of Ripton v. Brandon [Vt.] 67 A. 541. Parol evidence is incompetent to show contents or allegations of complaint which was never filed. Tomlinson v. Bennett [N. C.] 59 S. E. 37.

51. Records held best evidence of whether deeds had been recorded. Seivert v. Galvin [Wis.] 113 N. W. 680. Where original records were in court, oral evidence was held incompetent to show that sworn copies thereof were incorrect. Glos v. Holmes, 224 Ill. 436, 81 N. E. 1064. Original legislative journals are best evidence of form of statute as passed when it is claimed that a change was subsequently made. Erford v. Peoria, 229 Ill. 546, 82 N. E. 374. Proof of trial and conviction of one before a mayor should be made by producing the record or the mayor's docket. Cooke v. Loper [Ala.] 44 So. 78. A certificate by a clerk of court that a receiver duly qualified is not evidence of the fact, the record, or a certified copy, is the best evidence. Hagan v. Holderby [W. Va.] 57 S. E. 289. Testimony of land commissioner, based wholly on his records, inadmissible, records themselves or certified copies being best evidence. Patterson v. Knapp [Tex. Civ. App.] 17 Tex. Ct. Rep. 96, 99 S. W. 125. As to what property was embraced in an entry purporting to be a levy, the entry itself was the best evidence. Gray v. Joiner, 127 Ga. 544, 56 S. E. 752. Best evidence of whether constable filed claim against county, itemized and verified, is claim itself, not oral testimony as to whether it was filed. McGuire v. Iowa County, 133 Iowa, 636, 111 N. W. 34. The record is the best evidence that a judgment has been set aside not the fact that the state's attorney directed execution to be returned because of the setting aside of the judgment. Bonner v. Com., 30 Ky. L. R. 992, 99 S. W. 1150. Affidavits stating that signers of a petition for formation of an irrigation district had the necessary qualifications, and abstracts of title, held not the best evidence in proceedings to determine the validity of the organization of the district and of a bond issue. Ahern v. High-Line Irr. Dist. Directors [Colo.] 89 P. 963. The record of a judgment of a justice of the peace is only prima facie evidence of its recitals and can be impeached by competent evidence. Albie v. Jones [Ark.] 102 S. W. 222.

52. Records of deeds inadmissible without preliminary proof required by Hurd's Rev. St. 1905, c. 30, § 36. Tucker v. Duncan, 224 Ill. 453, 79 N. E. 613. To prove the execution of lost deeds the record books of the county were held admissible, especially where the clerk testified that he copied them as best he could, that they were old and worn, and that they came from a representative of the estate of the grantee. Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417. Under California statutes, where a copy of a patent duly certified by the land office is recorded in the county where the land is situated, a certified copy of the record is competent without accounting for the original patent. Preston v. Hirsch [Cal. App.] 90 P. 965. Certified transcript of lease for less than three years is not competent evidence under Code, § 935. Goodman v. Greenberg, 53 Misc. 583, 103 N. Y. S. 779.

53. Under the act of March 7, 1905, providing for the recording of stock brands and the issuance of certificates of the record, oral evidence is incompetent to prove ownership of a stock brand. State v. Dunn [Idaho] 88 P. 235.

54. Bill of exceptions incorporated in transcript on appeal is not a part of the record, and hence parol evidence is competent to show that it was not signed within the time allowed by law and that the order extending the time was invalid. Rainey v. Ridgway [Ala.] 43 So. 843.

55. Action taken at annual school election may be proved by parol where no record of the meeting was kept. Kinney v. Howard, 133 Iowa. 94, 110 N. W. 282. City decision to engage in removal of ashes from limits not being a legislative act may be proved by any evidence; an ordinance is not necessary. Johnson v. Somerville [Mass.] 81 N. E. 268. Where drainage commissioners acted as agents of two parties in settling a drainage dispute, their acts were provable by parol, there being no official record thereof. Dunn v. Youmans, 224 Ill. 34, 79 N. E. 321. Where a highway is both a highway of record and by user, proof of user is not objectionable as secondary evidence, both modes of proof being competent. Harriman v. Moore & Co. [N. H.] 67 A. 225.

56. Where the evidence furnished by the journals of the legislature is ambiguous or contradictory as to the actual time of its final adjournment, so that it is impossible to tell with certainty therefrom upon what day the legislature adjourned sine die, recourse may be had to other competent evidence to supply the omission. State v. Junkin [Neb.] 113 N. W. 256. In an action to recover costs of litigation from one who

proof of facts disclosed by an examination of a record is competent where the contents of the record is not sought to be thus proved.[57]

In a proceeding to register a title under the Illinois statute, an abstract of title is inadmissible without proof of loss of the original instruments,[58] and proof that the abstract was made in the regular course of business.[59]

§ 5. *Parol evidence to explain or vary writings.*[60]—When a written contract imports on its face to be a complete expression of the whole agreement, it is presumed that the parties have introduced therein every item or term [61] and that all prior negotiations and contemporaneous oral agreements have been merged therein;[62] hence the well settled rule that evidence of prior or contemporaneous agreements, negotiations, or representations,[63] or other parol or extrinsic evidence,[64] is inadmissible

had promised to pay them, on settlement of a will contest, parol evidence was admissible to show that the will contest was the litigation referred to, this evidence not contradicting the record but supplementing it to show the subject-matter. Jordan v. McDonnell [Ala.] 44 So. 101. Where assessment rolls described land as a certain numbered lot of a named tract, the description could be supplemented by proof that there was a tract known by that name and that a survey and plat referred to the lot in question, which was a known subdivision thereof. Chapman v. Zobelein [Cal.] 92 P. 188.

57. Competent to show that records in ordinary's office do not show the granting of letters of administration upon a particular estate. Wilson v. Wood, 127 Ga. 316, 56 S. E. 457. The facts that returns had been made to the court and withdrawn by an executor need not be proved by entries made thereon. American Surety Co. v. Wood [Ga. App.] 58 S. E. 1116. An officer having in his custody the records of his predecessor showing real estate agent licenses, as required by statute, and who has examined such records, may testify that his predecessor did not issue a license to a particular person. Reeder v. Jones [Del.] 65 A. 571. Where tax collector filed list of delinquent taxes in clerk's office, but the list when found had no affidavit attached as required by law, testimony of the collector and his deputy that the affidavit had been made and attached but had been detached was competent. Brasch v. Western Tie & Timber Co., 80 Ark. 425, 97 S. W. 445. To establish identity of corporation named as grantee in deed, testimony of secretary of state that his records did not show the creation of a corporation with the name shown in the deed was competent. Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513.

58, 59. Glos v. Wheeler, 229 Ill. 272, 82 N. E. 234.

60. See 7 C. L. 1536.

61. In absence of fraud or mistake there is a conclusive legal presumption that a written contract contains the entire agreement of the parties. Smith v. Vose & Sons Piano Co. [Mass.] 80 N. E. 527. Proof of conversations and oral negotiations prior to written contract, tending to contradict it, held incompetent, under Rev. Civ. Code, § 1239. Gardner v. Welch [S. D.] 110 N. W. 110. Where a writing does not show on its face that it is incomplete and does not purport to contain the entire agreement, oral evidence is not admissible on the theory that the contract is partly oral and partly written. Koons v. St. Louis Car Co., 203 Mo. 227, 101 S. W. 49.

62. Manson v. Dayton [C. C. A.] 153 F. 258.

63. Horner v. Beasley [Md.] 65 A. 820; Wallace v. Kelly, 148 Mich. 336, 14 Det. Leg. N. 230, 111 N. W. 1049; New York Life Ins. Co. v. Wolfson, 124 Mo. App. 286, 101 S. W. 162; Gilroy v. Everson-Hickok Co., 118 App. Div. 733, 103 N. Y. S. 620; Michels v. Studnitz, 103 N. Y. S. 817; Walker v. Brosius [Tex. Civ. App.] 14 Tex. Ct. Rep. 384, 90 S. W. 655. Letters, ante-dating and leading up to and culminating in written contract of agency, held inadmissible to vary its terms. Haas v. Malto-Grapo Co., 148 Mich. 358, 14 Det. Leg. N. 187, 111 N. W. 1059. Proof of oral representations as to the effect of a contract and rights of a party thereto is incompetent, when not amounting to proof of fraud. Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702, 14 Det. Leg. N. 57, 111 N. W. 343. Oral proof of an understanding at time contract of sale was executed, which contradicted the writing, held inadmissible. Newell v. Lamping [Wash.] 88 P. 195. An oral agreement which alters an agreement in writing is not valid or binding unless executed; hence proof of the oral agreement is not competent to change the written contract. Page v. Geiser Mfg. Co., 17 Okl. 110, 87 P. 851. In an action on a contract of guaranty, a parol agreement prior to execution of the contract, that defendant would not be bound if certain other parties should fail to sign, could not be shown. Lefkovits v. First Nat. Bk. [Ala.] 44 So. 613. Where steamship ticket signed by the buyer provided for a limitation of liability for baggage, parol evidence of what took place between the buyer and agent at the time was inadmissible to vary the terms of the contract then reduced to writing. Bachman v. Clyde S. S. Co. [C. C. A.] 152 F. 403.

64. Words in a contract having a clear and unambiguous import will not be subject to explanation by parol to show what the parties meant. West v. Hermann [Tex. Civ. App.] 104 S. W. 428. Contract held complete and unambiguous and oral proof which would add a term excluded. United States v. Fidelity & Deposit Co. [C. C. A.] 152 F. 596. Where no fraud, duress, or mistake in connection with a written contract was alleged, it was error to admit testimony as to surrounding circumstances tending to impeach it. San Antonio & A. P. R. Co. v. Timon [Tex. Civ. App.] 18 Tex. Ct. Rep. 349, 99 S. W. 418. In the absence of ambiguity

to vary, add to, or contradict the terms of a valid written instrument.[65] The rule ap-

and of fraud, accident, or mistake, parol evidence is not admissible to assist in the interpretation of a written contract. Wheeler v. Moore [Neb.] 111 N. W. 121. Where the final agreement of the parties is embodied in an instrument under seal, other writings, prior or contemporaneous, not under seal, are incompetent to vary or contradict the sealed instrument. Kidd v. New Hampshire Traction Co. [N. H.] 66 A. 127.

65. Southeastern Const. Co. v. Farnham Co. [C. C. A.] 148 F. 619; Lower v. Hickman, 80 Ark. 505, 97 S. W. 681; Boylan v. Cameron, 126 Ill. App. 432; McKee v. Owen, 104 N. Y. S. 373; Garrison v. Kress [Okl.] 91 P. 1130; Perkiomen R. Co. v. Bromer, 217 Pa. 263, 66 A. 359; Reed v. Coughran [S. D.] 111 N. W. 559; Teague v. Ricks [Tex. Civ. App.] 17 Tex. Ct. Rep. 656, 100 S. W. 794.

Illustrations. Miscellaneous Contracts and writings: Parol evidence inadmissible to aid to or vary terms of written rent contract. Smith v. Green [Ga.] 57 S. E. 98. Where a way bill was complete on its face and no fraud or mistake appeared, parol evidence was incompetent to show an agreement to deliver at a certain packing house, nor could such term be added by proof that a way bill issued for use of employes only contained such stipulation. International & G. N. R. Co. v. Griffith [Tex. Civ. App.] 19 Tex. Ct. Rep. 520, 103 S. W. 225. A contract with the United States provided that payment was to be made at such times and in such amounts as the officer in charge of the work might elect. Proof that government officers said just before the contract was signed that payments could be expected every thirty days was inadmissible. Ramsey v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 65 A. 461. Writing construed as complete contract for sale of lands for right of way, and hence parol evidence inadmissible to show a time limit for completion of part of road or other terms. Chicago, etc., R. Co. v. Lane [Mich.] 113 N. W. 22. It is not competent to vary a contract certain in its terms by proof of a custom. Leonhart v. California Wine Ass'n [Cal. App.] 89 P. 847. Purpose for which property was purchased by a club held admissible in evidence in order to explain legal nature of trust instrument executed at the time. Eis v. Croze [Mich.] 112 N. W. 943. A written agreement provided for an exchange of property and the giving of a note and mortgage by plaintiff to defendant, which were given. Held, in a suit by plaintiff to redeem from the mortgage, plaintiff could not show an oral agreement by defendant to release the mortgage on payment of part of the note and release of a mortgage held by plaintiff. McCusker v. Geiger [Mass.] 80 N. E. 648. Where written contract of employment showed that it was of indefinite duration, oral evidence was incompetent to show that it was to be for a year. Wightman v. New York Life Ins. Co., 104 N. Y. S. 214. Where notes were turned over as collateral to secure a debt, and a written contract provided that the notes were to be returned when the debt was paid, oral proof was incompetent to show that parties agreed that notes were to be turned over to debtor for collection at maturity in order to avoid expense of collection. Buxton v. Alton-Dawson Mercantile Co., 18 Okl. 287 90 P. 19. Where written contract for laying an asbestos granite floor was complete, parol evidence was incompetent to show a collateral agreement between defendant and plaintiff's soliciting agent that the floor was to be polished and the colors therein permanent. McKeige v. Carroll, 105 N. Y. S. 342. Where draft by creditor on debtor in favor of a bank was discounted by the bank, evidence of an unexpressed intention of the drawer when the draft was presented and discounted was held inadmissible. Provident Nat. Bank v. Hartnett Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 748, 100 S. W. 1024. In an action for failure to deliver hogs according to terms of written contract, evidence that defendant failed to deliver all his hogs was admissible, the contract using the term "my hogs," but proof changing the effect of the written terms was inadmissible. Watson v. Lamb, 75 Ohio St. 481, 79 N. E. 1075. Where contract of settlement was full, clear, and unambiguous, parol evidence was incompetent to show a contemporaneous agreement whereby one of the parties thereto was to pay an additional sum. First Nat. Bank of Lincoln v. Penn Mut. Life Ins. Co. [C. C. A.] 147 F. 519. Where a contract involving several vessels is entire and complete, parol evidence is inadmissible to show that a part of it never became effective owing to the nonfulfillment of a condition precedent. Morris v. Chesapeake & O. S. S. Co. [C. C. A.] 148 F. 11. Parol understandings of parties prior to written contract cannot, though they induced making of contract, be permitted to vary its plain provisions. Gates v. Detroit & M. R. Co., 147 Mich. 523, 111 N. W. 101. Receipt for property levied on by an officer was signed by a director of a corporation in his individual capacity. In an action on the receipt oral proof of an agreement that the signer was to be liable only as a director was held to contradict the subsequent writing, and hence inadmissible. Dejon v. Street, 79 Conn. 333, 65 A. 145. Where a written contract bound the obligor to pay a certain sum if a third party failed to pay it, an oral statement at the time of signing that the obligor would not be called on to pay was inadmissible. Doyle v. Nesting, 37 Colo. 522, 88 P. 862. A written accord and satisfaction "of all claims to date," including three hogs killed, and claims for damage to land or crops or from failure to erect gates, held to exclude oral proof that it did not include damages arising from failure to maintain fences. Rowland v. St. Louis, etc., R. Co., 124 Mo. App. 605, 102 S. W. 19. Inadmissible to show that plaintiff was to receive instructions in courses other than specified in contract. American Educational Co. v. Taggert, 124 Ill. App. 567. Parol evidence is inadmissible to change the legal effect of an application for dram-shop license signed by an abutting owner. People v. Griesbach, 127 Ill. App. 462.

Written contracts of sale, orders, etc.: Where written contract for sale of piano provides for payment in money, a prior

parol agreement to pay by boarding certain employes cannot be shown. Andrews v. John Church Co., 1 Ga. App. 560, 58 S. E. 130. Where a written agreement provided for the furnishing of certain articles for a specified consideration, parol evidence that a certain note was to be turned in as the last payment was held inadmissible. Houts v. Sioux City Brass Works [Iowa] 110 N. W. 166. Where contract stated that goods were sold and that buyer assumed certain debts of seller and was to proceed to sell the goods and pay proceeds to the seller less the debts assumed, oral evidence was inadmissible to prove that the transaction was not in fact an absolute sale. Doolittle v. Murray & Co. [Iowa] 111 N. W. 999. Where sale of sawmill was evidenced by complete, unambiguous contract in writing, oral evidence was incompetent to prove a warranty of the capacity of the mill.. Lower v. Hickman, 80 Ark. 505, 97 S. W. 681. In the absence of proof of fraud, accident, or mistake, oral evidence held incompetent to prove omission of statement of capacity of sawmill, where contract was complete on its face and contained a detailed memorandum of terms and items sold. Id. Where written contract for sale of flour did not contain an alleged oral agreement to send salesman to introduce the flour, proof thereof, and of a breach of it, was inadmissible. Columbia Mill. Co. v. Russell Co., 89 Miss. 437, 42 So. 233. Where contract of sale of machinery was clear and complete and no fraud was alleged, parol evidence was incompetent to prove a breach of warranty, not contained in the writing, as to the capacity of the machinery. Barry-Wehmiller Machinery Co. v. Thompson [Ark.] 104 S. W. 137. Contract of sale of plantations provided for payment in cotton instead of cash, and the contract was clear and unambiguous. Held parol evidence that the cotton was to be grown on the land sold was inadmissible. Soudan Planting Co. v. Stevenson [Ark.] 102 S. W. 1114. Sale contract contained certain warranties and was on its face complete. Held an additional warranty could not be shown by parol. Johnson, Berger & Co. v. Hughes & Co. [Ark.] 103 S. W. 184. In an action for the price of pictures, proof of a custom not to "rough" pictures unless expressly ordered so to do was inadmissible, where the order was for pictures like samples in defendant's possession. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306. Written contract for sale of stock cannot be varied by proof of prior negotiations. Commercial & Savings Bank v. Pott, 150 Cal. 358, 89 P. 431. Written contract provided for delivery of specified quantities of grapes of a certain kind at certain prices. Held proof of a custom relating to amount of daily deliveries was incompetent, the contract not providing for any limitation on the amount of daily deliveries. Leonhart v. California Wine Ass'n [Cal. App.] 89 P. 847.

Leases: A lease is a contract within the meaning of the parol evidence rule. Hinsdale v. McCune [Iowa] 113 N. W. 478. Where a written lease expressly included all of certain premises including a farm, oral evidence that it did not cover the farm was inadmissible. Suderman-Dolson Co. v. Rogers [Tex. Civ. App.] 19 Tex. Ct. Rep. 346, 104 S. W. 193. Where written lease is for a term of one year, oral evidence is incompetent to show a tenancy from month to month. Dodd v. Pasch [Cal. App.] 91 P. 166. Parol evidence is inadmissible to annex to a written lease a condition which would defeat its operative effect. Morris v. Healy Lumber Co. [Wash.] 91 P. 186. In an action for an accounting between a landlord and tenant, evidence of an oral agreement by the landlord to construct a drain, made without consideration, and of damage to the land by reason of failure to construct it, is inadmissible, the oral agreement being omitted from the written lease. Gandy v. Wiltse [Neb.] 112 N. W. 569. Prior and contemporaneous conversations are inadmissible to change terms of written lease. Jackson Brewing Co. v. Wagner, 117 La. 875, 42 So. 356. Where party did not claim that a mistake had been made in a lease, a conversation after its execution was held inadmissible. Johnston v. Mulcahy [Cal. App.] 88 P. 491.

Deeds and mortgages: When the consideration stated in a deed for land made by a father to a daughter is one dollar, the daughter takes the land as purchaser, and parol evidence is not admissible to show that the consideration was not paid, and that in fact the consideration was natural love and affection. Cowden v. Cowden, 7 Ohio C. C. (N. S.) 277. The terms of a deed cannot be varied, altered, or modified by parol evidence. Sutton v. Lemen, 130 Ill. App. 50. Parol evidence held incompetent to prove that a patent from the state conveyed the land to the grantees in trust. Sanborn v. Loud [Mich.] 113 N. W. 309. Deed to right of way for telephone line being unambiguous, parol evidence was incompetent to limit its effect to a grant for a noncommercial line. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747. Where deed is clear and unambiguous, only a clear case of fraud, accident, or mistake will warrant admission of parol proof as to its terms. Taylor v. Southerland [Ind. T.] 104 S. W. 874. Where a deed is unambiguous and purports to convey the present title, parol evidence not directed to proof of such attendant circumstances as to raise an implied trust is not admissible to contradict the deed by showing that it was not intended to become binding until the happening of a future event to be brought about by the grantor. Williams v. Smith [Ga.] 57 S. E. 801. Where deed contains special warranty against incumbrances, grantor cannot recover tax assessed prior to conveyance from grantee on parol proof that this tax was to be paid as a part of the consideration. Edison Elec. Illuminating Co. v. Gibby Foundry Co. [Mass.] 80 N. E. 479. Parol evidence that mortgage was intended to cover crops in a county other than that named in the mortgage held inadmissible. Baker v. Cotney [Ala.] 43 So. 786. Parol evidence is incompetent to contradict an absolute deed by showing an agreement that buildings on the premises were not to be conveyed. Mahaffey v. Rumbarger Lumber Co., 61 W. Va. 571, 56 S. E. 893. In the absence of proof of fraud or mistake, parol evidence is inadmissible to show that grantor did not intend to include a certain tract in a deed. McCreary v. Skidmore [Ky.] 99 S. W. 219. Where deed was broad enough to include everything on the land conveyed except certain personal ef-

fects, parol evidence was inadmissible to vary or contradict it. Carter v. Childress [Tex. Civ. App.] 18 Tex. Ct. Rep. 392, 99 S. W. 714.

NOTE. Parol evidence rule as applied to deeds, mortgages, etc.: "The general rule of law which excludes testimony of prior or contemporaneous oral declarations and agreements to carry the terms or legal effect of a written contract is too elementary to permit of argument or citation of authorities. It is also well established that a deed purporting to transfer or convey title to property may be shown by parol to have been given and received as a mortgage whether the action be in equity or at law. McAnnulty v. Seick, 59 Iowa, 586, 13 N. W. 743; Frick v. Kabaker, 116 Iowa, 502, 90 N. W. 498. This rule is not altogether an exception ingrafted upon the former; because, ordinarily speaking, a deed is not evidence of the contract between the parties, but is rather the consummation of a contract resting in parol or in another writing. Trayer v. Reeder, 45 Iowa, 272; Saville v. Chalmers, 76 Iowa, 325, 41 N. W. 30; Bever v. Bever, 144 Ind. 162, 41 N. E. 944; Davis v. Hopkins, 18 Colo. 153, 32 P. 70. But where any inconsistency is found between the terms of the preliminary contract and the deed which witnesses the consummation, the latter will prevail. Philbrook v. Emswiler, 92 Ind. 590; Cole v. Gray, 139 Ind. 396, 38 N. E. 856. It may be further conceded that the purpose for which a writing was delivered may generally be shown by parol; but this is subject to the restriction that the purpose thus shown must not be in contradiction of the express terms of such writing. Courtwright v. Strickler, 37 Iowa, 382; Dickson v. Harris, 60 Iowa, 727, 13 N. W. 335; Blair v. Buttolph, 72 Iowa, 31, 33 N. W. 349; DeGoey v. Van Wyk, 97 Iowa, 492, 66 N. W. 787. These rules have been most frequently applied to conveyances of real estate, but have sometimes been invoked in the consideration of bills of sale of personal property. Voorhies v. Hennesy, 7 Wash. 243, 34 P. 931; Seavey v. Walker, 108 Ind. 78, 9 N. E. 347; Frick v. Kabaker, 116 Iowa, 502, 90 N. W. 498. But, where the writing is something more than a formal transfer of title credited by the parties, and contains mutual stipulations and provisions which the parties specifically undertake to observe, it is held with very general unanimity that parol evidence is not admissible.

"It has been held that, where a mortgage secures in express terms the payment of a given sum of money, parol evidence will not be admitted to show the real purpose of the parties was to secure the performance of an oral agreement. Adair v. Adair, 5 Mich. 204, 71 Am. Dec. 779. Nor will such evidence be admitted to show that a mortgage given by an individual was in fact the mortgage of a partnership of which he was a member. Jones v. Phelps, 5 Mich. 218. One B. having acknowledged, in writing, the receipt of payment from G. for a private way across his land, it was incompetent for him to show by parol that the grant was understood to be personal only, and subject to revocation by the grantor. Wetherell v. Brobst, 23 Iowa, 586. Where the parties have in writing declared in clear and unambiguous terms the purpose of their agreement, that declaration cannot be denied or varied by proof of prior or contemporaneous parol agreements. Crane v. Bayley, 126 Mich. 323, 85 N. W. 874.

"It is believed that no case can be found where parol evidence has been received for the purpose of showing that such an instrument (assignment) was given merely as collateral security, and not for the precise purpose mentioned in it. Without commenting upon the authorities, the following are ample to show that the evidence was not competent—citing 1 Greenl. Ev. § 275; McCrea v. Purmornt, 16 Wend. [N. Y.] 461, 30 Am. Dec. 103; Kellogg v. Richards, 14 Wend. [N. Y.] 117; Goodyear v. Ogden, 4 Hill [N. Y.] 104; Graves v. Friend, 5 Sandf. [N. Y.] 568; Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502; Cocks v. Barker, 49 N. Y. 107; Hinckley v. Railroad Co., 56 N. Y. 429; Van Bokkelen v. Taylor, 62 N. Y. 105; Shaw v. Ins. Co., 69 N. Y. 286; Wilson v. Deen, 74 N. Y. 531; Eighmie v. Taylor, 98 N. Y. 228; Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961." "Parol evidence is inadmissible to annex to a bill of sale or contract of sale any condition inconsistent with the conditions therein expressed. 17 Cyc. 645; Davis v. Robinson, 71 Iowa, 618, 33 N. W. 132; Daly v. Kimball, 67 Iowa, 132, 24 N. W. 756; Fawkner v. Lew Smith Wall Paper Co., 88 Iowa, 169, 55 N. W. 200, 45 Am. St. Rep. 230; McCormick v. Market, 107 Iowa, 340, 78 N. W. 33; Neal v. Flint, 88 Me. 72, 33 A. 669; Whitaker v. Sumner, 20 Pick. [Mass.] 399; Stevens v. Wiley, 165 Mass. 177, 43 N. E. 177."—From opinion of Weaver, C. J., in Doolittle v. Murray & Co. [Iowa] 111 N. W. 1003.

Insurance policies: Insurance policy described property as dwelling house, and that destroyed consisted of stores and dwelling house combined. Held, proof that broker who wrote the policy had maps showing the property correctly was inadmissible. Bowditch v. Norwich Union Fire Ins. Co., 193 Mass. 565, 79 N. E. 788. No claim of fraud or mistake being made, oral evidence tending to vary or contradict insurance policy held incompetent. Rief v. Continental Casualty Co. [Wis.] 111 N. W. 502. Oral evidence to show agreement prior to signing of application for insurance. Prince v. State Mut. Life Ins. Co. [S. C.] 57 S. E. 766. The parol evidence rule applied to a contract of insurance. Gish v. Insurance Co. of North America [Okl.] 87 P. 869. Where an application for fire insurance and the policy clearly indicated that the policy covered only lumber in the yard or sheds and excluded stock in the sawmill and additions, oral evidence was inadmissible to vary the contract by showing that it covered all the lumber. Ferguson v. Lumbermen's Ins. Co. [Wash.] 88 P. 128.

Notes: Parol evidence may be received to explain that a promissory note was an accommodation note, or to be held as collateral, but cannot be received to defeat recovery thereon where the payee, on the strength of its execution and delivery and at the maker's request, extended credit to a third person. Willoughby v. Ball, 18 Okl. 525, 90 P. 1017. Where a note is given as a subscription to a railroad corporation to aid in the construction of a road, representations made prior to or contemporaneous with the execution of the note are not admissible to contradict, change, vary, or add to the conditions plainly incorporated into and

plies as well to terms necessarily implied or read into a contract by law as to those expressly stated.[66] Parol evidence is of course incompetent to supply elements of a contract required by the statute of frauds to be in writing,[67] though proof of the circumstances surrounding its execution and the condition of the parties may be shown,[68] and is particularly applicable when the contract declares on its face that it is unconditional except as therein noted.[69]

Where it appears, however, that the parties did not intend to reduce the entire contract to writing, oral evidence is competent to show omitted terms consistent with those contained in a written memorandum,[70] since the existence of such a partial memorandum does not exclude parol proof of the real and entire contract of the parties,[71] but this rule does not permit contradiction of the written terms by parol.[72]

made a part of the note. Guthrie & W. R. Co. v. Rhodes [Okl.] 91 P. 1119. One who knowingly gives promissory notes for the price of land, and accepts a bond for deed from the payee providing for payment of the sum secured by notes, cannot defeat collection of the notes by showing an antecedent, executory agreement by the payee to give him the land or to sell at a price other than that stated in the written contract. Carroll v. Hutchinson [Ga. App.] 58 S. E. 309. In a suit on a promissory note, a verbal agreement by the payee to take less than the stipulated sum is inadmissible. Bowen v. Waxelbaum & Bro. [Ga. App.] 58 S. E. 784. Oral evidence is incompetent tending to show an oral contract made at the time a note was executed altering the effect of the note. Whitehead v. Emmerich [Colo.] 87 P. 790. In the absence of any allegation of fraud, accident, or mistake, parol proof is incompetent, in an action on promissory notes, to show that they were given as security only, and that the promissor was not to be bound. Byrd & Co. v. Marietta Fertilizer Co., 127 Ga. 30, 56 S. E. 86. Plaintiff gave a note to trustees of a railroad conditioned only upon construction of a railroad to a certain city, and the note was transferred to a trustee, the assignment reciting that the consideration was the benefit to be derived from building of the road. Held parol evidence inadmissible to show an oral agreement not to build a station between two certain towns. Farrington v. Stuckey [Ind. T.] 104 S. W. 647.

Endorsements on negotiable instruments: An indorsement in terms "with recourse" on a note cannot be shown by parol to be intended to be "without recourse." Kinsel v. Ballou [Cal.] 91 P. 620. Where a note is transferred by written assignment to a certain person, it is not competent to show by parol that title was in another than the assignee. Hester v. Gairdner [Ga.] 58 S. E. 165. The legal effect of a blank indorsement on a note cannot be varied by parol. Torbert v. Montague [Colo.] 87 P. 1145. A contract of indorsement (promissory note) cannot be varied by evidence that the indorsee promised to keep the indorser informed as to the maker's conduct and failed to do so. Hopkins v. Merrill, 79 Conn. 626, 66 A. 174. Contract made by indorsement and delivery of a negotiable promissory note cannot be varied or contradicted by parol, contemporaneous agreement. Crilly v. Gallice [C. C. A.] 148 F. 835. Parol evidence held incompetent to change legal effect of written waiver of demand placed on a note by an indorser. Toole v. Crafts [Mass.] 82 N. E. 22.

66. United States v. Fidelity & Deposit Co. [C. C. A.] 152 F. 596. If what the law implies from the written terms makes the contract complete, this is sufficient to exclude parol proof. Peterson v. Chaix [Cal. App.] 90 P. 948. Where the statute fixes the status of a party to a negotiable instrument as being that of an indorser, parol evidence is not admissible to vary that status. Baumeister v. Kuntz [Fla.] 42 So. 886. Where a statute provides a standard of weight, and also provides that contracts are to be construed with reference to such statutory standard, it will be presumed that parties contracted with reference thereto, and proof of a usage in conflict therewith is inadmissible. (Sale of structural steel at a certain price per pound.) Hale Bros. v. Milliken [Cal. App.] 90 P. 365.

67. Where the description in a contract for the sale of land is definite, certain, and complete, parol evidence is incompetent to show that entirely different tract was intended, the entire contract being required by Civ. Code, § 1741, to be in writing. Willmon v. Peck [Cal. App.] 91 P. 164. In the absence of fraud or mistake, extrinsic evidence is incompetent to supply omissions or rectify defects in a contract to convey land which is lacking in some essential element. Chambers v. Roseland [S. D.] 112 N. W. 148.

68. While parol evidence is incompetent to vary or change a written contract or aid a memorandum insufficient under the statute of frauds, yet it is competent to show the surrounding circumstances and the condition of the parties when the writing was made. Great Western Print. Co. v. Belcher [Mo. App.] 104 S. W. 894.

69. Scientific American Compiling Dept. v. Creighton, 32 Pa. Super. Ct. 140.

70. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 S. W. 375; Chicago Tel. Supply Co. v. Marne & Elkhorn Tel. Co. [Iowa] 111 N. W. 935; Taylor v. Elmira Storage & Supply Co., 54 Misc. 363, 104 N. Y. S. 557; Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613. Where note was dated a certain year and day and made payable on a certain day of a certain month, no year being given, parol proof was competent to supply the omission. Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911.

71. Where contract rests partly in writing and partly in parol, the parol portion

Where the written evidence of a contract or a term thereof is ambiguous or uncertain, oral or extrinsic evidence is admissible to explain the ambiguity or clear up the uncertainty, in order that the real intention of the parties may be made to appear.[73] For this purpose evidence of the facts and circumstances leading up to

thereof may be proved by oral testimony. Hueni v. Freehill, 125 Ill. App. 345. If it is apparent that a writing does not contain the entire agreement of the parties, oral evidence is competent to show the entire agreement, or a collateral agreement, which does not contradict the written evidence. Roquemore v. Vulcan Iron Works Co. [Ala.] 44 So. 557. Where it appeared that a contract for the sale of a business was only partly reduced to writing, parol evidence was competent to show the entire contract. McConnell v. Camors-McConnell Co. [C. C. A.] 152 F. 321. Where contract of sale of telephones did not purport to contain all the terms and contained no warranty, the fact that a printed catalogue contained a warranty did not exclude parol evidence of a different warranty. Chicago Tel. Supply Co. v. Marne & Elkhorn Tel. Co. [Iowa] 111 N. W. 935. The parol evidence rule applies only where there is in fact a written contract; it does not apply to a contract partly written and partly oral. Hallowell v. McLaughlin Bros. [Iowa] 111 N. W. 428. Parol evidence is competent to show whether a certificate of deposit was given for a deposit or a loan. State v. Corning State Sav. Bank [Iowa] 113 N. W. 500. Where a written contract is stricken from a pleading and it is introduced as evidence merely, parol proof that it did not express the true agreement of the parties is admissible without a plea of fraud or mistake. Martin v. Ferguson [Ky.] 104 S. W. 698. Where the original contract was verbal and entire, the fact that part of it was afterwards reduced to writing does not make parol evidence incompetent to show the entire agreement. Picard v. Beers [Mass.] 81 N. E. 246. Where agreement as to sales of stock was oral, and tickets were thereafter given showing the terms of the transaction, which were not signed by either of the parties, oral evidence was competent to show the contract. Id. Writing held a mere memorandum of items sold and not contract, and hence parol proof was competent to show terms of contract. North Packing & Provision Co. v. Lynch [Mass.] 81 N. E. 891. Oral sale was completed on April 3, 1903. A written instrument was drawn and signed May 26, reciting a present sale, and one dated Dec. 1 recited the sale of April 3, and each altered the terms of the original agreement as to time of payment and security. Held the writings did not purport to contain the entire agreement of the parties, and hence oral evidence was competent. Cooper v. Payne, 186 N. Y. 334, 78 N. E. 1076. Where letter did not purport to be a complete contract but was a mere memorandum reciting and confirming an oral agreement, the oral agreement was the real contract and the letter was not conclusive as to its terms. Perry v. Bates, 115 App. Div. 337, 100 N. Y. S. 881. Where written order for typewriter was admitted to be part of the contract, testimony tending to show that payment was to be made in part by allowing a commission on sale of other machines to be applied thereon was held not to contradict the writing but to supplement it by showing the entire agreement. Smith Premier Typewriter Co. v. Rowan Hardware Co., 143 N. C. 97, 55 S. E. 417. "Sixty days net" held ambiguous. Hagen Co. v. Greenwood, 27 Pa. Super. Ct. 239. Resort to prior negotiation allowed in case of ambiguity as to whether penalty or liquidated damages was intended. United States v. Bethlehem Steel Co., 205 U. S. 105, 51 Law. Ed. 731. Extrinsic evidence held admissible to explain ambiguous provisions as to amount of work to be done. Jones & L. Steel Co. v. Monongahela & W. Dredging Co. [C. C. A.] 150 F. 298. In action at law against carrier for injuries to live stock, where carrier relied on provision of contract of carriage exonerating it from part of liability, held that plaintiff might show that, through mistake, said contract was not properly reduced to writing, and that writing set up did not contain real agreement. Cincinnati, etc., R. Co. v. Pendleton, 29 Ky. L. R. 721, 96 S. W. 434.

72. Where a memorandum of a contract is incomplete, extrinsic evidence is admissible only as to terms on which the writing is silent or as to which there is uncertainty or ambiguity. Peterson v. Chaix [Cal. App.] 90 P. 948.

73. Massey Bros. v. Dixon Bros. [Ark.] 99 S. W. 383; Kitzman v. Carl, 133 Iowa, 340, 110 N. W. 587; Schuster v. Snawder [Ky.] 101 S. W. 1194; Smith v. Vose & Sons Piano Co. [Mass.] 80 N. E. 527; Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613; Loomis v. MacFarlane [Or.] 91 P. 466; Sellers v. Atlantic Coast Line R. Co. [S. C.] 57 S. E. 1102. Contract for sale of coal vein held not ambiguous. Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895. Ambiguity in description by metes and bounds held to admit parol proof that bounds were agreed upon and set on the land. Haskell v. Friend [Mass.] 81 N. E. 962. Where written contract was for driving of well which would produce a certain number of gallons per minute, oral proof was competent to show that fresh, not salt, water was intended. Bill of lading held ambiguous as to place of delivery of goods so as to render competent proof of custom to show meaning of terms used and intended place of delivery. Southern R. Co. v. Cofer [Ala.] 43 So. 102; Smith v. Vose & Sons Piano Co. [Mass.] 80 N. E. 527. Writing addressed to "E. Agent," and signed by defendant stating that he would pay a certain sum for property and pay a certain commission, held ambibuous as not showing whose agent "E" was nor to whom the commission was to be paid. Hanna v. Espalla [Ala.] 42 So. 443. Lease gave lessee right to conduct on premises restaurants and "buffets." Held evidence was competent to show that the word "buffets" was intended to include bars. Pine Beach Inv. Corp. v. Columbia Amusement Co., 106 Va. 810, 56 S. E. 822. Salesman's contract provided for certain salary if sales "averaged" a certain amount per annum, and contained

other provisions for compensation. It was held ambiguous. Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 55 S. E. 923. Contract of employment of fur cutter provided for certain salary during "busy season" and other salary during "dull season." Oral proof to explain meaning of these terms in the fur trade was admissible. Schultz v. Simmons Fur Co. [Wash.] 90 P. 917. An agreement between a widow having a dower interest in land and a person owning a four-fifths interest, relating to the boundary, provided that each was "to have and to hold" one "end" of the land. Held there was a latent ambiguity as to the estate each was to have to explain which parol evidence was competent. Slusher v. Slusher [Ky.] 102 S. W. 1188. An assignment of a judgment contained the statement that the assignor appointed the assignee its irrevocable attorney with power of substitution. Held the assignment was abiguous as to the interest intended to be transferred to the assignee, and parol evidence on the question was competent. First Nat. Bank v. Miller, 48 Or. 587, 87 P. 892. Contract of shipment of cattle being silent as to exact point of delivery in a certain city, parol evidence on that point was admissible in explanation. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 18 Tex. Ct. Rep. 75, 99 S. W. 1052. Extrinsic evidence held admissible to explain writing whereby party acknowledged receipt of money and stated that full settlement should be deferred until a date named in "a note," this making the writing ambiguous. Zerr v. Klug, 121 Mo. App. 286, 98 S. W. 822. Where a memorandum of a broker's contract for compensation was silent or at least ambiguous on a certain point (who was to do a certain act), extrinsic evidence was competent to supply the omission and explain the contract. Blake v. Miller [Iowa] 112 N. W. 158. Contract bound owner of land to convey to railroad a right of way 50 feet wide on each side of the center line, as finally located, at $100 per acre. Parol evidence was held competent to show that line had already been located, that owner knew it, and that part of a right of way already bought and paid for was included, and that railroad was not to pay for such portion. Albert v. Tidewater R. Co. [Va.] 58 S. E. 575. Accident policy insured a person as "contractor, office and traveling." Held oral proof that agent knew insured was a railroad contractor was admissible to show what was meant by the quoted words. Trow v. Preferred Acc. Ins. Co. [Vt.] 67 A. 821. A theatrical contract employed an actress for a certain part for the "regular season." Held parol evidence was competent to show what theatrical men understood by that term. Lovering v. Miller [Pa.] 67 A. 209.

Contract or writing held unambiguous and parol or extrinsic proof excluded: Contract unambiguous and oral evidence inadmissible. Harrison v. Franklin [Mo. App.] 103 S. W. 585. Provision in policy of insurance exempting company from liability under certain facts held unambiguous. Wheeler v. Fidelity & Casualty Co. [Ga.] 58 S. E. 709. Stipulation in a bill of sale that title was conveyed subject to liens of record held clear and unambiguous. Townsend v. Southern Product Co., 127 Ga. 342, 56 S. E. 436. Contract of sale held unambiguous and conversation of parties inadmissible to contradict it. Cobb v. Johnson, 126 Ga. 618, 55 S. E. 935. Written contract was for sale of "about" 250 tons of grapes, "more or less." Held quoted words did not make it ambiguous so as to let in parol proof. Peterson v. Chaix [Cal. App.] 90 P. 948. Contract provided that vendor of ranch would sell and "deliver" it to the vendee and vendee would "take" it. Oral evidence of an agreement to allow tenants to remain as tenants of the vendee was incompetent. Pierce v. Edwards, 150 Cal. 650, 89 P. 600. Erroneous recital of source of grantors' title in a deed held not to make deed ambiguous so as to let in parol evidence. West v. Hermann [Tex. Civ. App.] 104 S. W. 428. Oral evidence inadmissible to show intention of writer of letter acknowledging a debt, where the letter was clear and unambiguous. Robertson v. Warren [Tex. Civ. App.] 18 Tex. Ct. Rep. 621, 100 S. W. 805. An insurance policy containing the words "fully insured" cannot be varied by parol to show that property was insured to only three-fourths its value. Kentucky Wagon Mfg. Co. v. People's Supply Co. [S. C.] 57 S. E. 676. In action on contract for sale of land describing land by courses and distances, and reciting "said dimensions being more or less," parol evidence incompetent to show the understanding of the parties as to the words "more or less." Beardmore v. Barry, 118 App. Div. 334, 103 N. Y. S. 353. Where premises were leased "including the use of the heating plant and water system and plumbing, all as now connected up," the quoted clause was held unambiguous and not open to explanation by parol. Wheeler v. Moore [Neb.] 111 N. W. 120. Where contract for sale of land was entire and provided for a certain price in money, and was upon condition that the timber on the land be sawed into lumber and delivered by the vendee to the vendor at a stipulated price, it was unambiguous and parol evidence was incompetent to show that the provisions for manufacture and sale of the lumber were intended merely as security for the payment of the price of the land. Burton v. O'Neill Mfg. Co., 126 Ga. 806, 55 S. E. 933. A contract of sale, read in connection with certain deeds and other writings to which it referred, showed on its face that the subject of the sale was a portion of a vein of coal lying partly under a certain tract of land, described and conveyed in the deeds, and separately described and treated as coal in said deeds, as known to the parties to the deeds and contract, in point of area, existence, location, and relative position. It was held that the contract did not include other veins of coal in said tract of land which were not known to the parties, and that therefore parol evidence was not necessary to apply the contract to the subject-matter, though other veins were afterwards discovered. Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895. Iowa Code, § 4617, that where terms of a contract have been intended in different senses by different parties thereto the contract shall be construed against either party in the sense in which he had reason to believe the other understood it does not authorize the introduction of oral evidence to explain a contract which is unambiguous on its face. Inman Mfg. Co. v. American Cereal Co., 133 Iowa, 71, 110 N. W. 287. Oral evidence that seller of machinery was told by

and attending the execution of the writing is admissible,[74] and acts of the parties tending to show the construction placed by them upon their contract may also be shown.[75]

Extrinsic evidence is also competent when necessary to identify or locate the subject-matter of the contract.[76] Where the description in a deed is uncertain or

the buyer that if the machinery would do a certain amount of work it would be satisfactory held inadmissible as affecting construction of written contract that machinery was to be satisfactory to the buyer. Id. Where seller's agent lived in New York and sale was made in Illinois, and was to be performed in Iowa, and contract was construed differently under laws of first two states from construction under Iowa laws, yet oral evidence that seller understood the contract as construed in New York and Illinois was inadmissible. Id. Under above statute, where a contract provided that buggies were to be delivered in "good condition" at a time specified, oral evidence was admissible to explain meaning of "good condition," but not to show what either party understood as the time, since the contract was clear on that point. Capital City Carriage Co. v. Moody [Iowa] 110 N. W. 903. Contract for sale of land free of encumbrances and warranty deed were parts of same transaction and made a clear and unambiguous contract. Held a parol agreement that if certain assessments became payable they were to be paid by the grantee was inadmissible to prove a defense to an action on the warranty against encumbrances. Pierse v. Bronnenberg's Estate [Ind. App.] 81 N. E. 739. Contract between husband and wife held to show clearly an intent to renounce marital relations; hence parol proof to contradict that intent was inadmissible. Hill v. Hill [N. H.] 67 A. 406.

74. Harris v. Faris-Kesl Const. Co. [Idaho] 89 P. 760. Negotiations properly allowed to be shown to explain meaning of word "cost" as used by parties. Raisler Heating Co. v. Dowd, 52 Misc. 656, 102 N. Y. S. 504. For the purpose of explaining an ambiguity in a deed, negotiations preceding its execution and what was then said and done may be shown. McSurley v. Venters [Ky.] 104 S. W. 365. Even in the case of contracts within the statute of frauds, parol evidence may be given of the situation and relation of the parties and the surrounding circumstances. Howard v. Adkins 167 Ind. 184, 78 N. E. 665. Letters and plats present and referred to when a contract was made are admissible to explain ambiguous parts but not to contradict the contract. Bent v. Trimboli, 61 W. Va. 509, 56 S. E. 881. Where contract for furnishing lumber provided for construction of waterway of "heart of yellow pine," proof, negotiations, and circumstances surrounding execution of contract was admissible to explain the term quoted. San Miguel Consol. Gold Min. Co. v. Stubbs [Colo.] 90 P. 842. Contract being obscure in meaning, proof of what was said and done by the parties at the time of its execution is competent to explain it. Shenandoah Land & Anthracite Coal Co. v. Clarke, 106 Va. 100, 55 S. E. 561. Where there are peculiar circumstances leading up to and surrounding the transaction in question and the execution of the contract in issue, which were known to the parties, it is proper to place these circumstances before the jury. Hale Bros. v. Milliken [Cal. App.] 90 P. 365. Evidence of preliminary negotiations held admissible to aid the court in determining whether a written instrument was intended as a contract of sale or lease of certain machinery. Lambert Hoisting Engine Co. v. Carmody, 79 Conn. 419, 65 A. 141. Where casualty insurance policy was to cover all injuries to employes of news agency while at work on trains, and was procured because of contract with railway company exempting said company from liability for injuries, evidence was admissible to show all the circumstances and knowledge of this contract by the casualty company in order to show extent of liability on the bond. Fidelity & Casualty Co. v. Southern R. News Co. [Ky.] 103 S. W. 297. Where written order for jewelry was obscure, the representations of the salesman could be shown to interpret it in order to show a failure of consideration for an accepted draft in action against acceptors. Johnson County Sav. Bank v. Rapp [Wash.] 91 P. 382. Where delivery of deeds by a decedent was in issue, held proper to show by justice who drew the deeds what was said and done by the parties and by him at the time. Napier v. Elliott [Ala.] 44 So. 552.

75. In an action on a note contained in an order for goods, where defendant denied on oath the making of the note, evidence of what took place between the parties when the writing was made was admissible. Acme Food Co. v. Tousey, 148 Mich. 697, 112 N. W. 484. Written lease contained covenant not to sublet for any other purpose than for "lodge use" or "lodge purposes" without the lessor's consent, and premises were sublet to lodges who used them for dancing, and lessor sought to restrain use of premises for that purpose. Held proof of custom of lodges of the city as to dancing and of contemporaneous acts and conversations of the parties, their subsequent conduct, and the situation at the time, was admissible to explain meaning of "lodge use" and "lodge purposes." O'Neill v. Ogden Aerie No. 118, F. O. E. [Utah] 89 P. 464. Where deed was executed and was broad enough to convey certain uncut grain on the land, proof that the grantee permitted the grantor to cut and stack it on the land, and that grantee then offered to buy it, was admissible to explain their conduct and to show the intention of the parties. Carter v. Childress [Tex. Civ. App.] 18 Tex. Ct. Rep. 392, 99 S. W. 714.

76. Sale of "Texas red rust-proof oats" was made through a broker, and purchaser brought suit for damages resulting from delivery of oats of a different kind. Held competent for broker to testify that contract was made with the mutual understanding that the quoted term meant oats raised in Texas. Brackett Co. v. Americus Grocery Co., 127 Ga. 672, 56 S. E. 762. Where the language of a mortgage as to the description

ambiguous, but is capable of being made certain, extrinsic evidence is competent for that purpose;[77] but if a description is so deficient as to render a deed void, parol evidence is incompetent to supply the deficiency, since oral evidence cannot be received to describe land sold and then to apply the description.[78]

Parol evidence is competent to show the actual relation of parties named in a writing to the contract evidenced by it[79] as between the immediate parties thereto,[80]

of the debt intended to be secured is uncertain, indefinite, and general in its terms, and does not describe the same with such precision as to identify it by a comparison with the mortgage, its identity may be established by parol. Boyes v. Masters, 17 Okl. 460, 89 P. 198. Where by a written contract of settlement one party sold to another a certain number of staves, more or less, branded with certain named marks, parol evidence was held competent to show that certain staves bearing a brand not mentioned in the contract were not included therein. Little Rock Cooperage Co. v. Gunnels [Ark.] 101 S. W. 729. Contract for sale of house provided also for sale of coal and cattle feed on the premises and certain mirrors, and showed an indorsement of $100 paid for the coal and feed. Oral evidence was held competent to show whether parties considered mirrors as part of the house. Martin v. Ferguson [Ky.] 103 S. W. 257. Where written lease showed that it did not include all of a farm, but did not designate the portion leased, parol evidence was competent to identify the portion covered by the lease. Cockrell v. Egger [Tex. Civ. App.] 17 Tex. Ct. Rep. 569, 99 S. W. 568. Where company transferred its property by a written contract, oral evidence was competent to show that certain articles, not expressly mentioned in the contract, were the individual property of a member of the firm and intended to be sold by the instrument. Houston Transfer Co. v. Lee [Tex. Civ. App.] 97 S. W. 842. Description in mortgage as "all my crops, corn, cotton, etc., now up and growing on about 240 acres of land, all the above property is in Jackson district, county and state aforesaid," may be aided and explained by parol as between the parties. Read Phosphate Co. v. Weienselbaum Co. [Ga. App.] 58 S. E. 122. In applying contract to its proper subject-matter, resort may be had to circumstances attending execution. Interpretation of condition for maintenance of educational institutional and teaching therein of religious doctrine consistent with what had been theretofore taught. Lowrey v. Territory of Hawaii, 206 U. S. 206, 51 Law. Ed. 1026.

77. If a description is not void for uncertainty, oral evidence is competent to identify the land to which it was meant to apply. Walden v. Walden [Ga.] 57 S. E. 323. In suit to have deed declared a mortgage, parol proof was competent to show a mistake in the description and to show what property was intended to be included therein. Openshaw v. Rickmeyer [Tex. Civ. App.] 18 Tex. Ct. Rep. 103, 102 S. W. 467. Where description in sheriff's deed was ambiguous but referred to records, which showed only one deed to judgment debtor, this deed was admissible in aid of description in sheriff's deed. Clark v. Wm. M. Rice Inst. [Tex. Civ. App.] 19 Tex. Ct. Rep. 608, 103 S. W. 1110. Where deed referred to street as a boundary and also to a map, and the map showed no street, oral proof to explain the ambiguity was competent. St. Louis, etc., R. Co. v. Payne [Tex. Civ. App.] 19 Tex. Ct. Rep. 765, 104 S. W. 1077. Where descriptions in deeds mentioned certain objects, parol evidence was competent to show what and where they were; also testimony of witness who saw the line run as to where it was. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275. A call in a deed being for a line over "Cat Face" to a tree, evidence of the location of the monument known as "Cat Face," and of the traditional derivation of the name, was admissible to identify and locate the call. Douglas Land Co. v. Thayer Co. [Va.] 58 S. E. 1101. Where description of land in deed referred to a point on the boundary line of a tract entered by a certain person as the place of beginning, oral evidence was competent to show the location of the land. Staub v. Hampton, 117 Tenn. 706, 101 S. W. 776. A deed contained two irreconcilable descriptions intended to apply to the same land. Held oral evidence was competent to show the real intention of the parties. Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691. Where the description of premises in a contract is uncertain, parol evidence is admissible to identify it. Where the subject-matter of a contract is not sufficiently identified therein, parol evidence is admissible for that purpose. Bennett v. Palmer, 128 Ill. App. 626.

78. If the description in a deed is so patently ambiguous and defective as not to pass title, oral or extrinsic evidence is inadmissible to aid it; such evidence cannot make the deed operate on land not included in the descriptive words. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665.

79. Where signatures to contract and names recited as parties did not tally, parol proof was competent to show who were the real parties. Schuster v. Snawder [Ky.] 101 S. W. 1194. Parol proof is competent to show that payee in promissory note is not the owner thereof, but that note was made for benefit of a firm. Rhomberg v. Avenarus [Iowa] 112 N. W. 548. Parol evidence is admissible as between several indorsers to show that they agreed to become liable otherwise than in the order in which they indorsed. Under P. L. 1902, p. 594 (§ 68 of Neg. Instr. Law). Wilson v. Hendee [N. J. Err. & App.] 66 A. 413. It may be shown by parol that an indorsement on a note was made for a special purpose, as, for instance, as authority to collect. Goette v. Sutton [Ga.], 57 S. E. 208. Note reading "we promise to pay," and containing stamp of name of company and signature of president under it, held to be ambiguous so as to render competent extrinsic proof that it was the note of the

provided their relation thereto and their obligations thereunder are not clearly shown [81] or fixed by implication of law.[82]

It is usually held that a simple receipt is only prima facie evidence of the fact recited and is subject to contradiction or explanation by parol; [83] but if the writing constitutes or is accompanied by a contract, the parol evidence rule applies.[84] The recitals of consideration in a contract, being in the nature of a receipt, are not conclusive; oral evidence is always competent to show the real consideration.[85] The

company and not the president. Dunbar Box & Lumber Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91. Parol proof is admissible to show the circumstances in which persons other than the payee, and apparently not connected with a note, endorsed it. Kinsel v. Wieland [Colo.] 88 P. 153. Oral evidence held competent to show that property conveyed to "Odd Fellows' Building & Savings Association" was intended to be conveyed to "Odd Fellows' Building & Exchange Company of Texas." Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513. In action to try title held that oral evidence was competent to show that a corporation which had appeared in a former partition suit and consented to judgment of partition was the same corporation as that under which defendant claimed. Id. In some states it is held that where it is uncertain from the face of the note whether it was intended to be the note of the corporation or of the individuals signing, or both, if the litigation arises between the original parties, evidence may be introduced to explain the ambiguity. Conflict on point noted. Western Grocer Co. v. Lackman [Kan.] 88 P. 527. Parol evidence is admissible to show the actual relations of the parties with reference to a written contract. Parol evidence is admissible to show that chattel mortgage was not intended to be effective between the parties. Van Norman v. Young, 129 Ill. App. 542.

80. Under Rev. Civ. Code S. D., § 1994, one appearing by terms of note to be a joint maker may be shown by parol to be a surety only, in the absence of any showing that same person has relied, to his injury, on such other's apparent character as principal. Windhorst v. Bergendahl [S. D.] 111 N. W. 544.

81. If contract is unambiguous as to who are contracting parties, extraneous evidence is inadmissible to vary or contradict it. Schuster v. Snawder [Ky.] 101 S. W. 1194. A person whose name does not appear upon a promissory note cannot be charged as endorser thereof by parol proof that the nominal payee in accepting and indorsing it was acting as his authorized agent where nothing upon the face of the note suggests the existence of any agency. New York Life Ins. Co. v. Martindale [Kan.] 88 P. 559.

82. See cases supra, holding that parol evidence rule applies to terms of a contract implied by law.

83. Schlessinger v. Schlessinger [Colo.] 88 P. 970; Hartford Life Ins. Co. v. Sherman, 123 Ill. App. 202; Wegmann v. Rothwell, 121 Mo. App. 413, 99 S. W. 59. Receipts in full may be explained to show for what they were given. Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 P. 86. Receipt for freight is not conclusive but is only prima facie evidence of what was received from the carrier. Mussellam v. Cincinnati, etc., R. Co. [Ky.] 104 S. W. 337. Writing "Received of C. fifty dollars option money in part payment on $1,000 for L.'s interest in an option (description) taken by C." held a mere receipt which did not exclude oral proof that a sale of the option by L. was not intended. Lazier v. Cady [Wash.] 87 P. 344. Negotiations for settlement of a dispute resulted in the giving of a receipt. Held that recitals thereof were not conclusive, but that real facts of settlement could be shown. Fidelity & Deposit Co. v. Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272.

84. Where a release was intended by the parties to express their final agreement, being more than a mere receipt, parol evidence to vary its legal effect was held incompetent. Allen v. Ruland, 79 Conn. 405, 65 A. 138. Bills of lading, except as to recitals of the receipt of goods by the carrier and their condition when received, are contracts and come within the rule excluding parol evidence to vary or contradict the terms thereof. International & G. N. R. Co. v. Griffith [Tex. Civ. App.] 19 Tex. Ct. Rep. 520, 103 S. W. 225.

85. Kinkead v. Peet [Iowa] 111 N. W. 48; Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325; Scanlon v. Northwood, 147 Mich. 139, 13 Det. Leg. N. 1013, 110 N. W. 493; Dilcher v. Nellany, 52 Misc. 364, 102 N. Y. S. 264; Ivey v. Bessemer City Cotton Mills, 143 N. C. 189, 55 S. E. 613; Smith v. Bowen [Tex. Civ. App.] 17 Tex. Ct. Rep. 664, 100 S. W. 796. Where defendant agreed to build on a lot or to repay to plaintiff his profits if he resold and did not build, and this agreement was an inducement to and part of the consideration for the deed, proof of it, resting in parol, was not objectionable as contradicting the deed. Bourne v. Sherrill, 143 N. C. 381, 55 S. E. 799. Though lease expressed a money consideration, parol evidence was held admissible to show that the employment of a certain party as physician was a part of the consideration. Suderman-Dolson Co. v. Rogers [Tex. Civ. App.] 19 Tex. Ct. Rep. 346, 104 S. W. 193. A recital in a note that it is given in part payment of a hearse is not a part of the contract and may be varied by parol as against a purchaser after maturity. Kampman v. McCormick [Tex. Civ. App.] 18 Tex. Ct. Rep. 588, 99 S. W. 1147. Written contract gave defendant exclusive agency for sale of certain goods; parol evidence was competent to show an agreement by plaintiff to use due efforts to sell goods and to employ its organization and other means for that purpose. Taylor v. Elmira Storage & Supply Co., 54 Misc. 363, 104 N. Y. S. 557. Recital of consideration and payment

fact that there was or was not a consideration or that it has failed may also be shown by parol,[86] but where a recital on consideration is contractual in its nature, constituting a substantive part of the agreement of the parties, it cannot be varied by parol,[87] nor can a recital of consideration be contradicted in any case for the purpose of impairing the validity or operative effect of the instrument.[88]

Fraud in the inception of the contract,[89] or which induced its execution, may be shown by parol, though the contract is in writing, and where it is claimed that through fraud or mutual mistake the contract as written is not the one actually made, parol evidence is admissible to show the true contract.[90] Parol evidence is admissible

thereof in deed is only prima facie evidence. Morton v. Morton [Ark.] 102 S. W. 213. Real consideration for deed may be shown by parol. Dean v. Carpenter [Iowa] 111 N. W. 815; Blackwell v. Blackwell [Mass.] 81 N. E. 910; Faust v. Faust, 144 N. C. 383, 57 S. E. 22. Oral evidence held competent to show value of land which was consideration for deed in action for damages for breach of covenants of deed. Mayer v. Wooten [Tex. Civ. App.] 19 Tex. Ct. Rep. 431, 102 S. W. 423. Recital of consideration in a deed is not conclusive; the subject is open to modification or explanation by parol as to time, place, amount, and other considerations. Allen v. Rees [Iowa] 110 N. W. 583. The recital of a certain consideration in a deed of conveyance is not conclusive; extrinsic evidence is admissible to show a consideration greater or less, or different from the one recited, so long as the existence of some consideration to support the conveyance is not denied. Jost v. Wolf, 130 Wis. 37, 110 N. W. 232. Where deed conveyed both land and personalty, and recited a stated money consideration, parol evidence was admissible to show how much applied on the land and how much on the personalty. Goette v. Sutton [Ga.] 57 S. E. 308.

86. Way v. Greer [Mass.] 81 N. E. 1002. Failure of consideration may be shown by parol in any case. Lefkovits v. First Nat. Bank [Ala.] 44 So. 613. In an action on a written instrument made payable at the death of the obligor, heirs may show by parol that no consideration passed and that there was a failure of consideration as to an agreement contained therein. Sere v. Darby, 118 La. 619, 43 So. 255.

87. Where a consideration expressed in a contract is something more than a mere acknowledgment of receipt and is of a contractual nature and is made of the essence of the contract, then parol evidence is inadmissible to change the terms thereof. Lefkovits v. First Nat. Bank [Ala.] 44 So. 613. Provision as to payment in contract for sale of a business held contractual in character and hence could not be contradicted by parol. Farquhar v. Farquhar [Mass.] 80 N. E. 654. The consideration in a deed (to take effect after the grantor's death) was one dollar and that grantee should look after the grantor's welfare and his business when so required. Held this was contractual and could not be varied by parol. Rogers v. Rogers [Miss.] 43 So. 434. Chattel mortgage for payment of $4,500 reciting that that sum was the amount of the debt held conclusive as to such recital. Sturmdorf v. Saunders, 117 App. Div. 762, 102 N. Y. S. 1042.

88. Where a warranty deed fully recites the consideration, it cannot be contradicted by parol for the purpose of avoiding the deed. Redmond v. Cass, 226 Ill. 120, 80 N. E. 708. In the absence of fraud, a want of consideration cannot be shown as against a recital of consideration for the purpose of defeating the operative words of a deed. Strong v. Whybark, 204 Mo. 341, 102 S. W. 968. Where deed reciting love and affection as consideration (from father to daughter) was attacked by one holding a contract for a valuable consideration. Lawson v. Mullinix, 104 Md. 156, 64 A. 938. The consideration of a contract may always be inquired into in order to show that the promise is no longer binding according to its tenor, but in inquiring into the consideration the promisor cannot deny that he made the promise evidenced by the writing. Byrd & Co. v. Marietta Fertilizer Co., 127 Ga. 30, 56 S. E. 86.

89. McCusker v. Geiger [Mass.] 80 N. E. 648. The defense of fraud and want of consideration may be shown by parol, not to contradict or vary, but to destroy the legal and binding effect of a written contract. Minneapolis Threshing Mach. Co. v. Otis [Neb.] 110 N. W. 550. Where an indorser of a note waived demand in writing, parol evidence was competent to show fraud or duress and to show surrounding facts and circumstances. Toole v. Crofts [Mass.] 82 N. E. 22. Fraud inducing execution and acceptance of lease of premises for a particular purpose may be shown. Hinsdale v. McCune [Iowa] 113 N. W. 478.

90. Parol proof of fraud, accident, or mistake is competent to vary the terms of a written agreement. Dillard v. Jones [Ill.] 82 N. E. 206. Where it is alleged that receipts showing settlement in full were obtained by fraud and that the party defrauded was in fact entitled to mere parol evidence was admissible to show the fraud and the true facts. Sawyer v. Walker, 204 Mo. 133, 102 S. W. 544. The parol evidence rule does not exclude proof that the answers in the application of the insured were not written by him and that he did not know the contents of the application when he signed it. Modern Woodmen of America v. Angle [Mo. App.] 104 S. W. 297. Where assignments to defendant by a deceased person to whom he stood in a confidential relation were alleged to have been procured by undue influence, parol evidence on his part was competent to show that the assignments were consistent with her previous acts and purposes as to defendant. Taylor v. Vail [Vt.] 66 A. 820. A court of equity may consider parol evidence in determining whether through fraud, mis-

to show that delivery of a contract was conditional,[91] and that by reason of the nonperformance of a condition precedent the contract never became operative,[92] or to show that delivery was not intended,[93] or that an instrument was not valid when delivered,[94] or that it has been altered since delivery,[95] or to show which of two writings embodies the actual agreement of the parties.[96] It may always be shown by parol that a written contract was made in furtherance of an illegal purpose or object.[97]

Parol evidence is admissible to show a contemporaneous, collateral, and independent agreement omitted from the writing and not inconsistent with its terms,[98]

take, or inadvertence the writing fails to express the true agreement of the parties, and may enforce the true agreement so proved. Cook v. Sterling Elec. Co. [C. C. A.] 150 F. 766. In a suit to cancel a policy of insurance, where it appeared that applicant thought he was getting a fifteen payment policy, and his policy was in fact a different kind, evidence of what took place between the applicant and the agent at the time was admissible. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 S. W. 580. A vendor included in a second conveyance a part of land already sold, and an action was brought to recover part of consideration for first conveyance. Held vendee may show that such portion was included in second conveyance by mistake, and that no consideration was paid therefor. McLendon Bros. v. Finch [Ga. App.] 58 S. E. 690. Fraud which induced written contract may be shown by parol, though the contract is in writing. American Educational Co. v. Taggert, 124 Ill. App. 567. Party signing contract in blank may show as against those who filled it that the agreement was other than expressed by the terms thereof. Martin v. Trainer, 125 Ill. App. 474. If pleaded. Trainor v. Schutz, 98 Minn. 213, 107 N. W. 812.

91. Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060. Though a note has been delivered, oral evidence is competent to show a previous agreement that the note was not to become effective until certain other persons had signed. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192.

92. Hinsdale v. McCune [Iowa] 113 N. W. 478; Way v. Greer [Mass.] 81 N. E. 1002. In action on a draft, evidence of an agreement that the draft should be accepted only upon delivery of an attached bill of lading was held admissible to show condition precedent. National Park Bank v. Saitta, 55 Misc. 93, 106 N. Y. S. 328. In action on a written contract for the installation of a system of cash and package carriers in a store, oral evidence was held admissible to show that the contract was not to be delivered or take effect until certain arrangements in the store had been completed. Barr Cash & Package Carrier Co. v. Brooks-Ozan Mercantile Co. [Ark.] 101 S. W. 408. Oral evidence tending to establish an independent collateral agreement as a condition precedent to a contract becoming operative is not evidence tending to vary or impeach the written contract. Manhattan Guide Co. v. Gluck, 52 Misc. 652, 101 N. Y. S. 528.

93. Parol evidence is competent to show intent in turning over policy of insurance to assured, whether or not delivery was intended. Waters v. Security Life & Annuity Co., 144 N. C. 663, 57 S. E. 437. Possession of deed by grantee is prima facie evidence of delivery, but parol evidence is competent to show no delivery was in fact intended. Drinkwater v. Hollar [Cal. App.] 91 P. 664. Where husband took title to land in his wife's name and thereafter had the title transferred to him but never filed the deed, which was found in his safety deposit box after his death. Held oral and circumstantial evidence was competent to show that actual transfer of title to the husband from the wife was not intended. Hamlin v. Hamlin, 117 App. Div. 493, 102 N. Y. S. 571.

94. In ejectment action plaintiff may show by parol that his deed to defendant's grantor did not have a seal when delivered, that the seal was afterwards added and the record changed, since in Virginia a deed without a seal is void. Burnette v. Young [Va.] 57 S. E. 641.

95. Price v. Stanbra [Wash.] 88 P. 115.

96. Where supposed duplicate copies of one agreement differ as to some particulars, parol evidence is competent to show which of the two embodies the real agreement of the parties. Bowman v. Poppenberg, 53 Misc. 373, 103 N. Y. S. 245.

97. Twentieth Century Co. v. Quilling, 130 Wis. 318, 110 N. W. 174. Where an agreement is contrary to public policy, the parties cannot by reducing unobjectionable portions of it to writing (promissory note) preclude the introduction of oral evidence to show the entire agreement. Id.

98. Where an option contract and an oral agreement to pay a commission for sale of land were separate and distinct, proof of the latter did not vary or contradict the former and was competent. Green v. Booth [Miss.] 44 So. 784. Where an independent parol agreement has been made as the inducement to the making of a written contract, the former may be proved and enforced though not referred to in the latter. Agreement to move plaintiff's family as inducement to contract of employment. New York Life Ins. Co. v. Thomas [Tex. Civ. App.] 19 Tex. Ct. Rep. 567, 104 S. W. 1074. An oral promise by one of the parties made at the time and used to procure the execution of the written contract may be proved though its effect is to change the written contract. Oral agreement by railroad president at time of execution of grant of right of way to build a crossing connecting parts of grantor's lands was provable, though not mentioned

also to show a subsequent modification of a written contract resting in parol.[99] Parol evidence is admissible to show that a deed absolute on its face is in fact a mortgage.[1] The parol evidence rule does not exclude oral proof of collateral facts having no tendency to contradict or vary the terms of the writing.[2]

The parol evidence rule applies only as between parties to the written contract, and not as between third persons or a party and a third person,[3] and has no application to the contents of letters and other writings which do not bring the writer into contractual relations with the recipient.[4] Where entries made in a book of original entry are admissible as part of the res gestae, evidence explaining the meaning of such entries is competent.[5]

in the deed. Perklomen R. Co. v. Bromer, 217 Pa. 263, 66 A. 359. In action for breach of lease, parol proof was held competent to show a collateral agreement made prior to and in consideration of the lease whereby defendant agreed to give plaintiff possession of the premises on a certain date and to have them in a tenantable condition by that date. Schweig v. Manhattan Leasing Co., 54 Misc. 233, 104 N. Y. S. 371. Land was conveyed for an expressed money consideration and deed recorded. While grantor was in possession land was attached in action against grantee, who had reconveyed. Held a parol agreement that grantee was to build and live on the land, and that he failed to do so and had reconveyed in accordance with the terms of the agreement, could be shown. Paris Grocer Co. v. Burks [Tex. Civ. App.] 17 Tex. Ct. Rep. 892, 99 S. W. 1135. The presumption that a sale of land is by the acre and not in gross, where the quantity is referred to in the contract, may be met and overcome by evidence that the parties intended to be governed by the estimated quantity, and this evidence does not tend to vary or contradict the deed, but establishes a collateral contract. Emerson v. Stratton [Va.] 58 S. E. 577.

99. Roquemore v. Vulcan Iron Works Co. [Ala.] 44 So. 557. Consent to the alteration of a written instrument may be shown by parol. State v. Baird [Idaho] 89 P. 298. While a written contract cannot be contradicted by parol, evidence of any character is competent to show that a new contract, resting mainly in parol, has been substituted for the former written one. Jost v. Wolf, 130 Wis. 37, 110 N. W. 232. Evidence to show a subsequent abandonment of a written contract and the substitution of an oral contract therefor is competent. Fleming Bros. v. Linder [Iowa] 109 N. W. 771. In action by payee of note against one who indorsed in blank before delivery for the purpose of giving credit to the maker, note being payable one day after date, proof of the circumstances and conduct of the parties is admissible to show that presentment for payment was waived. Baumeister v. Kuntz [Fla.] 42 So. 886.

1. Smith v. Hope [Fla.] 41 So. 69. Parol evidence is competent to show that a deed absolute on its face was in fact a mortgage given to secure a loan, and the entire transaction may be shown. Krebs v. Lauser, 133 Iowa, 241, 110 N. W. 443. Where a deed is shown by parol to have been given as security, in an action for judgment and to establish a lien, parol evidence is also competent to show that the deed was given to secure a debt to the amount stated as to the consideration, and also to secure future advances. Hester v. Gairdner [Ga.] 58 S. E. 165.

2. City ordinance prohibiting use of scales until inspected by city inspector held to be part of contract of sale of scales, with warranty that they were correct, Held introduction of ordinance did not vary or contradict the contract, since it was a part of it. Wright v. Computing Scale Co. [Wash.] 91 P. 571. Where a note is not produced but appears to be lost or mislaid, and its contents are proved orally, it will be presumed that the note contained the terms shown to be a part of the entire oral agreement, and proof will not be excluded on the theory that it contradicts the writing. Abney v. Marshall, 124 Mo. App. 483, 101 S. W. 694.

3. Does not apply to conversations between one of the parties and a third person. New York Life Ins. Co. v. Rilling, 121 Ill. App. 169. The parol evidence rule does not apply in an action between parties, only one of whom is a party to the written contract. Glidden v. Newport [N. H.] 66 A. 117. The rule that parol evidence is inadmissible to contradict or vary the terms of a written contract is inapplicable in a case in which the agreement assailed is between strangers to the parties to the suit, since the former cannot by their ignorance, carelessness, or fraud estop the litigants from proving the truth. George S. Good & Co. v. Central Coal & Coke Co. [Ind. T.] 104 S. W. 613. Where deed from husband to wife is sought to be set aside as a fraud on creditors, the true consideration may be shown by parol to be different from that recited, love and affection and $1. Aultman Engine & Thresher Co. v. Greenlee [Iowa] 111 N. W. 1007. The parol evidence rule applies only to the parties to the contract or their privies; as against a stranger to the contract the parties thereto may assert that it was other or different, in any respect and to any extent, than that which the writing imports. In re Shield Bros. [Iowa] 111 N. W. 963. After conveyance to another of title by the apparent owner, the actual present holder of legal title, when attacked, may show the true facts by parol. Cain v. Bauman, 118 La. 82, 42 So. 654.

4. It may be shown that words used in a letter or notice were inadvertently used. Wiggins v. Wilson, 123 Ill. App. 663.

5. Evidence held admissible to show that entries "pt." and "prt." in connection

Parol evidence to vary or explain public records.[6]—Public or judicial records cannot be contradicted by parol,[7] but facts omitted therefrom may be shown,[8] and a mistake therein may be shown in order to prevent a fraud or injustice.[9]

§ 6. *Hearsay. A. General rules.*[10]—Unsworn statements out of court by persons not parties to the action, and not made in the presence or hearing of a party,[11] and communications between one party to the action and a third party,[12] are inad-

with entries of payments made mean that they were accepted as part payment. Wiggins v. Wilson, 123 Ill. App. 663.

6. See 7 C. L. 1547; see, also, supra, § 4, Best and Secondary Evidence.

7. The official record of the contents of an ordinance cannot be varied by parol evidence. Fogg v. Ocean City Sewer Co. [N. J. Eq.] 66 A. 609. Where the record of a divorce case showed that the court's findings were made from evidence adduced and not from a stipulation, evidence of a party, in a suit to modify the decree, that she did not understand the stipulation was inadmissible. Chappell v. Chappell [Wash.] 89 P. 166. A court record of a trial, though meager, must be taken as true, and cannot be enlarged or charged by parol, but only by amendment by the court or magistrate of whose action it purports to be a record. Warburton v. Gourse, 193 Mass. 203, 79 N. E. 270.

8. While records of city common council cannot be contradicted by parol, facts omitted therefrom may be shown, and it may be shown that bills allowed by the council left out certain facts and that council knew the facts omitted. Wheat v. Van Tine [Mich.] 112 N. W. 933. While record in condemnation proceeding cannot be contradicted, yet other evidence, consistent with the record, including parol proof, is competent with respect to matters on which the record is silent to show what was considered, involved, and adjudicated. Stone v. Missouri Pac. R. Co. [Kan.] 90 P 251. County order not a contract. Worth County v. Sykes [Ga. App.] 58 S. E. 380. Apparent omissions in public records may be supplied by parol evidence. Where a comparison of the records of two suits does not disclose their identity, parol evidence is admissible for that purpose. Wiehe v. Atkins, 126 Ill. App. 1.

9. Where a mistake was made in an eminent domain proceeding so that the judgment and award were erroneous as to one party, and to allow it to stand would amount to legal fraud on the part of another, oral evidence was admissible to show the true facts so that the correction could be made. Getzendaner v. Trinity & B. V. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 511, 102 S. W. 161.

10. See 7 C. L. 1548.

11. Erbes v. Smith, 35 Mont. 38, 88 P. 568; Robinson v. Jones [Md.] 65 A. 814; Gray v. Joiner, 127 Ga. 544, 56 S. E. 752. Statements of third party as to ownership of property not made in presence of a party inadmissible against the party. Preston v. Newcomb [Mich.] 14 Det. Leg. N. 501, 113 N. W. 29. A statement of a person not interested in a transaction in regard to it is hearsay as a party in interest. Buffalo Coal Creek Min. Co. v. Troendle, 30 Ky. L. R. 740, 99 S. W. 622. In action for death from explosion of dynamite used to break iron machinery, evidence of a conversation between witness and the person employed to do the work as to the manner of death of decedent was inadmissible. Falender v. Blackwell, 39 Ind. App. 121, 79 N. E. 393. Where in action for personal injuries it appeared defendant was not liable, the injuries having been caused by an independent contractor, declarations of the contractor at the time of the injury were inadmissible. Symons v. Road Directors for Allegany County [Md.] 65 A. 1067. In action for alienation of affections, statements of plaintiff's wife to various witnesses, detailing acts of cruelty, were hearsay. Brown v. Evans [Mich.] 14 Det. Leg. N. 476, 112 N. W. 1079. In action for waste, evidence of statements of plaintiff's husband as to his or plaintiff's interest in the land was inadmissible, it not appearing that he was a former owner. Erbes v. Smith, 35 Mont. 38, 88 P. 568. In action against parents of plaintiff's husband for alienating husband's affections, evidence of the husband's statements, not made in presence of the parents, was inadmissible. Leavell v. Leavell, 122 Mo. App. 654, 99 S. W. 460. In actions for injuries to child at street crossing, evidence of statements of his father, not made in presence of any agent of defendant, was hearsay. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 S. W. 162. Statements in letter of claim agent asking for report on accident held hearsay. Weinstein v. Interurban St. R. Co., 52 Misc. 468, 102 N. Y. S. 512. In action of detinue for a mule, what sheriff said to witness when he came to seize the mule under a writ held inadmissible. Beal v. McKee [Ala.] 43 So. 235. In action for slander for charging plaintiff with having whipped her mother, statements by the mother to witnesses as to treatment of her by her daughter were held incompetent. Earley v. Winn, 129 Wis. 291, 109 N. W. 633. In action by a bank cashier to set aside a note alleged to have been procured by duress, and for money stolen by another, a statement by such third person ten days after the money disappeared held inadmissible. Lacks v. Butler County Bank, 204 Mo. 455, 102 S. W. 1007.

12. Letters and telegrams between one party and third persons held hearsay, and incompetent as to other party. Smith v. Jefferson Bank, 120 Mo. App. 527, 97 S. W. 247. In replevin by one in possession of machinery attached as property of another, conversations between attachment defendant and a third person, not in plaintiff's presence, as to a bill of sale to plaintiff, were inadmissible. Taylor v. Brown [Or.] 90 P. 673. Where ownership of mowing machine was in issue, a postal card written by a third person to claimant stating that claimant's mowing machine was ready for

missible, and testimony based on hearsay,[13] and not on the personal knowledge of the witness,[14] or which is conjectural only,[15] is also incompetent. Testimony apparently based on the personal knowledge of the witness [16] or on information derived from

him was inadmissible. Kaufhold v. Roth [N. J. Law] 64 A. 1057. Where plaintiff claimed that goods refused by consignee had been wrongfully delivered to another, a letter from plaintiff to the person to whom the goods were delivered was hearsay. Marshall Medicine Co. v. Chicago & A. R. Co. [Mo. App.] 104 S. W. 478. In suit for proceeds of beneficiary certificate between plaintiff and defendant, declarations by insured to defendant were held incompetent against plaintiff. Grand Lodge Colored Knights of Pythias v. Mackey [Tex. Civ. App.] 104 S. W. 907. Conversations between defendant and two others, in plaintiff's absence, held immaterial in action for chattels bought by plaintiff and claimed by defendant under subsequent purchase. Farmer v. Hughes [Colo.] 88 P. 191. In action for injuries by passenger, alleged to have been caused by transferring from one train to another, evidence that her physician told her that her ailment was due to another cause, and advised her not to sue, was hearsay. Texas & N. O. R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. In action by widow to set aside deed to her husband of lands which had previously been conveyed to her, testimony by the notary who drew the deed regarding statements by the husband that the deed to the wife should not have been recorded, and that it was recorded by mistake, were inadmissible against the widow when not shown to have been made in her presence. Yordi v. Yordi [Cal. App.] 91 P. 348; Corning v. Dollmeyer, 123 Ill. App. 188; Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658; Gulf, etc., R. Co. v. Craft [Tex. Civ. App.] 18 Tex. Ct. Rep. 510, 102 S. W. 170; Evans v. Nail, 1 Ga. App. 42, 57 S. E. 1020.

13. Nashville, etc., R. Co. v. Karthaus [Ala.] 43 So. 791. In trespass to try title, testimony of a witness that certain children told witness that their mother claimed the land was hearsay. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. In action against partnership, testimony by one partner that neither his partner nor the firm had been notified of a certain fact was held hearsay. Dunn & Lallande Bros. v. Gunn [Ala.] 42 So. 686. To show loss of note in mails, testimony of cashier of bank that cashier of another telephoned that he had received and remailed the note was hearsay. Schwartz v. Mechanics' & Traders' Bk., 103 N. Y. S. 119. Evidence of what a person holding a telephone conversation told witness as to what the person at the other end of the line said was hearsay. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 17 Tex. Ct. Rep. 745, 99 S. W. 439. Hearsay evidence is incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who speak from their own knowledge. Hirshberg, Hollander & Co. v. Robinson [N. J. Law] 66 A. 925. Whether or not a building was within the limits of a survey being an issue, it was error to permit a witness to testify, over objection, that the surveyor told him the building was included in the survey. Martin v. Gainesville, 126 Ga. 577, 55 S. E. 499. Whether witness knew of others conversing with a decedent on certain subjects called for hearsay. Huyck v. Rennie [Cal.] 90 P. 929. In action for services, testimony of witness, a third person, that he was authorized to employ an attorney and consulted plaintiff was hearsay. Miner v. Rickey [Cal. App.] 90 P. 718. In an action for damages to a shipment of hogs being transported to a stock show, by reason of their exposure to a virulent disease, evidence that the disease was reported to have existed among hogs at the show was inadmissible. Council v. St. Louis, etc., R. Co., 123 Mo. App. 432, 100 S. W. 57.

14. Where medical expert testified that he knew of but one case in which the injury resulted in a similar manner as that in issue, his testimony as to how the injury occurred is inadmissible as hearsay. City of Chicago v. Saldman, 129 Ill. App. 282. Person not shown to have personal knowledge of facts not allowed to testify. People v. Cahill, 188 N. Y. 489, 81 N. E. 453. In ejectment, plaintiff claimed under a parol gift from owner, since deceased. Held opinions by neighbors as to who was the head of the house were incompetent. Wood v. Praul, 217 Pa. 293, 66 A. 528. Agent's testimony, as to how, when, and by what road a shipment of organs was injured held hearsay. Texas Cent. R. Co. v. Fowler [Tex. Civ. App.] 18 Tex. Ct. Rep. 564, 102 S. W. 732. In action for death of young man by electric shock, where there was evidence tending to show that decedent knew something of the dangers of electricity, the admission of testimony of his mother that he knew nothing about such dangers was prejudicial error. Sneed v. Marysville Gas & Elec. Co., 149 Cal. 704, 87 P. 376. Testimony as to prices paid for cattle, based wholly on records made by another, not known by witness to be correct, inadmissible. Texas & P. R. Co. v. Leggett [Tex. Civ. App.] 17 Tex. Ct. Rep. 676, 99 S. W. 176. Testimony of witness that plaintiff, who was a physician, by reason of his deafness, could no longer examine patients for heart and lung trouble, held inadmissible because it could not have been based on personal knowledge. Cleaver v. Louisville & N. R. Co., 30 Ky. L. R. 1059, 100 S. W. 223. Ordinary may not testify as to reputation of woman seeking to regain custody of child when his testimony is based wholly on evidence given before him in a former proceeding. Moore v. Dozier [Ga.] 57 S. E. 110. As to one not a party to a letter, a statement of the writer, who was not the agent of such party, that he had taken up a certain matter with him was held hearsay. Houston & T. C. R. Co. v. Mayes [Tex. Civ. App.] 16 Tex. Ct. Rep. 818, 97 S. W. 318.

15. Statement by plaintiff in a slander suit that defendant advertised her throughout a certain locality as a thief is inadmissible as hearsay. Corning v. Dollmeyer, 123 Ill. App. 188.

16. Witness who had seen work of changing street grade could give estimate

official sources[17] is competent. Testimony in another cause is not objectionable as hearsay when the person against whom it is offered had an opportunity to confront and cross-examine the witness.[18]

Where it is material to prove as a fact that a certain declaration was made, regardless of whether it was true or false, testimony to the fact does not violate the hearsay rule;[19] and where the question is whether a person acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence.[20] Proof of the notoriety of a fact in the neighborhood is competent to show knowledge of such fact.[21]

Hearsay evidence is competent upon questions of boundary affecting public rights, and also in the case of disputes as to boundaries between private landowners,[22]

of height of grade change though he had not measured it. Downey Bros. Spoke & Bending Co. v. Pennsylvania R. Co. [Pa.] 67 A. 916. One who testifies that he is familiar with a certain person's business and the percentage of profits on sales may testify in regard thereto when he is confined to his actual knowledge. Quinn v. Rhode Island Co. [R. I.] 67 A. 364. The testimony of a witness to a fact of which he swears he has personal knowledge is not rendered inadmissible by the further showing that he also knows it from hearsay. Atlanta, etc., R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258. In action for injuries caused by breaking of elevator cable, what labor commissioner had said about the elevator was inadmissible, he not having examined the cable. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 N. W. 577. Testimony of witness to whom another had been sent by a party to arrange a transfer of property in issue as to what occurred was not hearsay. White v. Poole [N. H.] 65 A. 255. Where a person who saw where a horse was killed by a train pointed out the place to witnesses, the latter could testify as to how far away the engineer could have seen the horse. Arkansas & L. R. Co. v. Sanders [Ark.] 99 S. W. 1109. In action for injuries to cattle caused by delay in furnishing cars, a statement by plaintiff as a witness that he ordered cars of a certain person was not hearsay. San Antonio & A. P. R. Co. v. Timon [Tex. Civ. App.] 18 Tex. Ct. Rep. 349, 99 S. W. 418. Testimony of plaintiff, in action for failure to deliver message to her, that the charges were paid, held not hearsay. Western Union Tel. Co. v. Westmoreland [Ala.] 43 So. 790. Where store manager testified that accounts were made from the books and that the books were correct, his testimony was not hearsay, though he did not keep the books, as he had personal knowledge of the facts. Pelican Lumber Co. v. Johnson [Tex Civ. App.] 17 Tex. Ct. Rep. 262, 98 S. W. 207. Answer of witness, "just as Mrs. B. said," simply made the answer of the other witness her own, and was not hearsay. Breeden v. Martens [S. D.] 112 N. W. 960. Testimony of a clerk that letters were dictated to her by a member of the firm employing her, that she wrote them out as dictated, and signed the firm name, and placed them in properly addressed envelopes and mailed them, held not objectionable as hearsay. Wyandotte Portland Cement Co. v. Bruner, 147 Mich. 400, 12 Det. Leg. N. 1042, 110 N. W. 949. When plaintiff was asked why he left a place where he was being treated by specialists, his answer that they could do nothing for him was not objectionable as hearsay. Brunswick & B. R. Co. v. Hoodenpyle [Ga.] 58 S. E. 705.

17. Testimony of witness as to time of trains, based on information derived from official time cards furnished by the company for the use of the public, held competent. Western Union Tel. Co. v. O'Fiel [Tex. Civ. App.] 19 Tex. Ct. Rep. 653, 104 S. W. 406.

18. Deposition in another case between other parties held competent in disbarment proceeding when the attorney had opportunity to confront and cross-examine the deponent and availed himself of it. In re Durant [Conn.] 67 A. 497.

19. Ferguson v. Boyd [Ind.] 81 N. E. 71. The fact that a conversation was held may be relevant and competent though what was said would be hearsay. Charlton v. St. Louis & S. F. R. Co., 200 Mo. 413, 98 S. W. 529. Where a witness testifies that he has truly stated to a third person, of his own knowledge, a fact which he has since forgotten, the testimony of the third person as to what the statement was is competent. Hart v. Atlantic Coast Line R. Co., 144 N. C. 91, 56 S. E. 559. Agent for plaintiff testified that he made correct reports to plaintiff of number of cords of wood cut and corded by him, and plaintiff testified that he kept a correct record of all reports. Held competent for plaintiff to state the total number of cords shown by his record. Id.

20. Person whose good faith in a transaction was attacked properly allowed to state information given him by another party. Ferguson v. Boyd [Ind.] 81 N. E. 71.

21. In trespass to try title, evidence of general notoriety of a claim made by the adverse claimant was held competent to show knowledge of the claim by the record owner. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. For the purpose of showing notice to a creditor of the dissolution of a partnership, proof of general reputation of the dissolution in the community where the creditor resides may be shown. Such reputation is not notice, but is evidence for the jury on the issue whether the creditor had notice. Bush v. McCarty Co., 127 Ga. 308, 56 S. E. 430.

22. Inmon v. Pearson [Wash.] 92 P. 279.

and in such disputes general reputation or tradition as to the location of boundaries may be proved.[23]

Admissions or statements made in the course of a telephone conversation are not objectionable as hearsay if the person talking is clearly identified,[24] and it is now held that where a person places himself in connection with a telephone system through an instrument in his office he thereby invites communication in relation to his business through that channel,[25] and that a conversation with one apparently connected with and authorized to speak for such person or business concern may be proved, though the persons talking are unknown to each other.[26]

Matters of pedigree.[27]—In matters of family history or pedigree general repute in the family may be testified to by a member of the family,[28] and admissions and declarations in respect to such matters are competent [29] and shown to have been made by a member of the family [30] or a person closely related or intimately acquainted with the family [31] ante litem motam,[32] when it is further shown that the declarant is dead [33] or that his or her testimony is inaccessible.[34] Such declarations by mem-

23. General reputation and tradition as to location of state line and corner of ancient patent held competent evidence. Douglas Land Co. v. Thayer Co. [Va.] 58 S. E. 1101.

24. Witness may testify to admissions made in a telephone conversation where he is familiar with the person's voice and the identity of the person is established. Holzhauer v. Sheeny [Ky.] 104 S. W. 1034. Where it was admitted that a car dispatcher's orders were asked for and given over a telephone and the conductor repeated the orders over the telephone, it was proper to allow witnesses who heard the persons talking at either end to tell what the orders were. Edge v. Southwest Missouri Elec. R. Co. [Mo.] 104 S. W. 90.

25. See Wolfe v. Missouri Pac. R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539.

26. Cashier of bank telephoned to commission company and asked for a certain person and was told he was not in. Later the bank was called and told the person wanted at the commission company's office was there and the cashier then talked to him. The cashier did not know the other person's voice. Held the telephone conversation was competent evidence. Godair v. Ham Nat. Bk., 225 Ill. 572, 80 N. E. 407. In action by hospital for services rendered for employes of defendant corporation, the defendant denying employment of the hospital, a witness for plaintiff was properly allowed to testify that he had had a telephone call purporting to come from defendant to send the ambulance for two injured men, and that the person speaking had said the corporation would stand the expense. General Hospital Soc. v. New Haven Rendering Co., 79 Conn. 581, 65 A. 1065. In an action to recover a bill for advertising, the issue was whether defendant corporation authorized the advertisements. Held that proof that a person had called up one of the plaintiff's staff on the telephone, had said he was the president of the defendant, and spoke of the advertisements "we are putting in," was admissible though the persons speaking were not known to each other. Kansas City Star Pub. Co. v. Standard Warehouse Co., 123 Mo. App. 13, 99 S. W. 765, referring to Guest v. R. Co. 77 Mo. App. 261.

27. See 7 C. L. 1552.

28. Scheidegger v. Terrell [Ala.] 43 So. 26. Declarations of a weak minded deceased person, shown to have sufficient intelligence to know his relatives, are competent. Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808.

29. Taylor v. Grand Lodge A. O. U. W. of Minnesota, 101 Minn. 72, 111 N. W. 919.

30. Declarations by a deceased member, or declarations by persons shown by other evidence to be members of the family, may be proved. Scheidegger v. Terrell [Ala.] 43 So. 26. Witness stated that her information concerning a certain person was derived from her mother, then dead, who was a sister of the person. Held proper to allow witness to state certain facts concerning such person's pedigree and relationship, and the date of his death. Kirby v. Hayden [Tex. Civ. App.] 99 S. W. 746. To prove matters of pedigree, declarations of a person related by blood or marriage to the person whose pedigree is in question, and since deceased, are competent, but the rule does not admit declarations of a stranger based only on information and belief. Bernards Tp. v. Bedminster Tp. [N. J. Law] 64 A. 960. Statements of members of a family respecting relationships, births, marriages, and deaths, made ante litem motam, are competent when pertinent to the issue, the reason for the rule being that this is frequently the only kind of evidence available to prove such facts. Taylor v. Grand Lodge A. O. U. W. of Minnesota, 101 Minn. 72, 111 N. W. 919. On issue of falsity of statement of date of birth in application for insurance, another application previously made to another company containing a statement of the date was held competent. Id.

31, 32. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665.

33. Scheidegger v. Terrell [Ala.] 43 So. 26; Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665. Declarations of deceased father as to when child was born held competent evidence of the fact. Mutual Reserve Life Ins. Co. v. Jay [Tex. Civ. App.] 18 Tex. Ct. Rep. 932, 101 S. W. 545. Declarations of living persons as to pedigree are incompetent. Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808.

34. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665.

bers of the family must be made either upon what such members know to be the general repute in the family or on what they have heard other members of the family say.[35] A declaration which merely expresses information collected from persons not qualified to be declarants, or from other sources than family tradition, or the statements of other members who knew the facts, is inadmissible.[36] Where a declaration of a member of the family is sought to be proved, the declaration itself and not the declaration of the witness from it should be proved.[37]

It has been held that the exception to the hearsay rule, in the case of matters of pedigree, is not applicable to prove illegitimacy,[38] but the weight of modern authority seems to be to the contrary.[39] Thus, declarations of the deceased mother and of members of her family are generally held competent to establish the illegitimacy of her child,[40] in cases where the child was born before marriage of the mother or in cases where she had never been married.[41] Some courts admit also declarations of the putative father and members of his family,[42] though on this point there is some conflict.[43]

A living person may testify to his age or date of his birth though his information is derived from his parents or others having knowledge of the facts.[44] The source of money used by a member of the family cannot be proved by hearsay under the exception as to matters of pedigree.[45]

Market reports[46] in journals such as the commercial world rely upon are competent evidence of the state of the market.[47]

Census reports[48] are competent evidence of the population,[49] but not of other facts stated therein necessarily based on information derived from others by the enumerators.[50]

(§ 6) *B. Res gestae.*[51]—Contemporaneous or nearly contemporaneous acts or declarations explanatory of the act, transaction, or condition which is the subject

35. Scheidegger v. Terrell [Ala.] 43 So. 26.

36. Testimony of nephews of a decedent as to their aunt's maiden name, marriage, and relationship to persons in Europe, based not on declarations of their mother or on general family repute, but on documents in English, from the United States, and upon the fact that their mother used to speak of deceased and received letters from her, held incompetent. Scheidegger v. Terrell [Ala.] 43 So. 26.

37. Scheidegger v. Terrell [Ala.] 43 So. 26.

38. See discussion of common-law theory in Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808.

39. Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808.

40. Declarations of mother, of child, and of half-brothers and sisters, all deceased, held competent to prove child's relationship. Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808.

41. Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808.

42. See cases cited in Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808.

43. See Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808.

44. Taylor v. Grand Lodge A. O. U. W. of Minnesota, 101 Minn. 72, 111 N. W. 919.

45. Rumors in family as to whether wife furnished funds to husband held incompetent. Bispham v. Turner [Ark.] 103 S. W. 1135.

46. See 7 C. L. 1553.

47. Market reports of newspapers relied on by the commercial world are competent evidence of the value of stocks and bonds. State v. Johnson, 144 N. C. 257, 274, 56 S. E. 922. Standard price lists and market reports shown to be in general circulation, and relied on by the commercial world and by those engaged in the trade, are admissible as evidence of market value of articles of trade. St. Louis, etc., R. Co. v. Pearce [Ark.] 101 S. W. 760. On the issue of the value of horses and mules, market reports covering the period in question, shown to have been regularly kept, were admissible, though the editor of the paper from which they were taken, who testified, had no personal knowledge of the sales, and though general classes of stock only were specified. Bullard v. Stewart [Tex. Civ. App.] 18 Tex. Ct. Rep. 666, 102 S. W. 174.

48. See 7 C. L. 1554.

49. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665. An official census of a city or town taken in the manner provided, by Laws 1903, c. 5191, p. 134, is competent evidence of the number of inhabitants of such town or city. Gregory v. Woodbery [Fla.] 43 So. 504.

50. A census roll is competent evidence only of the population, not to prove that certain persons were alive, their ages, and family relationships. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665.

51. See 7 C. L. 1554.

of controversy, and growing naturally therefrom, are admissible as a part thereof.[52]

52. The admissibility of declarations as a part of the res gestae rests largely in the discretion of the court. Clark v. Van Vleck [Iowa] 112 N. W. 648. To be admissible as a part of the res gestae declarations must be natural and spontaneous and so closely connected with the transaction as to form a part of it. Id. Entries in above made at time of transaction and in presence of adverse party are admissible as part of the res gestae. Statement of motorman when given signal of danger is admissible as part of the res gestae. Wiggins v. Wilson, 123 Ill. App. 663; Chicago City R. Co. v. McDonough, 125 Ill. App. 223. All that is said and done by conductor in ejecting a passenger from his car is admissible as part of the res gestae. Chicago Union Trac. Co. v. McClevey, 126 Ill. App. 21. Conversations between plaintiff and conductor in action for unlawful ejectment of passenger are admissible as part of the res gestae where they tend to show whether or not plaintiff in good faith believed he was a passenger. Chicago Union Trac. Co. v. Brethauer, 125 Ill. App. 204. Statements made in the course of a transaction, or so soon thereafter as to form a legitimate part of it, are admissible in favor of the party making them in so far as they tend to explain it, or the relation of the parties to it. Robinson v. Stahl [N. H.] 67 A. 577. To be competent as a part of the res gestae, declarations must be substantially contemporaneous with the litigated transaction, and must be the instinctive, spontaneous utterances of the mind, under the active, immediate influence of the transaction, the circumstances precluding the idea or reflection or design. State v. Way [S. C.] 56 S. E. 653. Declarations are admissible as a part of the res gestae only when they are coincident with the main fact under consideration and are so connected with it as to illustrate its character. Hayes v. Jersey City, etc., R. Co., 73 N. J. Law, 639, 64 A. 119. Declarations of a superintendent and agent of a lumber company, while engaged in directing the construction of a trestle, in the direction of, and a mile from certain timber, claiming the timber, as stating that they were going across to get it, held competent to show a claim by the company, but not to show title, it appearing that some of the timber was already cut. Gray Lumber Co. v. Harris, 127 Ga. 693, 56 S. E. 252. In action for malicious prosecution in taking out a warrant and causing plaintiff's arrest, declarations of defendant's manager, before the justice, at the time the warrant was procured, explaining and characterizing his act, were held admissible. Stanford v. Messick Grocery Co., 143 N. C. 419, 55 S. E. 815. To prove intention, knowledge, or other mental state, the statements of the person in question are admissible. Weiss v. Haight & Freese Co., 148 F. 399. Where pedestrian was killed by a train, his statements just after being run over that it was his own fault, that he saw the switch engine and thought he could get across, but did not see a flat car, were competent against his administrator. Chicago, etc., R. Co. v. Clarkson [C. C. A.] 147 F. 397. In action for injuries caused by defective pinch bar, statements made by parties present at the time as to the defective condition of the pinch bar were held admissible. St. Louis S. W. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 S. W. 783. Action for damage to bridge by vessel, alleged to have been caused by captain ordering boat ahead at a particular time. Held, what the captain said at the time and immediately after giving the order was competent as a part of the res gestae. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389. In action for timber alleged to have been cut in excess of that provided for by contract, evidence of a statement by the foreman in charge of cutting the timber while the work was being done, that certain trees ought not to have been cut, as they belonged to plaintiff, and he would have to pay for them, was held competent as a part of the res gestae. Gray Tie Co. v. Clark, 30 Ky. L. R. 409, 98 S. W. 1000. Liability for expenditures in caring for a pauper being in issue, declarations of the pauper while he was arranging for the removal of his family from one town to another, and while making arangements for the board of his family in the latter town, were held admissible as a part of the res gestae. Town of Jericho v. Huntington, 79 Vt. 329, 65 A. 87. Shortly before collision of schooner and barge, being towed by same tug, captain of schooner called to master of barge to stop sheering, and master replied that the tug was going "all the way around the river." The statement was held competent as a part of the res gestae. The Theodore Roosevelt, 154 F. 155. In action for injuries received in collision between street car and train, held proper to prove what conductor of street car said to passengers about going ahead to look out for the crossing, his remarks being made just before the crossing was reached, as he started forward, a few seconds before the collision occurred. Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 18 Tex. Ct. Rep. 88, 99 S. W. 869. Where a certain agent of defendant was charged with the duty of inspecting a trestle and reporting defects, a conversation with him in regard to the trestle, showing notice to him of defects, and his acts and statements with reference to reported defects, were held competent as a part of the res gestae, in an action based on the subsequent fall of the trestle. Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 P. 622.

Held incompetent as res gestae: In action for death caused by explosion of dynamite used to break up iron machinery, proof that one of the defendants told witness the morning of the day of the accident that he would be in another city was not competent as a part of the res gestae. Falender v. Blackwell, 39 Ind. App. 121, 79 N. E. 393. In action by widow for death of husband, declarations or admissions of the deceased on the morning before the afternoon when he was killed as to his physical condition were held inadmissible, not being a part of the res gestae, and the action being by the widow under Rev. St. 1892, §§ 2342, 2343. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516. Street car superintendent put a motorman on a car at 10:30 a. m., and at 4:30 he caused a collision in which plaintiff was

It is not essential that a statement or admission should be exactly coincident with the act if it arises naturally therefrom and tends to characterize or explain it.[53] But statements subsequent to the transaction in issue which do not form a part thereof, but are in effect only narrative of past events, are incompetent.[54]

injured. After the collision the cars were run to another point four miles away, where the employes were talking about the accident, when the superintendent came and said he ought to have known better than put the motorman on a car. Held, his statement was inadmissible. Ft. Wayne & Wabash Valley Trac. Co. v. Crosbie [Ind.] 81 N. E. 474. Vessel was injured by collision with drawbridge by reason of bridge tenders failure to open bridge in time. Evidence that tender visited vessel next morning and asked if a certain sum would be accepted and the matter dropped was not admissible as a part of the res gestae. Southern R. Co. v. Reeder [Ala.] 44 So. 699.

53. The real test is not whether the declarations are in point of fact contemporaneous, but whether the circumstances exclude premeditation and design. Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077. Declaration of injured person as to how accident occurred, made just after recovering consciousness, held admissible. Id. In action for assault, statement of plaintiff before she regained her feet that defendant pushed her, held admissible. Robinson v. Stahl [N. H.] 67 A. 577. Where boy was killed by suffocation in a bin of oats, declarations of foreman that he had sent boy to the bin to do a certain act, made to boy's father five minutes after he disappeared, and shortly afterwards to the boy's mother and brother, all made before they supposed the boy was dead, were admissible as part of the res gestae. Meier v. Way, Johnson, Lee & Co.[Iowa] 111 N. W. 420. Statement of man mortally injured, a few minutes after his injury was received, and a few feet from where it occurred, as to how it happened, held competent, the declarant having died a few hours after. Kansas City So. R. Co. v. Morris, 80 Ark. 528, 98 S. W. 363. Where infant child was injured on a train, statements of its mother thirty or sixty seconds after the injury were competent as res gestae. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. In action for injuries to passenger, proof of his statements to persons who came to his assistance not more than five minutes after the accident, while he lay where he had fallen in answer to general questions as to how he came there, were competent. International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 17 Tex. Ct. Rep. 752, 18 Tex. Ct. Rep. 65, 100 S. W. 1000. Plaintiff tried to catch a moving train, but caught hand rail only, and fell after being carried 800 feet. Flagman ran back to him as soon as train stopped. Held, evidence that flagman told plaintiff as soon as he reached him that he would have stopped the train before, but that the signal cord was out of order, was admissible. Illinois Cent. R. Co. v. Cotter [Ky.] 103 S. W. 279. Witness reached passenger who had fallen in about three or four minutes, and conductor came two minutes later. Proof that conductor said passenger had fallen, and that passenger denied it and said conductor pushed him off, was held properly admitted, or at least its admission was not reversible error. Pittsburgh, etc., R. Co. v. Haislup, 39 Ind. App. 394, 79 N. E. 1035. Plaintiff was injured in a runaway caused by her horse being frightened by the whistle of a locomotive. Immediately on recovering consciousness she said no signal was given until the train had reached the crossing, when a loud whistle was sounded, which frightened the horse. This statement was held admissible as a part of the res gestae. Paris & G. N. R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 S. W. 428. Statement of injured person five or six minutes after receiving injury in car collision, while lying next the steps of the car, held admissible as res gestae. St. Louis S. W. R. Co. v. Coats [Tex. Civ. App.] 19 Tex. Ct. Rep. 645, 103 S. W. 662. Statements of railroad engineer as to cause of a wreck made less than five minutes after the accident, while he was lying near the wreck, to the first person who came to him, held admissible. Illinois Cent. R. Co. v. Houchins [Ky.] 101 S. W. 924. Where employe was killed by train as alleged result of defective condition of engine, evidence of a declaration by the engineer in charge of the engine, made when the body was discovered by him, that there was something the matter with the air, and that it had bothered him all the way from a certain place, was admissible. Union Pac. R. Co. v. Edmondson [Neb.] 110 N. W. 650. Passenger was injured by being thrown from a car which she was attempting to board, and after re-entering the car the conductor asked her if she was hurt and she said she was. Held her statement was competent. Nixon v. Omaha & Council Bluffs St. R. Co. [Neb.] 113 N. W. 117.

54. Upon issue as to whether plaintiff boarded car as passenger or to assist his companion in getting started, statement of companion made after car had gone a block is not part of the res gestae, plaintiff not being present at the time it was made. Chicago Union Trac. Co. v. Lowenrosen, 125 Ill. App. 194. Statements by superior of school as to why plaintiff was not allowed to attend made long after her dismissal is inadmissible in an action for damages against person whose slanderous statements caused the dismissal. Legris v. Marcotte, 129 Ill. App. 67. Statement made after accident by motoneer as to the condition of appliances in his car are no part of the res gestae. Chicago Union Trac. Co. v. Daly, 129 Ill. App. 519. Declarations of employes of defendant subsequent to the time of an accident held incompetent in action for injuries. Weinstein v. Interurban St. R. Co., 52 Misc. 468, 102 N. Y. S. 512. In action for injuries to boy struck by automobile, a conversation between the father of the boy and the automobilist, after an accident, relating to the manner of the accident, was held merely narrative of a past event, and inadmissible. Clark v. Van Vleck [Iowa] 112 N. W. 648. In action for injuries at railroad

Complaints or natural expressions of present existing pain or suffering, or other natural expressions of an existing bodily or mental condition, may be shown under the res gestae rule.[55] Statements by an injured person to an attending physician, merely descriptive of the patient's present physical condition, are competent [56] provided they can be fairly considered a part of the res gestae,[57] and where the circumstances are such as to exclude the idea of providing evidence to support a claim for damages.[58]

Declarations accompanying and characterizing the possession of property are competent,[59] but declarations relating to title and not to possession are incompetent,[60] and declarations of a grantor, made after he has parted with his title, are inadmissible to impeach the title of anyone claiming under him.[61]

crossing, evidence of statements of engineer some minutes after accident held inadmissible. Davis v. Louisville, etc., R. Co., 30 Ky. L. R. 172, 97 S. W. 1122. Statements of engineer a half hour after running over and killing a person, several miles from the place of the injury, held inadmissible. International & G. N. R. Co. v. Munn [Tex. Civ. App.] 18 Tex. Ct. Rep. 548, 102 S. W. 442. On the issue whether a man struck by train had been seen by the engineer, a statement of the engineer after he had arrived at the next station that he had knocked a man off the track was incompetent as a part of the res gestae. Frye v. St. Louis, etc., R. Co., 200 Mo. 377, 98 S. W. 566. In action for injuries to an employe while assisting others to put a car on the track, statements by the fireman, after the accident, he not having seen it, were merely hearsay. St. Louis S. W. R. Co. v. Brisco [Tex. Civ. App.] 18 Tex. Ct. Rep. 171, 100 S. W. 989.

55. Armour & Co. v. Skene [C. C. A.] 153 F. 241; Patton v. Sanborn, 133 Iowa, 650, 110 N. W. 1032; Sheldon v. Wright [Vt.] 67 A. 807. Usual and natural expressions of present pain or suffering may be shown, and the fact that they were made some time after an accident in issue may go to the weight, but not to the competency, of the evidence. St. Louis, etc., R. Co. v. Boyer [Tex. Civ. App.] 97 S. W. 1070. The admissibility of declarations of an injured person depends upon the circumstances of each case, and is largely within the discretion of the trial court; the exact length of time is not mathematically controlling. Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077. Evidence of groans is part of the res gestae. Chicago & A. R. Co. v. Johnson, 128 Ill. App. 20.

56. Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 A. 4. Declaration of injured person as to how accident occurred, just after recovering consciousness, held competent though in response to question by physician, the question not being leading or suggestive. Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077. Subjective symptoms if evidenced at examination of patient, made solely for the purposes of treatment, are admissible as part of the res gestae. Chicago City R. Co. v. Mauger, 128 Ill. App. 512.

57. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. In personal injury action, held proper to allow physician who attended plaintiff to testify that he asked her what hurt most and that she indicated her back and side, the accident having occurred in the afternoon, and the statement being made that night. Dublin Gas & Elec. Co. v. Frazier [Tex. Civ. App.] 18 Tex. Ct. Rep. 714, 103 S. W. 197. Declaration of plaintiff, made to physician, that he felt no pain when a needle was stuck into his finger held inadmissible. Goodwyn v. Central of Georgia R Co. [Ga. App.] 58 S. E. 688.

58. As where examination is prior to action and without reference to bringing it. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. Statements during examination made at the instance of a defendant, with a view to the trial, would be competent. Id. The test of the admissibility of declarations of an injured person, after his injury is received, is whether they relate to the principal transaction and are explanatory of it, and are made under such circumstances of excitement, still continuing, as to show that they are spontaneous and not the result of deliberation or design. Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077. Statements of an injured person to a physician with a view to bringing suit are inadmissible. Chicago Union Trac. Co. v. Giese, 229 Ill. 260, 82 N. E. 232. Held proper to exclude evidence of what plaintiff complained of to physician when he called on her. Birmingham R., Light & Power Co. v. Moore [Ala.] 43 So. 841.

59. Declarations of person in possession that she held under a certain will. Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784. Statements of one in possession of land, explanatory of such possession, are admissible even though self-serving in their tendency. Brewer v. Cochran [Tex. Civ. App.] 17 Tex. Ct. Rep. 796, 99 S. W. 1033. Where ownership of stock was shown by circumstantial evidence, proof of statements as to ownership of it by an interested party was held admissible. San Antonio Brew. Ass'n v. Magoffin [Tex. Civ. App.] 17 Tex. Ct. Rep. 682, 99 S. W. 187. On issue whether wife was named as grantee in deed simply to secure an advance made by her to her husband to apply on the purchase price, in controversy between heirs of the two grantees, declarations of the husband while in possession of the land, contained in letters, were held admissible. Hubbard v. Cheney [Kan.] 91 P. 793. In boundary dispute, declarations as to the boundary of a remote grantor at the time of the conveyance were competent. Bollinger v. McMinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 762, 104 S. W. 1079. In action for price of land, statements of grantors as to true boundary line held admissible in favor of their vendees. Gurley v. Starr [Ky.] 99 S. W. 972.

60. Declarations not relating to declar-

(§ 6) *C. Admissions or declarations against interest.*[62]—Upon the presumption that one will not readily speak untruthfully against his own interest, admissions and declarations out of court by a party in interest,[63] or a person in privity with him[64] against the interest of a party,[65] are received as original evidence.[66] Whether a particular declaration or statement is against interest, within the meaning of this rule, depends upon the facts of the particular case.[67] Admissions and declarations in

ant's possession, but to his legal title, are inadmissible, since legal title cannot be proved or defeated by parol. Munsey v. Hanly [Me.] 67 A. 217.

61. Jonas v. Hirshburg [Ind. App.] 79 N. E. 1058. Declarations of grantor in deed to one of two brothers, after executing and delivering deed, that he desired the land equally divided and gave the deed only to get rid of the grantee (defendant in ejectment), were incompetent. Bain v. Bain [Ala.] 43 So. 562. Where a mother deeded land to her child, her statements in derogation of the title of the child or its grantee were held inadmissible, in an action after the mother's death, where the deed had been recorded but not delivered when the statements were made. Pentico v. Hays [Kan.] 88 P. 738. In a replevin action where defendant bases his title and right to possession on the foreclosure of a chattel mortgage, declarations of the mortgagor after executing the mortgage are inadmissible to impeach the mortgage or to show that he did not have the legal title or right to make the mortgage at the time of making it. First Nat. Bk. v. Yoeman, 17 Okl. 613, 90 P. 412. Statements of the grantor in a deed and of the attorney who prepared the deed that it was not made in good faith held incompetent. Hargus v. Hayes [Ark.] 103 S. W. 163. The rule that declarations of a vendor after he has parted with title are not admissible to disparage the title held applicable to a report of a sale by the assignee of a bankrupt. Beall v. Chatham [Tex.] 17 Tex. Ct. Rep. 853, 99 S. W. 1116.

62. See 7 C. L. 1558.

63. In action by administrator to recover money converted by defendant, statements by decedent's children were incompetent. Zimmerman v. Beatson, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165. Declarations of a person whose mental condition is in issue, in a proceeding to have a guardian for declarant appointed, tending to show mental unsoundness, held competent as admissions of a party against interest. Conway v. Murphy [Iowa] 112 N. W. 764. A letter containing an admission against interest by the writer, a party, is admissible though not shown to have been delivered to the other party. Austin v. Long, 1 Ga. App. 258, 57 S. E. 964. Where agency was in issue, proof that defendant had testified that the person in question was his agent, in another action, was competent. C. N. Robinson & Co. v. Green [Ala.] 43 So. 797. In action on note by payee against maker, defense being that note was for machine, and that buyer was to be repaid in case it was found that the machine was an infringement of a patent, and the machine returned, admissions of the payee, subsequent to the maturity of the note, tending to sustain the defense, were competent. Theophine v. Valchos, 53 Misc. 612, 103 N. Y. S. 776.

64. Admission of predecessor in title that he had given land to certain persons held competent as against alleged successor in interest in trespass to try title. Chew v. Jackson [Tex. Civ. App.] 18 Tex. Ct. Rep. 678, 102 S. W. 427. A deed containing admissions of facts generally conclusive between parties and their privies, amounting to declarations of pecuniary or proprietary nature against interest, is admissible in evidence by a stranger, whether plaintiff or defendant against all other parties to the suit who have a joint interest in the matter with the party making the admissions. Peters v. Nolan Coal Co., 61 W. Va. 392, 56 S. E. 735. The admissions of a defendant in execution against his interest, before the pendency of litigation, are admissible in evidence in favor of either the claimant or the plaintiff in execution. Rountree v. Gaulden [Ga.] 58 S. E. 346. Declarations of testator held admissible against executor in action to recover testator's share on policy of insurance. Ormond v. Connecticut Mut. Life Ins. Co. [N. C.] 58 S. E. 997. In action by surviving husband against the administrator of his wife's estate for a decree adjudging land standing in the wife's name to be community property, statements in the petition for letters, subscribed and sworn to by the administrator, that the land was the wife's homestead, were not competent against the husband, he not being shown to have knowledge of the contents of the petition, though he had waived his right to administer. Deming v. Gamble [Cal. App.] 91 P. 408. After proof of joint liability, declarations of one debtor are competent against the other. Where a prima facie case of joint liability has been made, admissions of one of the debtors are admissible though not made in the presence of the other. Thomas v. Mosher, 128 Ill. App. 479.

65. A statement made by a party or his privy, suggesting any inference as to any fact in issue, or relevant fact unfavorable to the contention of such party, is competent. Ogden v. Sovereign Camp Woodmen of the World [Neb.] 113 N. W. 524.

66. When a plaintiff knows from the pleadings that defendant will deny the validity of a claim, he may prove the latter's admissions against his own interest without first examining him in reference thereto. Atlas Lumber & Coal Co. v. Flint [S. D.] 104 N. W. 1046.

67. Held admissions against interest and competent evidence: Where, in action on benefit certificate, the condition of the member's health at the time of his reinstatement, after suspension, was in issue, evidence of a statement by plaintiff (beneficiary) to attending physician that her husband (member) had been sick three weeks was competent as an admission. Woodmen of The World v. Jackson, 80 Ark. 419, 97 S. W. 673. In action to quiet title based on plaintiff's title by prescription, a petition and schedule in bankruptcy and a statement of property

rendered the assessor omitting all mention of the property were competent as admissions against interest. Code Civ. Proc. § 1870, subd. 2. Spotswood v. Spotswood [Cal. App.] 89 P. 362. In an action involving the location of a boundary, the declaration of a party when the adverse party was building a line fence that he had all the land which belonged to him was competent. Manuel v. Flynn [Cal. App.] 90 P. 463. In suit to specifically enforce oral contract to convey land to a corporation, an entry in the journal of the corporation showing the resolution and sale was competent. Meridian Oil Co. v. Dunham [Cal. App.] 90 P. 469. Admissions by defendant to others that her husband was her general agent held competent evidence against her. Ham v. Brown Bros. [Ga. App.] 58 S. E. 316. In an action against an estate for money loaned decedent, there being no written evidence of the debt, a witness to whom deceased made admissions may testify in regard thereto. Schell v. Weaver, 225 Ill. 159, 80 N. E. 95. Where in an action for the value of services, under an oral contract, the defense was that the work was done under an express contract providing for the price, entries in an account book kept by the plaintiff, tending to sustain defendant's theory, were competent as admissions against interest. Milhollen v. McDonald & M. Mfg. Co. [Iowa] 112 N. W. 812. Where it sufficiently appeared that a certain letter referred to land in dispute, an admission therein as to ownership was competent against the writer. Nichols-Shepard Co. v. Ringler [Iowa] 112 N. W. 543. In action for alienation of husband's affections, statements of defendant, after separation of the parties, are competent when they amount to an admission of responsibility for the acts alleged in the petition. White v. White [Kan.] 90 P. 1087. Where ownership of team by which plaintiff was injured was in issue, a report by defendant to a casualty company, admitting ownership, was competent though the purpose of the report was not shown. Sibley v. Nason [Mass.] 81 N. E. 887. Proof that when defendant was informed of a claim against her she gave a mortgage held competent as tending to show an admission of liability which she was trying to defeat by giving the mortgage. Pelkey v. Hodgdon [Me]. 67 A. 218. Where one has erected a house upon the land of another and has conveyed it to a third person, and when, in a suit by such third person, defendant claims to hold as tenant of the landowner, admissions by the latter as to title are admissible against defendant. Collins v. Taylor, 101 Me. 542, 64 A. 946. A statement by a tenant in common who claimed to have acquired title by adverse possession recognizing the title of the cotenant held competent as an admission against interest. Loranger v. Carpenter, 148 Mich. 549, 112 N. W. 125. In a suit to restrain removal of rails by a purchaser, the claim being that they were sold by the president of the plaintiff railway company in his individual capacity, though the property of the road, a memorandum of assets made by the president to persons negotiating for the purchase of the road was held admissible as in the nature of an admission of the president. Saginaw Suburban R. Co. v. Connelly, 146 Mich. 395, 13 Det. Leg. N. 796, 109 N. W. 677. Sworn statements as to taxable property, given to assessor, held competent as admissions on issue whether party making them had given away all his property. Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597. Where the issue was whether a transaction was a loan or gift, statements of the party advancing the money that he had given $1,400 to his son-in-law (the other party), intended to give him $600 more, and that he was worth $52,000, were held competent as admissions, tending to characterize the transaction. Id. In an action to enforce a trust in an interest in a mine against executors of plaintiff's co-owner, declaration of decedent at the time of the issuance of the patent that plaintiff still had an interest, and the fact that the two joined in leases, were competent as declarations against interest. Delmoe v. Long, 35 Mont. 139, 88 P. 778. Where defendant denied conversion of property and set up a property right therein, a statement made by him in a bond to release the property from attachment, as to the ownership of the property, was competent as an admission. Southern Car Mfg. & Supply Co. v. Wagner [N. M.] 89 P. 259. The admissions and declarations of a party to an action against his own interest in a material matter may be proven as original evidence, and it is unnecessary to lay a foundation therefor in the cross-examination of such party where he has testified in his own behalf. Young v. Kinney [Neb.] 112 N. W. 558. Declarations by a party to a suit against his interest are admissible though made to a party since deceased. Hueni v. Freehill, 125 Ill. App. 345. In action for conversion of machinery sold by conditional contract, against a transferee, a corporation, declarations of a director of the corporation who negotiated the transfer against his interest were competent, after his death, to show that the transferee had knowledge of the condition of the title. Tompkins v. Fonda Glove Lining Co., 188 N. Y. 261, 80 N. E. 933. Letter telling defendant that plaintiff would bear expense of getting a patent, and that defendant could repay him any time, held inconsistent with claim of indebtedness of defendant to plaintiff at the time, and competent evidence in action on the alleged debt. Broadwell v. Conover, 186 N. Y. 429, 79 N. E. 402. In action for damages to property by construction of railroad tunnel and approaches, a rendition of the property for taxation by the general manager, not sworn to, was held competent as an admission on the issue of its value, though not binding. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 S. W. 822. Where plaintiff claimed proceeds of benefit certificate as affianced wife of insured, a declaration by her that the engagement had been broken was competent. Grand Lodge Colored Knights of Pythias v. Mackey [Tex. Civ. App.] 104 S. W. 907. On issue of terms of a cropping contract where it appeared that a draft of the contract had been made but never signed, evidence that one of the parties had said that he had read the writing and that it was all right was admissible as an admission against interest, and the writing was competent in connection therewith. Morgan v. Tims [Tex. Civ. App.] 97 S. W. 832. On issue of delivery of certain deeds, declarations of a person since deceased that he intended to give and had given the land to the boys were competent, being against in-

disparagement of the title of declarant are limited to those cases where the subject-matter is capable of parol proof.[68] When they do not relate to declarant's possession, but to his legal title, they are inadmissible.[69] Admissions made in the course of judicial proceedings, such as testimony,[70] allegations in pleadings,[71] or statements in other papers used in a case,[72] are also competent against the party making them and his privies.

Proof of bona fide *offers of compromise,* made solely to avoid suit, is usually excluded on grounds of public policy,[73] but an offer not made for the purpose of

terest. Chew v. Jackson [Tex. Civ. App.] 18 Tex. Ct. Rep. 678, 102 S. W. 427. Letter from client to attorney admissible against client in an action by attorney to recover for services, though they reflected on client's business character. Stern v. Daniel [Wash.] 91 P. 552. In action for death of minor son who had left home against his parents' wishes, held that, on the issue whether the son intended to give his earnings and services to his parents, his letters and conversations indicating such an intention were not objectionable on the ground that they were self-serving declarations. Dean v. Oregon R. & Nav. Co. [Wash.] 87 P. 824. Admissions by a claimant that the incompetent person, services to whom were alleged, did not owe her anything, but had paid in advance for board and services, held competent. Scheer v. Ulrich [Wis.] 113 N. W. 661. Sheriff's return upon a writ of attachment that property attached was property belonging to defendant held an admission against interest, competent against him in an action on his bond for allowing the property to be taken from his custody. Phillips v. Eggert [Wis.] 113 N. W. 686.

Held incompetent as admission: Advertisement of sale of land by an administrator held incompetent as an admission against the administrator in a subsequent action of ejectment against him as an individual because land was not definitely described and identified as same as that in suit. Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004.

68, 69. Munsey v. Hanly [Me.] 67 A. 217.

70. In civil action for rape, plaintiff's testimony at examining trial of defendant was admissible against her. Munk v. Stanfield [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 S. W. 213. Testimony of a party in another action held competent as an admission. Thompson v. Mills [Tex. Civ. App.] 18 Tex. Ct. Rep. 139, 101 S. W. 560. Statements made by a party in interest in a deposition against his interest are admissible in favor of the adverse party without any preliminary foundation being laid. Southern Bank of Fulton v. Nichols, 202 Mo. 309, 100 S. W. 613.

71. While admissions in pleadings may be used against the party making them, affirmative statements by a party in his own behalf have no probative value when in conflict with sworn testimony. Austin v. Ferst's Sons & Co. [Ga. App.] 58 S. E. 318. A party's answers to interrogatories are evidence against him as admissions though given in another case. Robert R. Sizer & Co. v. G. T. Melton & Sons [Ga.] 58 S. E. 1055. Allegations in pleadings which have been withdrawn may be competent as admissions, but are not conclusive on the party making them. Hallowell v. McLaughlin Bros. [Iowa] 111 N. W. 428. Allegations of original petition are evidence, though not binding, where complete amended petition is filed. Reemsnyder v. Reemsnyder [Kan.] 89 P. 1014. A portion of a pleading containing an admission of a distinct and separate fact relevant to the inquiry may be put in evidence without introducing other portions containing qualifying or explanatory matter. Sawyer v. Roanoke R. & Lumber Co. [N. C.] 58 S. E. 598. Petition in action on written contract did not set out the contract, and an answer was filed with knowledge on part of defendant that contract had been altered. Held, amended answer having been filed, the original answer was not competent as an admission, having been made without knowledge of all the facts. Koons v. St. Louis Car Co., 203 Mo. 227, 101 S. W. 49. In a proceeding to secure a review of the action of assessors in assessing property under Tax Laws 1896, p. 882, § 250, an allegation of value of the property in the complaint is in the nature of an admission, but is not conclusive. People v. Ouderkirk, 105 N. Y. S. 134. In determining a motion for judgment on the pleadings, a party is, in the absence of mistake, bound by solemn admissions in his pleadings, which have been amended, and such admissions must be considered. Page v. Geiser Mfg. Co., 17 Okl. 110, 87 P. 851. An allegation in an abandoned pleading may be used as evidence, but is not conclusive. Miller v. Drought [Tex. Civ. App.] 19 Tex. Ct. Rep. 416, 102 S. W. 145. Plaintiff's original petition held admissible, as evidence, but not conclusive, on an issue raised by defendant. William Cameron & Co. v. Realmuto [Tex. Civ. App.] 100 S. W. 194. Original answer competent evidence of admissions therein where new answer to amended bill was filed. Scoville v. Brock, 79 Vt. 449, 65 A. 577. Admissions against interest made in the course of judicial proceedings are competent. Burgener v. Lippold, 128 Ill. App. 590.

72. A lien statement under oath, and a cross petition filed by a party in another cause, are competent as admissions, but are not conclusive and do not amount to an estoppel in an action against one not a party to the suit in which they were filed. Limerick v. Lee, 17 Okl. 165, 87 P. 859. A claim against a decedent's estate is competent as an admission in an action against the executor on another claim subsequently filed and rejected. Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911. Where the record of a former suit contains a solemn admission of a party thereto, it is admissible in a subsequent action in favor of a stranger to the former suit to prove the admission. Becker v. Philadelphia, 217 Pa. 344, 66 A. 564.

73. Where a settlement is offered without the acknowledgment of a debt, but to avoid litigation, the offer may not be proven. Mil-

avoiding litigation,[74] and which is a virtual admission of liability,[75] is not incompetent, and an independent admission of a fact may be shown though accompanied by an offer of compromise.[76] Whether an offer contains such an independent admission of a fact is a question to be decided by the court, and not by the jury.[77]

Silence or acquiescence[78] of a party when a statement adverse to his interest is made in his presence is construed as an admission[79] if the circumstances are such as to call for a denial if the statement were untrue.[80] This rule does not apply

hollen v. McDonald & M. Mfg. Co. [Iowa] 112 N. W. 812. An offer made in an effort to compromise and avoid suit cannot be legally admitted over the objection of the adverse party. Whitney v. Cleveland [Idaho] 91 P. 176. An offer for the purpose of avoiding litigation cannot be treated as an admission of liability. Schiavone v. Callahan, 52 Misc. 654, 102 N. Y. S. 538. Offer to settle held inadmissible. O'Brien v. New York City R. Co., 105 N. Y. S. 238. An offer to compromise the claim sued on cannot be shown. McKnight v. Milford Gin Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 631, 99 S. W. 198. Proposition of insurer to pay a certain sum held a compromise offer, and inadmissible to show waiver of proof of loss. Cullen v. Insurance Co. of North America [Mo. App.] 104 S. W. 117. In action by broker for commission, an offer by the owner of the property to pay the broker $500 was held incompetent. Hurst v. Williams [Ky.] 102 S. W. 1176. Admission of offer of compromise by one of several parties, in behalf of all, held inadmissible. Franklin v. Hoadley, 115 App. Div. 538, 101 N. Y. S. 374. In action for negligent death, defendant pleaded a settlement with the decedent's administratrix, and the reply alleged that the settlement was fraudulent and that administratrix was incompetent. An offer by an agent of defendant to an attorney for plaintiff of a sum larger than that given in the settlement was admissible to prove the allegations of the reply but inadmissible to show defendant's liability. Loveman v. Birmingham R., Light & Power Co. [Ala.] 43 So. 411. Proof that before filing of amended answer claiming work sued for was worthless, defendant's attorney told plaintiff's attorney that his client told him he had no defense, and asked if plaintiff would accept the amount of the claim without costs, was incompetent, both as hearsay and as containing an offer of compromise. Schwartzman v. Cohen, 51 Misc. 635, 101 N. Y. S. 236. Where letter stated that plaintiff fixed his damages at $500, and that plaintiff had delayed because expecting the claim agent, and expressed a hope that defendant would call and that litigation could be avoided, it was inadmissible though it did not expressly refer to a pending settlement. St. Louis S. W. R. Co. v. Kern [Tex. Civ. App.] 18 Tex. Ct. Rep. 42, 100 S. W. 971. Where vessel was injured by collision with drawbridge by reason of the tender's failure to open the bridge in time, proof that the tender visited the vessel next morning and asked if a certain sum would be accepted and the matter dropped was inadmissible. Southern R. Co. v. Reeder [Ala.] 44 So. 699. Statement of account handed to a party as a part of a proposition for compromise held inadmissible, not containing distinct admissions. C. W. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 So. 533. Admissions in affidavit of party used on interlocutory motion. Bogart v. New York & L. I. R. Co., 118 App. Div. 50, 102 N. Y. S. 1093.

74. In action for libel, an offer to retract was held admissible on issue of malice, and not incompetent as an offer of compromise, there being no offer to settle and avoid litigation. Dalziel v. Press Pub. Co., 52 Misc. 207, 102 N. Y. S. 909. When there was no litigation pending or threatened at the time plaintiff's attorney wrote defendant asking for a partnership accounting between plaintiff and defendant, defendant's replies were not inadmissible as offers of compromise, he having signified a willingness to account. Doncourt v. Denton, 105 N. Y. S. 906. Where it appeared that conversations with a former defendant in a suit to try title were not had while a compromise of a prospective suit was pending, the conversations could be proved. Upson v. Campbell [Tex. Civ. App.] 18 Tex. Ct. Rep. 413, 99 S. W. 1129. Proof that plaintiff asked defendant what he was going to do about a claim and that defendant did not answer was held not objectionable as relating to a compromise. McKnight v. Milford Gin Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 631, 99 S. W. 198.

75. Where an offer is a virtual admission of indebtedness, and is for a sum much less than that claimed, it may be proven. Millhollen v. McDonald & M. Mfg. Co. [Iowa] 112 N. W. 812.

76. Kuhn v. Williams, 124 Ill. App. 390. An independent admission of a fact, such as the handwriting of a party, or an item of an account, may be proved. Whitney v. Cleveland [Idaho] 91 P. 176. Offer to compromise claim for damage done by sheep held not to contain an independent admission of identity of sheep or damage done, and hence inadmissible. Id.

77. Error to submit to jury. Whitney v. Cleveland [Idaho] 91 P. 176.

78. See 7 C. L. 1561.

79. In an action against an administrator, declarations of the decedent in his own favor, in the presence of plaintiff, were admissible against plaintiff. Dean v. Carpenter [Iowa] 111 N. W. 815.

80. Statements made in agent's presence held not to call for denial, and hence his silence held not to constitute an admission. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S. E. 222. Letter from son to his brother asserting title to be in his mother held incompetent in the absence of any showing that the brother had replied to it admitting the claim. Mitchell v. Cleveland [S. C.] 57 S. E. 33. Where plaintiff and another were injured in a collision with a street car, what the other said, just after recovering consciousness, in the presence of plaintiff, as to the cause of the accident was inadmissible though not denied by plaintiff, she being also injured and hysterical, and

to statements made in the course of a judicial hearing.[81] Failure to assert a claim, under circumstances such as naturally would call for an assertion thereof,[82] is also construed as an admission.[83]

A party will not be allowed to make evidence for himself, hence *ex parte, unsworn statements* of a party of a *self-serving* character cannot be proved.[84]

the circumstances not being such as to naturally call for a denial. McCord v. Seattle Elec. Co. [Wash.] 89 P. 491.

81. The rule that an undenied statement made in the presence of a person implicated or interested is a tacit admission of the facts asserted does not apply when such facts are stated by a witness in the course of a judicial hearing in which the party implicated or interested could not interfere. Hauser v. Goodstein [N. J. Law] 66 A. 932.

82. In action to establish a claim against a decedent's estate, the fact that decedent had said in claimant's presence that if a third person would do a certain thing decedent would give him all his property held not to amount to an admission by claimant, as negotiations had not then gone so far that claimant was called on to make any claim. Pond v. Pond's Estate, 79 Vt. 352, 65 A. 97.

83. Conversations with a party to suit, relative to the ownership in dispute, in which the party made no claim to the property, are admissible. Bashore v. Mooney [Cal. App.] 87 P. 553. Where ownership of irrigation ditch was in issue, evidence that a predecessor of plaintiff had tried to sell it to defendant and that defendant had not disputed his title was competent. Id.

84. Damren v. Trask [Me.] 65 A. 513. Letter containing self-serving statements is inadmissible. United States Health & Acc. Ins. Co. v. Harvey, 129 Ill. App. 104. Letter by defendant to plaintiff's attorneys denying that it owed the amount claimed. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768. Self-serving letters inadmissible. American Car & Foundry Co. v. Alexandria Water Co. [Pa.] 67 A. 861. Declarations of a decedent not made in the presence of a claimant held inadmissible to disprove the claim. Coleman v. McGowan's Estate [Mich.] 113 N. W. 17. Issue being whether broker was entitled to commission, a letter by the broker to another saying that the owner of the property would pay a commission was inadmissible. Hanna v. Espalla [Ala.] 42 So. 443. In an action for broker's commission, evidence that seller told buyer that he would not deal through a middleman was inadmissible because a self-serving declaration. Ross v. Moskowitz [Tex.] 17 Tex. Ct. Rep. 992, 100 S. W. 768. In an action for the price of property, a statement in a letter written by the president of the defendant corporation, who had no personal knowledge of the transaction, long after it had taken place, that the corporation had not bought it, was a mere self-serving declaration and inadmissible. Buffalo Coal Creek Min. Co. v. Troendle, 30 Ky. L. R. 740, 99 S. W. 622. Statements by broker as to the alleged sale and his compensation held inadmissible in suit for commission. Leuschner v. Patrick [Tex. Civ. App.] 103 S. W. 664. In action for services by attorneys, held error to allow witness to testify that defendant had approached him and asked him to take his case, that his counsel had deserted him, this being a mere self-serving statement. Rabb v. Goodrich [Tex. Civ. App.] 18 Tex. Ct. Rep. 662, 102 S. W. 910. In an action for seduction, allegations in plaintiff's complaint that she was unmarried were held incompetent as evidence because merely self-serving declarations, though offered by defendant to impeach plaintiff as a witness. Breiner v. Nugent [Iowa] 111 N. W. 446. In an action to recover land, a complaint in intervention in another suit to which defendant was a party was inadmissible in favor of parties claiming under the intervener, the complaint containing only self-serving declarations. Sutton v. Whetstone [S. D.] 112 N. W. 850. Self-serving declarations of a deceased mortgagee not in the presence of the mortgagors or any successor in interest held inadmissible in action by mortgagee's executor. Howard v. Maxwell's Ex'r, 30 Ky. L. R. 448, 98 S. W. 1013. In an action for breach of contract for purchase of goods, a letter by plaintiff to defendant, after a misunderstanding had arisen, setting forth plaintiff's position, was inadmissible. Moritz v. Herskovitz [Wash.] 89 P. 560. Declarations of grantees in deed as to mental capacity of grantor, in his absence, held incompetent in action to set aside the deed, and for an accounting. Nichols v. Nichols, 79 Conn. 644, 66 A. 161. Where contract provided for cutting timber on lands of certain named persons, and United States claimed it was cut on public domain, proof of conversation between contracting parties at the time of executing the contract was inadmissible because self-serving. Anderson v. U. S. [C. C. A.] 152 F. 87. Official report by government chemist made at request of board of customs appraisers and in regard to goods then involved in dispute held incompetent in proceeding to review appraisement of goods by customs officials, since it was ex parte, not under oath, and not subject to cross-examination. United States v. O. G. Hempstead & Son, 153 F. 483. Issue being whether plaintiff acted as agent of intervener in making a sale, cards having been introduced showing that plaintiff was connected with the intervener, other cards made by plaintiff, not showing any connection with intervener, were inadmissible. Englander v. Fleck, 51 Misc. 567, 101 N. Y. S. 125. Letter stating the interpretation placed on an agreement by the president of one of the parties, a corporation, and which contradicted a letter showing the agreement, held incompetent. National City Bank v. Pacific Co., 117 App. Div. 12, 101 N. Y. S. 1098.

Held not objectionable as self-serving: In action to set aside deed from wife to husband, after husband's death, testimony of the wife that there was no consideration for it was held not objectionable as self-serving. Yordi v. Yordi [Cal. App.] 91 P. 348. Issue being location of boundary line, testimony of witness that it was plainly marked was

Alleged declarations against interest are admissible in their entirety and where a portion of such a declaration has been introduced by one party, the other party may show the whole thereof.[85] An alleged admission having been introduced by one party, the other may introduce evidence to explain it or destroy its effect.[86] In case of conversation with witness by telephone, the speaker must be identified.[87]

Admissions and declarations of an *agent of a party,* against the interest of the party, accompanying and explaining acts then being done by him, so as to constitute a part of the res gestae,[88] such declarations and acts being within the scope of his au-

held not objectionable as showing that it had been recently marked, and being thus self-serving. Douglas Land Co. v. Thayer Co. [Va.] 58 S. E. 1101.

85. Witness testified that one partner made certain statements in the presence of the other, held proper to show by witness that the other partner had said that it was the first he had heard of it, this being a part of the same conversation. Mitchem v. Allen [Ga.] 57 S. E. 721. Where parts of a deposition containing admissions against interest are read, the party making them is entitled to have other portions relating to such admissions read. Southern Bank of Fulton v. Nichols, 202 Mo. 309, 100 S. W. 613. Where part of conversation containing admissions was introduced, it was error to exclude on cross-examination other portions tending to explain the admissions. People v. Bingham, 121 App. Div. 593, 106 N. Y. S. 330. Plaintiff and the owner of land testified to what passed between them and defendant regarding authority to sell land. Held, defendant should have been permitted to testify to the same. Wefel v. Stillman [Ala.] 44 So. 203.

86. Where plaintiff, suing on insurance policy, was charged with having knowingly made false statements as to the value of the property destroyed in his application for insurance and proofs of loss, his testimony that he had no intention or purpose to deceive or mislead the company as to the value of the property was held competent. Helm v. Anchor Fire Ins. Co., 132 Iowa, 177, 109 N. W. 605.

87. Godair v. Ham Nat. Bank, 128 Ill. App. 293. Telephone conversation is admissible where circumstantial evidence indicates who the speaker was though the voice could not be identified. Id.

88. Only words spoken or acts done by anagent in the execution of his agency are admissible in evidence against the principal. Hayes v. Jersey City, etc., R. Co., 73 N. J. Law, 639, 64 A. 119. Declarations of an agent are competent against the principal only when within the scope of his authority and as a part of the res gestae. Matteson v. New York, etc., R. Co. [Pa.] 67 A. 847. Statements of an agent are inadmissible against the principal unless a part of the res gestae. Holzhauer v. Sheeny [Ky.] 104 S. W. 1034. Declarations or admissions of an agent, unless part of the res gestae, do not bind the principal, and have no probative value in a suit against the principal, and conduct of the agent, relied on as an admission, is within the rule. Georgia R. & Elec. Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076. Statements and declarations of an agent, made in reference to an act which he is authorized to perform, and at a time when he is conducting the business or making propositions to that end, are admissible against the principal. St. Louis, etc., R. Co. v. Watkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 746, 100 S. W. 162. Statements of agent held to have been made while acting for the principal, and hence admissible against him. Gaines v. Perry Bros. [Tex. Civ. App.] 18 Tex. Ct. Rep. 649, 102 S. W. 755. Statements of agents during negotiations conducted by him for his principal, concerning or growing out of the business in hand, held admissible against principal. Nicola Bros. Co. v. Hurst, 30 Ky. L. R. 851, 99 S. W. 917. Statements of person while acting for himself and as agent for signers of contract in suit, and parties, to other interested parties, held competent. Randall v. Claflin [Mass.] 80 N. E. 594. In action for conversion of lumber wrongfully levied upon under a writ of replevin, where it was shown that the party procuring the levy placed an agent in charge of the lumber, statements of the agent explaining why he had possession and why it could not be taken away were held admissible. Three States Lumber Co. v. Blanks [Tenn.] 102 S. W. 79. Letters between president, secretary, and treasurer of a corporation and another relating to business then being done between the corporation and such person held admissible on question of acquiescence of corporation in statement concerning transaction made by such person. Eagle Min. & Improvement Co. v. Hamilton [N. M.] 91 P. 718. In action for rent, evidence of statement by an officer of the defendant corporations that one of them was occupying the premises was competent as an admission. Huse v. St. Louis Belting & Supply Co., 121 Mo. App. 89, 97 S. W. 990. Where a note was ambiguous, not showing whether it was the personal note of the president of a company or that of the company, a memorandum by the president of the payee company indicating that he regarded it as the note of the payor company only was admissible against the payee. Dunbar Box & Lumber Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91. Statement by agent of seller of typewriter in explaining ambiguous terms of a written order that a commission for selling other machines was to be applied on the purchase price held competent against seller, being made when the transaction was being closed. Smith Premier Typewriter Co. v. Rowan Hardware Co., 143 N. C. 97, 55 S. E. 417. The rule that acts and declarations of an agent can be proved against the principal applies to declarations made before and after a particular act, such as a threat to commit assault which is afterwards committed. Conklin v. Consolidated R. Co. [Mass.] 82 N. E. 23.

Held incompetent because not a part of the res gestae: Declarations of an agent, not

thority as agent,[89] are competent against the principal. There must be at least a prima facie showing of the existence of the agency before such admissions or declarations are admissible;[90] neither the fact of the agency, nor the extent of an alleged agent's authority, can be shown by his acts or declarations.[91]

a part of the res gestae, are hearsay. Miller & Co. v. McKenzie, 126 Ga. 746, 55 S. E. 952. Statements of employe after transaction in issue had been finished held inadmissible. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S. E. 222. Declarations of an agent while engaged in looking after his principal's tenants cannot be introduced for the purpose of proving that the principal was engaged in excavating for railroad, during the course of which an explosion injured a tenant and her house. Bessemer Coal, Iron & Land Co. v. Doak [Ala.] 44 So. 627. In action against a carrier for injuries to goods, statement of agent at point of shipment that goods never left defendant's line, without a showing that the agent had investigated or knew the facts, made a month after the shipment, was held inadmissible. Reason v. Detroit, etc., R. Co. [Mich.] 113 N. W. 596. Admissions of agent of property owner who negotiated a lease of the premises, made after execution of the lease, held inadmissible in action to rescind the lease for false representations by lessor as to ownership of the property. Finch v. Causey [Va.] 57 S. E. 562. Husband was wife's agent only for sale of certain property, and the wife executed the deed. The consideration was paid and the deed accepted and recorded. Held, declarations of the husband after the transaction was closed were inadmissible against the wife. Hartman v. Thompson, 104 Md. 389, 65 A. 117.

89. Held admissible: Where the issue concerns the honesty or fraud of corporate dealing, letters by those who control the corporation which describe and characterize its fraud are admissible. Weiss v. Haight, 148 F. 399. Defendant's attorney took possession of a stock of goods under a void writ and made an inventory of them. Held, in action of trespass, the inventory was competent evidence against defendant on the issue of the value of the goods. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108. While a statement of a director of a bank, other than the cashier, is not ordinarily binding on the bank, it will be binding if reported to or acted on or acquiesced in by the bank or its managers. West Branch State Bank v. Haines [Iowa] 112 N. W. 552. Statement of one who was carrier's agent to deliver goods that one box was missing, but would be along in a few days, held competent against the carrier. Musselam v. Cincinnati, etc., R. Co. [Ky.] 104 S. W. 337. Where it appeared to be telephone lineman's duty to ascertain information concerning injuries to employers, an admission as to what hit plaintiff, made by one acting as lineman, and when ascertaining such information, was held competent against defendant. McNicholas v. New England Tel. & T. Co. [Mass.] 81 N. E. 889. Where it appeared that plaintiff was real party in interest in transactions in which his son was nominal party, statements of the son were competent against plaintiff though not made in his presence. Rice v. Eisler, 103 N. Y. S. 1054. Admission of one who was at various times manager, treasurer, and trustee of corporation in regard to a contract held admissible against the corporation. Chilcott v. Washington State Colonization Co. [Wash.] 88 P. 113. Statements of a promoter of corporation who acted for it in making a contract, and later became a manager, held admissible in action on contract against corporation. Id. Admissions made by attorney in the management of litigation are admissible against his client. Question as to whether attorney did not at previous trial of cause admit that certain figures were in the handwriting of his client held improperly ruled out. Kirchheimer v. Barrett, 125 Ill. App. 56.

Held inadmissible: Where agent was authorized only to deliver certain property, his declarations as to the purpose of delivery are not admissible against the principal. Trainor v. Schutz, 98 Minn. 213, 107 N. W. 812. In action for damages to shipment of cattle because of insufficient pens, certain statements of the railroad employes, made to third persons, that the company would upon notice provide means for through shipments, to avoid using insufficient pens, were held inadmissible because not authorized by the company. St. Louis & S. F. R. Co. v. Crowder [Ark.] 103 S. W. 172. Where it did not appear that a report of the killing of plaintiff's cow was made by an agent who had authority to bind the company, it was proper to exclude proof that such a report had been made. Young v. Darien & W. R. Co., 1 Ga. App. 317, 57 S. E. 921. Where person injured sent her son for a physician, a statement by the son to the physician that the physician would get $100 and more out of the company if he attended his mother, and would testify at the trial in her favor, was inadmissible against the injured person, the son having no authority to make such statement. Gainesville Midland R. Co. v. Jackson, 1 Ga. App. 632, 57 S. E. 1007. Statements of employe of a party not shown to have authority to bind his company held inadmissible. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S. E. 222. Statement by soliciting agent who had no power to make contract agreeing to something not contained in the written contract held inadmissible against defendant. McKeige v. Carroll, 105 N. Y. S. 342. In action for damages to shipment of cattle, evidence of statement by brakeman should have been excluded on the ground that he had no authority to make it. St. Louis & S. F. R. Co. v. Frazar [Tex. Civ. App.] 16 Tex. Ct. Rep. 983, 97 S. W. 325. Statement made by a person at the scene of a collision that the company would fix things up all right held inadmissible without proof of the connection of the speaker with company showing authority to bind it. Galveston, etc., R. Co. v. Levy [Tex. Civ. App.] 17 Tex. Ct. Rep. 1012, 100 S. W. 195. Letter of attorney not known to or approved by defendant not an admission against defendant. Virginia-Carolina Chemical Co. v. Knight, 106 Va. 674, 56 S. E. 725.

90. Declarations of an alleged agent are

Statements and admissions of an *attorney at law* in respect of his principal's business are inadmissible against his principal unless it is specially shown that they were authorized or that they were made in the due and orderly conduct of a case for the distinct purpose of dispensing with formal proof of the facts to which they relate.[92] An admission by an attorney, made to expedite the trial, that the other side's witnesses would testify to certain facts, if called, is incompetent in a subsequent trial.[93]

Where several *persons* are *jointly interested,* the admissions of one may be shown against all.[94] Otherwise an admission may be proved only against the person making it, or the party for whom he was acting at the time.[95] Where there is independent prima facie proof of partnership, declarations of either of the alleged partners, written or spoken, are admissible in corroboration.[96] In the case of "old line" insurance, where the beneficiary acquires a vested interest in the insurance, it is usually held that admissions or declarations by the insured, either before or after issuance of the policy, are inadmissible against the beneficiary;[97] but in the case of fraternal insurance, where the beneficiary acquires no interest in the policy or certificate, the contract being with the member of the order, the rule is otherwise.[98] Admissions and declarations of a legatee are admissible in evidence against the will when he is

not competent to prove agency in the first instance (Ham v. Brown Bros. [Ga. App.] 58 S. E. 316), but if the agency be prima facie proved, declarations of the agent are admissible in corroboration (Id.). The fact of agency may be established by proof of circumstances, apparent relations, and the conduct of the parties, and, the fact of agency once established, declarations and admissions of the person whose agency is thus shown, within the scope of his authority are admissible against the principal. Cable Co. v. Walker, 127 Ga. 65, 56 S. E. 108. Declarations of alleged agent are inadmissible until agency is shown. Howell v. Maine & Co., 127 Ga. 574, 56 S. E. 771. Verbal and written statements of president of corporation before incorporation held inadmissible against corporation subsequently formed. Horowitz v. Broads Mfg. Co., 54 Misc. 569, 104 N. Y. S. 988. Admissions of one not defendant's agent, and receipts signed by him, held inadmissible against defendant. Fensterheim v. Abeles, 105 N. Y. S. 280. Letter by agent before agency arose held inadmissible against principal. Ohly v. Mendham, 104 N. Y. S. 413. Admissions of defendant's husband held inadmissible against defendant without proof of agency. McKee v. Owen, 04 N. Y. S. 373. An assessor's return of real estate is not competent against the owner on the issue of the value of the land, he having nothing to do with the valuation placed thereon by the assessor. Lewis v. Englewood El. R. Co., 223 Ill. 223, 79 N. E. 44.

91. On issue whether buyer of lumber was defendant's agent, letter by alleged agent to a lumber exchange, and letterhead showing buyer as agent, were incompetent. Rice v. James, 193 Mass. 458, 79 N. E. 807.

92. Horseshoe Min. Co. v. Miners' Ore Sampling Co. [C. C. A.] 147 F. 517.

93. City of Detroit v. Little Co., 146 Mich. 373, 13 Det. Leg. N. 803, 109 N. W. 671.

94. Where evidence showed that two persons were acting jointly in a certain transaction, the admissions of one were competent against the other. Miller v. Harris, 117 App. Div. 395, 102 N. Y. S. 604.

95. Admissions of one defendant contrary to his testimony held merely to tend to discredit him as a witness and not to constitute substantive evidence against his codefendant. McCormick Harvesting Mach. Co. v. Perkins [Iowa] 110 N. W. 15. Admission of one defendant, in letter written by him, that he did not own legal title to land, but was only a mortgagee, obviated necessity for proof as against him, but was not binding on his cotenant. Nichols-Shepard Co. v. Ringler [Iowa] 112 N. W. 543. In suit for dissolution of partnership and for an accounting, a statement by one defendant to a commercial agency, not adopted by a codefendant, is inadmissible to show the assets and liabilities of the partnership. Kliger v. Rosenfeld, 105 N. Y. S. 214. Files in another cause inadmissible where it appeared one defendant therein had consented to the filing of them, and no showing as to others, and no offer to limit proof to defendant who had consented. Bain v. Bain [Ala.] 43 So. 562.

96. Davidson v. Waxelbaum & Bro. [Ga. App.] 58 S. E. 687.

97. Taylor v. Grand Lodge, A. O. U. W., 101 Minn. 72, 111 N. W. 919; Ogden v. Soveriegn Camp, Woodmen of the World [Neb.] 111 N. W. 797.

98. Taylor v. Grand Lodge, A. O. U. W., 101 Minn. 72, 111 N. W. 919. On issue whether applicant for membership had made false statement of date of birth, a prior application by him to another company, showing a different date, was held admissible in favor of the order. Id. Evidence being held sufficient to show that both applications had been made by the same person. Id. In an action on a certificate of a fraternal insurance order, where the contract was with the assured, and the beneficiary acquired no vested interest in the certificate, statements of the assured prior to his death were admissible in favor of the order to show what he considered his standing with the order to be. Ogden v. Sovereign Camp, Woodmen of the World [Neb.] 111 N. W. 797.

the sole beneficiary under it,[99] but not when there are several legatees.[1] Acts and admissions of a conspirator during the pendency of the conspiracy are admissible against his co-conspirators.[2]

(§ 6) *D. Declaration of a person since deceased,*[3] made in good faith, ante motam litem, are competent,[4] though statutes in most states forbid any party in interest to testify to such declarations.[5] The rule as to declarations of decedents relating to boundaries does not make competent declarations of a living person not shown to have been made on the land.[6]

§ 7. *Documentary evidence. A. In general.*[7]—A written instrument upon which the action is based,[8] or any private writing the contents of which are relevant and material,[9] is admissible in evidence when the proper foundation has been laid by due and sufficient proof of its identity and authenticity,[10] and proper execution.[11]

99. The time, place, and circumstances of such admissions go only to their weight, not their competency. In re Miller's Estate, 31 Utah, 415, 88 P. 338.

1. In action to vacate probate of will, evidence of statements of one of the contesting legatees as to advancements received by him is inadmissible. Vannest v. Murphy [Iowa] 112 N. W. 236.

2. Acts and admissions of a conspirator held admissible against all when done during the pendency of the conspiracy. Perry v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 180, 98 S. W. 411.

3. See 7 C. L. 1567.

4. Mass. Rev. Laws, c. 176, § 66, makes competent declarations of a person since deceased if made in good faith before commencement of an action. Declarations of person for whose death action was brought held competent. Chaput v. Haverhill, etc., R. Co. [Mass.] 80 N. E. 597. Letter written by one since deceased, before action was begun, contradicting material testimony of a party, held competent. Randall v. Claflin [Mass.] 80 N. E. 594. Declarations of a person since deceased against his interest, and not made with a view to opening legislation, are admissible in any case. American Surety Co. v. Wood [Ga. App.] 58 S. E. 1116. In action for trespass based on title derived from a deed by a decedent, declarations by decedent, at the time of a survey of the land, were competent. Fincannon v. Sudderth, 144 N. C. 587, 57 S. E. 337. In proceeding for settlement of executor's account, held proper to allow proof of declarations of decedent in her husband's presence by witnesses who were not parties to the proceeding. Medlin v. Simpson, 144 N. C. 397, 57 S. E. 24. Private account books kept by a person since deceased when accompanied by proof that they were his books and of his handwriting are admissible at common law in behalf of his estate, though Mills' Ann. St. § 4817 does not contemplate the admission of such evidence except when the books are shown to have been kept in the usual course of business. Davie v. Lloyd [Colo.] 88 P. 446. Admissions of a person since deceased against his pecuniary interest are admissible to bind his estate. Schell v. Weaver, 128 Ill. App. 106. Where deceased actually delivered property to his daughters under circumstances which may or may not have constituted a gift, his statements before and after delivery are admissible. McIntosh v. Fisher, 125 Ill. App. 511. Conversations otherwise competent are not rendered inadmissible by reason of the fact that one of the participants is dead. Hueni v. Freehill, 125 Ill. App. 345.

5. See Witnesses, 8 C. L. 2351.

6. Goyette v. Keenan [Mass.] 82 N. E. 427.

7. See 7 C. L. 1567.

8. A state deed or grant relied on as the foundation of title in an action of ejectment is admissible unless probate is defective; no objection not going to competency of instrument is available. Bealmear v. Hutchins [C. C. A.] 148 F. 545.

9. Correspondence between parties held competent. Wefel v. Stillman [Ala.] 44 So. 263. Renewal of lease being in issue, letters between the parties, showing that negotiations for renewal were pending, were admissible. Wallace v. Dorris [Pa.] 67 A. 858. Certain notes set out as exhibits, and properly identified, and not denied, held admissible in evidence. Owsley v. Boles' Adm'r, 30 Ky. L. R. 1016, 99 S. W. 1157. Conveyances are admissible to prove ownership as a collateral fact. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583. Under Code Civ. Proc. § 1854, providing that when a detached writing is introduced any other writing necessary to explain the first is competent, a reply to a letter which has been introduced is not admissible when the letter can be understood without the reply. Hale Bros. v. Milliken [Cal. App.] 99 P. 365. Where cross claim was made for failure to deliver rice, and plaintiff claimed rice had been taken under writ of sequestration, the writ was admissible in evidence. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 328, 99 S. W. 128. Though deed of homestead was invalid because not separately acknowledged by the wife, it was held admissible to explain a subsequent deed given to confirm the first, though the names therein were not the same. Davis v. Miller Brent Lumber Co. [Ala.] 44 So. 639. Where several writings were executed as parts of the same transaction, all were admissible in evidence. Kampmann v. McCormick [Tex. Civ. App.] 18 Tex. Ct. Rep. 588, 99 S W. 1147. Coal lease being offered in evidence, the whole thereof, including an indorsement, was evidence, and it was proper to require the endorsement to be read. Wallace v. Dorris [Pa.] 67 A. 858.

10. Genuineness of letters offered in evi-

Such proof must conform to statutory requirements.[12] Where corporate records are by statute made provable by copies, the terms of the statute relative to authentication must be complied with.[13] Where proper execution and authenticity of an instrument is admitted, proof thereof is unnecessary.[14] Evidence to show the competency of documentary proof may, in the discretion of the court, be received after the documentary proof is received.[15]

Exhibits in a foreign language, not translated, are inadmissible.[16]

dence must be shown. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71. Verified account consisting of several loose sheets held together by wire clip not driven through the paper, with verification on last sheet, referring to foregoing account, held admissible. Murphy v. St. Louis Coffin Co. [Ala.] 43 So. 212. To render original papers in a suit competent evidence, they must be identified by a witness who has personal knowledge in regard to them. Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78. In action for loss of express, receipt for express held inadmissible, not having been properly authenticated. Southern Exp. Co. v. Hill [Ark.] 98 S. W. 371. Letters held inadmissible because execution not proved, nor signatures established, nor recitals of agency therein shown to be true. Henry Vaughan [Tex. Civ. App.] 18 Tex. Ct. Rep. 711, 103 S. W. 192. Drilling contract provided that foreman should keep and furnish a report of the formation through which he drilled. Held, in action on contract, an unidentified paper, purporting to give such formation, found on the floor of the house where the foreman lived was inadmissible to show that his report furnished defendant was incorrect. Runyan v. Punxsutawney Drilling & Cont. Co. [Ky.] 102 S. W. 854. Requisition on carrier for cars held inadmissible without proof of its authenticity. Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., 104 Md. 693, 65 A. 425. Time cards furnished by railroad company to the public held admissible as against objection that it was not shown to be authorized. Western Union Tel. Co. v. O'Fiel [Tex. Civ. App.] 19 Tex. Ct. Rep. 653, 104 S. W. 406. Letters addressed to defendant and found in her possession not admissible unless shown to have been answered or that they were part of a series. Jones v. Jones, 124 Ill. App. 201.

11. Proof of execution of letters by purported writer is prerequisite to their admission as evidence. Ex parte Denning [Tex. Cr. App.] 18 Tex. Ct. Rep. 740, 100 S. W. 401. Lease which provided for a renewal, and letters exercising the option to renew, held competent evidence though not attested and recorded like a deed. Parker v. Gortatowsky, 127 Ga. 560, 56 S. E. 846. A deed not properly attested or probated for record is not rendered admissible as a recorded deed by reason of the indorsement thereon, some months later, by the maker of a power to the grantees to sell all rights and privileges previously conveyed by the deed, this power being witnessed, and it and the power being recorded together. Gray Lumber Co. v. Harris, 127 Ga. 693, 56 S. E. 252. Instrument purporting to be certificate of registration of horse, and showing his pedigree, held inadmissible without proof of its due execution, though a witness testified that any horseman anywhere would recognize it as a certificate of the American Trotting Register officials. Texas & P. R. Co. v. Newsome [Tex. Civ. App.] 98 S. W. 646. In action for price of materials for a heating plant, a writing purporting to be a memorandum of sale, made by the selling agent, and not signed by the buyer who did not know its contents, was held inadmissible. Crane & Ordway Co. v. Jones [S. D.] 113 N. W. 80. Where there were no subscribing witnesses to a contract, proof by three witnesses that they were present at its execution and saw it signed was sufficient. Lefkovits v. First Nat. Bk. [Ala.] 44 So. 613.

12. Deeds, if registered, can be put in evidence, when otherwise competent, even when registered during the trial. Johnson v. Eversole Lumber Co., 144 N. C. 717, 57 S. E. 518. Under Code 1896, § 1792, providing that testimony must be given in open court, under oath, a certain agreement between parties as to time of bringing suit, waiver of service, and notice of issue, and as to time for hearing, was inadmissible when its execution was proved only by an affidavit made out of court before the bill was filed. Durr v. Hanover Nat. Bk. [Ala.] 42 So. 599. Where it appeared that a subscribing witness to a written instrument was attending school in another state at the time of the trial, his absence was sufficiently accounted for, and execution of the instrument could be proved otherwise than by his testimony. Civ. Code 1895, § 5245, construed. Terry v. Broadhurst, 127 Ga. 212, 56 S. E. 282. Civ. Code 1895, § 3628, relating to filing of an affidavit of forgery to a deed, and having a special issue made up and tried as to the genuineness of a deed attacked for forgery, is inapplicable to a fieri facias and entry of levy thereon offered in connection with a sheriff's deed which is also attacked for forgery. Vickers v. Hawkins [Ga.] 58 S. E. 44.

13. Certificate which fails to state that the paper is a copy and that party certifying is the keeper of the original records is insufficient. Grand Lodge A. O. U. W. v. Young, 123 Ill. App. 628.

14. Deed admitted by pleadings and written instrument, the execution of which was conceded, held admissible. Kauffman v. Baillie [Wash.] 89 P. 548.

15. Proof of facts necessary to show competency of tax deed may be allowed to be made after the deed is offered. Treasury Tunnel, Min. & Reduction Co. v. Gregory [Colo.] 88 P. 445.

16. French exhibits not admissible. Squadrilli v. Ciervo, 101 N. Y. S. 661. Ex-

A party offering in evidence an instrument showing alterations must explain the alterations before the instrument is admissible.[17] Such explanation may satisfactorily appear from the instrument itself, as altered,[18] or it may be made by extrinsic evidence.[19]

A deed purporting to have been executed by an officer of the court is inadmissible without extrinsic proof of the authority of such officer[20] in the absence of a statute to the contrary.[21] The absence of a Federal revenue stamp from an instrument required by law to be stamped does not impair its competency as evidence[22] in the absence of an express statutory inhibition. A reply letter received in due course, purporting to be executed by the addressee of the one to which it purports to be a reply, is admissible without further proof.[23]

An ancient record or document, if it comes from a custody which the court deems proper,[24] and is in itself free from any indication of fraud or invalidity, proves itself.[25] Such an instrument will be presumed to have been executed upon lawful authority,[26] even though defectively acknowledged.[27] The rule as to ancient deeds,

hibits in Spanish language held inadmissible. Brummer v. George B. Van Cleve Co., 105 N. Y. S. 3.

17. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127. Code Civ. Proc. § 1982, provides that a party producing a writing as genuine which has been altered must account for the alteration, hence an instrument showing an alteration is inadmissible over objection without first accounting for the alteration. Manuel v. Flynn [Cal. App.] 90 P. 463. Part of an application for policy of insurance held inadmissble without proof explaining why it was not all produced. Trow v. Preferred Acc. Ins. Co. [Vt.] 67 A. 821.

18. Certified copy of ordinance with pen and ink alterations of the printed portions held to constitute a harmonious and consistent whole, and to be admissible without further explanation. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127.

19. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127.

20. If a deed conveying land purports to have been executed by an officer of court under a decree, in order to make it admissible in evidence, the power or authority of the officer to make the deed must be shown unless waived. Winn v. Coggins [Fla.] 42 So. 897. A recital in a deed by a special receiver, showing his appointment and authority to execute it, is not evidence of such authority against persons not claiming under it. Hagan v. Holderby [W. Va.] 57 S. E. 289.

21. Under Texas statutes, allowing administrator to specifically perform contracts of the intestate, an administrator's deed is admissible in evidence without further proof, Sayle's Rev. Civ. St. art. 2153, making such deed prima facie evidence that all requirements of law have been complied with. Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525.

22. Contract of sale admissible though not stamped. Phillips v. Hazen, 132 Iowa, 628, 109 N. W. 1096.

23. Letter in reply to one asking sick benefits, purporting to be signed by insurer's president, written on insurer's letterhead, enclosed in its envelope, and mailed at its place of business, was held admissible without proof of its execution by insurer's president. Hays v. General Assembly American Benev. Ass'n [Mo. App.] 104 S. W. 1141. Where letter written by one defendant to bank was an answer to a letter to him concerning certain land, and the cashier of the bank identified the signature as the same as that on other letters in the correspondence concerning this land, a sufficient foundation was laid for admission of the letter. Nichols-Shepard Co. v. Ringler [Iowa] 112 N. W. 543.

24. Proper custody of a document purporting to be ancient is required in order to give credit to its genuineness. But it is not necessary that the place from which it came should be the best and most natural place; it is enough if it appears that it came from a place where it was natural and proper for it to be. Woodward v. Keck [Tex. Civ. App.] 17 Tex. Ct. Rep. 425, 97 S. W. 852. Certified copy of notification of intention to claim land under Oregon donation act, genuine and regular on its face, held competent evidence of date when it was given, though notification was found in general land office at Washington instead of in the Oregon office, the land being a part of Oregon Territory. Sylvester v. State [Wash.] 91 P. 15.

25. Where a deed is thirty years old, is free from suspicion, and comes from the proper custody, it is admissible in evidence without the necessity of proof of accompanying possession or acts of ownership corroborative of its genuineness. Woodward v. Keck [Tex. Civ. App.] 17 Tex. Ct. Rep. 425, 97 S. W. 852. Deeds over fifty years old, shown to have come from custody of a representative of the grantee's estate, held competent as ancient instruments, Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417.

26. The existence of the power under which ancient instruments purport to have been executed will be presumed. Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417.

27. Under Shannon's Code, § 3761, providing that where a deed has been registered for more than twenty years it shall

wills, and other instruments executed under the solemnities of the law is held to apply with equal force to letters, receipts, official endorsements, and all other ancient writings;[28] but is held inapplicable in the case of a copy of such an instrument.[29] Recitals in ancient deeds are competent evidence of the facts recited.[30] The issue of the genuineness of ancient documents sought to be used as evidence should go to the jury where their genuineness is attacked.[31]

Standard mortality tables[32] are competent when life expectancy is in issue,[33] but not otherwise.[34] Hospital records are inadmissible without proof of their correctness and the manner in which they were made.[35] Standard scientific works are competent when relevant.[36]

Proof of handwriting[37] may be necessary when the genuineness of a signature or other writing is disputed.[38] Any person who has seen a party write or who is familiar with his handwriting may express his opinion as to the genuineness of an alleged signature of such party.[39] Where there are subscribing witnesses, testimony

be presumed to have been upon lawful authority, and the probate shall be good, it was held that a deed, registered for more than twenty years, was admissible in evidence though the acknowledgment taken by the justice of the peace of another state was defective. Kobbe v. Harriman Land Co., 117 Tenn. 315, 98 S. W. 175.

28. Woodward v Keck [Tex. Civ. App.] 17 Tex. Ct. Rep. 425, 97 S. W. 852. Where identity of patentee in ancient patent was in issue, it appeared that a letter had been written by one of the same name as the patentee to an attorney, directing him to get a patent, and enclosing notes of survey of the tract desired. The letter also mentioned that the writer had had a chill. The letter and notes were found in the land office and were indorsed in the manner shown to conform to the practice of the land office. There was evidence tending to show the truth of the fact mentioned in the letter. Held, to establish genuineness of ancient patent, the letter, notes of survey, and other evidence above mentioned, was competent. Id.

29. The rule that an ancient document, coming from the proper custody, is admissible, is not applicable to a copy of the instrument in question. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

30. Where issue was whether a certain deed had been executed, a recital in a deed forty years old that grantor was grantee of plaintiff's ancestors, from whom deed was claimed, was held competent evidence. Brewer v. Cochran [Tex. Civ. App.] 17 Tex. Ct. Rep. 796, 99 S. W. 1033.

31. Woodward v. Keck [Tex. Civ. App.] 17 Tex. Ct. Rep. 425, 97 S. W. 852.

32. Where life expectancy table was not shown to be a standard table, nor in general use by insurance companies, mere proof that it was contained in a book on insurance and prepared by the actuaries of certain companies did not make it competent. Banks v. Braman [Mass.] 80 N. E. 799. Expectancy tables included in legislative code, for use in assessing inheritance taxes on life and term estates, held competent where personal injuries were proved permanent. Clark v. Van Vleck [Iowa] 112 N. W. 648.

33. Standard mortality tables competent in action for death. Valente v. Sierra R. Co. [Cal.] 91 P. 481. Carlisle expectancy tables held competent in action for personal injuries where there is evidence that injuries are permanent. Howard v. McCabe [Neb.] 112 N. W. 305. Where permanency of injuries was placed in issue, life tables were competent. O'Donnell v. Rhode Island Co. [R. I.] 66 A. 578. In action for permanent injuries, Carlisle mortality tables are competent. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.

34. Where life estate had terminated by death of tenant, when inheritance taxes had been assessed thereon, life tables to determine its value were inadmissible. Kahn v. Herold, 147 F. 575.

35. Entries in hospital record held incompetent where it was not shown by whom the entries were made, and no evidence whatever to prove their authenticity or correctness was produced. State v. Trimble, 104 Md. 317, 64 A. 1026.

36. Passage from Encyclopedia Britannica on life expectancy held competent on issue of damage from permanent personal injury. Patton v. Sanborn, 133 Iowa, 650, 110 N. W. 1032. Standard medical dictionary held competent evidence of definition of certain medical terms, to aid the memory and understanding of the court, even though judicial notice might have been taken thereof. State v. Wilhite, 132 Iowa, 226, 109 N. W. 730. Standard medical works on subject of inquiry held competent evidence. Birmingham R. Light & Power Co. v. Moore [Ala.] 42 So. 1024.

37. See 7 C. L. 1570.

38. Where a letter is not shown to have been received in response to one sent to the purported writer, it is inadmissible without proof of the signature. Louisville & N. R. Co. v. Britton [Ala.] 43 So. 108.

39. Ware v. Burch [Ala.] 42 So. 562. A witness who has corresponded with a person or seen him write may testify as to whether an alleged signature of such person is genuine. Griffin v. Working Woman's Home Ass'n [Ala.] 44 So. 605. Testimony of person familiar with handwriting of a deceased admissible to show whether endorsement of check, in which deceased was payee, was in his handwriting. Campbell v. Collins, 133 Iowa, 152, 110 N. W. 435.

by others should not be admitted until the absence of such witnesses is accounted for.[40] Experts who have compared such writings may state their opinions on the genuineness of the disputed writing,[41] even though there is other testimony by non-experts,[42] but one not an expert may not give an opinion based on a comparison of writings.[43] There is a conflict of authority as to whether such a comparison may be made by the jury.[44] A paper which has been used as evidence for some other purpose in the case, and which is admitted or proved to have been signed by the party whose signature is in issue, is competent as a standard of comparison to prove the disputed signature.[45] Where a document, the signature to which is in dispute, is an ancient one, other ancient documents which have been treated as authentic are competent as standards of comparison.[46] A comparison may not be instituted between a disputed writing and extraneous papers though the latter are shown to be genuine,[47] and writings not otherwise relevant and admissible are not admissible for the sole purpose of instituting a comparison either by the jury or experts.[48]

(§ 7) *B. Books of account.*[49]—It was the common-law rule that entries in books of account or shop books made in the regular course of a person's business or employment were admissible in evidence on proof of the handwriting of the entrant, after his death.[50] The rule has now been extended in most jurisdictions so as to

A witness who swears that he knows and would recognize the handwriting of a person may testify to the genuineness of his signature. Brown v. McBride [Ga.] 58 S. E. 702.

Witness not qualified: Contract erroneously admitted where only proof of execution was by witness who said he did not know the party's signature for sure, but had corresponded with him and had letters from him signed by him. Morris & Co. v. Southern Shoe Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 564, 99 S. W. 178. One who testified that he was familiar with decedent's handwriting at time of trial, but not when the will was written, ten or twelve years before, was not qualified to identify the handwriting in the will. Carmical v. Carmical [Ky.] 104 S. W. 1037.

40. Where there are subscribing witnesses to a contract whose absence is not accounted for, it is not error to refuse to allow the execution of the contract to be proved by a person familiar with the signer's handwriting. North Penn Iron Co. v. International Lithoid Co., 217 Pa. 538, 66 A. 860.

41. Expert may make comparison and give opinion. Griffin v. Working Woman's Home Ass'n [Ala.] 44 So. 605. Experts may properly compare writings admitted to be genuine with a disputed signature and give their opinions thereon. Pulliam v. Sells, 30 Ky. L. R. 456, 99 S. W. 289. Under Court and Practice Act of 1905, § 399, previous acquaintance with a person's handwriting is not now necessary to qualify a witness to testify in regard thereto, since comparison may be made by witnesses between the disputed writing and any writing proved to the satisfaction of the judge. Municipal Ct. of Providence v. Kirby [R. I.] 67 A. 8.

42. Where it is sought to prove a signature by comparison with other writings conceded to be genuine, expert opinion is competent though there are witnesses who testify from personal knowledge and observation. Howard v. Creech [Ky.] 101 S. W. 974.

43. Griffin v. Working Woman's Home Ass'n [Ala.] 44 So. 605. Only experts may make comparisons between writings shown or admitted to be genuine and disputed writings. Ware v. Burch [Ala.] 42 So. 562.

44. Comparison of disputed with admitted or proved writing may be made by jury. Griffin v. Working Woman's Home Ass'n [Ala.] 44 So. 605. Held error to allow counsel for propounder of will, in his argument, to point out revocatory words on the margin to the jury and show differences between the signature there and the signature to the will. In re Shelton's Will, 143 N. C. 218, 55 S. E. 705.

45. Woodward v. Keck [Tex. Civ. App.] 17 Tex. Ct. Rep. 425, 97 S. W. 852. Where genuineness of signature to second will was in issue, the first will, admitted and treated as genuine, and which was in evidence, was properly used as a standard of comparison. Griffin v. Working Woman's Home Ass'n [Ala.] 44 So. 605. Where an affidavit for capias in action for alienation of affections contained certain charges, and there was offered a written statement by the affiant retracting the charges, which was charged to be a forgery, the affidavit was competent as a standard of comparison to prove the signature on the statement. Brown v. Evans [Mich.] 14 Det. Leg. N. 476, 112 N. W. 1079.

46. Woodward v. Keck [Tex. Civ. App.] 17 Tex. Ct. Rep. 425, 97 S. W. 852.

47, 48. Griffin v. Working Woman's Home Ass'n [Ala.] 44 So. 605.

49. See 7 C. L. 1571.

50. Remington Mach. Co. v. Wilmington Candy Co. [Del.] 66 A. 465. Entry in books of physician since deceased, showing visit to testatrix whose capacity was in issue, and payment of charge therefor, held admissible not only to show payment but all the facts stated, date, nature of disease, etc., the entry being against the interest of the one who made it. Knapp v. St.

render such entries competent during the life of the entrant under certain conditions.[51] Thus, it is generally held that where books of account are shown to have been regularly kept,[52] original entries therein, made in the usual course of business, at or near the time of the transaction to which they relate,[53] and shown to be true and correct,[54] are competent evidence of the facts to which they relate,[55] though some courts limit the rule to cases where the witness verifying them is unable to testify

Louis Trust Co., 199 Mo. 640, 98 S. W. 70. Where shopkeeper kept his own books, and copied therein orders taken by his clerk and entered in an order book, and the clerk had only general knowledge of the business and no personal knowledge of various accounts, the books were competent, the shop keeper being dead. Van Name v. Barber, 115 App. Div. 593, 100 N. Y. S. 987.

51. Remington Mach. Co. v. Wilmington Candy Co. [Del.] 66 A. 465.

52. Original books of a corporation, regularly kept, and identified by the proper custodians as books kept pursuant to Civ. Code, § 377, are competent evidence in an action between other parties. Hurwitz v. Gross [Cal. App.] 91 P. 109. There being an agreement between plaintiff and defendant that defendant's son should keep a memorandum of the transactions between them, the books of account, and testimony of the son as to credit placed therein at his father's direction, were competent. Gray v. Joiner, 127 Ga. 544, 56 S. E. 752.

53. Entries need not be made at the exact time of the event recorded, and whether they are made sufficiently near in point of time depends on the particular facts of each case. Murray v. Dickens [Ala.] 42 So. 1031. Where entries were made each week, based on weekly reports submitted by an employe, they were held competent as against the objection that they were not shown to have been made contemporaneously with the events recorded. Id. Account book showing sales of meal tickets held admissible where preliminary proof showed that the owner of the business kept the books, in Chinese, and that the book was the only one he kept, and showed original entries made at the time of the sales recorded, and that the charges there shown corresponded to the ordinary charge. Yick Wo v. Underhill [Cal. App.] 90 P. 967.

54. By weight of authority, such entries are now held to be competent when verified and adopted by the entrant as correct. See Remington Mach. Co. v. Wilmington Candy Co. [Del.] 66 A. 465. Where book of account had been shown to be correct and treated so by all the parties, it was competent evidence. McGrath v. Stein [Ala.] 42 So. 454. Where shopkeeper kept his own books, and witnesses testified that their accounts were always found correct, and it appearing that the books were regularly kept, they were held sufficiently authenticated. Van Name v. Barber, 115 App. Div. 593, 100 N. Y. S. 987. Books held competent when shown to be kept by a member of the firm, and to be correct, though it was not shown that he kept no clerk. Hinkle v. Smith & Son, 127 Ga. 437, 56 S. E. 464. If a witness has personal knowledge of the transactions recorded, he may identify and testify to correctness of books of account, and render them competent though he did not keep the books. Pelican Lumber Co. v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 262, 98 S. W. 207. Report of police officer on an accident held incompetent without proof of its correctness. City of Chicago v. Jarvis, 226 Ill. 614, 80 N. E. 1079. Book of a bank held inadmissible because not sufficiently identified, not shown to be correctly kept, nor by whom kept. Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 S. E. 212. In action on corporate notes, entries in company's books, relating to bills payable, made after the notes were executed by a person not produced as a witness, were incompetent when not shown to have been known by and consented to by the payee. Baines v. Coos Bay, etc., R. & Nav. Co. [Or.] 89 P. 371. Page from ledger held incompetent, not being a book of original entries, and the entries thereon not being proved just and correct. Holloway & Bros. v. White-Dunham Shoe Co. [C. C. A.] 151 F. 216. Whether records made by an employe in the regular course of business are properly verified so as to entitle them to admission as original evidence for the purpose of corroborating a witness is a question addressed to the sound discretion of the trial court. Held proper to exclude report of boiler maker on particular engine day before an accident. Strand v. Great Northern R. Co., 101 Minn. 85, 111 N. W. 958. Scaling book held inadmissible where person who kept it said he did not know where timber came from that was entered therein except by letters from other employes, and the testimony of the others not identifying the items. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 So. 533.

55. Train sheets, identified by train dispatcher and shown to have been kept in the usual and regular course of business, held competent to show what trains passed a certain place and the time thereof. Big River Lead Co. v. St. Louis, etc., R. Co., 123 Mo. App. 394, 101 S. W. 636. In action against city for rent of premises, on issue whether city held over after expiration of the lease, books of the lessor, regularly kept, showing payments by city, though authority of officer making them not shown, after expiration of the lease, were competent. Commercial Wharf Corp. v. Boston [Mass.] 80 N. E. 645. Books of a fraternal order, required by law to be kept, read in open lodge and approved by the members, and constituting records of the lodge, and containing the only complete history of its financial transactions, made by the recorder, held, when identified, to be competent evidence against members in an action by the lodge. Union Pacific Lodge No. 17, A. O. U. W. v. Bankers' Surety Co. [Neb.] 117 N. W. 263.

from present recollection of the facts recorded.[56] Entries made by one person from information given by others are competent, though not strictly original, when shown to have been regularly made in the usual course of business,[57] and when sufficiently corroborated by the entrant and by those having personal knowledge of the facts recorded, at the time.[58] An entry not connected with the regular business in which books are kept is not admissible,[59] but such entry does not render the books incompetent as to other regular entries concerning the business.[60] Books of account are not competent to prove a prior special agreement,[61] but books of account showing charge on sale are admissible though the sale was on order made and accepted in writing.[62] Books showing only one side of an account are incompetent,[63] and self-serving entries in private books of account are also excluded.[64]

Expert accountants are usually allowed to testify to the result of an examination of complicated accounts. In Louisiana the report of an expert on books of account, sworn to and filed, but not homolgated, is incompetent when the expert is not examined as to the correctness of his report.[65] Commercial books should be properly audited below, and not sent to the supreme court for general examination.[66] Stipula-

56. See Remington Mach. Co. v. Wilmington Candy Co. [Del.] 66 A. 465. Entries and book of accounts made by witness and not used by him to refresh his memory, but as substantive evidence, held incompetent. Dick v. Biddle Bros. [Md.] 66 A. 21. Where date of cutting certain timber was in issue, and a witness used pay rolls to fix the date and refresh his memory, and was permitted to show them to the jury, it was proper to refuse to admit the pay rolls as evidence. Moore v. Luehrmann Hardwood Lumber Co. [Ark.] 102 S. W. 385. Books of account are competent when it is shown that they were regularly kept, that the items shown therein are original entries, and they are true, and were made at the time of the transaction to which they relate. Where party who made entries in book testified that they were books of original entry, that the items are correct, and were made at the time of the transaction, such books are admissible in evidence. Garlick v. Mutual Loan & Bldg. Ass'n, 129 Ill. App. 402. Book kept for the purpose of indicating when certain notes will mature is not admissible as a book of original entry. Wiggins v. Wilson, 123 Ill. App. 663.

57. Entries in a book were made each week of the number of days a stream hoist had been used, based on reports of an employe in charge of it. Held, the entries were not objectionable as not having been made in the usual course of business. Murray v. Dickens [Ala.] 42 So. 1031. Entries regularly and correctly made are not inadmissible, merely based on information given by others to the person making the entries. Where one party testifies that he knew the correctness of the items and correctly gave them to another who testifies that he received such information and correctly entered the items in the original book of account, such book is admissible in evidence. Wright v. Charbonneau, 122 Ill. App. 52.

58. Where memoranda of sales were made by a merchant and his clerks as sales were made, and the slips were kept and entered in the books each month, the books were competent, when verified by the merchant and clerks, to show delivery of goods. Pettey v. Benoit, 193 Mass. 233, 79 N. E. 245. In action for breach of warranty of ice making machine, "time slips" were offered to show amount of ice manufactured per day. The entries were made by a bookkeeper who received his information from other employes who had personal knowledge of the facts. Both the bookkeeper and his informant testified that entries were correct. They were held competent. Remington Mach. Co. v. Wilmington Candy Co. [Del.] 66 A. 465. Where entries in books based on reports by an employe were supported by the testimony of the person making them, and also by the testimony of the employe who made the reports that they were correct, they were held to be sufficiently corroborated. Murray v. Dickens [Ala.] 42 So. 1031.

59. Entry of loan in books showing sales of meal tickets by restaurant keeper does not prove the loan. Yick Wo v. Underhill [Cal. App.] 90 P. 967.

60. Yick Wo v. Underhill [Cal. App.] 90 P. 967.

61. Corporate book entries showing payments by stockholders held incompetent to prove that money was paid for treasury stock sold them, but never delivered. Jacobs v. Morganthaler [Mich.] 14 Det. Leg. N. 307, 112 N. W. 492.

62. Vallee Bros. Elec. Co. v. North Penn Iron Co., 32 Pa. Super. Ct. 111.

63. Books of account showing only charges against defendant and no payments by him held incompetent. Dugan v. Longstaff, 52 Misc. 288, 102 N. Y. S. 1120.

64. Entries in a testator's cash book held incompetent in favor of his executor. Page v. Hazelton [N. H.] 66 A. 1049. In suit to have deed from husband to wife through a third person declared a mortgage, entries in the wife's private diary, she having since died, were held incompetent in behalf of her successors in interest. Wilson v. Terry [N. J. Err. & App.] 65 A. 983. Pay rolls and time books held competent so far as they contained original entries, made in regular course of duties of persons making them but private entries therein by corporation for its own use and benefit held incompetent. Eureka Hill Min. Co. v. Bullion Beck & Champion Min. Co. [Utah] 90 P 157.

65, 66. Hewitt v. Williams, 118 La. 236, 42 So. 786.

tion whereby statement drawn from books of original entry is admitted in evidence does not obviate the necessity of laying a proper foundation for the entry of the books.[67]

(§ 7) *C. Public and judicial records and documents.*[68]—Public official documents[69] and public official records required by law to be kept by sworn officials are competent evidence of the facts required by law to be shown therein.[70] Unofficial statements on public records not required by law to be recorded are inadmissible.[71] Instruments so executed as to be entitled to recordation[72] are provable by the record or duly authenticated copies thereof.[73] Records of courts,[74] of legislative bodies,[75] and of administrative or executive branches of government,[76] are competent. Since

67. American Bonding & Trust Co. v. New Amsterdam Casualty Co., 125 Ill. App. 33.

68. See 7 C. L. 1573.

69. Where a report of a survey is made and filed and no exceptions filed, the report may be read in evidence, and is prima facie proof of its recitals. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275. Certificate of levee district officers, made in accordance with act creating district, giving full returns of election, held competent and prima facie evidence of facts recited, as the report was made in the line of their duty and authority. Jonesboro, etc., R. Co. v. St. Francis Levee Dist. Board of Directors, 80 Ark. 316, 97 S. W. 281. Quadrennial appraisal of real estate for general taxes, made by public officers sworn to appraise property at its just value in money, held competent as a public document. Town of Ripton v. Brandon [Vt.] 67 A. 541.

70. Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055. Thus, official census returns, or properly certified copies thereof, are competent evidence of facts required to be shown by the statute. Copies of U. S. Census returns, certified by secretary of the interior, held competent to show ages of members of a certain person's family at a certain time. Id. Where valid ordinance required health records to be kept, and provided for a record of births, the record was competent evidence of the date of a particular birth. Finer v. Nichols, 122 Mo. App. 487, 99 S. W. 808. P. L. 1888, p. 60, § 13, makes a certificate of birth competent evidence of the facts recited. Vanderbilt v. Mitchell [N. J. Err. & App.] 67 A. 97. Held that a court of equity has power to cancel the record of and restrain the use as evidence of a certificate containing false statements as to the paternity of the child. Id.

71. Where right to maintain a dam at a certain height was in issue, an indorsement after the record of the deed granting the dam privilege, by the clerk, that the dam was rebuilt at a cerain height was inadmissible. Dutton v. Stoughton, 79 Vt. 361, 65 A. 91. Memoranda by public officer in a book not required by law to be kept, as to matters not within his personal knowledge, held inadmissible. Big Thompson & P. River Ditch Co. v. Mayne [Colo.] 91 P. 44. Plat and certificate of survey, not being official plat by county surveyor, held not entitled to be recorded, and hence not competent evidence. Stumpe v. Kopp, 201 Mo. 412, 99 S. W. 1073. Entry of satisfaction of chattel mortgage on margin of record held inadmissible without proof of authority of the judge of probate or his clerk to make it. Wilson v. Johnson [Ala.] 44 So. 539.

72. A certified copy of the record of an instrument which was not entitled to be recorded is incompetent to prove the contents of the instrument. Copy of record of translated copy of a testimonio, not identified, inadmissible. West v. Houston Oil Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 286, 102 S. W. 927. Record of instrument not entitled to be recorded because acknowledged before an officer without authority is incompetent. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

73. Copies of articles of incorporation, under certificate and seal of secretary of state of a sister state, held competent proof of corporate capacity. Bannard v. Duncan [Neb.] 112 N. W. 353. Under Rev. St. Mo. 1899, § 3094, county plat books are admissible in evidence when properly certified by the register or receiver, when entries relate to those made by a receiver or register of a U. S. land office, and not otherwise. Stewart v. Lead Belt Land Co. [Mo.] 98 S. W. 767. Plat of lands, certified by legal custodian as true copy of plat on file, held competent evidence together with certificate, though latter also covered number of acres contained in each of three tracts, which information was given on the plat itself. Austin v. Whitcher [Iowa] 110 N. W. 910. Under Act Feb. 4, 1842, a certified copy of a certificate by the clerk of the district court that plaintiff, in an action to establish a state land certificate, had recovered a verdict for certain land, and that judgment had been duly entered, the clerk's certificate having been filed in the general land office, from which the certified copy came, was competent evidence. Kirby v. Hayden [Tex. Civ. App.] 99 S. W. 746.

74. The record of a court in which a case is being tried, when relevant, is itself competent; a certified transcript is not necessary. Sellers v. Page, 127 Ga. 633, 56 S. E. 1011. The fact that Rev. St. 1899, § 3135, makes a properly attested and certified copy of court records admissible, does not render the original records inadmissible when properly identified. Carp v. Queen Ins. Co. [Mo.] 101 S.W. 78.

75. Contents of ordinance as well as fact of passage by council may be proved by original record properly identified. City of Grafton v. St. Paul, etc., R. Co. [N. D.] 113 N. W. 598.

76. Town plat from volume of state papers held competent evidence in absence of objection to authenticity. Twombly v. Lord [N. H.] 66 A. 486. A volume of the records

it is impracticable to produce the originals, public records are almost universally provable by copy or transcript, which must be authenticated, as required by statute.[77]

Public statutes or ordinances may usually be proved by printed copies purporting to be printed and published with authority.[78] A public document should be received in evidence or rejected in its entirety, and where portions thereof are for any reason inadmissible, the jury should be instructed to disregard that portion.[79]

(§ 7) *D. Proceedings to procure production of documentary evidence.*[80]—Courts have inherent power to order the production of documentary evidence in the possession of the adverse party[81] or of a third party.[82] Notice to a party to pro-

of permanent surveys of the county surveyor forming a part of the public records of the county is not discredited as evidence because it may contain an original paper of a survey instead of a copy. Scott v. Williams, 74 Kan. 448, 87 P. 550.

77. Sworn copies of proceedings and papers in tax case, of record, held competent. Glos v. Holmes, 228 Ill. 436, 81 N. E. 1064. In an action on an official bond, of a Federal officer, a certified transcript of his account with the United States, as shown by the books of the treasury department, was admissible, being made competent by U. S. Rev. St. § 886. Ewing v. U. S. [Ariz.] 89 P. 593. Certified copies of papers on file or orders shown in minutes of probate court held admissible; copies of unsigned orders held inadmissible. Teague v. Swasey [Tex. Civ. App.] 18 Tex. Ct. Rep. 290, 102 S. W. 458. Copy of judicial record of another state must be certified according to the Federal statute or C. de Civ. Proc. Kan. § 371; it is not sufficient that it is certified according to § 372, Kan. Code, as this relates only to records required to be kept by statutes of Kansas or of the United States. Ayres v. Deering & Co. [Kan.] 90 P. 794. Only final judgments and decrees rendered and entered in the circuit courts of the state, and certified copies thereof, are admissible as prima facie evidence of the entry and validity thereof, under Acts 1899, p. 115, c. 4723; the act does not extend to the judgments of a justice of the peace docketed in the office of the clerk of the circuit court under Rev. St. 1892, § 1624. Palmer v. Parker [Fla.] 42 So. 398. Certified copy of proceedings of Federal court in Indian Territory held inadmissible because not showing certificate by judge that attestation of clerk was in due form as required by U. S. Rev. St. § 905. Hagan v. Snider [Tex. Civ. App.] 98 S. W. 213. Rev. St. U. S. § 905 has reference to authentication of state judicial records, and not records of Federal courts. Hence, held that copy of writ of error from U. S. Circuit Court, authenticated with seal and certificate signed "X. Clerk of U. S. circuit court, per Ina Allison, Deputy Clerk," was sufficiently authenticated. Jordan v. McDonnell [Ala.] 44 So. 101. An exemplification of the record of proceedings in a foreign justice court is incompetent to prove a judgment of such court; neither Rev. St. U. S. § 905, nor Rev. Codes N. D. 1905, § 7292, authorizes such proof. The judgment can only be proved as other facts are proved, in some common-law method. Strecker v. Railson [N. D.] 111 N. W. 612. The fact that such foreign justice court judgment had been filed in the district court of the sister state would not make an exemplification of the abstract of the judgment so filed competent, as the judgment still remained a judgment of the justice of the peace. Id. Certificate of transcript from records of court of ordinary, signed by a named person as ordinary of the county, sufficiently authenticates the record where it affirmatively appears in the certificate that the ordinary had no clerk, but was acting as his own clerk. This last fact may be shown by the ordinary's certificate. Civ. Code 1895, § 4250 (11). Sellers v. Page, 127 Ga. 633, 56 S. E. 1011. A certificate of the ordinary purporting to certify a copy of a marriage license appearing of record in his office does not render the copy admissible unless it is made to appear affirmatively that there is no clerk other than the ordinary. Smallwood v. Kimball [Ga.] 58 S. E. 640.

78. A printed pamphlet containing village ordinances, purporting to be published by authority of the president and board of trustees of the village, held competent evidence thereof, and of date of passage as shown therein. Illinois Cent. R. Co. v. Warriner, 228 Ill. 91, 82 N. E. 246. Code 1896, § 1821, provides that any public or private statutes, or the proceedings of any legislative body, purporting on the face of the book to be printed by authority of the government or state or territory, are evidence without further proof. Compton v. State [Ala.] 44 So. 685. Parts of Georgia Code held provable by book purporting to contain the Code, showing when adopted, and by whom prepared and printed, and showing also "ntered according to act of congress, in 1896, by state of Georgia, in the office of the librarian of congress at Washington." Id. Cobbey's Ann. St. 1903 Neb. § 1381, provides for proof of statutes and written laws by duly authenticated printed volumes thereof, and of common or unwritten law only by parol; hence statutes and constitution of another state cannot in Nebraska be proven by parol. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718.

79. Held to apply to coroner's verdict though it attempted to fix the responsibility for the accident occasioning the death. O'Donnell v. Chicago & A. R. Co., 127 Ill. App. 432.

80. See 7 C. L. 1576; also subject Discovery and Inspection, 9 C. L. 990.

81. Held to compel production of corporate books would not be an "unreasonable search and seizure." United States v. Terminal R. Ass'n of St. Louis, 148 F. 486. As a general rule, subject to exceptions for privilege, where it is shown that a paper which would be evidence material to the issue is in the court, it is the duty of the court to require the production of such

duce such evidence should be given before the aid of the court is invoked.[83] A petition for a subpoena duces tecum is sufficiently definite if the books and documents are designated so as to enable the witness to produce them without uncertainty.[84] The petition should set out facts showing prima facie the relevancy of the documentary evidence desired, a mere allegation of relevancy is not enough.[85] An order to produce books and documentary evidence should in a proper case be made absolute, though the relevancy of the evidence may be passed upon at the time of the trial.[86] The court should determine the materiality of papers before making a peremptory order for their production,[87] but such determination is for the court and not for the witness.[88]

§ 8. *Evidence adduced in former proceedings.*[89]—At common law and by statute in many states,[90] testimony of a witness on a former trial is admissible when the witness is dead or beyond the jurisdiction,[91] provided the issues and parties in the two actions are substantially the same,[92] and depositions read at a former trial are competent under similar circumstances.[93] A stenographic transcript of testimony in a former trial is usually competent,[94] when properly authenticated,[95] or such

documentary evidence instanter, and, if the alleged holder is in court, to grant a proper request for an investigation to determine whether the paper is in fact in court and whether its production should be required. Moore v. Central of Georgia R. Co., 1 Ga. App. 514, 58 S. E. 63. Production of an instrument may be ordered for the purpose of aiding witness to frame his answer. Columbian Bldg. & Loan Ass'n v. Leeds, 128 Ill. App. 195.

82. A court of equity has power to compel the production of books and papers by virtue of its inherent and general jurisdiction, and this power is not confined to parties to the suit but extends to third persons. United States v. Terminal R. Ass'n, 148 F. 486.

83. Where a paper is in the possession of the adverse party, he should be notified to produce it before trial or procure a rule for its production, otherwise the court may refuse to require its production. Mussellam v. Cincinnati, etc., R. Co. [Ky.] 104 S. W. 337.

84, 85. United States v. Terminal R. Ass'n, 154 F. 268, modifying 148 F. 486.

86. International Coal Min. Co. v. Pennsylvania R. Co., 152 F. 557. A witness may not refuse to produce papers on the ground that they are not relevant or material, this being a question for the court when produced. United States v. Terminal R. Ass'n, 148 F. 486.

87, 88. Central of Georgia R. Co. v. Lewis [Ga. App.] 58 S. E. 674.

89. See 7 C. L. 1577.

90. The common-law rule allowing proof of former testimony of deceased witness was not altered in Pennsylvania by Act May 23, 1887. Keim v. Reading, 32 Pa. Super. Ct. 613.

91. Testimony of witness at former trial may be read to the jury when it appears witness is beyond the jurisdiction of the court. Dolph v. Lake Shore & M. S. R. Co. [Mich.] 14 Det. Leg. N. 426, 112 N. W. 981. Subpoena for witness was returned "not found" and it appeared he had left the county and was on his way to his home in another state. Held testimony on a former trial competent. Woodstock Iron Works v. Kline [Ala.] 43 So. 362. Where witnesses who testified at former trial were not dead at time of second trial and their testimony did not consist of admissions in the course of their duties as officers of defendant bank, it was error to admit testimony given by them on a former trial. Citizens' Sav. Bk. v. Boswell [Ky.] 104 S. W. 1014. In action for injuries to child on the railroad track, the testimony of the conductor of the train at a former trial was inadmissible where it appeared he was present at the present trial and had not been called as a witness. Missouri, etc., R. Co. v. Nesbit [Tex. Civ. App.] 97 S. W. 825. Testimony of a living witness at a former trial can only be used to refresh the memory of a witness or to contradict him. Dambmann v. Metropolitan St. R. Co., 55 Misc. 60, 106 N. Y. S. 221.

92. Where a company to which an elevated road had been leased was made a party to a suit to enjoin the operation of the road on the second trial thereof, testimony of a witness, since deceased, given at the first trial was competent on the second. Shaw v. New York El. R. Co. [N. Y.] 79 N. E. 984. Under Iowa Code Supp. 1902, § 245a, making reporter's shorthand notes competent on a retrial, such notes taken in a will contest instituted by a widow and her children in their individual rights were held competent on a retrial wherein the widow appeared as administratrix, the widow and children having been erroneously substituted for another in the former proceeding. In re Wiltsey's Will [Iowa] 109 N. W. 776.

93. Depositions read at former trial of same cause admissible, deponents having died. Rogers v. Rogers [Del.] 66 A. 374. Depositions used in another case held admissible where parties against whom they were offered had been represented by counsel in the other action though not named as parties thereto. Brownlee v. Bunnell [Ky.] 103 S. W. 284.

94. Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

95. Transcript of testimony of witness on a former trial, not shown to be correct by the testimony of the stenographer who took it down and transcribed it, held inadmissible. El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 18 Tex. Ct. Rep. 376, 99 S. W. 587.

testimony may be proved by one who was present in court and heard it.[96] In Missouri such testimony, preserved by a bill of exceptions, may be read in the same manner as a deposition.[97] It is error to allow the introduction of portions of the testimony of a witness on a former trial without any showing as to the relevancy thereof.[98] A judgment in a criminal prosecution cannot be received in a civil action to establish the truth of the facts on which it was rendered.[99]

The use of testimony in a former trial or proceeding to impeach or contradict a witness is elsewhere treated.[1]

§ 9. *Expert and opinion evidence. A. Conclusions and nonexpert opinions.*[2]—Mere conclusions of the witness,[3] and opinions of nonexperts on issues which

Testimony of witness at former trial held not identified as required by Code Civ. Proc. § 3146, and inadmissible, where witness and stenographer were dead, and no one could be found who could read the stenographer's notes or testify to their correctness or that they embodied the witness' testimony. Pew v. Johnson, 35 Mont. 173, 88 P. 770.

96. One who was present at a former trial and heard the testimony may state what his recollection of the testimony of a certain witness is. Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78.

97. Under Rev. St. 1899, § 3149, testimony taken at a former trial and preserved by bill of exceptions may be read in evidence in the same manner as a deposition. Harris v. Quincy, etc., R. Co. [Mo. App.] 101 S. W. 601. Under Missouri statutes the deposition of a judge, lawyer, or physician, or his testimony at a former trial, preserved by a bill of exceptions, may be read in evidence, though he has not been summoned as a witness, if it appear that he is engaged in professional duties. Doyle v. St. Louis Transit Co. [Mo. App.] 101 S. W. 598.

98. The whole record should be introduced, and counsel should not be allowed to select portions arbitrarily. Rumford Chem. Works v. Hygienic Chem. Co., 148 F. 862.

99. Judgment of acquittal in case where plaintiff was prosecuting witness inadmissible in action on accident policy growing out of assault by defendant in criminal action of assault. Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 S. W. 124.

1. See Witnesses, 8 C. L. 2347.

2. See 7 C. L. 1577.

3. Taylor v. Brown [Or.] 90 P. 673. Memorandum of proposed contract made by witness held inadmissible, it being merely his conclusions as to purport of conversation. Boone v. Rickard, 125 Ill. App. 438. Question as to fact which can be ascertained by inspection of an instrument previously introduced in evidence is properly ruled out. New York Life Ins. Co. v. Rilling, 121 Ill. App. 169.

Held mere conclusion on facts and inadmissible: Whether unexpected jerk of train would throw a brakeman off the bumpers of a car. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 818, 104 S. W. 399. Statement by telephone operator that plaintiff refused to answer a telephone call. Smith v. Birge, 126 Ill. App. 596. Testimony of witness that light at place of injury was so bright he thought he could have read a newspaper there and that he thought it was as bright as daylight. City of Chicago v. Loebel, 130 Ill. App. 487. It is improper to ask witness whether the use of device is under certain conditions safe and proper. Riley v. American Steel & Wire Co., 129 Ill. App. 123. That a certain person ratified an illegal sheriff's sale. Walker v. McLoud, 204 U. S. 302, 51 Law. Ed. 495. Opinion of surveyor as to supposed monument found by him. Clarke v. Case, 144 Mich. 148, 13 Det. Leg. N. 193, 107 N. W. 893. Where plaintiff fell into uncovered hatchway of vessel at night, question whether a candle light around the hatchway would have enabled him to see it if there was no light in the hold. Doyle v. Eschen [Cal. App.] 89 P. 836. Statement of broker that he found a buyer ready, willing, and able to buy. Northwestern Packing Co. v. Whitney [Cal. App.] 89 P. 981. Whether injury to pedestrian struck by car could have been prevented by certain named means. Indianapolis Trac. & T. Co. v. Kidd, 167 Ind. 402, 79 N. E. 347. Whether witness could see railroad track as well from where he stood as engineer of train could. Chicago, etc., R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602. That a hole in the track caused child to stumble and fall. Masterson v. St. Louis Transit Co., 204 Mo. 507, 103 S. W. 48. Testimony that motorman was "evidently" talking to someone on the platform when child was struck. Masterson v. St. Louis Transit Co. [Mo.] 98 S. W. 504. Statement that witness was afraid of a crane because it was too close to the track. Charlton v. St. Louis, etc., R. Co., 200 Mo. 413, 98 S. W. 529. Question what certain employes were "aiming to do." American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784. Testimony of witness that he delivered a telegram to be sent for the benefit of the addressee. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. That plaintiff knew that trestle was "shaky." West Pratt Coal Co. v. Andrews [Ala.] 43 So. 348. Whether motorman "seemed" to stop car as soon as he could. Birmingham R., Light & Power Co. v. Randle [Ala.] 43 So. 355. Testimony in action for price of scale that it was "manufactured dishonestly." Moneyweight Scale Co. v. Deis, 104 N. Y. S. 456. Statement of what caused mule hauling empty cars in a mine to turn off the track. Madden v. Saylor Coal Co., 133 Iowa, 699, 111 N. W. 57. Opinion of witness that corner of patent was on state line. Douglas Land Co. v. Thayer Co. [Va.] 58 S. E. 1101. Whether witness had noticed that a person was cautious in money maters. Conway v. Murphy [Iowa] 112 N. W. 764. Whether witnesses thought side-

walk was "in good condition" or was a "good sidewalk." Spaulding v. Edina, 122 Mo. App. 65, 97 S. W. 545. Testimony of witness that a hole in a track caused a child to fall "evidently." Masterson v. St. Louis Transit Co. [Mo.] 98 S. W. 504. Opinion of witness that places where he posted notices were public places. O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 S. E. 739. A witness cannot state his mere conclusion that others than himself know a fact. Bush v. McCarty Co., 127 Ga. 308, 56 S. E. 430. Held error to permit defendants to state their opinions on whether policy of insurance was held by them as copartners. Swing v. Rose, 75 Ohio St. 355, 79 N. E. 757. On issue whether person buying goods of plaintiff was defendant's authorized agent, testimony of witness that he was the authorized agent. Rice v. James, 193 Mass. 458, 79 N. E. 807. Held proper to refuse to allow a partner to state whether he had authority from the firm to sign checks and notes. Michigan Shoe Co. v. Paul [Mich.] 14 Det. Leg. N. 554, 113 N. W. 310. In action by physician for personal injuries, his opinion as to what per cent his practice had decreased. Dunn v. Gunn [Ala.] 42 So. 686. In action for damages alleged to have been caused by fire started by locomotive, testimony of engineer that he managed the engine carefully while going by and from the place in question. Birmingham R., Light & Power Co. v. Martin [Ala.] 42 So. 618. Where witness testified that he did not see plaintiff at a particular time, but from his position afterwards he must have been sitting. Southern Coal & Coke Co. v. Swinney [Ala.] 42 So. 808. Except where experts are being examined a witness cannot be called upon to give an opinion on facts testified to by other witnesses. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 So. 903. Testimony that witness found a book entry which he thought indicated a certain conveyance was incompetent as a conclusion and not the best evidence. Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513. A witness not an expert may not give an opinion on another's physical condition, but should state facts from which the jury may draw its own conclusions. Kirby v. Western Union Tel. Co. [S. C.] 58 S. E. 10. Where witness testified to facts, he could not give a conclusion which he deduced therefrom. Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789. In action for libel, testimony by plaintiff as to amount of damage she had suffered. Harriman v. New Nonpareil Co., 132 Iowa, 616, 110 N. W. 33. Where an issue was whether a mine had been abandoned, a question asked the lessor whether the lessee had done anything toward surrendering the mine and property. Wilson v. Big Joe Block Coal Co. [Iowa] 112 N. W. 89 Where two witnesses had described experiments made by them at a crossing, held proper to exclude testimony as to whether a person thirty feet from the crossing listening for a train could not have heard it. Northern Tex. Trac. Co. v. Caldwell [Tex. Civ. App.] 18 Tex. Ct. Rep. 88, 99 S. W. 869. Question to railway conductor, "When a street car is approaching a crossing, when will it appear that the car is going to stop?" Id. In action for injuries received in collision with street car, testimony that motorman "tried to stop the car." San Antonio Trac. Co. v. Kumpf [Tex. Civ. App.] 18 Tex. Ct. Rep. 423, 99 S. W. 863. In action on alleged promise to pay board for others, testimony of plaintiff that defendant "was to pay the board." Marino v. Collis, 54 Misc. 581, 104 N. Y. S. 747. Testimony of witness that contractor's bond was still in force held incompetent, where he was not shown to have knowledge of whether the work covered had been completed or not. Aetna Indemnity Co. v. Ryan, 53 Misc. 614, 103 N. Y. S. 756. In an action for injuries sustained by plaintiff while riding backwards on a hand car, a question whether he would have been injured if he had been standing in a different position. Southern R. Co. v. McGowan [Ala.] 43 So. 378. Question to motorman whether he stopped the car as soon as he could improper; he could state facts only. Birmingham R., Light & Power Co. v. Randle [Ala.] 43 So. 355. In action for death of a teamster, struck by switching train, held error to allow another teamster to state that there would have been no "unusual danger" in crossing the track if the train had been going at the usual speed. Detroit So. R. Co. v. Lambert [C. C. A.] 150 F. 555. In a controversy as to the making of an agreement, one of the parties to it may not testify as to what he had in mind in the preliminary negotiations nor state his unexpressed intent. Cornelius v. Atchison, etc., R. Co., 74 Kan. 599, 87 P. 751. In action for injuries at railroad crossing, testimony of defendant's roadmaster that the condition of the highway was reasonably necessary for the improvement of the road. Illinois So. R. Co. v. Hayner, 225 Ill. 613, 80 N. E. 316. Testimony as to proper manner of unloading oil tank car, which was in substance only the witness' conclusion as to what a reasonably prudent man should do. Gulf, etc., R. Co. v. Wittnebert [Tex. Civ. App.] 104 S. W. 424. Testimony as to how witness would have acted, or how a person of ordinary prudence would have acted under certain circumstances. Id. The conclusion of a witness as to the authority of an agent, based entirely on acts of the agent known to witness, is inadmissible, since the authority of an agent must be proved by facts other than his acts. McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132. In action for death of person struck by street car, testimony that there were persons on the platform and that the conductor was "evidently" talking to them was inadmissible. Masterson v. St. Louis Transit Co., 204 Mo. 507, 103 S. W. 48. Where facts in regard to a transaction with a decedent whose capacity was in issue were shown, it was proper to exclude a question whether the deal was advantageous to decedent. Huyck v. Rennie [Cal.] 90 P. 929. Nonexpert opinion that person could not have fallen in position in which he was found but must have lain down, and that his wound looked as though the pilot of the engine had struck him, held incompetent. Continental Casualty Co. v. Todd [Ark.] 101 S. W. 168.

Held statement of fact and not a mere conclusion: In action for death of mare on railroad right of way, a question whether

are for the court [4] or jury,[5] or the subject-matter of which requires expert skill or

the mare was frightened by an approaching hand car. Mikesell v. Wabash R. Co. [Iowa] 112 N. W. 201. Testimony that barrel heads appeared "to have been staved inwards by heavy blows from the outside." International & G. N. R. Co. v. Drought & Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 912, 100 S. W. 1011. Whether witness saw any violence committed on the person of plaintiff by defendants. Barlow v. Hamilton [Ala.] 44 So. 657. Testimony of witness that he could not work as much since injury as before. Southern R. Co. v. Dean [Ga.] 57 S. E. 702. Whether or not persons could have seen an object under certain conditions. Central of Ga. R. Co. v. Hyatt [Ala.] 43 So. 867. Estimate of distance properly allowed. Birmingham R. Light & Power Co. v. Randle [Ala.] 43 So. 355. Testimony of one who had driven an engine on the morning of the day of the accident in question as to whether it allowed steam to escape to such an extent as to obscure the track. Stone v. Union Pac. R. Co. [Utah] 89 P. 715. Plaintiff properly allowed to testify that she did not know of defective condition of walk by which she was injured. Patton v. Sanborn, 133 Iowa, 650, 110 N. W. 1032. Whether condition of sidewalk was good until after stating facts, and hence no error in admitting it when no objection was specifically made. Thompson v. Poplar Bluff [Mo. App.] 101 S. W. 709. Where grass destroyed by fire appeared to have had no market value when destroyed, it was proper to admit opinion evidence as to its value, the witnesses stating the facts on which they based their opinions. Ft. Worth & R. G. R. Co. v. Brown [Tex. Civ. App.] 17 Tex. Ct. Rep. 849, 101 S. W. 266. In action for injuries to telephone employe, held not error to reject testimony of witness that he had gone up the pole a few days later and that there was nothing to prevent one from seeing that the insulation was off the wire, or from perceiving the danger, witness having testified to the facts. Cumberland Tel. & T. Co. v. Grave's Adm'x [Ky.] 104 S. W. 356. In action for forcible and wrongful ejection from car, plaintiff's testimony that he was not in a position to meet the assault and for that reason resisted as long as possible. Pierson v. Illinois Cent. R. Co. [Mich.] 14 Det. Leg. N. 405, 112 N. W. 923. Where there is other evidence tending to connect a party with an intent, it is proper to prove such intent by his direct testimony. Semler Mill. Co. v. Fyffe, 127 Ill. App. 514. Where a witness has stated that a note was turned over to another for a certain purpose, he may state that the purpose has ended. Stiles v. Shedden [Ga. App.] 58 S. E. 515. Where witness, a messenger, was allowed to state the facts, it was not prejudicial error to allow him to state what a reasonably quick delivery of a telegram would be. Kirby v. Western Union Tel. Co. [S. C.] 58 S. E. 10. Plaintiff in personal injury action, who had been engaged in ordinary vocation, may give his estimate of what his services and attention to his business were worth. Howard v. McCabe [Neb.] 112 N. W. 305. Where plaintiff was struck by a car while climbing a telegraph pole, his answer, on being asked why he climbed up the side he did, that it was the safe side was construed to mean that he so understood it at the time, and hence competent as a reason for his act. Ahearn v. Boston El. R. Co. [Mass.] 80 N. E. 217. Where plaintiff's decedent was killed while assisting in moving a derrick, testimony of his foreman as to decedent's relation to the other men, from whom he took orders, etc. Farrell v. Sturtevant Co. [Mass.] 80 N. E. 469. Question whether witness could have reached a certain place at a certain time if a telegram had been delivered. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. Question how long witness lived on land "claiming it for another" held proper. Henry v. Frohlichstein [Ala.] 43 So. 126. Proper to allow motorman to state whether car would have struck a man walking a certain distance from the track. Birmingham R., Light & Power Co. v. Randle [Ala.] 43 So. 355. In action for false imprisonment plaintiff may testify that he was detained against his will. Robinson & Co. v. Green [Ala.] 43 So. 797. Witnesses who saw a collision held properly allowed to state that they could have heard a bell and whistle. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83, 99 S. W. 867. Statement that witness had inspected barrels of molasses at a certain point and tried to stop their leaking, but that barrels appeared to be sound and that leaking appeared to be from fermentation. International & G. N. R. Co. v. Drought & Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 912, 100 S. W. 1011. Witness who saw a runaway accident properly allowed to state that a loose wire across the street caused the runaway. Dublin Gas & Elec. Co. v. Frazier [Tex. Civ. App.] 18 Tex. Ct. Rep. 714, 103 S. W. 197. A question calling for the statement of a fact, which, though partly the result of a conclusion, could and would necessarily be inferred by any reasonable mind from the facts and circumstances which the witness has testified to, is not improper. As question who appeared to be in charge of cattle at a ranch. McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132. A question to the executor of a will applying for probate, the will being contested on the ground of undue influence, whether he did anything with a view of influencing the testator held proper. Sherman v. Sherman, 193 Mass. 400, 79 N. E. 774. In action for injuries caused by collision with car, testimony as to how far witnesses could see on the night in question was competent. Chicago City R. Co. v. Hagenback, 228 Ill. 290, 81 N. E. 1014. In action for injuries to tree by trimming, testimony as to manner of cutting limbs, and appearance of the tree after trimming, was proper. Delaware & Madison Counties Tel. Co. v. Fisk [Ind. App.] 81 N. E. 1100.

4. Whether personal property of a decedent is sufficient to pay his debts. Hunt v. Curtis [Ala.] 44 So. 54. In action for injuries alleged to have resulted from defective electric wiring, whereby a city ordinance was violated, construction of ordinance was for court; hence it was improper to allow city inspector to state that it was his duty to inspect wires and enforce

knowledge,[6] are inadmissible. Nonexpert opinion evidence is excluded for the reason that deductions of fact are to be made by the jury;[7] and such evidence should usually be excluded when the facts are such that they can be clearly and intelligibly presented,[8] and when the deductions therefrom can as well be made by the jury as by the witness.[9] The rule does not exclude the statement of a collective fact by a witness,[10] nor the statement of the result of the witness' observation, though such statement involves in some measure an opinion or judgment.[11] Where the facts are such that they cannot be clearly and intelligibly detailed to the jury so as to repro-

the ordinance and his only. Brunelle v. Lowell Elec. Light Corp. [Mass.] 80 N. E. 466.

5. Whether street was in a "dangerous or impassable" condition, owing to presence of sewer ditch full of water. City of Anniston v. Ivey [Ala.] 44 So. 48. In condemnation proceedings, opinion evidence is incompetent on issue of necessity of taking land. City of Grand Rapids v. Coit [Mich.] 14 Det. Leg. N. 555, 113 N. W. 362. Whether land was damaged by driving over it; facts should be stated. Gosdin v. Williams [Ala.] 44 So. 611. In a proceeding, habeas corpus, by a mother to regain custody of a child, witnesses may not state whether or not she is a fit and proper person to have custody of the child, that being the very matter in issue. Moore v. Dozier [Ga.] 57 S. E. 110. Hypothetical question asking witness in effect whether injured person was guilty of contributory negligence held improper. Curtis v. Barber Asphalt Pav. Co. [Wash.] 87 P. 345.

6. Where witness was shown by his own testimony to have no knowledge of the character, quality, and value of certain goods, it was error to allow him to testify in regard thereto. McAllister-Coman Co. v. Matthews [Ala.] 43 So. 747.

7. Whether engineer of train which collided with another took every precaution which an engineer could take to stop the train was for the jury. Johnson v. Center [Cal. App.] 88 P. 727. In an action by a parent for the death of his child, the opinion of the parent as to the value of the child's services to him and his family at the time of her death, and thereafter, is incompetent, this being a question for the jury. Cincinnati Trac. Co. v. Stephens, 75 Ohio St. 171, 79 N. E. 235.

8. Moore v. Dozier [Ga.] 57 S. E. 110.

9. The opinion of a witness is not admissible where all the facts and circumstances are capable of being clearly detailed and described so that the jurors may be able readily to form correct conclusions therefrom. Brunswick & B. R. Co. v. Hoodenpyle [Ga.] 58 S. E. 705. Where expert bookkeeper testified to what firm books showed, it was not error to refuse to allow him to state whether a certain partner was debtor or creditor of the firm. Morgan v. Barber [Tex. Civ. App.] 17 Tex. Ct. Rep. 914, 99 S. W. 730.

10. In an action on a new promise of a bankrupt to pay, given after his discharge, and on the issue of his ability to pay, a question to him as to how much of his income was necessary to support himself and family was held not to call for a conclusion but for a collective fact. Torrey v. Kraus [Ala.] 43 So. 184

11. As statement by conductor that car going round a curve would not lurch more than ordinary car on single track. Partelow v. Newton & B. St. R. Co. [Mass.] 81 N. E. 894. A statement not involving an inference or conclusion of the witness to any greater extent than is usual in the statement of any ordinary matter of fact is not objectionable. Testimony of witness that brake club in brakeman's hand was caught and "turned far enough to throw his feet off the brake beam" held not objectionable. Smith v. International & G. N. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 583, 99 S. W. 564. Testimony of witnesses that a person personally known to and observed by them was not intemperate in use of alcoholics held testimony to fact and not a mere conclusion. Taylor v. Security Life & Annuity Co. [N. C.] 59 S. E. 139. Statement why other passenger on car jumped held merely a description of what the witness saw, and held not objectionable. Lord v. Manchester St. R. [N. H.] 67 A. 639. Nonexpert witness, who lived in vicinity, held properly allowed to testify that channel of stream across which bridge was being built was not wide enough, and that dirt and rock dumped into it caused water to back up and flood land, and that water was higher above than below the dam by nearly three feet. Standley v. Atchison, etc., R. Co., 121 Mo. App. 537, 97 S. W. 244. In action for injuries resulting from being crowded off a platform of an elevated road, alleged to be too small to accommodate the crowd, held proper to allow witness to state whether, if three cars unloaded thirty-three passengers each, there would be a fair sized crowd on the platform. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507. Held proper also to question inspector as to how crowd could be controlled and kept from getting too large. Id. Ownership of chattels being in issue, it is competent for a claimant to answer the question "To whom did the property belong?" Lipschitz v. Halperin, 53 Misc. 280, 103 N. Y. S. 202. Witness properly allowed to state that no precaution was taken to warn foot passengers of approach of cars at a street crossing. Aurora, etc., R. Co. v. Gary, 123 Ill. App. 163. Nonexpert with usual knowledge of time and distance may estimate speed of car which he saw. Hall v. St. Louis & S. R. Co. [Mo. App.] 101 S. W. 1137. One who sees a moving street car, and has a knowledge of time and distance, may give an opinion as to its speed. Coffey v. Omaha & C. B. St. R. Co. [Neb.] 112 N. W. 589. Witness who had railroaded for sixteen years and one who had traveled on trains for twenty years held qualified to testify as to speed of train which they saw at the

duce the witness' observation.[12] Thus, a witness shown to have knowledge of the facts may testify as to a person's health at a particular time,[13] his ability to use his limbs, or organs, or sight, or hearing,[14] whether he was suffering pain,[15] or manifested particular symptoms or ill health,[16] or was conscious or in possession of his faculties,[17] and whether he appeared to be acting under the stress of particular emotions.[18]

As to the admissibility of nonexpert opinion evidence on the subject of a person's mental capacity, the courts are not in accord, though it is generally held that

time in question. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235. One who has observed the running of trains and compared speed of different trains, or whose training or experience is such as to entitle his opinion to weight, and who had a fair opportunity to observe a moving train at the time in question, may give an opinion as to the rate of speed. Stotler v. Chicago & A. R. Co., 200 Mo. 107, 98 S. W. 509.

12. Nonexperts may express opinions when the subject-matter is such that its nature cannot be reproduced or described to the jury precisely as it appeared at the time. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. Statements in the nature of conclusions are competent when they relate to matters which cannot well be reproduced or described to the jury as they appeared to the witness. As that testatrix "acted very childish." Vannest v. Murphy [Iowa] 112 N. W. 236. Witnesses may not state whether a woman is financially able to rear her child, when the statement is based upon hearsay, though an opinion based on facts personally known to a witness, and detailed in evidence, would be competent. Moore v. Dozier [Ga.] 57 S. E. 110.

13. Testimony that plaintiff in a personal injury action "was ill" at a certain time and place held competent. St. Louis & S. F. R. Co. v. Boyer [Tex. Civ. App.] 97 S. W. 1070. Testimony as to the appearance of a party, whether she appeared to be injured, held competent. Id. In a personal injury action held proper to allow a witness who had known plaintiff for twelve years to testify that she had always had good health prior to the accident, but that thereafter she had been in poor health and had lost weight. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 18 Tex. Ct. Rep. 416, 99 S. W. 715. A nonexpert witness having been in constant attendance on an injured person and having opportunity to observe his movements and general physical condition may testify whether such person's health is good or poor, and whether he is afflicted with or free from pains. Davis v. Oregon Short Line R. Co., 31 Utah, 307, 88 P. 2. It is competent for a layman to testify as to the physical appearance of an injured limb. McIlwain v. Gaebe, 128 Ill. App. 209.

14. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. In a personal injury action it is proper to allow nonexpert witnesses to state the appearance of plaintiff before and after the injury, whether she suffered pain, and whether she could get around as well after as before the injury. Fulton v. Metropolitan St. R. Co., 125 Mo. App. 239, 102 S. W. 47.

15. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. Whether plaintiff seemed to suffer after receiving injury. Southern R. Co. v. Hobbs [Ala.] 43 So. 844. Any person of ordinary intelligence, who saw another, may testify whether such person was suffering. Kline v. Santa Barbara Consol. R. Co., 150 Cal. 741, 90 P. 125. Statements of mother of injured person that he suffered pain more or less all the time, in connection with facts detailed by her, held competent. St. Louis S. W. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 S. W. 783. Statement of physician who attended injured person that he found him "suffering in the hip and back" held not objectionable, he having also stated the general condition of the patient. Detrich v. Metropolitan St. R. Co., 125 Mo. App. 608, 102 S. W. 1044. Pain and suffering are natural manifestations attending physical injury, and may be detected in a person's look or facial expression; and one not an expert may testify to a person's appearance or expression, as whether one "appeared to be hurt." Barlow v. Hamilton [Ala.] 44 So. 657.

16. Held not opinion evidence for husband to state whether his wife had any cough, lung trouble, or heart failure before a certain exposure. St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 17 Tex. Ct. Rep. 265, 57 S. W. 1087. Statements of witnesses as to effects of injuries which they observed held competent. San Antonio Trac. Co. v. Flory [Tex. Civ. App.] 18 Tex. Ct. Rep. 575, 100 S. W. 200. Nonexperts may testify whether a person had or did not have certain symptoms at particular times, this being merely facts of observation, though only a medical expert could state whether the person had a certain disease. Illinois Life Ins. Co. v. De Lang, 30 Ky. L. R. 753, 99 S. W. 616.

17. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23.

18. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. Witness may properly characterize manner of person seen by him by stating that he gesticulated "like he was mad" or had his head down "as if he was crying." White v. White [Kan.] 90 P. 1087. In some cases witnesses may be allowed to testify directly to the conclusion or inference that another was on a particular occasion angry, calm, agitated, excited, intoxicated, rational, or irrational, where from the nature of the case the facts on which the inference or conclusion is based cannot be described in words. Sneed v. Marysville Gas & Elec. Co., 149 Cal. 704, 87 P. 376. Rule as to stating appearance of a person held not to render competent testimony that a person did not seem to be "pleased" by a certain occurrence. Fleckinger v. Taffee [Mich.] 14 Det. Leg. N. 545, 113 N. W. 311.

any person, qualified by observation or acquaintanceship,[19] may state an opinion as to another's mental condition,[20] when the opinion is accompanied by a statement of the facts on which it is based.[21] Such opinion should not go beyond the facts stated.[22] By some courts it is held that one shown to have had an intimate personal acquaintance with, and opportunity and occasion to observe the actions of, a person whose mental capacity is called in question, may testify affirmatively that in his opinion such person was normal and of sound mind at the time;[23] while a person called to give an opinion that the person whose condition is in issue was insane at the time must first state particular facts and observations on which the opinion is based.[24] It is held in New York that nonexpert witnesses may testify to acts and statements of a person and characterize them as rational or irrational, but may not testify that such person is of sound or unsound mind.[25]

19. Whether a witness is shown to be an "intimate acquaintance" of a decedent, so as to qualify him to testify as to decedent's sanity at the time of making a will, under Code Civ. Proc. § 1870, subd. 10, is a question addressed to the discretion of the trial court, the exercise of which is reviewable only where an abuse is shown. Huyck v. Rennie [Cal.] 90 P. 929. Person who drew deed and witnessed its execution is qualified to testify that person executing it then appeared rational. Arellanes v. Arellanes [Cal.] 90 P. 1059. Mere casual acquaintance and one who had given decedent massage treatments three times held not "intimate acquaintances." Huyck v. Rennie [Cal.] 90 P. 929. Under Civ. Code Proc. § 1870, a sister of decedent who lived with her was qualified to give an opinion as to decedent's sanity at a particular time. Doherty v. Courtney, 150 Cal. 606, 89 P. 434.

20. Held competent for witness to give opinion on whether person executing a release had sufficient mental capacity to know what he was doing. Beard v. Southern R. Co., 143 N. C. 137, 55 S. E. 505. The sanity of one of the parties being in issue, nonexpert witnesses may testify that they know such party and have seen nothing in his appearance or conduct to indicate insanity. Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111. Skillful and reputable physicians, though not experts on the subject, may testify to the mental condition of their patients whom they have observed, and such testimony is testimony to facts of observation, and is not of the character of expert opinion, legal competency, or incompetency. Ireland v. White [Me.] 66 A. 477. Nonexpert witnesses shown to have especial opportunities of observation are allowed to give opinion evidence on the mental condition of one under investigation in this respect, having first stated the facts on which such opinions are based, or without stating the facts when opportunity is given to cross-examine in regard thereto. Order of United Commercial Travelers of America v. Barnes [Kan.] 90 P. 293. Witness may testify what his opinion is as to a person's condition mentally, based on his observations, when the facts are such that they cannot clearly be shown in detail to the jury. Nelson v. Thompson [N. D.] 112 N. W. 1058.

21. Nonexperts may state their opinions as to a person's mental condition when they state also the facts on which their opinions are based. Wightman v. Grand Lodge A. O. U. W., 121 Mo. App. 252, 98 S. W. 829. A nonexpert may testify to the condition of a testator's mind at the time of executing a will, after stating the facts on which his opinion is based. Brown v. McBride [Ga.] 58 S. E. 702. A nonexpert must state the facts on which he bases his opinion as to insantiy. Birmingham R. Light & Power Co. v. Randle [Ala.] 43 So. 355. Where question, "What did you observe with respect to her mental condition?" was treated by witnesses as calling for incidents bearing on condition of mind of deceased, the admission of their answers was not prejudicial. Vannest v. Murphy [Iowa] 112 N. W. 236. Where questions asked nonexperts as to mental condition of testatrix, and their answers that she was of sound mind were based on facts already detailed in evidence, their testimony was competent. Smith v. Ryan [Iowa] 112 N. W. 8.

22. Question as to a person's mental condition going beyond the facts testified to by the witness is improper. Loveman v. Birmingham R. L. & P. Co. [Ala.] 43 So. 411. Opinion of nonexpert as to whether testator was easily influenced held inadmissible without stating the facts. Heath v. Slaughter, 127 Ga. 747, 57 S. E. 69. A nonexpert witness may state all the facts he knows in relation to a testator bearing on the state of his mind and the nature of his acts, and may give his opinion, based on such facts as to the condition of the testator's mind, but it is improper to ask him to state whether, in his opinion, the testator had a decided and rational desire when he made the will or whether his desires were like the ravings of a madman or the pratings of an idiot, or the whim of a child. Id.

23. In re Wilson's Estate [Neb.] 111 N. W. 788. Where a nonexpert testifies in favor of mental capacity, he cannot be limited so strictly to specific facts as one who testifies to mental unsoundness or insanity. Smith v. Ryan [Iowa] 112 N. W. 8.

24. In re Wilson's Estate [Neb.] 111 N. W. 788.

25. Schoenberg & Co. v. City Trust, Safe Deposit & Surety Co., 52 Misc. 104, 101 N. Y. S. 798. In New York nonexperts may characterize the acts and words of a person as rational or irrational, but may not so characterize the person doing or saying them. In re Small's Will, 118 App. Div. 502, 103 N. Y. S. 705.

(§ 9) *B. Subjects of expert testimony.*[26]—Expert opinion evidence is admissible in regard to matters adequate knowledge of which presupposes special skill, experience, or investigation.[27] It is inadmissible upon matters of common knowl-

26. See 7 C. L. 1585.

27. Whether expert testimony is admissible on a particular subject is largely discretionary with the trial court. Meyer Bros. Drug Co. v. Madden, Graham & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 908, 99 S. W. 723.

Illustrations. In general: Proper and safe method of piling flour in fifty pound sacks. Commerce Mill. & Grain Co. v. Gowan [Tex. Civ. App.] 19 Tex. Ct. Rep. 687, 104 S. W. 916. Held error not to allow witness to state whether a railroad would not be a benefit to certain land under certain future conditions which were not impossible. Taber v. New York, P. & B. R. Co. [R. I.] 67 A. 9. Where books of account have been introduced in evidence, an expert bookkeeper may testify that he has examined the books and reached given results from the entries therein to aid the jury, the proper deductions to be made from the entries being at last solely for the jury. Crawford v. Roney, 126 Ga. 763, 55 S. E. 499. In action for injuries caused by contact with defectively insulated electric wire, expert held properly allowed to state, basing his opinion on facts in evidence, whether wire in question was properly insulated. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P. 815. Expert opinion on question of competency of one engaged in the oil refining business held competent when given by experts in the work who had been intimately associated with the person in question for many years and had seen him at work. United Oil & Refining Co v. Grey [Tex. Civ. App.] 18 Tex. Ct. Rep. 670, 102 S. W. 934. In action for injuries to miner injured by fall of rock from roof of room where he was working, expert testimony was competent to show what was usually done to prevent such accidents. Spencer v. Bruner [Mo. App.] 103 S. W. 578. Witnesses who had examined a die, and a splinter alleged to have been split from it, and which injured plaintiff, and who testified that they examined the edges, surface, hardness, etc., of the die and the splinter, using a microscope, were properly allowed that the splinter came from the die, their information being special and outside the range of common knowledge. Hocking v. Windsor Spring Co. [Wis.] 111 N. W. 685. In railroad condemnation case expert testimony was held competent on question whether tile of a certain size in a drainage ditch under the embankment would be sufficient to carry off the water which would be brought there. New Jersey, etc., R. Co. v. Tutt [Ind.] 80 N. E. 420. Where injuries were caused by electric shock claimed to have resulted from placing electric lamp pole too close to iron awning, it was proper to allow expert to testify whether pole could have been so placed as to allow a lamp trimmer to perform his duties without coming in contact with the awning. Horne v. Consolidated Rys., Light & Power Co., 144 N. C. 375, 57 S. E. 19. Cattleman, experienced in dealing at points in question, properly allowed to give estimate of loss of weight in cattle caused by reshipment at certain points. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 17 Tex. Ct. Rep. 571, 99 S. W. 152. Experienced cattleman properly allowed to state what cattle would have sold for on a particular date, being familiar with market price and class of cattle in question. Id. Expert properly allowed to state estimate of weight and shrinkage of cattle in action for loss against carriers. St. Louis, etc., R. Co. v. Dodson [Tex. Civ. App.] 16 Tex. Ct. Rep. 109, 97 S. W. 523. An expert, duly qualified, who has stated all the facts on which his opinion is based, may properly be allowed to state what the "regulation" of a particular organ indicated, to show that the instrument had been improperly used. Estey Organ Co. v. Lehman [Wis.] 111 N. W. 1097. Electrician of seventeen years' experience may properly state whether precautions were necessary in repairing broken electric wires. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516. Held proper to allow an expert on latches on switches in coal mines to state that he did not consider latches safe on main slopes. Southern Coal & Coke Co. v. Swinney [Ala.] 42 So. 808. Expert testimony that premises were too damp for dry goods stock and that stock would have been damaged if allowed to remain held proper. Meyer Bros. Drug Co. v. Madden, Graham & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 908, 99 S. W. 723. The reasonable value of services as attorney in the preparation of abstracts of title and perfecting of title held a proper subject for expert opinion. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340. In action for damages to land by reason of removal of lateral support, qualified witnesses may testify to the value of the land before and after the injury. Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184. Expert opinions held proper on subject of value of certain vehicles when new, and as secondhand. Texas & P. R. Co. v. Wilson's Hack Line [Tex. Civ. App.] 18 Tex. Ct. Rep. 226, 101 S. W. 1042. Character of soil, and crops it will produce, may be shown by experts who have testified to value of land taken. New Jersey, etc., R. Co. v. Tutt [Ind.] 80 N. E. 420. Expert may state that railroad nuisance caused depreciation of fifty per cent in value of property, though he cannot state depreciation in dollars and cents. St. Louis, etc., R. Co. v. Payne [Tex. Civ. App.] 19 Tex. Ct. Rep. 765, 104 S. W. 1077. Market value of vessel at time of destruction may be shown by opinions of persons who by experience and knowledge of the vessels are qualified to testify in regard thereto. The Mobile, 147 F. 882.

Medical and scientific matters: Testimony of physician that he could state whether injuries were painful is not testimony that they were painful. Barry v. Kurshan, 103 N. Y. S. 120. Medical testimony explaining condition of broken bone as shown by an X-ray picture held admissible. Sheldon v. Wright [Vt.] 67 A. 807. Physician who attended plaintiff and knew extent and

edge,[28] or when the facts can be intelligibly presented to the jury and are of such a nature that jurors generally are competent to form opinions and draw conclusions from them.[29] Expert opinion is inadmissible upon the ultimate issues of fact[30]

character of injury could state that she could not have used limbs or ankle without crutches sooner than she did. Galveston, etc., R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 S. W. 699. Where experts had applied tests to patient, held proper to inquire of another expert whether the tests were fair and proper. Rowe v. Whatcom Co. R. & Light Co. [Wash.] 87 P. 921. Symptoms being shown, physicians may testify to progress of a disease. Nelson v. Chicago & N. W. R. Co., 130 Wis. 214, 109 N. W. 933. In an action to recover for a horse alleged to have been overdriven, testimony of a veterinary was competent as to the proper manner of treating a sick horse, not to show the care required of defendant, but to show the condition of the horse and the cause of such condition. Welch v. Fransioli [Wash.] 90 P. 644. Expert medical testimony as to what a midwife does or is expected to do as such held competent on issue whether such acts constituted the practice of medicine. Commonwealth v. Porn [Mass.] 81 N. E. 305.

Railroad construction and operation: Properly qualified witness may give opinion as to effect of bent point of split rail in a switch on trains passing over it. Place v. Grand Trunk R. Co. [Vt.] 67 A. 545. Rules of Master Car Builders' Association held admissible to show proper construction of car. Leas v. Continental Fruit Exp. [Tex. Civ. App.] 18 Tex. Ct. Rep. 394, 99 S. W. 859. Experienced railroad man properly allowed to state that street car could be stopped in shorter space than locomotive train. Northern Tex. Trac. Co. v. Caldwell [Tex. Civ. App.] 18 Tex. Ct. Rep. 88, 99 S. W. 869. Expert testimony is admissible on question whether vibration of trestle caused by trains moving over it would cause nails to start and the timbers to become loose, and whether spikes or nails should have been used to secure them. Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 P. 622. Expert testimony that a locomotive engine, properly equipped and carefully operated, will not set out a fire held proper in action for damages by fire claimed to have been started by locomotive engine. St. Louis & S. F. R. Co. v. Noland [Kan.] 90 P. 273. Competent and experienced engineers are properly allowed to state within what distance trains can be stopped under certain conditions. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 18 Tex. Ct. Rep. 566, 99 S. W. 144. Competent engineers may state whether running an engine without a spark arrester and with damper open past buildings where there was imflammable material was a proper operation of the engine. Underwood v. Stevens Co. [Mich.] 14 Det. Leg. N. 296, 112 N. W. 487. Competent witnesses may give opinions on distance in which engine could be stopped under certain conditions. Wise Terminal Co. v. McCormick [Va.] 58 S. E. 584. Whether the shifting of the tracks of a railroad according to a given plan was feasible, and whether it would increase the cost of operation and maintenance, or interfere with the handling of business or increase the danger, held a proper subject for expert opinion. Atlantic & B. R. Co. v. Cordele [Ga.] 57 S. E. 493.

Machinery, construction, engineering: If the skill and experience of witnesses in mechanical work will aid and is necessary to aid the jury, their testimony on the issue is competent. Testimony by carpenters as to number of nails required to hold a cleat to support a man held competent. Combs v. Rountree Const. Co. [Mo.] 104 S. W. 77. Where the machine by which plaintiff was injured was a comparatively new invention and complicated, it was proper to allow experts to testify that it should have been equipped with a guard or a cover at a particular place, that the machines when shipped from the factory had such guards, and that machine in question had a place for one. Ford v. Providence Coal Co., 30 Ky. L. R. 698, 99 S. W. 609. Expert testimony held proper on question which method of operating a complicated machine was the less dangerous. Swarts v. Wilson Mfg. Co., 115 App. Div. 739, 100 N. Y. S. 1054. Expert may testify to usual manner of placing a counterpoise on a movable steam derrick to keep it from tipping. Redhead v. Dunbar & Sullivan Dredging Co., 116 App. Div. 34, 101 N. Y. S. 301. Held proper, in action for injuries alleged to have been caused by splinter from steel die, to allow experts to testify that die was improperly set, and to state the facts on which their opinion was based. Hocking v. Windsor Spring Co. [Wis.] 111 N. W. 685. Held proper to allow a witness shown to be an expert by long experience in such matters to state that bent glass doors in jewelry cases would not work as smoothly as straight doors, and to explain reason. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S. E. 222. Expert testimony in regard to certain machinery and the manner of its operation held competent and proper. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 N. W. 809. Expert testimony of surveyors as to location and boundaries of lands admissible in ejectment action where issue was whether land in question was part of a certain lot. Chappell v. Roberts [Ala.] 43 So. 489.

28. Hildebrand v. United Artisans [Or.] 91 P. 542. Expert testimony is not competent on question whether an ordinary hatchet was a proper tool with which to remove a box cover. Whalen v. Rosnosky [Mass.] 81 N. E. 282. That a heavy team driven rapidly on a paved street would make considerable noise. Star Brew. Co. v. Houck, 126 Ill. App. 608. Expert opinions are inadmissible on a subject which can readily be understood by men of ordinary experience and education. Riley v. American Steel & Wire Co., 129 Ill. App. 123.

29. Whether vertical belt and horizontal shaft in factory were sufficiently guarded held not a question for expert testimony.

and upon questions of law,[31] but the witness may be permitted to state what might have caused a condition shown by the evidence to exist.[32]

In personal injury cases medical experts are properly allowed to state their opinions as to the probable duration or recurrence of the plaintiff's injuries or condition,[33] and as to the probable producing cause or causes of plaintiff's malady or con-

Morgan v. Hager & Sons Hinge Mfg. Co., 120 Mo. App. 590, 97 S. W. 638. Where question describing the manner in which body was found and showing the conditions surrounding it, which pointed to the fact that death was caused by electricity, is based on the evidence, it is proper to ask expert what might have caused the injury. Goddard v. Enzler, 123 Ill. App. 108. See 222 Ill. 462, 78 N. E. 805. Where knowledge of a subject does not lie within the range of the common knowledge a jury is supposed to possess, expert testimony is competent. Elgin J. & E. R. Co. v. Myers, 129 land was covered by deed incompetent. Witness should be confined to statement of Ill. App. 12. Opinion of witness as to what facts. Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275. In action for injuries alleged to have been caused by pole in the street, where witness testified to all the facts, such as the size, location, and structure of the pole and the conditions as they existed, it was proper to exclude his opinion as to whether it was dangerous. McKim v. Philadelphia, 217 Pa. 243, 66 A. 340. Question as to what an inspection of certain books would have shown incompetent. McKone v. Metropolitan Life Ins. Co. [Wis.] 110 N. W. 472. Opinion of street car conductor inadmissible on necessity of assisting unencumbered ladies on and off cars. San Antonio Trac. Co. v. Flory [Tex. Civ. App.] 18 Tex. Ct. Rep. 575, 100 S. W. 200. Held improper to allow witness to state that he considered cattle pens at shipping pens insufficient for the business done. Texas & P. R. Co. v. Slator [Tex. Civ. App.] 18 Tex. Ct. Rep. 682, 102 S. W. 156. A witness may state facts from which damage is alleged to have accrued, but may not state his opinion as to the damage's resulting from a particular act. Montgomery v. Somers [Or.] 90 P. 674.

30. Whether shipment of cattle was as rapid as possible in a particular case. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 17 Tex. Ct. Rep. 571, 99 S. W. 152. Whether trench in which plaintiff was working should have been braced. Smith v. Kansas City [Mo. App.] 101 S. W. 1118. Question which permits witness to consider facts in evidence and state what in his opinion brought about a certain condition is improper as invading the province of the jury. City of Chicago v. O'Donnell, 124 Ill. App. 78. Question to medical witness ending, "What would you say his condition was occasioned by?" held improper as permitting witness to invade the province of the jury. City of Chicago v. France, 124 Ill. App. 648. Question which would permit witness to state what in his opinion caused the injury complained of is improper. City of Chicago v. Rosenbaum, 126 Ill. App. 93. What would be a safe rate of speed for a car at a particular place is not a subject of expert testimony. Ford's Adm'r v. Paducah City R., 30 Ky. L. R. 644, 99 S. W. 355. Opinion of witnesses incompetent as to whether appliance consisting of snatch block or pulley was reasonably safe, and where employe should stand performing his duties in connection therewith. Virginia-Carolina Chem. Co. v. Knight, 106 Va. 674, 56 S. E. 725. Experts may give facts as to efficiency of brakes of various kinds, but testimony that a certain brake could not be relied on to work "uniformly," and that the insufficiency of the brake was the cause of a particular accident, was improper. Regan v. Brooklyn Heights R. Co., 115 App. Div. 705, 101 N. Y. S. 213. Where two employes were engaged in dumping acid pots, using hooks, and one hook slipped, allowing the pot to tip, injuring an employe, it was error to admit an expert engineer to testify that the accident was caused by reason of a certain defect in the hook, the issue being for the jury. Welle v. Celluloid Co., 186 N. Y. 319, 79 N. E. 6. Improper to ask physician if he concurred in supposed opinion of another physician as to extent of plaintiff's injuries. Galveston, etc., R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 S. W. 699. Improper to allow experts to state what was the cause of an explosion, though they may state what causes might have produced it. Caster Electrolytic Alkali Co. v. Davies [C. C. A.] 154 F. 938. Hypothetical question held not to call for opinion on the merits of the case. Order of United Commercial Travelers of America v. Barnes [Kan.] 90 P. 293. An expert cannot give an opinion on a question of fact; the only purpose of a hypothetical question is to obtain an opinion on matters not within the observation or experience of ordinary jurors, based on facts, assumed to be true, but whose truth is for the jury. Chicago Union Trac. Co. v. Roberts, 229 Ill. 481, 82 N. E. 401.

31. Expert witnesses should not be allowed to state whether they considered a testator able to make a last will and testament, the question of testamentary capacity being one of law. In re Cheney's Estate [Neb.] 110 N. W. 731. Question to an engineer as to the practice of engineers in determining whose duty it was to see that plans are followed held for court, not for expert. Arkwright Mills Co. v. Aultman & Taylor Mach. Co. [C. C. A.] 145 F. 783.

32. It is proper for expert to state what may have caused a physical condition shown by the evidence to exist. Chicago City R. Co. v. Foster, 128 Ill. App. 571.

33. Question to physician who had examined party as to when she would ultimately recover held proper. Simone v. Rhode Island Co. [R. I.] 66 A. 202. The probable duration or recurrence of a person's malady is a proper subject of expert testimony. Ellis v. Rhode Island Co. [R.

dition.[34] It is also generally held that they may state what external causes might have or could have produced the injury or condition complained of,[35] but they should not be allowed to express an opinion on the question whether such injury or condition was in fact caused by the negligent act or omission, or the particular fall or other accident or occurrence set out in the complaint.[36]

(§ 9) *C. Qualifications of experts.*[37]—Qualification of a witness to testify as an expert is a preliminary question [38] addressed largely to the discretion of the trial court.[39] Special familiarity with the subject under investigation, experience, and

I.] 67 A. 428. Question assuming symptoms and facts in evidence and inquiring as to permanency of injuries held proper. Southern R. Co. v. Hobbs [Ala.] 43 So. 844.

34. Physician may state that in his opinion certain injuries were produced by traumatism. Galveston, H. & S. A. R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 505, 98 S. W. 898. Physician's testimony as to plaintiff's present condition, a wound on his head, and whether his headaches were caused by the wound, held proper in personal injury case. Southern R. Co. v. Hobbs [Ala.] 43 So. 844. Qualified physician who had attended plaintiff at time of injury and some time afterwards properly allowed to testify to what was the producing cause of sleeplessness and nervousness which his patient suffered from. Indianapolis & E. R. Co. v. Bennett, 39 Ind. 141, 79 N. E. 389. Physician properly allowed to testify that plaintiff's nervous condition was due to injuries suffered. Galveston, etc., R. Co. v. Stoy [Tex. Civ. App.] 17 Tex. Ct. Rep. 849, 99 S. W. 135. Not error to allow experts to state whether plaintiff's condition was due to the injury received by her in the accident in question when it was proved otherwise that she was injured by the fall for which suit was brought. City of Chicago v. Didier, 227 Ill. 571, 81 N. E. 698. Held proper to allow them to state that her condition "had been produced" by her injuries; not necessary to ask if it "might have been" so caused. Id.

35. Physician may testify whether condition of patient might have resulted from injury received by fall. Chicago City R. Co. v. Foster, 226 Ill. 288, 80 N. E. 762. Physician may testify whether patient's condition might have been produced by a certain accident. Thomas v. Metropolitan St. R. Co., 125 Mo. App. 131, 100 S. W. 1121. Held proper to allow the physician to answer question to which of two causes he would attribute the condition of the patient, one of the causes being the accident complained of and the other the patient's physical condition and surroundings at the time. Smith v. Kansas City [Mo. App.] 101 S. W. 1118. Medical witnesses may state whether injuries described might naturally have resulted from the patient having been thrown from a buggy to the street. Mayes v. Metropolitan St. R. Co., 121 Mo. App. 614, 97 S. W. 612. Where physician testified to condition of plaintiff three years after injury, his testimony as to whether plaintiff's condition could have resulted from a fall was inadmissible Mackey v. Interurban St. R. Co., 115 App. Div. 467, 101 N. Y. S. 439. An opinion that a patient's condition must have been caused by certain named causes does not invade the province of the jury. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. Physician properly allowed to state whether plaintiff's condition was due to traumatism or other causes. Chicago Union Trac. Co. v. Roberts, 229 Ill. 481, 82 N. E. 401. A physician may be asked either whether an injury was the cause of a condition or whether it was sufficient to cause such condition. Id. Where there is evidence that a person's condition resulted from injuries received in a particular accident, physicians may testify that such condition might or could have been so produced. Kehoe v. International R. Co., 56 Misc. 138, 106 N. Y. S. 196.

36. Question to medical expert construed as calling for opinion whether injury caused plaintiff's pains and present condition, and hence held improper. Roscoe v. Metropolitan St. R. Co., 202 Mo. 576, 101 S. W. 32. Whether plaintiff's condition was due to the alleged accident was not proper opinion evidence. Thomas v. Metropolitan St. R. Co., 125 Mo. App. 131, 100 S. W. 1121. Opinion of physician whether fall in a car produced the injury of his patient held inadmissible Lutz v. Metropolitan St. R. Co., 123 Mo. App. 499, 100 S. W. 46. A certain condition and a certain accident and shock being assumed, a medical expert was asked, "Did such condition in your opinion result from that shock?" and the answer was, "We might suppose that it did." Held not proper expert testimony. Thomas v Metropolitan St. R. Co., 125 Mo. App. 131, 100 S. W. 1121. In action for personal injuries physician was improperly allowed to state whether he attributed plaintiff's injuries to a fall on the city sidewalks, as claimed, or to a fall on the steps of her house, some time before, as shown by the evidence, this being a question for the jury. Spaulding v. Edina, 122 Mo. App. 65, 97 S. W. 545.

37. See 7 C. L. 1588.

38. The qualifications of a witness is a preliminary question addressed largely to the discretion of the trial court. Cleveland v. Rowe, 99 Minn. 444, 109 N. W. 817.

39. Markowitz v. Pittsburg & C. R. Co., 216 Pa. 535, 65 A. 1097; Meyer Bros. Drug Co. v. Madden, Graham & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 908, 99 S. W. 723. Decision of trial court on qualification of expert is final in the absence of some error of law. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Determination of trial judge that expert witness is qualified is conclusive if supported by evidence. Horne v. Consolidated Rys., Light & Power Co., 144 N. C. 375, 57 S. E. 19. Decision of

professional skill and training, are the tests usually applied.[40] Expert capacity is a matter wholly relative to the subject of a particular question.[41]

trial court on qualification of expert will not be disturbed, unless founded on an error of law or grossly wrong on the evidence. Municipal Ct. of Providence v. Kirby [R. I.] 67 A. 8. The qualification of experts rests largely in the discretion of the court and depends to a large extent on the facts of the particular case. Souchek v. Karr [Neb.] 111 N. W. 150. When a question in issue involves special knowledge or skill, and the opinion of a witness is asked, the trial court is the sole judge of the witness' qualifications to answer if there is any evidence tending to show that he has knowledge or skill with respect to the matter under consideration. Place v. Grand Trunk R. Co. [Vt.] 67 A. 545. Whether retail fur dealers were qualified to testify as to a custom in the fur trade held a question of fact for the trial court. Hess, Bases & Co. v. Shurtleft [N. H.] 65 A. 377. Qualifications of expert on handwriting for trial court. Griffin v. Working Woman's Home Ass'n [Ala.] 44 So. 605. Competency of witness as expert on nervous diseases held a question for the trial court, where witness stated he was a graduate of a medical school and had practiced medicine and surgery nine years, but did not claim to be an expert on nervous diseases. Spaulding v. Edina, 122 Mo. App. 65, 97 S. W. 545.

40. To qualify a witness as an expert to give an opinion on any particular fact, he must be shown to have a knowledge of the fact, gained either from practice or study or both, which is beyond ordinary knowledge or observation. Souchek v. Karr [Neb.] 111 N. W. 150. Physician must be shown to be qualified by actual experience in similar cases or by careful and deliberate study. Hildebrand v. United Artisans [Or.] 91 P. 542. Opinion evidence may be given by a person of ordinary intelligence who has by opportunity for practice acquired special knowledge which is outside the limits of common observation and which may be of value in elucidating the matter under investigation. Crosby v. Wells [N. J. Err. & App.] 67 A. 295. The experiential qualifications of the witness, including his opportunity to observe the very thing under inquiry, being first shown, his special knowledge may be imparted to the jury under questions in ordinary form. Crosby v. Wells [N. J. Err. & App.] 67 A. 295. Where a previous habit of study is essential to the formation of an opinion sought to be put in evidence, only such persons are competent to express an opinion as have by experience, special learning, or training, gained knowledge of the subject-matter superior to that of the ordinary person. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. A witness may be competent from actual experience with an operation though ignorant of its theory. Combination of crushed stone and cement. McDonald v. Sundstrom, 31 Pa. Super. Ct. 241.

Witnesses held qualified: Carpenter with thirty years' experience, some of which was in setting plate glass, held qualified to give opinion evidence on cause of breaking of plate glass window. Drouin v. Wilson [Vt.] 67 A. 825. Persons of practical railroad experience may testify as to whether certain buffers at end of spur track were safe and as to the dangers of an overhead structure preventing use of handbrakes near end of spur track. Gila Valley, G. & N. R. Co. v. Lyon, 203 U. S. 465, 51 Law. Ed. 276. Professional engineer having experience in bridging of streams and familiar with the locality in question is competent as to negligent construction of bridge. Dutton v. Philadelphia, B. & W. R. Co., 32 Pa. Super. Ct. 630. Architects, suing for services, are competent expert witnesses on the value of such services. Wheeler v. Anglim, 193 Mass. 600, 79 N. E. 810. Witness shown to have used drilling machines, similar to that by which plaintiff was injured, for twenty-five years, held properly allowed to state that a string used for a bucket on a hook of the machine was more likely to let the hook fall. Chicago, etc., R. Co. v. Denton [Tex. Civ. App.] 18 Tex. Ct. Rep. 277, 101 S. W. 452. Miner with eleven years' experience, eighteen months in mine in question, qualified to testify to sufficiency of sprinkling apparatus to keep down explosive dust. Bolen-Darnall Coal Co. v Williams [Ind. T.] 104 S. W. 867. Witness with long experience with oils of various kinds held qualified to testify that room in which oils were kept was not properly ventilated and to state what precautions for employes' safety should have been taken. Bardsley v. Gill & Co. [Pa.] 66 A. 1112. In action on fire policy insured testified that he was familiar with all his stock and could recall most of the goods. Held he was qualified to express an opinion on their value. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 N. W. 94. Witness stated she was the mother of children and knew the difference between a prematurely born child and a full grown child. Held qualified to testify whether a particular child was prematurely born. Bessemer Coal, Iron & Land Co. v. Doak [Ala.] 44 So. 627. One who had passed under a certain bridge many times, was familiar with currents, and was on a vessel which caused injuries to bridge for which suit was brought, held qualified to testify that collision with bridge would not have occurred had not the captain given a certain order. Multnomah County v. Williamette Towing Co., [Or.] 89 P. 389. Former railroad superintendent, shown to have knowledge of railroad rates under conditions similar to those in question, held qualified to testify as to what would be a reasonable rate for a particular haul, though he had no knowledge of the financial condition of the road, nor of the cost of transportation on the particular line in question. Halliday Mill. Co. v. Louisiana & N. W. R. Co. [Ark.] 98 S. W. 374. Former brakeman held qualified to testify as to duties of brakeman by telling what they usually did with reference to keeping tres-

passers off trains. Charlton v. St. Louis & S. F. R. Co., 200 Mo. 413, 98 S. W. 529. Conductor in charge on train on which plaintiff was injured, who had long experience as conductor and brakeman and knew the equipment of trains at the time as to buffer plates or irons, held qualified to state whether accident in question could have happened if cars in question had been equipped with buffer irons or plates such as were in common use on well equipped trains at the time. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318. Conductor on street car who had observed operation of cars qualified to state in what distance one going at a certain rate could be stopped. Birmingham R., Light & Power Co. v. Randle [Ala.] 43 So. 355. One who had taught as his life work, and had been employed in the state for fifteen years, held qualified to testify that it was customary to employ teachers in May or June. Peacock v. Coltrane [Tex. Civ. App.] 17 Tex. Ct. Rep. 609, 99 S. W. 107. Experienced millwright held qualified to testify whether it was practicable to guard a transmission shaft. McGinnis v. Rigby Printing Co., 122 Mo. App. 227, 99 S. W. 4. Surveyor and civil engineer, skilled in bridge and trestle building, and who had observed the construction of a particular trestle, held qualified to testify to defects in original construction and how it should have been rebuilt in order to make it reasonably safe. Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 P. 622. Farmer who had been growing and handling, buying and selling melons for ten or twelve years, and was engaged in the melon business in a certain year, in a certain county, held qualified to state what was the average rate per crate of melons to farmers in that year. Colorado Farm & Live Stock Co. v. York [Colo.] 88 P. 181. One brought up on a farm, and who followed farming after growing up, held qualified to state whether there was a good stand of canteloupes on land a certain year. Colorado Farm & Live Stock Co. v. York [Colo.] 88 P. 181. Farmer who had handled and sold hay and was familiar with local market and had examined the hay, the quality of which was in issue, held qualified to state whether the hay in question was considered marketable. Eaton v. Blackburn [Or.] 88 P. 303. Where defendant had been at work a month when injured while attempting to board a car, he was qualified to testify to a custom of employes to ride on cars as he was doing at the time. Daniel v. Atlantic Coast Line R. Co. [N. C.] 58 S. E. 601. Witness who stated that he had sent ties to a certain market, had seen report of inspection there, and knew the basis of inspections there, held qualified to give opinion on what would be result of inspection there of ties which he was familiar with. Lehigh v. Standard Tie Co. [Mich.] 14 Det. Leg. N. 283, 112 N. W. 481. Witness who saw cattle weighed, weights written down, and knew they were correct, and had a memorandum which he knew at the time was correct and which he used to refresh his memory while testifying, held qualified to testify to weights though he had not himself weighed the cattle. St. Louis, etc., R. Co. v. Dodson [Tex. Civ. App.] 16 Tex. Ct. Rep. 109, 97 S. W. 523. Where witness was not shown to be scientifically qualified on the subject of explosives, but stated that he had had actual experience with gasoline and sugar as an explosive, and was a pharmacist, his opinion was properly received, the adverse party not showing on the cross-examination that he was not qualified. Bloch v. American Ins. Co. [Wis.] 112 N. W. 45. A professional nurse who had had fifteen years' experience in obstetrical cases, and who assisted at birth of child, was held competent to give an opinion as to whether the child was prematurely born. Souchek v. Karr [Neb.] 111 N. W. 150. Where a physician testified that he had been the local surgeon for the defendant railroad company, had their rules in his possession, and had examined plaintiff when he applied for a position, it was proper to allow him to state whether the injuries received by plaintiff were such as to permanently render him inacceptable, according to railroad standards, as a locomotive fireman. Chicago, etc., R. Co. v. Hiltibrand [Tex. Civ. App.] 18 Tex. Ct. Rep. 93, 99 S. W. 707. Evidence of physician who said he was familiar with expectancy tables, having examined for insurance companies ten years, properly allowed to state expectancy of person he had seen. Kansas City So. R. Co. v. Morris, 80 Ark. 528, 98 S. W. 363.

As to values: Witness shown to have independent knowledge of market value of horses held qualified to testify in regard thereto. Ft. Worth & R. G. R. Co. v. Hickox [Tex. Civ. App.] 18 Tex. Ct. Rep. 691, 103 S. W. 202. A witness may state market prices of cattle at a particular time and place, basing his testimony on current authentic market reports, but if such testimony is based on private letters, telegrams, or advices, it is incompetent. Texas & P. R. Co. v. Slater [Tex. Civ. App.] 18 Tex. Ct. Rep. 682, 102 S. W. 156. Carriage dealers and repairers held qualified to give opinions on value of vehicles, new and second-hand. Texas & P. R. Co. v. Wilson's Hack Line [Tex. Civ. App.] 18 Tex. Ct. Rep. 226, 101 S. W. 1042. Witness who was in produce business, owned a ranch, had bought cows, and had personal knowledge of several sales and prices paid, held qualified to give opinion on value of cow. Texarkana & Ft. S. R. Co. v. Bell [Tex. Civ. App.] 19 Tex. Ct. Rep. 401, 101 S. W. 1167. A witness whose information is based on regular market reports may testify to the market value of cattle, though he also gets information from other sources. Southern Kansas R. Co. v. Bennett [Tex. Civ. App.] 18 Tex. Ct. Rep. 995, 103 S. W. 1115. In a proceeding for the assessment of street easements for taxation witnesses who had been students of taxation for years and had examined and testified to the value of easements in many cities were qualified to testify to the value of a gas company's easements, knowing their extent, character, etc. Consolidated Gas Co. v. Baltimore [Md.] 65 A. 628. One familiar with the value of real property in the vicinity and with the property in question may testify as to its value. Horner v. Beasley [Md.] 65 A. 820. To qualify a witness in

(§ 9) *D. Basis of expert testimony and examination of experts.*[42]—The usual and proper mode of examining experts is by hypothetical questions, which should embody and state hypothetically substantially all the facts shown by the evidence relating to the subject of inquiry,[43] and essential to the formation of an opinion.[44]

a condemnation proceeding it should appear that he is familiar with the property and uses to which it may be put, and the nature of the improvements, also that he is familiar with the general price and value of property in the neighborhood. Markowitz v. Pittsburg & C. R. Co., 216 Pa. 535, 65 A. 1097. Witness resident in an adjoining borough for thirty years, who had been assessor for twelve years, was familiar with values in the borough in question and knew of sales and prices received. Held qualified in condemnation case. Id. In condemnation proceedings by an elevated road, witnesses who have occupied business houses near elevated roads and observed their effects on the value of such property may testify in regard thereto. Lewis v. Englewood El. R. Co., 223 Ill. 223, 79 N. E. 44. A person whose business is such that he is familiar with the value of an article which is a common subject of sale is competent to testify to its market value, though he has no personal knowledge of any particular sales. Cleveland v. Rowe, 99 Minn. 444, 109 N. W. 817.

Witnesses held not qualified: It is error to allow witnesses to testify to value of land and its boundaries when not shown to be qualified by particular knowledge of the facts. Arnd v. Aylesworth [Iowa] 111 N. W. 407. Witness held not qualified to testify to market value of horses at a town in another state where his knowledge was based on information given by others by letter and telegram, and in part on verbal information, and partly from a sale made there the year before, and on newspaper notices. Pecos & N. T. R. Co. v. Hughes [Tex. Civ. App.] 17 Tex. Ct. Rep. 263, 98 S. W. 410. Brakeman who said he did not thoroughly understand railroad braking was not qualified to state whether seven cars going down a certain grade could be stopped with two brakes. Woodstock Iron Works v. Kline [Ala.] 43 So. 362. Witness who had not been in a mill for fifteen years, and knew of machinery in it, only from plaintiff's testimony, held not qualified to give an opinion on the rental value of the mill based solely on cost of maintenance and interest on investment. Munson v. James Smith Woolen Mach. Co., 118 App. Div. 398, 103 N. Y. S. 502. The customary location of signs in street cars could not be proved by conductors who stated that they did not know of any general custom, but that they placed the signs in a certain place. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 18 Tex. Ct. Rep. 382, 99 S. W. 574. Where witness had no special knowledge of values of land in vicinity and had knowledge of only one transaction, his opinion on the value of a tract of land was properly rejected. Walsh v. Board of Education of Newark, 73 N. J. Law, 643, 64 A. 1088. Witness who had not qualified as to the strength of belt lacings, how often they should be replaced, etc., when certain use was shown, held not competent on issue whether proper care was used in replacing lacing. Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 A. 4. Testimony as to value of stock properly excluded where witnesses were not shown to be qualified. Commercial & Sav. Bk. of San Jose v. Pott, 150 Cal. 358, 89 P. 431. Where witness testified merely that he knew some of the values of lands adjoining a tract in controversy, he was not shown to have such knowledge that his opinion on the value of the tract in question was competent. Butsch v. Smith [Colo.] 90 P. 61. The mere fact that a person has inspected records does not render competent his testimony that a chattel mortgage was not recorded. Buxton v. Alton-Dawson Mercantile Co., 18 Okl. 287, 90 P. 19. Where physician testified that he had seen and known a case where epilepsy resulted from a head injury seven years thereafter, but on cross-examination it appeared his knowledge consisted wholly of what others had told him, his testimony should have been stricken. Defguard v. New York & L. B. R. Co. [N. J. Err. & App.] 67 A 609.

41. Lumber salesman held qualified to testify as to market price of lumber delivered at New York though he lived in Philadelphia. Kilpatrick v. Whitmer, 118 App. Div. 98, 103 N. Y. S. 75. Expert plumber not qualified to state whether sinking of iron pillar was cause of breaking of tile drain eight or nine feet below. Epstein v. Interborough Rapid Transit Co., 52 Misc. 184, 101 N. Y. S. 793. Witness who testified that he had had considerable experience with horses, had lived on a farm when a boy, and that his father was a horse trader, held not qualified to state whether a certain injury killed an animal, or what in his opinion killed the horse. Southern R. Co. v. Taylor [Ala.] 42 So. 625. Person who was a plasterer by trade, and not a physician, but who had paid some doctor's bills and surgical bills, held not qualified to give opinion on reasonableness of doctor's charges, where he stated he did not know whether charges were reasonable but they seemed to be customary. Missouri, K. & T. R. Co. v. Craig [Tex. Civ. App.] 17 Tex. Ct. Rep. 547, 98 S. W. 907. Where experts were shown to be qualified as to the value of street easements of a gas company, it was not necessary to show knowledge of the value of the easements as real estate. Consolidated Gas Co. v. Baltimore [Md.] 65 A. 628. Professional nurse is not qualified as an expert on the value of services rendered by one not a professional nurse, witness admitting that she knew nothing about the value of the services actually rendered. Schou v. Blum, 104 N. Y. S. 887.

42. See 7 C. L. 1590.

43. The proper mode of examining experts is by a hypothetically stated case which should embody substantially all the facts relating to the subject. Hildebrand

Such questions should not include facts not sustained by some evidence.[45] They need not include all the evidentiary circumstances and conditions in detail, where the facts stated necessarily imply the details omitted.[46] It is proper to embody in a hypothetical question the theory of the party proposing it within the limits of what that party's evidence tends to prove,[47] and the question may be so framed as to

v. United Artisans [Or.] 91 P. 542. Hypothetical question should include all facts relevant to the issue which the evidence at the time the question is asked tends to prove. Fregstad v. Great Northern R. Co., 101 Minn. 40, 111 N. W. 838. Instruction on rule that hypothetical question should embody facts in evidence criticized. Vannest v. Murphy [Iowa] 112 N. W. 236. The proper course in examining a medical expert is to state hypothetically the facts in evidence and ask an opinion based thereon. Illinois Cent. R. Co. v. McCollum, 130 Ill. App. 267.

44. Question to expert on value of personalty properly excluded where facts on which the opinion was to be based were not included in the question. Barker v. Lewis Storage & Transfer Co., 79 Conn. 342, 65 A. 143. A hypothetical question to lawyers to show reasonable value of services rendered held proper which stated in detail the services, time required, work done, value of property involved, responsibility of attorney. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340. Where a hypothetical question was designed merely to elicit the fact whether a condition of plaintiff's leg was permanent, it was not objectionable because not assuming all the facts in evidence. Rosier v. Metropolitan Street R. Co. [Mo. App.] 101 S. W. 1111. A hypothetical question need not recite all the facts shown by the evidence, but only those necessary as a basis for the opinion sought. St. Louis, etc., R. Co. v. Hook [Ark.] 104 S. W. 217. On the issue whether plaintiff's malady had been aggravated by defendant's negligence, opinion evidence was held competent to the effect that his trouble had stopped at a certain time and had grown worse thereafter, where the facts in evidence, on which the opinions were based, showed the plaintiff's symptoms during the entire time. Nelson v. Chicago & N. W. R. Co., 130 Wis. 214, 109 N. W. 933.

45. The hypothetical question should not assume facts not in evidence. Western Elec. Co. v. Prochaska, 129 Ill. App. 589. Opinion based on appliance in evidence which is not shown to be similar to the one causing the injury is incompetent. Id. Expert who has no personal knowledge of the cause of an injury may testify hypothetically as to what might have caused it. City of Chicago v. Saldman, 129 Ill. App. 282. Hypothetical questions based on facts not in evidence are improper. Butler v. Phillips [Colo.] 88 P. 480. Question assuming fact not in evidence held improper. Elzig v. Bales [Iowa] 112 N. W. 540. Hypothetical question improper because not based on facts in evidence. Gulf, etc., R. Co. v. Craft [Tex. Civ. App.] 18 Tex. Ct. Rep. 510, 102 S. W. 170. Expert testimony held inadmissible because based on facts not in evidence. Texas & P. R. Co. v. Leggett [Tex. Civ. App.] 17 Tex. Ct. Rep. 676, 99 S. W. 176. Where hypothetical question was designed to draw out opinion on mental capacity of testatrix, but assumed facts as to the giving of medicines to testatrix not supported by evidence, the question was properly rejected. Robinson v. Jones [Md.] 65 A. 814; Frigstad v. Great Northern R. Co., 101 Minn. 40, 111 N. W. 838. Hypothetical question to expert held proper where facts assumed were substantially shown by evidence. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 So. 1024. Hypothetical questions should be based upon such facts only as the evidence tends to prove. If as to any material hypothesis such question is without the support of evidence, it should be excluded. Order of United Commercial Travelers of America v. Barnes [Kan.] 90 P. 293.

Questions held proper: Hypothetical question held to assume facts within the evidence. Lanigan v. Neely [Cal. App.] 89 P. 441. Where physician who attended decedent during his last illness testified that he died of embolism, it was proper to assume, in questions to experts as to cause of death, that the physical ailment of which he died was embolism. Kelly v. Wills, 116 App. Div. 758, 102 N. Y. S. 223. Where a physician who had observed plaintiff's symptoms made a clear and positive statement of them, other physicians could give opinions as to what she was suffering from, though the first physician was uncertain as to which of two conditions prevailed. Louisville R. Co. v. Oppenheimer [Ky.] 104 S. W. 720. Question attempting to elicit cause of explosion which assumes the use of steam pipes materially different from those shown by the evidence improper. City of Chicago v. O'Donnell, 124 Ill. App. 78. Where evidence shows that one eye was injured three years before trial and there is no testimony showing the condition of the other eye, it is improper to permit expert to state what would be the result if the uninjured eye became inflamed. Western Elec. Co. v. Prochaska, 129 Ill. App. 589. A hypothetical question reciting facts, and embodying testimony of witnesses heard by the expert, by asking him if he heard it, and assuming it to be true, held proper in form. City of Chicago v. Didier, 227 Ill. 571, 81 N. E. 698.

46. Question held to include necessary facts though omitting details. Nelson v. Chicago & N. W. R. Co., 130 Wis. 214, 109 N. W. 933.

47. Indianapolis Trac. & T. Co. v. Formes [Ind. App.] 80 N. E. 872. Hypothetical questions based on testimony of witnesses of party propounding them held proper. Hanstad v. Canadian Pac. R. Co. [Wash.] 87 P. 832. While hypothetical questions must be based on facts in evidence, they may be so framed as to call for an opinion on the theory of the case maintained by the party proposing it. Order of United Commercial

call for an opinion on facts identical with those in issue.[48] The fact that the expert has no personal knowledge of the matter in issue does not render his testimony incompetent.[49] In fact, by some courts it is held that expert opinions cannot be based upon the personal knowledge of the witness, even in part;[50] by others it is held that such opinions may be based in part on the personal observation of the expert.[51] The opinions of expert medical witnesses should be based upon objective and not subjective symptoms of the patient,[52] but statements made by injured person to his physician, for the purpose of treatment as to the nature and location of pains, may be made the basis of the expert's opinion,[53] but those made upon examination by a physician for the purpose of supplying evidence upon which to base a claim for damages are incompetent.[54] Opinions, however, which are based on objective symptoms disclosed at such examination, may be received in evidence.[55] An expert opinion cannot be based upon conclusions of other witnesses,[56] and opinion of expert

Travelers of America v. Barnes [Kan.] 90 P. 293. Hypothetical question based on facts sufficient to enable expert to state whether an injury was permanent held not improper as assuming that it was caused by defendant. Rosier v. Metropolitan St. R. Co. [Mo. App.] 101 S. W. 1111. It is not error for a party to state to an expert hypothetically the case made by his witnesses, and to have the witness state his opinion upon such hypothetical case of the probable cause of plaintiff's condition as shown by the evidence. City of Chicago v. Bork, 227 Ill. 60, 81 N. E. 27.

48. The mere fact that the answer of an expert may decide the very question at issue before the jury, if the jury should believe it, is no ground of objection to the question and answer. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 18 Tex. Ct. Rep. 407, 99 S. W. 884.

49. Expert who has no personal knowledge of the cause of an injury may testify hypothetically as to what might have caused it. City of Chicago v. Saldman, 129 Ill. App. 282.

50. In considering expert opinions, jury are not to consider personal knowledge of witnesses but only the facts shown by evidence. Vannest v. Murphy [Iowa] 112 N. W. 236. Medical expert cannot give opinion based upon information derived from private conversations with a witness. Hanchett v. Haas, 125 Ill. App. 111.

51. Where physician was called to see deceased after he fell from a tank which he was painting and saw him before he died, his opinion that the man died from inhaling fumes from the paint, based in part on his observations and in part on testimony, was competent. Houston & T. C. R. Co. v. Rutland [Tex. Civ. App.] 18 Tex. Ct. Rep. 134, 101 S. W. 529.

52. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. An opinion as to a patient's condition based on outward appearances indicating that a person is irritable, nervous, feeble, or is suffering pain, or capable of performing physical or mental labor, is not objectionable as being based on subjective symptoms. Id. Experts properly allowed to testify as to whether plaintiff was feigning paralysis, their testimony being based wholly on their experiments and what they had observed, her statements to them and subjective symptoms and condition being excluded from their opinions and from the jury. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 N. E. 1049.

53. Chicago Union Trac. Co. v. Giese, 130 Ill. App. 608. Opinion of medical expert based solely upon examination of injured person is competent, notwithstanding conversations between them with reference to the injury. Chicago & A. R. Co. v. Johnson, 128 Ill. App. 20. Where opinion of medical expert is based on subjective symptoms only, such statements of the patient as relate to symptoms and sufferings at the time of the examination should be considered. Illinois Cent. R. Co. v. McCollum, 130 Ill. App. 267. Opinions of a physician based in part on self-serving declarations of the patient are incompetent. Chicago Union Trac. Co. v. Giese, 229 Ill. 260, 82 N. E. 232.

54. Opinion of medical expert based on narration of patient or history of his ailment is inadmissible. Illinois Cent. R. Co. v. McCollum, 130 Ill. App. 267. Where examination by physician is made for the purpose of supplying testimony as to nature of injuries, all testimony based on subjective symptoms is inadmissible. Chicago Union Trac. Co. v. Giese, 130 Ill. App. 608. Where physician examines patient for sole purpose of supplying evidence as to his condition, opinion based on subjective symptoms is inadmissible. Chicago City R. Co. v. Shreve, 128 Ill. App. 462.

55. Medical expert may be permitted to testify to pain, suffering, irritability, and despondency, where he shows that he can tell such conditions from objective symptoms. City of Chicago v. McNally, 128 Ill. App. 375. Where opinion of medical expert is based on objective symptoms, the fact that his examination was made long after the accident does not render his testimony inadmissible. Chicago Union Trac. Co. v. Hampe, 130 Ill. App. 596. Where examination of patient was made solely for purpose of supplying evidence as to the nature of the injuries, the opinion must be based solely on objective symptoms. Chicago City R. Co. v. Manger, 128 Ill. App. 512.

56. What another physician found injured person was suffering from and what treatment he found it necessary to give is improper as the basis of the opinion of a medical expert. City of Chicago v. France, 124 Ill. App. 648.

based on the testimony he has heard in open court is inadmissible,[57] but opinion based on the assumption that the entire testimony of one witness is true is allowable.[58] A hypothetical question must not be so framed as to call upon the expert to pass upon the weight of testimony.[59] The hypothetical question should assume that all facts stated therein are true.[60] Speculative opinions are incompetent.[61] However, only general rules can be prescribed in regard to the character of hypothetical questions, and much discretion must of necessity be vested in the trial court.[62] Wide latitude should be allowed in the examination,[63] which may be directed both to the qualifications of the witness [64] and the soundness and accuracy of the opinion or conclusion which he has stated.[65] Thus the facts on which the opinion is based and the reasons therefor may be shown.[66] The rule that a hypothetical question to an expert must be based on facts proved in the case does not apply on cross-examination of experts.[67] The extent of such cross-examination rests in the sound discretion of the trial court.[68] Substantive evidence not competent in chief is not, however, admissible.[69]

§ 10. *Real or demonstrative evidence.*[70]—Real evidence, when relevant, is admissible.[71] In personal injury cases exhibition of the injured member is usually

57. Illinois Cent. R. Co. v. McCollum, 130 Ill. App. 267.

58. Hanchett v. Haas, 125 Ill. App. 111.

59. Question reciting that one witness "charged" a certain fact which was denied by another held improper. King v. Gilson [Mo.] 104 S. W. 52. Where testimony of physicians that plaintiff's injuries were permanent was based on facts not shown by the evidence, or on plaintiff's own testimony, the weight of which and the facts established by it they must have determined, its admission was error. Leahy v. Gaylord & Eitapenc Co., 117 App. Div. 316, 102 N. Y. S. 78.

60. Illinois Central R. Co. v. McCollum, 130 Ill. App. 267.

61. Expert opinion as to reason for illuminating gas in a room, wholly speculative, and not based on any fact proved, held incompetent. White v. Prudential Ins. Co. of America, 105 N. Y. S. 87.

62. Order of United Commercial Travelers of America v. Barnes [Kan.] 90 P. 293. It should not be required that the question be based on conceded facts, nor that it embrace all the facts of which there is evidence; neither is technical accuracy required in the framing of the question, but no material exaggeration of facts assumed is permissible. Id.

63. Quincy Gas & Elec. Co. v. Schmitt, 123 Ill. App. 647.

64. Cross-examination of defendant's witness, a physician, to show he could not be as well informed on the facts as plaintiff's physician, held proper. Galveston, etc., R. Co. v. Fink [Tex. Civ. App.] 17 Tex. Ct. Rep. 344, 99 S. W. 204. Where physician testified to effect of an injury on bones of the leg, it was error to restrict cross-examination to show his knowledge of the position of the bones normally. Morgan v. Hendricks [Vt.] 67 A. 702. Held improper to inquire on cross-examination of expert how much he was paid for an examination and whether he was paid in other cases. Rowe v. Whatcom County R. & Light Co. [Wash.] 87 P. 921. Questions directed under the theory that injury resulted from causes other than accident complained of are admissible. City of Chicago v. Rosenbaum, 126 Ill. App. 93.

65. Held proper to ask medical expert what authorities sustained his position. Chicago Union Trac. Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816. Full cross-examination of person testifying to handwriting should be permitted to show extent of familiarity or knowledge of writing of person in question. Griffin v. Working Woman's Home Ass'n [Ala.] 44 So. 605.

66. Where experts compare writings and give their opinions on the genuineness of a disputed writing, they may properly be required to state their reasons for their opinions. Howard v. Creech [Ky.] 101 S. W. 974. Where witness in railway condemnation case testified that land would depreciate in value on account of the railroad crossing it, it was proper to ask him on cross-examination if he knew of any land which had depreciated or would sell for less because of a railroad crossing it. Eldorado, etc., R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281. Expert witnesses should be permitted to state the reasons for their opinions. Quincy Gas & Elec. Co. v. Schmitt, 123 Ill. App. 647.

67. Thomas v. Fidelity & Casualty Co. of New York [Md.] 67 A. 259.

68. The extent of cross-examination of an expert to test his accuracy and credibility rests in the sound discretion of the trial court. Thomas v. Fidelity & Casualty Co. of New York [Md.] 67 A. 259. It is within the discretion of the court to widen the range of cross-examination of an expert even to the inclusion of matters not pertinent to the issues to test his means of knowledge, memory, accuracy, or credibility. West Pratt Coal Co. v. Andrews [Ala.] 43 So. 348.

69. A witness to value may be cross-examined to show his qualification, but substantive evidence not competent in chief is inadmissible. Schonhardt v. Pennsylvania R. Co., 216 Pa. 224, 65 A. 543. Where plaintiff as a witness had placed a certain market value on his property, he cannot on cross-examination be asked what other property in the vicinity has sold for in the last two years. Schonhardt v. Pennsylvania R. Co., 216 Pa. 224, 65 A. 543.

70. See 7 C. L. 1592.

allowed,[72] and courts have power, in such cases, to order plaintiff to submit to a physical examination in proper cases, and under proper circumstances.[73] It is also proper to ask the plaintiff while on the stand in his own behalf if he is willing to submit to such examination.[74] This subject is more fully discussed elsewhere.[75]

71. When the question is as to the working of a mechanical device, as for instance whether a certain link would stay on a knob of a device, the safer plan is to introduce the device itself in evidence and illustrate its workings to the jury. Spurlock v. Shreveport Trac. Co., 118 La. 1, 42 So. 575. In action on fire insurance policy, where defendant introduced evidence that goods burned were cheap and of poor grade, it was not error to introduce in rebuttal some of the articles of the same stock. Bloch v. American Ins. Co. [Wis.] 112 N. W. 45. It is error to admit garment introduced to illustrate the nature of an accident without proof that it is in the same condition as it was immediately after the accident. Chicago Term. Trans. R. Co. v. Korando, 129 Ill. App. 620.

72. Held not error for injured employe to exhibit injured foot to jury and to show by movements and testimony its condition. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Refusal to allow exhibition of man's leg which had been amputated, to show extent of injury, held error, though not prejudicial. Ford v. Providence Coal Co., 30 Ky. L. R. 698, 99 S. W. 609. It is proper to allow an injured limb to be exhibited to the jury. McIlwain v. Gaebe, 128 Ill. App. 209.

73. Court held to have such power where plaintiff had medical witnesses who had examined her testify. Johnston v. Southern Pac. Co., 150 Cal. 535, 89 P. 348.

Contra: A plaintiff, in a personal injury action, cannot be compelled to submit to a physical examination. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23.

NOTE. Power of courts to order a physical examination of a plaintiff in a personal injury action: "As to the power of a court to order such examination in proper cases, the overwhelming weight of authority is that it exists. The supreme court of the United States substantially alone has denied the power in Railroad Co. v. Botsford, 141 U. S. 250, 35 Law. Ed. 734. In Brown v. Chicago, etc., R. Co., 12 N. D. 61, 95 N. W. 153, the Botsford Case is reviewed. It is said that it is not authority in a state court, and that the reason of the rule as to federal courts comes from the fact that all United States courts other than the supreme court must, in the absence of statute, follow the mode of proof as it existed in actions at common law. By the state courts, however, with unusual unanimity, it is held that courts have the power to order such examinations, and should exercise it with a sound discretion. In some states, as New York, the matter is controlled by statute, but where it is not a matter of statute the courts are uniform in declaring the existence of the power. Says the supreme court of Minnesota: 'To allow the plaintiff in such cases to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses upon the trial, but at the same time to deny the defendant the right in any case to have a physical examination of plaintiff's person and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross in our judgment to be tolerated for one moment.' Wanek v. Winona, 78 Minn. 98, 80 N. W. 851, 79 Am. St. Rep. 354, 46 L. R. A. 448. Says the supreme court of Indiana in City v. Turner, 156 Ind. 418, 60 N. E. 275, 83 Am. St. Rep. 200, 54 L. R. A. 396: 'When serious and permanent injuries are claimed by the plaintiff, and he or she has submitted to an examination by a chosen physician or surgeon, who appears as a witness in plaintiff's behalf, and the nature, extent, and effect of the injury are to be deduced from objective conditions, and so fully from no other source, no degree of sentiment will justify the refusal of the motion. When it becomes a question of probable violence to the refined and delicate feelings of the plaintiff, on the one hand, and probable injustice to the defendant on the other, the law will not hesitate; the court in making such orders with respect to time, place, and person, in every case, having such due regard for the feelings of the plaintiff and proprieties of the case as the ends of justice will permit.' To the same effect may be cited Shroeder v. Railway Co., 47 Iowa, 375; White v. Railway Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154; Shaw v. Van Renssalaer, 60 How. Pr. [N. Y.] 143; Miami, etc., T. Co. v. Baily, 37 Ohio St. 104; A. T. & S. F. R. Co. v. Thul, 29 Kan. 466, 44 Am. Rep. 659; Stuart v. Havens, 17 Neb. 211, 22 N. W. 419; Sibley v. Smith, 46 Ark. 275, 55 Am. Rep. 584; Railway Co. v. Underwood, 64 Tex. 463; Owens v. Kansas City, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Railroad Co. v. Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808; Hess v. Lowery, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Hess v. Railroad Co., 7 Pa. Co. Ct. R. 565; Railroad Co. v. Hill, 90 Ala. 71, 79, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442; Graves v. Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641; Demenstein v. Richardson, 2 Pa. Dist. R. 825; Marler v. Springfield, 65 Mo. App. 301; Belt Elec. Line Co. v. Allen, 102 Ky. 551, 44 S. W. 89, 80 Am. St. Rep. 374; Lane v. Spokane R. Co., 21 Wash. 119, 57 P. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; South Covington & C. St. R. Co. v. Stroh, 23 Ky. L. R. 1807, 66 S. W. 177, 57 L. R. A. 875; Thompson on Trials, par. 859; Jones on Evidence, pars. 396-399; Fetter on Carriers of Pass., par. 406, p. 1138; 7 Am. & Eng. Enc. Law, pp. 507, 508, and cases cited; Elliott on Evidence, p. 1237, and late cases cited."—From opinion, by Henshaw, J., in Johnston v. Southern P. Co. [Cal.] 89 P. 351.

74. Held not error to ask plaintiff while on the stand in a personal injury action whether she was willing to submit to a

Photographs,[76] and maps or plats, are competent evidence when authenticated and shown to have been properly made,[77] and when it is shown that they correctly represent the actual conditions of facts sought to be proved or explained.[78] Photographs are received as either secondary or demonstrative evidence according to their use.[79] Whether a photograph, plat or model offered in evidence has been properly verified is a question for the trial court, the decision of which is ordinarily final.[80] Where evidence of this character is introduced only to explain or apply testimony of witnesses, greater latitude is permitted.[81] A plat which purports to show matters not within its province is inadmissible,[82] but the fact that photographs and plats are incorrect in respect to minor matters not in issue does not render them incompetent.[83]

Whether experiments in the presence of the jury shall be permitted,[84] or proof

physical examination, but question as to propriety of such testimony in general not decided. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23.

75. See Discovery and Inspection, 9 C. L. 990.

76. Photographs of scene of accident held competent. Kansas City So. R. Co. v. Morris, 80 Ark. 528, 98 S. W. 363. In action for injuries at railroad crossing, photographs of the railway and highway at the crossing were competent evidence. Illinois So. R. Co. v. Hayer, 225 Ill. 613, 80 N. E. 316. In action for personal injuries, photograph of sore, taken some weeks after injury, held competent evidence. Davis v. Adrian, 147 Mich. 300, 13 Det. Leg. N. 1023, 110 N. W. 1084. X-ray photographs, or skiographs, properly authenticated, are competent evidence. Elzig v. Bales [Iowa] 112 N. W. 540. Photographs of two cars which had collided held competent in action for injuries received by motorman of one who jumped. Edge v. Southwest Mo. Elec. R. Co. [Mo.] 104 S. W. 90. Where photograph is admitted for the purpose of showing the general surroundings of the place of accident but not as to a particular feature, it is error to exclude evidence tending to show that the photograph was a correct representation of conditions at the time of the accident and to exclude from the jury a consideration of such particular feature. City of Chicago v. Hutchinson, 129 Ill. App. 239. Where X-ray photograph of injured limb is introduced in evidence, it is error to exclude a photograph of a normal limb. McIlwain v. Gaebe, 128 Ill. App. 209.

77. X-ray photographs held admissible when shown to have been made by post graduate physician with twelve years' experience who had experience with such photographs, who testified they were correct representations of the subject-matter. Chicago City R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716. Physician in describing plaintiff's condition used photographs showing the patient's back and illustrating enlargement of certain vertebrae of the spine. The photographer was not called, but the physician testified that photographs were made in his presence and under his direction. They were held competent. McKarren v. Boston & N. St. R. Co. [Mass.] 80 N. E. 477. Where map was shown to have been made by a person under direction of witness who said he was familiar with the premises, but was not shown to be correct by the sworn statement of the person who made it, the map was inadmissible. Camden v. New York, 103 N. Y. S. 971. Unproved map showing route of proposed railroad incompetent. In re Central R. Co. [N. J. Law] 65 A. 905.

78. Photograph of furniture held not to show its quality and condition so as to be competent evidence of its value. Foss v. Smith, 79 Vt. 434, 65 A. 553. Photographs of scene of railroad accident, three years after the accident, inadmissible where there was no proof that the place had not changed. Columbia, etc., R. Co. v. State [Md.] 65 A. 625. Photographs of sidewalk where accident occurred, taken the day after, held inadmissible where the only evidence that its condition was the same consisted in testimony that there was no great change, or no change except more wear. Crandall v. Dubuque [Iowa] 112 N. W. 555. In action for damages by fire, photographs of the place burned over, showing combustible material and remains, were held admissible though photographer did not testify to correctness of photograph, other evidence showing that they substantially represented the conditions. Smith v. Central Vermont R. Co. [Vt.] 67 A. 535.

79. As secondary, a photograph represents the original, as demonstrative it serves to explain, illustrate, or apply the testimony. Elzig v. Bales [Iowa] 112 N. W. 540.

80. McKarren v. Boston & N. St. R. Co. [Mass.] 80 N. E. 477.

81. Maps of railroad right of way containing descriptions shown to be correct held admissible to illustrate testimony of witnesses though not made by persons who made survey. Portland & S. R. Co. v. Ladd [Wash.] 91 P. 573. Where correctness of a survey was in issue and surveyor testified, an uncertified plat was held competent to aid in showing in a general way the shape and location of the land in question. Austin v. Whitcher [Iowa] 110 N. W. 910.

82. Plat of a room with statement thereon to the effect that a door shown therein is always locked is inadmissible. Corning v. Dollmeyer, 123 Ill. App. 188.

83. Photograph showing that portion of the place where accident occurred concerning which testimony was given it is admissible though it does not show all of the conditions of the place. Illinois S. R. Co. v. Hayer, 128 Ill. App. 315.

84. Held not an abuse of discretion to allow tests of telephones to be made in presence of jury, where breach of warranty was in issue. Chicago Tel. Supply Co. v.

of experiments out of court admitted, is a question addressed to the sound discretion of the trial court.[85] In either case substantial similarity as to the essential and material facts affecting the comparison should be shown.[86] It is not error to refuse to allow an experiment to be made outside of the court in the presence of the jury without the consent of both parties.[87]

§ 11. *Quantity required and probative effect.*[88]—The weight of evidence and the credibility of witnesses[89] are exclusively for the jury or trial court, and in considering the same it is proper to consider all the facts and circumstances shown by the evidence,[90] the interest of the witness,[91] his manifest bias or prejudice,[92] his

Marne & Elkhorn Tel. Co. [Iowa] 111 N. W. 935.

85. Proof of experiments. De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co. [Ga. App.] 58 S. E. 790.

86. Proof of experiments. De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co. [Ga. App.] 58 S. E. 790. In action against railroad for killing stock, the vital point on the issue of negligence was the distance the stock could have been seen on the track by the engineer. Held competent for plaintiff to prove the results of experiments covering this point, made subsequently to the time of the accident, when made at the same place, under facts and circumstances substantially similar to those surrounding the accident. Atlanta & W. P. R. Co. v. Hudson [Ga. App.] 58 S. E. 500. Experiments in presence of jury should be permitted only when conditions are shown to be the same. Chicago Tel. Supply Co. v. Marne & Elkhorn Tel. Co. [Iowa] 111 N. W. 935. In action for death of man riding velocipede on railroad track, struck by a train, on the issue whether the engineer could have seen the man killed, he testifying that he could not see him until within 750 yards of him, evidence of two experiments were held admissible; one was at 3:30 p. m. and the other about 6 p. m., and at both times it was shown that a man six feet high, in his shirt sleeves, standing at the place in question, could be seen at a distance of 1,000 yards plainly. Houston & T. G. R. Co. v. Ramsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 745, 97 S. W. 1067. Where action was for injuries caused by bursting of steam pipe, experiments to show the pressure to which the pipe had been subjected were properly excluded, where the conditions were not shown to be substantially the same. Mitchell v. Sayles [R. I.] 66 A. 574. Plaintiff was burned by electric wires and tests were made to determine the cause. Held evidence as to whether the report of the tests contained a true statement of the manner in which the plant was run when the tests were made was admissible. Rasmussen v. Wisconsin Trac., Light, Heat & Power Co. [Wis.] 113 N. W. 453.

87. Wheeling & Lake Erie R. Co. v. Parker, 9 Ohio C. C. (N. S.) 29.

88. See 7 C. L. 1594.

Scope of this section: Only a few general rules are here included, other topics treating of the province of court and jury (Questions of Law and Fact, 8 C. L. 1566), the propriety of granting a nonsuit (Discontinuance, Dismissal and Nonsuit, 9 C. L. 982), or directed verdict (Directing Verdict and Demurrer to Evidence, 9 C. L. 975), the extent to which appellate courts will review questions of fact (Appeal and Review, 9 C. L. 211), and the sufficiency of evidence on particular issues (see topic dealing with the particular matter involved, such as Master and Servant, 8 C. L. 840).

89. See Witnesses, 8 C. L. 2347.

90. The jury should reconcile evidence if possible, if not they should accept that most entitled to credit under all the circumstances. Reed v. Continental Ins. Co. [Del.] 65 A. 569; Rogers v. Rogers [Del.] 66 A. 374; Reese v. Hoffecker [Del.] 65 A. 588; Staunton v. Smith [Del.] 65 A. 593; Simeone v. Lindsay [Del.] 65 A. 778. It is the duty of the jury to reconcile conflicting testimony if possible. Atlantic Coast Line R. Co. v. Miller [Fla.] 44 So. 247. Where facts and circumstances shown in evidence are so much at variance with the testimony of a witness as to cast a doubt upon the truthfulness of the witness, his testimony is not to be given the greater weight. Johnston v. New York City R. Co., 54 Misc. 642, 104 N. Y. S. 812. Testimony of a disinterested witness to a fact within his knowledge which is not improbable and not in conflict with other evidence is legal proof of the fact. In re Miller's Will [Or.] 90 P. 1002. In estimating the weight of testimony the jury should consider the witnesses' means of knowledge, their intelligence, apparent fairness and truthfulness, and other facts and circumstances shown by the evidence going to the reliability of such witnesses. Simeone v. Lindsay [Del.] 65 A. 778. The jury may believe part of the testimony of witnesses and disregard other parts. Missouri, K. & T. R. Co. v. Harris [Tex. Civ. App.] 18 Tex. Ct. Rep. 190, 101 S. W. 506. Where in an action for damages for wrongful death there was positive, uncontradicted evidence that deceased had never been sick prior to the injury resulting in his death, it was held that life expectancy tables were conclusive on the issue of his life expectancy. Davis v. Michigan Cent. R. Co., 147 Mich. 479, 111 N. W. 76. See Questions of Law and Fact, 8 C. L. 1566.

91. The testimony of an interested party is not conclusive though he is not impeached and his testimony is uncontradicted. Burleson v. Tinnin [Tex. Civ. App.] 100 S. W. 350. But the fact that a witness may have some interest in the controversy does not warrant rejecting his testimony in toto. The fact that certain witnesses were or had been in the employ of one of the parties held not to warrant jury in disregarding their testimony. Christianson v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97.

92. Where a hostile witness uses ex-

means of knowledge, apparent intelligence or capacity,[93] his conduct or demeanor while on the stand,[94] and the inherent improbability of the testimony offered.[95] Thus the testimony of a witness is not ordinarily conclusive even though uncontradicted,[96] though it will ordinarily be controlling in the absence of any impeaching or discrediting circumstances, or inherent inconsistency or improbability.[97]

A preponderance of the evidence, by which is meant the greater weight of evidence, and not necessarily the greater number of witnesses,[98] is all that is required in civil cases.[99] In determining whether a recovery is warranted, all the evidence

pressions favorable to the side he opposes, a court may properly attach more importance thereto than to the main purport of his narrative. Fleming v. Howard, 150 Cal. 28, 87 P. 908.

93. Intelligence and capacity of witnesses, or their want thereof, may be considered. Manufacturers' Fuel Co. v. White, 228 Ill. 187, 81 N. E. 841. Though a six year old child is allowed to testify, its age is an important element in determining the weight to be given its testimony, which is for the jury. Van Salvellergh v. Green Bay Trac. Co. [Wis.] 111 N. W. 1120.

94. Jury is not required to believe a witness, though he is not impeached directly or by the inherent impossibility of facts stated by him; it may disregard his testimony because of his manner of testifying and his behavior on the stand. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 18 Tex. Ct. Rep. 566, 99 S. W. 144.

95. Oral testimony in direct contravention of natural laws must be deemed incredible. Oral testimony that railroad semaphore showed red to one, green to another, and blurred to a third, all looking at it from the same direction. Tillson v. Maine Cent. R. Co. [Me.] 67 A. 407. Neither courts nor jurors are bound by the uncontradicted testimony of an interested party, which appears to be untruthful by reason of improbable or inconsistent statements. Testimony by holder of note that he was bona fide holder, note being without consideration, rejected. Gosline v. Dryfoos [Wash.] 88 P. 634. Party's own testimony that he could not see objects directly in front of him held entitled to no weight where circumstances showed that he must have seen them. Scanlon v. Butler-Duncan Land Co. [R. I.] 67 A. 364.

96. The jury is not bound by uncontradicted testimony which is not consistent with other circumstances proved. Logue v. Grand Trunk R. Co. [Me.] 65 A. 522. Though testimony is uncontradicted, it may be rejected if inherently improbable or self-contradictory. Gorman v. Hand Brew. Co. [R. I.] 66 A. 209. Jury is not bound to accept testimony of witness as conclusive though uncontradicted. McCracken v. Lantry-Sharpe Contracting Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 959, 101 S. W. 520. Credibility of witnesses and evidence is for trial court, trying the facts, though direct testimony of two witnesses on issue was uncontradicted. Hunter v. Wethington [Mo.] 103 S. W. 543. The jury may disregard testimony of interested parties, though uncontradicted, and find for the opposing party, subject of course to the court's power to grant a new trial. First State Bk., Iowa, v. Hammond [Mo. App.] 101 S. W. 677. Jury are sole judges of credibility of witnesses and weight to be given their testimony, and they may reject the testimony of a witness, although he is not contradicted by other witnesses when the circumstances cast a suspision on his statements or render them inconsistent with reason or common observation. El Paso Foundry & Mach. Co. v. De Guereque [Tex. Civ. App.] 19 Tex. Ct. Rep. 405, 101 S. W. 814.

97. Plaintiff's corroborated and uncontradicted testimony on a point held not to have been rendered improbable by other testimony. Berus v. New York City R. Co., 52 Misc. 181, 101 N. Y. S. 748. Testimony which is not improbable and is not in any way contradicted is conclusive. Molloy v. Whitehall Portland Cement Co., 116 App. Div. 839, 102 N. Y. S. 363. Where defendant offers no testimony, plaintiff's testimony must be taken as true, and inferences therefrom which are reasonable must be drawn. McGill v. Gargoula, 103 N. Y. S. 113. Where a plaintiff is the sole witness in her own behalf, but her testimony is clear, uncontradicted, and not inherently improbable, and is sufficient as to the facts shown to constitute a cause of action, it is error to render judgment for defendant. Karl v. New York City R. Co., 52 Misc. 650, 101 N. Y. S. 750. Uncontradicted and unimpeached testimony of an employe that he had warned a street car conductor to look out for a pole near the track held sufficient to sustain burden of showing a warning had been given. Savage v. Rhode Island Co. [R. I.] 67 A. 633. Mill company's quotation for flour delivered at a certain place being only evidence of market value, and not being attacked, held proper basis of finding thereon. Bowie v. Western Union Tel. Co. [S. C.] 59 S. E. 65.

98. Preponderance of evidence does not depend on the number of witnesses. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 S. W. 555. Where there are but two witnesses and their testimony is in direct conflict, it does not necessarily follow that plaintiff has failed to establish his case by a preponderance of the evidence, the circumstances pointing to the truth of plaintiff's testimony. Omensky v. Gieske, 125 Ill. App. 77. The number of witnesses may be considered in determining where the preponderance of evidence lies. Elgin, J. & E. R. Co. v. Lawlor, 229 Ill. 621, 82 N. E. 407.

99. Reed v. Continental Ins. Co. [Del.] 65 A. 569; Hartzell v. Murray, 127 Ill. App. 608. Preponderance of evidence is sufficient to prove claim for services rendered to decedent. Miller v. Steele [C. C. A.] 153 F. 714. In a civil action the party having

adduced by both parties should be considered,[1] and if possible reconciled.[2] The proof must correspond to the facts alleged,[3] since a party cannot plead one cause of action and recover upon proof of another.[4] A prima facie case, unrebutted, warrants a recovery.[5] A verdict may be supported by circumstantial as well as by direct evidence,[6] but the circumstances shown must reasonably tend to establish the theory of the party relying on such evidence,[7] and must be inconsistent with every other reasonable theory.[8]

Usually, positive testimony is entitled to be given greater weight than negative,[9] but this rule does not render negative testimony incompetent[10] or insufficient[11]

the burden of proof is not required to show the existence of a fact absolutely, but is only required to reasonably satisfy the jury of its existence. Dorough v. Harrington [Ala.] 42 So. 557. An instruction that a party must establish a fact "to the entire satisfaction of the jury" held erroneous. McEntyre v. Hairston [Ala.] 44 So. 417.

1. In determining whether the evidence is sufficient to sustain a verdict, all the evidence, adduced by both parties, will be considered. Murray v. Butte, 35 Mont. 161, 88 P. 789. A deficiency in plaintiff's evidence may be supplied by defendant's evidence so as to warrant judgment for plaintiff. Western Assur. Co. v. Chesapeake Lighterage & Towing Co. [Md.] 65 A. 637.

2. Coughlan v. Philadelphia, etc., R. Co. [Del.] 67 A. 148; Little v. American Tel. & T. Co. [Del.] 67 A. 169.

3. See Pleading, 8 C. L. 1421.

4. Milliken v. Thyson Commission Co., 202 Mo. 637, 100 S. W. 604.

5. Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

6. In civil as well as criminal cases a fact may be established by circumstantial evidence, and a jury may accept such evidence and base a finding or verdict thereon, although opposed by the direct and positive testimony of witnesses. Atchison, etc., R. Co. v. Colliati [Kan.] 88 P. 534. Sending and receipt of papers by mail may be proved by circumstantial evidence. Cain v. Corley [Tex. Civ. App.] 17 Tex. Ct. Rep. 644, 99 S. W. 168. Notice of facts to put a person on inquiry may be shown by circumstantial evidence. Cleveland, etc., R. Co. v. City Trust, Safety Deposit & Surety Co. [Ind.] 82 N. E. 52.

7. Where circumstantial evidence is the only kind available, as in action for damages by fire alleged to have been started by sparks from a locomotive, a verdict for plaintiff will not be set aside if the circumstances shown furnish ground for the jury to find that it was reasonably probable that sparks from the locomotive started the fire. Minard v. West Jersey & S. R. Co. [N. J. Law] 64 A. 1054. There is nothing for the jury in a case supported wholly by circumstantial evidence, unless it tends to establish the conclusion claimed in some appreciable degree; a mere scintilla of inconclusive circumstances, giving no scope for legitimate reasoning by the jury, does not carry the burden of proof. Georgia R. & Elec. Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076. There must be some substantial evidence to support a verdict or findings, the jury cannot be left to conjecture in passing upon the issues. Evidence held insufficient to show that work was done for defendant at the request of any authorized person. Silver Mountain Mine Co. v. Anderson [Colo.] 92 P. 226.

8. Where a plaintiff in a civil case supports his action solely by circumstantial evidence, he is not entitled to a verdict unless the circumstances shown are shown by a preponderance of evidence to be consistent with the theory advanced by him, and inconsistent with every other reasonable theory. Georgia R. & Elec. Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076.

9. Testimony of one witness that signal was given is stronger than of another that he did not hear it. Illinois Southern R. Co. v. Hamill, 128 Ill. App. 152. Testimony of witness that he had not heard matter contained in contract discussed held to have no weight. Bryson's Adm'r v. Biggs [Ky.] 104 S. W. 982. Positive testimony of engineer and fireman that locomotive whistle was blown held entitled to greater weight than testimony of other witnesses whose attention was not called to the situation that they did not hear it. Missouri, K. & T. R. Co. v. McCoy [Ind. T.] 104 S. W. 620. When one or more witnesses testify that they saw an object or heard a signal upon a given occasion, their testimony is to prevail over that of a same number of witnesses of equal candor who testify that they did not hear or see it. The Fin Mac Cool [C. C. A.] 147 F. 123.

10. Where it was charged that a guardian's deed was fraudulent and that grantee was a fictitious person, and guardian testified that he lived in a certain county, testimony of persons who lived in the county that they were well acquainted there and knew no one of that name was competent. Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756.

11. The rule as to the superiority of positive over negative testimony does not necessarily render the latter inefficient in case of the former, its weight is for the jury. Van Salvellergh v. Green Bay Trac. Co. [Wis.] 111 N. W. 1120. Testimony of witnesses who were in a position to hear whistle of train, if blown, and bell, if rung, and whose attention was called to the train, that no signals were given, is entitled to some weight and is some evidence that no such signals were given. Stotler v. Chicago & A. R. Co., 200 Mo. 107, 98 S. W. 509, In action for injuries resulting from collision with car, held not necessary to disregard plaintiff's positive testimony that he looked for but could not see a car, though other witnesses testified that they were able to see it for some distance. Indiana-

where there is also positive testimony. The weight to be given negative testimony depends upon the situation of the witness, his opportunity to hear or see or know the facts, his attention or inattention and other attendant facts and circumstances.[12]

The testimony of experts is not conclusive[13] nor exclusive;[14] its weight is for

polis St. R. Co. v. Taylor, 39 Ind. App. 592, 80 N. E. 436. In action for damages for killing animals on railroad track, positive, uncontradicted testimony by three of the train crew that they did not see the animals on the track could not be totally disregarded by the jury. Miller v. Chicago & N. W. R. Co. [S. D.] 111 N. W. 553.

12. The rule as to positive and negative testimony should not be applied inexorably, but due regard should be had to the circumstances of the particular case. The Fin MacCool [C. C. A.] 147 F. 123. Where it is alleged that a locomotive bell was not rung as it approached a crossing, the evidence of witnesses who were present, conscious, in the possession of their physical senses, and listening for signals, that they did not hear it ring has probative value sufficient to take the issue to the jury, though other witnesses testify that the bell did ring. Cotton v. Willmar & S. F. R. Co., 99 Minn. 366, 109 N. W. 835. Where trackman was struck by a train, and the engineer, fireman, and brakeman testified positively that the crossing and danger signal was given, and three others testified that danger signal was given, the testimony of three other persons, more than a half mile away, eating breakfast inside closed doors that no signals were given was held insufficient to raise a conflict in the evidence. Hoffard v. Illinois Cent. R. Co. [Iowa] 110 N. W. 446. It is improper to charge the jury that positive testimony is to be believed in preference to negative without qualifying the charge with reference to the credibility of witnesses. Central of Ga. R. Co. v. Orr [Ga.] 57 S. E. 89.

NOTE. Negative and affirmative evidence: "When it is sought to prove the nonexistence of sound by the testimony of witnesses, the conditions essential to the competency of the evidence must be supplied. The probative value to be given to the fact that a witness did not hear the sound depends upon the condition of his senses, his proximity to place, the degree of attention, and other such circumstances which render it more or less probable that, if the sound had been made, the witness would have heard it. Hence the mere statement of a witness that he did not hear a bell rung is valueless as evidence, unless it further appears that he was able to hear and was in a position and under conditions where he would probably have heard the sound had it been made. The degree of attention will affect the value of the evidence but the fact that the witness was not giving his direct attention at the time for the purpose of learning whether signals were given will not destroy the value of the evidence if he was present at the crossing, was conscious, and in the possession of his ordinary senses, and testifies positively that he heard no signal. The testimony of a witness that he did not hear a bell rung is thus of itself, as against direct and positive testimony of another that the bell did ring, no evidence that it did not ring, but, taken in connection with evidence showing that the witness could and probably would have heard it, had it been rung, and that he was listening to hear it ring, is evidence that it did not ring. The position and situation of the witnesses, the attention they were giving, and their credibility, and the weight of the evidence are questions for the jury. Moran v. Eastern R. Co., 48 Minn. 46, 50 N. W. 930; Green v. Eastern R. Co., 52 Minn. 79, 53 N. W. 808; Peterson v. Mpls. St. R. Co., 90 Minn. 52, 95 N. W. 751; Tenn., etc., R Co. v. Hanford, 125 Ala. 349, 28 So. 45; Dyer v. Erie R. Co., 71 N. Y. 236; Johanson v. Boston & M. R. Co., 153 Mass. 57, 26 N. E. 426; Walsh v. Railway Co., 171 Mass. 52, 50 N. E. 453; Marcott v. Railway Co., 49 Mich. 101, 13 N. W. 374; McLean v. Erie R. Co., 69 N. J. Law, 57, 54 A. 238; Id., 70 N. J. Law, 337, 57 A. 1132; Goodwin v. Central R. Co., 73 N. J. Law, 576, 64 A. 135; Northern Cent. R. Co., v. State, 100 Md. 404, 60 A. 19; Purnell v. R. Co., 122 N. C. 832, 29 S. E. 953; Reed v. Chicago, etc., R. Co., 74 Iowa, 188, 37 N. W. 149; Atchison, etc., R. Co. v. Feehan, 149 Ill. 202, 36 N. E. 1036; Chicago, etc., R. Co. v. Eganolf, 112 Ill. App. 323; Chicago, etc., R. Co. v. Pulliam, 111 Ill. App. 305; McDuffie v. Lake Shore, etc., R. Co., 98 Mich. 356, 57 N. W. 248; Murray v. Mo. Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601. Such evidence, while negative in form, is affirmative in substance. Grabill v. Ren, 110 Ill. App. 587. The cases cited by appellant are not inconsistent with this rule, as a careful examination of the facts of each case will disclose that some essential element was absent. In Bohan v. Milwaukee, etc., R. Co., 61 Wis. 391, 21 N. W. 241, and Tully v. Fitchburg R. Co., 134 Mass. 499, stress is laid upon the inadequacy of such evidence. The substance of these decisions is that it is not enough for a witness to say merely that he does not remember having heard a bell ring. "Courts have often been asked," says Wigmore, "to exclude testimony based on what may be called negative knowledge—i. e., Testimony that a fact did not occur—founded upon the witness' failure to hear or see a fact which he would supposedly have heard or seen if it had occurred. But there is no inherent weakness in this kind of knowledge. It rests upon the same data of the senses. It may even sometimes be stronger than affirmative impressions. The only requisite is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred." 1 Wigmore, Evidence, § 664; 2 Elliott, Ev. § 969; 6 Thompson, Negligence, § 7865; 5 C. L. 1369.—From opinion by Elliott, J., in Cotton v. Willmar & S. F. R. Co., 99 Minn. 366, 109 N. W. 837.

13. Jury is not bound by opinions of experts on values of property. Helm v. An-

the jury to be tested by the same rules as other testimony,[15] and it has been said that it should be received with great caution.[16] Physical experiments have evidentiary value corresponding to the closeness of similarity between the facts proved and the facts on which the experiments are based.[17] Admissions of a party against interest are entitled to peculiar weight,[18] but are not conclusive.[19] Entries in books of account are persuasive evidence but not conclusive.[20] Declarations of a person since deceased are entitled to little weight.[21] Hearsay evidence has no probative value.[22]

chor Fire Ins. Co., 132 Iowa, 177, 109 N. W. 605. Expert opinions are not conclusive. Southern Kansas R. Co. v. West [Tex. Civ. App.] 102 S. W. 1174. Opinion evidence on value of services is not conclusive on the jury. Jennings v. Stripling, 127 Ga. 778, 56 S. E. 1026. Testimony of attorney, claiming for services, and of his expert as to value of services, held not binding on the jury. Jetter v. Zeller, 104 N. Y. S. 229.

14. Jury may find injuries to be permanent, though such finding is not supported by expert testimony, such testimony not being exclusive. Payne v. Whatcom County R. & Light Co. [Wash.] 91 P. 1084.

15. Expert testimony is to be given consideration like all other testimony which the court allows to go to the jury and accorded such weight, as, in view of all the evidence, of every kind and nature, and its reasonableness, and the apparent candor and competency of the witnesses, in fairness demands. Instructions on weight to be given expert testimony criticised. Ball v. Skinner [Iowa] 111 N. W. 1022. In the consideration of the testimony of medical experts the test of consistency and reasonableness, always having reference to the other testimony in the case, which their opinions may tend to corroborate or contradict, should be applied. In re American Board of Com'rs for Foreign Missions [Me.] 66 A. 215. If the opinion of a medical expert is made up from a prejudiced view and with a predetermined purpose, it has no weight and is in fact unsafe and dangerous. Id. The opinions of experts based on hypothetical questions have little or no weight unless the assumed facts are true, and it is proper for the court to so instruct the jury. Anderson v. Husted, 79 Conn. 535, 66 A. 7. Expert testimony in response to hypothetical questions is not wholly valueless, though there is a variance between the facts assumed and those shown by the evidence; its weight is for the jury. Id.

16. Illinois Cent. R. Co. v. McCollum, 130 Ill. App. 267.

17. Atlanta & W. P. R. Co. v. Hudson [Ga. App.] 58 S. E. 500. In action for injuries resulting from collision between tender of switch engine and road engine, evidence of an experiment was inconclusive when the headlight on the tender used in the experiment was not the same as that in use when the collision occurred, the object being to show how far plaintiff could see along the track. Brantner v. Chicago, B. & Q. R. Co. [Iowa] 112 N. W. 790.

18. Simeone v. Lindsay [Del.] 65 A. 778. Defendant having admitted on cross-examination that she owed plaintiff more than she had tendered, a judgment for her was erroneous. Giovanniello v. Horton, 101 N. Y. S. 20. Where a plaintiff answered questions based on the assumption that he received a certain letter, he could not thereafter claim that the proof failed to show that he received the letter. Auer v. Hoffmann [Wis.] 112 N. W. 1090.

19. Statements of a party against interest are presumptively but not conclusively true. Randolph v. Metropolitan St. R. Co., 125 Mo. App. 620, 102 S. W. 1085. Letter claiming a certain amount is not conclusive when there is evidence that a mistake was made in the letter in stating the amount. Aetna Life Ins. Co. v. Pelham, 52 Misc. 658, 102 N. Y. S. 461. It is improper to instruct that testimony by plaintiff against her interest "must be taken as true," while statements made by her as a witness in her own favor are to be given such credit as the jury believe them entitled to. McGinnis v. Rigby Printing Co., 122 Mo. App. 227, 99 S. W. 4. Admissions of liability for loss of property which defendant had agreed but failed to keep insured, made after the loss occurred, held insufficient to support cause of action because without consideration. Wilson-Moline Buggy Co. v. Pruebe, 123 Mo. App. 521, 100 S. W. 558. A mere statement of defendant's attorney that defendant concedes that a certain amount is due plaintiff, nothing being said by the other attorney, is not such a concession as to warrant a reversal. Ryan v. Brown, 104 N. Y. S. 871. Admissions upon a former trial are merely evidence taking the place of proof. Potash v. Utopia Land Co., 48 Misc. 402, 95 N. Y. S. 571. In an action for services plaintiff may prove and recover the full value of each item, though an itemized statement given his employer before suit shows claims in a smaller amount. Wright v. St. Louis Sugar Co., 146 Mich. 555, 13 Det. Leg. N. 866, 109 N. W. 1062

20. Van Nome v. Barber, 115 App. Div. 593, 100 N. Y. S. 987. Entries in books of account, being private memoranda, are not conclusive; parol evidence is competent to show the goods shown by them to have been charged to one person were in fact shipped to another, or his order. Pettey v. Benoit, 193 Mass. 233, 79 N. E. 245.

21. Indefinite admissions of the decedent to a third party held insufficient to prove a claim against his estate, evidence of this character being weak and unsatisfactory. Clarke v. Roberts Estate [Colo.] 87 P. 1077. While parol proof of admissions and declarations of a decedent is the weakest species of evidence, it is entitled to consideration when corroborated by contemporaneous memoranda and the action and conduct of deceased with reference to the subject-matter at issue. Succession of Zacharie [La.] 43 So. 988.

22. Miller & Co. v. McKenzie, 126 Ga. 746, 55 S. E. 952.

Evidence admitted without proper objection may be considered even though it would be inadmissible over a proper objection,[23] and on a motion for a nonsuit evidence which is relevant must be considered though erroneously admitted.[24]

The quantum of proof required to prove particular facts is treated in titles dealing with the subject or issue to which the evidence is addressed; a few illustrative holdings appear in the note.[25]

Examination Before Trial, see latest topical index.

EXAMINATION OF WITNESSES.

§ 1. General Rules of Examination (1312). Leading Questions (1314). Responsiveness (1315). Refreshing Memory (1315).
§ 2. Cross-examination (1317).
§ 3. Redirect Examination (1324).
§ 4. Recalling Witness for Further Examination (1325).

Scope of article.—This article treats generally of the rules governing the examination of witnesses in both civil and criminal cases, except those peculiarly applicable to the examination of experts, which are treated in the preceding article.[26] Matters pertaining to the impeachment of witnesses, and the privileges of witnesses,[27] and general questions of trial procedure, such as the exclusion of witnesses from the court room,[28] and the proper manner of raising objections,[29] are elsewhere discussed.

§ 1. *General rules of examination.*[30]—The manner of examining witnesses is a matter resting largely in the discretion of the trial court, though controlled by certain well settled general rules.[31] Greater latitude is allowed in the examination of an ignorant and illiterate witness who does not understand the English language nor the methods of taking testimony in court procedure.[32] It is proper for the trial court to examine witnesses, when this course is deemed necessary to elicit the truth, but this right should be carefully exercised so as not to indicate, directly or indirectly, any opinion on the merits or any basis in favor of either party,[33] and in the exercise of

23. Mushet v. Fox [Cal. App.] 91 P. 534. Extracts from deeds and title books, containing substance of deeds greatly abbreviated, being admitted by agreement, would be construed according to their manifest meaning. Evans v. Foss [Mass.] 80 N. E. 587. Evidence which is relevant is to be weighed, notwithstanding an objection to its competency if made would have been sustained. Metropolitan Music Co. v. Shirley, 98 Minn. 292, 108 N. W. 271.

24. Without or against objection. Archibald Estate v. Matteson [Cal. App.] 90 P. 723.

25. The Louisiana rule that a contract above $500 must be proved by at least one credible witness and corroborating circumstances does not apply where the items of the contract are amply proved. Harliss v. Drews [La.] 43 So. 1008. To establish the existence and contents of a lost deed, the proof must be so cogent, clear, and forcible as to leave no doubt in the mind of the chancellor. Haworth v. Haworth, 123 Mo. App. 303, 100 S. W. 531. A written instrument will not be overturned by parol testimony unless the testimony be clear, unequivocal, and decisive. Mason v. Harkins [Ark.] 102 S. W. 228.

26. See Evidence, 9 C. L. 1228.

27. See Witnesses, 8 C. L. 2347.

28. See Trial, 8 C. L. 2161.

29. See Saving Questions for Review, 8 C. L. 1822.

30. See 7 C. L. 1599.

31. Not error to permit county attorney to read from the statement of facts in a former trial and ask witness if she made certain statements. Pool v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 271, 103 SW 892.

32. State v. Fowler [Idaho] 89 P 757.

33. State v. Caron, 118 La. 349, 42 S 960. Judge has inherent right to question witness, but should be so guarded as not to give even a hint of his opinion of the veracity of the witness, or any impression as to merits of case. Dreyfus v. St. Louis & S. R. Co., 124 Mo. App. 585, 102 SW 53. Presiding judge should not by form or manner of his examination intimate an opinion upon the facts. Rouse v. State [Ga. App.] 58 SE 416. Leading question asked by court held proper to clear up misunderstanding as to testimony given on cross-examination, which was susceptible of two meanings. Territory v. Meredith [N. M.] 91 P 731. Chance remark of court regarding a practice held not ground of objection. State v. Cornelius, 118 La. 146, 42 S 754. Court in examination of witness held to have violated Civ. Code 1895, § 4334, in intimating opinion to jury. Dicks v. State [Ga. App.] 58 SE 335. Witness having made positive assertion of fact, held improper for court to catechise witness at length as to his being absolutely sure of the truth of the fact stated, and to tell

a sound discretion the trial court may permit a juror to ask a witness a question.[34] For the court to assist a witness, liable to embarrassment or confusion, by directing the manner of testifying is not improper.[35] The number of witnesses to be examined may, in some instances, be limited in the discretion of the court.[36] Needless repetition,[37] or a prolonged and useless examination,[38] may be prevented in the discretion of the court. Counsel in their interrogatories should not improperly characterize facts as to which inquiry is made.[39] Questions should be asked in proper form or they will not be allowed.[40] They should call for the knowledge and not cogitations of witness.[41] Questions put to witnesses should not call for a conclusion,[42] nor should they assume as true facts in issue,[43] or as to which there is no evidence.[44] Questions should not be too general in their nature,[45] but should be clear,[46] specific, and certain.[47] Hypothetical questions, pertinent to the subject under investigation, may be

witness if he was mistaken he could correct his statement, and to ask him to think and see if he was not mistaken, and to correct his testimony if there was any doubt. Glover v. U. S. [C. C. A.] 147 F 426. See, also, Trial, 8 C. L. 2163, for remarks and conduct of court indicating bias.

34. Must not be in violation of general rules established for eliciting testimony. State v. Kendall, 143 N. C. 659, 57 SE 340.

35. Held not error for trial court to direct prosecutrix, a girl under sixteen years of age, to tell in her own way all that occurred at the time an alleged assault was made upon her. People v. Davis [Cal. App.] 91 P 810.

36. Limited to eight on question of reputation for peaceableness and quietness of defendant in homicide. People v. Wright [Cal. App.] 89 P 364.

37 Gracy v. Atlantic Coast Line R. Co. [Cal.] 42 S 903; American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784; Elgin, J. & E. R. Co. v. Lawlor, 229 Ill. 621, 82 NE 407; Tucker v. Buffalo Cotton Mills [S. C.] 57 SE 626. The court may limit the examination of a witness to prevent a reiteration of his testimony. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Refusal to permit defendant to restate matters of testimony fully gone over no error. Stern v. Bradner, Smith & Co., 225 Ill. 430, 80 NE 307. Sustaining objecton to question where matter had already been brought out on examination held no error. State v. James [Utah] 89 P 460.

38. Court has power to prevent useless examinations that do not tend to throw light on the issues. State v. Caron, 118 La. 349, 42 S 960. Discretion held not abused in refusing to hear further evidence on point to which questions directed. Mutchmor v. McCarty, 149 Cal. 603, 87 P 85.

39. Held error for prosecutor to characterize an alleged conversation in his interrogatory as "cruelty" or "ill-treatment." State v. Blydenburg [Iowa] 112 NW 634. Likewise, held improper for witness to do so in his answer, even inferentially. Id.

40. Question held not in proper form, and properly disallowed, where in an action for personal injuries, plaintiff, on cross-examination, was asked if she was willing to submit to a physical examination as to her injuries. City of Chicago v. McNally, 227 Ill. 14, 81 NE 23.

41. In an action for maintaining a nuisance, the question if witness did not think a privy had been for years located at or within a few feet of a new privy held objectionable as not calling for knowledge of witness. Town of Vernon v. Edgeworth [Ala.] 42 S 749.

42. McGuire v. Iowa County, 133 Iowa, 636, 111 NW 34. Error held not prejudicial. Doyle v. Eschen [Cal. App.] 89 P 836. The question "what were they aiming to do?" asked concerning the common objects of certain employes, held properly refused as calling for a conclusion. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784. Question held not objectionable as calling for conclusion. Iler v. Miller [Neb.] 111 NW 589.

43. Fleming v. State [Ala.] 43 S 219. In the absence of proof to establish allegations necessary to be proved, held improper to ask questions predicated on the assumed existence of the facts pleaded. Dewey v. Komar [S. D.] 110 NW 90. Hypothetical question asked expert held not objectionable as assuming facts not in proof. Coon v. Atchison, etc., R. Co. [Kan.] 89 P 682.

44. Allred v. State [Ala.] 44 S 60; Alabama Lumber Co. v. Cross [Ala.] 44 S 563.

45. Compressors were installed in defendant's plant by plaintiff, and on the issue of their sufficiency a question asked an expert as to whether or not in 1885 he saw better compressors than those installed in use in England was properly excluded as too general. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F 241.

46. Schmoe v. Cotton, 167 Ind. 364, 79 NE 184. A question asked an expert witness: "State whether or not this hay you saw there is considered as marketable hay here in Baker City, compared with other kind that is sold here," held to sufficiently advise the court as to what was sought to be proved by the witness. Eaton v. Blackburn [Or.] 88 P 303.

47. Where question called for condition of highway 300 feet east of where witness saw defendant's automobile, east of place of accident, objection for not specifying place with certainty sustained. Strand v. Grinnell Automobile Garage Co. [Iowa] 113 NW 488. Matter may be made more definite and exact on cross-examination. Birmingham R., Light & Power Co. v. Martin [Ala.] 42 S 618. A question calling for witness' opinion as to a testator's mental

asked on cross-examination, especially where they do not assume impossible conditions.[48] It has been held proper to permit a witness to use a map to explain his testimony.[49]

Leading questions.[50]—In general, leading questions, that is those which suggest a desired answer,[51] are improper on direct or redirect examination, but the matter is one resting in the trial court's discretion,[52] and a ruling will not be interfered with on appeal unless an abuse of discretion is made to appear,[53] whether a question is leading, or, if leading, is objectionable, depends largely upon the circumstances attending the examination of the witness.[54, 55] Where a witness is hostile or unwill-

capacity prior to a certain date was held objectionable for indefiniteness as to time. Huyck v. Rennie [Cal.] 90 P 929. Not identifying persons referred to by pronoun. Strickland v. State [Ala.] 44 S 90.

48. Held error not to permit witness on cross-examination to give his opinion as to whether a railroad would be a benefit to land under certain future conditions, which were not impossible. Taber v. New York, etc., R. Co. [R. I.] 67 A 9.

49. Although map not admitted in evidence. State v. Harrison [N. C.] 58 SE 754 [advance sheets only].

50. See 7 C. L. 1600.

51. State v. Walker, 133 Iowa, 489, 110 NW 925; Indianapolis & E. R. Co. v. Bennett, 39 Ind. App. 141, 79 NE 389. "It is one which * * * properly admits of an answer 'Yes' or 'No,' and suggests the particular answer desired." St. Louis & S. F. R. Co. v. Conrad [Tex. Civ. App.] 17 Tex. Ct. Rep. 566, 99 SW 209.

52. Western Union Tel. Co. v. Westmoreland [Ala.] 43 S 790; Barlow v. Hamilton [Ala.] 44 S 657; Teston v. State, 50 Fla. 138, 39 S 787; Barker v. State, 1 Ga. App. 286, 57 SE 989; McCann v. People, 226 Ill. 562, 80 NE 1061; Purcell Cotton Seed Oil Mills v. Bell [Ind. T.] 104 SW 944; People v. Sexton, 187 N. Y. 495, 80 NE 396; State v. Williams [S. C.] 56 SE 783. On redirect examination. Indianapolis & E. R. Co. v. Bennett, 39 Ind. App. 141, 79 NE 389. Trial court vested with reasonable degree of discretion to permit leading questions. People v. Way, 104 NYS 277. Although testimony taken in form of deposition. Breiner v. Nugent [Iowa] 111 NW 446. In bastardy proceedings held within discretion of court to permit district attorney to ask prosecutrix leading questions (Johnson v. State [Wis.] 113 NW 674), or to ask defendants' witness if he had drunk anything the day before (Id.). Though a party calls the opposing party to the stand as his witness, the court may prohibit counsel for the latter from asking leading questions on cross-examination. Lauchheimer v. Jacobs, 126 Ga. 261, 55 SE 55. Court may ask witness a leading question. Territory v. Meredith [N. M.] 91 P 731.

53 "Only in extreme cases, if at all, will a reviewing court order a new trial because leading questions were propounded to the witness." Barker v. State, 1 Ga. App. 286, 57 SE 989. While improper, the fact that an examination was conducted by the state by asking a series of leading questions held not reversible error. Taylor v. State [Ark.] 102 SW 367. Discretion not abused in allowing leading questions to be asked a witness thirteen or fourteen years old, somewhat unfamiliar with the English language, and embarrassed while on the stand. McCann v. People, 226 Ill. 562, 80 NE 1061. Discretion not abused in permitting. Purcell Cotton Seed Oil Mills v. Bell [Ind. T.] 104 SW 944; People v. Way, 104 NYS 277; Territory v. Meredith [N. M.] 91 P 731; People v. Sexton, 187 N. Y. 495, 80 NE 396.

54, 55. Held leading and objectionable: Question "when an engine is out upon a track, * * * is there not any usual or general custom, * * * with reference to whether or not a machinist working under such engine shall protect himself?" held leading and objectionable. St. Louis & S. F. R. Co. v. Conrad [Tex. Civ. App.] 17 Tex. Ct. Rep. 566, 99 SW 209. Witness having stated that having a railroad in the street abutting owners could get spur tracks for manufacturing concerns by asking for them held no error to allow question on cross-examination—"They always get spur tracks, do they, when they ask for them?" Davis v. Farwell [Vt.] 67 A 129. Question, in action by employe for wrongful discharge, whether or not after witness had made his contract with defendant it was generally understood that plaintiff was to be discharged held leading and erroneously permitted. Seago v. White [Tex. Civ. App.] 18 Tex. Ct. Rep. 183, 100 SW 1015. Question "was there any necessity for any one in removing the brake shoe to put himself in such position that the engine driver would run over him and catch him?" held leading and objectionable. St. Louis & S. F. R. Co. v. Conrad [Tex. Civ. App.] 17 Tex. Ct. Rep. 566, 99 SW 209.

Held not objectionable: Question "Did you make any demand upon the defendant for the value of said damaged goods?" held not leading. International & G. N. R. Co. v. Drought & Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 912, 100 SW 1011. Question "Did you see any other tracks there like those you described a while ago?" held not leading. Hickey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 142, 102 SW 417. Where accused's testimony tended to show that he killed his wife accidentally, held not error for state to ask him "So, you killed your wife accidentally?" Thomas v. State [Ala.] 43 S 371. Held not leading though answerable by "Yes" or "No." St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 17 Tex. Ct. Rep. 265, 97 SW 1087. Hypothetical question asked physician, testifying concerning plaintiff's injuries, in action for damages for personal injuries, held not leading. Gal-

ing,[56, 57] or is lacking in intelligence and cannot comprehend the questions propounded,[58] it is not error to allow leading questions to be asked, and such questions are also proper to refresh or aid the recollection of a witness whose memory has failed him.[59] Ordinarily it is permissible to ask expert witnesses leading questions, when an opinion is desired on subjects concerning which such witnesses have peculiar information on account of professional knowledge.[60]

Responsiveness.[61]—Voluntary statements of the witness not responsive to the question may be excluded on application for such relief.[62] Whether an answer should be stricken out on motion as not being responsive is a matter resting within the discretion of the trial court,[63] and a ruling will not be disturbed unless the discretion is abused.[64] Where the question asked concerns an original contract, an answer referring only to a copy is not responsive.[65] That an answer is not responsive does not necessarily render it inadmissible,[66] and only the examining party can complain that an answer is not responsive.[67] A motion to take from the jury an entire answer as unresponsive is properly overruled, where a part of the answer is directly responsive and the remainder is not prejudicial.[68]

Refreshing memory.[69]—For the purpose of refreshing his memory, a witness may consult any memorandum made at or near the time of a transaction or occurrence, whether made by himself or another,[70] when the recitals of the memorandum

veston, etc., R. Co. v. Powers [Tex. Civ. App.] 18 Tex. Ct. Rep. 915, 101 SW 250.

56, 57. Barker v. State, 1 Ga. App. 286, 57 SE 989. Leading question permitted where witness was unwilling to testify. People v. Sexton, 187 N. Y. 495, 80 NE 396. State permitted to ask hostile witness, testifying on trial of paramour, leading questions, where witness refused to answer questions, although witness had made a sworn statement covering the matter sought to be elicited. State v. Walker, 133 Iowa, 489, 110 NW 925. Where prosecutrix, in prosecution for statutory rape, was reticent, permitting leading questions held no error. State v. Waters, 132 Iowa, 481, 109 NW 1013. Held permissible. State v. Barrett, 117 La. 1086, 42 S 513.

58. There was no error in permitting leading questions by plaintiff on examination of children eighteen and fourteen years of age, testifying on trial of their father for the murder of their mother. State v. Megorden [Or.] 88 P 306. Held proper to permit leading question, where witness was thirteen or fourteen years old, somewhat unfamiliar with the English language, and embarrassed while on the stand. McCann v. People, 226 Ill. 562, 80 NE 1061.

59. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 S 1024. Properly allowed to test witness' memory. Mefford v. Missouri, K. & T. R. Co., 121 Mo. App. 647, 97 SW 602. Apparent lack of recollection. People v. Sexton, 187 N. Y. 495, 80 NE 396.

60. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 18 Tex. Ct. Rep. 915, 101 SW 250.

61. See 7 C. L. 1602.

62. Answer properly excluded as not being responsive. Birmingham R., Light & Power Co. v. King [Ala.] 42 S 612; Fleming v. State [Ala.] 43 S 219. Witness' reply to question as to what he gave for certain stock, that he stated that he gave a certain amount for it, when in faot he had formerly so testified, was not objectionable as being unresponsive. Moore v. Woodson [Tex. Civ. App.] 17 Tex. Ct. Rep. 364, 99 SW 116.

63. Entirely within discretion of trial court. Concord Apartment House v. O'Brien, 228 Ill. 360, 81 NE 1038.

64. Morello v. People, 226 Ill. 388, 80 NE 903. No abuse in overruling motion to strike out answer as not being responsive. Concord Apartment House v. O'Brien, 228 Ill. 360, 81 NE 1038. Witness, a physician who examined the deceased's wounds, on being asked to state what killed him, having replied "I am impressed with the opinion that there was nothing done to him that night after I left," held that answer was nonresponsive and properly stricken out, as there was no evidence to show that anything had been done to deceased after witness left him. Smith v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 948, 99 SW 100. Denial of motion to strike out answer as nonresponsive held error. La Rosa v. Wilner, 51 Misc. 580, 101 NYS 193.

65. Testimony held properly excluded. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 SW 658.

66. Massuco v. Tomasi [Vt.] 67 A 551.

67. In re Dunahugh's Will, 130 Iowa, 692, 107 NW 925.

68. Cleveland Terminal & V. R. Co. v. Gorsuch, 8 Ohio C. C. (N. S.) 297.

69. See 7 C. L. 1602.

70. Record of daily count and scale of logs made by assistant properly used by surveyor, under whose direction count and scale made, to refresh his recollection of scale, and testimony of surveyor was competent as to quantity of logs cut, and conclusive if not contradicted. Madunkeunk Dam & Imp. Co. v. Allen Clothing Co. [Me.] 66 A 537. Witness permitted to refresh memory by looking at copy which he had made from a book of original entries. Smith v. Pickands, 148 Mich. 558, 112 NW 122; Spencer v. State [Wis.] 112 NW 462.

are shown to be correct either by the testimony of the witness or the person who made it.[71] By some courts it is held that a witness may not use a memorandum unless, after using it, he can testify from present recollection of the facts,[72] or is willing to swear positively from the memorandum;[73] by others it is held that where the witness swears positively that the memorandum or entry was made at the time according to the true facts, he may testify therefrom though the facts are not in present remembrance.[74] It has been held proper to allow a witness to refresh his memory from memorandum books,[75] books of account,[76] return of magistrate,[77] letter press copies,[78] account sales,[79] notes,[80] from a ledger containing a summary of an inventory of stock,[81] and from a list of goods made from recollection,[82] from a petition in an action containing a list of personal property,[83] from former testimony before a grand jury,[84] and from a return to a search warrant made by the witness.[85] It is within the discretion of the trial court to permit one to refresh the memory of his own witness by repeating to him testimony given on another trial;[86] or it may permit an attorney to ask witness if he did not make certain statements to entertain persons for the purpose

71. Proctor & Gamble Co. v. Blakeley Oil & Fertilizer Co. [Ga.] 57 SE 879.

72. Sizer & Co. v. Melton [Ga.] 58 SE 1055. Testimony held inadmissible where witness after examining memorandum had no independent recollection, but testified to facts stated in memorandum solely because found there. Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 NE 392. Testimony properly excluded where witness was asked if he had an independent recollection, or depended on memorandum or other sources, replied: "I answered from memorandum." Proctor & Gamble Co. v. Blakeley Oil & Fertilizer Co. [Ga.] 57 SE 879.

73. To swear positively from paper it is essential that witness should at some time have had personal knowledge of its correctness. Sizer & Co. v. Melton [Ga.] 58 SE 1055.

74. "A witness cannot, without finally testifying from his recollection of the facts, swear from a written memorandum, without showing that he made the memorandum or at some time knew it to be correct." Proctor & Gamble Co. v. Blakeley Oil & Fertilizer Co. [Ga.] 57 SE 879.

75. A physician, who delivered a child, being enabled by reason of refreshing his memory from memorandum book, indicating his attendance upon the mother at such time, to reasonably fix date of birth, is competent to testify to date of birth. State v. Palmberg, 199 Mo. 233, 97 SW 566.

76. Where witness, who was plaintiff's bookkeeper, testified, without objection, that he had paid off plaintiff's employes, as requested, and charged amounts on books, he was properly permitted to testify to the aggregate amount by refreshing his memory from books. Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 NW 788. Copy made by witness from original book of entries. Smith v. Pickands, 148 Mich. 558, 14 Det. Leg. N. 267, 112 NW 122.

77. Magistrate conducting preliminary trial was properly allowed to use, in testifying in relation to testimony of absent witness, testimony taken down by him and incorporated in his return. Spencer v. State [Wis.] 112 NW 462.

78. Letter press copy of report of daily sales of tickets by agent held permissible to be used by him in refeshing his memory to enable him to testify as to ticket sales on a certain date. People v. Lowrie [Cal. App.] 87 P 253.

79. Witness having stated that he heard the weighmaster call the weight of the stock, and that the weight stated in the account sales furnished by a commission company at the time were correct as called, held proper to permit him to testify as to the weights, using the account sales to refresh his memory. St. Louis, etc., R. Co. v. Wills [Tex. Civ. App.] 18 Tex. Ct. Rep. 565, 102 SW 733.

80. Note for the payment of money executed by third person properly introduced in evidence for use by witness in refreshing his memory. Whittle v. Whittle [Cal. App.] 91 P 170.

81. An inventory having been lost, a summary taken and preserved in compliance with fire insurance policy was entered on ledger, and in action on policy held that the ledger could be referred to by witness to refresh his memory as to contents of inventory. Arkansas Mut. Fire Ins. Co. v. Woolverton [Ark.] 19 Tex. Ct. Rep. 159, 102 SW 226.

82. So held where insured, shortly after store was destroyed by fire, made a list of the goods therein, and testified that he was absolutely familiar with his stock and could recollect a greater part of the goods. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94.

83. Petition in action to recover personal property containing list of articles properly used by witness for purpose of refreshing his memory as to the articles, it having been shown that the copy was correct. Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 SW 453.

84. Witness properly allowed to read over his testimony given before the grand jury for the purpose of refreshing his memory. Magill v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 239, 103 SW 397.

85. Officer using must ordinarily inform court that it is necessary. State v. Collins [R. I.] 67 A 796.

86. Can only be done by express leave granted in the discretion of the court. Bass v. State, 1 Ga. App. 728, 790, 57 SE 1054.

of refreshing his memory.[87] Generally, it is not essential that a memorandum used by a witness to refresh his memory should be introduced in evidence.[88] Whether witness shall be allowed to testify after having read his testimony at a former trial rests in discretion.[89]

§ 2. *Cross-examination.*[90]—The extent, manner, and course of the cross-examination of witnesses is largely discretionary with the trial court,[91] and will not be interferred with on appeal unless the discretion has been abused.[92] It is proper for the court to prevent needless repetition,[93] or to limit the cross-examination when the matters of inquiry have been fully developed and clearly placed before the jury.[94] A greater latitude is allowed in the cross-examination of a party who takes the stand than in the case of an ordinary witness.[95] In some states the adverse party may be

87. Trial court has legal discretion in such matters. Thomasson v. State, 80 Ark. 364, 97 SW 297. Held proper to allow prosecuting attorney to refresh memory of state's witness by asking him if he did not make certain statements to himself and the grand jury. Id.

88. Books of account used by witness to refresh his memory as to aggregate sums paid out, where witness testified to having made regular payments and charges, did not have to be introduced in evidence. Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 NW 788.

89. Watters v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 524, 94 SW 1038.

90. See 7 C. L. 1604.

91. Lanigan v. Neely [Cal. App.] 89 P 441; Manuel v. Flynn [Cal. App.] 90 P 463; Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 81 NE 1038; Schotts v. McKinney, 39 Ind. App. 101, 79 NE 219; Harrold v. Territory, 18 Okl. 395, 89 P 202. The placing of limitations upon the cross-examination discretionary with trial court. Earley v. Winn, 129 Wis. 291, 109 NW 633. On cross-examination much is left to the trial court as to latitude and range to test sincerity and recollection of witness. Gregory v. State [Ala.] 42 S 829. It is the duty of the court to protect the witness and to insist on his being treated with the proper respect by counsel, but, in view of the latitude allowed in cross-examination, and of the fact that the demeanor of the witness is before the court, much must be left to the discretion of the court. Southern R. Co. v. Hobbs [Ala.] 43 S 844. It was discretionary with the court to limit the cross-examination of state's witness, respecting his prejudice against defendant, to his feelings in a general way, and then not to permit detail. State v. Baird, 79 Vt. 257, 65 A 101. Within discretion of court to refuse to compel witness of contestant of will, on ground of lack of testamentary incapacity, on cross-examination to state which of several circumstances indicating insanity was in his judgment the most significant. O'Dell v. Goff [Mich.] 14 Det. Leg. N. 399, 112 NW 736. Where an investigator of defendant traction company testified in its behalf the scope of the cross-examination with reference to the work he had done for defendant in other cases was held largely in discretion of trial court. Chicago Union Trac. Co. v. Ertrachter, 228 Ill. 114, 81 NE 816. In an action on a beneficial certificate witness was asked on direct examination to identify a letter from defendant's supreme secretary referring to certain proof papers, and was asked to what papers the letter referred, and defendant was permitted on cross-examination of witness to have him identify the proof papers and mark them for subsequent reference. Held error harmless, but such practice should not be encouraged. Hildebrand v. United Artisans [Or.] 91 P 542.

92. Exercise of discretion held extreme, but not grounds for reversal. Earley v. Winn, 129 Wis. 291, 109 NW 633. Discretion not abused. Mefford v. Missouri, K. & T. R. Co., 121 Mo. App. 647, 97 SW 602. Ruling held not erroneous or prejudicial. People v. Sexton, 187 N. Y. 495, 80 NE 396. No abuse of discretion in refusal to permit witness to be asked on cross-examination whether in making certain statements she told the truth. Wright v. State [Ala.] 43 S 575. No error in permitting witness to be asked if she realized what would happen to her in another world if she swore falsely, and if she knew the nature of an oath, and penalty for false swearing. State v. Armstrong, 118 La. 480, 43 S 57. Court did not err in sustaining objection to question asked witness by defendant if he was as certain as he was of everything else he had testified about. Gregory v. State [Ala.] 42 S 829. Question relating to witness being a fugitive from justice at time of arrest held not objectionable. State v. Cornelius, 118 La. 146, 42 S 754. Held that trial court unduly and needlessly restricted cross-examination. People v. Mitchell [Cal. App.] 89 P 853.

93. A question already substantially answered may be excluded. Schmoe v. Cotton, 167 Ind. 364, 79 NE 184. Repetition of question for third time on cross-examination properly disallowed. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 211, 102 SW 1134.

94. Extent to which prolonged largely within discretion of trial court. Horton v. Houston & T. C. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 870, 103 SW 467. Where plaintiff while on the stand as an adverse witness produced a written agreement, and twice denied that there was any agreement except the written one, the court was justified in stopping further examination. State v. Walker, 133 Iowa, 489, 110 NW 925; Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809.

95. Error in refusal to allow plaintiff when testifying to be cross-examined as to

called for cross-examination.[96] The trial court has discretionary power to permit one defendant to cross-examine a co-defendant,[97] or witnesses introduced by a co-defendant.[98] Ordinarily a party cannot cross-examine his own witness,[99] but the right to do so, and extent to which carried, is a matter resting largely within the discretion of the trial court.[1] The defendant cannot cross-examine counsel of complainant on statement filed after close evidence constituting a mere summary prepared from the evidence.[2] Usually, the direct examination cannot be interrupted to permit a cross-examination on the same subject, as the cross-examination may be made when the direct examination is concluded.[3] When a defendant in a criminal prosecution takes the stand in his own behalf, he may be cross-examined the same as any other witness,[4] and his credibility may be impeached in the same manner.[5]

previous admissions tending to show knowledge that would affect claim. Snell v. Roach [Ala.] 43 S 189. On cross-examination of a person injured by being expelled from a train, it was not objectionable to ask witness if it was not a fact that it was because she was a Christian Scientist. Ft. Worth & D. C. R. Co. v. Travis [Tex. Civ. App.] 18 Tex. Ct. Rep. 70, 99 SW 1141. Sustaining objection, held error, as invading the right of cross-examination. Id. It is proper to allow a party on the stand, testifying in his own behalf, to state where he had lived and what business he had followed, in order that the jury may have a better idea of who the witness is and what weight his opinion merits. Mussellam v. Cincinnati, etc., R. Co. [Ky.] 104 SW 337.

96. Plaintiff called by defendant. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809. Held not error to permit plaintiff, in an action against a corporation, to examine an owner of the corporate stock called by him in such manner as would elicit the facts, though amounting to a cross-examination, as he was in reality a defendant. North American Restaurant & Oyster House v. McElligott, 227 Ill. 317, 81 NE 388. Cross-examination of plaintiff by defendant held proper under Code Civ. Proc. § 3376. Mahoney v. Dixon, 34 Mont. 454, 87 P 452.

97. In an action against a seller for failure to deliver according to the contract of sale, and against the carrier for failure to deliver according to the contract of carriage, being consolidated, it was held that the seller, if called as a witness by the carrier and appearing hostile, could be cross-examined, and if called in his own favor, and the court found that the carrier was affected by his evidence, could permit the carrier to cross-examine him. Sullivan v. Fugazzi, 193 Mass. 518, 79 NE 775.

98. One joint defendant who did not offer evidence on the trial, and at the close of plaintiff's evidence announced its intention to abide by its motion for a peremptory instruction, which had been refused, was properly allowed to cross-examine witnesses introduced by the other defendant, and to argue to the jury facts brought out by the witnesses. Postal Telegraph-Cable Co. v Likes, 225 Ill. 249, 80 NE 136.

99. State v. Hamilton, 74 Kan. 461, 87 P 363; State v. Church, 199 Mo. 605, 98 SW 16.

1. Discretion in allowing not abused. State v. Hamilton, 74 Kan. 461, 87 P 363. Refusal to allow defendant to cross-examine his own witness held no error. State v. Church, 199 Mo. 605, 98 SW 16.

2. Goss Printing Co. v. Scott, 148 F 394.

3. Refusal to permit held proper, the court stating that such cross-examination might be made later when direct examination concluded. Flaacke v. Stratford, 72 N. J. Law, 487, 64 A 146.

4. State v. Clark, 117 La. 920, 42 S 425; Pollok v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 231. Waives constitutional right to silence, and is subject to same latitude of cross-examination as ordinary witness. Harrold v. Territory, 18 Okl. 395, 89 P 202. May be examined, cross-examined, or impeached as any other witness. Clinton v. State [Fla.] 43 S 312. Subject to full cross-examination (State v. Rowell, 75 S. C. 494, 56 SE 23), except that he is not bound to incriminate himself (Id.). Held proper to permit cross-examination of accused, in prosecution for violating prohibitory law, to a previous charge, and plea of guilty, to violation of same law, where instructions given to fully protect his rights. State v. Plomondon [Kan.] 90 P 254. Cannot defeat cross-examination on ground that testimony might tend to incriminate. Ex parte Hedden [Nev.] 90 P 737. When accused takes stand he waives the constitutional protection, as to incriminating evidence, concerning all facts relevant to the issues, and may be fully cross-examined. Pate v. State [Ala.] 43 S 343. Where accused on trial for homicide was asked on cross-examination concerning his criminal intimacy with a certain woman, and if he had not threatened to kill any one who went to see her, held no error, if so not prejudicial. Carr v. State [Ark.] 99 SW 831. Accused, on trial for violating local option law, having testified on direct examination that on the day of arrest he made "more bonds than one in similar cases," held not reversible error to allow state to ask on his cross-examination if he had been arrested in eleven other cases for violations of same law. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 113, 101 SW 224. Defendant, on prosecution for practicing medicine without certificate, on taking stand compelled to respond to inquiry as to what was the ingredient of a so-called nerve food used by him. State v. Hefferman [R. I.] 65 A 284. Could not refuse to answer on ground that the secret as to the composition of the nerve food was his private property. Id.

5. Clinton v. State [Fla.] 43 S 312; Harrold v. Territory, 18 Okl. 395, 89 P 202; State

Limitation to scope of direct examination.[6]—The cross-examination should, in general, be confined to the subject-matter of the examination in chief,[7] but matters pertinent to and growing out of or clearly connected with matters brought on the examination in chief are competent.[8] Where a matter has been partially developed on the examination in chief, it may be gone into fully on the cross-examination,[9] and

v. Rowell, 75 S. C. 494, 56 SE 23. Defendant in prosecution for forgery, taking stand on his own behalf properly asked on cross-examination, as affecting his credibility, if he had previously been convicted, by another name, of false pretenses, and why he used such other name. State v. Clark, 117 La. 920, 42 S 425.

6. See 7 C. L. 1605.

7. Southern R. Co. v. Hobbs [Ala.] 43 S 844; Yordi v. Yordi [Cal. App.] 91 P 348; Day v. State [Fla.] 44 S 715; Harrold v. Territory, 18 Okl. 395, 89 P 202; Jones v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 172, 101 SW 993. Cross-examination must be limited to the material matters testified to in chief. Manuel v. Flynn [Cal. App.] 90 P 463. Held no error to refuse cross-examination as to matter to which direct examination did not relate. Morse v. Odell [Or.] 89 P 139. Under Missouri statute the cross-examination of an accused must be confined to subject-matter of examination in chief. State v. Teasdale, 120 Mo. App. 692, 97 SW 995. Witness not having given an opinion on direct examination, held not error to refuse cross-examination as to a conversation he had in which he expressed an opinion. Ross v. Minneapolis, etc. R. Co. [Minn.] 113 NW 573. Proper to refuse proponent to cross-examine witness of contestant of will who had testified to lack of testamentary capacity of testator induced by spiritualism, on subject of other religions and their effect on testamentary capacity. O'Dell v. Goff [Mich.] 14 Det. Leg. N. 399, 112 NW 736. Where an examination in chief of a character witness was confined to defendant's general reputation, the court may refuse cross-examination concerning his actual character. Green v. Dodge, 79 Vt. 73, 64 A 499. On direct examination witness not having testified to general character of prosecutrix could not be asked on cross-examination if there was not a report in the community derogatory to her character. State v. Whitley, 141 N. C. 823, 53 SE 820. On cross-examination of defendant's employe, who did not prepare answer, and concerning which he was not examined in chief, objections to questions relative to averments therein properly sustained. Multnomah County v. Willamette Towing Co. [Or.] 89 P 389. No objection that answers affect credibility. State v. Brown, 118 Ala. 373, 42 S 969. Cross-examined by accused in homicide case seeking to show self-defense held not within scope of direct. Kirby v. State [Ala.] 44 S 38. Witness who did not on direct examination touch on accident resulting in injury should not be asked the name of party who witnessed it. Chicago City R. Co. v. Strong, 230 Ill. 58, 82 NE 335. Where direct examination was confined to identification of a book and as to the contents of a lost writing, cross-examination as to witness' private business affairs is improper. Citizens' Sav. Loan & Bldg. Ass'n v. Weaver, 127 Ill. App. 252. Where a witness used only two pages of a book to refresh his memory, cross-examination as to the entire book is improper. Bistritz v. Star Fire Ins. Co., 105 NYS 116.

8. Cross-examination held responsive to direct examination. Rector v. Robins [Ark.] 102 SW 209; Wefel v. Stillman [Ala.] 44 S 203. Questions held to be within scope of direct examination. Lanigan v. Neely [Cal. App.] 89 P 441. On cross-examination, it appearing that witness was commonly called "doctor," and that when asked by the conductor of the car on which plaintiff, witness' wife, was injured, his name, witness handed him a handbill containing his name, picture, location of his office, and advertisement of his methods of treatment, held proper inquiry on cross-examination if witness was a licensed practitioner, if he prescribed for his wife (Grant v. Spokane Trac. Co. [Wash.] 91 P 553), and handbills properly admitted in evidence (Id.).

9. Witness having testified generally to situation and conditions surrounding an accident, and to certain acts of decedent, may be cross-examined in detail as to conduct of deceased immediately preceding the accident. Fadley v. Baltimore & O. R. Co. [C. C. A.] 153 F. 514. Party introducing a contract may be cross-examined as to the circumstances of its execution. Ruderman v. Schwartz, 100 NYS 1017. Accused, on trial for selling whisky to Indians, having testified in chief as to whisky, beer, and intoxicating liquors possessed by him at the time of and prior to the offense charged, was properly cross-examined regarding what alcohol he kept about the premises. Bruchman v. U. S. [Ariz.] 89 P 413. A witness having been questioned regarding the directions and instructions of a testator for drawing his will was properly cross-examined in full as to statements by testator regarding his testamentary wishes. Huyck v. Rennie [Cal.] 90 P 929. Plaintiff having admitted receiving certain letters from defendant which were not produced, and that copies shown him were correct, on cross-examination, defendant was entitled to ask him concerning contents of letters. Beard v. Southern R. Co., 143 N. C. 137, 55 SE 505. In an action for damages for personal injuries, witness having been asked on direct examination if he asked plaintiff how he was hurt, or location of injuries, and what, if anything, he said about being hurt in the back, and on what part of his leg he said that he was hurt, held proper on cross-examination to ask if in the same conversation plaintiff told witness how he got hurt and to tell what he said. Missouri, K. & T. R. Co. v. Lindsey [Tex. Civ. App.] 18 Tex. Ct. Rep. 304, 101 SW 863. Where witness on direct examination testified as to the habit and custom of an engineer in making couplings, held proper on cross-examination to ask whether or not engineer was in the

matters connected with the subject-matter of the direct examination, and which tend to explain, contradict, or discredit the testimony in chief, are competent.[10] Where a cross-examination covers matters outside the scope of the direct examination, the examining party makes the witness his own to that extent.[11]

Limitation to issues.[12]—The cross-examination should generally be confined to material issues in the case,[13] but this, also, is a matter resting largely within the discretion of the trial court,[14] and the examination may include collateral matters under some circumstances.[15]

Examination going to credibility of witness.[16]—It is always proper on cross-examination to interrogate a witness, within reasonable bounds, as to any matter of fact calculated to affect his credibility or the weight of his testimony,[17] and the extent of the examination for this purpose is necessarily left largely to the discretion

habit of making couplings with unusual force or violence. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318.

10. Harrold v. Territory, 18 Okl. 395, 89 P 202. An agent of the purchaser of bank stock having testified to his reliance upon the reports of the bank to the comptroller of the currency, held error to exclude answers to questions calling for explanations of agent's testimony bearing upon extent of reliance. Smalley v. McGraw, 148 Mich. 384, 14 Det. Leg. N. 226, 111 NW 1093. Where witness testified that he was present at time crime committed, held proper, on cross-examination, to ask who else was present, and if others were present if they could have seen or did see a knife in the hand of decedent. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Witness having testified to flooding of land by construction of defendant's railroad bridge, and the size and extent of gullies and depressions thereby resulting, on cross-examination, held proper to ask if land was not subject to overflow before building bridge, and the depressions then existing. Matteson v. New York Cent. & H. R. Co. [Pa.] 67 A 847. A state witness on his direct examination having testified to a sale by defendant to him of six bottles of beer, at a certain time and place, held proper to permit him to testify on cross-examination that he purchased the beer from defendant on the day named, between stated hours, and gave two bottles to certain persons, and another bottle to a person he did not know. Seiwert v. State [Tex. Cr. App.] 109 Tex. Ct. Rep. 135, 103 SW 932.

11. Bispham v. Turner [Ark.] 103 SW 1135.

12. See 7 C. L. 1607.

13. State v. Seigenthaler, 121 Mo. App. 510, 97 SW 271. As being irrelevant plaintiff, a broker, suing for commissions for procuring a purchaser of real estate, could not be asked, on cross-examination, if he had a license as a real estate agent. Reeder v. Jones [Del.] 65 A 571. The purpose of witness not on trial, in receiving a bribe, as to which he has testified in an election contest, not being in issue, cannot be brought out on cross-examination. Tinkle v. Wallace, 167 Ind. 382, 79 NE 355. In action for personal injuries by certain machinery, witnesses for both sides having testified as to size of rope at cotton press where injury occurred, held not irrelevant on cross-examination of defendant's witness to ask if specifications sent out by dealers in the machinery called for a special sized rope that size would be necessary. McCarley v. Glenn-Lowry Mfg. Co., 75 S. C. 390, 56 SE 1. Objection to question properly sustained on ground of irrelevancy and materiality. Du Bose v. State [Ala.] 42 S 862. Permitting questions not bearing on any phase of issues and tending to prejudice witness in opinion of jury held error. Wallen v. Wallen [Va.] 57 SE 596. No error in refusal to permit question on cross-examination having no apparent relevancy to issue. Douglass v. State [Fla.] 43 S 424. Error to allow state to show on cross-examination that witness claimed a reward for arresting accused. Smith v. State [Miss.] 43 S 465. Matter held collateral to issue, and objection to question properly sustained. Norfolk & W. R. Co. v. Carr, 106 Va. 508, 56 SE 276.

14. Unless discretion is flagrantly abused, it is not reviewable. Harrold v. Territory, 18 Okl. 395, 89 P 202. Abuse of discretion to permit questions wholly foreign to issues, although the court gave the witness the privilege of not answering. State v. Belknap [Wash.] 87 P 934.

15. May extend to matters not inquired about on examination in chief. Harrold v. Territory, 18 Okl. 395, 89 P 202. Question on cross-examination of defendant held not objectionable as invading rule against state putting character of deceased in issue, where defendant has not put his character in issue. Bays v. State [Tex. Cr. App.] 99 SW 561.

16. See 7 C. L. 1608.

17. Miller v. Oklahoma Ter. [C. C. A.] 149 F. 330; State v. Blackburn [Iowa] 110 NW 275; Mahoney v. Dixon, 34 Mont. 454, 87 P 452. Inquiries having tendency to diminish force of witness' testimony, or impeach his credit, held proper. Crosby v. Wells [N. J. Err. & App.] 67 A 295. Witness may be cross-examined in regard to his conduct having a tendency to discredit his testimony. State v. Caron, 118 La. 349, 42 S 960. Moral character may be impeached on cross-examination if it assists justice. Id. But even to affect credibility it is inadmissible to ask a witness if stolen property had not been found in his possession, and if he had not been forced to pay for the property. Miller v. Oklahoma Ter. [C. C. A.] 149 F 330.

of the trial court.[18] Matters tending to show the interest, bias, or hostility of the witness may be shown,[19] and questions tending to test the fullness and accuracy of a witness' observation, examination, and recollection, or his truthfulness, character, and skill, are proper.[20] Thus, particular facts inconsistent with a general statement

18. It is discretionary with the court to permit inquiry about collateral and irrelevant fact, if it materially aids jury in forming opinion as to credibility of witness. Shotts v. McKinney, 39 Ind. App. 101, 79 NE 219. Action will not be disturbed except for such abuse as works injury to party complaining. State v. Pugh [Kan.] 90 P 242. Discretion not abused. State v. Katon [Wash.] 91 P 250; City of Greenville v. Spencer [S. C.] 57 SE 638. No abuse of discretion in latitude of cross-examination allowed. Horton v. Houston & T. C. R. Co. [Tex. Civ. App.] 18 Tex Ct. Rep. 870, 103 SW 467. The discretion of the trial court must in a large measure determine the extent to which cross-examination upon wholly collateral issues may be permitted for testing a witness' honesty, credibility, or accuracy of recollection. Greer v. Union St. R. Co., 193 Mass. 246, 79 NE 267. As preliminary to evidence affecting witness' credibility, it was discretionary with the court to permit on cross-examination witness to be asked if he was the person who had a lawsuit in the court some time since, in which he swore that he did not execute a note to a person named. Shotts v. McKinney, 39 Ind. App. 101, 79 NE 219.

19. Pendency of suit between witness and party. Gosdin v. Williams [Ala.] 44 S 611. Witness may be asked if he has any feeling toward either party. Blair v. Blair, 125 Ill. App. 341. May be asked if he did not assist in selecting jury. Village of Humboldt v. Watkins, 123 Ill. App. 62. Held proper for defense, for purpose of impairing testimony of prosecution's witness, to show his interest by asking if he had not contributed money to aid prosecution, and his purpose in so doing. Miller v. Oklahoma Ter. [C. C. A.] 149 F 330. Held proper for defense to show that an attorney, offered as a witness for the prosecution, had received a retainer in the case to assist the prosecution, also capacity in which retained. Miller v. Oklahoma Ter. [C. C. A.] 149 F 330. As showing interest and bias, held permissible to ask witness, a doctor, on cross-examination, such questions as would show that he had been habitually called by plaintiff's counsel, and that his fees for professional services were contingent on a recovery of damages. Horton v. Houston & T. C. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 870, 103 SW 467. Allowing state to cross-examine witness for defense as to whether he was not a suitor of accused's daughter held proper. State v. Miles, 199 Mo. 530, 98 SW 25. Held permissible in state on prosecution for homicide to ask witness on cross-examination if he did not tell a certain person, called as a witness, not to say anything about the affair. Heninburg v. State [Ala.] 43 S 959. Great latitude to show bias should be allowed. Atlanta, etc., R. Co. v. McManus, 1 Ga. App. 302, 58 SE 258. Permissible to show prejudice against defendant in a general way, but inquiry in detail refused. State v. Baird, 79 Vt. 257, 65 A 101. Cross-examination permitted to discover motives, feelings, and prejudices. Chicago City R. Co. v. Smith, 226 Ill. 178, 80 NE 716. No error in refusing to allow cross-examination to extend to collateral matters to show motive or prejudice. Id.

20. City of Greenville v. Spencer [S. C.] 57 SE 638. Questions are proper on cross-examination which might affect the fullness and accuracy of the observations and examinations of a physician testifying as to examination of plaintiff at time and place of wreck, in which he received personal injuries. Southern R. Co. v. Lester [C. C. A.] 151 F 573. Witness testifying that he bought of a certain person may be asked if he did not in fact buy of another. Coburn v. State [Ala.] 44 S 58. In an action for injury to a horse in transitu, where the evidence of market value was slight, and was chiefly opinion evidence covering a wide range of values, and the evidence showed a recent sale of the horse for $300, held error to sustain objection to question, on cross-examination, to witness who stated that horse was worth $7,000, as to whether, if the horse was bought for $300, and other horses like him could be bought in the market for the same price, the horse would be worth $7,000. Texas & P. R. Co. v. Newsome [Tex. Civ. App.] 98 SW 646. A stenographer who took down testimony at a former trial, and testified to the testimony in such trial by a deceased witness, held properly cross-examined by being required to read his transcript of the evidence for purpose of testing his memory and veracity. Austin v. Com., 30 Ky. L. R. 295, 98 SW 295. On cross-examination of plaintiff held permissible to show, as a mere test of memory, that he was mistaken in its accuracy, that he was a man of large possessions, and operator in many affairs. Waggoner v. Moore [Tex. Civ. App.] 18 Tex. Ct. Rep. 490, 101 SW 1058. Questions designed to test accuracy and knowledge on subject testified to on direct examination are proper on cross-examination. San Antonio Trac. Co. v. Haines [Tex. Civ. App.] 18 Tex. Ct. Rep. 606, 100 SW 788. Improper to inquire into correctness of witness' opinion in cases about which questioned. Horton v. Houston & T. C. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 870, 103 SW 467. Where witness could not recall the number of cases in which he testified, proper to allow counsel to name a particular one. Id. Where matter merely prejudices jury outside of issue, or beyond object legitimately falling within the reason for cross-examination, question is properly refused. State v. Seigenthaler, 121 Mo. App. 510, 97 SW 271. Question erroneously permitted. Id. For purpose of impairing credibility, witness may be cross-examined concerning his past conduct and character. State v. Pugh [Kan.] 90 P 242. Questions tending to test character or skill of witness permissible. Harrold v. Territory, 18 Okl. 395, 89 P 202.

of the witness may be inquired into.[21] In the case of experts or witnesses who give opinion evidence, a wide range of examination is proper to test the accuracy and value of their opinions.[22] A character witness may be examined as to his knowledge of particular facts concerning the person whose reputation is in issue.[23] Previous statements inconsistent with the testimony on the trial may be shown,[24] provided the statements are not so vague and indefinite as not to have any tendency to contradict the witness,[25] when the proper foundation has been laid.[26] A foundation for the impeachment of a witness may be laid on cross-examination.[27] Ordinarily, a witness

21. Witness having testified on direct examination that he had no money except such as his father gave him, held proper, on cross-examination, as tending to contradict him, to ask if he had not presented a claim for $115 against a certain estate, and if it was not paid. Joyce v. Joyce [Conn.] 67 A 374. Accused, on trial for violating the local option law, having stated on his direct examination that he was merely engaged in running a pool hall and selling tobacco, held proper, on cross-examination, to allow the state to ask if he did not have an internal revenue license. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 113, 101 SW 224. Plaintiff on direct examination having stated that defendant never said anything about paying for a window broken in building leased, held proper on cross-examination to ask concerning an offer made by defendant conditioned on plaintiff's repairing window at once, and as to an inability to bring the top of the door within the case, and to defendant's repairs in that respect. Drouin v. Wilson [Vt.] 67 A 825. Cross-examination held proper, and if not answer was not prejudicial. Borden v. Lynch, 34 Mont. 503, 87 P 609.

22. Expert witness may be cross-examined as to basis of opinion, and as to whether the authorities are not to the contrary. Chicago Union Trac. Co. v. Ertrachter, 228 Ill. 114, 81 NE 816. Permissible to ask physician testifying as expert if he agreed with statements on the subject found in text books, admitted by them to be standards. State v. Blackburn [Iowa] 110 NW 275. In proceedings to condemn right of way for railway, witness having testified for landowner and given opinion concerning injury to the remainder by the building of the road, held competent to ask witness if he knew of any farm which was depreciated in value by reason of a railroad like petitioner going across it, or any farm that sold or would sell for less on that account. Eldorado, etc., R. Co. v. Everett, 225 Ill. 529, 80 NE 281.

23. Where district attorney had stated that he would not attack reputation of defendant, on trial for homicide, for peaceableness, held not error to allow cross-examination as to such reputation. People v. Wright [Cal. App.] 89 P 364. Witnesses having testified that the character of decedent for peace and quietude was bad, held proper to ask on cross-examination as to particular instances showing bad character of which they had personal knowledge. Weaver v. State [Ark.] 102 SW 713.

24. Cross-examination held proper where import of question, if answered in the affirmative, would tend to modify and discredit statements on examination in chief. Sperbeck v. Camden & S. R. Co. [N. J. Law] 64 A 1012. Questions as to occurrence of a conversation containing statements inconsistent with testimony permitted. People v. Tubbs, 147 Mich. 1, 13 Det. Leg. N. 959, 110 NW 132. Cross-examination as to conversations contradictory of testimony held proper. Gurden v. Stevens, 146 Mich. 489, 13 Det. Leg. N. 840, 109 NW 856. The averments of an original declaration, which had been withdrawn, filed by plaintiff's authority, and on information to some extent furnished by him, properly admitted on cross-examination for purpose of impeaching him. Browder v. Southern R. Co. [Va.] 57 SE 572. On cross-examination witness may be asked concerning alleged written statement signed by him without introducing the paper in evidence. State v. Rowell, 75 S. C. 494, 56 SE 23. Witness having testified on direct examination that he was present when the liquor, sold in violation of law, was delivered by accused, his brother, and that accused merely acted as agent for another person, purchasing the liquor, held proper on cross-examination to ask if he had not, prior to trial, stated to prosecuting attorney that accused was not at the place in question on the day he was alleged to have sold the liquor. Hood v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 106, 101 SW 229. On the cross-examination of a physician, a medical certificate signed by him, stating that he had examined insured on a certain day was properly admitted to contradict his former evidence that he had not made an examination at that time. Paquette v. Prudential Ins. Co., 193 Mass. 215, 79 NE 250. Quaere: If on cross-examination it is permissible to show by a witness that he had testified differently on a former occasion, and that his testimony was correct. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 17 Tex. Ct. Rep. 571, 99 SW 152. As bill of exceptions did not show what answer of witness would have been, no prejudice was shown by refusal of lower court to permit witness to answer, and assignment of error overruled. Id.

25. Gleason v. Daly [Mass.] 80 NE 486.

26. Where a witness is cross-examined as to a conversation with certain persons in which his statements were inconsistent with his testimony, the occasion should be fully identified to witness. Gurden v. Stevens, 146 Mich. 489, 13 Det. Leg. N. 840, 109 NW 856.

27. Cincinnati, etc., R. Co. v. Rodes [Ky.] 102 SW 321. Question whether witness for defense had been arrested, tried, and convicted of assault and battery held proper on cross-examination for purpose of im-

cannot be cross-examined as to collateral and irrelevant matter for the purpose of contradicting him,[28] though the matter may be governed by statute,[29] and having answered as to collateral or irrelevant facts, the answer cannot be contradicted,[30] even for the purpose of impeachment;[31] but this rule loes not wholly preclude cross-examination as to collateral matters relevant to the issue for the purpose of contradicting witness,[32] and has no application to testimony introduced by the opposite party.[33] Where facts sought to be shown are such as tend to discredit the witness in the particular case on trial, as distinguished from facts which tend to discredit him generally, the rule forbidding contradiction on collateral matters does not apply.[34] A witness cannot be impeached by incompetent evidence.[35] A defendant in a criminal

peachment. People v. Tubbs, 147 Mich. 1, 13 Det. Leg. N. 959, 110 NW 132. Witness may be asked on cross-examination if he had a conversation with certain persons, and made certain statements, contradictory to his testimony, for the purpose of impeaching him. Gurden v. Stevens, 146 Mich. 489, 13 Det. Leg. N. 840, 109 NW 856. No error in refusing impeaching questions where no foundation had been laid. Whitney v. Cleveland [Idaho] 91 P 176.

28. Loranger v. Carpenter, 148 Mich. 549, 14 Det. Leg. N. 223, 112 NW 125; Moody v. Peivano [Cal. App.] 88 P 380; Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F 241. Cross-examination on collateral matters, not relevant to issues, properly refused. State v. Sweeney [Kan.] 88 P 1078. Questions having no bearing on the issues are not admissible to test witness' credibility, where the evidence which may be thus elicited does not tend to contradict witness' testimony in his direct or previous cross-examination. Greer v. Union St. R. Co., 193 Mass. 246, 79 NE 267. Permission to inject collateral matter into case to afford opportunity to contradict witness held properly refused. Galveston, etc., R. Co. v. Quinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 825, 104 SW 397. Witness cannot be cross-examined as to any fact collateral or irrelevant to the issue merely for purpose of contradiction by other evidence should he deny it, thus discrediting his testimony. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318. In action for deceit refusal to allow defendant to inquire into grounds of separation between plaintiff and her first husband held proper, fact being immaterial. Western Cottage Piano & Organ Co. v. Anderson, [Tex. Civ. App.] 18 Tex. Ct. Rep. 524, 101 SW 1061. So, with attempt to show that plaintiff had testified in another case that she had never borne but one child, while in present case she testified she was the mother of four children. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 18 Tex. Ct. Rep. 524, 101 SW 1061. On cross-examination of defendant, held proper to ask as to number of times he had testified in the case before, if he had not testified in all of the trials, and if at a certain trial he testified the same as in the present trial. Hickey v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 142, 102 SW 417. That no objection is made to an irrelevant statement brought out on cross-examination of defendant does not entitle prosecution to draw it into the issue and contradict it. Dalton v. People, 224 Ill. 333, 79 NE 669. Evidence held material and not purely collateral. Pelkey v. Hodgdon [Me.] 67 A 218. The extent to which a party who becomes a witness in his own behalf may be cross-examined on irrelevant matters to affect his credibility rests largely in the discretion of the trial court. State v. Quirk [Minn.] 112 NW 409. Though extended and severe, held not to exceed discretion. Id.

29. By Code Civ. Proc. § 3144, the trial court is vested with discretionary power to permit inquiry into collateral facts affecting the credibility of a witness. Mahoney v. Dixon, 34 Mont. 454, 87 P 452.

30. Norfolk & W. R. Co. v. Carr, 106 Va. 508, 56 SE 276; Dunham v. Salmon, 130 Wis. 164, 109 NW 959.

31. Dunham v. Salmon, 130 Wis. 164, 109 NW 959.

32. Smith v. Mine & Smelter Supply Co. [Utah] 88 P 683.

33. "The rule that testimony collateral to the issue cannot be contradicted does not apply to testimony introduced by the opposite party, but is confined to testimony introduced by cross-examination of an opponent's witness, or otherwise, by the party which proposes to contradict it." Pelkey v. Hodgdon [Me.] 67 A 218.

34. St. Louis,, etc., R. Co. v. Clements [Ark.] 99 SW 1106. Specific acts may be shown which tend to discredit, though collateral and irrelevant. State v. Pugh [Kan.] 90 P 242. Witness may be cross-examined on matters foreign to the issue when it reasonably tends to affect his credibility. State v. Katon [Wash.] 91 P 250. On cross-examination of plaintiff in libel suit, held proper exercise of discretion to permit question as to how many times she had been a witness before and on denial that she had been a witness a dozen times, to ask questions showing that she was mistaken. Butler v. Gazette Co., 104 NYS 637.

35. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Credibility cannot be impeached by showing witness' association with persons reputed thieves. Miller v. Oklahoma Ter. [C. C. A.] 149 F 330. Whether a witness has been arrested for stealing is immaterial and inadmissible to affect credibility. State v. Stewart [Del.] 67 A 786. The record of conviction being the best evidence, held no error, in refusing permission to prove by witness on cross-examination, as showing his incompetency, that he had been convicted of perjury in another state. James v. U. S. [Ind. T.] 104 SW 607. On prosecution for simple assault accused cannot be cross-examined concerning payment of fines

prosecution testifying in his own behalf may be impeached as any other witness.[36] He may be cross-examined as to a habit, the existence of which would discredit his testimony and render probable the occurrence of the offense with which he is charged.[37]

§ 3. *Redirect examination.*[38]—The redirect examination should be confined to matters related to those brought out on the cross-examination,[39] though the court may in its discretion allow matter proper only in chief.[40] The redirect examination of a witness is within the sound discretion of the trial court.[41] Matters tending to explain statements made on the cross-examination,[42] or tending to qualify or destroy the effect of testimony brought out on the cross-examination,[43] are proper. The court may, in its discretion, prevent a mere repetition,[44] and may allow questions to be put to the witness which would not have been proper on direct examination.[45] The

for fighting prior to charge of assault, as fighting is not an offense involving moral turpitude. Pollok v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 76, 101 SW 231.

36. State v. Rowell, 75 S. C. 494, 56 SE 23. On the cross-examination of a defendant who has taken the stand in his own behalf, held permissible for the state to prove specific facts tending to discredit him, or to impeach his moral character. People v. Gluck, 117 App. Div. 432, 102 NYS 758. Defendant having testified that he did not kill deceased or employ any one to kill him, held proper on cross-examination to ask where he was at the hour of night the homicide was committed. People v. Soeder, 150 Cal. 12, 87 P 1016. Held permissible for purpose of impeaching credibility to ask defendant, testifying in his own behalf, on cross-examination if he had not been prosecuted for other offenses. State v. Clark, 117 La. 920, 42 S 425. Held proper, on cross-examination of accused in prosecution for robbery, for state to prove, as affecting credit of witness, that he had murdered his wife. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 211, 102 SW 1134.

37. Defendant, charged with use of profane language, which he denied, properly asked on cross-examination if he did not habitually use profane language. Nicholson v. State [Ala.] 43 S 365.

38. See 7 C. L. 1610.

39. Witness having testified on cross-examination concerning a book formula, it was held error to permit counsel to read from the book an extended extract and ask witness on redirect examination if he did not find it there. Ball v. Skinner [Iowa] 111 NW 1022. May adopt and enforce rule restricting redirect to new matter brought out on cross-examination. Commonwealth v. Campbell, 31 Pa. Super. Ct. 9. Where witness on cross-examination denied making certain statements during a cross-examination, it is error to permit him on redirect examination to state the conversation. Chicago City R. Co. v. Gregory, 123 Ill. App. 259.

40. McGuire v. Neils Lumber Co., 97 Minn. 293, 107 NW 130.

41. No such abuse of discretion as to be reversible error. Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 81 NE 1038.

42. On redirect examination witness was properly allowed to explain and reconcile letter introduced as tending to contradict his testimony on cross-examination. Hale Bros. v. Milliken [Cal. App.] 90 P 365. Where plaintiff on cross-examination was asked if she had told defendant that property claimed was hers, to which she replied she had not, held proper on redirect examination to permit her to explain why she was silent. Yordi v. Yordi [Cal. App.] 91 P 348. Held that defendant had legal right to state on redirect examination that in giving a mortgage, the execution of which she admitted on cross-examination, she had no motive or design to hinder the collection of plaintiff's claim. Pelkey v. Hodgdon [Me.] 67 A 218. Where witness on cross-examination states that his feeling of hostility toward a party is justified, he may be called upon to explain what induced it. Blair v. Blair, 125 Ill. App. 341. It being shown on cross-examination that insured executed mortgage on premises shortly before fire occurred, held proper to permit him on redirect examination to explain that the mortgage was intended to cover another building on the same lot and not the insured building. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94. On cross-examination, plaintiff having testified that he received certain money and for what, held not prejudicial to permit him to tell how much money he received. Southern R. Co. v. Gentry [Ga.] 57 SE 703. Where on cross-examination a portion of witness' testimony at inquest was introduced to contradict him, held proper to allow remainder of testimony to be offered on the redirect examination to explain the part already in evidence. Corpus v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 225, 102 SW 1152.

43. Where a witness' testimony on cross-examination materially differs from that given on the direct examination, material testimony given on the direct examination may be read to him on the redirect examination and witness examined upon it. People v. Tubbs, 147 Mich. 1, 13 Det. Leg. N. 959, 110 NW 132. Permitted, by reading two of witness' former answers, which he admitted to be true, it also appearing from witness testimony that he had been subpoenaed by adverse party. Id.

44. Discretion not abused in refusing to allow question asked and answered on direct examination to be repeated on redirect examination. Lauchheimer v. Jacobs, 126 Ga. 261, 55 SE 55.

45. Matters of explanation not admissible on direct examination may properly be admitted on redirect examination. Wheeler v. State [Neb.] 113 NW 253.

direct examination of one's own witness as to testimony on a former trial should be confined to refreshing his memory.[46] It is not permissible after examination in chief and cross-examination of the witness, and motion to strike out the evidence, to amplify by redirect examination the testimony given on the direct examination.[47] The object of the cross-examination being to show the feeling of witness toward the accused, it is not competent on the redirect examination to go into details concerning the relation between the parties.[48] Where the course of the cross-examination renders admissible testimony inadmissible on the examination in chief, such testimony may be admitted on the redirect examination under proper restrictions.[49]

§ 4. *Recalling witness for further examination.*[50]—This also is a matter resting in the sound discretion of the trial court.[51] A witness may be recalled to lay foundation for impeachment.[52] A witness for the adverse party may be recalled after cross-examination for further examination without the consent of the latter.[53]

Exceptions and Objections; Exceptions, Bill of, see latest topical index.

EXCHANGE OF PROPERTY.[54]

The general contract rules governing the exchange of property are elsewhere treated.[55]

An "exchange," as distinguished from a "sale," is the giving of property in consideration of the receipt of other specific property instead of money.[56] A contract for the exchange of real estate of a married woman executed by her husband without authority is unilateral in California.[57] In the exchange of corporate stock there is no implied warranty that the corporation issuing the same is de jure.[58] A stipulation making time the essence of the contract may be waived,[59] and where no

46. Crotty v. Danbury, 79 Conn. 379, 65 A 147.

47. On cross-examination it appeared that a character witness based the whole of his testimony in his direct examination upon his personal relations and private dealings with the party about whom he was testifying, and, after motion to strike out his testimony, refusal to permit witness to be further examined to amply testify on direct examination held no error. State v. Stewart [Del.] 67 A 786.

48. Held not prejudicial where witness had indicated extreme hostility, and the redirect examination added nothing to the objection already expressed. State v. Judd, 132 Iowa, 296, 109 NW 892.

49. Where on cross-examination it became necessary for a prosecuting witness on his cross-examination to give evidence of the character of accused by way of explanation of his own conduct at the time of the commission of the offense charged, held proper, on redirect examination, to allow him, under proper restriction, to give such evidence. Craig v. State [Neb.] 111 NW 143.

50. See 7 C. L. 1612. As to admission of evidence out of order, see Trial, 8 C. L. 2161.

51. United Brew. Co v. O'Donnell, 124 Ill. App. 24. In discretion of trial court to refuse to recall witness for further cross-examination, and its ruling is not reviewable in absence of abuse. Hirsch & Sons Iron & Rail Co. v. Coleman, 227 Ill. 149, 81 NE 21. Held discretionary with court to permit state to examine a witness after close of defendant's evidence, though not in rebuttal, and more properly brought out before state rested. Nicholson v. State [Ala.] 42 S 1015. Cross-examination as to previous conflicting statements. Sperbeck v. Camden & S. R. Co. [N. J. Law] 64 A 1012.

52. Pitman v. State [Ala.] 42 S 993; Rhomberg v. Avenarius [Iowa] 112 NW 548.

53. Percival v. Jack [Cal. App.] 90 P. 555.

54. See 7 C. L. 1612.

55. See Contracts, 9 C. L. 654; Fraud and Undue Influence, 7 C. L. 1813; Sales, 8 C. L. 1751; Vendors and Purchasers, 8 C. L. 2216; Specific Performance, 8 C. L. 1946.

56. Freeman v. Trummer [Or.] 91 P. 1077. In determining whether transaction is sale or exchange, court must ascertain whether there is a fixed price at which properties were to be exchanged or whether such prices were mere estimates incidental to the exchange. Fagan v. Hook [Iowa] 111 NW 981. Contract whereby owner of land "sold" his land at $16 per acre and agreed "to accept as part payment" other land, held under code to be an exchange of property and not a sale, where actual money to be paid was insignificant. Steere v Gingery [S. D.] 110 NW 774.

57. Unenforceable by either party in absence of tender of conveyance by her. Shanks v. Michael [Cal. App.] 88 P 596.

58. Marshall v. Keach, 227 Ill. 35, 81 NE 29.

59. Held waived by failure to insist thereon. Marshall v. Keach, 227 Ill. 35, 81 NE 29.

time for performance is stated, each party has a reasonable time.[60] Where co-owners agree to exchange property with a third person, the latter cannot justify nonperformance on grounds concerning co-owners alone.[61] In the case of fraud,[62] or nonperformance,[63] the usual contractual rights and remedies obtain.[64] Where property is exchanged subject to trial and plaintiff, after discovering a deficiency, continues to use the property, he thereby elects to stand on the contract.[65] Where a contract for the exchange of realty calls for a marketable title,[66] or for an abstract showing such,[67] they must be furnished. Before one can recover liquidated damages, he must show performance on his part.[68] Where a contract is rescinded, the agreed value therein of the property does not fix the damages for nonreturn of the property delivered.[69] A vendor's lien does not exist in the exchange of property.[70] Where a contract provided that plaintiff's goods should be invoiced at St. Louis cost prices, plaintiff must furnish reasonably satisfactory evidence of such prices.[71]

EXCHANGES AND BOARDS OF TRADE.

Membership, rights, and dealings.[72]—An exchange or board of trade is genally a mere voluntary association with the right of selecting its members,[73] and hence its consent is usually made a condition precedent to a transfer of membership.[74] On joining one becomes subject to the constitution and by-laws of such organization.[75]

60. Payment of current taxes. Warren v. Mount [Pa.] 67 A 742.

61. As that one co-owner discharged liens with money obtained from different source than that agreed upon with co-owner. McKennan v. Mickelberry, 228 Ill. 460, 81 NE 1012. Where contract provided that such third should convey his property to trustee for use of one co-owner "as provided in a certain contract" between co-owners "of even date," it was no defense that latter contract was oral. Id.

62. Fact that agent of one party divided commissions with other party held under facts not to show a conspiracy to obtain from principal more than property was worth. MacKeller v. Thompson, 103 NYS 853. Where property was to be exchanged free from liens, except one assumed, party cannot relieve himself from his obligations by a collusive trust deed placed thereon by one of the co-owners. McKennan v. Mickelberry, 228 Ill. 460, 81 NE 1072.

63. Where defendant has fully performed his part of contract except payment of less than $7 of accrued but not due interest, plaintiff cannot rescind contract without demand for payment of interest (McConnell v. Newell, 133 Iowa, 736, 111 NW 17), nor can he recover damages for non-payment in absence of appropriate pleadings (Id.).

64. See Fraud and Undue Influence, 7 C. L. 1813; Contracts, 9 C. L. 654, etc.

65. Cannot thereafter rescind and replevin his property. Fox v. Wilkinson [Wis.] 113 NW 669.

66. Held marketable though perfected by adverse possession, if statutory elements be clear. Freedman v. Oppenheim [N. Y.] 79 NE 841. As to what constitutes such title, see Vendors and Purchasers, 8 C. L. 2216.

67. Where contract required an abstract showing good title except as to an assumed lien, fact that abstract showed certain other liens does not relieve other party from performance where such liens are discharged before time for delivery of title papers, and abstract was not corrected because other party had fraudulently obtained possession thereof. McKennan v. Mickelberry, 228 Ill. 460, 81 NE 1072.

68. Where contract provides "Both parties to give warranty deeds and abstract showing title," party can not recover stipulated damages where action to quiet title necessary to perfect record title was based on insufficient publication of service. Denser v. Gunn, 74 Kan. 748, 87 P 1132.

69. Fagan v. Hook [Iowa] 111 NW 981.

70. Vendor taking land in exchange for his land waives his vendor's lien. Ross v. Clark, 225 Ill. 326, 80 NE 275. Vendor has no lien for damages resulting from misrepresentations as to amount of rent that can be received from apartment houses received in exchange. Id.

71. Defendant held not bound to accept judgment of experts, or himself furnish better method. Inlow v. Bybee, 122 Mo. App. 475, 99 SW 785. Whether plaintiff furnished such evidence held for jury. Id.

72. See 7 C. L. 1613.

73. Chicago Board of Trade so held although incorporated and deriving income from rent of offices. People v. Board of Trade, 224 Ill. 370, 79 NE 611.

74. Hence, where assignor becomes bankrupt after assignment but before exchange has acted thereon, membership passes to trustee as asset, though it may be subject to equities in assignee, and controversy to determine right thereto or to proceeds is within exclusive jurisdiction of bankruptcy court. O'Dell v. Boyden [C. C. A.] 150 F 731. When board of trade has not consented to sale of membership, it has jurisdiction to try member for violation of its rules. Bostedo v. Board of Trade, 227 Ill. 90, 81 NE 42.

75. Courts will not interfere with action

Such bodies may adopt reasonable[76] rules and regulations for the conduct of their affairs,[77] provided they are not in conflict with positive law.[78] Likewise, they may provide for the expulsion of members, and courts will not interfere so long as they act in conformity with their by-laws.[79] While members must generally seek relief within the corporation before applying to the courts,[80] such rule does not obtain where rights are being forfeited by irregular procedure,[81] or where it appears that an appeal to the association would be futile.[82]

Property and contract rights of board.[83]—Until they are published generally,[84] market quotations are property of the exchange,[85] and one unlawfully obtaining and using the same[86] will be restrained.[87] The value of quotations wrongfully obtained is the value of the right to the exchange to control its quotations and not the rate paid by defendant to the telegraph company from which he received them.[88] Where an exchange collected a balance due from its members to a bankrupt member and distributed the same among creditor members with the consent of the bankrupt, and the trustee made no claim thereto until after distribution, the exchange is not liable.[89]

Actions and litigation.[90]—In an action by an exchange to restrain the similation of its quotations, the general rules prohibiting pleading of immaterial[91] and evidentiary matters[92] apply.

of exchange when in conformity with its constitution and by-laws, however injurious to member. Quentell v. New York Cotton Exch., 56 Misc. 150, 106 NYS 228.

76. By-law providing for exclusion of member from rooms upon failure to pay assessments within thirty days from time when due and ipso facto forfeiture of membership, if not paid during fiscal year, held not unreasonable, immoral, or contrary to public policy or law. People v. Board of Trade, 224 Ill. 370, 79 NE 611. Rule providing that directors shall fix value of commodities for marginal purposes, and where parties fail to a just claim under contract on which margins have been deposited, party claiming deposit may apply to board, who shall direct payment, etc., held valid. Albers Commission Co. v. Spencer [Mo.] 103 SW 523.

77. By-laws of Chicago Board of Trade held to require suspended members to pay dues. People v. Board of Trade, 224 Ill. 370, 79 NE 611, afg. 125 Ill. App. 20.

78. Cohen v. Budd, 52 Misc. 217, 103 NYS 45. Rule providing that money due to defaulting member from other members may be collected and applied to obligations of such defaulting member to members is invalid as in violation of bankruptcy law. Id.

79. People v. Board of Trade of Chicago, 125 Ill. App. 20. Where charges have been preferred against a member, equity will not enjoin the board of directors from trying him in compliance with by-laws complying with charter (Bostedo v. Board of Trade, 227 Ill. 90, 81 NE 42), though such party may lose valuable rights (Id.). Where by-laws require that, upon proceedings against a member, copy of complaint, documentary evidence, and list of adverse witnesses shall be served upon him, proceedings not in conformity therewith may be restrained. Quentell v. New York Cotton Exch., 56 Misc. 150, 106 NYS 228. Facts held to show that proceeding was something more than voluntary preliminary examination, and hence regular procedure must be followed. Id.

80. One objecting to payment of marginal deposits on ground that member had unlawfully cornered wheat cannot invoke equity without first applying to exchange for relief as provided by rules. Albers Commission Co. v. Spencer [Mo.] 103 SW 523.

81, 82. Quentell v. New York Cotton Exch., 56 Misc. 150, 106 NYS 228.

83. See 7 C. L. 1613.

84. Limited or restricted publication is one which communicates quotations to a select few for restricted use (Chamber of Commerce of Minneapolis v. Wells, 100 Minn. 205, 111 NW 157), and does not destroy property right (Id.). Publication not restricted both as to persons and use is general. Id. Recording of quotations on blackboard in office for use of members and like recording in private offices of members for private use held not unrestricted publication. Id.

85. Chamber of Commerce of Minneapolis v. Wells, 100 Minn. 205, 111 NW 157.

86. Findings of trial court held to show that defendant surreptitiously and fraudulently obtained quotations. Chamber of Commerce of Minneapolis v. Wells, 100 Minn. 205, 111 NW 157.

87. Chamber of Commerce of Minneapolis v. Wells, 100 Minn. 205, 111 NW 157.

88. So held in determining whether jurisdictional amount was involved. Hunt v. New York Cotton Exch., 205 U. S. 322, 51 Law. Ed. 821.

89. Held a mere conduit and trustee must proceed against member receiving same. Cohen v. Budd, 52 Misc. 217, 103 NYS 45.

90. See 7 C. L. 1614.

91. Held material: Allegations reciting object of complainant's incorporation (Board of Trade of Chicago v. National Board of Trade, 154 F 248), and its powers (Id.), and the manner of operating the exchange

EXECUTIONS.

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§ 16. Restitution on Reversal of Judgment (1339).

The scope of this topic is noted below.[93]

§ 1. *Definition.*[94]—An execution is a writ proceeding from and directed to a competent authority, by which the former requires the latter to do some act.[95]

§ 2. *Right to have execution.*[96]—Execution cannot issue upon an erroneous [97] or an invalid judgment,[98] hence its issuance on such judgment cannot be compelled by mandamus,[99] but, on the contrary, will be restrained in the absence of a remedy

and distributing quotations (Id.). That its sales are made only during market hours. Id. Characterizing complainant's property right in its quotations furnished to telegraph companies and how it will be destroyed by defendant's action. Id. Reciting circumstance which induced complainant to refuse to allow quotations to be given to telegraph companies except under contract restraining distribution thereof. Id. That defendants have not delivered to telegraph companies any contract entitling them to receive quotations. Id. That, to carry out illegal purpose of simulating complainant's quotations, certain defendants organized a board of trade (Id.), and that offerings through such exchange were not bona fide, that their alleged contracts were not real and did not contemplate delivery at Chicago (Id.).

Not material: Allegations that, in order to overcome legal obstacles and to simulate complainant's quotations, defendants, by petition, assert that transactions in defendant's exchange is for future delivery in Chicago. Board of Trade of Chicago v. National Board of Trade, 154 F 238. That no person or corporation was receiving quotations from telegraph companies except those who had contracted not to give quotations to bucket shops. Id. Showing willingness of complainant to make like contracts with all telegraph companies. Id. Showing relation of complainants with telegraph companies with which defendants have no relation. Id. Number of complainant's members, cost of its buildings, and the maintenance thereof, and how the money is raised. Id. As to purpose and object of defendant exchange, what it did and what it represented in reference to simulation of complainant's quotations. Id. In suit by Chicago exchange to restrain simulation of its quotations by persons in Kansas City and vicinity, allegations that there were no business conditions justifying trading in grain in Kansas City for delivery in Chicago or dissemination of quotations in such transactions. Id.

92. In suit to restrain simulation of quotations, allegation of successful suit to enjoin certain bucketshops from surreptitiously obtaining quotations, and that some of defendants were parties thereto, held mere evidence at most. Board of Trade of Chicago v. National Board of Trade, 154 F 238.

93. It includes only the ordinary writ of execution on a money judgment. **It excludes** writs in execution of judgments not for money (See such topics as Forcible Entry and Unlawful Detainer, 7 C. L. 1671; Ejectment, 9 C. L. 1026; Quo Warranto, 8 C. L. 1582; Replevin, 8 C. L. 1732, and the like), procedure to aid execution (See Civil Arrest, 9 C. L. 270; Creditors' Suit, 9 C. L. 849; Supplementary Proceedings, 8 C. L. 2046), exemption from execution (See Exemptions, 9 C. L. 1339), and procedure for collection of judgments against public corporations (See Counties, 9 C. L. 872; Municipal Corporations, 8 C. L. 1056), and against representatives and fiduciaries (See Estates of Decedents, 9 C. L. 1154; Guardianship, 7 C. L. 1899; Receivers, 8 C. L. 1679; Trusts, 8 C. L. 2169).

94. See 7 C. L. 1615.

95. Collins v. Hines [Tex.] 17 Tex. Ct. Rep. 487, 99 SW 400.

96. See 7 C. L. 1615.

97. Breck v. Coffield [Tex. Civ. App.] 14 Tex. Ct. Rep. 823, 91 SW 594.

98. Hudson v. Wright, 204 Mo. 412, 103 SW 8; Meeks v. Black [Ark.] 104 SW 147.

99. State v. Thompson [Tenn.] 102 SW 349.

at law.[1] Neither can it issue if the judgment is dormant,[2] or has been set aside,[3] or marked satisfied,[4] and a sale under execution on an amended judgment is invalid.[5] But the writ may issue from the circuit court on a transcript judgment and the constable's return of "no property found" on the justice's execution,[6] and an alias may issue without the judgment so providing.[7] It may issue at any time after entry of judgment,[8] and transferees may enforce it,[9] payment of the debt by such transferees being inferred from a recital that such transfer was for value.[10] If plaintiff dies after assignment of the judgment, execution should issue in the name of his personal representative.[11]

§ 3. *Stay and how procured.*[12]—Execution will be stayed while case is pending on certiorari,[13] but the fact that the judgment was not authorized by the verdict is no ground for a stay,[14] nor will the Federal courts stay execution against a judgment defendant who owns no real estate,[15] nor will the writ in one action be stayed by order in another.[16] The validity of a stay bond is not affected by clerical errors.[17]

§ 4. *Procedure to procure issuance of writ.*[18]—Under California statute, notice of the application for execution is not required.[19]

§ 5. *Power to allow or issue and to recall writ.*[20]—The probate courts have no power to issue executions against realty,[21] nor, in the absence of statutory authority, can the superior court clerk issue it on a judgment rendered by a city court, subsequently abolished,[22] but the circuit clerk may on a judgment of affirmance in the appellate court,[23] and he may do so in vacation.[24] In California the power to allow execution on a dormant judgment is discretionary [25] and, in that state, on motion and a proper case made, the court may recall the execution.[26]

§ 6. *Form and contents of writ.*[27]—Though as a rule the execution must conform to the judgment,[28] yet, if it is practically in the form prescribed by statute, it

1. Brown v. Gorman [Ind. T.] 104 SW 1165.

2. Bick v. Boyd [Mo. App.] 100 SW 1128. Entry by sheriff on execution docket will not prevent dormancy, he not being proper officer to make entry. Dunlap Hardware Co. v. Tharp [Ga. App.] 58 SE 398. Discretionary to allow in California. Doehla v. Phillips [Cal.] 91 P 330.

3. State v. Thompson [Tenn.] 102 SW 349.

4. Plaintiff had judgment against defendant and receipted to him in full. Subsequently execution issued for unpaid costs. Erroneous. Pilcher v. Hickman [Ala.] 41 S 741.

5. Judgment entered against purchaser for purchase money, and at subsequent term amended so as to include sureties on purchase-money bond, no suit having been brought for breach of bond. Giddens v. Alexander, 127 Ga. 734, 56 SE 1014.

6. Bick v. Paris [Mo. App.] 101 SW 716.

7. Weddington v. Carver [Tex. Civ. App.] 18 Tex. Ct. Rep. 79, 100 SW 786.

8. Code Civ. Proc. § 685, amended by St. 1895, p. 38, c. 33. Doehla v. Phillips [Cal.] 91 P 330.

9. Execution against several, jointly bound, and payment made by some who obtained transfer of fi. fa. for value. Enforcement against codefendants. Miller v. Perkerson [Ga.] 57 SE 787.

10. Miller v. Perkerson [Ga.] 57 SE 787.

11. Adams v. Connelly, 118 Ill. App. 441.

12. See 7 C. L. 1616. Stay pending appeal, see Appeal and Review, 9 C. L. 140.

13. Boston & M. R. Co. v. Gorkey, 150 F 686.

14. Warren v. Chicago B. & Q. R. Co., 122 Mo. App. 254, 99 SW 16.

15. In Pennsylvania judgments are liens on real, but not personal, property. Defendant owned no realty. Offered bail for stay of execution levied on personalty. Stay refused. The Island Queen, 152 F 470.

16. Gilroy v. Everson Hickok Co., 105 NYS 188.

17. Execution for $1,000, penal sum $200, "being double the amount named in writ." Austin v. Union Pav. & Cont. Co. [Cal. App.] 88 P 731.

18. See 7 C. L. 1617.

19. Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33. Doehla v. Phillips [Cal.] 91 P 330.

20. See 7 C. L. 1617.

21. Robertson v. Eldridge, 15 Okl. 599, 87 P 659.

22. Martin v. Craven, 126 Ga. 780, 55 SE 962.

23. Howard v. Deens [Ala.] 44 S 550.

24. Transcript judgment from justice's court on return of nulla bona. Scharff v. McGaugh [Mo.] 103 SW 550.

25, 26. Doehla v. Phillips [Cal.] 91 P 330.

27. See 7 C. L. 1617.

28. Judgment for "taxes," execution for "state, county, and special taxes." Rankin v. Porter Real Estate Co., 199 Mo. 345, 97 SW 877.

is sufficient;[29] hence omission of the name of plaintiff will not render it void if otherwise complete,[30] and it is also sufficient if the description of parties conform in that respect with the caption of the judgment.[31] To identify the parties named in the writ, the complaint may be consulted.[32] The execution is not invalidated by the failure to itemize the bill of costs,[33] nor by a variance as to amount.[34] It may be amended so as to limit the lien of the judgment to the date of recording notice,[35] but the deputy has no power, under a general oral authority, to sign the clerk's name thereto.[36]

§ 7. *Quashal of writ.*[37]—The court may quash its own void execution,[38] but a mis-statement of facts by the appellate court, in affirming a judgment, is no ground for doing so.[39]

§ 8. *The levy. A. Leviable property and order of leviability.*[40]—Generally any title which may be asserted by claim is subject to execution,[41] hence a legal title[42] or a vested remainder may be levied on.[43] In Colorado both legal and equitable estates in land are leviable,[44] and in Missouri any interest a debtor has therein may be sold under such writ to satisfy a judgment rendered in the same county;[45] but in other jurisdictions a leasehold interest is not subject to sale thereunder,[46] nor is a determinable estate,[47] nor a growing crop,[48] nor property acquired by a bankrupt subsequent to docketing judgment.[49] Money is leviable though in the hands of a public ministerial officer,[50] but not a mere indebtedness,[51] nor choses in action unless made so by statute or voluntarily given up.[52] An income payable under a trust cannot be taken in execution,[53] nor can property conveyed by trust deed, in effect a mortgage, until the execution creditor pays or tenders the amount secured thereby.[54]

(§ 8) *B. Mode of making levy.*[55]—In levying on an undivided interest, possession by the officer is not necessary, but notice to the party in control is sufficient.[56]

29. Writ headed, "County of St. Louis—sct," reciting that plaintiff's decedent K., on date named, recovered judgment against defendant W., in "our circuit court," for $2,000 debt, damages, interest, and costs, signed by clerk, with seal and date, sufficiently identified judgment. Overton v. White [Mo. App.] 103 SW 512.

30. Body of writ reciting judgment except name of plaintiff, but endorsement shows names of parties, held good. Collins v. Hines [Tex.] 17 Tex. Ct. Rep. 487, 99 SW 100; Id. [Tex. Civ. App.] 18 Tex. Ct. Rep. 37, 100 SW 359.

31, 32. Simmons v. Sharpe [Ala.] 42 S 441.

33. Item, "orders of court, thirty cents." Word "orders" plural, but, when considered in connection with statute allowing that sum for entering any order of court, obviously should be read "order." Simmons v. Sharpe [Ala.] 42 S 441.

34. Judgment for $995.70, with interest on the whole from March 10, 1905. Writ required interest from this date on interest accrued at that time. Doehla v. Phillips [Cal.] 91 P 330.

35. Judgment in Kings county, 1891, transcript docketed in Oswego county, 1893, where defendant owned property. In 1896, notice filed. Execution issued against all interest of defendant owned in 1891, and erroneous for stating transcript filed on latter date. Amendment. Burch v. Burch, 51 Misc. 232, 100 NYS 814.

36. Biggers v. Winkles, 124 Ga. 990, 53 SE 397.

37. See 7 C. L. 1618.

38. Bick v. Carter, 123 Mo. App. 311, 100 SW 531.

39. Overton v. White [Mo. App.] 103 SW 512.

40. See 7 C. L. 1618.

41. Ward v. Kennesaw Fertilizer Co., 127 Ga. 106, 56 SE 123.

42. Bridger v. Exchange Bk., 126 Ga. 821, 56 SE 97.

43. Jonas v. Weires [Iowa] 111 NW 453.

44. Reed v. Munn [C. C. A.] 148 F 737.

45. Rev. St. 1879, §§ 2354, 2730, 2731, 2767. Williams v. Lobban [Mo.] 104 SW 58.

46. Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 F 217.

47. Estate devised so long as devisee remains on land. Harber v. Nash [Ga.] 55 SE 928.

48. Civ Code, § 5425. Hixon v. Callaway [Ga. App.] 58 SE 1120.

49. Graves Elevator Co. v. Seitz, 54 Misc. 552, 104 NYS 852.

50. Money in the hands of sheriff as proceeds of execution sale is subject to execution. Commerce Vault Co. v. Barrett, 123 Ill. App. 398.

51. Money on deposit in bank is not subject to execution. National Bk. of the Republic v. Young, 125 Ill. App. 139.

52. International Coal Min. Co. v. Pennsylvania R. Co., 152 F 554.

53. Ringe v. Mortimer, 116 App. Div. 722, 101 NYS 1110.

54. Rev. Civ. Code, § 2099. Joas v. Jordan [S. D.] 113 NW 73.

55. See 7 C. L. 1619.

56. Community property owned by husband and wife, execution against wife's in-

(§ 8) *C. Duty to make levy.*[57]

(§ 8) *D. Extent and adequacy of levy.*[58]—A valid levy cannot be made on land not described in the execution,[59] nor will a levy on specifically mentioned personalty and "all other goods and chattels belonging to" debtor include a leasehold interest.[60] Where land can only be levied on in its entirety, though of considerably more value than the amount of execution, the levy will not be considered excessive.[61] If, however, it is alleged to be so, the burden is on the party so alleging;[62] but this question, and whether the property is capable of subdivision, the jury must decide.[63]

(§ 8) *E. Conflicting levies and liens; priorities.*[64]—The execution first levied[65] or which first goes into the officer's hands will take priority,[66] but the filing of a bill to subject lands fraudulently conveyed gives the complainant priority over a prior levy.[67] In some jurisdictions a landlord's special lien is superior to judgments,[68] and a judgment lien on growing crops, when properly docketed, is superior to all subsequent liens except those given priority by statute.[69] A mortgagee, having notice of proceedings to issue execution, takes subject thereto,[70] and when a purchaser, with notice, satisfies the mortgage, its priority is destroyed,[71] but priority cannot be affected by the order of sale.[72] Failure of execution plaintiff to furnish indemnity bond to sheriff on demand postpones his levy to one junior in time.[73]

(§ 8) *F. Relinquishment and dissolution of levy.*[74]

(§ 8) *G. Release of property on receipts or forthcoming or delivery bonds.*[75] A defendant giving a forthcoming bond retains the property as the agent of the sheriff.[76] The obligors on such bond are liable on its breach, though such instrument is not good as a statutory bond,[77] and they are estopped to deny its validity.[78] Such obligors are also liable when the claim to the property is shown to be fraudulent,[79] and the fact that the assignee for the creditors failed to attack the fraudulent conveyance will not affect their right to recover,[80] nor is this right affected by the debtor's discharge in bankruptcy.[81] A refusal to deliver constitutes a breach of the bond[82] for which the officer to whom it was given is the proper party to sue,[83] but the execution need not be made a part of the petition,[84] nor is the liability of the property to levy an issue in the action.[85] The measure of damages is fixed by statute.[86]

terest, husband in possession. Hubert v. Hubert [Tex. Civ. App.] 18 Tex. Ct. Rep. 577, 102 SW 948.

57. See 5 C. L. 1401.

58. See 7 C. L. 1619.

59. If the execution directs the seizure of one acre, a tract of twenty acres cannot be seized thereunder. People's Independent Rice Mill Co. v. Benoit, 117 La. 999, 42 S 480.

60. Olden v. Sassman [N. J. Eq.] 66 A 603.

61, 62, 63. Bridger v. Exchange Bk., 126 Ga. 821, 56 SE 97.

64. See 7 C. L. 1620.

65. Olden v. Sassman [N. J. Eq.] 66 A 603.

66. An execution on a junior will take priority over one on a senior judgment if first in the officer's hands. Sitley v. Morris [N. J. Eq.] 67 A 789.

67. M. had execution and sale of property wherein debtor had only equitable interest. Subsequently S. recovered judgment at law, and filed bill to subject debtor's interest, pending which M. filed suit of like nature, decree, execution, and levy. S.'s bill established his lien. Sitley v. Morris [N. J. Eq.] 67 A 789.

68. Civil Code 1895, §§ 2795, 2800. Cochran v. Waits, Johnson & Co., 127 Ga. 93, 56 SE 241.

69. Civ. Code 1895, § 2779; Act Dec. 21, 1899 (Laws Ga. 1899, p. 78). Hixon v. Callaway [Ga.] 58 SE 1120.

70. Lyons Nat. Bk. v. Schuler, 115 App. Div. 859, 101 NYS 62.

71. Independent purchaser with notice of encumbrances, two judgments, and three mortgages, discharges one mortgage. Execution issued on judgments subject to mortgages unsatisfied. Purchaser refused injunction. Kuhn v. National Bk. of Holton, 74 Kan. 456, 87 P 551.

72. Several executions against debtor in hands of sheriff. Senior liens not affected by sale under junior. Woods v. Kellerman, 3 Cal. App. 422, 89 P 358.

73. Baker v. Duddleson, 125 Ill. App. 483.

74, 75. See 7 C. L. 1621.

76. Hatton v. Brown, 1 Ga. App. 747, 57 SE 1044.

77. Mount v. Wall, 127 Ga. 211, 56 SE 298.

78. Hatton v. Brown, 1 Ga. App. 747, 57 SE 1044.

79, 80, 81. Bishop v. Hibben Dry Goods Co., 30 Ky. L. R. 725, 99 SW 644.

82, 83, 84. Hatton v. Brown, 1 Ga. App. 747, 57 SE 1044.

85. O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 SE 739.

86. Civ. Code 1895, § 5438. Hatton v. Brown, 1 Ga. App. 747, 57 SE 1044.

(§ 8) *II. Liability of officer for loss of property levied upon.*[87]

(§ 8) *I. Rights as to custody of property levied on and incidental to taking possession.*[88]—The sheriff, by levy, acquires a special or qualified title, but the debtor's title is not wholly divested.[89]

(§ 8) *J. Effect of death of debtor.*[90]—Execution against a dead defendant is void, there being no other defendant in the case,[91] but where a codefendant dies insolvent, execution against the survivor is not prejudicial.[92]

(§ 8) *K. Liability for wrongful levy.*[93]—A wrongful levy is a trespass.[94] No liability attaches to execution creditors for its wrongful levy if done without their sanction or presence,[95] nor are they liable for a levy made by seizing the property held in the hands of the debtor, though present,[96] nor, in action by a wife, for damages done community property.[97] In some jurisdictions an execution creditor may be held liable in treble damages for a wrongful levy,[98] but damages for sickness, mental and physical suffering, are not recoverable.[99]

§ 9. *Claims of third persons and trial thereof.*[1]—A claim is a statutory proceeding, the object of which is to prevent sale, on the ground that the property levied on belongs to claimant and is not subject,[2] hence, the sole issue in such case is whether the property is subject.[3] The claim may be filed by a next friend for a minor,[4] but cannot be consolidated with a controversy over the proceeds of other property.[5] A claimant holding under a fraudulent conveyance cannot resist sale,[6] nor can a mortgage given superiority over judgments of older date be asserted by claim,[7] nor will the writ be dismissed on the ground of payment, evidenced by unexplained entries of levy alone,[8] nor because levy was not made in officer's bailiwick,[9] but the fact that claimant and execution debtor lived together will not defeat the claim.[10] By giving forthcoming bond the claimant is estopped to question the legality of the levy,[11] unless the execution is void on its face,[12] and he is

87. See 3 C. L. 1402.

88. See 7 C. L. 1621.

89. Pedrick v. Keummell [N. J. Law] 65 A 846.

90. See 7 C. L. 1622.

91. Bick v. Carter, 123 Mo. 311, 100 SW 531.

92. Doehla v. Phillips [Cal.] 91 P 330.

93. See 7 C. L. 1622. See Sheriffs and Constables, 8 C. L. 1897, for liability of officer.

94. Levy with notice that debtor has been adjudged bankrupt. Taylor v. Crowe, 122 Ill. App. 518.

95. Ainsa v. Moses [Tex. Civ. App.] 18 Tex. Ct. Rep. 604, 100 SW 791.

96. Richards v. Heger, 122 Mo. App. 512, 99 SW 802.

97. Ainsa v. Moses [Tex. Civ. App.] 18 Tex. Ct. Rep. 604, 100 SW 791.

98. Mills' Ann. St. § 2564. Seerie v. Brewer [Colo.] 90 P 508.

99. Ainsa v. Moses [Tex. Civ. App.] 18 Tex. Ct. Rep. 604, 100 SW 791.

1. See 7 C. L. 1622.

2. Walden v. Walden [Ga.] 57 SE 323; Hollingshead v. Woodward [Ga.] 57 SE 79.

3. Bradford v. Bassett [Ala.] 44 S 59. After levy dismissed, and case reinstated, claimant cannot make issue whether reinstatement proper. Widincamp v. James [Ga.] 58 SE 836.

4. Walden v. Walden [Ga.] 57 SE 323.

5. A claim by landlord to property other than crops raised upon rented premises cannot be consolidated with controversy over proceeds of such crops. Cochran v. Waits, Johnson & Co., 127 Ga. 93, 56 SE 241.

6. Debtor paid for property, directed conveyance to claimant after suit brought. Owned no other property. Maxwell v. Rucker, 127 Ga. 111, 56 SE 91.

7. Acts 1899, p. 78, declares mortgages given to secure debts for supplies, money, necessities, etc., to aid in making crops, superior to judgments of older date. Ward v. Kennesaw Fertilizer Co., 127 Ga. 106, 56 SE 123.

8. Execution showed several unexplained levies on personalty. Evidence of value of property levied on was essential in determining whether the levies raised a presumption of payment. American Harrow Co. v. Banks, 127 Ga. 203, 56 SE 300.

9. In Georgia, execution on foreclosure of mortgage, if amount exceeds $100, may be levied in any county where property found. Booker v. Bass, 127 Ga. 133, 56 SE 283.

10. Infant claimant, manumitted, resided with father, defendant in execution, and raised crops sought to be levied on as father's on land rented from third person. Richter v. Virginia-Carolina Chem. Co., 1 Ga. App. 344, 57 SE 939.

11. O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 SE 739. Levy, and forthcoming bond by claimant. Dismissal of levy on ground that entry insufficiently described property refused. Booker v. Bass, 127 Ga. 133, 56 SE 283.

12. Code 1896, § 4141. Bradford v. Bassett [Ala.] 44 S 59.

also estopped to question the sufficiency of description in the notice of sale.[13] The true owner may claim though the property was in possession of the judgment debtor unless credit was extended on the faith of such possession,[14] and though he has never had possession he may claim against an execution creditor whose right of action was acquired with knowledge of the true state of the title.[15] The burden is on execution plaintiff to show the property levied to belong to the debtor,[16] and this he must sustain or the claimant will prevail.[17] If claimant admits execution debtor was in possession at the time of the levy, and assumes the burden of proof, the execution need not be introduced.[18] The evidence to support the claim, if relevant,[19] and going directly to show title in claimant, is admissible,[20] and he may also show that the execution is void,[21] but letters of third parties, tax bills, and assessor's certificate, articles not mentioned in claim, and title deeds to realty, will not be admitted.[22] Whether the property levied on is liable is for the jury,[23] whose verdict should definitely determine the issue.[24]

§ 10. *Appraisement.*[25]

§ 11. *Execution sales. In general.*[26]—The sale must be made pursuant to statute;[27] it must be advertised as the statute directs,[28] hence, a sheriff executing a justice's fi. fa. must advertise the sale as constables are required to do,[29] but such advertisement is not necessary where defendant refuses to deliver up the property under forthcoming bond.[30] In determining the sufficiency of notice, fractions of a day are not considered,[31] and whether posted in public places is a question for the jury.[32] Generally, sales of real property must be made in the county where situated,[33] but a sale of railroad property made outside of the county in which was its principal office has been held valid,[34] nor does it avoid the sale if a part only of such property be sold.[35] A sale is not complete, however, until the purchase money is paid.[36]

Rights and liabilities of bidder.[37]—The bidder may transfer his purchase, and the transferee will stand in his stead.[38]

13. Walden v. Walden [Ga.] 57 SE 323. Claimant claimed property under description and gave bond for its forthcoming. O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 SE 739.

14. Anheuser-Busch Brew. Co. v. Kickham, 119 Ill. App. 58.

15. Cronin v. De Peyster, 118 Ill. App. 583.

16. Cochran v. Garrard [Ala.] 43 S 721.

17. Richter v. Virginia-Carolina Chem. Co., 1 Ga. 344, 57 SE 939. Question between execution creditor and alleged conditional seller as to whether the condition had been waived and title passed to the debtor held for the jury. Etna Mfg. Co. v. Enos, 31 Pa. Super. Ct. 393.

18. Manley v. McKenzie [Ga.] 57 SE 705.

19. Deeds, not connected with land in dispute, or general statements of witness that he witnessed agreement making partition among the family of all lands, including subject of dispute, inadmissible. Wright v. Stafford [Ga.] 58 SE 452.

20. Proper to show claimant's husband, before judgment, exchanged her lands with defendant in fi. fa., who took possession. Wright v. Stafford [Ga.] 58 SE 452.

21. Bradford v. Bassett [Ala.] 44 S 59.

22. Title deeds to realty owned by claimant, communications to claimant by third parties, mentioning certain property levied on as claimants, and acknowledging payment by him of certain of the other property, articles not mentioned in claim, assessor's certificate that execution debtor was not assessed in the township, and tax bills to show claimant was assessed, held inadmissible. Kaufhold v. Roth [N. J. Law] 64 A 1057.

23. Levy on personal property under mortgage execution. Booker v. Bass, 127 Ga. 133, 56 SE 283.

24. Verdict merely finding for plaintiff a given sum of money does not determine property subject. Widincamp v. James [Ga.] 58 SE 836.

25. See 5 C. L. 1392.

26. See 7 C. L. 1624.

27. Civ. Code 1895, §§ 4165, 4166. Rhodes & Son Furniture Co. v. Jenkins [Ga. App.] 58 SE 897.

28. Civ. Code 1895, § 4165. O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 SE 739.

29. Civ. Code 1895, § 4165. Hatton v. Brown, 1 Ga. App. 747, 57 SE 1044.

30. Hatton v. Brown, 1 Ga. App. 747, 57 SE 1044.

31. Publication Feb. 16, 5 p. m., sale Mar. 8, 10 a. m., twenty days' notice. Leppel v. Kus [Colo.] 88 P 448.

32. O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 SE 739.

33. Vietzen v. Otis [Wash.] 90 P 264.

34, 35. Weddington v. Carver [Tex. Civ. App.] 18 Tex. Ct. Rep. 79, 100 SW 786.

36. Rowe v. Granger, 118 App. Div. 459, 103 NYS 439.

37. See 7 C. L. 1625.

38. Reed v. Munn, 148 F 737.

Costs.[39]—Execution debtor, not causing delay and supplemental proceedings, is not chargeable with the costs incident thereto,[40] nor will he be required to pay the cost of an inaccurate notice.[41]

§ 12. *Return and confirmation of sale.*[42]—If the return complies with the spirit of the statute, and is substantially in form, it is sufficient;[43] it is also sufficient if, taken as a guide, it points the way to the land and readily enables the enquirer to identify it, and for this purpose parol evidence is admissible,[44] but if there was a failure to surrender the property, the return should show it.[45] A return of "no property found" means that the defendant had no goods or chattels whereof to levy the execution,[46] but if there is a proper tender of the debt, interest and legal fees, the writ should be returned "satisfied" before sale,[47] when such return, as it appears on the writ, should be recorded on the execution docket.[48] In determining the time of return, the date of issue will be excluded.[49] The return will not overcome the presumption that the officer did his duty,[50] but, on the contrary, if attacked for insufficiency, the law will presume he acted within his authority.[51] It will be aided, even, by claim affidavit as between the parties,[52] and oral evidence is admissible to identify lands, if defectively described.[53] Generally, when necessary, an amendment may be made as a matter of right[54] so as to conform to the facts,[55] hence, an entry of levy on land, if it sufficiently describes it, may be amended in other respects by the officer at any time, so long as he is in office, and, by order of court, when out of office,[56] but it will not be canceled at the suit of the execution plaintiff though the sale was void.[57] To pass title there must be a confirmation of the sale,[58] but such confirmation cures no defects other than irregularities in the manner of conducting it.[59]

§ 13. *Redemption.*[60]—Statutory proceedings to redeem are not exclusive, but resort may be had to equity.[61] A creditor who has no lien may redeem,[62] and a pur-

39. See 7 C. L. 1625.
40. In re Shepherd, 154 F 957.
41. Sheriff directed to sell interest owned by debtor when judgment docketed. Gave notice to sell interest owed before judgment docketed and before it became a lien. Taylor v. Bell, 121 App. Div. 437, 106 NYS 273.
42. See 7 C. L. 1625.
43. "Executed within writ in county of Stoddard, Mo., on 2nd May, 1893. No property found to levy this execution." Signed. Sufficient. Scharff v. McGaugh [Mo.] 103 SW 550.
44. Levy on all right, title, and interest (of named parties) in the Independence lode, the Archer lode, the San Jose lode, the Little Stella lode, the General Shields lode, the Burlington lode, the Winnemuck No. 2 lode and Uncle Sam lode, on Breece Hill, California Dist., Lake Co., Col., standing in name of Clinton, or C. Reed, trustee, known as the Archer Consolidation. Sufficient. Reed v. Munn, 148 F 737.
45. Property attached and interpleader. Execution on original judgment. Failure of interpleaders to surrender. Faulkner & Co. v. Cook [Ark.] 103 SW 384.
46. Bick v. Paris [Mo. App.] 101 SW 716.
47. Debtor tendered full amount claimed, except costs of inaccurate and unauthorized notice of sale. Motion to direct return of writ "satisfied" should have been sustained on payment of amount tendered. Taylor v. Bell, 121 App. Div. 437, 106 NYS 273.
48. Dunlap Hardware Co. v. Tharp [Ga.] 58 SE 398.
49. Writ issued Feb. 1, returned May 2. Not within 90 days. Scharff v. McGaugh [Mo.] 103 SW 550.
50. Sale of several lots. Return that sale made to highest bidder. Presumption that property first offered in parcels but sold for more en masse. Leppel v. Kus [Colo.] 88 P 448.
51. Entry not stating in what county levy made, presumption, made within officer's balliwick. Booker v. Baas, 127 Ga. 133, 56 SE 283.
52. Walden v. Walden [Ga.] 57 SE. 323.
53. Writ based on mortgage describing land as in Jefferson county, Ga., 79th district, G. M. containing one hundred acres, bounded on one side by grantor's lands, on other three sides by lands of parties named. Walden v. Walden [Ga.] 57 SE 323.
54. Manley v. McKinzie [Ga.] 57 SE 705.
55. In re Tolman, 101 Me. 559, 64 A 952.
56. Execution against three. Return failed to show land levied on was seized as property of particular party. Manley v. McKinzie [Ga.] 57 SE 705.
57. Execution sale made without notice and proceeds applied to judgment. Judgment against sheriff at suit of execution defendant, which plaintiff paid off. Not being obliged to pay, he could not have return and satisfaction of judgment canceled. Allen v. Peterson [S. D.] 111 NW 538.
58. Kenady v. Gilkey [Ark.] 98 SW 969.
59. Vietzen v. Otis [Wash.] 90 P 264.
60. See 7 C. L. 1626.
61. Iowa statute provides that person

chaser at sale may do so, even from a subsequent purchaser,[63] but the owner, as against innocent purchasers, may be estopped to claim the right to redeem on the ground of mistake in appraisement.[64] One claiming such right must pay off the liens, however,[65] and, on redemption, acquires no greater interest than that of the judgment debtor at the time of the accrual of the lien under which the sale was made.[66] A parol contract of redemption, made at or before sale, will be enforced,[67] and an agreement to permit redemption waives laches.[68] A complaint in a proceeding to redeem, which sets out a legal deposit and bond, is sufficient,[69] nor need notice of redemption be given to others than the execution creditor and purchaser,[70] a waiver of which may be conclusively shown from a recital of waiver in the certificate and lapse of time.[71] An action to set aside a fraudulent certificate of redemption is limited to three years in Washington,[72] and in such action the acceptance of a deed to a portion does not estop grantee to deny grantor's title to the remainder of the premises.[73]

§ 14. *Title and rights acquired in property sold, and evidence thereof.*[74]—Title is shown by proof of a valid judgment, issuance of execution thereon, sale thereunder, and payment of the purchase money,[75] hence, a purchaser under a writ based on a void judgment acquires no title.[76] In determining whether the levy was made within the statutory time, the date of it is excluded,[77] though failure to levy within that period will not affect title,[78] nor will the title be affected by the failure of the sheriff to require payment in cash,[79] nor by the fact that the purchase was by an attorney, if his conduct was unimpeachable.[80] The purchaser acquires the interest of the debtor only,[81] whatever that may be,[82] hence, the sale of the mere legal title conveys nothing as against a cestui que trust.[83] The purchaser takes subject to prior equities[84] of which he had notice,[85] and the doctrine of lis pendens applies to him.[86] He takes

claiming right to redeem may deposit necessary amount with clerk, etc. Right refused, suit in equity lies. Kendig v. McCall, 133 Iowa, 180, 110 NW 458.

62. Woods v. Kellerman, 3 Cal. App. 422, 89 P 358.

63. Plaintiff, under his execution, purchased the property. Subsequently, an execution issued in a foreclosure suit, and plaintiff in that action became purchaser under special execution. First purchaser could redeem. Kendig v. McCall, 133 Iowa, 180, 110 NW 458.

64. Owner lived on or near lands, brought suit two years after sale, having had every opportunity to detect mistake. Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Purdy [Ky.] 102 SW 303.

65. Two executions issue on judgments which are liens, but one only levied. Party redeeming must satisfy both claims. Carlson v. Headline, 100 Minn. 327, 111 NW 259.

66. Woods v. Kellerman, 3 Cal. App. 422, 89 P 358.

67. Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Purdy [Ky.] 102 SW 303.

68. Dimmit v. Flynn, 229 Ill. 111, 82 NE 249.

69. In Minnesota, if a suffieient deposit is made and bond given, under Laws 1895, ch. 326, it is unnecessary to produce deed under which right of redemption is claimed. Thompson v. Dupont Co., 100 Minn. 367, 111 NW 302.

70, 71. Carroll v. Hill Tract. Imp. Co. [Wash.] 87 P 835.

72. Bal. Ann. Codes & Sts., § 4800. Carroll v. Hill Tract. Imp. Co. [Wash.] 87 P 835.

73. Pending suit to cancel redemption certificate, execution purchaser conveyed to defendant a part of the land in dispute. Carroll v. Hill Tract. Imp. Co., [Wash.] 87 P 835.

74. See 7 C. L. 1627.

75. Reeder v. Eidson [Tex. Civ. App.] 18 Tex. Ct. Rep. 213, 102 SW 750.

76. Meeks v. Black [Ark.] 104 SW. 147; Davis v. Montgomery [Mo.] 103 SW 979.

77. Judgment entered June 10, 1902, execution levied Dec. 10, 1902. Within six months. Carroll v. Salisbury [R. I.] 65 A 274.

78. Carroll v. Salisbury [R. I.] 65 A 274.

79. Under statute sheriff authorized to sell for cash only. Purchaser paid in money, checks, drafts, etc., and certificate issued. Sale valid. Carlson v. Headline, 100 Minn. 327, 111 NW 259.

80. Caldwell v. Bigger [Kan.] 90 P 1095.

81. White v. McSorley [Wash.] 91 P 243; Bridges v. Exchange Bk., 126 Ga. 821, 56 SE 97.

82. In New Jersey, on sale under execution against husband, who is tenant by the entirety, purchaser takes a freehold. Bilder v. Robinson [N. J. Eq.] 67 A 828.

83. Conveyance of land to husband and wife jointly. Purchase money paid by wife in whom resulting trust. Execution against husband. Hudson v. Wright, 204 Mo. 412, 103 SW 8.

84. Sturdivant v. Cook [Ark.] 98 SW 964.

85. Robinson v. Muir [Cal.] 90 P 521.

86. Bridger v. Exchange Bk., 126 Ga. 821, 56 SE 97.

subject to dower interest,[87] or equities in favor of the debtor,[88] or the party in possession,[89] but possession is constructive notice only as to the lot actually occupied.[90] Recitals in a mortgage may be sufficient to charge him with notice of previous conveyances,[91] but the burden to show this is on claimants under such deed.[92] He takes title over the holder of an unrecorded deed of which he had no notice,[93] nor will he be affected by an outstanding equitable interest of which he had no notice at time of the purchase, though he had before deed was made,[94] nor will notice affect his title, if plaintiff in execution had none when he acquired his judgment execution lien.[95] Purchaser's title cannot be collaterally attacked for mere irregularities in the levy and sale,[96] nor can a vendee, having notice of proceedings to issue execution, claim against it,[97] nor will a claim, based on prior purchase under void trust, defeat his title,[98] nor will a subsequent conveyance or voluntary surrender by the debtor defeat the sale under the levy,[99] nor a vacation of the judgment after sale,[1] and one who alleges the title to be vitiated by fraud must prove it.[2]

Right to possession of realty.[3]—The legal title remains in the judgment debtor till the execution and delivery of the sheriff's deed,[4] but the purchaser may maintain ejectment to recover property fraudulently conveyed before action,[5] and where the land was subject to the lien, possession will not be restrained on the ground that the sheriff refused to accept an insufficient claim affidavit.[6]

The sheriff's deed.[7]—The execution of a sheriff's deed is not necessary to the validity of the sale,[8] nor is the deed void for failing to recite the county where land situated,[9] nor because sale was made contrary to directions not received till after it was consummated,[10] but such deed, based on an illegal sale, will be canceled.[11] The deed, under judgment in attachment, relates back to the attachment,[12] and that it was made to party entitled by direction of the purchaser named in the return will be presumed from circumstances and long acquiescence.[13]

§ 15. *Legal and equitable remedies against defective or improper levy or sale. Injunction against levy or sale.*[14]—Injunction will not lie, either in the court giving

87. Crenshaw v. Kener, 127 Ga. 742, 57 SE 57.

88. Party taking by quitclaim deed from purchaser at sale, with notice of arrangement and settlement by which debtor could redeem, not an innocent purchaser. Demmitt v. Flynn, 229 Ill. 111, 82 NE 249.

89. Bridger v. Exchange Bk., 126 Ga. 821, 56 SE 97.

90. Claimant held several lots under unrecorded deed. In actual possession of one. Purchaser takes title to lots unoccupied. Brooks v. Hibbard, Spencer, Bartlett & Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 71, 99 SW 718.

91, 92. Whitaker v. Farris [Tex. Civ. App.] 17 Tex. Ct. Rep. 1010, 101 SW 456.

93. Brooks v. Hibbard, Spencer, Bartlett & Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 71, 99 SW 718; Whitaker v. Farris [Tex. Civ. App.] 17 Tex. Ct. Rep. 1010, 101 SW 456.

94. Reed v. Munn, 148 F 737.

95. Whitaker v. Farris [Tex. Civ. App.] 17 Tex. Ct. Rep. 1010, 101 SW 456.

96. Hubert v. Hubert [Tex. Civ. App.] 18 Tex. Ct. Rep. 577, 102 SW 948.

97. Lyons Nat. Bk. v. Schuler, 115 App. Div. 859, 101 NYS 62.

98. Judgment in 1884. Void devise in trust for debtors. Debtors took by descent in 1893. Sale by trustee to claimant and execution on judgment. Claim of purchaser denied. Lyons Nat. Bk. v. Schuler, 115 App. Div. 859, 101 NYS 62.

99. Thomassen v. DeGoey, 133 Iowa, 278, 110 NW 581.

1. Vacation of judgment a year after purchase, no knowledge of proceedings to vacate by purchaser. Hefferman v. Ragsdale, 199 Mo. 375, 97 SW 890.

2. Hefferman v. Ragsdale, 199 Mo. 375, 97 SW 890.

3. See 7 C. L. 1628.

4. Paxton v. Heron [Colo.] 92 P 15.

5. Prior to action and judgment under which execution issued, debtor, after notice to make good, for a nominal consideration, conveyed all his property to wife. Held improper to nonsuit plaintiff. Carroll v. Salisbury [R. I.] 65 A 274.

6. O'Brien v. O'Keefe [Ga.] 57 SE 682.

7. See 7 C. L. 1629.

8, 9. Reeder v. Eidson [Tex. Civ. App.] 18 Tex. Ct. Rep. 213, 102 SW 750.

10. Owner wrote sheriff to return order of sale, but communication not received till after sale. Caldwell v. Bigger [Kan.] 90 P 1095.

11. Giddens v. Alexander, 127 Ga. 734, 56 SE 1014.

12. Martinovich v. Marsicano, 150 Cal. 597, 89 P 333.

13. Member of partnership purchaser, money paid by partnership, to whom deed made, and to whom execution debt due. Acquiescence for fifty years. Jackson v. Gunton [Pa.] 67 A 467.

14. See 7 C. L. 1629.

the judgment or another, to restrain the sale,[15] where the remedy at law is complete[16] and adequate.[17] Therefore, the enforcement of the execution will not be enjoined where the defendant had a remedy by motion,[18] or by affidavit of illegality,[19] or on any ground available in a claim case,[20] nor will it lie on the ground that the judgment has been satisfied,[21] nor because the complainant's property is being pursued exclusively,[22] nor because of mistake,[23] nor because of a mere possibility,[24] nor will sale be restrained till an executor account,[25] nor because of mere irregularities[26] which would not avoid it;[27] but when the judgment upon which the execution is based is void,[28] the invalidity affirmatively appearing from the record,[29] or where the judgment was obtained by fraud,[30] or when the sale would cast a cloud on the title, courts will enjoin.[31] The wife and children of a debtor may enjoin a sale of their property taken as his under execution,[32] and so may one having a lien on land as equitable owner,[33] and even one not a party, if he is interested, may do so,[34] nor will their petition be dismissed for harmless irregularities.[35]

Affidavits of illegality.[36]—The office of an affidavit of illegality is not to attack the validity of the judgment, if defendant has had his day in court, but to resist the execution because of some injustice in the party seeking to enforce it,[37] and the issue in the case is that made by the affidavit of illegality to try which the fi. fa., with entry of levy, and the affidavit, constitute the pleadings.[38] On the trial the affiant may avail himself of any entry appearing on the execution,[39] but the remedy will not lie to defeat a special lien for purchase money,[40] nor, where the execution is in favor of a minor, is it ground of illegality that the prochein ami has not given bond,[41] but the debtor may resist by showing the debt was

15. Pleshek v. McDonell, 130 Wis. 445, 110 NW 269.

16. Roney v. McCall [Ga.] 57 SE 503.

17. Cameron v. Griesa, 74 Kan. 560, 87 P 679; Donovan v. McDevitt [Mont.] 92 P 49; Palladeno v Hilpert [N. J. Eq.] 65 A 721.

18. In Wisconsin the remedy to prevent enforcement of execution is by motion in action wherein it issues. Pleshek v. McDonell, 130 Wis. 445, 110 NW 269.

19. Mathews v. Gelders [Ga.] 58 SE 649.

20. Hollingshead v. Woodward [Ga.] 57 SE 79.

21. Remedy at law complete under § 1201, Civ. Code Proc. Donovan v. McDevitt [Mont.] 92 P 49.

22. Judgment against several on joint bond, and execution against complainant's property alone. Buckley v. Kilker [Pa.] 67 A 55.

23. Debtor having notice of sale cannot rely on mistake as to whether it would be made. Palladino v. Hilpert [N. J Eq.] 65 A 721.

24. Crenshaw v. Kener, 127 Ga. 742, 57 SE 57.

25. Claimant, concluded by judgment, cannot require accounting of defendant, executor of insolvent estate, to ascertain relative priority of judgment with claims of other undisclosed creditors of testator, and reduction from face of judgment of such amount as may be found from such accounting. Hollingshead v. Woodward [Ga.] 57 SE 79.

26. Sheriff's notice of sale failed to specify county or state where property situated. Cameron v. Griesa, 74 Kan. 560, 87 P 679.

27. Thomassen v. DeGoey, 133 Iowa, 278, 110 NW 581.

28, 29. Ketelsen v. Pratt [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172.

30. Judgment by confession directed by an illegal quorum of corporate directors. Paxton v. Heron [Colo.] 92 P 15.

31. Execution against grantor of holder of legal title. Austin v. Union Pav. & Cont. Co. [Cal. App.] 88 P 731.

32. Hurst v. Thompson & Co., 118 La. 57, 42 S 645.

33. Plaintiff purchased land subject to mortgage, which he paid off. Ejectment plaintiff recovered judgment against him, which she sought to enforce under execution. Injunction proper. Taylor v. Roniger, 147 Mich. 99, 13 Det. Leg. N. 994, 110 NW 503.

34. Petitioner had conveyed land sought to be subjected with covenants of warranty. Judgment paid, but not marked satisfied. Petitioner, under his covenants, was interested in having the fact of payment of judgment established, and, though not a party, entitled to injunction. Jackson Mill Co. v. Scott, 130 Wis. 267, 110 NW 184.

35. Jackson Mill Co. v. Scott, 130 Wis. 267, 110 NW 184.

36. See 7 C. L. 1630.

37. Monroe v. Security Mut. Life Ins. Co., 127 Ga. 549, 56 SE 764.

38, 39. Miller v. Perkerson [Ga.] 57 SE 787.

40. Land sold, bond for titles and promissory note for purchase money transferred and judgment against maker and indorser, with special lien. Ground of illegality, that vendor had conveyed to maker of note in order that execution levy under Civ. Code 1895, § 5432, not good. Stocking v. Moury [Ga.] 58 SE 712.

41. Oxford Knitting Mills v. Sutton, 127 Ga. 162, 56 SE 298.

paid before execution issued,[42] or that the levy was made under a void execution,[43] or he may resist by showing a good defense to suit abandoned on agreement,[44] but he must allege compliance with the terms of the agreement.[45] At the trial, if execution be omitted from the record, it may be attached to the transcript as a part thereof.[46]

Setting aside the sale.[47]—The court giving judgment has power to set aside the sale when justice demands it,[48] but will not do so on motion of a substituted party.[49] Petition to set aside should set out the amount property sold for and what it would probably bring on resale,[50] and should be verified by affidavit where facts averred are aliunde the record.[51] Generally, inadequacy of consideration alone is not sufficient evidence of fraud to justify setting aside an execution sale on that ground,[52] where parties stand on equal footing and no confidential relations exist between them, unless the inadequacy is so gross as to be proof of fraud or shock the judgment and conscience,[53] and the fact of gross inadequacy must clearly appear.[54] If, in connection with gross inadequacy of price, the debtor was ignorant of the sale,[55] or the property was susceptible of division but sold en masse without first offering it in separate parcels, relief will be given,[56] but not if the property is incapable of division,[57] and if, also, in connection with such gross inadequacy, there was fraud by the creditor purchaser,[58] or the debtor's attorney, relief may be had,[59] but to set aside the sale for fraud and collusion,[60] or for fraud of the purchaser, it must be clearly shown.[61] "Mere inadequacy of price" means simply an inequality in values between the subject-matter and the price.[62] The sale will be set aside where the levy is so excessive as to amount to fraud in law,[63] and a sale for an amount materially in excess of the amount due is void.[64] A sale made by execution plaintiff pending appeal from a judgment, afterwards reversed, will be set aside,[65] so, too, if made under execution based on a void judgment,[66] and false representations resulting in chilling bidding

42. Mathews v. Gelders [Ga.] 58 SE 649.
43. Roney v. McCall [Ga.] 57 SE 503.
44. Plaintiff agreed with defendant that if suit abandoned judgment to be discharged on performance of certain acts, which were performed. Monroe v. Security Mut. Life Ins. Co., 127 Ga. 549, 56 SE 764.
45. Monroe v. Security Mut. Life Ins. Co., 127 Ga. 549, 56 SE 764.
46. Bill of exceptions failed to specify fi. fa. as part of the record. Supplied. Miller v. Perkerson [Ga.] 57 SE 787.
47. See 7 C. L. 1630.
48. Palladino v. Helpert [N. J. Eq.] 65 A 721.
49. Party purchased from debtor defendant after issuance of attachment, and before venditioni exponas and filing of exemption claim, then while exemption claim contest pending purchased at sheriff's sale. Motion originally made by debtor defendant. Purchaser not proper party. Nearen v. Farrow, 146 Ala. 623, 41 S 421.
50, 51. Armstrong County Trust Co. v. Boozer, 216 Pa. 242, 65 A 669.
52. Odell v. Cox [Cal.] 90 P 194; Jonas v. Weires [Iowa] 111 NW 453.
53. Nodine v. Richmond, 48 Or. 527, 87 P 775. Sale for less than three per cent of real value set aside. Guinan v. Donnell, 201 Mo. 173, 98 SW 478.
54. Evidence of value conflicting. Valued by debtor at $14,000, incumbered by $13,049.78, sold for $600. Relief denied. Palladino v. Hilpert [N. J. Eq.] 65 A 721.
55. $2,000 worth of property sold to creditor for $2,650. Debtor excusably ignorant of sale, though notice given in manner required by letter of law. Odell v. Cox [Cal. App.] 90 P 194.
56. Farm of ten different tracts, worth $3,000, sold for $75. Demmitt v. Flynn, 229 Ill. 111, 82 NE 249.
57. Debtor owned a one-fourth remainder interest, valued at $2,000, with possibility of encumbrance. Sold for $22. Upheld. Jonas v. Weires [Iowa] 111 NW 453.
58. Odell v. Cox [Cal. App.] 90 P 194.
59. Attorney employed to collect judgments against property sold and which he had been compensated to protect. Guinan v. Donnell, 201 Mo. 173, 98 SW 478.
60. Nodine v. Richmond, 48 Or. 527, 87 P 775.
61. Conduct of debtor and creditor subsequent to sale held to rebut charge of fraud. Dickson v. Sentell [Ark.] 104 SW 148.
62. Odell v. Cox [Cal. App.] 90 P 194.
63. Execution for $40.90 levied on land valued at $30,000. Fortin v. Sedgwick, 133 Iowa, 233, 110 NW 460.
64. Judgment and costs, $42.40, reduced by payment of $25. Execution issued for $42.40, and lot purchased for $45. Downs v. Dennis [Ark.] 102 SW 699.
65. Wood v. Ogden [Mo. App.] 101 SW 615.
66. Davis v. Montgomery [Mo.] 103 SW 979.

will invalidate it,[67] but statements of fact to one bidder by another who afterwards becomes purchaser will not,[68] nor will the sale be set aside for mistake in the appraisement.[69] One who asserts ownership as soon as it is sought to be disturbed is not chargeable with laches,[70] nor is a debtor who was excusably ignorant of the sale.[71] Where it would be inequitable to do so, the purchaser will not be refunded the money paid at the sale as a condition precedent to setting it aside.[72]

§ 16. *Restitution on reversal of judgment.*[72a]

EXECUTORS AND ADMINISTRATORS; EXEMPLARY DAMAGES, see latest topical index.

EXEMPTIONS.

§ 1. The Right to Exemptions Generally (1339).
§ 2. Persons Who May Claim (1340).
§ 3. Goods and Other Chattel Properties Exempted (1341).
§ 4. Debts and Liabilities Inferior or Superior to Right of Exemption (1341).
§ 5. Loss of Exemption Rights (1342).
§ 6. Selling or Transferring Exempt Property (1342).
§ 7. How the Right is Claimed and Enforced (1343).
§ 8. Recovery for Selling Exempt Property or Evading Exemption Laws (1343).

This topic excludes homestead exemptions,[73] and the procedure for claiming exemptions in bankruptcy.[74]

§ 1. *The right to exemptions generally.*[75]—Exemption of property from the payment of debts is purely statutory,[76] and while exemption laws are liberally construed,[77] they will not be so enlarged as to include property not fairly within their terms,[78] or persons not bringing themselves within the provisions of the statute,[79] nor will they, as a rule, be so construed as to aid in the perpetration of a fraud.[80] Exemption laws should be construed in the light of circumstances existing at the date of the seizure.[81] The bankruptcy act has adopted the state laws in regard to

67, 68. Nodine v. Richmond, 48 Or. 527, 87 P 775.

69. Suit to set aside two years after sale, owner having had, in meantime, ample opportunity to discover mistake. Testimony conflicting. Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Purdy [Ky.] 102 SW 303.

70. Wife claimed absolute ownership of land taken in name of herself and husband. Sale on execution against husband founded on judgment of several years standing. No fault of claimant prejudicial to purchaser. Hudson v. Wright, 204 Mo. 412, 103 SW 8.

71. Odell v. Cox [Cal. App.] 90 P 194.

72. Purchaser bought with notice of all equities connected with the land. Defendant acquired no benefit from purchase and did not mislead purchaser. Guinan v. Donnell, 201 Mo. 173, 98 SW 478.

72a. See 5 C. L. 1399. See, also, Appeal and Review, 9 C. L. 222, n. 30, 31.

73. See Homesteads, 8 C. L. 93.

74. See Bankruptcy, 9 C. L. 373.

75. See 7 C. L. 1631.

76. State v. Ross [W. Va.] 57 SE 284.

77. Miller v. Swhier [Ind. App.] 79 NE 1092. Iowa statutes held so liberal in regard to exemptions as to forbid any strained interpretation in determining what was exempt by implication. In re Sullivan [C. C. A.] 148 F 815. Statutes which are both remedial and penal will be liberally construed in so far as they are remedial and strictly construed in so far as they are penal. Rule applied to Code 1899, §§ 24, 25 (Code 1906, §§ 1320, 1321), providing for exemptions and penalty for failure on part of officer to release after notice. State v. Ross [W. Va.] 57 SE 284.

78. Matured crops grown on homestead are not, merely for that reason, exempt under homestead exemption statute of Iowa. In re Sullivan [C. C. A.] 148 F. 815. New Jersey act April 8, 1875, § 8 (Revision, p. 102; Gen. St. p. 350, § 8), exempting from sale on execution cemetery lands and property of the association, held only to apply to land actually brought into use for cemetery purposes, and lands not so used were allowed to be sold to satisfy a mortgage. Spear v. Locust Wood Cemetery Co. [N. J. Eq.] 66 A 1068. Land on which there were no graves sold to pay part of the cost in a suit for the purchase price. Woodland Cemetery Co. v. Stout's Adm'r, 30 Ky. L. R. 165, 97 SW 756.

79. Exemption refused where assignor was not a resident householder at the time of the assignment, under Burns' Ann St. 1901, §§ 715, 2907, providing for exemption in favor of a resident householder who assigns. Miller v. Swhier [Ind. App.] 79 NE 1092.

80. Under laws of Wisconsin a homestead owned by a bankrupt is exempt although it was purchased by him while insolvent from the proceeds of nonexempt property. In re Wood, 147 F 877.

81. Where the statement of facts admit-

exemptions,[82] and does not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of filing the petition.[83] As in other cases where the Federal courts apply state statutes,[84] the courts of bankruptcy will follow the construction placed on the exemption laws by the highest courts of the state, so far as they have received a construction, and beyond that will apply to them the general, established rules of construction.[85] Exemption statutes prevail against demands in favor of the state as well as against executions in civil cases.[86] Property purchased with exempt money is exempt.[87]

§ 2. *Persons who may claim.*[88]—Statutes usually vary the right to and the scope of exemptions according to the scope of the debtors, as heads of families,[89] householders,[90] residents,[91] mechanics and laborers.[92] If the husband, as head of the family, leaves the state, the wife or minor children can make the claim of exemp-

ted that the plaintiff was owner and in possession of property at the date of seizure, the contention that he was not in actual possession will be disregarded. Garner v. Freeman, 118 La. 184, 42 S 767.

82. In re Downing, 148 F 120.

83. In re Wood, 147 F 877. An exemption to which the bankrupt had not become entitled at the time of the filing of the petition is not within the saving and protecting clauses of the Bankruptcy act. In re Youngstrom [C. C. A.] 153 F. 98. Homestead exemption lost through failure to follow state statute. Id.

84. See Stare Decisis, 8 C. L. 1965.

85. In re Wood, 147 F 877. Bankrupt allowed exemption under St. 1903, § 1702, providing for exemption of a homestead if occupied by debtor in good faith at the time the attempt is made to subject it to execution, provided that the debt or liability did not arise prior to the purchase of the land or erection of improvements. In re Downing, 148 F 120. Bankruptcy court not bound to follow an obiter dictum of state court. In re Sullivan [C. C. A.] 148 F 815.

86. Rev. St. 1899, § 3159 (Ann. St. 1906, p. 1795), giving exemptions to the head of a family, entitles a criminal, convicted and sentenced to pay fines and costs, to exemptions. Betterton v. O'Dwyer [Mo. App.] 101 SW 628.

87. Where a debtor purchased a homestead with money exempt under Ky. St. 1903, § 1697, the exemption followed the money into the homestead despite § 1702, which provided that the exemption should not apply to a homestead as against a debt existing prior to its purchase. Nicholsons Trustee v. Nicholson [Ky.] 101 SW 985. Payments to wife from earnings to pay off mortgage on house regarded as rent, and exempt under statute exempting earnings necessary for family support, so that they could not be followed into the house. (Lynch v. Rodebaugh, 4 Ohio N P. [N. S.] 260), whereas payments for the land made from the earnings, before the house was built, held not necessary for the family support and could be followed into the land (Id.).

88. See 7 C. L. 1632.

89. Where there was a separation by mutual consent, held bankrupt husband was not a "head of a family" within the meaning of homestead exemption laws of South Carolina. In re Finklea, 153 F 492. Under Const. 1898, art. 244, a husband need not as a condition precedent to claiming a homestead prove that his wife did not own or enjoy property exceeding $2,000. Garner v. Freeman, 118 La. 184, 42 S 767. A "head of a family" is entitled to a homestead exemption although at the date of the seizure his wife and children were not living with him (Id.) and he was in prison (Id.). The purpose of the act being to protect the wife and children, exemptions will be allowed a **criminal** as well as an improvident husband. Betterton v. O'Dwyer [Mo. App.] 101 SW 628. Proof that the debtor is a resident with a family and needs money to keep them up is insufficient to establish a right of exemption to money which is not exempt of itself. Further proof as to the other property of the debtor or lack of provisions for which money could be substituted under the statute was necessary. O'Sullivan's Trustee v. Douglass, 30 Ky. L. R. 366, 98 SW 990.

90. Three things must concur in the creation of a homestead: First the person must be a householder; second, he must have a family; and third, the premises must be occupied as a residence. Daughters v. Christy, 223 Ill. 612, 79 NE 292. Under Burns' Ann. St. 1901, §§ 715, 2907, a resident householder who assigns has the right to exemptions to the amount of $600 (Miller v. Swhier [Ind. App.] 79 NE 1092), but the statute does not apply to one who is not a resident householder at the time of assignment although he becomes one directly after (Id.). Under Code Civ. Proc. §§ 1390-92, a woman with a family is entitled to the same exemptions as a householder and head of family. Galowitz v. Bumford, 54 Misc. 41, 104 NYS 492.

91. Under Const. N. C. art. 10, § 1, the personal property of any resident of that state to the value of $500 is exempt. In re Ansley Bros., 153 F 983. Exemption given by Michigan law of a certain amount of wages from garnishment cannot be claimed by a nonresident. Kelson v. Detroit, etc., R. Co., 146 Mich. 563, 13 Det. Leg. N. 850, 109 NW 1057.

92. Mills' Ann St. §§ 2562, 2712, subd. 11, exempts tools and implements of any mechanic, miner or other person. Eckman v. Poor [Colo.] 87 P 1088. General St. 1901, § 3018, subd. 8. Reeves & Co. v. Bascue [Kan.] 91 P 77.

tion.[93] The laws of South Dakota do not give a partnership exemption.[94] The legal title is not essential to support a claim for exemption.[95]

§ 3. *Goods and other chattel properties exempted.*[96]—The articles usually exempted include professional implements and furniture,[97] tools and implements.[98] Crops fully matured and ready for the reaper are not exempt merely because grown upon an exempt homestead, in the absence of express statutory provision therefor.[99] In some states the wages of a debtor to a specified amount are exempt from attachment or garnishment.[1] The personal property to a specified amount exempted in North Carolina is a property and not a cash exemption.[2] The salary of a city official is not exempt in Kentucky.[3] Pension money is exempt in New York.[4]

§ 4. *Debts and liabilities inferior or superior to right of exemption.*[5]—In some states, suits for necessaries are partially superior,[6] and judgments against attorneys or agents on liabilities incurred by them for failure to account are, in Washington, wholly superior to the right of exemption.[7] A chattel mortgage for part of the purchase price of exempt property given at the time of the sale,[8] and costs and compensation allowed by a municipal ordinance to the marshal for impounding stray exempt animals, are superior to the right of exemption.[9] A bona fide purchaser without actual notice has a superior right where the debtor has failed to take the steps required by statute for his protection.[10] A purchase-money mortgage on land to be used for a cemetery, and exempt as such by statute, is inferior to the right of exemption where the mortgage was sold with notice of the intended

93. Under Mills' Ann. St. §§ 2562, 2563, a deserted wife held to be "the said family," and as such entitled to exemption. In re Youngstrom [C. C. A.] 153 F. 98.

94. Code Civ. Proc. S. D. 1903, § 363, subd. 5, being void, a bankrupt partnership is not entitled to claim an exemption. In re Novak, 150 F 602.

95. Daughters v. Christy, 223 Ill. 612, 79 NE 292.

96. See 7 C. L. 1632.

97. Under Code Civ. Proc. §§ 1390-92, exempting "necessary household furniture, working tools, and team, not exceeding in value $250," a desk, counter, two chairs, three wagons, two harnesses, a Dutch collar, and $7.47, held exempt. Galowitz v. Bumford, 54 Misc. 41, 104 NYS 492.

98. The portable engine and boiler with saw attachments of a lumberman are "implements," and exempt under Mills' Ann. St. § 2562. Eckman v. Poor [Colo.] 87 P 1088. A traction engine and saws, belts, carrier, etc., used in lumbering are "tools and implements" within Gen. St. 1901, § 3018, subd. 8. Reeves & Co. v. Bascue [Kan.] 91 P 77.

99. In re Sullivan [C. C. A.] 148 F 815.

1. In Massachusetts $20 is exempt in a suit which is **not for necessaries.** Leonard v. Weymouth, 193 Mass. 479, 79 NE 787. In Ohio in a suit for **necessaries** only ninety per cent of the personal earnings of the debtor are exempt (Sweet v. Barnum & Co., 8 Ohio C. C. [N. S.] 108), and in proceedings in aid of the execution it may be shown by parol that the original claim was for necessaries (Id.). The exemption given by Pub. Acts 1901, p. 235, act No. 172, of a certain portion of an indebtedness for personal labor from garnishment, cannot be claimed by a nonresident. Kelson v. Detroit, etc., R. Co., 146 Mich. 563, 13 Det. Leg. N. 850, 109 NW 1057.

2. Const. N. C. art. 10, § 1, providing for exemption of personal property to the value of $500 does not contemplate an exemption of $500 in cash, but the bankrupt must select property to that value which may then be sold and proceeds paid to him. In re Ansley Bros., 153 F 983. Where such sale is made, the bankrupt should be charged his percentage of the difference between the appraised value and the price obtained. Id.

3. It may therefore be recovered by a trustee in bankruptcy from persons to whom it was assigned in fraud of creditors. O'Sullivan's Trustee v. Douglass, 30 Ky. L. R. 366, 98 SW 990.

4. Under Code Civ. Proc. § 1393. Such money is not subject to past claims for support and maintenance in state hospital, but should be applied in current charges therefor. In re Strohm, 51 Misc. 481, 101 NYS 688.

5. See 7 C. L. 1633.

6. In Ohio ninety per cent only of personal earnings are exempt. Sweet v. Barnum & Co., 8 Ohio C. C. (N. S.) 108.

7. Ballinger's Ann. Codes & St. § 5248. Judgment in suit for money obtained by fraud by "medium" not within statute. Ervay v. Hill [Wash.] 90 P 590. The words "no property" in said statute refers only to personal property, and not to homestead exemptions. Id.

8. Boggs v. Kelly Mfg. Co. [Kan.] 90 P 765.

9. Thomason v. Brownwood [Tex. Civ. App.] 17 Tex. Ct. Rep. 418, 98 SW 938.

10. Failure to describe the property claimed as exempt sufficiently definite to impart constructive notice under Civ. Code 1895, § 2866. Harris v. Hill, 1 Ga. App. 425, 58 SE 124.

use.[11] Where a sale of property is made with the bankrupt's assent, no exceptions having been set off, the right to exemption in the proceeds will be postponed to superior claims thereto.[12] Execution against a debtor's wages for the satisfaction of a claim for rent is not authorized by a statute permitting a resort to wages to satisfy claims for "necessaries sold," etc.[13] Exemptions are in some states allowed only in actions on contract.[14]

§ 5. *Loss of exemption rights.*[15]—Waiver of exemptions in some states is deemed invalid.[16] Where a debtor who has waived exemptions goes into bankruptcy and has his exemptions set off, the creditor to whom the waiver was given who has not proved his claim in bankruptcy may, in Georgia, go into equity and get a judgment in rem against the exempted property or have a receiver appointed.[17] One who has concealed or denied the ownership of property to prevent its being subjected to the payment of his debts forfeits thereby his claim to exemptions.[18] The right to exemptions is not affected by the imprisonment of the debtor.[19] Where a debtor ceases to be a resident of a state before property belonging to him becomes applicable to a creditor's claim, the general exemption laws of the state cease to operate in his favor.[20] Under the Washington statute a bankrupt seller in bulk of merchandise cannot claim exemptions out of the purchase price.[21] When a bankrupt fails to make a full disclosure of personal property, exemptions should not be set off until all the property is accounted for.[22] Where a bankrupt converts the proceeds of a sale of property between the time of the filing of the petition and the time when the marshal took possession, the amount so converted should be deducted from the exemption.[23] A bankrupt does not lose his exemption rights by assenting to a sale of property by the receiver,[24] but in such case the bankruptcy court may pass upon the right to exemption from, and conflicting claims to, the proceeds of the sale.[25]

§ 6. *Selling or transferring exempt property.*[26]—The owner of exempt property has an absolute right to transfer the same,[27] and in so doing cannot be charged

11. Act April 8, 1875, § 8 (Revision p. 102; Gen. St. p. 350, § 8), held not repealed by Act March 14, 1879 (P. L. 1879, p. 318; Gen. St. p. 360, § 56). Spear v. Locust Wood Cemetery Co. [N. J. Eq.] 66 A 1068.

12. Claim of landlord in lease waiving exemptions (In re Renda, 149 F 614), and wage claims against which there was no exemption by law held superior to exemption claim (Id.), while an attachment execution from the common pleas on a judgment with waiver served on receiver as garnishee held inferior (Id.).

13. Code Civ. Proc. § 1391, as amended by Laws 1905, p. 370, c. 175. Beard v. Covill, 102 NYS 204.

14. A judgment by confession in an amicable action of ejectment on termination of a lease, under the terms thereof, is in contract, and the debtor is entitled to exemptions. Morris Run Coal Co. v. Chrzan, 31 Pa. Super. Ct. 184.

15. See 7 C. L. 1633.

16. Stipulation in promissory note waiving exemptions held absolutely void. Teague v. Weeks, 89 Miss. 360, 42 S 172.

17. Keller v. Bowen, 127 Ga. 584, 56 SE 634.

18. Evidence established a deliberate and willful intention to conceal or otherwise defraud, and exemption declared forfeited under the laws of Pennsylvania. In re Schafer, 151 F 505. Homestead exemption refused on account of fraud in Georgia. In re Simon, 151 F 507.

19. Although incarcerated the head of a family may still use his property for his family, and is entitled to homestead exemption under Const. 1898, art. 244. Garner v. Freeman, 118 La. 184, 42 S 767. Under Rev. St. 1899, § 3159 (Ann. St. 1906, p. 1795), a criminal convicted and sentenced to pay fine and costs is entitled to the exemptions therein prescribed. Betterton v. O'Dwyer [Mo. App.] 101 SW 628.

20. Wierse v. Thomas [N. C.] 59 SE 58.

21. Laws 1901, p. 222, c. 109; Ballinger's Code Supp. § 3102; Pierce's Code, § 5346. Nor do his creditors waive their right to contest his claim by instituting involuntary bankruptcy proceedings. In re Connor, 146 F 998.

22, 23. In re Ansley Bros., 153 F 983.

24. He must, however, make a seasonable claim. In re Renda, 149 F 614.

25. Claim of landlord in lease waiving exemption (In re Renda, 149 F 614), and wage claims not exempt by law held superior to exemption claim (Id.). An attachment execution from common pleas on a judgment with waiver of exemption served on receiver held inferior to exemption claim. Id.

26. See 7 C. L. 1634.

27. The law presumes that a resident householder will claim an exemption where it affirmatively appears that he is such and

with defrauding or intending to defraud his creditors.[28] In Kansas a chattel mortgage of exempt property given without the consent and signature of the mortgagor's wife is invalid.[29]

§ 7. *How the right is claimed and enforced.*[30]—An affidavit setting forth the claim and grounds of exemption is required in some states,[31] while a schedule of property and list of exemptions is required in others.[32] The schedule required in Indian Territory must be filed with the court after notice to the creditor, and a supersedeas may then issue staying proceedings against the exempt property,[33] while that required by the Georgia statute to gain a "short" or "statutory" homestead must be recorded and contain a description of the property sufficiently definite to give constructive notice.[34] An appeal bond is necessary, in Arkansas, in an appeal from a judgment refusing an exemption to suspend proceedings on the judgment.[35] A removal of exempt property to another state to defraud creditors will be deemed a selection of the property, removed as exempt, by the debtor.[36] Exemptions should be pleaded and proved.[37] In an action to set aside a transfer as fraudulent, a claim that the property is exempt is admissible under an answer of general denial.[38]

§ 8. *Recovery for selling exempt property or evading exemption laws.*[39]—The fact that suit has been instituted on a claim in another state, whereby the debtor's wages were attached, raises the presumption of an intent to evade the exemption laws,[40] and a resident creditor may be enjoined from prosecuting such an action,[41] and such injunction does not violate the Federal constitution.[42] Dam-

that his proper y is within the amount exempted. Stark v Lamb, 167 Ind. 642, 78 NE 668, 79 NE 895.

28. Where the court finds that the transfer is made "with intent to defeat and defraud creditors," it must be presumed, in the absence of a contrary finding, that the property was not exempt. Stark v. Lamb, 167 Ind. 642, 78 NE 668, 79 NE 895. It is not fraudulent for debtor to use exempt money to buy a homestead, and the exemption will follow the money into the land despite Ky. St. 1903, § 1702, which provides that a homestead shall not be exempt as against a debt existing prior to its purchase. Nicholson's Trustee v. Nicholson [Ky.] 101 SW 985. Payments of exempt money to wife not fraudulent. Lynch v. Rodenbaugh, 4 Ohio N. P. (N. S.) 260.

29. Gen. St. 1901, § 4255. Reeves & Co. v. Bascue [Kan.] 91 P 77. A mortgage back for part of the purchase price given at the time of the sale is not within the statute. Boggs v. Kelly Mfg. Co. [Kan.] 90 P 765.

30. See 7 C. L. 1634.

31. Mills' Ann. St. §§ 2711, 2712, provides for the separate trial of the claim of exemption, and the judgment on such trial is final and appealable. Eckman v. Poor [Colo.] 87 P 1088.

32. Code of 1899, c. 41, §§ 24, 25 (Code 1906, §§ 1320, 1321), requires a list and claim of exemption to be given to officer from whom is demanded a certificate of release of the property garnished to be delivered to the garnishee. State v. Ross [W. Va.] 57 SE 821. By Rev. St. 1899, §§ 2806, 2807 (Ann. St. 1906, pp. 1620, 1621), an insolvent criminal must deliver a schedule of all his property to the sheriff, who shall certify it to the judge or clerk, who upon application shall cause to be delivered or reserved to the debtor exempt property. Betterton v. O'Dwyer [Mo. App.] 101 SW 628. A debtor who gave notice of intention to file a schedule on the day judgment was rendered against him held entitled to claim his exemptions, the attachment proceeding being still pending. Madison County Bk. v. Bird, 77 Ark. 611, 99 SW 692.

33. The debtor is not required to serve the supersedeas on the officer under Mansf. Dig. § 3006 (Ind. T. Ann. St. 1899, § 2121). Minor v. Edwards, 6 Ind. T. 438, 98 SW 151.

34. Civ. Code 1895, § 2866. "One cow and one calf" held too indefinite to protect property against a bona fide purchaser without actual notice. Harris v. Hill, 1 Ga. App. 425, 58 SE 124.

35. When an appeal without a bond was taken, an officer who sold property adjudged on appeal to be exempt was only liable for the balance of the proceeds after paying the judgment. Fultz v. Castleberry [Ark.] 99 SW 71.

36. In order to claim property retained as exempt, that removed must be brought back in its place. Rogers v. Ayers [Tenn.] 104 SW 521.

37. Neither pleading nor proof of exemption. O'Sullivan's Trustee v. Douglas, 39 Ky. L. R. 366, 98 SW 990. Since under Code 1899, c. 41, §§ 24, 25 (Code 1906, §§ 1320, 1321), the officer makes the exemption list a part of his return, there is no necessity for a plea of exemption. State v. Ross [W. Va.] 57 SE 284.

38. Stark v. Lamb, 167 Ind. 642, 78 NE 668, 79 NE 895.

39. See 7 C. L. 1635.

40. Wierse v. Thomas [N. C.] 59 SE 58. Action brought under Cobbey's Ann. St. 1903, §§ 1531-1534, dismissed. Presumption rebutted. Satterlee v. First Nat. Bk. [Neb.] 111 NW 591.

41. Wierse v. Thomas [N. C.] 59 SE 58.

42. Neither art. 4, § 1, requiring each

ages lie for the wrongful taking and detention of exempt property.[43] Replevin lies against the purchaser of exempt property.[44]

EXHIBITIONS AND SHOWS.[45]

The conducting of a theater is strictly a private business and the proprietor may decide who shall be admitted thereto,[46] and, where admission is denied to the holder of a ticket, he can recover only the amount paid therefor and necessary expenses.[47] Such business, however, is within the police power, and, subject to constitutional restrictions,[48] reasonable regulations may be imposed.[49] A mere ticket taker is not within the New York penal statute prohibiting the admission of children under sixteen to theatres unless accompanied by parent or guardian.[50] The giving of a Sunday performance under the charter of Greater New York forfeits a music room license though given contrary to proprietor's orders.[51] Theatricals given in the opera houses of cities of the third class are not subject to a license tax in Missouri, though having more than 5,000 inhabitants.[52] Where proceedings to revoke a music room license under the New York charter is in the name of the city, the petition may be in the name of the police commissioner,[53] and should be positive in its averments.[54] The proprietor of a theater must keep the place in a reasonably safe condition,[55] and a patron may assume that such duty has been

state to give full faith and credit to judicial proceedings of every other state, or art. 4, § 2, providing that citizens of each state shall have full all the privileges and immunities of the several states. Wierse v. Thomas [N. C.] 59 SE 58.

43. The usable value of the property from the time of the taking to the date of judgment, and also the injury to it while unlawfully detained, may be shown and recovered. Reeves & Co. v. Bascue [Kan.] 91 P 77. Under Code 1899, §§ 24, 25 (Code 1906, §§ 1320, 1321), providing for a penalty of $5 a day for failure of an officer to release exempt property, said penalty can only be recovered for such a period as the officer holds under a live process (State v. Ross [W. Va.] 57 SE 284), and in order to recover said penalty the plaintiff must specify and prove the number of days he is entitled to recover for (State v. Ross [W. Va.] 57 SE 821). Owing to failure to give an appeal bond by debtor, sheriff was justified in selling property held exempt on appeal, and was liable only for the balance of proceeds after payment of the judgment. Fultz v. Castleberry [Ark.] 99 SW 71.

44. Minor v. Edwards, 6 Ind. T. 438, 98 SW 151.

45. See 7 C. L. 1636.

46. In absence of statute. People v. Flynn [N. Y.] 82 NE 169.

47. Expenses incurred in preparing to attend. People v. Flynn [N. Y.] 82 NE 169.

48. Statute requiring lessee of race course to admit persons holding tickets unless intoxicated, boisterous, or of lewd character, held not to deny equal protection of laws where it is applicable to all persons or corporations conducting any place of amusement (Western Turf Ass'n v. Greenberg, 204 U. S. 359, 51 Law. Ed. 520), nor does it deprive it of property without due process of law (Id.).

49. Acts 1896-97, p. 542, giving City of Mobile full police power within its corporate limits, held to authorize ordinance requiring a fireman to be present at every performance at expense of the proprietor. Tannenbaum v. Rehm [Ala.] 44 S 532. Ordinance requiring all theater entrances for patrons to open on public street and not on alley held beyond police power. City of Indianapolis v. Miller [Ind.] 80 NE 626. Burns' Ann. St. Supp. 1905, § 3477, subd. 7, giving city council power to declare what is a nuisance and to prevent same, held not to authorize ordinance requiring all theater entrances for patrons to be on public street. Id.

50. Pen. Code, § 290. People v. Sheriff of Kings County, 54 Misc. 8, 105 NYS 387.

51. Greater New York Charter, § 1481, Laws 1897, c. 378, p. 522, providing that certain performances "shall of itself vacate and annul" the license, held self-executing. In re City of New York, 52 Misc. 606, 102 NYS 950.

52. Rev. St. 1899, § 10,054, provides that no license shall be levied by any city of third or fourth class, or in cities under special charters and having less than 5,000 inhabitants. Held that clause "having less than 5,000 inhabitants" applies only to "cities under special charters." Hodkins v. McDonald, 123 Mo. App. 566, 100 SW 508.

53. Action under Laws 1897, c. 378, p. 520, § 1476. In re City of New York, 52 Misc. 606, 102 NYS 950.

54. Petition by police commissioner held sufficiently positive, though he did not claim to have personal knowledge of violations charged, where he alleged his belief and stated the grounds thereof, making the affidavits on which belief was based a part of the petition. In re City of New York, 52 Misc. 606, 102 NYS 950.

55. Not sufficient that defendant should have knowledge, actual or constructive, of hole in carpet, but it must be of a character

performed.[56] In actions for personal injuries, the usual rules as to sufficiency of the evidence [57] and instructions [58] apply.

EXHIBITS; EXONERATION; EXPERIMENTS; EXPERT EVIDENCE, see latest topical index.

EXPLOSIVES AND INFLAMMABLES.[59]

Liability for injury to employes,[60] and liability for maintaining dangerous premises generally,[61] are excluded.

One maintaining a magazine or discharging explosives under circumstances rendering the same a nuisance [62] is liable for injury irrespective of negligence,[63] and so too is one who causes a physical invasion of another's property [64] without his assent,[65] or inflicts a direct personal injury,[66] provided the appropriate action is brought; [67] and, in all cases, one negligently maintaining or discharging [68] explosives is liable for injuries proximately resulting therefrom,[69] unless the party injured is a trespasser.[70] One knowingly [71] or negligently [72] selling [73] a dangerous explosive

as to cause a reasonably prudent man to foresee danger. Nephler v. Woodward, 200 Mo. 179, 98 SW 488.

56. Held not negligence to fail to look for holes in carpet. Nephler v. Woodward, 200 Mo. 179, 98 SW 488.

57. In action for injuries to patron of theater by alleged hole in carpet causing her to fall, verdict held not so contrary as to indicate passion or prejudice. Nephler v. Woodward, 200 Mo. 179, 98 SW 488.

58. Where plaintiff's witness testified that hole in theater carpet had existed for two weeks and court instructs to find for defendant unless jury believes plaintiff's evidence, instruction that defendant must keep theater in a reasonably safe condition is not erroneous as ignoring whether condition existed for sufficient time to give notice. Nephler v. Woodward, 200 Mo. 179, 98 SW 488.

59. See 7 C. L. 1637.

60. See Master and Servant, 8 C. L. 840.

61. See Negligence, 8 C. L. 1090.

62. Whether maintenance of a powder magazine within 1,000 feet of dwelling house is a nuisance held for jury. Kerbaugh v. Caldwell [C. C. A.] 151 F 194. Discharge of fireworks in park held not per se public nuisance. Crowley v. Rochester Fireworks Co., 183 N. Y. 353, 76 NE 470.

63. Kerbaugh v. Caldwell [C. C. A.] 151 F 194.

64. But where injury results from shock, liability exists only in case of negligence. Bessemer Coal, Iron & Land Co. v. Doak [Ala.] 44 S 627. In action for injury to house and cistern from shock of blasting, held that proof of negligence was essential to recovery. Thurmond v. Ash Grove White Lime Ass'n, 125 Mo. App. 73, 102 SW 617.

65. Where owner of land conveyed strip thereof to railroad for right of way, held that he could not recover for rocks cast upon his land by necessary blasting done in careful manner. St. Louis, etc., R. Co. v. Hanks, 80 Ark. 417, 97 SW 666.

66. Defendant is liable as trespasser. Richter v. Solomon, 104 NYS 405.

67. Where plaintiff sues on case for negligent blasting, proof of naked trespass by casting rocks on land without injury does not entitle him to recovery. Thurmond v. Ash Grove White Lime Ass'n, 125 Mo. App. 54, 102 SW 619.

68. Proof that case of rocket fell upon plaintiff, a spectator at fireworks display, with sufficient force to fell her to ground, held to make case of negligence for jury in using such heavy rockets. Crowley v. Rochester Fireworks Co., 183 N. Y. 353, 76 NE 470. Evidence that defendant was blasting with dynamite within 175 yards from plaintiff's house, that foreman was not an expert blaster, that he was away a part of time, and that workmen were unskilled, held to make question of negligence for jury. Kimberly v. Howland, 143 N. C. 398, 55 SE 778. Evidence that blasting had caused injury to house and cistern and had cast about two wagon loads of rock on plaintiff's farm, with evidence that blasting was carried on prior and subsequent thereto without injury, held to make case of negligence for jury. Thurmond v. Ash Grove White Lime Ass'n, 125 Mo. App. 73, 102 SW 617.

69. Where defendant in making gas pipe connection negligently permits gas to escape into room, fact that it was ignited by another does not relieve him, since such result should have been foreseen. Moore v. Lanier [Fla.] 42 S 462. One blasting with dynamite within 175 yards from dwelling house and without properly smothering blast held bound to foresee possible injury, though not exact nature thereof. Kimberly v. Howland, 143 N. C. 398, 55 SE 778. Dropping of lighted match into open vent-hole of drip wagon, thereby causing explosion, by boy seven and one-half years old, held not such intervening agency as to break causal connection between defendant's negligence in leaving wagon in street unguarded and injury, such boy being irresponsible. Iamurri v. Saginaw City Gas Co., 148 Mich. 27, 14 Det. Leg. N. 163, 111 NW 884.

70. Where defendant left drip wagon with uncovered vent-hole in street and injury resulted to plaintiff from explosion, fact that plaintiff had climbed onto wagon held not to make him trespasser so as to defeat recovery. Iamurri v. Saginaw City

for a less violent one is liable for resulting injury,[74] in the absence of contributory negligence.[75] A principal is not liable for damage caused by explosives used by an independent contractor,[76] unless the work is inherently dangerous.[77] Employers using explosives must exercise commensurate care for the protection of their servants.[78] The maintenance of explosives in violation of an ordinance designed for protection [79] is per se negligence.[80] It is often made a criminal offense to blast [81] within city limits unless done in a prescribed manner.[82] Likewise, the keeping for sale [83] of illuminating fluids below a certain quality,[84] or inflammable below a prescribed temperature,[85] is prohibited. In view of the state scheme for the inspection

Gas Co., 148 Mich. 27, 14 Det. Leg. N. 163, 111 NW 884.

71. Selling of coal oil with which gasoline had become mixed, of which fact defendant had knowledge, held actionable negligence, especially where defendant knew that it would be retailed as coal oil. Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 P 212.

72. In action for death caused by explosion of substance sold for kerosene and used as such, evidence held sufficient to require submission of defendant's negligence in sale and delivery thereof to jury. Ellis v. Republic Oil Co., 133 Iowa, 11, 110 NW 20.

73. In action for injuries caused by gasoline explosion, evidence held insufficient to sustain finding that defendant delivered gasoline instead of kerosene to plaintiff. Wilkins v. Standard Oil Co. [N. J. Law] 64 A 985.

74. Circumstantial evidence held sufficient to show that death of plaintiff's wife and children was due to explosion. Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 P 212.

75. Use of kerosene to start fire held not negligence as matter of law so as to defeat recovery for death caused by more dangerous explosive sold and used as kerosene. Ellis v. Republic Oil Co., 133 Iowa, 11, 110 NW 20; Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 P 212. Held that plaintiff was not negligent in permitting fifteen year old daughter to use kerosene for lighting fire. Nelson v. Republic Oil Co. [Iowa] 110 NW 24.

76. Where dynamite obtained by contractor, engaged in widening railroad tracks for use in work, exploded from unknown cause and injured plaintiff, railroad company held not liable where it had nothing to do with dynamite. Hall v. New York, etc., R. Co., 121 App. Div. 488, 106 NYS 106. See Independent Contractors, 8 C. L. 176.

77. Person employing one to break up machinery by explosion of large charges of dynamite near road is liable, though latter is an independent contractor. Falender v. Blackwell, 39 Ind. 121, 79 NE 393.

78. In action for injury to employe by premature blast, caused by alleged defective fuse, evidence that explosion occurred immediately after lighting three foot fuse held insufficient to show that fuse was defective or that by due care employer could have discovered same. Langhorn v. Nelson, 30 Ky. L. R. 482, 99 SW 223. Employer held liable where he set common laborer without knowledge of explosives to work in disentangling and straightening wires connecting dangerous explosive caps without warning, and injury resulted. Lavia v. Kountz Brothers Co., 31 Pa. Super. Ct. 481. See Master and Servant, 8 C. L. 840.

79. Brick structure entirely open on one side held not a "vault or safe" within ordinance regulating storage of explosives. Smith v. Mine & Smelter Supply Co. [Utah] 88 P 683. Keeping of dynamite for immediate use by contractor widening railroad tracks held not within ordinance making it unlawful "to have or keep" dynamite except in magazines, etc., such ordinance relating to "storing." Hall v. New York, etc., R. Co., 121 App. Div. 488, 106 NYS 106.

80. Smith v. Mine & Smelter Supply Co. [Utah] 88 P 683. Where defendant left a drip wagon with vent-hole uncovered and injury resulted from explosion caused by child dropping match in vent-hole, ordinance prohibiting leaving of wagons in street held admissible as showing negligence. Iamurri v. Saginaw City Gas Co., 148 Mich. 27, 14 Det. Leg. N. 163, 111 NW 884.

81. Ordinance of city of Spokane prohibiting blasting within city unless covered in such manner as to prevent danger held to apply to "spring shot" which is designed to simply make chamber at bottom of drilled hole. City of Spokane v. Patterson [Wash.] 89 P 402.

82. Master held criminally liable for blasting within city limits without covering same as provided by ordinance, though he did not assent thereto and directed employe to adopt different course. City of Spokane v. Patterson [Wash.] 89 P 402. Member of partnership engaged in quarrying held criminally liable for blasting contrary to ordinance, though he did not, as partner, participate therein or consent thereto. Id.

83. Under Gen. St. 1902, § 4579, making it an offense to keep for sale illuminating fluids inflammable at lower temperature than that prescribed, one who keeps such fluid for sale is liable though acting as employe of another. State v. Boylan, 79 Conn. 463, 65 A 595.

84. Statute prescribing a particular test for coal oils and gasoline sold for domestic use cannot be held void because some other test may be better suited to accomplish purpose (Waters-Pierce Oil Co. v. Deselms, 18 Okl. 107, 89 P 212), nor will it be declared unconstitutional because it excludes certain oils equally safe as others passing test (Id.).

85. Where in prosecution for keeping for sale illuminating fluid inflammable below prescribed temperature evidence is conflicting as to which devise should be used for

of oils, the city of Chicago has no power to require an additional inspection at seller's cost.[86] In actions for personal injuries resulting from explosives, the usual rules respecting pleadings,[87] evidence,[88] and variance [89] apply.

Ex Post Facto Laws; Express Companies, see latest topical index.

EXTORTION.[90]

EXTRADITION.

§ 1. International (1347). § 2. Interstate (1348).

§ 1. *International.*[91]—One may not be held for extradition where there is no legal evidence of the commission of the crime charged.[92] The decision of the authorities of the country on which demand is made that an offense is or is not extradictable under a treaty is final and cannot be reviewed by the courts of the demanding country after extradition.[93] As to offenses not covered by treaty, each country may exercise its discretion as to the surrender of a fugitive,[94] and if a demand is acceded to either on the theory of treaty obligation, or as an act of comity, accused cannot raise the question that the offense was not within the treaty.[95] A person surrendered under an extradition treaty is not subject to arrest or trial for any other offense than that charged in extradition until after a reasonable time for return unmolested to the country from which he was brought,[96] but this immunity does not extend to offenses committed subsequent to extradition.[97] In

testing, question is for jury unless statute prescribes test. State v. Boylan, 79 Conn. 463, 65 A 595. Evidence held to sustain a verdict that fluid kept for sale was inflammable below prescribed temperature. Id.

86. Since Act July 1, 1874, Hurd's Rev. St. 1905, c. 104, §§ 1-8, provides complete scheme for inspection of oil, held that ordinance creating office of city oil inspector and providing for additional inspection at expense of sellers is void. City of Chicago v. Burke, 226 Ill. 191, 80 NE 720.

87. Allegation that defendants wantonly and recklessly exploded powder "well knowing that said acts would probably result in injury to plaintiff and with reckless disregard to consequences" held to charge willful conduct. Bessemer Coal, Iron & Land Co. v. Doak [Ala.] 44 S 627. Where declaration alleges that defendant negligently and carelessly permitted acetylene gas to escape into room while making pipe connections, well knowing that it was liable to explode, and an explosion resulted, held sufficient without alleging means whereby it became ignited. Moore v. Lanier [Fla.] 42 S 462.

88. Where magazine exploded on March 5th, evidence as to quantity of explosives and conditions under which it was stored in February and on March 1st, held not too remote as bearing on question of nuisance. Kerbaugh v. Caldwell [C. C. A.] 151 F 194. Evidence as to what was done to protect child from injury from subsequent blastings held immaterial where no injury from such blasts is alleged. Bessemer Coal, Iron & Land Co. v. Doak [Ala.] 44 S 627. Where caps are not kept in vault or safe as required by ordinance, evidence of comparative explosive power of fulminate of mercury, component part of caps, and gun powder, is admissible where ordinance prohibits keeping of explosives stronger than gunpowder within city. Smith v. Mine & Smelter Supply Co. [Utah] 88 P 683. Where on direct examination defendant's salesman testifies that two or three days before explosion defendant had 2,000 electric exploders in vault, and on cross-examination testifies that defendant was selling same, on redirect he may testify whether defendant would be likely to sell 2,000 exploders during two or three days to meet inference that they might have been all sold. Id.

89. In case of negligent blasting, alleging that defendant caused rocks to fall on and among his cattle and crops, etc., recovery cannot be had for entry of defendant's servants to drive cattle out of danger. Thurmond v. Ash Grove White Lime Ass'n, 125 Mo. App. 57, 102 SW 619.

90. See 7 C. L. 1639. No cases have been found for the period covered for this topic, which includes only extortion under color of office. See Blackmail, 9 C. L. 393.

91. See 7 C. L. 1639.

92. Ex parte Ramirez [Ariz.] 90 P 323.

93, 94, 95. Greene v. U. S. [C. C. A.] 154 F 401.

96. Person extradited from Canada, under treaty of 1889, for trial, could not be seized in execution of prior judgment on different charge, which he had escaped by flight. Ex parte Browne, 148 F 68; Johnson v. Browne, 205 U. S. 309, 51 Law. Ed. 816. Omission of words "or be punished" from the treaty held not to justify the imprisonment. Id.

97. Extradition from Canada. Ex parte Collins [Cal.] 90 P 827.

determining whether an indictment charges the same offense for which accused was extradited, it is immaterial whether or not the crime has the same name in both countries, it being sufficient if the same acts are charged.[98] Where an indictment charges an extraditable offense, the fact that after extradition it is quashed in the demanding state for technicalities does not entitle accused to a reasonable time to return to the country of asylum before being called on to answer a new indictment charging the same facts.[99]

§ 2. *Interstate. Origin and extent of power.*[1]—A state has no sovereign power to surrender fugitives to another jurisdiction, but can grant extradition only under the Federal constitution and statutes.[2] These, however, impose upon the executive authorities of the different states and territories the duty of apprehending fugitives under the conditions therein specified.[3] It must appear that accused is charged with an offense against the laws of the demanding state [4] and that he is a fugitive from justice, but to constitute a fugitive it is necessary only that he should have been in the demanding state when the crime was committed and have thereafter left that state and been found in another.[5] Whether or not, when he left the demanding state, he believed that he had committed a crime, is immaterial.[6]

Though Porto Rico is not a "territory" or "foreign country" within the meaning of the extradition laws,[7] its governor has power by virtue of the organic act of the island to issue a requisition for the return of a fugitive by a state.[8]

Procedure.[9]—An indictment is sufficient upon which to base extradition proceedings if it states the substance of the offense, regardless of inartificialities, surplusage, or mere technicalities.[10] That the venue as stated in an affidavit is followed by the unnecessary naming of the parties does not render it defective.[11] The indictment or affidavit must be properly certified as authentic by the governor of the demanding state.[12] It will be implied from the authentication that the officer certifying to the jurat of the affidavit was such magistrate as he is therein represented to be.[13] The governor of the surrendering state need not require independent proof apart from the requisition papers that accused was a fugitive from justice.[14] The executive warrant need not show that the acts charged constitute an offense under the laws of the demanding state, or that the fugitive

98. Indictment charging conspiracy with Federal disbursing officer to defraud United States held to charge "participation in fraud by agent or trustee." Green v. U. S. [C. C. A.] 154 F 401.

99. Ex parte Fischl [Tex. Cr. App.] 18 Tex. Ct. Rep. 822, 100 SW 773.

1. See 7 C. L. 1640.

2. In re Kopel, 148 F 505.

3. Whenever the executive authority of a state or territory demands a person as a fugitive from justice from the executive authority of another state or territory, and produces a duly certified copy of an indictment or affidavit charging the commission of a crime in the demanding state, it is the duty of the latter authority to issue his warrant for the arrest of such person, having first ascertained that he is a fugitive from justice. U. S. Rev. St. § 5278 (Comp. St. 1901, p. 3597). Ex parte Denning [Tex. Cr. App.] 18 Tex. Ct. Rep. 740, 100 SW 401.

4. In re Waterman [Nev.] 89 P 291.

5. Appleyard v. Massachusetts, 203 U. S. 222, 51 Law. Ed. 161; Depoilly v. Palmer, 28 App. D. C. 324. Evidence that accused had resided in demanding state more than three years after date of crime properly rejected. Depoilly v. Palmer, 28 App. D. C. 324.

6. Appleyard v. Massachusetts, 203 U. S. 222, 51 Law. Ed. 161.

7. In re Kopel, 148 F 505.

8. Rev. St. § 5278 (U. S. Comp. St. 1901, p. 3597), made applicable by Organic Act of April 12, 1900, putting in force in Porto Rico all Federal statutes not locally inapplicable. In re Kopel, 148 F 505; People v. Bingham [N. Y.] 81 NE 773, afg. 117 App. Div. 411, 102 NYS 878.

9. See 7 C. L. 1640.

10. Indictment charging making of false affidavit that a corporation was not party to combination agreements. Ex parte Pierce, 155 F 663.

11. State v. Bates [Minn.] 112 NW 260.

12. Certification held to relate to affidavit charging the crime as well as to certain other affidavits. State v. Bates [Minn.] 112 NW 260.

13. That justice of peace in California could administer an oath. State v. Bates [Minn.] 112 NW 260.

14. Pettibone v. Nichols, 203 U. S. 192, 51 Law. Ed. 148.

was charged in accordance with the procedure of that state.[15] That it recites that relator was charged upon "complaint" instead of by "affidavit" is not fatal where it was issued upon a charge which was in form and legal effect an affidavit.[16] That the arrest and deportation is so carried out that accused is given no opportunity to prove in the surrendering state that he was not a fugitive from justice, or to appeal to the courts of that state to prevent his illegal deportation, does not violate the constitution or laws of the United States.[17] The issuance of a commitment for an arrest under executive warrant is justified under the New York statute if it appears to the satisfaction of the magistrate that the person is charged in some other state with crime and that he has fled from justice, it not being necessary to show that his return to the demanding state is justified.[18]

Review.[19]—In habeas corpus the court may go behind the executive warrant and examine the sufficiency of the papers upon which it was issued,[20] and if the indictment or affidavit is sufficient, the prisoner will be discharged;[21] but the executive warrant being in due form, the burden is on accused to overcome the prima facie case thereby established.[22] The identity of relator with the person named in the extradition papers must appear,[23] but, in the absence of any claim by relator in his petition or in his traverse of the return thereto that he is not the person named in the warrant, the presumption arising from identity of name is sufficient prima facie evidence.[24] Where no attempt is made to show on what date the offense was in fact committed, nor that there is any error in the date stated in the affidavit, relator is simply required to show that he was not present in the demanding state on the date charged.[25] That the indictment was not found within the period of limitations is not conclusive, it not being shown that accused was in the demanding state during the period.[26] Evidence as to the actual guilt or innocence of relator is inadmissible,[27] and the court cannot inquire into the motive or ultimate purposes of the extradition proceeding.[28]

Rights of extradited persons.[29]—Accused will not be entitled to a release because the methods by which his presence in the demanding state was secured may have violated the constitution and statutes relating to extradition, he being held under an indictment for a crime against the laws of that state.[30]

FACTORS.

Matters relating generally to agency,[31] and liability on drafts with bill of lading attached,[32] are elsewhere treated.

15. Under Acts Ind. 1905, c. 169, § 26, requiring warrant to recite fact of demand and charge upon which it was based, etc. Kemper v. Metzger [Ind.] 81 NE 663.

16. State v. Bates [Minn.] 112 NW 260.

17. Pettibone v. Nichols, 203 U. S. 192, 51 Law. Ed. 148.

18. Code Cr. Proc. § 830. People v. Flynn, 54 Misc. 7, 105 NYS 368.

19. See 7 C. L. 1641.

20. In re Waterman [Nev.] 89 P 291.

21. Indictment insufficient under Iowa Code, § 5041, for obtaining money or property by false pretense. In re Waterman [Nev.] 89 P 291.

22. State v. Schlachter [S. D.] 111 NW 566.

23. Under the evidence, held not error to refuse to discharge petitioner on ground that he was not the person mentioned in the extradition papers. Harris v. State [Ala.] 41 S 416.

24. State v. Bates [Minn.] 112 NW 260.

25. Conflicting evidence insufficient to justify discharge. State v. Schlachter [S. D.] 111 NW 566.

26. Ex parte Pierce, 155 F 663; Kemper v. Metzger [Ind.] 81 NE 663.

27. Ex parte Denning [Tex. Cr. App.] 18 Tex. Ct. Rep. 740, 100 SW 401. Matters of defense to indictment cannot be considered. Depoilly v. Palmer, 28 App. D. C. 324.

28. Depoilly v. Palmer, 28 App. D. C. 324; Pettibone v. Nichols, 203 U. S. 192, 51 Law. Ed. 148.

29. See 7 C. L. 1641.

30. Contention that accused was not fugitive. Pettibone v. Nichols, 203 U. S. 192, 51 Law. Ed. 148.

31. See Agency, 9 C. L. 58.

32. See Banking and Finance, 9 C. L. 340.

The relation of factor to consignor.[33]—One having possession[34] of goods with the authority to sell the same and to collect the price is a factor,[35] possession and authority to collect distinguishing him from a broker.[36]

Rights and liabilities inter se and as to third persons.[37]—As between factor and consignor, their rights and liabilities are controlled largely by their contract,[38] especially in regard to compensation,[39] and their previous course of dealing.[40] A factor has no implied authority to dispose of goods in satisfaction of his private debts,[41] or to delegate to another the powers vested in him,[42] but an unauthorized act may be ratified by the principal.[43] The burden of proving a ratification rests upon the party seeking to bind the principal.[44] A factor is not obliged to depart from his usual course of business at the direction of his principal.[45] In Texas a factor receiving goods of one as the property of another in possession is protected only under the doctrine of estoppel.[46] In actions growing out of the relation, the general rules of evidence[47] and trial[48] apply.

FACTORS' ACTS, see latest topical index.

33. See 7 C. L. 1642.

34. Where one seeking to buy and resell goods directs that they be sent to particular place and they are shipped in name of owner with draft attached to bill of lading, and in letter offering goods for sale such party states that goods were "owned by mill company and we are merely selling for them," held there was no such possession as to constitute him factor. Robinson, Norton & Co. v. Corsicana Cotton Factory, 30 Ky. L. R. 580, 99 SW 305.

35. Contract construed not sale but consignment for sale on commission. Federal Chemical Co. v. Green & Sons, 30 Ky. L. R. 223, 97 SW 803. Where contract provided that title should remain in consignor until consignee had sold and settled for same and who was to report unsold fertilizers at a specified time, failure to report did not vest title in consignee. Id. Tobacco warehouse company may charge commissions for sale of tobacco and cannot be held responsible for samples taken out. Orr v. Louisville Tobacco Warehouse Co., 30 Ky. L. R. 457, 99 SW 225.

36. Robinson, Norton & Co. v. Corsicana Cotton Factory, 30 Ky. L. R. 580, 99 SW 305.

37. See 7 C. L. 1642.

38. Principal's instructions held not to direct immediate sale where corn was graded lower than 2 and factor did not think an appeal from grading justified. Aygarn v. Fraser Co., 123 Ill. App. 95.

39. Where insurance company elected to take over damaged goods under its option, such taking held not to constitute a sale within contract, fixing factor's compensation, but came within clause providing commissions where unsold goods are transferred to another at principal's request. Wertheimer v. Talcott, 118 App. Div. 840, 103 NYS 692. Held that expense incurred by factor in employing insurance adjusters to settle loss was properly allowed, though other adjusters would have done the work cheaper, there being no evidence of negligence or bad faith. Id.

40. Where principal consigned goods to factor with power to sell or reconsign, and company of which factor was president reconsigned same and sold draft drawn on new consignee, held not binding on principal unless authorized by previous course of business. Smith v. Jefferson Bk., 120 Mo. App. 527, 97 SW 247.

41. Cannot accept payment by balancing account against consignments of purchaser (Liebhardt v. Wilson [Colo.] 88 P 173), and custom among factors of city to so do is not binding on principal (Id.).

42. Right of reconsignment. Smith v. Jefferson Bk., 120 Mo. App. 527, 97 SW 247.

43. Subsequent ratification of unauthorized act is equivalent to prior authority, unless intervening rights of third persons will be prejudiced thereby. Smith v. Jefferson Bk., 120 Mo. App. 527, 97 SW 247. Where goods consigned to factor were reconsigned by company of which factor was president, and company's draft sent in payment, held that if principal accepted draft with knowledge of facts he thereby ratified reconsignment (Id.), but not if he accepted draft in belief that reconsignment was regular (Id.). Held that, if he accepted draft believing company to be solvent, he might thereafter repudiate reconsignment if rights of third persons would not be prejudiced. Id. Ratification held for jury under facts of case. Id.

44. Smith v. Jefferson Bk., 120 Mo. App. 527, 97 SW 247.

45. Held not obliged to sell cattle consigned as dressed meats, especially where there were no facilities for slaughtering and where large advancements had been made. Poels v. Brown [Neb.] 111 NW 798.

46. Where one permits cotton to be shipped as property of another, he is not estopped to assert title as against factor who prior thereto had made advancements to latter upon false representations that he owned certain cotton and would ship same, factor not being misled by owner's action (Kempner v. Thompson [Tex. Civ. App.] 100 SW 351), nor is he estopped by advancement thereafter made where it was not made upon ownership of particular cotton which was small in amount, but upon all of consignor's cotton in his possession and promises of future shipments (Id.).

47. Where goods consigned to factor and reconsigned by company of which he was

FALSE IMPRISONMENT.

§ 1. What Constitutes, Persons Liable, and Jurisdiction (1351). | § 2. The Action to Recover Damages (1352).

§ 1. *What constitutes, persons liable, and justification.*[49]—False imprisonment is the unlawful restraint of the personal liberty of another.[50] It differs from malicious prosecution in that the latter proceeds under lawful process but from malicious motives and without probable cause.[51] It may consist of an unauthorized arrest or incarceration [52] without legal warrant [53] or probable cause;[54] but an arrest lawfully made is not rendered unlawful by a subsequent discharge of accused before the expiration of a reasonable time to procure a warrant or present him before a magistrate.[55] Actual force or visible physical restraint is not essential.[56]

president and draft drawn on new consignee was sold to and collected by bank, action by principal against bank for conversion, letters by principal to third person repudiating transaction held hearsay (Smith v. Jefferson Bk., 120 Mo. App. 527, 97 SW 247), as are also telegrams by factor to principal to effect that he had wired new consignee that goods belonged to him and letter written by company to effect that consignee had been directed to remit direct to principal (Id.). Where company of which factor was president wrongfully reconsigns goods and sends its draft to principal, which is accepted, held that principal's knowledge of facts which should warn him of company's insolvency may be considered in determining whether he intended to ratify action of company whether solvent or not. Id.

48. Where goods consigned to factor were wrongfully reconsigned by company of which he was president and draft of company sent in payment, and purchaser of draft drawn on new consignee relied on acceptance of company's draft as ratification, instruction that, as draft was dishonored, principal's acceptance was not payment unless he accepted it as payment held misleading. Smith v. Jefferson Bk., 120 Mo. App. 527, 97 SW 247.

49. See 7 C. L. 1643.

50. Placing a person against his will in a position where he cannot exercise it in going where he may lawfully go and detaining him without lawful authority held false imprisonment. Robinson & Co. v. Green [Ala.] 43 S 797. Evidence held not to show that plaintiff was restrained of his liberty. Cramer v. Barmon [Mo. App.] 103 SW 1086. Evidence insufficient to connect defendant with an unlawful arrest and imprisonment. Scheurrmann v. Vaccaro, 118 La. 67, 42 S 648.

51. Neves v. Costa [Cal. App.] 89 P 860. Complaint charging that plaintiff was arrested and imprisoned on a false charge and without probable cause held not to charge false imprisonment as well as malicious prosecution. Clark v. Palmer, 116 App. Div. 117, 101 NYS 759. One arrested without process and on complaint stating no offense could not sue for malicious prosecution, but action for false imprisonment was barred. Hackler v. Miller [Neb.] 112 NW 303.

52. Arrest of father for telling son in defendant's hearing that defendant was after him for army desertion held violation of Ky. St. 1903, § 1221, against illegal arrests, where son was clearly not subject to arrest because of limitations. Commonwealth v. White, 30 Ky. L. R. 1322, 101 SW 331. Where court was without jurisdiction to order an arrest on ground of insufficiency of an affidavit, the truthfulness of such affidavit and affiant's knowledge relative thereto were immaterial. Neves v. Costa [Cal. App.] 89 P 860. Police judge had authority to arrest plaintiff in forcible detainer for injuring tenant's property, though detainer proceedings had terminated. Read v. Shipley [Ky.] 104 SW 1001. Proceedings for incarceration of plaintiff for violating an ordinance held valid so as not to render judge or marshal liable for false imprisonment, though excessive costs were taxed. Rowe v. Reneer, 30 Ky. L. R. 545, 99 SW 250.

53. One who arrests another on the sole authority of a private telegram and without ascertaining that a crime has been committed acts at his peril. Janes v. Wilson [La.] 44 S 275. In prosecution for arrest without a warrant for violation of an ordinance, held immaterial whether ordinance was valid or not, it not having been violated in defendant's presence. Gambill v. Cargo [Ala.] 43 S 866. Presumed that a magistrate's warrant of arrest was based on proper affidavit or personal knowledge. Read v. Shipley [Ky.] 104 SW 1001. Allegations that plaintiff was arrested on a body execution and imprisoned did not show false imprisonment, it not appearing that execution or judgment was invalid. McClerg v. Vielee, 116 App. Div. 731, 102 NYS 45. In suit for arrest without warrant, question whether plaintiff was intoxicated held for jury. Snyder v. Thompson [Iowa] 112 NW 239.

54. An officer's arrest without a warrant is not false imprisonment where he acts with probable cause. O'Malley v. Whitaker, 118 La. 906, 43 S 545. Conductor held not to have had probable cause for arresting an alleged trespasser. Davis v. Chesapeake & O. R. Co., 61 W. Va. 246, 56 SE 400.

55. Not false imprisonment. Atchison, etc., R. Co. v. Hinsdell [Kan.] 90 P 800. Where plaintiff had committed larceny by taking goods from possession of a carrier having a lien, that carrier's agent described his offense as running away without pay-

One at whose instance or request the tort is committed is liable as a party thereto.[57] A master or principal is liable for a false imprisonment by his servant or agent within the scope of the latter's employment or authority.[58] A judge of inferior jurisdiction is responsible for an imprisonment in proceedings beyond his jurisdiction.[59] An election judge who without authority arrests and detains a voter is liable though he be a judicial officer with judicial discretion within prescribed limits.[60]

Justification and excuse.[61]—One is protected where an arrest was lawful,[62] or where he acted under regular legal process [63] executed as directed.[64] Ordinarily the motive of a person in making an illegal arrest is immaterial except to show malice as a basis for smart money damages,[65] but an officer may defend on the ground of probable cause.[66]

Damages.[67]

§ 2. *The action to recover damages.*[68]—The complaint must state a cause of action [69] for false imprisonment as distinguished from malicious prosecution.[70] An information alleging an assault without lawful authority sufficiently charges violence [71] and want of authority by law to arrest and detain.[72] When one is arrested without a warrant it is more important that he be informed by the plea of the grounds of arrest than where a warrant is used.[73]

The burden is on defendant to justify the imprisonment.[74] Testimony by

ing his bill, and that all carrier wanted was its money, held not to authorize recovery. Id. See, also, Arrest and Binding Over, 9 C. L. 249.

56. McAleer v. Good, 216 Pa. 473, 65 A 934. Policemen inducing one to go with them to chief of police who searched and incarcerated him held liable. Id.

57. One at whose instance an arrest is made is liable as a party thereto, although he did not expressly direct the officer to make the arrest. McAleer v. Good, 216 Pa. 473, 65 A 934. Persons at whose request plaintiff was seized and detained in a sanitarium held joint tort feasors, though they did not know that confinement was without legal commitment. Allen v. Ruland, 79 Conn. 405, 65 A 138.

58. In suit against a railroad held for jury, under the evidence, whether person making the arrest acted as special police officer or within scope of his duties as employe of defendant. Baltimore, etc., R. Co. v. Twilley [Md.] 67 A 265. Street railway held liable for arrest of passenger caused by superior officer who had right to take charge of car at any point. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 SW 495. Not necessary that authority of agent be expressly conferred, or that particular act complained of should have been authorized. Authority may be implied from agent's relation to principal, nature of employment, and mode in which he was permitted to conduct the business. Robinson & Co. v. Green [Ala.] 43 S 797. Evidence held to show that defendant had given his deputy authority to make arrests. Gambill v. Cargo [Ala.] 43 S 866.

59. Justice without jurisdiction causing arrest, trying and sentencing accused. McCarg v. Burr, 186 N. Y. 467, 79 NE 715. Order for imprisonment in house of correction instead of in common jail. Brewer v. Casey [Mass.] 82 NE 45. Recital that accused was committed to "prison" did not show excess of jurisdiction. Id.

60. Smyth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 338, 103 SW 899.

61. See 7 C. L. 1645.

62. Officer justified in making arrest where plaintiff was violating an ordinance. Meyer v. Lally, 143 Mich. 578, 13 Det. Leg. N. 67, 107 NW 109. Arrest by servant of railroad company held justified where plaintiff was committing a misdemeanor by getting on moving train. East v. Brooklyn Heights R. Co., 115 App. Div. 683, 101 NYS 364.

63. Rowe v. Reneer, 30 Ky. L. R. 545, 99 SW 250.

64. Officer not protected where he did not bring accused before the justice as warrant directed, but placed him in jail at another place. Wright v. Templeton [Vt.] 67 A 817.

65. East v. Brooklyn Heights R. Co., 115 App. Div. 683, 101 NYS 364.

66. If a police officer wantonly and maliciously arrests an innocent person, he is liable in as heavy punitive damages as a private person would be for a malicious prosecution, but if in the honest endeavor to arrest a felon he takes an innocent person, justly suspected, he is not liable. McAleer v. Good, 216 Pa. 473, 65 A 934.

67. See 7 C. L. 1645. See, also, Damages, 9 C. L. 869.

68. See 7 C. L. 1646.

69. Complaint for arrest and imprisonment in civil action based on affidavit insufficient to confer jurisdiction held sufficient as against general demurrer. Neves v. Costa [Cal. App.] 89 P 860.

70. As against general demurrer complaint held to show false imprisonment and not malicious prosecution. Neves v. Costa [Cal. App.] 89 P 860.

71, 72. Smyth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 338, 103 SW 899.

73. Tubbs v. Haessig [Mich.] 112 NW 750.

74. To show that it was by authority of law. McAleer v. Good, 216 Pa. 473, 65 A 934. Officer making arrest without a war-

plaintiff that he was detained against his will is not opinion evidence.[75] It is proper to show that the person who made an arrest was defendant's agent,[76] and the extent and character of his authority,[77] though matters in justification are ordinarily not admissible under the general issue.[78] It has been held proper to show under a general denial that at the time of an arrest plaintiff was committing a misdemeanor.[79] Evidence of defendant's good faith,[80] of plaintiff's mental suffering,[81] and that he was released on habeas corpus,[82] may be admitted on the question of damages. That an indictment against plaintiff was dismissed can be considered only for the purpose of determining whether the prosecution had terminated favorably to him.[83] That the evidence shows that the imprisonment did not immediately follow an arrest does not constitute a variance where it was the final result of the arrest.[84] An information against an election judge for imprisonment of a voter is supported by proof that he ordered the marshal to take the voter into custody and that this was done.[85]

Questions of justification are often for the jury.[86] Instructions must properly state the law,[87] must not be misleading,[88] and must be supported by the pleadings and evidence.[89]

FALSE PERSONATION.[90]

FALSE PRETENSES AND CHEATS.

Elements of Offense (1354).
Statutory Cheats, Swindling etc. (1354).
Defenses (1355).
The Indictment (1355).
Evidence; Admissibility (1356).
Sufficiency of Proof (1357).
Instructions and Verdicts (1357).

rant. Snyder v. Thompson [Iowa] 112 NW 239. Burden on policeman to justify arrest as per his notice of justification. Tubbs v. Haessig [Mich.] 112 NW 750.

75. Robinson & Co. v. Green [Ala.] 43 S 797.

76. In suit against a license inspector, evidence held admissible to show that person making the arrest was defendant's deputy during the month in which the arrest was made. Gambill v. Fuqua [Ala.] 42 S 735. On issue of whether one acted as defendant's agent, held error to admit evidence that when he arrested plaintiff he entered a charge of vagrancy against him. Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 29, 97 SW 712.

77. Certain evidence held admissible to show extent and character of an agent's authority and to show plaintiff was unlawfully restrained of his liberty. Robinson & Co. v. Green [Ala.] 43 S 797.

78. Gambill v. Fuqua [Ala.] 42 S 735.

79. Could be shown that plaintiff stole a ride on a moving train. East v. Brooklyn Heights R. Co., 115 App. Div. 683, 101 NYS 364.

80. Instructions of superior officers as to arrest. Klein v. Pollard [Mich.] 112 NW 717.

81. Evidence of extent of plaintiff's mental suffering and that he required treatment held competent. Illinois Central R. Co. v. Wilson [Ky.] 103 SW 364. Improper to allow him to testify as to certain hallucinations. Id.

82. Admissible in support of an allegation that he had incurred expense to secure his release. Neves v. Costa [Cal. App.] 89 P 860.

83. Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 29, 97 SW 712.

84. That plaintiff was under bail part of time. Neves v. Costa [Cal. App.] 89 P 860.

85. Smyth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 338, 103 SW 899.

86. In suit against policeman, justification for arrest was for jury. Tubbs v. Haessig [Mich.] 112 NW 750.

87. Modification of instruction so as to include idea of "implied" authorization of carrier's agents to cause an arrest held not prejudicial. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 SW 495. In a criminal prosecution, an instruction on intent and ignorance of law properly refused and another considered proper. Smyth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 338, 103 SW 899.

88. In prosecution for arresting a father for telling his son that defendants were after him for army desertion, instruction held prejudicial to commonwealth as leaving jury to consider that father had committed some offense. Commonwealth v. White, 30 Ky. L. R. 1322, 101 SW 331.

89. Evidence held to authorize instruction as to effect of an understanding between the parties that plaintiff should be released after staying at a station over night and should make no claim for damages. Bates v. Reynolds [Mass.] 81 NE 260. Instructions properly refused as not being supported by the evidence and because there was no plea of justification. Gambill v. Fuqua [Ala.] 42 S 735. Instructions properly refused as ignoring evidence of defendant's ratification of acts of his deputy. Id. Properly refused as ignoring ratification by principal. Robinson & Co. v. Green [Ala.] 43 S 797.

90. No new cases have been found for this topic during the period covered by volume 9. See 5 C. L. 1415.

Larceny by trick and general rules of criminal law and procedure[92] are excluded.

Elements of offense.[93]—It must appear that accused knowingly made a false pretense[94] with intent to cheat and defraud,[95] and by such pretense actually did defraud and obtain the property.[96] A false pretense is such a fraudulent representation of a fact past or existing by one who knows it to be untrue as is adapted to induce the person to whom it was made to part with something of value,[97] and it may consist of any act, word, or token knowingly and designedly employed to defraud another of personalty.[98] While a mere promise or representation as to something to take place in the future does not amount to a pretense,[99] yet a promise and a statement as to an existing fact may be considered together where the latter becomes effective only by reason of the former.[1] Knowledge of county officers that a claim presented is false will not be imputed to the county for the protection of one who fraudulently obtains money thereon.[2] It being shown that money was obtained with intent to defraud, it is immaterial to whom the benefit subsequently accrued.[3]

The place of the crime.[4]

Statutory cheats, swindling, etc.[5]—Among the offenses especially prohibited by statute may be mentioned the presentation of fraudulent claims,[6] the passing of fictitious bank notes of banks not in existence,[7] the working of the so-called "confidence game,"[8] and the obtaining of money or other property on a contract of hiring with

91. See Larceny, 8 C. L. 699.

92. See Criminal Law, 9 C. L. 851; Indictment and Prosecution, 8 C. L. 189.

93. See 7 C. L. 1646.

94. State v. Briscoe [Del.] 67 A 154.

95. State v. Briscoe [Del.] 67 A 154. That defendant was not twenty-one did not prevent his committing the crime of swindling. Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 108, 101 SW 212.

96. State v. Briscoe [Del.] 67 A 154. Must be shown that representations were made; that they were knowingly and designedly false, and made with intent to deceive and defraud; that they did deceive; that they related to existing facts or past events; that other party was induced to part with property in reliance thereon. Goddard v. State [Ga. App.] 58 SE 304.

97. State v. Briscoe [Del.] 67 A 154. Representation that another had agreed to go on defendant's note held of existing fact. Fairy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 314, 97 SW 700. Person guilty who obtained goods by false representations that he had a contract with another for upholstering of certain articles at a certain price. Martin v. Com. [Ky.] 102 SW 273. False representation of game protector that he had the right to receive money for logs cut from state forest preserve held not to sustain conviction for larceny by false representations. People v. Klock, 55 Misc. 46, 106 NYS 267. That accused threatened to prosecute complainant for disturbing religious worship, but desisted on payment of $10, held no violation of Pen. Code 1895, § 670. Franklin v. State [Ga. App.] 58 SE 491.

98. State v. Briscoe [Del.] 67 A 154. **Mere acts** without any verbal representations may be sufficient to constitute swindling. Including weight of iron in sale of hogs. Speer v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 297, 97 SW 469.

99. State v. Hollingsworth, 132 Iowa, 471, 109 NW 1003.

1. Indictment charging that defendant represented he had arranged to go into business, that he would be married, would go and establish the business, etc., held not demurrable. State v. Hollingsworth, 132 Iowa, 471, 109 NW 1003.

2. State v. Talley [S. C.] 57 SE 618.

3. Where accused swindled in sale of hogs belonging to son and later turned money over to son. Speer v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 297, 97 SW 469.

4, 5. See 7 C. L. 1648.

6. On the issue of whether accused obtained money from a county on false representations that it was owing him, it is immaterial that the claim presented was not in perfect legal form. State v. Talley [S. C.] 57 SE 618. Rev. St. 1898, § 4083, punishing the presentation of fraudulent claims to public officers not amended or superseded by Laws 1903, c. 48, amending Laws 1901, c. 137, relative to presentation of bounty claims. State v. Swan, 31 Utah, 336, 88 P 12.

7. Two incomplete bank notes pasted together held false and fictitious within Pen. Code, § 476. People v. Harben [Cal. App.] 91 P 398. Pen. Code, § 470, relating to signing name of fictitious person with intent to defraud, held not applicable to § 476. Id.

8. Procuring cash deposit from applicant for employment by representations that defendant was conducting a large business held to violate Hurd's Rev. St. p. 692, c. 38. Hughes v. People, 223 Ill. 417, 79 NW 137. Obtaining money by bogus check. Juretich v. People, 223 Ill. 484, 79 NE 181. That defendant sold stock in a gold mining company guaranteeing it to pay a certain amount each year held not to render him guilty of obtaining money by confidence game. Lory v. People [Ill.] 82 NE 261. Inducing

intent to defraud.[9] In Texas the acquisition of title to property by false pretext is swindling, whereas the acquisition of mere possession by such pretext is theft.[10] A false oral representation as to the present truth of a formal written financial statement is sufficient under the New York statute requiring representations as to a purchaser's ability to pay for goods to be in writing in order to make them criminal.[11] The word "person" as used in a statute punishing one who obtains money or property from "any other person" includes a corporation.[12]

Defenses.[13]—In a few states it is held that no conviction can be had for inducing one to part with money or property for an illegal purpose,[14] but in a prosecution for obtaining a loan it is no defense that the loan was usurious.[15] That defendant was acting as attorney for the one to whom he made the representations does not relieve him from criminal responsibility therefor.[16]

Limitations.[17]

The indictment.[18]—All the essential elements of the offense must be set forth[19] with precision and certainty.[20] Thus it must be sufficiently shown that accused knowingly[21] made false representations[22] as to past or existing facts,[23] feloneously and designedly pretending them to be true,[24] and with a present intent to defraud and deceive,[25] that these were relied on,[26] and that money or something

prosecutor to part with money on defendant's representations that he would engage in business with prosecutor held obtaining money by confidence game, and not a mere breach of a civil contract. Chilson v. People, 224 Ill. 535, 79 NE 934.

9. Act Aug. 15, 1903, does not deny equal protection of law. Vance v. State [Ga.] 57 SE 889. Not invalid for failure to declare measure of proof sufficient to overcome presumption of fraudulent intent declared to arise on proof of certain facts. Id. Not in conflict with provision providing for uniformity of operation throughout the state (Id.), nor with provision for public and speedy trial by jury (Id.). Does not violate constitutional inhibition against amendments or repeals by mere reference to title or section. Id. The statute was not designed to create a remedy for the collection of debts or for compelling performance of contracts. Mulkey v. State, 1 Ga. App. 521, 57 SE 1022; Heywood v. State, 1 Ga. App. 530, 57 SE 1025. Provision creating presumption of fraudulent intent on proof of obtaining money on contract, failure to perform, etc., must be restricted in application so as not to result in imprisonment for debt or nonperformance of contract. Mulkey v. State, 1 Ga. App. 521, 57 SE 1022. Evidence as a whole must show beyond reasonable doubt that fraudulent intent existed at time money was obtained. Id. Hence accused should not be convicted where he engaged in the promised services so long as to make it unreasonable to presume that he did not intend to perform. Id.

10. Obtaining money to be used in paying express charges swindling and not theft. Bink v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 469, 98 SW 863.

11. People v. Levin, 104 NYS 647.

12. State v. Briscoe [Del.] 67 A 154.

13. See 7 C. L. 1649.

14. On horse race betting. No conviction under statute on larceny by false pretense, etc., recommending legislation on the subject. People v. Tompkins, 186 N. Y. 413, 79 NE 326. Where complainant parted with money for logs sold from state forest preserve contrary to law. People v. Klock, 55 Misc. 46, 106 NYS 267.

15. People v. Koller, 116 App. Div. 173, 101 NYS 518.

16. Obtaining money on representations that a bond was valid. People v. Colmey, 117 App. Div. 462, 102 NYS 714.

17, 18. See 7 C. L. 1650.

19. Indictment held to state all essential elements of offense of passing fictitious bank note on bank not in existence. People v. Harben [Cal. App.] 91 P 398. Indictment for obtaining credit by false representations as to assets, etc., held sufficient. Kinard v. State, 1 Ga. App. 146, 58 SE 263.

20. Information for presenting fraudulent claims to county clerk for allowance held sufficiently certain. State v. Swan, 31 Utah, 336, 88 P 12.

21. Information for obtaining goods by false pretenses in exchange for land held to sufficiently allege scienter. State v.. Roberts, 201 Mo. 702, 100 SW 484.,

22. Must allege facts from which it may appear wherein the representations were false or fraudulent. People v. Carpenter [Cal. App.] 91 P 809.

23. That the representations alleged are not all of existing facts does not render the indictment defective. That some were as to hopes and intentions. People v. Sattlekau, 104 NYS 805.

24. Information bad for failure to state that accused feloniously, designedly, and falsely pretended that an abstract was true. State v. Roberts, 201 Mo. 702, 100 SW 484. Use of words "by virtue of the premises, to wit," followed by particulars, held not to destroy effect of previous allegation that defendant falsely and feloniously pretended that another was owner of land. Id.

25. Held to sufficiently allege intention to appropriate an amount of money in excess of that to which accused was entitled. Speer v. State [Tex. Cr. App.] 17

of value was obtained thereby.[27] It must also be shown from whom the property was obtained [28] and what was it character,[29] and amount or value,[30] but a statement that accused intended to defraud of a certain sum in money sufficiently places a value on the property which he intended to procure,[31] and it need not be stated who owned property falsely represented by accused to be owned by him;[32] neither is it necessary to allege the purpose for which complainant paid the money to accused.[33] That some of the statements in the indictment are inconsistent does not necessarily render it demurrable.[34] Where two counts charge the same transaction, the state is not required to elect.[35]

Evidence; admissibility.[36]—The intent to defraud may be established by either direct or circumstantial evidence,[37] such as by proof of similar transactions in which accused participated.[38] Minor false representations connected with and surrounding the main false representations relied on are admissible as part of the res gestae.[39]

Tex. Ct. Rep. 297, 97 SW 469. Indictment charging defendant with assigning wages and subsequently collecting them himself held insufficient to show violation of Pen. Code, § 670, against cheating by any deceitful means or artful practice, it not stating that representations were made with intent to defraud or with present intent to himself collect the wages. Crawford v. State [Ga. App.] 58 SE 301.

26. The indictment need not expressly state that complainant relied on the representations. People v. Sattlekau, 104 NYS 805. An equivalent allegation, as that accused obtained the money or property by the aid and color of the representations set out, and with intent to defraud, is sufficient. Id. Allegation that prosecutor was induced to part with the property sufficient without distinct allegation of reliance. Fairy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 314, 97 SW 700.

27. Indictment fatally defective for failure to aver that accused obtained money or other thing of value from alleged fraudulent sale of stock. In re Waterman [Nev.] 89 P. 291. Allegation that prosecutor sold and delivered certain goods in exchange for a pretended conveyance held sufficient allegation that deed was delivered to and received by prosecutor in exchange for the property delivered to accused. State v. Roberts, 201 Mo. 702, 100 SW 484.

28. Information that accused intended to defraud R and C held good though it stated only that he obtained money from C, Pen. Code, § 956, making immaterial erroneous allegations as to person injured. People v. Hines [Cal. App.] 89 P 858.

29. The character of the property obtained must be alleged with the same degree of certainty as is required in an indictment for larceny. Failure to state what character of money was obtained. In re Waterman [Nev.] 89 P 291.

30. Information held to sufficiently state of what amount it was intended to defraud. Speer v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 297, 97 SW 469.

31. Speer v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 297, 97 SW 469.

32, 33. People v. Hines [Cal. App.] 89 P 858.

34. Not demurrable for failure to allege the sex of prosecutrix, allegations being sufficient whether she was man or woman. State v. Hollingsworth, 132 Iowa, 471, 109 NW 1003.

35. Charging transaction as theft and swindling. Bink v. State [Tex. Cr App.] 17 Tex. Ct. Rep. 469, 98 SW 863.

36. See 7 C. L. 1651.

Held admissible: Contract for services executed by accused who signed by mark held admissible after proof by witnesses who signed his name. Campbell v. State [Ala.] 43 S 743.

Not admissible: On trial for swindling by false representations as to ownership of property, claim affidavits, bonds, etc., filed by third persons to a levy on certain property as defendant's held not admissible. Kinard v. State, 1 Ga. App. 146, 58 SE 263.

37. State v. Briscoe [Del.] 67 A 154.

38. Juretich v. People, 223 Ill. 484, 79 NE 181; People v. Levin, 104 NYS 647. In prosecution for obtaining money from county on false claims. State v. Talley [S. C.] 57 SE 618. For obtaining personalty in exchange for realty not owned by defendants. State v. Roberts, 201 Mo. 702, 100 SW 484. The facts when clearly proven usually speak for themselves, and other proof of guilty intent is not required. State v. Sparks [Neb.] 113 NW 154. In such cases, evidence of similar and independent transactions should not be received. Id. But when the transaction relied on is such as to require further proof of guilty knowledge, and intent, evidence of like crimes, committed in like manner, at or about the same time, or as part of the same scheme, may be received. Id. That an indictment for presenting a false claim in an account set forth the entire account, and specifically charged that one item was fraudulent, did not preclude state from showing falsity of other items. Thomas v. Ter. [Ariz.] 89 P 591. Evidence of subsequent passing of fictitious bank notes held admissible on intent and for identification of defendant. People v. Harben [Cal. App.] 91 P 398. Evidence of similar representations made to another at about same time held admissible in corroboration of prosecutor as to fact that representations were made, as being inconsistent with plea of not guilty. People v. Ward [Cal. App.] 89 P 874.

39. People v. Colmey, 117 App. Div. 462,

Sufficiency of proof.[40]—The state must establish all the elements of the offense.[41] It is not sufficient to establish facts which would render accused liable in a civil action or subject him to prosecution under some other provision of the criminal statute.[42] Where, however, several false pretenses enter into a transaction, proof of any one of them constituting an operative cause is sufficient to support a verdict of guilty,[43] and the jury may take into consideration the acts and conduct of the parties in determining the truth or falsity of the representations.[44] So, also, the state need not prove that accused obtained the particular sum of money specified in the indictment.[45] A material variance is fatal.[46]

Instructions and verdicts.[47]—The court should instruct on the question of intent[48] and should not invade the province of the jury.[49] This question of intent is one of fact for the jury where circumstances are relied on which have some tendency to negative fraud.[50] Accused cannot complain of the omission of statutory terms from a charge where such omission is favorable to him,[51] and instructions not warranted by the evidence are properly refused.[52] Formal defects in verdict, not prejudicial, are not fatal.[53]

False Representations; False Swearing; Falsifying Records; Family Settlements; Federal Procedure; Fellow-servants, see latest topical index.

102 NYS 714; People v. Sattlekau, 104 NYS 805.

40. See 7 C. L. 1653.

41. **Evidence sufficient** to sustain conviction for obtaining money by means of bogus check. Juretich v. People, 223 Ill. 484, 79 NE 181. For larceny by false pretenses. People v. Sattlekau, 104 NYS 805. For obtaining money by false pretenses. People v. Ward [Cal. App.] 89 P 874. To show that defendant made false representations as to validity and value of a bond upon which he obtained a loan and that bond was worthless. People v. Colmey, 117 App. Div. 462, 102 NYS 714.

Evidence insufficient to show swindling in horse trade. Goddard v. State [Ga. App.] 58 SE 304. To show beyond reasonable doubt that representations were false. Swift v. State, 126 Ga. 590, 55 SE 478. To show false representations. Fairy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 314, 97 SW 700. To sustain verdict for cheating by false representations as to ownership of property. Kinard v. State, 1 Ga. App. 146, 58 SE 263. To sustain allegation that defendant knew that his representations as to ownership of property were false. Carlisle v. State [Ga. App.] 58 SE 1068.

42. Evidence insufficient to sustain conviction for obtaining a cashier's check by means of confidence game. Dorr v. People, 228 Ill. 216, 81 NE 851.

43. People v. Ward [Cal. App.] 89 P 874.

44. That accused never called for a draft, but left county. People v. Ward [Cal. App.] 89 P 874.

45. Sufficient to show that any sum of paper money was obtained. State v. Briscoe [Del.] 67 A 154.

46. Proof that a check was obtained is a fatal variance from an indictment charging the obtaining of money. Lory v. People [Ill.] 82 NE 261. In prosecution for obtaining money on contract of hiring, evidence held to show a variance between contract alleged and that proven. Chapple v. State, 126 Ga. 638, 55 SE 471.

47. See 7 C. L. 1653.

48. To give to jury Pen. Code 1895, § 31, held not sufficient compliance with request to charge on question of criminal intent. Ager v. State [Ga. App.] 58 SE 374. In a prosecution for obtaining money on a contract with intent not to perform, the intention of accused at the time of obtaining the money is so directly in issue that the court should instruct thereon even in the absence of any request. Mulkey v. State, 1 Ga. App. 521, 57 SE 1022. In prosecution for swindling, in sale of hogs, by receiving pay for excessive weight, instruction on intent held sufficient. Speer v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 297, 97 SW 469.

49. Instructions held to invade province of jury. Campbell v. State [Ala.] 43 S 743.

50. Error to authorize jury to infer fraud if accused knew that representations were false. State v. Hicks [S. C.] 57 SE 842.

51. Instruction omitting statutory words "or attempt to obtain" money, etc., not fatally defective. Chilson v. People, 224 Ill. 535, 79 NE 934.

52. Instruction that if defendant had part of cotton on which he obtained a loan properly refused, there being nothing to show that what he had would reduce debt below $50. Abbott v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 294, 97 SW 488. Instruction referring to other cotton not included in mortgage properly refused. Id. Where vendor brought to vendee an inferior horse, instruction that its value should be deducted from that of horse sold, and if this made a difference of less than $50 accused would be guilty only of a misdemeanor, properly refused where inferior horse was not accepted. Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 108, 101 SW 212.

53. Verdict of guilty as charged and that property obtained was of "amount" of $200. Allegation as to value could be eliminated as surplusage. People v. Hines [Cal. App.] 89 P 853.

FENCES.

Rights, duties and regulations.[See 7 C. L. 1654]—The duty to construct and maintain a fence may be imposed by contract.[54] By statute in most states, railroads are required to construct and maintain fences along their right of way,[55] and in some states one must enclose his lands before he may recover for trespasses thereon by stock.[56] Statutes also frequently provide for the construction and maintenance of partition fences.[57]

Construction, maintenance and cost.[See 7 C. L. 1654]—A statutory partition fence must be of a character permitted by the statute [58] and located on the division line,[59] and if not so located ejectment will lie.[60] Where the maintenance of a partition fence has been assigned by the viewers, it may be replaced by any other lawful fence.[61] In order to bring a hedge fence within the statutory provision that it shall not be cut back if it protects an orchard, etc., it must be affording present protection.[62]

Crimes and penalties.[See 7 C. L. 1655]—It is a criminal offense in Nebraska to construct a barbed wire fence across a road or track in common use.[63] The Missouri penal statute prohibiting the cutting of fences is not limited to partition fences,[64] but applies to a fence entirely upon the land of one [65] which does not lead to the inclosure of the other,[66] and a statement for the cutting of such fence need not allege that the adjoining fields were under cultivation or that statutory notice was not

54. Where two adjoining landowners agree that each shall build and maintain one-half of line fence "entirely on his own land," such fence does not constitute a statutory division fence, but duties and rights of parties are contractual. McLean v. Berkabile, 123 Mo. App. 647, 100 SW 1109.

55. See Railroads, 8 C. L. 1590.

56. See Trespass, 8 C. L. 2147; Animals, 9 C. L. 100.

57. Code, § 2355, providing that owners of adjoining lands, except timber lands used only for timber thereon, shall erect fences, etc., does not apply to or require erection of fence on each side non-navigable division river, the bed being necessarily regarded as uninclosed land. Foster v. Bussey, 132 Iowa, 640, 109 NW 1105. Fact that Hurd's Rev. St. 1905, c. 54, § 7, authorizes fence viewers to assign hedge partition fence belonging to one to adjoining owner to maintain, and thus giving right of removal, held not unconstitutional as taking property without due process of law. Hill v. Tohill, 225 Ill. 384, 80 NE 253.

58. Under Comp. Laws, § 2415, relating to partition fences, held that worm or Virginia fence may be lawfully built though it requires strip of land from three to five feet wide, as also may stump fence built in accordance with local practice and approved by viewers. Rose v. Linderman, 147 Mich. 372, 13 Det. Leg. N. 1046, 110 NW 939.

59. Where it requires strip from three to five feet wide, equal amount may be taken from each adjoining pieces, builder not being required to place same on own land. Rose v. Linderman, 147 Mich. 372, 13 Det. Leg. N. 1046, 110 NW 939.

60. Rose v. Linderman, 147 Mich. 372, 13 Det. Leg. N. 1046, 110 NW 939.

61. Where hedge fence was assigned to one adjoining owner, under Hurd's Rev. St. 1905, c. 54, § 7, for maintenance, held that he could replace with wire fence, without adjacent owner's consent. Hill v. Tohill, 225 Ill. 384, 80 NE 253.

62. Mere intention of adjoining owner to plant orchard at future time held not bringing case within Hurd's Rev. St. 1905, c. 54, § 3. Hill v. Tohill, 225 Ill. 384, 80 NE 253.

63. Information based on § 108, c. 78, Comp. St. 1903, making it unlawful to "build a barbed wire fence across or in any plain traveled road or track in common use," which omits to charge that track or road was in "common use," is defective. Gilbert v. State [Neb.] 111 NW 377. Words "common use" held to apply to both roads and tracks. Gilbert v. State [Neb.] 112 NW 293.

64. Action held under Rev. St. 1899, § 4573 (Ann. St. 1906, p. 2486), for cutting of fence wholly on plaintiff's land. Frederick v. Bruckner [Mo. App.] 101 SW 619. Where plaintiff constructed fence on own land and did not intend that defendant should use the same, it was not a partition fence. Frederick v. Bruckner [Mo. App.] 101 SW 619.

65. Where surveyor ran two division lines which did not coincide, and evidence tends to show that parties agreed to accept one as true boundary, and that plaintiff built fence on his side thereof which was torn down by defendant, agreement held properly submitted by instruction as question of fact. Frederick v. Bruckner [Mo. App.] 101 SW 619.

66. Failure of statement to allege that fence destroyed did not lead into defendant's enclosure, as required by Rev. St. 1899, § 4573, creating liability, was cured by failure to raise such objection by demurrer. Frederick v. Bruckner [Mo. App.] 101 SW 619.

given.[67] Where a fence obstructs a public street, one inconvenienced thereby, may remove the same without liability.[68]

FERRIES.[68a]

In many states the granting of franchises generally, or to a particular class of persons,[69] rests in the sound discretion of the court,[70] and its judgment in respect thereto is not subject to collateral attack.[71] While the posting of a notice of application is jurisdictional in Kentucky,[72] the order granting the right need not show such posting.[73] A statute limiting the period for which a franchise may be granted will be read into an order silent in respect to duration.[74] In Illinois a city may acquire land for ferry purposes by condemnation.[75] The right of a ferryman to use the property of another for a landing depends largely upon statute.[76] Ferriage charges are often regulated by statute or other public act.[77] In Kentucky a ferry for hire[78] cannot be established within one mile of an existing one, and, if so established, the operator thereof is liable in damages.[79] The operator of a ferry is

67. Such provisions of Rev. St. 1899, § 4573 (Ann. St. 1906, p. 2486), held to relate only to partition fences. Frederick v. Bruckner [Mo. App.] 101 SW 619.

68. State v. Godwin [N. C.] 59 SE 132. In prosecution under Revisal 1905, § 3673, for injuring and removing fence surrounding yard, etc., whether fence was one within statute and whether land had been dedicated as street, held under evidence for jury. Id.

68a. See 7 C. L. 1655.

69. Under Shannon's Code, §§ 1696, 1699, 1703, empowering county court to grant franchise to one owning a ferry landing or land on both sides of stream, held to authorize granting of franchise to one who was only tenant in common. Guinn v. Eaves, 117 Tenn. 524, 101 SW 1154. One operating ferry, using public road on his land as one landing and land of third person for opposite landing, has no preference over franchise subsequently granted to such third person, under Shannon's Code, §§ 1696-1699, 1703 (Id.), and such person cannot increase his rights by changing landing on eve of litigation (Id.).

70. Granting of second ferry franchise by county court, although not necessary to accommodate public, held not such abuse of discretion as to authorize superior court to interfere. Guinn v. Eaves, 117 Tenn. 524, 101 SW 1154.

71. As in action for infringement of privilege. Hatten v. Turman [Ky.] 97 SW 770.

72. Ky. St. 1903, § 1804, providing that no application to establish ferry shall be heard unless notice thereof shall be posted, etc. Hatten v. Turman [Ky.] 97 SW 770. Evidence of posting of notice together with presumption in favor of validity of judgment establishing ferry held to show posting. Id.

73. Hatton v. Turman, 30 Ky. L. R. 382, 98 SW 1000.

74. Where order establishing ferry is silent as to the period for which right is granted, Ky. St. 1903, § 1802, prohibiting grant for more than twenty years, will be read into it, and in action for infringement of privilege it will be conclusively presumed that it was for twenty years. Hatten v. Turman [Ky.] 97 SW 770; Hatton v. Turman, 30 Ky. L. R. 382, 98 SW 1000.

75. Under Hurd's Rev. St. 1905, c. 24, § 194, providing that it shall be lawful for a city "to build or acquire ferries, by purchase, lease, or gift," city may condemn land for ferry purposes and is not limited to acquisition by "purchase, lease, or gift." Helm v. Grayville, 224 Ill. 274, 79 NE 689. Hurd's Rev. St. 1905, c. 55, § 23, which is part of chapter on ferries, conferring power to take or damage private property for ferry landing, is not limited to ferries to be operated under such chapter, but applies to ferries to be established under c. 24, § 194. Id. It is no defense that one landing will be in another state, and city may not be able to acquire a landing there. Id. In proceedings under Hurd's Rev. St. 1905, c. 24, § 194, to condemn land for ferry petition alleging that business interests of city require greater ferry facilities than those afforded by existing ferry held to sufficiently show that ferry was for public purposes. Id.

76. Kirby's Dig. § 3556, providing that person operating ferry and owning land on one side shall have privilege of landing on opposite bank, held not to give right of landing on private property, but merely on public property. Lake v. Combs [Ark.] 104 SW 544.

77. Act of February 6, 1799 (Gen. St. p. 1469), does not suffice to authorize chosen freeholders of Hudson county to fix rate of ferriage of foot passengers from New Jersey to New York. New York Cent. etc., R. Co. v. Board of Chosen Freeholders of Hudson County [N. J. Law] 65 A 860. As to power of states to prescribe charges on interstate commerce and as to what constitutes such commerce, see Commerce, 9 C. L. 583.

78. Where storekeeper establishes ferry and issues tickets therefor with purchases, he is maintaining ferry for hire in violation of Ky. St. 1903, § 1820. Hatten v. Turman [Ky.] 97 SW 770.

79. Where ferry privilege has been infringed, measure of damage is such sum as will compensate owner for tolls lost. Hatten v. Turman [Ky.] 97 SW 770. And damages will be presumed from showing that public is using defendant's ferry and a diminution of receipts, it not being necessary to show that such persons would have

liable for injury to his patrons [80] through his negligence [81] unless such party is also negligent.[82] The county commissioners in Ohio are not liable for negligence in the operation of a free ferry.[83]

Fidelity Insurance; Filings; Final Judgments and Orders; Finding Lost Goods; Findings, see latest topical index.

FINES.[83a]

The scope of this topic is noted below.[84]

Where a verdict is against several defendants, it must separately assess the fine against each.[85] Fines imposed for the violation of penal statutes or ordinances are not debts within a constitutional inhibition against imprisonment for debt.[86] But while a sentence may provide for imprisonment if a fine and costs are not paid within a given period,[87] such imprisonment must not result in a confinement for an offense for a longer period than that prescribed by law.[88] Where a statute provides for imprisonment one day for every dollar of fine and costs, and a commitment is made under several distinct and similar judgments simultaneously entered, an incarceration sufficient to discharge one is a discharge of all the others in the absence of any order for successive incarcerations.[89] Where a misdemeanor convict is sentenced to work with a provision for discharge upon the payment of a fine, the court

used his ferry. Id. Where it appears that plaintiff's daily receipts for five years were about $1.50 lower than for five years prior to infringement, held that verdict for $1,000 was not excessive. Id.

80. Liable for failure to provide reasonably safe way to board for one intending to take passage, though not yet a passenger in that fare has not been paid or the intention signified. Burke v. St. Louis Southwestern R. Co. 120 Mo. App. 683, 97 SW 981.

81. Cradle track consisting of detached railway track with irons connecting rails, and which rested upon regular track at water's edge and arranged so as to be movable, held not a reasonably safe means of getting foot passengers aboard. Burke v. St. Louis S. W. R. Co., 120 Mo. App. 683, 97 SW 981.

82. In action for injuries received while boarding ferryboat, instruction that point of junction of ferryboat and dock may be dangerous, and that plaintiff was bound to use care accordingly, held not erroneous. Gassert v. Central R. Co. [N. J. Law] 64 A 1014. Where plaintiff testified that cradle track was not in motion when he went upon it, and that he was injured by sudden lurch thereof, held sufficient to prevent peremptory instruction on ground of contributory negligence. Burke v. St. Louis S. W. R. Co. 120 Mo. App. 683, 97 SW 981. Verdict for plaintiff thereon held not so against the evidence as to indicate prejudice. Id. Negligence in failing to observe that gangplank was tilted up, or in slipping thereon if such fact was observed, held for jury. Gassert v. Central R. Co. [N. J. Law] 64 A 1014.

83. Amendment of § 845, Rev. St. 1892, providing that county commissioners shall be liable for negligence "in keeping any such road or bridge in proper repair," held not to apply to free ferry. Board of Com'rs of Morgan County v. Marietta Transfer & Storage Co., 75 Ohio St. 244, 79 NE 237.

83a. See 7 C. L. 1656.

84. It includes the enforcement, payment, and disposition of fines imposed on conviction of crime.

It excludes the amount of fine which may be imposed and the determination of excessiveness (See Criminal Law, § 6, 9 C. L. 851) and the procedure for imposition (See Indictment and Prosecution, 8 C. L. 189).

85. Perry v. State [Ala.] 43 S 18.

86. Speed ordinance. Peterson v. State [Neb.] 112 NW 306.

87. United States circuit court had common-law jurisdiction to commit one, until he paid a fine imposed under Federal Statutes, for willful refusal to allow search by revenue officers for goods imported without payment of duty. Ex parte Barclay, 153 F 669. When a fine is assessed, trial court must either imprison defendant or sentence him to labor under §§ 5423-5425, Code 1896, unless fine and costs are paid or judgment confessed. Perry v. State [Ala.] 43 S 18. Judgment ordering performance of additional labor, not to exceed a certain time, at eighty-three cents per day until the costs are satisfied, is not a determination of the time necessary to work out the costs at thirty cents per day as required by Code 1896, § 4532. Moore v. State [Ala.] 42 S 996.

88. Where six months was limit for a misdemeanor, and prisoner was unconditionally sentenced to jail for five months, he could not be sentenced to six months more if he failed to pay a fine. Wallace v. State, 126 Ga. 749, 55 SE 1042. Relator entitled to discharge where, after being fined $72.42, including costs, she remained in jail twenty-six days after filing her affidavit in forma pauperis as required by law. Ex parte Woodroe [Tex. Cr. App.] 101 SW 226. That on one day prisoner claimed he was sick did not defeat his right to discharge after confinement for sufficient length of time to discharge the fine. Ex parte Clayton [Tex. Cr. App.] 19 Tex. Ct. Rep. 236, 103 SW 630.

89. Peed v. Brewster [Ind.] 79 NE 1039.

should prescribe a reasonable time for payment.[90] If it fails to do so, or prescribes two irreconcilable limits within which to pay, the law will allow a reasonable time.[91] One may not insist on his being required to work out a fine where under the statute this is left discretionary with the town authorities.[92] A fine imposed for a criminal offense is not enforceable by the state after the death of the person upon whom it was imposed.[93] Though a bond for the payment of a fine does not conform to the requirements of a statute,[94] it may constitute a valid common-law obligation,[95] so that where the sheriff is subsequently compelled to pay the amount of the fine to the county[96] he may recover on such bond against the principal and sureties.[97] A fine paid by one convicted under a void indictment cannot be recovered by him by rule against the sheriff who collected it.[98] In Ohio, where fines for the violation of the municipal local option law or the law prohibiting the sale of liquor on Sunday are collected by the clerk of the court of common pleas, they must be paid by him into the county treasury,[99] and where imposed by the municipal court they must be paid into the treasury of the municipality.[1]

FIRES.

§ 1. Rights and Duties Respecting Fires (1361).
§ 2. Remedies and Procedure (1362).
§ 3. Fire Districts and Protection (1363).

Insurance against fire,[2] fires by railroads,[3] and liabilities of persons storing inflammable substances,[4] are elsewhere treated.

§ 1. *Rights and duties respecting fires.* See 7 C. L. 1657—One using fire for a lawful purpose[5] is not liable for damage caused thereby in the absence of negligence,[6] but he must exercise care commensurate to the danger to which property is exposed.[7] Such care is exacted in starting the fire,[8] in preventing its escape,[9] and

90. Dunaway v. Hodge, 127 Ga. 690, 55 SE 483.
91. Where court prescribed that convict should have five days, but also that he might have until end of sentence. Dunaway v. Hodge, 127 Ga. 690, 55 SE 483. Fifteen days held reasonable where sentence was twelve months' service. Id.
92. Defendant subject both as to fine and costs to Code Cr. Prac. § 304, providing for length of confinement. Rowe v. Reneer, 30 Ky. L. R. 545, 99 SW 250.
93. A fine imposed for giving rebates in violation of the interstate commerce act is not enforceable against the estate of the accused, who died after judgment but before paying the fine. United States v. Pomeroy, 152 F 279. Court imposing fine has jurisdiction to abate proceedings on motion of decedent's personal representatives. Id.
94. Where it was not made payable to state and within thirty days it did not have effect of a judgment under Kirbys' Dig. §§ 1091-2475. Wilson v. White [Ark.] 102 SW 201.
95. Wilson v. White [Ark.] 102 SW 201.
96. That he took the imperfect bond did not acquit him. Wilson v. White [Ark.] 102 SW 201.
97. Wilson v. White [Ark.] 102 SW 201.
98. McDonald v. Sowell [Ga.] 58 SE 860.
99. City of Mt. Vernon v. Mochwart, 75 Ohio St. 529, 80 NE 185.
1. Statutes construed. City of Mt. Vernon v. Mochwart, 75 Ohio St. 529, 80 NE 185.
2. See Insurance, 8 C. L. 377.
3. See Railroads, 8 C. L. 1655.
4. See Explosives and Inflammables, 9 C. L. 1345.
5. Farmer may rightfully set out fire on his premises to clean field of weeds, burs, etc. Johnson v. Veneman [Kan.] 89 P 677.
6. Generally, plaintiff must show that fire was unlawfully kindled or was negligently started or guarded. Beckham v. Seaboard Air Line R. Co., 127 Ga. 550, 56 SE 638; Talmadge v. Central of Georgia R. Co., 125 Ga. 400, 54 SE 128.
7. In determining what constitutes ordinary care, consideration must be given to surrounding circumstances and conditions. Talmadge v. Central of Georgia R. Co., 125 Ga. 400, 54 SE 128; Johnson v. Veneman [Kan.] 89 P 677.
8. Evidence that brisk wind was blowing, that grass and thistles were tall and dry, held to sustain finding of negligence in starting fire. McVay v. Central California Inv. Co. [Cal. App.] 91 P 745.
9. Must exercise reasonable care. Hayes v. Brandt, 80 Ark. 592, 98 SW 368; King v. Norcross [Mass.] 82 NE 17; Mahaffey v. Rumbarger Lumber Co., 61 W. Va. 571, 56 SE 893. Railroad company held not negligent under facts alleged in not dragging burning building away so as not to set fire to plaintiff's property. Beckham v. Seaboard Air Line R. Co. 127 Ga. 550, 56 SE 638. Finding of negligence sustained, although it appeared that fire was set out while weather conditions were favorable

in extinguishing the same after it has spread to the property of another.[10] It has been held, however, that one is not liable for negligently permitting a fire to escape from his premises where he was not responsible for its origin.[11] Defendant's negligence must be the proximate cause of the loss,[12] and no recovery can be had for damage caused by a fire carried beyond his control by a sudden and violent wind[13] though, if he negligently permits a fire to escape, it is no defense that it would have missed plaintiff's property had the wind not changed.[14] No recovery can be had for losses which could have been prevented by due diligence on plaintiff's part.[15]

§ 2. *Remedies and procedure.* See 7 C. L. 1659—Petition must allege negligence on the part of defendant,[16] identify the property destroyed,[17] and aver title thereto,[18] but in Massachusetts contributory negligence need not be negatived where defendant is charged with negligently permitting fire to escape onto plaintiff's property.[19] Plaintiff must recover upon the cause of action alleged,[20] proving the particular negligence charged,[21] which must be shown to have been the proximate cause of the loss.[22] Plaintiff must identify the fire causing the loss as the one negligently started by defendant,[23] and must prove ownership of property destroyed.[24] The general

and wholly extinguished except at straw stack from which it spread during high wind, although surrounded by burnt strip. Johnson v. Veneman [Kan.] 89 P 677. Instruction held to properly charge as to liability of one negligently permitting fire to escape which he has originated. Mahaffey v. Rumbarger Lumber Co., 61 W. Va. 571, 56 SE 893.

10. To constitute actionable negligence in "allowing" a burning by fire communicated from locomotive, there must be alleged negligence in communication or other circumstance imposing duty to put out fire. Atlantic Coast Line R. Co. v. Benedict Pineapple Co. [Fla.] 42 S 529.

11. Mahaffey v. Rumbarger Lumber Co., 61 W. Va. 571, 56 SE 893. Contrary holding, see 7 C. L. 1658. Instruction that if fire which destroyed plaintiff's property started upon defendant's premises and was negligently permitted to escape therefrom defendant is liable, though it passed over intervening property of another, held erroneous as ignoring defendant's agency in starting same. Id.

12. Negligence of defendant in storing oils and waste in wooden building and in allowing tramps to sleep therein held not to render it liable where fire was caused by accidental or negligent overturning of lamp by person in building with permission, such person not being an employe. Beckham v. Seaboard Air Line R., 127 Ga. 550, 56 SE 638.

13. Instruction in respect thereto held improperly refused. McVay v. Central California Ins. Co. [Cal. App.] 91 P 745.

14. Especially where it was not of unusual character. Mahaffey v. Rumbarger Lumber Co., 61 W. Va. 571, 56 SE 893.

15. One in position to prevent damages from fire without incurring unusual damage, and does not do so, cannot recover. Hawley v. Sumpter Valley R. Co. [Or.] 90 P 1106. Duty of protecting own property held not to require plaintiff to go upon defendant's property to assist in extinguishing fire. Mahaffey v. Rumbarger Lumber Co., 61 W. Va. 571, 56 SE 893. Negligence of employe engaged with reference to care and management of property destroyed is negligence of employer. Hawley v. Sumpter Valley R. Co. [Or.] 90 P 1106. Evidence held insufficient to show negligence on part of any employe charged with care of property. Id.

16. Allegation that it was negligence on part of defendant "in placing a car used for the purpose the said cook car was used for so close to the building of said Planters Warehouse Company" held properly stricken as not alleging negligence. Talmadge v. Central of Georgia R. Co., 125 Ga. 400, 54 SE 128.

17. Complaint alleging destruction of property "on lands owned by plaintiffs in township seventeen (17) north, range one (1) west, in Colusa county," held to sufficiently identify property. McVay v. Central California Inv. Co. [Cal. App.] 91 P 745.

18. Allegation that plaintiffs were owners sufficiently avers title, since ownership in common will be presumed. McVay v. Central California Inv. Co. [Cal. App.] 91 P 745.

19. King v. Norcross [Mass.] 82 NE 17.

20. Where plaintiff alleged that defendant negligently started fire which caused injury to certain premises owned by him, he cannot prove injury to premises owned by another and assignment of cause of action. Woodward v. Northern Pac. R. Co. [N. D.] 111 NW 627.

21. Where defect alleged to have caused fire was spark arrester, recovery must be had upon such negligence. Barker v. Collins [Del.] 63 A 686. Evidence that fire was started by sparks from locomotive is inadmissible to prove allegation that, "the servants, agent and employes" did negligently set fire to brush and grass on right of way. Riley v. St. Louis & S. F. R. Co. [Mo. App.] 101 SW 156.

22. Where, in action for fire set by sparks, plaintiff alleges negligence in use of too much steam, he must prove connection between use of too much steam and emission of sparks, which is not done by showing that other fires were started by sparks Louisville & N. R. Co. v. Vinyard, 39 Ind. App. 628, 79 NE 384.

23. Union Pac. R. Co. v. Fickenscher [Neb.] 110 NW 561. Where evidence shows

rules respecting the admissibility of evidence [25] and the giving of instructions [26] apply.

§ 3. *Fire districts and protection.* See 7 C. L. 1659—Building restrictions designed to prevent fire [27] and water districts and service [28] are treated in other topics, as are matters relating to officers of fire departments but common to all public employes.[29] The fire commissioner of New York may require the installation of a system of perforated pipes [30] for fire protection,[31] and it is no defense to one failing to comply therewith that the property is in the possession of a tenant [32] or that such tenant has agreed to comply with all state and municipal regulations.[33] Though a city may destroy a building maintained within the fire limits in violation of a contract and an ordinance,[34] it must do no unnecessary damage.[35] A city is not liable for losses due to the negligence of its fire department.[36] The Fulton Fire Department has no legal capacity to sue, since the incorporation of the city of Fulton.[37]

several fires of independent origin, it is not sufficient to show that it is more probable that fire started by defendant was one causing damage. Id. Evidence held insufficient to support finding that defendant's fire caused damage. Id.

24. Nonsuit held proper where it appeared that another and not plaintiff was owner of land damaged. Woodward v. Northern Pac. R. Co. [N. D.] 111 NW 627.

25. In action for damages from fire alleged to have been caused by traction engine, evidence that such engine emitted sparks on day preceding fire is inadmissible where it is not shown that engine was in same condition. Barker v. Collins [Del.] 63 A 686. Where it is alleged that defendant's engine set fire to barn, which in turn communicated fire to house, evidence as to how far sparks were carried from barn is admissible to show that fire was so communicated. Cleveland, etc. R. Co. v. Hayes, 167 Ind. 454, 79 NE 448. Evidence of fires repeatedly occurring, of which defendant had knowledge may be considered in determining whether defendant exercised due care in respect to particular fire. Hayes v. Brandt, 80 Ark. 592, 98 SW 368. Evidence that defendant's servant who set fire had been in habit of piling and burning brush, that fire previously occurring therefrom had burned plaintiff's fence, and that he had warned servant that such fires would "burn plaintiff out," held admissible to show knowledge by defendant of dangerous character of the fires. Id.

26. Where petition seeks to recover for damage done by two fires alleged to have been caused by defendant, and evidence fails to show that last fire was so caused, held error to refuse instruction limiting recovery to damage done by first fire. St. Louis S. W. R. Co. v. Kemper [Tex. Civ. App.] 18 Tex. Ct. Rep. 297, 101 SW 813. Instruction that if plaintiff was owner of barn, contents, and hog pen mentioned in petition, etc., held not objectionable as referring jury to petition for issues. Big River Lead Co. v. St. Louis, etc., R. Co., 123 Mo. App. 394, 101 SW 636. Where evidence shows that all property sued for was destroyed and tends to show value of each item, instruction that damages should be such as barns, contents, and hogpens were reasonably worth, not exceeding amount sued for, to wit, $6,479, held not erroneous as not setting out each item. Id.

27. See Buildings and Building Restrictions, 9 C. L. 441.

28. See Waters and Water Supply, 8 C. L. 2294. And see note 4 C. L. 1853, as to liability to householder for failure to furnish water sufficient for fire protection.

29. See Officers and Public Employes, 8 C. L. 1191, for civil service regulations and the like.

30. System of perforated pipes in building, connected with valves outside building for use of firemen, held a "means of preventing and extinguishing fires," within Greater New York Charter, Laws 1897, p. 263, c. 378, § 762, providing that owners shall provide fire hose and other means of preventing and extinguishing fires as fire commissioners may direct. Langtry v. Hoffman, 105 NYS 353. Fact that Building Code, § 152, provides for installation of such system in certain buildings, held not to prevent fire commissioners from requiring same. Id.

31. Courts will take judicial notice of purpose of installing perforated pipes and having them connected with valves outside of building. Lantry v. Hoffman, 105 NYS 353.

32. May enter for such purpose. Lantry v. Hoffman, 105 NYS 353.

33. Lantry v. Hoffman, 105 NYS 353.

34. In action against city for destruction of building so maintained, evidence that city had not removed other buildings maintained in violation of ordinance is inadmissible. Wheeler v. Aberdeen [Wash.] 87 P 1061. Where city rightfully destroyed building wrongfully maintained within fire limits, the only recovery which can be had is for unnecessary damage. Id. Not liable for cost of removing stock, damage to leasehold interest, or for mental distress or humiliation. Id.

35. Wheeler v. Aberdeen [Wash.] 87 P 1061.

36. Hazel v. Owensboro, 30 Ky. L. R. 627, 99 SW 315. Defective streets delaying fire department held not proximate cause of loss by fire. Id. For liability generally see Municipal Corporations, 8 C. L. 1056.

37. Laws 1902, p. 124, c. 63, incorporating city of Fulton and vesting in it all property previously owned by fire department of village of Fulton, held to destroy existence of the fire department as created by laws 1898, p. 828, c. 269. Fulton Fire Department v. Fulton, 51 Misc. 242, 100 NYS 816.

FISH AND GAME LAWS.

§ 1. Public Control of Fish and Game (1364).
§ 2. Offenses; Penalties; Prosecutions (1366).
§ 3. Private Rights in Fish and Game (1367).

§ 1. *Public control of fish and game.* See 7 C. L. 1659—In the exercise of its police power, a state may make reasonable regulations for the preservation and protection of fish and game,[38] which power cannot be contracted away.[39] These statutes, however, must observe constitutional requirements [40] as to title,[41] taking of private property [42] without due process of law [43] and without compensation,[44] denying equal privileges to all citizens,[45] interfering with Federal regulation of interstate commerce,[46] and impairing the obligation of contracts.[47] The preservation and protection of fish and game is effected by statutes of various character, the more common ways being to prohibit the taking thereof during certain seasons or for a specified period,[48] restricting the methods of capture [49] by requiring hunters to take out

38. Sherwood v. Stephens [Idaho] 90 P 345.

39. State v. Tower Lumber Co., 100 Minn. 38, 110 NW 254.

40 Pub. Laws 1902, p. 36, c. 969, providing for punishment of persons having short lobsters in their possession, and that possession of any such lobster shall be prima facie evidence to convict, held not violative Const. art. 1, § 10, guarantying a speedy and public trial by impartial jury, and that accused shall be confronted with opposing witnesses, or § 14, providing that every one shall be presumed innocent, etc. State v. Sheehan [R. I.] 66 A 66. Laws 1905, c. 344, § 56, making it unlawful to interfere with game and fish commission in gathering spawn, held not to allow commission to arbitrarily interfere with business, and not violative of Federal or State constitution. State v. Tower Lumber Co. 100 Minn. 38, 110 NW 254.

41. Laws 1905, p. 161, § 13 (Ann. St. 1906, p. 3608), entitled "An act relating to the preservation, propagation, and protection of game animals," held sufficiently broad to cover domesticated deer. State v. Weber [Mo.] 102 SW 955. Act. No. 48, p. 106, of 1906, prohibiting sale of plumage of certain birds, held sufficient as to title. In re Schwartz [La.] 44 S 20. Title to c. 344, p. 598, Laws 1905, held sufficiently broad to cover § 56, making it unlawful to interfere with game and fish commission in gathering of spawn. State v. Tower Lumber Co., 100 Minn. 38, 110 NW 254. Title of Act of May 29, 1901, P. L. 302, held sufficient as to title to authorize conviction for fishing in illegal manner though fish caught were not game or food fish to which title specifically referred. Commonwealth v. Kenney, 32 Pa. Super. Ct. 544.

42. Rules limiting power of legislature to prohibit possession of personal property generally are not applicable to game. People v. Waldorf-Astoria Hotel Co., 118 App. Div. 723, 103 NYS 434; Sherwood v. Stephens [Idaho] 90 P 345.

43. Laws 1900, p. 28, c. 20, § 31, as amended by Laws 1904, p. 1409, c. 582, and Laws 1902, p. 487, cc. 194, 141, prohibiting possession for sale of pheasants until 1910 except that pheasants bred or purchased and liberated in Suffolk county might be possessed in Greater New York for consumption only, held not unconstitutional in so far as it prohibited possession of foreign killed pheasants as taking property without due process of law. People v. Waldorf-Astoria Hotel Co., 118 App. Div. 723, 103 NYS 434.

44. Laws 1905, p. 161, § 13 (Ann. St. 1906, p. 3608), making it unlawful to have in possession the carcass of any deer which has not thereon the natural evidence of its sex, does not violate. Const. art. 2, § 21, prohibiting taking of private property for public use without compensation, though applicable to domestic deer. State v. Weber [Mo.] 102 SW 955.

45. Act 1899, p. 194, c. 117, § 1, providing that nothing in this or any other act shall prevent any Indian from taking fish at any time for use of himself and family, includes only Indians not citizens, hence it does not render an act which it qualifies unconstitutional as denying equal privileges to all citizens. State v. Lewis [Wash.] 88 P 940.

46. Act. No. 48, p. 106, of 1906, prohibiting sale of body or plumage of certain birds whether killed within or without state, held not violative of § 8, art. 1, Federal Const. In re Schwartz [La.] 44 S 20.

47. Contractual rights of boom company incorporated with special rights in particular stream held subordinate to police power respecting fish. State v. Tower Lumber Co., 100 Minn. 38, 110 NW 254.

48. Amendment of 1906 of game laws 1903 (P. L. 1906, p. 699,) is to be read as independent enactment, extending closed season for deer for three years from 1906. State v. Snyder [N. J. Law] 67 A 934.

49. Under Kirby's Dig. § 3600, it is unlawful to catch fish with trammel net regardless of size of meshes, such qualification applying only to seines. Rowe v. State [Ark.] 103 SW 613. Act 1899, p. 194, c. 117, § 1, providing that nothing in this or any other act shall prevent any Indian residing in this state from taking fish at any time for use of himself and family, held to constitute proviso to Sess. Laws 1905, p. 343, c. 170, § 4, making it unlawful to catch salmon except with hook and line between 6 P. M. Saturday and 6 A. M. Monday. State v. Lewis [Wash.] 88

licenses,[50] prohibiting dogs from running at large,[51] and by regulating the possession,[52] the shipment,[53] and the sale[54] of the same, especially during the closed season. A person knowingly[55] having short lobsters in his possession is liable in Rhode Island. Municipal officers have no power in Maine to regulate the catching of clams until the voters have failed to act thereon at town meeting.[56] Since Oregon and Washington have concurrent jurisdiction over the Columbia river, a regulation respecting fishing therein must be concurred in by both states.[57] Before an order of the forest, fish, and game commission of New York, prohibiting the fishing in a stream, passed upon request of town board, becomes effective, a copy,[58] thereof must be filed with the town clerk.[59] In many states, license fees or a portion thereof[60] go into the state treasury to constitute a game protection fund.[61]

P 940. One fishing in manner prohibited by Act of May 29, 1901, P. L. 302, is liable though fish caught was not a game or food fish. Commonwealth v. Kenney, 32 Pa. Super. Ct. 544.

50. Hurd's Rev. St. 1905, p. 1114, c. 61 § 25, making it unlawful to hunt rabbits, etc., without license, held constitutional and a reasonable exercise of police power. Kyle v. People, 226 Ill. 619, 80 NE 1081. Laws 1905, pp. 168, 169, § 54, providing that it shall be unlawful for any person to hunt in the state outside the county in which he lives without first obtaining a license, does not require one to take out license to hunt in county where he resides. State v. Koock, 202 Mo. 223, 100 SW 630.

51. Owner who knowingly allows or suffers his dog to run loose out of his sight and control "permits" such dog to run at large within § 24. Act April 14, 1903 (P. L. p. 526), as amended April 5, 1904 (P. L. p. 406). Conner v. Fogg [N. J. Law] 67 A 338.

52. Laws 1905, p. 161, § 13 (Ann. St. 1906, p. 3608), making it unlawful to have in possession the carcass of any deer which has not thereon the natural evidence of its sex, applies to domestic deer. State v. Weber [Mo.] 102 SW 955. Under Laws 1900, p. 28, c. 20, § 31, as amended by Laws 1904, p. 1409, c. 582, providing that there shall be no open season for English pheasants, nor shall same be killed or possessed etc., prior to 1910, and Laws 1902, p. 487, c. 194, providing that when possession of game or fish is prohibited such statute shall be equally applicable to game or fish coming from without state, one having pheasant for sale in New York City, though killed in foreign state, is liable. People v. Waldorf-Astoria Hotel Co., 118 App. Div. 723, 103 NYS 434.

53. Forest, Fish, and Game Law, § 8 prohibiting shipment of slaughtered deer, wild or domesticated, held constitutional exercise of police power. Dieterich v. Fargo, 52 Misc. 200, 102 NYS 720. For purpose of protecting wild deer, legislature may prohibit transportation of domesticated deer as well. Dieterich v. Fargo, 104 NYS 334, Id., 52 Misc. 200, 102 NYS 720. Forest, Fish and Game Law, Laws 1900, p. 24, c. 20, § 8, as amended by Laws 1906, p. 1337, c. 478, providing that deer or venison killed within state shall not be transported, etc., applies to domesticated deer. Dieterich v. Fargo, 104 NYS 334. Reference in Act May 25, 1900, c. 553, § 4, requiring packages to be marked, to section 1, is clerical error, section 3 being intended, hence not applicable to game birds killed during open season and shipped out of state in violation of state law. United States v. Thompson, 147 F 637.

54. Laws 1892, p. 985, c. 488, as amended by Laws 1904, p. 1403, c. 580, construed, and held that before amendment sale of foreign grouse and woodcock was not prohibited, but is now prohibited unless seller has complied with provisions requiring bond. People v. Weinstock, 117 App. Div. 168, 102 NYS 349. Where grouse or partridge are sold without bond prescribed by Laws 1900, p. 27, c. 20, § 27, as amended by Laws 1905, p. 612, c. 335, it is immaterial whether they were killed within or without state. People v. Stillman, 117 App. Div. 170, 102 NYS 351. Laws 1900, p. 27, c. 20, § 27, as amended by Laws 1905, p. 612, c. 335, prohibiting sale of grouse or partridge without giving prescribed bond, held to apply to selling agents of a nonresident. Id. Held question for jury whether defendant was selling agent of a nonresident or mere delivery and collecting agent. Id.

55. If one knows that he has lobsters in his possession and has full opportunity to examine same, but fails to ascertain that they are under legal size, he is liable. State v. Sheehan [R. I.] 66 A 66.

56. Pub. Laws 1905, c. 161, p. 175, § 1, amendatory of § 34, c. 41, Rev. St. State v. Wallace [Me.] 66 A 476. Failure of voters to act at meeting just prior to enactment held under Rev. St. c. 41, § 34, then in force to be equivalent to affirmative action in favor of free catching of clams. Id.

57. B. & C. Comp. § 4092, as amended by Sess. Laws Or. 1903, p. 218, prohibiting any person from taking salmon therefrom unless he is a citizen of the United States or has declared his intention of becoming such and has been a bona fide resident of Oregon, Washington, or Idaho for six months, held void as not concurred in by Washington. Ex parte Desjeiro, 152 F 1004.

58. Where copy only identified stream by words "this stream," it is insufficient. People v. Worden [N. Y.] 79 NE 1013.

59. Laws 1900, p. 51, c. 20, and Laws 1901, p. 230, c. 94, § 156, as amended by laws 1901, p. 1682, c. 662. People v. Worden [N. Y.] 79 NE 1013.

60. Act 1905, p. 158, §§ 57, 58, 59 (Ann. St. 1906, pp. 3605-3621), construed, and held that license collector of City of St. Louis was to collect $1 for each hunter's license and to retain fifteen cents therefrom as fee and not to charge $1.15. State v. Moody, 202 Mo., 120, 100 SW 619.

61. Under Act 1905, p. 159, (Ann. St. 1906,

§ 2. *Offenses; penalties; prosecutions.*[See 7 C. L. 1662]—At common law one is prohibited from impeding the passage of fish up and down stream.[62] The penalties for violations of fish and game laws are usually prescribed by statute,[63] but, under the constitution of many states, they must not be excessive.[64] One committed in the enforcement of a civil judgment recovered under the game laws of New York is entitled to the liberties of the jail.[65]

While an indictment need not negative purely defensive matters,[66] it should allege all facts necessary to make defendant's acts an offense,[67] though a failure may be aided by verdict.[68] It must not be duplicitous.[69] The game warden may serve the warrant and make the arrest in a case in which he is prosecutor, and hence entitled to one-third of the penalty in New Jersey.[70] The proof must establish the offense charged.[71] While the prosecution must make out its case[72] by competent evidence,[73] possession is presumptively illegal in some states.[74] Where an exception is not in the enacting clause, the defendant has the burden of bringing his case within it.[75]

pp. 3605-3621), creating game warden and requiring all license fees to be paid into state treasury, state, and not game warden, is proper party to sue to compel county clerk to turn over such fees, although they become a part of game protection fund. State v. Moody, 202 Mo. 120, 100 SW 619.

62. Sherwood v. Stephens [Idaho] 90 P 345.

63. Penalty prescribed by § 24, Act April 14, 1903, (P. L. p. 526), as amended April 5, 1904 (P. L. p. 406), held to relate to portion of act prohibiting dogs running at large in fields inhabited by rabbits as well as that prohibiting running of rabbits at night. Conner v. Fogg [N. J.] 67 A 338. Dredging over private oyster bed held not an "illegal" dredging within Gen. St. 1902, § 3241, providing for seizure and sale of boat engaged in illegal dredging. Doolan v. The Greyhound, 79 Conn. 697, 66 A 511.

64. Fact that act imposes a fine for each bird killed in violation of Act No. 48, p. 106, of 1906, held not to invalidate it as imposing excessive penalty. In re Schwartz [La.] 44 S 20.

65. One arrested under Laws 1900, p. 57, c. 20, providing for enforcement of civil judgments recovered under game law by execution against the person, is entitled to the liberties of the jail as provided by Code § 149. People v. Monaco, 54 Misc. 25, 105 NYS 401.

66. Under Rev. St. c. 41, § 17, indictment need not charge that short lobsters were not liberated alive, such fact being matter of defense. State v. Brewer [Me.] 66 A 642.

67. Indictment under Rev. St. c. 41, § 17, need not allege that live lobsters in accused's possession were less than ten and one-half inches long when caught, but must so allege in respect to cooked lobsters. State v. Brewer [Me.] 66 A 642. Indictment under act 1903 (Acts 1903, p. 44), amending Pen. Code 1895, § 221, for hunting on posted land, must allege that at time of registering of name of landowner and the posting of the land in register he also registered description of land as required by statute. Hardaway v. State, 1 Ga. App. 150, 58 SE 141.

68. Indictment under Acts 1895, p. 256, c. 127 § 1, as amended by Acts 1897, p. 679, c. 321, failing to allege that fish were not caught for private use, is good after verdict where evidence shows such fact. Freeman v. State [Tenn.] 100 SW 723.

69. Held that catching fish with seine having meshes of less than four inches is a distinct offense, under Kirby's Dig. § 3600, from that of catching by other prohibited means hence indictment charging that defendant did "unlawfully catch fish with a net and a seine" is duplicitous. Rowe v. State [Ark.] 103 SW 613. Indictment under Rev. St. c. 41, § 17, alleging that respondent "did have in her possession sixty-seven live lobsters and fifty-three cooked lobsters, each less than ten and one-half inches," etc., charges only one offense. State v. Brewer [Me.] 66 A 642.

70. Under P. L. 1897, p. 109. State v. Snyder [N. J. Law] 67 A 934.

71. Under Kirby's Dig. § 3600, defendant cannot be convicted of using a trammel net under indictment charging the use of a seine, the acts constituting distinct offenses. Rowe v. State [Ark.] 103 SW 613.

72. In prosecution under § 24, Act April 14, 1903 (P. L. p. 526), as amended by Act April 5, 1904 (P. L. p. 406), for permitting dog to run at large in field inhabited by rabbits, testimony that "there are rabbits in that field" together with evidence tending to show that dog caught one, held to show that field was inhabited by rabbits. Conner v. Fogg [N. J. Law] 67 A 338.

73. In prosecution under Pub. Laws 1902, p. 36, c. 969, for having short lobsters in possession, evidence that on previous occasions defendant had in his possession lobsters of lawful size is inadmissible. State v. Sheehan [R. I.] 66 A 66.

74. In replevin under game act (Sess. Laws 1899, p. 188, c. 98, § 15), by game commissioner for deer skins, defendant has burden of alleging and proving facts which, under the act, entitles him to possession. People v. Johnson [Colo.] 88 P 184.

75. In prosecution under § 24, Act April 14, 1903 (P. L. p. 526), as amended by Act April 5, 1904 (P. L. p. 406), for permitting dog to run at large in violation thereof, held not necessary for state to show that field was not inhabited by deer. Conner v. Fogg [N. J. Law] 67 A 338.

§ 3. *Private rights in fish and game.*[See 7 C. L. 1663]—In Idaho private fish ponds can be established only as provided by statute,[76] and one suing game warden for a wrongful release of the fish must show that the pond was established and stocked in accordance with law.[77]

Fishery rights.[See 7 C. L. 1663]—A right in gross to take fish from a mill pond is neither assignable nor inheritable.[78] Town trustees in New York cannot lease the bottom under town waters contrary to the vote of the people.[79] The right to plant oysters in public waters, and the interest which the planter has therein, is regulated by statute in many states.[80] In Virginia an assignee of an oyster location takes the same subject to all previously acquired rights of others.[81]

FIXTURES.

§ 1. Definition (1367).
§ 2. Annexation and Intent (1367).
§ 3. Title of Third Persons (1369).

This topic excludes the distinction between real and personal property generally [82] and the doctrine of accession.[83]

§ 1. *Definition.*[See 7 C. L. 1664]

§ 2. *Annexation and intent.*[See 7 C. L. 1665]—Chattels substantially annexed to realty,[84] especially where adapted for permanent use therewith [85] and with an intent that they become a part of the freehold,[86] are fixtures. Annexation by weight

76. Under § 3 of act passed to protect fish and game by legislature of 1903 (Sess. Laws, p. 189), as amended in 1905 (Sess. Laws p 258), private ponds may be constructed only as provided therein. Sherwood v. Stephens [Idaho] 90 P 345.

77. As provided by Sess. Laws 1903, p. 189, § 3, as amended by Sess. Laws 1905, p. 258. Sherwood v. Stephens. [Idaho] 90 P 345.

78. A right in gross to take fish from millpond is neither assignable nor inheritable. Mallet v. McCord, 127 Ga. 761, 56 SE 1015.

79. Where town meeting, under Town Law, Laws 1890, p. 1215, c. 569, § 24 (1 Rev. St. p. 340, § 6), voted that trustees should no longer lease the bottom under waters of town or oyster planting, subsequent lease is void People v. Warner, 116 App. Div. 863, 102 NYS 362.

80. Act March 30, 1874, St. 1873-74, p. 940, c. 671, § 1, providing that any citizen may lay down and plant oysters in any public waters, and the ownership and exclusive right to take up the same shall remain in him, etc., held that privilege was mere personal license, and not an estate of inheritance subject to partition under Code Civ. Proc. § 752. Darbee & Immel Oyster & Land Co. v. Pacific Oyster Co., 150 Cal. 392, 88 P 1090.

81. Under Code 1904, § 2137, rights held subject to previously acquired rights of dock and ship building company to dredge for construction of shipyard over same area. Newport News Shipbuilding & Dry Dock Co. v. Jones, 105 Va. 503, 54 SE 314.

82. See Property, 8 C. L. 1471.

83. See Accession and Confusion of Property, 9 C. L. 10.

84. Building once affixed to realty becomes part thereof in absence of agreement to contrary (Barnes v. Hosmer [Mass.] 82 NE 27), though built by mistake upon the land of another (Rollinger v. McMinn [Tex. Civ. App. 19 Tex. Ct. Rep. 762, 104 SW 1079). Sugar cane boiler placed under building, in large horse stable, as part of watering system, held fixture. Brigham v. Overstreet [Ga.] 57 SE 484. Sugar cane mill constructed by placing four large posts firmly in ground and spiking mill thereto and sugar cane boiler placed in furnace, which rested on ground with chimney running up through mill house, held fixtures. Id. Assignee of lease containing option of purchase and covenants requiring lessee to make improvements in certain amount which should revert if option was not exercised to owner of land, held upon abandonment, that buildings became part of realty, and not subject to attachment as property of assignee. Peters v. Stone, 193 Mass. 179, 79 NE 336.

85. Shelving nailed to walls of storehouse, large and cumbersome counters, tables and meat box placed therein to carry out purpose for which building was erected, and to be used therewith, held fixtures, passing with sale of realty. Brigham v. Overstreet [Ga.] 57 SE 484. Fire hose attached to standpipe in hotel by being screwed onto projecting valves, and hose rack attached to pipe by clamps, held to constitute fixtures so as to support mechanic's lien, though they could be easily removed without injury to pipe being adapted to permanent use with hotel. Crane Co. v. Epworth Hotel Const. & Real Estate Co., 121 Mo. App. 209, 98 SW 795. Building erected upon substantial rock foundation to effectuate purpose for which land was conveyed and for permanent use held a fixture. Mosca Town Co. v. Wellington [Colo.] 89 P 783. Instruction that whatever was placed on premises and attached to realty or connected in any way therewith for use and improvement of same for a vinegar factory, and all tanks erected therein appurtenant to its use, became a part of realty, held too broad. Lord v. Rowse [Mass.] 80 NE 822.

86. Mining houses and machinery attached to soil with intent that they should remain

alone has been held sufficient in the case of heavy and cumbersome machinery.[87] Since intention is of primary importance in determining whether a chattel has become a fixture, relationships such as licensor and licensee,[88] vendor and vendee,[89] landlord and tenant,[90] etc., apparently invoke different rules. In Louisiana movables which are permanently attached to realty by the owner, or which are placed thereon for its service and exploitation, are "immovables by destination," [91] and cannot be demobilized by a mere act of will of the owner [92] or by cessation of the work in which they are employed.[93]

*By agreement or estoppel.*See 7 C. L. 1667—By agreement a chattel which would otherwise become a part of the realty may retain its character as personalty [94] unless of such a character as to be necessarily incorporated into the realty.[95] Where a contract of sale of land reserves fixtures, the question as to what constitutes fixtures thereunder is for the jury.[96] The owner of realty in many cases may sever the fixture and treat it as personalty,[97] and when it is wrongfully severed by another, he

and become part of freehold are fixtures. Hoye Coal Co. v. Colvin [Ark.] 104 SW 207.

87. Storage tanks, fermenting tubs, chip casks, a large kettle and pipes in brewery, attached only by weight, but which could not be removed except by taking to pieces, and which were adapted to use in the brewery, held fixtures. Dehring v. Beck, 146 Mich. 706, 13 Det. Leg. N. 930, 110 NW 56.

88. Where structure is affixed to premises of another by temporary occupant or licensee, it is deemed temporary in character and not part of realty. Young v. Chandler [Me.] 66 A 539. Annexations with consent of owner or mortgagee by licensee are presumed to be removable and to remain property of one annexing in absence of facts indicating contrary intent. Id.

89. Substantially same rules prevail between grantor and grantee as between mortgagor and mortgagee, but different rules apply as between landlord and tenant. Young v. Chandler [Me.] 66 A 539. Where vendor of house containing large mirrors anchored to walls entered into negotiations for purchase of mirrors after entry of decree for sale of land under her vendor's lien, such negotiation did not preclude her from claiming same on taking deed to property as part of realty. Martin v. Ferguson [Ky.] 103 SW 257.

90. Tenant cannot remove fixtures placed on property while owner thereof which passed with realty as between vendor and vendee. Brigham v. Overstreet [Ga.] 57 SE 484. Manure produced in the usual course of husbandry upon farm during term of lease cannot be removed. Id.

91. Civ. Code La. art. 468 (458). Morton Trust Co. v. American Salt Co., 149 F 540. Instances given thereunder of "immovables by destination" are illustrative, and not limitative. Id. Machinery and apparatus placed on land for sinking or working salt wells, horses used in connection therewith, and goats used in keeping brush and weeds down, held immovable by destination. Id.

92, 93. Morton Trust Co. v. American Salt Co., 149 F 540.

94. By agreement between owner of personalty and owner or mortgagee, personal property may retain its status after annexation. Young v. Chandler [Me.] 66 A 539. Heating plant installed under contract reserving title until paid for. Kirk v. Crystal, 118 App. Div. 32, 103 NYS 17. Sprinkling system is installed under contract reserving lien until payment, with right of entry and removal upon default. Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co., 148 F 159. Defendant contracted to sell his dwelling to T, reserving right to remove fixtures. T. contracted to sell to B. with like reservation. B. assigned contract to plaintiff. Title was closed between plaintiff and defendant on basis of defendant's contract with T., and, while deed did not reserve right to remove fixtures, it was orally agreed that they could be removed. Held that defendant could remove same, contract not being mrged into deed. Brunswick Const. Co. v. Burden, 116 App. Div. 468, 101 NYS 716. Where tenant erects building which would become part of realty, except for provision in lease that at expiration of term lessor shall purchase same or grant a new lease, title thereto vests immediately in landlord upon execution of new lease not reserving title in lessee. Precht v. Howard [N. Y.] 79 NE 847. And lessor is not estopped to assert such title because of contract entered into under misapprehension of facts extending time within which she could exercise her option to give new lease or to purchase house, lessee not being prejudiced thereby. Id. Original agreement that building should remain personalty may be shown by inference from subsequent recognition of rights which could only so exist. Barnes v. Hosmer [Mass.] 82 NE 27. Where, in replevin, issue was whether property was personalty or fixtures, instruction that plaintiff would not have right to remove articles which were fixtures, but that he could remove such as were personalty, either under the law or by agreement under which they were attached, held sufficiently favorable to defendant. Lord v. Rowse [Mass.] 80 NE 822.

95. Drive pipe and well casing held to become a part of realty despite agreement. Perry v. Acme Oil Co. [Ind. App.] 80 NE 174.

96. Brunswick Const. Co. v. Burden, 116 App. Div. 468, 101 NYS 716. Mantels and hinges made to match furniture, and parquet flooring laid over a permanent floor, held fixtures within contract to sell dwelling, reserving right to remove fixtures. Id.

97. Though slag dumped as refuse from ore smelter ordinarily becomes part of

may recover it as a chattel or suit for damage to the realty.[98] Where written contract does not show whether particular things passed as fixtures or as personalty, such fact may be shown by parol evidence.[99]

Right to remove.[See 7 C. L. 1668]—Tenant's fixtures may be removed at any time before surrender of possession of the premises,[1] but not thereafter [2] unless removed under contract right.[3] In many states the taking of a new lease without reserving the right of removal destroys the right.[4]

§ 3. *Title of third persons.*[See 7 C. L. 1669]—While an agreement as between the parties thereto,[5] prior vendors of the realty taking back the property under a reserved lien [6] or persons acquiring an interest in the realty with notice thereof [7] may continue the personalty character of the annexed chattel, it is ineffectual as against bona fide purchasers.[8] In Maine mortgagor cannot by agreement with third party affect the rights of a "prior" mortgagee.[9]

FOLIOING PAPERS, see latest topical index.

FOOD.

The scope of this topic is noted below.[10]

Validity and construction of statutes.[See 7 C. L. 1670]—In the exercise of the police

realty, it may be sold as personalty. Manson v. Dayton [C. C. A.] 153 F 258. Rails and fastenings laid solely for the purpose of operating railroad held not to become a part of realty so as to become immovable therefrom before abandonment of land. Georgia R. & Banking Co. v. Hass, 127 Ga. 187, 56 SE 313. Where railroad was proceeding to remove rails and fastenings when enjoined by donators of land, held that there was no abandonment of same. Id

98. Martin v. Ferguson [Ky.] 103 SW 257.

99. Parol evidence that parties regarded mirrors as part of house held not to contradict memorandum of sale of house reciting sale of mirrors also. Martin v. Ferguson [Ky.] 103 SW 257.

1. Though holding over without landlord's permission. Fenimore v. White [Neb.] 111 NW 204. Decree providing that unless tenant should surrender possession within twenty days, a writ of possession should issue and that upon failure of landlord to pay for fixtures within said twenty days tenant could remove same within twenty days thereafter, held not to limit tenants right of removal any time during possession. Id.

2. Left in place in brewery storage tanks, fermenting tanks, chip casks, and kettles. Dehring v. Beck, 146 Mich. 706, 13 Det. Leg. N. 930, 110 NW 56.

3. Lease providing that lessee should have right to remove fixtures "at any time" construed to authorize removal after termination of lease. Churchill v. More [Cal. App.] 88 P 290. Contract giving lessee right "to remove all property at any time" construed to give only reasonable time for removal. Perry v. Acme Oil Co. [Ind. App.] 80 NE 174. In order to prevent lessee from taking words to mean "unlimited time," lessor need not give notice to remove within specified time. Id.

4. Where tenant continues under extended lease as distinct from new lease, he may remove fixtures. Crandall Investment Co. v. Ulyatt [Colo.] 90 P 59.

5. See Ante, § 2.

6. Where plaintiff sold gasoline engine to L. under agreement that title thereto should remain in plaintiff until full payment of purchase price, with right of entry and removal, such engine remained personalty, though substantially affixed to realty, as against vendor of realty who resumed possession upon default (Davis v. Bliss [N. Y.] 79 NE 851), notwithstanding L. wrongfully removed and sold the engine replaced thereby (Id.), and agreement between vendor of realty and vendee that all machinery installed should become part of realty (Id.). Contract construed and held to justify inference that parties contemplated installation of machinery which should remain subject to seller's lien. Id.

7. Where it is practicable to remove casing in oil well, such casing is fixture within lease giving tenant right of removing fixtures and may be removed as against one purchasing property with notice. Churchill v. More [Cal. App.] 88 P 290. Evidence tending to show that promoters of corporation when purchasing mining property knew that air compressor thereon, which could be removed without injury to land, belonged to plaintiff, held to sustain finding that same was not a fixture. Possell v. Smith [Colo.] 88 P 1064.

8. Where heating plant, installed under contract reserving title until payment, consisted of large boiler and pipes extending through house, connecting radiators and intended as only heating system, it becomes part of realty as to bona fide purchaser. Kirk v. Crystal, 118 App. Div. 31, 103 NYS 17

9. Young v. Chandler [Me.] 66 A 539. Where greenhouse was constructed upon mortgaged property without consent of mortgagee, it became property of mortgagee upon purchase of realty on foreclosure. Id. Pot plants and fertilized loam taken upon leased premises held not to become fixtures as against prior mortgagee of premises. Id.

10. It includes regulation of food prod-

power,[11] food departments may be established [12] and the sale of injurious foods prohibited or regulated.[13] Such statutes and ordinances must observe constitutional requirements [14] and be sufficiently definite to admit of enforcement.[15] The regulatory power of a municipality depends largely upon its charter.[16] The New York board of health is an administrative body,[17] and a permit to sell milk granted thereby is a mere license,[18] revocable without notice or hearing [19] and although there is no existing ordinance of the board authorizing revocation.[20] Cream of tartar sold by merchants of New York must be of the standard of purity established by the latest edition of the United States Pharmacopaeia.[21] At common law there is

ucts and powers and duties of boards and officers charged with their enforcement.

It excludes matters relating to adulteration (See Adulteration, 9 C. L. 37), the police power of the state and of municipalities to legislate in the interest of purity of food products (See Constitutional Law, 9 C. L. 610; Municipal Corporations, 8 C. L. 1056), health regulations generally (See Health, 8 C. L. 36), and regulations as to purity of drugs and medicines (See Medicine and Surgery, 8 C. L. 972).

11. Sanitary Code of New York City, § 56, continued in force by city charter (Laws 1901, p. 499, c. 466, § 1172), providing that no milk shall be kept or sold without permit from board of health, and subject to conditions thereof, held valid exercise of police power. People v. Department of Health, 189 N. Y. 187, 82 NE 187.

12. Act March 13, 1895 (P. L. 17), creating department of agriculture, and providing for appointment of a dairy and food commissioner, being valid, such commissioner cannot be ousted from office in quo warranto because illegal powers have been subsequently conferred upon him. Commonwealth v. Warren, 217 Pa. 163, 66 A 322.

13. Where nonresident cocoa manufacturer makes sales in Massachusetts through agent, both manufacturer and agent must comply with Rev. Laws, c. 75, §§ 16, 18, prohibiting sales of adulterated foods. Sullivan v. Crave & Martin Co., 193 Mass. 435, 79 NE 792. Act No. 12, p. 14, Pub. Acts 1905, regulating sale of "all condimental stock foods * * * claimed to possess nutritive properties and all other materials intended for feeding to domestic animals," includes preparation advertised as food which, in addition to possessing medicinal properties, "fattens both cattle and hogs quickly," etc., and in horses "produces bone, muscle, and better staying powers," though label stated "P's food is a regulator, to be used according to directions, and is not sold as a feeding stuff, nor is it to be fed in place of grain or other feed. Pratt Food Co. v. Bird, 148 Mich. 631, 14 Det. Leg. N. 304, 112 NW 701. St. Louis Ordinance 20,808, § 18, prohibiting offering of milk for sale containing less than three per cent by weight of butter fat, estimated by designated process, and providing that in contested analysis of milk, butter fat shall be estimated by particular test, held not objectionable as prescribing a rule of evidence. City of St. Louis v. Bippen, 201 Mo. 528, 100 SW 1048.

14. Title to Act No. 211, Pub. Acts 1893, p. 421, "An act to provide for the appointment of a dairy and food commissioner, and to define his powers and duties," etc., held sufficient to cover amendatory act providing a standard of pure stock food, and means to prevent deception in sale thereof. Pratt Food Co. v. Bird, 148 Mich. 631, 14 Det. Leg. N. 304, 112 NW 701. Act June 26, 1895, P. L. 317, entitled "An Act to provide against the adulteration of food, and providing for enforcement thereof," held sufficient to cover provisions prohibiting sales. Commonwealth v. Arow, 32 Pa. Super. Ct. 1. Rev. Municipal Code of City of Chicago of 1905, § 1161, authorizing summary seizure and destruction of any "putrid, decayed, poisoned, or infected" articles of food kept in storage or for sale, held not violative of fourteenth Amend. Fed. Const. North American Cold Storage Co. v. Chicago, 151 F 120. St. Louis Ordinance 20, 808, § 18, prohibiting exposure of milk for sale containing less than three per cent butter fat, etc., neither deprives citizen of the gains of his industry, contrary to Const. art. 2, § 4 (City of St. Louis v. Bippen, 201 Mo. 528, 100 SW 1048), nor of liberty and property without due process of law (Id.).

15. St. Louis Ordinance 20,808, § 18, prohibiting exposure of milk for sale containing less than three per cent butter fat, etc., held not too indefinite to be enforced. City of St. Louis v. Bippen, 201 Mo. 528, 100 SW 1048.

16. Under Birmingham City Charter (Loc. Laws 1898-99, p. 1391), authorizing city to license, tax, and regulate all kinds of business, and conferring on it full power to inspect food products and dairies, city has power to impose license tax on dairymen at rate of fifty cents per cow. City of Birmingham v. Goldstein [Ala.] 44 S 113.

17. Greater New York Charter § 1173, 3 Laws 1901, p. 500, c. 466, providing that actions of board shall be regarded as in their nature judicial, and be treated as prima facie just and legal, etc., held not to change members from administrative to judicial officers. People v. Department of Health, 189 N. Y. 187, 82 NE 187. Hence, action revoking permit to sell milk cannot be reviewed by review or certiorari, but subject to mandamus in case of arbitrary abuse. Id. One convicted four times of selling or offering for sale adulterated milk is not entitled to permit to sell. Id.

18. Not property, within the constitution, which cannot be taken without due process of law. People v. Department of Health, 189 N. Y. 187, 82 NE 187.

19. People v. Department of Health, 189 N. Y. 187, 82 NE 187, rvg. 117 App. Div. 856, 103 NYS 275.

20. Board of health of New York City, may revoke a permit to sell milk though no ordinance has been adopted by board authorizing such revocation. People v. Department of Health, 189 N. Y. 187, 82 NE 187, rvg. 117 App. Div. 856, 103 NYS 275.

21. Public Health Law, Laws 1900, p. 1479, c. 667, § 199, construed and held to except

no implied warranty that food stuffs sold to a provision dealer are wholesome.[22] Equity will restrain unlawfully threatened prosecutions where of a character to result in great and irreparable injury.[23]

Crimes; prosecutions. See 7 C. L. 1671—Ordinarily any one may institute criminal proceedings for the violation of the pure food laws.[24] An indictment or information in the language of the statute is usually sufficient [25] and need not negative defensive matters.[26] In Pennsylvania one indicted for illegally selling oleomargarine may be enjoined from further sales until determination of the case.[27] The fact that a penalty is to be paid to the dairy and food commissioner, to be by him turned into the state treasury, does not make his title to office a material issue in a prosecution.[28] Questions of fact are for the jury.[29]

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

§ 1. **Civil Rights and Remedies (1371).**
A. The Cause of Action (1371).
B. Procedure (1374).
§ 2. **Criminal Responsibility (1377).**

While this topic includes some cases arising out of the statutory application of the remedy to tenants holding after termination of their leasehold rights, that phase of the subject is more fully treated in an appropriate topic.[30]

§ 1. *Civil rights and remedies. A. The cause of action.* See 7 C. L. 1671—The purpose of the action is to preserve the peace by preventing those not in the actual possession of real property from resorting to physical force or threats or intimidation of any kind to gain possession of the property from the one in the actual enjoyment thereof.[31] The conditions essential to the right to this action vary in the different states.[32] It is generally held essential that plaintiff be shown to have

merchants selling cream of tartar only from visitorial powers of State board of pharmacy and not exempt them from general provisions against adulteration. State Board of Pharmacy v. Gasau, 52 Misc. 490, 102 NYS 539.

22. Hence, consumer cannot sue original vendor whatever may be his rights against his vendor. Tomlinson v. Armour & Co., [N. J. Law] 65 A 883. Declaration charging that defendant packed and sold some diseased ham to retailer of whom plaintiff purchased and was made sick by eating same held to state no cause of action. Id.

23. Though equity will not ordinarily restrain public officer from enforcing criminal laws, it will enjoin state officer from unlawfully placing in hands of every stockfood dealer a bulletin in effect threatening them with prosecutions if they use manufacturer's product sold in lawful form. Pratt Food Co. v. Bird, 148 Mich. 631, 14 Det. Leg. N. 304, 112 NW 701.

24. No objection that prosecution for violation of Act June 26, 1895, was agent of department of agriculture. Commonwealth v. Arow, 32 Pa. Super. Ct. 1.

25. Information in language of § 18 of Ordinance 20,808, of city of St. Louis, prohibiting sale of milk containing less than three per cent butter fat by weight, specifying time and place of violation, is sufficient. City of St. Louis v. Bippen, 201 Mo. 528, 100 SW 1048.

26. Indictment under Act of June 26, 1895, P. L. 317, need not allege that article sold was not within third section thereof, that being matter of defense. Commonwealth v. Arow, 32 Pa. Super. Ct. 1.

27. Petition under act May 29, 1901, for order restraining one indicted for illegally selling oleomargarine from further sales, is sufficient if it charges that defendant has again been guilty of the offense set forth in indictment, contrary to act May 29, 1901. Commonwealth v. Henderson, 31 Pa. Super. Ct. 382.

28. Prosecution under Act June 26th, 1895. Commonwealth v. Arow, 32 Pa. Super. Ct. 1.

29. On a prosecution for violating the pure food law by selling a compound for pure honey where the label used was made up of "Honey" in bold type, "Compound" in smaller and lighter faced type, and "Honey-Syrup" in still smaller type, and the seller testified that he sold it as a compound, held a question for the jury whether the statute was violated People v. Berghoff, 112 App. Div. 712, 99 NYS 201.

30. See Landlord and Tenant, 8 C. L. 696.

31. Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097. "The remedy of forcible entry and detainer is provided so that possession of real property may be obtained in a judicial and orderly way, and without resorting to violence or steps likely to provoke a breach of the peace. Having this remedy, no one is permitted to vindicate his claimed rights with his own hand." Wilson v. Campbell [Kan.] 88 P 548.

32. Under the Missouri statute relating to forcible entry and detainer, all that needs to be shown to sustain plaintiff's right to restitution is that plaintiff was in the actual possession of the property and was forcibly dispossessed by the defend-

been in the actual [33] and peaceable [34] possession of the premises at the time of the entry,[35] title in the possessor not being essential.[36] Where a possession is disturbed, the occupant must be actually dispossessed.[37] Though actual force be an essential element under the statute,[38] yet no great degree of force or of personal violence is required to be used or threatened.[39] In some states a mere entry against the will of the person in possession [40] or without claim or color of right [41] is sufficient. It has

ant. Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097. And see post, Pleading.

33. Brown v. French [Ala.] 42 S 409; Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097; Check v. Reiter [Ky.] 102 SW 287. In an action of unlawful detainer, the principle is elementary that the plaintiff must recover upon the strength of his right to possession, and not rely upon the weakness of the adversary right. Fisk v. Arnold [Ind. T.] 104 SW 824.

Constructive possession of a tract of land under a deed definitely describing its boundaries, connected with actual possession of part of the premises, is sufficient in Tennessee to authorize and maintain an action of unlawful entry and detainer. Stockley v. Cissna [Tenn.] 104 SW 792.

User must be continuous and uninterrupted: A claim to possession of the premises, based upon the fact that the complainant from time to time cut timber therefrom and used it for the grazing of his stock, not showing that such user was continuous and uninterrupted, will not sustain the action of forcible entry and detainer. Stockley v. Cissna [Tenn.] 104 SW 792.

34. Fowler v. Ohnick [Wash.] 87 P 1050.

35. Fowler v. Ohnick [Wash.] 87 P 1050; Redman v. Perkins, 120 Mo. App. 164, 98 SW 1097.

The possession by a tenant of plaintiff is, as to strangers, possession by plaintiff, his landlord, and his abandonment of the premises during the tenancy does not oust plaintiff from possession though he was not present and did not appear until after the entry had been accomplished. Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097. An attornment by a tenant to a stranger who is not within any of the excepted clauses of section 4112 of the Mo. Rev. St. 1899 is void and will not affect the possession of the landlord. Thus, where the plaintiff enters into a contract of lease with a person whom he knows to be in possession as a tenant of a third person, this will not give plaintiff such possession as will sustain an action of forcible entry and detainer though he exercised some acts of ownership, such as repairing fences, preparing some of the land for plowing and receiving a portion of the crop raised. Id.

Successful party in homestead entry contest may maintain: The successful party in a contest as to homestead entry before the secretary of the interior, after such contest is closed, may prosecute an action for forcible entry and detainer. Howe v. Parker, 18 Okl. 282, 90 P 15.

36. School directors may bring, though only trustees may sue if title to school lands is involved. McDaniel v. Stephenson County School Directors, 125 Ill. App. 332. Validity of election of trustees cannot be questioned in such action by them. Id.

37. Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097.

38. Brown v. French [Ala.] 42 S 409; Folsom v. Hunter, 6 Ind. T. 453, 98 SW 156; Wilson v. Campbell [Kan.] 88 P 548; Redman v. Perkins, 120 Mo. App. 164, 98 SW 1097.

Acts held to constitute forcible entry: Under § 1159 of the Cal. Code Civ. Proc., every person is held to be guilty of a forcible entry who "by breaking open doors, windows or other parts of a house * * * enters upon or into any real property." Winchester v. Becker [Cal. App.] 88 P 296 holding that the use of a false key constituted forcible entry within the statute. Entry and tearing down fence erected by tenant. Brown v. French [Ala.] 42 S 409. Entry under claim of title, erecting fence and preventing its removal. Check v. Reiter [Ky.] 102 SW 287; Fowler v. Ohnick [Wash.] 87 P 1050. A number of men, at the instance of the owner, in the absence of the person in possession and his agent, invaded the premises, opened the building and detached and carried out the furniture and fixtures. Held that the entry was of such a character as to authorize the action of forcible entry and detainer. Wilson v. Campbell [Kan.] 88 P 548.

39. Wilson v. Campbell [Kan.] 88 P. 548. Evidence tending to show that defendants went to premises and by threats and intimidation caused plaintiff's agent to leave, and that they intended to use such force as might be necessary, held sufficient. Collins v. Stanley [Wyo.] 88 P 620.

40. Under subsection 1 of section 452 of the Ky. Civ. Code, "a forcible entry is an entry without the consent of the person having the actual possession." Check v. Reiter [Ky.] 102 SW 287. Under subdivision 6 of § 3 of the Washington Laws of 1905, c. 86, p. 173, any person is guilty of forcible entry or forcible detainer who shall without the permission of the owner, and without having any color of title thereto, enter upon the land of another, and who shall fail or refuse to remove therefrom after three days' notice in writing, to be served in the manner provided in the act. Stahl Brew. & Malting Co. v. Van Buren [Wash.] 88 P 837. In Stahl Brewing, etc., Co. v. Van Buren [Wash.] 88 P 837, the lessee, under a lease stipulating against assignment without written consent of the landlord, agreed to give possession to defendant without such consent. The landlord afterwards leased the premises to the plaintiff and the defendant paid rent to the plaintiff and proffered the rental to plaintiff after being notified by him to leave the premises. It was contended by defendant that no relation existed between him and the plaintiff which would entitle the latter to maintain the action of unlawful detainer

been held that ejectment under process which, though irregular, is not void, will not render the one procuring such ejectment guilty of forcible entry and detainer.[42] The action of unlawful detainer presupposes that the defendant obtained possession without force, but wrongfully refuses to surrender it on demand to the person having the legal right thereto.[43] The action being merely possessory,[44] questions of title [45] or right of possession prior to entry are ordinarily not involved, though title may become important as determining the right of possession where the entry was peaceable and the gist of the action is the wrongful detainer.[46] The only question to be determined is possession,[47] but what is possession must be determined in this action just as in any other action.[48]

Defenses.[See 7 C. L. 1674]—Superior title in the defendant is no defense.[49] A defense only available in equity cannot be pleaded to an action of forcible entry and detainer.[50]

against him. It was held, however, that the action would lie under the above statute, the word "owner" being used in a more comprehensive sense than the record or title owner of the land.

41. Possession by mortgagor after foreclosure and taking of possession under master's deed is without color of right. Johnson v. Anna Bldg. & Loan Ass'n, 126 Ill. App. 592. Evidence held for jury as to whether defendant was tenant or intruder. Smallwood v. Jones [Ga.] 57 SE 99.

42. Thus in French v. Burr [Conn.] 66 A 504, after a judgment for possession, the plaintiff had been put in possession by the voluntary act of the defendant and had then died. The administrator upon his estate, having subsequently found the original defendant again in possession, employed an attorney to eject him, and the attorney proceeded to do so under an execution on the satisfied judgment. It was both a misuse of process and the use of an irregular process, but neither of these facts rendered the writ absolutely void, and its service would not render the administrator guilty of forcible entry and detainer.

43. Such refusal to make restitution is in its nature an exhibition of force, and consequently is constructively a forcible entry for which an action will lie. Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097.

44. Fisk v. Arnold [Ind. T.] 104 SW 824; Jones v. Com. [Ky.] 104 SW 782; Stockley v. Cissna [Tenn.] 104 SW 792.

45. Folsom v. Hunter, 6 Ind. T. 453, 98 SW 156; Hendrickson v. Linville [Ky.] 104 SW 688; Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097; Moore v. Shoup, 123 Mo. App. 409, 100 SW 53; Stockley v. Cissna [Tenn.] 104 SW 792. The preservation of peace furnishes the reason upon which is founded the statutory prohibiton against inquiry into the merits of the title. Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097. As to certification of cause to district court where it appears that the title is in dispute, see post, Jurisdiction. The question of title is immaterial except so far as tending to show the plaintiff's right of present possession. Folsom v. Hunter, 6 Ind. T. 453, 98 SW 156.

46. Neither the right of entry nor the right of property is therein involved. Engle v. Tennis Coal Co., 30 Ky. L. R. 1269, 101 SW 309. In an action of unlawful detainer, the defendant may prove declarations made by him during the period covered by his possession, to the effect that he was in possession under claim of title and not as the tenant of any one. This is in accordance with the general rule that admissions of a person in possession of property are admissible for the purpose of showing the nature of his possession when that fact is a material issue in the case. Moore v. Shoup, 123 Mo. App. 409, 100 SW 53. It will lie against one taking possession by force under claim of right. Establishment of boundaries under Act May 10, 1901, does not authorize forcible taking of land so defined. Ross v. Youngman, 125 Ill. App. 494.

47. Hendrickson v. Linville [Ky.] 104 SW 688; Engle v. Tennis Coal Co., 30 Ky. L. R. 1269, 101 SW 309; Check v. Reiter [Ky.] 102 SW 287; Stockley v. Cissna [Tenn.] 104 SW 792.

48. Hendrickson v. Linville [Ky.] 104 SW 688. Upon a motion to dissolve an attachment, in an action of unlawful and forcible entry, on the ground that defendants did not fraudulently or criminally contract the obligation as alleged in the affidavit for attachment, it was held that the circumstances out of which the plaintiff's cause of action arose might be inquired into although they might involve some of the facts upon the merits, such inquiry is for the purpose of determining whether grounds for the attachment exist, and not whether there is or is not a cause of action. Collins v. Stanley [Wyo.] 88 P 620.

49. "It matters not that the claimant out of possession may have the better right to immediate possession, if his title or right are not recognized by the one in possession he must not attempt to enforce his claim by the strong hand, but must seek redress in the courts, and, if through force of whatever nature he succeeds in ousting his adversary from possession, an action of forcible entry and detainer will lie against him no matter how strong may be his title or his right to possession. Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097. If the owner entitled to possession can legally obtain it, he may undoubtedly hold the same, but he has no right to resort to unlawful and forcible means to gain possession. Wilson v. Campbell [Kan.] 88 P 548.

50. Jones v. Com. [Ky.] 104 SW 782. The erection of valuable improvements in ac-

*Damages.*See 7 C. L. 1674—The right to recover damages for the detention of the property has been held to be incident to the action for unlawful detainer though the latter is a possessory action,[51] and, in some states, provision is made for the recovery of double or treble damages by way of penalty.[52]

(§ 1) *B. Procedure.*See 7 C. L. 1674—The remedy in forcible entry and detainer proceedings is under the law in force at the time of the commencement of the action.[53] In Washington the plaintiff may proceed under the amendatory act of 1905, in which he must prove the forcible or unlawful detainer as alleged, or under the act of 1891, under which the superior title will prevail.[54] A sufficient demand for possession or notice to quit,[55] properly executed and served, is generally required.[56]

cordance with the terms of a lease is no defense. Id.

51. Fisk v. Arnold [Ind. T.] 104 SW 824; Hinckley v. Casey [Wash.] 88 P 753. In Colorado, in the absence of statutory provisions therefor, a demand for damages or rent cannot be joined in an action for possession of the premises. Mackenzie v. Porter [Colo.] 91 P 916. Under the Colorado statute, provision is made for the recovery of rent in an action commenced under par. 4 of § 1973, but in no other class of cases. Id. Query, whether in an action of unlawful entry and detainer, instituted in the circuit court under c. 89 of the Code 1899 (Code 1906, §§ 3332-3335), damages can be recovered for the detention of the property. Montgomery v. Economy Fuel Co., 61 W. Va. 620, 57 SE 137.

Issuance of attachment in action for damages: An action to recover unliquidated damages for unlawful and forcible entry is a civil action within the meaning of Wyo. Rev. St. 1899, § 3988, authorizing the issuance of attachment in civil actions for the recovery of money. Collins v. Stanley [Wyo.] 88 P 620.

Recovery of damages by defendant: Upon demurrer sustained to the complaint in forcible entry and detainer, and refusal to amend by plaintiff who has obtained a writ of possession, and after judgment for return of the property to the defendant, it is the duty of the court, upon motion of the defendant, to award him a writ of inquiry for a jury to assess the damages and thereon to render a judgment against plaintiff therefor. Folsom v. Hunter, 6 Ind. T. 453, 98 SW 156. The officer's return to a writ of possession issued in an action of forcible entry and detainer, showing that such writ was duly executed, is conclusive evidence in the proceeding for award of damages that the plaintiff had possession from then until the judgment for damages. Id.

52. Under § 5542, Ballinger's Ann. Codes & St., it is provided that the jury or the court "shall also assess the damages occasioned to the plaintiff by any forcible entry or by any forcible or unlawful detainer * * * and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of the damages thus assessed, and of the rent, if any, found due." Hinckley v. Casey [Wash.] 88 P 753. This penalty is imposed for the refusal to surrender possession on the termination of the tenancy, whether it be terminated by the terms of the lease, for nonpayment of rent, or for any of the other causes specified in the statute. Id. Section 1995, Mills' Ann. St., provides for recovery, in separate action, of treble damages for any damages or injury sustained by the plaintiff during the time he shall have been deprived of the possession of the premises. Mackenzie v. Porter [Colo.] 91 P 916.

53. Columbia & P. S. R. Co. v. Moss [Wash.] 87 P 951. The act of 1905 is applicable though the entry was made before such act took effect, the act being a purely remedial one. Id.

54. If he fails to append an abstract of title to the complaint and sues out a writ of restitution before final judgment, he will be taken to have proceeded under the former or general forcible entry and detainer act, and his rights will be determined by that act. Columbia & P. S. R. Co. v. Moss [Wash.] 87 P. 951.

55. Three days' notice in writing. Stahl Brew. & Malting Co. v. Van Buren [Wash.] 88 P 837.

New notice after verdict of not guilty: Where a lease is by the month, either party may abandon it by giving one month's notice, and therefore where the landlord in such a lease gave a notice to vacate, and on refusal to deliver possession brought an action of forcible entry and detainer, in which a verdict of not guilty was rendered, he may give a new notice for any other month to vacate and proceed thereunder. In such new proceedings a plea of former acquittal is untenable. Pulliam v. Sells, 30 Ky. L. R. 456, 99 SW 289.

56. Martin v. Hartshorne, 17 Okl. 586, 87 P 854; Columbia & P. S. R. Co. v. Moss [Wash.] 87 P 951; Stahl Brew. & Malting Co. v. Van Buren [Wash.] 88 P 837. It is sufficient service where notice to quit was served upon defendant by agent of plaintiff who handed a copy personally to defendant more than three days before the suit was instituted. Iler v. Miller [Neb.] 111 NW 590.

Return day: A summons in an action of unlawful entry and detainer can be made returnable to any day of a term of a circuit court. Montgomery v. Economy Fuel Co., 61 W. Va. 620, 57 SE 137.

57. Bunker v. Hanson, 99 Minn. 426, 109 NW 827, in which it was held that the municipal court of the city of Minneapolis has

Limitations See 7 C. L. 1675 are governed by the statutes of the different states.

Jurisdiction. See 7 C. L. 1675—The action of forcible entry and unlawful detainer is a local action involving the ouster of the tenant from the lands and the restitution of possession thereof to the owner. Jurisdiction of the land is therefore essential to its maintenance.[57] In Colorado it is the duty of a justice of the peace to stay the proceedings and certify the cause to the district court where it appears from sufficient affidavit, on the evidence upon the trial of an action of unlawful detainer, that the title is in dispute and an adjudication of the same may be necessary.[58]

Parties. See 7 C. L. 1676—Where an action is brought against several defendants jointly, which action embraces, among other causes of action, unlawful entry and detainer, upon the death of one of the defendants, the action of unlawful entry and detainer abates as to him.[59] Parties in possession under lessees are proper defendants.[60]

Pleadings. See 7 C. L. 1676—In some jurisdictions the complaint is required to be in writing,[61] while in others written pleadings are not required in proceedings of forcible entry and detainer, or either.[62] With regard to the allegations of the complaint, the usual rules of pleading apply to a large extent. Thus the plaintiff must set out the facts upon which he relies for recovery, and must prove his cause of action as alleged,[63] and may not introduce evidence which contradicts his pleading.[64] The complaint should describe the property with reasonable certainty.[65] Where it is desired to recover treble damages under statute authorizing such recovery, the action should be brought for the recovery of treble damages, and there should be allegations bringing it within the scope of the statute.[66] Amendments may be al-

no jurisdiction in forcible entry and detainer proceedings based upon breach of the contract of a lease to lands part of which were within Hennepin County and part of which were without that county. A county court has jurisdiction to hear and determine an issue formed by a counter affidavit to a warrant issued against one as a tenant holding over. Harper v. Tomblin, 127 Ga. 390, 56 SE 433.

58. Bonnell v. Gill [Colo.] 92 P 13 holding that an attempt to put the title in dispute by a general denial in the answer of the averments of the complaint as to ownership will not sustain a motion to certify. The party desiring to have a case certified must apply to the justice at the earliest opportunity, and he may not, after trial before the justice on the merits, and on appeal from an adverse judgment, raise the question of the right of the justice to proceed with the trial after filing an answer, as provided in conformity with the provisions of the statute, for the first time in the county court. Id.

59. Mulligan v. O'Brien, 53 Misc. 4, 102 NYS 911.

60. Haynes v. Sherwin-Williams Co., 126 Ill. App. 414.

61. Columbia & P. S. R. Co. v. Moss [Wash.] 87 P 951.

62. Jones v. Com. [Ky.] 104 SW 782.

63. Under the Washington forcible entry and detainer act as amended, the plaintiff must prove his cause of action as alleged, namely, that he is the owner of the property, that the defendant entered without permission and without having color of title thereto, that a proper, notice to surrender was given and served, and that the defendant has failed to comply therewith. If he fail to prove the forcible entry or the unlawful detainer as alleged, he will fail in the action. Columbia & P. S. R. Co. v. Moss [Wash.] 87 P 951. Under the statutory action for forcible entry and detainer, the complaint must necessarily show, by apt pleading, that either the relation of landlord and tenant exists between plaintiff and defendant or that defendant by force and arms ousted the plaintiff from possession. Folsom v. Hunter, 6 Ind. T. 453, 98 SW 156. Under § 2 of the Wash. Act of 1891, an abstract of the plaintiff's title must accompany the complaint, while under § 8 of the general forcible entry and detainer act the complaint need only be in writing and set forth the facts upon which the plaintiff seeks to recover. Columbia & P. S. R. Co. v. Moss [Wash.] 87 P 951.

64. Evidence cannot be introduced by the plaintiff, in an action of unlawful detainer, tending to prove that he was at all times mentioned in the proceedings the beneficial owner of the premises when the complaint states that a certain other person was the owner of the property subject to a deed of trust. McFarland Real Estate Co. v. Joseph Gerardi Hotel Co., 202 Mo. 597, 100 SW 577.

65. Columbia & P. S. R. Co. v. Moss [Wash.] 87 P 951. Description in complaint need not conform to that in lease if latter is incorrect. Haynes v. Sherwin-Williams Co., 126 Ill. App. 414. General description of premises is sufficient if from it they can be identified. Id.

66. Salmon v. Blasier Mfg. Co., 53 Misc. 36, 103 NYS 1031.

lowed in proper cases.[67] An answer under the Colorado act must specifically admit or deny all the material facts set forth in the complaint.[68] Matters in "excuse, justification, and avoidance," required by the Minnesota forcible entry statute to be pleaded, are such as constitute "new matter" under the general practice act.[69] Under the Kentucky practice, if either party conceive himself injured by the finding of the jury, he may file a traverse thereof with the judge or justice within three days next after the finding.[70] Whereupon the judge or justice shall stay all further proceedings on the inquisition and return the whole of the papers and proceedings, or a fair transcript thereof, to the office of the circuit court of said county within ten days thereafter.[71] The traversee joins issue on the traverse, and it is tried and judgment given on the verdict as in other cases.[72] Objection to the sufficiency of the complaint must be by motion to quash.[73]

*Evidence.*See 7 C. L. 1676—The burden is upon the plaintiff, in an action of unlawful detainer, from the start to the close of the case, to show by the evidence that he was legally entitled to have and recover the possession of the land in question as against the defendant.[74] In forcible entry and detainer proceedings, the question in litigation is the right of possession, and by joining issue all matter that may throw light upon the question involved may be proved pursuant to the rule obtaining with reference to the introduction of evidence.[75] It has been held that a judgment in ejectment will not bar an action for forcible entry and detainer, notwithstanding the

67. Folsom v. Hunter, 6 Ind. T. 453, 98 SW 156. Held permissible to amend a complaint by adding the words "and forcible" to the allegation of an "unlawful" entry. Wilson v. Campbell [Kan.] 88 P 548.

68. Bonnell v. Gill [Colo.] 92 P 13.

69. Sodini v. Gaber, 101 Minn. 155, 111 NW 962.

70. Check v. Reiter [Ky.] 102 SW 287. The traverse is, in effect, the plea of the traverser, unsuccessful party on the first trial or inquisition that "the inquisition returned in this case is not true." Jones v. Com. [Ky.] 104 SW 782.

71. Check v. Reiter [Ky.] 102 SW 287.

72. The practice in respect to proceedings on traverse in the circuit court is announced by the Ky. Civ. Code of Practice, § 465, of which provides: "The clerk shall docket the traverse as other actions; it shall stand for trial as docketed; the traversee shall join issue on the traverse; and it shall be tried by a jury and judgment given on the verdict as in other cases; provided, however, that nothing herein contained shall be construed to prevent the court from giving judgment against either party for default, nor from deciding any question of law as in other cases." Jones v. Com. [Ky.] 104 SW 782. No form is given by § 465 of the Ky. Civ. Code providing for a joinder of issue on the traverse, and it has been held that nothing more formal is required than the appearance of the traversee and his undertaking to uphold the verdict of the jury. Check v. Reiter [Ky.] 102 SW 287. Following plea by which the traversee joined issue was held to be in correct form: "Comes Calvin Jones and joins issue of the traverse herein, and denies that the inquisition in this case is not true, and says that it is true." Jones v. Com. [Ky.] 104 SW 782.

73. Haynes v. Sherwin-Williams Co., 126 Ill. App. 414.

74. Fisk v. Arnold [Ind. T.] 104 SW 824. It is unnecessary for the latter to offer any proof until the plaintiff shall have by the weight of evidence shifted the burden of defense upon him. Id. The burden of proof is on the plaintiff to show that the one on whose possession he relies as giving him the right to maintain the action was his tenant. Redman v. Perkins, 122 Mo. App. 164, 98 SW 1097. While under the Washington forcible entry and detainer act, as amended by the act of 1905, if the plaintiff fail to prove the forcible or unlawful detainer, he will fail in his action, under the act of 1891, the only effect of such failure is to convert the action into one of ejectment where the superior right will prevail. Columbia & P. S. R. Co. v. Moss [Wash.] 87 P 951.

Evidence held to make prima facie case: Where the plaintiff in an action of forcible entry and detainer alleges and proves his title to the property, that the defendant entered without permission and without having color of title thereto, that due notice to remove from the premises was given, and that the defendant failed to comply therewith, this makes a prima facie case for the plaintiff, and it is error to grant a nonsuit. Columbia & P. S. R. Co. v. Moss [Wash.] 87 P 951.

75. The defendant's claim of right to possession was under a parol contract not to be performed within a year, and therefore, within the statute of frauds unless he could show part performance of the contract. It was, therefore, proper to allow him to show that he was required by the contract to sow a certain portion of the land in wheat, and that such sowing constituted part performance of the contract. Jones v. Com. [Ky.] 104 SW 782.

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identity of the parties and the land in question, the nature of the actions and the issues involved being different.[76]

The Judgment. See 7 C. L. 1676—It has been held that there can, properly speaking, be no "judgment" in summary proceedings, although the final order is frequently referred to as a judgment and in effect is a judgment.[77] As to the conclusiveness of the judgment in summary proceedings, the rule differs in the various states.[78] Where the justice has jurisdiction and the plaintiff recovers, he is entitled to possession of the premises in any event.[79] Where a demurrer to the complaint in forcible entry and detainer has been sustained and the plaintiff who has given bond and obtained a writ of possession refuses to amend, it is the duty of the court to dismiss the complaint and render judgment for the return of the property to defendant, and for costs.[80]

Appeal See 7 C. L. 1677 or other method of review is controlled by statute.[81] The appellant should give notice [82] and is ordinarily required to give bond.[83] Where no exception to the final judgment has been taken and preserved, the supreme court, on appeal from the judgment in an action for unlawful detainer, is not called upon to consider the sufficiency of the evidence to support such judgment.[84]

76. Stockley v. Cissna [Tenn.] 104 SW 792. The parties to a forcible entry and detainer action will, however, be concluded by the decision in a prior action of ejectment that a grant of land by the state to the plaintiff was invalid. Id.

77. Seymour v. Hughes, 105 NYS 249.

78. In New Jersey it has been held that summary proceedings under the landlord and tenant act do not result in any judgment that is binding as between the landlord and the tenant. Their purpose is merely to secure a warrant that shall justify the constable or other executive officer in removing the tenant from possession and putting the claimant into possession. The result of the proceedings is conclusive as between the officer and the tenant. Richardson v. Smith [N. J. Law] 65 A 162. In New York, however, a judgment in summary proceedings by a landlord for nonpayment of rent is conclusive between the parties as to the existence and validity of the lease, the occupation of the tenant, and the fact that rent was due, and also as to any other facts alleged in the petition or affidavit which are required to be alleged as a basis of the proceedings. Meyerhoffer v. Baker, 51 Misc. 598, 101 NYS 24, holding that such judgment was conclusive as to the validity of the lease in a suit by the tenant on the ground of fraud inducing the lease. The fact that a forcible entry and detainer action has been brought by one person against another will not bar a suit in equity under Ky. St. 1903, § 11, by the latter against the former where the relation of landlord and tenant is not shown to exist. Engle v. Tennis Coal Co., 30 Ky. L. R. 1269, 101 SW 301.

79. See 7 C. L. 1677.

80. Folsom v. Hunter, 6 Ind. T. 453, 98 SW 156.

81. By the New Jersey landlord and tenant act the proceedings are not subject to review by appeal or certiorari, but the landlord remains liable in an action of trespass for any unlawful proceedings under the act. Richardson v. Smith [N. J. Law] 65 A 162. In West Virginia in an action of unlawful entry and detainer, a writ of error lies to the supreme court of appeals, but if, upon consideration thereof, it is found that there is no error in the judgment giving recovery for the possession of the property sued for, the action of the court below in allowing damages for the detention thereof cannot be reviewed unless the amount of such damages, exclusive of costs, exceeds the sum of $100. Montgomery v. Economy Fuel Co., 61 W. Va. 620, 57 SE 137.

82. Although a written notice of appeal from a final verdict of a jury in favor of the tenant, in summary proceedings by the landlord, states that the landlord "appeals from the judgment," this sufficiently apprises his adversary that the appeal is from the final order, as there could, strictly speaking, be no final judgment entered. The misdescription of the final order in the notice of appeal should be corrected by amendment by substituting the words "final order" for the word "judgment." Seymour v. Hughes, 105 NYS 249.

83. Under the Utah statutes (B. & C. Comp. 5754), on appeal in a forcible entry and detainer action, "if judgment be rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from such judgment until he shall, in addition to the undertaking now required upon appeal, give an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff of twice the rental value of the property of which restitution shall be adjudged from the rendition of such judgment until final judgment in such action, if such judgment shall be affirmed upon appeal." Wolfer v. Hurst [Or.] 91 P 366.

84. Bonnell v. Gill [Colo.] 92 P 13.

§ 2. *Criminal responsibility.*See 7 C. L. 1678—In Mississippi it is an offense, punishable by fine, to go upon the enclosed land of another without his consent, after having been notified by such person or his agent not to do so, or to remain on such land after a request by the owner or his agent to depart.[85]

FORECLOSURE OF MORTGAGES ON LAND.

§ 1. General Rights and Defenses and Remedies Available (1378).
§ 2. Foreclosure by Scire Facias Executory Process (1381).
§ 3. Sale by Trustee in Deed or Power (1381).
A. Right and Authority to Sell (1381).
B. Notice (1381).
C. Sale and Deed (1382).
D. Costs and Fees (1382).
§ 4. Entry and Possession or Possessory Action (1382).
§ 5. Strict Foreclosure (1382).
§ 6. Foreclosure by Action and Sale (1382).
A. Right of Action and Nature of Remedy (1382).
B. Parties and Process (1383).
C. Pleading, Trial, and Evidence (1384).
D. Decree or Judgment (1386).
E. Sales (1386).
F. Receivership in Foreclosure (1387).
G. Costs, Fees, and Expenses (1388).
H. Effect of Proceedings (1388).
§ 7. Defective Foreclosures and Their Avoidance (1388).
§ 8. Title and Rights of Purchasers (1391).
§ 9. The Bid and the Proceeds of Foreclosure (1392).
§ 10. Personal Liability and Judgment for Deficiency (1393).
§ 11. Redemption (1394).

This topic excludes the validity of mortgages and the rights of parties thereto,[86] and the foreclosure of chattel mortgages.[87]

§ 1. *General rights and defenses and remedies available. Rights and defenses in general.*See 7 C. L. 1678—A conveyance conditioned for support may be foreclosed as a mortgage.[88] A senior mortgagee who buys at foreclosure of a subsequent mortgage on a part of the land does not thereby lose his right to foreclose as to the remainder.[89] but one who also holds junior mortgages must take proper steps to protect his rights if he buys on foreclosure of the senior one,[90] and an oral agreement by the mortgagor's grantee to pay off the junior liens will not entitle him to foreclose them.[91] A tenant's mortgagee who after the tenant's eviction takes a lease for the balance of the term does not thereby lose his right to foreclosure a statutory right of redemption in the tenant.[92]

A lender may elect to look first to the security given by one at whose request he made the loan.[93] The rule that a senior mortgagee must first resort to land not covered by a junior mortgage cannot be defeated by a secret oral agreement between the senior mortgagee and the debtor that the former shall first resort to the common security.[94]

A junior mortgagee not a party in foreclosure of a prior mortgage must satisfy the equity of the senior mortgagee or purchaser before he can subject the property to his mortgage.[95]

Stipulations authorizing foreclosure as to the entire debt on default in any payment are valid.[96] Upon maturity of some though not all of several notes se-

85. Title to the land is not involved in a prosecution for a violation of the above provision, contained in § 1320 of the Code 1892. Raiford v. State, 87 Miss. 359, 39 S 897.

86. See Mortgages, 8 C. L. 1022.

87. See Chattel Mortgages, 9 C. L. 560.

88. Abbott v. Sanders [Vt.] 66 A 1032.

89. Equitable Bldg. & Loan Ass'n v. Thomas, 216 Pa. 571, 65 A 1100.

90. Where he did nothing to protect himself at sale and accepted redemption money from mortgagor's grantee, he could not thereafter foreclose his junior liens. Henry v. Mack [Iowa] 110 NW 469.

91. Henry v. Mack [Iowa] 110 NW 469.

92. Mortgagee's interest not merged in her term but tenant's right under Code Civ. Proc. § 2256, still outstanding. Chumar v. Melvin, 53 Misc. 460, 105 NYS 27.

93. Both the borrower and his attorney gave the lender trust deeds. Thackaberry v. Johnson, 228 Ill. 149, 81 NE 828.

94. Anthes v. Schroeder [Neb.] 112 NW 593.

95. May either pay amount due senior mortgagee or purchaser, or parties may agree that property be sold at an upset price fixed to cover amount of senior debt. Karl v. Conner, 30 Ky. L. R. 238, 97 SW 1111.

96. Robson v. Beasley, 118 La. 738, 43

cured, the mortgagee may foreclose though there is no precipitating clause.[97] A forfeiture will not be allowed where the mortgagor is able and willing to make a payment but without fault on his part cannot find the mortgagee.[98] Failure to pay interest [99] or taxes,[1] or to maintain insurance,[2] are often made grounds for foreclosure. While a provision that on default in payment of interest the whole debt shall be due at the option of the mortgagee does not require the latter to give formal notice of election to the mortgagor.[3] It confers but a mere option which may be lost by unreasonable delay or by failure to exercise it before interest is in fact paid.[4] The mortgagee's mere mental determination or direction to his own agents is not a sufficient election.[5] Whether it was intended that a foreclosure for nonpayment of interest should be in enforcement of payment of both principal and interest depends upon the terms of the mortgage.[6] The mortgagor's insolvency authorizes foreclosure before contract due-date.[7]

Payment,[8] release,[9] extension,[10] fraud, and failure of consideration,[11] are good defenses, and assignees are subject to all the equities existing as against their assignors.[12] A surety may show satisfaction out of lands pledged by the principal.[13]

S 391. A clause maturing all instalments on sale of the land by the mortgagor is binding on one who buys subject to the mortgage. Tidwell v. Wittmeier [Ala.] 43 S 782.

97. Handman v. Volk, 30 Ky. L. R. 818, 99 SW 660.

98. Where assignee did not give notice of assignment or of his residence. Pizer v. Herzig, 105 NYS 38.

99. On the question of the right to foreclose for nonpayment of interest, the note and mortgage will be construed together (Trinity County Bk. v. Haas [Cal.] 91 P 385, and hence foreclosure may be authorized by the note only (San Gabriel Valley Bk. v. Lake View Town Co. [Cal. App.] 89 P 360), or vice versa (Trinity County Bk. v. Haas [Cal.] 91 P 385). Instruments construed and suit held not premature. Graham v. Fitts [Fla.] 43 S 512.

1. Union Trust Co. v. Thomas [Md.] 66 A 450. Subsequent payment did not obliterate default Id.

2. Mortgagee not entitled to foreclose on ground of mortgagor's failure to effect insurance where complaint did not show that mortgagee had procured it and demanded premiums from mortgagor as required by the mortgage and by statute. Bumpus v. Willett, 55 Misc. 94, 106 NYS 366.

3. Suit sufficient. Trinity County Bk. v. Haas [Cal.] 91 P 385.

4. Interest held paid by proper tender before exercise of option. Trinity County Bk. v. Haas [Cal.] 91 P 385.

5. Trinity County Bk. v. Haas [Cal.] 91 P 385.

6. Note and mortgage construed after judgment held to authorize complete foreclosure. San Gabriel Valley Bk. v. Lake View Town Co. [Cal. App.] 89 P 360.

7. Adjudicated insolvency operates to mature mortgage bonds at option of holders, although the mortgage fixed the date for payment, for otherwise the bondholders would have been precluded from recovering any portion of a deficiency that might arise on sale. Union Trust Co. v. Thomas [Md.] 66 A 450. Where mortgaged property was set apart as homestead in bankruptcy, foreclosure of vendor's lien and mortgage could be had by leave of bankruptcy court before stipulated date of maturity. Jungbecker v. Huber [Tex. Civ. App.] 101 SW 552.

8. Lapse of time and failure to collect interest not conclusive on question of payment. Edmonston v. Wilbur, 99 Minn. 495, 110 NW 3. That an assignee of the mortgage fails to notify the mortgagor of the assignment does not preclude him from foreclosing the mortgage as against a defense of payment to the mortgagee where after the alleged payment the mortgagor, by extension agreements made with the mortgagee, recognizes the continued existence of the note and mortgage as binding obligations. Gemkow v. Link, 225 Ill. 21, 80 NE 47.

9. Plaintiff held not entitled to foreclose where at previous foreclosure of another mortgage he had consented to sale free of incumbrance. Crisman v. Lanterman, 149 Cal. 647, 87 P 89. Defense that defendant had procured a release from the last record assignee held insufficient where statutory provision that such release should discharge the mortgage had been repealed. Mayse v. Williams [Kan.] 91 P 795.

10. Arnot v. Union Salt Co., 186 N. Y. 501, 79 NE 719. Evidence held not to show any extension where negotiations failed because owner became angry. Gottschalk v. Noyes, 225 Ill. 94, 80 NE 72. Question of extension properly referred to a master. Id.

11. Alton-Dawson Mercantile Co. v. Staten [Okl.] 91 P 892. Mortgage was given originally so that mortgagee might raise money on it. Was never used for that purpose but was assigned after maturity and without consideration. Gantt v. Gantt [S. C.] 56 SE 676.

12. Contention that complainants were innocent purchasers of notes held not good as against plea of failure of consideration. Pierce v. Coryn, 126 Ill. App. 244.

13. Where mortgage to secure debt of husband also covered land belonging to wife. White v. Rovall, 105 NYS 624.

An unauthorized and fraudulent compromise of a foreclosure suit by a mortgage trustee does not defeat a second foreclosure as against a subsequent mortgagee with record notice.[14] A provision that payment shall be made only out of sales of the land to procure which the mortgagor is required to exercise reasonable diligence does not bar foreclosure after failure of mortgagor to exercise diligence in making sales within a reasonable time,[15] and a stipulation against sales for less than prescribed prices does not authorize the arbitrary fixing of prices by the mortgagor so as to postpone indefinitely the accomplishment of the purposes of the agreement.[16]

The mortgagor is estopped to deny his title,[17] and one who assumes payment of a mortgage by purchasing subject thereto cannot question its validity.[18] One whose interest in the land was divested prior to attaching of the mortgage lien may not object to foreclosure,[19] but a question from the mortgagor is sufficient to protect the grantee against foreclosure by a junior mortgagee whose rights were lost under the first foreclosure.[20] One who, being in law the real debtor, pays part of the notes secured and takes an assignment from the mortgagee may not claim priority thereunder in foreclosure by the latter to enforce payment of the balance.[21] A plea in bar good as against one of two mortgagors of the same property will not prevent judgment against the other and against the land.[22]

Accounting and amount due. See 7 C. L. 1682

Tender. See 7 C. L. 1683

Presentation to debtor's estate. See 7 C. L. 1684

Persons entitled to foreclosure. See 7 C. L. 1684—One seeking to foreclose as assignee must have a legal assignment.[23] Where a portion of bonds secured by trust deed is pledged for the payment of a prior incumbrance, an assignee thereof may foreclose subject to payment of the prior incumbrance and discharge of the other bonds.[24] One subrogated to the mortgagee's rights may foreclose.[25]

The remedies See 7 C. L. 1684 are more particularly discussed in other sections.[26] An action at law will lie for premature foreclosure.[27] Upon refusal of a trustee to execute a trust created by a trust deed in the nature of a mortgage, the beneficiaries may resort to equity for adjustment of right and sale.[28] Neither a trustee

14. Schroeder v. Wolf, 227 Ill. 133, 81 NE 13.

15, 16. Trust deed in nature of mortgage. Earle v. Sunnyside Land Co., 150 Cal. 214, 88 P 920.

17. Townsend v. Boyd, 217 Pa. 386, 66 A 1099.

18. Defense of ultra vires and that it was security for bonds that sold below par. Camden Safe Deposit & Trust Co. v. Citizens Ice & Cold Storage Co. [N. J. Err. & App.] 65 A 980.

19. Interest of minor held divested by prior guardian's sale by order of court and conveyance of her interest after attaining majority. Mortgage Trust Co. v. Redd [Colo.] 88 P. 473.

20. Where one foreclosing a first mortgage failed to protect his rights, by redemption or otherwise, under a second, grantee took free from second by redeeming from first. Henry v. Mack [Iowa] 110 NW 469.

21. Wife taking assignment of notes given by husband for land bought for her. Polk County Nat. Bk. v. Darrah [Fla.] 42 S 323.

22. Walker v. Hillyer [Ga.] 58 SE 715.

23. Must have a recorded legal assignment before he can foreclose by advertisement. Casserly v. Morrow, 101 Minn. 16, 111 NW 654. Assignment without name of assignee held invalid. Id.

24. Moses v. Philadelphia Mortgage & Trust Co. [Ala.] 42 S 868.

25. One of two parties claiming under a trust deed held entitled to foreclose by virtue of agreement subrogating him to rights of a first mortgagee, and his rights held not affected because his note passed through hands of other party. Earle v. Sunnyside Land Co., 150 Cal. 214, 88 P 920. Where mortgagor defaulted under first mortgage by failing to support a lunatic and second mortgagee was forced to make the expense in order to protect himself, he was entitled to foreclose under first mortgage. Jamaica Sav. Bk. v. Howards' Ex'r, 79 Vt. 372, 65 A 92.

26. See Post, §§ 2, 3, 4, 5, 6.

27. Measure of damages held difference between value of property and amount of debt secured at date of foreclosure. Missouri Real Estate Syndicate v. Sims, 121 Mo. App. 156, 98 SW 783.

28. Suit not forbidden as attempt to foreclose a trust deed. Curtin v. Krohn [Cal. App.] 87 P 243. Prayer not controlling. Id. Equity may enforce a deed of trust where the amount of the debt is

in deed of trust nor his attorney to foreclose has authority to compromise the beneficiary's claim without the consent of the beneficiary.[29]

§ 2. *Foreclosure by scire facias and by executory process. Scire facias.* See 7 C. L. 1685—The plea of usury must set out facts from which the court can determine whether there was usury.[30]

§ 3. *Sale by Trustee in deed or under power. A. Right and authority to sell.* See 7 C. L. 1685—Limitations will not begin to run until maturity of the mortgage.[31] A proceeding by a trustee to foreclose a trust and by advertisement in accordance with its terms is not an "action" within the meaning of a statute limiting the time for bringing certain actions,[32] and a sale under power is not barred because an action on the note is barred.[33]

An instruction by bond holders that the principal be declared due is a sufficient request that the power be exercised.[34] Where the mortgage authorizes the trustee to foreclose upon default, his right is not dependent upon request of the bondholders though the latter are also given the right to require foreclosure.[35] A trustee may foreclose regardless of who owns the obligation.[36] Usury infecting the debt does not avoid a power.[37] After death of mortgage creditor a trustee may not foreclose until appointment of an administrator,[38] but a foreign executor may exercise a power without qualifying in the state where the land is located,[39] and his prior execution of a deed of the premises will not prevent it.[40] An unauthorized sale may be enjoined.[41] After such sale by the mortgagee to an innocent purchaser the remedy is an action for damages against the mortgagee.[42]

(§ 3) *B. Notice.* See 7 C. L. 1687—Such notice as the mortgage requires must be given,[43] but in the absence of statute none other need ordinarily be given to the mortgagor.[44] Where, however, the mortgagee dies and the debtor agrees to a sale

disputed and the trustee refuses to act. Washington Nat. Bldg & Loan Ass'n v. Heironimus [W. Va.] 57 SE 256; Washington Nat. Bldg. & Loan Ass'n v. Buser, 61 W. Va. 590, 57 SE 40. On ascertaining amount due, court could retain cause and administer trust either through old or new trustee or through its own commissioners. Id.

29. Schroeder v. Wolf, 227 Ill. 133, 81 NE 13. Where compromise was fraudulent and land was transferred to others, a subsequent mortgagee was bound by the record of the first mortgage. Id.

30. It was alleged that the amount secured was the purchase price of land with sixteen years' interest and that the contract was usurious but the purchase price and rate of interest were not stated. Industrial Sav. & Loan Co. v. Hare, 216 Pa. 389, 65 A 1080.

31. Revisal of 1905, § 1044, applies to limitation on foreclosure by action to foreclosure under power. There had been default of interest and there was an optional power to foreclose for such default. Scott v. Blades Lumber Co., 144 N. C. 44, 56 SE 548.

32. There is no limitation for commencement of such proceeding in Colorado. Foot v. Burr [Colo.] 92 P 236.

33. Foot v. Burr [Colo.] 92 P 226.

34. Union Trust Co. v. Thomas [Md.] 66 A 450.

35. Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 116 App. Div. 78, 101 NYS 241.

36. Where obligations were issued under the mortgage and that there was default of interest. Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 188 N. Y. 38, 80 NE 568.

37. Sale could be had for debt and lawful interest. Payton v. McPhaul [Ga.] 58 SE 50.

38. The trustee foreclosed and sold the mortgaged property at less than its value without notice to the debtor. Armistead v. Kirby, 106 Va. 585, 56 SE 570.

39. Subsequent probate sufficient if rights of third persons do not intervene. Scott v. Blades Lumber Co., 144 N. C. 44, 56 SE 548.

40. The mortgagee had power to foreclose. As the executors had not qualified in the state they could only assign the debt and mortgage by their deed but not the land. Scott v. Blades Lumber Co., 144 N. C. 44, 56 SE 548.

41. The holder of the mortgage was nonresident and was exercising his power by agents. The petition alleged that the power was void and that the proposed sale was in violation of its terms. Sellers v. Page, 127 Ga. 633, 56 SE 1011. Not error to admit in evidence another note involved in transaction. Id.

42. Garret v. Crawford [Ga.] 57 SE 792.

43. Notice not posted in three public places as mortgage required. Smith v. Kirkland, 89 Miss. 647, 42 S 285. Notices apprising public of time, place, etc., of sale, held not invalid because improperly dated at bottom. Weyburn v. Watkins [Miss.] 44 S 145.

44. Mortgage provided only for advertisement. Garrett v. Crawford [Ga.] 57 SE

without the appointment of an administrator, he should have actual notice of such sale.[45]

(§ 3) *C. Sale and deed.*See 7 C. L. 1688—The stipulated date controls.[46] Removal of county seat may change the place of sale.[47] A provision as to sale in parcels must be observed,[48] and a fair opportunity for bidding must be given.[49] Execution of a power by the mortgagee in his own name is sufficient if the recitals in the deed show that he intended to convey in behalf of the mortgagor.[50] Recitals in an affidavit made by one who sells under a power, as evidence that the power has been executed, will not estop him from showing the true condition of the title in a suit to enforce the contract of sale or for a reconveyance.[51] Where a trustee holds possession of the proceeds of a sale for several years, he will be charged such interest as with reasonable care he could have realized.[52] Questions relating to fraud, mistake, or inadequacy of price,[53] or the right of the trustee or beneficiary to purchase,[54] are discussed in subsequent sections.

(§ 3) *D. Costs and fees.*See 5 C. L. 1446—Sureties are bound by a stipulation as to trustee's commissions.[55] A "reasonable compensation" will be computed with reference to the circumstances and the nature of the services rendered.[56]

§ 4. *Entry and possession or possessory action.*See 5 C. L. 1446

§ 5. *Strict foreclosure.*See 5 C. L. 1446—In the interest of justice and economy, equity may decree a strict foreclosure where the mortgagor is insolvent and has parted with his interest and no prejudice can result to junior lienors.[57]

§ 6. *Foreclosure by action and sale. A. Right of action and nature of remedy.*See 7 C. L. 1688—A proceeding in equity to enforce a trust agreement covering the property of different owners is not barred by the pendency of an action at law to subject a portion of the property to the payment of the debt,[58] and the foreclosure of an equitable mortgage does not bar a subsequent foreclosure of another mortgage to which plaintiffs became subrogated.[59] The validity and extent of alleged prior incumbrances asserted by intervenors are proper subjects of inquiry.[60]

792. That mortgagor had no notice of the sale is no defnese in an action for partition of the interest bought, where mortgage did not provide for notice and sale was duly advertised. Call v. Dancy, 144 N. C. 494, 57 SE 220.

45. Armistead v. Kirby, 106 Va. 585, 56 SE 570.

46. Code required sale on the first Tuesday of the month unless the instrument provides otherwise. Garrett v. Crawford [Ga.] 57 SE 792.

47. The power authorized a sale at the court house door at Isabella. Before sale the county seat was removed to Sylvester. Payton v. McPhaul [Ga.] 58 SE 50.

48. Evidence insufficient to sustain contention that sale was made in bulk in violation of an agreement. Hamilton v. Stephenson, 106 Va. 77, 55 SE 577.

49. Refusal of delay after three hours' bidding held not misconduct, where 200 persons were present and the bidding was stimulated by declaring but five or ten minutes more would be allowed. Hamilton v. Stephenson, 106 Va. 77, 55 SE 577.

50. Payton v. McPhaul [Ga.] 58 SE 50; Garrett v. Crawford [Ga.] 57 SE 792.

51. Affidavit under Rev. Laws, c. 187, § 15, as amended by St. 1906, p. 182, c. 219, § 2. Atkins v. Atkins [Mass.] 80 NE 806.

52. In re Waterloo Organ Co., 147 F 814.

53. See post, § 7, Fraud, Accident or Mistake.

54. See post, § 8, Purchases by Beneficiary or Trustee.

55. Could not contend that he should receive a reasonable sum only. Bolton v. Gifford & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 804, 100 SW 210.

56. Two per cent of proceeds of property not in dispute and expenses in defending a suit held proper. In re Waterloo Organ Co., 147 F 814.

57. Where mortgagor had conveyed the land in satisfaction of the debt and judgment creditor was allowed to redeem. Moffett v. Farwell, Jr., 123 Ill. App. 528.

58. Whole matter properly disposed of in one action. Michigan Trust Co. v. Frymark [Neb.] 107 NW 760.

59. Plaintiffs took absolute conveyance of the land in trust to mortgage it and with the proceeds clear off incumbrances and did so. On trial the conveyance was declared a mortgage and foreclosed, the other mortgage still subsisting. Plaintiffs were then compelled to pay their mortgage note and ask to be subrogated to the rights of their mortgagee. The two mortgages constituted separate contracts enforceable separately. Koppang v. Steenerson, 100 Minn. 239, 111 NW 153.

60. Court could find that a clause in a

*Jurisdiction.*See 7 C. L. 1689—A court is not deprived of power to foreclose a mortgage and enter a deficiency judgment merely because a portion of the property has been conveyed to a sovereign power which insists on immunity from suit.[61] If the mortgage covers property in two counties, foreclosure may be in either.[62]

*Limitations.*See 7 C. L. 1690—A payment by one of two joint mortgagors tolls limitations,[63] and in the absence of statute the full period of limitations as to the mortgage runs from the date of the last payment, regardless of limitations as to the debt.[64] Statutes have been enacted, however, barring foreclosure where the debt is outlawed.[65] Absence of mortgagor from the state will not suspend the running of limitations in favor of his grantee, though the latter may not have held the property for the entire statutory period.[66]

The defense of limitations is not available to a debtor who originally instituted the suit in equity for the purpose of relieving his property from the trust deed in the absence of fraud or a showing that the conditions of the trust have been performed.[67] An exception of the mortgage from a covenant of warranty in a deed does not estop the grantee from invoking the defense.[68]

*Abatement.*See 7 C. L. 1692

*Leave to sue.*See 5 C. L. 1450

*Discontinuance.*See 5 C. L. 1450

(§ 6) *B. Parties and process. Parties plaintiff and defendant.*See 7 C. L. 1692 All persons materially interested should be made parties,[69] otherwise their rights will not be affected.[70] Holders of liens which are clearly superior are not necessary or proper parties defendant;[71] junior lien holders are if their rights are to be de-

lease was invalid. Sammons v. Kearney Power & Irr. Co. [Neb.] 110 NW 308.

61. To territory of Hawaii. Kawananakoa v. Polyblank, 205 U. S. 349, 51 Law. Ed. 834.

62. Where mortgagee subsequently took a deed of property in another county in exchange for release of part of the land from mortgage, and such deed was in fact a mortgage. Hilt v. Griffin [Kan.] 90 P 808.

63. Comp. Laws 1897, § 9725, held not to alter the common-law rule of Whitcomb v. Whiting, 2 Doug. 652. Brown v. Hayes, 146 Mich. 474, 13 Det. Leg. N. 875, 109 NW 845.

64. Payment of interest gave twenty years more within which to foreclose though note was barred six years thereafter. Hughes v. Thomas [Wis.] 111 NW 474.

65. The provision of Act Feb. 18, 1891 (Rev. St. §§ 4276, 4277), referring to limitations two years after its passage, does not apply to mortgages theretofore executed where debt was not then barred. McCauley v. Brady, 123 Mo. App. 558, 100 SW 541. Under Laws 1901, p. 13, c. 11, limitations run "from maturity of whole debt secured by the mortgage" and not from maturity as stated in the mortgage, hence **agreements of extension** must be considered. Trudeau v. Germann [Minn.] 112 NW 281. Agreements not invalid under statute of frauds. Id.

66. Boyer v. Price [Wash.] 88 P 1106.

67. Michigan Trust Co. v. Frymark [Neb.] 107 NW 760.

68. Boyer v. Price [Wash.] 88 P 1106.

69. Proper or necessary: Persons claiming interest in premises and in mortgage held proper parties defendant though complaint denied any interest in them. Doherty v. Doherty [Wis.] 111 NW 478. One of several against whom a joint decree is sought is a necessary party. Sarasota Ice, Fish & Power Co. v. Lyle & Co. [Fla.] 43 S 602.

Not necessary: Wife of one executing mortgage while single not necessary party, though living with him on premises. Adams v. Bartell [Tex. Civ. App.] 19 Tex. Ct. Rep. 503, 102 SW 779. Under the law existing in 1843 the heirs of a deceased mortgagor were not necessary parties in foreclosure against the administrator. Flack v. Braman [Tex. Civ. App.] 18 Tex. Ct. Rep. 107, 101 SW 537. Where under a will the realty was equitably converted into personalty, residuary legatees and devisees were not necessary parties to suit to foreclose a mortgage on property of the estate. Boehmcke v. McKeon, 103 NYS 930.

70. Rights of judgment owner not affected where he was not made party. Smith v. Wehrheim, 126 Ill. App. 328; Wehrheim v. Smith, 226 Ill. 346, 80 NE 908.

71. Persons in possession under a tax title apparently superior to the mortgage lien are not proper parties defendant. Tax title held superior to lien of prior mortgage. Erie County Sav. Bk. v. Schuster [N. Y.] 79 NE 843. Bank president made mortgagee to secure money loaned third party by the bank. Bank held tax certificates but on foreclosure the president did not make it a party. Making the bank a party would not have required it to include the tax lien in its demand for relief. Bushey v. National State Bank [N. J. Eq.] 66 A 592.

termined.[72] Beneficiaries need not always be joined in a suit by a trustee.[73] Where the mortgagor has parted with his equity, he is not a necessary party.[74] A mortgagor's administrator is not of proper party for the purpose of establishing the liability of the estate for the mortgage indebtedness.[75] A tenant by curtesy whose wife's grantor failed to record his deed is not bound under the New Jersey law unless made a party.[76] Foreclosure will not lie against a state without its consent,[77] and the fact that the attorney general is made a party and asks any surplus that may arise does not authorize investiture of the state's interest.[78]

New parties and intervention. See 7 C. L. 1693—Where a prior mortgage also covers other land, a second mortgagee who holds a decree of foreclosure and sale may await foreclosure of the first mortgage and have his rights determined in that proceeding and cannot be required to sell at once under his decree.[79]

The process. See 7 C. L. 1694—Provisions in the statute or mortgage relative to publication,[80] posting,[81] and service on the occupant or mortgagor,[82] must be strictly followed, and the affidavit of publication must show publication for the required time.[83] Publication of the name of a mortgagee firm as it appears in the mortgage is sufficient.[84] Proper service will be presumed on collateral attack though not recited in the judgment.[85] A defendant who appears is not entitled to have default of the other defendants vacated on the ground of no service.[86]

(§ 6) *C. Pleading, trial, and evidence. Bill, complaint, or petition.* See 7 C. L. 1694—A paper sworn to but not signed cannot be the basis of foreclosure as an affi-

72. Persons holding judgment liens subject to mortgage. Wehrheim v. Smith, 226 Ill. 346, 80 NE 908. Where suit was dismissed by agreement, a junior mortgagee should have been made party upon subsequent reinstatement. Karl v. Conner, 30 Ky. L. R. 238, 97 SW 1111.

73. Under B. & C. Comp. § 29, authorizing trustee of express trust to sue without joining beneficiaries, issues as to who were beneficiaries held foreign. Wright v. Conservative Inv. Co. [Or.] 89 P 387.

74. Not necessary in action at law, though Rev. St. 1899, § 4342, requires inclusion of "mortgagor" and actual occupier of the land. McCauley v. Brady, 123 Mo. App. 558, 100 SW 541.

75. Such liability enforceable only in county court. In re Hanlin's Estate [Wis.] 113 NW 411.

76. Does not claim under unrecorded deed within Chancery Act, § 58, as amended by Laws 1903, p. 385, binding persons claiming under unrecorded conveyance though not made parties. New Jersey Bldg. Loan & Inv. Co. v. Schatzkin [N. J. Eq.] 64 A 1086.

77. Where equity had escheated. Seitz v. Messerschmitt, 117 App. Div. 401, 102 NYS 732.

78. Seitz v. Messerschmitt, 117 App. Div. 401, 102 NYS 732.

79. Held proper to order sale first of land not covered by second mortgage, then of remainder, allow redemption by second mortgagee, etc. Redfield v. Reid, 148 Mich. 545, 14 Det. Leg. N. 281, 112 NW 124.

80. Publications commencing Dec. 18, 1906, held to have been made "at least twice a week for three successive weeks immediately preceding sale," which took place Tuesday, January 8, 1907. Cortland Sav. Bk. v. Lighthall, 53 Misc. 423, 104 NYS 1022. Four weeks' notice means that twenty-eight days must elapse between first publication and sale. Publication for twenty-three successive days is not "four weeks' notice." Quinn v. McDole [R. I.] 67 A 327. After confirmation, sale will not be set aside because time for advertising was changed from that fixed in trust deed where decree was passed on application of mortgagor and trustee, and approved by a large majority of bondholders. Parsons v. Little, 28 App. D. C. 218.

81. The statute provided for posting notice on court house door. There was no positive evidence that this had been done. Shea v. Ballard, 61 W. Va. 255, 56 SE 472.

82. Notice of foreclosure by advertisement must be served on the occupants of each of two farms covered by the same mortgage. Casserly v. Morrow, 101 Minn. 16, 111 NW 654. A statute requiring service of the notice of sale on the grantor, his agents or personal representative, does not require service on his assignee. Code 1899, § 7, c. 72. Code 1906, § 3056. Shea v. Ballard, 61 W. Va. 255, 56 SE 472.

83. Affidavit of publication of notice of sale reciting that the notice was published "seven successive times" in a "weekly newspaper" held sufficient proof of publication for six successive weeks. Cook v. Lockerby [N. D.] 111 NW 628.

84. The mortgage ran to "Cook & Dodge." The publication recited the names in the same way without giving given names. Mortgage held good and statutory foreclosure sustained. Cook v. Lockerby [N. D.] 111 NW 628.

85. Where petition prayed for citation on an administrator and notice to heirs. Flack v. Braman [Tex. Civ. App.] 18 Tex. Ct. Rep. 107, 101 SW 537.

86. Gottschalk v. Noyes, 225 Ill. 94, 80 NE 72.

davit.[87] The bill or complaint must show plaintiff's interest,[88] and default in the conditions of the mortgage,[89] but when the suit is between the original parties it need not specifically allege that complainant is the owner of the note and mortgage.[90] Each of several notes need not be made the subject of a separate count where no personal judgment is sought.[91] There is no misjoinder of causes in uniting all parties who conveyed their property in trust to secure the same debt,[92] and a petition is not demurrable for failure to include the actual occupant of the land where it does not appear that the land was actually occupied.[93] Where one acquires an interest pending the proceedings, an amendment to the bill must state that interest and supply a proper prayer as against him.[94] A bill seeking foreclosure of a mortgage or in the alternative, to enforce a vendor's lien is not repugnant.[95] It is not always necessary to aver a readiness to do equity.[96]

Demurrer, plea, or answer. See 7 C. L. 1695—In foreclosure of a purchase-money mortgage an answer setting up fraud in defense to the note and a cross bill for rescission of the contract on account of the same fraud are not inconsistent.[97] A defendant's failure to deny that he claims an interest but that plaintiff's lien is superior is an admission authorizing foreclosure as against him.[98] It must appear what interest the pleader has in the question he raises.[99]

Cross bills and supplemental bills. See 7 C. L. 1695—An intervenor's petition should be verified.[1] A cross bill to reach the rents during the redemption period is in time though filed after execution by sale on foreclosure,[2] and is not rendered faulty by failure to allege that the property was improved and rented.[3] Cross bills are not necessary to authorize relief as between defendants where the original pleadings involve the whole subject.[4] The rule to avoid circuity of action will not support a cross bill so as to favor one defendant by depriving another of a good defense.[5]

87. Such an affidavit cannot be amended, and in case of foreclosure and levy thereon there was no case before the court. Meadows v. Alexander, 1 Ga. App. 40, 57 SE 901.

88. A complaint alleging an assignment of the mortgage to plaintiff must also allege an assignment of the debt. Smith v. Thompson, 118 App. Div. 6, 103 NYS 336. Complaint by one claiming under an assignment from an executrix held sufficient as against general demurrer to show title in plaintiff, though there was no allegation of confirmation of the transfer by the court. Wells, Fargo & Co. v. McCarthy [Cal. App.] 90 P 203.

89. Complaint basing right to foreclose on failure of mortgagor to maintain insurance held insufficient for failure to state that mortgagee had procured such insurance and demanded premiums from mortgagor. Laws 1896, p. 596, art. 7, § 219, subd. 3. Bumpus v. Willett, 55 Misc. 94, 106 NYS 366.

90. Graham v. Fitts [Fla.] 43 S 512.

91. McCauley v. Brady, 123 Mo. App. 558, 100 SW 541.

92. The parties were stockholders who had granted their property to secure payment of debts of their bankrupt bank, but with provision that the bank property and that of certain of the stockholders be first taken. Michigan Trust Co. v. Frymark [Neb.] 107 NW 760.

93. McCauley v. Brady, 123 Mo. App. 558, 100 SW 541.

94. Laflin v. Gato [Fla.] 42 S 387.

95. Winkleman v. White, 147 Ala. 481, 42 S 411.

96. Not necessary in suit to foreclose conveyance conditioned for grantors support, grantee being guilty of unjustifiable and persistent abuses. Abbott v. Sanders [Vt.] 66 A 1032.

97. Richardson v. Lowe [C. C. A.] 149 F 625.

98. Error to dismiss as to one thus failing to deny. Wright v. Conservative Inv. Co [Or.] 89 P 387.

99. Separate defenses by intervenor merely alleging usury and failure of consideration in assignment of mortgage to plaintiff held insufficient, there being no allegations showing intervenor's interest in such questions. Biedler v. Malcolm, 105 NYS 642.

1. Parsons v. Little, 28 App. D. C. 218.

2. The bill made no attempt to interfere with the final decree and a receiver to receive the rents was properly appointed. Ruprecht v. Muhlke, 225 Ill. 188, 80 NE 106.

3. Ruprecht v. Muhlke, 225 Ill. 188, 80 NE 106.

4. In suit by holder of two notes, relief could be decreed to defendants holding other notes secured by same mortgage. Winkleman v. White, 147 Ala. 481, 42 S 411.

5. Plaintiff released priority to defendant association which foreclosed without making plaintiff a party and sold to W. Plaintiff then filed his bill making the association and W. parties. W. set up breach of covenant against the association and decree was entered against it in favor of plaintiff for the amount of the mortgage debt. Reversed. Marsden v. White [N. J. Err. & App.] 65 A. 181.

*Trial and hearing.*See 7 C. L. 1695—No notice of reference is necessary to a defendant in default.[6] A defendant's admission that plaintiff "is" the owner of the mortgage relates back to the time of filing the petition.[7]

*Evidence.*See 7 C. L. 1696—Plaintiff need not prove title in the mortgagor as against the latter and his privies,[8] nor need he offer any proof so long as he has a prima facie case on the pleadings.[9] A statutory allegation as to whether any portion of the debt has been collected by any other action need not be affirmatively proven as a part of plaintiff's case.[10] Material allegations of the complaint put in issue by intervenors require proof though intervenors do not appear at the trial.[11] In the absence of other evidence, the amount due may be ascertained from an admission of a former owner of the equity of redemption.[12] An allegation in the present tense of an election to treat the principal due does not authorize proof of election before commencement of suit.[13] It may be shown that a deed subsequently taken by the mortgagee in consideration of a release of a part of the land from the mortgage was in fact intended as a mortgage.[14] The sufficiency of the evidence is governed by the ordinary rules.[15]

(§ 6) *D. Decree or judgment.*See 7 C. L. 1697—Judgment should not be rendered against persons not parties.[16] Questions not in issue cannot be determined as between codefendants.[17] That a widow accepts part of a mortgaged homestead in satisfaction of her homestead right is not ground for subjecting the remainder first.[18]

(§ 6) *E. Sales.*See 7 C. L. 1698—The land must be sold in the county in which it is situated and by the sheriff of that county.[19] Stipulations in a trust deed against sale by grantor at less than prescribed prices are not binding in foreclosure based on grantor's failure to sell.[20] Ordinarily, land capable of division should be sold in parcels.[21] Where the mortgage covers both a husband's curtesy interest and

6. Winkleman v. White, 147 Ala. 481, 42 S 411.

7. Admission made to relieve plaintiff from trouble of proof. Wood v. Speck [Neb.] 110 NW 1001.

8. As against one holding chattel mortgage on buildings. Bazelman Lumber Co. v. Hinton [Neb.] 112 NW 603.

9. Where answer merely pleaded matter in avoidance from which payment might be inferred. Parsons v. Ramsey [Fla.] 43 S. 503.

10. Not necessary to prove allegation under Code Civ. Proc. § 1629, that no other action had been brought, especially where denied only on information and belief and where defendant withdrew from trial. Riesgo v. Glengariffe Realty Co., 116 App. Div. 414, 101 NYS 832.

11. Error to render judgment in favor of other intervening bondholders without proof of existence and amount of outstanding bonds. Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 188 N. Y. 38, 80 NE 568.

12. Defendant alleged but failed to prove tender. Wright v. Stone Harbor Imp. Co., 69 N. J. Eq. 837, 66 A 417.

13. Trinity County Bk. v. Haas [Cal.] 91 P 385.

14. Such evidence admissible against a wife as well as her husband, she having filed joint answer asking that deed be declared absolute. Hilt v. Griffin [Kan.] 90 P 808.

15. Evidence sufficient to authorize finding that mortgage was a valid lien for amount found. Koyer v. Benedict [Cal.] 91 P 590. Evidence that plaintiff had received a certain sum and that remainder was due and payable held to warrant finding that no other proceeding had been instituted to collect amount due from which anything had been received that could be credited. Riesgo v. Glengariffe Realty Co., 116 App. Div. 414, 101 NYS 832.

16. Error to render judgment against wife of one who executed mortgage while single where she was not a party. Adams v. Bartell [Tex. Civ. App.] 19 Tex. Ct. Rep. 503, 102 SW 779.

17. Error to determine ownership of certain bonds, the same not having been properly put in issue between them, where this question was immaterial to trustee's right to foreclose. Knickerbocker Trust Co. v. Oneonta, etc., S. R. Co., 116 App. Div. 78, 101 NYS 241.

18. Adams v. Bartell [Tex. Civ. App.] 19 Tex. Ct. Rep. 503, 102 SW 779.

19. No distinction between execution in foreclosure and at law. Statutes construed. Vietzen v. Otis [Wash.] 90 P 264. That decree directed sale in another county did not cure defect. Id.

20. Where trust deed provided for sale of lots to satisfy debt but grantor failed to make sales within reasonable time, not necessary for court to direct that sale be made at not less than minimum prices stated in deed. Earle v. Sunnyside Land Co., 150 Cal. 214, 88 P 920.

21. Sale of land in bulk contrary to con-

the remainder, the curtesy interest should be first sold,[22] and only so much of the remainder as will satisfy the debt, if the land is divisible.[23] If before execution of an order of sale the debt is discharged, the sale should be stayed,[24] though such order provided for the distribution of part of the proceeds to an intervenor who had made improvements,[25] care being taken that the judgment be so modified as not to prejudice intervenor's rights in the improvements.[26]

On confirmation. See 7 C. L. 1699—Invalidity of the decree,[27] or gross inadequacy of price,[28] is ground for refusing to confirm. Confirmation involves a determination that the proceedings are regular,[29] and the presumption is in favor of the order.[30]

Resale. See 7 C. L. 1700

(§ 6) *F. Receivership in foreclosure.* See 7 C. L. 1700—While a provision that the mortgagee shall be entitled to a receiver as a matter of right without regard to solvency or the value of the property is not conclusive on a court of equity,[31] a receiver should be appointed where in addition to such provision the rents and profits are specifically pledged and there is doubt as to the sufficiency of the security.[32] Where the parties have stipulated for notice of appointment of a receiver, either inability to give it or prejudice incidental to delay should be shown before a receiver is appointed without notice.[33] As against a junior mortgagee rightfully in possession, a senior mortgagee's lien on rents cannot be enforced through a receiver improperly appointed,[34] and the mortgagor's right of possession cannot be impaired by an unauthorized receivership.[35] A receiver's possession is unaffected by later adjudication in bankruptcy.[36] The receiver should not be permitted to expend large sums of money unnecessarily for the benefit of the holder of the certificate of sale,[37] nor should large expenditures be allowed without vouchers and evidence of their necessity.[38] Necessary expenses may be allowed though the receiver was improperly appointed.[39] A receiver's lease should not be summarily canceled by order of court

stitution held void. McClusky v. Trussel [Miss.] 44 S 69.

22, 23. Buckley's Assignee v. Stevenson, 30 Ky. L. R. 952, 99 SW 961.

24. Washington Trust Co. v. Morse Iron Works & Dry Dock Co. [N. Y.] 79 NE 1022.

25. Installer of pumping plant could not insist on sale for his sole benefit. Washington Trust Co. v. Morse Iron Works & Dry Dock Co. [N. Y.] 79 NE 1022.

26. Washington Trust Co. v. Morse Iron Works & Dry Dock Co. [N. Y.] 79 NE 1022.

27. Though decree was fair on face. Where instrument sued on was not a mortgage and part of judgment ordering sale was invalid. Stark Bros. v. Royce [Wash.] 87 P 340.

28. Ballentyne v. Smith, 205 U. S. 285, 51 Law. Ed. 803.

29. Necessarily involved question whether clerk's order of sale was authenticated by seal of court. Carter v. Hyatt [Kan.] 91 P 61.

30. Decree of confirmation will not be reversed on unverified petition of a dissatisfied bondholder that there was an agreement between purchaser and the other bondholders that purchase should be for their joint benefit, and that sale was for a totally inadequate price. Parsons v. Little, 28 App. D. C. 218.

31. Pizer v. Herzig, 121 App. Div. 609, 106 NYS 370.

32. Pizer v. Herzig, 121 App. Div. 609, 106 NYS 370. Holder of several notes secured by mortgage pledging rents and profits held entitled to a receiver after maturity of some of the notes, though property might be worth more than mortgage debt. Handman v. Volk, 30 Ky. L. R. 818, 99 SW 660.

33. Woerishoffer v. Peoples, 105 NYS 506.

34. Where pleadings did not authorize affirmative relief. Ruprecht v. Muhlke, 225 Ill. 188, 80 NE 106. Second mortgagee held entitled to rents during period of unlawful possession by receiver. Id.

35. The receiver took possession and made improvements. After it was decided he should not have been appointed the mortgagor sued for rents including the costs of repairs. Joslin v. Williams [Neb.] 112 NW 343. Mortgagor should not be charged with costs of foreclosure in absence of personal liability. Id.

36. Where there was also a prayer for relief appropriate to insolvency proceedings. Nelson v. Spence [Ga.] 58 SE 697.

37. Standish v. Musgrove, 223 Ill. 500, 79 NE 161.

38. Even though there is no objection to them. Receipts $2,300, expenditures $1,900. Standish v. Musgrove, 223 Ill. 500, 79 NE 161.

39. Where he incurred expenses which would necessarily have been made by junior mortgagee entitled to possession. Ruprecht v. Muhlke, 225 Ill. 188, 80 NE 106.

to the prejudice of a tenant who has made expenditures in good faith merely because it covers an undivided interest not included in the mortgage.[40]

(§ 6) *G. Costs, fees, and expenses.* See 7 C. L. 1700—Reasonable [41] attorney's fees stipulated for in the note or mortgage [42] are properly allowed if demanded.[43] Plaintiff is entitled to interest on taxes paid,[44] but no relief can be had for a voluntary payment of taxes.[45] Under a statute permitting the mortgagee to include a statement of defect of title in the notice of sale, only the cost of search in records subsequent to the date of the mortgage may be taxed.[46]

(§ 6) *H. Effect of proceedings.* See 7 C. L. 1701—Foreclosure renders the mortgage functus officio, and merges in the decree the rights and liabilities thereby created,[47] but it does not necessarily pay the debt nor cancel the evidence of it.[48] Persons made parties and defaulting are barred where the petition sufficiently puts in issue the facts upon which they rely.[49] Under the Iowa statute providing for the foreclosure of trust deeds in accordance with their terms, a foreclosure of a deed in which a wife did not join is a judicial sale such as will bar her dower right.[50] Where a guardian without authority releases the priority of his wards' mortgage in favor of another mortgage, the statutory foreclosure of the two mortgages will not operate to reverse the priorities as against the wards.[51]

§ 7. *Defective foreclosures and their avoidance. Defects and irregularities.* See 7 C. L. 1702—A period of eleven days between decree and sale may not be unreasonably short.[52] The erroneous appointment of a special master to sell is not fatal after failure to appeal.[53] The mere fact that a surety had been discharged before foreclosure does not entitle him to have the sale set aside.[54] The foreclosure of a mortgage given by a life tenant to replace a purchase-money mortgage, and also for other debts, cannot be sustained against the remaindermen though the first mortgage was good as against them.[55] A curative act validating sales made by a person

40. Mortgage of undivided nine-tenths and lease of entire premises. Witthaus v. Capstick, 117 App. Div. 212, 102 NYS 166.

41. Plaintiff's testimony as to what was a reasonable attorney's fee may not be disregarded. Wright v. Conservative Inv. Co. [Or.] 89 P 387. Allowance of $500 not ground for reversal on bill of review. Winkleman v. White, 147 Ala. 481, 42 S 411.

42. Attorney's fees provided for in a note may be allowed though not specifically mentioned in the mortgage. Armijo v. Henry [N. M.] 89 P 305. On default in payment of an interest note, note for principal became due and plaintiff became entitled to stipulated attorney's fee on amount of both notes. Robson v. Beasley, 118 La. 738, 43 S 391.

43. Solicitor's fees are not allowed unless demanded in the pleadings. Crowe v. Kennedy, 127 Ill. App. 189.

44. Wright v. Conservative Inv. Co. [Or.] 89 P 387.

45. The tax collector had made threats but had taken no official step toward pursuing the land. Jamaica Sav. Bk. v. Howard's Ex'r, 79 Vt. 372, 65 A 92.

46. Statute provided that purchaser might be relieved from his bid upon showing court existence of substantial cloud on or defect in title, unless the notice of sale showed the existence of same and amount thereof. P. L. 1906, p. 269. Armstrong v. Fisher [N. J. Eq.] 66 A 1071.

47. Mortgagor entitled to insurance money where loss occurred the day after sale, trustee having thereafter no right to receive it as trustee. Rawson v. Bethesda Baptist Church, 123 Ill. App. 239. A sale under decree of foreclosure extinguishes the mortgage lien. Barry v. Harnesberger [C. C. A.] 148 F 346.

48. Mortgage for $400. Mortgagor at sale bid on the land for $50. It did not appear but that this was the fair value. He should have been charged with $50 and not with $400. Skelley v. Cody [N. Y.] 79 NE 994.

49. Holders of detached interest coupons defaulting in foreclosure of mortgage held barred from subsequently foreclosing coupons. Wyman v. Embree [Neb.] 110 NW 537.

50. Code 1851, § 2096. Pierce v. O'Neil, 132 Iowa, 530, 109 NW 1082.

51. Wards could insist on priority and foreclose anew. Covey v. Leslie, 144 Mich. 165, 13 Det. Leg. N. 218, 107 NW 900.

52. The value of the property was less than the amount of the debt and there had been ample time before the decree was rendered. Redfield v. Reid, 148 Mich. 545, 14 Det. Leg. N. 281, 112 NW 124.

53. Could not be availed of in proceeding to set aside decrees. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

54. Mortgagee was entitled to sell upon default in payment. Weyburn v. Watkins [Miss.] 44 S 145.

55. Stump v. Warfield, 104 Md. 530, 65 A 346. Where attorney of mortgagee to whom power of sale was given in second mortgage was not named in the first, foreclosure by

not named in the power does not apply against remaindermen whose interest was not conveyed.[56]

Grounds available after confirmation.[See 7 C. L. 1704]—Laches, as usual, bars relief.[57] Failure of the clerk to affix his seal to the order of sale is not ground for collateral attack after confirmation,[58] and, as against an action to redeem, confirmation cures an irregularity in making the sale after the death of plaintiff without revivor.[59] Confirmation will not validate a sale made in the wrong county.[60]

Fraud, accident, or mistake.[See 7 C. L. 1704]—Fraud is ground for relief.[61] An agreement by a prospective purchaser that if he buys he will sell to another is not illegal unless intended to prevent competition,[62] and the fact that an arrangement to make a joint purchase may indirectly prevent the parties thereto from bidding is not sufficient to render it unlawful.[63] Ordinarily mere inadequacy of price will not avoid the sale,[64] but a sale for a grossly inadequate price due to mistake is voidable.[65] Failure of executors of a mortgagee to bid does not waive their right to submit to defendant's motion to set aside a sale for inadequacy of price.[66] After a fair determination of amount due, a second accounting will be refused.[67]

Modes of attacking sale.[See 7 C. L. 1705]—Proper grounds existing, a sale may be enjoined.[68] Errors in including in the decree property not covered by the mortgage

him could not be sustained as having been made under first mortgage. Id.

56. Where their interest had been conveyed by an original mortgage which was replaced by one void as to them. Act 1890, p. 205, ch. 187. Stump v. Warfield, 104 Md. 530, 65 A 346.

57. Heirs barred, after 60 years, from attacking sale in foreclosure of purchase-money mortgage on ground that proceedings should have been in probate court. Flack v. Braman [Tex. Civ. App.] 18 Tex. Ct. Rep. 107, 101 SW 537. After 30 years' possession, failure of clerk to enter order of sale held not ground for vacating sale. Redmond v. Cass, 226 Ill. 120, 80 NE 708.

58. Carter v. Hyatt [Kan.] 91 P 61.

59. Wardrobe v. Leonard [Neb.] 111 NW 134.

60. And by sheriff of such county. Vietzen v. Otis [Wash.] 90 P 264.

61. A sale will be canceled where fraudulently made by the mortgagee or his assignee in violation of an agreement to abate the price of land on partial failure of title. Bill held to authorize equitable relief. Yarbrough v. Thornton, 147 Ala. 221, 42 S 402. A fraudulent foreclosure and release of trust deed by a trustee will be set aside and an account taken as to expenses by parties in possession. Barlow v. Hitzler [Colo.] 90 P 90. One who had collected rents and profits more than sufficient to cover expenses while she was in possession under a second trust deed held not entitled to further reimbursements. Id. A mortgagor may come into equity when it appears that the purchaser at sale under power had made representations whereby he was enabled to buy at an undervalue. Carr v. Graham [Ga.] 57 SE 875. Equity will place a constructive trust on the land for the owner's benefit if the purchaser assumed to act as agent or sustained a confidential relation to the owner. But if no such relation existed, the fraud will not make such pretended agent a trustee ex maleficio so as to entitle the owner to a recovery of the land without disaffirming the sale. Id. A wife whose land is sold under deed of trust executed before conveyance to her may recover it on offering to do equity, she not knowing of the deed of trust or of the sale and defendant knowing of plaintiff's deed when purchasing. Parks v. Worthington [Tex. Civ. App.] 19 Tex. Ct. Rep. 698, 104 SW 921.

Evidence insufficient to show that decrees were procured by fraud. Venner v. Denver Union Water Co. [Colo.] 90 P 623. To show **mental incapacity** of mortgagor at time of executing mortgage or at time of foreclosure and sale so as to justify setting aside sale. Goerz v. Barstow [C. C. A.] 148 F 562. Where trustees of life tenants bought the property at foreclosure of an outstanding mortgage, evidence held insufficient to justify recovery in ejectment by remaindermen 40 years later. Mead v. Chesbrough Bldg. Co. [C. C. A.] 151 F 998.

62. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

63. Must appear that object was to avoid competition. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

64. Windes v. Russell [Ala.] 43 S 788. Sale at forty per cent of actual value. Weyburn v. Watkins [Miss.] 44 S 145. Affidavits on motion to confirm sale held insufficient to set it aside for inadequacy of price. Cortland Sav. Bk. v. Lighthall, 53 Misc. 423, 104 NYS 1022.

65. Property worth $1,600 was struck down to B for $610. F at once claimed the bid. Sheriff ignored his claim. Montclair Bldg. & Loan Ass'n v. Farmer [N. J. Eq.] 67 A 852.

66. Strode v. Hoagland [Neb.] 107 NW 754.

67. Held not error to refuse accounting in proceeding to set aside trustee's sale where on day of sale amount of debt was computed in debtor's and his counsel's presence and considered correct. Hamilton v. Stephenson, 106 Va. 77, 55 SE 577.

68. Bill to enjoin sale under trust deed to enforce payment of $1,665 not without equity where it shows that the notes were without consideration except as to $504. McDonald

or by the complaint cannot be corrected in a suit to annul the decree on the ground of lack of jurisdiction.[69] An objection that the property was not sold by lots as described in the mortgage may not be availed of in an outside attack on the purchaser's title.[70] Only apparent substantial errors can be reached by bill or review,[71] and no presumptions will be indulged against the proceedings.[72] A mortgagee who acquires legal title by a foreclosure which by accident or mistake was incomplete as to heirs may foreclose anew as against them for an unpaid balance.[73]

A suit to set aside a foreclosure and to redeem must be brought in the county in which the land is situated.[74] After term at which a sale in full satisfaction of the debt was approved, the court has no further jurisdiction of the property in the proceeding.[75] A bill to enjoin a mortgage sale should aver a tender of interest from date of maturity to date of tender.[76] An averment that no attorney's fee was due is a mere conclusion.[77] The burden of proof is on the party charging fraud or other irregularity.[78] Recitals in a trustee's deed that the requirements of the trust deed were duly complied with are prima facie evidence against the mortgagor.[79] Where a defendant does not choose to rely on a legal presumption as to notice arising from a trustee's deed, the question must turn on the evidence.[80] On proof of fraud the court may not require the purchaser to take the land at a price fixed by it,[81] but the sale should be set aside.[82] Setting aside the sale of one of two connected tracts may be ground for setting aside the other.[83] In a suit to enforce a contract of sale under a power or for a reconveyance, the foreclosure proceedings should not be set aside on account of the invalidity of the contract where the mortgagor whose debt was satisfied is not a party and the time for redemption has expired.[84] After foreclosure equity will not correct an error in the mortgage so as to cover additional land without directing another foreclosure and sale and opportunity to redeem.[85]

v. Kamper, 89 Miss. 221, 42 S 877. General demurrer of "no equity" held insufficient to raise question of tender. Id. Bill to enjoin mortgage sale averring tender, etc., held not without equity. Tidwell v. Wittmeier [Ala.] 43 S 782.

69. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

70. Held at most an irregularity. Goerz v. Barstow [C. C. A.] 148 F 562.

71. That bill was repugnant, or that its footnote was not signed by counsel, or that decree failed to direct a copy to be sent to defendant, held not reached. Winkleman v. White, 147 Ala. 481, 42 S 411.

72. Will not be presumed that a husband who failed to join in his wife's mortgage was a resident of the state. That bill in foreclosure failed to state husband's residence did not show error. Winkleman v. White, 147 Ala. 481, 42 S 411.

73. His grantees could maintain the action. McCague v. Eller Neb.] 110 NW 318.

74. The land was in R county and the action was brought there. Upon affidavit of defendants it was transferred to H county where they demurred. Upon plaintiff's motion the case was remanded to R county. Defendant appeared specially and objected. Casserly v. Morrow, 101 Minn. 16, 111 NW 654.

75. Could not entertain petition for resale three years after approval on ground that receiver had misapplied rents. Innes v. Linscheid, 126 Ill. App. 27.

76, 77. Tidwell v. Wittmeier [Ala.] 43 S 782.

78. To prove fraud. Hewitt v. Price, 204 Mo. 31, 102 SW 647. Burden upon heirs seeking to set aside foreclosure on ground **that mortgage was fraudulent.** Jobert v. Wagner, 147 Mich. 409, 13 Det. Leg N. 1016, 110 NW 942. Burden on plaintiff suing to set aside sale to show that property was **not properly advertised.** Shea v. Ballard, 61 W. Va. 255, 56 SE 472. Burden of proving **agreement to stifle bidding** is upon party attacking the sale. Hamilton v. Stephenson, 106 Va. 77, 55 SE 577. Burden on mortgagor to show that **purchaser was auctioneer.** Windes v. Russell [Ala.] 43 S 788.

79. Evidence as against both husband and wife. Bucker v. Hyde [Tenn.] 100 SW 739.

80. Evidence held insufficient to show posting of notices in three public places as required by mortgage. Smith v. Kirkland, 89 Miss. 647, 42 S 285.

81. Hewitt v. Price, 204 Mo. 31, 102 SW 647.

82. And parties put in statu quo or at mortgagor's election, set aside on condition that the debt be satisfied. Hewitt v. Price, 204 Mo. 31, 102 SW 647.

83. Where same party had bought both and claimed to have no use for the one alone. Montclair Bldg. & Loan Ass'n v. Farmer [N. J. Eq.] 67 A 852.

84. Where sale was made under contract with wife of trustee, wife who failed to pay held required to reconvey to trustee who was to hold for trust estate. Atkins v. Atkins [Mass.] 80 NE 806.

85. One wall of building mortgaged with three lots was on adjacent land belonging to same mortgagor but which was not mention-

Offer of equity.[See 7 C. L. 1706]—An heir not made a party may not maintain ejectment against a purchaser who went into possession without first tendering the amount due on the mortgage.[86] In ejectment a plea on the theory that defendant is entitled to subrogation under a previous mortgage is insufficient without an offer to surrender on payment of the amount claimed.[87]

Rights under invalid foreclosure.[See 7 C. L. 1707]

§ 8. *Title and rights of purchasers.*[See 7 C. L. 1708]—The purchaser can acquire title to such land only as was covered by the mortgage.[88] Superior liens are not affected in the absence of estoppel.[89] A subsequent easement [90] or lease [91] is extinguished, and leases extinguished by lapse of time are immaterial; [92] but an unexpired leasehold created before execution of the mortgage is not affected [93] and a purchaser acquires only the rights of the landlord.[94] A judgment at law that a purchaser acquired no title as against certain remaindermen does not preclude equitable subrogation under a former mortgage valid as to them.[95]

Lis pendens and bona fide purchasers.[See 7 C. L. 1710]—A rule of law that a suit against a vendor is notice to his vendee applies to a foreclosure sale where the mortgage creditor is made party.[96]

Purchases by beneficiary trustee, or the like.[See 7 C. L. 1711]—In foreclosure by action, complainant has the same right to purchase as any other person.[97] A mortgagee or trustee may not purchase under his own power,[98] but the mortgagee may purchase from a third person who in good faith purchased at the sale.[99] A purchase by the mortgagee under his own power is only voidable [1] and may not be impeached by a subsequent judgment creditor of the mortgagor or by the purchaser at his execution sale.[2]

Agreements to permit redemption [See 7 C. L. 1712] must be proven by satisfactory evidence.[3]

ed in the mortgage. Carrigg v. Mechanics' Sav. Bank [Iowa] 111 NW 329.

86. Lunny v. McClellan, 116 App. Div. 473, 101 NYS 812.

87. The equity arose from the foreclosure being made under a mortgage which was invalid as against certain remaindermen and which had been substituted for a mortgage valid as against the entire fee. Stump v. Warfield, 104 Md. 530, 65 A 346.

88. Building covered more ground than was described in the mortgage. Held that the purchaser took only an easement to have the building stand where it was but no title to the land, although the mortgagor owned all the land and the description was erroneous. Carrigg v. Mechanics' Sav. Bank [Iowa] 111 NW 329. Certain canal strip held to pass to purchaser and not to mortgagor's subsequent grantee, the same having been covered by the mortgage. In re Canal Place in City of New York, 115 App. Div. 458, 101 NYS 397.

89. Evidence insufficient to estop bank holding tax certificates because of alleged representations of its solicitor at foreclosure sale. Bushey v. National State Bank [N. J. Eq.] 66 A 592.

90. Foreclosure sale held to terminate easement granted after execution and record of mortgage. Burlington & C. R. Co. v. Colorado Eastern R. Co. [Colo.] 88 P 154.

91. McFarland Real Estate Co. v. Joseph Gerardi Hotel Co., 202 Mo. 597, 100 SW 577.

92. Sale of leasehold under foreclosure not affected by a lease executed seventy-five years before whereon rent was never exacted. Code Pub. Gen. Laws, art. 53, § 26. Lewis v. Kinnaird, 104 Md. 653, 65 A 365. Title under foreclosure of mortgage given after sixty years undisputed possession is good as against a more ancient lease. Townsend v. Boyd, 217 Pa. 386, 66 A 1099.

93. F. Groos & Co. v. Chittim [Tex. Civ. App.] 100 SW 1006.

94. Where latter had previously assigned rents as security, mortgagee with notice who purchased at foreclosure was not entitled thereto. F. Gross & Co. v. Chittim [Tex. Civ. App.] 100 SW 1006.

95. Stump v. Warfield, 104 Md. 530, 65 A 346.

96. Scovel v. Levy's Heirs, 118 La. 982, 43 S 642.

97. Innes v. Linscheid, 126 Ill. App. 27.

98. Mortgagor's vendee held entitled to set aside sale so far as her property was affected where purchase was by a corporation of which trustee was president. Smith v. Downey [Colo.] 88 P 159.

99. Transaction sustained, there being nothing to show that third person bought by understanding with mortgagee. Windes v. Russell [Ala.] 43 S 788.

1, 2. Payton v. McPhaul [Ga.] 58 SE 50.

3. Where after foreclosure mortgagor gave purchaser a quitclaim deed, evidence held not to show any agreement that former might recover the land by paying sum expended and interest. Pankau v. Morrissey, 224 Ill. 177, 79 NE 643.

*Remedies to assert or protect title.*See 7 C. L. 1714—In a suit to establish title to land through foreclosure of a mortgage, the burden is on plaintiff to prove a breach of condition at the time of the foreclosure.[4] A beneficiary who buys under a trust deed describing a tract of land not intended may later have the trust deed reformed in equity if the intended tract has not passed to innocent purchasers,[5] but he cannot have the trustee's deed reformed.[6] Execution issued in good faith after the death of the mortgagee is not void so as to render the administrator liable in forcible entry.[7]

*Writ of assistance.*See 7 C. L. 1713—Rights of persons not made parties in the foreclosure suit cannot be adjudicated on application for a writ of assistance,[8] and if any such person is in possession he may restrain execution of the writ.[9] Laches may bar recovery against a person in possession under recorded deed.[10]

§ 9. *The bid and proceeds of foreclosure.—The bid is a contract,*See 7 C. L. 1714 and an outstanding deed void under the recording statutes is not ground for refusing to complete the purchase.[11] Lis pendens by itself does not justify release, but the right thereto must depend upon the validity of the claim represented thereby.[12] Failure to serve formal notice of application for resale does not relieve a purchaser from liability for a deficiency in the amount realized, where he has actual notice and is present at the resale,[13] but a defaulting bidder cannot be held for the difference between his bid and a resale bid unless the two sales were made under the same terms.[14]

*Bid money or deposit.*See 7 C. L. 1715

*Accumulated rents.*See 7 C. L. 1715—If the sale brings enough to satisfy the debt and costs, rents to the end of the redemption period belong to the mortgagor,[15] but if he allows the receiver to expend them on the property, he will not be entitled to a second sale so as to defeat the rights of subsequent purchasers.[16] If the security is inadequate, rents and profits specifically pledged and accruing after commencement of suit will be applied on the debt.[17] The purchaser at foreclosure is entitled to no part of the rents until he has performed the conditions of sale.[18]

*Payment and distribution.*See 7 C. L. 1715—Application of proceeds will be made by the court according to the equities of the case.[19] Thus, superior liens for rents

4. Temple v. Phelps, 193 Mass. 297, 79 NE 482.

5. Harper v. Combs, 61 W. Va. 561, 56 SE 902.

6. Trustee did not assume to sell intended tract. Harper v. Combs, 61 W. Va. 561, 56 SE 902.

7. After time for redemption mortgagee was put in possession voluntarily by mortgagor. Mortgagee died and mortgagor resumed possession. Mortgagee's attorney then caused execution to issue, which his administrator caused to be served. Finch v. Burr, 79 Conn. 682, 66 A 504.

8. Where estate of deceased wife of deceased mortgagor was not party. Hibernia Sav. & Loan Soc. v. Robinson, 150 Cal. 140, 88 P 720.

9. Evidence sufficient to sustain finding that administrator was not in possession. Hibernia Sav. & Loan Soc. v. Robinson, 150 Cal. 140, 88 P 720.

10. The purchaser failed to exhibit his title for two years after foreclosure. Writ of assistance denied. New Jersey Bldg., Loan & Inv. Co. v. Schatzkin [N. J. Eq.] 64 A 1086.

11, 12. Baecht v. Hevesy, 115 App. Div. 509, 101 NYS 413.

13. Especially where terms of sale authorized resale without application, and, after order for resale, motion of purchaser to be relieved was denied and he took no appeal. Egan v. Buellesbach, 116 App. Div. 306, 101 NYS 476.

14. Where second sale was made "subject to an alleged claim represented by lis pendens." Baecht v. Hevesy 115 App. Div. 509, 101 NYS 413.

15. Innes v. Linscheid, 126 Ill. App. 27. See post, § 11, Right to Possession Pending Redemption.

16. Innes v. Linscheid, 126 Ill. App. 27.

17. Could be applied notwithstanding Code Civ. Proc. § 261, providing that mortgagee shall not be entitled to possession prior to foreclosure and sale. Moncrieff v. Hare [Colo.] 87 P 1082. Should be limited to rents and profits accruing after filing of suit. Id.

18. Purchaser bid $70,000, paid $5,000 at once and $65,000 balance fifty-one days after deed was executed. He claimed the rents for the fifty-one days. They were distributed to junior mortgagees. Thompson v. Ramsey [N. J. Eq.] 66 A 588.

19. Wishes of neither debtor nor creditor control. Crisman v. Lanterman, 149 Cal. 647, 87 P 89.

and taxes,[20] and the claims of senior lienors, will be first satisfied.[21] A second mortgagee is entitled to a surplus as against a mere bondholder,[22] but a vendee who refused performance, thus acquiring no interest in the land, is not entitled to any surplus.[23] After satisfaction of the mortgage debt insurance money for fire loss occurring after foreclosure belongs to the person having the right of redemption.[24] A trustee in bankruptcy is not entitled to reimbursement from the security fund for expense in litigating the right of bondholders to share therein, the same having been principally incurred for the benefit of the general creditors.[25] That the second instead of the first of two notes is paid from the proceeds does not cancel the first as against one who converts personalty also mortgaged to secure the same debt.[26]

§ 10. *Personal liability and judgment for deficiency.*[See 7 C. L. 1717]—In the absence of release [27] a personal judgment for a deficiency may be recovered,[28] if there is a covenant to pay the debt.[29] Such judgment may be rendered though all the mortgaged property be not first applied where part of it has become immune by conveyance to a sovereign power.[30] In a suit for a deficiency the mortgagee will be charged only with the amount realized at the foreclosure sale, regardless of the actual value of the land at the time of the sale.[31] Execution in enforcement of a deficiency judgment entered on foreclosure cannot issue after sale and redemption and after expiration of the period for the issuance of execution on other judgments.[32] A vendee who takes property "under and subject" to a mortgage is liable to his vendor for the amount the vendor may be compelled to pay under a deficiency decree,[33] But this does not apply where the deficiency creditor was purchaser and suffered no loss.[34]

A mortgagee who fails in the foreclosure proceeding to assert against the land a claim for taxes paid by him cannot thereafter have personal judgment against the mortgagor or subsequent owners.[35]

20. Municipal claims for taxes, rents, etc., have priority over mortgages executed before passage of act June 4, 1901, p. 365, since this act did not change the law of 1824 in this regard. Haspel v. O'Brien [Pa.] 67 A 123.

21. Where a first mortgage was valid as to timber, though invalid as to certain personalty, first mortgagee should have been credited with value of timber on foreclosure of second mortgage, and should have judgment against mortgagors for balance only. Fullerton v. McBride [Miss.] 43 S 684.

22. Where vendor of land took trust deed to secure part of price and a bond for the balance and foreclosed trust deed leaving a balance over amount secured thereby, such balance should go to the holder of a second trust deed, though bond was recorded. Carpenter v. Duke, 144 N. C. 291, 56 SE 938.

23. Vendee refusing tender of performance held to have elected to resort to action for breach of contract of sale and therefore not to be entitled to surplus. Rosenberg v. Wilson, 104 NYS 1087.

24. Church sold for less than mortgage debt and deficiency judgment entered for $400. Mortgagee as agent got possession of $1,500 insurance money, paid himself $400, and refused to surrender the balance to the church, claiming it for himself as purchaser under the foreclosure. Rawson v. Bethesda Baptist Church, 221 Ill. 216, 77 NE 560.

25. In re Waterloo Organ Co., 147 F 814.

26. The amount received from sale did not cover entire debt. Rev. Laws 1905, § 4465, intended for benefit of mortgagor and mortgagee. Endreson v. Larson [Minn.] 112 NW 628.

27. An agreement to release an indorser if he would negotiate a sale of the property for the bid price is binding when executed though made by only one trustee and ratified by the others. Ubhoff v. Brandenburg, 26 App. D. C. 3.

28. Provision that on default in any payment remainder should become "exigible by foreclosure" held not to bar personal judgment. Robson v. Beasley, 118 La. 738, 43 S 391.

29. In the absence of any covenant to pay the debt, no deficiency can be recovered. B. & C. Comp, § 5339. Kramer v. Wilson [Or.] 90 P 183.

30. Conveyance to Hawaii. Kawananakoa v. Polyblank, 205 U. S. 349, 51 Law. Ed. 834.

31. Randrup v. McBeth, 116 App. Div. 195, 101 NYS 604.

32. Under Hurd's Rev. St. Ill. 1905, c. 77, § 1, providing that a judgment shall cease to be a lien on realty unless execution is issued within one year from its rendition. Barry v. Harnesberger [C. C. A.] 148 F 346.

33. In re May's Estate [Pa.] 67 A 120.

34. Property mortgaged for $8,000 bid in for $50 by agreement that purchaser should pay the mortgagee his claim after sale. Purchaser admitted his willingness to pay whole amount of mortgage debt. In re May's Estate [Pa.] 67 A 120.

35. Stone v. Tilley [Tex.] 18 Tex. Ct. Rep. 97, 101 SW 201.

§ 11. *Redemption.*See 7 C. L. 1719—Statutes providing for redemption are liberally construed.[36] A statute providing a method to determine who has the right to redeem does not exclude the right to proceed in equity to effect a redemption where tender has been refused.[37] A purchaser at execution [38] or an assignee of a judgment creditor may redeem,[39] but a wife who merely joined in a mortgage on her husband's property to secure his debt cannot.[40] A remote grantee is within a statute allowing redemption from the "purchaser or his vendee." [41] The time for redemption is variously regulated by statute.[42] When the mortgagee is purchaser the "purchase money" required by a statute to be tendered by the mortgagor is the amount of the the debt, though the bid was in excess of that amount.[43] Matters determined in foreclosure and in a prior ejectment suit are conclusive, as against parties and privies, in a suit to redeem.[44] If the certificate of purchase becomes void even after failure to redeem, the mortgagor by his former title becomes the absolute owner.[45] A judgment creditor not made a party to the proceedings does not lose his lien by failure to redeem.[46]

*Rights to possession pending redemption.*See 7 C. L. 1722—In the absence of special provisions, rent and profits accruing during the period for redemption belong to the owner of the equity.[47]

*Title and rights acquired by redemption.*See 7 C. L. 1723—Redemption by a tenant inures to the benefit of cotenants,[48] provided within a reasonable time they elect to contribute and reinstate their title.[49] Redemption of a life estate from foreclosure of the fee does not entitle the redemptioner to contribution from the reversioners.[50] A redemption procured by fraud against an incompetent mortgagor will be annulled and his subsequently appointed guardian allowed to redeem.[51]

36. Smith v. Wehrheim, 126 Ill. App. 328.

37. The clerk refused to permit redemption unless affidavits were filed under Code, § 4057. Kendig v. McCall, 133 Iowa, 180, 110 NW 458.

38. Purchaser at execution before foreclosure acquires mortgagor's right to redeem. Code, § 4045, permits debtor to redeem within one year, and on debtor's failure, Code, § 4046, permits any creditor to do so after the first nine months. Execution purchaser entitled to redeem under § 4045, where he took his deed before expiration of the year. Kendig v. McCall, 133 Iowa, 180, 110 NW 458.

39. Smith v. Wehrheim, 126 Ill. App. 328.

40. Mortgage on homestead to secure their joint note. Wife could give no right of redemption by deed of the premises. Robbins v. Brown [Ala.] 44 S 63.

41. Robbins v. Brown [Ala.] 44 S 63.

42. "Six months from time of sale" does not refer to the time of the confirmation of sale. Laws 1899, p. 310, No. 200, §§ 111, 118. Trombly v. Klersy, 147 Mich. 370, 110 NW 940. By Hurd's Rev. St. 1905, c. 77, § 20, judgment creditors made parties are required to redeem within three months after the expiration of twelve months from sale. Wehrheim v. Smith, 226 Ill. 346, 80 NE 908. Where at foreclosure sale sheriff deeded to mortgagee who then conveyed to another, the latter was a mortgagee in possession, time for redemption from whom was twenty years with possibly an additional year for disability of infancy Messinger v. Foster, 115 App. Div. 689, 101 NYS 387.

43. Code 1896, §§ 3505-3507. Bean v. Pearce [Ala.] 44 S 83.

44. Amount due from mortgagor to mortgagee and whether there had been an agreement to extend period for redemption held binding on mortgagor's grantee who defended in ejectment. Potter v. Ft. Madison Loan & Trust Bldg. Ass'n, 133 Iowa, 367, 110 NW 616.

45. As by the statute of limitations or otherwise. Judgment creditor of life tenant redeemed from foreclosure and resold. After death of life tenant the remaindermen claimed the land although they had made no redemption of the fee. Schroeder v. Bozarth, 224 Ill. 310, 79 NE 583.

46. His rights not lost by expiration of redemption period, where he asserted his rights while lien was still alive though it became dormant pending suit. Wehrheim v. Smith, 226 Ill. 346, 80 NE 908; Smith v. Wehrheim, 126 Ill. App. 328.

47. That mortgage waived incomes pending redemption was immaterial since purchaser takes under foreclosure decree and not under mortgage. Standish v. Musgrove, 223 Ill. 500, 79 NE 161. Immaterial that mortgage authorized appointment of receiver who was authorized to pay rents and profits to person entitled to deed. Id.

48. Savage v. Bradley [Ala.] 43 S 20.

49. Ten years' delay held laches. Savage v. Bradley [Ala] 43 S 20.

50. Equity of redemptioner of estate of husband was not equal to equity of wife's heirs after death of husband, mortgage having been on wife's land for husband's debt. Schroeder v. Bozarth, 224 Ill. 310, 79 NE 583.

51. Redemption by assignee of judgment obtained against mortgagor while insane. Morrison v. Steenstra [Wash.] 88 P 104.

FOREIGN CORPORATIONS.

§ 1. Status, Privileges, and Regulation (1395). Permits (1397). License, Excise, or Franchise Taxes (1397). Operation and Construction of Regulatory Statutes (1397). Noncompliance with Statutes; Effect (1400).
§ 2. Powers (1403).
§ 3. Actions by and Against; Jurisdiction of Courts (1403). Right to Sue (1404). Venue (1404). Limitations (1404). Service of Process (1404).
§ 4. Remedies of Stockholders and Creditors (1404).

Scope of topic.—This article is confined strictly to foreign corporations as such, and excludes matters relating to corporations generally and not affecting their status in states other than that of their domicile. Process and venue are also excluded.

§ 1. *Status, privileges, and regulation.*[1]—In the absence of any prohibitory statute, a corporation having the domicile of its origin in one state has, as a matter of comity, the right to do business in other states,[2] but since the right rests on comity a state may, for the protection of its citizens, prescribe terms and conditions upon which foreign corporations may do business in the state,[3] and such regulation is usually upheld as not in violation of the Federal constitution,[4] unless it interferes with interstate commerce.[5] Foreign corporations, however, are entitled to the constitutional right to equal protection of the laws,[6] and contractual obligations cannot be impaired in the exercise of such prerogative.[7] The regulative prerogative

1. See 7 C. L. 1725.

2. Blackwell's Durham Tobacco Co., v. American Tobacco Co. [N. C.] 59 SE 123.

3. Williams v. Mutual Reserve Fund Life Ass'n [N. C.] 58 SE 802. Permission to foreign corporations to do business in the state is a proper subject of state legislation. Pittsburg Const. Co. v. West Side Belt R. Co., 151 F 125. A state, under its police power, has power to protect its citizens rrom imposition, fraud, and wrong from the abuse of corporate privileges by imposing conditions upon the right of foreign corporations to do business in the state. Such was purpose of Laws 1898, p. 27, c. 10, known as the Bush act. State v. Western Union Tel. Co. [Kan.] 90 P 299; State v. Pullman Co. [Kan.] 90 P 319. In the absence of state constitutional restrictions it is the sovereign and political prerogative of a state to permit to or forbid, at its own pleasure, foreign corporations from doing a domestic business within its borders. Seaboard Air Line R. Co. v. Railroad Commission of Alabama, 155 F 792.

4. Acts W. Va. 1905, c. 39, requiring foreign and nonresident corporations to appoint state auditor as agent for service of process, and exacting fee of $10, held not to deprive corporations of equal protection of laws or of liberty or property without due process of law. St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183, 51 Law. Ed. 144. Foreign corporation which is not subject to process from the courts of a state cannot invoke the provision of the fourteenth amendment, that no state shall deny any person within its jurisdiction the equal protection of its laws. Merchants' Nat. Bk. v. Ford, 30 Ky. L. R. 558 99 SW 260. Bush law requiring charter for and judgment of ouster thereunder depriving Pullman company of right to charge or collect for services to intrastate passengers did not violate obligation of contracts between such company and railroad lines running through the state whereby railroad company agreed to haul Pullman cars and Pullman company agreed to furnish such cars, and this though the value of the Pullman company's right, under the contract, to collect fees for its services was greatly diminished. State v. Pullman Co. [Kan.] 90 P 319. Mo. Rev. St. § 7890, prohibiting life insurance companies, domestic or foreign, from avoiding policy liabilities on account of misrepresentations by insured in his application unless the matters to which such representations relate actually contributed to the contingency or event on which the policy, by its terms, became due and payable, held not to deprive foreign corporations of equal protection of laws or of liberty or property without due process of law. Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 51 Law. Ed. 168. Corporations are **not citizens** within U. S. Const. art. 4, § 2, guaranteeing to the citizens of each state all the privileges and immunities of the citizens of the several states (Merchants' Nat. Bk. v. Ford, 30 Ky. L. R. 558, 99 SW 260), or within section one of the fourteenth amendment, forbidding the states from abridging the privileges and immunities of citizens of the United States (Id.)

5. State v. Western Union Tel. Co. [Kan.] 90 P 299. See Commerce, 7 C. L. 667. For noncompliance with the state law a foreign corporation may be deprived of the right to do intrastate business, though it is also engaged in interstate commerce and business of the Federal government, and though the fees from the governmental and interstate business is not alone sufficient to justify the corporation in continuing its business in the state. Id.; State v. Pullman Co. [Kan.] 90 P 319.

6. See Const. Ala. 1901, § 240, and fourteenth amend. to Federal Constitution. Seaboard Air Line R. Co. v. Railroad Commission of Alabama, 155 F 792.

7. Right of foreign railroad company to conduct and operate road purchased from domestic company pursuant to law giving purchaser all rights of seller as to such property. Seaboard Air Line R. Co. v. Railroad Commission of Ala., 155 F 792.

is also subject to the Federal constitutional limitation relative to due process of law.[8] The mere fact that a corporation is acting under authority of Federal laws does not exempt it from state regulation.[9] The right to regulate sometimes comes within the reserved power to amend charters.[10] For some purposes foreign and domestic corporations may be placed in different classes, and greater burdens be placed on the former,[11] and for the purpose of regulation corporations with their places of business and works outside of the state may be classed as foreign corporations.[12] A provision for revocation of the license of a corporation applying for removal to Federal courts of actions growing out of its business is not unconstitutional,[13] nor is any unconstitutional discrimination in requiring foreign corporations to do what is substantially required of domestic corporations,[14] and such conditions may be imposed on corporations already doing business in the state.[15] As already stated the right of a foreign corporation to do business in states other than that of its creation rests on comity, and hence additional requirements may be made of corporations already doing business in the state.[16] While, therefore, the statute and its acceptance may in some cases constitute a contract,[17] as a general rule foreign corporations which have been permitted to transact business acquire no vested right in such regard.[18]

A foreign corporation which has complied with the laws of the state so as to be entitled to do business therein and which is actually doing such business, acquires, for most purposes, the status of a domestic corporation,[19] and is amenable to the laws of the state in all matters connected with such business.[20] On the other

8. Right of foreign railroad company to operate road purchased from domestic company pursuant to statute giving purchaser all rights of seller could not be taken away by state except for abuse or nonuser. Seaboard Air Line R. Co. v. Railroad Commission of Ala., 155 F 792.

9. Acceptance of conditions and obligations imposed by an act of Congress (14 Stat. 221, c. 230, § 1), granting Western Union Telegraph Co. permission to construct and operate its lines over the public domain and navigable waters of the United States, did not relieve such company from regulation by state of Kansas, though it conducted business in such state when it was a mere territory. State v. Western Union Tel. Co. [Kan.] 90 P 299; State v. Pullman Co. [Kan.] 90 P 319.

10. Acts W. Va. 1905, c., 39, taking away right of foreign and nonresident corporation to appoint own agent for service and requiring appointment of state auditor. St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183, 51 Law. Ed. 144.

11. Act. Ill. 1905, § 1, exempting charitable and educational devisees from inheritance tax, but, according to construction of state court not extending such exemption to foreign corporations, held in view of state's power over inheritances, not invalid as denial of equal protection of laws or abridgment of privileges and immunities of citizens of United States. Board of Education of Kentucky, Annual Conference of M. E. Church v. People of Illinois, 203 U. S. 553, 51 Law. Ed. 314.

12. St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183, 51 Law. Ed. 144.

13. See Revisal 1905, § 401, relating to insurance companies. Pacific Mut. Life Ins. Co. v. Insurance Department, 144 N. C. 442, 57 SE 120; Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246, 50 Law. Ed. 1013.

14. Requirement of acts 1899, p. 19, c. 19, § 2, as amended by acts 1899, p. 305, c. 168, § 2, that foreign corporations file copies of articles with secretary of state and pay filing fee of $25. Western Union Tel. Co. v. State [Ark.] 101 SW 748.

15. See Const. 1874, art. 12, §§ 6, 11, reserving right to alter or amend charter rights of corporations doing business in state. Western Union Tel. Co. v. State [Ark.] 101 SW 748.

16. Requirement of Const. 1901, § 232, that certified copy of articles be filed with secretary of state. Armour Packing Co. of Louisiana v. Vinegar Bend Lumber Co. [Ala.] 42 S 866. Const. 1901, § 232, applies to corporations doing business under existing laws with which they have complied. Id. In the absence of an estoppel the regulative prerogative may be exercised at any time, subject only to the individuality of vested rights acquired under former statutes. Seaboard Air Line R. Co. v. Railroad Commission of Alabama, 155 F 792.

17. See post, this section, subdivision License, Excise of Franchise Taxes.

18. State v. Western Union Tel. Co. [Kan.] 90 P 299; State v. Pullman Co. [Kan.] 90 P 319.

19. In re Consolidated Rendering Co. [Vt.] 66 A 790.

20. In re Consolidated Rendering Co. [Vt.] 66 A 790. Foreign building, loan and Savings associations must comply with Laws 1890, p. 56, c. 4. State v. Co-Operative Home Builders [Wash.] 91 P 953.

Production of documents and papers relating to its business in the state may be compelled, and neither the corporation's duty nor the court's jurisdiction ceases merely because such documents and papers

hand, so long as a foreign corporation is allowed to do business in a state, it is entitled to the equal protection of the laws of such state,[21] but it cannot demand rights which are not accorded to citizens of the state.[22] The status of foreign corporations with regard to the removal of causes to Federal courts is treated in another article.[23]

Permits.[24]

License, excise, or franchise taxes.[25]—The police power of a state over foreign corporations may be exercised by imposing a charter fee,[26] and the character of such a fee is not changed merely by the fact that some revenue is derived from it.[27] Provisions imposing such fees are usually upheld as constitutional.[28] The power to impose additional or greater license fees may be limited by contractual obligations under prior laws,[29] but as a general rule foreign corporations which have been permitted to transact business without a license acquire no vested right to an exemption from license,[30] and in the absence of such exemption, expressly made or clearly implied, they may be subjected to state regulation and license,[31] but the corporation in such case may escape license fees by withdrawing from the state when the same are imposed.[32]

Operation and construction of regulatory statutes.[33]—The general rules as to construction of statutes apply to statutes regulating foreign corporations, as, for example, in determining whether a former statute is repealed by a later one,[34] and the Federal courts will follow the construction adopted by the courts of the enacting

have been sent out of the state to the home office. In re Consolidated Rendering Co. [Vt.] 66 A 790.

21. Blackwell's Durham Tobacco Co. v. American Tobacco Co. [N. C.] 59 SE 123.

22. Rights accorded only to resident, incorporated banks. Merchants' Nat. Bk. v. Ford, 30 Ky. L. R. 558, 99 SW 260.

23. See Removal of Causes, 8 C. L. 1722.

24. See 7 C. L. 1726.

25. See 7 C. L. 1726.

26. 27. State v. Western Union Tel. Co. [Kan.] 90 P 299.

28. Franchise tax on foreign insurance company under Laws 1896, p. 795, c. 908, as amended by Laws 1901, p. 298, c. 118, and Laws 1905, p. 133, c. 94, based on premium received during previous year, held not retroactive and hence not subject to constitutional objections on this ground. People v. Kelsey, 116 App. Div. 910, 101 NYS 902. Requirement of Bush Act that all corporations shall pay certain charter fee computed at fixed rate on authorized capital stock, irrespective of where such stock may be employed, does not deprive foreign corporations of equal protection of laws, though most of its capital is invested outside of the state. State v. Western Union Tel. Co. [Kan.] 90 P 299; State v. Pullman Co. [Kan.] 90 P 319.

29. Corporations entering state under Act Colo. 1897 were subjected to the same liabilities as domestic corporations, and hence Act March 22, 1902, § 65, imposing greater fee on foreign corporations than on domestic corporations, was invalid as to the corporation which had entered under Act 1897. American Smelting & Refining Co. v. People of Colorado, 204 U. S. 103, 51 Law. Ed. 393. License to do business in the state upon the payment of a license fee or tax constitutes a contract which cannot be impaired by the imposition of additional taxes not imposed on domestic corporations, and corporations which have paid tax under Act 1893, 21 St. at Large, p. 409, are subject to tax under Act 1904, 24 St. at Large, p. 462. British American Mortg. Co. v. Jones [S. C.] 56 SE 983, afd. on rehearing [S. C.] 58 SE 417.

30. State v. Western Union Tel. Co. [Kan.] 90 P 299; State v. Pullman Co. [Kan.] 90 P 319. Even when corporation went into state when it was mere territory, and spent large sums of money in the public service supplied by it. State v. Western Union Tel. Co. [Kan.] 90 P 299. Corporation which has complied with all laws of state relative to foreign corporations is required to pay license tax under P. L. 1849, 570, for conducting eating house. Commonwealth v. Childs Dining Hall Co., 32 Pa. Super. Ct. 467.

31. State v. Western Union Tel. Co. [Kan.] 90 P 299; State v. Pullman Co. [Kan.] 90 P 319.

32. Kansas acts regulating telegraph companies in general and the Western Union Telegraph Company do not compel it to continue its nongovernmental, interstate business notwithstanding Bush Act, and it may escape charter fee by discontinuing such business. State v. Western Union Tel. Co. [Kan.] 90 P 299; State v. Pullman Co. [Kan.] 90 P 319.

33. See 7 C. L. 1727.

34. Acts 1899, p. 305, c. 168, § 2, requiring foreign corporations generally, except railroad companies, to file copies of articles with Secretary of State, and to pay certain fees for such filing, etc,, held repealed by Acts 1901, p. 386, c. 216, which was a substitute for the former act, and hence telegraph companies, which were expressly excepted from the act of 1901, were not required to file copies of their articles or to pay filing fees. Western Union Tel. Co. v. State [Ark.] 101 SW 745.

states.[35] General laws making no distinction between domestic and foreign corporations apply to both,[36] and if unconstitutional as to one cannot be confined to the other by judicial construction and thus be rendered constitutional as to the other.[37] A provision subjecting foreign corporations entering a state and complying with its laws relative to such entry to all the liabilities of domestic corporations exempts it from any greater liability,[38] and such a provision constitutes a contract for the term of years fixed for the life of domestic corporations,[39] which cannot be impaired by subsequent legislation.[40] Whether a particular transaction comes within the terms of the statute depends, of course, upon the terms of the statute.[41] One of the questions which the courts are most frequently called upon to decide is the meaning of such terms or phrases as doing business or transacting business in the state. This question is, of course, largely one of fact,[42] but, the facts being proved or undisputed, it is held that the business referred to is the general prosecution of the ordinary business for which the corporation was organized,[43] and does not include every act which the corporaton is authorized to do [44] or single, isolated, or occasional transactions.[45]

35. Pittsburgh Const. Co. v. West Side Belt R. Co., 151 F 125; Groton Bridge Co. v. American Bridge Co., 151 F 871. Act Ill. 1905, § 1, exempting charitable and educational devisees from inheritance tax, held not to apply to foreign corporations. Board of Education of Kentucky Annual Conference v. People of Illinois, 203 U. S. 553, 51 Law. Ed. 314.

36, 37. Cella Commission Co. v. Bohlinger [C. C. A.] 147 F 419.

38. American Smelting & Refining Co. v. People of Colorado, 204 U. S. 103, 51 Law. Ed. 393.

39. American Smelting & Refining Co. v. People of Colorado, 204 U. S. 103, 51 Law. Ed. 393.

40. Act Colo. March 22, 1902, § 65, imposing greater license fee on foreign corporations than on domestic corporations, held invalid as to corporation which entered state under Act 1897. American Smelting & Refining Co. v. People of Colorado, 204 U. S. 103, 51 Law. Ed. 393.

41. Revisal 1905, § 401, providing for revocation of license of foreign insurance companies for **removal to Federal courts** of actions growing out of or in any way connected with any policy of insurance does not apply to an action growing out of controversy between company and agent as to accounts. Pacific Mut. Life Ins. Co. v. Insurance Department, 144 N. C. 442, 57 SE 120. One who is not a creditor of a foreign corporation at the time a **mortgage** by it is recorded in the state cannot, as against the mortgagee, claim benefit of Rev. St. 1899, § 1024 [Ann. St. 1906, p. 886], prohibiting foreign corporations doing business in the state from mortgaging their property to the injury of resident creditors. Handlin-Buck Mfg. Co. v. Wendelkin Const. Co. [Mo. App.] 101 SW 702. Ruling of Trial Court that interpleader in attachment against property of foreign corporation held under bill of sale and not under mortgage held presumptively correct. Id. Evidence held not to show conclusively that interpleader in attachment against property of foreign corporation held under mortgage and not under bill of sale. Id.

42. Whether two sales by agent was transacting business. Von Seyfried v. Vollers [N. J. Law] 67 A 930. Lessee not bound by statement filed by lessor as to doing business within state. Green v. Chicago B & Q. R. Co., 147 F 767. Where a foreign railroad company which had filed a statement and appointed an agent, as required by law, leased its road to another foreign company and the agent of former performed same services for latter as he had performed for former, but the lease was not offered in evidence and it did not appear that lessee had filed any statement, it was held that it did not appear that lessee was doing the business in the state so as to be liable to suit therein. Id.

43. First Nat. Bk. v. Leeper, 121 Mo. App. 688, 97 SW 636; Von Seyfried v. Vollers [N. J. Law] 67 A 930.

Held to constitute transaction of business: Lending of money on real estate in state by foreign corporation whose principal business was lending money on such security held doing business in state though debt was payable outside of the state. British American Mortg. Co. v. Jones [S. C.] 56 SE 983, afd. on rehearing [S. C.] 58 SE 417.

44. Sale of stock by telegraph and telephone company held not doing business. First Nat. Bk. v. Leeper, 121 Mo. App. 688, 97 SW 636.

45. Ladd Metals Co. v. American Min. Co., 152 F 1008; Craig v. Leschem & Sons Rope Co. [Colo.] 87 P 1143; Wilson-Moline Buggy Co. v. Priebe, 123 Mo. App. 521, 100 SW 558. Single act held not doing business within Act Cong., Feb. 18, 1901, 31 Stat. 794, c. 379. Poole v. Peoria Cordage Co., 6 Ind. T. 298, 97 SW 1015. Single sale of machinery by foreign corporation. Lutes Co. v. Wysong, 100 Minn. 112, 110 NW 367. Sale of stock to resident, and making loan thereon secured by mortgage. Brown v. Guarantee Sav. Loan & Investment Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 514, 102 SW 138. Arrangement to sell peaches for one season to resident commission agent at cost, the agent to sell them and divide profits with corporation, held not doing business in state within Laws 1892, p. 1805, c. 687. Brown Seed Co. v. Richardson, 53 Misc. 517, 103 NYS 243. Cause of action for failure of domestic bank to return in proper time note sent to it by foreign corporation for collection held not

Some of the particular transactions which have been held not to constitute the transaction of business within the meaning of the statutes are, soliciting business through agents,[46] sales through brokers[47] or resident agents,[48] or through traveling salesmen,[49] acquisition of personal property in the state[50] and bringing suit to protect the same,[51] and maintenance of legal proceedings in general.[52] Regular and continuous sales through agents are held to constitute transaction of business,[53] as is also the maintenance of a warehouse and distributing agency,[54] or a bailment of goods for sale.[55] Regulatory provisions are primarily for the benefit of citizens of

a cause of action growing out of business transactions within state. Kiblinger Co. v. Sauk Bk. [Wis.] 111 NW 709.

Note: "The authorities with practical unanimity are to the effect that an isolated transaction, commercial or otherwise, between a foreign corporation domiciled in one state and a citizen of another state is not a doing or carrying on of business by the foreign corporation within the latter state. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 Law. Ed. 1137; Caldwell v. N. C., 187 U. S. 622, 47 Law. Ed. 336; Kilgore v. Smith, 122 Pa. 48, 15 A. 698; Mearshon v. Lumber Co., 187 Pa. 12, 40 A 1019, 67 Am. St. Rep. 560; Delaware, etc., Co. v. Bethlehem, etc., Co., 204 Pa. 22, 53 A 533; D. S. Morgan & Co. v. White, 101 Ind. 413; Ware Cattle Co. v. Anderson, 107 Iowa, 231, 77 NW 1026; Meddis v. Kenney, 176 Mo. 200, 75 SW 633, 98 Am. St. Rep. 496; D. & H. Canal Co. v. Mahlenbrock, 63 N. J. Law, 281, 43 A 978, 45 L. R. A. 538; Henry v. Simanton, 64 N. J. Eq. 572, 54 A 153; Keene, etc., Bk. v. Lawrence, 32 Wash. 572, 73 P 680; Milan Milling Co. v. Gorten, 93 Tenn. 590,27 SW 971, 26 L. R. A. 135; Col. Iron Works v. Mining Co., 15 Colo. 499, 25 P 325, 22 Am. St. Rep. 433; Miller v. Williams, 27 Colo. 34, 59 P 740; Florsheim v. Lester, 60 Ark. 120, 29 SW 34, 46 Am. St. Rep. 162, 27 L. R. A. 505; State v. Robb-Lawrence Co. [N. D.] 106 NW 406; Penn Collieries Co. v. McKeever, 93 App. Div. 303, 87 NYS 869; Bank v. Sherman, 28 Or. 573, 43 P 658, 52 Am. St. Rep. 811; Ammons v. Brunswick-Balke Co., 5 Ind. T. 636, 82 SW 937; Oakland, etc., Mill. Co. v. Wolf & Co., 55 C. C. A. 93, 118 F 239; Frawley v. Casualty Co., 124 F 259; contrary. John Deere Plow Co. v. Wyland, 69 Kan. 255, 76 P 863; Dundee Mortgage, etc., Co. v. Nixon, 95 Ala. 319, 10 S 311; Chattanooga Bldg. & Loan Ass'n v. Denson, 189 U. S. 408, 47 Law. Ed. 870 (under Alabama statute); 3 Current Law, p. 1457."—From W. H. Lutes Co. v. Wysong, 100 Minn. 112, 110 NW 367.

46. Soliciting passenger traffic for railroad lines outside of state although resident passenger agent held not doing business in state and district where such business was solicited. Green v. Chicago, B. & Q. R. Co., 205 U. S. 530, 51 Law. Ed. 916. Soliciting business by agent of foreign railroad company having no lines in state held not "doing business" within state within Court and Practice Act 1905, p. 155, c. 29, § 526. Berger v. Pennsylvania R. Co., 27 R. I. 583, 65 A 261. Solicitation of traffic by railroad company through agents held not doing business within Const., art. 12, § 232, relating to venue and Code 1896, § 4207, relating to process. Abraham v. Southern R. Co. [Ala.] 42 S 837.

47. Sale through resident brokers on commissions held not doing business in state. McBath v. Jones Cotton Co. [C. C. A.] 149 F 383.

48. Maintenance of a sales agency for the purpose of taking orders to be filled from the home office held not doing business within the state. Case v. Smith, Lineaweaver & Co., 152 F 730.

49. Bruner v. Kansas Moline Plow Co. [Ind. T.] 104 SW 816. Where corporation has no capital employed, goods stored, or branch office within state. Vio Chem. Co. v. Studholme, 53 Misc. 470, 103 NYS 463. Making sales and taking orders through traveling salesmen and not otherwise held not doing business within state within Code, c. 54, § 30, as amended by Acts 1901, p. 108, c. 35, § 31, Code 1906, § 2322, and corporation taking such orders is not required to comply with the Act and may enforce such contracts in the state courts. Underwood Typewriter Co. v. Piggott, 60 W. Va. 532, 55 SE 664.

50, 51. Craig v. Leschen & Sons Rope Co. [Colo.] 87 P 1143.

52. Continuation of suit commenced before withdrawal from state held not continuance of business. Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co., 150 F 666. Presence of officer in state for purpose of adjusting a single controversy held not doing business in state. Wilkins v. Queen City Sav. Bk. & Trust Co., 154 F 173. Giving of an appeal bond on appeal from a judgment in favor of a foreign corporation is not a transaction of business by the latter. McCarthy v. Alphons Custodis Chimney Const. Co., 125 Ill. App. 119, afd. 219 Ill. 616, 76 NE 850.

53. Within Gen. St. 1901, §§ 1260, 1261, 1263, prohibiting suits by foreign corporations doing business in state without certificate of secretary of state showing compliance with statute. Osborne & Co. v. Shilling, 74 Kan. 675, 88 P 258.

54. Thomas Mfg. Co. v. Knapp [Minn.] 112 NW 989.

55. Bailment to domestic agent for sale, the property being consigned to agent f. o. b. cars in another state, and agent to keep proceeds of sales separate and to remit same to corporation, held doing business in state. Milburn Wagon Co. v. Com. [Ky.] 104 SW 323. Bailment of goods to resident for purpose of sale, the bailee to pay corporation at list price for all goods sold, held transaction of business of such nature as to prevent corporation from claiming benefit of Rev. St. 1899, § 1026, Ann. St. 1906, p. 890, exempting wholly foreign corporations from necessity of complying with act as condition to right to sue. Wilson-Moline Buggy Co. v. Priebe, 123 Mo. App. 521, 100 SW 558.

the state, and hence do not apply to foreign contracts or nonresidents,[56] nor does the prohibition of suit by a noncomplying corporation extend to the actual beneficiary of the transaction claiming through the corporation,[57] or to an assignee of the corporation, provided the noncompliance with the statute does not render the contract absolutely void,[58] which latter question is treated in the next subdivision;[59] nor is compliance with such provisions essential to the right of a foreign corporation to act as agent for another foreign corporation which has complied therewith.[60]

Prohibitory provisions are self-executing,[61] and the operative effect of such provisions is not impaired by the failure to provide any penalty or to declare the effect of a violation,[62] or by provisions for a money penalty and express prohibition of suit by the noncomplying corporation.[63]

Noncompliance with statutes; effect.[64]—The effect of noncompliance with regulatory statutes necessarily depends upon the construction placed thereon by the courts, and the construction of such statutes has already been considered for most intents and purposes.[65] One phase of the question, however, deserves particular consideration, and that is whether noncompliance renders the transactions of the corporation void or merely affects its capacity to sue. Of course there can be no question as to capacity to sue where the statute is express on the subject,[66] nor is there any doubt where the noncomplying corporation's transactions are expressly

56. Compliance with state laws is not essential to the right to sue on contracts made in other states. Robinson v. American Linseed Co., 147 F 885. Act 1899, p. 176, c. 54, § 62, subsec. 3, Revisal 1905, § 4747, requiring foreign insurance companies to appoint state insurance commissioner as attorney for service of process, and prohibiting power or revoke such appointment as long as any liability of company remains outstanding in state, does not apply to where a contract of insurance between foreign corporation and a resident of the state, expressly made a foreign contract, has been assigned to a nonresident. Williams v. Mutual Reserve Fund Life Ass'n [N. C.] 58 SE 802. Contract executed by salesman in the state subject to approval of corporation in home state and there to be executed held not doing business in state where contract was made by agent. Bruner v. Kansas Moline Plow Co. [Ind. T.] 104 SW 816. Under Rev. St. 1898, § 1770b, as amended by various statutes, including Laws 1905, making void all contracts of foreign corporations "affecting the personal liability thereof or relating to property within the state," are unilateral contracts, such as bills and notes, of which the corporation is the obligee, and all contracts fully executed outside the state upon which there remains as the only obligation the payment of the amount due the corporation or payment to it and delivery by it within the state. Catlin & Powell Co. v. Shuppert, 130 Wis. 642, 110 NW 818. Where title to property sold to resident by foreign corporation failed to pass by reason of seller's incapacity to do business in the state, a resident who purchased the property from the corporation in its home state obtained title and could sue to recover possession of the property from first purchaser. Roeder v. Robertson, 202 Mo. 522, 100 SW 1086.

57. Indorsee of note payable to corporation, former being the real beneficiary. Cavanaugh v. Witte Gas & Gasoline Engine Co., 123 Ill. App. 571.

58. Purpose of a foreign corporation in assigning the claim sued on to the plaintiff is immaterial, and hence fact that it had previously commenced suit on claim which was dismissed was irrelevant and no defense. Dewey v. Komar [S. D.] 110 NW 90. Under Rev. Code Civ. Proc. § 538, making communications to attorneys privileged, attorney for plaintiff in suit on claim assigned by foreign corporation was exempt from examination as to whether he had advised the assignment to evade the incapacity of the assignor. Id. Where indorsee of note payable to corporation which had not complied with the state statutes and received by latter in payment of purchase price of property sold by it in the state acquired all the assets and business of the payee, such indorsee, having itself complied with the state laws, could sue on the note, regardless of the payee's right to sue. Northwest Thresher Co. v. Riggs [Kan.] 89 P 921.

59. See, post, this section subdivision Noncompliance with Statutes; Effect.

60. General Wilmington Coal Co. v. Finance Co. of Pa., 125 Ill. App. 89.

61. Const. 1901, § 232, prohibiting foreign corporations from doing business without filing articles with secretary of state. Armour Packing Co. v. Vinegar Bend Lumber Co. [Ala.] 42 S 866.

62. Armour Packing Co. v. Vinegar Bend Lumber Co. [Ala.] 42 S 866.

63. Force of § 67b, of Act 1899, requiring appointment of agent, etc., held not affected by § 67c. United Lead Co. v. Reedy Elevator Mfg. Co., 124 Ill. App. 174.

64. See 7 C. L. 1728.

65. See ante, this section, subdivision, Operation and Construction of Regulatory Statutes.

66. Corporation held on agreed statement of facts to have been doing business in the state without compliance with statutes, and hence not entitled to maintain any action in the state courts. International Text-Book Co. v. Pigg [Kan.] 91 P 74.

declared to be void, such provisions being held not unconstitutional as depriving foreign corporations of their property without due process of law,[67] or as denying equal protection of the laws,[68] or as taking private property for private use,[69] or as disturbing the title of property.[70] The doubt and conflict arises where the statute does not expressly declare such transactions void, and in some jurisdictions they are held void,[71] while in other jurisdictions the contrary doctrine obtains.[72] In Illinois the cases are in conflict.[73] Where a contract of a noncomplying corporation is held to be void, it cannot be validated by subsequent compliance prior to performance,[74] even though such compliance is prior to performance,[75] nor is an award under such contract effective,[76] and no action can be maintained in a Federal court on such a transaction.[77] Where the contracts of noncomplying corporations are not void, the right to sue thereon is determinable as of the date of the suit,[78] and suit may be maintained in a Federal court though not maintainable in the state courts.[79] Where part of a transaction is void and part valid, the corporation cannot apply general payments to the illegal transaction.[80] The right of a foreign corporation to do business in the state cannot be collaterally raised by private persons unless there be something in the statute either expressly or by necessary implication authorizing them to do so,[81] but the other party to a contract or transaction with a non-complying corporation is not estopped to assert and to rely upon the effect of such noncompliance.[82]

Failure of a plaintiff corporation to comply with the conditions precedent to its

67, 68, 69, 70. Roeder v. Robertson, 202 Mo. 522, 100 SW 1086.

71. Contracts by corporations which have not complied with Pa. St. 1874, are absolutely void both as to parties and as to guarantor, according to decisions of Pennsylvania courts. Pittsburg Const. Co. v. West Side Belt R. Co., 151 F 125, afd. [C. C. A.] 154 F 929. Contracts by corporations which have not complied with Const. 1901, § 232, prohibiting foreign corporations from doing business in state without complying with the provisions of such section, are void. Armour Packing Co. v. Vinegar Bend Lumber Co. [Ala.] 42 S 866. Contracts by foreign corporations doing business in the state without complying with Rev. St. 1899, §§ 1024, 1026, providing penalty for violation of the act and denying defaulting corporations the right to sue, held void. First Nat. Bk. v. Leeper, 121 Mo. App. 688, 97 SW 636. Contracts are treated as void in actions thereon by the corporation. Handlin-Buck Mfg. Co. v. Wendelkin Const. Co. [Mo. App.] 101 SW 702.

72. In absence of ruling of state courts, noncompliance with Laws N. Y. 1892, p. 1805, c. 687, § 15, prohibiting foreign corporations from doing business or suing in state unless they have complied with terms of act, and Laws N. Y. 1896, p. 856, withholding right to sue from corporations which have not paid license tax, held not to render a contract by the defaulting corporation void. Groton Bridge & Mfg. Co. v. American Bridge Co., 151 F 871. Noncompliance with Gen. St. 1901, c. 23, § 39, does not render transactions void but merely unenforceable by the corporation. Northwest Thresher Co. v. Riggs [Kan.] 89 P 921. Gen. St. 1901, § 4255, imposes personal disability to sue upon noncomplying corporations, and does not affect the validity of its transactions. Boggs v. Kelly Mfg. Co. [Kan.] 90 P 765.

73. Noncompliance with Act 1899 (R. S. c. 32, § 67), § 4, renders transactions of foreign corporations void. United Lead Co. v. Reedy Elevator Mfg. Co., 222 Ill. 199, 78 NE 567, afg. 124 Ill. App. 174. **Contra.** Cavanaugh v. Witte Gas & Gasoline Engine Co., 123 Ill. App. 571.

74. Under Act 1899, § 67b, prohibiting transaction of business until appointment of agent, etc. United Lead Co. v. Reedy Elevator Mfg. Co., 124 Ill. App. 174, afd. 222 Ill. 199, 78 NE 567.

75, 76. Pittsburg Const. Co. v. West Side Belt R. Co., 151 F 125, afd. [C. C. A.] 154 F 929.

77. Pittsburg Const. Co. v. West Side Belt Co., [C. C. A.] 154 F 929, afg. 151 F 125.

78. McCarthy v. Alphons Custodis Chimney Const. Co., 125 Ill. App. 119, afd. 219 Ill. 616, 76 NE 850. Compliance prior to bringing of suit is sufficient though not until after the transaction of the business out of which the cause of action arose. Under Gen. Laws 1896, c. 253, as amended by Pub. Laws 1902, p. 53, c. 980. Swift & Co. v. Little [R. I.] 65 A 615. Contract may be enforced **after corporation ceases to do business in state.** Under Gen. St. 1901, § 4255, imposing personal disability to sue upon corporations doing business in the state without compliance with the statute. Boggs v. Kelly Mfg. Co. [Kan.] 90 P 765.

79. Groton Bridge & Mfg. Co. v. American Bridge Co., 151 F 871.

80. Where part of goods sold by foreign corporation were shipped outside state and part in state, and conceding that part shipped outside state did not constitute doing business in state. Armour Packing Co. v. Vinegar Bend Lumber Co. [Ala.] 42 S 866.

81. Could not be made ground for injunction against use of same name as that of complainant, a domestic corporation. Blackwell's Durham Tobacco Co. v. American Tobacco Co. [N. C.] 59 SE 123.

82. Purchaser of merchandise from for-

right to sue is a matter of defense [83] and cannot be raised collaterally in subsequent proceedings based on the judgment,[84] and compliance with the statutory conditions need not be pleaded and proved by a foreign corporation plaintiff in the first instance.[85] Incapacity to sue by reason of noncompliance is not raised by a general denial.[86] Since foreign corporations are not absolutely forbidden to sue, but only prohibited in certain instances,[87] proceedings will not be dismissed merely because the petitioner is a foreign corporation, where it does not appear that it comes within the prohibition.[88] Where noncompliance does not go to the substance, but merely affects capacity to sue, it cannot be taken advantage of by nonsuit, but must be raised by demurrer if apparent on the face of the complaint, or otherwise by answer.[89]

A state may restrain foreign corporations from doing business therein until compliance with its statutes.[90] Though a suit to recover a penalty for noncompliance is held to be a civil suit,[91] it cannot be enjoined by a Federal court where the injunction suit will in effect be against the state.[92] A judgment of ouster is not without due process of law because it entails irreparable loss.[93]

eign corporation not estopped to assert corporation's incapacity to sue. United Lead Co. v. Reedy Elevator Mfg. Co., 124 Ill. App. 174, afd. 222 Ill. 199, 78 NE 567. Fact that other party to transaction knows that corporation is in default will not estop him from asserting corporation's incapacity to sue. Osborne & Co. v. Shilling, 74 Kan. 675, 88 P 258. Nor will filing of counterclaim for damages for plaintiff's breach of contract sued on operate as waiver of right to ask for the abatement of action. Id. Party receiving benefit of performance by the corporation is not estopped to assert the invalidity of the contract. Id. In action by foreign corporation against its domestic agent to recover money received for plaintiff's use, agent is not estopped to show noncompliance by plaintiff with Gen. Laws 1899, cc. 69, 70, pp. 68, 71. Thomas Mfg. Co. v. Knapp [Minn.] 112 NW 989. **Obligors on appeal bond are estopped** to assert its invalidity on account of the obligee's incapacity to sue by reason of its failure to comply with statutory conditions precedent to the right to maintain the original suit. McCarthy v. Alphons Custodis Chimney Const. Co., 125 Ill. App. 119, afd. 219 Ill. 616, 76 NE 850.

83. McCarthy v. Alphons Custodis Chimney Const. Co., 125 Ill. App. 119, afd. 219 Ill. 616, 76 NE 850. **Burden of proving** incapacity to sue is on defendant. In suit by assignee of foreign corporation. Dewey v. Komar [S. D.] 110 NW 90.

84. In suit by corporation on appeal bond. McCarthy v. Alphons Custodis Chimney Const. Co., 125 Ill. App. 119, afd. 219 Ill. 616, 76 NE 850.

85. Friedenwald Co. v. Warren [Mass.] 81 NE 207. When it does not appear that the corporation is doing business in the state, it need not, in the first instance, either allege or prove compliance with acts relating to corporations doing business in the state. Brown v. Guarantee Sav., Loan & Investment Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 514, 102 SW 138.

86. Friedenwald Co. v. Warren [Mass.] 81 NE 207.

87. Laws 1892, p. 1805, c. 682, and Laws 1896, p. 856, c. 908, § 181. In re Rosenblatt's Estate, 52 Misc. 659, 103 NYS 1016.

88. In re Rosenblatt's Estate, 52 Misc. 659, 103 NYS 1016. When it did not appear that plaintiff was a stock corporation and therefore within Laws 1892, p. 1805, c. 687, § 15, and Laws 1896, p. 856, c. 908, § 181, complaint did not fail to set forth good cause of action because it showed plaintiff was foreign corporation, but did not show compliance with act. Wright & Co. v. Faulkner, 52 Misc. 100, 101 NYS 807. In order to justify the dismissal of an action by a foreign corporation which has not complied with the statute, it must affirmatively appear that the corporation is within the statute. Failure of plaintiff corporation to procure certificate required by Laws 1892, p. 1805, c. 687, to be procured by foreign stock corporations, not ground for dismissal where it does not appear that plaintiff is a stock corporation. Brown Seed Co. v. Richardson, 53 Misc. 517, 103 NYS 243.

89. Wright & Co. v. Faulkner, 52 Misc. 100, 101 NYS 807.

90. Payment of license tax. Scollard v. American Felt Co. [Mass.] 80 NE 233. Foreign building, loan, and savings association must comply with Laws 1890, p. 56, c. 4, or be deprived of right to do business in state. State v. Co-operative Home Builders [Wash.] 91 P 953.

91. Suit for penalty for noncompliance with regulating statutes held under laws and decisions of Arkansas a civil suit. Western Union Tel. Co. v. Andrews, 154 F 95.

92. A suit by a county attorney to recover a penalty for noncompliance with the regulating statute, the proceeds of the recovery being payable to the county's general fund except a portion allowed the attorney as compensation, is a suit against the state, and hence cannot be enjoined by a Federal court. Western Union Tel. Co. v. Andrews, 154 F 95.

93. Ouster of telegraph company requiring closing of offices and abandonment of poles and wires unless same are removed

The effect of noncompliance upon the corporation's right to the use of a certain name as against domestic corporations is treated elsewhere.[94]

§ 2. *Powers.*[95]—The powers of a foreign corporation must be exercised subject to the laws and policies of the state in which it attempts to do business.[96] Where, therefore, foreign corporations are prohibited from transacting business on more favorable terms than domestic corporations,[97] it will not be allowed to do business or to file articles authorizing business which domestic corporations cannot do,[98] and a disavowal of intention to do such business in a petition for mandamus to compel the allowance of the filing of such articles will not entitle the petitioner to the writ.[99] A foreign corporation cannot exercise the power of eminent domain unless such power is conferred upon it by the laws of the state where it is to be exercised.[1]

§ 3. *Actions by and against; jurisdiction of courts.*[2]—Foreign corporations doing business in a state or doing certain acts therein are usually subjected by statute to the jurisdiction of the state courts.[3] Merely soliciting business within the state through an agent does not subject a foreign corporation to the jurisdiction of the state courts,[4] but a foreign corporation doing business in a state without license or permission may nevertheless be a resident for jurisdictional purposes and within the practice acts.[5] A state court has jurisdiction to enjoin the exercise by a foreign corporation of corporate functions in violation of the laws and policies of the state.[6] Jurisdiction of a domestic corporation is not ousted by its consolidation with a foreign corporation.[7] A Federal court has no jurisdiction of a suit against a corporation unless it is subjected by the state laws to the jurisdiction of the state courts in some one of the counties within the territorial jurisdiction of the Federal court.[8] In an action against a foreign corporation the complaint must show the jurisdiction of the court,[9] and defects in this regard are available by answer,[10] but it is unnecessary to allege the state in which the corporation was incorporated.[11]

at great loss. State v. Western Union Tel. Co. [Kan.] 90 P 299; State v. Pullman Co. [Kan.] 90 P 319.

94. See Corporations, 9 C. L. 733.

95. See 7 C. L. 1730.

96. Foreign corporation cannot vote stock in another corporation for purpose of creating monopoly condemned by laws of the state of the latter corporation's domicile. Southern Elec. Securities Co. v. State [Miss.] 44 S 785.

97. Const. art. 12, § 7, Laws 1903, p. 367, c. 176, § 4291. State v. Nichols [Wash.] 91 P 632. Provision of Ballinger's Ann. Codes & St., § 4291, that prohibition therein contained against doing certain kind of business shall not extend to other business for which the corporation may be organized, does not change this rule. Id.

98. See Laws 1903, c. 176, § 1, prohibiting corporations from doing trust company business except under such act. State v. Nichols [Wash.] 91 P 632.

99. Since there is no provision for public record of such disavowal. State v. Nichols [Wash.] 91 P 632.

1. Not conferred on foreign corporations by laws of Montana. Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 P 773.

2. See 7 C. L. 1731.

3. See post, this section, subdivision, Liability to be Sued. Under Code 1883, § 697, foreign corporation purchasing property of domestic corporation at mortgage sale becomes domestic corporation for jurisdictional purposes. Carolina Coal & Ice Co. v. Southern R. Co., 144 N. C. 732, 57 SE 444.

4. Berger v. Pennsylvania R. Co., 27 R. I. 583, 65 A 261; Buffalo Glass Co. v. Manufacturers' Glass Co., 142 F 273.

5. Corporation doing business in county without complying with statutory conditions held resident of county within Rev. St. 1899, §§ 1024-1026, requiring appeals by residents of county from justices' judgments to be taken within ten days. Young v. Niles & Scott Co., 122 Mo. App. 392, 99 SW 517.

6. Foreign corporation formed for purpose of dominating domestic corporation which was itself engaged in a combination and trust enjoined from voting stock of latter corporation. Southern Elec. Securities Co. v. State [Miss.] 44 S 785.

7. Especially where it is so declared by statute authorizing consolidation. See Private Laws 1899, p. 212, c. 105. Staton v. Atlantic Coast Line R. Co., 144 N. C. 135, 56 SE 794.

8. Kibbler v. St. Louis & S. F. R. Co., 147 F 879.

9. In action in New York City municipal court, complaint must show that defendant has office in city. See Laws 1902, p. 1489, c. 580, § 1, subd. 18. Epstein v. Weisberger Co., 52 Misc. 572, 102 NYS 488.

10. Epstein v. Weisberger Co., 52 Misc. 572, 102 NYS 488.

11. Where in action against corporation corporate capacity is admitted but place of

Right to sue.[12]—A constitutional provision entitling foreign corporations to the right to sue the same as natural persons is a sufficient protection from a statutory forfeiture of the right to do business in the state for bringing a suit in a Federal court.[13] The right to sue as dependent upon compliance with state statutes is treated elsewhere.[14] Jurisdiction is dependent entirely upon the local statutes.[15] Unless the corporation appears,[16] such jurisdiction is predicated upon the transaction of business in the state,[17] or the maintenance of an office,[18] or the ownership of property in the state,[19] but the mere maintenance of an agency to take sales orders which are filled from the home office is not sufficient.[20] The mere appointment of a receiver in another state, the corporation not being dissolved, affects neither pending suits against the corporation[21] nor its liability to other suits.[22] As to pending suits the receiver may, on proper application, be made a party, but if he does not apply he will nevertheless be bound by the judgment.[23] As to subsequent suits the receiver is a proper party, and he should be permitted to appear and defend, but the fact that he is not a party will not nullify the judgment.[24]

Venue.[25]

Limitations.[26]—Statutes relating to domestic corporations do not apply unless such an intent is clear.[27]

Service of process.[28]

§ 4. *Remedies of stockholders and creditors.*[29]—In a proper case a stockholder may sue in behalf of his corporation,[30] and such a suit may be maintained in the state courts having jurisdiction of the subject-matter and the person.[31] A statutory right to inspect the books and papers of corporations in general is available to a stockholder in a foreign corporation as to such books and papers as are within the court's

incorporation is put in issue, failure to find on such issue does not affect the judgment where place is immaterial. Waldeck & Co. v. Pacific Coast S. S. Co., 2 Cal. App. 167, 83 P 158.

12. See 7 C. L. 1731.

13. Seaboard Air Line R. Co. v. Railroad Commission of Alabama, 155 F 792.

14. See ante, § 1, subdivision, Operation and Construction of Regulatory Statutes, and subdivision, Noncompliance with Statutes.

15. Jurisdiction because of doing business in state must be supported by local statute rendering corporations doing business in state liable to suit. Buffalo Glass Co. v. Manufacturers' Glass Co., 142 F 273.

16. Court had jurisdiction to enforce attorney's lien on property in hands of court in suit against foreign corporation which was settled by parties, where corporation was served and appeared in the suit by the attorney and the attorney's client was served by publication. Oishei v. Bonaddio, 117 App. Div. 110, 102 NYS 368; Oishei v. Morenna, 117 App. Div. 119, 102 NYS 374.

17. Donovan v. Dixieland Amusement Co., 152 F 661; Wilkins v. Queen City Sav. Bk. & Trust Co., 154 F 173; Ladd Metals Co. v. American Min. Co., 152 F 1008; Case v. Smith, Lineaweaver & Co., 152 F 730. Foreign corporations are suable in the courts of the states wherein they do business, the policy of the states being to exempt their citizens from the necessity of going into other states to sue such corporations. Ord Hardware Co. v. Case Threshing Mach. Co. [Neb.] 110 NW 551. Under Municipal Court Act, Laws 1902, p. 1489, c. 580, § 1, subd. 18, municipal court for New York City has jurisdiction of suits against only such foreign corporations as have an office in the city. Epstein v. Weisberger Co., 52 Misc. 572, 102 NYS 488.

As to what constitutes transaction of business, see ante, § 1, subdivision, Operation and Construction of Regulatory Statutes.

18. See cases cited in next preceding note.

19. Case v. Smith, Lineaweaver & Co., 152 F 730.

20. Case v. Smith, Lineaweaver & Co., 152 F 730. See ante, § 1, subdivision, Operation and Construction of Regulatory Statutes.

21, 22, 23, 24. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

25. See 7 C. L. 1731. See Venue and Place of Trial, 8 C. L. 2236.

26. See 7 C. L. 1731.

27. N. Y. Laws 1892, c. 688, § 55, limiting to two years the right to bring an action for debt of corporation after defendant has ceased to be stockholder, refers to domestic corporations provided for in reference to the stockholder's liability created by the preceding section of the same chapter, and not to statutory liability of stockholder in foreign corporation. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163.

28. See 7 C. L. 1732. See Process, 8 C. L. 1449.

29. See 7 C. L. 1734.

30. When proper authorities refuse to sue. Sloan v. Clarkson [Md.] 66 A 18.

31. Suit to compel resident agent to account to corporation. Sloan v. Clarkson [Md.] 66 A 18.

jurisdiction,[32] and such right may be enforced by mandamus.[33] A court of equity has no jurisdiction to dissolve and wind up a foreign corporation,[34] but in a proper case it may appoint a receiver to take charge of the property of the corporation in the state and enforce the rights of stockholders and creditors in regard to the same,[35] and where the corporation has been dissolved and its affairs finally wound up in the home state, the court may make final distribution of the assets within its jurisdiction and control, without remitting any part of such assets to the state of the corporation's domicile.[36] A court of one state cannot, however, compel the officers of a foreign corporation who reside in another state to obey its decree respecting the management of the affairs of the corporation.[37]

Whether deposits required of foreign corporations are for the benefit of a particular creditor or class of creditors depends upon the intention of the legislature in requiring the deposit,[38] and the liability of officers of foreign corporations to creditors under a domestic statute depends upon, among other things, whether the statute applies to such corporations.[39] The liability of stockholders to creditors is primarily enforceable in the home state of the corporation,[40] and where it is sought to be enforced elsewhere the procedure of the home state will be followed,[41] and while it is held that the statutory limitation on actions of the state of the former will prevail over that of the state of the corporation's domicile,[42] a Federal court sitting in one state will follow the decisions of another state as to when the liability of stockholders accrues under the laws of the latter state.[43] A fortiori a proceeding cannot be followed which is authorized by the laws of neither the forum nor the state of the corporation's domicile.[44] A decree in winding up proceedings making assessments upon members is binding on nonresident members if binding on resident members.[45]

FOREIGN JUDGMENTS.

§ 1. Recognition and Effect (1406).
§ 2. Matters Adjudicated and Concluded by Foreign Judgment (1407).
§ 3. Action on Foreign Judgment (1407).

32. Under Code 1896, § 1274. Nettles v. McConnell [Ala.] 43 S 838.

33. Nettles v. McConnell [Ala.] 43 S 838.

34, 35, 36. Culver Lumber Co. v. Culver [Ark.] 99 SW 391.

37. Injunction against enforcement of amendment to by-laws of fraternal benefit association changing insurance rates. Mock v. Supreme Council Royal Arcanum, 121 App. Div. 474, 106 NYS 155.

38. Deposit required of foreign guaranty and surety companies by Laws 1897, p. 119, c. 94, §§ 1, 2, 3, 4, as amended by Laws 1901, p. 282, c. 116, § 6, held to constitute a trust fund for the benefit of domestic investors only. Morrill v. Colonial Security Co. [Tex. Civ. App.] 102 SW 937. One who became an investor after the amendment of 1901 was bound by the terms thereof. Id.

39. Since Rev. Laws, c. 110, § 43, requiring corporate officers to file certificate showing payment of capital, applies only to domestic corporations. Officers of foreign corporations are not rendered liable for debts contracted before such payment and the filing of such certificate by c. 126, § 17, making such officers liable for debts of corporation to same extent as officers of domestic corporations as provided in c. 110, §§ 58-68, which render officers of domestic corporation liable for debts contracted prior to payment of capital and filing of certificate as required by section 43. Standard Asphalt Co. v. Merrimack Pav. Co. [Mass.] 81 NE 262.

40. See Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77 NE 877; Id., 53 Misc. 80, 103 NYS 1108.

41. Demurrer sustained on ground that suit to enforce liability of stockholders in Maryland corporation should have been by creditor in own behalf and behalf of all other creditors who may come in. Knickerbocker Trust Co. v. Iselin, 53 Misc. 80, 103 NYS 1108.

42. Limitations under laws of Massachusetts prevails in suit in such state to enforce liability under Comp. Laws, Kan. 1885, c. 23, § 44. Ramsden v. Knowles, 151 F 718; Id. [C. C. A.] 151 F 721.

43. Ramsden v. Knowles, 151 F 718.

44. Since under Laws N. Y. 1890, p. 1078, c. 654, § 57, as amended by Laws 1892, p. 1841, c. 688, § 54, and Laws 1901, p. 971, c. 354, holders of paid up stock are relieved from all liability, and under Laws Md. 1904, p. 597, c. 337, and p. 179, c. 101, liability of such stockholders is enforceable only by bill in equity in nature of creditor's bill against all stockholders, an action at law by a single creditor against a single stockholder of a Maryland corporation cannot be maintained. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77 NE 877.

45. Swing v. American Glucose Co., 123 Ill. App. 156.

§ 1. *Recognition and effect.*[See 7 C. L. 1734]—Under the Federal constitution and the statutes of some states,[46] a judgment[47] must be given in every other state and territory over which the constitution has been extended[48] the same faith and credit to which it is entitled at home.[49] Such judgment, however, must be final[50] and rendered by a court having jurisdiction both of the subject-matter[51] and of the parties,[52] which question is open to inquiry[53] notwithstanding record recitals of jurisdiction,[54] though it has been held that a determination in the action of the sufficiency of personal service fraudulently obtained is conclusive.[55] Where the judgment is rendered by a court of general jurisdiction,[56] jurisdiction will be presumed[57]

46. Foreign divorce decree awarding custody of child, rendered by court having jurisdiction of subject-matter and parties, is entitled to full faith and credit under Burns' Ann. St. 1901, § 1061. Hardin v. Hardin [Ind.] 81 NE 60.

47. Judgment on confession on warrant of attorney, valid where entered, is entitled to full faith and credit under Const. U. S. art. 4, § 1. Vennum v. Mertens, 119 Mo. App. 461, 95 SW 292. Effect to be given foreign divorce decree, see Divorce, 9 C. L. 997; decree admitting will to probate, see Wills, 8 C. L. 2305; judgments and decrees relating to estates of decedents, see Estates of Decedents, 9 C. L. 1154.

48. Under Act May 2, 1890, c. 182, 26 Stat. 96, extending Federal constitution to Indian Territory, foreign judgments must be given full faith and credit therein. Tottle v. McClellan [Ind. T.] 103 SW 766.

49. Bleakley v. Barclay [Kan.] 89 P 906. Courts of Utah will not take judicial notice of laws of foreign state as to validity and effect to be given to its judgments. Hunt v. Monroe [Utah] 91 P 269.

50. Under Laws of Texas, decree not disposing of case against all parties thereto is not final. Weaver v. Schumpert, 118 La. 315, 42 S 949. Where party petitions court for leave to discharge counsel and asks that fees be fixed, decree enterde after hearing in which parties interested participated, fixing fees, is final adjudication of amount due, so as to support action at law. Seymour v. Du Bois, 145 F 1003. Decree for alimony or maintenance become due in future and payable in instalments held not a final decree requiring full faith and credit under Federal const. until court rendering it fixes specific amount due either by proceedings in original action or by independent action. Hunt v. Monroe [Utah] 91 P 269. A decree for alimony and costs will support an action in another state in so far as it is for a sum due at the time of its rendition and which is absolutely awarded, but not with respect to future payments, for which it provides, but as to which it remains subject to modification at any time, in the discretion of the court. Israel v. Israel [C. C. A.] 148 F 576.

51. Where, after judgment in circuit court of Arkansas dismissing cross bill and death of party affected thereby, chancery court, which had succeeded to equity jurisdiction of circuit court, directed ex parte the entry of judgment nunc pro tunc against deceased without reviving action as required by statute, held void for want of jurisdiction. Grider v. Corbin, 116 App. Div. 818, 102 NYS 181. In action on foreign judgment purporting to have been entered nunc pro tunc as amendment of former judgment, where exemplified copy of record showed that former judgment was signed by judge, it cannot be treated as entered by clerk by mistake so as to authorize an amendment, for to do so would be to deny it full faith and credit. Id.

52. Due process of law is denied by giving full faith and credit to a foreign judgment in personam rendered without jurisdiction of the person. Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 590, 51 Law. Ed. 345. Death of party after case has been fully submitted and while court has same under advisement does not deprive court of jurisdiction to enter nunc pro tunc as of date of submission. Stilwell v. Smith [Pa.] 67 A 910. Where suit is brought to administer assets of insolvent insurance company and decree is entered levying an assessment, members are sufficiently bound thereby to require an answer to suit on such decree in foreign state, although not expressly made party to suit in which decree was rendered. Swing v. Karges Furniture Co., 123 Mo. App. 367, 100 SW 662. Where assessment against stockholders of insolvent corporation includes sum for expenses, for which stockholders are not liable under their contract, such assessment is not conclusive upon a nonresident stockholder who was not served and who did not appear, as corporation could not represent him in matters beyond scope of his contract liability. Converse v. Aetna Nat. Bk., 79 Conn. 163, 64 A. 341.

53. Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 590, 51 Law. Ed. 345; Roberts v. Leutzke, 39 Ind. App. 577, 78 NE 635; Bank of Horton v. Knox, 133 Iowa, 443, 109 NW 201. Where record recital of due service on defendant is not attacked, evidence that attorney who entered appearance for defendant had no authority so to do is inadmissible in contradiction of recital of such appearance. Converse v. Aetna Nat. Bk., 79 Conn. 163, 64 A. 341.

54. Forsyth v. Barnes, 228 Ill. 326, 81 NE 1028; Tottle v. McClellan [Ind. T.] 103 SW 766; State v. Westmoreland [S. C.] 56 SE 673.

55. Made motion to quash service on ground that he was fraudulently induced to come within state for sole purpose of service. Tottle v. McClellan [Ind. T.] 103 SW 766.

56. Supreme court of Kansas held to take judicial notice that circuit court of Illinois is a superior court of general original ju-

unless the record negatives such fact,[58] and the attacking party must show lack thereof. A judgment based on a penal statute will not be enforced in states not having a similar statute.[59] Fraud in obtaining a foreign judgment, for which equity will enjoin the enforcement of a domestic judgment based thereon, must affect the jurisdiction or be such as prevented applicant from presenting his defenses.[60]

§ 2. *Matters adjudicated and concluded by foreign judgment.* See 7 C. L. 1736—A valid foreign judgment is conclusive of all matters litigated and decided by it[61] unless such matters are outside of the issues.[62]

§ 3. *Action on foreign judgment.* See 7 C. L. 1736—A foreign judgment will support an action only when final in character[63] and rendered by a court having jurisdiction of the subject-matter and of the parties.[64] The action must be brought within the period allowed by statute[65] by a party having an interest in the judgment,[66] and the pleadings must show that the court rendering the same was one of general jurisdiction[67] or that the court had jurisdiction of the subject-matter and

risdiction. Bleakley v. Barclay [Kan.] 89 P 906. In action in New York on judgment rendered in supreme court of District of Columbia, judicial notice will be taken of Act Cong. March 3, 1863, c. 91, 12 Stat. 763, establishing judicial system for District and conferring general jurisdiction on such court. Milliken v. Dotson, 117 App. Div. 527, 102 NYS 564.

57. State v. Weber, 96 Minn. 422, 105 NW 490. Where foreign judgment is rendered by court of record, it will be presumed that such court was one of general jurisdiction, had jurisdiction of subject-matter and the parties, and rightfully gave judgment thereon. Roberts v. Leutzke, 39 Ind. App. 577, 78 NE 636.

58. Presumption of jurisdiction cannot be indulged where it affirmatively appears from pleadings or evidence to be lacking. Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 590, 51 Law. Ed. 345. Pleadings and evidence held to destroy presumption of jurisdiction to render judgment in personam against foreign corporation. Id. Failure of officer's return of writ of citation on foreign corporation to show whether it was served within or without state, whether certified copy of complaint accompanied citation, and whether person served was local agent, held not to overcome presumption. Hodge v. International Registry Co., 54 Misc. 442, 105 NYS 1067.

59. Prior to enactment of Code 1906, § 2303, authorizing wife or children of one paying money on a "future" transaction to recover same, action could not be maintained on foreign judgment recovered under similar statute. Minkus v. Armstrong [Miss.] 44 S 32.

60. Wilson v. Anthony [N. J. Eq.] 66 A 907. Averments that plaintiff therein did not file complaint until day judgment was entered and made false affidavits as to indebtedness held insufficient. Id.

61. Validity of sale under trust deed. Weyburn v. Watkins [Miss.] 44 S 145. Where will was admitted to probate in New York, testator's domicile and duly authenticated copy of will and probate decree was filed in recorder's office of county where land was located in Missouri, and no contest was instituted under Rev. St. 1899, §§ 4622, 4623 (Ann. St. 1906, pp. 2509, 2515), within five years, foreign decree was conclusive on question whether will was revoked by marriage. Cohen v. Herbert [Mo.] 104 SW 84. Judgment of probate court of another state admitting will to probate is not open to collateral attack. Stevens v. Oliver, 200 Mo. 492, 98 SW 492. Where withdrawing stockholder in Savings & Loan Association brought action to determine amount he was entitled to, judgment rendered therein is conclusive of amount in suit on judgment. Tillinghast v. U. S. Sav. & Loan Co., 99 Minn. 62, 108 NW 472.

62. Where judgment is not responsive to the issues it is void. Roberts v. Leutzke, 39 Ind. App. 577, 78 NE 635.

63. See ante, § 1.

64. See ante, § 1. Froeign judgment will be enforced only so far as court had jurisdiction of subject-matter, hence decree of divorce in Washington held not to pass interest in land in Nebraska. Fall v. Fall [Neb.] 113 NW 175.

65. Where judgment was obtained in Nebraska in 1892, action thereon in Iowa in 1902 was not barred by limitations, there being no Nebraska statute limiting time for suing thereon and Iowa fixing twenty years as the limitation. Mahoney v. State Ins. Co., 133 Iowa, 570, 110 NW 1041. Where foreign judgment has been revived in state rendering it, action thereon may be maintained in Idaho any time during statutory period of limitations from such revival. Leman v. Cunningham, 12 Idaho, 135, 85 P 212.

66. Divorce decree directing plaintiff's husband to pay certain monthly sum to designated person for use of children during minority held not to enable him to sue thereon. Hunt v. Monroe [Utah] 91 P 269. And where complaint shows on its face that no cause of action exists in plaintiff, such defect may be reached by demurrer. Id.

67. Jurisdiction presumed, see ante, § 1. Where complaint shows action commenced in foreign court of general jurisdiction, appearance of defendant therein, and rendition of judgment sued upon, it is sufficient though it contains no pleadings and does not show that judgment was responsive to issues. Roberts v. Leutzke, 39 Ind. App. 577, 78 NE 635.

parties.[68] The pendency of a suit to set aside a judgment is usually sufficient to prevent judgment in an action thereon,[69] although if such action is allowed to go to judgment such judgment is valid in the absence of fraud,[70] notwithstanding the basic judgment is subsequently vacated.[71]

Defenses.[See 7 C. L. 1737]—Since a foreign judgment is conclusive of all matters which were or which might have been litigated in the action,[72] no defense can be interposed which goes to the merits of the controversy,[73] but lack of jurisdiction may always be asserted.[74]

Proof of foreign judgments.[See 7 C. L. 1737]—The Federal statutes provide for the authentication[75] of judgments of courts of general jurisdiction.[76] State statutes also frequently regulate the same matter.[77] Where a judgment record is admitted though not duly authenticated, such defect may be remedied in New York by presentation of a proper record on appeal.[78] Where jurisdiction is denied, judgment must be accompanied by proof thereof.[79]

Foreign Laws, see latest topical index.

FORESTRY AND TIMBER.

§ 1. Protection and Regulation of Forests and Trees (1408).
§ 2. Logs and Lumbering; Booms and Floatage (1410). Contracts and Conveyances (1410). Scaling and Measurement (1414). Hauling and Floatage (1414). Actions (1415).

The scope of this topic is noted below.[80]

§ 1. *Protection and regulation of forests and trees.*[See 7 C. L. 1737]—Where

68. In pleading judgment of justice of peace, complaint must show jurisdictional facts unless statutory method prescribed by § 6871, Rev. Codes 1905, is followed. Strecker v. Railson [N. D.] 111 NW 612. Pleading must be couched in exact language of Rev. Codes 1905, § 6871, using the words "duly given or made" or words of the exact equivalent thereof. Id. In action on judgment rendered by court of special jurisdiction, general averment that judgment was given as authorized by § 372, Burns' Ann. St. 1901, is sufficient. Hardin v. Hardin [Ind.] 81 NE 60. Application for writ of habeas corpus based on foreign divorce decree which fails to show that court was one of general jurisdiction or had jurisdiction of the subject-matter or parties is defective. Id. Where suit is brought by trustee of insolvent insurance company on a foreign decree levying assessment under statutes of domiciliary state, petition must allege that court rendering such decree had jurisdiction of subject-matter. Swing v. Karges Furniture Co., 123 Mo. App. 367, 100 SW 662.

69. Parker v. Bowman [Ark.] 104 SW 158.

70. Where there was nothing to show that plaintiff, assignee of judgment, knew of want of service in original action, mere fact that he proceeded after institution of suit to vacate is not fraud. Parker v. Bowman [Ark.] 104 SW 158.

71. Parker v. Bowman [Ark.] 104 SW 158.

72. See ante, § 2.

73. Stilwell v. Smith [Pa.] 67 A 910.

74. Want of jurisdiction in court to set aside judgment of dismissal and to render judgment sued on may be asserted as defense whatever remedies the local practice may afford. Wetmore v. Karrick, 205 U. S. 141, 51 Law. Ed. 745.

75. Authentication of record of judgment held in substantial conformity to Rev. St. § 905 (U. S. Comp. St. 1901, p. 677). Seymour v. Du Bois, 145 F 1003.

76. Rev. St. § 905 (U. S. Comp. St. 1901, p. 677) held not to apply to judgment in justice court. Strecker v. Railson [N. D.] 111 NW 612. Filing of transcript of judgment of justice with clerk of district court held not to make it a judgment of such court so as to authorize its authentication as a judgment thereof. Strecker v. Railson [N. D.] 111 NW 612.

77. Transcript of justice of peace of foreign state must be authenticated in accordance with Code Civ. Proc. § 415, and not § 414, which relates to judgments of courts of record. Gordon Bros. v. Wageman [Neb.] 108 NW 1067. Rev. Codes N. D. 1905, § 7292, providing for exemplification of records, held inapplicable to judgment rendered in justice court. Strecker v. Railson [N. D.] 111 NW 612. Where transcript of foreign judgment was authenticated as required by Burns' Ann. St. 1901, §§ 458, 479, and exhibited a personal judgment against defendant rendered by court of general jurisdiction, held admissible as prima facie evidence of debt though not containing any pleadings or issues. Roberts v. Leutzke, 39 Ind. App. 577, 78 NE 635.

78. Milliken v. Dotson, 117 App. Div. 527, 102 NYS 564.

79. Swing v. St. Louis Refrigerator & Wooden Gutter Co., 78 Ark. 246, 93 SW 978.

80. **It includes** the regulation and protection of forestry and matters of contract relating to logging and floatage.

It excludes regulations designed to prevent fire (See Fires, 9 C. L. 1361), timber rights on the public domain (see Public Lands, 8 C. L. 1486), floatage rights in navigable waters (see Navigable Waters, 8 C. L.

lands paid for by the state are held under a restricted agency by a university for the purpose of instruction in scientific forestry,[81] the state has an interest in them sufficient to enable it to invoke the aid of the courts for the protection of the forests thereon,[82] and neither the university [83] nor one claiming under it will be permitted to destroy the forests.[84] Under the Federal constitution, congress has power to establish forest reserves [85] and to provide for the making of rules and regulations as to their use,[86] and no state legislation or policy can interfere with this right or embarrass its exercise.[87] An indictment will lie to punish [88] and an injunction will lie to prevent the violation of regulations made by the executive department of the United States government for the protection of forest reservations.[89] The constitution of New York provides for the preservation of lands constituting the forest preserves.[90] Penalties have been provided for the unlawful cutting of the trees of an-

1083), sale of manufactured lumber (see Sales, 8 C. L. 1751), and matters of trespass (see Trespass, 8 C. L. 2147) and waste (see Waste, 8 C. L. 2261).

81. Under Laws 1898, p. 230, c. 122, authorizing Cornell University to acquire, at the expense of the state, forest lands for the conduct of experiments in forestry, the university was agent of the state with special and restricted powers. People v. Brooklyn Cooperage Co. [N. Y.] 79 NE 866. The statute is constitutional, since the state had never been vested with the legal title to the lands; art. 7, § 7, of the constitution providing that the lands of the state constituting the forest preserve shall be kept as a wild forest, and that timber thereon shall not be sold, removed, or destroyed, is not violated (Id.), nor is art. 8, § 9, providing that neither the credit nor the money of the state shall be given or loaned to or in aid of any associated, corporation, or private undertaking, violated (Id.).

82. State entitled to injunction to restrain cutting and removing of timber by party claiming under the university. People v. Brooklyn Cooperage Co. [N. Y.] 79 NE 866.

83. Under Laws 1898, p. 230, c. 122, authorizing Cornell University to acquire, at the state's expense, forest lands for experiments in forestry and to raise, cut, and sell timber of such species and quantities as it may deem best for forestry purposes, it being provided that after thirty years the lands should be conveyed to the state, a contract between the university and a private corporation requiring the former to cut and deliver for fifteen years wood to a given amount as required is hostile to the scheme of the act and will be enjoined. People v. Brooklyn Cooperage Co. [N. Y.] 79 NE 866.

84. A corporation dealing with the university holding the lands as above described, having notice of its special and restricted powers as to the land, contracted with it in relation thereto at its peril and was bound by the provisions of the statute giving the university its authority, and therefore could not cut and remove the timber on the lands. People v. Brooklyn Cooperage Co. [N. Y.] 79 NE 866.

85. Under art. 4, § 3, which provides "that congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," congress had the power to pass act June 4, 1897, c. 2, 30 Stat. 35, 36. United States v. Shannon, 151 F 863.

86. The delegation of the power to make rules and regulations to the secretary of the interior is within the constitutional right of congress (United States v. Shannon, 151 F 863; United States v. Domingo, 152 F 566), and the rules and regulations, regarding the use of forest reserves for grazing, of October 3, 1903, are not beyond the power delegated (United States v. Shannon, 151 F 863). Act June 4, 1897, c. 2, by prescribing the same penalty as provided in act June 4, 1888, effectually provides penalties for its violation, although the offenses in the two acts are different. United States v. Domingo, 152 F 566.

87. Ordinance No. 1, Const. Mont., providing that "the people inhabiting the said proposed state of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof," was adopted in accordance with the Enabling Act of congress and shows knowledge of this ownership and right of control. United States v. Shannon, 151 F 863. The right of the United States government to regulate the use of forest reserves for grazing is paramount to the policy of the state of Montana to allow cattle to run at large on public or unfenced lands. Id.

88. Violation of rule forbidding pasturing of live stock without a permit is punishable under act June 4, 1897, 30 Stat. 35 (U. S. Comp. St. 1901, p. 1540). United States v. Deguirro, 152 F 568. Regulation 72 of the secretary of the interior which forbids any grazing or driving of live stock upon, on, or across a forest reservation without a permit is not a law but only a rule, and valid (United States v. Domingo, 152 F 566), while the part prescribing a fine and imprisonment for such unpermitted acts is invalid, but may be treated as surplusage which does not invalidate the balance of the rule (Id.).

89. Grazing without permit from the secretary of the interior or commissioner of the general land office and in disregard of rules and regulations contained in the compilation of October 3, 1903, restrained. United States v. Shannon, 151 F 863.

90. Art. 7, § 7. People v. Fisher, 116 App. Div. 677, 101 NYS 1047. The forest,

other against his consent in some states.[91] Injunction will issue to restrain the unlawful cutting of timber,[92] but equity has no jurisdiction to grant relief for an unlawful cutting or conversion where the remedy is adequate at law.[93] The Pennsylvania act prohibiting the cutting of timber on state lands applies to growing trees of any size.[94] Willfulness or intent is not essential to the offense.[95] Violations of the act must be prosecuted by indictment at quarter sessions.[96]

§ 2. *Logs and lumbering; booms and floatage.*[See 7 C. L. 1739]—Questions involving public and private rights on legally navigable waters,[97] contracts relating to sales of manufacturing lumber,[98] and questions concerning the measure of damages for breach of timber contracts, are discussed in separate articles,[99] as is the right to condemn land for haulways and other logging purposes.[1]

Contracts and conveyances.—Growing timber is a part of the realty,[2] and con-

fish, and game law, Laws 1900, p. 61, c. 20, § 216, provides that the forest preserve shall include lands owned or hereafter acquired by the state. Id. The holding of a belt of timber land in connection with its canal system is not inconsistent with its being part of the forest preserve, the purpose being not to cut the timber and devastate the land, but the reverse. Id.

91. Treble damages under Gen. St. 1902, § 1097. Avery v. White, 79 Conn. 705, 66 A 517. Defendant who sent his agents on plaintiff's land to cut trees of a certain size is liable nevertheless for smaller trees cut, it not being shown that the smaller stuff was necessarily cut to get at and remove the larger timber. Id. State held entitled to penalties for cutting timber on state lands under forest, fish, and game law (Laws 1900, pp. 63, 64, c. 20, § 222). People v. Fisher, 116 App. Div. 677, 101 NYS 1047.

92. See, also, Injunction, 8 C. L. 279. Cutting down trees and bushes is waste, and injunction lies to restrain the threatened continuance. Hatton v. Gregg [Cal. App.] 88 P 594. Injunction granted although defendant was solvent and plaintiff had not a "perfect title" as required in some cases by Civ. Code 1895, § 4927, where the damages were irreparable and the evidence showed that the acts were constantly recurring and a multiplicity of suits probable. Lewis v. Hutchinson, 127 Ga. 789, 56 SE 998. Held error to refuse injunction where the damage would be irreparable. Baker v. Davis, 127 Ga. 649, 57 SE 62. Injunction granted on the ground of irreparable injury to the plaintiff. Burton v. O'Neill Mfg. Co., 126 Ga. 805, 55 SE 933. In action of trespass in cutting timber, plea of title by adverse possession overruled, cutting timber on land not constituting possession. Morgan v. Pott [Mo. App.] 101 SW 717. Where an oral extension of time for removal of timber was given in consideration of payment of taxes, an injunction to restrain removal of timber thereunder refused on ground that no case was made out and equity would not aid to enforce a forfeiture. Wallace v. Kelley, 148 Mich. 336, 14 Det. Leg. N. 230, 111 NW 1049. Injunction dissolved, no grounds for equitable relief. Godwin v. Phifer [Fla.] 41 S 597. Right to injunction barred by statute of limitations, Revisal of 1905, § 391 [4], limiting rights of action to ten years after they accrue. Bernhardt v. Hagamon, 144 N. C. 526, 57 SE 222.

93. Injunction to restrain cutting after time specified in deed refused. McCarty v. Wilson [Ark.] 98 SW 682.

94. Act Feb. 25, 1901 Commonwealth v. LaBar, 32 Pa. Super. Ct. 228.

95. Commonwealth v. LaBar, 32 Pa. Super. Ct. 228.

96. Justice has no authority to entertain summary proceeding. Commonwealth v. LaBar, 32 Pa. Super. Ct. 288.

97. See Navigable Waters, 8 C. L. 1083.

98. See Sales, 8 C. L. 1751.

99. See Damages, 9 C. L. 869.

1. See Eminent Domain, 9 C. L. 1073.

2. See Emblements and Natural Products, 9 C. L. 1072. Midyette v. Grubbs [N. C.] 58 SE 795; North Georgia Co. v. Bebee [Ga.] 57 SE 873. So provided by Georgia Code 1895, § 3045. Marthinson v. King [C. C. A.] 150 F 48. Where a testator had excepted growing timber from a deed of land, with a right for forty years to enter, cut, and remove it, the timber at his death was real estate and passed to his heirs who were limited to forty years in which to remove it. Williams v. Jones [Wis.] 111 NW 505. Testator had an interest in so much of the soil as was necessary to sustain the timber. Id. Where a right to timber held to be real estate was not treated as such by an executrix and not converted in personalty as directed in will, acts of the heirs in regard to it held to be an election to treat it as real estate. Id. Contract for sale of certain trees construed to create an estate in fee in the trees with an interest in the soil sufficient for their growth, although the fee to the soil remained in the owner. North Georgia Co. v. Bebee [Ga.] 57 SE 873. Trees standing on land are part of the land, the title to which can be passed by a statutory deed. Morgan v. Pott [Mo. App.] 101 SW 717. A sale of growing or standing timber is a contract concerning an interest in lands, and within the statute of frauds. Richbourg v. Roes [Fla.] 44 S 69. Where a sale of standing timber is not made in contemplation of their immediate severance, they do not become personal property (Bell County Land & Coal Co. v. Moss, 30 Ky. L. R. 6, 97 SW 354),but where trees sold are to be immediately severed from the soil and carried away the sale is of personal property and not of an interest in land (Graham v. West, 126 Ga. 624, 55 SE 931). Crude turpentine in boxes in a state to be dipped up is personal property and subject to re-

tracts and conveyances relating thereto are governed by the laws applicable to contracts concerning that kind of property.[3] An attempted oral conveyance constitutes a mere revocable license to enter upon the premises and cut and remove the growth.[4] An oral surrender of an estate in standing timber is ineffectual to revest the owner with the title.[5] Under the Alabama statute a conveyance of timber on a homestead requires an acknowledgment by a wife.[6] A contract concerning growing trees, as part of the realty, will in proper cases, like chattels of peculiar value, be specifically enforced.[7] The essential elements of agreements for the sale or removal of timber depend upon the ordinary principles of contract law,[8] including those in regard to delivery [9] and consideration.[10] Fraud vitiates the contract as in other cases.[11] The usual rules of interpretation apply, intention being the primary consideration.[12]

plevin. Richbourg v. Rose [Fla.] 44 S 69. Replevin failed because occupation of the land annually for turpentine purposes was adverse possession which ousted the constructive possession of the plaintiff who only claimed under a paper title. Id.

3. While a contract for the sale of standing timber is within the statute of frauds and must be in writing, the right to forfeit it for nonremoval within the time specified may be waived by parol. Wallace v. Kelley, 148 Mich. 336, 14 Det. Leg. N. 230, 111 NW 1049. Contract for transporting and manufacturing logs into lumber and selling same, first paying plaintiff a given rate per 1,000 and dividing the balance equally after deducting the cost of manufacture and sale, is not within the statute of frauds (Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 NW 237), and a parol modification without new consideration was valid (Id.). An instrument reciting that the owner of land was agreed to let a person put a steam mill on it and cut timber at a certain price per thousand feet, which is agreed to, does not convey the timber for lack of words of conveyance (Tremaine v. Williams, 144 N. C. 114, 56 SE 694), nor, though recorded, does it amount to a notice to a purchaser under Revisal 1905, § 980, relating to registration of conveyances valid as passing property against purchasers from grantor (Id.), and even if good as a conveyance the instrument is void for lack of description of the tract on which the timber stood in the absence of evidence that only one tract was owned (Id.). A conveyance of timber for sawmill purposes to be removed in a limited time is a sale of real estate and not a lease. McLendon Bros. v. Finch [Ga. App.] 58 SE 690. Being a deed and not a lease, it is within the purview of Civ. Code 1895, § 3613, providing that in a sale of land there is no implied warranty of title and it is to be treated as a quit claim deed. Id. The time limit for removal is not a limitation directly upon the estate owned in the timber but upon the concurrent license of ingress and egress necessary to use the timber. Id.

4. A written contract not acknowledged and evidently not intended to be recorded and having none of the phrases common to deeds nor apt words to convey a present interest in the timber grants a mere license, revocable by a subsequent sale. Polk v. Carney [S. D.] 112 NW 147. Instrument duly acknowledged and recorded held to be a deed of sale of standing timber and a lease of land for turpentine purposes, and not revoked by a later conveyance of the land by the grantor. Richbourg v. Rose [Fla.] 44 S 69. A license to cut timber founded on a valuable consideration and coupled with an interest is irrevocable. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639.

5. Nor will it work an estoppel if the owner does not act on it. Warren v. Ash [Ga.] 58 SE 858.

6. Under Code 1896, § 2034, requiring the wife's separate acknowledgement to a deed of the homestead. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639.

7. Remedy at law adequate and relief refused. Marthinson v. King [C. C. A.] 150 F 48.

8. See Contracts, 9 C. L. 654.

9. Payments made by vendee and acts of vendor in allowing vendee to scale and brand logs held to amount to a delivery and to vest title in vendee. Chaney v. Southerland Innes Co., 80 Ark. 572, 98 SW 967. Where a defendant agreed to build a boom and try to stop logs and pay for those caught, but the logs broke the boom without the defendant's fault, held no delivery of the logs. Southern Pine Lumber Co. v. Cameron & Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 1, 101 SW 488.

10. The plaintiff's extra trouble and expense in having the logs ready at the earlier date set in the modification of the original contract was sufficient consideration to uphold the new contract. Asher v. Garrard [Ky.] 101 SW 889. Consideration expressed in contract for cutting timber for a specified time and giving a right to an extension if desired held to include the privilege of extension as well as the present right. Baker v. Davis, 127 Ga. 649, 57 SE 62.

11. Evidence insufficient to show an intentional conversion by the defendant or that its separate account of plaintiff's logs was inaccurate. Wisconsin Sulphite Fiber Co. v. Jeffries Lumber Co. [Wis.] 111 NW 237. The right to an action for deceit for procuring a deed to timber by false representations is not dependent upon the removal of the timber. See, also, Fraud and Undue Influence, 7 C. L. 1813. Modlin v. Roanoke R. & Lumber Co. [N. C.] 58 SE 1075.

12. Where by its charter a dam and improvement company was authorized to charge on the "**stumpage scale,**" in the absence of an agreement as to a scaler, a

contract was implied that a scale made in accordance with the method customarily adopted by scalers and between landowners and operators and recognized as the stumpage scale should control. Madunkeunk Dam & Improvement Co. v. Allen Clothing Co. [Me.] 66 A 537. An equivocal addendum to a deed of supposed mineral which reserved the timber, giving the timber to both grantee and grantor, construed to give the grantee the right only to such timber as was needed for mining operations. Shenandoah Land & Anthracite Coal Co. v. Clarke, 106 Va. 100, 55 SE 561. Where a contract provided for a joint-adventure for the sale and manufacture of plaintiff's logs into lumber and required the defendant to keep separate accounts, held that by necessary implication the defendant's accounts formed the primary basis of settlement and method used was erroneous. Wisconsin Sulphite Fiber Co. v. Jeffries Lumber Co. [Wis.] 111 NW 237. Where the contract provided that the defendant should deduct the "actual cost" of planing, loading, and selling lumber, he was not entitled to charge the reasonable value or the customary charge (Id.), nor to charge as part of the expense of manufacture for belting, repairs to machinery and tools, and new tools (Id.), nor to charge for the cost of loading works (Id.), and to charge for the difference between value of lumber used in a tramway built to handle the lumber, when it was new and its value when the tramway was torn down. (Id.). Taxes were properly charged as an expense. Id. Where a lease gave the lessee "a right of way fifty feet wide, to be used for logging purposes either for a road, flume, tram or in any manner the party of the second part may decide upon as will best meet their needs," the lessee was not confined to use the right of way for the purposes of a road, flume or tram, but were entitled to use a stream admittedly within the limits of the grant to float logs. Fox v. Miller [C. C. A.] 150 F 320. Contract for the sale of timber and binding the seller to haul and load same on cars within fifty miles of a town for a specified sum construed to be a present sale of timber with an agreement for future services concerning same (St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 SW 375), and whenever logs were cut within fifty miles of the town the title passed to the buyer (Id.). Where a contract for the sale of standing timber did not state where or in what direction the timber should be removed, the place of exercising the right of removal, determined by the parties, fixed the location as if stated in the contract. Boring Lumber Co. v. Roots [Or.] 90 P 487. Where a verbal contract for the sale of the timber at $3 per 1,000 feet was made with the understanding that if a written contract was made later it should cover the timber cut, but the written contract failed to do so, and set the price at $4 per 1,000 feet, the wood cut under the verbal contract could only be recovered at the rate of $3 per 1,000. Hendrickson Lumber Co. v. Cretorious [Ark.] 101 SW 733. A deed conveying timber to an individual, his heirs, and assigns, and stating that it was understood that the deed was to be turned over to a lumber company, held to be a valid conveyance to the individual, and his conveyance to the company was effectual. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639. A contract for the sale of growing timber with the right in the grantee to enter and cut if the grantor failed to deliver is a contract of purchase and not a mere option. McIntosh v. Rutland, 88 Miss. 718, 41 S 372. The interest in the proceeds of the sale descends to the heirs of the grantor. Id. "Trees" and "wood" are not synonymous terms, and a contract for the sale of "wood on a certain lot of land" was held to be an executory sale of personalty and not of realty. Graham v. West, 126 Ga. 624, 55 SE 931. Where the time of performance was extended sixty days for $900, entry being made on contract, "the $900 paid shall apply on amount due on the 'written contract," and later the contract was rescinded, the entry was held merely to increase the purchase price, and liability for a note for $900 ended with the contract. Dickey v. Smith, 127 Ga. 645, 56 SE 756. A deed conveying "all the pine, oak, ash, cypress, and poplar timber upon" a certain tract "containing forty-two acres more or less, all pine, poplar, and cypress timber on said land on the southern side of Cooper swamp and in said swamp and ravines construed to convey all the pine, oak, ash, cypress, and poplar on the whole tract execpt that part lying south of the swamp and conveyed only the pine, poplar and cypress timber there. Modlin v. Roanoke R. & Lumber Co. [N. C.] 58 SE 1075. Under a contract granting "all and singular timber suitable for sawmill purposes growing on" a certain lot, the word "**timber**" taken in connection with the word "growing" and the rest of the grant denotes "green" and not "dead" timber. Handcock v. Massee & Felton Lumber Co., 127 Ga. 698, 56 SE 1021. Where, under a contract selling all the timber on certain land of a certain size at a certain price per 1,000, to be cut within a given time, the defendant only cut the larger trees, leaving the smaller, he was held liable for all the trees at the contract rate, and judgment against him based on a different rate was held erroneous. Coat Lumber Co. v. Pope [Miss.] 43 S 434. A contract to transport logs, under which not less than 5,000,000 feet per year were to be furnished, continues for such period as is necessary to remove timber on lands described at the contract rate. Gates v. Detroit & M. R. Co., 147 Mich. 523, 111 NW 101. In a contract of sale giving three years to **remove** the logs, timber cannot be said to be removed when it is merely cut down and left on the land. Clark v. Ingram Day Lumber Co. [Miss.] 43 S 813. Under a contract providing that the vendee should pay taxes during his possession or until certain government subdivisions were released by notice that the timber had been cut therefrom, the defendant was liable for the taxes although certain suits questioning the vendor's title, and ultimately successful, were brought (Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 14 Det. Leg. N. 47, 111 NW 177), and in the absence of the notice although the vendor knew the timber had been cut (Id.), and his heirs

Contracts for the sale of timber to be removed within a specified time are generally construed as sales of only so many trees as the vendee removes within the time designated.[13] If no time is fixed for its removal, the vendee has a reasonable time for that purpose.[14] What is a reasonable time depends upon the circumstances of each particular case.[15] Trees may be so conveyed or reserved in a deed as to leave in one person a title in fee in the soil and in another a life title in the timber.[16] Where timber is excepted or reserved in a deed and a time or event is specified upon which the timber must be cut, the reservation expires upon the happening of the event or the expiration of the time,[17] whereas if no limitation is specified the grantee must

who acted under the contract profitably were liable also (Id.). The phrase "at the base" in a deed conveying timber "twelve inches in diameter at the base when cut" at any time during fifteen years means "at the ground," a local custom to the contrary notwithstanding. Banks v. Blades Lumber Co., 142 N. C. 49, 54 SE 844. The phrase "when cut" merely extends the time of measurement from the date of the contract to the time of the actual cutting. Id. Under a contract to carry the plaintiff's logs at $3 per 1,000 feet and to add a given amount thereto for carriage of other parties' freight, the additional amount to be divided between the parties, the plaintiff had a right to make such charges as he pleased for the use of his private roads and banking grounds (Gates v. Detroit & M. R. Co., 147 Mich. 523, 111 NW 101), but was only entitled to the $3 rate for logs cut on his own land (Id.).

13. Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 14 Det. Leg. N 47, 111 NW 177; Ormand Min. Co. v. Bessemer City Cotton Mills, 143 N. C. 307, 55 SE 700. Failure to remove within time limited or a reasonable time thereafter held to work a forfeiture of right to timber (Bell County Land & Coal Co. v. Moss, 30 Ky. L. R. 6, 97 SW 354), since, the sale not having been made in contemplation of their immediate severance, the trees did not become personal property (Id.). Under a contract conveying log timber and giving "three years to remove" the logs from the land, after the expiration of three years the grantee had no right to the timber whether standing or severed but not removed. Clark v Ingram Day Lumber Co. [Miss.] 43 S 813. A conveyance of standing timber to be removed within a specified time creates a determinable fee in the timber (Midyette v. Grubbs [N. C.] 58 SE 795; Warren v. Ash [Ga.] 58 SE 858), with a reverter to the owner of all trees not cut within the time limited (Midyette v. Grubbs [N. C.] 58 SE 795), and, upon the decease of the grantee intestate, that estate devolves upon his heir subject to his widow's dower (Id.). A grantor of a determinable fee in standing timber is not concerned with the validity of an assignment of it by the grantee during its existence. Warren v. Ash [Ga.] 58 SE 858.

Contra: Where, in a deed of standing timber, the time in which to cut and remove is limited, the limitation clause is a **covenant** and not a condition subsequent, and does not work a forfeiture of the title to the timber on failure to cut and remove it within the time limited. Zimmerman Mfg. Co. v. Daffin [Ala.] 42 S 858. If the timber is removed after the time limited, the grantor may maintain an action of quare clausum fregit, not trover or trespass de bonis (Id.), and may recover the actual damage he may have sustained to his possession, if any, otherwise nominal damages only (Id.).

14. Ormand Min. Co. v. Bessemer City Cotton Mills, 143 N. C. 307, 55 SE 700. Under an oral extension of the time for cutting, giving the defendants "all the time they needed" after the expiration of the contract to cut the timber, but no definite time was fixed, they had only a reasonable time in which to cut. Weaver v. King [Tex. Civ. App.] 17 Tex. Ct. Rep. 510, 98 SW 902. Where forfeiture for nonremoval of timber within time specified was deemed to be waived, decree directed the defendant to "cut and remove the timber within a reasonable time." Wallace v. Kelley, 148 Mich. 336, 14 Det. Leg. N. 230, 111 NW 1049. Where a contract granted timber on certain forty acre tracts with right to remove and rights of way for logging railways, and provided that the deed should remain in force until the vendees "commence to cut" on each forty acre tract "and for one year thereafter," but that the railway right of way should remain in full force, held the vendees must begin to cut within a reasonable time and were only entitled to what they could cut and remove within one year from the time they began. The railway right of way was for use of adjacent lands. Hall v. Eastman, Gardiner & Co., 89 Miss. 588, 43 S 2.

15. Where the evidence showed that a few months at most was necessary, a failure to begin cutting for a year was unreasonable in the absence of proof of special circumstances justifying it. Weaver v. King [Tex. Civ. App.] 17 Tex. Ct. Rep. 510, 98 SW 902.

16. Deed construed to grant estate in fee simple in the timber carrying right to cut at any time without limitation express or implied. Lodwick Lumber Co. v. Taylor [Tex.] 98 SW 238, overrruling Lodwick Lumber Co. v. Taylor [Tex. Civ. App.] 17 Tex. Ct. Rep. 633, 99 SW 192; Jones v. Lodwick Lumber Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 53, 99 SW 736. Deed granting certain trees and right of way for removal held to create an estate in fee in the trees with a perpetual right of entry, to cut and remove them. North Georgia Co. v. Bebee [Ga.] 57 SE 873.

17. The event specified was "the erection

give notice for a reasonable time that the grantor must cut and remove.[18] Where the time in which to remove timber is extended conditionally, the performance of the condition is essential to rendering the extension effective.[19] An assignor of a "timber lease" is not estopped from acquiring rights, not inconsistent with his grant, to take effect after the expiration of the lease.[20] Questions of performance [21] and waiver are governed by the ordinary rules.[22]

Scaling and measurement.—The parties generally agree upon some person to do the scaling.[23] When the contract stipulates a measurement of the logs after delivery, the right of action for the price does not accrue until a reasonable time for measuring, after delivery.[24] In Louisiana the rule for scaling is governed by statute.[25] An action may lie in a proper case for timber cut where the vendor is found not to have the title to the land.[26]

Hauling and floatage.—An action will lie for interference with right to remove

of any building upon any lot," and assignee of the reservation held not liable for cutting timber before the happening of the event. Ormand Min. Co. v. Bessemer City Cotton Mills, 143 N. C. 307, 55 SE 700.

18. An assignee of the right where no time is specified must cut and remove within a reasonable time. Ormand Min. Co. v. Bessemer City Cotton Mills, 143 N. C. 307, 55 SE 700.

19. Boring Lumber Co. v. Roots [Or.] 90 P. 487.

20. An option for an extension of cutting rights held not to pass to the assignee by operation of law (Baker v. Davis, 127 Ga. 649, 57 SE 62), and since the contract containing the option lacked words of assignability and was made after the assignment of the lease, the option was not in the nature of a covenant running with the land (Id.). Assignor held not to be estopped to deny assignee's rights by the statement of counsel in argument. Id.

21. Cutting logs and piling on river bank for shipment within the time set for cutting and removal held due performance of contract, although logs not shipped until after the time limit and the bank was part of the timber tract. Plummer v. Reeves [Ark.] 102 SW 376. Conversion did not lie. Id. Under a contract to manufacture plaintiff's logs into lumber, the evidence was held to be insufficient to show that the work was not performed in a workmanlike manner. Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 NW 237. A contract to deposit in a wasteway or ditch 500 pine logs suitable for manufacture into merchantable timber in eight months is not performed by depositing them along the ditch (Fletcher v. Prestwood [Ala.] 43 S 231), nor if unsuitable lumber was furnished was the defendant at fault for inherent defects (Id.).

22. Oral extension of time to remove lumber in consideration of payment of taxes held to amount to a waiver of right to forfeit for nonremoval of timber within time specified in contract. Wallace v. Kelly, 148 Mich. 336, 14 Det. Leg. N. 230, 111 NW 1049. Where timber was sold out but title reserved in vendor until payment, the vendor did not waive the reservation by asking the court to order the receiver of the vendee to pay the purchase price before disposing of the lumber. Hendrickson Lumber Co. v. Pretorious [Ark.] 101 SW 733. Where, in a contract to transport logs, a provision to furnish so many feet per year was waived by failure to furnish cars, by the defendant, which made excuses for same, it could not refuse to carry out the contract because of the failure to furnish the contract quantity of timber. Gates v. Detroit & M. R. Co., 147 Mich. 523, 111 NW 101.

23. The scale bill of a surveyor agreed upon between the parties is, in the absence of fraud, binding upon them (Madunkeunk Dam & Imp. Co. v. Allen Clothing Co. [Me.] 66 A 537), and the survey book is evidence of the scale (Id.). In an action to collect tolls by a dam and improvement company which by its charter could collect on the "stumpage scale" and no scale was agreed upon, a contract was implied that a scale made in accordance with the method customarily adopted by scalers and between landowners and operators and recognized as the stumpage scale should govern. Id. Surveyor allowed to use scale book made by his assistant under his direction to refresh his recollection of the stumpage scale (Id.), and the scale proved by his uncontradicted testimony held to control (Id.). Method in contract of ascertaining log measure, viz: "By deducting twenty-five per cent from the actual scale or tally of sound lumber cut," held capable of practical application and enforced. Wisconsin Sulphite Fibre S. Co. v. Jeffris Lumber Co. [Wis.] 111 NW 237.

24. This is so although the logs broke the boom and got away upon delivery so that measurement became impossible. Southern Pine Lumber Co. v. Cameorn & Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 1, 101 SW 488.

25. By act No. 147, p. 231 of 1900, the strict Doyle rule, by which the diameter of the log at the small end must be taken in measuring both long or short, is prescribed. Foscue v. Black Bayou Lumber Co., 118 La. 725, 43 S 387.

26. Defendant held liable for the price of trees cut although the vendor was found not to own the land, he having claimed and paid taxes on it and alone claimed the value of the timber cut on it. Richburg v. Patten [Tex. Civ. App.] 18 Tex. Ct. Rep. 204, 101 SW 836.

timber along roads made for the purpose by the buyer.[27] A timber driver has the right to occupy a stream as a highway for driving purposes and is only liable to a riparian owner for damages resulting from his negligence,[28] but this right does not carry with it the right to use the banks.[29] The rights of boom companies in streams are subject to the exercise of the police power by the state.[30] In some jurisdictions dam and improvement companies are by their charters allowed to collect toll for all logs and lumber passing over or through their dams and other improvements.[31] In Alabama a license to haul logs, lumber, and other timber over the public roads of a certain county is required by statute.[32]

Actions.—An owner of land whose growing trees have been destroyed by another may sue for the injury to the land or for the value of the trees.[33] The measure of damages in such cases is treated elsewhere.[34] In actions for the wrongful cutting of timber or on contracts relating thereto, the ordinary rules of pleading[35] and

27. It is immaterial that there are other equally accessible ways open to the buyer. Boring Lumber Co. v. Roots [Or.] 90 P 487. Grant of right of way by seller to third person held to be after the termination of buyer's rights. Id. Entry by third person held to be on an unauthorized trespass for which the defendant was not liable. Id.

28. Damages resulting from use with reasonable care is an incidental burden which the riparian owner must bear. Mitchell v. Lea Lumber Co., 43 Wash. 195, 86 P 405. Evidence of negligence should have gone to jury. Id. Mill company which controlled boom company held liable for injuries resulting from latter's negligence. Id.

29. Riparian owner who had revoked license to use the banks entitled to injunction to restrain threatened future use. Mitchell v. Lea Lumber Co., 43 Wash. 195, 86 P 405.

30. Laws 1905, c. 344 p. 598, § 56, providing that no person or corporation shall obstruct the game and fish commission while gathering spawn or place logs or other debris in streams at such time and imposing a penalty for violations of its provisions, is reasonable in its requirements (State v. Tower Lumber Co., 100 Minn. 38, 110 NW 254), and is not obnoxious to the state or Federal constitution (Id.). Where a contractor agreed to cut a certain quantity of lumber for the plaintiff and was also to be allowed to cut a certain lot for himself and the contract was silent as to which lot should be cut first, the contractor was at liberty to cut his wood at any time. Rice v. Knostman [Wash.] 88 P 194.

31. It is mainly a question of fact whether the company has so perfected the improvements as to give it the right to exercise its franchise. Madunkeunk Dam & Imp. Co. v. Allen Clothing Co. [Me.] 66 A 537. If the improvements are of little value, there is no compliance with the charter and tolls cannot be collected. Id. If, however, they are substantial and facilitated the driving of logs, although it might have been possible for the owner or driver to float the logs at times without the aid of the improvements, they were sufficient to comply with the condition on which toll might be demanded. Id. The plaintiff held to have sustained the burden of proof. Id.

32. Acts 1903, pp. 682-689. The act is constitutional since it is not a "bill for raising revenue" which is void if passed within the last five days of the session (Kennamer v. State [Ala.] 43 S 482), nor does it discriminate against citizens hauling logs, etc.,and in favor of others hauling heavy commodities, the burden being equally imposed on all persons within the same class (Id.). An indictment for hauling without a license need only set out the substance of the order of the court and aver a violation. Id. The order of the commissioner's court fixing the license tax was sufficiently definite and certain. Id. The words "logs, lumber or other timber" used in the act do not in the connection used necessarily include firewood. Id.

33. The same rule applies to one who owns the timber without the land. Williams v. Jones [Wis.] 111 NW 505. Timber excepted from a deed of land with right to cut and remove it is real estate and passes to heirs who are entitled to compensation for wrongful cutting and removal. Id. An innocent purchaser from one who has unlawfully cut timber on public domain is not protected by a plea of good faith in an action by the United States for the value of the timber. Anderson v. U. S. [C. C. A.] 152 F 87. A trepasser is liable whether acting for himself or as agent (Baker v. Davis, 127 Ga. 649, 57 SE 62), and principal and agent may be held jointly liable (Id.). The rule that where forest land has been invaded and trees cut the diminution in value to the whole premises may be shown in an action of trespass not applied where a telephone company was at fault and there was an assumption merely that its occupation would be permanent. Morrison v. American Tel. & T. Co., 115 App. Div. 744, 101 NYS 140. Trover may be maintained by part owners of timber for its conversion. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 S 533. Claim for damages held barred by two years statute of limitations. Kirby v. Hayden [Tex. Civ. App.] 99 SW 746. Nonsuit held proper. Gray Lumber Co. v. Harris, 127 Ga. 693, 56 SE 252. Judgment in favor of defendants in action for conversion of timber affirmed. Rice v. Knostman & Franke [Wash.] 88 P 194.

34. See Damages, 9 C. L. 869.

35. See Pleading, 8 C. L. 1355. In action

evidence apply.[36] Where the contract is unambiguous, parol evidence is inadmissible for cutting trees on plaintiff's land, the defense that the cutting was done as a riparian owner to remove obstructions to the flow of the stream not open, not having been pleaded as required by Code Civ. Proc. § 437. Hatton v. Gregg [Cal. App.] 88 P 594. Defense of an easement not available because not pleaded. Id. Where a complaint sets up the fact that one year was allowed in which to remove timber and fails to allege any modification thereof, the plaintiff is bound by its pleading to the one year limitation alleged. Boring Lumber Co. v. Roots [Or.] 90 P 487. In an action for an accounting, under a contract for the manufacture and sale of lumber, where the defendant set up in its answer a maximum sum claimed for actual expenses, and at the trial made a larger claim therefor, it was limited to the amount claimed in its answer. Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 NW 237. Complaint in an action against carrier for failure to furnish cars, for logs which shipper had placed along carrier's tracks, after a demand therefor, alleging that by reason of its failure logs deteriorated, states a cause of action (St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 SW 375), and sufficiently charges that the negligence of the carrier was the proximate cause of the injury (Id.). A failure to allege the agent on whom demand for cars was made held cured by the verdict. Id. In an action to enjoin unlawful cutting defense under a lease ineffectual since brief of evidence contained only a description of the lease. Lewis v. Hutchinson, 127 Ga. 789, 56 SE 998.

36. See Evdience, 9 C. L. 1228. A scale book made by an assistant acting under the direction of and inspected and retained by a surveyor may be used by him to refresh his recollection of the stumpage scale (Madunkeunk Dam & Improvement Co. v. Allen Clothing Co. [Me.] 66 A 537), and his testimony so given is competent evidence as to the quantity of logs in question (Id.). Evidence held to show delay in shipment by carrier proximate cause of log's deterioration. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 SW 375. A deed invalid because improperly acknowledged held admissible to explain subsequent deed ratifying and extending it. Davis v. Miller BBrent Lumber Co. [Ala.] 44 S 639. In an action by seller of options on trees for breach of contract, evidence held sufficient to show that the defendant got the trees under the options and was liable for the price. Campbell v. Phillips, 30 Ky. L. R. 567, 99 SW 277. In an action to recover for timber unlawfully cut on public lands where defendants claimed to be acting under mineral land acts, evidence as to steps taken in regard to mining claims outside of land where timber was cut is inadmissible (Anderson v. U. S. [C. C. A.] 152 F 87), while evidence that the defendants had made mining locations in other places and proceeded to cut timber on adjoining lands regardless of boundaries was admissible to show lack of good faith as to mining claims (Id.), and where it was shown that the timber cut on the adjoining lands exceeded that cut on land located it was presumed that the cutting was unlawful (Id.). Conversations between the defendants and others at the time contract for sale of logs was made as to the particular lands on which the timber was to be cut inadmissible as self-serving. Id. To meet the mining claim defense, it was proper to admit an opinion by an expert that the ground where the timber was cut was not worth locating for mining purposes. Id. In an action for unlawfully cutting timber, declarations of an agent of a lumber company claiming that certain timber belonged to the company held admissible, not as showing good title, but that the company claimed it, and negativing the idea that its cutting was accidental or through mistake as to boundaries. Gray Lumber Co. v. Harris, 127 Ga. 693, 56 SE 252. In action for the price of posts, ties, and poles, the question of the passage of title and of surrender or discharge of the contract was properly submitted to the jury. Watson v. Naugle Tie Co., 148 Mich. 675, 14 Det. Leg. N. 334, 112 NW 752. The marking of the poles with the defendant's mark was evidence of ownership under Comp. Laws, § 5085. Id. In an action for unlawful cutting, declarations of defendant's foreman at the time of the cutting admissible as part of the res gestae. Gray Tie Co. v. Clark, 30 Ky. L. R. 409, 98 SW 1000. In an action for destruction of trees, evidence as to the effect which the destruction had on the value of the land is admissible where the trees were of little or no value except with reference to their situation as to the land on which they stood. Alberts v. Husenetter [Neb.] 110 NW 657. Where a contract, under which a contractor was to cut wood for the plaintiff and also wood for himself, was silent as to which lot should be cut first and no finding was made by the trial court on this point, it was presumed that the contractor sold his own lumber to defendants who were sued for conversion. Rice v. Knostman & Franke [Wash.] 88 P. 194. In an action for conversion of timber based on a breach of contract, the burden is on the plaintiff to prove a breach. Id. In an action for conversion, a scaling book (Zimmerman Mfg. Co. v. Dunn [Ala.] 44 S 533) and evidence of defendant's agent's act being irrelevant (Id.), and a statement of account as not being an admission of distinct facts, held wrongly admitted (Id.). Defendants claiming under plaintiffs were estopped to deny their title to timber. Id. Where an owner of land who having sold the timber thereon subsequently sells the land without excepting the timber, it is competent for him to show, in an action for the purchase price of the timber, that no sum was received by him for the timber in the second conveyance (McLendon Bros. v. Finch [Ga. App.] 58 SE 690), and as the deed in question contained no warranty the plea of breach of warranty of quiet possession will not lie in a suit for purchase price (Id.). Various instructions to the jury given and requested in an action on a contract to furnish logs to be manufactured into tim-

to explain or qualify it,[37] but where the language employed is of equivocal import,[38] or the contract as written is incomplete, parol evidence is admissible to explain and complete it.[39] The mere fact that a conveyance of timber states that all covenants and agreements shall run with the land and mentions assigns does not give a right of action to an assignee of part of the land upon notes given in payment for the timber which are held by third persons.[40]

Liens.[See 7 C. L. 1744]—In several states a lien is given for labor performed on logs and timber[41] which is enforced by the attachment of the property subject thereto.[42] The Michigan statute requires service of the writ on or before the return day upon the owner of the products or his agent or attorney, if such owner, agent, or attorney be known to the sheriff as residing in the state.[43] The Oregon statute requires a verified claim to be filed within thirty days after the close of the work.[44] Liens for tolls due dam and improvement companies are provided by statute in some states.[45] In Wisconsin no lien attaches for hauling logs from the mill after they are manufactured.[46] Lien laws being in derogation of the common laws are strictly con-

ber passed upon. Fletcher v. Prestwood [Ala.] 43 S 231. In an action for trespass for cutting timber, various requests for instructions by the plaintiff were properly refused. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639. In an action by a riparian owner for damage to his land by negligence of a timber driver, evidence that by reason of driving and formation of jams soil had been cut away from plaintiff's premises for a distance of six to ten feet laterally, extending from 800 to 1,000 feet along the banks, taken in connection with evidence as to the value of the land, was sufficient to show damage at least to the amount stated in the complaint. Mitchell v. Lea Lumber Co., 43 Wash. 195, 86 P 405.

37. A contract to transport logs, under which the owner was "to furnish not less than 5,000,000 feet per year until" his "timber is cut from above described lands," is not ambiguous, and parol understandings of the parties, even though they induced the making of the contract, are inadmissible. Gates v. Detroit & M. R. Co., 147 Mich. 523, 111 NW 101. The rule that the construction of an unambiguous written contract is for the court applied (Banks v. Blades Lumber Co., 142 N. C. 49, 54 SE 844), and also the rule forbidding variance by parol evidence, the court construing a contract for the sale of trees of a given size "at the base" to mean "at the ground," although it was customary in the vicinity to cut two feet from the ground (Id.). The contract for the sale of land and cutting of timber by vendee to be delivered to the vendor at a given price being in writing and unambiguous, parol evidence is inadmissible to show that the provision for the lumber was security only for the price of the land. Burton v. O'Neill Mfg. Co., 126 Ga. 805, 55 SE 931.

38. Parol evidence admissible to explain "addendum" to a deed which on its face gave both the grantor and grantee absolute right to the timber on the land. Shenandoah Land & Anthracite Coal Co. v. Clarke, 106 Va. 100, 55 SE 561.

39. Parol evidence to supply essential features necessary to complete the contract is admissible. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 SW 375.

40. Nor is any question of renting involved. Jackson v. Aripeka Saw Mills [Fla.] 43 S 601.

41. Rev. Laws 1905, §§ 3524-3540. The lien lapses after ninety days, by § 3526, unless action begun. Breckke v. Duluth Log Co., 101 Minn. 110, 111 NW 949. B. & C. Comp. § 5677. The lien is not lost by sawing the logs into lumber. Fischer v. Cone Lumber Co. [Or.] 89 P 737.

42. The attachment proceedings are governed by Rev. Laws 1905, § 4215, regulating ordinary attachments, except as modified by § 3526, as to the time of issuing the writ. Breckke v. Duluth Log Co., 101 Minn. 110, 111 NW 949. The writ is provisional, not jurisdictional, and may issue at the time of issuing the summons or any time thereafter within ninety days of filing of the lien. Id.

43. A return on writ returned before return day that it had been served on the agent, the owners being nonresidents and not to be found, held good although premature and not affected by an amended return that the owners were not to be found in the state. Pepin v. Nalt [Mich.] 14 Det. Leg. N. 432, 112 NW 959.

44. B. & C. Comp. § 5683. Construing this with § 5677 the laborer has in the first instance a lien for a specified time without the assertion of any formal claim therefor, but if he intends to preserve his claim he must file the claim. Fischer v. Cone Lumber Co. [Or.] 89 P 737.

45. Private and Special Laws of 1903, c. 315, p. 485. The party whose interest is directly affected by the lien must be considered liable for the tolls. Madunkeunk Dam & Improvement Co. v. Allen Clothing Co. [Me.] 66 A 537. Assignee of original contract held to be the party in interest in fact. Id.

46. Under Rev. St. 1898, § 3329, giving a lien for labor or services performed in manufacturing logs, etc., into lumber, hauling the manufactured products from the mill is not included, the process of manufacture ending at the point in the mill yard from which it is designed that the lumber shall be taken to enter into consumption. McGeorge v. Stanton-De Long Lumber Co. [Wis.] 110 NW 788.

strued[47] and in order to be able to claim a lien a compliance with and performance of the contract must be shown.[48] A lien for necessary sawmill supplies under the Georgia statute is not superior to a prior claim based on a conditional sale.[49] One who cuts and hauls logs to a sawmill at a certain price per thousand feet is not an employe of the mill within the meaning of the Washington statute,[50] but is only entitled to a lien on the logs.[51] Under the Arkansas statute one who in the performance of a contract for work and labor hires others to assist him is not entitled to enforce their liens,[52] nor does his payment for the hired labor operate as an assignment of the lien to him.[53] Jurisdiction obtained by a bill to enforce a lien for the purchase price of timber[54] is not lost by the removal of all the timber on which the lien might attach before the hearing.[55] Under the Oregon statute an action for damages lies for rendering difficult, uncertain, or impossible of identification logs subject to laborers' liens without the consent of the persons entitled thereto.[56]

FORFEITURES, see latest topical index.

FORGERY.

Elements of Offense (1418).
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Elements of offense.[See 7 C. L. 1744]—Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice,[57] hence there must be a false writing or alteration of an instrument[58] apparently capable of defraud-

47. Haralson v. Speer, 1 Ga. App. 573, 58 SE 142.

48. But proof of the completion of the contract in the foreclosure of a lien under Civ. Code 1895, § 2816, may be dispensed with when compliance with the contract is prevented by the defendant. Haralson v. Speer, 1 Ga. App. 573, 58 SE 142. In such a case a novation of the original contract is presumed. Id.

49. Civ. Code 1895, § 2809, rendering liens for necessary sawmill supplies superior to all liens not excepted therein, does not apply, as the claim was not under a lien but a duly recorded contract of sale. Tift v. Moultrie Lumber Co., 1 Ga. App. 608, 57 SE 1053.

50. Ballinger's Ann. Codes & St. § 5919. Graham v. Gardner [Wash.] 89 P 171.

51. Under Ballinger's Ann. Codes & St. § 5390. Graham v. Gardner [Wash.] 89 P 171.

52. Valley Pine Lumber Co. v. Hodgens, 80 Ark. 516, 97 SW 682.

53. It extinguishes both the debt and the lien (Valley Pine Lumber Co. v. Hodgens, 80 Ark. 516, 97 SW 682), and he is only entitled to a lien on the lumber to the amount due him for actual labor by him on the logs from which the lumber was made (Id.).

54. Under a contract for the sale of lumber, a provision that the vendee was to pay the taxes during his possession held to be a condition and the taxes part of the purchase price for which there was a lien. Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 14 Det. Leg. N. 47, 111 NW 177.

55. Michigan Iron & Land Co. v. Nester, 147 Mich. 599, 14 Det. Leg. N. 47, 111 NW 177. The court had jurisdiction also to receive a supplemental bill for taxes accruing after the filing of the original bill. Id.

56. B. & C. Comp. § 5692. Evidence held insufficient to show knowledge and consent of all the lienholders. Fischer v. Cone Lumber Co. [Or.] 89 P 737. An assignment of the lien carries with it the right to claim damages under this section, although the alleged injury was committed before the assignment. Id. Complaint held sufficient despite the fact that there was no positive allegation of filing the claim within thirty days, in the absence of a demurrer. Id.

57. State v. Lotono [W. Va.] 58 SE 621. Alteration of school warrant on county treasurer for teacher's services held forgery in first degree under Rev. St. 1899, § 1995. State v. Tyree, 201 Mo. 574, 100 SW 645. One depositing in a bank to his credit a check knowing that indorsement of payee's name had been forged held guilty under Pen. Code, §§ 511, 520, 521. People v. Mingey, 118 App. Div. 652, 103 NYS 627.

58. People v. McPherson [Cal. App.] 91 P 1098; Goodman v. People, 228 Ill. 154, 81 NE 830. Assignment of certificate of sale of school lands obtained on application in name of fictitious person and authorizing land board to execute a deed to assignee

ing [59] with intent to defraud.[60] The similitude between the forged instrument and the genuine need only be such that an ordinary person might be deceived;[61] the forgery need not be such as to require an expert to detect it.[62] The forging of a fictitious name is a crime if done with intent to defraud.[63] Under the New York statute directed against the concealing of larceny or misappropriations "by any person" by failure to make proper entries in account books, it is not necessary to show that accused himself took money.[64]

An alteration must be of a material part of an instrument.[65] A material alteration is one which makes the instrument speak a different language in legal effect from that which it originally spoke,[66] or which carries with it some change in the rights, interests, or obligations of the parties thereto.[67]

An uttering is complete upon the offering of a forged instrument in one's possession, as genuine, though it be not exhibited to or accepted by the offeree.[68] Putting up as collateral security for a loan a note known to be forged is uttering a forged instrument regardless of actual loss suffered by the borrower.[69]

Defenses.[See 7 C. L. 1745]—A forgery is not nullified because it appears that it also constitutes a swindle.[70] Forging separate instruments at the same time and as part of the same general transaction is a separate offense for each instrument.[71] In a prosecution for forging and altering a deed, the existence of another deed to defendant purporting to be signed by the title holder is immaterial if the deed relied on was in fact forged and uttered with intent to defraud.[72]

The indictment.[See 7 C. L. 1746]—The indictment may charge the same offense in

held a deed within statute against forging deeds. State v. Kelliher [Or.] 88 P 867.

59. People v. McPherson [Cal. App.] 91 P 1098; Goodman v. People, 228 Ill. 154, 81 NE 830; State v. Floyd [Ind.] 81 NE 1153.

Held forgeable as importing obligations: Affidavit sufficient without venue or notarial seal to jurat. Meldrum v. U. S. [C. C. A.] 151 F 177. Way bill or invoice, though it might require explanatory averments. Ex parte Fischl [Tex. Cr. App.] 18 Tex. Ct. Rep. 822, 100 SW 773. Signed writing to an express agent: "Please let this boy have my jug." McGuire v. State [Miss.] 44 S 802. Check drawn by married woman living with her husband. Miller v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 771, 100 SW 380. Subscription paper for a book with name written under "subscribers" held a "writing obligatory" or "instrument in writing" within Burns' Ann. St. 1901, § 2354. State v. Hazzard [Ind.] 80 NE 149.

Not forgeable: Instrument described as a lease held void on its face. State v. Cordray, 200 Mo. 29, 98 SW 1. Paper by uttering of which it was alleged accused obtained land held not to import any legal obligation. Commonwealth v. Tabor [Ky.] 104 SW 261.

60. People v. McPherson [Cal. App.] 91 P 1098; Goodman v. People, 228 Ill. 154, 81 NE 830; State v. Cordray, 200 Mo. 29, 98 SW 1. Conviction based on finding of jury on question of intent affirmed. Allen v. State, 126 Ga. 559, 55 SE 478. Finding of intent to defraud held authorized though one who deposited a forged check intended to apply proceeds on an alleged claim against the payee whose name was forged on back of the check. People v. Mingey, 118 App. Div. 652, 102 NYS 627. Evidence insufficient to show fraudulent intent in forgery of a note. Abel v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 361, 97 SW 1055. One not guilty for presenting to an express company an order for goods at instance of another whom he believed had an interest therein or authority to sign the order. Scott v. State [Miss.] 44 S 803.

61, 62. Goodman v. People, 228 Ill. 154, 81 NE 830.

63. Prosecution for forging and uttering a deed. People v. Browne, 118 App. Div. 793, 103 NYS 903.

64. Pen. Code, § 515. People v. Curtiss, 118 App. Div. 259, 103 NYS 395.

65, 66. State v. Lotono [W. Va.] 58 SE 621.

67. Figures in a check held not material, amount being controlled by the words. State v. Lotono [W. Va.] 58 SE 621. Changing of figures in two places in an order but leaving written amount as it was held material as inducing belief that maker intended figures to control. White v. State [Ark.] 102 SW 715.

68. Walker v. State, 127 Ga. 48, 56 SE 113.

69. State v. Calhoun [Kan.] 88 P 1079.

70. Under Pen. Code 1895, art. 947, providing that if the facts attending a swindle show forgery the case is forgery. Abel v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 361, 97 SW 1055.

71. United States v. Carpenter [C. C. A.] 151 F 214. See Note, 7 C. L. 1746.

72. People v. Browne, 118 App. Div. 793, 103 NYS 903.

different counts all based upon the alleged forged instrument.[73] It must be certain in its allegations,[74] must be drawn under the proper statutory provisions,[75] and must show all the essential elements of the offense as therein defined,[76] including knowledge[77] and intent to injure or defraud.[78] An indictment in the language of the statute is not sufficient where all the facts constituting the offense are not set forth therein.[79] Innendoes and averments of extrinsic facts necessary to show the fraudulent character of the writing must be made,[80] unless the instrument on its face imports an obligation,[81] or unless they relate to matters otherwise obvious or immaterial.[82] A charge that "with intent to defraud, defendant did feloniously forge a

73. People v. Alderdice, 105 NYS 395.

74. Indictment for forging and uttering a draft held not uncertain or duplicitous. Jordan v. State, 127 Ga. 278, 56 SE 422.

75. An indictment for forging bill of lading should be based on statutory provision against forgeries by which property rights are affected, and not on provision in Rev. St. 1899, § 2009, relating to pecuniary demands or obligations. State v. Harroun, 199 Mo. 519, 98 SW 467. Information for forging a deed is properly brought under Pen. Code, § 470, not under § 476 relative to uttering of fictitious bills. People v. McPherson [Cal. App.] 91 P 1098. Offense defined by Crimes Act, § 133 (Gen. St. 1891, § 2126), is not the uttering or passing of forged paper but the procuring of another to pass it. State v. Calhoun [Kan.] 88 P 1079. Offense committed in January, 1905, controlled by Burns' Ann. St. 1901, § 2354, since public offense statute was passed later and provided that it should not affect offenses theretofore committed. State v. Hazzard [Ind.] 80 NE 149.

76. Indictment for feloniously causing a deed to be forged held sufficient under Rev. St. 1899 § 1994. State v. McGinnis, 203 Mo. 590, 102 SW 479. Information for forging a note held to sufficiently charge forgery of a pecuniary obligation of another under Rev. St. 1899, § 2009. State v. Paul, 203 Mo. 681, 102 SW 657. Indictment for having possession of forged deed with intent to defraud held sufficient under Rev. St. 1899, § 2012. State v. Stark, 202 Mo. 210, 100 SW 642. Information charging transfer of forged note to a bank held to sufficiently charge uttering and passing of forged paper under § 134 of Crimes Act (Gen. St. 1891, § 2127). State v. Calhoun [Kan.] 88 P 1079. Information not defective because it could not be determined whether it charged forging of a fictitious deed or signing a person's name to a deed. People v. McPherson [Cal. App.] 91 P 1098.

77. A charge that accused "knowingly" uttered as true a false check sufficiently states that he uttered it knowing it to be false. State v. Waterbury, 133 Iowa, 135, 110 NW 328.

78. Indictment for forging affidavit of pretended settler on unsurveyed government land with intent to procure survey and payment therefor held sufficient. Meldrum v. U. S. [C. C. A.] 151 F. 177. A charge of forgery with intent to "cheat and defraud" sufficiently alleges an intent to "injure or defraud." Under Rev. St. 1899, § 2009. State v. Harroun, 199 Mo. 579, 98 SW 467. It need not be alleged that the intent to defraud was felonious. McGuire v. State [Miss.] 44 S 802.

79. Forgery of bill of lading. Indictment under Rev. St. 1899, § 2009, not sufficient. State v. Harroun, 199 Mo. 519, 98 SW 467. Indictment closely following statute defining forgery in first degree held good. People v. Alderdice, 105 NYS 395.

80. Indictment for passing a false time pass upon a railway held bad as not showing use to which pass was to be put, that company had any railway lines, etc. Goodman v. People, 228 Ill. 154, 81 NE 830. Failure of indictment against school trustee for forging receipt for tuition money to allege that person whose name was signed was under contract to teach. State v. Floyd [Ind.] 81 NE 1153. Failure to show how rights might be affected by forgery of bill of lading. State v. Harroun, 199 Mo. 519, 98 SW 467. Failure to explain a paper alleged to have been uttered by defendant so as to obtain land. Commonwealth v. Tabor [Ky.] 104 SW 261. To explain that person whose name was signed to an order on a bank had an account therein and that bank was instructed to pay account to payee. Belden v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 968, 99 SW 563. Indictment under Ann. Code 1892, § 1108, for making false entries in a book of account, held insufficient for failing to show how any pecuniary obligation was to be affected. State v. Starling [Miss.] 42 S 203.

81. McGuire v. State [Miss.] 44 S 802; Reeves v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 267, 103 SW 894. Not necessary to allege how injured party could be affected or that he owned property. People v. McPherson [Cal. App.] 91 P 1098. Not necessary to state that a check payable to another had been indorsed by him to accused who was charged with intending to pass it (Reeves v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 267, 103 SW 894), nor to state to whom he intended to pass it (Id.). Other innuendoes held not necessary. Id. Indictment charging forging of affidavit of a pretended settler with intent to procure survey of government land held sufficient without negativing truth of matters recited in the affidavit or alleging that money was deposited to meet expense of survey. Meldrum v. U. S. [C. C. A.] 151 F 177.

82. Not necessary to explain "Ten" after "$10," or the word "Per" before a signature. Johnson v. State [Tex. Cr. App.] 99 SW 404. Not necessary to explain an obliteration shown in instrument admitted in evidence. Id. Where a draft is set out in the indictment it is not necessary to explain who is the drawee, though it is doubtful because there appears in one upper corner the name of a banking company and in another the name of a grocery company. Id. An infor-

certain deed" set out in full is sufficient without setting out the particular act in which the forgery consisted.[83] An information for forging a deed need not state that the person whose name was forged was the owner of the property described therein at the time of the forgery.[84]

Presumptions.[See 7 C. L. 1748]—Though possession of a forged instrument by the obligee raises a presumption of his knowledge of the forgery,[85] mere possession is not sufficient evidence of such knowledge where the instrument is payable to and indorsed by a third person.[86]

Admissibility of evidence.[87] [See 7 C. L. 1748]—Upon proof that accused personated the title holder in signing and acknowledging a deed, the burden is upon him to show authority to sign if any existed.[88] Under a count charging the intentional uttering of a forged instrument, evidence is admissible to show forgery either by defendant or another, and that accused knowingly uttered the instrument with intent to defraud.[89] On the question of intent and guilty knowledge, proof of other and similar offenses is admissible.[90] Other genuine instruments may be admitted by way of comparison.[91] Subpoenas for the persons whose names were signed to the forged instrument and returns showing that they could not be found are inadmissible to show that they were fictitious persons.[92]

Sufficiency of evidence.[93] [See 7 C. L. 1749]—Knowingly passing as genuine a forged paper is conclusive of intent to defraud.[94] Age and illiteracy are insufficient

mation for altering a school warrant need not set forth the details of the organization of the school district. State v. Tyree, 201 Mo. 574, 100 SW 645.

83. People v. Alderdice, 105 NYS 395.

84. Matter of evidence. People v. McPherson [Cal. App.] 91 P 1098.

85, 86. State v. Waterbury, 133 Iowa, 135, 110 NW 328.

87. **Held admissible:** Evidence on identity of person whose name was forged, showing relation between him and accused, held admissible by state in rebuttal. State v. Clark, 117 La. 920, 42 S 425. The amount of money in defendant's possession immediately before and after the cashing of an alleged forged check may be shown. Walker v. State, 127 Ga. 48, 56 SE 113.

Not admissible: In prosecution of bounty inspector for forging bounty claim certificates, certain evidence held properly excluded as not constituting any defense. State v. Newman, 34 Mont. 434, 87 P 462. See Bounties, 9 C. L. 406.

88. Not necessary to produce person whose name was alleged to have been forged. People v. Browne, 118 App. Div. 793, 103 NYS 903.

89. People v. Alderdice, 105 NYS 395.

90. That accused had in his possession another forged deed. State v. Stark, 202 Mo. 210, 100 SW 642. Possessing and passing of other similar forged instruments. State v. Calhoun [Kan.] 88 P 1079. Evidence of forgery of other bounty claim certificates. State v. Newman, 34 Mont. 434, 87 P 462. Certain evidence relative to defendant's connection with prior conveyances held admissible in prosecution for forging and uttering a deed. People v. Browne, 118 App. Div. 793, 103 NYS 903. Evidence of other forgeries by another not admissible, defendant's knowledge or connection therewith not being shown. State v. Kelliher [Or.] 88 P 867.

91. Other instruments executed by accused may be admitted to prove his handwriting. Rev. St. 1899, § 4679. State v. Stark, 202 Mo. 210, 100 SW 642. Where defendant claims that a certified copy of a deed alleged to be forged was also spurious, evidence of a witness that he had examined a number of old instruments bearing the county clerk's seal and that the seal was different than that on the certified copy is admissible, as are instruments proven to bear the genuine seal for the purpose of comparisons. Loring v. Jackson [Tex. Civ. App.] 95 SW 19.

92. Taylor v. State [Tex. Cr. App.] 97 SW 474.

93. **Evidence sufficient** to warrant conviction under Pen. Code, § 515, for concealing misappropriations by failure to make proper entries in account books. People v. Curtiss, 118 App. Div. 259, 103 NYS 395. To sustain conviction for forgery of a check. State v. Berry [S. C.] 56 SE 662; State v. Hill [Wash.] 89 P 160; For passing forged check. Walker v. State, 127 Ga. 48, 56 SE 113. To show uttering of forged deed. People v. Alderdice, 105 NYS 395. To show that accused knowingly had in his possession a forged deed with intent to utter it as genuine in county where land was situated. State v. Stark, 202 Mo. 210, 100 SW 642. To sustain a finding that a deed in plaintiff's chain of title was forged. Loring v. Jackson [Tex. Civ. App.] 95 SW 19. In prosecution for forging a deed, evidence held sufficient to take case to jury. People v. Browne, 118 App. Div. 793. 103 NYS 903.

Evidence insufficient to support conviction for attempting to procure a loan on forged stock certificates. People v. Colmey, 116 App. Div. 516, 101 NYS 1016. Insufficient to connect defendant with forgery of a deed. State v. Kelliher [Or.] 88 P 867.

94. Charge not objectionable. Jordan v. State, 127 Ga. 278, 56 SE 422.

to show innocence of the offense of having forged papers in one's possession.[95] Evidence of forgeries of instruments not shown to be those set out in the indictment is insufficient to support a conviction.[96]

Variance.[See 7 C. L. 1748]—A charge of intent to defraud an individual may be sustained by proof of fraud on the firm of which he is a member.[97] Words on the instrument proven not constituting a part thereof do not constitute a variance;[98] and where an indictment states that the forged instrument is in defendant's possession and therefore sets out only its substance and the note is subsequently produced, a difference between its date and that alleged is not fatal.[99] But an indictment for uttering a check with two indorsements on it is not supported by proof showing that one indorsement was made after the check was uttered.[1]

Instructions.[See 7 C. L. 1750]—The materiality of an alteration is for the court.[2] Charges should make proper reference to the alleged forged instrument,[3] and must be supported by the issues [4] and the evidence.[5] The jury should be properly instructed on the question of intent.[6] They should be told that before alleged collateral forgeries can be considered as bearing on intent or motive, they must be found to be forgeries.[7] In a prosecution for uttering a forged instrument, it is proper to instruct as to what constitutes a forged instrument.[8]

Conviction. Where uttering and forging constitute forgery in the same degree and it is conceded that accused uttered a forged instrument, it is immaterial whether he is convicted under a count for forgery or under one for uttering.[9]

FORMER ADJUDICATION.

§ 1. The Doctrine in General (1423). Persons Concluded (1427).
§ 2. Adjudication as a Bar of Causes of Action or Defense (1431).
§ 3. Adjudication as Estoppel of Facts Litigated (1439).
§ 4. Pleading and Proof (1441).

95. That accused was an illiterate man fifty years old who could write only his name did not show innocence of offense of having in his possession a forged deed with intent to defraud. State v. Stark, 202 Mo. 210, 100 SW 642.

96. That amount of a forged check accorded with that of one set out held insufficient. Richard v. State, 127 Ga. 42, 55 SE 1044.

97. Evidence insufficient to show that the individual was a member of a certain firm. Sage v. People [Colo.] 90 P 58.

98. That the words "Dorsey Litho, Dallas, Texas," appeared in one corner of the instrument proven did not constitute a variance. Johnson v. State [Tex. Cr. App.] 99 SW 404.

99. Not error to introduce note in evidence. Baird v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 123, 101 SW 991.

1. State v. Waterbury, 133 Iowa, 135, 110 NW 328.

2. State v. Lotono [W. Va.] 58 SE 621.

3. Alleged forged instrument sufficiently identified in court's charge where it was referred to as a check for amount shown by the written words, though figures showed a greater amount. Miller v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 771, 100 SW 380.

4. Where only question was whether a name had been signed by accused or by some one else, instruction for acquittal if defendant did not sign held sufficiently favorable to him. Baird v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 123, 101 SW 991.

5. In prosecution for forging and uttering a deed, instructions held not supported by evidence and objectionable as omitting element of intent. People v. Browne, 118 App. Div. 793, 103 NYS 903. Evidence that defendant indorsed a forged check payable to his order is sufficient to authorize a charge that he would be guilty if he knowingly and fraudulently passed it or was in possession of it with intent to fraudulently pass it. Jordan v. State, 127 Ga. 278, 56 SE 422. Not error for court not to charge a section of the statute defining a grade of the offense for which accused could not be convicted for want of evidence. Id.

6. Failure to require finding of intent to defraud held error. State v. Tyree, 201 Mo. 574, 100 SW 645. Instructions not objectionable as ignoring intent and knowledge of one negotiating a forged check. State v. Berry [S. C.] 56 SE 662. Instruction authorizing jury to infer intent to defraud if accused obtained loan by putting up as security a note he knew to be forged held proper. State v. Calhoun [Kan.] 88 P 1079. Evidence that person to whom forged note was given was acquainted with handwriting of accused and prosecutor held not to require a special charge on defendant's intent. Abel v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 361, 97 SW 1055.

7. Taylor v. State [Tex. Cr. App.] 97 SW 474.

8. State v. Calhoun [Kan.] 88 P 1079.

9. People v. Browne, 118 App. Div. 793, 103 NYS 903.

To be distinguished from former adjudication are the doctrines that a decision of an appellate court is binding in all subsequent proceedings in the same case,[10] and that decisions on questions of law will be observed as precedents.[11] Also the doctrines of election of remedies,[12] the conclusiveness of foreign judgments under constitutional provisions,[13] must be distinguished from that of former adjudication.

§ 1. *The doctrine in general.*[See 7 C. L. 1750]—*The doctrine of former adjudication is that whatever matters have been finally*[14] *and without collusion*[15] *determined on the merits,*[16] *in any action or proceeding*[17] *in a court having jurisdiction,*[18]

10. See Appeal and Review, 9 C. L. 108.

11. See Stare Decisis, 8 C. L. 1965.

12. See Election and Waiver, 9 C. L. 1037.

13. See Constitutional Law, 9 C. L. 610; Foreign Judgments, 9 C. L. 1405.

14. Gulling v. Washoe County Bk. [Nev.] 89 P 25, rvg. 28 Nev. 450, 82 P 800. Court's findings, orders, and decrees, to which exceptions by both parties were overruled, held judgments conclusively establishing the rights of the parties. Hutchins v. Berry [N. H.] 66 A 1046.

Judgments on demurrer, dismissal and nonsuit. [See post this section On the Merits]: Judgment of dismissal after a hearing on the merits is final. School Tp. of Bloomfield v. Independent School Dist. [Iowa] 112 NW 5. Judgment in an action between two counties for apportionment of plaintiff's indebtedness fixing the boundaries of the two counties and dismissing the suit without prejudice as against a suit for the apportionment held conclusive as to the boundaries in each suit. Board of Com'rs, Hinsdale County v. Mineral County Com'rs [Colo.] 88 P 436. Dismissal of action because of another action pending held not binding after that objection was removed. City of Chicago v. Baldwin, 227 Ill. 534, 81 NE 542. A judgment of nonsuit in a suit of entry brought by defendants against petitioner held not conclusive on his petition to register title to the land. Haskell v. Friend [Mass.] 81 NE 962. No bar where suit was withdrawn before final judgment. Thomas v. Young, 79 Conn. 493, 65 A 955.

Default judgment is res judicata. Turnage v. Joyner [N. C.] 58 SE 757.

Judgment for costs held to prevent party from presenting same matter to another judge of the same court. Herring v. Atlantic Coast Line R. Co., 144 N. C. 208, 56 SE 873. Taxation of costs in criminal cases to a constable by a justice of the peace is not a final adjudication binding on the county. Code, § 4600, construed. McGuire v. Iowa County, 133 Iowa, 636, 111 NW 34.

Orders made on motions affecting the substantial rights of parties from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issue necessarily decided as are final judgments. Order denying motion to quash service of summons. Rogers v. McCord-Collins Mercantile Co. [Okl.] 91 P 864. Where two persons are contesting in the land department for a tract of government land, and one plants a portion thereof after obtaining a mandatory injunction, and the injunction is on motion dissolved, and the court orders the crop divided, such order is not final and the rights of the parties to the crop may be litigated on the final hearing. Brown v. Donnelly [Okl.] 91 P 859.

Appellate judgments: A judgment and order of an appellate court reversing and remanding a case, general in its terms and containing no direction to the trial court, is not res judicata. Zerulla v. Supreme Lodge, Order of Mutual Protection, 223 Ill. 518, 79 NE 160.

Error does not prevent binding effect. Gable v. Page [Cal. App.] 91 P 339; Johnson v. Porterfield [Ala.] 43 S 228. Judgment against public corporation. Raymer v. Trustees White School Dist. No. 18, 30 Ky. L. R. 332, 98 SW 323. Correctness of the judgment or decree is not the test whereby its effect as res judicata is determined. Hogle v. Smith [Iowa] 113 NW 556. Erroneous orders made in proceedings wherein judgment was secured does not render it any the less conclusive. Carpenter v. Landry [Tex. Civ. App.] 101 SW 277. Claim evidenced by final decree in equity cannot be questioned in probate proceedings but must be deemed "proved" in actions under Gen. Laws 1896, c. 218, § 27. Williams v. Starkweather [R. I.] 66 A. 67. Where judgment fixed liability of beneficiaries on notes taken by the trustee endorsed by them in action for accounting against trustee, claim that such judgment erroneously provides for the collection of interest held barred. Blair v. Cargill, 111 App. Div. 853, 98 NYS 109. Where in a statutory action against a street railway company and a city for injuries from a defect in the street plaintiff suffered an involuntary nonsuit against the street railway company and then elected to pursue his action against the city, which he was not bound to do, and was defeated in a trial on the merits, he was bound by the judgments and he has no ground of complaint because not nonsuited as to both defendants. Crotty v. Danbury, 79 Conn. 379, 65 A 147. Answer failing to allege that judgment had been appealed from, and appeal being dismissed before trial, its pendency at the time of the commencement of the action cannot be raised. Wheeler v. Aberdeen [Wash.] 87 P 1061.

15. B. F. Johnson Pub. Co. v. Com., 30 Ky. L. R. 148, 97 SW 749.

16. Carroll v. Grande Ronde Elec. Co. [Or.] 90 P 903; Macon & B. R. Co. v. Walton, 127 Ga. 294, 56 SE 419; Peacock v. Feaster [Fla.] 42 S 889. Unless the evidence shows that the former adjudication was on the merits, the plea fails. Evidence of former adjudication held insufficient to show that it was had on the merits. Couch v. Harp, 201 Mo. 457, 100 SW 9. Judgment must be the result of an actual and fair trial of the issues. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93. Discharge of garnishees in proceeding by judgment creditor of corporation by garnishment against stockholders held to bar suit to enforce such

stockholder's liability in equity. Montgomery Iron Works v. Roman, 147 Ala. 434, 41 S 811. A judgment, in an action on a note, in favor of defendant because there was no revenue stamp on the note held to bar action between same parties on the same note after a stamp had been placed thereon. Roney v. Westlake, 216 Pa. 374, 65 A 807. Waiver or withdrawal of demand for damages by a cotenant in a suit to recover possession of his interest in a mining claim held not to bar him from subsequently recovering the value of his share of ore extracted therefrom in a suit for an accounting. Dettering v. Nordstrom [C. C. A.] 148 F 81. A denial of mandamus on the ground that the railroad defendant was in the hands of a Federal receiver held not to preclude, after the discharge of the receiver, proceedings involving the same matters before the corporation commission. Winchester & S. R. Co. v. Com., 106 Va. 264, 55 SE 692. A decree expressly reserving from its operation the right to take proceedings in respect to certain matters is no bar to a subsequent action on such matters, but precludes the parties from litigating the matters not within the exception. Smith v. Cowell [Colo.] 92 P 20. Judgment of appellate court that lower court had no jurisdiction of case held not to bar a subsequent suit on the same cause of action. Brick v. Atlantic Coast Line R. Co. [N. C.] 58 SE 1073.

No bar by a dismissal not upon the merits. In re Hanlin's Estate [Wis.] 113 NW 411; Robb v. New York & Cleveland Gas Coal Co., 216 Pa. 418, 65 A 938.

Dismissal on technical grounds is no bar to a subsequent suit, except as to the ground on which the dismissal was based. Smith v. Cowell [Colo.] 92 P 20. Dismissal on the ground that all matters of difference between the parties had been adjusted held no bar. Shakespeare v. Caldwell Land & Lumber Co., 144 N. C. 516, 57 SE 213. Dismissal of petition on general demurrer on the ground that petitioner was not able to take advantage of his equitable defenses in the court held no bar. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93. Dismissal of an equity suit on the ground that plaintiff should have proceeded at law is no bar to a legal action thereafter commenced. Costello v. Grant County Mut. Fire & Lightning Ins. Co. [Wis.] 113 NW 639. Dismissal of crossbill held not to bar suit on note set up therein. Grider v. Corbin, 116 App. Div. 818, 102 NYS 181. Dismissal of petition of mandamus against city clerk, to compel him to call a special election, for failure of relator to amend his petition after the overruling of a demurrer to the return, held not to bar subsequent mandamus proceedings on a subsequent petition for an election. State v. Hinkel [Wis.] 111 NW 217. Dismissal of action in justice court because the summons did not comply with the requirement that it have attached thereto "a copy of the cause of action sued on," and because "it was impossible to tell from the summons or the 'acount' thereto attached, the nature of the claim upon which the action was based," held no adjudication on the merits. Macon & B. R. Co. v. Walton, 127 Ga. 294, 56 SE 419.

Dismissals on the merits: Dismissal after hearing on the merits is a bar. Whitney v. Whitney [Neb.] 110 NW 555. Judgment dismissing action for trial of right to property is conclusive of claimant's right to the property. Kempner v. First Nat. Bk. [Tex. Civ. App.] 17 Tex. Ct. Rep. 341, 99 SW 112. Dismissal of bill to set aside tax deeds as invalid is on the merits. Pond v. Huling, 125 Mo. App. 474, 101 SW 115. A decree dismissing a proceeding for limitation of liability for damages for a collision after hearing, on the ground that petitioner was the owner of both vessels concerned in the collision and both of which were in fault and had surrendered but one, is on the merits. The San Rafael, 149 F 893. A judgment of dismissal entered on the sustaining of a statutory objection to the admission of any evidence under the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, is equivalent to one on general demurrer and is on the merits. Coram v. Ingersoll [C. C. A.] 148 F 169. So held where in an action on a contract the judgment of dismissal was affirmed on appeal in an opinion which construed the contract and held that the facts alleged in the complaint did not show a performance of the contract entitling plaintiff to recover. Id. Under Code Civ. Proc. § 1007, a judgment of dismissal of the complaint is a bar if on the merits and such fact appears by express declaration. Glass v. Basin & Bay State Min. Co., 35 Mont. 567, 90 P 753. Judgment in an action for breach of contract not so declaring held not a bar. Id.

Voluntary dismissal. Woodward v. Davidson, 150 F 840. A judgment of voluntary dismissal is no bar. Smith v. Cowell [Colo.] 92 P 20; Sevier v. Bowling, 30 Ky. L. R. 217, 97 SW 806; Couch v. Harp, 201 Mo. 457, 100 SW 9.

Dismissal without prejudice: A dismissal without prejudice does not constitute an estoppel. Voluntary dismissal. Woodward v. Davidson, 150 F 840. Petition in condemnation proceedings. Kittery Water Dist. v. Agamenticus Water Co. [Me.] 67 A 631. A decree of dismissal without prejudice to any "action at law" rendered by a Federal court on sustaining a demurrer to the complaint in equity on the ground that plaintiff was not entitled to the relief prayed for is a bar to a subsequent action in a state court setting up a like equitable cause of action; the quoted words meaning a cause of action at law, notwithstanding the Code abolishes different forms of action. Smith v. Cowell [Colo.] 92 P 20.

Nonsuit against garnishee in proceeding by judgment creditor of corporation by garnishment against stockholder held not to bar suit to enforce such stockholder's liability in equity. Montgomery Iron Works v. Roman, 147 Ala. 434, 41 S 811.

Judgment of nonsuit is no bar (Carroll v. Grande Ronde Elec. Co. [Or.] 90 P 903), and it can make no difference upon what point the motion is allowed, or how the judgment may be framed, or what recitals it may contain, or that the motion was ordered upon the failure of plaintiff's evidence (Id.). Nonsuit of plaintiff does not bind parties though they agree that determination of instant case should be governed by the determination of another suit pending. Carp v. National Assur. Co. [Mo. App.] 99 SW 523.

Default judgment: Default judgment held a bar. Turnage v. Joyner [N. C.] 58 SE 757.

Defendant having knowledge of the pendency of the suit held binding. Kelly & Jones Co. v. More [Ga.] 58 SE 181.

Judgment on the pleadings is on the merits under Code Civ. Proc. §§ 581, 582. Bailey v. Aetna Indemnity Co. [Cal. App.] 91 P 416. A judgment on the pleadings is conclusive if it determines the merits of the controversy as distinguished from the merits of the pleading. Code Civ. Proc. § 1005 considered. Glass v. Basin & Bay State Min. Co., 35 Mont. 567, 90 P 753.

Judgment on demurrer: Judgment of dismissal on a demurrer going to the merits as that the facts stated do not constitute a cause of action is a bar. Smith v. Cowell [Colo.] 92 P 20. Judgment of dismissal sustaining a demurrer for want of jurisdiction or technical defect is not a bar to a subsequent suit. Id. Judgment on demurrer reaching the merits is res adjudicata. Northern Pac. R. Co. v. Slaght, 205 U. S. 122, 51 Law. Ed. 738; Id., 205 U. S. 134, 51 Law. Ed. 742. Judgment sustaining a general demurrer is a bar. Kempner v. First Nat. Bk. [Tex. Civ. App.] 17 Tex. Ct. Rep. 341, 99 SW 112; Carpenter v. Landry [Tex. Civ. App.] 18 Tex. Ct. Rep. 236, 101 SW 277. Judgment on demurrer to petition in action against bank directors on the ground that the cause of action therein set forth could be maintained only by the bank's receiver is no bar to a subsequent action under petition stating cause of action in favor of the individual creditor. Yates v. Utica Bank, 206 U. S. 181, 51 Law. Ed. 1015. Dismissal on demurrer reaching the jurisdiction is no bar to another action involving the same issues. Weisenborn v. Evans, 30 Ky. L. R. 781, 99 S W 629. Where a demurrer goes both to defects of form and also to the merits, a judgment thereon not designating between the two grounds will be presumed to rest on the former, the record not disclosing otherwise. Motes v. Gila Valley, Globe & N. R. Co. [Ariz.] 89 P 410. Where defendant demurred to a bill on the ground that it was without equity and was multifarious and the demurrer was sustained but the order not reciting upon which ground, it will be presumed that the demurrer was considered on the merits. Burton v. McMillan [Fla.] 42 S 879. Striking out claim for damages in a replevin action as irrelevant held not to bar action thereon. Haughawaut v. Royse, 122 Mo. App. 72, 98 SW 101. If a portion of a plea or answer is stricken out upon a ruling made that it is without merit, this is res judicata, if an amendment setting up substantially the same defense is tendered at a later date. Morrison-Trammell Brick Co. v. McWilliams, 127 Ga. 159, 56 SE 306. But if such part of a plea or answer is stricken on a special demurrer on the ground that it is not sufficiently specific, it is not res judicata. Id.

Presumption as to decision on merits: Under Code, § 3771, requiring a judgment where both matters in abatement and bar are pleaded, if based on the matter in abatement to so declare, a judgment failing to so declare will be presumed to have been on the merits. Reeves & Co. v. Lamm Bros. [Iowa] 112 NW 642.

17. Judgment of court of competent jurisdiction as to validity of bonds held res judicata. Board of Com'rs of Day County v. Kansas [Okl.] 91 P 699. Order of court retaxing costs held res judicata as between moving party and officer in whose favor costs are taxed. Sheibley v. Cooper [Neb.] 113 NW 626. Where motion to set aside summons because of lack of proper foundation and of nonconformity with the laws of the state was denied and defendant failed to plead in the time allotted, held validity of summons was res judicata. Kellogg v. Maloney [C. C. A.] 152 F 405. Except in the cases of provisional remedies the denial of a motion bars a subsequent motion for the same relief, unless based on facts subsequently arising on the ground that the former judgment was obtained by fraud. Haskell v. Moran, 117 App. Div. 251, 102 NYS 388. Motion to bring in parties. Id.

Accounting of executor or trustee. In re Menzie's Estate, 54 Misc. 188, 105 NYS 925.

Condemnation proceedings. Laguna Drainage Dist. v. Charles Martin Co. [Cal. App.] 89 P 993.

Habeas corpus. Bleakley v. Barclay [Kan.] 89 P 906; Ex parte Moebus [N. H.] 66 A 641. Judgment in habeas corpus rendered in one court is a bar to a further proceeding on the same issues in an appellate court. In re Boutelle, 124 Mo. App. 450, 101 SW 1096.

Contra: The doctrine of res judicata does not apply in matters of habeas corpus, and, there being no Federal statute limiting the common-law right of an applicant to petition successfully every judge having authority in the premises, a Federal court may entertain a petition, notwithstanding the denial in the same petition by a state court also having jurisdiction. In re Kopel, 148 F 505.

Mandamus proceeding. Kaufer v. Ford, 100 Minn. 49, 110 NW 364.

18. Page v. Garver [Cal. App.] 90 P 481. Equity and law. Smith v. Cowell [Colo.] 92 P 20. Not a bar where it affirmatively appears that the court was without jurisdiction. Weaver v. Schumpert, 118 La. 315, 42 S 949. Judgment which shows affirmatively that the court acquired no jurisdiction is not a bar. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 SW 572. Judgment of commitment under Civil Code 1895, § 2372 et seq., is a judgment of a court of competent jurisdiction. Kennedy v. Meara, 127 Ga. 68, 56 SE 243. Judgment rendered by the probate court on matters beyond its jurisdiction is not conclusive. Ivie v. Ewing, 120 Mo. App. 124, 96 SW 481. Probate decree by judge of county adjoining county of decedent's residence and acting at the request of the probate judge of the county of decedent's residence held not binding for want of jurisdiction. In re Mears' Estate, 75 S. C. 482, 56 SE 7. Order of distribution of probate court held not a conclusive adjudication that a partnership did not exist between decedent and another to which the property belonged as against a creditor of the alleged partner who seeks to follow the property into the hands of the heirs. Bartleson v. Feidler, 149 F 299. So far as relates to assets applied and disclosed on accounting of executors held decree of surrogate allowing acounts was decisive of validity of certain provisions of the will relating to accumulations so far as they affected assets applied and disclosed in such report. Kirk v. McCann, 117 App. Div. 56, 101 NYS 1093.

or before an officer or board exercising judicial functions,[19] *are concluded by such adjudication and cannot again be litigated* [20] *between the same parties* [21] *or their privies,*[22] *either before the same or another tribunal,*[23] *until the adjudication has been duly reversed, modified, or otherwise adjudged erroneous.*[24] The doctrine of res judicata does not apply to propositions of law,[25] and in this regard is to be distinguished from the rules applicable to the law of the case.[26] The fact that the forms of action and the precise remedies sought in the two actions are different does not prevent an estoppel.[27] Consequently, it makes no difference that one suit is at law and the other in equity.[28] While judgment is no bar to actions on subsequently acquired or arising rights,[29] still the fact that the former judgment was rendered

19. Determination of attorney general not to bring quo warranto proceedings no bar to such proceedings by successor. People v. McClellan, 118 App. Div. 177, 103 NYS 146.

20. Gulling v. Washoe County Bk. [Nev.] 89 P 25, rvg. 28 Nev. 450, 82 P 800.

21. Peacock v. Feaster [Fla.] 42 S 889; Chatman v. Hodnett, 127 Ga. 360, 56 SE 439; Pratt v. Griffin, 223 Ill. 349, 79 NE 102; Gulling v. Washoe County Bk. [Nev.] 89 P 25, rvg. 28 Nev. 450, 82 P 800; McCord v. Akeley [Wis.] 111 NW 1100. See post this section, Persons Concluded.

22. Gable v. Page [Cal. App.] 91 P 339; Peacock v. Feaster [Fla.] 42 S 889; Pratt v. Griffin, 223 Ill. 349, 79 NE 102; Gulling v. Washoe County Bk. [Nev.] 89 P 25, rvg. 28 Nev. 450, 82 P 800; McCord v. Akeley [Wis.] 111 NW 1100. See post this section, Persons Concluded.

23. Peacock v. Feaster [Fla.] 42 S 889; Strickland v. National Salt Co. [N. J. Eq.] 64 A 982. Foreign judgment res judicata. Bailey v. Wilson, 52 Misc. 644, 54 Misc. 45, 103 NYS 1021; Bleakley v. Barclay [Kan.] 89 P 906. State and Federal. Kellogg v. Maloney [C. C. A.] 152 F 405; St. Louis Min. & Mill. Co. v. Montana Min. Co., 148 F 450. Decree of superior court of Florida rejecting a Florida land claim on the ground of fraudulent alteration bars an action in the Federal court to establish it. Act of June 22, 1860, construed. United States v. Dalcour, 203 U. S. 408, 51 Law. Ed. 248. A decree of a Federal court is binding on the parties and on the state courts until set aside, though it conflicts with a decision of the state courts. Smith v. Cowell [Colo.] 92 P 20. Determination of the courts of one state on the question of its jurisdiction is res adjudicata in an action on the judgment in another state. Tootle v. McClellan [Ind. T.] 103 SW 766. Judgment of probate court in partition is conclusive in a similar proceeding in equity unless grounds of equitable interposition appear. Finch v. Smith, 146 Ala. 644, 41 S 819.

24. City of Elizabeth v. Central R. Co., 70 N. J. Eq. 797, 66 A 418. No bar where trial court's decree has been reversed on appeal and cause remanded. Wiemers v. People, 225 Ill. 82, 80 NE 68. Judgment of commitment under Civ. Code 1895, § 2372 et seq., binding on parties so long as unreversed. Kennedy v. Meara, 127 Ga. 68, 56 SE 243. Unappealed judgment of circuit court on appeal from a magistrate's court held res judicata. Forrest v. McBee [S. C.] 58 SE 955. The validity of a deed being in issue, the judgment rendered is binding on the parties and their privies until reversed on appeal or set aside by direct attack. Wilkinson v. Lehman-Durr Co. [Ala.] 43 S 857.

25. In re Hurlbut's Estate, 51 Misc. 263, 100 NYS 1098.

26. See Appeal and Review, 9 C. L. 108.

27. Manchester Home Bldg. & Loan Ass'n v. Porter, 106 Va. 528, 56 SE 337. Is not necessary that the form of action be the same in both cases. Van Camp v. Huntington, 39 Ind. App. 28, 78 NE 1057. Judgment in mandamus to compel lodge to reinstate a member is a bar to a judgment for damages for malicious expulsion. Matousek v. Bohemian Roman Catholic First Cent. Union, 192 Mo. 588, 91 SW 538.

28. Van Camp v. Huntington, 39 Ind. App. 28, 78 NE 1057. Judgment in injunction suit held conclusive as to execution of contract in subsequent action on the contract for services. Id. Facts arising after the commencement of the original action. Ben C. Jones & Co. v. Gammel Statesman Pub. Co. [Tex.] 99 SW 701. A judgment on the merits in an action at law is conclusive in equity, except as to matters within its exclusive jurisdiction and a determination in equity is conclusive in an action at law. Smith v. Cowell [Colo.] 92 P 20. Judgment quieting title to property is not a bar to a subsequent action by defeated party based upon title acquired after the adjudication. Wadley v. Leggitt [Ark.] 101 SW 720. Where, in ejectment, it is shown that in a previous equity suit, in which the parties and property were the same and the equity set up against the legal title was the same, a decree was entered against plaintiff, it constitutes res judicata. Bruner v. Finley, 217 Pa. 127, 66 A 159.

29. Right to enter on land. Richey v. Beus, 31 Utah, 262, 87 P 903. The estoppel of a judgment only applies to the facts as they existed when the judgment was rendered and does not extend to facts occurring after such time. State v. Leavenworth [Kan.] 90 P 237. A judgment is not a bar to a cause of action accruing after the rendition of the judgment. Roach v. Curtis, 115 App. Div. 765, 101 NYS 333. A judgment in a claim case finding the property not subject on the ground that defendant had no leviable interest held not to estop plaintiff in fi. fa. from proceeding to subject the property after tenable interest had been acquired. McLendon v. Shumate [Ga.] 57 SE 886. In a suit to enforce an agreement, defendant can urge any defense based on circumstances arising subsequent to a previous adjudication in a suit brought under the

after the commencement of the second suit,[30] or during the pendency therof,[31] does not affect its operation as res judicata, and the parties trying to relitigate the questions in another tribunal, the court first having jurisdiction may enjoin such proceedings.[32] Where there are no intervening equities, a nunc pro tunc judgment will sustain a plea of res judicata between the parties as to the matter involved in the litigation.[33] When application is made to collect a judgment by process not contained in itself, and requiring, in order to be sustained, reference to the alleged cause of action upon which it is founded, the aid of the court should not be granted when upon the face of the record it appears that the judgment rests upon no cause of action whatever.[34] In some cases a decision not technically res judicata will be given such effect by analogy.[35] What effect a judgment of a state court shall have as res judicata is a question of state or local law.[36] The effect of a former adjudication cannot be overcome by a collateral attack on the judgment.[37]

Persons concluded.[See 7 C. L. 1754]—All adversary parties[38] to the action, or persons in privity with them[39] who acquire their interest subsequent to the suit[40] are bound by a final judgment on the merits rendered therein. The term "privity" suggests mutual succession or relation to the same property or property right.[41] While,

same agreement. Buttlar v. Buttlar [N. J. Eq.] 65 A 485. The fact that a party may have obtained a judgment against another does not bar him from subsequently asking for the same kind of relief against the same party, if conditions have changed and new facts and elements are brought in. State v. Leavenworth [Kan.] 90 P 237. Rule applied to quo warranto proceedings. Id. An order granting, after hearing a preliminary injunction, is not res judicata on an application for the dissolution thereof on the grounds that it has been in force 12 months, that the applicant does not consent to its remaining longer in force, and that the cause has not been set for trial on its merits, as expressly authorized by Code Civ. Proc. § 527. German Sav. & Loan Soc. v. Aldridge [Cal. App.] 89 P 1063. Decree enjoining a nuisance is not res adjudicata as to fact subsequently arising and bringing about a change of conditions. Perrin v. Crescent City Stockyard & Slaughterhouse Co. [La.] 44 S 513. Judgment in action to cancel lease does not bar cause of action which could not arise until lease was canceled. Lincoln Trust Co. v. Nathan, 122 Mo. App. 319, 99 SW 484.

30. Manchester Home Bldg. & Loan Ass'n v. Porter, 106 Va. 528, 56 SE 337.

31. Patent infringement. Bredin v. National Metal Weatherstrip Co., 147 F 741.

32. Proceedings in state court enjoined by Federal court. St. Louis Min. & Mill. Co. v. Montana Min. Co., 148 F 450.

33. Walden v. Walden [Ga.] 57 SE 323.

34. Brunson v. Caskie, 127 Ga. 501, 56 SE 621. On application for mandamus to compel issue of county warrant to pay a judgment, the principle of res judicata held not to apply, but the court would go behind the judgment to ascertain if the liability be such as the county may legally levy a tax to discharge it. Id.

35. A decision of a state court denying the right of a city to attack the validity of a contract made by it with a water company held controlling in a Federal court in a subsequent action by the water company against the city on the contract, even though the question of the validity of the contract was not strictly res judicata. City of Defiance v. McGonigle [C. C. A.] 150 F 689.

36. Carson v. Three States Lumber Co. [C. C. A.] 149 F 377.

37. Corbet v. Craven [Mass.] 82 NE 37. See Judgments, 8 C. L. 530.

38. Johnson v. Knudson-Mercer Co., 167 Ind. 429, 79 NE 367. Codefendants in an action in which they appear and litigate the issues determined by the decree are concluded by it although the issues are not set forth in the pleadings. Gulling v. Washoe County Bk. [Nev.] 89 P. 25, rvg. 28 Nev. 450, 82 P 800. Where two parties are by way of defense to a suit by one of them charged with a joint conversion, the determination against defendants is a bar to an action against the other party. Clement v. Clement [Tex. Civ. App.] 17 Tex. Ct. Rep. 575, 99 SW 138. In a suit to quiet title to water right defendant, who obtained title under a foreclosure proceeding adjudging that plaintiff had a certain water right and with knowledge of the adjudication, was conclusively bound thereby, and could not plead that plaintiff's grantors had abandoned the water right. Schmidt v. Olympia Light & Power Co. [Wash.] 90 P 212.

39. See ante this section. As to who are privies, see infra, this section.

40. Only those are privies who acquire an interest in the subject-matter of the action subsequent to its commencement. A decree in favor of the defendant in a suit for infringement of a patent brought after the defendant had been succeeded in business by a corporation is not a bar to a second suit against the corporation which continued the alleged infringement, but was not made a party to the first suit. Calculagraph Co. v. Automatic Time Stamp Co., 154 F 166. Where after sale and delivery of goods to buyer's agent the seller resells them, replevin by the second buyer against the agent is not binding on the principal. Northwestern State Bk. v. Silberman [C .C. A.] 154 F 809. See, also, Sill v. Pate, 230 Ill. 39, 82 NE 356.

41. ILLUSTRATIONS: One who advised and directed litigation and did not inter-

vene therein when his rights were involved is bound by the decree. Champlin v. Butler, 124 Ill. App. 41. Irrigation case. **Carrier of water and persons receiving water** held in privity. Combs v. Farmers' High Line Canal & Reservoir Co. [Colo.] 88 P 396. Suit by **government** to cancel patent to public lands held not binding on **homestead claimant** not a party thereto. Brandon v. Ard, 74 Kan. 424, 87 P 366.

Assignor and assignee held privies. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 NW 499.

Bailor and bailee in privity. Rowe v. Grangor, 118 App. Div. 459, 103 NYS 439.

Bankrupt and trustee in bankruptcy held privies. O'Sullivan's Trustee v. Douglass, 30 Ky. L. R. 366, 98 SW 990. Adjudication of existence of partnership in a bankruptcy proceeding against it held not binding on trustee, of individual partner, not a party to such proceeding. Manson v. Williams [C. C. A.] 153 F 525.

Citizens, etc.: Residents and inhabitants of county bound by taxpayers' action. See Giblin v. North Wisconsin Lumber Co. [Wis.] 111 NW 499. Judgment validating an issue of municipal bonds is conclusive upon the city, its citizens, and every one else. Baker v. Cartersville, 127 Ga. 221, 56 SE 249. Judgment in proceeding brought by a legal voter of a county on behalf of himself and all other legal voters of the county held binding on all such voters. Kanfer v. Ford, 100 Minn. 49, 110 NW 364. Decree of the Choctaw and Chickasaw citizenship court in a test case against ten persons as provided by statute, vacating the judgments of the United States courts for irregularity, is binding on all persons similarly situated who were not made parties to the suit but abided by the decision therein and failed to transfer their cases to the citizenship court. Wallace v. Adams, 204 U. S. 415, 51 Law. Ed. 547.

Consignor and consignee of goods held not in privity with each other, there being no relation of agency existing between them. American Exp. Co. v. Des Moines Nat. Bk. [Iowa] 111 NW 31.

Corporation and stockholders: Suit against stockholders and managing agent of corporation as an individual does not bind corporation. Harvey v. Sparks Bros. [Wash.] 88 P 1108. In the absence of fraud or collusion a judgment against a corporation is conclusive of the amount and validity of the claim as against the stockholders. Montgomery v. Whitehead [Colo.] 90 P 509.

Corporation and officers: In suit against officers for mismanagement of banking affairs, neither the bank nor creditors or stockholders are estopped to set up claims of the bank against other creditors claiming under judgments or otherwise, the matters not having been previously adjudicated in suits between the same parties. Elliott v. Farmers' Bk., 61 W. Va. 641, 57 SE 242.

Debtor and assignee for creditors: Claim existing at the time of the execution of an assignment for the benefit of creditors can be subsequently enforced against the debtor and the judgment is binding on the assignee. Nicholas v. Lord, 118 App. Div. 800, 103 NYS 681. Executor and foreign administrator are not in privity. Brown v. Fletcher's Estate, 146 Mich. 401, 13 Det. Leg. N. 818, 109 NW 686. Executor held not in privity with foreign administrator so as to be bound by judgment on an award against him in an action started in decedent's lifetime though decedent had stipulated that the "award" should be binding on himself, his executors, administrators, etc. Id. Probate proceedings in a foreign jurisdiction by which a domestic administrator was removed from his position as guardian of certain minors on petition of a surety on his bond held not to bar successor from denying that administrator had paid over to himself as guardian the shares of the estate to which the minors were entitled. State v. Whitehouse [Conn.] 67 A 503. **General and ancillary administrator** subsequently appointed held in privity. Benker v. Meyer [C. C. A.] 154 F 290. Suit by an administrator on a chose in action constituting part of the estate bars a second suit thereon by an ancillary administrator of the estate in another jurisdiction. Coram v. Ingersoll [C. C. A.] 148 F 169.

Grantor and grantee held in privity. Potter v. Ft. Madison Loan & Trust Bldg. Ass'n, 133 Iowa, 367, 110 NW 616.

Heirs, ancestor, and personal representatives: A judgment binding upon an intestate is binding on his heirs at law. Page v. Carver [Cal. App.] 90 P 481. Widow held in privity with husband and his administrator. Suit to set aside deed. Id. Where, as in Ohio, there is no privity between an administrator and the heirs of the decedent, a judgment against the administrator is no more than prima facie evidence against the heirs and their grantees of a claim against the estate, but for the purpose of some cases it may be considered that such judgment is conclusive evidence. Kemper v. Apollo B. & L. Co., 5 Ohio N. P. (N. S.) 403.

Husband and wife: Judgment determining that one holds realty as mortgagee and not as owner binds his wife though she is not a party to the decree. Stitt v. Smith [Minn.] 113 NW 632. Where assignee of notes sued husband and wife thereon held he could show that matter set up in defense was adjudicated in another action brought by the husband against the payee and received his damages therefor. Community benefited. Parker v. Galbraith [Wash.] 89 P 712. Judgment for defendant in action by wife for injuries is not a bar to action by husband for injuries to wife. Womach v. St. Joseph, 201 Mo. 467, 100 SW 443.

Life tenant and remaindermen: Decree for sale of real estate in action brought by life tenant is not binding upon remaindermen not in esse at the time the decree was rendered, where they take title under a will as heirs of the body of the life tenant, who takes life estate under the same will. Heady v. Crouse, 203 Mo. 100, 100 SW 1052.

Minor and next friend held in privity. Walden v. Walden [Ga.] 57 SE 323.

Parent and child: Children not in privity with parents. Divorce suit. Graham v. Graham [Colo.] 88 P 852. Children asserting title to land as heirs of father and independently of mother who was party to former suit held not in privity with her. McSwain v. Ricketson [Ga.] 58 SE 655. Judgment against surviving wife establishing community debt and foreclosing lien against community property is conclusive as against minor heirs of deceased husband. Henry v. Vaughan [Tex. Civ. App.] 18 Tex. Ct. Rep. 711, 103 SW 192.

Partners: Judgment in action against an

except in the case of proceedings in rem,[42] only parties or privies to parties to the action are bound by the judgments therein,[43] still it is not necessary that one be a party to the record in order to be bound; it is sufficient if he has an interest and participates in the action,[44] or has negligently failed to become a party,[45] or has consented to the

individual member of a firm is res adjudicata in an action against the firm involving the same issues. Fox v. Clemmons, 30 Ky. L. R. 805, 99 SW 641.

Principal and agent: Exclusive sales agents held in privity with principal. Patent infringement suit. Warren Featherbone Co. v. DeCamp, 154 F 198. Judgment in favor of a corporate defendant held to bar similar action against the corporation's agent on the same transaction. Krolik v. Curry, 148 Mich. 214, 14 Det. Leg. N. 74, 111 NW 761. Where after sale and delivery of goods to buyer's agent the seller resells the goods, replevin by the second buyer against the agent is not binding on the principal. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

Principal and surety: Order of probate court approving administrator's account and charging the administrator with interest is, unless impeached for fraud, conclusive on the administrator and his sureties in a suit on his bond. McDonald v. People, 222 Ill. 325, 78 N E 609.

Public officials: Successor in public office is in privity with predecessor. Wheeler v. Aberdeen [Wash.] 87 P 1061.

Purchaser pendente lite: Trustee in bankruptcy intervening in a suit instituted by a claimant to recover specific property alleged to have been purchased by the bankrupt by fraudulent representations held bound by the judgment as a person acquiring an interest pendente lite. Linstroth Wagon Co. v. Ballew [C. C. A.] 149 F 960.

Trustee and beneficiary: Trustee and beneficiary held in privity. Friedman v. New York, etc., R. Co., 52 Misc. 20, 100 NYS 981; Letcher v. Letcher's Trustee, 30 Ky. L. R. 707, 99 SW 628. Title to realty involved and beneficiary had full knowledge of trustee's action. Van Etten v. Passumpsic Sav. Bk. [Neb.] 113 NW 163. Judgment in action by a creditor against a trustee for the benefit of creditors to impress a trust upon certain real estate purchased by defendant held not an adjudication of the rights of another creditor. Eisert v. Bowen, 117 App. Div. 488, 102 NYS 707. In a creditor's suit to subject real estate devised to trustees to the payment of the testator's debts, held the trustees, having power to sell, etc., represented all persons beneficially interested in the estate. McDevitt v. Bryant, 104 Md. 187, 64 A 931.

42. The record in lunacy proceedings holding the person incompetent is conclusive evidence that he was incapable of making a valid contract. O'Reilley v. Sweeney, 54 Misc. 408, 105 NYS 1033.

43. Silva v. Hawkins [Cal.] 92 P 72; Sill v. Pate, 230 Ill. 39, 82 NE 356; Barfield v. Saunders, 116 La. 136, 40 S 593; Hutchins v. Berry [N. H.] 66 A 1046. Allowance of return of guardian filed as a result of a proceeding brought by surety on his bond to be discharged from his liability held not binding on surety. Rich & Bros. v. Fidelity & Deposit Co., 126 Ga. 466, 55 SE 336. The judgment rendered in a suit to quiet title to land against a claimant under a void tax deed is not binding upon the real owner who is not a party to the suit. Oehler v. Walsh, 7 Ohio C. C. (N. S.) 572. Parties in possession of a passway during the progress of a suit involving the right to its use and not parties to the suit are not bound by the judgment rendered therein. Jones v. Jones [Ky.] 101 SW 980. Judgment as to lands embraced within a patent is not binding in an action to quiet title brought by one not a party to the prior action. Davis v. Commonwealth Land & Lumber Co., 141 F 711. Report of commissioners and judgment thereon setting apart premises as dower held not admissible in evidence as tending to show adverse possession against the administrator, who claims independent title thereto and was not a party to the suit. Whitehead v. Pitts, 127 Ga. 774, 56 SE 1004. Judgment in favor of officer in action based on an excessive levy under a writ of replevin does not bar an action against those who procured the levy. Three States Lumber Co. v. Blanks [Tenn.] 102 SW 79. One of two defendants in an action for conversion, they having filed a joint plea of not guilty, is unaffected by a judgment in a former action by plaintiff against the other defendant, adjudging title to be in plaintiff. Posey v. Gamble [Ala.] 41 S 416. Failure to recover judgment in an action against the maker of a note, the guarantor not being a party, will not preclude a subsequent judgment against the guarantor. Thompson v. Brown, 121 Mo. App. 524 97 SW 242. Where a member of three firms gave orders to defendant indiscriminately and defendant unsuccessfully attempted to set off his entire claim in a suit against him and one of the firms, the judgment did not bar his rights as against the others. Hyslop v. Johnson, 30 Ky. L. R. 379, 98 SW 993. A judgment foreclosing a real estate mortgage held not res judicata on the issue of a third person's water rights under a conveyance conveying other land together with a water right. Schmidt v. Olympia Light & Power Co. [Wash.] 90 P 212. Judgment for alimony and monthly allowance for custody and care of children, in a suit for divorce, entire sum not to exceed $2,000, held not to bar suit by wife for continued allowances for children after $2,000 had been paid, since the children were not parties to the divorce suit. Graham v. Graham [Colo.] 88 P 852. Judgment in proceedings to charge purchaser of a railroad with a claim against the receivers thereof held not res judicata of a third party's claim against such claimant though arising out of the same transaction. Doyle v. Cincinnati, etc., R. Co., 148 F 322. A decree, in a suit by a father to set aside a conveyance of land which belonged to himself and his wife, executed by him after the wife's death to his sons, on the ground of fraud, which denies the relief prayed for, is not res judicata in a suit by other heirs of the deceased wife against the sons for partition of the premises. Stern v. Selleck [Iowa] 111 NW 451.

44. The term "parties" includes those who

obtaining of the decree.[46] A judgment in rem against one party cannot be pleaded as a bar to an action in personam against another.[47] As a general rule community rights cannot be affected by a suit to which the wife is not a party,[48] though the contrary has been held where the community has received the benefits of the former adjudication.[49] A judgment against one joint tort-feasor does not bar actions against the others jointly liable.[50] The fact that a person was non compos mentis does not affect the binding effect of the judgment.[51] When one is responsible by force of law or by contract for the faithful performance of the duty of another, a judgment against that other for failure in the performance of such duty may be used as evidence in a suit against the party so responsible for that other.[52] While judgments are presumptively only conclusive against parties in the character in which they sue or are sued,[53] still if a person is a party to the record in some capacity or has so allied and identified himself with a party as to have had his rights submitted by his consent to the determination of the court in a given case, he is bound by the judgment as if he was an actual party to the record, and, if an actual party in some capacity, is bound in every capacity in which his rights were effected.[54] It

are directly interested in the subject-matter of the suit, knew of its pendency, and had the right to control, direct or defend it Parsons v. Urie, 104 Md. 238, 64 A 927. Real parties held bound where though not made parties to the bill they as solicitors conducted and controlled the defense and testified on the trial. Id. Witness fully acquainted with character and object of action and interested in the result is estopped as fully as though he had been a party. American Bonding Co. v. Loeb [Wash.] 92 P 282. Where grantee of land gave testimony in suit brought by grantor against others to recover such land, and grantee had knowledge that in such suit effort was being made to divest grantor of all title to the land, held he was not bound by judgment against grantor. Cornett v. Moore, 30 Ky. L. R. 280, 97 SW 380. Person though technically not a party held bound by judgment where he was intimately connected with them in interest and actively participated therein. Pew v. Johnson, 35 Mont. 173, 88 P 770. The obtaining of the approval of a guardian's return, though participated in by his surety, held not to render the surety liable to creditors for the amount of their claims, the refusal to pay which would not in law make the surety liable on the bond. Rich & Bros. v. Fidelity & Deposit Co., 126 Ga. 466, 55 SE 336. Judgment in garnishment suit is res adjudicata in a subsequent proceeding to reach the funds, brought by one who appeared generally as claimant in the former action. Southern R. Co. v. Funke [Ala.] 44 S 397. Evidence held to show that one was a party to a prior suit, though misnamed therein. Haines v. West [Tex. Civ. App.] 18 Tex. Ct. Rep. 469, 102 SW 436.

Prosecuting witness in criminal action is not bound in a subsequent civil action by the judgment in the former. Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 SW 124.

45. Judgment against indemnitee city held binding on indemnitor contractor having notice of the suit. City of Seattle v. Saulez [Wash.] 92 P 140.

46. Equitable owners of lands standing in the name of a bankrupt held estopped by a decree obtained with their consent quieting title in him absolutely. In re Coffin, 146 F 181. Though it has been held that the rule that one not a party to a suit may be bound as a privy by the judgment or decree therein applies only to cases where, by agreement, a joint defense is made or a principal defends his agent, or a licensor his licensee, or other like relation contractual or representative exists. Patent infringement suit. Rumford Chemical Works v. Hygienic Chemical Co., 148 F 862. One is not bound as a privy merely because he contributes to the defense without having the right to control the proceedings or to appeal from the judgment or decree. Id. Contractor, not a party to a suit against a city to have a contract entered into with him declared void, is not bound by the judgment in that action though he paid the fee of an attorney employed to assist the city attorney. City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F 329.

47. Henderson Iron Works & Supply Co. v. Howard [La.] 44 S 296.

48. Judgment for plaintiff in an action for possession of community property to which the wife was not made a party held not to bar suit, have deed declared a mortgage, and judgment set aside for fraud. Gustin v. Crockett [Wash.] 87 P 839.

49. Parker v. Galbraith [Wash.] 89 P 712.

50. Johnson v. McKenna [N. J. Eq.] 67 A 395; Parks v. New York, 111 App. Div. 836, 98 NYS 94.

51. Wilkinson v. Lehman-Durr Co. [Ala.] 43 S 857. Evidence held sufficient to show that party to prior suit was of sound mind at time of trial and adjudication of former suit. Haines v. West [Tex. Civ. App.] 18 Tex. Ct. Rep. 469, 102 SW 436.

52. As against a surety on the bond of an indemnitor contractor, judgment against indemnitee city held competent to prove its own existence and the cause of action for which it was rendered if not conclusive as to the liability of the surety, who had no notice of the prior action. City of Seattle v. Saulez [Wash.] 92 P 140.

53. Sbarbero v. Miller [N. J. Eq.] 65 A 472.

54. Sbarbero v. Miller [N. J. Eq.] 65 A 472. Action against administrator as such

follows that the next friend of an infant plaintiff is not a party to the action in such a sense that the judgment therein rendered can be pleaded in bar of any cause of action he might have against the same defendant growing out of the same transaction [55] unless he allows his claim to be litigated in such action.[56] Where one is liable over to a defendant and actually defends the suit, it is immaterial that the defense was not formally tendered him.[57] Certain decrees in equity are classified as quasi in rem, and such decrees may be offered in evidence as against any person with respect to any property described therein for the purpose of establishing prima facie the status of that property.[58] A judgment ordered in an action involving the title to real property and adjudicating it to be in one of the parties is admissible in evidence on behalf of the party claiming under the judgment, and subsequently asserting a claim to the property affected by it as a link in his chain of title, although such judgment would not be conclusive on the party against whom it is offered because he was not a party or privy thereto.[59] It is admissible in evidence, not for the purpose of defeating or affecting any claim or title of a party who was not a party or privy to such judgment, but solely as a muniment in an asserted title.[60] Where a person by an assumed or trade name sues another, and the judgment of the court goes in favor of the defendant, the judgment will be binding on the person suing, and such person will be afterwards in his real name, estopped from denying the validity of the judgment.[61] The rule that an adjudication in favor of a plaintiff against two or more defendants is not binding on such defendants is rather an exception to the rule that all parties to a decree are concluded thereby than a rule itself.[62] The exception relates to matters between co-defendants which are not in themselves necessarily involved in the plaintiff's contention against each and all the defendants, or matters which are not the main object and purpose of the plaintiff's suit.[63] The foregoing rules do not prevent the use of the judgment as evidence even as against third parties.[64]

§ 2. *Adjudication as a bar of causes of action or defense.* See 7 C. L. 1759—*As a general proposition, it is stated that to constitute a prior adjudication a complete bar to a cause of action or defense there must occur identity of parties,*[65] *identity of*

seeking to bind him individually is a bar to an action involving the same issues against him as an individual. Clement v. Clement [Tex. Civ. App.] 14 Tex. Ct. Rep. 575, 99 SW 138.

55. Suit by father as next friend of infant son for personal injuries suffered by the latter. Bowring v. Wilmington Malleable Iron Co. [Del.] 67 A 160.

56. Bowring v. Wilmington Malleable Iron Co. [Del.] 67 A 160. Suit by father for loss of services of child and expenses incurred held barred by judgment in former suit by father as next friend of infant son in which evidence of such facts was introduced. Id.

57. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 NW 499.

58. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 NW 499. A decree declaring invalid fraudulent or spurious municipal obligations which are non-negotiable but readily assignable is of this class. Id.

59, 60. Chapman v. Moore [Cal.] 91 P 324.

61. Clark Bros. v. Wyche, 126 Ga. 24, 54 SE 909. In such case where defendant by a plea of recoupment recovered a judgment against the plaintiff in her assumed or trade name only and sought to enforce the collection of the judgment by garnishment held error to dismiss the garnishment proceedings. Id.

62. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 NW 499.

63. Giblin v. North Wisconsin Lumber Co. [Wis.] 111 NW 499. Where the plaintiff makes a claim hostile to each and every defendant in the suit asserting that an instrument for the payment of money in which each of the defendants claims an interest or has an interest either as present holder or as privy to the present holder by reason of being a transferror of the present holder is fraudulent and void, and obtains a decree affirming his claim against such instrument, that instrument must be held fraudulent and void in any subsequent litigation between the same parties however they are arrayed against one another in such subsequent litigation. Id.

64. A judgment may be introduced on any collateral matter but is conclusive only on the parties thereto. Mitchell v. Cleveland [S. C.] 57 SE 33. Order allowing counsel's fees, while not conclusive as to those not parties to the proceeding, is presumptive evidence that they were not exorbitant. Hays v. Johnson's Adm'r, 30 Ky. L. R. 614, 99 SW 332.

65. Patrick v. Barker [Neb.] 112 NW 358.

subject-matter,[66] *and identity of issues,*[67] *or the cause of action*[68] *as it has been termed.*

Where a new party is joined the former judgment is not a bar. Port Gibson Brick & Mfg. Co. v. Rothrock Const. Co. [Miss.] 43 S 1022.

66. Pratt v. Griffin, 223 Ill. 349, 79 NE 102. Judgment setting aside agreement held to bar enforcement of claim for the amounts payable under such agreements. Strickland v. National Salt Co. [N. J. Eq.] 64 A 982. Judgment for plaintiff in replevin by conditional seller of goods held not to bar buyer's right to recover amount paid on goods on seller's failure to resell. Roach v. Curtis, 115 App. Div. 765, 101 NYS 333.

67. Linton v. Safe Deposit & Title Guaranty Co., 147 F 824; Laguna Drainage Dist. v. Charles Martin Co. [Cal. App.] 89 P 993. The **denial of the application of a bankrupt for a discharge** does not bar his right to proceed to obtain a subsequent discharge from new debts. In re Kuffler [C. C. A.] 151 F 12. Decrees in suits for **partition and to quiet title** held to bar subsequent suit to quiet title. Hight v. Hirsch, 149 F 890. Judgment that notes given directors of corporation **for salary and money loaned were void** because given to themselves held not to bar action to **recover on quantum meruit** for salary and money loaned. Shievly v. Eureka Tellurium Gold Min. Co. [Cal. App.] 89 P 1073. Judgment in action for **replevin** is no bar to a subsequent action based on an **excessive levy under the writ.** Three States Lumber Co. v Blanks [Tenn.] 102 SW 79. Judgment upon issue as to whether a surviving **partner** has any **claim upon the assets of a partnership** is not a bar to an action to **recover from such partner a sum due the firm,** he having no interest in its assets, except as to the profits. Wylie v. Langhorne [Tex. Civ. App.] 18 Tex. Ct. Rep. 144, 101 SW 527. Judgment in action for **cutting timber from one tract of land** is not a bar to an action for similar trespass on an **adjoining tract.** Phillips v. Beattyville Mineral & Timber Co., 30 Ky. L. R. 1102, 100 SW 244. Judgment in action of **forcible detainer under one notice** to quit is not a bar to an **action under another.** Pulliam v. Sells, 30 Ky. L. R. 456, 99 SW 289. Adjudication as to the right of a municipality to **tax one class of property** is not a bar to litigation to determine its right to tax a **different class.** Board of Councilmen of City of Frankfort v. Capital Gas & Elec. Light Co., 29 Ky. L. R. 1114, 96 SW 870. Issuance of **injunction to restrain illegal acts** is not a bar to an **action for damages** resulting from such acts. Hammond Signor Tie Co. v. Zwolle Lumber Co., 115 La. 750, 40 S 34. Judgment in action of **ejectment,** wherein the right to immediate possession is not adjudicated, is not a bar to an action of **forcible entry and detainer.** Stockley v. Cissna [Tenn.] 104 SW 792. Judgment in action for **breach of covenant** in a deed is not a bar to an action for a **subsequent breach** thereof. Leet v. Gratz, 124 Mo. App. 394, 101 SW 696. Suit for **salary** does not bar suit for damages for a subsequent **breach of the contract of employment.** American China Development Co. v. Boyd, 148 F 258. Judgment for defendant in a suit on an **unauthorized note** given by an agent held not to bar an action for **money had and received.** Commercial Nat. Bk. v. Sloman, 53 Misc. 97, 102 NYS 931. Judgment **distributing an estate among heirs** cannot be pleaded as a bar to an action by a **judgment creditor of one of the heirs to subject his share** to the payment of the judgment. Clark v. Raison [Ky.] 104 SW 342. Decree **dividing damages to vessels by collision** caused by the fault of both is no bar to an action **for contribution** by vessel which was obliged to pay the entire cargo damage. Erie R. Co. v. Erie & W. Transp. Co., 204 U. S. 220, 51 Law. Ed. 450. Dismissal of **foreclosure proceeding** on the ground that all matters of difference between the parties had been adjusted held not to bar specific performance to compel **conveyance of land accidentally omitted from deed** to mortgagor by mortgagee. Shakespeare v. Caldwell Land & Lumber Co., 144 N. C. 516, 57 SE 213. An adjudication sustaining the right of a **city to remove a frame building** because within the fire limits is conclusive against a right of **action for damages** for such removal (Wheeler v. Aberdeen [Wash.] 87 P 1061), excepting only such as were caused by the wanton manner in which the removal was made (Id.). Judgment in **ejectment** declaring deed to be a mortgage held res judicata in **suit to have deed declared a mortgage** and to foreclose it. Meeker v. Shuster [Cal. App.] 87 P 1102. Judgment in **partition** held to bar second suit in partition to accomplish same purpose. Gerdom v. Durein, 74 Kan. 704, 87 P 1137. Issues in two suits to **set aside deed for fraud** held identical. Page v. Garver [Cal. App.] 90 P 481. Decree **enjoining city from building its waterworks** and denying liability under water rentals contracted for is not res adjudicata as to right of city to **regulate water rates** under law passed after decree was rendered, though the issues in each case involve the reasonableness of the rates. City of Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 51 Law. Ed. 1155. **Foreclosure of equitable mortgage** held not to bar foreclosure of **written mortgage.** Koppana v. Steenerson, 100 Minn. 239, 111 NW 153. A judgment in **forcible entry and detainer** cannot bar a **suit to cancel a deed,** quiet title, or remove a cloud. Burns v. Kennedy [Or.] 90 P 1102. A judgment **striking one of the counts in a petition** in an action for personal injuries on the ground that no cause of action is therein stated does not bar the prosecution of the **suit upon another count** in the petition. Gainesville & Dahlonega Elec. R. Co. v. Austin, 127 Ga. 120, 56 SE 254. A surrogate's decree and a judgment decreeing the **amount necessary to produce certain annuities** and adjudging that a **certain party was not entitled to share** in the distribution held not res judicata as to **amount necessary** to produce the annuities as payable **since the death of certain annuitants.** Griffen v. Keese, 187 N. Y. 454, 80 NE 367, modifying 115 App. Div. 264, 100 NYS 903. Decree **accepting resignation of surviving trustee under a trust deed,** which provides that property shall be partitioned upon death of the last surviving trustee, and appointing a successor and pro-

viding that no partition shall be made until the death of the resigning trustee, does not bar an action for the purpose of **construing the trust** deed and determining the rights of the parties upon the death of the surviving trustee. Parrish v. Mills [Tex. Civ. App.] 18 Tex. Ct. Rep. 160, 102 SW 184. Denial of **motion to vacate judgment** because of lack of authority in attorney representing applicants held to bar **collateral attack** on same grounds. Griffis v. First Nat. Bk. [Ind. App.] 79 NE 230. A judgment in favor of defendants in **replevin** to recover furniture sold by plaintiff to defendants, the action being brought on the **theory of a conditional sale contract,** was a bar to a subsequent action on the ground that the furniture had been secured from plaintiff through **fraud.** Cuschner v. Longbehn [Wash.] 87 P 817. Suit by vendor against agent and vendee to **rescind for fraud** does not bar suit against agent for negligence or **failure to perform a duty owed plaintiff** after the contract was entered into. Harvey v. Sparks Bros. [Wash.] 88 P 1108. Determination of a **corporation's alleged unlawful use of certain franchises** and privileges in a proceeding not brought to test the right of the corporation to exercise its franchise as a corporation was no bar to a subsequent proceeding by the attorney general to test the corporation's right in the premises. People v. Detroit, etc., R. Co. [Mich.] 14 Det. Leg. N. 387, 112 NW 716. Judgment for proponent in proceedings **contesting will** held not to bar contestant from bringing suit alleging the validity of the will and asserting a **constructive trust** in certain property. Smullin v. Wharton, 73 Neb. 667, 103 NW 288, 106 NW 577, 112 NW 622, 113 NW 267. Judgment of **conviction of a third party for fornication** with the complaining witness held not to bar **bastardy proceedings** against defendant though such conviction of such third party raises a reasonable doubt as to the child's paternity. Johnson v. State [Wis.] 113 NW 674. One who has **unsuccessfully claimed title to property levied** upon by an execution in favor of a third party is not thereby estopped from **foreclosing a mortgage** in his favor upon that property previously claimed by him and asserting the lien of such mortgage. Virginia-Carolina Chem. Co. v. Roberts [Ga. App.] 58 SE 502. A judgment by an assignee **setting aside another assignment of an interest** in an estate for fraud held not to bar a suit by the defendant claiming under another subsequent assignment to set aside the assignment of the plaintiff in the first action. Carmer v. Still, 53 Misc. 443, 103 NYS 247. Judgment on a **note** for fertilizers held not to bar action for **damages** to crop by use of such fertilizer. Kirven v. Virginia-Carolina Chem. Co. [S. C.] 58 SE 424. Deed of standing timber held practically a mortgage, and a suit by the grantor for **trespass and trover** in cutting down and converting the timber after default held not to bar grantee from enforcing his right of redemption. Ordway v. Farrow, 79 Vt. 192, 64 A 1116. A judgment in an action on a **note** in favor of defendant because there was **no revenue stamp** on the note held to bar action between the same parties on the same note after a stamp had been placed thereon. Roney v. Westlake, 216 Pa. 374, 65 A 807. An adjudication **setting aside a conveyance** as obtained by undue influence is not conclusive of the grantee's rights under a **subsequent conveyance** of the same property between the same parties. Horner v. Bell [Md.] 66 A 39. Where **breach of warranty is asserted as a defense** to an action for the purchase price, a judgment for the plaintiff bars a subsequent **action to recover damages for breach of warranty.** Berman v. Henry N. Clark Co. [Mass.] 80 NE 480. Judgment in **ejectment against life tenant** held not to bar **suit after his death to recover fee.** Schroeder v. Bozarth, 224 Ill. 310, 79 NE 583. Refusal of probate decree to **set aside discharge of administrator** held not to bar suit by warrant against the administrator to **recover funds garnished and wrongfully paid out by him.** Geiger v. Gaige [Iowa] 111 NW 804. Judgment in foreclosure suit declaring **mortgage wholly void** for want of valid description held to bar suit to **reform and foreclose mortgage.** Tio v. Brown [Wis.] 111 NW 679. The **dismissal of a writ of habeas corpus** in the United States District court granted under Bankr. Act 1908, § 9, is not a bar to a motion to **vacate an order of arrest and service of summons** in a civil action in a state court. Goldsmith v. Haskell, 105 NYS 327. **Construction of contract** for the installation of a sprinkler system held not in issue in a suit by tenants against the owner of the building **for damages** for an overflow, the party installing the system being notified to defend, so as to be res judicata in a subsequent suit by the owner against such party. Bagley v. General Fire Extinguishing Co. [C. C. A.] 150 F 284. A judgment in ejectment, that **purchasers at a foreclosure sale had not acquired title** as against remaindermen, held not to preclude purchasers from maintaining a **suit in equity to be subrogated to the rights of a former mortgage** valid as against the remaindermen. Stump v. Warfield, 104 Md. 530, 65 A 346. Where in a suit by one **joint payee** of the note against the maker the other joint payee was made a party defendant and judgment was rendered for defendant on the ground that the maker had paid the defendant payee held not to bar an action by the plaintiff payee against the defendant payee for **money had and received.** Whittle v. Whittle [Cal. App.] 91 P 170. Where demurrer to bill in suit to **set aside a conveyance** alleged to have been given for an illegal purpose was sustained on the ground that both parties were in pari delicto and that neither was in a position to obtain relief, such judgment does not bar the setting up of the same facts in **defense to a suit of ejectment** by the defendant in the former suit against the plaintiff therein. Burton v. McMillan [Fla.] 42 S 879. Decree dismissing **proceeding for limitation of liability for damages for a collision** on the ground that the petitioner was the owner of both vessels, both of which were at fault and but one surrendered, held to bar a second proceeding for limitation of the same liability in which both vessels are surrendered as between petitioner and damage claimants, who were parties to and contested the first. The San Rafael, 149 F 893. A **judgment setting aside a tax deed** in an action by purchaser of premises against the holder of the tax deed and the vendor, who was notified that no personal claim would be made against her in case of default, and she

Identity of parties See 7 C. L. 1760 is essential,[69] but this does not mean that all the parties to the two actions must be the same.[70]

Identity of cause of action. See 7 C. L. 1760—The test of the identity of causes of action has been stated to be whether the same evidence will support both actions.[71] In Louisiana a judgment is res adjudicata only as to actions in which the thing demanded and the object of the action is the same.[72]

Privies of a party.[73]

Scope of adjudication. See 7 C. L. 1760—If the parties and issues be identical, the adjudication is binding not only as to all matters actually litigated [74] but as to every-

defaulted, is not a bar to an action by the purchaser against the vendor to **reform the deed** to him so as to make the same a warranty deed and to recover on the warranty the amount he paid to relieve the property from the tax liens. Brown v. Hollister [S. D.] 111 NW 564. An action in **forcible entry and detainer** by a purchaser with notice of lease, in which a judgment of ouster has been taken by the purchaser, is not a bar to **injunction proceedings** brought by the tenant to prevent interference with his possession. Robert Raitz & Co. v. Dow, 10 Ohio C. C. (N. S.) 249.

68. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93; Stitt v. Rat Portage Lumber Co., 101 Minn. 93, 111 NW 948; Kirven v. Virginia-Carolina Chem. Co. [S. C.] 58 SE 424. Where in a suit on an express contract for services defendant set up that the services were rendered under other express contracts, judgment for plaintiff does not bar an action to recover for services under the contracts so set up by defendant. Stitt v. Rat Portage Lumber Co., 101 Minn. 93, 111 NW 948. Judgment for defendant in a suit to rescind or for damages for fraud bars subsequent suit for deceit arising out of same transaction. Krolik v. Curry, 148 Mich. 214, 14 Det. Leg. N. 74, 111 NW 761. Where plaintiff dies pending an action for damages for personal injuries and his administrator revives the action and prosecutes it unsuccessfully to judgment, the judgment is conclusive against the administrator's right to maintain a subsequent action for wrongful death. Brammer's Adm'r v. Norfolk & W. R. Co. [Va.] 57 SE 593. Party suing for failure to deliver corporate stock pursuant to contract, and denied relief on the ground that the stock has no pecuniary value, may sue in equity for specific performance. Baumhoff v. St. Louis & K. R. Co. [Mo.] 104 SW 5.

69. Principal not held real party in issue where joined with surety. Johnson v. Knudson-Mercer Co., 167 Ind. 429, 79 NE 367, citing 5 C. L. 1510. Judgment in suit between the two stockholders owning practically all the stock of a corporation as to the ownership of certain shares of stock therein held res judicata in a suit by the corporation against the defendant and others. Leigh v. National Hollow Brake-Beam Co., 224 Ill. 76, 79 NE 318. The final judgment in an election contest in favor of contestant is admissible on subsequent quo warranto by the people on relation of the successful contestant against the contestee, the parties being essentially the same in both actions. People v. Wilson [Cal. App.] 91 P 661. An action by a school township against an independent school district to set aside and declare void the proceedings by which the independent school district was formed and a subsequent action involving the same issues by the school township against the independent school district and the individual members of the board held between the same parties. School Tp. of Bloomfield v. Castalia Independent School Dist. [Iowa] 112 NW 5. See ante § 1 subd. Persons Concluded.

70. Johnson v. Knudson-Mercer Co., 167 Ind. 429, 79 NE 367.

71. Commercial Nat. Bk. v. Sloman, 53 Misc. 97, 102 NYS 931. Judgment canceling note and mortgage is res adjudicata as to an action commenced to foreclose though it erroneously describes the property covered by the mortgage, the descriptions in other respects being sufficient for identification. Alexander County Nat. Bk. v. Foster, 124 Mo. App. 344, 101 SW 685.

72. Scovel v. Levy's Heirs, 118 La. 982, 43 S 642.

73. See 7 C. L. 1760. See, also, ante § 1, subd. Persons Concluded.

74. Day County Com'rs v. Kansas [Okl.] 91 P 699. Evidence held to show that issues were tried and determined in a former action in which the parties were codefendants. Gulling v. Washoe County Bk. [Nev.] 89 P 25, rvg. 28 Nev. 450, 82 P 800. Decree of surrogate on accounting held conclusive, as against all parties duly cited, as to all questions as to correctness of accounts and as to disbursements. In re Hurlbut's Estate, 51 Misc. 263, 100 NYS 1098. Where in an action on a default judgment it was determined that defendant was properly served, the adjudication is binding on a motion to have the default judgment set aside. Bailey v. Wilson, 52 Misc. 644, 103 NYS 1021. Where a petition for habeas corpus has been denied, the question decided cannot be again litigated as a matter of right, in the absence of anything occurring since such decision affecting the petitioner's legal status. In re Moebus [N. H.] 66 A 641. Decree in equity on an accounting held res judicata as to notes referred to in the pleadings in the former case as matters to be considered in the accounting and which were actually introduced in evidence in such case. Fowler v. Davis, 1 Ga. App. 549, 57 SE 939. Irrigation case. Decree under Sess. Laws 1879, p 99, § 19, and Sess. Laws 1881, p. 142, adjudges the relative priorities of the ditches, canals, or reservoirs and the consumers of water, but not the relative rights of the owners or consumers of water under any particular ditch. Combs v. Farmers' High Line Canal & Reservoir Co. [Colo.] 88 P 396. A decision denying a petition for rehearing held conclusive of a right to rents and profits if that issue was properly raised.

thing which might have been litigated under the issues as made [75] by the pleadings,[76]

and if not then the reversal of the case to leave it or one submitted to the lower court for a decree on the pleadings and evidence subject to appeal. Hogle v. Smith [Iowa] 113 NW 556. A denial of mandamus to compel the vacation of an order because of the laches of petitioner is decisive of his right to a bill of review for the same relief. Daniel v. Citizens' Mut. Fire Ins. Co. [Mich.] 14 Det. Leg. N. 525, 113 NW 17. A judgment foreclosing liens held by a city, directing a sale of land and adjudging that the corporation counsel shall be paid his taxable costs out of the proceeds before the city is paid, fixes the order of payment, and that question is not open for review in an action by the corporation counsel against the city for the costs. Sutherland v. Rochester [N. Y.] 82 NE 171, rvg. 112 App. Div. 712, 98 NYS 970. In a proceeding in the probate court to sell three parcels of land to pay debts, all questions that were legally determined in such proceeding as to all the land are res adjudicata in a subsequent proceeding in partition of one parcel not sold in the probate court proceeding. Simpson v. Simpson, 9 Ohio C. C. (N. S.) 137.

75. Smith v. Cowell [Colo.] 92 P 20; Peacock v. Feaster [Fla.] 42 S 889; Van Camp v. Huntington, 39 Ind. App. 28, 78 NE 1057; Aetna Life Ins. Co. v. Tremblay, 101 Me. 585, 65 A 22; Kaufer v. Ford, 100 Minn. 49, 110 NW 364; Koppang v. Steenerson, 100 Minn. 239, 111 NW 153; Alexander v. Thompson, 101 Minn. 5, 111 NW 385; Pond v. Huling, 125 Mo. App. 474, 101 SW 115; Meyerhoffer v. Baker, 51 Misc. 598, 101 NYS 24; In re Menzie's Estate, 54 Misc. 188, 105 NYS 925; Case Mfg. Co. v. Moore, 144 N. C. 527, 57 SE 213; Spokane Valley Land & Water Co. v. Madsen [Wash.] 91 P 1; St. Louis, etc., R. Co. v. Wabash R. Co. [C. C. A.] 152 F 849. Under Rev. St. c. 84, § 17, bars equitable defenses to actions at law. Aetna Life Ins. Co. v. Tremblay, 101 Me. 585, 65 A 22. Decisions of quasi judicial bodies are not a bar unless rendered upon issues formed by the parties against whom they are pleaded. Letter of secretary of interior containing opinion as to lands in controversy is not. Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 SW 534. Title being averred in an action to recover realty, the judgment is conclusive thereof. Turnage v. Joyner [N. C.] 58 SE 757. Bar of statute of limitations. Irish v. Daniels, 100 Minn. 189, 110 NW 968. Claim case. McLendon v. Shumate [Ga.] 57 SE 886. A party failing to properly assert his claims or to present proper evidence cannot litigate his cause of action in a second suit. Suit to quiet title. Keller v. McGilliard [Cal. App.] 90 P 483. Party against whom **ownership of property was decided** cannot, in action to recover the property, **attack the constitutionality of the statute** upon which the action was based. Drinkard v. Oden [Ala.] 43 S 578. After a claimant has litigated a **claim case** and the property has been found subject, a court of equity will not enjoin a sale under the levy on any ground which the claimant might have urged in the claim case tending to show the invalidity or discharge of the judgment. Hollinshead v. Woodward [Ga.] 57 SE 79. Where defendant was afforded an opportunity to prove certain alleged payments as a partial defense but failed to do so held conclusive as to such payments. Ferguson v. Bien, 54 Misc. 88, 104 NYS 715. Under Mills' Ann. St. § 2644, requiring **each party to bring forward all demands** existing at the commencement of a suit and which can be joined in one action or defense, held failure of a landlord to join in a suit of unlawful detainer a demand for accrued rent does not bar action for rent. Mackenzie v. Porter [Colo.] 91 P 916. A judgment in favor of the holder of bonds issued by a city, in an action thereon, concludes the question of the **validity of the bonds** in the absence of fraud in obtaining the judgment. Graham v. Tuscumbia, 146 Ala. 449, 42 S 400. Where by a decree land of one devisee is on his death intestate partitioned to his heirs, another devisee who is a **copartitioner** under such decree cannot thereafter assert against his copartitioners any **greater interest** in the land partitioned than that conferred upon him thereby. Tolley v. Poteet [W. Va.] 57 SE 811. In an action for the settlement of an estate, where a distributee was brought in and admitted an **assignment of his interest** but did not contest such assignment, he was bound by the judgment. State v. Johnson, 144 N. C. 277, 56 SE 929.

Married woman defeated in her **claim to homestead** rights in property taken by her husband's execution creditors cannot bring a subsequent action claiming **independent title.** Brashears v. Frazier, 30 Ky. L. R. 647, 99 SW 342. The circuit court having jurisdiction of an **action by guardian** in behalf of wards **to recover from sureties of former guardian** sum due wards by latter, and having had jurisdiction of persons of defendants, the fact that order appointing second guardian was void was a matter of defense in that action, and allegation that he was such guardian not having been denied and such defense not having been presented, effect was same as if court had found that appointment was valid, and question could not be raised in action for discovery of assets to satisfy judgment on bond. Havens v. Ahlering, 29 Ky. L. R. 1265, 97 SW 344. In a suit to **enforce a judgment against a school district** for balance due for building school house, trustees could not interpose the defense that they had built the school house without authority. Raymer v. Trustees White School Dist. No. 18, 30 Ky. L. R. 332, 98 SW 323. A judgment refusing to set aside a conveyance as in fraud of creditors because of its **homestead** character, the question of the liability of the excess over the homestead right not being raised is conclusive, in a subsequent action to set aside the same conveyance as to the excess. Spratt v. Early, 199 Mo. 491, 97 SW 925. A judgment in favor of plaintiff in an **action for trespass,** in which defendant rested his right to the land on the claim of title, was a bar to a subsequent action by defendant therein to establish his right to the use of the land on the ground of an easement. Sumrall v. Maninni, 30 Ky. L. R. 299, 98 SW 301. Judgment in **condemnation proceedings** held conclusive on the city, so that in mandamus to compel payment

or which is necessarily involved in the decision made,[77] but this rule does not bar the use of an affirmative cause of action or set-off which might have been but never was

thereof it could not introduce evidence of liens for taxes. State v. Fairley [Wash.] 87 P 1052. Judgment in **statutory action to determine boundary lines** held to bar ejectment by one party to recover possession of a wedge-shaped tract along the boundary line between the two tracts, title to which he claimed by adverse possession. Krabbenhoft v. Wright [Minn.] 112 NW 421. A **judgment for rent** in which it was held that defendants were hold-over tenants for another year under the conditions of the written demise held to estop defendants from urging the defense of trespass or eviction, in a subsequent action to recover rent for a subsequent portion of the year. Pierson v. Hughes, 102 NYS 528.

76. No bar if subject-matter of second suit could not have been litigated under the pleadings of the first. Halliday v. Stewart County Bk. [Ga.] 58 SE 169.

77. Whatever is necessarily implied in the former decision is, for the purposes of the estoppel, deemed to have been actually decided. Meyerhoffer v. Baker, 51 Misc. 598, 101 NYS 24. Upon a plea of former adjudication a matter will be held res judicata, although not raised as an issue by the pleadings in the former action, if from the record it appears that it formed one of the premises upon which the judgment necessarily rested. Bleakley v. Barclay [Kan.] 89 P 906. A judgment operates as a bar as to all matters which are by plain implication covered by it. Sarratt v. Gaffney Carpet Mfg. Co. [S. C.] 57 SE 616. In an action for the **recovery of land,** a final judgment for plaintiff fixes the liability of defendant for **timber cut pendente lite.** McCord v. Akeley [Wis.] 111 NW 1100. Final **judgment discharging administrator** is a bar to an **action on his bond.** State v. Shacklett, 115 Mo. App. 715, 91 SW 956.

Order reciting report of receiver, referring to the amount found to be in the receiver's hands and providing for his discharge after payment of certain amounts, is res judicata of the receiver's accounts. Sarratt v. Gaffney Carpet Mfg. Co. [S. C.] 57 SE 616.

Judgment validating an issue of municipal bonds is conclusive upon all questions which the constitution and laws require to be determined before authority is conferred upon a municipality to incur a debt. Baker v. Cartersville, 127 Ga. 221, 56 SE 249. A valid and final judgment against a plaintiff on the facts of the case, in a **suit against the servant for an injury** which was the result of the negligence of the servant alone, is a bar to an **action subsequently brought by the same plaintiff against the master** for the identical cause of action, the master being neither present nor directing nor concurring in the act which produces the injury Williford v. Kansas City, etc., R. Co., 154 F 514. Judgment as to **regularity of school district proceedings** held conclusive as to sufficiency of notice of election. School Tp. v. Independent School Dist. [Iowa] 112 NW 5. Adjudication that **civil service employe had been illegally discharged** and was entitled to mandamus to compel his reinstatement held conclusive that employe had not acquiesced in his discharge. Ransom v. Boston [Mass.] 81 NE 998. Judgment **annexing certain lands to a drainage district** held to conclude question as to whether landowners had so connected their ditches as to make application to be annexed to such district. People v. Schaffer, 228 Ill. 17, 81 NE 785.

In **ejectment by mortgagor's grantee** based on alleged extension of time of redemption, a judgment for defendant is conclusive of plaintiff's right to maintain a subsequent suit to redeem. Potter v. Ft. Madison Loan & Trust Bldg. Ass'n, 133 Iowa, 367, 110 NW 616. Probate decree **charging a guardian in specie for notes payable to him** as guardian held conclusive determination of the right of his executrix to transfer the notes to his successor. Kent v. Hunt [N. H.] 65 A 386.

Determination of the validity of certain provisions of a will providing for accumulations of income, on an accountng by the executors, held res judicata as to the validity of such provisions as against all persons interested in the estate in so far only as they affected assets applied and disclosed in such reports, the decree settling the same containing no provision relating to subsequent accumulations. Kirk v. McCann, 117 App. Div. 56, 101 NYS 1093. A default judgment in **summary proceedings for nonpayment of rent,** until reversed, set aside or vacated is conclusive, in an action by the landlord against the tenant to recover rent, of the facts alleged in the affidavit and which are required by the statute to be alleged as the basis of the proceedings. That is of the tenancy, the occupation by the tenant, the nonpayment of rents due, and the holding over after default in the payment. Prince v. Schlesinger, 116 App. Div. 500, 101 NYS 1031. Validity of lease. Meyerhoffer v. Baker, 51 Misc. 598, 101 NYS 24. In a **plenary action by the trustee of a bankrupt corporation to recover an assessment levied against the holders of unpaid stock,** the decision of the bankruptcy court, authorizing such assessment, was res judicata as to the amount paid by the stockholder for his stock, the indebtedness of the corporation, and the amount of the assessments, the stockholder being only entitled to make any individual defense he might have to such action. In re Remington Automobile & Motor Co. [C. C. A.] 153 F 345. Determination in mandamus proceedings that board of county commissioners had **jurisdiction** to consider petition for removal of county seat held conclusive upon all questions affecting jurisdiction in an action for an injunction to restrain proceedings according to its direction in the matter. Kaufer v. Ford, 100 Minn. 49, 110 NW 364. Where in an **action to determine the rights to the use of the waters of a river** the court found that the rights of the parties, as fixed by a decree in an action between them in 1899, were

put in litigation.[78] The admission by the pleadings of material facts does not constitute an exception to the above rules.[79] Matters not in issue and not determined are of course not within the scope of the adjudication as an estoppel.[80] For the purpose of this rule a matter is in issue if it be something affirmed

the same as were fixed by a decree in a prior action in 1893, evidence that during the period between the decrees plaintiff had acquired a prescriptive right as against defendant to the use of a portion of the waters is inadmissible. Hartson v. Dill [Cal.] 90 P 530.

78. New England Mortg. Sec. Co. v. Fry, 143 Ala. 637, 42 S 57. Where in distress proceedings defendant did not reconvene to recover damages for the wrongful suing out of the warrant, a judgment foreclosing the same was only conclusive as to the regularity of the proceedings and did not estop the tenant from showing that the grounds authorizing distress proceedings did not exist and that the warrant was unjustly sued out. Morgan v. Tims [Tex. Civ. App.] 17 Tex. Ct. Rep. 111 97 SW 832.

Counterclaim being set up. a judgment for plaintiff bars future action thereon, it not being withdrawn before the final decree. Hogle v. Smith [Iowa] 113 NW 556. Where in a suit on one of several purchase-money notes given for the purchase price of machinery defendant pleads a counterclaim for defects in the machinery and recovers thereon, it is a bar to their setting up substantially the same counterclaim in an action on others of the notes. Case Mfg. Co. v. Moore, 144 N. C. 527, 57 SE 213. Suit by executor in which he defeated a charge of conversion made by defendant is a bar to a subsequent suit by defendants against him individually to recover for such alleged conversion. Clement v. Clement [Tex. Civ. App.] 17 Tex. Ct. Rep. 575, 99 SW 138.

79. Peacock v. Feaster [Fla.] 42 S 889.

80. Lewisohn v. Lansing Co., 104 NYS 543, rvg. 51 Misc. 274, 100 NYS 1077. Judgment is not res adjudicata as to matters which the court held were not involved therein. Wilson v. Tye [Ky.] 102 SW 856. Proceedings, the primary purpose of which is to establish the right of an original claimant of a land certificate, is not binding as to the right of an heir therein, though the recitals of the judgment purport to establish his title thereto. Kirby v. Hayden [Tex. Civ. App.] 99 SW 746.

Judgment for rent held not res judicata as to the nature of the tenancy. Rothstein v. Steinbugler, 52 Misc. 552, 102 NYS 470.

Partnership accounting resulting in judgment for one party held not conclusive as to whether the lien of such judgment was paramount to that of the other's mortgage. Alexander v. Thompson, 101 Minn. 5, 111 NW 385.

Judgment in dissolution proceedings held not res judicata of issue of fraud of certain stockholders in procuring another stockholder to join in the petition for dissolution. Vogt v. Vogt, 104 NYS 164.

Mandamus proceeding to compel city officials to execute contract held not conclusive as to power of parties to compel specific performance of said contract. Lighton v. Syracuse, 188 N. Y. 499, 81 NE 464. The **sustaining of a general demurrer** to a bill in equity on the ground that the action was one at law is not a conclusive adjudication that the facts stated do not constitute a cause of action at law. Farmers' & Mechanics' Life Ass'n v. Caine, 224 Ill. 599, 79 NE 956, afg. 123 Ill. App. 419. A **decree remanding a cause** with instructions to refer it to a commissioner to ascertain in what property the parties were jointly interested held not an adjudication as to the existence or nonexistence of joint property. Coons v. Coons, 106 Va. 572, 56 SE 576. Though such lapse of time as will bar an action for debt will also bar a suit to foreclose the mortgage or trust deed given to secure the debt, a judgment for defendant in an action for **foreclosure** on the ground that the proceeding was **barred by limitations** was not an adjudication as to the validity of the debt, nor the mortgagee's right to have the property sold by the trustee out of court as provided in the trust deed. Bandy v. Cates [Tex. Civ. App.] 16 Tex. Ct. Rep. 811, 97 SW 710. Where broker fulfilled contract in negotiating sale of realty but deal fell through because of defects in seller's title, a judgment for plaintiff in an **action by the agent for his commission** held not to determine the validity of the seller's title. Laws v. Newkirk [Colo.] 88 P 861.

Decree of ratification of mortgage foreclosure adjudging that attorney of mortgagee had power to make sale and that remaindermen had no ground of complaint, the purchaser alone being injured if there was any defect, does not preclude remaindermen after death of life tenant from asserting that their interest was not conveyed by the mortgage. Stump v. Warfield, 104 Md. 530, 65 A 346. A decree, in a **suit** by a father **to set aside a conveyance** of land which belonged to himself and his wife, executed by him after the wife's death to his sons, on the ground of fraud, which denies the relief prayed for, is not res judicata in a suit by other heirs of the deceased wife against the sons for partition of the premises. Stern v. Selleck [Iowa] 111 NW 451. Where a person suing for the **breach of a contract for the sale of land** obtains a judgment impressing a **vendee's lien** for the amount of the deposit paid, but not for his expenses incurred in examining the title because there was no authority in law for extending the lien so as to cover it, he is not precluded by the judgment from bringing a separate action for that expense. Occidental Realty Co. v. Palmer, 105 NYS 171. Decree determining **amount widow is entitled to under a will for support** held res judicata as to the amount thereof, but not that such amount constitutes a debt against the estate which can be allowed to accumulate and be passed by the widow to her devisee or personal representatives. Brown v. Cresap, 61 W. Va. 315, 56 SE 603.

by one party and either denied or admitted expressly or impliedly by the other, and its determination is essential in the rendition of a final judgment upon the merits of the cause as presented by the pleadings.[81] A counterclaim consisting of an independent cause of action, a default judgment in favor of the plaintiff is inoperative as a bar to the prosecution of the counterclaim in a subsequent action.[82] One cannot split his cause of action and have successive recoveries.[83] Allied to this

81. Van Camp v. Huntington, 39 Ind. App. 28, 78 NE 1057. In an action for rent, allegations in the answer of a year's lease held not a defense and did not create an issue, but was a recital of irrelevant facts and hence a judgment for the tenant was not binding on such issue. Frank v. Miller, 116 App. Div. 855, 102 NYS 277.

82. So held where original action was for purchase price of certain bottles and defendant counterclaimed for damages resulting from the undersize of the bottles. North Baltimore Bottle Glass Co. v. Altpeter [Wis.] 113 NW 435.

83. All claims or causes of action arising out of the same contract must be included in one suit, or all that are not so included will be deemed waived. Paton v. Doyne [N. J. Law] 65 A 843. But this rule does not apply to separate notes given in independent transactions though between the same parties. Id.

Specific performance held to bar action to recover **rents and profits.** Hogle v. Smith [Iowa] 113 NW 556.

Foreclosure decree bars a separate action for the penalty for collecting attorney's fees in such suit as a method of collecting usurious interest. Strait v. British & American Mortg. Co. [S. C.] 57 SE 1100.

Plaintiff who **took care of her father** before and after he became insane and upon petition to the probate court **received allowance** for doing so after he was so adjudged cannot sue his administrator for services rendered before the insanity nor for **additional compensation** for services rendered afterward. Bircher v. Boemler, 204 Mo. 554, 103 SW 40. Action construed to be one to recover rent under lease and not for damages for its breach, and hence not a bar to action for **rent accruing subsequently.** Davidson v. Hirsh [Tex. Civ. App.] 18 Tex. Ct. Rep. 159, 101 SW 269.

Where a riparian owner erected wing dams, whereby the current of the river was deflected so that at **each successive rise of the river it washed away a portion of the land** of the opposite owner, he was entitled to maintain successive actions for successive injuries. Gulf, etc., R. Co. v. Mosely, 6 Ind. T. 369, 98 SW 129. A judgment in an **action to recover possession of part of a tract of land** bars an action to recover another part of the same tract alleged to have been taken at the same time by the act of the same parties as the land in the former action. Kline v. Stein [Wash.] 90 P 1041. Where holders of **bond for title** brought suit to compel **specific performance** of the bond and therein failed to set up any claim to certain land, held to bar subsequent claim to such land by virtue of the bond. Cornett v. Moore, 30 Ky. L. R. 280, 97 SW 380. Waiver or withdrawal of **demand for damages** by a cotenant, in a suit to **recover possession** of his interests in a **mining claim,** held not to bar him from subsequently recovering the value of his share of ore extracted therefrom in a suit for an accounting. Dettering v. Nordstrom [C. C. A.] 148 F 81. Separate actions may be brought for **different legal services** rendered the same party under separate contracts, though both contracts were fully performed at the time the first action was commenced. Wheless v. Serrano, 121 Mo. App. 17, 98 SW 108. Action to **specifically enforce contract** held to bar action to **reform deed** executed in part performance of the contract. Collins v. Gleason [Wash.] 91 P 568. Judgment for **cost of abating nuisance** held to bar suit for permanent injury to plaintiff's property from nuisance. Murray v. Butte, 35 Mont. 161, 88 P 789. Suit to recover **instalment due** held not to bar recovery of instalments not due. Love v. Flitcraft [Mich.] 14 Det. Leg. N. 339, 112 NW 735; Johnson v. Johnson, 31 Utah, 408, 88 P 230. Code 1906, § 1999, providing that where plaintiff has several demands on contract he must bring his action for all or be barred as to those not sued on, does not require one having several demands on contract to include in one suit **demands not due** at its date. Adams v. International Supply Co., 61 W. Va. 401, 56 SE 607. Where complainant recovered judgment on part of a **single account,** all the items of which were due, the judgment was a bar to a recovery of the balance of the account. Williams-Abbott Elec. Co. v. Model Elec. Co. [Iowa] 112 NW 181. An **account** consisting of **one or more items, all of which are due** and payable, constitutes but one demand. Id. **A continuous book account** is entire. Id.

Judgment against one partner on a partnership obligation held a merger of the cause of action and a bar to any further action thereon against nonresident partners. Hurd's Rev. St. 1905, c. 76, § 3, p. 1253, and ch. 110, § 9, p. 1532, construed. Fleming v. Ross, 225 Ill. 149, 80 NE 92.

Equitable and written mortgage held to constitute separate independent contracts and could be foreclosed severally. Koppang v. Steenerson, 100 Minn. 239, 111 NW 153. Judgment for defendant in an action to **recover purchase price of** certain stone held to bar action for damages for breach of contract. Martin v. Rockland Lake Trap Rock Co., 103 NYS 947. The originator of a **nuisance** is liable to **successive actions** for damages resulting from its maintenance. Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196. A suit to **specifically enforce part of a single contract** bars a subsequent suit to enforce the rest. Collins v. Gleason [Wash.] 91 P 566. So held where facts constituting basis of second suit were learned in time to have

principle is the one that the cause of action is merged in the judgment.[84] Where damages are occasional and recurring a party may sue as often as he suffers injury therefrom.[85] Where by accident or mistake one has split his cause of action and recovered judgment upon a part thereof, the proper remedy is to seek relief by opening the judgment, amending the pleadings and trying the issues anew.[86] The issues and measure of proof being different, a judgment of acquittal in a criminal prosecution does not bar a civil suit.[87] The estoppel of an adjudication made on grounds purely technical and where the merits could not come in question, is limited to the point actually decided and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first.[88] While a judgment is conclusive as to matters litigated, it does not conclude the question as to the liabiliy of property to seizure under it.[89]

§ 3. *Adjudication as estoppel of facts litigated.* See 7 C. L. 1765—*Though there be no identity of issues*[90] *or cause of action*[91] *and subject-matter,*[92] *an adjudication is conclusive in all suits between the parties and their privies*[93] *as to all matters in issue*[94] *and decided*[95] *or necessarily involved in the decision made,*[96] *but not as to*

permitted amendment of pleading in first action. Id. Where a **servant was employed under a single contract for a year at a specified salary per month,** payable monthly, and was thereafter wrongfully discharged, a recovery of salary for several months subsequent to the discharge, whether as damages or for constructive service after discharge, bars a subsequent action to recover salary for the balance of the contract term. Carmean v. North American Transp. & Trading Co. [Wash.] 88 P 834.

84. Bethlehem Iron Co. v. Hoadley, 152 F 735. Where defendant in a suit in equity died and the action was continued as to his ancillary administrator and a decree rendered for the complainant, held the decree was satisfied when the ancillary administrator had distributed the estate within the state of his appointment according to the laws of that state. Brown v. Fletcher's Estate, 146 Mich. 401, 13 Det. Leg. N. 818, 109 NW 686. Judgment canceling note and mortgage is res adjudicata as to a holder thereof having no interest therein, though not a party to the first suit. Alexander County Nat. Bk. v. Foster, 124 Mo. App. 344, 101 SW 685.

85. Judgment in action against railroad company for failure to construct cattle crossing, thus rendering plaintiff's land of no value, is no bar to an action for subsequent failure to do so. Charles v. St. Louis, etc., R. Co., 124 Mo. App. 293, 101 SW 680. See ante, Splitting Cause of Action.

86. Kline v. Stein [Wash.] 90 P 1041.

87. Acquittal of a defendant in a criminal prosecution for obstructing a navigable stream does not bar a subsequent suit in equity to compel removal of obstruction. United States v. Donaldson-Shultz Co. [C. C. A.] 148 F 581, rvg. 142 F 300, 7 C. L. 1764, n. 90. Record of conviction for unlawful sale of liquor is not conclusive in action to recover penalty therefor. Adams v. Sigman, 89 Miss. 844, 43 S 877. Judgment in criminal action discharging one charged with assault is not conclusive on prosecuting witness in action on accident policy on the question as to whether provocation by instant plaintiff justified the assault. Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 SW 124.

88. So held where judgment in first action by foreign corporation was decided on the fact that the corporation had not filed the required certificate with the secretary of state. United States Fidelity & Guaranty Co. v. Schiff, 54 Misc. 225, 104 NYS 396.

89. Fordyce & McKee v. Woman's Christian Nat. Library Ass'n, 79 Ark. 550, 96 SW 155.

90. Kelly & Jones Co. v. Moore [Ga.] 58 SE 181; Leigh v. National Hollow Brake-Beam Co., 224 Ill. 76, 79 NE 318. Where a prior decree in a suit between the same parties held that certain deeds passed the title in trust for the grantor's children and such decree is conclusive against the right of the parties to such suit to have the land sold for the payment of debts against the decedent's estate, not urged in the prior proceeding. In re Stahl's Estate, 227 Ill. 529, 81 NE 531.

91. Kirven v. Virginia-Carolina Chemical Co. [S. C.] 58 SE 424.

92. O'Keefe v. Barry Benev. & Athletic. Ass'n [N. J. Law] 66 A 601.

93. Surrogate's decree on settlement of executor's accounts as to amount of annuity fund held binding on parties and privies. Griffen v. Keese, 115 App. Div. 264, 100 NYS 903. Determination of unconstitutionality of statute held res judicata in quo warranto proceedings brought against contestee. People v. Wilson [Cal. App.] 91 P 661. A proceeding cannot be maintained to set aside or vacate a decree of foreclosure, based on an allegation of fact which was in issue and was determined in the trial which resulted in such decree. City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 NW 317.

94. Bradford v. Abbott, 127 Ill. App. 6. The denial of the application of a bankrupt for a discharge renders the issue as to his right to a discharge res judicata as to debts which were provable in that proceeding. In re Kuffler [C. C. A.] 151 F 12. Fact must be technically in issue. Value of property at

matters not in controversy and not heard and determined.[97] The bar in this case does not extend to facts that might have been, but were not, litigated.[98] To render a judgment available, as a bar to a second action against the same parties upon a different claim or demand, it is essential that the issue in the second action was a material issue in the first and necessarily determined by the judgment therein.[99] The

time of assessment held not technically in issue in a proceeding on appeal from the refusal of assessors to abate taxes. Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Laconia [N. H.] 65 A 378.

95. In a proceeding by a judgment creditor to set aside a conveyance as fraudulent, the validity and enforceability of the claim is res judicata. Irish v. Daniels, 100 Minn. 189, 110 NW 968. Judgment for plaintiff for full amount claimed in a suit by him to recover the withdrawal value of his shares held conclusive as to such value in a suit on the judgment to recover the unpaid balance thereon. Tillinghast v. United States Sav. & Loan Co., 99 Minn. 62, 108 NW 472. A fact within the jurisdiction of the court litigated and determined in a forcible entry and detainer suit cannot again be brought in question between the same parties. Connelly v. Omaha [Neb.] 112 NW 360. Judgment as to amount due vendor of land held conclusive in proceedings against the carrying out of judgment, and hence evidence of depreciation in the value of the land between the date of the sale and of the judgment was inadmissible. Horne v. Carstarphen [Ga.] 57 SE 238. Where a depositary fails to perform his duty and judgment is recovered against him he cannot relitigate such question in a subsequent suit. McLean v. Hughes [Minn.] 112 NW 1013. In an action for divorce by a wife for cruelty and nonsupport, the court will not consider evidence of the husband's alleged cruelty and failure to support prior to a judgment of dismissal in a former suit between the same parties based on the same grounds, when there was a trial on the merits and no appeal taken. Whitney v. Whitney [Neb.] 110 NW 555. Where judgment determines matters upon which damages subsequently accruing are predicated, it is conclusive. National Surety Co. v. Coates [Ark.] 104 SW 219. This principle is not affected by Kirby's Dig. § 6291. Id. Judgment in ejectment as to validity of title is conclusive of that question in a subsequent action of forcible entry and detainer. Stockley v. Cissna [Tenn.] 104 SW 792. Where in action for damages for default in carrying out contract recovery was had except as to one item of damages not sufficiently proved as to which item plaintiff was nonsuited, the first action is res adjudicata on the question of default in a subsequent action by plaintiff to recover on the item dismissed in the first suit. Amos Kent Lumber & Brick Co. v. Payne [La.] 44 S 728. Where defendant's claim to homestead rights in property sold under execution is decided against him, the judgment is as to such claim conclusive in a subsequent proceeding to have the judgment modified as to other matters. Bowen v. Highbaugh, 30 Ky. L. R. 1114, 100 SW 221.

96. Foreclosure decree held binding as to amount due mortgagee and hence question could not be relitigated in a subsequent suit to redeem. Potter v. Ft. Madison Loan & Trust Bldg. Ass'n, 133 Iowa, 367, 110 NW 616. Where an attachment was sued out to enforce collection of debt and judgment was rendered for defendant held conclusive in suit for wrongful attachment that debt was not owing by defendant and hence that the attachment was wrongfully sued out. Goldstein v. Drysdale [Ala.] 42 S 744. In an action for wrongful attachment the judgment for defendant in the attachment suit was conclusive evidence that the attachment was wrongful. McGill v. Fuller & Co. [Wash.] 88 P 1038. A compromise judgment by which a third person was to convey defendant's title to lands to plaintiffs held to estop defendants from a subsequent assertion of title. Townsend v. Scurlock [Tex. Civ. App.] 17 Tex. Ct. Rep. 732, 99 SW 123. Note secured by mortgage is merged in decree of foreclosure. Sears v. Nichols, 123 Ill. App. 449. Where the terms of a divorce decree were full and complete in their bearing on the property rights of the parties, it was proper, in a subsequent action by the divorced wife for an accounting of the operation of a mine, to exclude parol evidence of a conflicting contemporaneous agreement. Mogenson v. Zubler, 36 Colo. 235, 84 P 981.

97. When a second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but when the second suit is upon a different cause of action though between the same parties, the judgment in the former action operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. Blackford v. Wilder, 28 App. D. C. 535. A decree finding one a habitual drunkard rendered in an appropriate proceeding is conclusive of his condition on such date but not prior thereto. May be considered, however, in an action for specific performance of a contract entered into prior to the adjudication as tending to show his condition. Knott v. Giles, 27 App. D C. 581.

98. Griffen v. Keese, 187 N. Y. 454, 80 NE 367, modifying 115 App. Div. 264, 100 NYS 903.

99. Heilner v. Smith [Or.] 88 P 299. A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered. Sbarbero v. Miller [N. J. Eq.] 65 A 472. A judgment in favor of plaintiff in ejectment, defendant on the ground that his title was founded on a conveyance executed by one not having sufficient mental capacity, is res judicata on the

necessity of mutuality in estoppels by record requires that a court should not hold a judgment conclusive in favor of a person, unless it would be equally conclusive against him.[1]

§ 4. *Pleading and proof.* See 7 C. L. 1767—Ordinarily, and unless the former judgment is used merely as evidence,[2] the defense of res judicata must be presented by the pleadings [3] but it is sufficient if found in the pleadings of the party against whom it is sought to be set up.[4] It has been stated that the question of res judicata can be raised only by a plea [5] in bar, but while a plea of former recovery has sometimes been spoken of as a plea in abatement, it should not be regarded as a mere dilatory plea.[6] A defense of res judicata in an equity suit should properly be raised by plea or where it arises after answer by a supplemental answer,[7] but it may be considered, although raised informally by an amended answer, filed by stipulation of the parties, and to which no objection is made.[8] In some cases it is held that the proper way of raising the question is by a motion to set aside the service of the summons and complaint.[9] The plea should set up the former adjudication so that the court may determine whether it is available as a bar.[10] A plea of former adjudication must show: That the former judgment was rendered by a court of competent jurisdiction;[11] that the matter in issue in the present suit was or might have been, determined in the former suit;[12] that the particular controversy adjudicated in the former action was between the parties to the present suit;[13] and that the judgment in the former action was rendered on the merits.[14] A plea of res judicata is amendable by adding thereto the judgment claimed to be conclusive,[15] and this may be done though the judgment was entered nunc pro tunc after the commencement of the action in which it was pleaded.[16] One has the right to plead a prior decree obtained pending suit,[17] and is not precluded therefrom by the fact that evidence has been taken in the second suit.[18] A defective plea may in some cases be remedied by the proof.[19] In all pleadings on this subject the general rule that facts and not conclu-

issue of plaintiff's want of knowledge of the grantor's mental incapacity but not on the question as to whether the grantor was incompetent or whether plaintiff paid less than the market value. Id. Where in a suit for conversion defendant denied the conversion and alleged a purchase and that money due him for merchandise was to be considered as a payment on such contract, a judgment for plaintiff does not bar an action by defendant to recover the money for the merchandise. Heilner v. Smith [Or.] 88 P 299.

1. Sbarbero v. Miller [N. J. Eq.] 65 A 472.

2. Where a second suit between the same parties involves a different cause of action which depends upon the existence or nonexistence of a fact adjudicated in the first suit, the judgment rendered in the first suit being evidence tending to show that fact, it may be introduced, even though it is not especially pleaded. Gray v. Linton [Colo.] 88 P 749.

3. See American China Development Co. v. Boyd, 148 F 258.

4. The former adjudication being set forth in plaintiff's pleadings, defendant may take advantage of it. Collins v. Gleason [Wash.] 91 P 566.

5. People v. Detroit, etc., R. Co. [Mich.] 14 Det. Leg. N. 387, 112 NW 716.

6. Walden v. Walden [Ga.] 57 SE 323.

7, 8. Warren Featherbone Co. v. De Camp, 154 F 198.

9. In a quo warranto proceeding to determine defendant's title to a public office, defendant's objection that the proceeding was barred by a former attorney general's determination not to bring the proceeding was properly raised by motion to set aside the service of summons and complaint and not by answer or plea in bar. People v. McClellan, 118 App. Div. 177, 103 NYS 146.

10. Plea stating in a general way the object and purpose of the former action is insufficient. Pond v. Huling, 125 Mo. App. 474, 101 SW 115.

11. Johnson v. Knudson-Mercer Co., 167 Ind. 429, 79 NE 367, citing 5 C. L. 1516.

12. Johnson v. Knudson-Mercer Co., 167 Ind. 429, 79 NE 367, citing 5 C. L. 1516. In an action on a note reply held to sufficiently identify the subject-matter of the former action. Id.

13. Johnson v. Knudson-Mercer Co., 167 Ind. 429, 79 NE 367, citing 5 C. L. 1516. Allegations showing that additional party in second suit was a mere surety on the note sued on held sufficient to show identity of parties. Id.

14. Johnson v. Knudson-Mercer Co., 167 Ind. 429, 79 N7 367, citing 5 C. L. 1516; Farmers' & Mechanics' Life Ass'n v. Caine, 123 Ill. App. 419.

15, 16. Walden v. Walden [Ga.] 57 SE 323.

17, 18. Bredin v. National Metal Weatherstrip Co., 147 F 741.

19. Though plea did not sufficiently show

sions of law must be pleaded applies.[20] An order allowing a plea of res judicata to be filed, over the objection of plaintiff, as a part of the defendant's pleading, is not to be regarded as conclusive on the former as to the merits of the plea, when the order expressly recites that the court does not undertake to pass upon the question whether or not the plea sets up a good defense.[21] So long as the case is in limine and there is no estoppel of which the party filing the plea may take advantage, it is within the power of the court, of its own motion, to order it stricken as legally insufficient in matter of substance, or to instruct the jury to disregard the defense thereby sought to be interposed.[22] The constructions placed on various specific pleas are shown in the notes.[23] A defense that the judgment pleaded has been appealed from admits the allegations of the plea of res adjudicata.[24] The burden is on the party setting up the plea to prove it.[25] A judgment is, however, presumed to remain in force.[26] The usual and appropriate manner of proving the former judgment is to offer the judgment roll,[27] though in some states, but not all,[28] a duly certified copy of the judgment is evidence of the adjudication by the court of the issues involved in the suit and the recitals therein showing jurisdiction are evidence thereof;[29] this being in accord with the general doctrine that on collateral attack of a judgment of a court of general jurisdiction the recitals constitute evidence of their truth, and every intendment will be indulged in in support of the judgment.[30] The former adjudication must appear from the record alone or from the record supplemented by other evidence,[31] it is not sufficient that there be an inference of a decision upon the same point.[32] The record may not be contradicted, but so far as is consistent with it, with respect to matters concerning which it is silent, other evidence, including parol testimony, may be received to show what was involved, considered, and established.[33] It is only matters

that same question had been litigated and though purporting to answer the whole declaration failed to answer a part thereof held records of former action, with such parol evidence as was necessary, should be admitted to show that question at issue was litigated and determined therein. Manchester Home Bldg. & Loan Ass'n v. Porter, 106 Va. 528, 56 SE 337.

20. To avoid the effect of res judicata upon the ground that the judge making the order was personally disqualified, such disqualification must be shown by averments of facts, not by mere legal conclusions. Milton v. Hundley [Fla.] 42 S 185.

21. Gainesville & Dahlonega Elec. R. Co. v. Austin, 127 Ga. 120, 56 SE 254.

22. Gainesville & Dahlonega Elec. R. Co. v. Austin, 127 Ga. 120, 56 SE 254. In such a case defendant cannot complain that trial court entirely ignored it in instructing the jury. Id.

23. Plea that it had been adjudicated that one was the owner of a "ditch and waterway" held to mean a mere easement. Hoyt v. Hart, 149 Cal. 722, 87 P 569.

24. Murphy v. Junction City Citizens' Bk. [Ark.] 100 SW 894.

25. Griffen v. Keese, 187 N. Y. 454, 80 NE 367, modifying 115 App. Div. 264, 100 NYS 903; Chatman v. Hodnett, 127 Ga. 360, 56 SE 439. Condemnation proceedings. Laguna Drainage Dist. v. Charles Martin Co. [Cal. App.] 89 P 993. Burden is on party relying on res judicata to prove that particular matter involved was necessarily or actually determined in former action. Harris v. Equitable Securities Co. [Ga.] 58 SE 831. One claiming title to personal property through a sale under attachment proceedings in a justice court must show legal notice to the defendants of the pendency of the action and that the property claimed was attached thereon. Beckwith v. Dierks Lumber & Coal Co. [Neb.] 106 NW 442.

26. Party setting up defense of res adjudicata need not show that the judgment is in full force and has not been appealed from. Murphy v. Junction City Citizens' Bk. [Ark.] 100 SW 894.

27. Page v. Garver [Cal. App.] 90 P 481.

28. When it is sought merely to establish the fact that a judgment has been rendered, a certified copy of the judgment, without the proceedings prior thereto, is admissible. Patterson v. Drake, 126 Ga. 478, 55 SE 175. Aliter, when the judgment is sought to be used as an estoppel upon the parties thereto. Id.

29. Page v. Garver [Cal. App.] 90 P 481.

30. Page v. Garver [Cal. App.] 90 P 481. See Judgments, 8 C. L. 530.

31. Corbett v. Craven [Mass.] 82 NE 37. A judgment for plaintiff, in an action for trespass, is only evidence that the title to some part of the premises was in plaintiff, and, before he may avail himself of such judgment as an estoppel to deny his title in another action against defendant to enjoin further trespass, he must show on what part of the premises the trespass was committed, and then apply the issues and judgment to the premises in controversy in the action to enjoin. Hume v. Burns [Or.] 90 P 1009.

32. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93.

33. Stone v. Missouri Pac. R. Co. [Kan.]

which are put in issue by the pleadings in the former case which can be shown by extrinsic evidence to have been actually decided therein.[34] What the issues are must be shown by the record.[35] Whether a particular matter, within such issues, was really litigated and decided upon the trial, may be shown by extrinsic evidence.[36] It follows that a question in issue and decided in the court's opinion is sometimes deemed res judicata though such decision is not contained in the court's decree.[37] In construing a decree evidence as to what the parties understood its scope to be,[38] and of a custom existing in the locality or adopted by the parties prior to the decree respecting the subject-matter of the litigation,[39] is inadmissible. There is a conflict where the precise theory upon which the former action was decided is not disclosed by the record and it may have been decided upon a theory which would bar the subsequent suit whether the judgment must be deemed a bar.[40] Under a general finding and judgment it will be presumed, in a subsequent action between the same parties, that all the issues were decided in the former action in favor of the party in whose favor that action resulted,[41] though this does not apply to matters erroneously omitted from the judgment.[42] Where on the face of the proceedings the only defense was one of limitations a judgment for defendant without reason assigned will be presumed to have been based on the determination of such issue.[43] One may become estopped

90 P 251; Irvin v. Spratlin, 127 Ga. 240, 55 SE 1037.

34, 35. Halliday v. Bank of Stewart County [Ga.] 58 SE 169.

36. Halliday v. Bank of Stewart County [Ga.] 58 SE 169. Where pleadings on their face and the judgment roll do not show the issue tried and determined between parties, it may be shown by extrinsic evidence. Gulling v. Washoe County Bk. [Nev.] 89 P 25, rvg. 28 Nev. 450, 82 P 890. Uncertainty as to whether particular issue was decided may be determined by parol. Harris v. Equitable Securities Co. [Ga.] 58 SE 831. Where distinct and unrelated issues are presented and the record does not show upon which the decision turned, parol evidence is sometimes admissible to show that a particular one was not passed upon or decided. Hogle v. Smith [Iowa] 113 NW 556. Testimony of judge as to evidence introduced held admissible. Gorham v. New Haven, 79 Conn. 670, 66 A 505. Letter acknowledging that decision in unlawful detainer determined question of tenancy held admissible to show that it was determined in such action. Manchester Home Bldg. & Loan Ass'n v. Porter, 106 Va. 528, 56 SE 337.

37. Carson v. Three States Lumber Co. [C. C. A.] 149 F 377. The judgment rendered, and not the opinion, must be looked to in order to find the thing adjudged. Bleakley v. Barclay [Kan.] 89 P 906. At the same time the inquiry is not always confined to the formal issues as defined by the pleadings, nor to the formal parts of the judgment. Id.

38. Hartson v. Dill [Cal.] 90 P 530. But see Manchester Home Bldg. & Loan Ass'n v. Porter, 106 Va. 528, 56 SE 337.

39. Hartson v. Dill [Cal.] 90 P 530.

40. Suit on an express contract for services, defenses being payment and accord and satisfaction judgment for defendant, held to bar suit on an implied contract for such services. Ziegler v. Freedman, 105 NYS 283. Where two issues were involved in a suit and a general verdict rendered the judgment is no bar to a subsequent action based on one of the issues, it not appearing that such issue was the basis for the verdict in the former action. Hooper v. Pierce [Ala.] 44 S 108.

41. Van Camp v. Huntington, 39 Ind. App. 28, 78 NE 1057. Where a former judgment is set up in bar of the action and it appears that the issues in the former suit involved the question in issue in the later one, and there was, in the former suit, a general finding and judgment on the merits, and there were other questions in issue in the former suit which, if determined for the same party, would have resulted in the same finding and judgment, then, notwithstanding the jury in the former suit found such issues as are involved in the later suit the other way, the former adjudication is prima facie conclusive. Id. In a suit on two items, plaintiff recovering on only one, it will be deemed an adjudication that he was not entitled to recover on the other. Alcolm Co. v. Philip Hano & Co., 101 NYS 762. Where pending litigation on three items plaintiff brings to trial another action for two of the items and recovers for only one such judgment is res adjudicata of his right to recover on all but the third item. Id.

42. Principle that a demand not granted must be considered as rejected has no application to an erroneous omission to order cancellation of a paving certificate. Declared void by the decree. McManus v. Scheele, 118 La. 744, 43 S 394.

43. Where on the face of the proceedings the only defense available to an action for the foreclosure of a trust deed was the statute of limitations, it will be presumed that a verdict directed without reason assigned therefor and the judgment rendered thereon were merely intended to adjudicate the question of limitation and the burden is on the party alleging that the question of the validity of the trust deed was adjudicated to prove it. Bandy v. Cates [Tex. Civ. App.] 16 Tex. Ct. Rep. 811, 97 SW 710.

to set up the plea.[44] The benefit of the former adjudication may in some cases be preserved by injunction.[45]

FORMER CONVICTION OR ACQUITTAL, see latest topical index.

FORMS OF ACTION.[45a]

This topic treats of the distinctions between particular forms or kinds of actions, the grounds of actions being excluded.[46] The common-law forms of personal actions are treated under appropriate heads,[47] as are matters of practice dependent upon the form of action.[48] While many states have abolished the common-law forms of action and substituted a single form therefor,[49] many of the principles applicable to the different forms are still recognized.[50] Except as affected by statute,[51] the distinctions between law and equitable actions are still preserved,[52] and suit should be brought in,[53] or transferred to [54] the appropriate court, although the failure so to do may be waived.[55] In the absence of statute, equitable issues cannot be tried in an action at law [56] unless the other party fails to object thereto.[57] An objection to the

44. Where on motion of defendant a claim of plaintiff's was stricken out as not relevant, held defendant was estopped to assert that claim was adjudicated in that action. Haughawaut v. Royse, 122 Mo. App. 72, 98 SW 101. In a suit to quiet title, plaintiff filed an amendment setting up an action at law under the Code for the recovery of possession. Defendants moved to strike the amendment on the ground that plaintiff could not amend by setting up a different action; the motion was sustained. Held that defendants were not estopped from setting up the defense of res judicata based on a prior decree in a suit to quiet title. Smith v. Cowell [Colo.] 92 P 20.

45. Bankrupt enjoined from prosecuting second proceeding looking to a discharge from debts involved in a former proceeding wherein a discharge was denied. In re Kuffler [C. C. A.] 151 F 12.

45a. See 7 C. L. 1769.

46. See Causes of Action and Defenses, 9 C. L. 539, and topics descriptive of particular actions.

47. See Assumpsit, 9 C. L. 277; Detinue, 9 C. L. 975; Trespass, 8 C. L. 2147, etc.

48. See Costs, 9 C. L. 812; Dockets, Calendars and Trial Lists, 9 C. L. 1008; Jury, 8 C. L. 617, etc.

49. Under Code, § 3432, providing that forms of action are not controlling, etc., action described as habeas corpus treated as application for order of probate court for custody of wards, there being no objection by defendant. Smith v. Haas, 132 Iowa, 493, 109 NW 1075.

50. While by express provisions of Code Civ. Proc. § 460 there is but one form of action whether at law or in equity, principles applicable to different forms of actions at common law are recognized. Donovan v. McDevitt [Mont.] 92 P 49. See, also, Equity, 9 C. L. 1110.

51. Under Pierce's Code, § 250 (Ballinger's Ann. Codes & St. § 4793), providing for a single form of action, called "civil action," where complaint alleges fraudulent conveyance of property by one of defendants to the other and purchase by plaintiff on execution against grantor, relief will be granted regardless of whether it is legal or equitable. Brown v. Baldwin [Wash.] 89 P 473.

52. Proceeding to enjoin private nuisance held proceeding in equity, notwithstanding allegation and claim of damages. Geltz v. Amsden, 125 Mo. App. 592, 102 SW 1037. Proceeding to sever agricultural lands from incorporated town is at law. In re Town of LeRoy [Iowa] 113 NW 347. Action held one at law and not for accounting where plaintiff sued to recover balance collected by defendant as agent and not turned over and for money defendant collected for, but failed to remit to, others, which plaintiff was bound to pay and where no accounting was asked in answer. Judith Inland Transp. Co. v. Williams [Mont.] 91 P 1061.

53. Purchaser at execution sale of land fraudulently conveyed by debtor may try out question of fraud in ejectment suit in law court. Ward v. Sturdivant [Ark.] 98 SW 690.

54. Where plaintiff properly brought case in court of equity but it is insufficient to entitle him to relief, defendant could not set up legal defense and have it transferred to law court, since Mansf. Dig. § 4928 does not authorize such transfer where plaintiff properly sued in equity. Pilgrim v. McIntosh [Ind. T.] 104 SW 858. Where wife brings suit on promise to pay her specific sum which husband had agreed to pay in separation settlement, given in consideration of release of attachment on husband's property on which promisee held mortgage and joinder in deed, it is pure action at law and cannot be transferred to equity where there is pending action to vacate deed and whole transaction. Kinkead v. Peet [Iowa] 111 NW 48.

55. Failure of defendant to move for transfer held to waive his right to have case heard in equity. Wilson v. White [Ark.] 102 SW 201.

56. Federal courts. Cook v. Foley [C. C. A.] 152 F 41.

57. Failure to object to trial of equitable issues in law action in Federal courts waives objection. Cook v. Foley [C. C. A.] 152 F 41.

form of an action may be waived [58] or taken advantage of by a motion for nonsuit.[59] Whether a particular action is ex contractu [60] or ex delicto [61] is determined largely by the language in which the cause of action is set forth and the relief demanded. Where defendant appears in a suit brought under the rule day acts and complies with the provisions necessary to prevent default judgment, the case proceeds as an ordinary action ex contractu.[62] Where a statute creating a special proceeding is complete in itself and covers the entire subject, it is exclusive.[63]

FORNICATION.[63a]

Fornication is a statutory crime consisting in sexual intercourse between unmarried persons, and birth of issue is not an element of the offense.[64] An indictment in the language of the statute is sufficient.[65] It need not allege that the parties were unmarried unless the statute expressly makes that an element.[66] Circumstantial evidence must exclude every fair theory of innocence [67] and uncorroborated and improbable testimony of the female, denied by accused has been held insufficient.[68]

FORTHCOMING AND DELIVERY BONDS; FORWARDERS, see latest topical index

FRANCHISES.

§ 1. Definition and Elements (1446).
§ 2. Grant of Franchise and Regulation of its Exercise (1446).
§ 3. Powers and Duties Under Franchises (1448).
§ 4. Duration and Extension of Term (1449).
§ 5. Transfer of Franchises and Effect Thereof (1449).
§ 6. Revocation and Forfeiture (1449).
§ 7. Taxation (1449).

58. Not waived by submitting case to jury. Conroy v. Equitable Acc. Co., 27 R. I. 467, 63 A 356. Objection that form of action should have been in ejectment, instead of one to quiet title, is waived where answer in addition to denials affirmatively alleges title in defendant and prays that he be decreed owner thereof and the issues are tried after objection to evidence in nature of demurrer to complaint. Brown v. Baldwin [Wash.] 89 P 483.

59. Where objection does not appear on face of pleadings, it can be taken advantage of only by motion for nonsuit. Conroy v. Equitable Acc. Co., 27 R. I. 467, 63 A 356.

60. **Construed as ex contractu:** Complaint for failure of defendant to return money placed with him to meet a contingent claim, as agreed, and not in conversion. Lange v. Schile, 117 App. Div. 233, 101 NYS 1080. Complaint alleging that defendant had agreed to present note for payment and to return it by certain time in case of nonpayment, which he had failed and neglected to do. Kiblinger Co. v. Sauk Bk., 131 Wis. 595, 111 NW 709. Action for damages sustained because of wrongful refusal of bank to honor check although containing allegations appropriate to tort. Lorick v. Palmetto Nat. Bk. of Columbia [S. C.] 57 SE 527. Action construed as based on implied contract to return money obtained through false vouchers of ties purporting to be furnished to plaintiff and not ex delicto. Morgan's Louisiana & T. R. & S. S. Co. v. Stewart [La.] 44 S 138. Petition by administrator seeking adjustment of business relations between decedent and defendant held to state action for recovery of indebtedness due, and not for conversion of notes, although it alleges that defendant executed notes for money of decedent retained by him, which notes he refuses to deliver to plaintiff. Ackerman v. Green, 195 Mo. 124, 93 SW 255. Count charging that plaintiff loaned to defendant a plow which was broken and destroyed by defendant held to state cause of action ex contractu, though it did not contain allegations of fictional sale and promise. Redel v. Missouri Valley Stone Co. [Mo. App.] 103 SW 568.

61. **Construed ex delicto:** Action for damages resulting from negligent construction of windmill which defendant had contracted to erect on plaintiff's barn in first class manner. Flint & Walling Mfg. Co. v. Becket, 167 Ind. 491, 79 NE 503. Action by lessee for damages caused by lessor who entered upon the premises without lessee's consent and made extensive repairs dehors his contract rights. Wood v. Monteleone, 118 La. 1005, 43 S 657.

62. And neither affidavit nor cause of action filed controls as to nature of proof. Legum v. Blank [Md.] 65 A 1071.

63. Proceedings under Rev. St. 1899, §§ 3227-3232 (Ann. St. 1906, pp. 1832-1834), to compel execution defendant to appear for examination as to his ability is governed solely by its provisions. Ackerman v. Green, 201 Mo. 231, 100 SW 30.

63a. See 5 C. L. 1518.

64. State v. Sharp [N. J. Law] 66 A 926, distinguishing Smith v. Minor, 1 N. J. Law. 19, as decided before the Crimes Act of 1796.

65. "Did commit fornication." State v. Sharp [N. J. Law] 66 A 926.

66. Under a statute punishing "any person who shall commit fornication," marriage is matter of defense. State v. Sharp [N. J. Law] 66 A 926.

67. Circumstantial evidence held insufficient to show intercourse between defendant and woman acting as nurse of his child. Lightner v. State, 126 Ga. 563, 55 SE 471.

68. Hofer v. State, 130 Wis. 576, 110 NW 391.

Scope of topic.—A distinction is made between corporate franchises and the instrumentalities by means of which such franchises may be exercised, the latter being called secondary franchises,[69] and this article treats only of the latter.[70]

§ 1. *Definition and elements.*[See 7 C. L. 1771]—Franchises are separate and distinct from the property used in the exercise therof,[71] and from mere regulation,[72] and a grant of public rights and privileges is not prevented from being a franchise by regulatory provisions.[73] A municipal franchise constitutes a contract which is entitled to the guaranty of the Federal constitution against impairment,[74] and a Federal court will enforce such guaranty by injunction against the grantor.[75] The question of revocation and forfeiture is treated in another section.[76]

§ 2. *Grant of franchise and regulation of its exercise.*[See 7 C. L. 1771]—Public franchises cannot be granted for private use.[77] Legislative franchises may be bestowed upon individuals to the same extent as upon private corporations,[78] and a statute authorizing the sale of such franchises by a receiver sanctions the use thereof by an individual purchaser.[79] But such right may be withdrawn by subsequent legislation.[80] Municipal franchises may be modified by the state in the exercise of its police power,[81] and, subject to municipal police power, a franchise holder may change its system of operation when so authorized by statute, without impairment of its municipal franchise and without the consent of the municipality.[82] In some cases the legislature may even grant franchises to be exercised in municipalities without requiring compensation to be paid to the municipalities.[83] A municipal corporation can grant franchises only in such manner as is authorized by charter or statute,[84] and a municipal grant which is ultra vires is

69. Right of way through city granted to railroad company is a secondary franchise, as distinguished from the franchise to construct and operate the road. Shreveport Trac. Co. v. Kansas City S. & G. R. Co. [La.] 44 S 457.

70. As to corporate franchises, see Corporations, 9 C. L. 733, and see also titles dealing with corporations exercising particular franchises, such as Street Railways, 8 C. L. 2004, and the like.

71. Grant of franchise to use bridge constructed by city, subject to rights of public to use thereof, does not make construction a private enterprise to which municipality could not lend its aid by issue of bonds, etc. Haeussler v. St. Louis [Mo.] 103 SW 1034.

On expiration of franchise, property rights are not affected. See post, § 4, Duration and Extension of Term.

72. Fogg v. Ocean City [N. J. Law] 65 A 885.

73. Right to construct telegraph lines in streets. Western Union Tel. Co. v. Visalia, 149 Cal. 744, 87 P 1023.

74, 75. Des Moines City R. Co. v. Des Moines, 151 F 854.

76. See post, § 6.

77. Grant of right to street railroad company to connect with warehouse of local express company held not grant of use of streets for private use. Dulaney v. United Rys. & Elec. Co., 104 Md. 423, 65 A 45.

78. McCarter v. Vineland Light & Power Co. [N. J. Eq.] 65 A 1041.

79. P. L. 1842, p. 164, as preserved by Rev. St. 1846, p. 136, tit. 5, c. 3, § 20, Revision, p. 192, § 85, P. L. 1896, p. 303, § 82. McCarter v. Vineland Light & Power Co. [N. J. Eq.] 65 A 1041.

80. P. L. 1881, p. 33, Gen. St. p. 3094, §§ 34, 35, confines use of franchises purchased under decrees of courts to corporations created by the act ex proprio vigore. McCarter v. Vineland Light & Power Co. [N. J. Eq.] 65 A 1041.

81. Right to lay electrical wires and conductors under streets taken away by statute requiring laying of such wires and conductors in subway constructed under general plan adopted by board of commissioners. People v. Ellison, 51 Misc. 413, 101 N Y S 444.

82. Light and power company which was authorized by city merely to erect poles held, under Act 1889, P. L. 136, to have power to change to conduit system. Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A 72.

83. Right of street railroad to do express business. Dulaney v. United Rys. & Elec. Co., 104 Md. 423, 65 A 45.

84. Under Const. § 164, city cannot grant any franchise except at public sale to highest bidder. Moberly v. Richmond Tel. Co. [Ky.] 103 SW 714. Const. § 164, requiring municipalities to dispose of franchises to highest bidder, when construed with a view to its purpose to protect the citizens of the municipality, and in connection with other constitutional provisions relating to monopolies, held not to prevent municipality from providing for rejection of bids of rival company already holding franchise similar to one to be sold. Stites v. Norton [Ky.] 101 SW 1189. Under Const. § 164, forbidding municipalities from granting franchises for a term of years, except after advertisement and upon public bids, a franchise awarded otherwise is invalid,

ineffective[85] and will not be enforced by the courts,[86] but prohibition against the grant of a municipal franchise will not lie at the instance of a disinterested party.[87] Where consents have been once acted on by a city council in the granting of a valid street railway franchise, their vitality is expended and they cannot be again used as the basis of a second grant to another company.[88] Power to regulate does not include power to grant.[89] The statutory power of a municipal council to grant franchises is subject to the general veto of its executive head under its charter.[90] Power to grant franchises may and sometimes is delegated to municipal commissions or departments,[91] or it may be vested in the people themselves.[92] The grant of a franchise by a municipality will not be invalidated by the smallness of the fee charged, in the absence of fraud, or collusion, or noncompliance with the law,[93] but a municipal franchise to do what the grantee already has the right to do is ineffective for any purpose.[94] Similar franchises may be granted to rival companies where the exercise of one does not exclude the exercise of the other.[95] Where a statute amending, altering, or rechartering a corporation expressly preserves its former rights and franchises, a new franchise from a city in which the corporation was already operating under franchise therefrom is not necessary.[96] A grant, or at least consent to the exercise of a franchise, may be implied from long acquiescence.[97] A municipal-

though the municipality does not bind itself to continue the franchise for more than a year. Frankfort Tel. Co. v. Common Council of Frankfort, 30 Ky. L. R. 885, 100 SW 310. Power granted to construct and maintain poles, etc., for transmission of electricity in consideration of agreement to furnish certain city plants with electricity held not merely grant of way to city plants but a franchise which, under Comp. Laws, § 3111, could only be granted by two-thirds vote of all the aldermen elect. Vossen v. St. Clair, 148 Mich. 686, 14 Det. Leg. N. 331, 112 NW 746.

85. There is an entire absence of express power, either in the municipal code or previous statutory provisions, whereby a municipality may grant to a lighting company the right to jointly use municipal poles, nor can such power be implied from authority to sell either real or personal property, and to treat such pole rights as a mere license might easily result in confiscation to a degree which would exclude the city from larger use demanded by future growth. City of Columbus v. Columbus Public Service Co., 4 Ohio N. P. (N. S.) 329.

86. The fact that public policy and good business judgment favor an advantageous contract by a city for the joint use of city poles by an electric lighting company furnishes no warrant to a court to assist in a continuance of such use, where the entering into such a contract is manifestly ultra vires on the part of the municipality. City of Columbus v. Columbus Public Service Co., 4 Ohio N. P. (N. S.) 329.

87. Company owning no property in municipality, paying no taxes thereto, and having no vested right and no municipal consent or franchise, and which has applied for none over route of another company, and having no certificate of convenience and necessity for such route, and which is merely applying for municipal consent to such route, has no status to maintain prohibition against grant of franchise to other company. People v. Bauer, 54 Misc. 28, 103 NYS 1081.

88. Isom v. The Low Fare R. Co., 10 Ohio C. C. (N. S.) 89.

89. Act March 24, 1897, P. L. p. 46, authorizing cities to prescribe manner of exercise of franchises involving use of streets, does not authorize cities to make original grants of such franchises. Fogg v. Ocean City [N. J. Law] 65 A 885.

90. Power under St. 1901, p. 265, c. 103, to grant street railroad franchises, held subject to veto power of mayor under city charter. City of Los Angeles v. Davidson, 150 Cal. 59, 88 P 42.

91. Acts 1888, p. 1060, c. 583, tit. 16, § 2, delegating to Brooklyn park department control over Ocean Parkway outside of the then limits of city of Brooklyn. People v. Color, 54 Misc. 21, 103 NYS 590.

92. Under Acts 1903, p. 393, c. 186, authorizing amendment of city charter in regard to any matter within realm of local affairs or municipal business, an amendment giving people of city power to grant franchises was authorized, notwithstanding Ball. Ann. Codes & St. § 740, vesting legislative powers in mayor and council. Hindman v. Boyd, 42 Wash. 17, 84 P 609.

93. Dulaney v. United Rys. & Elec. Co., 104 Md. 423, 65 A 45.

94. Franchise to telegraph company to construct line in streets when company already had such right under 14 Stat. 221, Rev. St. U. S. § 3964 [U. S. Comp. St. 1901, p. 2707], and Cal. Pol. Code, § 2618, and Civ. Code, § 536. Western Union Tel. Co. v. Visalia, 149 Cal. 744, 87 P 1023.

95. Railroad franchises granted by municipality over different routes. People v. Bauer, 54 Misc. 28, 103 NYS 1081. As to **exclusiveness** of franchise, see post, § 3, **Powers and Duties under Franchises.**

96. See Act 1889, P. L. 136, authorizing surrender of charters and providing for granting of new charters Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A 72.

97. Acquiescence for ten years of city

ity may annex any lawful condition to the exercise of a public franchise which it is authorized to grant,[98] and such condition becomes a part of the contract under which the franchise is thenceforth exercised,[99] but a municipality cannot, in granting a franchise, abridge, limit, or destroy its police power.[1] A municipality, in granting a franchise, may reserve the right to change the conditions of the grant.[2]

§ 3. *Powers and duties under franchises.* See 7 C. L. 1774—In determining the powers granted by a franchise ordinance, the whole ordinance must be looked to,[3] and so also, in determining powers under a legislative franchise, the whole course of legislation relative thereto must be considered.[4] Legislative franchises, whether granted by special charters or under general laws, are exclusive as against all to whom similar rights have not been conferred,[5] and an unlawful invasion of such franchises will be enjoined.[6] Public franchises, however, are strictly construed in favor of the public, and the franchise holder takes nothing not clearly granted.[7] In the absence, therefore, of an agreement to such effect, a franchise is not exclusive of the right of the grantor to engage in enterprises similar to those covered by the franchise,[8] or the grant of similar franchises to others,[9] and where a city has no power to grant an exclusive franchise, such a franchise is not binding.[10] A public franchise is sufficiently exercised when the holder furnishes to the public all reasonable accommodations required by the franchise, regardless of the agencies employed.[11] Unwarranted use or usurpation of legislative franchises may be restrained on information filed by the attorney general.[12] Statutory provision is sometimes made for proceedings in the nature of quo warranto against persons usurping public franchises.[13]

of Brooklyn in exercise of lighting franchise on Ocean Parkway granted by park department under authority of Acts 1888, p. 1060, c. 583, tit. 16, § 2. People v. Coler, 54 Misc. 21, 103 NYS 590. Six years' acquiescence in objecting to change of system from poles to conduits held to deprive both city and individuals of right to relief in equity. Id.; Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A 72 .

98. Moberly v. Richmond Tel. Co. [Ky.] 103 SW 714.

99. Limitation of telephone rates by ordinance. Moberly v. Richmond Tel. Co. [Ky.] 103 SW 714.

1, 2. Coatesville Borough v. Coatesville Elec. Light, Heat & Power Co., 32 Pa. Super. Ct. 513.

3. Grant of power to street railroad company to lay connecting switch held not taken away but only modified by subsequent section prohibiting interference with or encroachment upon sidewalks, where the switch authorized could not be laid without crossing sidewalk. Dulaney v. United Rys. & Elec. Co., 104 Md. 423, 65 A 45.

4. Water company incorporated under Acts 1886, p. 138, c. 100, with power to lay pipes in county highways without consent of county commissioners, held not to have such power under amendments by Acts 1888, p. 81, c. 73, and Acts 1900, p. 49, c. 52, the latter of which acts conferred, in addition to corporation's former rights, all rights under Code Pub. Gen. Laws, art. 23, § 358 (Acts 1898, p. 691, c. 199), corporations incorporated under the general act being forbidden to exercise such power without the consent of county commissioners. Baltimore County Water & Elec. Co. v. Baltimore County Com'rs [Md.] 66 A 34.

5. Attempted exercise by such others is unwarranted usurpation of power, and an invasion of the rights of the holder of the franchise. Millville Gaslight Co. v. Vineland Light & Power Co. [N. J. Eq.] 65 A 504.

6. Millville Gaslight Co. v. Vineland Light & Power Co. [N. J. Eq.] 65 A 504.

7. Ambiguities resolved in favor of public and against franchise holder. Millville Gaslight Co. v. Vineland Light & Power Co. [N. J. Eq.] 65 A 504. Street railroad franchise granted by city. Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116, 51 Law. Ed. 399.

8. City not precluded from establishing own waterworks. Hastings Water Co. v. Hastings Borough, 216 Pa. 178, 65 A 403; Tillamook Water Co. v. Tillamook Co. [C. C. A.] 150 F 117.

Injunction against erection of waterworks by city in violation of exclusive franchise held by complainant, subject to city's right to purchase, refused when answer denied intention to infringe complainant's rights and only evidence of such intention was ordinance authorizing issue of bonds to purchase complainant's plant or constructing building, and equipping a waterworks plant. Selma Water Co. v. Selma, 154 F 138.

9, 10. Crouch v. McKinney [Tex. Civ. App.] 104 SW 518.

11. Franchise for carrying express. Dulaney v. United Rys. & Elec. Co., 104 Md. 423, 65 A 45.

12. McCarter v. Vineland Light & Power Co. [N. J. Eq.] 65 A 1041.

13. Code tit. 21, c. 9, providing for pro-

§ 4. *Duration and extension of term.* See 7 C. L. 1775—Subject to statutory provisions against perpetual franchises,[14] the duration of a franchise is a matter of intent and statutory construction.[15] Where a city recognizes the existence of a franchise after a certain date and imposes obligations upon the franchise holder consistent only with the continuation of the franchise, it will be estopped to assert that the franchise expired on such date.[16] Expiration of a municipal franchise does not divest the grantee of title to property acquired and used in the exercise of such franchise,[17] and such property cannot be disposed of to a subsequent grantee by a municipal ordinance.[18]

§ 5. *Transfer of franchises and effect thereof.* See 7 C. L. 1775—A purchaser of franchises at a judicial sale acquires a valid title thereto,[19] regardless of the power of the original corporate holder to make a transfer,[20] and only the state can question the validity of a transfer of a legislative franchise as being ultra vires the corporate transferrer.[21] Acts authorizing sales and leases of franchises will not receive the same strict construction applicable to the original grants.[22]

§ 6. *Revocation and forfeiture.* See 7 C. L. 1776—A municipal franchise is irrevocable by the municipality unless forfeited by the terms thereof.[23]

§ 7. *Taxation.*[24]

FRATERNAL MUTUAL BENEFIT ASSOCIATIONS.

§ 1. Nature, Organization, and Powers (1450). Status of Local Lodges and Relation to Supreme Body (1451).
§ 2. Foreign Associations (1452).
§ 3. Officers, Agents, Organizers, Physicians, etc. (1453).
§ 4. Members and Discipline (1453). Arbitration of Disputes (1453).
§ 5. The Contract of Insurance (1454).
A. General Nature, Requisites, and Formation (1454).
B. General Rules of Construction (1455).
C. Risk Assumed and Benefit Promised (1455).
D. Conditions, Warranties, and Representations (1457).
E. Dues and Assessments (1458).
F. Modification and Alteration of Contract or its Terms (1459).
G. Rescission, Forfeiture, Cancellation, and Avoidance (1460).
H. Waiver, Estoppel, and Reinstatement (1462).

ceedings in nature of quo warranto against persons usurping franchises, applies to unauthorized use of streets by street railroad company. State v. Des Moines City R. Co. [Iowa] 109 NW 867. Word person, as used in statute, includes corporations. Id.

Practice under such acts is treated elsewhere. See Quo Warranto, 8 C. L. 1582.

14. Gas company which had been operating with consent or acquiescence of city for ten years under a purported franchise which was not limited as to duration held entitled to continue such exercise for twenty-five years from date of purchase, under Greater New York City charter [Laws 1897, p. 25, c. 378, § 23], providing that franchises in use of streets shall not be granted for more than twenty-five years. People v. Coler, 54 Misc. 21, 103 NYS 590. Franchise would have been void if it had purported to have been granted in perpetuity. Id.

15. Ordinance granting franchise to be exclusive for a certain number of years held not to limit duration of franchise but only its exclusive nature. Des Moines City R. Co. v. Des Moines, 151 F 854.

16. Des Moines City R. Co. v. Des Moines, 151 F 854.

17. Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116, 51 Law. Ed. 399.

18. Such would not be due process of law. Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116, 51 Law. Ed. 399.

19. In re Long Acre Elec. Light & Power Co., 188 NY 361, 80 NE 1101. Even though the corporation has been dissolved. In re Long Acre Elec. Light & Power Co., 51 Misc. 407, 101 NYS 460, afd. 117 App. Div. 80, 102 NYS 242, which afd. 188 N. Y. 361, 80 NE 1101.

20. In re Long Acre Elec. Light & Power Co., 188 N. Y. 361, 80 NE 1101.

21. Conduit company could not refuse acommodations to transferree of franchise to conduct electricity to consumers, on ground of lack of power in corporate transferror to make transfer. In re Long Acre Elec. Light & Power Co., 188 N. Y. 361, 80 NE 1101.

22. P. L. 1842, p. 164, as preserved by Rev. St. 1846, p. 136, tit. 5, c. 3, § 20, Revision, p. 192, § 85, and P. L. 1896, p. 303, § 82. McCarter v. Vineland Light & Power Co. [N. J. Eq.] 65 A 1041. Laws 1905, p. 2097, c. 737, § 13, prohibiting transfer of franchises by corporation, held not applicable to transfers by individuals. In re Long Acre Elec. Light & Power Co., 51 Misc. 407, 101 NYS 460, afd. 117 App. Div. 80, 102 NYS 242, which afd. 188 N. Y. 361, 80 NE 1101.

23. People v. Ellison, 51 Misc. 413, 101 NYS 444. See, also, § 1, **Definition and Elements.**

24. See Taxes, 8 C. L. 2058.

§ 6. The Beneficiary (1466). Exemption of Benefits from Liability for Debts (1469).
§ 7. Maturity and Accrual of Benefits (1469).
§ 8. Notice and Proofs of Death or Disability (1469).
§ 9. Payment of Benefits and Discharge of Liability (1469).
§ 10. Procedure to Enforce Right to Benefits, etc. (1470). Submission of Disputes to Arbitration or to Tribunals Within the Order (1470). Remedies and Procedure in General (1470). Parties (1471). Limitations (1471). Pleading (1472). Evidence (1473).

The scope of this topic is noted below.[25]

§ 1. *Nature, organization, and powers.* See 7 C. L. 1778—What organizations are to be deemed fraternal benefit associations depends on the statutes of the various states.[26] The character of insurance which the association may write depends on the terms of its charter.[27] In many states the general insurance law is made inapplicable to fraternal benefit associations.[28]

The legislature may, by amendment of the society's charter, or the statute under which it was organized, limit the scope of its business as originally authorized, at least in so far as it does not thereby impair contract obligations.[29] The right of amendment is also often reserved to the association.[30] Amendments to

25. This article deals only with the law peculiarly applicable to fraternal mutual benefit associations. All questions relating to the insurance contracts of such associations have, however, been included, even though governed by the rules of law applicable to insurance contracts generally. Matters relating generally to corporations (See Corporations, 9 C. L. 733; Foreign Corporations, 9 C. L. 1395, or associations (See Associations and Societies, 9 C. L. 274), have been excluded. Reference should also be had to the article Insurance, 8 C. L. 377.

26. Defendant held fraternal beneficiary association within meaning of Rev. St. 1899, §§ 1408-1423. Tice v. Supreme Lodge K. of P., 204 Mo. 349, 102 SW 1013, afg. 123 Mo. App. 85, 100 SW 519. Defendant held not profit making or profit sharing concern within meaning of § 1408 though it established large reserve fund and invested same in interest bearing securities. Id. Fact that association held property in excess of limit fixed by its charter held immaterial on issue whether it furnished fraternal or old line insurance. Tice v. Supreme Lodge K. of P., 123 Mo. App. 85, 100 SW 519, afd. 204 Mo. 349, 102 SW 1013. Association having no initiatory ceremony and no ritualistic form of work, and into which members were admitted by simply paying required amount of dues, held not fraternal benefit association within provisions of act March 8, 1879 (Laws 1879, p. 65), but an accident insurance company, so that rights of insured were to be determined by contract of insurance solely. Young v. Railway Mail Ass'n [Mo. App.] 103 SW 557.

27. Where society was authorized to pay certain sum weekly or monthly to any member "disabled by sickness or other disability," held that provision in contract and by-laws that he should be paid half amount to which beneficiary would be entitled on his death, in case of total and permanent disability, "or upon reaching the age of seventy years," would be construed as authorizing payment when permanent total disability should ensue, of which reaching age of seventy years should be conclusive evidence, so that contract was not ultra vires though agreement to pay absolutely at age of seventy would have been. Guthrie v. Supreme Tent Knights of Maccabees [Cal. App.] 87 P 405. Even if agreement to pay member benefit on arriving at age of 70 was ultra vires when made, held that objection was removed by reincorporation of association under Laws 1893, p. 186, No. 119, authorizing payment of benefits in case of old age, and adoption of by-law providing for payment of such benefits. Wineland v. Knights of Maccabees, 148 Mich. 608, 14 Det. Leg. N. 345 112 NW 696. Held that, after lapse of ten years from reincorporation of association, it was too late for one then a member to insist that certificates then in existence should be treated otherwise than if they had been issued after such reincorporation, particularly where he was insisting that provision of his contract ultra vires originally was binding because of increased powers granted by act under which reincorporation was alleged to have taken place. Id. Rev. Laws 1905, §§ 1594, 1703, held to prohibit sale of endowments by fraternal beneficiary associations. National Protective Legion v. O'Brien [Minn.] 112 NW 1050. Contract agreeing to pay dividends or "maturity benefits" to living members not under disability, incidents of which were to pay small disability benefits as loan and an insignificant death benefit, for a flat premium, held sale of endowments. Id.

28. For applicability of statutes relating to particular rights or remedies under the contract of insurance, see §§ 5-9, post. In Missouri it is the terms of the contract and not nature of society which determines whether exemptions from general insurance laws in favor of fraternal benefit associations apply, and hence such an association executing contract not authorized by statute relating to such associations is not entitled to such exemptions. Wilson v. General Assembly of American Benev. Ass'n, 125 Mo. App. 597, 103 SW 109.

29. Amendment restricting classes of persons who might be designated as beneficiaries held valid and binding on one who became member after its adoption. Sturges v. Sturges [Ky.] 102 SW 884.

30. For right to amend constitution and by-laws with respect to insurance con-

the laws, when authorized, must be adopted in the manner prescribed.[31] Authority conferred on a committee to revise the constitution and laws of the order gives it no power to propose wholly new provisions.[32] A revised constitution adopted without compliance with the requirements of the old constitution as to the procedure in such cases is invalid.[33]

The by-laws of an incorporated association must be reasonable,[34] but those of a purely voluntary, unincorporated association, if not illegal, immoral, or contrary to public policy, have been held to be binding on its members whether reasonable or not.[35] By-laws otherwise valid are binding on a member though he was not present at the meeting at which they were adopted and was insane at the time.[36]

The journal of the proceedings of the representative body of an association is presumed to be correct, and entries therein cannot be overcome by the parol testimony of members.[37] Ordinarily, the minutes must be taken to import that the proceedings were regular and that all of the ordinary and customary incidents necessary to the validity of the action recorded duly transpired.[38]

Questions relating purely to the internal management of the affairs of the corporation must, within reasonable limits, be decided by the legislative boards or bodies created by it for that purpose.[39]

Status of local lodges and their relation to supreme body. See 7 C. L. 1779—Where a question of discipline only is involved, a suspended subordinate branch must ordinarily exhaust its remedies within the organization before recourse can be had to

tracts, and effect of such amendments, see § 5F, post. Both general incorporation act under which defendant was incorporated, and fraternal beneficiary act under which it did business, held to authorize amendment abolishing life membership in supreme council. Pond v. Royal League, 127 Ill. App. 476. Where by-laws provided that new laws might be adopted by two-thirds vote, held that law so adopted creating compulsory insurance department, requiring payment of $1 per month by all members except certain aged and disabled ones, and providing that those failing to pay should no longer meet with the lodge, was reasonable and valid, original by-laws having provided for benefits, etc. Ward v. David & Jonathan Lodge [Miss.] 43 S 302.

31. Where evidence showed that amendment to by-laws was adopted at stated meeting at which many of the members were present, and was passed by many more votes of those present than was necessary in order to make it valid, held that it would be presumed that it was regularly proposed by member in good standing as required by laws of order, and that it devolved on one claiming contrary to prove it. Maxwell v. Theatrical Mechanical Ass'n, 54 Misc. 619, 104 NYS 815. Governing body of association which has not adopted representative form of government, as required by Acts 1897, p 266, c. 47, § 1, is without power to adopt edict or by-law changing terms or obligations of certificate theretofore issued. Lange v. Royal Highlanders [Neb.] 110 NW 1110, former opinion, [Neb.] 106 NW 224. Attack on such edict or by-law on that ground held not to amount to collateral attack on right of society to transact business. Id.

32. Confers no authority to originate and propose, without notice required for amendments generally, the abolition of laws and constitution. National Council v. State Council, 27 App. D. C. 1.

33. Bill in equity by national council to compel state council to surrender its charter and to enjoin it from acting thereunder, on ground that said charter has been revoked by national judiciary, will not lie where said national judiciary was created under revised constitution not validly adopted. National Council v. State Council, 27 App. D. C. 1. Adoption of revised constitution held in disregard of provisions of old constitution and hence invalid. Id.

34. For reasonableness of by-laws and amendments as affecting existing contracts, see § 5F, post.

35. Maxwell v. Theatrical Mechanical Ass'n, 54 Misc. 619, 104 NYS 815.

36. Action of society in raising assessments, if legal and reasonable, where he agreed to be bound by laws thereafter adopted. Conner v. Supreme Commandery Golden Cross, 117 Tenn. 549, 97 SW 306.

37. Cannot be overcome by vague impressions of witnesses as to result of certain vote. National Council v. State Council, 27 App. D. C. 1.

38. Statement in minutes that motion that report of committee be agreed to and revised laws adopted "was agreed to" held to import only that quorum was present and that majority voted in favor of motion, and not that motion was carried by two-thirds vote of members present as required by constitution. National Council v. State Council, 27 App. D. C. 1.

39. Question as to increase of assessments, in which regard by-laws were subject to amendment under general reserve power. Meek v. Supreme Council Royal Arcanum, 121 App. Div. 474, 106 NYS 155.

the civil courts.[40] An attempted withdrawal of a local body is ineffective unless in compliance with the laws of the order.[41] A minority of the members of a local lodge remaining faithful to the order on the withdrawal of the majority generally continue to constitute the local lodge.[42] The liability of the supreme body for injuries inflicted on a member during his initiation depends on whether the persons conducting the initiation are acting as its agents.[43] The relation of the local lodge and its officers to the supreme body as affecting questions of waiver and estoppel in relation to contracts of insurance is treated in a subsequent section.[44]

§ 2. *Foreign associations.* See 7 C. L. 1780—Foreign fraternal benefit associations stand on the same footing as other foreign corporations.[45] A license to do business in the state,[46] and a compliance with its laws regulating such associations,[47] is generally required. The doctrine of comity does not extend so far as to concede to them powers which their own charters do not permit them to exercise, nor to permit a foreign association to exercise powers within the state which a domestic corporation is not permitted to exercise under the laws or policy of the state.[48] Service of process,[49] and venue [50] in actions against foreign associations, are treated elsewhere.

40. Application for writ of mandamus to reinstate subordinate lodge, which had been suspended by chief officer of the organization under its rule with approval of executive council after a hearing, denied, notwithstanding irregularities of procedure, no property rights or money demands being involved, and lodge not having exhausted its right of appeal within the organization. Grant v. Ancient Order of Forresters [N. J. Law] 66 A. 902.

41. Attempted dissolution and withdrawal of subordinate court held ineffective in view of provision in constitution and laws of order prohibiting withdrawals except as provided therein. Sabourin v. Lippe [Mass.] 81 NE 282. Action of grand court, after attempted withdrawal, in recognizing plaintiffs as still constituting subordinate court and in granting them new dispensation, held not to have worked dissolution of subordinate court but to have left it in continued existence, in view of provisions of laws of order to effect that, if fifteen members remained loyal to order, they should be recognized as still constituting court and dispensation to that effect should be issued. Id. Where laws of subordinate court provided that they could not be annulled or amended without previous notice, held that attempted withdrawal from order without notice was ineffectual. Id. Notice of matters to be considered at meeting held insufficient as notice that question of secession would be considered. Id.

42. Where attempted dissolution of subordinate court was ineffective, and all officers withdrew and abandoned their offices and transferred their support to new organization, to which they attempted to transfer property of court, held that loyal members could reorganize and elect officers to take their places, and that officers so elected represented court and could sue to recover its property. Sabourin v. Lippe [Mass.] 81 NE 282.

43. Evidence held to support finding that officers and members of subordinate lodge were following directions of ritual and were acting as lawfully constituted agents of supreme body, within the scope of the authority vested in them, so as to render supreme body liable for injuries inflicted on plaintiff. Thompson v. Supreme Tent of Knights of the Maccabees [N. Y.] 82 NE 141, rvg. 100 NYS 1145. By-laws held not to be construed as relieving supreme body from liability, even if such a by-law would be valid. Id.

44. See § 5H, post.

45. National Council, J. O. A. Mechanics v. State Council, J. O. U. A. Mech., 203 U. S. 151, 51 Law. Ed. 132. See Foreign Corporations, 9 C. L. 1395.

46. To receive benefit of laws and rules of construction relating to certificates issued by fraternal benefit associations, must plead and prove that it has been admitted to do business in state in manner prescribed by Rev. St. 1899, § 1410. Gruwell v. National Council of K. & L. of S. [Mo. App.] 104 SW 884. In absence of such proof, held that defendant's contract was to be considered as one of regular insurance, regardless of fact that it indicated on its face that it was issued by fraternal beneficiary society. Id.

47. Foreign association having paid agents in violation of Burns' Ann. St. 1901, § 5050k, and of its own charter, held not entitled to writ of mandamus to compel auditor to grant it license to do business in state. State v. Bigler [Ind.] 82 NE 464. Foreign association held to have violated Burns' Ann. St. 1901, § 5050a, requiring associations to have lodge system with ritualistic form of work, and writ of mandamus to compel auditor to grant it license to do business in state denied. Id. To receive benefit of laws and rules of construction relating to certificates issued by fraternal beneficiary associations, foreign association must plead and prove that it possesses qualifications of such societies as prescribed by Rev. St. 1899, § 1408. Gruwell v. National Council of K. & L. of S. [Mo. App.] 104 SW 884.

48. Writ of mandamus to compel auditor to license foreign association denied where it did not have lodge system with ritualistic form of work as required by Burns' Ann. St. 1901, § 5050a, and employed

§ 3. *Officers, agents, organizers, physicians, etc.*[See 7 C. L. 1781]—Statutes in some states forbid the employment of paid agents.[51] Officers of subordinate lodges are generally held to be the agents of the supreme body in the performance of their official duties.[52] Directors of an insolvent association disposing of its assets in violation of its laws are personally liable for resulting losses to beneficiaries.[53]

§ 4. *Members and discipline.*[See 7 C. L. 1782]—Expulsions and suspensions as affecting the right to benefits are treated in subsequent sections.[54] The procedure for the expulsion of members is generally prescribed by the laws of the order.[55] The member is generally entitled to notice and an opportunity to be heard.[56] Mandamus is the proper remedy to effect the restoration of a member who has been irregularly expelled.[57] Where the tribunal appointed to try a member has jurisdiction, its members are not personally liable for acts committed in their judicial capacity,[58] and, where there is probable cause for the prosecution, the members instituting it are not liable for malicious prosecution or conspiracy.[59]

Arbitration of disputes.[See 7 C. L. 1783]—Provisions requiring an expelled member to exhaust his remedies within the order before appealing to the courts are generally held to be valid if reasonable.[60] The validity and effect of agreements to arbi-

paid agents in violation of Id., § 5050k, and its own charter provisions, though it was doing business in state at time of enactment of said statutes. State v. Bigler [Ind.] 82 NE 464.

49. See Process, 8 C. L. 1449.

50. See Venue and Place of Trial, 8 C. L. 2236.

51. Foreign association having paid agents in violation of Burns' Ann. St. 1901, § 5050k, and of its own charter, held not entitled to writ of mandamus to compel auditor to grant it license to do business in state. State v. Bigler [Ind.] 82 NE 464.

52. For discussion of this subject as affecting waiver and estoppel in regard to insurance contracts, see § 5H, post. Medical examiner and worthy recorder held agents of society while performing duties incumbent on them by virtue of their respective positions as to matters embraced in or relating to such duties. Modern Order of Praetorians v. Hollmig [Tex. Civ. App.] 17 Tex. Ct. Rep. 969, 103 SW 474, rvd. on other grounds [Tex.] 18 Tex. Ct. Rep. 806, 103 SW 476.

53. Where directors of insolvent society, whose by-laws required payment of benefits out of fund collected for that purpose, acting in good faith, for best interests of association, and under direction of stockholders, transferred entire assets of association, including realty, bonds, etc., in which said fund was invested, to another similar association without first paying benefit liability which had been reduced to judgment, though there were sufficient funds for that purpose on hand, held that they were guilty of breach of duty imposed on them by by-laws, and were personally liable to beneficiary for amount of his judgment. Harvey v. Wasson, 74 Kan. 489, 87 P 720.

54. See §§ 5E, G, H, post.

55. Upon filing of complaint, in accordance with by-laws, alleging violation of regulation of order, held that lodge possessed power to determine, in first instance, matter in issue and to expel member if found guilty. Moon v. Flack [N. H.] 65 A 829. Contract of membership and member's acquiescence in and practical submission to committee appointed to try him held waiver of any valid objection he might have had to it as judicial board. Id.

56. Expulsion from association having benefit fund in which members are entitled to participate is quasi judicial proceeding affecting members' property rights of which accused member is entitled to have specific notice, and an opportunity to be heard in his defense upon a specified charge. Byrne v. Supreme Circle Brotherhood of the Union [N. J. Law] 65 A 839. Expulsion without notice or hearing held unauthorized. Id. Expulsion held illegal. Venezia v. Italian Mut. Benev. Soc. [N. J. Law] 65 A 898.

57. Member expelled without hearing. Venezia v. Italian Mut. Benev. Soc. [N. J. Law] 65 A 898. Expelled member held entitled to alternative writ of mandamus, though it appeared that he had, so far as formal procedure was concerned, been removed in method prescribed by constitution and laws of the order where there was a controversy as to facts involving right to remove him. People v. Independent Order Brith Abraham, 116 App. Div. 364, 101 NYS 866.

58. Officers appointing committee, and committee appointed to try member, held not personally liable though their acts were irregular and reprehensible, and though member was reinstated on appeal to grand lodge. Moon v. Flack [N. H.] 65 A 829.

59. Threat by one member to kill another held probable cause for latter to believe that former was guilty of "improper conduct" or conduct "unbecoming" a member within meaning of by-law providing for expulsion of members so offending. Moon v. Flack [N. H.] 65 A 829. Members instituting proceedings for expulsion because of said threat held not liable for conspiracy to procure his expulsion without having probable cause to believe him guilty of an offense justifying expulsion, though they were hostile to him and confederated together to procure his expulsion. Id.

60. Where there was ample provision for appeals within order, members who

trate matters relating to insurance contracts, or to submit them to the tribunals of the order, are treated in a subsequent section.[61]

§ 5. *The contract of insurance. A. General nature, requisites, and formation.* See 7 C. L. 1783—Parol contracts of insurance are valid unless forbidden by statute or the laws of the order.[62] So, too, a certificate of membership is not indispensable to the completion of the contract unless the rules of the society expressly provide to the contrary.[63] Conditions precedent to membership must be complied with before the contract becomes effective,[64] but a failure to deliver the certificate before the member's death does not preclude recovery where it is due to the negligence of the association, though it would otherwise have that effect.[65]

The constitution and by-laws of the association generally form a part of the contract [66] and are often expressly made so by reference.[67] In some states they cannot be so considered unless a copy thereof is contained in, or attached to, the certificate.[68]

Statutory provisions requiring conditions and provisions in insurance policies to be printed in certain sized type or written with pen and ink in or on the policy have

were denied privileges of membership for failure to take out lodge insurance policy in accordance with by-law creating compulsory insurance department held to have no standing in court to procure reinstatement until they had exhausted remedies so provided. Ward v. David & Jonathan Lodge, No. 1,976, G. U. O. O. F. [Miss.] 43 S 302.

61. See § 10, post.

62. Where agreement has been entered into and completed except as to the issuance of a certificate or policy. Knights of Maccabees of the World v. Gordon [Ark.] 102 SW 711.

63. In absence of certificate, may look to by-laws to determine obligations of society existing by reason of a good standing membership therein, and, in absence of express provision therein that certificate is essential, by-laws and existence of good standing membership may alone be regarded as constituting valid contract for doing of anything for which society is bound by by-laws to members. Social Benev. Soc. No. 1 v. Holmes, 127 Ga. 586, 56 SE 775. Failure to allege issuance of certificate held not to render petition subject to general demurrer. Id. Allegations showing that deceased was entitled to certificate of insurance for benefit of plaintiff, supported by evidence, held sufficient to support judgment for amount of such insurance in her favor. Knights of Maccabees of the World v. Gordon [Ark.] 102 SW 711.

64. Constitution and laws of order providing that membership should not be complete until applicant should have been obligated or initiated held part of contract, so that there was no liability where member died before complying with them. Supreme Lodge Knights & Ladies of Honor v. Johnson [Ark.] 99 SW 834. "Adoption" or initiation held condition precedent to complete membership, and hence to liability on certificate, unless waived. Bruner v. Brotherhood of American Yeomen [Iowa] 111 NW 977. Held no contract where applicant did not comply with regulations of order and his application was not passed on by medical examiner until after his death, when it was rejected. Brotherhood of Locomotive Firemen v. Hand [Miss.] 44 S 161.

65. Applicant had conformed to all requirements of order entitling him to certificate and offered to pay first assessment, which was due when certificate was delivered. Application was approved and certificate issued, but through mistake was sent to wrong local lodge for delivery, and applicant died before he actually received it. Held that beneficiary was entitled to recover, though application and laws of order provided that liability should not begin until certificate had been delivered to member personally while he was in good health and until he had paid one assessment. Sovereign Camp, Woodmen of the World v. Dees [Tex. Civ. App.] 17 Tex. Ct. Rep. 982, 100 SW 366.

66. Whether formally incorporated into it or not. Fraternities Acc. Order v. Armstrong, 106 Va. 746, 56 SE 565. Regulations of relief association, together with application for membership and certificate, constitute contract, and must be read and construed together. Chicago, B. & Q. R. Co. v. Hendricks, 125 Ill. App. 580.

67. By-law making payment of permanent disability benefit dependent upon member being destitute of means of support on arriving at age of expectancy held binding on member, it having been enacted before he joined society, and incorporated in contract, and he having had knowledge of it when he joined Donnelly v. Supreme Council Catholic Benev. Legion [Md.] 67 A. 276. Stipulation in certificate that it should be subject to forfeiture for any of causes prescribed in laws of order held to make laws relating to forfeiture then in force part of contract. Gruwell v. National Council of K & L. of S. [Mo. App.] 104 SW 884.

68. St. 1903, § 679, held not to prescribe mere rule of evidence, but to determine what constitutes contract between the parties, and hence where loss occurred and action was brought on certificate prior to enactment of act March 24, 1906, providing that said section should not apply to secret or fraternal societies, society could not rely on said amendment, contract rights of beneficiary having become fixed on member's death, and state having no right to impair them. American Guild v. Wyatt, 30 Ky. L. R. 632, 100 SW 266.

been held not to apply to provisions or conditions contained in the by-laws of mutual benefit associations.[69]

(§ 5) *B. General rules of construction.*See 7 C. L. 1784—The ordinary rules for the construction of written contracts apply.[70] In case of ambiguity the contract will be construed liberally in favor of the insured and strictly against the insurer.[71] Where two constructions, equally reasonable, are possible, that should be adopted which will enable the beneficiary to recover [72] or which will not impair the indemnity.[73] A construction sustaining the contract will be preferred to one rendering it invalid [74] or which will result in a forfeiture.[75] The provisions of the certificate control over conflicting provisions in the application.[76]

(§ 5) *C. Risk assumed and benefit promised.*See 7 C. L. 1785—It is sometimes provided that no recovery can be had or that the amount to be paid shall be reduced in case death is caused or superinduced at the hands of justice,[77] or in the violation of, or an attempt to violate, any criminal law,[78] or in case the member engages in certain prohibited occupations,[79] or becomes so intemperate as to impair his health,[80] or commits suicide while sane or insane.[81] There is a conflict of authority as to the

69. Code 1904, § 3252, held not to apply, since by-laws are part of contract whether expressly made so or not. Fraternities Acc Order v. Armstrong, 106 Va. 746, 56 SE 565.

70. Construed exactly as other contracts. Modern Woodmen of America v. Vincent [Ind. App.] 82 NE 475, 80 NE 427.

71. Grand Legion of Ill., Select K. of A. v. Beaty, 224 Ill. 346, 79 NE 565, afg. 117 Ill. App. 657. Construction most favorable to insured in order to indemnify him for loss sustained. Switchmen's Union of North America v. Colehouse, 227 Ill. 561, 81 NE 696. Any doubt arising upon face of contract as to its meaning is to be resolved in favor of insured. Lewis v. Brotherhood Acc. Co. [Mass.] 79 NE 892. By-laws to be liberally construed in favor of insured to prevent forfeiture. Morgan v. Independent Order of Sons & Daughters of Jacob [Miss.] 44 S 791. Health certificate should be so construed as to resolve all doubts and ambiguities in favor of insured. Merriman v. Grand Lodge, Degree of Honor [Neb.] 110 NW 302.

72. Grand Legion of Ill., Select K. of A. v. Beaty, 224 Ill. 346, 79 NE 565, afg. 117 Ill. App. 657. Constitution and by-laws of a relief association should be liberally construed so as to effect its benevolent purpose rather than defeat it. Starnes v. Atlanta Police Relief Ass'n [Ga. App.] 58 SE 481.

73. Switchmen's Union of North America v. Colehouse, 227 Ill. 561, 81 NE 696.

74. Guthrie v. Supreme Tent Knights of Macabees [Cal. App.] 87 P 405.

75. Starnes v. Atlanta Police Relief Ass'n [Ga. App.] 58 SE 481.

76. Provision in certificate making it incontestable after two years held to control provision in application avoiding it if member committed suicide within three years from date of his initiation. Harr v. Highland Nobles [Neb.] 110 NW 713.

77. Killing by husband of wife's paramour, even though it was justifiable homicide, held not at the hands of justice either punitive or preventive, within meaning of policy or of Civ. Code 1895, § 2118. Supreme Lodge, K. of P. v. Crenshaw [Ga.] 58 SE 628.

78. Where insured was shot by husband of woman with whom he had committed, or was about to commit, adultery, held that his death was not caused or superinduced in violation of, or attempt to violate, any criminal law, his death not being natural and legitimate consequence of the adultery itself. Supreme Lodge, K. of P. v. Crenshaw [Ga.] 58 SE 628. Where insured shot and killed another person in self-defense and was himself shot and killed by latter, held that he did not die in consequence of a duel, or of violation or attempted violation of laws of the state. Woodmen of the World v. Walters, 30 Ky. L. R. 916, 99 SW 930. Evidence held to support finding that insured was not the aggressor, but that he acted in self-defense. Id. Evidence held to justify finding that insured was not attempting to kill another person when he was himself killed, and hence that he did not meet death while in violation or attempted violation of laws of state. Woodmen of the World v. Torrence [Tex. Civ. App.] 19 Tex. Ct. Rep. 565, 103 SW 652.

79. Decedent held saloonkeeper within meaning of policy. Solomon v. American Guild [Ala.] 44 S 387. Evidence held to show that insured engaged in saloon business, so that beneficiary could not recover. Mutual Protective League v. Langsdorf, 126 Ill. App. 572.

80. Evidence held insufficient to sustain defense. Sovereign Camp, Woodmen of the World v. Boehme [Tex. Civ. App.] 97 SW 847.

81. One who intentionally takes his own life by administering to himself a poisonous drug, being of sufficient mental capacity to comprehend nature and consequences of act, commits deliberate suicide. Zearfoss v. Switchmen's Union of North America [Minn.] 112 NW 1044. Where by-laws relieved insurer from liability in case member committed suicide while sane or insane, held that evidence that member came to his death while insane, and that his mind was in such a condition of insanity and frenzy that he was not aware of physical consequences of his act if he took his own life, was properly excluded. Kieswetter v. Supreme Tent, Knights of Maccabees, 227 Ill. 48, 81 NE 19, afg. 112 Ill. App. 48. Evi-

effect of suicide while sane when the contract contains no provisions on the subject.[82] In Missouri fraternal beneficiary associations are exempt from the operation of the statute providing that suicide shall not be a defense to an action on an insurance policy unless it was procured in contemplation of suicide.[83] There is a presumption against suicide, and the burden of proving it is on the insurer.[84]

Provision is sometimes made for the payment of benefits in case of permanent and total disability [85] rendering the insured unable to carry on his vocation or calling,[86] or for a weekly indemnity while he is entirely and continuously confined to his bed through sickness.[87] A provision that no liability for any second claim for any sickness shall attach until a specified time after payment of the previous claim has been held not to apply to a claim for a second sickness not the same as, and not traceable to, a former sickness.[88]

dence held to show suicide. Id.; Zearfoss v. Switchmen's Union of North America [Minn.] 112 NW 1044. Evidence held not to show as matter of law that member committed suicide, but to make question for jury. Rohloff v. Aid Ass'n for Lutherans, 130 Wis. 61, 109 NW 989. Evidence held insufficient to show suicide. Sovereign Camp Woodmen of the World v. Bridges [Ind. T.] 104 SW 672. Evidence held sufficient to sustain finding that member did not commit suicide. Markham v. Supreme Ct., I. O. F. [Neb.] 110 NW 638; Sovereign Camp of Woodmen of the World v. Boehme [Tex. Civ. App.] 97 SW 847.

82. Illinois: Does not defeat right of wife named as beneficiary to recover. Grand Legion of Ill., Select K. of A. v. Beaty, 224 Ill. 346, 79 NE 565, afg. 117 Ill. App. 657.

Massachusetts: Can be no recovery even though third person, and not member's estate, is named as beneficiary, there being an implied exception in such case. Davis v. Supreme Council Royal Arcanum [Mass.] 81 NE 294.

Nebraska: Will not defeat recovery if certificate was not procured with intention of committing suicide. Lange v. Royal Highlanders [Neb.] 110 NW 1110, former opinion, 106 NW 224.

83. By-laws and application provided for forfeiture in case of suicide, and application provided that laws in force at member's death should govern. Defendant was foreign corporation, and was not licensed to do business as fraternal society in state until shortly after contract in suit was made, but member continued to pay assessments after license was obtained. Rev. St. 1899, § 7896, restricting right to plead suicide as defense, is made inapplicable to fraternal societies by act of 1897. Held that § 7896 was not part of contract, but merely affected right to plead suicide as defense, and that if provisions of application and by-laws against suicide were not effective when contract was made they became so when defendant obtained license. Schmidt v. United Order of Foresters [Mo. App.] 101 SW 625. Defendant held fraternal beneficiary association within meaning of Rev. St. 1899, §§ 1408-1423, and hence not subject to § 7896. Tice v. Supreme Lodge, K. of P., 123 Mo. App. 85, 100 SW 519, afd. 204 Mo. 349. 102 SW 1013.

84. See § 10, post.

85. Total disability does not mean absolute physical disability to transact any kind of business pertaining to his occupation, but it exists though he is able to perform few occasional acts if he is unable to do any substantial portion of work connected with his occupation. Foglesong v. Modern Brotherhood of America, 121 Mo. App. 548, 97 SW 240. Where plaintiff was unable to do all substantial and material acts necessary to be done in his business of farming, held that fact that he was able to direct business to some extent and to do some of work did not preclude recovery for total disability. Id. Where by-laws provided that any member suffering certain specified injuries, or who should become totally blind, should be considered totally disabled and entitled to receive full amount of his certificate, "likewise any physical disability that may permanently disqualify a member from performing the duties of a switchman," held that member who lost one eye and was thereby totally disabled from performing duties of switchman was entitled to recover for total disability. Switchmen's Union of North America v. Colehouse, 227 Ill. 561, 21 NE 696. Where by-laws provided for payment of half amount of certificate if member should become permanently and totally disabled, and provided that such disability should include "insanity so adjudged by the courts," held that insanity did not authorize recovery until member had been adjudged insane by court in proceeding instituted for that purpose. Knipp v. United Benev. Ass'n [Tex. Civ. App.] 18 Tex. Ct. Rep. 270, 101 SW 273.

86. "Permanent and total disability" rendering member "unable to carry on or conduct any vocation or calling" held to refer to calling or vocation in which he was engaged when disabled, and not to mean inability to carry on any vocation whatever. Foglesong v. Modern Brotherhood of America, 121 Mo. App. 548, 97 SW 240.

87. Insured held "entirely and continuously confined to bed" where he was confined to his bed the greater portion of every day, though he was up and out of house a part of the time. Hays v. General Assembly American Benev. Ass'n [Mo. App.] 104 SW 1141.

88. Hays v. General Assembly American Benev. Ass'n [Mo. App.] 104 SW 1141.

Contracts of accident insurance generally provide for an indemnity for death resulting solely from injuries received through external, violent, and accidental means,[89] leaving visible marks on the body.[90] The insurer is frequently exempted from liability for injuries to which the member's own negligence contributed.[91] The amount to be paid is sometimes reduced where the facts and circumstances surrounding the accident and injury are not established by the testimony of an eyewitness.[92]

(§ 5) *D. Conditions, warranties, and representations.*See 7 C. L. 1787—A warranty is a promise, usually collateral to the principal contract, but not necessarily so.[93] In the absence of a statutory provision to the contrary,[94] a false warranty avoids the policy whether material to the risk or not,[95] while misrepresentations

89. To recover on such a certificate, plaintiff must show that insured received an accidental injury, and that death resulted from such injury alone. National Ass'n of R. Postal Clerks v. Scott [C. C. A.] 155 F 92. There being no direct proof of any accidental injury, held that court should have directed verdict for defendant. Id.

90. Provision making external marks of contusion or wounds upon body condition of right to recover in case of death held not to apply to case of death by drowning. Lewis v. Brotherhood Acc. Co. [Mass.] 79 NE 802.

91. Member injured while attempting to board moving freight train by climbing up iron ladder on side of car held not entitled to recover. Garcelon v. Commercial Travelers' Eastern Acc. Ass'n [Mass.] 81 NE 201. Fact that commercial travelers in vicinity were accustomed to take like risks held immaterial. Id.

92. Provision requires that enough must be testified to by an eye witness to show operating cause of injury, or at least to show that at time of injury there was an operating cause to which accident may be fairly attributed, and to indicate in general way the nature of that cause and the manner of its working. Lewis v. Brotherhood Acc. Co. [Mass.] 79 NE 802. Facts and circumstances held established by eyewitnesses within meaning of policy, in case where insured was drowned. Id.

93. Modern Woodmen of America v. Vincent [Ind. App.] 82 NE 475, 80 NE 427. Statement in application as to age of applicant held warranty. Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 NW 452.

94. Code, § 1813, prohibiting forfeiture on ground of misstatement as to age unless policy has been procured by fraud in fact, but authorizing insured to collect difference between premium paid and that which would have been collected had true age been given, held not applicable to fraternal benefit societies as defined by id. § 1822. Krause v. Modern Woodmen of America, 133 Iowa, 241, 110 NW 452. Section held to cover all cases where association or company has power to insure person to whom policy or certificate is issued. Id. Allegations of answer held insufficient to put in issue allegations of petition that defendant was life insurance and beneficial society, and hence demurrer to answer setting up breach of warranty on ground that it was not alleged that insured knew that statement as to age was false was properly sustained. Id. Claim that contract was ultra vires, and hence that statute was inapplicable, because member was in fact forty-seven years of age, though he stated that he was forty-four, and by-laws prohibited insurance of anyone over forty-five, held untenable, since Code, § 1789, authorizes assessment companies to insure persons between sixteen and forty-five, and there was no presumption that articles of incorporation were like by-laws, and no allegation as to provisions of articles, and provisions of by-laws could be waived. Id. Held that difference in rate of premium, if any, could be taken into account in determining amount of indemnity to which beneficiary was entitled. Id. Terms of contract and not nature of society determine whether exemptions from general insurance laws in favor of fraternal benefit associations apply, and hence association executing contract not authorized by statute relating to such associations is not entitled to such exemptions. Wilson v. General Assembly of American Benev. Ass'n, 125 Mo. App. 597, 103 SW 109. Where contract designated member's legal representative as beneficiary, though such designation was not authorized by Rev. St. 1899, § 2823, in force when certificate was issued, or § 1408, in force at member's death, held that § 7890, providing that no misrepresentation shall avoid policy unless matter misrepresented actually contributes to contingency or event on which policy is to become due and payable, applied notwithstanding fact that § 1408 exempts fraternal benefit associations from operation of general insurance laws. Id. Sess. Laws 1899, p. 195, c. 115, § 1, construed, and held that Rev. St. 1895, art. 3096aa, providing that any provision in contract of insurance that untrue answers or statements in application shall render contract void or voidable shall be of no effect and shall be no defense to action on policy unless it is shown that matter or thing misrepresented contributed to risk, etc., does not apply to fraternal and beneficiary associations. Modern Order of Praetorians v. Hollmig [Tex.] 18 Tex. Ct. Rep. 806, 103 SW 476, rvg. [Tex. Civ. App.] 17 Tex. Ct. Rep. 969, 103 SW 474.

95. Warranties must be literally fulfilled. Court of Honor v. Clark, 125 Ill. App. 490. Statement in application as to age held warranty. Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 NW 452. Where answers in application which was made part of certificate were made warranties, held that their truthfulness was condition prece-

have that effect only if intentionally false and material to the risk.[96] Warranties are not favored, and, in case of doubt, statements in the application will be deemed representations rather than warranties.[97]

The contract generally provides that it shall be void if the insured makes false statements as to his age [98] or the condition of his health.[99]

(§ 5) *E. Dues and assessments.* See 7 C. L. 1789—It is generally provided that the insurance shall be forfeited in case dues and assessments are not paid when due.[1] A valid tender within the time prescribed is sufficient.[2] Notice of assessments must be given when the contract requires it, and in the manner and form prescribed.[3] Where no method of payment is prescribed, payment in accordance with an established custom precludes forfeiture.[4] Payment made to a person

dent to enforcement of contract, so that certificate was void if answer was false whether matter was material to risk or not. Modern Woodmen of America v. Angle [Mo. App.] 104 SW 297. Answer as to when and for what insured had previously consulted physician held material to risk. Id.

96. Held incumbent on defendant to defeat recovery because of false misrepresentations to show that they were fraudulent. Court of Honor v. Clark, 125 Ill. App. 490.

97. Declarations of deceased in application as to her condition of health held representations, though word "warrant" was used. Court of Honor v. Clark, 125 Ill. App. 490.

98. Evidence held to support finding that member did not misrepresent his age in application. Edmonds v. Modern Woodmen of America, 125 Mo. App. 214, 102 SW 601. Misstatements as to age, whether regarded as warranties or misrepresentations, held to have worked forfeiture, they being material to risk and having been conclusively made so by express agreement that certificate should be void and all payments thereunder forfeited if they were untrue. Elliott v. Knights of Modern Maccabees [Wash.] 89 P 929. Charge assuming that because a husband acted for his wife in applying for membership for both himself and his wife any false representations which he may have made with reference to his own age, etc., affected equally membership of his wife, held erroneous. Schwartz v. St. Elizabeth Roman & Greek Catholic Union, 9 Ohio C. C. (N. S.) 337.

99. Is not false representation for married woman to sign health certificate stating that she is in sound bodily health when she is pregnant, if certificate is otherwise true. Merriman v. Grand Lodge, Degree of Honor [Neb.] 110 NW 302. Certificate held simply warranty that applicant was in sound bodily health when she signed it. Id. Married woman is not bound to inform company that issues policies on lives of married women of evidence of pregnancy discovered after her physical examination and application and before final approval of application. Id. Intentionally false answer to question whether applicant had ever had disease of insanity held to preclude recovery. Mudge v. Supreme Ct., I. O. F. [Mich.] 14 Det. Leg. N. 515, 112 NW 1130. Evidence held to establish insured's previous insanity and his knowledge and fraudulent concealment of same. Id. Where policy and physician's certificate were sufficient to show breach of contract, failure of defendant to offer by-laws in evidence held not fatal to defense. Id. Where application made part of contract warranted that statements therein were true and accurately recorded by medical examiner, that no facts known to insured affecting risk were withheld, and contained agreement that false statement or suppression should forfeit all rights to benefits, held that false statements therein as to previous condition of health, and suppression of fact that insured had previously suffered from inflammatory rheumatism, which was indirect cause of his death, precluded recovery on certificate. Loehr v. Supreme Assembly, Equitable Fraternal Union [Wis.] 112 NW 441.

1. See § 5G, post, for full treatment of this question.

2. Where son had for some months paid father's dues to proper officer, who had accepted them, held that subsequent bona fide tender by son of dues to said officer, who positively refused to receive them, prevented forfeiture for nonpayment, it being unnecessary to repeat tender in such case. Starnes v. Atlanta Police Relief Ass'n [Ga. App.] 58 SE 481.

3. Under constitution of order, held that publication of notice in official organ did not dispense with necessity of sending notice to insured. Grand Legion of Ill., Select K. of A. v. Beaty, 224 Ill. 346, 79 NE 565, afg. 117 Ill. App. 657. Where by-laws provided that ex-members of police force should have thirty days after notice in which to pay assesssments, held that association was bound to give notice before it could expel members for nonpayment. Lockney v. Police Beneficiary Ass'n, 217 Pa. 568, 66 A 844. Reading notice in police station held not notice to ex-members. Id. Posting notice on bulletin board in station house held not, as matter of law, notice to ex-members. Id. In absence of provision as to method of giving notice to ex-members, question whether custom to give such notice by posting copy of call for assessment on bulletin board in police station was sufficiently established to charge member with notice held for jury. Id. Custom to be binding must have existed so long as to have become generally known, and must be clearly and distinctly proved. Id.

4. Where it was custom of collecting of-

other than the one designated to receive it will not prevent a suspension unless he pays the same over to the association within the time specified.[5] Payments should generally be applied to the oldest overdue premium.[6] A member cannot be regarded as in arrears until an advance payment made by him has been applied upon some assessment.[7]

(§ 5) *F. Modification and alteration of contract or its terms.* See 7 C. L. 1790—A general agreement to be bound by regulations or by-laws subsequently adopted authorizes only such changes as are lawful,[8] and reasonable,[9] and as do not interfere with the vested rights of the member.[10] There is a conflict of authority as to whether it authorizes an increase in the assessment rate,[11] or the adoption of a by-

ficer to receive remittances at certain post office, which was designated as his address on his official stationery, held that remittance of assessment addressed to him at said office and reaching there on day it became due was payment of assessment preventing suspension of member and cancellation of certificate, though agent did not receive it until later owing to fact that he had changed his post office address without knowledge of member or beneficiary. Vancura v. Zapadni Cesko Bratrska Zednota [Neb.] 111 NW 845.

5. Sending draft to former collector of lodge who had resigned held not payment to lodge, it not appearing that he paid same over to lodge. Supreme Lodge of Pathfinder v. Johnson [Tex. Civ. App.] 19 Tex. Ct. Rep. 656, 104 SW 508.

6. Jury held to have properly applied payment to past due assessment, which parties mistakenly supposed had been paid rather than to subsequent ones. Munn v. Masonic Life Ass'n, 115 App. Div. 855, 101 NYS 91.

7. Where advance assessment is exacted prior to initiation. Trotter v. Grand Lodge of Iowa Legion of Honor, 132 Iowa, 513, 109 NW 1099.

8. Agreement that laws thereafter adopted should be basis of contract held to mean laws which association had right to adopt and not to authorize changes in rate of assessments which law of its organization did not permit. Wineland v. Knights of Maccabees of the World, 148 Mich. 608, 14 Det. Leg. N. 345, 112 NW 696. Association held to have no power, under law of its organization, to change provisions of contract as to assessments by amendment of by-laws. Id.

9. Binding if reasonable. Scow v. Supreme Council, Royal League, 223 Ill. 32, 79 NE 42. Must be reasonable Wineland v. Knights of Maccabees of the World, 148 Mich. 608, 14 Det. Leg. N. 345 112 NW 696; Olson v. Court of Honor, 100 Minn. 117, 110 NW 374. Subsequently enacted statute and by-laws providing that beneficiary must be within designated classes at time of member's death held to preclude recovery, though beneficiary was eligible when designated. Murphy v. Nowak, 223 Ill. 301, 79 NE 112, rvg. 127 Ill. App. 125. Any amendment which entirely changes scheme of insurance and makes radical departure from fundamental plan is unreasonable. Chicago, etc., R. Co. v. Hendricks, 125 Ill. App. 580. Amendment requiring personal representative of deceased member of railroad employes' relief association to obtain releases of all claims for damages against railroad for member's death as condition precedent to right to recover benefits held unreasonable. Id. By-law limiting time within which action could be brought on certificate held invalid as to certificates issued before its promulgation. Attorney General v. Supreme Council A. L. H. [Mass.] 81 NE 966.

10. Is no vested right to have contract remain unchanged, if change is reasonable. Scow v. Supreme Council, Royal League, 223 Ill. 32, 79 NE 42. Vested rights cannot be impaired. Mock v. Supreme Council of Royal Arcanum, 121 App. Div. 474, 106 NYS 155.

Held valid: Where there was no provision exempting member entitled to benefit on reaching age of 70 from payment of assessment after reaching that age, amendment requiring continued payment of assessments as condition of receiving such benefit. Wineland v. Knights of Maccabees of the World, 148 Mich. 608, 14 Det. Leg. N. 345, 112 NW 696. Amendment requiring delinquent member to carry his own risk for 30 days after payment of arrearages. Maxwell v. Theatrical Mechanical Ass'n, 54 Misc. 619, 104 NYS 815.

Held void: Agreement held not to bind member to submit to an elimination of old age benefits provided for by contract but only to reasonable fixing of part of endowment which he should receive. Wineland v. Knights of Maccabees of the World, 148 Mich. 608, 14 Det. Leg. N. 345, 112 NW 696. Amendment avoiding certificates of those engaging in sale of intoxicating liquor at retail, there being originally no restrictions on occupation. Ayers v. Grand Lodge, A. O. U. W., 188 N. Y. 280, 80 NE 1020, afg. 109 App. Div. 919, 95 NYS 1112.

11. Provision for levying fewer assessments at increased rate, whether intended to procure same sum in different way or to increase contributions over present necessities and to accumulate a fund, held valid if reasonable and proportional, young and old alike contributing, it being lawful to increase number of assessments to meet demands from death of members. Wineland v. Knights of Maccabees of the World, 148 Mich. 608, 14 Det. Leg. N. 345, 112 NW 696. Increased assessments held not unreasonable in view of conditions. Id. Reasonable increase held not breach of contract and not to violate vested rights. Conner v. Supreme Commandery Golden Cross, 117 Tenn. 549, 97 SW 306. Increase held reasonable. Id. By-law providing that members of certain degree should pay same amount on each assessment thereafter while member of order held to mean simply that rate would not be increased except under rules and by-laws of the company,

law providing for a forfeiture, or a decrease in the amount of benefits, in case of suicide.[12] In some states the reasonableness of an amendment to the by-laws of a purely voluntary unincorporated association cannot be inquired into.[13] Amendments within a reserved power to amend in a specified particular are valid.[14]

Changes will not ordinarily be deemed retroactive unless they so provide, either expressly or by necessary implication.[15]

(§ 5) *G. Rescission, forfeiture, cancellation, and avoidance.* See 7 C. L. 1792. Provision is generally made for a forfeiture of the contract for breach of warranty or misrepresentation,[16] and for a forfeiture or a suspension of a member for a failure to pay assessments when due,[17] or in case the member has been in default in

and not to prevent raise in rates otherwise authorized, said degree being merely initiating degree. Id.

12. Subsequently enacted by-law limiting liability to half face value of certificate in case of suicide held reasonable and binding. Scow v. Supreme Council, Royal League, 223 Ill. 32, 79 NE 42. Certificate made suicide while sane or insane a defense, except that assessments paid would be returned, but constitution provided that after two years certificate should be incontestable except for certain specified causes of which suicide was not one. After member had paid assessments for more than two years society which had power under contract to make all reasonable changes, adopted by-law reducing amount to be paid in case member committed suicide. Held that by-law was invalid as to such certificate as impairing obligation of a contract. Court of Honor v. Hutchens [Ind. App.] 82 N. E. 89. Same amendment held invalid in same case on former appeal to different division of appellate court. Court of Honor v. Hutchens [Ind. App.] 79 NE 409. Where by-laws originally provided that benefit of member committing suicide would not be paid unless he was at time under treatment for insanity, held that amendment after certificate was issued limiting benefit in case of suicide to 5 per cent of face of certificate for each year of continuous membership was unreasonable and void as to then existing members. Olson v. Court of Honor, 100 Minn. 117, 110 NW 374. Where original by-law provided that suicide of member within 5 years after his admission should bar recovery, held that subsequent amendment giving beneficiary, in all cases of suicide, twice amount of assessments paid by member could not be given retrospective operation, but that beneficiary of one who commited suicide after he had been member for 5 years was entitled to reeover full amount of certificate. Zimmerman v. Supreme Tent of Knights of the Maccabees of the World, 122 Mo. App. 591, 99 SW 817.

13. Constitution and by-laws are the contract between parties, and their provisions, if not illegal, immoral, or contrary to public policy, must be upheld whether reasonable or not. Maxwell v. Theatrical Mechanical Ass'n, 54 Misc. 619, 104 NYS 815.

14. Where by-laws contained general reservation of power to amend, and in application member agreed to be bound by laws of order then in force or thereafter adopted, and that he should forfeit membership and benefits if he engaged in any occupation deemed extrahazardous by board of directors or their successors, held that regulation classing occupation of switchman as extrahazardous was binding on member, though adopted after he became member, and though such occupation was not so classed when application was made. Gienty v. Knights of Columbus, 105 NYS 244. Where by-laws did not limit rate of assessment and expressly provided for extra assessments, held that amendment increasing assessment rates, which was necessary to preserve life of society and effectuate purposes for which it was organized, was within contemplation of parties and did not interefere with vested contract rights. Mock v. Supreme Council of Royal Arcanum, 121 App. Div. 474, 106 NYS 155.

15. Held retroactive: By-law limiting liability to half face value of certificate in case of suicide held broad enough to embrace all members without regard to time when they became such. Scow v. Supreme Council, Royal League, 223 Ill. 32, 79 NE 42.

Held not retroactive: Changes as to benefits in by-laws, particularly in view of provision in statute prohibiting changes affecting existing contracts. Guthrie v. Supreme Tent K. of M. of W. [Cal. App.] 87 P 405. Amendment of charter restricting right to designate beneficiaries, there being no reserved power to amend and nothing therein to show intention that it should operate retrospectively. Brown v. Grand Fountain of U. O. of True Reformers, 28 App. D. C. 200. Amendment changing classes of beneficiaries. Cigar Makers' International Union v. Huecker, 123 Ill. App. 336. State statutes, act of congress, and by-laws prescribing who might be designated as beneficiaries. Supreme Lodge K. of P. v. Reyman, 126 Ill. App. 482. St. 1905, p. 150, c. 223, enlarging rights of designation of beneficiaries and providing that benefits may be made payable in such manner as by-laws shall provide, within prescribed limits, held inapplicable where by-laws changing provisions in that respect did not go into effect until after member's death, at which time widow's right to fund, because of absence of designated beneficiary competent to take, vested. Spear v. Boston Relief Ass'n [Mass.] 81 NE 196.

16. See § 5D, ante.

17. Provision for forfeiture for nonpayment of annual dues held to apply to members joining at any time during year who failed to pay pro rata part of annual dues for which they were liable. Morrison v. Mutual Benev. Ass'n [S. C.] 59 SE 27. Failure to pay dues to lodge or its collector within time specified held to warrant suspension. Supreme Lodge of Pathfinder v. Johnson [Tex.

their payment for a specified time thereafter.[18] In the absence of any stipulation in the contract for a forfeiture for nonpayment, the certificate will remain in force during the lifetime of the insured, however delinquent he may be.[19] The validity and effect of provisions requiring members of an employe's relief association to release all claims for damages against the employer as a condition precedent to the recovery of benefits is treated elsewhere.[20]

In order to enforce a forfeiture the association must show compliance with the provisions authorizing it.[21] Whether provisions for forfeiture are self-executing or require some affirmative action to render them effective is a question of construction and depends entirely on the terms of the contract.[22] If they are not, an election

Civ. App.] 19 Tex. Ct. Rep. 656, 104 SW 508. Provisions that nonpayment of assessments shall ipso facto work forfeiture without notice will be enforced. Gruwell v. National Council of K. & L. of S. [Mo. App.] 104 SW 884. Even if decedent ever became member, held that he was suspended for nonpayment of assessment, amount of one assessment paid by him being applicable to assessment for month in which lodge was instituted. Supreme Lodge K. & L. of H. v. Johnson [Ark.] 99 SW 834. Evidence held to show that assessment was not paid within time prescribed. Woodmen of the World v. Jackson, 80 Ark. 419, 97 SW 673. By-law providing for suspension of member for nonpayment of monthly per capita tax without further notice than that imparted by by-law is reasonable and valid. Nelson v. Modern Brotherhood of America [Neb.] 110 NW 1008. By-laws held to provide for suspension for nonpayment of mortuary assessments after notice, and for nonpayemnt of per capita tax on or before last day of month, either with or without notice. Id.

18. Membership held forfeited under provision declaring that every person one year or more in arrears for dues, etc., should forfeit membership. Odd Fellows Ben. Ass'n v. Burton [Ark.] 104 SW 163. Certificate construed and held that it was forfeited by member becoming four weeks in arrears in payment of dues. Singleton v. Progressive Ben. Ass'n [S. C.] 58 SE 609. Where constitution provided that any member whose dues remained unpaid for two months should be dropped from roll and lose all claim to membership, held that member could not be dropped until two months after default, and order entered upon minutes declaring member dropped as being two months in arrears was ineffective where dues had not at that time been unpaid for two months. Starnes v. Atlanta Police Relief Ass'n [Ga. App.] 58 SE 481. Evidence held not to show that member had been in default for eight weeks so as to work forfeiture, even if provision for such forfeiture was self-executing. Cigar Makers' International Union v. Huecker, 123 Ill. App. 336. Member's dues held not to have been unpaid "for over 3 months" at time of his death so as to preclude beneficiary from recovering death benefits, where she tendered amount due after his death and before expiration of 3 months. O'Keefe v. Barry Benevolent & Athletic Ass'n [N. J. Law] 66 A 601. Member held, in legal contemplation, "clear of all debts on the books of the association" on date of payment of judgment for sick benefits recovered by him against association, judgment being conclusive on that question in subsequent action for death benefits, since such indebtedness would have been complete defense, and it being duty of association under P. L. 1898, p. 574, §§ 60, 61, to set off any indebtedness in former action, and constitution of association providing for deduction of dues accruing during payment of sick benefits from amount so paid. O'Keefe v. Barry Benevolent & Athletic Ass'n [N. J. Law] 66 A 601.

19. Contract is not assurance for single year with privilege of renewal on payment of assessments, but an entire contract consideration for which is payable in instalments. Gruwell v. National Council of K. & L. of S. [Mo. App.] 104 SW 884. Defendant claiming forfeiture has burden of pleading and proving provision authorizing it and that it actually occurred. Id.

20. See 7 C. L. 1794. See Master and Servant, § 3A, 8 C. L. 861.

21. Where under constitution directors could not order assessment until there was at least one death benefit unpaid and there was less than specified sum in surplus account, held that, in order to enforce forfeiture for failure to pay assessment, it must be made to appear that such contingency existed when assessment was ordered, and hence that it was necessary. Mutual Aid Ass'n v. Hogan, 124 Ill. App. 447.

22. Held self-executing: Provision for suspension for nonpayment of assessments. National Council Knights & Ladies of Security v. Burch, 126 Ill. App. 15; Catholic Order of Foresters v. Lynch, 126 Ill. App. 439. Condition that if member should become so far intemperate in use of alcoholic drinks as to permanently impair his health or to produce delirium tremens, certificate should be void, and all moneys paid and all benefits should be forfeited. Modern Woodmen of America v. Breckenridge [Kan.] 89 P 661.

Held not self-executing: Neither provision that no member should be entitled to benefits who had not paid dues and assessments in advance, nor provision that any member whose dues remained unpaid for two months should be dropped from roll and lose all claim to membership, held to ipso facto work forfeiture, but some judicatory or affirmative action by association, declaring member suspended or expelled, was necessary. Starnes v. Atlanta Police Relief Ass'n [Ga. App.] 58 SE 481. Act of secretary in marking defaulting member as "suspended" held not to amount to affirmative action of association. Id. Where contract expressly confers right to avoid it for breach of warranty, such a breach does not ipso facto render contract void from beginning but renders it voidable

to forfeit must be made within a reasonable time.[23] In case of a rescission the insurer must restore, or offer to restore, everything of value received by it under the contract,[24] in the absence of a provision therein to the contrary,[25] or unless restoration has been rendered impossible by the wrongful acts of the member.[26]

To effectuate a cancellation by agreement, fairness and a strict compliance with the laws of the other must be shown.[27]

(§ 5) *H. Waiver, estoppel, and reinstatement.*[See 7 C. L. 1794]—In the matter of estoppel and waiver, fraternal benefit societies are generally governed by the same rules of law as old line insurance companies.[28] Forfeitures are not favored, and slight evidence of waiver or estoppel is sufficient.[29] The society may waive its by-laws or estop itself from enforcing them, provided it does not thereby enter into a contract forbidden by its charter,[30] though it has been held that the officers cannot waive by-laws relating to the substance of a contract between an individual member and his associates in their corporate capacity.[31] Any acts, declarations, course of dealing, or conduct on the part of the association leading a member to believe that a strict performance of the terms and conditions of his contract will not be insisted upon will preclude it from thereafter claiming a forfeiture for failure to strictly perform,[32] provided it acts with knowledge of the facts.[33] Thus, the receipt and reten-

only at election of association. Modern Woodmen v. Vincent [Ind. App.] 80 NE 427. Breach of warranty as to insured's age, which did not affect amount of premium to be paid by him, held not to preclude recovery where answer failed to allege election by insurer to avoid policy or any facts tending to show such election. Id. Held that membership could not be forfeited against will of member by delinquency ipso facto, but he must first be given an opportunity to justify himself, and this must be followed by some action by society looking to severance of relations between society and member. Schwartz v. St. Elizabeth Roman and Greek Catholic Union, 9 Ohio C. C. (N. S.) 337.

23. Modern Woodmen of America v. Vincent [Ind. App.] 82 NE 475, 80 N. E. 427.

24. Demurrer to answer showing breach authorizing rescission held properly sustained where it did not state facts showing valid election to rescind, or a return of premiums or willingness to return them, or that none had been received. Modern Woodmen of America v. Vincent [Ind. App.] 82 NE 475, 80 N. E. 427. Answer relying on breach of warranty must not only set up warranty and breach but also election by insurer to avoid policy for that reason, particularly where warranty was in regard to fact immaterial to risk. Id. In suit to cancel benefit certificate for breach of warranty, insured held entitled to return of premiums paid with interest thereon at 6 per cent. Modern Woodmen of America v. Angle [Mo. App.] 104 SW 297. Failure to deposit amount of interest in court held not reversible error, no deposit being necessary in equity, since chancellor may compel its restoration as condition precedent to cancellation. Id.

25. Where contract provided that all assessments paid should be forfeited for false statements in application, held that, on forfeiture of certificate during member's lifetime for fraudulent misstatements as to his age, he was not entitled to recover premiums paid. Elliott v. Knights of Modern Maccabees [Wash.] 89 P 929.

26. On forfeiture of certificate during member's lifetime because of fraudulent misstatements as to his age, held that he was not entitled to recover premiums paid, the association doing business on current cost plan, and all such assessments having been disbursed in payment of losses as soon as received. Elliott v. Knights of Modern Maccabees [Wash.] 89 P 929.

27. Evidence held to authorize finding that surrender of certificate by member who was insane was not procured by fair means. Wrightman v. Grand Lodge A. O. U. W., 121 Mo. App. 252, 98 SW 829. Evidence held to sustain finding that member was insane when he applied for and received his withdrawal card. Id.

28. Morgan v. Independent Order of Sons & Daughters of Jacob [Miss.] 44 S 791; Morrison v. Mutual Benev. Ass'n [S. C.] 59 SE 27. May be estopped by contract in same manner as private individual. Morgan v. Independent Order of Sons & Daughters of Jacob [Miss.] 44 S 791.

29. Trotter v. Grand Lodge of Iowa Legion of Honor, 132 Iowa, 513, 109 NW 1099.

30. May waive, or estop itself from relying on, by-law prohibiting insurance of persons over 45 years old, where charter contains no such limitation. Edmonds v. Modern Woodmen of America, 125 Mo. App. 214, 102 SW 601. Provision that no person may be insured who is over age of 45 held not to render contract insuring man of 47 ultra vires, where statutory limit was 65. Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 NW 452.

31. Officers of fraternal society organized for mutual protection of its members cannot waive by-law so as to admit persons of prohibited age and thereby bind society. Elliott v. Knights of Modern Maccabees [Wash.] 89 P 929.

32. Waiver does not depend on intention of party against whom it is asserted, but on effect which his conduct or course of business has had on other party. Trotter v. Grand Lodge of Iowa Legion of Honor, 132 Iowa, 513, 109 NW 1099.

Provisions as to eligibility: Insurer held

tion of assessments by the association or its duly authorized agent,[34] with knowledge of facts authorizing a forfeiture, precludes a forfeiture on that ground,[35] and the acceptance of overdue assessments is a waiver of the delay[36] and precludes reli-

estopped to rely on provision of by-laws prohibiting insurance of persons over 45, where certificate was issued and dues collected for over 9 years, though date of member's birth as stated in application showed that he was over 45. Edmonds v. Modern Woodmen of America, 125 Mo. App. 214, 102 SW 601. Where application stated insured's age as between 44 and 45, but date of his birth, as stated therein, showed that he was over 45, held that inconsistency was sufficient to put association on inquiry as to his true age. Id. Same held true if statement as whole was ambiguous or of doubtful meaning because of change in figures showing date of birth. Id. Instruction that statement as to date of birth would control statement as to age held Harmless, even if erroneous. Id.

Conditions precedent to membership: Election of applicant to office in local lodge held not waiver of provision that membership should not be complete until applicant was obligated or initiated, where he was never installed, never performed any of duties of office, and never attended any meetings. Supreme Lodge K. & L. of H. v. Johnson [Ark.] 99 SW 834. Evidence held not to show habit or practice on part of association or local lodge to ignore or omit requirement of adoption as preliminary to recognition of applicant as qualified member, or that such recognition was accorded in particular case. Bruner v. Brotherhood of American Yeomen [Iowa] 111 NW 977.

Dues and assessments (See, also, post, this section): Held that there was evidence tending to support allegations that society had permitted payment of assessments after they were due, and had led member to believe that conditions of payment would not be insisted upon, so that it was error to give peremptory instruction in favor of society. Lane v. Yeomen of America, 125 Ill. App. 406. If association itself or by its agent adopts method of business whereby assessments are habitually collected and received after they become delinquent according to strict letter of contract, and no forfeiture is declared thereon, but such members are recognized as in good standing, and by this course of business members have reason to fairly conclude that insurer does not insist on literal compliance with terms of contract in this respect, insurer will not be heard to deny good standing of member who has depended upon custom observed by agent and offered to pay assesssments in accordance therewith. Trotter v. Grand Lodge of Iowa Legion of Honor, 132 Iowa, 513, 109 NW 1099. Defendant held not entitled to claim forfeiture in view of custom of financial officer of local lodge. Id.; Wood v Iowa Legion of Honor, 133 Iowa, 33, 110 NW 164. Held that there was some evidence to go to the jury on question of waiver of forfeiture, so that it was error to charge that plaintiff could not recover because of forfeiture and ignore doctrine of waiver. Morrison v. Mutual Benev. Ass'n [S. C.] 59 SE 27. Association issued joint certificate to two persons whereby it agreed to pay survivor specified sum less certain deductions based on age of insured at his death and monthly assesssment. Subsequently, by-law was passed increasing assessments and which, if applicable, would greatly reduce indemnity under said certificate. Neither of the persons insured had knowledge of change, but they continued to pay assessments at old rate. Held that even though they agreed to be bound by subsequently enacted by-laws, association, by accepting payments at old rate without objection, waived enforcement of new by-law and was estopped to assert it against survivor. Boman v. Bankers' Union of the World [Kan.] 91 P 49.

Provision as to suicide: Stipulation in application avoiding insurance if member committed suicide within three years held waived by issuance of certificate providing that it should be incontestable after two years. Harr v. Highland Nobles [Neb.] 110 NW 713.

33. Acceptance of dues and giving receipts therefor held not waiver of forfeiture for engaging in extrahazardous employment, where neither association nor officers had knowledge or notice of member's change of occupation. Gienty v. Knights of Columbus, 105 NYS 244. Waiver of breach of warranty cannot be predicated on acts of agent where he has no knowledge of facts. Loehr v. Supreme Assembly of Equitable Fraternal Union [Wis.] 112 NW 441.

34. For agency of local lodge and its officers, see post, this section. Supreme secretary who was general agent of society to receive dues, and who had power to reinstate members suspended for delay in payment, held to have power to waive forfeiture for delay in payments, there being no provision in by-laws to contrary. Reed v. Bankers' Union of the World, 121 Mo. App. 419, 99 SW 55.

35. Evidence held insufficient to show that defendant accepted assessments with knowledge that insured was engaged in prohibited occupation. Mutual Protective League v. Langsdorf, 126 Ill. App. 572. Subordinate lodge having power to discipline or expel members for excessive use of intoxicants held to have waived forfeiture because of such use where, with knowledge of facts, it continued to receive his dues and in all other respects to treat him as member until his death. Modern Woodmen of America v. Breckenridge [Kan.] 89 P 661. Collection of dues and assessments from member convicted of felony, by clerk of local lodge, with full knowledge of that fact, which are forwarded to and retained by supreme lodge until after member's death, is waiver of right to forfeit certificate because of such conviction. Pringle v. Modern Woodmen of America [Neb.] 113 NW 231.

36. See, also, general statement of rule, ante, this section. Receipt of payments after default in payment is waiver of default. Lane v. Yeomen of America, 125 Ill. App. 406. Ipso facto suspension for nonpayment held waived by acceptance of delinquent assessment after default pursuant to like course adopted in regard to previous delinquent as-

ance on a provision requiring formal reinstatement.[37] The receipt of an overdue assessment has, however, been held not to estop the association from showing that the member was not in good health at the time of an attempted reinstatement, where actual good health was made a condition precedent to reinstatement,[38] and the previous acceptance of overdue payments not to prevent a forfeiture for a subsequent default when the insured was in poor health,[39] nor does a custom of accepting overdue assessments from a member during his lifetime require their acceptance from the beneficiary after the member's death.[40] Where the relationship of the beneficiary appears on its face, the issuing of a certificate and the acceptance of dues thereunder precludes the insurer from asserting that the beneficiary was not a proper person to be designated.[41]

Where an agent of the association, with knowledge of the facts and without the knowledge of the member, inserts untrue answers to questions in the application, the association is estopped to asssert their falsity,[42] but this rule does not apply where the false answer is the result of collusion between the agent and the member.[43]

sessments. Catholic Order of Foresters v. Lynch, 126 Ill. App. 439. Right to suspend member until reinstatement for nonpayment of assessments held waived where two overdue assessments were received and retained by supreme secretary, second one being received and retained though health certificate sent to member for signature after receipt of first one was not returned. Reed v. Bankers' Union of the World, 121 Mo. App. 419, 99 SW 55. Act of agent in receiving and receipting for dues held waiver of forfeiture for failure to pay them on time. Singleton v. Progressive Ben. Ass'n [S. C.] 58 SE 609. Receipt of overdue assessment by clerk of local lodge, who forwarded it to head body, held not to have worked estoppel where it was promptly returned by latter, and in view of provisions in regard to reinstatement. Woodmen of the World v. Jackson, 80 Ark. 419, 97 SW 673.

37. Acceptance by local council of assessment after expiration of period within which member suspended could be reinstated by payment held waiver of forfeiture and a reinstatement. National Council Knights & Ladies of Security v. Burch, 126 Ill. App. 15. Where society accepted assessment paid on day after it became due, and all subsequent assessments, without notifying member that he was suspended and that money was taken only as application for reinstatement, held that it was estopped to deny liability on certificate. Morgan v. Independent Order of Sons and Daughters of Jacob [Miss.] 44 S 791. Evidence held to show waiver of strict compliance with rule as to reinstatements. Munn v. Masonic Life Ass'n, 115 App. Div. 855, 101 NYS 91. Formal reinstatement of member, whose name had been canceled from roster of members for nonpayment of dues, held waived where he paid more than amount of arrears to officer of defendant corporation, who received and retained it until after member's death. Cardinale v. Society of Civility & Labor, 102 NYS 471.

38. Woodmen of the World v. Jackson, 80 Ark. 419, 97 SW 673.

39. Fact that insurer had on some occasions accepted overdue assessments held not course of dealing amounting to standing waiver of terms of contract. Hay v. People's Mut. Benev. Ass'n, 143 N. C. 256, 55 SE 623.

40. Notwithstanding previous course of dealing whereby local lodge had accepted overdue assessments from member ipso facto suspended for default without requiring formal reinstatement, held that beneficiary could not recover where member was suspended at time of his death because in default, though payment was made after his death. Catholic Order of Foresters v. Lynch, 126 Ill. App. 439. Where member was suspended for nonpayment, held that payment by third person after his death did not operate to reinstate him. National Council Knights & Ladies of Security v. Burch, 126 Ill. App. 15.

41. Stronge v. Supreme Lodge K. P. [N. Y.] 82 NE 433, rvg. 111 App. Div. 87, 97 NYS 661.

42. Camp physician held agent of society with authority to determine materiality of answers to questions in application so that, where he had full knowledge of the facts and wrote answers as he deemed them material, society would be deemed to have waived its right with respect to answers being literally true in that regard, and to be estopped from asserting their untruth as breach of warranties. Modern Woodmen of America v. Angle [Mo. App.] 104 SW 297. Evidence held to show that physician had full and complete knowledge as to facts when writing certain answers. Id. Evidence held to show that he did not have knowledge of facts when writing certain other answers so that there was no waiver as to them. Id.

43. Fact that agent who took application and physician who made examination knew that insured had been insane and that his answer to question was false held not to prevent company from relying on insured's false statement that he had never been insane when he knew that he had been. Mudge v. Supreme Court, I. O. F., 149 Mich. 467, 14 Det. Leg. N. 515, 112 NW 1130. Fraudulent misstatement as to age in application held to have avoided certificate, though applicant told his true age to agent, where he knew that agent was acting in his own interest and participated in fraud, since he had no reason to assume that agent would communicate true age to principal. Elliott v. Knights of Modern Maccabees

The insured may generally show by parol that the answers were not written by him and that he did not know the contents of the application when he signed it,[44] but where he is subsequently furnished with a copy thereof he will, after a reasonable time, be presumed to know its contents.[45]

Local lodges and their officers are generally deemed to be the agents of the supreme body in the collection of assessments so that their acts in that regard, if within the general scope of their authority, are regarded as its acts,[46] and their knowledge, acquired while so acting, its knowledge,[47] and this has been held to be true regardless of provisions in the contract to the contrary.[48]

There is a conflict of authority as to the effect of limitations in the contract as to who may waive its provisions[49] and as to what will amount to a waiver,[50] and of provisions requiring waivers to be in writing.[51]

[Wash.] 89 P 929. Evidence held to show that applicant participated in defrauding association. Id.

44. Modern Woodmen of America v. Angle [Mo. App.] 104 SW 297.

45. Even though agent of insurer wrote untrue answer to questions in application without knowledge of insured, and latter signed application without reading it, held that, where insured was furnished copy of application containing such untrue answers annexed to policy, and had held same for reasonable time, he was charged with notice of said answers and estopped to deny knowledge thereof. Modern Woodmen of America v. Angle [Mo. App.] 104 SW 297.

46. Local body held agent of supreme body in collection of assessments. National Council Knights & Ladies of Security v. Burch, 126 Ill. App. 15; Catholic Order of Foresters v. Lynch, 126 Ill. App. 439. Financial secretary of local lodge held agent of grand lodge in collecting assessments, so that his custom of receiving assessments after they were due was waiver of right to forfeit certificate for nonpayment. Trotter v. Grand Lodge of Iowa Legion of Honor, 132 Iowa, 513, 109 NW 1099. Secretary and treasurer of local lodge. Wood v. Iowa Legion of Honor, 133 Iowa, 33, 110 NW 164. Acts of agent of society may be such as will estop it from taking advantage of forfeiture for failure to pay dues on time, though constitution, laws, and regulations provide for forfeiture for nonpayment. Davidson v. Temple of Supreme Tribe of Ben Hur [Iowa] 111 NW 46. Acts and conduct of local scribe held to estop defendant to claim forfeiture for failure to pay dues on time, supreme body being chargeable with notice of what latter did within scope of her duties. Davidson v. Temple of Supreme Tribe of Ben Hur [Iowa] 111 NW 46. Subordinate lodge held agent of supreme body in receiving dues, etc. Modern Woodmen of America v. Breckenridge [Kan.] 89 P 661. Notice to presiding officer of local lodge held notice to lodge, and his personal knowledge the knowledge of said lodge. Id. Company is estopped by acts of subordinate officers, where member's dealings with them are of such nature that they must pass under observation of those having in charge ultimate management of company's affairs to such an extent as to justly induce member to believe that practice is approved by company itself. Edmonds v. Modern Woodmen of America, 125 Mo. App. 214, 102 SW 601. Where by-laws prohibited insuring of persons over 45 years old, but it appeared on face of application that applicant was over that age, but officers issued certificate and received dues for over 9 years, held that it would be presumed that company knew of officers' acts. Id.

47. Subordinate lodge and its clerk, who is designated by supreme lodge to receive and forward dues and assessments from certificate holders, are agents of supreme lodge, and their knowledge of his conviction of felony is that of supreme lodge. Pringle v. Modern Woodmen of America [Neb.] 113 NW 231.

48. Scribe of local lodge held agent of supreme body in collecting dues to be transmitted to it, though she was elected by local lodge and though articles of society declared that she should be deemed agent of members of local lodge. Davidson v. Temple of Supreme Tribe of Ben Hur [Iowa] 111 NW 46.

49. Provision prohibiting local lodge or its officers from waiving any provisions of by-laws held to refer only to contractual waivers and not to waiver by operation of law resulting from acts of lodge, such as waiver by receipt of dues with knowledge of facts operating as forfeiture. Modern Woodmen of America v. Breckenridge [Kan.] 89 P 661.

50. No insurance corporation or society can, by contract or by virtue of its by-laws, exempt itself in advance from liability to estop itself from asserting a forfeiture, when there has been a breach on the part of the insured and its conduct has been affirmatively such as to induce belief that forfeiture has been waived. Morgan v. Independent Order of Sons & Daughters of Jacob [Miss.] 44 S 791. Provision that receipt given for payment of any financial claim of order should not waive suspension for nonpayment of any prior financial liability held void and not to prevent estoppel by accepting overdue and subsequent assessments. Id.

51. Provisions making payment of each call when due condition upon which continuance of insurance depends, and that no verbal statement should modify same "unless the same be reduced to writing and signed by the president and secretary" of the association, are for the benefit of the association, and, if it sees fit to enter into oral agreement for extension of time for payment, it thereby waives right to have evidence of its action in writing, and also right to insist upon for-

A member may, by his conduct, assent to modifications of his contract so as to preclude a subsequent contention that they were unauthorized.[52]

Waiver of proofs of death[53] and of contract limitations[54] is treated in subsequent sections.

Reinstatement.[See 7 C. L. 1797]—The conditions on which a suspended member is entitled to be reinstated depend on the laws of the association.[55] Provisions as to the manner of reinstatement must be complied with[56] unless waived.[57]

§ 6. *The beneficiary.*[See 7 C. L. 1798]—The person entitled to benefits is to be determined by a construction of the contract and the laws of the order.[58] Only persons within the classes specified by the statute and the laws of the order may be designated as beneficiaries.[59] The society may restrict the class of eligible beneficiaries within narrower limits than that fixed by the statute under which it is or-

feiture for nonpayment of call at time when it was originally due. Farmers' & Mechanics' Life Ass'n v. Caine, 224 Ill. 599, 79 NE 956, afg. 123 Ill. App. 419.

52. Failure of member to take any action held not an assent to modification of contract as to amount to be paid, where he had no notice or knowledge that defendant intended to dispute validity or amount on maturity of claim, and statute prohibited changes affecting existing contracts. Guthrie v. Supreme Tent K. of M. of W. [Cal. App.] 87 P 405. Member held not to have acquiesced in amendment by continued payment of assessments or otherwise. Brown v. Grand Fountain of U. O. of True Reformers, 28 App. D. C. 200. Member held not to have waived right to old age benefits by continued payment of assessments after passage of by-laws eliminating such benefits, and up to adoption of first law containing demand upon him to agree to construction making earlier law retroactive. Wineland v. Knights of Maccabees of the World, 148 Mich. 608, 14 Det. Leg. N. 345, 112 NW 696.

53. See § 8, post.

54. See § 10, post.

55. By-laws providing that any member failing to pay assessments within 30 days after notice should be dropped from association and required to pay new membership fee in order to renew his insurance held not to give insured absolute right to reinstatement on payment of delinquent assessments three months after forfeiture and when his health had become greatly impaired, but assent of insurer was necessary. Hay v. People's Mut. Benev. Ass'n, 143 N. C. 256, 55 SE 623.

56. Where there was no proof that member either appeared before clerk in person or furnished written application for reinstatement containing statement as to good health as required by laws of order, held that there was failure to prove reinstatement. Woodmen of the World v. Jackson, 80 Ark 419, 97 SW 673.

57. See ante, this section.

58. Application directed that benefit should be paid to member's wife, subject to such future disposal among his dependents as he might thereafter direct. Upon back of application was indorsed unsigned direction that payment should be made to wife to be held in trust for member's adopted daughter, and similar provision for payment was contained in certificate, which was accepted by member and retained without objection. Held that daughter was equitable beneficiary, though direction indorsed on application was not signed. Murphy v. Nowak, 223 Ill. 301, 79 NE 112, rvg. 127 Ill. App. 125. Constitution construed, and held that where one of two beneficiaries died before member her share went to survivor. Stahl v. Grand Lodge A. O. U. W. [Tex. Civ. App.] 17 Tex. Ct. Rep. 429, 98 SW 643. Sum which certificate provided should be paid for erection of monument over insured's grave held payable to his wife, there being no express provision as to whom payment should be made, and society not having retained privilege of selecting monument, and not being burdened with duty of erecting it. Woodmen of the World v. Torrence [Tex. Civ. App.] 19 Tex. Ct. Rep. 565, 103 SW 652.

59. Charter of association held to have been amended by 97 Ohio Laws, p. 422, which did not authorize member to designate his estate as beneficiary, and hence such an attempted designation by member who became such after said amendment was invalid, though it would have been valid under original charter. Sturges v. Sturges [Ky.] 102 SW 884. Where constitution and by-laws provided that certain specified sum should be payable to widow of deceased member, except that member might designate his children to receive half of it in such proportions as he might direct, and provided for entry of designations permitted by laws of order in book kept for that purpose, held that declarations wherein member designated his children as beneficiaries of whole fund was ineffectual for any purpose, and widow was entitled to whole fund. Weinstein v. Weinstein, 104 NYS 1113. Where after passage of statute enlarging eligible class, member surrendered his certificate and requested another to be issued to his grandniece and grandnephew who were eligible under such statute, and association issued certificate naming them as beneficiaries, held that it thereby assented to their designation, a formal acceptance of such statute being unnecessary. Mathewson v. Supreme Council Royal Arcanum, 146 Mich. 671, 13 Det. Leg. N. 923, 110 NW 69. Subordinate lodge held lawful beneficiary at time when certificate was issued. Supreme Lodge K. of P. v. Reyman, 126 Ill. App. 482. Mass. St. 1876-77, c. 204, as amended by St. 1882, c. 195, § 2, held to authorize designation of grandniece and grandnephew as beneficiaries. Mathewson v. Supreme Council Royal Arcanum, 146 Mich. 671, 13 Det. Leg. N. 923, 110 NW 69.

ganized.[60] The designation of one having no insurable interest is void as contrary to public policy.[61] Among those commonly made eligible are dependents,[62] relatives,[63] the member's wife,[64] members of his family,[65] and devisees.[66] Eligibility at the death of the member is generally required.[67] The effect on existing contracts of changes in the provisions of the by-laws and the statutes as to who may be designated has been treated in a previous section.[68]

In case there is no valid designation,[69] or the person designated dies before the insured, and there is no new designation,[70] the benefits generally go to the persons made eligible in the order named. In the absence of a provision to the contrary, the marriage of a member does not affect a certificate previously issued or the rights of the beneficiary named therein.[71]

60. Contract and not statute governs in such case. Murphy v. Nowak, 223 Ill. 301, 79 NE 112, rvg. 127 Ill. App. 125.

61. Person not related to insured held to have no insurable interest in his life. Dolan v. Supreme Council of Catholic Mut. Ben. Ass'n [Mich.] 14 Det. Leg. N. 544, 113 NW 10.

62. Illegitimate child held "dependent." Stahl v. Grand Lodge A. O. U. W. [Tex. Civ. App.] 17 Tex. Ct. Rep. 429, 98 SW 643. Adopted daughter held a "dependent." Murphy v. Nowak, 223 Ill. 301, 79 NE 112, rvg. 127 Ill. App. 125.

63. Illegitimate child held related by blood. Stahl v. Grand Lodge A. O. U. W. [Tex. Civ. App.] 17 Tex. Ct. Rep. 429, 98 SW 643.

64. Where insured was coerced into marriage and never lived with woman, held that she was not entitled to proceeds of certificate payable to his "widow or other heirs," marriage being void in so far as claim was concerned. Grand Lodge K. P. v. Smith, 89 Miss. 718, 42 S 89.

65. Meaning of word "family" determined, and held that it included adult son who was supporting his father and with whom latter lived. Starnes v. Atlanta Police Relief Ass'n, [Ga. App.] 58 SE 481. Words "immediate family" held not to exclude from class of eligible beneficiaries adult child of insured not dependent on him for support and not under his legal control, and whom he was not bound to support. Dalton v. Knights of Columbus [Conn.] 67 A 510. Requested charge to effect that adult daughter would not be legally designated beneficiary if, at time of member's death, she had separated herself from family and ceased to be member of his household held properly refused. Id. Beneficiary not related to decedent or adopted by him held under evidence not a member of his family. Grand Lodge of A. O. U. W. v. McKay, 149 Mich. 90, 14 Det. Leg. N. 360, 112 NW 730. Children who married and moved away from member's house held no longer members of his family. Spear v. Boston Relief Ass'n [Mass.] 81 NE 196.

66. Where statute provided for payment to "widow, orphans, and devisees" of deceased members, held that designation of brother as beneficiary in certificate, though not by will, was valid and binding. Stake v. Stake, 228 Ill. 630, 81 NE 1146. Designation of stranger held not contrary to public policy though member has wife or other relatives. Id.

67. In view of statute and charter, adopted daughter who had ceased to be dependent on member at time of his death held not entitled to fund though designated as beneficiary. Murphy v. Nowak, 223 Ill. 301, 79 NE 112, rvg. 127 Ill. App. 125. Under St. 1876, p. 22, c. 16, incorporating relief association and association's by-laws, held that status of beneficiaries at time of member's death determined their right to benefits, and, where they had ceased to be members of his "family" at that time, widow was entitled to benefits. Spear v. Boston Relief Ass'n [Mass.] 81 NE 196. Policy to "A. T. Wife" reverts to administrator if wife is divorced before death of insured. The Brotherhood of Railroad Trainmen v. Taylor, 9 Ohio C. C. (N. S.) 17.

68. See § 5F, ante.

69. Where person named is outside classes eligible as beneficiaries, fund goes to member's heirs at law who are within such classes. Murphy v. Nowak, 223 Ill. 301, 79 NE 112, rvg. 127 Ill. App. 125. Classes named in Acts 1899, p. 195, c. 115, § 1, are entitled to benefits in order named when there is no valid designation of beneficiary by insured, as where designated beneficiary is not within classes specified. Grand Lodge Colored K. of P. v. Mackey [Tex. Civ. App.] 104 SW 907.

70. By-laws provided that beneficiaries should be wife, children, etc., and that if member outlived beneficiary named in certificate, and died without naming new beneficiary, benefits should go to "member's next living relation in the order named." Held that where member named his wife as beneficiary, and on her death married again and did not name new beneficiary, benefits went to second wife. Speegle v. Sovereign Camp of Woodmen [S. C.] 58 SE 435. Certificate provided that it was subject to conditions named in constitution. Constitution provided that beneficiaries should be wife, children, etc., and that in case beneficiary designated by member predeceased him, and no new designation was made, benefits should go to "member's next living relation in the order named" therein. Held that where member's first wife, who was named as beneficiary, predeceased him, and no new beneficiary was designated, his second wife was entitled to benefits in preference to his children by former marriages. Harris v. Harris [Tex. Civ. App.] 16 Tex. Ct. Rep. 930, 97 S. W. 504. Proceeds of certificate held to go to member's second wife, no designation having been made by him after death of his first wife who was named as beneficiary. Roberts v. Roberts [Tex. Civ. App.] 17 Tex. Ct. Rep. 648, 99 SW 886.

71. Stake v. Stake, 228 Ill. 630, 81 NE 1146.

Where the contract authorizes a change of beneficiaries, the beneficiary acquires no vested interest in the certificate during the member's lifetime,[72] and hence his death before that of the member puts an end to his interest.[73] His contract rights, however, become fixed at the member's death, and cannot be impaired by statutes subsequently enacted.[74] Changes of beneficiaries must be made substantially in the manner prescribed.[75] Where a member has pursued the course pointed out by the by-laws, and has done substantially all that is required of him to effectuate a change, the change will take effect though the formal details are not completed by the association before his death.[76] Where the association acquiesces in an attempted change, the original beneficiary cannot raise the question of compliance with the rules,[77] and this is particularly true where there is a valuable consideration for the change,[78] or where noncompliance is due to his own wrongful conduct.[79] There is a conflict of authority as to the effect on the rights of the original beneficiary of an invalid attempt to change beneficiaries.[80] A contract between the member and the beneficiary not to change the beneficiary is valid and enforceable in equity if based upon a sufficient consideration.[81] So, too, a reserved right to make a change will not authorize a change as against a beneficiary designated for a valuable consideration.[82]

72. Murphy v. Nowak, 223 Ill. 301, 79 NE 112, rvg. 127 Ill. App. 125; Grand Legion of Ill. Select K. of A. v. Beaty, 224 Ill. 346, 79 NE 565, afg. 117 Ill. App. 657; Davis v. Supreme Council Royal Arcanum [Mass.] 81 NE 294; Ogden v. Sovereign Camp, Woodmen of the World [Neb.] 111 NW 797; Speegle v. Sovereign Camp of Woodmen [S. C.] 58 SE 435; Bernheim v. Martin [Wash.] 88 P 101.

73. His administrator has no interest in fund though no other beneficiary is designated. Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662.

74. American Guild v. Wyatt, 30 Ky. L. R. 632, 100 SW 266.

75. Paper directing beneficiary to make certain payments out of proceeds of certificate in accordance with previous agreement held not to have operated as change of beneficiaries. Supreme Lodge K. of P. v. Reyman, 126 Ill. App. 482.

76. Change held effective where insured signed application with her name before her marriage though secretary refused to issue new certificate until she also signed it with her name after her marriage, there being no such requirement in rules or by-laws. Bernheim v. Martin [Wash.] 88 P. 106.

77. Where association waives strict compliance with rules and acquiesces in change, admitting liability and paying money into court. Coleman v. Grand Lodge Colored K. of P. [Tex. Civ. App.] 19 Tex. Ct. Rep. 849, 104 SW 909.

78. After death of beneficiary, insured agreed that amount remaining payable thereunder should go to plaintiff, his niece, at his death if she would provide home and care for him, which she did. Insured sent certificate to recorder of local lodge with request that niece be designated as beneficiary. Recorder, under mistaken impression that plaintiff was insured's only niece, informed him that no change was necessary, but that benefit would go to her anyway. Held that, as between plaintiff and other nieces, insurer having voluntarily paid money to trustee, plaintiff was entitled to fund, though rules of association as to manner of changing beneficiary had not been complied with. Tidd v. McIntyre, 116 App. Div. 602, 101 NYS 867.

79. Refusal of person named as beneficiary for a valuable consideration to surrender certificate held not unlawful so as to excuse failure of member seeking to change beneficiaries from surrendering old certificate. Stronge v. Supreme Lodge K. P. [N. Y.] 82 NE 433, rvg. 111 App. Div. 87, 97 NYS 661.

80. Kentucky: If the attempted change is invalid for any reason, as where new beneficiary is not eligible, rights of original beneficiary are not affected and original designation remains in force. Sturges v. Sturges [Ky.] 102 SW 884.

Texas: Surrender of certificate to grand lodge, acceptance thereof, and issuance by grand lodge of another certificate naming another beneficiary, held to have fully revoked original certificate and destroyed all rights of original beneficiary, though new beneficiary could not be legally designated as such. Grand Lodge Colored K. of P. v. Mackey [Tex. Civ. App.] 104 SW 907.

81. Member gave certificate to his wife, who was named as beneficiary, promising her that he would never change it except as he should appoint her children instead. Relying on promise she kept insurance alive by paying premiums out of her separate estate. Held that daughter, representing wife, was entitled to insurance as against member's brother, whom he had substituted as beneficiary without wife's knowledge or consent, promise being present assignment to take effect and attach as soon as fund came into existence and operating to estop member from making change. King v. Supreme Council Catholic Mut. Ben. Ass'n, 216 Pa. 553, 65 A 1108.

82. Where beneficiary was designated in consideration of her and her husband taking member into their home and caring for him, which they did. Stronge v. Supreme Lodge K. P. [N. Y.] 82 NE 433, rvg. 111 App. Div. 87, 97 NYS 661.

An agreement to reimburse a beneficiary out of the proceeds of the certificate for payments made by him to third persons is enforceable in equity though the certificate is not assignable at law.[83] It has been held that persons taking the proceeds of the certificate under the laws of the association, because of the failure of the member to designate a new beneficiary on the death of the one originally named, must reimburse a third person who has paid assessments under an agreement with the member and the original beneficiary providing for such reimbursement.[84]

Exemption of benefits from liability for debts.[See 7 C. L. 1802]—As a general rule the proceeds of a certificate payable to a beneficiary other than the member's estate are not liable for the member's debts,[85] and the same is true where it is provided that payment shall be made to the member's personal representative in trust for his heirs.[86] The personal representative of a deceased member may recover sick benefits accruing to him during his lifetime.[87]

§ 7. *Maturity and accrual of benefits.*[See 7 C. L. 1803]—The right to the benefit accrues on the death of the insured [88] from one of the causes covered by the contract, or on the happening of any other contingency insured against.[89] Recovery cannot be had under an agreement to pay funeral expenses not to exceed a specified sum in the absence of proof of the amount expended for that purpose.[90]

§ 8. *Notice and proofs of death or disability.*[See 7 C. L. 1803]—Proofs of disability are waived by a positive denial of liability.[91]

§ 9. *Payment of benefits and discharge of liability.*[See 7 C. L. 1804]—Statutes in some states provide for the accumulation and maintenance of a reserve fund for the payment of the difference between the amount due on certificates and the proceeds of assessments levied for their payment.[92] Funds applicable to the pay-

83. Gives him vested interest. Supreme Lodge K. of P. v. Reyman, 126 Ill. App. 482.

84. After certificate had lapsed for nonpayment of assessments, insured, beneficiaries, and plaintiff entered into agreement whereby plaintiff was to pay amount necessary to reinstate insured and all future dues and assessments, and was to be reimbursed out of proceeds of certificate. Plaintiff performed on his part. Beneficiaries died before insured, and no new beneficiary was designated. Under laws of order, fund went to insured's children on his death. Held that, since children received benefit of contract made with original beneficiaries, fund received by them was liable to reimburse plaintiff for sums expended thereunder by him. Kelly v. Searcy [Tex.] 18 Tex. Ct. Rep. 433, 102 SW 100, rvg. [Tex. Civ. App.] 17 Tex. Ct. Rep. 138, 537, 98 SW 1080.

85. Proceeds of certificate in which member's brother was named as beneficiary held not assets of member's estate. Stake v. Stake, 228 Ill. 630, 81 NE 1146. Under Rev. St. 1899, § 1418, proceeds of certificate cannot be taken or applied to pay debts or liabilities of member or beneficiary. Beall v. Graham, 125 Mo. App. 38, 102 SW 636. Allowance of claim for medical services rendered insured in last illness against estate of minor beneficiaries who had received proceeds of certificate held error, particularly where member did not himself pay all premiums. Id. In no event could such claim be enforced against estate of minors, remedy, if any, being against estate of decedent. Id.

86. Proceeds held not to have become assets of estate subject to payment of debts and to unrestricted disposition by will, but that administrator held money solely in trust for heirs, and was answerable for it to them alone, they being in substance the real beneficiaries, so that provision was not void as inconsistent with statutes. Lewis v. Brotherhood Acc. Co. [Mass.] 79 NE 802.

87. Though not death indemnity payable to named beneficiary. Continental Casualty Co. v. Maxwell, 127 Ill. App. 19.

88. Evidence held to sustain verdict as to death of insured and identity of body. Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 110 NW 358.

89. Risks assumed, suicide clauses, and exceptions, see § 5c, ante.

90. Where by-laws required association to pay funeral expenses "which will not be more than $75," held that judgment of $75 for funeral expenses was erroneous where there was no evidence as to funeral expenses incurred. Cardinale v. Society of Civility & Labor, 102 NYS 471.

91. Hays v. General Assembly American Benev. Ass'n [Mo. App.] 104 SW 1141.

92. Hurd's Rev. St. 1893, c. 73, §§ 230-257, held not to have become part of contract entered into before its passage, or to have in any way affected or changed relations of parties to such contract, since statutes cannot abrogate or impair obligations of existing contracts. Crawford v. Northwestern Traveling Men's Ass'n, 226 Ill. 57, 80 NE 736, afg. 126 Ill. App. 468. Amendment to constitution and by-laws providing for creation of emergency fund and that de-

ment of benefits cannot be followed by beneficiaries into the hands of innocent purchasers.[93] Matters relating to settlements [93a] and releases [93b] are treated elsewhere.

§ 10. *Procedure to enforce right to benefits, etc. Submission of disputes to arbitration or to tribunats within the order.*[94] See 7 C. L. 1805—Agreements to refer a cause of action arising under other provisions of the contract, as distinguished from preliminary questions as to damages and the like, to arbitrators are usually held to be invalid as ousting the courts of jurisdiction.[95] It is generally held that provisions requiring disputed questions as to the insurance contract to be settled by tribunals within the order are valid and binding, and that the courts will not inquire into the regularity of the procedure adopted and pursued by such tribunals,[96] though there seems to be some conflict of authority in this regard.[97] Provisions denying the right to resort to the civil courts until after all remedies within the order have been exhausted are generally held to be valid if reasonable, but not otherwise.[98] Such a requirement is waived by an absolute refusal to pay the claim.[99] There is a conflict of authority as to whether a member is precluded from suing at law after he has exhausted such remedies, where the contract does not specifically provide that the decisions of the tribunals of the order shall be final,[1] and as to the validity of provisions making such decisions final.[2]

Remedies and procedure in general.[See 7 C. L. 1805]—Where the right of action does not accrue until a specified time after the receipt of proofs, such time is not necessarily extended by amendments to the proofs originally furnished.[3] Equity

ficiencies might be paid therefrom held to have made such payment optional only. Id. Under Rev. Laws, c. 119, § 19, held that so much of claim on which judgments, obtained against corporation after institution of receivership proceedings, were founded as appeared to court to be due for death or disability benefit might be proved, to be paid out of emergency fund in receiver's possession. Attorney General v. Supreme Council A. L. H. [Mass.] 81 NE 966.

93. Where directors of insolvent association were guilty of breach of duty in transferring assets in which fund applicable to payment of benefits was invested without paying fixed benefit liability, held that bona fide purchaser's of such assets for valuable consideration did not take them impressed with trust in favor of beneficiary, and such assets could not be recovered from them. Harvey v. Wasson, 74 Kan. 489, 87 P 720.

93a. See Accord and Satisfacton, 9 C. L. 11.

93b. See Releases, 8 C. L. 1714.

94. For submission of questions other than those relating to insurance contracts, see § 4 ante.

95. Agreement held one to refer to cause of action. Lewis v. Brotherhood Accident Co. [Mass.] 79 NE 802.

96. Donnelly v. Supreme Council Catholic Benev. Legion [Md.] 67 A 276.

97. Regulation of railway employe's relief association requiring submission of claim against it to arbitrament of association held invalid, especially where tribunal which would pass upon it was mainly composed of officers of railroad company. Chicago, B. & Q. R. Co. v. Hendricks, 125 Ill. App. 580.

98. Laws of order provided that suit could not be brought until member had exhausted remedies within order, that member might appeal to executive council from decision of chief ranger denying application for disability benefits "within 20 days from the date of the decision," that interested parties should be notified of decision at once, and that party failing to appeal should be bound by decision. Held that laws could not be construed as giving right of appeal within 20 days after notice of decision, and hence, where applicant was not notified of decision until more than 20 days after it was rendered, fact that he did not appeal was not bar to action to recover benefits. Steiner v. Supreme Council I. O. F., 149 Mich. 567, 14 Det. Leg. N. 539, 113 NW 15. Provisions requiring appeal to highest tribunal of order, which was required to meet in foreign country three years after claim accrued, held unreasonable and void so that disregard thereof did not preclude recovery. Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 110 NW 358.

99. Chicago B. & Q. R. Co. v. Hendricks, 125 Ill. App. 580.

1. **Maryland:** Where tribunals of order have jurisdiction to try disputed question, their jurisdiction is exclusive, whether by-laws provide that their decisions shall be final or not, and courts cannot review their decisions of questions coming properly before them except in cases of fraud. Donnelly v. Supreme Council Catholic Benev. Legion [Md.] 67 A 276. Rule applies whether member does not press claim before tribunals of order at all or carries it through final tribunal, or does not exhaust all his remedies. As to binding force of by-law limiting members entitled to sick benefits. Id.

2. Rule requiring appeal from action of officers vested with authority to allow or reject death claims to supreme body, whose action is declared to be final, held unreasonable and void as against public policy as depriving courts of jurisdiction. Markham v. Supreme Court I. O. F. [Neb.] 110 NW 638.

3. Where original proofs of death had been received 7 months before commence-

has no jurisdiction of a suit to collect the difference between the face of the certificate and the proceeds of an assessment, there being an adequate remedy at law.[4] Where the obligation of the association is to pay not to exceed a specified sum from a fund raised by the board of directors at its discretion for the payment of all death losses, claims for which have been approved by the board, the beneficiary is not required to sue in equity to compel the levying of an assessment, but may sue at law for the amount due on the certificate.[5] An action to recover on a benefit certificate is one at law though the validity of a withdrawal by the member before his death is involved.[6] Matters relating to process [7] and venue [8] are treated elsewhere. Where nothing remains to be done under the contract but to pay over money, plaintiff may, as a rule, declare generally in indebitatus assumpsit.[9] Assumpsit will not lie to recover on a certificate under seal.[10] Technical defenses are not favored.[11]

Parties—It is generally held that there is such privity between the society and the beneficiary designated in the certificate or by-laws as authorizes the beneficiary to sue for the benefits in his own name.[12] In some states, however, if the certificate is a specialty the action must be brought by the legal representative of the insured, though it is payable to named beneficiaries and not to his estate.[13]

Limitations.—Provisions limiting the time within which actions to recover benefits must be brought are generally held to be valid and must be complied with,[14] unless waived.[15] Where it is provided that the action must be brought

ment of action, held that fact that amendment thereto was received less than 90 days before commencement of action was no ground for its abatement. Rohloff v. Aid Ass'n for Lutherans, 130 Wis. 61, 109 NW 989.

4 Northwestern Traveling Men's Ass'n v. Crawford, 126 Ill. App. 468, afd. on other grounds, 226 Ill. 57, 80 NE 736.

5. In action on certificate entitling beneficiary to participate in mortuary fund to extent of one full assessment on all members in good standing, not exceeding $2 000, petition alleging that mortuary fund was always on hand for purpose of paying death losses, same being maintained by advance assessments, and assessments from time to time when said fund was depleted or insufficient to pay losses, that full assessment at member's death was largely in excess of sum to be paid on certificate, and that said sum of $2,000 had already been collected and was in defendant's possession, held to entitle plaintiff to sue at law. Van Norman v. Modern Brotherhood of America, 134 Iowa, 575, 111 NW 992. Even if it appeared that there was no fund in defendant's possession from which judgment at law could be paid if recovered, and auxiliary proceedings to compel collection of money by assessment would have been necessary, held that such fact would not preclude plaintiff from having judgment at law if she saw fit to take it. Id.

6. Though answer alleged that member had severed his connection with order before death, and reply claimed that withdrawal was irregular and procured through fraud. Wightman v. Grand Lodge A. O. U. W., 121 Mo. App. 252, 98 SW 829.

7. See Process, 8 C. L. 1449.

8. See Venue and Place of Trial, 8 C. L. 2236.

9. Where action to recover benefits was predicated on membership in association and its constitution and laws, and there was no policy or certificate and nothing remained of any contract except payment of money. Cigar Makers' International Union v. Huecker, 123 Ill. App. 336.

10. Acts 1896, No. 121, p. 89, providing that, in actions on certain insurance policies, general count in assumpsit shall be a sufficient declaration, held not to affect form of action or to make action of assumpsit appropriate where it was not so at common law, and hence not to make assumpsit proper remedy to recover on certificate under seal. Morrill's Adm'x v. Catholic Order of Foresters, 79 Vt. 479, 65 A 526.

11. Professedly benevolent and charitable character of fraternal societies does not exempt them from application of rule. Trotter v. Grand Lodge of Iowa Legion of Honor. 132 Iowa, 513, 109 NW 1099.

12. It being alleged that defendant was benefit society, that under charter and by-laws nearest relative was beneficiary, and that plaintiff's ward was nearest relative, held that suit was properly instituted in plaintiff's name. Social Benev. Soc. No. 1 v. Holmes, 127 Ga. 586, 56 SE 775. Action held properly brought by guardian of minor whom petition showed had right of action. Id. For death benefit payable to family of deceased, those persons whose relationship to him are legally counted in word "family" and not his legal representatives are entitled to sue. Jackson v. Brothers and Sisters of Promise [Ga. App.] 59 SE 11.

13. Certificate held sealed instrument so that action was properly brought in name of administratrix of member rather than by his sons, who were named as beneficiaries. Morrill's Adm'x v. Catholic Order of Foresters, 79 Vt. 479, 65 A 526.

14. Provision that no action should be maintained on contract unless brought within one year after member's death held not contrary to the public policy of Illinois. Dolan v. Royal Neighbors of America, 123 Mo. App. 147, 100 SW 498. Contract limita-

within a specified time after the rejection of the member's claim for benefits, the limitation does not commence to run until the member has notice of such rejection.[16]

Pleading.[See 7 C. L. 1806]—The usual rules of pleading apply,[17] including those as to exhibits,[18] amendments,[19] and the necessity of verification.[20] Allegations must be definite and certain,[21] and facts, not conclusions, must be alleged.[22] It is not necessary to set forth a copy of the written contract sued on, where its substance is properly alleged.[23] Plaintiff need not allege that the contract is in writing, though the law requires it to be.[24] A general allegation of corporate capacity is usually sufficient.[25] Defendant must plead forfeitures, if relied on,[26] and facts showing a right to any deductions authorized by the contract.[27] A general denial renders admissible all evidence directly tending to disprove one or more of the alle-

tion held restriction upon contractual obligation and not provision pertaining merely to remedy, and hence its validity was to be determined by the lex loci contractus rather than the lex fori. Id. Requirement that action should be commenced within 6 months after disallowance of plaintiff's claim held to refer to claim made upon proofs of loss and action commenced within 6 months after rejection of said claim was in time though more than 6 months had elapsed since defendant had notified plaintiff, before proofs were filed, that it would not pay. Munn v. Masonic Life Ass'n, 115 App. Div. 855, 101 NYS 91. Question of limitations held one of law for court, there being no dispute as to facts. Munn v. Masonic Life Ass'n, 115 App. Div. 855, 101 NYS 91.

15. Failure to sue within 6 months held not waived. Harris v. Phoenix Accident & Sick Benefit Ass'n, 149 Mich. 285, 14 Det. Leg. N. 445, 112 NW 935. Exclusion of evidence that beneficiary recorder of order persuaded plaintiff not to sue on certificate within year, and promised him that claim would be paid, held reversible error. Dolan v. Royal Neighbors of America, 123 Mo. App. 147, 100 SW 498.

16. Demurrer to plea of limitations held properly sustained where it was not alleged that member had notice of rejection. Switchmen's Union of North America v. Colehouse, 227 Ill. 561, 81 NE 696.

17. See, also Pleading, 8 C. L. 1355.

18. Where certificate, providing that member should comply with constitution, laws, etc., of order, was made exhibit, held not necessary to file copy of constitution and by-laws as an exhibit. Court of Honor v. Hutchins [Ind. App.] 79 NE 409. Fact that certificate attached to petition as exhibit designated defendant as a fraternal beneficiary society held not inconsistent with allegation of petition that it was a life insurance and beneficiary society, exhibit forming no part of allegation. Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 NW 452.

19. Amendment held not to have added new cause of action and to have been properly allowed. Social Benev. Soc. No. 1 v. Holmes, 127 Ga. 586, 56 SE 775. Amendment held not to set up new cause of action but merely to have amplified original allegations and to have been improperly disallowed. Jackson v. Brothers & Sisters of Promise [Ga. App.] 59 SE 11.

20. See Verification, 8 C. L. 2255, for full treatment of this question.

21. Cause of action held set forth in exhibit to original summons in justice court with sufficient definiteness, especially in absence of timely special demurrer. Jackson v. Brothers & Sisters of Promise [Ga. App.] 59 SE 11. Petition held as against general demurrer, to have sufficiently set forth contract resulting from operation of rules and by-laws, though it did not allege issuance of certificate. Social Benev. Soc. No. 1 v. Holmes, 127 Ga. 586, 56 SE 775.

22. Averment that defendant was life insurance society held not put in issue by general allegation of answer, by way of conclusion, that it was fraternal beneficiary society. Krause v. Modern Woodmen of America, 133 Iowa, 241, 110 NW 452.

23. Petition held subject to special demurrer for failure to attach copies of charter and by-laws relied on as constituting contract sued on, where there was no allegation as to their substance but only an allegation by way of a conclusion as to their effect. Social Benev. Soc. No 1 v. Holmes, 127 Ga. 586, 56 SE 775. Objection held not overcome by allegation that plaintiff did not have charter and by-laws but had served defendant with notice to produce them. Id.

24. As against general demurrer, will be presumed that it is. Social Benev. Soc. No. 1 v. Holmes. 127 Ga. 586, 56 SE 775. Allegation that contract was contained in by-laws, copy of which plaintiff alleged she did not have but had served notice upon defendant to produce, held to imply that it was in writing. Id.

25. Sufficient under Code, § 3627. Krause v. Modern Woodmen of America, 133 Iowa, 241, 110 NW 452.

26. Defendant has the burden of pleading and proving a forfeiture for nonpayment of assessments. Must show provision for forfeiture for nonpayment of assessments and that forfeiture in fact occurred. Gruwell v. National Council of K. & L. of S. [Mo. App.] 104 S. W. 884. Where defendant pleaded particular law, held that it could not rely on different one not pleaded. Id.

27. Claim that judgment was excessive in sum which defendant was entitled to deduct for reserve fund under stipulation in certificate held not open to consideration where it was not pleaded in answer.. Gruwell v. National Council of K. & L. of S. [Mo. App.] 104 SW 884.

gations of the complaint.[28] In some states the facts relied on to negative corporate existence,[29] or the performance of conditions precedent,[30] must be specifically stated. In some states waiver may be shown under an allegation of full performance.[31]

Evidence. Presumptions and burden of proof. See 7 C. L. 1807—The presumption is against suicide,[32] and the insurer has the burden of proving it [33] by a preponderance of the evidence.[34] Where the insurer is exempted from liability in case of suicide unless the member is under treatment for insanity at the time, the burden is on plaintiff to show that he was under treatment.[35] The burden of proving forfeitures,[36] and death or injury from expected causes,[37] is ordinarily on the insurer. Where the evidence shows suspension of the insured, the beneficiary has the burden of showing reinstatement.[38] Plaintiff need not, in the first instance, prove the truth of representations or warranties in the application, but their falsity is a matter of defense.[39] Where a member while insane withdraws from the association and releases it from further liability, the burden is on it to show that the transaction was fair and made in good faith.[40] The court cannot take judicial notice that a society is a fraternal association.[41]

Admissibility. See 7 C. L. 1809—The usual rules of evidence apply,[42] including those as to the admissibility of declarations of a party,[43] and admissions against

28. Proofs held not admissible under general denial. Craiger v. Modern Woodmen of America [Ind. App.] 80 NE 429.

29. General allegation of corporate capacity cannot be put in issue by general denial or averment of different corporate capacity as a conclusion. Code, § 3628. Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 NW 452.

30 General denial of general allegations of performance of conditions precedent held not to have put them in issue. Code, §§ 3626, 3628. Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 NW 452. Though denials were general in their nature, held that they were sufficient to put burden on plaintiff to establish his general allegations that insured was member in good standing, that his dues had been paid, that proof of death had been furnished, etc. Supreme Lodge K of P. v. Crenshaw [Ga.] 58 SE 628.

31. Modern Woodmen of America v. Angle [Mo. App.] 104 SW 297.

32. Sovereign Camp Woodman of the World v. Bridges [Ind. T.] 104 SW 672; Hildebrand v. United Artisans [Or.] 91 P 542. As between accidental death and suicide, presumption is that death was accidental. Van Norman v. Modern Brotherhood of America, 134 Iowa, 575, 111 NW 992. Court will presume that death was result of accident where nothing more is shown than that it was brought about by a violent injury, character of which is consistent with theory of accident. Sovereign Camp, Woodmen of the world v. Boehme [Tex. Civ. App.] 97 SW 847. Original and amended proofs held not to have required court to take from jury presumption against suicide. Rohloff v. Aid Ass'n for Lutherans, 130 Wis. 61, 109 NW 989. If known facts are consistent with theory of natural or accidental death, presumption requires finding against suicide. Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 110 NW 358; Zearfoos v. Switchmen's Union, 102 Minn. 56, 112 NW 1044.

33. Van Norman v. Modern Brotherhood of America, 134 Iowa, 575, 111 NW 992; Olson v. Court of Honor, 100 Minn. 117, 110 NW 374; Hildebrand v. United Artisans [Or.] 91 P 542; Sovereign Camp, Woodmen of the World v. Boehme [Tex. Civ. App.] 97 SW 847; Rohloff v. Aid Ass'n for Lutherans, 130 Wis. 61, 109 NW 989. Insurer must eliminate and disprove all other causes consistent with evidence. Zearfoos v. Switchmen's Union, 102 Minn. 56, 112 NW 1044. Where circumstantial evidence is relied on, defendant must establish facts excluding any reasonable hypothesis of natural or accidental death. Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 110 NW 358.

34. Instructions requiring defendant to prove suicide with that degree of certainty which is required in criminal prosecutions, though erroneous, held harmless where jury found for defendant, and evidence warranted verdict even under instructions as given. Williams v. Supreme Court of Honor, 120 Ill. App. 263. Ultimate fact is required to be proved by preponderance of evidence only. Zearfoos v. Switchmen's Union, 102 Minn. 56, 112 NW 1044; Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 110 NW 358.

35. If did commit suicide. Olson v. Court of Honor, 100 Minn. 117, 110 NW 374.

36. Must show provision for forfeiture for nonpayment of assessments and that forfeiture in fact occurred. Gruwell v. National Council of K. & L. of S. [Mo. App.] 104 SW 884.

37. Voluntary exposure to unnecessary danger or lack of due diligence in avoiding injury. Garcelon v. Commercial Travelers' Eastern Acc. Ass'n [Mass.] 81 NE 201.

38. Where evidence showed failure to pay assessment on time and consequent suspension. Woodmen of the World v. Jackson, 80 Ark. 419, 97 SW 673.

39. Court of Honor v. Clark, 125 Ill. App. 490.

40. Wightman v. Grand Lodge A. O. U. W., 121 Mo. App. 252, 98 SW 829.

41. Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662.

42. See, also, Evidence, 9 C. L. 1228.

43. Where beneficiary has no vested in-

interest.[44] The constitution and laws of the order are generally admissible if part of the contract.[45] Proofs of death are admissible as evidence of the facts therein stated as against the beneficiary and in favor of the insured only in so far as they can be construed as admissions by the beneficiary against his interest.[46] They are, at most, only prima facie evidence of the facts therein stated.[47] The coroner's verdict is generally held to be inadmissible.[48] Where the by-laws provide that upon the death of a member the officers of the local society to which he belonged shall furnish full proof of death upon blanks furnished for that purpose, and give their opinion as to the validity of the beneficiary's claim, such officers must be considered the agents of the general society,[49] and their statements and admissions made against the interests of the general organization are competent evidence in an action on the benefit certificate.[50] Cases dealing with the admissibility of particular evidence on the issues of suicide,[51] waiver,[52] total disability,[53] and forfeiture,[54] will be found in the notes.

terest, statements and admissions of insured are admissible as against beneficiary in an action on certificate. Ogden v. Sovereign Camp Woodmen of the World [Neb.] 111 NW 797. On issue as to good standing of insured at time of his death, statements of deceased tending to show his understanding as to his standing in order. Id. In contest between two persons over proceeds of certificate, declarations made by insured to one of them, not dying declarations or part of res gestae, held inadmissible. Grand Lodge Colored K. of P. v. Mackey [Tex. Civ. App.] 104 SW 907.

44. Where laws provided that no attempted reinstatement should be effective unless member was in good health, and beneficiary relied on reinstatement, held that testimony of physician who attended member that beneficiary told him at the time that member had been sick for about three weeks held admissible as an admission of beneficiary, where it brought period of member's illness within time jury could have found, from other evidence, that reinstatement was attempted, and hence tended to show that he was not then in good health. Woodmen of the World v. Jackson, 80 Ark. 419, 97 SW 673. Declarations of officer of lodge, who took active part in procuring withdrawal card, concerning member's mental condition, held admissible as tending to show want of good faith in procuring release of defendant's obligation on benefit certificate. Wightman v. Grand Lodge A. O. U. W., 121 Mo. App. 252, 98 SW 829. Declaration that engagement had been broken off held admissible against one claiming proceeds of certificate as insured's affianced wife. Grand Lodge Colored K. of P. v. Mackey [Tex. Civ. App.] 104 SW 907.

45. In action of assumpsit to recover benefits, founded on membership and laws of order, held that constitution and by-laws were admissible to establish existence of duty to pay and to determine amount recoverable. Cigar Makers' International Union v. Huecker, 123 Ill. App. 336. Where plaintiff sued for benefits to which she became entitled under set of rules adopted after member joined order, and which provided for their amendment and alteration, held that amendments were relevant and admissible in so far as they affected claims or status of parties to action or of deceased member. Cigar Makers' International Union v. Huecker, 123 Ill. App. 336.

46. Statements of attending physician on blank included in proofs held inadmissible as admissions, in view of requirements of by-laws as to proofs and notice to physician printed on blank. Triple Tie Benefit Ass'n v. Wheatley [Kan.] 91 P 59. Authenticated copy of coroner's proceedings, evidence taken before him, and verdict, required by by-laws to accompany proofs, held inadmissible as evidence of facts therein stated to establish defense of suicide, there being nothing in contract to contrary, particularly where beneficiary, in proofs, denied truth of such facts. Craiger v. Modern Woodmen of America [Ind. App.] 80 NE 429.

47. Fact that proofs stated that member committed suicide held not ground for granting nonsuit or for dismissal. Rohloff v. Aid Ass'n for Lutherans, 130 Wis. 61, 109 NW 989. Original and amended proofs held not to have required court to take presumption against suicide from jury. Id.

48. Craiger v. Modern Woodmen of America [Ind. App.] 80 NE 429.

49. Hildebrand v. United Artisans [Or.] 91 P 542. Question whether proof was furnished by secretary of local society or by plaintiff's attorney held for jury under the evidence. Id. Where local secretary sent proofs of death to supreme secretary, held immaterial that she was assisted in preparing them by an attorney who was member of order and afterwards became attorney for beneficiary in action on certificate. Id. Question as to whether person assisting local secretary in preparing proofs did so as attorney or just as member of order at her request held proper. Id.

50. Hildebrand v. United Artisans [Or.] 91 P 542.

51. Certified copy of certificate of death made by physician and health officer, and filed in register's office as required by statute, held properly excluded as not best evidence. Rohloff v. Aid Ass'n for Lutherans, 130 Wis. 61, 109 NW 989. Fact that member was short in his acounts as financial secretary of a church may be shown. Rohloff v. Aid Ass'n for Lutherans, 130 Wis. 61, 109 NW 989. Evidence of trustee that he had made partial inquiries among church members and found that certain of them claimed to have made payments to deceased

FRAUD AND UNDUE INFLUENCE.

§ 1. Actual Fraud (1475).
§ 2. Inferences from Circumstances and Condition of Parties or From Intrinsic Nature of the Transaction (1483).
§ 3. Remedies (1487). Pleading (1491). Evidence (1492). Instructions (1494).

Scope of topic.—This topic treats of fraud and undue influence generally, being devoted principally to a consideration of the nature and elements of fraud, the application of the general principles herein propounded and considered being treated more exhaustively and particularly in the various topics devoted to the subject-matter of the fraud.[55] Remedies for fraud are herein considered, but also only in a general way, the particular treatment of such remedies being covered by topics specifically devoted thereto.[56] Fraud in its criminal aspect,[57] and conveyances fraudulent as to creditors,[58] are entirely excluded herefrom, as is also the measure of damages[59] and limitations of actions.[60]

§ 1. *Actual fraud.*[See 7 C. L. 1813]—The prime essentials of fraud are deception[61] and unjust or unfair treatment,[62] as distinguished from mere errors of judgment,[63] or breach of contract,[64] though the latter may constitute fraud where it amounts to a breach of trust,[65] or the promise itself was fraudulent.[66]

and taken receipts therefor held inadmissible as hearsay and because receipts were best evidence. Id.

52. Exclusion of evidence that beneficiary recorder of order persuaded plaintiff not to sue on certificate within year, and promised that claim would be paid, held reversible error. Dolan v. Royal Neighbors of America, 123 Mo. App. 147, 100 SW 498.

53. Exclusion of evidence on cross-examination, as to what plaintiff did in way of directing work on his farm held reversible error, though there was evidence that he directed it to some extent. Foglesong v. Modern Brotherhood of America, 121 Mo. App. 548, 97 SW 240.

54. Where evidence tended to show that members of certain lodge were also members of defendant association, and that if member of said lodge was "unfinancial" to extent of having forfeited membership therein he could not recover on policy issued by defendant, held that evidence that person to whom policy was issued was "financial" in said lodge was admissible in action on policy issued by defendant. Odd Fellows Ben. Ass'n v. Burton [Ark.] 104 SW 163.

55. See such titles as Agency, 9 C. L. 58; Attorneys and Counselors, 9 C. L. 300; Corporations, 9 C. L. 733; Judgments, 8 C. L. 530; Marriage, 8 C. L. 833; Mortgages, 8 C. L. 1022; Negotiable Instruments, 8 C. L. 1124; Non-Negotiable Paper, 8 C. L. 1167; Partnership, 8 C. L. 1261; Releases, 8 C. L. 1714; Sales, 8 C. L. 1751; Trusts, 8 C. L. 2169; Vendors and Purchasers, 8 C. L. 2216; Wills, 8 C. L. 2305.

56. See Deceit, 9 C. L. 935; Cancellation of Instruments, 9 C. L. 454; Reformation of Instruments, 8 C. L. 1708, and other topics relating to specific remedies.

57. See Criminal Law, 9 C. L. 851; Indictment and Prosecution, 8 C. L. 189; False Pretenses and Cheats, 9 C. L. 1353; Conspiracy, 9 C. L. 600; Forgery, 9 C. L. 1418.

58. See Fraudulent Conveyances, 7 C. L. 1841; also Bankruptcy, 9 C. L. 343.

59. See Damages, 9 C. L. 869.

60. See Limitation of Actions, 8 C. L. 521.

61. Mere request to broker by purchaser that deed should not mention a lease on the land held not fraud where no representations were made and vendor read and signed deed, as prepared, voluntarily and without objection. Weinhard v. Summerville [Wash.] 89 P 490. Fact that defendant in suit to set aside a deed made by an Alaska townsite trustee obtained his title in ex parte proceedings was not of itself sufficient to authorize a court of equity to inquire into the truth or falsity of the evidence upon which the trustee acted in confirming defendant's claim, where complainant was not prevented by fraud from appearing and presenting his claim, and it does not appear that the trustee failed to give the required notice of the proceedings. Miller v. Margeric [C. C. A.] 149 F 694.

62. Conveyance by father to son by former marriage held not in fraud of rights of second wife whom he was about to marry. Jenkins v. Rhodes, 106 Va. 564, 56 SE 332. Agreement that note given for engine was not to be put into circulation until purchaser had tried engine, the engine to be returned if not satisfactory, did not show that note was put into circulation fraudulently, when it did not appear that purchaser had tried engine or kept his part of agreement. First Nat. Bk. v. Person, 101 Minn. 30, 111 NW 730.

63. Fraud held not proved in award of contract to furnish court house to highest bidder, it being matter of discretion with board of supervisors who ratified the award as to whether it was best to pay the highest price and thus secure the assurance of good quality, etc. Raymond v. McKenna, 147 Mich. 35, 13 Det. Leg. N. 935, 110 NW 121.

64. Breach of contract is not necessarily fraud. First Nat. Bk. v. Person, 101 Minn. 30, 111 NW 730.

65. Evidence held to show that joint owner who had sold his interest to his co-owner for the former's part of original

Fraud may be accomplished by acts and artifices,[67] conspiracy,[68] representations,[69] or concealment.[70] A fortiori it may be accomplished by the concurrence of acts, representations, and concealment.[71]

A representation to be fraudulent must be false either in fact[72] or in effect,[73] and must relate to past or existing facts[74] as distinguished from mere hearsay,[75]

purchase price which latter had paid was entitled, under agreement under which conveyance was made, to share in profits of sale made by such co-owner. Chambers v. Thompson [Ark.] 100 SW 79.

66. See post, this section.

67. Old and infirm person was induced by fraud and concealment to execute conveyance he did not intend to convey. Tolley v. Poteet [W. Va.] 57 SE 811. Procuring defendant's signature to contract for purchase of goods by representation that it was a simple order for goods, defendant having read the order and found it seemingly all right, but plaintiff's agent having by some artifice or trick substituted the contract for the order. Price v. Huddleston, 167 Ind. 536, 79 NE 496.

68. Conspiracy and fraud in obtaining deed held not proved. Saunders v. Wells [Iowa] 112 NW 205.

69. Where railroad agent miscounted number of cases of goods delivered and shipper affirmed that the count was correct, thus inducing agent to sign bill of lading for more than were delivered. Cohen Bros. v. Missouri, K. & T. R Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 121, 98 SW 437. Representation that there was railroad right of way on land and stipulation as to deduction from purchase price in case vendor could not give good title thereto held not a representation that a railroad would soon be constructed through the land. Kincaid v. Price [Ark.] 100 SW 76. Principal bound by knowledge of agent notwithstanding fraud of agent, as against persons not privy to or having notice of such fraud. Armstrong v. Ashley, 204 U. S. 272, 51 Law. Ed. 482. Instruction that plaintiff must prove fraud of defendant "and" his agent held erroneous as excluding liability for fraud of agent. First Nat. Bk. v. Baldwin [Tex. Civ. App.] 18 Tex. Ct. Rep. 563, 102 SW 786.

Question of fact: Where defrauded vendee testified fully and clearly to misrepresentations by vendor, though his testimony was uncorroborated. Sulkin v. Gilbert [Pa.] 67 A 415. Where there is any evidence tending to show fraudulent representations. Crosby v. Wells [N. J. Err. & App.] 67 A 295.

Evidence held sufficient to show false representation by warehouseman that warehouse in which plaintiff's goods were burned was fireproof. Clifford v. Universal Storage Warehouse & Exp. Co., 52 Misc. 595, 102 NYS 460. Evidence held to show that vendor falsely represented that he had made no prior contract affecting the land. Norris v. Hay, 149 Cal. 695, 87 P 380. Evidence held to sustain finding that false representations had been made. Rutherford v. Irby, 1 Ga. App. 499, 57 SE 927. Receipt for party's share of commissions on sales made by him and other party held secured by fraudulent representations as to amount. Sawyer v. Walker, 204 Mo. 133, 102 SW 544.

Evidence held insufficient to show making of any representation as to value of property sold. MacKellar v. Thompson, 103 NYS 853. Evidence held not to show representation by lessor that public road connected the two tracts covered by lease, but that he only observed that he had used a roadway or trail between such tracts for many years. Ahern v. Hindman, 101 Minn. 34, 111 NW 734. Where value represented to vendor by a third person was a fair one at the time, the fact that such person afterwards purchased from the first vendee in an entirely different transaction and that several years later the property was worth three times the original price paid did not show fraud. Long's Ex'r v. Owen, 30 Ky. L. R. 495, 98 SW 1010.

70. Finding of fraud in ordering goods when insolvent held sustained by evidence. National Bk. of Commerce v. Chatfield, Woods & Co. [Tenn.] 101 SW 765. Evidence discussed as to fraud in procurement of assignment of insurance policy. Mutual Life Ins. Co. of New York v. Lane, 151 F 276.

71. Fraudulent representations necessarily involve fraudulent concealment. Rutherford v. Irby, 1 Ga. App. 499, 57 SE 927. Sale by one partner to another induced by fraudulent representations as to financial conditions of firm and concealment of facts not known to seller held voidable at instance of seller. Goldsmith v. Koopman [C. C. A.] 152 F 173. Representation that party had certain land of certain value which he would exchange for lands of other party, thereby inducing latter to execute escrow which former secured without latter's consent, and then deeded the property to third person and purchasing land from another party and conveying it to the grantor in the escrow without his knowledge. Kempe v. Bennett, 134 Iowa, 247, 111 NW 926. Where bank officers recommended financial responsibility and trustworthiness of gang of conspirators and gamesters and expedited collection of checks obtained by such gang. Hobbs v. Boatright, 195 Mo. 693, 93 SW 934.

72. Boddie v. Ward [Ala.] 44 S 105; Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050. Falsity is **question of fact** for jury. Hawley v. Wicker, 117 App. Div. 638, 102 NYS 711. Finding that vendee did not know certain fact when he declared that he did not held not so contrary to evidence as to justify setting it aside. Burrows v. Fitch [W. Va.] 57 SE 283.

73. False representation may be made by presenting truth in such aspect or way as to create false impression. Tolley v. Poteet [W. Va.] 57 SE 811.

74. Gipe v. Pittsburg, etc., R. Co. [Ind. App.] 82 NE 471.

75. Actionable fraud cannot be predicated upon making and promulgation of corporation prospectus containing nothing

warranties,[76] promises and agreements,[77] or forecasts,[78] or opinions and estimates.[79] This rule, however, is difficult of application, since it involves the determination in each particular case of the question as to what constitutes facts as distinguished from opinions.[80] The rule, moreover, is correct only in its gener-

which can be construed as asserting that its statements were based on or true to the personal knowledge of the persons making them. Duryea v. Zimmerman, 121 App. Div. 560, 106 NYS 237.

Rule stated: Representations expressly stated to be on information from others do not constitute fraud where the party correctly repeats such information and believes it to be true, but it is otherwise if the information is intentionally misrepresented, or if he knows the information is false or the party falsely states that he has information when he in fact has none. Hansen v. Kline [Iowa] 113 NW 504.

76. Mere agreement that engine sold was in good condition held not to authorize inference that engine was falsely so represented to knowledge of seller. First Nat. Bk. v. Person, 101 Minn. 30, 111 NW 730.

77. Violation of an agreement to return a note under certain conditions, and not to use it as collateral outside of a certain locality, does not of itself show fraud in the procurement of the note. Hutchins v. Langley, 27 App. D. C. 234.

78. Representation of promoter that stock would be issued as full paid not ground for rescission of stock and bond subscription. Farwell v. Colonial Trust Co. [C. C. A.] 147 F 480.

79. Schell v. Alston Mfg. Co., 149 F 439. Mere opinion or estimate as to amount of timber on land given and received as an opinion or estimate between parties dealing at arm's length and having equal opportunities of informing themselves. Frey v. Middle Creek Lumber Co., 144 N. C. 759, 57 SE 464.

80. Representation of law book publisher to writer that article could be written in certain time seems to be mere matter of opinion. Chamberlayne v. American Law Book Co., 148 F 316. Statement of insurance agent that company was issuing certain kind of policy and would issue one to applicant held statement of fact and not mere opinion. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 NE 595. Statement that combination was about to be formed for a certain purpose and that the value of the subject-matter of the transaction would thereby be increased held to relate to facts. Standard Interlock Elevator Co. v. Wilson [Pa.] 67 A 463. Statement of promoters to subscriber that all subscribers were ready and willing to sign notes or to pay cash for their subscriptions, thus inducing subscriber to sign notes. Luetzke v. Roberts, 130 Wis. 97, 109 NW 949. Allegations that confidential relations existed between defendant and testatrix, that latter was over eighty years old and dependent upon defendant for advice, and that defendant fraudulently caused testatrix to execute codicil without sufficient attestation, held to allege more than mere expression of opinion by which testatrix was misled, and to be a sufficient allegation of an actionable wrong. Lewis v. Corbin [Mass.] 81 NE 248. Representation by one that he was negotiating for the purchase of a tract of land which, it appeared, he was totally unable to purchase held not per se fraudulent. Saunders v. Wells [Iowa] 112 NW 205.

Legal effect of instruments is not a matter of fact. Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702, 14 Det. Leg. N. 57, 111 NW 343. Representation by railroad agent to widow of deceased employe that she had to sign release both as individual and as administratrix only as matter of form in order to secure indemnity from a mutual relief fund held not to invalidate the release as defense to action by widow as administratrix for husband's death. Gipe v. Pittsburg, etc., R. Co. [Ind. App.] 82 NE 471.

Solvency and financial status: Solvency as a basis of credit may be represented as a fact. Phillips v. Hebden [R. I.] 65 A 266. Where bank officers recommended gang of gamesters and fraudulent conspirators as financially responsible and trustworthy. Hobbs v. Boatright, 195 Mo. 693, 93 SW 934. Proof of statement that a customer's dealings were satisfactory during a specified, limited period, and assent to customer's statement that during certain period he had paid his obligations before maturity, held not to sustain allegation of general representation of financial responsibility. Bartles v. Courtney, 6 Ind. T. 379, 98 SW 133.

Value: Generally, statements of value are mere statements of opinion. Church v. Marsh, 133 Iowa, 51, 110 NW 161; Long v. Kendall, 17 Okl. 70, 87 P 670; Guthrie v. Lyon [Tex. Civ. App.] 17 Tex. Ct. Rep. 321, 98 SW 432. Trading land at excessive valuation held not per se fraud. Saunders v. Wells [Iowa] 112 NW 205. Representation as to market value of land held mere opinion and puffing. Kincaid v. Price [Ark.] 100 SW 76. Executor held not responsible as for a fraud for alleged false statement as to value of beneficiary's share where error was one of judgment in failing to fully appreciate the advancement in the value of realty. In re Cunningham's Estate, 212 Pa. 441, 61 A 993. Held question of fact for jury whether representations to purchaser of stock as to value of corporate assets were as to facts or were mere opinion. Hawley v. Wicker, 117 App. Div. 628, 102 NYS 711. Representations as to **matters affecting value** may constitute fraudulent representations of fact, as when vendee stated that he did not know whether oil had been discovered on the property. Burrows v. Fitch [W. Va.] 57 SE 283. Representations by purchaser that assessments were to be made against land sought to be purchased, that he was making offer to purchase at great risk of loss and principally for seller's benefit, and that he had already purchased another joint tenant's interest for same amount offered seller, held affirmations of fact. Dolan v. Cummings, 116 App. Div. 787, 102 NYS 91.

ality, and the question of fraud may depend upon the attitude of the parties and the intent with which the representation is made rather than upon its character.[81] Intent, moreover, is itself a matter of fact and as such may be the subject of a fraudulent misrepresentation,[82] and since a promise or agreement implies an intent to keep or forfeit it, a present intent not to do so renders the promise or agreement itself fraudulent.[83] A fraudulent intent is essential to actionable fraud,[84] and one charged with fraudulent representations must be shown to have had knowledge of their falsity, either actual[85] or implied.[86] A fraudulent intent or its equivalent is also essential to vitiating fraud,[87] but such intent may be implied or imputed.[88] So, also, reckless or negligent disregard for the truth may be evidence of actionable fraud,[89] though it does not of itself constitute such fraud,[90]

81. Representations as to **title** to land may constitute fraud, when made positively and with the intent that the vendee should rely thereon. Curtley v. Security Sav. Soc. [Wash.] 89 P 180.

Legal opinion by attorney not known by him to be false held not fraudulent representation. Fortune v. English, 226 Ill. 262, 80 NE 781.

Statements as to value held fraud when made with intention that other party shall rely thereon and with knowledge that he will so rely. American Hardwood Lumber Co. v. Dent, 121 Mo. App. 108, 98 SW 814. Where parties are not in equal position to know value and party misrepresents value intending other party to rely thereon. Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050. Where one party assumes to have special knowledge of value and other party relies on his statements. Riggins v. Trickey [Tex. Civ. App.] 19 Tex. Ct. Rep. 496, 102 SW 918. Where statement is made with knowledge of its falsity and of the other parties ignorance and reliance. Smith v. Owsley [Ky.] 102 SW 277; Fisher v. Dippel [Tex. Civ. App.] 18 Tex. Ct. Rep. 546, 102 SW 448.

82. Rogers v. Virginia-Carolina Chem. Co. [C. C. A.] 149 F 1.

83. Scoggin v. Mason [Tex. Civ. App.] 19 Tex. Ct. Rep. 569, 103 SW 831; Rogers v. Virginia-Carolina Chem. Co. [C. C. A.] 149 F 1. Promise to take care of grantor. O'Brion v. Camp [Tex. Civ. App.] 18 Tex. Ct. Rep. 974, 101 SW 557. Complaint alleging that defendant induced plaintiff to assign to him a land contract by fraudulent promises to advance certain funds to plaintiff until the latter could sell the land, and that the advances were not made, held to state a cause of action for breach of trust and defendant would not be allowed to hold the land, even if the representations inducing the assignment should be construed as being mere promises. Norgren v. Jordan [Wash.] 80 P 597. Evidence held insufficient to show agreement by defendant to purchase plaintiff's land at trust deed sale and to allow plaintiff to redeem it. Pankau v. Morrissey, 224 Ill. 177, 79 NE 643.

Intent not to pay for goods constitutes fraud vitiating the sale only when such intent existed at the time of or prior to the receipt of the goods. Ayres v. Farwell [Mass.] 82 NE 35. Insolvency at the time of the receipt of goods does not charge the buyer with the fraudulent intent not to pay for them. Id. Intention not to pay for goods existing at time of purchase constitutes fraud, though no fraudulent representations are made. Atlas Shoe Co. v. Bechard [Me.] 66 A 390. Bona fide intent to pay for goods at some future time will not obviate effect of fraudulent representations inducing the sale. Id.

84. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 NE 595; Bartles v. Courtney, 6 Ind. T. 379, 98 SW 133; Duryea v. Zimmerman, 121 App. Div. 560, 106 NYS 237; Ahern v. Hindman, 101 Minn. 34, 111 NW 734; Curtley v. Security Sav. Soc. [Wash.] 89 P 180.

85. Curtley v. Security Sav. Soc. [Wash.] 89 P 180.

86. As where representations are made with reckless disregard for their truth. Curtley v. Security Sav. Soc. [Wash.] 89 P 180. When defendant positively stated that he knew the indorser of a note to be an owner of real estate in a certain city, when, as a matter of fact, he did not know it, and it was false, this was sufficient to take case to jury on question of knowledge of falsity. Farmer v. Lynch [R. I.] 67 A 449.

87. Fraudulent intent or its equivalent must exist to defeat recovery on instrument alleged to have been procured by fraud. Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050. In action on insurance policy, finding that valuation given by plaintiff in his application was his honest opinion held sustained by the evidence. Helm v. Anchor Fire Ins. Co., 132 Iowa, 177, 109 NW 605.

88. Reckless making of false statements as of own knowledge will constitute vitiating fraud, though no knowledge of such falsity is shown. Goodwin v. Fall [Me.] 66 A 727. Statement of fact which is not true where party was charged with duty of knowing truth is fraudulent in equity, though he honestly believed it to be true. Tolley v. Poteet [W. Va.] 57 SE 811.

89. Shackett v. Bickford [N. H.] 65 A 252.

90. Shackett v. Bickford [N. H.] 65 A 252. False statements made through carelessness and in reckless disregard for their truth do not constitute actionable fraud where they are made in honest belief that they are true. Statement on sale of insurance business as to collection of premiums and balances due from agents, based on books and memoranda prepared previously for vendor's own use, held not actionable. Pittsburgh Life & Trust Co. v. Northern Cent. Life Ins. Co. [C. C. A.] 148 F 674.

but an intent to defraud may be implied from lack of belief in or a conscious indifference to the truth of the statement made.[91] A fraudulent representation, in order to be cognizable by the courts, must be material,[92] calculated to deceive,[93] and must actually deceive.[94] It must, moreover, be such as will justify reliance thereon,[95] which may depend upon the character of the representation [96] with relation to its materiality,[97] and the probability of deception,[98] to whom the representation is made,[99] the relation of the parties,[1] the relative knowledge of the

91. Shackett v. Bickford [N. H.] 65A 252. **Rule stated:** Where one makes a statement of fact, intending it to be relied on, he of necessity affirms his belief in its truth, and if such statement is untrue and he knows it or makes the statement without belief in its truth or with a conscious indifference to its truth, he is guilty of fraud. Shackett v. Bickford [N. H.] 65 A 252.

92. Gipe v. Pittsburg, etc., R. Co. [Ind. App.] 82 NE 471; Farwell v. Colonial Trust Co. [C. C. A.] 147 F 480. A representation is material when it is such that if it had not been made the transaction would not have been entered into by the other party. See Civ. Code, § 1568. Greenawalt v. Rogers [Cal.] 91 P 526.

Held material: Where parent positively refused to send daughter to certain school unless her former classmates attended such school, whereupon agent of school falsely represented that he had secured contracts for attendance of such classmates. Brown v. Search, 131 Wis. 109, 111 NW 210. On exchange of stores by two parties, it being agreed that the party paying the lesser rent was to pay the other party the difference, a representation by one of the parties as to amount of rent he was paying was material. Turner v. Ware [Ga. App.] 58 SE 310. Charge of court, which assumes that because husband acted for his wife in applying for membership for both himself and his wife in mutual benefit society any false representations which he may have made with reference to his own age, etc., affected equally the membership of his wife, held erroneous. Schwartz v. St. Elizabeth Roman and Greek Catholic Union, 9 Ohio C. C. (N. S.) 337. Where vendee stated that he wanted the land for purpose of growing hay, and needed only small amount of timber, representations by vendor as to amount of timber on land held **immaterial.** Kincaid v. Price [Ark.] 100 SW 76. Materiality of representations by seller of stock as to corporate assets held **for jury.** Hawley v. Wicker, 117 App. Div. 638, 102 NYS 711.

93. Turner v. Ware [Ga. App.] 58 SE 310; Farwell v. Colonial Trust Co. [C. C. A.] 147 F 480.

94. Turner v. Ware [Ga. App.] 58 SE 310; Gipe v. Pittsburg, etc., R. Co. [Ind. App.] 82 NE 471; Sulkin v. Gilbert [Pa.] 67 A 415. Fraudulent representations held to have deceived. Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050. Purchaser of corporate stock held not deceived by statements furnished him by the corporation and which he used in inducing others to engage in the enterprise. Van Cleve v. Radford, 149 Mich. 106, 14 Det. Leg. N. 376, 112 NW 754.

95. Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050.

96. See, also, ante, this section, as to the necessity of the representation being of matters of fact, etc.

Subscribers to corporate stock held justified in signing notes for their subscriptions in reliance upon promoter's assertion that requisite number of subscriptions to make subscriptions binding had been secured and that all subscribers were ready to sign notes or to pay cash. Leuetzke v. Roberts, 130 Wis. 97, 109 NW 949.

97. See ante, this section.

Fraudulent representations by one party made as to inducement to proposed contract which was rejected by other party held not to affect new contract proposed by latter and accepted by former. Simpson v. Crane, 149 Mich. 352, 13 Det. Leg. N. 1071, 110 NW 1081.

98. See ante, this section.

That a roadway or trail between two tracts covered by lease was not a public highway but merely a track or trail over lands of strangers held so apparent that lessee must have observed it. Ahern v. Hindman, 101 Minn. 34, 111 NW 734. Statement of purchaser to broker that he had come in response to their correspondence held not necessarily to give broker notice of falsity of third party's representation that he had sent purchaser to broker. Shearer v. Hill, 125 Mo. App. 375, 102 SW 673. Where one falsely representing himself as having sent purchasers to broker requested broker not to let purchasers know that he had anything to do with sale, and purchasers lived at distance. Id. Party purchasing land was not entitled to rely on false statement as to number of fruit trees thereon, when the statement was **corrected** before the trade was consummated. Aldrich v. Scribner, 146 Mich. 609, 13 Det. Leg. N. 893, 109 NW 1121.

99. Any one may rely on representations made pursuant to a fraudulent scheme to defraud the public. Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050. Any one may rely on corporation prospectus promulgated generally for purpose of securing subscriptions. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 SE 494.

1. Rule that one guilty of negligence in relying on the statements of another does not apply where relations of trust and confidence exist, and hence children and heirs of mother held entitled to rely on statements of father, who was mother's administrator, whereby they were induced to advance money to the estate and to acquiesce in final account without examination and to withhold claims against the estate. Johnson v. Savage [Or.] 91 P 1082.

parties and their familiarity with the subject-matter,[2] or opportunity to investigate,[3] and must actually be relied on,[4] thus inducing the party so relying to act,[5]

2. Applicant for life insurance entitled to rely on assurances and representations of agent, though he had other means of information at hand. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580. Representation as to market value of hay held not calculated to mislead vendees of land, one of whom was a farmer. Kincaid v. Price [Ark.] 100 SW 76. One holding himself out as a law writer able to perform the contract into which he is about to enter to write an article upon a certain subject and as conversant with such subject cannot rely on a representation of the other party as to the time it would take to write such article. Chamberlayne v. American Law Book Co., 148 F 316.

3. Dorsey v. Watkins, 151 F 340. One may rely on representations of material facts not open to inspection. Graybill v. Drennen [Ala.] 43 S 568. Receiver who sold valuable judgment for small amount held not to have equal opportunity with purchaser to ascertain real value. Files v. Rankin [C. C. A.] 153 F 537. One who is cheated by reason of his failure to take advantage of an offer and opportunity to investigate cannot ordinarily complain. Brooks v. Boyd, 1 Ga. App. 65, 57 SE 1093; Church v. Marsh, 133 Iowa, 51, 110 NW 161; Long v. Kendall, 17 Okl. 70, 87 P 670. One guilty of fraud cannot escape responsibility by sending his victim to a confederate for an opinion, nor by inducing him to make an investigation which will not disclose to him, though it might to an expert, the falsity of the statement. Barron v. Myers, 146 Mich. 510, 13 Det. Leg. N. 810, 109 NW 862. Mere fact that an investigation is made does not of itself preclude the right of reliance on representations made. Graybill v. Drennen [Ala.] 43 S 568. One may rely on **descriptions of land** situated at a distance without going to inspect it. Hansen v. Kline [Iowa] 113 NW 504. Vendee had right to rely on vendor's representations as to character of soil where ground was covered with snow. Lunscheon v. Wocknitz [S. D.] 111 NW 632. When right and opportunity to inspect land was equally held by and open to both parties, party had no right to rely on statements of other party. Arkadelphia Lumber Co. v. Thornton [Ark.] 104 SW 169. No right to rely on mere opinion as to **value** where there is ample opportunity to investigate the correctness of such opinion. Long v. Kendall, 17 Okl. 70, 87 P 670. Vendee may rely on representations of vendor as to **title** without searching public records. Curtley v. Security Sav. Soc. [Wash.] 89 P 180. Purchaser of land had right to rely on vendor's representation that no contract of sale had been made with anyone else. Norris v. Hay, 149 Cal. 695, 87 P 380. Whether applicant for life insurance was inexcusably negligent in not making use of present means of knowledge instead of relying on representations of agent held **question of fact.** Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580.

Representations as to written instruments: In absence of fiduciary relations between the parties or circumstances placing one of them in an advantageous position, a party is not entitled to sign a contract upon the representations of the other party as to its contents. Farlow v. Chambers [S. D.] 110 NW 94; Toledo Computing Scale Co. v. Garrison, 28 App. D. C. 243. Mere ignorance of contents of writing is no ground for avoidance by one who signed it. Missouri K. & T. R. Co. v. Craig [Tex. Civ. App.] 17 Tex. Ct. Rep. 547, 98 SW 907. Representations as to contents of note held no defense where its terms were plain and clear and it did not appear that maker could not read. Guthrie & W. R. Co. v. Rhodes [Okl.] 91 P 1119. When party signing could read and was not prevented from reading the instrument by representations, he could not complain of trick or fraud. Rounsaville v. Leonard Mfg. Co., 127 Ga. 735, 56 SE 1030. Where one is induced by fraudulent representations to sign an instrument without reading it, he may avoid it on the ground that it does not represent the contract of the parties. Shook v. Puritan Mfg. Co. [Kan.] 89 P 653; St. Louis Jewelry Co. v. Bennett [Kan.] 90 P 246. Mortgage note secured by representation that it is a mortgage held secured by fraud. Wickham v. Evans, 133 Iowa, 552, 110 NW 1046. One signing contract in blank may dispute contract written above his signature as against party writing it. Martin v. Trainer, 125 Ill. App. 474. Negligence of the defrauded party is not available to the party perpetrating the fraud.

Ignorance and illiteracy may excuse one in relying upon representations as to contents of writing. Abercrombie v. Carpenter [Ala.] 43 S 746; American Standard Jewelry Co. v. Witherington [Ark.] 98 SW 695. Rule as to party being bound to know what he is signing does not apply where signers are too ignorant to understand the writing, and advantage is taken of such ignorance. Alexander v. Dickinson [Ark.] 101 SW 739. Release pleaded in defense held secured from plaintiff, who could not read English, by false representation as to contents. Creshkoff v. Schwartz, 53 Misc. 576, 103 NYS 782. Ignorant and unlettered grantor who by misrepresentations as to contents was induced to execute deed including property which she did not intend to convey held to have right to avoid the deed, though she neglected to read it before signing. Leonard v. Roebuck [Ala.] 44 S 390. One about to sign instrument must acquaint himself with contents unless his signature is procured by fraud, though he cannot read, as where party had daughter sign for him but did not ask her to acquaint him with contents. Fulton v. Messenger, 61 W. Va. 477, 56 SE 830.

4. Graybill v. Drennen [Ala.] 43 S 568; Arkadelphia Lumber Co. v. Thornton [Ark.] 104 SW 169; Brooks v. Boyd, 1 Ga. App. 65, 57 SE 1093; Gipe v. Pittsburg, etc., R. Co. [Ind. App.] 82 NE 471; Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050. Fact that **investigation** was

to his injury and damage [6] proximately resulting therefrom.[7] The concurrence

made does not of itself show that the representations of the other party were not relied on. Graybill v. Drennen [Ala.] 43 S 568. Fact that party in acting on misrepresentations did not know his acts closed the contract, and that he would not have acted without investigation if he had known the legal effect of his acts, does not show that he did not rely on the representations. Fisher v. Dippel [Tex. Civ. App.] 18 Tex. Ct. Rep. 546, 102 SW 448. Contracting engineers who, after investigation, contracted to construct water and irrigation pipe line could not defend, on ground of fraudulent representations, suit for breach of contract. Curran v. Smith [C. C. A.] 149 F 945. False representations by means of reports of corporation as bearing on validity of stock purchase where purchaser had no **knowledge of** such **representations** could not have been relied on. Scott v. Brusse, 148 Mich. 529, 14 Det. Leg. N. 264, 112 NW 117. Knowledge of insurance **agent** as to value of property alleged by company to have been overvalued by insured imputed to principal, regardless of whether the former communicated such knowledge to latter. Helm v. Anchor Fire Ins. Co., 132 Iowa, 177, 109 NW 605.

Corporation could not be deceived by representations and concealment by its sole stockholders in making sale to it, rights of subsequent stockholders not being involved. Old Dominion Copper Min. & Smelting Co. v. Lewisohn [C. C. A.] 148 F 1020. Heirs **held to have relied** on statements and advice of their friend, who was also a coexecutor, in regard to conveyance to another executor who was also a creditor, and not upon statements of latter. Moss v. Jack [Cal.] 90 P 552. Vendee held to have relied on vendor's representations as to character and quality of land sold. Luncheon v. Wocknitz [S. D.] 111 NW 632. Evidence held to show reliance on defendant's prompt payment of past accounts rather than on false statements as to ownership of property. Phillips v. Hebden [R. I.] 65 A 266. Purchaser of corporate stock **held not to have relied** on false representation as to value of stock. Scott v. Brusse, 148 Mich. 529, 14 Det. Leg. N. 264, 112 NW 117. Where subscriber to stock refused to give note to corporation's agent but made same payable to a friend to whom he gave authority to indorse it to corporation if he found matters as represented. Youle v. Fosha [Kan.] 90 P 1090. No reliance where worthless check was given in payment of past debt. Goldstein v. Messing, 104 NYS 724.

5. Kincaid v. Price [Ark.] 100 SW 76; Gipe v. Pittsburg, etc., R. Co. [Ind. App.] 82 NE 471; Ahern v. Hindman, 101 Minn. 34, 111 NW 734; McNealy v. Bartlett, 123 Mo. App. 58, 99 SW 767; Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050; Farwell v. Colonial Trust Co. [C. C. A.] 147 F 480. No false representation as inducement to sale of goods can be implied from giving of worthless check two weeks after delivery of goods. Goldstein v. Messing, 104 NYS 724. Where one was induced to act by representations of another is a **question of fact** for the jury. Hawley v. Wicker, 117 App. Div. 638, 102 NYS 711.

Finding that court was not satisfied that plaintiff "relied" on representations of defendant, followed by finding for defendant, held to exclude issues of whether plaintiff acted upon such representations and whether the representations were false. Peabody v. Whitcomb [Mass.] 81 NE 193. Representations charged as fraud **need not constitute sole inducement,** it being sufficient if they materially contribute an inducement. American Hardwood Lumber Co. v. Dent, 121 Mo. App. 108, 98 SW 814. Where false representations of facts constituted controlling inducement, but reliance was also placed on promises as to future transactions. Damers v. Sternberger, 102 NYS 739.

6. Graybill v. Drennen [Ala.] 43 S 568; Bowen v. Waxelbaum [Ga. App.] 58 SE 784.

Damage where one was induced to exchange stock in one corporation for stock in another corporation by false representation that the latter corporation controlled the former. Jahn v. Reynolds, 115 App. Div. 647, 101 NYS 293. Where one holding option on property at $4,000 procured, through collusion with the vendor, a sale to himself and another for $6,000, each vendee paying $3,000, but $2,000 being returned to the holder of the original option, the other vendee was damaged, though property was worth $6,000. Douglas v. Richards, 116 App. Div. 27, 101 NYS 299.

No damage from fraud inducing taking of mortgage for antecedent debt, no rights or property being parted with in reliance on such fraud. Badger v. Pond, 105 NYS 546. Where worthless check was given in payment for goods long theretofore delivered. Goldstein v. Messing, 104 NYS 724. No damage shown from representation of publisher's agent that amount agreed to be paid plaintiff to write article on legal topic was equal to amount paid to publisher's most favored writer, it not appearing that publisher would in any event have paid plaintiff more than it agreed to pay him. Chamberlayne v. American Law Book Co., 148 F 316. No damage to subscriber to stock where promoter made false representation as to contract being held by corporation where such contract was thereafter secured and there was no loss by delay. Farwell v. Colonial Trust Co. [C. C. A.] 147 F 480. Fraudulent foreclosure decree will not be vacated for fraud where mortgagor had no defense. Bell v. Thompson, 147 Cal. 689, 82 P 327. Damage to publisher's agent from representations by publisher as to extent of his business held not proved. Tregner v. Hazen, 116 App. Div. 829, 102 NYS 139. Did not appear that agent for defrauded party was damaged so as to give him right to complain. Farmer v. Lynch [R. I.] 67 A 449.

7. Loss of house and lot which were exchanged for a farm held not to result from fraudulent representation as to interest on mortgage on farm whereby person receiving the farm in the exchange was led to make no provision for pay-

of all the above mentioned elements and conditions constitutes fraud by means of fraudulent representations, and such fraud is cognizable by the courts.[8] Benefit to the guilty party is not essential to constitute a fraudulent representation or to authorize the courts to take cognizance thereof.[9]

Under ordinary circumstances a party to a transaction owes no duty of communication to the other party, and his mere silence will not constitute fraud,[10] but concealment or silence amounts to fraud where there is a duty to speak,[11] or where one of the parties makes representations or suggestions which put the other party off his guard,[12] and where one does speak it is his duty to speak the truth [13] and the whole truth.[14] As in the case of representations, concealment must relate to material facts in order to be cognizable by the courts as fraud.[15]

ment of such interest and farm was lost. Russell v. Stoops [Md.] 66 A 698. Though fraud does not cause substantial **damage apart from subsequent events** which reasonably may be expected to happen, if such events do happen the party guilty of the fraud will be chargeable with the consequences thereof, as where testator is induced to execute codicil in an invalid manner, and does not subsequently change his mind as to the legacy, and leaves estate sufficient to pay same, the legatee is damaged to extent of legacy lost. Lewis v. Corbin [Mass.] 81 NE 248. Allegations held insufficient to show that testator would not have changed his mind as to legacy. Id.

8. Trollinger v. Amirillo Sav. & Loan Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 684, 103 SW 199. False representation by owner of joint interest in property as to price offered by third party for property, whereby co-owner was induced to sell his interest to his co-owner at certain price which was less than former's share of price actually offered and paid by purchaser. Christy v. Campbell, 36 Colo. 261, 87 P 548. Representations as to solvency of building and loan company inducing subscription to stock held fraudulent to subscriber's damage, though he had asked for no loan. Trollinger v. Amarillo Sav. & Loan Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 684, 103 SW 199. Representations by stockholders that company was insolvent, whereby another stockholder was induced to join in petition for dissolution in order that the stockholders making the representation might succeed to the business of the corporation, which they did by forming new corporation, etc., thus rendering stock in old corporation valueless. Vogt v. Vogt, 104 NYS 164. Question of fraud in making such representations held not adjudicated by decree of dissolution on ground of insolvency. Id.

9. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 SE 494.

10. Ferguson-McKinney Dry Goods Co. v. Grear [Kan.] 90 P 770. Concealment by purchaser of value of judgment purchased from bank receiver. Files v. Rankin [C. C. A.] 153 F 537. Mere silence by one liable to a cause of action is not fraudulent concealment, under Rev. St. 1874, c. 83, § 22, relating to running of limitations. Fortune v. English, 226 Ill. 262, 80 NE 781. Concealment of a mistake of fact in the execution of a contract does not, in the absence of fiduciary relations between the parties, vitiate the contract. Morgan v. Owens, 228 Ill. 598, 81 NE 1135.

11. Land agent who purchased land from principal communicated fact of tax sale but concealed fact, which he knew, that sale was void. Cantwell v. Nunn [Wash.] 88 P 1023. Ordering goods without communicating change of financial condition, since making of statement which expressly purported to continue in effect until advice to contrary. Atlas Shoe Co. v. Bechard [Me.] 66 A 390. Financial statement furnished as basis of credit and expressly purporting to extend to future orders until advice to contrary rendered fraudulent by subsequent purchase of goods without communication as to change of condition. Id.

Partners in dealing with each other owe the duty of full disclosure, and a concealment inducing action upon the part of another partner is fraud, as where partner concealed facts bearing on condition of partnership affairs, thereby inducing assignment of interest of another partner. Goldsmith v. Koopman [C. C. A.] 152 F 173. The relation between attorney and client does not require the attorney to disclose to his client that the latter has a cause of action against him for misrepresenting that land was not encumbered and that mortgage thereon could not be enforced, it not appearing that attorney knew his representations to be false. Fortune v. English, 226 Ill. 262, 80 NE 781.

12. Though the suggestions amount to mere opinion. Files v. Rankin [C. C. A.] 153 F 537. Sale of judgment in favor of bank by receiver thereof induced by fraudulent concealment of securities held by bank to secure such judgment, and of which receiver was excusably ignorant, held voidable by receiver. Id. Where railroad company's agent neither contradicted nor explained statement of husband to wife that a release already executed by him barred a recovery by her. Rockwell v. Capital Trac. Co., 25 App. D. C. 98.

13. Where vendor asked vendee if he knew of certain matter affecting value of the property which vendor did not know. Burrows v. Fitch [W. Va.] 57 SE 283.

14. Failure of insurance agent, who knew that applicant had not been vaccinated, to explain exception from liability in case of death by smallpox. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 NE 595.

15. Concealment by debtor of ownership

§ 2. *Inferences from circumstances and condition of parties or from intrinsic nature of transaction.*[See 7 C. L. 1818]—Fraud may be inferred from the facts proved.[16] Such inference is generally designated as a prima facie presumption of fraud, usually by way of undue influence,[17] and may be inferred from the inherent nature of the transaction [18] in connection with the opportunity for deception and unjust advantage afforded by the advantageous position of the parties benefited by the transaction,[19] as where the other party is old and feeble,[20] or unable to guard

of property worth $400 held not material to settlement secured by representations that he owned no property whatever, where debt settled was $3,500, amount paid by debtor was $100, and his total debts were $1,500, the representations of the debtor being construed to mean and to have been understood as meaning that $100 was the very best he could do in making the settlement. Greenawalt v. Rogers [Cal.] 91 P 526.

16. Rogers v. Rogers [Del.] 66 A 374. From willfully false statements in regard to material facts. Goodwin v. Fall [Me.] 66 A 727.

17. **Fraud and undue influence distinguished:** Fraud is never presumed, but undue influence may be presumed from mere existence of confidential relations. Hutchinson v. Bibb, 142 Ala. 586, 38 S 754.

NOTE. Gifts inter vivos and testamentary gifts distinguished: "In respect to the question of undue influence arising from confidential relations as affecting the validity of deeds and wills, the courts have made a distinction between transactions inter vivos and transactions of a testamentary character. In transactions inter vivos, where confidential relations exist between the parties, the law raises up the presumption of undue influence, and puts upon the donee, when the dominant party in the transaction, the burden of repelling such presumption by competent and satisfactory evidence; and this is usually done by showing that the grantor had the benefit of competent and independent advice of some disinterested third party. In transactions testamentary in character, the mere existence of confidential relations between the testator and the beneficiary under the will are not, in and of themselves alone, sufficient to raise the presumption of undue influence in the making of the will that would avoid the will in the absence of rebutting evidence. This subject was gone over with at length in Bancroft v. Otis, 91 Ala. 279, 8 S 286, 24 Am. St. Rep. 904, where many cases bearing on the question are cited and reviewed. There must be something more to avoid the will, such as fraud or coercion. As was said in Bancroft v. Otis, 91 Ala. 279, 8 S 286, 24 Am. St. Rep. 904. 'The undue influence which will avoid a will must amount to fraud or coercion, ideas which involve actual intent to control the testator against his will. The law never presumes fraud or the evil intent and unlawful acts essential to the coercion here contemplated. There must be some proof of these things. They cannot be considered to have been done merely because the proponent had the power to coerce. Undue influence with respect to gifts and conveyances inter vivos is a very different matter. It may exist without either coercion or fraud. It may result entirely from the confidential relation, without activity in the direction of either coercion or fraud, on the part of the beneficiary occupying the position of dominant influence. It is upon him not only to abstain from deceit and duress, but to affirmatively guard the interests of the weaker party, so that their dealing may be upon a plane of equality and at arm's length. To presume undue influence in such a case, therefore, is not to presume fraud or coercion, or any act which is malum in se, but simply the continuance of the influence which naturally inheres in and attaches to the relation itself.'" Hutcheson v. Bibb, 142 Ala. 586, 38 S 754.

18. **Sale of expectant interest** by an heir is presumed to be fraudulent. McAdams v. Bailey [Ind. App.] 80 NE 171.

19. In case of a conveyance by person, susceptible to undue influence, of his entire property, without consideration, to one in a position of trust and confidence, under suspicious circumstances which suggest wrong, accompanied by proof of opportunity and disposition to exert undue influence, a presumption of fraud arises. Quinn v. Quinn, 130 Wis. 548, 110 NW 488.

Inadequacy or lack of consideration and incapacity of party to whom it moved. Allen's Adm'rs v. Allen's Adm'rs, 79 Vt. 173, 64 A 1110. Conveyance to son without consideration. Quinn v. Quinn, 130 Wis. 548, 110 NW 488. Presumption of fraud from drunkenness of purchaser and exhorbitance of price. Fagon v. Wiley [Or.] 90 P 910. Gross inadequacy of consideration and mental weakness of recipient thereof. Studebaker v. Faylor [Ind. App.] 80 NE 861. Inadequacy of consideration and ignorance of recipient. Leonard v. Roebuck [Ala.] 44 S 390. Confidential relation between husband and wife, age of latter, and lack of consideration. Ring v. Ring, 108 NYS 498. Deed to mortgaged property secured from very aged and feeble mortgagor by holder of mortgage note for inadequate consideration held prima facie fraudulent. Leech v. Hirshman [Miss.] 44 S 33. Finding that conveyance without consideration by aged and mentally feeble man to his tenant with whom he lived was the result of undue influence held sustained by the evidence. Hopkins v. Ormsby, 149 Mich. 598, 14 Det. Leg. N. 574, 113 NW 281. Contract whereby old and feeble person conveyed property in consideration of care and support held procured by fraud. Studebaker v. Faylor [Ind. App.] 80 NE 861.

Note: "What constitutes fraud in a given case is almost impossible of definition. It

his own interests by reason of mental [21] or physical incapacity,[22] or by reason of his ignorance,[23] or where there exists between the parties relations of trust and confidence,[24] such as husband and wife,[25] parent and child,[26] brothers and

is not a thing susceptible of ocular observation or physical demonstration. In averments necessary to show fraud in transactions between parties equally armed and equipped for the contest, much more is required than in transactions between parties grossly disproportioned, for any cause in their ability to protect themselves or their property. Under the latter circumstances, it becomes the duty of the strong to guard and protect the weak, not to circumvent or defraud him. Absolute fairness of contract and honesty of conduct is required of the stronger party; and averments that show that this rule of action, under such circumstances, was not followed, is sufficient to state a cause of action and invoke the aid of the courts. And this may be shown by intrinsic evidence or unfairness in the transaction itself. Ashmead v. Reynolds, 134 Ind. 139, 33 NE 763, 39 Am. St. Rep. 238; McCormick v. Milan, 5 Blackf. [Ind.] 509; Marshall v. Billingsly, 7 Ind. 250; Harding v. Wheaton, 2 Mason 378, Fed. Cas. No. 6,051; McLean v. Equitable, etc., Co., 100 Ind. 127, 50 Am. Rep. 779; Scovill v. Barney, 4 Or. 288; Allore v. Jewell, 94 U. S. 506, 24 Law. Ed. 260; Ikerd v. Beavers, 106 Ind. 483, 7 NE 326; Yount v. Yount, 144 Ind. 133, 43 NE 136. In the case last cited, the court say, on page 139 of 144 Ind., on page 138 of 43 NE: 'It was not necessary to allege in the complaint that appellee was at the time of unsound mind, or in such a state of mental imbecility as to render her entirely incapable of making a deed. It is sufficient to allege facts which show that from her sickness and infirmities she was at the time in a condition of mental weakness, and that there was either gross inadequacy of consideration for the conveyance, or that by improper practices, undue influence, misapprehension, or concealment, or taking advantage of her ignorance, she was induced to execute a deed which in the free exercise of her deliberate judgment she would not have done. Undue influence generally occurs when one of the parties is weak in intellect, or is so situated or related to the other party as to be under his influence. What the relation may be is not material, if confidence is reposed and influence obtained. When one of the parties is old and feeble, illiterate, and weak-minded from sickness, or other cause, very slight circumstances will cast the burden on the other party.'" Studebaker v. Faylor [Ind. App.] 80 NE 861.

20. Studebaker v. Faylor [Ind. App.] 80 NE 861; Hopkins v. Ormsby, 149 Mich. 598, 14 Det. Leg. N. 574, 113 NW 281; Leech v. Hirshman [Miss.] 44 S 33; Tolley v. Poteet [W. Va.] 57 SE 811.

21. Sbarbero v. Miller [N. J. Eq.] 65 A 472. Incapacity by reason of **drunkenness.** Fagan v. Wiley [Or.] 90 P 910. Where mental capacity of party signing release pleaded as defense was only issue, it was error to refuse an **instruction** that verdict should be for defendant unless jury believed plaintiff was incapable. Missouri, etc., R. Co. v. Craig [Tex. Civ. App.] 17 Tex. Ct. Rep. 547, 98 SW 907.

Evidence held to show capacity of grantor to make deed. Bishop v. Hilliard, 227 Ill. 382, 81 NE 403; Reese v. Shutte, 133 Iowa, 681, 108 NW 525. Grantor held to have been mentally capable. McIntyre v. Bullock, 30 Ky. L. R. 261, 97 SW 1117. Transaction **must be result of incapacity.** Reese v. Shutte, 133 Iowa, 681, 108 NW 525.

22. Assignment by blind residuary legatee of her legacy held procured by fraud of niece by marriage, the legatee being led to believe that she was signing merely an instrument relating to the adoption of the assignee by the niece. United States Trust Co. v. Baker, 51 Misc. 657, 102 NYS 194.

23. Where contract was signed by ignorant negroes upon representation that it had been prepared by their attorneys and there was a material interlineation which was not read to them, or if read was not explained. Alexander v. Dickinson [Ark.] 101 SW 739. Deed secured from ignorant and aged negroes who could not read or write under pretense that it was a mortgage held a mortgage subject to redemption. Abercrombie v. Carpenter [Ala.] 43 S 746. Deed including property which ignorant woman did not intend to convey, upon inadequate consideration, other party being experienced real estate man. Leonard v. Roebuck [Ala.] 44 S 390. Finding that release of loss under fire policy was obtained from illiterate policy holder by fraud held sustained by evidence. Capital Fire Ins. Co. v. Montgomery [Ark.] 99 SW 687. Contract between **foreigner** who had resided here a long time and understood English and some of his fellow countrymen who reposed great confidence in him and had very limited knowledge of English. Ballouz v. Higgins, 61 W. Va. 68, 56 SE 184. Presumption of fraud by foreigner who had resided here for long time and was well acquainted with English in securing contract from fellow countrymen who reposed great confidence in him and who knew little English held not rebutted. Id.

24. White v. Penuel [Del.] 66 A 362; Hunter v. McCammon, 104 NYS 402; Fjone v. Fjone [N. D.] 112 NW 70. Where distributee of one estate who was administratrix of another estate assented to amicable action by administratrix of former estate on claim against latter estate and gave testimony favorable to plaintiff. White v. Penuel [Del.] 66 A 362. Conveyance by mentally diseased woman held secured by undue influence of friends, relations, and spiritual adviser. Birdsall v. Leavitt [Utah] 89 P. 397. Confidential relations **not proved.** Knight v. Rawlings [Mo.] 104 SW 38.

25. Conveyance, without consideration, by old woman to her much younger husband, held induced by fraud and undue influence. Ring v. Ring, 105 NYS 498. Evidence held to show that deed from husband to wife was obtained by undue in-

sisters,[27] persons between whom family relations exist,[28] personal representatives and beneficiaries of estate,[29] guardian and ward,[30] attorney and client,[31] partners or business associates,[31a] principal and agent.[32] Fraud, however, will not be in-

fluence. Yordi v. Yordi [Cal. App.] 91 P 348; Allen's Adm'rs v. Allen's Adm'rs, 79 Vt. 173, 64 A 1110. Fraud presumed where shrewd business man prepared, under advice of lawyer, **antenuptial contract** whereby his intended wife released, without consideration, her rights as survivor, and induced her to execute it without consulting friends or obtaining advice. Maze's Ex'rs v. Maze, 30 Ky. L. R. 679, 99 SW 336.

26. Transactions between child and aged and infirm parent who has reposed confidence and trust in the child will be closely scanned by a court of equity, and is prima facie presumed fraudulent. Reese v. Shutte, 133 Iowa, 681, 108 NW 525. Where parent was old and had become dependent upon child to whom gift was made, equity would presume that parent did not appreciate the consequences of his act. Post v. Hagan [N. J. Err. & App.] 65 A 1026. Conduct of father who was his wife's administrator in securing settlement held fraud upon children. Johnson v. Savage [Or.] 91 P 108. Conveyance to son without consideration. Quinn v. Quinn, 130 Wis. 548, 110 NW 488. Deed from **mother to son** held secured by fraud. Smith v. Lindner [S. C.] 58 SE 610. Fraud presumed where aged mother ignorant of English language conveyed property to son for only nominal consideration. Arellanes v. Arellanes [Cal.] 90 P 1059. Undue influence exercised by son on mother in securing conveyance of all her property. Fjone v. Fjone [N. D.] 112 NW 70. Conveyance by **mother to daughter** held induced by fraud and undue influence. Hunter v. McCammon, 104 NYS 402. Evidence held to sustain finding that deed by **mother to children** was secured by undue influence. Ferguson v. Heffner [Ky.] 103 SW 270. Discharge executed by aged **father to son** of purchase price of property conveyed to son and of mortgage securing such price, thus virtually disinheriting the aged mother, held secured by fraud and undue influence. Smith v. Gardner, 147 Mich. 670, 14 Det. Leg. N. 23, 111 NW 347. Father who was old and feeble conveyed his land to son. Couch v. Couch [Ala.] 42 S 624. Conveyance by old and feeble father to trusted son. Id. Finding that conveyance from aged and easily influenced father to two sons was secured by undue influence held sustained by the evidence. Groesbeck v. Groesbeck [Or.] 88 P 870. Bona fides of conveyance without consideration by aged father to trusted son held not proved. Quinn v. Quinn, 130 Wis. 548, 110 NW 488. Deed vacated where procured by son from father who was sixty-six years old, and who thought he was executing release of curtesy in deceased wife's property. Morgan v. Owens, 228 Ill. 598, 81 NE 1135. Where son holding power of attorney from father and managing his affairs procured property from him. Griesel v. Jones, 123 Mo. App. 45, 99 SW 769. Where administrator prior to intestate's death was the latter's **son-in-law** and confidential agent, the father-in-law being old and feeble, a transfer of bonds by father to the son-in-law for inadequate consideration held presumptively fraudulent. State v. Johnson, 144 N. C. 257, 274, 56 SE 922. Conveyance by aged woman to **grandson** occupying confidential position held induced by undue influence. Tipton v. Tipton [Tenn.] 104 SW 237.

Witnesses stating mental feebleness of father who executed note to son must state opportunity for observations as to condition of father. Hoffman's Estate, 32 Pa. Super. Ct. 646.

Independent advice to parent must be shown by child to rebut presumption of fraud in connection with gift. Post v. Hagan [N. J. Err. & App.] 65 A 1026. "Proper, independent advice," in this connection means that donor had preliminary benefit of conferring fully and privately with one competent to advise and disinterested in the donee. Id. Distinguishing Haydock v. Haydock's Ex'rs, 34 N. J. Eq. 570, 38 Am. Rep. 385, and Slack v. Rees, 66 N. J. Eq. 447, 59 A 466, 67 L. R. A. 393, and applying the last case.

27. Conveyance by sister to sister without consideration held under evidence prima facie fraudulent. Balthrop v. Todd [N. C.] 58 SE 996. Where brother who was familiar with value of property owned by him and his sister and who had received offer of certain amount therefor purchased his sister's interest for less than such value and amount without disclosing the same to her, she being ignorant thereof. Dolan v. Cummings, 116 App. Div. 787, 102 NYS 91. Finding that defendant had exercised undue influence over his brother in securing conveyance from him held sustained by the evidence. Champeau v. Champeau [Wis.] 112 NW 36.

28. Deed from aged man to person with whom he was living and upon whom he was more or less dependent for assistance, etc., held procured by undue influence. Hurley v. Kennally [Mo.] 103 SW 937.

29. Act of coexecutor in securing transfer of property of estate to third party and then to corporation for his own benefit held fraud on other executor in his trust capacity. Smith v. David Stevenson Brew. Co., 117 App. Div. 690, 102 NYS 672.

30. Where guardian is also parent, settlement short time after ward reached majority is presumptively fraudulent. Evidence held insufficient to rebut presumption. Faum v. Hartman, 226 Ill. 160, 80 NE 711.

31. Settlement of claim brought about by attorney who after employment by the party liable was employed by the other party vacated. Whitcomb v. Collier, 133 Iowa, 303, 110 NW 836.

31a. Finding that conveyance obtained by one from his business associate who was helpless in business matters, at the time of which helplessness it appeared that the former was disposed to take advantage, was not secured by undue influence, held not sustained by the evidence. Allen v. Bryant [Cal. App.] 88 P 294. Where agent

ferred from merely suspicious circumstances,[33] or from the fact that one of the parties receives the greater benefit,[34] or is better fitted to guard his own interests,[35] or from the relationship of the parties,[36] and the presumption, when it does arise, is a presumption of fact and not of law,[37] and transactions, therefore, between parties occupying relations of trust and confidence will be upheld when not shown to be fraudulent,[38] or, a fortiori, where good faith is affirmatively proved.[39] The

of vender secretly acted as joint purchaser, thus obtaining the confidence of the other purchasers which he abused, held fraud. Houts v. Scharbauer [Tex. Civ. App.] 19 Tex. Ct. Rep. 556, 103 SW 679. Partner who had withdrawn money from firm was induced by other party to surrender property on representation that assets would not pay debts and by threats of prosecution. Greenwell v. Negley [Ky.] 101 SW 961.

32. Where trusted agent was beneficiary of transaction with principal. Taylor v. Vail [Vt.] 66 A 820. Division of commissions by agent with purchaser held not alone sufficient to show fraud on principal. MacKellar v. Thompson, 103 NYS 853. Conveyance by principal to land agent held void because of representations of agent that land had been sold for taxes and that principal had been divested of all interest therein, though agent knew that sale was void. Cantwell v. Nunn [Wash.] 88 P 1023.

33. Burrows v. Fitch [W. Va.] 57 SE 283.

34. **Inadequacy of consideration** not alone sufficient to stamp a transaction as fraudulent. Allen's Adm'rs v. Allen's Adm'rs, 79 Vt. 173, 64 A 1110. Absolute presumption of adequate consideration indulged where vendor had been dead eight years and vendee was also dead, as against heirs of vendor. Gougenheim's Heirs v. Ermann, 118 La. 577, 43 S 170.

35. Ignorance or incapacity of one of the parties to a contract is insufficient to sustain a finding of fraud where it does not appear that the other party knew of such ignorance or incapacity. Where plaintiff signed release pleaded in defense without knowing what it was. Probate Court v. Enright, 79 Vt. 416, 65 A 530. Mere fact that maker of note cannot write and signs by his mark raises no presumption of fraud in procurement of signature, the presumption being that he knows the contents of the note, especially where he executes and acknowledges a deed of trust to secure the note. Dawson v. Wombles, 123 Mo. App. 340, 100 SW 547. Fraud will not be inferred from the mere ignorance of a party to a written instrument of its contents in the absence of such fraud causing such ignorance. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 17 Tex. Ct. Rep. 672, 99 SW 141. No presumption of fraud from age alone. Goughenheim's Heirs v. Ermann, 118 La. 577, 43 S 170. Mere fact of drunkenness of one of the parties raises no presumption of fraud against the other party. Fagan v. Wiley [Or.] 90 P 910.

36. Hutcheson v. Bibb, 142 Ala. 586, 38 S 754.

Parent and child: Father executed note to son. Hoffman's Estate, 32 Pa. Super. Ct. 646. No presumption of fraud in assignment to child in absence of proof of relations of confidence and dependence incident to incapacity of parent. Cooper v. Moore, 104 NYS 1049. Gift by father to son not presumed fraudulent in absence of incapacity or dependence on the part of the former. McCord v. McCord [Iowa] 113 NW 552. Note from father to son not presumptively fraudulent, fraud or undue influence being dependent upon the influence exerted and the mental condition of the father. Rogers v. Rogers [Del.] 66 A 374. Payments of money by a parent to a child presumed to constitute gift. Jenning v. Rohde, 99 Minn. 335, 109 NW 597. Instructions as to presumptions and burden of proof held correct as applied to circumstances. Id. Gift from parent to child not presumptively fraudulent. Vaughn v. Vaughn, 217 Pa. 496, 66 A 745. Facts on which instruction was based held not to raise presumption of undue influence in execution of deed by father to son. Bain v. Bain [Ala.] 43 S 562. Fraud not presumed from grant from mother to daughter with whom and her husband the mother was living. Bishop v. Hilliard, 227 Ill. 382, 81 NE 403. Undue influence on part of son in obtaining personal property from father held, under the evidence, a question **for the jury.** Griesel v. Jones, 123 Mo. App. 45, 99 SW 769.

Husband and wife: No presumption of fraud from mere fact of conveyance by wife to husband without consideration. Yordi v. Yordi [Cal. App.] 91 P 348.

Personal representative and legatee or heir: Dealings with legatee not per se fraudulent. Stapleton v. Haight [Iowa] 113 NW 351. Did not arise where administrator occupying position of trust and confidence with respect to heir secured from latter a deed of trust for the benefit of creditors of the estate. Boddie v. Ward [Ala.] 44 S 105.

37. The presumption of undue influence in respect to gifts by a man to his mistress is one of fact and not of law. Platt v. Elias, 186 N. Y. 374, 79 NE 1.

38. Contention that conveyance was not read to grantor held not sustained by evidence (Fontenette v. Kling, 118 La. 152, 42 S 756), or presumption of fraud from mere lack of **consideration** for conveyance by wife to husband (Yordi v. Yordi [Cal. App.] 91 P 348). Mere absence of consideration for an instrument under seal given by a father to his son is immaterial as between the payee and the obligor or his heirs and legatees. Hoffman's Estate, 32 Pa. Super. Ct. 646. Consideration held not so inadequate as to justify inference of fraud. McIntyre v. Bullock, 30 Ky. L. R. 261, 97 SW 1117. Contention that consideration for conveyance was grossly inadequate held not sustained. Fontenette v. Kling, 118 La. 152, 42 S 756. Evidence held not to show **mental incapacity** of defendant's assignor. Sbarbero v. Miller [N. J. Eq.] 65 A 472. Evidence

rule as to presumptions from dealings between persons occupying positions of trust and confidence does not apply to transactions whereby the relationship is established.[40]

The essence of undue influence is the substitution of minds or volitions,[41] and it may be exercised without fraud.[42]

§ 3. *Remedies.*[See 7 C. L. 1820]—Fraud vitiates a transaction as to the party chargeable with the fraud,[43] and as to their privies[44] and persons having notice

held not to show that value of leasehold secured from alleged lunatic was of greater value than the amount paid therefor. Id. Where defendant in ejectment failed to establish plaintiff's knowledge of his grantor's incapacity, the judgment did not necessarily adjudicate such capacity. Id. Evidence held not to show that quitclaim deed from **legatee to executor** was obtained by fraud. Stapleton v. Haight [Iowa] 113 NW 351. Legatee who quitclaimed to executor could not plead ignorance of conditions and limitations of bequest or of things incident to due course of administration. Id. Fraud not shown by fact that in suit against infant the **guardian** ad litem was appointed at plaintiff's request. Harris v. Bigley [Iowa] 111 NW 432. Mere failure of guardian to produce evidence known and available in suit against ward held not alone sufficient to authorize vacation of decree for fraud. Id. Fraud not shown by mere fact that guardian ad litem appointed by plaintiff's request failed to make active defense where case was fairly tried by court and the facts themselves developed the defense. Id. Fraud in proceedings by guardian to sell ward's property held not established. Sansom v. Wolford, 60 W. Va. 380, 55 SE 1020. Fraud in obtaining release from **ignorant person** held not proved. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 17 Tex. Ct. Rep. 672, 99 SW 141. Deed from old and ignorant man. McCaskill v. Scotch Lumber Co. [Ala.] 44 S 405. Held not to sustain finding of fraud in securing contract from illiterate parties who could not read. Sellers, Bullard & Co. v. Grace [Ala.] 43 S 716. Evidence held not to show incompetency of grantor who executed **deed to child.** Boyle v. Robinson, 129 Wis. 567, 109 NW 623. Evidence held not to show undue influence inducing deed from parent to child. Id. Evidence held not to show that note executed by **father to son** was fraudulent. Hoppman's Estate, 32 Pa. Super. Ct. 646. Mere fact that father was aged and infirm when he executed note to son insufficient to show fraud, especially where there is evidence of good faith. Id. Fraud cannot be predicated upon evidence of feebleness of mind of father who executed note to son where period covered by evidence does not extend to time of execution of note. Id. Conveyance by father to son held not proved to have been procured by undue influence. Jenkins v. Rhodes, 106 Va. 564, 56 SE 332. Evidence held insufficient to sustain finding that deed from **mother to son** was procured or induced by fraud. Thompson v. Lanfair, 127 Ga. 557, 56 SE 770. Evidence held not to show any fraud or undue influence in procurement of deed from mother to son. McClellan v. O'Connor [Wash.] 91 P 562. Securities held by **attorney** and upon which he claimed a lien held not shown to have been acquired by fraud. Heyward v. Maynard, 103 NYS 1028.

39. Evidence held to show that vendor willingly sold his property after full explanation as to nature and effect of each act. Fontenette v. Kling, 118 La. 152, 42 S 756. Finding of absence of fraud or undue influence as to deed from **mother to son** held sustained. Akers v. Akers [Ky.] 101 SW 353. Finding that conveyance by aged mother ignorant of English language to son for nominal consideration was a bona fide gift held sustained by evidence. Arellanes v. Arellanes [Cal.] 90 P 1059. Finding that there was no fraud in sale to **drunken man** held sustained by the evidence, though it appeared that the price was exorbitant, the property, however, being worth more to purchaser than any one else by reason of its location with relation to other property owned by him. Fagan v. Wiley [Or.] 90 P 910. Finding of bona fides in transactions leading to **conveyance by heirs** to executor who was also a creditor held sustained by the evidence. Moss v. Jack [Cal.] 90 P 552.

Attorney held not to have secured conveyance of and authority to sell client's land by fraud, the client's claim that she did not know she executed such conveyance or authority being contradicted by the evidence. Burchell v. Collier, 148 Mich. 248, 14 Det. Leg. N. 65, 111 NW 748. Attorney for one who was about to institute proceedings against his wife for divorce and for settlement of property rights held not guilty of fraud or undue influence in uniting with wife in conveyance under power of attorney of client's property to children of latter's sister subject to life estate in him, he being found to be mentally capable but of spendthrift habits, and the conveyance being in a measure for his benefit. Jones v. Hughes [Iowa] 110 NW 900.

Sale of expectant interest will be sustained if made for a fair price and the ancestor consents thereto. McAdams v. Bailey [Ind. App.] 80 NE 171.

40. Attorney and client. Title Guarantee & Trust Co. v. Stemberg, 103 NYS 857; Birdsall v. Leavitt [Utah] 89 P 397.

41. Rogers v. Rogers [Del.] 66 A 374. Mere advice, argument, or persuasion does not constitute undue influence, though it has its desired effect. Bishop v. Hilliard, 227 Ill. 382, 81 NE 403. Question is not whether the subject of the influence knew what he was doing, but how his volition was produced. Couch v. Couch [Ala.] 42 S 624.

42. Birdsall v. Leavitt [Utah] 89 P 397. Fraud and undue influence compared and distinguished. Hutcheson v. Bibb, 142 Ala. 517, 38 S 754.

43. Stock subscription notes the execu-

of the fraud,[45] and, subject to the rights of innocent third parties[46] and to the doctrine of estoppel,[47] renders the transaction voidable at the election of the defrauded party;[48] but such election must be exercised promptly[49] by repudiating

tion of which was induced by representation that certain number of shares required to render subscriptions binding had been secured. Luetzke v. Roberts, 130 Wis. 97, 109 NW 949. Deed held void on account of fraud and undue influence in its procurement. Studebaker v. Faylor [Ind. App.] 80 NE 861. Settlement procured by fraud held not binding. Shearer v. Hill, 125 Mo. App. 375, 102 SW 673. For other instances see cases cited ante, §§ 1, 2.

44. One may become a privy to the fraud of another by ratification and acceptance of benefits of the fraud of the latter. Joint assignee of partnership interest held chargeable with notice of fraud inducing same. Goldsmith v. Koopman, 152 F 173.

45. Purchaser who has or is charged with notice of the fraud of his grantor acquires no better title than the latter had. Burns v. Kennedy [Or.] 90 P 1102.

46. Fraud gives rise to only a personal claim and goes to the motives and not to the formal constituents of a legal transfer and can affect a title only when the owner takes with notice or without giving value. Fidelity Mut. Life Ins. Co. v. Clark, 203 U. S. 64, 51 Law. Ed. 91. Mere knowledge of confidential relations between parties to transaction will not charge third persons with **notice** of any undue influence exercised in such transaction. Boddie v. Ward [Ala.] 44 S 105. Where husband induced wife to join in conveyance of homestead by false representation that a cash consideration would be paid and they would buy another homestead with it, and grantee connived by accepting deed reciting a cash consideration. Scoggin v. Mason [Tex. Civ. App.] 19 Tex. Ct. Rep. 569, 103 SW 831. A party defrauded into making a conveyance is not estopped as against a general **creditor** of the grantee where the latter's reliance on the grantee's apparent ownership is not clearly established and it also appears that he was as negligent in extending the credit as was the grantor in making the conveyance. Rihner v. Jacobs [Neb.] 113 NW 220. Subscriber to corporate stock cannot rescind subscription where credit has been extended to corporation on faith thereof. Marion Trust Co. v. Blish [Ind. App.] 79 NE 415. Where creditor connived at debtor's false representations as to latter's financial standing, thus enabling him to procure goods from another which were afterwards transferred to creditor. Parlin & Orendorff Co. v. Glover [Tex. Civ. App.] 17 Tex. Ct. Rep. 589, 99 SW 592. Holder of mortgage note held not **bona fide purchaser.** Wickham v. Evans, 133 Iowa, 552, 110 NW 1046. One holding lease by transfer through mesne process from lessee held not chargeable with latter's fraud in procuring lease where former was not connected therewith and had no notice thereof. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 S 481. Probate court's decree of distribution will not be set aside for fraud as against stranger to record who has purchased property from a distribute unless the purchaser is connected, by actual or constructive notice, with the fraud. In re Kenny's Estate [Minn.] 106 NW 344. Bona fide transferee of negotiable paper before maturity and without notice of fraud between the original parties takes title free from the effect of such fraud. Harrell v. National Bk of Commerce [Ga.] 57 SE 869. Civ. Code 1895, § 3696, providing that holder of note is presumed to be a bona fide holder for value but that such presumption is negatived by fraud in the procurement, refers solely to fraud of holder. Id.

47. Estoppel: Grantor of parol easement which by fraudulent representations as to title he induced grantee to purchase is estopped to assert as defense against the fraud the invalidity of such an easement. Storseth v. Folsom [Wash.] 88 P 632. One who has recovered a judgment against a corporation as such cannot hold the incorporators liable as partners on the ground that they falsely represented themselves as constituting a corporation. Rossow v. Burke, 52 Misc. 118, 101 NYS 608. Neither corporation nor its receiver acting in its behalf can complain of fraud in issue of stock without compensation where all stockholders and officers were implicated in the transaction and no one else is interested in or affected by the result. Bostwick v. Young, 118 App. Div. 490, 103 NYS 607.

Not estopped: No merger of fraud in contract procured thereby. Gubbins v. Ashley, 146 Mich. 453, 13 Det. Leg. N. 844, 109 NW 841. Conveyance procured by fraud cannot operate by way of estoppel, and hence may be attached by the grantor on the ground of fraud. Goodwin v. Fall [Me.] 66 A 727. Life policy holder not estopped to assert that policy was not the kind he intended to secure and which the agent assured him he was securing. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580.

48. Eldorado Jewelry Co. v. Darnell [Iowa] 113 NW 344; Richards v. School Tp., 132 Iowa, 612, 109 NW 1093; Tolley v. Poteet [W. Va.] 57 SE 811; Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 SE 494.

49. Graybill v. Drennen [Ala.] 43 S 568; Richardson v. Lowe [C. C. A.] 149 F 625; Gallagher v. O'Neill [Neb.] 111 NW 582. See Cancellation of Instruments, 9 C. L. 454; Contracts, 9 C. L. 654. When one discovers that fraud has been practiced upon him, he is entitled to a **reasonable time** in which to determine whether to ratify or repudiate the transaction. Stackpole v. Schmucker, 225 Ill. 502, 80 NE 314. Repudiation of purchase of stock in mining corporation over a year after purchase and after purchaser had visited and investigated the mines and assisted in selling stocks to others held under the circumstances, the seller not being injured by the delay, not such laches as would preclude relief. Barron v. Myers, 146 Mich. 510, 13 Det. Leg. N. 858, 109 NW 862.

Acting on advice of attorney may prevent

the transaction [50] unconditionally [51] and unequivocally [52] or, otherwise, an election to affirm will be implied.[53] An election once made is final whether it be to repudiate [54] or to affirm.[55] A transaction is absolutely void and not merely voidable when the fraud is such as to entirely exclude the volition of the defrauded party.[56]

delay from being laches. Smith v. Linder [S. C.] 58 SE 610. The question of delay may be affected by the **relation of the parties** and mother held not required to take such prompt action to secure relief against fraud of daughter as would be required against a stranger. Hunter v. McCammon, 104 NYS 402.

50. Refusal to perform a contract while it is still entirely executory is a sufficient repudiation. Brown v. Search, 131 Wis. 109, 111 NW 210. One fraudulently induced to purchase property may take proper steps for the preservation of the property after the discovery of the fraud, but if he does more he will be deemed to have waived the fraud and elected to affirm the sale. Employment of agent to operate fruit farm which principal was induced by fraud to purchase and operation of farm by agent. Stackpole v. Schmucker, 225 Ill. 502, 80 NE 314. Purchaser of option on plant owned by corporation not estopped to complain of seller's fraud in falsely representing that he had power to sell where purchaser demanded performance of the contract by corporation but immediately thereafter repudiated the contract and the other party was not misled. Gubbins v. Ashley, 146 Mich. 453, 13 Det. Leg. N. 844, 109 NW 841. When one desires to hold some of several parties to a fraud responsible, he should rescind, and not without their knowledge place it beyond his power to secure redress, which would have been substantially effectual, from another party to the fraud. Saunders v. Wells [Iowa] 112 NW 205.

51, 52. Richardson v. Lowe [C. C. A.] 149 F 625.

53. Fraud of purchaser in inducing acceptance of long time note upon representation that it would be paid in six hours held waived by employment of purchaser by seller for several weeks thereafter and a month's delay in bringing suit. Warren v. Osborne [Tex. Civ. App.] 17 Tex. Ct. Rep. 110, 97 SW 851.

Failure to make defense at law on ground of fraud deprives defendant of right to equitable relief against judgment, as where defendant had notice of scire facias to revive judgment but did not appear and present his defense McCormick v. McCormick, 104 Md. 325, 65 A 54. Affirmation by **retention of benefits.** Gallagher v. O'Neill [Neb.] 111 NW 582. Where party treats property sold to him as his own after discovery of fraud in sale to him. Graybill v. Drennen [Ala.] 43 S 568; Stackpole v. Schmucker, 225 Ill. 502, 80 NE 314. Operation of mines after discovery of fraud inducing their purchase and after such fraud had been set up in defense at suit to foreclose purchase-money mortgage held waiver of fraud. Richardson v. Lowe [C. C. A.] 149 F 625. Allegation of rescission of stock subscription insufficient where there was no allegation of offer to return certificate of stock or of demand for return of consideration, though worthlessness of stock was alleged. Marion Trust Co. v. Blish [Ind. App.] 79 NE 415. Where advantage was taken of old and feeble person to procure conveyance of property, failure to restore held not ratification. Studebaker v. Faylor [Ind. App.] 80 NE 861. As to necessity of restoration, see Cancellation of Instruments, 9 C. L. 454; Contracts, 9 C. L. 654. Fraud in inducing insured to take out policy held waived by **payment** of premiums after discovery of fraud. Hartford Life Ins. Co. v. Hanlon [Ky.] 104 SW 729.

Delay of six months in making objection to trust deed on account of misrepresentation as to value of property, and then accepting six months later a deed to the property pursuant to terms of trust deed, and retaining both deeds for six months more, held waiver. Guthrie v. Lyon [Tex. Civ. App.] 17 Tex. Ct. Rep. 321, 98 SW 432. Policy holder estopped to assert that changes should have been made in policy when he kept it for over year after it was returned by company. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 SW 686. Subscriber held not to have waived fraud of promoter in securing subscription by delay induced by assurance of promoter that if he would wait his money and more would be returned to him, no rights of third parties having intervened. Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 SE 494. Acts relied on by defendant as waiver of plaintiff's right to rescind held not done pending **negotiations for settlement.** Richardson v. Lowe [C. C. A.] 149 F 625.

Knowledge essential to ratification, waiver, or estoppel. Graybill v. Drennen [Ala.] 43 S 568. Acceptance of conveyance of part of property the original conveyance of which was secured by fraud will not estop original grantor from asserting the fraud where he accepts such conveyance in ignorance of the fraud. Tolley v. Poteet [W. Va.] 57 SE 811. Use of proceeds of release before discovering that it had been induced by fraudulent representation that the cause of action had already in legal effect been released. Rockwell v. Capital Trac. Co., 25 App. D. C. 98. When one has evidence sufficient to reasonably actuate him to rescind and on which he has once acted, no subsequent discovery of cumulative evidence can operate to excuse a waiver or to revive the lost right to rescind. Richardson v. Lowe [C. C. A.] 149 F 625.

54. Waiver by acceptance of benefits does not operate to destroy the effect of a repudiation once legally accomplished. Rescission of purchase of horse by offer to return which was refused held not affected by subsequent occasional use of the horse. Hayes v. Woodham, 145 Ala. 597, 40 S 511.

55. Richardson v. Lowe [C. C. A.] 149 F 625. Party, after full investigation instigated by the discovery of the fraud, ratified contract and accepted benefits thereof Kertson v. Kertson [Neb.] 110 NW 750.

56. Where fraud causes a mistake which

One who has been defrauded has an election of several remedies.[57] He may repudiate and refuse to carry out the transaction,[58] and when sued by the other party may set up the fraud as a defense,[59] or may recoup for damages though he has not repudiated,[60] or, when he himself is the plaintiff, may avoid a defense as based on fraud,[61] or he himself may take the initiative and sue for relief either at law[62] or in equity.[63] It is commonly declared that courts of law and equity have concurrent jurisdiction,[64] but the correct rule is that equity's jurisdiction of fraud rests upon the fundamental basis of all equitable jurisdiction,[65] which

prevents the meeting of minds. Eldorado Jewelry Co. v. Darnell [Iowa] 113 NW 344. Deed secured by undue influence and delivered without grantor's consent held invalid even as to **third parties,** regardless of the grantee's participation in the fraud. Birdsall v. Leavitt [Utah] 89 P 397. Where possession of undelivered deed was secured by fraud and there was never any delivery, purchaser from grantee got no title. Burns v. Kennedy [Or.] 90 P 1102.

57. Modlin v. Roanoke R. & Lumber Co. [N. C.] 58 SE 1075.

58. May refuse to receive goods the order for which was procured by fraud. Eldorado Jewelry Co. v. Darnell [Iowa] 113 NW 344.

59. Turner v. Ware [Ga. App.] 58 SE 310; Modlin v. Roanoke R. & Lumber Co. [N. C.] 58 SE 1075. In action on contract for purchase of goods. Price v. Huddleston, 167 Ind. 536, 79 NE 496. That indorsement was secured by fraud held complete defense against liability of indorser. Roessle v. Lancaster, 104 NYS 217. Assuming that fraud in procurement of contract was defense to suit to restrain interference therewith, evidence held insufficient to show such fraud. Beekman v. Marsters [Mass.] 80 NE 817.

Answer construed as setting up fraud in procurement of order for goods and also countermand of order before shipment. Rounsaville & Bro. v. Leonard Mfg. Co., 127 Ga. 735, 56 SE 1030. Defense of fraud in procurement of note sued on held **not sustained.** Steven v. Henderson [Neb.] 110 NW 646. Fraud in procurement of plaintiff's title may be pleaded as **defense to ejectment** brought by one claiming under the defrauded party. Phelps v. Nazworthy, 226 Ill. 254, 80 NE 756. Defendant in ejectment claiming under administrator of plaintiff's grantor may set up fraud in plaintiff's title. Doherty v. Courtney, 150 Cal. 606, 89 P 434. Ejectment cannot be defended on ground that plaintiff obtained his deed by fraud, only remedy to test validity of deed being in equity. Loranger v. Carpenter, 148 Mich. 549, 14 Det. Leg. N. 273, 112 NW 125.

60. See generally, Set-off and Counterclaim, 8 C. L. 1875. Vendee, with full knowledge of vendor's fraud, cannot go on and perform contract, thus voluntarily subjecting himself to damages, and thereafter recover same, or set them off in action for purchase price, but where vendee has executed his part of contract he may plead fraud by way of failure of consideration in an action on purchase-money note though he has waived his right to rescind. Richardson v. Lowe [C. C. A.] 149 F 625. Where order for goods is procured by fraud, the buyer may receive the goods and recoup for damages. Eldorado Jewelry Co. v. Darnell [Iowa] 113 NW 344. Where vendor colluded with one of two joint vendees to cause other vendee to pay $2,000 in cash and give note for $1,000 in payment for his half interest in property actually sold for only $4,000, the defrauded vendee could not be compelled to pay the note, and the loss must fall on vendor. Douglass v. Richards, 116 App. Div. 27, 101 NYS 299. Fraudulent representations as a defense in an action by a vendor for the purchase money does not necessarily involve an impeachment of the sufficiency of the deed, and the vendee's testimony alone is sufficient to take the case to the jury. Sulkin v. Gilbert [Pa.] 67 A 415.

61. Release pleaded in defense held invalid for fraud in procurement. Creshkoff v. Schwartz, 53 Misc. 576, 103 NYS 782. Plaintiff may meet a defense of accord and satisfaction by showing that the settlement was procured by fraud. Whitehead v. Trussed Concrete Steel Co., 51 Misc. 664, 101 NYS 250.

62. Fraud is remediable at law though it relates merely to the consideration of the contract or conveyance attacked. Goodwin v. Fall [Me.] 66 A 727. May rescind by own act and sue for what he parted with. Ritko v. Grove, 102 Minn. 312, 113 NW 629.

Action for damages, see Deceit, 9 C. L. 935.

Trespass quare clausum fregit for cutting timber on lands which grantor was induced by defendant's fraud to include in cutting permit. Goodwin v. Fall [Me.] 66 A 727. Rescission of sale and **trover** for goods sold. Atlas Shoe Co. v. Bechard [Me.] 66 A 390. Since conveyances induced by actual fraud are void ab initio, such conveyances may be attacked in **ejectment** by the real owner (Mead v. Chesbrough Bldg Co. [C. C. A.] 151 F 998), but fraud arising from mere breach of trust is solely of equitable cognizance, and cannot be relied on by the plaintiff in ejectment to recover the property conveyed (Id.).

Assumpsit lies under Comp. Laws 1897, § 10,421, to recover back purchase price paid in a sale induced by fraud. Gubbins v. Ashley, 146 Mich. 453, 13 Det. Leg. N. 844, 109 NW 841.

63. See Cancellation of Instruments, 9 C. L. 454.

64. Phelps v. Nazworthy, 226 Ill. 254, 80 NE 756; Modlin v. Roanoke R. & Lumber Co. [N. C.] 58 SE 1075. Cross bill for rescission on account of fraud and answer setting up failure of consideration are not inconsistent defenses in a suit for the purchase price of property. Richardson v. Lowe [C. C. A.] 149 F 625.

65. See Equity, 9 C. L. 1110.

is the inadequacy of the remedy at law,[66] and where the circumstances are such that no action at law lies, equity has exclusive jurisdiction.[67] Equity will not relieve one from the consequences of his own fraud.[68]

Pleading.[See 7 C. L. 1822]—Fraud is not cognizable by the courts unless pleaded[69] and an issue of fraud must be clearly raised,[70] but an express averment of fraud is not necessary.[71] General allegations of fraud are not sufficient to raise the issue,[72]

66. Farwell v. Colonial Trust Co. [C. C. A.] 147 F 480. No jurisdiction of suit to abate purchase price on ground of fraudulent representations as to quantity and quality, since damages caused thereby may under Code 1852, § 2240, be set off at law, a large part of purchase price still remaining unpaid. Williams v. Neal [Ala.] 44 S 551.

Note: "The case of Bell v. Thompson, 34 Ala. 633, many times approved in this court, seems to settle this question. It was there said: 'Under the Code (section 2240—the set-off statute) the claim of the complainant, for an abatement of the purchase-money, or for damages on account of such misrepresentations, may be allowed as a set-off in the action at law; or it may be recovered in an independent suit at law against the vendor. Holley v. Younge, 27 Ala. 203; Gibson v. Marquis, 29 Ala. 668; Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203. It is a well-settled doctrine of this court, that a court of equity will not take jurisdiction of a case, upon the mere ground that the complainant is entitled to compensation on account of a deficiency of the land sold, or to damages for the fraudulent misrepresentations of the vendor, either as to its quantity or quality. Such a claim, though well founded, is not recognized as an independent ground of equitable relief, and will not be enforced by a court of chancery except as an incident to some other matter of equitable cognizance, or in a case where the remedy at law is inadequate, or where some peculiar equity in favor of complainant arises out of the circumstances of the case,' etc. In Smith's Ex'r v. Cockrell, 66 Ala. 77, it was said: 'Fraud of itself is never a distinctive ground of equity jurisdiction; that is, it is never, of itself, a foundation which will uphold a bill in equity. On the contrary, fraud is, in many cases, cognizable in a court of law.' Story's Eq. Jur. § 60. In Sadler v. Robinson, 2 Stew. [Ala.] 520, this court said: 'On what ground, then, the appellees ask the interposition of a court of equity, we are unable to comprehend. It cannot be because they charge their vendor with fraud, for every circumstance alleged as fraudulent, could it avail them, is fully examinable at law. No matter how gross the fraud may be, if the party can have full, complete and adequate redress at law, he cannot go into a court of equity. Russell v. Little, 28 Ala. 160.' We have recently gone over this question in the case of Wilson v. Miller, 143 Ala. 264, 39 S 178, 111 Am. St. Rep. 42, in which the majority of the court adopted the view maintained by the court in Smith's Ex'r v. Cockrell, 66 Ala. 77, and from which we have no reason now to dissent."—Williams v. Neal [Ala.] 44 S 551.

67. Where in order to state the cause of action it was essential to allege facts such as would authorize the court to set it aside and there had been no breach by defendant. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 SW 686.

68. Specific performance decreed of contract between McK. and Z. on the one hand and M. on the other hand, notwithstanding acts collusively done by M. and Z. to render such performance impossible. McKennan v. Mickelberry, 228 Ill. 460, 81 NE 1072.

69. In suit based on fraud, defendant cannot introduce evidence of fraud by plaintiff where former has not pleaded such fraud. First Nat. Bk. v. Baldwin [Tex. Civ. App.] 18 Tex. Ct. Rep. 563, 102 SW 786. Where accord and satisfaction is pleaded by a defendant, the plaintiff may attack the settlement as fraudulent though he has not theretofore pleaded fraud. Whitehead v. Trussed Concrete Steel Co., 51 Misc. 664, 101 NYS 250.

70. Not raised by allegation that release purporting to cover certain matters related to other matters and was so understood by the parties, there being no allegation of deception or imposition. Rowland v. St. Louis & S. F. R. Co., 124 Mo. App. 605, 102 SW 19. Allegation that object of vacation of public street was to give title to one owning land on each side thereof held not to raise any question of fraud or collusion, but only one of public policy. Mottman v. Olympia [Wash.] 88 P 579. Issue of fraud in obtaining defendant's individual signature to officer's receipt for attached property held not raised by special defense that it was agreed before the execution of the receipt that defendant was to sign and be held liable only as officer of corporation. Dejon v. Street, 79 Conn. 333, 65 A 145. Uncertainty in allegations of acts constituting the fraud is not ground for **general demurrer.** Yordi v. Yordi [Cal. App.] 91 P 438.

71. Averment of facts that fairly impute knowledge of the condition of the defrauded party are as efficient as a naked averment of the ultimate fact. Studebaker v. Faylor [Ind. App.] 80 NE 861.

72. Fraud in procurement of judgment. Kuhling v. Beidenhorn, 30 Ky. L. R. 811, 99 SW 646. Mere use of adjectives importing fraud is insufficient. Rogers v. Virginia-Carolina Chem. Co. [C. C. A.] 149 F 1. Allegations that act was done "craftily," "fraudulently," "falsely," "maliciously," are insufficient. Fortune v. English, 26 Ill. 262, 80 NE 781. Facts constituting fraud must be alleged. Schell v. Alston Mfg. Co., 149 F 439. In suit to set aside deed made by Alaska townsite trustee for fraud, complainant must allege facts showing that without negligence on his part he was prevented by the fraud from appearing and setting up his claim, mere allegation that proceedings were ex parte being insufficient. Miller v. Margerie [C. C. A.] 149 F 694. Fraud **held sufficiently alleged.** Cox v. Nat. Coal & Oil Inv. Co., 61 W. Va. 291, 50 SE 494. Averments that party fraudulently represented himself as owner

but an impracticable standard of particularity is not required,[73] and even general allegations are sufficient where fraud is not the gist of the action.[74] The allegations must cover all the elements of vitiating or actionable fraud, such as intent,[75] materiality,[76] right to rely,[77] fact of reliance,[78] deception,[79] and damage,[80] and as against third parties the pleadings must connect them with the fraud.[81] Fraud must be substantially proved as laid.[82] A requirement that denials of the terms of written instruments must be verified does not require the verification of a pleading alleging that the signature to an instrument was obtained by fraud.[83]

Evidence.[See 7 C. L. 1823]—Except by way of inference from evidence,[84] fraud is never presumed and must be proved [85] by clear and satisfactory evidence.[86] The

of note secured by mortgage, showed note to recorder purporting to be mortgage note, and by false representations obtained entry of satisfaction of mortgage, held to allege fraud sufficiently. Ennis v. Padgett [Mo. App.] 99 SW 782.

73. Allegations held sufficiently particular. Rogers v. Virginia-Carolina Chem. Co. [C. C. A.] 149 F 1. Allegation that deed from wife to husband was secured by intimidation and undue influence held sufficient, case being one in which the circumstances were difficult to affirm precisely. Yordi v. Yordi [Cal. App.] 91 P 348.

74. Ennis v. Padgett [Mo. App.] 99 SW 782.

75. Intent need not be expressly alleged, but may be inferred from the facts alleged. Burns v. Kennedy [Or.] 90 P 1102.

76. Pleading held to sufficiently allege materiality of allegations of value and character of land. Fisher v. Dippel [Tex. Civ. App.] 18 Tex. Ct. Rep. 546, 102 SW 448.

77. Equal opportunity of party charging fraud to ascertain truthfulness of statements as to value must be negative or a sufficient excuse, such as fraudulent prevention, for not making use of such opportunities. Brooks v. Boyd, 1 Ga. App. 65, 57 SE 1093.

On demurrer absence of negligence of applicant for life insurance in failing to use other means of knowledge instead of relying on representations of agent will be supplied by intendment if not alleged. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580.

78. Brooks v. Boyce, 1 Ga. App. 65, 57 SE 1093.

79. Allegation that party was misled is essential. Sulkin v. Gilbert [Pa.] 67 A 415.

80. Bowen v. Waxelbaum & Bro. [Ga. App.] 58 SE 784. Complaint must allege that damage sustained resulted from the fraud alleged. Russell v. Stoops [Md.] 66 A 698. Complaint based on fraud in an executed transaction must allege damage. Foreclosure of mortgage as to which complaint showed no defense. Bell v. Thompson, 147 Cal. 689, 82 P 327. Allegation that plaintiff, in reliance on the alleged fraudulent representations, parted with title to lands, **held sufficient.** Rihner v. Jacobs [Neb.] 113 NW 220. Allegation of loss of options of certain value held sufficient in action for damages without allegation that options could or would have been sold to others or why they were of the value alleged. Rogers v. Virginia-Carolina Chem. Co. [C. C. A.] 149 F 1. Allegation of damages are **not necessary** to a defense by a surety that his indorsement was secured by fraud. Roessle v. Lancaster, 104 NYS 219.

81. In suit by transferee of lease, evidence offered in defense of fraud in procurement of leases was properly excluded in absence of any allegation connecting plaintiff with the fraud. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 44 S 481.

82. Variance where bill alleged that defendant promised to purchase debt for which plaintiff's land was about to be sold under trust deed and testimony that defendant promised to purchase land at such sale and allow plaintiff to redeem it. Pankau v. Morrissey, 224 Ill. 177, 79 NE 643. Variance between pleadings and proof as to manner in which the alleged substitution of contracts constituting the alleged fraud was accomplished held immaterial and without prejudice. National Cereal Co. v. Alexander [Kan.] 89 P 923.

83. St. Louis Jewelry Co. v. Bennett [Kan.] 90 P 246.

84. See ante, § 2. Inference from Circumstances, etc.

85. Burrows v. Fitch [W. Va.] 57 SE 283. Fraud not presumed in absence of evidence thereof. Hutcheson v. Bibb, 142 Ala. 586, 38 S 754; Gipe v. Pittsburgh, etc., R. Co. [Ind. App.] 82 NE 471; Beddow v. Wilson, 28 Ky. L. R. 661, 90 SW 228; Ayers v. Farwell [Mass.] 82 NE 35; Raymond v. McKenna, 147 Mich. 35, 13 Det. Leg. N. 935, 110 NW 121.

86. Kincaid v. Price [Ark.] 100 SW 76; Sansom v. Wolford, 60 W. Va. 380, 55 SE 1020. Evidence of undue influence must be clear and convincing, a mere **preponderance** being insufficient. When deed of wife showed on its face that it was duly acknowledged and recorded. Willis v. Baker, 75 Ohio St. 291, 79 NE 466, citing and following Ford v. Osborne, 45 Ohio St. 1, 12 NE 526. Evidence held insufficient to sustain decree declaring such a deed void. Id. Under Code Civ. Proc. § 3390, subd. 5, only a preponderance of evidence is necessary to sustain any civil action, whether for fraud or any other cause. Gehlert v. Quinn, 35 Mont. 451, 90 P 168.

Sufficiency of evidence is for the jury. Universal Metal Co. v. Durham & C. R. Co. [N. C.] 59 SE 50. To sustain defense that contract for purchase of goods sued on was obtained by fraud. Price v. Huddleston, 167 Ind. 536, 79 NE 496. In ejectment by one claiming title by reason of fraud practiced on ancestor against one claiming under purchaser at mortgage sale, finding for defendant sustained. Mead v. Chesbrough Bldg. Co. [C. C. A.] 151 F 998. Evidence held not clear and convincing as to fraud whereby purchase at judicial sale was made for in-

burden of proof is upon the party alleging the fraud,[87] except when a prima facie presumption of fraud arises from the circumstances,[88] and even in this latter case it is held that the true burden is not shifted but that the other party merely has the burden of meeting the prima facie case.[89] Where fraud in the original transaction is proved, the burden is upon a third party to prove lack of notice and privity.[90]

The admissibility of evidence depends, as in other cases, upon its relevancy.[91]

adequate price. Locke v. Friedman, Keller & Co. [Miss.] 43 S 673. For further examples of sufficiency of evidence, see §§ 1, 2, in connection with acts constituting fraud.

Intent: Where the natural inference from the evidence does not necessarily lead to the presumption of fraudulent intent, but is equally consistent with innocence, the latter construction will be adopted. Duryea v. Zimmerman, 121 App. Div. 560, 106 NYS 237.

Damage: Defendants pleading fraud as defense to action for purchase price held not to have proved their damage. Richardson v. Lowe [C. C. A.] 149 F 625. False representation to purchaser that no prior contract for sale of the land had been made not rendered harmless by circumstances, unknown to the purchaser, from which it might be inferred that the contract had been abandoned. Norris v. Hay, 149 Cal. 695, 87 P 380.

87. Rogers v. Rogers [Del.] 66 A 374; Raymond v. McKenna, 147 Mich. 35, 13 Det. Leg. N. 935, 110 NW 121; Burk v. Pence [Mo.] 104 SW 23; Burrows v. Fitch [W. Va.] 57 SE 283. Burden is on party alleging fraudulent misrepresentations to show falsity of such representations. Church v. Marsh, 133 Iowa, 51, 110 NW 161. Burden on person asserting fraud in making and promulgation of corporation prospectus to show that the maker of the prospectus did not have and believe the information forming the basis of the prospectus. Duryea v. Zimmerman, 121 App. Div. 560, 106 NYS 237. Burden of showing that party was **misled.** Church v. Marsh, 133 Iowa, 51, 110 NW 161. Burden as to **damage.** Id. Where vendee pleads fraud he must prove that property is of less value than he paid and how much less. Richardson v. Lowe [C. C. A.] 149 F 625.

88. See ante, § 2, Inference from Circumstances, etc.

Transaction between aged **parent and child** on whom confidence has been reposed. Reese v. Shutte, 133 Iowa, 681, 108 NW 525. On son to show good faith as to conveyance from old and feeble father. Couch v. Couch [Ala.] 42 S 624. Conveyance without consideration by aged father to son who occupied position of trust and confidence. Quinn v. Quinn, 130 Wis. 548, 110 NW 488. On son to prove bona fides of transfer of property to him by father for whom he acted as general confidential agent under power of attorney. Griesel v. Jones, 123 Mo. App. 45, 99 SW 769. On daughter to show bona fides of transaction wherein she acquired her mother's property. Hunter v. McCammon, 104 NYS 402. Son held to have burden of proving bona fides of transaction whereby he secured conveyance from aged mother of all her property. Fjone v. Fjone [N. D.] 112 NW 70. On **son in-law,** who was confidential agent of the old and feeble father-in-law, to prove bona fides of transfer of bonds to former. State v. Johnson, 144 N. C. 257, 274, 56 SE 922. Settlement between **ward and guardian** who was also ward's parent. Baum v. Hartmann, 226 Ill. 160, 80 NE 711. Burden of proof on grantee where **fiduciary relations** existed between him and grantor. Morgan v. Owens, 228 Ill. 598, 81 NE 1135. Where trusted **agent** was beneficiary of transaction with principal. Taylor v. Vail [Vt.] 66 A 820. On vendor to show that no fraud was practiced on **drunken vendee.** Fagan v. Wiley [Or.] 90 P 910. On **foreigner,** who had resided in America a long time and understood English well, to prove good faith in procuring contract from fellow countrymen who reposed great confidence in him and who knew little English. Ballouz v. Higgins, 61 W. Va. 68, 56 SE 184. On holder of mortgage note to prove bona fides of **conveyance** to her **by mortgagee** who was very old and feeble. Leech v. Hirshman [Miss.] 44 S 33. To prove bona fides of **antenuptial contract** whereby wife released her rights as survivor. Maze's Ex'rs v. Maze, 30 Ky. L. R. 679, 99 SW 336. Burden is on party seeking to enforce **sale of expectant interest** to show the bona fides and fairness of the sale. McAdams v. Bailey [Ind. App.] 80 NE 171.

Burden held not shifted: Facts hypothesized in charge held not to make case of such confidential relations between father and son as to charge latter with burden of proving bona fides of conveyance to him by former. Bain v. Bain [Ala.] 43 S 562.

89. Boyle v. Robinson, 129 Wis. 567, 109 NW 623.

Note: "The rule is that he who alleges fraud must prove it, and the supposed exceptions to this rule are more apparent than real. There may be prima facie fraud, or fraud may be proved by a number of concurrent circumstances. Nevertheless, so long as the scales are evenly balanced, the defendant, against whom fraud is alleged, must prevail. Greer v. O'Brien, 36 W. Va. 277, 15 SE 74; Board of Trustees v. Blair, 45 W. Va. 812, 32 SE 203; Bodkin v. Rollyson, 48 W. Va. 453, 37 SE 617; Clay v. Deskins, 36 W. Va. 350, 15 SE 85."—From Burrows v. Fitch [W. Va.] 57 SE 283.

90. National Bk. v. Chatfield, Woods & Co. [Tenn.] 101 SW 765. Evidence held not to show fraud in inducing execution of note and negotiation thereof so as to place burden on indorsees to show that he was a holder for value without notice. First Nat. Bk. v. Person, 101 Minn. 30, 111 NW 730.

91. On issue whether creditor was induced to accept trust deed by representations of debtor as to value and location of land covered thereby, evidence of debtor's financial worth several years thereafter held inadmissible. Guthrie v. Lyon & Sons [Tex. Civ. App.] 17 Tex. Ct. Rep. 321, 98 SW 432. On issue as to whether representations of value and location of lots covered by trust deed to secure debt were true, evidence of financial worth of grantor several years thereafter was inadmissible. Id. When exchange of property was alleged to have been obtained by fraudulent representations as to value of one

Evidence of similar acts is usually held admissible.[92] Declarations of the defrauded party after the transaction are not admissible to prove the fraud.[93] On an issue as to whether one knowingly made a false statement, his testimony that he did not intend to deceive is admissible.[94] Parol evidence of misrepresentations as to the legal effect of a written contract is inadmissible as varying the terms of a written contract,[95] but the parol evidence rule does not exclude parol evidence of fraud in the procurement of the writing.[96]

*Instructions.*See 7 C. L. 1826—The general rules as to instructions apply, such as that they must be warranted by the evidence,[97] that they must not be misleading,[98] that they must be considered as a whole,[99] and that error cannot be predicated upon them if they are substantially correct.[1]

FRAUDS, STATUTE OF

§ 1. Agreements not to be Performed Within One Year (1495).
§ 2. Promise to Answer for Debt or Default of another or to Indemnify or Insure (1495).
§ 3. Agreements in Consideration of Marriage (1497).
§ 4. Representations as to Character or Credit of Another (1497).
§ 5. Agreements with Executors and Administrators (1497).
§ 6. Agreements with Real Estate Brokers (1497).
§ 7. Agreements Respecting Real Property or an Estate or Interest Therein (1498).
§ 8. Sale of Goods (1500).
§ 9. Trusts (1500).
§ 10. What will Satisfy the Statute (1501).
A. Writing (1501).
B. Delivery and Acceptance (1503).
C. Part Payment and Earnest Money (1504).
D. Part Performance (1504).
§ 11. Operation and Effect of Statute (1506).
§ 12. Pleading and Proof (1508).

of the properties, evidence that value of other property was very little held admissible as bearing on probability of the making of the fraudulent representations and upon the question of reliance. Aldrich v. Scribner, 146 Mich. 609, 13 Det. Leg. N. 893, 109 NW 1121. Evidence that woman who had been injured was nervous and crying when she signed release. Rockwell v. Capital Trac. Co., 25 App. D. C. 98. Evidence of representations tending to show a fraudulent plan is admissible, though the representations alone do not constitute fraud. Kempe v. Bennett, 134 Iowa, 247, 111 NW 926.

92. Previous acts of bank officers lending assistance to fraudulent conspirators. Hobbs v. Boatright, 195 Mo. 693, 93 SW 934. Evidence of similar acts is admissible on the question of knowledge and intent, as that party charged with fraudulent representations as to corporate stock made similar representations on offers to sell to others. Crosby v. Wells [N. J. Err. & App.] 67 A 295. Representations as to kind of policies insurance company was issuing and would issue. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 NE 595.

93. Declarations of father that he had made conveyance to son to get rid of him. Bain v. Bain [Ala.] 43 S 562.

94. In suit on insurance policy where defense was that plaintiff overvalued his property. Helm v. Anchor Fire Ins. Co., 132 Iowa, 177, 109 NW 605.

95. Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702, 14 Det. Leg. N. 57, 111 NW 343.

96. Sawyer v. Walker, 204 Mo. 133, 102 SW 544. Where applicant for life insurance thought and was assured by agent that he was securing a policy different from the one he actually secured. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580.

97. When the sole issue is whether the alleged fraudulent act was committed, an instruction as to the presumption of honesty in acts equally capable of interpretation as honest and dishonest is unwarranted. Russell v. Stoops [Md.] 66 A 698.

98. Instruction held erroneous in that it diverted jury's attention from a general issue of fraud effected by means of a general plan, to issue whether certain portions of the facts would in themselves constitute fraud. Kempe v. Bennett, 134 Iowa, 247, 111 NW 926. Instruction that ignorance of or incapacity to understand contents of writing was ground for avoidance held misleading as tending to lead jury to think that such ignorance alone invalidated the writing. Missouri, etc., R. Co. v. Craig [Tex. Civ. App.] 17 Tex. Ct. Rep. 547, 98 SW 907. Instruction that fraud is never presumed and must be clearly and distinctly proved held to place too great a burden on party alleging fraud, since Code Civ. Proc. § 3390, subd. 5, requires only a preponderance of the evidence. Gehlert v. Quinn, 35 Mont. 451, 90 P 168.

99. Where court indicated clearly in its review of the evidence that undue influence had been used, its finding would not be set aside on account of a concluding statement which standing alone might indicate that the burden of proof had been placed upon the party charged with the fraud to disprove it. Champeau v. Champeau [Wis.] 112 NW 36.

1. In action based on fraudulent misrepresentations, an instruction that if defendant did not willfully conceal from plaintiff some fact which he should have stated he would not be liable held not reversible error, since willful falsehood in regard to a matter necessarily involves and includes willful concealment of the truth. Rutherford v. Irby, 1 Ga. App. 499, 57 SE 927.

The scope of this topic is noted below.[2]

§ 1. *Agreements not to be performed within one year.* See 7 C L 1826—To come within the statute it must appear from the terms of the contract,[3] or its manifest intent,[4] that it is not to be performed within one year from the time it was made.[5] A contract is not within statute if it may possibly be performed within the year,[6] or if the contingency on which it is dependent may happen within a year.[7] Thus, contracts to insure,[8] or to form a partnership,[9] or to make a will may rest in parol.[10] Contracts for one year to begin at once are not within the statute,[11] but generally a lease [12] or a contract of employment [13] for one year to begin at a future date is, the rule being otherwise in New York.[14] Such contracts may be orally ratified within the year.[15]

§ 2. *Promise to answer for debt or default of another or to indemnify or insure.* See 7 C. L. 1827—A contract of guaranty is within the statute,[16] though the indebtedness was created after the promise,[17] but an original undertaking,[18] or an independent obligation,[19] or a novation,[20] is not. A promise to pay an antecedent debt is

2. This topic includes the operation and effect of all statutes requiring contracts to be in writing. Specific performance of oral contracts (see Specific Performance, 8 C. L. 1946), and the sufficiency of writing to avoid the bar of limitations (see Limitation of Actions, 8 C. L. 768), are excluded.

3. Contract to purchase each week, for a period of 60 weeks, two shares of the capital stock of a designated corporation, for which purchaser was to pay $5 per share or $10 per week on delivery of certificate, was within statute. McIlroy v Richards, 148 Mich. 694, 14 Det. Leg. N. 286, 112 NW 489. Where servant was working under a contract for more than one year, was orally promised a "bonus" at the end of the term, it was within the statute though the servant performed. Price v. Press Pub. Co., 117 App. Div. 854, 103 NYS 296. A contract orally assented to held within the statute where by its terms it was to continue until termination of certain patents which had more than one year to run. Warth v. Kastriner, 104 NYS 1056. Renewal of lease by holding over held not for more than five years. Wallace v. Dorris [Pa.] 67 A 858.

4. Plaintiff orally contracted to saw at his mill all wood on about 250 acres of land. No time was mentioned for performance, but the lowest estimate of amount of wood was 2,400 cords, while the capacity of the mill was 3½ cords a day. Held contract within statute, and death of plaintiff within the year would not have mattered, as then the contract would not have been fully performed. White v. Fitts [Me.] 66 A 533.

5. Contract cannot be partly oral and partly written. Hamilton v. Fred Miller Brew. Co., 125 Mo. App. 579, 102 SW 1088.

6. Agreement of grantee of land to pay grantor one-half of crops during his life not within statute as grantor might die within year. Johnson v. Johnson, 31 Utah, 408, 88 P 230. Contract for services for one year with provision for renewal beyond the year is not within the statute though no notice has been given to terminate it. General Elec. Inspection Co. v. Ebling Brew. Co., 52 Misc. 145, 101 NYS 648.

7. Lumber company orally employed physician at a certain place until it cut out certain timber, which contract recited would take about two years. Texarkana Lumber Co. v. Lennard [Tex. Civ. App.] 19 Tex. Ct. Rep. 683, 104 SW 506.

8. Fire Insurance contract for more than one year. American Cent. Ins. Co. v. Leake [Ky.] 104 SW 373.

9. Two parties agreed to join in the purchase and sale of a carload of hogs and share equally in the gain or loss. McNealy v. Bartlett, 123 Mo. App. 58, 99 SW 767.

10. Stewart v. Smith [Cal. App.] 91 P 667.

11. Hudgins v. State, 126 Ga. 639, 55 SE 492; Bell Bros. v. Aiken, 1 Ga. App. 36, 57 SE 1001.

12. Jones v. Com. [Ky.] 104 SW 782; Ray v. Blackman, 120 Mo. App. 497, 97 SW 212. Cobbey's Ann. St. 1903, § 5954. Oral lease made in December for a term of one year from the first of March next. Thostesen v. Doxsee [Neb.] 110 NW 319. Parol lease to begin in future and to continue from year to year is within the statute. Wessells v. Rodifer, 30 Ky. L. R. 51, 97 SW 341.

13. Stovall v. Gardner [Tex. Civ. App.] 94 SW 217. Oral contract of employment made Nov. 20 for one year from Jan. 1 was within statute. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867.

14. Oral lease made on or about April 15th for a year from May 15th, the end of the present lease. Fishman v. Wolf, 101 NYS 16.

15. Oral lease of farm land made in May, 1904, for crop season of 1905 for one-third of crops, but plaintiffs purchased the land in Nov. 1904, with knowledge of and assenting to the oral lease. O'Connor v. Oliver [Wash.] 88 P 1025.

16. Agreement by owner to see that building contractor's men were paid. Rancil v. Krohne, 31 Pa. Super. Ct. 130.

17. Bank refused to hold money to a corporation and directors orally agreed that each would guaranty his proportionate share of the loan. Mechanics' & Traders' Bk. v. Stettheimer, 116 App. Div. 198, 101 NYS 513.

18. A. rented land to B., who was taken sick. C. having paid B. for the crop, his promise to A. to pay the rent and his substitution as tenant was enforcible. Pylant v. Webb [Ga. App.] 58 SE 329.

19. Bank agreed with purchaser of stock that it would accept certain notes held by him in full payment thereof, and verbally

void unless supported by a new consideration,[21] but it is an original promise where based on new [22] and valuable consideration [23] of substantial benefit to promisor.[24] The promise may be an original one though the new consideration does not move to the promisor, if the creditor suffers a detriment.[25] Where goods are delivered,[26] or purchased,[27] or work done,[28] or expense incurred,[29] or a risk taken [30] in consideration of defendant's promise to pay therefor, the promise is an original one. If any credit was given to original promise, the subsequent oral promise is collateral and within the statute,[31] but a parol promise to protect creditors,[32] or a mortgagor at a public sale, made to induce the mortgagor to give the mortgage, is not a collateral promise.[33]

agreed not to hold the purchaser liable on his indorsements of said notes. Patrick v. Barker [Neb.] 112 NW 358.

20. Milby v. Mowry, 125 Ill. App. 417.

21. The drawer's promise made after the check had been deposited by payee in a bank to pay the same if the bank failed was within the statute. Burns v. Yocum [Ark.] 98 SW 956.

22. Owner of premises orally promised plaintiff that if he would not file a lien and would continue to furnish sand, he would pay the debt owing by the contractor, and it was held not within the statute. Schnaufer v. Ahr, 53 Misc. 299, 103 NYS 195. Oral promise of administrator to buyer of mortgaged chattels from the estate to loan money to pay the mortgage debt. Hedden v. Schneblin [Mo. App.] 104 SW 887. Promise by one hiring the servant of another to pay a debt of such servant to his former employer to secure his release from service. Evans v. Griffin, 1 Ga. App. 327, 57 SE 921.

23. Parol promise to pay the note of another, where main purpose was to benefit promisor. Blakeney v. Nalle & Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 56, 101 SW 875. Promise by devisee to pay funeral expenses, for which he was liable to the extent that he had received property of testator, is not within the statute. Withers' Adm'r v. Withers' Heirs, 30 Ky. L. R. 1099, 100 SW 253.

24. First, of two accommodation indorsers, indorsed on the strength of a verbal agreement of the second, that in consideration that the maker of the note should place valuable property in his hands as security he would indemnify the first indorser, and the maker having delivered the property before the delivery of the note, the promise was not within the statute. Wilson v. Hendee [N. J. Err. & App.] 66 A 413. Attorney testified that before beginning work defendant stated that if the vendor did not pay him defendant would, and the attorney did the work which was beneficial to defendant. Treakle v. Vaughan Abstract Co. [Ark.] 103 SW 174.

25. One orally promised that if a stakeholder would pay the money to the winner of a bet that he would repay him, if he were compelled to return any of it to the loser. Himmelman v. Pecaut, 133 Iowa, 503, 110 NW 919. Plaintiff having sold goods to third persons released them on defendant's promise to pay therefor. Smith Bros. & Co. v. Miller [Ala.] 44 S 399. Promise to pay debt of another in consideration of the discontinuance of two foreclosure suits was enforceable as the release was a damage to the creditor, or a benefit to the promisor. Lee v. Unkefer [S. C.] 58 SE 343.

26. Goods sold and delivered to third persons on credit of defendant alone. Smith Bros. & Co. v. Miller [Ala.] 44 S 399.

27. Plaintiff bought mortgage chattels of an estate on the administrator's promise to loan him the amount of the mortgage debt. Hedden v. Schneblin [Mo. App.] 104 SW 887. Defendant promised to hold plaintiff harmless if he should bid on goods at a judicial sale, and plaintiff bought relying on such promise. McKnight v. Milford Gin Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 631, 99 SW 198.

28. Plaintiff was employed by officer of the Order to make robes for the Order, and the officer told her that he would see that she got her money. Steele v. Ancient Order of Pyramids, 125 Mo. App. 680, 103 SW 108. Agreement of lumber company to collect for physician specified sums from its employes monthly. Texarkana Lumber Co. v. Lennard [Tex. Civ. App.] 19 Tex. Ct. Rep. 683, 104 SW 506.

29. On receipt of a telegram addressed to his wife announcing the death of her father, defendant authorized the telegraph operator to have the body shipped at his expense. Hillman v. Hulett, 149 Mich. 289, 14 Det. Leg. N. 458, 112 NW 918.

30. Defendant agreed with plaintiff to pay for certain property if destroyed by fire while plaintiff's house was occupied by defendant's servant. Chapman v. Conwell, 1 Ga. App. 212, 58 SE 137. Traveling salesman at time of employment agreed to pay 50 per cent of the losses on customers with whom he dealt. Myer-Bridges Co. v. Badeau [Miss.] 43 S 609.

31. Oral promise to pay for services rendered to a third person by a physician who sent bill to such third person. Johnson v. Bank, 60 W. Va. 320, 55 SE 394. Attached to minor son's contract for instruction was the following signed at the same time by father: "I hereby guarantee the payment of the price of the scholarship taken," which was held insufficient as not expressing the consideration. International Text-Book Co. v. McKone [Wis.] 113 NW 438.

32. Defendant stockholder agreed with creditors to bid in corporation property at foreclosure sale at a price sufficient to pay the corporation debts, and creditors relied on the agreement and refrained from bidding. Held not within statute. Satterfield v. Kindley, 144 N. C. 455, 57 SE 145.

33. Mortgagee agreed to buy in the goods if they did not sell for a certain sum, and sell them at private sale, and paying over to the mortgagor any surplus after the satisfaction of the debt. Cerny v. Paxton & Gallagher Co. [Neb.] 110 NW 882.

The intention of the parties must be considered in determining whether a promise is original or collateral,[34] and the question should be submitted to the jury.[35]

§ 3. *Agreements in consideration of marriage.*See 7 C. L. 1829—Contracts made in consideration of marriage are unenforceable unless reduced to writing.[36]

§ 4. *Representations as to character or credit of another.*See 7 C. L. 1829—The representations as to the character, conduct, and credit of another required to be in writing are such as are made with the intent to obtain money, credit, or goods thereon, and not with the intent to sell corporate stock.[37]

§ 5. *Agreements with executors and administrators.*See 7 C. L. 1829

§ 6. *Agreements with real estate brokers.*See 7 C. L. 1829—A statute providing that no contract for the sale of land by an agent shall bind the principal unless in writing does not apply to the contract of employment,[38] but in some states brokerage contracts are by statute required to be in writing,[39] where any interest in real estate,[40] except leases,[41] is involved. Otherwise the brokers are precluded from recovering compensation,[42] though the sale itself may be valid.[43] A statute making it an offense for any person to offer property for sale without written authority of the owner is not retroactive,[44] and such laws have generally been upheld,[45] except in New York where the statute has been held unconstitutional.[46] The writing must be subscribed [47] by the principal,[48] must state the rate of compensation,[49] and must purport

34. The words of the promise, the situation of the parties, and all the attending circumstances should be considered. Johnson v. Bank, 60 Va. 320, 55 SE 394.

35. Error to direct verdict for defendants, owners of building, who plaintiff, a lumber dealer, testified had promised to pay him for lumber, where the contractor had failed to pay and plaintiff had refused to make additional deliveries. Haak v. Kellogg, 146 Mich. 541, 13 Det. Leg. N. 855, 109 NW 1068.

36. Agreement that property of each should pass to their respective children free from any claim of the other being a nullity, a written agreement of the same nature, but not referring to the prior oral agreement, made after marriage was void. Frazer v. Andrews, 134 Iowa, 621, 112 NW 92.

37. Representations by members of a corporation of facts as to its property, made for the purpose of showing value of stock and in order to sell the same, are not required to be in writing. Grover v. Cavanaugh [Ind. App.] 82 NE 104.

38. The broker is entitled to his compensation though orally employed. Young v. Ruhwedel, 119 Mo. App. 231, 96 SW 228.

39. The requirement of the Nebraska statute that contracts between real estate brokers and landowners shall be "subscribed" by both parties means that they must be signed, and it is immaterial whether the signature be placed at the bottom, the top, or in the body of the instrument. Myers v. Moore [Neb.] 110 NW 989. Demurrer sustained to petition to recover compensation for services of real estate broker under contract not shown to be in writing. Smith v. Aultz [Neb.] 110 NW 1015. Required to be in writing in New Jersey. Callaway v. Prettyman [Pa.] 67 A 418.

40. Defendant had procured an oral extension of an option on a mine and was in possession, and had made improvements, and on a resale was to have a certain sum for his services. Crowell v. Ewing [Cal. App.] 88 P 285.

41. A parol contract employing a broker to procure a purchaser of a lease is not within the Arkansas statute of frauds. McCurry v. Hawkins [Ark.] 103 SW 600.

42. A statute requiring a contract for agent's commissions to be in writing precludes a recovery by an agent, under an instrument merely reciting that the owner had placed property in his hands for sale, giving him control thereof, and "a lien during the existence" of the contract, but not containing any promise to pay. Phillips v. Jones, 39 Ind. App. 626, 80 NE 555.

43. Ballinger's Ann. Codes & St. § 4576, subd. 5. Peirce v. Wheeler [Wash.] 87 P. 361.

44. Does not invalidate a verbal appointment made before its passage. Stahlin v. Hoffmeister, 121 Mo. App. 24, 97 SW 970.

45. Under Missouri statute making it a misdemeanor to offer to sell another's realty without written authority, a person selling without such authority cannot recover the agreed compensation therefor. Rothwell v. Gibson, 121 Mo. App. 279, 98 SW 801; Finley v. Handley, 121 Mo. App. 358, 98 SW 803.

46. New York statute making it a misdemeanor to offer real estate for sale without written authority held unconstitutional, and broker's right to compensation for making an exchange under verbal authority is not affected thereby. Tieck v. McKenna, 115 App. Div. 701, 101 NYS 317. Violation of the state constitution as to due process of law and of the U. S. Constitution, art. 1, § 10, and of the 14th amendment. Fisher Co. v. Woods [N. Y.] 79 NE 836.

47. Cobbey's Ann. St. 1903, § 10, 258. Myers v. Moore [Neb.] 110 NW 989. Position of signature immaterial. Id.

48. Plaintiff was employed by defendant's husband to sell her land, but the written authorization was not signed by her. Hochbaum v. Rotter, 101 NYS 531. Broker cannot recover compensation unless contract be in writing signed by the principal. Stahlin v. Hoffmeister, 121 Mo. App. 24, 97 SW 970.

49. A written authorization fixing the broker's compensation at all he may get over

to employ a broker,[50] as a mere incidental notice to negotiate with third persons is insufficient.[51] Whether a writing is necessary is determined by the lex loci contractus.[52] A brokerage contract, which does not conform to the statute requiring it to be in writing, cannot be taken out of the operation of the statute by a performance thereof,[53] but an oral contract employing a broker may subsequently become merged into a written agreement created by the written statements of the parties.[54]

§ 7. *Agreements respecting real property or an estate or interest therein.* See 7 C. L. 1830—Oral contracts for the sale[55] or conveyance of land,[56] for the conveyance of any interest therein,[57] for transfer of Indian allotments,[58] for leases for more than one year,[59] for the sale of standing timber,[60] for the sale of buildings,[61] for a partition,[62] for a perpetual license,[63] for a right of way,[64] whether for rail-

a certain price for land is within the New Jersey statute of frauds, even though the rate of commission is not stated, as required by the literal words of the statute. Mendles v. Danish [N. J. Law] 65 A 888.

50. A letter from a prospective purchaser to a broker, stating that if the broker could buy certain land the writer "thought he would be ready to purchase" on a certain day, is not a sufficient memorandum of a brokerage contract under the California statute. Logan v. McMullen [Cal. App.] 87 P 285.

51. Plaintiff and defendant had an oral agreement for the division of commissions from the sale of land, but a letter from one to the other that he had told a third person to talk with him on the subject of commissions was insufficient. Crowell v. Ewing [Cal. App.] 88 P 285. Insufficiency of memorandum of contract authorizing sale of land under Washington contract to entitle broker to recover. Keith v. Smith [Wash.] 89 P 473.

52. A resident of New Jersey contracting in Pennsylvania to sell land situated in New Jersey is not required to have a broker's license in writing under the Pennsylvania law which controls. Callaway v. Prettyman [Pa.] 67 A 418.

53. Such construction would nullify the statute. Keith v. Smith [Wash.] 89 P 473.

54. Haven v. Tartar, 124 Mo. App. 191, 102 SW 21.

55. Husband not liable for broker's commissions on contract to sell wife's property, which was not authorized or signed by her, as required by statute. Hochbaum v. Rotter, 101 NYS 531.

56. Plaintiff conveyed land to his sister on her oral agreement to recovery on his return from sea if he should so request. Cromwell v. Norton, 193 Mass. 291, 79 NE 433.

57. To induce plaintiff to continue in charge of her late husband's business defendant orally promised him an interest in the premises when certain liens were paid off, and on a sale of the property defendant was not a trustee of the proceeds. Dietrich v. Heintz [Tex. Civ. App.] 17 Tex. Ct. Rep. 837, 99 SW 417. Decedent holding land under a deed reserving an express lien for the purchase price cannot divest himself of title thereto by a verbal agreement. Jante v. Culbreth [Tex. Civ. App.] 101 SW 279.

58. A conveyance of the exclusive right to select land as their several allotments and obtain patents therefor is equivalent to the equitable title to the land. Taylor v Southerland [Ind. T.] 104 SW 874.

59. Rader v. Huffman, 125 Ill. App. 554; Bogigian v. Booklovers' Library, 193 Mass. 444, 79 NE 769. Oral lease of farm for five years, unenforceable, and tenant must surrender possession on 30 days' notice, but was allowed the value of improvements. Poole v. Johnson [Ky.] 101 SW 955. A parol agreement modifying terms of lease and intended to cover the unexpired term of more than one year does not create a valid lease or effect a surrender of the existing lease. Seymour v. Hughes, 105 NYS 249. On oral lease for three years, tenant may be evicted under summary proceedings by landlord. Garofalo v. Rohleder, 52 Misc. 553, 102 NYS 897.

60. Parol agreement for sale of trees to be severed by purchaser will amount to a license, and if not revoked before severance the title to the trees will be in purchaser, who will have irrevocable right to enter and remove, but if license revoked before severance the purchaser will acquire no rights. Rishbourg v. Rose [Fla.] 44 S 69. Agreement not providing for immediate severance. King v. Cheatham [Ky.] 104 SW 751. Standing timber is a part of realty and can only be conveyed by such instrument as is sufficient to convey realty. Tremaine v. Williams, 144 N. C. 114, 56 SE 694; Midyette v. Grubbs [N. C.] 58 SE 795. An agreement giving right to remove timber cut under claim of right in consideration of relinquishment of right to cut further is not within the statute. York v. Westall, 143 N. C. 276, 55 SE 724.

61. Oral agreement to pay $500 for certain buildings and to remove the same from the land held within the statute, being the sale of an interest in land as the buyer was to sever the buildings, otherwise if the seller was to sever the buildings, as then it would be good as a license. Volk v. Olsen, 54 Misc. 227, 104 NYS 415. An original parol agreement that a building to be affixed to land should remain personalty may be shown, but in the absence of such agreement the building cannot be converted into personalty by any subsequent verbal agreement without a severance. Barnes v. Hosmer [Mass.] 82 NE 27.

62. Agreement was partly in writing and partly parol, but was enforced as it had been performed. Jones v. Jones, 118 App. Div. 148, 103 NYS 141.

63. A landowner agreed with another that he would erect a building on his lot and that the other should place store fixtures in the lower story to remain there permanently, and that they should be rented together, the owner of the land receiving two-thirds of the rent and the other, one-third. Adams v.

road,[65] irrigation,[66] or mining purposes,[67] for restrictions on the use of land,[68] are all within the statute. So, also, parol agreements, with reference to boundary lines,[69] to judgment sales of land,[70] to releasing or waiving rights to redeem,[71] agreements to devise,[72] to accepting payment in land,[73] to bidding at a foreclosure sale,[74] are within the statute. A parol contract of partnership to buy or sell lands,[75] or to purchase an interest in such a partnership, is generally held to be within the statute,[76] but an agreement to consider partnership realty as personalty,[77] or to give the agent selling the lands a share of the profits, is not within the statute.[78] The statute does not apply to agreements extending the time for the performance of a contract of sale,[79] or to agreements with reference to the proceeds of sale of land,[80] and a

Weir [Tex. Civ. App.] 17 Tex. Ct. Rep. 905, 99 SW 726.

64. Check given for a passway in 1894, but contained no description sufficient to identify it. Jones v. Jones [Ky.] 101 SW 980. Right to construct and use a wagon road for transporting timber from a tract of land. Storseth v. Folsom [Wash.] 88 P 632.

65. Parol contract to convey land to a railroad for a right of way is within the statute. Cape Girardeau & C. R. Co. v. Wingerter, 124 Mo. App. 426, 101 SW 1113.

66. Bashore v. Mooney [Cal. App.] 87 P 553. Here not a case of a revocable parol license, but plaintiff had acquired a prescriptive right to it.

67. Tunnel to a mining claim. Laesch v. Morton [Colo.] 87 P 1081.

68. Oral modification of lease for five years that lessee should only sell on premises liquors made by the lessor, or goods imported, was a restriction on the use of land. Mausert v. Christian Fergenspan, 68 N. J. Eq. 671, 64 A 801. To induce sale of land owner orally agreed that no buildings other than one-family dwellings should be erected on remaining lots. Held that the erection of an apartment house could not be enjoined. Norton v. Kain, 121 App. Div. 497, 106 NYS 129.

69. Adjoining landowners orally agreed to exchange certain parcels of land separated from their respective main bodies of land by a road, though there had been no dispute as to boundary line. Mann v. Mann [Cal.] 91 P 994. Agreement giving to one party land included in deeds to the other as to which there had been dispute. Clarke v. Clarke, 28 Ky. L. R. 704, 90 SW 244. Possession in accordance with agreement will take the same out of the statute. Purtle v. Bell, 225 Ill. 523, 80 NE 350.

70. Oral agreement between judgment debtor and purchaser at sale that on payment of judgment debt by a certain date the land would be deeded back not enforceable where made after sale had been confirmed and purchaser had received his deed. Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Purdy [Ky.] 102 SW 303.

71. Taken out of statute by mortgagor receiving benefit, and mortgagee taking possession of the land. Ferguson v. Boyd [Ind.] 81 NE 71. Where mortgagor under deed absolute with collateral agreement giving right to redeem told mortgagee that he had abandoned the idea of redeeming, it did not affect the right to redeem. Sebree v. Thompson [Ky.] 104 SW 781.

72. An oral contract to devise and bequeath all her property, it not appearing that there was any real property, is not within the statute. Stewart v. Smith [Cal. App.] 91 P 667.

73. Part of agreed value of services to be performed was to be credited on purchase price of real estate thereafter to be conveyed. Murphy v. Adams, 8 Ohio C. C. (N. S.) 583.

74. Taken out of statute by execution of all that part of contract that was within the statute. Satterfield v. Kindley, 144 N. C. 455, 57 SE 145.

75. Each party was to take title to the timber lands for which he advanced the consideration, but to hold the same for the benefit of both, who were to share equally in the profits. Bill for an accounting dismissed. Nester v. Sullivan [Mich.] 14 Det. Leg. N. 235, 111 NW 85. The purchase was finally made by one who took title and paid the whole price, the other, having orally agreed to pay one-half thereof on demand, sued for an accounting, which was denied. Norton v. Brink [Neb.] 110 NW 669. The partnership was to purchase, develop, and sell lands. One paid the purchase price and took title and orally agreed to convey a half interest to the other on his paying his share. This was unenforceable. Pounds v. Egbert, 117 App. Div. 756, 102 NYS 1079.

76. Plaintiff verbally promised defendant to furnish him money to purchase the interest of his partner in a lumber business necessarily involving the holding of real estate and to hold the same for him. Butts v. Cooper [Ala.] 44 S. 616.

Contra: Existence of partnership to buy and sell land and the respective interests of the partners may be proved by parol. Miller v. Ferguson [Va.] 57 S. E. 649. Oral partnership for dealing in options of coal lands will not prevent one partner from recovering his share of the profits. Williams v. Kendrick, 105 Va. 791, 54 SE 865.

77. Partnership for purpose of buying and selling real estate. Buckley v. Doig, 188 N. Y. 238, 80 NE 913.

78. Under oral contract one undertook to purchase land, to take charge of, rent, and procure purchasers therefor, the titles to be taken in the name of another who furnishes the money and the net profits are to be equally divided. Rice v. Parrott [Neb.] 111 NW 583.

79. Agreement for extension of time for closing a sale of land under written contract may be by parol, as it is in the nature of a waiver. Kissack v. Bourke, 224 Ill. 352, 79 NE 619.

80. When plaintiff conveyed property to defendant it was orally agreed that, if the latter resold at a profit instead of building,

purchaser may sue to recover purchase price of land conveyed under an oral contract.[81] An oral agreement that a deed should operate as a mortgage is not within the statute.[82] Prior to 1840, verbal sales were recognized under the civil law of Texas.[83] An agreement of several adjoining owners to jointly erect a pumping station does not affect title to land.[84]

§ 8. *Sale of goods.*See 7 C. L. 1832—Agreements for the sale of goods for the price of fifty dollars or more are within the statute.[85] In some states the English rule is followed that if the contract results in the sale of a chattel, though involving work and labor, it is within the statute,[86] in others the contrary result is reached.[87] The statute does not cover partnership agreements,[88] or a broker's agreement to buy corporate stock for his customer,[89] or an agreement to protect a chattel mortgagor on the sale of his goods at auction by buying the same.[90]

§ 9. *Trusts.*See 7 C. L. 1832—Constructive trusts are not within the statute.[91] An absolute deed may always be shown to be a mortgage.[92] So a parol contract to redeem made before or at time of an execution sale[93] or a parol agreement of one joint owner to bid in at public sale is not within the statute.[94] Though statute forbids resulting trusts, one who furnished consideration may recover his proportion,[95]

the former should have the profit. Bourne v. Sherrill, 143 N. C. 381, 55 S. E. 799. An oral contract for the payment of balance from the sale of land, in consideration of an executed release of an inchoate right of dower, is valid. Lyttle v. Goldberg, 131 Wis. 613, 111 NW 718. A grantor, while incapacitated, executed a deed for an express consideration which was not paid. To avoid suit the grantee orally agreed to pay grantor for life one-half of the crops. Johnson v. Johnson, 31 Utah, 408, 88 P 230.

81. Oral contract for sale of land. Purchaser may recover the price he has paid and the value of the improvements which he has made. Burleson v. Tinnin [Tex. Civ App.] 100 SW 350.

82. De Bartlett v. De Wilson [Fla.] 42 S 189. Absolute deed intended as security, defeasance resting in parol. Linkemann v. Knepper, 226 Ill. 473, 80 NE 1009. Deed from a son to his father. Abrams v. Abrams, 74 Kan. 888, 88 P 70. See infra, § 9.

83. A parol transfer of a certificate for land issued by the state is good if made before the land was surveyed and located. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 SW 192.

84. Boone v. Rickard, 125 Ill. App. 438.

85. Sale of flock of sheep for $400. Ladnier v. Ladnier [Miss.] 43 S 946. Verbal sale of lumber amounting to $275 will not pass the title. Silkman Lumber Co. v. Hunholz [Wis.] 112 NW 1081.

86. Customer orally contracted with a tailor to make him a coat and vest of peculiar pattern and design, and the English rule (Lee v. Griffin, 1 B. & S. 272) followed that it was not a contract for work and labor. Schmidt v. Rozier, 121 Mo. App. 306, 98 SW 791.

87. Defendant agreed to transport plaintiff's logs to its mill, saw the same into lumber, sell the same, and pay plaintiff $5 per M, and divide the balance equally. Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 NW 237.

88. An oral agreement between two parties to join in the purchase and sale of a carload of hogs and share the profits and losses is not an agreement for a sale of goods. McNealy v. Bartlett, 123 Mo. App. 58, 99 SW 767.

89. A mere contract of agency authorizing the agent to purchase from a third party for his principal. Wiger v. Carr, 131 Wis. 584, 111 NW 657.

90. Creditor induced debtor to give a mortgage of his goods on oral promise that if they did not sell at auction for a certain sum he would bid them in for that sum and allow debtor to dispose of them at private sale, retaining any surplus above the debt. Cerny v. Paxton & Gallagher Co. [Neb.] 110 NW 882.

91. They are founded on the doctrine of estoppel. Griffin v. Schlenk [Ky.] 102 SW 837. Where plaintiff furnished defendant money to buy for him his partner's interest in land business, evidence held not to show either a resulting or a constructive trust. Butts v. Cooper [Ala.] 44 S 616. Where plaintiff was to receive under an oral agreement for land that he had sold defendants one-third of what it subsequently sold for above fixed sum, and held not to create a trust in same. Allen v. Rees [Iowa] 110 NW 583.

92. The relations between the parties may be considered in determining the question. De Bartlett v. De Wilson [Fla.] 42 S 189. Defendant who was surety for complainant paid the debt and took in return an absolute conveyance of the mortgaged property under parol agreement to receive rent for interest and to reconvey within five years if complainant paid the debt. Linkemann v. Knepper, 226 Ill. 473, 80 NE 1009.

93. Oral contracts to redeem create a trust and are valid. Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Purdy [Ky.] 102 SW 303.

94. Where joint owners of mortgaged land agreed that one of them should bid it in at the sale for the benefit of all, it created a trust for the benefit of all, and it was immaterial that the purchaser was not paid in advance by the others. Griffin v. Schlenk [Ky.] 102 SW 837.

95. A husband furnished the money and title of land was taken in wife's name under an agreement that the rents should be used to support them and their children and, she

for where a trust is executed in part it is taken out of the statute.[96] A grantee may execute a parol trust,[97] and third persons cannot object that a trust is not in writing.[98]

§ 10. *What will satisfy the statute. A. Writing. Contracts not performable within a year.* See 7 C. L. 1833—The writing must state the consideration [99] and must be signed [1] by both parties,[2] though it is sufficient if one of the writings be signed by one of the parties.[3] The contract cannot be partly written and partly oral,[4] but a renewal of a written contract may be by parol.[5] The usual pawnbroker's receipt is a sufficient memorandum of the contract to redeem.[6]

Sale of goods. See 7 C. L. 1833—The memorandum must be signed [7] by the party to be charged [8] and must state the price,[9] though every detail need not be in writing at the time the contract is made.[10] A writing may be sufficiently definite though a parol explanation of trade terms might be necessary.[11] The contract may be in several writings,[12] but there must be a written acceptance of the offer.[13] That the memorandum was written after the sale and repudiates liability makes no difference.[14]

having driven him away, he could recover his proportion of the price paid by him. Brooks v. Brooks [Ky.] 104 SW 392.

96. Wife orally agreed that rents of land paid for by her husband, but deeded to her, should be used to support the family, and she performed the agreement until separation. Brooks v. Brooks [Ky.] 104 SW 392.

97. Smith v. Ellison, 80 Ark. 447, 97 SW 666. Courts will protect grantee in performing his moral obligation, and a conveyance to the beneficiary will not be a fraud on his creditors who have no legal right to ask him to hold property to which he has no moral right. Id.

98. Lease for mining ground was taken in name of one of three persons jointly interested who could sue alone as trustee of an express trust. Geer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151.

99. Texarkana Lumber Co. v. Lennard [Tex. Civ. App.] 19 Tex. Ct. Rep. 683, 104 SW 506, rvg. 16 Tex. Ct. Rep. 821, 94 SW 383.

1. Contract, not signed, but orally assented to, which was to continue during the life of certain patents which had more than one year to run, was within the statute. Warth v. Kastriner, 104 NYS 1056.

2. Contract for purchase of stock signed by purchaser. Vendor was not allowed to sue for its breach. McIlroy v. Richards, 148 Mich. 694, 13 Det. Leg. N. 286, 112 NW 489.

3. At defendant's request plaintiff sent it a contract for services to be rendered for a year, specifying compensation to be paid in advance. Defendant under its signature acknowledged receipt of contract and forwarded checks for same. General Elec. Inspection Co. v. Ebling Brew. Co., 52 Misc. 145 101 NYS 648.

4. Necessary that entire contract be in writing, but here question was waived by answer. Hamilton v. Miller Brew. Co., 125 Mo. App. 579, 102 SW 1088.

5. Byrne Mill Co. v. Robertson [Ala.] 42 S 1008. Written contract for the sale of lumber provided that it should be in force one year, and that purchaser might renew it for five years additional, and held that the exercise of the option need not be in writing. Id.

6. Receipt for diamond ring for loan of $50 stated that if loan were repaid within one year $15 should be paid for use of money, if not then $25 was to be paid. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P 947.

7. But a verbal employment of a stockbroker is not merged into a written agreement by the broker giving an unsigned ticket of the purchase or sale to his customer after the deal. Picard v. Beers [Mass.] 81 NE 246.

8. A memorandum of offer to sell seed subscribed only by seller is sufficient in an action by buyer, as on acceptance the law implies a promise to pay. Bailey v. Leishman [Utah] 89 P 78.

9. Memorandum for sale of onions over $50 in value insufficient where price not stated and no proof of acceptance of goods. Kemensky v. Chapin, 193 Mass. 500, 79 NE 781. "Please ship me * * * twenty-five sacks of bolted meal." Glasgow Mill. Co. v. Burgher, 122 Mo. App. 14, 97 SW 950.

10. Only necessary that some memorandum shall be in writing before suit is brought. Purdon Naval Stores Co. v. Western Union Tel. Co., 153 F 327.

11. There had been a written contract to sell glass between the parties, when plaintiff offered to renew the same at present prices, but if there was a reduction in prices he would modify the prices accordingly. Flash v. Rossiter, 116 App. Div. 880, 102 NYS 449.

12. Seller sent buyer a detailed written order for goods, and buyer by signed letter in reference to confirmation of order cancelled a part thereof, and it was held a sufficient memorandum as to the balance. Myers v. Harris, 104 NYS 514.

13. Traveling salesman took orders which stipulated that they were subject to the approval of the principal, and as they amounted to mere offers they could be withdrawn before acceptance in writing. Cable Co. v. Hancock [Ga. App.] 58 SE 319.

14. Buyers of goods returned invoice in letter and said that goods sold did not come up to sample, and that they refused the same, the correspondence showing that the terms of sale were not in dispute, but only the quality of the goods. Spencer Turner Co. v. Robinson, 105 NYS 98.

Contracts for the sale of land. See 7 C. L. 1833—The memorandum must describe the land [15] though parol evidence is admissible to identify the same.[16] The memorandum need not specify the interest to be conveyed,[17] but it must state the essential facts,[18] though it need not contain all collateral agreements.[19] It must state the full consideration,[20] which may be sufficiently described as a note.[21] The memorandum must be signed by the party to be charged [22] or by his agent thereunto authorized in writing.[23] Such authority may be shown by the correspondence of the parties.[24] In some states, however, the authority of the agent is not required to be in writing to bind his principal [25] though necessary if the broker wishes to recover his compensation.[26] The signing by an authorized agent of his own name as agent is sufficient.[27] The principal may ratify the act of the agent [28] by oral statements.[29] One who has

15. "Received of A. F. Truesdell ten dollars in part payment of lot sold to him, he to pay balance, forty dollars, on delivery of deed, D. W. Burt;" and no averment that the land sold was the only land of defendant, and was insufficient. Miller v. Burt [Mass.] 82 NE 39. Check was given for a "passway," but contained no further description, and was held insufficient. Jones v. Jones [Ky.] 101 SW 980.

16. "Lots 2, 3, 4, 5, 10, 11, 12, 13, in block 62, Springfield," is sufficient, as they may be located by parol evidence. Conroy v. Woodcock [Fla.] 43 S 693.

17. Presumption that it is a fee simple. Conroy v. Woodcock [Fla.] 43 S 693.

18. Correspondence between parties as to long term lease never stated the length of the term. Simons v. New Britain Trust Co. [Conn.] 67 A 883. Defendant's letter set out all the terms of the oral contract to lease except that of furnishing a guarantor, and it was held not to be a memorandum of the contract sued on. Bozigian v. Booklover's Library, 193 Mass. 444, 79 NE 769.

19. Plaintiff conveyed land to defendants and in addition to consideration expressed in deed it was orally agreed that if land was subsequently sold above a certain sum plaintiff should have one-third of the excess, and the oral agreement was enforceable. Allen v. Rees [Iowa] 110 NW 583.

20. "Received of Bradley Real Estate Co. twenty-five dollars, part payment on lot 1, block 8, in town of Muskogee. E. L. Robbins," is insufficient. Bradley Real Estate Co. v. Robbins [Ind. T.] 103 SW 777.

21. Part by note and "Balance to be paid in one, two, and three years at 6 per cent. interest" is sufficient. Conroy v. Woodcock [Fla.] 43 S 693.

22. Boehly v. Mansing, 52 Misc. 382, 102 NYS 171. Contract for sale of standing timber to be cut in the future, under which plaintiff had cut a few trees, but which had not been signed by defendant or her agent. Suit was brought by defendant on contract, but this did not ratify the same as there was no showing that the attorney was authorized to bring the same. King v. Cheatham [Ky.] 104 SW 751. Unsigned draft of lease of premises for six years at a rental of $3,000. Clement v. Young Amusement Co. [N. J. Err. & App.] 65 A 185. If the promise is by a corporation the writing must show execution in its behalf. Individual signatures of directors insufficient. Taylor v. Scott & Co., 149 Mich. 525, 14 Det. Leg. N. 503, 113 NW 32.

23. The correspondence between two persons showed a sale of land, but that one of them was acting merely as agent, and in no way disclosed the name of his principal, and it was insufficient to take the case out of the statute. Mertz v. Hubbard [Kan.] 88 P 529. The contract held not to show any promise to execute a conveyance, but merely a parol license to use lands. Detroit, P. & N. R. Co. v. Hartz, 147 Mich. 354, 13 Det. Leg. N. 1086, 110 NW 1089. Does not affect question of agent's compensation. Young v. Ruhwedel, 119 Mo. App. 231, 96 SW 228. Where statute expressly provides that no contract for the sale of lands made by an agent shall bind his principal unless the agent is authorized in writing, a written authority to an agent from a husband to sell his wife's lands is insufficient. Kirkpatrick v. Pease, 202 Mo. 471, 101 SW 651. Lease for more than three years, signed by an agent without written authority, is only effective as a lease at will. Clement v. Young-McShea Amusement Co. [N. J. Err. & App.] 67 A 82.

24. Owner wrote to his agent "I hope, Parrott, we can sell it soon or by spring," and in another letter "Yes, Parrott, I always keep my word. You are to have one-half of the profits * * * in the Copsin farm," and it was held sufficient. Harrison v. Rice [Neb.] 111 NW 594.

25. Where a deed made by an agent was ineffective because of lack of a sufficient power of attorney, it was valid as a contract of sale as the agent had sufficient oral authorization. Godsey v. Standifer [Ky.] 101 SW 921.

26. Specific performance enforced against principal at the suit of purchaser though agent's authority was only oral. Roberts v. Hilton Land Co. [Wash.] 88 P 946.

27. Agent for purchaser who was duly authorized in writing. McCullough v. Sutherland, 153 F 418.

28. Owner who corresponded with agent, knew he was acting for her in selling her land and in making deed, and accepted the full purchase price, ratified the contract. Kirkpatrick v. Pease, 202 Mo. 471, 101 SW 651. Agent had no authority to execute a contract of sale, but it was ratified where he immediately informed the principal and remitted the money which was retained. Roberts v. Hilton Land Co. [Wash.] 88 P 946.

29. Agent who signed contract of sale had no written authority, but the attorney for the purchaser was orally informed that agent was authorized and to see him in

himself signed a lease is estopped to assert that it is within the statute because the authority of the agent who signed for the other party is not shown.[30] Though the original contract was verbal,[31] it may be reduced to writing [32] in the form of a receipt,[33] or in letters to a third person,[34] or in separate writings [35] if they refer to each other.[36] The memorandum must always purport to be made between the parties to the contract.[37]

To answer for the debt of another or to indemnify or insure. See 7 L. C. 1835—It is not necessary that the writing should use any particular words so long as a guaranty may be fairly implied from its terms.[38] The consideration should be expressed.[39] Where the guaranty is made at the same time as the original contract, it is sufficient that the original states a consideration.[40] The word guaranty imports a concurrent act and that there was consideration. The signing of the guarantor's surname is a sufficient signing. No time of payment need be stated.[41] Part performance will take the case out of the statute.[42]

(§ 10) *B. Delivery and acceptance.* See 7 C. L. 1835—Delivery and acceptance of any part of the goods takes the entire contract out of the statute.[43] The receipt of goods by carrier, or giving directions to him,[44] or the examination of goods for purpose of inspection, is not an acceptance such as to take the case out of the statute,[45]

reference to the matter. Gregg v. Carey [Cal. App.] 88 P 282.

30. Bowman v. Powell, 127 Ill. App. 114.

31. Letter of defendant's agent to defendant stating that he had given plaintiffs a receipt for the purchase price of certain land and that he desired a receipt from defendant was insufficient. Winders v. Hill, 144 N. C. 614, 57 SE 456.

32. When the purchase price is paid, the leaving of a properly executed deed with the attorney of the grantor satisfies the statute of frauds. Robbins v. Porter, 12 Idaho, 738, 88 P 86.

33. Receipt stated that owner had received from person named a specified sum in part payment on land therein described and which specified the price, and could be enforced by the vendor though the purchaser's promise was oral. Boehly v. Mansing, 52 Misc. 382, 102 NYS 171.

34. Negotiations embodied in twenty-two letters between parties and their agents. Nicholson v. Dover [N. C.] 58 SE 444.

35. The contract stated: "Anderson to receive 2100.00 of Schneider * * *, to leave everything on the farm and to give possession Oct. 1, 04," but an undelivered deed held in escrow, but executed at same time fully identified the land. Schneider v. Anderson [Kan.] 88 P 525.

36. Letters and telegrams which did not describe the property or state the consideration were relied on in connection with a deed prepared by agent, but were insufficient as they could not be connected by parol. Patt v. Gerst [Ala.] 42 S 1001.

37. Written contract between C. and Y. is not evidence of a contract between C. and a corporation. Clement v. Young-McShea Amusement Co. [N. J. Err. & App.] 67 A 82.

38. Letter requesting bank to permit son to make overdrafts up to $500 to buy livestock with, and hoping the bank would accommodate both, was sufficient. Miami County Nat. Bk. v. Goldberg [Wis.] 113 NW 391.

39. Miami County Nat. Bk. v. Goldberg [Wis.] 113 NW 391. Defendant signed agreement whereby he assumed one-half of the liability of another under a guaranty contract executed by the latter for the benefit of plaintiff, but no consideration was expressed. Klee v. Stephenson, 130 Wis. 505, 110 NW 479. Written agreement of father to guarantee the payment for a course of instruction taken by his minor son was void for failing to express consideration. International Text-Book Co. v. McKone [Wis.] 113 NW 438.

40. "We * * * hereby personally guarantee the faithful performance of the within contract, as per terms therein set forth," held to show on face that the contracts were contemporaneous, and that the consideration of the original was adopted in the collateral contract. Merritt v. Coffin [Ala.] 44 S 622.

41. Across a bill for printing done for another person was written "Guaranteed. Belcher," and it was sufficient. Great Western Printing Co. v. Belcher [Mo. App.] 104 SW 894.

42. Contract of employment of traveling salesman provided he was to have 50 per cent of profits on sales made by him and pay 50 per cent of losses on customers with whom he dealt, and after receiving share of profits he cannot object to paying share of losses, as it is not within statute. Meyer-Bridges Co. v. Badeau [Miss.] 43 S 609.

43. Oral contract to deliver 1,200 bushels of corn. Fifty-two bushels were in fact delivered. Gabriel v. Kildare Elevator Co., 18 Okl. 318, 90 P 10.

44. Onions were delivered by seller to railway selected by purchaser, and later the purchaser, after notifying seller that they would not accept the goods, directed the transfer of the car of onions to the general yard of the railway. Kemensky v. Chapin, 39 Mass. 80, 79 NE 781.

45. Buyer of onions on arrival of car opened bags for inspection. Kemensky v. Chapin, 193 Mass. 500, 79 NE 781.

the question of acceptance being really a question of intention.[46] A constructive acceptance insufficient where terms of the contract are indefinite.[47]

(§ 10) *C. Part payment and earnest money.*See 7 C. L. 1836—Part payment of the purchase price under an oral contract for sale of land does not take the case out of the statute.[48] A check may be accepted as earnest money.[49]

(§ 10) *D. Part performance. Contracts for the sale of land.*See 7 C. L. 1836—An oral contract for conveyance of land is valid in many jurisdictions where plaintiff has fully performed,[50] as by paying the consideration and taking possession of the land,[51] and by making lasting improvements thereon,[52] or otherwise changing his position,[53] provided this is done in full reliance on the oral contract[54] and is not referable to some other contract or lease between the parties.[55] Part performance under a verbal lease, sufficient to take the same out of the statute of frauds, obtains in equity only, and will not avail to render the contract capable of being sued on in

46. When goods arrived the purchaser paid the freight both ways and at once reshipped to the seller, held he should have been allowed to testify as to his intent. Jarrell v. Young, Smyth, Field Co. [Md.] 66 A 50. In sale of corporate stock the delivery to the purchaser of an order for the stock and his tendering his note, which was refused, did not show an acceptance and delivery. McIlroy v. Richards, 148 Mich. 694, 13 Det. Leg. N. 286, 112 NW 489.

47. Delivery and acceptance of three pet sheep about the house does not take contract for sale of flock of sheep in the woods range out of the statute. Ladnier v. Ladnier [Miss.] 43 S 946.

48. Instructions in case held not prejudicial. German Nat. Bk v. Laflin [Neb.] 111 NW 578.

49. Broker with authority to sell received a check of $50 on a contract of sale and transmitted the same to his principal. Chouteau Land & Lumber Co. v. Chrisman, 204 Mo. 371, 102 SW 973.

50. In consideration of plaintiff's caring for the owner of land for life, the latter agreed that at his death the land should belong to them, and they fully performed. Powers v. Crandall [Iowa] 111 NW 1010. Contract for sale of interest in mining claims completely performed by purchaser and nearly performed by vendor before his attempted repudiation of it. Ferguson v. Blood [C. C. A.] 152 F 98. Defendant, stockholder of an insolvent corporation, agreed with creditor to buy land at foreclosure sale at price sufficient to pay debts in full, but did not though creditors relied on his promise and refrained from bidding. Satterfield v. Kindley, 144 N. C. 455, 57 SE 145.

51. In parol sale of railroad and coal mining corporation, purchasers paid for and took over the railroad. McCullough v. Sutherland, 153 F 418. Complainant bought lots for $300, paid price, and was put in possession by vendor who promised to convey, but instead mortgaged to a third person. City Loan & Banking Co. v. Poole [Ala.] 43 S 13. Agent closing a land sale gave check to a third person to await delivery of deed, and the purchaser being authorized to take possession and go ahead did so by renting it and utilizing the timber. Arkadelphia Lumber Co. v. Thornton [Ark.] 104 SW 169. Defendant railway purchased of owner land under parol agreement and, having paid full purchase price and entered into possession by constructing railway, it was entitled to enjoin a subsequent purchaser from bringing ejectment against it. Atlantic City R. Co. v. Johanson [N. J. Eq.] 65 A 719. Wife deeded a portion of her farm to her husband in pursuance of oral agreement that he was to join in deeding the remainder to her children who took possession of same. Kittredge v. Kittredge, 79 Vt. 337, 65 A 89.

52. Abrams v. Abrams, 74 Kan. 888, 88 P 70. Where purchaser under an oral agreement to convey land has invested money and made permanent improvements, the statute does not apply. Crane v. Cheney [Kan.] 91 P 67. A railroad entering on land under parol contract of owner to convey and taking possession and constructing its road is entitled to sue for breach of contract. Cape Girardeau & C. R. Co. v. Wingerter [Mo. App.] 101 SW 1113. Equity will enforce an irrevocable parol license to construct and use a wagon road for transporting timber from a tract of land where the licensee has paid the consideration and the road is constructed. Storseth v. Folsom [Wash.] 88 P 632.

53. Oral purchase of a passway in 1894, which had been used ever since, and a former passway by a lane was closed up. Jones v. Jones [Ky.] 101 SW 980. Vendor who has given deed may recover the unpaid purchase price. Knight v. Collings, 227 Ill. 348, 81 NE 346.

54. Under lease of coal land, lessor advanced money on oral promise to be repaid in coal, and was held to have an equitable lien enforceable in bankruptcy. Atchison, etc., R. Co. v. Hurley [C. C. A.] 153 F 503. Plaintiff was in possession already under a valid lease and a parol long time extension could not be enforced. Simons v. New Britain Trust Co. [Conn.] 67 A 883. In a sale to a tenant in common, her continued possession of the land will not take the case out of the statute. Harper v. Gorley [Ga.] 57 SE 695. Payment of purchase-money followed by delivery of possession, but contract not clearly alleged. Maloy v. Boyett [Fla.] 43 S 243. Purchase of two movable machines or removing partitions from other premises does not show part performance of long time oral lease. Clement v. Young Amusement Co. [N. J. Err. & App.] 65 A 185.

55. Oral promise to convey land to tenant for $25 an acre who merely continued in possession. Steger v. Kosch [Neb.] 110 NW 983.

a court of law.[56] To defeat fraud equity will compel the performance of such contracts,[57] where they are established by clear and cogent evidence,[58] though not necessarily beyond a reasonable doubt.[59] Where one party has fully performed the other party has the right to do so.[60] Part payment alone,[61] or the making of slight changes [62] or removable improvements, will not take a case out of the statute.[63] A parol partition [64] or boundary agreement followed by possession renders them enforceable.[65] A void parol lease followed by possession will create a tenancy from year to year.[66] In case of an oral contract to devise lands, the beneficiary having fully performed [67] is sometimes allowed specific performance,[68] and at other times is compensated in damages.[69] To an invalid instrument of adoption may be good where there is part performance by surrender of child.[70] The right to redeem may be lost by parol agreement where it is inequitable to permit redemption.[71] If the agreement is not reduced to writing on account of the fraud of the other party, it is nevertheless enforceable.[72]

56. Breuer v. Berold, 9 Ohio C. C. [N. S.] 350.

57. Sale of a railroad and coal mining corporation. McCullough v. Sutherland, 153 F 418. Parol agreement for a right of way made as an inducement to purchase land on which he had made valuable improvements. Burrell v. Middleton [N. J. Eq.] 65 A 978.

58. Maloy v. Boyett [Fla.] 43 S 243. Evidence did not support right to tunnel to a mining claim. Laesch v. Morton [Colo.] 87 P 1081. Preponderance of unambiguous evidence showed that an aged man worth $13,000 had made a reasonable contract with a woman of his own nationality to make her a testamentary gift of property worth about $1,600 in return for her care and attention during his last days. A will was drawn in accordance with it, and the estate which passed by a subsequent varying will was chargeable with the performance of the contract. Berg v. Moreau, 199 Mo. 416, 97 SW 901.

59. Complainant entered under parol contract of lease with an option to purchase, paid rent in advance, and made permanent improvements. West v. Washington & C. R. R. [Or.] 90 P 666.

60. Plaintiff having performed services under an oral contract by which he was to be paid in land cannot recover therefor on an implied assumpsit when defendant was willing to perform specifically. Colorado Lumber, Land & Improvement Co. v. Dustin [Colo.] 87 P 1142.

61. Defendant orally agreed to convey an interest in land to plaintiff on his making payment, but the case is not taken out of the statute by plaintiff's making payment, or by his buying neighboring land to enhance its value, or by his doing other services at defendant's request, but without ever having possession of the land. Pounds v. Egbert, 117 App. Div. 756, 102 NYS 1079.

62. Removal of partition and purchase of two movable machines. Clement v. Young Amusement Co. [N. J. Err. & App.] 65 A 185.

63. Parol lease from year to year, beginning in the future, and entry and occupancy, did not fully perform the same. Wessells v. Rodifer, 30 Ky. L. R. 51, 97 SW 341.

64. Parol division of lands by children on death of parent. Sires v. Melvin [Iowa] 113 NW 106. Partition agreement partly in writing and partly parol, and parties took and remained in possession of their respective portions. Equity will require them to execute the necessary conveyances. Jones v. Jones, 118 App. Div. 148, 103 NYS 141.

65. Possession in pursuance of parol agreement will be binding on parties, but, where they merely endeavored to ascertain the exact line and made a mistake, the agreement is not binding. Burtle v. Bell, 225 Ill. 523, 80 NE 350.

66. Though statute provided that a tenancy created by an oral contract for a term of years shall have the force of an estate at will. Ray v. Blackman, 120 Mo. App. 497, 97 SW 212.

67. Powers v. Crandall [Iowa] 111 NW 1010. Where testatrix orally contracted with her children that if they would convey to her their intersts in their father's estate she would leave them all her property at her death and they did so convey, the contract was enforceable. Stewart v. Smith [Cal. App.] 91 P 667.

68. Plaintiff entered home of her grandaunt under express oral agreement that she would by will, or otherwise, leave her all her property. Plaintiff did all the work and fully performed her part of the contract, was not allowed to recover damages from the administrator but could have specific performance against the heirs. Hall v. Getman, 121 Mo. App. 630, 97 SW 607.

69. Complainant took care of and supported sister under parol contract that she should have all her property at her death. The sister duly made her will to that effect, but it was impliedly revoked by her marriage and the birth of issue. Grindling v. Rehyl, 149 Mich. 641, 14 Det. Leg. N. 572, 113 NW 290.

70. Parties in consideration of surrender of child agreed to accept duties of parents to the child and that it should have all the rights of inheritance of a lawful child. Chehak v. Battles, 133 Iowa, 107, 110 NW 330.

71. Where the mortgage was by absolute deed and collateral written agreement to recovery, the right to redeem was lost under parol agreement where mortgagor had received the benefits he was entitled to and there had been long delay and mortgagee had taken possession. Ferguson v. Boyd [Ind.] 81 NE 71.

72. Defendant led plaintiff to believe that he had signed a contract for sale of mining

*Parol gifts of land.*See 7 C. L. 1838—Parol gifts unaccompanied by possession are utterly void,[73] but they will be upheld in equity where the donee has gone into possession and made permanent improvements [74] of substantial value during life time of donor and with his acquiescence,[75] or where donee was induced to forego a benefit,[76] or where the denial of relief would operate as a fraud on the donee.[77] The parol gift of land must be shown by clear and unequivocal, though not necessarily undisputed, evidence,[78] and improvements must be made in reliance thereon.[79] Possession and valuable improvements made by a life tenant will take both life estate and remainder out of statute.[80]

*Contracts not performable within a year.*See 7 C. L. 1838—Where both parties have fully performed an oral contract to extend a mortgage [81] or of employment,[82] neither can afterwards allege its invalidity. Part performance will not always validate an oral contract.[83]

*Contracts for sale of goods.*See 7 C. L. 1839—If there has been no change of physical possession, the sale is within the statute,[84] but an actual change of possession, though not consented to, will take the sale out of the statute.[85]

§ 11. *Operation and effect of statute.*See 7 C. L. 1839—The law of the state where the oral contract was made determines whether the statute applies or not.[86]

claims, and the latter acted on such belief. Ferguson v. Blood [C. C. A.] 152 F 98.

73. Defendant in ejectment claimed to hold land under parol gift from plaintiff's testator who remained in possession and paid taxes until his death. Wood v. Praul, 217 Pa. 293, 66 A 528.

74. Donee went into possession, paid no rent, paid taxes, and erected a substantial home for himself. Bevington v. Bevington, 133 Iowa, 351, 110 NW 840. Son took possession of 160 acres under parol gift from father and held and paid taxes for nine years, until his death. Sires v. Melvin [Iowa] 113 NW 106.

75. The improving of two city lots by repairing fence and planting a few fig trees and rose bushes if not to exceed $10 in value did not take a parol gift out of the statute. The building of a woodshed and chicken house after donor's death was immaterial. Hutcheson v. Chandler [Tex. Civ. App.] 104 SW 434.

76. Defendant's ward orally agreed with complainant, if he would continue in partnership, to buy him a home near the place of business which he should live in rent free until the ward's death, and then it should become the sole property of complainant. Buhler v. Trombly, 139 Mich. 557, 102 NW 647, 108 NW 343.

77. Niece accepted offer of uncle of house and lot made to induce her to live near him, and lived in the same three years before the uncle's death when arrangements had nearly been completed for the conveyance of the lot. White v. Poole [N. H.] 65 A 255.

78. Gift of fee simple shown by facts of possession, rent free, erection of permanent improvements, relationship of parties, and declarations of deceased. Bevington v. Bevington, 133 Iowa, 351, 110 NW 840.

79. Evidence that complainant moved on land at her brother's request, which he said he would give her for a home, and would give her a deed, that until such time she was to give one-third of the crops, that it was not certain what estate she was to have or when the conveyance was to be made, and that she only expended $150 on the premises was insufficient to establish the gift. Logue v. Langan [C. C. A.] 151 F 455.

80. Gift must be immediate and absolute and proved by clear and unequivocal evidence. Here failure to prove gift of land to one for life, with remainder to her children. Sombest v. Wall [Tex. Civ. App.] 18 Tex. Ct. Rep. 498, 102 SW 147.

81. The agreement to extend a mortgage for more than one year is valid, though no consideration was expressed, where the same was fully performed by the mortgagor, and will prevent the statute of limitations from barring a foreclosure. Trudeau v. Germann [Minn.] 112 NW 281.

82. Oral contract for employment for more than one year had been voluntarily performed by both parties, and had been orally renewed, and, though originally unenforceable, it fixed the rate of compensation. Schrader v. Fraenckel, 117 App. Div. 97, 102 NYS 335.

83. Oral contract of employment for one year, to begin at a future date, ineffective though part performed. San Antonio L. & P. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867. Under parol contract of leasing which required lessee to seed, evidence was admissible to show that he had done the required seeding, in an action to evict him. Jones v. Com. [Ky.] 104 SW 782.

84. Where subject of sale is in possession of the vendee as bailee, the mere oral agreement for sale does not work a change of possession and take case out of the statute. Silkman Lumber Co. v. Hunholz [Wis.] 112 NW 1081.

85. On sale of saloon furniture, vendor refused to deliver possession until paid, but the purchaser took possession during the former's absence, which was afterwards acquiesced in, and was in effect an actual delivery. Freyberg v. Los Angeles Brew. Co. [Cal. App.] 88 P 378.

86. Contract for sale of 35,000 barrels of cement at over $1 a barrel not within Illinois statute where contract was made.

The statute does not apply to declarations [87] or waivers.[88] The statute has no application where an oral contract has been fully performed on both sides,[89] neither can the benefit of the statute be claimed by strangers to the contract.[90] A modification of a contract need not be in writing where the original was not required to be in writing,[91] and that part was reduced to writing does not prevent the admission of parol evidence to show the whole agreement.[92] But when a contract is required to be in writing, it cannot be enforced unless all the terms are reduced to writing.[93] It cannot be varied by parol evidence [94] except to show a modification of a detail of performance,[95] but parol evidence may be resorted to to show the situation of the parties and the circumstances under which the writing was made.[96] Though a contract is unenforceable, certain provisions may be binding,[97] as that fixing the rate of compensation,[98] and where fully performed one may have a right to recover the compensation,[99] or to recover on an implied contract for the consideration furnished [1] or the improvements made.[2] An oral promise to devise in consideration of

Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F 641.

87. A married woman told plaintiff that he might treat as signed by her any notes to which her name was signed by her husband, and was bound thereby, as it was not a promise to do or perform anything. Arnold v. Hopper [Kan.] 91 P 76.

88. Parol extension of time of closing written contract for sale of land. Kissack v. Bourke, 224 Ill. 352, 79 NE 619.

89. Contract to extend a mortgage. Trudeau v. Germann [Minn.] 112 NW 281. An oral promise within the statute cannot be avoided after performance. Blackwell v. Blackwell [Mass.] 81 NE 910. Contract for services for more than one year. Schrader v. Fraenckel, 117 App. Div. 97, 102 NYS 335.

90. Telegraph company cannot have benefit of statute in suit for failing to deliver a message sent by plaintiff accepting an offer for sale of property from another party. Purdom Naval Stores Co. v. Western Union Tel. Co., 153 F 327.

91. Contract for manufacture and sale of logs into lumber. Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 NW 237.

92. Customer verbally engaged broker to buy and sell stocks and received from him an unsigned ticket setting out the agreement. Picard v. Beers [Mass.] 81 NE 246.

93. Here construed to be a written contract, and not the reduction of a previous oral contract to writing, and proper to reject evidence of variance. Gate City Cotton Mills v. Cherokee Mills [Ga.] 57 SE 320. Contract not to be performed within one year. Hamilton v. Miller Brew. Co., 125 Mo. App. 579, 102 SW 1088.

94. Deed conveying rights to Indian allotments of land. Taylor v. Southerland [Ind. T.] 104 SW 874. See, also, Evidence, § 5, 9 C. L. 1228.

95. Lease of coal lands under which lessor was to be supplied with coal and pay the lessee on the fifteenth of the following month modified by oral agreement to advance money to be repaid by subsequent delivery of coal. Atchison, etc., R. Co. v. Hurley [C. C. A.] 153 F 503.

96. Where across a bill for printing posters for Michaels was written "Guaranteed. Belcher," it was shown that Michaels was indebted to plaintiff who declined to deliver the posters without a guaranty from defendant. Great Western Printing Co. v. Belcher [Mo. App.] 104 SW 894.

97. The provisions with respect to repairs amount to rent, and as to time for termination in a void parol lease for more than one year, were binding on the parties. Ray v. Blackman, 120 Mo. App. 497, 97 SW 212.

98. Oral contract for services for more than one year fully performed by employe. Schrader v. Fraenckel, 117 App. Div. 97, 102 NYS 335.

99. One gave services under parol contract to make a will. The will though made was impliedly revoked by marriage of testatrix and birth of issue. Grindling v. Rehyl, 149 Mich. 641, 14 Det. Leg. N. 572, 113 NW 290. Land conveyed pursuant to verbal contract, and may recover price. Knight v. Collings, 227 Ill. 348, 81 NE 346.

1. But no right of action on oral contract to pay bonus at end of term of employment. Price v. Press Pub. Co., 117 App. Div. 854, 103 NYS 296. Plaintiff having performed services for her greataunt on oral promise that she should have all her property, on the latter's dying without a will, plaintiff might maintain quantum meruit for her services. Hall v. Getman, 121 Mo. App. 630, 97 SW 607. Plaintiff conveyed land to defendant, his sister, on oral agreement that she should reconvey to him if he returned from sea and so requested, and he was entitled to recover the value of the property so conveyed. Cromwell v. Norton, 193 Mass. 291, 79 NE 433. Under Rev. St. § 3744, requiring contracts made on behalf of the government to be in writing, an oral direction of an officer to a contractor to prepare tugs and lighters and be ready to do lighterage for vessels expected to arrive shortly, followed by his getting the tugs, was not a valid contract. Johnston v. U. S., 41 Ct. Cl. 76.

2. Void oral lease of farm for five years. At end of four years tenant was dispossessed, but was allowed $99.92 for the value of permanent improvements which he had made. Poole v. Johnson [Ky.] 101 SW 955. Purchaser under oral contract for sale of land may recover price paid and value of improvements he had made where the vendor's title was defective. Burleson v. Tinnin [Tex. Civ. App.] 100 SW 350.

services though within the statute, is admissible to rebut the presumption that the services were gratuitous and raise an implied contract.[3] A subsequent new contract may be enforceable notwithstanding the existence of a prior invalid oral contract.[4]

§ 12. *Pleading and proof.* See 7 C. L. 1840—The law of the state where the contract was made controls both in the state[5] and the Federal courts.[6] Where a pleading sets up a contract which is required to be in writing to be valid, it will be presumed to be in writing[7] unless the contrary affirmatively appears,[8] and it will be sustained on demurrer.[9] But where the pleading shows on its face that there is either no writing[10] or an insufficient writing,[11] it is demurrable or may be stricken out on motion.[12] A failure to argue demurrer will not waive defense.[13] The defense may be shown under a denial of the contract[14] or under the general issue.[15] Failure to object to evidence of the oral contract[16] or an oral admission on argument does not waive the defense.[17] But so far as the answer admits the contract[18] it waives the statute.[19]

FRAUDULENT CONVEYANCES.

§ 1. The Fraud and its Elements (1509). Bulk Sales (1510). Consideration (1511). Retention of Possession or Apparent Title (1513). Reservation of Benefits and Resulting Trusts (1513). Fraudulent Intent and Evidence of Fraud (1514). Fraud in the Grantee and Notice to Him of Fraud (1515). Relationship of the Parties (1517). Preference to Creditors (1518).

§ 2. Validity and Effect (1519).

§ 3. Who May Attack (1520).

§ 4. Rights and Liabilities of Persons Claiming under a Fraudulent Grantee (1520).

§ 5. Extent of Grantee's Liability (1521).

§ 6. Remedies of Creditors (1521).

3. In re Taylor's Estate [Wis.] 111 NW 229.

4. A void oral contract of employment for one year, to begin at a future date, is not enforceable, but a request made, after the employment had begun, to continue the work under the contract, which was acted on, constituted a new enforceable contract. San Antonio L. & P. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867.

5. A contract to sell land situated in another state is governed by the lex loci contractus, and need not be in writing though so required by the law of the state where the land lies. Callaway v. Prettyman [Pa.] 67 A 418.

6. Sale of 35,000 barrels of cement for over $1 per barrel not within Illinois statute. Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F 641.

7. Must set up by answer or demur. Maloy v. Boyett [Fla.] 43 S 243. Plea set up a contract with reference to land. Wilhite v. Skelton [C. C. A.] 149 F 67. Demurrer will not lie. Cape Girardeau & C. R. Co. v. Wingerter [Mo. App.] 101 SW 1113.

8. Contract with reference to real estate. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606.

9. Petition did not disclose on face whether contract concerning land and one not to be performed within one year was written or oral. Belt v. Lazenby, 126 Ga. 767, 56 SE 81. Contract to sell and convey land, and defendant disabled himself from performing by conveying to another. Mobley v. Lott, 127 Ga. 572, 56 SE 637.

10. Stovall v. Gardner [Tex. Civ. App.] 94 SW 217. Petition stating oral contract for employment for one year from date not demurrable. Bell Bros. v. Aiken, 1 Ga. App. 36, 57 SE 1001. Action to recover compensation for services as real estate broker. Smith v. Aultz [Neb.] 110 NW 1015. Petition showed an oral contract of employment for one year, beginning at a future date. Stovall v. Gardner [Tex. Civ. App.] 94 SW 217.

11. Contract of guaranty which failed to state a consideration. Merritt v. Coffin [Ala.] 44 S 622. Appeared by the bill that there was an oral contract for sale of land and that the only memorandum contained no description of the land. Miller v. Burt [Mass.] 82 NE 39.

12. Plea in effect for specific performance of oral contract to sell land without setting up sufficient facts to show part performance. Harper v. Gorley [Ga.] 57 SE 695.

13. Defendants were ready to argue the point if requested, but court thought the question could only be raised by plea. Stovall v. Gardner [Tex. Civ. App.] 94 SW 217.

14. Specific performance sought of oral contract to convey land. Winders v. Hill, 144 N. C. 614, 57 SE 456. Suit on contract for sale of goods where memorandum stated no price. Answer a general denial. Glasgow Mill Co. v. Burgher, 122 Mo. App. 14, 97 SW 950.

15. The appearance of defendant before justice of peace operated to raise the general issue, and thus let in the defense. Schmidt v. Rozier, 121 Mo. App. 306, 98 SW 791.

16. Petition for specific performance of contract for sale of land showed on face that it was an oral contract, and defendants denied any contract. Bradley Real Estate Co. v. Robbins [Ind. T.] 103 SW 777.

17. Plea set up contract as to land and was presumed to be in writing. Wilhite v. Skelton [C. C. A.] 149 F 67.

18. Defendant did not plead statute, but admitted part of oral modification to a lease restricting the use of land. Mausert v. Christian Fergenspan, 68 N. J. Eq. 671, 64 A 801.

19. Petition set up an invalid contract because not wholly in writing. Answer waived defense of statute by pleading a

The scope of this topic is noted below.[20]

§ 1. *The fraud and its elements.* See 7 C. L. 1841—A fraudulent conveyance is one made with intent to hinder, delay, or defraud creditors of the grantor.[21] The conveyance must have been made with intent to defraud,[22] unless it is of a character denominated fraudulent by law.[23] The intent actuating the transfer, therefore, and not its effect, determines its validity,[24] though a contrary rule seems to have been

different contract partly oral and partly written. Hamilton v. Miller Brew. Co., 125 Mo. App. 579, 102 SW 1088.

20. It includes all transfers by incumbrance or absolute conveyance in fraud of creditors. **It excludes** fraud as between the parties (Fraud and Undue Influence, 9 C. L. 1475; Cancellation of Instruments, 9 C. L. 454), bona fides within the meaning of the recording acts (see Notice and Record of Title, § 1, 8 C. L. 1169), transfers in fraud of the bankrupt act (Bankruptcy, 9 C. L. 343), fraudulent transfer as ground for attachment (see Attachment 9 C. L. 282), or arrest (see Civil Arrest, 9 C. L. 570), respective rights of partnership and individual creditors (see Partnership, 8 C. L. 1261), rights of stockholders as to fraudulent transfers by corporation (see Corporations, 9 C. L. 733), and remedies of **creditors** by execution (see Executions, 9 C. L. 1328) or in aid of execution (see Creditors' Suit, 9 C. L. 849; Supplementary Proceedings, 8 C. L. 2046).

21. Held fraudulent: Conveyance by husband a few days prior to general assignment for benefit of creditors of stock of goods, he remaining in possession and from proceeds of sales repurchasing in name of wife. Bishop v. Hibben Dry Goods Co., 30 Ky. L. R. 725, 99 SW 644. Sale by debtor of all his assets, knowing of existence of just claims one of which was about to be reduced to judgment, held in violation of Laws 1897, § 24, c. 417, p. 511, prohibiting sales with intent to hinder, delay, or defraud creditors. Hall v. Frith, 51 Misc. 600, 101 NYS 31. Transfer by a husband to his wife of all his attachable property for a nominal consideration for purpose of avoiding attachments. Thomas v. Fletcher, 153 F 226. Mortgage of realty to sisters, sale of personalty and withdrawal of bank accounts during pendency of an action for slander. McCauley v. Shockey [Md.] 66 A 625. Conveyance of property of large value for nominal consideration by guarantor under obligation to pay amount of guaranty. Carroll v. Salisbury [R. I.] 65 A 274. Assignment of bank deposit amounting to $1,000 in consideration of payment by assignee of $50, and his agreement to go on assignor's bond in a criminal proceeding and to hire an attorney, held fraudulent, assignee not going on bond and expending only $150 and both parties knowing that creditor was about to attach deposit. Goode v. Rio Grande Sampling Co. [Colo.] 91 P 1105. Chattel mortgage reciting that it was given for the benefit of only those creditors who would accept its provisions within sixty days, such acceptance giving the mortgagor an extension of one year within which to pay amount due, held an attempt to coerce creditors to grant such an extension and therefore void as to nonaccepting creditors as hindering and delaying collection of their claims. Wood v. Eldredge, 147 Mich. 554, 14 Det. Leg. N. 40, 111 NW 168. Transfer of property to son held to have been in contemplation of the bringing of an action for slander against the grantor and to defraud the plaintiff in that action, the consideration claimed not appearing in the deed and not being sustained. Blahnik v. Barta, 130 Wis. 121, 109 NW 980.

Not fraudulent: Where a landlord required tenant to assume mortgage on realty, same not being a lien on any property owned by latter, tenant's creditors were not entitled to its cancellation as fraudulent, it not appearing that landlord was attempting to enforce any claim secured thereby. Pritz v. Jones, 117 App. Div. 643, 102 NYS 549. Purchase by wife of insurance policy on life of husabnd which had been assigned by him as security for a debt and sold to a third person on default of payment thereof. Lewis v. Palmer, 106 Va. 522, 56 SE 341. Trust deed given to secure future as well as existing indorsements. Weaver v. Neal, 61 W. Va. 57, 55 SE 909. Release of portion of mortgaged property by mortgagee and taking of other property in lieu thereof. Wellington v. Terry [Colo.] 88 P 467. Giving chattel mortgage to secure debt of another. Id. Mortgage covering after-acquired property given for a sufficient consideration. In re Chantler Cloak & Suit Co., 151 F 952.

22. The mere fact that the goods sold were not paid for by the seller, of which fact the vendee had knowledge does not render the sale fraudulent in the absence of an intent to defraud. Valdosta Mercantile Co. v. White [Fla.] 42 S 633. Fraudulent intent is necessary, and where the debtor intended to apply proceeds of sale to payment of creditors, though same was insufficient to pay all, the transfer is not fraudulent. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516. Creditors of a person paying liens on land of another cannot subject land of latter to payment of their claims in the absence of fraud. Mann v. Brazie, 61 W. Va. 613, 57 SE 43. Assignment by corporation held to have been without intent to defraud and to enable it to pay its debts. Van Slyck v. Woodruff, 118 App. Div. 47, 103 NYS 139.

23. A voluntary conveyance of all of debtor's property, rendering him insolvent, is fraudulent as to creditors under Civ. Code, § 3432. Hemenway v. Thaxter, 150 Cal. 737, 90 P 116. Under the bankruptcy act a purchase within four months prior to the institution of bankruptcy proceedings is presumptively fraudulent. Dokken v. Page [C. C. A.] 147 F 438.

24. An insolvent may sell his property if he acts in good faith and without fraudulent intent, though the effect of the sale is to place the property beyond the reach of his creditors. Pritz v. Jones, 117 App. Div. 643, 102 NYS 549. That the effect of a conveyance was to hinder and delay creditors

adopted in some states.[25] It must prejudice the rights of existing creditors,[26] unless made with intent to defraud future creditors as well.[27] Conveyances of exempt property,[28] or in consideration of transfer to debtor of property which he could claim as exempt,[29] and conveyances to the rightful owner of property held in trust,[30] although the trust may be unenforcible as against the trustee,[31] do not prejudice creditors and hence are not fraudulent. The validity of a conveyance must be determined by the law in force at the time of its execution.[32]

Bulk sales.[See 7 C. L. 1844]—At common law a sale in bulk is not prima facie fraudulent,[33] but statutes in most states have materially altered this rule. The weight of authority sustains the validity of bulk sale laws adopted in many of the states,[34] although there is a conflict of opinion.[35] The courts are not in ac-

does not render it fraudulent. Handlin-Buck Mfg. Co. v. Wendelkin Const. Co. [Mo. App.] 101 SW 702.

25. Where prejudice to creditors is apparent from the face of the instrument, it will be declared fraudulent irrespective of the motives actuating the parties to it. Chattel mortgage coercing creditors desiring benefits thereunder to accept its provisions which would give mortgagor an extension of one year. Wood v. Eldredge, 147 Mich. 554, 14 Det. Leg. N. 40, 111 NW 168. Where the effect of a sale is to hinder and delay creditors, it is void as to them though the parties acted in good faith. Smith v. Birge, 126 Ill. App. 596.

26. In a proceeding to set aside a fraudulent transfer and to subject land conveyed to lien of judgment, the creditor must show by evidence outside of proof of judgment that the claim upon which it was based existed at such a time as to have made him a creditor when the alleged fraudulent transfer was made. Irish v. Daniels, 100 Minn. 189, 110 NW 968.

27. Constructive fraud is not sufficient to avoid a conveyance as to subsequent creditors. Leavengood v. McGee [Or.] 91 P 453. Where fraud in a conveyance is established as a question of fact as to existing creditors, the transaction is prima facie fraudulent as to subsequent creditors. Voluntary conveyance of all debtor's property, rendering him insolvent. Hemenway v. Thaxter, 150 Cal. 737, 90 P 116.

28. Transfer of exempt property does not constitute a fraud on creditors. Stark v. Lamb, 167 Ind. 642, 79 NE 895, afg. on rehearing 78 NE 668; McCarty v. Coffin [C. C. A.] 150 F 307. Notwithstanding intent to defeat creditors in making transfer. Hobson v. Noel, 30 Ky. L. R. 1, 97 SW 388. Homestead. Brunson v. Joseph Rosenheim [Ala.] 43 S 31; South Omaha Nat. Bk. v. Boyd, 79 Ark. 215, 97 SW 288; Nicholdson v. Nesbitt [Cal. App.] 88 P 725; Rothwell v. Rothwell [Ky.] 104 SW 276; Bartle v. Bartle [Wis.] 112 NW 471. Conveyance of homestead is not a fraud notwithstanding fact that plat of homestead had not been made and filed at time of transfer. Citizens' Sav. Bk. of Olin v. Glick, 134 Iowa, 323, 111 NW 970. Law presumes that resident freeholder will avail himself of right to exemption, and where it appears that debtor was a resident freeholder of the state and that all property owned by him did not exceed $600 in value, equity will not disturb transfer thereof as fraudulent. Stark v. Lamb, 167 Ind. 642, 79 NE 895, afg. on rehearing 78 NE 668.

29. Assignment of judgment in part consideration of a conveyance of land which assignor at once claimed as a homestead is not fraudulent as to his creditors though suggested by the assignee for the purpose of defeating the former's creditors. Thompson v. International & G. N. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 623, 100 SW 197.

30. Conveyance of property wrongfully withheld to the rightful owner cannot operate as a fraud upon the creditors of the grantor irrespective of his intent in making the transfer. Property purchased by husband with money of wife, title being taken in husband. Hunt v. Doyal [Ga.] 57 SE 489. Transfer to a grantee who already owned the property is not in fraud of creditors though induced by threats of criminal prosecution. McCormick Harvesting Mach. Co. v. Perkins [Iowa] 110 NW 15. Assignment by husband to wife of benefits due under accident policy held to have been intended to cure defect in policy making same payable to him instead of to wife, who had procured policy with her own funds. Weckerly v. Taylor [Neb.] 110 NW 738.

31. Conveyance of land held in trust by the judgment debtor does not constitute a fraud on creditors though as against him the trust may have been unenforcible. Land conveyed to debtor under parol trust. Smith v. Ellison, 80 Ark. 447, 97 SW 666.

32. Where under the law at the time of a conveyance it could not be declared fraudulent solely because it was voluntary, a subsequent amendment could not affect it. Hawley v. Harrington [Cal.] 92 P 177.

33. May constitute a badge of fraud. Houck v. Christy [C. C. A.] 152 F 612.

34. Acts 1903, p. 92, held valid. Taylor v. Folds [Ga. App.] 58 SE 683. Act March 28, 1905, P. L. 62, held constitutional. Feingold v. Steinberg, 33 Pa. Super. Ct. 39. Does not deny equal protection of the law because applying only to sales of a "stock of merchandise and fixtures." Wilson v. Edwards, 32 Pa. Super. Ct. 295. Is not an unwarranted infringement of liberty or of the right to acquire, possess, protect, and dispose of property. Spurr v. Travis, 145 Mich. 721, 13 Det. Leg. N. 598, 108 NW 1090; Wilson v. Edwards, 32 Pa. Super. Ct. 295. Does not deny equal protection because not applying to merchants having no creditors or to persons of other callings. Spurr v. Travis, 145 Mich. 721, 13 Det. Leg. N. 598, 108 NW 1090. Does not authorize deprivation of property without due process of law. Young v. Lemieux, 79 Conn. 434, 65 A 436, 600. Act 1905 entitled "An act relative to the sale in bulk of the

cord as to whether noncompliance with the law raises a conclusive [36] or a rebuttable presumption of fraud, or renders the sale void or merely voidable,[37] but in any event the property may be levied on as that of the grantor.[38] Where the transfer is voidable merely, bona fide purchasers may take title superior to the creditors of the grantor.[39] What transfers come within the operation of the act is a matter of construction.[40] It has been held to apply to a preferential transfer,[41] although a contrary rule has been adopted in Louisiana where the transfer is made to the wife,[42] and it has been held not to apply to chattel mortgages operating to create a lien only,[43] or to transfers between partners.[44] Being in derogation of the common law, bulk sale laws must be strictly construed.[45] A conveyance void under the act may be attacked by any creditor,[46] and the vendee does not acquire a lien on the property for the amount paid therefor by him.[47] The question as to whether the purchaser has made the inquiry required by the act is for the jury.[48]

Consideration. See 7 C. L. 1846—A valuable consideration is necessary to sustain a conveyance as against creditors.[49] A voluntary conveyance is presumptively

whole, or a large part of a stock of merchandise and fixtures, or merchandise or fixtures, not in the ordinary course of business; providing certain requirements therefor, imposing certain duties upon the seller and making their violation a misdemeanor," held to express its subject in the title. Wilson v. Edwards, 32 Pa. Super. Ct. 295.

35. See 7 C. L. 1844, note.

36. Bulk sale Act 1905, providing that sales not in compliance therewith "shall be deemed fraudulent and voidable as against creditors of the seller," does not merely cast burden of proving good faith on purchaser but renders such sales voidable at option of creditors. Wilson v. Edwards, 32 Pa. Super. Ct. 295.

37. Noncompliance with the bulk sale law renders the transfer voidable merely and not absolutely void. Kelley-Buckley Co. v. Cohen [Mass.] 81 NE 297.

38. No title passes where the sale is not in compliance with the law, and property may be levied on. Parham & Co. v. Potts-Thompson Liquor Co., 127 Ga. 303, 56 SE 460. To levy on goods as property of debtor and in response to sheriff's rule to interplead to aver facts which make sale fraudulent and voidable is an appropriate proceeding to invalidate a sale in bulk under act of 1905. Wilson v. Edwards, 32 Pa. Super. Ct. 295.

39. Where a grantor and a grantee fraudulently pretended to have complied with the bulk sale law, sending out notices to about half the creditors, informing a small creditor who had received notice from the grantor and had been informed that the law had been complied with and who thereupon loaned money to the grantor secured by a chattel mortgage given on the stock by the grantee, was held to have rights therein prior to the creditors. Kelley-Buckley Co. v. Cohen [Mass.] 81 NE 297.

40. The sale of the whole of a stock of trade of an independent business is within the statute. Sale of a drug stock and fixtures conducted independent of a general store. Young v. Lemieux, 79 Conn. 434, 65 A 436, 600. Bar fixtures, safes, desks, cash registers, etc., used in connection with a business, are part of a "stock of goods, wares and merchandise" within act of 1903 (Acts 1903, p. 93). Parham & Co. v. Potts-Thompson Liquor Co., 127 Ga. 303, 56 SE 460. Sale of stock of goods and business by a saloon keeper holding a lease from year to year so long as he bought beer from his landlord held not within the bulk sale law. Laws 1904, p. 1385. Pritz v. Jones, 117 App. Div. 643, 102 NYS 549.

41. Applies to transfer in bulk in full or partial payment of a debt. Sampson v. Brandon Grocery Co., 127 Ga. 454, 56 SE 488.

42. Bulk sales law has no application to a preferential transfer to his wife by an insolvent debtor. Does not apply to wife receiving goods by dation en paiement in restitution of her paraphernal property received and alienated by him. Compton v. Deitlein, 118 La. 360, 42 S. 964.

43. Chattel mortgage is not a "sale, transfer or assignment" within the bulk sale law, as it does not operate as a sale or assignment but merely secures a lien to the mortgagee on the property covered. Hannah v. Richter Brew. Co. [Mich.] 14 Det. Leg. N. 393, 112 NW 713.

44. A sale by one partner of his interest in a mercantile business to his copartners is not within the act. Taylor v. Folds [Ga. App.] 58 SE 683.

45. Taylor v. Folds [Ga. App.] 58 SE 683.

46. A creditor as to whom the sale is voidable need not obtain the co-operation of other creditors but may himself attack it. Wilson v. Edwards, 32 Pa. Super. Ct. 295.

47. Farrar v. Lonsby Lumber & Coal Co. [Mich.] 14 Det. Leg. N. 386, 112 NW 726.

48. Feingold v. Steinberg, 33 Pa. Super. Ct. 39.

49. McCauley v. Shockey [Md.] 66 A. 625.

Consideration sufficient: Transfer in consideration of advances made to liquidate indebtedness constituting a lien on property held valid as to subsequent creditor. Sentel v. Jennings, 123 Ill. App. 469. Setting aside judgment in sequestration proceeding brought by wife to recover alimony held sufficient consideration for assignment of fund sequestered. Tisdale v. Rider, 104 NYS 77. Conveyances based on partition agreement and in settlement of moneys misapplied by an executor held based on a sufficient consideration. Perkins v. Gibbs [C. C. A.] 153 F 952. Conveyance made in consideration of a promise to marry by a solvent grantor is valid as against subsequent creditors. Huntress v. Hanley [Mass.] 80 NE 946. Con-

fraudulent as to existing creditors,[50] and this is especially true when the grantor is insolvent,[51] but it is not void as to subsequent creditors in the absence of an actual intent to defraud them.[52] A voluntary conveyance is not necessarily fraudulent if the grantor retains sufficient property to satisfy his debts,[53] hence, a husband may make reasonable provision for his family [54] though he afterwards becomes in-

veyance to wife in consideration of payment by her of husband's debts which exceeded value of land held valid as against subsequent creditors of latter. Farmers' & Merchants' Irr. Co. v. Brumbaugh [Neb.] 110 NW 663. Conveyance made in consideration of advances by wife for family support from her professional earnings held based on a sufficient consideration, though under the law she was jointly liable for such support. Aultman Engine & Thresher Co. v. Greenlee, 134 Iowa, 368, 111 NW 1007. Deed from solvent husband to wife in consideration of pre-existing, bona fide debt held based on sufficient consideration, the debt being adequate to the amount conveyed. Sawyer v. Metters [Wis.] 113 NW 682. That debt due wife was for advances made by her to husband from her own earnings during marriage does not render consideration inadequate because such earnings belonged to husband, as while solvent he could make a gift of same to her, and having done so subsequent advances therefrom to him constituted a debt. Id. Assignment of trade mark by corporation in consideration of sum of $1,500 and agreement to pay indebtedness of $4,250 held adequate, though same was afterwards sold by assignee for $10,500, the business of the corporation having been previously conducted at a loss and the trade mark having subsequently sold to a representative of attacking creditor at a receiver's sale of assets of original assignor for only $100. Van Slyck v. Woodruff, 118 App. Div. 47, 103 NYS 139. Deed to wife in consideration of continuance of pending divorce suit and dissolution of injunction restraining husband from disposing of property, deed to be delivered in escrow and wife to resume cohabitation so long as husband refrained from intoxicants and supported her, upon condition broken deed to be delivered to her, held not voluntary, even as to portion in excess of what wife could have recovered as alimony. Pippin v. Tapia [Ala.] 42 S 545. Evidence held to show payment of consideration in notes which had been transferred to a bona fide purchaser. Gumbel & Co. v. Ryan, 118 La. 606, 43 S 251.

Insufficient: Transfer by a husband to his wife in consideration of her agreement to substitute her name in lieu of his on a note payable by him shortly after held without sufficient consideration. Thomas v. Fletcher, 153 F 226. Money received by a wife in consideration of her joining in contract for sale of land held to have been without consideration. Sharff v. Hayes, 132 Iowa, 609, 110 NW 24. Where wife contributed less than a third of the consideration for property taken in name of husband, exchanging same for other property in name of wife eleven years after, held fraudulent. Ahlering's Ex'r v. Speckman, 30 Ky. L. R. 940, 99 SW 973. Evidence held sufficient to show that conveyance was voluntary. Hemenway v. Thaxter, 150 Cal. 737, 90 P 116. Evidence held to show inadequacy of consideration, same amounting to only a third of value of land conveyed. Southern Bank of Fulton v. Nichols, 202 Mo. 309, 100 SW 613.

50. Though there was no fraudulent intent. Scharff v. McGaugh, 205 Mo. 344, 103 SW 550. Under Ky. St. 1903, § 1907, a voluntary conveyance is presumptively fraudulent as to existing debts independent of the intentions or circumstances of the grantor or the amount conveyed. Standifer v. Baker [Ky.] 101 SW 365. The burden is upon the grantee to show that, independent of property conveyed, grantee had sufficient means to satisfy creditors. Long v. Garey Inv. Co. [Iowa] 112 NW 550. A voluntary conveyance is void as to existing creditors. Allen v. Caldwell, Ward & Co. [Ala.] 42 S 855; North Penn Iron Co. v. International Lithoid Co., 217 Pa. 538, 66 A 860. Voluntary transfer by an insolvent to his wife and children of policies of life insurance, made payable to his estate, is in fraud of creditors and may be set aside. Lytle v. Equitable Ins. Co. of Iowa, 5 Ohio N. P. (N. S.) 28. Conveyance in consideration of love and affection void as to existing creditors. Heckling v. Gehring's Ex'r, 30 Ky. L. R. 1198, 100 SW 824.

51. A voluntary conveyance by an insolvent vests title in the grantee subject to prior incumbrances and existing debts of grantor. Parks v. Worthington [Tex. Civ. App.] 19 Tex. Ct. Rep. 698, 104 SW 921. A voluntary conveyance by an insolvent debtor is presumptively fraudulent. Richardson v. Richardson, 134 Iowa, 242, 111 NW 934. A voluntary conveyance by an insolvent grantor is fraudulent in itself. Hessian v. Patten [C. C. A.] 154 F 829.

52. A voluntary conveyance by a solvent grantor to his child is valid as against subsequent creditors in absence of evidence that it was made with intent to defraud them. Hessian v. Patten [C. C. A]. 154 F 829. Voluntary conveyance held not void as to subsequent creditors, all existing creditors being secured and there being no showing that grantor anticipated incurring future indebtedness. Allen v. Caldwell, Ward & Co. [Ala.] 42 S 855. Evidence held insufficient to show that deed was antedated so as to make it appear to have been given prior to date on which debt as to which it was alleged to be fraudulent was incurred. Id.

53. Voluntary conveyance by solvent grantor to his child is valid if reasonable, not disproportionate to the means of the grantor, if he retain ample property to pay existing debts, and there is no actual intent to hinder or defraud creditors. Hessian v. Patten [C. C. A.] 154 F 829.

54. Voluntary conveyance by solvent husband to wife held not fraudulent as to creditors whose claims were not created until eight or ten years afterward. Reece v. Goldstein [Ky.] 104 SW 963. A solvent husband may make a voluntary conveyance to his wife if such conveyance is not made in contemplation of future indebtedness and to place property beyond reach of future cred-

solvent.[55] As a rule the burden of showing the insufficiency of the consideration is on the person attacking the conveyance,[56] but it has been held that a conveyance will be presumed to have been voluntary where a valuable consideration is not established.[57] Its adequacy must be determined as of the time of the transfer.[58] Recitals of a consideration in the instrument do not constitute evidence of the actual consideration.[59]

Retention of possession or apparent title.[See 7 C. L. 1847]—It is generally provided by statute that chattel mortgages [60] or sales of personal property [61] shall be accompanied by delivery and immediate and continued change of possession,[62] or that the instrument evidencing the transfer be recorded,[63] in order to render the transaction valid as to subsequent bona fide purchasers [64] and creditors. Independent of statute, retention of possession, while evidence of fraud, is not necessarily conclusive.[65]

Reservation of benefits and resulting trusts.[See 7 C. L. 1848]—The reservation by the transferror of some right or benefit, such as the power of disposal of mortgaged chattels [66] and the application of the proceeds thereof [67] by the mortgagor, renders

itors. Clark v. Else [S. D.] 110 NW 88. Conveyance by solvent husband to wife prior to becoming indebted to creditor seeking to set it aside and with knowledge of such creditor is not fraudulent as to him. Lowther v. Rader, 102 NYS 929. A conveyance by a husband to his wife while free from debt and before engaging in a hazardous pursuit does not constitute a fraud under the bankrupt act. In re Foss, 147 F 790. Voluntary conveyance by a solvent husband to his wife will not be set aside where it was reasonable even to existing creditors. McMunnigal v. Aylor, 204 Mo. 19, 102 SW 486. Money expended by a husband for the reasonable support of his family does not constitute a fraud on creditors. Payment of interest on a mortgage on his wife's home by a husband and taxes and assessments thereon cannot be followed by a creditor so as to make same a charge on the land. Farr v. Hauenstein [N. J. Err. & App.] 67 A 377, rvg. 70 N. J. Eq. 635, 62 A 383.

55. Where a voluntary conveyance by a solvent husband to his wife was reasonable, his subsequent insolvency not produced by causes existing at the time of the transfer will not invalidate the conveyance. McMunnigal v. Aylor, 204 Mo. 19, 102 SW 486.

56. Civ. Code, § 2170, note and mortgage import a consideration under § 2169, although given for an antecedent debt. Borden v. Lynch, 34 Mont. 503, 87 P. 609. In the absence of proof to the contrary, the consideration will be presumed to be adequate. Conveyance to wife in consideration of preexisting debt. Ilfeld v. De Baca [N. M.] 89 P 244, overruling on rehearing 79 P 723.

57. Bennett v. Boshold, 123 Ill. App. 311.

58. Where consideration was adequate at time of transfer, fact that property afterward increased in value does not render it inadequate. Ilfeld v. De Baca [N. M.] 89 P 244, overruling on rehearing 79 P 723.

59. Deed from husband to wife reciting consideration of $1,000. Bennett v. Boshold, 123 Ill. App. 311.

60. Under a statute requiring a chattel mortgagee to take possession within a reasonable time after default, failure to do so renders the mortgage fraudulent per se. And the mortgagee's default cannot be explained. Cassell v. Deisher [Colo.] 89 P 773.

61. Sale of personalty is fraudulent and void as to creditors without notice in absence of actual delivery to purchaser. Lovejoy v. Raymond, 127 Ill. App. 519.

62. Where the evidence is conflicting as to the extent to which a purchaser went into possession, the question as to whether the acts of the parties constituted an actual and continued change of possession is for the jury. Selvert v. Galvin [Wis.] 113 NW 680.

63. Statutes intended for the protection of creditors against unrecorded deeds apply only to creditors holding liens. Code 1906, § 3103, was not intended to protect general creditors. Moore v. Tearney [W. Va.] 57 SE 263.

64. To charge a subsequent purchaser with want of good faith under such a statute, he must be shown to have had actual notice of prior sale, or knowledge of such facts as would put a prudent man on inquiry and which if made would have resulted in knowledge of prior sale. Farmer v. Hughes [Colo.] 88 P 191.

65. Unexplained possession of a mortgagor after the giving of the mortgage, while evidence of fraud, is not conclusive. Eastman v. Parkinson [Wis.] 113 NW 649. That chattel mortgagor remained in possession and exchanged portion of mortgaged property for other property of the same value does not invalidate the mortgage. Strop v. Hughes, 123 Mo. App. 547, 101 SW 146. Whether chattel mortgage allowing mortgagor to remain in possession was intended as a fraud on creditors held a question for the jury. Fleisher Bros. v. Hinde, 122 Mo. App. 218, 99 SW 25. Chattel mortgage allowing mortgagor to remain in possession and requiring him to keep stock up to present standard, but containing no provision allowing him to dispose of same in usual course of business for his own benefit, held not void on its face as a fraud on creditors. Id.

66. Chattel mortgage on lumber, supplies and manufactured furniture by a manufacturing concern, providing that mortgagor should remain in possession until default, creates an implied reservation of power of disposal, and is void as to existing and subsequent creditors of mortgagor. Albes v. Keith, Simmons & Co., [Ala.] 44 S 693.

67. Sale by mortgagor of mortgaged

the transaction fraudulent. Transfers in trust for the benefit of the transferror are fraudulent where the transferror retains any control over the disposition of the property conveyed,[68] but this rule has no application to conveyances made primarily for the use of the grantee in which the reservation to the grantor is secondary and partial.[69] A transfer to a person other than the one paying the consideration therefor is presumptively fraudulent.[70]

Fraudulent intent and evidence of fraud. See 7 C. L. 1849—The question of fraudulent intent is one of fact which may be proved by circumstantial evidence.[71] and in ascertaining such intent a wide range of investigation is permitted.[72] The existence of fraud will not be presumed [73] and must be proved by a preponderance of

property with consent of mortgagee and application of proceeds to a purpose other than the liquidation of the mortgage debt renders the mortgage void as to creditors. Wellington v. Terry [Colo.] 88 P 467. Where chattel mortgagor remains in possession, failure to apply proceeds of sale of mortgaged goods toward payment of debt renders mortgage void, irrespective of intent to defraud. Fleisher Bros. v. Hinde, 122 Mo. App. 218, 99 SW 25.

68. A person cannot, as against creditors either prior or subsequent, settle his property in trust for his own use for life and over to his appointees by will and in default of such appointment to the use of his lawful heirs in fee, and such a trust is void though the instrument creating it expressly provides that it shall be irrevocable. Nolan v. Nolan [Pa.] 67 A 52.

69. Reservation in deed by an aged man of possession of property during life. Hessian v. Patten [C. C. A.] 154 F 829.

70. Presumption held overcome by evidence that real purchaser paid but a very small portion of the consideration, the balance being paid by money borrowed on the security of the property itself. Colnon v. Buckley, 117 App. Div. 742, 102 NYS 912.

71. Acts of grantor in asserting title and dominion over property conveyed after its conveyance with apparent acquiescence of grantee. Moore v. Tearney [W. Va.] 57 SE 263. Sale by insolvent to brother held fraudulent as to creditors, grantor's acts and declarations after alleged conveyance being inconsistent with transfer of title. McCloy v. Robertson [Ark.] 102 SW 386. Transfer to wife held fraudulent, she having allowed others to extend credit to husband on faith of apparent title in him. Citizens' Sav. Bk. of Olin v. Glick, 134 Iowa, 323, 111 NW 970.

72. Evidence of fraud: Sale by an insolvent of a large stock of goods in bulk without invoice or appraisement and made in haste is evidence of facts from which jury may infer fraud. Irwin Phillips & Co. v. Rule, 124 Mo. App. 525, 102 SW 32. Transfer to brother made a year prior to bankruptcy of grantor, name of grantee not being inserted in deed until same was presented for record at about a week after bankruptcy, during interim grantee having made declarations inconsistent with ownership. Tabor v. Armstrong, 30 Ky. L. R. 938, 99 SW 957, rehearing denied [Ky.] 101 SW 305.

Not evidence of fraud: Mere failure to record voluntary deed is not of itself evidence of fraud, and when consistent with good intentions no bad motive will be attributed to grantee. Allen v. Caldwell, Ward & Co. [Ala.] 42 S 855. A recital that mortgage was given in good faith without intent to defraud creditors is, standing alone, without force, an adequate consideration having in fact been paid. Strop v. Hughes, 123 Mo. App. 547, 101 SW 146. Failure of mortgagee to list property for taxation. Id. Recitals as to the nature of the consideration, not absolutely true, should not be taken as an evidence of fraud when consistent with good faith. Id. That mortgagor requested payment of money borrowed on mortgage to his wife. Shive v. Merritt [Ky.] 104 SW 368.

Evidence admissible: That grantee knew of existence of indebtedness alleged to have been affected by fraudulent transfer is admissible. Bennett v. Boshold, 123 Ill. App. 311. Evidence that property transferred was exempt is admissible under a general denial. Stark v. Lamb, 167 Ind. 642, 79 NE 895, afg. on rehearing 78 NE 668. Schedule in insolvency proceedings to show insolvency at time of sale. Smith v. Birge, 126 Ill. App. 596. Judgment against grantors in attachment is admissible to show intent to defraud creditors in making transfer. Id.

Inadmissible: Declarations of grantor tending to show fraud, made in absence of grantee, are incompetent as against latter. Hargus v. Hayes [Ark.] 103 SW 163.

73. Burden is upon the creditor to establish fraud. Stark v. Lamb, 167 Ind. 642, 79 NE 895, afg. on rehearing 78 NE 668; Southern Bk. of Fulton v. Nichols, 202 Mo. 309, 100 SW 613. Where an adequate consideration was paid, the burden of proving fraud is on the person attacking the conveyance. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516; Sawyer v. Metters [Wis.] 113 NW 682. Where the debt was contracted subsequent to the conveyance assailed as fraudulent, the burden is upon the creditor to show that it was made and accepted with a fraudulent purpose. Seeley v. Ritchey [Neb.] 110 NW 1105, overruling on rehearing, 107 NW 769. Where deed appears on its face to have been given prior to incurring of debt with creditor seeking to avoid it, burden is upon him to show that deed was executed subsequent to incurrence of debt. Allen v. Caldwell, Ward & Co. [Ala.] 42 S 855. A mere charge of simulation will not shift the burden to the defendant, but only when the facts proved throw doubt upon the realty of the sale. New Orleans Acid & Fertilizer Co. v. Guillory & Co., 117 La. 821, 42 S 329.

the evidence.[74] Proof of mere circumstances tending to arouse suspicion will not suffice.[75] A fraudulent intent, however, may be assumed from the existence of facts proved,[76] such as that the conveyance was voluntary[77] and that the grantor was insolvent.[78]

Fraud in the grantee and notice to him of the fraud. See 7 C. L. 1851—Fraudulent intent on the part of the grantor is not alone sufficient to avoid a conveyance.[79]

74. Evidence held insufficient to show intent to defraud subsequent creditors of transferror by conveyance for a valuable and adequate consideration. Pritz v. Jones, 117 App. Div. 643, 102 NYS 549. To show that in having deed to land jointly purchased run to his brother plaintiff intended to defraud his creditors, he being at the time contingently liable as surety, on a claim fully secured and which was paid before paying for land purchased. Reemsnyder v. Reemsnyder [Kan.] 89 P 1014. To establish fraud in giving mortgage, no proceedings having been taken to set it aside from its execution until the mortgagor's death twelve years later and a consideration being established. Beddow v. Wilson, 28 Ky. L. R. 661, 90 SW 228. To show fraud in conveyance as to subsequent creditors, unrebutted testimony showing payment of a consideration. Leavengood v. McGee [Or.] 91 P 453. Evidence that subsequent to voluntary conveyance to daughter, made while solvent, the grantor's liabilities increased, held insufficient to show that transfer was made in anticipation of financial difficulties. Dorwin v. Patton [Minn.] 112 NW 266. Where a woman advanced in years and without business experience guaranteed payment of certain notes, all of which were promptly met as they matured, a conveyance five years later to only creditor whom she believed had claims against her held not to show intent to defraud holder of note which had not yet matured. Merchants' Nat. Bank v. Cole [C. C. A.] 149 F 708. Evidence that debtor's father agreed to convey certain property to her children if she would pay debt due him, that later debtor declined on ground of her inability to pay, and that no conveyance was ever made, held insufficient to show that father held legal title in trust for debtor to defraud creditors although she had procured insurance on property and exercised some control over it. Pickren v. Northcutt [Ark.] 102 SW 708.

Held sufficient: Evidence that shortly before bankruptcy, while grantor was insolvent, goods were sold in bulk for half actual value, without invoice or examination of goods or books or any inquiry as to grantor's financial condition, held sufficient to show fraud. Dokken v. Page [C. C. A.] 147 F 438. Proof that conveyance was voluntary or that it was made with fraudulent intent to hinder, delay, or defraud creditors and accepted by grantee with knowledge of fraud creates a prima facie case. Stark v. Lamb, 167 Ind. 642, 79 NE 895, afg. on rehearing 78 NE 668. Evidence held sufficient to show that conveyance made while grantor was insolvent and immediately prior to entry of several judgments against him was with intent to hinder, delay, and defraud creditors. St. Francis Mill Co. v. Sugg [Mo.] 104 SW 45. Evidence held sufficient to show that conveyance to daughter was intended to defraud creditors. Martin v. Shears [Neb.] 110 NW 1010.

75. Mere suspicions of fraud will not overcome positive and unimpeached testimony showing good faith. Transfer between relatives. Gage Bros. & Co. v. Burns [Neb.] 111 NW 791. Fraud must be clearly and distinctly proved, and will not be assumed from doubtful evidence or circumstances of mere suspicion. Harrisonburg Harness Co. v. National Furniture Co., 106 Va. 302, 55 SE 679. Will not be presumed that purchase price of lot taken in name of wife, or money paid for erection of building on it, was husband's merely because paid over by him, wife claiming it as hers. Lemp Brewing Co. v. Guion, 17 Okl. 131, 87 P 584.

76. Where comaker on note, after payment had been demanded by payee, conveyed land, upon strength of which credit was extended, to his children for an inadequate consideration, fraud was presumed as a matter of law. Southern Bk. of Fulton v. Nichols, 202 Mo. 309, 100 SW 613. Proof of existence of debt at time of alleged fraudulent conveyance, of entry of judgment thereon, and return of execution nulla bond, and insolvency of debtor, creates a prima facie case of fraud which vendee must overcome by proof of adequate consideration and good faith. Brunson v. Rosenheim & Son [Ala.] 43 S 31.

77. A voluntary conveyance by an insolvent debtor is presumptively fraudulent. Richardson v. Richardson, 134 Iowa, 242, 111 NW 934; Long v. Garey Inv. Co. [Iowa] 112 NW 550. Transfer of corporate property for nominal consideration, transferee making no inquiry as to financial condition, held constructively fraudulent. McNeal v. Hayes Mach. Co., 118 App. Div. 130, 103 NYS 312. Evidence that on day judgment was entered against him debtor conveyed property worth $34,500 to his wife without her knowledge, for an expressed nominal consideration, held to show intent to defraud creditors. Bekins v. Dieterle [Cal. App.] 91 P 173.

78. Evidence held to show insolvency of transferror at time of transfer, which fact was known to transferee. In re Arkonia Fabric Mfg. Co., 151 F 914. Where mortgage is supported by a valuable consideration and given in good faith to secure a debt actually due, the insolvency of the mortgagor does not raise a presumption of fraud. Borden v. Lynch, 34 Mont. 503, 87 P 609. Though once established insolvency is presumed to continue, it will not be presumed to relate backwards. Hence, where at time of his death deceased owed debts amounting to $2,000 and was without assets, no fraud would be presumed in a voluntary conveyance to his son five days prior to his death in absence of showing as to when debts were incurred. Long v. Garey Inv. Co. [Iowa] 110 NW 26.

79. Fraudulent intent on the part of the grantor is not sufficient to avoid a conveyance unless the grantee had notice actual

The grantee must have had notice, either actual or constructive,[80] of the fraud,[81] but where such notice is shown he is not a bona fide purchaser and will not be protected.[82] Notice will not be presumed but must be established by the party seeking relief[83] except where the conveyance is voluntary,[84] or where the grantee's relationship to the grantor is such as to charge him with notice.[85] A purchaser at an execution sale occupies a more favorable position than a purchaser from the grantor direct.[86] A grantee with notice of facts sufficient to put an ordinarily prudent man on inquiry[87] is charged with notice of the grantor's fraudulent intent,[88]

or constructive. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516.

80. Grantee must be shown to have notice of grantor's fraudulent intent or knowledge of such facts as would put an ordinarily prudent man on inquiry and which if followed with reasonable diligence would have resulted in notice of fraud. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S. 516; Valdosta Mercantile Co. v. White [Fla.] 42 S 633. Instruction construed, and held not erroneous as leaving jury to conclude that transaction was to be judged solely by constructive, and not actual, notice on part of purchaser. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516.

81. Grantee purchasing for a valuable consideration without notice is a bona fide purchaser and will be protected. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516. An undisclosed intent of a mortgagor to defraud his creditors does not affect the rights of an innocent mortgagee. Shive v. Merritt [Ky.] 104 SW 368. Knowledge on the part of the grantee is essential to setting aside of conveyance, founded on valuable consideration, as a fraud on creditors. Pippin v. Tapia [Ala.] 42 S 545. In an action to set aside alleged fraudulent conveyance of a husband and wife, failure to connect wife with fraud in a conveyance to her prior to incurring of indebtedness bars relief. Mishler v. Finch, 104 Md. 182, 64 A 945. In the absence of fraud on the part of the grantee the fact that conveyance was made during insolvency of grantor is not ground for setting it aside. Borden v. Lynch, 34 Mont. 503, 87 P 609.

82. Knowledge by transferee of transferror's insolvency prior to payment of consideration renders transfer void as to creditors. Jordan v. Rice [Ala.] 44 S 93. Knowledge by grantee of grantor's intent to defeat claims of creditors by making conveyance renders him a participant in the fraud, though he may have paid some consideration for the conveyance. Levering v. Miller, 127 Ill. App. 235. One is not a purchaser in good faith if he purchases with knowledge of the fraudulent intent of the vendor or under such circumstances as should put him on inquiry as to the object for which the vendor sells. Houck v. Christy [C. C. A.] 152 F 612.

83. Where purchaser pays a valuable consideration, notice to him of fraud must be proved. Hall v. Frith, 51 Misc. 600, 101 NYS 31. Creditor must show that grantee had knowledge of the fraud. McCauley v. Shockey [Md.] 66 A 625; Southern Bk. of Fulton v. Nichols, 202 Mo. 309, 100 SW 613.

Evidence held sufficient: Purchaser knowing of financial embarrassment of grantor and that property purchased was only property available for satisfaction of claims of creditors held to have had knowledge of fraud of grantor. Hall v. Frich, 51 Misc. 600, 101 NYS 31. Evidence held to show that grantee, a near relative of grantor, had knowledge of latter's intent to defraud a creditor by the conveyance. Gust v. Hoppe, 201 Mo. 293, 100 SW 34; St. Francis Mill Co. v. Sugg [Mo.] 104 SW 45. That mortgagees who were sisters of mortgagors were parties to scheme to place property beyond reach of mortgagors' creditors. McCauley v. Shockey [Md.] 66 A 625.

Insufficient: That mortgagor requested mortgagee to pay money borrowed on mortgage to former's wife is not sufficient to charge latter with knowledge of formers' fraudulent intent. Shive v. Merritt [Ky.] 104 SW 368. That mortgagor and mortgagee, a banker, were friends and lived in same community, and that former was a customer of latter's bank, held not to justify inference that bank was aware of mortgagor's fraudulent intent in executing mortgage. Shive v. Merritt [Ky.] 104 SW 368. Evidence held to show that vendee was without knowledge of vendor's insolvency or intent to defraud creditors by transfer of property. Gumbel & Co. v. Ryan, 118 La. 606, 43 S 251.

84. Where the conveyance is voluntary, the burden is upon the grantee to rebut the presumption of fraud. Scharff v. McGaugh [Mo.] 103 SW 550. Where a voluntary conveyance operates as a fraud on creditors, fraud on the part of the grantee need not be alleged or proved. Richardson v. Richardson, 134 Iowa, 242, 111 NW 934. Where husband procured property to be deeded to wife to defraud creditors, knowledge of fraud by grantor or grantee is unnecessary. Ahlering's Ex'r v. Speckman, 30 Ky. L. R. 940, 99 SW 973.

85. In dealings between a corporation and its president, the latter will be presumed to have knowledge of any intent to defraud which may have existed on the part of the former. Instruction requiring circumstances sufficient to put a reasonable man on notice held erroneous. Nelson v. Spence [Ga.] 58 SE 697.

86. A bona fide purchaser for value at an execution sale, paying an adequate price for the property purchased, does not stand in the position of a grantee of an insolvent debtor, though the judgment on which the sale was based was collusive. Lipschitz v. Halperin, 53 Misc. 280, 103 NYS 202.

87. That the purchaser might have discovered the seller's fraudulent intent is not sufficient to charge him with notice unless the facts were such as to have put him on inquiry. Instruction held properly modified. Jackson v. Citizens' Bk. & Trust Co. [Fla.]

but it has been held that such notice is merely a circumstance to be considered by the jury.[89]

Relationship of the parties. See 7 C. L. 1852—While transfers between near relatives will be carefully scrutinized [90] when made in good faith,[91] the mere existence of the relationship is not sufficient to stamp them with fraud [92] unless they are voluntary.[93] When such conveyances are attacked as fraudulent, however, the weight of authority seems to be that the burden is upon the grantee to show good faith [94] and the payment of a consideration,[95] though the courts are not in harmony.[96]

44 S 516. Knowledge of indebtedness or even insolvency merely of transferror held not sufficient to put purchaser on inquiry. Id.

88. Actual notice is unnecessary where vendee had knowledge of facts sufficient to have placed him on inquiry and which if prosecuted would have led to actual knowledge. Brunson v. J. Rosenheim & Son [Ala.] 43 S 31. The law charges the grantee with his knowledge of circumstances which afford ground for reasonable suspicion of the debtor's fraudulent intent, and not so much the duty of exercising reasonable diligence, to discover such circumstances. Spence v. Morrow [Ga.] 58 SE 356. The vendee is not a bona fide purchaser where he has knowledge of such facts as would lead an ordinarily prudent man to make inquiries which would lead to a discovery of the fraud. Instruction on good faith held correct. Bergenthal Co. v. Security Bk., 102 Minn. 138, 112 NW 892.

89. While knowledge by the grantee of facts which would put a prudent man on inquiry is a circumstance to be considered by jury as showing knowledge of grantor's fraudulent intent, it is not knowledge of fraud nor a fact from which such knowledge can be inferred. Instruction held erroneous. Irwin Phillips & Co. v. Rule, 124 Mo. App. 525, 102 SW 32.

90. Clark v. Else [S. D.] 110 NW 88. Transfers between near relatives will be looked upon with suspicion. Aunt and nephew. Gage Bros. v. Burns [Neb.] 111 NW 791. Though the relationship may be so distant as not to create a presumption of fraud, it may, when coupled with knowledge, suffice to that end. Assignment of mortgage to niece's husband who had knowledge of pendency of actions against grantor. Martin v. Shears [Neb.] 110 NW 1010. Where, however, the transfer is made while the grantor is solvent and the debt in controversy is secured, the suspicion is removed and, a consideration being proved, the good faith of the transaction is established. Seeley v. Ritchey [Neb.] 110 NW 1105, overruling on rehearing, 107 NW 769.

91. Evidence held to show that wife authorized to do business as a feme sole purchased property from assignee of her husband with proceeds of her separate estate. Potter v. Potter's Receiver [Ky.] 101 SW 905. Evidence that purchase price of property taken in name of wife and money expended in construction of building on it was paid over by husband held insufficient of itself to show ownership of same in him. Lemp Brewing Co. v. Guion, 17 Okl. 131, 87 P 584. Conveyance by a solvent father to his daughter held to have been without intent to defraud his creditors. Dorwin v. Patton [Minn.] 112 NW 266. Evidence held sufficient to show bona fides of transfer between aunt and nephew. Gage Bros. v. Burns [Neb.] 111 NW 791. Evidence held insufficient to show fraud in transfer from husband to wife in consideration of pre-existing debt due her. Sawyer v. Metters [Wis.] 113 NW 682. Evidence held insufficient to show that conveyance to step-father was colorable and not in good faith. Hargus v. Hayes [Ark.] 103 SW 163.

92. That parties to transfer were husband and wife is not of itself sufficient evidence of fraud. Rice-Stix Dry Goods Co. v. Sally, 198 Mo. 682, 96 SW 1030. Fraud is not to be presumed from the mere fact of the relationship of husband and wife. Conveyance by husband to wife to whom he was indebted resulting in preferring her over other creditors. Mahaska County v. Whitsel, 133 Iowa, 335, 110 NW 614. Mere fact that the husband acts as agent for his wife in transacting business will not warrant assumption that they are acting fraudulently. Power of attorney to husband to draw checks in wife's name on funds owned by her, none of same being derived from husband except as loans which were subsequently repaid out of her individual funds. Clark v. Else [S. D.] 110 NW 88. While conveyances between husband and wife will be carefully scrutinized, but when made in good faith and for a sufficient consideration, the wife's right to protection is not destroyed by coverture. Aultman Engine & Thresher Co. v. Greenlee, 134 Iowa, 368, 111 NW 1007. Mere fact of relationship will not stamp the transaction as fraudulent. Note given by father to son held not fraudulent as to creditors. Weldon's Estate, 31 Pa. Super. Ct. 47.

93. Evidence held insufficient to show that conveyance to wife was in consideration of pre-existing debt. Scharff v. McGaugh [Mo.] 103 SW 550. Evidence of consideration for conveyance between near relatives held insufficient, same being services most of which were performed after date of conveyance. South Omaha Nat. Bk. v. Boyd, 79 Ark. 215, 97 SW 288. Evidence held to show that conveyance from father to daughter was voluntary. Standifer v. Baker [Ky.] 101 SW 365. Conveyance to wife held to have been in consideration of pre-existing indebtedness due her by husband. Weis v. Farley [Neb.] 110 NW 656.

94. Seeley v. Ritchey [Neb.] 110 NW 1105, overruling on rehearing, 107 NW 769. Where debtor conveyed all his property to his brother, burden was upon latter to show want of knowledge of grantor's fraudulent intent and payment of a valuable con-

Preference to creditors. See 7 C. L. 1853—In the absence of statutory inhibition,[97] a debtor may prefer one creditor,[98] though other creditors are thereby defeated in the collection of their claims,[99] notwithstanding the grantor's fraudulent intent,[1] so long as the grantee is actuated solely by a desire to secure his claim and does not participate in the fraud.[2] The rule, however, does not apply to preferential transactions by insolvent corporations.[3] Under the New York statute a preferential transfer by an insolvent corporation or one whose insolvency is imminent [4] is void except as to a creditor standing in the position of a bona fide purchaser,[5] and knowledge by the

sideration by him. Stubling v. Wilson [Or.] 90 P 1011. Evidence held insufficient to disprove presumption of knowledge of grantee, who was a brother of grantor, of latter's fraudulent intent. Id. Evidence held insufficient to overcome presumption of fraud arising from purchase of property in name of son with money of father. Hulen v. Chilcoat [Neb.] 113 NW 122. Evidence held insufficient to rebut presumption of fraud arising from conveyance between near relatives. Flint v. Chaloupka [Neb.] 111 NW 465.

95. Where a conveyance from a husband to his wife is claimed to be in fraud of creditors, the burden is upon her to show the consideration. Bennett v. Boshold, 123 Ill. App. 311. Where conveyance is made by a debtor to a near relative in consideration of a past due indebtedness, the burden is upon the grantee to show the genuinenss of the debt and that both parties acted in good faith. Flint v. Chaloupka [Neb.] 111 NW 465, Where property is purchased from an insolvent debtor by his wife during coverture, the burden is upon her to show that the consideration therefor was derived from some other source than her husband. Lewis v. Palmer, 106 Va. 522, 56 SE 341.

96. Where a deed by a husband to his wife was made while solvent and for a valuable consideration, the burden is upon a creditor attacking it to prove fraud. Sawyer v. Metters [Wis.] 113 NW 682.

97. Conveyance by insolvent to son-in-law held a fraudulent preference of latter, the transaction being a cash sale followed a few days later by payment to son-in-law of unsecured note due him by vendor. New Orleans Acid & Fertilizer Co. v. Guillory, 117 La. 821, 42 S 329.

98. Where defendant advanced money to a third person wich which to purchase a stock of goods and never had possession of the property sold, payment by grantor to defendant of a debt due him out of the proceeds of sale held not fraudulent as to creditors of former. Pritz v. Jones, 117 App. Div. 643, 102 NYS 549. An insolvent debtor may prefer one creditor over another and to that end may transfer all of his property providing his purpose is honest and not to hinder or delay other creditors. Handlin-Buck Mfg. Co. v. Wendelkin Const. Co. [Mo. App.] 101 SW 702.

99. Taking a conveyance of securing a pre-existing debt does not constitute a fraud though creditor knows that same will defeat other creditors and that it was made for that purpose. Gust v. Hoppe, 201 Mo. 293, 100 SW 34.

1. Preferential transfer is not void as to other creditors, notwithstanding preferred creditor knew that debtor was actuated solely by a desire to defraud his creditors. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516.

2. Preferred creditor must act in good faith, and if he takes property to aid debtor in accomplishing the fraud the conveyance is void. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516. The mere fact that a conveyance operates to secure the grantee priority in the payment of his debt will not avoid it where he does not participate in a fraudulent design on the part of the grantor to defraud his creditors. McCauley v. Shockey [Md.] 66 A 625. Sale of stock of goods at grossly inadequate price and application of proceeds to payment of one creditor, who had knowledge of scheme to thereby defeat other creditors, held fraudulent though such creditor received no more than was due him. Stitt v. Stone [Tex. Civ. App.] 18 Tex. Ct. Rep. 990, 19 Tex. Ct. Rep. 764, 103 SW 1192.

3. An insolvent corporation holds its assets as a trust fund for the equal benefit of all creditors, and hence is without power to prefer one creditor over another. Transfer by insolvent corporation with understanding that transferee should prefer certain creditors held void as to other creditors. Furber v. Williams-Flower Co. [S. D.] 111 NW 548.

NOTE. Preference by Insolvent Corporations: This doctrine emanates from the fact that creditors are confined to corporate assets while natural persons may subsequently acquire property and discharge previous obligations, and is sustained by the following cases. Adams & Westlake Co. v. Deyette, 5 S. D. 418, 59 NW 214, 49 Am. St. Rep. 887; Ford v. Plankinton Bank, 87 Wis. 363, 58 NW 766; Hardware Co. v. Manufacturing Co., 86 Tex. 143, 24 SW 16, 22 L. R. A. 802; Wood v. Dunmer, 3 Mason, 311, Fed. Cas. No. 17,944; Sanger v. Upton, 91 U. S. 56, 23 Law. Ed. 220; Curran v. State of Arkansas, 15 How. [U. S.] 312, 14 Law. Ed. 705; Appleton v. Turnbull, 84 Me. 72, 24 A 592; Biddle Purchasing Co. v. Steel Wire & Nail Co., 16 Wash. 681, 48 P 407; Sawyer v. Hoag, 17 Wall [U. S.] 610, 21 Law. Ed. 731.—See Furber v. Williams-Flower Co. [S. D.] 111 NW 548.

4. Deposit with defendant, a creditor, of proceeds of sale of corporate assets and loan by defendant to corporation, which was also deposited, secured by assignment of outstanding, the entire deposit then being drawn to pay defendant's unsecured claims, held a scheme to prefer defendant. Perry v. Van Norden Trust Co., 118 App. Div. 288, 103 NYS 543. Payment by an insolvent corporation of notes secured by mortgage to the extent of the mortgage securities is not a preference within the act. Wright v. Gansevoort Bk., 118 App. Div. 281, 103 NYS 548.

5. The receipt of a preferential payment contrary to statute is in law no payment at

creditor of the debtor's insolvency or its intent to give a preference is not essential.[6] Relationship with the creditor preferred does not render the transaction fraudulent.[7]

The rule that the fraudulent intent of the debtor does not vitiate a perferential transfer does not apply where the debt is materially less than the value of the property, in which case the conveyance is void where the creditor takes with notice of the debtor's fraudulent intent,[8] notwithstanding payment of a cash consideration for the surplus[9] except where the money received is by agreement applied to payment of other debts.[10]

§ 2. *Validity and effect.*[See 7 C. L. 1855]—A conveyance fraudulent as to creditors is valid and binding as between the parties to it[11] and those in privity to the grantor.[12] As to creditors it is void regardless of the grantor's solvency[13] or the consideration paid,[14] but though a conveyance is fraudulent as to a portion of the property transferred it may be valid as to the remainder.[15]

all, hence a creditor holding an indorsed note does not thereby release the indorser and does not by accepting such payment become a bona fide purchaser. Perry v. Van Norden Trust Co., 118 App. Div. 288, 103 NYS 543; Wright v. Gansevoort Bk., 118 App. Div. 281, 103 NYS 548.

6. Wright v. Gansevoort Bank, 118 App. Div. 281, 103 NYS 548.

7. Assignment to wife who was a creditor held valid though preferring her over other creditors. Lowther v. Rader, 102 NYS 929. A wife who is a creditor has the same right to a conveyance in payment of her claim as any other creditor. Evidence held to show that husband was indebted to wife, and hence conveyance to her was valid though a preference over other creditors. Weis v. Farley [Neb.] 110 NW 656. Where at time of marriage husband borrowed money from wife which he agreed to repay her in future, even at an indefinite time, he may subsequently, even as against creditors who had in meantime acquired claims against him, convey to her in satisfaction of such indebtedness, although effect may be to hinder and delay creditors in enforcement of their claims. Mahaska County v. Whitsel, 133 Iowa, 335, 110 NW 614. And it is immaterial that creditors extended credit on faith of property standing in husband's name, wife not being guilty of any purpose to defraud them. Id. Under the civil law a wife who is also a creditor of her husband stands upon a different footing from other creditors, and it is the husband's duty to see that she is paid the amount due her in preference to other creditors. Compton v. Deitlein, 118 La. 360, 42 S 964.

8. Transfer is valid where the purchasing creditor has no knowledge of debtor's intent to defraud other creditors. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516.

9. If creditor takes more than enough property to pay his debt, the sale is void, where he has notice of debtor's fraudulent intent, within the rules applicable to a volunteer purchaser, notwithstanding payment of valuable consideration for the surplus. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516.

10. Notwithstanding preferred creditor takes more property than is necessary to pay his debt, paying a valuable consideration for the surplus, the sale is not void where by agreement the purchaser or seller applies the money received to payment of other debts of the seller, the sale being in good faith. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516. Though amount realized was insufficient to pay all. Id. And in such case the rules of a creditor purchaser, where the debt is the sole consideration, apply. Id.

11. Martin v. Shears [Neb.] 110 NW 1010. Though statute makes conveyances in fraud of creditors "null and void." Tudor v. Tudor [Vt.] 67 A 539. As between the parties to a fraud, the transaction is valid, and the court will not relieve them of the consequences of the fraud. Sewell v. Norris [Ga.] 58 SE 637. Neither a court of law or equity will aid a fraudulent grantor in recovering back the property or in enforcing the trust upon which the deed was made. Will leave them in precise position in which their fraudulent acts have placed them. Cochonour v. Ratcliff, 223 Ill. 274, 79 NE 83. Where property was conveyed in trust for benefit of vendor to defraud his creditors, and subsequently reconveyed to the vendor, recognition of latter's title in action on fire policy requiring insured to be sole and unconditional owner is not an enforcement of the trust. Insurance Co. v. Waller, 116 Tenn. 1, 95 SW 811.

12. Deed fraudulent as to creditors is valid as against the heirs of the grantor. Southwood v. Southwood, 30 Ky. L. R. 307, 98 SW 304; Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 SW 198. In action by heirs of grantor to set aside conveyance to wife as fraudulent, instruction held to require finding for defendant if jury believed that grantor conveyed to her with intent, known to her, to defraud his creditors, notwithstanding undisclosed intent on part of grantor that deed should not operate to pass title. Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 SW 198.

13. If fraudulent intent on the part of the grantor is shown, the conveyance is void, notwithstanding the debtor has other property sufficient to satisfy his creditors. Bekins v. Dieterle [Cal. App.] 91 P 173.

14. A sale with intent to hinder or defraud creditors of the seller, which intent was known to the grantee, is void, notwithstanding payment by latter of an adequate con-

§ 3. *Who may attack.* See 7 C. L. 1855—Only creditors [16] and others directly affected [17] who were prejudiced [18] by the conveyance may attack it, and they may be estopped to assert its invalidity.[19] As a rule a creditor must first reduce his claim to judgment,[20] but by statute in some states a surety whose liability has not yet accrued may sue.[21] Administrators of the grantor may attack it when authorized by statute.[22]

§ 4. *Rights and liabilities of persons claiming under a fraudulent grantee.* See 7 C. L. 1856—A fraudulent grantee can convey a good title to an innocent purchaser,[23] but not to one with notice of the fraud.[24] This latter rule has no application, however, where the subsequent purchaser derives title from an innocent grantee.[25]

sideration. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516; Gust v. Hoppe, 201 Mo. 293, 100 SW 34.

15. The effect of constructive fraud on an instrument will not be extended so as to render a mortgage covering two distinct classes of property wholly void merely because it is void as to one of them. Chattel mortgage covering stock in trade and other property, void as to former because being allowed to remain in possession of mortgagor, held valid as to other property. Eastman v. Parkinson [Wis.] 113 NW 649.

16. Mitchell v. Cleveland [S. C.] 57 SE 33. One neither a creditor nor a purchaser cannot attack a chattel mortgage, Mill's Ann. St. § 2027 providing that sales of goods, unaccompanied by immediate delivery and followed by actual and continued change of possession, shall be void as to creditors and subsequent purchasers. Klug v. Munce [Colo.] 90 P 603.

17. A pledgee of corporate stock may sue in equity to enjoin fraudulent transfer of property of corporation though neither a stockholder nor a creditor of the corporation. Andrews Co. v. National Bk. [Ga.] 58 SE 633.

18. Purchaser at sale under judgment subject to a first and second mortgage could not avoid the lien of the second mortgage on ground that it was invalid as to mortgagor's creditors. Youd v. German Sav. & Loan Soc., 3 Cal. App. 706, 86 P 991. The rule denying creditors the right to attack acts of a debtor prior to the creation of the debt does not apply to the right of a forced heir to attack a conveyance by his ancestor in fraud of his legitime, as, though the right does not accrue until the death of the donor, it relates back to a date anterior to the donation. Jones v. Jones [La.] 44 S 429. Defects in a prior agreement to convey, based on a sufficient consideration, cannot be asserted by a creditor seeking to set aside a conveyance made in pursuance thereof as fraudulent. Aultman Engine & Thresher Co. v. Greenlee, 134 Iowa, 368, 111 NW 1007. Where property is transferred in good faith for a valuable consideration, a creditor is not entitled to have the transfer set aside merely because the debtor might have successfully resisted an action to compel performance. Id.

19. The assignee of a creditor is estopped to assert the invalidity of a transfer as a fraud on creditors where he was largely instrumental in securing the transfer as attorney for one of the parties to it. Canton Roll & Mach. Co. v. Rolling Mill Co., 155 F 321. Though ordinary heirs are estopped to assert the invalidity of a conveyance by their ancestor, the rule has no application to conveyances in fraud of forced heirs in so far as their legitime is concerned. Jones v. Jones [La.] 44 S 429. Dismissal of an attachment in suit against grantor, and entry of judgment against him on stipulation, does not estop plaintiff in such action from atacking conveyances by grantor as in fraud of plaintiff. Scharff v. McGaugh, 205 Mo. 344, 103 SW 550.

20. Only creditors having a lien on the land of the debtor may sue to set aside conveyances in fraud of their rights. Hence no right of action exists after the lien of a judgment has expired. Smith v. Ellison, 80 Ark. 447, 97 SW 666. Simple contract creditor cannot maintain an action in equity in the Federal courts to set aside a fraudulent conveyance by the debtor either by virtue of state statutes or otherwise. Jurisdictional Act Mar. 3, 1875 (18 Stat. 472, c. 137, U. S. Comp. St. 1901, p. 513), permitting action to enforce liens to be brought in the district where the property is situated, does not confer such right, and, if it did, would be unconstitutional as in violation of the 7th amendment. Canton Roll & Mach. Co. v. Rolling Mill Co., 155 F. 321. Nor does the fact that the creditor holds a mechanic's lien on the property entitle him to maintain such an action, as, if valid, it may be enforced against the property itself regardless of conveyances. Id

21. Under Civ. Code of Practice, § 237, a surety may bring an action in equity against his principal before the debt or liability becomes due to assail fraudulent conveyances by the latter. Walters v. Akers [Ky.] 101 SW 1179.

22. An administrator may maintain an action to set aside a conveyance fraudulent as to creditors whose claims had not accrued at the time of the transfer, as well as to then existing creditors. St. 1898, § 3832. Sawyer v. Metters [Wis.] 113 NW 682, overruling Ecklor v. Wolcott, 115 Wis. 19, 90 NW 1081.

23. Evidence held to show that vendee of fraudulent grantee was a bona fide purchaser for value. South Omaha Nat. Bk. v. Boyd [Ark.] 97 SW 288.

24. The burden is upon one claiming under a fraudulent grantee to show that purchase was made in good faith and for a valuable consideration. Long v. Garey Inv. Co. [Iowa] 112 NW 550. Where grantee, in conveyance fraudulent as to creditors, formed a new corporation and transferred property

§ 5. *Extent of grantee's liability.*See 7 C. L. 1856—A fraudulent grantee is not entitled to a lien on the property purchased to the extent of the price paid therefor,[26] nor can he assert a claim against his grantor's estate until claims of creditors have been paid.[27] Goods replaced with the proceeds of sale of property conveyed may be recovered,[28] and in setting apart to the grantee property as to which the conveyance is valid, the value of remaining property converted by him may be deducted.[29]

§ 6. *Remedies of creditors.*See 7 C. L. 1856—A conveyance in fraud of creditors may be attacked either at law[30] or in equity, and where numerous transactions are involved a single action in equity will lie,[31] but equity will not grant relief unless all legal remedies have been exhausted.[32] In a proceeding in aid of execution to set aside a fraudulent conveyance, it is not necessary that the creditor should first issue an execution against the debtor,[33] nor need he exhaust his remedies against one partner before seeking relief against a fraudulent conveyance by the other.[34] A creditor may enforce his judgment by levy on the property conveyed,[35] but only to the extent of such property.[36] All persons interested must be made parties.[37] The proceeding must be brought with due diligence after the discovery of the fraud[38] or the time within which in the exercise of reasonable diligence it would have been discovered,[39] and may be barred by laches independent of statute of limitations.[40]

to it in consideration of its capital stock, the latter is liable to creditors of the former's grantor to the extent of the property received. McNeal v. Hayes Mach. Co., 118 App. Div. 130, 103 NYS 312.

25. Knowledge by an assignee for value of an innocent mortgagee that the mortgage was executed to defraud creditors of mortgagor does not affect his title. Shive v. Merritt [Ky.] 104 SW 368.

26. A sale void as to creditors cannot operate to give the vendee a lien for money paid by him. Transfer void under bulk-sale law. Farrar v. Lonsby Lumber & Coal Co., 149 Mich. 118, 14 Det. Leg. N. 386, 112 NW 726.

27. Walters v. Akers [Ky.] 101 SW 1179.

28. Young v. Lemieux, 79 Conn. 434, 65 A 436, 600.

29. In setting apart a homestead to a fraudulent grantee, the court may deduct the value of the grain, grown on land conveyed, converted by him. Walters v. Akers [Ky.] 101 SW 1179.

30. Jurisdiction of law and equity in cases of fraud being usually concurrent, a fraudulent conveyance may be attacked in action at law. In ejectment. Carroll v. Salisbury [R. I.] 65 A 274.

31. A series of acts involving different conveyances, and fraudulent judgments made to different parties at different times in furtherance of a single scheme to defraud, may properly be made the subject of one bill in equity by the creditors to reach the property. Wright v. Simon, 118 App. Div. 774, 103 NYS 911, afg. 52 Misc. 360, 102 NYS 1108.

32. Refused where no showing that execution had ever been levied on judgment against debtor, or that any effort had been made to collect same, or that debtor was insolvent. Smith v. Ellison, 80 Ark. 447, 97 SW 666.

33. Such a proceeding differs from a creditor's bill where issuance of execution is essential. Dawson v. First Nat. Bk., 228 Ill. 577, 81 NE 1128. The issuance of an execution need not be averred. Id.

34. On obtaining judgment against an insolvent partnership, a creditor need not proceed against one of the partners before filing a bill to set aside a fraudulent conveyance by the other. Dawson v. First Nat. Bk., 228 Ill. 577, 81 NE 1128.

35. Creditor as to whom a sale is fraudulent may levy on goods without bringing an action to have sale set aside. Hall v. Frith, 51 Misc. 600, 101 NYS 31. May levy as though it were property of debtor. Sale in bulk without complying with law. Parham & Co. v. Potts-Thompson Liquor Co., 127 Ga. 303, 56 SE 460. May levy on and sell property fraudulently conveyed as though no conveyance had been made. Bekins v. Dieterle [Cal. App.] 91 P 173.

36. A creditor may levy only on the identical property conveyed, hence property purchased by the grantee with the proceeds of the sale of property fraudulently conveyed is not subject to levy. Guyton v. Chasen [Tex. Civ. App.] 17 Tex. Ct. Rep. 1016, 101 SW 290.

37. Action held properly dismissed for failure to join grantee of alleged fraudulent conveyance. Mishler v. Finch, 104 Md. 182, 64 A 945. The vendee of a fraudulent grantee who was not made a party to a proceeding to have deed declared void is not bound by the decree. Tudor v. Tudor [Vt.] 67 A 539. The debtor is a necessary party to an action to set aside an alleged fraudulent conveyance. Rule applies to fraudulent transfer by corporation to its stockholders. Lathrop, Shea & Henwood Co. v. Byne, 100 NYS 1041. One not shown to be a partner of the grantor, though alleged to be interested in a fraudulent sale, need not be made a party to an action to set it aside. Sale void under the bulk sale law. Murray Drug Co. v. Harris [S. C.] 57 SE 1109.

38. Gordon v. Anderson [Miss.] 44 S 67.

39. Delay of twenty years after conveyance alleged to be fraudulent held a bar to

The complaint must allege fraud [41] and, when a particular statute is relied on, facts bringing the case within the statute must be set forth.[42] A denial of fraud is sufficient to raise the question that the property conveyed was exempt.[43] The parties are entitled to an instruction on all issues presented by the evidence.[44] Upon setting aside a conveyance the proceeds should first be applied to the payment of the owner's debts,[45] and in an action on a foreign judgment, though relief against the grantees is denied, the plaintiff is entitled to a decree against the grantor's estate.[46]

Freemasons; Friendly Suits; Friend of the Court; Funds and Deposits in Court; Future Estates, see latest topical index.

GAMBLING CONTRACTS.

§ 1. What Constitutes a Wagering Contract (1522).
§ 2. Rights and Remedies of Parties and Their Privies (1523).
§ 3. Effect of Illegality on Substituted or Collateral Contracts or Securities (1524).

The crime of gambling and the right to recover money lost thereat is elsewhere treated.[47]

§ 1. *What constitutes a wagering contract.* See 7 C. L. 1859—A contract of sale for future delivery is valid if actual delivery is intended,[48] though the seller does not own the commodity at the time of entering into the same,[49] but such contract

an action to set it aside, same having been recorded on the day of its execution and plaintiff's grantor having purchased at an execution sale a year after recording of conveyance to defendant. Gordon v. Anderson [Miss.] 44 S 67. Delay of thirteen years after obtaining judgment and filing of creditor's bill to set aside alleged fraudulent conveyance held fatal. Farr v. Hauenstein [N. J. Err. & App.] 67 A 377, rvg. 70 N. J. Eq. 635, 62 A 383.

40. Attack on conveyances made from ten to twenty years previously held barred though statute of limitations was not pleaded. Potter v. Potter's Receiver [Ky.] 101 SW 905. Delay of four years in bringing action to set aside fraudulent transfer held not to constitute laches. Bennett v. Boshold, 123 Ill. App. 311.

41. Complaint in action to set aside conveyance as fraudulent must allege fraud or facts from which the existence of fraud may be reasonably inferred. Pritz v. Jones, 117 App. Div. 643, 102 NYS 549. The facts on which fraud is predicated must be specifically pleaded. Mere allegation that property was conveyed in fraud of creditors not sufficient. Leavengood v. McGee [Or.] 91 P 453.

42. Under Ky. St. 1903, §§ 1910-1911, providing that mortgages made in contemplation of insolvency with intent to prefer certain creditors shall inure to benefit of all creditors upon petition filed by any person interested filed within six months after record thereof, a petition which did not allege insolvency of mortgagor, or that mortgage was made in contemplation of insolvency with intent to prefer certain creditors, or that it was filed within the time prescribed held insufficient. Krish & Co. v. Kentucky Jeans Clothing Co. [Ky.] 102 SW 803.

43. Answer need not allege that land conveyed was defendant's homestead. Hobson v. Noel, 30 Ky. L. R. 1, 97 SW 388.

44. Where there is evidence to show that lease of farm was taken in name of wife to prevent creditors from levying on crop, it is error to refuse an instruction on the issue thus presented. Fink v. McCue, 123 Mo. App. 313, 100 SW 549.

45. Upon setting aside a fraudulent conveyance of corporate property by the owner of all of its stock, the court may properly order the proceeds first applied to the payment of corporate debts. Taber v. Armstrong, 30 Ky. L. R. 938, 99 SW 957, rehearing denied, 101 SW 305.

46. Action against the administrator of the estate of a judgment debtor on a foreign judgment and alleged fraudulent grantees to set aside certain conveyances as in fraud of creditors. South Omaha Nat. Bk. v. Boyd. 79 Ark. 215, 97 SW 288.

47. See Betting and Gaming, 9 C. L. 388.

48. Watson v. Hazlehurst, 127 Ga. 298, 56 SE 459; Cleage v. Laidley [C. C. A.] 149 F 346. Not gambling contract within Hurd's Rev. St. Ill. 1905, pp. 698-700. Zeller v. Leiter [N. Y.] 82 NE 158. In action between broker and principal it is their intent and not intent of brokers actually making sale to make delivery that controls. Carson v. Milwaukee Produce Co. [Wis.] 113 NW 393. Intention of parties to contract of purchase and sale for future delivery to sell contract and rights thereunder and thus avoid delivery or receipt thereunder does not render it a wager. Cleage v. Laidley [C. C. A.] 149 F 346. Intention of parties to contracts of purchase and sale for future delivery to settle same so far as possible by "set-off" and "ringing off" under rules of board of trade and only delivery remainder does not render contract a wager. Id. Evidence held to show intent to "off-set" and "ring off" contracts of purchase and sale for future delivery, and to delivery remainder. Id.

49. Watson v Hazlehurst, 127 Ga. 298, 56 SE 459.

is void where it is mutually [50] understood that no delivery is to be made but a settlement is to be effected on the difference between market and contract price.[51] Marginal contracts,[52] gift enterprises based on chance,[53] and optional contracts for the purchase or sale of grain for future delivery,[54] are expressly prohibited in some states. Remedial contracts relating to gambling contracts are liberally construed.[55] Intent to make delivery or not to make delivery is usually a question for the jury,[56] under all the facts and circumstances of the transaction.[57]

§ 2. *Rights and remedies of parties and their privies.* See 7 C. L. 1860—Gambling contracts being void will not support an action,[58] but the party seeking to

50. Both parties must contemplate nondelivery. Ware v. Dumont, 123 Ill. App. 1; In re Baxter & Co. [C. C. A.] 152 F 137. Facts and circumstances held to support finding that there was intent to make actual delivery on appellee's part. Semler Mill. Co. v. Fyffe, 127 Ill. App. 514. It being necessary to show that both parties contemplated nondelivery, defendant after testifying that he did not intend to deliver, may show by conversations with other party that such was his intent also. Zeller v. Leiter [N. Y.] 82 NE 158.

51. Gibney v. Olivette [Mass.] 82 NE 41; Carson v. Milwaukee Produce Co. [Wis.] 113 NW 393; Cleage v. Laidley [C. C. A.] 149 F 346. Intention to "settle by payment of differences," "betting on future prices," or "closing up without delivery by payment of differences," means an intention by one who has sold for future delivery to buy on same board for same delivery and to off-set one against the other and to pay or receive difference Carson v. Milwaukee Produce Co. [Wis.] 113 NW 393. Under Hurd's Rev. St. 1905, pp. 698, 699, c. 38, § 130, all transactions in grain are gambling contracts where neither party thereto contemplates delivery but settlement of differences only. Pratt & Co. v. Ashmore, 224 Ill. 587, 79 NE 952.

52. Claim against estate alleging that testator employed plaintiffs to purchase stock and to advance price thereof, which he agreed to repay, with commissions and interest, depositing stocks purchased, together with stocks, as security, etc., held not to show on its face a contract for purchase of stocks on margins, in violation of Const. art. 4, § 26. Pollitz v. Wickersham, 150 Cal. 238, 88 P 911. But where, in addition thereto plaintiffs were given right to sell for protection in case of decline in market, a finding of such a contract was authorized. Id. Evidence held to warrant finding that plaintiffs had right to sell to protect themselves against decline of price. Id.

53. Where each purchaser receives certificate entitling him to hat pin, all of which are alike, such scheme is not void as gift enterprise under Laws 1895, p. 289, c. 152, the element of chance being lacking. United Jewelers' Mfg. Co. v. Keckley [Kan.] 90 P 781.

54. Contract to leave offer to make legal contract of sale open for specified time held option contract within Crim. Code, § 130. Woods v. Bates, 126 Ill. App. 180. Contract considered and held not mere offer to make contract for sale of grain, but an option to enter into a contract for purchase of grain. Bates v. Woods, 225 Ill. 126, 80 NE 84.

55. That portion of Hurd's Rev. St. 1905, c. 38, § 130, relating to option contracts to buy or sell grain for future delivery, held entitled to liberal construction. Bates v. Woods, 225 Ill. 126, 80 NE 84.

56. Carson v. Milwaukee Produce Co [Wis.] 113 NW 393. Evidence of prior transactions, methods of doing business by board of trade where sales were made, together with communications between plaintiff and defendant, held to make intent a question for jury. Id. Positive testimony of plaintiff that they did not know that defendants did not intend to receive or deliver cotton, together with rules of exchange under which transaction was had requiring actual delivery, held to require court to instruct in favor of contract. Springs & Co. v. Carpenter [C. C. A.] 154 F 487.

57. Direct testimony of party that delivery was or was not intended may be overcome by inferences from facts and circumstances. Carson v. Milwaukee Produce Co. [Wis.] 113 NW 393. Probability that intelligent and experienced business man dealing with bucket shop knew that sales were only colorable held to overcome his testimony to contrary. In re Baxter & Co. [C. C. A.] 152 F 137. Positive contract agreement to make actual delivery held overcome by admissions of plaintiff. Saunders v. Baker, 122 Mo. App. 294, 99 SW 51.

Facts and circumstances surrounding transaction and settlements made held to show that neither party contemplated delivery. Pratt & Co. v. Ashmore, 224 Ill. 587, 79 NE 952. Held to show that appellant knew that appellee and middlemen contemplated settlement without delivery. Ware v. Dumont, 123 Ill. App. 1.

Evidence of seller's inability to purchase goods sold because of lack of funds and buyer's inability to accept delivery if tendered, and other facts, held to show that there was no intent to make delivery. Saunders v. Baker, 122 Mo. App. 294, 99 SW 51.

Evidence admissible: Where defendant, sued upon contract for sale of cotton, pleaded that as part of consideration plaintiff's assignor had agreed to purchase and carry two cotton futures for him, evidence of assignor's methods of doing business held admissible to show that no delivery was intended. Smith v. Bowen [Tex. Civ. App.] 17 Tex. Ct. Rep. 664, 100 SW 796. Party to contract of sale for future delivery may testify as to intent to deliver where facts and circumstances make a reasonable case for the jury. Semler Mill Co. v. Fyffe, 127 Ill. App. 514.

58. In action for cotton sold, defendant may show that as part consideration plaintiff's assignor agreed to purchase and carry for defendant two cotton futures, rule that if plaintiff can make out case without proving illegality of contract he may recover,

escape therefrom has the burden of establishing its invalidity [59] by clear proof.[60] Recovery of money lost or advanced under gambling contract, together with interest thereon,[61] is allowed to the party losing or advancing the same [62] in some states,[63] unless he has received the full benefit of his contract.[64] The right of recovery given by the Alabama statute is a personal action which survives the death of plaintiff.[65] An agent making a settlement with a customer on a gambling contract does not succeed to his rights as against the principal.[66] Where right to recover margins advanced on a gambling contract is given, unpaid margins cannot be off-set against them.[67]

§ 3. *Effect of illegality on substituted or collateral contracts or securities.* See 7 C. L. 1861—A note given in settlement of a gambling contract is invalid,[68] and, if non-negotiable, is unenforceable in the hands of all holders,[69] and cannot form the basis of a valid compromise.[70] Generally,[71] money loaned or advanced to discharge gambling contract obligations may be recovered,[72] unless made by a party interested and as a mere device to enable winner to recover his debt.[73]

Game and Game Laws; Gaming; Gaming Houses, see latest topical index.

not being applicable (Smith v. Bowen [Tex. Civ. App.] 17 Tex. Ct. Rep. 664, 100 SW 796), and it is not necessary to show performance of such illegal agreement (Id.). Where defendant sued upon contract for sale of cotton pleaded that as part of consideration plaintiff's assignor agreed to buy and carry for him two cotton futures, and court instructed that if money paid by plaintiff's assignor to defendant was a loan he could recover, it is not error to refuse to instruct that money must have been paid for cotton and not as loan to support defendant's plea. Id. Rights and remedies on marginal contracts as affected by rules of boards of trade and exchanges, see Exchanges and Boards of Trade. 9 C. L. 1326.

59. Allen v. Caldwell, Ward & Co. [Ala.] 42 S 855; King v. Zell [Md.] 66 A. 279; Smith v. Bowen [Tex. Civ. App.] 17 Tex. Ct. Rep. 664, 100 SW 796. Contract valid on its face. Watson v. Hazlehurst, 127 Ga. 208, 56 SE 459. Where evidence of party seeking to enforce a debt admits of no reasonable question but that it arose out of gambling contract, it is immaterial where burden of proof lies. Saunders v. Baker, 122 Mo. App. 294, 99 SW 51.

60. Cleage v. Laidley [C. C. A.] 149 F. 346.

61. In action under Code 1896, § 2163, authorizing recovery of money lost on wager contract, interest may be allowed thereon, recovery not being a penalty. Motlow v. Johnson [Ala.] 44 S 42.

62. Right to recover money lost by gaming, etc., given by Crim. Code, § 132, is to party losing, hence member of firm cannot individually recover losses of firm. Ware v. Dumont, 123 Ill. App. 1.

63. Under Rev. Laws, c. 99, § 4, and amendments, money lost on illegal wagering contracts may be recovered. Gibney v. Olivette [Mass.] 82 NE 41.

64. Where customer paid $770 margins to agent of defendant for purchase of stock, but no purchase was made and agent transferred account to another company which carried same without expenses to customer and finally settled for $1,100, such customer cannot recover margins from defendant though defendant retains same without consideration. Fuller v. Municipal Tel. & Stock Co., 117 App. Div. 352, 102 NYS 154. But where no benefits have been paid by latter company, advanced margins may be recovered. Id.

65. Action under Code 1896, § 2163, authorizing recovery of money lost on a bet, is a personal action within § 35, and survives death of plaintiff. Motlow v. Johnson [Ala.] 44 S 42.

66. Especially where agent knew of illegality and was party thereto. Fuller v. Municipal Tel. & Stock Co., 117 App. Div. 352, 102 NYS 154.

67. Fuller v. Municipal Tel. & Stock Co., 117 App. Div. 352, 102 NYS 154.

68. Zeller v. Leiter [N. Y.] 82 NE 158. Is contra bonas mores. Union Collection Co. v. Buckman, 150 Cal. 159, 88 P 708.

69, 70. Union Collection Co. v. Buckman, 150 Cal. 159, 88 P 708.

71. Lender of money to be used in illegal purchase of stocks on margins cannot recover same. Gibney v. Olivette [Mass.] 82 NE 41. Where broker brings principals together for purpose of entering into wagering contract and advances money on behalf of his principal, he cannot recover therefor from his principal. Anderson & Co. v. Holbrook [Ga.] 57 SE 500.

72. Though contract for sale of cotton is wagering contract, broker who has no interest therein and who does not share in profit or loss may recover for advances made on behalf of principal. Allen v. Caldwell, Ward & Co. [Ala.] 42 S 855. Where defendant directed plaintiffs, stockbrokers, to sell short and afterwards directed them to purchase to fill sale contracts, plaintiffs may recover money so advanced, though original short sale was void as wager, since it is not unlawful to fulfill such contract. Whittmore v. Malcomson, 155 F 503.

73. Evidence held to show that loan made by plaintiff, agent of foreign bucket shop, was made as devise to enable winner to recover debt and in hope of retaining defendant as customer. Saunders v. Baker, 122 Mo. App. 294, 99 SW 51.

GARNISHMENT.

§ 1. Definition and Nature of Remedy in General (1525).
§ 2. Grounds for Garnishment and Choses and Properties Subject (1525).
§ 3. Persons Liable to Garnishment (1526).
§ 4. Rights, Defenses, and Liabilities Between Plaintiff and Garnishee (1526).
§ 5. Rights, Defenses, and Liabilities Between Defendant and Garnishee (1528).
§ 6. Duties of a Garnished Agent to his Principal (1528).
§ 7. Conflicting and Hostile Claims and Liens (1528).
§ 8. Jurisdiction and Venue (1528).
§ 9. Procedure to Obtain Writ; Bond (1528).
§ 10. The Writ and Service Thereof; Return; Notice to Defendant (1529).
§ 11. Answer or Disclosure and Later Pleadings or Traverse (1529).
§ 12. Claims or Interventions (1529).
§ 13. Dissolution of Writ (1530).
§ 14. Effect of Pendency of Other Proceedings; Stay, etc. (1530).
§ 15. Trial, Verdict and Judgments, Costs and Execution (1530).
§ 16. Appellate Review (1531).

The scope of this topic is noted below.[74]

§ 1. *Definition and nature of remedy in general.* See 7 C. L. 1862—In Washington garnishment is a civil suit and not process of execution to enforce a judgment already rendered.[75]

§ 2. *Grounds for garnishment and choses and properties subject.* See 7 C. L. 1862—Choses in action, as well as corporeal property, are as a general rule, subject to garnishment.[76] Liability for tort is not garnishable,[77] but the amount agreed to be paid in settlement of an action for tort is subject.[78] What is garnishable must frequently be determined by construction of the terms of the statute.[79] Property to be subject to garnishment must belong to defendant and be in the hands of the garnishee [80] at the time of the service of process.[81] In the case of a debt it must be an unconditional obligation [82] owing by the garnishee to the defendant [83]

74. **It includes** all ancillary process to attach credits of the defendant whether known as garnishment, trustee process, factorizing process, or the like. **It excludes** Attachment (see Attachment, 9 C. L. 282) and Final Process (see Execution, 9 C. L. 1328). Exemptions are largely governed by the same statutes as prescribe exemption from execution, as to which see Exemptions, 9 C. L. 1339.

75. Laws Wash. 1893, p. 95, c. 56; Pierce's Code, p. 107; Ballinger's Ann. Codes & St. §§ 5390 et seq. Baker v. Duwamish Mill Co., 149 F 612.

76. Holmes & Co. v. Pope, 1 Ga. App. 338, 58 SE 281.

77, 78. Lee v. Louisville & N. R. Co. [Ga. App.] 58 SE 520.

79. A draft is property and subject to garnishment under the Washington garnishment statute. Washington Brick, Lime & Mfg. Co. v. Trader's Nat. Bk. [Wash.] 89 P 157. Under Gen. Laws 28th Leg. p. 166, c. 109, § 6 authorizing a judgment creditor of a mutual insurance company to garnish securities deposited with state treasurer under provisions of act applies to companies acting under the act as well as to those incorporated under it. Robbins v. Midkiff [Tex. Civ. App.] 18 Tex. Ct. Rep. 477, 102 SW 430.

80. Where upon termination of contract one contractor becomes entitled to property in hands of other, such property becomes subject to garnishment. Guffey Petroleum Co. v. Nearn [Tex. Civ. App.] 17 Tex. Ct. Rep. 903, 100 SW 967. T. Bank had in its possession a draft drawn by defendant upon S. P. Co. in favor of S. Bank, which was accepted by drawee. S. Bank had a rule that in receiving collections it acted only as agent and always charged amount of a draft back to drawer when it failed to collect. It was held that even though pending collection S. Bank permitted drawer to check against draft. It remained his property and subject to garnishment by his creditors in hands of T. Bank. Washington Brick, Lime & Mfg. Co. v. Traders Nat. Bk. [Wash.] 89 P 157. Where agent of lottery company received check or draft from company proceeds of which it was intended should ultimately be applied to payment of a certificate holder, but it was deposited in bank in agent's name, money thus deposited remained property of company and subject to garnishment by one holding a claim against it. Fidelity Funding Co. v. Vaughn, 18 Okl. 13, 90 P 34. Wife held to have such equitable interest in fund deposited in bank in name of husband and wife as to protect it from garnishment proceedings by husband's creditor. Schnellmann v. Southern Commercial & Sav. Bk., 123 Mo. App. 188, 100 SW 575. Where defendant holds checks of the garnishee, given as cash in payment for transportation to be thereafter furnished, the garnishee is under no obligation to stop payment of the checks after service of the writ of garnishment. Larsen v. Allen Line S. S. Co. [Wash.] 88 P 753.

81. Wheelock v. Globe Const. Co. [Mass.] 81 NE 276. Under Garnishment Act, Hurd's St. (1903) 1011, § 5, garnishee must answer for debt due and owing any time before answer, although it did not exist in matured or unmatured form at time of service. The Howard Co. v. Miller, 123 Ill. App. 483.

82. Smith v. Marker [C. C. A.] 154 F 838. Duty to pay it must not be contingent on happening of any future event. Id.

83. Funds to be garnishable must be due

at that time,[84] but need not be then immediately due unless the statute so requires.[85] Property held under a contract of hire is not garnishable during the life of the contract.[86] By statute in some states, wages are exempted from garnishment.[87] The exemption cannot be waived unless such waiver is authorized by statute.[88] Under the Federal constitution and statutes[89] a railroad car is not exempted from garnishment because of the incidental effect the impounding thereof may have on its general use in the matter of transporting interstate freight.[90]

§ 3. *Persons liable to garnishment.*[See 7 C. L. 1864]—When property is in custodia legis, the officer holding it is not liable to garnishment unless made so by statute.[91] This rule applies to a guardian.[92] Under statutes in some of the states, administrators may be garnished.[93] In Georgia a judgment creditor may bring garnishment proceedings against an officer who has levied another process on the debtor's property.[94] Special commissioners who have in their hands an amount arising out of a chancery cause belonging to a judgment debtor, which the decree directs to be paid over to the owner, are liable to garnishment.[95]

§ 4. *Rights, defenses, and liabilities between plaintiff and garnishee.*[See 7 C. L. 1865]—One who disregards a summons of garnishment does so at his peril, and for any misapplication of property or funds is personally liable in damages to plaintiff.[96] A valid existing judgment against defendant is a condition precedent

to defendant. Adams v. Augustine [Mass.] 81 NE 192. Where defendant, captain of fishing vessel, had exclusive possession and control until completion of voyage, and net proceeds of catch were to be shared in certain proportions by defendant owners and crew, proceeds in hands of purchasers of part of catch are garnishable for personal debt of defendant. Id.

84. Smith v. Marker [C. C. A.] 154 F. 838. Where at time of service of process there was merely an executory contract, whereby garnishee was bound to take bonds and pay for them, the fact that bonds were subsequently delivered does not warrant judgent against garnishee for their price. Wheelock v. Globe Const. Co. [Mass.] 81 NE 276.

Statutory rule in Georgia: Under Acts 1901, p. 55, service of summons of garnishment operates as a lien on garnishee's indebtedness at the date of the services, and also upon all future indebtedness accruing up to date of answer. Mutual Reserve Fund Life Ins. Co. v. Fowler [Ga. App.] 59 SE 469; Lee v. Louisville & N. R. Co. [Ga. App.] 58 SE 520. It was not the purpose of this statute to violate existing contracts or to restrain the right to contract. Mutual Reserve Fund Life Ins Co. v. Fowler [Ga. App.] 59 SE 469; Singer Sew. Mach. Co. v. Southern Grocery Co. [Ga. App.] 59 SE 473.

85. Smith v. Marker [C. C. A.] 154 F. 838.

86. Southern Flour & Grain Co. v. Northern Pac. R. Co., 127 Ga. 626, 56 SE 742. Where a railroad company in Georgia receives from a railroad company in another state a car, under a contract by which Georgia company has right to carry car loaded to its destination in Georgia, unload it, reload and return it to owner beyond limits of state, paying for its use, the car while thus being used by the Georgia company is not subject to garnishment. Id.

87. Under laws of Georgia wages of all journeymen, mechanics and day laborers are exempted. Traders' Inv. Co. v. Macon R. & Light Co. [Ga. App.] 59 SE 454. A nonresident of state is not entitled to benefit of Cobbey's Ann. St. 1903, §§ 1531-1534, prohibiting garnishment of wages of employes earned within sixty days prior to commencement of proceeding. McCormack v. Tincher [Neb.] 110 NW 547.

88. A contract, either specific or general, by which a laborer attempts to waive his exemption under Georgia statutes, is void. Traders Inv. Co. v. Macon R. & Light Co. [Ga. App.] 59 SE 454.

89. Constitution, art. 1, § 8, par. 3, and U. S. Rev. St. § 5258 (U. S. Comp. St. 1901, p. 3564).

90. Southern Flour & Grain Co. v. Northern Pac. R. Co., 127 Ga. 626, 56 SE 742.

91. Pugh v. Jones, 134 Iowa, 746, 112 NW 225.

92. Pugh v. Jones, 134 Iowa, 746, 112 NW 225. Not liable after death of ward to garnishment by judgment creditors of heirs. Id.

93. This is so in Iowa Code § 3936. Geiger v. Gaige, 134 Iowa, 197, 111 NW 804; Pugh v. Jones, 134 Iowa, 746, 112 NW 225.

94. Civ. Code 1895, § 4776, only applies where money is in the hands of an officer. Barkley v. May [Ga. App.] 59 SE 440.

95. Boylan v. Hines [W. Va.] 59 SE 503.

96. Lee v. Louisville & N. R. Co. [Ga. App.] 58 SE 520. A garnishee who applies money or property in his hands which may be subject to garnishment according to his own judgment and without judicial direction does so at his own risk. National Lumber Co. v. Turner [Ga. App.] 59 SE 15. If after a judgment is entered against an administrator as garnishee of defendant he pays defendant's distributive share and procures his discharge in the probate court, he is personally liable in damages to plaintiff or his assignee. Geiger v. Gaige, 134 Iowa, 197, 111 NW 804. It is no defense in such case that plaintiff moved, in probate court, to set aside discharge, and motion was overruled. Id.

to a judgment against the garnishee,[97] and the admission by the garnishee of his indebtedness to defendant will not preclude him from contesting the validity of the judgment against him.[98] The plaintiff has the same,[99] but no greater, rights against the garnishee[1] than the defendant himself has. If there is nothing due from the garnishee to the defendant at the time of garnishment the plaintiff cannot recover.[2] It is a good defense that defendant had assigned the property or debt bona fide, prior to the garnishment.[3] An estoppel precluding recovery by defendant is equally effective against plaintiff.[4] Where employer in good faith pays money to employe upon affidavit that he is head of family, as required by Garnishment Act, he is protected though such affidavit is false.[5] Against assets in his hands, the garnishee is entitled to set off all indebtedness owed by defendant.[6] The bankruptcy of the defendant, if the petition in bankruptcy was filed more than four months after the service of the summons of garnishment, will not preclude the subjection of the funds in the hands of the garnishee.[7] A transfer of the debtor's

97. Ingram v. Jackson Mercantile Co. [Ga.. App.] 58 SE 372. Good defense by the garnishee that plaintiff has obtained no judgment against defendant. Fagan v. Jackson, 1 Ga. App. 24, 57 SE 1052. Good defense that judgment against defendant is dormant and cannot be enforced. Ingram v. Jackson Mercantile Co. [Ga. App.] 58 SE 372.

98. Ingram v. Jackson Mercantile Co. [Ga. App.] 58 SE 372.

99. Garrett v. Mayfield Woolen Mills [Ala.] 44 S 1026, Melton Hardware Co. v. Heidelberg [Miss.] 44 S 857. Garnishee is not entitled to occupy a better position than if sued by defendant. Guffey Petroleum Co. v. Nearn [Tex. Civ. App.] 17 Tex. Ct. Rep. 903, 100 SW 967; Garrett v. Mayfield Woolen Mills [Ala.] 44 S 1026. Any liability which defendant could assert against garnishee may be asserted against him by plaintiff. Buckwalter v. Bradley [Ky.] 104 SW 970.

1. Singer Sewing Mach. Co. v. Southern Grocery Co. [Ga. App.] 59 SE 473; Holmes & Co. v. Pope, 1 Ga. App. 338, 58 SE 281; Southern Flour & Grain Co. v. Northern Pac. R. Co., 127 Ga. 626, 56 SE 742; Munson v. Mahon [Iowa] 112 NW 775; Pugh v. Jones, 134 Iowa, 746, 112 NW 225; Melton Hardware Co. v. Heidelberg [Miss.] 44 S 857; Schuler v. Murphy [Miss.] 44 S 810. The creditor may stand in his debtor's shoes, but he gains no additional privileges. Garrett v. Mayfield Woolen Mills [Ala.] 44 S 1026; Singer Sew. Mach. Co. v. Southern Grocery Co. [Ga. App.] 59 SE 473. Where a fund in hands of the garnishee is, under contract with defendant, to be advanced for one special purpose only, plaintiff cannot compel its payment to purposes foreign to contract. Holmes & Co. v. Pope, 1 Ga. App. 338, 58 SE 281.

2. McMillan v. Schneider, 147 Mich. 258, 13 Det. Leg. N. 1054, 110 NW 961; Melton Hardware Co. v. Heidelberg [Miss.] 44 S 857. Money is due building contractor when work is completed and certificate of architect waived or improperly withheld. McMillan v. Schneider, 147 Mich. 258, 13 Det. Leg. N. 1054, 110 NW 961. Where the defendant contracted with garnishee to sell sewing machines on commission, he to retain his commissions, there is nothing to which garnishment can attach, and Acts 1901, p. 55, creating lien on all future indebtedness of garnishee to defendant accruing to date of answer, is not applicable in such case. Singer Sew. Mach. Co. v. Southern Grocery Co. [Ga. App.] 59 SE 473. Where, after one holding fund under assignment for benefit of creditors has mailed to creditors checks for their pro rata share, he is served with summons of garnishment by one of creditors, he is not liable for any part of debt represented by checks except plaintiff's pro rata share. Parker-Fain Grocery Co. v. Orr, 1 Ga. App. 628, 57 SE 1074. But where summons of garnishment has been served on sender of check before it has left postoffice, and when sender, under regulations of postoffice, has right to withdraw it from mail, debt represented by check is subject to garnishment. Watt-Harley-Holmes Hardware Co. v. Day, 1 Ga. App. 646, 57 SE 1033.

3. Pugh v. Jones, 134 Iowa, 746, 112 NW 225. Assignment by heirs of property in hands of administrator. Id. Non-negotiable draft delivered by garnishee to defendant, accepted by him as conditional payment, and transferred to bank for value. Patek v. Chicago & N. W. R. Co., 147 Mich. 377, 13 Det. Leg. N. 1065, 110 NW 1059. An order given against his wages by a debtor to a creditor for necessaries furnished does not, where the order is for a period longer than thirty days, defeat an attachment for necessaries against wages earned after the thirty-day period. King v. Laws, 5 Ohio N. P. (N. S.) 414. Bona fide assignee of check, before garnishment service on the bank, has superior claim to funds though presentment is not made until after service Paepcke-Leicht Lumber Co. v. Becker, 124 Ill. App. 311. Where assignment is superior to rights of plaintiff, notice of assignment to garnishee in time to allow latter to set up the claim is timely. Anderson v. McGraw, 124 Ill. App. 457.

4. Munson v. Mahon [Iowa] 112 NW 775. Facts constituting estoppel to claim commission for sale of garnishee's land. Id.

5. Illinois C. R. R. Co. v. Cowles, 127 Ill. App. 456.

6. Mutual Reserve Fund Life Ins. Co. v. Fowler, [Ga. App.] 59 SE 469. In Georgia a garnishee may set off, against assets in his hands belonging to a nonresident defendant, any indebtedness owed him by the latter, even though it be not due. Civ. Code 1895, § 3755. Holmes & Co. v. Pope, 1 Ga. App. 338, 58 SE 281.

7. National Surety Co. v. Medlock [Ga. App.] 58 SE 1131.

property with the purpose of defrauding creditors may be attacked in garnishment proceedings.[8] Stockholders of a garnished corporation, after judgment against the garnishee, are liable for sums received by them as dividends in fraud of defendant's rights.[9]

§ 5. *Rights, defenses, and liabilities between defendant and garnishee.* See 7 C. L. 1866—Where defendant has personal knowledge of the suit, the garnishee need only look to the jurisdiction, act fairly, and make a full disclosure.[10] But when the judgment against defendant is void for want of jurisdiction, payment by the garnishee is no defense to an action against him by defendant.[11]

§ 6. *Duties of a garnished agent to his principal.* See 5 C. L. 1578

§ 7. *Conflicting and hostile claims and liens.* See 7 C. L. 1866—The garnishee, if defendant be indebted to him, has a lien on funds coming into his hands, or future indebtedness to the defendant on his part, superior to that of the plaintiff.[12] A mechanic's lien that is not perfected until after garnishment must wait until the claim of the plaintiff in garnishment is satisfied.[13] The respective legal priorities of a judgment lien and a mortgage fi. fa. may be adjudicated by the determination of the issue made upon the answer of a garnishee and the traverse thereof.[14]

§ 8. *Jurisdiction and venue.* See 7 C. L. 1867—In Georgia the situs of a debt for the purpose of garnishment is at the residence of the garnishee.[15] In Illinois personal service of process on defendant is not essential to jurisdiction, where wages sought to be reached were earned and payable outside the state, if the cause of action arose within the state.[16] Where an issue is joined in garnishment proceedings between citizens of different states, the cause may be removed to the Federal courts upon petition of garnishee.[17]

§ 9. *Procedure to obtain writ; bond.* See 7 C. L. 1869—In Illinois a preliminary notice is prerequisite to garnishment of the head of a family.[18] The application for writ of garnishment need not be separate from the affidvait therefor.[19] The affidavit must conform to statutory requirements.[20] An affidavit is

8. McDaniel v. Bryan, 123 Mo. App. 640, 100 SW 1103.

9. Montgomery v. Whitehead [Colo.] 90 P 509.

10. Baltimore & O. R. v. Freeze [Ind.] 82 NE 761.

11. Geduld v. Baltimore & O. R. Co., 105 NYS 110.

12. Mutual Reserve Life Ins. Co. v. Fowler [Ga. App.] 59 SE 469. This applies to any past indebtedness due by defendant. Id.

13. McMillan v. Schneider, 147 Mich. 258, 13 Det. Leg. N. 1054, 110 NW 961. Where mechanic's lien on property owned jointly by husband and wife is not perfected because of wife's failure to sign contract for improvement, and a creditor of contractor garnishes money due under contract, the wife cannot thereafter, by consenting to entry of decree establishing lien, postpone right of plaintiff in garnishment. Id.

14. Barkley v. May [Ga. App.] 59 SE 440. Presentment of check to bank for payment is sufficient notice of claim on fund, and, where fund is garnished, the claim of holder should be set up. Paepcke-Leicht Lumber Co. v. Becker, 124 Ill. App. 311.

15. Act August 13, 1904 (Acts 1904, p. 100), so providing, is not unconstitutional. Harvey v. Thompson [Ga.] 57 SE 104.

16. See Illinois Act July 1, 1903. Baltimore & O. R. Co. v. Freeze [Ind.] 82 NE 761.

17. Baker v. Duwamish Mill Co., 149 F 612. Defendant in original action is a necessary party in such case and must be placed in controversy on side of plaintiff. Id.

18. Where wages of a wage-earner and head of family are to be garnisheed, demand in writing must first be served upon employe and employer twenty-four hours before bringing such suit and nonservice renders judgment void. Boyne v. Vandalia R. R. Co., 128 Ill. App. 191.

19. Burge v. Beaumont Carriage Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 918, 105 SW 232.

20. Where there are several defendants, and affidavit states that "defendant has not * * * property in their possession * * *, subject to execution, sufficient to satisfy * * * debt," words "property in their possession" makes affidavit sufficient as extended to all defendants. United States Fidelity & Guaranty Co. v. Warnell [Tex. Civ. App.] 103 SW 690. Sufficient statement of plaintiff's belief that garnishees are indebted to defendants not subject to objection as being an affidavit that garnishee's agent is indebted to defendant. Id. Affidavit which states that garnishee is indebted to "defendant" is sufficient where one of two defendents was dismissed and judgment recites that fact. Id. In an action against two defendants not jointly liable, an affidavit seek-

sufficient though it does not state specifically that application has been made.[21] It is not fatal to an affidavit that the amount claimed therein is less than that named in the petition in the main action.[22] Such petition may be looked to in aid of the statements as to amount due made in the affidavit.[23]

Bond. See 5 C. L. 1580—Where there are two defendants and the property garnished belongs only to one of them, it is not ground for complaint that the bond for garnishment is made payable to both.[24] A single bond will support a writ issued to two garnishees.[25]

§ 10. *The writ and service thereof; return; notice to defendant.* See 7 C. L. 1870—Objection to sufficiency of service may be waived by garnishee.[26] A return to the improper court does not render the levy of the garnishment void, but the case will be transferred with the levy intact to the proper court.[27] Where the writ was not served on the defendant, he cannot be concluded by any decision adverse to him respecting jurisdiction or the liability of the garnishee.[28]

§ 11. *Answer or disclosure and later pleadings or traverse.* See 7 C. L. 1870—Where answers of garnishee, a trustee of defendant, show that income which it has collected and holds was assigned by instrument in writing to another creditor before service of the present attachment, but that defendant had revoked the assignment, there is no admission of assets liable to attachment.[29] In Georgia the grounds on which garnishment proceedings are based cannot be traversed.[30] The objection that the defense of set-off was not specially pleaded by the garnishee may be waived.[31] A traverse of a garnishee's answer is sufficient if it merely denies the truth of the answer.[32] Defendant cannot complain of sufficiency of garnishee's answer to justify entry of judgment against him.[33]

§ 12. *Claims or interventions.* See 7 C. L. 1872—One interested [34] may intervene in the proceeding.[35] In Georgia to enable a claimant to become a party to a garnishment suit he must file a claim to the property in the hands of the garnishee or

ing to reach a debt due one of them, which states that writ was not sued out to injure "either the defendant or garnishee," is not invalid. Burge v. Beaumont Carriage Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 918, 105 SW 232. This is so though bond was made payable to both defendants and writ commands garnishee to make known his indebtedness to both. Id. Affidavit averring that garnishment is not sued out to injure "garnishee" fatally defective where there are two garnishees. United States Fidelity & Guaranty Co. v. Warnell [Tex. Civ. App.] 103 SW 690.

21, 22. Burge v. Beaumont Carriage Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 918, 105 SW 232.

23. Rate of interest ascertained by reference to petition. Burge v. Baumont Carriage Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 918, 105 SW 232.

24. Burge v. Beaumont Carriage Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 918, 105 SW 232.

25. United States Fidelity & Guaranty Co. v. Warnell [Tex. Civ. App.] 103 SW 690.

26. Cranford v. Dunson & Bros. Co., 1 Ga. App. 319, 57 SE 1057. Acknowledgment of service by him is sufficient. Id. After garnishee has appeared and answered and claimant has given dissolution bond, objection cannot be made to sufficiency of service. Id.

27. Carreker v. Thornton, 1 Ga. App. 507, 57 SE 988.

28. Alexander v. Segee, 101 Me. 561, 64 A 1049.

29. Egbert v. DeSolms [Pa.] 67 A 212.

30. Statutes make no provision for such traverse. Cohen v. Goodrum Tobacco Co., 1 Ga. App. 38, 57 SE 974.

31. Welton Hardware Co. v. Heidelberg [Ala.] 44 S 857.

32. Barkley v. May [Ga. App.] 59 SE 440.

33. Slattery v. Stevens, 125 Ill. App. 67.

34. In attachment proceedings, where it is sought through the answer to a garnishee process to hold the funds of one who is a stranger to the action pending the obtaining of jurisdiction over the defendant by publication, the owner of the fund is "interested" in the proceedings within the meaning of § 5121, and, upon intervening by motion to discharge the attachment, he has the right to be heard. Modoc Soap Co. v. Brankamp, 5 Ohio N. P. (N. S.) 252.

35. Right of one claiming interest in fund garnished to interplead, under Hurd's Rev. St. 1903, c. 62, § 11, is not wholly discretionary with court. Paepcke-Leicht Lumber Co. v. Becker, 124 Ill. App. 311. Motion to vacate judgment and for leave to plead held timely made where garnishee made answer and judgment was entered before return day unbeknown to claimant, who applied immediately upon learning of same. Id.

give a bond to dissolve the garnishment.[36] A claimant whose claim is based on a fraudulent transfer from defendant cannot recover.[37] The question whether an assignment of the garnished fund to a claimant was subsequent to service of garnishment is for the jury.[38] In Massachusetts trustee's sworn answers to interrogatories propounded by plaintiff are admissible upon issues between plaintiff and claimant.[39] The judgment against the defendant does not bind the intervenor.[40]

§ 13. *Dissolution of writ.* See 7 C. L. 1872—It is only a statutory bond that will dissolve a garnishment.[41]

§ 14. *Effect of pendency of other proceedings; stay, etc.* See 7 C. L. 1872—The effect of appeal from judgment against defendant and execution of supersedeas bond after writ of garnishment has issued is to suspend garnishment proceedings until the appeal is decided.[42] Upon affirmance of the judgment the suspension is terminated.[43]

§ 15. *Trial, verdict and judgments, costs and execution.* See 7 C. L. 1873—In Colorado a valid judgment cannot be rendered against a garnishee in a justice's court, when his answer is controverted, if scire facias is not served upon him.[44] The burden of proof is upon the plaintiff to show that he has obtained a judgment against defendant[45] and that money was due from the garnishee to defendant at the time of garnishment.[46] When it is shown that garnishee has realized a sum of money from goods of defendant which were in his possession, the burden is cast upon him to show that the money is not subject to garnishment.[47] If the answer of the garnishee clearly admits liability, judgment may be ordered thereon.[48] Evidence is admissible to show that money is due from the garnishee to defendant.[49] The question whether the garnishee is indebted to or has assets of defendant is to

36. Civ. Code 1895, § 4720. Drought v. Poage [Ga. App.] 59 SE 728. But where defendant for purpose of dissolving garnishment executes bond under Civ. Code 1895, § 4718, for use of a named user, such recital does not make the user a party, entitled as such to have an issue tendered and disposed of as to title to the property. Id.

37. Where claimant before parting with any consideration for transfer by defendant of interest in judgment recovered against garnishee, had knowledge of defendant's insolvency and his indebtedness to plaintiff, the transfer is fraudulent and void as to plaintiff. Jordan v. Rice [Ala.] 44 S 93.

38. Jordan v. Rice [Ala.] 44 S 93.

39. Where alleged partnership of which defendant was member claimed funds in hands of trustee, it was held that under Rev. Laws, c. 189, § 32, answers to interrogatories propounded under § 11, containing statements of acts and conduct of defendant from which it might be inferred he was only person interested in alleged partnership, were admissible. Hubbard v. Lamburn [Mass.] 80 NE 459.

40. Where upon bill of interpleader the real issue is between the creditor and another claiming title to the funds, admission of judgment against defendant by garnishee and creditor does not dispense with necessity of proof as against the others. Max Gross v. Eddie Strzyzowski, 124 Ill. App. 300.

41. Bond held not a statutory bond under Civ. Code 1895, § 4720. Roney v. McCall [Ga.] 57 SE 503.

42, 43. Garrett v. Mayfield Woolen Mills [Ala.] 44 S 1026.

44. Unless he be already in court. Mill's Ann. St. § 2728. State Bk. of Ft. Morgan v. Harcourt, 38 Colo. 243, 88 P 855. The mere filing of an answer is not such an appearance, under this statute, as will authorize judgment where answer denies liability to defendant. Id.

45. Fagan v. Jackson, 1 Ga. App. 24, 57 SE 1052. Proof must be made of the judgment against defendant before judgment can be rendered against garnishee. The Howard Co. v. Miller, 123 Ill. App. 483. Under Garnishment Act, § 10, judgment against defendant in attachment is prerequisite to judgment against garnishee. Boyne v. Vandalia R. R. Co., 128 Ill. App. 191.

46. Where money alleged to be due building contractor was garnished, evidence held to prove work completed and certificate of architect waived or improperly withheld. McMillan v. Schneider, 147 Mich. 258, 13 Det. Leg. N. 1054, 110 NW 961.

47. Barkley v. May [Ga. App.] 59 SE 440.

48. Where garnishee's answer discloses on its face liability and no issue of fact is raised, conditional judgment may be made final on motion. The Howard Co. v. Miller, 123 Ill. App. 483. Under rule of practice of court, judgment will not be entered upon garnishee's answer unless it contains distinct admissions of funds in possession or of such facts as leave possession of funds a mere inference of law. McGeary v. Huff, 31 Pa. Super. Ct. 401. Answer of garnishee bank that it had money deposited by defendant, but had been notified that it belonged to others, the truth of which it is unable to state, held sufficient to prevent judgment. Id.

49. In garnishment of money alleged to be due building contractor, evidence admissible to show work completed and certificate

be ascertained by a comparison of their respective claims on accounts.[50] The charge to the jury must cover all the issues involved.[51] Where the effect of an instruction is to eliminate evidence that was not admissible, it is not open to the objection that it gives undue prominence to a portion of the evidence.[52] The verdict must be in proper form[53] and must be supported by evidence.[54] The judgment must conform to the pleadings.[55] Under the Georgia practice, before judgment can be rendered upon a dissolving bond, the plaintiff must obtain judgment in the main action and a judgment declaring the property found in the hands of the garnishee subject.[56] Plaintiff is not precluded from entering up judgment against the surety on the dissolving bond by the fact that pending suit defendant has been adjudged bankrupt.[57] Where defendant executes a dissolving bond for the use of a named usee, a final judgment against defendant is conclusive against the usee.[58] Where one is suggested as a claimant and appears generally and secures a continuance, judgment for plaintiff is res judicata in a subsequent action by such claimant against the garnishee.[59] The court may, in the exercise of a sound discretion, set aside its judgment at the term at which it was entered.[60]

§ 16. *Appellate review.*[See 7 C. L. 1874]—Exceptions will be dismissed, where the hearing below was premature, because the writ was not served on the principal defendant.[61] In Colorado on certiorari to review a judgment against garnishee in the justice's court, the garnishee is entitled to a trial de novo in the county court upon the question of jurisdiction.[62] Error not going to the foundation of the action will not be considered unless properly assigned.[63] Exceptions to the rulings of the court upon immaterial matters will not be passed on.[64] An appellate court will not make

of architect waived or improperly withheld. McMillan v. Schneider, 147 Mich. 258, 13 Det. Leg. N. 1054, 110 NW 961.

50. Mutual Reserve Life Ins. Co. v. Fowler [Ga. App.] 59 SE 469; Holmes & Co. v. Pope, 1 Ga. App. 338, 58 SE 281.

51. Failure to charge upon question of past indebtedness by defendant to garnishee is error. Mutual Reserve Fund Life Ins. Co. v. Fowler [Ga. App.] 59 SE 469.

52. Evidence upon question of garnishee's good faith, in remitting funds garnished, to bank. Citizens Sav. Bk. v. Boswell [Ky.] 104 SW 1014.

53. Where issue made by claim to property in hands of garnishee is one of title, verdict finding garnished property subject to garnishment is correct as to form. Cranford v. Dunson & Bros. Co., 1 Ga. App. 319, 57 SE 1057.

54. Verdict for plaintiff held supported by evidence. Carreker v. Thornton, 1 Ga. App. 508, 57 SE 988.

55. Statutory plea denying indebtedness to defendant is sufficient to enable court to fully determine rights of parties. Continental Compressed Air Co. v. Franklyn [N. J. Eq.] 66 A 897. Court may determine whether defendant could exercise option to declare contract with garnishee void and thus discharge latter's obligation to make payments thereunder. Therefore proceedings will not be enjoined to enable court of equity to determine such question. Id.

56. National Surety Co. v. Medlock [Ga. App.] 58 SE 1131. The court is without jurisdiction to render a summary judgment against sureties on a dissolution bond under Civ. Code 1895, § 4723, if the bond is not a statutory bond under § 4720. Roney v. Medlock [Ga. App.] 58 SE 1131.

57. Provided filing of petition in bankruptcy occurred more than four months after summons of garnishment was served and dissolving bond given. National Surety Co. v. Medlock [Ga. App.] 58 SE 1131.

58. The interests of defendant and usee are identical in such case. Drought v. Poage [Ga. App.] 59 SE 728. After judgments have been entered against garnishee and on dissolution bond, they should not be opened at instance of usee to allow him to make claim to property in hands of garnishee which has been appropriated to payment of judgment in favor of plaintiff. Id.

59. Southern R. Co. v. Funke [Ala.] 44 S 397.

60. No abuse of discretion on statement of facts disclosed in record in setting aside judgment against garnishee and allowing him to file a second answer. Patterson Produce & Provision Co. v. Wilkes, 1 Ga. App. 430, 57 SE 1047.

61. Alexander v. Segee, 101 Me. 561, 64 A 1049.

62. State Bk. of Ft. Morgan v. Harcourt, 38 Colo. 243, 88 P 855.

63. Garnishment bond lacking a few dollars of statutory amount. Burge v. Beaumont Carriage Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 918, 105 SW 232. Under a general assignment that court erred in refusing to quash proceedings, the several grounds set out in motion to quash cannot be considered. Id.

64. Cranford v. Dunson & Bros. Co., 1 Ga. App. 319, 57 SE 1057. Where verdict is against right of claimant to property in hands of garnishee, exceptions to ruling on sufficiency of his bond, or as to his right to have fund paid over to him on giving dissolution bond, will not be passed on. Id.

a mathematical calculation to determine whether the garnishment bond is below the statutory amount where motion to quash on that ground is made for the first time on appeal.[65] Judgment will not be reversed for error which is not prejudicial to appellant.[66]

GAS.

§ 1. Gas Franchises; Powers and Duties of Corporations Exercising Them (1532). Obligation to Supply Consumers (1533).
§ 2. Public Regulation (1533).
§ 3. Torts and Crimes (1534).

The scope of this topic is noted below.[67]

§ 1. *Gas franchises; powers and duties of corporations exercising them.* See 7 C. L. 1875—Gas companies are frequently incorporated under a general act,[68] and their corporate powers,[69] and liability to forfeiture of franchise,[70] are not dissimilar to that of other corporations. While the legislature may authorize the occupation of streets without municipal consent,[71] such consent is usually made a condition precedent,[72] and the terms upon which it is given must be complied with.[73] The territory over which such companies may extend their systems is usually con-

65. Burge v. Beaumont Carriage Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 918, 105 SW 232.

66. Citizens' Sav. Bk. v. Boswell [Ky.] 104 SW 1014. Where evidence shows that defendant had on deposit with garnishee more than amount of judgment admission of evience of subsequent deposit made after service of garnishment was not prejudicial error. Id. Instruction as to effect of misnomer of defendant in garnishment process held not prejudicial error. Id.

67. **It includes** the powers, duties, and liabilities of persons manufacturing and furnishing illuminating and fuel gas. **It excludes** gas wells and leases for their operation (see Mines and Minerals, 8 C. L. 985), general matters relating to franchises (see Franchises, 9 C. L. 1445), corporations (see Corporations, 9 C. L. 733), and some questions relating to occupation of streets (see Highways and Streets, 8 C. L. 40), and the police power of municipalities (see Municipal Corporations, 8 C. L. 1056). Gas as an explosive is also treated under separate head (see Explosives and Inflammables, 9 C. L. 1345), though many such questions will be found treated in this topic (see § 3).

68. Language of 23rd clause of § 1249, Gen. St. 1901, enumerating some of purposes for which corporations may be formed, held broad enough to authorize creation of corporations to supply natural gas to public. Compton v. People's Gas Co. [Kan.] 89 P 1039.

69. Act March 27, 1878 (Gen. St. p. 1613, § 13), authorizing gas light companies by majority vote of directors with consent of majority of stockholders owning 60 per cent of capital stock to increase bonded indebtedness not to exceed two-thirds of capital stock, held not to restrict those already possessing power to create indebtedness in excess of such amount. Thatcher v. Consumer's Gas & Fuel Co. [N. J. Eq.] 66 A 934. Act March 14, 1879 (P. L. 1879, p. 316, Gen. St. p. 1613 § 30), authorizing gas companies to lay gas mains "and the like," etc., held not to authorize laying of water pipes or other pipe lines, but only pipes similar to mains for distribution of gas. Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co. [N. J. Law] 67 A 1005. Act March 14, 1879, (P. L. 1879, p. 316; Gen. St. p. 1613, § 30), held not unconstitutional as special legislation or as granting special privileges. Id.

70. Where company acquired franchise under Const. art. 11, § 19, providing that, in absence of public works for supplying artificial light, any corporation shall have privilege of laying pipes in streets to supply gas or other illuminating light, etc. its charter was not subject to forfeiture because some of its patrons used its gas for heating purposes after it had passed beyond control of company. People v. Los Angeles Independent Gas Co., 150 Cal. 557, 89 P 108.

71. In re Consolidated Gas Co., 56 Misc. 49, 106 NYS 407. Where certain gas companies were incorporated to furnish gas to city of New York, a provision that no public street should be dug into, etc., without municipal consent, held mere gratuitous delegation to city to control time, manner, and method in which streets could be opened and did not restrict companies' power to occupy. Id.

72. Permission to occupy and lay pipes in streets when exercised becomes property right which can only be taken for cause by due process of law. In re Consolidated Gas Co., 56 Misc. 49, 106 NYS 407. Term limitations in licenses granted to various constituent companies of the Consolidated Gas Company of New York construed as mere limitations upon right to open streets in original placing of pipes, etc., and not limiting corporate life of companies. Id.

73. Ordinance requiring Columbus Gas company to pay annual sum as compensation for municipal supervision as condition to right to occupy streets held not rendered invalid because of misapplication of funds so raised (City of Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 NE 440), and it is not relieved from paying same because actual cost of supervision is less (Id.), or by fact that city subsequently granted like privileges to other gas companies, especially where ordinance expressly stated no exclusive privilege was granted (Id.). Held that former ordinance under which Columbus Gas Company operated had expired by 1892, and hence ordinance of that year not superfluous and unnecessary. Id.

trolled by statute [74] or otherwise,[75] and a township, in its legislative discretion,[76] may restrain an unauthorized use of its highways.[77]

Obligation to supply consumers. See 7 C. L. 1876—A company having a right to supply gas to the inhabitants of a city is a public service corporation and must serve all alike,[78] who comply with the conditions imposed by statute [79] and the reasonable [80] rules adopted by company for its own protection.[81] Under the statutes of New York, a company failing to furnish [82] gas upon written application [83] is liable to a penalty.

§ 2. *Public regulation.* See 7 C. L. 1876—A municipality has only such power to regulate public service gas companies as is expressly or by necessary implication granted to it,[84] and such power as is given cannot be delegated.[85] A charge within the maximum fixed by statute is conclusively presumed reasonable in some states.[86]

74. Word "town," as used in supplement to gas company act of 1879 (P. L. 1879, p. 316; Gen. St. p. 1613, § 30), authorizing extension of mains into any neighboring city, town, or village, held to include townships (Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co. [N. J. Law] 67 A 1005), and the word "neighboring" therein used to extend to municipalities in same county to which gas can be conveniently conveyed from central point (Id.). Charter right to lay pipes in streets of "town of Millville and its vicinity" held to mean village of Millville and vicinity and township of Millville, hence did not authorize the laying of pipes in township of Landis. Landis Tp. v. Millville Gaslight Co. [N. J. Eq.] 65 A 716.

75. Township ordinance granting right to transmit gas to other municipalities is not void for failing to limit right to those municipalities where it may lawfully lay its pipes. Millville Imp. Co. v. Pitman Glassboro & Clayton Gas Co. [N. J. Law] 67 A 1005.

76. Propriety of township instituting suit to restrain unauthorized use of highways is legislative and not judicial question. Landis Tp. v. Millville Gaslight Co. [N. J. Eq.] 65 A 716

77. Landis Tp. v. Millville Gaslight Co. [N. J. Eq.] 65 A 716. Where gas pipes are unlawfully laid in highway, township may prevent the use thereof where it has not been connected with system. Id.

78. Whether its right is exclusive or not. Vanderberg v. Kansas City Gas Co. [Mo. App.] 105 SW 17. Where married woman rents property in her own name and on own responsibility, as she may do under statute, gas company cannot refuse to furnish her with gas on ground that she is not head of family. Id.

79. Where consumer of gas refuses to make deposit as security for gas furnished as authorized by Transportation Law (Laws 1890 pp. 1148, 1149, c. 566, §§ 66, 68), he has no standing in equity to restrain company from shutting off gas because of refusal to pay more than rate prescribed by statute. Pollits v. Consolidated Gas Co., 118 App. Div. 92, 102 NYS 1017.

80. Rules providing for discontinuance of service to delinquent customers and for cash deposit to secure payment of monthly bills held reasonable. Vanderberg v. Kansas City Gas Co. [Mo. App.] 105 SW 17. Cannot refuse to supply gas to married woman for use in building leased by her unless she pays debt of husband. Id.

81. Where contract between gas company and city, giving former right to furnish gas to inhabitants of city, fixes rules for exercise of right, such rules control if reasonable, and when no rules are prescribed company can establish only reasonable rules of its own. Vanderberg v. Kansas City Gas Co. [Mo. App.] 105 SW 17. Gas company may refuse to contract with married woman for furnishing of gas when she is not tenant of premises, and hence without power to authorize access thereto for inspection of meters, etc. (Id.), and it is immaterial that company placed refusal on another ground (Id.).

82. Laws 1890, p. 1148, c. 566, § 65, providing that if gas company on application shall refuse or neglect to supply gas to building, though there may be arrears due for gas furnished prior occupant, shall forfeit, etc., is applicable to discontinuance of supply once commenced. Hoch v. Brooklyn Borough Gas Co., 117 App. Div. 882, 103 NYS 370.

83. Complaint under Laws 1890, p. 1148, c. 566, § 65, alleging that defendant waived written application, is fatally defective. Shelly v. Westchester Lighting Co., 105 NYS 133. Furnishing of gas on oral application does not waive necessity of written application to render company liable for discontinuance. Shelley v. Westchester Lighting Co., 103 NYS 951. Where, in pursuance to written application, company commenced to furnish gas, it is not liable for penalty for wrongful disontinuance in absence of new written application. Shelly v. Westchester Lighting Co., 105 NYS 133.

84. To regulate price. City of Richmond v. Richmond Natural Gas Co., 168 Ind. 82, 79 NE 1031. Where franchise to supply gas is granted without any restrictions as to price and is accepted, a city incorporated under general law has no authority to regulate price by ordinance except so far as such power is conferred by law of 1905 (Id.); and such law, authorizing cities to fix prices by contract or franchise, does not authorize it to fix by ordinance price to be charged by company possessing franchise, since such ordinance is not a contract or franchise (Id.).

85. Ordinance of city of Omaha regulating construction of buildings and providing that it shall be unlawful to erect gas tank therein without written consent of all owners of property within 1,000 feet thereof held void as to proviso. State v. Withnell [Neb.] 110 NW 680.

86. Charge of 90 cents per 1,000 feet, charge of $1.25 being authorized by Laws 1890, p. 1149, c. 566, § 70. Brooklyn Union

§ 3. *Torts and crimes.*[See 7 C. L. 1877]—Corporations and persons engaged in the manufacture and distribution of gas are held to a high degree of care,[87] or care commensurate with the danger to be apprehended,[88] as it is sometimes stated, and are liable for damages resulting from negligence.[89] The party injured, however, must not be guilty of contributory negligence.[90] Proof of escape of gas from a defective or broken pipe makes a prima facie case of negligence.[91] The rules of pleading [92] and evidence [93] are not dissimilar to those obtaining in tort actions generally.

General Average; General Issue, see latest topical index.

GIFTS.

§ 1. Definitions and Distinctions (1534).
§ 2. Validity and Requisites (1535).
§ 3. Fraud, Undue Influence, Mistake, and Incapacity (1539).

Scope.—Donation by will [94] and the doctrine of charitable gifts is elsewhere treated,[95] as is the validity as to third persons of voluntary conveyances.[96]

§ 1. *Definition and distinctions.*[See 5 C. L. 1587]—Whether a particular transaction was a gift or a sale,[97] loan [98] or giving of security for an existing indebtedness,[99] and whether it was charged with a trust in favor of the donor or another,[1]

Gas Co. v. New York, 188 N. Y. 334, 81 NE 141.

87. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 SW 608.

88. Gould v. Winona Gas Co., 100 Minn. 258, 111 NW 254.

89. Liability of gas company for damage to trees caused by escape of gas is controlled by principles of negligence and not by doctrine that one must control that which, for purposes other than those which are natural, he has brought on own land. Gould v. Winona Gas Co., 100 Minn. 258, 111 NW 254. Company is not liable for permitting high pressure in its mains where not sufficiently high as to be beyond control of customers by proper regulation of valves in houses. Hollon v. Campton Fuel & Light Co. [Ky.] 105 SW 426. Petition held defective for failure to allege that pressure was such as to destroy valves or to render them insufficient. Id. In action for death caused by gas escaping from defective main, negligence held for jury. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 SW 608. In action for destruction of house alleged to be due to high pressure of gas in defendant's mains, evidence held to show that fire might have been due to other causes as likely as that of defendant's negligence, hence error not to direct verdict for defendant. Hollon v. Campton Fuel & Light Co. [Ky.] 105 SW 426.

90. Contributory negligence of plaintiff, a foreigner unfamiliar with dangers of gas, in retiring after smelling gas without investigating, held for jury. Laclede Gaslight Co. v. Cottone [C. C. A.] 152 F 629. In action for asphyxiation caused by gas escaping from main into room where deceased was sleeping, evidence held to show due diligence on deceased's part. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 SW 608.

91. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 SW 608. Where damage is caused to trees by escape of gas due to leak produced by frost, the escape not being discovered until June, held that doctrine of res ipsa loquitur applies. Gould v. Winona Gas Co., 100 Minn. 258, 111 NW 254.

92. Complaint construed to allege negligence in permitting gas to escape after knowing of leak, as well as in permitting main to become defective in first instance. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 SW 608.

93. In action for destruction of house alleged to be due to high pressure of gas in mains, evidence of pressure in other houses is admissible without proof that they were similarly located and equipped with same regulators as house destroyed, where size of town is such that equipment must necessarily be practically same, and installation was by defendant. Hollon v. Campton Fuel & Light Co., 105 SW 426. Evidence of pressure hour and half before fire held not sufficiently connected in time to be admissible. Id. Evidence of condition of "by-path" and "regulator" after fire, held inadmissible. Id.

94. See Wills, 8 C. L. 2305.

95. See Charitable Gifts, 9 C. L. 555.

96. Fraudulent Conveyances, 9 C. L. 1508.

97. The following writing: "Received of A for B the sum of $1,007.25, and I hereby relinquish all my claim to the balance of $1,500 worth of securities, excepting that in the event of the necessity that B shall pay me $3 per week until my death (signed) C." held to be a sale or release, and not a valid gift inter vivos. Puff v. Puff [Ky.] 104 SW 332.

98. Evidence held to show that purchase of property for son was gift, and not loan. McGarr v. Taylor's Adm'r, 30 Ky. L. R. 446, 98 SW 1030. Demand loan held not converted into gift by death of lender before demand. Weltch v. Straub, 74 Kan. 292, 86 P 148.

99. Evidence held to show that note was in consideration of existing indebtedness, and not a gift. In re Royer's Estate [Pa.] 66 A 854.

1. An allegation that moneys are "to be used for purposes unknown to plaintiff" will

are questions of fact. It is the general rule that in the absence of fraud or undue influence a voluntary payment by a parent to a child will be presumed to be a gift.[2]

§ 2. *Validity and requisites.*[See 7 C. L. 1878]—To constitute a valid gift inter vivos there must be a delivery,[3] actual or constructive,[4] with intent[5] on part of

be construed to import a gift rather than a trust in an action against defendant for an accounting of funds paid him to be used for benefit of plaintiff. New York L. Ins. Co. v. Hamilton, 52 Misc. 189, 102 NYS 771. Held to be a gift, and not a resulting trust, where husband furnished consideration for a conveyance of realty to his wife, that she might have a home in case anything should happen to husband. Foster v. Berrier [Colo.] 89 P 787. Evidence held sufficient to warrant that such donor and donee were husband and wife. Id. See, also, Trusts, 8 C. L. 2169.

2. Jenning v. Rhode, 99 Minn. 335, 109 NW 597.

3. What constitutes an essential delivery, possession, or control must depend always on circumstances of each case and environment of the parties. Beaumont v. Beaumont [C. C. A.] 152 F 55. A gift of household goods and personal property is ineffectual where there was no delivery and donor continued to use them until her death. Taylor v. Vail [Vt.] 66 A 820. Evidence held not to establish an unconditional delivery of certain jewelry to alleged donee. Godard v. Conrad [Mo. App.] 101 SW 1108. Creditor may make a gift to his debtor, but, as in other cases, there must be delivery either by surrendering to donee the evidence of the debt or by giving him a receipt for the amount. Quirk v. Quirk, 155 F 191.

Evidence of delivery held sufficient: Facts held to constitute valid delivery of stocks which had never been transferred on books of corporation before death of donor. Bone v. Holmes [Mass.] 81 NE 290. Evidence held sufficient to establish gift of savings bank deposit. Gick v. Stumpf, 53 Misc. 83, 103 NYS 1109. Evidence held to show gift from donor to his dependent sisters of money which he caused one of them to deposit in bank to their credit, delivery to bank constituting delivery to the sisters. Succession of Zacharie [La.] 43 S 988. A manual delivery of personal property is unnecessary under Civ. Code Cal. §§ 1146, 1043, 1083, 1054, to establish a gift inter vivos where such gift is evidenced by a written instrument duly executed and delivered. Fisher v. Ludwig [Cal. App.] 91 P 658. In action against defendant to recover cow claimed by her as gift, evidence held to sustain verdict for defendant. Demmons v. Booker [Ga.] 57 SE 108.

4. Decedent told donee to go to cupboard and get a bank passbook. She took it and handed it back to him saying: "This is yours," and told him to pay her debts and not squander it, held to be a complete delivery whether it be a gift inter vivos or causa mortis. McCoy's Adm'r v. McCoy [Ky.] 104 SW 1031. Delivery of inventory of donor's assets with an instrument of assignment to donee held sufficient delivery to constitute a gift. In re Palmer's Estate, 117 App. Div. 360, 102 NYS 236. Checks drawn on decedent's bank account just before her death and delivered to payee does not constitute a valid gift of the amounts for which they are drawn where such checks are not presented nor accepted by bank before death of donor. Nor can the intention of donor be carried into execution by treating the transaction as a trust for benefit of donee. Pennell v. Ennis [Mo. App.] 103 SW 147. Donor draws check payable to donee, which is taken to bank and placed to latter's credit. Donee's pass book is kept in the bank, with other customers' books subject to her call, and she is not informed of gift until after death of donor. Held sufficient delivery. Bangs v. Browne, 149 Mich. 478, 14 Det. Leg. N. 484, 112 NW 1107. Delivery of check which is not presented for payment will not operate as a gift of the money for which it is drawn, and drawer will not be considered as trustee for payee. Thogmorton v. Grigsby's Adm'r, 30 Ky. L. R. 661, 99 SW 650. Donor by writing authorized bank to pay to donee his deposit, represented by a passbook, and delivered the order and passbook to donee, which were accepted by the bank before death. Deposit was not transferred on bank books until after death of donor. Held a valid gift inter vivos. Fisher v. Ludwig [Cal.] App.] 91 P 658.

5. Evidence held sufficient to constitute sufficient delivery of bond, with intent to pass title thereto, to constitute a valid gift inter vivos. Bone v. Holmes [Mass.] 81 NE 290. Evidence held to show no donative purpose. Schippers v. Kempkes [N. J. Law] 67 A 1042. A having a fund on deposit in a savings bank directs the bank to issue a passbook to "A or B, either to draw," or "in account with A or B," held not to constitute a present gift evidenced by the passbook, to B, there being no evidence of donative purpose. Schippers v. Kempkes [N. J. Law] 67 A 74. Where it appeared that a conveyance was made by mother to son with intent to transfer title, evidence held to constitute valid gift. Arellanes v. Arellanes [Cal.] 90 P 1059. Facts insufficient to show intent on part of savings bank depositor to pass title to account during his lifetime, and hence not a perfected gift. Magee v. Knight [Mass.] 80 NE 620. Whether or not a gift was made by mother to son, evidence indicating a desire on her part previous to her death to make such gift held admissible. McCoy's Adm'r v. McCoy [Ky.] 104 SW 1031. Where a decedent assigned property to his son a few months previous to his death it was held, in a proceeding for an assessment of decedent's estate under the transfer tax act, that evidence showed that such assignment was not made as an absolute gift, but for purpose of passing the property to heirs of decedent under terms of his will. In re Palmer's Estate, 117 App. Div. 360, 102 NYS 236. Evidence held to show a valid gift of $2,000 and that donor did not intend such sum, when withdrawn at her direction, to be paid to her. Liebert v. Hoffman, 105 NYS 337.

donor to presently divest himself of all title and dominion over the same[6] and invest donee therewith,[7] and acceptance by donee.[8] The donor[9] or a third party may take as agent or trustee for donee.[10] Where, however, donee has absolute dominion over bonds or securities given, the fact that donor has access thereto along with donee will not defeat the gift,[11] nor where he reserves interest to accrue thereon,[12] nor where he sells some of the securities and collects dividends and interest on others as donee's deputy.[13] A gift once transferred is irrevocable.[14] A donor may attach a condition to a gift in presenti if that condition be not incon-

6. Evidence of gift of personalty from husband to wife must be clear and convincing of a delivery by husband with intention of divesting himself of all control of it and vesting title in wife. Farrow v. Farrow [N. J. Err. & App.] 65 A 1009. A gift of household goods and personal chattels without delivery either actual or constructive, where donor continues to use them until her death, is ineffectual. Taylor v. Vail [Vt.] 66 A 820. Where depositor has certificate of deposit issued payable to himself or a certain other person with intent to give certificate to such person in case he survived the depositor, held not to be a gift. Turnbull v. Turnbull, 118 App. Div. 449, 103 NYS 499. Authority given a wife by her husband to draw upon his bank account is consistent with continued ownership of husband, and does not show a gift to wife. Crane v. Brewer [N. J. Eq.] 68 A 78. Where a father buys property in the name of his minor daughter, assuming to be her natural tutor and so declares in the deed, but in fact is acting for his own benefit to protect himself from claims of creditors, and afterwards sells property before child arrives at age of majority, and it passes into hands of third parties, held not to be a gift. Lyons v. Lawrence, 118 La. 561, 43 S 51. Declarations of donor before and after alleged gift are admissible as to intent. McIntosh v. Fisher, 125 Ill. App. 511. Must be such change of possession as to put it out of the power of donor to revest himself with the property. Sutton v. Lemen, 130 Ill. App. 50. Evidence held to show that gift of stock certificates was absolute and no dominion was retained by donor. Day v. Bullen, 127 Ill. App. 155. Evidence held to show that gift was made subject to revocation and was revoked. Carskaddon v. Miller, 31 Pa. Super. Ct. 94.

7. Donee should have such control, and such control only, of the subject-matter of the gift as is consistent with the ownership purported to be transferred to him. Beaumont v. Beaumont [C. C. A.] 152 F 55.

8. Beaumont v. Beaumont [C. C. A.] 152 F 55. Where a gift is beneficial and imposes no burdens upon donee, acceptance will be presumed as a matter of law. Varley v. Sims, 100 Minn. 331, 111 NW 269; Thompson v. Griggs, 31 Pa. Super. Ct. 608. Check drawn by donor payable to donee is taken to bank and placed to latter's credit. Donee's passbook was kept in the bank, with other customer's books, subject to call by her. She was not informed of gift until after death of donor. Held acceptance will be presumed. Bangs v. Browne, 149 Mich. 478, 14 Det. Leg. N. 484, 112 NW 1107.

9. Held valid gift where donor deposits money in bank in her own name in trust for donee and passbook is found in vault of latter after his death. In re Davis' Estate, 103 NYS 946. Whether donor makes delivery of stock to himself as trustee for donee held question of fact for jury. Dewey v. Barnhouse [Kan.] 88 P 877.

10. Evidence held to make a prima facie case of a complete gift inter vivos, from mother to her child, of certain money which was in possession of child's uncle and deposited in bank by him as agent of child. Jackson v. Gallagher [Ga.] 57 SE 750. In an action by the child to recover the money, it was error to grant a nonsuit where it appeared that the uncle withdrew the money and deposited it in his name as agent for his wife by whom it was drawn out and used. Id.

11. So held where evidence showed gift of bond kept in bank vault to which donor delivered a key to donees and retained one himself. Beaumont v. Beaumont [C. C. A.] 152 F 55.

12. Donor delivered to his brothers certain bonds, stating that it was a gift, but that he desired to have the coupons which should mature therefrom during his life. Coupons were kept in bank vault to which donor retained access. Held from evidence to be a valid gift even though donor afterwards visits vault and takes coupons therefrom. Beaumont v. Beaumont [C. C. A.] 152 F 55. So held subject to such qualified reservation where donor hands railroad bond to donee saying: "This is yours, but, if you will, cut off the coupons and give them to me during my life." Bone v. Holmes [Mass.] 81 NE 290.

13. Evidence held sufficient to establish a valid gift where woman withdraws her securities from vaults of trust company and in presence of officer of company states her intention to give same to her nephew who is present, and he accepts and places them in his own vault and makes his aunt his deputy, even though she afterwards sells some of them and collects. Reese v. Philadelphia Trust, Safe Deposit & Ins. Co. [Pa.] 67 A 124.

14. An absolute gift by donor to the head of a religious sect as an offering to the Lord, expecting same to be used for common good of the sect, and that he should be cared for by such sect, held to be irrevocable. Williams v. Johnston [Ark.] 104 SW 789. In a written instrument a mother states that she has made a gift of a savings bank deposit to her son, such paper confirming the gift, and delivers the instrument to him, but subsequently, by her will and codicil, declared such deposit to be held by son in trust and is specially bequeathed to certain legatees, held that the former instrument can not be set aside by mother's executor, there being no evidence of its invalidity. Gick v. Stumpf, 53 Misc. 83, 103 NYS 1109.

sistent with possession or control by the donees of the thing given.[15] But such conditions must be complied with.[16] Unless the rights of creditors[17] intervene, any person of sound mind and lawful age may make a gift,[18] but by statute in Louisiana a gift reducing the donor to penury is void.[19] Evidence is admissible to show reasons for a gift by donor.[20] It is not necessary that a gift be supported by consideration.[21] The validity of a gift does not depend upon magnitude of donor's title.[22] Where evidence is conflicting it is province of jury to determine its sufficiency.[23] And if donee does not assert gift until after death of donor, he must establish it by clear and convincing evidence, as in case of gift causa mortis.[24] Gifts of land may be by parol where donee takes possession[25] and makes valuable improvements thereon,[26] but such gift must be established by clear and unequivocal evidence.[27]

15. Gift of bonds upon condition that donor should receive coupons accruing thereon. Beaumont v. Beaumont [C. C. A.] 152 F 55.

16. Donors made conveyance of church and lot to a church corporation for the purpose of perpetuating family name, the donee thereby making a parol agreement that it would take the name of "Bales Chapel Baptist Church." Held to constitute a gift the purpose of which was continuing, and the plaintiff could restrain a change of name. Bales v. Bales Chapel Baptist Church [Mo. App.] 101 SW 150. Evidence held to show title in the defendants, the donation to plaintiff having reverted for failure to use for donative purpose. Henderson County v. Carpenter [Tex. Civ. App.] 16 Tex. Ct. Rep. 990, 98 SW 413.

17. Under Rev. Laws Mass. 1902, c. 153, §§ 1, 3, and decisions of the supreme judicial court, facts held sufficient to constitute a valid gift of corporate stocks from husband to wife through third party, and good as against husband and his subsequent creditors in absence of actual intent to defraud. Tucker v. Curtin [C. C. A.] 148 F 929. A gift of realty was made and recorded from mother of debtor to his wife and children, and the donees had been in possession since the donation. Property was subsequently seized by judgment creditors of debtor and a sale thereof enjoined by donees. Injunction was perpetuated, the debt having been created subsequently to the time of the donation, and it not being shown that creditors had any legal interest to attack donation. Hurst v. Thompson & Co., 118 La. 57, 42 S 645. A separate and special gift to a wife does not fall into the community, and § 2402 of Civ. Code La. does not apply. Id.

18. Rogers v. Rogers [Del.] 66 A 374.

19. Not void where he retains enough for subsistence. Ackerman v. Larner [La.] 44 S 452.

20. In an action by plaintiff against sister of her deceased husband to recover a cow which defendant claimed was promised her by the husband during his lifetime, and that after his death plaintiff delivered it to her, held that evidence was admissible to show such promise of deceased, such evidence not showing a perfect gift by deceased, but a reason and probability of gift by the widow. Demmons v. Booker [Ga.] 27 SE 108.

21. Where a conveyance which is held to be a gift recites that it was made in consideration of one dollar, held that such provision is a mere recital, and it was unnecessary to show any consideration. Bales v. Bales Chapel Baptist Church [Mo. App.] 101 SW 150. An assignment of household goods and chattels made upon a consideration of gratitude for services rendered and not under seal will be treated as a gift. Taylor v. Vail [Vt.] 66 A 820.

22. Donor may convey good title of estray as against everyone save the true owner. Frank v. Symons, 35 Mont. 56, 88 P 561.

23. McCoy's Adm'r v. McCoy [Ky.] 104 SW 1031. Evidence held to negative gift by wife to husband of her separate property. Reinard's Estate, 32 Pa. Super. Ct. 608.

24. Evidence insufficient to establish a gift of oyster lot from testator to executor. In re Wright, 121 App. Div. 581, 106 NYS 369.

25. Plaintiff in ejectment may recover against defendant claiming a gift from plaintiff's testator where evidence shows a parol gift unaccompanied by possession and that testator lived in house and paid taxes until his death. Wood v. Praul, 217 Pa. 293, 66 A 528. Opinions of neighbors as to who seemed to be the head of the house held inadmissible. Id. A parol gift of certain cattle by uncle to niece, where unaccompanied by delivery of possession, is void under art. 2546, Rev. St. 1895, Tex., prescribing mode of executing gifts. Eldridge v. McDow [Tex. Civ. App.] 18 Tex. Ct. Rep. 474, 102 SW 435.

26. Improvements must be such as to indicate an acceptance upon alleged terms of gift, and such as are clearly referable to no other arrangement or understanding. Logue v. Langan [C. C. A.] 151 F 455. Evidence held insufficient to establish parol gift of land. Id. So held where donee, his widow, and heirs have possession of land for about twenty-four years, during which time they pay taxes, cultivate, and make such improvements thereon as owners usually do. Sires v. Melvin [Iowa] 113 NW 106. Held sufficient part performance where donee takes possession of premises, pays taxes thereon, and makes improvements to amount of more than one thousand dollars. Maas v. Anchor Fire Ins. Co., 148 Mich. 432, 14 Det. Leg. N. 232, 111 NW 1044. Evidence held insufficient to show such improvements as would establish parol gift of land from father to son. Meurin v. Kopplin [Tex. Civ. App.] 18 Tex. Ct. Rep. 601, 100 SW 984. Improvements costing from $200 to $500, covering a period of twenty-five years, made upon land by donee who receives an annual rent of $100 therefrom, is not such part perform-

To constitute a gift causa mortis.[See 7 C. L. 1880] there must be a manifest intention to give,[28] a subject capable of passing by delivery,[29] and actual delivery[30] in contemplation of death. Where the delivery is to another than the donee, he will be presumed to take as trustee for the donee.[31] A gift causa mortis is revocable.[32] The fact that a check is not accepted by the bank does not invalidate the gift.[33] The intent or direction of donor in making the gift must not be testamentary in character.[34] One claiming a gift causa mortis must establish it by clear and convincing evidence.[35]

ance as will constitute a parol gift of the property. Young v. Crawford [Ark.] 100 SW 87. Where a party in possession of land which she claims the gift of a life estate, with remainder to her children, makes valuable improvements thereon, held that such facts would take both estates from out of the statute of frauds. Combest v. Wall [Tex. Civ. App.] 18 Tex. Ct. Rep. 498, 102 SW 147. Where defendant claims under a parol and perfected gift, there is no merit in a contention that it would work a hardship upon defendant to hold against a gift because of improvements made where they are of less value than the use of the land. Meurin v. Kopplin [Tex. Civ. App.] 18 Tex. Ct. Rep. 601, 100 SW 984. Decree quieting plaintiff's title to the extent of life estate only will be reversed where evidence shows fee in plaintiff acquired by parol gift, followed by possession and making of valuable improvements thereon. Bevington v. Bevington, 133 Iowa, 351, 110 NW 840. The donee of parol gift of land thus acquired is the owner within the meaning of an application for insurance stating that he is absolute owner of property and of the policy, which by its terms was "void if subject of insurance be a building on ground not owned by insured in fee simple." Maas v. Anchor Fire Ins. Co., 148 Mich. 432, 14 Det. Leg. N. 232, 111 NW 1044. Where plaintiff claims parol gift of land from her father, held to be a proper instruction, in an action to try title thereto, that jury should find for father, the defendant, if they believed from the evidence that plaintiff went into possession by permission of defendant and made permanent and valuable improvements thereon with the expectation that defendant would at some time give land to her, or if they believed that it was the intention of defendant at some time to give it to her. Combest v. Wall [Tex. Civ. App.] 18 Tex. Ct. Rep. 498, 102 SW 147. Evidence held insufficient to establish a parol gift of land. Id.

27. Bevington v. Bevington, 133 Iowa, 351, 110 NW 840. Where, in an alleged parol gift of land from parents to son, a statement in their will made afterwards that they had "already advanced to all of their children a liberal share of their estate" is no evidence of such gift where the will is silent as to what such advancements consisted of, especially where there was evidence of other advancements. Meurin v. Kopplin [Tex. Civ. App.] 18 Tex. Ct. Rep. 601, 100 SW 984.

28. Evidence sufficient to establish intent to make a gift causa mortis of proceeds of land. Davie v. Davie [Wash.] 91 P 950. Evidence insufficient to show intent to make a gift causa mortis of bank deposits. In re Dittrich, 53 Misc. 511, 105 NYS 301.

29. McCoy's Adm'r v. McCoy [Ky.] 104 SW 1031. Evidence insufficient to establish gift causa mortis of note and mortgage by delivery and without written assignment. Kimball v. Green, 148 Mich. 298, 14 Det. Leg. N. 84, 111 NW 761.

30. Held sufficient delivery to establish gift causa mortis where donor and wife, a few days prior to death of former, executed a written contract for sale of certain real estate to be held in escrow until paid for according to contract, the donor stating that papers belonged to his wife, that he would give them to her, that she should place them in escrow in her name, which she subsequently did, and that if anything should happen to him it would leave her in pretty good shape. Davie v. Davie [Wash.] 91 P 950. Transaction held not ineffective as an attempted oral gift of land. Id. Where decedent upon his death bed delivered certain jewelry to his lawyer, stating that if he died he wanted the alleged donee to have them as she had been so good to him, held not to constitute a valid gift causa mortis (Godard v. Conrad [Mo. App.] 101 SW 1108), nor do the facts establish a trust in favor of the alleged donee (Id.). Evidence held not to show sufficient delivery to establish gift causa mortis of a bank account. Davis v. Davis, 104 NYS 824. Circumstantial evidence may overbear positive testimony of an interested party that a transfer was made in contemplation of death, in a proceeding under the transfer tax act. In re Palmer's Estate, 117 App. Div. 360, 102 NYS 236. So held where donor, in view of death from a surgical operation, draws a check on bank for her entire deposit and delivers it to a third party as a gift to donee, and is not delivered until after death of donor. Varley v. Sims, 100 Minn. 331, 111 NW 269.

31. Varley v. Sims, 100 Minn. 331, 111 NW 269.

32. Donor conveyed certain land to donee while ill and expecting to die, who thereupon reconveyed it to donor, which deed was delivered to a third party who delivered it to donor after his recovery, held upon the evidence that first conveyance was in nature of a gift causa mortis, but that the reconveyance to donor was intended to revest title in case of latter's recovery. Le Brun v. Le Brun [Or.] 90 P 584.

33. Held a gift causa mortis where donor, in view of death from a surgical operation from which she dies, draws check on bank for her entire deposit and delivers it to a person as a gift, though unaccepted by the bank. Varley v. Sims, 100 Minn. 331, 111 NW 269. And it is unnecessary that the check in such cases distinctly state on its face that it covers the entire fund. The fact that it does may be shown by proof on the trial. Id.

34. A having a fund on deposit in a sav-

§ 3. *Fraud, undue influence, mistake, and incapacity.*[36]—Where a fiduciary relation exists between grantor and grantee, a conveyance is prima facie voidable,[37] and the burden is upon the one seeking a benefit to show absence of undue influence.[38] But the burden is not upon donee to show that there was no undue influence where there is no evidence that donor was not in possession of his mental faculties.[39] A conveyance made without consideration will not be presumed to have been intended as a gift where grantor is ignorant of his title.[40] Whether or not a gift was procured by undue influence and was abuse of confidence held to be question of fact for jury.[41]

GOOD WILL.

Partnership good will,[42] and the validity of contracts not to engage in competing business,[43] are elsewhere treated.

Good will is the favor which a business has won from the public and the probability of continued patronage,[44] and it cannot exist independent of the business.[45] The sale of an interest in the good will of a business carries an implied covenant not

ings bank directs the bank to issue passbook to "A or B, either to draw," or "in account with A or B," held not to be a gift donatio causa mortis to B, the direction being testamentary in character. Schippers v. Kempkes [N. J. Law.] 67 A 74.

35. Evidence held insufficient to establish such a gift of money by delivery of bankbook. Conaghan v. German Sav. Bk., 54 Misc. 582, 104 NYS 829. Where defendant claimed a bank account under a gift causa mortis from decedent, and evidence showed that the latter had given defendant contents of a box which he did not receive until after death of decedent, held, in an action by administratrix for its recovery, that defendant could not, under Code Civ. Proc. § 829, prove contents of box and identify the bank accounts claimed under gift. Davis v. Davis, 104 NYS 824.

36. See 7 C. L. 1882. Being governed largely by general rules, validity of assent is more fully treated in the topics Duress, 9 C. L. 1016; Fraud and Undue Influence, 9 C. L. 1475; Incompetency, 8 C. L. 169; Mistake and Accident, 8 C. L. 1020.

37. Conveyance from father to son, where evidence showed that they occupied fiduciary relations, held prima facie voidable. Morgan v. Owens, 228 Ill. 598, 81 NE 1135.

38. Liebert v. Hoffman, 105 NYS 337. Where a feeble minded person, so placed as to be subjected to influence of another, makes a gift in favor of such person, to sustain it there must be proof of the fact that the donor understood the nature of the act and that it was not done through the influence of donee. Baur v. Cron [N. J. Err. & App.] 66 A 585. Upon a bill to set aside a gift, the master must find against the presumption to the contrary that there was no undue influence on part of donee, but, where there is nothing to indicate that he did not consider the presumption in reaching his conclusion, it will be presumed on appeal that he did, and burden is on excepting party to show that he did not. Taylor v. Vail [Vt.] 66 A 820. A son accepting from his father a power of attorney by which he is given authority to manage his father's estate is placed in a position of trust, and if he claims a gift from father made during such relation the burden is upon him to show by clear and convincing testimony that such gift was made, that it was the expression of the will and intention of donor, and free from any improper practice on part of donee. Griesel v. Jones, 123 Mo. App. 45, 99 SW 769. Burden is upon donee to show that a conveyance to him for a nominal consideration by his mother, who was sixty-four years of age and unable to read, write, or understand the English language, was made freely and voluntarily, and that she had full knowledge of all the facts and a perfect understanding of effect of the transaction. Arellanes v. Arellanes [Cal.] 90 P 1059. Burden held to be upon donee to show that donor was mentally competent, that she was not unduly influenced, and that she acted with full knowledge of her property, and understood the nature and effect of her act. Taylor v. Vail [Vt.] 66 A 820. And donee is entitled to show by parol any fact from which it could be argued that the action of the donor was consistent with her previous tendencies and purposes. Evidence held sufficient to establish a valid gift by donor to one holding a confidential relation to donor. Id.

39. McCord v. McCord [Iowa] 113 NW 552.

40. Deed held not to be a gift when evidence shows fiduciary relation between grantor and grantee, and the former being ignorant of his title, of which latter has full knowledge, but fails to disclose. Morgan v. Owens, 228 Ill. 598, 81 NE 1135.

41. Griesel v. Jones, 123 Mo. App. 45, 99 SW 769.

42. See Partnership, 8 C. L. 1268.

43. See Contracts, 9 C. L. 677.

44. Evidence held to show that established retail business which was conducted mostly through mail orders had good will of value to surviving partner continuing same (In re Silkman, 105 NYS 872), value of which should be based on profits before dissolution and not subsequent (Id.).

45. Where insurance companies had withdrawn business from agent and he had no lease of office where business had been formerly conducted, held that he had no business to which good will could attach. In re Case, 106 NYS 1086.

to so engage in business as to injure that sold,[46] and upon breach thereof [47] the vendee may recover the loss sustained [48] and enjoin further violation thereof.[49]

GOVERNOR, see latest topical index.

GRAND JURY.

Constitution of Juries; Qualifications of Jurors (1540).
Jury Lists; Summoning and Impaneling of Jury (1540).
Powers and Procedure (1542).
Effect of Illegality in Constitution or Proceedings of Juries (1542).
Objections and Waiver Thereof; Estoppel to Urge (1544).
Secrecy of Deliberations (1544).

The scope of this topic is noted below.[50]

Constitution of juries; qualifications of jurors.[See 7 C. L. 1884]—The fact that one or more jurors could have been challenged for cause does not render them incompetent.[51] Among the persons commonly disqualified are those unable to read or write the English language,[52] and in Georgia it is required that a juror shall have resided in the county a prescribed period prior to service.[53] It is expressly provided by statute in Texas that failure to pay poll tax as required by law does not disqualify a person for jury service in any instance.[54]

Jury lists; summoning and impaneling of jury.[See 7 C. L. 1884]—In some states statutes prescribing the time and manner of selecting juries are regarded as directory merely,[55] while in others they are considered mandatory.[56] The officers by

46. Foss v. Roby [Mass.] 81 NE 199. Implied covenant in sale of dental business being restricted in territory in which practice is prohibited is not in restraint of trade. Id.

47. One selling good will of dental business and thereafter locating in same city and soliciting patronage by personal letters to former patrons, giving location of former place of business, breaks his implied covenant. Foss v. Roby [Mass.] 81 NE 199. Where one sold good will of book store business which had made a specialty of books used by Episcopal Church, held that, where he formed company to deal in books used by Episcopal Church, successor to vendee was entitled to injunction and an accounting. Old Corner Book Store v. Upham [Mass.] 80 NE 228.

48. Foss v. Roby [Mass.] 81 NE 199.

49. Good will of dental business in Boston held sufficiently protected by injunction restraining seller from practicing within city, although there were patrons from without the city. Foss v. Roby [Mass.] 81 NE 199.

50. **It includes** the drawing powers and proceedings of grand juries. **It excludes** the binding over of persons to await the action of the grand jury (Arrest and Binding Over, 9 C. L. 249), bail on such binding over (Bail, Criminal, 9 C. L. 320), signing and return of indictments (Indictment and Prosecution, 8 C. L. 198), and objections and motions to quash the same (Indictment and Prosecution, 8 C. L. 198). It also excludes matters relating to qualification, drawing, and challenging which are common to grand and petit juries (see Juries, 8 C. L. 617).

51. Might have been challenged for failure to pay poll tax. King v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387.

52. Evidence held to show inability to read or write English language. State v. McClendon, 118 La. 792, 43 S 417.

53. Evidence held sufficient to show residence at time of service. Shirley v. State, 1 Ga. 143, 57 SE 912.

54. Motion to quash indictment because jurors had not paid their poll tax as required by law held properly overruled under act of 29th Leg. p. 207, ch. 1807, amending article 3139, Rev. St. 1895. King v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387. Neither is failure to pay poll tax cause for challenge under above statute. Id. Under act of 28th Leg. (first called Session, p. 15, ch. 10), failure to pay poll tax does not disqualify but simply constitutes ground for challenge. Id.

55. Sess. Laws 1891, pp. 248-253, is simply directory, and not exclusive of common-law method of securing juries. Imboden v. People [Colo.] 90 P 608. Motion to quash on ground that jury was improperly selected by sheriff upon an open venire, according to common-law procedure, instead of having been drawn from box as provided by statute, held properly overruled. Sess. Laws 1891, pp. 248-253. Imboden v. People [Colo.] 90 P 608. Sess. Laws 1891, pp. 248-253, extend to both grand and petit juries. Imboden v. People [Colo.] 90 P 608. A statutory requirement that names shall be drawn from an envelope is directory only and a drawing from a box is not ground for quashing the venire. State v. Mitchell [La.] 44 S 132. Where by excusing certain jurors the names on the venire list were reduced below the number from which the jury was required to be selected, the drawing of the jury from the remaining names held not to be ground for quashing indictment, it not appearing that the jurors sworn were prejudiced against accused or that he was prejudiced in any way by the action of the court. State v. Brown, 118 La. 373, 42 S 969. Where it appears that jurors summoned by special venire had not, as a matter of fact, served

whom jurors are to be selected,[57] and the manner of selecting from the general venire list the names of persons qualified to serve as jurors is regulated by statute.[58] It is no ground for challenge that a Federal grand jury was summoned from the district of Minnesota at large, instead of from the particular division in which the offense was committed.[59] The jury is required to be selected by chance by drawing from slips containing the names of those summoned,[60] accompanied by the answer of the juror.[61] The Wisconsin statute requires the record book containing the names of persons composing the jury list to be filed with the clerk of the circuit court.[62] While one is not entitled to have persons of his own race on the grand jury there must be no discrimination against such persons.[63] The right to call a grand jury,[64] to excuse jurors,[65] and to summon and organize a jury in default of one at the regular term,[66] and the manner of drawing a second jury where the regular drawing has been set aside, is regulated by statute.[67] Statutes prescribing the manner of making up a deficiency in the number of jurors, caused by excusing some of them, are usually regarded as directory, and a substantial compliance is

as jurors on regular list within the preceding 12 months, the defendant is not prejudiced by the court's failure, in directing sheriff to summon additional jurors, to include in the order the statutory requirement that such persons summoned as jurors should not be persons who had served upon the regular list within the previous 12 months, and such failure is an irregularity merely in formation of jury and not ground for setting aside indictment. Par. 2808, Rev. St. 1901, amended by Laws 1905, p. 28, ch. 24. Thomas v. Territory [Ariz.] 89 P 591.

56. A grand jury selected by the board of county supervisors at a meeting of such board, which was neither regular nor special, held not to be a legal jury under Hurd's Rev. St. 1905, ch. 78, 34, §§ 9, 49, pp. 1264, 567. Marsh v. People, 226 Ill. 464, 80 NE 1006. Exception in Code 1896, § 5269, does not relieve officers designated of duty of drawing jurors from box which they are required to prepare, Code 1896, §§ 4982 et seq., 4989, and making up venire which is to compose jury in any other mode may be taken advantage of by plea in abatement. Tucker v. State [Ala.] 44 S 587. Held error for the court to refuse to allow defendant to prove that jurors were not drawn from box at all, or were illegally drawn, in support of his plea. Tucker v. State [Ala.] 44 S 587.

57. Mansfield's Dig. of Statutes, § 4003, providing that if for any cause jury commissioners shall not be appointed, or shall fail to select a jury in accordance with §§ 3976, 3982, the court shall order the sheriff to summon a jury, does not impower the court, in any event, and for no other reason than that it prefers it, to ignore the latter provisions, and order marshal to select jury. Reynolds v. United States [Ind. T.] 103 SW 672, § 4003. But a saving clause enacted for purpose of preventing a slip of terms for want of jurors, arising from inadvertence or mistake. Id. Motion to quash because jurors were selected by marshal under order of court instead of by commissioners held properly overruled, it not being shown that court acted willfully. Id.

58. Evidence held to show compliance by jury commissioner with Act No. 135, p. 218 of 1898, § 4, in selecting from general venire list names of 20 citizens qualified to serve as jurors. State v. McClendon, 118 La. 792, 43 S 417.

59. Act Cong. May 11, 1858, ch. 31 (11 Stat. 285); Act March 3, 1859, ch. 76 (11 Stat. 402 [U. S. Comp. St. 1901, pp. 316, 446]); Act April 26, 1890, ch. 167, § 1 (U. S. Comp. St. 1901, p. 374); Act Cong. June 12, 1894, ch. 132 (28 Stat. 102). Clement v. U. S. [C. C. A.] 149 F 305. District divided for convenience of suitors, not as separate judicial districts, but for limited purpose disclosed by act of 1890 "of holding terms of court" in the district of Minnesota. Id.

60. State v. Brown, 118 La. 373, 42 S 969. Exception in Code 1896, § 5269, does not relieve officers designated of duty of drawing jurors from box which they are required to prepare under Code 1896, §§ 4982 et seq., 4989. Tucker v. State [Ala.] 44 S 587.

61. As an absent juror cannot answer, the mere drawing of his name does not place him on the panel under Act no. 135, p. 216, of 1898. State v. Brown, 118 La. 373, 42 S 969.

62. St. 1898, § 2546a (Sanborns' Supp. p 1138), Laws 1903, ch. 90, § 2, p. 136. Niezorawski v. State, 131 Wis. 166, 111 NW 250.

63. Evidence held insufficient to show discrimination in excluding negroes from grand jury which found indictment against person of that race. Hanna v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 142, 105 SW 793.

64. In Idaho the order for the drawing of a grand jury may be made by a judge and need not be made in court. Sess. Laws 1891, § 7. State v. Barber [Idaho] 88 P 418.

65. Judge vested with discretion to excuse jurors for incompetency or other cause, by § 1, act 135, p. 216, 1898. State v. Brown, 118 La. 373, 42 S 969. Fact that prior to drawing of jury the court excused certain jurors held not to be ground for quashing indictment, it not appearing that the judge acted arbitrarily or without sufficient cause. Id. Excusal may be made before jury is drawn to serve upon panel. Code, § 5240. State v. Johnson [Iowa] 111 NW 827.

66. No jury having been summoned to appear at the regular term, action of court, under Code 1896, § 4998, ordering sheriff to summon a jury to appear at a later day of the term, held regular and proper and not ground for quashing indictment. Burgess v. State [Ala.] 42 S. 681.

sufficient.[68] It is not only the right, but the duty, of the judge to dismiss an incompetent juror.[69]

Powers and procedure. See 7 C. L. 1885—For all the ordinary purposes of procuring evidence a grand jury is a distinct body clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules,[70] and it has power to determine for itself the qualifications of witnesses of tender years, so long as there is due observance of the statutory safeguards enjoined upon other tribunals in similar circumstances.[71] The court may by attachment compel attendance of witnesses on grand jury.[72] A jury summoned at the beginning of the term may serve until a new jury appears,[73] and it does not become functus officio because the office of judge becomes vacant and there is no one for it to report to.[74] The California statute providing for accusations against public officers by the grand jury being silent as to the number which may present the common law governs, and twelve grand jurors may present an accusation.[75]

Effect of illegality in constitution or proceedings of juries. See 7 C. L. 1886—Indictments found by a jury constituted in any other manner than that prescribed by statute are void,[76] and the participation of an incompetent juror in the finding thereof vitiates the indictment.[77] In some states indictments have been held not to be invalidated because of defects or irregularities in the formation or selection of the jury,[78] with certain exceptions,[79] or because jury commissioners, who assisted in

67. Where regular drawing was set aside because two jurors were drawn from same township, held no ground of objection that all names so drawn were returned into jury box as provided in Code, § 350, from which a new drawing was made in which were two of the names first drawn. State v. Johnson [Iowa] 111 NW 827.

68. Court held to have substantially complied with Code 1896, § 5023, in summoning two qualified persons to make up deficiency where number of jurors was reduced to fourteeen. Williams v. State [Ala.] 43 S 182.

69. Where commissioners selected as one of twenty members to compose venire a minor, whose name was stricken from list by order of court, held motion to quash properly overruled. State v. Brown, 118 La. 373, 42 S 969.

70. People v. Sexton, 187 N. Y. 495, 80 NE 396.

71. Code Cr. Proc. § 392, applies as well to grand juries as to courts and magistrates. People v. Sexton, 187 N. Y. 495, 80 NE 396. Where jury complied with Code Cr. Proc. § 392, in examination of children under twelve years of age, held no ground for dismissing indictment that the preliminary examination required by the statute was not made by the justice presiding at the term of court. Id.

72. Ferriman v. People, 128 Ill. App. 230.

73. Under Act of 1893 (P. L. p. 341), indictment found by jury summoned at beginning of term held to be good in absence of any suggestion that a new grand jury actually appeared. State v. Castle [N. J. Law.] 66 A 1059. In the absence of anything to the contrary appearing, it will be presumed that an order was made under the statute restraining the sheriff from summoning rejury. Id. Such order need not be filed with the clerk but may be delivered to the sheriff. Id.

74. Where, at the date to which the jury had been adjourned, the office of judge was vacant, the fact that the jury met at a later date and returned an indictment after the qualification of the new judge held not to invalidate indictment. State v. McClendon, 118 La. 792, 43 S 417. Fact that jury adjourned to Nov. 13, 1906, but did not meet on that date, and not until Feb. 6, 1907, held not to constitute the body functus officio or invalidate indictment returned Feb. 8, 1907, as jury was impaneled Oct. 15, 1906, to serve six months, or until their successors should have been qualified. Id.

75. Pen. Code, § 758. Coffey v. Sacramento County Superior Ct., 2 Cal. App. 453, 83 P 580.

76. Where eighteen qualified persons were legally sworn as jurors, and subsequently three were excused by the court, held that under Code 1896, § 5023, the action of the court causing four other persons to be called and sworn and added to the fifteen remaining rendered the jury so constituted an illegal body, and consequently the indictment returned by it was a nullity. Trammell v. States [Ala.] 44 S 201.

77. Motion to quash properly sustained on ground that juror could not read or write English language. State v. McClendon, 118 La. 792, 43 S 417.

78. Code 1896, § 5269. Tucker v. State [Ala.] 44 S 587. Objection that upon impaneling of jury, a sufficient number of jurors not appearing, court, in directing sheriff to summon additional jurors, neglected to include in the order the requirement of par. 2808, Rev. St. 1901, as amended by Laws 1905, p. 28, ch. 24, that such persons summoned as jurors should not be persons who had served as jurors upon the regular list within the previous twelve months is not one that can be raised under Code by motion upon arraignment. Rev. Code, §§ 791, 792, 862. Thomas v. Territory [Ariz.] 89 P 591. Neither is such objection a ground for challenge under the Code. Id. Where it appears that jurors summoned by special ven-

drawing the jury, were subsequently ousted from office, when at the time of the drawing they were acting by virtue of commissions issued from proper legal authorities,[80] or because of a clerical error making it appear that the jury was illegally constituted,[81] or because of statutory incompetency of an individual juror, which is not made a ground of challenge,[82] or because of error in filing the oath of a stenographer employed by the jury,[83] or because, on a prosecution for selling intoxicating liquors without license, a bottle of beer brought into the grand jury room by a witness was tasted by one of the jurors to determine whether or not it was beer,[84] while in others, indictments have been held to be vitiated because of defects in selecting the jury,[85] or because of defects in the constitution of the jury commission.[86] No objection can be taken because of defects in selecting, drawing and impaneling jury

ire had not as a matter of fact served on regular list within the preceding twelve months, the defendant is not prejudiced by the court's action, and its failure to comply with statute was a mere irregularity in formation of jury and not ground for setting aside indictment. Id. Fact that when list of jurors was drawn all appeared but one, who had been excused the week before the seven who were to constitute the jury were drawn, and one who was present when the jury was drawn was excused, and from the ten remaining the seven were drawn, held no ground for setting aside indictment under Code, § 5240, there being no showing as to excusal of one juror that it was not done in accord with statute, and as to the other there was no material or substantial departure from statute. State v. Johnson [Iowa] 111 NW 827. Where record book containing jury list was deposited in first instance with clerk of circuit court as required by statute, and having been taken to municipal court for drawing December panel for that court, fact that it remained with clerk of latter court till after drawing of February panel, which indicted defendant, held an irregularity, but in absence of showing that defendant was prejudiced was no ground for quashing indictment. Section 2546a, St. 1898 (Sanborn's Supp. p. 1133), Laws 1903, p. 136, ch. 90, § 2. Niezorawski v. State, 131 Wis. 166, 111 NW 250.

79. Under Code 1896, § 5269, only such objection that can be so taken advantage of is that jurors were not drawn in presence of officers designated by law. Tucker v. State, [Ala.] 44 S 587. Exception in statute does not relieve officers designated of duty of drawing jurors from box which they are required to prepare, Code 1896, §§ 4982 et seq., 4989, and it was held, therefore, error for the court to refuse to allow defendant to prove that jurors were not drawn from box at all, and the like, in support of his plea in abatement. Tucker v. State [Ala.] 44 S 587.

80. Such officers acted under color of office, and were therefore de facto commissioners. Logan v. State [Ala.] 43 S 10.

81. Where one of names on venire appeared as "John L. Gradin" from beat 17 and record stated in regard to venire that all persons named therein and summoned appeared, and further stated that "John T. Gradin" appeared in court, and it being ascertained that the said "John T. Gradin" was the only person in that beat (No. 17) by that name was duly sworn in as a juror, held that the record meant that among the "all" who appeared was the Gradin, who, though called "John L. Gradin" in the venire, was really "John T. Gradin" and that it did not show that the court enlarged the jury beyond the legal number by swearing in John T. Gradin. Peppers v. State [Ala.] 42 S 734.

82. Fact that a juror was incompetent by reason of having served and been discharged as a juror by a court of record within a year of the time that he was summoned and impaneled to act as such juror held not to invalidate the indictment. Code Civ. Proc. § 199; Penal Code, §§ 896, 901, 995. In re Ruef, 150 Cal. 665, 89 P 605; Kitts v. Nevada County Superior Ct. [Cal. App.] 90 P 977. Fact that individual jurors may not have been assessed on the last assessment roll of the county on property belonging to them held not to invalidate the indictment. Code Civ. Proc. § 198; Penal Code, §§ 896, 995. Kitts v. Nevada County Superior Ct. [Cal. App.] 90 P 977.

83. Where statute requires oath to be filed, but does not designate the place where or the person with whom it is to be filed, filling with clerk of grand jury, even though erroneous, held not to disqualify stenographer or invalidate indictment. Niezorawski v. State, 131 Wis. 166, 111 NW 250.

84. Guarreno v. State [Ala.] 42 S 833.

85. Jury not selected by board of supervisors at regular or special meeting as required by statutes. Hurd's Rev. St. 1905, ch. 34, 78, §§ 9, 49, pp. 567, 1264. Marsh v. People, 226 Ill. 464, 80 NE 1006.

86. Where a jury commission fails to take the oath required by art. 160 of the constitution to support the constitution and laws of the United States and of the state, he is disqualified to enter upon discharge of his duties, notwithstanding he may have taken the oath prescribed by the act relating to jury commissions to discharge his duties as commissioner, and hence a jury commission, having such disqualified member, is not legally constituted and cannot legally perform any functions assigned to it. Act No. 135, p. 218, of 1898, § 3. State v. McClendon, 118 La. 792, 43 S 417. Where commissioner, disqualified because of not having taken the oath required by art. 160 of the constitution, participates with other qualified commissioners in proceeding to supplement general venire list and take out names of 20 persons, from whom members of jury were subsequently selected and drawn, such participation vitiated the proceedings and was ground for quashing indictment. State v. McClendon, 118 La. 792, 43 S 417. Fact that commissioners after taking the oath re-

where accused was held to answer by committing magistrate.[87] When it clearly appears that the legal evidence received by a grand jury is insufficient to support an indictment, or that illegal evidence is the sole basis for an indictment, the person indicted has a constitutional right to make a motion to dismiss,[88] and the right to make a motion upon these substantial grounds, and have it decided in the first instance, necessarily implies the right to have a review of an adverse decision.[89]

Objections and waiver thereof; estopped to urge. See 7 C. L. 1888—Fundamental and jurisdictional objections may be availed of for the first time on appeal.[90] Objections to qualifications of jurors are waived by failure to challenge at the time of the impaneling of the jury,[91] and where no objection is made at the trial to the organization of the jury, it will, on appeal, be presumed to have been legally organized.[92] Objections because of defects relating to the formation of the jury may be taken by plea in abatement,[93] or objection to the legality of the jury may properly be taken by motion to quash the indictment before plea.[94] A motion to quash must be supported by sufficient proof of the facts it states.[95]

Secrecy of deliberations. See 7 C. L. 1889—The testimony of a grand juror may be introduced to show statements of witness before the grand juror were inconsistent with his testimony at the trial.[96] In some states the accused is not entitled to inspect the minutes of the jury as a matter of right but as a matter of judicial discretion,[97]

quired by the constitution also took an oath imposed by a particular statute to faithfully discharge duties imposed upon them by the statute does not militate against the sufficiency of their qualification. Id. Where the statute provides that number, less than all the members of jury commission, shall be sufficient to perform the duties imposed by the act, provided all members are duly notified, it is necessary that all the members be notified and not merely those actually prosecuting the work, but notice cannot be given if the places which the law contemplates shall be so occupied are not filled with persons capable of receiving such notice. Id.

87. Motion to set aside indictment held properly overruled under Code 1897, § 5321. State v. Johnson [Iowa] 111 NW 827.

88. Notwithstanding mandatory provisions of Cr. Code, § 313, that a motion to dismiss can be made only on grounds enumerated therein. People v. Sexton, 187 N. Y. 495, 80 NE 396. Affidavits held insufficient to show presentation of illegal evidence to jury or insufficiency of evidence to support indictment. Id. Indictment presumed to be founded upon legal and sufficient evidence. Id.

89. So at least in the absence of any statutory limitation. People v. Sexton, 187 N. Y. 495, 80 NE 396. Denial of motion to dismiss treated as question that might be reviewed upon appeal from judgment of conviction in capital case. Id.

90. That indictment was returned by jury illegally constituted under Code 1896, § 5023, in that court having excused certain jurors caused other persons to be added before the original number was reduced below fifteen. Trammell v. State [Ala.] 44 S 201.

91. Motion to quash because jurors had not paid poll tax as required by law held not well taken where no challenge was made at time of impaneling and motion was made some ten months after return of indictment and at subsequent term of court. King v. State [Tex. Cr. App.] 100 SW 387. Where terms of act do not disqualify, but simply form cause for challenge, the cause for challenge must be interposed at formation of jury, and it is too late to make motion to quash at subsequent term. Act 28th Leg. (First called session, p. 15, ch. 10). Id.

92. Where the minute entry affirmatively states that jury, as organized, consisted of fifteen persons, but sets up the names of only fourteen, in the absence of objection in the lower court, it will be presumed that the jury as organized was composed of fifteen, and that the failure to state the name of the fifteenth person was a clerical omission in making up the transcript. Logan v. State [Ala.] 43 S 10.

93. Under exception in Code 1896, § 5269, where officers designated fail to draw jurors from box which they are required to prepare, or draw them illegally, held advantage may be taken of it by plea in abatement. Tucker v. State [Ala.] 44 S 587.

94. Motion held to be made in apt time. Marsh v. People, 226 Ill. 464, 80 NE 1006.

95. Motion to quash on ground that jury was not selected by commissioners as required by law, but by marshal under order of court, held properly overruled, where not accompanied by proof other than affidavit charging usurpation of power by court. Reynolds v. U. S. [Ind. T.] 103 SW 762.

96. Rev. St. 1899, § 2506 (Ann. St. 1906, p. 1497). To show witness failed to disclose to grand jury matters the truth of which he admitted on the trial. Cramer v. Barmon [Mo. App.] 103 SW 1086.

97. People v. Klaw, 53 Misc. 158, 104 NYS 482. Reasons for granting inspection are (1) precedents of court require it, (2) stenographer's minutes are best evidence as to whether jury have or have not acted without evidence or upon illegal or incompetent testimony, and to deprive accused of such minutes is to deprive him of opportunity of learning with certainty whether there is or is not ground for moving to set aside in-

and a motion to permit him to do so will be entertained for the purpose of enabling him to move to set aside the indictment upon one or more of the grounds permissible by law,[98] or of enabling him to go to trial more fully apprised of the nature of the accusation against him.[99] Such inspection should not be denied because there has been a preliminary hearing before a magistrate.[1]

Ground Rents, see latest topical index.

GUARANTY.

§ 1. What Constitutes (1545).
§ 2. Form and Requisites of the Contract (1545).
§ 3. Operation and Effect of Guaranty (1546). Interpretation in General (1546). Fixing Default and Liability of the Guarantor (1547). Defenses and Discharge of Guaranty (1547).
§ 4. Rights and Remedies Between Guarantor and Principal Debtor (1548).
§ 5. Actions on Guaranty (1548).

The scope of this topic is noted below.[2]

§ 1. *What constitutes.*[See 7 C. L.1891]—A guaranty may be implied from the language of the writing,[3] if it is clearly so intended,[4] but a mere direction to draw on defendant without a promise to pay is insufficient to show a guaranty.[5]

§ 2. *Form and requisites of the contract.*[See 7 C. L. 1891]—To make a valid guaranty there must be consideration.[6] An agreement for forbearance [7] or action taken on the faith, if the guaranty is sufficient.[8] The making of further loans at the request of the guarantor is a sufficient consideration for a guaranty of the prior and subsequent indebtedness.[9] The word "guaranty" implies a consideration.[10] A creditor

dictment as having been found without evidence or upon illegal or incompetent testimony, (3) considerations of public policy. Id.

98, 99. 1. People v. Klaw, 53 Misc. 158, 104 NYS 482.

2. **It excludes** contracts of suretyship (see Suretyship, 8 C. L. 2050) and indemnity (see Indemnity, 8 C. L. 173), and the requirements that contracts of guaranty be in writing (see Frauds, Statute of, 9 C. L. 1494). It likewise excludes powers of corporations to guaranty the obligations of third persons (see Corporations, 9 C. L. 733; Banking and Finance, 9 C. L. 327), the power of a partner to bind the firm by a guaranty (see Partnership 8 C. L. 1261), and the liabilities of guarantors of promissory notes by endorsement thereon (see Negotiable Instruments 8 C. L. 1124). It also excludes general principles of contract (see Contracts, 9 C. L. 654), and grounds of invalidity common to all contracts (see Fraud and Undue Influence, 9 C. L. 1475; Incompetency, 8 C. L. 169; Mistake and Accident, 8 C. L. 1020).

3. Letter requested a bank to "let the writer's son . . . make overdrafts" up to "800 to buy live stock with," and hoping the bank would accommodate the son and the writer, impliedly guaranteed repayment. Miami County Nat. Bank v. Goldberg [Wis.] 113 NW 391.

4. Plaintiff became superintendent of defendants Industrial Department under written contract which provided he might nominate and instruct subagents and see that they remitted promptly, also that he should abide by the rules in the manual, one of which provided that he was personally responsible for moneys received by assistants. Held a contract of employment and not of guaranty and plaintiff not liable. McKone v. Metropolitan Life Ins. Co., 131 Wis. 243, 110 NW 472.

5. Defendant directed plaintiff to call on his brother each week for a certain amount of the water charges, and if he did not pay to draw on defendant for the balance, and if he did not pay the drafts to proceed as it chose. Staples v. Vicksburg Waterworks Co. [Miss.] 44 S 766.

6. Mere promise to pay existing debt of another without new consideration is void. Hedden v. Schneblin [Mo. App.] 104 SW 887. An insurance agent's promise to repay the company any amounts embezzled by a subagent, for whose acts he was not responsible, made in the belief that he was responsible is not binding. McKone v. Metropolitan Life Ins. Co., 131 Wis. 243, 110 NW 472. Where a contract does not take effect until the execution of a guaranty thereof, the guaranty is supported by the consideration of the contract. Lomax v. Witkowsky, 124 Ill. App. 261.

7. At guarantor's request plaintiff agreed to delay enforcing claim against principal debtor. Mudge v. Varner [N. C.] 59 SE 540. Where no particular time is specified, it is presumed to be a reasonable time. Lefkovits v. First Nat. Bank [Ala.] 44 S 613.

8. Defendant offered to see plaintiff paid for all goods sold defendant's sons, and plaintiff sold the goods relying on the offer. Small Co. v. Claxton [Ga. App.] 57 SE 977.

9. Two hundred dollars already advanced at time defendant guaranteed the bank to the extent of $10,000. Peters v. Merchants' & Farmers' Bk. [C. C. A.] 149 F 373.

10. Implies entire matter on concurrent act supported by the same consideration. Great Western Print. Co. v. Belcher [Mo. App.] 104 SW 894.

must accept the guaranty which is not shown by a mere performance of acts in reliance upon the offer, but there must be notice thereof given to the guarantor.[11] The statute of frauds requires contracts of guaranty to be in writing.[12] Guarantors may bind themselves in different amounts[13] and limit their liability.[14] A guaranty may be assigned where there is nothing to show a special guaranty or that confidence was reposed in the obligee.[15] There can be no delivery in escrow of a contract of guaranty to the obligee itself.[16]

§ 3. *Operation and effect of guaranty. Interpretation in general.* See 7 C. L. 1892 Where a guaranty is in writing and free from ambiguity it cannot be varied by parol evidence.[17] It should be construed as to best accord with the intention of parties as manifested by its terms;[18] and where doubtful language is used it should be construed most strongly against the party using the same.[19] It should be liberally construed to determine the intent of the parties, and when that is discovered, the guarantor is entitled to a strict construction in working out the intent.[20] Words of limitation are to be construed as limiting the liability of the guarantor and not as limiting the extent of credit to be given.[21] A guaranty will be held to apply only to future advances unless another construction is indicated.[22] It will extend to the extension of the original contract made in pursuance of an option therein contained,[23] but it will not be construed to cover penalties.[24] Where provision is made for assigning ac-

11. No notice given of offer to repay bank for advances to son made in reliance upon said offer. Miami County Nat. Bank v. Goldberg [Wis.] 113 NW 391.

12. See Frauds, Statute of, 9 C. L.

13. Each is liable to extent of his promise for the unpaid balance. Lefkovits v. First Nat. Bank [Ala.] 44 S 613.

14. The guarantors of a warranty are not liable for the full measure of damages where they have stipulated the amount assumed. Wood v. Stewart [Ark.] 98 SW 711.

15. Building contractors' bond which merely recited that principal and obligee had entered into a contract by which the former was to construct for the latter a building, who assigned to the owner of the building. Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F 672.

16. Lefkovits v. First Nat. Bank [Ala.] 44 S 613.

17. Defendant, president of corporation, not allowed to testify that he did not intend to bind himself personally to guarantee the corporate debt. Mudge v. Varney [N. C.] 59 SE 540.

18. "We guarantee you to trust L. B. & Co. $300 worth of material to be credited to them at the rate of 10 or 15 days terms for a term of 5 mos. from date," held to be a continuing guaranty for 5 months limited to $300. Paskusz v. Bodner [N. J. Law] 67 A 1040. Bond conditioned that purchasers will pay the moneys due on merchandise which was to be paid for in four months, covers merchandise which the purchasers have not been called upon to pay for until after the lapse of four months. McGuire v. Gerstley, 204 U. S. 489, 51 Law. Ed. 581; Clark v. Gerstley, 204 U. S. 504, 51 Law. Ed. 589. Directors of a corporation signed a letter to the attorney general agreeing that "the taxes due by said company" will be paid on a certain date, on receipt of which the tax proceedings were adjourned. State of New Jersey v. Limburg, 54 Misc. 404, 105 NYS 1016.

19. Defendant sold plaintiff his log boom outfit and guaranteed that the earnings would amount to $475. Held this meant "net earnings." Loomis v. MacFarlane [Or.] 91 P 466. "My sons may need some help through the summer, and I ask you to show them all the favors that you can, and I will see that you get pay for anything that you may sell them," held to be a continuing guaranty for all goods furnished in reasonable amounts and in a reasonable time, though not during that summer. Small Co. v. Claxton [Ga. App.] 57 SE 977.

20. Guaranty of assets of branch bank which was to be incorporated independently with larger capital held to be made to strengthen its position and so for its benefit. Punta Gorda Bank v. State Bank [Fla.] 42 S 846.

21. To induce plaintiffs to give credit to a corporation defendant, its president, guaranteed bills "providing the amount of credit shall not exceed $5,000 at any one time." The amount exceeding that sum, defendant was liable to the extent of $5,000. Schinasi v. Lane, 118 App. Div. 76, 103 NYS 127.

Contra: "I guarantee Evans that whatever . . . materials he delivers to Cohen . . . I will pay for . . . 60 days after each delivery. The amount not higher than $250." Was held not a continuing guaranty, and that where defendant had already paid $220 he was not liable for $250. Evans v. Schiff, 54 Misc. 319, 105 NYS 1037.

22. Defendant had already guaranteed an account to $10,000, and then not knowing this had been exceeded he guaranteed an additional $2,000, which was held to cover only future advances. Peters v. Merchants & Farmers' Bk. [C. C. A.] 149 F 373.

23. Guaranty of payment of rent under a lease for three years, with option for two years additional, extends to the full term of five years. Heffron v. Treber [S. D.] 110 NW 781.

24. Directors of a New Jersey corporation agreed with attorney general to pay its taxes before a certain date. State of New Jersey v. Limburg, 54 Misc. 404, 105 NYS 1016.

counts to guarantor,[25] or where one guarantees that a debt will be paid on a certain day, the guaranty is one for payment and not of collection.[26] There is no liability where one merely guarantees the payment of what sums may become due on an infant's contract.[27]

Fixing default and liability of the guarantor. See 7 C. L. 1893—A guarantor of payment is liable on an absolute promise to pay on the failure of debtor to pay, while a guarantor of collection is only liable on condition that the creditor diligently prosecute the debtor without success.[28] Where payment was to be made by a specified time,[29] or there was an absolute guaranty of payment, no demand on the principal debtor is required to perfect any rights,[30] and no demand on the guarantor is necessary if none is necessary on the creditor.[31] A creditor must show that the security held by him is exhausted or worthless before he can proceed on a guaranty for collection.[32]

Defenses and discharge of guaranty. See 7 C. L. 1894—The return of the guaranty to the guarantor, though under a mistake, is a defense.[33] The guarantor of rent will be released by the substitution of another tenant without his knowledge.[34] The failure to perform a condition precedent,[35] or a material change in the contract guaranteed, will release the guarantors.[36] Where there has been no substantial departure from the terms of the contract,[37] as where a creditor sold mortgaged property under an execution on a judgment instead of foreclosing the same,[38] or where there was a continuance of work on a building beyond the time specified, there is not such a novation as would discharge the surety.[39] A guaranty may expressly provide that extensions or adjustments between debtor and creditor shall not release guarantor,[40]

25. Defendant sold plaintiff's goods under agreement either to procure credit insurance or to guarantee the accounts. Oneida Steel Pulley Co. v. New York Leather Belting Co., 105 NYS 534.

26. Defendant, president of corporation, guaranteed that if account should be held up until July 10th that it would be paid on that date. Mudge v. Varner [N. C.] 59 SE 540.

27. As he has the right to repudiate the same. International Text-book Co. v. McKone [Wis.] 113 NW 438.

28. Mudge v. Varner [N. C.] 59 SE 540.

29. Not even necessary to start the running of interest. Doyle v. Nesting, 37 Colo. 522, 88 P 862.

30. Defendant guaranteed payment to bank on a fixed date, and it was his duty to see that the debtor paid at the time stipulated. Lefkovits v. First Nat. Bank [Ala.] 44 S 613.

31. His liability is commensurate with that of his principal. Great Western Printing Co. v. Belcher [Mo. App.] 104 SW 894.

32. Plaintiffs made certain advances to a corporation, sold their goods, and accounts were payable to them. Defendant guaranteed to hold plaintiff harmless from any losses, but a complaint against him was defective which did not show that nothing could be realized from the accounts. Nachod v. Hindley, 118 App. Div. 658, 103 NYS 801.

33. Creditors' employe by mistake credited debtor with an excess payment and returned guaranty. On discovery of error and insolvency of debtor creditor cannot recover of the guarantor. Marshall Field & Co. v. Sutherland [Iowa] 113 NW 770.

34. Error to reject evidence of assignment without knowledge of guarantor in action by landlord against guarantor. Fleck v. Feldman, 54 Misc. 228, 104 NYS 366.

35. Condition of guaranty that obligee should conduct the log boom business in a workmanlike manner was complied with where obligee gave the business his personal attention and rendered such services as he was qualified to render. Loomis v. MacFarlane [Or.] 91 P 466.

36. Plaintiff agreed to deliver horses to defendant in exchange for cattle. Subsequently defendant accepted horses not according to contract in consideration of reduction of price, and extension of time to deliver the cattle, and it was held that his guarantor was released. Stafford v. Christian [Tex. Civ. App.] 18 Tex. Ct. Rep. 341, 101 SW 876.

37. Subcontractor's surety had received notice of termination of contract on account of abandonment of subcontractor, and the formation of new contract with subcontractor for completion of work did not release the surety. Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F 672.

38. Guarantor not prejudiced and creditor might apply proceeds to payment of mortgage debt and apply any surplus pro rata in the remaining indebtedness. Peters v. Merchants' & Farmers' Bk. [C. C. A.] 149 F 373.

39. Simply a continuance of work in an attempt to fulfill the contract and to relieve the surety from his obligations. Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F 672.

40. Where guaranty provided that accounts for merchandise sold might be adjusted between creditor and debtor, or extension given without notice to guarantor, the latter was not released by creditor's fail-

but otherwise in the absence of subsequent consent.[41] A guarantor will be discharged by an agreement for extension of time, but not by a mere indulgence [42] or delay.[43] A failure to charge indorsers of a note is not such a release of security as will discharge a guarantor.[44] It may be a defense that the credit extended exceeded the limit set in the guaranty.[45] A guarantor will never be discharged where the breach of a land contract was occasioned by the principal's fault.[46] Laches defeats the right to repudiate the contract for fraud, misrepresentation, or failure of consideration.[47] Payment by guarantor of one delinquency and giving of receipt in full does not release another delinquency then accrued but unknown to either creditor or guarantor.[48]

§ 4. *Rights and remedies between guarantor and principal debtor.* See 5 C. L. 1600

§ 5. *Actions on guaranty.* See 7 C. L. 1895—The complaint must show existence of valid contract of guaranty,[49] which was accepted by creditor,[50] and that there was a breach.[51] The setting out of a contract in full which purports to have been made on consideration is a sufficient averment of consideration.[52] Under statutes, frequently one of several guarantors may be sued,[53] without joining the debtor.[54] A judgment recovered by creditor against the principal is not conclusive against the surety.[55] One only incidentally interested cannot sue on a guaranty.[56] All elements of damage resulting directly from failure to perform the contract are recoverable,[57]

ure to pursue the debtor within a reasonable time. Goff v. Janeway, 30 Ky. L. R. 705, 99 SW 602.

41. New note taken for old, the extension being negotiated by the sureties. Spier v. McNaught, 105 NYS 1060.

42. Directors had guaranteed payment of tax of a corporation and attorney general on receipt of part payment wrote that they could have a further continuance. State of New Jersey v. Limburg, 54 Misc. 404, 105 NYS 1016.

43. Mere delay to enforce an absolute guaranty of payment, without any contract extending time of payment, will not discharge the surety, though the principal became insolvent. Manchester Bldg. & Loan Ass'n v. Shuart [N. J. Err. & App.] 65 A 985.

44. But indorsers had waived notice of protest. Spier v. McNaught, 105 NYS 1060.

45. President of corporation guaranteed its bills "provided the amount of credit shall not exceed $5,000," but majority of court held this was not a condition. Schinasi v. Lane, 118 App. Div. 76, 103 NYS 127.

46. One guaranteed that an assignee would perform a land contract for sale of bounded land stated to contain about 80 acres for $1,000 per acre, and which provided for a survey. The survey showed 95 acres, and on the assignee refusing to perform his guarantor was held liable. Sheindelman v. Colyer, 106 NYS 762.

47. Defendant purchased mortgaged cattle without paying the mortgagee, but later guaranteed payment, upon being given the right to handle the remaining cattle, and delayed for 39 days to deny liability because of misrepresentation as to number of cattle and quantity of feed. Drovers' Live Stock Com. Co. v. Wolff Packing Co., 74 Kan. 330, 89 P 465, 86 P 128.

48. Lomax v. Witkowsky, 124 Ill. App. 261.

49. Sufficient to set out contract where defendant guaranteed past due debts of a firm to plaintiff, and future advances to $8,000, payment to be made on a specified date, and the existence of indebtedness on that date, and failure to pay on request. Lefkovits v. First Nat. Bank [Ala.] 44 S 613.

50. Allegation that guaranty was delivered to plaintiff, and that in consideration thereof credit was extended to debtor, was sufficient. Goff v. Janeway, 30 Ky. L. R. 705, 99 SW 602.

51. Defendant guaranteed that another would deliver mules or their value in satisfaction of any award of arbitrators, but petition showed that there had never been any arbitration. Shell v. Asher [Ky.] 102 SW 879. Bond conditioned on payment of goods sold on four months' credit is shown to be violated by particulars of demand which showed that last sale had occurred more than four months previous and had not been paid for. McGuire v. Gerstley, 204 U. S. 489, 51 Law. Ed. 581.

52. Contract recited that the creditor forbore at the request of guarantors and the receipt of $1. Lefkovits v. First Nat. Bank [Ala.] 44 S 613.

53. Mills' Ann. St. § 2528, declaring that joint obligations shall be joint and several. Doyle v. Nesting, 37 Colo. 522, 88 P 862.

54. Petition setting forth account, guaranty, refusal of debtors to pay, notice to guarantor that guaranty was accepted, and alleging that goods were sold on the faith of the guaranty, was sufficient. Small Co. v. Claxton [Ga. App.] 57 SE 977.

55. Landlord obtained judgment for rent against tenant who had assigned his interest, which was not conclusive on the question of the tenant's liability, in an action against the tenant's guarantor. Fleck v. Feldman, 54 Misc. 228, 104 NYS 366.

56. Where to induce another to put $10,000 into a branch bank and reincorporate as an independent bank the main bank guaranteed the assets of the branch, the independent bank, and not merely the one who furnished the additional capital, had the right to sue on the guaranty. Punta Gorda Bank v. State Bank [Fla.] 42 S 846.

57. Where one guaranteed that a leased steamboat should be returned in six months

and the ordinary rules of evidence apply.[58] A guarantor of bonds cannot, as a set-off in an action against a director on his contract of guaranty, recover from him, by reason of the statute avoiding issues made below par, the difference between the purchase price of bonds and their par value.[59]

GUARDIANS AD LITEM AND NEXT FRIENDS.

§ 1. Necessity or Occasion for a Guardian ad Litem or Next Friend (1549).
§ 2. Qualification and Appointment (1549).
§ 3. Powers, Duties, Rights, and Liabilities (1550).
§ 4. Procedure by or Against Guardian ad Litem or Next Friend (1550).

General guardians [60] and the rights and privileges of infants in respect to suit [61] are elsewhere treated.

§ 1. *Necessity or occasion for a guardian ad litem or next friend* See 7 C. L. 1896 exists where an insane person [62] or an infant sues [63] or is sued,[64] or in suits where the rights of persons unborn are involved.[65] In some states a guardian ad litem must be appointed though there is a general guardian,[66] in others this is unnecessary.[67] A judgment against an infant is erroneous where no guardian or guardian ad litem was appointed, but is not void.[68]

§ 2. *Qualification and appointment.* See 7 C. L. 1897—No appointment should be made until after service of summons on the infants,[69] but the fact that the guardian was prematurely appointed is not a jurisdictional defect.[70] The necessary steps prescribed by statute must be followed,[71] and any irregularities in an appointment constitute reversible error [72] and ground for new trial,[73] an appointment will be pre-

free from liens, he was liable for amount of liens, though incurred after expiration of time and for rental. Mitchell, Lewis & Staver Co. v. Beeson [Wash.] 92 P 426.

58. An indorser who was liable to the sureties who had been compelled to pay, but was not a party to an action against his subsequent indorsers, was not incompetent to testify as to conversations with plaintiff's testator, one of the sureties. Spier v. McNaught, 105 NYS 1060.

59. Cincinnati, etc., R. Co. v. Kleybolte, 5 Ohio N. P. (N. S.) 536.

60. See Guardianship, 9 C. L. 1551.

61. See Infants, 8 C. L. 267.

62. Eversole v. Eastern Kentucky Asylum for the Insane, 30 Ky. L. R. 989, 100 SW 300.

63. Ejectment should be brought in name of infant by her guardian ad litem. Mitchell v. Cleveland [S. C.] 57 SE 33.

64. Where guardian appears and answers, the court has full jurisdiction of the infants and they are bound by its decrees, and one who purchased in good faith at judicial sale of the infant's land will be protected though decree was procured by collusion. Hansford v. Tate, 61 W. Va. 207, 56 SE 372. Minor not being represented by a tutor or guardian, the service of notice of tax delinquency on major co-owner is insufficient to bind minor co-owners even though they reside with him on the property. In re Interstate Land Co., 118 La. 587, 43 S 173. Appointed on proceeding to sell an infant's property. Fatal defect that there was no order of reference. Hegeman v. Stearns Realty Co., 117 App. Div. 754, 102 NYS 1025. Nonresident infant defendants' bound by decree in partition suit where guardian ad litem was duly appointed. O'Donaghue v. Smith, 184 N. Y. 365, 77 NE 621.

65. In final accounting in probate court. Libby v. Todd [Mass.] 80 NE 584.

66. Guardian ad litem appointed on application of guardian for order to sell timber belonging to the ward. Lilly v. Claypool, 59 W. Va. 130, 53 SE 22. The general guardian has not power to institute a suit to contest a will. Campbell v. Fichter, 168 Ind. 645, 81 NE 661.

67. Williams v. Smith [R. I.] 66 A 63. Action in behalf of adult under guardianship must be begun in his name by his guardian. Id.

68. Sued for slander, no evidence heard, and judgment rendered pro confesso, infant's remedy was by petition to vacate which need not set out that he had a defense, since under the law all allegations against an infant must be proven though not traversed. Berryhill v. Holland, 30 Ky. L. R. 831, 99 SW 902.

69. No presumption that infant's were served where nothing in record shows it. Gannon v. Moore [Ark.] 104 SW 139.

70. Jurisdiction of court over minors becomes complete on the service of summons on them, and guardian appointed the very next day. Welsh v. Koch [Cal. App.] 88 P 604.

71. Petition of guardian of infant, when under fourteen, the consent of and order appointing special guardian, and his undertaking. Hegeman v. Stearns Realty Co., 117 App. Div. 754, 102 NYS 1025. Code Proc. § 116, providing for appointment of guardians ad litem for nonresident infant defendants on plaintiff's application in partition proceedings, held inapplicable when appointment is made by infant through her mother. O'Donaghue v. Smith 184 N. Y. 365, 77 NE 621.

72. In proceeding for sale of land, guardian

sumed to be valid [74] unless the contrary appears on the face of the record.[75] An objection to the failure to give bond is premature when made before the time the money is to be paid over.[76] A failure to give bond will not render the proceeding void.[77] It is immaterial on whose petition the guardian is appointed where he properly looked after the infant's interests,[78] and an illegal appointment may be ratified by the infant on his coming of age.[79]

§ 3. *Powers, duties, rights, and liabilities.* See 7 C. L. 1897—When an infant is suing in forma pauperis, his guardian ad litem has no authority to make a binding contract with an attorney as to his compensation.[80] A guardian ad litem must take proper measures to safeguard the interests of the person he represents.[81] On an accounting he may contest the validity of a contract for attorneys' fes,[82] but a failure of guardian to contest a claim will not affect the proceeding where he has made proper investigation.[83] The misconduct of guardian will not render the judgment liable to direct or collateral attack after time for appeal has expired.[84] A guardian ad litem will not be entitled to compensation for arguing questions not to the benefit of his wards.[85]

§ 4. *Procedure by or against guardian ad litem or next friend.* See 7 C. L. 1899—A lunatic may sue by next friend though another has applied for letters of guardianship of his estate.[86] Suits may be instituted by guardians for insurance in behalf of infant beneficiaries.[87] In suits against infants [88] or insane persons, service should

ad litem for infant defendant was appointed before service of process on infant was perfected. McQueen v. Grigsby [Ala.] 44 S 961.

73. Guardian appointed without request on first day of term, where statute provided that if defendant neglects for one day after the first day of the term to ask for a guardian the court may appoint one. Kurtz v. Eisenstein, 123 Mo. App. 288, 100 SW 574.

74. And to be based on showing that minor's had been served with process. Welsh v. Koch [Cal. App.] 38 P 604.

75. Statute required appointment of guardian ad litem for infant over fourteen, to be made on application of infant. Record showed appointment was made on application of stepfather of infant of sixteen, which was erroneous though not void. Johnston v. Southern Pac. Co., 150 Cal. 535, 89 P 348. On motion for new trial or appeal. Welsh v. Koch [Cal. App.] 88 P 604.

76. Son, as next friend of insane mother, had recovered judgment for money due for the use of her dower interest in property. Crenshaw v. Kener, 127 Ga. 742, 57 SE 57.

77. Execution may be enforced on judgment obtained in a suit by a minor, prosecuted by a prochein ami, though no bond was given as required, as payment may be safely made to the officer who alone is interested in seeing that a bond is furnished. Oxford Knitting Mills v. Sutton, 127 Ga. 162, 56 SE 298.

78. Purchaser obtained a valid title at a judicial sale whether the attorney at law who was appointed guardian was appointed on the petition or the cross petition, where he denied the allegations of the adverse pleadings, cross-examined the witnesses, obtained a resale, and did everything he could under the circumstances. Weakley v. Middleton, 30 Ky. L. R. 571, 99 SW 288.

79. Guardian ad litem for infant of sixteen appointed on application of stepfather, but was ratified by her affirming the proceedings which were still pending on her attaining her majority. Johnston v. Southern Pac. Co., 150 Cal. 535, 89 P 348.

80. An ex parte decree purporting to approve the account is without jurisdiction where the citation was merely served on the mother, and not on the infant himself. In re Tyndall, 117 App. Div. 294, 102 NYS 211.

81. Guardian ad litem and testamentary guardian may, with approval of court, elect to treat trust property as real estate and join in suit for partition, instead of taking share of proceeds of trust property. Train v. Davis, 49 Misc. 162, 98 NYS 816.

82. Contract between guardian and trustee of minor that law firm of which trustee was a member should receive a certain sum for services. In re Manning's Estate, 134 Iowa, 165, 111 NW 409.

83. In suit to recover for board of patient at insane asylum, guardian reported after full investigation that he was unable to make any defense. Eversole v. Eastern Kentucky Asylum for the Insane, 30 Ky. L. R. 989, 100 SW 300.

84. Alleged that he failed to adduce evidence to sustain the title of his minors to certain real estate which he knew existed and could have been produced. Welsh v. Koch [Cal. App.] 88 P 604.

85. Not his duty to suppress facts in order to secure unjust advantage for wards, but the remote possibility that they may have to refund does not justify him on an accounting in objecting that wards not entitled to any remainders on proper construction of will. Libby v. Todd [Mass.] 80 NE 584.

86. Suit for annulment of marriage. Schneider v. Rabb [Tex. Civ. App.] 18 Tex. Ct. Rep. 962, 100 SW 163.

87. Rather than by administrator of deceased. Social Benev. Soc. No. 1 v. Holmes, 127 Ga. 586, 56 SE 775.

88. No presumption to aid the record. Gannon v. Moore [Ark.] 104 SW 139. Before 1876 in Georgia service on the guardian ad

be made on the infants or insane persons and the persons having them in charge,[89] but, after jurisdiction has been obtained, service of papers may properly be made on the guardian ad litem or the prochein ami.[90] Where there are infant defendants the petition should allege their ages and the names of the persons who have charge of them.[91] A minor has no further time than an adult within which to take steps for the correction of errors in proceedings or a judgment against him.[92]

GUARDIANSHIP.

§ 1. The Occasion for Guardianship (1551).
§ 2. The Person of the Guardian; His Appointment, Qualification and Tenure (1552).
§ 3. General Powers, Duties, and Liabilities (1553).
§ 4. Custody, Support, and Education of the Ward (1553).
§ 5. The Ward's Property and Administration Thereof (1554).
§ 6. Presentment and Allowance of Claims (1555).
§ 7. Judicial Proceedings to Sell Property of Ward (1555).
§ 8. Actions and Legal Proceedings By and Against Guardians (1556).
§ 9. Accounting and Settlement (1556).
§ 10. Rights and Liabilities Between Guardian and Ward (1557).
§ 11. Compensation of Guardian (1557).
§ 12. Guardianship Bonds (1558).

Guardians ad litem,[93] natural guardians,[94] and the rights and liabilities of persons under disability,[95] are elsewhere treated.

§ 1. *The occasion for guardianship.* See 7 C. L. 1899—Guardians may be appointed for infants, drunkards, spendthrifts,[96] lunatics, or insane persons, or persons incapable of caring for property.[97] Parents are guardians by nature and for nurture of all children born to them in lawful wedlock.[98] Where a child has no proper guardian, she may be committed to an institution.[99] In case of delay in the appointment of a guardian, a special guardian may be appointed.[1]

The jurisdiction. See 7 C. L. 1899—The court of the county of the ward's residence has jurisdiction,[2] which when once obtained is not lost, though the ward moves into another county,[3] but is retained until a final disposition is made of the matter.[4] The domicile of parents is presumably the residence of their minor children.[5] A failure to give all the different names a person is known by is not a jurisdictional

litem was in accordance with the equity practice, and sufficient. Morehead v. Allen, 127 Ga. 510, 56 SE 745.

89. In suit to recover for board of defendant at insane asylum, it was sufficient to serve the defendant and the superintendent where insane person had no committee, father, guardian, or wife. Eversole v. Eastern Kentucky Asylum for the Insane, 30 Ky. L. R. 989, 100 SW 300.

90. Bill of exceptions sued out by defendant. Vickers v. Hawkins [Ga.] 58 SE 44.

91. Petition for sale of land for division among joint owners. McQueen v. Grigsby [Ala.] 44 S 961.

92. Welsh v. Koch [Cal. App.] 88 P 604. Time for appeal had expired, and claimed the facts stated in the findings were not true. Id.

93. See Guardians ad Litem and Next Friends. 9 C. L. 1549.

94. See Parent and Child, 8 C. L. 1225.

95. See Infants, 8 C. L. 267; Insane Persons, 8 C. L. 319.

96. Where he was only adjudged to be lacking in discretion in management of his estate, the appointment was only voidable, not void. Brown v. Probate Ct. of Warwick [R. I.] 67 A 527.

97. Ordinary rules of evidence apply, and admissions and declarations of the one for whom a guardian is asked are admissible. Conway v. Murphy [Iowa] 112 NW 764. Test of propriety of appointing conservator for alleged incompetent is whether he has capacity to transact ordinary business in intelligent manner. Leefers v. People, 123 Ill. App. 634.

98. This guardianship can only be transferred to another by consent unless forfeited by vice. In re Wright [Neb.] 112 NW 311.

99. People v. O'Neill, 117 App. Div. 826, 102 NYS 988.

1. No power to appoint a special guardian where a guardian has been appointed, though an appeal from the appointment is pending. State v. Parsons, 131 Wis. 606, 111 NW 710.

2. Ordinary of county of ward's present residence must approve selection of new guardian. Dickerson v. Bowen [Ga.] 57 SE 326.

3. Insane person has no power to change his domicile. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

4. Court appointed a guardian of an idiot and ordered a sale of her property, and it could on proper showing order the sale to be set aside and enjoin the parties from disposing of the property. In re Propst, 144 N. C. 562, 57 SE 342.

5. Presumption may be overcome by facts showing a different condition, as that children worked and lived on a farm of their own. Wirsig v. Scott [Neb.] 112 NW 655.

defect,[6] but false representations as to jurisdictional facts will be ground for the revocation of the appointment.[7] Where the relation is created by a court of competent authority, having jurisdiction of the ward, it will be recognized in other jurisdictions.[8]

§ 2. *The person of the guardian; his appointment, qualification and tenure.* See 7 C. L. 1900—In case of necessity,[9] or in the absence of contest,[10] the natural right of a parent to act as guardian for their children will only be set aside in cases of unfitness where the interests of the children require that another should be appointed.[11] Statutes sometimes provide an order of precedence to be observed in the appointment of guardians,[12] though the court may have discretion to depart therefrom.[13] In Louisiana a relative who has failed to file an inventory will be excluded from the tutorship.[14] Other things being equal, it is the duty of courts to see that guardians of the persons of children are of the same religion as the deceased parents.[15] Infants over fourteen years have the right to nominate a guardian.[16] The appointment should clearly designate the ward by name.[17] The clerk may make an appointment in vacation subject to confirmation by the court.[18] An order appointing a guardian is appealable,[19] and the person appointed guardian should be made a party.[20]

Removal.—The death of the ward immediately terminates the guardianship.[21]

6. Insane person known by three names, but was designated by only one of them in the order appointing a committee, but the court had power on proper notice to amend the order by inserting the additional names. Sporza v. German Sav. Bk., 104 NYS 260.

7. In re Burns, 102 NYS 203.

8. Nonresident insane person might be properly confined in hospital at request of his nonresident guardian. In re Crosswell's Petition [R. I.] 66 A 55.

9. The father is by law and nature the guardian of his minor child, and the necessity for the appointment of a guardian does not arise except for cause. Hare v. Sears, 4 Ohio N. P. (N. S.) 566.

10. Parents may surrender control of children if they choose. Wirsig v. Scott [Neb.] 112 NW 655.

11. Infant over 14 petitioned for appointment of maternal aunt, and application in behalf of sisters for appointment of maternal uncle. Court appointed father guardian of infants, though his financial ability was not so great, and trust company guardian of property. In re Guardianship of Tully Infants, 105 NYS 858. The affluence of relatives who owe the children no duty is not controlling as against the care and interest of their mother. Graviess v. Graviess, 7 Ohio C. C. (N. S.) 135.

12. Ky. St. 1903, § 2021. (1) Father or testamentary guardian; (2) mother, if unmarried; (3) next of kin giving precedence to males. Wright v. Boswell's Guardian [Ky.] 103 SW 314. Mansf. Dig. § 3465, provides that the father, while livlng, and after his death the mother, shall be the natural guardians of children. Hudson v. Von Weise [Ind. T.] 104 SW 602. Grandmother after the mother has the right to be appointed tutrix and prevails over the aunt who had adopted the child, though the child remained vested with the right of a legitimate child to a large extent. In re Brown [La.] 44 S 919.

13. Evidence insufficient to justify appellate court in disturbing appointment of trial court, though court had appointed the public guardian despite applications of the relatives. Wright v. Boswell's Guardian [Ky.] 103 SW 314.

14. Does not apply where property consists of jewelry of small value, and the person sought to be excluded did not know of its existence. In re Succession of Burrell, 118 La. 1076, 43 S 882.

15. Appointment revoked where guardian who was Roman Catholic had married an Episcopalian, where ward's parents had been Roman Catholics. In re Crickard, 52 Misc. 63, 102 NYS 440.

16. Subject to the right of the ordinary to refuse if the selection be unwise. Dickerson v. Bowen [Ga.] 57 SE 326.

17. Appointment of committee for a person called "Jetta" was sufficient to authorize a bank to pay to committee money deposited under the name of "Jetter." Sporza v. German Sav. Bk., 104 NYS 260.

18. But clerk's appointment will not be confirmed where made over protest of father who was the natural guardian, and another court had already appointed a guardian. Hudson v. Von Weise [Ind. T.] 104 SW 602.

19. An order of the probate court appointing a stranger guardian of a minor child is a final order affecting substantial rights of its father and is reviewable on error. Hare v. Sears, 4 Ohio N. P. (N. S.) 566. The discretion vested in a trial court with reference to the custody of children will not be inquired into by a reviewing court, except on a charge of abuse of discretion or that a grave mistake has been made. Graviess v. Graviess, 7 Ohio C. C. (N. S.) 135.

20. Court had denied cross applications, and had appointed a third party. Wright v. Boswell's Guardian [Ky.] 103 SW 314.

21. A guardian obtained judgment and defeated party after death of ward, served notice of appeal on guardian, which was utterly ineffectual. Hurst v. Hawkins, 39 Ind. App. 467, 79 NE 216, 80 NE 42.

The right to revoke a guardian's appointment belongs to the court making the appointment.[22] The appointment should be revoked where the guardian's interests are in conflict with those of the ward,[23] or where the appointment was made on false representations.[24] The question of removal rests in the sound discretion of the court making the appointment,[25] and will be granted more readily where the original appointment was ex parte.[26] An application to set aside the appointment of a guardian must be made in behalf of the infant and in the manner provided by statute.[27] The right to revoke a voidable appointment may be lost by laches.[28] In Louisiana a mother may not resign the tutorship after she has remarried and her husband has become cotutor.[29] After a removal, and the appointment of a new guardian, the latter is not bound by acts of the former except as approved by court.[30]

§ 3. *General powers, duties, and liabilities.*[See 7 C. L. 1903]—Natural guardianship extends only to custody and nurture.[31] A guardian has no power until he is appointed.[32] He may, with leave of court, compromise suits with reference to land,[33] or, in Louisiana, when authorized thereto by a family meeting.[34] Improvident approval of the settlement of a suit will be set aside.[35] The committee of a lunatic is authorized to bind the lunatic by acts clearly for his benefit.[36] Contracts for legal services are not valid without approval of court.[37] It is a guardian's duty to manage the estate for the best interest of the ward and to pay all just debts.[38] He is liable for his negligence.[39]

§ 4. *Custody, support, and education of the ward.*[See 7 C. L. 1903]—The guardian

22. Ward had moved into another county, and revocation should become effective upon the appointment and qualification of the new guardian in the other county. Dickerson v. Bowen [Ga.] 57 SE 326.

23. Guardian of insane person used land of the estate himself, paying only a small rental, and also rented the land to his son, and put nearly all the income into improvements. In re Edmonson's Estate [Neb.] 110 NW 540.

24. As to jurisdictional facts. In re Burns, 102 NYS 203.

25. But appellate court will interfere where guardian had failed to annually account as required by statute, and where he had mingled his own funds with those of the estate, though he had acted in good faith and in acordance with custom, and will remand the matter to the lower court for it to appoint a successor. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

26. Where, on application stating that best interests of an infant ten months old demanded an immediate appointment, the guardianship was granted to an aunt, who appeared narrow minded and quick tempered, and the grandparents, who had custody of child, were competent and of the same religion as the parents, took immediate steps to have the same revoked, it was revoked. In re Crickard, 52 Misc. 63, 102 NYS 440.

27. After a guardian had applied for settlement of accounts, permission to resign and appointment of successor, and a successor had been appointed who was contesting his claim to compensation, he cannot apply in his own behalf to have the appointment of his successor set aside, and so delay paying over the ward's money. In re Twichell, 117 App. Div. 301, 102 NYS 163.

28. Spendthrift never questioned appointment until after guardian's death and more than eight years after appointment. Brown v. Probate Ct. of Warwick [R. I.] 67 A 527.

29. Quaere: Whether mother can resign tutorship of her children. In re Minors Long, 118 La. 689, 43 S 279.

30. New guardian not estopped to deny that former guardian had never received from himself as administrator his ward's share of the estate, where his guardianship accounts had not been allowed. State v. Whitehouse [Conn.] 67 A 503.

31. Cannot without authority of court bind estate of minor. Pilgrim v. McIntosh [Ind. T.] 104 SW 858.

32. Conveyance by pretended guardian of no effect though he was subsequently appointed guardian. Ayer & Lord Tie Co. v. Witherspoon's Adm'r, 30 Ky. L. R. 1067, 100 SW 259.

33. Court may authorize a conveyance of interest conceded. Skidmore v. Cumberland Valley Land Co. [Ky.] 104 SW 390.

34. The advice of the meeting that the property be sold at private sale to effect a partition is mere surplusage. Holliday v. Hammond State Bk., 118 La. 1000, 43 S 656.

35. Guardian compromised without knowledge of his counsel, and court approved and dismissed suit. Subsequently, on application of attorney showing the same was improvidently made, and without consent of the ward or his mother, dismissal was set aside and case reinstated. Picciano v. Duluth, M. & N. R. Co., 102 Minn. 21, 112 NW 885.

36. Waived rights to sue for trespass by standing by and permitting another to underpin a party wall. Sharpless v. Boldt [Pa.] 67 A 652.

37. Guardian made contract with trustee that latters' law firm should be the attorneys and the same was indorsed by district judge but was never recorded. In re Manning's Estate, 134 Iowa, 165, 111 NW 409.

38. Where he allowed property to be foreclosed without trying to sell the same, he was liable for the loss of the equity. Alcon v. Koons [Ind. App.] 82 NE 92.

39. Question if used due care in continu-

is prima facie entitled to the custody of the minor ward, but he is not entitled to maintain habeas corpus to secure the same.[40] The father should be allowed access to a child under guardianship where he is a fit person.[41] The guardian under proper circumstances may pay sums for the ward's support to the ward's mother,[42] or he may divide the expense between different wards living in the same family without reference to their actual consumption.[43] Usually in absence of express order, a guardian can only expend the income on the ward's support and education,[44] but, if justified, he will be credited for necessary payments out of the principal.[45] In such case the personal property should be first applied to the expenses of supporting and educating the ward.[46]

§ 5. *The ward's property and administration thereof.* See 7 C. L. 1904—Statutes usually forbid the guardian to loan the ward's money except on the order of the court,[47] and without such order he cannot borrow money of the ward's estate,[48] or to invest its funds in his own business or that of his firm.[49] A guardian must keep his ward's money and property separate from his own,[50] but a guardian may at a judicial sale bid in property in his own name to protect himself as well as the ward.[51] The guardian should apply to court for authority to make loans,[52] but he may bind the ward by acts clearly for his benefit.[53] Thus, the estate will be liable for money borrowed where the same was used for the benefit of the ward.[54] The guardian may make valid leases of property not to extend beyond majority of ward.[55] A grant of an easement will be construed to run as long as a valid lease could be made.[56] It is the duty of a guardian to protect his ward's equity of redemption,[57] and he may sue on a mortgage of his ward's.[58] A guardian must pay any debt he owes to the ward

ing to hold securities. Scoville v. Brock, 79 Vt. 449, 65 A 577.

40. Guardian was appointed ex parte, and child was cared for not against its will by its aunt, who was a suitable person, and guardian should have tested his rights by proper civil action. In re Parker, 144 N. C. 170, 56 SE 878.

41. In re Ross [Cal. App.] 92 P 671.

42. Though mother ordinarily owes the duty of nurturing and caring for her children. In re Boyes' Estate [Cal.] 90 P 454.

43. But he cannot charge a ward's account for his share for a year when he was not at home. In re Boyes' Estate [Cal.] 90 P 454.

44. But guardian allowed credit for same where waived by ward on coming of age. Hudson v. Newton [Ark.] 103 SW 170. Suit against surety where it appeared that the guardian had, without the approval of the ordinary, applied the corpus of the estate to the support and education of the wards. United States Fidelity & Guaranty Co. v. Davis [Ga. App.] 58 SE 777.

45. Gave a fixed sum at stated periods and was allowed to charge the same in his accounts. In re Boyes' estate [Cal.] 90 P 454.

46. Presumption that guardian did so in a controversy between the heirs of the ward. McDonald v. Weisiger, 30 Ky. L. R. 1224, 100 SW 832.

47. Code, § 3200, provides management of the estate to be under the orders of the court. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588. Otherwise he is liable if any loss occurs. In re O'Brien's Estate [Neb.] 113 NW 1001.

48. Query if mortgage and note which he gave constituted a valid contract. Cummings v. Strobridge Land Syndicate, 150 Cal. 209, 88 P 901. But estate is liable for money borrowed without authority to the extent it was benefited. In re Manning's Estate, 134 Iowa, 165, 111 NW 409.

49. Liable for conversion if he does. United States Fidelity & Guaranty Co. v. State [Ind. App.] 81 NE 226.

50. Must keep separate accounts and must not make investments in his own name. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

51. Land sold under a deed of trust taken by guardian to secure debt of guardian as well as debt of ward. Bunel v. Nester, 203 Mo. 429, 101 SW 69.

52. Fact judge knew of same, or that annual report was approved without notice, is not equivalent to an order authorizing the loans. In re O'Brien's Estate [Neb.] 113 NW 1001.

53. Committee of a lunatic waived trespass committed by another in underpinning a party wall. Sharpless v. Boldt [Pa.] 67 A 652.

54. Though guardian had no authority from the court, and though he should have had sufficient funds on hand to meet all obligations. In re Manning's Estate, 134 Iowa, 165, 111 NW 409.

55. Ky. St. 1903, § 2031, provides they must not exceed seven years. Cumberland Pipe Line Co. v. Howard, 30 Ky. L. R. 1179, 100 SW 270.

56. Right to lay a pipe line across a ward's land. Cumberland Pipe Line Co. v. Howard, 30 Ky. L. R. 1179, 100 SW 270.

57. Real estate mortgaged for less than value, and guardian did not apply for permission to sell same and pay debts, but allowed it to be foreclosed and lost the equity. Alcon v. Koons [Ind. App.] 82 NE 92.

58. Fact that it appears minors are of age and should be made parties cannot be raised

and invest the same. Investment in his partnership business is a conversion of the fund,[59] but where a note and mortgage of the guardian is part of the ward's estate, the guardian may satisfy the same of record.[60]

§ 6. *Presentment and allowance of claims.* See 7 C. L. 1908

§ 7. *Judicial proceedings to sell property of ward.* See 7 C. L. 1909—A guardian has no power without the authority of court to make executory contract for the sale of land.[61] Authority will be given where it is necessary to secure the guardian's compensation [62] or to pay debts,[63] in which case it is the duty of the guardian to institute proceedings.[64] A court's finding that the best interests of the child did not require a sale will be sustained if possible.[65] The petition for sale must set forth the facts in detail [66] and it cannot be amended after the sale.[67] The statutory requirements as to proof must be followed.[68] The sale must be made under the express order of the court, and must be confirmed by it.[69] In case of a private sale the court has full discretion to confirm or ignore it.[70] The deed is prima facie evidence that the sale was regular,[71] but the failure to give a bond renders the sale void.[72] A court has power to set aside the sale,[73] as where the sale was to a guardian [74] or to a relative of his.[75] Where the tutor receives the price the purchaser is protected.[76] So guardian's failure to give the required published notice is not a jurisdictional defect that will render the sale liable to collateral attack.[77] The fraud of a guardian may be shown in defense to an action founded on a guardian's deed.[78]

on a motion for a continuance. Young v. Malone [Pa.] 67 A 355.

59. Partner, as guardian, used funds in his business. He sold out to his copartner who assumed the debt. Thereafter the copartner was appointed guardian, but never actually separated the money, and held he converted the same. United States Fidelity & Guaranty Co. v. State [Ind. App.] 81 NE 226.

60. One purchasing the land on the faith of the satisfaction will not be obliged to reimburse the ward where the satisfaction was wrongfully given. Cummings v. Strobridge Land Syndicate, 150 Cal. 209, 88 P 901.

61. Sale can only be made under order, and subject to approval of probate court. Gault Lumber Co. v. Pyles [Okl.] 92 P 175. Ward's interest in growing timber is an interest in land. Ayer & Lord Tie Co. v. Witherspoon's Adm'r, 30 Ky. L. R. 1067, 100 SW 259.

62. Guardian allowed $300 for services as guardian and $300 for services as administrator after death of ward. Johnson v. Porterfield [Ala.] 43 S 228.

63. Sale of timber authorized to save infant's share in testator's estate, but decrees extending time and altering the original sale were void where based upon no pleadings. Lilly v. Claypool, 59 W. Va. 130, 53 SE 22.

64. For failure to sell property and to protect the equity of redemption therein, the guardian was liable. Alcon v. Koons [Ind. App.] 82 NE 92.

65. Land inherited by imbecile infant worth $1,000 was now worth $2,000, and evidence to show the rent was sufficient to provide for the support of the child. Landrum v. Clark [Ky.] 102 SW 271.

66. As to mortgage debts of insane ward. Alcon v. Koons [Ind. App.] 82 NE 92.

67. Wanted to amend by alleging that the land was indivisible. Phillips v. Spalding's Guardian [Ky.] 102 SW 1193.

68. Requirement that proof must be taken by interrogatory unnecessary where no motion and two of the defendants were adults, but a deposition was sufficient. Phillips v. Spalding's Guardian [Ky.] 102 SW 1193.

69. Guardian's deed alone insufficient to support ejectment. Phelps v. Nazworthy, 226 Ill. 254, 80 NE 756. Fact that the deed falsely recited order and confirmation was immaterial. Rippy v. Harlow [Tex. Civ. App.] 101 SW 851. Unless entered in some book recognized as a record, as in the probate judge's minutes or his docket, it is a nullity. Teague v. Swasey [Tex. Civ. App.] 18 Tex. Ct. Rep. 290, 102 SW 458.

70. But where directed public bidding for a base, the court must confirm the highest bid. In re Berryhill's Estate [Ind. T.] 104 SW 847.

71. But not presumptive evidence of all the prerequisites of a valid sale. Teague v. Swasey [Tex. Civ. App.] 18 Tex. Ct. Rep. 290, 102 SW 458.

72. Civ. Code Prac. §§ 489, 493, requires bond on sale of infant's land for reinvestment. Phillips v. Spalding's Guardian [Ky.] 102 SW 1193.

73. Guardian made sale to his wife which was approved by the court which was set aside on motion of the ward. In re Propst, 144 N. C. 562, 57 SE 342.

74. Without proof of fraud or inadequacy of consideration where sale of oil lands was made by guardian to secure for himself and others the title to the land sold. In re Tanner's Estate [Pa.] 67 A 646.

75. Wife. In re Propst, 144 N. C. 562, 57 SE 342.

76. Sale on partition suit approved by family meeting. Carrollton Land & Improvement Co. v. Eureka Homestead Soc. [La.] 44 S 434.

77. But where statute required three weeks' published notice, held it was sufficient where publications on April 24, May 1, and 8, for hearing on May 9th. Mortgage Trust Co. v. Redd, 38 Colo. 458, 88 P 473.

78. Claimed guardian's deed was to a fic-

A ward may disaffirm a sale at any time before reaching majority or within a reasonable time thereafter.[79] A deed from a ward after he becomes of age will prevail over a guardian's deed subsequently recorded.[80]

§ 8. *Actions and legal proceedings by and against guardians.*[See 7 C. L. 1911]—In some states he cannot institute suits,[81] but generally he has prima facie right to sue[82] in behalf of ward,[83] as for injuries to ward[84] or to secure a partition.[85] The actions must be brought in name of ward by guardian.[86] A guardian may defend suits without authorization.[87] The guardian may sue on a mortgage made to him as guardian of minor children.[88] The statute of limitations does not run against a ward's right of action against his guardian until the discovery of the fraud.[89]

§ 9. *Accounting and settlement.*[See 7 C. L. 1912]—It is the duty of a guardian to fully account to the court that appointed him,[90] as it is for the information of the court and the protection of the ward, and statutes frequently impose a penalty for failing regularly to render accounts.[91] A guardian must settle his final account with ward, if of age, or with his legal representatives if the ward is incompetent or dead,[92] or, in case of removal, with his successor,[93] and until such settlement he is not fully discharged.[94] Any person interested may file written exceptions to the account which may include statements of affirmative matters which may require additional charges,[95] but it is the duty of the court, regardless of exceptions, carefully to scrutinize all items.[96] Where exceptions are taken to a guardian's report, the burden is on him to establish the facts,[97] as that he had made a settlement with the ward after he became of age.[98] If there was undue influence such release and discharge of

titious person. Phelps v. Nazworthy, 226 Ill. 254, 80 NE 756.

79. Ward at age of nineteen petitioned to disaffirm sale of her oil lands to one who purchased in behalf of guardian. In re Tanner's Estate [Pa.] 67 A 646.

80. Grantee of ward not shown to have actual or constructive notice of guardian's deed. Phelps v. Nazworthy, 226 Ill. 254, 80 NE 756.

81. A guardian ad litem should be appointed to bring suit to contest a will. Campbell v. Fichter, 168 Ind. 645, 81 NE 661.

82. Petition need not allege when the guardian was appointed or from what court he received his appointment. Western & A. R. Co. v. Harris [Ga.] 57 SE 722.

83. Suit on a beneficiary certificate in favor of nearest relatives of the member. Social Benev. Soc. No. 1 v. Holmes, 127 Ga. 586, 56 SE 775.

84. Should be brought in name of ward by his guardian, and complaint should allege his appointment by the proper court. Patterson v. Melchior, 102 Minn. 363, 133 NW 902.

85. Infant entitled to share of trust property and by guardian could elect to join in action and to treat the property as real estate. Twain v. Davis, 49 Misc. 162, 98 NYS 816.

86. Williams v. Smith [R. I.] 66 A 63.

87. No authorization from judge or advice of family meeting needed by tutor to answer in a partition suit. Carrollton Land & Improvement Co. v. Eureka Homestead Soc. [La.] 44 S 434.

88. The fact that they are now adults cannot be shown on motion for a continuance. Young v. Malone [Pa.] 67 A 355.

89. Where ward had perfect confidence in the integrity of guardian, statute did not run until something occurred to raise a doubt in his mind although this did not occur until eight years after the fraud was committed. Scoville v. Brock, 79 Vt. 449, 65 A 577.

90. Bondsman held where guardian went to another state and never accounted in the original state. Gillum v. Parker's Guardian, 30 Ky. L. R. 1191, 100 SW 820.

91. Burns' Ann. St. 1901, § 2685, subd. 3, provides that if guardian fails to file his account every two years that he is liable to a penalty of 10 per cent of the estate and loses his compensation. Alcon v. Koons [Ind. App.] 82 NE 92.

92. Where statute required ten days' notice and ward deceased, the court had no jurisdiction where less than ten days had elapsed between appointment of administrator and date of hearing. Livermore v. Ratti, 150 Cal. 458, 89 P 327.

93. Subject to approval of court. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

94. Letters of guardianship revoked for lack of jurisdiction, but accounting directed. In re Burns, 102 NYS 203. A successor had been appointed, but was nevertheless liable to a suit for waste brought by the ward on coming of age, as his accounts had not been approved. Hix v. Duncan [Tex. Civ. App.] 17 Ct. Rep. 702, 99 SW 422.

95. One is limited to the exceptions which he files, and evidence will be limited to such matters. In re Boyes' Estate [Cal.] 90 P 454.

96. To inquire into truthfulness and accuracy and to reject all items which appear illegal or excessive. In re Boyes' Estate [Cal.] 90 P 454.

97. Considered a plaintiff, and proper on request to specially find the facts and to state the conclusions of law thereon. Alcon v. Koons [Ind. App.] 82 NE 92.

98. Guardian not estopped to prove the

a guardian will be set aside.[99] A guardian will be credited for expenditures made in behalf of ward [1] unless barred by the statute of limitations,[2] and he may be credited with payments made to ward after he became of age.[3] On a settlement one may contest the validity of a contract for attorney's fees,[4] and if they were rendered in another court the surrogate has no jurisdiction to allow them.[5] A guardian will be charged with interest where he delayed settlement after the ward became of age.[6] Where there is a special equity [7] or where both guardian and ward are deceased, a suit for an accounting is in the jurisdiction of equity, and not of the orphan's court.[8] After a long lapse of time it will be presumed that guardian has paid over balance due on a final account.[9] Notwithstanding the allowance of a final account, the ward may have relief in equity for subsequently discovered fraud or negligence of the guardian.[10]

§ 10. *Rights and liabilities between guardian and ward.*[See 7 C. L. 1913]—A conveyance from guardian to ward on the latter's coming of age will not be presumed to be a settlement of all matters between them.[11] If the guardian is parent of the ward, a release made just after the ward became of age, which is prejudicial to the ward, is constructively fraudulent.[12] Where the parties to the relation die, their representatives must account in equity.[13] A ward on becoming of age may sue a guardian for waste committed,[14] or for loss occasioned by his negligence.[15] The statute of limitations does not begin to run until the appointment of an administrator of the deceased ward.[16]

§ 11. *Compensation of guardian.*[See 7 C. L. 1914]—A guardian's compensation

same, though afterwards in a petition in bankruptcy he had alleged he was indebted to the ward, where he explained that he had neglected to take a written receipt, and the ward refused to execute one and denied the settlement. Robb's Estate v. Robb, 134 Iowa, 195, 111 NW 803.

99. Guardian was parent of ward, and after he had defaulted induced ward to release him just after she became of age. Baum v. Hartmann, 226 Ill. 160, 80 NE 711.

1. Committee of a lunatic advanced moneys for his support and maintenance after his personal property was exhausted. In re Roberts, 52 Misc. 630, 103 NYS 1017.

2. Committee of a lunatic not allowed for expenditures made more than six years before. In re Roberts, 52 Misc. 630, 103 NYS 1017.

3. Nothing unfair, but not entitled to any personal claim against the ward, but only against the estate remaining in his hands. In re Boyes' Estate [Cal.] 90 P 454.

4. Contract was invalid because approval of court was not of record. In re Manning's Estate, 134 Iowa, 165, 111 NW 409.

5. Guardian was attorney for guardian ad litem, in suit in Federal court for injuries to ward, and put in a claim for 50 per cent of the recovery, and no service of citation was made on infant. In re Tyndall, 117 App. Div. 294, 102 NYS 211.

6. No valid objection where he had charged himself with 8 per cent interest. In re Boyes' Estate [Cal.] 90 P 454.

7. Necessary expenditures for wards were made by guardian out of his own funds without prior order authorizing expenditure out of principal of the ward's estate, and only the chancery court could reimburse him. Spidle v. Blakeney [Ala.] 44 S 62. Petitioner was guardian of a lunatic and then administrator of her estate after her death, and both proceedings were removed in order that they might be settled together. Johnson v. Porterfield [Ala.] 43 S 228.

8. Because not a suit between the parties but one between their representatives. Stevenson v. Markley [N. J. Eq.] 66 A 185.

9. Final account of guardian of a deceased lunatic had been allowed twenty years before. Mathews v. Kelly [N. J. Err. & App.] 67 A 1075.

10. Though unable to vacate probate decree, ward may sue to set aside final settlement based on fraud of guardian in concealing loss of securities through his negligent mismanagement. Scoville v. Brock, 79 Vt. 449, 65 A 577.

11. Guardian had lost moneys through improper investments. Rouse v. Whitney, 53 Misc. 56, 102 NYS 899.

12. Parent had defaulted, and though daughter, after being informed of effect of release in probate court, gave same, it was set aside in equity as not sufficient showing that her will was uninfluenced. Baum v. Hartmann, 226 Ill. 160, 80 NE 711.

13. Suit not barred until the appointment of representatives. Stevenson v. Markley [N. J. Eq.] 66 A 185.

14. Sued a former guardian who had failed to renew his bond, but had never formally been discharged, though a successor had been appointed. Hix v. Duncan [Tex. Civ. App.] 17 Tex. Ct. Rep. 702, 99 SW 422.

15. In suit to set aside decree allowing guardian's final account, based on negligence, the burden is on the guardian to show he exercised the necessary diligence. Scoville v. Brock, 79 Vt. 449, 65 A 577.

16. Cause of action accrued on ward's death in 1885 and administrator not appointed until 1906. Stevenson v. Markley [N. J. Eq.] 66 A 185.

should come out of the interest rather than out of the principal of the ward's estate,[17] but real estate may be sold if necessary for this purpose.[18] An ex parte order approving of a contract between guardian and guardian ad litem as to compensation is not binding on the infant.[19] For breach of his duties the guardian forfeits his right to compensation.[20] A guardian may remain a party to a suit after the ward becomes of age in order to have his compensation allowed.[21] A successor may contest the claim of his predecessor for compensation.[22]

§ 12. *Guardianship bonds.*[See 7 C. L. 1914]—A bond is valid if it substantially complies with the statute.[23] It is frequently required that the bond be in double the amount of the value of the propery.[24] The return of the guardian is prima facie evidence against both him and his sureties,[25] as is also the return of an execution issued on surrogate's decree against the guardian,[26] but to fix the liability of sureties there must be a decree rendered upon a judicial settlement of the account,[27] though it is not essential that the amount of defalcation be fixed.[28] Demand is unnecessary on the surety.[29] The giving of additional security by a guardian pursuant to order of court does not release the sureties on his original bond.[30] and such release can only be obtained by petition of the sureties to the probate court.[31] Contracts between the retiring guardian and his successor as to the assets do not discharge the sureties on the former's bond.[32] Nor will an invalid order of the probate court approving such a contract.[33] Sureties on successive bonds may be joined in the same suit,[34] but a surety may be sued without joining the guardian and the other surety,[35] and the plaintiff may dismiss as to the guardian and one surety and recover against the other alone.[36] A guardian's fraud or misrepresentations[37] or his removal from the state and appointment in another state does not release his bondsmen.[38] A wrongful discharge of the guardian will not release his sureties unless they have changed

17. Commissions to guardian for the care of real estate. McDonald v. Weisiger, 30 Ky. L. R. 1224, 100 SW 832.

18. Three hundred dollars allowed. Johnson v. Porterfield [Ala.] 43 S 228.

19. Guardian was to have 50 per cent of recovery in acting as attorney for the guardian ad litem. In re Tyndall, 117 App. Div. 294, 102 NYS 211.

20. Failed to render account every two years as required by statute. Alcon v. Koons [Ind. App.] 82 NE 92.

21. Where executors promised guardian compensation before his services were rendered, it was proper to pay them out of the fund provided for the ward's support and education. Elizabeth Speers Memorial Hospital Trustees v. Makibben's Guardian [Ky.] 102 SW 820.

22. Application of guardian to set aside appointment of his successor, who was contesting his claim to compensation, refused. In re Twichell, 117 App. Div. 301, 102 NYS 163.

23. The statute required bond to be given "for the faithful discharge of his duty as guardian," the condition of the bond set these duties out in detail, and it was valid. United States Fidelity & Guaranty Co. v. Davis [Ga. App.] 58 SE 777.

24. Both real and personal. Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665.

25. Wards never received funds which deceased guardian admitted were in his hands. United States Fidelity & Guaranty Co. v. Davis [Ga. App.] 58 SE 777.

26. Sufficient proof that the ward has exhausted his remedies against the guardian. Rouse v. Whitney, 53 Misc. 56, 102 NYS 899.

27. After ward became of age, guardian's account was opened and vacated and she was decreed to pay plaintiff $2,000; but such decree was insufficient as it contained no summary statement, nor was it final, nor the result of a proceeding for an accounting. Rouse v. Payne, 105 NYS 549.

28. Liable for defaults occurring between execution of bond and discharge of surety. Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665.

29. Guardian dead, his estate unrepresented, and liability proved by breach of bond by principal. U. S. Fidelity & Guaranty Co. v. Davis [Ga. App.] 58 SE 777.

30. Act March 13, 1874, does not apply to guardian's bonds. Kaspar v. People, 230 Ill. 342, 82 NE 816.

31. Hurd's Rev. St. 1905, c. 103. Kaspar v. People, 230 Ill. 342, 82 NE 816.

32, 33. Kaspar v. People, 230 Ill. 342, 82 NE 816.

34. Proper to sue all, together with guardian's executrix. Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665.

35, 36. Kaspar v. People, 230 Ill. 342, 82 NE 816.

37. Guardian lost moneys by improper investments made by her as administratrix before her appointment as guardian. Rouse v. Whitney, 53 Misc. 56, 102 NYS 899.

38. He failed to account for money that he received to either court Gillman v. Parker's Guardian, 30 Ky. L. R. 1191, 100 SW 820.

their positions on the faith of it,[39] so, where an invalid reduction of the bond was made, the discharge of the sureties was invalid.[40] On appeal the complaint in an action on a guardian's bond will be construed, if possible, to sustain it.[41] Where equity had jurisdiction to set aside the discharge of a guardian, it will retain it to do justice between the ward and the guardian's sureties.[42]

HABEAS CORPUS (AND REPLEGIANDO).

§ 1. Nature of the Remedy and Occasion and Propriety of It (1559).
§ 2. Jurisdiction (1561).
§ 3. Petition (1561).
§ 4. Hearing on Petition and Issuance of Writ (1562).
§ 5. The Writ; Service Thereof; Effect of Writ (1562).
§ 6. Certiorari in Aid of Habeas Corpus (1562).
§ 7. Return and Hearing and Determination Thereon; Judgment (1562).
§ 8. Review (1563).

The scope of this topic is noted below.[43]

§ 1. *Nature of the remedy and occasion and propriety of it.*[See 7 C. L. 1916] The scope of the common-law writ and its statutory substitutes[44] has been greatly extended, and, while it is now commonly used to determine the custody of children,[45] the validity of extradition proceedings,[46] and for other purposes to which it was originally inapplicable,[47] when invoked to relieve from restraint[48] under legal process,

39. Defaulting guardian induced ward, his daughter, to release him just after she became of age. Baum v. Hartmann, 226 Ill. 160, 80 NE 711.

40. But the sureties on the reduced bond were liable as it was a good common-law obligation. Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665.

41. Complaint alleged appointment of guardian, execution of bond, that he received specified sum and mingled it with his own and converted to his own use, and was removed, and was sufficient though it alleged no demand on guardian or sureties or that it was unpaid. United States Fidelity & Guaranty Co. v. State [Ind. App.] 81 NE 226.

42. Sureties were already parties to the suit. Baum v. Hartmann, 226 Ill. 160, 80 NE 711.

43. The right to the remedy and the extent to review allowed thereon is retained, but questions of substantive law determined on habeas corpus are treated in the topics to which they relate. See such topics as Arrest and Binding Over, 9 C. L. 249; Bail, Criminal, 9 C. L. 320; Infants, 8 C. L. 267; Indictment and Prosecution, 8 C. L. 189; Military and Naval Law, 8 C. L. 981, and the like.

44. Proceeding authorized by P. L. p. 263, § 8, to determine custody of children, is not common-law habeas corpus proceeding, and court may modify order notwithstanding removal of mother and children from state. Dixon v. Dixon [N. J. Eq.] 66 A 597.

45. Must be illegal restraint. In re Parker, 144 N. C. 170, 56 SE 878. **Contra.** Tytler v. Tytler [Wyo.] 89 P 1. Remedy given in act of 1894 (Acts 1894, p. 80), now contained in Civ. Code 1895, § 2372 et seq., to parent to apply to authorities of institution to which child has been committed under act, is not exclusive. Kennedy v. Meara, 127 Ga. 68, 56 SE 243. Habeas corpus procedure provided by Gen. St. 1621 does not authorize court to settle permanent custody of children. Morris v. Wardell [N. J. Law] 67 A 850.

46. May go back of requisition and examine sufficiency of indictment. In re Waterman [Nev.] 89 P 291. May show that he is not fugitive or that process is void, but cannot go into merits of offense (Compton v. State [Ala.] 44 685; Blackwell v. Jennings [Ga.] 57 SE 484), or motive and purpose of extradition (Depoilly v. Palmer, 28 App. D. C. 324), and hence evidence of alibi is inadmissible (Ex parte Edwards [Miss.] 44 S 827; Burns v. Tarbox, 76 Ohio St. 520, 81 NE 761).

Contra, as to alibi: Where there is no showing as to when crime was committed or that there was error in date stated in affidavit on which demand was founded, relator need only prove alibi on date named. State v. Schlachter [S. D.] 111 NW 566. Where evidence on alibi is conflicting, writ will be denied. Id. Where requisition papers do not specify hour of day when crime was committed, affidavits showing alibi during afternoon are insufficient where petitioner could have been present during forenoon, although petition alleges that petitioner heard person on whom crime was committed testify that it was committed at 2 o'clock P. M. People of Illinois v. Pease, 28 S. Ct. 58.

Court may determine whether court, sitting as commissioner, had any, as distinct from sufficient, competent evidence to warrant holding petitioner for extradition. Ex parte Ramirez [Ariz.] 90 P 323.

47. Where petitioner was discharged under Crim. Code, § 18, div. 13 (Hurd's Rev. St. 1905, p. 746), providing that one committed for criminal offense and not tried at term commencing within four months from committment shall be set at liberty, habeas corpus will lie to secure discharge from custody under second indictment. People v. Heider, 225 Ill. 347, 80 NE 291.

48. Mere nominal and voluntary restraint is insufficient. Ex parte Schmitz, 150 Cal. 663, 89 P 438. V. S. 1610, providing that one confined for contempt shall be entitled to writ of habeas corpus, is inapplicable where fine is imposed. In re Consolidated Rendering Co. [Vt.] 66 A 790.

such process must be void.[49] It cannot be used to try the merits [50] or to review the same,[51] or to relieve from irregularities of procedure,[52] but only in case of lack of jurisdiction [53] to render the particular judgment entered,[54] and will ordinarily issue only in the absence of other remedy.[55] While it cannot be invoked to try the sufficiency of an indictment,[56] it has been allowed where the indictment wholly failed to state an offense,[57] or was founded upon an unconstitutional act.[58] Unfitness of

49. Held entitled to release: One held as suspicious character without any complaint charging him with any specific offense. Hill v. Smith [Va.] 59 SE 475.

Not entitled thereto: Warrant charging that accused failed to pay tax on sale of corporate stock, as required by Laws 1905, p. 474, c. 241, as amended, held not defective in substance so as to authorize release on habeas corpus. People v. Mensching [N. Y.] 79 NE 884. May go back of warrant and consider sufficiency of depositions upon which it issued. People v. Moss, 187 N. Y. 410, 80 NE 383. In habeas corpus to review commitment on preliminary examination, court will only examine evidence to ascertain whether commitment is with or without reasonable cause, its sufficiency to convict beyond reasonable doubt being for jury (Ex parte Vandiveer [Cal. App.] 88 P 993, and discharge should be allowed only where testimony of material witnesses is clearly shown to be false, court not being allowed to pass on conflict (Id.).

50. Whether acts constituted assault. Ex parte Brumbaugh [Tex. Cr. App.] 19 Tex. Ct. Rep. 878, 105 SW 180. Constitutionality of act which goes only to merits cannot be inquired into. Id.

51. Cannot be invoked to review or modify decree awarding custody of children. Hardin v. Hardin, 168 Ind. 352, 81 NE 60; Hamerick v. People, 126 Ill. App. 491. Where petitioner is arrested on mesne process in action on judgment, matters affecting validity of claim are not grounds for release. Ex parte Morton [Mass.] 81 NE 869.

52. People v. Heider, 225 Ill. 347, 80 NE 291. As that case was tried in wrong building. People v. Warden of City Prison, 117 App. Div. 154, 102 NYS 374.

53. Servonitz v. State [Wis.] 113 NW 277. By common law, if court in given case has authority under any circumstances to render judgment imprisoning accused, writ will not lie, but if court has no such authority, error is jurisdictional and writ will issue. Id. Where commitment for contempt is issued by court of common-law jurisdiction having seal, jurisdiction is not assailable if it has jurisdiction of person, since it has inherent jurisdiction of subject-matter. In re Clark [Mo. App.] 103 SW 1105.

Held not jurisdictional: That petitioner was kidnapped in foreign state and forcibly brought back. Ex parte Davis [Tex. Cr. App.] 19 Tex. Ct. Rep. 254, 103 SW 891. That defendant in perjury prosecution is charged with matters forming basis of another charge. Ex parte Collins [Cal.] 90 P 827. Right to discharge for failure to retry after mistrial within four terms. People v. Strassheim, 228 Ill. 581, 81 NE 1129.

Jurisdictional: Absence of accused at rendition of judgment committing for contempt. Ex parte Mylius, 61 W. Va. 405, 56 SE 602.

54. Sentence in excess of that allowed by statute. State v. District Ct. of Third Judicial Dist., 35 Mont. 321, 89 P 63; Ex parte Narvaez [Cal. App.] 89 P 857. Gen. St. 1901, § 5167, does not prevent relief from sentence of imprisonment contrary to statute. In re Spaulding [Kan.] 88 P 547. Single gross sentence for conviction on distinct counts, having served time for which such sentence is valid. United States v. Peeke [C. C. A.] 153 F 166.

55. Failed to invoke mandamus to enforce right of appeal from justice court to county court. Ex parte De Loche [Tex. Cr. App.] 19 Tex. Ct. Rep. 39, 100 SW 923. Failed to apply to court of conviction for bail. Ex parte Doyle [W. Va.] 57 SE 824. Remedy of one committed for misdemeanor, and denied right to secure payment of fine and costs imposed, is in error and not by habeas corpus (In re J. B. Stanfeal, 9 Ohio C. C. [N. S.] 553), and it is error to direct mayor to amend his mittimus by providing that a fine and costs may be secured to be paid (Id.). While office of writ is to challenge jurisdiction, it is no objection to issuance thereof that petitioner has remedy by appeal. State v. District Ct. of the Third Judicial Dist., 35 Mont. 321, 89 P 63. Refusal of county commissioners to discharge one committed for nonpayment of costs upon proof of his inability to pay is no ground for release on habeas corpus. Ex parte Ellis [Kan.] 91 P 81. Right to discharge for failure to retry within four terms from mistrial cannot be raised on habeas corpus, but only by assignment of error to overruling of motion based thereon in trial court. People v. Strassheim, 228 Ill. 581, 81 NE 1129. Invalidity of information based on order of commitment alleged to have been made without jurisdiction cannot be inquired into, since question is not jurisdictional and may be reached by motion to set aside. Ex parte Fowler [Cal. App.] 90 P 958.

56. Ex parte Ruef, 150 Cal. 665, 89 P 605; Ex parte Williford [Tex. Cr. App.] 19 Tex. Ct. Rep. 40, 100 SW 919.

57. Ex parte Goldman [Cal. App.] 88 P 819. Complaint charging conjunctively, in language of ordinance prohibiting keeping of saloons, etc., that defendant unlawfully and willfully did all things prohibited by ordinance, held sufficient on habeas corpus. Ex parte Mogensen [Cal. App.] 90 P 1063.

58. Servonitz v. State [Wis.] 113 NW 277. Court is not competent within St. 1898, §§ 3408, 3427, providing that writ should not issue to one detained under final order or judgment of any competent court. Id. Rule that writ does not reach beyond commitment when person is detained by virtue of final order or judgment of court having jurisdiction does not prevent release where conviction is founded on unconstitutional law, since court lacked jurisdiction. Id. Adoption of unreasonable rules for examination and certification of architects by state board, under authority of St. 1901, p. 641, c. 212, does not justify an attack

place of imprisonment is no ground for its issuance.[59] There is a conflict as to whether jurisdictional facts may be inquired into.[60] Judgment may be collaterally attacked by habeas corpus by one not a party thereto.[61] Questions once decided cannot be made the basis of a new writ in the absence of something occurring to change petitioner's status.[62]

§ 2. *Jurisdiction.*[See 7 C. L. 1917]—The jurisdiction of the court commissioner,[63] the appellate courts,[64] and the inferior courts[65] of the various states to issue the writ, is largely statutory. Where the constitution confers concurrent jurisdiction on a court it cannot by rule require application to be first made to the other court.[66] Where the custody of a child is sought to be determined, the court must obtain jurisdiction of the child,[67] but once obtained is retained until the matter is disposed of.[68] While the district court of Montana cannot issue a writ running into another district,[69] the district court of Nebraska, in the exercise of its legal discretion,[70] may do so,[71] as may a judge in Mississippi, but he cannot make it returnable before himself.[72]

Federal courts.[See 7 C. L. 1917]—The Federal courts may issue the writ to discharge one illegally held by state authorities in violation of the Federal constitution or a United States treaty,[73] and where appeal or error will not lie,[74] or to release one held for an act done in pursuance of an order of a Federal court,[75] or in the performance of duty as a United States soldier.[76]

§ 3. *Petition.*[See 7 C. L. 1918]—While petitions for habeas corpus are liberally

on validity of act in habeas corpus for discharge from arrest for practicing without certificate. Ex parte McManus [Cal.] 90 P 702.

59. Ex parte Ellis [Kan.] 91 P 81.

60. Where court determines that accused is over 16 years of age and hence subject to sentence to State Industrial Reformatory, such fact cannot be questioned, although jurisdictional. Ex parte Wallace [Kan.] 89 P 687.

61. Adoption proceedings. Beatty v. Davenport [Wash.] 88 P 1109.

62. Ex parte Moebus [N. H.] 66 A 641.

63. Circuit court commissioner may issue. In re Potter [Wis.] 112 NW 1087.

64. Supreme court has neither original nor appellate jurisdiction. Petition of Channels, 30 Ky. L. R. 1248, 100 SW 214. Under Pen. Code, § 1475, as amended by St. 1907, c. 286, p. 560, where district court of appeals, as distinct from single justice thereof has remanded prisoner on habeas corpus, single justice of supreme court cannot overrule such decision on return of new writ before himself, but it must be returnable before court in banc. Ex parte Mogenson [Cal.] 91 P 334.

65. Under Code 1896, § 4817, petition of one confined in penitentiary in Elmore county held properly addressed to chancellor of northeastern chancery division. State v. Fuller, 147 Ala. 164, 41 S 990. Where writ is granted by chancellor of northeastern chancery division more than 10 days before time for holding court in county of confinement, held under Code 1896, § 4819, chancellor properly made it returnable in another county. Id.

66. Rule of practice 13 of supreme court (45 S. E. xi). Ex parte Doyle [W. Va.] 57 SE 824.

67. Where child is in lawful custody of father domiciled in Louisiana, temporary presence of child in Texas does not give court thereof jurisdiction to determine right to custody. Lanning v. Gregory [Tex.] 17 Tex. Ct. Rep. 587, 99 SW 542. Lanning v. Gregory [Tex. Civ. App.] 18 Tex. Ct. Rep. 210, 101 SW 484. Where father domiciled in New Mexico consented to removal of child to Texas to be kept there in custody of relatives, courts of Texas had jurisdiction to determine right to custody. Campbel v. Stover [Tex.] 19 Tex. Ct. Rep. 720, 104 SW 1047.

68. Terry v. State [Neb.] 110 NW 733.

69. Const. art. 8, § 11. Though judge thereof is absent from state. State v. District Ct. of Second Judicial Dist., 35 Mont. 51, 88 P 564.

70. Properly issued where respondent removed child from county contrary to agreement. State v. Porter [Neb.] 112 NW 286.

71. State v. Porter [Neb.] 112 NW 286.

72. Code 1906, § 2448, construed. McLeod v. McLeod, 88 Miss. 722, 42 S 873.

73, 74. Ex parte Collins, 149 F 573; Id., 154 F 980. Committed under statute of Washington without due process of law upon acquittal of murder on ground of insanity. Urquhart v. Brown, 205 U. S. 179, 51 Law. Ed. 760.

75. Where Federal court granted preliminary injunction restraining state officers from enforcing statute fixing maximum rates, and requiring companies to issue coupons to purchasers, show charge in excess of statutory rate, sale of tickets in compliance therewith is "an act done * * * in pursuance of * * * an order * * * of a court" of United States, within Rev. St. § 753 (U. S. Comp. St. 1901, p. 592), and where one is imprisoned therefor, he may be released on habeas corpus. Ex parte Wood, 156 F 190.

76. Rev. St. §§ 752, 753, 761 (U. S. Comp. St. 1901, pp. 592, 594). May summarily determine it was so done and discharge from state custody. United States v. Lipsett, 156 F 65.

construed, they must show illegal restraint.[77] A motion to quash the writ tests the sufficiency of the petition.[78]

§ 4. *Hearing on petition and issuance of writ.* See 7 C. L. 1918—One arrested on warrant of a magistrate in New York need not await the hearing before suing out the writ.[79] A Federal court need not issue the writ instanter but may order custodian to show cause why the writ should not issue,[80] and may deny the writ absolutely where the petition discloses that applicant is not entitled thereto.[81]

§ 5. *The writ; service thereof; effect of writ.* See 3 C. L. 1578

§ 6. *Certiorari in aid of habeas corpus.* See 5 C. L. 1617

§ 7. *Return and hearing and determination thereon; judgment.* See 7 C. L. 1918—The function of the petition is merely to secure the issuance of the writ,[82] and the person having the custody of the prisoner must make return,[83] to which petitioner may present exceptions,[84] raising issues of law or a traverse creating issues of fact.[85] An undenied return is conclusive.[86] The burden is usually on the petitioner[87] to affirmatively show void, as distinct from irregular, commitment.[88] The authority of the supreme court of Colorado being constitutional,[89] its practice is governed by rules of court,[90] and, in its discretion,[91] it may admit to bail after return.[92] The granting of a continuance is discretionary.[93] Where petitioner is held under sentence defective in form only, opportunity to correct same should be given before discharging petitioner.[94]

77. Petitioner is only required to allege, among other things, that he "is imprisoned or restrained of his liberty; the place where * * * and the officer or person by whom he is imprisoned," as required by Code Civ. Proc. § 2019. People v. Moss, 187 N. Y. 410, 80 NE 383. Petition for release of one sought to be extradited on ground that prosecution is barred by limitations must show statute of demanding state relative thereto. Kemper v. Metzger [Ind.] 81 NE 663.

78. Hardin v. Hardin, 168 Ind. 352, 81 NE 60.

79. Statute in respect thereto being for his benefit and subject to waiver. People v. Moss, 187 NY 410, 80 NE 383.

80. Ex parte Collins, 154 F 980.

81. Rev. St. § 755 (U. S. Comp. St. 1901, p 593). Ex parte Collins, 151 F 358.

82. When writ issues, petition has accomplished its purpose. Ex parte Collins [Cal.] 90 P 827.

83. Ex parte Collins [Cal.] 90 P 827.

84. Under Burn's Ann. St. 1901. § 1131, providing that petitioner may except to sufficiency of return, a paper filed, stating that petitioner, for exception to third paragraph, says that it does not state facts sufficient to constitute a defense, held good, though in form of demurrer. Kemper v. Metzger [Ind.] 81 NE 663.

85. Ex parte Collins [Cal.] 90 P 827.

86. Morris v. Wardell [N. J. Law] 67 A 850. Code 1896. § 4832. Harrist v. Harrist [Ala.] 43 S 962. Demurrer is not proper. Id. Where petitioner fails to plead over or deny return after exception thereto has been overruled, judgment may be rendered against him. Kemper v. Metzger [Ind.] 81 NE 663.

87. Must show void commitment. In re Wright, 74 Kan. 406, 86 P 460, 89 P 678. Held on executive extradition warrant valid on face. Blackwell v. Jennings [Ga.] 57 SE 484; Ex parte Collins [Cal.] 90 P 827; State v. Schlachter [S. D.] 111 NW 566. Identity of one arrested on extradition warrant will be presumed from identity of name. State v. Bates [Minn.] 112 NW 260. Where court adjudged petitioner in contempt for delay of business for less than 12 hours, it will be presumed that petitioner waived statutory right to 12 hours to make jury challenges, so that delay was possible. In re Clark [Mo. App.] 103 SW 1105. Where conditional pardon was revoked for alleged violation of its conditions, burden may be placed on state to show such breach. Spencer v. Kees [Wash.] 91 P 963.

88. Error of court in holding petitioner of sufficient mental capacity to make answer is not jurisdictional, hence it must appear that court did not pass thereon in binding him over. In re Wright, 74 Kan. 406, 89 P 678, 86 P 460. Conceding that one committed for failure to give bond for payment of alimony may be released on habeas corpus, where default was due to inability to give same, such fact must be made to affirmtively appear. Ex parte Caple [Ark.] 99 SW 830. On habeas corpus for discharge from commitment for contempt, facts recited in commitment are conclusive. Ex parte Shortridge [Cal. App.] 90 P 478. Matters dehors the record cannot be considered. In re Clark [Mo. App.] 103 SW 1105.

89, 90. In re Moyer, 35 Colo. 154, 91 P 738.

91. Bail refused where it appeared that petitioner was held as military prisoner and governor, as commander in chief of National Guards, advised that detention was necessary to preserve order. In re Moyer, 35 Colo. 154, 91 P 738.

92. In re Moyer, 35 Colo. 154, 91 P 738.

93. Where counsel was sick when retained and associates were present, held no abuse of discretion to deny motion for continuance on account thereof. Blackwell v. Jennings [Ga.] 57 SE 484.

94. United States v. Carpenter [C. C. A.] 151 F 214.

§ 8. *Review.*[See 7 C. L. 1919]—The appealability of particular orders,[95] and the method of reviewing the same,[96] are largely regulated by statute. Objections must be properly saved [97] and presented.[98] Certiorari brings up only questions of law.[99] Where prisoner is remanded to the custody from whence he came, there is nothing to stay on appeal.[1] Where the case is triable de novo, improperly admitted evidence will be disregarded.[2] Findings of fact are conclusive on appeal in South Carolina.[3] Where the trial court misconceived the law and his powers, a new trial will be awarded.[4]

HABITUAL DRUNKARDS.[5]

Where from excessive use of intoxicants one is squandering his property, a guardian may be appointed.[6]

HABITUAL OFFENDERS.[7]

HANDWRITING, PROOF OF; HARBOR MASTERS, see latest topical index.

HARMLESS AND PREJUDICIAL ERROR.

§ 1. The General Doctrine (1563).
§ 2. Triviality Constituting Harmlessness (1566).
§ 3. Errors Cured or Made Harmless by Other Matters (1579).

§ 1. *The general doctrine.*[See 8 C. L. 1]—*Generally speaking, a judgment will not be reversed or a verdict set aside or other proceeding overthrown because of error of which it can be said that no harm resulted to the complaining party,*[8] even

95. Order refusing to dismiss writ is not final order within Code Civ. Proc. § 2058 authorizing appeals from final orders only. People v. Duryee, 188 N. Y. 440, 81 NE 313. Order of appellate division of supreme court reversing order of special term refusing to dismiss writ is final order reviewable by court of appeals, although appellate division was without power to review action of special term, it not being final. Id.

96. Under Rev. St. §§ 763, 764 (U. S. Comp. St. 1901, pp. 594, 595), final order of circuit court denying application can be reviewed on appeal only and not on writ of error. Rainbow v. Young [C. C. A.] 154 F 489.

97. Joinder of issues and trial held not to waive denial of motion to quash writ. Bleakley v. Barclay [Kan.] 89 P 906.

98. Special exceptions to executive warrant and to requisition cannot be considered where not preserved in bill of exceptions. Ex parte Denning [Tex. Cr. App.] 18 Tex. Ct. Rep. 740, 100 SW 401. Where record contains no bill of exceptions, and return of officer is sufficient to sustain judgment refusing to discharge petitioner, judgment will be affirmed. Ex parte McIntyre [Neb.] 109 NW 763. Where writ is made returnable before chancellor in another county than county of confinement, record is properly certified by register in chancery of such court, under Code, § 4814. State v. Fuller, 147 Ala. 164, 41 S 990.

99. Finding of fact that welfare of child would be best subserved by placing it with mother is conclusive. Carpenter v. Carpenter, 149 Mich. 138, 14 Det. Leg. N. 366, 112 NW 748.

1. He is held by virtue of original process and not under order of remand, and hence application for bail must be made as if no writ had issued. Ex parte Collins [Cal.] 91 P 397. Where one indicted obtains writ of error from United States supreme court to review order in habeas corpus remanding him to custody, such writ does not stay proceedings on indictment. Reuf v. Superior Ct. San Francisco, 150 Cal. 657, 89 P 604.

2. Spencer v. Kees [Wash.] 91 P 963.

3. To determine custody of child. Brown v. Robertson [S. C.] 56 SE 786. Where no illegal restraint is shown, it is not error of law to discharge writ issued at instance of stranger. Id.

4. Walker v. Jones, 1 Ga. App. 70, 57 SE 903.

5. See 7 C. L. 1919. For general matters respecting guardians for spendthrifts, see Guardianship, 9 C. L. 1551.

6. Under Gen. Laws 1896, c. 248, § 7, and Court and Practice Act 1905, § 803, declaring that probate decree shall not be deemed invalid in any collateral proceeding or quash for want of form or want of jurisdiction appearing on its face, decree appointing guardian which only adjudged that inebriate lacked discretion to manage estate is voidable only. Brown v. Probate Ct. of Warwick [R. I.] 67 A 527.

7. No cases have been found during the period covered for this topic, which includes only the crime of being an habitual offender against law. See Criminal Law, 9 C. L. 851, as to increased punishment on second or subsequent convictions.

8. Leonhart v. California Wine Ass'n [Cal. App.] 89 P 847; Southern R. Co. v. Oliver, 1 Ga. App. 734, 58 SE 244; Clark v. Empire Mercantile Co. [Ga. App.] 58 SE 363; Boone v. Rickard, 125 Ill. App. 438; City of Chicago v. Pulcyn, 129 Ill. App. 179; Hopkin-

son v. Conley [Kan.] 88 P 549; Whitney v. Brown [Kan.] 90 P 277; Hargis v. Marcum [Ky.] 103 SW 346; Gordon v. Doran, 100 Minn. 343, 111 NW 272; Bush v. Brandecker, 123 Mo. App. 470, 100 SW 48; Spencer v. Bruner [Mo. App.] 103 SW 578; Waldron v. McBride [Neb.] 112 NW 619; Ostergaard v. Greek Catholic Congregation of St. John the Baptist [N. J. Err. & App.] 68 A 86; Wallace v. New Albion, 105 NYS 524; Snyder v. Stribling, 18 Okl. 168, 89 P 222; Howell v. Blesh [Okl.] 91 P 893; Reed v. Southern R. Co., 75 S. C. 162, 55 SE 218; Worthen v. Peruvian Consol. Min. Co. [Utah] 88 P 679; Hempstead v. Salt Lake City [Utah] 90 P 397; Gingrass v. Harvey [Wis.] 113 NW 1095; Pardee v. Kuster [Wyo.] 91 P 836; Cook v. Foley [C. C. A.] 152 F 41. Where result would have been the same had no error been committed. Tye v. Manley [Ind. T.] 104 SW 636. Where had rulings been in favor of complaining party different result would not have been reached. Spotswood v. Spotswood [Cal. App.] 89 P 362. Failure to establish cause of action renders all errors harmless. Pardee v. Kuster [Wyo.] 91 P 836. Technical errors harmless when verdict does substantial justice. Mutual Aid Ass'n v. Hogan, 124 Ill. App. 447; Barnes v. City of Grafton, 61 W. Va. 408, 56 SE 608. Where judgment on undisputed facts and applicable law is correct, it will not be reversed for errors. Van Cleve v. Radford, 149 Mich. 106, 14 Det. Leg. N. 376, 112 NW 754. Failure to state ground upon which new trial was granted harmless where same may be sustained on any ground set forth in motion. Sharp v. Odom, 121 Mo. App. 565, 97 SW 225. Refusal to suggest to counsel correction which court deemed necessary as condition to approval of bill of exceptions, containing evidence not in stenographic record, harmless. Rabb v. Goodrich [Tex. Civ. App.] 18 Tex. Ct. Rep. 662, 102 SW 910. Error cannot be predicated upon claims of law based upon contingency of court's making findings contrary to those it actually did make. Contaldi v. Errichetti, 79 Conn. 276, 64 A 219. Third incumbrance not aggrieved by allowance of interest on first incumbrance where proceeds of sale of incumbered property was insufficient in any event to pay both first and second incumbrances. Polliham v. Reveley [Mo. App.] 93 SW 829.

So provided by statute: Rev. St. 1899, § 865 (Ann. St. 1906, p. 812). Where judgment is for right party. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86; O'Keefe v. United R. Co. [Mo. App.] 101 SW 144. Under Civ. Code Pr. § 134, court must disregard errors not affecting substantial rights. City of Henderson v. Sizemore [Ky.] 104 SW 722; Staton v. Byron [Ky.] 105 SW 928.

Right decision on wrong ground: Where correct conclusion is reached, error in the method employed is harmless. Kemper v. Metzger [Ind.] 81 NE 663. Where decision was right though court proceeded upon erroneous theory. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545; Higgins v. Los Angeles R. Co. [Cal. App.] 91 P 344; O'Neil v. Ft. Lyon Canal Co. [Colo.] 90 P 849; McNicholas v. Tinsler, 127 Ill. App. 381. A correct judgment will be affirmed irrespective of correctness of reasons given for awarding it. Jeffries v. Fraternal Bankers' Reserve Soc. [Iowa] 112 NW 786; Bailey v. Brown [Cal. App.] 88 P 518. Where judgment is right though reason given is insufficient or would lead to a different conclusion. Corgan v. Lee Coal Co. [Pa.] 67 A 655. Error in directing nonsuit, on ground that in no event could plaintiff recover, harmless where under evidence plaintiff could not recover. Brick v. Atlantic Coast Line R. Co. [N. C.] 58 SE 1073. Where an action against a surety is tried on the assumption that it was immaterial whether plaintiff had notice that the alleged principal was a principal, a judgment rendered for plaintiff on an erroneous ground will not be affirmed on the ground that plaintiff is not shown to have had notice of the relationship. Crosby v. Woodbury, 37 Colo. 1, 89 P 34. Where order sustaining demurrer was correct, reasons on which trial court based its ruling are immaterial. Bishop v. Owens [Cal. App.] 89 P 844. Erroneous conclusion of law harmless where findings show actionable negligence. Gulf, etc., R. Co. v. Campbell [Tex. Civ. App.] 20 Tex. Ct. Rep. 89, 105 SW 539. Where in action of mandamus court assumed propriety of remedy but denied relief on ground of invalidity of certain ballots cast at an election, its decision denying writ will be affirmed though ballots were in fact valid if mandamus was not proper remedy. Dickinson v. Cheboygan County Canvassers, 148 Mich. 513, 14 Det. Leg. N. 196, 111 NW 1075. Where district court properly dismissed an appeal to it from county court, its action will not be disturbed because of grounds upon which dismissal was based. Hayward v. Fisher [Neb.] 110 NW 984. Proper direction of verdict will not be disturbed because court gave a wrong reason therefor. Benson v. Bawden, 149 Mich. 584, 14 Det. Leg. N. 522, 113 NW 20. Withdrawal by court from consideration of jury of an item of cause of action for insufficient reason will be sustained if proper on other grounds. Kohler v. Hughbanks [Neb.] 112 NW 577. Although court granted order on erroneous ground, it will not be reversed unless it appears from record that it was not supported by other grounds enumerated in the motion. Bouchard v. Abrahamsen [Cal. App.] 88 P 383. Exclusion of improper evidence on wrong ground harmless. Van Horn v. Van Horn [Cal. App.] 91 P 260; Brunswick & B. R. Co. v. Hoodenpyle [Ga.] 58 SE 705; Campbell v. Collins, 133 Iowa, 152, 110 NW 435; Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 SE 593. Exclusion of testimony on ground of incompetency of witness where evidence was immaterial. Fender v. Fender, 123 Ill. App. 105.

Result reached only one sustainable: Where evidence is so conclusive that no other verdict could have been sustained, errors in **instructions** are harmless. Clark v. Empire Mercantile Co. [Ga. App.] 58 SE 363; Dawson v. Wolf, 130 Ill. App. 77; Miller Harness Co. v. Flannigan, 130 Ill. App. 332; Pierce v. Kellyville Coal Co., 130 Ill. App. 376; Melton Hardware Co. v. Heidelberg [Miss.] 44 S 857; Hax v. Quincy, etc., R. Co., 123 Mo. App. 172, 100 SW 693; Neal v. Taylor, 106 Va. 651, 56 SE 590; Browder v. Southern R. Co. [Va.] 57 SE 572; Parker v. Fairbanks Morse Mfg. Co., 130 Wis. 525, 110 NW 409. Where evidence required answer given to questions, refusal to instruct as to burden of proof thereon is harmless. Gingrass v. Harvey [Wis.] 113

though he has properly saved his objection and excepted to the ruling,[9] and has regularly preserved it in the "record."[10] The party must affirmatively show error apparent on the "record."[11] It must harm him rather than a coparty,[12] and must be one which he has not invited,[13] and which he can assail without inconsistency to his contentions made on the trial.[14]

The majority of courts presume prejudice from error, once it is shown to exist,[15] and require the party defending against errors to show that no harm resulted.[16]

NW 1095. Erroneous instruction in favor of party for whom it would have been court's duty to direct verdict, harmless. Davis v. Chesapeake & O. R. Co., 61 W. Va. 246, 56 SE 400. Error in instructions on contributory negligence harmless where court would have been warranted in withdrawing issue from jury. Gerringer v. North Carolina R. Co. [N. C.] 59 SE 152.

Rulings on evidence. Smith v. Kansas City [Mo. App.] 101 SW 1118; St. Louis, etc., R. Co. v. Andrews [Tex. Civ. App.] 99 SW 871; Mitchel v. Richmond [Va.] 57 SE 570. Error in admitting evidence on question of damages and failing to find on question harmless where plaintiff was not entitled to recover in any event. Wood, Curtis & Co. v. Scurich [Cal. App.] 90 P 51. Erroneous admission of evidence harmless where in any event verdict would have to be against complaining party. Dumphy v. New York, etc., R. Co. [Mass.] 82 NE 675. Admission of incompetent evidence harmless where on all evidence but one conclusion could be reached. State v. Smith [Neb.] 110 NW 557. Where record shows as a matter of law that verdict was correct, misconduct of jury or errors in instruction are harmless. Moore v. Phoenix Ins. Co., 100 Minn. 393, 111 NW 263. Error in overruling demurrer harmless where judgment rendered is the only one which the evidence would sustain. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 111 NW 606. Where evidence demanded finding made on one issue, errors in submission of another issue foreign to the case are harmless. Stone v. Smith, 127 Ga. 483, 56 SE 640. Improper argument of counsel harmless where evidence conclusively established right to recover. Crow v. Ball [Tex. Civ. App.] 18 Tex. Ct. Rep. 381, 99 SW 583; St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83, 99 SW 867. Where evidence clearly shows that defendant was not liable, intervening errors are harmless. Teague v. Bloomington [Ind. App.] 81 NE 103. Where court properly gave general charge for defendant, refusal to give instructions requested by plaintiff harmless. Farley v. Mobile & O. R. Co. [Ala.] 42 S 747. Error in instructions given at request of defendant harmless where he was entitled to general charge. Pearson v. Hooper [Ala.] 43 S 576 [Advance sheets only]. Submitting validity of writing to jury harmless where successful party was entitled to a peremptory instruction. Puff v. Puff [Ky.] 104 SW 332. Submission of issue harmless where on evidence court would have been justified in instructing against complaining party thereon. Beale's Heirs v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 917, 99 SW 1045.

9. See Saving Questions for Review, 8 C. L. 1822.

10. See Appeal and Review, 9 C. L. 108.

11. Where error in admission of evidence affirmatively appears on record, it is not rendered harmless because record does not contain all evidence taken at trial. Zimmerman v. Beatson, 39 Ind. App. 664, 79 NE 518, 80 NE 165.

12. Rauch v. Fort Dearborn Nat. Bk., 124 Ill. App. 257; In re McNeile's Estate, 217 Pa. 179, 66 A 328; St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83, 99 SW 867. Failure to enter default against nonanswering codefendant cannot be complained of by answering defendant. Geffinger v. Klewer, 227 Ill. 598, 81 NE 712. Error in settlement of title between plaintiffs not available to defendant. Dixon v. Hunter, 204 Mo. 382, 102 SW 970. An appellant may not assign errors not relating to his interest in the controversy. Troike v. Cook County Sav. Bk., 127 Ill. App. 413. Submitting question of negligence of codefendant as to when plaintiff had taken a nonsuit. Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 SW 675. A defendant who does not demur cannot complain of the overruling of his codefendant's demurrer. Shiff v. Andress, 147 Ala. 690, 40 S 824. Dismissal of action as to defendant who was not made a party to the appeal cannot be reviewed. Peterson v. Red Wing, 101 Minn. 62, 111 NW 840. Where in action to recover taxes for benefit of certain school district it is found that such district is not entitled to taxes, and judgment is rendered in plaintiff's favor for benefit of another district, plaintiff on appeal cannot complain of decision in favor of latter district. State v. Hamilton, 202 Mo. 377, 100 SW 609. Quieting plaintiff's title to land as to which defendant made no claim not prejudicial as to latter. Worthen v. Peruvian Consol. Min. Co. [Utah] 88 P 679.

13, 14. See Saving Question for Review, 8 C. L. 1822.

15. See 8 C. L. 6. State v. Young, 134 Iowa, 505, 110 NW 292. Rejection of competent evidence is reversible error unless it clearly appears beyond reasonable doubt that it would not have affected the result. Thomas v. Territory [Ariz.] 85 P 1063. Evidence erroneously admitted, direct tendency of which was to prejudice party. Short v. Frink [Cal.] 90 P 200; Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 SE 826. Erroneous instruction presumptively prejudicial. Londonderry Min. Co. v. United Gold Mines Co. [Colo.] 88 P 455; Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind.] 81 NE 492. Overruling challenge to juror. Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 SW 1072.

16. Must affirmatively appear that error was not prejudicial. Texas Mexican R. Co. v. Lewis [Tex. Civ. App.] 18 Tex. Ct. Rep. 345, 99 SW 577; Cook v. Foley [C. C. A.] 152 F 41. Record must affirmatively show that error of court in refusing to examine

Errors which favor the party objecting are of course not ground for reversal,[17] nor are such as may be corrected without resort to a new trial.[18]

§ 2. *Triviality constituting harmlessness.—An error is harmless if too trivial in its nature or consequences to have substantially influenced the result.*[19] The weight or strength of the evidence may affect the importance of error.[20] Cases ap-

more than certain number of instructions was without prejudice. Crane Co. v. Hogan, 228 Ill. 338, 81 NE 1032.

Contra: Burden is upon appellant to show that error was prejudicial. Hamlin v. Pacific Elec. R. Co., 150 Cal. 776, 89 P 1109; Boline v. Wilson [Kan.] 89 P 678; Pardee v. Kuster [Wyo.] 91 P 836.

17. See 8 C. L. 7. Southern R. Co. v. Oliver, 1 Ga. App. 734, 58 SE 244; Abraham Lincoln B. & H. Ass'n v. Zuelk, 124 Ill. App. 109; Starks v. Schlensky, 128 Ill. App. 1; Lufkin v. Hitchcock [Mass.] 80 NE 456; Marshall Medicine Co. v. Chicago & A. R. Co. [Mo. App.] 104 SW 478; North Fork Lumber Co. v. Southern R. Co., 143 N. C. 324, 55 SE 781; St. Andrews Parish Tp. Com'rs v. Charleston Min. & Mfg. Co. [S. C.] 57 SE 201; Rambie v. San Antonio & G. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 903, 100 SW 1022.

Rulings on evidence: Error in not limiting evidence in behalf of complaining party Arden Lumber Co. v. Henderson Iron Works & Supply Co. [Ark.] 103 SW 185. In action against husband, evidence tending to show extension of credit to wife. Landgrof v. Tanner [Ala.] 44 S 397. Limitation on range of proof. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639. Improper joinder of causes of action against same parties held harmless, same being beneficial rather than hurtful to complaining parties. Stanton v. Byron [Ky.] 105 SW 928. Variance harmless where bill of particulars alleges payment of greater amount than was actually paid on note on which defendant was jointly liable, the difference being favorable to latter. Moffet v. Sebastian, 149 Mich. 451, 14 Det. Leg. N. 511, 112 NW 1120. Where court erroneously extended time within which plaintiff, a nonresident, was to file cost bond, plaintiff cannot complain. Union Iron Works v. Vekol Min. & Mill. Co. [Ariz.] 89 P 539. Plaintiff could not complain that no attorney was appointed to represent defendant. Stith v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 462, 95 SW 587.

Instructions favorable to complaining party. Fitzgerald Cotton Oil Co. v. Farmers' Supply Co. [Ga. App.] 59 SE 713; Brockmiller v. Industrial Works, 148 Mich. 642, 14 Det. Leg. N. 336, 112 NW 688; Bush v. Brandecker, 123 Mo. App. 470, 100 SW 48; Ferris v. Edmonston, 124 Mo. App. 94, 100 SW 1119; Murphy v. Metropolitan St. R. Co., 125 Mo. App. 269, 102 SW 64. Submission of contributory negligence of child six years old harmless to defendant. Jaffi v. Missouri Pac. R. Co., 205 Mo. 450, 103 SW 1026. Submission of construction of contract to jury where correct construction would have been unfavorable to complaining party. Moss Mfg. Co. v. Carolina Portland Cement Co., 1 Ga. App. 232, 57 SE 914. Defining contributory negligence harmless to defendant when not raised by its answer. Snipes v. Atlantic Coast Line R. Co. [S. C.] 56 SE 959. Instruction directing deduction of amount paid by defendant in settlement from amount found due plaintiff cannot be objected to by defendant on ground that it did not interpose a counterclaim. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577. Instruction erroneously placing burden of proof on plaintiff as to certain facts harmless to defendant. Arkansas Cent. R. Co. v. Bennett [Ark.] 102 SW 198. Erroneous instruction on measure of damages held favorable to appellant. Kerr v. Blair [Tex. Civ. App.] 20 Tex. Ct. Rep. 71, 105 SW 548; Lake Erie & W. R. Co. v. Hobbs [Ind. App.] 81 NE 90. Instruction ignoring defense held not available to plaintiff. Oxford Junction Sav. Bk. Co. v. Cook [Iowa] 111 NW 805. Inaccuracy in definition of proximate cause harmless to defendant where it placed heavier burden on plaintiff than required by law. Odegard v. North Wisconsin Lumber Co., 103 Wis 659, 110 NW 809.

Inconsistent instruction harmless when more favorable to objecting party than it should have been. Ryan v. Page, 134 Iowa, 60, 111 NW 405. Where neither of two **conflicting** instructions is correct, error may be predicated thereon though one of them favors objecting party, but not where one of the instructions is correct. Woods v. Latta, 35 Mont. 9, 88 P 402.

Verdict and judgment: Inadequacy of verdict for either party cannot be asserted by the other. Landreth v. Carey [Iowa] 113 NW 545; Crigler v. Duncan, 121 Mo. App. 381, 99 SW 61. Where jury returned verdict for certain sum one-half against each of two defendants, one of latter cannot complain because verdict was not against defendants jointly. St. Louis, etc., R. Co. v. Nance [Tex. Civ. App.] 18 Tex. Ct. Rep. 276, 101 SW 294. Allowing plaintiff legal interest merely cannot be complained of by him where under law all interest could have been forfeited for usury. Wagoner Nat. Bk. v. Welch [Ind. T.] 104 SW 610. Failure to grant relief on counterclaim cannot be complained of by plaintiff. Graham v. Bell-Irving [Wash.] 91 P 8. Where plaintiff appeals from judgment in his favor on ground that amount awarded was too small, he cannot complain that theory upon which it was awarded was erroneous, since he was not injured thereby. Donnellan v. Wood, Curtis & Co. [Cal. App.] 87 P 235. That judgment not conforming to verdict was favorable to complaining party on a matter not sustained thereby **does not** bar him from asserting error. Williams & Co. v. Smith [Tex. Civ. App.] 98 SW 916.

18. See Appeal and Review, 9 C. L. 108. See, also, post, § 3, Errors Cured or Made Harmless by other Matters.

19. See 8 C. L. 9. Foster v. Balch, 79 Conn. 449, 65 A 574. Excess of $1.54 in verdict for $121.79 harmless. McKone v. Metropolitan Life Ins. Co., 131 Wis. 243, 110 NW 472.

20. Exclusion of evidence on merits harmless where evidence establishes bar by

plying these principles to errors or irregularities in process or appearance,[21] parties,[22] pleadings and formation of issues,[23] provisional and interlocutory proceedings,[24]

limitations. Visher v. Wilbur [Cal. App.] 91 P 412. Where undisputed evidence shows that plaintiff's employer was not an independent contractor, exclusion of petition alleging him to be such was harmless. William Cameron & Co. v. Realmuto [Tex. Civ. App.] 100 SW 194. Error in definition of word "conversion" harmless where undisputed evidence showed conversion. Crow v. Ball [Tex. Civ. App.] 18 Tex. Ct. Rep. 381, 99 SW 583. Error in sustaining demurrer to count setting forth defects in car harmless where evidence showed there were no defects. Garth v. North Alabama Trac. Co. [Ala.] 42 S 627. Exclusion of evidence of damages harmless where plaintiff fails to prove cause of action. Munsey v. Hanly [Me.] 67 A 217; Hynds v. Rhode Island Co. [R. I.] 67 A 368. Error in submitting question to jury is not prejudicial to one who is not as a matter of law entitled to recover. Citizens' Bk. of Pleasantville v. First Nat. Bk. [Iowa] 113 NW 481. Refusal to charge harmless where no cause of action is proved. Simons v. New Britain Trust Co. [Conn.] 67 A. 883. Errors in charge harmless to plaintiff where no cause of action was proved. Id

Conflicting evidence: Where conflict is sharp, errors which might otherwise be unimportant may require reversal. Pittsburgh, etc., R. Co. v. Haislup, 39 Ind. App. 394, 79 NE 1035. Where evidence conflicts, erroneous instructions may not be disregarded on the ground that the judgment was correct. Blake v. Miller [Iowa] 112 NW 158. Erroneous instruction held prejudicial, evidence being conflicting. Elmore v. Booth [Ark.] 102 SW 393; Chicago & Alton R. Co. v. Neves, 130 Ill. App 340; Ballard v. Kansas City [Mo. App.] 104 SW 1126; Selman v. Gulf, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 464, 101 SW 1030. Errors in rulings on evidence and giving instructions held prejudicial, evidence conflicting. Cummings v. Holland, 130 Ill. App. 315.

21. Amendment of writ so as to substitute word defendant for plaintiff. Brock v. Fuller Lumber Co. [C. C. A.] 153 F. 272.

22. Refusal to order persons secondarily liable joined as parties harmless. McGowan v. Watertown, 130 Wis. 555, 110 NW 402. Overruling demurrer on ground of misjoinder of parties harmless, no substantial rights being affected. Woolacott v. Meekin [Cal.] 91 P 612. Amendment bringing in new party plaintiff harmless where verdict against such party is directed in favor of complaining party. International & G. N. R. Co. v. Howell [Tex. Civ. App.] 19 Tex. Ct. Rep. 123, 105 SW 560.

23. Error in ruling on pleadings harmless where general charge was properly given. Walker v. Winn [Ala.] 43 S 801. Refusal to construe negative pregnant as an admission harmless. McCready v. Crane, 71 Kan. 710, 88 P 748. Failure to establish unnecessary allegations in pleading harmless. Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P 39. Defect in pleading harmless, defendant not being misled. Hester v. Stine [Wash.] 90 P 594. Refusal to require plaintiff, a nonresident of county, to state post office address in petition harmless where defendant knew same. White v. White [Kan.] 90 P 1087. Where either of two constructions of a pleading would render defendant liable, he is not harmed by adoption of one of them. Adams v. Collins [Mass.] 82 NE 498. Refusal to rule on demurrer until after hearing evidence harmless. Thompson v. Mills [Tex. Civ. App.] 18 Tex. Ct. Rep. 139, 101 SW 560. Refusal to require petition to be properly paragraphed held harmless. Staton v. Byron [Ky.] 105 SW 928.

Variance: Slight variance harmless. First Nat. Bk. of Atwood v. Drew, 130 Ill. App. 60. Variance existing throughout three trials. Mills v. Larrance, 120 Ill. App. 83. Variance harmless where plaintiff did not rely for recovery on matter constituting variance. Bare v. Ford, 74 Kan. 593, 87 P 731. Variance as to immaterial allegations harmless. Pearce v. Martin, 130 Ill. App. 24 Where evidence supports judgment, variance held immaterial. Alexander v. Harkin, 53 Misc. 317, 103 NYS 856.

Sustaining demurrer: Where demurrer to special plea was overruled and demurrer to replication was sustained and plaintiff refused to plead over, such refusal amounted to a confession on plea of general issue and error in sustaining demurrer to replication was harmless. Watson v. Birmingham R., Light & Power Co. [Ala.] 43 S 732. Error in sustaining demurrer where motion to strike was proper remedy harmless where pleadings were faulty. Hooker v. Forrester [Fla.] 43 S 241; Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318. Error in sustaining demurrer to pleading harmless where matters averred therein could have been shown under other pleas. Creola Lumber Co. v Mills [Ala.] 42 S 1019; Smith v. Davis [Ala.] 43 S 729; Clarke v. Darr, 168 Ind. 101, 80 NE 19; Perry v. Acme Oil Co. [Ind. App.] 80 N E 174. Error in sustaining demurrer harmless where on pleading plaintiff would have been entitled to judgment rendered. United States Supply Co. v. Vlasnik [Neb.] 113 NW 813. Sustaining demurrer to special pleas held not prejudicial. City of Anniston v. Ivey [Ala.] 44 S 48.

Held prejudicial: Error in sustaining demurrer to prayer for discovery prejudicial though properly sustained to other portions of bill. Palliser v. Home Tel. Co. [Ala.] 44 S 575.

Overruling demurrer: Error in overruling demurrer harmless where uncertainty in complaint involved only a trifling amount. Leonhart v. California Wine Ass'n [Cal. App.] 89 P 847. Overruling demurrer to unnecessary allegations harmless. St. Louis S W. R. Co. v. Granger [Tex. Civ. App.] 18 Tex. Ct. Rep. 169, 100 SW 987. Overruling demurrer to formal defect. Blue Grass Trac. Co. v. Skillman [Ky.] 102 SW 809. Overruling demurrer to counts of complaint upon which no recovery was or could have been had, harmless. Southern R. Co. v. Cunningham [Ala.] 44 S 658. Overruling demurrer to plea harmless where matters

procedure,[25] continuances, adjournments, dismissal before trial, and the like.[26] the

averred therein could have been shown under general issue. Burgin v. Sullivan [Ala.] 44 S 202. Where counts were good as counts for simple negligence, held that court would not be reversed for overruling demurrers thereto on theory that they were insufficient as counts for willful and wanton misconduct. Montgomery St. R. Co. v. Lewis [Ala.] 41 S. 736. Where any of defenses presented sustain judgment generally for defendant, overruling demurrer harmless. City of Larned v. Boyd [Kan.] 90 P 814. Overruling demurrer to defective count harmless where another count would sustain judgment. Alvey v. Hartwig [Md.] 67 A 132. Error in overruling demurrer on ground of ambiguity harmless where party was not misled. Yordi v. Yordi [Cal. App.] 91 P 348; Bank of Lemoore v. Fulgham [Cal.] 90 P 936.

Held prejudicial: Overruling demurrer to pleading as stating conclusion held prejudicial. Western Union Tel. Co. v. Heathcoat [Ala.] 43 S 117. Refusal to sustain demurrer to defective paragraph reversible error where it did not appear upon which paragraph verdict was rendered. Lake Erie & W. R. Co. v. Moore [Ind. App.] 81 NE 85. Where verdict is general, overruling demurrer to bad paragraph of answer is prejudicial. Sullivan Mach. Co. v. Breeden [Ind. App.] 82 NE 107.

Rulings on exceptions: Overruling exceptions to allegations tending to excuse delay in recording deed harmless where defendant was shown to have knowledge of prior deed before taking title. Parks v. Worthington [Tex. Civ. App.] 19 Tex. Ct. Rep. 698, 104 SW 921.

Rulings on motion to strike: Error in striking out one of two grounds for relief alleged harmless where evidence negatived reliance thereon. O'Brion v. Camp [Tex. Civ. App.] 18 Tex. Ct. Rep. 974, 101 SW 557. Striking out unessential matters in pleading harmless. Roth Tool Co. v. Champ Spring Co., 122 Mo. App. 603, 99 SW 827.

Held harmless: Striking a plea fully covered by others. Wefel v. Stillman [Ala.] 44 S 203. Striking matter appearing in other portions of pleading harmless. Klink v. Toledo Railway & Light Co., 10 Ohio C. C. (N. S.) 49. Error in striking out plea harmless where facts alleged could have been shown under general issue. Hays v. Miller [Ala.] 43 S 818. Where in chancery the same defense is made by both plea and answer, error in rejecting the plea is harmless. Emmons v. Hawk [W. Va.] 59 SE 519. Striking out demurrable pleading and refusing to admit evidence under it harmless. Moore v. Gould [Cal.] 91 P 616. Error in striking out plea of nonjoinder harmless where objection could be urged under plea permitted to stand. Lasher v. Colton, 225 Ill. 234, 80 NE 122. Striking out defective portion of answer harmless though same should have been attacked by demurrer. Morse v. Odell [Or.] 89 P 139. Error in refusing to strike certain allegations of complaint harmless where defendant could have protected itself by objections to evidence and special charges. Central of Georgia R. Co. v. McNab [Ala.] 43 S 222. Denial of motion to strike portion of answer harmless where plaintiff was not entitled to relief sought. Foster v. Case, 126 Ga. 714, 55 SE 921. Overruling motion to strike cross petition harmless where plaintiff was not entitled to relief. Hall v. Kary, 133 Iowa, 465, 110 NW 930. Refusal to strike out amendment of objection to special assessment harmless. City of Belleville v. Perrin, 225 Ill. 437, 80 NE 270.

Held prejudicial: Denial of motion to strike count not sustained by evidence prejudicial where it does not appear on what count verdict was rendered. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. Striking out material allegations of petition prejudicial. Klink v. Toledo Railways & Light Co., 10 Ohio C. C. (N. S.) 49.

Amendment: Refusal of amendment harmless where all facts set up therein might have been shown under original pleading. Black v. McCarley's Ex'r [Ky.] 104 SW 987. Amendment of complaint so as to make it conform to the proofs held without prejudice where it would not have sustained recovery without amendment. Estey Organ Co. v. Lehman [Wis.] 111 NW 1097. Allowances of amendment to conform to proofs harmless. Doherty v. California Nav. & Imp. Co. [Cal. App.] 91 P 419. Failure to amend complaint in equity to make it conform to proof held harmless. Tye v. Manley [Ind. T.] 104 SW 636. Amendment held harmless. Glos v. Murphy, 225 Ill. 58, 80 NE 59; Norgren v. Jordan [Wash.] 90 P 597.

Prejudicial: Error in imposing unjust terms on amendment held prejudicial. Williams v. Myer, 150 Cal. 714, 89 P 972.

Rulings on motions for more specific allegation: Denial of motion to make definite and certain harmless where action was tried by court and there was no restriction of evidence under issues framed. Mosca Town Co. v. Wellington [Colo.] 89 P 783. Error in denying motion to make complaint more definite and certain held harmless. Bolen-Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867.

Election: Reservation of right to proceed upon another count upon being required to elect harmless, same not affecting finality of election. Gorham v. New Haven, 79 Conn. 670, 66 A 505.

24. Modification of injunction before complainant had opportunity to present proofs held harmless. Haile v. Venable [Fla.] 44 S 73. Error in modifying restraining order ex parte harmless where plaintiff was not entitled to injunctive relief. Wolfer v. Hurst [Or.] 91 P 366.

25. Error in consolidating actions involving different issues held prejudicial. Winters v. St. Louis, etc., R. Co. [Mo. App.] 101 SW 1116.

26. Dismissal: Overruling motion to strike case because not at issue when notice of trial was served harmless in absence of showing of surprise. Kennedy v. Agricultural Ins. Co. [S. D.] 110 NW 116.

Continuance: Refusal to grant continuance after amendment harmless where

trial and course and conduct of the same,[27] formation and selection of the jury,[28] and rulings on demurrers to evidence and motions for directed verdicts and nonsuits,[29] and new trials,[30] are cited below. The admission [31] or exclusion [32] of evi-

amendment was unsupported by evidence. Arkansas Cent. R. Co. v. Bennett [Ark.] 102 SW 198. Denial of continuance on striking out portion of pleading harmless. Ratliff v. Tinar [Tex. Civ. App.] 18 Tex Ct. Rep. 385, 102 SW 131. Denial of motion to continue garnishment until disposition of motion for new trial in main suit harmless where it does not appear that new trial was granted or that an appeal was taken from the judgment. Danby Millinery Co. v. Dogan [Tex. Civ. App.] 19 Tex. Ct. Rep. 942, 105 SW 337. Denial of extension of time within which to take evidence harmless. Eddleman v. Fasig, 128 Ill. App. 120. Refusal of continuance on ground of absence of one of counsel harmless where not shown that counsel who tried case mismanaged same. Virginia Iron, Coal & Coke Co. v. Kiser, 105 Va. 695, 54 SE 889.

27. Proceeding to trial in absence of defendant's regular counsel harmless where defendant was represented during trial by one of its regular attorneys. McArthur v. Kansas City Elevated R. Co., 123 Mo. App. 503, 100 SW 62. Permitting contract sued on to go to jury after its retirement held harmless. Fibus v. St. Louis & S. F. R. Co. [Ind. T.] 104 SW 568. Taking up trial of case out of regular order harmless to defendant where he fails to show a meritorious defense. Bartlett v. Jones Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 551, 103 SW 705. Error in excluding party's agent from court room with other witnesses harmless though he was assisting counsel, he having no personal knowledge of matters on which case turned. Manhattan Life Ins. Co. v. Kephart [Ky.] 102 SW 882. Refusal to submit an issue harmless where finding on issue submitted will necessarily answer same. Clark v. Patapsco Guano Co., 144 N. C. 64, 56 SE 858. Error in refusing to permit counsel to use instructions in argument to jury harmless where he was not shown to have been thereby prevented from properly arguing case. Storm v. Butte, 35 Mont. 385, 89 P 726. Refusal to permit exhibition of injured leg to jury harmless where it was amputated. Ford v. Providence Coal Co., 30 Ky. L. R. 698, 99 SW 609. Physical examination held in judge's room while judge was on bench within few feet of door, partly open, and defendant's counsel being present, held harmless. Sheldon v. Wright [Vt.] 67 A 807. Withholding ruling on objection to competent evidence until motion to direct verdict was made held not prejudicial. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 111 NW 534. Refusal of interrogatories where those refused were covered by others submitted. Chicago City R. Co. v. Foster, 226 Ill. 288, 80 NE 762. Abuse of discretion in awarding an issue out of chancery constitutes reversible error. Stevens v. Duckett [Va.] 57 SE 601. Refusal to permit pamphlet to be taken to jury room held prejudicial issue being as to whether they were bound and what was meant by "cover." State v. Young, 134 Iowa 505 110 NW 292

28. Overruling challenge for cause is not prejudicial, where party claiming error failed to exercise all peremptory challenges allowed him. Malone v. Sierra R. Co. [Cal.] 91 P 522; Harris v. Moore, 134 Iowa, 704, 112 NW 163. Betten v. Toledo & Ohio Central R. Co., 9 Ohio C. C. (N. S.) 53. Where an impartial jury is secured, error in retaining disqualified juror is harmless where he was afterward peremptorily challenged. Pearce v. Quincy Min. Co., 149 Mich. 112, 14 Det. Leg. N. 367, 112 NW 739, overruling Theisen v. Johns, 72 Mich. 285, 40 NW 727. Error in excluding questions to jurors harmless where they were not accepted and complaining party did not exhaust his peremptory challenges. American Surety Co. v. Scott & Co., 18 Okl. 264, 90 P 7. Error in allowing each defendant six peremptory challenges, though their interests were not adverse, harmless where appellant did not exhaust his peremptory challenges. Paris Grocer Co. v. Burks [Tex. Civ. App.] 17 Tex. Ct. Rep. 892, 99 SW 1135. Overruling challenge to juror harmless where party did not challenge him peremptorily and where such juror dissented from a verdict against complaining party. Williamson v. St v. Louis Transit Co., 202 Mo. 345, 100 SW 1072.

29. Although there was evidence tending to support case where on whole evidence different verdict would have been set aside, direction is harmless. Standidge v. Lynde, 120 Ill. App. 418. Peremptory instruction to find for a certain sum harmless where though the charge was denied by answer it was admitted by the testimony. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 SW 340. Giving affirmative charge in action of trespass harmless where no damages were shown notwithstanding technical trespass. Williams v. Alabama Cotton Oil Co. [Ala.] 44 S 957. Direction of verdict is harmless when, pending review, a decision by a state court in proceeding between same parties conclusively establishes successful party's right to verdict. Lamar v. Spalding [C. C. A.] 154 F 27.

30. Failure to specify grounds for new trial harmless where trial court was justified in setting aside verdict as against evidence. Israel v. Ury, 52 Misc. 525, 102 NYS 871. Denying motion to resettle order granting new trial on ground that motion did not specify grounds therefor held prejudicial. Israel v. Ury, 52 Misc. 523, 102 NYS 873.

31. Cochran v. Garrard [Ala.] 43 S. 721; Arkansas & L. R. Co. v. Stroude [Ark.] 100 SW 760; St. Louis, etc., R. Co. v. Dupree [Ark.] 105 SW 878; Huyck v. Rennie [Cal.] 90 P 929; Vatuone v. Cannobio [Cal. App.] 88 P 374; Spotswood v. Spotswood [Cal. App.] 89 P 362; Yordi v. Yordi [Cal. App.] 91 P 348; Kelly v. Lewis, 38 Colo. 18, 88 P 388; Anderson v. Wyche, 126 Ga. 393, 55 SE 19; Central of Georgia R. Co. v. Augusta Brokerage Co. [Ga. App.] 58 SE 904; Wabash R. Co. v. Warren, 125 Ill. App. 416; Thomas v. Wightman, 129 Ill. App. 305; Toledo, etc., R. Co. v. Gerard, 130 Ill. App.

225; Chicago Union Trac. Co. v. Ertrachter, 130 Ill. App. 602; Indianapolis St. R. Co. v. Taylor, 39 Ind. App. 592, 80 NE 436; Louisville & N. R. Co. v. Gollihur [Ind. App.] 82 NE 492; Tennis v. Gifford, 133 Iowa, 372, 110 NW 586; West Branch State Bk. v. Haines [Iowa] 112 NW 552; Rothenburger v. Schoniger, 30 Ky. L. R. 1018, 99 SW 1150; Crowley v. Burns Boiler & Mfg. Co., 100 Minn. 178, 110 NW 969; Stumpe v. Kopp, 201 Mo. 412, 99 SW 1073; Carp v. Queen Ins. Co. [Mo.] 101 SW 78; Haurigan v. Chicago & N. W. R. Co. [Neb.] 113 NW 983; McCartney v. Titsworth 104 NYS 45; Duclos v. Kelley, 106 NYS 1058; McCutchen v. McCutchen [S. C.] 57 SE 678; Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644; Paris Grocer Co. v. Burks [Tex. Civ. App.] 17 Tex. Ct. Rep. 892, 99 SW 1135; Continental Lumber Co. v. Garrison [Tex Civ. App.] 101 SW 1020; Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665; Punchard v. Masterson [Tex. Civ. App.] 103 SW 826; Massuco v. Tomasi [Vt.] 67 A 551; Browder v. Southern R. Co. [Va.] 57 SE 572; Pachko v. Wilkeson Coal & Coke Co. [Wash.] 90 P 436; Gelo v. Pfister & Vogel Leather Co. [Wis.] 113 NW 69; Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738; International Mercantile Marine Co. v. Fleming [C. C. A.] 151 F 203. Improper evidence which did not show plaintiff entitled to a greater or less recovery than that had held harmless. St. Louis, etc., R. Co. v. Brady [Ark.] 104 SW 160. In action to revive a judgment, admission of petition and judgment in original cause harmless where plaintiff had established right to revival. Henry v. Red Water Lumber Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 216, 102 SW 749. Evidence that city paid officer certain sum per month where shown that such sum was fixed by ordinance. City of San Antonio v. Serna [Tex. Civ. App.] 18 Tex. Ct. Rep. 405, 99 SW 875. Evidence of receipt of notice harmless where notice was waived. Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 SW 124. Admission of release of mortgage harmless where right to subrogation existed whether mortgage was paid or not. Young v. Pecos County [Tex. Civ. App.] 19 Tex. Ct. Rep. 387, 101 SW 1055. Evidence of statements to third persons harmless where same statements were shown to have been made to defendant's agent. Douglas Land Co. v. Thayer Co. [Va.] 58 SE 1101. Admission of evidence as to what exhibits did not show, harmless where no attack was made on correctness of exhibits. Hurwitz v. Gross [Cal. App.] 91 P 109. Improper evidence of manner of payment harmless where defendant was liable to reimburse plaintiff for amount expended. Id. Admitting evidence of value of services performed by witness without showing his competency harmless. Shively v. Eureka Tellurium Gold Min. Co. [Cal. App.] 89 P 1073. Admission of evidence to rebut presumption arising from failure to call witness held harmless. Weidner v. Standard Life & Acc. Ins. Co. [Wis.] 113 NW 50. Admission of argumentative questions and answers harmless. McArthur v. Sault News Printing Co., 148 Mich. 556, 14 Det. Leg. N. 265, 112 NW 126. Where executrix, suing on notes, alleges that they were property of her testator long before they became due, and were his property at time of his death, and defendant denies ownership, production of notes at trial is not prejudicial to defendant. Tucker v. Sherman, 9 Ohio C. C. (N. S.) 70. Evidence in line with other competent evidence which proves no new facts, though erroneous. Smith v. Township of Au Gres, Michigan [C. C. A.] 150 F 257. Incompetent documentary evidence introduced solely to rebut inference which could not by drawn from other evidence. Page v. Hazelton [N. H.] 66 A 1049.

Immaterial evidence. Marx v. Raley & Co. [Cal. App.] 92 P 519; Citizens Sav. Bk. v. Boswell [Ky.] 104 SW 1014; Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 18 Tex. Ct. Rep. 566, 99 SW 144; International & G. N. R. Co. v. McVey [Tex. Civ. App.] 18 Tex. Ct. Rep. 218, 102 SW 172. Evidence of age of party, though immaterial. Owensboro Wagon Co. v. Hall [Ala.] 43 S 71. Introduction of paper on which witness had written his name at request of counsel harmless. Goodloe v. Goodloe [Tex. Civ. App.] 19 Tex. Ct. Rep. 960, 105 SW 523. Admission of evidence of good character of witness harmless. Colorado Salt Co. v. San Jacinto Oil Co. [Tex. Civ. App.] 105 SW 822. Evidence in action for breach of marriage promise that defendant had promised priest to marry plaintiff where defense is denial of breach and accord and satisfaction. Massuco v. Tomasi [Vt.] 67 A 551. Admission of subpoenas with sheriff's return harmless. Southern R. Co. v. Cunningham [Ala.] 44 S 658.

Irrelevant evidence. Rector v. Robins [Ark.] 102 SW 209; Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 SE 222; Lathan v. Western Union Tel. Co., 75 S. C. 129, 55 SE 134; Roberts v. Western Union Tel. Co. [S. C.] 56 SE 960. Evidence that after commencement of suit defendant remedied defect where due care on its part would not relieve it from liability. Vogt v. Grinnell, 133 Iowa, 363, 110 NW 603. Admission of evidence inadmissible under pleadings harmless where same could not have surprised defendant. Kline v. Santa Barbara Consol. R. Co., 150 Cal. 741, 90 P 125. Admission of incompetent evidence harmless where same had no bearing on matters in issue. Hollen v. Crim [W. Va.] 59 SE 172.

32. Torrey v. Kraus [Ala.] 43 S 184; Arellanes v. Arellanes [Cal.] 90 P 1059; Redpath v. Evening Exp. Co. [Cal. App.] 88 P 287; Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101; Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co. [Colo.] 92 P 290; Watts v. River Forest, 227 Ill. 31, 81 NE 12; Toledo, etc., R. Co. v. Gerard, 130 Ill. App. 225; Dean v. Carpenter, 134 Iowa, 275, 111 NW 815; In re Kalis Estate [Iowa] 113 NW 563; Huckins v. Randolph, 75 Kan. 815, 88 P 540; Farrell v. Sturtevant Co. [Mass.] 80 NE 469; Preston v. West Beach Corp. [Mass.] 81 NE 253; Gehlert v. Quinn, 35 Mont. 451, 90 P 168; Zeigler v. Interborough Rapid Transit Co., 104 NYS 822; Lippe v. Brandner, 105 NYS 225; Randazzo v. Brooklyn Heights R. Co., 121 App. Div. 573, 106 NYS 193; Missouri, etc., R. Co. v. Schroeder [Tex. Civ. App.] 100 SW 808; Trow v. Preferred Acc. Ins. Co. [Vt.] 67 A 821; Wees

dence which cannot have been efficient to the result is harmless.[33] For example, evidence which tended to prove a fact not necessary to the party's case,[34] or one conclusively disproved by other evidence,[35] or evidence erroneously admitted tending to prove a fact admitted or sufficiently proved by other competent evidence.[36] Like-

v. Page [Wash.] 91 P 766; Neumeister v. Goddard [Wis.] 113 NW 733; Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F 241. Exclusion of evidence of which court takes judicial notice. City of San Antonio v. Serna [Tex. Civ. App.] 18 Tex. Ct. Rep. 405, 99 SW 875. Evidence of custom of amount of commissions chargeable harmless when the same as that fixed by contract between parties. Morgan v. Barber [Tex. Civ. App.] 17 Tex. Ct. Rep. 914, 99 SW 730. Exclusion of evidence of a party as to previous declaration for purposes of impeachment harmless, no predicate being necessary. Birmingham R., Light & Power Co. v. Hayes [Ala.] 44 S 1032. Exclusion of evidence harmless where if admitted it would not have established a right to recover. Alabama Mineral Land Co. v. Blockton-Cahaba Coal Co. [Ala.] 43 S 831. Where evidence excluded would not have made out a prima facie case for plaintiff, its exclusion is harmless. Patt v. Gerst [Ala.] 42 S 1001. Best method for ascertaining whether roof of mine was safe where it was not incumbent on plaintiff to resort thereto. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. Exclusion of evidence on objection which had previously been admitted without objection. Stillman v. Thompson [Conn.] 67 A 528. In action for injuries caused by breaking of hurricane deck of ferry boat, exclusion of evidence that such decks on excursion boats were constructed with a view to carrying passengers harmless where construction of deck in question was fully testified to. Evers v. Wiggins' Ferry Co. [Mo. App.] 105 SW 306. Evidence on an immaterial issue. Texas & P. R. Co. v. Edrington [Tex. Civ. App.] 102 SW 1171. Photograph of furniture to show. value Foss v. Smith, 79 Vt. 434, 65 A 553.

33. Rulings on evidence as to undisputed facts harmless. Gambill v. Cargo [Ala.] 43 S 866.

34. Park v. Park [Colo.] 91 P 830; Purcell Cotton Seed Oil Mills v. Bell [Ind. T.] 104 SW 944; Vorhes v. Buchwald [Iowa] 112 NW 1105. Livering's Ex'r v. Russell, 30 Ky. L. R 1185, 100 SW 840.

35. In re Anderson v. Husted, 79 Conn. 535, 66 A 7.

36. Mann v. Mann [Cal.] 91 P 994; Brackett & Co. v. Americus Grocery Co., 127 Ga. 672, 56 SE 762; Stoutenborough v. Rammel, 123 Ill. App. 487; Borst v. Lynch, 133 Iowa, 567, 110 NW 1031; Figures v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 701, 99 SW 412; Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 176; McGill v. Sites [Tex. Civ. App.] 18 Tex. Ct. Rep. 63, 19 Tex. Ct. Rep. 695, 103 SW 695. Admission of evidence to show matters **presumed** to be true. Nelson v. Spence [Ga.] 58 SE 697. Where legitimacy of child was **conclusively** established, error in admitting testimony of resemblance to father is harmless. O'Dell v. Goff, 149 Mich. 152, 14 Det. Leg. N. 399, 112 NW 736. Error in admission of evidence harmless where truth of evidence is afterward admitted by witness for adverse party. Concord Apartment House v. O'Brien, 228 Ill. 360, 81 NE 1038. Admission of **documents** as to which complaining party had already testified. Larkin v. Trammel [Tex. Civ. App.] 20 Tex. Ct. Rep. 43, 105 SW 552. Admission of **hearsay.** Travelers' Ins. Co. v. Bingham [Ky.] 105 SW 894; St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 17 Tex. Ct. Rep. 571, 99 SW 152. Performance of services proved by evidence other than **book entries** erroneously admitted. Burke v. Baker [N. Y.] 80 NE 1033. Admission of evidence of facts to which complaining party had already testified. Lanigan v. Neely [Cal. App.] 89 P 441. Evidence of value of services at time of trial where other evidence showed it was the same at time of injury. Central of Georgia R. Co. v. McNab [Ala.] 43 S 222. Admission of **books of account** without laying foundation harmless where facts elicited were shown by other evidence. Alabama Lumber Co. v. Cross [Ala.] 44 S 563. Where evidence showed husband was guilty of cruel treatment of wife, admission of evidence that he had been divorced three times from other women on ground of cruelty harmless. Livering's Ex'r v. Russell, 30 Ky. L. R. 1185, 100 SW 840. Admission of declarations harmless where merely cumulative. Illinois Cent. R. Co. v. Houchins [Ky.] 101 SW 924. Admission of improper evidence of damages harmless where correct elements of damages were shown. Hempstead v. Salt Lake City [Utah] 90 P 397. Evidence of **incompetent witness** harmless when facts testified to are established by other competent testimony. Bispham v. Turner [Ark.] 103 SW 1135; Chesapeake & O. R. Co. v. Perkins [Ky.] 105 SW 148; Shearer v. Hill, 125 Mo. App. 375, 102 SW 673. Admission of evidence of value without first showing competency of witness harmless when established by other evidence. Anderson v. Wheeler, 125 Mo. App. 406, 102 SW 628. Admission harmless where similar testimony was received **without objection.** McVay v. Central California Inv. Co. [Cal. App.] 91 P 745; Daughtry v. Savannah & S. R. Co., 1 Ga. App. 393, 58 SE 230; Slaughter v. Jasper County [Iowa] 113 NW 545; Missouri, K. &. T. R. Co. v. Carter [Tex. Civ. App.] 19 Tex. Ct. Rep. 691, 104 SW 910. Admission of offer of compromise harmless where similar evidence had been received without objection. Hall v. Jennings [Tex. Civ. App.] 19 Tex. Ct. Rep. 602, 104 SW 489.

Facts admitted. Walters v. Mitchell [Cal. App.] 92 P 315; Richards v. Sanderson [Colo.] 89 P 769; Shepperd v. Fisher, 206 Mo. 208, 103 SW 989; Shelton Implement Co. v. Parlor Furniture & Mattress Co. [Neb.] 112 NW 618. Facts admitted by pleadings. Webb v. Hicks, 127 Ga. 170, 56 SE 307.

Undisputed matters. Little Rock & Ft. Smith R. Co. v. Wallis [Ark.] 102 SW 390; Glanz v. Miller, 230 Ill. 196, 82 NE 591; Indianapolis St. R. Co. v. Taylor, 39 Ind. App. 592, 80 NE 436; Jacobsen v. Omaha [Neb.] '13 NW 792; Portland & Seattle R. Co. v. Ladd [Wash.] 91 P 573. Where facts are

wise, the rejection of evidence of facts otherwise established [37] unless prejudice plainly appears.[38] Error in evidence is innocuous in a trial of facts by the court where it may be supposed that the decision was founded solely on proper proofs.[39] Likewise, where the case is tried de novo on appeal.[40] An improper mode of questioning or an erroneous ruling on a proper question may be harmless because of the answer given [41] or the lack of an answer.[42] Application of these doctrines to di-

uncontroverted, though immaterial, evidence tending to establish same is harmless. Hartzell v. Murray, 127 Ill. App. 608. Admission of offer of compromise harmless where there was no dispute as to amount which plaintiff claimed was due defendant interposing a set-off. White v. Davenport [Tex. Civ. App.] 18 Tex. Ct. Rep. 463, 101 SW 1036. Expert evidence. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65. Unsworn testimony as to undisputed facts harmless. Hodd v. Tacoma [Wash.] 88 P 842.

37. Johnson v. Birmingham R., Light & Power Co. [Ala.] 43 S 33; Crenshaw v. Shapleigh Hardware Co. [Ark.] 100 SW 882; Johnson v. Center [Cal. App.] 88 P 727; Beckerle v. Brandon, 229 Ill. 323, 82 NE 266; Vorhes v. Buchwald [Iowa] 112 NW 1105; Louisville & N. R. Co. v. Beeler [Ky.] 103 SW 300; Keys v. Winnsboro Granite Co. [S. C.] 56 SE 949; Breeden v. Martens [S. D.] 112 NW 960; San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 18 Tex. Ct. Rep. 382, 99 SW 574; Meyer Bros. Drug Co. v. Madden, Graham & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 908, 99 SW 723; Missouri, K. & T. R. Co. v. Lindsey [Tex. Civ. App.] 18 Tex. Ct. Rep. 304, 101 SW 863; Gulf, etc., R. Co. v. Wittnebert [Tex. Civ. App.] 104 SW 424. Exclusion of writings where jury was informed of contents. Erbes v. Smith, 35 Mont. 38, 88 P 568. Exclusion of evidence on ground of incompetency where facts are proved by other witnessses. Goddard v. Enzler, 123 Ill. App. 108, afd. 222 Ill. 462, 78 NE 805. Decisions tending to show that law of another state was the same as law of state in which action was brought, there being no showing to contrary. Austin v. Whitcher [Iowa] 110 NW 910. Where witness testified there was no difference between specifications for two organs, exclusion of question as to what the difference between the organs was held harmless. Estey Organ Co. v. Lehman [Wis.] 111 NW 1097. Refusal to admit secondary evidence where best evidence of matters sought to be proved was afterward introduced. Millhollen v. McDonald & Morrison Mfg. Co. [Iowa] 112 NW 812. Excluding question as to "integrity" of defendant in action for breach of marriage promise and seduction harmless where his chastity was shown by other evidence. Lanigan v. Neely [Cal. App.] 89 P 441. Facts shown by other witnesses. Gehlert v. Quinn, 35 Mont. 451, 90 P 168; McCafferty v. Lewando's French Dyeing & Cleansing Co. [Mass.] 80 NE 460. Evidence tending to prove undisputed facts. Arellanes v. Arellanes [Cal.] 90 P 1059; Gray Lumber Co. v. Harris, 127 Ga. 693, 56 SE 252; Keller v. Chicago, B. & Q. R. Co. [Neb.] 111 NW 384; Moore v. Linn [Okl.] 91 P 910; Moody & Co. v. Rowland [Tex. Civ. App.] 102 SW 911; Anderson v. Arpin Hardwood Lumber Co., 131 Wis. 34, 110 NW 788. Facts established by uncontroverted evidence. Hinkle v. Smith, 127 Ga. 437, 56 SE 464. Exclusion of evidence of admitted facts. Powers v. Hatter [Ala.] 44 S 859; Campbell v. Collins, 133 Iowa, 152, 110 NW 435; Breiner v. Nugent [Iowa] 111 NW 446. Error pertaining to evidence relating to averments in complaint admitted by answer harmless. Mendocino County v. Peters, 2 Cal. App. 24, 82 P 1122. Exclusion of testimony on former trial to impeach witness where latter admitted testimony to have been as claimed. Smith v. International & G. N. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 583, 99 SW 564.

38. In action to recover over-payment on note, exclusion of evidence tending to show two payments on one day, which if true constituted an excessive payment though receipt of one was admitted, held prejudicial. Campbell v. Collins, 133 Iowa, 152, 110 NW 435.

39. Mahoney v. State Ins. Co., 133 Iowa, 570, 110 NW 1041; Waddington v. Lane, 202 Mo. 387, 100 SW 1139; Texas Cent. R. Co. v. Marrs [Tex. Civ. App.] 18 Tex. Ct. Rep. 229, 101 SW 1177; Western Union Tel. Co. v. O'Fiel [Tex. Civ. App.] 19 Tex. Ct. Rep. 653, 104 SW 406; Chlopeck v. Chlopeck [Wash.] 91 P 966; Vera Cruz & P. R. Co. v. Waddell [C. C. A.] 155 F 401. Trial before chancellor. Dings v. Dings, 123 Ill. App. 318. Evidence taken before master. Long v. Athol [Mass.] 82 NE 665. Mechanics' lien being tried without jury, erroneous admission of evidence is harmless. Spafford v. McNally, 130 Wis. 537, 110 NW 387. Immaterial evidence. Breeden v. Martens [S. D.] 112 NW 960. Hearsay. State Nat. Bk. of New Orleans v. Roberts [Tex. Civ. App.] 18 Tex. Ct. Rep. 714, 103 SW 454. Report of referee confirmed by court when supported by competent testimony. Bossi's Estate v. Baehr [Wis.] 113 NW 433. Harmless unless evidence improperly admitted entered into result at which trial court arrived. Southern R. Co. v. St. Louis Hay & Grain Co. [C. C. A.] 153 F 728; McCready v. Crane, 74 Kan. 710, 88 P 748. Admission of incompetent testimony harmless where decree is sustained by competent evidence. Patrick v. Kirkland [Fla.] 43 S 969; Champion v. McCarthy, 228 Ill. 87, 81 NE 808; Shedd v. Seefeld, 230 Ill. 118, 82 NE 580; Slattery v. Stevens, 125 Ill. App. 67; McIntosh v. Fisher, 125 Ill. App. 511; Ritzmuller v. Neuer, 130 Ill. App. 380; Baker v. Montgomery [Neb.] 110 NW 695; Palmer v. McFarlane [Neb.] 111 NW 794; Charles v. Atlantic Coast Line R. Co. [S. C.] 58 SE 927; St. Louis, etc., R. Co. v. Watkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 746, 100 SW 162; Coleman v. Grand Lodge Colored Knights of Pythias [Tex. Civ. App.] 19 Tex. Ct. Rep. 849, 104 SW 909.

40. Brown v. Baldwin [Wash.] 89 P 483.

41. Question calling for conclusion cured by indefinite answer. Young v. Metropolitan St. R. Co. [Mo. App.] 103 SW 135. Improper

rect.[43] redirect.[44] and cross-examination,[45] and to the order of taking proof,[46] the burden of proof,[47] the reception of affidavits and depositions,[48] opinion [49] and expert

question cured by negative answer. Bodcaw Lumber Co. v. Ford [Ark.] 102 SW 896. Leading question harmless where answer was the same as to another question which was not leading. Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 18 Tex. Ct. Rep. 248, 101 SW 541. Question objectionable as calling for conclusion harmless where answer is strictly a matter of opinion. Thomas v. Metropolitan St. R. Co., 125 Mo. App. 131, 100 SW 1121. Overruling objection to question as to conversation harmless where answer did not show what conversation was. Sanders v. Davis [Ala.] 44 S 979. Where answer did not disclose any fact injurious to objecting party. Id. Unresponsive answer establishing nothing. Yick Wo v. Underhill [Cal. App.] 90 P 967; Southern R. Co. v. Hobbs [Ala.] 43 S 844. Where witness treated question as calling for testimony as to facts and not his opinion, admission of answer is harmless. Vannest v. Murphy [Iowa] 112 NW 236. Where answer is competent though question is improper. Dickinson v. Pere Marquette R. Co., 148 Mich. 461, 14 Det. Leg. N. 252, 111 NW 1078. Answer showing lack of knowledge of facts sought. Simone v. Rhode Island Co. [R. I.] 66 A 202.

42. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 S 1024. Where question is not answered. Hoskins v. Saunders [Conn.] 66 A 785. Question withdrawn before answer. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 18 Tex. Ct. Rep. 978, 101 SW 554.

43. Allowance of leading questions. Gress Co. v. Berry [Ga. App.] 58 SE 384; Sovereign Camp Woodmen of the World v. Bridges [Ind. T.] 104 SW 672; Walker v. Baldwin [Md.] 68 A 25. Arbitrarily restricting examination harmless where party was not prevented from introducing material evidence on which case turned. Boldenweck v. Bullis [Colo.] 90 P 634. Leading question on rebuttal harmless, matter having been fully inquired into. Logeman Bros. Co. v. Preuss Co., 131 Wis. 122, 111 NW 64.

44. Admission of conclusion on redirect harmless where same conclusion was elicited on cross-examination. Newvahner v. Wabash R. Co. [Mo. App.] 105 SW 21. Erroneously curtailing re-examination of matter fully testified to harmless. Beaty v. Hood, 229 Ill. 562, 82 NE 350. Evidence improper on redirect held harmless. Sheldon v. Wright [Vt.] 67 A 807.

45. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 176. Refusal to allow question as to plaintiff's willingness to submit to physical examination harmless where defendant's counsel was permitted to comment upon her refusal to do so. City of Chicago v. McNally, 227 Ill. 14, 81 NE 23. Refusal to allow cross-examination where witness was afterward allowed to testify fully on subject. Kohl v. Bradley, Clark & Co., 130 Wis. 301, 110 NW 265. Exclusion of questions calling for conclusion as to matters regarding which witness had fully testified. Gardner v. Waterloo Cream Separator Co., 134 Iowa, 6, 111 NW 316. Admission of irrelevant cross-examination following a general examination regarding same matter which was not objected to held harmless. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29. Exclusion of question on cross-examination harmless where further examination elicited information sought. Vorhes v. Buchwald [Iowa] 112 NW 1105; Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. Exclusion of proper question on cross-examination as to manner of making alleged payment harmless where from entire record it appears that money was paid. Neves v. Costa [Cal. App.] 89 P 860. Error in permitting improper cross-examination harmless where matter elicited is subsequently shown. Williams v. Myer, 150 Cal. 714, 89 P 972. Unnecessary restriction of cross-examination which did not prevent party from introducing material evidence on which case turned harmless. Boldenweck v. Bullis [Colo.] 90 P 634. Unresponsive answer to immaterial question on cross-examination harmless. City of Chicago v. McNally, 227 Ill. 14, 81 NE 23.

46. Error in reopening case harmless where only evidence offered by defendant was after case was reopened and where that introduced by plaintiff was immaterial. Purcell Cotton Seed Oil Mills v. Bell [Ind. T.] 104 SW 944. Limitation on purposes for which evidence introduced out of order might be considered, harmless. Griffin v. Working Woman's Home Ass'n [Ala.] 44 S 605. Admitting evidence out of order harmless. Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 P 302. Allowing plaintiff to introduce further proof after resting, harmless. Brockmiller v. Industrial Works, 148 Mich. 642, 14 Det. Leg. N. 336, 112 NW 688. Admission of evidence in rebuttal which was excluded when offered in chief held harmless, complaining party not having requested an opportunity to introduce further evidence. In re Hendershott's Estate, 134 Iowa, 320, 111 NW 969.

47. See 8 C. L. 19.

48. Refusal to permit reading of deposition containing nothing beneficial to party's case harmless. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 SW 340. Erroneous admission of deposition containing merely cumulative testimony harmless. O'Keefe v. United Ry.'s Co. [Mo. App.] 101 SW 1144.

49. Atlantic & B. R. Co. v. Cordele, 128 Ga. 293, 57 SE 493. Admission of conclusion as to amount due for services rendered harmless where it was only a matter of **computation.** Milhollen v. McDonald & M. Mfg. Co. [Iowa] 112 NW 812. Exclusion of testimony as to weight of hitching weight as conclusion harmless where defect claimed was in strap attached to it. Barry v. Kurshan, 103 NYS 120. Admission of nonexpert testimony as to possibility of guarding dangerous **machinery** held harmless. Roy Lumber Co. v. Donnelly [Ky.] 103 SW 255. Question as to what would be required to make place safe harmless, though **master** was obliged to use only ordinary care to make it safe. Spencer v. Bruner [Mo. App.] 103 SW 578. Opinion evidence constituting mere **argument** from undisputed facts. Castner Electrolytic Alkali Co. v. Davies [C. C. A.] 154 F 938. Exclusion of opinion harmless where facts from which jury could draw

testimony,[50] admission of secondary evidence,[51] and rulings on motions to strike evidence,[52] are cited below. A few illustrative cases wherein errors respecting evidence have been held prejudicial are collected.[53] Improper argument,[54] or conduct

proper inferences were before them. Cumberland Tel. & T. Co. v. Graves' Adm'x [Ky.] 104 SW 356. Error in admitting opinion harmless where facts on which it is based are also stated. Illinois So. R. Co. v. Hamill, 226 Ill. 88, 80 NE 745; Bolen-Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867; Churchill v. Mace, 148 Mich. 456, 111 NW 1034; Columbia Box & Lumber Co. v. Brown [C. C. A.] 156 F 459. Admission of conclusion harmless where witness had been permitted to answer same conclusion without **objection.** Doyle v. Eschen [Cal. App.] 89 P 836. Admission of conclusion as to possibility of hearing **signals** harmless where witness testified that he did not hear them. Chesapeake & O. R. Co. v. Perkins [Ky.] 105 SW 148. Admission of conclusion harmless where matter elicited is shown by other **competent** evidence. Brunswick-Balke Collender Co. v. Northern Assur. Co. [Mich.] 14 Det. Leg. N. 651, 113 NW 1113. Admission of conclusion as to **authority** of agent where other evidence showed its existence. Kohl v. Bradley, Clark & Co., 130 Wis. 301, 110 NW 265. Error in admitting opinion as to **direction of wind** produced by explosion harmless, as same was manifest. Bolen-Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867. Admission of **self-evident** conclusion harmless, all facts being in evidence. Farnsworth v. Union Pac. Coal Co. [Utah] 89 P 74. Admission of conclusion of witness harmless where shown to be **true.** Marquette Cement Mfg. Co. v. Williams, 230 Ill. 26, 82 NE 424. Admission of conclusion harmless in view of other evidence showing probable **truth** thereof. Hodd v. Tacoma [Wash.] 88 P 842. Admission of conclusion as to **ownership** harmless where aside from question of conveyance being fraudulent ownership was conceded. Seivert v. Galvin [Wis.] 113 NW 680. Rejection of opinion evidence as to matters of **common knowledge** or bearing only remotely on issues litigated. Gallaway v. Massee [Wis.] 113 NW 1098. Admission of conclusion on **uncontroverted** issue harmless. Chew v. Jackson [Tex. Civ. App.] 18 Tex. Ct. Rep. 678, 102 SW 427; Gulf, etc., R. Co. v. Rogers [Tex. Civ. App.] 18 Tex. Ct. Rep. 197, 102 SW 739.

50. Excluding hypothetical question harmless where party had benefit of witness' opinion in answer to other questions. Southern R. Co. v. Cunningham [Ala.] 44 S 658. Improper hypothetical question harmless, evidence elicited thereby being established by other competent testimony. O'Keefe v. United Rys. Co. [Mo. App.] 101 SW 1144. Improper hypothetical question harmless where answer would not have been different had question been correct. Rogers v. Mexico City Banking Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 853, 103 SW 461. Where question and answer showed that expert only testified that injuries resulted from some such violence as that suffered by plaintiff, there being no dispute but that injuries resulted from accident alleged, admission is harmless. McGovern v. Interurban R. Co. [Iowa] 111 NW 412. Admission of expert's conclusion as to amount of diminution in value harmless. Hempstead v. Salt Lake City [Utah] 90 P 397. Failure to qualify expert harmless where facts testified to by him are shown to be true. Hedges v. Metropolitan St. R. Co., 125 Mo. App. 583, 102 SW 1086. Where expert had been qualified to testify as to value of land, exclusion of question as to his knowledge of local values held harmless. Ranck v. Cedar Rapids, 134 Iowa, 563, 111 NW 1027. Evidence held merely descriptive and not prejudicial as an attempt to get non-expert testimony before jury. Listman Mill Co. v. Miller, 131 Wis. 393, 111 NW 496. Medical testimony claimed to be speculative held harmless. Chicago Union Trac. Co. v. Ertrachter, 228 Ill. 114, 81 NE 816.

51. Secondary evidence of letter, contents of which were in another letter received in evidence, harmless. Murphy v. American Can Co. [Md.] 67 A 17. Admission of secondary evidence where adverse party had already proved contents of writing. Indiana Match Co. v. Kirk, 118 Ill. App. 102. Admission of secondary evidence without laying foundation harmless where same was immaterial. First Nat. Bk. v. Carroll, 35 Mont. 302, 88 P 1012. Copy of deposition taken on former trial held harmless. Miller v. Canton, 123 Mo. App. 325, 100 SW 571, Permitting copy properly introduced to remain in evidence after introduction of original, harmless. St. Louis, etc., R. Co. v. White [Tex. Civ. App.] 19 Tex. Ct. Rep. 664, 103 SW 673. Admission of secondary evidence as to matters not in dispute harmless. Kepner v. Ford [N. D.] 111 NW 619.

52. Refusal to strike out interrogatories where facts shown thereby were proved by other competent evidence. State v. Co-Operative Homebuilders [Wash.] 91 P 953. Refusal to strike out conclusion that car was running at an "unpardonable rate" harmless where it was conceded that car had escaped control and was running at a dangerous rate. Kline v. Santa Barbara Consol. R. Co., 150 Cal. 741, 90 P 125. Refusal to strike answer as not responsive held without prejudice where it was a mere repetition of evidence which had been properly admitted. Coffey v. Omaha & C. B. St. R. Co. [Neb.] 112 NW 589. Refusal to strike out answer as speculative harmless in light of other testimony of same witness showing that matters referred to were reasonably certain to occur. City of Chicago v. Jarvis, 226 Ill. 614, 80 NE 1079. Striking out answer of witness harmless where defendant was afterward allowed to testify to same matter. King v. Zell [Md.] 66 A 279. Striking out immaterial evidence harmless. Hade Bros. v. Milliken [Cal. App.] 90 P 365; Sarchfield v. Hayes [Iowa] 112 NW 1100.

53. Admission of requisition by claim agent to superintendent for information regarding accident. Weinstein v. Interurban St. R. Co., 52 Misc. 468, 102 NYS 512. Evidence that building inspector who had approved defective wall was member of defendant corporation which owned it. Kupfersmith v. Hopper, 106 NYS 797. Ad-

of counsel,[55] or party,[56] or interference with the right to open and close,[57] may be disregarded if without material effect on the result. The same is true of remarks by the court.[58] Error in instructing the jury or refusing to do so is ground for re-

mission of writings incompetent under pleading is not rendered harmless because portion of them were competent for another purpose. In re Boyes' Estate [Cal.] 90 P 454. Evidence inadmissible under pleadings. Naughton v. Laclede Gaslight Co., 123 Mo. App. 192, 100 SW 1104. Admission of marginal satisfaction of chattel mortgage without showing authority of officer making it. Wilson v. Johnson [Ala.] 44 S 539. Improper admission of marriage license where legality of marriage was in issue. Smallwood v. Kimball [Ga.] 58 SE 640. Admission of evidence under issue not tendered. Ilfeld v. Ziegler [Colo.] 91 P 825. In action for personal injuries, admission of evidence that defendant was a "trust." Crammond v. International Paper Co., 116 App. Div. 39, 101 NYS 363. In action for libel, evidence of writing of libelous letters to others. Price v. Clapp [Tenn.] 105 SW 864. Admission of privileged communications containing admissions. Hardy v. Martin, 150 Cal. 341, 89 P 111. Admission of offer of compromise. Whitney v. Cleveland [Idaho] 91 P 176. Admission of offer of compromise where amount of loss was one of the principal issues. Cullen v. Insurance Co. of North America [Mo. App.] 104 SW 117.

Exclusion of corroborative evidence where testimony conflicted. Hansen v. Kline [Iowa] 113 NW 504. Exclusion of evidence tending to establish plea of limitations interposed against claim of interveners. Kirby v. Hayden [Tex. Civ. App.] 99 SW 746. Exclusion of evidence that witness had a pecuniary interest in suit as attorney on contingent fee prejudicial, though jury knew he was counsel for plaintiff in the action. Pecos River R. Co. v. Harrington [Tex. Civ. App.] 18 Tex. Ct. Rep. 67. 99 SW 1050.

54. See Argument and Conduct of Counsel, 9 C. L. 239. Chicago & G. T. R. Co. v. Smith, 124 Ill. App. 627; Major v. Brewster, 148 Mich. 623, 14 Det. Leg. N. 323, 112 NW 490; McGinnis v. Rigby Printing Co., 122 Mo. App. 277, 99 SW 4; Harless v. Southwest Mo. Elec. R. Co., 123 Mo. App. 22, 99 SW 793; McArthur v. Kansas City El. R. Co., 123 Mo. App. 503, 100 SW 62; Duerler Mfg. Co. v. Eichhom [Tex. Civ. App.] 99 SW 715. Houston & T. C. R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 662, 100 SW 1013. Allusion to change inapplicable to pending case enlarging recovery for wrongful death harmless. Chicago City R. Co. v. Strong, 230 Ill. 58, 82 NE 335. Referring to witness in conjunction with statement that certain evidence was made for him harmless. Id. Statement that thousands of men lose their lives annually by reason of negligence of railroads more than in war between Russia and Japan harmless. Louisville & A. R. Co. v. Wilson, 30 Ky. L. R. 734, 99 SW 634. Statement that two juries had found in same way on certain issues harmless in view of denial by trial judge and opposing counsel. Meyer Bros. Drug Co. v. Madden, Graham & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 908, 99 SW 723. Improper argument on question of damages harmless in view of previous correct instruction. St. Louis, etc., R. Co. v. Smith [Ark.] 100 SW 884. Improper statement harmless where withdrawn on objection. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 18 Tex. Ct. Rep. 978, 101 SW 554. That it is easier to copy handwriting with a pencil than with a pen held a mere appeal to experience of jury. Foss v. Smith, 79 Vt. 434, 65 A 553. Statement that plaintiff's counsel had admitted plaintiff was a knave. Id.

Held prejudicial: Comment of counsel upon evidence excluded coupled with failure of court to charge jury to disregard same held prejudicial. Hanstad v. Canadian Pac. R. Co. [Wash.] 87 P 832. Statement that member of court of appeals would approve verdict for twice amount sued for because he was a Confederate soldier held prejudicial. San Antonio Trac. Co. v. Lambkin [Tex. Civ. App.] 18 Tex. Ct. Rep. 382, 99 SW 574.

55. Statement by counsel that he wished to refresh memory of witness and that her memory was not good harmless. Walker v. Walker [R. I.] 67 A 519. Reading rules of railway company where one was same as a rule put in evidence and the other had no bearing on issue harmless. Minot v. Boston, etc., R. Co. [N. H.] 66 A 825. Repeatedly asking same question after exclusion held harmless. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83. 99 SW 867. Placing certain memoranda on face of instructions inadvertently harmless where most of them were meaningless. Russell v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 SW 613. Controversy between counsel as to reading decision of supreme court to jury harmless where same was not read. Mooney v. Seattle, R. & S. R. [Wash.] 92 P 408.

56. Merely conversing with jurors and laughing at their insipid jokes held not to require reversal. McGraw v. O'Neil, 123 Mo. App. 691, 101 SW 132.

57. Denial of right to open and close harmless where trial is before court on law and fact. Poole v. Johnson [Ky.] 101 SW 955.

58. Midland Valley R. Co. v. Hamilton [Ark.] 104 SW 540; First Nat. Bk. v. Yoeman, 17 Okl. 613, 90 P 412; Byron v. Eastern Coal Co. [R. I.] 67 A 447; McGowan v. Watertown, 130 Wis. 555, 110 NW 402. Admonition to witness while on stand but not in presence or hearing of jury harmless. Zink v. Lahart [N. D.] 110 NW 931. Remark in overruling objection that question was incompetent harmless, the question being in fact incompetent. Arkansas & L. R. Co. v. Stroude [Ark.] 100 SW 760. Remark of court that he would consider certain documents in evidence harmless where they were not read to jury. Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 SW 453.

Held prejudicial: Expression of opinion as to evidence. Central of Georgia R. Co. v. Augusta Brokerage Co. [Ga. App.] 58 SE

versal when the jury has been misled or it was efficient to the result declared in the verdict,[59] and not otherwise.[60] The verdict and findings may indicate whether an

904. Remark of court in ruling on evidence that same was not very material nor entitled to much weight. Schneider v. Great Northern R. Co. [Wash.] 91 P 565.

59. Denver & R. G. R. Co. v. Gannon [Colo.] 90 P 853; Atlanta, etc., R. Co. v. McManus, 1 Ga. App. 302, 58 SE 258; Indianapolis Trac. & T. Co. v. Richey [Ind. App.] 80 NE 170; Atkinson v. Maris [Ind. App.] 81 NE 745; Reliance Mfg. Co. v. Langley [Ind. App.] 82 NE 114; Reynolds v. Taylor, 144 N. C. 165, 56 SE 871; Western Union Tel. Co. v. De Andrea [Tex. Civ. App.] 18 Tex. Ct. Rep. 11, 100 SW 977; Texas & P. R. Co. v. Stoker [Tex. Civ. App.] 18 Tex. Ct. Rep. 998, 103 SW 1183. Error in instruction is ground for reversal notwithstanding existence of other grounds upon which verdict might be based. Cole v. Blue Ridge R. Co., 75 S. C. 156, 55 SE 126. Instruction assuming truth of disputed facts. Thompson v. Fitzgerald [Tex. Civ. App.] 19 Tex. Ct. Rep. 967, 105 SW 334. Submission of court not sustained by evidence prejudicial where it does not appear on what count verdict was rendered. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. Refusal to instruct on issue presented by evidence. Stukey v. Rissinger, 31 Pa. Super. Ct. 3. Instruction in eminent domain proceeding that special benefits could not be set off against damage to land not taken where evidence tended to show such benefits. Peoria, B. & C. Trac. Co. v. Vance, 225 Ill. 270, 80 NE 134. Instruction submitting construction of lease to jury held prejudicial though inadvertent. Erie Crawford Oil Co. v. Meeks [Ind. App.] 81 NE 518. Under Acts 1903, p. 338, c. 193, failure to give instructions in writing constitutes reversible error. Molt v. Hoover [Ind. App.] 82 NE 535. Authorizing jury to find ratification by principal if shown that he had actual or constructive notice. Heinzerling v. Agen [Wash.] 90 P 262. Instruction not based on evidence. Chadister v. Baltimore & O. R. Co. [W. Va.] 59 SE 523. Refusal to charge in action for wrongful death that amount of insurance collected on decedent's life was not to be considered in determining his savings. Nevers Lumber Co. v. Fields [Ala.] 44 S 81. Error in submitting issue not made by pleadings. Kampmann v. McCormick [Tex. Civ. App.] 18 Tex. Ct. Rep. 588, 99 SW 1147. Contradictory instructions. McCurry v. Hawkins [Ark.] 103 SW 600. Instruction on damages. Gibler v. Terminal R. Ass'n [Nev.] 101 SW 37. Failure to define words "remote," "actual," and "speculative" in instruction on damages prejudicial. First Nat. Bk. v. Carroll, 35 Mont. 302, 88 P 1012.

60. West Pratt Coal Co. v. Andrews [Ala.] 43 S 348; Birmingham Rolling Mill Co. v. Myers [Ala.] 43 S 492; Louisville & N. R. Co. v. Sherrell [Ala.] 41 S 631; De Amado v. Friedman [Ariz.] 89 P 588; Arkansas Mut. Fire Ins. Co. v. Claiborne [Ark.] 100 SW 751; Miller v. Fireman's Fund Ins. Co. [Cal. App.] 92 P 332; Daniels v. Johnston [Colo.] 89 P 811; Penn Mut. Life Ins. Co. v. Ornauer [Colo.] 90 P 846; Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516; Overstreet v. Nashville Lumber Co., 127 Ga. 458, 56 SE 650; Stern v. Bradner Smith & Co., 225 Ill. 430, 80 NE 307; Village of Palestine v. Siler, 225 Ill. 630, 80 NE 345; St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz, 226 Ill. 409, 80 NE 879; Chicago Consol. Trac. Co. v. Mahoney, 230 Ill. 562, 82 NE 868; Hancheft v. Haas, 125 Ill. App. 111, afd. 219 Ill. 546, 76 NE 845; Kluge v. Crank, 127 Ill. App. 39; Molt v. Hoover [Ind. App.] 81 NE 221; Schaefer v. Anchor Mut. Fire Ins. Co., 133 Iowa, 205, 110 NW 470; Tiller v. Chicago, B. & Q. R. Co. [Iowa] 112 NW 631; Heath v. Hagan [Iowa] 113 NW 342; Wilson's Adm'r v. Wilson, 30 Ky. L. R. 695, 99 SW 319; Westerfield v. McDonald, 30 Ky. L. R. 1034, 100 SW 230; Trabue v. Todd County [Ky.] 102 SW 309; Owensboro City R. Co. v. Robertson [Ky.] 104 SW 707; Henry v. Manistique Iron Co., 174 Mich. 509, 14 Det. Leg. N. 35, 111 NW 79; Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978; Hax v. Quincy, etc., R. Co., 123 Mo. App. 172, 100 SW 693; Haven v. Tartar, 124 Mo. App. 691, 102 SW 21; German Nat. Bk. v. Laflin [Neb.] 111 NW 578; Christensen v. Floriston Pulp & Paper Co. [Nev.] 92 P 210; Ware v. Guatemalan & Mexican Mahogany & Export Co., 104 NYS 520; Kuhl v. Supreme Lodge Select K. & L., 18 Okl. 383, 89 P 1126; Love v. Turner [S. C.] 59 SE 529; Harbert v. Atlanta etc., R. Co. [S. C.] 59 SE 644; Lowry v. Southern R. Co, 117 Tenn. 507, 101 SW 1157; Carrera v. Dibrell [Tex. Civ. App.] 15 Tex. Ct. Rep. 587, 95 SW 628; International & G. N. R. Co. v. Elder [Tex. Civ. App.] 18 Tex. Ct. Rep. 90, 99 SW 856; Houston & T. C. R. Co. v. Anglin [Tex. Civ. App.] 17 Tex. Ct. Rep. 714, 99 SW 897; Oliver v. Grant [Tex. Civ. App.] 100 SW 1022; Gilmore v. Houston Elec. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 436, 102 SW 168; Texas & N. O. R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408; Merryman v. Hoover [Va.] 59 SE 483; Duteau v. Seattle Elec. Co. [Wash.] 88 P 755; Johnston v. Chicago, etc., R. Co., 130 Wis. 492, 110 NW 424; Montana Min. Co. v. St. Louis Min. & Mill. Co. [C. C. A.] 147 F 897. Instruction erroneously stating time at which value of converted goods should be taken where no showing of different value at correct time. Pearne v. Coyne, 79 Conn. 570, 65 A 973. Directing assessment of value as of a certain date when value was the same as on the correct date. St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 SW 583. Improper instruction on right to disregard testimony of impeached witness harmless where there was no such contradiction as would lead jury to believe that witness had been impeached. Chicago City R. Co. v. Ryan, 225 Ill. 287, 80 NE 116. Refusal of instruction on existence of defect for such a time as to charge others with knowledge where it was shown that plaintiff did not have knowledge thereof. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Instruction requiring jury to assess value of "defendants' interest" in certain property harmless where evidence showed title in defendants. Enno-Sander Mineral Water Co. v. Fishman [Mo.

App.] 104 SW 1156. Instruction submitting question whether child was sui juris harmless where it was shown that child exercised due care. Indianapolis Trac. & T. Co. v. Beckman [Ind. App.] 81 NE 82. Instruction as to damages not limited so as to apply only to physical injury sustained by plaintiff held harmless. Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 81 NE 864. Instruction on preponderance of evidence omitting number of witnesses as an element harmless. Elgin, J. & E. R. Co. v. Lawlor, 229 Ill. 621, 82 NE 407. Error in instruction as to presumption of receipt of letter harmless where shown that letter was received. Westbrook v. Reeves & Co., 133 Iowa, 655, 111 NW 11. Instruction on weight of expert testimony. Madden v. Saylor, 133 Iowa, 699, 111 NW 57. Instruction that evidence of one party tended to prove certain facts and that of the other the contrary, if error, is harmless. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29. Emphasizing facts which might be taken into consideration. In re Kah's Estate [Iowa] 113 NW 563. Allowing damages for breach of rental contract for incorrect period but of substantially same length harmless. Munson v. James Smith Woolen Mach. Co., 118 App. Div. 398, 103 NYS 502. Where upon withdrawal of impeachment court instructs jury to disregard same, omission in written charge to repeat instruction to disregard is harmless. Gulliford v. McQuillen, 75 Kan. 454, 89 P 927. Modification making instruction neither better nor worse. Kimball v. Salt Lake City [Utah] 90 P 395. Instruction not to draw inferences from absence of witnesses where there was no evidence that absent witnesses were under control of either party. Curtin v. Clear Lake Lumber Co. [Wash.] 91 P 956. Reading statute covering cause of action without amendment harmless where latter had no reference to the particular case. Barksdale v. Seaboard Air Line R. [S. C.] 56 SE 906. That receipt by mail was presumptive evidence of acceptance where acceptance was otherwise proved. Holder v. Prudential Ins. Co. [S. C.] 57 SE 853. In action against carrier, time for fixing value of undelivered goods. Atlantic Coast Line R. Co. v. Goodwin, 1 Ga. App. 351, 57 SE 1070. Instruction that books shown to have been locked in safe would be presumed to have remained there until removed harmless, since it was manifestly true. McMillan v. Insurance Co. [S. C.] 58 SE 1020. Refusal of unnecessary instruction. Southern R. Co. v. Taylor [Ala.] 42 S 625. Where in directing verdict for plaintiff in action for breach of contract court did not take a particular breach into consideration, refusal of instruction thereon held harmless. Boulware v. Crohn, 122 Mo. App. 571, 99 SW 796. Submission of issue as to permanency of injury. Galveston, etc., R. Co. v. Gracia [Tex. Civ. App.] 18 Tex. Ct. Rep. 574, 100 SW 198. Liability of city for defective drains. Campbell v. Vanceburg, 30 Ky. L. R. 1340, 101 SW 343. Failure to define a "lawful fence" where complaining party did not attempt to prove that fence in question was a lawful fence. Ayers v. St. Louis, etc., R. Co. [Mo. App.] 101 SW 689. Instruction held not prejudicial as enlarging issues where based on evidence admitted without objection. Bussell v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 SW 613. Allowing recovery on quantum meruit though express contract was relied on. Runyan v. Punxsutawney Drill. & Contr. Co. [Ky.] 102 SW 854. Error in modifying instruction as to insignificant injury held harmless. Smith v. Chicago & A. R. Co. [Mo. App.] 105 SW 10. Modification of instruction on assumption of risk. Receivers of Kirby Lumber Co. v. Poindexter [Tex. Civ. App.] 19 Tex. Ct. Rep. 513, 103 SW 439. Extent of recovery. St. Louis, etc., R. Co. v. Snell [Ark.] 100 SW 67; Schofield v. Little [Ga. App.] 58 SE 666. Degree of care on crossing railroad. Osteen v. Southern R., Carolina Division [S. C.] 57 SE 196. Instruction on willfulness. Hull v. Seaboard Air Line R. [S. C.] 57 SE 28. Due care. Zarnik v. C. Reiss Coal Co. [Wis.] 113 NW 752.

Conflicting instructions: Erroneous conflict of instructions is harmless where there is no evidence warranting giving of one of the instructions creating conflict. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577.

Misstatements: Misstatement of facts. Houston Lighting Power Co. v. Hooper [Tex. Civ. App.] 19 Tex. Ct. Rep. 410, 102 SW 133. Mistake in stating holding of supreme court on former appeal. Weaver v. Richards [Mich.] 14 Det. Leg. N. 617, 113 NW 867. Inadvertent misstatement of age of child in action for its death. Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 NE 246.

Technical inaccuracies and informal defects: In action for injuries received from object kicked from train, instruction inserting word "thrown" in connection with "kicked" harmless. Maysville & B. S. R. Co. v. Willis [Ky.] 104 SW 1016. Use of term "proper care" in instruction on due care. Randolph v. Metropolitan St. R. Co., 125 Mo. App. 620, 102 SW 1085. Use of word "plaintiff" instead of "defendant." Jumper v. Dobson, 127 Ga. 544, 56 SE 514. Mere verbal error. Snyder v. Stribling, 18 Okl. 168, 89 P 222. Mere want of precision in an instruction is not prejudicial except in connection with refusal of requested more definite instruction. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29. Making answer to interrogatory depends upon whether evidence "satisfies" jury. McKone v. Metropolitan Life Ins. Co., 131 Wis. 243, 110 NW 472. Giving instruction orally instead of in writing harmless. Doyle v. Nesting, 37 Colo. 522, 88 P 862.

Abstract or inapplicable instructions: Instructions not directly applicable to questions in connection with which they were given harmless. Neumeister v. Goddard [Wis.] 113 NW 733. Instruction on assumed risk though it did not fit evidence to whom complaint and by whom promise to repair was made. North American Restaurant & Oyster House v. McElligott, 227 Ill. 317, 81 NE 388. Abstract instruction on degree of care required in operation of trains in populous districts harmless. Elgin, J. & E. R. Co. v. Lawlor, 229 Ill. 621, 82 NE 407. Mere giving of instruction not applicable to case does not constitute prejudicial error. Turner v. Elliott, 127 Ga. 338, 56 SE 434; Griffin Grocery Co. v. Reeves, 127 Ga. 669, 56 SE 751; Telfair County v. Clements, 1 Ga. App. 437, 57 SE 1059; Langston v. Cothran [S. C.] 58 SE 956; Pelton v. Spider Lake Sawmill &

erroneous instruction was effective.[61] If, as in equitable issues, the verdict is merely advisory, such error is presumptively harmless.[62] Defects and irregularities in the verdict, findings, and conclusions of law are not ground for reversal where no harm results,[63] and the same is true as to the judgment and record.[64] Thus, a wrong de-

Lumber Co. [Wis.] 112 NW 29. Instruction stating mere abstract principle of law harmless. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808; Fitzpatrick Square Bale Ginning Co. v. McLaney [Ala.] 44 S 1023; Kansas City So. R. Co. v. Davis [Ark.] 103 SW 603; Mulrone v. Marshall, 35 Mont. 238, 88 P 797; Newport News & O. P. R. & Elec. Co. v. McCormick, 106 Va. 517, 56 SE 281.

Matters not in issue or in evidence: Submission of issue unsupported by any evidence. Chenoweth v. Sutherland [Mo. App.] 101 SW 1105. Instruction on immaterial matter not in evidence. Cleveland,etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Instruction on question not in issue. St. Louis, etc., R. Co. v. Dowgiallo [Ark.] 101 SW 412. Computation of interest in event of plaintiff's recovery harmless, there being no issue thereon. Morris v. Fisk Rubber Co. [Ala.] 43 S 483. Erroneous instruction on issue not raised and regarding which there was no evidence whatever held harmless. Morrow v. North Carolina R. Co. [N. C.] 59 SE 158. Instruction on presumption arising from possession of notes, though ownership is not denied. Tucker v. Sherman, 9 Ohio C. C. (N. S.) 70. Refusal of instruction on issue not raised. Richards v. Sanderson [Colo.] 89 P 769. Instruction on willful negligence harmless to plaintiff though no such issue was raised. Jansen v. Southern Pac. Co. [Cal. App.] 89 P 616. General statement of rule as to impeachment of witnesses harmless though no attempt had been made to impeach any witness. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29.

Matters admitted or shown by undisputed evidence: Submission of uncontroverted issue harmless. Texas & N. O. R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Assumption of the existence of an injury where same was undisputed. Georgia So. & F. R. Co. v. Stanley, 1 Ga. App. 487, 57 SE 1042. Expression of opinion as to admitted facts. Georgia, etc., R. Co. v. Jernigan, 128 Ga. 501, 57 SE 791. Instruction authorizing recovery of medical expenses not limiting same to reasonable value harmless where reasonableness was not disputed. Malone v. Sierra R. Co. [Cal.] 91 P. 522. Error in instruction on due care harmless where undisputed evidence showed contributory negligence. Hamlin v. Pacific Elec. R. Co., 150 Cal. 776, 89 P 1109. Instruction on fact shown by uncontroverted evidence. Thompson v. Fitzgerald [Tex. Civ. App.] 19 Tex. Ct. Rep. 967, 105 SW 334. Where power of agent to waive conditions was established by undisputed evidence, refusal to charge that waiver must have been within scope of agent's authority harmless. Industrial Mut. Indemnity Co. v. Thompson [Ark.] 104 SW 200. Inaccurate instruction that plea of payment admits contract harmless where existence of contract was admitted. Sayles v. Quinn [Mass.] 82 NE 713.

61. See cure of instructions by verdict, § 3, post. Failure to define technical legal phrase where jury appeared to have understood its meaning. Miller v. Barnett [Mo. App.] 101 SW 155. Error in instruction allowing punitive damages is prejudicial where verdict is in excess of actual damages. Hartford Life Ins. Co. v. Hope [Ind. App.] 81 NE 595. Instructions prejudicial where verdict was so extreme as to indicate erroneous elements of recovery had been taken into consideration. Farrell v. Jerry Madden Shingle Co., 148 Mich. 275, 14 Det. Leg. N. 99, 111 N. W. 771.

62. Error in instructions in action for specific performance harmless. Waddington v. Lane, 202 Mo. 387, 100 SW 1139. Submission of matters not in controversy. Id.

63. Verdict in replevin not complying with exact terms of statute. McLean v. Berkabile, 123 Mo. App. 647, 100 SW 1109. Requiring jury to particularize in verdict items allowed plaintiff, date and amounts, held not to prejudice defendant. Moffet v. Sebastian, 149 Mich. 451, 14 Det. Leg. N. 511, 112 NW 1120. Directing jury to correct verdict not prejudicial. Kinkead v. Peet [Iowa] 111 NW 48. Immaterial variance between special finding and cross complaint. Radebaugh v. Scanlan [Ind. App.] 82 NE 544. Where interrogatories are submitted to jury relating to matters of an evidential nature rather than to ultimate facts, no prejudicial error can be based on verdict in which some answers to interrogatories are neither affirmative nor negative but simply words "Don't know." Pullman Co. v. Washington, 10 Ohio C. C. (N. S.) 105. Immaterial finding not supported by evidence harmless. Patterson v. Rubenstein [Cal. App.] 92 P 401. Failure to find harmless in absence of showing of prejudice. Mushet v. Fox [Cal. App.] 91 P 534. Failure to find upon issue harmless unless evidence is shown to have been sufficient to sustain a finding which if made would render judgment erroneous. Hatton v. Gregg [Cal. App.] 88 P 594. Failure to find harmless where other finding required judgment rendered though findings had been made. Union Collection Co. v. Buckman, 150 Cal. 159, 88 P 708. Failure to find on an issue harmless in absence of showing of introduction of evidence in support thereof. People v. McCue, 150 Cal. 195, 88 P 899. Where findings made sustain judgment, failure to find on other issues is harmless. Robinson v. Muir [Cal.] 90 P 521. Failure to make proper conclusions of law harmless. Olson v. Goerig [Wash.] 88 P 1017.

Disregarding instructions constitutes reversible error without regard to the legal accuracy of the instructions, but only where complaining party is injuriously affected thereby. Kaplan v. Shapiro, 53 Misc. 606, 103 NYS 922.

64. Allowance of amendment of record to show that amendment of answer after trial was by interlineation and not by filing of amended answer not prejudicial to

cision when no substantial right exists,[65] or when substantially equivalent to a right decision,[66] is harmless.

§ 3. *Errors cured or made harmless by other matters.* See 8 C. L. 26—Error is also harmless if some subsequent condition has rectified it or has averted its prejudicial effect.[67] This may be done by allowing the injured party to obviate the effect of the error [68] by considering excluded evidence as having been admitted on appeal,[69] by withdrawal or abandonment of issues,[70] by pleadings and rulings thereon,[71] by the

defendant. Indianapolis Trac. & T. Co. v. Formes [Ind. App.] 80 NE 872. Error in entering judgment before expiration of time for motion for new trial harmless where judgment was right. Gosline v. Dryfoos [Wash.] 88 P 634. That judgment was not entered immediately after verdict but was signed by judge after denial of motion for new trial held harmless. Schultz v. Simmons Fur Co. [Wash.] 90 P 917. That praecipe for default was filed by attorney after his appointment as judge held harmless, being a mere ministerial act. Cone v. Knight [Fla.] 42 S 460. Refusal to amend judgment by striking out recital of defendant's admission that animals sought in detinue were dead, harmless. Hammond Bros. & Co. v. Lusk [Ala.] 43 S 573. Refusal to amend judgment in detinue by insertion of descriptive words harmless. Id. Error in entering judgment in favor of defendant and against a garnishee and a justice of the peace harmless, the latter judgment being intended as a mere order of payment. Madison County Bk. v. Bird, 77 Ark. 611, 99 SW 692. Judgment in replevin. McLean v. Berkabile, 123 Mo. App. 647, 100 SW 1109.

65. See 8 C. L. 26.

66. See right decision on wrong ground, § 1, ante. Where appellant presumably made the best case he could and the court reached the right result in directing a nonsuit, the case will not be sent back because of the technical objection that a motion for a nonsuit is not proper in equity. Kavanaugh v. Flavin, 35 Mont. 133, 88 P 764.

67. Improper argument cured by withdrawal by counsel. Harless v. Southwest Missouri Elec. R. Co., 123 Mo. App. 22, 99 SW 793. Affixing revenue stamp to note after its introduction in evidence. Beem v. Farrell [Iowa] 113 NW 509. Error in misjoinder may be cured in appellate court by setting aside judgment in favor of party improperly joined and dismissing his action. Texas Mexican R. Co. v. Lewis [Tex. Civ. App.] 18 Tex. Ct. Rep. 345, 99 SW 577. Statement of court in overruling objection to evidence that unless proper foundation was laid it would amount to nothing and that he would so instruct jury held not to cure admission where no foundation was laid and no instruction given. Wilson v. Johnson [Ala.] 44 S 539. Admission of evidence in personal injury case that plaintiff had a wife and family not cured by statement of court that plaintiff could not recover by reason of his having a family, no instruction to disregard being given. Warner v. De Armond [Or.] 89 P 373.

68. Error in admitting parol evidence of title harmless where defendant subsequently showed same. Tutwiler Coal, Coke & Iron Co. v. Wheeler [Ala.] 43 S 15. Evidence held harmless in view of complaining party's right to cross-examine. Aetna Ins. Co. v. Missouri Pac. R. Co., 123 Mo. App. 513, 100 SW 569. Admission of hearsay to prove refusal to answer interrogatories harmless where complaining party was permitted to explain refusal. Berry v. Joiner [Tex. Civ. App.] 18 Tex. Ct. Rep. 282, 101 SW 289.

69. Williams v. United States Fidelity & Guaranty Co. [Md.] 66 A 495.

70. Error in ruling on pleadings cured by withdrawal of issue from jury. Galveston, etc., R. Co. v. Quinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 825, 104 SW 397. Error in overruling demurrer to special pleas and striking out replications thereto harmless where case was tried on general issue, special pleas being presumptively abandoned. Wright v. Kansas City, etc., R. Co. [Ala.] 42 S 480. Error in overruling demurrer to certain counts of complaint harmless where same are abandoned. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 S 1034. Error in overruling demurrer to count cured by action of court in withdrawing count from jury. United States Furniture Co. v. Taschner [Ind. App.] 81 NE 736. Where pleas to which demurrers have been overruled are withdrawn. rulings on demurrers will not be reviewed. Rock Island Sash & Door Works v. Moore & Handley Hardware Co., 147 Ala. 581, 41 S 806. Overruling demurrer to complaint for improper joinder of causes of action harmless where court withdrew one of them from jury. Skeen v. Paine [Utah] 90 P 440. Error in holding decision on demurrer to defective defense in abeyance during trial cured by withdrawal of defense from jury. Minneapolis Threshing Mach. Co. v. Currey, 75 Kan. 365, 89 P 688. Count upon which issue was taken but respecting which no evidence was introduced is harmless. Wilmington City R. Co. v. White [Del.] 66 A 1009. Error in overruling demurrer to count of complaint harmless where no evidence was introduced to sustain it. Louisville & N. R. Co. v. Mulder [Ala.] 42 S 742. Evidence tending to show depreciation harmless where issue was withdrawn from jury. International & G. N. R. Co. v. Stewart [Tex. Civ. App.] 18 Tex. Ct. Rep. 115, 101 SW 282. Error in admitting evidence cured by withdrawal by court of count which it tended to sustain. William Grace Co. v. Larson, 227 Ill. 101, 81 NE 44.

71. Error in overruling demurrer cured by amendment of pleading. Pacific Selling Co. v. Albright-Prior Co. [Ga. App.] 59 SE 468. Error in overruling demurrer cured by cross petition to which original petition constituted a defense. Alton-Dawson Mercantile Co. v. Staten [Okl.] 91 P 892. Error in overruling demurrer on ground of uncertainty cured by answer denying all material averments of complaint. Dennis v. Crocker-Huffman Land & Water Co. [Cal.

admission of evidence,[72] by striking out or excluding evidence,[73] by reinstating case

App.] 91 P 425. Sustaining demurrer to special plea where defendant then interposed general issue under which he could prove all matters set up in special plea. Wabash R. R. Co. v. Keeler, 127 Ill. App. 265. Denial of amendment harmless where case is tried on theory that matters presented by amendment are in issue. Miner v. Rickey [Cal. App.] 90 P 718. Exclusion of evidence under general denial where defendant was permitted to amend and present it. Sayles v. Quinn [Mass.] 82 NE 713. Overruling demurrer to certain counts of complaint and sustaining demurrer to pleas thereto harmless where court excludes evidence tending to prove averments thereof and directs affirmative charge thereon. Carbon Hill Coal Co. v. Cunningham [Ala.] 44 S 1016. Overruling demurrer cured by refusal to submit issue to which it was directed. Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428.

72. Cure of remarks by court: Improper remark of court in sustaining objection to question cured by subsequent admission of testimony. Elgin, etc., R. Co. v. Lawlor, 229 Ill. 621, 82 NE 407.

Cure of rulings on pleadings: Striking out portion of answer cured by admission of evidence under general denial. Couch v. State [Ind.] 82 NE 457. Striking out special pleas harmless where matters alleged therein were shown under general denial. Buford v. Christian [Ala.] 42 S 997; Nashville, etc., R. v. Karthaus [Ala.] 43 S 791. Error in striking out denial in answer on information and belief harmless where plaintiff proved truth of allegation to which it was directed. Atlantic & B. R. Co. v. Brown [Ga.] 59 SE 278. Sustaining demurrer to special plea where defendant had benefit of all evidence which could have been received under it. Smith v. Davis [Ala.] 43 S 729; Benjamin v. Slaughter [Ala.] 44 S 468; North American Storage Co. v. Reagan [R. I.] 67 A 363. Refusal to allow amendment of plea of set-off where evidence was allowed under general issue. Battey v. Warner [R. I.] 67 A 63. Refusal to require plaintiff to show for whose benefit he sued harmless where same was shown under defendant's general denial. Copeland v. Southern R. Co. [S. C.] 57 SE 535. Refusal to permit filing of additional counts to declaration harmless where matter was fully presented under other pleadings. Van Norman v. Young, 228 Ill. 425, 81 NE 1060. Sustaining demurrer to replication harmless where plaintiff had benefit of matters set up therein at trial. Union Fertilizer Co. v. Johnson [Ala.] 43 S 752. Refusal to permit filing of amendment harmless where court treated matter stricken as surplusage and admitted proof thereof under other pleadings. Ratliff v. Tinar [Tex. Civ. App.] 18 Tex. Ct. Rep. 385, 102 SW 131. Error in sustaining exceptions to portion of answer harmless where party was allowed to introduce necessary proof under another plea. Id. Error in sustaining demurrer to certain counts harmless where plaintiff under other counts had benefit of all evidence which could have been offered under former. Bradley v. Louisville & N. R. Co. [Ala.] 42 S 818. Error in overruling demurrer for failure to allege certain facts cured by evidence showing their existence. City of Henderson v. Sizemore [Ky.] 104 SW 722.

Cure of exclusion of evidence: Erroneous exclusion of evidence is cured where afterwards admitted. Gambill v. Fuqua [Ala.] 42 S 735; Central of Ga. R. Co. v. Simons [Ala.] 43 S 731; Higgins v. Los Angeles R. Co. [Cal. App.] 91 P 344; Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 S 903; Chicago Union Trac. Co. v. Ertrachter, 228 Ill. 114, 81 NE 816; Chicago & E. R. Co. v. Lawrence [Ind.] 82 NE 768; Baltimore, etc., R. Co. v. Trader [Md.] 68 A 12; Inlow v. Bybee, 122 Mo. App. 475, 99 SW 785; Miller v. Barnett [Mo. App.] 101 SW 155; Walker v. Walker [R. I.] 67 A 519; Union Pac. R. Co. v. Thomas [C. C. A.] 152 F 365. Admission on cross-examination. Omer v. St. Louis & H. R. Co., 123 Mo App. 214, 100 SW 47. Subsequent admission of evidence to same effect as answer excluded. Birmingham R., L. & P. Co. v. King [Ala.] 42 S 612. Exclusion of testimony as to what certain person told witness cured by admitting testimony of latter as to what he said Chicago, etc., R. Co. v. Hiltibrand [Tex. Civ. App] 18 Tex. Ct. Rep. 93, 99 SW 707. Error in exclusion of written instrument cured by admission of secondary evidence. Moore v. Linn [Okl.] 91 P 910. Refusal to admit documentary evidence on cross-examination harmless where subsequently admitted as part of defense. Hildebrand v. United Artisans [Or.] 91 P 542. Exclusion of hypothetical question harmless where by mere change in form of question desired evidence was elicited. Kline v. Santa Barbara Consol. R. Co., 150 Cal. 741, 90 P 125. Exclusion of question harmless where witness was subsequently permitted to answer same or a similar one. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P 815. Exclusion of evidence that specific loan was made in usual course of business where witness was permitted to testify as to usual course of business. William Bergenthal Co. v. Security State Bk., 102 Minn. 138, 112 NW 892. Exclusion of testimony that letter had been placed in hands of certain person where such person was permitted to testify that he had received it. Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 110 NW 358. Error in refusing to permit witness to answer question as to "how bright" street light was cured by permitting him to testify as to how plainly he could see. City of Chicago v. Loebel, 228 Ill. 52, 81 NE 796. Erroneous exclusion of evidence where facts sought are brought out on further examination. Flanagan v. Fabens [Neb.] 110 NW 655. Error in excluding testimony harmless where witness subsequently testified to facts inferentially answering question excluded. Mikesell v. Wabash R. Co., 134 Iowa, 736, 112 NW 201. Exclusion of testimony harmless where witness was permitted to testify fully regarding excluded matter. Marquette Cement Mfg. Co. v. Williams, 230 Ill. 26, 82 NE 424. Exclusion of question harmless where witness was subsequently permitted to state facts in detail. Southern R. Co. v. Cofer [Ala.] 43 S 102. Exclusion of evidence harmless where facts sought were elicited through other questions. Pierson v. Illinois Cent. R. Co., 149 Mich. 167, 14 Det. Leg. N 405, 112 NW 923.

Not cured: Error in excluding evidence in

after dismissal,[74] by withdrawal of objections,[75] by proceeding with trial of issues of fact that after overruling of demurrer to evidence,[76] by instructions,[77] by verdict or findings,[78] by judgment,[79] by remittitur of damages,[80] or by statute.[81]

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behalf of defendant not cured by exclusion of plaintiff's evidence on same matter. Londonderry Min. Co. v. United Gold Mines Co. [Colo.] 88 P 455. Exclusion of declaration of testator prior to execution of will not cured by admission of statements made at time of execution. In re Miller's Estate, 31 Utah, 415, 88 P 338. In action on saloonkeeper's bond for maintaining a disorderly house, exclusion of evidence as to what witnesses saw therein not cured by subsequent evidence establishing character of the place. Clement v. Federal Union Surety Co., 106 NYS 1061. Exclusion of evidence of habits of animal held not cured by subsequent ruling that evidence of person who had seen enough of animal to know that it was vicious was admissible. Johnstone v. Tuttle [Mass.] 81 NE 886.

Admitted evidence cured by later evidence: Refusal to strike out testimony as conclusion where witness then states facts upon which conclusion was based and which if true sustained it. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65. Admission of record of testimony of witnesses at former trial harmless where they subsequently testify substantially as on former trial. Citizens' Sav. Bk. v. Boswell [Ky.] 104 SW 1014. Admission of hearsay where same was corroborated by testimony of complaining party. Gilmore v. McBride [C. C. A.] 156 F 464. Allowing opinion evidence without showing competency where same is established on cross-examination. Id. Evidence of value of entire tract cured on cross-examination showing value of tract in issue. Shaw v. New York El. R. Co. [N. Y.] 79 NE 984. Error in admitting memorandum cured by cross-examination showing that it was of a class of memoranda which might have been admissible and not being returned on appeal was presumed competent. Chautauqua Lake Mills v. Hewes, 55 Misc. 634, 106 NYS 1026. Erroneous admission of testimony that bond was still in force cured by evidence of defendant that work which it was given to secure was completed prior to action for premiums. Aetna Indemnity Co. v. Ryan, 53 Misc. 614, 103 NYS 756. Error in admission of record without authentication cured by evidence identifying it. Carp v. Queen Ins. Co. [Mo.] 101 SW 78. Error in admitting answer to leading question cured by admission of similar testimony without objection. Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 SW 453. Erroneous admission of report of surveyor in action to determine boundaries cured by repetition of same matters in oral testimony without objection. McDonald v. McCrabb [Tex. Civ. App.] 19 Tex. Ct. Rep. 789, 105 SW 238.

Not cured: Erroneous admission of testimony in plaintiff's behalf not cured by evidence of defendant differing materially therefrom and introduced solely to explain objectionable evidence as far as possible. Short v. Frink [Cal.] 90 P 200.

73. Admission of evidence of child of tender years cured by sustaining motion to exclude. St. Louis Southwestern R. Co. v. Kennedy [Tex. Civ. App.] 96 SW 653. Request by plaintiff that incompetent evidence introduced in his behalf be withdrawn from jury and order of court granting motion to strike out held to cure such admission. Hocking v. Windsor Spring Co., 131 Wis. 532, 111 NW 685. Error in admission of evidence cured by withdrawal. Galveston, etc., R. Co. v. Stoy [Tex. Civ. App.] 17 Tex. Ct. Rep. 849, 99 SW 135. Error in refusing to strike objectionable evidence cured by striking out on motion to exclude. Hollen v. Crim [W. Va.] 59 SE 172. Erroneous admission of evidence cured by striking it out, though no instruction to disregard was given, none being requested. Pierson v. Illinois Cent. R. Co., 149 Mich. 167, 14 Det. Leg. N. 405, 112 NW 923. Inadvertent allusions of witnesses to improper matters harmless, same being stricken by court. Miller v. Canton, 123 Mo. App. 325, 100 SW 571. Evidence erroneously admitted cured by striking it out. Chicago Union Trac. Co. v. Ertrachter, 228 Ill. 114, 81 NE 816; Id., 130 Ill. App. 602; Mears v. Petruschke [Minn.] 112 NW 390.

Not cured: Admission of evidence on matter not in issue over objection. Chicago Union Trac. Co. v. Daly, 129 Ill. App. 519. Erroneous admission of evidence considered with erroneous charge held not cured by striking out. Miller v. Wabash R. Co., 123 Ill. App. 60. Admission of evidence of repairs after accident. City of Joliet v. Donnelly, 129 Ill. App. 119.

74. Reinstatement after erroneous dismissal cures error. Howe v. Parker, 18 Okl. 282, 90 P 15.

75. Schofield v. Little [Ga. App.] 58 SE 666.

76. Where after denial of nonsuit defendant introduced evidence supplying defect in plaintiff's proof. Reshofsky v. Weisz, 53 Misc. 602, 103 NYS 718. Introduction of evidence after denial of nonsuit. Mooney v. Seattle, etc., R. Co. [Wash.] 92 P 408.

Not cured: Refusal to direct a nonsuit on ground of contributory negligence not cured by subsequent examination of witnesses by defendant not affecting negligence shown. Van Ness v. North Jersey St. R. Co. [N. J. Law] 67 A. 1027.

77. Improper argument and remarks of counsel: Contract between financial situation of parties cured by instruction that parties stood on an equal footing. Davis v. Adrian, 147 Mich. 300, 13 Det. Leg. N. 1023, 110 NW 1084. Improper statement in argument cured by inquiry of court and withdrawal by counsel of claim made. Bolton v. Ovitt [Vt.] 67 A 881. Statement of claim by counsel in opening cured by instruction to disregard. Ellis v. Rhode Island Co. [R. I.] 67 A 428. Misconduct of counsel in stating contents of excluded document to jury cured by instruction to disregard. Briscoe v. Parker [N. C.] 58 SE 443. Statement that plaintiff was a "penniless girl" cured by instruction to disregard. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 18 Tex. Ct. Rep. 416, 99 SW 715.

Misstatement of evidence by counsel cured by instruction that memory of jury was sole test of what evidence was. Aetna Ins. Co. v. Missouri Pac. R. Co., 123 Mo. App. 513, 100 SW 569. Incorrect statement of law in argument to jury cured by instruction. Chesapeake & O. R. Co. v. Perkins [Ky.] 105 SW 148. Improper remarks of counsel cured by instruction to disregard. Tingley v. Times Mirror Co. [Cal.] 89 P 1097; Lanigan v. Neely [Cal. App.] 89 P 441; Macon & B. R. Co. v. Parker, 127 Ga. 471, 56 SE 616; Brown v. Evans, 149 Mich. 429, 14 Det. Leg. N. 476, 112 NW 1079; American Storage & Moving Co. v. Harding [Mo. App.] 104 SW 484; St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83, 99 SW 867; Houston, etc., R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 662, 100 SW 1013; Jones v. Seattle, etc., R. Co. [Wash.] 92 P 379; Ferguson v. Truax [Wis.] 110 NW 395; Neumeister v. Goddard [Wis.] 113 NW 733. Misconduct of counsel cured by reprimand and instruction to disregard. Brockmiller v. Industrial Works, 148 Mich. 642, 14 Det. Leg. N. 336, 112 NW 688. Improper argument cured by withdrawal and instruction to disregard. Chicago, etc., R. Co. v. Gillett [Tex. Civ. App.] 18 Tex. Ct. Rep. 392, 99 SW 712; Arden Lumber Co. v. Henderson Iron Works & Supply Co. [Ark.] 103 SW 185.

Not cured. Seaboard Air Line R. v. Smith [Fla.] 43 S 235. Persistent misconduct of counsel in argument held not cured by instruction to disregard and imposition of fine for contempt. Pullman Co. v. Pennock [Tenn.] 102 SW 73.

Remarks by court: Improper statements of court cured by charge. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F 365. Remark of court that certain evidence might be admissible as substantive testimony cured by charge that it must be considered as corroborative only. Leonard v. Gillette, 79 Conn. 664, 66 A 502. Unfavorable comments of court on credibility of witness cured by instruction that jury were sole judges of credibility and cautioning them against prejudice in weighing testimony of such witness. Partelow v. Newton & B. St. R. Co. [Mass.] 81 NE 894.

Rulings on pleadings: Error in overruling demurrer cured by instruction that there could be no recovery under the count demurred to. Woodward Iron Co. v. Curl [Ala.] 44 S 969. Duplicity in pleading cured by instruction. Reid v. Rhode Island Co. [R. I.] 67 A 328. Allegation of improper element of damage cured by instruction. Arkansas & L. R. Co. v Stroude [Ark.] 100 SW 760. Error in overruling demurrer for failure to allege certain facts cured by instruction requiring existence of such facts to be found as a basis for recovery. City of Henderson v. Sizemore [Ky.] 104 SW 722.

Cure of rulings on evidence: The admission of improper evidence may be renderd harmless by proper instructions. Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249, 80 NE 136. Admission of evidence cured by instruction limiting purposes for which it might be considered. Goodloe v. Goodloe [Tex. Civ. App.] 19 Tex. Ct. Rep. 960, 105 SW 533. Erroneous admission of evidence cured by correct charge eliminating question thus raised. Pennsylvania R. Co. v. Garcia [C. C. A.] 152 F 104. Erroneous admission of evidence as to damages cured by instruction that plaintiff could not recover such damages. Crowley v. Burns Boiler & Mfg. Co., 100 Minn. 178, 110 NW. 969. Erroneous admission of evidence as to damages cured by instruction stating true measure of damages. Hempstead v. Salt Lake City [Utah] 90 P 397. Erroneous admission of indictment against defendant in action for wrongful death cured by instruction to disregard. Hargis v. Marcum [Ky.] 103 SW 346. Withdrawal of evidence is harmless where court charged that defendant was not chargeable with negligence in respect which such evidence tended to prove. Brantner v. Chicago, etc., R. Co. [Iowa] 112 NW 790. Evidence of custom cured by charge. Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 SW 845. Error in admitting evidence not part of res gestae cured by instruction to disregard. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 176. Improper question harmless where court sustained objection to it and instructed jury to disregard it. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 954, 101 SW 453. Error in admitting plaintiff's evidence showing a verbal contract, defendant relying on a written one, cured by instruction that latter would preclude recovery unless waived. Chicago, etc., R. Co. v. Burns [Tex. Civ. App.] 19 Tex. Ct. Rep. 775, 104 SW 1081. Erroneous admission of evidence harmless where issue which it tended to sustain was not submitted to jury. Weir v. Metropolitan St. R. Co. [Mo. App.] 103 SW 583; Listman Mill Co. v. Miller, 131 Wis. 393, 111 NW 496. Erroneous admission of evidence cured by charge to disregard. McLean v. Hattan, 127 Ga. 579, 56 SE 643; Louisville & S. I. Trac. Co. v. Leaf [Ind. App.] 79 NE 1066; Medlin v. Simpson, 144 N. C. 397, 57 SE 24; Armour & Co. v. Skene [C. C. A.] 153 F 241.

Not cured: Admission of evidence as to defendant's wealth in action for alienation of affections not cured by instruction, size of verdict indicating prejudice. Flinders v. Bailey, 133 Iowa, 616, 111 NW 27. Instructions to disregard testimony erroneously admitted held not to cure same where counsel was permitted in argument to dwell on matter and jury was shown to have considered it. Brown Land Co. v. Lehman [Iowa] 112 NW 185.

Curing other portions of charge. Choctaw, etc., R. Co. v. Hickey [Ark.] 99 SW 839; St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 SW 583; Consolidated Kansas City Smelting & Refining Co. v. Binkley [Tex. Civ. App.] 99 SW 181. Must affirmatively appear that presumptive prejudice has been removed. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318. Instruction cured by other correct instruction. Keys v. Winnsboro Granite Co. [S. C.] 56 SE 949. Defect in instruction cured by other instructions. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 79 NE 1062. Ambiguity in statement of measure of proof held cured by subsequent statement. Ray v. Jefferson County Gas Co., 31 Pa. Super. Ct. 194. Instruction on amount recoverable cured by other limiting instructions. Williams v. Meadville, etc., St. R. Co., 31 Pa. Super. Ct. 580. Instruction permitting jury to consider common experience of value cured by instruction that they could only act under the evidence. Indianapolis Trac. & Terminal Co. v. Beckman [Ind. App.] 81 NE 82. Error in instruction

may be cured by withdrawing it. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind.] 81 NE 492. Instruction not requiring jury to award damages on evidence cured by instruction requiring that case be decided on evidence. Chicago City R. Co. v. Hagenback, 228 Ill. 290, 81 NE 1014. Omission of instruction on preponderance of evidence in stating essentials to recovery cured by instruction given in defendant's behalf. East St. Louis & S. R. Co. v. Zink, 229 Ill. 180, 82 NE 282. Instruction on measure of damages disregarding question of negligence cured by instruction requiring jury to look to evidence for facts and instructions for law. Id. Erroneous instruction as to rights of persons at street crossings cured by subsequent correct instruction on contributory negligence. Kelleher v. Interurban St. R. Co., 102 NYS 466. Verbal error in instruction cured by subsequent instruction. Snyder v. Stribling, 18 Okl. 168, 89 P 222. Erroneous instruction cured by immediate correction. Atlantic & B. R. Co. v. Smith [Ga. App.] 58 SE 542. Instruction permitting punitive damages for negligence cured by one requiring willfulness. Dempsey v. Western Union Tel. Co. [S. C.] 58 SE 9. Erroneous instruction on burden of proof cured. St. Louis S. W. R. Co. v. Groves [Tex. Civ. App.] 16 Tex. Ct. Rep. 895, 97 SW 1084. Instruction omitting certain elements of damage cured by subsequent correct instruction. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 SW 608. Omitted elements in instruction cured by subsequent instruction. In re Wilson's Estate [Neb.] 111 NW 788; Gibler v. Terminal R. Ass'n, 203 Mo. 208, 101 SW 37; Underwood v. Metropolitan St. R. Co., 125 Mo. App. 490, 102 SW 1045.

Refusal of instruction harmless when **covered** by others given. Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249, 80 NE 136; Hanchett v. Haas, 125 Ill. App. 111; City of Louisville v. Knighton, 30 Ky. L. R. 1037, 100 SW 228; Cairnes v. Pelton, 103 Md. 40, 63 A 105; Horner v. Beasley [Md.] 65 A 820; Aetna Ins. Co. v. Missouri Pac. R. Co., 123 Mo. App. 513, 100 SW 569; Ferris v. Edmonston, 124 Mo. App. 94, 100 SW 1119; Bridgeport Coal Co. v. Wise County Coal Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 678, 99 SW 409; St. Louis S. W. R. Co. v. Bryant [Tex. Civ. App.] 18 Tex. Ct. Rep. 755, 103 SW 237; Merryman v. Hoover [Va.] 59 SE 483; Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427. Where instructions as a whole present substance of refused instruction. Indianapolis St. R. Co. v. Taylor, 39 Ind. App. 592, 80 NE 436. Refusal to charge that certain facts did not constitute negligence harmless where court repeatedly stated what facts would constitute negligence. Blickley v. Luce's Estate, 148 Mich. 223, 14 Det. Leg. N. 121, 111 NW 752. Error in refusing requested instruction as a charge on facts harmless where substance thereof was embodied in an instruction given. Bussey v. Charleston & W. C. R. Co. [S. C.] 58 SE 1015. Refusal of instruction that if jury found plaintiff was not entitled to recover they need not consider question of damages harmless in view of instruction stating what plaintiff must prove to recover. Chicago City R. Co. v. Hagenback, 228 Ill. 290, 81 NE 1014. Instructions must be **considered** as a **whole**. Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 S 706; Brown Store Co. v. Chattahoochee Lumber Co., 1 Ga. App. 609, 57 SE 1043; Bush v. Fourcher [Ga. App.] 59 SE 459; Smith v. Landa [Tex. Civ. App.] 18 Tex. Ct. Rep. 130, 101 SW 470; Painter v. Kilgore [Tex. Civ. App.] 19 Tex. Ct. Rep. 380, 101 SW 809; Virginia-Carolina Chem. Co. v. Knight, 106 Va. 674, 56 SE 725. Ambiguous statements may be cured by other portions of charge. City of Austin v. Forbis [Tex. Civ. App.] 99 SW 132.

Not cured. Western Union Tel. Co. v. De Andrea [Tex. Civ. App.] 18 Tex. Ct. Rep. 11, 100 SW 977. Erroneous instruction on due care not cured by subsequent instruction. Johnson v. Texas & C. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 823, 100 SW 206; Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902. Instruction rendering defendant liable for damages irrespective of negligence not cured by instruction requiring jury to find injury before assessing any damages. St. Louis, etc., R. Co. v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 10, 103 SW 1176. Erroneous instruction not cured by statement that it was to be considered as part of main charge which was correct. Texas Cent. R. Co. v. Waldie [Tex. Civ. App.] 18 Tex. Ct. Rep. 60, 101 SW 517. Instruction on weight of evidence not cured by instruction setting forth adverse party's theory of the action. Louisville R. Co. v. O'Connor, 30 Ky. L. R. 1329, 101 SW 305. Error in instruction on burden of proof not cured by instruction that if certain facts were found defendant was not liable. Trotter v. St. Louis & Suburban R. Co., 122 Mo. App. 405, 99 SW 508. Misleading instruction not cured by other correct instructions. Walsh v. Henry, 38 Colo. 393, 88 P 449. Correction of charge at request of party whom it favored held not sufficiently definite to cure error therein. Martin v. Forty-Second St., etc., R. Co., 54 Misc. 645, 104 NYS 840. Error in instruction not cured by giving **qualified** requested instruction. Barr v. Schefer, 118 App. Div. 834, 103 NYS 733. Erroneous instruction on knowledge to be imputed to principal from knowledge of agent not cured by subsequent instruction. Weaver v. Richards [Mich.] 14 Det. Leg. N. 617, 113 NW 867. Instruction making defendant an insurer not cured by instruction as to necessity of proof as to cause of injury. Sullivan v. Brooklyn Heights R. Co., 117 App. Div. 784, 102 NYS 982. Erroneous instruction not cured by one **conflicting** therewith. Fogarty v. Southern Pac. Co. [Cal.] 91 P 650; Atlanta, etc., R. Co. v. McManus, 1 Ga. App. 302, 58 SE 258; Sullivan v. Metropolitan Life Ins. Co., 35 Mont. 1, 88 P 401. Instruction permitting recovery of speculative damages not cured by conflicting instruction. Malone v. Sierra R. Co. [Cal.] 91 P 522. Instruction invading province of jury not cured by conflicting instruction submitting issues to jury. Texas Cent. R. Co. v. Waldie [Tex. Civ. App.] 18 Tex. Ct. Rep. 60, 101 SW 517.

78. Error in instruction is not cured by giving one contradicting it without withdrawing erroneous one. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind.] 81 NE 492. Where verdict was as favorable to complaining party as it could have been had no error been committed. Clark v. Empire Mercantile Co. [Ga. App.] 58 SE 363.

Cure of rulings on pleadings: Striking out cross complaint harmless where finding would have defeated recovery thereon. Naler v. Ballew [Ark.] 99 SW 72. Refusing

leave to amend so as to ask dissolution of partnership harmless where court found there was no partnership. Chlopeck v. Chlopeck [Wash.] 91 P 966. Overruling demurrer to defendant's cross complaint harmless as to plaintiff where court finds in his favor. Talbott v. New Castle [Ind.] 81 NE 724. Error in overruling demurrer to answer harmless where jury finds facts averred therein are true. Teague v. Bloomington [Ind. App.] 81 NE 103. Overruling demurrer to second cause of action harmless where special finding, supported by evidence, sustains verdict returned for plaintiff on first cause of action. Snyder v. Schardt, 9 Ohio C. C. (N. S.) 615.

Misconduct of counsel, in argument, harmless where size of verdict indicates no prejudice. Eldorado Coal & Coke Co. v. Swan, 227 Ill. 586, 81 NE 691.

Joinder of parties: Objection to nonjoinder of parties cured by finding that defendant was not bound by contract sued on. Atkins v. Atkins [Mass.] 80 NE 806.

Special interrogatories: Error in submitting special interrogatory harmless where jury did not answer it, finding facts rendering answer unnecessary. Wallace v. Skinner [Wyo.] 88 P 221. Refusal to require jury to answer specific interrogatories where answers thereto appear under other interrogatories. Oolitic Stone Co. v. Ridge [Ind. App.] 80 NE 441. Refusal of question for special verdict cured by findings covering same in answer to other interrogatories. McKone v. Metropolitan Life Ins. Co., 131 Wis. 243, 110 NW 472.

Admitted evidence cured: Harmless where finding shows that erroneous evidence was not considered. Southern R. Co. v. St. Louis Hay & Grain Co. [C. C. A.] 153 F 728. Evidence of damage caused by injunction not raised by plea in reconvention cured by verdict. Darst v. Devini [Tex. Civ. App.] 19 Tex. Ct. Rep. 455, 102 SW 787. Refusal to strike expert testimony introduced on assumption that services were not performed under contract harmless where jury finds they were performed under contract. Cunningham v. Springer, 203 U. S. 647, 51 Law. Ed. 662. Admission of evidence harmless where verdict does substantial justice. Toledo, etc., Trac. Co. v. Sterling, 9 Ohio C. C. (N. S.) 206. Erroneous admission of evidence cured by verdict for defendant on counts which it tended to support. East St. Louis & S. R. Co. v. Zink, 229 Ill. 180, 82 NE 283. Erroneous admission of testimony held harmless in view of size of verdict rendered. Bahr v. Northern Pac. R. Co. [Minn.] 112 NW 267; Daniel v. Atlantic Coast Line R. Co. [N. C.] 58 SE 601. Admission of conclusion as to damages harmless, verdict indicating that no prejudice resulted. Montgomery v. Somers [Or.] 90 P 674. Admission of evidence of defendant's conduct with respect to land in trespass harmless where verdict was for nominal damages. Buford v. Christian [Ala.] 42 S 997. Erroneous admission of evidence of custom harmless where jury construed contract from its terms alone. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 SW 375. Erroneous admission of evidence on certain issue harmless where court found in favor of injured party thereon. Flack v. Braman [Tex. Civ. App.] 18 Tex. Ct. Rep. 107, 101 SW 537. Error in admitting testimony of incompetent witness as to value harmless where verdict was for amount authorized by competent evidence. Ft. Worth, etc., R. Co. v. Hickox [Tex. Civ. App.] 18 Tex. Ct. Rep. 691, 103 SW 202. Erroneous admission of evidence cured by findings and conclusions of court. St. Louis, etc., R. Co. v. White [Tex. Civ. App.] 19 Tex. Ct. Rep. 664, 103 SW 673. Admission of improper evidence to explain contract harmless when verdict shows correct construction. St. Louis, etc., R. Co. v. Payne [Tex. Civ. App.] 19 Tex. Ct. Rep. 765, 104 SW 1077.

Curing exclusion: Exclusion of evidence in reduction of punitive damages harmless where none were allowed. Cain v. Corley [Tex. Civ. App.] 17 Tex. Ct. Rep. 644, 99 SW 168. Exclusion of evidence as to speed of car harmless where court finds injury due to decedent's contributory negligence. Higgins v. Los Angeles R. Co. [Cal. App.] 91 P 344.

Curing errors in charge. Where it is clear from verdict that jury disregarded erroneous instruction, error is harmless. Whitney v. Brown, 75 Kan. 678, 90 P 277. Erroneous instruction cured by verdict showing that it was not considered. Chew v. Jackson [Tex. Civ. App.] 18 Tex. Ct. Rep. 678, 102 SW 427. But see disregard of erroneous instruction as constituting reversible error, § 2, ante, defects in verdicts or findings. Error in instruction of presumption of negligence of carrier from injury to live stock, where shipper under contract, was required to accompany shipment, harmless where from verdict jury must have found contract invalid. St. Louis, etc., R. Co. v. Wells [Ark.] 99 SW 534. Ordinarily, an instruction for defendant, if erroneous, is harmless where verdict is for plantiff. St. Louis, etc., R. Co. v. Nance [Tex. Civ. App.] 18 Tex. Ct. Rep. 276, 101 SW 294; Cleaver v. Louisville & N. R. Co., 30 Ky. L. R. 1059, 100 SW 223. Error in submitting liability of several defendants for certain acts for which one alone was liable cured by verdict in favor of that one. Southern Kansas R. Co. v. Curtis [Tex. Civ. App.] 17 Tex. Ct. Rep. 743, 99 SW 566. Error in instruction authorizing verdict in favor of a codefendant harmless where verdict was against both defendants. St. Louis, etc., R. Co. v. Nance [Tex. Civ. App.] 18 Tex. Ct. Rep. 276, 101 SW 294. Misleading instruction cured by special finding showing that it was understood. St. Louis & S. F. R. Co. v. Beets, 75 Kan. 295, 89 P 683. Incorrect instruction as to defendant's primary liability harmless where jury found for defendant on a release. Wallace v. Skinner [Wyo.] 88 P 221. Error in instruction on assumed risk cured by verdict finding plaintiff guilty of contributory negligence. Madison v. Clippinger, 74 Kan. 700, 88 P 260. Error in instruction on constructive notice cured by verdict showing actual notice. Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59. Where jury found for plaintiff in trover for the entire property claimed, error in instruction directing partial recovery is harmless. Major v. Brewster, 148 Mich. 623, 14 Det. Leg. N. 323, 112 NW 490. Instruction in action for breach of marriage promise that fornication of plaintiff was no defense where abandonment was for another cause harmless where defense was based on plaintiff's condition which jury found was caused by defendant. Colburn v. Marble [Mass.] 82 NE 28. Erroneous instruction on certain issue cured by verdict on such issue

for party harmed thereby. Donk Bros. Coal & Coke Co. v. Stroetter, 229 Ill. 134, 82 NE 250. Error in submitting issue to jury cured by verdict for injured party thereon. Gates v. Detroit & M. R. Co., 147 Mich. 523, 111 NW 101; Rockefeller v. Wedge [C. C. A.] 149 F 130. Instruction ignoring question of contributory negligence where jury necessarily found that plaintiff exercised due care. Knoefel v. Atkins [Ind. App.] 81 NE 600. Where evidence showed that when policy was taken insured was in good health unless she had a certain disease, and jury found she did not have it, error in instruction as to effect of want of knowledge of insured as to her condition was harmless. Perry v. John Hancock Mut. Life Ins. Co., 147 Mich. 645, 14 Det. Leg. N. 19, 111 NW 195. Where facts constituting elements of proximate cause are found in special verdict, inaccuracy in definition harmless. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809. Verbal instruction as to authority of nine jurors to bring in verdict harmless where verdict was unanimous. Baxter v. Magill [Mo. App.] 105 SW 679. Confusion of contributory negligence and assumed risk where jury found that deceased was guilty of neither. Shattuck's Adm'r v. Central Vt. R. Co., 79 Vt. 469, 65 A 529. Submission of issue unsupported by evidence harmless in view of verdict. London v. Crow [Tex. Civ. App.] 19 Tex. Ct. Rep. 451, 102 SW 177. Conflicting instructions cured by verdict. Id. Error in submitting construction of contract to jury harmless where jury construed it correctly. (St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 SW 375; Seago v. White [Tex. Civ. App.] 18 Tex. Ct. Rep. 183, 100 SW 1015; St. Louis, etc., R. Co. v. Payne [Tex. Civ. App.] 19 Tex. Ct. Rep. 765, 104 SW 1077), and a similar rule applies to the **submission** of the construction of a decree of court (Charles v. St. Louis, etc., R. Co., 124 Mo. App. 293, 101 SW 680). Instruction not limiting damages recoverable where verdict allowed proper amount. Western Union Tel. Co. v. Lehman [Md.] 66 A 266. Where verdict was for less than undisputed evidence showed property was worth, improper instruction on measure of damages was harmless. Lake Erie & W. R. Co. v. Hobbs [Ind. App.] 81 NE 90. Charge that in no event could verdict exceed $15,000 harmless where verdict was for $3,000. McGovern v. Interurban R. Co. [Iowa] 111 NW 412. Submission of measure of damages to jury on erroneous theory is harmless where verdict is correct. Kelly v. Pierce [N. D.] 112 NW 995. Correctness of measure of damages rendered immaterial by verdict showing that jury did not consider it. Buick Motor Co. v. Reid Mfg. Co. [Mich.] 14 Det. Leg. N. 626, 113 NW 591. Errors in instructions or damages harmless when verdict was for defendant. Fletcher v. Prestwood [Ala.] 43 S 231; Loveman v. Birmingham R., L. & P. Co. [Ala.] 43 S 411; Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101; Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 S 903. Instruction misstating evidence of witness as to value cured by verdict for less than amount which evidence of such witness would have justified. Calhoun County v. Art Metal Const. Co. [Ala.] 44 S 876. Instruction authorizing consideration of contributory negligence in mitigation of damages harmless where verdict was reasonable in amount. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902. Error in instruction on measure of damages harmless where verdict of $500 was rendered for loss of both legs. Oliver v. Calbert, 30 Ky. L. R. 1316, 101 SW 314.

Not cured: Erroneous instruction not cured by verdict, it not appearing which instructions jury followed. Londonderry Min. Co. v. United Gold Mines Co. [Colo.] 88 P. 455.

Curing failure or refusal to charge: Where jury found that plaintiff was not serving under contract made prior to passage of employers' liability act, refusal to charge that act did not apply to contracts made before its passage is harmless. Pittsburgh, etc., R. Co. v. Collins [Ind.] 80 NE 415. Where jury found that application of brake could not have stopped car, refusal to charge that if car were equipped with proper brake which would have checked train and prevented collision is harmless. Id. Failure to charge jury to make special findings only where general verdict was returned harmless where general verdict was returned. Wallace v. Skinner [Wyo.] 88 P 221. Refusal to instruct where jury could not have arrived at verdict rendered without consideration of matters contained in instruction requested. Picard v. Beers [Mass.] 81 NE 246. Refusal of instruction on damages harmless to plaintiff where jury finds defendant not liable. Rogers v. Rio Grande W. R. Co. [Utah] 90 P 1075. Refusal to charge that in determining value jury might consider amount for which plaintiff agreed to sell harmless where verdict was for a less amount. Calhoun County v. Art Metal Const. Co. [Ala.] 44 S 876. Error in refusing instruction on fraud harmless where jury found that no misleading statements were made. Bridgeport Coal Co. v. Wise County Coal Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 678, 99 SW 409. Refusal to instruct jury as to their verdict if they found no profits would result from certain contract harmless where jury found that profits would have resulted. Nicola Bros. Co. v. Hurst, 30 Ky. L. R. 851, 99 SW 917. Refusal to submit issue as to expenses incurred under contract harmless when jury found there was no contract. Weldon v. Finley [Ky.] 104 SW 701.

79. Where substantial justice has been done, errors in charge are harmless. Baird v. Burton Tel. Co., 10 Ohio C. C. (N. S.) 163. Erroneous admission or exclusion of evidence harmless where correct conclusion supported by competent testimony is reached. Peet v. Peet, 229 Ill. 341, 82 NE 376. Error in admitting evidence harmless where judgment was not rendered on same. Keller v. McGilliard [Cal. App.] 90 P 483; Downing v. Ernst [Colo.] 92 P 230. Erroneous admission of evidence that 8 per cent was agreed rate of interest harmless where only 6 per cent was allowed. Grey v. Callan, 133 Iowa, 500, 110 NW 909. That action was brought in law instead of equity harmless where judgment is correct. Wilson v. White [Ark.] 102 SW 201. Overruling exception that action to restrain collection of taxes could not be maintained without consent of state harmless where court denied injunctive relief. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 SW 157; Texas Co. v. Stephens [Tex. Civ. App.] 99 SW 160. Error in declaring a lien on land insufficiently described in the complaint cured by amendment of judgment eliminating the lien. Salter v. Goldberg [Ala.] 43 S 571. Error in overruling demurrer to petition

HEALTH[1]

§ 1. Validity and Construction of Health Regulations (1586).
§ 2. Health Boards and Officers (1587).
§ 3. Care and Control of Sanitation and Disease (1588).

The scope of this topic is noted below.[82]

§ 1. *Validity and construction of health regulations.*[See 8 C. L. 36]—In the exercise of the police power reasonable regulations for the promotion of the public health, such as regulations excluding unvaccinated children from the schools,[83] governing location of cemeteries,[84] prohibiting the sale of impure and deleterious foods,[85] and indiscriminate transportation of garbage,[86] and dead animals [87] through

harmless where judgment was for defendant. Pardee v. Kuster [Wyo.] 91 P 836. Where in replevin there was no judgment for property taken and not returned, erroneous admission of evidence as to such property is harmless. Indiana Union Trac. Co. v. Bick [Ind. App.] 81 NE 617. Where judgment was on pleadings, errors in rulings on evidence harmless. Bailey v. Aetna Indemnity Co. [Cal. App.] 91 P 416. Refusal to order judgment for plaintiff on pleadings harmless where judgment quieting plaintiff's title was rendered correctly made subject to outstanding lien. Sartor v. Wells [Colo.] 89 P 797. Questions arising under a paragraph not made the basis of the judgment appealed from will not be considered. Robards v. Hamrick, 39 Ind. App. 134, 79 NE 386. Error in refusing to strike cross complaint harmless where judgment was not rendered on cross complaint. Keller v. McGilliard [Cal. App.] 90 P 483. Error in applying credit harmless where judgment was for less than amount to which plaintiff was entitled. Star Mill & Lumber Co. v. Porter [Cal. App.] 88 P 497. Correct judgment will not be reversed because relief was granted on ground not alleged in complainant's bill. Ransier v. Dwyer, 149 Mich. 487, 14 Det. Leg. N. 521, 112 NW 1120. Where decree required conveyance of only an undivided two-fifths interest, defendant was not prejudiced by finding that she apparently owned a life interest in whole tract. Moore v. Gariglietti, 228 Ill. 143, 81 NE 826. Error in awarding certain defendants costs against plaintiff cured by final judgment adjudging all costs against another defendant. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242. Failure to find value of several articles in replevin harmless where judgment was for return of property only. Tucker & Co. v. Freiberg [Tex. Civ. App.] 101 SW 837.

80. McGraw v. O'Neil, 123 Mo. App. 691, 101 SW 132; Houston & T. C. R. Co. v. Barr [Tex. Civ. App.] 17 Tex. Ct. Rep. 705, 99 SW 437. Errors affecting solely the extent of recovery may be cured by remittitur where correct amount can be satisfactorily ascertained. Lyttle v. Goldberg, 131 Wis. 613, 111 NW 718. Erroneous charge cured by remittitur on appeal. Hall v. Luckman, 133 Iowa, 518, 110 NW 916. Error in failing to limit jury in determining damages on certain ground to amount claimed in petition cured. Smith v. Kansas City, 125 Mo. App. 150, 101 SW 1118. Submission of issue not pleaded held cured. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Admission of evidence as to issue not pleaded cured. Id.

Not cured: Where verdict is so large as to indicate passion and prejudice, remittitur will not cure. Belt R. Co. v. Charters, 123 Ill. App. 322. Error in admitting proof of marriage of plaintiff in action for personal injuries not cured. Jones & Adams Co. v. George, 227 Ill. 64, 81 NE 4.

81. See 8 C. L. 29.

82. It includes the validity and execution of health regulations and the powers and duties of officers charged with their enforcement. **It excludes** general matters as to the police power of the state (see Constitutional Law, 9 C. L. 610), and of municipalities (see Municipal Corporations, 8 C. L. 1056), and regulations pertaining to food products (see Adulteration, 9 C. L. 37; Food, 9 C. L. 1369). The practice of medicine and the sale of drugs are also treated in a separate topic (see Medicine and Surgery, 8 C L. 972).

83. Reasonableness of rule requiring pupils to be vaccinated as condition to right to attend school, adopted under authority of Rev. St. § 3986, held for board of education in first instance and only to be judicially interfered with in case of abuse. State v. Board of Education of Barberton, 76 Ohio St. 297, 81 NE 568. Fact that no epidemic of smallpox is prevalent held not to render rule of board requiring all pupils to be vaccinated, as condition to right to attend school, unreasonable and abuse of discretion. Id. Act June 18, 1895 (P. L. 203), held to impose duty upon superintendents, principles, and teachers to exclude pupils from schools who cannot show certificate of vaccination and not upon directors, hence mandamus will not lie against latter. Commonwealth v. Rowe [Pa.] 67 A 56. See, also, Schools and Education, 8 C. L. 1851.

84. Public Health Law, Laws 1893, p. 1502, c. 661, § 21, giving local board of health power to regulate matters detrimental to public health, will not support order restraining use of certain lands for cemetery unless such prohibition is necessary to preserve public health. Morton v. St. Patrick's Roman Catholic Church Soc., 105 NYS 1100. Held not necessary, cemetery being located without city limits and in sparsely settled territory. Id. See, also, Cemeteries, 9 C. L. 541.

85. See Food, 9 C. L. 1369.

86. Fact that garbage contains some element of value held not to prevent such regulation. Nash v. District of Columbia, 28 App. D. C. 598. Grease and cracklings rendered from fats of fresh meats cooked and

the streets, smoke regulations,[88] building regulations,[89] may be adopted by municipalities and statutory boards [90] within the scope of their conferred authority,[91] and subject to constitutional restrictions.[92] A municipality cannot authorize the maintenance of a business injurious to the public health.[93]

§ 2. *Health boards and officers.*[See 8 C. L. 38]—In Massachusetts boards of health cannot appoint one of their own number quarantine officer,[94] while in the absence of statutory authority, towns cannot remove health officers,[95] when such power is conferred it is free from judicial interference except where frivolous and arbitrary.[96] The compensation of health officers in New York is fixed by the local boards of health.[97] Health commissioner is not disqualified to sit as a member of the board of health in Missouri on a hearing to show cause why a business should

carried away within twenty-four hours held not garbage within Police Regulations, D. C. art. 14, § 1. Id.

87. Municipality has power to grant monopoly for transporting and utilizing dead animals which have not been slaughtered for food, and demurrer to petition for injunction against interference with rights under such grant will not lie where petition alleges that carcasses which have become decayed, putrid, or offensive are not transported or handled, and that such transportation and handling has at all times complied with the rules and regulations of the board of health. Stadler v. Cleveland, 4 Ohio N. P. (N. S.) 649.

88. Failure to provide smoke consumer as provided by Sanitary Code, § 96, does not render superintendent liable. People v. Sturgis, 121 App. Div. 407, 106 NYS 61. Sanitary Code, § 96, prohibiting one from allowing smoke to escape to the annoyance of person not engaged in building, held not violated where smoke does not annoy people living in vicinity. Id.

89. Tenement House Law, Laws 1901, p. 905, c. 334, §§ 67, 68, and 71, as amended by Laws 1902, p. 931, c. 352, providing for windows in tenements based upon floor area, construed, and held that alcoves are to be considered as part of room to which annexed and not as separate room. People v. Butler, 105 NYS 117. See, also, Buildings and Building Restrictions, 9 C. L. 441.

90. Act June 24, 1895, P. L. 232, authorizing boards of health to provide for registration of journeymen and master plumbers, held not unlawful delegation of legislative power. Commonwealth v. Shafer, 32 Pa. Super. Ct. 497.

91. Acts 1904, p. 106, c. 35, amendatory of Ky. St. 1903, § 2055, creating county boards of health and defining their powers, held not to authorize resolution placing contagious diseases under exclusive control of health officer and preventing other physicians from attending those afflicted therewith. Trabue v. Todd County [Ky.] 102 SW 309. Municipal Code of Chicago, § 964, prohibiting keeping of certain slops and refuse for cow feed, held within police power granted. Ringelstein v. Chicago, 128 Ill. App. 483. Sanitary Code of Elizabeth, § 2, requiring plans for plumbing and drainage systems to be filed with board, held expressly authorized by Supp. of 1888, § 1 (Gen. St. p. 1642, par. 39), and a reasonable regulation. Board of Health of Elizabeth v. Dickstein [N. J. Law] 67 A 89. Act June 24, 1895, P. L. 232, authorizing boards of health to provide for registration of journeymen and master plumbers, does not authorize rule requiring examination. Commonwealth v. Shafer, 32 Pa. Super. Ct. 497, Regulation thereunder providing for registration of master plumbers only and prohibiting unregistered persons from engaging in plumbing work held invalid as excluding journeymen. Id.

92. Act June 24, 1895, P. L. 232, authorizing boards of health in cities and boroughs having sewerage systems to provide for registration of plumbers, is not void as special legislation because inapplicable to cities without sewerage. Commonwealth v Shafer, 32 Pa. Super. Ct. 497. Rev. St. § 3986, authorizing boards of education to make rules and regulations to prevent spread of smallpox among pupils and to secure vaccination of pupils, held not violative of state or Federal constitution. State v. Board of Education of Barberton, 76 Ohio St. 297, 81 NE 568.

93. Ordinance prohibiting manufacture of any article injurious to public health or which gives off offensive odors in process of manufacture, without obtaining consent of municipal assembly, held not to authorize assembly to allow carrying on of business destructive of public health, etc. State v. St. Louis [Mo.] 105 SW 748.

94. Holds office during pleasure of board of health, is subject to their directions, and his charges must be approved by them, hence inconsistent. Gaw v. Ashley [Mass.] 80 NE 790.

95. Attorney General v. Stratton, 194 Mass. 51, 79 NE 1073.

96. Gaw v. Ashley [Mass.] 80 NE 790. Action of mayor in removing members of board of health for "misuse of authority," etc., in appointing one of their number to inconsistent office of quarantine inspector, is not frivolous or unreasonable (Id.), though such appointment had been made before (Id.).

97. Under Public Health Law, Laws 1893, p. 1502, c. 661, § 21, as amended by Laws 1903, p. 879, c. 383, local board of health may fix its health officer's compensation on yearly basis, and allow expense in attending annual sanitary conference of health officers (People v. Blood, 105 NYS 20), without concurrence of board of town auditors (Id.), and failure of board to formally prescribe duties is no ground for withholding compensation (Id.).

not be abated as injurious to public health.[98] The board of health of Yonkers is not an agent of the city so as to render the latter liable for its torts.[99]

§ 3. *Care and control of sanitation and disease.*[See 8 C. L. 38]—In Louisiana the power to define and abate nuisances dangerous to the public health is vested in the boards of health of the parishes,[1] subject to judicial interference only in case of abuse.[2] The action of the board of health under the public health law of New York in declaring a nuisance is not an adjudication thereof,[3] and a suit to abate the same is properly brought in the name of the village.[4] Special form of conviction in prosecutions by local boards of health for violation of their ordinances is prescribed in some states.[5]

Liability and expense.[See 8 C. L. 39]—In the absence of contract,[6] where the board of health of a city of the fourth class combine with that of the county for treatment of smallpox patients, the city is liable for the expense incurred in treating cases arising within the city and the county for those arising without.[7] Except in the case of an emergency,[8] the secretary of a city board of health cannot be employed to care for smallpox patients in Indiana.[9] The power of taxation and methods of collecting same to support sanitation districts and undertakings is usually statutory.[10]

Hearng; Hearsay; Heirs, Devisees, Next of Kin and Legatees; Herd Laws, see latest topical index.

HIGHWAYS AND STREETS.

§ 1. Definitions and Classifications (1589).
§ 2. Establishment (1589).
A. In General (1589).
B. Prescription or User (1590).
C. Statutory Proceedings (1591). Occasion or Necessity for Road (1591). Application or Petition (1591). Jurisdiction, Notice, and Hearing (1592). Viewing, Locating, and Assessing, and Recovery of Damages (1592). Order Locating the Road (1593). Discontinuance and Dismissal (1594). Appeal or Other Review (1594). Injunction and Other Relief (1594).
§ 3. Boundaries and Extent of Way, Ascertainment, and Resurvey (1595).
§ 4. Alterations and Extensions (1595).

98. State v. St. Louis [Mo.] 105 SW 748.

99. Board of health of Yonkers, created by Laws 1881, p. 265, c. 184, tit. 9, § 1. Prime v. Yonkers, 116 App. Div. 699, 102 NYS 118.

1. Police jury is without power to modify ordinance adopted by board of health defining and prohibiting a nuisance. Naccari v. Rappelet, 119 La. 272, 44 S 13.

2. Naccari v. Rappelet, 119 La. 272, 44 S 13. Ordinance prohibiting use of fish and shrimp-shell refuse as fertilizer held not so arbitrary as to justify judicial interference, though some evidence tended to show that use during winter was not injurious. Id.

3. Complaint for abatement must allege facts showing that it is a nuisance. Village of White Plains v. Tarrytown, etc., R. Co., 117 App. Div. 910, 102 NYS 1046.

4. Under Public Health Law, Laws 1893, c. 661, p. 1502, § 21, where board of health of village has declared a nuisance, action to abate same is properly brought in name of village instead of board of health. Village of White Plains v. Tarrytown, etc., R. Co., 117 App. Div. 841, 102 NYS 1046.

5. Gen. St. p. 1642, par. 41, prescribing form of conviction in prosecutions by local boards of health for violation of their ordinances, held valid exercise of legislative power. Board of Health of Elizabeth v. Dickstein [N. J. Law] 67 A 89. On conviction thereunder it is not necessary that judge sign conviction on docket. Id.

6. Conceding that under agreement county was liable for one-half of necessary expense, city cannot recover additional amount without showing that sum received was less than one-half of "actual and necessary" expense incurred. Pulaski County v. Somerset, 30 Ky. L. R. 387, 98 SW 1022.

7. Pulaski County v. Somerset, 30 Ky. L. R. 387, 98 SW 1022. And where county pays sum to city as one-half of total expense incurred, it cannot recover a part thereof in absence of showing that amount paid exceeded amount which it would have cost to treat patients afflicted without city. Id.

8. Evidence that there were other available physicians to care for smallpox patients, held that there was no such emergency as to authorize employment of secretary in violation of act. City of Greenfield v. Black [Ind. App.] 82 NE 797.

9. Officer within Act March 14, 1867 (Laws 1867, p. 53, c. 15, § 152; 2 Burns' Ann. St. 1901, § 3539), declaring that no city officer shall be interested in any contract with city, etc. City of Greenfield v. Black [Ind. App.] 82 NE 797.

10. St. 1891, p. 223, c. 161, held not to authorize board of sanitary districts to adopt method of own to collect taxes and enforce same through county tax collector, but if it adopts method of collection different from that provided b ygeneral tax law it must enforce same through own officers. Guptill v. Kelsey [Cal. App.] 91 P 409.

§ 5. Change of Grade (1596).
§ 6. Improvement and Repair (1598).
§ 7. Abandonment and Diminution (1600).
§ 8. Vacation (1601).
§ 9. Street and Highway Officers and Districts (1603).
§ 10. Fiscal Affairs (1603).
§ 11. Control by Public and Public Regulations (1605).
§ 12. Rights of Public Use; Law of the Road (1608).
§ 13. Rights of Abutters (1611). Ownership of Fee (1612).
§ 14. Defective or Unsafe Streets or Highways (1613).
A. Liability of Municipalities in General (1613).
B. Notice of Defect (1615).
C. Sidewalks (1615).
D. Barriers, Railings, and Signals (1616).
E. Snow and Ice (1616).
F. Defects Created or Permitted by Abutting Owners and Otherwise (1616).
G. Persons Entitled to Protection (1618).
H. Remote and Proximate Cause of Injury (1618).
I. Contributory Negligence of Person Injured (1619).
§ 15. Actions for Injuries (1620). Notice of Claim for Injury and Intent to Sue (1620). Pleading (1621). Evidence (1622). Questions for the Jury, Instructions and Findings (1623).
§ 16. Injury to, Obstructions of, or Encroachment on, Street or Highway (1626).

The scope of this topic is noted below.[11]

§ 1. *Definitions and classifications.* See 8 C. L. 40—The terms "street," "highway," and "road" have been variously defined.[12] A distinction is sometimes observed between "public road" and "public highway."[13] Whether a county road becomes a street when included within the limits of a city depends upon the legislative intent.[14] That a street is conveyed to park commissioners and improved as an approach to a park does not make it a part of the park.[15]

§ 2. *Establishment. A. In general.*—A public road may be established by legislative enactment, statutory proceedings, dedication, or prescription.[16] General principles of dedication are elsewhere discussed.[17] Mandamus will not issue to compel a board to change a discretionary decision for or against the establishment of a

11. This title embraces all the questions of existence, establishment, construction and maintenance of roads, comprehended by §§ 1-9; the public administration of highway matters as comprehended by §§ 10-12; the rights in highways as comprehended in §§ 13, 14; the liability for unsafe or defective highways as comprehended in § 15; and the tortious or criminal obstruction or misuse of highways (§ 16). General matters of public administrative law which do not depend upon any principle peculiar to highways and streets are not included, though they may arise in some connection with highways. For example, see topics Bridges, 9 C. L. 408; Dedication, 9 C. L. 939; Eminent Domain, 9 C. L. 1073; Municipal Corporations, 8 C. L. 1056; Parks and Public Grounds, 8 C. L. 1233; Public Works and Improvements, 8 C. L. 1506; Railroads, 8 C. L. 1590; Sewers and Drains, 8 C. L. 1882; Street Railways, 8 C. L. 2004; Toll Roads and Bridges, 8 C. L. 2123.

12. A street is a road or public way in a city, town, or village laid out and opened for travel by the public. Robins v. McGehee, 127 Ga. 431, 56 SE 461. Public highway is one under the control of the public, dedicated by the owner, used by the public for 20 years, or established in a regular proceeding. Dunn v. Dunn [Ala.] 42 S 686. Rev. Code 1852, as amended 1893, p. 491, c. 60, § 1, relative to highways previously laid out or made or maintained for 20 years, was merely descriptive of highways at time of its enactment and did not apply to others subsequently established by public authority or private dedication. State v. Southard [Del.] 66 A 372. "Streets" includes sidewalks. Van Gorder v. Seneca Falls, 104 NYS 299. Though in a popular sense the word "road" is a generic term including all overland ways of every character, it has no fixed meaning in law, its scope depending upon the context in which it appears. Griffin v. Sanborn, 127 Ga. 17, 56 SE 71.

13. "Public road" refers to the land, while "public highway" includes all the various public easements. Johnson v. State, 1 Ga. App. 195, 58 SE 265.

14. When the legislature expressly confers upon a municipality control of county roads within its limits and excepts its territory from county control for road purposes, such county roads thereby become streets and subject to burdens as such. Oliver v. Newberg [Or.] 91 P 470.

15. Could be condemned for street railway extension. In re Union Trac. Co., 104 NYS 377.

16. Johnson v. State, 1 Ga. App. 195, 58 SE 265. May be established by deed or contract between private parties in interest. Bent v. Trimboli, 61 W. Va. 509, 56 SE 881. A recorded plat of the division of a farm into a number of tracts, upon which is shown a narrow way that "is for the common use of all persons interested now or who may hereinafter be interested in said divisions or parts thereof," creates an easement only, and said way does not become a public way except by dedication and acceptance or the acquirement of title therein by prescription, nor does the use of such a way by the public after annexation to a municipality create in the municipality any title or responsibility for such way. Bonebrake v. Columbus, 6 Ohio N. P. (N. S.) 41.

17. See Dedication, 9 C. L. 939.

road.[18] A street once in existence is presumed to continue until it ceases to be such by abandonment or other lawful cause.[19]

(§ 2) *B. Prescription or user.* See 8 C. L. 41, 43—Highways may be established by prescription,[20] but there must be an adverse, uninterrupted, public user of a well defined way for the statutory period.[21] Dedicatory intent is not essential to the es-

18. Under Code, §§ 1501, 1512, establishment of consent road is discretionary with board of supervisors, and mandamus will not issue to compel board to change decision. Parry v. Clarke County Sup'rs, 133 Iowa, 281, 110 NW 591.

19. City of Buffalo v. Delaware, L. & W. R. Co. [N. Y.] 82 NE 513.

20. Highways by user for 20 years exist under Pub. St. 1901, c. 67. § 1, notwithstanding §§ 2, 12, 13, prescribing methods for laying out roads. Harriman v. Moore & Co. [N. H.] 67 A 225. Under this statute a way will not become public if the travel is limited to travel to and from a toll bridge or ferry (Id.), but if it is used for general public travel, though not exclusively for such travel, it becomes a public highway by 20 years' user (Id.). Twenty years' actual occupancy and use of a particular strip creates a public highway (State v. Lloyd [Wis.] 113 NW 964), and it is immaterial that such strip was used in the mistaken belief that it corresponded to a formerly laid out road (Id.). A grant of land for a highway will be presumed from exclusive, uninterrupted public use for a period sufficient to bar an action for its recovery (Meade v. Topeka, 75 Kan. 61, 88 P 574), and burden of showing that the use was only permissive is on the owner of the title (Id.). Mere adverse user acquiesced in for 20 years conclusively shows abandonment to public. Riverside Tp. v. Pennsylvania R. Co. [N. J. Err. & App.] 66 A 433. On issue of highway by user, witness may testify that he was employed by highway commissioner to look after road and to see that it was not obstructed. Parkey v. Galloway, 147 Mich. 693, 14 Det. Leg. N. 34, 111 NW 348.

Evidence sufficient to show highway by prescription. Village of Peotone v. Illinois Cent. R. Co., 224 Ill. 101, 79 NE 678; Canton Co. of Baltimore v. Baltimore, 104 Md. 582, 65 A 324; Commonwealth v. Henchey [Mass.] 82 NE 4; Pope v. Alexander [Mont.] 92 P 203; Harriman v. Moore & Co. [N. H.] 67 A 225; Dover Tp. v. Brackenridge [N. J. Law] 67 A 689. Though adjoining owners had built gates where it crossed railroad. Sikes v. St. Louis, etc., R. Co. [Mo. App.] 105 SW 700. Evidence of user and improvements held to justify refusal of instruction that there was no evidence of highway by user. Parkey v. Galloway, 147 Mich. 693, 14 Det. Leg. N. 34, 111 NW 348.

21. Adverse, uninterrupted public user under claim of right for 21 years held necessary to title by prescription. Cincinnati & M. V. R. Co. v. Roseville, 76 Ohio St. 108, 81 NE 178. Must be shown that a well defined line of travel has been used by the public for the statutory period adversely and continuously with the owner's knowledge and without his consent. Evidence held to warrant finding that city had not acquired the land in dispute by prescription. City of Chicago v. Galt, 224 Ill. 421, 79 NE 701.

Adverse user: Permissive use refers to the conduct of an owner in consenting to travel by the public, while adverse user imports an assertion of right by the travelers hostile to the owner. Township Com'rs v. Charleston Min. & Mfg. Co., 76 S. C. 382, 57 SE 201. Mere use of land for highway raises no presumption that it was adverse. Gosdin v. Williams [Ala.] 44 S 611. Where there is no attempt at public repair or control over a **road through open and unfenced lands,** the presumption is that a public use is not adverse to the owner. Brumley v. State [Ark.] 103 SW 615; Van Wanning v. Deeter [Neb.] 112 NW 902. One who claims the right to close a street used by the public for over twenty years has the burden of showing that such user was consistent with his claims of private ownership and control. Canton Co. of Baltimore v. Baltimore, 104 Md. 582, 65 A 324. Evidence insufficient to show adverse use by general public of way over certain school land. Petterson v. Waske [Wash.] 88 P 206.

Use and improvement: Twenty years' public use and improvement necessary. Johnson v. State, 1 Ga. App. 195, 58 SE 265. Failure to improve road where no improvement is required does not necessarily destroy presumption of implied dedication arising from 10 years' user. Brandt v. Olson [Neb.] 113 NW 151. It must be assumed that a road used generally by the public for 25 or 30 years is a public highway making it unlawful to obstruct it, though there is nothing to show that it is what might be termed "a county road" worked and maintained by the public authorities. Smith v. Illinois Cent. R. Co. [Ky.] 105 SW 96. That a road had never been worked by county as required by Rev. St. 1899, § 9694, held immaterial where prescription was complete before passage of the act. Sikes v. St. Louis & S. F. R. Co. [Mo. App.] 105 SW 700.

Statutory period: Seven years' user is necessary to establish a highway under Ballinger's Ann. Codes & St. § 3846, notwithstanding the act of congress granting right of way for construction of highways over public lands not reserved for public use. Vogler v. Anderson [Wash.] 89 P 551. Ten or more years' user and improvement sufficient to establish county road. Ridings v. Marion County [Or.] 91 P 22. Act of owner in fencing in a part of a traveled road and in establishing a new one in its place held not to interrupt running of statute. Berry v. St. Louis, etc., R. Co. [Mo. App.] 101 SW 714. Where public has acquired a prescriptive easement, city may assert the right without having itself claimed the easement for full prescriptive period. City of Ft. Worth v. Mansfield [Tex. Civ. App.] 17 Tex. Ct. Rep. 704, 99 SW 436.

Well defined way: Travel generally over uninclosed tract not sufficient. Pope v. Alexander [Mont.] 92 P 203. Divergence of travel held not a sufficient variance to defeat presumption of implied dedication arising from 10 years' user. Brandt v. Olsen [Neb.] 113 NW 151.

tablishment of a highway by prescription.[22] Proof of user is not inadmissible because a highway may also be one of record,[23] nor is prescription prevented by an attempted dedication.[24] User is evidence of an acceptance by the public of an offer to dedicate land for highway purposes.[25]

(§ 2) *C. Statutory proceedings.*[See 8 C. L. 44]—The authority of public officials to lay out highways is derived from statute,[26] in accordance with which the essential proceedings vary.[27] It may be said in general that statutory requirements must be fully and strictly complied with,[28] and that, since the duties of municipal officers in this connection are in their nature judicial,[29] disqualification of such officers vitiates a proceeding.[30] Special provision is made in some states for the opening of private roads.[31]

Occasion or necessity for road.[See 8 C. L. 44]—It must appear that there is sufficient reason or necessity for a road,[32] and this question is usually addressed to the discretion of some board.[33]

Application or petition.[See 8 C. L. 45]—A petition is generally essential.[34] This must be sufficient to give jurisdiction,[35] and to this end must describe the easement desired with reasonable definiteness,[36] give correctly the names of landowners,[37] and be

22. Immaterial what original owner intended. Village of Peotone v. Illinois Cent. R. Co., 224 Ill. 101, 79 NE 678.

23. Harriman v. Moore & Co. [N. H.] 67 A 225.

24. Commonwealth v. Henchey [Mass.] 82 NE 4.

25. Rev. St. § 2477 (U. S. Comp. St. 1901, p. 1559), authorizing public lands not reserved for public purpose to be taken for public roads, held a standing offer of dedication (Van Wanning v. Deeter [Neb.] 110 NW 703), and long and continuous user of road across public lands by settlers held to show acceptance (Id.).

On rehearing it is held that defendant had the burden of showing that the land was public domain at time of the passage of the act (Van Wanning v. Deeter [Neb.] 112 NW 902), and that the evidence did not show this fact (Id.).

26. No public way can be located across flats without authority from the legislature. Chase v. Cochran, 102 Me. 431, 67 A 320.

27. Under Pub. St. 1901, c. 67, § 12, authorizing towns on the Connecticut River to contract with towns on the Vermont side for the purchase of the realty franchise, etc., of any bridge corporation, a highway is established when the contract is made and the property purchased without any further proceedings. O'Neil v. Walpole [N. H.] 66 A 119. Certification by park commissioners of map of portion of New York, pursuant to Laws 1874, 1876, declared to be final as to location and existence of streets, held a legal appropriation and designation of streets shown thereon. In re Jerome Ave., 105 NYS 319. Act of 1873 (Gen. St. 1873, p. 959), declaring section lines public roads, did not of itself create lawful highway, but proper authorities must provide for payment of damages. Van Wanning v. Deeter [Neb.] 112 NW 902.

28. Laying out of townway. Appeal of Conant, 102 Me. 477, 67 A 564.

29. Appeal of Conant, 102 Me. 477, 67 A 564.

30. A proceeding is void where one of the town officers who laid out the road was also petitioner. Appeal of Conant, 102 Me. 477, 67 A 564. Where highway commissioner's determination of necessity for highway has been affirmed on appeal to township board, it is immaterial that commissioner was disqualified. Bogue v. De Long, 147 Mich. 63, 13 Det. Leg. N. 945, 110 NW 119.

31. Private roads may be opened for the convenience of one or more residents of any road district, the persons for whom they are laid out paying the damage awarded to land owners and keeping the roads in repair. Rev. St. 1887, § 933. Latah County v. Hasfurther, 12 Idaho, 797, 88 P 433.

32. Under Acts 1901, p. 950, c. 729, § 13, providing for the laying out of a private cartway "if sufficient reasons be shown," petition alleging that an existing road was very rough and increased distance about three miles held sufficient against demurrer. Cook v. Vickers, 144 N. C. 312, 57 SE 1.

33. Under Code 1906, § 4400, providing procedure for establishment of roads, necessity therefor is matter addressed to discretion of board of supervisors. Strahan v. Attala County Sup'rs [Miss.] 44 S 857.

34. Petition for a way is necessary to authorize selectmen to lay out a townway under the statute. Cushing v. Webb, 102 Me. 157, 66 A 719.

35. Where original petition for a townway was lost, return of selectmen and long acquiescence held at least prima facie evidence that petition was sufficient to give jurisdiction to selectmen exempting it from collateral attack. Cushing v. Webb, 102 Me. 157, 66 A 719.

36. Proceeding under Laws 1903, p. 269, §§ 20-24, void where neither petition nor order appointing viewers specified whether it should be a county road or a gateway, but left this matter with viewers. Shannon v. Malheur County Ct., 48 Or. 617, 87 P 1045. The way must be described in the petition and with such definiteness that when notice of it is given the public and property owners will be appraised with reasonable certainty where the way is sought to be located. Cushing v. Webb, 102 Me. 157, 66 A 719.

37. Failure of petition to give correct name of owner under Rev. St. 1899, § 10,343

properly signed.[38] Where the statute authorizes the county board to pass on the sufficiency of a petition, their findings cannot be collaterally attacked.[39]

Jurisdiction, notice, and hearing.[See 8 C. L. 45]—Notice in substantial compliance with the statute,[40] and properly served [41] or posted,[42] is necessary,[43] but failure to give notice to all landowners along a proposed road does not invalidate proceedings as to those served,[44] and a board whose order refusing to lay out a highway has been reversed may thereafter lay it out without a second notice.[45] Denial of a petition after full statement of what petitioners' witnesses would testify to is equivalent to a hearing.[46] Irregularities in the appointment of commissioners may be waived by appearing before them and opposing the opening of the road.[47] Proceedings of a township board may be collaterally attacked for want of jurisdiction.[48]

Viewing, locating, and assessing, and recovery of damages.[See 8 C. L. 46]—An application for the appointment of viewers or commissioners is premature where made before the expiration of the statutory period after publication of notice.[49] The order appointing reviewers must specify the kind of easement to be located.[50] A proceeding in which a viewer failed to take the statutory oath is voidable.[51] The duties of commissioners are governed by the statute in force at the time of their appointment.[52] Roads cannot be located or established on public land except on lines au-

(Ann. St. 1906, p. 4672), leaves township board without jurisdiction. Mulligan v. Martin, 125 Mo. App. 630, 102 SW 59.

38. One signature sufficient to petition for private road under Rev. St. 1887, § 933. Latah County v. Hasfurther, 12 Idaho, 797, 88 P 433.

39. On ground that petition was not signed by requisite number of householders. Ballinger's Sup. § 3775. State v. Pierce County Super. Ct. [Wash.] 91 P 241.

40. Notice of application for appointment of commissioners to lay out highway served on afternoon of June 6th and returnable in forenoon of June 11th held five days' notice within highway law. In re Niel, 55 Misc. 317, 106 NYS 479. Commissioners' notice fixing hearing on petition to lay out road at "the site of the road" is insufficient. Hand v. Audubon, 123 Ill. App. 600.

41. Service of town road order by reading original down to description of property and by handing copy thereof to occupant, which copy was correct except as to date of hearing, held personal service within Rev. Laws 1905, § 1172. Damon v. Town Board of Baldwin [Minn.] 112 NW 536. Under Code, § 1495, service on husband who is shown by auditor's transfer book to be owner is sufficient, though index book shows co-ownership with wife and transfer book refers to recorder's records which also show such co-ownership. Berger v. Tracy [Iowa] 113 NW 465.

42. Statutes providing for posting of notices for the laying out of county roads and for the designation of the places for posting must be reasonably construed. Lutgen v. Stearns County Com'rs, 99 Minn. 499, 110 NW 1. Where post has not been provided for by supervisors as required by Gen. St. 1894, § 1030, notice posted at place which had been previously designated and used held sufficient. Id. Affidavit of posting which states that notice was posted upon the elm tree, near a designated school house, which was one of the public places in the township, held sufficient in view of recital of jurisdictional facts in order of commissioners. Id.

43. Selectmen's return is prima facie evidence that they gave notice on petition and also of such other facts as were required to be embraced in the notice, such as that notice contained a description of the way and what it was. Cushing v. Webb, 102 Me. 157, 66 A 719.

44. Town of Tyrone v. Burns, 102 Minn. 318, 113 NW 695. Hence damages paid to one duly served cannot be recovered back. Id.

45. Where commissioners reverse order of supervisors refusing to lay out highway, latter may proceed to lay out same without again giving notice required by St. 1898, § 1267. Morris v. Edwards [Wis.] 112 NW 248.

46. Hearing required by Code 1906, § 4400. Strahan v. Attala County Sup'rs [Miss.] 44 S. 857.

47. Highway commissioners served with notice of application for appointment of commissioners to lay out highway but not appearing on the hearing of application, and thereafter appearing before commissioners and opposing the opening, held to have waived irregularities in appointment of commissioners. In re Niel, 55 Misc. 317, 106 NYS 479.

48. Mulligan v. Martin, 125 Mo. App. 630, 102 SW 59.

49. Under Buffalo City Charter, Laws 1891, p. 225, c. 105, § 420, at least 10 days must elapse between expiration of the two weeks of publication of notice of application for appointment of commissioners to ascertain compensation for land to be taken and time of application. In re Street Opening in Buffalo, 52 Misc. 313, 102 NYS 218.

50. Proceedings void where neither petition nor order specified whether road was to be a county road or a gateway, but left this discretionary with viewers. Shannon v. Malheur County Ct., 48 Or. 617, 87 P 1045.

51. Proceedings for establishment of private road held voidable where county surveyor appointed as a viewer did not take the statutory oath, the law not requiring his appointment. Latah County v. Hasfurther, 12 Idaho, 797, 88 P 433.

52. Where appointment of commissioners

thorized by statute.[53] Upon recommending the establishment of a road, a commissioner should cause it to be surveyed and plainly marked if its precise location cannot be otherwise given.[54] Damages will depend largely upon the value of the land taken.[55] Benefits may be set off against the damages.[56] Under the New York charter assessments for benefits affect not only the land but are a personal liability against the owners.[57] Recitals in a commissioners' report relative to assessments of benefits are presumably true.[58] Insufficiency of description in report of commissioner recommending establishment of a proposed road is waived by filing claim for damages.[59] Where land is subject to easements, the fee owner is not entitled to the full award.[60] A commissioners' award of damages cannot be disturbed except for manifest errors of law.[61] Notice of a second hearing is generally given on the coming in of the report of viewers, commissioners or surveyors.[62]

Order locating the road.[See 8 C. L. 47]—A board's record of the report of viewers and plat of a road in a book kept for the purpose of showing established highways is equivalent to a declaration of location and establishment.[63] The road must be laid out in accordance with the petition,[64] and must be described with reasonable certainty.[65] In Washington the county court may fix the width of the road at 60 feet or less without regard to the prayer of a petitioner.[66] The validity of an order of a court of superior jurisdiction will be presumed on collateral attack.[67] In Wisconsin

was not made until after adoption of New York Charter, their general duties and those of city as to payment for land were governed by the charter. In re Jerome Ave., 105 NYS 315.

53. Under statutes of Nebraska, held that road could not be established across public lands except on section lines. State v. Boone County [Neb.] 110 NW 629.

54. Hoye v. Diehls [Neb.] 110 NW 714.

55. Where land condemned by a city for a park and boulevard contained stone, evidence of its quality was pertinent on question of damages. Keim v. Reading, 32 Pa. Super Ct. 613. See Eminent Domain, 9 C. L. 1073.

56. Laws 1879, c. 310, p. 397, prohibiting the imposition of assessments on land used for cemetery purposes, does not prevent a deduction of benefits from damages. In re Jerome Ave., 105 NYS 315.

57. Laws 1897, § 1004. In re Jerome Ave., 105 NYS 315.

58. Where commissioners certified that they had complied with law and limited assessment to one-half of value of the lots as valued by them. In re Avenue D, 106 NYS 889.

59. Hoye v. Diehls [Neb.] 110 NW 714. And injunction will not lie to prevent establishment thereof. Id.

60. Holder of easements entitled to their value. In re Jerome Ave., 105 NYS 319.

61. In re Redmond, 105 NYS 936.

62. Sess. Laws 1901, c. 96, p. 200, having provided that county surveyor shall take place of viewers but having failed to amend Ballinger's Ann. Codes & St. §§ 3871, 3872, providing for notice to landowners on report of viewers, notice on landowners on report of surveyor is proper and effectual. State v. Pierce County Super. Ct. [Wash.] 91 P 241.

63. Boulder County Com'rs v. Brierly [Colo.] 88 P 859.

64. Where petition for a townway was lost, return of selectmen and long acquiescence held to justify presumption on collateral attack that laying out of road was in accordance with petition. Cushing v. Webb, 102 Me. 157, 66 A 719. No objection that way consisted of two streets connecting at right angles. Id.

65. Under Pol. Code, § 520, the records of the county commissioners must describe the location of the road with such particularity as to clearly designate it to the ministerial officers charged with its improvement. Green v. Road Board of Bibb County, 126 Ga. 693, 56 SE 59. Description naming certain persons "past or through" whose lands the road was to pass held too indefinite and not cured by "pegging out," record not indicating manner or location of pegging. Id. Decision of commissioners held sufficiently definite as to starting point and width of road where it contained a survey shown by the petition and application for appointment of commissioners, which survey stated the starting point, width, and center. In re Redmond, 105 NYS 936. Acceptance by town of "road" laid out by selectmen sufficient though road consisted of two connecting streets running at right angles. Cushing v. Webb, 102 Me. 157, 66 A 719. Order establishing road held void for uncertainty of location. Green v. Road Board of Bibb County, 126 Ga. 693, 56 SE 59.

66. Under Code 1881, § 2979, the county court may fix the width of a road at 60 feet or less upon the prayer of any petitioner at the hearing, but they are not bound by a petitioner's prayer and may fix any width which the circumstances seem to warrant. Hab v. Georgetown [Wash.] 91 P 10.

67. In establishment of highways county court is a court of superior jurisdiction. Brumley v. State [Ark.] 103 SW 615. Order reciting that petition for highway was signed by ten citizens and that notice had been given as required by law held to sufficiently show that petitioners were freeholders and that notice had been served. Id.

failure to file the order within ten days after deciding upon the application renders it inoperative.[68]

Discontinuance and dismissal.[See 8 C. L. 47]

Appeal or other review.[See 8 C. L. 49]—The right of appeal,[69] procedure,[70] and questions reviewable,[71] will depend upon the statute. In proceedings to lay out a townway in Maine, the question of the jurisdiction of the county commissioners and any other questions affecting the legality of their proceedings may be raised when the report of the committee on further appeal is offered for acceptance.[72] On an appeal de novo on the question of damages, a landowner is not confined to the elements of damage claimed before the jury of view.[73] In the absence of statutory requirement, an appellate board in reviewing the question of necessity for a highway need not view the premises.[74] Remote relationship or conduct not calculated to influence the decision will not disqualify such board or its members.[75]

Injunction and other relief [See 8 C. L. 50] may be barred by delay,[76] but the fact that one petitions for a highway does not estop him to deny the legality of its subsequent location.[77] An interested town is properly made defendant.[78]

When town supervisors lay out a highway in Wisconsin, landowners are entitled

68. St. 1898, § 1269. Morris v. Ewdards [Wis.] 112 NW 248. Where supervisors refusal to lay out road was reversed by commissioners, and supervisors thereafter met and laid out a road, failure to file order within ten days from reversal held not to invalidate proceedings. Id.

69. Landholders dissatisfied with proceedings for establishment of private road under Rev. St. 1887, § 933, may appeal to district court where case will be heard de novo or may refuse award and thus compel condemnation. Latah County v. Hasfurther, 12 Idaho, 797, 88 P 433. Appeal to district court governed by Sess. Laws 1899, p. 273, § 4. Id. Under Acts April 15, 1891, P. L. 17, and May 26, 1891, P. L. 116, a landowner in Butler County may appeal to the common pleas from a report of a road jury denying him damages, though local act Feb. 1854, P. L. 62, makes the report final. Kohler v. Butler County, 31 Pa. Super. Ct. 305. Citizens and taxpayers of a city held to have no right to appeal from laying out of a highway by mayor and board of aldermen. Lane v. Keene [N. H.] 66 A 101.

70. Since supervisors in laying out a highway under St. 1898, c. 52, act on behalf of town and are a permanent and continuous body, writ of certiorari to review their action should run to the board and not to the clerk. State v. Town Clerk of Lebanon, [Wis.] 111 NW 1129. Affidavit that affiant filed with auditor notice of appeal from order of supervisors denying petition for road held not objectionable as a mere conclusion. Rosaaen v. Black Hammer [Minn.] 112 NW 267. Affidavit held sufficient to sustain finding that notice had been filed. Id. Under Code 1896, § 2497, making petitioners for private road liable for cost thereof and requiring them to keep same in repair, on appeal from commissioners' court to circuit court from order confirming report of viewers, landowners should be on one side and petitioners on other. Cleckler v. Morrow [Ala.] 43 S 784.

71. Under Code 1896, § 2450, the only matter to be reviewed on appeal from order of commissioners' court confirming report of viewers laying out private road is the question of damages (Cleckler v. Morrow [Ala.] 43 S 784), question of necessity for road and whether report of viewers should be set aside cannot be considered (Id.). Under a statute providing for a determination de novo on appeal, the public necessity of a proposed highway may be inquired into. Appeal under Rev. St. 1899, § 9419 (Ann. St. 1906, p. 4333), from judgment of county court opening highway. Mayes v. Palmer, 206 Mo. 293, 103 SW 1140.

72. Appeal of Conant, 102 Me. 477, 67 A 564.

73. Home v. Montgomery County [Pa.] 67 A 209.

74. Under Pub. Acts 1905, p. 285, No. 195, township board need not view premises on appeal from highway commissioner. Bogue v. De Long, 147 Mich. 63, 13 Det Leg. N. 945, 110 NW 119.

75. Township board held not disqualified to hear appeal from highway commissioner's determination of necessity for highway because prior hearing of appeal of other persons in the proceeding. Bogue v. De Long, 147 Mich. 63, 13 Det. Leg. N. 945, 110 NW 119. Member of board not disqualified because his wife was sister of deceased wife of an applicant, because wife had signed former petition for road, or because, as a member, he had authorized expenditure of money to open the road. Id.

76. Where town was barred by delay from attacking laying out of a highway, inhabitants and taxpayers were also barred from doing so on petition for discontinuance of road on ground that selectmen were disqualified, though petitioners were not individually parties to the proceedings. Town of New London v. Davis [N. H.] 65 A 107.

77. Bridge across plaintiff's flats without authority from legislature. Chase v. Cochran, 102 Me. 431, 67 A 320.

78. In suit to restrain a borough from using certain land for widening of a street, a town having control of construction and repair of portion of the street was properly made defendant. Pinney v. Winsted, 79 Conn. 606, 66 A 337.

to 30 days' notice to remove fences,[79] but are not required to remove them between April and November unless they are in default after a previous valid notice has been served.[80]

§ 3. *Boundaries and extent of way, ascertainment, and resurvey.*[See 8 C. L. 50]—The question of boundaries or extent of a road is often one of fact [81] to be determined from competent evidence.[82] Immemorial fence lines will overcome legendary opinions as to where the lines were intended to be.[83] Many years' use and improvement of a road laid out on a township line raises a presumption that the actual location was correct.[84] A grant presumed by user is confined to the tract actually used.[85] While this does not mean that the public will be confined to the precise track made by the wheels of the vehicles,[86] a use generally in a uniform direction must be reasonable in extent.[87] Mere improvement ordinances are ineffectual to extend the width of a street.[88]

§ 4. *Alterations and extensions.*[See 8 C. L. 50]—Provision is generally made by statute for the alteration or extension of roads [89] on valid notice,[90] when a change is for the public benefit.[91] After a petition for the alteration of a road has been passed on a request by part of the signers to withdraw their names comes too late.[92] In Illi-

79. Notice to landowner to remove fence held not invalidated by erroneous recital of date of order laying out road where such order was annexed and owner could not have been misled by mistake. Morris v. Edwards [Wis.] 112 NW 248. Notice to remove within 30 days from "date of order" held sufficient under St. 1898, § 1284, requiring that he be allowed "not less than 30 days after giving of notice," such notice being served on day it was dated. Id.

80. Where landowner is in default after due notice to remove fence, county supervisors may order same removed between April 1st and November 1st, St. 1898, § 1284, applying only to original order. Morris v. Edwards [Wis.] 112 NW 248.

81. Evidence insufficient to show that a street extended to Hudson River prior to filling in of lands under water. Iselin v. Cold Springs, 105 NYS 184.

82. Under a statute providing that all public highways in use and theretofore laid out and allowed by law, of which record shall have been made, shall be deemed public highways, a record of an old survey is useless on the issue of the extent of a way in the absence of proof of user or laying out. Rev. St. (1st Ed.) p. 520, c. 17, §§ 98, 100. Iselin v. Cold Springs, 105 NYS 184.

83. Officers held not authorized to appropriate land beyond immemorial fence line without legal process. Anderson v. Huntington [Ind. App.] 81 NE 223. Error to permit testimony as to understanding of witnesses as to original width of road. Id.

84. Council Grove Tp. v. Bowman [Kan.] 92 P 550.

85. Anderson v. Huntington [Ind. App.] 81 NE 223. Meade v. Topeka, 75 Kan. 61, 88 P 574. Where after an ineffective attempt to establish a section line highway public continues to use same but travel wholly on one section because of fence enclosing other, establishment of highway by user does not give public title to two rods on section not traveled, under Comp. Laws, § 4061, providing that all highways which shall become such by use shall be four rods wide, and where situated on section lines such lines shall be the center, etc. Watz v. Sunderland. 147 Mich. 96, 13 Det. Leg. N. 969, 110 NW 507.

86. Montgomery v. Somers [Or.] 90 P 674.

87. Where loose stock had been driven over the land, held proper to limit width of road to 60 feet, the statutory width of county roads. Montgomery v. Somers [Or.] 90 P 674.

88. Where street as originally dedicated was only 50 feet wide, city could not acquire right to greater width either by improvement ordinances or otherwise accept by condemnation. Elliot v. Atlantic City, 149 F 849.

89. City charter held sufficiently comprehensive to authorize deflection of a street near one of its termini. Athens Terminal Co. v. Athens Foundry & Mach. Works [Ga.] 58 SE 891. A borough held authorized to extend streets across complainant's railroad by ordinance. Act June 7, 1901, P. L. 531, prohibiting grade crossings, held not to apply, the same having been passed three years later. Ligonier Valley R. Co. v. Latrobe Borough, 216 Pa. 221, 65 A 548. Public road can only be changed by order of county court made in accordance with Ky. St. 1903, §§ 4289, 4290, and parol agreement with county judge is insufficient. Big Sandy R. Co. v. Floyd County [Ky.] 101 SW 354.

90. Notice of relocation need not state width of proposed road but only "the place of beginning the intermediate points, if any, and the place of termination." Code 1881, § 2871. Hab v. Georgetown [Wash.] 91 P 10.

91. Under Rev. St. 1895, arts. 4672, 4696, it is for commissioners' court to determine whether proposed change in course of public road is for the public benefit, and its determination will be disturbed only in case of abuse of power. Smith v. Ernest [Tex. Civ. App.] 19 Tex. Ct. Rep. 422, 102 SW 129. Mere fact that proposed road was longer held not to show abuse in ordering change. Id.

92. After commissioners had passed on petition, request could not be granted by supervisors on appeal. Commissioners of Highways of Tolono v. Bear, 224 Ill. 259, 79 NE 581.

nois persons interested in the alteration of a road may make inducements by paying money to the town for the benefit of the road and bridge fund.[93] While the supervisors have no authority to collect or disburse such money,[94] their doing so in good faith does not affect the validity of the order for alteration,[95] nor is an order invalid because it improperly includes statements relative to the receipt and disbursements of the money.[96] Under the Texas statute an order is not invalidated as to third persons by a provision that the change shall be made at the applicant's expense.[97] A portion of a street to be discontinued does not lose its street character until the substitute portion is physically opened.[98] If a road is widened by the county in its corporate capacity, failure to strictly comply with the statute relative to procedure will not deprive landowners of compensation for land taken.[99]

§ 5. *Change of grade.*[See 8 C. L. 51]—Municipalities usually have power to change the grade of streets or highways when necessary for their improvement.[1]

There being no right at common law to recover consequential damages for change of grade [2] unless the same is made illegally,[3] such right is now generally conferred by statute or constitutional provisions [4] which must be complied with by those seeking relief.[5] Tenants may become entitled to damages though the freehold be not

93. Under Hurd's Rev. St. 1905, c. 121, §§ 51, 60, the supervisors in proceedings to alter a highway have no authority to collect or disburse the money offered. Commissioners of Highways of Tolono v. Bear, 224 Ill. 259, 79 NE 581.

94, 95, 96. Commissioners of Highways of Tolono v. Bear, 224 Ill. 259, 79 NE 581.

97. Under Rev. St. 1895, arts. 4672, 4696, authorizing commissioners' court to change course of public road. Smith v. Ernest [Tex. Civ. App.] 19 Tex. Ct. Rep. 422, 102 SW 129.

98. Laws 1895, p. 2037, c. 1006, § 2. In re Jerome Ave. of New York, 105 NYS 315.

99. Where a road was widened by a county in its corporate capacity, the fact that the work was not done in accordance with Pol. Code 1895, § 520, relating to application, publication, etc., did not deprive a landowner of compensation. Terrell County v. York, 127 Ga. 66, 56 SE 309.

1. A borough may change within its limits the grade of a road extending beyond its limits. McLain v. West Washington Borough, 31 Pa. Super. Ct. 471.

2. Bowden v. Jacksonville [Fla.] 42 S 394; Melenbacker v. Salamanca, 188 N. Y. 370, 80 NE 1090; Triest v. New York, 105 NYS 571. Establishment or change. In re Perry Ave. of New York, 118 App. Div. 874, 103 NYS 1069.

3. Triest v. New York, 105 NYS 571. Approval by council of bills presented for labor in lowering street held a ratification of the work done so as to relieve claimants from liability in trespass (Wheat v. Van Tine, 149 Mich. 314, 14 Det. Leg. N. 430, 112 NW 933), and parol evidence is admissible to show that approved bills related to such work and that council so knew (Id.).

4. City of Charleston v. Newman, 130 Ill. App. 6; Coyne v. Memphis [Tenn.] 102 SW 355; Crowe v. Corporation of Charles Town [W. Va.] 57 SE 330. Recovery for change of grade under Act May 24, 1878 (P. L. 129). Klenke v. West Homestead Borough, 216 Pa. 476, 65 A 1079. When a borough changes within its limits the grade of a road extending beyond its limits, an injured property owner may have damages ascertained under Act May 24, 1878, P. L. 129. McLain v. West Washington Borough, 31 Pa. Super. Ct. 471. This rule applies to a part of the "National" or "Cumberland Road." Id. That a change is made in conformity to an ordinance of a municipality acting in its legislative capacity (City of Macon v. Daley [Ga. App.] 58 SE 540), that street was lowered and railroad track left at former grade, in exercise of police power, held not to affect abutting owner's right to compensation (Coyne v. Memphis [Tenn.] 102 SW 355). That a grantor retained the fee in a proposed street and subsequently conveyed it to the city did not preclude an award of damages to his first grantees under Laws 1901, c. 466, § 980. In re Perry Ave. of New York, 118 App. Div. 874, 103 NYS 1069. Laws 1901, p. 400, c. 466, § 951, barring liability to abutters for originally establishing a grade, relates only to assessments for local improvements other than those confirmed by a court of record, and not to proceedings to open a street. Id. Acts 1901, p. 272, c. 153, amending Acts 1891, p. 67, c. 31, by adding proviso that latter act, authorizing recovery of damages for change of grade, shall not apply to cities organized under Act Jan. 29th, 1879, is unconstitutional in so far as it denies compensation of taking of private property. Coyne v. Memphis [Tenn.] 102 SW 355. New York charter held not to repeal a village law so as to take away right to damages for change made after village was merged in Greater New York. Triest v. New York, 105 NYS 571. Liability of city for injuriously changing grade is same in extent and character as for injuriously grading without valid ordinance therefor. Richardson v. Sioux City [Iowa] 113 NW 928. Laws 1893, c. 84, §§ 1, 2, 47, construed, and held a city is liable to an abutting owner for damages caused by the **original establishment** of the grade of a **street dedicated** by him to it though the grade is reasonable and the work is properly done. Fletcher v. Seattle [Wash.] 88 P 843.

5. Property owner could not have damages, under Laws 1883, as amended, for change of railroad crossing, where he failed to proceed under Railroad Laws 1890, c. 565, and file notice with railroad commissioners

injured,[6] but where in legal proceedings an owner has been paid damages for a proposed change of grade, his vendee is not entitled to damages from the physical grading subsequently done,[7] and estoppel may also preclude recovery.[8] It must appear that there was a previously established grade,[9] and, in Iowa, that improvements had been made in conformity thereto.[10] A grade may have been previously established either by statute [11] or by user, acquiescence, or recognition.[12] One who improves his property after the establishment of the original grade cannot recover damages which would have resulted had the actual change been made only to conform to such grade.[13] The measure of damages is the difference in the market value of the property before and after the change,[14] less special but not general benefits.[15]

Suit for damages must be timely.[16] Delay in completing slight incidental improvements does not render it premature.[17] The complaint must set forth all conditions essential to recovery,[18] and should avoid surplusage.[19] A petition not signed or otherwise acquiesced in by plaintiff is not admissible against him.[20] Competent evidence bearing on the question of market value is admissible.[21] Thus, the cost

as therein required. Melenbacker v. Salamanca, 188 N. Y. 370, 80 NE 1090. Under Rev. St. c. 23, § 68, a previous application in writing to the municipal officers must be made before resort to court to have damages assessed. Persson v. Bangor, 102 Me. 397, 66 A 1019. Mayor and aldermen and not mayor and council held to constitute the "municipal officers." Id.

6. Under Rev. Laws, c. 48, §§ 17, 18, 20, 22, providing for cases where holders of several estates claim damages. Galeano v. Boston [Mass.] 80 NE 579.

7. In re Sedgley Ave., 217 Pa. 313, 66 A 546.

8. Where lot owner authorizes and consents to removal of earth from street in front of his lot, he is estopped to complain. Wheat v. Van Tine, 149 Mich. 314, 14 Det. Leg. N. 430, 112 NW 933. Plaintiff who built house with reference to viaduct in street could not thereafter complain that erection of original viaduct was diversion of street, when same is being rebuilt so as to change grade. Bowden v. Jacksonville [Fla.] 42 S 394.

9. Where no grade of the street in front of plaintiff's premises had been established, no damages can be recovered for lowering of street. Wheat v. Van Tine, 149 Mich. 314, 14 Det. Leg. N. 430, 112 NW 933.

10. Property is improved in accordance with initial grade within Code, § 785, when it is so improved that it can be conveniently used for purpose to which it is devoted while grade remains unchanged. Richardson v. Sioux City [Iowa] 113 NW 928. House constructed after establishment of initial grade held built in conformity therewith though built on natural surface. Id. Value of property in its entirety before and after change could not be considered where house had not been established in conformity with initial grade. Id. Instruction permitting recovery for cost of lowering all buildings is erroneous where one building was built before initial grade was established. Id.

11. New York charter, Laws 1897, § 951, construed so as to allow establishment of a grade either by user "or" by improvement, etc. Triest v. New York, 105 NYS 571.

12. Evidence held to show that a certain highway was a village street graded with surface of adjacent land by user, etc., at time of merger of village into New York City. Triest v. New York, 105 NYS 571.

13. Destruction of trees set out along street cannot be considered in absence of showing that destruction would not have been necessary to reduce street level to initial grade. Richardson v. Sioux City [Iowa] 113 NW 928.

14. City of Macon v. Daley [Ga. App.] 58 SE 540; Richardson v. Sioux City [Iowa] 113 NW 928. Fact that abutting property under original grade was only walled in part precludes finding that owner is entitled to wall coextensive with boundary lines after change of grade. Id.

15. Godby v. Bluefield, 61 W. Va. 604, 57 SE 45; Barnes v. Grafton, 61 W. Va. 408, 56 SE 608.

16. Recovery barred ten years after change. Nyhart v. Taylor Borough, 31 Pa. Super. Ct. 635.

17. Where grade had been fixed and street paved for nearly two years, that a retaining wall was not completed did not bar suit. Barnes v. Grafton, 61 W. Va. 408, 56 SE 608.

18. Held sufficient. Crowe v. Corporation of Charles Town [W. Va.] 56 SE 330; Barnes v. Grafton, 61 W. Va. 408, 56 SE 608. Petition for damages held to sufficiently state a change of grade without stating that petitioner did not consent to the change or alleging failure to agree with borough on compensation. Klenke v. West Homestead Borough, 216 Pa. 476, 65 A 1079. Insufficiency of statement immaterial. Id. Complaint demurrable where it failed to allege diversion of street from street purposes, a physical invasion of plaintiff's property, or negligence in prosecuting work. Bowden v. Jacksonville [Fla.] 42 S 394.

19. Allegation in action for impairment of value of abutting property by change of grade to make subway for elevated car tracks, that defendants, city, and railroad, "each and all combined and confederated in one common purpose and unlawfully," etc., held surplusage. Coyne v. Memphis [Tenn.] 102 SW 355.

20. Petition for change. City of Americus v. Tower [Ga. App.] 59 SE 434.

21. Opinions of witness as to value before and after change are competent. Richardson v. Sioux City [Iowa] 113 NW 928.

of raising or lowering the property to conform to the new grade,[22] as distinguished from merely shifting its location,[23] may be shown, but only as throwing light upon the general question of diminution in market value.[24] In an action for damages the city cannot recover over against plaintiff if his property was enhanced in value by the improvement.[25] Where after a change of grade has been made a board is authorized by statute to determine and allow damages, a court of equity has power to decide as to the person to whom an award should be made.[26] On appeal from a viewer's award of damages, it is discretionary with the court to allow a view of the premises.[27]

§ 6. *Improvement and repair.* See 8 C. L. 53—Matters embraced in this section are more particularly treated in another topic.[28] Highways may be constructed or repaired either by the state itself [29] or by municipal subdivisions,[30] or their agents [31] acting under its authority; but a city may not direct the paving of a street at the expense of the property owners while a valid contract is in force by which railroad companies are bound to do the work.[32] Cities and villages are often empowered to cause the construction or improvement of sidewalks upon failure of abutters to do so after notice.[33] Under a statute authorizing cities to improve portions of streets

Testimony as to the value of other abutting lots before and since change held relevant, but not testimony that a similar claim for damages to other abutting property had been settled. City of Americus v. Tower [Ga. App.] 59 SE 434. City could show that street elevation was part of general scheme of improvement including a park in neighborhood. Bond v. Philadelphia [Pa.] 67 A 805. Destruction of trees growing in grade parking is competent to show that improvements had been made in view of original grade and as bearing on value of property before and after, and it is immaterial whether fee to street is in abutting owner or municipality. Richardson v. Sioux City [Iowa] 113 NW 928. Evidence as to how initial grade compared with grade on other streets held immaterial. Id. Evidence of cost of a particular retaining wall held inadmissible in absence of proof as to character and extent of wall rendered necessary by change of grade. Id.

22. May be considered as bearing on difference in market value. Richardson v. Sioux City [Iowa] 113 NW 928.

23. Cost of shifting inadmissible. Richardson v. Sioux City [Iowa] 113 NW 928.

24. The cost of filling a lot and raising buildings to the level of the street as altered cannot be included in the estimate of damages as elements thereof, unless it is necessary to so alter the condition of the property in order to preserve it from further injury or render it fit for use and enjoyment (Godby v. Bluefield, 61 W. Va. 604, 57 SE 45), but the cost and loss incident to such alteration may be considered in subordination to the proper rule of damages as showing the uses to which the property was adaptable immediately after the change of grade (Id.). Instructions on measure of damages held erroneous. Id. May be considered not as an independent element of special damage but as throwing light on the general question of diminution of market value. City of Macon v. Daley [Ga. App.] 58 SE 540. Cost of raising to within five feet of street the original level could not be considered. Bond v. Philadelphia [Pa.] 67 A 805. Certain indirect evidence held properly excluded. Id.

25. Not error to refuse answer setting up counterclaim. City of Owensboro v. Yewell [Ky.] 104 SW 284.

26. Board's action not conclusive except as to existence of damages and amount thereof. Johnson v. Pettit, 105 NYS 730.

27. Act May 21, 1895 (P. L. 89), providing for view as of right, applies only to actions for damages and not on appeal. Bond v. Philadelphia [Pa.] 67 A 805.

28. See Public Works and Improvements. 8 C. L. 1506.

29. Construction and repair of public highways by the state is the exercise of a state function. State v. Marion County Com'rs [Ind.] 82 NE 482.

30. Highways may be constructed and kept in repair by the state, or, under state authority, by municipal subdivisions, or by taxing districts created for that purpose. State v. Marion County Com'rs [Ind.] 82 NE 482. Shoemaker Road Law (Acts 1904, p. 388, c. 225) held not unconstitutional as to title. Fout v. Frederick County Com'rs [Md.] 66 A 487. Section 2 not repugnant to § 15 providing that nothing in the act shall affect the present method of road construction or repair by the several counties. Id. Acts 1905, p. 521, c. 167, substantially reenacting all previous systems of improving highways, repealed by implication Acts 1903, p. 255, c. 145, concerning gravel and macadamized roads. Findling v. Foster [Ind.] 81 NE 480.

31. Owner of fee cannot complain that sidewalk is being constructed along public road by private persons, where permission has been given by county commissioners. Hitchcock v. Zink [Neb.] 113 NW 795.

32. City of Chicago v. Newberry Library, 224 Ill. 330, 79 NE 666.

33. Par. 19, § 15, Act No. 136, p. 230, of 1898, authorizing cities to cause to be constructed and maintained sidewalks, etc., and to levy and collect taxes by special assessments, held not repealed by Act No. 131, p. 295, of 1904. Town of Rayne v. Harrel, 119 La. 652, 44 S 330. When council provides for construction of a sidewalk, and serves notice on abutting owner that in case of his failure within a specified time to construct

not less than a block in length, the length of a block is a question of fact to be determined from the evidence in the absence of statutory definition.[34] In Kentucky it is unlawful for a justice of the peace to become interested in any contract for working roads.[35]

Proceedings must conform to statutory regulations,[36] and where private property is taken compliance must be affirmatively shown by the record.[37] Questions pertaining to damages are governed by principles applicable in cases where a grade is changed.[38] Courts will not interfere with the discretionary powers of road commissioners and overseers with reference to the improvement of highways, though some incidental damage may result to abutters,[39] and while an improvement cannot be so

a walk of certain material and width it will be laid by the municipality or village and expense assessed back upon the property, all procedure has been had which is necessary for construction of the walk and levying of a proper assessment (Meek v. Collinwood, 10 Ohio C. C. [N. S.] 9), but where notice on owner calls for walk of sandstone, the laying of a cement walk without further procedure imposes no obligation on him (Id.). Power given to villages prior to 1903 to require construction of sidewalks held not to include power to compel lot owner to reduce sidewalk space to established grade (Smith v. Hofeldt [Neb.] 112 NW 605), and before village could require lot owner to construct sidewalk at grade, it must first reduce space to such grade (Id.).

34. Ky. St. 1903, § 3449. Board of Councilmen of Frankfort v. Brislan [Ky.] 104 SW 311.

35. Ky. St. 1903, § 4332, declaring it unlawful for a justice of the peace, who is ex officio a member of fiscal court, to become directly or indirectly "interested in any contract for working roads," held violated where he and his teams do work on road by the day under employment by road supervisor. Commonwealth v. Lane [Ky.] 102 SW 313.

36. Petition for condemnation of sidewalk on "lot 95" and for construction of a new one held sufficient as to description of location of sidewalk. City of Fayette v. Rich, 122 Mo. App. 145, 99 SW 8. Need not specify kind of walk to be laid, under Rev. St. 1899, § 5989. Id. Evidence held to show that certain land abutted on proposed improvement so as to authorize owners to sign petition. Kemp v. Goodnight, 168 Ind. 174, 80 NE 160. To be a "resident landholder" entitled to sign a petition for the improvement of a road under Acts 1903, p. 255, c. 145, one must be a fee holder and not a mere life tenant. Id.

Ordinance authorizing city to construct sidewalk and charge cost thereof to abutting owner held not in accordance with power delegated by Act No. 136, p. 230, of 1898, in that it omitted special assessment feature. Town of Rayne v. Harrel, 119 La. 652, 44 S 330. Under charter provision that all special ordinances in conflict with a general ordinance are void, special ordinance for improvement of street 50 feet wide establishing roadway 36 feet wide, center of which to be 30 feet from north lines, is void where general ordinance requires sidewalk on such street to be 10 feet wide. Asphalt & Granitoid Const. Co. v. Hauessler, 201 Mo. 400, 100 SW 14. An ordinance for a street improvement providing that the same shall conform to the established grade as established by the ordinance, which fixes the grade at street intersections, requires the grade to be fixed on a line drawn from the grade fixed at one intersection to the grade fixed at another intersection (Lindblad v. Normal, 224 Ill. 362, 79 NE 675), and the grade will be fixed on a line which is the shortest distance between the two points (Id.). Ordinance fixing grade only at intersections held sufficient. Ogden, Sheldon & Co. v. Chicago, 224 Ill. 294, 79 NE 699.

37. Under Laws 1903, p. 148, providing for grading of public roads and payment of damages therefor, and requiring appointment of three commissioners "who shall be disinterested freeholders" to assess damages, order of appointment which fails to recite that commissioners are disinterested or are freeholders is defective (Grading Bledsoe Hill in Buchanan County v. Bledsoe, 200 Mo. 630, 98 SW 631), and such defect is not cured by recital in affidavit of commissioners to their report that they are freeholders (Id.). Likewise, failure to state that commissioners were sworn and instructed as required is fatal, and a mere recital that instructions were given without setting out same is insufficient. Id.

38. Damages to abutting property from grading sidewalk is difference in market value before and after. Town of Eutaw v. Botnick [Ala.] 43 S 739. City not liable in trespass for mere consequential injuries. Herr v. Altoona, 31 Pa. Super. Ct. 375. Abutting property owner cannot recover damages for cutting and trimming of hedge planted on public highway by municipal authorities. Bright v. Bell, 117 La. 947, 42 S 436. Merrick's Rev. Civ. Code, art. 691, has no application, hedge not being on boundary line. Bright v. Bell, 117 La. 947, 42 S 436. Evidence of building of retaining wall (Town of Eutaw v. Botnick [Ala.] 43 S 739), and of rental value before and after grading, held admissible (Id.). In action for damages by grading of abutting sidewalk, though jury is entitled to know condition of ground so as to determine whether grading has interfered with the ingress and egress, questions as to character of walk before and after, directing special attention to improvement, are inadmissible. Id. Where plaintiff has testified to value before grading an abutting sidewalk, he may be cross-examined as to an offer to sell for lesser amount. Id.

39. Drainage. Davis v. Howell [Ark.] 104 SW 550. The making of an embankment for a highway cannot be enjoined merely because it obstructs the flow of surface water against which a landowner may protect himself. Darlington v. Cloud County Com'rs, 75 Kan. 810, 88 P 529. Road officers are vested with broad discretion as to plans and meth-

made as to unnecessarily and unreasonably throw water in a body upon private land,[40] no suit is maintainable for the laying of a culvert reasonably necessary for the protection of a road from surface water.[41] A municipality is not liable for injuries due to the negligence of an independent contractor in repairing a highway where there are no defects or obstructions in the highway itself;[42] but the improvement of streets being a corporate and not a governmental, function, a city is liable for negligent injuries to employes.[43] The right of appeal and proceedings thereon depend on statute.[44]

§ 7. *Abandonment and diminution.* See 8 C. L. 56—While mere private adverse possession cannot divest public rights in streets or alleys,[45] the doctrine of estoppel may do so.[46] Mere divergence of travel at impassable places,[47] or failure to repair a road,[48] does not amount to abandonment. Failure to open a road for public use within a certain time after granting of authority to do so operates as an abandonment in some states,[49] and a mislaid prescriptive road supersedes original lines.[50] A city may not alienate streets without legislative authority.[51] The New York statute provides for acquisition by abutters of the city's interest in a street upon its discontinuance.[52]

ods of maintaining highways and mere error of judgment is not ground for enjoining an improvement. Dennis v. Osborn, 75 Kan. 557, 89 P 925.

40. Dennis v. Osborn, 75 Kan. 557, 89 P 925. Road supervisor and those working under him are liable in compensatory damages for diversion of water from natural course onto private lands without regard to their good faith. Wrightsel v. Fee, 76 Ohio St. 529, 81 NE 975.

41. Injunction not maintainable by lower land owner. Dennis v. Osborn, 75 Kan. 557, 89 P 925.

42. County not liable for injuries from blasting. Symons v. Road Directors for Allegany County [Md.] 65 A 1067.

43. Burke v. South Omaha [Neb.] 113 NW 241.

44. In proceeding for construction of a gravel road under Acts 1903, p. 255, c. 145, statutes considered and held to authorize appeal by landowners to the circuit court from finding of county commissioners that a majority of landowners had signed petition. Ross v. Becker [Ind.] 81 NE 478. Held not error to refuse filing of amended remonstrances in circuit court where under the statute the decision of the county commissioners was final. Kemp v. Goodnight, 168 Ind. 174, 80 NE 160.

45. City of El Paso v. Hoagland, 224 Ill. 263, 79 NE 658; De Land v. Dixon Power & Lighting Co., 225 Ill. 212, 80 NE 125; Christian v. Eugene [Or.] 89 P 419; Krause v. El Paso [Tex. Civ. App.] 17 Tex. Ct. Rep. 960, 101 SW 828. Mere obstructions or encroachments on a public highway will not affect the public rights in it (In re Jerome Avenue in New York, 105 NYS 319), nonuser and affirmative evidence of a clear determination to abandon being necessary (Id.). See, also, post, § 16.

46. Where city attempted to vacate alley not actually opened and later permitted erection of improvements. City of El Paso v. Hoagland, 224 Ill. 263, 79 NE 658. Long notorious possession, improvement, payment of taxes, etc. Forster v. Raznik [Wash.] 91 P 252. Held that land dedicated for streets could not be lost by equitable estoppel. Krause v. El Paso [Tex. Civ. App.] 17 Tex. Ct. Rep. 960, 101 SW 828.

47. Evidence that because of impassability of road at various places diverging roads have been used and that a more convenient road had been established held not to show abandonment. Perry v. Staple [Neb.] 110 NW 652. Removal of bridge which did not render road impassable and establishment of another which diverted part of travel held not to show abandonment. Lyons v. Mullen [Neb.] 110 NW 743.

48. Mere failure to work or repair a road does not amount to abandonment where the road is used though only to a limited extent. Brumley v. State [Ark.] 103 SW 615.

49. Ballinger's Ann. Codes & St. § 3803 (Pierce's Code, § 7854), providing that any authorized "county road" remaining unopened for public use for five years after granting of authority for opening it shall be vacated, and authority for building it barred, applies to streets dedicated by platting land outside the limits of an incorporated city or town. Murphy v. King County [Wash.] 88 P 1115. Under a statute declaring all section lines in a county public highways and providing for their opening on petition, such lines are county roads within the statute of 1879, providing that such roads shall be vacated if unopened for seven years "after the order is made or the authority granted for opening the same." Cowley County Com'rs v. Johnson [Kan.] 90 P 805. The quoted phrase refers to the time the act was passed and not to the time of a county commissioners' order for opening of the road. Id. Road created prior to 1879 and unopened for seven years held vacated. Id.

50. Where particular highway was laid out and used in the belief that it corresponds to previously laid out road, old road was abandoned in so far as it did not correspond. State v. Lloyd [Wis.] 113 NW 964.

51. Charter held not to confer authority. Krause v. El Paso [Tex. Civ. App.] 17 Tex. Ct. Rep. 960, 101 SW 828.

52. Laws 1895, p. 2042, c. 1006, prescribing method by which conveyance from city may

§ 8. *Vacation.*[See 8 C. L. 56]—When the elevation of railway tracks becomes necessary for the public safety, a grant to a railway company of the use of so much of a street as may be necessary for that purpose does not constitute a vacation of the street resulting in reversion.[53]

The legislature has power to provide for the closing of streets by local officers or boards.[54] The mere fact that property may be rendered less accessible does not prevent a closing,[55] but the power of a city to vacate a street cannot be perverted for the sole benefit of private interests.[56] To entitle a private person to enjoin a proceeding, he must show special injury [57] and no adequate remedy at law.[58]

A valid petition [59] and notice [60] are generally required, but appearance gives jurisdiction though no notice has been served,[61] and failure to give notice to all the landowners does not invalidate the proceedings as to those served.[62] While nonjurisdictional irregularities will not avoid a vacation,[63] jurisdictional facts must affirmatively appear on the record.[64]

In the absence of constitutional or statutory provisions, abutting owners are not entitled to compensation for the vacation of a street or highway.[65] Damages are generally allowed by statute however,[66] and in such case the right thereto accrues im-

be acquired, held not repealed by Laws 1905, p. 871, c. 379, amending City Charter, Laws 1901, c. 466, § 205, providing for disposition of such lands. People v. Metz, 104 NYS 649.

53. Weage v. Chicago & W. I. R. Co., 227 Ill. 421, 81 NE 424.

54. People v. Delany, 105 NYS 746. Common council of city of first class may by ordinance vacate streets and alleys whenever it deems it necessary or expedient. Blackwell, etc., R. Co. v. Gist, 18 Okl. 516, 90 P 889. Greater New York charter and amendatory laws empowers the board of estimate and apportionment to close streets without action on part of local district boards. Reis v. New York, 188 N. Y. 58, 80 NE 573. Laws 1895, p. 2037, c. 1006, is inapplicable to vacation of a street never opened in fact, and where complaining party will not be injured in her property rights. Id. Act April 21, 1858, P. L. 385, relating among other matters to vacation of streets in Philadelphia, is constitutional. Umbria Street, 32 Pa. Super. Ct. 333. City council of city of Cleburne held to have no power, under charter tr statute, to close street and grant use thereof to railway. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 SW 162. Purchase of platted lots does not give vested right to continuance of streets as against power of supervisors to vacate under Code, § 422. Chrisman v. Brandes [Iowa] 112 NW 833. Code, § 920, does not restrict power of supervisors under § 422. Id. Code, § 422, subds. 16, 17, §§ 751, 48, 1507, construed, and held that where land is platted into lots, streets, and alleys prior to incorporation of town which embraced same such streets and alleys became county roads subject to jurisdiction of supervisors, and, though control may have passed to town upon incorporation, it reverted upon vacation of incorporation, and supervisors could vacate such streets and alleys. Id.

55. Reis v. New York, 188 N. Y. 58, 80 NE 573.

56. Attempt to cure private title. De Land v. Dixon Power & Lighting Co., 225 Ill. 212, 80 NE 125.

57. Letherman v. Hauser [Neb.] 110 NW 745. Elector residing within five miles of such road has sufficient special interest. Id. Bill insufficient. Robbins v. White [Fla.] 42 S 841.

58. Where highway is being closed pursuant to void vacation proceedings, one using such road as most available route to market and county seat held to have no adequate remedy at law. Letherman v. Hauser [Neb.] 110 NW 745.

59. Under Comp. St. 1903, c. 78, § 4, petition for vacation signed by 10 electors "residing within five miles of the road" is jurisdictional. Letherman v. Hauser [Neb.] 110 NW 745. Railroad company may make application for vacation of streets and alleys. Chrisman v. Brandes [Iowa] 112 NW 833.

60. Under St. 1898, § 1267, notice of proceeding to vacate a portion of a road must be given to occupants along portion not sought to be discontinued. Morris v. Edwards [Wis.] 112 NW 248.

61, 62. Chrisman v. Brandes [Iowa] 112 NW 833.

63. Action of city council under Cobbey's Ann. St. 1903, § 8739, vacating street, has the force and effect of judicial proceeding. Enders v. Friday [Neb.] 111 NW 140.

64. Record of county board failed to show that signers of petition lived within five miles of road as required by Comp. St. 1903, c. 78, § 4. Letherman v. Hauser [Neb.] 110 NW 745.

65. Damages not recoverable under constitution or Act May 16, 1891, P. L. 75 (Nocton v. Pennsylvania R. Co., 32 Pa. Super. Ct. 555), nor under Act May 9, 1871, P. L. 639, relating to road law procedure in Montgomery county (Id.).

66. Under street closing act, Laws 1895, c. 1006, an abutting owner on a street 50 feet wide is entitled to damages for narrowing the street to 38 feet in front of his property. People v. Delany, 105 NYS 746. Adequate compensation necessary. Blackwell, etc., R. Co. v. Gist, 18 Okl. 516, 90 P 889. Property owners whose property abuts upon vacated portion, and who can recover damages. Enders v. Friday [Neb.] 111 NW 140. Where a street or part thereof has been discontinued and an abutting owner has presented to the

mediately upon the vacation of the highway.[67] While vacation which does not cut off access to lots from any direction but merely makes it necessary to travel farther to reach them is not a special injury entitling the owner to damages,[68] the case is different where one of two modes of access is cut off.[69] Under statute the court may extend the time for the filing of a jury's report assessing damages.[70] If a jury improperly assesses all the damages against an owner, the court may refer its report back for correction and the jury need not be again sworn for such purpose.[71] A jury's report does not become a debt against a municipality until approved by the court.[72] Damages for vacation of a street is a personal claim which does not pass by grant of the land or run with it.[73] Laches and failure to appeal may bar the right to damages.[74]

A municipal exercise of delegated power to vacate streets is a legislative function not reviewable by the courts in the absence of fraud or collusion.[75] Under some statutes a judgment on appeal from the local board is not appealable.[76] An objection that a vacation was not of public utility is too late on appeal.[77]

Whether a particular tract was covered by an ordinance is a question of construction.[78] Where a street or alley is vacated, the land embraced in it becomes part of the adjacent private property[79] and cannot be thereafter taken for railway or other public uses without compensation.[80]

comptroller a timely written statement for compensation and request for appointment of commissioners which has not been complied with, mandamus will lie to compel the corporation counsel to proceed though the damage may be small. People v. Delany, 105 NYS 746.

67. Final order vacating a street is self-executing, and damages are recoverable at once. City of Indianapolis v. L. C. Thompson Mfg. Co. [Ind. App.] 81 NE 1156. The confirmation by the proper authorities of a new plan of streets omitting a portion of a previously existing street operates as an immediate vacation of such portion and **limitations** will run forthwith. Pulaski Avenue, 33 Pa. Super. Ct. 108; Old Tacony Road, 32 Pa. Super. Ct. 444. Immaterial that street was not actually closed for years after, or that a petition of an owner was quashed below for want of jurisdiction, and on theory that damages did not accrue until street was actually closed. Pulaski Ave., 33 Pa. Super. Ct. 108.

68. Ruscomb Street, 33 Pa. Super. Ct. 148. Where one's property does not abut on a portion of a street about to be closed and access is not cut off, he will suffer no actionable damage (Reis v. New York, 188 N. Y. 58, 80 NE 573), unless private easements are interfered with (Id.). Plaintiff held not deprived of private easement acquired by purchase with reference to a map. Id.

69. Ruscomb Street, 33 Pa. Super. Ct. 148. Existence of blind streets affording no means of access to general system of streets immaterial. Id.

70. Act March 18, 1903, P. L. 28, authorizing courts to extend time for filing of reports by road juries, is valid, and applies to vacation proceedings under act April 21, 1858. Umbria Street, 32 Pa. Super. Ct. 333.

71. Umbria Street, 32 Pa. Super. Ct. 333.

72. Where report had been set aside, mandamus execution would not lie against city. Old Tacony Road, 32 Pa. Super. Ct. 444.

73. Pulaski Ave., 33 Pa. Super. Ct. 108.

74. Old Tacony Road, 32 Pa. Super. Ct. 444.

75. Mottman v. Olympia [Wash.] 88 P 579. Allegation that object of vacation was to give title to the state which owned land on both sides of portion vacated did not show fraud or collusion. Id. Expediency of vacating streets held for supervisors and not subject to review by certiorari. Chrisman v. Brandes [Iowa] 112 NW 833. Courts will not ordinarily inquire into **motive** of city council vacating a street. Enders v. Friday [Neb.] 111 NW 140.

76. Judgment in proceedings for an award of damages in circuit court by way of appeal from hearing before board of public works is not appealable under Acts 1905, p. 284, § 102. City of Indianapolis v. L. C. Thompson Mfg. Co. [Ind. App.] 81 NE 1156.

77. Under Acts 1905, pp. 523, 524, c. 167, §§ 5, 9, 10, relating to proceedings before board of commissioners for location, vacation, etc., of highways, landowner cannot present such remonstrance for first time in circuit court. Williamson v. Hauser [Ind.] 82 NE 771.

78. Ordinance vacating a street so far as same "intersects, crosses, or comes in contact with" a certain railroad right of way held effective to vacate a triangular section near a railroad. City of Larned v. Boyd [Kan.] 90 P 814.

79. Wilson's Rev. & Ann. St. 1903, c. 12, § 49. Blackwell, etc., R. Co. v. Gist, 18 Okl. 516, 90 P 889. Under Mill's Ann. St. § 4370, title to portions of streets vacated or abandoned passes not to original grantor but to abutting owners. Bothwell v. Denver Union Stockyard Co. [Colo.] 90 P 1127. Where public acquires only an easement, upon surrender thereof, the municipality cannot grant use of vacated portion to third persons but same reverts to abutting property owner. Robbins v. White [Fla.] 42 S 841.

80. City could not by ordinance vacate street and also grant railroad right of way without compensating property owner. Blackwell, etc., R. Co. v. Gist, 18 Okl. 516, 90 P 889.

§ 9. *Street and highway officers and districts.*[See 8 C. L. 58]—Questions relating to the election or appointment,[81] qualification,[82] jurisdiction,[83] and liability[84] of highway officers, are peculiar to the local statutes. In the absence of statute highway commissioners need not always act as a board, nor need they preserve record evidence of their acts.[85] County officers having jurisdiction of streets and highways may make contracts in regard to such subject-matter subject only to the statutes or public policy of the state.[86] Mandamus will not lie to compel highway commissioners to reimburse the township road fund to the extent of money expended by them in improving a road within the limits of a village contrary to law, where the money was raised by the taxpayers for that purpose and voluntarily paid by them.[87] A road board having no authority to create or establish roads cannot be required to clear and work a road where the order establishing such road is void for uncertainty of description.[88] In proceedings to lay out a highway in New York, the highway commissioners may present the matter to the town board which may by resolution employ counsel to oppose the application,[89] but if the commissioners themselves employ counsel for this purpose, they and not the town will be individually responsible to him,[90] and they should then present a claim therefor to the town for necessary expenses incurred in the discharge of their duties.[91]

§ 10. *Fiscal affairs.*[See 8 C. L. 59]—Many questions relating to revenue for highway purposes are controlled by rules applicable to fiscal maters involved in public improvements generally,[92] or by ordinary principles of taxation,[93] a few illustrative

81. Const. art. 4, § 49, providing that legislature may provide for one or more county road commissioners to be elected by the people or appointed, contemplates appointment by some person or body representative of county, hence provision of Acts 1905, p. 200, No. 146, authorizing county clerk and mayor of Detroit to appoint for Wayne county, is unconstitutional (Board of Road Com'rs of Wayne County v. Wayne County Auditors, 148 Mich. 255, 111 NW 901), and appointment thereunder being void, fact that supervisor recognized appointees does not entitle them to hold office (Id.).

82. One is completely qualified as highway commissioner if he is a legal voter and resident of the town and has been such for one year previous to his election, and is a bona fide resident of the road commissioner's district. Markiewicz v. People, 126 Ill. App. 203. "Legal voter" construed. Id.

83. County commissioners held empowered to compel a railroad company to widen highway over its tracks, under Rev. Laws, c. 111, §§ 140, 141, conferring jurisdiction. Bartlett v. New York Cent., etc., R. Co. [Mass.] 81 NE 204. Acts 1902 (23 St. at Large, p. 998), including in definition of highways roads laid out under statute or order, does not limit the jurisdiction of highway officers to such roads, but such jurisdiction extends to highways by prescription. Township Com'rs of St. Andrews Parish v. Charleston Min. & Mfg. Co., 76 S. C. 382, 57 SE 201. Act August 15, 1904 (Acts 1904, p. 252), granting to the county commissioners "all the powers and duties of the ordinary of Decatur county so far as the same relate to roads, bridges, and ferries," did not confer upon them jurisdiction to remove obstructions from private ways, "roads" not including such ways. Griffin v. Sanborn, 127 Ga. 17, 56 SE 71. Pol. Code 1895, § 679, is a general law not subject to repeal or modification by local law. Id.

84. A superintendent of streets is liable on his bond for injuries due to official neglect relative to repair of streets. Vrooman Act (St. 1885, pp. 160, 161, c. 153, §§ 22, 23). Merritt v. McFarland [Cal. App.] 88 P 369. Evidence sufficient to authorize recovery by one who fell over embankment. Id. City trustees appointing superintendent are not responsible. Id. In prosecution of road overseer for failure to discharge duties respecting particular road, proof that he worked road as such and that public used same held sufficient to show that it was public road within Code 1896, § 5398. Savell v. State [Ala.] 43 S 201. Whether road was in as good condition as other roads in community held inadmissible. Id.

85. Could specify where telephone company should place polls. Interstate Independent Tel. & T. Co. v. Towanda, 123 Ill. App. 55.

86. County commissioners could contract with mill owner that he deed right of way for highway and contribute to erection of a bridge on condition that he have right to join mill dam to piers of bridge and use them as a bulkhead. Wright v. Floyd County, 1 Ga. App. 582, 58 SE 72. Jurisdiction to determine whether such arrangement would be detrimental to public convenience or safety was primarily in county commissioners. Id.

87. Lee v. People, 123 Ill. App. 520.

88. Mandamus would not lie. Green v. Road Board of Bibb County, 126 Ga. 693, 56 SE 59.

89, 90. McCoy v. McClarty, 53 Misc. 69, 104 NYS 80.

91. McCoy v. McClarty, 53 Misc. 69, 104 NYS 80. Town could not be held for expense incurred by commissioners in unsuccessful defense of suit of attorney. Id.

92. See Public Works and Improvements, 8 C. L. 1506; Public Contracts, 8 C. L. 1473. See, also, Counties, 9 C. L. 827; Municipal

cases being herein cited. Authority to levy taxes or assessments must be derived from statute,[94] and statutory provisions must be observed,[95] not only as to levy but also as to expenditure,[96] but the validity of a tax levy will be presumed and a contestant has the burden of proof.[97] Taxing districts for the improvement of public highways may be established without regard to boundaries of counties, townships, or municipalities.[98] It is a criminal offense in some states to fail to work one's road tax after warning.[99] The Pennsylvania statute providing for abolition of the work tax at the election of the taxpayers in the township is not unconstitutional.[1] In Idaho an employer may become liable for a road poll tax of his employe provided he is or

Corporations, 8 C. L. 1056. Various statutes relating to improvement of highway on boundary line between counties and providing for issuing of bonds construed and held that amount of bonds is not limited to contract price and expenses incurred before contract is let, and that expenses to be incurred after the apportionment of total cost must be estimated. State v. Marion County Com'rs [Ind.] 82 NE 482.

93. See Taxes, 8 C. L. 2058. A tax upon all the property within a taxing district for the construction and repair of a public highway is for a public governmental purpose, and if unwise or oppressive relief must be sought through the legislature and not the courts. State v. Marion County Com'rs [Ind.] 82 NE 482.

94. Ordinance of town of Farmerville imposing per capita tax for maintenance of its streets held unauthorized by charter or statute. Town of Farmerville v. Mathews [La.] 44 S 999. Under Laws 1903, p. 513, c. 228, § 52, a town whose roads are maintained under the money system of taxation cannot levy a poll tax where there is no incorporated village within its boundaries. Town of Plattekill v. Lounsberry, 54 Misc. 492, 106 NYS 139. Where proceedings for improvement of a road were begun by petition under act of March 22, 1895, the right to assess land thereunder for benefits was not revoked by the road improvement act of April 1, 1903 (P. L. 1903, p. 145), subsequently passed. Anderson v. Cortelyou [N. J. Err. & App.] 68 A 118. Title to Code, § 1530, providing for road fund and how same shall be levied and expended, held sufficient. City of Newton v. Jasper County Sup'rs [Iowa] 112 NW 167.

95. Under Hurd's Rev. St. 1905, c. 121, § 13, highway commissioners must state what the contingency is which requires the additional levy for roads and bridges; it is not enough to merely certify that the regular levy is insufficient. St. Louis, etc., R. Co. v. People, 224 Ill. 155, 79 NE 664. Addition to regular levy held void where highway commissioners' request therefor was not certified to board of auditors and assessor as per Hurd's Rev. St. 1905, p. 1724, § 14. Litchfield & M. R. Co. v. People, 225 Ill. 301, 80 NE 335. Where commissioners did not certify contingency for additional levy. Chicago, etc., R. Co. v. People, 225 Ill. 519, 80 NE 336; Toledo, etc., R. Co. v. People, 226 Ill. 557, 80 NE 1059. Road and bridge tax for town operating under labor system, assessed on a mere copy of highway commissioner's statement instead of on original, required to be submitted to county board, held void. Litchfield & M. R. Co. v. People, 225 Ill. 301, 80 NE 335; Chicago, etc, R. Co. v. People, 225 Ill. 519, 80 NE 336; Toledo, etc., R. Co. v. People, 226 Ill. 557, 80 NE 1059. Where a road and bridge tax was resisted for failure of town clerk to attach to papers filed by him with county clerk a certificate that the papers were true copies of papers in his office, court held authorized to allow clerk to supply such certificate. Toledo, etc., R. Co. v. People, 225 Ill. 425, 80 NE 283.

Cash and labor systems: Tax under law relating to labor system held void where township operated under cash system. Litchfield & M. R. Co. v. People, 225 Ill. 301, 80 NE 335; Toledo, etc., R. Co. v. People, 226 Ill. 557, 80 NE 1059. Evidence held to show that road and bridge tax was properly levied under Hurd's Rev. St. 1905, c. 121, § 139, governing towns under cash system, and not under § 209, relating to towns under labor system. People v. Chicago & A. R. Co., 228 Ill. 102, 81 NE 813.

96. Under Code, § 1530, part of road fund collected within a city must be expended on the roads in and about such city. City of Newton v. Jasper County Sup'rs [Iowa] 112 NW 167. Code, §§ 1530, 1531, providing that board of supervisors may levy road tax to be paid out only on order of board for work done on the roads of the county, etc., held not to authorize purchase of **road machines** (Harrison County v. Ogden, 133 Iowa, 9, 110 NW 32), but such authority is vested in township trustees by §§ 1528, 1829 (Id.). Under Code, §§ 1528, 1529, 1549, 1553, warrants cannot be issued for labor performed in a particular road district payable out of township fund (Miller v. Hinke [Iowa] 113 NW 325), and such warrants being void, they are not payable out of general township road fund after consolidation of township into one road district under Code Supp. 1902, § 1532a (Acts 29th Gen. Assem. p. 33, c. 54, § 1) (Id.).

97. That record book of town did not show filing of a sufficient petition for labor system held insufficient to show that such system was not legally adopted. Toledo, etc., R. Co. v. People, 225 Ill. 425, 80 NE 283.

98. State v. Board of Com'rs of Marion County [Ind.] 82 NE 482.

99. Under Kirby's Dig. § 7267, in order to convict one for failure to work, he must have resided in road district ten days previous to time he was warned to work. Barber v. State [Ark.] 103 SW 724. Evidence insufficient. Id.

1. The proviso of § 2, Act April 12, 1905, P. L. 142, does not violate the constitutional provision that the legislative power shall be vested in the General Assembly, or the one declaring that this body shall not pass any local or special law regulating the affairs of counties, cites, townships, etc. Foster Tp. Road Tax, 32 Pa. Super. Ct. 51.

becomes indebted to him,[2] and upon the employer's refusal to pay an action may be brought in the name of the county to recover it.[3] Where a county buys all turnpikes within its borders, portions thereof lying within the limits of a city must be maintained by the city.[4] Provision is generally made for apportioning the expense of improvements between superior and inferior,[5] or co-ordinate, municipal subdivisions.[6] That an improvement is made through county commissioners on petition of the freeholders of a township does not necessarily make the indebtedness incurred a township or county charge.[7]

§ 11. *Control by public and public regulations.*[See 8 C. L. 61]—The state[8] or its various municipal agencies may regulate the use of streets and highways by public service corporations,[9] or by persons who operate motor or other vehicles,[10] leave

2. Rev. St. 1887, § 901, was not repealed by Sess. Laws 1899, p. 392, providing for collection of such taxes by seizure of personalty. Kootenai County v. Hope Lumber Co. [Idaho] 89 P 1054.

3. Kootenai County v. Hope Lumber Co. [Idaho] 89 P 1054.

4. Though city has not exercised any control. Purchase under free turnpike act (Ky. St. 1903, § 4748b). Nelson County v. Bardstown, 30 Ky. L. R. 870, 99 SW 940.

5. Act May 1, 1905, P. L. 318, did not operate retrospectively so as to affect the obligation of a township in its contract with the state highway department under Act April 15, 1903, to pay one-sixth of improvement of a road where the contracts were entered into and the work begun before passage of act of 1905. Rader v. Kriebel, 32 Pa. Super. Ct. 548. Under Laws 1898, p. 220, c. 115, § 9, as amended by Laws 1906, p. 1093, c. 468, making one-half of expense of constructing a road a county charge in the first instance, but providing that 15 per cent shall be charged to the town wherein the road is located, the supervisors are not required to make the town apportionment until it is definitely known what the cost of the work will be. In re Business Men's Ass'n of Newburg, 54 Misc. 11, 103 NYS 847. With reference to the maintenance of roads the special Orange County Law of 1901, amended in 1904, making the cost thereof a county charge, is still in force, the same not having been repealed by the general highway law as amended in 1906. Id. Constitutional requirement that laws for improvement of highways be general applies only to building and not to maintenance. Id.

6. Act March 7, 1905 (Acts 1905, pp. 493-496, c. 164; Burn's Ann. St. Supp. 1905, §§ 6816-6822), providing for improvement of highways on boundary line between counties upon petition of fifty freeholders to commissioners of either county, and requiring other county to issue bonds for its proportionate amount, is not unconstitutional as a deprivation of the right to local self-government (State v. Marion County Com'rs [Ind.] 82 NE 482), as taking property without due process of law (Id.), nor is it violative of Const. art. 6, § 10, authorizing legislature to confer powers of local administrative character on county boards, in that it confers powers of judicial character, since such board is of judicial character (Id.). Where commissioners of one county ordered improvement of boundary highway under this act, and the two counties met in joint session and apportioned the cost, all orders of adjoining county seeking to vacate its own proceedings were void. Id. Pub. St. 1901, c. 73, § 4, providing for apportionment of expense of repairing highways among towns greatly benefited, applies to existing highways for future maintenance. O'Neil v. Walpole [N. H.] 66 A 119. Before expense of maintaining a highway can be apportioned among other towns, such other towns must be "greatly" benefited. Id. Though the petition of a town for apportionment should be made to superior court and referred by it to the county commissioners, filing directly with commissioners will not invalidate. Id.

7. Under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, providing for improvement of highways on petition of freeholders of townships, etc., through county commissioners, the board is not the agent of the township (Board of Com'rs of Jackson County v. Branaman [Ind.] 82 NE 65), and the indebtedness created is not a liability against the county or township which may constitute the taxing district, but is the indebtedness of persons whose property is subject to assessment (Id.).

8. All roads laid out under legislative enactment are public highways belonging to the state and under full control of legislature which may exercise control directly. State v. Marion County Com'rs [Ind.] 82 NE 482. The legislature may grant a corporation a street franchise without requiring it to obtain the consent of local authorities. In re Consolidated Gas Co., 56 Misc. 49, 106 NYS 407.

9. **Railroads** [see, also, Railroads, 8 C. L. 1590; Street Railways, 8 C. L. 2004]: Legislature may authorize municipalities to grant to street railway companies right to occupy streets for tracks subject to proper restrictions for public safety. McKim v. Philadelphia, 217 Pa. 243, 66 A 340. The plenary powers given to city councils by city and village act Ill. c. 24, § 62 (Hurd's Rev. St. 1905), to regulate the use of streets and permit their use by railroads, includes power to authorize a street railroad to cross a railroad track (East St. Louis R. Co. v. Louisville & N. R. Co. [C. C. A.] 149 F 159), and such power is not affected by Act July 1, 1889, p. 223, 3 Starr & C. Ann. St. Ill. c. 114, par. 112, p. 3292, empowering the state Railroad and Warehouse Commission to regulate the crossing of railroad tracks (Id.). System of railroad tracks held not removable by mandatory injunction at instance of city where laid and maintained pursuant to authorized ordinance long acquiesced in and

not unreasonably interfering with use of street as a thoroughfare. City of Colorado Springs v. Colorado & Southern R. Co., 38 Colo. 107, 89 P 820. St. 1901, p. 154, c. 214, § 3, construed and held to authorize street railway company to maintain poles and wires for transmission of electricity in a street in which it had no right to operate a railway. Williams v. Old Colony St. R. Co., 193 Mass. 305, 79 NE 484. Greater New York City Charter, Laws 1901, p. 107, c. 466, § 242, as amended by Laws 1905, p. 1533, c. 629, conferring on board of estimate and apportionment power to grant "franchises or rights * * * for occupation of any of the streets for railroads," etc., does not empower board to authorize occupation of street for private spur track. Hatfield v. Straus [N. Y.] 82 NE 172. The general power of care, supervision, and control over streets and public grounds held not to include power to grant to railroad company right to occupy or incumber same. Louisville & N. R. Co. v. Cincinnati, 76 Ohio St. 481, 81 NE 983. Ordinance passed by city of Cincinnati Nov. 7, 1904, and as amended Aug. 28, 1905, prescribing conditions upon which Louisville & Nashville Ry. Co. could occupy and pass over streets and public grounds, held void. Louisville & N. R. Co. v. Cincinnati, 76 Ohio St. 481, 81 NE 983. Legitimate exercise of police power to require a railroad company to change location of tracks in a street when regulation is reasonable and promotive of the general welfare of the city. Atlantic & B. R. Co. v. Cordele, 128 Ga. 293, 57 SE 493. Evidence held to authorize finding that ordinance was of such character. Id. City could enforce regulation by itself making the change after notice and failure of company to act within reasonable time. Id. Ordinance requiring a street railway company temporarily to remove its wires and suspend traffic so as to allow moving of a building held valid so as to relieve owner of liability. Indiana R. Co. v. Calvert, 168 Ind. 32, 80 NE 961. Municipal corporations may regulate the **speed of street cars.** Ashley v. Kanawha Valley Traction Co., 60 W. Va. 306, 55 SE 1016.

Telegraphs and Telephones [see, also, Telegraphs and Telephones, 8 C. L. 2096]: Legislature had power to enact Act Minn. April 19, 1893, and Act April 13, 1901, revoking right of telegraph and telephone companies under Gen. St. c. 34, tit. 1, § 42, to occupy roads or highways in the state except in so far as poles had already been erected by providing that companies must obtain consent from the city or village. Northwestern Telephone Exch. Co. v. St. Charles, 154 F 386. A telephone company obtains its rights to the use of the streets from the legislature, and the function of the probate court includes neither the length nor extent of such use but is limited strictly to the mode of use. Cleveland Telephone Co. v. South Newburgh, 4 Ohio N. P. (N. S.) 624.

Gas companies [see, also, Gas, 9 C. L. 1532; Pipe Lines and Subways, 8 C. L. 1354]: A township may by bill in equity prevent the use of its highways by a gas company engaged in laying pipes therein without legislative authority. Landis Tp. v. Millville Gaslight Co. [N. J. Eq.] 65 A 716. Defendant held without such authority. Id. Relief granted may also prevent use of pipes already laid where such pipes have not been connected with buildings. Id. Gas for public use cannot be conveyed along a public highway by subsurface pipes without the consent of the authorities having control of the highway. Hardman v. Cabot, 60 W. Va. 664, 55 SE 756. The right to convey gas for public use along a highway by means of pipes may be granted by the county court to a natural person. Id. Where an act incorporating a gas company provided that no public street should be injured without permission from the city, a license by the city to use the streets vested in the corporation a perpetual property therein which could be taken from it only for cause and by due process. In re Consolidated Gas Co., 56 Misc. 49, 106 NYS 407.

Water Companies [see, also, Waters and Water Supply, 8 C. L. 2262]: Statutes considered and held not to authorize a water company to lay pipes, mains, etc., in certain new territory over which its operations had been extended without first obtaining the consent of the highway authorities. Baltimore County Water & Elec. Co. v. Baltimore County Com'rs. [Md.] 66 A 34.

10. Supplement May 26, 1905 (P. L. p. 484), to an act defining motor vehicles and providing for their registration, use, and speed, does not infringe state or Federal constitution. State v. Unwin [N. J. Err. & App.] 68 A 110. Whether the registration fee be regarded as a license fee or a fee for registering the certificate is immaterial, since in either case it is not a tax on property but an exercise of police power. Id. Laws 1903, p. 162, regulating operation and speed of automobiles, held a valid exercise of police power. State v. Swagerty, 203 Mo. 517, 102 SW 483. Not class legislation. Id. Where statute authorized local authorities to regulate speed of motor vehicles on condition that sign boards indicating speed allowed be conspicuously posted, ordinance held not applicable where it did not appear such condition had been complied with. People v. Keeper of Prison of Seventh Dist., 121 App. Div. 645, 106 NYS 314, rvg. 55 Misc. 616, 106 NYS 960. Where one insisted on being tried under the ordinance and not under state statute, burden was on him to show that ordinance was in force. Id. Ordinance penalizing excessive automobile speed held void, the subject-matter being covered by state statute imposing a fine for riding or driving faster than a common pace in cities or compact parts of towns or villages. State v. Thurston [R. I.] 66 A 580. A statute requiring one to stop his automobile when a horse is about to become frightened applies to cases where the horse has actually become frightened. Ward v. Meredith, 220 Ill. 66, 77 NE 118, afg. 122 Ill. App. 159. Chapter 356, p. 646, Gen. Laws 1903 (Rev. Laws 1905, § 1277), held not to require driver of automobile to stop motive power as well as machine upon signal. Mahoney v. Maxfield, 102 Minn. 377, 113 NW 904. Under Acts 1905, p. 202, c. 123, § 5, providing that any person operating a motor vehicle shall stop upon signal of "any such person or persons so driving any horse," etc., signal may be given by any occupant of vehicle (State v. Goodwin [Ind.] 82 NE 459), and allegation in affidavit that signal was given for and on behalf of person actually driving horse should be regarded as surplusage (Id.). Under Laws 1905, p. 469, c. 305, § 4, requiring operator of automobile to stop on signal, unless forward movement shall be deemed necessary to avoid accident, it is for operator to determine whether such forward movement is necessary, and his determination is

horses,[11] engage in sports,[12] excavate,[13] build,[14] move buildings,[15] haul logs or lumber,[16] transact other business,[17] or allow or maintain obstructions therein.[18] Regulations must be reasonable,[19] and they cannot be invoked to qualify or abridge a

conclusive unless he acts unreasonably or in bad faith. McCummins v. State [Wis.] 112 NW 25. Evidence of speed is admissible. Id. Order of commissioners' court fixing license tax according to character of vehicle as indicated by number of horses used and limiting duration of license to one month held definite and certain. Kennamer v. State [Ala.] 43 S 482. The term "use" in an ordinance regulating the use of vehicles on the streets of a municipality and requiring payment of certain license fees therefor has reference to continued or repeated use, and the ordinance applies to all who use the streets with the vehicles described whether residents or nonresidents of the municipality. Pegg v. City of Columbus, 10 Ohio C. C. (N. S.) 199. Under Burns' Ann. St. 1901, § 4398, making it a misdemeanor to ride on sidewalks made of certain materials, and § 1709, prohibiting punishment of state offenses by ordinance, the jurisdiction of cities to regulate bicycle riding is limited to sidewalks of materials other than stone, brick, plank, or gravel. Millet v. Princeton, 167 Ind. 582, 79 NE 909. Certain ordinance held not to authorize riding on walks made of stone, brick, plank, or gravel. Id.

11. Town may by ordinance forbid leaving of horses hitched or unhitched on streets or alleys. Wells v. Mt. Olivet [Ky.] 102 SW 1182. Ordinance making it unlawful to leave team on street unhitched and unattended is reasonable and within power of board of trustees of town of sixth class. Rowe v. Reneer, 30 Ky. L. R. 545, 99 SW 250. Town ordinance that person leaving team on street hitched to a vehicle shall on conviction be fined, etc., held not void for indefiniteness as to person liable, and to mean that it is unlawful to leave team unhitched and unattended on street. Id.

12. If public may use streets for mere sport, such right is subject to regulation. Billington v. Miller [N. J. Law] 67 A 935. Ordinance held directed against mere sport of roller skating on streets and not to prohibit travel on roller skates. Id.

13. Municipalities may, in exercise of police power, regulate, supervise, and inspect excavations in and use of streets, and impose a reasonable charge for such supervision. Pottsville Borough v. Pottsville Gas Co., 33 Pa. Super. Ct. 480.

14. May license or restrict placing of building material. Bensel Const. Co. v. Homer [Ga. App.] 58 SE 489.

15. Though a city may regulate the use of streets for moving of buildings, it must do so by reasonable ordinance duly adopted and promulgated. Hinman v. Clarke, 105 NYS 725. Oswego ordinance No. 180 held only to limit right to move buildings on streets to such cases as department of works should approve in reasonable exercise of discretion. Id. The moving of a building upon or across a street is not an ordinary use of the street, but is one which must be exercised subject to such restrictions as may be imposed by the municipal authorities. Toledo, Bowling Green & Southern Traction Co. v. Sterling, 9 Ohio C. C. (N. S.) 200. Proof by the owner of the loss of a permit which he obtained from the mayor for the moving of the building was competent in action for preventing the moving, both for the purpose of showing the contents of the permit and that the owner was not trespassing in the use which he was making of the street. Toledo, Bowling Green & Southern Trac. Co. v. Sterling, 9 Ohio C. C. (N. S.) 200. The moving of a building across or through a public street, in such a manner as may be prescribed or permitted by ordinance enacted by council, is a lawful, but not a public, use of the street, and involves a privilege with reference to which the probate court has no duty to perform in fixing the mode of use of the streets by a telephone company. Cleveland Telephone Co. v. South Newburgh, 4 Ohio N. P. (N. S.) 624.

16. Acts 1903, pp. 682-689, authorizing commissioners' court of Jackson county to require license to haul logs, lumber and timber over public roads, held not unconstitutional as discriminating in favor of those hauling other heavy loads. Kennamer v. State [Ala.] 43 S 482. Not revenue measure within Const. art. 4, § 70, prohibiting passage of revenue bills within last five days of session. Id. Terms "logs, lumber, or other timber" do not include firewood. Id. Indictment for hauling lumber over public road without license, as required by order of commissioners' court need not set out order but may state substance. Id.

17. Street vender's license held not to authorize maintenance of lunch stand on sidewalk. Galloso v. Sikeston [Mo. App.] 101 SW 715. Injunction will not lie to restrain municipal officers from removing street stands which obstruct public travel. Cordatos v. Chicago, 129 Ill. App. 471.

18. Ordinance prohibiting obstruction of sidewalks, etc., with boxes, vehicles, etc., held valid. Sandeguard Grocery Co. v. Conley [Tex. Civ. App.] 19 Tex. Ct. Rep. 761, 104 SW 1073. The power of borough councils under Rev. Borough Act (P. L. 1897, p. 296, § 28, par. 1), to remove encroachments on streets, is a police power to be exercised only where the obstructions are readily ascertainable without adjudication, and does not authorize the summary removal of fences and trees where the true location of the line of the highway is involved. Hitchner v. Richman [N. J. Law] 65 A 856. Fact that one extends **sign over sidewalk** at time when not prohibited does not give him a vested right to maintain same as against city in exercise of police power. City of St. Louis v. St. Louis Theater Co., 202 Mo. 690, 100 SW 627. City of Providence could require owners, occupants, etc., of buildings and lots to **remove snow** from sidewalks within first four hours of daylight after snow had ceased falling. State v. McCrillis [R. I.] 66 A 301. Ordinance does not violate constitutional provision that laws shall be made for the general good and burdens of state fairly distributed (Id.) or authorize taking of private property for public use without compensation (Id.). Does not deny equal protection, or deprive of property without due process. Id.

19. In determining reasonableness of a

direct legislative franchise,[20] but the burden is on him who asserts unreasonableness,[21] and notice of the proposed enactment of a reasonable regulation is a privilege and not a right.[22] Licenses are accepted subject to the police power of the municipality,[23] and the rights of the public,[24] but a license cannot be arbitrarily and oppressively revoked.[25]

§ 12. *Rights of public use; law of the road.*[See 8 C. L. 65]—Highways being designed principally for the benefit of the traveling public, municipalities have no power to authorize their use permanently and exclusively for private purposes,[26] though they may permit the use of portions of them for semi-private purposes not inconsistent with the public rights,[27] and may devote different portions to different pub-

license tax for excavations, where a gas company is bound to repair the street after excavation, the cost of such repair by the company or the city should not be considered. Pottsville Borough v. Pottsville Gas Co., 33 Pa. Super. Ct. 480. Cost of issuing and recording permit, and of supervision so long as same may be necessary because of the excavation, should be considered. Id. While a city may fix the width of the carriageway or sidewalks within reasonable limits, it cannot arbitrarily determine that the whole street shall be used for a carriageway. City of Georgetown v. Hambrick [Ky.] 104 SW 997. While a city is not precluded from removing a passageway from a waiting room in a store to an elevated railroad station by previous agreement to permit its use for a money consideration, if in fact it is an unlawful obstruction (Rothschild & Co. v. Chicago, 227 Ill. 205, 81 NE 407), it may not do so where such passageway is a public benefit (Rothschild & Co. v. Chicago, 227 Ill. 205, 81 NE 407, rvg. 130 Ill. App. 542). Ordinance prohibiting roller skating on a street as a sport held reasonable under circumstances. Billington v. Miller [N. J. Law] 67 A 935. Mere fact that sign extending 18 inches over sidewalk in violation of ordinance was used to light people in and out of defendant's place of business held not to show ordinance to be unreasonable. City of St. Louis v. St. Louis Theater Co., 202 Mo. 690, 100 SW 627.

20. Defendant not required to obtain permission from city to excavate in street where authorized by charter to do so. Hudson & M. R. Co. v. Hoboken [N. J. Law] 68 A 60.

21. Ordinance prohibiting hitching or leaving of horses on street. Wells v. Mt. Olivet [Ky.] 102 SW 1182. Unless ordinance prohibiting the projecting of sign more than 18 inches over sidewalk is unreasonable on its face, party attacking same has burden of showing facts rendering it unreasonable. City of St. Louis v. St. Louis Theater Co., 202 Mo. 690, 100 SW 627. Court cannot take judicial notice of conditions of the place or the necessities of the situation. Id.

22. Ordinance requiring railroad to shift position of tracks. Atlantic & B. R. Co. v. Cordele, 128 Ga. 293, 57 SE 493.

23. License to maintain stone steps and areaway extending into sidewalk held revocable. City of New York v. United States Trust Co., 116 App. Div. 349, 101 NYS 574.

24. See post, § 13. Grant to street railway company of right to operate its line on a certain street held not to authorize it to exclude public or make street unnecessarily dangerous. McKim v. Philadelphia, 217 Pa. 243, 66 A 340. Permits for private occupation of portions of a street above or under ground are revocable whenever the space is required for public travel. Right to maintain vault spaces under sidewalk subordinate to purposes of subsurface railway. Potter v. Interborough Rapid Transit Co., 54 Misc. 423, 105 NYS 1071.

25. Revocation of license to move buildings after licensee had acted and incurred expense held ineffectual, and order stopping removal of building already in street held not a proper exercise of police power. Hinman v. Clarke, 105 NYS 725.

26. Streets cannot be occupied by private individual for the purposes of trade, and no officer can authorize such use. Lunch stand. Galloso v. Sikeston, 124 Mo. App. 380, 101 SW 715. City authorities may not authorize use of sidewalks for private purposes. Cordatos v. Chicago, 129 Ill. App. 471. Ordinances authorizing private occupation of sidewalks by a court yard and portico held void and not validated by acquiescence. City of New York v. Knickerbocker Trust Co., 52 Misc. 222, 102 NYS 900. An ordinance granting a private corporation the right to maintain an elevated platform on the public sidewalk in front of its building is invalid, and this though public travel is not wholly obstructed. Chicago Cold Storage Warehouse Co. v. People, 127 Ill. App. 179. City & Village Act, art. 5, § 1 (Hurd's Rev. St. 1905, c. 24, § 62), authorizing regulation of use of streets and sidewalks, gave no right to grant a private concern the privilege of maintaining a long elevated platform on sidewalk in front of its building. Chicago Cold Storage Warehouse Co. v. People. 224 Ill. 287, 79 NE 692. Held proper in mandamus to provide that walk be restored to substantially the level of the street. Id. Statutes considered and held not to authorize board of estimate and apportionment of New York City to grant to owners of a store the personal privilege of constructing and operating a spur track to connect the store with a street railway, said spur to be used exclusively for transportation of their goods. Hatfield v. Straus, 117 App. Div. 671, 102 NYS 934. Where owner of land plats same and executes deeds to city for streets, alleys, etc., a reservation therein of the exclusive right to use streets for operation of street railroads, for maintenance of lighting appliances, sewers, gas, waterworks, and telephone lines, free from city's control, held against public policy and void as creating monopoly. Jones v. Carter [Tex. Civ. App.] 18 Tex. Ct. Rep. 111, 101 SW 514.

27. Maintenance of free wharf at inter-

lic uses.[28] Members of the general public, including persons having charge of automobiles [29] or railway cars,[30] have equal rights in the use of highways.[31] Pedestrians may use the entire street and are not confined to sidewalks.[32] The public rights in streets includes their use for every kind of reasonable and proper communication and travel, including underground occupation by subsurface railroads where rendered necessary by the congested condition of the surface.[33] An owner of a building has a common-law right to a reasonable use of the streets for the purpose of moving it.[34]

One who operates a street railway or railroad car,[35] steam engine,[36] automo-

section of street with river held not inconsistent with use as public street. Williams v. Intendant & Town Council of Gainesville [Ala.] 43 S 209. Where a railroad company had the right to maintain tracks in a street, it could construct a siding thereon if public travel was not thereby unreasonably obstructed. Beaver Borough v. Beaver Valley R. Co., 217 Pa. 280, 66 A 520. Requiring a railroad company to elevate its tracks and authorizing it to use so much of the streets as may be necessary to that end is not a diversion of the streets to an unauthorized purpose. Where elevation was necessary for public safety. Weage v. Chicago & W. I. R. Co., 227 Ill. 421, 81 NE 424.

28. The rule that the public is entitled to use any portion of a street is subject to the right of a municipality to devote portions thereof to other purposes useful and convenient to the public. City not liable to one who tripped over wire stretched to protect plat for shade trees. Teague v. Bloomington [Ind. App.] 81 NE 103. A municipality has the right to determine the width of its streets which shall be devoted to lawful public uses, devoting a part to sidewalks, a part to lawn and shade trees, a part to necessary poles for public lighting, etc., a part to drainage, gutters, etc., and a part to vehicles and street cars, and it is not an unlawful use if that part of a street which is usually devoted to drainage be occupied in part by poles supporting street lights. City of Norwalk v. Jacobs, 9 Ohio C. C. (N. S.) 153.

29. Right to operate automobiles on highways of state is expressly conferred by Acts 30th Gen. Assem. c. 53 (Laws 1904, p. 44). House v. Cramer, 134 Iowa, 374, 112 NW 3.

30. Public and railway company have equal rights in use of streets (Saylor v. Union Traction Co. [Ind. App.] 81 NE 94; Jaffi v. Missouri Pac. R. Co., 205 Mo. 450, 103 SW 1026; Duffy v. Atlantic & N. C. R. Co., 144 N. C. 26, 56 SE 557; Ashley v. Kanawha Valley Trac. Co., 60 W. Va. 306, 55 SE 1016), and such rights must be exercised by each with due regard for the rights of the other (Heidelbaugh v. People's R. Co. [Del. Super.] 65 A 587; Weldon v. People's R. Co. [Del. Super.] 65 A 589), though a traveler must yield the right of way to a railroad in the ordinary course of the latter's business (Duffy v. Atlantic & N. C. R. Co., 144 N.C. 26, 56 SE 557).

31. Public highway open to reasonable common and equal use of persons on foot and in vehicles. Simeone v. Lindsay [Del. Super.] 65 A 778. As between driver of wagon approaching cross walk and pedestrian. Young v. Herrmann, 104 NYS 72.

32. Beasel Const. Co. v. Homer [Ga. App.] 58 SE 489; Keith v. Worcester, etc., R. Co. [Mass.] 82 NE 680. Where a private dock is built over a street, it becomes a part thereof and public may travel thereon. City of Buffalo v. Delaware, L. & W. R. Co. [N. Y.] 82 NE 513.

33. Potter v. Interborough Rapid Transit Co., 54 Misc. 423, 105 NYS 1071.

34. Hinman v. Clarke, 105 NYS 725. Refusal by the owner to pay in advance $10 demanded, after consent to move the building across a railway track and the bringing of the building to the track, did not justify the railway employes in resisting the passage of the building, in the absence of previous notice that such a demand would be made, or of ground for believing that the $10 could not be subsequently collected from the owner. Toledo, etc., Traction Co. v. Sterling 9 Ohio C C. (N. S.) 200. But even if the company was warranted in treating the building as an obstruction on its tracks, there was no warrant for the using of undue force in removing it, and the unexplained failure to push the building back on the skids, which apparently could have been easily done, rather than the running of the car violently into it, rendered the company liable for the resulting damages. Id.

35. See, also, Railroads, 8 C. L. 1590; Street Railways, 8 C. L. 2004. It is negligence for a street car company to so operate its cars as not to have them under control at street intersections. Ashley v. Kanawha Valley Trac. Co., 60 W. Va. 306, 55 SE 1016. The mere fact that a train is standing across a public street does not show negligence (Duffy v. Atlantic & N. C. R. Co., 144 N. C. 26, 56 SE 557), but a railroad company is liable if it unnecessarily maintains its train in such position and thereby causes injury (Id.). Failure of one running traction engine on road to have watchman 200 yards in advance, as required by Shannon's Code, §§ 1609-1616, does not make his actions unlawful in the sense that no recovery can be had for negligence of railroad company in colliding and injuring the engine (Chesapeake & N. Ry. v. Crews [Tenn.] 99 SW 368), and such failure will defeat recovery only if it contributed to the accident (Id.).

36. Where railroad has tracks in street, trainmen must be on lookout for danger when getting up steam by use of blower and must stop noise when it is obvious that a team is becoming frightened thereat. Feeney v. Wabash R. Co., 123 Mo. App. 420, 99 SW 477. That team was frightened by noise produced held shown by fact that they were accustomed to be driven near engines. Id. Evidence that engineer and firemen paid no attention to wagon road and that conductor did not see team in time to warn them to shut off steam held to make question

bile or motor car,[37] or other vehicle,[38] or who drives horses [39] or leaves them unattended,[40] is bound to exercise reasonable care to avoid injury to others lawfully in the highway,[41] such care being commensurate with the danger reasonably to be apprehended in the particular case.[42] It is negligence per se to violate a speed ordi-

of negligence for jury. Id. Where an engine is placed in a street by permission of the authorities and necessarily used in the construction of a building, one who seeks recovery for injuries caused by a frightened horse must show that the engine was negligently operated. Munro v. Wells Bros. Co., 116 App. Div. 663, 101 NYS 900. Evidence insufficient to show negligent operation of a steam engine. Id.

37. Operator of automobile must use reasonable care under circumstances. Simeone v. Lindsay [Del.] 65 A 778; House v. Cramer, 134 Iowa, 374, 112 NW 3. Fact that one approaching automobile with restive horse does not give signal to stop does not relieve operator of duty to exercise reasonable care to avoid accident and to stop if it appeared reasonably necessary. Strand v. Grinnell Automobile Garage Co. [Iowa] 113 NW 488. In action for injuries caused by plaintiff's horse taking fright at defendant's approaching automobile, evidence held to sustain finding of negligence on defendant's part and freedom therefrom on plaintiff's part. Id. One driving a heavy automobile suddenly around the rear of a car, stopping to receive passengers at a point where he knew there were likely to be many people, is guilty of gross negligence. Gregory v. Slaughter, 30 Ky. L. R. 500, 99 SW 247. Operating at so high rate of speed as to lose control is negligence. Simeone v. Lindsay [Del.] 65 A 778; Routledge v. Rambler Automobile Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 386, 95 SW 749. An automobile is not per se dangerous so as to render its owner responsible for injuries to a traveler caused by the negligence of a chauffeur acting beyond the scope of his employment. Jones v. Hoge [Wash.] 92 P 433. One struck by automobile must show by weight of evidence that automobile was operated negligently and by defendant Simeone v. Lindsay [Del.] 65 A 778. Evidence insufficient to justify recovery for injury for negligence in operating automobile. Green v. Cherry, 130 Ill. App. 158. Noises incident to operation of an automobile are not, of themselves, evidence of negligence. House v. Cramer, 134 Iowa, 374, 112 NW 3.

38. Mere fact that collision occurred between two vehicles held not to show negligence. Luecke v. Graham, 123 Mo. App. 215, 100 SW 505. A rope by which one wagon was drawn by another held no less an obstruction because shifted by progress of wagons. Young v. Herrmann, 104 NYS 72. Users bound to observe due care. Id. That it was necessary to use the rope held no excuse. Id.

39. Driver of a wagon must have his horse under reasonable control, keep a lookout ahead, and exercise ordinary care to prevent injury to others using the street. D. H. Ewing & Sons v. Callahan [Ky.] 105 SW 387. Person injured by collision with wagon negligently driven by another may recover if he could not have avoided collision by exercise of ordinary care. Id.

Held negligence to drive wagon so close to street car as to strike on running board. Sibley v. Nason [Mass.] 81 NE 887. Where, knowing his horse to be afraid of cars, one drives past a street car where people are working. Fertel v. Peck [Vt.] 67 A 818.

Not negligence: A driver is not negligent in approaching a crossing at an ordinary trot where horse is under such control that he can be stopped in six feet. Henson v. Arthur, 217 Pa. 156, 66 A 256. Not negligence for driver of a truck not to have on it such light as would enable plaintiff, a motorman, to see it from behind. Regan v. McCarthy, 119 Ill. App. 578. Collision held a pure accident due to breaking of a bolt which let down the shaft and frightened the horse. Luecke v. Graham, 123 Mo. App. 212, 100 SW 505.

Evidence held to sustain verdict for plaintiff for negligent driving of defendant's servant. D. H. Ewing & Sons v. Callahan [Ky.] 105 SW 387. To show that wagon was defendant's property and that person in charge was defendant's agent. Corpies v. Sand Co., 31 Pa. Super. Ct. 107. To show that injury was on public street. Casey v. U. S. Exp. Co., 214 Pa. 1, 63 A 365.

Evidence insufficient to show negligence where boy was struck by defendant's wagon. Barth v. Borden's Condensed Milk Co., 104 NYS 882. To show negligence on part of driver causing death of boy on street. Gelderman v. Curtis, 105 NYS 221. To show negligence of one who backed his wagon on driveway intended exclusively for teams. Hopper v. Benne, 114 App. Div. 572, 99 NYS 1118.

40. Leaving of horse which ran away and caused injury held to render owner liable for resulting injury. Damonte v. Patton, 118 La. 530, 43 S 153.

Not negligence per se to leave a horse and carriage unhitched and unattended in a street. Moulton v. Lewiston, etc., R. Co., 102 Me. 186, 66 A 388. To leave a team restrained only by 56-pound weight. Caughlin v. Campbell-Sell Baking Co. [Colo.] 89 P 53. Evidence held to sustain finding that defendant was not negligent. Id. Testimony that horse had no weight while he was running held to justify submission of negligence in leaving unhitched. Swift & Co. v. Murphy [Tex. Civ. App.] 18 Tex. Ct. Rep. 893, 100 SW 997. Under Civ. Code, art. 2321, rendering owner liable for damage caused by animal, burden is on owner to show that animal running away and causing injury escaped without fault on his part. Damonte v. Patton, 118 La. 530, 43 S 153. Fact that owner of horse running unattended upon street takes charge of him after collision and promises to settle for damages done held to connect owner with prima facie negligence arising from fact horse was running unattended. Brunkow v. Waters, 131 Wis. 31, 110 NW 802.

41. All must exercise reasonable care. Simeone v. Lindsay [Del.] 65 A 778. Pedestrian bound to use reasonable care to avoid collision with automobile. Id.

42. All must exercise care commensurate with danger in each case. Simeone v. Lindsay [Del.] 65 A 778.

nance,[43] or to ride a bicycle on a sidewalk without right.[44] Contributory negligence defeats recovery.[45] Questions for the jury are treated later.[46] A city is not liable for injuries resulting from its failure to enforce to laws with reference to the riding of bicycles on sidewalks.[47]

By the law of the road drivers of vehicles should keep to the right when passing in opposite directions, and one desiring to pass another going in the same direction should do so on the left, the other keeping to the right.[48] There is no occasion to invoke the law of the road where under the circumstances it could not be observed.[49]

§ 13. *Rights of abutters.*[See 8 C. L. 70]—While an abutter is not entitled to damages or an injunction for an injury to his public right to travel on the street,[50] he enjoys as appurtenant to his property certain private easements consisting of the right of ingress and egress, light, air, and view,[51] and for an invasion of these he may sue,[52] though the same obstruction also impairs his public right of travel and regardless of the number of other persons who may suffer similar injuries.[53] He is also entitled to a reasonable portion of the street for sidewalks.[54] An owner may plant shade and ornamental trees in the street in front of his property subject to

43. It is negligence per se to drive a horse in violation of a speed ordinance regardless of care otherwise exercised. Foley v. Northrup [Tex. Civ. App.] 19 Tex. Ct. Rep. 921, 105 SW 229.

44. Even in absence of prohibitory statute or ordinance, one has no right to ride bicycle on sidewalk and is liable for injury to one while so riding, though not negligent. Fielder v. Tipton [Ala.] 42 S 985.

45. Where one failed to observe a vehicle backed without negligence. Hopper v. Benne, 114 App. Div. 572, 99 NYS 1118. Evidence insufficient to show freedom from negligence on part of one struck by automobile. Wilkins v. New York Transp. Co., 52 Misc. 167, 101 NYS 650. On part of bicycle rider colliding with wagon. Dickinson v. Platt, 116 App. Div. 651, 101 NYS 956. Motorman running car down grade at great speed against steam roller held guilty of contributory negligence. Hanson v. Whalen, 110 App. Div. 793, 97 NYS 237. Motorman guilty per se of contributory negligence for running car so fast he could not stop within distance he could see an obstruction. Regan v. McCarthy, 119 Ill. App. 578. Plaintiff held not negligent in staying in buggy while approaching a locomotive standing in street and getting up steam by use of blower (Feeney v. Wabash R. Co., 123 Mo. App. 420, 99 SW 477), and, if negligent, held that humanitarian doctrine applied (Id.). Failure of driver of restive horse to give signal to automobile driver to stop held not to show contributory negligence as matter of law. Strand v. Grinnell Automobile Garage Co. [Iowa] 113 NW 488. One momentarily on running board of street car while attempting to find seat held not negligent in failing to watch for collision with team. Sibley v. Nason [Mass.] 81 NE 887. Motorman injured by collision with runaway horse held not negligent, horse not being discovered in time to be avoided. Damonte v. Patton, 118 La. 530, 43 S 153. Motorman operating car at night held not negligent in not anticipating and being prepared to avoid a runaway horse. Id. That plaintiff rode a bicycle did not alone bar recovery. Clinton v. Revere [Mass.] 80 NE 813.

46. See post, § 15, Actions for Injuries.

47. Millett v. Princeton, 167 Ind. 582, 79 NE 909.

48. Road Act, § 91 (Gen. St. p. 2823). State v. Unwin [N. J. Err. & App.] 68 A 110. For jury whether defendant was negligent in attempting to pass his automobile on left of a carriage going in same direction near a corner (Mendleson v. Van Rensselaer, 118 App. Div. 516, 103 NYS 578), and whether plaintiff was negligent in not keeping to the right (Id.). That a milk man drove on left side of street was not negligent as to one who walked against side of his wagon at a crossing. Henson v. Arthur, 217 Pa. 156, 66 A 256.

49. Where collision occurred just as a wagon emerged from an alley. Dickinson v. Platt, 116 App. Div. 651, 101 NYS 956.

50. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330.

51. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330. Whether fee of street is in city or not, abutting owner has right of ingress, egress, air, and light, of which he cannot be deprived for public or other uses without compensation. Blackwell, etc., R. Co. v. Gist, 18 Okl. 516, 90 P 889, and authorities cited. Abutter has special easement of ingress and egress (Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70; City of Indianapolis v. Miller [Ind.] 80 NE 626), and this rule applies to **public alleys** (City of Indianapolis v. Miller [Ind.] 80 NE 626). Ordinance prohibiting theater entrances on a public alley held invalid. Id.

52. An owner's right of ingress and egress is invaded by obstructions absolutely preventing access to the premises though not being immediately in front of them. Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70. Complaint too general to authorize damages for excavations for proposed railroad, it not appearing that they interfered with rights of ingress, etc. Brown v. Rea, 150 Cal. 171, 88 P 713.

53. Signal tower erected by street railway company. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330.

54. City could not restrain construction of reasonable walk. City of Georgetown v. Hambrich [Ky.] 104 SW 997. City's remedy is to widen street if too narrow for sidewalks. Id.

removal or trimming when they interfere with the proper public use of the street,[55] and may recover damages against a mere trespasser for cutting or mutilating them without authority.[56] He may occupy the highway for private purposes not inconsistent with the public easement,[57] but the use must be reasonable,[58] and he may not permanently exclude the public.[59] Property owners on one side of a street may not enjoin the building of a structure on the other side where they will not be specially injured.[60]

Ownership of fee.[See 8 C. L. 71]—Except in some jurisdictions [61] the fee of public streets or highways is in the abutters,[62] who may use it in any reasonable manner not infringing upon the public rights.[63] Thus, an abutter may lay pipes in the street,[64] and for this purpose he has the right to make the necessary excavations.[65] The fee ownership is, however, subject to all proper street or highway uses,[66] and these generally differ according to the character of the highway as urban or rural,[67] though this distinction is not universally observed.[68] Abutters are entitled to compensation for additional burdens on the fee,[69] or they may be relieved therefrom by

55. Cartwright v. Liberty Tel. Co., 205 Mo. 126, 103 SW 982.

56. Telephone could not defend on ground that maintenance of lines was a proper use of streets, where it showed no franchise or right to occupy the streets. Cartwright v. Liberty Tel. Co., 205 Mo. 126, 103 SW 982.

57. Under the law of Ohio the rights of an abutting property owner in the space occupied by the street and sidewalk is not limited to mere egress and ingress, but includes any private use not inconsistent with, or constituting an actual or threatened interference with, the public use for transit or other incidental purposes, and while such use by an abutting owner is subject to reasonable regulation in the interest of the public, such use cannot be interfered with unless it amounts to an actual obstruction or menace to the public. Reese v. Cleveland, 5 Ohio N. P. (N. S.) 193. The projection of an electric sign ten feet from the front of a building over the sidewalk and at a height of fourteen feet above the sidewalk is not an unreasonable use of the street by an abutting owner and cannot be enjoined. Id.

58. Right of upland owner to build dock over street to the navigable water does not authorize an appropriation of the street or an unreasonable use thereof. City of Buffalo v. Delaware, L. & W. R. Co. [N. Y.] 82 NE 513. Though abutting owners may temporarily use sidewalk in front of place of business, they cannot appropriate any portion thereof to their exclusive use, though sufficient space is left for public. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700. After dedication has been accepted, dedicator cannot use street in manner to interfere with public use thereof. City of Buffalo v. Delaware, L. & W. R. Co. [N. Y.] 82 NE 513.

59. Township not liable for closing up a private cattleway under public road and substituting a culvert, though same had been maintained for 50 years. Snively v. Washington Tp. [Pa.] 67 A 465. Though one may temporarily place obstructions in highway while improving abutting property, he must remove same within a reasonable time. Elzig v. Bales [Iowa] 112 NW 540. Right of abutting owner to temporarily occupy street while building and repairing it no defense to one unnecessarily permitting billboard to fall over sidewalk and to remain there for an undue length of time. Ryan v. Foster [Iowa] 109 NW 1108.

60. Could not enjoin street railway company for constructing elevated approach to a crossing. Cobb v. Warren St. R. Co. [Pa.] 67 A 654.

61. Evidence held to show that certain land conveyed by city of Brooklyn to plaintiff's grantor was previously an old Dutch road, so that city could convey the fee according to law of continent of Europe. Caminez v. Goodman, 104 NYS 68.

62. Allegations showing ownership of lots on both sides of a street held sufficient allegation of ownership of fee in street. Seaboard Air Line R. Co. v. Southern Inv. Co. [Fla.] 44 S 351.

63. Colegrove Water Co. v. Hollywood [Cal.] 90 P 1053; King v. Norcross [Mass.] 82 NE 17. Could pile wood. King v. Norcross [Mass.] 82 NE 17.

64. Colegrove Water Co. v. Hollywood [Cal.] 90 P 1053.

65. Where he gave notice and offered to secure city against damage. Colegrove Water Co. v. Hollywood [Cal.] 90 P 1053. Ordinance requiring permission to use street not applicable to owner of soil. Id.

66. Baltimore County Water & Elec. Co. v. Dubreuil [Md.] 66 A 439.

67. Laying of gas and water pipes would not be an additional servitude in cities, whereas it would be in an ordinary country highway. Baltimore County Water & Elec. Co. v. Dubreuil [Md.] 66 A 439. Road held not to authorize application of rule governing cities and towns, though within corporate limits. Id.

68. There is no distinction in this state between rural and urban highways with respect to the rights of the public therein and legislative control thereover. Hardman v. Cabot, 60 W. Va. 664, 55 SE 756.

69. See, also, Eminent Domain, 9 C. L. 1073. Telephone line held additional burden. Burrell v. American Tel. & T. Co., 224 Ill. 266, 79 NE 705. Insertion in ordinance granting use of public street to railroad company, a provision vacating portion of street to be so used, held not to prevent abutting property owner from recovering damages caused by such occupation. Stehr v. Mason City & Ft. D. R. Co. [Neb.] 110 NW 701.

injunction;[70] but the operation of a railroad upon a street is not per se a nuisance as to abutting owners,[71] and to warrant an injunction the facts must show that a nuisance would result from the proposed acts and that plaintiff will suffer some peculiar injury.[72] Mere incorporation of territory within the limits of a city does not make a bare country road urban so as to authorize the laying of pipes therein without compensation to abutters.[73]

§ 14. *Defective or unsafe streets or highways. A. Liability of municipalities in general.*[See 8 C. L. 72]—A municipality is bound to exercise reasonable care to maintain its highways in a reasonably safe condition for ordinary travel.[74] This

Pipe line in rural highway not additional burden on fee. Hardman v. Cabot, 60 W. Va. 664, 55 SE 756. Public road may be improved to accommodate footmen as well as those using teams (Hitchcock v. Zink [Neb.] 113 NW 795), and the construction of a **sidewalk along a rural highway** is not an additional burden (Id.). The erection of **telephone lines** in city or borough streets in conformity with municipal regulations, or unsightliness of poles, or noises incident to the non-negligent maintenance of the lines, do not entitle an abutting owner to compensation. Shinzel v. Bell Tel. Co., 31 Pa. Super. Ct. 221. Appreciable **interference** with **light, air, access, or drainage** is an additional burden. Id.

70. Maintenance of **telephone line** without consent or condemnation. Burrall v. American Tel. & T. Co., 224 Ill. 266, 79 NE 705. Mere delay held no bar. Id. That line was convenient for public held immaterial. Id. Maintenance of telephone lines is a proper street use in large cities and abutters may not restrain it. Evidence sufficient to show a city street in a thickly populated territory. Gannett v. Independent Tel. Co., 55 Misc. 555, 106 NYS 3. An abutting owner who consents or submits to the use of the street in front of his premises for telephone purposes by means of poles and wires is not, as a matter of law and an invasion of his private rights, entitled to an injunction restraining the company from placing its wires in a conduit in said street. Burns v. Columbus Citizens' Tel. Co., 10 Ohio C. C. (N. S.) 307. Could restrain construction of **railway tracks** in street without compensation. Athens Terminal Co. v. Athens Foundry & Mach. Works [Ga.] 58 SE 891. Where fee in street is in abutting owner and public has only an easement, held that such owner could enjoin laying of steam track in street until payment has been made for property taken or such payment has been secured by deposit. Seaboard Air Line Ry. v. Southern Inv. Co. [Fla.] 44 S 351. An abutting owner has no cause of action against a street railway company changing the grade of a highway for the construction of its road in accordance with locations granted by the officers of the municipality. Hyde v. Boston & W. St. R. Co., 194 Mass. 80, 80 NE 517. Erection of electric **lighting plant** by village in center of street held an improper use thereof. McIlhinny v. Trenton, 148 Mich. 380, 14 Det. Leg. N. 190, 111 NW 1083. Fact that work is completed was no defense to suit for injunction where construction was over objection of abutter. Id.

71. Brown v. Rea, 150 Cal. 171, 88 P 713.

72. Complaint insufficient. Brown v. Rea, 150 Cal. 171, 88 P 713.

73. Richards v. Citizens' Water Supply Co., 104 NYS 927.

74. City of Denver v. Utzler, 38 Colo. 300, 88 P 143; Stidham v. Delaware City [Del.] 67 A 175; City of Americus v. Johnson [Ga. App.] 58 SE 518; City of Henderson v. Sizemore [Ky.] 104 SW 722; City of Dayton v. Glaser, 76 Ohio St. 471, 81 NE 991. Town bound to maintain sidewalk in reasonably safe condition under Rev. Laws, c. 51, § 1. Mason v. Winthrop [Mass.] 81 NE 644. A city or village whose trustees are made commissioners of highways is liable for negligence in not repairing same. Van Gorder v. Seneca Falls, 104 NYS 299. Instruction, in action for personal injury caused by defective sidewalk, requiring plaintiff to prove that same was in "unreasonable" dangerous condition, is erroneous. Brown v. Pierce [Neb.] 111 NW 366. Evidence held to support finding of negligence in maintaining insufficient sidewalk across ditch. City of Cleburne v. Elder [Tex. Civ. App.] 18 Tex. Ct. Rep. 530, 102 SW 464. In suit to recover for injuries from stepping into a hole. Miller v. International R. Co., 52 Misc. 344, 102 NYS 254. Where rock ledge extended across road and stood from four to ten inches above ground. Dralle v. Reedsburg, 130 Wis. 347, 110 NW 210. Evidence sufficient to show that dangerous condition of highway was due to negligence of county commissioners, and not merely to a snow. Harford County Com'rs v. Hause [Md.] 67 A 273. Street commissioner not necessarily free from negligence in filling hole in street because he had always filled such holes in that way. Heberling v. Warrensburg, 204 Mo. 604, 103 SW 36. Under the evidence, city held not negligent in maintaining a wire along sidewalk to protect a plat for shade trees. Teague v. Bloomington [Ind App.] 81 NE 103. Village held liable for permitting obstruction of street by live wire though electrical plant was maintained in public capacity. Village of Palestine v. Siler, 225 Ill. 630, 80 NE 345. Evidence sufficient to show negligence. Id. Disabled vehicle left in street after expiration of a reasonable time for removal becomes a nuisance, and under Code, § 753, city is liable for injuries resulting therefrom. Cutter v. Des Moines [Iowa] 113 NW 1081. Barrier put up as a guard held to be of itself an obstruction where it had fallen down, was without signal light, and because of color was inconspicuous at night. Weber v. Union Development & Const. Co., 118 La. 77, 42 S 652.

Only reasonable care required: Merely required to use reasonable care in detecting and remedying defects which it might fairly be anticipated would be likely to cause accidents. Butler v. Oxford, 186 N. Y. 444, 79 NE 712. Township officers bound only for reasonable and ordinary care under the circumstances. Ackley v. Bradford Tp., 32 Pa. Super. Ct. 487. Village not liable for failure

duty is performed when it maintains ways which are smooth and convenient for travel,[75] but it extends to all thoroughfares used as public highways and recognized by the municipality as such [76] and to their entire width [77] except that as to country roads within the limits of a city the latter is bound to keep in repair only the traveled portion.[78] While a municipality is not liable for nonexercise of discretionary powers with respect to streets,[79] if it exercises such powers, as by procuring a sidewalk to be built, it will be required to maintain it reasonably safe.[80] It is not an insurer of the safe condition of its ways,[81] and hence is not liable unless negligent,[82] nor is it responsible for extraordinary accidents [83] or for defects so slight that injury could not reasonably be anticipated.[84] Quasi municipal corporations such as townships and counties are not, in the absence of statute, liable for failure to keep their

to remove stones from rarely used dirt road leading up a hill in sparsely settled district. McKone v. Warsaw, 187 N. Y. 336, 80 NE 212. City not liable because of an ordinary rut in a dirt road adapted as a street. Clifton v. Philadelphia, 217 Pa. 102, 66 A 159.

For ordinary travel only: A municipality is bound to keep its streets in repair and free from nuisance both as to the width of the street and freedom from obstructions in the line of travel, but it is only bound to keep them in such condition as to render them safe for ordinary travel as distinguished from an extraordinary emergency, such as riding behind a frightened horse or a horse beyond the control of its driver. City of Norwalk v. Jacobs, 9 Ohio C. C. (N. S.) 153. The liability of a municipality with reference to its streets is limited to reasonable care in maintaining them in a safe condition for the ordinary uses for which they were dedicated. Iroquois Hotel Co. v. Columbus, 5 Ohio, N. P. (N. S.) 357. While an abutting owner probably has the right to excavate under the sidewalk, he assumes all liability attaching thereto, and a claim on his part for damages will not lie against the municipality where his loss resulted from storm water which covered the street and sidewalk and running through the gratings in the sidewalk filled the space excavated below and flooded the basement of his building. Id

75. Mitchell v. Tell City [Ind. App.] 81 NE 594.

76. County commissioners held charged with duty of maintaining in reasonably safe condition an approach to a bridge used by public and repaired by county for over twenty years though it had no control over the bridge. Garrett County Com'rs v. Blackburn [Md.] 66 A 31. Upon the incorporation or extension of a city, roads and bridges within its limits and formerly controlled by the county become subject to the jurisdiction and care of the city. Cavender v. Charleston [W. Va.] 59 SE 732. Fact that street has been vacated does not relieve city from liability for personal injuries where it permits same to be used as before vacation. Fritz v. Watertown [S. D.] 111 NW 630. Where approach to street curb was used for many years with city's knowledge as continuation of sidewalk, it is immaterial that it was originally constructed by private person. City of Chicago v. Loebel, 228 Ill. 52, 81 NE 796.

77. City of Mobile v. Shaw [Ala.] 43 S 94. Where, under ordinance, entire space between curb and lot line, including grass plot, is part of sidewalk and open to public as such, city must keep such space in reasonably safe condition. Coffey v. Carthage, 200 Mo. 616, 98 SW 562.

78. No liability to one injured while attempting to turn onto a lower road. Nelson v. Spokane [Wash.] 87 P 1048.

79. Van Gorder v. Seneca Falls, 104 NYS 299. A city is not bound to light its streets. Mitchell v. Tell City [Ind App.] 81 NE 594.

80. Van Gorder v. Seneca Falls, 104 NYS 299.

81. Stidham v. Delaware City [Del.] 67 A 175; City of Chicago v. Hutchinson, 129 Ill. App. 239. Not an insurer of persons traveling at night against danger from stepping off sidewalk into a drain. Mitchell v. Tell City [Ind. App.] 81 NE 594. Where one knew of drain and that city maintained no light, she assumed the risk. Id.

82. Town not liable where stumbling of horse and fall from carriage were mere accidents not due to defects in road. Elseeck v. Capwell [R. I.] 67 A 421.

83. Where horse fell on smooth pavement and got foot wedged in sewer opening. Vaccarini v. New York, 54 Misc. 600, 104 NYS 928.

84. Slight scoop-shaped depression in sidewalk. Isaacson v. Boston [Mass.] 80 NE 809. Depression three-fourths inches deep, twelve inches long, and six inches wide. Powers v. New York, 121 App. Div. 433, 106 NYS 166. Two to five inch difference in level of end of stone walk and dirt walk continuation. Butler v. Oxford, 186 N. Y. 444, 79 NE 712. Where street and sidewalk were greatly disturbed by excavation and building operations, held not to show negligence that portion of a flagstone was depressed. Henry v. New York, 104 NYS 440. Top of manhole extending from three to six inches above surface of sidewalk held not a defect so slight as to absolve city of liability as matter of law. Corr v. New York, 121 App. Div. 578, 106 NYS 280. In the absence of actual or constructive notice, a city is not negligent merely because a small hole exists in a thick even ice on a pavement. McCabe v. Philadelphia, 217 Pa. 140, 66 A 247. City not liable for slipping of horse on slippery asphalt pavement. Vaccarini v. New York, 54 Misc. 600, 104 NYS 928. Held not negligence to permit holes from one to four inches deep to exist in asphalt pavement. City of Dayton v. Glaser, 76 Ohio St. 471, 81 NE 991. Backing of wagon over unguarded embankment not as matter of law such accident as could not reasonably be expected. Wallace v. New Albion, 105 NYS 524.

highways in safe and proper condition.[85] As in other cases, contributory negligence is fatal to recovery.[86] Jury questions are discussed in a subsequent section.[87]

(§ 14) *B. Notice of defect.*[See 8 C. L. 74]—It must appear that the municipality had either actual or constructive notice of the defects complained of [88] and failed to remedy them within a reasonable time thereafter.[89] Evidence of the general unsafe condition of a sidewalk tends to charge the municipality with constructive notice of the particular defect which caused the injury,[90] and a city is bound to know of defects of its own creation.[91] If a city has notice of an obstruction, greater diligence to remove it will be required of it than if such was not the case.[92]

(§ 14) *C. Sidewalks,*[See 8 C. L. 75] like other portions of the street, must be kept in a reasonably safe condition,[93] the same general rules of liability applying.[94] To

85. James v. Trustees of Wellston Tp., 18 Okl. 56, 90 P 100, reviewing authorities. County not liable under Act April 13, 1894, amending Rev. St. 1892, § 845, to one who sustained injuries because his horse took fright at stones collected by its commissioners by roadside for repair work. Ebert v. Pickaway County Com'rs, 75 Ohio St. 474, 80 NE 5. The duty of keeping ordinary county roads in repair is not imposed on county commissioners by § 845, Rev. St., and a directed verdict for the defendants is not erroneous in an action for damages for negligence brought by one injured in his vehicle sliding into a deep rut or hole in the road. Smith v. Williams County Com'rs, 10 Ohio C. C. (N. S.) 115.

86. See post, I, Contributory Negligence of Person Injured.

87. See post, § 15, Actions for Injuries.

88. City held not liable for injury caused by falling of iron water pipe standing against side of building abutting on sidewalk where city had no notice of defective attachment. Mitchell's Adm'r v. Brady, 30 Ky. L. R. 258, 99 SW 266. Middletown City Charter, § 30 (Laws 1902, p. 1376, c. 572), precluding recovery for injuries from snow and ice unless city shall fail to remove the snow and ice within a reasonable time after written notice, is not unconstitutional (MacMullen v. Middletown [N. Y.] 79 N E 863), but such notice is a condition precedent to right to sue and must be both pleaded and proved (Id.). City not liable for injuries from snow or ice unless it remains long enough to charge city with notice and require it to remove it. City of Chicago v. Hutchinson, 129 Ill. App. 239. In an action for injury resulting from an alleged defect in a street, it is error to overrule a motion by the city for an instructed verdict in its behalf where actual notice of the condition of the street is not claimed and there is no evidence of constructive notice except as based on speculation. City of Cincinnati v. Klein, 10 Ohio C. C. (N. S.) 296. Notice will be implied where defects have continued so long that the city officials by the exercise of reasonable care might have known of them. City of Chicago v. Loebel, 130 Ill. App. 487; Abbott v. Detroit [Mich.] 14 Det. Leg. N. 662, 113 NW 1121. Instruction that obstruction had been in street too short a time to give constructive notice held erroneous, although particular stones had been there but two hours where pile had been continuously maintained for three days by addition of new stones as pile was depleted by use. Vance v. Kansas City, 123 Mo. App. 644, 100 SW 1101. Where excavation has been left unguarded for such a length of time that knowledge may be inferred, it is proper to submit questions of knowledge though there is no direct evidence thereof. Muncy v. Bevier [Mo. App.] 101 SW 157. Notice to a city is to be determined not only from the length of time a dangerous condition has existed but also from the nature of the defect, extent of travel, and similar considerations. Jones v. Ogden City [Utah] 89 P 1006. Evidence sufficient to show notice. Austin v. Bellingham [Wash.] 88 P 834. To town of defective crossing. Town of Normal v. Bright, 125 Ill. App. 478. Fact that sidewalk was constructed of wood, had been used for about ten years, and hence liable to be defective, held to sustain finding of constructive notice of defect. Murphy v. South St. Paul [Minn.] 112 NW 259. Grant by city to contractor of permit to open a ditch across street held notice to city that work was in progress. Kinsey v. Kinston [N. C.] 58 SE 912. Knowledge of street superintendent who discovered a defect held notice to a town. Mason v. Winthrop [Mass.] 81 NE 644. Evidence insufficient to charge city with notice of alleged defective manhole covering. Bissell v. District of Columbia, 28 App. D. C. 38. Hole in sidewalk covered with a board for twenty-four hours not sufficient to show constructive notice. Yeager v. Burwick Borough [Pa.] 67 A 347.

89. Sidewalk. Ballard v. Kansas City [Mo. App.] 104 SW 1126. City liable if it knew or by exercise of ordinary care could have known of defect and remedied it prior to accident. Smart v. Kansas City [Mo.] 105 SW 709.

90. City of Roswell v. Davenport [N. M.] 89 P 256. Proof that for more than a year a walk has been out of repair and unsafe in places on each side and near the place of injury is sufficient to charge the city with notice of the condition of the walk at the place of injury. Hammock v. Tacoma [Wash.] 87 P 924. Not necessary to prove that defect was such that it could have been discovered by the observation a mere traveler is required to exercise to avoid injury. Id.

91. Where it had removed a culvert. Heberling v. Warrensburg, 204 Mo. 604, 103 SW 36.

92. Cutter v. Des Moines [Iowa] 113 NW 1081.

93. Evidence sufficient to sustain recovery for injury from defective sidewalk. City of Chicago v. Loebel, 130 Ill. App. 487; Romaine v. Spring Valley, 105 NYS 256. Per-

this end a city is bound to examine not only their surface but the supports as well whenever it has reasonable cause to believe that these are becoming defective.[95] If for a long time a city acquiesces in the use by the public of an apron over a drain as a part of a sidewalk, it must exercise care to keep it reasonably safe.[96]

(§ 14) *D. Barriers, railings, and signals.*See 8 C. L. 76—A city must exercise reasonable care to maintain proper guards or signals near dangerous places in its streets,[97] and the same duty rests upon others who create or maintain such places.[98] That one knows that a street is occupied by building material does not relieve the city of its duty to maintain guards.[99] Where a city or railway company erects and maintains suitable barriers to warn the public that a street is closed for repair, it will not be held liable to one who is injured by disregarding them.[1]

(§ 14) *E. Snow and ice.*See 8C. L. 77—Municipalities are not liable for injuries from smooth and even temporary accumulations of snow or ice,[2] but it is negligence to allow accumulations amounting to obstructions to remain for an unreasonable length of time.[3]

(§ 14) *F. Defects created or permitted by abutting owners and otherwise.* See 8 C. L. 78—In the absence of statute[4] a city is bound to exercise reasonable diligence to remedy or remove defects or obstructions in its streets though the same were not created or permitted by its authority.[5] What constitutes such diligence de-

mitting three flag stones one on the other to remain on sidewalk held negligence. Graham v. New Rochelle, 104 NYS 939. Evidence that on account of rains sidewalk had sagged and had become slippery held to sustain finding of negligence. Forbes v. Omaha [Neb.] 112 NW 326.

94. See ante, A, Liability in General.

95. Hammock v. Tacoma [Wash.] 87 P 924.

96. City of Chicago v. Loebel, 130 Ill. App. 487.

97. Where city grants right to place building material in street, it is chargeable with notice of obstruction and must exercise reasonable care in giving warning thereof. Blocher v. Dieco, 30 Ky. L. R. 689, 99 SW 606.

98. See post, F, Defects Created by Abutters and Others.

99. Blocher v. Dieco, 30 Ky. L. R. 689, 99 SW 606.

1. City and street car company held not negligent. McFarlane v. Boston El. R. Co., 194 Mass. 183, 80 NE 447.

2. Not liable for mere general slippery condition due to rain and freezing during previous twenty-four hours. Blaine v. Philadelphia, 33 Pa. Super. Ct. 177. Where one slipped on ice formed only about two days before. Zunz v. New York, 103 NYS 222. Not liable unless snow or ice had remained long enough to permit of notice and removal (City of Chicago v. Hutchinson, 129 Ill. App. 239), nor if accumulation does not obstruct travel or prevent walk from being reasonably safe (Id.). Judgment in case where court refused to charge that plaintiff could not recover if fall was due to general slippery condition of sidewalk affirmed, court being equally divided. Leisenring v. Nanticoke Borough, 33 Pa. Super. Ct. 305. Where rain and snow or thawing and freezing constantly alternate, a city is not bound to clear its walks of every fall of snow or covering of ice. Brennan v. New York, 117 App. Div. 849, 103 NYS 266.

3. Where ice and snow accumulate so as to amount to an obstruction and this is allowed to remain for several weeks without action on the part of a city, it is sufficient to establish negligence in the absence of reasonable justification. Bull v. Spokane [Wash.] 89 P 555. Liable for permitting ridge of ice to remain on sidewalk for a month where one fell after it was covered with snow. Moore v. Philadelphia, 33 Pa. Super. Ct. 194.

4. Provision in charter that city should not be liable for damage caused by neglect of any person to keep any sidewalk clear from obstruction held to control general statute rendering cities liable for injuries caused by defective sidewalks, etc. Maclam v. Marquette, 148 Mich. 480, 14 Det. Leg. N. 207, 111 NW 1079. Provisions held not repealed by Loc. Acts 1899, p. 241, No. 423. Id. Not unconstitutional as class legislation. Id.

5. City of Grand Forks v. Allman [C. C. A.] 153 F 532. That defect was produced by third person is no defense where city has knowledge thereof and fails to remedy. Davis v. Adrian, 141 Mich. 300, 13 Det. Leg. N. 1023, 110 NW 1084. No defense that a coal hole was maintained by an abutter where city did not exercise reasonable care. City of Chicago v. Jarvis, 226 Ill. 614, 80 NE 1079. Negligence of contractor making excavations will not relieve city if it has knowledge of such negligence. Kinsey v. Kinston [N. C.] 58 SE 912. City liable where a horse takes fright and runs away, causing injury, because of obstructions permitted to remain in street, provided driver exercised due care. City of Denver v. Utzler, 38 Colo. 300, 88 P 143. Wooden awning held a nuisance rendering city liable for injuries. Mansfield v. New York, 104 NYS 386. That awning interfered with public use held shown by proof that a vehicle struck it and injured pedestrian. Id. Evidence held to sustain finding of negligence on part of city in permitting awning to be maintained though same be not considered a nuisance. Id.

pends upon the facts in each case [6] and especially upon the location of the obstruction and the length of time it has continued.[7] A city may not grant the right to use a street in a manner dangerous to the public,[8] and where an improvement is done under its command it may not escape liability by pleading that the negligence was that of an independent contractor.[9] It is liable for permitting public service corporations to endanger the public safety by the manner in which they exercise their privileges.[10]

An abutting owner is liable for acts or omissions rendering a street or highway unsafe [11] unless he has surrendered possession to others who expressly or impliedly covenant to make the necessary repairs,[12] and where a defect is due solely to the negligence of an abutter and the city is required to respond in damages to third persons, it may in turn recover from the abutter.[13] The limited right of an abutting owner to obstruct a highway by reason of his business exigencies must be reasonably exercised in subservience to the right of the public to safe passage,[14] and if an obstruction temporarily justified is not removed in a reasonable time it becomes a nuisance.[15]

Corporations or individuals using a street or highway for building operations or the making of other improvements must exercise care for the safety of the public [16] and must erect and maintain proper guards and signs where reasonably neces-

6. City of Grand Forks v. Allman [C. C. A.] 153 F 532. Maintenance by owner of store of a peanut roaster between sidewalk and street held not a public nuisance as matter of law, so as to render village liable to pedestrian injured by an explosion, there being evidence that such machines were in common use. Frank v. Warsaw, 116 App. Div. 618, 101 NYS 938.

7. City of Grand Forks v. Allman [C. C. A.] 153 F 532. A municipality is bound to know of and remedy defects after a reasonable time. Rife v. Middletown, 32 Pa. Super. Ct. 68.

8. That an awning had existed for over fifteen years held not to raise presumption that owner had acquired right to use the street. Mansfield v. New York, 104 NYS 386.

9. Where a city required a property owner to repair a street in front of his property and the curbsetter employed by him left obstructions in the street resulting in injury. Meyers v. Philadelphia, 217 Pa. 159, 66 A 251.

10. For permitting street railway to maintain a pole in middle of street unlighted in night time resulting in death to one who drove against it. McKim v. Philadelphia, 217 Pa. 243, 66 A 340.

11. Responsible for condition of sidewalk. Reynolds v. Strong, 103 NYS 106. Abutter liable for maintaining structures turning water onto the sidewalk where it froze, causing injury. Hynes v. Brewer, 194 Mass. 435, 80 NE 503. Immaterial that structures were there when he purchased and had been maintained for fifty years. (Id.), or that some of the ice formed from other water (Id.). Findings held not to show negligence on part of one who left a large stone leaning against a building over a hole in a sidewalk where a boy pulled it upon himself. Falkenberg v. Stout [Kan.] 88 P 874. Owner of building and coal company engaged in putting coal into a **coal hole** both owe duty seeing that hole is properly guarded, and neither is relieved by duty resting on the other. French v. Boston Coal Co. [Mass.] 81 NE 265. Proof that defendant owned and had control of a building and that **unsafe trap doors** were maintained exclusively for the benefit of the building held sufficient to warrant finding that defendant maintained the doors and had control of them. City of Seattle v. Puget Sound Imp. Co. [Wash.] 91 P 255. The mere fact that a dealer is engaged in delivering material into a coal hole in a sidewalk for the owner of a building does not render him liable to one who falls into the hole. Scheafer v. Iron City Sand Co., 31 Pa. Super. Ct. 476. Evidence sufficient to warrant finding of negligence in maintaining a hole in sidewalk in front of defendant's store. Brown v. Milligan, 33 Pa. Super. Ct. 244. Abutting owners must so use their property as not to unreasonably interfere with those lawfully using the adjoining highway. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. An object maintained near a highway of a character naturally calculated to frighten horses of ordinary gentleness is a nuisance. Id.

12. Parties who merely had possession and control as agents to collect rent held not liable to one who fell into a coal hole. Reynolds v. Strong, 103 NYS 106.

13. City of Seattle v. Puget Sound Imp. Co. [Wash.] 91 P 255.

14. Brooks v. Atlanta, 1 Ga. App. 678, 57 SE 1081.

15. Permitting sidewalk to become greasy and strewn with hay, etc. Brooks v. Atlanta, 1 Ga. App. 678, 57 SE 1081. Evidence sufficient to prevent nonsuit. Id.

16. Evidence sufficient to sustain recovery against street railroad company for loss of a horse due to defendants piling ballast in highway beyond its tracks. Zirkman v. Philadelphia & W. C. Tract. Co., 33 Pa. Super. Ct. 85. One who parts with all control over a place where building is carried on cannot be held for subsequent injuries unless the place was defective when he surrendered

sary.[17] Persons negligently maintaining steam machinery [18] or placing or permitting other obstructions or defects on or near highways [19] are liable for resulting injuries,[20] and violation of statutes or ordinanecs is evidence of negligence.[21]

(§ 14) *G. Persons entitled to protection.* See 8 C. L. 81—One who is not a traveler is not entitled to protection as such.[22]

(§ 14) *H. Remote and proximate cause of injury.* See 8 C. L. 81—The general principle of proximate cause applies.[23] If an injury would not have resulted but for

such control. Moret v. George A. Fuller Co. [Mass.] 80 NE 789. In suit for injury from a board protruding from a fence around a building in course of construction, held error not to charge that defendants would not be liable if they had previously parted with all control of the place. Id. Although materials for repairing culvert may be placed in highway, reasonable care must be exercised to so place it as to be least liable to frighten horses. Carlon v. Greenfield, 130 Wis. 342, 110 NW 208. A subway company is not relieved of its duty to keep a street reasonably safe while it works therein because of its having let the work out to an independent contractor. Monahan v. Empire City Subway Co., 52 Misc. 566, 102 NYS 774. Evidence insufficient to show failure of subway company to keep highway reasonably safe. Id. Gas company **excavating** for pipes held not negligent in leaving pile of dirt over night. Stevens v. Citizens' Gas & Elec. Co., 132 Iowa, 597, 109 NW 1090. Held under facts shown that it was not negligence to throw dirt excavated across motor tracks. Id. It is duty of one who has made excavation in road to restore the highway to a reasonably safe condition. Elzig v. Bales [Iowa] 112 NW 540. Where one makes an excavation in road, he is not relieved from liability for injuries caused thereby by fact that he had hired an independent contractor to fill same and he had failed to do so. Id. Authority of owner to cut ditch across road used by public over his land does not authorize cutting of one dangerous to travel. Dunn & Lallande Bros. v. Gunn [Ala.] 42 S 686. Negligence in leaving dirt an unreasonable length of time in street held that of master, and not of agent who placed same in street under directions of lot owner while building sidewalk, he having no further control. Evans v. Ellefson [Ark.] 100 SW 759.

17. Fact that one secures permission of city to place building material in street does not relieve him of duty of giving warning thereof. Blocher v. Dleco, 30 Ky. L. R. 689, 99 SW 606. Duty of public service corporation excavating in street to place proper guards and danger signals. Stevens v. Citizens' Gas & Elec. Co., 132 Iowa, 597, 109 NW 1090. Violation of a valid ordinance limiting the space in a street which may be occupied by building material or requiring the placing of lights near temporary obstructions is per se negligence as against one injured by reason thereof. Bensel Const. Co. v. Homer [Ga. App.] 58 SE 489.

18. It is an actionable nuisance to maintain upon a public highway a stationary steam engine calculated to frighten horses. Smith v. Illinois Cent. R. Co. [Ky.] 105 SW 96. Held for jury whether defendant maintained such engine in highway. Id. Owner of large steam whistle near highway must exercise care and keep lookout for horses. Truex v. South Penn Oil Co. [W. Va.] 59 SE 517. In action for injuries caused by horse taking fright at steam escaping from exhaust pipe near highway, special finding that defendant was operating mill in usual manner and that no more than usual amount of steam escaped held not inconsistent with finding of negligence. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Findings held not in irreconcilable conflict with general finding that plaintiff was not negligent. Id. Fact that manufacturing plant is in close proximity to highway does not of itself render it a nuisance, or its operation negligence. Id.

19. Owner of land who permits public to travel across same cannot place dangerous obstruction in such road without notice, nor can he authorize another to do so. Dunn & Lallande Bros. v. Gunn [Ala.] 42 S 686. He is liable for injury caused by obstructions placed therein notwithstanding revocation of right to use road where notice of revocation is not given. Id. Allegation in answer that road was so indistinct that it did not appear to ordinary observation to be used by public is insufficient without allegation that defendant did not know that it was so used. Id. Where obstruction was in fact dangerous, it is immaterial whether it so appeared to party placing same in highway. Id. Where conditions are such that one must anticipate that horses may become frightened, the fact that a traveler's horse becomes uncontrollable will not bar recovery against one who places a dangerous obstruction in the highway. Harriman v. Moore & Co. [N. H.] 67 A 225. No defense that plaintiff's horse was uncontrollable where highway was near a railroad and defendant had narrowed it so as to render it dangerous. Id. Evidence held not to show that defect in road was caused by defendant. De Long v. Miller [Cal.] 90 P 925.

20. One placing an obstruction in a street by special authority from the proper municipal authorities cannot be held in trespass for a resulting injury on the ground that the obstruction was a nuisance. Can be held only on ground of negligence in failing to protect public. Sanford v. White [C. C. A.] 150 F 724.

21. Constructed wire fence across road in violation of St. 1885, p. 317, c. 77, § 1. Vanderveer v. Moran [Neb.] 112 NW 581. Where defendant violated ordinance prohibiting obstruction of sidewalk, court properly submitted ordinance as ground of recovery. Sandeguard Grocery Co. v. Conley [Tex. Civ. App.] 19 Tex. Ct. Rep. 761, 104 SW 1073.

22. Where plaintiff left traveled portion and went onto a scale maintained by city in street but outside such portion he was not entitled to protection as a traveler. O'Neil v. New Haven [Conn.] 67 A 487.

23. Violation of ordinance restricting

an obstruction or defect, the fact that other matters contributed will not bar relief to one who was free from negligence.[24]

(§ 14) *I. Contributory negligence of person injured* See 8 C. L. 82 precludes recovery,[25] but one is guilty of contributory negligence only when injured by some

placing of building material in street held proximate cause of injury to pedestrian. Bensel Const. Co. v. Homer [Ga. App.] 58 SE 489. Held, under evidence, it could not be said as matter of law that certain ice rather than other defects caused plaintiff's fall. Mayhood v. New York, 103 NYS 856. Where wagon was backed over embankment, absence of guard held proximate cause and not previous removal of a timber. Wallace v. New Albion, 105 NYS 524. Defective street delaying fire department held not proximate cause of plaintiff's loss by fire. Hazel v. Owensboro, 30 Ky. L. R. 627, 99 SW 315. City not liable where horse fell on smooth pavement and got hind foot caught in perpendicular sewer opening of standard make. Vaccarini v. New York, 54 Misc. 600, 104 NYS 928.

24. One need not show that his injury was due solely to an obstruction if his own conduct in no way contributed. Harriman v. Moore & Co. [N. H.] 67 A 225. That lawful use of a street by others contributes to an injury does not relieve the municipality. Where bicycle rider was injured while a car and another vehicle were passing abreast in same direction. Clinton v. Revere [Mass.] 80 NE 813. Act of driver in driving against a pile of earth in street held not to preclude recovery by plaintiff who was injured. Citizens' Gas & Elec. Co. v. Nicholson [C. C. A.] 152 F 389. That horse was temporarily uncontrollable at time of collision held not to render obstructions less the proximate cause. Janes v. Tampa [Fla.] 42 S 729. Complaint considered and held to show that unguarded obstructions were proximate cause. Id. City not relieved because snow contributed to fall on defective sidewalk. Forney v. Melvin, 130 Ill. App. 203; City of Covington v. Billiter, 30 Ky. L. R. 650, 99 SW 318. City responsible for injury caused by dangerous walk though plaintiff was suffering from a disease which aggravated the consequences of the injury. City of Roswell v. Davenport [N. M.] 89 P. 256. In action for injuries caused by horse taking fright at steam escaping from exhaust pipe near highway, fact that it was blown across road by wind does not relieve defendant where such wind was not unusual or extraordinary. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83.

25. Stidham v. Delaware City [Del.] 67 A 175; City of Americus v. Johnson [Ga. App.] 58 SE 518.

Held guilty of contributory negligence: Pedestrian falling into manhole. Wrigley v. New York, 106 NYS 812. Stepping into trench from which curbstones had been removed. McHugh v. Inter-State Pav. Co., 121 App. Div. 517, 106 NYS 165. Leaving walk and walking in gutter, falling into sewer opening therein. Mitchel v. Richmond [Va.] 57 SE 570. Carrying a couch so as to obstruct her view. Lautenbacher v. Philadelphia, 217 Pa. 318, 66 A 549. Knowingly taking an obviously dangerous sidewalk where he could take a safe path. City of Chicago v. France, 124 Ill. App. 648. One injured by depression in street. Smith v. Philadelphia, 217 Pa. 118, 66 A 142. Falling into unguarded street excavation. Austin v. Charlotte [N. C.] 59 SE 701. Petition demurrable for showing contributory negligence in attempting to pass a known ditch in the road. Southern R. Co. v. Rowe [Ga. App.] 59 SE 462. No recovery where one disregarded barriers warning public that street was closed for repair. McFarlane v. Boston El. R. Co., 194 Mass. 183, 80 NE 447. Where one attempted to turn on to a lower parallel highway, upsetting vehicle. Nelson v. Spokane [Wash.] 87 P 1048. If one riding in a vehicle acquiesces in another's negligent manner of driving, he cannot recover for injuries from obstructions. Canter v. St. Joseph [Mo. App.] 105 SW 1. Where unfastened horse ran away and against obstruction permitted by city, causing injury. City of Denver v. Utzler, 38 Colo. 300, 88 P 143.

Not guilty: Woman falling by stepping into hole in front of defendant's store. Brown v. Milligan, 33 Pa. Super. Ct. 244. Girl **injured on sidewalk.** City of Atlanta v. Harper [Ga.] 59 SE 230. On icy sidewalk. Hynes v. Brewer, 194 Mass. 435, 80 NE 503. That she could see the ice did not bar recovery. Id. One injured by a board sticking out of a fence over temporary sidewalk. Moret v. George A. Fuller Co. [Mass.] 80 NE 789. Pedestrian falling into opening left in sidewalk by removal of a plank, night being dark, etc. Ashley v. Aberdeen [Wash.] 90 P 210. That one goes over a defective walk is not negligence as matter of law. Mayhood v. New York, 103 NYS 856. Evidence held not to show contributory negligence on part of one injured on **defective crossing.** Town of Normal v. Bright, 125 Ill. App. 478. Pedestrian **stumbling** against lumber in street held not guilty of contributory negligence. Bensel Const. Co. v. Homer [Ga. App.] 58 SE 489. Woman hurrying from store to catch electric car held not negligent as matter of law in failing to discover street car rails left in street. Keith v. Worcester & B. V. St. R. Co. [Mass.] 82 NE 680. Old woman **driving a** wagon which was overturned held not guilty of contributory negligence as a matter of law. City of Ft. Collins v. Yetter, 38 Colo. 87, 89 P 777. Driving horse of ordinary gentleness by a steam exhaust pipe at rate of seven miles per hour. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Not negligence per se to drive on east side of street where dirt had been piled on west side, though some had also been piled on east side. Citizens' Gas & Elec. Co. v. Nicholson [C. C. A.] 152 F 389. Mere **existence of another route** does not show contributory negligence, question being ordinarily for jury. Town of Normal v. Bright, 125 Ill. App. 478. Fact that pedestrian failed to remember defect of which she had **previous knowledge** held not to necessarily render her negligent. City of Brownsville v. Arbuckle, 30 Ky. L. R. 414, 99 SW 239. Plaintiff held not negligent as matter of law in stepping into known hole, night being dark. City of Natchez v.

obvious defect which by the exercise of reasonable care he could have avoided [26] or by some defect latent or patent which he knows exists but nevertheless does not take care to avoid.[26a] Travelers may assume that the highway is reasonably safe [27] and that others using it will exercise reasonable care.[28] So, also, a mere knowledge of a defect will not bar relief as a matter of law unless the danger was so obvious that persons of ordinary prudence would not have attempted to use the street,[29] nor is it negligence per se to use a street where there is no sidewalk,[30] though knowledge or uncommon use may call for greater care.[31] Presumptions and burden of proof are discussed in a subsequent section.[32]

§ 15. *Actions for injuries.* See 8 C. L. 85—The Nebraska statute does not require one injured on a defective street to first present his claim to the city council and then appeal from its action, but an original action may be maintained in the district court.[33]

Notice of claim for injury and intent to sue See 8 C. L. 84 is a prerequisite to the maintenance of an action when required by statute,[34] and must be properly presented or served [35] within the prescribed time.[36] The character and contents of a claim will depend upon the statute.[37] A notice or claim will be reasonably construed,[38]

Lewis [Miss.] 43 S 471; Nicholson v. South Omaha [Neb.] 110 NW 558. Not negligent in pursuing way over rough and uneven street which was covered with light snow, knowing of its condition. Jacobsen v. Omaha [Neb.] 113 NW 792. Not as matter of law contributory negligence to take an alley home at night though existence of an open ditch was known. Harrell v. Macon, 1 Ga. App. 413, 58 SE 124.

26, 26a. Hammock v. Tacoma [Wash.] 87 P 924.

27. Stidham v. Delaware City [Del.] 67 A 175; Ryan v. Foster [Iowa] 109 NW 1108; Weber v. Union Development & Const. Co., 118 La. 77, 42 S 652; Hammock v. Tacoma [Wash.] 87 P 924; Ashley v. Aberdeen [Wash.] 90 P. 210. And are not negligent for failing to observe concealed dangers in time. Corcoran v. New York, 188 N. Y. 131, 80 NE 660.

28. Indianapolis St. R. Co. v. Hoffman [Ind. App.] 82 NE 543.

29. City of Mobile v. Shaw [Ala.] 43 S 94; Harrell v. Macon, 1 Ga. App. 413, 58 SE 124; Cook v. Hedrick [Iowa] 112 NW 157; Murphy v. South St. Paul [Minn.] 112 NW 259; Heberling v. Warrensburg, 204 Mo. 604, 103 SW 36; Kennedy v. Greenville [S. C.] 58 SE 989. Where there are two ways, one safe and other unsafe, traveler knowing condition of both must exercise care of ordinarily prudent person to select safe way. City of Cleburne v. Elder [Tex. Civ. App.] 18 Tex. Ct. Rep. 530, 102 SW 464.

30. Bensel Const. Co. v. Homer [Ga. App.] 58 SE 489. Pedestrian may cross street at any point and in doing so is not bound to use a greater degree of care than at crossing. City of Covington v. Whitney, 30 Ky. L. R. 659, 99 SW 337. Pedestrian is not guilty of negligence in crossing street diagonally to catch street car. Weber v. Union Development & Const. Co., 118 La. 77, 42 S 652.

31. Plaintiff held to more than ordinary care where sidewalk was obviously rough and uneven on account of excavations and building operations. Henry v. New York, 104 NYS 440. Being off sidewalk. Bensel Const. Co. v. Homer [Ga. App.] 58 SE 489.

32. See post, Actions, subd. Evidence.

33. Sess. Laws 1903, p. 177, c. 17, § 107, being § 8106, Cobbey's Ann. St. 1903. Nicholson v. South Omaha [Neb.] 110 NW 558.

34. Fact that plaintiff was unconscious during time for giving notice held not to excuse. Ellis v. Kearney [Neb.] 113 NW 803. Hurd's Rev. St. 1905, c. 70, § 7, requiring written notice of injury to be given within six months, is not complied with by commencing suit within such period. Erford v. Peoria, 229 Ill. 546, 82 NE 374. Act May 13, 1905, § 1 (Hurd's Rev. St. 1905, c. 70, § 6), limiting time for bringing actions for personal injuries against cities, towns, and villages, and requiring notice to be given within six months of injury, held not violative of Const. art. 4, § 13, providing that no law shall be amended by reference to its title only (Id.), nor is it special legislation because not applying to counties, townships, etc. (Id.).

35. Under Detroit charter notice must actually reach corporation counsel or his chief assistant. Abbott v. Detroit [Mich.] 14 Det. Leg. N. 662, 113 NW 1121. Held under evidence question for jury whether notice left with chief clerk reached counsel or chief assistant. Id. Service on messenger in office of corporation counsel held insufficient under statute requiring service on counsel or his assistant. McAuliff v. Detroit [Mich.] 14 Det. Leg. N. 669, 113 NW 1112. Under Rev. Code N. D. 1899, § 2172, requiring presentation of claim to mayor and common council within 60 days, presentation to and filing by the city auditor within prescribed time is proper. City of Grand Forks v. Allman [C. C. A.] 153 F 532.

36. Notice of intent to sue held served within six months after cause of action accrued where served within six months from filing of complaint with comptroller, though after six months from date of injury. Bernreither v. New York, 55 Misc. 130, 106 NYS 286.

37. Oral notice is insufficient under Comp. St. 1907, c. 13, art. 3, § 39, requiring written notice. Ellis v. Kearney [Neb.] 113 NW 803. Statutory provision that clerk shall keep record of the notice, "describing the defect complained of," held not to require notice

and held sufficient if enough information is given to enable the authorities to properly investigate the case.[39]

Pleading.[See 8 C. L. 85]—The ordinary rules apply.[40] A cause of action or defense must be set out,[41] hence the complaint must sufficiently show that the place of injury was a public highway,[42] that defendant was negligent[43] and had notice,[44] and that plaintiff was a traveler and as such entitled to protection.[45] Plaintiff cannot be

to contain such description. Forbes v. Omaha [Neb.] 112 NW 326.

38. Ellis v. Seattle [Wash.] 92 P 431.

39. Notice held sufficient, especially after city acted thereon without objection. Davis v. Adrian, 147 Mich. 300, 13 Det. Leg. N. 1023, 110 NW 1084. Notice is not void by inclusion of irrelevant and unnecessary matter unless misleading. Jacobsen v. Omaha [Neb.] 113 NW 792. Written **notice given by wife** in conformity with § 12, c. 12a, of charter of Omaha, and which discloses that she is a married woman, held sufficient to authorize **recovery** of consequential damages **by husband.** Wright v. Omaha [Neb.] 110 NW 754. Notice to town describing cause of injury as limb of a tree extending across highway, and place as "on Great Neck Road, so called, near the Hedden place, so called, in town of Waterford," held sufficient **as to place.** Town of Waterford v. Elson [C. C. A.] 149 F 91. Notice of claim sufficient though designating place as "west" instead of east side of street. Ellis v. Seattle [Wash.] 92 P 431. Misdescription of place not fatal where city immediately located place and removed obstruction. Cook v. Topeka [Kan.] 90 P 244. Notice reciting that claimant sustained injury by falling on defective sidewalk "at corner of Howard and Twenty-First St," **held insufficient** as to place. Barribeau v. Detroit, 147 Mich. 119, 13 Det. Leg. N. 810, 110 NW 512. Notice not invalid for **misstating date** in one place where in another place correct date was given. Canter v. St. Joseph [Mo. App.] 105 SW 1.

40. Where complaint alleges that material placed in highway was for use in repairing culvert, defendant may show such fact without alleging it in answer. Carlon v. Greenfield, 130 Wis. 342, 110 NW 208. Where complaint avers that road on which plaintiff was traveling was a neighborhood or public highway, general issue puts character of road in issue and it is not error to sustain demurrer to plea especially putting character in issue. Dunn & Lallande Bros. v. Gunn [Ala.] 42 S 686. Certain allegations in complaint in suit for negligently operating automobile held so indefinite and uncertain as to be subject to motion to amend; others held not so indefinite. Harrington v. Stillman, 105 NYS 75. In suit for collision with automobile, not abuse of discretion to permit amendment that automobile was driven by defendant's servant, and to allow insertion of words "and negligently." Lampe v. Jacobsen [Wash.] 90 P 654. In suit for injury from defective sidewalk, amendment of complaint by striking words "tripped and stumbled upon and against" and substituting "stepped upon and broke through" held not to state a new cause. City of Evanston v. Richards, 224 Ill. 444, 79 NE 673. Allegations in original petition held sufficient to authorize proof of contents of speed ordinance, violation of which resulted in a collision. Foley v. Northrop [Tex. Civ. App.] 19 Tex. Ct. Rep. 921, 105 SW 229.

Variance: Evidence held not to show that defect was in a bridge instead of in a sidewalk as alleged. City of Bloomington v. Woodworth [Ind. App.] 81 NE 611. Allegation of snow and ice on cross walk held not sustained by proof that plaintiff slipped on sidewalk. Brennan v. New York, 117 App. Div. 849, 103 NYS 266.

41. Complaint held not demurrable for want of facts in suit for injury to child from pile of earth and open pipe negligently left near a building. Hunton v. Peekskill, 104 NYS 220. Complaint showing that in operation of defendant's mill great clouds of steam were emitted within eight feet of highway and within six feet of the ground, which passed over the highway, and producing loud and frightful noises, all of which tended to frighten horses, etc., held sufficient. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Complaint under Laws 1905, p. 469, c. 305, § 4, requiring operator of automobile, on signal of distress by person driving horses to stop all motor power and remain stationary unless movement forward shall be deemed necessary to avoid accident, held to sufficiently charge failure to shut off motor power (McCummins v. State [Wis.] 112 NW 25), and negative exception, objection being taken after prosecution had rested (Id.). Allegation that plaintiff did not know of dangerous condition of sidewalk, and that accident occurred at night without his fault, held not to show contributory negligence. City of Indianapolis v. Keeley, 167 Ind. 516, 79 NE 499. Answer held good on demurrer where plaintiff sued for injuries from tripping over wire stretched near sidewalk to protect the grass. Teague v. Bloomington [Ind. App.] 81 NE 103.

42. Complaint held to sufficiently charge that a certain street was within city limits and was a public street so as to show defendant's duty to plaintiff. City of Indianapolis v. Keeley, 167 Ind. 516, 79 NE 499. Allegation that "while going west on G. avenue, at the intersection of T. street, said street then being and now a public street," etc., held to allege that both streets were public streets. City of Louisville v. Adams, 30 Ky. L. R. 1129, 100 SW 218.

43. Complaint held sufficient to show actionable negligence in suit for injuries from icy sidewalk. Storm v. Butte, 35 Mont. 385, 89 P 726. Held sufficient to show what caused the injuries. Id.

44. Complaint held to sufficiently allege negligence and notice of defect on part of municipality. City of Anniston v. Ivey [Ala.] 44 S 48. Averment of actual notice held to admit evidence of constructive notice. Village of Bethany v. Lee, 124 Ill. App. 397.

45. Chicago, I. & L. R. Co. v. McCandish, 167 Ind. 648, 79 NE 903.

required to plead defensive matter.[46] Contributory negligence is matter of defense to be pleaded and proven by defendant.[47]

Evidence.[See 8 C. L. 86]—The burden is on plaintiff to establish his case,[48] including the giving of notice to the municipality.[49] Though the doctrine of res ipsa may be applicable,[50] it does not require defendant to disprove negligence by a preponderance of evidence.[51] While ordinarily the burden of showing contributory negligence is on defendant,[52] there is no presumption that plaintiff was exercising ordinary care.[53]

The general principles control as to the admissibility[54] and sufficiency of the evidence,[55] hence mere conclusions or opinions are objectionable.[56] While on the question of reasonable care a town may show what was reasonable and practicable

46. In action for injuries caused by wire fence stretched across road, plaintiff cannot be compelled to state whether there was a new and plainly traveled road at such place. Vanderveer v. Moran [Neb.] 112 NW 581.

47. Board of Councilmen of Nicholasville v. Fain, 30 Ky. L. R. 564, 99 SW 275; City of Henderson v. Sizemore [Ky.] 104 SW 722; Coffey v. Carthage, 200 Mo. 616, 98 SW 561.

48. To show that railroad company unnecessarily and wrongfully obstructed street by its train proximately causing his injury. Duffy v. Atlantic & N. C. R. Co., 144 N. C. 26, 56 SE 557. Under Rev. Laws, c. 51, § 18, plaintiff must prove that in exercise of reasonable diligence defendant town should have ascertained and remedied the defect. Mason v. Winthrop [Mass.] 81 NE 644. In suit against city, burden on plaintiff to prove not only that defendant was negligent but that he himself was free from negligence. Stidham v. Delaware City [Del.] 67 A. 175.

49. McAuliff v. Detroit [Mich.] 14 Det. Leg. N. 669, 113 NW 1112.

50. Where pedestrian stepped through inadequate filling up of water-main trench. Cunningham v. Dady, 103 NYS 852. Where one is injured by falling of an awning extending over street, presumption of negligence arises. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700.

51. Cunningham v. Dady, 103 NYS 852.

52. City of Indianapolis v. Keeley, 167 Ind. 516, 79 NE 499.

53. Acts 1899, p. 58, c. 41, placing burden of proof on defendant, does not create such presumption. City of Indianapolis v. Keeley, 167 Ind. 516, 79 NE 499.

54. Declarations of automobile driver as to how accident occurred made after he had left machine, examined child, and had talked to police officer, held not res gestae. Clark v. Van Vleck [Iowa] 112 NW 648. Statements of father after accident that it was not defendant's fault held hearsay, as were statements as to child's health. Id. Police officer's notes made at time of accident but not shown to be true held properly excluded. City of Chicago v. Jarvis, 226 Ill. 614, 80 NE 1079. **Photographs** taken next day after accident held inadmissible without showing that conditions remained the same. Crandall v. Dubuque [Iowa] 112 NW 555. Error to exclude consideration of protograph after attempt to show that it correctly represented the place at time of accident. City of Chicago v. Hutchinson, 129 Ill. App. 239. Statement on subsequent repair of sidewalk, irresponsive to question on cross-examination, held improper. City of Aurora v. Plummer, 122 Ill. App. 143. Held not error to strike out testimony that witness would not want to say that sidewalk was in dangerous condition. Crandall v. Dubuque [Iowa] 112 NW 555. Question, "I will ask you to state whether or not, if there had been a ditch 12 or 18 inches deep on Fourteenth street for several days prior to the time Ivey was hurt, you would have noticed it," held not admissible as showing nonexistence of ditch. City of Anniston v. Ivey [Ala.] 44 S 48. Question, "state what your duties are as chairman of the street committee," held immaterial as calling for duties at time of trial. Id. In suit for injuries from falling into coal hole, evidence held to tend to prove allegations of complaint. City of Chicago v. Jarvis, 226 Ill. 614, 80 NE 1079. Evidence as to whether in fact culvert was rebuilt is admissible as bearing on allegation that materials placed in highway were for repair of such culvert. Carlon v. Greenfield, 130 Wis. 342, 110 NW 208. In action for injuries caused by old and defective sidewalk, evidence of life and durability of nails and boards used in construction of such sidewalk is admissible. Patton v. Sanborn, 133 Iowa, 650, 110 NW 1032. Defendant's testimony that he was an expert driver of horses and had never before been accused of negligence held immaterial. Hanchett v. Haas, 125 Ill. App. 111.

55. Evidence sufficient to sustain finding that plaintiff was on a crossing when she was injured. Town of Normal v. Bright, 125 Ill. App. 478. Fact that jury visited scene of accident at request of a party does not preclude him from asserting that verdict is not supported by evidence. Forbes v. Omaha [Neb.] 112 NW 326.

56. Witness cannot testify as to whether street is in a "dangerous or impassable condition." City of Anniston v. Ivey [Ala.] 44 S 48. Not reversible error to strike statements that an electric light was burning "so bright I think I could have read a newspaper there," and that "I think it was pretty near as bright as day." City of Chicago v. Loebel, 130 Ill. App. 487. Statement that a horse became frightened (Ward v. Meredith, 220 Ill. 66, 77 NE 118, afg. 122 Ill. App. 159), or that plaintiff had no knowledge of defective condition of sidewalk at time of accident, held not objectionable as a conclusion (Patton v. Sanborn, 133 Iowa, 650, 110 NW 1032). Statement that "wagon was coming at full speed" held not a mere opinion. United Breweries Co. v. O'Donnell, 124 Ill. App. 24.

to be done under the circumstances and the cost thereof,[57] evidence merely showing the per mile appropriation for streets in the year of the accident is inadmissible,[58] and where a defect has existed for over a year, evidence of the extent of sidewalks under municipal control will not be admitted.[59] Evidence of previous inspection of a structure by city officials showing it to be unsafe may be admitted to show notice, and to impose upon the city the burden of showing subsequent repairs.[60] The condition of the place of injury shortly after the accident may be shown where there could have been no substantial change in the meantime.[61] Evidence of other and similar accidents at the same place may be admitted for certain purposes,[62] provided the cause was the same,[63] and the condition of the street in the immediate vicinity of the place of injury may also be shown.[64] Subsequent improvement of a defect may not be shown.[65] Under an allegation that the locus was a public highway, one may show its dedication by defendant.[66] Compliance or violation of an ordinance may be shown on the question of care or negligence.[67] Permits to operate in a street may be admitted to show defendant's control of the place,[68] or that he acted within his rights.[69]

Questions for the jury, instructions and findings. See 8 C. L. 88—The question of negligence,[70] contributory negligence,[71] proximate cause,[72] or notice,[73] is ordinarily for the jury.[74]

57, 58. Adams v. Stoneham, 193 Mass. 597, 79 NE 881.

59. Hammock v. Tacoma [Wash.] 87 P 924.

60. Unsafe awning inspected and pronounced unsafe seven years before accident. Mansfield v. New York, 104 NYS 386.

61. Condition of coal hole an hour and a half after. City of Chicago v. Jarvis, 226 Ill. 614, 80 NE 1079. Evidence of condition of stringers and planks a few days after accident and after sidewalk had been torn up held admissible to show condition at time of accident. Patton v. Sanborn, 133 Iowa, 650, 110 NW 1032. Evidence of rotten condition of stringers of sidewalk six weeks after accident held admissible. Miller v. Canton, 123 Mo. App. 325, 100 SW 571.

62. Evidence of numerous other accidents of the same kind at the same place is admissible as showing that the common cause was a dangerous and unsafe defect (City of Chicago v. Jarvis, 226 Ill. 614, 80 NE 1079), and knowledge on the part of the municipality (Id.). Evidence that plaintiff's companions fell at same time and as to how they fell held admissible as showing nature of defect. Abbott v. Detroit [Mich.] 14 Det. Leg. N. 662, 113 NW 1121.

63. Held improper to allow plaintiff's witness to testify to an injury she had received at same place, it not appearing that the cause was the same. City of Aurora v. Plummer, 122 Ill. App. 143.

64. Plaintiff held not restricted in showing bad condition of sidewalk to loose board causing accident but may show that walk in immediate vicinity is in bad condition. Thompson v. Poplar Bluff [Mo. App.] 101 SW 709. Condition of road 300 feet from place of accident held inadmissible under facts as **too remote.** Strand v. Grinnell Automobile Garage Co. [Iowa] 113 NW 488.

65. Evidence of subsequent filling in of defect in sidewalk held inadmissible. Mackey v. New York, 121 App. Div. 473, 106 NYS 114.

66. Davis v. Oregon Short Line R. Co., 31 Utah, 307, 88 P 2.

67. Penal ordinance regulating fastening of horses in street. Caughlin v. Campbell-Sell Baking Co. [Colo.] 89 P. 53. In a suit for injuries from a collision, a speed ordinance alleged to have been violated is relevant and material. Foley v. Northrop [Tex. Civ. App.] 19 Tex. Ct. Rep. 921, 105 SW 229.

68. Building permit held admissible only as bearing on defendant's control of place of injury and not to show negligence in maintenance of a guard fence. Moret v. George A. Fuller Co. [Mass.] 80 NE 789.

69. Where it was necessary to show not only that defendant had right to lay its pipes in street but that it acted within its right, admission of municipal consent does not render permit inadmissible. Stevens v. Citizen's Gas & Elec. Co., 132 Iowa, 597, 109 NW 1090.

70. Where defendant backed a wagon across a foot path and against a building. Casey v. United States Exp. Co., 214 Pa. 1, 63 A 365. Where plaintiff was knocked down by defendant's vehicle. Murphy v. Withington, 194 Mass. 28, 79 NE 783. As to speed at which wagon was driven. Cooke Brewing Co. v. Ryan, 125 Ill. App. 597. Whether defendant's intoxication contributed to injury. Id. Negligence of driver of truck. Gelb v. Murtagh, 104 NYS 842. In suit for injury to child. Coopers v. Sand Co., 31 Pa. Super. Ct. 107. Where child was run over by a wagon. Barth v. Borden's Condensed Milk Co., 52 Misc. 487, 102 NYS 498. Where boy was run over. Levin v. Dunn, 101 NYS 25. Negligence of driver of beer wagon. Cooke Brewing Co. v. Ryan, 125 Ill. App. 597. In suit for collision with defendant's horse. McMahen v. White, 30 Pa. Super. Ct. 169. Where flagman was struck by defendant's horse. Griffin v. Bell, 104 NYS 295. Negligence of driver in leaving a horse unbridled where noises might scare him. Koonz v. New York Mail Co., 72 N. J. Law, 530, 63 A 341. Team frightened by automobile. Raber v. Hinds, 133 Iowa, 312, 110 NW 597. Automobile collision. Lampe v. Jacobsen [Wash.] 90 P. 654. Negligence of defendant's chauffeur where

a mule became frightened by automobile. Rochester v. Bull [S. C.] 58 SE 766. Negligence of street car company in operating cars. Ashley v. Kanawha Valley Traction Co., 60 W. Va. 306, 55 SE 1016. Where railroad company left a car off tracks on highway on dark night. Davis v. Oregon Short Line R. Co., 31 Utah, 307, 88 P 2. Whether materials for repairing culvert were placed unnecessarily near traveled portion of highway. Carlon v. Greenfield, 130 Wis. 342, 110 NW 208. Negligence in maintaining steam exhaust pipe near highway. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Where it was not made to appear that had defendant arrested the sparker as soon as he saw or might have seen that team was frightened or that he could have done anything to have stopped their fright, held that case was not made for jury. House v. Cramer, 134 Iowa, 374, 112 NW 3. Icy condition of sidewalk. Storm v. Butte, 35 Mont. 385, 89 P 726; Bull v. Spokane [Wash.] 89 P. 555. Trodden snow on sidewalk. Crandall v. Dubuque [Iowa] 112 NW 555. Where pedestrian was injured by stepping on clinker of ore in cinder sidewalk. City of Latonia v. Hall [Ky.] 103 SW 354. City's liability for maintaining top of manhole three to six inches above sidewalk surface. Corr v. New York, 121 App. Div. 578, 106 NYS 280. In suit for injury from falling on a concrete incline. Stratton v. New York, 117 App. Div. 887, 103 NYS 358. Allowing obstruction to remain in street. Jones v. Ogden City [Utah] 89 P 1006. In suit against township for injuries from wire extending across and above a road. Ackley v. Bradford Tp., 32 Pa. Super. Ct. 487. Loose stones in street. Adams v. Stoneham, 193 Mass. 597, 79 NE 881. As to negligence in failing to remove a loose plank over which plaintiff stumbled. City of Grand Forks v. Allman [C. C. A.] 153 F 532. Where plaintiff slipped on beveled end of plank in temporary driveway. Humphrey v. Leonard [Cal.] 90 P. 705. In suit for falling into unguarded coal hole. French v. Boston Coal Co. [Mass.] 81 NE 265. Leaving excavation unguarded. Muncy v. Bevier, 124 Mo. App. 10, 101 SW 157. In action for injury to child caused by falling into sag hole in street filled with hot water from steam heating plant of school district. Svendsen v. Alden [Minn.] 112 NW 10. Where the location and character of a defect is in controversy, the question of whether a highway was reasonably safe is ordinarily for the jury (Mason v. Winthrop [Mass.] 81 NE 644), and it is only when there is no dispute as to the facts or inferences to be drawn therefrom that it becomes a question of law for the court (Id.). Whether barrels had been placed so as to prevent people from falling into a bulkhead held for jury. Owens v. Harvard Brewing Co., 194 Mass. 498, 80 NE 509. In suit for injuries from hole in a street, area, depth, location, etc., of defect, held for jury. Clinton v. Revere [Mass.] 80 NE 813. Where automobile ran over an embankment, question of sufficient light held for jury under evidence. Corcoran v. New York, 188 N. Y. 131, 80 NE 660.

71. Where plaintiff passed on a foot path behind a wagon which was backed against him. Casey v. United States Exp. Co., 214 Pa. 1, 63 A 365. Whether plaintiff's driver was guilty of negligence in manner of turning from street car track, thus contributing to collision with defendant's cab. Keile v. Kahn, 30 Pa. Super. Ct. 416. Collision with vehicle. Murphy v. Withington, 194 Mass. 28, 79 NE 783. Where one was struck by a team while working in street. Fertel v. Peck [Vt.] 67 A 818. Where plaintiff fell from a load when wagon struck defect in street. City of Chicago v. Bork, 227 Ill. 60, 81 NE 27. Riding on top of load of potatoes, seated on sacks, while crossing rock ledge. Dralle v. Reedsburg, 130 Wis. 347, 110 NW 210. Where team was frightened by car left on highway off track on dark night. Davis v. Oregon Short Line R. Co., 31 Utah, 307, 88 P 2. Where boy was run over. Levin v. Dunn, 101 NYS 25. Whether school boy killed exercised care to be expected of him. United Breweries Co. v. O'Donnell, 124 Ill. App. 24. In suit for injury to child, contributory negligence of mother. Coopies v. Sand Co., 31 Pa. Super. Ct. 107. Of one struck by street car. Ashley v. Kanawha Valley Traction Co., 60 W. Va. 306, 55 SE 1016. Pedestrian injured by automobile. Lampe v. Jacobsen [Wash.] 90 P 654. Where automobile ran over embankment at night. Corcoran v. New York, 188 N. Y. 131, 80 NE 660. In suit for falling on concrete incline. Stratton v. New York, 117 App. Div. 887, 103 NYS 358. Walking on rough, uneven, and slippery sidewalk. Crandall v. Dubuque [Iowa] 112 NW 555. Walking on extreme edge of sidewalk while passing other pedestrians. Davis v. Adrian, 147 Mich. 300, 13 Det. Leg. N. 1023, 110 NW 1084. Using sidewalk known to be defective. Cook v. Hedrick [Iowa] 112 NW 157. Failure to see bill board placed across sidewalk. Ryan v. Foster [Iowa] 109 NW 1108. Falling into bulkhead of sidewalk. Owens v. Harvard Brewing Co., 194 Mass. 498, 80 NE 509. Falling into open ditch in public alley. Harrell v. Macon, 1 Ga. App. 413, 58 SE 124. Stepping into known hole in darkness. City of Covington v. Billiter, 30 Ky. L. R. 650, 99 SW 318. Falling into coal hole. French v. Boston Coal Co. [Mass.] 81 NE 265. In suit against township for injury from wire above and across a road. Ackley v. Bradford Tp., 32 Pa. Super. Ct. 487. Whether plaintiff's nonobservance of law of road was prudent under circumstances. Clinton v. Revere [Mass.] 80 NE 813. Amount of lookout for defects one must observe is for jury under all facts and circumstances. City of Americus v. Johnson [Ga. App.] 58 SE 518. Instruction undertaking to say what was contributory negligence held properly refused. Teague v. Bloomington [Ind. App.] 81 NE 103.

72. Where horse and wagon backed over unguarded declivity. Ballentine v. Kansas City [Mo. App.] 103 SW 564. Street car collision. Ashley v. Kanawha Valley Traction Co., 60 W. Va. 306, 55 SE 1016. Whether negligence of city with respect to icy walk. Bull v. Spokane [Wash.] 89 P 555.

73. Notice of defect. Kinsey v. Kinston [N. C.] 58 SE 912. Notice of defect caused by third person. Davis v. Adrian, 147 Mich. 300, 13 Det. Leg. N. 1023, 110 NW 1084. Constructive notice of condition of walk. Meachem v. Coraopolis Boro, 31 Pa. Super. Ct. 150. Whether sidewalk had been so notoriously out of repair as to charge city with notice of particular defect. Fritz v. Watertown [S. D.] 111 NW 630. Notice to city of obstruction causing injury. Jones v. Ogden City [Utah] 89 P 1006. Whether bobsled with box removed which had remained in

Instructions [75] and findings [76] are governed by the ordinary rules. Instructions must conform to the law [77] and the evidence,[78] and avoid unwarranted assump-

street two days had remained sufficient length of time for defendant city to have known of and removed it. Cutter v. Des Moines [Iowa] 113 NW 1081.

74. Where injury resulted from driving at night against earth piled in street, question for jury whether place was properly guarded with lights and whether plaintiff was negligent in failing to discover the dirt. Citizens' Gas & Elec. Co. v. Nicholson [C. C. A.] 152 F 389. Evidence sufficient to take case to jury where level of street had sunk below cap of a water gate. Moore v. Wilkes-Barre [Pa.], 67 A 619. Where pedestrian ran against a rope by which one wagon was drawn by another, defendant's care in giving warning, and question of plaintiff's care held for jury. Young v. Herrmann, 104 NYS 72.

75. Instruction held not to mislead jury to believe that city's duty with reference to construction and maintenance of cross walks was less than its legal duty. Houghton v. New Haven, 79 Conn. 659, 66 A 509. Instructions on contributory negligence of one killed by live wire held not erroneous or misleading. Village of Palestine v. Siler, 225 Ill. 630, 80 NE 345. Certain modifications of requested instructions held proper. Id. Instruction as to liability for injury caused by collision while driving on left side of street, and on one's right to cross to left side to avoid obstruction, considered and held not in conflict. Clark v. Van Vleck [Iowa] 112 NW 648. In suit by one who fell into a coal hole, charge that defendants had sufficient management of premises to make them liable held too broad. Reynolds v. Strong, 103 NYS 106. In suit for injuries from excessive speeding of automobile, instruction not erroneous for using words "either by himself or his agent." Ward v. Meredith, 220 Ill. 66, 77 NE 118. No error to use words "sidewalk or apron" where injury was due to disrepair of apron which was used as part of sidewalk. City of Chicago v. Loebel, 130 Ill. App. 487. Instruction requiring the city to keep sidewalks reasonably safe by night as well as by day not bad for using the word "night." City of Evanston v. Richards, 224 Ill. 444, 79 NE 673. Instruction on contributory negligence held properly modified with reference to plaintiff's obligation to "use her eyes and senses." Rose v. Kansas City, 125 Mo. App. 231, 102 SW 578. Instruction to find for city unless it "actually" knew of defect, etc., held improperly modified by inserting after word "actually" the words "constructively or impliedly." City of Greenwood v. Harris, 89 Miss. 121, 42 S 538. Where plea of contributory negligence is based on failure to use safe portion of sidewalk, it is not reversible error to instruct that plea fails if there was no such safe portion. City of Mobile v. Shaw [Ala.] 43 S 94. Where act of contributory negligence is particularized, instruction need not cover contributory negligence generally. Negligence pleaded was in driving unsafe horse and in using rotten harness. Board of Councilmen of Nicholasville v. Fain, 30 Ky. L. R. 564, 99 SW 275. Instruction on contributory negligence held not prejudicial for using the words "if any" after headlight, though existence of such light was not disputed, and omission to limit plaintiff's failure to exercise care to a failure contributing to accident. Regan v. McCarthy, 119 Ill. App. 578.

76. Comp. Laws 1897, c. 91, § 3444, providing that provisions of act rendering townships liable for defects in highways shall not apply to highways which have not been in use for ten years, being a proviso, it is defensive and court need not make a finding of user within 10 years to support judgment for plaintiff. Schelske v. Orange Tp., 147 Mich. 135, 13 Det. Leg. N. 988, 110 NW 506. Finding that highway was dangerous held equivalent to finding that it was not reasonably safe (Id.), and that there was an unwarranted obstruction to travel at the place of accident (Id.).

77. Instruction on constructive notice to city approved. Crotty v. Danbury, 79 Conn. 379, 65 A 147. Instructions erroneous for failure to allow city a reasonable time to repair after notice. Ballard v. Kansas City [Mo. App.] 104 SW 1126. Instruction authorizing recovery for injuries from unsafe approach to a bridge approved. Garret County Com'rs v. Blackburn [Md.] 66 A 31. Instruction in language of statute as to facts sufficient for prima facie case in suit for injuries from automobile run at excessive speed held not objectionable as ignoring whether injuries resulted from running at excessive speed. Ward v. Meredith, 220 Ill. 66, 77 NE 118, afg. 122 Ill. App. 159. Instruction held not objectionable as requiring city to repair a sidewalk in time to have prevented the accident. Smart v. Kansas City [Mo.] 105 SW 709. Instruction requiring jury to find that walk was in a "dangerous condition," and another charging that defendant was bound to exercise no greater care than was sufficient to keep its walks reasonably safe, held proper. Thompson v. Poplar Bluff, 124 Mo. App. 439, 101 SW 709. Instruction, in action for injuries to child caused by falling into hole in street filled with hot water from heating plant of school district, that city had right to assume that janitor in flushing boilers would act in such manner as not to create dangerous nuisance in streets until it had notice that it was "customarily and usually" done in different manner, held erroneous. Svendsen v. Alden [Minn.] 112 NW 10. Instruction barring recovery if plaintiff slipped into a hole because of snow held erroneous as ignoring defendant's duty to keep sidewalk reasonably safe. Forney v. Melvin, 130 Ill. App. 203. Not error to refuse to require jury to say whether plaintiff could have taken opposite side of street where plaintiff had no knowledge of the danger. City of Indianapolis v. Keeley, 167 Ind. 516, 79 NE 499. In suit for injuries caused by negligent driving of defendant's servant, instructions on negligence and contributory negligence approved. D. H. Ewing & Sons v. Callahan [Ky.] 105 SW 387. Instruction directing verdict and ignoring starting of an engine before plaintiff had passed held improper. Clark v. Farmington Coal Co., 130 Ill. App. 192.

78. Where evidence presented only question of whether an excavator was negligent

tions.[79] It is error to refuse instructions properly applicable in the case,[80] unless sufficiently covered by others.[81]

§ 16. *Injury to, obstructions of, or encroachment on, street or highway.*[See 8 C. L. 89]—A permanent obstruction or encroachment of a public street is a nuisance [82] remediable in equity at the instance of the public,[83] or a private person showing special

in not properly guarding the place by lights held error to allow consideration of whether he was negligent in manner of excavating. Citizens' Gas & Elec. Co. v. Nicholson [C. C. A.] 152 F. 389. Where defendant is charged with negligence in placing pile of earth in street, in leaving same over night, and in failing to guard same, but only latter was supported by evidence, held error to submit all three acts of negligence. Stevens v. Citizen's Gas & Elec. Co., 132 Iowa, 597, 109 NW 1090. Instruction ignoring precise distance of projection of coal hole above sidewalk held not erroneous where evidence as to such distance was conflicting. Smart v. Kansas City [Mo.] 105 SW 709. Instructions not erroneous for ignoring question of plaintiff's knowledge of defect, there being no evidence that she had such knowledge. City of Bloomington v. Woodworth [Ind. App.] 81 NE 611. Testimony that driver was always very particular about the horse because it was always trying to get away, and that it appeared to be skittish, held to justify instruction as to negligence in leaving horse tied with strap and weight. Swift & Co. v. Murphy [Tex. Civ. App.] 18 Tex. Ct. Rep. 893, 100 SW 997. Instruction in suit for injuries from collision with defendant's vehicle held not objectionable as being on weight of evidence for failure to use qualifying words. Foley v. Northrup [Tex. Civ. App.] 19 Tex. Ct. Rep. 921, 105 SW 229.

79. Instruction assuming negligence is erroneous. Muncy v. Bevier, 124 Mo. App. 10, 101 SW 157. Charge on notice held not objectionable as assuming existence of defect. City of Cleburne v. Elder [Tex. Civ. App.] 18 Tex. Ct. Rep. 530, 102 SW 464. Held error to charge on law of road and refuse an instruction requested by defendant after such charge, where under the evidence there was no occasion to apply that law. Dickenson v. Platt, 116 App. Div. 651, 101 NYS 956.

80. Proper instruction on proof of contributory negligence held improperly refused. City of Indianapolis v. Keeley, 167 Ind. 516, 79 NE 499. Under evidence held error to refuse instruction on contributory negligence based on acquiescence in negligence of plaintiff driver. Canter v. Joseph [Mo. App.] 105 SW 1. Under the evidence held error to refuse to charge that defendant was not liable if jury believed defendant's description of the defect. Mason v. Winthrop [Mass.] 81 NE 644. Request to charge on question of plaintiff's negligence in walking in roadway and not on sidewalk held sufficiently complied with. Cratty v. Danbury, 79 Conn. 379, 65 A 147.

81. Instructions held to cover case. City of Brownsville v. Arbuckle, 30 Ky. L. R. 414, 99 SW 239. Not error in view of other instructions to refuse charge that it was plaintiff's duty to be on alert for approaching teams, considering the conditions. Fertel v. Peck [Vt.] 67 A 818. Requested instruction that city must exercise "reasonable care to keep sidewalk in safe condition" held covered by instruction that "city must keep sidewalks in a reasonably safe condition," etc. Crandall v. Dubuque [Iowa] 112 NW 555. Instruction requiring finding that plaintiff's horse became frightened at rubbish pile and ran away because of such fright held to cover requested instruction that no recovery could be had if horse was frightened at some other object before reaching pile. Board of Councilmen of Nicholasville v. Fain, 30 Ky. L. R. 564, 99 SW 275. Instruction held to sufficiently submit question whether rubbish pile was of character to render street unsafe. Id.

82. Robins v. McGehee, 127 Ga. 431, 56 SE 461; McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700. Which court may cause to be abated upon conviction of the offender. State v. Southern Indiana Gas Co. [Ind.] 81 NE 1149. Fence. State v. Godwin [N. C.] 59 SE 132. Opening through sidewalk and not conforming to permit held a nuisance per se. City of New York v. De Peyster, 105 NYS 612. Steps and areas on sidewalk held a nuisance enjoinable in equity. City of New York v. Knickerbocker Trust Co., 52 Misc. 222, 102 NYS 900. By express provisions of Civ. Code, §§ 3479, 3480, and Pen. Code. § 370, anything unlawfully obstructing the free passage or use in the customary manner of a public highway is a public nuisance. People v. McCue, 150 Cal. 195, 88 P 899.

83. That other remedies may exist for the abatement of an obstruction does not affect the power of the district attorney under Act Mar. 15, 1899, St. 1899, p. 103, c. 88, to begin an action in the name of the state. People v. McCue, 150 Cal. 195, 88 P 899. Under Comp. Laws, § 433, providing that circuit court of chancery shall have jurisdiction to determine all cases of encroachments on public highways, bill in equity may be brought therein to compel removal of street car tracks unlawfully placed in highway. Bangor Tp. v. Bay City Trac. & Elec. Co., 147 Mich. 165, 110 NW 490. Equity will assume jurisdiction of proceeding by city to remove obstruction of permanent nature. City of New York v. De Peyster, 105 NYS 612. Where private dock built over street unreasonably interferes with public travel, owner may be compelled under Pen. Code, § 385, and Highway Law, Laws 1890, p. 1198, c. 568, § 104, to remove same. City of Buffalo v. Delaware, etc., R. Co. [N. Y.] 82 NE 513. Municipal authorities may cause an obstruction to be removed from any public street in actual use by the public. Robins v. McGehee, 127 Ga. 431, 56 SE 461. Threatened obstruction of highway by erection of fence along center preventable by injunction. Council Grove Tp. v. Bowman [Kan.] 92 P 550. Lapse of time held not to bar right of public to have an encroachment removed where such encroachment did not extend full width of highway and entirely cut off travel. City of New York v. De Peyster, 105 NYS 612. Complaint charging that defendant did maintain, set up, and cause to be set up a certain sign, held not multi-

injury.[84] An action for damages,[85] ejectment,[86] or summary abatement, may also be resorted to in certain cases,[87] but charter power to prevent or remove nuisances does not include power to summarily remove obstructions which are not nuisances per se,[88]

farious although ordinance used the disjunctive. City of St. Louis v. St. Louis Theater Co., 202 Mo. 690, 100 SW 627. In proceeding to abate an obstruction constituting a nuisance, highway should be identified. State v. Southern Indiana Gas Co. [Ind.] 81 NE 1149. In suit by a borough to restrain obstruction by a railroad company of a street, evidence held to show that the portion obstructed had been previously vacated by ordinance. Borough of Rochester v. Pennsylvania Co., 216 Pa. 320, 65 A 796. Telephone company held guilty of obstructing highway where it placed poles along same at different places than those directed by highway commissioners by notice pursuant to act in force July 1, 1903. Interstate Independent Tel. & T. Co. v. Towanda, 123 Ill. App. 55. In an action by a municipality to compel by mandatory injunction the removal from the sidewalk of so much of a building as encroaches thereon, the owner of the property, as well as the lessee who erected the building, is a necessary party. City of Columbus v. Philbrick, 5 Ohio, N. P (N. S.) 449.

84. Equity will restrain obstruction of public or private roads at instance of one specially injured. Bent v. Trimboli, 61 W. Va. 509, 56 SE 881. Public highway. Robbins v. White [Fla.] 42 S 841.

Must be specially injured. Johnson v. Andengaard, 100 Minn. 130, 110 NW 369. Burden on complainant to establish special injury where he sought to enjoin completion of a canal or slip because of obstruction of alleged highways. Hamilton v. Semet Solvay Co., 227 Ill. 501, 81 NE 538. Evidence insufficient. Id. Abutting owners held to have sufficient interest to enable them to sue to restrain obstruction of extension of a street. Street v. Leete, 79 Conn. 352, 65 A 373. One occupying property as a residence, in front of which a track for movement of express cars is being unlawfully constructed, suffers such special injury as will support suit to enjoin. Hatfield v. Straus [N. Y.] 82 NE 172. Abutter whose ingress and egress was impaired held entitled to sue to enjoin construction of private spur track. Hatfield v. Straus, 117 App. Div. 671, 102 NYS 934. Owner whose right of view and access would be interfered with may sue. Riley v. Pennsylvania Co., 32 Pa. Super. Ct. 579. Complaint held to show special injury to plaintiff's quarrying business by street obstructions so as to authorize suit for damages. Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70. Liability of overseers of highway to statutory penalty for failure to keep roads in good repair and free from obstructions gives them sufficient interest to maintain injunction to prevent obstructions. Williams v. Riley [Neb.] 113 NW 136. Under Act April 11, 1849, P. L. 754, the Pennsylvania Railroad Company may occupy a street for right of way by municipal consent but not for depots or freight houses. Riley v. Pennsylvania Co., 32 Pa. Super. Ct. 579. Even if original right be conceded, railroad could not encroach by extension of a station. Id. In suit to remove as a nuisance steps and areaway extending into sidewalk, evidence held to show that the structures extended into street. City of New York v. United States Trust Co., 116 App. Div. 349, 101 NYS 574. Evidence held to sustain finding that abutting property was not damaged by construction of railroad tunnel in street. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 SW 822. Judgment directing abatement of nuisance, consisting of projections of buildings into street, rendered against one no longer having any rights in the premises held ineffectual. Ackerman v. True, 105 NYS 12. Property holders held entitled to join in single suit to contest right of municipality to grant railroad company right of way along so-called street traversing their properties which they claim to be private property and not a street. Gill v. Lake Charles, 119 La. 17, 43 S 897.

85. In private action for obstructing a street, it was immaterial that the portion actually used by the public was in what would be the sidewalk portion of the street if sidewalks were constructed. Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70. A borough is not liable in tort for the mere existence of an incumbrance in a street where it never authorized the act of placing it there nor ratified it later. Dirt dumped in street. Nyhart v. Taylor Borough, 31 Pa. Super. Ct. 635. In action by nighway commissioner for obstructing highway, his evidence should be treated as that of any other witness. Parkey v. Galloway, 147 Mich. 693, 14 Det. Leg. N. 34, 111 NW 348. Where public road is obstructed by railroad company, the measure of damages recoverable by county is cost of putting road in as good condition as it was before and not the inconvenience suffered by public. Big Sandy R. Co. v. Floyd County [Ky.] 101 SW 354.

86. Ejectment will lie by a municipality against a person unlawfully encroaching upon a highway under its control. Riverside Tp. v. Pennsylvania R. Co. [N. J. Err. & App.] 66 A 433.

87. A fence unlawfully obstructing a public highway is an indictable nuisance (State v. Godwin [N. C.] 59 SE 132), and may be rightfully removed either by the officers charged with the duty of keeping the streets open or by any person annoyed or prejudiced (Id.). Agreement of abutters to construction of a ditch in public street on different line from that of an older and smaller one held not to bind the public. Kern Island Irr. Co. v. Bakersfield [Cal.] 90 P 1052. Right to maintain new ditch held not authorized by previous right to maintain an older and smaller one. Id. One not specially injured may not remove a fence and trees on ground that they encroached on street (Hitchner v. Richman [N. J. Law] 65 A 856), and a private person can interfere only so far as it is necessary in order to exercise his right of passing along the highway (Id.). That one removed trees and a fence by direction of mayor and council of a borough did not show that direction was in form of an ordinance as required by statute. Id.

88. Brown v. Carrollton, 122 Mo. App. 276, 99 SW 37. Wooden awning extending over street at height of fifteen feet and substantially supported held not per se a nuisance.

nor is this remedy available when a street has never been actually opened but has been in private occupation for many years.[89] Estoppel may bar relief,[90] though prescription will not ordinarily do so.[91] Injunction will issue to restrain county authorities from removing gates constructed across a road in accordance with statute.[92] Where one conveys land for a highway, his adjoining land will be burdened with the lateral support of a road built in accordance with the terms of the deed,[93] and he must not endanger the highway by excavations.[94]

Criminal liability.[See 8 C. L. 91]—Obstruction of highways is made criminal in many jurisdictions,[95] but it must appear that the locus was a public highway.[96] The indictment must set forth all the essential elements of the offense,[97] and should identify the highway with certainty.[98] Where one has the right to temporarily occupy a street for a certain purpose, the indictment must show occupation for an unreasonable time.[99] A railroad company sentenced to abate an embankment as a nuisance and later summoned to show cause why it should not be abated by the sheriff at its expense has the burden of showing that it did in fact abate the obstruction.[100]

Id. Whether it was a nuisance in fact held question for the courts, and, in absence of authority to declare nuisances, city could not provide for summary removal. Id.

89. Since the rationale of the principle that an obstruction may be summarily abated is the theory that an obstruction of a street in use by the public is a nuisance, when a street has never been actually opened or used but has been in private occupation for forty years, this mode of procedure is not available, and this though the fee is in the city. Robins v. McGehee, 127 Ga. 431, 56 SE 461.

90. Where, from filing of plats of city addition in 1852 and 1856, nothing further was done, and thereafter city stands by and sees extensive steel mills erected encroaching on the streets and without objection permits large sums of money to be expended in belief that streets have been abandoned, city is estopped from claiming that such mills constitute obstructions. City of Chicago v. Illinois Steel Co., 229 Ill. 303, 82 NE 286. The statutes provide the only way a street may be narrowed, and no act by the municipality not in accordance with the statute, but which might be construed as an abandonment of some part of the street, gives to an abutting property owner the right to encroach thereon, nor is estoppel created against the municipality by reason of the fact that other property owners have been permitted to so encroach. City of Columbus v. Philbrick, 5 Ohio N. P. (N. S.) 449. In suit to compel opening of alley obstructed by defendants, evidence insufficient to create estoppel by consent. Williams v. Poole [Ky.] 103 SW 336. Fact that township officers made no objection to laying of street car tracks in highway held not to estop township from compelling removal. Bangor Tp. v. Bay City Traction & Elec. Co., 147 Mich. 165, 13 Det. Leg. N. 999, 110 NW 490.

91. Abutter could not by prescription obtain right to maintain unauthorized ditch in street. Kern Island Irr. Co. v. Bakersfield [Cal.] 90 P 1052. Would not be inferred that permit to encroach on street was issued, it not being shown that city had power to grant it. City of New York v. De Peyster, 105 NYS 612. Prior to Civ. Code 1899, § 6, easement could be acquired in street by adverse user. Outside stairway extended over street. Agnew v. Pawnee City [Neb.] 113 NW 236.

92. Adkins v. Bumgardner [Tex. Civ. App.] 99 SW 132.

93. Board of Chosen Freeholders v. Woodcliffe Land Imp. Co. [N. J. Law] 65 A 844.

94. Excavation by tenant so as to endanger retaining wall. Board of Chosen Freeholders v. Woodcliffe Land Imp. Co. [N. J. Law) 65 A 844.

95. In prosecution under Rev. Code 1852, as amended 1893, p. 501, c. 60, § 31, for obstructing road, the time of the offense as laid in indictment is not material provided offense is proven to have been committed within two years immediately preceding finding of indictment. State v. Southard [Del.] 66 A 372. Placing a fence across a public road is an offense under Rev. Code 1852, as amended 1893, p. 501, c. 60, § 31. Id. In prosecution for obstructing a highway, evidence sufficient to support conviction. Brumley v. State [Ark.] 103 SW 615.

96. Conviction for maintaining a nuisance on a public highway cannot be sustained on evidence not showing that the place was a public highway. Commonwealth v. Slagel, 33 Pa. Super. Ct. 514. Where part of prescriptive road had been abandoned and a new way constructed without statutory proceedings. Id. Where a highway is established by dedication, the fact that it is used for the storage of logs to be loaded on cars is immaterial to its existence. State v. Southard [Del.] 66 A 372.

97. Information, based on § 108, c. 78, Comp. St. 1903, making it unlawful to "build a barbed wire fence across or in any plain traveled road or track in common use," must charge that road was in common use. Gilbert v. State [Neb.] 111 NW 377.

98. Mere averment that accused obstructed a public highway in a certain county is insufficient. State v. Southern Indiana Gas. Co. [Ind.] 81 NE 1149.

99. Indictment charging railroad with obstructing public road by embankment raised in course of making road crossing held defective for failure to allege that embankment was maintained for unreasonable length of time. Commonwealth v. Morganfield, etc., R. Co., 30 Ky. L. R. 1274, 101 SW 304.

100. Immaterial that no replication was

HOLIDAYS.[1]

Statutory holidays possess only the sanctity attached to them by the statute creating them,[2] and in this respect differ from Sunday,[3] hence, a legal holiday is not dies non juridicus unless made so by statute.[4] To constitute a general state election within the meaning of an act making the day upon which it is held a holiday, the election must be held generally throughout the state and not in certain political subdivisions only,[5] and the fact that certain state officers are elected thereat does not alter the rule.[6] Under a statute prohibiting the service of any process "on a legal holiday," service of a citation whether original or alias on such a day is ineffective.[7] Objections to judicial proceedings upon holidays must be timely made, and came too late on a motion in arrest of judgment after conviction.[8]

HOMESTEADS.

§ 1. The right to the Homestead in General (1629).
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§ 1. *The right to the homestead in general.*[See 8 C. L. 93]—Homestead exemptions are favored by the law.[9] The homestead law in Utah is wholly independent of the statutes providing for support of widow and children pending administration.[10]

Nature of homestead estate.[See 8 C. L. 93]

§ 2. *Persons entitled.*[See 8 C. L. 93]—The statutes determine who is entitled to homestead. Generally the right is based upon the existence of a family.[11] In Kentucky a nonresident cannot acquire a homestead in the state.[12]

An abandoned wife or family.[See 8 C. L. 93]

§ 3. *Properties and estates in which homestead may be claimed.*[See 8 C. L. 94]—In Iowa matured crops grown on homestead are not exempt.[13]

filed. Commonwealth v. Philadelphia, etc., R. Co., 33 Pa. Super. Ct. 452. Five degree grade mentioned in Act June 13, 1836, P. L. 551, applies only to new roads. Id.

1. See 8 C. L. 92.

2. Acts not expressly forbidden are not prohibited. State v. Duncan, 118 La. 702, 43 S 283.

3. See Sunday, 8 C. L. 2045. State v. Duncan, 118 La. 702, 43 S 283.

4. Labor day though a legal holiday for certain purposes is not so as to make an order entered on that day invalid. Logan v. Ballard, 61 W. Va. 526, 57 SE 143. Under Ann. Code 1906, § 504, a notice or summons returnable on a holiday may be acted on the next secular day, but action on the return day is not void. Id.

5. State v. Duncan, 118 La. 702, 43 S 283.

6. Election of judges of court of appeals held not a general state election within Act No. 3, 1904, p. 5. State v. Duncan, 118 La. 702, 43 S 283.

7. Rev. St. 1895, § 1180. Service of citation in divorce proceedings. Michael v. Michael [Tex. Civ. App.] 18 Tex. Ct. Rep. 923, 100 SW 1018.

8. State v. Duncan, 118 La. 702, 43 S 283.

9. Ervay v. Hill [Wash.] 90 P 590.

10. Rev. St. 1898, § 2829, not repealed by Laws 1903, p. 51, c. 57. In re Syndergaard's Estate, 31 Utah, 490, 88 P 616.

11. In North Dakota a husband as head of the family is entitled to claim homestead exemption although the fee to the land is vested in his wife. Const. § 208; Rev. Code 1905, §§ 5049, 5050. Bremseth v. Olson [N. D.] 112 NW 1056. Evidence held to show such a social status existing between brother and sister and moral obligation upon his part to support her and corresponding dependence on her part as to warrant conclusion of law that they constituted a family within meaning of constitution and homestead exemption statutes. Drought & Co. v. Stallworth [Tex. Civ. App.] 17 Tex. Ct. Rep. 603, 100 SW 188.

12. Lyons v. Adams, 30 Ky. L. R. 870, 99 SW 900.

13. In re Sullivan [C. C. A.[148 F 815.

*As dependent on nature of claimant's title.*See 8 C. L. 94—A homestead may be claimed in a fee, or in a life estate, or in both,[14] and can be acquired in land held by husband and wife jointly or as tenants by entireties.[15] In Wisconsin a tenant in common can acquire a homestead if his occupation is with the consent, express or implied, of his cotenant.[16]

*As dependent on use of premises.*See 8 C. L. 94—Residence upon [17] or occupancy of land [18] is generally essential to the acquisition of a homestead therein. A business homestead, distinct from the residence, must be reasonably necessary to the business or calling of the head of the family.[19] In Minnesota two separate parcels of land touching only at the corners, between which is a regular roadway, if owned, occupied, and cultivated as one farm, may constitute a homestead, although the residence and appurtenances are all located upon one tract.[20]

*As dependent on whether lands are rural or urban.*See 8 C. L. 95

*As dependent on whether property is realty or personalty.*See 3 C. L. 1633

*Amount exempt.*See 8 C. L. 95—Value of property at the time of conveyance thereof governs on the question as to whether at that time it was a homestead.[21]

§ 4. *Claiming, selecting, and setting apart of homesteads.*See 8 C. L. 95—One cannot have homestead rights in two places. Therefore, until an existing homestead has been abandoned, a new one cannot be established.[22] In Iowa the selection of a homestead may be made at any time before judicial sale.[23] Where the selection is made from the separate property of the wife, is must be with her consent. The actual use of a dwelling as a family home is a sufficient selection under the Nebraska homestead law,[24] but in Colorado the word "homestead" must be entered on the margin of the recorded title,[25] and in Georgia the debtor must prepare a schedule of the property he desires to be exempted.[26]

§ 5. *Liabilities superior or inferior to homestead.*See 8 C. L. 97—As a rule homestead exemptions apply only to debts incurred subsequent to the acquisition of the homestead,[27] and do not apply as against one holding a vendor's lien on the land.[28]

14. Under Code, §§ 2977, 2978, one having a fee in forty acres and a life estate in an adjoining tract of forty acres may select a homestead from a part of each, provided his dwelling house is located on land selected. Lutz v. Ristine [Iowa] 112 NW 818.

15. Gannon v. Moore [Ark.] 104 SW 139.

16. St. 1898, § 2983 (Laws 1901, c. 269, p. 365). Bartle v. Bartle [Wis.] 112 NW 471. Acquiescence of cotenant under such circumstances as raise a presumption of consent sufficient. Id.

17. Rev. Code 1899, § 3605. Smith v. Spafford [N. D.] 112 NW 965.

18. Const. of N. C. art. 10, § 2. In re Paramore & Ricks, 156 F 208.

19. Duncan v. Ferguson-McKinney Dry Goods Co. [C. C. A.] 150 F 269.

20. Brixius v. Reimringer [Minn.] 112 NW 273.

21. Bruner v. Hicks, 230 Ill. 546, 82 NE 888.

22. LaPlant v. Lester [Mich.] 14 Det. Leg. N. 643, 113 NW 1115. Where one sells his homestead, purchases a hotel with the proceeds and occupies it as his dwelling, he acquires a homestead therein. Bartle v. Bartle [Wis.] 112 NW 471.

23. Lutz v. Ristine [Iowa] 112 NW 818; Hobson v. Huxtable [Neb.] 112 NW 658; Miller v. Paustion [Neb.] 112 NW 342. Such consent may be inferred from facts and circumstances from which a reasonable inference of consent may be deduced, or facts and circumstances may be shown which would estop wife from asserting that consent was not given. Id. Consent may, until contrary be shown, be presumed from use and occupancy of property as a family home. Hobson v. Huxtable [Neb.] 112 NW 658.

24. Hobson v. Huxtable [Neb.] 112 NW 658.

25. Mill's Ann. St. § 2133. This requirement is not complied with by causing word to be written on deed itself. Leppel v. Kus, 38 Colo. 292, 88 P 448.

26. Civ. Code 1895, § 2866. Harris v. Hill, 1 Ga. App. 425, 58 SE 124. Homestead will not prevail over title of bona fide purchaser without actual notice unless schedule contains description of property sufficiently definite to impart constructive notice. Id.

27. Under Ky. St. 1903, § 1702, homestead exemption does not apply to sales under execution, or judgment, if debt existed prior to purchase of the land or erection of improvements thereon. Cowan McClung & Co. v. Evans [Ky.] 101 SW 964. Homestead is purchased under this statute when it is paid for. Id. Defendant borrowed money from plaintiff to apply on purchase price of land, which he subsequently sold, and with part of proceeds bought another tract. The latter tract was not exempt as a homestead

The Utah statute making homesteads subject to mechanics' and laborers' liens is unconstitutional.[29] An attachment of property is subject to a homestead exemption therein.[30] The Washington statute [31] making inoperative the exemption laws where the liability of an agent or attorney incurred in relation to money or other property of his principal is concerned does not apply to homestead exemptions.[32] Under the Federal statutes a homestead exemption given by the laws of a state may be asserted against a fine due the United States although under the state law the exemption does not extend to fines.[33]

Application of payments to protect homestead. See 8 C. L. 98

§ 6. *Alienation and incumbrance.* See 8 C. L. 98—Generally a homestead may be sold or mortgaged,[34] and being exempt from execution its conveyance can work no fraud against a creditor,[35] but, where a homestead has been selected from the separate property of the wife, she cannot by a conveyance of the property deprive the husband of his homstead right therein.[36] In Nebraska a wife cannot convey the family homestead to the exclusion of the homestead right of her insane husband.[37] Where homestead right is not released by both, it is not released as to either spouse.[38]

Necessity of consent of wife to conveyance or joinder therein. See 8 C. L. 99—Generally it is essential to a valid conveyance or mortgage of a homestead that the wife shall join in the instrument of conveyance,[39] but under the Illinois statute title will pass although the wife does not join, if possession is abandoned or given pursu-

from execution on judgment for the money loaned. Hensley v. Webb [Ky.] 101 SW 375. By "improvements" are meant original improvements and not repairing or additional improvements becoming necessary fer comfort of family. Cowan McClung & Co. v. Evans [Ky.] 101 SW 964.

28. "Purchase money liens" referred to in St. 1898, § 2983, making such liens an exception to the rule exempting homesteads from debts of owner, mean vendor's liens for purchase money. Bartle v. Bartle [Wis.] 112 NW 471. One who pays notes secured by vendor's lien on homestead, at request of maker and with understanding that he shall hold the lien, becomes subrogated to the rights of vendor. Mergele v. Felix [Tex. Civ. App.] 18 Tex. Ct. Rep. 398, 99 SW 709. Wife may without knowledge or assent of husband procure third person to pay such notes. Id.

29. Violative of constitutional requirement that legislature shall provide for selection and exemption of a homestead from sale on execution. Volker-Scowcroft Lumber Co. v. Vance [Utah] 88 P 896.

30. Citizen's Sav. Bk. of Olin v. Glick, 134 Iowa, 323, 111 NW 970. Homestead of family cannot be taken on attachment for tort of husband and father. Cassady v. Morris [Okl.] 91 P 888.

31. Ballinger's Ann. Codes & St. § 5248a.

32. Ervay v. Hill [Wash.] 90 P 590.

33. United States v. Stacey, 155 F 510.

34. In re Paramore & Ricks, 156 F 208.

But under constitution of Texas a mortgage or lien upon a homestead is void. Brooks v. Sanger [Tex.] 19 Tex. Ct. Rep. 782, 105 SW 37. Married man living upon land as a homestead cannot mortgage it. Adams v. Bartell [Tex. Civ. App.] 19 Tex. Ct. Rep. 503, 102 SW 779. Mortgage of a business homestead by husband and wife, if not given for purchase price or improvements, is void. Musick v. O'Brien [Tex. Civ. App.] 18 Tex. Ct. Rep. 532, 102 SW 458. Constitutional provision cannot be avoided by a simulated transaction by which homestead is conveyed to another, and simultaneously reconveyed with detention of vendor's lien to secure alleged purchase-money notes. Brooks v. Sanger [Tex.] 19 Tex. Ct. Rep. 782, 105 SW 37. And lien thus attempted to be created is not enforceable by purchaser of notes, though he had no actual knowledge that property was a homestead. Id.

35. Brunson v. Rosenheim [Ala.] 43 S 31; Nicholson v. Nesbitt [Cal. App.] 88 P 725; McCarty v. Coffin [C. C. A.] 150 F 307.

36. Miller v. Paustion [Neb.] 112 NW 342.

37. Comp. St. 1905, c. 36, § 4. Weatherington v. Smith [Neb.] 112 N W 566.

38. Columbian Bldg. & Loan Ass'n v. Leeds, 128 Ill. App. 195.

39. A lease of a homestead for five years is a conveyance under Cobbey's Ann. St. 1903, § 6203, and is void unless executed and acknowledged by both husband and wife. Kloke v. Wolff [Neb.] 111 NW 134. Hurd's Rev. St. 1905, c. 52, § 4, prohibiting conveyance of homestead by husband without joinder of wife, applies where husband and wife are joint tenants. Lininger v. Helpenstell, 229 Ill. 369, 82 NE 306. Where joinder of wife, under separate acknowledgment, is required, husband and purchaser cannot without wife's knowledge consummate sale upon terms and conditions materially different from those stated in conveyance as executed and delivered. Scoggin v. Mason [Tex. Civ. App.] 19 Tex. Ct. Rep. 569, 103 SW 831. Where in body of mortgage wife's name appears with that of husband as a mortgagor, and certificate of acknowledgment recites that wife acknowledged instrument to be her act and deed for purposes therein named, there is sufficient joinder to convey her homestead interest. Long v. Branham, 30 Ky. L. R 552, 99 SW 271.

ant to the conveyance.[40] It is not essential to the validity of an agreement to compensate another for finding a purchaser for land embracing a homestead that the owner's wife should join in its execution,[41] and an agreement changing the terms and manner of paying rentals of a gas and oil lease on a homestead from cash to a royalty need not be consented to by the wife of the lessor.[42] If a wife is induced by the fraudulent representations of her husband to join in the conveyance of their homestead, she is entitled to a cancellation of the conveyance where the grantee has notice, actual or implied, of the fraud.[43]

Acknowledgment of conveyance.[See 8 C. L. 101]—Any conveyance of a homestead is void, unless it contains a release of the grantor's homestead rights and is duly signed and acknowledged.[44]

Contracts to convey.[See 8 C. L. 101]—In Iowa a contract to convey a homestead not signed by the wife of the contractor is void.[45] The lien of a mortgage on a homestead is not discharged by a forbearance agreement between the husband and the mortgagee.[46]

§ 7. *Loss or relinquishment.*[See 8 C. L. 101]—A right of homestead once vested continues until lost through abandonment or parted with by voluntary relinquishment.[47] It cannot be forfeited by misconduct.[48] Removal from the land with intention to abandon it as a homestead defeats the exemption after creditor's rights have intervened,[49] but the cessation of occupancy must be with an intention of total relinquishment shown by clear and decisive circumstances.[50] A temporary renting does not ordinarily constitute an abandonment.[51] An assignment for the benefit of

40. Hurd's Rev. St. 1905, c. 52, § 4. Facts held not to constitute abandonment or surrender of possession pursuant to conveyance. Venters v. Wickens, 224 Ill. 569, 79 NE 946.

41. Kepner v. Ford [N. D.] 111 NW 619.

42. Wilson v. People's Gas Co., 75 Kan. 499, 89 P 897.

43. Scoggin v. Mason [Tex. Civ. App. 19 Tex. Ct. Rep. 569, 103 SW 831.

44. Lease of homestead for the purpose of mining oil and gas for ten years or so long as oil and gas might be found thereon held conveyance of freehold and void as not executed in accordance with statute. Bruner v. Hicks, 230 Ill. 536, 82 NE 888. The right of homestead can be released only by conveyance or waiver subscribed by the householder and his wife and acknowledged by both. Giving of chattel mortgage upon house standing on leased ground and permitting constable to sell it thereunder and accepting the proceeds in excess of judgment and costs is insufficient. Myers v. Henderson, 129 Ill. App. 644.

45. Code, § 2974. Such contract cannot be specifically enforced, nor damages recovered for its breach. Wheelock v. Countryman, 133 Iowa, 289, 110 NW 598. But a contract to convey reversion where homestead estate is expressly reversed is valid though not signed by wife. Reilly v. Reilly [Iowa] 110 NW 445.

46. McKinley-Lanning Loan & Trust Co. v. Johnson [Neb.] 105 NW 899.

47, 48. Citizens' Sav. Bk. of Olin v. Glick, 134 Iowa, 323, 111 NW 970.

49. Smith v. Spafford [N. D.] 112 NW 965. Where one abandons a homestead and for fifteen years does not reside on the land nor receive any profits thereform, he loses his right thereto. Martin v. Smith [Ky.] 104 SW 310. Evidence held to show abandonment of homestead. Smith v. Spafford [N. D.] 112 NW 965.

50. Duncan v. Ferguson-McKinney Dry Goods Co. [C. C. A.] 150 F 269. Property does not lose its character as a homestead until its use as such has been discontinued with intention not to again use it as a home. Drought & Co. v. Stallworth [Tex. Civ. App.] 17 Tex. Ct. Rep. 603, 100 SW 188. A removal from a homestead for temporary purposes, with intention to return, is not an abandonment. Lutz v. Ristine [Iowa] 112 NW 818. Leaving homestead on account of ill health with intention of returning when able is not an abandonment. Bartle v. Bartle [Wis.] 112 NW 471. Where one sells part of land covered by his homestead exemption on which is located his dwelling house, and then builds and occupies a dwelling house on remainder, he does not abandon his homestead in such remainder. Lutz v. Ristine [Iowa] 112 NW 818. Facts held not to show an abandonment of homestead. LaPlant v. Lester [Mich.] 14 Det. Leg. N. 643, 113 NW 1115.

51. Where there is only a temporary renting of a part of homestead and no segregation made or intended, it does not constitute a divestiture of the homestead character as to such portion. Drought & Co. v. Stallworth [Tex. Civ. App.] 17 Tex. Ct. Rep. 603, 100 SW 188. Where four lots upon which were two buildings divided by a partition fence were purchased for a home, the fact that at husband's death one of buildings was leased will not preclude setting aside entire tract as homestead to widow where its value is less than $1,000. In re Murphy's Estate [Wash.] 90 P 916. Under Const. art. 16, § 51, temporary renting of business homestead does not consti-

creditors of nonexempt property and cessation of business does not constitute an abandonment of a busines homestead. The assignor is entitled to a reasonable time in which to embark in a new business.[52] In determining whether there has been an abandonment, all the facts and circumstances of the case must be considered.[53] Declarations of homesteader as to his intentions in removing from the homestead are competent to show that there was no abandonment, but are not conclusive.[54] A wife cannot by abandoning the family homestead and removing to another state defeat the homestead right of her insane husband.[55] A wife may part with her homestead interest in her husband's land by a release, supported by a sufficient consideration.[56] Where a year's support to the widow is set aside out of homestead property, the homestead is thereby extinguished.[57]

tute abandonment if no other homestead has been acquired. Duncan v. Ferguson-McKinney Dry Goods Co. [C. C. A.] 150 F 269.

52. Where assignment and cessation of business were on March 29, homestead passed by conveyance made on April 3. McCarty v. Coffin [C. C. A.] 150 F 307.

53. Drought & Co. v. Stallworth [Tex. Civ. App.] 17 Tex. Ct. Rep. 603, 100 SW 188. In solving such question jury or court must consider uses to which property has been subjected, character of improvements made, effect and object of temporary renting and intention to preserve it as a home, as indicated by acts of party asserting homestead rights. Id.

54. Smith v. Spafford [N. D.] 112 NW 965.

55. Weatherington v. Smith [Neb.] 112 NW 566.

NOTE. Effect of abandonment by dependent members of family: In the recent case of Palmer v. Sawyer [Neb.] 103 NW 1088, the state of the law as exhibited by the adjudicated cases is well presented in these words: "Turning now to the decisions of the courts of last resort in other states on statutes of somewhat similar construction to our own, we find an irreconcilable conflict in the various conclusions reached. This conflict in some instances is traceable to the different provisions of the statute construed, and in other instances to the conception taken by the court of the intention of the legislature in the enactment of the statute. Those courts which look upon the statute as a statute of nurture, intended solely for the protection of the dependent members of the family from the improvidence of the head of the family, without any division, arrive at the conclusion that when the homestead has been selected, and the dependent members of the family for whose benefit it was created have ceased to occupy, the protection of the homestead ceases, because the reason for the protection has ceased. The leading cases supporting this theory of constructon are Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Bank v. Cooper, 56 Cal. 339; Johnson v. Little, 90 Ga. 781, 17 SE 294; Cooper v. Cooper, 24 Ohio St. 488; Galligar v. Payne, 34 La. Ann. 1057; Hill v. Franklin, 54 Miss. 632; Fullerton v. Sherrill, 114 Iowa, 511, 87 NW 419. In opposition to this view is another line of decisions based on the hypothesis that the intention of the legislature in enacting the various homestead statutes was to protect the home and all its inmates from any business misfortune and financial adversity that might befall them; that the protection extends to the head of the family as well as to the dependent members. This theory leads to the conclusion that when a homestead has been selected by the head of a family he becomes invested with a right or estate in such homestead, which cannot be defeated by the death or abandonment of the home by the other members of the family who occupied it at the time of its selection. The following are some of the leading cases supporting this view: Silloway v. Brown, 12 Allen [Mass.] 30; Kimbrel v. Willis, 97 Ill. 494; Stanley v. Snyder, 43 Ark. 429; Beckmann v. Meyer, 75 Mo. 332; Webb v. Cowley, 5 Lea [Tenn.] 722; Blum v. Gaines, 57 Tex. 119; Stults v. Sale, 92 Ky. 5, 17 SW 148, 36 Am. St. Rep. 575, 13 L. R. A. 743."

While this classification shows nearly an equal division among the jurisdictions from which cases are cited, such preponderance as there is favors the exemption. The Nebraska court more-over aligned itself with the majority. And the following decisions from other states may be added to the list; Pardo v. Bittorf, 48 Mich. 275, 12 NW 164; Barney v. Leeds, 51 N. H. 253; Wilkinson v. Merrill, 87 Va. 513, 12 SE 1015, 11 L. R. A. 632, overruling Calhoun v. Williams, 32 Grat. [Va.] 18, 34 Am. Rep. 759; Towne v. Rumsey, 5 Wyo. 11, 35 P 1025. See, also, Moore v. Parker, 13 S. C. 486, and In re Feas Estate, 30 Wash. 51, 70 P 270. Pierce v. Kusic, 56 Vt. 418, and Myers v. Ford, 22 Wis. 139, are sometimes cited as authorities upon this side of the question; but they have no real bearing on the matter, for they are based upon statutes under which the existence of a family is not necessary to the inception of the homestead right. On the other hand the following should be added to the leading cases supporting the minority view: Herrin v. Brown, 44 Fla. 782, 33 S 522, 103 Am. St. Rep. 182; Jones v. McCrary, 123 Ga. 282, 51 SE 349 (as being perhaps more closely in point than the Georgia case cited by the Nebraska court); Betts v. Mills, 8 Okl. 351, 58 P 957.—From Weaver v. First Nat. Bank [Kan.] 94 P 273.

56. A deed conveying land from husband to wife, made in view of their separation, to provide for her, is sufficient consideration for a release by her of homestead rights in other land of the husband. LaPlant v. Lester [Mich.] 14 Det. Leg. N. 643, 113 NW 1115.

57. Moore v. Moore, 126 Ga. 735, 55 SE 950.

§ 8. *Rights of surviving spouse, children, heirs, or dependents of homestead tenant.*[See 8 C. L. 102]—Upon the death of a husband or wife the rights of the surviving spouse and the children in the homestead is determined by statute.[58] A distributee is not entitled to homestead until a judgment recovered against him by the administrator for the conversion of the property is paid.[59] In Tennessee a husband cannot by will deprive his wife of her homestead right.[60] A widow's rights in her deceased husband's homestead are subject to a mortgage thereon filed prior to her marriage,[61] but are not affected by the husband's deed of assignment for benefit of creditors executed subsequent to the marriage in which she did not join.[62] Heirs to whom a homestead descends may by giving their note for their ancestor's debt with a lien on the land subject the homestead to liability therefor.[63] The alienation of premises occupied by a widow and children as a homestead is always subject to the right of the heirs to continue to occupy the premises as a homestead.[64] An attempted sale of the homestead by the widow without an order from the proper court is a nullity.[65]

Nature of survivor's homestead estate.[See 8 C. L. 103]—The nature of the survivor's homestead estate is to be determined from an interpretation of the terms of the statute.[66]

Loss of survivor's right.[See 8 C. L. 103]—A widow may lose her homestead rights

58. **Alabama:** Under Const. 1901, §§ 205, 208, providing that homestead of husband shall be exempt to widow, widow can assert homestead rights only in tract which was husband's homestead at his death. McGaugh v. Davis [Ala.] 43 S 745.

California: Under Code Civ. Proc. § 1474, upon death of either spouse homestead vests absolutely in survivor by operation of law, and no order of court is necessary to perfect title. Fisher v. Bartholomew [Cal. App.] 88 P 608. Title thus acquired cannot be affected by order of probate court authorizing sale of premises. Id. Such order may be attacked collaterally by a purchaser from surviving spouse. Id. Where property covered by a homestead declaration has been selected from community property of husband and wife, it vests absolutely in wife upon death of the husband, and while held by her retains its homestead character. Hibernia Sav. & Loan Soc. v. Hinz [Cal. App.] 88 P 730.

Illinois: Surviving spouse cannot bind the property by contract for a period longer than her life. Henion v. Vavrik, 126 Ill. App. 292. The surviving wife is not required to elect between the widow's award and a life estate in the homestead; she is entitled to both. Miller v. Hammond, 126 Ill. App. 267.

Kentucky: Under Ky. St. 1903, § 1707, widow and children entitled to homestead husband could claim if living, subject to conditions that attached to it before his death. Warren's Adm'r v. Warren [Ky.] 104 SW 754, 1199. If homestead is in indivisible property worth more than $1,000, whole may be sold for decedent's debts, but $1,000 of proceeds must be set apart for use of widow and children. Id.

In Missouri, where a husband dies leaving no lineal heirs, his widow is entitled to a homestead right of $1,500. Coleman v. Coleman, 122 Mo. App. 715, 99 SW 459.

In Texas upon husband's death widow entitled to possession of homestead, but children entitled to half rents and profits during their minority. Stubbs v. Pitts [Ark.] 104 SW 1110.

59. Small v. Usher [S. C.] 57 SE 623.

60. Const. art. 11 § 11; Shannon's Code, § 3798. Chamness v. Parrish [Tenn.] 103 SW 822.

61. McGill v. Hughes [Ark.] 105 SW 255.

62. Potter v. Potter's Receiver [Ky.] 101 SW 905.

63. Adams v. Bartell [Tex. Civ. App.] 19 Tex. Ct. Rep. 503, 102 SW 779.

64. Oil and gas lease by widow owning undivided half interest in premises. Compton v. People's Gas Co., 75 Kan. 572, 89 P 1039.

65. And if she delivers possession under such sale, she may recover the property in a proper action. Williford v. Denby, 127 Ga. 786, 156 SE 1010.

66. **Alabama:** Under Code 1886, § 2543, upon the death of husband widow takes only life estate in his homestead, subject to be enlarged into fee upon ascertainment of insolvency of his estate. O'Daniel v. Gaynor [Ala.] 43 S 205. There must be a judicial ascertainment of insolvency. Id. Equity will not, on ground that personal representative has fraudulently refused to report estate as insolvent, regard as passed a decree of insolvency when in fact no such decree has been entered. Id. The heirs being necessary parties to a bill to declare estate insolvent are entitled, on that issue, to assert by demurrer bar of statute of limitations against only claim working such insolvency. Id.

Mississippi: Under Rev. Code 1871, § 1956, held that widow was entitled to child's part in fee simple in exempt homestead to which decedent held equitable title at time of his death. Warren v. Davis [Miss.] 43 S 604.

Missouri: Under Rev. St. 1899, § 3620, widow's interest in homestead is not an unqualified life tenancy. If she marries her tenancy ceases. Therefore, Acts 1903, p. 167, § 1, relating to computation of present

by abandonment,[67] but where a wife was driven from the homestead by the abuse and cruelty of her husband, she is not thereby deprived of the right to have the homestead set aside to her.[68]

Partition and assignment out of decedent's estate.[See 8 C. L. 104]—To warrant the setting aside of a homestead at the widow's suit, the evidence must show that she is entitled to a homestead in the property.[69]

Election.[See 8 C. L. 104]—Where a husband devises to his wife all his real estate as long as she remains a widow, she is not required to elect between such provision and her homestead right.[70]

Rights of divorced parties.[See 5 C. L. 1701]

Claim to reimbursement for expenditures.[See 8 C. L. 1642]

§ 9. *Exemption of proceeds of homestead or of substituted properties.*[See 8 C. L. 105]—Generally the proceeds of a homestead are exempt to the same extent that the homestead was,[71] it usually being a condition to such exemption that they be reinvested within a reasonable time [72] or within a time specified.[73]

§ 10. *Remedies and procedure by creditors. Remedies by suit or action.*[See 8 C. L. 105]—The holder of a mortgage on the homestead of a decedent cannot maintain an action thereon unless he first presents his claim as required by statute.[74] In an action to enforce a mechanics' lien if defendant would rely upon a homestead, he must allege it in his answer.[75] Where a homestead has been shown to have existed, the burden is upon the creditor to show that it has expired.[76] The holder of a note secured by vendor's lien and mortgage on the homestead of a bankrupt is entitled, in a suit brought by authority of the court of bankruptcy in a state court against

value of life estate, does not include such interest. Coleman v. Coleman, 122 Mo. App. 715, 99 SW 459.

67. In Texas, if a widow abandons her homestead rights, such rights vest in the children (Stubbs v. Pitts [Ark.] 104 SW 1110), but until there has been a specific act of abandonment they are not entitled to her share of the rents and profits (Id.). The mere fact that widow has lost right to recover her portion of rents and profits through laches or statute of limitations does not vest right to recover them in children until they have recovered possession of homestead from adverse holder. Id. Where a widow had rented her husband's business homestead continuously since his death, its homestead character was lost. Morris v. Morris [Tex. Civ. App.] 17 Tex. Ct. Rep. 639, 99 SW 872.

68. In re Murphy's Estate [Wash.] 90 P 916.

69. Evidence held to show that property acquired in the husband's name was community property, purchased for a home, in which widow was entitled to claim a homestead. In re Murphy's Estate [Wash.] 90 P 916.

70. Chamness v. Parrish [Tenn.] 103 SW 822.

71. A creditor cannot subject to payment of his judgment the proceeds of a homestead, title to which was acquired before the debt was contracted. Green v. Forney, 134 Iowa, 316, 111 NW 976. Where there is a valid transfer of a homestead from husband to wife, the proceeds thereof in her hands after his death are exempt from the claims of his creditors. Bartle v. Bartle [Wis.] 112 NW 471.

72. Collins Adm'r v. Collins, 30 Ky. L. R. 816, 99 SW 653. A judgment creditor cannot subject to payment of his claim land purchased with proceeds of sale of land which was purchased with proceeds of sale of homestead which was exempt from creditor's claim. Id.

73. In Utah the proceeds of a sale of a homestead is exempted for one year after the receipt thereof. Rev. St. 1898, § 1158. Christensen v. Beebe [Utah] 91 P 129. The mere acceptance of an oral promise to deliver certain goods is not a receipt of the proceeds of the sale within this statute, and the exemption of such goods does not expire until a year after their actual delivery. Id.

74. Under Code Civ. Proc. §§ 1475, 1500, if a mortgagee does not present his claim to executor or administrator within prescribed time he cannot maintain an action either to foreclose mortgage or to recover debt. Hibernia Sav. & Loan Soc. v. Hinz [Cal. App.] 88 P 730.

75. In an action to enforce mechanics' lien against property of married woman, answer alleging facts showing defendant to be head of family and that property is her homestead is sufficient as against a general demurrer. Volker-Scowcroft Lumber Co. v. Vance [Utah] 88 P 896.

76. In action to foreclose mortgage on property in which a deceased widow had a homestead, burden is upon plaintiff to show that homestead exemption terminated upon her death by reason of her leaving no family. Hibernia Sav. & Loan Soc. v. Hinz [Cal. App.] 88 P 730.

the trustee in bankruptcy, to foreclose his liens before the note is due, where otherwise he would lose his right to resort to the general fund for the balance of his debt.[77]

Remedies of creditors against excess. See 8 C. L. 105

Decrees, and judicial and execution sales. See 8 C. L. 105—An execution sale of a tract of land, part of which is a homestead, without such homestead being platted, is void.[78] Where there is a mortgage upon property including a homestead, the homesteader is entitled to have the nonhomestead property first subjected.[79] It is under some circumstances permissible to sell the homestead and allot the amount exempt from the proceeds.[80] A wife is entitled to injunction to protect her homestead interest against a writ of possession or execution issued upon a judgment against her husband.[81]

HOMICIDE.

§ 1. Elements of Crime in General and Parties Thereto (1636).
§ 2. Murder (1637). Degrees (1639).
§ 3. Manslaughter (1640).
§ 4. Assault with Intent to Kill or do Great Bodily Harm (1643).
§ 5. Justification and Excuse (1644).
§ 6. Indictment or Information (1650).
§ 7. Evidence (1653).
A. Presumptions and Burden of Proof (1653).
B. Admissibility in General (1654).
C. Dying Declarations (1666).
D. Sufficiency (1669).
§ 8. Trial and Punishment (1672).
A. Conduct of Trial in General (1672).
B. Instructions (1672). Harmless Error (1686).
C. Verdict (1686).
D. Punishment (1687)

Matters of procedure not strictly peculiar to the crime of homicide are elsewhere treated.[82]

§ 1. *Elements of crime in general and parties thereto.* See 8 C. L. 106—Death must have been the proximate result of the defendant's act.[83] Though malice is essential to some degrees of homicide,[84] motive is immaterial [85] except as evidence of malice or as tending to connect accused with the offense.[86] General rules regarding principals and accessaries [87] and the liability of conspirators [88] apply. Each person pres-

77. Jungbecker v. Huber [Tex. Civ. App.] 18 Tex. Ct. Rep. 975, 101 SW 552.

78. Lutz v. Ristine [Iowa] 112 NW 818.

79. Citizens' Sav. Bk. of Olin v. Glick, 134 Iowa, 323, 111 NW 970. Where property including a homestead is attached and a mortgagee intervenes, the fact that owner does not ask that mortgagee be required to first resort to the nonhomestead property does not warrant a decree that mortgage be first satisfied out of homestead. Id.

80. In Louisiana, when homestead exceeds $2,000 in value, it may be seized and sold under legal process, the beneficiary being entitled to that amount if a sale realizes more than the sum. Const. art. 244. Reily v. Johnston, 119 La. 119, 43 S 977. Where claims of mortgagees, whose mortgages cover all lands of a bankrupt, are submitted to bankrupt court, that court is not required to allot homestead from the land but may sell and make allotment from proceeds. In re Paramore & Ricks, 156 F 208.

81. Taylor v. Ward [Tex. Civ. App.] 19 Tex. Ct. Rep. 441, 102 SW 465.

82. See Indictment and Prosecution, 8 C. L. 189.

83. If decedent dies because of negligent and improper treatment of wounds, defendant is not guilty. Sartin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 321, 103 SW 875.

84. See post, § 2.

85. Clefford v. People, 229 Ill. 633, 82 NE 343. An instruction that absence of motive is a circumstance in favor of accused, but that he could be found guilty regardless of motive, is proper. State v. Barrington, 198 Mo. 23, 95 SW 235. Motive can never justify assault with a weapon. Griffin v. State [Ala.] 43 S 197.

86. See post, § 7B.

87. Where both parties to a crime are principals, it is not necessary to show that any independent act of either caused death. McCoy v. State [Miss.] 44 S 814. Under Ky. St. 1906, § 1128, providing that accessaries before the fact are principals, a principal in the first degree may be acquitted and aiders and abettors convicted. Reed v. Com., 30 Ky. L. R. 1212, 100 SW 856. Where accused was charged as principal and the jury was directed to find him guilty as principal or acquit him, it was not error to refuse a peremptory charge in his favor because the proof showed him an accessary before the fact. Bast v. Com., 30 Ky. L. R. 967, 99 SW 978. That one was fifteen or twenty feet away from a house at the time a homicide was committed therein does not prevent his being a principal under the rule that actual presence in sense of being an eye or ear witness is unnecessary. It being sufficient that he be in the vicinity acting with actual participants. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 909, 105 SW 182.

88. A conspirator is equally guilty

ent and aiding and abetting in the commission of the offense is responsible as a principal.[89] Mere presence at the scene and opportunity to commit the act is not enough to connect accused with the offense.[90] One assaulting another for the purpose of robbery is not guilty of homicide where the person assailed, shooting in self-defense, accidentally kills a third person.[91]

§ 2. *Murder* See 8 C. L. 106 is the unlawful killing of a human being with malice aforethought, express or implied.[92] A specific intent to kill is not essential [93] since

whether or not he is present at commission of homicide. Rigsby v. State [Ala.] 44 S 608. Where two persons commit a homicide pursuant to conspiracy they are principals, but if one does not know of the intent of the other to kill and did not with such knowledge aid him he is not a principal. Abbata v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 209, 102 SW 1125. Where defendants killed a prison guard while attempting to escape pursuant to conspiracy, all were guilty of murder in first degree. State v. Vaughan, 203 Mo. 663, 102 SW 644. Where accused was outside the house in which the homicide was committed at the time and was charged as principal and there was testimony that the person who did the killing might have acted on sudden impulse in which he did not participate, the jury should be charged that if they had reasonable doubt that the shooting was on sudden impulse and not result of agreement they should acquit. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 909, 105 SW 182. To render one who is not present and does not aid or assist in a murder guilty thereof by reason of a former conspiracy with the slayer, it must appear that the murder was within the contemplation of the conspiracy, or was the natural and probable outcome thereof. State v. Keleher, 74 Kan. 631, 87 P 738. A conspiracy to steal money from a barn where it was supposed to be hidden is not such a conspiracy as would naturally and probably result in the murder of the owner of the money at a place entirely remote from the barn, and under circumstances in no way connected with obtaining money from the barn. Id. In such a case, and in the absence of evidence showing any connection between the conspiracy and the murder, except that the murder was for the purpose of obtaining the money, it is error to instruct that the jury may find the absent conspirator guilty of the murder if they find the murder was the natural and probable outcome of the conspiracy. Id. Parties may conspire to commit manslaughter. Ferguson v. State [Ala.] 43 S 16. Where deceased and brother were acting together in harboring ill will against deceased, the act of one was properly regarded as the act of both. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100.

89. Each person present consenting to and acting in furtherance of the crime is a principal. McCoy v. State [Miss.] 44 S 814. Where one commits an assault and others are present aiding and abetting, all are principals. State v. Ostmann, 123 Mo. App. 114, 100 SW 696. In Kentucky the principal actor, aider and abettor, and accessary before the fact, are all principals in first degree. Commonwealth v. Hargis, 20 Ky. L. R. 510, 99 SW 348. One who is present, aiding and abetting and assisting in an unlawful assault, may be found guilty of murder if deceased is shot during the assault whether or not defendant fired the shot that killed deceased. State v. Crittenden, 191 Mo. 17, 89 SW 952. Where two persons are jointly indicted for murder, each may be convicted upon evidence showing that he was either the absolute perpetrator of the crime or was present aiding and abetting the other in its commission. Bradley v. State, 128 Ga. 20, 57 SE 237. Where one is present encouraging and advising the killing, the law presumes his presence, etc., "induced" the crime. Bast v. Com., 30 Ky. L. R. 967, 99 SW 978. Where two parties met and a fight immediately ensued and one was killed, it was immaterial who fired the fatal shot, since what would justify one would justify all, each being an aider and abettor. Watkins v. Com., 29 Ky. L. R. 1273, 97 SW 740. Instructions as to principals held sufficient without stating elements of a principal. Cecil v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 803, 100 SW 390. Defendant agreed to a plot with another to watch the house where the killing was to be done and to burn it after the act was committed, and carried out his part of the plot. Held, accused could be convicted of murder in the first degree. Commonwealth v. Johnson, 217 Pa. 77, 66 A 233. Persons associated with an accused in a homicide may be guilty of murder in the first decree, and accused, though acting with them, be guilty of some lesser offense or none at all. Parnell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 331, 98 SW 269. Where one defendant does the shooting and others are present and aid and abet, all may be found guilty. Goodin v. State, 126 Ga. 560, 55 SE 503.

90. Where two defendants are jointly indicted and on the separate trial of one it appears that both had equal opportunity to commit the act of killing, if upon all the evidence there is a reasonable doubt as to which did the killing, defendant cannot be convicted unless it appears that he was present and aided and abetted while the other committed the act. State v. Cremeans [W. Va.] 57 SE 405. Mere presence and participation in the act of killing a human being is not conclusive evidence of consent and concurrence in the perpetration of the act by a defendant sought to be held responsible for the homicide as aiding and abetting the actual perpetrator unless such defendant participated in the felonious design of the person killing. Brooks v. State, 128 Ga. 261, 57 SE 483.

91. Commonwealth v. Moore, 28 Ky. L. R. 62, 88 SW 1085.

92. Instruction held erroneous for failure to require a finding that the killing was willful and unlawful. Shipp v. Com., 30

the intent will be presumed by law where death results naturally and proximately from the wrongful act,[94] but where there is no actual intent, and the circumstances do not raise a presumption of intent, the homicide is not murder.[95] The intent need not be to kill the person actually slain.[96] The intent of one participant in a homicide cannot be imputed to another.[97]

Malice may be implied from the facts and circumstances shown,[98] as from the fact of use of a deadly weapon.[99]

Ky. L. R. 904, 99 SW 945. Where in agreed mutual combat one party uses a deadly weapon without the knowledge of the other, causing death, the crime is murder. State v. Maupin, 196 Mo. 164, 93 SW 379. Means by which offense was committed held not an element of crime of murder. Gaines v. State, 146 Ala. 16, 41 S 865. Where one arms himself in anticipation of interference with his purpose of entering the house of another and with intent to kill the owner if necessary to save his own life, such formed design renders him guilty of murder. State v. Emerson [S. C.] 58 SE 974.

93. Specific intent to kill is not essential to murder in second degree. State v. Baldes, 133 Iowa, 158, 110 NW 440. Intent to kill is not essential to crime of murder. Morello v. People, 226 Ill. 388, 80 NE 903. Murder may be committed without actual intent to kill or do grievous bodily harm. Commonwealth v. Parsons [Mass.] 81 NE 291.

94. Intent to kill will be presumed from use of deadly weapon in the usual and natural way in which such weapon is used. McLeod v. State, 128 Ga. 17, 57 SE 83. Law will presume intention to produce death where accused knew of the weak condition of deceased's heart and death resulted naturally from his violent assault upon her. State v. Baldes, 133 Iowa, 158, 110 NW 440. The unlawful administering of poison with bad intent, but without specific intent to kill, constitutes malice aforethought, rendering the crime murder. State v. Thomas [Iowa] 109 NW 900. The design to take life, essential to murder in the first degree, may be shown from attending circumstances. Deliberate selection of deadly weapon, preconcerted hostile meeting, lying in wait, quarrel, threats, etc. State v. Samuels [Del.] 67 A 164.

95. Beating of a child with the hand, resulting in its death, does not raise presumption of intent to kill. People v. Dinser, 106 NYS 495. On evidence that shooting was accidental, it should be charged that if shooting was accidental and without carelessness accused must be acquitted. Blanton v. Com. [Ky.] 103 SW 329. Evidence insufficient to show that accused, a boy of fourteen years, was conscious of fact that he was doing wrong when he fired the fatal shot. Kear v. State [Ark.] 104 SW 1097. Where one shoots another while he (the actor) is unconscious from the effects of a gunshot wound inflicted by a third person, he is guilty of no crime. Risner v. Com. [Ky.] 102 SW 825.

96. Where blow intended for one person falls upon another, liability is the same as though person intended was struck. State v. Clifford, 59 W. Va. 1, 52 SE 981. Where one shoots at another with intent to kill but hits and kills a third person, he is guilty of murder the same as if he had shot directly at the person killed. State v. Cavin, 199 Mo. 154, 97 SW 573. Killing of another than intended person does not affect liability for the crime. State v. Bell, 5 Pen. [Del.] 192, 62 A 147. Liability of defendant not affected by fact that he thought he was killing another than deceased. Thompkins v. Com., 28 Ky. L. R. 642, 90 SW 221. Murder in first degree where accused shot at and intended to kill D. and hit and killed T. State v. Mathews, 133 Iowa, 398, 109 NW 616. Where one went to the room of another with whom he had had a quarrel and deliberately shot at him but killed another, he was guilty of murder. Commonwealth v. Johnson [Pa.] 68 A 53.

97. Parnell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 331, 98 SW 269. Instructions which authorize the jury to impute the condition of minds of defendant's associates to him without regard to whether he was principal or was acting without regard to knowledge of their evil intent are erroneous. Id. On prosecution of two persons for assault with intent to kill a peace officer, instructions as to intent held to properly protect the rights of defendants. Chaney v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 780, 98 SW 847.

98. Malice is presumed where fatal act is done deliberately or without adequate cause. State v. Bell, 5 Pen. (Del.) 192, 62 A 147. Ill will is not the only element of malice; any other unlawful cause or motive is sufficient. Driggers v. U. S. [Ind. T.] 104 SW 1166. Malice need not arise from personal ill will; it may exist wherever there is a wrongful and intentional killing without lawful excuse or mitigating circumstances. State v. Banks, 143 N. C. 652, 57 SE 174. The implied malice essential to make homicide murder in the second degree is an inference from facts proved and is implied from every cruel act committed by one person against another, however sudden the act may be. State v. Honey [Del.] 65 A 764. Law will presume malice wherever the act is done deliberately or without adequate cause. State v. Johns [Del.] 65 A 763; State v. Honey [Del.] 65 A 764. Implied malice is an inference or conclusion of law from facts found by the jury. State v. Johns [Del.] 65 A 763. Implied malice, essential to constitute murder in second degree, is an inference from facts proved, and is implied by law from every deliberate cruel act committed by one against another, however sudden the act may be. State v. Cephus [Del.] 67 A 150. Express malice includes and implies implied malice; proof of first sustains indictment involving second. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. Implied malice is constructive malice and is

Degrees.[See 8 C. L. 107]—In most states, though not in all,[1] murder is by statute divided into various degrees. To constitute the crime of murder in the first degree the elements of express malice and premeditation must exist,[2] or the homicide must have been committed on the perpetration of some criminal offense,[3] usually a felony,[4] punishable by death.[5] To constitute deliberation or premeditation it is only essential that there be a formed design to kill;[6] no appreciable or particular time need elapse between the formation of such design and the killing.[7]

not a fact to be specifically proved. Id. "Malice" is not restricted to hatred, spite, or malevolence toward the particular person slain but also includes that general malignity and reckless disregard of human life which proceed from a heart void of a just sense of social duty and fatally bent on mischief. State v. Johns [Del.] 65 A 763; State v. Honey [Del.] 65 A 764.

99. Homicides with a deadly weapon are presumed to be malicious until the contrary appears from the evidence. State v. Johns [Del.] 65 A 763; State v. Honey [Del.] 65 A 764; State v. Cephus [Del.] 67 A 150; State v. Uzzo [Del.] 65 A 775. A deadly weapon is one likely to produce death. State v. Johns [Del.] 65 A. 763; State v. Cephus [Del.] 67 A 150. Where homicide was by shooting with a pistol, it was not error to charge that pistol is a deadly weapon. McLin v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 881, 90 SW 1107.

1. There are no degrees of murder in Louisiana. State v. Hogan, 117 La. 863, 42 S 352.

2. State v. Uzzo [Del.] 65 A 775; State v. Honey [Del.] 65 A 764. If defendant went with a gun for the purpose of killing deceased and waited until he came and then shot and killed him, crime was murder in the first degree. Tribble v. State, 145 Ala. 23, 40 S 938. The elements of the crime are an intent to kill and an execution of that intent with deliberation and premeditation. State v Lang [N. J. Law] 66 A 942. Murder in the first degree consists in the taking of a human life with intent to kill and with deliberation and premeditation. Id. Express malice aforethought is where one person kills another with a deliberate mind and formed design. State v. Johns [Del.] 65 A 763. The mere fact that a murder has been accomplished by poison does not of itself establish "malice aforethought;" this fact must be found before a verdict of murder in the first degree can be found. State v. Phinney [Idaho] 89 P 634. The fact that the charge is murder by poison does not change the rule. Id. Where there are no facts from which formation of premeditated design to kill may be found, a verdict of first degree murder cannot be sustained. Baker v. State [Fla.] 44 S 719. To constitute murder in first degree, offender's mind must be cool and sedate and there must be express malice aforethought. Dixon v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 244, 103 SW 399. Premeditation and deliberation necessary under Kirby's Dig. § 1766 to constitute murder in first degree not shown by evidence that accused shot deceased, an officer, on a dark night when he grabbed her suddenly and said "I have you at last." Howard v. State [Ark.] 100 SW 756. Deliberation warranting murder in first degree sufficiently shown where when accused saw deceased, a sheriff, coming to arrest him he went into a house and armed himself with a gun. State v. Spaugh, 200 Mo. 571, 98 SW 55. In a prosecution for the killing of an arresting officer, and the accused who killed such officer in resisting arrest interposes the defense that the warrant for the arrest was illegal, the consideration which should be given to such a defense depends upon the circumstances surrounding both the officer and the accused at the time of the homicide; and where the killing had been premeditated by the accused for some hours, and the officer was fully advised as to the crime, the same being a felony, and would have been authorized in making the arrest without a warrant, the question of the legality of the warrant under which the arrest was made is of no importance and does not excuse the willful and premeditated killing of the officer. Colle v. State, 8 Ohio C. C. (N. S.) 596.

3. Murder in first degree properly submitted when state's evidence showed that motive was robbery and evidence for defendant showed defense of a third person. Abbata v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 209, 102 SW 1125. Murder in first degree is killing with express malice aforethought or in perpetrating or in attempting to perpetrate a crime punishable by death. State v. Bell, 5 Pen. (Del.) 192, 62 A 147.

4. Where convicts killed guard in accordance with previous concerted plan to break prison, they were all guilty of first degree murder, the killing being committed in perpetration of a felony. State v. Vaughan, 200 Mo. 1, 98 SW 2.

5. Murder in the first degree was where the killing was done with express malice aforethought or in perpetrating or attempting to perpetrate a crime punishable with death. State v. Johns [Del.] 65 A 763. Murder in the first degree is the killing of a human being with express malice aforethought or in perpetrating or attempting to perpetrate a crime punishable with death. State v. Samuels [Del.] 67 A 164.

6. "Deliberately" properly defined as intent to kill, executed by person not under influence of passion suddenly aroused by unlawful provocation. State v. Spaugh, 200 Mo. 571, 98 SW 55.

7. No particular time need elapse between formation of intent and killing. State v. Clifford, 59 W. Va. 1, 52 SE 981. A moment is enough. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. A deliberate design to take life, though the conception of a moment, is sufficient deliberation to make murder in the first degree. State v. Honey [Del.] 65 A 764. There need be no appreciable space of time between the intent to kill and the killing; it is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation. In such case the homicide is mur-

Murder in the second degree includes that in which the element of premeditation is lacking [8] but where malice, express or implied, is shown to exist.[9] Particular statutory decisions are given in the note.[10]

§ 3. *Manslaughter.*[See 8 C. L. 107]—As generally defined, includes all unlawful, intentional killing without malice,[11] and unintentional killing by culpable negli-

der in the first degree, no matter how rapidly the act follows the formed intent. People v. Yee Foo [Cal. App.] 89 P 450. It is not necessary that deliberation and premeditation should continue for an hour or for a minute; it is enough that the design to kill be fully formed and purposely executed to constitute murder in the first degree. State v. Lang [N. J. Law] 66 A 942. Where the purpose to kill is weighed long enough to form a fixed design and subsequently, no matter how remote or soon, the design is executed, the crime is murder in the first degree. State v. Jones [N. C.] 59 SE 353.

8. Premeditation is not an element of second degree murder. Strickland v. State [Ala.] 44 S 90. If the killing is intentional but without deliberation and premeditation, it is murder in the second degree. State v. Jones [N. C.] 59 SE 353. Homicide without a design to take life but where death results from an unlawful act of violence, and where there is no adequate provocation. State v. Honey [Del.] 65 A 764. Where the killing occurred in a saloon after quarreling and defendant going out after his pistol, if intent to kill was not formed at time of quarrel and his mind was inflamed by insulting words and cooling time had not elapsed, he was only guilty of second degree murder. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Murder in second degree is killing without a formed design to take life and without provocation to reduce the crime to manslaughter and under the influence of a wicked and depraved heart or with cruel and wicked indifference to human life. State v. Cephus [Del.] 67 A 150.

9. State v. Uzzo [Del.] 65 A 775. Malice essential in murder of both degrees. State v. Bell, 5 Pen. [Del.] 192, 62 A 147. Malice is an essential element both of murder in the first and second degree. State v. Johns [Del.] 65 A 763. Murder in the second degree is where the killing is done with implied malice. Id. An instruction on murder in second degree must include element of malice. Clark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 199, 102 SW 1136. Instruction on second degree murder must charge that jury must find malice. Abbata v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 209, 102 SW 1125.

10. Under Florida statute, proof of intent to kill a particular individual does not preclude conviction of second degree murder. Vasquez v. State [Fla.] 44 S 739. Instruction held to fully recognize the principle that intentional homicide with deadly weapon is presumed to be murder in the second degree in absence of proof to contrary. State v. Zorn, 202 Mo. 12, 100 SW 591. Beating a cripple to death with the fist is not a killing in a "cruel and unusual manner." State v. Knoll, 72 Kan. 237, 83 P 622. Unlawful killing of one who has given the slayer no provocation other than the use of words, threats, menaces, or contemptuous gestures, cannot be graded to voluntary manslaughter under the doctrine of mutual combat. Pen. Code, § 65. Bird v. State, 128 Ga. 253, 57 SE 320. Homicide resulting from breach of peace, commiteed by use of deadly weapon in heat of passion without provocation or premeditation, is murder in second degree in New Jersey. State v. Biango [N. J. Law] 68 A 125. Where two brothers fought and a knife was used and one left home and returned later for his clothes and in altercation killed the other, if the intent to kill was formed through passion without adequate cause and sufficient cooling time had not elapsed, the offense was second degree murder. Dixon v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 244, 103 SW 399. It is not necessary to murder in second degree that passion be sudden or that there be transport thereof, but merely that mind of slayer be not cool at time intent is formed. Kannmacher v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 82, 101 SW 238. A deliberate killing under the impulse of anger, jealousy, hatred, or revenge, created or incited by defendant's belief or knowledge of prior infidelity of deceased or any prior wrongdoing of deceased, is without adequate provocation, and is willful and malicious, and murder in the second degree. State v. Johns [Del.] 65 A 763. Murder of the second degree is where the killing is done without a deliberate mind or formed design to take life or to perpetrate a crime punishable by death but where the killing was without justification or excuse and without legal provocation. Id. Under Rev. Code 1852, as amended 1893, c. 226, where death of a pregnant woman results from the use of an instrument for the purpose of producing a miscarriage, the perpetrator is guilty of murder in the second degree. State v. Fleetwood [Del.] 65 A 772. Under Div. 1 of Crim. Code, § 3, where death results either from an abortion or an attempt to produce an abortion, the person responsible is guilty of murder. Clark v. People, 224 Ill. 554, 79 NE 941.

11. Manslaughter is the unlawful killing of another without malice. State v. Uzzo [Del.] 65 A 775; State v. Bell, 5 Pen. [Del.] 192, 62 A 147. Charge that accused cannot be convicted unless the fatal wound was inflicted maliciously is error. He may be convicted of manslaughter. State v. Vicknair, 118 La. 963, 43 S 635. Voluntary manslaughter is the taking of human life, not in self-defense, in sudden affray, or heat of passion, without prior malice. Shipp v. Com., 30 Ky. L. R. 904, 99 SW 945.

Circumstances held not such as to reduce homicide to manslaughter: Honest belief that decedent was about to inflict great bodily injury on accused without grounds for such belief will not reduce murder to manslaughter. State v. Clay, 201 Mo. 679, 100 SW 439. Where defendant called decedent a vile name and without further provocation deceased acted in a manner which caused defendant to fear death or harm, instruction as to manslaughter not justified. State v. Kelleher, 201 Mo. 614, 100 SW 470. Causing death

gence or recklessness.[12] Thus, it is manslaughter if the killing was on sudden quarrel or mutual combat,[13] or in the heat of passion,[14] induced by legally adequate

while attempting to produce an abortion is not manslaughter, under Pen. Code, § 192. Huntington v. San Francisco Super. Ct. [Cal. App.] 90 P 141. Where there is no evidence of mutual combat, neither the law of voluntary manslaughter nor of assault and battery is necessarily involved. Howard v. State [Ga. App.] 59 SE 89. Evidence that accused found his mistress and deceased together in a room, that he broke down the door, the mistress left, the body of decedent was found a few steps from the room with fatal stabs thereon, and a pistol in the hand which had been recently discharged, held not to raise issue of manslaughter. Williams v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 420, 95 SW 538.

12. Gross negligence in use of firearms resulting in death of another justifies conviction of manslaughter. Austin v. State, 145 Ala. 37, 40 S 989. To render one responsible for the fatal consequences of the malperformance or nonperformance of duty, the duty must have been a plain one which he was bound by law or contract to perform personally. People v. Smith, 105 NYS 1082. Evidence insufficient to show that physician did not use proper care in performing operation in trial of charge of homicide by negligence. Gorden v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 593, 90 SW 636. To constitute the offense of negligent homicide under Pen. Code, art. 684, and art. 686, there must be an apparent danger of causing the death of the person killed. Id. Where one person owes another a legal or contractual duty and omission of such duty results in his death, he is chargeable with manslaughter. People v. Beardsley [Mich.] 14 Det. Leg. N. 688, 113 NW 1128. Relation existing between man and his paramour does not render it his duty to care for her after she takes drugs and she dies while they are both drunk. Id. Neither a street railroad company nor any of its officers or employes, whose gross negligence in the operation of its cars or other appliances, but without actual malice, has caused the death of any person, is liable for indictment for manslaughter unless said company or its said officer or employe was, at the time of the killing, engaged in a violation of some law. In re Grand Jury, 5 Ohio N. P. (N. S.) 33.

13. It is error to fail to charge manslaughter where evidence shows that deceased and accused were quarreling and deceased cursed accused and struck him in the face, whereupon the fatal assault was made. Fuller v. State [Tex. Cr. App.] 95 SW 1039. Evidence that killing was result of an effort to prevent deceased from getting a pistol from a drawer held to warrant a charge on manslaughter. Newcomb v. State [Tex. Cr. App.] 95 SW 1048. Where homicide is claimed to have been in self-defense, defendant may nevertheless be convicted of manslaughter if with reasonable prudence and caution on his part the killing could have been avoided. Lucas v. State [Neb.] 111 NW 145. If upon sudden quarrel the parties fight upon the spot or presently agree and fetch weapons and fight and one is killed, it is voluntary manslaughter no matter who strikes the first blow. Sapp v. State [Ga. App.] 58 SE 667. Homicide in mutual combat with deadly weapons on sudden quarrel is voluntary manslaughter. Giles v. State, 126 Ga. 549, 55 SE 405. On who provokes a controversy without a felonous intent, but intending merely an ordinary battery, and is compelled during the combat to take his opponent's life in order to save his own, is guilty of manslaughter. State v. Gordon, 191 Mo. 114, 89 SW 1025. Fact that defendant and deceased had been quarreling and that prior to the killing deceased had struck or was about to strike defendant with a bottle held sufficient to raise issue of manslaughter. Mitchell v. State [Tex. Cr. App.] 96 SW 929.

14. It is manslaughter when one kills another because of insulting conduct towards slayer's wife, his mind being enraged beyond cool reflection. Mitchell v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 579, 96 SW 43. Sudden intentional killing with deadly weapon by one not in any way at fault, in immediate resentment of a gross provocation, is prima facie a killing in heat of blood, and hence no higher crime than voluntary manslaughter. State v. Clifford, 59 W. Va. 1, 52 SE 981. To reduce homicide to manslaughter, provocation must be so great as to produce a passion such as to render a person for the time being incapable of reason. State v. Honey [Del.] 65 A 764. The law of voluntary manslaughter, where the homicide was committed under sudden and violent passion, irresistible and justly aroused. Howard v. State [Ga. App.] 59 SE 89. Homicide without malice and under the influence of sudden passion aroused by adequate cause is manslaughter. Commonwealth v. Curcio, 216 Pa. 380, 65 A 792. To reduce murder to manslaughter it is only necessary that mind be incapable of cool reflection from some adequate cause. Kannmacher v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 82, 101 SW 238. Evidence that demonstration by decedent at time of killing might have excited passion held to justify charge on manslaughter. Clark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 199, 102 SW 1136. Theory that killing was done in sudden heat of passion properly submitted on evidence that accused shot decedent as soon as he saw him approaching his home. Freeman v. Com. [Ky.] 103 SW 274. Where two brothers quarreled and fought and after an hour they had another altercation and one was killed, held, if intent to kill was created through passion aroused by adequate cause, the offense was manslaughter. Dixon v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 244, 103 SW 399. Where there was evidence of a difficulty between accused and deceased five minutes before the killing, which was interrupted for a short time just before the fatal difficulty, it was error to restrict the jury, in determining provocation to reduce the crime to manslaughter, to things transpiring immediately at the difficulty. Watson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 587, 95 SW 115. Voluntary manslaughter is homicide without malice, unlawfully and willfully done in sudden affray, or in heat of passion, upon provocation calculated to excite the passion beyond control. Watkins v. Com., 29 Ky. L. R. 1273, 97 SW 740. Refusal to charge

provocation,[15] and before the lapse of reasonable cooling time.[16] The crime may be manslaughter though the fatal difficulty was provoked by accused.[17] Decisions on involuntary manslaughter,[18] and on the various degrees of manslaughter [19] as defined by statute, are given in the note.

on manslaughter held error where evidence showed that decedent snapped his pistol at accused at the time and accused was wrought up over assault by decedent on his friend. Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 SW 496.

15. Definition of "provocation" approved. State v. Barrington, 198 Mo. 23, 95 SW 235. The fact that deceased called defendant, a negro, "Irish" on several occasions after defendant had warned him not to do so will not reduce the killing to manslaughter. Mays v. State [Tex. Cr. App.] 96 SW 329. An illegal arrest accompanied by an assault is adequate cause for provocation, such as to reduce killing to manslaughter. Earles v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 223, 94 SW 464. The provocation must have been so great as to produce such a transport of passion as to render the person for the time being incapable of cool reflection. State v. Cephus [Del.] 67 A 150. If a deadly weapon is used the provocation to reduce the crime to manslaughter must be great. Id. Slight assault does not reduce killing with a deadly weapon to manslaughter. Id. Instructions as to facts reducing crime to manslaughter, insults offered female relation, etc., held proper. Green v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 907, 105 SW 205. Where it appeared that defendant had been drinking heavily during the day and had quarrels with his wife relative to her association with others, and decedent denied having associated with her and other circumstances, held to require instruction on manslaughter. Miller v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 3, 105 SW 502. Mere apprehension of danger will not lessen degree of crime. State v. Barnett, 203 Mo. 640, 102 SW 506. Where accused while calling on decedent, his mistress, was accused by her of associating with other women and she stated that she would kill him rather than see him with another woman, and advanced toward him with drawn knife threatening to kill him, whereupon he shot, charge on manslaughter was proper. Fisher v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 811, 98 SW 852. Insults offered a female relation in order to be provocation need not be communicated to accused at time of homicide, prior communication being sufficient. Instruction disapproved. Bays v. State [Tex. Cr. App.] 99 SW 561. Where one commits a homicide on first meeting after he learns of insults offered to his wife, on account of passion engendered thereby the crime is manslaughter. Id. Where deceased was the paramour of accused and she refused to have anything more to do with him and said "you son of a bitch, go away from me," held insufficient to raise issue of manslaughter. Washington v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 90, 96 SW 1084. Provocation by words, threats, menaces, or contemptuous gestures are not sufficient to free person killing from guilt and crime of murder. Pryer v. State, 128 Ga. 28, 57 SE 93. Such provocation does not justify homicide or reduce murder to lower crime. Fargerson v. State, 128 Ga. 27, 57 SE 101. Fact that deceased, wife of slayer, may have been unchaste would not of itself justify homicide, nor would it, in absence of sudden heat of passion resulting from adequate cause, be sufficient to reduce homicide below crime of murder. Rogers v. State, 128 Ga. 67, 57 SE 227. It would be manslaughter to kill a man found in the house for the purpose of illicit relations with the owner's daughter, but such fact would deprive him of the right of self-defense. State v. Emerson [S. C.] 58 SE 974. Recital of ill treatment by deceased of defendant's sister held not adequate cause, defendant having met deceased since and before the killing. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100. Only provocation consisting of personal violence will reduce murder to manslaughter, words of reproach, insulting or contemptuous language, or gestures, are not enough. State v. Gordon, 191 Mo. 114, 89 SW 1025.

16. Whether cooling time has elapsed must be determined from the standpoint of accused in the light of facts disclosed by the evidence. The question varies in each particular case and with the temperament of the party. State v. Hazlett [N. D.] 113 NW 374. Issue of cooling time need not be submitted where difficulty consisted of continuous acts. Armstrong v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 519, 96 SW 15. Threats made by decedent a week or ten days prior to the killing is not provocation. State v. Edwards, 203 Mo. 528 102 SW 520. Not error to refuse to charge as to cooling time where evidence showed that parties clinched in a quarrel and defendant took decedent's pistol from him and began firing it and decedent ran and defendant followed him and fired six shots. Perkins v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 357, 97 SW 1047. The fact that deceased called defendant vile names will not reduce the crime to manslaughter where sufficient cooling time elapsed before the homicide. Puryear v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 721, 98 SW 258.

17. Instruction on manslaughter held erroneous as eliminating fact that accused might have provoked the difficulty. Creagh v. State [Ala.] 43 S 112. Instruction that if accused provoked the difficulty with intent to kill he would be guilty of murder was erroneous for failing to state that unless such intention existed he was guilty of manslaughter only. Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 SW 496.

18. Under Mansf. Dig. §§ 1532, 1533, 1534, there is no such crime as involuntary manslaughter. Carney v. U. S. [Ind. T.] 104 SW 606. Involuntary manslaughter is the killing of another person in the doing of some unlawful act not amounting to a felony nor likely to endanger life without intent to kill, or the killing of another in the doing of a lawful act in an unlawful manner. Westrup v. Com., 29 Ky. L. R. 519, 93 SW 646. Where there is evidence that homicide resulted from a blow struck deceased by accused with an instrument which would not ordinarily produce death and which accused hastily seized and struck deceased with without sufficient

§ 4. *Assault with intent to kill or do great bodily harm.*[See 8 C. L. 108]—This offense is variously defined by statute, and in many jurisdictions is divided into degrees. The gist of the offense of assault with intent to kill or murder is the malicious[20] intent.[21] It is sometimes said to exist where, if death had resulted, the offense would have been murder.[22] Malice,[23] or the intent to kill,[24] may be implied.

provocation, it is error to fail to charge on involuntary manslaughter. Joiner v. State [Ga.] 58 SE 859. Law of involuntary manslaughter held properly presented. Dorsey v. State [Ga. App.] 58 SE 477.

19. Accused shot his wife with a pistol in an alleged insane frenzy resulting from misconduct of his wife. Held offense was not manslaughter in fourth degree as defined by St. 1898, § 4363. Duthey v. State, 131 Wis. 178, 111 NW 222. Where there is no intention or willfullness resulting from a mental status incapable of forming intent, though produced by drunkenness, the crime is manslaughter in second degree. Heninburg v. State [Ala.] 43 S 959. Manslaughter in the fourth degree is the intentional killing of a human being in the heat of passion or reasonable provocation without malice or premeditation, and under circumstances which do not excuse or justify the homicide. State v. Darling, 199 Mo. 168, 97 SW 592. Evidence held to justify a charge on this crime. Id.

20. Malice, either express or implied, is essential to assault with intent to kill. Satterwhite v. State [Ark.] 100 SW 70. To constitute assault with intent to kill, there must be assault coupled with specific intent to kill, the party being actuated by malice aforethought. Intent to inflict great bodily harm is not sufficient. Prescott v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 881, 105 SW 192. The mind must be capable of cool reflection at the time. In assault with intent to kill it is admissible to show that defendant's mind was enraged at the time beyond cool reflection by acts and breach of contract by prosecutor. Roch v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 903, 105 SW 202. Intention to take life at the time is not sufficient to constitute assault with intent to kill if it was the result of sudden passion or provocation. Satterwhite v. State [Ark.] 100 SW 70.

21. There must be a deliberate intent to kill. Howard v. State [Ga. App.] 59 SE 89. The gist of the offense is the intent with which the assault is made. Lindsey v. State [Fla.] 43 S 87. The gist of the offense of assault with intent to murder consists in the intent with which the asault is made. Barber v. State [Fla.] 42 S 86. Intent to kill is the gist of the offense of assault in the first degree, and on trial of a charge of that offense it is error to charge that a malicious and guilty intent will be presumed from the deliberate commission of an unlawful act, and that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him. State v. Schaefer, 35 Mont. 217, 88 P 792. It is also error to instruct in such case that if the jury believe that defendant would be guilty of manslaughter in case death resulted he could be found guilty of assault in the first degree, since intent is not always an essential element of manslaughter, but is always essential in assault in the first degree. The gravaman of the offense of assault with intent to kill is the intent with which the assault is made. Evidence that accused shot at one person and the shot took effect on another does not show the crime. State v. Williamson, 203 Mo. 591, 102 SW 519. Under Rev. St. 1899, § 1847, in order to constitute assault with intent to kill, there must be an assault and an intent to kill, which is not shown where one committing such assault on one person without intent to kill or harm another shoots such third person. State v. Mulhall, 199 Mo. 202, 97 SW 583. To constitute assault with intent to kill it is sufficient that the weapon be raised while in striking distance and an attempt to strike made. State v. Tetrick, 199 Mo. 100, 97 SW 564. A charge that if asasult was made with a rock with intent to kill defendant was guilty could not be complained of on appeal in the absence of showing as to size or character of the rock. Taft v. State [Tex. Cr. App.] 97 SW 494. Assault with intent to kill being charged, intoxication is material as a defense only as to the specific intent to commit the crime charged. State v. Yates, 132 Iowa, 475, 109 NW 1005. In assault with intent to murder, where accused voluntarily sought prosecutrix, his wife, ran her down and inflicted a murderous assault because she would not live with him, the fact that prosecutrix was in habit of carrying a razor did not lessen the offense. Purdy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 295, 97 SW 480. Circumstances held to show assault with intent to kill where defendant went to home of prosecutor and shot him as he appeared. Jones v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 874, 105 SW 349. Instruction on assault with intent to kill held erroneous for failure to include idea that shooting must have been by design and not accidental. Bell v. State [Miss.] 43 S 84. Where two persons attack one and he stabs one of them and runs away and they pursue him, and when in no danger of life or bodily harm fall upon him and stab him until separated by bystanders, they are guilty of assault with intent to kill. Canterbury v. State [Miss.] 43 S 678. Instruction on common assault not justified where evidence showed that defendant followed prosecuting witness into his house and shot him. State v. Harris, 199 Mo. 716, 98 SW 457.

22. An assault with intent to commit murder is such an assault that had death resulted the offense would have been murder. Young v. State [Tex. Cr. App.] 97 SW 698. Request that if jury believed that if defendant killed decedent under circumstances shown by evidence he would not have been guilty of murder he could not be convicted of assault with intent to kill is proper. Duncan v. State, 1 Ga. App. 118, 58 SE 248. Assault with intent to kill is not committed where if person assaulted had died the offense would have been manslaughter or if committed in self-defense. Bagley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 282, 103 SW 874.

23. Assault with intent to kill may be on implied malice. Not necessary that when

Absence of malice [25] aforethought,[26] or a specific intent to kill,[27] reduces the crime to lower degrees. Decisions on the crime of aggravated assault,[28] simple assault,[29] and like statutory crimes,[30] are given in the note.

§ 5. *Justification and excuse.*[See 8 C. L. 108]—Homicide is justifiable as committed in self-defense where defendant, without having provoked the difficulty,[31] or

defendant entered into an agreement with another to kill a third person his mind should have been sedate and cool. Chaney v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 780, 98 SW 847.

24. Intent may be inferred from nature of instrument used, manner of its use, nature of wounds inflicted, as well as brutality and duration of the assault. Howard v. State [Ga. App.] 59 SE 89.

25. "Malice" distinguishing higher from lower grades of assault with intent to kill signifies disposition which would prompt killing or the doing of great bodily harm without cause. State v. Tetrick, 199 Mo. 100, 97 SW 564. The higher and lower grades of assault with intent to kill are distinguished by the presence or absence of malice aforethought. Id.

26. "Aforethought" means thought of beforehand for any length of time, however short. State v. Tetrick, 199 Mo. 100, 97 SW 564.

27. Pointing a loaded pistol at a person without intent to kill or harm him is common assault only. State v. Wilson [Mo. App.] 103 SW 110. Assault with a deadly weapon but without intent to kill is an aggravated assault. Young v. State [Tex. Cr. App.] 97 SW 698. Instruction approved. Id.

28. The gist of the offense of aggravated assault under Rev. St. 1892, § 2403, and Gen. St. 1906, § 3230, consists in the character of the weapon used. Lindsey v. State [Fla.] 43 S 87. Use of gun to alarm and frighten another is aggravated assault if the gun is loaded, but simple assault if it is not. Hall v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 171, 105 SW 816. In aggravated assault intent to kill is not essential. Lindsey v. State [Fla.] 43 S 87. Instruction that aggravated assault is one which accused was moved to commit by rage, resentment, or terror rendering his mind incapable of cool reflection is proper. Lasana v. State [Tex. Cr. App.] 98 SW 855. Jury warranted in finding verdict of aggravated assault where defendant's assailant fled after the first shot and defendant fired a second. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 94, 89 SW 1068.

29. Accidental but negligent shooting of one is simple assault. Jackson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 279, 103 SW 927. Question of simple assault should have been submitted where accused testified that he did not intend to kill and ceased shooting as soon as he knew prosecutor was not trying to harm him. Haygood v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 308, 103 SW 890.

30. Shooting an officer to prevent illegal arrest is not assault with intent to kill, but the statutory crime of shooting at another defined by Pen. Code 1895, § 113. Jenkins v. State [Ga. App.] 59 SE 435. Under information based on Rev. Penal Code, § 285, charging defendant with shooting at a person with intent to kill, he may properly be convicted of the lesser offense of shooting at a person without justification or excusable cause. State v. Horn [S. D.] 111 NW 552. Under Rev. St. 1892, § 2403, and Gen. St. 1906, § 3230, it is not necessary that the assault be made with a deadly weapon. Lindsey v. State [Fla.] 43 S 87.

31. Where defendant was aggressor, question of self-defense is not in the case. Jacobs v. State, 146 Ala. 103, 42 S 70. Self-defense is not available to one who is at fault in bringing about a difficulty. Wright v. State [Ala.] 42 S 745. Self-defense not available where accused brought on difficulty. O'Day v. Com., 30 Ky. L. R. 848, 99 SW 937. No issue of self-defense shown where defendant made first assault and provoked assault. Laws v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 136, 101 SW 987. Right of self-defense forfeited where accused went to decedent for purpose of provoking difficulty and made demonstration of such purpose. Smart v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 141, 101 SW 989. An aggressor cannot assert self-defense. King v. State [Fla.] 44 S 941. Evidence sufficient to show that defendant was the aggressor. Id. Self-defense not available where accused was aggressor though perhaps decedent made motion to draw gun. Bluett v. State [Ala.] 44 S 84. Evidence that accused and deceased had engaged in a difficulty, that accused went from the place and was followed by deceased, that he procured a gun and returned and shot deceased, did not raise the issue of voluntarily engaging in mutual combat. Armsworthy v. State [Tex. Cr. App.] 95 SW 526. Self-defense not sustained where defendant testified that deceased had shot him three times rendering him unconscious, that on regaining consciousness he grappled with deceased, got the gun, and fired and killed her. State v. Fraga, 199 Mo. 127, 97 SW 898. On a showing that defendant provoked the difficulty and then used a deadly weapon, instruction on imperfect self-defense not justified. State v. Kelleher, 201 Mo. 614, 100 SW 470. Where defendant went to where decedent was and stated to him that he drew a gun on him last night and now was the time to shoot, and had his gun cocked and ready and decedent dodged behind his team and snapped his pistol at him twice when defendant shot him, held no issue of self-defense. Smart v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 141, 101 SW 989. One who provokes a combat in order to have a pretext for killing his adversary or doing him great bodily harm is guilty of murder in the first degree if he kills his adversary during the combat, regardless of how hard pressed he is during the combat. State v. Gordon, 191 Mo. 114, 89 SW 1025. Where in difficulty which arose over water defendant fired first shot, and deceased fired once and then retreated while defendant continued to shoot and killed deceased, defendant became the assailant and could not invoke the law of self-defense. Steele v. People [Colo.] 88 P

voluntarily engaged in combat,[32] is assaulted in such manner that he in good faith believes,[33] and has reasonable ground to believe,[34] that he is in imminent danger [35]

857. Instruction that if defendant was at fault and brought on the difficulty by striking deceased's horse with his whip he could not avail himself of the defense of self-defense held proper. Rose v. State, 144 Ala. 114, 42 S 21. Charge that defendant could not create an emergency which rendered it necessary for another to defend himself and then take advantage of the effort of such other to do so held not erroneous. Pryer v. State, 128 Ga. 28, 57 SE 93. Self-defense not available where defendant was making wrongful effort to shoot decedent with good prospects of success. Black v. State [Ark.] 104 SW 1104. One is not deprived of the right of self-defense by seeking another for the purpose of provoking a difficulty if he does not do so when he meets him. Instruction disapproved. Prescott v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 115, 101 SW 215. If one provokes a difficulty with intent to kill, self-defense is not available, but if he provoked it without such intent he would be guilty of no higher offense than manslaughter. Parnell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 331, 98 SW 269. Where assault was committed by four persons with whom prosecutor had had trouble earlier in the evening, who halted him on the street and asked him insulting questions, held sufficient to authorize submission of provoking difficulty which if found true would preclude right of self-defense. Prescott v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 115, 101 SW 215. Charge on self-defense that accused had a right to stand his ground without regard to whether he provoked the attack properly refused. Stuart v. Com. [Ky.] 105 SW 170. Instruction on provoking the difficulty is authorized where it appears that accused left the saloon where he was quarreling with decedent, procured a weapon, and came back and applied vile names to him, which deceased had just called accused. Puryear v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 721, 98 SW 258.

32. Instruction that certain acts would constitute mutual combat and preclude right of self-defense held proper. Driggers v. U. S. [Ind. T.] 104 SW 1166. Where evidence showed defendant and deceased to be on hostile terms and that defendant brought on the difficulty and expressed willingness to resort to combat, self-defense was not available. Skipper v. State, 144 Ala. 100, 42 S 43. One who participated with another in bringing on a difficulty, and was equally at fault with him, cannot kill in his defense. Woodrich v. State [Tex. Cr. App.] 90 SW 882.

33. Self-defense may be asserted where accused believed and had reasonable grounds to believe that he was in danger, but if he does not believe and has reasonable grounds for such belief, it may not. White v. Com. [Ky.] 102 SW 298, 1199. Instruction on self-defense should not submit whether decedent was about to harm accused, and not submit whether accused believed he was. Cleveland v. Com. [Ky.] 101 SW 931.

34. A bare fear of danger is not enough; the circumstances must be such as to excite fears of a reasonable man. Roseboro v. State, 127 Ga. 826, 56 SE 991. Mere fact that deceased was a violent and dangerous man would not alone justify homicide, if accused had no reason to apprehend danger at the time. Harrison v. State, 144 Ala. 20, 40 S 568. In order to justify on the ground of self-defense, the belief of necessity of killing must be such as a reasonable man would have entertained. Bleich v. People, 227 Ill. 80, 81 NE 36. One must believe as a reasonable man that he is in imminent peril. Bluett v. State [Ala.] 44 S 84. All facts and circumtances in the case should be considered in determining whether defendant had reasonable grounds to believe he was in danger of great bodily injury. Commonwealth v. Thomas [Ky.] 104 SW 326. That a person is of a nervous and timid disposition does not excuse him from the exercise of ordinary prudence and courage in resisting attack. State v. Usher [Iowa] 111 NW 811. One is justified in killing if he knew that decedent had threatened to kill him and deceased manifested an intent to execute the threats. Harris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 154, 105 SW 801. Whether defendant had reasonable ground to apprehend that deceased was about to kill him or do him great bodily harm held a question for the jury. State v. Gordon, 191 Mo. 114, 89 SW 1025. On trial for assault with intent to murder, jury in considering defense of self-defense should consider not only an actual assault on and real danger to defendant, but also a threatened assault and his apparent danger. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 94, 89 SW 1068. Instruction on self-defense held erroneous as not requiring belief of injury at hands of deceased to have been begotten by attending circumstances fairly creating it. Nelson v. State [Ala.] 43 S 18. Under Rev. Pen. Code, § 268, a party may act on appearances of an assault being made upon her. State v. Lepine [S. D.] 113 NW 1076. Charge that defendant must have been in danger of receiving harm or death from deadly weapon is error, it being sufficient if he reasonably apprehended danger. Waller v. State [Miss.] 44 S 825. Where other elements of self-defense existed and deceased had threatened defendant to his knowledge, defendant had the right to act upon any overt act or hostile demonstration by deceased which may have led to the honest belief that defendant was in imminent peril, though such act or demonstration did not amount to a felonious assault. George v. State, 145 Ala. 41, 40 S 961. It is immaterial to the right of self-defense whether the person exercising it knows the dangerous character and disposition of his assailant. Wallace v. State [Tex. Cr. App.] 97 SW 471. Instruction that accused had a right to defend himself if it seemed to him "acting as a reasonable person" that he was in danger of death or great bodily harm not error, where it is not contended that he is not a person of ordinary reason. Hoard v. State, 80 Ark. 87, 95 SW 1002. On prosecution of officer for negligent homicide, it should be charged that in act of accused in

of death or great bodily harm,[36] and that no reasonably safe means of avoiding the

handling pistol with which deceased was shot there must have been apparent danger of causing his death. Saye v. State [Tex. Cr. App.] 99 SW 551. Where deceased came to defendant's hotel armed with an open knife and abused and threatened defendant, defendant had the right to request him to leave, to arm and defend himself if he apprehended and was placed in danger. Yantis v. State [Tex. Cr. App.] 94 SW 1019. Evidence held to justify a charge that an assault by decedent raising in defendant's mind a reasonable apprehension or fear of pain or bloodshed justified the killing. Mitchell v. State [Tex. Cr. App.] 96 SW 929. Where accused claimed self-defense and claimed that deceased had reached under a counter for a pistol, it is not necessary that there should have been a pistol there, but only that defendant believed deceased was reaching for a weapon. Puryear v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 721, 98 SW 258. It is error to charge that if a homicide is committed from excessive cowardice the defendant cannot be convicted of any higher degree of crime than manslaughter. Danford v. State [Fla.] 43 S 593. Threatening words and overt acts to carry them into effect does not justify killing in self-defense. Black v. State [Ark.] 104 SW 1104. An instruction that if accused killed decedent and at the time he did so decedent was making or about to make an attack upon him calculated to cause him to fear great bodily injury, as viewed from his standpoint he had a right to kill him, was proper as leaving whether accused took the initiative to the jury. Patterson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 552, 95 SW 129. A homicide may be justifiable though committed while accused was entirely self-possessed and capable of contemplating the consequences of his acts. Instruction disapproved. Parnell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 331, 98 SW 269. If defendant had been assaulted by deceased with intent to rape her and she feared another assault, she had a right to arm herself and go to his room, which was in her hotel, and order him to leave, and if in so doing the pistol was accidentally discharged she would not be liable. People v. Williamson [Cal. App.] 92 P 313. In determining whether or not the pistol was discharged accidentally, the jury should consider all the facts of the case. Id.

Immaterial whether danger is real: Requested charge that if defendant acted under a bona fide belief that his life was in danger, and if under all the circumstances he had reasonable cause so to believe, it would be immaterial whether there was actual danger or not, held correct. Snyder v. State, 145 Ala. 33, 40 S 978. Apparent danger of death or great bodily harm is sufficient; need not be actual. Watkins v. Com., 29 Ky. L. R. 1273, 97 SW 740. Danger need not have been real or actual or then impending and about to fall; it is enough to justify homicide that defendant had reasonable cause to apprehend immediate danger. State v. Gordon, 191 Mo. 114, 89 SW 1025. If circumstances are such as to lead a reasonably prudent man to believe he is in imminent danger, it is not necessary that the danger actually existed. Allen v. State [Ala.] 42 S 1006.

35. Request on self-defense properly refused as pretermitting honest belief of imminent peril. Fleming v. State [Ala.] 43 S 219. Instruction on self-defense which fails to hypothesize imminent danger to life or limb is error. Creagh v. State [Ala.] 43 S 112. The doctrine of reasonable fear as a defense does not apply except where danger apprehended is urgent and pressing, or apparently so at time of killing. Tolbirt v. State, 124 Ga. 767, 53 SE 327. Prior assault by prosecutor on defendant would not justify assault with intent to kill. Roper v. U. S. [Ind. T.] 104 SW 584. Charge of self-defense should have been given without the limitation of provoking the difficulty where it appeared that, though defendants were going to house of accused to argue with him, he saw them first, drew his gun, and ordered them to hold up their hands. Crowson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 728, 100 SW 782. To justify a killing as in self-defense, danger must have reasonably appeared to exist at the very moment of firing the shot; a belief that danger was about to become imminent or would become imminent in the future is not enough. People v. Taylor [Cal. App.] 87 P 215. Self-defense not available where parties were quarreling and decedent sent for his gun and accused shot him before it was brought Black v. State [Ark.] 104 SW 1104. Instruction that deceased would have to be near enough to accused to injure him and be doing something toward that end, and that defendant could not kill him merely because he thought he had a knife in his pocket, is proper. Green v. U. S. [Ind. T.] 104 SW 1159. Defendant held not justified in shooting decedent who had withdrawn from the difficulty though he had directed his son to get his gun. Weaver v. State [Ala.] 102 SW 713. Where evidence showed that decedent offered to fight accused but was ten feet away when he was shot and the only reason defendant shot was because he thought decedent was about to draw a gun, it was held insufficient to show that decedent assaulted accused within Pen. Code 1895, art. 677, justifying a homicide committed in repelling a violent attack. Bryant v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 812, 100 SW 371.

36. One in charge of a saloon has a right to preserve peace therein, and if in so doing he is assaulted he has a right to self-defense, but may not kill unless in danger of death or great bodily harm. Kannmacher v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 82, 101 SW 238. If killing is not necessary to protect defendant or members of his party from death or bodily injury, self-defense is not available. Watkins v. Com., 29 Ky. L. R. 1273, 97 SW 740. Instruction that an officer and a creditor of a decedent had a right to levy execution on property of decedent and to arm themselves for that purpose, and if their persons were put in danger by decedent they had a right to slay him, stated the law. Martin v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 63, 95 SW 501.

same is open to him except the killing of his assailant.[37] As to the duty to retreat from a felonious assault, the courts are not agreed.[38] Some hold that a person assailed must retreat, unless upon his own premises,[39] if he can safely do so;[40] others hold that one upon whom a felonious assault is made may stand his ground[41] and use such force as is necessary to defend himself. Under the same limitations[42] the right extends to the defense of others,[43] and to the defense of one's habitation,[44] or

37. A person assaulted may not kill unless there is no other available means to escape death or great bodily harm. State v Cephus [Del.] 67 A 150. Testimony that accused on returning to room of his mistress was not aware that deceased was in the room until he felt some one grab him, a scuffle ensued, decedent fired, and accused stabbed him, held not to raise issue of manslaughter but of self-defense. Williams v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 420, 95 SW 538. Killing in self-defense is justified only when it is necessary to preserve life or prevent great bodily injury to person attacked after he has tried all possible means to avoid danger. Black v. State [Ark.] 104 SW 1104. Accused would not be justified in taking the lives of one or all of several persons who conspired to kill him unless he knew of or had reasonable ground to believe in the existence of the conspiracy, or unless all were present, or unless the death of all or one was necessary to protect himself. Hisler v. State [Fla.] 42 S 692. In order to justify on the ground of self-defense, accused must have retreated if practicable, and have done everything in his power consistent with his safety to avert necessity of slaying deceased. State v. Fraga, 199 Mo. 127, 97 SW 898. Law of self-defense stated in case where defendant and codefendant were executing a warrant for arrest of deceased on latter's premises when homicide was committed. Neeley v. Com., 29 Ky. L. R. 408, 93 SW 596.

38. See note in 5 C. L. 1707.

39. One assaulted on his own premises with a deadly weapon by one whom he had warned not to come there is not under duty to retreat. State v. Rutledge [Iowa] 113 NW 461.

40. Instruction as to duty to retreat approved. Bluett v. State [Ala.] 44 S 84. It is one's duty to retreat where he can do so without adding to his peril. Id. Instruction on self-defense properly refused as ignoring duty to retreat. Fleming v. State [Ala.] 43 S 219. Correct rules as to duty to retreat. Danford v. State [Fla.] 43 S 593. There is a duty to retreat and escape threatened danger if possible. People v. Mallon, 116 App. Div. 425, 101 NYS 814. Instruction that a man is not allowed to kill another if by retreating he can get out of danger approved. State v. Rowell, 75 S. C. 494, 56 SE 23. It is the duty of a person attacked to retreat if possible, even though in fear of death; self-defense is available only where there is no other means of escape except by killing assailant. State v. Honey [Del.] 65 A 764. Where ill feeling existed between the parties and defendant knew complaining witness had threatened to kill him, and he went across his farm armed, held to warrant a charge as to defendant's duty to avoid conflict and his duty to retreat. State v. Remington [Or.] 91 P 473. Where deceased only threatened to kill defendant if he did not leave and defendant could safely have driven away and thereby avoided the killing, it was his duty to do so. Stuart v. Com. [Ky.] 105 SW 170.

41. One who has the right of self-defense because of apparent danger is not bound to retreat but may stand his ground, though an assault has not been made on him. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 94, 89 SW 1068. Where one approaches another and asks him why he is talking about him and while talking to him such other assaults him, he has a right to defend himself without retreating. Hix v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 156, 102 SW 405. One may voluntarily resist an unprovoked and unsought for assault without forfeiting right to rely on self-defense. State v. Gordon, 191 Mo. 114, 89 SW 1025. Defendant has this right, notwithstanding insulting language used by him toward deceased, who assaulted defendant. Id. Prosecutor being at a woman's house, under arrangement with the woman, when assaulted, he was under no duty to retreat, but could lawfully repel an attack upon him. Jacobs v. State, 146 Ala. 103, 42 S 70.

42. One present while constable was making an arrest but who did not go to his aid until he considered that the officer was in danger did not become a trespasser until ordered off by the owner. State v. Williams, 76 S. C. 135, 56 SE 783. Where defendant killed decedent while he was threatening to assault decedent's father, an instruction as to necessity of retreating should have been applied to the father as well as to defendant. Dobbs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 64, 100 SW 946. Defense of a third person is no defense where third person was aggressor in difficulty with deceased, or fought willingly, so that he would not have been justified in killing deceased. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 685, 93 SW 116. Instruction making defendant's acquittal depend on his own belief as to whether his father was in danger of being killed by decedent, without regard to any fault or carelessness in reaching such conclusion or absence of reasonable grounds therefor, properly refused. Mabry v. State, 80 Ark. 345, 97 SW 285. A son killing in defense of his father cannot claim justification unless both he and the father were free from fault. Morris v. State [Ala.] 39 S 608.

43. One is justified in killing in defense of the life of his brother. McIntosh v. Com., 29 Ky. L. R. 1100, 96 SW 917. One has the same right to defend the life of his child as the child has. Parnell v. State, [Tex. Cr. App.] 17 Tex. Ct. Rep. 331, 98 SW

the habitation of another.[45] The right of self-defense is limited to the exercise of such force as is necessary to repel the assault.[46] The rule that one who is the aggressor or who provokes a difficulty cannot invoke the theory of self-defense [47] is not applicable unless accused committed some act calculated to provoke a difficulty.[48] A mere breach of decorum, or use of insulting or opprobrious language, is not enough.[49] One who has provoked an assault, or voluntarily engaged in combat, regains the right of self-defense if he abandons the combat in good faith.[50] A homicide is not justified by threats alone,[51] there must also be an apparent intent to execute them.[52] In Texas one is justified in killing a person found in the act of adul-

269. Where one interfered in a difficulty between his son and deceased without knowing who provoked it, he has a perfect right to self-defense. Id. One who believes with reason that another is in imminent danger of death or great bodily injury has the same right to defend him as such other would have to defend himself. State v. Hennessy [Nev.] 90 P 221. One fearing that a relative would be injured is entitled to be present and defend him. Bice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 61, 100 SW 949. Where one interfered in a quarrel to protect his relative, held error to refuse to charge as to right of self-defense. Id.

44. One has a right to repel invasion of his property to the extent of shooting. Roch v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 903, 105 SW 202. One who has been dispossessed of property by legal writ has no right to retake possession, and if he does such possession confers no property rights which he is entitled to defend to the extent of taking life. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 909, 105 SW 182. In such case erroneous advice of counsel is no justification. Id.

45. Instruction as to the right of accused to slay decedent in defense of the habitation of his employer held sufficiently favorable to accused. Patterson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 552, 95 SW 129. Under Pen. Code 1895, art. 677, it is proper to charge that accused had a right to kill deceased if necessary to repel an attack made by him on the habitation of the employer of accused. Id. Where it appeared that decedent kicked at the door of accused's employer and demanded admittance after the employer had requested him to leave, and accused pushed him to the ground and shot him, whether he was authorized to do so in defense of his employer's habitation was for the jury. Id.

46. No more force then is necessary can be used in repelling an assault. State v. Cephus [Del.] 67 A 150. Slight assault will not excuse killing with deadly weapon or reduce crime to manslaughter. State v. Bell, 5 Pen. [Del.] 192, 62 A 147. No looks, gestures, or language, however insulting or offensive, will excuse a slight assault. Id. One upon whom a simple assault is made may not stand his ground and take his assailant's life to prevent the assault. State v. Waldrop, 73 S. C. 60, 52 SE 793. Instruction on theory of self-defense that no greater force than was necessary could be used held proper where there was evidence of a struggle and that deceased was stronger than accused. Newcomb v. State [Tex. Cr. App.] 95 SW 1048. Under statutes making it a felony to destroy a fence and justifying homicide in defense of property against one intending to commit a felony, mere placing of hand on a fence post to pull it down to make a gap does not justify killing. Driggers v. U. S. [Ind. T.] 104 SW 1166.

47. See cases cited above.

48. The fact that one who committed an assault as means of defense sought the person assaulted for the purpose of provoking the difficulty does not preclude assertion of self-defense unless some act was committed in furtherance of such purpose calculated to bring on the difficulty. Sanders v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 375, 97 SW 1046.

49. Accused may rely on self-defense theory though there is evidence that he used opprobrious language to deceased or was guilty of a breach of decorum which caused the attack on him. State v. Rowell, 75 S. C. 494, 56 SE 23.

50. One who entered into a combat without felonious design, and tries in good faith to withdraw, but is pursued by his opponent whom he necessarily kills to save his own life, is justified in so doing. State v. Gordon, 191 Mo. 114, 89 SW 1025. Where defendant entered on the premises of deceased with a gun and used threatening language which would put a reasonable man in the same situation in fear of death, deceased's act in going toward his house and calling for a gun did not justify defendant in killing him, unless defendant in good faith abandoned the quarrel and did everything he could consistent with safety to avoid killing deceased. Velvin v. State, 77 Ark. 97, 90 SW 851. Instruction depriving defendant of his plea of self-defense if before deceased assailed him he attacked deceased, without regard to whether such attack was justified, is error. West v. State [Fla.] 43 S 445. Where accused first provoked a difficulty but abandoned it and decedent renewed it and made a demonstration as if to get a weapon, self-defense is available. Purycar v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 721, 98 SW 258.

51. Threats alone will not justify homicide. Gregory v. State [Ala.] 42 S 829. Threat to attack habitation is not threat against life within law of self-defense. State v. Waldrop, 73 S. C. 60, 52 SE 793.

52. Under Pen. Code 1895, art. 713, providing that threats made may be shown but are not justification unless decedent at the time manifested an intent to execute them, where accused knowing of threats armed himself and approached decedent to discuss the matter, but it was necessary to

tery with one's wife, or where the appearances are such as to reasonably justify a belief that the act had been or was about to be committed.[53] A necessary homicide to escape an illegal arrest is justified.[54] A mere trespass is no justification.[55] A violation of a Sunday law does not justify an assault.[56]

An officer may kill to prevent an escape,[57] provided the person under arrest is charged with a felony,[58] and may use necessary force to defend himself from attack while performing his duty.[59]

Voluntary drunkenness is no excuse nor defense[60] to a charge to sustain which

kill in order to protect himself, he was justified in so doing. Mitchell v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 597, 96 SW 43. Statement by decedent "If you had let me alone I would have killed all of them," made with reference to a group of persons of which accused was one, held a threat as to him. McKinney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 545, 96 SW 48. The law of threats should not be charged when threats were made only during the difficulty. Armstrong v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 519, 96 SW 15. Where state proved that defendant had threatened to kill deceased, he should be allowed to prove that he had no such intent when threats were made. Pratt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 599, 96 SW 8. On evidence that deceased had made threats against accused, and subsequently had cursed him and struck him in the face, whereupon the fatal assault was made, accused was entitled to a charge on self-defense distinct from a charge on self-defense in connection with threats. Fuller v. State [Tex. Cr. App.] 95 SW 1039. Evidence that decedent had stated to accused that he had laid out two other men and would do the same by him held sufficient to authorize a charge as to his dangerous character and defendant's knowledge thereof. Smith v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 948, 99 SW 100. Evidence that the parties had had a quarrel but had made up held insufficient to authorize a charge on threats and self-defense. Id.

53. Under Pen. Code 1895, art. 672, providing that a person shall be justified in killing another taken in the act of adultery with the slayer's wife, it is sufficient if the appearances are such as to reasonably justify a belief that deceased and the wife had committed or were about to commit the act of adultery. Gregory v. State [Tex. Cr. App.] 94 SW 1041.

54. One who commits a homicide, using no more force than is necessary to escape an illegal arrest, is guilty of no offense; he is under no duty to retreat but may use necessary force to protect himself. Earles v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 223, 94 SW 464. Where defense was lawful resistance of illegal arrest, the law of self-defense is not alone applicable; the right to resist attempt to arrest illegally and not merely right to prevent a felony of his person should be charged. Jenkins v. State [Ga. App.] 59 SE 435.

55. One has no right to kill another merely to prevent a trespass arising out of an attempt to arrest without a warrant. Neeley v. Com., 29 Ky. L. R. 408, 93 SW 596. Rule that person may defend habitation even to taking life of person attempting to invade it held inapplicable where deceased and an officer were seeking to dispossess defendant under a writ of possession. Williams v. State, 147 Ala. 10, 41 S 992. One conspiring to resist officers seeking to execute a writ of possession with no excessive or unnecessary display of force by shooting one of them cannot set up the plea of self-defense either for himself or his mother. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 SW 817. Where a plan to substitute others for the regularly appointed judges and clerks of a political club election was not carried out, but a difficulty arose over alleged ballot stuffing in which defendant killed deceased, the act was not justified though defendant was a clerk in charge of the roster containing names of members. Roberts v. People, 226 Ill. 296, 80 NE 776. Where killing occurred at a political club election in a difficulty over alleged ballot stuffing, the fact that defendant was a clerk in chage of a roster, and that deceased kicked the roster off the table in trying to reach the ballot box, did not constitute justification. Id.

56. Law prohibiting Sunday work held not to justify assault on a person violating it. People v. Tubbs, 147 Mich. 1, 13 Det. Leg. N. 959, 110 NW 132.

57. An officer has the right to kill if necessary to prevent escape. Stevens v. Com., 30 Ky. L. R. 290, 98 SW 284. Instruction held erroneous as limiting officer's right to kill on the single ground of self-defense. Id. Where **United States soldier** in line of his duty shooting at an escaping prisoner hits and kills another, held not manslaughter triable in state courts. United States v. Lipsett, 156 F 65.

58. A constable who has arrested a person for misdemeanor may not kill him when he attempts to escape. Commonwealth v. Loughhead [Pa.] 67 A 747. An officer may not kill to prevent escape or attempt to arrest for a misdemeanor but may for a felony. Reed v. Com., 30 Ky. L. R. 1212, 100 SW 856. Where one who committed a misdemeanor was pursued by a posse and turned and fired upon them, he was guilty of a felony, and if shot to prevent his escape the killing was justified. Id.

59. Instruction as to right of officer to kill in self-defense where he went to a place to quell a disturbance held proper and sufficient. Woodward v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 128, 97 SW 499. As to provocation of the difficulty by defendant, an officer, the court in instructions should guard his rights to the extent that if his acts were in quieting a disturbance, and deceased first attacked him, he had a right to act in self-defense. Id.

60. Voluntary drunkenness is no excuse. State v. Kidwell [W. Va.] 59 SE 494. Drunk-

no specific intent need be shown,[61] but may be considered on the degree of guilt when intent is essential.[62] Fixed *insanity* at the time of the homicide is of course a good defense.[63] "Transitory frenzy" is not a defense to a charge of murder.[64]

§ 6. *Indictment or information.* See 8 C. L. 109—Ordinarily an indictment need not follow the language of the statute defining the crime charged, substantial conformity to the statute being sufficient.[65] Each essential element of the crime must of course be charged with certainty [66] and must be proved as laid,[67] though a variance

enness is not an excuse under Mansf. Dig. § 1502. Carney v. U. S. [Ind. T.] 104 SW 606. Voluntary drunkenness is no defense. State v. Woodward, 191 Mo. 617, 90 SW 90. No instruction on defense of drunkenness need be given in manslaughter case. Laws v. State [Ala.] 42 S 40.

61. Voluntary drunkenness is no defense to a charge of manslaughter, no specific intent being essential. Laws v. State, 144 Ala. 118, 42 S 40. Instructions that drunkenness would be no defense unless accused was so drunk that he could not form an intent, and that the mere fact that accused's passions were inflamed by drink would not be a defense, held not inconsistent. State v. Yates, 132 Iowa, 475, 109 NW 1005.

62. Where killing by defendant is admitted and intoxication is set up as a defense, the only issue is the degree of guilt, which depends upon the degree of intoxication. Commonwealth v. Eyler, 217 Pa. 512, 66 A 746. Pen. Code, § 22, provides that an act is no less criminal because committed by an intoxicated person, but that when particular intent is an essential element the jury may consider the fact of drunkenness. People v. Hower [Cal. App.] 91 P 507. Where it appeared that defendant had been drinking heavily during the day and after the homicide could make no coherent statement, under Pen. Code 1895, art. 41, providing that temporary insanity produced by ardent spirits, his condition, is admissible on degree of murder. Miller v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 3, 105 SW 502. Drunkenness at common law neither excuses nor mitigates criminal offenses not requiring a specific intent, but in a murder case, where the evidence tends to show some provocation, it may be taken into consideration, in connection with all the other facts and circumstances, to show that accused acted from heat of blood rather than from malice. State v. Hogan, 117 La. 863, 42 S 352. Voluntary intoxication is an excuse only in determining whether accused is guilty of murder in the first or second degree, as to subsequent inquiries, including self-defense, he is judged by same rules as a sober man, and if he believed he was in danger when a sober man would not have entertained such belief, such defense is not available. Atkins v. State [Tenn.] 105 SW 353.

63. Partial insanity is no defense unless accused was incapable of distinguishing between right and wrong. State v. Paulsgrove [Mo.] 101 SW 27. Insanity to be an excuse must be fixed insanity and not a mere fit of drunkenness. State v. Kidwell [W. Va.] 59 SE 494. Insanity from use of morphine and drinks to such extent that accused did not know what he was doing or that he was doing wrong is a defense. Phillips v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 757, 98 SW 868. Where accused had been drinking heavily and had taken two morphine tablets, evidence held to entitle him to a charge under Pen. Code 1895, art. 41, relative to insanity produced by intoxication. Id. Insanity at the time of committing the offense is a defense regardless of the time when or the manner in which it was caused. Duthey v. State, 131 Wis. 178, 111 NW 222. While mere intoxication is no defense, insanity resulting from intoxication is a defense. Commonwealth v. Parsons [Mass.] 81 NE 291. Where defense was insanity, instruction that if defendant was insane at the time he should be acquitted, but if sane he should be found guilty, though he subsequently became insane, was proper. State v. Crane, 202 Mo. 54, 100 SW 422.

64. Commonwealth v. Renzo, 216 Pa. 147, 65 A 30. Shooting wife in an alleged insane frenzy resulting from her misconduct held not justifiable or excusable homicide as defined by St. 1898, §§ 4366, 4367. Duthey v. State, 131 Wis. 178, 111 NW 222.

65. An indictment for murder need not charge the offense in the language of the statute defining the crime; the use of words of equivalent meaning is sufficient. Allegation that act was done purposely, of one's deliberate and premeditated malice, with intent to kill, held equivalent to averment of premeditated design to effect death, and sufficient. Walcher v. Territory, 18 Okl. 525, 90 P 887. An information for assault with intent to kill in the language of the statute does not charge a crime unknown to the law though it uses words not in the statute which could be treated as surplusage and still leave a description of the offense. State v. Spaugh, 199 Mo. 147, 92 SW 901.

66. Where indictment charged that a homicide was maliciously, unlawfully, and feloniously done, it was sufficient without setting out the statute claimed to have been violated. United States v. Battle, 154 F 540. Indictment held to sufficiently charge an assault by accused upon deceased. State v. Barrington, 198 Mo. 23, 95 SW 235. An indictment charging that accused willfully and deliberately did certain acts is not fatally defective for failure to charge that they were done with design to effect death. Id. Indictment charging that defendant did feloniously, etc., strike and beat deceased on the head with a club, inflicting a mortal wound, held insufficient because failing to allege that the fatal stroke was done feloniously and of malice aforethought, and in not stating definitely that wound was given with the club. State v. Woodward, 191 Mo. 617, 90 SW 90.

Identity of deceased: Deceased is suffi-

as to immaterial matters not constituting an essential element [68] is not fatal.[69] An indictment for a particular offense will support a conviction for any included offense,[70] hence evidence to sustain included offenses is admissible.[71] In the notes are

ciently described by his proper name in indictment for murder under Rev. St. § 1048. State v. Hogan, 117 La. 863, 42 S 352. Indictment must contain true name of person killed. Bennett v. State [Ark.] 104 SW 928.

Means or cause of death or injury: General verdict of guilty may rest on allegation that means of death were unknown where there is uncertainty in evidence as to direct cause of death, though there are other counts in the indictment. Koser v. People, 224 Ill. 201, 79 NE 615. Indictment alleging in one count that death was caused by brick and in another by some hard substance, to grand jury unknown, not antagonistic. Outley v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 947, 99 SW 95. Indictment for assault to kill need not allege the specific weapon. It is sufficient to allege that it was a deadly one. Canterberry v. State [Miss.] 43 S 678. Information charging murder need not allege that killing was by means of a deadly weapon. State v. Hottman, 196 Mo. 110, 94 SW 237; State v. Myers, 198 Mo. 225, 94 SW 242. Information charging murder may charge that it was committed by the use of more than one weapon. State v. Hottman, 196 Mo. 110, 94 SW 237. Indictment charging infliction of mortal wound with "pistol" and later that they were gunshot wounds is not indefinite and uncertain, as gunshot wounds include those made by a pistol. State v. Barrington, 198 Mo. 23, 95 SW 235. Indictment alleging killing "by striking or cutting" is sufficient under Cr. Code 1896, § 4911, providing that where an offense may be committed by different means such means may be alleged in the alternative. Coleman v. State [Ala.] 44 S 184. Where a count of the indictment alleges that the means of death was unknown, it is proper to charge that if the jury believe from the evidence beyond a reasonable doubt that deceased came to her death at the hands of the defendant it matters not what means were employed by him. Parham v. State, 147 Ala. 1, 42 S 1. Where indictment for assault with a deadly weapon names the weapon as a gun, it is sufficient without alleging that the gun was loaded, as Comp. Laws 1897, § 1383, declares a gun to be a deadly weapon. Territory v. Gonzales [N. M.] 89 P 250. Indictment alleging that a blow in the face knocked deceased down with great violence on divers stones, etc., on the ground, and that by reason of the force and violence of the blow and the violent contact of deceased's head with such stones, etc., a mortal wound was given, held not objectionable as failing to allege that deceased's head came in contact with the stones and rubble. Koser v. People, 224 Ill. 201, 79 NE 615. One count alleged administration of hydrate of chloral and certain poisons to the grand jury unknown; another, that death was caused by some means, drugs, poisons, instruments, and weapons to the grand jury unknown. Proof of administration of chloroform was held admissible under either count, hence submission of only one count was not prejudicial. State v. Thomas [Iowa] 109 NW 900. Information charging assault by shooting at deceased but omitting "thereby giving him mortal wound" or other words of similar import showing connection between shooting and killing is insufficient. State v. Birks, 199 Mo. 263, 97 SW 578. Indictment charging "defendant, a certain pistol," etc., held not bad for omitting "with" before "pistol." State v. West, 202 Mo. 128, 100 SW 478. Indictment charging that accused feloniously shot deceased in a vital part, from which wounds he became senseless, and immediately thereafter feloniously pushed him into a pond where he suffocated, held not fatally defective as charging proximate cause. State v. Barrington, 198 Mo. 23, 95 SW 235. An indictment at common law need not expressly allege intent to kill. Burge v. U. S., 26 App. D. C. 524; Hamilton v. U. S., 26 App. D. C. 382. Where it is averred that deceased immediately died of the wounds inflicted, such wounds need not be averred in terms to have been "mortal." Id.

67. Fatal variance between name "Karnegay" in indictment and "Kornegay" shown by proof. Haygood v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 308, 103 SW 890. Indictment charging assault with a knife, such means of assault must be proved. Hext v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 252, 90 SW 43. To convict of aggravated assault under indictment for assault with a knife "which was then and there a deadly weapon," it must be proved that the knife was a deadly weapon. Id. Charges that death resulted from striking and beating with the fists are not sustained by proof that it resulted from a fall on stones and rubble. Koser v. People, 224 Ill. 201, 79 NE 615. Charge that homicide was by shooting decedent with a pistol is supported by proof of shooting with a shotgun. Taylor v. State [Ala.] 42 S 997.

68. Allegation that accused held pistol in left hand, and proof that he held it in the right, not a fatal variance. State v. Bell, 5 Pen. (Del.) 192, 62 A 147. Date of offense in indictment for murder is not essential. State v. Cornelius, 118 La. 146, 42 S 754.

69. Variance between allegtions in indictment for murder in an attempt to produce an abortion that instrument was thrust into "body and womb" and into "private parts and womb," and proof that it was thrust into private parts and bladder, held not fatal. Clark v. People, 224 Ill. 554, 79 NE 941.

70. Indictment for assault with intent to murder in first degree embraces also second degree, assault with intent to commit voluntary manslaughter, assault and battery, and simple assault. Fuerst v. State, 115 Tenn. 357, 89 SW 955. Verdict of murder in the first or second degree or manslaughter may be rendered under an indictment for murder in the first degree. State v. Honey [Del.] 65 A 764. Indictment for abortion, charging that death resulted therefrom, includes murder in the second

grouped decisions as to the sufficiency of indictments for murder,[72] manslaughter,[73] assault with intent to kill or murder,[74] assault with a deadly weapon,[75] and lower degrees of assault [76] and on joint indictments.[77]

degree, manslaughter and assault. State v. Fleetwood [Del.] 65 A 772. Verdicts of murder in the second degree, manslaughter, or not guilty, may be rendered under an indictment for murder in the first degree. State v. Uzzo [Del.] 65 A 775. Under indictment for manslaughter, defendant cannot be convicted of the offense defined by Crimes Act 1898 (P. L. p. 806), making persons participating in a fight or assault, etc., or aiding or abetting it, guilty of a misdemeanor. State v. Scaduto [N. J. Law] 65 A 908. Where evidence authorizes crime of higher degree, it also authorizes conviction of crime found. Harbin v. State, 127 Ga. 48, 55 SE 1046. Where there is reasonable doubt as to whether one is guilty of murder or manslaughter, he should be convicted of the lesser offense. Watkins v. Com., 29 Ky. L. R. 1273, 97 SW 740. Instruction tending to acquittal unless offense charged is proved properly refused. Blanton v. State [Fla.] 41 S 789.

71. Under indictment for murder, state may show facts which will prove the offense charged or any lower degree of the crime. Gregory v. State [Ala.] 42 S 829.

72. Indictment alleging that accused with intent to rob a train placed rails on the track and wrecked the train and fatally injured a person held not to charge murder within Code, § 4728. State v. Von Kutzleben [Iowa] 113 NW 484. Information charging killing by shooting held to charge murder in first degree. State v. Barnett, 203 Mo. 640, 102 SW 506. Information for murder in second degree by shooting with a pistol held fatally defective because failing to allege that "defendant with leaden balls shot out of the pistol did strike and penetrate the body," etc. State v. Johnson, 191 Mo. 177, 90 SW 89. Indictment held to charge murder in first degree. State v. Spivey, 191 Mo. 87, 90 SW 81. Indictment held to sufficiently charge murder in first degree. State v. Clay, 201 Mo. 679, 100 SW 439. An indictment charging murder with a pistol will not be quashed on account of the omission of a count charging carrying concealed weapons, under Cr. Code 1902, § 131. State v. Hasty, 76 S. C. 105, 56 SE 669. Indictment for murder in commission of robbery in form prescribed by White's Ann. Pen. Code, § 1254, not defective for failure to allege who was robbed or what he was robbed of. Oates v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 285, 103 SW 859. Indictment charging conspiracy to inflict punishment and bodily injury on a person, and also charging his murder, held good as an indictment for murder. State v. McCoy, 61 W. Va. 258, 57 SE 294.

73. Indictment alleging substantially that accused wrongfully and feloniously, but without design to kill, with his fists and feet assaulted, kicked, and struck decedent, thereby inflicting mortal wounds from the effects of which decedent died, held to charge manslaughter in first degree, as defined by Pen. Code, § 189. People v. Stacy, 104 NYS 615. Indictment charged that defendant was general manager of certain railroad and had charge of maintenance of tracks, operation of trains, and employment and instruction of engineers, that he omitted to prevent excessive speed at a certain curve and placed an inexperienced engineer in charge of a train and allowed it to be run at excessive speed, and that by reason of his negligence the train left the rails and was wrecked, thereby causing the death of a certain person, a passenger. Held, the indictment was sufficient to charge manslaughter in the second degree under Pen. Code, § 195, and Code Cr. Prac. § 275. People v. Smith, 105 NYS 1082.

74. Indictment held to allege sufficiently that assault was with intent to kill and commit a felony. Barber v. State [Fla.] 42 S 86. Indictment for assault with intent to kill held not bad for duplicity. Greenwell v. Com., 30 Ky. L. R. 1282, 100 SW 852. Under Rev. St. 1899, § 1847, where asault is with pistol or knife, indictment need not allege weapon to be a deadly one. State v. Williams, 191 Mo. 205, 90 SW 448. Two counts held to each sufficiently charge assault with intent to kill. Id. Information charging accused with assault with intent to kill held sufficient. State v. Harris, 199 Mo. 716, 98 SW 457. Indictment for assault to kill following language of statute held sufficient. State v. Wilson [Mo. App.] 103 SW 110. Under Ann. St. 1906, p. 1278, indictment for assault with intent to kill need not charge that assault was committed with malice aforethought. State v. Ostmann, 123 Mo. App. 114, 100 SW 696. Indictment for assault to kill need not allege that pistol was pointed at a vital part of body within shooting distance. State v. Wilson [Mo. App.] 103 SW 110. Indictment for assault with intent to murder alleging that assault was made with malice aforethought, with intent to kill, held sufficient. Jackson v. State [Tex. Cr. App.] 90 SW 34.

75. Indictment charging assault with a deadly weapon held to charge elements of crime with sufficient definiteness. Territory v. Gonzales [N. M.] 89 P 250. Indictment need not allege that assault with deadly weapon was "feloniously" made under Comp. Laws 1897, § 1379. Id. An information for shooting and stabbing another, the offense defined by Rev. St. 1899, § 1847, need not allege that the "assault" was feloniously committed. State v. Bond, 191 Mo. 555, 90 SW 830.

76. Indictment charging that defendant "did willfully, unlawfully, wrongfully, intentionally, and feloniously assault one J. S. by throwing said J. S. from a moving street car" with intent to inflict grievous bodily harm upon said J. S. held to charge assault in the third degree as defined by Pen. Code, § 401, subd. 3. State v. Tracy, 35 Mont. 552, 90 P 791.

77. Principals in the first and second degree in the crime of murder are punished alike, and no distinction between them need be made in the indictment. Bradley v. State, 128 Ga. 20, 57 SE 237. Under Cr. Code

§ 7. *Evidence. A. Presumptions and burden of proof.*[See 8 C. L. 110]—The burden is upon the state to prove beyond a reasonable doubt[78] every essential element of the crime,[79] and the presumption of innocence continues until such proof has been adduced.[80] The burden is upon accused to prove that the homicide was justi-

Prac. §§ 122, 126, under an indictment charging that a certain person in connection with others conspired to and killed decedent, held such person could be convicted on proof that he was principal actor, aider and abettor, or accessory before the fact. Commonwealth v. Hargis, 30 Ky. L. R. 510, 99 SW 348. Where one is indicted jointly with others for murder and it appears the actual homicide was by another defendant, the one on trial cannot under the joint indictment for murder be convicted of an assault with intent to commit murder. Smith v. State, 127 Ga. 262, 56 SE 360. Hence error to so charge the jury as to authorize a conviction for assault independently of participation in design which resulted in death of deceased. Id.

78. Instruction failing to predicate a finding to be made from the evidence beyond a reasonable doubt held erroneous Frazier v. State, 117 Tenn. 430, 100 SW 94. If evidence as to right of self-defense raises reasonable doubt, defendant is entitled to acquittal. Instruction that if jury found defendant's contention true they should acquit is error. Id. Instruction authorizing conviction if the jury believe the evidence true or that it showed or tended to show defendant's guilt was error as requiring too low a degree of proof. Oates v. State [Tex. Cr. App.] 19 Tex. Ct Rep. 285, 103 SW 859. Not fair to refuse to charge that defendant could not be convicted unless the evidence against him excluded to a moral certainty every supposition except of guilt. Young v. State [Ala.] 43 S 100. Should be charged that hypothesis of guilt should flow naturally from facts proved and be consistent with them. Brown v. State [Ala.] 43 S 194. Error to refuse to charge that if the jury have reasonable doubt of guilt arising from any part of evidence they must acquit. Griffin v. State [Ala.] 43 S 197. The accused has not the burden to prove that the crime was manslaughter or was committed in self-defense before he could be acquitted of murder in second degree. Instruction disapproved. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059.

What is a reasonable doubt: Must not be vague, speculative, or fanciful. State v. Cephus [Del.] 67 A 150. Doubt must be a reasonable one. Davis v. State [Ala.] 44 S 561. Reasonable doubt is actual and substantial doubt, not mere possibility or speculation. Bluett v. State [Ala.] 44 S 84. Instruction approved. Id. A well founded doubt is the same as a reasonable doubt. Creagh v. State [Ala.] 43 S 112. Definition of reasonable doubt held correct. Dempsey v. State [Ark.] 102 SW 704. Definition of reasonable doubt approved. State v. Spaugh, 200 Mo. 571, 98 SW 55. A reasonable doubt is more than a mere possibility of innocence. Territory v. Price [N. M.] 91 P 733. The crime is established beyond a reasonable doubt if the truth of the facts is shown to a reasonable and moral certainty. State v. Samuels [Del.] 67 A 164. Charge as to consistency and degree of circumstantial evidence required, though not as full as usually given, held sufficient. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Instruction requiring reasonable doubt to be "substantial and well founded doubt" is erroneous. Frazier v. State, 117 Tenn. 430, 100 SW 94. Facts and circumstances of circumtial evidence should be consistent with each other and with the guilt of accused, and inconsistent with any theory of his innocence, and sufficient to produce moral conviction on an unprejudiced mind. State v. Francis, 199 Mo. 671, 98 SW 11. Circumstantial evidence to warrant conviction must be of such force as to produce conviction in the minds of the jury beyond reasonable doubt, consistent with each other, and inconsistent with any other rational conclusion. State v. Samuels [Del.] 67 A 164.

79. The state must prove every material element of the crime beyond a reasonable doubt. State v. Cephus [Del.] 67 A 150; State v. Samuels [Del.] 67 A 164. The burden is on the state to show defendant's guilt, and an instruction requiring him to establish defense of self-defense or manslaughter is erroneous. Casey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 351, 102 SW 725. It must be shown that decedent died before the indictment was returned. Percer v. State [Tenn.] 103 SW 780. Instruction which fails to require that every element of the crime be established beyond a reasonable doubt is error. Frazier v. State, 117 Tenn. 430, 100 SW 94. The defense of accidental killing is not such a one that defendant is required to substantiate the same. It is, rather, denial of criminal intent which the state must prove beyond reasonable doubt. State v. Hazlett [N. D.] 113 NW 374. Intent to kill must be proved and is a question of fact. Duncan v. State, 1 Ga. App. 118, 58 SE 248. Instruction disapproved. Id. State has burden to prove that defendant was at fault in bringing on difficulty where circumstances justify belief that he was in danger of life or bodily harm. Bluett v. State [Ala.] 44 S 84. Where indictment was for murder of Mooney Thomas and proof showed that he also was known as Monte Thomas, question of identity held for jury. Bennett v. State [Ark.] 104 SW 928.

80. The presumption of innocence remains until guilt is proved. State v. Samuels [Del.] 67 A 164. The presumption of innocence in doubtful cases is sufficient to turn the scales in favor of the accused. Id. The presumption of innocence entitles an accused to be acquitted unless guilt is provable beyond a reasonable doubt. Watkins v. Com., 29 Ky. L. R. 1273, 97 SW 740. Error to charge that presumption of innocence continues throughout the trial, as it ceases when guilt is proved beyond reasonable doubt. Strickland v. State [Ala.] 44 S 90.

fiable [81] or to prove any other defense,[82] but a preponderance of the evidence is sufficient[83] and the defendant is entitled to the benefit of all the evidence, however shown.[84] Some courts, however, hold that the burden is upon the state to show that defendant did not act in self-defense.[85] Express malice need not be proved [86] as malice will be presumed from the fact of killing, unexplained,[87] or from the use of a deadly weapon,[88] or other facts tending to show it. But no presumption of malice arises from mere proof of killing where the circumstances are fully shown by eye witnesses.[89]

(§ 7) *B. Admissibility in general.* See 8 C. L. 111—In general, evidence having a tendency to prove or disprove any material fact in issue, is relevant and admissible,[90] though evidence slightly relevant may, in the discretion of the court, be ex-

81. State v. Honey [Del.] 65 A 764. One who sets up self-defense must prove the elements thereof unless evidence which proves homicide also shows justification. Bluett v. State [Ala.] 44 S 84. The accused has the burden to prove self-defense. State v. Cephus [Del.] 67 A 150. Under Pen. Code, § 1105, the burden of proving mitigation or justification is on defendant unless the evidence of the state shows such facts, and this rule extends to self-defense and to where it is claimed the killing was accidental. People v. Grill [Cal.] 91 P 515. Until defendant has shown that he was in imminent peril and could not have retreated, burden is not upon the state to show that he was not free from fault in bringing on difficulty. Wright v. State [Ala.] 42 S 745. Burden is not on the state to show that defendant was at fault in bringing on the difficulty unless it appears that defendant was in imminent peril. Allen v. State [Ala.] 42 S 1006.

82. Drunkenness being set up as a defense, defendant has burden of proving it by a fair preponderance of evidence. State v. Yates, 132 Iowa, 475, 109 NW 1005. Burden is on defendant to prove an alleged alibi. Parham v. State, 147 Ala. 1, 42 S 1.

83. Reversible error to instruct that burden was upon defendant "to convince you beyond a reasonable doubt that the killing of the deceased was purely accidental before he should be acquitted upon that ground." Commonwealth v. Deitrick [Pa.] 66 A 1007. Under Rev. Codes 1905, § 10023, where commission of a homicide has been established by the state, the burden is on defendant to prove circumstances of mitigation, excuse, or justification unless the state's proof tends to show manslaughter or that defendant's acts were justifiable. But this does not mean that he must raise more than a reasonable doubt. State v. Hazlett [N. D.] 113 NW 374.

84. Burden of proving homicide was justifiable rests upon accused, though he is entitled to benefit of state's evidence tending to show such justification. State v. Moss [S. C.] 57 SE 1098. Defendant to establish self-defense need not prove that he in good faith tried to avoid further trouble before the assault was made on him, where it was conceded that deceased was the aggressor. Filippo v. People, 224 Ill. 212, 79 NE 609.

85. In prosecution for assault with intent to kill, the burden is on the state to prove that the assault was not in self-defense. State v. Yates, 132 Iowa, 475, 109 NW 1005.

86. Express malice or motive need not be proved. State v. McDowell [N. C.] 59 SE 690.

87. Malice is presumed from the fact of unexplained voluntary homicide. Robinson v. State [Ga.] 58 SE 842. This rule should not be charged where it appears that decedent was shot to prevent commission of a felony. Id. In assault with intent to kill a presumption of malice is raised from the unexplained attempt to take life. Taylor v. State [Ark.] 102 SW 367. Failure to require a finding of malice is not prejudicial where such presumption is not rebutted. Id.

88. Error to fail to charge, Pen. Code, art. 676, that intent to inflict injury is presumed when deadly weapons are used where it appears that homicide was committed by shooting. Yardley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 759, 100 SW 399.

89. Lucas v. State [Neb.] 111 NW 145.

90. That witness stated a bullet hole was of a certain size did not exclude testimony that it was size of his little finger. Moss v. State [Ala.] 44 S 598. Homicide having occurred while deceased and an officer were attempting to execute a writ of possession, the writ was admissible without direct proof that the premises described were those from which they sought to eject the defendant. Williams v. State, 147 Ala. 10, 41 S 992. Where cause of homicide was alleged intimacy between decedent and defendant's wife, and wife was not a witness, her good character could not be proved by the state, her reputation not being in issue. Shipp v. Com., 30 Ky. L. R. 904, 99 SW 945. On trial of policeman for manslaughter, he could show that shortly before killing deceased was in front of police headquarters with bottle in his hand. Commonwealth v. Thomas [Ky.] 104 SW 326. Certain evidence held admissible as corroborating a witness. Bull v. Com., 29 Ky. L. R. 949, 96 SW 817. In prosecution of officer for manslaughter, it was not error to require accused to testify that at the time he had his own pistol as well as one taken from deceased. Stacy v. Com., 29 Ky. L. R. 1242, 97 SW 39. On prosecution for murder of an officer, evidence held admissible to show that deceased had reasonable cause to believe that a felony had been committed, authorizing him to arrest without a warrant. State v. Spaugh, 200 Mo. 571, 98 SW 55. Proper to show that defendant had materials with which he could have pro-

cluded on the ground of remoteness.[91] Evidence not relevant to any issue,[92] or

duced effects on his clothing which he claimed were caused by shots fired by him. Territory v. Price [N. M.] 91 P 733. Evidence as to whether there were shows in progress at time is admissible to show date of killing and fix incidental circumstances. Nelson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 140, 101 SW 1012. A witness may state that he is a justice of the peace. Hickey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 142, 102 SW 417. Certain evidence regarding stick with which defendant claimed deceased had struck him held admissible. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. Evidence that during the past few years defendant's physical condition had degenerated, mind become weak, and that he would do things under excitement which he could not thereafter recall, is admissible. Pratt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 599, 96 SW 8. In assault with intent to kill where accused claimed that a difficulty arose because prosecuting witness abused his father in regard to a note which accused was trying to collect from prosecutor, evidence that the note had been paid at the time was admissible, though theory of state did not involve the note. Brundige v. State [Tex. Cr. App.] 95 SW 527. Evidence that companion of accused purchased a pistol after an altercation with deceased held admissible. McKinney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 545, 96 SW 48. Acts of the father in procuring arms and ammunition after son had joined him on the premises admissible. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 SW 817. Testimony as to the barricading of doors and windows with sacks of wheat. Id. It was competent to introduce in evidence the judicial proceedings upon which the writ of possession was based, although defendant was not a party to those proceedings. Id. In trial on murder charge, evidence that defendant made an assault on witness while latter was going for officers to arrest defendant was admissible. Scott v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 407, 93 SW 740. It is competent to show that inquest proceedings were reduced to writing and that certain persons testified therein. Newcomb v. State [Tex. Cr. App.] 95 SW 1048. Where state's theory was that accused killed deceased because of a dispute over payment of a bill, it is competent to show that the bill had been paid. Id. Testimony that decedent did not own nor have in his possession a pistol at the time of the murder not objectionable as an opinion. Wagner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 717, 98 SW 255. Nor is testimony that decedent went to the place where the crime tcok place to attend his mule. Id. Where a witness detailed the situation of the parties, his statement "all he had to do was to walk up and stab her like he did" was not a conclusion. Armstrong v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 812, 98 SW 844. A physician may testify that in his opinion wounds were made by blunt instrument. Ozark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 69, 100 SW 937. Evidence of extent of bleeding of decedent after shooting held admissible as relevant to seriousness of wound. Owen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 974, 105 SW 513.

91. Testimony that decedent had been seen with a pistol two years before properly excluded. Pate v. State [Ala.] 43 S 543. Where there was evidence to explain decedent's position when shot, proof that witness had had a similar experience, necessitating the taking of such position, a month before, was properly excluded. People v. Wright [Cal. App.] 89 P 364. On trial for murder of a father in the room of his daughter, evidence of estrangement between father and daughter occurring 10 years prior is too remote. State v. Emerson [S. C.] 58 SE 974.

92. It is immaterial that two other persons are in jail charged with same offense. Strickland v. State [Ala.] 44 S 90. Evidence as to acts of decedent a week before the homicide relative to money matters held inadmissible. Andrews v. State [Ala.] 44 S 696. Testimony for defendant that another told witness immediately after the killing that he did not know who killed decedent and that decedent's husband had attempted to kill her held inadmissible. Id. Evidence as to assault on decedent by her husband, not defendant, held inadmissible. Id. Evidence that deceased said to third person "you ought to stand up for your rights, people put you out a whole lot," is immaterial, not shedding any light on circumstances of killing. Bell v. State [Ark.] 104 SW 1108. Whether witness arrested a certain negro held immaterial. Strickland v. State [Ala.] 44 S 90. Testimony of undertaker that he found old bullet holes in bones of deceased where he had been shot before not admissible. Brown v. State [Ala.] 43 S 194. Evidence of instructions given at the inquest is immaterial. Parham v. State, 147 Ala. 57, 42 S 1. Evidence as to how accused became intoxicated is not admissible where drunkenness is asserted merely to reduce the degree of the crime. Heninburg v. State [Ala.] 43 S 959. Where decedent had stated that he expected "to die with his boots on," but such statement was in no way connected with defendant and he did not know of it, it was properly excluded. People v. Quimby [Cal. App.] 92 P 493. Evidence that deceased, accused's daughter, was a virgin at time of death, inadmissible where no attack on character of deceased as to chastity had been made. Bullard v. State, 127 Ga. 289, 56 SE 429. How long accused would probably live held inadmissible, there being evidence as to his physical and mental condition at time of homicide. Id. Widow of decedent may not testify as to number and ages of children. State v. Rutledge [Iowa] 113 NW 461. Theory of defense was that deceased committed suicide, being despondent over his relations with a girl, and defendant testified that he sang a song which he (decedent) declared did him more good than all the whisky he could drink. Held proof of the words of the song was properly excluded. State v. Nowells [Iowa] 109 NW 1016. Where killing was done during political club election, proof of how defendant came to be made a clerk, and of the fact that persons who came to vote were nearly all unknown to witness

which is incompetent, as hearsay [93] and self-serving acts or declarations,[94] should be

and were not members or residents of the district, held immaterial. Roberts v. People, 226 Ill. 296, 80 NE 776. Evidence that deceased was married and had five children inadmissible. Filippo v. People, 224 Ill. 212, 79 NE 609. Where evidence in prosecution for murder committed during a political club election failed to show an alleged conspiracy to oust regular judges and conduct a fraudulent election, proof tending to show the same was properly excluded, the difficulty having arisen in a different manner. Roberts v. People, 226 Ill. 296, 80 NE 776. Where accused had been sitting in a window with a prostitute when decedents, under influence of liquor, were attracted by the woman, and on their refusal to leave the shooting took place, defendant could not show that decedents had been in the vicinity acting boisterously for some time and attempting to enter the houses where he did not know of such conduct. Sturgeon v. Com. [Ky.] 102 SW 812. Evidence that decedent was engaged in selling whisky or keeping it for sale is irrelevant. Martin v. Com., 30 Ky. L. R. 1196, 100 SW 872. Where evidence showed that accused used pistol according to previously formed design to kill deceased, evidence of how he got the pistol was immaterial. Johnson v. Commonwealth, 29 Ky. L. R. 442, 93 SW 581. Coroner's certificate of death held not evidence of guilt or innocence of accused. State v. Hopkins, 118 La. 99, 42 S 660. Business relations existing between witness and defendant regarding premises where homicide occurred held not admissible. State v. Hazlett [N. D.] 113 NW 374. Evidence concerning business of deceased, that it made him many enemies who had threatened him with personal violence, is inadmissible. State v. Barrington, 198 Mo. 23, 95 SW 235. Witness may not state that he passed near house of defendant on day of homicide where it does not appear that he saw defendant or that defendant saw him. State v. Darling, 202 Mo. 150, 100 SW 631. Where it is shown that killing was done with shotgun, evidence of purchase of revolvers by defendant's son is not admissible. State v. Edwards, 203 Mo. 528, 102 SW 520. Not material to prove amount of whisky deceased had on night of homicide. Woodward v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 128, 97 SW 499. Testimony that deceased was lady of average intelligence inadmissible, dying declaration being in evidence. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Evidence that after decedent had been killed her husband seized his gun to shoot guilty parties, but on ascertaining that they were out of range broke it, is immaterial. Fizini v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 836, 100 SW 394. Where accused claimed that he acted in self-defense and there was evidence that just prior to the killing he came out of a house and pointed a pistol at a group of persons and warned them not to approach him and immediately thereafter shot deceased who was approaching him from another direction with drawn knife, held testimony of deceased's son who was in the group that the reason he approached deceased after the shooting was to find out who killed his father was not admissible. Maroney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 570, 95 SW 108. Evidence that decedent carried a pistol on a certain day several months prior to the shooting is not admissible. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218. Request made by decedent immediately on being shot to telegraph his mother held irrelevant. Bice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 61, 100 SW 949. On prosecution for murder of a "strike breaker" who was acting as motorman on a street car at the time, evidence of threats made and other occurrences with which accused had nothing to do is not admissible. Ripley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 49, 100 SW 943. Testimony that deceased raped a woman and was subsequently forced to marry her is inadmissible. Serna v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 133, 105 SW 795. Testimony that decedent had at one time cut another with a razor is not admissible to show her habit of carrying a razor and that she would likely execute any threats she made. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445. Where decedent's wife identified defendant and there was testimony that she failed to identify him the day after the tragedy, it was error to permit the state to prove that after the tragedy she was prostrated by the shock. Oates v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 285, 103 SW 859. Evidence that accused shortly before the killing of decedent, an officer, while attempting to arrest another left in a buggy held inadmissible. Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868. Evidence of personal appearance of decedent on reaching home after walking five blocks from place of shooting was not admissible on the question whetner he had dispossessed himself of his pistol. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Evidence as to when decedent and his wife were married not admissible as tending to show her opportunity of knowing whether he had a pistol. Id. Evidence of acts of defendant on day of tragedy held irrelevant. Oates v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 285, 103 SW 859.

93. Testimony as to what decedent said about her husband attempting to kill her is hearsay. Andrews v. State [Ala.] 44 S 696. A witness for accused may not state that another party present at the controversy had told him that he and not accused did the stabbing. Bacigalupi v. Com., 30 Ky. L. R. 1320, 101 SW 311. Testimony as to conduct and threats witness saw and heard is not hearsay. Driggers v. U. S. [Ind. T.] 104 SW 1166. Where evidence showed that killing grew out of an assault by decedent on a third person, statements made by deceased relative to such assault when accused was not present and not communicated to him are not admissible. Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 SW 496.

94. One who claims an alibi cannot show that six hours prior to the killing he invited another to spend the night with him at his home three miles from the scene of crime. Sasser v. State [Ga.] 59 SE 255. Self-

excluded. In the notes are grouped decisions as to the admissibility of evidence to show the relation between the parties and the state of feeling existing between them,[95] to show provocation or adequate cause,[96] to show a motive for the crime,[97]

serving declarations and conduct on part of defendant when they form no part of the res gestae or no part of conversation or conduct introduced by the prosecution are not admissible. West v. State [Fla.] 43 S 445. Testimony that defendant told a third person that deceased had said he would kill him held inadmissible as self-serving declaration. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218. On prosecution of peace officer for negligent homicide, it was not admissible for him to state that he was surprised and grieved when he found deceased was shot. Saye v. State [Tex. Cr. App.] 99 SW 551. Where state made no effort to prove flight, proof that accused voluntarily surrendered himself the day after commission of crime is inadmissible as self-serving declaration. Pate v. State [Ala.] 43 S 343.

95. Held admissible: Statements of deceased showing hostility toward defendant. Bethune v. State [Tex. Cr. App.] 90 SW 1014. Circumstances showing animus of defendant toward decedent. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Evidence of abuse and ill treatment of decedent by defendant for a year prior to the killing. Owen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 974, 105 SW 513. Evidence that deceased seemed in good humor and jolly a few minutes before the homicide Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509. Testimony of decedent's wife as to a visit of decedent to defendant's house some time prior to the difficulty and to friendly spirit in which he was received held admissible in rebuttal of threats. Id. Testimony that defendant had said that if decedent, his wife, did not live with him she would not have the pleasure of living with any other man held admissible where it appeared that he was jealous and they had separated several times. Owen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 974, 105 SW 513 On issue of who was aggressor, defense having shown malice and threats by prosecutor, and prosecutor that accused had spent four nights at his house and had been well treated, defense should have been allowed to disprove the last. Cunningham v. State, 89 Miss. 356, 42 S 172. Testimony that accused and deceased were not very good friends not objectionable as a conclusion. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 428, 95 SW 521. Error to exclude evidence that though there had been ill will between defendant and decedent they had agreed to forget their differences. Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868. It is admissible to show that deceased arrested accused on day of homicide and struck and abused him, as showing decedent's state of mind toward accused. Humber v. Com. [Ky.] 102 SW 1179. Testimony of conversation with postmaster held admissible as to readiness of deceased to assist defendant and his wife. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218. Circumstances showing animus of accused toward deceased are admissible. Morris v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 490, 98 SW 873. Tone of voice used by accused toward decedent admissible. Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 76, 97 SW 100.

Held inadmissible: Evidence of bad feeling toward defendant by decedent not known to him is not admissible. Sasser v. State [Ga.] 59 SE 255. Evidence of quarrels between decedent's wife and decedent relative to defendant, not communicated to defendant, is not admissible. Id. Decedent's conduct prior to killing is not admissible where it does not appear to have been hostile. Commonwealth v. Thomas [Ky.] 104 SW 326. Evidence that son of decedent spent the night with defendant several months before the crime not admissible. Sasser v. State [Ga.] 59 SE 255. Honesty and trustworthiness of accused is irrelevant. State v. Griggsby, 117 La. 1046, 42 S 497. Visit of widow of deceased to office of counsel for defendant not admissible to show that she was in sympathy with him and had had illicit relations with him. Sasser v. State [Ga.] 59 SE 255. Where the only evidence of illicit relations between accused and the daughter of deceased occurred ten years before the homicide, evidence thereof was not competent to show ill feeling between the parties at time of killing. State v. Emerson [S. C.] 58 SE 974.

96. Held admissible: Evidence of language used by decedent about defendant's mother to defendant's brother held admissible. People v. Smith [Cal.] 91 P 511. Evidence tending to show that an assault by father of accused upon deceased and his companion was without provocation held admissible where assault was simultaneous with shooting of accused. Smith v. State, 126 Ga. 803, 55 SE 1024. Where cause of homicide was alleged intimacy between decedent and wife of accused to which intimacy she had confessed, the force of such confession could be broken by evidence that she was not at the place at which it is alleged to have been made. Shipp v. Com., 30 Ky. L. R. 904, 99 SW 945. Where homicide was of a marshal attempting to arrest accused without a warrant, evidence that accused had violated an ordinance of the town upon a certain date in the presence of the marshal was relevant and material. Yates v. State, 127 Ga. 813, 56 SE 1017. Where defendant claimed that stones were thrown at caboose in which he was, and decedent's dying declaration was that he threw no stones, evidence that decedent told witness he was going to "rock" the trains and that he asked witness to join him was admissible. Burroughs v. U. S., 6 Ind. T. 164, 90 SW 8.

Held inadmissible: Where defendant shows provocation reducing crime to manslaughter by fact of confession to him by his wife that decedent had raped her, the state could not show prior illicit relations of which accused did not know. Jones v. State [Tex.

to show malice or intent,[98] or tending to connect accused with the crime.[99] The

Cr. App.] 19 Tex. Ct. Rep. 172, 101 SW 993. Where it did not appear that defendant who killed his wife discovered her in adultery with another at the time, nor that he shot her in self-defense, evidence that she had committed adultery not admissible. Thomas v. State [Ala.] 43 S 371.

97. Held admissible: Testimony of decedent at examining trial of accused in a pending prosecution held admissible to show motive. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Where accused pleaded insanity and intimacy between decedent and his wife, evidence that shortly before the killing his wife confessed to him is admissible to show motive and state of his mind. Shipp v. Com., 30 Ky. L. R. 904, 99 SW 945. Failure to show motive tends to show innocence of accused. State v. Francis, 199 Mo. 671, 98 SW 11. Evidence held not to show motive. Id. In assault with intent to kill, evidence of assaults on other persons at the same time and as part of same occurrence is admissible to show motive. Greenwell v. Com., 30 Ky. L. R. 1282, 100 SW 852. It is competent to show motive by proof that decedent had procured an indictment against accused, and had sued him for slander. Ball v. Com. [Ky.] 101 SW 956. Evidence that defendant had stated that decedent, his wife, would not live with him and that he had a notion to cut her throat is admissible on question of motive or malice. Owen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 974, 105 SW 513. Where defendant was charged with killing aged couple to obtain their property, evidence that he was unable to pay bills shortly before was admissible to rebut testimony that he had money to purchase the property. People v. Bonier [N. Y.] 81 NE 949. Collateral crimes may be proved where they show malice or motive entering into the offense charged. Sanderson v. State [Ind.] 82 NE 525. On trial for a murder committed pursuant to conspiracy, evidence of prior assaults on decedent in endeavoring to get his property is admissible to show motive. Id. Such assaults are admissible whether or not accused was present at the time. Id. Where state's theory was that defendant's improper relations with other women caused estrangement with wife (deceased), testimony of witness that she had sustained improper relations with defendant for a year and a half, up to two years before the homicide, was admissible. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Where accused was heir at law of deceased, it was proper to show that accused had spoken of money that his father was supposed to have in a bank, but improper to show that accused was in indigent circumstances. Johnson v. State, 128 Ga. 71, 57 SE 84., Evidence that deceased had a large sum of money which was taken by accused held admissible. State v. Bailey, 79 Conn. 589, 65 A 951. Where theory of state was that accused enticed deceased to America and insured his life and then killed him to get the insurance, letters written by him to a young woman showing that he wanted to marry her, that he knew he would have to have money, and that he expected to get the sum necessary, were admissible to show a motive for the crime. People v. Soeder, 150 Cal. 12, 87 P 1016. The fact that the letters might tend to prejudice the jury against defendant would not affect their admissibility. Id. Evidence having a direct tendency to show motive for the crime is admissible, however discreditably it may reflect on defendant, and even where it may show him guilty of other crimes. Id. Homicide having been committed during a robbery, proof that defendant had asked where he could get money, and that he needed it, was admissible. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975. Where homicide occurred while a codefendant was attempting to arrest deceased under a peace warrant issued on complaint of defendant, proof of the issuance of the warrant, of the authorization of codefendant to execute it, and of what was done thereunder, was admissible to show motives of defendants. Neeley v. Com., 29 Ky. L. R. 408, 93 SW 596. Evidence of familiar relationship between accused and wife of another whom he shot at the same time he killed deceased is admissible to show motive. Menefee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 296, 97 SW 486. Proof of other crimes of accused is admissible to show motive or identity. State v. Spaugh, 200 Mo. 571, 98 SW 55. Where theory of a state was that decedent and accused were rivals for affections of a certain young woman, the woman was properly permitted to testify that defendant had attempted to have her leave house where deceased was paying her rent or he would burn it. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879. Letters written by defendant to the woman threatening decedent admissible. Id.

Held inadmissible: Altercation between decedent, defendant, and a third person not admissible to show motive on part of such third person in the absence of testimony that such third person might have committed the crime. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Evidence that defendant's wife confessed intimacy with decedent to defendant's son, not admissible where such confession was not communicated to him. Shipp v. Com., 30 Ky. L. R. 904, 99 SW 945. Information not communicated to accused prior to homicide and which might have furnished motive is not admissible. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 909, 105 SW 182. On prosecution for murder of pregnant girl, evidence that accused was responsible for her condition does not show that he committed the murder. State v. Francis, 199 Mo. 671, 98 SW 11. Where defendant's house was surrounded by armed men, and as soon as he appeared shooting commenced and one was killed, the persons who surrounded the house should not be permitted to testify as to their motive in going there. Tillman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 87, 101 SW 210.

98. Where defendant, a deputy sheriff, had on election day requested decedent, a constable, to move away from the polls, and that decedent started to draw his gun

entire res gestae of the assault or homicide may be shown, including all facts and circumstances leading up to or in any way constituting a part of the difficulty and the

and defendant shot him, evidence as to instructions defendant had received from his superior officer held admissible on question of intent and malice. Warford v. People [Colo.] 92 P 24. Also competent to show that defendant had been told decedent had made threats against him, that he was a dangerous man, and to take no chances with him. Id. In assault with intent to kill, testimony of attending physician as to extent and effect of injury admissible on question of intent. State v. Remington [Or.] 91 P 473. On prosecution for parricide, evidence of previous attempts on life of deceased is admissible. Holder v. State [Tenn.] 104 SW 225. Where guilt of defendant depends upon intent, purpose, or design with which the act is done or upon his guilty knowledge thereof, collateral facts in which he bore a part occurring immediately before the act complained of may be shown for purpose of showing guilty intent, design, or knowledge, even though such facts show commission of another crime. Clark v. State [Neb.] 113 NW 211. In prosecution for murder, proof that defendant directed a saloon keeper to give him water when he ordered gin, as he had a bet with deceased as to who could drink the most two or three months before the killing, was held admissible where there was evidence of an intent to kill two or three months before. State v. Banusik [N. J. Err. & App.] 64 A 994. That defendant went to town where homicide occurred to get evidence to put deceased under bond to keep the peace held inadmissible to show malice or premeditation. Lee v. State, 78 Ark. 77, 93 SW 754.

99. Held admissible: Where there was evidence that at time of shooting deceased was trying to handcuff accused, that his handcuffs were found in defendant's possession is admissible. Strickland v. State [Ala.] 44 S 90. Ownership of handcuffs found in defendant's possession which were claimed to have been in decedent's possession when he was killed is admissible. Id. Testimony as to condition of body of decedent's husband and his knife held admissible on question whether he killed her. Andrews v. State [Ala.] 44 S 696. A doctor who examined the murdered man may testify that cuts in his hat found on defendant's head corresponded with cuts on head. Commonwealth v. Karamarkovic [Pa.] 67 A 650. A witness may state direction in which tracks appeared to be going. Hickey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 142, 102 SW 417. Where it appeared that crime was committed with a forty-four caliber revolver, and that tracks led from scene of crime to defendant's home, a pistol of such caliber dug up several rods from the house is admissible. Moss v. State [Ala.] 44 S 598. Testimony as to tracks leading from scene of murder held admissible where state's theory was that after the killing defendant traveled over a certain road. Id. Where evidence showed that accused shot at prosecutor through window of prosecutor's house and ran off, it was proper to allow prosecutor to give his opinion that it was defendant who shot. Williams v. State [Ala.] 43 S 720. Testimony as to photographs taken of accused's hand held admissible where taken with his consent, and it appeared that it was deformed and marks made by it were found at place of homicide. Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 722, 99 SW 1005. Testimony that foot prints coming to and going from scene of crime look as if made by same person is admissible. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Where proof showed a conspiracy to murder, evidence that one of the conspirators were seen driving toward the scene of the murder is admissible. Bull v. Com., 29 Ky. L. R. 949, 96 SW 817. Where proof showed a conspiracy between several persons to murder, evidence that articles found near the dead body were property of one of the conspirators is admissible. Id. Where there was evidence of a conspiracy between defendant and another to murder defendant's husband, and proof that defendant sent money to the other and told him to come to the city where defendant lived, testimony by such third person as to why he came to the city was admissible. State v. Myers, 198 Mo. 225, 94 SW 237. Where there was evidence tending to show that a single tree had been used to strike blows which caused death, proof tending to connect defendant with the act and to show where the single tree was obtained was admissible. State v. Walker, 133 Iowa, 489, 110 NW 925. Accused may be asked if he did not have the watch of deceased in his possession, and contradicted if he denies it. State v. Kenny [S. C.] 57 SE 859. A witness may state that he called attention to fact that decedent had not been searched, and when searched a small pocket knife was found in his pocket. Waggoner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 717, 98 SW 255. Testimony that witness could not be sure whose voice he heard but that it was mighty like defendant's is not opinion. Id.

Held inadmissible: Not error to exclude testimony that defendant's brother offered his own horse for comparison of tracks with those found near the scene of crime which the state claimed were made by defendant's horse. Sasser v. State [Ga.] 59 SE 255. Evidence that defendant said between the 1st and 15th of October that he must hurry and go to meet decedent "between five and six" has no tendency to prove that defendant murdered deceased on 3rd of following November. State v. Francis, 199 Mo. 671, 98 SW 11. Where two persons were separately indicted, it is error to permit evidence of the kind of hat one wore after the difficulty, on a trial of the other. Parnell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 331, 98 SW 269. Evidence that accused had been identified as a man witness had seen passing along the street shortly after the killing is not admissible where accused was under arrest at the time. Ripley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 49, 100 SW 943.

assault or homicide, or arising naturally therefrom,[1] but subsequent acts or declara-

1. Conversation which occurred between the parties immediately before the killing is res gestae. Fleming v. State [Ala.] 43 S 219. What accused did immediaately after killing is res gestae. Pate v. State [Ala.] 43 S 343. Testimony showing defendant's conduct, demeanor, and frame of mind at time held improperly refused as it was res gestae. Young v. State [Ala.] 43 S 100. Physician may testify to statements made by deceased as to his condition, pain, location and nature of injuries while suffering therefrom. Gregory v. State [Ala.] 42 S 829. Where it was shown that decedent fell with his hand in his bosom, it is proper to show that he died in same position. Bluett v. State [Ala.] 44 S 84. Evidence that just after shooting accused said he had done wrong, in response to statement of another that he had made a mistake, held admissible. Fuller v. State, 127 Ga. 47, 55 SE 1047. Where homicide resulted from statement alleged to have been made by accused to a third person concerning wife of decedent, what such third person said at time of difficulty resulting in the killing is res gestae. State v. Rutledge [Iowa] 113 NW 461. Statements made by defendant immediately after the homicide that he had killed decedent in self-defense held res gestae. Id. Proof that witness gave defendant a letter from deceased a few days before the commission of the offense held admissible in prosecution for murder by an attempt to produce an abortion. Clark v. People, 224 Ill. 554, 79 NE 941. Declaration by accused shortly after killing that he had killed deceased "deader than hell" admissible. Stacy v. Com., 29 Ky. L. R. 1242, 97 SW 39. Declarations of deceased immediately after shooting that they had killed him and that the shots came from a certain place held res gestae. Commonwealth v. Hargis, 30 Ky. L. R. 510, 99 SW 348. Exclamations of son of decedent "don't shoot pap" uttered immediately before the shooting is part of res gestae. Kennedy v. Com., 30 Ky. L. R. 1063, 100 SW 242. Nonexpert can testify as to cause of death where it is such that an ordinary person can understand and testify to. State v. Caron, 118 La. 349, 42 S 960. Exclamations of decedent at the time he is shot are res gestae, also what transpired between the parties as basis for exclamation. State v. Lively, 119 La. 363, 44 S 128. Proof of what occurred at accused's home in his presence two hours after the killing held admissible. People v. Tubbs, 147 Mich. 1, 13 Det. Leg. N. 959, 110 NW 132. Declaration of third person mortally wounded in same affray that defendant shot him and deceased held admissible as part of res gestae. State v. Williams, 96 Minn. 351, 105 NW 265. Where two parties attacked and stabbed another, all acts occurring at the time are res gestae. McCoy v. State [Miss.] 44 S 814. Proof that defendant's brother, jointly indicted, had an open knife during the affray, and that a third person was cut, admissible as res gestae. State v. Woodward, 191 Mo. 617, 90 SW 90. All that occurred at the time of the killing, including the fact that accused at the time shot another person, is res gestae. State v. Cavin, 199 Mo. 154, 97 SW 573. On prosecution for killing of a prison guard by convicts in attempt to escape, evidence of killing of another guard at the same time admissible as res gestae. State v. Vaughn, 200 Mo. 23, 98 SW 2. Declaration of defendant's son, "Well, it has happened," after learning of the shooting, is admissible. State v. Edwards, 203 Mo. 528, 102 SW 520. Evidence that defendant was intoxicated at the time and had an altercation with deceased which resulted in the shooting held admissible as res gestae. Territory v. Price [N. M.] 91 P 733. Evidence that accused was intoxicated half an hour before the homicide and of a conversation with him tending to show intoxication held relevant. State v. Rowell, 75 S. C. 494, 56 SE 23. Proof of the shooting of a child by defendant while shooting deceased held admissible as a part of the res gestae. Stevison v. State [Tex. Cr. App.] 89 SW 1072. But it is error to tell the jury that that evidence may be considered in determining whether defendant was guilty of murder in shooting deceased. Id. Defendant shortly after killing went to a physician to have a wound on his arm dressed, and stated to the physician that the wound was given by deceased just before the fatal shot was fired. The statement was held admissible in defendant's favor. Wakefield v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 558, 94 SW 1046. In homicide case, proof that deceased said 15 or 20 minutes after difficulty, "What a pity! they killed me for nothing," was admissible as res gestae. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. Witness having testified that he was wounded in same affray in which deceased was killed, by defendant, held proper to allow witness to show his scar on issue of manner in which wound was produced. Alarcon v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 383, 90 SW 179. It is admissible to show that accused and his companions committed another murder immediately after the crime in question was committed. Campos v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 511, 95 SW 1042. Where accused killed two persons at same time and the indictment restricts the killing to one, evidence as to killing of other is admissible as res gestae. Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 76, 97 SW 100. The idea of concocted story being precluded, a statement by deceased shortly after the shooting "Why did he do it" held admissible. Moore v. State [Tex. Cr. App.] 96 SW 321. Where two altercations were a part of the same affair, evidence of the former is admissible as res gestae. McKinney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 545, 96 SW 48. Conversation between accused and another immediately after killing is admissible. Pratt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 599, 96 SW 8. Where two brothers were jointly indicted on trial of one, proof that they were standing in front of the store talking just before the killing occurred was admissible. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. Evidence that at the time of killing accused shot another person is res gestae. Menefee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 296, 97 SW 486. Evi-

tions of the parties or others are usually inadmissible.[2] Threats by accused against deceased may be shown,[3] but threats against others are usually inadmissible.[4] Proof

dence of conversation between deceased and accused just prior to the homicide and what transpired between them is res gestae. Waggoner v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 717, 98 SW 255. Where accused shot two persons at same time, evidence as to killing of the other is res gestae. Nelson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 140, 101 SW 1012. Evidence of conversation between deceased and accused shortly prior to killing admissible as res gestae. Lahue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 125, 101 SW 1008. Statements made by decedent immediately after being shot relative to the shooting are res gestae. Bice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 61, 100 SW 949. Evidence of circumstances immediately preceding shooting of decedent, a peace officer, held admissible as res gestae. Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403. In a prosecution for homicide committed pursuant to a conspiracy between defendant, a minor, and his father and mother with whom he lived, to resist the execution of a writ of possession, testimony is admissible of the salient facts attending service of first writ of possession and matter even antedating that and amicable disposition of the writ disseissees, especially where defendant introduced evidence to show previous trouble between the disseissees and his parents. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 SW 817. Conversations had at the time of the homicide between defendant's father and the persons attempting to dispossess them, showing that the latter were officers and were seeking to execute the writ, admissible as being part of the res gestae, especially where defendant saw them, had reason to know they were officers, and did not himself give the deceased an opportunity to state his mission. Id. It is admissible to show that just before the homicide defendant approached witness and decedent and stated that he desired to see decedent alone, and upon witness saying she would withdraw decedent asked her not to. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445.

2. Statement by defendant some hours after shooting that his gun was loaded and he intended to shoot until it melted if they did not quit running over him, not referring to any particular person, not res gestae. Deal v. State [Ark.] 100 SW 75. Statement made by defendant after the killing not res gestae where it does not appear how soon after nor where it was made. Mitchell v. State [Ark.] 101 SW 763. Declarations of relatives after the homicide not admissible to show state of feeling. Declaration of mother of deceased that she was surprised that her son did not kill defendant. Bundrick v. State, 125 Ga. 753, 54 SE 683. Statements of deceased three days after affray, not shown to be dying declaration, held inadmissible. State v. Barber [Idaho] 88 P 418. Evidence of statements made by deceased 15 minutes after difficulty to attending physician not res gestae. State v. Birks, 199 Mo. 263, 97 SW 578. Declarations of defendant as to why he shot decedent not being res gestae are not admissible. State v. Long, 201 Mo. 664, 100 SW 587. Where deceased was shot in one saloon and fled to another and shortly after his arrival there made statements to officers as to the shooting, they were not res gestae. State v. Kelleher, 201 Mo. 614, 100 SW 470. Statement of accused "I told you I would come to you" made to sheriff some time after the killing and after defendant's arrest by constable not admissible as res gestae because too remote and not relating to the homicide. Fuller v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 413, 95 SW 541. Declaration of bystander that deceased snapped his pistol at accused and that accused grabbed his gun from the bystander and shot decedent not admissible as res gestae. Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 SW 496. Evidence of conduct and statements of two persons separately indicted with defendant which occured in his absence a long time after the killing is not admissible. Parnell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 331, 98 SW 269. Declaration by one conspirator made after he had withdrawn from the difficulty and was in no manner aiding it held inadmissible. People v. Smith [Cal.] 91 P 511.

3. Threats by accused to kill decedent are admissible. Bluett v. State [Ala.] 44 S 84. In prosecution for assault with intent to commit murder, evidence that accused said he was going to shoot deceased, that he told another he was going to kill deceased's whole family, and that he possessed a pistol before the assault, was admissible. Esterline v. State [Md.] 66 A 269. State may prove threats of defendant to kill deceased. Heninburg v. State [Ala.] 43 S 959. Statement of defendant in nature of threat toward decedent held admissible. Owen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 974, 105 SW 513. Threat held sufficiently shown to have been directed at deceased to be admissible, where defendant approached her with drawn knife and returned and remarked that he was going to start something, and shortly afterward stabbed decedent. Armstrong v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 812, 98 SW 844. Evidence of threats is admissible. Manning v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 388, 98 SW 251. If there is sufficient evidence of the corpus delicti to make it a question for the jury, threats of defendant are admissible. Parham v. State, 147 Ala. 57, 42 S 1. Threats by defendant against deceased a week before homicide admissible. Id. Where homicide occurred while a writ of possession was being executed by deceased and an officer, proof that defendant had said a year before that he would not give up possession and would die before surrendering if they sought to eject him was admissible. Williams v. State, 147 Ala. 10, 41 S 992. Upon trial of a person, threats by a third person against deceased may be proved if accompanied by proof connecting such person with the crime. State v. Cremeans [W. Va.] 57 SE 405. Previous threats by defendant admissible though not directly connected with the killing. Franklin v. State [Ala.] 39 S 979. Evidence as to time when such threats were made is admissible though not exact. Bluett v. State [Ala.] 44 S 84.

of prior difficulties between the parties is admissible,[5] but the details of such difficulties may not be shown.[6] The defendant may show his previous good reputation [7] by proper evidence,[8] and when he places it in issue the state may attack it,[9] but proof of particular acts or offenses is usually excluded.[10] In Texas, where insults

Proof of defendant's reckless disregard and drunken bravado just before homicide held admissible. McLin v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 881, 90 SW 1107. Threats by deceased and defendant could not be proved by witness who could not tell which party had made certain threats. State v. Blee, 133 Iowa, 725, 111 NW 19. Proof that defendant said there would be trouble some day at the place in question held not proof of a threat. Wright v. State [Ala.] 42 S 745.

4. Threats to kill another person for cause for which decedent was killed not admissible. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879. Threats by defendant having no reference to deceased or any member of his family held inadmissible. George v. State, 145 Ala. 41, 40 S 961.

5. Evidence of altercations 10 years previous are admissible; remoteness goes only to weight. State v. Schuyler [N. J. Err. & App.] 68 A 56. Proof of a difficulty between defendant and deceased three days before the killing held admissible to relations between them. State v. Fielding [Iowa] 112 NW 539. Where decedent came into a saloon where accused was and stated that he was looking for trouble, and that defendant became agitated and commenced shooting, and it appeared that decedent held a knife at the time, held proper to admit evidence that decedent had previously assaulted accused and that accused avoided him whenever he could. White v. Com. [Ky.] 102 SW 298, 1199. In prosecution for murder, where self-defense is the defense, proof of the fact of a former affray, and who had been the aggressor therein, was admissible, but not the details of such former difficulty. State v. Blee, 133 Iowa, 725, 111 NW 19. The fact of former difficulties between deceased and accused is admissible but not the details of such difficulties. State v. Birks, 199 Mo. 263, 97 SW 578. Whether foundation has been laid for introduction of proof of former difficulties between accused and deceased by proof of any overt act on the part of accused held a question for the trial court's discretion. State v. Craft, 118 La. 117, 42 S 718.

Contra: Evidence as to prior difficulties properly excluded. Bluett v. State [Ala.] 44 S 84. Evidence of prior difficulty held not admissible. State v. Rutledge [Iowa] 113 NW 461. Proof of prior difficulties and an attempt by deceased on life of defendant is admissible to show motive and malice. State v. Clark, 119 La. 733, 44 S 449.

6. Details of prior difficulty at different time and place not admissible. Fleming v. State [Ala.] 43 S 219. Particulars of prior difficulty not admissible. McCoy v. State [Miss.] 44 S 814. Accused may not testify as to particulars of previous difficulty with decedent. Logan v. State [Ala.] 43 S 10.

7. The good reputation of the accused relative to traits of character involved is to be considered by the jury. People v. Van Gaasbeck [N. Y.] 82 NE 718. Evidence that accused enjoyed a good reputation for peaceableness is admissible. Id. On prosecution of peace officer for negligent homicide, general reputation as cautious and prudent man is admissible. Saye v. State [Tex. Cr. App.] 99 SW 551. Where self-defense is asserted, accused may show his character as a peaceable man. State v. Rutledge [Iowa] 113 NW 461. There being evidence that defendant acted in self-defense, it was proper to exclude evidence of defendant's character for peace and quiet without accompanying evidence to show that deceased was a violent and dangerous man. Tribble v. State, 145 Ala. 23, 40 S 938.

8. Defendant may show his general character and reputation as a peaceable and law abiding man, and negative testimony by witnesses having required knowledge of him that they have never heard his character for peaceableness questioned is competent. State v. Cremeans [W. Va.] 57 SE 405. Error to exclude evidence of the general reputation of defendant as a peaceable law abiding citizen in the neighborhood for 20 years or more, and up to from 2 to 4 years of the time of the killing, even though proof of reputation 2 or 4 years preceding was admitted. This evidence is not so remote as to have no probative value. State v. Simmons, 74 Kan. 799, 88 P 57. Proof of defendant's peaceable and quiet disposition in a town where he lived for many years before moving to the town where the homicide occurred four or five years before held admissible. People v. Van Gaasbeck, 118 App. Div. 511, 103 NYS 249. In assault with intent to kill, evidence that accused had a pistol on his person at the time is admissible as showing his character. State v. Spaugh, 199 Mo. 147, 97 SW 901. Character evidence must be limited to the witness' knowledge of defendant's reputation and cannot be as to that they have never heard his character solely from personal knowledge and observation by witness. People v. Van Gaasbeck [N. Y.] 82 NE 718. Testimony that witness never heard anything against the character of the accused is admissible. Id. Witness cannot testify merely of his personal knowledge of another's unworthiness aside from his general reputation. Hughes v. State [Ala.] 44 S 694. Testimony that defendant must have been a pretty good man to belong to the lodge he did properly refused. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445.

9. Where accused puts his character for peace and quietude in issue, it is open to attack by state. Weaver v. State [Ark.] 102 SW 713.

10. Evidence of a burglary committed by defendant four years prior to the crime is inadmissible for remoteness. Commonwealth v. Parsons [Mass.] 81 NE 291. Evidence that defendant had committed crime of sodomy is not admissible. State v. Hazlett [N. D.] 113 NW 374. Character witness

to a female relative are relied upon as justification; the character of the female is in issue but cannot be attacked by proof of specific acts.[11] Incriminating acts or declarations of accused may be shown,[12] including declarations and admissions against interest.[13] Real or demonstrative evidence, such as the weapon or other means of injury or death,[14] the wound or scar of the person killed or injured,[15] clothing worn by deceased[16] or accused.[17] photographs and maps,[18] is competent when properly and adequately identified and connected with the crime or with accused.[19]

could not testify that after the homicide he heard reports that accused had run his stepfather away from home and threatened to kill his school teacher. Powers v. State, 117 Tenn. 363, 97 SW 815. Evidence of prior offenses showing moral turpitude is admissible. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Evidence of prior murder and rape. Id.

11. Evidence of specific acts of adultery not admissible under Pen. Code, art. 704, providing that where it is sought to reduce homicide to manslaughter because of insults to female relative general character of female may be proved. Jones v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 172, 101 SW 993.

12. Where evidence was all circumstantial and it appeared that decedent had been in a certain bawdy house several times during day of his death, evidence that some of the women left the house next day and that parties who were in the house left the state next day is admissible. Haywood v. State [Miss.] 43 S 614. Flight of accused after crime and resistence of arrest is admissible. State v. Spaugh, 200 Mo. 571, 98 SW 55. Evidence that as accused was escaping shortly after homicide he shot at a person approaching him and whom he suspected was pursuing him is admissible. Id. In trial of wife for murder of husband, it may be shown that she did not attend the funeral. State v. Myers, 198 Mo. 225, 94 SW 237. Acts and conduct of accused after homicide may be shown though not a part of the res gestae. State v. Hogan, 117 La. 863, 42 S 352. Not admissible to show that defendant surrendered to sheriff where there was no proof of flight. Brown v. State [Ala.] 43 S 194.

13. Statements made in presence of accused, who remains silent, are admissible if by such silence he assented to the truth. O'Hearn v. State [Neb.] 113 NW 130. Statements by deceased in presence of accused who was then under arrest for the crime not admissible. State v. Kelleher, 201 Mo. 614, 100 SW 470. Testimony of a witness as to what he heard of a conversation between defendant and another shortly before the difficulty is admissible though the witness did not hear all that was said. Woodward v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 128, 97 SW 499. Prosecution may show by other witnesses conversation between defendant and another party for the purpose of showing admissions against interest. Loudenback v. Territory [Okl.] 91 P 1030.

14. Where fatal wound was produced with a knife, it was proper to allow a knife found near scene of homicide to be introduced and identified and to prove its width and length. Alarcon v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 383, 90 SW 179. On trial for assault with intent to commit murder, it is proper to exhibit to the jury the weapon with which assault is alleged to have been made, and to identify it as the weapon used. Jackson v. State [Tex. Cr. App.] 90 SW 34. Gun held admissible where there was evidence that it was the one used. Clefford v. People, 229 Ill. 633, 82 NE 343. Where decedent died from a pistol wound, bullet found in his body is admissible. Moss v. State [Ala.] 44 S 598. Where homicide was committed with blunt instrument, hammer stained with blood found near the scene of crime held admissible. People v. Bonier [N. Y.] 81 NE 949. Where there is an issue as to the deadly character of weapon, the instrument may be considered in judging intent. Hardin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 231, 103 SW 401. Jack knife taken from pocket of deceased after shooting and identified as one decedent had in his hand a few minutes before the crime is admissible as against objection that it was not shown that he might not have had some other weapon. Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509. Bullets of same caliber as defendant's pistol found at scene of crime 100 days after killing admissible. Hickey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 142, 102 SW 417. Pistol cartridges and shells used at killing admissible. Id.

15. Scar of wound inflicted by stabbing may be exhibited in assault with intent to kill. Mayes v State [Tex. Cr. App.] 18 Tex. Ct. Rep. 966, 100 SW 386. Not error to refuse to require sheriff to produce decedent's skull on an issue as to whether he was killed by 44 caliber bullet, where physicians were present who had dissected the skull. Moss v. State [Ala.] 44 S 598. Condition and character of wounds of person assaulted may be shown in prosecution for assault with intent to kill. Wright v. State [Ala.] 42 S 745.

16. Clothing worn by deceased at time of killing held admissible when shown to be in same condition at time of trial. State v. Craft, 118 La. 117, 42 S 718. Clothing of deceased showing cuts made by knife used held admissible. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 685, 93 SW 116. Clothes worn by decedent at time properly admitted. Pate v. State [Ala.] 43 S 343. Clothing worn by decedent at time he was shot is admissible. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Undershirt worn by decedent at time showing where he was shot admissible though it has been washed in meantime. Clark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 199, 102 SW 1136.

17. Where it appeared that on night of homicide accused was wearing an overcoat, and an overcoat with blood stains on it was found after the homicide, it was held proper to admit it. Ozark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 69, 100 SW 927.

18. Map of scene of crime held admissible.

The competency of confessions and of acts and declarations of conspirators is treated elsewhere.[20]

A few decisions as to what constitutes harmless and prejudicial error in the admission or exclusion of evidence are referred to in the note,[21] the subject being more fully treated elsewhere.[22]

Justification. See 8 C. L. 113—On the issue of self-defense, evidence tending to to show the relative size, strength, and physical condition of the parties,[23] and whether they were armed,[24] is admissible. Unless it appears that accused was the aggressor,[25] threats by deceased, communicated to defendant, may be shown.[26] Un-

State v. Remington [Or.] 91 P 473. Photograph of scene of homicide held admissible. People v. Grill [Cal.] 91 P 515.

19. Shoe properly identified as that of accused so that evidence regarding it tending to connect accused with crime was admissible. Du Bose v. State [Ala.] 42 S 862. Witness identified a tie with blood on it, found near the place of the homicide, as one defendant had worn just prior to killing. Held proper to permit him to testify that tie exhibited looked like the one owned and worn by defendant. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975. There being evidence that defendant had been seen where there were certain tracks, held proper to allow state to show that shoes exhibited to witness would make tracks like those seen. Id. Photograph of scene of killing not taken under conditions existing at time of killing not admissible. Newcomb v. State [Tex. Cr. App.] 95 SW 1048. Articles found in defendant's house corresponding to similar articles seen at scene of homicide held admissible. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975. Where killing occurred during difficulty over alleged ballot stuffing in a political club election, it was proper to admit a bunch of ballots claimed to have been forced into the box by a certain party who denied the act. Roberts v. People, 226 Ill. 296, 80 NE 776. There was evidence that deceased had a pistol at the time of his death which he kept in a box which had a picture of the pistol on the outside, also that defendant had a similar pistol in his possession. Box, properly identified, was admissible. Shelton v. State, 144 Ala. 106, 42 S 30.

20. See Indictment and Prosecution, 8 C. L. 189.

21. Where it appeared that just prior to his death decedent was intoxicated and in a stupor, evidence that he had unsuccessfully attempted to purchase morphine on night of crime was not prejudicial to accused. Ozark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 69, 100 SW 927. Not reversible error that evidence by the state tending to show that defendant shot a different person from the one he was charged with killing by the indictment. State v. Cavin, 199 Mo. 154, 97 SW 573. Admission of indictment against deceased, found before the killing, charging him with assault on accused, is harmless where the facts forming basis of indictment were shown. Moore v. State [Tex. Cr. App.] 96 SW 321. Where theory of accused was that deceased was killed by a horse, testimony that there was a struggle between deceased and the horse was harmless. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 220, 95 SW 521. Admission of statements made by defendant on day preceding homicide that he was going to kill a man that day and had a pistol held prejudicial. Washington v. State [Ark.] 103 SW 617. Admission of statement by decedent too indefinite to constitute threat not prejudicial to accused. Newton v. Com. [Ky.] 102 SW 264.

22. See Harmless and Prejudicial Error, 9 C. L. 1563; Indictment and Prosecution, 8 C. L. 189.

23. Where self-defense is asserted, defendant may show that decedent was a strong man and resorted to use of weapons. State v. Rutledge [Iowa] 113 NW 461. Where accused claimed that deceased was trying to get a pistol out of a drawer and that he seized him to prevent him from doing so, evidence of the relative strength of the parties is admissible. Newcomb v. State [Tex. Cr. App.] 95 SW 1048. Testimony that decedent was a large strong man and defendant a small cripple is admissible to show whether defendant had reasonable ground to fear attack by decedent. Humber v. Com. [Ky.] 102 SW 1179. On an issue of self-defense, defendant may show that he was smaller and weaker than deceased and was sick. People v. Smith [Cal.] 91 P 511. Relative size and physical condition of deceased as well as of defendant may ordinarily be shown by testimony of facts. State v. Barber [Idaho] 88 P 418.

24. Where state claimed decedent was not armed and accused claimed he was armed with a small pistol, proof of a statement by decedent to witness as to what he did with a large pistol was inadmissible. Lee v. State, 78 Ark. 77, 93 SW 754. Where self-defense is asserted, it is error to refuse to permit defendant to prove that he had seen a pistol on person of decedent a day or two before the tragedy. Kennedy v. Com. [Ky.] 102 SW 863. Evidence as to how often decedent had been seen with a pistol not admissible. Bluett v. State [Ala.] 44 S 84.

25. Threats properly excluded where defendant was aggressor. Fleming v. State [Ala.] 43 S 219. Threats are not admissible on issue of self-defense where it is shown that decedent was not the aggressor. Black v. State [Ark.] 104 SW 1104. Uncommunicated threats not admissible where there was no evidence that parties who made the threats assaulted defendant and the trial court was not advised that self-defense would be interposed. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Unless there was an attack by deceased, his previous threats against defendant are inadmissible. Evidence held to show no attack. Guy v. State, 37 Ind. App. 691, 77 NE 855. Proof of threats by deceased inadmissible

communicated threats are also held admissible in some jurisdictions,[27] but in others uncommunicated threats are admissible only to show which party was the aggressor.[28] The character or general reputation of deceased is in issue only when attacked by accused [29] to support his plea of self-defense.[30] Character must be proved

where evidence showed that defendant brought on the difficulty. Skipper v. State, 144 Ala. 100, 42 S 43.

26. Threats by deceased communicated to defendant held admissible to explain defendant's mental attitude and possession of weapon. State v. Clifford, 59 W. Va. 1, 52 SE 981. Where accused set up defense of himself and of another as an excuse, proof of threats by decedent against such other, and that such threats were communicated to defendant, was admissible. State v. Hennessy [Nev.] 90 P 221. Threats by decedent against defendant are admissible. Burton v. State [Ark.] 102 SW 362. Threats made by decedent against accused a week or two before the killing are admissible. State v. King, 203 Mo. 560, 102 SW 515. Communicated threats of decedent to kill accused are admissible. Bluett v. State [Ala.] 44 S 84.

27. Uncommunicated threats are admissible where there is any evidence of self-defense. Warford v. People [Colo.] 92 P 24. Uncommunicated threats are admissible to show decedent's mind before killing and to show who was aggressor. Commonwealth v. Thomas [Ky.] 104 SW 326. On an issue of self-defense, uncommunicated threats are admissible. Neathery v. People, 227 Ill. 110, 81 NE 16. Where self-defense is asserted, threats of decedent to kill defendant the first time they met, made an hour before the killing, are admissible though not communicated to defendant. State v. Jackman [Nev.] 91 P 143. Where charge was manslaughter, and defense was self-defense, and it appeared from the evidence that defendant and deceased were in actual collision at the time of the killing, previous threats by deceased against defendant were competent though not communicated to defendant. State v. Scaduto [N. J. Law] 65 A 908. Uncommunicated threats are admissible as throwing light on decedent's acts at time of killing. State v. Edwards, 203 Mo. 528, 102 SW 520. Where there was evidence of a conspiracy by accused and others in pursuance of which the difficulty arose, threats by conspirators were relevant. State v. Clifford, 59 W. Va. 1, 52 SE 981. Proof of uncommunicated threats is admissible to show ill will of decedent toward accused. Newton v. Com. [Ky.] 102 SW 264.

Held inadmissible: Evidence that on day of homicide deceased exhibited a pistol and said it was loaded for a certain person other than accused "or anybody else" is not admissible. Barbee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 377, 97 SW 1058. Evidence that decedent had stated after a prior fight with defendant that it was a good thing that some one had interfered or he would have knocked defendant down with his pistol not admissible as threat. Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868.

28. Uncommunicated threats are not admissible where there is no dispute as to who was the aggressor, but they may be shown where that question is mooted or where there are no eyewitnesses to show who was most likely the aggressor. State v. Barber [Idaho] 88 P 418. On the issue of who was the aggressor in a fatal affray, and as to defendant's attitude of mind to deceased, and to corroborate evidence of communicated threats, proof of uncommunicated threats by deceased may be introduced. State v. Blee, 133 Iowa, 725, 111 NW 19. Threats made by deceased but not communicated to accused may be considered in explaining conduct of deceased and in determining who was the aggressor. State v. Darling, 199 Mo. 168, 97 SW 592. Uncommunicated threats are admissible where evidence as to who was the aggressor is conflicting. State v. Kelleher, 201 Mo. 614, 100 SW 470. Where testimony is conflicting as to who was the aggressor, proof of uncommunicated threats by deceased against defendant may be considered in determining who was the aggressor. State v. Birks, 199 Mo. 263, 97 SW 578.

29. Not error to sustain objection to question asked a witness for the state as to general character of deceased where his character was not in issue. Kirby v. State [Ala.] 44 S 38. Where defendant assails character of decedent the state may rebut. Weaver v. State [Ark.] 102 SW 713. Prosecution cannot show reputation of deceased for peaceableness unless it is first attacked. Kelly v. People, 229 Ill. 81, 82 NE 198. Prosecution cannot show reputation of deceased for peacefulness though defendant offers evidence of his own reputation. Id. That defense shows that decedent was large strong man, not a pugilist, is not evidence of bad reputation for peaceableness. Id. Reputation of decedent for peaceableness is presumed good, and the prosecution cannot introduce evidence thereof unless it is first attacked. Id. The general reputation of deceased for peace and quiet, unless known to defendant at the time of the affray, or where the question as to who was the aggressor is in doubt, is inadmissible. State v. Barber [Idaho] 88 P 418. On prosecution of officer for killing a person to prevent his escape, evidence as to reputation of deceased among peace officers as distinguished from his acquaintances generally is not admissible. Stevens v. Com., 30 Ky. L. R. 290, 98 SW 284. Where at the time of killing decedent had made no hostile demonstration against accused, evidence of prior threats is not admissible, nor is the reputation of deceased as a dangerous man, as such facts could not justify the killing. State v. Coleman, 119 La. 669, 44 S 338. Evidence of deceased's habits of drinking extending over a period long prior to and up to the commission of the crime held inadmissible in prosecution for murder. Birkenfeld v. State, 104 Md. 253, 65 A 1. State cannot show good character of person assaulted where it is not attacked. Woods v. State [Miss.] 43 S 433. Where defendant attacks deceased's reputation, the state may in rebuttal show that his reputation was good. State v. Woodward, 191 Mo. 617, 90 SW 90. The state may not take the initiative

by competent evidence.[31] Other holdings as to the admissibility of evidence to sustain or disprove the plea of justification are given in the note.[32]

(§ 7) *C. Dying declarations.*[See 8 C. L. 115]—Statements of deceased are admissible as dying declarations only when a predicate has been laid [33] by the introduction of proper evidence [34] showing that the declaration was made under a sense

in putting character of decedent in issue. Bays v. State [Tex. Cr. App.] 99 SW 561. Cross-examination of witness held not evasion of this rule. Id. Pen. Code 1895, art. 713, authorizing evidence of threats in justification whereupon the state may prove reputation of decedent, does not authorize proof of reputation until attack thereon by accused unless such threats have been communicated. Arnwine v. State [Tex. Cr. App.] 99 SW 97. The state cannot, in the first instance, put the character of deceased in issue as being a peaceable and inoffensive man. Puryear v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 721, 98 SW 258. In prosecution for killing of deceased by his wife's son, evidence of difficulties between deceased and his wife in which deceased may have assaulted her, and that he had separated from her twice, held not to warrant admission of proof of deceased's reputation for peace and quiet. Wakefield v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 558, 94 SW 1046. Proof of the reputation of deceased for peace and quiet is inadmissible until his reputation has been attacked by accused. Keith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 516, 94 SW 1044. Where defendant claimed he shot deceased because he found him in a compromising position with his wife and offered positive proof that deceased had debauched his wife, this did not place deceased's character for virtue in issue so as to warrant admission of evidence of deceased's general reputation for chastity in the community. Gregory v. State [Tex. Cr. App.] 94 SW 1041.

30. Evidence of character of decedent is admissible only when showing of self-defense is made. State v. Zorn, 202 Mo. 12, 100 SW 591. Self-defense being pleaded, proof that decedent was a violent and dangerous man was competent to show who was the aggressor and the nature of the assault, though decedent's reputation was not known to defendant. State v. Thompson [Or.] 88 P 583. Defendant puts reputation of deceased in issue so as to admit evidence by the state that it is good, where he seeks to justify under Pen. Code 1895, art. 713, on ground of threats, where he testifies that, when h ewent to see deceased, deceased made a demonstration against him by pulling a knife. Menefee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 296, 97 SW 486. Where there was no proof of violence by prosecutor, proof of his reputation as a dangerous man is not admissible. Roch v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 903, 105 SW 202.

31. Reputation of decedent for shooting people not proper method of proving character. Bluett v. State [Ala.] 44 S 84. Specific acts of violence by deceased not admissible in addition to proof of general character. McCoy v. State [Miss.] 44 S 814.

32. Condition of prosecutor shortly after alleged assault with intent to kill, relevant. Jacobs v. State, 146 Ala. 103, 42 S 70. Where self-defense is asserted, accused may show that he threw away the razor with which he cut decedent and why he cut him. State v. Rutledge [Iowa] 113 NW 461. Where in assault with intent to kill justification in resisting unlawful arrest is asserted, evidence to show justification for making the arrest is admissible though it tends to show commission of another crime. State v. Baruth [Wash.] 91 P 977. In prosecution for manslaughter, evidence on issue of self-defense tending to show the shot could not have been fired as claimed was held admissible though it inferentially assumed a higher degree of crime than manslaughter. State v. Usher [Iowa] 111 NW 811. Where self-defense is asserted, accused may show by an expert whether the fatal blow was inflicted by blow or cut. State v. Rutledge [Iowa] 113 NW 461. Improper to show that defendant had been warned to look out for decedent; nothing to show ground for warning. Commonwealth v. Thomas [Ky.] 104 SW 326. Evidence of insanity is not relevant to existence of adequate cause. Sartin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 321, 103 SW 875. Where a material element of defense was that decedent had criminally assaulted defendant and that she feared another assault, it was admissible to show that defendant had been seen with bruises on her neck and arms and that deceased had been seen following her and making indecent remarks. People v. Williamson [Cal. App.] 92 P 313. Where defense was self-defense, proof of the intent of others who accompanied deceased was immaterial. Roberts v. People, 226 Ill. 296, 80 NE 776. Evidence of property rights of parties to difficulty inadmissible where self-defense and not defense of property was pleaded. State v. Blee, 133 Iowa, 725, 111 NW 19. Where evidence showed enmity between accused and deceased and that on the night of the homicide some one fired into accused's house, evidence as to shooting that occurred at his home on a prior occasion is not admissible as it was no justification. Hopper v. Com. [Ky.] 96 SW 838.

33. While dying declarations should be received with caution, slight preliminary proof will justify their admission. Moody v. State, 1 Ga. App. 772, 58 SE 262. Proper to refuse to charge that dying declarations are to be received with great caution. Brown v. State [Ala.] 43 S 194. Witness may testify that decedent told him he was going to die as predicate for dying declarations. Pate v. State [Ala.] 43 S 343. Sufficient predicate laid for admission of declarations. Id. Where deceased lingered two weeks, suffering from peritonitis, had a chill, and was worse, held, surrounding circumstances constituted sufficient predicate for admission of dying declarations. McEwen v. State [Ala.] 44 S 619.

34. Foundation for admission of dying declarations may be by express statements of decedent of his sense of impending death. State v. Biango [N. J. Law] 68 A 125. State-

of impending death[35] and after all hope of recovery had been abandoned.[36] It

ment just before declaration as to shooting that he was a dead one, and asking for a priest, held admissible. State v. Kelleher, 201 Mo. 614, 100 SW 470. In laying foundation for introduction of dying declarations, not error to refuse to admit evidence that decedent refused to send for a minister or his relatives at the time. State v. Zorn, 202 Mo. 12, 100 SW 591. What decedent said at time he made dying declarations as to not wanting a minister not admissible, it not appearing whether decedent was an infidel. Id. Evidence as to decedent's advice to his relatives held not admissible in laying foundation for dying declaration. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Whether declarant was under a sense of impending death is to be determined not only from his statements but also from his conduct, manner, symptoms, and condition, which flow as the natural and reasonable results from the extent and character of his wound or illness. Williams v. State, 168 Ind. 87, 79 NE 1079.

35. It must appear that declarant was impressed with belief that death was impending. Delaney v. State [Ala.] 42 S 815. Declaration competent where declarant said he was going to die and was dead already from the stomach down. Gregory v. State [Ala.] 42 S 829. Declarations made by decedent after he stated that he knew he was going to die held dying declarations. Logan v. State [Ala.] 43 S 10. Showing that deceased told his brother that he would never get well and that he told another who made him a cigarette that it was the last one she would ever make for him held sufficient predicate for admission of his statements as dying declarations. Brown v. State [Ala.] 43 S 194. Evidence that deceased stated in response to a question that she knew she was fatally wounded is a sufficient predicate to admit dying declarations. Heninburg v. State [Ala.] 43 S 959. Written declaration after deceased had said that he was going to die held admissible though he told the magistrate who took the statement that he was feeling well and asked him if he thought he would die. Rose v. State, 144 Ala. 114, 42 S 21. Evidence sufficient to show that dying declarations were made under fear of impending death. Fogg v. State [Ark.] 99 SW 537. Where deceased said they were taking her away and that she was going to die, and showed her wound and made reference to her injuries, her statement was admissible as a dying declaration. State v. Uzzo [Del.] clarant was told she could not recover and 65 A 775. Declaration admissible where desaid she knew she would die and wanted to die, and told nurses to go away and let her die, and that she was in terrible agony. State v. Fleetwood [Del.] 65 A 772. Declarant said he could not get over it and would not live; declaration admissible though other witness testified that declarant was not "conscious" but admitted he did not know what "conscious" meant. McMillan v. State, 128 Ga. 25, 57 SE 309. Decedent, two or three hours after being shot, said to witness that he was "all in," that he was a "goner," and that defendant had made a "sieve" of his "insides." Held, declarant competent though decedent did not express in so many words a belief that he was dying. Williams v. State, 168 Ind. 87, 79 NE 1079. Wounded person on being told he would probably die said, "Boys, I am going." "Tell mother goodbye," and accused his companion of shooting him, and immediately thereafter was convulsed in the death struggle. His statement was held admissible. State v. Nowells [Iowa] 109 NW 1016. Declarations "they have killed me at last" held admissible, it appearing that they were made under belief of impending death. Commonwealth v. Hargis, 30 Ky. L. R. 510, 99 SW 348. Declarations of decedent, made within two hours of and in view of death, as to details of crime, are admissible. Bricker v. Com. [Ky.] 102 SW 1175. Declarations by one who had answered a question as to how he was "same as a dead man; I will never get out of here," as to circumstances attending shooting, are admissible. Kennedy v. Com., 30 Ky. L. R. 1063, 100 SW 242. Statement of deceased to witness that he was dying, and that he did not know what his wife and children would do, and that he begged F. (defendant) to go along and leave him (deceased) alone, held admissible. State v. Bohanon, 142 N. C. 695, 55 SE 797. Decedent just after he was shot said, "Boys, I am mortally wounded, I am all in," and then stated the circumstances of the shooting. He died two days later. Declaration admissible. State v. Hennessy [Nev.] 90 P 221. Decedent died a few hours after making declarations regarding the nature of her injuries, after having received the last rites of the church, and disposed of her child in expectation of death. Declarations held admissible though physician held out some hope of declarant's recovery. People v. Stacy, 104 NYS 615. Physician told decedent his case was hopeless and that only chance was an operation and that he probably would not survive, and asked if he desired to make a statement, which he did, and the statement, reduced to writing, was signed by him, and he died fifteen or twenty minutes later. Held admissible. State v. Thompson [Or.] 88 P 583. Mere statement of decedent in response to question that he knew he was in a critical condition held not to make declaration competent. Phillips v. State [Tex. Cr. App.] 94 SW. 1051. Declaration admissible where declarant said "I am going to die. I want my children." Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Statement made fifteen minutes before death, after he had told physician he was going to die, held dying declaration. Rice v. State [Tex. Cr. App.] 19 Tex Ct. Rep. 353, 103 SW 1156. Where decedent directly after the shooting stated "I am killed, I am dying now," and then made a statement with respect to the occurrence leading to the shooting, a sufficient predicate was laid for admission of statement as a dying declaration. Patterson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 552, 95 SW 129. Where it did not appear that deceased knew he was dying, his statement was not a dying declaration. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. Deceased's statement "What will become of my poor wife and children" held inadmissible. Id.

36. Decedent was shot in the arm and be-

should also be made to appear that declarant was sane and rational.[37] Whether a sufficient foundation has been laid is usually a question for the trial court,[38] but is sometimes submitted to the jury.[39] Dying declarations are confined to the immediate acts of the homicide and the circumstances that brought it about and attended it.[40] That declarations were made in response to questions does not necessarily render them incompetent,[41] nor does the use of profane language at the same time

fore physician came said he was going to die, but afterwards spoke of future plans and being a one armed man. Held his statement as to circumstances of shooting was inadmissible. Coyle v. Com., 29 Ky. L. R. 340, 93 SW 584. Declarant must have been under a sense of impending death without hope of recovery. Williams v. State, 168 Ind. 87, 79 NE 1079. Declarant must have been under belief of impending death, and without hope of recovery. People v. Brecht, 105 NYS 436. Victim of criminal operation was taken to hospital by physicians. She was bleeding from genital organs but able to walk from bed to table, supported. When asked she said she believed she was about to die, but also said she hoped God would let her recover. Held, her declaration as to cause of her condition was inadmissible. Id. Dying declaration must have been made under sense of impending death and after hope of recovery had been abandoned. State v. Kelleher, 201 Mo. 614, 100 SW 470. Declaration inadmissible where declarant did not appear to have given up all hope of recovery. Craven v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 373, 90 SW 311. Decedent's declaration that defendant shot him admissible on showing that his mother (witness) was with him for three days previous to his death, that he realized his approaching end, said he knew it, and had no hope of recovery. Lewis v. State [Tex. Cr. App.] 89 SW 1073. Held proper to allow witness who testified to dying declaration to state also that deceased had asked him to knock him (declarant) in the head, as indicating that he had no hope of recovery. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100.

37. Evidence held to show that when decedent made the dying declaration he was sane and rational and in fear of impending death. Hinton v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 795, 100 SW 772.

38. People v. Brecht, 105 NYS 436. Whether a dying declaration was made under a sense of impending death is for the court. State v. Zorn, 202 Mo. 12, 100 SW 591. Where a dying declaration is offered in evidence the preliminary question of fact, whether declarant was under a sense of impending death is for the determination of the trial court, and its finding, if supported by any legal evidence, is not reviewable by ordinary writ of error. State v. Monich [N. J. Err. & App.] 64 A 1016. Where a trial court determines that a dying declaration was in fact made under a sense of impending death, the defendant is not entitled to have the jury instructed that they may review such determination and disregard the declaration if they come to a different conclusion from that reached by the trial court. Id. Court should in the absence of the jury hear facts and circumstances to show that statements and what statements were made in extremis, and permit these to be introduced. Coyle v. Com., 29 Ky. L. R. 340, 93 SW 584. Whether declaration was made while declarant was under a sense of impending death is a question for the trial court, and its decision is reviewable only where manifest error appears. Williams v. State, 168 Ind. 87, 79 NE 1079.

39. Where decedent said he never expected to get up, the court properly submitted to the jury whether he realized that he was dying, since his statement admitted of two interpretations. Bird v. State, 128 Ga. 253, 57 SE 320. Whether sufficient predicate had been laid for admission of dying declarations held for jury. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879.

40. Declaration that decedent's wife sent her little boy for defendant when he came home the night of the homicide held too remote. Wakefield v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 558, 94 SW 1046. Dying declarations are admissible only where death of deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations. Craven v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 373, 90 SW 311. A dying declaration which involves only facts as to which decedent could have testified had he been a witness is admissible. Circumstances attending the shooting. Hinton v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 795, 100 SW 772. Statements in dying declaration as to declarations made by deceased at the time he was shot are not admissible. State v. Kelleher, 201 Mo. 614, 100 SW 470. Statement that decedent had begged accused not more than two weeks before the fatal assault not to assault him and that once before accused had wanted to kill him, but had been induced not to do so, held incompetent as a part of a dying declaration. State v. Spivey, 191 Mo. 87, 90 SW 81.

41. Answer to suggestive but not leading question held admissible in dying declaration. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Dying declarations made in response to questions which did not suggest the answer are admissible. Phillips v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 757, 98 SW 868. When evidence was circumstantial, and deceased was shot at night, and deceased stated in dying declaration that accused shot him, it is admissible that deceased stated in response to a question that he recognized defendant by the flash of the pistol. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879. It is error to eliminate from a dying declaration a statement of declarant in answer to a question of a bystander that he might be mistaken as to a material fact just stated. Arnwine v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 691, 17 Tex. Ct. Rep. 446, 96 SW 4. Declaration in response to question by witness to decedent as to what he was doing when shot, and whether he threw anything, that he did not

effect the admissibility of a dying declaration.[42] A declaration amounting to a mere conclusion is inadmissible.[43] Neither the declaration [44] nor the preliminary proof [45] need be in writing, and the fact that a portion of the dying declaration has been reduced to writing does not exclude supplementary oral proof.[46] But a written statement, not signed by deceased and omitting portions of the declaration, is inadmissible.[47] Dying declarations having been admitted, proof of other contradictory statements of deceased is competent,[48] but other statements do not render the dying declaration incompetent.[49] Dying declarations are entitled to the same weight as sworn testimony in court [50] whether in favor of the state or the defendant.[51]

(§ 7) *D. Sufficiency.*[See 8 C. L. 115]—In the foot notes are grouped citations to cases dealing with the sufficiency of evidence to show the corpus delicti [52] and other

throw anything and did nothing to cause anybody "to do that to him" [shoot him], held admissible. Burroughs v. U. S., 6 Ind. T. 164, 90 SW 8.

42. That decedent used profane language before and after making declaration does not render it inadmissible. Kirby v. State [Ala.] 44 S 38.

43. Declaration "Oh, Lordy! Willie shot me for nothing, without any cause," held not objectionable as a mere conclusion. McMillan v. State, 128 Ga. 25, 57 SE 309. Dying declaration that defendant deliberately shot declarant held not objectionable as a mere conclusion. State v. Fielding [Iowa] 112 NW 539. Statements that deceased was requested to arrest defendant who was drunk and had run his family out of house, and deceased had shot defendant in self-defense, not admissible as dying declaration. State v. Horn, 204 Mo. 528, 103 SW 69. Declaration that death was caused by strychnine put into a syringe with which she injected fluid for constipation held not a conclusion. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Where dying declarations contain unimportant expressions of opinion which are not prejudicial, entire declaration may be read. Cleveland v. Com. [Ky.] 101 SW 931.

44. Dying declaration need not be reduced to writing. Kirby v. State [Ala.] 44 S 38. Admissible though partly in writing and partly in parol. Id. Competency of proof of dying declaration is for trial court. Coyle v. Com., 29 Ky. L. R. 340, 93 SW 584.

45. Parol evidence is admissible to show that declaration was made under sense of impending death. Cleveland v. Com. [Ky.] 101 SW 931.

46. Statements held admissible as dying declarations though other dying declarations had been reduced to writing. Pate v. State [Ala.] 43 S 343. Where dying declaration was made under oath to justice of peace and the justice reduced same to writing as far as possible, it was not improper for him not to read notes to jury. Mitchell v. State [Ark.] 101 SW 763. It was proper in addition to reading notes to supply from his recollection remainder of declarations. Id.

47. Where physician testified that he told decedent he was dying, and that decedent realized it, that he was conscious and capable of making intelligent statements, but had to be aroused from stupor to make them, that he put down statements of decedent which he thought material, omitting others, and then signed statement for decedent, the statement was inadmissible. Cooper v. State, 89 Miss. 351, 42 S 666.

48. Dying declaration having been introduced, statements afterwards made by deceased should also be admitted. Coyle v. Com., 29 Ky. L. R. 340, 93 SW 584. A dying declaration having been introduced, the state was entitled to introduce contradictory statements made by deceased about the same time. State v. Uzzo [Del.] 65 A 775. Where dying declarations are admitted, it is proper to admit other statements contradictory thereto. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879.

49. The mere fact that a witness may at different times have made different statements as to dying declarations does not authorize the court to withhold them from the jury. Carter v. State [Ga. App.] 58 SE 532.

50. Dying declarations are entitled to as much weight as if made under oath duly administered in a court of justice. State v. Fleetwood [Del.] 65 A 772.

51. Dying declarations are entitled to the same credit whether in favor of the state or defendant. State v. Uzzo [Del.] 65 A 775. Error to exclude dying declaration on theory that it was favorable to accused. Green v. State, 89 Miss. 331, 42 S 797.

52. Evidence sufficient to show that deceased was killed by a shot from defendant's gun fired with criminal intent. People v. Grill [Cal.] 91 P 515. Evidence of corpus delicti held for the jury where accused confessed to killing and throwing body in river, and letters from deceased had been received from near where he had been seen last, and there was other evidence of the crime. Leftridge v. U. S., 6 Ind. T. 305, 97 SW 1018. The corpus delicti, consisting of the death of the person alleged to have been killed and the criminal agency of some one causing death, may be established by circumstantial evidence. State v. Barrington, 198 Mo. 23, 95 SW 235. Where there was a confession, full proof of the corpus delicti, independently of the confession, was held unnecessary in a prosecution for murder the confession being corroborated. State v. Banusik [N. J. Err. & App.] 64 A 994. Evidence that new born babe's throat was cut is insufficient to show that it was born alive and murdered. Berryman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 111, 101 SW 225. Evidence insufficient to establish corpus delicti where new born babe was alleged to have been killed. McCowan v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 101, 100 SW 1157.

elements of the crime charged,[53] and to sustain generally convictions of murder,[54] manslaughter,[55] and assault.[56]

Corpus delicti may be proven by testimony of accomplices corroborated by confession of defendant, and vice versa. Fallis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 120, 101 SW 242. Corpus delicti sufficiently proved by confession and testimony as to corpse being taken from a river having clothes on similar to those worn by decedent. Id. To sustain conviction for destroying life of child during parturition, there must be proof that child was born alive or was alive at the inception of its birth. Evans v. State [Tex. Cr. App.] 89 SW 974. Evidence sufficient to show that child was born alive and was killed by mother. Heubner v. State, 131 Wis. 162, 111 NW 63. Evidence that the description of a man by that name when living corresponded with the description of the dead man found, and a witness identified the dead man as the man alleged to have been murdered, held sufficient to show that the man alleged to have been murdered was dead. Bull v. Com., 29 Ky. L. R. 949, 96 SW 817. Circumstantial evidence of corpus delicti held sufficient. Perovich v. U. S., 205 U. S. 86, 51 Law. Ed. 722.

53. Evidence sufficient to identify defendant as murderer. People v. Sexton, 187 N. Y. 495, 80 NE 396. An allegation that death was caused by means, instruments, and weapons to the grand jurors unknown need not be proven in the first instance by the people. Koser v. People, 224 Ill. 201, 79 NE 615. Evidence sufficient to show that killing was done with a knife and that the knife was a deadly weapon. Armstrong v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 519, 96 SW 15. On prosecution for assault with intent to murder, evidence sufficient to show that defendant knew prosecuting witness was an officer. Chaney v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 780, 98 SW 847. Evidence sufficient to show that at the time decedent was shot by defendant he was a peace officer and acting as such. Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403. Where evidence showed that one brother stabbed decedent and the other struck him a blow on the head which contributed to his death, the latter was guilty of homicide. Dempsey v. State [Ark.] 102 SW 704. Evidence sufficient to establish **venue** of offense. Kennedy v. Com., 30 Ky. L. R. 1063, 100 SW 242. Evidence sufficient to show preparation and **premeditation.** State v. McDowell [N. C.] 59 SE 690. Evidence sufficient to show that killing was premeditated and deliberate. State v. Jones [N. C.] 59 SE 353. Where defendant claimed self-defense, evidence held to show premeditated killing. People v. Wenzel [N. Y.] 82 NE 130. Evidence held to support finding that deceased was shot pursuant to a **conspiracy,** and not in defense of defendant's mother. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 SW 817. Evidence sufficient to show conspiracy to kill. Sanderson v. State [Ind.] 82 NE 525. Evidence sufficient to show that one of two defendants aided and abetted the other, and that there was a common design or purpose to kill. State v. Kendall, 143 N. C. 659, 57 SE 340. Evidence sufficient to show a conspiracy between accused and others to murder deceased. Hall v. Com. [Ky.] 101 SW 376. Evidence sufficient to show that accused aided and abetted another in the killing. Coffman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 701, 103 SW 1128.

Evidence sufficient to take issue to jury: Whether decedent or accused brought on fatal encounter held for the jury. Burton v. State [Ark.] 102 SW 362. Evidence of conspiracy between accused and others to murder deceased held to raise a question for the jury. State v. Spaugh, 200 Mo. 571, 98 SW 55. Evidence of conspiracy between defendants to assault deceased held sufficient to carry that theory to the jury. State v. Darling, 199 Mo. 168, 97 SW 592. In assault with intent to kill, it is proper to refuse a general affirmative charge for defendant where evidence shows that he shot at prosecutor from outside through window of his own house. Williams v. State [Ala.] 43 S 720. Held proper to refuse to direct acquittal on the evidence. Moss v. State [Ala.] 44 S 598. Evidence held for the jury as to whether the wife of the decedent fired the fatal shot while attempting to assist him in repelling a murderous attack by the accused. Oates v. State [Tex. Cr. App.] 95 SW 105. Evidence of malice held for jury. State v. Pyles, 206 Mo. 626, 105 SW 613. Whether an assault with intent to kill was the result of giving way to sudden passion, reasonably excited, and in resentment of insult, or whether it was in execution of formed design to take life, seizing upon the words of assaulted as a mere pretext, is for the jury. Griffin v. State [Ala.] 43 S 197. Question of guilt of one charged with murder held for the jury. Young v. State [Ala.] 43 S 100. Evidence sufficient to go to the jury on question of whether accused killed deceased. State v. Spaugh, 200 Mo. 571, 98 SW 55. Evidence of defendant's guilt held for the jury. Bacigalupi v. Com., 30 Ky. L. R. 1320, 101 SW 311. Evidence of self-defense held for the jury. State v. King, 203 Mo. 560, 102 SW 515. Evidence as to justification held for the jury. State v. Johnson [Wash.] 91 P 949.

54. First degree: Evidence sufficient to sustain conviction. Smith v. State, 79 Ark. 25, 94 SW 918; Nash v. State, 79 Ark. 120, 95 SW 147; Goddard v. State, 78 Ark. 226, 95 SW 476; Mitchell v. State [Ark.] 101 SW 763; People v. Clark [Cal.] 90 P 549; Brewer v. State [Fla.] 43 S 423; Long v. State, 127 Ga. 350, 56 SE 444; Caesar v. State, 127 Ga. 710, 57 SE 66; McDonald v. State [Ga.] 59 SE 242; McCann v. People, 226 Ill. 562, 80 NE 1061; Bleich v. People, 227 Ill. 80, 81 NE 36; Clefford v. People, 229 Ill. 633, 82 NE 343; Johnson v. Com., 29 Ky. L. R. 442, 93 SW 581; Bull v. Com., 29 Ky. L. R. 949, 96 SW 817; Hopper v. Com. [Ky.] 96 SW 838; Williamson v. Com. [Ky.] 101 SW 370; Ball v. Com. [Ky.] 101 SW 956; Newton v. Com. [Ky.] 102 SW 264; State v. Eaton, 191 Mo. 151, 89 SW 949; State v. Barrington, 198 Mo. 23, 95 SW 235; State v. Francis, 199 Mo. 671, 98 SW 11; State v. Gordon, 199 Mo. 561, 98 SW 39; State v. Brooks, 202 Mo. 106, 100 SW 416; State v. West, 202 Mo. 128, 100 SW 478; State v. Long, 201 Mo. 664, 100 SW 587;

State v. King, 203 Mo. 560, 102 SW 515; People v. Ciardi, 188 N. Y. 145, 80 NE 925; People v. Nelson [N. Y.] 81 NE 768; People v. Bonier [N. Y.], 81 NE 949; State v. Guthrie [N. C.] 59 SE 652; Commonwealth v. Ferruchi [Pa.] 68 A 41; Ransom v. State, 116 Tenn. 355, 96 SW 953; Powers v. State, 117 Tenn. 363, 97 SW 815; Frazier v. State, 117 Tenn. 430, 100 SW 94; Holder v. State [Tenn.] 104 SW 225; Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 685, 93 SW 116; Brown v. State [Tex. Cr. App.] 95 SW 1039; Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 722, 99 SW 1005; Gregg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 89, 100 SW 1161; Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445; Salinas v. State [Tex. Cr. App.] 102 SW 116; Williams v. State [Tex. Cr. App.] 102 SW 413. Where officer making arrest was murdered. State v. Spaugh, 200 Mo. 571, 98 SW 55. Circumstantial evidence held sufficient to sustain a conviction of murder. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Evidence sufficient to show willful murder. France v. Com., 30 Ky. L. R. 1297, 100 SW 1193. Where husband and wife quarreled and he threw her down, procured a gun and she was shot, evidence held to show murder in first degree. Beene v. State, 79 Ark. 460, 96 SW 151. Evidence held to support conviction for willful murder by sharp instrument as alleged. Johnson v. Com., 29 Ky. L. R. 675, 94 SW 631. Evidence sufficient to sustain conviction of murder and infliction of death penalty. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 244, 94 SW 224. Conviction of murder held sustained by evidence though connection of defendant with crime was shown wholly by circumstantial evidence. Flinchem v. Com., 28 Ky. L. R. 653, 89 SW 1129. Evidence held to show deliberation and premeditation and to sustain conviction of murder in the first degree. State v. Bank, 143 N. C. 652, 57 SE 174. Evidence sufficient to sustain conviction of murder in the first degree (by administering poison). State v. Thomas [Iowa] 109 NW 900. Evidence sufficient to sustain conviction of murder in first degree; defense of mental epilepsy or epileptic furor not sustained. People v. Furlong [N.Y.] 79 NE 978. Evidence sufficient to support conviction of murder by attempt to produce an abortion. Clark v. People, 224 Ill. 554, 79 NE 941.

Second degree: Evidence sufficient to sustain conviction; Samaniego v. Ter. [Ariz.] 85 P 721; Traylor v. State [Ark.] 96 SW 505; People v. Quimby [Cal. App.] 92 P 493; State v. Pyles, 206 Mo. 626, 105 SW 613; People v. Yoskow, 117 App. Div. 75, 20 Crim. R. 527, 101 NYS 1062; People v. Ferone, 105 NYS 448; Martin v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 63, 95 SW 501; Pinson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 702, 96 SW 23; Perkins v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 357, 97 SW 1047; White v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 816, 100 SW 941; Hickey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 142, 102 SW 417; Bailey v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 174, 105 SW 792. Evidence sufficient to show murder in second inquire of defendant why he abused his daughter supports murder in second degree. Lucas v. State [Tex. Cr. App.] 105 SW 788. Evidence that decedent did nothing but degree where accused on hearing that deceased had insulted his mother went to his house and shot him. Pipkin v. State [Ark.] 97 SW 61. Proof that accused shot deceased from the rear while he was walking along a public road oblivious to defendant's presence sufficient to sustain murder in second degree. Richardson v. State, 80 Ark. 201, 96 SW 752. Proof of corpus by wounds, etc., and defendant's confession held sufficient to support conviction for murder in second degree. Gallegos v. State [Tex. Cr. App.] 90 SW 492. Evidence sufficient to sustain conviction of murder in second degree though defendant claimed killing to be accidental. People v. Bonifacio, 104 NYS 181.

Evidence insufficient to sustain conviction for murder. Berryman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 111, 101 SW 225. Evidence insufficient to warrant conviction of murder in second degree. Chambless v. State [Tex. Cr. App.] 97 SW 472. Where charge is murder by administration of a particular poison, proof that accused had that poison in his possession at the time of the alleged offense is necessary to a conviction. Evidence held insufficient to show that accused had arsenic in his possession. State v. Blydenburg [Iowa] 112 NW 634. Evidence insufficient to justify conviction where defense was justifiable homicide. State v. Lepine [S. D.] 113 NW 1076.

55. Evidence sufficient to sustain a conviction of voluntary manslaughter. Myers v. State, 78 Ark. 302, 95 SW 771; Douglass v. State [Fla.] 43 S 424; Lee v. State [Ga. App.] 58 SE 676; Harris v. State [Ga. App.] 58 SE 680; White v. State [Ga. App.] 58 SE 686; Kennedy v. Com., 30 Ky. L. R. 1063, 100 SW 242; Freeman v. Com. [Ky.] 103 SW 274; Stuart v. Com. [Ky.] 105 SW 170; McCoy v. State [Miss.] 44 S 814. To reduce murder to manslaughter, or to excuse the homicide, defendant need only "satisfy the jury" as to the existence of the necessary facts; he need not prove them beyond a reasonable doubt. Taylor v. Com., 29 Ky. L. R. 563, 93 SW 1042; State v. Kendall, 143 N. C. 659, 57 SE 340.

Evidence held insufficient to support conviction for involuntary manslaughter caused by failure to provide necessaries and medical attendance for wife during childbirth. Westrup v. Com., 29 Ky. L. R. 519, 93 SW 646. State's evidence that accused shot deceased on his refusal to obey an order not to approach him, and defendant testified that as he was about to shoot at a tree a bystander pulled his gun aside and it was accidentally discharged and killed decedent, does not show negligent homicide but accidental shooting. Jones v. State [Tex. Cr. App.] 95 SW 539. Evidence insufficient to sustain conviction for manslaughter. Lindsey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 473, 98 SW 856. Evidence insufficient to go to the jury on the question of manslaughter. Mitchell v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 45, 100 SW 930.

56. Evidence sufficient to sustain assault in second degree. Defense was alibi. People v. Maggiore, 104 NYS 526. Conviction of assault with intent to commit murder sustained. Jackson v. State, 125 Ga. 101, 53 SE 607. The testimony of the prosecutor that he was "cut" and "stabbed" with a knife by defendant is sufficient to authorize the jury in finding that there was in fact such penetration as would constitute the offense of stabbing. Miller v. State, 125 Ga. 788, 54 SE

§ 8. *Trial and punishment. A. Conduct of trial in general.*[See 8 C. L. 117] In general, all questions of fact are for the jury.[57] The sufficiency of the evidence may be for the court under certain circumstances.[58]

(§ 8) *B. Instructions.*[See 8 C. L. 117]—Instructions should not be argumentative,[59] confusing,[60] or misleading,[61] but should present the entire law of the case[62]

692. Evidence held to warrant verdict of shooting at another. Parker v. State, 1 Ga. App. 781, 57 SE 1028. Evidence held to support finding of intent to kill, in trial for assault with intent to kill. Jackson v. State [Tex. Cr. App.] 90 SW 34. Evidence sufficient to show intent to kill, in trial of assault with intent to kill, where defendant struck prosecutor from behind with a piece of scantling. Wright v. State [Tex. Cr. App.] 90 SW 36. Evidence of shooting in attempt to rob held to sustain conviction of assault with intent to kill. Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 592, 95 SW 1044. Evidence of unprovoked assault with rock held to sustain conviction of assault with intent to kill. State v. Tetrick, 199 Mo. 100, 97 SW 564.

Evidence sufficient to authorize conviction of assault with intent to kill. Satterwhite v. State [Ark.] 100 SW 70; Fews v. State, 1 Ga. App. 122, 58 SE 64; Dawson v. State [Ga. App.] 58 SE 1065; State v. Foister, 202 Mo. 46, 100 SW 442; State v. Arnold, 206 Mo. 589, 105 SW 641; Mayes v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 966, 100 SW 386; Wilson v. State [Tex. Cr. App.] 100 SW 956; Jackson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 279, 103 SW 927.

Evidence insufficient to show assault with intent to kill. State v. Williamson, 203 Mo. 591, 102 SW 519; Nalley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 821, 100 SW 385.

57. Whether piece of timber was deadly weapon held question for jury. Allen v. State [Ala.] 42 S 1006. Whether a weapon is a deadly one is usually a question for the court but may be for the jury in particular cases. Tribble v. State, 145 Ala. 23, 40 S 938. Where a knife found at scene of crime is introduced, the connection of the knife with the crime is for the jury. Commonwealth v. Karamarkovic [Pa.] 67 A 650. Whether one had reason to act in self-defense held for the jury. State v. Darling, 202 Mo. 150, 100 SW 631. Not error to refuse to charge that unless there was other evidence than that of assaulted person that defendant committed the assault the jury could not convict. Williams v. State [Ala.] 43 S 720. Evidence held for the jury as to whether there was a conspiracy between accused and his relatives to kill deceased by an instruction requiring that before defendant could be convicted it must be found that he aided, advised, or commanded the shooting. Lowe v. Com., 30 Ky. L. R. 199, 97 SW 765. Under Pen. Code 1895, art. 717, providing that the instrument with which the crime is committed is to be considered in judging the intent, the question of intent should be submitted where it is not shown that the knife used was a deadly weapon and defendant testified that he hurt deceased to a greater extent than he intended. Williams v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 586, 96 SW 42. Evidence as to whether accused acted in self-defense held for the jury. Mitchell v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 45, 100 SW 930.

58. Whether there is malice is for the jury if there is evidence to sustain a finding; whether there is any evidence is for the court in giving instructions; whether there is sufficient evidence to sustain a verdict is for court on motion for new trial. State v. Clifford, 59 W. Va. 1, 52 SE 981.

59. Request properly refused as argumentative. Thomas v. State [Ala.] 42 S 371; Kirby v. State [Ala.] 44 S 38; Strickland v. State [Ala.] 44 S 90. Instruction to consider the fact that killing was with weapon taken from deceased in determining grade of homicide argumentative. Outler v. State, 147 Ala. 39, 41 S 460. Instruction using phrase "mere fact that defendant killed decedent" held argumentative. Allen v. State [Ala.] 42 S 1006. Instruction held argumentative because leading jury to believe that evidence showed a mere reckless taking of human life. Id. Instruction on alibi held argumentative. Rigsby v. State [Ala.] 44 S 608. Request as to effect of intoxication held argumentative. Davis v. State [Ala.] 44 S 561. Request on self-defense properly refused as argumentative. Fleming v. State [Ala.] 43 S 219. Instruction as to who was aggressor and rights of parties held argumentative. Davis v. State [Ala.] 44 S 561. Request that possession of deadly weapon may be explained so as to create no presumption against defendant is argumentative and abstract. Kirby v. State [Ala.] 44 S 38. Instruction that fact that accused had but one arm is to be considered as argumentative. Patterson v. State, 146 Ala. 39, 41 S 157. Instruction that it was for the jury to say whether any punishment should be given a peaceable man killing a violent and turbulent one who had previously assaulted him properly refused. Harrison v. State [Ala.] 40 S 57. Instruction properly refused as argumentative. State v. Edwards, 203 Mo. 528, 102 SW 520.

60. Instruction in trial for assault using term "deceased" properly refused. Wright v. State [Ala.] 42 S 745. Instruction erroneous because confusing the doctrines of justifiable homicide, reasonable fears, and self-defense (Pen. Code 1895, §§ 70, 71, 73). Pryer v. State, 128 Ga. 28, 57 SE 93. Pen. Code 1895, § 73, does not qualify law of justifiable homicide contained in §§ 70, 71, and instructions as to these two branches of the law need not be given so as to confuse one with the other. Lightsy v. State [Ga. App.] 58 SE 686.

61. Charge held misleading as putting too great emphasis on character of deceased. Bluett v. State [Ala.] 44 S 84. Instruction as to belief jury must entertain from the evidence held misleading. Andrews v. State [Ala.] 44 S 696. Request as to reasonable doubt held misleading. Davis v. State [Ala.] 44 S 561. Instruction as to belief from facts proven held misleading. Moss v. State [Ala.] 44 S 598. Instruction held misleading because not based on evidence. Foglia v. People, 229 Ill. 286, 82 NE 262. Instruction

clearly and intelligibly.[63] They should conform to the indictment [64] and the evidence.[65] The court should not in its instructions invade the province of the jury,[66]

as to reasonable doubt properly refused as misleading. Thomas v. State [Ala.] 43 S 371. Instruction misleading as to provoking difficulty resulting in homicide. Hanners v. State, 147 Ala. 27, 41 S 973. Instruction as to presumptions of innocence and burden of proof held misleading. Frazier v. State, 117 Tenn. 430, 100 SW 94. Instruction held erroneous as susceptible of the construction that if defendant shot in revenge for treatment of his companion it would be murder in second degree. State v. McDowell [N. C.] 59 SE 690. Instruction requested on assault with intent to kill held misleading and bad in form because not stating conditions under which conclusion that defendant was acting in self-defense could be drawn. Grisham v. State, 147 Ala. 1, 41 S 997. Instruction that defendant's good character could be considered, if shown, as a circumstance tending to show innocence, held misleading when there was no evidence of good character. State v. Penna, 35 Mont. 535, 90 P 787. An instruction that defendant had a right to visit his minor child properly refused where the evidence was that he endeavored by violence and with a deadly weapon to force an entrance to the house where the child was. People v. Feld, 149 Cal. 464, 86 P 1100. Where there was some evidence of a conspiracy between defendant and another, a requested instruction that defendant could not be convicted unless the evidence established his guilt, independent of the other, beyond all reasonable doubt, was properly refused as misleading. Hanners v. State, 147 Ala. 27, 41 S 973. Instructions as to what would constitute murder and what would justify the homicide held **not misleading.** Teague v. State [Tex. Cr. App.] 100 SW 401. An instruction that the fact that deceased struck accused with a shoe last would not justify the killing, considered in connection with other instructions on the issue of self-defense, held not misleading. Brown v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 548, 95 SW 126. Instruction for acquittal if specific intent is not shown properly refused where conviction of included offense might be had. Millender v. State, 147 Ala. 688, 40 S 664. Instructions construed and held not to authorize finding one of several defendants indicted for assault to murder guilty of one of several offenses. Greenwell v. Com., 30 Ky. L. R. 1282, 100 SW 852. Instruction mentioning accidental homicide as a special defense held not to place burden of proof on defendant. State v. Mack [S. C.] 57 SE 1107. Instruction held not misleading as leading jury to believe that accused had burden to prove facts reducing crime to manslaughter. Ball v. Com. [Ky.] 101 SW 956. Instructions as to provoking difficulty held not misleading. Lahue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 125, 101 SW 1008. Instruction as to how evidence of intoxication of defendant should be considered held not misleading. People v. Hower [Cal. App.] 91 P 507. Instruction on provocation which would reduce the killing to manslaughter held not misleading because of omission of a word. Green v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 907, 105 SW 205. Instruction as to form of verdict on trial of two that one might be found guilty of murder and the other of manslaughter did not place two separate and distinct crimes before the jury. Foglia v. People, 229 Ill. 286, 82 NE 262. Request held misleading as requiring state to prove that accused could not be guilty. McEwen v. State [Ala.] 44 S 619.

62. In prosecution for killing a peace officer who was making arrest, leaving jury to determine proper manner to make arrest and failing to hypothesize knowledge of defendant of decedent's official character, is error. Strickland v. State [Ala.] 44 S 90. Proper to refuse to charge that accused should not be tried according to Bible but according to law as given in instructions. Brown v. State [Ala.] 43 S 194.

63. Request properly refused as incomplete and unintelligible. Davis v. State [Ala.] 44 S 561. Charge on reasonable doubt and self-defense held unintelligible. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Instructions as to reasonable doubt held not objectionable as being unintelligible. State v. Brooks, 202 Mo. 106, 100 SW 416. Request properly refused as abstract. Thomas v. State [Ala.] 43 S 371. Request properly refused as elliptical. Strickland v. State [Ala.] 44 S 90. A general charge that homicide must have been willful is not sufficiently specific where the defense is that it was per information. State v. Vicknair, 118 La. 963, 43 S 635.

64. An instruction to find a defendant not guilty under a certain count, ignoring other counts which were good, held erroneous. Koser v. People, 224 Ill. 201, 79 NE 615. Instruction that defendant would be guilty notwithstanding he believed he was killing another than deceased proper, though there was no corresponding allegation in the indictment. Thompkins v. Com., 28 Ky. L. R. 642, 90 SW 221.

65. Instructions criticized as not conforming to the evidence. Lucas v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 776, 90 SW 880. Request as to impairment of faculties by drink held abstract. Davis v. State [Ala.] 44 S 561. Charge which merely directs attention to excluded evidence properly refused. Bluett v. State [Ala.] 44 S 84. Whether there is proof of a declaration by defendant "we have come here to kill" deceased, instruction assuming that the proof of conspiracy to kill is circumstantial is properly refused. Morris v. State, 146 Ala. 66, 41 S 274. Instruction on right of men to assemble and co-operate in securing increased wages held inapplicable to issues and erroneous in trial of charge of murder, though difficulty arose between union and nonunion men. State v. Hennessy [Nev.] 90 P 221. No necessity for defining conspiracy where such element was eliminated from the case. Cecil v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 803, 100 SW 390. On trial of several for assault with intent to kill, evidence held not to require that they should believe that one of their number was in danger before one of them could act. Greenwell v. Com., 30 Ky. L. R. 1282, 100 SW 852. Not error to refuse to instruct on circumstantial evidence where all evidence was direct.

as by commenting on the evidence in such manner as to intimate an opinion,[67] or give undue prominence to a particular fact or theory,[68] or by assuming as true disputed facts,[69] though uncontroverted facts may properly be assumed as true.[70]

State v. Paulsgrove [Mo.] 101 SW 27. Where evidence showed that decedent went to defendant's house for trouble and commenced shooting as soon as decedent appeared, instruction as to his rights if he went on a peaceful mission was not warranted. Tillman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 87, 101 SW 210. Instruction that accused was entitled to protect his home is not warranted where it appears that deceased was killed on the highway and there was no evidence that he was attempting to come on defendant's premises. Williamson v. Com. [Ky.] 101 SW 370. Where there was no evidence that defendant was trying to arrest decedent for a felony, instruction on that theory properly refused. Mitchell v. State [Ark.] 101 SW 763. Where there was no proof of conspiracy, it was not error to refuse a charge thereon. State v. King, 203 Mo. 560, 102 SW 515. Request to charge as to liability of conspirators where no conspiracy to kill existed, but the killing was done by one while another held decedent, and two other persons were killed at same time. State v. Vaughan, 203 Mo. 663, 102 SW 644. Instruction as to right to kill in self-defense properly refused as not applicable to the evidence. Hopper v. Com. [Ky.] 96 SW 838. Instructions as to threats by deceased, based on facts not in evidence, should not be given. State v. Birks, 199 Mo. 263, 97 SW 578. On prosecution of convicts for killing prison guard in furtherance of concerted plan to escape, instruction properly refused as predicated on testimony inconsistent with physical facts. State v. Vaughan, 200 Mo. 1, 98 SW 2. Where there was no evidence that defendant was in danger, an instruction which leads the jury to believe that he was is erroneous. Ellis v. Com., 30 Ky. L. R. 348, 98 SW 278.

66. Instruction as to duty to retreat held to invade province of jury. Kirby v. State [Ala.] 44 S 38. Charge that threats are of very little importance invades province of jury. Dorsey v. State [Ga. App.] 58 SE 477. Charge on presumption of malice properly refused because invading province of jury and not hypothesizing unworthiness of belief of defendant's evidence. Allen v. State [Ala.] 42 S 1006. The power and duty of the jury to ascertain the degree of murder is fixed by law, and a peremptory instruction taking from it the power to do so is erroneous. Commonwealth v. Curcio, 216 Pa. 380, 65 A 792. Where indictment charges murder by means of poison, the degree or grade of the crime is for the jury, and the court cannot properly peremptorily instruct to find defendant guilty of murder in the first degree, if at all. State v. Phinney [Idaho] 89 P 634. Instruction that jury could not infer malice from use of deadly weapon if evidence showed any circumstances from which a want of malice might be inferred held to invade province of jury. Austin v. State, 145 Ala. 37, 40 S 989. Instruction as to facts reducing crime to manslaughter held not to take from the jury, as an adequate cause, the passion aroused by threats of deceased and the pistol drawn by him. Ham v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 451, 98 SW 875. In prosecution for murder of infant its mother testified to its complete birth, and a physician that it could not have been still born. Held an instruction that child was in actual and complete existence was properly refused. Tune v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 249, 94 SW 231. A judge may tell the jury how the testimony strikes his mind, both as to force and inferences he would draw from it. State v. Schuyler [N. J. Err. & App.] 68 A 56. While it is necessary in order to sustain assault with intent to kill that the evidence should show that if death had ensued defendant would be guilty of murder, it is error to charge such fact. Burris v. State [Ga. App.] 58 SE 545. Also error to charge that he would be guilty of voluntary stabbing if the crime would have been voluntary manslaughter had death ensued. Id. But it is proper to charge that the proof must show that if the act had resulted in death the crime would have been murder, and if the proof does show such fact the crime is assault with intent to kill. Dawson v. State [Ga. App.] 58 SE 1065.

67. Instruction held on weight of evidence. Davis v. State [Ala.] 44 S 561. Instruction as to belief from evidence held on weight of evidence. Rigsby v. State [Ala.] 44 S 608. Instruction on self-defense held not on weight of evidence. Logan v. State [Ala.] 43 S 10. Instruction that state had introduced evidence showing a certain fact is on the weight of evidence. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Instruction held erroneous as singling out particular parts of evidence and ignoring other evidence. State v. Horn, 204 Mo. 528, 103 SW 69. Instruction that confession cannot be looked to for corroboration of testimony of accomplice is on weight of evidence. Follis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 120, 101 SW 242. Instruction on self-defense held on weight of evidence. King v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 112, 101 SW 237. Instruction as to purchase of weapons held on weight of evidence. Dobbs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 64, 100 SW 946. Instruction as to proof required to establish murder in first degree held not on weight of evidence. Gregg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 89, 100 SW 1161. Instruction in assault with intent to kill erroneous as justifying inference that the judge thought that there was unlawful and deliberate use of gun as deadly weapon, though it was not used to shoot with. Woods v. State [Miss.] 43 S 289; Id., 43 S 433.

68. Instruction held erroneous as giving undue prominence to the view that the accused was not entitled to a verdict of manslaughter. Fuller v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 413, 95 SW 541. Portions of evidence should not be singled out and charged upon. Green v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 907, 105 SW 205. Proper to refuse charges embodying conclusions on facts or bringing out particular facts when general charge covers the law of the case. State v. Rideau, 118 La. 385, 42

The instructions should submit all issues,[71] defenses,[72] and aspects thereof,[73]

S 973. Instruction held erroneous as singling out portions of evidence. Begg v. State [Ala.] 43 S 484.

69. Charge held not to assume facts. Robinson v. State [Ga.] 58 SE 842. Instruction held not to assume that insults offered a female must have been established as a fact. Bays v. State [Tex. Cr. App.] 99 SW 561. Instruction that accused could not justify the killing by showing that he was subsequently attacked by friends of deceased, but that such attack must have preceded the killing, held not to assume facts and exclude theory of self-defense. Nash v. State, 79 Ark. 120, 95 SW 147. Instruction relative to aggressors held not to assume that accused brought on the difficulty. West v. State [Fla.] 43 S 445.

70. Uncontroverted facts may be assumed. Powers v. State, 117 Tenn. 363, 97 SW 815.

71. Instruction ignoring theory of conspiracy between accused and another to kill held erroneous. Ferguson v. State [Ala.] 43 S 16. Where it is an issue of fact whether the name of deceased was as alleged, an instruction for acquittal, unless it be proved as laid beyond a reasonable doubt, should be given. Stallworth v. State, 146 Ala. 8, 41 S 184. Instruction as to homicide in attempt to arrest should hypothesize good faith, where there is evidence that the arrest was but a pretext. Hammond v. State, 147 Ala. 79, 41 S 761. Use of word "compelling" in instruction that if accused armed himself with intention of compelling decedent to apologize and shot him when he did not held not error though no witness had used word "compel." Pipkin v. State [Ark.] 97 SW 61. Where there is evidence that defendant was aggressor, it is proper to charge on that theory. Vasquez v. State [Fla.] 44 S 739. Where evidence of specific acts of violence is admitted by agreement to show the character of one for violence, it is not error to instruct that jury may consider such evidence, since it was admitted by agreement, but that a character for violence cannot in law be established by proof of specific acts. Long v. State, 127 Ga. 350, 56 SE 444. Evidence held to sustain charge on mutual combat. Goodin v. State, 126 Ga. 560, 55 SE 503. Where insurance on life of deceased was the alleged motive, an instruction that the invalidity of the policy was immaterial if defendant believed it valid sustained. State v. Woodard, 132 Iowa, 675, 108 NW 753. Where evidence was conflicting on question whether defendant was present in room where homicide was committed, aiding and abetting in the killing, it was proper to submit that issue to the jury. State v. Williams, 76 S. C. 135, 56 SE 783. Where defendant testified that difficulty began in an unprovoked assault on him by deceased persons, who pulled him off his horse and assaulted him, an instruction on manslaughter leaving to the jury the question whether the assault was one which would produce passion in a person of ordinary temper should have been given. Arnwine v. State [Tex. Cr. App.] 90 SW 39. Fact that defendant testified to facts showing an alibi held not to justify court in failing to charge on manslaughter, when that was made an issue by other evidence in the case. Lewis v. State [Tex. Cr. App.] 89 SW 1073. Where evidence was conflicting on question whether deceased had a pistol, instruction should have been given on presumption arising from deceased's having had a pistol. McMichael v. State [Tex. Cr. App.] 93 SW 723. In assault with intent to kill, the court should have charged that if there was any evidence that prosecuting witness told witnesses that difficulty arose from fact that accused had a gun, was noisy, and because prosecutor was remonstrating with him against such conduct, such evidence should not be considered as original, but only to support credibiltiy of prosecutor. Brundidge v. State [Tex. Cr. App.] 95 SW 527.

72. Where no eyewitness of a homicide testifies to the facts thereof, it is the duty of the court to charge on the law of self-defense. Messer v. Com., 28 Ky. L. R. 920, 90 SW 955. Deceased was killed by co-defendant while latter was attempting to arrest deceased under a warrant. Defendant was prosecutor and accompanied codefendant, but was unarmed, took no part in arrest, and stayed outside premises. Held these facts required a charge to acquit defendant. Neeley v. Com., 29 Ky. L. R. 408, 93 SW 596. A defendant is entitled to have submitted all defenses having support in the evidence, whether consistent or inconsistent, and the court properly charged on accidental killing as well as justifiable homicide. State v. Hazlett [N. D.] 113 NW 374. Instruction should have been given on right to defend another reasonably believed to be in great danger. State v. Hennessy [Nev.] 90 P 221. Evidence sufficient to justify charge on self-defense. Commonwealth v. Thomas [Ky.] 104 SW 326. Where accused testified that he was only holding his pistol in readiness to defend himself if decedent got a gun, and it appeared that he could have shot decedent at any time for several minutes prior to the shooting, and accused testified that his pistol went off by accident. Pen. Code 1895, art. 45, relative to accident, should have been charged. Miller v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 3, 105 SW 502. Where there is evidence tending to show homicide in self-defense, defendant is entitled to an instruction on reasonable doubt in connection with threatened danger to life. Harris v. State [Tex. Cr. App.] 89 SW 1064.

73. Where killing was done while decedent was advancing to attack defendant, instructions as to attack and pending attack should be given. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Where defendant was intoxicated, it is proper to instruct on the question of drunkenness though it was not interposed as a defense. Bleich v. People, 227 Ill. 80, 81 NE 36. Where there is evidence of sudden affray, an instruction on voluntary manslaughter ignoring this phase of case is error. Kennedy v. Com. [Ky.] 102 SW 863. Where deceased had threatened to kill defendant and was approaching him with drawn knife at the time he was killed, an instruction giving pertinent application to law of threats in connection with self-defense was warranted. Fisher v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 811, 98 SW 852. Where insanity was

and all offenses included in the charge against defendant [74] of which there is evi-

relied on as a defense, a charge that irresistable impulse is no defense is not erroneous as presenting a false issue. People v. Buck [Cal.] 91 P 529. Where the court gave a charge embodying the law concretely on the subject of justifiable homicide, a charge embodying the entire field of the law as embraced in Pen. Code, § 197, was not error. People v. Quimby [Cal. App.] 92 P 493.

74. Instruction that highest degree which jury could find was murder in the second degree properly refused where murder in first degree could be found. Gordon v. State, 147 Ala. 42, 41 S 847. Evidence authorized instruction on voluntary manslaughter. Freeman v. State, 1 Ga. App. 276, 57 SE 924. Prejudicial error to fail to instruct on law of involuntary manslaughter in commission of a lawful act without due caution and circumspection, where evidence would have supported conviction of that offense. Ray v. State, 127 Ga. 52, 55 SE 1046. Evidence held to authorize charge on manslaughter. Pryer v. State, 128 Ga. 28, 57 SE 93. Error to omit charge on manslaughter, though not requested, where evidence did not warrant conviction of higher offense. May v. State, 89 Miss. 291, 42 S 164. Evidence regarding difficulty between defendant and decedent held to require instruction on manslaughter in the fourth degree arising from heat of passion. State v. Spivey, 191 Mo. 87, 90 SW 81. Evidence held to require instruction on manslaughter in fourth degree where deceased came upon defendant unawares and threatened and attacked him. State v. Walker, 196 Mo. 73, 93 SW 384. Defendant's testimony that he did not remember how killing occurred, but only that he pulled out his gun and shot the deceased, that he was under the influence of liquor and did not desire to kill deceased, held to require an instruction on manslaughter in the first degree as defined by Pen. Code, § 189. People v. Granger [N. Y.] 79 NE 833. In assault with intent to kill if proof shows lower offense, the jury should be instructed as to the law thereof. Prescott v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 881, 105 SW 192. On prosecution for negligent homicide, where there was no direct evidence that accused, an officer, shot toward deceased to scare him, but he first denied that he shot and then admitted that he shot decedent accidentally, held to justify a charge as to his liability if he shot toward deceased to scare him. Saye v. State [Tex. Cr. App.] 99 SW 551. Error to omit charge on manslaughter where evidence showed that defendant was attacked by deceased with a knife, that defendant retreated and tried to avoid combat, and then fired. Harris v. State [Tex. Cr. App.] 89 SW 1064. Where state showed murder in first degree and defendant testified to contrary, charge on such offense authorized. Salinas v. State [Tex. Cr. App.] 102 SW 116. Evidence held to require charge on manslaughter. Lara v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 5, 89 SW 840. Evidence held to require charge that if defendant shot deceased in order to escape from an illegal arrest which had rendered defendant incapable of cool reflection he would be guilty of no higher crime than manslaughter Earles v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 223, 94 SW 464. In trial for homicide committed with knife, court should have instructed on simple and aggravated assault under Pen. Code 1895, art. 719. Lucas v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 776, 90 SW 880. Accused went to talk to deceased about his treatment of their mother-in-law, and as soon as subject was broached deceased threatened to kill accused, whereupon accused said he did not want to hurt deceased but that he should not come on. Deceased came on, reaching for his knife, and defendant shot him. Held to require charge on manslaughter but not on imperfect self-defense. Keith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 516, 94 SW 1044. Court should have charged on aggravated assault where there was evidence of an attack with a pocket knife, in prosecution for homicide. Neilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. Buggies of deceased and defendant collided accidentally, and deceased's buggy was smashed, and he ordered defendant to stop, pursued him, and stopped his horse. Defendant then struck deceased with butt of black snake whip and killed him. Held instruction on aggravated assault should have been given. Coleman v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 371, 90 SW 949. Also instruction on self-defense. Id. Where there was evidence that defendant was attacked by a mob because he was a negro at work as a brakeman, and that the mob kept firing at him, and that defendant was excited or terrorized and fired into the mob, killing deceased, whom he did not know, an instruction on manslaughter was required. Lewis v. State [Tex. Cr. App.] 89 SW 1073. Defense of accidental and unintentional killing does not preclude instructions on any crime charged and supported by evidence. State v. Clifford, 59 W. Va. 1, 52 SE 981. Under Rev. St. 1879, § 1654, providing that one may be found guilty of a lesser crime under an indictment for a greater, it is proper to charge on murder in second degree though there is evidence of first degree murder only. State v. West, 202 Mo. 128, 100 SW 478. Refusal to instruct on lower degrees of homicide than murder is prejudicial error if evidence from any reasonable view will support a lower crime. Duthey v. State, 131 Wis. 178, 111 NW 222. Held error to refuse to instruct on manslaughter in third degree as defined by St. 1898, § 4354. Id. Where charge is murder in the first degree, and the evidence is such as to practically exclude any theory of guilt in any lower degree, and does not naturally suggest absence of deliberation and premeditation, yet the court should define and instruct in regard to all degrees of which there is any reasonable theory of guilt under the evidence. State v. Newton, 74 Kan. 561, 87 P 757. But it is not reversible error to omit such instructions in the absence of any request therefor. Id. Where evidence showed that decedent on meeting accused charged him with stealing, that decedent had a knife in his hand which he threw on the ground and advanced and struck accused with his hand, and accused simultaneously shot him, and accused claimed decedent had the knife in his hand all the time, held proper to charge on mur-

dence sufficient to make an issue for the jury; issues [75] and defenses [76] not presented

der in first and second degrees and justifiable homicide. People v. Quimby [Cal. App.] 92 P 493. Where murder was committed during a difficulty between accused and deceased, proper to charge on murder by poison, lying in wait, etc., as defined by the code, thereby explaining forms in which murder may present itself. Id. Evidence held to justify charge on murder in first and second degrees and manslaughter. Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403.

75. Charge on excessive force should not be given where there was no evidence thereof. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Where evidence showed that motive for killing was to prevent injury to accused, it was not error to refuse to charge on the theory of no motive. State v. Barnett, 203 Mo. 640, 102 SW 506. Error to charge on theory that prosecutor provoked the difficulty where there is no testimony on that point. Canterberry v. State [Miss.] 43 S 678. Where there was no evidence that defendant provoked the difficulty, a charge that if he did he would be guilty was error. Williams v. State [Miss.] 43 S 467. "Held no occasion to charge that defendant could not be convicted on evidence of drunkenness or use of profane or indecent language in presence of ladies. McLin v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 881, 90 SW 1107. Where there was evidence that defendant shot in self-defense, and when decedent was on his knees attempting to shoot defendant shot him three times, but there was no evidence that such three shots shortened his life, a charge that if such shots did shorten his life defendant was guilty of manslaughter was error. Williams v. State [Miss.] 43 S 467. Where accused made no claim that he killed deceased because of provocation, but denied killing him at all, he could not object to omission to instruct on provocation or define "heat of passion." State v. Barrington, 198 Mo. 23, 95 SW 235. Failure to charge that assault causing bloodshed is adequate cause is not error where there was no evidence of such assault. Blunt v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 144, 105 SW 794. Instruction that law of self-defense does not imply the right to attack in the first instance nor permit of retaliation or revenge held erroneous where there was no evidence that accused was the attacking party, or that he committed the act in retaliation or revenge. Filippo v. People, 224 Ill. 212, 79 NE 609. Instruction based on Pen. Code, art. 652, limiting homicide to cases where destruction of life is complete, not authorized where decedent lived 18 days and died of results of wound. Lahue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 125, 101 SW 1008. Where fractured skull resulted from assault causing death in seven days, but it appeared that deceased fell out of bed the night before he died, it was not error to refuse to charge Pen. Code 1895, art. 651, that the death was caused by act of accused. Outley v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 947, 99 SW 95.

76. Instruction on self-defense held error because not based on evidence. Foglia v. People, 229 Ill. 286, 82 NE 262. Issue of self-defense not presented by fact showing that deceased was killed by shot intended for her husband who was trying to get her into the house. Fizini v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 836, 100 SW 394. Refusal of instruction as to uncommunicated threats not error where there is no evidence of such threats. State v. Arnold, 206 Mo. 589, 105 SW 641. Not proper to charge law of self-defense where prosecutor was making no demonstration at the time. Roch v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 903, 105 SW 202. Not error to refuse request on abandoning difficulty where there is no evidence of abandoment. Draggers v. U. S. [Ind. T.] 104 SW 1166. Instruction as to self-defense in assault to murder held not warranted by evidence. Floyd v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 170, 105 SW 791. Not error to refuse to charge on justifiable homicide under Pen. Code 1895, § 73, no evidence of such defense. Lightsy v. State [Ga. App.] 58 SE 686. It is error to give such charge. Id. Not error to refuse to charge on invasion of habitation where there was no proof thereof. White v. State [Ga.] 58 SE 686. Request on insanity not applicable to evidence not showing mental unsoundness to antedate a drunken spree. State v. Kidwell [W. Va.] 59 SE 494. Evidence insufficient to justify charge on threats as justification under Rev. St. 1895, art. 713, providing that they are no justification unless the decedent manifested an intent to execute them. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Instruction on self-defense or manslaughter not warranted where defendants conspired to kill deceased and shot him while he was asleep. Bast v. Com., 30 Ky. L. R. 967, 99 SW 978. Where defendant shot deceased while deceased was standing over prostrate son of defendant with whom he was fighting, instruction as to abandonment of difficulty by decedent was not warranted. Morris v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 490, 98 SW 873. Where defendant pleaded insanity and alibi and alibi was disproved, it was not error to fail to mention it. Bast v. Com., 30 Ky. L. R. 967, 99 SW 978. Where proof showed that accused was a man of sane mind, charge on insanity was properly refused. Id. Where evidence showed that accused and his companions fired many shots toward decedent before killing him, instruction that they were not guilty if they did not intend to kill him not warranted by the evidence. McKinney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 545, 96 SW 48. Additional instruction on alibi defense held not required. Benton v. State, 78 Ark. 284, 94 SW 688. Charge on self-defense not warranted where accused struck deceased from behind and then beat him to death. Spencer v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 594, 90 SW 638. Where there was a great deal of testimony that decedent sought defendant and provoked the difficulty, instructions on self-defense held erroneous. Kennedy v. Com. [Ky.] 102 SW 863. Instruction as to self-defense properly refused as not based on evidence. State v. Edwards, 203 Mo. 528, 102 SW 520. Where there is no issue of self-defense, charge thereon need not be given. Laws v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 136, 101 SW 987. Theory of imperfect self-defense properly ignored

by the evidence need not and should not be submitted. No instructions need be given on offenses not charged,[77] nor as to offenses which could not be found under the evidence.[78] If facts proved constitute a particular offense, it is proper to so charge,[79] and if there is no evidence as to a particular defense, the court may so state.[80] In Alabama the court is required to charge on both degrees of murder, though the evidence will support only a verdict for the first degree or acquittal.[81]

where evidence showed either murder or that the killing was justified. State v. Zorn, 202 Mo. 12, 100 SW 591. Court need not submit issue of self-defense where killing is admitted and only claim of defendant is that it was accidental and involuntary. People v. Mallon, 116 App. Div. 425, 20 Crim. R. 427, 101 NYS 814. Omission to charge on self-defense held not error where it appeared that assault was wholly unprovoked and where only defense was drunkenness to such an extent that no intent could be formed. State v. Yates, 132 Iowa, 475, 109 NW 1005.

77. Instruction on murder inapplicable where charge was assault. Fuller v. State, 127 Ga. 47, 55 SE 1047.

78. Charge on murder in first degree properly refused where defendant had been acquitted on that charge. Allen v. State [Ala.] 42 S 1006. Evidence held not to authorize instruction on voluntary manslaughter upon the theory of mutual combat. Bird v. State, 128 Ga. 253, 57 SE 320. Where the only claim of defendant was that killing was accidental, he could not complain of failure to charge manslaughter. Thomas v. State [Ala.] 43 S 371. Not error to refuse to charge on law of shooting at another nor as to simple assault where such offenses are not involved. Fews v. State, 1 Ga. App. 122, 58 SE 64. In assault with intent to kill, it is error to leave it optional with the jury to find accused guilty of that offense or of another where if death had resulted the crime would have been manslaughter. Jenkins v. State [Ga. App.] 59 SE 435. Error to charge on assault and battery where evidence clearly shows assault with intent to kill. Howard v. State [Ga. App.] 59 SE 89. Not error to refuse to charge on manslaughter where there was evidence only of murder or justifiable homicide. Robinson v. State [Ga.] 58 SE 842. Failure to charge on crimes lower than manslaughter not error where defendant would be guilty of that crime if guilty at all. State v. Walker, 133 Iowa, 489, 110 NW 925. Omission to charge on manslaughter is not error where there is no evidence reducing the crime. State v. Clay, 201 Mo. 679, 100 SW 439. Not error to refuse instruction on involuntary killing where there was no evidence in regard thereto. State v. Megorden [Or.] 88 P 306. Where circumstantial evidence, with defendant's confessions, showed that deceased was murdered while asleep for the purpose of robbery, no instruction on murder in the second degree was necessary, though circumstantial evidence alone tended to show no malice. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 244, 94 SW 224. Evidence held not to justify submission of murder in second degree but only of first. State v. Hottman, 196 Mo. 110, 94 SW 237. It being admitted that homicide was during perpetration of a robbery, it was not error to refuse to charge on murder in the second degree. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975. No evidence of manslaughter and court properly refused to charge thereon. Abbata v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 209, 102 SW 1125. Where there is no evidence of murder in second degree, it is not error to refuse to charge as to it. State v. Paulsgrove [Mo.] 101 SW 27. Instruction on manslaughter not required where there is no evidence of such crime. State v. West, 202 Mo. 128, 100 SW 478. Failure to charge on lesser degrees of crime not error where proof showed murder in first degree or nothing. Frazier v. State, 117 Tenn. 430, 100 SW 94. Not error to refuse to instruct on manslaughter in fourth degree. State v. Spaugh, 200 Mo. 571, 98 SW 55. Omission to charge on lesser offenses included in the indictment but as to which there was no evidence not prejudicial to accused. Powers v. State, 117 Tenn. 363, 97 SW 815. Instruction that if jury believed to exclusion of reasonable doubt that accused in sudden affray and in sudden heat and passion killed deceased, without malice, he was guilty of misdemeanor, only sufficient response to request for misdemeanor instruction. Ford v. Com., 30 Ky. L. R. 54, 97 SW 370. Where the issues were murder in first degree or accidental homicide, the facts did not require a charge on manslaughter. McKenzie v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 68, 96 SW 932. Where there were no circumstances to reduce the crime below murder in first degree, an instruction was not erroneous as failing to state excusable circumstances which relate only to lower degrees of homicide. Jones v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 82, 96 SW 930. Charge on murder in second degree properly refused where evidence clearly showed premeditation and formed design. Tune v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 249, 94 SW 231. Where insanity alone was pleaded and there was no evidence of provocation, it was proper to refuse a charge on manslaughter. State v. Paulsgrove [Mo.] 101 SW 27. No instruction on manslaughter in fourth degree required where parties agreed to fight and defendant used a knife from the first without deceased's knowledge. State v. Maupin, 196 Mo. 164, 93 SW 379. Instruction that if jury believed the evidence they could not find defendant guilty of any crime higher than manslaughter in the second degree properly refused where verdict of murder would be justified by evidence. Austin v. State, 145 Ala. 37, 40 S 989. Where evidence would justify verdict of murder only, charge allowing the finding of lower degree of homicide was properly refused. Gordon v. State, 147 Ala. 42, 41 S 847.

79. Where the facts proved show murder, it is proper to so charge. Bleich v. People, 227 Ill. 80, 81 NE 36.

80. Where there is no evidence of provocation, court may properly so state to jury. State v. Hottman, 196 Mo. 110, 94 SW 237.

81. Code 1896, § 4857, provides that a jury finding a defendant guilty of murder must

Instructions are to be construed as a whole,[82] hence refusal of requested instructions covered by those given will not be held error,[83] and it is not error to omit special charges on issues on theories covered generally, in the absence of any request therefor.[84] Without a request the court is not bound to instruct on the law of a theory arising solely from the statement of the accused.[85]

In the foot notes are grouped holdings on the propriety and correctness of particular instructions relating to the burden and degree of proof and presumptions,[86] intent,[87] malice,[88] deliberation and premeditation,[89] responsibility of con-

also find the degree; hence it is proper and it is the duty of the court to instruct on the first and second degree, though the evidence warrants only a verdict of the first degree or acquittal. Parham v. State, 147 Ala. 57, 42 S 1. Code 1896, § 4857, expressly requires that in prosecution for highest degree of homicide the court must charge on first and second degree murder. Thomas v. State [Ala.] 43 S 371.

82. Where accused is given benefit of reasonable doubt in one instruction, such element need not be referred to in others. O'Day v. Com., 30 Ky. L. R. 848, 99 SW 937. Instruction as to provocation of difficulty not subject to this objection. Id. Instruction defining murder and malice not erroneous as eliminating right of self-defense where that element is covered in other instructions. Green v. U. S. [Ind. T.] 104 SW 1159. Where excuse, mitigation, and justification are defined in charge on manslaughter, failure to state circumstances constituting such elements held not error. Cravens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 304, 103 SW 921. Instruction as to presumption of innocence held to render failure to charge that the burden of proof was on the state harmless. Jones v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 874, 105 SW 349. Where court charged murder in second degree, manslaughter, assault, and self-defense, and on reasonable doubt between the degrees the accused could not complain that no charge on reasonable doubt between degrees of murder was given. Green v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 907, 105 SW 205.

83. Request held fully covered by charge on self-defense and not error to refuse it. State v. King, 203 Mo. 560, 102 SW 575. Instruction on right to use weapon in self-defense held covered by instructions given. State v. Ross, 75 S. C. 533, 55 SE 977. Instruction as to murder in second degree properly refused. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879. Where "circumstances of mitigation or justification" are treated in one instruction, it is not necessary to define them in others. Holt v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 751, 100 SW 156.

84. Omission to charge certain theories held not error where no request was made. State v. Barnett, 203 Mo. 640, 102 SW 506. Not error to omit to charge law of reasonable doubt where no request is made therefor. Mabry v. State, 80 Ark. 345, 97 SW 285. Instruction as to extent to which character evidence could be considered, though too narrow, held not reversible error in absence of request. Powers v. State, 117 Tenn. 363, 97 SW 815.

85. Parker v. State, 1 Ga. App. 781, 57 SE 1028.

86. See, also, Indictment and Prosecution, 8 C. L. 189. Error to refuse to charge to acquit if there was a probability of innocence. Fleming v. State [Ala.] 43 S 219. Request as to conflicting evidence held misleading. Rigsby v. State [Ala.] 44 S 608. Request properly refused as leading jury to believe too high a degree of proof was required. Id. Charge as to reasonable doubt properly refused. Young v. State [Ala.] 43 S 100. Request that fact that defendant has good character may generate reasonable doubt properly refused. Davis v. State [Ala.] 44 S 561. Request on burden of proof properly refused for want of clearness. McEwen v. State [Ala.] 44 S 619. Charge that if jury doubted defendant's guilt and that all doubts should be resolved in his favor held bad. Kirby v. State [Ala.] 44 S 38. Error to refuse to charge to acquit unless the evidence excluded every reasonable supposition except that of guilt. Griffin v. State [Ala.] 43 S 197. Instruction that highest degree of proof was required properly refused. Kirby v. State [Ala.] 44 S 38. Instruction requiring circumstantial to exclude every other hypothesis except guilt instead of "reasonable" hypothesis is error. Strickland v. State [Ala.] 44 S 90. Instruction as to degree and certainty of proof properly refused. Brown v. State [Ala.] 43 S 194. Proper to refuse to charge that reasonable doubt is that want of repose and confidence which an honest man has in the correctness of a conclusion which he is about to make after giving question best thought. Id. Not error to refuse to charge that jury must be satisfied to a moral certainty not only that proof is consistent with guilt but is wholly inconsistent with any other rational conclusion. Griffin v. State [Ala.] 43 S 197. Proper to refuse to charge that if evidence was evenly balanced jury should lean to side of mercy. Kirby v. State [Ala.] 44 S 38. Request on reasonable doubt held bad. Id. Instruction as to weight to be given opinion testimony held on weight of evidence. People v. Buck [Cal.] 91 P 529. Instruction as to burden of proof held not on the weight of evidence. People v. Grill [Cal.] 91 P 515. Burden of proof is on defendant in first instance to prove self-defense, unless it is shown by evidence produced against him. Instruction to this effect held not objectionable. State v. Bailey, 79 Conn. 589, 65 A 951. Charge as to presumption of innocence and burden of proof approved. Vasques v. State [Fla.] 44 S 739. Error to refuse a requested charge on reasonable doubt where its equivalent had not been given. Foglia v. People, 229 Ill. 286, 82 NE 262. Instruction that failure of evidence to show any motive for act is a circumstance in favor of innocence and is to be considered in connection with all

the evidence held sufficiently favorable to accused. State v. Walker, 133 Iowa, 489, 110 NW 925. Instructions that the state had the burden to prove every element of the crime and the intent should be found from attending circumstances excludes from the consideration of the jury any presumption that in firing the gun defendant intended to kill. Commonwealth v. Parsons [Mass.] 81 NE 291. Charge that circumstantial evidence is as good as any other, and if it rises high enough in scale of belief to generate conviction of guilt beyond reasonable doubt the jury should act upon it, is error. Haywood v. State [Miss.] 43 S 614. Where state made out a case of deliberate killing and defendant claimed accidental killing, and instruction charging Pen. Code 1895, art. 715, relative to killing with a deadly weapon and one on the theory of accident, held not to militate against presumption of innocence. McKenzie v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 68, 96 SW 932. Where only small knife was used and that but once, court should have charged that, if instrument used was not likely to produce death, intent to kill cannot be presumed unless from the manner in which it was used. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 126, 93 SW 735.

87. Instructions in a prosecution for homicide committed by stabbing, as to intent and character of weapon and manner of its use, held proper. Hardin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 231, 103 SW 401. Where crime was committed either with large knife or a small one, instruction that unless instrument was a deadly weapon accused could not be convicted unless it was used with intent to kill held proper, for if the larger knife was used the charge was beneficial to accused, and if the small one the charge was correct. Early v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 78, 97 SW 82. Instruction that defendant could not be found guilty unless jury found beyond a reasonable doubt that defendant intended to kill decedent when he struck him properly refused. Allen v. State [Ala.] 42 S 1006. An instruction must require that the acts were done with design to effect death. State v. Barrington, 198 Mo. 23, 95 SW 235. It is proper to charge Pen. Code 1895, art. 717, providing that the instrument or means by which the killing was done are to be considered in judging the intent, where the weapon used was a deadly one, the purpose of accused was to kill, and the weapon was used in a deadly manner. Campos v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 511, 95 SW 1042. Where two-bladed knife was used, court should have instructed that, if jury did not find the knife to be a deadly weapon, intent to kill could not be presumed, unless from the manner of its use. Lucas v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 776, 90 SW 880. Where it appeared that accused intended to and did kill deceased with a pistol, an instruction that the means by which the homicide is committed may be considered in judging the intent was not prejudicial to accused. Barbee v. State, [Tex. Cr. App.] 17 Tex. Ct. Rep. 377, 97 SW 1058. Instruction relative to presumption arising from use of deadly weapon should not be given where accused carried a whip handle only which he used as a club. Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868.

88. Express malice defined. State v. Bell, 5 Pen. [Del.] 192, 62 A 147. Instructions on implied malice held correct. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Instruction defining legal malice approved. Long v. State, 127 Ga. 350, 56 SE 444. Charge on presumption of malice approved. Mann v. State, 124 Ga. 760, 53 SE 324; Tolbirt v. State, 124 Ga. 767, 53 SE 327. Failure to define "malice aforethought" held error. State v. Von Kutzleben [Iowa] 113 NW 484. Failure to define "malice aforethought" not error where the instruction contained the elements thereof. Jones v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 82, 96 SW 930. Giving general definition of "express malice" not error though part of such definition is not applicable. Manning v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 388, 98 SW 251. Use of "with malice aforethought" in latter instead of first part of instruction not error. O'Day v. Com., 30 Ky. L. R. 848, 99 SW 937. An instruction reciting hypothetical facts from which the law implies malice is not objectionable for not expressly requiring malice to be found. Koser v. People, 224 Ill. 201, 79 NE 615. Where indictment charged malice aforethought, an instruction to convict of murder if certain facts were found "as charged in the indictment" was not objectionable as failing to mention the element of malice aforethought. Id. Where in murder trial state's evidence authorizes inference of malice, it is proper to instruct that law presumes every homicide malicious until contrary appears and that it is incumbent on defendant to make out circumstances of alleviation, excuse, or justification, unless they appear from the state's evidence. Bradley v. State, 128 Ga. 20, 57 SE 237. Instruction that "if you find the accused killed deceased in the manner charged (that is not in self-defense as claimed), and you find that there were then present at the time of the killing no circumstances reducing the crime to manslaughter, the law presumes malice and the crime committed was murder," held correct. State v. Bailey, 79 Conn. 589, 65 A 951. Instruction that "the law presumes malice in the case of every unlawful homicide, unless attended by circumstances of mitigation or extenuation and presumes that such homicide is murder," held sufficiently accurate under the facts. Id. Instruction as to consideration to be given evidence of threats held erroneous as to their being relevant to issue of whether decedent harbored malice or ill will toward accused. Thomas v. State [Ala.] 43 S 371.

89. Definition of "deliberation in a prosecution for homicide" approved. State v. Barrington, 198 Mo. 23, 95 SW 235. Requested instruction that defendant could not be convicted of murder unless jury believed beyond a reasonable doubt that he had a "formed and fixed design to kill" properly refused. Skipper v. State, 144 Ala. 100, 42 S 43. Instruction in extenso as to premeditation and malice aforethought sustained. Commonwealth v. Tucker, 189 Mass. 457, 76 NE 127. Instruction that there must be deliberation and premeditation but that no particular length of time need elapse, etc., held to exclude idea of killing simultaneous

spirators,[90] of aiders and abettors,[91] of principals and accomplices,[92] and persons jointly indicted,[93] assault with intent to kill or murder,[94] and lower grades of assault,[95] manslaughter,[96] murder and the degrees thereof,[97] provocation,[98] self-defense,[99] and defense of another,[1] and justification.[2]

with formation of design to kill. State v. Banks, 143 N. C. 652, 57 SE 174. There being evidence that defendant had been mentally disturbed some time before the killing, it was held proper to leave the question of time for deliberation and premeditation to the jury under instruction that there must be proof that design to kill must have been formed and matured in cool blood. State v. Megorden [Or.] 88 P 306.

90. Acts of a co-conspirator can be considered only in furtherance of common design. Error to instruct to consider conduct of one in absence of other. Dobbs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 64, 100 SW 946. In a case where evidence showed a conspiracy to murder, instructions held not erroneous as authorizing the jury to find all guilty if they found one guilty. Bull v. Com., 29 Ky. L. R. 949, 96 SW 817.

91. Instruction as to liability of accused if he counseled, advised, assisted, encouraged, caused, or procured another to kill decedent should be modified by adding "and said killing was induced thereby." Hall v. Com., 29 Ky. L. R. 485, 93 SW 904. Instruction on when one can be convicted as a principal for having aided and abetted in the crime approved. State v. Hunter [S. C.] 57 SE 637. An aider and abettor must be present participating in the crime and sharing the intent of the principal. Instruction held misleading. Landrum v. Com., 29 Ky. L. R. 924, 96 SW 587.

92. Request submitting what would constitute an accomplice properly refused. Strickland v. State [Ala.] 44 S 90. Instruction that indictment charging one as a principal in the first degree is sustained by proof beyond a reasonable doubt that defendant is guilty as a principal in the second degree approved. McLeod v. State, 128 Ga. 17, 57 SE 83. Instructions approved in case where defendant was one of several assailants and deceased was killed during assault. State v. Crittenden, 191 Mo. 17, 89 SW 952. Instruction on theory that one was a principal when it was not claimed that he did the shooting but was present at the time held error. Oates v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 285, 103 SW 859.

93. Instructions where codefendants were jointly tried held erroneous in making guilt of one dependent on guilt of other. Abbata v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 209, 102 SW 1125. On prosecution of several persons jointly for homicide, held error to refuse to charge that one or more could be found guilty and others not guilty. State v. Vaughan, 200 Mo. 1, 98 SW 2. On trial of joint defendants, instructions held not to permit conviction of one on evidence against his codefendant. State v. Spaugh, 200 Mo. 571, 98 SW 55. Separate trials being granted three persons jointly indicted, the court may properly instruct that persons named are charged, and as to aiding and abetting in crime. State v. Kenny [S. C.] 57 SE 859. Where two persons are jointly indicted it is not improper to charge on the law of conspiracy where the evidence authorizes it, though the indictment does not in terms allege a conspiracy. Bradley v. State, 128 Ga. 20, 57 SE 237. Though the killing may have been done by only one of two defendants on trial, an instruction that both must be acquitted unless the evidence shows beyond a reasonable doubt which one did it is properly refused, as it ignores the element of one aiding or abetting the other, and conspiracy. State v. Kendall, 143 N. C. 659, 57 SE 340.

94. Instruction on assault with intent to kill taken alone held erroneous, but in connection with others held sufficient. Satterwhite v. State [Ark.] 100 SW 70. Where in assault with intent to kill malice and malice aforethought are defined, and both assault with intent to kill and aggravated assault are defined, it was not error to fail to explain elements of murder. Lasana v. State [Tex. Cr. App.] 98 SW 855. In trial of charge of assault with intent to murder, where evidence showed that defendant fired into room where persons assailed were repeatedly after being told to stop, an instruction on aggravated assault was not necessary. Palmer v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 83, 89 SW 836. Where indictment used term "feloniously" in charging assault under Comp. Laws 1897, § 1379, its use was unnecessary and hence omission from the term in instruction on offense held not error. Territory v. Gonzales [N. M.] 89 P 250. Omission of word "unlawfully" held not error in the light of other instructions. Id. Where instruction on circumstances under which offense defined by Comp. Laws 1897, § 1379, could be found used term "without excuse or justification," the instruction was not objectionable as coming under § 1381. Id. Instruction on circumstances under which verdict of guilty of assault with intent to kill could be found approved. Jackson v. State, 125 Ga. 101, 53 SE 607. Instruction in trial of charge of assault with intent to commit murder that malice will be presumed from use of deadly weapon held erroneous because omitting requirement as to intent to kill. Wright v. State [Ala.] 42 S 745.

95. Not error to charge simple assault on evidence that defendant stabbed decedent. Hardin v. State [Tex. Cr. App.] 19 Tex. Ct Rep. 231, 103 SW 401. Charge on assault and battery may be given if evidence warrants. Id.

96. Law of voluntary manslaughter properly submitted. Solomon v. State [Ga. App.] 58 SE 381. Instruction defining manslaughter in the first degree and stating that any other killing would be manslaughter in the second degree is error. Neilson v. State, 146 Ala. 683, 40 S 221. Court having charged entire section of Penal Code containing law of voluntary manslaughter, held not error not to charge on law of cooling time, no request therefor being made. Rogers v. State,

128 Ga. 67, 57 SE 227. Instruction as to manslaughter held faulty in not requiring a finding that deceased intentionally shot and killed decedent. State v. Elsey, 201 Mo. 561, 100 SW 11. Instruction on voluntary manslaughter need not require that the killing be "felonious." Shipp v. Com., 30 Ky. L. R. 964, 99 SW 945. Requests to charge on manslaughter which eliminate criminal recklessness and specific intent to kill properly refused. Commonwealth v. Parsons [Mass.] 81 NE 291. Charge on voluntary manslaughter approved. Bradley v. State, 128 Ga. 20, 57 SE 237. Instruction that if acts were done without intent to kill defendant would be guilty of manslaughter held properly to submit manslaughter. State v. Walker, 133 Iowa, 489, 110 NW 925. Omission of "unlawfully" in charge on manslaughter not prejudicial to accused even if erroneous. Foster v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 42, 100 SW 1159. Use of "transport" in charge on manslaughter held erroneous as intensifying passion necessary to reduce the degree of crime. Clark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 199, 102 SW 1136. Where law of self-defense is properly presented, instruction on manslaughter is not erroneous for failure to require acquittal if accused acted in self-defense. Foster v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 42, 100 SW 1159. Where evidence showed that killing occurred immediately on insult being offered, instruction that it must have so occurred in order to reduce the crime to manslaughter not misleading. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059.

97. Instruction on murder in first degree which eliminates element of malice is error. Oates v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 285, 103 SW 859. Charge that homicide is reduced to manslaughter only where passions aroused are acted upon promptly and that crime is murder if act is done from vengeance or malice and not in passion approved. Harrison v. State, 144 Ala. 20, 40 S 568. Charge on murder in second degree sustained. Gregory v. State [Ala.] 42 S 829. Instruction held not erroneous as failing to state elements of murder in first degree. Duckworth v. State, 80 Ark. 360, 97 SW 280. Murder in second degree defined. State v. Bell, 5 Pen. [Del.] 192, 62 A 147. Where instruction was to effect that crime would be murder in the first degree if injuries were inflicted willfully, deliberately, premeditatedly, and with malice aforethought, otherwise murder in the second degree, if death resulted from defendant's acts, it was not objectionable as allowing a conviction for a purely accidental killing. State v. Baldes, 133 Iowa, 158, 110 NW 440. Held proper to embody all the elements of the crime of murder in an instruction, and to tell the jury that if all those elements are found beyond a reasonable doubt to convict of murder without mentioning manslaughter. Koser v. People, 224 Ill. 201, 79 NE 615. Instruction on murder and involuntary manslaughter held not erroneous because of omission of word "feloniously." Stout v. Com., 29 Ky. L. R. 627, 94 SW 15. Omission of "feloniously" from an instruction on subject of murder and manslaughter is not erroneous. O'Day v. Com., 30 Ky. L. R. 848, 99 SW 937. Defining murder without prescribing penalty is not error where penalty is prescribed in another instruction. Id. In Louisiana there is no statute dividing the crime of murder into two degrees and defining murder in the first degree as a homicide with the specific intent to kill or positive premeditation; hence it is proper to refuse to give a special charge on the theory that absence of such specific intent would justify the jury in finding the defendant guilty without capital punishment or guilty of manslaughter. State v. Hogan, 117 La. 863, 42 S 352. Instruction defining murder in second degree not bad because containing word "feloniously." State v. Miles, 199 Mo. 530, 98 SW 25. Nor is such instruction bad for failure to use "beyond reasonable doubt." Id. Instruction on murder in second degree not bad for failure to define "deliberately." State v. West, 202 Mo. 128, 100 SW 478. Charge that every willful killing of a human being is either murder or manslaughter is error since this includes killing in self-defense. Murphy v. State, 89 Miss. 827, 42 S 877. Definition of murder in second degree not objectionable because in two paragraphs. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. Instruction as to murder in second degree held favorable to accused notwithstanding use of terms not technically correct. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879. Where issues of murder in both degrees were submitted, the defendant was held entitled to have converse of propositions submitted. Ripley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 49, 100 SW 943. Held error to charge that to convict of murder in the second degree evidence must "fail to establish" manslaughter and self-defense. Casey v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 818, 90 SW 1018. Though evidence tends to show manslaughter, instruction on murder is proper if evidence warrants it. State v. Clifford, 59 W. Va. 1, 52 SE 981. Instructions on murder in first and second degree and on presumptions from certain facts proper where warranted by evidence. Id.

98. Failure to define "improper conduct" as used in an instruction on provocation is not error, it not being a technical term. State v. Barrington, 198 Mo. 23, 95 SW 235. A charge that the fact that deceased struck accused with a shoe last would not justify the killing taken in connection with a charge that if the blow inflicted pain and caused passion which rendered accused's mind incapable of cool reflection he could only be found guilty of manslaughter held not erroneous. Brown v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 548, 95 SW 126. "Cooling time" should be defined. Kannmacher v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 82, 101 SW 238. Instruction held to have sufficiently covered provocation and manslaughter where defendant's claim was that he found deceased and his wife in a compromising position and hence shot deceased. Gregory v. State [Tex. Cr. App.] 94 SW 1041. Instruction on manslaughter held not too restrictive as confining acts of provocation to acts at time of difficulty. Armstrong v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 519, 96 SW 15. Where accused set up self-defense and insult to his wife and crime occurred at first meeting after insult, instruction that provocation as predicate for manslaughter must arise at time of killing was proper. Barbee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 377, 97 SW 1058. Where

evidence showed that decedent slandered defendant's wife in his presence, and that defendant did not then resent it but went away and came back with a gun and killed decedent, an instruction that to reduce murder to manslaughter provocation must have come from decedent, and that defendant must have acted upon the provocation at the time, was proper. Tyler v. State [Tex. Cr. App.] 90 SW 33. Where the court in a charge on manslaughter gave the statutory definition of adequate cause, it was not necessary to illustrate it by example. Holt v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 757, 100 SW 156. Where there were two difficulties, some minutes apart, defendant returning armed after the first, the question of passion and adequate cause was limited to the first difficulty. Instruction as to cooling time held erroneous. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 94, 89 SW 1068.

99. Improper to omit element of freedom from fault in charge on self-defense. McEwen v. State [Ala.] 44 S 619; Rose v. State, 144 Ala. 114, 42 S 21. Requested charge on self-defense properly refused because ignoring element of accused's provoking difficulty with murderous design. Harrison v. State, 144 Ala. 20, 40 S 568. Instruction on self-defense properly refused which omitted reference to belief by accused that he was in danger whether he brought on difficulty, etc. Id. Charge erroneous because failing to hypothesize defendant's duty to retreat. Gregory v. State [Ala.] 42 S 829. Instruction failing to set out elements of self-defense properly refused. Allen v. State [Ala.] 42 S 1006. Charge on self-defense held to improperly charge the law of freedom from fault. McEwen v. State [Ala.] 44 S 619. Requested instructions on self-defense properly refused because ignoring question of freedom of accused from fault in bringing on the difficulty, his duty to retreat, necessity for danger, etc. Tribble v. State, 145 Ala. 23, 40 S 938. Instruction properly refused which failed to define self-defense and required jury to acquit if they had a reasonable doubt as to whether defendant acted in self-defense or otherwise. Laws v. State, 144 Ala. 118, 42 S 40. Instruction on self-defense properly refused which ignored question of who provoked the difficulty. Id. Requested instruction on self-defense held misleading. Williams v. State, 147 Ala. 10, 41 S 992. Instruction on self-defense objectionable because failing to postulate that circumstances were such as to reasonably impress, and did impress defendant with the belief that he was in great and imminent peril. Id. Requested instructions on self-defense held to omit reference to duty to retreat and defendant's freedom from fault in bringing on affray. Hanners v. State, 147 Ala. 27, 41 S 973. Instruction on self-defense properly refused because omitting question whether defendant willfully brought on the difficulty. George v. State, 145 Ala. 41, 40 S 961. Instructions on provocation by defendant, and abandonment and self-defense, approved. Velvin v. State, 77 Ark. 97, 90 SW 851. Instruction on self-defense properly refused because not stating defendant's duty to escape. Wright v. State [Ala.] 42 S 745. Instruction that conduct of decedent and previous threats are evidence that accused was in danger invades province of jury. Bluett v. State [Ala.] 44 S 84. Instruction on self-defense though perhaps confusing did not place court in error. Id. Request on self-defense properly refused as ignoring peril of life or bodily harm and honest belief of such peril. Kirby v. State [Ala.] 44 S 38. Instruction on self-defense must set out elements thereof. Id. Instruction on self-defense held bad for ignoring freedom from fault and necessity of taking life. Id. Instructions on self-defense held erroneous in that it did not negative a willingness on part of defendant to enter the combat, of which there was evidence. Degg v. State [Ala.] 43 S 484. Instruction as to liability if killing occurred after decedent had ceased his assault on accused held to properly submit the issues. Dempsey v. State [Ark.] 102 SW 704. Instructions as to right of self-defense held to sufficiently present the right of the accused to exercise it. Muldrow v. State [Ark.] 99 SW 383. Issue of self-defense properly submitted. Dempsey v. State [Ark.] 102 SW 704. Instruction as to reasonableness of belief in imminence of danger approved. People v. Gallaner, 3 Cal. App. 431, 86 P 814. Instruction on right of self-defense approved. King v. State [Fla.] 44 S 941. "Actual danger" and "apparent danger" need not be defined. Danford v. State [Fla.] 43 S 593. Instruction on self-defense approved. Roseboro v. State, 127 Ga. 826, 56 SE 991. Instruction on self-defense erroneous because misleading as to definition of a felony to prevent which court instructed killing would be justifiable. Freeman v. State, 1 Ga. App. 276, 57 SE 924. Request that where threats are susceptible of two constructions to give defendant benefit of innocent construction properly refused. Word "equally" should be in charge. Dorsey v. State [Ga. App.] 58 SE 477. Instruction that reasonable apprehension of injury or death was necessary element of self-defense, omitting element of real or apparent danger, held erroneous. Morello v. People, 226 Ill. 388, 80 NE 903. Instruction held to properly present law of self-defense. Drigger v. U. S. [Ind. T.] 104 SW 1166. Instruction on self-defense held erroneous as implying that the court thought accused the aggressor and could have declined further struggle without killing. Foglia v. People, 229 Ill. 286, 82 NE 262. Law of self-defense correctly stated. Stuart v. Com. [Ky.] 105 SW 170. Instruction on self-defense which fails to submit what accused believed and had reasonable grounds to believe as to whether he was in danger is erroneous. Dossenbach v. Com., 30 Ky. L. R. 749, 99 SW 626. Instruction on self-defense held to include right of defense when danger is real as well as when apparent. Stout v. Com., 29 Ky. L. R. 627, 94 SW 15. Instruction as to right of accused to kill in self-defense held sufficiently favorable to accused. Hopper v. Com., [Ky.] 96 SW 838. Requested instructions held not applicable to self-defense as shown where defendant did not retreat. State v. Hopkins, 118 La. 99, 42 S 660. Requested instruction on self-defense not covered by one given. Scott v. State [Miss.] 42 S 184. Charge that defendant had no right to kill in self-defense unless such killing was apparently necessary to repel the assailant and to prevent some great personal injury to himself or forcible en-

try to his home held proper, and instruction on other facts properly refused. State v. Touri [Minn.] 112 NW 422. Instruction on self-defense using terms "reasonable cause to believe," "reasonable cause to apprehend," "reasonable cause to believe and did believe," and also terms "reasonable belief" and "honest belief," held not erroneous. People v. Tubbs, 147 Mich. 1, 13 Det. Leg. N. 959, 110 NW 132. Held error to modify requested instruction on self-defense. Scott v. State [Miss.] 42 S 184. Instruction on self-defense as to apprehension of danger approved. State v. Hazlett [N. D.] 113 NW 374. Instruction on self-defense disapproved because not conforming to evidence, argumentative, and improperly qualifying right of self-defense. State v. Walker, 196 Mo. 73, 93 SW 384. Instruction on self-defense held not erroneous by reason of phrase "the law of self-defense is emphatically the law of necessity." State v. Maupin, 196 Mo. 164, 93 SW 379. Instruction on self-defense held faulty as requiring existence of danger when belief of such existence is sufficient. State v. Darling, 202 Mo. 150, 100 SW 631. Error to deny right to self-defense where there is no evidence that accused brought on difficulty or was aggressor. State v. Elsey, 201 Mo. 561, 100 SW 11. Instruction held not to intrench on right of self-defense. State v. Darling, 202 Mo. 150, 100 SW 631. "Provoked the difficulty" and "began the quarrel" need no definition. State v. Long, 201 Mo. 664, 100 SW 587. Where law of self-defense is fully instructed upon, refusal to charge that mere trespass by landlord on premises in possession of tenant would not justify assault by tenant and that landlord could protect himself not error. State v. Zorn, 202 Mo. 12, 100 SW 591. Instruction that an aggressor cannot invoke self-defense held sufficiently favorable to defendant. Territory v. Price [N. M.] 91 P 733. Instruction on right of self-defense approved. State v. Williams, 76 S. C. 135, 56 SE 783. Instruction on when one may resort to deadly weapon in self-defense approved. State v. Ross, 75 S. C. 533, 55 SE 977. Instruction on self-defense held erroneous in requiring defendant to conduct himself as man of "ordinary prudence, caution, and courage." Frazier v. State, 117 Tenn. 430, 100 SW 94. Where evidence showed that deceased commenced shooting at defendant first and there was no question as to apparent danger, instruction requiring defendant to have acted with ordinary care, caution, and courage, not prejudicial. Id. Where accused fired four shots in rapid succession and there is no proof as to which shot caused death, a charge that if he was justified in firing the first shot he was justified in firing all safeguarded his rights. Cravens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 304, 103 SW 921. Under the rule that adequate cause is such as will produce passion in person of ordinary temper, it is proper to refuse to call attention to evidence that accused was not well at time of killing. Id. Instructions on threats by deceased should be given affirmatively and favorably to the accused rather than in a negative form. Watson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 587, 95 SW 115. Where evidence showed that accused came out of a house and pointed his pistol at a group of persons, warning them not to approach him and immediately afterwards shot decedent who he claimed was approaching him with a drawn knife from another direction, the issue of self-defense should not have been curtailed by one of imperfect self-defense. Maroney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 570, 95 SW 1008. Where there was evidence that deceased made a motion to draw a knife or pistol, it is error to cut off the right of the accused to act upon the appearance of danger. Watson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 587, 95 SW 115. Instruction on self-defense held to present issue of reasonable appearance of danger. Fizini v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 836, 100 SW 394. Instruction as to self-defense held to properly present such defense. Cecil v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 803, 100 SW 390. Instruction on self-defense using "all" instead of "any" circumstances, not erroneous. Holt v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 751, 100 SW 156. It is sufficient to charge on reasonable doubt in closing paragraph of instructions. Teague v. State [Tex. Cr. App.] 100 SW 401. Use of disjunctive "or" instead of conjunctive "and" in charge that accused should not be convicted of assault with intent to kill if found guilty of aggravated assault or that he acted in self-defense. Id. Instruction as to provoking the difficulty held not erroneous for use of "armed himself" where it appeared that accused carried a large knife. Lahue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 125, 101 SW 1008. Right to act in defense of another held properly submitted on defendant's testimony that he so acted. Abbata v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 209, 102 SW 1125. When danger to accused was real, an instruction on self-defense correctly stating the law as to real danger was not erroneous because not instructing as to appearance of danger viewed from defendant's standpoint. Pinson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 702, 96 SW 23. The law of threats connected with acts manifesting an intent to carry them into effect is a statutory ground of self-defense and should be charged affirmatively. Pratt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 599, 96 SW 8. Instruction on theory of self-defense held not to require that deceased was really making an attack on accused or making an effort to procure a pistol at the time. Newcomb v. State [Tex. Cr. App.] 95 SW 1048. Instruction held not to deprive accused of right to protect himself against apparent danger. Id. Instruction is not erroneous as making self-defense depend upon defendant being attacked where it also states that the homicide was justified if it reasonably appeared to defendant that he was in danger of death or serious bodily harm. Moore v. State [Tex. Cr. App.] 96 SW 321. Where there was nothing to show that deceased assaulted accused or the existence of any other excuse for the crime, an instruction authorizing consideration of all antecedent circumstances and those occurring at the time in passing on question whether accused was capable of cool reflection was not objectionable as failing to define adequate cause. Thomas v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 70, 96 SW 930. Evidence insufficient to warrant a charge on

threats in connection with self-defense. Mitchell v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 45, 100 SW 930. Instruction limiting right of self-defense to fact that defendant must have gone to see decedent on a friendly mission is error. King v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 112, 101 SW 237. Instruction that if decedent shot at defendant and defendant feared death or great bodily injury and shot deceased he had a right to continue to shoot as long as, from his standpoint, he was in danger, held sufficiently favorable to accused. Wallace v. State [Tex. Cr. App.] 97 SW 471. Where "adequate cause" is defined in one instruction, it is not necessary to define it in others. Manning v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 388, 98 SW 251. Instructions not objectionable as failing to state that accused had a right to pursue his adversary until appearance of danger ceased, where it is charged that he had a right to so act until all appearance of danger was passed. Dickey v. State [Tex. Cr. App.] 98 SW 269. In assault with intent to kill, instruction that adequate cause or sudden passion must concur with self-defense to justify assault not misleading on the ground that either is sufficient. Lasana v. State [Tex. Cr. App.] 98 SW 855. Instruction making right to self-defense depend upon being beaten with a club and struck with a pistol is erroneous, since either is sufficient. Gafford v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 736, 99 SW 998. Instructions on self-defense approved. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100. Instruction that in viewing theory of self-defense the jury should regard it from standpoint of accused and that he had a right to defend himself against all appearances of danger is sufficient without charging that accused had a right to shoot if deceased shot at him. Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 592, 95 SW 1044. In a prosecution for assault with intent to murder, instruction that if the assault was made in self-defense accused should be acquitted considered in connection with a charge that the jury should view the facts as they appeared to accused at the time, and that he had a right to act on appearances, held proper. McKinney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 75, 95 SW 504. Evidence held to call for charge on law of threats in connection with self-defense. Lara v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 5, 89 SW 840. Instruction on defense of another as justification held not misleading. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 SW 817. Instruction on voluntarily engaging in combat knowing it would result in death held warranted where it appeared that there was an altercation with decedent and accused went to a store, procured a gun, and returned and commenced shooting at deceased. McKinney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 545, 96 SW 48. Instruction on the theory of self-defense under Pen. Code, art. 713, where the defense is that the killing was done to prevent execution of threats, should be given in the affirmative form and not negatively. Mitchell v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 579, 96 SW 43. In assault with intent to kill, where threats by prosecutor to whip defendant are shown, a charge on threats of violence not amounting to death should be given. Hix v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 156, 102 SW 405. Instructions on self-defense held to sufficiently submit law as to appearance of danger. Ham v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 451, 98 SW 875. Instruction requiring jury to believe that each effort to injure defendant was committed by deceased before defendant could act in self-defense was erroneous. Lara v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 5, 89 SW 840. Instruction on law of self-defense that accused had a right to arm himself when he knew decedent had threatened to kill him and that such fact could not be considered as an incriminating circumstance held sufficiently favorable to accused. Harris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 154, 105 SW 801. Instruction held to sufficiently cover law of self-defense though not applied to evidence. Lucas v. State [Tex. Cr. App.] 105 SW 788. Making right to self-defense depend on relative strength of parties and defendant's knowledge of decedent's character is error where there is no evidence of character or attack by decedent. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Instruction on self-defense where large strong man assailed feeble man held proper and applicable to evidence. Sartin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 321, 103 SW 875. Instruction that assault on defendant causing pain and bloodshed is adequate cause for assault since either would be sufficient. Bagley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 282, 103 SW 874.

1. Where defense was that accused killed decedent to protect his father, instruction construed and held not to require jury to find that deceased was about to kill father of accused before they could acquit him. Mabry v. State, 80 Ark. 345, 97 SW 285. Where defendant killed father and son at same time, instruction as to right of self-defense held sufficient to protect rights of accused as to right to defend his parent. Newton v. Com. [Ky.] 102 SW 264. Where it is assumed that accused had the same right to defend his employe's habitations as his employer had, it is not necessary to specifically charge such rule. Patterson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 552, 95 SW 129. Instruction held to sufficiently define defendant's rights to interfere in a difficulty where an officer was using more force than necessary in making arrest. Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868. Charge that if jury believed that defendant killed deceased to prevent crime of rape by deceased he should be acquitted held sufficiently favorable to defendant. Scott v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 407, 93 SW 740. Charge on trespass on property of another as a defense to an assault on such other with a deadly weapon held as favorable to defendant as evidence authorized. Fuller v. State, 127 Ga. 47, 55 SE 1047.

2. Under Pen Code 1895, art. 713, providing threats and manifestation to execute same may be shown in justification, instruction held not too onerous on defendant. Clark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 199, 102 SW 1136. Instruction as to effect of disturbance of the mind by liquor on degree of offense held sufficient. Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep.

Harmless error.[3]—Erroneous instructions on higher degrees are harmless when accused is convicted of a lower,[4] and erroneous instructions on lesser degrees are harmless where only a verdict finding a higher degree or acquittal could be sustained.[5] Instructions more favorable to accused than the law or the evidence warrants cannot be complained of by him.[6]

(§ 8) *C. Verdict.*[See 5.C. L. 1730]—Decisions as to the form of particular verdicts are given in the note.[7] Forms for all the verdicts possible should be submitted.[8]

76, 97 SW 100. Charge that passion induced solely by words, threats, menaces, etc., would not justify homicide or reduce the crime held proper under the evidence. Fargerson v. State, 128 Ga. 27, 57 SE 101. Instruction that accused would be justified if he acted under influence of fear, under circumstances such as to excite fears of a reasonable man, approved. Roseboro v. State, 127 Ga. 826, 56 SE 991. Instruction that assault with hand or fist never justifies use of deadly weapon held erroneous. George v. State, 145 Ala. 41, 40 S 961. Requested instruction that such assault never justifies or excuses homicide, under ordinary circumstances, and whether circumstances were ordinary was for jury, was correct and should have been given. Id. Where court charged on justifiable homicide as defined in Pen. Code, §§ 70, 71, it was not error to omit a charge on § 73, in the absence of a request therefor, since § 73 limits the other two sections. Williams v. State, 1 Ga. App. 508, 57 SE 939. Charge that use of opprobrious words only justifies an assault, in connection with other instructions, held not error. Parker v. State, 1 Ga. App. 781, 57 SE 1028. Instruction that mere striking with the hand or fist will not justify killing held erroneous in form. Taylor v. State, 89 Miss. 671, 42 S 608. Instruction on justification held erroneous in law and as assuming facts not shown. Hisler v. State [Fla.] 42 S 692. Where it appeared both parties were shooting, a requested instruction that "defendant is not to be judged by the cool light of after developed facts but that [jury] are to put themselves in his place and find their verdict according to the existing circumstances at the time of the alleged killing" should have been given. Johnson v. State [Miss.] 42 S 166. Held similar instruction should have been given where self-defense was set up. Scott v. State [Miss.] 42 S 184

3. See, also, Indictment and Prosecution, 8 C. L. 189, also 5 C. L. 1729.

4. Error in charge on murder is eliminated by a verdict of manslaughter. Adams v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 9, 105 SW 497. Instruction on murder in first degree is harmless where the verdict is for second degree murder. State v. Darling, 199 Mo. 168, 97 SW 592. Erroneous instruction requiring jury to find absence of premeditation and deliberation to reduce crime to second degree murder held cured by other instructions and a verdict of first degree murder. Beene v. State, 79 Ark. 460, 96 SW 151. Improper instruction on murder in first degree harmless where defendant was acquitted of that offense. Gregory v. State [Ala.] 42 S 829. Where accused is convicted of involuntary manslaughter in the commission of an unlawful act, the judgment will not be reversed for failure to charge on voluntary manslaughter, though the evidence might have warranted an instruction on this subject. Harbin v. State, 127 Ga. 48, 55 SE 1046. Instruction on malice harmless error where manslaughter was found. Rogers v. State, 124 Ga. 794, 53 SE 102. Instruction on manslaughter not prejudicial to defendant where there was no evidence showing any grade of homicide except murder. State v. Penna, 35 Mont. 535, 90 P 787.

5. Where the evidence showed murder in the first degree or nothing, accused could not object to instructions as to a lesser crime. State v. Barrington, 198 Mo. 23, 95 SW 235. An erroneous instruction on manslaughter is not reversible where there is no evidence of manslaughter but only of murder. State v. Kendall, 143 N. C. 659, 57 SE 340. Where court instructed on murder in first and second degree and jury found defendant guilty of murder in the first degree, failure to instruct on homicide was harmless error. People v. Granger [N. Y.] 79 NE 833. Instruction as to lesser crime cannot be complained of by one convicted of first degree murder. State v. Spaugh, 200 Mo. 571, 98 SW 55.

6. Accused could not complain of an instruction on manslaughter where there was no evidence reducing the homicide to manslaughter. Pinson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 702, 96 SW 23. Where there were two difficulties and the court charged as to both, defendant was not prejudiced by omission to charge as to cooling time. Ham v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 451, 98 SW 875. Error in charging on self-defense not reversible where there is evidence of difficulty but no evidence of attack by deceased on defendant. Yardley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 759, 100 SW 399. Where in prosecution for murder the only evidence of intent showed its existence for two or three months prior to homicide, any error in instructing that an intent, formed the instant before the killing, if found, would justify a verdict of murder in the first degree, was harmless. State v. Banusik [N. J. Err. & App.] 64 A 994.

7. Verdict of common assault not erroneous in failing to state on which count of indictment defendant was found guilty, where such assault would be involved in either count. State v. Wilson [Mo. App.] 103 SW 110. On prosecution for "willful murder" under Ky. St. 1903, § 1149, a verdict finding accused "guilty as charged in the indictment of murder" not defective as not conforming to the statute. Brown v. Com., 30 Ky. L. R. 505, 99 SW 236. A verdict finding defendant guilty of shooting without justifiable or excusable cause at another, with intent to injure him," is sufficient as to form to convict of the offense defined by Rev. Pen. Code, § 314. State v. Horn [S. D.] 111 NW 552. Where indictment charged as-

Where the wrong form is filled out by mistake which is apparent, the jury should be sent back to correct the mistake.[9] A conviction of manslaughter is an acquittal of the charge of murder.[10] In Florida written verdicts may be received in capital cases.[11]

(§ 8) *D. Punishment.*[See 8 C. L. 122]—In determining whether punishment is excessive, the character of the crime and all the circumstances are considered.[12] In some states the punishment is fixed by the jury.[13] Where the court imposes the sentence, a finding of mitigating circumstances by the jury should not be disregarded.[14] That accused is serving a sentence in the penitentiary for prior murders does not prevent conviction and sentence to death for subsequent murder.[15] In New York, where the evidence sustains a verdict of murder in the first degree, the court of appeals has no jurisdiction to modify the penalty because of mitigating circumstances.[16] Such relief can be given only by the governor, upon an appeal for executive clemency.[17] In Iowa the governor has authority to issue a warrant for the execution of a defendant convicted of murder, where the conviction has been affirmed by the supreme court.[18]

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sault with intent to kill, verdict that defendant was guilty as charged of felonious assault finds the offense charged. State v. Williams, 191 Mo. 205, 90 SW 448. Where indictment charged defendant with being an accomplice to the crime of murder, a verdict of "guilty of being an accomplice to the offense of murder of the first degree as charged in the indictment" is not defective. Carbough v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 241, 93 SW 738. Where indictment is for assault with intent to commit murder, a verdict of "guilty as charged" is sufficient as a verdict of assault with intent to commit murder, since jury need not declare the degree. Fuerst v. State, 115 Tenn. 357, 89 SW 955. Verdict that "We the jury find the defendant Paris May guilty as charged in the within indictment," and which does not find the degree of murder as required by Code 1906, c. 159, § 4584, is fatally defective, and judgment thereon will be arrested, and a new trial granted. State v. May [W. Va.] 57 SE 366.

8. Error to submit form of verdict with no reference to acquittal or to a lesser degree of crime where there was evidence that defendant might not have been guilty or might have been guilty of a lesser crime. Oates v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 285, 103 SW 859.

9. Where the jury were given forms of verdict for murder in second degree and manslaughter, and by mistake the form for manslaughter was filled out and punishment in excess of that permitted by statute filled in, held the court properly refused to accept it and directed the jury to retire and correct it. State v. Miles, 199 Mo. 530, 98 SW 25. Rev. St. 1899, § 2651, does not require the court to receive such verdict, Id.

10. Where accused is tried for murder and convicted of manslaughter, this amounts to an acquittal of murder. Huntington v. Superior Ct. San Francisco [Cal. App.] 90 P 141. Hence, upon a new trial, he can only be tried upon the charge of manslaughter. Id.

11. Brewer v. State [Fla.] 43 S 423.

12. Two years in penitentiary not excessive for wanton and malicious assault. State v. Spaugh, 199 Mo. 147, 97 SW 901. Thirty years in the penitentiary not excessive for killing by beating an unarmed man over head with pistol and shooting him three times when he was running away. State v. Miles, 199 Mo. 530, 98 SW 25. Punishment of death held excessive and reduced to life imprisonment. O'Hearn v. State [Neb.] 113 NW 130. Sentence of eight years not excessive for brutal assault with a knife. State v. Yates, 132 Iowa, 475, 109 NW 1005. Life imprisonment not excessive punishment for murder in the second degree. State v. Baldes, 133 Iowa, 158, 110 NW 440. Where the fatal altercation was brought on in an effort by accused to get decedent with whom he had been carousing to go home, and there was testimony that defendant was not the aggressor, a sentence of 15 years in the penitentiary was held excessive by 10 years. Fraylor v. State [Ark.] 96 SW 505.

13. Under Mansf. Dig., one on trial for manslaughter is entitled to have jury determine his punishment. Carney v. U. S. [Ind. T.] 104 SW 606.

14. Where evidence showed decedent was a dangerous man and there was some evidence that killing was accidental, and a verdict of first degree murder was returned with mitigating circumstances, the court should not disregard the latter part of the verdict and sentence defendant to death. Frazier v. State, 117 Tenn. 430, 100 SW 94.

15. Brown v. State [Tex. Cr. App.] 95 SW 1039.

16, 17. People v. Broncado, 188 N. Y. 150, 80 NE 935.

18. Construing Code, § 4746. Busse v. Barr, 132 Iowa, 463, 109 NW 920.